

STATE OF MAINE
DEPARTMENT OF MARINE RESOURCES
Standard Aquaculture Lease Application
Bottom Culture of Oysters and Hard Clams
Johns River, South Bristol

David. P. Cheney, Inc.
Lease JOHN NB2
Docket # 2011-03
February 8, 2012

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION

David P. Cheney, Inc., a Maine corporation, applied to the Department of Marine Resources (“DMR”) for a standard ten-year aquaculture lease on 4.2 acres located in the coastal waters of the State of Maine, in the North Branch of the Johns River in the Town of South Bristol in Lincoln County, for the purpose of cultivating American oysters (*Crassostrea virginica*), hard clams (*Mercenaria mercenaria*), and European oysters (*Ostrea edulis*) using bottom culture techniques. The application was accepted as complete on January 28, 2011. No one intervened in this case. A public hearing on this application was held on September 19 2011, in South Bristol, Maine.

1. THE PROCEEDINGS

Notices of the hearing and copies of the application and DMR site report were sent to numerous state and federal agencies for their review, as well as to a number of educational institutions, aquaculture and environmental organizations, the Town of South Bristol and its Harbormaster, members of the Legislature, representatives of the press, riparian landowners, and other private individuals. Notice of the hearing was published in the *Lincoln County News* on August 18 and September 8, 2011, and in the *Commercial Fisheries News* September, 2011 edition.

Sworn testimony was given at the hearing by the applicant, represented by David P. Cheney, who described his existing and proposed aquaculture operations. Jon Lewis, the Department’s Aquaculture Environmental Coordinator, presented his site report and showed the videotape of the bottom filmed during the site visit on June 28, 2011. No other witnesses testified. Each witness was subject to questioning by the Department, the applicant, and members of the public. The hearing was recorded by DMR. The Hearing Officer was Diantha Robinson.

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

List of Exhibits²

¹ The reference (Smith/Jones) means testimony of Smith, being questioned by Jones.

1. Case file, docket 2011-03
2. Application signed and dated January 10, 2011
3. DMR site report dated July 26, 2011

2. DESCRIPTION OF THE PROJECT

A. Proposed Operations

Mr. Cheney currently operates an experimental lease site in the North Branch covering 1.85 acres. The proposed lease would expand that site to 4.2 acres, which he expects will be sufficient room to conduct his operations over the ten-year duration of the lease. Additional space will permit him to use a lower stocking density of up to 450,000 oysters per acre and to grow multiple year-classes of shellfish. He expects his oysters to take approximately four years to reach market size from seed (Cheney, testimony).

Mr. Cheney testified that his aquaculture operations at the proposed lease site will be identical to those at his present experimental lease site, except that shellfish will be harvested by drag, rake, and tongs, as well as by diving (Cheney, testimony; App 2-3). As he has been doing over the past several years, Mr. Cheney will continue to grow seed oysters in floating mesh bags at his nursery sites in the East Branch of the Johns River and the upper Damariscotta River.³ When the oysters reach approximately one to two inches in size, they will be free-planted on the bottom at the North Branch site by scattering them by hand from Mr. Cheney's 15-ft. skiff. The oysters will grow to market size on the bottom and be harvested either by diving, dragging, or using a rake or tongs. If quahogs are grown on the site, they will be harvested by rake or tongs (Cheney, testimony).

Part of the experiment conducted at the existing site was to determine if harvesting only by diving would be practicable. Experience has proved this not to be so. According to Mr. Cheney, the visibility at the site during the summer months is extremely poor, making it difficult for a diver to select the best oysters for market. Therefore, he proposes to also harvest by drag, rake, and tongs. He expects that approximately 60% of his crop will continue to be harvested by diving, mainly between September and January (Cheney/Lewis). Drag harvesting will be conducted primarily from June to September and whenever winter temperatures are too cold for diving (Cheney, testimony; App 2-3). Mr. Lewis agreed that the visibility in the river can be very poor, particularly in August and September. The site report notes that at the time of the site visit and dive on June 28, 2011, visibility was 4 to 6 feet.

Harvesting by diving or dragging will be done in daylight hours, at maximum for up to eight hours per day, five days a week, year-round. Harvesting by rake or tongs will be done at any time of year in shallow water. Diving will be done between mid-tide and high tide, Mr. Cheney said. It will require a diver, a tender in a skiff, and a "sorter" on board either his skiff or his 37-ft. lobster boat to clean, count,

² Cited, with page references, as CF1, App2, SR3, etc. Other exhibits are cited by exhibit number.

