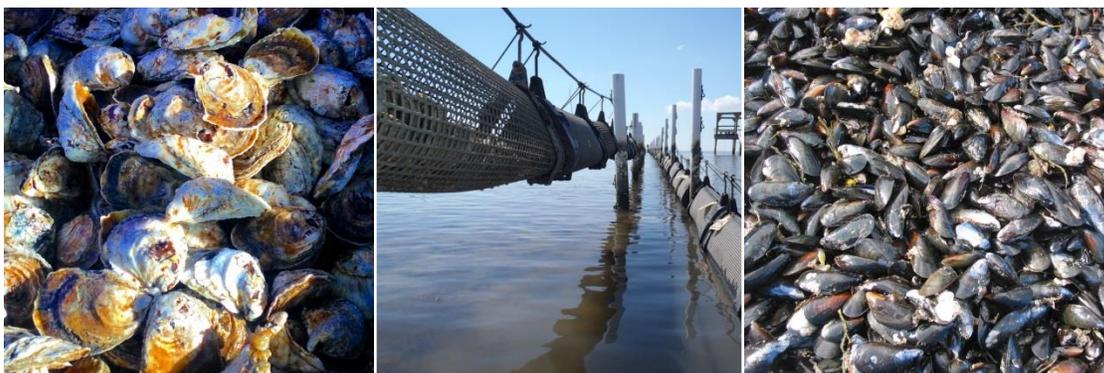


Information for Shellfish Growers:



Leases, permits, and other authorizations required for shellfish aquaculture gear, seeding, rearing, cultivating, transplanting and harvesting

The Interagency Working Group on Aquaculture

January 2015



Shellfish aquaculture is a growing industry in the United States that provides many economic benefits and environmental services to the nation. Shellfish aquaculture provides a source of seafood for growing demand, creates coastal jobs and business opportunities, builds habitat for important commercial and recreational species, restores native populations, protects shorelines, and provides ecosystem services such as improvement of water quality.

[The National Shellfish Initiative](#) and the [National Ocean Policy Implementation Plan](#) call for bolstering shellfish populations in our nation's waters through sustainable commercial production and restoration activities. Improving coordination among federal, state and local agencies to facilitate the permitting of commercial shellfish aquaculture activities is a priority for both. Clarifying permitting requirements and processes and making them more transparent and accessible to shellfish growers can contribute to improved coordination and more timely permit decisions.

This guide provides information to help shellfish growers navigate the permit process in the United States and understand how to secure the permits they need. It includes information on the main types of leases, permits, or other forms of authorization needed for a commercial shellfish farm. The guide provides links to additional sources of information and contacts, including aquaculture coordinators, who can help growers identify the specific requirements for their respective state or region.

The guide was developed by the federal Interagency Working Group on Aquaculture's (IWG-A) Regulatory Task Force in response to needs of the shellfish industry. The Task Force includes representatives from the National Oceanic & Atmospheric Administration (NOAA), the U.S. Department of Agriculture, the Army Corps of Engineers, the Environmental Protection Agency, and the Fish & Wildlife Service. The Task Force works within the IWG-A, and coordinates with the National Ocean Council, to identify and communicate procedures and information, such as this guide, to inform and improve Federal permitting processes.

Samuel D. Rauch, III
Chair, IWG-A Regulatory Task Force
Deputy Assistant Administrator for Regulatory Programs,
NOAA Fisheries

**Information for Shellfish Growers:
Leases, permits, and other authorizations required for shellfish aquaculture gear,
or for the seeding, rearing, cultivating, transplanting, and harvesting of shellfish**

1. Introduction

This document provides information on the main types of leases, permits, or other forms of authorization you will need for a commercial shellfish farm. You need to have all of these in hand before you can place your gear in the water and begin to seed, rear, cultivate, transplant, and harvest shellfish on your site.

The authorizations you are issued will contain a suite of requirements that you will need to incorporate in the initial construction of your project as well as in the day-to-day operation and maintenance of your farm. While some of these requirements will be spelled out up front in the informational materials about applicable laws and regulations, you should be aware that your permit may include additional terms and conditions. This is because the agency that issues your permit is often required to consult with other regulatory agencies and solicit public input regarding the potential impacts of your farm on natural and cultural resources and other users of the marine environment, and include appropriate measures to address issues of concern.

