

**STATE OF MAINE
DEPARTMENT OF MARINE RESOURCES**

Experimental Aquaculture Lease Application
Suspended Culture of Blue Mussels
Blue Hill Bay, Mount Desert

Mussel Bound, Incorporated

BHB Bix

September 15, 2021

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION

Mussel Bound, Incorporated (“Mussel Bound”) applied to the Department of Marine Resources (DMR) for a 3-year experimental aquaculture lease on 3.58 acres.¹ The proposed site is located east of Bartlett Island in Great Cove, Blue Hill Bay, Mount Desert, Hancock County, Maine, for the cultivation of blue mussels (*Mytilus edulis*) using suspended culture techniques.

1. PROCEDURAL HISTORY

A. Application, 2019 Public Comment and Hearing Notice

The application was deemed complete by DMR on March 6, 2019. Notice of the completed application and 30-day comment period was provided to riparian landowners within 1,000 feet of the proposed site, the Town of Mount Desert, including the Harbormaster, and other state and federal agencies. It was also published in the March 28, 2019 edition of the *Mount Desert Islander*. In accordance with 12 M.R.S.A. §6072-A(6), public hearings for experimental leases are optional unless DMR receives five or more written requests for a public hearing during the comment period. During the comment period, DMR received more than five requests for a public hearing. Therefore, DMR was required to schedule and hold a public hearing on the experimental lease application. DMR’s site report was issued on October 15, 2019.

A public hearing on this application was originally scheduled for November 19, 2019. Public notice of the hearing was initially published in the *Mount Desert Islander* on October 17, 2019 and was scheduled to be published a second time on November 7, 2019. Notice of the hearing was also provided to riparian landowners within 1,000 feet of the proposed site, the Town of Mount Desert, other state and federal agencies, and subscribers of DMR’s aquaculture email list-serve. However, the hearing was postponed on November 7, 2019 and was not immediately rescheduled. On November 1, 2019, DMR received an application to intervene from Friends of Blue Hill Bay (FOBHB). DMR notified FOBHB that the hearing was postponed and that when it was rescheduled a new intervenor deadline would be

¹ Applicant originally requested 3.55 acres, but DMR calculations based on the provided coordinates indicated the proposed area is 3.58 acres.

announced. Therefore, FOBHB would need to apply to intervene, at that time, in compliance with applicable deadlines.

B. Notice of Rescheduled Hearing and Pre-Hearing Conference

By the time the hearing could be rescheduled, DMR had changed the format of aquaculture hearings in response to the COVID-19 pandemic. DMR rescheduled the proceeding remotely, for 5:00 p.m. on April 6, 2021, using a virtual meeting platform.² The public notice of the hearing was first published in the February 11, 2021 edition of the *Mount Desert Islander*. That initial notice provided information about the remote pre-hearing conference scheduled for March 10, 2021 at 3:00 p.m., the deadline to apply for intervenor status, the April 6, 2021 hearing date, and instructions on how to register to participate in the hearing. The notice indicated that registration to participate in the hearing would open at 8:00 a.m. on March 9, 2021 and it included instructions on where to access the registration form. Copies of this notice were provided to the Town of Mount Desert 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.

In accordance with 5 M.R.S.A. §9052(3)(A), the second notice of the hearing was published in the March 11, 2021 edition of the *Mount Desert Islander*. This notice included details about the deadline to apply for intervenor status, the April 6, 2021 hearing date, and the deadline to register to participate in the public hearing, which was 5:00 p.m. on March 22, 2021. The notice included instructions on where to access the hearing registration form. A copy of this notice was also published in the March 2021 edition of the *Commercial Fisheries News*.

Given the remote format of the hearing and anticipated complexity of issues and volume of exhibits, DMR decided to hold a remote pre-hearing conference at 3:00 p.m. on March 10, 2021. As previously described, DMR published notice about the pre-hearing conference in a local newspaper and sent notice to the municipality, riparian landowners, and other stakeholders. The conference considered issues such as deadlines for the exchange and submission of witness lists, pre-marking and exchange of proposed exhibits, intervention, and other matters pertaining to the conduct of the remote hearing. On March 15, 2021, DMR issued a procedural order detailing the conduct of the remote hearing and specifying the submission of pre-filed testimony, exhibits, and objections, among other things.

C. Intervenor Decisions

² DMR uses Microsoft Teams for all virtual conferencing, so this was the platform used for the remote hearing.

The deadline to apply for intervenor status was 5:00 p.m. on March 22, 2021. DMR received two applications for intervenor status, one from FOBHB and one from Bartletts Island, LLC. On March 22, 2021, after the intervenor applications were received, DMR requested that representatives of FOBHB and Bartletts Island LLC provide a complete list of members they were representing by 12:00 p.m. on March 26, 2021. DMR noted that the list was necessary, so that if intervenor status was conferred it would be clear who the status applied to by virtue of their membership in that group. DMR further specified that if intervenor status was conferred to the organizations that applied for intervenor status, the members listed would be expected to participate in that proceeding as members of the group, but not also as members of the public. This information would also have implications for the general administration of the public hearing.

On March 24, 2021, FOBHB asked that the filing deadline of 12:00 p.m. on March 26, 2021 be extended to 12:00 p.m. on March 29, 2021. This request was denied, because DMR had to determine intervenor status no later than 5:30 p.m. on Monday, March 29, 2021. In the response denying the request, DMR explained that if the extension were granted there would not be enough time for the agency to review all filings and render a final decision on intervenor applications by the deadline specified in the procedural order. DMR also requested that FOBHB identify which individual was a riparian landowner with the March 26, 2021 filing.

On March 24, 2021, Bartletts Island, LLC provided a list of the individuals it was representing. On March 26, 2021, FOBHB submitted a copy of its 2020 annual report and articles of incorporation. Citing *Nat'l Org. for Marriage v. Comm'n on Governmental Ethics & Elections Practices*, 2015 ME 103, ¶ 27 n.10 (citing *NAACP v. Alabama*, 357 U.S. 449, 460 (1958))³, FOBHB responded that DMR had no compelling need to obtain FOBHB's membership list. Although FOBHB elected not to file a membership list, the intent of the list was to specify which members FOBHB would be representing in the proceeding. Without this information, there would be no other way for DMR to determine who may be participating in this proceeding as a member of FOBHB or a member of the public.

The laws and regulations governing DMR's lease proceedings provide that members of the public may offer testimony or submit exhibits as part of the public hearing process. Applying for and

³ Email from Sally Mills to A. Ellis, dated March 26, 2021, which notes in full: *State action "that requires disclosure of donor or membership information constitutes a restraint on the right to freedom of association." Nat'l Org. for Marriage v. Comm'n on Governmental Ethics & Elections Practices*, 2015 ME 103, ¶ 27 n.10 (citing *NAACP v. Alabama*, 357 U.S. 449, 460 (1958)). *Such state action is only permissible when the state has "a compelling need for the material sought" and "there is no significantly less restrictive alternative for obtaining the information." United States v. Comley*, 890 F.2d 539, 544 (1st Cir. 1989).

being granted intervenor status is not required to participate in a lease proceeding. Individuals or entities that apply for intervenor status must demonstrate that they will be substantially and directly affected for the status to be conferred. In instances where an intervenor applicant has not demonstrated that they will be substantially and directly affected, participation may be limited or denied. The terms “substantial” and “direct” are not defined in the rules or laws that govern lease proceedings. However, the use of these terms suggest that the injury must be particularized and distinct.⁴ That if the lease were granted, those applying for intervenor status would suffer an injury not held by the public at large.⁵

When evaluating experimental lease proposals, DMR must consider the criteria established in Chapter 2.37(1)(A)(1-7). These criteria include such considerations as impacts to riparian landowner ingress and egress, navigation, commercial and recreational fishing, and significant wildlife habitat, among others. Chapter 2.05(1)(C) of DMR’s regulations defines “riparian owner” as a shorefront property owner whose property boundaries are within 1,000 feet of the proposed lease boundaries.

