

Application for Change in Gear Authorization  
Maquoit Bay, Brunswick

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION**

Mere Point Oyster Company (MPOC) applied to the Department of Marine Resources (DMR) to change the gear authorization for existing standard lease MAQ MP, located in Maquoit Bay in the Town of Brunswick, Cumberland County, Maine.

**1. THE PROCEEDINGS**

The application was submitted to DMR on July 19, 2022. The application was deemed complete by DMR on October 5, 2022. Notice of the application and the 14-day public comment period were provided to other state and federal agencies, riparian landowners, the Town of Brunswick and its Harbormaster, and others on DMR's mailing list. One public comment was received in support of the gear change. The evidentiary record before DMR regarding this lease amendment application includes five exhibits (see exhibit list below).

**LIST OF EXHIBITS<sup>1,2</sup>**

1. Application for a change of species and gear authorization, deemed complete October 5, 2022
2. Case file for the amendment application
3. Executed lease document for MAQ MP signed February 24, 2020
4. Original lease decision signed December 19, 2019
5. Original lease application, deemed complete February 5, 2018

**2. STATUTORY CRITERIA & FINDINGS OF FACT**

Approval of standard aquaculture lease amendments is governed by 12 M.R.S.A. § 6072 and Chapter 2.44 of DMR regulations. The statute and regulations provide that the Commissioner may grant amendments for the use of specific gear, species, and/or operational modifications on an existing lease site provided the proposed changes are consistent with the findings on the underlying lease application, do not materially alter the findings of the original decision, and would not result in a change to the original lease conditions.

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<sup>1</sup> Exhibits 1-5 are cited below as: Amendment Application – “App”, Case File – “CF”, Executed lease for MAQ MP – “Exhibit 3”, DMR Decision on Lease MAQ MP - “Exhibit 4”, and Original Experimental Lease Application for MAQ MP – “Exhibit 5”.

<sup>2</sup> Page numbers are cited using the PDF page number, and not the page number written on the application.

## **A. Original Lease Decision**

On December 19, 2019, DMR granted lease MAQ MP to MPOC (Exhibit 4, page 36). DMR's Findings of Fact, Conclusions of Law, and Decision, henceforth referred to as "the original decision", found that the evidence in the record supported the conclusion that the aquaculture activities proposed by MPOC met the requirements for granting a standard aquaculture lease as set forth in 12 M.R.S.A. § 6072 (Exhibit 4, page 34).

The original decision provided authorization to cultivate American/eastern oysters (*Crassostrea virginica*), European oysters (*Ostrea edulis*), bay scallops (*Aequipecten irradians*), sea scallops (*Placopecten magellanicus*), and northern quahogs (*Mercenaria mercenaria*) using suspended culture (Exhibit 4, page 34). The decision authorized a variety of soft mesh and wire cages and three work platforms to be deployed at the lease site (Exhibit 4, page 10). The moorings authorized for the cages and bags included 75-150 lb mushroom anchors and for the work platforms 250-3000 lb blocks.

In the original decision, the Commissioner established conditions governing the use of MAQ MP, as is allowed pursuant to 12 M.R.S.A § 6072 (7-B). In the executed lease document, the lease term for MAQ MP was set for ten years, beginning on December 19, 2019 and ending on December 18, 2029 (Exhibit 3, page 1).

## **B. Proposed Changes to Gear and Findings**

The leaseholder is requesting to change all but 10 of the mushroom anchors to helical anchors. The remaining mushroom anchors will serve as service anchors if cage lines and helical anchors need to be repaired or replaced (App 6). Helical anchors are preferred by the applicant for better holding capacity and are more environmentally friendly to bottom habitat (App 6). In addition, the Brunswick Harbormaster is seeking to have all anchoring systems replaced with helical anchors by 2032 (App 6). The comment in support of the change was received from Clifford Goudey of C.A. Goudey and Associates. Mr. Goudey noted that he is a design engineer with a focus on the development of aquaculture systems (CF, Goudey Letter). Mr. Goudey's letter did not raise any objections to the proposed change but suggested that helical anchors may be more suitable for marine farm operations when compared to mushroom anchors.

Originally, the lease authorized the use of various soft mesh and wire cages suspended on the surface of the water and deployed on the bottom (Exhibit 4, page 10). Operations are broken into four sections, separated by navigational corridors: 1) grow-out/overwintering area with floating and bottom cages, 2) intermediate area with floating cages and work floats for tumbling, sorting, and defouling, 3) experimental area with bottom cages, and 4) nursery area with floating bags (Exhibit 4, pages 11, 12).

As DMR Rule Chapter 2.44 (1) states that "the Commissioner shall not amend a lease in such a way that it materially alters the findings of the original decision, or would result in a change to the original lease conditions", this amendment proposal will be considered in light of the original decision and lease conditions.

The current application proposes to replace all but 10 mushroom anchors with 39" x 10" x 10" helical anchors (App 12). The helical anchors will remain in the water year-round and are made of steel and

metal (App 5 and 6). The work float anchors will not be changed to helical anchors. The ten remaining mushroom anchors will be kept on site to be used as service anchors if a helical anchor needs to be replaced. The service mushroom anchors would be a temporary holding point (in roughly the same location as the failed helical) while a new helical anchor is installed. When not in use, the mushroom anchors will be stored on land (CF, Niven/White email).

Given this, and because the gear change proposed in this amendment application, which would result in the use of helical anchors in place of most mushroom anchors, is very similar to operations in the original decision, and because no public comments raising concerns with the proposal were received by the Department, the proposed change is consistent with the findings on the underlying lease application and would not materially alter the findings of the original decision.

### **3. CONDITIONS**

The following conditions that were imposed on the original lease for MAQ MP remain in place:

- a. The lease site must be marked in accordance with both U.S. Coast Guard requirements and DMR Rule 2.80.
- b. The 400-foot navigational corridor shall be clearly marked and kept free of all aquaculture gear, moorings, and structures.
- c. In compliance with applicable laws, recreational fishing and hunting is permitted within the boundaries of the proposed lease site. Commercial fishing vessels and all other vessels will be allowed to navigate within the boundaries of the proposed lease site that do not contain surface gear.
- d. Video monitoring of the site must occur at least once between August 15 and November 1 each year. MPOC must submit the video, to DMR, within 30 days of the date video monitoring occurs. The geographic extent of the video monitoring must include transects of all cultivation areas within the boundaries of the proposed site. The video must be a continuous recording under each section of the longest axis of all gear.
- e. In consideration of the video monitoring, DMR may require MPOC to conduct additional monitoring of the lease site.
- f. Other public uses that are not inconsistent with the purposes of the lease are permitted within the lease boundaries.

The proposed change to helical anchors would not violate any of the conditions listed above. According to the applicant, the remaining mushroom anchors would be kept on land. In consideration of condition 'b', when on site the remaining mushroom anchors cannot be kept in the navigational corridor.

**4. DECISION**

Based on the foregoing, the Commissioner grants the request from MPOC for the authorization to use helical anchors on MAQ MP, deployed in the manner described in section 2.B.

Dated: 1/18/23



**Patrick C. Keliher, Commissioner  
Department of Marine Resources**

**STATE OF MAINE  
DEPARTMENT OF MARINE RESOURCES**

**Mere Point Oyster Company, LLC**

Standard Aquaculture Lease Application  
Suspended Culture of Shellfish  
Maquoit Bay, Brunswick

**MAQ MP**

December 19, 2019

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION**

Mere Point Oyster Company LLC (MPOC), a Maine company, applied to the Department of Marine Resources (DMR) for a ten-year standard aquaculture lease on 39.84 acres.<sup>1</sup> The proposed site is in Maquoit Bay, Brunswick, Cumberland County, Maine and is for the suspended culture of American/eastern oysters (*Crassostrea virginica*), European oysters (*Ostrea edulis*), bay scallops (*Aequipecten irradians*), sea scallops (*Placopecten magellanicus*), and northern quahogs (*Mercenaria mercenaria*).

**1. THE PROCEEDINGS**

**A. Pre-Hearing:**

The pre-application meeting was held on July 17, 2017, and the scoping session was held on September 11, 2017. DMR accepted the application as complete on February 5, 2018. Notice of the completed application was provided to the Town of Brunswick, including the Town of Brunswick Commander of Patrol, and Shellfish Warden.<sup>2</sup> Notice of the completed application was also provided to other state and federal agencies for their review. The DMR site report was completed on August 1, 2018.

Prior to the first public hearing, several individuals and entities either applied for intervenor status, or indicated to DMR that they intended to apply for intervenor status.<sup>3</sup> Given the anticipated complexity of issues

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<sup>1</sup> The applicant originally requested 40 acres. DMR calculations, based on the coordinates in DMS format provided by the applicant, indicate the area is 39.84 acres.

<sup>2</sup> Commander of Patrol, Thomas Garrepy is listed as the point of contact for the Habormaster and Shellfish Warden.

<sup>3</sup> The initial public hearing on the proposal was originally scheduled for October 18, 2018, at the Brunswick Town Hall. DMR provided public notice of this hearing in accordance with applicable rules and statutes. However, the October hearing was cancelled due to logistical issues. The original notice contained instructions and a deadline to apply for intervenor status. Some individuals submitted their application for intervenor status before or during the timeframe specified in the original notice. The Department kept these applications on file and notified the respective individuals of the hearing cancellation. Notice of the November hearing dates and locations were processed in accordance with applicable laws and regulations. Notice of the November hearings also contained a new deadline for intervenor applications. After the close of the intervenor deadline, DMR reviewed all applications received and decided on intervenor status within the deadline specified in the notice for the November hearings.

and volume of exhibits, DMR held a prehearing conference on October 22, 2018. The conference considered issues such as deadlines for the exchange and submission of witness lists, pre-marking and exchange of proposed exhibits, intervention, and other matters pertaining to the conduct of the hearing. On October 25, 2018, DMR issued a procedural order detailing the conduct of the hearing and specifying the submission of pre-filed testimony, exhibits, and objections among other considerations.

On November 6, 2018, DMR issued a final decision on intervenor applications and notified all applicants accordingly. In accordance with Chapter 2.20(3)(A) of its rules, DMR granted limited intervenor status to the six individuals and two entities that applied for intervenor status. Limited, as opposed to full intervenor status, was granted to these individuals and entities based on the review of their applications. DMR determined that the applicants did not demonstrate they would be substantially and directly affected by the lease proposal, if it were to be granted. The applicants raised concerns that would be held by the public in general. Although none of the applications merited full intervenor status, DMR did find that participation as a limited intervenor was warranted as some of the issues raised by applicants were pertinent to DMR’s consideration of the proposal.

The limited intervenors were consolidated into two groups, which DMR designated: “Concerned Citizens of Maquoit Bay” (CCMB) and “Commercial Fishermen.” Table 1 provides an overview of the individuals and entities assigned to each DMR designated group.

**Table 1:** Limited intervenor groups

Concerned Citizens of Maquoit Bay (CCMB)	Commercial Fishermen
Mark Wyman, Patricia Rathbone, Nicholas Rathbone, Andrew Powers, Maquoit Bay LLC (Paul and Kathleen Dioli), Maquoit Bay Preservation Group, David and Susan Clark	Thomas Santaguida and John Powers

Limited intervenors were assigned to these groups based on the similarity of concerns they raised in their respective applications. In accordance with Chapter 2.20(3)(C), DMR determined that consolidation was necessary to avoid repetitive testimony, evidence, or questioning. Consolidation also provided an orderly and efficient way for similar interests to be represented during the proceedings.

**B. Pre-Hearing Filings<sup>4</sup> and Issues:**

The procedural order issued on October 25, 2018 required parties to pre-file a concise statement of issues. In their pre-filings and during the November 15, 2018, public hearing CCMB raised several objections, which are addressed below.<sup>5</sup>

<sup>4</sup> All pre-filings submitted by the limited intervenors were entered as exhibits and testimony during the respective public hearings noted on the exhibit list.

<sup>5</sup> The arguments CCMB made in their pre-filings were also incorporated by reference in their closing arguments.

**Conflict of Interest.** The applicant is represented by Daniel Devereaux and Douglas Niven. At the time the application was under consideration by DMR, Mr. Devereaux was also the harbormaster for the Town of Brunswick. The statutes and regulations governing the aquaculture lease process provide municipalities with several opportunities to review and provide feedback on the proposal. Some of the regulations concerning the lease review process reference obtaining input from the municipal harbormaster.

