

**STATE OF MAINE**  
**DEPARTMENT OF MARINE RESOURCES**  
Experimental Aquaculture Lease Application  
Suspended culture of oysters, Casco Bay, Cumberland

**Peaks Island Shellfish, LLC**  
**Lease CAS BC**  
Docket # 2012-03E  
February 5, 2013

**HEARING OFFICER'S REPORT**  
**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION**

Peaks Island Shellfish, a limited-liability corporation, applied to the Department of Marine Resources ("DMR") for a three-year experimental aquaculture lease on 1.8 acres located in the coastal waters of the State of Maine, in Broad Cove, Casco Bay, in the Town of Cumberland in Cumberland County, for the purpose of cultivating American/Eastern oysters (*Crassostrea virginica*) using suspended culture techniques. DMR accepted the application as complete on March 20, 2012. No public hearing was held on this application.

**1. THE PROCEEDINGS**

Notice of the application, the DMR site report, and the 30-day public comment period were sent to state and federal agencies which were requested to review the project, as well as to riparian landowners, the Town of Cumberland and its Harbormaster, members of the Legislature, representatives of the press, aquaculture and environmental organizations, and others on the Department's mailing list. Notice of the application and comment period was published in the *Forecaster* newspaper on April 5, 2012. One comment requesting a hearing was received by the Department. Since fewer than five written requests for a public hearing were received during the comment period, as provided by 12 M.R.S. §6072-A (6), the Department chose not to hold a hearing.

The evidentiary record before the Department regarding this lease application includes the application and the Department's site report dated July 19, 2012. The evidence from all of these sources is summarized below.<sup>1</sup>

**2. DESCRIPTION OF THE PROJECT**

**Proposed Operations**

According to the application, the proposed lease site will be used for commercial research, consisting of growing American/Eastern oysters in wire mesh cages stacked on the

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<sup>1</sup> The application and site report are cited as "App" and "SR" with page numbers.

bottom (App 4). Cages are 3' x 3' x 6" and will be stacked two or three cages high, with plastic runners on the bottom to hold each stack above the mud. Stacks will be placed eight feet apart in rows running north to south across the site; each stack will be tethered to a long sinking line running the length of the row. Rows of stacked cages will be placed parallel to each other twenty feet apart; the application estimates a maximum twelve rows of twenty-six stacks each can be accommodated on the site. The stacks of cages will be hauled aboard a work boat for tending and harvesting.

The applicant expects to grow approximately 500,000 oysters per year at the proposed lease site. No dragging, raking, or dredging will be conducted on the site. Access to the proposed lease will be by boat (App 2). The corners of the site will be marked with white 8" buoys; the rows of cages will be marked with small toggle buoys (App 3).

### **Site Characteristics**

The proposed lease site is a square, 280 ft. on each side, located in shallow subtidal waters in Broad Cove. Wide areas of intertidal mud flats lie between the site and the surrounding upland shore. The applicant selected this site because it expects the warmer water in summer to promote faster growth of its oysters, and because the shallow depths mean that no commercial lobstering or significant navigation is conducted in the vicinity of the lease site (App 3). The site report notes that "water depths are approximately 1-2 feet at mean low water. Tidal currents run to the north-northeast on a flood tide and to the south-southwest on an ebb tide" (SR 2).

The site report notes that water quality at the site, in Growing Area WI-14F, is classified by the Department as "conditionally approved" for the harvest of shellfish. This classification means that it is approved for shellfish harvesting between November 1 and May 31 each year but closed to shellfish harvest from June 1 to October 31 (SR 4).

The bottom of the site is fine, soft mud. The application notes that the stacks of cages will be visible for about an hour at low water approximately twice each month at extra-low tides (App 4). At high tide, the cages will be submerged in eight to ten feet of water (App 3).

### **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 uses of the area, taking into consideration the number and density of aquaculture leases in an area; with the ability of the lease site and surrounding areas to support existing ecologically significant flora and fauna; or with the public use or enjoyment within 1,000 feet of beaches, parks, or docking facilities owned by municipal, state, or federal governments. The Commissioner must also determine that the applicant has demonstrated that there is an available source of organisms to be cultured for the lease site.