In their application to intervene, Bartletts Island, LLC identified themselves as a riparian landowner under Chapter 2.05(1)(C) of DMR’s regulations. The lease application submitted by Mussel Bound, listed Bartletts Island, LLC as the only riparian landowner within 1,000 feet of the proposal. The application to intervene submitted by Bartletts Island, LLC indicated that the landowners use the area for recreational navigation and that they have granted a conservation easement to Maine Coast Heritage Trust, which includes all shore and intertidal areas on Bartletts Island near the proposed lease site. The application indicated that if the lease were granted, it would have direct impacts on the easement and their use of Bartletts Island and the surrounding area.

Bartletts Island, LLC met the definition of a riparian landowner under Chapter 2.05(1)(C) of DMR’s regulations and its intervention application described how, if the proposal were granted, it may directly impact how the members that comprise the LLC utilize the area. Based on the application, DMR found Bartletts Island, LLC demonstrated that it would be substantially and directly affected by the proposal, should it be granted. Therefore, DMR granted full intervenor status to Bartletts Island, LLC.

In its application to intervene, FOBHB indicated that it is a nonprofit organization “concerned with the responsible use of our public marine resources, particularly in Blue Hill Bay.” The application further noted that the organization represents: “the concerns of commercial fishermen, at least one riparian landowner, and the hundreds of members who use and are concerned with a healthy future for

⁴ See *Nelson v. Bayroot, LLC*, 953 A.2d 378, 382 (Me. 2008).

⁵ See *Ricci v. Superintendent, Bureau of Banking*, 485 A.2d 645, 647 (Me. 1984)

Blue Hill Bay in general and the lease area in particular.”⁶ FOBHB indicated that it represents a wide range of uses of Blue Hill Bay and the lease area. However, the application did not include any specific details about how the hundreds of members it represents would be substantially and directly affected by the proposed lease if it were granted. In addition, the uses identified would be held by the public in general and included activities like fishing, navigation, etc.

FOBHB indicated that they represent the interest of at least one riparian landowner. However, it was unclear from the application what FOBHB meant by “riparian landowner.” DMR felt that this was important to clarify as Bartletts Island, LLC indicated that it was the riparian landowner of Bartletts Island and only one riparian landowner was listed in Mussel Bound’s application. DMR requested that FOBHB identify the riparian landowner and whether they met the definition of riparian owner under Chapter 2.05(1)(C). Providing the name of that person or entity would help DMR determine if there were similar riparian interests between members of Bartletts Island, LLC and FOBHB, which could have implications for consolidation of the parties (assuming both groups were granted intervenor status). As previously noted, Bartletts Island, LLC provided a list of its members, but FOBHB elected not to provide the identity of the riparian landowner. However, FOBHB noted that it wanted to make a correction to its application. Specifically,

Correction: FOBHB referenced one member as a “riparian owner.” This individual is not a riparian owner within the strict definition under Maine’s aquaculture legislation. Further, this individual does not intend to testify – whether as a member of FOBHB or individually. We ask that the Department disregard this statement in its analysis.

Based on this correction, FOBHB was not representing the interest of any riparian landowner as defined under Chapter 2.05(1)(C) of DMR’s regulations. The organization also cited the fact that they had intervened in other lease proceedings as a consideration that would merit approval of their request to intervene in this case. However, the number of times an organization has been granted intervenor status in prior proceedings is not dispositive regarding the question whether it meets the criteria for intervenor status in any specific case.

The application further asserted that the proposal would result in unreasonable impacts to certain lease criteria. However, it only listed the criteria and did not provide enough detail to support the claims raised. In addition, some of the criteria cited only apply to standard leases, which do not

⁶ See answers to questions 3 and 4 of the FOBHB’s application to intervene.

apply evaluating an experimental lease proposal.⁷ FOBHB represents a broad array of uses within Blue Hill Bay and all of those uses would be held by the public in general. Therefore, DMR denied their request for full intervention.

When substantial and direct affects are not demonstrated, but participation as a limited intervenor would be helpful, DMR may grant limited intervenor status. However, DMR felt that the concerns raised by FOBHB would be represented by the participation of Bartletts Island LLC as a full intervenor, as well as any relevant testimony provided by members of the public who registered to participate in the proceeding. Therefore, DMR did not grant limited intervenor status to FOBHB. On March 29, 2021, DMR issued a letter to Mussel Bound, Bartletts Island, LLC, and FOBHB detailing the final decision concerning intervenor status.

The letter concerning intervenor status, issued on March 29, 2021, noted that the registration deadline for members of the public to offer testimony had ended at 5:00 p.m. on March 22, 2021. However, the letter indicated that DMR would issue a second procedural order that specified how interested members of FOBHB could register to offer testimony and submit pre-marked exhibits. The second procedural order would also apply to any member of the public who registered to participate in the proceeding by the March 22, 2021 deadline.

On March 30, 2021, Mussel Bound requested that the public registration deadline be extended, so that members of the public would have additional time to register to offer testimony. Mussel Bound noted that the March 22, 2021, deadline to register for the proceeding was not contained in procedural order issued on March 15, 2021, and alleged it was not included in the notice of the lease hearing or on DMR's website. Mussel Bound argued that if the hearing was held in-person a member of the public could provide testimony without having to register. Mussel Bound alleged that a failure to extend the deadline would severely prejudice Mussel Bound and deny the public the right to participate in the hearing.

On March 31, 2021, DMR denied Mussel Bound's request to extend the registration deadline for members of the public. In response to Mussel Bound's request, DMR provided tear sheets of all published hearing notices to Mussel Bound for their review. The notices of the hearing indicated that registration to participate would be required and included applicable deadlines and instructions on how to register. Furthermore, Mussel Bound was provided with an initial copy of the hearing notice before it

⁷ Unreasonable impacts from noise and light are cited as impacts, but these criteria are specific to standard leases, not experimental. On March 10, 2021, DMR held a prehearing conference and reminded participants that this is an experimental lease proposal, so some of the criteria specific to standard leases would not apply. Representatives from FOBHB attended that prehearing conference.

was published on February 11, 2021, so it and the public were aware that registration to participate would be required nearly two months before the first hearing. Notice of the public registration deadline would not have been included in the March 15, 2021 procedural order as that governed the administration of the hearing and associated filings for parties.

