

June 30, 2020

Application for Change in Gear Authorization
Scarborough River

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION

Pine Point Oyster Company, LLC applied to the Department of Marine Resources (DMR) for a change in gear authorization on their existing standard lease SCAR ERR, located southeast 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 the Department 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 February 8, 2016

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 February 8, 2016, DMR granted a 5.93-acre standard lease (SCAR ERR) to Pine Point Oyster Company, LLC (Exhibit 2, page 10). Nate Perry is the owner of Pine Point Oyster Company, LLC (Exhibit 2,

12 M.R.S.A. § 6072 (Exhibit 2, page 10). The standard lease proposal was an operational expansion of Mr. Perry's experimental lease, SCAR ELS, which was initially issued in July 2011 and in the same location as the current standard lease.¹ The standard lease replaced Mr. Perry's experimental site.

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

Gear Type	Description	Time of Year Deployed
Polyethylene mesh oyster bags	1,840 floating bags arranged in 23 lines. Each line contains 80 bags total	April-December
Stacked oyster trays	Deployed on the bottom of the site.	Year-round
Overwintering cages	30 cages deployed on the bottom of the proposed lease site.	December-April

The decision also authorized the use of up to three 12'x10' work floats that are connected to make a single work platform. The oysters are deployed in the floating bags until they reach approximately 2" in size, then they are moved to the stacked trays on the bottom of the site until they reach desired market size. During the winter months, the oysters in the floating bags are moved to overwintering cages that are kept on the bottom of the site.

The conditions imposed on lease SCAR ERR, pursuant to 12 M.R.S.A § 6072 (7-B) and located on page 14 of the original decision, are as follows:

1. The lease area shall be marked in accordance with both U.S. Coast Guard and Department of Marine Resources regulations Chapter 2.80.
2. All oyster bags and similar gear must be marked with the lessee's name and contact information.
3. Dragging, shellfish harvesting, and anchoring are prohibited on the lease site, except with the authorization of the leaseholder.
4. Other public uses that are not inconsistent with the purposes of the lease are permitted on the lease site.

¹ Based on a review of DMR records, two variances were granted for the experimental site. The first variance was granted December 16, 2011, which authorized the addition of polyethylene rope around sets of 8 bags each with the sets deployed in arrays of 17; The second variance was granted on January 22, 2013, which authorized the deployment of up to 30 bottom cages from December 1 through March 15 for overwintering purposes. Variances were subsequently replaced by the amendment process defined in 12 M.R.S.A. § 6072 (13)(G).

B. Proposed Gear Changes and Findings

Pine Point Oysters, LLC is requesting authorization to add SEAPA baskets and stacked bottom trays, organized in seven parallel rows, to the proposed site. Both gear types would be deployed from March 1 through December 31 each year. The SEAPA baskets measure 26" X 12"x 15" and are secured to longlines, with clips, in sections of eight. The SEAPA baskets are designed to flip or rotate with the tides (App 6 and 7). The leaseholder plans to deploy SEAPA baskets in sections of eight and is proposing to deploy stacked trays secured to round bar tables between each section of baskets. The individual trays measure 40"X 40" X 3", but up to five may be stacked together on top of each round bar table (App 11). The tables measure 36"x36"x72" and a maximum of 42 are proposed for the site (App 9). The base of the table would extend 24" below the substrate. The height of the tables as measured from the SEAPA basket line to the substrate would be approximately 48" (App 7). According the application, the deployment of the SEAPA baskets and stacked trays would be limited to the area of the existing lease site as depicted below:

