

STATE OF MAINE
DEPARTMENT OF MARINE RESOURCES

Standard Aquaculture Lease Application
Suspended culture of American oysters
(*Crassostrea virginica*) and
European oysters (*Ostrea edulis*)
Thomas Bay, Bar Harbor

Bar Harbor Oyster Co, LLC
EAST TB

Docket #2015-10

September 1, 2016

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION

Bar Harbor Oyster Co., LLC, a Maine corporation, applied to the Department of Marine Resources ("DMR") for a standard aquaculture lease on 22.04¹ acres located in the coastal waters of the State of Maine, in Thomas Bay in the Town of Bar Harbor in Hancock County, for the purpose of cultivating American oysters (*Crassostrea virginica*) and European oysters (*Ostrea edulis*) using suspended culture techniques. DMR accepted the application as complete on June 2, 2015. Friends of Thomas Bay and Rebecca Richardson, a member of Friends of Thomas Bay, applied to intervene in this case (CF). Based on the expertise demonstrated by Friends of Thomas Bay, and by Ms. Richardson, these two intervenors were consolidated on July 22, 2016 when Ms. Richardson's intervenor application was withdrawn (CF). DMR accepted testimony from the intervenor on the following topics that were pertinent to the criteria which DMR must consider when determining whether to grant a standard aquaculture lease:

- kayaking
- navigation
- recreation (including swimming)
- noise pollution
- light pollution
- recreational fishing
- mooring boats
- riparian access (ingress and egress)

A public hearing on this application was held on July 28, 2016, at the Bar Harbor Town Hall in Bar Harbor, Maine.

¹ Please note, this acreage differs from the acreage reflected in the lease Application. Based on the Latitude and Longitude corner points provided in the application, DMR staff recalculated acreage using ESRI ArcGIS software and arrived at this more accurate acreage.

1. THE PROCEEDINGS

Notices of the hearing and copies of the application and DMR site report were provided to numerous state and federal agencies for their review, as well as to various educational institutions, aquaculture and environmental organizations, the Town of Bar Harbor and the Bar Harbor Harbormaster, members of the Legislature, representatives of the press, riparian landowners, and other private individuals. Notice of the hearing was published in the *Mt. Desert Islander* on June 16, 2016, and in the July 2016 edition of *Commercial Fisheries News*.

Sworn testimony was given at the hearing by: the applicant; DMR's Division of Aquaculture Director, Jon Lewis; Gordon Longworth (geographic information systems analyst, expert witness for the applicant); Dr. Brian Beal (marine sciences expert witness for the applicant); Charles Phippen (Bar Harbor Harbormaster and Bar Harbor Shellfish Warden, expert witness for the applicant); Katy Degross (Maine certified kayak guide, expert witness for the applicant); Attorney Sally Mills (representing Friends of Thomas Bay); Glenn Milligan (riparian owner, speaking on behalf of Friends of Thomas Bay); and Dr. Joseph Dealteris (marine sciences expert witness for Friends of Thomas Bay). Public comment was also taken from William Stockman, of Trenton, Maine. Eleven comment letters were received by email and regular mail to the department, 10 of which concerned bird attraction issues, and one from the Town of Bar Harbor expressing that the Town Council is in support of the application and that no negative comments were expressed at the Council meeting nor by the Marine Resources Committee for the town, which also reviewed the application (Exhibit 8). The applicant described his proposed project. Mr. Lewis described the site visit and presented a videotape of the bottom.

Each witness was subject to questioning by the Department, the applicant, the intervenors, and members of the public. The U.S. Army Corps of Engineers was represented by Shawn Mahaney. The hearing was recorded by DMR. The Hearing Officer was Hannah Dean. Dr. Beal testified that the application is in line with aquaculture best practices and will not have negative ecological impacts on the area. Mr. Phippen testified regarding fishing, boating, and navigational uses in the area. Ms. Degross testified that she regularly kayaks in the area and has safely kayaked around existing LPAs operated by the applicant. She was not able to comment on whether kayaking would be difficult in a layout of oyster

grow cages along the lines of the applicant's proposal, as she has not kayaked around large aquaculture farms. Ms. Mills described the membership and gave a general overview of the concerns of the Friends of Thomas Bay (See, Exhibit 5). Mr. Milligan testified as to his experience kayaking in the area and his observations of swimming in the area of the proposed lease tracts. Dr. DeAlteris testified as to best practices for aquaculture sites in regards to noise and light contamination, as well as the density of cages. Mr. Stockman's public comment focused on concerns about the attraction of birds to cages and potential contamination of the product through bird vectors.

