

September 9, 2020

Application for Change in Gear Authorization

Scarborough River

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION

Nonesuch Oysters, LLC applied to the Department of Marine Resources (DMR) for a change in gear authorization on their existing standard lease, SCAR SRR, located south of the railroad trestle, in the Scarborough River in the Town of Scarborough in Cumberland County, Maine.

1. THE PROCEEDINGS

Notice of the application and the 14-day public comment period were provided to other state and federal agencies, riparian landowners, the Town of Scarborough and its Harbormaster, and others on DMR's mailing list. The evidentiary record before DMR regarding this lease amendment application includes two exhibits (see exhibit list below).

LIST OF EXHIBITS

1. Application for a change of gear authorization
2. Original lease decision signed November 3, 2015

2. STATUTORY CRITERIA & FINDINGS OF FACT

Approval of standard aquaculture lease amendments is governed by 12 M.R.S.A. § 6072 (13)(G) and Chapter 2.44 of DMR regulations. The statute and regulations provide that the Commissioner may grant amendments for the use of specific gear on an existing lease site provided the proposed changes are consistent with the findings of the original decision and lease conditions.

A. Original Lease Decision

On November 3, 2015, DMR granted a 6.8-acre standard lease (SCAR SRR) to Nonesuch Oysters, LLC (Exhibit 2, page 11). Abigail Carroll is the owner of Nonesuch Oyster, LLC (Exhibit 2, page 1). DMR's

Findings of Fact, Conclusions of Law, and Decision, henceforth referred to as “the decision”, found that the evidence in the record supported the conclusion that the aquaculture activities proposed by the applicant met the requirements for granting a standard aquaculture lease as set forth in 12 M.R.S.A. § 6072 (Exhibit 2, page 11). The standard lease proposal, comprised of two tracts, was an operational expansion and consolidation of Ms. Carroll’s experimental leases, SCAR WLS and SCAR NELS, which were issued in 2011 and 2012, respectively (Exhibit 2, page 2). The standard lease replaced these experimental lease sites.

The standard lease decision authorized the culture of American oysters (*Crassostrea virginica*) and European oysters (*Ostrea edulis*) using suspended and bottom culture techniques. Specifically, the authorized gear type is as follows:

Gear Type	Description	Time of Year Deployed
Polyethylene mesh oyster bags	3,200 floating bags secured to 64, 55-foot lines with 25 bags attached to each line.	Deployed on both Tracts during the growing season. During the winter months the floating gear is removed from Tract 2 and may be overwintered on Tract 1, or the is gear removed, and product kept in refrigerated storage.

The oysters are deployed in the floating bags until they grow large enough to be free planted on the bottom of the site (Exhibit 2, page 3).¹ Once the oysters reach market size, they are harvested from the bottom of the site by hand or by using a small drag (Exhibit 2, page 3).

The conditions imposed on lease SCAR SRR, pursuant to 12 M.R.S.A § 6072 (7-B) and located on page 11 of the original decision, are as follows:

1. The lease site must be marked in accordance with both U.S. Coast Guard and DMR rule 2.80.
2. All oyster bags and similar gear must be marked with the owner’s name and contact information.
3. Dragging and shellfish harvesting, except by the leaseholder or its authorized agents, are prohibited within the boundaries of the lease site.
4. Other public uses that are not inconsistent with the purposes of the lease are permitted within the boundaries of the lease site.

¹ On August 30, 2020, the lease holder clarified that they no longer bottom seed all oysters in year two. The holder has two brands of oysters, some of which are planted on the bottom and some of which are maintained in gear until they reach maturity (CF: email from A. Carroll to A. Ellis dated August 30, 2020).

B. Prior Lease Amendments

On April 18, 2017, Ms. Carroll wrote to DMR and the U.S. Army Corps of Engineers requesting a change in gear authorization.² Ms. Carroll requested that 600 wire mesh grow-out trays be added to the lease site. The mesh trays would measure 4'x3'x6' and be deployed in four rows along the bottom of Tract 1 from April through October. From November through March, a maximum of 150 trays would be moved to deeper waters in Tract 1 for overwintering.

In the overwintering configuration, up to four 300' longlines, or "sink lines" would be used to secure the stacked trays. Four to five trays would be stacked together and up to 38 tray stacks would be secured to each longline. Except for the ends of each line, which would be marked with floating toggles, the longlines and associated trays would be below the surface of the water so that ice would be able to flow over them.

