

STATE OF MAINE
DEPARTMENT OF MARINE RESOURCES
Standard Aquaculture Lease Application
Bottom and Suspended Culture of Shellfish
Casco Bay, Freeport

Walter Coffin

June 2, 2020

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION

Walter Coffin applied to the Department of Marine Resources (DMR) for a 20-year standard aquaculture lease on 16.63 acres.¹ The proposed site is located between Wolf Neck and Flying Point in an area referred to as Recompense Cove, Casco Bay, Freeport, Cumberland County, Maine for the cultivation of quahogs (*Mercenaria mercenaria*), American/eastern oysters (*Crassostrea virginica*), soft-shell clams (*Mya arenaria*), razor clams (*Ensis leei*²), and Arctic surf clams (*Mactromeris polynyma*) using suspended and bottom culture techniques.

1. THE PROCEEDINGS

A.) Procedural History

The pre-application meeting was held on June 12, 2017 and the scoping session was held on December 4, 2017. Both the pre-application meeting and scoping session were held in Freeport. The original application was received by DMR on September 12, 2018 and subsequently deemed complete by DMR on May 7, 2019. Notice of Mr. Coffin's completed application was provided to riparian landowners within 1,000 feet of the proposed site, the Town of Freeport, including the Town of Freeport Harbormaster, and other state and federal agencies. DMR Scientists visited the proposed site on September 12, 2019 and October 8, 2019; a site report was issued on December 19, 2019.

The public hearing on the application was scheduled for January 27, 2020. Notice of the public hearing and copies of the completed application and DMR site report were provided to state and federal agencies for their review, the Town of Freeport, and riparian landowners within 1,000 feet of the proposed site. Notice of the hearing was published in the *Times Record* on December 23, 2019 and January 16, 2020. Notice was also published in the January 2020 edition of the *Fishermen's Voice*.

¹ Applicant originally requested 16 acres. Based on the provided coordinates, DMR calculated the area at 16.63 acres.

² In the application, razor clams were referred to as *Ensis directus*. The accepted name for razor clams is now *Ensis leei* and will be referred to in this decision as such.

On January 10, 2020, Protect Recompense Cove (PRC) and Keith Kennedy applied for intervenor status in the proceeding. On January 14, 2020, DMR issued a final decision on intervenor applications and notified all applicants. In accordance with Chapter 2.20(3)(A) of its rules, DMR granted limited intervenor status to PRC and Mr. Kennedy. Limited, as opposed to full intervenor status was granted based on the review of their applications, which indicated that the proposal would directly impact riparian landowners. However, the intervenor applications did not contain enough information about riparian interests and uses and how they may be impacted. This made it impossible for DMR to determine whether the applicants would be substantially and directly affected by the proposal, if it were to be granted.

Although none of the applications merited full intervenor status, DMR did find that participation as a limited intervenor was warranted as some of the issues raised by applicants were pertinent to DMR’s consideration of the proposal. The limited intervenors were consolidated into the DMR designated group: “Concerned Citizens of Recompense Cove” (CCRC). Limited intervenors were assigned to this group based on the similarity of concerns they raised in their respective applications. In accordance with Chapter 2.20(3)(C), DMR determined that consolidation was necessary to avoid repetitive testimony, evidence, or questioning. Consolidation also provided an orderly and efficient way for similar interests to be represented during the proceedings.³

On January 14, 2020, DMR issued a procedural order to CCRC and Mr. Coffin detailing the conduct of the hearing and specifying the submission of pre-filed testimony, exhibits, and issues. The procedural order required the parties pre-file proposed exhibits no later than 12 p.m. on January 21, 2020. In compliance with the procedural order, CCRC pre-filed exhibits and other materials by the deadline specified. Mr. Coffin did not pre-file any exhibits or other materials.

The public hearing on Mr. Coffin’s application was held as scheduled on January 27, 2020 at the Freeport Middle School. Sworn testimony was given at the hearing by the following witnesses:

| Name | Affiliation |
|--|---|
| Walter Coffin | Applicant |
| Cathryn Bigley, Kerry Michaels, Keith Kennedy, Nancy Meagher, Mary Anne Richman, and Kevin Hays | Members of CCRC (Represented by Attorney Sally Mills) |
| Timothy Forrester, Atlantic Environmental, LLC; Joseph DeAlteris, Ph.D, DeAlteris Associates, Inc. | Expert Witnesses, CCRC |
| Jon Lewis | Director, DMR Aquaculture Division |

³ On January 21, 2020, Mr. Kennedy indicated he would participate in the proceeding as a member of PRC.

| | |
|--|-----------------------|
| Scott Shea, Mike Brown, Brett Pierce, Malcolm McIntosh, Dale Sawyer, Toni Shorne, Triplett Kise, Rob Wilson, Gina Castronovo, Mike Roy, Chad Coffin, Andy Ulrickson, Nora Healy, Dave Herring, David Tyson, and Corey Walker | Members of the Public |
|--|-----------------------|

Mr. Coffin described aspects of the lease application and answered questions about the proposal. Mr. Lewis testified about DMR’s site visit and answered questions related to Maine’s aquaculture program and regulations. CCRC and expert witnesses testified about issues related to DMR’s lease decision criteria. Members of the public offered testimony about how the proposal may affect their uses of the area. LeeAnn Neal, U.S. Army Corps of Engineers and Angela Brewer, Maine Department of Environmental Protection attended the public hearing. Ms. Neal and Ms. Brewer did not offer any testimony.