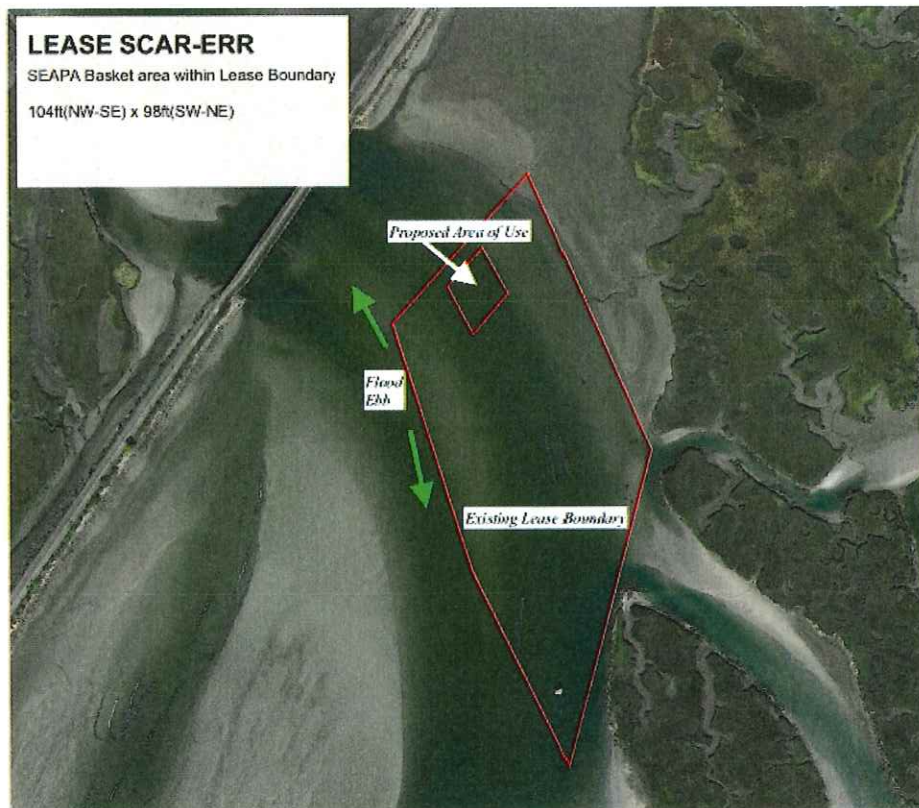


Figure 1: Area of existing lease area where the SEAPA baskets, tables, and stacked trays would be deployed. Image from page 5 of the completed amendment application.

The SEAPA baskets and stacked trays would be submerged below the surface of the water during high tide and partially exposed during low tide (App 6 and 7). At mean low water, water depths where the gear would be deployed are ~40" or 3.3' (App 7). Any stock removed from the gear during the winter months would be kept in bottom cages, which are currently authorized on the site (App 13).

The application indicates that the addition of this gear would replace some of the existing floating bags, which would reduce the number of maintenance related trips to the site (App 12).² In addition, the application specifies that the general level of activity on the site would likely decrease as gear tending activities would be limited to lower tidal stages when the gear is more readily accessible (App 12). Except for certain tidal stages, the gear remains submerged which may help reduce the likelihood of birds landing and roosting on gear for extended periods of time (App 12).

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. The site is also within the Scarborough Marsh Wildlife Management Area, which is owned by MDIFW. DMR provided MDIFW with a copy of the completed amendment application and an opportunity to submit written comments. Nate Perry also met with officials from MDIFW to discuss the proposed gear change. In their response to DMR's request for comments, MDIFW indicated that:

...all structures and activities be located in subtidal areas with greater than 1 meter (3 feet) of water depth at low tide. Further, the lease area must be accessed only from the subtidal. Salt marsh and intertidal areas within the Scarborough Marsh WMA [Wildlife Management Area] are not to be used to access the lease area, store equipment, secure boats, or other activities related to PPO's [Pine Point Oyster] operation. MDIFW acknowledges that intertidal areas within the Scarborough Marsh are sometimes dynamic due to extreme weather events and tidal activity. MDIFW notes that, when PPO reinstalls it's proposed structures annually, it is expected to observe site conditions and place the structures in conformance with this minimum low water depth recommendation each time.³

MDIFW's letter further specifies that if the lease holder follows the modifications and best management practices it is unlikely that the amendment will cause "substantial detrimental impacts" to the resources under MDIFW's jurisdiction.

² The lease holder submitted a cover letter, dated January 27, 2020, that estimates the proposed gear would replace between 700-1200 of the existing floating bags. However, these numbers were not listed in the application.