Ms. Carroll noted that, if approved, the 600 submerged trays would be replaced by 600 floating bags, so the total number of floating and submerged gear would not exceed 3,200 pieces (the original decision authorized 3,200 floating bags). On May 22, 2017, DMR approved the amendment requested by Nonesuch Oysters, LLC, so that 600 submerged wire mesh trays were replaced by 600 floating mesh bags in the manner described by Ms. Carroll.

C. Proposed Gear Changes and Findings

Nonesuch Oysters, LLC is requesting authorization to deploy a total of 4,000 floating bags on the lease site (App 2). As previously noted, the original decision authorized a total of 3,200 floating bags, which was reduced to 2,600 by a 2017 amendment decision that permitted Nonesuch Oysters, LLC to replace 600 floating bags with 600 submerged trays. Therefore, if this amendment request is granted, 1,400 floating cages would be added to the site. Nonesuch Oysters, LLC is not proposing to modify the stacked trays, so the number of submerged cages and their configuration would remain unchanged.

Although the number of floating bags would increase, the number of longlines on the site would decrease, if this amendment request were approved. The original decision authorized 64 longlines with 25 bags attached to each side of the line (Exhibit 2, page 3). However, if the amendment is granted it would change the original configuration, so that 50 bags would be secured to each side of up to 40 longlines (App 4). Therefore, a total of 100 bags would be secured to each of the 40 longlines in a fanned configuration, which would result in 24 longlines being removed from the site (App 4).

² See lease case file concerning this request: Emails from A. Carroll to D. Robinson dated April 18, 2017 and May 22, 2017

The amendment application indicates that during the winter months, the site does not freeze. The lease holder no longer stacks trays for overwintering and keeps floating bags at the surface of the site, which they are permitted to do. The amendment application further specifies that there tends to be some reduction in surface gear during the winter months, but it is deployed on the site year-round.

The existing lease site is in an area designated by the Maine Department of Inland Fisheries and Wildlife (MDIFW) as Essential Habitat for State-Endangered Piping Plovers (*Charadrius melodus*) and Least Terns (*Sternula antillarum*). Under the Maine Endangered Species Act, MDIFW has final approval of the amendment, because it is located within Essential Habitat. The site is also within the Scarborough Marsh Wildlife Management Area, which is owned by MDIFW. On November 25, 2014, MDIFW reviewed the original lease decision and indicated that the project “appears to have no impact on habitat, minimal impacts to wildlife are anticipated” (Exhibit 2, page 7).

DMR provided MDIFW with a copy of the completed amendment application and an opportunity to submit written comments. Ms. Carroll also talked with officials from MDIFW to discuss the proposed gear change. In their preliminary review of the amendment request, MDIFW indicated that the:

...gear amendment requests use for up to 4,000 mesh bags on the farm at one time, which is an increase of 800 more pieces of surface gear than what was originally permitted.³ With the change, however, the original permitted number of lines on the site will decrease. Additionally, in our communications with Abigail she stated that the farm is an existing site and that all structures will continue to be located in subtidal areas of 2-3 feet of water at low tide. We require, and she agreed, that all lands, including intertidal areas, within the Scarborough Marsh Wildlife Management Area will not be used for access to the lease area or for storing equipment, securing boats, or other farming activities, except to occasionally retrieve lost gear.

MDIFW indicated that if these recommendations are followed, then it is unlikely that the amendment would unreasonably harm species under their jurisdiction. The MDIFW comment also seemed to indicate that their recommendations should be a condition of the amendment, if it is granted. DMR did not receive any other comments on the proposed amendment.

Discussion:

The applicant is currently authorized to cultivate oysters using a combination surface and bottom gear. Based on the record, approving the additional gear would be consistent with the findings of the

³ As described in section 2.B of this decision, it would be an increase of 1,400 bags as the 2017 amendment resulted in a reduction of 600 floating cages. Based on a review of the record, it was unclear if MDIFW was made aware of the 2017 amendment. However, DMR recently updated its policies, so that any amendment to a lease site located in an Essential Habitat is sent to MDIFW for their approval.

original decision and associated lease conditions. MDIFW has conducted a preliminary review of the amendment request and did not find that the amendment, as proposed, would cause unreasonable harm to species under their jurisdiction, so long as their recommendations were followed. According to the record, the lease holder agreed with these recommendations and has appeared to follow them since the initial issuance of the lease.

