



March 28, 2019

The Honorable Larry Hogan  
Governor of Maryland  
100 State Circle  
Annapolis, Maryland 21401

Re: Veto Request – HB 298 (Oysters - Tributary-Scale Sanctuaries - Protection and Restoration)

Dear Governor Hogan:

For the reasons outlined herein, coupled with the rationale in our related opposition written testimony to General Assembly committees (copies enclosed), we are hereby requesting a gubernatorial veto of House Bill 298.

As you are undoubtedly aware, this legislation deals a crushing blow to the men and women who work the waters of the Chesapeake Bay and the fishing communities in which they live by codifying certain oyster restoration sanctuaries. This enactment represents another strategy in the ongoing quest to privatize for a select few the public waters of the Nation's largest estuary. Your public statement earlier this month, recommitting to the protection of the Bay in response to the Trump Administration's proposed gutting of restoration funding, reconfirms that prudent, science-based restoration efforts are the best way forward. Yet Maryland legislators are being swayed by mountains of misleading "evidence" and pseudo-science brought forward by certain special interest groups that want to protect their funding streams more than the Bay's iconic bivalve. And do so at the expense of the wild, public fishery – which includes Maryland's first conservationists and the residents who have the most motivation to preserve and protect a way of life that forms the bedrock of this State's history, culture and economy.

From ancient Roman times through the Magna Carta and into the formation of the United States of America, the Public Trust Doctrine has been a foundational right of citizens of many nations. Our own Federal court system has long recognized certain powers and duties of States to assure the preservations of the public's right to use and enjoy lands, waters and living resources. In our view, HB 298 renders subordinate this broad public use and enjoyment by permanently removing a large percentage of the viable oyster resource and Bay bottom from the public fishery. Adding insult to injury, HB 298 selectively permits those holding aquaculture leases to harvest oysters and oyster seed with impunity in the same sanctuaries. The State holds the tidal waters of the Bay and its tributaries in public trust for the citizens of Maryland. It cannot lease bottom and waters to private individuals, thereby favoring one person over the public at large.

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Therefore, while the Maryland Department of Natural Resources (DNR) can adopt reasonable regulatory limits equally applicable to all, it cannot confer special rights and privileges on favored persons. The General Assembly has done just that with the passage of HB 298.

If HB 298 becomes law, a public resource will be used for exclusive profit by private aquaculture lessees, subverting the public's right to traverse and fish in waters where aquaculture gear can interfere with boats, fishing and crabbing gear. It is patently unconstitutional to make fish, shellfish, wild game and the tidal waters of the State available to some individuals on terms more favorable than other citizens of the State. The State would do well to remember that, "...the PTD [Public Trust Doctrine] holds that publicly owned wildlife resources are entrusted to the government (as trustee of these resources) to be managed on behalf of the public, the beneficiaries. Consequently, governmental institutions do not own trust resources; rather they are owned by the public and are entrusted in the care of government to be safeguarded for the public's long-term benefit."<sup>1</sup>

Rather than further disenfranchising the men and women who work the waters of the Chesapeake Bay, why not recognize that sanctuaries work best when they are co-located in tributaries that incorporate traditional rotational harvest strategies? Research has shown that oysters have a complex life cycle and their viability is intrinsically connected to a variety of environmental factors such as natural flow, total suspended solids, temperature, salinity and dissolved oxygen levels. Given the variability of these factors and our collective inability to control them in an estuary the size of the Chesapeake Bay, it seems illogical to adopt a sanctuary-only approach to the entirety of the main oyster-producing tributaries in the watershed.

In 1997, DNR allowed Maryland watermen to resume oyster cultivation through dredging with engine powered boats in portions of the area known as the Tangier Sound in the southern portion of the Maryland Chesapeake Bay (*i.e.*, the Honga River, Fishing Bay, the lower Nanticoke River, the lower Wicomico River, the lower Manokin River, the Big Annemessex River, the Little Annemessex River and Tangier Sound areas). As oysters and shells were unburied, washed of smothering sediments, pseudo feces and decomposing algae blooms and returned to settle on top of such sediments that formerly covered them, the habitat on the historic oyster beds was restored through the oyster cultivation process.