The evidentiary record before the Department regarding this lease application includes exhibits introduced at the hearing (see exhibit list below), and the record of testimony at the hearing itself. The evidence from all of these sources is summarized below.²

A. LIST OF EXHIBITS³

- a. Case file, (CF)
- b. Application completed June 2, 2015 (App)
- c. DMR site report completed April 29, 2016 (SR)
- d. Town of Bar Harbor - Bar Harbor Oyster Letter of Support (PDF received by mail June 26, 2015 from Cornell F. Knight, Town Manager of Town of Bar Harbor, ME)
- e. Information on Friends of Thomas Bay (PDF received by email 7/14/2016 from Intervenor Applicant Friends of Thomas Bay Representative, Sally Mills)
- f. Email from Sally Mills Re: Follow up on Information Request Re: Bar Harbor Oyster LLC Application July 28th Hearing (Email received 7/14/2016 from Intervenor Applicant Friends of Thomas Bay Representative, Sally Mills)
- g. Resume - Joseph DeAlteris (Word Document received by email 7/14/2016 from Intervenor Applicant Friends of Thomas Bay Representative, Sally Mills)
- h. Folder of Comment Letters (Received by DMR by email and mail)
- i. Map of Eelgrass conservation areas in Thomas Bay (Submitted during the July 28, 2016 hearing by Ms. Mills for the Friends of Thomas Bay).

² In references to testimony, "Smith/Jones" means testimony of Smith, questioned by Jones.

³ Exhibits 1, 2, and 3 are cited below as: Case file – "CF"; Application – "App", site report – "SR". Other exhibits are cited by number.

2. DESCRIPTION OF THE PROJECT

A. Site History

Presently, the applicants hold 8 Limited Purpose Licenses (LPAs) for the culture of shellfish within the general vicinity of the proposed lease area (JWAL115, JWAL215, JWAL315, JWAL415, JFOG115, JFOG315, JFOG415, JFOG516) (SR 2, 3).

B. Site Characteristics

The proposed lease site is located in Mr. Desert Narrows, east of Israel Point and west of Thomas Island, Bar Harbor, Hancock County, Maine.

On September 25, 2016, DMR biologists Jon Lewis and Marcy Nelson visited the proposed lease site and assessed it and the surrounding area in light of the criteria for granting an aquaculture lease, as described in the site report.

The area around the site is currently classified by the Department's Water Quality Classification program as "open/approved for the harvest of shellfish" (SR 17).

The site report describes the proposed lease site and its surroundings as follows:

The bottom consisted of fine sediments with little topographical variations and no attached or rooted vegetation was observed (SR 3).

Mean low water depth within the area of the proposed lease, as calculated from measurements taken during the site visit, ranged from 5 to 9 feet throughout the south tract, and 8 to 9 feet within the north tract (SR 4). Corrected MLW depths are approximately 4-5 feet throughout the majority of both proposed lease tracts, and deepen to a maximum of 17 feet along the eastern boundary of the south tract (SR 4).

C. Proposed Operations

The applicant is applying for a standard, 10 year lease to culture American or Eastern oysters and European oysters using floating cages in the spring through fall, and submerged cages over the winter. The applicant will source seed from Muscongus Bay Aquaculture (App, Cover Page). At full site development which will be reached at year three of the lease, the applicant plans to deploy a maximum of 1,240 OysterGro cages in 160 foot long-lines, supporting 10 cages each, for a total of 124 lines. The applicant proposes to maintain 28 to 30 feet between long lines to allow for vessel navigation, and each cage would measure 68"Lx40.5"Wx20"H. Each cage would hold 6 mesh oyster bags, and during

the winter months, the cages would be submerged (SR 2, App 4-6). The applicant will use 170 cages during the first year of operation, 500 total cages the second year, and 1240 cages by the third year. However, applicant will maintain the density of cages and spacing described above even at maximum capacity, ensuring minimal bottom shading and providing space needed for sinking cages in deeper areas to avoid ice damage during the winter (App 6, applicant testimony).

