

STATE OF MAINE
DEPARTMENT OF MARINE RESOURCES

Timothy Bennett and Adam Simmons

Experimental Aquaculture Lease Application
Suspended Culture of Shellfish
Back River, Waldoboro, Maine

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION

Timothy Bennett and Adam Simmons applied to the Department of Marine Resources (DMR) for a three-year experimental aquaculture lease located north of Haystack Island, Back River, Waldoboro, Lincoln County. The proposed lease is 2.71 acres¹ and is for the suspended cultivation of American oysters (*Crassostrea virginica*) for commercial aquaculture research and development.

1. THE PROCEEDINGS

DMR accepted the application as complete on February 10, 2022. Notice of the application and the 30-day public comment period was provided to state agencies, riparian landowners within 1,000 feet of the proposed lease site, the Town of Waldoboro, and others on DMR's email listserv. A Harbormaster Questionnaire was also sent to the Town of Waldoboro requesting information about designated or traditional storm anchorages, navigation, riparian ingress and egress, fishing, or other uses of the area, etc. Notice of the complete application and comment period was published in the March 3, 2022, edition of the *Lincoln County News*. Title 12 M.R.S.A. §6072-A (6) provides that the Commissioner shall hold a public hearing if five or more persons request a public hearing within the 30-day comment period. No requests for a public hearing were received and no hearing was conducted. The evidentiary record regarding this lease application includes the application, DMR's site report dated October 18, 2023, and the case file. The evidence from each of these sources is summarized below.²

LIST OF EXHIBITS

1. Case file
2. Application
3. DMR site report, issued on October 18, 2023

¹ Applicant originally requested 2.52 acres. DMR calculations indicate the area is 2.71 acres.

² These sources are cited, with page references, as App (Application), CF (case file), and SR (site report).

2. DESCRIPTION OF THE PROJECT

A. Proposed Operations

The purpose of the proposed experimental lease site is to determine the viability of the site for commercial oyster cultivation (App 7). The applicants are proposing to culture oysters using ten 120-foot longlines, which would be used to secure up to 1,200 floating mesh bags (App 7, 19). A maximum of 200 bottom cages may also be used to overwinter product during certain times of year (App 7, 21). The applicants intend to seed the floating bags in spring and tend and harvest throughout the year (App 7). The applicants would also utilize a rotary tumbler or sorter and service the proposed site via skiff (App 9).

B. Site Characteristics

On July 28, 2022, DMR scientists assessed the proposed lease site. The eastern shore of the Back River is rocky, intertidal ledge that leads to mature coniferous uplands (SR 2). The western shore of the Back River includes residential homes and is characterized by rocky outcroppings (SR 2). On October 5, 2023, DMR scientists conducted a second assessment to assess water depths at low tide and gather additional information about nearby features (SR 2). Correcting for tidal variation, depths at the proposed lease site ranged from 0.4-2.6 feet at mean low water (MLW) (SR 2).

3. STATUTORY CRITERIA & FINDINGS OF FACT

Approval of experimental aquaculture leases is governed by 12 M.R.S.A. §6072-A. This statute provides that a lease for commercial aquaculture research and development or for scientific research 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 other aquaculture uses in the 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, or docking facilities owned by municipal, state, or federal governments. The Commissioner must also determine that the applicants have demonstrated that there is an available source of organisms to be cultured for the lease site.

A. Navigation

The Back River is shallow, so the amount of navigable water varies with the tidal stage (SR 5). Water depths within the boundaries of the site, at mean low water, ranged from 0.4 to 2.6 feet (SR 2). At high tide, there is approximately 230 feet of navigable water to the west of the northwestern

boundary and at MLW, there is approximately 120 feet of navigable area (SR 5). At high tide, there is approximately 400 feet of navigable water to the west of the southwestern boundary and at MLW there is 300 feet of navigable water (SR 5).

The application indicates that there are two private docks within the vicinity of the proposed lease site (App 10). During the October 5, 2023, site visit DMR staff observed five docks in the vicinity of the proposal (SR 4). Two piers were also observed without a ramp or dock attached, but they were observed on land (SR 4). The closest pier was observed approximately 180 feet to the west of the proposal. One of the docks was also being used to store a dinghy (SR 4). During the July 28, 2022, site assessment three kayakers were observed within the vicinity of the proposed lease site.