The hearing was recorded by DMR. The Hearing Officer was Amanda Ellis. The evidentiary record before DMR includes the case file, application, site report, pre-filings that were entered into the evidentiary record at the public hearing, and the record of testimony at the hearing. The exhibit list is included in section 6 of this decision.⁴

2. DESCRIPTION OF THE PROJECT

A. Site Description

On September 12, 2019, DMR scientists visited the proposed lease site and assessed it and the surrounding area in consideration of the criteria for granting a standard aquaculture lease. The proposed site is in Recompense Cove, between Wolf Neck to the north and west and Flying Point to the east (SR 2). The Flying Point shoreline contains several residential buildings (SR 2). The shoreline of Wolf Neck is less developed. Staff observed some houses, Wolfe’s Neck Woods State Park and Wolfe’s Neck Center for Agriculture and the Environment to the north and west (SR 2). As depicted in Figure 1, tidally exposed mudflats separate the proposed site from shorefront properties. Correcting for mean low water, depths at the proposed site range from 1.4 feet at the NNE corner to 5.5 feet at the SE corner (SR 6).

The site report notes that tidal stations are utilized as estimates of tidal height and do not account for the unique physical characteristics of an area, which can affect water flow (SR 6). Given this

⁴ In references to testimony, “Smith/Jones” means testimony of Smith, questioned by Jones.

limitation, it is possible that actual water depths at mean low water, within the boundaries of the site, differ from estimates contained in the site report (SR 6). The National Oceanic and Atmospheric Administration (NOAA) Nautical Charts (see Figure 1) suggest that the area between corners INW and NNW of the proposed site may be intertidal (SR 6).

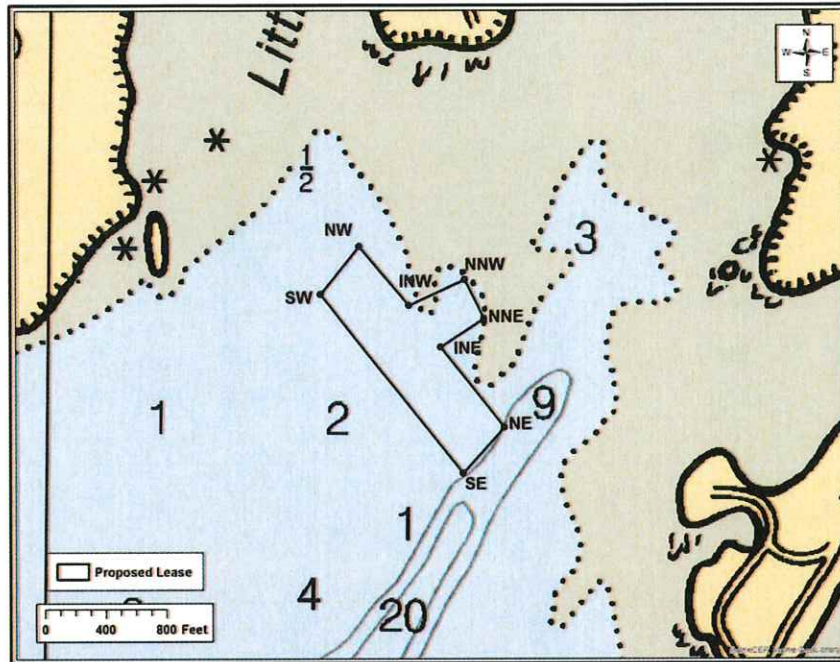


Figure 1: NOAA Chart depicting the proposed lease site in relationship to the tidally exposed mudflats. Image from DMR’s site report.

Based on historical eelgrass (*Zostera marina*) data, in 2001, eelgrass was documented throughout the proposed lease area (SR 15).⁵ A more recent survey, conducted in 2018, documented eelgrass within the southeastern section of the proposed site (SR 15).⁶ DMR conducted site assessments on September 12, 2019 and October 8, 2019. During the September site assessment patches of eelgrass were observed near the southeastern boundary of the proposed site (SR 15). During the October assessment, staff mapped the extent of the eelgrass using a transom-mounted depth sounder and video camera. The assessment in September and subsequent mapping in October confirm the 2018 eelgrass survey (SR 15). Figure 2 depicts DMR’s documentation of the eelgrass and the results of the 2018 survey.

⁵ 2001 survey conducted by DMR

⁶ Historical eelgrass data collected by The Maine Department of Environmental Protection in partnership with the Casco Bay Estuary Partnership.

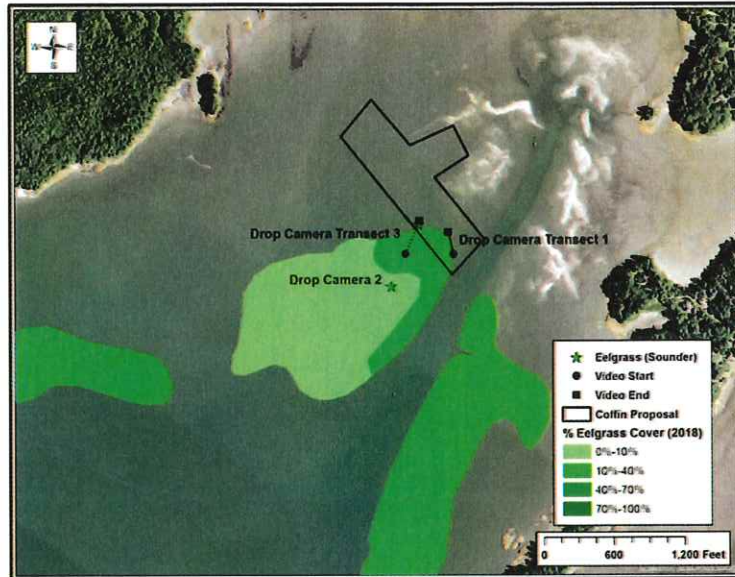


Figure 2: Documented eelgrass within the boundaries of the proposed lease site (DMR site assessments and 2018 eelgrass survey). Image from site report.