Storage and processing will take place on a floating upweller and work platform measuring 24'Lx12'Wx4'H and supporting a shelter measuring 8 feet in height that will be deployed in the southeastern corner of the south tract (SR 3, App 7). The applicant's residence will be used as the sanitary facility for the site, and no hazardous materials will be stored on the site (App 8). Gear colors will be black, including solar panels. The upweller float and house will be constructed from pressure treated timber, with black plastic dock floats, rope line will be a natural brown, and buoys as well as markers will be white (App 8).

The applicant will utilize a 15' welded aluminum work-skiff to transport product from the site, and will be moored off site at Hadley Point (App 9). A larger skiff of about 20', similar to a Carolina Skiff, will be used for crew and product transport and will be used to haul in and flip cages in order to prevent fouling (App 9). Finally, a pontoon boat measuring approximately 24'x10' will be used as a work barge on the site (App 9). The applicant plans to moor both the 20' skiff and the pontoon boat on the lease site (App 9). All vessels will be powered by low emission and quiet 4-stroke outboard engines and any maintenance except for emergency repairs will be made off site (App 9). Major activities to be conducted on site will include raising cages from the ocean floor to the surface and tumbling and grading oysters on the pontoon boat (App 10). The applicant will not use floodlights as they will operate during daylight hours (applicant testimony). The applicant will use the flipping method in order to clean the cages. When cages are flipped and left to dry out, organic matter will dry and fall off naturally, without the need to use power washing. Therefore, the applicants testified that they will not employ power washing (applicant testimony).

The applicant anticipates operating the site using two employees during the first season, after which the applicant anticipates hiring additional seasonal employees during the second and third years. However, the applicant does not foresee having more than four employees working on site at any one time, and will likely have additional onshore employees for other aspects of the operations such as marketing and delivery (App 11).

3. STATUTORY CRITERIA & FINDINGS OF FACT

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

A. Riparian Access

The site report provides the following distances to shore for each tract (SR 5):

North Tract

N1 to Trenton Boat Launch: ~3,750 feet to the northeast

N1 to Bar Harbor Airport (Runway 35): ~4,321 feet to the northeast

N2 to Thomas Island (MLW): ~243 feet to the east

N4 to Western Edge of Channel, 12 foot contour (MLW): ~480 feet to the west

South Tract

S2 to 6 foot contour line (MLW): ~130 feet to the east

Eastern boundary to 6 foot contour line (MLW): ~120 feet to the east

S3 to nearest intertidal mudflat (MLW): ~267 feet to the east

Western boundary to Israel Point (MLW): ~137 feet to the west

Western boundary to Israel Point (MHW): ~260 feet to the west

During the site visit, DMR staff did not observe docks or moorings with which the proposed activities would interfere. The north tract is approximately 240 feet at MLW to the west of the undeveloped western shore of Thomas Island. The south tract is about 137 feet from Israel Point at MLW. The proposed south tract lies adjacent to a developed shorefront property, but that property does not include any docks or moorings that DMR

staff observed during the site visit (SR 6). No docks or moorings were observed elsewhere in the vicinity of the site, and the distance from all shores is over 100 feet at MLW, indicating that ingress and egress will not be impeded by the site (SR 6).

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

B. Navigation

The proposed site occupies shallow subtidal waters to the east and west of a small channel leading into Thomas Bay. Navigation at low tide will likely be dominated by local clambers and wormers accessing the intertidal mudflats (SR 9). Mr. Phippen testified that there is limited boating in the area and that boat sizes range from approximately 12 to 20 ft in length, include skiffs and outboard motor boats (Phippen testimony). Mr. Phippen further testified that most boats are launched from the Trenton sea plane ramp and that the proposed gear layout is arranged in a way that would not interfere with major navigational corridors in the area (Phippen testimony). 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.

C. Fishing & Other Uses

The site report indicates that DMR staff did not observe commercial or recreational fishing within the boundaries or in the immediate vicinity of the proposed site. However, the presence of patchy mussel beds on the bottom would indicate that mussel dragging occurred in the past. Furthermore, clamming and worming likely take place on the intertidal mudflats surrounding the proposed site (SR 9).

Mr. Phippen testified that he knows of about a dozen skiffs which navigate in the area, fishing for worms and shellfish, and Bar Harbor has four commercial shellfish harvesters (Phippen testimony). However, Mr. Phippen stated that the shellfish harvesters are aware of the lease proposal and have expressed that the lease operations will not have an impact on the areas where they harvest (Phippen testimony). The evidence indicates there is minimal commercial or recreational fishing within the proposed lease boundaries,

or in the immediate area, and that existing commercial fishing operations will not be impacted (SR 9, Phippen testimony).