The main types of authorizations are summarized in Box 1 and discussed in more detail later in this document.

Federal, state, and local agencies have many similar and overlapping interests, so it is a good strategy to work with these agencies concurrently (rather than sequentially) to the extent possible. Doing so will provide

Contents:
1. <i>Introduction</i>
2. <i>Getting a Lease</i>
3. <i>Obtaining State and Local Permits</i>
4. <i>Obtaining Federal Permits</i>
5. <i>Aspects of Shellfish Farming that May Trigger Additional Actions, Consultations, and Permit Requirements</i>
6. <i>Federal Agency Initiatives to Facilitate Permitting Process for Shellfish Growers</i>
APPENDIX: LINKS TO HELPFUL SOURCES OF INFORMATION FOR SHELLFISH GROWERS

BOX 1 - Main Types of Authorizations Required for Commercial Shellfish Farming	
Lease	You need legal permission to put your farm in public waters of the United States. Usually, but not in all cases, this will be in the form of a lease from the agency that is responsible for managing submerged lands in your state. Note, however, that in some locations, submerged lands are managed by a local jurisdiction (county, city, town, harbor district, etc.), or belong to a tribe or private individuals.
State/local permit(s)	In most cases, you will need to obtain a permit or other type of authorization from the agency responsible for aquaculture in your state (not always the same agency that issues leases). There may be additional state permitting requirements as well. Depending on your location, you may also need to obtain additional permits or authorizations from local authorities in the county, town, or other jurisdiction where your farm is located.
Federal permit(s)	In most cases, you will need to obtain a permit from your District Office of the U.S. Army Corps of Engineers (Corps), which regulates activities in waters of the United States. The evaluation process may require project-specific consultation with other federal agencies and tribes, and/or coordination with other agencies and the public. Some specific locations or types of operations may require additional federal permits.

opportunities for the agencies to share information and coordinate their review processes, increasing the prospects for a timely decision on your application and minimizing the chances of having conflicting requirements from two or more authorities. In some parts of the country, coordinated processes and general permits are already in place to help you get all of your needed permits as quickly as possible.

Another important consideration is to make sure the agencies reviewing your application have all the information they need to reach a timely decision. In many cases, this information is requested in order to understand and assess the potential impacts of your farm on natural and cultural resources and other users of the marine environment. The main federal laws considered in these permit reviews are summarized later in this document. By anticipating potential issues, you can choose a site and incorporate best management practices that avoid, minimize, or mitigate the types of impacts of concern to permit reviewers and help speed the process for obtaining approval for your project. Some useful resources on existing national, state and regional best management practices may be found on the [NOAA Office of Aquaculture's shellfish portal](#). Consideration and inclusion of these BMPs while planning your aquaculture operations should facilitate the evaluation of your aquaculture operation application(s) by regulatory agencies.

2. Getting a Lease

Leasing of public lands in the nearshore environment is almost always handled at some combination of the municipal, county, or state level, in accordance with statute or regulation. Your [State Aquaculture Coordinator](#) can help you initiate the application process to lease public lands, and provide information about other lease options that may be available to you such as tribal lands or private leases.

Offshore sites in federal waters (which begin at 3 miles off most states), generally do not require a lease (but federal permitting requirements, discussed below, do apply). However, certain offshore areas may already be permitted or leased for other purposes such as oil and gas production or wind farms, and some sites may be inappropriate (e.g., due to potential interference with commercial fishing, shipping, or whale migration routes). [NOAA Fisheries Regional Aquaculture Coordinators](#) can help answer questions about siting your project in federal waters.

3. Obtaining State and Local Permits

State and local authorizations are typically required for aquaculture structures and/or the resultant benthic modifications of your farm in tidal or navigable waters. Consultation with your [State Aquaculture Coordinator](#) will help you to identify these authorizations. Many state [Sea Grant programs](#) have aquaculture extension agents who can provide assistance as well.

Permitting requirements vary from state to state and may involve several different agencies; therefore, it is not possible to summarize them in this document. NOAA Fisheries' Office of Aquaculture has compiled [links to state websites](#) that can provide a starting point for obtaining more information.