CCMB alleges, in part, that “the harbormaster here is the applicant and participated in the process to advance the private and commercial interest of the industrial scale lease, rather than protection the competing public uses of the area” (Exhibit 46, pg. 3). CCMB argues that granting the lease would be unconstitutional, because the applicant supplanted the pre-application procedures in violation of the public trust doctrine.<sup>6</sup>

Pursuant to 12 M.R.S.A. §6072(1), DMR has the exclusive authority to lease areas in, on and under coastal waters, including the public lands beneath those waters and portions of the intertidal zone. Although the state has exclusive authority to grant leases, municipalities are routinely consulted and are invited to participate throughout the leasing process. Prior to filing a lease application, Chapter 2.07(1) requires an applicant to attend a pre-application meeting with “DMR staff and the harbormaster(s) and/or a municipal officer(s) or other designee(s) of the municipality(ies) in which the proposed lease is located to discuss the proposed application.” The pre-application meeting was held on July 17, 2017 and attended by DMR staff, Mr. Devereaux, and Douglas Niven. At the pre-application meeting, Mr. Devereaux indicated that John Eldridge, Brunswick Town Manager, would assume any duties related to the evaluation of the lease proposal.<sup>7</sup> After the pre-application meeting Mr. Devereaux clarified, via email, that Thomas Garrepy, Town of Brunswick Patrol Commander, would review the proposal and that DMR should send relevant notices to Commander Garrepy.<sup>8</sup>

After a pre-application meeting, Chapter 2.07(2) requires the applicant to hold a scoping session, or public meeting in the municipality where the proposed standard lease is located. At the time the scoping session was held, the applicant and DMR staff were required to attend the scoping session.<sup>9</sup> The meeting is an opportunity for DMR and other interested stakeholders to learn more about the proposal. DMR is required to provide personal notice of the scoping session to the municipality and any riparian landowners within 1,000 feet of the proposal. As there were no riparian landowners within 1,000 feet of the proposal, DMR provided personal notice of the

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<sup>6</sup> CCMB also raised arguments related to the issuance of Limited Purpose Aquaculture (LPA) licenses. However, those arguments are not germane to the proposal under consideration.

<sup>7</sup> Case File (“CF”): Pre-Application Meeting Notes

<sup>8</sup> CF: Email from D. Devereaux to A. Ellis and C. Burke dated August 2, 2018.

<sup>9</sup> DMR modified the Aquaculture regulations (Chapter 2) during the winter of 2019. The changes became effective on April 1, 2019. References to Chapter 2 of DMR’s regulations reflect those regulations that were in effect while the application was being processed.

meeting solely to municipal officials in the Town of Brunswick. Notice of the scoping session was also published in the *Times Record* on September 6, 2017.<sup>10</sup> The scoping session was held on September 11, 2017. DMR staff, a representative from the U.S. Army Corps of Engineers (USACOE), and the applicants were the only persons in attendance.<sup>11</sup>

Following the scoping session, DMR received an application from MPOC on November 21, 2017. After two completeness reviews, the final application was deemed complete on February 5, 2018. Notice of the completed application was provided to the municipality, including Thomas Garrepy. DMR sent a Harbormaster Questionnaire to Mr. Garrepy to review and complete. The Harbormaster Questionnaire requests local information about how the proposal may affect designated or traditional anchorages, navigation, fishing, and other considerations related to the lease decision criteria. On March 19, 2018, DMR received a completed Harbormaster Questionnaire from Mr. Garrepy. However, Mr. Garrepy requested that DMR also send a Harbormaster Questionnaire to the Marine Patrol Officer (MPO) assigned to the area to avoid any conflicts of interest to his review as Mr. Garrepy was Mr. Devereaux's superior. DMR sent the Harbormaster Questionnaire to Curtis LaBelle, the Marine Patrol Officer (MPO) assigned to the area and to Robert Beal the Marine Patrol Sergeant that oversaw Section 2.<sup>12</sup> MPO LaBelle completed a review on March 27, 2018 and Sergeant Beal completed a review on October 2, 2018.

On October 9, 2018, DMR notified the Brunswick Town Manager that a pre-hearing conference on the application was scheduled for October 22, 2018.<sup>13</sup> The notice included pertinent details related to the purpose and function of the pre-hearing conference. However, no representative from the municipality attended. DMR also provided the municipality with personal notice of the public hearings and the opportunity to request intervenor status as required by statute and regulation. DMR is required to grant the municipality intervenor status upon request. Regardless of whether intervenor status is requested, municipal representatives may provide testimony at the public hearing and question witnesses. However, the municipality did not request intervenor status, or offer testimony at the public hearing.

The aquaculture laws do not require the municipality to participate in the leasing process and they do not mandate that a harbormaster or other municipal representative complete a review of the proposal. Rather, participation in the leasing process is at the discretion of the municipality, which would also have the authority to

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<sup>10</sup> The scoping session was originally scheduled for August 29, 2017 with the notice published on August 14, 2017 in the *Times Record*. However, that session was cancelled. Notice of the cancellation was published in the *Times Record* on August 25, 2017. Notice of the cancellation indicated that "The scoping session will be rescheduled, and notice posted in the *Times Record*."

<sup>11</sup> CF: Email from J. Lewis to D. Kallin dated September 17, 2018

<sup>12</sup> Section 2 is an area that extends from Freeport to Bremen.

<sup>13</sup> CF: Email from A. Ellis to J. Eldrige, Brunswick Town Manager, et al. regarding the prehearing conference. Email dated October 9, 2018.



decide who represents their interests should they decide to participate. The procedural history demonstrates that DMR complied with applicable municipal notice requirements and obtained local feedback on the proposal from someone other than Mr. Devereaux.

Furthermore, the authority given by law to DMR to lease subtidal coastal waters for aquaculture is exclusive within the state. It precludes all jurisdiction other than that of the federal government, with certain exceptions.<sup>14</sup> It also precludes the jurisdiction of other state agencies and, with a limited exception not applicable here, municipalities.<sup>15</sup> With regard to the lease application in this case, Brunswick municipal officials, including harbor masters, do not have the authority to grant or deny the lease. A review of the procedural history, in consideration of DMR's authority to grant leases, does not support CCMB's assertion that MPOC supplanted DMR's leasing procedures in violation of the public trust doctrine.

**Notice.** CCMB alleges that DMR failed to provide notice of the lease application to the Maine Department of Environmental Protection (MEDEP) in accordance with 12 M.R.S.A. §6072(6)(C). This provision specifies that MEDEP, in addition to other state agencies, "must be notified of all lease applications." In this case, DMR provided notice to MEDEP of the lease application and the public hearings. Notice of the application and hearings was provided to MEDEP via DMR's aquaculture list-serve.<sup>16</sup> On November 15, 2018, MEDEP sent a letter to DMR indicating that they had reviewed the application and site report (Exhibit 4). The letter also indicated that the applicant would not be required to obtain a Maine Pollutant Discharge Elimination System (MEPDES) permit/Maine Waste Discharge License (WDL) from DEP. Thus, DMR provided notice of the lease application to MEDEP and they reviewed the proposal.

In addition, CCMB alleges that the proposed lease site was not marked in accordance with Chapter 2.05(5) and 2.27(1)(A). CCMB argues that these provisions require the site be marked during the period of the DMR site review and 30 days prior to any public hearing. According to CCMB, the site was never marked during the summer months when the proposal would have been under consideration by DMR and that DMR should have required marking during the summer months. CCMB alleges that failure to mark the site constitutes a lack of notice. Chapter 2.27(1)(A) pertains to the DMR site review and provides: "An inspection of the proposed aquaculture site and the immediate surrounding area will be conducted by the Department. The site must be marked as referenced in

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<sup>14</sup> For example, DMR's authority precludes jurisdiction by MDEP under the Natural Resources Policy Act, but aquaculture projects that meet the definition of discharge are subject to MPDES permits.

<sup>15</sup> As required by law other state agencies are notified of aquaculture lease applications and they are asked to review and comment on the proposals. Municipalities are routinely consulted and are encouraged to participate throughout the leasing process. Consent of the municipal officers is required for leases proposed in intertidal waters in municipalities with a shellfish conservation ordinance see 12 M.R.S. § 6072(3).

<sup>16</sup> CF: See GovDelivery address reports that include the email address for Gregg Wood, who reviews aquaculture lease proposals on behalf of MEDEP. The completed application was provided to Mr. Wood on February 15, 2018.

Chapter 2.10(5) by the applicant.” Chapter 2.10(5) specifies: “At least 30 days prior to the proposed hearing date, the applicant shall place visible markers which delineate the area proposed to be leased.”

The marking requirement in Chapter 2.27(1)(A) incorporates by reference the provisions of Chapter 2.10(5), which specifies that marking must be in place at least 30 days prior to the public hearing. DMR has interpreted these regulations to mean that standard lease applicants are only required to mark the proposed site at least 30 days before the public hearing. Standard lease proposals do not need to be marked during the period of the DMR site review, or during the summer months as CCMB suggests. DMR believes that its interpretation is reasonable, because site reviews are conducted at a time of year that DMR determines appropriate to adequately evaluate the proposed site in consideration of the proposed operations, and according to staff availability.

In this case, the first public hearing on the proposal was held on November 15, 2018. The applicant testified that the proposed site was marked with buoys on October 14, 2018. Paul and Kathie Dioli testified that on October 21, 2018 the proposed lease site was marked (Exhibit 46b). Mr. Santaguida, a limited intervenor, testified that the proposed site was marked in mid-October (Santaguida/Kallin). Therefore, it appears that the site was marked by the applicant at least 30 days prior to the November 15, 2018 public hearing in accordance with Chapter 2.10(5).

**Procedural due process.** CCMB argues that DMR exceeded its authority by consolidating individual intervenors; prohibiting them from presenting their separate concerns or interests. CCMB further believes that DMR imposed unreasonable deadlines on the intervenors regarding their pre-filings. Specifically, CCMB alleges that they had less than 24 hours’ notice that a single unified filing rather than individual filings would be accepted by DMR.

On October 22, 2018, DMR held a prehearing conference and informed those present that the consolidation of intervenor applicants with like interests would be a possibility. DMR’s intent to consolidate was reiterated in the procedural order issued on October 25, 2018. On November 6, 2018, DMR issued decisions on intervenor applications and sent each applicant a letter. Limited intervenor status was granted in accordance with Chapter 2.20(3)(A) and for the reasons described in section 1(A) of this decision. In the letter issued on November 6, 2018, DMR described how limited intervenors were permitted to participate in the process. The letter explained that the limited intervenors had been consolidated into two groups and it provided the contact information of each individual and entity assigned to the respective group. DMR also noted that group members had broad discretion in structuring their participation in compliance with the procedural order.

Pursuant to the procedural order, the parties were required to submit their pre-filings no later than 12 p.m. on November 9, 2018. On November 8, 2018 Patricia Rathbone, a limited intervenor consolidated to CCMB, emailed DMR her pre-filed statement. DMR responded to Ms. Rathbone, and all other limited intervenors with the following:

Intervenor groups need to submit their proposed exhibits, testimony, etc. as a single filing, not as a filing from each individual member. Please be advised that materials need to be submitted in accordance with the procedural order.<sup>17</sup>

On November 8, 2018, Attorneys Mills and Kallin, who attended the prehearing conference and were provided with copies of the procedural order, raised objections to DMR's characterization of the procedural order in its response to Ms. Rathbone. Ms. Mills represents Maquoit Bay Preservation Group and Mr. Kallin represents Maquoit Bay, LLC (Paul and Kathie Dioli). They expressed a belief that submitting a consolidated joint filing by the November 9, 2018 deadline would be unduly burdensome. Ms. Mills and Mr. Kallin also expressed a belief that consolidation would violate attorney conduct rules as they would be "forced to give legal advice and make filing on behalf of individuals [they] do not represent."<sup>18</sup> Ms. Mills and Mr. Kallin also requested that the pre-filing deadline be extended to November 13, 2018.

On November 9, 2018, DMR issued a letter to all parties that clarified the procedural order and extended the pre-filing deadline to 11:59 p.m. on November 9, 2018.<sup>19</sup> The October 22, 2018, prehearing conference and subsequent procedural order put all persons on notice that consolidation was a possibility and that they would be expected to coordinate their efforts to avoid repetitive filings. The letters concerning intervenor status noted that limited intervenors had been consolidated into two groups. DMR never specified, nor did it expect attorneys Kallin or Mills to represent other individuals that are part of the consolidated group. Instead, the expectation was that the respective group members coordinate their participation and filings in compliance with the procedural order.

In accordance with Chapter 2.20(3)(C), DMR believed that consolidation was necessary and appropriate to avoid repetitive testimony, evidence, or questioning. Consolidation did not deny or limit the participation of the individuals and entities that were granted limited intervenor status. For example, the joint filings of CCMB contained the testimony of several individuals including Mark Wyman, Nick Rathbone, Maquoit Bay LLC (Paul and Kathie Dioli) among others.<sup>20</sup> These respective individuals and entities were able to present their respective concerns and interests in an orderly and efficient manner as part of a consolidated limited intervenor group.

**Discharge application.** CCMB argues that on-site power washing, storing gas in the tank of a generator, and refueling the generator on-site means that there will be a "discharge of pollutants" within the meaning of DMR regulation 2.05(1)(G), the Clean Water Act, and the Maine Pollutant Discharge Elimination System (MEPDES)

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<sup>17</sup> CF: Email from P. Rathbone to A. Ellis et al. dated November 8, 2018. Email from A. Ellis to P. Rathbone et al. dated November 8, 2018.

<sup>18</sup> CF: Email from D. Kallin to DMR et al. dated November 8, 2018. Email from S. Mills to DMR et al. dated November 8, 2018

<sup>19</sup> CF: Letter from A. Ellis to all parties clarifying the procedural order.