Based on the above, DMR recommends that the gear amendment be approved. If the gear amendment is approved all conditions currently imposed on the lease will remain in place, and a condition specific to gear deployment and use of the surrounding area will be added:

- A) The deployment of authorized structure within the lease boundaries must be subtidal and maintain a water depth of 3 feet or more at mean low water. Lands within the Scarborough Marsh Wildlife Management Area cannot be used for access to the lease area or for storing equipment, securing boats, or other farming activities, except to retrieve lost gear.

It is necessary to include this condition because, according to DMR records and experience with other lease sites in the vicinity, this area is dynamic. Substrates in upland, intertidal, and subtidal areas are all prone to shifting. As the area continues to evolve and change, this condition helps ensure that the lease operations continue to comply with MDIFW recommendations. Prior to DMR's issuance of this lease amendment decision, MDIFW must review and give final approval to this proposed change, because the proposal is located within an area designated as an Essential Habitat.

3. DECISION

Subject to final review and approval from MDIFW, the Commissioner grants the gear request from Nonesuch Oysters, LLC as described in this decision.

Dated: _____

9/9/2020



Patrick C. Keliher, Commissioner
Department of Marine Resources



JANET T. MILLS
GOVERNOR

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DEPARTMENT OF
INLAND FISHERIES & WILDLIFE
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JUDITH CAMUSO
COMMISSIONER

September 4, 2020

Abigail Carroll
Nonesuch Oysters, LLC
PO Box 311
Biddeford Pool, ME 04006

RE: Essential Habitat evaluation of Nonesuch Oysters, LLC gear amendment, Scarborough

Dear Ms. Carroll:

Based upon review and input from staff biologists, this Department approves the proposed gear amendment change for the Nonesuch Oysters, LLC lease located in the Nonesuch River within the Scarborough Marsh (Map R088, Lot Number 9, 10, 11, 1) in Scarborough. This reach of Scarborough Marsh is mapped as Essential Habitat # PPLT-04, under the authority of Maine's Endangered Species Act, 12 MRS §12804; see statute at <http://www.mainelegislature.org/legis/statutes/12/title12sec12804.html>. Relevant protection guidelines are adopted as Department rules, Chapter 8.05; see <http://www.maine.gov/sos/cec/rules/09/chaps09.htm>.

Your gear amendment requests use for up to 4,000 mesh bags on the farm at one time, an increase of 1,000 more pieces of surface gear than what was originally permitted. With the change, however, the original permitted number of lines on the site will decrease. Additionally, you state that because your farm is an existing site, all structures will continue to be located in subtidal areas of 2-3 feet of water at low tide. Finally, you state that all lands, including intertidal areas, within the Scarborough Marsh Wildlife Management Area will not be used for access to the lease area or for storing equipment, securing boats, or other farming activities, except to occasionally retrieve lost gear.

The Department finds that the gear amendment changes described in this proposal do not significantly alter or unreasonably harm the Essential Habitat of Piping Plover and Least Terns.

Please feel free to contact us if you have any concerns, questions, or suggestions.

Sincerely,

John Perry
Environmental Coordinator

cc: Brad Zitske, MDIFW Region A Wildlife Biologist
Laura Zitske, Maine Audubon

STATE OF MAINE

DEPARTMENT OF MARINE RESOURCES

Standard Aquaculture Lease Application

Suspended and bottom culture of shellfish

Scarborough River

Lessee: Nonesuch Oysters, LLC

Lease SCAR SRR

Docket #2014-21

November 3, 2015

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION

Nonesuch Oysters, LLC, a Maine corporation, applied to the Department of Marine Resources (“DMR”) for a 10-year standard aquaculture lease on 6.8 acres of coastal waters located in the Scarborough River, south of the railroad trestle, in the Town of Scarborough in Cumberland County for the purpose of cultivating American oysters (*Crassostrea virginica*) and European oysters (*Ostrea edulis*), using suspended and bottom culture techniques.

1. THE PROCEEDINGS

DMR accepted the application as complete on October 2, 2014. Department biologists conducted a site visit on June 25, 2015 and submitted a site report dated July 6, 2015. Notice of the application, site report, and public hearing was provided to state and federal agencies, educational institutions, aquaculture and environmental organizations, the Town of Scarborough and the Scarborough Harbormaster, members of the Legislature, representatives of the press, riparian landowners, and private individuals. The application was advertised for public hearing in the southern edition of the *Forecaster* on August 7 and 28, 2015, and in the September, 2015 issue of *Commercial Fisheries News*. The hearing was held on September 15, 2015, in Scarborough.