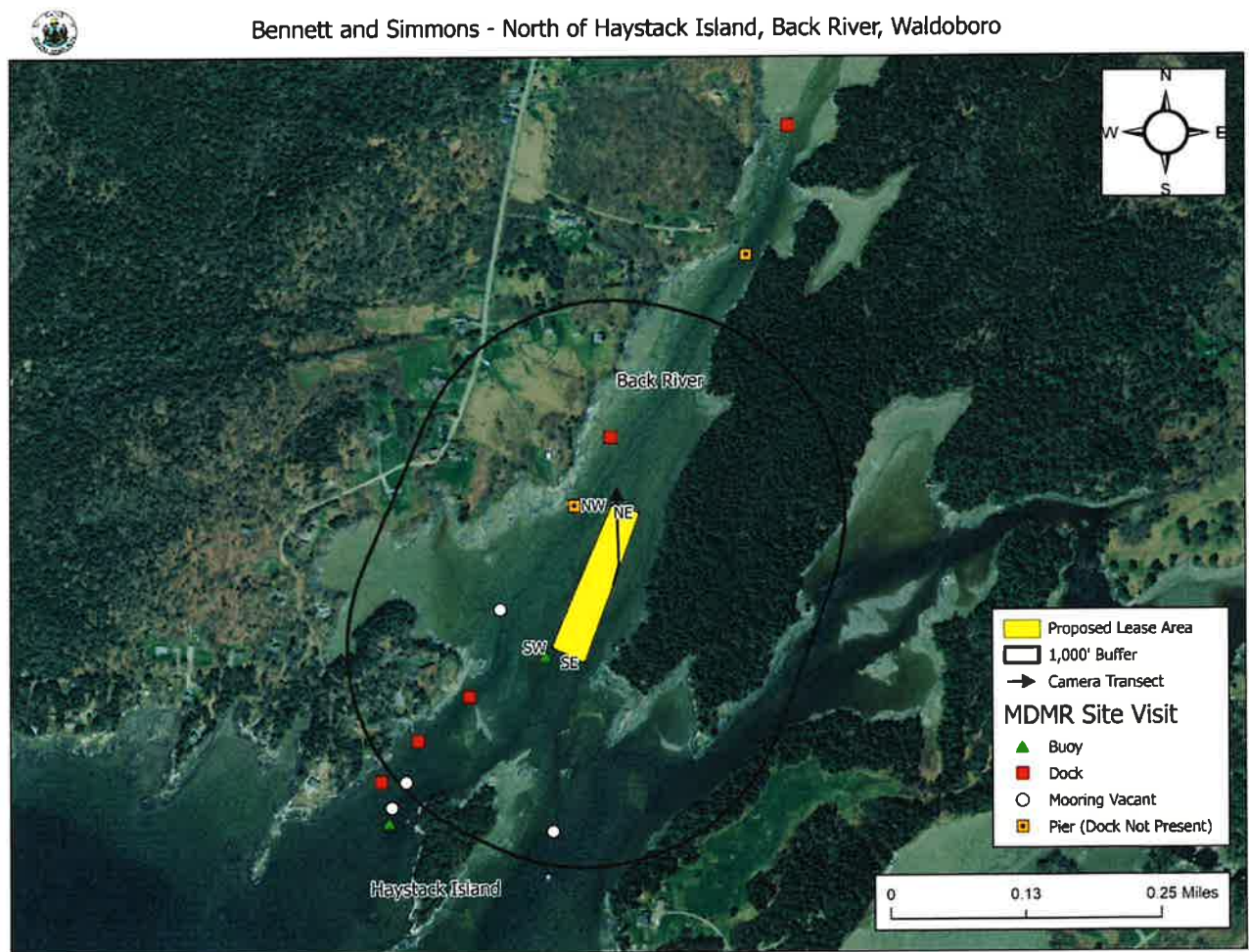


Figure 1: Observed infrastructure and buoys in the area. Image from DMR site report.