<sup>20</sup> All parties to the proceeding agreed to admit all pre-filings, including testimony, into the record on the dates noted in the exhibit list.

discharge rule.<sup>21</sup> CCMB maintains that the proposal should be considered a discharge application and be denied because it does not meet the rules or standards for a discharge application.

DEP has jurisdiction over MEPDES permitting<sup>22</sup> and Maine Waste Discharge Licenses (WDL). On February 15, 2018, DMR provided DEP with a copy of MPOC's completed lease application. In a letter dated November 15, 2018, DEP acknowledged receipt and review of MPOC's application (Exhibit 4). The application detailed MPOC's operational plans, including power washing. In their review of the application, DEP determined that MPOC did not need to obtain a MEPDES or WDL (Exhibit 4). However, DEP did recommend that DMR consider conditioning the lease, so that MPOC would be required to periodically conduct benthic infauna monitoring (Exhibit 4). Monitoring recommendations are discussed in section 3.D of this decision.

For the purposes of the aquaculture leasing and licensing program, DMR regulation 2.05(1)(G) defines discharge as "any spilling, leaking, pumping, pouring, emptying, dumping, disposing or other addition of any pollutant including, but not limited to, the addition of feed, therapeutants or pesticides to the waters of the State." This definition is intended to conform with DEP's definition of discharge in 38 M.R.S.A §361-A(1).<sup>23</sup> Power washing organic materials, refueling equipment on the site, or the presence of gas within the tank of a generator does not meet the definition of a discharge under Chapter 2.05(1)(G). DMR reviewed MPOC's application and deemed it complete. Therefore, DMR determined that the proposed activities did not meet the definition of a discharge and the proposal was processed as a non-discharge application.

### C. Public Hearings

Public hearings were held on November 15, 2018, November 19, 2018, and January 15, 2019. Notice of the November hearings were published in the *Times Record* on October 9, 2018 and November 1, 2018. Notice was also published in the November 2018 edition of *Commercial Fisheries News*. Notice of the January hearing was published in the *Times Record* on December 12, 2018 and December 31, 2018. Notice was also published in the January 2019 edition of *Commercial Fisheries News*. Notice of the three hearings was also posted to DMR's

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<sup>21</sup> CCMB noted that the generator is kept on the site permanently. However, page 7 of MPOC's application indicates that the generator will be on the site during the growing season and stored within a ventilated shed. MPOC's application indicates that no gas or oil will be stored on the proposed site.

<sup>22</sup> DEP has authorization from the U.S. Environmental Protection Agency to administer the National Pollutant Discharge Elimination System (NPDES) permit program in Maine. The NPDES program is part of the Clean Water Act, which prohibits the discharge of pollutants through a point source into the waters of the U.S. unless a NPDES permit is issued. DEP determined that NPDES permit was not necessary. Therefore, it is reasonable to assume that DEP determined that the proposed activities, including power washing do not constitute a discharge of a pollutant from a point source.

<sup>23</sup> Pursuant to 38 M.R.S.A. §361-A(1) discharge is defined as "means any spilling, leaking, pumping, pouring, emptying, dumping, disposing or other addition of any pollutant to water of the State."

website and sent to: DMR's case specific email list, Zone F lobster council members, and subscribers of the aquaculture email list-serve.

Messrs. Devereaux and Niven described the proposed project and their expert witnesses testified with respect to the relevant lease criteria and standards; limited intervenors presented their concerns with the proposal; and Mr. Lewis described DMR's site visit. The applicants and their expert witnesses, the limited intervenors and their experts, and DMR were subject to questioning. Members of the public also testified in favor or opposition to the proposal and were subject to questioning by the parties. Table 2 displays the dates on which individuals provided sworn testimony.

**Table 2:** Sworn testimony provided by date and individual:

**November 15, 2018**

<b>Name</b>	<b>Affiliation</b>
Dan Devereaux and Doug Niven	Applicants, MPOC
Alyssa Novak, PhD, and Dana Smith	Expert witnesses, MPOC
Joseph DeAlteris, PhD	Expert Witness, CCMB
David Clark	Limited Intervenor, CCMB
Susan Wilson, Elizabeth Butler, Susan Olcott, and Jeanne Ramsay	Members of the Public

**November 19, 2018**

<b>Name</b>	<b>Affiliation</b>
Dan Devereaux and Doug Niven	Applicants, MPOC
Charles Wallace, P.E. and Terrence DeWan	Expert Witness, MPOC
Jon Lewis	Aquaculture Division Director, DMR
Thomas Santaguida and John Powers	Limited Intervenor, Commercial Fishermen
Stephen Loeb, Dave Moody, Albert Rose, Andrew Ulrickson, Donald Ulrickson, Andrew Washburn, Savanna Kay, James Smith, Bill Morrell, Cameron Niven, Tyler Niven, and Max Friedman	Members of the Public

January 15, 2019

Name	Affiliation
Dan Devereaux and Doug Niven	Applicants, MPOC
Paul Dioli, Andrew Powers, Patricia Rathbone, and Mark Wyman	CCMB
Marko Melendy, Kelsey Fenwick, Bill Floyd, David Brooks, William Gerencer, Jon Roger, John McElwee, Todd Smith, Hannah Grady, Stephen Walker, Brian O'Connor, Mark Verhey, Jacob Verhey, Jesse Devereaux, Derek Devereaux, Chris Heinig, Monty Vogel, Heather Merriman, Raymond Trombley, Doug Jowett, David Toothaker, Chris Burtis, Ronald Holbrook, Tommy Santaguida, Taylor Santaguida, Langdon Winner, Sue Loeb, David Treadwell, Peter Vaughn, Glenda Wyman, Anne Hayden, and James MacCloud	Members of the Public

The hearing was recorded by DMR. The Hearing Officer was Amanda Ellis. The evidentiary record before DMR includes the case file, application, site report, documents introduced at the public hearings, pre-filings that were entered into the evidentiary record at the public hearings, and the record of testimony at the respective hearings. The exhibit list is included in section 8 of this decision.<sup>24</sup>

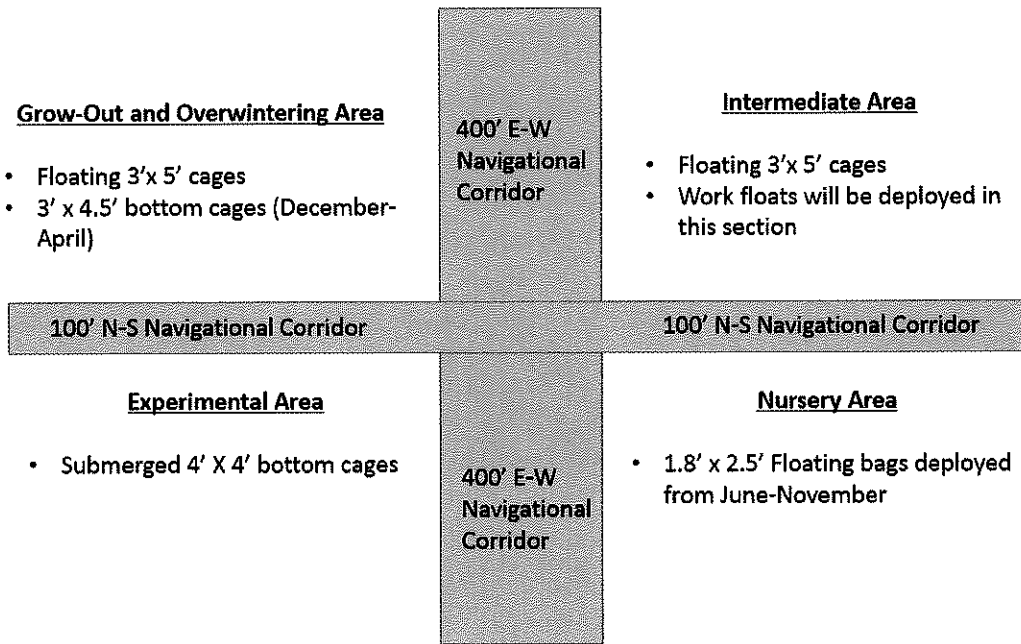
## **2. DESCRIPTION OF THE PROJECT AND PROPOSED LEASE AREA**

### **A. Proposed Operations**

The purpose of the proposed lease site is to expand existing oyster farming operations and to explore the feasibility of cultivating scallops and quahogs (App 6). Cultivation techniques include using various soft mesh and wire cages that are suspended on the surface of the water and deployed on the bottom of the proposed site (App 6). Although comprised of one continuous tract, the applicants have configured the proposed operations into four sections, separated by navigational corridors, as depicted in the figure below. One navigational corridor would be 400 feet wide and run east to west along the proposed site. The other navigational corridor would be 100 feet wide and run north to south along the proposed site.

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<sup>24</sup> In references to testimony, "Smith/Jones" means testimony of Smith, questioned by Jones.



**Figure I:** Rendering of the proposed site layout generated by DMR staff using Exhibit 5 and the application as a reference. Image not to scale.

Except for the experimental and overwintering areas, the proposed lease site will contain suspended surface gear. The power equipment proposed for the site includes the following:<sup>25</sup>

Equipment	Description	Months of Operation/Frequency of Use
10' X 20' Oyster Sorter and Tumbler	Battery powered and charged using solar power.	April-October
Water Pump	Moves large volumes of water to clean gear and equipment.	Periodically during the summer months
7,000-Watt Honda Generator	Will be utilized to power pumps and other cleaning gear.	Stored on site in ventilated shed during the growing season
Power Washers	Will be used during harvest periods.	Transported to the site and utilized as needed.

<sup>25</sup> Pages 6-7 of the application include a list of equipment proposed for the site. However, during the public hearing, the applicants noted that the wattage of the proposed generator had changed. Section 3.H of this decision describes the proposed change in wattage.

19' Carolina Skiff	Used as the primary tending vessel.	Year-round
28' Crowley Beal with hauler	The vessel and associated hauler will be used to lift and lower cages with the assistance of a commercial diver.	Primarily spring and fall
22' Grady White	Transport vessel for farm personnel.	Year-round

In addition to the equipment listed above, the applicants intend to utilize three work platforms that would measure 10' x 20' and are constructed of wood (Exhibit 8, pg. 3).<sup>26</sup> The three platforms would be aligned together in a parallel line that runs east to west (Exhibit 8 and 9).<sup>27</sup> The work platforms would be utilized primarily for the tumbling, sorting, and defouling of product. One work platform would contain a "hut" or shed that screens the tumbler and provides shade for product and workers (Exhibit 8, App 4). The platforms would be on the proposed site from April through October each year.

The applicants anticipate tending the site daily (App 5). Floating cages would be flipped to help control fouling (App 26). A power washer may also be used approximately two to three times a week from June through November (App 7). The applicants intend to harvest product year-round utilizing a variety of techniques (App 5). Product would eventually be processed at an upland facility owned by the applicant (App 8). Petroleum products would not be stored on the proposed site (App 5).

**B. Site Characteristics**

On June 15 and July 16, 2018, DMR staff assessed the proposed lease site and the surrounding area in consideration of the criteria for granting a standard aquaculture lease. The proposed lease site occupies subtidal waters in Maquoit Bay. The proposed lease site "is located on a shallow finger that extends into Maquoit Bay between two deeper channels" (SR 2). The uplands around Maquoit Bay are characterized by residential buildings

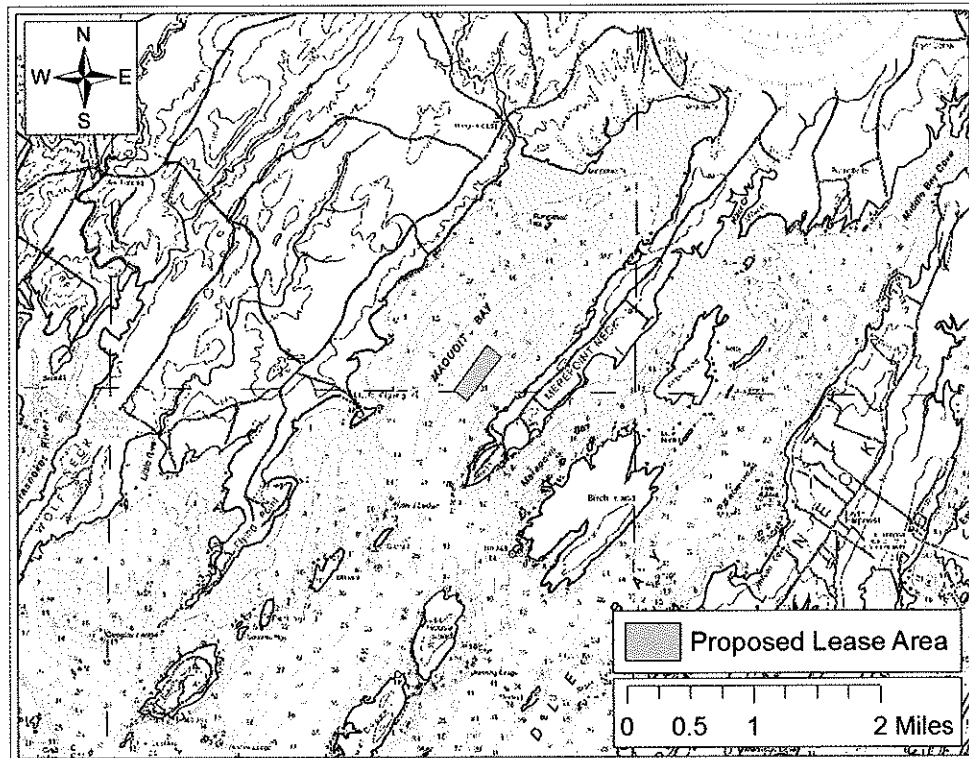
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<sup>26</sup> The dimensions of the on-site support structures differed slightly from what was contained in the application (see page 4 of the application for reference). The dimensions presented at the public hearing were smaller than what was contained in the completed application. The smaller dimensions presented at the public are what DMR considered in rendering a final decision on this proposal.