### **A. Riparian Access**

The site report states:

The surrounding uplands are separated from the proposed lease area by extensive mudflats of between 300 and 2,400 feet (Figure 2). This mostly prohibits water access to riparian docks and properties at low water depths. When the mudflats are covered in water sufficient for navigation over them, more than 1,300 feet of navigable water would exist on either side of the proposed lease site. The nearest dock is more than 1,300 [feet] away (SR 3).

No riparian land will be used for access to the proposed lease site (App 4). The lease activities will be conducted solely in the water. Activities at the lease site in subtidal waters will not hamper access to and from the shore.

**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**

The application states that "Because of the shallow nature of Broad Cove there is minimal boat traffic in the area and, when boating does occur, only happens during periods surrounding high tide when our oyster grow out cages will be 8-10 feet underwater" (App 3).

The site report describes navigation in the vicinity of the proposed lease site as follows:

The proposed lease is located at the head of Broad Cove in shallow water. Navigation is generally to and from shorefront properties and short trips in and out of the cove at higher water. Kayaking in the shallow water occurs. Other than the area directly within the proposed lease boundaries the remainder of the cove would be available for navigation (SR3).

Navigation in the area of the proposed lease site is limited by the shallow water, especially at low tide. It appears from this evidence that navigation in the area will not be unduly affected by the presence of the proposed lease site.

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

### **C. Fishing & Other Uses**

The application notes that clam harvesting in Broad Cove occurs near shore on the flats at the edge of the marsh grass, far from the lease site (App 4). According to the site report:

On June 8, 2012 no fishing activities were observed within the proposed lease area. Approximately 20 lobster trap buoys were observed in deeper waters

approximately 100-200 feet south of the proposed lease (see Figure 2). Striped bass fishing likely occurs throughout the bay. Clamming and perhaps worming take place on the mudflats adjacent to, but not within, the proposed lease area (SR3).

**Exclusivity.** The application states “We will not discourage any other uses from access to our lease site” (App 4). Accordingly, the Department will place a condition on the lease providing that navigation and fishing are permitted within the open areas of the lease site.

**Other aquaculture leases.** One limited-purpose aquaculture license site, PER-1-07, is located in Broad Cove approximately 900 ft. northwest of the proposed lease site. Several other aquaculture lease sites in Casco Bay are well over two miles south of the proposed lease site (SR4). Given these distances, it is apparent that activities at the proposed site will not affect the existing sites.

Based on this evidence, it appears that the proposed lease will not unreasonably interfere with fishing or other uses of the area. The lease must be marked in accordance with DMR Rule 2.80<sup>2</sup> Navigation and fishing will be permitted in the open areas of the lease site.

**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**

During the site visit on July 19, 2012 to the proposed lease site, the site report notes:

No underwater video was collected as part of the review of this limited purpose lease application although the shallow water at the time of the site visit allowed for direct observation of the bottom. An oar was used to probe the bottom to determine bottom hardness and composition.

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#### **<sup>2</sup>2.80 Marking Procedures for Aquaculture Leases**

1. When required by the Commissioner in the lease, aquaculture leases shall be marked with a floating device, such as a buoy, which displays the lease identifier assigned by the Department and the words SEA FARM in letters of at least 2 inches in height in colors contrasting to the background color of the device. The marked floating device shall be readily distinguishable from interior buoys and aquaculture gear.
2. The marked floating devices shall be displayed at each corner of the lease area that is occupied or at the outermost corners. In cases where the boundary line exceeds 100 yards, additional devices shall be displayed so as to clearly show the boundary line of the lease. In situations where the topography or distance of the lease boundary interrupts the line of sight from one marker to the next, additional marked floating devices shall be displayed so as to maintain a continuous line of sight.
3. When such marking requirements are unnecessary or impractical in certain lease locations, such as upwellers located within marina slips, the Commissioner may set forth alternative marking requirements in an individual lease.
4. Lease sites must be marked in accordance with the United State's Coast Guard's Aids to Private Navigation standards and requirements.