The Scarborough Shellfish Conservation Committee and the Scarborough Coastal Waters and Harbor Committee (“the Committees”) intervened jointly in the proceedings. They were represented at the public hearing by Rob Willette. The U.S. Army Corps of Engineers was represented at the public hearing by LeeAnn Neal.

Sworn testimony was given at the hearing by the applicant, represented by Abigail Carroll, its owner and president; by Jon Lewis, DMR Aquaculture Environmental Coordinator; by Rob Willette for the intervenors; and by Peter Angis, a member of the public. Ms Carroll described the proposed project. Mr. Lewis described his observations from the site visit and presented a videotape of the bottom. Mr. Willette explained the Committees’ concerns. Mr. Angis described his concerns as a local shellfish harvester. Each witness was subject to questioning by the Department, the applicant, the Army Corps, intervenors, and members of the public. The hearing was recorded by DMR. The Hearing Officer was Diantha Robinson.

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

LIST OF EXHIBITS¹

1. Case file, # 2014-21
2. Application, signed and dated November 21, 2013
3. DMR site report, dated July 6, 2015

2. DESCRIPTION OF THE PROJECT

A. Site History

The proposed lease consists of two tracts, totaling 6.8 acres. The north tract (0.4 acres, called Tract 2 in the DMR site report) has been leased to the applicant under experimental lease SCAR NEL5 since 2012. The south tract (6.4 acres, called Tract 1 in the DMR site report) is an expansion of experimental lease SCAR WLS (4.0 acres), held by the applicant since 2011. Both sites have been used for the culture of American and European oysters.²

B. Site Characteristics

Both tracts of the proposed lease site are located in shallow, subtidal waters in the Scarborough River, south of the railroad trestle that crosses the Scarborough Marsh and the river. The surrounding salt marsh is a wildlife management area owned by the State of Maine, Department of Inland Fisheries & Wildlife (MDIF&W). The area of both marshland and water surrounding the site is designated by MDIF&W as Essential Wildlife Habitat for piping plovers and least terns (PPLTo4) (SR6).

According to the DMR site report, "A scoured channel with depths between 5-8 feet MLW [mean low water] exists in the vicinity of the Railroad trestle." This channel runs northwest/southeast between the two lease tracts and leads under the trestle. Water depths on the south tract are approximately 9 feet at MLW in the southern portion, decreasing to 1-2 feet at MLW in the middle and northern portions. The average tide range in the area is nine feet (SR2). The application notes that currents in the area are 3 knots or less and that a wild mussel bar lies between the two lease tracts, near the trestle (App 14).

The report describes the south tract as follows:

Tract 1 of the proposed lease is a dog-leg configuration and occupies shallow subtidal waters. It is bounded by shoal water to the east and tidal flats leading to salt marsh to the west (Figure 2). The bottom is comprised of sand overlying compressed peat-bog sediments at the southern end transitioning to sand at the northern end. The bottom is generally smooth scoured sediments with little or no relief. The site is deepest in the southern portions of the proposed lease.

The south tract lies roughly parallel to the west shore of the Scarborough River; distances to the western shore from Tract 1 range from zero feet at the southwest corner to 81 feet at the northwest corner. The railroad

¹ Exhibits are cited, with page references, as CF1, App2, SR3, etc.

² References in the DMR site report on pages 2 and 3 to the site size as 5.9 or 5.93 acres are typographical errors and should be disregarded.

trestle lies approximately 160 feet to the north, while the east shore of the river lies approximately 330-574 feet across the main channel. Lease site SCAR ELS, located on the east side of the main channel, is also proposed for expansion; its proposed new western boundary lies approximately 200 ft. east of the south tract (SR 3).³

The site report describes the north tract as follows:

Tract 2 of the proposed lease is essentially square and bounded by shoal water to the southeast and tidal flats leading to salt marsh to the north (Figure 2). The majority of the proposed lease sits within the swift flowing waters of a tidally scoured channel. The bottom consists of sand/mud and slopes to the southwest.

Water depth on the north tract is approximately 2 feet at MLW (SR 2). This tract lies approximately 66 feet southeast of the railroad trestle, less than 80 ft. from the eastern shore, and approximately 129 feet north of the proposed Pine Point Oyster lease site (SR 4).

