STATE OF MAINE
DEPARTMENT OF MARINE RESOURCES
Experimental Aquaculture Lease Application
Suspended culture of shellfish, Morgan Bay, Surry

Joseph Porada
MORG NJIx
Docket # 2012-08-E
May 19, 2015

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION

1. PROCEDURAL HISTORY

Joseph Porada applied to the Department of Marine Resources ("DMR") on February 18, 2011, for a three-year experimental aquaculture lease on four subtidal acres located in the coastal waters of the State of Maine, approximately 2.5 miles north of Jed Island in Morgan Bay in the Town of Surry in Hancock County. Mr. Porada plans to use the lease to cultivate quahogs (*Mercenaria mercenaria*), American oysters (*Crassostrea virginica*), and European oysters (*Ostrea edulis*), using suspended culture techniques.

Public scoping sessions were held in Surry regarding the application on June 1, 2011, and February 2, 2012.[1] DMR accepted the application as complete on September 20, 2012. During the 30-day public comment period, more than five requests for a public hearing were received by the Department, mandating a public hearing.[2] A public hearing was held in Surry on March 25, continued on March 27, and re-opened on June 18, 2013, to gather evidence relating to the statutory criteria for granting the lease.

Seven intervenor applications were approved, including those of the Town of Surry, Ann Backer, Nicholas Sichterman, Mariah Hughs, Jack Pirozzolo, Christopher Goddu, and the *ad hoc* group Morgan Bay Neighbors. At the hearings, the town was represented by William Matlock, one of its selectmen. Morgan Bay Neighbors was represented by Sally Mills, Esq. Mrs. Backer, Mr. Sichterman, and Ms Hughs, all riparian landowners, were represented by David Kallin, Esq. Mr. Pirozzolo, a riparian landowner, represented himself. Mr. Goddu, holder of two rights of way to Morgan Bay within 1,000 feet of the proposed lease site, was required to consolidate his presentation with Mr. Pirozzolo's. Mr. Porada, the applicant, represented himself.

At the hearing, testimony and exhibits were presented by the applicant, the Department, representatives of the Town of Surry and the U.S. Army Corps of Engineers, the intervenors, and members of the public. Jon Lewis, DMR Aquaculture Environmental Coordinator, described the Department's site review and report and showed the underwater video of the proposed lease site taken during the site visit. Joseph Porada, the applicant, described his proposed project, and Dr.

[1] Scoping sessions on experimental lease applications are held at the Department's discretion; see DMR Rules Chapter 2.64 (4)(B).
[2] DMR Rule Chapter 2.64 (5); the comment period was advertised on October 4, 2012 in the *Ellsworth American* and ran until November 5, 2012.

Brian Beal described the experiments to be conducted on the proposed lease site. Selectman William Matlock testified for the intervenor the Town of Surry regarding its zoning ordinances as they relate to aquaculture. The intervenors Morgan Bay Neighbors presented Dr. Joseph DeAlteris, who reviewed the proposed project. The intervenors Backer, Sichterman, and Hughs presented Ann Backer, Nicholas Sichterman, Tim Elliot, Tom Matthews, and Brooke Williams, who testified to their use of the shore and waters in the vicinity of the proposed lease site. Intervenors Jack Pirozzolo and Christopher Goddu both testified to their use of the shore and waters and presented David Danielson, who testified about sailing in Morgan Bay.

All witnesses were sworn; each witness was subject to questioning by those present. The hearing was recorded by the Department. Following the hearing in March, Mr. Pirozzolo submitted three motions to the Department. On May 17, 2013, the Department issued an order on the motions which included a decision to re-open the hearing on June 18 to offer additional time for members of the public to testify.[3] Written closing arguments and rebuttals were submitted following the hearing by all parties except the Town of Surry. The hearing officer was Diantha Robinson.

The evidentiary record before the Department regarding this lease application includes seventy-five exhibits, which are listed in Appendix 1, and the record of testimony at the hearing itself. The evidence from all of these sources is summarized below.

Notice. Personal notice of the application, the comment period, the DMR site report, and the public hearings was sent to state and federal agencies which were requested to review the project, as well as to riparian landowners, the Town of Surry, members of the Legislature, representatives of the press, aquaculture and environmental organizations, and others on the Department's general aquaculture mailing list.

Public notice of public hearings on experimental lease applications is required by the Department's rules to be advertised twice in a newspaper of general circulation in the area affected, at least 30 days and at least 10 days before the hearing. Notice must also be published in a trade, industry, professional or interest group publication.[4]

The Department placed public notices of the March 25 public hearing in the *Ellsworth American*, a weekly publication available in the Surry area, and *Commercial Fisheries News*, a monthly trade publication, to meet the required schedule. The first public hearing notice was published in the *Ellsworth American* on February 14, 2013. The one-time notice in the *Commercial Fisheries News* appeared in the March, 2013 edition, which was distributed in late February.

The second notice, scheduled for March 14, was timely submitted by the Department to the *Ellsworth American* but was not published in the March 14 edition. The Department became

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[3] A copy of the order is attached as Appendix 2. The Commissioner has authority to reopen a hearing; see DMR Rule Chapter 2.31 (4), (8) (B).

[4] DMR Rule Chapter 2.64 (5) (A)

aware of this omission on March 15. Rather than reschedule the hearing, the Department placed the second notice in the next available issue of the *Portland Press Herald*, a daily newspaper of general circulation throughout the State of Maine, distributed daily to stores and subscribers in the Ellsworth/Bar Harbor area, in which the Department regularly advertises public notices of rulemakings and other marine resources matters.[5]

The second public hearing notice ran in the March 16 issue of the *Press Herald*. On March 21, 2013, the notice was published for a third time, again in the *Ellsworth American*. On March 15, DMR issued a press release with details of the hearing. Several articles with information about the public hearing were also published locally between March 7 and March 21. To the Department's knowledge, the following articles and notices regarding the March 25 hearing were published:

- February 21, *Ellsworth American*: public notice of hearing
- Late February, *Commercial Fisheries News*: March 2013 edition, public notice of hearing
- March 7, *Ellsworth American*: article
- March 14, *Weekly Packet* (local paper in Blue Hill area, including Surry): article
- March 19, *Ellsworth American* website: article based on DMR press release
- March 21, Friends of Blue Hill Bay website: notice of hearing
- March 21, *Ellsworth American*: public notice of hearing

Intervenors Backer, Sichterman, and Hughs argue that because the March 21 notice in the *Ellsworth American* ran less than ten days before the March 25 hearing, the hearing was held without proper notice and the Department therefore lacks the authority to issue a decision on the application.[6]

While the second public notice appeared in the *Portland Press Herald*, rather than the *Ellsworth American*, the Department believes that, in combination with the additional public notice in the *Ellsworth American* on March 21, the other articles in local papers and websites between March 7 and March 21 giving information about the hearing, as well as the February 14 *Ellsworth American* notice and the *Commercial Fisheries News* notice, the intent of the rule was met and the public was provided sufficient notice of the public hearing.

Intervenors Backer, Sichterman, and Hughs also argue that the June 18 hearing was held without proper notice, because the public notice advertisements appeared less than 30 days before the hearing.[7] Public notice of the re-opened hearing on June 18 was published in the *Ellsworth American* on May 30 and June 6, 2013. The Department placed these notices under

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[5] E-mail from Kevin Rousseau to Diantha Robinson, 3-21-13, contained in case file, Exhibit 1.

[6] Joint Closing Statement of Ann Backer, Intervenor and Nicholas Sichterman and Mariah Hughs, Intervenors (hereinafter cited as "Backer Closing Statement"), p. 4

[7] Ibid

the authority of its rule Chapter 2.30, Aquaculture Lease Hearing procedures.[8] On June 5, DMR issued a press release with details of the hearing. In addition to the public notices, articles about the reopened hearing appeared in the *Ellsworth American* on May 30 and June 13 and in the *Weekly Packet* on June 13, 2013. The Department believes that public notice of the June 18 hearing under Chapter 2.30 complied with all legal requirements and that the notice to the parties and the public of the time and place of the re-opened hearing was reasonable.

Marking. Intervenors Backer, Sichterman, and Hughs also argue that the proposed lease site was not properly marked during the 30 days prior to the March and June hearings and that this resulted in a lack of required notice to the public about the location of the proposed lease site. They contend that the Department is thus without legal authority to rule on the application unless it orders a new hearing and requires the proposed lease site to be marked for the preceding 30 days.[9]

The site report notes that "At the time of the Department's visit the proposed lease was marked by corner buoys" (SR 2).[10] Mr. Sichterman testified that the markers were properly placed when he swam on the site in the summer of 2012 and were also in place when he, Ms Hughs, Mr. Bolster, and others observed them at the time of the site visit in October of 2012.[11]

Mr. Porada testified on March 25 that the site had been marked for nearly two years but that some of the buoys on the site had recently been displaced, likely by ice. He said the weather had not been conducive to navigation, so he had not been able to replace the buoys before the hearing, but said he would do so on April 5.[12] On May 22, 2013, Mr. Porada e-mailed the hearing officer and the parties, saying that "the remaining outer corner buoys have been re-placed on proposed site," although he did not say on what date they were replaced.[13]

The intervenors argue that although the DMR rule, Chapter 2.64 (2)(F), requires that a proposed experimental lease site be marked during the period when the application is being considered by the Department, the requirement in Chapter 2.10 (5) that proposed standard leases be marked at least 30 days prior to the hearing date applies as well to proposed experimental leases "through Chapter 2.64 (2)(F) when a public hearing is held."

Chapter 2.64 (2)(F), titled "Proposed Site Marking," says only that "During the time period when the application is being considered by the Department, the applicant must place visible markers to delineate the area proposed to be leased." It is the last in a list of many requirements for experimental lease applications in Chapter 2.64 (2). It makes no reference to

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[8] DMR rules, Chapter 2.30. 3. Continuance. All hearings conducted pursuant to these regulations may be continued by the presiding officer for reasonable cause and reconvened from time to time and place to place by the presiding officer. The presiding officer shall provide reasonable notice to the parties and the public of the time and place of such reconvened hearing.

[9] Backer Closing Statement, pp.5-6

[10] The site visit was conducted on October 11, 2012.

[11] Transcript of March 27 hearing at p 190:5-7, 193:8-9, and 194:10-13

[12] Transcript of March 25 hearing at p 15:22–16:13

[13] Exhibit 1, e-mail from Joseph Porada to Diantha Robinson, et al., May 22, 2013, 5:40 a.m.

public hearings. There are significant differences in the application process for experimental and standard leases which underlie the difference in the marking requirements.

It is clear that this site was marked for approximately two years before the March hearing.[14] Movement of buoys by ice is a common, unavoidable, natural event, and Mr. Porada remedied the problem before the public notice was issued for the June hearing. No one who testified in the proceeding expressed any doubt as to the location of the proposed lease. [15] The Department is satisfied that the marking of the site was adequate to provide the information it was intended to provide to both the Department and the public and that the hearing does not need to be repeated.

Bias, Recusal. Intervenor Pirozzolo raises issues of bias and *ex parte* contact in his closing arguments and rebuttal which are substantially the same as those raised in the motions he filed following the March, 2013 hearings. The Department's response to these arguments is the same as that in its May 17, 2013, order on Mr. Pirozzolo's motions.

Intervenors Backer, Sichterman and Hughs note in their joint rebuttal statement that an email supporting the application was sent by riparian landowner Marshall Bolster to the hearing officer and Mr. Porada at the same time as closing arguments were submitted by the parties. The proposed lease site lies directly off Mr. Bolster's shore. Mr. Bolster did not intervene or speak at any of the public hearings. He e-mailed a letter to the *Ellsworth American*, Mr. Porada, and the hearing officer on September 20.

The intervenors contend that, as a riparian owner, Mr. Bolster is a "person legally interested in the outcome" of the application, even though, except for the email, he has not otherwise participated in the process. Therefore, the intervenors argue, Mr. Bolster's email constitutes *ex parte* contact with the hearing officer that prejudiced the intervenors by providing ostensibly factual information to the hearing officer supporting Mr. Porada's application after the hearing had ended.[16] The intervenors request that the hearing be re-opened to enable them to present evidence in opposition to Mr. Bolster's. They also ask the hearing officer to evaluate whether the cumulative *ex parte* contacts made to her by Mr. Porada, Mr. Bolster, and others warrant her recusal and the appointment of a new hearing officer. [17]

The September 20 e-mail from Mr. Bolster supporting the lease application was provided to the parties by the hearing officer on November 21, along with a letter opposing the proposed lease which was received by the hearing officer on September 18 from another riparian

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[14] Transcript for March 27 hearing at pp 167-168; Mr. Matthews testified that the markers had been moved by March 11.

[15] Maps showing the location of the site are included in the application and the site report, both of which have been posted on the Department's web site since they were completed in September and November, 2012, respectively.

[16] The *ex parte* rule appears in Title 5 MRS § 9055, which provides that "In any adjudicatory proceeding, no agency members authorized to take final action or presiding officers designated by the agency to make findings of fact and conclusions of law may communicate directly or indirectly in connection with any issue of fact, law or procedure, with any party or other persons legally interested in the outcome of the proceeding, except upon notice and opportunity for all parties to participate."

[17] Joint Rebuttal of Ann Backer, Intervenor and Nicholas Sichterman and Mariah Hughs, Intervenors to Closing Statement of Applicant, p.3-6 (hereinafter cited as "Backer rebuttal)."

landowner, Margaret Blom. While Ms Blom testified at the hearing, she is not an intervenor. Her status is basically the same as Mr. Bolster's, although they take opposing positions regarding the application. The hearing officer sent letters to both Mr. Bolster and Ms Blom explaining that their letters would not be considered by the Department.

In the course of handling this application over a lengthy period, the hearing officer received communications from numerous people supporting or opposing the application or seeking information about the application and the leasing process. Some of these people eventually became intervenors, while others testified and/or questioned witnesses at the hearing or sent comments to the Department during the two public comment periods. The hearing officer corresponded with Mr. Porada in connection with his application, informing him of changes or additional information needed in his application before it could be deemed complete[18] and responding to his questions about revising the application to include additional gear.[19] As noted in the May 17, 2013, order, the identity of the parties to the proceeding, other than the applicant, is not established until the intervenor applications are granted, between five and ten days before the hearing. Moreover, such communications with Mr. Porada occurred before his application was complete and before any adjudicatory proceeding was initiated with respect to that application in any event.

The hearing officer abided by the *ex parte* rule, as described in the May 17 order and reflected in a number of subsequent e-mails to the parties, some of which are cited in the intervenors' brief. All communications she has initiated have been copied to all parties. Despite the unsolicited communications the hearing officer has received throughout the pendency of this application from persons on all sides of the issue, she believes that she is able to remain objective and not be influenced by information that has not been tested in the hearing process. The Department agrees and believes that she can recommend a fair and objective decision to the Commissioner for his consideration.[20]

Other requests. The parties' closing arguments and rebuttals contain various requests for re-opening the hearing, holding a new hearing, and replacing the hearing officer, including an argument by Intervenors Backer, Sichterman, and Hughs, who argue that Mr. Porada's persistent flouting of the *ex parte* rule poses a risk of bias by the hearing officer and therefore a new hearing

[18] DMR Rules, Chapter 2.64 (2) E. Completion. Upon receipt of a written application, the Department shall notify the applicant of its receipt. Within 20 working days of receipt of a written application, the Commissioner shall determine whether the application is complete and contains sufficient information on which a decision regarding the granting of the application may be made. The Commissioner shall notify the applicant of his/her determination. If the application is incomplete, it shall be returned to the applicant with a written explanation of the additional information required in order to be complete.

[19] Copies of all such correspondence were provided to Mr. Pirozzolo in April 2013, in response to his request for information under the Maine Freedom of Access Act.

[20] Contrary to Mr. Pirozzolo's assertion (Pirozzolo closing statement p.90), the hearing officer does not make the final decision on the lease application, but recommends a decision to the commissioner, which he may or may not accept. The statute (12 MRS § 6072-A(1)) allows the commissioner or the deputy commissioner to authorize certain staff to issue experimental lease decisions, but the commissioner has not authorized the hearing officer to do this.

should be convened with a new hearing officer. [21] For the reasons described above and in the Department's order of May 17, 2013, this and similar requests are denied.

Public trust arguments. Mr. Pirozzolo argues that the State of Maine has no authority to grant aquaculture leases in subtidal lands and waters that it holds in public trust, because the Colonial Ordinance and Maine common law allow these lands and waters to be used only for public trust uses such as fishing, fowling, and navigation. He argues that any private rights in the public waters granted by the state must be for some form of fishing, fowling, or navigation. He contends that aquaculture is farming, not fishing, and therefore is not a public trust use that the state can allow under a lease granting any degree of private, exclusive rights. Granting a lease to Mr. Porada, he argues, would violate the public trust doctrine.[22]

The Department derives its authority from laws enacted by the Maine Legislature, in particular Title 12 MRS, §§ 6072, 6072-A, 6072-B, and 6072-C, which establish the aquaculture lease and license program. The Department has been administering the program under these and other laws since the aquaculture program began approximately 40 years ago and believes them to be within the power of the state to enact and within the authority of the Department to administer.