From 2002-2010, the diseases of Dermo and MSX took a toll on all of the oysters in the Tangier Sound and reduced the oyster population. Watermen continued to cultivate the areas where they were permitted to dredge (*i.e.*, power dredge, clean, cull, and fluff the oysters) so that their habitat was conducive to spat strike. The wild oysters on those bars that survived the diseases rapidly developed resistance thereto as older less disease resistant oysters were removed through harvest and younger more virulent oysters were returned through cultivation to restore the population. Sure enough, production and biomass began to increase, at first gradually, and then with persistent cultivation, much more rapidly. As DNR reported, "the 2013 Oyster Biomass Index, a measure of oyster abundance and weight, increased for the third consecutive

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<sup>1</sup> *The Public Trust Doctrine, Implications for Wildlife Management and Conservation in the United States and Canada.* The Wildlife Society, September 2010 p. 10

year and is at its highest point in 21 years.” (2013 DNR Oyster Survey at 1, 14.) This was the third consecutive year that the biomass increased. (*Id.* at 14.) There was a 32% gain in biomass between 2011-2012 and 2012-2013. (*Id.*)

The United States Army Corps of Engineers (USACE) acknowledges that oyster dredging pulls and cleans shell buried in sediments and has rehabilitated oyster beds that have been smothered by sediments and are dying. (2009 EA § 4.1 at 25; *see also* 2009 EA § 5.6 at 40.) USACE has acknowledged that the oyster dredging program conducted by Virginia watermen in the Great Wicomico River restored the oyster beds in the Bay and the mouth of that river bed. (2012 MP § 5.2.3.1 at 100.) “On the basis of current science and policy, USACE does support establishment of harvest reserves by the State’s [sic] within proximity of sanctuaries to provide near-term support to the seafood industry and establish a diverse network of oyster resources.”<sup>2</sup> (2012 MP § ES at 8.)

The USACE has repeatedly recognized the significant economic, cultural and social importance that the commercial harvesting of oysters has on the human environment in Maryland counties such as Dorchester, Kent, Queen Anne’s and other Clean Chesapeake Coalition counties. More specifically, USACE has observed and concluded:

The Eastern oyster is highly valued as a source of food, a symbol of heritage, an economic resource supporting families and businesses, and a contributor to the health of the Chesapeake Bay ecosystem. Harvesting, selling and eating oysters have historically been a central component and driver of social and economic development in the region. From the colonial period to the 20<sup>th</sup> century, oyster harvests supported a vibrant regional industry, which in turn supported secondary industries, fishing communities, and a culinary culture centered in the bivalve.

Oysters are an economic resource that supports unique communities and an industry that is an important component of the region’s heritage and identity. Within these communities, oysters are a source of income for families of watermen and those employed in the processing of oysters (*e.g.*, shuckers); they support multigenerational businesses and contribute to a regional economy.<sup>3</sup>

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<sup>2</sup> United States Army Corps of Engineers, Baltimore and Norfolk Divisions. *Chesapeake Bay Oyster Recovery: Native Oyster Restoration Master Plan*. September 2012.

<sup>3</sup> United States Army Corps of Engineers, Baltimore District. *Chesapeake Bay Oyster Restoration Using Alternate Substrate, Final Environmental Assessment*. May 2009.

The seafood industry and related businesses contributes nearly \$600 million each year (<https://msa.maryland.gov/msa/mdmanual/01glance/html/seafoodp.html>) to Maryland's total gross domestic product of \$399.5 billion (<http://www.bea.gov/regional/gsp/>). In 2017, commercial fisheries landings (*i.e.*, the weight, number and/or value of a species of seafood caught and delivered to port) alone earned \$77,403,458 million in the State of Maryland (<https://www.st.nmfs.noaa.gov/commercial-fisheries/commercial-landings/annual-landings/index>). Direct users include watermen, oyster growers, and oyster processors, packagers, shippers and retailers. Indirect jobs represent an assortment of positions, including day laborers, sales representatives, managers, maintenance workers, delivery personnel, and others.

