

STATE OF MAINE

DEPARTMENT OF MARINE RESOURCES

IN THE MATTER OF THE APPLICATION OF)
GAY ISLAND OYSTERS, INC. FOR AN) FINDINGS OF FACT,
AQUACULTURE LEASE LOCATED IN THE) CONCLUSIONS OF LAW
MEDUNCOOK RIVER, CUSHING,) AND DECISION
KNOX COUNTY, MAINE)

On December 3, 2004 Gay Island Oysters, Inc. of Cushing, Maine applied for an aquaculture lease totaling 0.12 acre in the coastal waters of the State of Maine, located in the Meduncook River, Cushing, Knox County, Maine. The applicant requested the lease for a term of ten (10) years for the purpose of cultivating American oysters (Crassostrea virginica) using suspended culture techniques. The application was accepted as complete on December 31, 2004 and as amended on July 13, 2005. A public hearing on this application was held on October 4, 2005 at 6:00 p.m. in Cushing. Intervenor status was granted to riparian landowner James Tower¹.

Approval of aquaculture leases is governed by 12 M.R.S.A. §6072. This statute provides that a lease may be granted by the Commissioner of the Department of Marine Resources (DMR) if it is determined that, taking into consideration the number and density of aquaculture leases in an area, the project will not unreasonably interfere with the ingress and egress of riparian owners; navigation; fishing or other uses of the area; significant wildlife habitat and marine habitat or the ability of the site and surrounding marine and upland areas to support ecologically significant flora and fauna; or the public use or enjoyment within 1,000 feet of a beach, park, docking facility or certain conserved land owned by the Federal

¹ Mr. Tower recently acquired property within 1,000 feet of the proposed lease and was therefore unknown to the applicant and the Department when hearing notices were sent out to the riparian landowners. When Mr. Tower informed the Department on September 21, 2005 that he was a riparian landowner, he was given the option of having the hearing postponed or going forward with the hearing and having 30 days after the hearing in which to provide comments. Mr. Tower chose the latter option. He attended the hearing and was given until November 7, 2005 to submit written comments.

Government, the State Government, or a municipal governmental agency. 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.

Evidence Introduced Concerning the Nature

and Impact of the Proposed Lease

The evidentiary record before the Department regarding this lease application includes the Department file (Exhibit 1), including the application (Exhibit 2), the Department site report (Exhibit 3), and the record of the October 4, 2005 public hearing. At the public hearing, testimony was given by the applicant Robert Lynde, the Department's Aquaculture Environmental Coordinator Jon Lewis, Intervenor James Tower and three members of the public.

According to the application, the proposed lease is sought to raise American oysters on a lease site totaling 0.12 acre, for a lease term of ten (10) years. The applicant testified that he currently grows oysters on a lease site further off shore, near Gay Island. He stated that the proposed site has good water flow, is nutrient-rich and has less salinity than the Gay Island lease. According to the applicant, growing the juvenile oysters on the proposed lease site before transferring them to the Gay Island lease would take one year off of the growing cycle. The proposed lease activities would consist of growing juvenile oysters in two 12' x 20' tidal upwellers, and then relocating them to the Gay Island lease site. Maximum stocking density would be between 1,000,000 and 1,500,000 oysters in different stages of growth. The applicant testified that he would be on site a few times per week for an hour or two at a time for routine maintenance and cleaning. The oysters would be placed in the upwellers in May and harvesting would occur in November. According to the applicant, there would be no power

equipment used on the lease site. The applicant does not plan to use lighting at the lease site. The floats would be made of spruce with stainless hardware. All seed shellfish would be obtained from the hatcheries of Muscongus Bay Aquaculture in Bremen, Maine and Marshall Point Sea Farm in Port Clyde, Maine.

In accordance with Department regulations, 2.10(3), the applicant provided an environmental characterization of the proposed lease area. According to this environmental characterization, the river bottom at the proposed lease site consists of mussel shells and cobble. The area is relatively flat with no vegetation. Fauna consists of mackerel, striped bass, green crabs, spider crabs, and minnows. The depths are estimated to be between 3 and 13 feet. The applicant included a letter from the Maine Department of Inland Fisheries and Wildlife with his application. According to Regional Wildlife Biologist Keel Kemper, the proposed lease is not located within an Essential or Significant Wildlife Habitat.