In order to mitigate the possibility of the proposed lease site interfering with existing eelgrass beds, and to comply with the U.S. Army Corps of Engineers (ACOE) recommended set-back of 25 feet, DMR science staff suggested modifying the boundaries of the proposed site (SR 18). If the lease were to be granted, science staff recommended shifting the SE corner (as depicted in Figure 3) approximately 650 feet to the northwest (SR 18). The suggested modification to the SE corner would reduce the size of the proposed site from the requested 16.63 acres to 13.64 acres (SR 18). This would result in an overall reduction of nearly 3 acres (~2.99 acres).

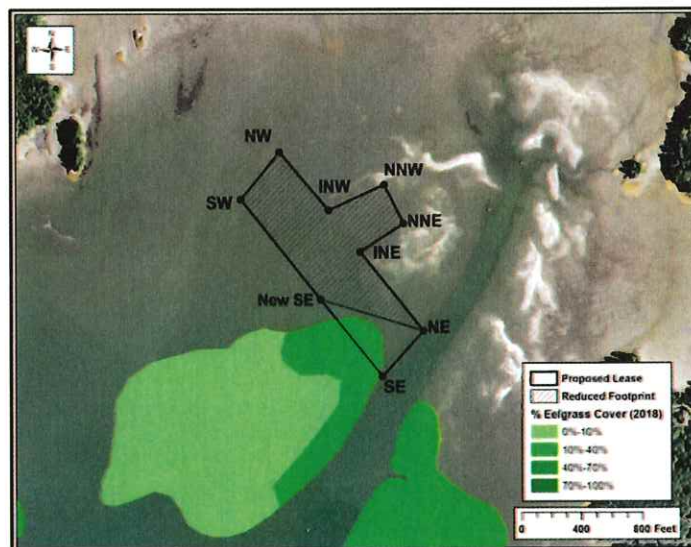


Figure 3: Depiction of the suggested reduction to the SE corner. Image from site report.

B. Proposed Operations

As originally proposed, the applicant intends to culture shellfish using a combination of bottom planting (no gear) and floating and submerged cages and mesh bags. The submerged cages would be deployed in up to 59 parallel rows (App 7, 23). The rows would measure 150 feet in length and be spaced 20 feet apart (App 7, 23). The floating cages and mesh bags would be deployed in up to 40 parallel rows (App 7). The rows would measure 200 feet long and be spaced 30 feet apart (App 7, 23). The northeastern most section of the proposed site would be utilized for bottom planting and would not contain any gear (App 23).

The applicant would utilize up to three small boats to access and service the proposed site (App 10). The boats would range between 14 feet and 24 feet and would be powered by outboard motors (App 10). The applicant would utilize a power washer “a few times per year” to clean the cages (App 11). A tumbler would be used weekly and a hauler would be used daily (App 12). The tumbler and hauler would be powered by 12-volt batteries on the outboard motor of the boat (App 12). A 4-stroke gas generator would be utilized to power the power washer (App 12).

During the public hearing, Mr. Coffin described his proposed operations. Although he initially requested 16 acres, Mr. Coffin explained that he was only interested in a ten-acre site. Mr. Coffin testified that he applied for more area than what he needed in case there were “exclusions,” and the lease area granted was smaller than the lease area requested.⁷ Mr. Coffin then presented a proposed reduction to the size of the lease site. Mr. Coffin proposed shifting the original SE and NE corners to the west, so the eastern boundary of the proposed site would be comprised of the labeled corners NNE, INE, and the revised SE. The proposed reduction is depicted in Figure 5 below. Based on DMR calculations, the proposed reduction would result in a requested area of ~10.54 acres.

In the site report (and depicted in Figure 4 below), DMR science staff recommended shifting the SE corner of the proposed site approximately 650 feet to the northwest. As described in a previous section of this decision, the suggested modification was intended to mitigate the possibility of the proposed lease site interfering with existing eelgrass beds, and to comply with the U.S. Army Corps of Engineers (ACOE) recommended set-back of 25 feet from eelgrass beds. The applicant’s proposed reduction would exceed the recommended reduction described in the site report.

⁷ According to DMR records, at a public scoping session for his proposal, Mr. Coffin indicated that he would apply for 7.5 to 10-acre site.

