

**STATE OF MAINE
DEPARTMENT OF MARINE RESOURCES**

**Matthew Hassler
and
Robert Willette**

Experimental Aquaculture Lease Application
Suspended culture of American/Eastern oysters
Nonesuch and Scarborough Rivers

SCAR NRx
October 9, 2018

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION

Matthew Hassler and Robert Willette applied to the Department of Marine Resources for an experimental aquaculture lease comprised of two tracts totaling 3.2 acres¹ located in the Nonesuch and Scarborough Rivers, Scarborough, Cumberland County, Maine, for the cultivation of American/Eastern oysters (*Crassostrea virginica*) using suspended culture techniques. DMR accepted the application as complete on January 11, 2018. No requests for a public hearing were received during the comment period and no hearing was held.

1. THE PROCEEDINGS

Notice of the application, and the 30-day public comment period were provided to state and federal agencies, riparian landowners, the Town of Scarborough, and others on the Department's mailing list. Notice of the application and comment period was published in the *Southern Forecaster* on February 16, 2018.

The evidentiary record before the Department regarding this lease application includes the application, the Department's site report dated August 17, 2018, and the case file. The evidence from these sources is summarized below.²

2. DESCRIPTION OF THE PROJECT

A. Proposed Operations

The purpose of the proposed lease is to explore the commercial feasibility of oyster production using suspended culture techniques (App 3). From spring through fall, the applicants will cultivate oysters using a combination of floating cages and bags secured to longlines (App 3). During the winter months, the bags and cages will be removed from the site

¹ Tract 1 is 1.88 acres, Tract 2 is 1.33 acres.

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

and the oysters will be transferred to a land-based facility for refrigeration (App 3). If the applicants are unable to refrigerate the oysters during the winter, they will submerge the cages on the bottom of the proposed lease site (App 3).

C. Site Characteristics

On July 19, 2018, DMR scientists visited the proposed lease site and assessed it and the surrounding area in consideration of the criteria for granting an experimental aquaculture lease. The proposed site is in the Nonesuch and Scarborough Rivers. The uplands are marshlands, which are comprised primarily of saltmarsh grass (*Spartina alterniflora*) (SR 2). The shoreline is composed of sand (SR 2). The bottom of the proposed site consists of sand and shell hash (SR 9). The proposed lease is in an area classified by the Department's Water Quality program as "approved for the harvest of shellfish" (SR 9).

The applicants intended for the entirety of the site to be subtidal (App 2). However, at the time of the site visit portions of the proposed site occupied the intertidal (SR 8). Based on historical aerial images of the area and staff observations, the intertidal, subtidal, and upland substrate are dynamic and subject to frequent shifts (SR 2). Therefore, portions of the proposed lease area may fluctuate between intertidal and subtidal. The dynamic nature of the area makes it difficult to demarcate sections of the proposed lease, via coordinates, that would consistently remain subtidal or intertidal throughout the term of the experimental lease (SR 4).

The distinction between subtidal and intertidal is important, because intertidal lease sites are subject to certain permission requirements. For example, applicants are required to obtain the written permission of every owner of intertidal land in, on or over, which the experimental activity will occur, and the Commissioner may not lease areas in the intertidal zone without the permission of the municipal officers, provided the municipality has an authorized shellfish conservation program.³

To address the dynamic nature of the site, while also providing for aquaculture activities in subtidal areas as originally requested, the applicants will only be permitted to deploy gear and conduct aquaculture activities in the subtidal portions of the proposed site. As the site changes and the substrate shifts, the applicants may need to alter their gear configuration and operations to ensure all aquaculture activities remain subtidal. A condition reflecting this requirement will be included in the lease.

3. STATUTORY CRITERIA & FINDINGS OF FACT

³ See Chapter 2.64 (2)(C)(6) and 2.64 (6), and 12 MRSA §6072(3)

Approval of experimental aquaculture leases is governed by 12 M.R.S.A. §6072-A. This statute provides that a lease may be granted by the Commissioner 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, or docking facilities 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.