Previous department site reports for the two existing experimental leases describe the surrounding river environment as “highly dynamic,” as currents erode the river bank, suspending and re-depositing the sand and silt. This results in continual fluctuation in water depths, the topography of the river bank, and the location of sand bars in the river.⁴

Water quality at the site is currently listed by the Department of Marine Resources Water Quality Classification program as “open/approved” for the harvest of shellfish (SR 7). As the site report notes, harvest of product from the lease will be subject to any subsequent changes in water quality classification.

C. Proposed Operations

The proposed lease will be used for aquaculture of marine organisms, specifically American oysters (*Crassostrea virginica*) and European oysters (*Ostrea edulis*). Oyster seed will be raised initially in an upweller on Ms Carroll’s Limited-Purpose Aquaculture (LPA) license site CAR-4-12 at Pine Point in Scarborough. Seed will then be grown in floating mesh bags at the surface until the oysters are large enough to be spread on the bottom to grow to maturity. Ms Carroll testified that over time she expects to reduce the use of floating gear in favor of bottom planting, which she said results in faster-growing and better-quality oysters which are clean when harvested, eliminating the maintenance, sorting, and grading associated with bag-grown oysters.

Gear to be used on the proposed lease site consists of up to 3200 floating mesh shellfish bags. Bags may be deployed horizontally or vertically. Nonesuch is also phasing in a “fanned configuration,” in which bags will be deployed on up to 64 55-foot lines with 25 bags attached to each side of a line (App 5-7). Each line will be moored by two 5-gallon cement blocks at each end of each line with an additional reinforcing block mooring midway along the line. Helix anchors will supplement the end block moorings, particularly on the northern tract, where currents are strongest (App 7, item f).

³ See application of Pine Point Oyster Company, LLC, Docket number 2014-19. The existing experimental lease site and the proposed, larger standard lease site are shown in Figure 2 of the site report.

⁴ Lease SCAR NELS, DMR site report, page 3

This floating gear will be deployed on the southern portion of the south tract and on the north tract. The northern end of the south tract will be used for bottom-planting of American oysters at approximately 12 – 15 per square foot. Oysters in bags will be harvested by hand. Oysters on the bottom will be harvested by hand while wading or snorkeling or by dragging with a small drag (App 10).

In winter, the bags will be removed from the north tract but may remain in place on the southern part of the south tract (App 5). Ms Carroll testified that the winter of 2014-15 was unusually harsh and that an unprecedented amount of ice in the river dislodged oyster bags from the lease site. Should the lease be granted, she said that she would install helix (screw) anchors for more secure holding of the gear. She testified that she may also overwinter bags of oysters on the bottom in deeper water on the south tract or remove them to refrigerated storage.

No private land will be used for access to the lease site. The applicant's boats are currently kept at the public pier at Pine Point (App 13).

The intervenor Committees were represented by Rob Willette, who testified that their main concern is that all gear on the lease site be tagged for identification in case it goes astray. He noted that strong currents in the waters on and around the proposed lease tracts can carry away the oyster bags and described finding errant bags washed away into other parts of the Scarborough Marsh. Mr. Willette stated that the Committees have no concerns about the expansion of the lease site, and that the lease operations will not interfere with navigation or with the use of nearby flats for clam harvesting.

Peter Angis, a shellfish harvester from Scarborough, testified in support of requiring the oyster bags to be tagged, saying that lobstermen had found oyster bags as far away as Old Orchard Beach. He noted that the past winter was severe and suggested that the increased use of helix anchors, as proposed by Ms Carroll, should help to prevent gear loss.

Ms Carroll testified that she had been marking all new gear since the beginning of the summer of 2015. She agreed to a condition on the lease requiring that all oyster bags be marked to identify the owner's name and contact information, so that errant gear can be returned. This is a reasonable limitation on the proposed aquaculture activity, as provided by 12 MRS §6072 (7-B). Therefore, a condition requiring the gear to be marked will be included in the lease; see Section 6 below.

3. STATUTORY CRITERIA & FINDINGS OF FACT

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

impact from noise or lights at the boundaries of the lease site; and that the lease will be in compliance with visual impact criteria adopted by the Commissioner relating to color, height, shape and mass.

A. Riparian Access

According to the site report, “The surrounding uplands are owned by the State of Maine. There are no houses, docks, nor moorings with which the proposed activities might interfere” (SR 5). The riparian land is a wildlife management area held by the Maine Department of Inland Fisheries and Wildlife, which has indicated that it has no concerns about the proposed lease (see section 3D below).

