

**STATE OF MAINE
DEPARTMENT OF MARINE RESOURCES**

**Western Bay Oyster Company, LLC
BHB OHC**

Standard Aquaculture Lease Application
Suspended and Bottom Culture of Oysters
Western Bay, Bar Harbor

February 25, 2021

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION

Western Bay Oyster Company, LLC applied to the Department of Marine Resources (DMR) for a 10-year standard aquaculture lease on 3.36 acres.¹ The proposed site is located south of Old House Cove in Western Bay, Bar Harbor, Hancock County, Maine, for the cultivation of American/eastern oysters (*Crassostrea virginica*) using suspended and bottom culture techniques.

1. THE PROCEEDINGS

The pre-application meeting for this proposal was held on December 13, 2017 and an initial scoping session was held on February 6, 2018. The application was submitted to DMR on February 23, 2018. The application was deemed complete by DMR on July 31, 2019. Notice of the completed application was provided to riparian landowners within 1,000 feet of the proposed site, the Town of Bar Harbor, including the Harbormaster, and other state and federal agencies. A second scoping session was held on September 16, 2019.² DMR's site report was issued on February 21, 2020.

A public hearing on this application was originally scheduled for April 2, 2020. Public notice of the hearing was published in the *Ellsworth American* on February 27, 2020, and March 19, 2020. Public notice of the hearing was also provided to riparian landowners within 1,000 feet of the proposed site, the Town of Bar Harbor, other state and federal agencies, and subscribers of DMR's aquaculture email list-serve. However, due to the COVID-19 pandemic, the April 2, 2020, hearing was postponed. A hearing was not immediately rescheduled because DMR was unsure when it would be safe to conduct the proceeding.

¹ Applicant originally requested 3.36 acres, but DMR calculations based on the provided coordinates indicated the area is 3.42 acres. The SE longitude seconds provided in the application differed slightly than those on file for the existing experimental lease. The difference led to a slightly larger proposed lease area than what the applicant intended. However, the applicant testified that the site should be 3.36 acres and confirmed on January 12, 2021 that the coordinates for the standard proposal should be the same as the existing experimental (CF: Email between A. Ellis and M. Gerald dated January 12, 2021).

² Given the amount of time that passed between the date the first scoping session was held and the date the application was deemed complete, DMR felt it was necessary for the applicant to hold a second scoping session.

Due to the uncertainty and evolving situation regarding COVID-19, and to limit any potential health risks associated with public gatherings, DMR decided to conduct this proceeding remotely, using a virtual meeting platform.³ The remote hearing was scheduled for October 13, 2020 at 2:00pm, and public notice was published in the September 10 and October 1, 2020 editions of the *Mount Desert Islander*. Public notice of the hearing was also provided to the Town of Bar Harbor and its Harbormaster, riparian landowners within 1,000 feet of the proposal, other state and federal agencies, and subscribers of DMR’s aquaculture email list-serve. The public notice for the October 13, 2020 hearing indicated that the proceeding would be conducted remotely and directed interested persons to contact DMR to sign up to participate in the proceeding. Each person who contacted DMR to participate was provided with instructions on how to join the hearing.

The remote hearing was held on October 13, 2020, and sworn testimony was given at the hearing by the following witnesses:

Name	Affiliation
Matthew Gerald	Applicant, Western Bay Oyster Company, LLC
Flora Drury	Marine Scientist, DMR Aquaculture Division

Mr. Gerald described aspects of the lease application and answered questions about the proposal. Ms. Drury testified about DMR’s site visit. One member of the public participated in the proceeding but did not ask any questions or offer testimony. The hearing was recorded by DMR. The Hearing Officer was Amanda Ellis.

Exhibits

The evidentiary record before DMR regarding this lease application includes the following:

1. Case file (CF)
2. Application (App)
3. Site Report (SR)

2. DESCRIPTION OF THE PROJECT

A. Proposed Operations

³ DMR uses Microsoft Teams for all virtual conferencing, so this was the platform used for the remote hearing.

During the public hearing, Matthew Gerald testified that this lease proposal would replace the existing experimental lease, BHB OHCx, which is held by Western Bay Oyster Company, LLC. Matthew Gerald is the sole owner of Western Bay Oyster Company, LLC (App 32-33). The experimental decision, signed on November 23, 2015, authorized the culture of American oysters (*Crassostrea virginica*) and European oysters (*Ostrea edulis*) using suspended and bottom culture techniques. DMR's Aquaculture Program has not received any complaints about the operation of the experimental aquaculture lease (SR 2).

