

STATE OF MAINE
DEPARTMENT OF MARINE RESOURCES
Standard Aquaculture Lease Application
Suspended culture of shellfish,
Scarborough River

Pine Point Oyster
Company, LLC
Lease SCAR ERR
Docket # 2014-19
February 8, 2016

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION

Pine Point Oyster Company, LLC, a Maine corporation, applied to the Department of Marine Resources (“DMR”) for a standard aquaculture lease on 4.933 acres located in the coastal waters of the State of Maine, in the Scarborough River in the Town of Scarborough in Cumberland County, for the purpose of cultivating American oysters (*Crassostrea virginica*) and European oysters (*Ostrea edulis*) using suspended culture techniques. DMR accepted the application as complete on September 10, 2014. Field work conducted by Department biologists indicates that the proposed lease area comprises 5.93 acres, not the 4.93 acres requested in the application.

1. THE PROCEEDINGS

Department biologists conducted a site visit on June 25, 2015 and submitted a site report dated July 6, 2015. A public hearing on this application was held on September 15, 2015, in Scarborough. No one intervened in the hearing.

Notices of the hearing and copies of the application and DMR site report were provided to numerous state and federal agencies for their review, as well as to various educational institutions, aquaculture and environmental organizations, the Town of Scarborough, members of the Legislature, representatives of the press, riparian landowners, and other private individuals. Notice of the hearing was published in the *Forecaster* on August 7 and 28, 2014, and in the *Commercial Fisheries News* September, 2014 edition.

Sworn testimony was given at the hearing by Nate Perry, owner of Pine Point Oyster Company, and by DMR’s Aquaculture Environmental Coordinator, Jon Lewis. Mr. Perry described his proposed project. Mr. Lewis described the site visit and presented a videotape of the bottom. The U.S. Army Corps of Engineers was represented at the hearing by LeeAnn Neal. The Scarborough Shellfish Conservation Committee and the Scarborough Coastal Waters and Harbor Committee were represented by Rob Willette.

Each witness was available for questioning by the Department, the applicant, and those in attendance. The hearing was recorded by DMR. The hearing officer was Diantha Robinson.

The evidentiary record before the Department regarding this lease application includes three exhibits introduced at the hearing (see exhibit list below), and the record of testimony at the hearing itself. The evidence from all of these sources is summarized below.¹

LIST OF EXHIBITS²

1. Case file, #2014-19
2. Application signed and dated Sept. 10, 2013
3. DMR site report dated July 6, 2015

2. DESCRIPTION OF THE PROJECT

A. Site History

Since 2011, Mr. Perry has operated an experimental lease for oyster culture, SCAR ELS, on 1.37 acres in the same location as this proposed standard lease. The proposed lease expands the footprint of Mr. Perry's original lease by approximately 4.56 acres (App 18; SR 3).

B. Site Characteristics

The proposed lease site is located in shallow, subtidal waters in the Scarborough River, southeast of the railroad trestle that crosses the Scarborough Marsh and the river. The surrounding salt marsh is a wildlife management area owned by the State of Maine, Department of Inland Fisheries & Wildlife (MDIF&W). The area of marshland and water surrounding the site is designated by MDIF&W as Essential Wildlife Habitat PPLTo4 for piping plovers and least terns (App 36).

The site report describes the proposed lease site location as follows:

The proposed lease occupies shallow subtidal waters along the eastern shore of the Scarborough River. It is bounded by the primary navigation channel to the west, shoal water to the north, and tidally exposed flats leading to saltmarsh to the south and east (Figure 2). The bottom topography of the proposed lease site is comprised of tidally scoured, undulating sand (SR 2).

The area around the site is currently classified by the Department's Water Quality Classification program as "open/approved for the harvest of shellfish." The site report notes that "Harvest of product from the proposed lease, if granted, will be subject to any changes in Water Quality Classification by The Department of Marine Resources Division of Public Health" (SR 4).

Mean low water depth (MLW) within the area of the proposed lease, as calculated from measurements taken during the site visit, is 1-8 feet; the site is deepest at its center. At mean high water (MHW), water depth ranges from 8-15 feet (SR 2).

¹ In references to testimony, "Smith/Jones" means testimony of Smith, questioned by Jones.