<sup>27</sup> When aligned the three platforms would measure 10' x 60' (Exhibit 8). In their response to the proposed decision, MPOC indicated that it did not intend for this to be the only alignment or configuration of the platforms. MPOC noted that they may need to utilize other configurations based on operational needs and conditions. The applicant requested that the draft decision be amended, so it does not include any limitation of the alignment or arrangement of the three platforms. DMR understands that other alignments or configurations of the three platforms may occur. However, the platforms must remain in the "intermediate area" of the proposed lease site as depicted in Figure 1.



and mixed forest (SR 2). The uplands around Merepoint Neck, which lies to the east of the proposal, are mostly residential (SR 2). Staff observed thirteen docks and a mooring field to the east of the proposed site near Merepoint Neck (SR 2). The western shoreline of Maquoit Bay contains fewer houses and is mostly wooded (SR 2).



**Figure 2:** Location of the proposed lease area within Maquoit Bay. Merepoint Neck is located to the east of the proposed lease area. Image from the site report.

Correcting to mean low water, depths at the proposed site ranged from ~9 feet along the northern and western boundaries to ~21.6 feet at the southeast corner (SR 2).

The bottom of the proposed lease site is comprised of soft mud (SR 2). The closest distance to shore, at mean low water, from the southeast corner of the proposed lease site to Merepoint Neck is ~1,160 feet (SR 6). At mean low water, the SE-NE boundary of the proposed lease site is ~730 from the nearest mooring (SR 6). The proposed lease is in an area currently classified by DMR’s Bureau of Public Health as “open/approved” for the harvest of shellfish” (SR 14).

### **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 water related 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 comply with visual impact criteria adopted by the Commissioner.

#### **A. Riparian Owners Ingress and Egress**

In accordance with 12 M.R.S.A. 6072-A(13)(A), DMR must determine whether the proposed lease would unreasonably interfere with the ingress and egress of riparian owners. Chapter 2.05(1)(C) of DMR's regulations define riparian owner as: "a shorefront property owner whose property boundaries are within 1,000 feet of the proposed lease boundaries." In this instance, there are no individuals or entities that are within 1,000 feet of the proposed lease boundaries and that meet the definition of riparian owner as specified in applicable law. Some limited intervenors who own or have an interest in property on Merepoint Neck expressed concerns about their ability to navigate to their docks and moorings. These concerns are addressed in section 3.B of this decision, which pertains to navigation.

**Therefore**, given that there are no individuals or entities that meet the definition of riparian owner, the aquaculture activities proposed for this site will not unreasonably interfere with the ingress and egress of any riparian owner.

#### **B. Navigation**

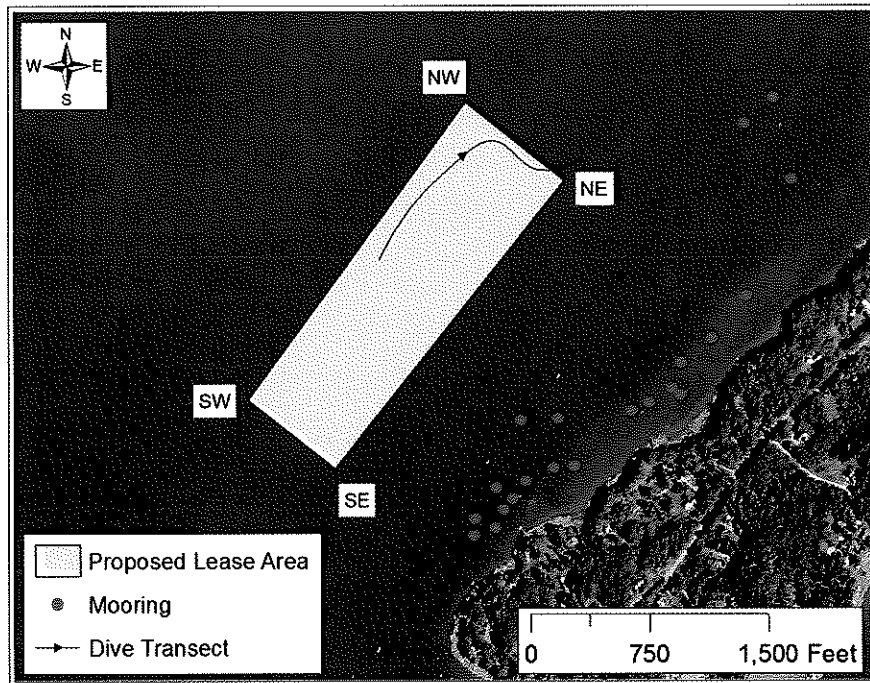
During the site visits on June 15, 2018 and July 16, 2018, DMR staff observed boats navigating in Maquoit Bay (SR 7). Staff also observed docks, moorings, and lobster buoys indicating that both commercial and recreational boating activities are common (SR 7). At mean low water, the proposed lease site is ~1,160 feet from the eastern shoreline and ~3,325 feet from the western shoreline (SR 7). These distances provide adequate navigable area for boats traversing to and from Maquoit Bay (SR 7). The proposed lease site would also occupy shallow water in the center of Maquoit Bay and would not extend into deeper channels to the east and west of the proposal (SR 7). As noted in the site report, it is likely that the deeper channels are preferred by vessels with deep drafts (SR 7).

Based on feedback contained in three separate Harbormaster Questionnaires, the proposal will not interfere with navigation in designated channels. The Harbormaster Questionnaire signed October 2, 2018, further specifies the following:

The proposed lease is not located in an area that is a designated channel. The proposed location is between two “channels” which are in excess of 20’ in depth that generally run north-south.<sup>28</sup>

The same questionnaire also indicates that boat traffic is limited by the shallow water to the north of the proposed lease site.<sup>29</sup>

Although there are no individuals or entities that meet the definition of “riparian owner,” DMR staff did observe and consider access points (i.e. moorings and docks) along the western shoreline of Maquoit Bay and Merepoint Neck. During the site visits, DMR observed approximately thirteen docks and a boat ramp along the shoreline to the immediate east/southeast of the proposed site (SR 6). Staff also observed additional docks along Merepoint Neck to the north and south of the proposed lease (SR 6). There is also a mooring field between the peninsula and the proposed site (SR 6). The figure below depicts the location of the proposed lease site in relationship to the mooring field. During the site visits there were kayaks, powerboats, rowboats, and sailboats secured to the docks and moorings (SR 6).



**Figure 3:** The location of the proposed lease site in relationship to moorings near Merepoint Neck. Image from site report.

<sup>28</sup> CF: Harbormaster Questionnaire completed by MPO Sergeant R. Beal

<sup>29</sup> Ibid

The docks on Merepoint Neck are located over 1,000 feet to the east of the proposed lease site and the closest mooring to the proposed lease site is located over 700 feet to the east (SR 6). Docks and moorings located on the western shoreline of Maquoit Bay are over 3,000 feet from the proposed lease site (SR 6). In consideration of these distances, “it appears that boats operating under power or paddle will be able to navigate off and on their moorings if the proposed lease is granted” (SR 6).

However, the site report indicates that under certain environmental conditions vessels that operate via sail may be impacted by the proposed site when maneuvering to certain moorings (SR 6). The area is exposed to prevailing southwesterlies (Exhibit 14). In addition, the proposed site is almost a half-mile in length, so vessels traveling east or west across Maquoit Bay may need to alter traditional routes, if the proposal is granted (SR 7). For example, a boat traveling to the western shore of Maquoit Bay from a dock on Merepoint Neck might first need to navigate south or north to avoid the proposed lease, before being able to travel westward (SR 7).

Several limited intervenors indicated that they regularly navigate through the proposed lease site using a variety of watercraft including kayaks, stand-up paddleboards, jet-skis, motorized vessels, and sailboats.<sup>30</sup> Several members of CCMB described the ways the proposed lease site will affect their ability to navigate within the area. For example, some limited intervenors felt that the proposed lease site would preclude westward navigation from Merepoint Neck.<sup>31</sup> Another limited intervenor indicated: “aquaculture gear in the proposed location would interfere with my ability to efficiently navigate the main channel of this bay in a variety of watercraft that I use” (Exhibit 46e, pg. 1). Patricia Rathbone, a limited intervenor, noted: “I cannot sail from my mooring, which is halfway to the farm from shore (deep water needed for a keel boat) and return to that mooring, given the prevailing southwesterlies and the need to tack to open water” (Exhibit 46f, pg. 1). Some members of the public raised similar concerns regarding navigation in the area should the proposal be granted.

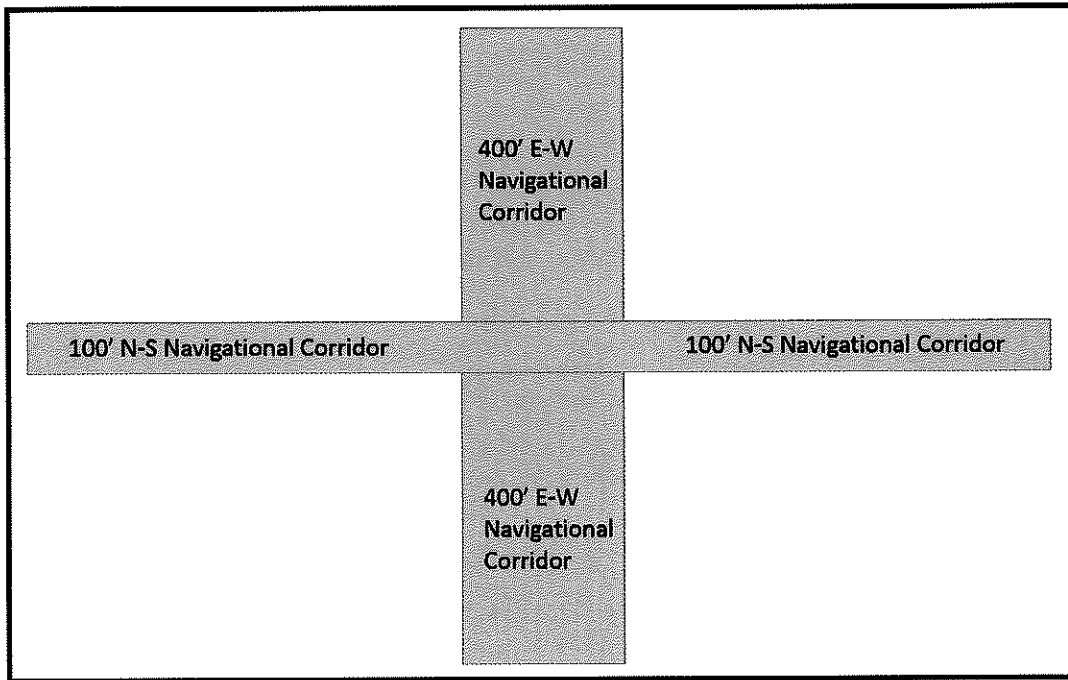
### **Navigational Corridors**

In its pre-filing and at the public hearing, the applicant proposed a 400-foot navigational corridor that would run northwest to southeast across the proposed site and a 100-foot navigational corridor that would run northeast to southwest, as depicted in Figure 4, through the middle of the lease site. The applicant indicated that the all vessels would be allowed to navigate within the corridors and commercial fishing would be permitted. MPOC indicated that the proposed corridors were a response to community feedback they received about the proposal prior to the public hearings. MPOC felt that modifying the layout of their proposal to include the navigational corridors would enable vessels to traverse through the proposed lease area.

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<sup>30</sup> Exhibit 42 displays routes some limited intervenors take through the proposed lease site as documented via GPS.

<sup>31</sup> Exhibit 46b



**Figure 4:** The location of the proposed navigational corridors in relationship to the proposed lease boundaries. Figure is not to scale and was generated by DMR staff using Exhibit 9 as a reference.

The public testimony regarding the proposed corridors varied. Some people indicated that the proposed corridors would provide for adequate transit across the lease site. However, limited intervenors and some members of the public felt that the proposed corridors would not ameliorate any of the concerns they raised about navigation. In addition, some individuals felt that navigating around the proposed gear to access a navigational corridor would pose a safety hazard.