One of the kayakers was observed departing from a dock located to the north of the proposed lease and traveled southerly past the site to the southern end of Haystack Island (SR 7). The application

indicates there are no moorings in the area (App 10). On October 5, 2023, four moorings were observed in the vicinity of the proposal (SR 5). Each of the moorings were vacant at the time of the site visit (SR 5). The closest mooring was approximately 315 feet to the west of the site (SR 5).

On March 27, 2022, the Waldoboro harbormaster commented that navigating through the area except at high tide could be problematic given the location and width of the proposed lease site. According to the Questionnaire, small lobster boats also frequent the area. J. Blodgett, who owns property at the head of the Back River stated that the proposed lease would restrict access, coming up the river, to high tide only.³ W. Bowman stated that the proposed site would occupy the deepest point in the Back River channel making it impossible for powerboats to navigate around the site during most tidal stages as the remaining navigable waters would be too shallow.⁴ W. Bowman also noted that there are at least three to four boat owners north of the proposed site that regularly navigate through the area.⁵

Discussion:

In rendering a final decision, the Commissioner shall consider the following regarding navigation:

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...⁶

The applicants are applying for both surface and subsurface structures to culture oysters. Specifically, if the proposal were granted, floating mesh bags would be at the surface year-round. The proposed site is also located in a body of water that is shallow and, based on information in the record, it would occupy the deepest part of a narrow channel.

There are also docks, piers, and moorings within the vicinity of the proposed site, which indicate that navigation within this section of the Back River is common, and some individuals have established access points. Based upon the site report and comments received, including the Harbormaster Questionnaire, a variety of commercial and recreational vessels regularly transit the area, including small lobster boats.

Based upon feedback received, if the lease were granted, navigation in the area for powered vessels would be restricted to high tide. This means that some vessels would only be

³ CF: Email from J. Blodgett to DMR dated March 28, 2022.

⁴ CF: Email from W. Bowman to DMR dated March 28, 2022

⁵ Id.

⁶ See Chapter 2.37(1)(A)(2). The Commissioner considers the applicable criteria contained in Chapter 2.37 pursuant to Chapter 2.64(11)(A).

able to access the area twice a day and that would be further restricted by the timing of the tides and hindered by the presence of existing docks and moorings in the area.⁷ Limited access would be problematic for individuals who operate powerboats and have to navigate to docks, piers, and moorings in the area, especially to the north of the site. Although kayaks or other hand powered vessels may be able to navigate within the area at lower tidal stages, other types of vessels that require deeper water are regularly used in the area.

Therefore, the aquaculture activities proposed for this site will unreasonably interfere with navigation.

B. Fishing & Other Uses

Fishing. The application states that there is no commercial or recreational fishing within the proximity to the proposed site (App 9, 11). During the July 28, 2022, site visit, DMR documented four lobster buoys within the vicinity of the proposal (SR 6). The closest observed lobster buoys were approximately 365 feet, and 1,100 feet to the west or southwest of the proposal (SR 6). During the October 5, 2023, site visit DMR observed one lobster buoy approximately 50 feet south of the proposal and another approximately 1,165 feet to the southwest (SR 6). No lobster (*Homarus americanus*) was observed within the boundaries of the proposed lease site (SR 6). During the public comment period on the proposed application, DMR received comments specific to lobster and green crab (*Carcinus maenas*) fishing within the area.

On March 31, 2022, W. Bowman noted that he sets five recreational lobster traps within the proposed lease and a member of his family deploys a 20-trap string. W. Bowman also noted that other licensed fishermen or their children deploy traps within the area and that it is a good location to fish for lobster, especially during the summer months.⁸ W. Bowman also deploys 25 green crab traps within the boundaries of the proposed site. W. Bowman noted that he fishes for lobsters and green crabs within the proposed lease area from April through November each year. R. Bowman noted that she has a commercial lobster license and that she sets traps within the boundaries of the proposed site.⁹ On March 28, 2022, members of the Blodgett family, who own property at the head of the Back River, noted that they have seen lobster and crab buoys within the area.¹⁰ They stated that a member of their family holds a commercial lobster license and fishes in that area of the Back River during the summer months. On

⁷ Based on two high tides per day that are approximately 12 hours and 25 minutes apart and their respective timing varies throughout the year.