DMR reasoned that members of FOBHB did not register to participate in the proceeding by the March 22, 2021 deadline, because the organization had applied for intervenor status and based on their application assumed that the status would be conferred. During the pre-hearing conference, it was not communicated that persons/entities applying for intervenor status should also register to participate as a member of the public. As a result of FOBHB's intervenor request being denied and the registration deadline closing, there would be no other opportunity for members of FOBHB to participate in the proceeding. Therefore, DMR provided individual members of FOBHB with the opportunity to register to provide testimony as members of the public.

The opportunity to register after March 22, 2021, was not extended to other members of the public as it was clear that the registration deadline was March 22, 2021 and no other person or entity had also applied for intervenor status. Allowing members of FOBHB to register to testify would not be prejudicial to Mussel Bound. FOBHB made clear that they intended to participate as an intervenor. If they had been granted intervenor status, they would have the same status as any other party to the proceeding. However, by virtue of the request being denied, individual members were only able to participate as members of the public. The participation of members of the public is generally limited when compared to a legal party to the proceeding.

Chapter 2.31(4) of DMR's regulations allow the agency to place reasonable conditions, terms, or limits on public participation. Given that remote proceedings require additional logistical work and are distinct from in-person proceedings, pre-registering to offer testimony is a reasonable requirement. Each day of the hearing, DMR posted a link to its website so that persons who did not register could still view or listen to the proceedings.

On March 31, 2021, DMR issued a second procedural order governing the participation of members of the public, including deadlines to pre-file exhibits. The procedural order also provided members of FOBHB with an opportunity to register to testify. In compliance with the procedural order, on April 2, 2021, FOBHB indicated that Donald Eley and Joseph DeAlteris would be offering testimony. In compliance with the procedural order, Mr. DeAlteris pre-filed a report about the proposed lease site.

FOBHB also requested that DMR reconsider the denial of intervenor status. That request included additional assertions about how certain named members of FOBHB may be substantially and

directly affected by the lease should it be granted and argued that FOBHB had direct organizational standing to participate in the proceedings as an intervenor, because its organizational purpose would be frustrated if the proposed lease was granted. On April 6, 2021, DMR denied FOBHB’s request, reiterating the justification it had provided in the March 29, 2021 letter regarding intervenor status.

D. Hearing Administration

1. Remote Proceedings

The remote hearing was held on April 6, 2021 and continued April 7, 2021. The hearings were recorded, and the Hearings Officer was Amanda Ellis.⁸ Sworn testimony was given at the hearing by the following witnesses on the following days:

April 6, 2021:

Name	Affiliation
Spencer Swanson	Applicant, Mussel Bound, Incorporated
John Lemoine	Town of Mount Desert Harbormaster ⁹ , Applicant’s Expert Witness
Marcy Nelson	Acting Aquaculture Division Director, DMR
Shawn Mahaney	Senior Project Engineer, U.S. Army Corps of Engineers (USACOE)

April 7, 2021:

Name	Affiliation
Rebecca Lambert and Lewis Gordon	Bartletts Island, LLC
Avery Law, Edward Johnson, ¹⁰ Donald Eley, and Joseph DeAlteris	Members of the Public

Mr. Swanson described the lease application and answered questions about the proposal. John Lemoine, Harbormaster for the Town of Mount Desert, described existing uses of the area as they related to the decision criteria governing experimental leases and summarized the written observations contained in “Exhibit 2” of Mussel Bound’s pre-filings.

⁸ The Hearings Officer attended the DMR site visit on June 7, 2019.

⁹ During the hearing, John Lemoine confirmed that he was providing testimony in his capacity as the Mount Desert Harbormaster.

¹⁰ Edward Johnson did not testify in the proceeding. Instead, Gordon Smith (Counsel, Verrill-Dana, LLP) made unsworn statements on Mr. Johnson’s behalf. DMR explained to Mr. Smith that the comments he provided would not be considered as testimony. Mr. Smith acknowledged that the comments were a statement, not testimony.

Marcy Nelson testified and answered questions about DMR's site report and the aquaculture program. Shawn Mahaney testified about the USACOE permitting authority and the status of permits held by the applicant. Mr. Mahaney also answered questions related to the USACOE permitting process and authority. Rebecca Lambert and Lewis Gordon testified on behalf of Bartletts Island, LLC. They described the use of the island, some concerns about the lease proposal, and the actions the applicant had taken to address some of those concerns.

Avery Law offered testimony in general support of the applicant's proposal, Donald Eley offered testimony in his capacity as a professional mariner and president of FOBHB. Mr. Eley testified about navigation within the area. Joseph DeAlteris testified that he was asked to review the DMR site report, which was published on October 15, 2019. Mr. DeAlteris indicated that his feedback was specific to the details noted in the site report, which reflected DMR's site visit on June 7, 2019. Mr. DeAlteris clarified that based on the testimony provided by the parties and others in attendance, most of the concerns in his 2019 report had since been addressed by the applicant.

2. Pre-filings and Objections

In compliance with the respective procedural orders, Bartletts Island, LLC, Mussel Bound, and Mr. DeAlteris pre-filed exhibits. On April 5, 2021, Mussel Bound objected to the pre-filings of Bartletts Island, LLC and Mr. DeAlteris. Mussel Bound also objected to Mr. DeAlteris' participation in the proceeding alleging that Mr. DeAlteris was not a member of FOBHB and asserting that he does not live near the lease proposal. Mussel Bound also submitted an offer of proof and an objection to DMR's decision not to extend the registration deadline for members of the public. The offer of proof included a list of eight individuals that had contacted Mussel Bound to indicate that they would have registered to participate in the hearing had the registration deadline been extended to April 2, 2021.

On April 6, 2021, the DMR Hearings Officer entered into the record the pre-filings submitted by Mussel Bound and a slide show presented by Ms. Nelson on behalf of DMR. There were no objections to any of these materials being entered into the record. During the remote proceeding, on April 7, 2021, the Hearings Officer responded to the pre-filed objections submitted by Mussel Bound. All the pre-filed exhibits submitted by Bartletts Island LLC and Mr. DeAlteris were admitted into the record. The Hearings Officer indicated that these exhibits may have relevance with regard of the evaluation of the proposal and DMR would decide how much weight each exhibit should be given. The Hearings Officer explained that each party would have the opportunity to review the proposed lease decision, which would cite any exhibits that were germane to DMR's proposed findings.

Furthermore, the Hearings Officer clarified that the March 31, 2021, procedural order should not be construed so narrowly as to require that Mr. DeAlteris' testimony on behalf of the members of FOBHB be in the capacity as a member of that organization. Rather, the order was intended to provide an opportunity for the members of FOBHB to present evidence that they could have offered had they registered to participate by the deadline, but did not because they anticipated that they would be granted intervenor status. The Hearings Officer then explained that the applicant would have the opportunity to cross-examine Mr. DeAlteris.

The Hearings Officer also clarified that other members of the public not affiliated with FOBHB, who did not register by the March 22, 2021 deadline, would not be allowed to offer testimony. As previously noted, Chapter 2.31(4) of DMR's regulations allows a Hearings Officer to place reasonable conditions, terms, or limits on public participation. In this case, DMR established a registration deadline for members of the public to help facilitate the proceeding. A similar mechanism could be used in any type of proceeding regardless of the format.