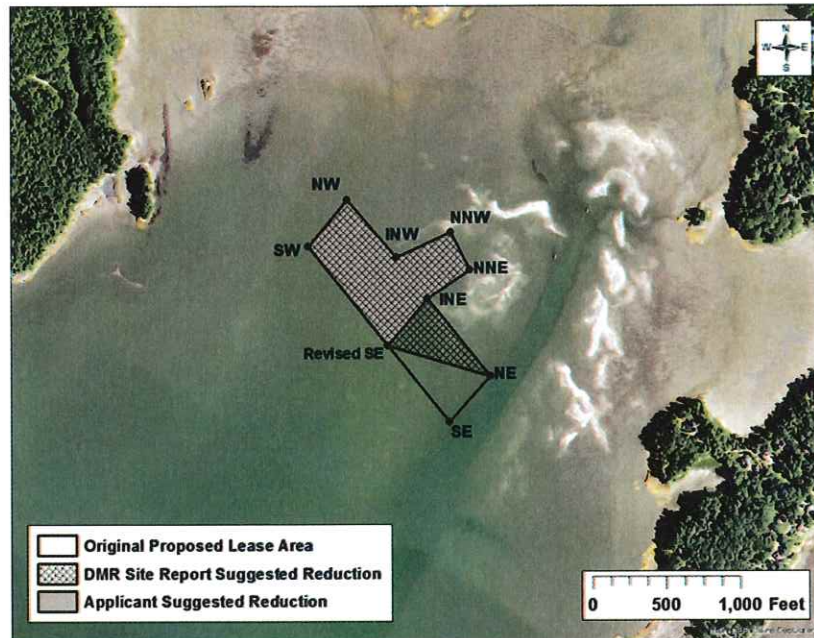


Figure 4: Applicant suggested reduction in relationship to the original proposed boundaries and DMR site report suggested reduction, which is based on eelgrass within the area. Image generated by DMR staff.

In addition to the reduction in size, Mr. Coffin presented several changes to the proposed operations. The applicant testified that instead of 20 feet of spacing between each of row of floating cages, the spacing would be 40 feet or more. Mr. Coffin estimated that a smaller, proposed lease size coupled with increased spacing between the longlines would result in a total of 20 rows of floating cages. Mr. Coffin then indicated that off the record⁸ he would initially space rows 100 feet apart and only add additional rows as the site became more developed. Mr. Coffin acknowledged that the site may never reach full capacity, so there may never be 20 rows of gear. Mr. Coffin then testified that the northeastern most section of the proposed site may contain cages, which would be deployed if product needed to be protected from predators (Coffin/Ellis).

The application included the use of a power washer, which would be powered by a gasoline or electric generator. During the public hearing, Mr. Coffin testified that he would utilize a small electric generator to power the pressure washer and described the possibility of creating a battery powered system with an inverter to power the pressure washer. The applicant indicated that the development of a battery powered system would eliminate the need for having to use a generator. When asked to clarify if he would use a generator on the proposed site, the applicant stated: "I am absolutely sure I can

⁸ Before answering some questions from members of the public, Mr. Coffin would indicate that the answer was "off the record." However, Mr. Coffin was under oath and all his statements are part of the official record.

avoid using a generator” (Coffin/Ellis).

The application notes: “we may occasionally power wash the cages, but this would only be done a few times per year” (App 11). When asked to provide additional details related to the frequency of power washing including the time of year and estimated daily usage, the applicant noted that it was difficult to predict and would vary year to year (Coffin/Ellis). However, the applicant’s initial response did not answer the question and he was asked multiple times to provide additional details. Eventually, the applicant estimated that power washing might occur for a few weeks in July, August, and September and that the power washer may be used for up to four hours per day (Coffin/Ellis; Coffin/Mills).

Mr. Coffin also testified that power washing may occur at a greater frequency than what he estimated or that power washing may not occur at the site as gear could be brought back to an upland facility (Coffin/Mills). When asked if he would agree to certain conditions limiting the use of the power washer to a couple of weeks each summer, Mr. Coffin testified that he would not agree to such conditions because power washing may vary each year (Coffin/Mills). If the lease were to be granted, Mr. Coffin wanted to retain the ability to power wash.

When asked to describe the tumblers and how often they would be used each day, Mr. Coffin testified that he originally proposed to use the tumblers on the vessels when they were at the proposed site (Coffin/Richmond). However, Mr. Coffin indicated that the tumblers would likely be used off-site at a dock. Mr. Coffin indicated that he wanted to keep his options open and, if the tumbler was used at the site, it would be between four to five hours per day. When asked about the noise generated by the tumbler, Mr. Coffin acknowledged that while tumblers are noisy, sometimes louder than generators, he was working on building a quieter version made of PVC pipe (Coffin/Richmond). However, Mr. Coffin did not provide any additional details regarding the possible development of a quieter tumbler.

As part of their pre-filings, CCRC noted that “the Site Report indicates that at least a portion of the lease site is located within the intertidal zone—an area over which the State lacks jurisdiction.”⁹ At the public hearing, Attorney Mills referenced Figure 2c of the site report (see Figure 2 in this decision), which suggests a small portion of the proposed site, between corners INW and NNW, may be intertidal. Attorney Mills then asked Mr. Coffin if he felt the site was in the intertidal zone. Mr. Coffin testified that the map [referencing the NOAA chart, Figure 2c in the site report] had probably not been updated in many years (Coffin/Mills). Based on his observations of the proposed site, Mr. Coffin testified that the area is subtidal. Mr. Coffin indicated that he had not conducted any assessment [i.e. a survey] to

⁹ CF: See pg. 2 of CCRC’s pre-filing of issues, dated January 21, 2020

determine whether the area was intertidal (Coffin/Mills). In addition, Mr. Coffin did not pre-file any materials to suggest that the area in question is subtidal or obtain the necessary permissions governing intertidal sites.