³ Mr. Cheney holds Limited-Purpose Aquaculture (LPA) license sites CHE-2, CHE-3, CHE-4, and CHE-5 in those two locations.

bag, and tag the oysters for market. Dragging will be done with the lobster boat, using either Mr. Cheney's present 25-inch drag or a larger drag up to four feet in width (Cheney, testimony; App 2-3). In response to a question from Mr. Lewis, Mr. Cheney said that he does not want the Department to restrict the days he can drag, because he wants flexibility in conducting his various fishing activities, which include clam harvesting and lobstering, as well as raising oysters (Cheney/Lewis).

Mr. Lewis noted that owing to the presence of the oyster disease "MSX" in the Damariscotta River, movement of American oysters from these rivers is now restricted. DMR has quarantined both the Damariscotta and Johns Rivers because the two water bodies are connected where water flows between them through "the Gut" at South Bristol. While Mr. Cheney can harvest American oysters for market from his lease site in the Johns River and can move American oyster seed to the lease from his license sites in the Damariscotta and the East Branch, he cannot move American oysters or seed into other Maine coastal waters outside of a line running from Ocean Point, Boothbay to Pemaquid Point, Bristol.⁴

In addition, the movement of European oysters is restricted statewide by DMR rule 24. Therefore, Mr. Cheney must obtain a permit from the Department to transport European oysters or oyster seed from one place to another, including seed obtained from a hatchery.

Mr. Lewis noted that while Mr. Cheney has not included a work float or any other gear in his lease application, he could still apply to the South Bristol Harbormaster or the U.S. Army Corps of Engineers for a permit to moor a work float in the Johns River off the lease site (Lewis, testimony).

B. Site Characteristics

Mr. Cheney's proposed site is located in the North Branch of the Johns River, a long, narrow body of water bordered by relatively undeveloped woodland. Mudflats border the site to the east and west, and an exposed ledge (Hawk's Nest Island) lies to the east, as well. The lease site, also long and narrow, is a more-or-less rectangular tract varying from 92 to 135 feet wide by approximately 1,500 ft. long, occupying most of the bottom of the channel that runs north-south in the northern half of the North Branch. Water depths at the site range from one to ten feet at mean low water (SR 2).

As described in the DMR site report,

The northern half of the proposed lease is a mixture of mud and sand and is softer than the southern end of the proposed lease site. A gradual shift to rocky outcrops and a sand/shell-hash mixture occurs from north to south (SR 2).

The proposed lease site is located in the deep water channel. The sides of this channel slope gradually upward to mudflats to the east and west. The proposed lease is approximately 150 feet from the mudflats to the northeast and as close as 50 feet in other areas (SR 4).

⁴ DMR Rules, Chapter 24 <http://www.maine.gov/sos/cec/rules/13/chaps13.htm>

The area is classified by DMR as approved/open to the harvest of shellfish (SR7). According to the site report,

The area of the proposed lease is expected to ice over in some winters. Drift ice from the upper reaches of the river is expected to flow through the lease site. During winter months, buoys may be moved offsite by ice and may have to be reset in the spring (SR 3).

The site report also notes the following information supplied by the South Bristol Harbormaster:

A "Harbormaster Questionnaire" was mailed to Mr. Cecil Burnham, Harbormaster for the town of South Bristol, on January 31, 2011. Mr. Burnham returned the questionnaire with comments that in his opinion the proposed lease would not interfere with navigation, traditional storm anchorages, riparian owner access, or publically owned lands or facilities. He did mention some lobstering, striper fishing, and mackerel fishing in the area. He also mentioned three moorings in the area; the Robinson mooring (unregistered) 1,000 feet away, the Adams mooring (registered), and to the north of the site a small mooring for Samuel Kaymen.

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 if s/he determines 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 and 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; 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

The proposed lease is for bottom planting of shellfish, with no gear to be deployed on the lease site. Thus, there will be no structures on the lease site to hamper the access of riparian landowners to and from their shore (SR 5). It appears from the Harbormaster's report that there are three moorings in the North Branch, although there is no evidence that the lease will interfere with any of them. For a discussion of the extent to which harvest activities might affect riparian and other access by boat, see Navigation, below.