³ Letter from B. Stratton to C. Burke dated March 3, 2020

DMR also provided a copy of the completed application to the Town of Scarborough but did not receive any comments. However, Nate Perry submitted an email exchange, dated January 28, 2020, he had with Angelo Mazzone, the Harbormaster for the Town of Scarborough. According to the emails, Mr. Mazzone was made aware of the applicant's plans and did not have any concerns regarding the proposal. DMR received the applicant's proposal on February 7, 2020. Although DMR never received any comments from the municipality, the applicant communicated his plans with a local official prior to submitting a proposal. 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 this gear type would be consistent with the findings of the original decision and lease conditions. MDIFW had one request specific to this gear amendment, which was that the gear be deployed in subtidal areas of the lease site that, at low tide, maintain a water depth of 3' or more. Per the application, at mean low water, depths where the new gear would be deployed is 3.3', which complies with MDIFW's recommendation.⁴ However, based on MDIFW's review and DMR's experience with other sites in the area, the substrate is dynamic and subject to frequent shifts. It is possible that site conditions could vary, and the deployment of the proposed gear in the specified area would no longer comply with MDIFW's low water depth recommendation. Therefore, it is reasonable to require the lease holder to adhere to MDIFW's water depth recommendations when deploying this new gear type. If the amendment is granted, a condition will be added to the existing lease that incorporates MDIFW's suggestion concerning the deployment of this gear and water depths.

The other recommendations made by MDIFW pertain to the operation of the existing site and are beyond the scope of what DMR can consider in evaluating this amendment, which is specific to the gear change under consideration. Furthermore, there is no documentation to suggest that the lease holder has operated the site in a manner contrary to the other recommendations made by MDIFW. Given the context, it is likely that the other recommendations are a reminder of best practices and expectations for operating this site. In 2026, this lease will be up for renewal. As part of the renewal process, MDIFW will have the opportunity to review and provide their feedback on current operations.

⁴ As part of their review MDIFW only specified depths of 3 feet at "low tide." The application includes water depths at mean low water and extreme low water. Depths at mean low water would be ~3.3 feet and depths at extreme low water would be ~1.3 feet. However, the applicant discussed the proposal with MDIFW, who also reviewed the revised application. MDIFW also visited the lease site, at low tide, in October 2019. According to the applicant, the area selected for the placement of gear is intended to satisfy concerns raised by MDIFW, while also keeping the shallowest areas of the site accessible to terns for plunge diving. The area was also selected based on its distance from the intertidal, which is utilized by plovers.

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 this gear type will be added:

- A) The deployment of the SEAPA baskets, tables, and associated trays are limited to the area of use specified in Figure 1 of the gear amendment decision. The deployment of authorized structure within that area must be subtidal and maintain a water depth of 3 feet or more at low tide. Given the dynamic nature of the Scarborough River, the area of the lease site where the SEAPA baskets, tables, and associated trays are deployed may be modified with prior, written approval from DMR and MDIFW.

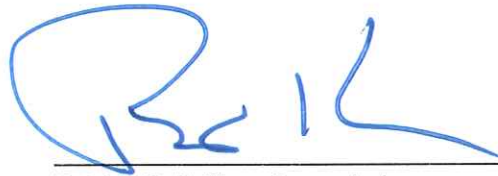
Prior to DMR's issuance of this lease amendment, MDIFW needs to review and give final approval to this proposed change, which is within Essential Habitat.

3. DECISION

Subject to final review and approval from MDIFW, the Commissioner grants the request from Pine Point Oyster Company, LLC to add SEAPA baskets, tables, and associated trays to the authorized area of the standard lease site SCAR-ERR.

Dated: _____

6/28/2020



Patrick C. Keliher, Commissioner
Department of Marine Resources

STATE OF MAINE
DEPARTMENT OF MARINE RESOURCES
Standard Aquaculture Lease Application
Suspended culture of shellfish,
Scarborough River

Pine Point Oyster
Company, LLC
Lease SCAR ERR
Docket # 2014-19
February 8, 2016

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION

Pine Point Oyster Company, LLC, a Maine corporation, applied to the Department of Marine Resources (“DMR”) for a standard aquaculture lease on 4.933 acres located in the coastal waters of the State of Maine, in the Scarborough River in the Town of Scarborough in Cumberland County, for the purpose of cultivating American oysters (*Crassostrea virginica*) and European oysters (*Ostrea edulis*) using suspended culture techniques. DMR accepted the application as complete on September 10, 2014. Field work conducted by Department biologists indicates that the proposed lease area comprises 5.93 acres, not the 4.93 acres requested in the application.