During the 2012-2013 season, 341,000 bushels of oysters were harvested by Maryland watermen. More than 62% of the oysters were harvested where DNR has permitted dredging with power boats. (Tarnowski, Mitchell and Staff, Maryland Oyster Population Status Report 2013 Fall Survey at 1, DNR Publ. No. 17-8192014-723 (Aug 2014) (2013 DNR Oyster Survey).) This was the highest harvest since the 2000-2001 season. (*Id.*) The dockside value of the 2012-2013 harvest was \$10.9 million dollars. (*Id.* at 15.) This was a \$6.3 million dollar increase over the dockside value of the 2011-2012 harvest. (*Id.*)

To date we are unaware of any independent, peer-reviewed study that conclusively demonstrates that sanctuaries outperform natural oyster bars that are worked traditionally. As recently as 2015, researchers from the U.S. Army Engineer Research and Development Center and Texas State University produced a report that *simulated* various management strategies in 10 reefs in the Great Wicomico River system in Virginia. While their model produced various predictions under several scenarios, the study acknowledges that, “determining how the population dynamics and productivity of sanctuary reefs differ from commercially harvested reefs, particularly those that are under rotational harvesting, is also complex due to the multiscale interactions among physical, ecological and socio-economic factors” and that “all of the model versions exhibited seasonal and year-to-year fluctuations in oyster abundance.” The Great Wicomico River currently utilizes an oyster management strategy comprised of sanctuaries mixed with rotational harvest areas and the report concludes that, “Under the scenarios that reflect current management within the Great Wicomico River [SRRH & SURH], the oyster population trends fluctuated annually as a result of inter-annual environmental conditions, but did not trend toward extinction.”<sup>4</sup>

Evidence presented in support of rotational harvest was sparse, to wit “In Virginia, a rotational harvest system was implemented in the Rappahannock River during 2007. Over the following three years, the oyster production in the Rappahannock River increased more than 14 times, from 1,600 bushels in 2007 to 23,000 in 2010. Due to increased restoration funding, improved management strategies, rotational harvest and emphasis on aquaculture, Virginia's total oyster harvest increased from an all-time low of 23,000 bushels, worth \$575,000 in 1999, to

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<sup>4</sup> Kjelland, Michael E., et al. *An Integrated Modeling Approach for Elucidating the Effects of Different Management Strategies on Chesapeake Bay Oyster Metapopulation Dynamics*. March 2015.

659,000 bushels, worth \$33.8 million, in 2014.”<sup>5</sup> And while cultivation (or dredging) by watermen is often seen by some advocates as only destructive, “It is also probable that new habitat was formed by the extensive dredging of the reefs, which spread shells over a wider area than the original pre-exploitation reefs covered.”<sup>6</sup> “If left unharvested, the natural mortality rate would result in a loss of 80 percent of the adults. The mortality rate is higher for older oysters as they are more susceptible to diseases.”<sup>7</sup>

For these reasons, we respectfully request your veto of House Bill 298. It is time to come together in our Statewide goal to increase the abundancy of the Chesapeake’s iconic oyster. Let us not slam the door on proven strategies that result in more oysters in the water and available for legal harvest without leaving any stakeholder behind.

Very Truly Yours,



Ronald H. Fithian  
Chairman, CCC  
Kent County Commissioner



Capt. Robert Newberry  
Chairman, DFA

cc: Jeannie Haddaway-Riccio, Secretary, DNR  
Maryland Rural Counties Coalition

Enclosures

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<sup>5</sup> North Carolina Department of Environmental Quality, Division of Marine Fisheries. *Recommendations for Implementation of the Senator Jean Preston Oyster Sanctuary Network 10-Year Plan*. 1 March 2016.

<sup>6</sup> Schulte, David M. *History of the Virginia Oyster Fishery, Chesapeake Bay, USA*. *Front. Mar. Sci.* 4:127. Doi: 10.3389/fmars.2017.00127.

<sup>7</sup> Santopietro, George D. *An Economic Analysis of Proposed Management Plans for the Public Oyster Grounds of the Rappahannock River*. Virginia Coastal Zone Management Program, NOAA. 2007.