Discussion:

Before a final application is accepted by DMR, standard lease applicants have several opportunities to obtain feedback from the public and refine their proposal. The applicant must first attend a pre-application meeting, which is an opportunity for the applicant to present their proposal to DMR and the municipality. After the pre-application meeting, a scoping session is scheduled whereby the applicant presents their proposal to members of the public. The scoping session is another opportunity for the applicant to get feedback on their proposal prior to submitting a final lease application to DMR. These meetings are intended to help applicants develop proposals that take into consideration any applicable concerns raised by the municipality, members of the public, and other stakeholders prior to the submission of the final application and subsequent hearing.

According to DMR records, approximately 20 people attended Mr. Coffin's scoping session, which was held on December 4, 2017. Members of the public in attendance asked questions related to the anticipated frequency of site visits, proposed operations schedule, and the use of a power washer, among other considerations.¹⁰ Mr. Coffin was aware, as early as December 2017, of the type of concerns the community had regarding the proposal and what issues could arise when the proposal went to a public hearing. Mr. Coffin submitted his application to DMR on September 12, 2018, which was subsequently deemed complete on May 7, 2019. Based on a review of the pre-application process, Mr. Coffin had ample feedback from stakeholders and time to develop a proposal that reflected and detailed his intended operations.

Once an application is deemed complete, DMR processes personal and public notice of the completed application in accordance with applicable laws. It is also posted on DMR's website for public review. The completed application informs DMR's site visit and subsequent site report. Other state and federal agencies also utilize the completed proposal to make recommendations or inform their own review processes respective to the resources they manage. Therefore, the completed application should reflect the applicant's intended operations at maximum capacity, including the acreage the applicant expects to utilize.

¹⁰ CF: DMR notes from the scoping session dated December 5, 2017

At the public hearing, an applicant may present some changes to their proposal. However, given the function of the completed application, DMR limits its consideration of proposed changes to those that do not substantively differ from what is contained in the original application. These types of changes are usually intended to address any concerns related to one or more of the lease decision criteria. For example, during a public hearing, an applicant may propose to reduce the size of their proposed site to accommodate navigation or commercial fishing in the area. DMR also expects the applicant to clearly present any proposed changes at the public hearing, so stakeholders can offer their feedback on such modifications.

During the public hearing, Mr. Coffin presented a lease proposal that continually evolved from what was contained in his original application. For example, he applied for a 16-acre site, but indicated he only wanted a ten-acre site and presented a reduction to the size of the site. Recognizing that a smaller lease site would change the scale of the proposed operations, Mr. Coffin presented some modifications to the proposed site. However, the explanations were contradictory and continually changed as members of the public and other stakeholders asked Mr. Coffin to further clarify his proposal.

For example, Mr. Coffin noted that his proposed reduction would result in a total of 20 rows of floating cages, rather than the 40 originally proposed. However, Mr. Coffin then indicated that “off the record” he would initially space rows 100 feet apart and only add additional rows as the site became more developed. Mr. Coffin acknowledged that the site may also never reach full capacity, so there may never be 20 rows of gear. In addition, Mr. Coffin proposed to deploy gear in a portion of the site that had been designated for bottom culture only in the original application. References to what he would do “off the record” gave the impression that there could be significant differences between what Mr. Coffin detailed in his application, what he testified about at the public hearing, and what would occur if the proposal were granted.

When members of the public asked clarifying questions related to the noise produced by the tumbler and activities like power washing, Mr. Coffin indicated he was planning to either utilize or develop quieter versions of the proposed equipment. However, he never pre-filed any schematics for stakeholders and DMR to review, nor did he offer specific details concerning the intended changes to the equipment. He also indicated that the equipment may not be utilized on the proposed lease site, but that he wanted to keep “all options open” and the equipment may be used on the proposed site. Information related to how frequently the equipment may be utilized on the proposed site continued to evolve and Mr. Coffin was reluctant to specify details or commit to certain periods governing the use of

such equipment.

The modifications seemed to reflect a combination of what the applicant had really intended to apply for and measures to address the concerns raised by members of the public. Presenting a proposal that continually evolves makes it difficult for members of the public and other stakeholders to assess the proposal and present evidence or testimony relevant to the decision criteria. In turn, this makes it difficult for DMR to properly evaluate whether the original proposal, including all the modifications presented by the applicant, would meet the applicable lease decision criteria.

In addition, Figure 2c of the site report (see Figure 1 in this decision), suggests a small portion of the proposed site, between corners INW and NNW, may be intertidal. CCRC believes that this section of the proposed site is intertidal, while the applicant maintains it is not. If any portion of a proposed lease site is intertidal, the applicant must obtain the written permission of every riparian owner whose land to the low water mark will be used; and if the municipality where the proposed site is located has a shellfish conservation program under 12 MRSA §6671, the applicant must obtain consent from the municipal officers. According to DMR's records, the Town of Freeport does have a shellfish conservation program under 12 MRSA §6671.

Mr. Coffin was provided with a copy of the completed site report, which noted that a portion of the site may be intertidal. Mr. Coffin was also given the opportunity to pre-file any exhibits or testimony and was provided with copies of CCRC's pre-filings. Mr. Coffin was aware that this was an issue in advance of the hearing. However, he did not submit evidence demonstrating he had obtained the necessary permissions, or other materials to suggest that the portion of the proposed site in question may not be intertidal. In consideration of the record, if the proposal is granted, DMR would need to further reduce the size of the site, so it did not encompass the possible intertidal area. All the proposed reductions are depicted in Figure 5 below. After revising the INW corner, so that it no longer encompasses the possible intertidal area, the proposed site is ~9.79 acres.