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

B. Navigation

The site report observes:

Considering tidal limitations, the restriction at the railroad trestle, and the lack of commercially exploitable species, vessel traffic in the area of the proposed lease site is dominated by canoes/kayaks, sport fishing boats, and outboard skiffs. Tract 1 of the proposed lease site is located along the west bank of the Scarborough River and bordered by shoal waters to the east. It is located in a narrow arm of deeper water beyond the primary navigational channel to the east (Figure 2). The majority of vessels transiting the area are expected to follow the channel leading under the railroad trestle and further upstream.

Depths in the area range from one foot to 9 feet at low water and ten to nineteen feet at high water. The majority of navigation, except for individuals with local knowledge, would be limited to the primary channels or mid to high tidal stages. At mid to high water, navigation around the proposed farm and gear would not be impeded. (SR 5).

Although DMR mailed a questionnaire to the Scarborough Harbormaster requesting his observations about the potential effect of the proposed site on navigation, fishing and other uses, and riparian access, it was not returned. At the time of the public hearing, the Department learned that the Harbormaster position had become vacant. The previous incumbent, however, had worked with Ms Carroll to locate her experimental leases in areas where they would not hamper other activities. Testimony by Mr. Willette on behalf of both the Shellfish and Harbor Committees indicated that they believe the lease activities will not interfere with navigation in the vicinity of the expanded lease site.

The evidence supports the conclusion that vessels navigating in the area have unrestricted access to the main channel and can easily navigate around the proposed lease site at the higher tidal stages when the majority of boat traffic is likely to occur. Aquaculture lease sites are required to be marked for navigation purposes in accordance with U.S. Coast Guard requirements.

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

C. Fishing & Other Uses

The site report notes that no fishing activity was observed within the area of the proposed lease site (SR 5). The report notes that “Fishing for lobster and crab and drag harvesting of shellfish ... is unlikely to occur in such shallow waters where navigation is severely limited and such commercially exploitable species are not present. The proposed activities, should the lease be granted, will not prevent digging for clams and worms in the surrounding tidal flats” (SR 5).

The site report states that recreational hook-and-line fishing for striped bass is common in the waters around the railroad trestle, so that the potential exists for “occasional entanglement of hooked fish in lines and gear associated with the proposed farm.” Fish may be attracted to the floating oyster bags as a refuge and find a source of food in the fouling organisms that grow on the oyster gear (SR 5).

Mr. Willette testified that the Shellfish and Harbor Committees believe the lease activities will not interfere with shellfish harvesting in the vicinity of the expanded lease site.

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

Other aquaculture leases. As noted above, an existing experimental lease for shellfish culture (SCAR ELS) located across the channel to the east of the proposed lease site is proposed to be expanded. The enlarged site would lie approximately 200 feet east of Nonesuch’s proposed south tract and 130 feet southeast of its proposed north tract.

There are two limited-purpose aquaculture (LPA) sites in the Scarborough River. LPA PER-2-09 lies 782 feet southeast of the proposed south tract. As noted above, Ms Carroll holds LPA CAR-4-12 off the public pier at Pine Point, more than 3,000 feet downriver from the proposed lease site.

Given the nature of the aquaculture activities that are or will be conducted on all of these sites, there is no evidence or reason to believe that any of them will be adversely affected by the activities on the proposed lease site.

Exclusive Use. The application states that Nonesuch Oysters “welcome[s] small motorboats and kayaks on our site as long as people don’t tamper with the gear, or worse, poach our site” (A 19). Ms Carroll testified that dragging and shellfish harvesting should be prohibited except by the lessee or its authorized agents, but that other activities, including navigation and recreational fishing, do not need to be prohibited. These restrictions are reasonable in order to enable the aquaculture project to be carried out while encouraging the greatest number of compatible uses of the area, as provided in 12 MRS §6072 (7-B). Conditions reflecting these restrictions will be included in the lease; see Section 6 below.