3. Exhibits

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

Exhibit Number	Description	Cited in Decision
1	DMR case file	CF
2	Completed Lease Application	App
3	DMR Site Report	SR
4	Mussel Bound Slide Presentation	Exhibit 4
5	Report of John Lemoine	Exhibit 5
6	DMR Slide Presentation	Exhibit 6
7	Roman, Lauren, et al., <i>A Quantitative Analysis Linking Seabird Mortality and Marine Debris Ingestion</i> . Scientific Reports. March 1, 2019.	Exhibit 7
8	Chesini Rossi, Liana, et al. <i>First Record of Debris Ingestion by the Shorebird American Oystercatcher (<i>Haematopus palliatus</i>) on the Southern Coast of Brazil</i> . Marine Pollution Bulletin. 138 (2019) 235-240.	Exhibit 8
9	Photograph taken on April 7, 2019 of unsecured equipment on a storage float in Great Cove	Exhibit 9

10	Photograph taken on April 7, 2019 of unsecured equipment (containers) on a storage float in Great Cove	Exhibit 10
11	Photograph taken on October 21, 2019 of a storage float in Great Cove	Exhibit 11
12	Report of Joseph DeAlteris	Exhibit 12

2. DESCRIPTION OF THE PROJECT

A. Current and Proposed Operations

The applicant testified that Mussel Bound currently operates a standard lease near Hardwood Island for the culture of blue mussels¹¹ and in 2020 was granted an experimental lease near Thomas Island, which the applicant utilizes to collect mussel spat.¹² Mr. Swanson noted there are a variety of environmental factors that have made it increasingly difficult to successfully culture mussels at the Hardwood Island site. Mr. Swanson indicated that environmental conditions at Great Cove are likely more conducive to the successful culture of mussels. Mr. Swanson indicated that if this proposed lease site is granted, it is likely that Mussel Bound would relinquish the Hardwood Island site.

The applicant is proposing to culture mussels on ropes that are vertically suspended from horizontal backlines, which are strung within the frames of 6 plastic circular fish pens or “polar circles” (SR 2, App 7; 21-25). Each pen measures 70 meters in circumference (App 21). From November through June a maximum of 6 pens would be deployed within the boundaries of the proposed lease site (App 7). From July through October, a maximum of 3 pens would be deployed within the boundaries of the proposed site (App 7). The remaining 3 pens would be moved to Frenchman Bay to a site permitted by the USACOE (App 7).

The proposed site would be seeded in November and product would be graded in May (App 6). Harvesting would occur year-round as the mussels reach market size (App 7). Product would be harvested from a barge that contains processing equipment including a conveyor, stripper, and pot

¹¹ DMR lease site: BHB HI2. The lease was initially issued in 1993 to Trumpet Island Salmon Farm for the culture of Atlantic salmon using net pens. In 2005, salmon culture was replaced by the suspended culture of blue mussels using rafts. In 2006, the lease was transferred from Trumpet Island Salmon Farm to Maine Cultured Mussels. In 2013, DMR approved the use of eight, 70-meter polar circle fish pens for the culture of mussels using longlines. In 2017, the lease was transferred from Maine Cultured Mussels to Mussel Bound, Incorporated. The most recent lease term expired on March 24, 2020. However, the applicant submitted a renewal application before the lease expired, so they can continue operating the site until DMR renders a final decision on the renewal.

¹² DMR lease site: EAST Tlx. The experimental lease was issued on May 26, 2020 for the suspended culture of blue mussels.

hauler (App 8 and 9). The applicant testified that the barge and a processing building would be part of the proposed operations but would not be kept on the proposed lease site (Lyons/Swanson).

B. Site Characteristics

The proposed lease site is located to the east of Bartlett Island in Great Cove (SR 6). The shoreline of Bartlett Island, adjacent to the proposed site, is undeveloped and the gradually sloping intertidal zone gives way to a mature coniferous forest (SR 6). Staff observed some buildings on the interior of the island and to the south near Birch Cove (SR 6). Correcting for tidal variation, depths at mean low water ranged from 37 to 45 feet (SR 6). At mean low water, the SW corner of the proposed site is ~810 feet to the nearest point of land on Bartlett Island (SR 8).

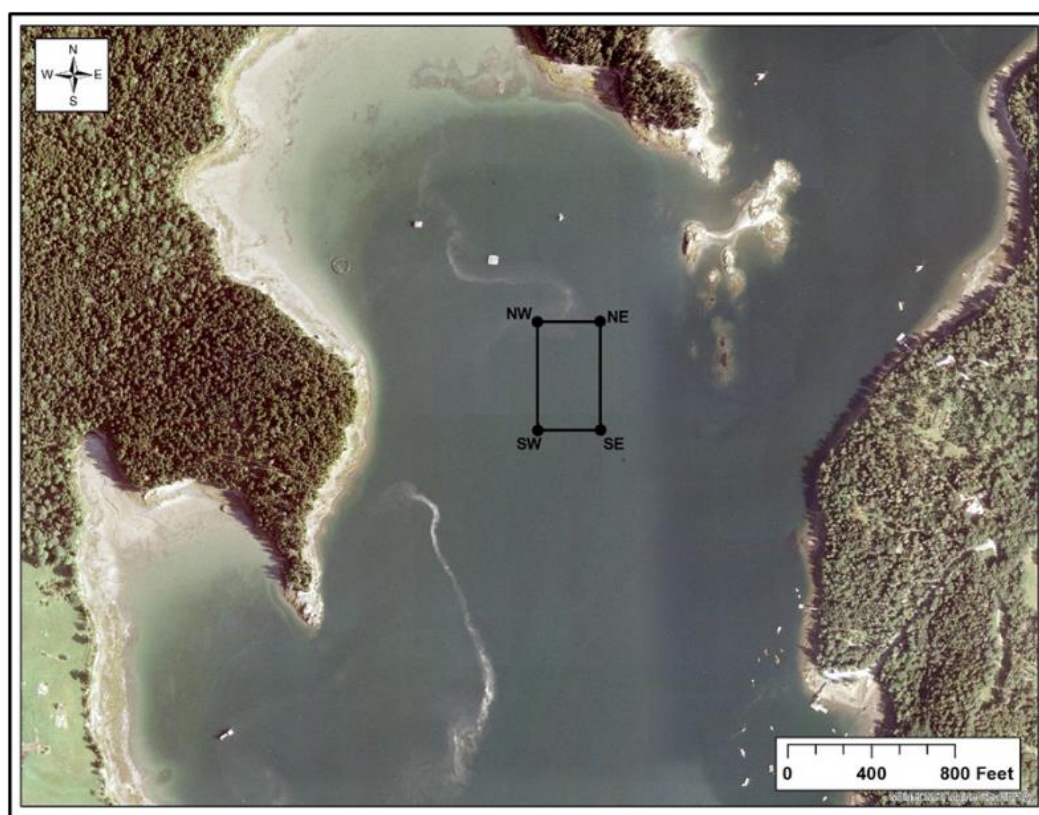


Image 1: Proposed lease site with corners labeled. Image from Site Report.

C. Site History and Permits

Mussel Bound was incorporated in 2013 and is owned by Eric “Spencer” Swanson and his brother Reid Swanson (App 36-41; 46-47; and Swanson testimony). During the public hearing, Spencer Swanson testified that, since approximately 1989, Bartletts Landing has been utilized for the storage and maintenance of barges and equipment associated with his family’s various aquaculture businesses. Some of these initial businesses included the culture of Atlantic salmon (*Salmo salar*) using polar circles.