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[21] Backer Closing Statement, page 8

[22] Closing argument of Intervenor, Jack R. Pirozzolo, pp. 12-14

2. DESCRIPTION OF THE PROJECT The proposed lease site is shown below, in an illustration from the DMR site report.

Figure 3: Map created in ArcMap version 9.3 using geo-referenced aerial photographs taken at low tide (2008) and provided by The Maine Office of GIS. DMR Site Report, p. 5

Site Characteristics

The proposed lease site is located on the northwest shore of upper Morgan Bay, directly seaward of the shorefront property of Marshall Bolster and Susan Straubing. The western site boundary runs approximately 370 feet parallel to shore below the mean low water mark. The site extends seaward to the east approximately 480 feet. From the east side of the site, the distance across the bay to the eastern shore ranges from 2100 feet to approximately 1600 feet. Smelt Brook flows into Morgan Bay at the southern edge of the Bolster/Straubing shore, approximately 134 feet southwest of the proposed lease site.[23]

[23] Exhibit 3, Site Report, p. 2; Transcript of March 27 hearing at p. 204:9-205:2

The western shore of upper Morgan Bay is an extensive stretch of rocky beach bordered by tidal flats, as shown above in Figure 3 from the DMR site report. The proposed lease site is located approximately five to ten feet below the mean low water mark at the edge of the extra-low water mark, between the tidal flats to the west and the open waters of the bay to the east. The water near the shore is shallow, particularly at the lower tidal stages.[24]

The Bolster/Straubing property is bordered on the north by the property of intervenors Nicholas Sichterman and Mariah Hughs and on the south by the property of intervenor Ann Backer.[25] Mr. Bolster and Ms Straubing have given Mr. Porada written permission to use their portion of the intertidal zone in conjunction with his proposed lease in the subtidal waters adjacent to their shore.[26]

On October 11, 2012, DMR biologists conducted a SCUBA dive and filmed underwater video of the proposed lease site, documenting the epibenthic ecology of the site and surrounding area beyond the proposed lease boundaries.[27] On November 16, 2012, they submitted a site report detailing their findings and assessment of the proposed lease site with respect to the lease criteria. They describe the proposed lease site as follows:

> The proposed lease occupies shallow subtidal waters in upper Morgan Bay. It is bounded by tidal flats leading to a rocky beach to the west and the open waters of Morgan Bay to the east.
>
> The topography of the proposed lease is relatively flat with deeper water to the east, and an area of shallower water in the vicinity of the SW corner and Smelt Brook. The northern three-quarters of the site are approximately 4-6 inches of mud overlaying a firmer sand and gravel base. The southern portion of the proposed lease is harder with only 2-3 inches of mud overlaying a gravel base with occasional boulders and rock outcroppings.
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> Currents run in a north south direction depending upon tidal stage. During our dive, which was conducted during near maximal tidal exchange, currents were slow and we were able to easily swim against the outgoing tide.[28]

Water depths at the site range from one foot at the northwest corner and 4.6 feet at the southeast corner at mean low water to 10.4 to 14 feet at high tide.[29] Water quality at the site is classified by the Department as open/approved for shellfish harvesting, although the site report notes that an area of the bay approximately 1,200 feet north of the proposed lease site is closed to

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[24] Exhibit 3, Site Report, p. 4

[25] Exhibit 2, Application, p 15. The Bolster/Straubing property is Lot 8, with approximately 400 feet of shorefront; the Sichterman/Hughs property is Lot 10, with approximately 100 feet of shorefront (transcript of March 27 hearing at p 174:19-175:2); the Backer property is Lot 6, with approximately 1,100 feet of shorefront (transcript of March 27 hearing at p 211:22-24.

[26] Exhibit 2, Application, p 18

[27] Exhibit 3, Site Report, p. 3

[28] Exhibit 3, Site Report, pp. 3-4

[29] Exhibit 3, Site Report, p. 4

shellfish harvesting because of pollution.[30] The site report notes the potential for ice to form in upper Morgan Bay and the need to remove gear during the winter.[31]

Mr. Porada cited the shallow, warm water, the southern exposure, and protection from weather in the near-shore location as reasons for selecting the proposed lease site.[32] He observed that one advantage of the shallow site for his proposed aquaculture operations is that it is easy to work while standing in the water; this reduces the need to use boats and simplifies access to the gear.[33]

Proposed Operations

The application describes Mr. Porada's plans to experiment with various methods of culturing quahogs and European and American oysters in Morgan Bay.[34] Mr. Porada testified that he and Dr. Brian Beal[35] compared growth and survival of quahogs in a number of areas in coastal Hancock County over several years.[36] Finding good results in upper Morgan Bay, Mr. Porada decided to apply for an experimental aquaculture lease there.[37]

Mr. Porada said that he plans to develop the lease site slowly, using several experiments, or "treatments," for growing both quahogs and oysters to determine "what works best in the bay." [38] Dr. Beal described the experiments he designed for Mr. Porada to use in the first year of the lease to test the viability of the site as a nursery for quahogs and oysters. The shellfish will be grown at different seed sizes and densities in different types of containers, and their growth and survival will be compared.[39]

Mr. Porada testified about the gear he proposes to use for his experiment. In summary, he will grow quahogs in large net bags on the bottom near the western edge of the site, oysters in cages on the bottom seaward of the quahogs, and oysters and quahogs in floating bags in the eastern portion of the site.

Nearest to shore at the westernmost edge of the proposed lease site, below the extra-low water mark, Mr. Porada plans to deploy up to fifteen nursery bags measuring 5 feet by 14 feet, made of plastic mesh netting and containing juvenile quahogs. The bags will lie directly on the

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[30] Exhibit 3, Site Report, p. 10

[31] Ibid

[32] Transcript of March 27 hearing at 61:19-21

[33] Transcript of March 25 hearing at 34:12-18

[34] Exhibit 2, Application, p. 3

[35] Brian Beal is a professor of marine ecology at the University of Maine at Machias and Director of Research at the Downeast Institute. He testified at the hearing as a witness on behalf of Mr. Porada; his resume is Exhibit 12.

[36] The work in Morgan Bay was conducted pursuant to a DMR special license issued to Dr. Beal.

[37] Mr. Porada originally applied for an experimental lease on the eastern side of upper Morgan Bay in 2009. He withdrew that application in 2010 after encountering public opposition to his proposal. In 2011, he applied for the proposed lease site on the western side of the bay that this decision addresses.

[38] Transcript of March 25 hearing at 28:12

[39] Transcript of March 25 hearing at 96:6-100:23; Exhibit 13

bottom and be pressed into the substrate and weighted with rocks at the corners to keep them in place.[40]

To the east of the nursery bags in deeper water, up to thirty wire cages will be placed on the bottom in lines running north-south, parallel to shore. The cages measure 4 feet by 4 feet by 6 inches high and will contain juvenile oysters, some of them held in smaller plastic mesh ADPI bags inside the cages. Although the application describes these cages as deployed in stacks of up to ten cages three feet high, Mr. Porada testified that the cages will not be stacked, so they will project no more than six inches above the bottom.[41] Nor will they be floated at the surface, at least in the beginning of the project, as shown in the application; [42] Mr. Porada said, "I'm not going to floating metal cages at this point, maybe down the road, as the application does call for them." He said that he prefers to use the smaller, softer, ADPI bags for floating gear. [43] He also noted that he will not use the soft bags described in the application. [44]

Farther to the east, seaward of the bottom cages, Mr. Porada will deploy up to 270 plastic mesh ADPI bags measuring 18 by 36 by 4 inches. The bags will be installed in two arrays of three lines each, 200 feet long, with 45 bags attached to each of the lines. Each set of three lines will be attached at each end to a 2-inch by 10-inch wooden plank, 16 feet long, which serves as a yoke or bridle to keep the lines in position. Thus, the floating bags will occupy two spaces approximately 200 feet by 16 feet, with the longer axis running north-south in the outer, eastern portion of the lease site, parallel to but some distance from shore.[45] The two arrays of lines will be moored at each end with a helix anchor if possible, otherwise with mushroom anchors or concrete blocks as alternative moorings.[46] Mr. Porada indicated that there would be "ample pathways at least 20 feet between any floating gear." [47]

All gear will be placed below the extreme low tide line, Mr. Porada said, and under most conditions, the gear will not be visible at low tide.[48] He will apply for two moorings off the lease site for vessels serving the site.[49]

The application states:

> The site and gear will be tended by boat and by wading at low tide where possible. The boat will be no more [than] 20' in length and be powered by a 40 horsepower or less outboard motor. The motor will only be running as necessary to move

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[40] Transcript of March 25 hearing at 32:17-19
[41] Transcript of March 25 hearing at 93:3-4
[42] Exhibit 2, Application, pp 19, 20
[43] Transcript of March 25 hearing at 36:16-21
[44] Transcript of March 25 hearing at 40:13-23
[45] Exhibit 2, Application, p 20
[46] Transcript of March 25 hearing at 38:3-39:20
[47] Transcript of June 18 hearing at p 228:18-21
[48] Transcript of March 27 hearing at 44:22-47:7
[49] Transcript of March 25 hearing at 161:21-24, 165:10-13; Moorings in upper Morgan Bay are regulated by the U.S. Army Corps of Engineers because the Town of Surry does not have a mooring ordinance or a harbormaster, Transcript of March 25 hearing at 185:9-16.

> from point to point or will be shut down. No other power equipment will be used.[50]

As the shellfish grow, the application indicates that they will be "culled, processed and bagged on site and on the shore owned by Susan Straubing and Sandy Bolster." Animals not ready for market will be placed back on site. Gear will be cleaned by hand with brushes and no cleaning agents. Harvesting will be done by hand and by use of bullrakes and tongs.[51]

Mr. Matlock, a selectman representing the Town of Surry, testified that the town's shoreland zoning ordinance requires planning board approval to conduct aquaculture operations on land covered by the ordinance. Any commercial uses of such land must be for home occupations, he said, and since Mr. Porada is not a Surry resident, he would not qualify for permission to conduct his aquaculture activities on the Bolster/Straubing land.[52] Mr. Porada stated that he can conduct aquaculture activities in the intertidal zone with the riparians' permission, since the town's jurisdiction extends only to the high tide mark.[53] He testified that culling and processing work will take place either in a boat or in the intertidal zone adjacent to the proposed lease site.[54] He said he will remove all shell matter from the operation from the beach.[55] He is not seeking a lease in the intertidal zone.

Overwintering. Because of the shallow water depths at the site, Mr. Porada said that it would not be "practical" to keep gear and shellfish on the site over the winter. [56] All gear and shellfish will therefore be removed from the site in the fall and returned in the spring. The shellfish will either be overwintered in a cold storage facility on land or in deeper water in Morgan Bay on a limited-purpose aquaculture (LPA) license site, if Mr. Porada obtains such a license from the Department. [57] Mr. Porada also mentioned the possibility of overwintering shellfish and equipment at the Downeast Institute in Beals, Maine, but said he does not intend to overwinter oysters in the Bagaduce River.[58] The moorings on the lease site will be marked for winter.[59]

Access to lease site. The application includes a statement signed by riparian landowners Marshall Bolster and Susan Straubing stating that "We give Joe Porada full permission and encouragement to use our shorefront and tidal zone extending from it for his quahog and oyster farming operation."[60] Part of the Bolster/Straubing road access to their property and shore is over a right-of-way across land of riparians Nicholas Sichterman and

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[50] Exhibit 2, Application, p 5

[51] Ibid

[52] Transcript of March 27 hearing at 15;7-16:8

[53] Transcript of March 27 hearing at 17:17-20; this is also the Department's understanding of the law.

[54] Transcript of March 27 hearing at 49:11-19

[55] Transcript of March 27 hearing at 34:7-12

[56] Transcript of March 25 hearing at 32:22-33:3, 45:5-17

[57] Transcript of March 27 hearing at 68:10-69:24; Cold storage of shellfish is a method of overwintering recognized by the Department, provided all public health requirements are met. Dr. Joseph DeAlteris, expert witness for intervenors Morgan Bay Neighbors, also approves: Transcript of March 25 hearing at 156:21-25; 157:1-9.

[58] Transcript of March 25 hearing at 37:1-5

[59] Transcript of March 25 hearing at 39:23-40:7

[60] Exhibit 2, Application, p 18

Mariah Hughs that abuts the Bolster/Straubing property on the north.[61] After the application was declared complete, Mr. Sichterman and Ms Hughs brought a civil action in Superior Court against Mr. Porada, seeking a declaratory judgment that he has no rights in the right-of-way and may not use it for access to the proposed lease site.[62] Mr. Porada subsequently testified at the DMR hearing that he is not claiming any right to use the right-of-way for access or to transport equipment to the proposed lease site.[63]

The application also includes a statement signed by Matthew Gerald giving Mr. Porada permission to use his shore in Bar Harbor for "for purposes of anchorage and access to his aquaculture sites."[64] Mr. Porada testified that his access to the proposed lease site will be by boat.[65]

Lease size. In 2009, the Legislature amended 12 MRS §6072-A to increase the Department's statutory authority to issue experimental leases from two acres to four acres.[66] Mr. Porada applied for this four-acre lease site in 2011. The Department's rule, however, continued to reflect the previous statutory two-acre limit until after the written closing arguments and rebuttals in Mr. Porada's case were filed.[67] Intervenors Backer, Sichterman, and Hughs argue that the Department lacks the authority to issue a four-acre experimental lease to Mr. Porada because the rule in effect at the time of the application and thereafter limited such leases to a maximum of two acres.[68]

The Department's statutory authority to issue experimental leases of up to four acres has been clear since 2009. The Department accepted Mr. Porada's application for a four-acre lease based in part on that authority. The parties and the public have been on notice throughout the proceeding that the lease application was for four acres, and all those who wished had an opportunity to submit evidence as to the potential effect of a four-acre lease.

The rule in effect at the time of the application erroneously reflected the statutory authority that was in effect at the time the rule was originally adopted; it was never the Department's intent that the size of an experimental aquaculture lease site be limited by Department rule to less than what is authorized by the statute. The Department has since revised the rule in order to conform it to the statute.

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[61] Exhibit 2, Application, p 15; the Bolster/Straubing land is lot 8; the Sichterman/Hughs land is lot 10.

[62] Exhibit 1, Case file, complaint dated Dec. 13, 2012, received by DMR Feb. 19, 2013. A stipulated judgment was granted on June 24, 2013; see Backer, et al, Joint Responses and Exceptions to Report of Hearing Officer, April 3, 2015 (copy of Superior Court Decision appended as Exhibit A).

[63] Transcript of March 27 hearing at 27:4-28:7

[64] Exhibit 2, Application, p 17

[65] Transcript of March 25 hearing at 66:16-18

[66] Title 12 MRS §6072-A was amended in 2009 to read:

> 4. Size limitation. A limited-purpose lease may not be issued for an area in excess of 4 acres.

[67] DMR Rule Chapter 2.64 was amended effective October 17, 2013, to replace the 2-acre limit in subsections (1) and (8) with the following:

> 8. Limit on Size and duration. An experimental aquaculture lease may not be issued for a time period greater than 3 years or for an area greater than 4 acres.

[68] Backer closing statement, p. 13

The issuance of a four-acre lease to Mr. Porada is consistent with legislative intent, provided the Department finds that the statutory criteria for granting such a lease are satisfied. Conversely, the imposition of a two-acre limitation based on a rule adopted before the amendment of 12 MRS §6072-A is inconsistent with the intent of the Legislature and the Department.

The site report notes that the area covered by the proposed lease is actually 4.03 acres.[69] Mr. Porada testified that he would reduce the lease footprint to fit within the four-acre size limit for experimental leases by moving the south boundary of the proposed lease site north by ten feet.[70]

3. STATUTORY CRITERIA & FINDINGS OF FACT

Approval of experimental aquaculture leases is governed by 12 M.R.S.A. §6072-A. 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, or docking facilities 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.

A. Riparian Access[71]

The site report describes the relationship of the proposed lease site to the adjacent shore as follows:

> On October 11, 2012, no docks were observed within the vicinity of the proposed lease site. A running line and outhaul were noted adjacent to the SW corner of the proposed lease (Figure 3).
>
> The proposed area sits immediately offshore of property belonging to Mr. Marshall Bolster and Ms. Susan Straubing (see pages 13-15 of the application). The outhaul and running line extend from this property (Figure 3). Several kayaks and dinghies were noted on shore at the surrounding properties.[72]

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[69] Exhibit 3, Site report, p 2

[70] Transcript of March 25 hearing at 75:14-76:3

[71] DMR Rules, Chapter 2.37 (1) (A)(1) Riparian Owners Ingress and Egress. The Commissioner shall examine whether the riparian owners can safely navigate to their shore. The Commissioner shall consider the type of shore involved and the type of vessel that can reasonably land on that shore. He/she shall consider the type of structures proposed for the lease and their potential impact on the vessels which would need to maneuver around those structures.

[72] Exhibit 3, Site Report, pp.5-6

Of the eight properties with shorefront within 1,000 feet of the proposed lease site, only the Bolster/Straubing shore would have aquaculture gear adjacent to it.[73] Access directly between the shore and the water for the other riparian properties would be unaffected by siting the lease as proposed.

The presence of the low-profile bottom gear on the nearshore portion of the proposed lease site would not interfere to any significant extent with access to the Bolster/Straubing shore by the type of vessels that could reasonably land on such a shore, such as kayaks, canoes, and small motor boats. At high tide, the bottom gear would be well below the surface; at low tide, it would restrict access in the shallowest areas of the site only slightly longer than the tide level otherwise would. The water above the bottom gear would be open for navigation.

The floating oyster bags would occupy two areas, each approximately 200 feet by 16 feet, with the long axis lying north-south, in the deeper water on the eastern portion of the proposed lease site.[74] A 20-foot navigation corridor would allow navigation between the arrays from north to south. The floating gear would be surrounded by open water with only the low-profile gear on the bottom between it and the shore. Navigating around the floating gear in the outer portion of the site would not significantly hamper ingress and egress to and from the adjacent shore.

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[75]

Mr. Porada testified with respect to the potential impact of his proposed lease on navigation in the area:

> Navigation, upper Morgan Bay outside my 400 by 400 proposed site contains 200 acres or more. It's more than half a mile wide across there. The entire bay contains roughly 2,500 acres. Additionally clear wide roads will be maintained between the floating gear to allow canoeing, kayaking, headway speed by a motor-powered crafts as the tide height allows. Historically there have been no navigational channels in upper Morgan Bay.[76]

The site report describes navigation in upper Morgan Bay and the potential effect of the proposed lease site on canoes, kayaks, and small motor vessels as follows as follows:

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[73] In response to a question whether it would be possible for a dinghy or small motor boat to get to the Bolster/Straubing shore by crossing the proposed lease site, Mr. Porada said, "There will be clear paths between – and also none of the shores other than the Straubing's are directly in the path. That – that lease site does not sit directly in the path of anyone's shorefront other than Straubing's and Bolster's. Transcript of March 25 hearing at 70:5-71:23

[74] Transcript of March 25 hearing at 38:10-20

[75] DMR Rules Chapter 2.37 (1) (A) (2) Navigation. The Commissioner shall examine whether any lease activities requiring surface and or subsurface structures would interfere with commercial or recreational navigation around the lease area. The Commissioner shall consider the current uses and different degrees of use of the navigational channels in the area in determining the impact of the lease operation. For example: A lease area adjacent to the usual course of a barge in tow shall be held to a stricter standard than one in an area frequented by only outboard skiffs. High tide "short cuts" shall not be considered navigational ways for the purposes of this section.