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

Navigation in the North Branch is limited by the shallow water and the narrow channel. As the Harbormaster noted, there are three moorings in the area, and fishing for lobster, striped bass, and mackerel is also conducted there. Mr. Cheney also notes in the application that lobstering is conducted within and around the boundaries of the proposed lease, although fewer than fifty traps in total are set in the entire North Branch (App 6). Clam diggers cross the proposed lease site by boat to reach the flats to the north during the period between mid- and low tides (App 6). Recreational boating includes mooring in the North Branch to swim or fish. A seaweed harvester recently used a 26-ft. skiff there for several months, according to the application (App 6). All of these activities, as well as access from the water to the shore and docks by riparian landowners, involve navigation.

Although no gear will be installed on the site, the site report notes that the harvesting activities to be conducted in the limited area of navigable water in the North Branch could pose two challenges to navigation.

Dive harvesting. The site report states that dive harvesting in shallow water in a constricted space poses a potential safety risk to the diver from approaching vessels and hence a need to alert such vessels to the diver's position. Although state law requires that an "Alpha" (blue and white) dive flag be displayed during SCUBA dive harvesting of marine species⁵ to identify the tending vessel as "restricted in its ability to maneuver"⁶, vessels are only required to keep a "safe distance" from the flag; no precise distance is specified in the law.⁷ The site report recommends that the following precautions should be taken:⁸

A safe distance is difficult to estimate *when an approaching vessel does not know exactly where the diver is located in relation to the flag*. For this reason, any diver harvesting should be accompanied by a dive tender able to communicate a route of safe passage to approaching vessels. A tender should remain close to the diver in the water and should use the tender vessel to create a physical obstruction between the diver and

⁵ 12 MRSA §6956. Diver's down flag required. A person licensed to harvest a marine species by hand must display a diver's down flag when using a self-contained underwater breathing apparatus to harvest that species. For the purposes of this section, "diver's down flag" means the International Code Flag "A" as defined in navigation rules adopted by the United States Coast Guard. A person who violates this section commits a civil violation for which a forfeiture of not less than \$100 and not more than \$500 may be adjudged.

⁶ US Coast Guard Rule 27, Vessel Not Under Command (e) Whenever the size of a vessel engaged in diving operations makes it impracticable to exhibit all lights and shapes prescribed in paragraph (d) of this Rule, the following shall be exhibited:
i. Three all-round lights in a vertical line where they can best be seen. The highest and lowest of these lights shall be red and the middle light shall be white;
ii. a rigid replica of the International Code flag "A" not less than 1 meter in height. Measures shall be taken to ensure its all-round visibility. *Supposed to be rigid but not enforced in my experience if it is visible (note by Jon Lewis)..*
< from: Rule 27: Vessel Not Under Command (<http://www.navcen.uscg.gov/mwv/navrules/Rules/Rule27.htm>) >

⁷ U.S. C. G. Rule 3 (a) A power-driven vessel underway shall keep out of the way of (ii) a vessel restricted in her ability to maneuver. (g) The term "vessel restricted in her ability to maneuver" means a vessel which from the nature of her work is restricted in her ability to maneuver as required by these Rules and is therefore unable to keep out of the way of another vessel.

⁸ Mr. Lewis has conducted two SCUBA dives on the proposed lease site and has experienced the conditions that gave rise to the site report's recommendations

any approaching vessel. An alternative would be for the diver to attach themselves to the flag so they remain within a fixed distance of this signaling device (SR 5) (emphasis added).

It is clear from both the application and Mr. Cheney's testimony at the hearing that he plans to use a dive tender during his harvesting activities. This should ensure that approaching vessels are adequately warned about where they can and cannot navigate safely during dive harvesting in the North Branch and that navigation will not be unreasonably hampered. Therefore, no condition regarding the use of a tender will be placed on the lease.

Drag harvesting. The site report describes the potential of drag harvesting to interfere with navigation in the limited space of the North Branch:

Drag harvesting is also proposed. Typically a small drag 3-4 feet in width is towed behind a boat. This restricts the ability of the harvesting vessel to maneuver and would require other vessels to give right-of way. With a small navigational corridor this could become problematic if the harvesting vessel does not communicate its intent to provide a safe corridor for passage to an approaching (burdened) vessel in a reasonable amount of time (SR 5).