Mr. Coffin, maintaining that the site was subtidal, limited his reductions to the SE and NE boundaries only. The operational changes he proposed were only based on this reduction. Therefore, it is unclear how another reduction to the INW corner may affect his proposed operations and the subsequent modifications he presented during the public hearing.

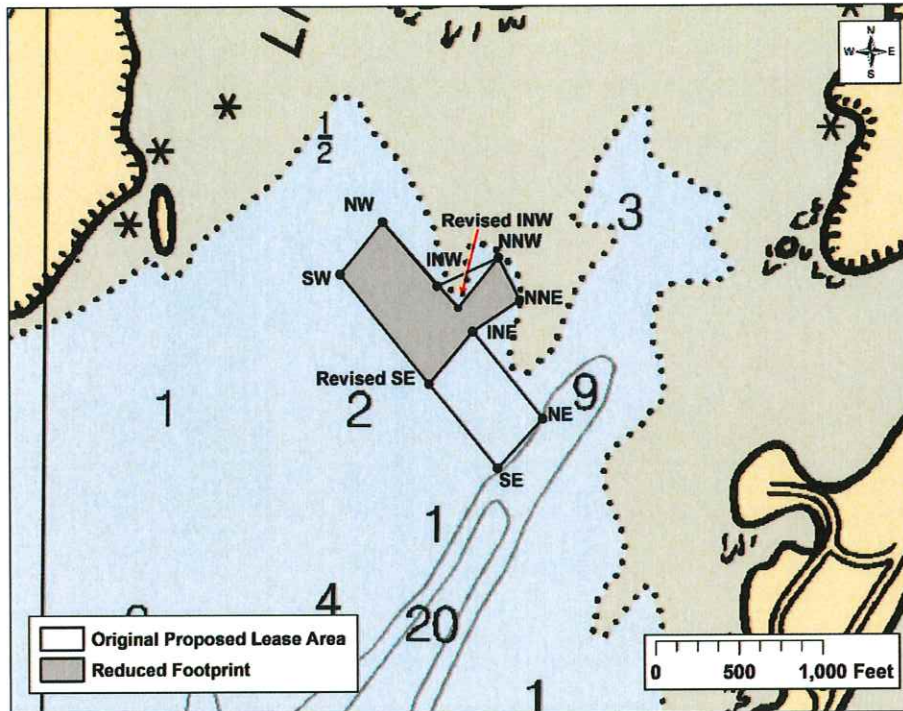


Figure 5: The reduced footprint of the proposed site in relationship to the area applied for. Image generated by DMR staff.

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. Fishing & Other Water Related Uses

During DMR's site assessment on September 12, 2019, commercial and recreational fishing activities were not observed within the boundaries of the proposed site (SR 11). However, lobster trap

buoys and a vessel engaged in lobster fishing activities were observed to the south of the proposed site (SR 11). A second visit to the area occurred on October 8, 2019 and DMR staff observed 8 trap buoys (all marked in the same manner) within the general area (SR 11). During the September site visit, DMR staff dove the proposed site and observed northern quahogs (*Mercenaria mercenaria*) and European oysters (*Ostrea edulis*).

Based on observations made during the dive transects, quahogs were common to abundant on the proposed site (SR 13). European oysters were observed along each of the dive transects but were more abundant between the NNW and INE corners of the proposed site (SR 11). The site report notes the following:

Considering the shallow subtidal water depths that compose the proposed lease area, and the extensive intertidal mud flats to the north, the commercial and/or recreational harvest of clams and oysters is likely to occur in the surrounding area, and even within the proposed lease boundaries during minus or extra low tides (SR 11).

A DMR Area Biologist reviewed the application and indicated that soft-shell clam (*Mya arenaria*) harvesting occurs in the high intertidal and is more frequent in an area to the west of the proposal along the east side of Little River Cove (SR 12).¹¹

After the application was deemed complete, DMR sent a copy of the proposal and a questionnaire to the Freeport Harbormaster. The questionnaire is an opportunity for the municipality to describe existing uses of the proposed lease area. It also allows the municipality to provide feedback on how the proposed operations may affect certain uses of the area as they relate to DMR's lease decision criteria. The following was provided in response to a query about the extent and type of commercial and recreational fishing within the area of the proposed site: "...During extreme low tides I [Freeport Harbormaster] have observed shellfish harvesters harvesting quahogs within the area. This lease will affect recreational stripe bass fishermen." The questionnaire also indicates that the lease area "sees the most boat traffic" from commercial vessels (i.e. shellfish harvesters and lobstermen) and recreational boaters.

Some members of the public, who live and recreate near the proposed lease site testified that they have observed shellfish harvesting in and around the proposed lease site. CCRC noted that clamming occurs in the vicinity of the proposed lease site and within the boundaries of the site.¹² Malcolm McIntosh, a member of the Freeport Shellfish Commission and shellfish harvester, testified

¹¹ CF: Email from P. Thayer to aquaculture staff dated June 10, 2019

¹² CF: See pg. 4 of CCRC's pre-filings, dated January 21, 2020

there are 50 licensed shellfish harvesters within the municipality. Mr. McIntosh indicated that in previous years he has harvested oysters from the boundaries of the proposed lease site via drag. Dale Sawyer, a commercial shellfish harvester, testified that within the proposed lease area quahogs and razor clams are harvested. Mr. Sawyer testified that at certain tides the area is a “sweet spot” for both quahogs and razor clams, which he indicated are harvested by hand or bull-rake. According to Mr. Sawyer, these species are becoming increasingly important to commercial harvesters within the Town of Freeport as populations of other commercial species such as soft-shelled clams appear to be declining.