1. THE PROCEEDINGS

Department biologists conducted a site visit on June 25, 2015 and submitted a site report dated July 6, 2015. A public hearing on this application was held on September 15, 2015, in Scarborough. No one intervened in the hearing.

Notices of the hearing and copies of the application and DMR site report were provided to numerous state and federal agencies for their review, as well as to various educational institutions, aquaculture and environmental organizations, the Town of Scarborough, members of the Legislature, representatives of the press, riparian landowners, and other private individuals. Notice of the hearing was published in the *Forecaster* on August 7 and 28, 2014, and in the *Commercial Fisheries News* September, 2014 edition.

Sworn testimony was given at the hearing by Nate Perry, owner of Pine Point Oyster Company, and by DMR’s Aquaculture Environmental Coordinator, Jon Lewis. Mr. Perry described his proposed project. Mr. Lewis described the site visit and presented a videotape of the bottom. The U.S. Army Corps of Engineers was represented at the hearing by LeeAnn Neal. The Scarborough Shellfish Conservation Committee and the Scarborough Coastal Waters and Harbor Committee were represented by Rob Willette.

Each witness was available for questioning by the Department, the applicant, and those in attendance. 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.¹

LIST OF EXHIBITS²

1. Case file, #2014-19
2. Application signed and dated Sept. 10, 2013
3. DMR site report dated July 6, 2015

2. DESCRIPTION OF THE PROJECT

A. Site History

Since 2011, Mr. Perry has operated an experimental lease for oyster culture, SCAR ELS, on 1.37 acres in the same location as this proposed standard lease. The proposed lease expands the footprint of Mr. Perry's original lease by approximately 4.56 acres (App 18; SR 3).

B. Site Characteristics

The proposed lease site is located in shallow, subtidal waters in the Scarborough River, southeast 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 marshland and water surrounding the site is designated by MDIF&W as Essential Wildlife Habitat PPLTo4 for piping plovers and least terns (App 36).

The site report describes the proposed lease site location as follows:

The proposed lease occupies shallow subtidal waters along the eastern shore of the Scarborough River. It is bounded by the primary navigation channel to the west, shoal water to the north, and tidally exposed flats leading to saltmarsh to the south and east (Figure 2). The bottom topography of the proposed lease site is comprised of tidally scoured, undulating sand (SR 2).

The area around the site is currently classified by the Department's Water Quality Classification program as "open/approved for the harvest of shellfish." The site report notes that "Harvest of product from the proposed lease, if granted, will be subject to any changes in Water Quality Classification by The Department of Marine Resources Division of Public Health" (SR 4).

Mean low water depth (MLW) within the area of the proposed lease, as calculated from measurements taken during the site visit, is 1-8 feet; the site is deepest at its center. At mean high water (MHW), water depth ranges from 8-15 feet (SR 2).

¹ In references to testimony, "Smith/Jones" means testimony of Smith, questioned by Jones.

² Exhibits 1, 2, and 3 are cited below as: Case file – "CF"; Application – "App", site report – "SR" with page numbers.

The northeast and southeast sides of the proposed lease site lie at or close the edge of the nearest intertidal shoreline. The western side of the site lies approximately 180 feet east of the shoal water to the west. The railroad trestle lies approximately 285 feet northwest of the northwest corner of the site. To the west and northwest of the proposed lease site lie two tracts of lease SCAR SRR, held by Nonesuch Oysters, LLC; the northeast corner of Nonesuch's south tract lies 199 feet southwest of Pine Point's proposed northwest corner (SR 3).

As noted above, Department biologists calculated the area of the proposed lease as being 5.93 acres, rather than 4.93, as stated in the application (SR 2).