The experimental decision noted that Mr. Gerald proposed testing several different types of gear and culture methods including the deployment of ADPI bags, predator net mats, stacked cages, and free planting.⁴ The proposed standard lease is the same footprint as the existing experimental, but Mr. Gerald is only proposing to deploy 3,000 plastic mesh ADPI bags, which would be dispersed on the bottom of the proposed site and secured to a maximum of 20, 200 foot sunken longlines.⁵ The submerged gear would be suspended to periodically to allow oyster shell to fall from the ADPI bags (App 7). The applicant also proposes to plant oysters on the bottom of the lease site. If this proposal is granted, it would only authorize the culture of American oysters as Mr. Gerald did not include the culture of European oysters as part of the standard lease application.

The gear would be deployed year-round, with harvesting occurring three days a week during the summer months and one day a week, weather permitting, during the winter months (App 8). At least twice a year the oysters would be graded, which involves removing bags of oysters from the proposed site and transporting them to an upland facility. Any market sized oysters would be sold, while smaller oysters would be placed in bags and returned to the proposed site for continued grow-out (App 7). The applicant intends to visit the site daily for routine tending and maintenance (App 7).

B. Site Characteristics

The proposed lease site is in subtidal waters to the south of Old House Cove in Western Bay, Bar Harbor (SR 2). The proposed site is the same footprint as an existing experimental lease, BHB OHCx, held

⁴ CF: Experimental lease decision, pp. 3-5.

⁵ The gear table on page 4 of the application indicate 6,000 ADPI bags. Mr. Gerald testified that he would deploy 6,000 ADPI bags. However, page 26 of the application indicates that up to 3,000 bags would be deployed. The same page indicates that up to 20 lines would be deployed and they would each hold 150 bags. In consideration of this layout, the site could hold 3,000 bags at maximum capacity. The experimental lease decision authorized the deployment of up to 6,000 ADPI bags in various sections of the experimental lease on several longlines of various lengths. On January 12, 2021, Mr. Gerald clarified that the number of bags is 3,000 (CF: Email from A. Ellis to M. Gerald dated January 12, 2021).

by Western Bay Oyster Company, LLC (SR 2). The shoreline to the east of the proposal is rocky with areas of marsh grass (*Spartina alterniflora*) located along the immediate uplands. Mixed forest, multiple houses, and a KOA Campground, are also located along the eastern shoreline (SR 2). At mean low water, the Mid-East Upper Corner of the proposed site is ~6 feet to the Bar Harbor shoreline (SR 8). The image below contains the labeled corners of the proposed site.



Figure 1: Labeled coordinates of the proposed site in relationship to DMR’s dive tract. Image from page 5 of the Site Report.

Depth measurements were not taken during the site visit on October 9, 2019 (SR 6). However, depths were measured during the June 3, 2015, site assessment for the experimental lease proposal (SR 6). The water depths during that assessment indicated that, at mean low water, portions of the eastern boundary of the site were intertidal (~1.52 feet) to 6.4 feet on other sections of the site (SR 6). According to the 2015 site report, the exact mean low water line along the eastern boundary was difficult to ascertain given a potential error with measurements from the depth sounder and GPS (SR 6). The 2015 report further specifies that the eastern boundary is located next to an intertidal ledge that abuts Mr. Gerald’s property and would most likely be exposed at mean low water or lower (SR 6).

The law requires that DMR must have the consent of the owner of intertidal land before issuing a lease within the intertidal zone. In addition, if the municipality has an approved shellfish conservation

program, the applicant must obtain approval from a majority of municipal officials prior to issuance of a lease within the intertidal zone. Bar Harbor has an approved shellfish conservation program. On November 6, 2015, Mr. Gerald was notified that some portions of the site, along the eastern boundary, were intertidal. Given that he owns the upland and intertidal area, Mr. Gerald was advised that he either needed to obtain consent of the Bar Harbor Town Council or move the eastern boundary of the proposed lease farther to the west, so that it no longer encompassed any portion of intertidal. Mr. Gerald elected to move the lease boundary further west and certain coordinates along the eastern boundary were adjusted accordingly.⁶