According to the application, there is minimal fishing in the area of the proposed lease. The applicant submitted letters from the Friendship and Cushing Harbormasters with his application. According to the Harbormasters, the proposed lease would have no effect on boat traffic. Additionally, they stated that there is very limited sport fishing and no moorings located in the area of the proposed lease.

The Department's Aquaculture Environmental Coordinator (AEC) conducted a site visit at the proposed lease area on June 24, 2005. During the site visit, a visual survey of the bottom characteristics and local flora and fauna was conducted. The site visit occurred shortly after low tide and therefore the water depths were too shallow for SCUBA diving and underwater video collection. The AEC created a site report summarizing the information obtained during the site visit and provided testimony regarding the site report at the public hearing. The AEC testified that the area of the proposed lease is not well-charted because it is far up river. Therefore, the location as depicted on the chart in his report and in the application is different from the actual location on the water. He stated that the coordinates in the

application are the correct location and thus the best way to ascertain where the site is located is to view it on the water². He also indicated that it was up to the shoreland property owners to determine where their property lines were located in relation to the proposed lease site as he did not observe any visual property line markers during his site visit.

According to the AEC's report, the proposed site is located in the upper reaches of the Meduncook River in water depths ranging approximately from 3-4 feet at low water. According to the AEC's report, the bottom consists of cobble and shell hash. Eel grass was observed on the intertidal mudflats, but not within the proposed lease site. Local fauna observed at the proposed lease site includes an occasional hermit crab, common periwinkle, and blue mussel. In addition, the surrounding area is heavily used by a variety of animal species, such as shorebirds, waterfowl, eagles, osprey, crows, deer, moose, raccoons, foxes, river otters and seals. According to the AEC, the proposed activities should not have any significant impact on the continued use of the area by these species.

According to the AEC, the proposed activities will not interfere with navigation or riparian ingress and egress. The proposed lease site is located approximately 25 feet from the mudflats to the east and approximately 265 feet from the western shore. According to the AEC, the issuance of a 50-foot wide lease would not interfere with the types of navigation that would be anticipated in the area of the proposed lease. No moorings or docks were observed within the area of the proposed lease site. According to the AEC's report, future moorings are unlikely to be placed within the vicinity of the proposed lease site as there are no houses or docks along the immediate shoreline. Additionally, the AEC testified that the presence of eel grass on the adjacent mudflats would likely preclude the construction of a dock near the proposed lease site.

² Due to inaccurate charting and questions from members of the public regarding the actual location of the proposed lease site, on October 6, 2005 the AEC placed 4 corner markers in the water which accurately showed the lease location. Members of the public were given until November 7, 2005 to provide additional comments after viewing the lease location on the water.

According to the AEC's report, no fishing activity was observed within the boundaries of the proposed lease site during the site visit. Approximately 25 lobster buoys were located outside of the lease boundaries, in the middle of the channel. According to the AEC, the nearest aquaculture lease is the applicant's Gay Island lease, which is located approximately 2.7 miles to the south southwest of the proposed site. According to the AEC's report the proposed lease is located in an area classified as open for the harvest of shellfish by the Department's Water Quality Division.

Intervenor James Tower and 2 other riparian landowners testified at the hearing and submitted written comments. They commented that they were unclear of precisely where the lease site would be located and are concerned regarding the proximity of the eel grass bed to the proposed lease site.

Riparian landowner Tom Duggan testified regarding the proposed lease. He stated that he was present during the site visit and therefore is familiar with the location of the proposed site. According to Mr. Duggan, although it is a congested area, upwellers are suitable in the proposed location. He stated that the upwellers would actually aid navigation by helping navigators locate a nearby rocky outcropping by its relation to the upwellers. In Mr. Duggan's opinion, he believed the proposed site was located in front of his property. He noted that none of the landowners are sure about where their property lines are located.

Findings of Fact

The proposed lease site is located in the upper reaches of the Meduncook River in water depths ranging approximately from 3-15 feet. There are no docks or moorings located in the area of the proposed lease. The proposed lease site is located approximately 25 feet from the mudflats to the east and approximately 265 feet from the western shore. This is a sufficient amount of open water for the type of navigation that would occur in the upper reaches of the river. Letters from the Friendship and Cushing Harbormasters submitted with the application indicate that the proposed lease would have no effect on boat traffic. Based

on this evidence, I find that the lease will not unreasonably interfere with navigation or the ingress and egress of riparian owners.