Federal laws also provide a role for state agencies in certifying that any federal permit issued for your shellfish farm is consistent with your state's coastal management program and water quality standards. These certifications, which take into account the potential for your farm to affect coastal resources and water quality, must be obtained before your permit from the Corps of Engineers or other federal agency is valid. In some cases, the state agencies responsible for these decisions have provided the required certification/concurrence on the Corps general permit. In other cases, the certification/concurrence has been denied and individual certification and concurrence will need to be obtained from the state agency, or waived. Box 2 provides additional information about these requirements.

BOX 2 – Federal Laws Requiring State Certifications for Federal Permits	
Coastal Zone Management Act	The Coastal Zone Management Act (CZMA) encourages states to preserve, protect, develop, and, where possible, restore or enhance valuable natural coastal resources such as wetlands, floodplains, estuaries, beaches, dunes, barrier islands, and coral reefs, as well as the fish and wildlife using those habitats. Under this law, an applicant for a federal license or permit for an activity affecting the coastal zone must provide a certification to the authorizing agency that the proposed activity complies with the enforceable policies of approved state coastal zone management programs and that such activity will be conducted in a manner consistent with the program. A consistency concurrence on any required federal permit must be obtained from the applicable state agency, unless a presumption of concurrence is appropriate.
Clean Water Act Section 401	Section 401 of the Clean Water Act requires a water quality certification or a waiver by coastal states (or tribes, where applicable) for any federal permit that may result in any discharge of a pollutant into waters of the United States, in order to ensure the discharge is consistent with water quality standards. This applies to both states and tribes.

4. Obtaining Federal Permits

The Corps of Engineers is the main federal permitting authority for commercial shellfish aquaculture under two laws – the Rivers and Harbors Act (Section 10) and the Clean Water Act (Section 404). Box 3 provides additional information about these two laws.

BOX 3 – Federal Laws Requiring Corps Permit for Commercial Shellfish Aquaculture	
Rivers and Harbors Act Section 10	Under Section 10 of the Rivers and Harbors Act (RHA), the U.S. Army Corps of Engineers regulates the installation of structures in coastal and navigable waterways to ensure protection of their course, condition, location, or capacity for commerce-related purposes. Specific to aquaculture, structures including but not limited to buoys, floats, racks, trays, nets, lines, tubes, and containers in navigable waters of the United States require authorization. The primary focus is on the potential for these activities to interfere with other activities in navigable waters. Section 10 of the RHA is extended to installations and other devices on the seabed, to the seaward limit of the outer continental shelf, by Section 4(f) of the Outer Continental Shelf Lands Act. In addition to evaluating effects on navigation, the Corps must also evaluate direct, indirect and cumulative effects of the activity on the public interest.
Clean Water Act Section 404	The Corps is also responsible for issuing permits for any activity that involves a discharge of dredged or fill material in waters of the United States, including navigable waterways under Section 404 of the Clean Water Act (CWA). Discharges of dredged and/or fill material in association with the shellfish aquaculture operations including shellfish seeding, rearing, cultivating, transplanting, and harvesting, require authorization under Section 404 of CWA. The primary focus is on the potential effects of these activities on the chemical, physical, and biological integrity of waters of the United States. The Corps must also evaluate direct, indirect and cumulative effects of the activity on the public interest.

There are three main ways to obtain an authorization from the Corps for your shellfish farm:

1. Nationwide Permit 48 (available in most states)
2. State or regional General Permit (not available in all states)
3. Individual permit for your farm (available in all states)

If your farm meets the terms and conditions of a general permit (nationwide, state, or regional), it may be verified more quickly under this permit than if you apply for an individual permit. This is because the most common concerns about the potential impacts of your farm have already been addressed by the Corps, in coordination with other agencies and the public during the development of the permit, and required documentation has been completed. Additional time will be needed if project-specific consultations are required with other federal agencies and/or federally-recognized tribes under other federal laws and/or treaties, as described below.