The family business is now focused on the culture of mussels and the area has more recently been used for wet storage and mussel processing.

During the June 7, 2019 site visit, DMR staff observed one commercial fishing vessel, six polar circles in varying states of use, a floating processing building, and approximately eight storage floats within the general area of the proposed site (Nelson). Four of the floats were associated with a Limited Purpose Aquaculture (LPA) license and wet storage permit¹³ issued to Victor Doyle (Nelson). Three polar circles and two floats were associated with wet storage permits issued to Mussel Bound and Maine Shellfish by the DMR Bureau of Public Health (Nelson). It is DMR's understanding that other moorings in Great Cove not associated with aquaculture licenses or wet storage activities¹⁴ were permitted through the U.S. Army Corps of Engineers (USACOE) or the Town of Mount Desert (Nelson).

At the public hearing, Mr. Swanson was asked if the USACOE permits he submitted with the lease application were still valid as they appeared to be expired (Mills/Swanson). Shawn Mahaney, Senior Project Engineer, USACOE, clarified that Mussel Bound does have a valid USACOE permit for the polar circles. These are permitted under the "Maine General Permit," which was initially issued in 2013 and amended in 2018. A condition of that permit authorizes the continuation of activities, so long as authorization was granted under a previous general permit. Therefore, the applicant is still authorized to have polar circles.

Mr. Mahaney testified that some of the other equipment, including the floats, were initially permitted by the USACOE in the early 1990s. The floats were associated with the prior salmon farming operations, which occurred on a lease site near Hardwood Island. When the salmon farming operations ended, the floats and other equipment were moved to Great Cove. The general permit authorizes the local Harbormaster to issue mooring permits on behalf of the USACOE. Mr. Mahaney testified that the applicant received permits from the municipality to moor that equipment in Great Cove. Provided the applicant has permission from the Town of Mount Desert, they are permitted through the USACOE. Mr. Mahaney testified that the applicant's general permit would be amended to include any other polar circles, provided the lease is granted by DMR.

¹³ Wet storage permits are issued by the Maine Department of Marine Resources, Bureau of Public Health and authorize the storage, by a dealer, of shellstock from certain growing area classifications. Any structure deployed as part of the wet storage activities, within navigable waters, requires a permit from the USACOE and/or the municipality.

¹⁴ According to DMR records, the wet storage activities occurred within an area permitted under USACOE permit #NAE-2013-1257, which is included with the completed application.

D. Condition of the Area

During the 2019 site visit, DMR took photographs of the floats and other structures within Great Cove. The floats contained buoys, rope, mussel tumbling equipment, and what appeared to be trash (SR 11). In addition, a polar circle that appeared to be broken was moored within the cove. Bartletts Island, LLC also submitted photographs of equipment and storage floats from April and October 2019 (Exhibits 9-11). These images depict rope, totes, and what also appears to be unsecured trash. Based on documentation from 2019, the storage floats and other equipment in Great Cove were in poor condition. The photograph below, from DMR's site report, depicts the condition of one of the storage floats from 2019.



Image 2: Storage floats with buoys, rope, mussel tumbling equipment and possibly trash. Image taken by DMR staff on June 7, 2019. Image 10 from the Site Report.

Bartletts Island, LLC has been concerned with the substandard conditions of the floats and other equipment within Great Cove. Rebecca Lambert (Bartletts Island, LLC) testified that her family purchased Bartletts Island in 1974 and since that time have been focused on conserving the area for wildlife and visitors to enjoy. A conservation easement on the island is intended to preclude further development of the area. Bartletts Island, LLC noted that some of the gear and trash piled onto the floats have washed up on the shore of Bartletts Island. Citing Exhibits 7 and 8, Ms. Lambert noted that the ingestion of trash or other marine debris can be fatal to shorebirds and seabirds.

Lewis Gordon, who manages Bartlett Island on behalf of Bartletts Island, LLC, described the photographs taken in April and October of 2019 (Exhibits 9-11) and noted that a significant amount of gear and what appeared to be trash were stacked on the floats. From 2016-2018, Mr. Gordon testified

that there was a lot of trash and debris that washed ashore, which Bartletts Island, LLC would cleanup. Mr. Gordon estimated that during one of those years (likely 2017), workers collected 22 bags of trash and other debris. Mr. Gordon noted that some of the trash was attributable to Mussel Bound, but it was also generated by other commercial fishing operations, including the lobster fishery.

On March 30, 2021, DMR staff revisited the proposed lease site. DMR staff noted that efforts had been made to consolidate gear within Great Cove. Two polar circles, the floating processing building with an attached storage float, and three other storage floats strung together were observed. The three storage floats were located behind a new processing building. The Bureau of Public Health also clarified that Mussel Bound and Maine Shellfish no longer had wet storage permits. DMR noted that the polar circles were empty, and the storage rafts had been cleaned up since the initial visit in 2019. Image 3 is a photograph of a float taken by DMR staff during the March 30, 2021 site visit.



Image 3: Photo of float taken by DMR staff on March 30, 2021.

At the public hearing, Mr. Swanson testified that over the past two years, Mussel Bound has made efforts to consolidate operations within the cove. For example, several older polar circles were decommissioned and removed from Great Cove. The applicant has also built a new floating processing facility. When asked to describe current conditions in Great Cove, Mr. Gordon testified that things have markedly improved. He felt that Great Cove was now one of the cleanest areas around Bartletts Island. Mr. Gordon testified: “Within the last two years, more so over the last year, Mussel Bound has done a

great job taking care of that cove. It would be great to have that continue” (Thomas/Smith). Mr. Swanson indicated that he intended to be a good neighbor.

E. Proposed Lease Conditions

On April 6, 2021, the applicant emailed DMR and Bartletts Island, LLC a list of six proposed conditions for the experimental lease. The email indicated that Mussel Bound and Bartletts Island, LLC had agreed to the conditions and Mussel Bound requested that DMR adopt the conditions if the lease is granted. The conditions were referenced as part of the applicant’s testimony and they were read into the record by Ms. Lambert as part of her testimony. The list of proposed conditions, as presented by the intervenor, is as follows:

1. Predator nets and deterrents. All predator nets used will be a maximum mesh size of 4 inches with twine of 3 mm or larger per MDIF&W recommendations. Mussel Bound will not use any noise or acoustic deterrents to prevent predators from entering the lease area.

2. Gear Tagging. Before Mussel Bound begins operation of the lease, it will tag or mark with its company name and phone number all polar circles, mooring lines, longlines, predator nets, and other gear associated with lease operations on the lease site that can reasonably be tagged or marked.

3. Gear and Debris. All gear and materials associated with Mussel Bound’s aquaculture operations will be secured to avoid gear loss. All debris resulting from the lease operations will be removed by Mussel Bound from the waters and shore of Great Cove. Within 14 day of being notified of gear, materials, or debris from the lease operations found in the waters and shore of Great Cove, Mussel Bound will retrieve errant gear, materials, or debris.

4. Great Cove Shore. Each spring and fall, Mussel Bound will conduct inspections in Great Cove for and clean the shore of any gear, materials, and debris associated with Mussel Bound’s aquaculture operations and submit a report letter to riparian owner Bartletts Island LLC and the Department of Marine Resources after each clean-up to document that it was conducted. Mussel Bound will clean up and remove other gear, materials, and debris not associated with Mussel Bound unless it is economically or logistically unreasonable.