² Exhibits 1, 2, and 3 are cited below as: Case file – "CF"; Application – "App", site report – "SR" with page numbers.

The northeast and southeast sides of the proposed lease site lie at or close the edge of the nearest intertidal shoreline. The western side of the site lies approximately 180 feet east of the shoal water to the west. The railroad trestle lies approximately 285 feet northwest of the northwest corner of the site. To the west and northwest of the proposed lease site lie two tracts of lease SCAR SRR, held by Nonesuch Oysters, LLC; the northeast corner of Nonesuch's south tract lies 199 feet southwest of Pine Point's proposed northwest corner (SR 3).

As noted above, Department biologists calculated the area of the proposed lease as being 5.93 acres, rather than 4.93, as stated in the application (SR 2).

C. Proposed Operations

Mr. Perry has grown oysters in the Scarborough River since 2009, using methods similar to those planned for the proposed lease site on both a limited-purpose aquaculture (LPA) license site and on the experimental lease site. This application represents an expansion of the current operation from 1.4 acres to 5.9 acres. All gear will be either floating or submerged; no bottom-planting of oysters is proposed for this lease site.

Pine Point Oyster Company proposes to grow all its oysters in three types of gear. From April to December, the company plans to deploy up to 1,840 polyethylene mesh oyster bags floating at the water's surface and arranged in 23 lines of 80 bags each, 40 bags on each side of each line. The lines of bags will be 30 feet apart, moored with helix anchors at each end. Mr. Perry testified that this is the same number of bags that has been deployed on the existing experimental lease site (Perry/Neal).

Up to three 10-ft. by 12-ft. work floats will also be deployed on the lease site. A single float has been deployed on the experimental lease site; as the additional floats are added, they will be connected to one another to make a single work platform, as depicted on pages 29 and 30 of the application.

The hearing on this application followed a hearing earlier in the day on application by for the Nonesuch lease SCAR SRR, which, as noted above, lies about 200 feet west of the proposed lease site. Mr. Perry attended that hearing, at which the Scarborough Shellfish and Harbor Committees testified that shellfish harvesters and others frequently find oyster bags in the marsh and river that have been washed away from the lease sites by the strong currents. The Committees requested that Nonesuch mark its bags so they can be returned, which Nonesuch agreed to do.

Although there were no intervenors at the hearing on his application, Mr. Perry testified that he is agreeable to a similar condition being placed on Pine Point's lease, since the proposed lease site is also affected by the strong currents in the area (Perry/Robinson). The wording of the condition will be "All oyster bags and similar gear must be marked with the lessee's name and contact information." A condition to this effect will be included in the lease; see section 6, below.

During the winter months, 30 overwintering cages will be deployed directly on the bottom sediments. Stacked trays will be used on the bottom throughout the year for grow-out of oysters (Perry/Robinson). A 12' x 10' work float will also continue to be used on the lease site, as it has been on the existing site.

The application describes the sequence of operations throughout the year, including setting out overwintered stock in March or April, adding new stock in August, cleaning gear and grading stock through October, and, beginning in December, overwintering oysters in gear on the bottom and/or in refrigerated storage (App 4, 5). Bags will be cleaned by hand brushing on-site and power washing off-site. Harvest will be by hand from the gear, usually from September to April. The site will be monitored weekly during winter and as needed during the remainder of the year (App 4).

Vessels used to tend the site will be a 17-ft. Carolina skiff with a 25 HP outboard, with the future addition of a slightly smaller skiff and outboard when needed (App 4). Vessels will travel to the lease site from the Ferry Beach launch site in Scarborough. They will “motor under load and between gear, but mostly be moved by hand along the ‘longlines’ to perform tasks” (App 4).

3. STATUTORY CRITERIA & FINDINGS OF FACT

Approval of standard aquaculture leases is governed by 12 M.R.S.A. §6072. This statute provides that a lease may be granted by the Commissioner of DMR upon determining that the project will not unreasonably interfere with the ingress and egress of riparian owners; with navigation; with fishing or other uses of the area, taking into consideration the number and density of aquaculture leases in an area; with the ability of the lease site and surrounding areas to support existing ecologically significant flora and fauna; or with the public use or enjoyment within 1,000 feet of beaches, parks, docking facilities, or conserved lands owned by municipal, state, or federal governments. The Commissioner must also determine that the applicant has demonstrated that there is an available source of organisms to be cultured for the lease site; that the lease will not result in an unreasonable impact from noise or lights at the boundaries of the lease site; and that the lease will be in compliance with visual impact criteria adopted by the Commissioner relating to color, height, shape and mass.