Pre-application discussions with your [Corps District Office Regulatory Branch](#) is highly encouraged and should offer helpful feedback regarding whether your proposal could likely be verified under a general permit, or whether an individual permit review will be required, and whether you will need to request an individual water quality certification and/or CZMA consistency concurrence from the appropriate state agencies. If your farm does not appear to be eligible under a general permit, you may want to consider modifications in order to qualify under a general permit and potentially obtain your authorization more quickly.

Nationwide Permit 48 – This nationwide general permit was most recently issued in 2012, after going through public and agency comment and rule-making, with an effective date of March 19, 2012 and an expiration date of March 18, 2017. Compliance with the National Environmental Policy Act was completed by the Corps during the development of this general permit, and

environmental assessments were prepared by Headquarters as well as the regional Division Offices to ensure appropriate consideration for effects, both individually and cumulatively, and to ensure the incorporation of both national and region-specific conditions that will ensure the use of this permit has no more than minimal adverse effects. The Corps determined in coordination with the public and other agencies that properly sited, operated and maintained commercial shellfish aquaculture activities verified under the NWP will have no more than minimal adverse effects on the aquatic environment.

If you are proposing a new or expanded aquaculture activity, you should review the [terms and conditions of NWP 48](#) and the regional conditions in your state to assess whether it is possible to design and conduct the activity consistent with this NWP. Seven East Coast states, all Gulf Coast and West Coast states, and Hawaii are using NWP48 with regional conditions. A state-by-state summary showing where NWP 48 is available, and what the associated regional conditions are, is available via the [NOAA Fisheries’ Office of Aquaculture shellfish portal](#).

You will need to submit a pre-construction notification to the appropriate Corps district for review and verification before proceeding with the activity if the proposal includes any of the activities or effects listed below (see Box 4).

BOX 4 – When Is a Pre-Construction Notification Required Under NWP-48?	
Proposal includes	
– dredge harvesting, tilling, or harrowing in areas inhabited by submerged aquatic vegetation	
– cultivation of a species not previously cultivated in the waterbody	
– change from bottom culture to floating or suspended culture	
– activities in a new project area	
– activities that trigger notification per the regional condition(s) that have been added to the NWP 48 by the district that covers the state in which the proposed activity is located.	See NOAA Fisheries’ Office of Aquaculture shellfish portal for links to regional conditions of the district that has jurisdiction in each state
Proposal may affect -	
– a species listed as threatened or endangered under the Federal Endangered Species Act or may affect or is located in designated critical habitat	Information on the location of listed species and their critical habitat may be obtained directly from U.S.Fish and Wildlife Service (FWS) and/or NOAA Fisheries .
– properties listed or eligible for listing in the National Register of Historic Places	Assistance regarding information on the location of or potential for the presence of historic resources may be sought from the following – State Historic Preservation Officer (SHPO) Tribal Historic Preservation Officer (THPO) National Register of Historic Places (NRHP) .

Other General Permits – In addition to NWP 48, other regional or state programmatic general permits are available in the New England region and in states including Alaska, Maryland, Florida and Virginia. Information on the terms and conditions of these permits, including notification requirements, is also found on [NOAA Fisheries’ Office of Aquaculture shellfish portal](#).

Individual Permit – If your proposed shellfish aquaculture activity does not meet the terms and conditions of a general permit, then an individual permit evaluation will be required. Two types of Individual Permits are available: Standard Permits, which require a public notice, and Letters

of Permission, which are typically for less controversial actions that would not have significant effects but that cannot be authorized by existing general permits. If your activity would not comply with a general permit, the individual permit application form ([Form ENG 4345](#)) should be completed and submitted to the Corps.

5. Aspects of Shellfish Farming that May Trigger Additional Actions, Consultations, and Permit Requirements

Multiple U.S. laws impose specific requirements on federal agencies that are responsible for federal actions such as issuing permits, licenses, loans or grants. For shellfish aquaculture, the Corps is the federal agency responsible for making a permit decision under one or both of the statutory authorities described above, and therefore must ensure compliance with other applicable laws such as Section 7 of the Endangered Species Act and Section 106 of the National Historic Preservation Act. See Box 5 for a complete listing.

Box 5 describes the requirements you should consider in planning your shellfish farm. If you site your farm and/or tailor your operation such that project-specific consultations are not needed under these laws, evaluation of your application will move more quickly.