Based on testimony received during the hearing held July 28, 2016, members of Friends of Thomas Bay testified that they used the area frequently for kayaking (Milligan testimony). Testimony was also provided by a certified kayak guide who expressed that given the clearance that the proposed site will provide between lines of cages, a typical kayak and paddle could maneuver within the proposed gear if necessary (Degrass testimony). However, the kayak guide could not offer actual experience in this regard, only conjecture based on having kayaked around existing smaller sites currently operated in the area by the applicant (Degrass testimony). Kayaks range between 12 and 16 feet in length (Degrass testimony, Phippen testimony). As stated in the section above describing operations, applicant proposes to maintain 28 to 30 feet of clearance between lines. While this clearance will not provide as much maneuverability as open water, it will not preclude kayaking in the area, and will leave approximately 12 to 18 feet of clearance beyond the length of the kayak, and depending on the model of kayak.

During the hearing, testimony was also provided indicating that swimming occurs at some frequency during the summer (Milligan testimony). However, testimony indicated that swimming occurred near shore – and the proposed lease site boundaries are all over 100 feet from any shoreline at MLW (SR 5). This would indicate that even at MLW there will be room between the shore and the proposed lease site for swimming in the area.

Other aquaculture leases. According to the site report, there are three aquaculture leases designated for the bottom culture of blue mussels (*Mytilus edulis*) within 1 mile of the proposed lease site (EAST HP, EAST OP, and EAST OP2) (SR 9). In addition, within the boundaries of lease EAST OP there are 6 Limited Purpose Aquaculture Licenses (MBEA116, MBEA216, RSMI116, RSMI216, RSMI316, and RSMI416) for the culture of blue mussels on long-lines. Additional leases and licenses are located over a mile due north, east, and west of the proposed lease tracts (SR 9). Given that other aquaculture sites and licenses are at a significant distance from the proposed site, the proposed aquaculture activities would not interfere with existing aquaculture uses in the area.

Exclusivity. The applicant will mark the site in accordance with DMR Rule 2.80.⁴

⁴**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

The applicant stated in the application that they will “welcome” the use of kayaks and small recreational boats on the site “as long as people do not tamper with...gear and equipment” (App 18). 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 (7-B). Conditions reflecting these restrictions will be included in the lease.

The evidence supports the conclusion that the site will not unreasonably interfere with fishing and other uses in the surrounding area. The lease site must be marked as required in DMR Rule Chapter 2.80.

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.

Department and the words SEA FARM in letters of at least 2 inches in height in colors contrasting to the background color of the device. The marked floating device shall be readily distinguishable from interior buoys and aquaculture gear.

2. The marked floating devices shall be displayed at each corner of the lease area that is occupied or at the outermost corners. In cases where the boundary line exceeds 100 yards, additional devices shall be displayed so as to clearly show the boundary line of the lease. In situations where the topography or distance of the lease boundary interrupts the line of sight from one marker to the next, additional marked floating devices shall be displayed so as to maintain a continuous line of sight.
3. When such marking requirements are unnecessary or impractical in certain lease locations, such as upwellers located within marina slips, the Commissioner may set forth alternative marking requirements in an individual lease.
4. Lease sites must be marked in accordance with the United State’s Coast Guard’s Aids to Private Navigation standards and requirements.

D. Flora & Fauna

Site observations. Species of marine flora and fauna were observed by DMR biologists during the site visit included as follows:

South Tract (SR 11-12):

Worm holes/castings - abundant
Blue mussels (*Mytilus edulis*) - common to abundant in scattered clumps
Green crab (*Carcinus maenus*) - common
Frisled anemone (*Metridium senile*) - commonly associated with mussels
Sand Shrimp (*Crangon septemspinosa*) - common
Mysid Shrimp (*Praunus flexuosus*) - common
Common sea star (*Asterias sp.*) - occasional
American lobster (*Homarus americanus*) - occasional
Rock crab (*Cancer sp.*) - occasional
Burrowing anemone (*Edwardsia sp.*) - occasional
Mud snails (*Littorina sp.*) - one large patch associated with decomposing knotted wrack
(*Ascophyllum nodosum*)Waved whelk (*Buccinum undatum*) - one shell
Kelp (*Laminaria/Saccharina sp.*) - unattached and occasional
Red algae (unidentified) - occasional
Beggiatoa sp. - single patch near decaying seaweed