A. Riparian Access

The site report states, “The surrounding uplands are owned by the State of Maine. There are no houses, docks, nor moorings with which the proposed activities might interfere” (SR 4).

Therefore, I find that the aquaculture activities proposed for this site will not unreasonably interfere with the ingress and egress of any riparian owner.

B. Navigation

The site report describes the potential effect of the proposed lease on navigation as follows:

Considering tidal limitations, the restriction at the railroad trestle and the lack of commercially exploitable species, vessel traffic in the area of the proposed lease site is dominated by canoes/kayaks, sport fishing boats, and outboard skiffs. On June 25, 2015 two individuals on stand-up paddleboards were observed transiting through the proposed lease area and into the small channel to the east.

The proposed lease site is located along the east bank of the Scarborough River and occupies the eastern arm of the subtidal channel (Figure 2), extending to the west into shoal water. As was the case with an approximately 20’ center-console boat that was

observed traveling under the railroad trestle on June 25, 2015, most vessels transiting the area are expected to follow the western arm of the channel leading under the bridge and further upstream (SR 4).

Although DMR mailed a questionnaire to the Scarborough Harbormaster requesting his observations about the potential effect of the proposed site on navigation, fishing, and riparian access, it was not returned. At the time of the public hearing, the Department learned that the Harbormaster position had become vacant. The previous incumbent, however, worked with Mr. Perry to locate his experimental lease in an area where it would not hamper other activities on the water and surrounding tidal flats. No testimony was presented at the hearing to indicate that the lease activities would interfere with navigation in the vicinity of the expanded lease site. Mr. Perry testified that gear on the site would not encroach on the small navigational channel between the east side of the lease site and the nearby shore (Perry/Neal; Perry/Willette).

The evidence supports the conclusion that the lease gear and activities will not interfere with navigation in the main channel to the west or with the small channel to the east of the site. Aquaculture lease sites are required to be marked for navigation purposes in accordance with U.S. Coast Guard requirements.

Therefore, I find that the aquaculture activities proposed for this site will not unreasonably interfere with navigation. The lease site must be marked in accordance with U. S. Coast Guard requirements.

C. Fishing & Other Uses

According to the site report, at the time of the site visit no fishing activity was observed within the proposed lease area (SR 4). The report observes:

The Department recognizes that commercial or recreational fishing in the area is seasonal. Fishing for lobster and crab and drag harvesting of shellfish, however, is unlikely to occur in such shallow waters where navigation is severely limited and such commercially exploitable species are not present.

The proposed activities, should the lease be granted, will not prevent digging for clams and worms in the surrounding tidal flats. Approximately 130 feet of passage for boat access to the intertidal will remain between the proposed expansion and the northerly SCAR NELS (Figure 1) (SR 4).

The report also notes that recreational hook-and-line fishing for striped bass is common around the railroad trestle to the north of the proposed lease site. While the presence of the lease will not restrict such fishing, the report states that “occasional entanglement of hooked fish in lines and gear associated with the proposed farm” is possible, as fish may be attracted to the shelter of the aquaculture gear and feed on algae and invertebrates that can grow on the gear at the aquaculture site” (SR 4).

The evidence indicates that the proposed oyster aquaculture operation will not significantly hamper such local fishing activities as exist in the area.

Other aquaculture leases. At the time of this decision, the nearest aquaculture site is a new standard lease site, SCAR SRR, held by Nonesuch Oysters, Inc., incorporating two experimental lease sites previously held by Nonesuch: SCAR NELS, located about 350 feet to the northwest of the proposed lease site, and SCAR WLS, approximately 275 feet west of the proposed lease site. The site report states that “a minimum of ~200 feet of navigable water” lies between SCAR SRR and the proposed Pine Point lease site (SR 5). Both lessees have operated experimental lease sites in the same locations since 2011, apparently without interfering with one another. Activities at the proposed lease site will not interfere with the use of the Nonesuch lease site, and vice versa.