The applicant proposes to use drag harvesting mainly during the warmer months of the year, a time when boat traffic in the North Branch is likely at its peak and when conflicts like those described in the site report are most likely to occur. To minimize such potential interference whenever drag harvesting is being conducted, the following condition will be placed on the lease:

When harvesting by drag, the lessee must maintain a lookout for approaching vessels, promptly communicate to them his intent to provide a safe corridor for their passage, and do so at the soonest practicable time.

Although the proposed lease location is in a small water body with a limited channel, the lack of gear, the presence of a tender during dive activities, prompt communication with and accommodation of approaching vessels during dragging, and the limited nature of boating activities in the area in general, support a finding that the activities on this lease site will not interfere significantly with navigation in the vicinity. The applicant will be required to mark the lease site 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, provided that the lessee maintains a lookout for other vessels during drag harvesting and promptly communicates about and provides a safe corridor for their passage, as described above. The lease site must be marked in accordance with U.S. Coast Guard requirements.

C. Fishing & Other Uses

The application notes that soft-shell clam beds surround the proposed lease site and that “Elver eels and smelts may enter Carl Bailey Marsh stream which is 1600 feet from the Northern boundary of my proposed lease” (App 4). The application also notes that seaweed harvesting takes place in the North Branch (App 6) and that bluefish, pogies, herring, and smelts have been caught in the North Branch in the past.

Recreational and commercial boating and fishing, swimming, and picnicking on the shore are popular activities in the North Branch, according to the application (App 6).

According to the site report, the Harbormaster noted that fishing for lobster, striped bass, and mackerel is conducted in the North Branch (SR 4). The site report notes that “approximately 50 lobster trap buoys were observed in the vicinity of the proposed lease” during the June 28 site visit, the majority of which were in the southern half of the proposed lease where the DMR biologists observed the most lobsters (SR 5). The report also notes that recreational fishing for striped bass and bluefish is likely and that the harvest of soft-shell clams in the intertidal areas east and west of the proposed lease site is common. Razor clams are reported to be found to the west of the site, as well. The site report states “The proposed lease activities will not preclude the continued harvest of intertidal species of shellfish” (SR 5), and with the conditions placed on drag harvesting (see Navigation, above), they will not unreasonably interfere with fishing or other activities conducted by boat.

Exclusivity. Mr. Cheney has requested that dragging and shellfish harvesting be prohibited on the lease site by others than himself or his authorized agents. Navigation and other forms of fishing need not be restricted, Mr. Cheney testified. These restrictions are the minimum necessary to enable the lessee to carry out the purposes of the lease.

Other aquaculture sites. No other aquaculture sites exist in the vicinity of the proposed site. Mr. Cheney has two LPA license sites for floating shellfish bags in the East Branch of the Johns River.

The lease must be marked in accordance with DMR Rule 2.80.⁹

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

⁹ **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.

other uses of the area. Boating and fishing will be permitted on the site, but dragging and shellfish harvesting on the site will be prohibited by anyone other than the leaseholder or its authorized agents. The lease must be marked in accordance with DMR Rule 2.8o.

D. Flora & Fauna

The site visit, during which DMR biologists conducted SCUBA dives and videotaped the bottom of the proposed site, took place on June 28, 2011. Species found to be common on the site included American oysters (which were abundant in the southern half of the proposed site, the location of the existing experimental lease), sand shrimp, and American lobsters. Species observed rarely included finger sponges, blue mussels, and hermit, green, and rock crabs. “No eel grass (*Zostera marina*) or other attached or rooted vegetation was observed” (SR6).

The site report describes the site and its terrestrial wildlife as follows:

Upland characteristics are that of a wooded, relatively undeveloped shoreline. Few houses were visible from the water. An osprey (*Pandion haliaetus*) nest was noted to the northeast of the proposed lease. The North Branch is recognized as a feeding ground for numerous avian species. The applicant is proposing to freely plant oysters in subtidal waters and dive or drag harvest once they have reached a marketable size. The potential to negatively impact the nearby nest or shorebirds will be no greater than the current uses of the river and surrounding shore – clam digging, fishing and recreation.

According to a letter provided to the applicant by Maine Department of Inland Fisheries and Wildlife (MDIF&W) Regional Biologist Keel Kemper and dated December 20, 2010, no Essential or Significant Wildlife Habitats are within the area of the proposed lease. MDIF&W was mailed a copy of the application and a “Request for Review and Comment” on February 1, 2011. At the time of this report the Department had received no feedback.