North Tract (SR 13):

Worm holes/castings - abundant
Enteromorpha sp. - common
Sand Shrimp (*Crangon septemspinosa*) - common
Mysid Shrimp (*Praunus flexuosus*) - common
Green crab (*Carcinus maenus*) - common
Rock crab (*Cancer sp.*) - occasional
American lobster (*Homarus americanus*) - occasional
Crab/lobster burrows - common
Blue mussels (*Mytilus edulis*) - occasional small clump
Frisled anemone (*Metridium senile*) - occasionally associated with mussels
Common sea star (*Asterias sp.*) - occasional
Burrowing anemone (*Edwardsia sp.*) - occasional
Kelp (*Saccharina sp.*) - unattached and occasional
Red algae (unidentified) - occasional
Beggiatoa sp. - single patch

Based on these observations, it is apparent that there is no eelgrass within the bounds of the proposed lease tracts. During the hearing, evidence was entered into the record showing a map of proposed areas for eelgrass restoration in the vicinity of the proposed lease tracts (Exhibit 9, Mills testimony, DeAlteris testimony). However, none of

the proposed areas for eelgrass restoration are within the bounds of the proposed lease tracts, indicating that the aquaculture gear will not negatively impact these restoration efforts.

Fisheries & wildlife. Copies of the application were provided to the Maine Departments of Environmental Protection and Inland Fisheries and Wildlife (MDIF&W) for review. One comment was received by email on June 30, 2015, from John Perry, Environmental Review Coordinator at MDIF&W noting that the proposed site is within a tidal waterfowl and wading bird habitat (CF). Based on this, Mr. Perry recommended that the siting of the project avoid intersecting with mud flats (CF, SR 15). During the hearing, applicants noted that they made sure that their lease tracts would not overlap with mudflats (applicant testimony). During the site review, DMR staff did observe a small flock of Bonaparte's gulls between the proposed southern tract and Israel Point, as well as three cormorants resting on the existing OysterGro cages being used on the current LPA sites within the proposed lease area (SR 16).

It appears from this evidence that the ecology of the proposed lease site and surrounding area will not be adversely affected by the lease activities.

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

E. Public Use & Enjoyment

According to the site report, "there are no publicly-owned beaches, conserved lands, or [public] docking facilities or beaches within 1,000 feet of the proposed lease" (SR 16). Thomas Island, to the east of the north tract, is privately owned and managed by Maine Coast Heritage Trust. The Twinnies Islands are over 2,000 feet to the east of the proposed lease area, and are owned by the U.S. Fish and Wildlife Service (USFWS). The nearest boundary of Acadia National Park on Thompson Island is over 2,000 feet to the west of the proposed south tract, and the Maine Bureau of Parks and Land maintains an easement along the shoreline of Thomas Bay, to the east of Blunt Point and over 3,000 feet from the proposed lease. Conserved land data was acquired from the Maine Office of GIS and utilized by Maine DMR staff in order to assess whether the proposed lease would interfere with public use and enjoyment (SR 16).

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

F. Source of Organisms

The application indicates that the source of stock for this proposed lease site is Muscongus Bay Aquaculture (App cover page).

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

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

G. Light

The applicant stated in his application that no lights will be used on site, and all work will take place during daylight hours, unless there is an emergency, such as a serious malfunction, or other problem that requires immediate attention (App 12, SR 17, applicant testimony).

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

H. Noise

The application states that he will be using some power equipment on the site which will produce some noise. The following is an inventory of noise generating equipment which will be used on site as well as noise reduction measures that the applicant will be utilizing (App 11-12, applicant testimony):

- a. A 15' skiff with a 60 HP Yamaha 4-stroke to move employees to and from the site, and to flip cages.
- b. A 20' flat-bottom skiff with 60 HP 4-stroke outboard which will utilize a silent electric pot hauler to raise cages for flipping and harvesting.
- c. A pontoon deck-barge with a 4-stroke outboard motor, equipped with a Honda hydraulic power unit, used to run the tumble grader and hauler, bolted to the vessel with rubber isolators to reduce vibration noise.
- d. An additional muffler will be applied to the Honda's exhaust system.
- e. A small house will be built over the Honda motor with Sound Down noise-suppressing insulation.
- f. The Honda hydraulic pack will power a hydraulic hauler motor and centrifugal water pump for washing.
- g. A solar-powered upweller utilizing an axial flow, high volume, low-pressure pump to circulate water for oyster seed will be mounted on a floating dock measuring 24'x12', with a small house structure.