3. STATUTORY CRITERIA & FINDINGS OF FACT

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

A. Navigation

The proposed lease site is parallel and adjacent to the Bar Harbor shoreline (SR 9). It is not located within any navigational corridors (SR 9). Given the location of the proposal, it is likely that vessels navigating near or within the site have local knowledge of the area, are recreational kayaks, canoes, boats, and outboard skiffs, and/or have permission to use the applicant's boat launch (SR 9). At mean high water, local vessels would be able to travel through and around the proposed lease site (SR 9). At lower tidal stages, propeller strikes may be possible, so the applicant should clearly indicate the

⁶ CF: Experimental lease decision pp. 2 and 11.

presence of submerged gear (SR 9). This point was reiterated by Ms. Drury during the public hearing on the proposal.

DMR did not receive any testimony or comments to indicate that the proposed lease site would unreasonably interfere with navigation. Chapter 2.80 of DMR's regulations specify the marking procedures for aquaculture leases. Should this proposal be granted, the lease holder would be required to mark the site in accordance with those rules.

1) Experimental Lease Decision and Condition Concerning Marking:⁷

The experimental lease decision, issued on November 23, 2015, noted that Mr. Gerald allows some recreational and commercial fishermen and some aquaculturists to utilize a sandy boat launch area on his intertidal shore and his upland area. In reviewing the experimental lease application, Mr. Gerald indicated that the recreational fishermen are friends of his and they use his boat launch area a couple times a year. The commercial fishermen include a lobsterman who uses the launch to access a lobster boat or use a smaller boat to haul traps. The lobsterman uses Mr. Gerald's landing once or twice a week in the spring and two or three times in the summer. The aquaculturists use the launch two to five days a week to access an aquaculture site.

In an overhead schematic of the proposed experimental lease, Mr. Gerald depicted a 40-foot corridor that runs west to east through the proposed site, which he referred to as the "boat launch area." This private launching area, or corridor separates the southern third of the proposed lease site from the northern two-thirds. Mr. Gerald indicated that he would keep the boat launch area free of oysters and gear. The 2015 site report noted that the experimental lease site was not within any navigational corridors and that vessel traffic in the area was most likely limited to those who have knowledge of the area and permission to use Mr. Gerald's private boat launch. The Harbormaster Questionnaire, for the experimental lease proposal, indicated that the boat traffic would not occur near the lease area.

The experimental lease decision found that the proposed site would not unreasonably interfere with navigation, but it also included a condition that required Mr. Gerald to indicate the location of the navigational corridor leading to the boat launch area. In applying for the standard lease, Mr. Gerald requested that this condition be removed.⁸ In reviewing the case file and Mr. Gerald's request, if this

⁷ CF: Refer to the "Navigation" section of the experimental lease decision (pp. 5-6). Conditions referenced in this section can be found on pages 9-10 of the experimental lease decision. Page 9 of the original experimental lease application describe who uses the private boat launch area and page 22 of the original experimental lease application includes the rendering of the "boat launch area."

⁸ CF: Pre-app notes for the standard lease proposal.

lease is granted, it will not be conditioned to require marking of the navigational corridor leading to the boat launch area. The boat launch area is on private property held by Mr. Gerald, so its use is subject to his permission. The corridor Mr. Gerald originally proposed is intended to help facilitate access to his private boat launch. The corridor was not proposed for any other purpose or intended to facilitate other water related uses held by the public in general. The use of the private launch is at Mr. Gerald's sole discretion.

The original decision also included a condition that required Mr. Gerald to mark the submerged gear and the lease boundaries to indicate the location of the gear. As part of the experimental lease, Mr. Gerald proposed experimenting with a variety of different culture methods, which included gear suspended on bottom, or below the surface at various water depths. In this instance, except for twice a year, Mr. Gerald would deploy all the gear along the bottom of the proposed site. Vessels transiting the area are likely familiar with this site and are aware of Mr. Gerald's operation. Therefore, the site must be marked in accordance with Chapter 2.80, but conditions specifying additional marking will not be required, if the proposal is granted.

