

NYCRR Part 41 - Sanitary Condition of Shellfish Lands & Part 47 - Certification of Shellfish Lands – Regulatory Impact Statement

1. Statutory authority:

Environmental Conservation Law (ECL) § 11-0303 authorizes the New York State Department of Environmental Conservation (Department) to regulate the fish and wildlife of New York State. ECL § 13-0307 requires the Department to periodically conduct examinations of all shellfish lands within the marine district to ascertain the sanitary condition of these areas. The Department collects data to determine which shellfish lands are in such sanitary condition that shellfish may be taken for food. Such lands are designated as certified shellfish lands. All other shellfish lands are designated as uncertified. ECL § 13-0319 grants the Department the authority to promulgate regulations concerning the harvest of shellfish.

2. Legislative objectives:

The purposes of the above cited legislations are: (1) to ensure that shellfish lands are appropriately classified, and (2) to protect public health by preventing the harvest and consumption of shellfish from lands that do not meet minimum standards for certification. Prior to proposing this rule, Department staff examined shellfish lands and determined which shellfish lands met the sanitary criteria for a certified shellfish land. The criteria for certification of shellfish lands, described at 6 NYCRR Part 47, are based on standards designed to ensure harvested shellfish will not be dangerous if consumed by humans.

3. Needs and benefits:

This rulemaking is necessary to preserve the public health and the general welfare, and it is further necessary to comply with ECL § 13-0307. The proposed amendments reflect the findings of surveys conducted by Department staff for shellfish growing areas (SGAs) in the marine

district. These surveys are the result of the regular collection and bacteriological examination of water samples to monitor the sanitary condition of SGAs.

Shellfish are filter feeders that consume plankton, other minute organisms, and particulate matter found in the water column. Shellfish are capable of accumulating pathogenic bacteria, viruses, and toxic substances within their bodies. Several SGAs require reclassification as year-round uncertified and/or seasonally uncertified.

Recent evaluations of current water quality data indicate that the bacteriological standards for certain certified shellfish lands are not being met in the affected areas, and an increased risk of illness exists for shellfish distributors, restaurants, and consumers. Consequently, closing shellfish lands that do not meet water quality standards is essential for the preservation of public health.

These regulations also protect the shellfish industry. Commercial shellfish harvesters and seafood wholesalers, retailers, and restaurants are adversely affected by public reaction to instances of shellfish related illness. By prohibiting the harvest of shellfish from lands that fail to meet the sanitary criteria, these regulations can ensure that only wholesome shellfish are allowed to be sold to the shellfish consumer.

The proposed rule includes changes to the SGA descriptions that will update, clarify, and correct them to match the current physical appearance and names of local landmarks cited in the descriptions, reduce complexity, and improve readability of the regulations. These changes will aid harvesters and law enforcement officials in determining which areas are uncertified for the harvest of shellfish. Additionally, the definitions in 6 NYCRR Part 47 were updated to align and match the language found in 6 NYCRR Part 42, Sanitary Control Over Shellfish, and amendments were made to

update the certification requirements for certified shellfishing areas.

4. Costs:

There will be no costs to state or local governments. There will be no cost to the Department. Administration and enforcement of the proposed amendment would be covered by existing programs.

No direct costs will be incurred by regulated commercial shellfish harvesters in the form of initial capital investment or initial non-capital expenses, in order to comply with these proposed regulations. The Department cannot provide an estimate of potential change in income to shellfish harvesters when areas are classified as uncertified, due to a number of variables that are associated with commercial shellfish harvesting; nor can the potential benefits be estimated when areas are reopened.

In 2022, there were 1,311 licensed shellfish diggers in New York State. The actual number of those individuals who harvest shellfish commercially fulltime is not known. Recreational harvesters who wish to harvest more than the daily recreational limit of 100 hard clams, with no intent to sell their catch, can only do so by purchasing a New York State digger's permit. The number of individuals who hold shellfish digger's permits for that type of recreational harvest is unknown. The Department's records do not differentiate between fulltime and parttime commercial or recreational shellfish harvesters.

The number of harvesters in a particular area is dependent upon the season, the amount of shellfish resource in the area, the price of shellfish and other economic factors, unrelated to the Department's proposed regulatory action. When a particular area is classified as uncertified, harvesters can shift their efforts to other certified areas.

5. Local government mandates:

The proposed rule does not impose any mandates on local government.

6. Paperwork:

Regulated parties are not expected to experience an increase in paperwork as a result of the proposed regulations.

7. Duplication:

The proposed amendment does not duplicate any state or federal requirement.

8. Alternatives:

There are no acceptable alternatives. ECL § 13-0307 mandates that when the Department has determined that a shellfish land meets the sanitary criteria for certified shellfish lands, the Department must designate the land as certified and open to shellfish harvesting. All other shellfish lands must be designated as uncertified and closed to shellfish harvesting. These actions are necessary to protect public health. Furthermore, failure to comply with the National Shellfish Sanitation Program (NSSP) guidelines could result in a ban on New York State shellfish in interstate commerce and would cause unnecessary economic hardship to the commercial harvesting industry.

9. Federal standards:

There are no federal standards regarding the certification of shellfish lands. New York and other shellfish producing and shipping states participate in the NSSP which provides guidelines intended to promote uniformity in shellfish sanitation standards among members. The NSSP is a cooperative program consisting of the federal government, states, and the shellfish industry. Participation in the NSSP is voluntary, but participating states agree to follow NSSP water quality standards. Each state adopts its own regulations to implement a shellfish sanitation program consistent with the NSSP. The U.S. Food and Drug Administration (FDA) evaluates state programs and standards relative to NSSP guidelines. Substantial non-conformity with NSSP guidelines can

result in sanctions being taken by the FDA, including removal of the state's shellfish shippers from the Interstate Certified Shellfish Shippers List. This effectively bars a state's shellfish products from interstate commerce.

10. Compliance schedule:

Compliance with any new regulations designating areas as certified or uncertified does not require additional capital expense, paperwork, record keeping or any action by the regulated parties. Immediate compliance with any regulation designating shellfish lands as uncertified is necessary to protect public health. Shellfish harvesters are notified of changes in the classification of shellfish lands by mail either prior to, or concurrent with, the adoption of new regulations.