STATE OF MAINE
DEPARTMENT OF MARINE RESOURCES
Standard Aquaculture Lease Application
Bottom culture of oysters
Royal River, Freeport and Yarmouth

Maine Oyster, Inc.
Lease ROY LAM
Docket #2014-20

April 11, 2016

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION

Maine Oyster, Inc., a Maine corporation, applied to the Department of Marine Resources ("DMR") for a standard aquaculture lease on two tracts totaling 9.5 acres located in the coastal waters of the State of Maine, in the Royal River in the Towns of Freeport and Yarmouth in Cumberland County, for the purpose of cultivating American oysters (*Crassostrea virginica*) and European oysters (*Ostrea edulis*) using bottom culture techniques. DMR accepted the application as complete on October 2, 2014. No one intervened in this case. A public hearing on this application was held on March 31, 2016, in the Town of Yarmouth.

1. THE PROCEEDINGS

Notices of the hearing and copies of the application and DMR site report were provided to numerous state and federal agencies for their review as well as to various educational institutions, aquaculture and environmental organizations, the Town of Freeport and Yarmouth and the Freeport and Yarmouth Harbormasters, members of the Legislature, representatives of the press, riparian landowners, and other private individuals. Notice of the hearing was published in the *Forecaster, Northern Edition* on February 25, 2016 and March 10, 2016 and in the *Commercial Fisheries News* March 2016 edition.

Sworn testimony was given at the hearing by the owners of Maine Oyster, Inc., Eric L. Horne and Valy Steverlynck, who described a history of their operations and proposed operations; and by DMR Aquaculture Scientist Marcy Nelson, who described the site visit. The U.S. Army Corps of Engineers was not represented. The Yarmouth Harbormaster was present but did not testify. The applicants described the proposed project. Ms. Nelson described the site visit and presented a videotape of the bottom.

Each witness was subject to questioning by the Department, the applicant, the intervenors, and members of the public. The hearing was recorded by DMR. The hearing officer was Hannah Dean.

The evidentiary record before the Department regarding this lease application includes 3 exhibits introduced at the hearing (see exhibit list below), and the record of testimony at the hearing itself. The evidence from all of these sources is summarized below.[1]

LIST OF EXHIBITS

1. Case file ("CF").
2. Application signed and dated January 7, 2014 ("A").
3. DMR site report dated November 2, 2015 ("SR").

2. DESCRIPTION OF THE PROJECT

A. Site History

Since 2011, the applicant has operated two experimental aquaculture leases for the bottom culture of American and European oysters in the general locations of proposed Tracts 1 and 2 (leases CAS LAM and CAS LNI, respectively). CAS LAM occupies a portion of a former bottom lease for oysters held by Mr. Horne and Ms Steverlynck, COUS BP, which expired in 2013.

B. Site Characteristics

On September 3, 2015, DMR biologists visited the proposed lease site and assessed it and the surrounding area in light of the criteria for granting an aquaculture lease, as described in the site report. Both proposed lease tracts occupy shallow subtidal locations at the eastern edge of the primary navigational channel of the Royal River. Extensive tidal mudflats lie between the tracts and the uplands to the east, as well as between the river channel and the uplands to the west (SR 2, Figure 2; 3). According to the site report, the topography of the bottom of the tracts is comprised of sand to firm mud; currents run in a north-south direction depending upon tidal stage (SR 2).

Tract 1 lies near the mouth of the Cousins River, west of Lambert Point and east of Brown's Point, on the outer edge of a curve in the Royal River (SR 2, Fig.2; 3). The northern end of the tract "occupies a finger channel leading into the Cousins River" (SR 2). Water depths are greatest in the southwest portion of the tract, decreasing rapidly toward the northeast portion (SR 3).

[1] In references to testimony, "Smith/Jones" means testimony of Smith, questioned by Jones.

Tract 2 lies south of Tract 1, between Parker Point to the west and Lane's Island to the east. Like Tract 1, water depths are greater along the west boundary and shallower to the east and north (SR 3).

The site report notes:

> The proposed lease is in an area currently classified by the Department of Marine Resources Water Quality Classification program as "conditionally approved for the harvest of shellfish". The harvest of product, if the applicants are awarded the proposed lease, will be subject to a closure from November 1 through April 30 of each year, when rainfall meets or exceeds 1" within a 4 hour period, during any malfunction of the Yarmouth Waste Water Treatment Plant, or when flow rates at the Yarmouth Waste Water Treatment Plant exceed 1.31 MGD over four hours (SR 14).