[76] Transcript of March 25 hearing, p 21:2-12

> The upper reaches of Morgan Bay are shallow and the bay "dead-ends" approximately 1,500 feet north of the proposed lease site. According to the U.S. Army Corps of Engineers, there are six permitted moorings in upper Morgan Bay; all belonging to Mr. Jack Pirozzolo. When we visited the site on October 11, 2012 three other buoys (which we assumed marked moorings but may have been used for some other purpose) and an outhaul were present (see Figure 3). *[NOTE: Figure 3 is reproduced above.]*
>
> Most navigation in the bay is likely recreational traffic and vessels coming to and from these moorings. Commercial navigation is likely restricted to clamming and perhaps elver fishing in Smelt Brook. Considering the size of vessels employed (small outboard powered), commercial traffic can likely transit though the area relatively unimpeded.
>
> Vessels such as canoes and kayaks are undoubtedly used in the bay. Vessels such as these, that are traveling along the western shore of Morgan Bay would have to deviate approximately 500 feet around the proposed lease site if no accommodation for transit is made in the placement of gear. [77]

Mr. Lewis testified that after learning at the hearing of the relatively small amount of gear to be deployed on the proposed lease site, he had reconsidered his comment in the site report regarding the potential need for kayaks and canoes traveling along the western shore of the upper bay to detour around the proposed lease site:

> What I'm hearing tonight is any lease site would be occupied sparsely and there would be large corridors and pathways available to do that. So in a site review at 500-feet or even a small sailboat not being able to transit through, that - that may have changed subsequent to when I wrote that.[78]

As noted above, there are no docks in this portion of upper Morgan Bay. Mr. Pirozzolo applied to the U.S. Army Corps of Engineers on March 11, 2013 for a 330-foot floating dock off his property, approximately 800 feet or more north of the proposed lease site.[79]

Just west of the proposed lease site is an outhaul mooring owned by Mr. Bolster, the riparian owner of the intertidal zone and upland adjacent to the proposed lease site, who has given Mr. Porada permission to use his intertidal land.[80]

Six moorings were placed in Morgan Bay in April, 2012 by Mr. Pirozzolo, three to the south of the proposed lease site and three to the east. According to the site report, the nearest of these six moorings (FB3) is approximately 483 feet south of the proposed lease site.[81]

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[77] Exhibit 3, Site Report, page 6

[78] Transcript of March 27 hearing at 98:5-18

[79] Exhibits 28, 42, 43; Transcript of March 27 hearing at p 269:3-9

[80] Exhibit 2, Application, p 6

[81] Exhibit 3, Site Report, p 2

Approximate distances between the proposed lease site and Mr. Pirozzolo's other moorings range from 590 to 1,471 feet.[82]

The site report describes the potential effect of the proposed lease site on sailing in the vicinity as follows:

> Sailboats would likely have to avoid the lease site entirely as tacking through any small corridor would be overly difficult. Small unpowered-sailboats that have entered the bay from the south would first have to negotiate the approximately 1,670 foot (MLW) passageway that is created by two points extending into the bay approximately 700 feet south of the proposed lease boundary. Additionally, small unpowered sailboats would have to negotiate the six permitted moorings and any vessels attached to them that lie south and east of the proposed lease. Approximately 740 feet (east to west) is available for navigation between each row of three moorings (Figure 3 and General Characteristics; Distances to Shore).[83]

Several witnesses testified regarding navigation in upper Morgan Bay in general and the potential effect of the proposed lease site.

Shawn Mahaney of the U.S. Army Corps of Engineers testified that when the Corps issued permits to Mr. Pirozzolo in March, 2012, to install six moorings in upper Morgan Bay, "We looked at where [Mr. Porada's proposed] site was and where [Mr. Pirozzolo's] proposed moorings were and we felt that there was enough distance between the two that it was not an impact on navigation."[84] Mr. Mahaney said that the Corps, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service had reviewed Mr. Porada's lease application, and that these federal agencies had no objections to the proposed lease regarding "navigation or other issues." Mr. Mahaney said the Corps would issue its permit to Mr. Porada to place gear on the lease site if the Department issues him a lease.[85]

David Danielson, an experienced sailor and sailing instructor, testified on behalf of Mr. Pirozzolo regarding the potential for sailboats, particularly small racing sailboats like Mr. Pirozzolo's 420, to become entangled with the gear on the proposed lease site. Mr. Danielson

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[82] Exhibit 3, Site Report, p. 2 - Distances to Shore:

Western Boundary to MLW	~ 5 – 10 feet
SE Corner to most eastern shore (MLW)	~2,101 feet @ 095°T
SE Corner to point south of "Carrying Place" (MLW)	~1,594 feet @ 128°T
Eastern boundary to 420 mooring	~590 feet @ 098°T
SE Corner to Mainship 30 mooring	~763 feet @ 127°T
SE Corner to Sabre 28 mooring	~1,141 feet @ 148°T
SE Corner to FB3 mooring	~483 feet @ 193°T
SE Corner to FB2 mooring	~975 feet @ 187°T
SE Corner to FB1 mooring	~1,471 feet @ 185°T
SE Corner to southeastern "spar" mooring	~1,388 feet @ 143°T
SW Corner to Smelt Brook	~134 feet @ 207°T

[83] Exhibit 3, Site Report, page 6

[84] Transcript of March 25 hearing at p 184:3-6

[85] Transcript of March 25 hearing at p 182:22-183:2

noted that sailboats have less ability to follow a strictly patterned route than a motorboat has.[86] He testified that the prevailing wind in upper Morgan Bay "is a southerly that comes straight – more or less straight up the bay."[87] He described sailing to a mooring and the possibility of missing the mooring, losing headway, and potentially being swept downwind until the sailor can regain control of the boat.[88]

Mr. Danielson described the 420 "which is a 14-foot day sailing racing boat...It's a very sporty boat. It planes, it can obtain speeds like a fast outboard motor. It gets on top of the water and planes."[89] He noted that Mr. Pirozzolo has a 420, and said, "So it's a very fast, athletic type of sailing where you've got to make instant decisions or you're swimming or you've hit something."[90]

Mr. Danielson noted the potential for getting tangled in the aquaculture gear if a sailboat missed the Pirozzolo mooring nearest to the proposed lease site (mooring FB 3 on site report Fig 3, above) and drifted northward.[91] Noting that the 420 could also be kept at Mr. Pirozzolo's proposed dock, if built,[92] Mr. Danielson said, "The lease area could be a hazard to young sailors tacking out from that dock."[93] He also suggested that a powerboat could run into the gear on the proposed lease site, and that the propeller might become entangled with the gear, which could be hard to see. [94]

Mr. Lewis testified that he would only sail through the proposed lease site himself in a very small boat with a centerboard, with favorable winds. He said there would be no reason to sail through the site in a large sailboat, such as Mr. Pirozzolo's 28-foot sailboat with a 5 ½ foot keel.[95] He observed that there is 1,600 feet of open water east of the proposed lease site for incoming boats to turn in, in order to pick up moorings, and that there is no need for such vessels to navigate across the proposed lease site. He explained that, if the lease is granted, the U.S. Coast Guard will determine what navigational markings are required on the site.[96]

Asked by Mr. Pirozzolo about the possibility of the aquaculture gear being an obstruction to incoming sailboats when there is fog over the bay, Mr. Lewis said, "I don't believe it's any more of an obstruction than a kid who was out in a kayak in the fog, as well. The prudent mariner – the regs require you have a lookout."[97]

Asked by Mr. Danielson if floating ADPI bags could be difficult to see from a distance and could thus constitute a danger to navigation, Mr. Lewis said, "I think if a person was going at an

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[86] Transcript of March 27 hearing at p 228:2-230:10
[87] Transcript of March 27 hearing at p 231:4-6
[88] Transcript of March 27 hearing at p 231:23-233:22
[89] Transcript of March 27 hearing at p 226:15-19
[90] Transcript of March 27 hearing at p 243:18-23
[91] Transcript of March 27 hearing at p 234:24-235:4
[92] March 27 hearing at p 236:22-24
[93] Transcript of March 27 hearing at p 237:4-5
[94] Transcript of March 27 hearing at p 238:10-12
[95] Transcript of March 27 hearing at p 130:1-10
[96] Transcript of March 27 hearing at p 141:24-142:1
[97] Transcript of March 27 hearing at p 141:7-12

imprudent speed they could. I would argue that a person in that part of Morgan Bay with the potential for people swimming and other activities and kids in rowboats or whatever, shouldn't be moving fast enough. With those bags, I mean I've got them all around me, you tend to see them not from a mile away but about at 50 yards you ought to be able to see them and you should have prudent headway speed so you're not running over things in the water."[98]

Mr. Lewis added, "One of the things I found running the coast of Maine particularly, is we get a lot of driftwood in this area. And a person who isn't able to distinguish something that's two inches above the water while traveling at a high rate of speed, we've got so many navigational hazards around here, because you know, lower units should be flying off left and right if a person can't avoid something in the water that's two inches high, especially one that's near shore."[99]

Two intervenors, Christopher Goddu and Nicholas Sichterman, addressed issues regarding their navigation across the proposed lease site.

Intervenor Christopher Goddu owns non-riparian land with two rights-of-way to the shore of Morgan Bay near the proposed lease site, one over Mr. Sichterman's property and one over the next lot to the north.[100] Mr. Goddu said that he comes up to his property in Morgan Bay in July and August, in January, and "every holiday we can."[101] He testified that he is Mr. Pirozzolo's son-in-law and uses one of the moorings Mr. Pirozzolo installed in upper Morgan Bay in 2012:

> So FB3 is the – another mooring of my father-in-law's. We keep a rowboat near Mr. Sichterman's property and we row out to FB3 to get the Whaler. We also keep three kayaks on our other access point down here and we kayak often all the way down to Jed's Island....it's windy in Morgan Bay, so we tend to stick to the shore 'cause it makes it much easier to get to Jed's Island. So going right through – we'd have to go right through Mr. Porada's lease. We could go around it, but it's unpleasant.[102]
>
> Joseph Porada: Are you aware that my proposed lease leaves a large section towards shore open with no obstruction and that where there are proposed bags that there would be ample room to paddle through them?
>
> Chris Goddu: Yes, but I also have a 420 and I have a Whaler and I'm – things happen, and I have a dog who wants to swim in that area as well.[103]

Intervenor Nicholas Sichterman testified that the proposed lease site and gear would interfere with his ability to boat in the lease site and surrounding area and with the ability of

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[98] Transcript of March 27 hearing at p 122:14-22

[99] Transcript of March 27 hearing at p 123:5-12

[100] Transcript of June 18 hearing at 224:1-8; The rights of way are over lots 10 and 12, respectively, on Surry tax map 17, page 15 of the application, Exhibit 2

[101] Transcript of June 18 hearing at p 224:12-16

[102] Transcript of June 18 hearing at 225:5-19; Mooring FB3 is depicted on Figure 3 of the site report, reproduced above under Site Characteristics.

[103] Transcript of June 18 hearing at p 230:2-8

tenants who rent the cottage on his property to do the same. [104] He testified that he has a mooring just to the north of the proposed lease site. The application describes this mooring as one that "has not been used for years and has moved with ice from slightly north of the proposed site."[105] Mr. Sichterman said that he once kept a sailboat at that mooring, but he has not had one there for the past nine years (as of the March, 2013 hearing), although he hopes to again.[106] He testified that when he did sail from that mooring, he sailed south into the prevailing wind, which took him across what is now the proposed lease site; he did not think he could paddle his sailboat across an open area of the site and sail from there.[107]

Marcel Nuss testified that he lives on the east side of Morgan Bay and "occasionally" sails through the area where the lease is proposed to be located at high tide in an 18 ft. sailboat.[108] He noted that "At low tide we don't go down there because it is fairly shallow."[109] Asked by Mr. Porada if he could sail in the other 2,496 acres of Morgan Bay besides the proposed lease site, Mr. Nuss said,

> Mr. Nuss: Yes, it's true that we have a bigger area to sail in that doesn't have this proposed lease on it, but we also – the cumulative effect of avoiding all the other buoys, as well as your buoys, will – it'll just be another burden to – that we have to watch out for so that we don't get entangled in your lines and traps and so forth.
> Mr. Porada: Would you call it – would you say it was any different of an object to navigate around than Jed Island?
> Mr. Nuss: No. There's buoys there also.[110]

Mark Baldwin testified that he lives farther north along the shore from the proposed lease site, and that he "has used the waters [of Morgan Bay] extensively in small boats [and] with deep keel sailboats;" he said he does not think that the proposed lease would interfere with his use of the water and shore.[111]

Regarding Mr. Danielson's testimony about the potential dangers posed by the aquaculture gear to the use of small racing sailboats in the vicinity of the proposed lease site, Mr. Baldwin said,

> I have deep personal respect for Mr. Pirozzolo's expert witness, but I think this is a red herring. Virtually every sailor in Maine waters has times when he or she must navigate through mooring fields and/or lobster traps at least as congested as the proposed lease. Besides that and whether or not radar can pick up oyster gear, it is imprudent to navigate a vessel in zero visibility conditions so close to shore in such shallow water. Besides that, I believe that the law requires boat

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[104] Transcript of March 27 hearing at p 184:22-185:6
[105] Exhibit 2, Application, p 6
[106] Transcript of March 27 hearing at p 175:10-176:2
[107] Transcript of March 27 hearing at p 190:16-19, p 194:18-25
[108] Transcript of June 18 hearing at p 62:4, 21-19
[109] Transcript of June 18 hearing at p 62:7-8
[110] Transcript of June 18 hearing at p 62:21-24, 63:10-20
[111] Transcript of June 18 hearing at p 52:1-2; 56:1-5

> operators to be able to cope with the situation at hand, which includes not getting into situations they can't handle.[112]

The evidence shows that there are no navigational channels in upper Morgan Bay. Navigation appears to consist mainly of occasional recreational kayaking, canoeing, and small-boat sailing in summer and early fall. Larger pleasure craft may use the Pirozzolo moorings from time to time. Small outboard-powered vessels may transit the area to reach the shore for clamming or elver harvesting, as the site report observes.

The Army Corps approved both the proposed lease site and the Pirozzolo moorings after finding that they would not hamper navigation.[113]

The bottom gear nearer shore on the proposed lease site will have a very low profile with open water above it, while the floating gear will occupy a limited area farther from shore, with a 20-foot navigation corridor between the two gear arrays and open water on all sides. Kayaks, rowboats, or small motor boats traveling along the western shore of Morgan Bay can navigate around the gear on the east side, cross it using the corridor, or cross the inner portion of the proposed lease site nearer shore above the bottom gear. Mr. Porada stated, "I don't have any intention of restricting reasonable headway speed through the lease."[114]

Sailboats, particularly those with fixed keels, and larger motor boats will need to avoid the floating gear on the lease site, as the site report indicates. The proposed lease site is located close to shore in shallow water with ample open water around it, including 1,600 to 2,100 feet of open water to the east of the site and more to the south, providing ample room for sailing vessels and other craft to maneuver. Given the large open area of upper Morgan Bay outside of the proposed lease site, the amount of interference with navigation occasioned by the presence of the aquaculture gear will be minimal.

To ensure that navigation across the lease site will continue to be accommodated as Mr. Porada develops his experiments over the duration of the lease, a condition will be placed on the lease requiring that at least one 20-foot navigation corridor be maintained between any arrays of floating gear and that the innermost 30 feet of the site be used for low-profile bottom gear 12 inches or less in height only. 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, provided that at least one 20-foot navigation corridor is maintained between any arrays of floating gear and that the innermost 30 feet of the site is used

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[112] Transcript of June 18 hearing at p 52: 5-17

[113] The proposed lease had been publicized at two scoping sessions in Surry in June 1, 2011, and on February 2, 2012. Since personal notice of the scoping sessions was sent to Mr. Pirozzolo by the Department and a copy of the application was sent to him at his request on February 7, 2012, he presumably sited his moorings with knowledge of the location proposed for the aquaculture gear. See Exhibit 1, Case file, email from Diantha Robinson to Jack Pirozzolo, 2-7-12. The same is true for his application for a floating dock, which was submitted to the Army Corps two weeks before the March hearings.

[114] Transcript of March 25 hearing, p 71:20-21

for low-profile bottom gear 12 inches or less in height only. The lease site must be marked in accordance with U.S. Coast Guard requirements.