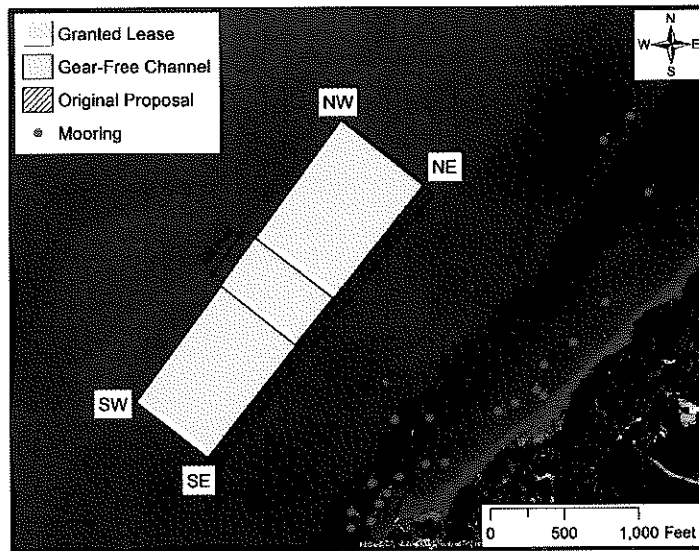
DMR’s decision regarding the proposed corridors is not germane to the determination that the proposal satisfied the statutory and regulatory standards relating to navigation. However, the applicants presented the navigational corridors as part of their proposal.<sup>32</sup> Members of the public and other stakeholders who participated in the public hearings evaluated the application in consideration of having corridors that would provide additional navigable area through the lease site. Therefore, the corridors are evaluated as a function of the proposed operations.

Those who are directly across from the 400-foot corridor would be able to traverse northwest to southeast through the proposed lease area rather than having to first navigate to the north or south when navigating to and from the western shoreline of Merepoint Neck from Maquoit Bay. More generally, the

<sup>32</sup> In addition, the applicant presented the corridors as a reduction in the operational footprint of the lease. Noting that they had requested 40 acres of area, but the proposed corridors would effectively reduce the operational area to 28-acres

corridor would also allow vessels to navigate through the proposed lease site (northwest to southeast). DMR will condition the lease, so that location of the 400-foot corridor is fixed and marked throughout the term of the lease. A condition will also be included that prohibits the deployment of gear within the 400-foot corridor.

The proposed 100-foot corridor that runs northeast to southwest through the middle of the lease site will be modified by DMR. Rather than the proposed corridor running through the middle of the lease, DMR will move the SE and NE corners 100-feet to the west as depicted in the figure below.<sup>33</sup>



**Figure 5:** 400-foot navigational corridor and SE-NE boundary modified by DMR. Image generated by DMR staff.

The reduction at the SE and NE corners provides additional navigable area between the proposed site and Merepoint Neck. In consideration of this modification, the closest mooring is now over 800 feet from the proposed lease site and the closest dock is now over 1,100 feet from the proposed lease site. If the lease is granted, it will be conditioned to reflect the restrictions pertaining to the 400-foot navigational corridor.

**Discussion.** In accordance with 12 M.R.S.A. §6072-A(13)(B), DMR must determine whether the proposed lease will unreasonably interfere with navigation. The regulatory standard contained in Chapter 2.37(1)(A)(2) specifies, in part, that DMR must consider the following:

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.

<sup>33</sup> The coordinates for each corner are as follows: SW 43.832475, -70.026971; NW 43.837477, -70.02152

In this instance, commercial and recreational boating are common in the area. The types of watercraft utilized in the area include kayaks, canoes, paddleboards, jet skis, motorboats, sailboats, and lobster boats. Some limited intervenors and members of the public submitted evidence demonstrating that they regularly traverse within the boundaries of the proposed lease area using a variety of watercraft including jet-skis and powerboats.

The proposed lease site is not within any designated navigational channels and occupies shallow waters within the middle of Maquoit Bay. As modified by DMR, by moving the 100 navigational corridor to the west, the closest dock is more than 1,100 feet from the proposed lease site and the closest mooring is more than 800 feet from the proposed lease site. Although the proposed site may prompt some vessels to alter their traditional course, there is adequate room for boats to navigate to and from Maquoit Bay and within Maquoit Bay. Furthermore, the evidence indicates that vessels operating under power or paddle will be able to navigate to and from the moorings within the vicinity of the lease site if the proposed lease is granted.

The site report indicates that depending on environmental conditions boats operating under sail may be impacted by the proposed site when navigating to certain moorings (SR 6). Paul and Kathie Dioli indicated that they own a small sailboat, which they utilize around the bay (Exhibit 46b). If the lease was granted, the Dioli's testified: "to access the bay, we will be required to tack around the lease site. Tacking [a] small sailboat around a 40-acre obstacle is challenging and detracts from the enjoyment of sailing" (Exhibit 46b, pg.3). Patricia Rathbone, a limited intervenor, indicated that the prevailing southwesterlies coupled with the location of the proposed lease site would preclude her from accessing her mooring. *A Cruising Guide to the Maine Coast* indicates that Maquoit Bay is affected by prevailing southwesterlies (Exhibit 14). However, the guide also notes that the area is "fine in settled summer weather" and protected from other directions (Exhibit 14, pg. 3).

If the lease is granted, the intervening factors that may affect access to certain moorings while under sail are environmental conditions. One of the possible environmental conditions identified by Ms. Rathbone is the direction of the prevailing wind. However, the evidence indicates that the effects of these winds dissipate when the weather is settled. Furthermore, as modified, there would be more than 800 feet of navigable area between the boundaries of the proposed lease site and the closest mooring.<sup>34</sup> Given these distances, access to certain moorings under sail are not precluded by the proposed lease site. The Dioli's testimony indicates that if the lease was granted their traditional sailing routes and preferences may change, but these do not rise to the level of being an unreasonable interference with navigation.

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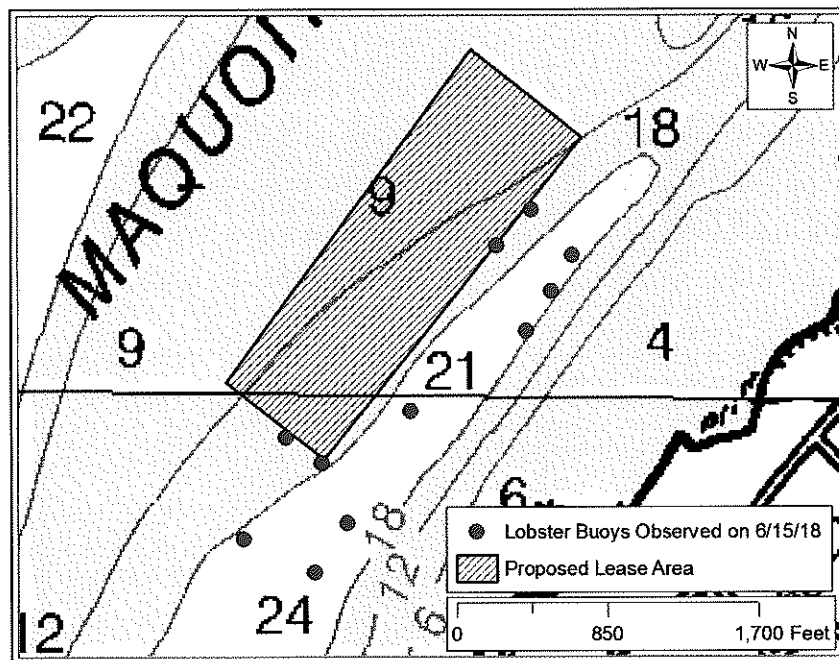
<sup>34</sup> Ms. Rathbone never provided the specific location of her mooring, only noting that it "was halfway to the farm from shore" (see exhibit 46f). For the purposes of this decision, DMR considered mooring access under sail using the observed and documented mooring closest to the proposed lease site.

Based on review of the relevant evidence and consideration of the standards governing navigation, the proposed lease site will not unreasonably interfere with navigation. **Therefore**, the aquaculture activities proposed for this site will not unreasonably interfere with navigation.

### C. Fishing & Other Water Related Uses

#### Commercial Fishing

During both site visits, DMR staff observed lobster buoys within the vicinity of the proposed lease site (SR 8). On June 15, 2018, DMR staff recorded the coordinates of all lobster buoys in the immediate vicinity of proposed lease site (SR 8). The location of the recorded buoys in relationship to the proposed lease site are depicted below. On June 15, 2018, approximately seven different colored buoys were observed in the immediate vicinity of the proposal (SR 8). During the second site visit, on July 16, 2018, the locations of the lobster buoys were not recorded, but the closest buoys were located to the east and south of the proposed lease site, not within the boundaries (SR 8).



**Figure 6:** Location of the proposed lease site in relationship to observed lobster buoys on June 15, 2018. Image from site report.

On July 16, 2018, an outboard-powered vessel was observed hauling traps within Maquoit Bay and a second lobster boat was observed operating near Merepoint (SR 8). DMR staff also observed two seining vessels that were likely targeting menhaden (*Brevoortia tyrannus*) within Maquoit Bay (SR 8). For most of the site visit these two vessels were located to the west of the proposed site. However, one of the vessels transited within the



boundaries of the proposed site. There also appeared to be two lobster boats associated with the seiners (SR 8). DMR staff further observed two vessels, navigating from north to south through the proposed lease site, that were likely harvesting soft sell clams from the northern area of Maquoit Bay (SR 8).

DMR's Harbormaster Questionnaire requests information about the extent and type of commercial and recreational fishing within the area of the proposed lease site. Commander Garrepy indicated that there is commercial lobstering and bait fishing around Merepoint, but "none within the last several years inside the proposed area to be leased."<sup>35</sup> Sergeant Beal noted that commercial and recreational fishing occurs seasonally in the general area of the proposed lease site. Lobster fishermen from Freeport, Brunswick, and Harpswell fish for both crabs (*Cancer sp.*) and lobster (*Homarus americanus*) within the area of the proposed lease site.<sup>36</sup> Based on Sergeant Beal's observations, the area is fished for lobster and crab in the late spring and early summer months and continues through the early fall.<sup>37</sup> Sergeant Beal indicated that he had observed five different lobster buoys being fished near the proposal. Sergeant Beal has observed a limited amount of menhaden fishing activity using purse seines and gillnets.

According to MPO LaBelle, harvesting clams occurs regularly within Maquoit Bay because "most of the bay empties out during low tide exposing mud."<sup>38</sup> Shellfish harvesting occurs in the north and westerns portion of Maquoit Bay. In addition, the proposed lease site is located over a mile from the extensive mudflats that are exposed at low-tide in the northern portions of Maquoit Bay. Given the distance and location of the flats relative to the proposed lease site, it is unlikely that the proposal will interfere with shellfish harvesting in those areas (SR 8).

DMR granted limited intervenor status to Thomas Santaguida and Jon Powers, who indicated in their application to intervene that they fish for lobster and crab in the boundaries of the proposed site and throughout other areas of Maquoit Bay.<sup>39</sup> Mr. Santaguida also noted that he has gillnetted for menhaden, or pogies, within the proposed lease site, on an intermittent basis.<sup>40</sup> In their pre-fillings, the commercial fishing group explained their use of the proposed area, including observed lobster activity. Mr. Powers noted "Maquoit Bay has thousands of acres of bottom, but the lobsters find the middle of the bay very attractive to burrow into and shed their shells early in the summer." Mr. Powers explained that the entirety of the lease proposal occupies the space where lobsters burrow. Mr. Powers also testified that the lobsters move out of the area later in the summer.

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<sup>35</sup> CF: Garrepy HM Questionnaire signed March 18, 2018

<sup>36</sup> CF: Beal HM Questionnaire signed October 2, 2018

<sup>37</sup> Ibid

<sup>38</sup> CF: LaBelle HM Questionnaire dated March 27, 2018

<sup>39</sup> CF: Powers and Santaguida application to intervene

<sup>40</sup> Ibid.

As part of the pre-filings, Mr. Santaguida detailed his fishing activities within the boundaries of the proposed lease site from 2015 through 2018. For example, in 2015, Mr. Santaguida had one trap on a trawl inside the proposed lease area that caught 14 legal lobsters. In 2016, Mr. Santaguida deployed a five-trap trawl in the proposed lease site and caught 31 legal lobsters. In 2016-17, Mr. Santaguida indicated he had more than ten trawls inside the proposed lease area. Mr. Santaguida also deployed lobster traps within the boundaries of the proposed lease area from September 27, 2018 to October 12, 2018.

At the public hearing, Mr. Santaguida testified that he did not keep detailed records about his fishing activities within Maquoit Bay, because he did not think that a lease would be proposed in the area.<sup>41</sup> When asked to estimate the average number of days he fished within the boundaries of the proposed site he thought he spent at least 50 days lobster fishing and ten days crabbing (Santaguida/Ellis). When asked to estimate the number of traps he fished within the proposed lease boundaries Mr. Santaguida testified “it depends” (Santaguida/Ellis). He estimated he deployed at least 30 lobster traps in July 2018 and 20 traps in October 2018 (Santaguida/Ellis).