Box 5 – Aspects of Shellfish Farming Considered in Review of Federal Permit Application	
Treaty rights	The Corps must ensure Tribal trust responsibilities are upheld by consulting as necessary with Federally recognized tribes if proposed shellfish aquaculture activities may impair treaty rights. These rights include, but are not limited to, reserved water rights and treaty fishing and hunting rights. No activity may be authorized by the Corps that would impair reserved treaty rights. If your proposal would have the potential to impair these rights, you will be notified by the Corps of its requirement to conduct government-to-government consultation(s) and you may be asked to provide additional information regarding the effects of your activity and/or incorporate measures to mitigate for these effects.
ESA-listed species Critical habitat for ESA-listed species	Section 7 of the Endangered Species Act requires the Corps to consult with NMFS and/or the FWS if the proposed federal action of issuing a permit for commercial shellfish farming has the potential to adversely affect an ESA-listed species and/or the designated critical habitat for an ESA-listed species. Completing this consultation requires an analysis of the activity's effects on listed species and critical habitat based on the best available science, and development of appropriate terms and conditions to avoid, minimize, or compensate for the adverse impacts.
Essential Fish Habitat for federally managed wild fish stocks	The National Marine Fisheries Service (NMFS) manages fishing in federal waters under the Magnuson-Stevens Fishery Conservation and Management Act. This law includes Essential Fish Habitat (EFH) provisions that require the Corps to consult with NMFS if the proposed federal action of issuing a permit for commercial shellfish farming has the potential to adversely affect the habitat of wild fish stocks managed by NMFS. Essential fish habitat is the habitat necessary for managed fish to complete their life cycle, so it includes habitats in nearshore areas where most U.S. shellfish aquaculture production currently takes place. Submerged aquatic vegetation is one example of EFH in nearshore areas. To facilitate access to EFH information, NMFS has made many of the EFH descriptions and maps available online .
Historic properties Areas of historic or cultural significance	Section 106 of the National Historic Preservation Act requires the Corps to consult with the State Historic Preservation Officer or Tribal Historic Preservation Officer if the proposed shellfish aquaculture activities may affect historic properties or areas of historic or cultural significance. If a proposed shellfish activity would have such effects these details should be provided by the applicant in their PCN or application package submitted to the Corps. As described above, assistance regarding information on the location of or potential for the presence of historic resources may be sought from the State Historic Preservation Officer or Tribal Historic Preservation Officer , as appropriate, and the National Register of Historic Places . Depending on the presence of known or potential historic properties, studies or additional information may need to be collected and submitted.
Fish and wildlife resources	The Fish and Wildlife Coordination Act law requires the Corps to consult with FWS, NMFS, and appropriate state agencies if the proposed shellfish aquaculture activities would modify a body of water in ways that could potentially harm fish and wildlife resources. These consultations may result in project modification and/or the incorporation of measures to reduce these effects.
Natural marine sanctuary resources	Section 304(d) of the National Marine Sanctuaries Act (NMSA) requires the Corps to consult with the National Marine Sanctuary Program if the shellfish aquaculture activities that require authorization are likely to destroy or injure any sanctuary resource. The purpose of consultation is to prevent harm to sanctuary resources by requiring an assessment of proposed federal agency actions before the initiation of any such action and before any irreversible or irretrievable commitment of resources with respect to any such action. Upon consultation, the NMSP can recommend reasonable and prudent alternatives. The recommendations are voluntary; however, if they are not followed, and sanctuary resources are destroyed or injured in the course of the action, the NMSA requires the agency taking the action to restore or replace the damaged resources. If your proposal would be located in a sanctuary resource, early coordination should occur with the Corps and NOAA's sanctuary manager to discuss the proposal, its effects and actions to mitigate those effects
Marine mammals	The Marine Mammal Protection Act (MMPA) prohibits the harassment, hunting, capturing or killing of marine mammals without a permit from either the Secretary of the Interior or the Secretary of Commerce. NMFS may issue two types of authorizations pursuant to section 101 of the MMPA. Incidental Harassment Authorizations (IHA) are for activities with no potential for mortality or serious injury while utilizing required mitigation measures. Letters of Authorization (LOA) are for activities that may result in injury or mortality despite utilizing required mitigation measures. LOAs are valid for up to one year and IHAs are valid for up to five years. NMFS also issues an ' Annual List of Fisheries ' specifying requirements for certain aquaculture activities. If your activity may affect marine mammals, you should contact your NOAA Fisheries Regional Aquaculture Coordinator to discuss the permitting process and information requirements.