C. Fishing & Other Uses[115]

The application describes the fisheries of upper Morgan Bay as follows:

> Limited/occasional hard clam harvesting shoreward of site, recreational and commercial. There is a population of soft shell clams near and along shore with few or none in or near the proposed lease site. One or two other harvesters occasionally use this resource commercially though not in the area of this proposed experimental lease. The site will be below the extreme low tide line and will not effect [*sic*] activities above the extreme low water line.
>
> Occasional worm harvesting occurs shoreward of the site on the intertidal portion of the cove.[116]

According to the Department's site report,

> On October 11, 2012, no fishing within the area of the proposed lease site was observed. The Department recognizes that commercial or recreational fishing in the area is seasonal. The two most likely types of fishing in the area are clamming (both commercial and recreational) and elver (*Anguilla rostrata*) fishing in Smelt Brook. It has been reported to the DMR that alewife (*Alosa pseudoharengus*) and/or rainbow smelt (*Osmerus mordax*) fishing also takes place in this brook, although that has not been confirmed. According to data provided by the DMR Landings Program, there are no records of smelt or alewife harvest in Morgan Bay or Smelt Brook between 2002 and 2012.
>
> Fishing for lobster (*Homarus americanus*) or crab (*Cancer spp.*) and drag harvesting of shellfish, however, is unlikely to occur in such shallow waters where navigation is limited and such commercially exploitable species are not present.
>
> The proposed activities, should the lease be granted, will not prevent digging for clams in the surrounding tidal flats.[117]

The site report also notes that seasonal hook-and-line recreational fishing may occur in the area for striped bass, Atlantic mackerel, bluefish, and flounder.[118] Ginger Williams testified that she had fished for "whatever's out there" occasionally in summers off Mrs. Backer's shore.[119]

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[115] DMR Rule Chapter 2.27 (1) (A) (3) Fishing. The Commissioner shall examine whether the lease activities would unreasonably interfere with commercial or recreational fishing or other water-related uses of the area. This examination shall consider such factors as the number of individuals that participate in recreational or commercial fishing, the amount and type of fishing gear utilized, the number of actual fishing days, and the amount of fisheries resources harvested from the area.
(4) Other Aquaculture Uses. The Commissioner shall consider any evidence submitted concerning other aquaculture uses of the area. The intensity and frequency of such uses as well as the degree of exclusivity required for each use shall be factors in the Commissioner's determination of whether any interference is unreasonable. The number, size, location, and type of other aquaculture leases shall be considered by the Commissioner.

[116] Exhibit 2, Application, p. 5

[117] Exhibit 3, Site Report, pp 6-7

[118] Ibid

[119] Transcript of June 18 hearing at p 11:22-12:3

John Stanley testified that he had stop-seined for herring in upper Morgan Bay in the years when herring were there. He said that he was not opposed to the proposed lease, although he speculated that the proposed aquaculture gear could pose a hazard to a stop-seining vessel at night if the operator were unfamiliar with the area and did not know of the existence of the lease site. He said he wanted it on record that there has been herring fishing in the bay and that it could recur "if they are up there."[120] Mr. Stanley said the last time he stop-seined for herring in Morgan Bay was in 1995.[121]

Based on this evidence, it is clear that the proposed lease will not interfere with fishing in the area. The proposed lease site would cover four subtidal acres out of approximately 200 acres of public waters in upper Morgan Bay. Use of the bottom of the site itself for shellfish harvesting will be restricted, but recreational fishing will be allowed on the lease site. The lease activities will not interfere with any shellfish harvesting outside its boundaries. The proposed lease site is 134 feet north of the outlet of Smelt Brook, so it will not impede harvest of elvers, smelt, or other species in that area. Seining for herring has not occurred in this part of Morgan Bay for twenty years, according to Mr. Stanley, and his testimony indicates that any potential interference the lease might present to stop-seining would be minimal.

Other water-related uses. Mr. Lewis characterized the attraction of the western shore of upper Morgan Bay for swimming:

> "...Morgan Bay is somewhat unique (in) that it is shallow, it is warm and there is easy access to the water. So I can see it's a swimming hole. For better or worse it is also a great place to grow oysters and clams because the two coexist. Everybody likes warm, salty water."[122]

In fact, the proposed lease site and the adjacent shore are not a separate "hole" and were not characterized as such by witnesses from the area; rather, they are part of a continuous wide, gravelly shoreline with mud flats and ledges that extends all along the western side of upper Morgan Bay and apparently along much of the eastern side, as well.[123] Testimony from a number of people who use the shore and water of upper Morgan Bay indicates that swimming, walking and playing on the shore, picnicking, kayaking, and sitting on various rocks and enjoying the view are the primary activities that occur there.

Intervenor Ann Backer owns 1100 ft. of shorefront south of Mr. Bolster and Ms Straubing's land.[124] She testified that she swims off the northern part of her shore, south of the proposed lease site, near the inflow of Smelt Brook. She enters the water at the point marked on

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[120] Transcript of June 18 hearing at p 80:21-81:10

[121] Transcript of June 18 hearing at p 93:21-94:4

[122] Transcript of March 27 hearing at 111:16-20

[123] Exhibit 16 shows the shore in the vicinity of the proposed lease site.

[124] Transcript of March 27 hearing at p 211:22-24; Exhibit 2, Application, p.15

Exhibit 26 as "Photo AB," which is approximately 250 feet southwest of the proposed lease site.[125] She said that at low tide, "there is a lot of rock ledge, flat, easy access to water."[126]

Mrs. Backer said that she swims almost daily and has for many years, formerly along the shore to the north and south, as well as east into deeper water. Now she does exercises in water over her head, "So that leads me into deeper waters that's sometimes to the north." In the summer of 2012, she said she "paddled out" to the east boundary of the proposed lease site.[127]

She said that other parts of her shore are less suitable for swimming "because the whale [Whale Rock, a ledge exposed at low tide, south of where she usually swims] is encased by gravelly, pebbly mud flat. And further on the other side of our wooded part it gets a little grassy, weedy...Southwest from the whale."[128] Asked by the hearing officer how the proposed lease, if granted, would interfere with her ability to swim off her shore, Mrs. Backer said:

> Well I wouldn't like the way it looked. I wouldn't feel that I'd want to swim very close to it. I am not persuaded in spite of all the testimony that it is going to be a very clean installation. There will be boats servicing it. There will be washing, we hope just by hand, which will put a certain amount of [*inaudible- means fouling material, algae*] into the water that wasn't there before. And I would like to, if I may, reiterate [what Mr.] Sichterman said about other values and uses. The care of the spirit is not nothing. I know that it's not one of the criteria of—of [DMR]."[129]

Mr. Sichterman testified he swam off his shore in 2012 after the proposed lease site had been marked and kept to the north of the site.[130] He said that the proposed lease would interfere with his ability to swim and with swimming by the people who rent his shorefront cottage.[131] Mr. Sichterman said that with the lease in place,

> "...sure, I could swim out there. But we're almost, you know, with the criteria being what they are you're trying to quantify enjoyment and it's - it's a nutty thing to do ... And at this point, even if I couldn't swim, it would tear my heart out to see that stuff sitting there..."[132]

Mr. Sichterman testified that he rents out his cottage in July and August, so his own use of his shore is in May, June, and October. He said some of his tenants were disturbed by visible nets on the shore in 2010 placed by Dr. Beal and Mr. Porada under Dr. Beal's special license from

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[125] Transcript of March 27 hearing at p 209:15-211:3
[126] Transcript of March 27 hearing at p 205:20-206:1
[127] Transcript of March 27 hearing at p 211:4-17
[128] Transcript of March 27 hearing at p 211:22-212:7
[129] Transcript of March 27 hearing at p 212:8-20
[130] Transcript of March 27 hearing at p 189:25-190:10
[131] Transcript of March 27 hearing at 184:22-185:6
[132] Transcript of March 27 hearing at p 195:1-17

the Department and did not rent the cottage the following year.[133] He is concerned about potential loss of rental income if future renters object to Mr. Porada's aquaculture gear.[134]

Mr. Sichterman said that people who do not own property on Morgan Bay use the shore, including the shore adjacent to the proposed lease site. "People clam. And I've seen people just walk by. I don't know what they're doing necessarily or where they came from." He said that people can walk to the western Morgan Bay shore from the Carter Nature Preserve to the northeast, across the bay.[135] He identified Little Whale Rock, an intertidal ledge on the Bolster/Straubing shore west of the proposed lease site: "at low tide it's exposed and we'll go out there and sit, it's lovely."[136]

Susan Longacre, who owns shorefront land south of Mrs. Backer's and more than 1,000 feet from the proposed lease site, said that she swims in Morgan Bay for three to four months of the year and kayaks and canoes, as well. Asked by the hearing officer if she swims off the Bolster/Straubing shore, Ms Longacre said:

> No, but I swim over to Whale Rock and beyond that right where Ann [Backer] swims. Sometimes we try to swim even further than that to the rock in front of Nick's [Sichterman's] place....We swim off into the rock in front of Nick's place as well. So we swim very much in that spot.[137]

Describing the impact the proposed lease operation would have on her ability to swim, Ms Longacre said, "I won't swim anymore, not at all." She explained:

> Because I don't want to swim where there's boats and there's people around. I mean it's absolutely silent down there. And it's absolutely clean. There's no boat smell, there's no noise. There's nothing on the beach. There's no litter of any kind. It's absolutely pristine. It's beautiful.[138]

Susan McDonald testified that people who are not landowners on the bay sometimes reach the shore by walking over her field to the beach, a practice she allows.[139] She said she kayaks and digs clams in front of Bolster/Straubing property and that she and her family walk along the shore there. She has swum in the area, as well, and she noted that a number of people kayak in the bay.[140] Asked by the hearing officer to describe how the proposed lease would interfere with her uses of the area, Mrs. McDonald said:

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[133] The nets were not placed below the extra-low water mark, as the special license required, so they were visible at low tide.

[134] Transcript of March 27 hearing at 176:13-181:2; Exhibit 24 contains letters from some of Mr. Sichterman's tenants.

[135] Transcript of March 27 hearing at p 187:18-19

[136] Transcript of March 27 hearing at p 189:9-13

[137] Transcript of June 18 hearing at p 197: 3-17

[138] Transcript of March 27 hearing at p 303:21-304:1

[139] Transcript of June 18 hearing at p 151:19-152:13

[140] Transcript of June 18 hearing at p 149:23-150:11, 150:21-151:1

> I think it's a tiny bay and I'm not against aquaculture, but I think that this bay is very, very unique and I think that, you know, I've traveled to other places and seen beautiful places and beautiful water, things, but there is nothing that really surpasses this and I think that to add things that are floating in the water, to add the business of a working waterfront right there and if there are other leases that are gonna be given out, they're gonna be in, you know, my area as well as other places on the bay, I think it just will destroy – destroy that treasure. It will take away the, you know, everything that that – that that bay is."[141]

Jan Pirozzolo-Mellowes, Mr. Pirozzolo's daughter, testified that as a child she spent time in Morgan Bay in August and "a little time in July." She said she sailed toy rafts to Whale Rock and played in the outflow of Smelt Brook.[142] Mrs. Mellowes said she used the whole western shore from childhood, when her family rented what is now the Backer property. "More recently I've spent some time closer to my dad's portion of the land" and the Goddu rights-of-way.[143] She said she comes to Morgan Bay now for two weeks in August and hopes for more time there eventually.[144] Mr. Porada asked Mrs. Mellowes:

> ...that shore is quite long and my lease is something like 300 feet from the high tideline and – could you walk or fish or swim anywhere along that several hundred to probably – well, probably several thousand feet, probably close to a mile from the Backer's to the point – could you use that shore for anything you want without being hindered by that 400 foot of line of my site?"[145]

Mrs. Mellowes replied that she did not know if she could build rafts and use the brook as she did as a child if the lease were there. She said that she did not know that things would be unaffected by the lease and said "I tend to think that visually it may not be as aesthetically pleasing and peaceful and serene as I've always found that area of the bay."[146]

Marcel Nuss said that he is opposed to the proposed lease because, among other things, "I think it creates a visual impact that affects the enjoyment and beauty we have been accustomed to."[147]

Hugh Curran testified about his opposition to the proposed lease. Asked by the hearing officer if he used the area where the lease is proposed to be located, Mr. Curran said he had swum near there but did not use that area. He noted that it is within sight of the Carter Nature Preserve, where he walks.[148] He said he considers "seeing the bay" to be a use of the bay, comparing it to

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[141] Transcript of June 18 hearing at p 151:4-18
[142] Transcript of June 18 hearing at p 25:7-26:3
[143] Transcript of June 18 hearing at p 27:16-21
[144] Transcript of June 18 hearing at p 27:23-28:4
[145] Transcript of June 18 hearing at p 29:16-23
[146] Transcript of June 18 hearing at p 31:12-15
[147] Transcript of June 18 hearing at p 60:14-15
[148] Transcript of June 18 hearing at p 244:6-11

the aesthetic value of looking at a painting. "If someone mars the painting, it changes the painting."[149]

Lucy Leaf testified that she uses the Carter Nature Preserve on the east side of the bay and studies at the Zen meditation center and the shamanic studies center nearby, where she likes to sit on the rocks on the shore and look out on the bay.[150] She said she is concerned that the proposed lease may be out of scale with the area and spoil "the very beautiful nature of this entire very special community."[151] Asked by the hearing officer if she uses the area of the shore and water where the lease is proposed to be located, Ms Leaf said that she is sure she could see the lease site from the Carter Preserve.[152]

Mark Baldwin testified that he lives farther north along the shore from the proposed lease site, he kayaks in the proposed lease area regularly, he has swum there, and he and his family walk the adjacent shore regularly. He said he does not think the lease activity would interfere with his use of the water and the shore.[153]

Elaine Shute agreed with Mark Baldwin's testimony. "we use the bay, on occasion have put our canoe in down there by the Carter Nature Preserve...and I just don't see – I don't see what this small portion of the bay that Mr. Porada wants to use would affect – how that would prevent anyone from enjoying the leisure aspects of the bay....as far as aesthetics go, beauty is in the eye of the beholder and I think a working waterfront is a beautiful thing."[154]

Tom Atherton testified that he used the area of the proposed lease site "a long time ago, just for recreational purposes," and that "The idea that a lease site in a small area in a mudflat will interfere with swimming is quite a stretch. No reasonable person trudges through a mudflat to go swimming where there is virtually no water...However, swimming there at high tide is quite enjoyable, but Joe's gear is covered by water then."[155]

Dr. Joseph DeAlteris, an expert witness in shellfish aquaculture and fisheries who testified on behalf of the group Morgan Bay Neighbors, acknowledged that the aquaculture equipment would pose "some obstacles" to swimming, but said he would recommend letting children swim around the gear: "If it were my kids I'd have masks on them and they'd [be] snorkeling around and looking at all the animals there, yes, if that were my kids."[156]

As Dr. DeAlteris notes, it is clear that the gear on the proposed lease site will pose "some obstacles" to swimming within the lease boundaries, although his testimony indicates that not everyone would view this negatively. While some witnesses said that they sometimes swim or have swum in the area of the proposed lease site, their testimony shows that they also swim

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[149] Transcript of June 18 hearing at p 245:9-18
[150] Transcript of June 18 hearing at p 252:21-253:4
[151] Transcript of June 18 hearing at p 254:7-12
[152] Transcript of June 18 hearing at p 254:14-23
[153] Transcript of June 18 hearing at p 55:11-5
[154] Transcript of June 18 hearing at p 69: 22-70:8
[155] Transcript of June 18 hearing at p 176:24-177:10; 179:6-7
[156] Transcript of March 25 hearing at p 178:4-24

elsewhere, off their own or others' shore. At high tide, when the bottom gear is covered by ten feet of water, the obstacles to nearshore swimming on the lease site itself would be minimal. The entire intertidal zone would be free of bottom gear and available, as well. Swimming on the seaward part of the site will be impeded by the floating gear, but given the extensive area available for swimming on all sides of the proposed lease site, this interference is not unreasonable.

The evidence shows that the proposed lease site will not interfere with activities such as walking, sitting on rocks, and playing on the shore. The site will not significantly hamper access to the shore by water. It will be located below the extra-low water mark, so it will not be an obstacle to using the intertidal zone at any tidal stage. Little Whale Rock is in the intertidal zone west of the site; the gear will not prevent access to it. Whale Rock is approximately 500 feet southwest of the site, far from the aquaculture gear. In fact, two of Mr. Pirozzolo's moorings are closer to Whale Rock than is the proposed lease site; kayakers approaching Whale Rock from the east would need to navigate around the moorings and any vessels moored on them. Smelt Brook is 134 feet south of the site; activities and gear on the proposed lease site would not interfere with activities at the mouth of the brook. The evidence shows that the proposed lease activities would interfere only minimally with swimming in the boundaries of the site itself and not at all with the activities that go on outside the site on the water or in the intertidal zone.

As much of the testimony cited above makes clear, the primary concern of many witnesses is apparently not about physical interference from aquaculture gear, but about seeing the gear in the water and the increased activity of people and boats on and around the proposed lease site. Others are not concerned by this change in activity.[157] Intervenors Backer, Sichterman, and Hughs argue that the Department must consider such hypothetical economic impacts as Mr. Sichterman's feared loss of rental income in evaluating whether the effect of the proposed lease on "other uses of the area" would be unreasonable.[158] These intervenors also argue that "the contemplative, spiritual and meditative uses of the lease site including Whale Rock and Little Whale Rock" (which are nearly 1,000 feet apart and are not part of the proposed lease site) are "water-related activities" that the Department must consider as "other uses of the area".[159] They cite *Harding v. Commissioner of Marine Resources*, 510 A.2d 533, 536 (Me. 1986) to support their argument.

In fact, the Justices in *Harding* noted the lack of guidance in the legislative history of the statute as to the meaning of "other uses of the area." Rejecting the argument that the effect of an aquaculture lease on upland property values is one of these "other uses" that the Department must consider, the Court said:

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[157] People attending the June 18 hearing were clearly surprised to hear Mr. Stanley describe stop-seining for herring, in which nets were placed across the narrowest part of upper Morgan Bay; should that practice resume, it would likewise be a change in activity compared to that of recent years.

[158] Backer closing statement, p. 10

[159] Ibid

> [T]he prohibition that leases may not interfere with "other uses of the area" more likely is meant to protect lobstering, clamming, scalloping, swimming, mooring of boats and those other activities that traditionally take place in the areas where aquaculture is to transpire.[160]

The Department's application of its rule, Chapter 2.37(1) (A) (3), is consistent with the *Harding* decision. Broadening the scope of "water-related uses" to include renting cottages and meditating on the shore would introduce a subjective element into the lease process that would be inconsistent with the statutory scheme and impossible to administer. DMR Rule Chapter 2.37 (1) (A) (7), Interference with Public Facilities does require consideration of the potential for a lease to interfere with "public use or enjoyment" of a publicly-owned beach, park, or docking facility within 1,000 feet of the proposed lease site, but in this case, all of the land within 1,000 feet of the proposed lease site is privately owned.