C. Proposed Operations

Mr. Perry has grown oysters in the Scarborough River since 2009, using methods similar to those planned for the proposed lease site on both a limited-purpose aquaculture (LPA) license site and on the experimental lease site. This application represents an expansion of the current operation from 1.4 acres to 5.9 acres. All gear will be either floating or submerged; no bottom-planting of oysters is proposed for this lease site.

Pine Point Oyster Company proposes to grow all its oysters in three types of gear. From April to December, the company plans to deploy up to 1,840 polyethylene mesh oyster bags floating at the water's surface and arranged in 23 lines of 80 bags each, 40 bags on each side of each line. The lines of bags will be 30 feet apart, moored with helix anchors at each end. Mr. Perry testified that this is the same number of bags that has been deployed on the existing experimental lease site (Perry/Neal).

Up to three 10-ft. by 12-ft. work floats will also be deployed on the lease site. A single float has been deployed on the experimental lease site; as the additional floats are added, they will be connected to one another to make a single work platform, as depicted on pages 29 and 30 of the application.

The hearing on this application followed a hearing earlier in the day on application by for the Nonesuch lease SCAR SRR, which, as noted above, lies about 200 feet west of the proposed lease site. Mr. Perry attended that hearing, at which the Scarborough Shellfish and Harbor Committees testified that shellfish harvesters and others frequently find oyster bags in the marsh and river that have been washed away from the lease sites by the strong currents. The Committees requested that Nonesuch mark its bags so they can be returned, which Nonesuch agreed to do.

Although there were no intervenors at the hearing on his application, Mr. Perry testified that he is agreeable to a similar condition being placed on Pine Point's lease, since the proposed lease site is also affected by the strong currents in the area (Perry/Robinson). The wording of the condition will be "All oyster bags and similar gear must be marked with the lessee's name and contact information." A condition to this effect will be included in the lease; see section 6, below.

During the winter months, 30 overwintering cages will be deployed directly on the bottom sediments. Stacked trays will be used on the bottom throughout the year for grow-out of oysters (Perry/Robinson). A 12' x 10' work float will also continue to be used on the lease site, as it has been on the existing site.

The application describes the sequence of operations throughout the year, including setting out overwintered stock in March or April, adding new stock in August, cleaning gear and grading stock through October, and, beginning in December, overwintering oysters in gear on the bottom and/or in refrigerated storage (App 4, 5). Bags will be cleaned by hand brushing on-site and power washing off-site. Harvest will be by hand from the gear, usually from September to April. The site will be monitored weekly during winter and as needed during the remainder of the year (App 4).

Vessels used to tend the site will be a 17-ft. Carolina skiff with a 25 HP outboard, with the future addition of a slightly smaller skiff and outboard when needed (App 4). Vessels will travel to the lease site from the Ferry Beach launch site in Scarborough. They will “motor under load and between gear, but mostly be moved by hand along the ‘longlines’ to perform tasks” (App 4).

3. STATUTORY CRITERIA & FINDINGS OF FACT

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

A. Riparian Access

The site report states, “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 4).

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 describes the potential effect of the proposed lease on navigation as follows:

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. On June 25, 2015 two individuals on stand-up paddleboards were observed transiting through the proposed lease area and into the small channel to the east.

The proposed lease site is located along the east bank of the Scarborough River and occupies the eastern arm of the subtidal channel (Figure 2), extending to the west into shoal water. As was the case with an approximately 20’ center-console boat that was

observed traveling under the railroad trestle on June 25, 2015, most vessels transiting the area are expected to follow the western arm of the channel leading under the bridge and further upstream (SR 4).

Although DMR mailed a questionnaire to the Scarborough Harbormaster requesting his observations about the potential effect of the proposed site on navigation, fishing, 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, worked with Mr. Perry to locate his experimental lease in an area where it would not hamper other activities on the water and surrounding tidal flats. No testimony was presented at the hearing to indicate that the lease activities would interfere with navigation in the vicinity of the expanded lease site. Mr. Perry testified that gear on the site would not encroach on the small navigational channel between the east side of the lease site and the nearby shore (Perry/Neal; Perry/Willette).