Members of CCRC indicated that there is “an abundance of large schools of striped bass that are often observed roiling the surface of the lease area.”¹³ According to CCRC, riparian owners, guides, tourists, and individuals local to the area, fish extensively within the vicinity of the proposed site and often within the boundaries of the proposed lease site.¹⁴ Some members of the public also testified that they fish for striped bass near and within the boundaries of the proposed site, or have observed others fishing for striped bass near or within the boundaries of the proposed lease.

Mike Roy, a full-time professional fishing guide, testified that his business would be “heavily impacted” by the proposed lease site. Mr. Roy has been fishing for striped bass in this area for over ten years. He and a fellow guide lead a combined total of 200 guided trips per year. Mr. Roy noted that Casco Bay offers a novel type of shallow water fishing, primarily for striped bass, that people travel great distances to experience. The area within the proposed lease boundary is important to Mr. Roy, because it contains a “secondary channel” that striped bass use during certain tidal stages to access shallow water flats. During the public hearing, Mr. Roy marked the location of the secondary channel on a map of the proposed site that DMR provided at the public hearing.

The secondary channel begins near the NW corner, runs through the entirety of the upper section of the proposed lease site (just below the INW and INE corners), and ends at a point beyond the SE-NE boundary. Figure 6 is an image of the map from the public hearing, which includes Mr. Roy’s depiction of the secondary channel. However, this map was also utilized by Mr. Coffin and others to depict modifications to the boundaries of the proposed lease site and the extent of eelgrass beds in the area. For clarity, a second image is included that approximates just the location of the secondary channel based on Mr. Roy’s drawing and subsequent testimony.

¹³ CF: See pg. 4 of CCRC’s pre-filing of issues, dated January 21, 2020.

¹⁴ Ibid.

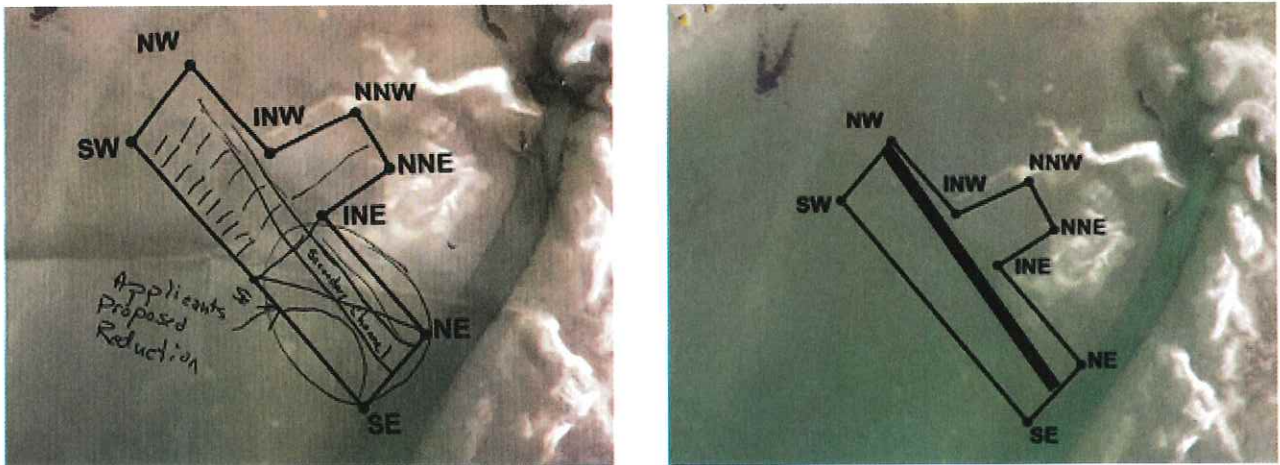


Figure 6: At left, is Mr. Roy's rendering of the secondary channel at the public hearing. At right, is DMR's approximation of the channel using Mr. Roy's description and rendering at left.

Except for the northern most portion of the proposed site, the secondary channel runs through the entirety of the lease. Therefore, Mr. Coffin's proposed changes to the boundaries of the site would not avoid the channel.

Mr. Roy testified that losing access to the channel and surrounding area would preclude his ability to offer this unique type of guided fishing experience. Mr. Roy indicated that striped bass fishing is a popular activity and the revenue generated from guide fees, hotel stays, boat registrations, tackle shops, etc. are an important part of the local economy. If the lease is granted, Mr. Roy felt that he would no longer be able to offer guided trips in this area.

Chad Coffin, a commercial shellfish harvester testified in support of the proposal.¹⁵ Chad Coffin took exception to the testimony describing shellfish harvesting and striped bass fishing in the area. Based on his personal observations, Chad Coffin did not think that the area supported a commercial quahog fishery, because parts of the site are only exposed during certain tides, for a short duration of time. Therefore, he felt harvesting quahogs from the area was not viable. Chad Coffin acknowledged that there is striped bass fishing in the area (that he had seen Mr. Roy on the water), but he did not believe the proposed lease, if granted, would impact Mr. Roy's business to the degree he described. Chad Coffin also requested to enter an exhibit, brought to the hearing by the applicant, into the record. However, the Hearing Officer denied Chad Coffin's request.¹⁶

¹⁵ According to testimony provided by Catherine Bigley, a member of CCRC, Chad Coffin has worked with Walter Coffin on other projects in Recompense Cove.