⁸ CF: Email from W. Bowman to DMR dated March 31, 2022.

⁹ CF: Email from R. Bowman to DMR dated March 21, 2022.

¹⁰ CF: Email from J. Blodgett to DMR dated March 28, 2022.

March 21, 2022, A. Balsler noted that he fishes for green crabs and lobster around and to the north of Haystack Island.¹¹

The application notes that there are some clams¹² in the area (App 14). The application further specifies that the area to the north of the proposed site drains at low tide, exposing flats (App 11). The Town of Waldoboro has a shellfish conservation program established in accordance with 12 M.R.S.A. §6671.¹³ The town also has a shellfish committee, which is responsible for implementing directives of the program as contemplated in the respective ordinance. On March 11, 2022, a scientist with DMR's Nearshore Marine Resources Program noted that the proposal may be close enough to the intertidal and occasionally shallow enough to allow for the harvest of wild shellfish existing within the site and that the area is soft shell clam habitat (SR 6,7).¹⁴

According to DMR records, the town's shellfish program conducted a variety of management activities in the Back River from 2010-2018.¹⁵ For example, DMR issued transplant permits, implemented conservation and pollution closures and related openings.¹⁶ On March 27, 2022, the Waldoboro harbormaster stated that the area has potential for commercial clamming. The harbormaster also stated that the Waldoboro Shellfish Committee (WSC) was concerned about the width of the proposed lease site.

Discussion:

In rendering a final decision, the Commissioner shall consider the following regarding commercial or recreational fishing or other water-related uses of the area:

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 actual fishing days, and the amount of fisheries resources harvested from the area.¹⁷

The record demonstrates that lobster and green crab fishing occur within the general vicinity of the proposed site with some individuals stating that they deploy traps (25 green crab traps, 5 recreational lobster traps, and a 20-trap string for commercial lobster fishing) within the boundaries of the proposed site. These fishing activities occur April through November and small lobster vessels transit the area. If

¹¹ CF: Email from A. Balsler to DMR dated March 21, 2022.

¹² The application does not specify the species of clams.

¹³ The Town of Waldoboro manages soft shell clams (*Mya arenaria*) and razor clams (*Ensis directus*). Given the context, references to clams and commercial clamming are most likely to soft shells.

¹⁴ CF: Email between Nearshore Marine Resources Program and the Aquaculture Division dated March 11, 2022. The Nearshore Marine Resources Program assists municipalities with resource assessment and the management of their shellfish ordinances. The site is not intertidal, so permission from the municipality is not required.

¹⁵ CF: Email between Nearshore Marine Resources Program and the Aquaculture Division dated March 11, 2022.

¹⁶ CF: Id.

¹⁷ See Chapter 2.37(1)(A)(3).

the lease were granted, it would unreasonably restrict access to portions of the Back River where buoys and fishing activity have been observed. The lack of access would have negative impacts on the ability of individuals to fish within the area. For example, vessels could only deploy or retrieve traps at high tidal stages within the area. In addition, the proposal would occupy the deepest water in the channel, which would further limit where traps could be placed within the river. These cumulative impacts would reduce trap fishing opportunities within this area of the Back River.

Based on DMR records, in 2022, there were 160 individuals commercially licensed by the Town of Waldoboro to harvest shellfish within the municipality. Clams have been observed in the area and the location is soft shell clam habitat. Given the feedback received, it is unclear if and how many licensed individuals may be harvesting within the boundaries of the proposed lease site and surrounding area. While DMR works with towns to help manage shellfish resources in accordance with 12 M.R.S.A. §6671, the agency does not require harvesters to report the specific locations they may be harvesting from or otherwise require towns to routinely conduct resource surveys for all flats within their jurisdiction.

However, the WSC expressed concerns about the width of the proposed site. The application also notes that areas to the north of the proposed lease drain at low tide, exposing flats. If the lease were granted, access to these flats and surrounding areas would be limited to high tide as the proposed site occupies deeper water required for motorized navigation at lower tidal stages. This would be problematic as the harvest of clams occurs at low tide, so the proposed site would prevent motorized vessel access to those flats and surrounding areas at tides when harvest is most feasible.¹⁸

It is also possible that the lack of access could hinder the management and conservation activities of the shellfish program as they indicated that the area has the potential for commercial clamming. The shellfish program conducted a variety of management activities in the Back River from 2010-2018. In consideration of these and other access issues referenced above, the site would unreasonably interfere with fishing or other water related uses of the area.