The evidence supports the conclusion that the lease gear and activities will not interfere with navigation in the main channel to the west or with the small channel to the east of the site. 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 lease site must be marked in accordance with U. S. Coast Guard requirements.

C. Fishing & Other Uses

According to the site report, at the time of the site visit no fishing activity was observed within the proposed lease area (SR 4). The report observes:

The Department recognizes that commercial or recreational fishing in the area is seasonal. Fishing for lobster and crab and drag harvesting of shellfish, however, 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. Approximately 130 feet of passage for boat access to the intertidal will remain between the proposed expansion and the northerly SCAR NELS (Figure 1) (SR 4).

The report also notes that recreational hook-and-line fishing for striped bass is common around the railroad trestle to the north of the proposed lease site. While the presence of the lease will not restrict such fishing, the report states that “occasional entanglement of hooked fish in lines and gear associated with the proposed farm” is possible, as fish may be attracted to the shelter of the aquaculture gear and feed on algae and invertebrates that can grow on the gear at the aquaculture site” (SR 4).

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

Other aquaculture leases. At the time of this decision, the nearest aquaculture site is a new standard lease site, SCAR SRR, held by Nonesuch Oysters, Inc., incorporating two experimental lease sites previously held by Nonesuch: SCAR NELs, located about 350 feet to the northwest of the proposed lease site, and SCAR WLS, approximately 275 feet west of the proposed lease site. The site report states that “a minimum of ~200 feet of navigable water” lies between SCAR SRR and the proposed Pine Point lease site (SR 5). Both lessees have operated experimental lease sites in the same locations since 2011, apparently without interfering with one another. Activities at the proposed lease site will not interfere with the use of the Nonesuch lease site, and vice versa.

Two LPA license sites lie in the Scarborough River, CAR-4-12 at the public pier at Pine Point, more than 3,000 feet downriver from the proposed lease site, and PER-2-09, approximately 1,450 feet to the south of the proposed lease site (SR 5). The former is held by the owner of Nonesuch Oysters, LLC and the latter by Mr. Perry; the proposed lease site will not interfere with activities at either license site.

Exclusivity. Mr. Perry testified that the conditions applied to the experimental lease (SCAR ELS) are appropriate for the proposed expanded lease. These conditions prohibit dragging, shellfish harvesting, and anchoring, except with the authorization of the leaseholder. Mr. Perry said that he would authorize local shellfish harvesters to harvest clams on the lease site (Perry/Robinson).

These conditions 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 to that effect will be included in the lease. The lease must be marked in accordance with DMR Rule 2.80.³

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.

32.80 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.

D. Flora & Fauna

Site observations. The site report describes observations made of the proposed lease site and the existing lease site:

Bottom sediments are mostly scoured sand with rippling caused by tidal action. Blue mussel (*Mytilus edulis*) and soft-shell clam (*Mya arenaria*) shell hash was scattered over the sediments. During the site visit in March 2011 [for the preceding experimental lease, SCAR ELS], 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 5).

According to the site report, no eel grass or other rooted submerged aquatic vegetation was observed during the site visit. The report notes that “A variety of green and brown algae, including sea lettuce (*Ulva lactuca*), were observed wherever structure, such as mooring lines, was available for attachment” (SR 5). Epibenthic fauna were relatively rare, except for sand shrimp, which were abundant. Other species observed occasionally include green crabs, hermit crabs, mud snails, blue mussels, and soft-shell clams (SR 5).

Fisheries & wildlife. Copies of the application were provided to the Maine Department of Inland Fisheries and Wildlife (MDIF&W) for review. The proposed lease site is located within Essential Wildlife Habitat PPLTo4, designated for piping plovers and least terns (SR 5).⁴ The site report also notes:

According to MDIF&W the area is also 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. The surrounding salt marsh is a wildlife management area owned by the State of Maine (SR 5).

The application includes a letter from MDIF&W concluding that the proposed expansion and associated subtidal activities would have minimal impact on sharptail sparrows, piping plovers, least terns, and other tidal wading birds and waterfowl that do not generally utilize open water (App 38, SR 6).