Exclusivity. Mr. Porada states in the application that the shellfish grown on the site "will need to be protected from siltation, digging and any disturbance of substrate." He also indicates that "There is no need to restrict fishing for finfish or any current form of navigation."[161] Therefore, lease conditions will prohibit shellfish harvesting, anchoring, dragging, or other disturbance of the bottom except by the lessee and his authorized agents. These restrictions 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-A (15).

Other aquaculture leases. As the site report indicates, the aquaculture lease site nearest to the proposed lease site is over 4.5 miles away.[162] The proposed site will not interfere with that site or with any existing aquaculture lease sites in the area.

The lease boundaries must be marked in accordance with DMR Rule 2.80[163]

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[160] *Harding v. Commissioner of Marine Resources*, 510 A.2d 533, 536 (Me. 1986)

[161] Exhibit 2, application, p. 7

[162] Exhibit 3, Site Report, pp 7-8

[163] 2.80 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.

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. Shellfish harvesting, anchoring, dragging, or other disturbance of the bottom on the lease site will be prohibited except by the lessee and his authorized agents. The lease boundaries must be marked in accordance with DMR Rule 2.80.

D. Flora & Fauna[164]

Site Observations. DMR biologists documented the benthic ecology of the proposed lease site and vicinity on October 11, 2012. The site report describes their dive and findings, including a list of species of flora and fauna observed.[165]

The site report notes that no eelgrass (*Zostera marina*) was observed during the dive and that "Searching DMR data bases likewise provided no historical evidence of eelgrass within the boundaries of the lease site or in the immediate vicinity."[166] The report describes the potential presence of finfish, including smelt, alewives, and elvers as follows:

> Smelt Brook is a prominent feature of the immediate shoreline area to the west of the proposed lease area. This is a small, rocky waterway flowing into the western side of Morgan Bay. Reports from local residents have included the presence of elvers and either rainbow smelt or alewives in the brook. A local Marine Patrol Officer has confirmed the presence of elvers and elver fishermen at the brook as well as "small smelts". He has not observed alewives.
>
> The DMR smelt program does not have records indicating smelt spawning in Smelt Brook. It is possible that smelt spawning has occurred there, however, it is equally likely that smelt may be spawned in the stream at the northern extreme of Morgan Bay (although DMR surveys between 2005 and 2009 did not detect this). Smelt may visit Smelt Brook for occasional spawning or feeding.[167]

Mr. Lewis said that elvers are present in Smelt Brook, and he assumes that smelt spawn there, as well. Both species spawn in heavily industrialized areas, Mr. Lewis said, and he has "minimal" concern about them being affected by the aquaculture activity.[168]

Wildlife. The site report notes that the application was reviewed by the Maine Department of Inland Fisheries and Wildlife, which indicated that it had no "inland fisheries concerns" with the proposed lease. DMR biologists requested additional review from MDIF&W

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164 DMR Rule Chapter 2.37 (1) (A) (5) Existing System Support. The Commissioner shall consider the degree to which the use of the lease site will interfere with significant wildlife habitat and marine habitat or with the ability of the lease site and marine and upland areas to support ecologically significant flora and fauna. Such factors as the degree to which physical displacement of rooted or attached marine vegetation occurs, the amount of alteration of current flow, increased rates of sedimentation or sediment resuspension, and disruption of finfish migration shall be considered by the Commissioner in this determination.

165 Exhibit 3, DMR site report, p.9 Species observed included: Brown benthic diatoms, Sand (mud) shrimp, Hermit crabs, Green crabs, Mud snails, Hard clams, Sea Stars, Frilled Anemones, Worm tubes, Irish moss, and Knotted wrack

166 Ibid

167 Ibid

168 Transcript of March 27 hearing at p 105:5-23

wildlife biologists, but no response was received.[169] It is usual for MDIF&W not to provide comments when it has no concerns about an application. The site report states:

> According to the Maine Departments of Environmental Protection and Inland Fisheries and Wildlife, the tidal flats and stream at the northern end of Morgan Bay are designated as "Tidal Wading Waterfowl Habitat". The boundary of this habitat is a minimum of 500 feet north of the proposed lease site's northern boundary.[170]

Mr. Lewis testified that the designation of tidal wading waterfowl habitat does not mean that activities cannot occur in the area. [171] He also testified that the proposed aquaculture project would not displace wildlife.[172] Mr. Lewis reiterated the finding in the site report that there is no past or present evidence of eelgrass within the proposed lease boundaries or in the vicinity.[173]

Various witnesses described seeing eagles flying over Morgan Bay or perched in trees on both sides of the upper bay. Several people expressed concerns that the proposed lease activities might disturb the eagles. An active eagle nest was documented by the Maine Department of Inland Fisheries and Wildlife on the east side of Morgan Bay in March, 2013, approximately 1.1 miles from the proposed lease site.[174] This nest is well beyond the 100-200-meter distance at which Federal Eagle Guidelines require precautions to be taken by those working in the vicinity.[175]

One witness was concerned that the lease activities might either attract or disturb seals in the area, but Mr. Lewis testified that seals would not be disturbed by the presence of the proposed lease site, noting that any potential for interaction between seals and the lease activities would be similar to that arising from interaction with recreational boating, swimming, and lobstering. He said that the oysters on the lease site would not attract seals:

> ...harbor seals are not shellfish eaters. They are finfish eaters. They will also take in squid, octopus and shrimp, but they are not shellfish eaters...harbor seals are warm-blooded animals and they do poop in the water as well.[176]

Mr. Lewis explained that seals are highly unlikely to become tangled in aquaculture gear:

> I spent about 10 years in Alaska as a harbor seal research biologist trying to gillnet harbor seals much like John Stanley does with herring. They spend a lot of time in very confined areas. They've got tremendous eyesight, they've got tremendous whiskers. You can see they don't get tangled in lobster gear. We

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[169] Ibid

[170] Exhibit 3, DMR site report, p.10

[171] Transcript of March 27 hearing at p 118:13

[172] Transcript of March 27 hearing at p 148:23-149:19 148

[173] Transcript of March 27 hearing at p 97:2-5

[174] Exhibit 70

[175] Bald Eagle Management Guidelines and Conservation Measures, U.S. Fish & Wildlife Service website, checked on 2-25-15, at http://www.fws.gov/northeast/ecologicalservices/eagleguidelines/visactivitystep3.html

[176] Transcript of June 18 hearing at p 137:15-24

> tried for a long time to tangle them with nets specifically designed and watched seals run right down the edge of that net countless times fully aware of their environment. We have had in the 15 years that I have been here with all the shellfish farms, no reports either from the public, from a governmental agency or observation of any harbor seal entanglement in any kind of aquaculture gear.[177]

Environmental issues. Some witnesses argued that the proposed lease activities would harm the environment on and around the lease site in various ways. Susan Longacre said that, although she is not a biologist, "I've been studying this for two years. So I'm a student of biology and I'm a citizen scientist. I'm not claiming to be a biologist. I'm quoting biologists."[178] Ms Longacre raised topics including organic loading of bottom sediments, competition between species for space and phytoplankton, decrease in species diversity, and effects of the proposed lease site on other species. She presented Exhibits 49-69, 74, and 75, which include emails with scientists, excerpts from documents, and photographs. The authors of the documents and emails were not available for questioning at the hearing.

Ms Longacre summarized her testimony on March 27 by saying:

> And I have a lot of letters and a lot of facts, but I'm just going to – I made some points. I think it's a habitat that should not have an aquaculture farm in it. I think I've shown it's an extremely important habitat and how it can be impacted by the farm, specially starting at the benthic level – the benthic community. The problems that are going to happen with the sediment. The loading of the sediment from the suspended aquaculture and then I – I just will close by saying that I probably love this place as much as anyone in this room does. I wrote a book about it. It's my life. I love it more than any person or any place I've ever been in my life. And my heart is breaking every second about this. And I'll do anything to try and help it.[179]

At the June 18 hearing, Ms Longacre said,

> I'm gonna show that oyster farming can destroy healthy substrates in intertidal soils. It reduces biodiversity and it doesn't clean the bay or estuary that is already clean.[180]
>
> My testimony will show that if an oyster farm goes in, there will be a lot wrong with it. It will change the entire food chain and affect every creature from the phytopolankton to the invertebrates, to the birds.[181]

Ms Longacre based her arguments on the conclusions she drew from her reading, but her comments serve more as general questions than as persuasive arguments about the effects of the proposed lease. Her attempt to demonstrate the likelihood of harm to the bay from the proposed oyster farm by using articles and letters and emails solicited from various authors who were not

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[177] Transcript of June 18 hearing at p 138:17-139:5
[178] Transcript of June 18 hearing at p 198:12-15
[179] Transcript of March 27 hearing at p 302:11-23
[180] Transcript of June 18 hearing at p 185:17-20
[181] Transcript of June 18 hearing at p 186: 5-8

present to testify and be questioned, although motivated by obvious concern, lacked credibility and persuasiveness.

In contrast, Dr. Beal and Mr. Porada have experimented with growing shellfish in Morgan Bay in the vicinity of the proposed lease site and have substantial similar experience in Blue Hill Bay and elsewhere in Maine. Mr. Lewis had spent, at the time of the hearing, fifteen years visiting every aquaculture lease site on the Maine coast and assessing oyster lease sites that have been in operation for thirty years. Dr. DeAlteris has extensive experience in shellfish aquaculture in New England, as well. These scientists have experience and knowledge directly pertinent to the proposed lease site and its vicinity in Morgan Bay that make their opinions credible and reliable.

In addition, the lease application has been reviewed, not only by DMR biologists, but by the Maine Department of Inland Fisheries and Wildlife, the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, and the U.S. Army Corps of Engineers, none of whom has found any reason to deny Mr. Porada the opportunity to carry out his experiments at the proposed lease site.

Scarlet Kinney testified that she had made a number of assumptions based on an article referred to at the hearing by Tom Matthews and critiqued by Dr. Beal and by Mr. Lewis.[182] Ms Kinney said that her resulting calculations showed that if the proposed lease (and possibly additional leases) were developed, the resulting oyster excrement would overwhelm Morgan Bay. Ms Kinney said:

> And what I see for the future of Morgan Bay, and perhaps I see this way because I'm an artist and I was very uncomfortable doing those numbers because I'm not good at math, but it looks to me like if this initial experimental lease is approved, we're gonna see an escalating assault on the bay's ecology and it's – and the habitat it provides for a lot of significant and high value species and on its natural capacity to flush and clean itself. I foresee the introduction of antibiotics, toxic chemicals and foreign species into the bay in attempts to deal with the inevitable illnesses and infestations that will prey upon a monoculture operation of the size this operation could easily become. [183]
>
> Dumping of millions of pounds of oyster feces and pseudofeces into tiny Morgan Bay...is not a sustainable activity. It will demolish the natural ecology of the bay and pollute it beyond recognition render it unsuitable for any use whatsoever.[184]

Mr. Lewis described the origin and nature of the material excreted by oysters:

> They have two mechanisms that they produce. One is called feces, and that is the plankton that is actually consumed, filtered and metabolized, and that is then deposited onto the floor of the ocean. They also have something called pseudofeces, which means they've taken in the particles and said this isn't what I want [and passed it] out the other end fundamentally. So you've got things

[182] Transcript of March 25 hearing at p 120:11-127:11. Although a copy of the article was shown to Dr. Beal at the hearing, it was not offered as an exhibit.

[183] Transcript of June 18 hearing at p 160:10-23

[184] Transcript of June 18 hearing at p 161:14-19

> they've taken in and metabolized, things they haven't. Basically, it amounts to a very fine, silty material."[185]

Mr. Lewis noted that he has traveled the entire Maine coast for fifteen years looking at shellfish aquaculture sites; the same biological processes occur under shellfish farms all along the coast. "One of the things that happens in marine environments is we have dispersal and we have a tremendous amount of consumption going on. This is not sterile mud down there. These are filled with bacteria, with invertebrates, with worms, with all sorts of things that tend to use this (deposited organic material from shellfish) for metabolism. So part of it is consumed, part of it is dispersed."[186]

In discussing the potential for organic matter excreted by oysters to build up on the bottom and degrade the environment, Mr. Lewis said that based on his experience, this was not a concern, whether the gear and shellfish were placed on a site of four acres or two acres.[187]. The feces from the oysters is composed of naturally-occurring phytoplankton that would fall out in a broader area as it naturally dies, but when it is filtered by oysters and deposited on the bottom, other species consume it, and bacterial action degrades it.

Mr. Lewis said that he had inspected the sea bottom under commercial oyster farms that have been in operation for 30 years, and he has been unable to detect any kind of a build-up or change on the bottom underneath oyster farms compared to the bottom outside the farms. "The organisms that are there, if anything, are probably a little more diverse than outside," he said.[188] He has seen effects on the bottom from finfish and mussel aquaculture sites when the organic material builds up, but "It does not exist in oyster aquaculture."[189]

Margaret Blom, a riparian landowner, testified that she feared that the oyster farm would degrade the water quality in Morgan Bay:

> My family will not be able to go get clean lobsters, clams or anything if Mr. Porada gets his wish.[190]
>
> My concern is the health and welfare of the bay and the health and welfare of the people who jump in and accidentally swallow the water or inhale it when they're swimming or they fall off their kayak. What is the *E. coli* count? Does the shellfishing enterprise mess up the quality of the water?[191]

Mr. Lewis explained that DMR regularly monitors the coastal waters of Maine, including Morgan Bay, for fecal contaminants from warm-blooded species and for paralytic shellfish poison (PSP) from red tide organisms:

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[185] Transcript of June 18 hearing p 142:3-12
[186] Transcript of March 25 hearing at p 134:15-21
[187] Transcript of March 27 hearing at p 112:4-20
[188] Transcript of March 27 hearing at p 109:8-15
[189] Transcript of March 25 hearing at p 125:1-126:25
[190] Transcript of June 18 hearing p 96:22-24
[191] Transcript of June 18 hearing p 132:11-16

> Our Public Health Division looks at two things and that's fecal coliforms as an indicator of sewage and it looks at red tide or PSP, paralytic shellfish poisoning. There is a monitoring program...The PSP is inspected and ...when there's a closure, shellfish are prohibited from being harvested and marketed until it [the area is] opened....Maine is a sort of world-renowned PSP program.[192]

DMR would not monitor Mr. Porada's lease specifically to check for any effects of oyster aquaculture on water quality, he said, "And the reason for that is that aquaculture has been done in Maine for about 30 years and shellfish farming, except underneath mussel farms, even salmon farms in terms of water quality itself, you don't see impacts.[193]

Asked if the oysters and quahogs on the proposed lease site would produce contaminants that would harm humans, Mr. Lewis said:

> They do not. They take in – they filter out what's in there – there's no additives, there's no hormones, they're cold-blooded, they're not warm-blooded so they're not producing things like warm-blooded viruses, they're not producing things like warm-blooded bacteria. They filter the bay. Water quality has been checked throughout the nation around shellfish farms. If anything, they remove those – they will consume *E. coli*. They will consume the particles that are in the water and excrete them or digest them. But in terms of contributing to water quality deterioration, it doesn't happen.[194]

Mr. Lewis explained that the experiment Mr. Porada and Dr. Beal propose to conduct is about how to farm successfully at this particular location. Referring to Dr. Beal, he said, "His 30 years of experience in shellfish, he wants to get precise, scientific, quantitative results so that he can tell people here's how you should farm.." Dr. Beal has to test this specific site, Mr. Lewis said, while he, on the other hand, draws on his experience with aquaculture sites all along the Maine Coast to determine that shellfish farming on the proposed lease site will not cause ecological harm.[195]

Dr. Joseph DeAlteris, a scientist with a background in research, teaching, and practice of fisheries and shellfish aquaculture, testified as an expert witness on behalf of the intervenor Morgan Bay Neighbors. Dr. DeAlteris said he would characterize Mr. Porada's proposal "as small scale or artisanal shellfish aquaculture."[196] The project uses technology that, he said, "is standard technology in shellfish aquaculture. It's really about trying to find out what works best in Morgan Bay, in this part of Morgan Bay...And that's why you do these experiments."[197]

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[192] Transcript of June 18 hearing at p 136:23-137:11
[193] Transcript of March 25 hearing at p 135:24-136:14
[194] Transcript of June 18 hearing at p 134:6-16
[195] Transcript of March 25 hearing at p 137:18-138:10
[196] Transcript of March 25 hearing at p 156:11-12
[197] Transcript of March 25 hearing at p 171:1-9

Dr. DeAlteris explained that shellfish aquaculture, "when done appropriately, and the scale of the operation here, it seems – in my opinion is in the appropriate scale, there's a "net benefit to shellfish aquaculture," because the shellfish filter out plankton and suspended sediment from the water, thereby removing excess nutrients from the water and improving water clarity. In addition, he said, the aquaculture gear benefits the environment by increasing the diversity of animals in the vicinity of the aquaculture site.[198]

According to Dr. DeAlteris, the scale of the project is not about the size of the site: "[I]t's not the acreage, it's the number of animals you put in it and how you handle all the gear. That's really what makes the difference."[199] Referring to larger-scale projects that utilize larger boats and power-washing equipment, he observed, "...large-scale industrial aquaculture I don't think would be appropriate at that end of the bay."[200] Recognizing that the Morgan Bay Neighbors were negotiating with Mr. Porada to agree to conditions to limit his operation to the 20-foot boat and up to 40-HP motor he proposes to use, Dr. DeAlteris said that such a limit would be "consistent with the idea of a small-scale artisanal-based shellfish aquaculture."[201]

Mr. Porada is not proposing to use power equipment, including a power washer, on the proposed lease site, as Dr. DeAlteris noted.[202] Instead, he observed, Mr. Porada proposes to clean any fouling material from the aquaculture gear by hand, a process of which Dr. DeAlteris approves:

> So what- what's been described in the application is a process of allowing the bags to dry, scrubbing them by hand and things like that. Which by definition then you're not going to allow the biofouling to build up too much. You know in my mind that's – that's more consistent with small-scale aquaculture. And – and much more sustainable in upper Morgan Bay....So I think what he's been proposing [is] a strategy that he's got and he's agreed to and he had it in his application is an excellent procedure.[203]

In response to questions about why the Department has not modeled the ecosystem in upper Morgan Bay, Mr. Lewis explained that the accumulated experience with shellfish aquaculture provides an understanding "to know what's risky and what's not risky."[204] Mr. Lewis said that he has seen oyster farms in salt ponds with less water circulation than Morgan Bay with

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[198] Transcript of March 25 hearing at p 167:18-168:7; Diversity is increased because the gear provides shelter that attracts other species.