A. Riparian Access

The Scarborough Marsh Wildlife Management area, which is owned by the Maine Department of Inland Fisheries and Wildlife (MDIFW) surrounds the proposed lease area (SR 9). In their review of the proposal, MDIFW did not object to the lease, but indicated that the lands within the Scarborough Marsh Wildlife Management Area cannot be used for access, the storage of equipment, or other activities affiliated with the proposal. There are no riparian access points located within 1,000 feet of the proposed lease site (SR 9). The site report indicates that state managers and members of the public will be able to access the uplands, if the lease is granted (SR 9).

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

B. Navigation

Staff observed motorized vessels navigating in the Nonesuch and Scarborough Rivers during the site assessment conducted on July 19, 2018 (SR 10). During this assessment, kayakers were also observed paddling through each of the proposed lease tracts (SR 10). Except for a small portion of Tract 2, each proposed tract is located within narrow waterways outside the main navigational channels (SR 10). Boats navigating in the Scarborough and Nonesuch Rivers would not be hindered by the proposed lease (SR 10). Vessels that deviate from the main navigational channel are naturally encumbered by shallow depths, which characterize the narrow channel where the proposed lease is situated (SR 10). During the appropriate tidal stages, shallow draft vessels would be able to navigate between the proposed tracts and the shoreline (SR 10). The site report notes: “at low tide and maximum gear layout, vessels would

likely avoid the narrow waterways occupied by the proposed lease. However, a variety of other routes would be available to these boaters” (SR 10).

The closest public launches are Seavey Landing, which is located ~2,600 feet to the north of the proposal; and Pine Point Boat Launch, which is located ~2,300 feet to the south of the proposal (SR 9). Moorings are located near the Pine Point Boat Launch. Considering these distances, the proposed lease site will not interfere with navigation to and from the launches or moorings.

Therefore, 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

During the site visit, staff did not observe any fishing activities in the immediate vicinity of the proposed lease area (SR 10). Staff did observe clam harvesters in other sections of the Nonesuch and Scarborough Rivers (SR 10). Harvesters would still be able to dig to the intertidal areas immediately adjacent to the proposed lease site, as the Department is conditioning the lease so that all aquaculture activity is restricted to subtidal areas.

The Department did not receive any comments from fishermen or other user groups regarding the lease proposal. Based on the absence of comments it is reasonable to conclude that fishermen and others do not have concerns about the proposed activities.

Exclusivity. The applicants are not requesting exclusive use of the proposed site.

Other aquaculture leases. There are two aquaculture leases and one Limited Purpose Aquaculture (LPA) license within 1,000 feet of the proposed lease (SR 10).⁴ The lease and LPA holders were sent notification of the proposal and they did not submit any comments.

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

D. Flora & Fauna

Site Observations. During the site visit, Department staff observed a variety of marine flora and fauna including mud snails (*Nassarius sp.*), hermit crabs (*Pagurus sp.*), sea lettuce (*Ulva sp.*) and red algae (*Rhodophyta sp.*) (SR 11). Double-crested cormorants (*Phalacrocorax auritus*), herring gulls (*Larus argentatus*), sandpipers (*Tringa sp.*), common terns (*Sterna*

⁴ See page 10 of the site report for a complete list of aquaculture sites within one mile of the proposed lease.

hirundo), and least terns (*Sterna antillarum*) were also observed near the proposed lease site (SR 13). Historical eelgrass (*Zostera marina*) data collected in 2001, indicate that no eelgrass beds were within one mile of the proposed site (SR 14). Staff did not observe any eelgrass during the site visit (SR 14).

Fisheries and Wildlife. Data maintained by MDIFW, indicates that the proposed lease overlaps with Essential Habitat for the Piping Plover (*Charadrius melodus*), which is listed as an Endangered Species under the Maine Endangered Species Act (SR 13). The area also overlaps with designated habitat for the Salt Marsh Sparrow (*Ammodramus caudacutus*), a species of special concern in Maine (SR 13). In addition, the proposed lease overlaps with Tidal Wading Bird and Waterfowl Habitat, which is defined under Maine's Natural Resources Protection Act (NRPA) as Significant Wildlife Habitat (SR 13).