Based on this evidence, it appears that the aquaculture activities proposed for this lease site will not interfere with the ecological functioning of 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

According to the site report, “there are no public docking facilities or beaches within 1000 feet of the proposed lease” (SR 6). The report notes that the public boat launch at Pine Point is more than 3,000 feet downstream from the proposed lease site.

⁴ According to the site report, Essential Habitat information is available on the State of Maine GIS server (gisdatabase.dafs.state.me.us) (SR 5).

All land within 1,000 feet of the proposed lease site is owned by the State of Maine. While this land is managed as a wildlife management area, not a public park, 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.⁵ 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 not adversely affect either wildlife or wildlife habitat, it is clear that the aquaculture activities will not unreasonably interfere with public use and enjoyment of the Scarborough Marsh waters and 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 certain conserved lands owned by municipal, state, or federal governments.

F. Source of Organisms

The application indicates that the sources of American oysters (*Crassostrea virginica*) and European oysters (*Ostrea edulis*) for this proposed lease site are Mook Sea Farm in Walpole, Maine, and Muscongus Bay Aquaculture in Bremen, Maine (App, cover page).

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

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

G. Light

The application indicates that no lights will be used at the proposed lease site, other than for navigation, and that “working beyond dusk is only likely in an emergency situation” (App 6).

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

⁵ 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.

H. Noise

The application indicates that a 17-foot Carolina skiff with a 25 horsepower outboard motor is currently used on the existing lease. Eventually, a 16-foot Carolina skiff with a 15 horsepower outboard motor may be required (App 4). Use of the outboard motors will be minimized on the lease site (App 4).

The only power equipment to be used at the lease site is a lobster trap hauler, mounted on the existing skiff and run on a 12-volt battery. It is mounted in a stainless box that muffles “almost all mechanical sound” (App 6). The hauler will be used “infrequently,” for setting out gear in spring and for harvesting. It will run in 10-second intervals and be “inaudible” beyond 20 ft. of the boat (App 6).

The site report observes that Carolina skiffs are commonly used in Maine coastal waters and that noise from the trap hauler will be comparable to that of similar equipment used throughout the state (SR 6).

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

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. According to the application, all gear except rope is black (App 3). Gear drawings in the application show the gear color, which is black, dark blue, or gray; the work float has a wooden deck (App 20-25, 29-32). Photographs of gear on the existing site show that it blends in with the surroundings (App 31, 32).

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.
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.
4. The aquaculture activities proposed for this site will not unreasonably interfere with the ability of the lease site and surrounding areas to support existing ecologically significant flora and fauna.
5. The aquaculture activities proposed for this site will not unreasonably interfere with the public use or enjoyment within 1,000 feet of beaches, parks, or docking facilities or certain conserved lands owned by municipal, state, or federal governments.

6. The applicant has demonstrated that there is an available source of stock to be cultured for 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.

5. DECISION

Based on the foregoing, the Commissioner grants the requested lease of 5.93 acres to Pine Point Oyster Company, LLC for ten years for the purpose of cultivating American oysters (*Crassostrea virginica*) and European oysters (*Ostrea edulis*) using suspended culture techniques. The applicant shall pay the State of Maine rent in the amount of \$100.00 per acre per year. 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 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)⁶. 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:

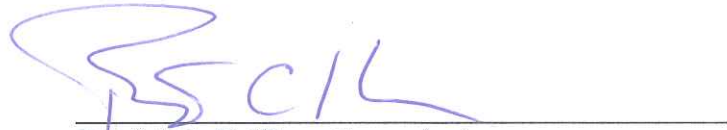
1. The lease site must be marked in accordance with both U.S. Coast Guard requirements and DMR Rule 2.80.
2. All oyster bags and similar gear must be marked with the lessee's name and contact information.
3. Dragging, shellfish harvesting, and anchoring are prohibited on the lease site, except with the authorization of the leaseholder.
4. Other public uses that are not inconsistent with the purposes of the lease are permitted on the lease site.

⁶ 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."

7. REVOCATION OF LEASE

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

Date: 2/8/16



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