[199] Transcript of March 25 hearing at p 169:7-9

[200] Transcript of March 25 hearing at p 163:22-23

[201] Transcript of March 25 hearing at p 162:5-10

[202] Transcript of March 25 hearing at p 161:1-3

[203] Transcript of March 25 hearing at p 158:7-12; 159:4-6; Dr. DeAlteris noted that the problem with power washing is that the fouling material is cleaned with a spray of pressurized water, normally treating many pieces of gear at once in the same location, which results in the fouling material being deposited in one place on the bottom. The process is noisy, he said, and the deposited material can build up and degrade the environment. The alternative way to use pressure washing is to do it on land and dispose of the fouling material there. Transcript of March 25 hearing at p 157:20-159:22; 159:10-14

[204] Transcript of March 25 hearing at p 133:5-6

no negative impacts.[205] He noted that oysters and quahogs do not provide contaminants to the bay that would harm humans, and they do not degrade water quality.[206] Dr. Beal said that as a professor of marine ecology, "[I] am also concerned about the ecological ramifications of shellfish farming. And it has been my experience that it has been at least in Maine from what I've seen, no negative effect on the community and diversity as a result of shellfish farming."[207]

When asked if a "baseline" is "absolutely necessary" in order to determine whether the lease activity would be deleterious to the environment, Mr. Lewis said "No," and explained what a baseline is by saying, "A baseline in scientific studies [is] basically measuring the status quo. Measuring the stable condition before some experiment is conducted."[208] He noted that in the absence of extensive measurements before and after a project is implemented, a spatial analysis can provide similar information:

> There are special ways of doing things as well. For instance, in water bodies you can go back if you do not have the baseline per se, and we do this all the time in science, if you don't have adequate baseline you can do things spatially. Which means you can look in things that are under the influence of the farm, upstream, downstream, and outside the influence, and make comparisons that way. It's done hugely, as you can imagine, in river work where downstream versus upstream versus the site of concern is done. So it's a spatial way of investigating things rather than strictly a before and after approach.[209]

Mr. Lewis said that the key to assessing the potential environmental impact of a proposed lease site is to use a level of assessment that is appropriate to the level of risk posed by the project.[210]

Explaining that DMR does water testing all along the coast but does not look for every conceivable substance in a water body, Mr. Lewis said:

> [T]he way the state operates, because quite frankly, we don't have the money to go running around the state, documenting things and taking things to laboratories saying tell me everything that's in this water. Including, how much – who knows what might be in there. What we do this and what we do with the video is we sort of integrate the environment. Is that a typical environment? Or do we go down and see a hundred dead green crabs on their back? Or do we see things that just don't belong in an area like that? Or do we see eagles and herons and smelt and those kinds of things that represent a healthy ecosystem? That's the way we do it. And quite frankly we do it because it's a heck of a lot more immediate, it's far more integrated over time and it's whole lot cheaper.[211]

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[205] Transcript of March 25 hearing at p:138:19-139:5
[206] Transcript of June 18 hearing at p 133:14-134:16
[207] Transcript of March 25 hearing at p 139:10-14
[208] Transcript of March 27 hearing at p 158:3-5
[209] Transcript of March 27 hearing at p 159:2-14
[210] Transcript of March 27 hearing at p 162:7-10
[211] Transcript of March 27 hearing at p 135:5-18

Mr. Lewis added, "I think studying water bodies willy-nilly looking for every organism...and every chemical constituent is a waste of state money when we can go look at the environment and with some experience look, is it healthy or not?"[212]

Asked to confirm that there had been no study of current flow in Morgan Bay, Dr. Beal explained:

> That's a great question. And – and there's also no one's – no one's done a study on – on the amount of phytoplankton. And ultimately you can do all the studies on the abiotic environment. That is to say the tides, the wind, the weather, but ultimately it comes down to the integration of the shellfish and what – what happens to the shellfish. So you could study Morgan Bay and – and – and show there's not enough phytoplankton. That's what your study might show, but what we're going to do is let the shellfish tell us. So we're letting the shellfish tell us.[213]

Dr. DeAlteris agreed with Mr. Lewis and Dr. Beal that rather than conduct extensive sampling and mathematical modeling of the site to predict outcomes, it is simpler just to grow the shellfish:

> ...to adequately describe the current regime and the—and the phytoplankton concentrations, you'd need at least a year or more worth of continuous data collection. You just can't go and take a point sample. So you would spend hundreds and hundreds of thousands of dollars [to do] what this shellfish will do for you in one season of experimentation. Because the net result is whether or not they grow or not and whether or not they survive.[214]

Dr. DeAlteris said, "...you start out with trying to find out if – if shellfish will grow. I think this is a legitimate experiment."[215]

Baseline argument of intervenors. The intervenors Morgan Bay Neighbors, joined by intervenors Backer, Sichterman, Hughs, Pirozzolo, and Goddu, challenge the adequacy of DMR rule Chapter 2.64 with respect to the statutory requirements of the experimental lease statute, 12 MRS §6072-A (10). They argue that the rule does not fulfill the statutory requirement to "provide a method for establishing a baseline to monitor the environmental effects" of the aquaculture activities, and that therefore the Department lacks the authority to grant this experimental lease. The Department believes that Chapter 2.64 satisfies the requirements of 6072-A (10).

Further, the Department believes that the information provided in the application by Mr. Porada pursuant to DMR Rule Chapter 2.64 (2) (C) (7), the site review performed by the Department pursuant to DMR Rule Chapter 2.64 (3), and Mr. Lewis's testimony about the methods of evaluation and his conclusions about the potential environmental effects of the

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[212] Transcript of March 27 hearing at p 139:7-11; generally, p 134:14-140:10
[213] Transcript of March 25 hearing at p 149:11-20
[214] Transcript of March 25 hearing at p 177:5-12
[215] Transcript of March 25 hearing at p 172:11-13

proposed lease meet the statutory requirements of 12 M.R.S. §6072-A (10). The Department believes that it has more than adequate information to evaluate the lease proposal and to analyze any effects of the lease activity in the future.

As Dr. DeAlteris, Dr. Beal, and Mr. Lewis all testified, the effect of the proposed lease activity on the environment is expected to be benign. They base their opinions on decades of experience with oyster aquaculture, both in Maine, and in Dr. DeAlteris's case, in other parts of the country. Mr. Lewis noted that rather than conduct extensive and costly sampling over time, particularly for an activity that is as low-risk as the proposed project, the most practical and effective way to monitor the environmental effects of the lease activities is to evaluate and document the site and its surroundings before the project begins, as done in the site report. Rather than require extensive and costly analysis of multiple aspects of upper Morgan Bay in advance, the most effective analysis of the suitability of the site for shellfish aquaculture is to implement the project and "let the shellfish tell us," as Dr. Beal said.

The issue raised by the intervenors was recently decided by the Superior Court for Hancock County. Denying a petition for review of final agency action with regard to the Department's granting of an experimental aquaculture lease pursuant to 12 MRS §6072-A, the Court made the following findings:

> In light of the statutory scheme involving aquaculture leases the Court finds that the Rules promulgated by the Department pursuant to Sec. 6072-A (10) are reasonable and consistent with the legislative direction to promulgate rules found in Sec. 6072-A (10). (citation omitted). This Court defers to the interpretation of a statutory scheme by the agency charged with its implementation. (citation omitted)."[216]
>
> The Court is satisfied not alone that the rule found in CMR Ch. 2, Sec. 64 is authorized by and consistent with the statute, but also that it reflects a reasonable interpretation and application of the authorizing statute.[217]

An experimental lease will allow Mr. Porada the time to determine whether oysters and quahogs will grow successfully at this location using the methods he envisions. Should he wish to continue to use the lease site after the lease term ends, he will need to apply for a standard, ten-year lease, in which case the Department will conduct another site review. This will be compared to the 2012 site review, to assess any environmental effects from the project to date and serve as an additional baseline for future comparisons.

The evidence shows that the proposed use of the lease site will not interfere with marine or wildlife habitat or with the ability of the site and surrounding marine and upland areas to support ecologically significant flora and fauna. There is no marine vegetation on the proposed

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[216] *Friends of Blue Hill Bay v. Keliher et al. No. AP-2012-03 (Me. Super. Ct. Hancock Cty., April 10, 2014)*, pp. 6-7
[217] Ibid, p. 7

lease site or in the immediate vicinity, so there will be no displacement of such flora. There is no evidence that current flow will be altered to any degree; the low profile of the proposed bottom gear makes that unlikely. The proposed lease activity resembles the activities that already occur in the area, such as wading, swimming, walking on the shore, clamming, kayaking, and boating; re is no evidence that sedimentation or sediment resuspension rates will be increased; there is no evidence that sedimentation or sediment resuspension rates will be increased significantly beyond what they already are. The evidence indicates that finfish migration will not be disrupted.

Based on the evidence and on the Department's experience with similar aquaculture activities, it is extremely unlikely that the proposed project will have any negative impacts on the surrounding environment; in fact, the testimony indicates that the effects are likely to be beneficial.

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[218]

According to the site report, there are no government-owned beaches, parks, or docking facilities located within 1,000 ft. of the proposed lease site.[219]

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 owned by municipal, state, or federal governments.

F. Source of Organisms[220]

According to the application, the sources of stock for the proposed lease are The Downeast Institute, Beals Island, Maine; Jesse Leach of Bagaduce River Oyster Co., Penobscot, Maine; and Muscongus Bay Aquaculture hatchery, Bremen, Maine.[221]

Therefore, I find that the applicant has demonstrated that there is an available source of Quahogs (*Mercenaria mercenaria*), American oysters (*Crassostrea virginica*) and European oysters (*Ostrea edulis*) to be cultured for the lease site.

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[218] DMR Rule Chapter 2.37 (1) (A) (7) Interference with Public Facilities (Portion applicable to experimental leases per C. 2.64 (7)(A)). (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 owned by the Federal Government, the State Government or a municipal government. Leases may not unreasonably interfere with public use or enjoyment of such beaches, parks, docking facilities.

[219] Exhibit 3, Site Report, p. 10

[220] DMR Rule Chapter 2.37 (1) (A) (6) Source of Organisms to be Cultured. The Commissioner shall include but not be limited to, consideration of the source's biosecurity, sanitation, and applicable fish health practices.

[221] Exhibit 2, Application, cover page

G. Stipulated conditions

The intervenors Morgan Bay Neighbors negotiated a number of proposed lease conditions with Mr. Porada in the course of the hearing which they request the Department to include as conditions on a lease, if one is granted.[222] The Department is not bound by side agreements between parties regarding lease conditions, but to the extent that the conditions agreed upon by the applicant and the intervenor are reasonable in light of the application and evidence, administrable, and do not duplicate existing requirements, they will be included.

Stipulated condition 5, regarding access, duplicates existing requirements and is not accepted. Stipulated condition 6, regarding water testing on the lease site, is vague and difficult to administer and is not accepted. Persons interested in testing water on the lease site should contact Jon Lewis of the Department. Stipulated conditions 1-4 are generally acceptable and, as revised by the Department, are listed below as conditions to be applied to the lease. Stipulated items not included do not meet the Department's standards as described above.

Overwintering: No gear, equipment, or product may be located on the lease site between November 25 and April 15.

Vessels: Vessels used at the site are limited to two at any one time, each with a maximum length of 20 feet and maximum motor size of 40 horsepower. Vessels over 20 feet in length, upwellers, barges of any size, and floating docks shall not be used on the lease site. These limitations do not apply in an emergency or when moving moorings or large pieces of gear.

Moorings: Moorings for vessels servicing the lease site are limited to two within the lease site or within 50 feet of the site boundary, except that any mooring within 75 feet of the extra-low water mark must be located within the lease boundary. Vessel mooring permits must be obtained from the agency legally responsible.

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[222] Exhibit 8. The stipulated conditions are as follows:

1. No gear, equipment, or product may be located on the lease site from November 25 to April 15.
2. None of the following may be used on-site or to service the site unless required by USACOE< US Coast Guard, or DMR, or in the course of an unforeseen emergency: dredges, power equipment, lights, vessels in excess of 20', upwellers, floating docks or barges of any size. If approved by the USACOE, or other appropriate agency, there may be up to two boat moorings within the lease site or within 50' of the perimeter of the lease site for the purpose of servicing the site, however any such mooring that is located within 75' of the extreme low tide line must be located within the lease site. Moorings used to anchor permitted aquaculture equipment and to mark the lease site are not prohibited by this condition. No more than two permitted vessels may be used to service the site at any one time except in emergency situations.
3. No propane cannons or other electronic noisemakers, voice amplifiers, radios or other music may occur at the site.
4. No boat may be used on-site or to service the site unless such boat is no more than 20' in length and powered by no greater than a 40 horsepower motor except in the course of an unforeseen emergency or in connection with setting and/or removing moorings and/or large pieces of gear associated with the site. Said motor may only run as necessary to motor from point-to-point. No other power equipment (including, without limitation, power washers) may be used at the site.
5. If private property is used for access to the lease site, written permission of every riparian owner whose land will be used to access the lease area must be obtained by the lessee and provided to DMR, pursuant to 12 M.R.S. §6072-A (8) and rule 2.64 (2) (C) (6).
6. The leaseholder will cooperate with DMR or other individuals or entities who may wish to engage in water-quality testing on-site.

Equipment: No lights, motorized equipment including power washers, dredges, radios or other music-playing devices, or propane cannons may be used on the site or to service the site, except for safety purposes, in an emergency, or as required by the U.S. Army Corps of Engineers, the U.S. Coast Guard, or the Maine Department of Marine Resources.

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. The lease boundaries must be marked in accordance with the requirements of DMR Rule 2.80.

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 owned by municipal, state, or federal governments.

6. The applicant has demonstrated that there is an available source of Quahogs (*Mercenaria mercenaria*), American oysters (*Crassostrea virginica*) and European oysters (*Ostrea edulis*) to be cultured for the lease site.

7. The lease conditions agreed to by the applicant and the intervenor Morgan Bay Neighbors listed above in section 3 G, are reasonable and will be applied to the lease.

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-A.

5. DECISION

Based on the foregoing, the Commissioner grants the requested experimental lease of four acres to Joseph Porada for three years, the term of the lease to begin within twelve months of the date of this decision, on a date chosen by the applicant[223]; however, no aquaculture rights shall accrue in the lease area until the lease is fully executed. This limited-purpose (experimental)

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[223] DMR Rule 2.64 (14) provides:

"The term of the lease shall begin within 12 months of the Commissioner's decision, on a date chosen by the applicant. No aquaculture rights shall accrue in the lease area until the lease term begins and the lease is signed."

lease is granted to the applicant for the purpose of cultivating Quahogs (*Mercenaria mercenaria*), 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. As this is an experimental lease with structures and no discharge, the applicant shall post a bond or establish an escrow account pursuant to DMR Rule 2.64 (10) (D) in the amount of $ 5,000.00, conditioned upon his 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-A (15)[224]. 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 included in the lease:

1. Navigation: At least one 20-foot navigation corridor must be maintained between any arrays of floating gear. The innermost 30 feet of the site may be used only for low-profile bottom gear 12 inches or less in height. The lease site must be marked in accordance with U. S. Coast Guard requirements.

2. Fishing: Shellfish harvesting, anchoring, dragging, or other disturbance of the bottom on the lease site are prohibited except by the lessee and his authorized agents. The lease boundaries must be marked in accordance with the requirements of DMR Rule 2.80.

3. Overwintering: No gear, equipment, or product may be located on the lease site between November 25 and April 15.

4. Vessels: Vessels used at the site are limited to two at any one time, each with a maximum length of 20 feet in length and maximum motor size of 40 horsepower. Vessels over 20 feet in length, upwellers, barges of any size, and floating docks shall not be used on the lease site. These limitations do not apply in an emergency or when moving moorings or large pieces of gear.

5. Moorings: Moorings for vessels servicing the lease site are limited to two within the lease site or within 50 feet of the site boundary, except that any mooring within 75 feet of the extra-low water mark must be located within the lease boundary. Vessel mooring permits must be obtained from the agency legally responsible.

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[224] 12 MRSA §6072-A (15) provides that:

"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. The commissioner may grant the lease on a conditional basis until the lessee has acquired all the necessary federal, state and local permits."

6. Equipment: No lights, motorized equipment including power washers, dredges, radios or other music-playing devices, or propane cannons may be used on the site or to service the site, except for safety purposes, in an emergency, or as required by the U.S. Army Corps of Engineers, the U.S. Coast Guard, or the Maine Department of Marine Resources.

Other public uses that are not inconsistent with the purposes of the lease are permitted.

7. REVOCATION OF EXPERIMENTAL LEASE

The Commissioner may commence revocation procedures upon determining pursuant to 12 MRSA §6072-A (22) and DMR Rule Chapter 2.64 (13) that no substantial research has been conducted on the site within the preceding year, that research has been conducted in a manner injurious to the environment or to marine organisms, or that any conditions of the lease or any applicable laws or regulations have been violated.

Dated: 5/19/15

Patrick C. Keliher, Commissioner
Department of Marine Resources

APPENDIX 1 - EXHIBIT LIST

Exhibits 1-75

Maine Department of Marine Resources - Aquaculture Lease Hearing

Joseph Porada, Morgan Bay - Docket No. 2012-08-E

Hearing March 25, 27, & June 18, 2013 – Surry, Maine

Note: "page" means an 8.5" x 11" sheet, unless otherwise noted.