In response to the same line of questioning concerning the number of fishing days and number of traps, Mr. Powers testified that the number of traps he deploys within the proposed site is contingent upon the lobsters (Powers/Ellis). Mr. Powers estimated that in some seasons he might deploy up to 100 or 200 traps and he might spend up to 50 days fishing for lobster within the boundaries of the proposed site (Powers/Ellis). Mr. Powers testified “It’s a crap shoot. You never know what you are going to get, but you need that bottom” (Powers/Ellis).

At the public hearings, other lobster fishermen testified about lobster fishing within the Maquoit Bay and the proposed lease area. For example, Dave Moody noted:

My buoys are not there now and they’re apt not to be there at any specific time in history. You go where the lobsters are, you put traps when they are there. I can’t tell you specific dates I am fishing there, but traditionally that’s good bottom at certain times of year (Moody/Wyman).

Andrew Washburn testified that lobster fishing activity within the proposed lease site varies, but it is important that the proposed lease area remain open for when the fishing is good (Washburn/Mills).

Andrew Ulrickson testified that lobsters are present in the area at various times throughout the year and that he wanted to be able to catch lobsters within the area when lobsters are present.<sup>42</sup>

As noted in other sections of this decision, the applicant proposed a 400-foot navigational corridor that would run west to east across the proposed site and a 100-foot navigational corridor, modified by

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<sup>41</sup> In their closing arguments, the Commercial Fishermen group noted: “It is impossible to keep sufficient records that document lobstering use of an area, and it is unreasonable to expect anyone would. The lobster fishery is far too dynamic to make this possible.”

<sup>42</sup> Andy Ulrickson, David Moody, Andrew Washburn were identified in the pre-filings of Maquoit Bay LLC and the Commercial Fishermen group as individuals that set traps within the boundaries of the proposed lease area.

DMR to run north to south along the eastern boundary of the lease site. Commercial fishing would be permitted within the corridors and other areas of the lease not marked and occupied with aquaculture gear. When asked if they would deploy gear in open areas of the lease, Mr. Santaguida indicated that he would use any open space inside the proposed lease boundaries (Santaguida/Ellis). Mr. Powers and some of the lobstermen who testified in opposition to the proposal indicated that they would not utilize the proposed corridors and that the corridors did not provide enough area for lobster fishing activity.

Other individuals testified that lobster fishing occurs in Maquoit Bay, but not at the frequency described by members of the limited intervenor Commercial Fishermen group and other fishermen who testified that they fish in the area. For example, David Toothaker, a commercial fisherman who testified that he spends several days a week traversing through Maquoit Bay, indicated he has never observed the number of traps described by some lobstermen. Stephen Walker, District II Town Councilor for Brunswick, testified: "I am confident in saying that Maquoit Bay has never been a hotbed for lobster fishing based on the lack of fishing effort I've seen consistently over the past few decades."<sup>43</sup> Jon Rogers, who holds a commercial lobster license testified that lobster fishermen in the area "will harvest 98% of his/her volume south of Merepoint."

Chris Heinig testified that between 2006 and 2012, his company MER Assessment Corporation was responsible for conducting the Intensified Paralytic Shellfish Poisoning (IPSP) program. The work required sampling at two stations in Maquoit Bay once every two weeks from early April through August. Mr. Heinig testified that throughout the sampling program only a few lobster buoys were observed within the boundaries of the proposed lease site.

### **Recreational Fishing**

The pre-filing submitted by CCMB indicates that some limited intervenors fish for striped bass (*Marone saxatilis*) and other fish species within the vicinity and boundaries of the proposed lease site. Nick Rathbone stated he has a recreational lobster license and has traditionally deployed traps within the boundaries of the proposed site.

### **Other water-related uses**

Some limited intervenors testified that swimming will be precluded by the lease site. For example, Nick Rathbone testified "I am a competitive open water swimmer. My swimming group and I have traditionally used the proposed lease area in front of my home for training" (Exhibit 46e). Mr. Santaguida

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<sup>43</sup> CF: Stephen Walker's written testimony that was read into the record on January 15, 2019. Mr. Walker indicated that he has lived, worked, and recreated around Maquoit Bay for 27 years.

also indicated that he hunts for sea ducks within the area each fall. Some members of CCMB testified that they hunt for duck and goose within the boundaries of the proposed lease site.

### Other Aquaculture Leases

There are eighteen active Limited Purpose Aquaculture (LPA) licenses and three active aquaculture leases within Maquoit Bay (SR 9). The fourteen closest LPAs to the proposed lease site are licensed to individuals associated with representatives of MPOC.<sup>44</sup> According to MPOC's application and testimony provided by Mr. Devereaux, these fourteen LPAs will not be renewed if the application is granted.<sup>45</sup> Operations would be consolidated to the proposed lease site. The closest lease site is more than 3,000 feet from the proposal, in Freeport.

### Discussion

In accordance with 12 M.R.S.A. §6072-A(C), DMR must determine whether the proposed lease will unreasonably interfere with fishing and other water related uses of the area. The regulatory standard contained in Chapter 2.37(1)(A)(3) specifies that DMR must consider the following in evaluating this criterion:

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 days, and the amount of fisheries resources harvested from the area.

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<sup>44</sup> LPA acronyms: TNIV118, TNIV218, NNIV117, NNIV217, NNIV317, NNIV417, CNIV116, CNIV216, CNIV316, CNIV416, DNIV116, DNIV216, DNIV316, and DNIV416. Eight of these LPA sites (NNIV117, NNIV217, NNIV317, NNIV417; and CNIV116, CNIV216, CNIV316, CNIV416) are within 1,000-feet of the proposal.

<sup>45</sup> Page 5 of the MPOC application notes: "Since 2015 Mere Point Oyster Company has successfully operated several LPAs (DNIV116-416, CNIV116-416, NNIV117-417, DDEV116-416, JDEV117-417, DEDEV117-417) around Mere Point." CCMB alleges that the operation of these LPAs is a violation of DMR statutes and rules as a company can hold no more than 4 LPAs. LPAs require the signature of the municipal harbormaster. In his capacity as harbormaster, Mr. Devereaux signed several of the LPAs submitted as an exhibit by CCMB (For example, see LPA acronyms CNIV116, 216, 316, and 416, which were issued to Cameron Niven and signed by Mr. Devereaux). CCMB alleges that under the standard in *Tuscan v. Smith*, 130 Me. 36, 153 A. 289 (1931) the LPAs place Mr. Devereaux "in a situation of temptation to serve his own personal pecuniary interest to the prejudice of the interest of those for who the law authorized and required him to act." CCMB argues that under this standard the LPAs are void and that MPOC has been conducting aquaculture without valid LPAs and with a quantity of LPAs that exceeded the legal limit. According to CCMB, these violations preclude the granting of an aquaculture lease. DMR has reviewed CCMB's claims regarding the LPAs. Chapter 2.90(1)(A) specifies that LPAs can only be issued to an individual or a municipal shellfish management committee. Individuals that hold LPAs are responsible for operating them in compliance with applicable laws. The LPA applications were issued to individuals in accordance with applicable laws and regulations. In addition, DMR provides notice of all proposed LPA renewals to the municipality in which the licenses are located and requests that the municipality post the notice. Anyone may provide comments to DMR on the proposed renewals within 14 days of the date of the notice. Since their initial issuance, the LPAs have been renewed without any comments from members of the public or other stakeholders. In any event, CCMB's arguments about the LPAs are not germane to the decision criteria the Commissioner must consider under 12 M.R.S.A. §6072(7-A).

DMR interprets this language as requiring it to look broadly at the potential effect the proposed site may have on fishing and other water-related uses of the area, both within the proposed lease site and the surrounding waters.

### **Commercial Fishing**

The evidence indicates that commercial fishing activities occur within Maquoit Bay and the boundaries of the proposed lease site. Based on the record, lobster fishing is the primary commercial activity that occurs in the area. Many commercial fishermen who testified wanted the lease denied, so that the proposed area would remain open to lobster fishing irrespective of fishing activities within the boundaries of the proposed lease site. This argument was also reiterated by the Commercial Fishermen limited intervenor group.

Most of the lobstermen who testified indicated that at certain times of the year lobster fishing within the lease boundaries may be good. However, lobster fishing within the boundaries of the proposed lease site is dependent upon lobster activity. The evidence indicates that fishing efforts within the boundaries of the proposed lease site vary year to year. Intervenors Powers and Santaguida both indicated that they fish outside the boundaries of the proposed lease site in other areas in and around Maquoit Bay. In their closing arguments, Messrs. Powers and Santaguida noted that the lobster fishery is dynamic and “there are thousands of relatively small but very important lobstering spots that fishermen use annually as lobsters move around.”<sup>46</sup> Although the proposed lease site may be utilized by fishermen, the evidence shows there are other areas where they can continue to fish productively.

Further, although there was testimony provided by Mr. Santaguida, Mr. Powers, and other commercial fishermen regarding the frequency of their fishing activities in the proposed lease area, there was contradicting evidence, as described above, given by several individuals who also live, commercially fish, and work within Maquoit Bay. Moreover, fishing activity in the area was described by Brunswick Patrol Commander, Thomas Garrepy, Marine Patrol Officer Curtis LaBelle, and Marine Patrol Sergeant Robert Beal. None of the descriptions provided by Messrs. Garrepy, LaBelle, and Beal support the assertions made by the limited intervenors about the commercial fishing activity within the boundaries of the proposed lease site. During the June and July site visits, lobster buoys were observed near the proposed lease site, but not within the lease boundaries. Relevant evidence indicates that lobster fishing in Maquoit Bay is not limited to within the boundaries of the proposed lease site and that lobster fishing within the boundaries of the lease site does not occur at the frequency suggested by the limited intervenors.

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<sup>46</sup> CF: Closing arguments Commercial Fishermen, pg. 8

The standard is whether there would be *unreasonable* interference with fishing and other water related uses of the area – not that there would be no interference. Maquoit Bay is nearly 3,000 acres in size and fishermen can deploy their traps in those areas as well as within the navigational channel of the proposed lease and around the proposed lease site itself. DMR has conditioned the proposed lease such that the 400-foot corridor must always remain free of aquaculture gear. In addition, rather than having a 100-foot corridor running north to south through the middle of the lease site, DMR has reduced the SE and NE corners of the proposed site by 100 feet (see Figure 5). This reduction incidentally provides for additional fishing area around the proposed site. Mr. Santaguida testified that he would utilize any open space inside the proposed boundaries to fish,<sup>47</sup> while other fishermen felt the corridors would be inadequate. Whether a fisherman chooses to utilize the 400-foot corridor is a matter of personal preference, but that area could be utilized by lobstermen who wish to set traps within the boundaries of the proposed site.

DMR staff observed two seining vessels that were likely targeting menhaden within Maquoit Bay. One of the vessels transited through a portion of the lease site. Mr. Santaguida indicated that he has fished for menhaden on an intermittent basis. Much of the testimony regarding commercial fishing focused on the lobster resource, not menhaden. Menhaden fishing occurs in Maquoit Bay when the resource is present in that area. However, if the lease is granted, menhaden fishing could continue to occur in other areas of Maquoit Bay should the fishery become more consistent.

Based on the evidence, I do not find that the proposed lease would have an unreasonable interference on commercial fishing activities.

### **Recreational Fishing**

Some limited intervenors indicated that they personally fish for lobsters or certain fish species near or within the boundaries of the proposed lease site.<sup>48</sup> Nick Rathbone testified that he has a recreational lobster license. The recreational lobster license, referred to in statute as a non-commercial lobster license, permits the holder to deploy up to five lobster traps.<sup>49</sup> Mr. Rathbone and other limited intervenors who indicate they fish in the area were concerned that the proposed lease site would unreasonably interfere with their ability to recreationally fish.

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<sup>47</sup> In closing arguments, Mr. Santaguida wrote “the proposed lease—even a reduced size lease and even with the completely unworkable proposed so called “open lanes”—which are viewed by this group as a meaningless gesture—will very unreasonably interfere and prohibit traditional lobstering and crabbing...(CF, Closing arguments, Commercial Fishing Group pg. 9). Mr. Santaguida’s testimony regarding the proposed corridors is inconsistent with statements contained in the closing arguments.

<sup>48</sup> See pre-filed testimony of Mark Wyman, David and Susan Clark (filed jointly), and Nick Rathbone.

<sup>49</sup> See 12 M.R.S.A. §6421(3-A)(F)

If granted, recreational fishing would be permitted within the boundaries of the proposed lease site. Mr. Rathbone could deploy his five recreational lobster traps in and around the proposed lease site. In addition, the limited intervenors who fish recreationally for striped bass or other species within the boundaries of the proposed lease site can continue to do so. Whether they choose to fish within the boundaries of the proposed site is a matter of preference, but it remains an option. Furthermore, recreational fishing remains available throughout the remainder of Maquoit Bay. Therefore, the proposed lease site will not unreasonably interfere with recreational fishing.