The Department sent a copy of the lease application to MDIFW for their review and comment. MDIFW indicated the following:

This site is located within an area mapped as both Essential Habitat and Tidal Waterfowl and Wading Bird Habitat. Based on the location of this site, there will be *partial* impacts to each of these resources. However, due to the location of the site in the lower, wider section of the river, we do not anticipate significant impacts to State Endangered least terns.⁵

Although they indicated partial impacts to the resources identified above, MDIFW did not object to the proposed lease, or describe any significant interference that the proposal might have on the surrounding wildlife.

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

E. Public Use & Enjoyment

Although the proposal is within 1,000 feet of the Scarborough Marsh Wildlife Management Area, which is owned by MDIFW, publicly owned conserved lands are not part of the decision criteria for experimental leases. There are no beaches, parks, or docking facilities owned by federal, state, or municipal government within 1,000 feet of the proposed lease site (SR 15).

⁵ CF: Email from J. Perry to A. Ellis dated August 22, 2018.

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

F. Source of Organisms

Seed stock for this proposed lease site will be obtained from Mook Sea Farm, in Walpole, Maine (App 1). This is an approved source of seed stock.

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

4. CONCLUSIONS OF LAW

Based on the above findings, I conclude that:

- A. The aquaculture activities proposed for this site will not unreasonably interfere with the ingress and egress of any riparian owner.
- B. The aquaculture activities proposed for this site will not unreasonably interfere with navigation.
- C. The aquaculture activities proposed for this site will not unreasonably interfere with fishing or other uses of the area, taking into consideration the number and density of aquaculture leases in the area.
- D. The aquaculture activities proposed for this site will not unreasonably interfere with the ability of the lease site and surrounding areas to support existing ecologically significant flora and fauna.
- E. The aquaculture activities proposed for this site will not unreasonably interfere with the public use or enjoyment within 1,000 feet of beaches, parks, or docking facilities owned by municipal, state, or federal governments.
- F. The applicant has demonstrated that there is an available source of American/Eastern oysters (*Crassostrea virginica*) to be cultured for the lease site.

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-A.

5. DECISION

Based on the foregoing, the Commissioner grants the requested experimental lease of 3.2 acres to Matthew Hassler and Robert Willette, for three years, the term of the lease to begin within twelve months of the date of this decision, on a date chosen by the lessee⁶; however, no aquaculture rights shall accrue in the lease area until the lease is fully executed.

This lease is granted to the lessee for the cultivation of American/Eastern oysters (*Crassostrea virginica*) using suspended culture techniques. The lessee shall pay the State of Maine rent in the amount of \$100.00 per acre per year. Since this is an experimental lease with more than 400 sq. ft. of structures and no discharge, a bond or escrow account is required. The lessee shall post a bond or establish an escrow account pursuant to DMR Rule 2.64 (10) (D) 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-A (15)⁷. Conditions are designed to encourage the greatest multiple compatible uses of the lease area, while preserving the exclusive rights of the lessee to the extent necessary to carry out the purposes of the lease. The following conditions shall be incorporated into the lease:

- A. The lease site must be marked in accordance with both U.S. Coast Guard requirements and DMR Rule 2.80.
- B. Other public uses that are not inconsistent with the purposes of the lease are permitted within the lease boundaries.
- C. The lessee can only deploy gear and conduct aquaculture activities in the subtidal portions of the lease site.

7. REVOCATION OF EXPERIMENTAL LEASE

⁶ DMR Rule 2.64 (14) provides:

“The term of the lease shall begin within 12 months of the Commissioner’s decision, on a date chosen by the applicant. No aquaculture rights shall accrue in the lease area until the lease term begins and the lease is signed.”

⁷ 12 MRSA §6072-A (15) provides that:

“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. The commissioner may grant the lease on a conditional basis until the lessee has acquired all the necessary federal, state and local permits.”

The Commissioner may commence revocation procedures upon determining pursuant to 12 MRSA §6072-A (22) and DMR Rule Chapter 2.64 (13) that no substantial research has been conducted on the site within the preceding year, that research has been conducted in a manner injurious to the environment or to marine organisms, or that any conditions of the lease or any applicable laws or regulations have been violated.

Dated: 10/7/18



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