C. Proposed Operations

The applicant proposes to grow American oysters (*Crassostrea virginica*) and European oysters (*Ostrea edulis*) on the proposed lease site, by distributing juvenile seed freely on the bottom and harvesting market size shellfish with a small, skiff-drawn drag. No suspended gear will be used other than 7.5" diameter plastic buoys to mark the corners of the lease tracts. Harvesting and monitoring will take place 1-2 days per week from early spring through fall, and harvested oysters will be rinsed and bagged on site and removed by skiff (A 2). Harvesting will take place annually from May through November, and production is expected to be approximately 5,000 oysters per week, with a maximum stocking density of 3 million oysters (1 million oysters per year class) (A 3).

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 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 be in compliance with visual impact criteria adopted by the Commissioner relating to color, height, shape and mass.

A. Riparian Access

Extensive intertidal mudflats separate the proposed lease tracts from all shorefront properties (SR 7). The site report indicates the nearest upland shorefront property is located more than 300 feet northeast of proposed Tract 1, with the nearest observed dock over 1,000 feet away. Parker Point is the nearest shore to Tract 2 and is located 400 feet away at mean low water (MLW). The primary navigation channel is located between the western boundary of proposed Tract 2 and Parker Point, and extensive mudflats separate the tract from riparian property to the north and east at MLW. No docks or moorings were observed in the general vicinity of Tract 2. The nearest developed riparian property is over 1,200 feet to the northeast, while a small beach is located on the western shore of Lane's Island, over 1,500 feet away (SR 9). Based on these observations, DMR staff concluded that Tracts 1 and 2 will not interfere with riparian ingress or egress (SR 7-9).

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

B. Navigation

A Harbormaster Questionnaire was sent to the Towns of Freeport and Yarmouth in October of 2014, but no responses were received (CF).

The applicant proposes to plant oysters directly on the bottom; no gear will be placed on either tract of the proposed lease site. The applicant has operated bottom leases at these locations since 2011 and has had no conflict with other navigational users in the area on both tracts (SR 10). The site report states, with regard to proposed Tract 2:

> The proposed lease site abuts the eastern edge of the primary navigation channel between Parker Point and Lane's Island. At low water vessels are restricted to the channel proper due to extensive mudflats to the east and Parker Point to the west. Individuals with local knowledge of the area and traveling at higher tidal stages may occasionally transit beyond the boundaries of the channel (SR 10).

With no gear proposed for Tract 2, at most vessel traffic may need to alter course slightly during harvesting activities but otherwise will be unencumbered by applicant's operations on Tract 2 (SR 11).

Aquaculture lease sites are required to be marked for navigation purposes in accordance with U. S. Coast Guard requirements

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

C. Fishing & Other Uses

The site report indicates that no fishing was observed within the boundaries of either Tract 1 or 2 at the time of the site visit on September 3, 2015, though digging for clams and worms is likely to occur in the tidal flats to the north and east (SR 11). Both tracts are subtidal and will not interfere with the harvest of clams and/or worms at MLW. During spring tides, it is likely that the eastern portions of both proposed tracts are exposed for digging (SR 11). Recreational fishing will likely occur throughout the Royal and Cousins Rivers; since no gear will be used on either tract, there is no risk of entanglement with fishing lines (SR 11; A 4-5).

The evidence indicates that while some level of commercial and recreational fishing is likely to occur in the vicinity of the proposed lease site it is unlikely that the presence of the aquaculture lease site will interfere significantly with fishing of any kind.

Other aquaculture leases. Presently, the applicant operates two experimental aquaculture leases for the bottom culture of American and European oysters in the general locations of proposed Tracts 1 and 2 (CAS LAM and CAS LNI, respectively). Because experimental leases expire after a three-year term, the applicant has applied for a standard 10-year lease in the same location. No changes to site dimensions are proposed for Tract 1/CAS LAM, whereas Tract 2/CAS LNI, if granted, would be expanded to the east (SR, Figure 2). Culture methods would remain unchanged. The site report states:

> The nearest other aquaculture activity consists of a limited purpose gear license (LPA) located between proposed Tracts 1 and 2. This LPA is held by the applicant, Ms. Valy Steverlynck (SR, Figure 2). There are no other aquaculture operations within the Cousins or Royal Rivers (SR 11).

Exclusivity. The applicant requested that dragging and shellfish harvesting, except by the leaseholder or its authorized agents, be prohibited on the lease site. The applicant is not requesting that lobstering, crabbing or recreational fishing/boating activity be excluded from either Tract 1 or 2 (A 5). These restrictions are reasonable in order to enable the aquaculture project to be carried out while encouraging the greatest number of compatible uses of the area, as provided in 12 MRS §6072 (7-B). Conditions reflecting these restrictions will be included in the lease.

Therefore, considering the number and density of aquaculture leases in the area, I find that the aquaculture activities proposed for this site will not unreasonably interfere with fishing or other uses of the area.

D. Flora & Fauna

Site observations.

A variety of creatures were observed at both tracts, but none that would pose an issue in terms of protected species or habitat. According to the site report, no eelgrass was observed on either tract during the site visit (SR 12).