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

dragging and shellfish harvesting, except by the leaseholder or its authorized agents, will be prohibited on the lease site. The lease must be marked in accordance with DMR Rule 2.80.⁵

D. Flora & Fauna

Site observations. In his testimony, Jon Lewis reviewed his findings from the site visit and gave his opinion that the Nonesuch project “makes sense” and will not cause any ecological harm to the environment on and around the proposed lease site. The site report describes his findings as follows:

Bottom sediments are mostly a thin layer of sand overlaying soft compressed peat-bog material to the south transitioning to sand at the northern end of Tract 1. Tract 2 is mostly sand. No rooted submerged aquatic vegetation such as eel grass (*Zostera marina*) was observed. During the site visit in March 2011, the water in the area had non-detectable salinity by taste. Heavy rain and snow melt surely contributed to this. In June 2015, the water had normal ocean salinity, by taste (SR 6).

The only species of fauna observed in abundance during the site visit was sand shrimp (*Crangon septemspinosa*) (SR 6). Other species observed occasionally included: green crabs (*Carcinus maenas*), mud snails (*Littorina* sp.), hermit crabs (*Pagurus* sp.), soft-shelled clams (*Mya arenaria*), and blue mussels (*Mytilus edulis*) (SR 6).

Fisheries & Wildlife. As noted above, the Scarborough River and Marsh area is designated by MDIF&W as “Essential Wildlife Habitat” for Piping Plovers and Least Terns (SR 6). The site report notes that, according to the Maine Department of Inland Fisheries & Wildlife (MDIF&W), “the area also is a significant nesting site in the spring for many birds, including the rare sharptail sparrow, and is a significant feeding and resting site for migratory birds.” MDIF&W manages the surrounding salt marsh as a wildlife management area.

DMR sent a copy of this lease application to MDIF&W for review and received a reply from John Perry, Environmental Review Coordinator, on November 25, 2014, stating that as the project “appears to have no impact on habitat, minimal impacts to wildlife are anticipated.”

⁵ **2.80 Marking Procedures for Aquaculture Leases**

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

This evidence supports the conclusion that the oyster farm will not impair the habitat or the well-being of marine and non-marine species in the area.

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

E. Public Use & Enjoyment

The site report notes that there are no public docks or beaches within 1,000 ft. of the proposed lease site (SR 7). The public boat launching facility at Pine Point is more than 2,900 feet downstream of the proposed lease site.

While the Scarborough Marsh itself is owned by the State of Maine, it is operated as a wildlife management area, not a public park; however, the Marsh does constitute “conserved lands” within the meaning of 12 M.R.S. 6072 (7-A) and DMR Rule Chapter 2.37 (7), since it is land acquired by the state in fee to protect its ecological attributes.⁶ Therefore, the Department must consider whether the proposed lease would interfere unreasonably with the public use and enjoyment of the marshlands within 1,000 feet of the proposed lease site, considering the purpose for which the land was acquired by the State of Maine.

Since the marsh is managed by MDIF&W as a wildlife refuge, and that Department has indicated that the proposed lease will have no impact on habitat and minimal impact on wildlife, it is clear that the aquaculture activities will not unreasonably interfere with public use and enjoyment of the Scarborough Marsh lands within 1,000 feet of the proposed lease site.

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

F. Source of Organisms

According to the application, American and European oyster stock will come from Muscongus Bay Aquaculture in Bremen, Maine, and Mook Sea Farm in Walpole, Maine.

Moving European oysters anywhere in Maine coastal waters requires a permit from the Department, since they are classified as “restricted” in order to prevent the spread of disease.

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

⁶ DMR Rules, Chapter 2.37 (7) Interference with Public Facilities. The Commissioner shall consider the degree to which the lease interferes with public use or enjoyment within 1,000 feet of a beach, park, docking facility or certain conserved lands owned by the Federal Government, the State Government or a municipal government. Conserved lands means land in which fee ownership has been acquired by the state, federal or municipal government in order to protect the important ecological, recreational, scenic, cultural or historic attributes of that property. Leases may not unreasonably interfere with public use or enjoyment of such beaches, parks, docking facilities, or conserved lands. In determining interference with the public use or enjoyment of conserved lands, the Commissioner shall consider the purpose(s) for which the land has been acquired.

G. Light

The application indicates that no lights will be used at the proposed lease site (App 13). The applicant will be bound by any lighting requirements imposed by the U. S. Coast Guard for navigation purposes.

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

H. Noise

The application describes the activities that are expected to produce noise on the lease site. These include voices, boat motors, occasional use of a power washer to clean oyster bags, and use of a sorter/tumbler on the work boat. No radios are used at the site. The application states that Nonesuch tries to do most of its “noisy work” at the public pier (App 13).