Two LPA license sites lie in the Scarborough River, CAR-4-12 at the public pier at Pine Point, more than 3,000 feet downriver from the proposed lease site, and PER-2-09, approximately 1,450 feet to the south of the proposed lease site (SR 5). The former is held by the owner of Nonesuch Oysters, LLC and the latter by Mr. Perry; the proposed lease site will not interfere with activities at either license site.

Exclusivity. Mr. Perry testified that the conditions applied to the experimental lease (SCAR ELS) are appropriate for the proposed expanded lease. These conditions prohibit dragging, shellfish harvesting, and anchoring, except with the authorization of the leaseholder. Mr. Perry said that he would authorize local shellfish harvesters to harvest clams on the lease site (Perry/Robinson).

These conditions are reasonable in order to enable the aquaculture project to be carried out while encouraging the greatest number of compatible uses of the area, as provided in 12 MRS §6072 (7-B). Conditions to that effect will be included in the lease. The lease must be marked in accordance with DMR Rule 2.80.³

Therefore, considering the number and density of aquaculture leases in the area, I find that the aquaculture activities proposed for this site will not unreasonably interfere with fishing or other uses of the area.

32.80 Marking Procedures for Aquaculture Leases

1. When required by the Commissioner in the lease, aquaculture leases shall be marked with a floating device, such as a buoy, which displays the lease identifier assigned by the Department and the words SEA FARM in letters of at least 2 inches in height in colors contrasting to the background color of the device. The marked floating device shall be readily distinguishable from interior buoys and aquaculture gear.
2. The marked floating devices shall be displayed at each corner of the lease area that is occupied or at the outermost corners. In cases where the boundary line exceeds 100 yards, additional devices shall be displayed so as to clearly show the boundary line of the lease. In situations where the topography or distance of the lease boundary interrupts the line of sight from one marker to the next, additional marked floating devices shall be displayed so as to maintain a continuous line of sight.
3. When such marking requirements are unnecessary or impractical in certain lease locations, such as upwellers located within marina slips, the Commissioner may set forth alternative marking requirements in an individual lease.
4. Lease sites must be marked in accordance with the United State's Coast Guard's Aids to Private Navigation standards and requirements.

D. Flora & Fauna

Site observations. The site report describes observations made of the proposed lease site and the existing lease site:

Bottom sediments are mostly scoured sand with rippling caused by tidal action. Blue mussel (*Mytilus edulis*) and soft-shell clam (*Mya arenaria*) shell hash was scattered over the sediments. During the site visit in March 2011 [for the preceding experimental lease, SCAR ELS], the water in the area had non-detectable salinity by taste. Heavy rain and snow melt surely contributed to this. In June 2015, the water had normal ocean salinity, by taste (SR 5).

According to the site report, no eel grass or other rooted submerged aquatic vegetation was observed during the site visit. The report notes that “A variety of green and brown algae, including sea lettuce (*Ulva lactuca*), were observed wherever structure, such as mooring lines, was available for attachment” (SR 5). Epibenthic fauna were relatively rare, except for sand shrimp, which were abundant. Other species observed occasionally include green crabs, hermit crabs, mud snails, blue mussels, and soft-shell clams (SR 5).

Fisheries & wildlife. Copies of the application were provided to the Maine Department of Inland Fisheries and Wildlife (MDIF&W) for review. The proposed lease site is located within Essential Wildlife Habitat PPLTo4, designated for piping plovers and least terns (SR 5).⁴ The site report also notes:

According to MDIF&W the area is also a significant nesting site in the spring for many birds, including the rare sharptail sparrow, and is a significant feeding and resting site for migratory birds. The surrounding salt marsh is a wildlife management area owned by the State of Maine (SR 5).

The application includes a letter from MDIF&W concluding that the proposed expansion and associated subtidal activities would have minimal impact on sharptail sparrows, piping plovers, least terns, and other tidal wading birds and waterfowl that do not generally utilize open water (App 38, SR 6).

Based on this evidence, it appears that the aquaculture activities proposed for this lease site will not interfere with the ecological functioning of the area.

Therefore, I find that the aquaculture activities proposed for this site will not unreasonably interfere with the ability of the lease site and surrounding areas to support existing ecologically significant flora and fauna.