6. Federal Agency Initiatives to Facilitate Permitting Process for Shellfish Growers

Federal agencies are coordinating efforts to facilitate the permitting of commercial shellfish aquaculture, with the assistance of a Regulatory Task Force established under the Interagency Working Group on Aquaculture. For example –

- The Task Force has prepared a Fact Sheet on “[Corps, NMFS, and FWS Opportunities for More Efficient Permitting of Commercial Shellfish Aquaculture under General Permits](#)”. The Fact Sheet focuses on the General Permit procedural issues related to Endangered Species Act and Essential Fish Habitat compliance and serves as a common reference for the Corps, NMFS, and FWS in the permitting process. Several agencies have also prepared [Aquaculture Regulatory Fact Sheets](#) describing the main laws and regulations they are responsible for implementing.
- The Corps is initiating programmatic consultations with NMFS and FWS for shellfish aquaculture activities in specific regions. Once such a consultation is complete, activities may move forward without the need for project-specific consultation, so long as the terms and conditions of programmatic consultation are met. The Corps recently completed a programmatic consultation with NMFS to cover some types of commercial shellfish aquaculture, as well as public shellfish restoration projects, in the state of Oregon.
- Several agencies participating in the Task Force (including NMFS, the Corps, FWS, and the U.S. Department of Agriculture) are working together to assess which best management construction practices and other avoidance/minimization measures, when implemented, will ensure that effects to listed resources are minimized, so that project proponents can consider incorporating these measures into their activities and consultations can be conducted and completed effectively and efficiently.

APPENDIX: LINKS TO HELPFUL SOURCES OF INFORMATION FOR SHELLFISH GROWERS

Contacts

NOAA Fisheries Regional Aquaculture Coordinators - http://www.nmfs.noaa.gov/aquaculture/about_us/contact.htm

State Aquaculture Coordinators - <http://www.nasac.net/>

Sea Grant Programs - <http://seagrant.noaa.gov/WhereWeWork/SeaGrantPrograms.aspx>

Army Corps of Engineers District Offices - <http://www.usace.army.mil/Locations.aspx>

State Historic Preservation Officers - <http://www.nps.gov/nr/shpolist.htm>

Tribal Historic Preservation Officers - <http://www.achp.gov/thpo.html>

U.S. Army Corps of Engineers Permits

Nationwide Permits

<http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/NationwidePermits.aspx>

Permit Application (Form ENG 4345)

<http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/ObtainPermit.aspx>

NOAA Fisheries Permits

Marine Mammal Permits and Authorizations

<http://www.nmfs.noaa.gov/pr/permits/types.htm>

Annual List of Fisheries (interactions with marine mammals)

<http://www.nmfs.noaa.gov/pr/interactions/lof/final2014.htm>

Tools and Information

NOAA Fisheries

Shellfish Portal - http://www.nmfs.noaa.gov/aquaculture/shellfish_portal/shellfish_portal_home.html

Critical Habitat - <http://www.nmfs.noaa.gov/pr/species/criticalhabitat.htm>

Essential Fish Habitat - <http://www.habitat.noaa.gov/protection/efh/habitatmapper.html>

Fish and Wildlife Service Trust Resources - <http://www.fws.gov/ipac/>

National Park Service National Register of Historic Places - <http://www.nps.gov/nr/index.htm>

National Marine Sanctuaries - <http://sanctuaries.noaa.gov/about/welcome.html>

Fact Sheets

Shellfish Permitting Fact Sheet ("Corps, NMFS, and FWS Opportunities for More Efficient Permitting of Commercial Shellfish Aquaculture Under General Permits")

http://www.nmfs.noaa.gov/aquaculture/docs/policy/shellfish_permitting_factsheet.pdf

Federal Agency Regulatory Fact Sheets

http://www.nmfs.noaa.gov/aquaculture/policy/24_regulating_aquaculture.html