The use of boat motors is minimized by paddling the boats on the lease site whenever possible. Power washing occurs for a few days in spring and fall; an additional week of such work may be added in the summer. The tumbler uses a plastic bin, which is quieter than the usual aluminum; it will be run “on a relatively quiet battery-operated drill” (App 13). A small Honda water pump may be used in future to run water through the system.

The application notes that Nonesuch expects to rear its oysters in floating bags only for the first year, after which 70% of the oysters will be planted on the bottom in the spring and the remaining, smaller oysters planted in the fall. “This means that we will be removing most of the bags before the fouling starts and will be resetting the majority of the bags out after the biggest mussel and algae infestation period is over” (App 11). The application states that work on the site will normally be limited to Monday through Friday, 8:00 am to 4:00 pm between May and October, with less frequent activity in the winter months (App 10).

It is apparent that the applicant will manage the activities on the lease site to minimize noise to the extent possible and that noise produced during the lease operations will be similar to that from other activities in the vicinity, such as use of small outboard-powered boats, recreational fishing, kayaking, clamming, etc.

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

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

I. Visual Impact

According to the application, the sinking line used at the lease site is green, and all other equipment will be black “in order to reduce the visual presence of the farm” (App 9).

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

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

4. CONCLUSIONS OF LAW

Based on the above findings, I conclude that:

1. The aquaculture activities proposed for this site will not unreasonably interfere with the ingress and egress of any riparian owner.
2. The aquaculture activities proposed for this site will not unreasonably interfere with navigation. The lease site shall be marked in accordance with U. S. Coast Guard requirements.
3. The aquaculture activities proposed for this site will not unreasonably interfere with fishing or other uses of the area, taking into consideration the number and density of aquaculture leases in the area. The lease must be marked in accordance with DMR Rule 2.80⁷
4. The aquaculture activities proposed for this site will not unreasonably interfere with the ability of the lease site and surrounding areas to support existing ecologically significant flora and fauna.
5. The aquaculture activities proposed for this site will not unreasonably interfere with the public use or enjoyment within 1,000 feet of beaches, parks, docking facilities, or certain conserved lands owned by municipal, state, or federal governments.
6. The applicant has demonstrated that there is an available source of American oysters (*Crassostrea virginica*) and European oysters (*Ostrea edulis*) to be cultured on the lease site.
7. The aquaculture activities proposed for this site will not result in an unreasonable impact from light at the boundaries of the lease site.
8. The aquaculture activities proposed for this site will not result in an unreasonable impact from noise at the boundaries of the lease site.
9. The aquaculture activities proposed for this site will comply with the visual impact criteria contained in DMR Regulation 2.37(1)(A)(10).

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

⁷ **2.80 Marking Procedures for Aquaculture Leases**

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

5. DECISION

Based on the foregoing findings of fact and conclusions of law, the Commissioner grants the requested standard lease of 6.8 acres to Nonesuch Oysters, LLC, for ten years. This standard lease is granted to the applicant for the purpose of cultivating American oysters (*Crassostrea virginica*) and European oysters (*Ostrea edulis*), using suspended and bottom culture techniques. The leaseholder shall pay the State of Maine rent in the amount of \$100.00 per acre per year. As this is a standard lease with structures and no discharge, the applicant shall post a bond or establish an escrow account pursuant to DMR Rule 2.40 (2) (A) in the amount of \$5,000.00, conditioned upon its performance of the obligations contained in the aquaculture lease documents and all applicable statutes and regulations.

6. CONDITIONS TO BE IMPOSED ON LEASE

The Commissioner may establish conditions that govern the use of the lease area and impose limitations on aquaculture activities, pursuant to 12 MRSA §6072 (7-B)⁸ Conditions are designed to encourage the greatest multiple compatible uses of the lease area, while preserving the exclusive rights of the lessee to the extent necessary to carry out the purposes of the lease.

The following conditions shall be incorporated into the lease:

1. The lease site must be marked in accordance with both U.S. Coast Guard requirements and DMR Rule 2.80.
2. All oyster bags and similar gear must be marked with the owner’s name and contact information.
3. Dragging and shellfish harvesting, except by the leaseholder or its authorized agents, are prohibited within the boundaries of the lease site.
4. Other public uses that are not inconsistent with the purposes of the lease are permitted within the boundaries of the lease site.

7. REVOCAION OF LEASE

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

Dated: 11.3.15


Meredith Mendelson, Deputy Commissioner
Department of Marine Resources

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