**Other water related uses**

Some limited intervenors felt that swimming would be impossible given the proposed operations. Accounting for the 100-foot reduction to the proposed site, the SE boundary of the proposed lease is ~1,260 feet to the nearest point on Merepoint Neck at mean low water. This would provide individuals with adequate area for swimming. Individuals who participate in open water swimming could either utilize the 400-foot corridor that runs through the proposed lease site, or swim around the boundaries of the proposed site. While the proposed lease site may cause some individuals to alter their traditional swimming routes or preferences, these changes are not unreasonable.

At least two limited intervenors indicated that they hunt for ducks and geese within the boundaries of the proposed lease site. According to the applicants, hunting would also be permitted within the boundaries of the proposed lease site. Therefore, hunting in and around the proposed lease site could continue in compliance with applicable laws. Furthermore, hunting remains available in other parts of Maquoit Bay.

**Exclusivity.** In addition to the 400-foot corridor, the applicant intends to permit commercial fishing and all vessels will be allowed to navigate within the boundaries of the proposed lease site that do not contain surface gear (App 10).<sup>50</sup> The applicant also proposes to permit recreational fishing and hunting within all areas of the proposed lease site. The lease will be conditioned to permit these uses.

**Other aquaculture leases.** The closest lease site is more than 3,000 feet from the proposed site. DMR did not receive any comments from lease holders in the area indicating that the proposal would have adverse effects on their aquaculture leases in the area.

**Therefore,** the aquaculture activities proposed for this site will not unreasonably interfere with fishing, existing aquaculture leases, or other water related uses of the area.

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<sup>50</sup> CF: Merepoint closing arguments pg. 1

#### D. Flora & Fauna

**DMR observations.** While conducting dive transects of the proposed site, staff observed the following marine species and recorded their respective abundance:

Species	Abundance
Lobster ( <i>Homarus americanus</i> )	Rare
Horseshoe Crab ( <i>Limulus polyphemus</i> )	Common
Crab ( <i>Cancer sp</i> )	Rare
Brown Benthic Diatoms	Abundant
Atlantic Menhaden ( <i>Brevoortia tyrannus</i> ) dead at surface	Abundant

Based on data collected by DEP and the Casco Bay Estuary Partnership in 2013, eelgrass (*Zostera marina*) was documented to the northeast and east of the proposed site (SR 13). No eelgrass was observed within the boundaries of the lease site during DMR's underwater site assessment on July 16, 2018 (SR 13).

During the site review on June 15, 2018, DMR staff observed double-crested cormorants (*Phalacrocorax auritus*) and herring gulls (*Larus argentatus*) near the proposed lease (SR 13). On July 16, 2018, DMR staff observed double-crested cormorants (*P. auritus*), herring gulls (*L. argentatus*), black-backed gulls (*Larus marinus*), common terns (*Sterna hirundo*), and eider ducks (*Somateria mollissima*) with juveniles near the proposed lease site (SR 13).

**Fisheries & wildlife.** Data maintained by the Maine Department of Inland Fisheries and Wildlife (MDIFW) indicates that the proposed lease is located over 3,000 feet to the east of Tidal Wading Bird and Waterfowl Habitat (SR 13). This habitat is defined under Maine's Natural Resources Protection Act (NRPA) as Significant Wildlife Habitat (SR 13). The proposed site is also located over 1,900 feet to the southwest of mapped bald eagle habitat (SR 13). DMR sent a copy of the lease application to MDIFW for their review and comment. MDIFW noted that: "minimal impacts are anticipated from this lease."<sup>51</sup>

Limited intervenor pre-filings and some individuals at the public hearing raised a variety of concerns related to how the proposed site may affect wildlife, and their respective habitat types, in the area. For example, some individuals noted that Maquoit Bay has been identified as an important bird area by Maine Audubon and designated a 'Focus Area of Statewide Ecological Significance' by *Beginning with Habitat* (Exhibit 33 and 36). Individuals argue that these designations should preclude the proposed leases.

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<sup>51</sup> CF: Email from J. Perry dated March 12, 2018.



**Discussion.** The habitat designations noted by the limited intervenors are non-regulatory and serve as planning, guidance, and educational resources. They do not prohibit aquaculture activities in Maquoit Bay.<sup>52</sup> In this instance, the proposal is located outside of any habitat or species designations defined under Maine’s Natural Resources Protection Act (NRPA) (SR 13). MDIFW reviewed the proposal and determined that any impacts to wildlife would be minimal.

**Eelgrass.** Based on assessments conducted in 2013, eelgrass was located within the vicinity of the proposed lease site, but not within the proposed boundaries. During the site assessment, DMR staff did not observe any eelgrass within the boundaries of the proposed site (SR 13). In addition to staff diving portions of the proposed site, Mr. Lewis testified that they checked the site for eelgrass using a sounder. DMR science staff also conferred with colleagues in the Maine Coastal Program who had recently assessed the area for eelgrass using a side scan sonar. Mr. Lewis indicated that the Maine Coastal Program found eelgrass to the north and east of the proposed lease site.

Mr. Santaguida testified that he has seen eelgrass within the boundaries of the proposed lease site on his sounder. As part of the pre-filings, Mr. Santaguida submitted a picture, taken on October 12, 2018, depicting a strand of eelgrass on a lobster trap that was deployed with the boundaries of the lease site. The photograph contains a disclosure that reads “The eelgrass was placed into this photo to show it is live eelgrass. It was on this trap when it was hauled on October 12” (Exhibit 48).

Dr. Joseph DeAlteris, CCMB’s expert witness, contends that the use of a power washer to clean gear will create biofouling debris, which “will accumulate on the bottom burying eelgrass. This will have a negative impact on eelgrass” (Exhibit 46g). Dr. DeAlteris also speculated that the biofouling debris will move as a plume with the tide and settle on the bottom of Maquoit Bay outside of the proposed lease area (Exhibit 46g). Dr. Alyssa Novak, MPOC’s expert witness, noted that defouling can have negative effects on eelgrass, but these effects are often confined to the respective aquaculture site and are a function of poor farm management and low tidal flushing. Dr. Novak indicated that Maquoit Bay has good tidal flushing and that the applicants intend to flip their cages, which reduces the need to power wash. Dr. Novak noted that good farm management would also include power washing on an outgoing tide to help further flush any bio-foul.

**Discussion.** In assessing the degree to which an aquaculture proposal may affect marine habitat, the Commissioner must consider: “such factors as the degree to which physical displacement of *rooted or attached*

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<sup>52</sup> Stephen Walker, District 2 Brunswick Town Councilor, submitted written testimony that provided context for the Focus Area designation. Mr. Walker indicated that worked to have Maquoit and Middle Bay designated as Focus Areas. The immediate threats to the focus area are shoreline development, nutrient loading from the developed uplands, nearshore habitat fragmentation from private piers, and tidal restrictions from roads and driveways. He notes that shellfish aquaculture “was never even considered as a threat to the integrity of the focus area.”

(emphasis added) marine vegetation occurs.” In general, the Department evaluates the eelgrass resource by assessing historical records of distribution, and the current distribution of the organism, which is documented during the site visit.

In this instance, DMR’s site assessment indicated that no eelgrass was observed within the sections of the lease site that they dived. Surveys conducted in 2013 indicated that eelgrass was located within the vicinity of the proposed lease site, but not within the proposed boundaries. Mr. Santaguida’s testimony that he observed eelgrass on his sounder is unpersuasive. Furthermore, a photograph of a piece of eelgrass on a lobster trap does not indicate that there is eelgrass rooted within the boundaries of the proposed lease site.<sup>53</sup> Consistent with Dr. Novak’s recommendation, the applicants propose to only power wash on outgoing tides.<sup>54</sup>

**Site Monitoring.** Some limited intervenors and members of the public were concerned about the deposition of organic solids under the proposed lease site. DEP submitted a letter to DMR, which suggested including a condition requiring benthic infauna monitoring (Exhibit 4). Mr. Lewis testified that benthic infauna monitoring is commonly utilized on salmon farms, which discharge feed and therapeutants into the water. Given the discharges, salmon farm operations require a MEPDES permit/WDL and they may be required to conduct benthic infauna monitoring. Mr. Lewis noted that he has never seen a build-up of solids or other fouling materials underneath oyster farms. He indicated that good farm management prevents the build-up of solids or other materials on oyster farms.

Considering the difference in operation between salmon and oyster farms, Mr. Lewis testified that annual visual or video monitoring of the bottom of the proposed site made more sense than benthic infauna monitoring. Video monitoring would enable DMR to determine if there was a problem with excessive solids accumulating on the bottom of the proposed site. If video analysis indicated that there was excessive build-up, DMR would then determine if benthic infauna monitoring or other approaches are necessary. In their closing arguments, MPOC indicated that it will conduct video monitoring of the proposed lease site. The lease will be conditioned to specify the parameters of video monitoring.

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

**Therefore,** 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**

Per the site report, “the proposed lease is not within 1,000 feet of any beach, park, docking facility, or conserved lands owned by federal, state, or municipal governments” (SR 14).

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<sup>53</sup> For example, there is eelgrass to the north and east of the proposed lease site, some eelgrass in those areas could have detached and drifted onto the proposed site.

<sup>54</sup> CF: Closing arguments Mere Point Oyster Company

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

**F. Source of Organisms**

The applicant intends to obtain stock from the following approved sources:

Source	Location	Species
Muscongus Bay Aquaculture	Bremen, Maine	Eastern oysters, European oysters, and bay scallops
Downeast Institute	Beals, Maine	European oysters, and quahogs
Pine Point Oyster	Cape Elizabeth, Maine	Sea scallops
Mook Sea Farm	Walpole, Maine	Eastern oysters

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

**G. Light**

Except for emergencies, operations on the proposed lease site would occur during daylight hours (App 8, Exhibit 8). The applicants would install low-level LED navigational lighting on the proposed work platforms (Exhibit 8). In accordance with Chapter 2.37(1)(A)(8), lighting for navigational purposes is not subject to DMR’s lighting standards. LED lights may also be installed inside the enclosed work structure (Exhibit 8). Lighting installed inside the work shed would not be visible from the outside (Exhibit 8). Pursuant to Chapter 2.37(1)(A)(8), DMR’s standards apply to exterior lighting only.

**Therefore**, 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**

As noted in section 2.A of this decision, the applicants are proposing to use an oyster sorter and tumbler, a high-volume water pump, a power washer, and a generator. Much of the testimony and arguments regarding the proposal focused on the potential adverse effects noise generating equipment could have in Maquoit Bay. Individuals were concerned that noise created by the generator and tumbler would disturb marine mammals and other wildlife (Exhibit 30). In addition, some individuals felt that the noise associated with the proposed

aquaculture operation would ruin the quality of life for people who live within the vicinity of the proposed lease site.

DMR evaluates noise in accordance with 12 M.R.S.A §6072-A(G) and the regulatory standards specified in Chapter 2.37(1)(A)(9). The statutory criterion specifies that a lease must not result in an unreasonable impact from noise at the boundaries of the proposed site. The statute further specifies that DMR must adopt rules that establish noise impact criteria. The applicable regulatory standards concerning noise requires that all motorized equipment be designed or mitigated to reduce the source sound levels to the maximum practical extent and that the applicant has taken reasonable measures to mitigate noise impacts associated with the lease activities.

In the proposal, the applicant originally intended to utilize a 5,000-watt Honda EU generator to power some of the mechanized equipment. However, the model of generator the applicant intended to use and listed in their application no longer exists (Kallin/Niven). During the public hearing the applicant clarified that their intention is to use a Honda EU2200i, which is a 2,200-watt generator (Kallin/Niven). The Honda EU2200i has been utilized as part of existing aquaculture operations near the proposed lease site (Kallin/Niven). If the EU2200i breaks down or needs to be replaced, the applicants intend to use the Honda EU7000is, which is a 7,000-watt generator (Kallin/Niven).

The generators proposed for the site are part of Honda's "Super Quiet" EU series (Exhibit 12).<sup>55</sup> The EU7000is has a muffler and insulated engine shroud, which reduces noise levels (Exhibit 12). The applicant also intends to utilize an electric power washer rather than a gasoline powered model. A sound assessment submitted by the applicant notes: "electrical power washers are much quieter than gasoline powered models because the gasoline engines are much louder in those pressure washers" (Exhibit 12, pg. 5). The generator selected for the site is designed to reduce sound levels and the selection of an electrical power washer further mitigates noise impacts.

The applicant will utilize powered equipment, including the tumbler, on the proposed work barges. The work barges will be kept in the "Intermediate Area" of the proposed lease site, which is near the SW-NW boundary. The SW-NW boundary is more than 1,580 feet from the nearest point on Merepoint Neck (Exhibit 9, SR).<sup>56</sup> During the first year of production, the applicants intend to limit their activities on the lease site from the hours of 9am to 5pm (App 7). In subsequent years the noise emitting equipment will be utilized inside the enclosed work shed to help deflect any noise (App 7). In addition, the power washer will be used two to three times a week from June through November (App 7).

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<sup>55</sup> The Super Quiet series includes the proposed EU2200i and EU7000is. The noise specification for the EU2200i is 57dBA and the EU7000is is 58dBA-where "dBA" is a unit of sound level (Exhibit 12).

<sup>56</sup> Exhibit 9 shows the location of the barges and page 5 of the site report provides distances from the lease boundaries and corners to various points of land.