Therefore, the activities proposed for this site will unreasonably interfere with fishing or other water related uses of the area.

C. Riparian Ingress and Egress

During the October 5, 2023, site assessment scientists observed five docks in the vicinity of the proposal (SR 4). Staff also observed two piers that did not have a dock or ramp attached, but they were on

¹⁸ Shellfish harvesters typically access flats from the water via vessel or over land. Accessing flats via land may require crossing private property, which is contingent upon permission from the landowner. Furthermore, depending upon the area and fishing activities, access via land may not be possible (i.e. there is no road/trail or the distance is prohibitive). Accessing flats via vessel typically does not require permission. Therefore, access by water may be the only viable option for some harvesters to reach flats.

land (SR 4). The closest pier was approximately 180 feet to the west of the proposal (SR 4). The harbormaster stated that there could be a concern for riparian ingress and egress at tidal stages other than high tide due to the width and location of the proposal. J. Blodgett noted that the proposed site is in a very narrow channel and that it could restrict access in this section of the river to high tide only.¹⁹ W. Bowman stated that the proposed site would occupy the deepest point in the Back River channel making it impossible for powerboats to navigate around the site during most tidal stages as the remaining navigable waters would be too shallow.²⁰ W. Bowman also noted that there are at least three to four boat owners north of the proposed site that regularly navigate through the area.²¹

Discussion:

In rendering a final decision, the Commissioner shall consider the following regarding riparian ingress and egress:

The Commissioner shall examine whether the riparian owners can safely navigate to their shore. The Commissioner shall consider the type of shore involved and the type of vessel that can reasonably land on that shore. The Commissioner shall consider the type of structures proposed for the lease and their potential impact on the vessels which would need to maneuver around those structures.²²

The applicants are applying for both surface and subsurface structures to culture oysters. Specifically, if the proposal were granted, floating mesh bags would be at the surface year-round. The proposed site is also located in a body of water that is shallow and, based on information in the record, it would occupy the deepest part of a narrow channel.

There are also docks and piers within the vicinity of the proposed site, which are likely used by shorefront owners to access their property. Based upon the site report and comments received, including the Harbormaster Questionnaire, a variety of commercial and recreational vessels regularly transit the area. Some of those vessels are accessing piers and docks, which provide water access to shorefront property.

If the lease were granted, navigation in the area for powered vessels would be restricted to high tide. This means that some vessels would only be able to access certain docks and piers twice a day and that would be further restricted by the timing of the tides and hindered by the presence of other structures in the area, including moorings.²³ Limited access would be

¹⁹ CF: Email from J. Blodgett to DMR dated March 28, 2022.

²⁰ CF: Email from W. Bowman to DMR dated March 28, 2022

²¹ Id.

²² See Chapter 2.37(1)(A)(1). The Commissioner considers the applicable criteria contained in Chapter 2.37 pursuant to Chapter 2.64(1)(A).

²³ Based on two high tides per day that are approximately 12 hours and 25 minutes apart and their respective timing varies throughout the year.

problematic for individuals who operate powerboats and have to navigate to docks and piers, especially to the north of the site. Although kayaks or other hand powered vessels may be able to navigate within the area at lower tidal stages, other types of vessels that require deeper water are regularly used in the area.

Therefore, the activities proposed for this site will unreasonably interfere with riparian ingress and egress.

D. Other Aquaculture Uses

When examining interference with other aquaculture uses, the commissioner considers any evidence submitted concerning other aquaculture uses of the area.²⁴ The assessment includes the intensity and frequency of such uses among other considerations. However, DMR did not receive any comments concerning other aquaculture uses of the area. In addition, there are no other aquaculture leases or Limited Purpose Aquaculture (LPA) licenses within 1,000 feet of the proposed site or general vicinity (SR 9).

Therefore, the activities proposed for this site will not unreasonably interfere with other aquaculture uses.