The applicant stated in his application that the work skiffs will be used on a daily basis, except for Sundays, to transport, flip cages, maintain cages, lines, and harvesting and that the pontoon barge will be moored on-site and used for tumbling and grading of oysters for one week each month (App 12, applicant testimony). At the beginning of the growing season, the pontoon barge will be used to raise and sink cages. The upweller will be moored on-site for the growing season and will be removed before the end of fall. Therefore, the upweller will be used as a work platform during the growing season but will only run as a functional upweller for about 2 months out of each growing season (App 12, applicant testimony).

The site report observes that the applicant has invested the best available technology and made every accommodation to minimize noise intrusion (SR 17).

Based on this evidence, it appears that any noise generated by operations on the site is unlikely to have a significant effect at the boundaries of the lease, and that the applicant has taken every effort available to reduce noise and light pollution from the proposed operations.

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

I. Visual Impact

The site report notes that the applicant proposes to use floating cages and bags, which are black in color and would protrude from the water's surface at most 20 inches, and only when in the drying position (SR 17). The proposed upweller/work float is made of wood and supports a structure which will be 12 feet high at its highest point and will measure less than 12 feet above the water's surface, given that a portion of the float will be submerged (SR 17). The overwintering cages will be deployed under water and will not be visible (applicant testimony). No other structures will be placed on the site, other than any navigational aids that may be required.

The Department's visual impact rule requires structures and gear on lease sites to blend with the surroundings as much as possible. The evidence shows that this will be the case on the proposed lease site.

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

4. CONCLUSIONS OF LAW

Based on the above findings, I conclude that:

- a. The aquaculture activities proposed for this site will not unreasonably interfere with the ingress and egress of any riparian owner.
- b. The aquaculture activities proposed for this site will not unreasonably interfere with navigation.
- c. 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.
- d. 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. 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. The applicant has demonstrated that there is an available source of American oysters (*Crassostrea virginica*) and European oysters (*Ostrea edulis*) to be cultured for the lease site.
- g. The aquaculture activities proposed for this site will not result in an unreasonable impact from light at the boundaries of the lease site.
- h. The aquaculture activities proposed for this site will not result in an unreasonable impact from noise at the boundaries of the lease site.
- i. The aquaculture activities proposed for this site will comply with the visual impact criteria contained in DMR Regulation 2.37(1)(A)(10).
- j. Accordingly, the evidence in the record supports the conclusion that the proposed aquaculture activities meet the requirements for the granting of an aquaculture lease set forth in 12 M.R.S.A. §6072.

5. DECISION

Based on the foregoing, the Commissioner grants the requested lease of 22.04 acres to Bar Harbor Oyster Co., LLC for ten years for the purpose of cultivating American oysters (*Crassostrea virginica*) and European oysters (*Ostrea edulis*) using suspended culture techniques. The lessee shall pay the State of Maine rent in the amount of \$100.00 per acre per year. The lessee shall post a bond or establish an escrow account pursuant to DMR Rule 2.40 (2) (A) in the amount of \$5,000.00, conditioned upon performance of the obligations contained in the aquaculture lease documents and all applicable statutes and regulations.

6. CONDITIONS TO BE IMPOSED ON LEASE

The Commissioner may establish conditions that govern the use of the lease area and impose limitations on aquaculture activities, pursuant to 12 MRSA §6072 (7-B).⁵ 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.

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

The following conditions shall be incorporated into the lease:

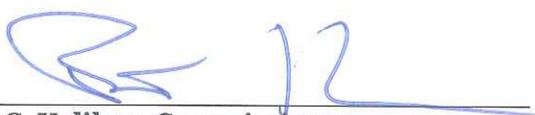
- a. The lease site must be marked in accordance with both U.S. Coast Guard requirements and DMR Rule 2.80.
- b. Other public uses that are not inconsistent with the purposes of the lease are permitted within the lease boundaries.

7. REVOCATION OF LEASE

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

Dated:

September 1, 2016


Patrick C. Keliher, Commissioner,
Department of Marine Resources