The applicant has selected equipment designed to reduce or mitigate source sound levels. The placement of noise generating equipment away from Merepoint Neck, operating equipment during reasonable hours, operating equipment within enclosures, and limiting the use of some noise generating equipment to a few days each week are reasonable measures to further mitigate noise impacts. 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 the applicant has satisfied the standards specified in Chapter 2.37(1)(A)(9).

**Therefore**, 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**

As noted in section 2.A of this decision, the applicant intends to deploy a variety of soft mesh and wire cages, and to install three work platforms. One platform would contain a work shed, which would be used for the operation and storage of some power equipment. Some individuals, including limited intervenors, maintain that the proposed gear and structures proposed for the lease site would detract from the scenery of Maquoit Bay.<sup>57</sup>

The Department assesses visual impacts in accordance with Chapter 2.37(1)(A)(10), which requires gear and structures on the proposed lease site to comply with certain requirements governing color, height, and building profiles. The regulation requires gear and structure to be a color that does not contrast with the surrounding area. Acceptable hues listed in regulation include black, brown, gray, green, and blue. According to the application and a visual assessment of the proposal submitted by MPOC gear for the site will be primarily black, brown, or other dark colors to minimize any contrasts with the surrounding landscape (App 4, Exhibit 8).

In accordance with applicable regulations, structures cannot exceed 20 feet in height as measured from the waterline. The three work platforms, including the platform that holds the shed will not exceed a height of nine feet as measured from the water line (Exhibit 8). Per the site report, all gear and structure comply with MDMR's height limitations (SR 15). The roof materials for the work shed will be dark asphalt shingles and the siding will be wooden boards that are stained or painted a dark color to blend with the surroundings (Exhibit 8). The roof and siding materials proposed for the shed satisfy DMR standards.

**Therefore**, equipment and structures proposed for the 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:

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<sup>57</sup> See testimony of Paul and Kathie Dioli, David and Susan Clark, and Exhibit 45, which was submitted by Mark Wyman.

- 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, as modified, 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/eastern oysters (*Crassostrea virginica*), European oysters (*Ostrea edulis*), bay scallops (*Aequipecten irradians*), sea scallops (*Placopecten magellanicus*), and northern quahogs (*Mercenaria mercenaria*) 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).

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 a lease in the amount of 34.52 acres, reduced from the original application as discussed above, to Mere Point Oyster Company LLC for 10 years for the cultivation of American/eastern oysters (*Crassostrea virginica*), European oysters (*Ostrea edulis*), bay scallops (*Aequipecten irradians*), sea scallops (*Placopecten magellanicus*), and northern quahogs (*Mercenaria mercenaria*) 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 M.R.S.A §6072 (7-B).<sup>58</sup> Conditions are designed to encourage the greatest multiple compatible uses of the lease area, while preserving the exclusive rights of the lessee to the extent necessary to carry out the purposes of the lease.

The following conditions shall be incorporated into the lease:

- a. The lease site must be marked in accordance with both U.S. Coast Guard requirements and DMR Rule 2.80.
- b. The 400-foot navigational corridor shall be clearly marked and kept free of all aquaculture gear, moorings, and structures.
- c. In compliance with applicable laws, recreational fishing and hunting is permitted within the boundaries of the proposed lease site. Commercial fishing vessels and all other vessels will be allowed to navigate within the boundaries of the proposed lease site that do not contain surface gear.
- d. Video monitoring of the site must occur at least once between August 15 and November 1 each year. MPOC must submit the video, to DMR, within 30 days of the date video monitoring occurs. The geographic extent of the video monitoring must include transects of all cultivation areas within the boundaries of the proposed site. The video must be a continuous recording under each section of the longest axis of all gear.
- e. In consideration of the video monitoring, DMR may require MPOC to conduct additional monitoring of the lease site.
- f. 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 M.R.S.A §6072 (11) and DMR Rule Chapter 2.42 that no substantial aquaculture has been conducted within the preceding

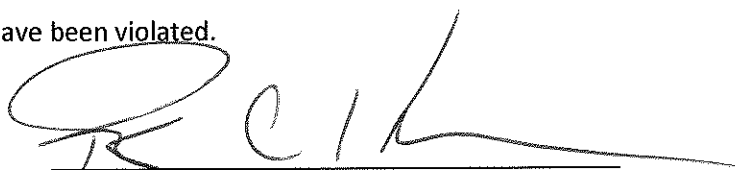
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<sup>58</sup> 12 M.R.S.A §6072 (7-B) states: "The commissioner may establish conditions that govern the use of the leased area and limitations on the aquaculture activities. These conditions must encourage the greatest multiple, compatible uses of 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."

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:

*December 19, 2019*



**Patrick C. Keliher, Commissioner  
Department of Marine Resources**

**8. EXHIBIT LIST**

<b>EXHIBIT NUMBER:</b>	<b>EXHIBIT DESCRIPTION:</b>	<b>DATE ENTERED INTO THE RECORD:</b>	<b>SUBMITTED BY:</b>	<b>CITED IN DECISION AS:</b>
1	DMR Case File	November 15, 2018	Department of Marine Resources (DMR)	CF
2	Completed application of Mere Point Oyster Company	November 15, 2018	DMR	APP
3	DMR Site Report	November 15, 2018	DMR	SR
4	Letter from the Maine Department of Environmental Protection to DMR dated November 15, 2018	November 15, 2018	DMR	Exhibit 4
5	Testimony of Dana Smith	November 15, 2018	Mere Point Oyster Company, LLC (MPOC)	Exhibit 5
6	Curriculum Vitae, Alyssa B. Novak, Ph.D.	November 15, 2018	MPOC	Exhibit 6
6a	Expert Report of Alyssa B. Novak	November 15, 2018	MPOC	Exhibit 6a
7	Sound Level Noise Impact Study by Resource Systems Engineering	November 15, 2018	MPOC	Exhibit 7
8	Visual Impact Assessment by Terrence J. DeWan & Associates	November 15, 2018	MPOC	Exhibit 8
9	Revised Site Plan with Navigation and Fishing Corridors	November 15, 2018	MPOC	Exhibit 9
10	Slide Presentation	November 15, 2018	MPOC	Exhibit 10



11	Visual Impact Assessment Slide Presentation	November 15, 2018	MPOC	Exhibit 11
12	Response to Rebuttal on Noise by Charlie Wallace	November 15, 2018	MPOC	Exhibit 12
13	Report of Joseph DeAlteris, Ph.D.	November 15, 2018	Concerned Citizens of Maquoit Bay (CCMB)	Exhibit 13
13a	Resume of Joseph DeAlteris, Ph.D.	November 15, 2018	CCMB	Exhibit 13a
14	Excerpt from <i>A Cruising Guide to the Maine Coast</i> , third edition.	November 15, 2018	CCMB	Exhibit 14
15	Best Management Practices for the East Coast Shellfish Aquaculture Industry, June 2010	November 15, 2018	CCMB	Exhibit 15
16	Maine Aquaculture Association, Code of Practice	November 15, 2018	CCMB	Exhibit 16
17	Maine Department of Inland Fish and Wildlife. Proposed Public Boat Launch, Merepoint, Brunswick, Maine, Environmental Assessment	November 15, 2018	CCMB	Exhibit 17
17a	Maine Department of Inland Fish and Wildlife. Proposed Public Boat Launch, Merepoint, Brunswick, Maine, Environmental Assessment ( <b>Note: Appears to be a duplicate of Exhibit 17</b> ).	November 15, 2018	CCMB	Exhibit 17a (Duplicate of Exhibit 17)
18	Cooperative Agreement for the Management and Maintenance of the Mere Point-Northern Casco Bay Access Site in Brunswick, Maine	November 15, 2018	CCMB	Exhibit 18
19	DMR Preapplication Meeting Notes	November 15, 2018	CCMB	Exhibit 19
20	DMR Scoping Session Notes	November 15, 2018	CCMB	Exhibit 20
21	Diolis' Mooring Approval Letter from Officer Dan Deveraux	November 15, 2018	CCMB	Exhibit 21
22	Letter from Mere Point Oyster Company, LLC	November 15, 2018	CCMB	Exhibit 22
23	DMR Request for Agency Comment dated February 15, 2018	November 15, 2018	CCMB	Exhibit 23

24	Limited Purpose Aquaculture Licenses utilized by Mere Point Oyster Company, LLC	November 15, 2018	CCMB	Exhibit 24
25	Review of Mere Point Oyster Company Application, Report by Owens A. McCullough, P.E., LEED-AP, dated November 9, 2018	November 15, 2018	CCMB	Exhibit 25
26	Map of Maquoit Bay, Prepared by Sebago Technics	November 15, 2018	CCMB	Exhibit 26
27	Dioli's Photographs	November 15, 2018	CCMB	Exhibit 27
28	Clark's Photographs	November 15, 2018	CCMB	Exhibit 28
29	Debating Science. "How Farming Oysters Impacts the Ocean," UMASS Amherst Course Blog, dated April 25, 2017	November 15, 2018	CCMB	Exhibit 29
30	Erbe, Christine. "Chapter 10: Effects of Noise on Marine Mammals." <i>Effects of Anthropogenic Noise on Animals</i> . Springer Handbook of Auditory Research, 2018	November 15, 2018	CCMB	Exhibit 30
31	Power's Photograph	November 15, 2018	CCMB	Exhibit 31
32	N. Rathbone's Photographs	November 15, 2018	CCMB	Exhibit 32
33	Maine Audubon, "Maquoit Bay (Freeport/Brunswick) Important Bird Areas"	November 15, 2018	CCMB	Exhibit 33
34	Brunswick Topsham Land Trust, "Maquoit Bay Conservation Land"	November 15, 2018	CCMB	Exhibit 34
35	Casco Bay Plan, "Habitat Protection," pp. 51-72	November 15, 2018	CCMB	Exhibit 35
36	Focus Areas of Statewide Ecological Significance: Maquoit and Middle Bay	November 15, 2018	CCMB	Exhibit 36
37	Ogunola Oluniyi Solomon. "Ecological Consequences of Oyster Culture: A Review." <i>International Journal of Fisheries and Aquatic Studies</i> , 4(3):01-06, 2016	November 15, 2018	CCMB	Exhibit 37
38	Fleming, Deirdre. "Maine's Great Blue Heron Study Raises	November 15, 2018	CCMB	Exhibit 38

	Awareness." Portland Press Herald, July 8, 2018			
39	Mere Point Boat Launch Agreement	November 15, 2018	CCMB	Exhibit 39
40	Wyman's Photographs	November 15, 2018	CCMB	Exhibit 40
41	Email Between Jon Lewis and Cindy Burke-J. Eldridge, dated October 1, 2018	November 15, 2018	CCMB	Exhibit 41
42	Image Depicting the Proposed Site in Relationship to Observed Moorings, Municipal Boundary, LPAs, etc.	November 15, 2018	CCMB	Exhibit 42
42a	Image Depicting the Proposed Site in Relationship to Active Aquaculture Leases, Municipal Boundary, Grady White GPS Tracts, etc.	November 15, 2018	CCMB	Exhibit 42a
43	Army Corps Permit for Sea Point Land Company, Mere Point Mooring Field	November 15, 2018	CCMB	Exhibit 43
44	Aquaculture Harbormaster Questionnaire, signed by DMR Marine Patrol Sergeant, Robert Beal, dated October 2, 2018	November 15, 2018	CCMB	Exhibit 44
45	Mark Wyman's PowerPoint Presentation	January 15, 2019	CCMB	Exhibit 45
46	Pre-Hearing Filing of Consolidated Intervenor pp.1-11	November 15, 2018	CCMB	Exhibit 46
46a	Pre-Filed Testimony, Mark Wyman	November 15, 2018	CCMB	Exhibit 46a
46b	Pre-Filed Testimony, Paul and Kathie Dioli	November 15, 2018	CCMB	Exhibit 46b
46c	Pre-Filed Testimony, David and Susan Clark	November 15, 2018	CCMB	Exhibit 46c
46d	Pre-Filed Testimony, Andrew Powers	November 15, 2018	CCMB	Exhibit 46d
46e	Pre-Filed Testimony, Nick Rathbone	November 15, 2018	CCMB	Exhibit 46e
46f	Pre-Filed Testimony, Patricia Rathbone	November 15, 2018	CCMB	Exhibit 46f
46g	Rebuttal Pre-Filed Testimony of Joseph DeAlteris, Ph.D.	November 15, 2018	CCMB	Exhibit 46g
47	Pre-Filed Testimony, John Powers	November 19, 2018	Commercial Fishermen (CF)	Exhibit 47

47a	Pre-Filed Testimony, Tom Santaguida	November 19, 2018	CF	Exhibit 47a
48	Santaguida's Photos	November 19, 2018	CF	Exhibit 48
49	Maine Department of Inland Fish and Wildlife, Proposed Public Boat Launch Mitigation Plan, May 2002	November 19, 2018	CF	Exhibit 49
50	Location of Lobster Buoys in Relationship to Proposed Lease Site	January 15, 2019	Derek Devereaux	Exhibit 50