E. Public Use & Enjoyment

According to the site report, “there are no public docking facilities or beaches within 1000 feet of the proposed lease” (SR 6). The report notes that the public boat launch at Pine Point is more than 3,000 feet downstream from the proposed lease site.

⁴ According to the site report, Essential Habitat information is available on the State of Maine GIS server (gisdatabase.dafs.state.me.us) (SR 5).

All land within 1,000 feet of the proposed lease site is owned by the State of Maine. While this land is managed as a wildlife management area, not a public park, the Marsh does constitute “conserved lands” within the meaning of 12 M.R.S. 6072 (7-A) and DMR Rule Chapter 2.37 (7), since it is land acquired by the state in fee to protect its ecological attributes.⁵ Therefore, the Department must consider whether the proposed lease would interfere unreasonably with the public use and enjoyment of the marshlands within 1,000 feet of the proposed lease site, considering the purpose for which the land was acquired by the State of Maine.

Since the marsh is managed by MDIF&W as a wildlife refuge, and that Department has indicated that the proposed lease will not adversely affect either wildlife or wildlife habitat, it is clear that the aquaculture activities will not unreasonably interfere with public use and enjoyment of the Scarborough Marsh waters and lands within 1,000 feet of the proposed lease site.

Therefore, I find that the aquaculture activities proposed for this site will not unreasonably interfere with the public use or enjoyment within 1,000 feet of beaches, parks, or docking facilities or certain conserved lands owned by municipal, state, or federal governments.

F. Source of Organisms

The application indicates that the sources of American oysters (*Crassostrea virginica*) and European oysters (*Ostrea edulis*) for this proposed lease site are Mook Sea Farm in Walpole, Maine, and Muscongus Bay Aquaculture in Bremen, Maine (App, cover page).

Moving European oysters in anywhere in Maine requires a permit from the Department, since they are classified as “restricted” in order to prevent the spread of disease. Movement of American oysters from within the waters between Ocean Point, Linekin Neck, Boothbay and Pemaquid Point, Bristol (including the Johns River and the Damariscotta River, the location of Mook Sea Farm), is also restricted and requires a permit from the Department under DMR Rule 24.05.

Therefore, I find that the applicant has demonstrated that there is an available source of stock to be cultured for the lease site.

G. Light

The application indicates that no lights will be used at the proposed lease site, other than for navigation, and that “working beyond dusk is only likely in an emergency situation” (App 6).

Therefore, I find that the aquaculture activities proposed for these sites will not result in an unreasonable impact from light at the boundaries of the lease site.

⁵ DMR Rules, Chapter 2.37 (7) Interference with Public Facilities. The Commissioner shall consider the degree to which the lease interferes with public use or enjoyment within 1,000 feet of a beach, park, docking facility or certain conserved lands owned by the Federal Government, the State Government or a municipal government. Conserved lands means land in which fee ownership has been acquired by the state, federal or municipal government in order to protect the important ecological, recreational, scenic, cultural or historic attributes of that property. Leases may not unreasonably interfere with public use or enjoyment of such beaches, parks, docking facilities, or conserved lands. In determining interference with the public use or enjoyment of conserved lands, the Commissioner shall consider the purpose(s) for which the land has been acquired.

H. Noise

The application indicates that a 17-foot Carolina skiff with a 25 horsepower outboard motor is currently used on the existing lease. Eventually, a 16-foot Carolina skiff with a 15 horsepower outboard motor may be required (App 4). Use of the outboard motors will be minimized on the lease site (App 4).

The only power equipment to be used at the lease site is a lobster trap hauler, mounted on the existing skiff and run on a 12-volt battery. It is mounted in a stainless box that muffles “almost all mechanical sound” (App 6). The hauler will be used “infrequently,” for setting out gear in spring and for harvesting. It will run in 10-second intervals and be “inaudible” beyond 20 ft. of the boat (App 6).

The site report observes that Carolina skiffs are commonly used in Maine coastal waters and that noise from the trap hauler will be comparable to that of similar equipment used throughout the state (SR 6).

Based on this evidence, it appears that any noise generated by operations on the site is unlikely to have a significant effect at the boundaries of the lease.

Therefore, I find that the aquaculture activities proposed for this site will not result in an unreasonable impact from noise at the boundaries of the lease.