5. Gear Storage. Other than gear intended to rest on the ocean bottom, such as mooring blocks, Mussel Bound will not store gear on the ocean bottom.

6. Float Removal. Unless used and moored within the lease area, Mussel Bound will remove moored floats from Great Cove used in support of its aquaculture operations before it begins lease operations. This condition does not include Mussel Bound's processing barge or clam barge.

During the public hearing, DMR asked Ms. Lambert clarifying questions about conditions four and six. Specific to condition four, DMR asked what was meant by "economically and logistically unreasonable" and what entity would be responsible for making that determination. Specific to condition six, DMR also asked when Mussel Bound would be expected to remove the floats. Ms. Lambert indicated that the proposed conditions are a work in progress, and they were recently agreed upon by the applicant and Bartletts Island, LLC.

In accordance with 12 M.R.S.A. §6072-A(15), the Commissioner may establish conditions that govern the use of the lease area and place limitations on the aquaculture activities. Chapter 2.37(1)(B) of DMR's regulations, further specify the types of restrictions and requests the Commissioner may consider in evaluating whether to place conditions on a lease site. During the proceeding, the Hearings Officer clarified that DMR has the sole authority to place conditions on a lease site. Any conditions need to comply with the provisions set forth in Chapter 2.37(1)(B) and are based on the applicable evidence in the record.

In previous years, the applicant had not been maintaining equipment or structures, permitted by other entities, to the satisfaction of Bartletts Island, LLC. The proposed conditions appear to be an agreement between the two parties that attempts to address the concerns Bartletts Island, LLC has had about prior activities within Great Cove. They also appear to be a measure that is intended to help keep the applicant accountable should the lease be granted. However, if the lease is granted the holder would need to comply with minimum lease maintenance standards and other applicable rules and laws governing the lease area. Failure to comply with those standards is grounds for lease revocation.

Furthermore, the lease could only be granted for a maximum of three years and would be non-renewable. If the holder wished to continue operations beyond the three-year term of the experimental lease, they would need to apply for a standard lease. Failure to comply with minimum lease maintenance standards or other rules and laws under DMR's jurisdiction during the term of the

experimental lease, could be considered by DMR in evaluating the standard lease proposal. This decision addresses the proposed conditions in applicable sections pertaining to relevant statutory criteria.

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 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 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 applicant has demonstrated that there is an available source of organisms to be cultured on the lease site.

A. Navigation

The proposed site is situated to the north and west of the Bartlett Narrows navigational channel (SR 9). Shoals and tidally exposed rocks are located between the channel and the eastern boundary of the proposed site (SR 9). To avoid natural hazards it is expected that vessels traveling northeast/southwest between Bartlett Island and Mount Desert Island would follow a course that adheres to the navigation channel, which is more than 200 feet to the south and east of the proposed site (SR 9). At mean low water, the channel is ~200-300 feet wide at the narrowest point (SR 9).

During the June 7, 2019 site visit, there were several rafts, moorings, and polar circles within 1,000 feet of the proposed lease site (SR 9). Except for four rafts associated with a separate proposed lease and a commercial fishing vessel moored ~640 feet to the northwest, all other observed surface gear/equipment was likely associated with the applicant or the Maine Shellfish Company (SR 9). There were also unmarked surface lines between the polar circles, which limited navigation between the structures (SR 9). Surface lines connecting the polar circles and moorings are also proposed for the lease site, so the ability of vessels to navigate east/west through the site would be limited (SR 9).

The site report indicated that if the observed aquaculture and wet storage gear are not consolidated and the lease is granted then navigable area within Great Cove would be further reduced (SR 9). If the lease is granted, motorized and hand powered vessels would still be able to maneuver between the site and the other gear/equipment (SR 9). However, it is likely that some motorized vessels and those under sail would avoid or continue to avoid Great Cove due to the limited maneuverability between all the gear (SR 9).

As noted in section 2.C. of this decision, since the site report was published, Mr. Swanson has made efforts to consolidate gear and other equipment in Great Cove. For example, several older polar circles were decommissioned and removed from Great Cove. The applicant has also built a new floating processing facility. After revisiting the site on March 30, 2021, DMR noted that gear within Great Cove had been consolidated. When asked to describe current conditions in Great Cove, Mr. Gordon testified that things have markedly improved. He felt that Great Cove was now one of the cleanest areas around Bartletts Island.

Mr. Eley, referencing NOAA Chart 13316,¹⁵ testified that Great Cove appears to be a good harbor of refuge. Great Cove offers protection from wind in most directions and is listed in several sailing guides as an excellent anchorage along the shoreline. However, given the presence of gear, Mr. Eley felt that mariners entering Great Cove during the day would assume that the area is a busy commercial operation. Mr. Eley testified that no one wants to anchor in Great Cove because it has historically been a “mess,” especially over the last 10 to 15 years.

Mr. Eley testified that there is no indication on the NOAA chart or in the U.S. Coast Pilot of any navigational hazards or aquaculture operations within the cove. Mr. Eley indicated that DMR had not issued a lease in Great Cove, which makes it difficult for mariners relying solely on the NOAA chart and U.S. Coast Pilot to enter Great Cove. Mr. Eley testified that the gear could present a safety and navigational hazard at night and instances of restricted visibility (i.e. fog) as none of the gear within Great Cove is illuminated or marked.

However, Mr. Eley also acknowledged that Mr. Swanson had been cleaning up Great Cove. Mr. Eley indicated that if the lease was granted it would be included on charts as the boundaries of the lease are required to be reported to the U.S. Coast Guard. Mr. Eley testified that charts are now electronic, so when information about lease boundaries are reported that information “will almost immediately show up on the electronic version of the chart, so that would make navigation much safer for someone who’s got a current electronic chart” (Lyons/Eley). Mr. Eley clarified that he would still be concerned about any gear outside the boundaries of the proposed lease site, which would not be included on any charts.

Mr. Gordon, when asked whether he observes any boat traffic in Great Cove testified that small sailboats would moor in the area usually during evenings in July and August (Mills/Gordon). Mr. Gordon explained that he has noticed more vessels within Great Cove since the area has been cleaned up. Mr. Gordon testified that in the spring and fall other mussel barges and boats will moor within Great Cove.

¹⁵ Figure 1 of the DMR site report shows the location of the proposed lease site on the digitized NOAA Nautical Chart referenced as part of Mr. Eley’s testimony.

John Lemoine, the Mount Desert Harbormaster, visited the proposed site and surrounding area on March 22, 2021 (Exhibit 5). Mr. Lemoine indicated that the proposed lease would not unreasonably interfere with navigation or designated or traditional storm anchorages (Exhibit 5).

Discussion:

In evaluating the impacts an experimental lease may have on navigation, the Commissioner must consider whether any lease activities requiring surface and or subsurface structures would interfere with commercial or recreational navigation around the lease area. The Commissioner also considers the current uses and different degrees of use of the navigational channels in the area in determining the impact of the lease operation.¹⁶

In this instance, the navigational channel is more than 200 feet to the south and east of the proposed site. In the past, Mr. Gordon has observed some sailboats within Great Cove during the late summer months and some mussel barges or other boats in the spring and fall. Based on Mr. Eley's testimony the area has historically been avoided by vessels due to the presence of gear and other structures, which are permitted by other agencies or entities. The site report, which reflects the site assessment conducted on June 7, 2019 also indicates that vessels may avoid the area due to the presence of gear.