Limited lobster fishing occurs outside the proposed lease in the channel. The nearest existing aquaculture lease is located 2.7 miles from the proposed lease site. The area of the proposed lease is classified as “open” for the harvest of shellfish. Letters from the Friendship and Cushing Harbormasters submitted with the application indicate that there is very limited sport fishing in the area of the proposed lease. I find that the proposed lease will not unreasonably interfere with fishing or other uses of the area.

The bottom of the proposed lease site consists of cobble and shell hash. Local fauna consists of mackerel, striped bass, green crabs, spider crabs, minnows, hermit crabs, common periwinkles, and blue mussels. In addition, the surrounding area is heavily used by a variety of animal species, such as shorebirds, waterfowl, eagles, osprey, crows, deer, moose, raccoons, foxes, river otters and seals. The proposed activities should not have any significant impact on the continued use of the area by these species. Eel grass is located on the intertidal mudflats, but not within the proposed lease site. The proposed lease site is not located within an Essential or Significant Wildlife Habitat. Based on this evidence, I find that the proposed activities will not unreasonably interfere with significant wildlife habitat and marine habitat or with the ability of the site and surrounding marine and upland areas to support ecologically significant flora and fauna.

All seed shellfish will be obtained from the hatcheries of Muscongus Bay Aquaculture in Bremen, Maine or Marshall Point Sea Farm in Port Clyde, Maine. Based on this evidence, I find that there is an available source of American oysters.

The proposed lease site is not located within 1,000 feet of any public beaches, parks, docking facilities, or conserved land. Based on this evidence, I find that the proposed lease site activities will not unreasonably interfere with public use or enjoyment within 1,000 feet of a

beach, park, docking facility or certain conserved land owned by the Federal Government, the State Government, or a municipal governmental agency.

No power equipment or lights would be used on the lease site. I find that the proposed lease will not result in an unreasonable impact from noise or lights at the boundaries of the lease site.

The lease site would contain two 12' x 20' upweller floats which are comprised of spruce with stainless hardware. I find that the proposed lease will comply with visual impact criteria.

Conclusions of Law

Based on the above findings, taking into consideration the number and density of aquaculture leases in the area, 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;
4. The aquaculture activities proposed for this site will not unreasonably interfere with significant wildlife habitat and marine habitat or with the ability of the site and surrounding marine and upland areas to support ecologically significant flora and fauna;
5. The applicant has demonstrated that there is an available source of American oysters;
6. The aquaculture activities proposed for this site will not unreasonably interfere with public use or enjoyment within 1,000 feet of a beach, park, docking facility or certain conserved land owned by the Federal Government, the State Government, or a municipal governmental agency;
7. The aquaculture activities proposed for this site will not result in an unreasonable impact from noise or lights at the boundaries of the lease site; and
8. The aquaculture activities proposed for this site will be in compliance with visual impact criteria.

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

Decision

Based on the foregoing, the Commissioner grants the applicant's requested aquaculture lease of 0.12 acre from the date of this decision for the purpose of cultivating American oysters (Crassostrea virginica) using suspended culture techniques. The applicant shall pay the State of Maine rent in the amount of \$100.00 per acre per year. The applicant shall post a bond or establish an escrow in the amount of \$5,000 conditioned upon their performance of the obligations contained in the aquaculture lease documents and all applicable statutes and regulations.

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. 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 aquaculture law.

The following conditions are placed on this lease:

- (1) navigation, lobster fishing and recreational boating and fishing shall be allowed on the open areas of the lease; and
- (2) the lease area shall be marked in accordance with U.S. Coast Guard and Department of Marine Resources regulations Chapter 2.80.

The Commissioner may commence revocation procedures if he determines that substantial aquaculture has not been conducted within the preceding year or that the lease activities are substantially injurious to marine organisms. If any of the conditions or requirements imposed in this decision, in the lease, or in the law are not being observed, the Commissioner may revoke the aquaculture lease.

Dated: _____

George D. Lapointe (Commissioner)

Department of Marine Resources