E. Flora and Fauna

When examining existing system support, the Commissioner considers the degree to which the use of the lease site will interfere with significant wildlife habitat and marine habitat or with the ability of the lease site and marine and upland areas to support ecologically significant flora and fauna.²⁵

During the site assessment on July 28, 2022, staff observed hermit crabs (*Paguroidea spp.*) and periwinkle (*Littorina spp.*) within the boundaries of the proposed lease site (SR 9). Staff also observed double-crested cormorants (*Nannopterum auritum*), common terns (*Sterna hirundo*), gulls (*Larinae spp.*), a great blue heron (*Ardea herodias*), a belted kingfisher (*Megaceryle alcyon*), terns (*Laridae spp.*), and Canadian geese (*Branta canadensis*) in the general vicinity of the proposal (SR 9).

Eelgrass (*Z. marina*). Historical records of eelgrass collected by DMR in 2010 indicate that the nearest mapped eelgrass is approximately 500 feet southeast of the proposal (SR 10).²⁶ No eelgrass was observed within the proposal boundaries during DMR's site assessments.

Fisheries and wildlife. According to Geographic Information System (GIS) data maintained by the Maine Department of Inland Fisheries and Wildlife (MDIFW), the proposed lease is located within mapped tidal waterfowl and wading bird habitat (SR 11). Data collected by the United States Fish and

²⁴ See Chapter 2.37(1)(A)(4).

²⁵ Chapter 2.37(1)(A)(5).

²⁶ 2010 is the most current record of mapped eelgrass in the vicinity of the proposal.

Wildlife Service in 2022 by aerial nest survey shows the closest mapped bald eagle nesting site to be approximately 1.5 miles west of the proposal (SR 11).

On March 3, 2022, a Wildlife Biologist with MDIFW responded by email to a “Request for Agency Review and Comment” stating minimal impacts to wildlife are anticipated for this project.²⁷

DMR did not receive any other comments to suggest that the proposed activities would unreasonably interfere with flora and fauna.

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

F. Public Use and Enjoyment

When examining interference with public facilities, the Commissioner considers the degree to which the lease interferes with public use or enjoyment within 1,000 feet of any beach, park or docking facility owned by federal, state, or municipal governments.²⁸ The proposed lease is not located within 1,000 feet of any beach, park or docking facility owned by federal, state, or municipal governments.

Therefore, the activities proposed for this site will not unreasonably interfere with the public use or enjoyment within 1,000 feet of any beach, park or docking facility owned by federal, state, or municipal governments.

G. Source of Stock

The applicant intends to obtain stock from Muscongus Bay Aquaculture, which is an approved source.

Therefore, the applicant has demonstrated that there is available source of stock to be cultured for the site.²⁹

4. CONCLUSIONS OF LAW

Based on the above findings, DMR concludes that:

1. The aquaculture activities proposed for this site will unreasonably interfere with navigation.

²⁷ CF: Email correspondence between MDIFW and DMR.

²⁸ See Chapter 2.37(1)(A)(7) and Chapter 2.64(11)(A).

²⁹ See Chapter 2.37(1)(A)(6).

2. The aquaculture activities proposed for this site will unreasonably interfere with fishing or other uses of the area.
3. The aquaculture activities proposed for this site will unreasonably interfere with riparian ingress and egress.
4. The aquaculture activities proposed for this site will not unreasonably interfere with other aquaculture uses.
5. The aquaculture activities will not unreasonably interfere with the ability of the lease site and surrounding areas to support existing ecologically significant flora and fauna.
6. The aquaculture activities proposed for this site will not unreasonably interfere with the public use or enjoyment within 1,000 feet of any beach, park or docking facility owned by federal, state, or municipal governments.
7. The applicant has demonstrated that there is an available source of stock.

Accordingly, the evidence in the record supports the conclusion that the proposed aquaculture activities do not meet all the requirements for the granting of an aquaculture lease set forth in 12 M.R.S.A. §6072-A.

5. DECISION

Based on the foregoing, the Commissioner denies the requested experimental lease for commercial aquaculture research and development to Timothy Bennett and Adam Simmons.

Dated: 2/15/24



Patrick C. Keliher, Commissioner
Department of Marine Resources