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

B. Riparian Access

During the site visit, DMR staff did not observe any docks within the vicinity of the proposed lease site (SR 8). However, staff did observe a skiff attached to a single mooring near the northwest corner of the proposed site (SR 8). During the hearing, Mr. Gerald clarified that there are two moorings in the area. One mooring, located outside the proposed lease boundaries, belongs to a neighbor. The second mooring, which was observed by DMR staff, belongs to Mr. Gerald (Drury/Gerald)⁹. The proposed site is more than 600 feet to the south of a KOA Campground (SR 9). Given this distance, it is unlikely that the proposal would interfere with the launch and retrieval vessels, or preclude water related recreational activities associated with the campground.

Mr. Gerald owns the shorefront immediately adjacent to the proposed standard lease (SR 8). When the experimental lease was originally applied for, the Bar Harbor Harbormaster indicated that the proposed site would not interfere with the ability of riparian landowners to get to and from their

⁹ Although the exact location of the mooring was not identified in the site report or hearing, there were no issues with this mooring during the experimental lease term.

property by water.¹⁰ DMR did not receive any comments from the Bar Harbor Harbormaster concerning this standard lease proposal. The standard lease proposal is the same footprint as the existing experimental and if granted, would contain less gear than what was originally permitted by the experimental lease. No comments or testimony were received to indicate that the proposed lease would interfere with riparian ingress and egress.

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

C. Fishing & Other Water Related Uses

During the site visit conducted on October 9, 2019, DMR staff did not observe any commercial or recreational fishing activity within or around the boundaries of the proposed site (SR 9). None of these activities were observed when DMR conducted the site assessment for the existing experimental lease on June 3, 2015 (SR 9). During the hearing, Mr. Gerald indicated that commercial fishing happens in other areas of Western Bay, but he had not observed commercial fishing near the site.

The site report indicates that it is likely light recreational fishing occurs in the general vicinity and would be expected to occur most frequently during the summer months (SR 9). During the hearing, Mr. Gerald testified that he had not observed any recreational fishing near the site. On October 31, 2019, DMR sent a questionnaire to the Bar Harbor Harbormaster, but no response was received.¹¹ DMR did not receive any comments or testimony concerning recreational or commercial fishing in the area. DMR has not received any comments to indicate that the operation of the existing experimental lease has adversely impacted commercial or recreational fishing.

Based on the absence of comments from fishermen and the local harbormaster, it is reasonable to conclude that it is unlikely that the proposal will unreasonably interfere with commercial or recreational fishing in the area.

Other aquaculture uses. If this proposal is granted it will replace the existing experimental lease, BHB OHCx, held by Western Bay Oyster Company, LLC. Matthew Gerald, who is the sole owner of Western Bay Oyster Company, LLC has two Limited Purpose Aquaculture (LPA) licenses that are less than 150 feet to east of the proposed site (SR 10).¹² When the site report was published on February 21,

¹⁰ CF: Experimental lease decision, pg. 5

¹¹ CF: Email from DMR to bhhmaster@barharbormaine.gov dated October 31, 2019

¹² At the time the decision was written, these LPAs had not been renewed for 2021.

2020, there were eight other LPA licenses and one additional aquaculture lease within one mile of this proposal (SR 10). The other lease, BHB GC4, is over 3,000 feet to the northwest of the proposal (SR 10).

Exclusivity. The applicant requests that mobile fishing gear be restricted from the lease site, as dragging would result in damage to the proposed site (App 14). This same request was contemplated in the experimental lease decision, which found that a condition prohibiting dragging would be warranted to enable the proposed aquaculture activities while also encouraging other compatible uses of the area.¹³ A condition reflecting this restriction was included in the experimental lease. In consideration of the prior condition, and proposed operations it is reasonable that the same condition be incorporated into the standard lease, provided it is granted.

Based on this evidence, it appears that the proposed lease will not unreasonably interfere with fishing or other water related uses of the area.

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

D. Flora & Fauna

Fisheries and Wildlife. The bottom of the proposed lease is comprised of bedrock, cobble, and pebbles interspersed with areas of gravel mixed with sand and mud (SR 10). During their dive of the proposed lease site on October 9, 2019, DMR staff observed a variety of species including knotted wrack (*Ascophylum nodosum*), green crab (*Carcinus maenas*), colonial tunicate (*Didemnum sp.*) and common periwinkle (*Littorina littorea*) (SR 10). Based on data maintained by the Maine Department of Inland Fisheries and Wildlife (MDIFW), the proposed lease area is 300 feet from Tidal Wading Bird and Waterfowl Habitat, which is further specified as “emergency wetland-mudflat complex” (SR 13).