Fisheries & wildlife. Copies of the application were provided to the Maine Departments of Environmental Protection and Inland Fisheries and Wildlife for review; no comments were submitted to DMR. The site report notes that there are no Essential Wildlife Habitats in the area of the lease, but the mudflats are listed as "Tidal Waterfowl and Wading Bird Habitat" by the Maine Department of Inland Fisheries & Wildlife (MDIF&W). Several species of wading birds were observed at the time of the site visit. While MDIF&W did not comment on the application to DMR, the application includes an email from that department stating the "proposed expansion is unlikely to adversely affect wildlife in this area..." (SR 13; A 10).

Therefore, I find that 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

According to the site report, there are no public docking facilities or beaches within 1000 feet of the proposed lease (SR 7, 9).

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

F. Source of Organisms

The application indicates that the source of stock for this proposed lease site is Muscongus Bay Aquaculture, in Bremen, Maine (A 1, Horne testimony).

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

G. Light

The applicant does not plan to employ any lighting at the proposed site, and they will not work at the site beyond daylight hours (A 3; SR 14).

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

H. Noise

The application states that operations will use a 115 HP Suzuki outboard motor and an electric 10" lobster pot hauler for harvesting. This equipment would only be used May through November for harvesting activities, and the motor for the hauler is enclosed in the console of the boat, rendering it inaudible except to those within 3-4 feet of the operation (A 3).

Based on review of the site report and on the application statements, it appears that any noise generated by operations on the site is unlikely to have a significant effect at the boundaries of the lease.

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

I. Visual Impact

The site report notes that only marking buoys and a 24' skiff will be used at the proposed lease site, thus, any visual impact from the lease activities will be minimal (SR 14). No other structures will be placed on the site, other than any navigational aids that may be required by the U.S. Coast Guard.

The Department's visual impact rule requires structures and gear on lease sites to blend with the surroundings as much as possible in materials, color, and height. The evidence shows that this will be the case on the proposed lease site.

Therefore, I find that the equipment, buildings, and watercraft to be used at the proposed lease site will comply with the visual impact criteria contained in DMR Regulation 2.37 (1) (A) (10).

4. CONCLUSIONS OF LAW

Based on the above findings, I conclude that:

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

2. The aquaculture activities proposed for this site will not unreasonably interfere with navigation.

3. 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.

4. 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.

5. 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.

6. The applicant has demonstrated that there is an available source of American oysters (*Crassostrea virginica*) and European oysters (*Ostrea edulis*) to be cultured for the lease site.

7. The aquaculture activities proposed for this site will not result in an unreasonable impact from light at the boundaries of the lease site.

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

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

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

5. DECISION

Based on the foregoing, the Commissioner grants the requested lease of 9.5 acres to Maine Oyster, Inc. for ten years for the purpose of cultivating American oysters (*Crassostrea virginica*) and European oysters (*Ostrea edulis*) using bottom culture techniques. The lessee shall pay the State of Maine rent in the amount of $100.00 per acre per year. The lessee shall post a bond or establish an escrow account pursuant to DMR Rule 2.40 (2) (A) in the amount of $500.00, conditioned upon performance of the obligations contained in the aquaculture lease documents and all applicable statutes and regulations.

6. CONDITIONS TO BE IMPOSED ON LEASE

The Commissioner may establish conditions that govern the use of the lease area and impose limitations on aquaculture activities, pursuant to 12 MRSA §6072 (7-B)[2] Conditions are designed to encourage the greatest multiple compatible uses of the lease area, while preserving the exclusive rights of the lessee to the extent necessary to carry out the purposes of the lease.

The following conditions shall be incorporated into the lease:

1. The lease site must be marked in accordance with both U.S. Coast Guard requirements and DMR Rule 2.80.

2. Dragging and shellfish harvesting, except by the leaseholder or its authorized agents, are prohibited on the lease site.

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[2] 12 MRSA §6072 (7-B) states: "The commissioner may establish conditions that govern the use of the leased area and limitations on the aquaculture activities. These conditions must encourage the greatest multiple, compatible uses of the leased area, but must also address the ability of the lease site and surrounding area to support ecologically significant flora and fauna and preserve the exclusive rights of the lessee to the extent necessary to carry out the lease purpose."

3. Other public uses that are not inconsistent with the purposes of the lease are permitted within the lease boundaries.

7. **REVOCATION OF LEASE**

The Commissioner may commence revocation procedures upon determining pursuant to 12 MRSA §6072 (11) and DMR Rule Chapter 2.42 that no substantial aquaculture has been conducted within the preceding year, that the lease activities are substantially injurious to marine organisms, or that any of the conditions of the lease or any applicable laws or regulations have been violated.

Dated: 4/11/16

Patrick C. Keliher
Commissioner,
Department of Marine Resources