The bottom of the proposed lease area is soft mud mostly devoid of vegetation. Small, sporadically occurring patches of eel grass, generally less than 1-2 feet in diameter, were observed at the southern boundaries of the proposed lease. Small amounts of hard and soft shell clams and blue mussel shell were observed in the mud (SR4).

As noted above, DMR sent a copy of this lease application to the Maine Department of Inland Fisheries & Wildlife for their review and comment. No comments were received. Normally MDIF&W comments on aquaculture applications when it has concerns about potential effects on wildlife. DMR interprets the absence of any comment as indicating that MDIF&W has no such concerns in this instance.

Based on this evidence, it appears that placing rows of oyster cages on the bottom as proposed for this lease site will not interfere with plant and animal life in the area.

**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 1,000 feet of the proposed lease" (SR4).

**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, or docking facilities owned by municipal, state, or federal governments.

#### **F. Source of Organisms**

According to the application, seed stock for this proposed lease site will be obtained from Mook Sea Farms in Walpole, Maine.

**Therefore, I find** that the applicant has demonstrated that there is an available source of American oysters (*Crassostrea virginica*) to be cultured for the lease site.

#### **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. The lease site must be marked in accordance with U. S. Coast Guard requirements.
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. Navigation and fishing will be permitted in the open areas of the lease site. The lease boundaries must be marked in accordance with the requirements of DMR Rule 2.80.

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*) to be cultured for the lease site.

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

## **5. DECISION**

Based on the foregoing, the Commissioner grants the requested experimental lease of 1.8 acres to Peaks Island Shellfish, LLC, for three years, the term of the lease to begin within twelve months of the date of this decision, on a date chosen by the applicant<sup>3</sup>; however, no aquaculture rights shall accrue in the lease area until the lease is fully executed.

This lease is granted to the applicant for the purpose of cultivating American oysters (*Crassostrea virginica*) using suspended culture techniques. The applicant shall pay the State of Maine rent in the amount of \$100.00 per acre per year. Since this is an experimental lease with more than 400 sq. ft. of structures and no discharge, the lessee shall post a bond or establish an escrow account pursuant to DMR Rule 2.64 (10) (D) in the amount of \$5,000.00, conditioned upon its performance of the obligations contained in the aquaculture lease documents and all applicable statutes and regulations.

## **6. CONDITIONS TO BE IMPOSED ON LEASE**

The Commissioner may establish conditions that govern the use of the lease area and impose limitations on aquaculture activities, pursuant to 12 MRSA §6072-A (15)<sup>4</sup>. Conditions are

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<sup>3</sup> DMR Rule 2.64 (14) provides:

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

<sup>4</sup> 12 MRSA §6072-A (15) provides that:

“The commissioner may establish conditions that govern the use of the leased area and limitations on the aquaculture activities. These conditions must encourage the greatest multiple, compatible uses of the leased area, but must also address the ability of the lease site and surrounding area to support ecologically significant flora and fauna and preserve the exclusive rights of the lessee to the extent necessary to carry out the lease

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.

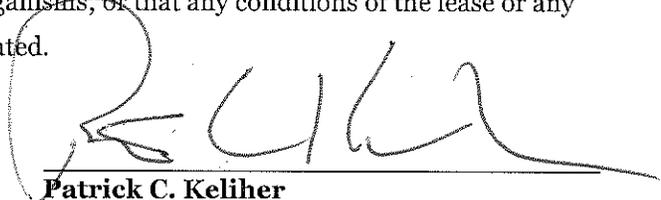
The following conditions shall be incorporated into the lease:

1. The lease site must be marked in accordance with both U.S. Coast Guard requirements and DMR Rule 2.80.
2. Navigation and fishing are permitted in the open areas of the lease site.

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

Dated: \_\_\_\_\_

2/5/2013



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

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