DMR sent a copy of the lease application to MDIFW for their review and comment, and MDIFW recommended that boats not ground out on reefs, aquatic beds, and mudflats.¹⁴ MDIFW also suggested that the project footprint be reduced to the minimum size necessary to have the least impact on populations of waterfowl and wading birds.¹⁵ In this instance, the applicant is not proposing to expand aquaculture operations in the area. If the proposal is granted, it would be for less gear than what was originally authorized in the experimental lease decision.

Eelgrass (*Zostera marina*). According to data collected in 2008, the closest eelgrass bed to the

¹³ CF: Page 7 of Western Bay experimental lease decision, signed November 23, 2015.

¹⁴ CF: Email from R. Settele to C. Burke dated November 12, 2019

¹⁵ Ibid.

proposed site was over 3,500 feet to the northwest of the proposed site (SR 12). DMR did not observe any eelgrass during the site assessment (SR 12).

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

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

E. Public Use & Enjoyment

There are no beaches, parks, docking facilities, or conserved lands owned by municipal, state, or federal government within 1,000 feet of the proposed lease site (SR 14).

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

F. Source of Organisms

The applicant intends to obtain stock for American/eastern oysters (*Crassostrea virginica*) from Muscongus Bay Aquaculture in Bremen, Maine (App 2).

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

G. Light

According to the application, any work beyond daylight hours may occur if inclement weather is anticipated, or during minus tides (App 8, SR 15). Battery-powered headlamps would be used during these periods (App 15).

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

H. Noise

The applicant plans to access and service the site using two Carolina Skiffs, which are 14 and 22 feet in length and powered by 30 and 60 horsepower four-stroke engines (App 8, SR 15). These vessels and the respective motors are consistent with recreational and commercial vessels used along the coast

of Maine (SR 15). Other than the vessels, no other powered equipment is proposed of the site.

No comments or testimony was received to indicate there is concern with noise associated from the proposed operations.

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

I. Visual Impact

The proposed ADPI bags are black, and the longlines are blue and white (App 6). The gear would remain on bottom for most of the year. Per DMR's site report, the proposed aquaculture operations comply with DMR's height and visual impact criteria (SR 16).

Therefore, equipment and structures proposed for the lease site will comply with the visual impact criteria contained in DMR Regulation 2.37 (1) (A) (10).

4. CONCLUSIONS OF LAW

Based on the above findings, I conclude that:

- 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 American/eastern oysters (*Crassostrea virginica*) to be cultured on the lease site.
- g. The aquaculture activities proposed for this site will not result in an unreasonable impact from light at the boundaries of the lease site.
- h. The aquaculture activities proposed for this site will not result in an unreasonable impact from noise at the boundaries of the lease site.

- i. The aquaculture activities proposed for this site will comply with the visual impact criteria contained in DMR Regulation 2.37(1)(A)(10).

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

5. DECISION

Based on the foregoing, the Commissioner grants the proposed lease in the amount of 3.36 acres to Western Bay Oyster Company, LLC for 10 years for the cultivation of American/eastern oysters (*Crassostrea virginica*) using suspended and bottom culture techniques. The lessee shall pay the State of Maine rent in the amount of \$100.00 per acre per year. The lessee shall post a bond or establish an escrow account pursuant to DMR Rule 2.40 (2)(A) in the amount of \$5,000.00, conditioned upon performance of the obligations contained in the aquaculture lease documents and all applicable statutes and regulations.

6. CONDITIONS TO BE IMPOSED ON LEASE

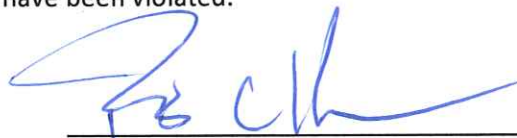
The Commissioner may establish conditions that govern the use of the lease area and impose limitations on aquaculture activities, pursuant to 12 M.R.S.A §6072(7-B).¹⁶ The conditions placed on this lease are as follows:

- 1. Dragging is prohibited within the lease boundaries.

7. REVOCAION OF LEASE

The Commissioner may commence revocation procedures upon determining pursuant to 12 M.R.S.A §6072(11) 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: 9/25/21



Patrick C. Keliher, Commissioner
Department of Marine Resources

¹⁶ 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."