However, when DMR revisited the site on March 30, 2021, staff observed that gear had been consolidated. Mr. Swanson testified that he was making efforts to consolidate gear and structures within Great Cove. DMR's observations and the applicant's testimony were further supported by Mr. Gordon and other participants, who described or noted the applicant's clean-up efforts as part of their testimony. Mr. Gordon indicated that these efforts may even be contributing to more vessels being able to utilize Great Cove. The Harbormaster, who visited the area on March 22, 2021 indicated that the site, if granted, would not unreasonably interfere with navigation (Exhibit 5).

Mr. Eley noted that if the lease was granted it would be depicted on charts, which would make navigation safer. However, Mr. Eley was concerned about the lack of marking and visibility of other structures not included within the boundaries of the lease site. The applicant testified that if the lease is granted, no additional polar circles would be deployed outside the lease area. If the lease is granted, Mussel Bound would be required to comply with DMR's marking requirements, which include contacting the U.S. Coast Guard Private Aids to Navigation to register marking devices and to comply with any U.S. Coast Guard marking requirements. No one from the U.S. Coast Guard Private Aids to Navigation

¹⁶ See Chapter 2.37(1)(A)(2) of DMR's regulations.

participated in the hearing, so it is unclear if the lease site is granted whether and when it would be depicted on electronic chart. However, mariners would be aware of the site when attempting to access Great Cove as the site would have to be marked. site).

The processing building and clam barge would remain in Great Cove but would not be within the boundaries of the proposed lease site. The processing building and barges would be permitted through other agencies or entities, including the USACOE and the municipality. DMR does not have jurisdiction over these permits. Therefore, it would be the responsibility of those relevant authorities to implement lighting or marking requirements for anything they have permitted provided those authorities felt that such measures were necessary.

In this instance, the testimony related to navigation tended to focus on the historical aquaculture related uses of Great Cove, which until 2013 would not have been completely attributable to Mussel Bound. In addition, not all the gear currently within Great Cove is associated with Mussel Bound. Some of the testimony also focused on the lack of marking associated with gear or structures permitted by other authorities that are utilized by the applicant. However, the applicant has made efforts to consolidate gear and structures within Great Cove. At the public hearing, no evidence was presented to suggest that granting the lease, in consideration of recent consolidation efforts, would unreasonably interfere with navigation.

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

B. Riparian Access

The docks, or access points to Bartlett Island, are more than 2,000 feet to the southwest of the proposed lease site in Birch Cove (SR 9). If the proposed lease is granted, it will not obstruct riparian access to Bartlett Island (SR 9). The closest observed dock to the proposed lease site was 1,400 feet to the east and on the shoreline of Mount Desert Island (SR 9). DMR staff observed a moored Hinckley Yacht and three empty moorings near the dock (SR 9). If the lease is granted, it will not interfere with access to the observed docks and moorings (SR 9).

DMR did not receive testimony from the riparian landowner, Bartletts Island, LLC, to suggest that their access to Bartlett Island would be restricted if the lease was granted. Instead, Bartletts Island, LLC was primarily concerned with the condition of gear in Great Cove and possible impacts to sea and shorebirds.

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 June 7, 2019, DMR did not observe any commercial or recreational fishing activity within or near the proposed lease site (SR 10). There were less than ten trap buoys observed in Bartlett Narrows and near the tidally exposed ledges to the northeast (SR 10). A commercial scallop dragging vessel, “Hard to Handle,” was moored within Great Cove ~640 feet from the northwest corner of the proposed site (SR 10). As noted in the site report, fishing and other water related activities may occur near the proposed lease site but were not observed by DMR staff (SR 12).

The site report indicated that it is also possible that commercial and recreational fishermen avoid the area due to the extent of moored equipment and unmarked surface lines within Great Cove (SR 12). However, as presented during the hearing, gear and equipment has been consolidated within the Great Cove. The Harbormaster indicated that the proposal, if granted, would not unreasonably interfere with commercial fishing or other uses in the area (Exhibit 5). DMR did not receive testimony to suggest that commercial or recreational fishing would be impacted if the proposal were granted.

Other aquaculture uses. At the time the site report was published, the closest existing aquaculture lease site to the proposal was a Limited Purpose Aquaculture (LPA) license held by Victor Doyle (SR 12). The LPA authorized the raft culture of shellfish and it was ~1,070 feet to the northwest of the proposed experimental lease site (SR 12). However, Ms. Nelson clarified at the public hearing that the LPA has expired and is no longer active. Mr. Doyle does have a pending experimental lease application, which is ~709 feet to the northwest of the Mussel Bound lease proposal. Mr. Doyle did not participate in the Mussel Bound hearing, or otherwise offer feedback on the proposal submitted by Mussel Bound.

Exclusivity. The applicant is not requesting exclusive use of the proposed lease area.

Therefore, based on this evidence and 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. During the June 7, 2019 site assessment, DMR staff observed common loons (*Gavia immer*), gulls (*Larus argentatus*), osprey (*Pandion haliaetus*), double-crested cormorants (*Phalacrocorax auritus*), and eider ducks (*Somateria mollissima*) in the general vicinity (SR 14). Some harbor seals (*Phoca vitulina*) were also observed in the general area, including a mother and pup pair on tidally exposed rocks ~500 feet to the northeast of the proposal (SR 14).

Based on data maintained by the Maine Department of Inland Fisheries and Wildlife (MDIFW), the proposed lease is in an area categorized as Tidal Waterfowl and Wading Bird Habitat (SR 13). The

entirety of the intertidal, and portions of the subtidal, surrounding Bartlett Island are characterized as high value “Reef-Mudflat Complex” (SR 13). Bartlett Island also supports a bald eagle (*Haliaeetus leucocephalus*) nest (SR 13). Bald eagles are considered a species of special concern; they are protected under federal law by The Bald and Golden Eagle Protection Act (SR 13).¹⁷ The proposed lease is located outside the boundaries of the ¼-mile buffer associated with the eagle nest (SR 13).

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

The proposed experimental aquaculture project intersects with Tidal Waterfowl and Wading Bird Habitat. If total exclusion nets will be used to deter and exclude predatory sea ducks from the facility, we recommend a maximum mesh size of 6 inches with 3mm twine or larger for excluding eiders, and a maximum mesh size of 4 inches with twine of 3mm or larger for excluding scoters.¹⁸

DMR also sent notice of the public hearing to MDIFW, but they did not participate in the hearing. The Tidal Waterfowl and Wading Bird Habitat designation is based on area characteristics that MDIFW regards as contributing to quality habitat. The designation applies to breeding, migrating/staging, or wintering areas for coastal waterfowl, or breeding, feeding, loafing, migrating, or roosting areas for coastal wading birds.¹⁹ Habitat types include eelgrass beds, mussel bars/beds, emergent wetlands and mudflats of a certain size.²⁰

The applicant is proposing to deploy predator nets, below the surface of the water, along the outside of each polar circle (App 25). The predator nets could be deployed year-round (App 23-24). As listed in the application, the predator nets would have a 6-inch mesh and would be 25 feet in length (App 25). The applicant has applied to affix one vertical 20-foot pole to a polar circle, which would be used to hold an “eagle kite.” The eagle kite is intended to deter birds from roosting on the polar circle (App 24).