I. Visual Impact

The Department’s visual impact rule requires structures and gear on lease sites to blend with the surroundings as much as possible. The evidence shows that this will be the case on the proposed lease site. According to the application, all gear except rope is black (App 3). Gear drawings in the application show the gear color, which is black, dark blue, or gray; the work float has a wooden deck (App 20-25, 29-32). Photographs of gear on the existing site show that it blends in with the surroundings (App 31, 32).

Therefore, I find that the equipment, buildings, and watercraft to be used at the proposed lease site will comply with the visual impact criteria contained in DMR Regulation 2.37 (1) (A) (10).

4. CONCLUSIONS OF LAW

Based on the above findings, I conclude that:

1. The aquaculture activities proposed for this site will not unreasonably interfere with the ingress and egress of any riparian owner.
2. The aquaculture activities proposed for this site will not unreasonably interfere with navigation.
3. The aquaculture activities proposed for this site will not unreasonably interfere with fishing or other uses of the area, taking into consideration the number and density of aquaculture leases in the area.
4. The aquaculture activities proposed for this site will not unreasonably interfere with the ability of the lease site and surrounding areas to support existing ecologically significant flora and fauna.
5. The aquaculture activities proposed for this site will not unreasonably interfere with the public use or enjoyment within 1,000 feet of beaches, parks, or docking facilities or certain conserved lands owned by municipal, state, or federal governments.

6. The applicant has demonstrated that there is an available source of stock to be cultured for the lease site.

7. The aquaculture activities proposed for this site will not result in an unreasonable impact from light at the boundaries of the lease site.

8. The aquaculture activities proposed for this site will not result in an unreasonable impact from noise at the boundaries of the lease site.

9. The aquaculture activities proposed for this site will comply with the visual impact criteria contained in DMR Regulation 2.37(1)(A)(10).

Accordingly, the evidence in the record supports the conclusion that the proposed aquaculture activities meet the requirements for the granting of an aquaculture lease set forth in 12 M.R.S.A. §6072.

5. DECISION

Based on the foregoing, the Commissioner grants the requested lease of 5.93 acres to Pine Point Oyster Company, LLC for ten years for the purpose of cultivating American oysters (*Crassostrea virginica*) and European oysters (*Ostrea edulis*) using suspended culture techniques. The applicant shall pay the State of Maine rent in the amount of \$100.00 per acre per year. The applicant shall post a bond or establish an escrow account pursuant to DMR Rule 2.40 (2) (A) in the amount of \$5,000.00, conditioned upon performance of the obligations contained in the aquaculture lease documents and all applicable statutes and regulations.

6. CONDITIONS TO BE IMPOSED ON LEASE

The Commissioner may establish conditions that govern the use of the lease area and impose limitations on aquaculture activities, pursuant to 12 MRSA §6072 (7-B)⁶. Conditions are designed to encourage the greatest multiple compatible uses of the lease area, while preserving the exclusive rights of the lessee to the extent necessary to carry out the purposes of the lease.

The following conditions shall be incorporated into the lease:

1. The lease site must be marked in accordance with both U.S. Coast Guard requirements and DMR Rule 2.80.
2. All oyster bags and similar gear must be marked with the lessee's name and contact information.
3. Dragging, shellfish harvesting, and anchoring are prohibited on the lease site, except with the authorization of the leaseholder.
4. Other public uses that are not inconsistent with the purposes of the lease are permitted on the lease site.

⁶ 12 MRSA §6072 (7-B) states: "The commissioner may establish conditions that govern the use of the leased area and limitations on the aquaculture activities. These conditions must encourage the greatest multiple, compatible uses of the leased area, but must also address the ability of the lease site and surrounding area to support ecologically significant flora and fauna and preserve the exclusive rights of the lessee to the extent necessary to carry out the lease purpose."

7. REVOCATION OF LEASE

The Commissioner may commence revocation procedures upon determining pursuant to 12 MRSA §6072 (11) and DMR Rule Chapter 2.42 that no substantial aquaculture has been conducted within the preceding year, that the lease activities are substantially injurious to marine organisms, or that any of the conditions of the lease or any applicable laws or regulations have been violated.

Date: 2/8/16



Patrick C. Keliher, Commission
Department of Marine Resources