1. DMR Case File, Application of Joseph Porada, Docket No. 2012-08-E (DMR exhibit)

2. Application of Joseph Porada for an experimental aquaculture lease in Morgan Bay, Surry, dated 8-17-12, 22 pp (DMR exhibit)

3. DMR Site Report dated 11-16-1, 10 pp (DMR exhibit)

4. Four maps exhibited at the hearing as a single poster, but not offered as an exhibit in poster form (offered by Joseph Porada):

4A – Map titled "Red Tide Closures 2000-2011," 1 page
4B - Map titled "Shellfish Harvesting Restrictions," 1 page
4C – Map titled "Past Commercial Fisheries," 1 page
4D – Map titled "Aquaculture Sites," 1 page

5. Four maps exhibited at the hearing as a single poster, but not offered as an exhibit in poster form (offered by Joseph Porada):

5A – Map titled "Ecological Habitats," 1 page
5B - MapSource map titled "poradamorgan2" showing lease site boundaries & moorings, 1 page
5C – Aerial photo of northern Morgan Bay titled "Narrowest point 2185' +/-," 1 page
5D – NOAA chart of northern Morgan Bay showing lease boundaries, 1 page

6. Document, résumé of Joseph DeAlteris (offered by Morgan Bay neighbors), 29 pp

7. Document titled "Best Management Practices for the East Coast Shellfish Aquaculture Industry" (offered by Morgan Bay neighbors), 9 pp

8. Document, untitled, with 6 numbered paragraphs of proposed lease conditions agreed between Joseph Porada and Morgan Bay Neighbors (offered by Morgan Bay neighbors), 1 page

9. Document titled "Meeting the Criteria" (offered by Joseph Porada), 1 page

10. Document, résumé of Joseph Porada (offered by Joseph Porada) 1 page

11. *This number was not assigned to any exhibit.*

12. Document, résumé of Brian Fairfield Beal (offered by Joseph Porada), 4 pp

13. Document titled "Proposed experiments with American oysters, *Crassostrea virginica*" (offered by Joseph Porada), 2 pages, printed double-sided

14. Document, letter from Town of Surry to Diantha Robinson, DMR, dated October 17, 2012 (offered by Town of Surry), 1 page

15. Document, letter from Town of Surry to Diantha Robinson, DMR, undated, stamped "Received Mar. 14, 2013, Maine Department of Marine Resources" (offered by Town of Surry), 1 page

16. Photograph of upper Morgan Bay intertidal zone on western shore near proposed lease site (offered by Scarlet Kinney), 1 page

17. Photograph of oyster gear at unidentified location at low tide (offered by Scarlet Kinney), 1 page

18. *This number was not assigned to any exhibit.*

19. Document, e-mail to David M. Kallin from Charlie Todd, Maine Dept. of Inland Fisheries and Wildlife, dated 2/22/13 (offered by David Kallin), 1 page

20. Document titled "Blue Hill Harbor Tides – Oct/2012" (offered by David Kallin), 1 page

21. Document titled "Blue Hill Harbor Tides – Mar/2013" (offered by David Kallin), 1 page

22. Photograph of northwest green-and-white marker buoy for proposed lease site taken at 5:51 pm on 3/11/12 (offered by David Kallin), 1 page

23. Photograph of northwest green-and-white marker buoy for proposed lease site taken at 8:48 am on 3/16/13 (offered by David Kallin), 1 page

24. Document, letters to Nicholas Sichterman and Mariah Hughs from Martin S. Obin dated 2/19/13 and Stephanie Marco dated 2/17/13 and email to Diantha Robinson from Cherrie Corey and John L. Nevins dated 3/22/13 (offered by David Kallin), 4 pp

25. Photograph of swimmer in water labeled "Summer 2012 Backer" (offered by David Kallin) 1 page

26. Poster, Figure 3 from DMR Site Report (Exhibit 3) with notations by several witnesses, 36" x 44" (DMR exhibit).

27. Document titled "List of Exhibits offered by Jack Pirozzolo, intervener" (offered by Jack Pirozzolo), 2 pp

28. Map, portion of NOAA chart of upper Morgan Bay with Pirozzolo moorings and proposed dock and proposed lease site marked (offered by Jack Pirozzolo), 1 page

29. Document titled "Quitclaim deed with covenant," stamped "BK 2801 PG 029," from James A. Carter, et al to Jack Pirozzolo (offered by Jack Pirozzolo), 2 pp

30. Document titled "Agreement (Right of First Refusal)," stamped "BK 2851 PG 512," between James A. Carter, et al to Jack R. Pirozzolo (offered by Jack Pirozzolo), 5 pp

31. Document titled "Warranty Deed," stamped "Book 1734 Page 573," from Barbara R. Carter to James Carter (offered by Jack Pirozzolo), 2 pp

32. Document titled "Warranty Deed," stamped "BK 1790 PG 564," from Barbara R. Carter to James A. Carter (offered by Jack Pirozzolo), 2 pp

33. Document titled "Warranty Deed," stamped "Book 1697 Page 160", from Barbara R. Carter to James A. Carter (offered by Jack Pirozzolo), 2 pp

34. Document titled "Warranty Deed," stamped "Book 1734 Page 571," from Barbara R. Carter to Denis R. McDonald and Susan C. McDonald (offered by Jack Pirozzolo), 2 pp

35. Document titled "Warranty Deed," stamped "Book 1697 Page 162," from Barbara R. Carter to Denis R. McDonald and Susan C. McDonald (offered by Jack Pirozzolo), 2 pp

36. Document titled "Trustee's Deed of Sale," stamped "BK 5299 Page 115," from Jeffrey W. Jones Trustee to Christopher R. Goddu and Lisa J. Pirozzolo (offered by Jack Pirozzolo), 3 pp

37. Document titled "Easement," stamped "BK 5588 Page 127," from Moira C. Creaser to Christopher R. Goddu and Lisa J. Pirozzolo (offered by Jack Pirozzolo), 1 page

38. Document titled "Maine General Permit (GP) Authorization Letter and Screening Summary, Army Corps Permit # NAE-2012-355," issued to Jack Pirozzolo (offered by Jack Pirozzolo), 51 pp

39. Document, résumé of David P. Danielson (offered by Jack Pirozzolo), 4 pp

40. Document, résumé of Jack R. Pirozzolo (offered by Jack Pirozzolo), 2 pp

41. Document titled "Maine Boats, Homes & Harbors Magazine – June/July 2013 – Issue 125 – Ad Proof" (offered by Jack Pirozzolo), 1 page

42. Document titled "Application for Department of the Army Permit" signed by Jack Pirozzolo, dated 3-11-13 (offered by Jack Pirozzolo), 3 pp

43. Document, Fax dated 2/3/12 to Jack Pirozzolo (*sic*) from Webber's Cove boatyard including plans for floating dock (offered by Jack Pirozzolo), 4 pp

44. Photograph labeled "Office of Coast Survey," showing western shore of upper Morgan Bay with point marked "A" showing approximate location of proposed Pirozzolo dock (offered by Jack Pirozzolo), 1 page

45. Document, letter from Jack R. Pirozzolo to Earle J. Shettleworth, Jr., dated 3/18/13 with map marked "approx lot line" and "approx dock location" (offered by Jack Pirozzolo), 2 pp

46. Map, portion of NOAA chart of upper Morgan Bay with Pirozzolo moorings and proposed dock and proposed lease site marked and with pencil markings by David Danielson showing wind direction (offered by Jack Pirozzolo), 1 page

47. Map, portion of NOAA chart of upper Morgan Bay with Pirozzolo moorings and proposed dock and proposed lease site marked and with pencil markings by David Danielson (offered by Jack Pirozzolo),1 page

48. Document titled "Marine Patrol Officer Comments" (offered by David Kallin), 1 page

49. Letter 3/20/13, U.S. Dept. of the Interior, Fish and Wildlife Service to Susan Longacre, signed Bob Houston (offered by Susan Longacre), 3 pp.

50. Document titled "Gulf of Maine Watershed Habitat Analysis Data Summary for ½ mile radius circle around the mouth of Smelt Brk, Surry, Maine", 11" x 17" (offered by Susan Longacre), 2 pp

51. Document titled "Gulf of Maine watershed habitat analysis: Priority species list" (offered by Susan Longacre), 1 page

52. Map titled "Valuable Habitat for U.S. Fish & Wildlife Service Priority Trust Species for Morgan Bay in Surry and Blue Hill, Maine," 11" x 17" (offered by Susan Longacre), 1 page

53. Map labeled "Morgan Bay", enlargement of a portion of Exhibit 55 (offered by Susan Longacre), 1 page

54. Transparency of DMR Site Report Figure 3 (also Exhibit 26) (offered by Susan Longacre), 1 page

55. Maps labeled "Prepared by Maine Department of Inland Fisheries & Wildlife, August 15, 2011" depicting plant and animal habitats, 11" x 17" (offered by Susan Longacre), 2 pp

56. Transparency of DMR Site Report Figure 3 (also Exhibit 26) superimposed upon and attached to a one-page enlargement of a portion of Exhibit 52, Map titled "Valuable Habitat for U.S. Fish & Wildlife Service Priority Trust Species for Morgan Bay in Surry and Blue Hill, Maine" (offered by Susan Longacre), 2 pp

57. Photograph of bottom of proposed lease site under 2 ft. of water, 11" x 17" (offered by Susan Longacre), 1 page

58. Photograph of bottom of proposed lease site under 2 ft. of water, 11" x 17" (offered by Susan Longacre), 1 page

59. *This number was not assigned to any exhibit.*

60. E-mail message from Jim Williams to Susan L, titled "RE: Application for Morgan Bay," dated 3/20/13 (offered by Susan Longacre), 2 pp

61. Two e-mail messages from Richard B. Coffin to Susan L, one titled "Morgan Bay Environmental Impact Assessment," dated 3/27/13 at 8:37 am, 2 pp; and one titled "Morgan Bay," dated 3/27/13 at 12:12 pm (offered by Susan Longacre), 1 page

62. E-mail message from Ted Grosholz to Susan L, no title, dated 3/27/13 at 11:00 am (offered by Susan Longacre), 1 page

63. E-mail message from Gregory Ruiz to Susan L, no title, dated 3/24/13 at 1:00 pm (offered by Susan Longacre), 2 pp

64. Document titled "Management Plan for the European Green Crab, submitted to the Aquatic Nuisance Species Task Force, November 13, 2002" (offered by Susan Longacre), 33 pp

65. Photograph labeled "July 26, 2012 Breeding Season" (offered by Susan Longacre), 1 page

66. Photograph labeled "2 eagles July 7 2010 Breeding Season" (offered by Susan Longacre), 1 page

67. Photograph labeled "August 4, 2011 Breeding Season" (offered by Susan Longacre), 1 page

68. E-mail message from Sarah Nystrom to "songacre" with salutation "Dear Ms. Longacre," titled "Aquaculture application" (offered by Susan Longacre), 1 page

69. Poster, portion of NOAA chart of upper Morgan Bay with Pirozzolo moorings and proposed dock and proposed lease site marked (offered by Jack Pirozzolo), approx. 24" x 33"

70. E-mail message from Charlie Todd to David Kallin and Jon Lewis, titled "New Bald Eagle Nest in Surry," dated 4/4/13 at 4:46 pm, (offered by DMR), 3 pages including map

71. E-mail message from David M. Kallin to Joseph Porada and Brent Chasse titled "RE: Morgan Bay Leases," dated 3/28/13 at 9:54 am and e-mail message from Brent Chasse to Joseph Porada titled "RE Morgan Bay Leases," dated 3/28/13 at 4:57 pm, (offered by DMR), 4 pages

72. Paperback book titled *Illuminations*, Susan Longacre, ed., Blue Hill, ME, Morgan Bay Moon, 2012, ISBN: 978-0-629-01800-2, (offered by Tom Matthews), 96 pages – PDF includes cover, publication information page, and foreward only; entire document available for inspection by appointment with DMR

73. Document titled "Scarlet Kinney: Comments for June 18, 2013 DMR Hearing on Joe Porada's Application for an Experimental Four-Acre Oyster and Quahog Aquaculture Lease on Morgan Bay," (offered by Scarlet Kinney), 4 pages

74. Green file folder labeled "Longaker [*sic*] Exhibits (9) June 18," containing 9 documents as listed in Exhibit 74-A (offered by Susan Longacre)

74-A. Contents of Exhibit 74 in portfolio format, including:

- "Exhibit 1," e-mail from Ted Grosholz to Susan L dated 3/27/13 at 11:00 am, 1 page (same as Exhibit 62)

- "Exhibit 2," Document titled "More statements re: Environment/Site visit," with attached 2-page e-mail message from Jim Williams to Susan L, titled "RE: Application for Morgan Bay," dated 3/20/13 at 5:01 pm (same as Exhibit 60), 3 pp

- "Exhibit 3," Document titled "Predators and Pests," 1 page

- "Exhibit 4," Document titled "Dichotomous Key and Illustrated Guide to the Pests of Bivalve Aquaculture in Washington and Oregon," by Steven R. Booth, Ph.D., Pacific Shellfish Institute, May, 2012, 45 pages

- "Exhibit 5," Document titled "Code of Practice for the Environmental management of the SA Oyster Farming Industry," labeled "Frm: South Australia Oyster Farming," 7 non-consecutive pages numbered 1, 5, 6, 7, 15, 19, and one un-numbered page

- "Exhibit 6," Document titled "Influence of Intertidal Aquaculture on Benthic Communities in Pacific Northwest Estuaries: Scales of Disturbance," by Charles A. Simenstad and Kurt L. Fresh, *Estuaries*, Vol. 18, No. 1A, pp. 43-70, March 1995, 27 pages

- "Exhibit 7," Documents including copy of Exhibit 75 in 8.5" x 11" format; and five unattributed single-page documents titled: "3.3.1 Accumulation of Waste, "3.1.2 Nutrients," "3.1.5 Genetic

integrity of wild stock and the introduction/translocation of pest species," "Other flora and fauna," and "Regional Effects," 6 pages

- "Exhibit 8," Document titled "Longaker [*sic*] Statement," 11 pages

- "Exhibit 9," Document titled "Sustainable Shellfish, Recommendations for responsible aquaculture, A report by Heather Deal for the David Suzuki Foundation, undated, 21 pages

75. Poster titled "Table 1 Impacts of aquaculture on marine biota in the South-east Marine Region," [Australia] (offered by Susan Longacre), 24" x 30" (duplicate of Exhibit 74-A (7))

Appendix 2 – Order on Motions, May 17, 2013[225]

STATE OF MAINE
DEPARTMENT OF MARINE RESOURCES
Experimental Aquaculture Lease Application
Suspended and bottom culture of shellfish
Morgan Bay, Surry

Joseph Porada, Applicant
Docket # 2012-08-E

May 17, 2013

ORDER ON MOTIONS FOR RECUSAL, DISCOVERY, AND RE-OPENING

1. PROCEDURAL HISTORY

Joseph Porada applied to the Department of Marine Resources ("DMR") for a three-year experimental aquaculture lease on four acres located in the coastal waters of the State of Maine, in Morgan Bay in the Town of Surry in Hancock County, for the purpose of cultivating quahogs (*Mercenaria mercenaria*), American oysters (*Crassostrea virginica*), and European oysters (*Ostrea edulis*), using suspended and bottom culture techniques. DMR accepted the application as complete on September 20, 2012. During the 30-day public comment period, more than five requests for a public hearing were received by the Department. A public hearing was held on March 25 and 27 in Surry to gather evidence relating to the statutory criteria for granting the lease.

Six intervenor applications were approved: the Town of Surry, the Morgan Bay Neighbors, Ann Backer, Nicholas Sichterman and Mariah Hughs, Jack Pirozzolo, and Christopher Goddu. At the hearing, the Town was represented by William Matlock, one of its Selectmen. Morgan Bay Neighbors was represented by Sally Mills, Esq. Mrs. Backer, Mr. Sichterman, and Ms Hughs were represented by David Kallin, Esq. Mr. Pirozzolo represented himself. Mr. Goddu was required to consolidate his presentation with Mr. Pirozzolo's and did not appear at the hearing.

At the hearing, testimony and exhibits were presented by the applicant, the Department, and each intervenor, except Mr. Goddu. All witnesses were sworn and subject to questioning by those present, including by members of the public. Members of the public also testified under oath and were subject to questioning; some submitted exhibits. In all, 67 exhibits were admitted. Owing to the length of the presentations and the questions, the hearing ran from approximately 5:40 pm until 11 pm on March 25 and from 5:30 pm on March 27 until approximately 2:20 am on March 28, when the record was closed.

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[225] NOTE: Owing to the peculiarities of the Department's word processing system, footnotes in the Order on Motion have been automatically renumbered in sequence with those in the decision itself. Footnotes in the original Order are numbered consecutively, starting with #1.

Written closing arguments from the parties were scheduled for April 22, with written rebuttals required by April 29. On April 12, the hearing officer extended the schedule for written closing arguments and rebuttals until April 29 and May 6, respectively, because of the length of time required for her to prepare the list of exhibits submitted during the hearing and to make copies of all exhibits available to the parties. On April 22, the hearing officer suspended the schedule for written arguments, pending a review of the hearing process and the issuance of this order.

2. MOTIONS

Intervenor Jack Pirozzolo objected at the outset of the hearing on March 25 that the hearing officer was biased and should not conduct the hearing. The hearing officer noted the objection but declined to recuse herself. Mr. Pirozzolo renewed this objection in the form of a written motion (Motion 1) which he submitted to the hearing officer at the public hearing on March 27. On April 2, Mr. Pirozzolo submitted a request (FOAA request) to the Department under the Freedom of Access Act (FOAA) for "all documents that constitute refer or relate to communications directly or indirectly between Diantha Robinson and Joseph Porada his agents servants or employees." He submitted two subsequent motions dated April 8 (Motion 2) and April 10 (Motion 3).

Motion 1 requests that:

- The hearing officer recuse herself and disqualify herself from acting as hearing officer.
- The hearing officer disclose all *ex parte* communications with the applicant and his agents, servants and employees.