Bartletts Island, LLC testified that, historically, the floats and other equipment in Great Cove have been left in poor condition with unsecured equipment and trash often washing ashore. Bartletts Island, LLC noted that some of the debris was attributable to other commercial fishing activities, including lobstering. However, Bartletts Island, LLC, which is focused, in part, on the conservation of

¹⁷ At the time the site report was published bald eagles were designated by MDIFW as a species of special concern. However, MDIFW has clarified that bald eagles no longer have this designation.

¹⁸ Email from R. Settele to DMR dated April 30, 2019.

¹⁹ Mapping designations for Significant Wildlife Habitat, see http://www.beginningwithhabitat.org/the_maps/map2-high_value_habitat.html

²⁰ <https://www.maine.gov/ifw/fish-wildlife/wildlife/environmental-review/significant.html>

Bartlett Island is concerned about sea and shorebirds ingesting marine debris. According to the studies cited by Bartletts Island, LLC, the ingestion of marine debris can cause injury or death to sea and shorebirds. Bartletts Island, LLC did not present evidence to suggest that any sea or shorebirds within the area were ingesting marine debris, or otherwise suffering injury or death attributable to the existing gear and structure within Great Cove.

Bartletts Island, LLC presented several proposed lease conditions related to gear cleanup and predator deterrents, which Mussel Bound requested be incorporated into the lease should it be granted (see section 2.E of this decision for the list of proposed conditions). For example, one proposed condition prohibits the use of noise or acoustic deterrents to prevent predators from entering the lease area and sets a maximum mesh size for predator nets at 4 inches with twine of 3mm or larger. Another proposed condition requires that all gear and materials associated with Mussel Bound's aquaculture operations be secured to avoid gear loss. The proposed conditions would also require Mussel Bound to remove any gear that washes ashore regardless of whether it is associated with their operations. As described in previous sections of this decision, the applicant has made efforts to clean up Great Cove.

Discussion:

The proposed lease area is designated by MDIFW as Tidal Waterfowl and Wading Bird Habitat. Such a designation does not preclude aquaculture activities and MDIFW is given the opportunity to review each aquaculture lease proposal and provide feedback on how the activities may impact species under their jurisdiction. They are also provided with notice of aquaculture lease hearings. In this case, MDIFW reviewed the proposal and provided recommendations on maximum mesh sizes for nets designed to deter and exclude predatory sea ducks. The maximum mesh size varies depending on the species of duck. A maximum mesh size of 6 inches with 3mm twine or larger for excluding eiders, and a maximum mesh size of 4 inches with twine of 3mm or larger for excluding scoters.

The applicant originally proposed a maximum mesh size of 6 inches. Based on MDIFW's recommendation, if the lease is granted, DMR will condition the lease so that the maximum allowable mesh size is 4 inches with twine of 3mm or larger. A condition requiring the smaller maximum mesh size will exclude any of the predatory sea ducks referenced by MDIFW. The applicant agreed to a similar condition proposed by Bartletts Island, LLC. The applicant is not proposing to use acoustic or noise deterrents, so they are not contemplated as part of this decision and could not be used without prior review and written authorization from DMR.

The intervenor felt that loose gear and debris could be problematic for sea and shorebirds and described a set of proposed conditions intended to address the possibility of errant gear. However, if

the lease is granted, the holder must comply with minimum lease maintenance standards in Chapter 2.75 of DMR's regulations. These standards provide, in part, that the lessee must ensure that all structures authorized by the lease remain within the boundaries of the site, that the lease is maintained to avoid the creation of a public or private nuisance and to avoid substantial injury to marine organisms.

The lessee is also obligated for the routine collection and proper disposal of all errant gear and equipment from the lease site. Failure to comply with those standards will result in enforcement actions and possible lease revocation. Therefore, most of the proposed conditions are either addressed by existing laws and rules under DMR's authority, are specific to gear or other structures not within DMR's jurisdiction, or address activities that the applicant has not proposed and, therefore, would not be authorized if the lease is granted.

DMR does not have jurisdiction over structures or other gear permitted by other authorities. The relevant authority would be responsible for establishing and enforcing any conditions or rules governing the use of floats or other structures. However, the applicant has made efforts to consolidate gear and clean-up Great Cove. Mr. Gordon indicated that within the last year, conditions within Great Cove have markedly improved and it was one of cleanest areas around Bartletts Island.

Eelgrass (*Zostera marina*). Based on data collected in 2008, the closest documented eelgrass bed is ~1,400 feet to the north of the proposed site (SR 15). The proposed aquaculture activities would not directly shade or disturb documented eelgrass (SR 15).

Therefore, in consideration of the condition concerning predator net mesh size, 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, or docking facilities, owned by municipal, state, or federal government within 1,000 feet of the proposed lease site (SR 16).

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 owned by municipal, state, or federal governments.

F. Source of Organisms

The application, which was deemed complete on March 6, 2019, indicates that stock would be sourced from a site in Frenchman Bay (App 2). This is an approved source of stock, but the applicant would need to adhere to all applicable rules and laws governing the collection of wild spat (SR 15). After the application was deemed complete and the site report was published, Mussel Bound was granted an

experimental lease in 2020, which is near Thomas Island in Frenchman Bay (DMR lease site ID: EAST T1x). The applicant indicated that stock would be sourced from that lease site, which would also be an approved source of stock.

Therefore, the applicant has demonstrated that there is an available source of stock 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. Given the condition concerning predator net mesh size, 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 blue mussels (*Mytilus edulis*) to be cultured on 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 proposed lease for 3.58 acres to Mussel Bound, Incorporated for 3 years for the cultivation of blue mussels (*Mytilus edulis*) using suspended culture techniques. The term of the lease to begin within twelve months of the date of this decision on a date chosen by the lessee; however, no aquaculture rights shall accrue in the lease area until the lease is fully executed. 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 2.64(12)(B) 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-A(15). The conditions placed on this lease are as follows:

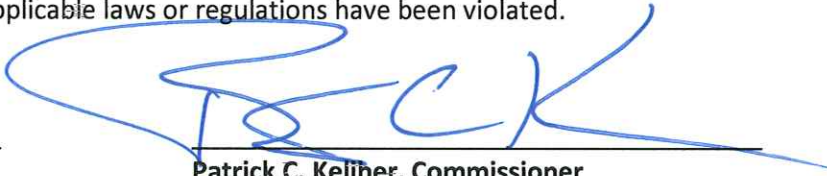
- 1) Predator nets must have a maximum mesh-size of 4 inches with twine of 3mm or larger. If the Maine Department of Inland Fisheries and Wildlife (MDIFW) changes recommendations concerning mesh size, this condition may be modified by DMR to reflect updated recommendations from MDIFW.

7. REVOCAION OF LEASE

The Commissioner may commence revocation procedures upon determining pursuant to 12 M.R.S.A §6072-A(22) that no substantial aquaculture or research 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: _____

9/15/21



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