¹⁶ In accordance with the procedural order, all parties to the proceeding were required to pre-file exhibits. The applicant did not pre-file any exhibits by the deadline specified in the procedural order. During the public hearing,

Discussion:

In evaluating the impacts of a proposed lease site on commercial or recreational fishing Chapter 2.37(1)(A)(2) specifies the following:

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.

The record indicates that the proposed lease site contains a variety of commercial shellfish species at common to abundant frequencies. There are approximately 50 licensed shellfish harvesters in the Town of Freeport.

It was unclear how many of these licensed individuals may utilize the proposed lease site. However, Mr. Sawyer has harvested quahogs and razor clams from the area via hand or bull-rake. Mr. McIntosh has also harvested oysters from the boundaries of the proposed site via drag. The Harbormaster also indicated that individuals harvest quahogs in the area and that vessels belonging to commercial shellfish harvesters frequent the area.

Some felt that the tides precluded commercially viable harvests in the area; others felt that although the frequency of harvests within the boundaries of the site may be limited to certain tides the area is a "sweet spot" for quahogs and razor clams and it is harvested when accessible. Tidal effects on commercial harvest aside, the lease area is utilized by harvesters who drag, bull rake, or hand harvest shellfish within the proposed lease site. Feedback from the Harbormaster, other stakeholders, including a DMR Area Biologist indicate that shellfish harvesting occurs around the proposed lease area as well.

The Harbormaster indicated that the proposed lease could affect recreational striped bass fishermen. According to Mr. Roy, a professional fishing guide, the proposed site is in an area of Casco Bay that supports a distinctive type of shallow water striped bass fishing. In

the applicant asked if he could enter a study about eelgrass into the record. His request was denied, because to allow the exhibit into the record would circumvent the intent and purpose of the procedural order. It would also be unfair to CCRC who had pre-filed and complied with the order. After he had finished testifying, Chad Coffin wanted to enter the same study into the record. He did not bring a copy of the study with him, but asked Walter Coffin for his copy, so that Chad Coffin could enter it into the record. This was an attempt to circumvent the initial denial of Walter Coffin's request to enter the study into the record. Therefore, Chad Coffin's request was also denied. Nora Healy, who testified in support of the proposal after Chad Coffin, also requested that the same study be entered into the record. However, Ms. Healy's request was also denied for the reasons noted above.

addition, the proposed site encompasses a “secondary channel” that striped bass utilize to access to shallow water flats during certain tidal stages. Mr. Roy and a fellow guide lead about 200 trips each season. If the proposed lease was granted, Mr. Roy indicated he would no longer be able to offer a unique fishing experience specific to this area.

This concern was reiterated by other stakeholders who also guide in the area commercially, or fish recreationally. Chad Coffin acknowledged that striped bass fishing occurs in the area and that he has seen Mr. Roy out on the water. Chad Coffin did not think the lease site would impact Mr. Roy’s business. However, Chad Coffin’s assessment of how the lease may impact someone else’s business is speculative. If the proposed lease were granted, striped bass may no longer utilize the channel. Even if the striped bass continued to use the channel, it is highly unlikely that Mr. Roy and other commercial or recreational fishermen would be able to continue to fish within the area. They would be casting their fishing lines into the boundaries of an aquaculture site, which could lead to gear entanglement.

Based on the evidence in the record, if the lease is granted it would unreasonably interfere with commercial and recreational fishing activities. This is particularly true for professional fishing guides as the proposed site encompasses a secondary channel that is an important part of commercial tours. Granting the proposed site would preclude access to this area and could have a variety of negative impacts on professional guides who have developed a niche fishing experience that is based on the distinctiveness of this area.

Therefore, the proposed site will unreasonably interfere with fishing. Chapter 2.37(1)(A)(2) also requires the Commissioner to examine whether the lease activities would unreasonably interfere with other water-related uses of the area. Specifically, “the Commissioner shall examine whether the lease activities would unreasonably interfere with commercial or recreational fishing **or other water-related uses of the area**” [emphasis added]. Members of the public did describe other water-related uses of the area. However, DMR has found that the proposed site would unreasonably interfere with commercial and recreational fishing. Based on the construction of the regulation, DMR does not need to also make a finding regarding other water-related uses of the area, because the lease, if granted, would unreasonably interfere with fishing activities.

4. CONCLUSIONS OF LAW

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

Therefore, the proposed aquaculture activities do not 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 denies Walter Coffin's proposed lease.

Dated: 6/2/2020

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

6. EXHIBITS

| EXHIBIT NUMBER: | EXHIBIT DESCRIPTION: | SUBMITTED BY: | CITED IN DECISION AS: |
|------------------------|---|--|------------------------------|
| 1 | DMR Case File | Department of Marine Resources (DMR) | CF |
| 2 | Walter Coffin's completed application | DMR | APP |
| 3 | DMR Site Report | DMR | SR |
| 4 | DeAlteris Report | Concerned Citizens of Recompense Cove (CCRC) | Exhibit 4 |
| 5 | Best Management Practices for the East Coast Shellfish Aquaculture Industry | CCRC | Exhibit 5 |
| 6 | Maine Aquaculture Association Code of Practice | CCRC | Exhibit 6 |
| 7 | Letter of Timothy Forrester | CCRC | Exhibit 7 |
| 7a | Report of Timothy Forrester | CCRC | Exhibit 7a |