Two documents were attached to Motion 1 to support the allegation that the hearing officer is biased:

- Email from Joseph Porada to David M. Kallin, dated March 20, 2013.[226]
- Email from Joseph Porada to Morgan Bay parties dated March 26, 2013 enclosing a letter from the Maine Clammer's Association to DMR Commissioner Patrick Keliher dated March 25, 2013.[227]

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[226] Mr. Porada's email discusses the issue of his potential use of the right-of-way over the Sichterman-Hughs property and refers to a visit to Morgan Bay by the hearing officer. The hearing officer noted on the record at the hearing when this motion was submitted that she accompanied Department biologists on a site visit, at which Mr. Porada was present, to a site in Morgan Bay that Mr. Porada applied for in 2009 and for which he later withdrew the application. Therefore, that contact did not occur in connection with the lease application that is currently being reviewed. It was not an "ex parte contact" within the meaning of 5 MRS section 9055. There is no evidence in the record that the 2009 contact, occurring before any adjudicatory proceedings were initiated concerning the present lease application, had any influence on the ability of the hearing officer to develop a fair and impartial recommended decision for the Commissioner's consideration in this case.

[227] The letter resembles many letters sent by persons and groups concerned about matters before the Department. There is no evidence that this letter would have any influence on the ability of the hearing officer to develop a fair and impartial recommended decision for the Commissioner's consideration in this case.

Motion 2 requests that:

- The hearing be re-opened with a "new, unbiased hearing officer who has had no prior contact with the applicant."
- Written discovery and depositions, including subpoenas, be allowed regarding bias and *ex parte* communications between the hearing officer and the applicant.
- "If the hearing officer is not replaced the hearing be reopened to allow for further testimony by the interveners and the public and that such a hearing be scheduled for reasonable times and adjourned to reasonable times."

Two documents were attached to Motion 2 to support the allegation that the hearing officer is biased:

- Letter from Diantha Robinson to Joseph Porada dated June 19, 2012 regarding incomplete application.[228]
- Copy of experimental aquaculture lease application from Joseph Porada for a site in Morgan Bay, stamped "Received Oct. 12, 2011, Maine Dept. of Marine Resources" marked with hand-written annotations.

Motion 3 requests that:

- The hearing be reopened.
- The time to submit closing arguments be enlarged "until a reasonable Time following receipt of information is requested from the Department of Marine Resources pursuant to the Maine the Freedom of Access Act and a further hearing is held."

Two documents were attached to Motion 3 to support the allegation that the hearing officer is biased.

- Letter to Jessica McKay, DMR, from Jack Pirozzolo dated April 2, 2013 making Freedom of Access Act request.
- Letter from Jessica McKay to Jack Pirozzolo dated April 9, 2013 regarding Freedom of Access Act request.[229]

3. ISSUES

Taken together, these motions raise three general issues:

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[228] This letter and the annotated copy of the application were sent to Mr. Porada by the hearing officer in accordance with DMR Rule Chapter 2.10 (4) (A) (1), which requires that an application found to be incomplete "shall be returned to the applicant with a written explanation of the additional information required in order to be complete." This is normal communication between the department and the lease applicant concerning procedural requirements. The existence of the communication does not indicate a bias or prejudgment on the part of the hearing officer nor suggest that the hearing officer would not fairly consider all of the evidence in the record in drafting a recommended decision in this case.

[229] This letter states that "Mr. Porada and Mrs. Robinson have communicated over the past six years regarding several lease proposals." Again, there is nothing in the existence of these communications that shows that the hearing officer is unable to develop a fair and impartial recommended decision for the Commissioner's consideration in this case.

A. Whether the hearing officer is biased owing to: the direct or indirect financial interest of the Department in the proceeding, the institutional structure of the aquaculture program and the responsibilities assigned to the hearing officer, or any *ex parte* contacts between the hearing officer and the applicant.

B. Whether discovery should be ordered, including depositions and subpoenas, to investigate the bias issue further, in addition to complying with the existing FOAA request; and

C. Whether the hearing on this application should be re-opened, and if so, to what extent.

These issues are considered in detail below.

A. BIAS AND EX PARTE CONTACT. Motion 1 cites sections 9063 and 9055 of the Maine Administrative Procedure Act (APA) in alleging bias on the part of the hearing officer. Title 5 MRS § 9063 provides that a presiding officer charged with bias "shall determine the matter as part of the record."[230] At the time of Mr. Pirozzolo's objection during the public hearing, the hearing officer determined on the record that the allegations of bias were without merit. For the reasons stated by the hearing officer on the record, there is no bias or prejudgment that would affect her full and fair consideration of all of the evidence in the record in making a recommended decision in this case.

Financial interest. Section 9063 of the APA refers to "bias or...personal or financial interest, direct or indirect." Motion 1 alleges as part of the grounds for the charge of bias that "the Department in which she (i.e., the hearing officer) works has a direct and indirect financial interest in the proceeding." This presumably stems from the fact that there is a fee of $100.00 for filing an experimental lease application and that the Department charges rent for aquaculture leases at the rate of $100.00 per acre, per year.[231] There is no merit in this allegation.

The Department has the statutory responsibility for administering and regulating aquaculture in the State of Maine. It is the only state agency with the authority to consider and, when the statutory lease criteria have been met, to grant leases in the coastal waters for the purposes of conducting aquaculture. Pursuant to statute and rule, the Department charges application fees for all aquaculture lease and license applications except for scientific experimental leases; it charges rent for all leases. These fees are charged relative to the administration of the aquaculture program and are not unlike fees charged by other state agencies for licensed and inspection costs for the programs that they administer. The revenue the Department receives from these sources defrays only a portion of the expenses involved in

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[230] 5 MRS §9063 Bias of presiding officer or agency member
1. Hearings; impartial. Hearings shall be conducted in an impartial manner. Upon the filing in good faith by a party of a timely charge of bias or of personal or financial interest, direct or indirect, of a presiding officer or agency member in the proceeding requesting that that person disqualify himself, that person shall determine the matter as a part of the record.

[231] See 12 MRS § 6072 (9), §6072-A (14), and DMR Rule Chapter 2.43 (rent); DMR Rule Chapter 2.64 (2) (B) (experimental lease application fee).

operating the aquaculture program, which is funded more broadly through the state budget process as part of the Department's overall budget.

Institutional bias. Motion 1 challenges the impartiality of the hearing officer on the basis that, in also serving as the aquaculture administrator, her position is biased as a consequence of the responsibilities assigned to that position, as well as by what the motion characterizes as the necessity of engaging in *ex parte* communications with the applicant.

The statutes and rules establishing the aquaculture leasing program authorize the Commissioner of Marine Resources to designate a staff member to review lease applications, preside at hearings, draft decisions on lease applications, and sign lease documents.[232] The hearing officer performs these and related administrative functions. The hearing officer is responsible to ensure that the application process meets all legal requirements and is conducted openly and fairly, whether or not a hearing is involved, with an opportunity for all interested persons to present relevant evidence and argument at the appropriate time. The hearing officer's role is to provide the Commissioner with a recommended decision that fairly summarizes the evidence pertaining to a lease application and proposes findings of fact and conclusions of law that reflect an objective, impartial analysis of that evidence, based on the relevant laws, rules, and specialized technical information involved in the Department's regulation of marine aquaculture.

There has been no showing that the hearing officer's role in the lease application and review process creates a bias in favor of lease applicants. Further, there is no evidence that the hearing officer's involvement in this particular case has resulted in any bias or prejudgment either in favor of, or in opposition to, Mr. Porada's lease application. The opportunity for all parties to

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[232] E.g., the following:
12 MRS §6072-A Limited-purpose lease for commercial or scientific research
1. Authority. The commissioner may issue a limited-purpose lease for areas in, on and under the coastal waters, including the public lands beneath those waters and portions of the intertidal zone, for commercial aquaculture research and development for scientific research. The commissioner or the deputy commissioner acting on the commissioner's behalf **may authorize in writing qualified professional department staff** to issue a final decision and sign a lease document on an application for a limited-purpose lease. A decision issued by department staff pursuant to this subsection is a final agency action with respect to that lease application.

DMR Rules Chapter 2.10 (4) Completion
(A) (2) When the application is complete, the Commissioner will make a determination whether the application could be granted and whether the applicant has the financial and technical capability to carry out the proposed activity. If the Commissioner makes both determinations in the affirmative, he **or his designee** shall schedule a hearing on the application. If the Commissioner **or his designee** determines either that the application could not be granted or the applicant lacks the necessary financial or technical capacity the applicant shall be notified in writing of that determination and no further Department action on the application is required.

DMR Rules Chapter 2.10 Aquaculture Lease Hearing Procedures
1. Presiding Officer
A. The presiding officer at any aquaculture lease hearing shall be either the Commissioner or **a Department employee or representative designated by the Commissioner to act as hearing officer**.

2.35 Hearing officer Report
1. In the event that an aquaculture lease hearing is conducted by a hearing officer other than the Commissioner, **the hearing officer may prepare a report, including proposed findings of fact, conclusions of law and, at the Commissioner's request a recommended decision.** A copy of the hearing officer's report shall be provided to each party and each party shall have an opportunity to file responses or exceptions to the report within 10 days following receipt of the report.

present evidence on the record and to submit responses and exceptions to the hearing officer's recommended decision, the review by the Commissioner of the recommended decision and his independent authority in making the final lease decision, and the availability of judicial review of the final decision of the Commissioner, all provide adequate safeguards against the possibility of any lack of impartiality in the lease application and decision process.[233]

Personal bias. Motion 2 alleges personal bias on the part of the Commissioner based on a public comment reflecting a general concern about some of the conflicts that have arisen over proposed aquaculture lease sites. The statement quoted in the motion was not specifically linked to Mr. Porada's application, and it does not indicate bias per se on the part of the Commissioner with respect to the issues raised in connection with that application. Moreover, "a preconceived position on law, policy or legislative facts is not a ground for disqualification." *See FTC v. Cement Institute*, 333 U.S. 683, 700-703, 68 S.Ct. 793, 803-804, 92 L.Ed. 1010 (1948). The federal cases that have found an agency officer disqualified have done so only after a showing of prejudgment on the specific facts subsequently presented to the agency. *New England Tel. & Tel. Co. v. Pub. Utilities Comm'n*, 448 A.2d 272, 280 (Me. 1982)

***Ex parte* contacts.** All three motions allege that there has been *ex parte* contact between Mr. Porada and the hearing officer. Title 5 MRS § 9055 provides that

> In any adjudicatory proceeding, no agency members authorized to take final action or presiding officers designated by the agency to make findings of fact and conclusions of law may communicate directly or indirectly in connection with any issue of fact, law or procedure, with any party or other persons legally interested in the outcome of the proceeding, except upon notice and opportunity for all parties to participate.

In accordance with the requirements of statute and DMR rule Chapter 2.20[234], the Department gave personal and public notice of the public hearing and the opportunity to intervene. All of the notices indicated that the deadline to apply to intervene in the application was 5:00 pm on March 15, 2013 and that the Department would decide whether to grant requests to intervene no later than 5:00 pm on March 20, 2013.

On March 18, the hearing officer notified all applicants for intervenor status except Mr. Goddu that their intervenor applications had been approved. Mr. Goddu's application was

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[233] And, indeed, there is no evidence of that the hearing officer is biased or otherwise unable to develop a fair and impartial recommended decision for the Commissioner's consideration in this case.

[234] DMR Rule Chapter 2.20 Intervention

2. Filing of Applications. Any application for intervenor status must be filed in writing and received by the Department at least 10 days prior to the hearing. The Commissioner may waive the 10 day deadline for good cause shown.

3. Participation Limited or Denied. At least 5 days prior to the hearing, the Commissioner shall decide whether to allow or refuse intervenor applications. The Commissioner shall provide written or oral notice of his decision to the intervenor applicant and all other parties to the proceeding. When participation of any intervenor is limited or denied, the Commissioner shall include in the hearing record an entry noting his decision and the reasons therefore.

approved on March 19. On both March 18 and March 19, the hearing officer notified all intervenors and Mr. Porada of these approvals in e-mails sent to a group distribution list titled "Morgan Bay Parties," which included the applicant, all intervenors, five DMR staff members, and two representatives of the U.S. Army Corps of Engineers. Both emails noted the requirement that communications between any party and the Department be copied to all parties. The use of the distribution list was intended to accomplish this.

Since the intervenor applications were approved, all communications between the hearing officer and any party to the Porada/Morgan Bay application, including Mr. Porada, have been sent to all parties using this distribution list. Emails sent to this list have been the sole means of communication between the hearing officer and the parties since March 18, other than oral communications on the record at the public hearings. Prior to March 18, the only party to this application was the applicant. Thus, except as discussed in the following paragraph, throughout the time that there have been other parties to the application besides Mr. Porada, they have been included in all communications between the hearing officer and Mr. Porada regarding this application, and between the hearing officer and any other party to the proceeding.

Two emails dated March 31, 2013 were sent by Mr. Porada to the hearing officer and others (but not to the intervenors), forwarding and commenting on emails he received from two Morgan Bay residents who are not intervenors, and commenting on the recent hearings and on aquaculture leasing in general. The hearing officer did not initiate these contacts, nor did she respond in any manner other than to email Mr. Porada and the other parties to remind him that he needed to include the other parties in his communications.[235] One email dated April 18, 2013, was sent by Mr. Porada to the hearing officer and other DMR staff (but not to the intervenors) regarding annual reports for his existing leases; and an email dated April 25, 2013 was sent by Mr. Porada to the hearing officer and others (but not to the intervenors) regarding a potential new lease application in Morgan Bay which was subsequently submitted to the Department on May 6, 2013. Thus, of these four emails, only the first two relate to the application in question and these were dealt with by the hearing officer in an appropriate manner. Of the remaining emails, the existence of an additional application by Mr. Porada for a lease site in Morgan Bay, outside of the current lease process, may well be of interest to the other parties to his present application. Therefore, copies of these emails and of the May 6 application are being forwarded to the parties simultaneously with the issuance of this order.

The hearing officer has made every effort to restrain Mr. Porada from sending her unsolicited emails relating to the pending application, even before there were other parties to the

[235] On April 4, 2013, the hearing officer emailed Mr. Porada and the other Morgan Bay Parties, requesting that he not send unsolicited emails to her, except under certain designated conditions. Previously, on January 20, 2012, March 11, 2013, and March 14, 2013, the hearing officer had emailed Mr. Porada, also requesting that he stop sending her emails relating to the merits of his Morgan Bay application or sending other unsolicited information. Copies of these four emails are attached to this order.

matter. Once other parties were admitted, all of her communications to him and all of his to her with the exception of the four listed above sent by him have been copied to all parties.

Clearly, it is impossible to prevent a determined individual from attempting to communicate with the hearing officer. Part of the hearing officer's job is to deal with such matters professionally and not allow them to influence her assessment of the factual evidence and its relation to the criteria for granting a lease. That has happened here, and there has not been any improper *ex parte* communications by the hearing officer.

Constitutional issues. Motion 1 also cites the Constitution of the State of Maine, Article I §§ 1, 6-A, 19, 21; and the Constitution of the United States, Amendments V and XIV in support of the request for recusal of the hearing officer. For the reasons discussed here, the Department believes that its procedures and the conduct of this proceeding meet all statutory and Constitutional requirements and that this adjudicatory proceeding has been and will be conducted in a fair and impartial manner.

Therefore, I find that: There is no evidence that hearing officer has a bias, prejudice, or any personal or financial interest, direct or indirect, in the proceeding that prevents her from conducting an impartial hearing in accordance with Title 5 M.R.S. §9063 or from developing a fair and impartial recommended decision for the Commissioner's consideration, based on the facts of this case as they relate to the statutory criteria for considering a lease application.

B. DISCOVERY IN ADDITION TO FOAA REQUEST.

Motion 2 requests that written discovery and subpoenas be allowed regarding the issues of bias and *ex parte* communications between the hearing officer and the applicant. Such discovery is not available in administrative proceedings. Further, as a general rule, inquiry into the mental processes of an administrative decision maker is prohibited. "This general rule may be abrogated only when a showing of bad faith or improper behavior is strong enough to justify intrusion into the administrator's province. The requirement that the complainant adduce at least *prima facie* evidence of such impropriety serves to protect the administrator from 'fishing expeditions.'" Carl L. Cutler Co., Inc. v. State Purchasing Agent, 472 A.2d 913, 918 (Me. 1984). As stated above, other than general allegations, *prima facie* evidence of bias or prejudice has not been presented. Furthermore, Mr. Pirozzolo is not left without a remedy, as the Department is providing the information he requested under the Freedom of Access Act.

Therefore, the Department will not provide for discovery or the issuance of subpoenas in this administrative proceeding.

C. RE-OPENING THE PUBLIC HEARING.

Motions 2 and 3 request that the hearing be re-opened, with or without a new hearing officer, to allow for additional testimony at "reasonable times" and that the time for submitting

written closing arguments after the re-opened hearing be enlarged until "a reasonable Time" after the Department has supplied the information requested under the Freedom of Access Act.

The Department has concluded that it is appropriate to re-open the hearing on a limited basis for the purpose of taking testimony from members of the public, owing to the lateness of the hour when public testimony was taken at the hearing in March. No additional testimony will be taken from the applicant or the intervenors. The Department may limit the amount of time for testimony by each individual in order to most effectively use the time available.

The re-opened hearing will be scheduled for Tuesday, June 18, in Surry. The Department will provide reasonable personal and public notice as required by DMR Rule Chapter 2.30 (3). The time to submit written closing arguments will be re-scheduled following the conclusion of the re-opened hearing. A new hearing officer will not be designated for the purposes of the re-opened hearing.

4. ORDER ON MOTIONS

Accordingly, it is ordered that: Motions 1, 2, and 3 are denied, except that the request to re-open the hearing is granted upon the terms described above.

Signed: /s/ Diantha C. Robinson Dated: May 17, 2013

Diantha C. Robinson
Aquaculture Hearing Officer