On March 23, 2007, during MDMR’s hearing on Mr. Cheney’s smaller experimental lease in the same location, Mr. Kemper provided testimony regarding the potential impacts of the proposed activities on wildlife, particularly waterfowl, in the area. At that time Mr. Kemper felt the proposal “will have minimal impact on waterfowl and wading birds” (SR 6-7).

In answer to a question at the hearing, Mr. Lewis said that it is not permissible to dump quantities of oyster shells on the bottom to improve the substrate for oyster settlement. Oyster shells cannot be imported to Maine for this purpose, in part because of the risk of disease. Some shells from the oysters at the lease site will normally fall to the bottom in the course of harvest, he said, but a leaseholder should not do anything “to drastically alter the nature of the bottom” (Lewis/P. Cheney).

Dragging occurs “all over the place” in Maine, Mr. Lewis said, noting that he does not know of any documentation of harm caused by oyster dragging. Some sensitive marine habitats have prohibitions on dragging, such as those for the protection of eel grass, but here no vegetation exists on the bottom of the lease site, so such a prohibition is unnecessary (Lewis/Degeer). Oyster drags are “small and slow”, he said, and will not catch lobsters. In addition, Mr. Lewis testified that oysters do not

eat clam larvae and that clams and oysters will continue to peaceably coexist in the North Branch (Lewis, testimony).

Mr. Lewis agreed with Mr. Cheney's testimony that any turbidity created by dragging for oysters in the Johns River will be similar to the natural turbidity already caused by wind and tide in conjunction with the soft bottom. "Dragging is a new form of turbidity, but clams and lobsters in the Johns are used to it," Mr. Lewis noted (Lewis/Degeer).

This evidence supports the finding that the oyster farming operations will not harm the other forms of life on and around the proposed lease site.

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, "No public facilities are located within 1,000 feet of the proposed lease" (SR 7).

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 or certain conserved lands owned by municipal, state, or federal governments.

F. Source of Organisms

The application indicates that the sources of seed stock for this proposed lease site are Muscongus Bay Aquaculture in Bremen, Maine and Mook Sea Farm, Inc. in Walpole, Maine.

Therefore, I find that the applicants have demonstrated that there is an available source of American/Eastern Oysters (*Crassostrea virginica*), Belon/European Oysters (*Ostrea edulis*), and hard clams (*Mercenaria mercenaria*) to be cultured for the lease site.

G. Light

The application states that no lights will be used at the proposed lease site, other than lights on the lobster boat used for navigation or repairs on board to keep the boat operating. The application notes that "There should be no reason to work on this site after dark" (SR 3).

DMR Rule 2.37 (1) (A) (8) requires applicants to demonstrate that all reasonable measures will be taken to mitigate light impacts from the lease activities. If vessel lighting is needed for emergency operations, the rule provides:

When harvest schedules, feed schedules, or other similar circumstances result in the need to work beyond daylight hours, spotlights or floodlights may be used to ensure safe working conditions and safe vessel operation. Such lighting shall be directed only at the work area to be illuminated and must be the minimum needed for safe operations....No provision in these rules is intended to restrict

vessel lighting levels below what is necessary for safety or as is otherwise required by state or federal law.

The evidence shows that lights will not be used at the site, except possibly for boat repairs necessary to enable the boat to navigate off the site. On those occasions, the applicants must comply with the provisions of the rule cited above. That being the case, any light 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 these sites will not result in an unreasonable impact from light at the boundaries of the lease site.

H. Noise

Sources of noise at the site will be the 50-hp outboard motor on the 15-ft. skiff, the lobster boat motor, and the power washer. Noise is likely to occur sporadically, whenever vessels are on site for seeding or harvesting activities, and to a lesser extent during monitoring.

The site report notes that:

Both vessels are typical of commercial and recreational activities along the coast of Maine. Mr. Cheney has indicated a desire to pressure wash oysters during harvest operations. The pressure washer is built into the lobster boat and operates off the muffled engine of that vessel (SR 7).

The application states:

The lobster boat has wet exhaust and an additional custom muffler. Sound down insulation is installed around the engine compartment. An additional front engine box seals the entire engine to reduce noise. Soft engine mounts reduce vibration. The wash down hose makes no noise. This state of the art boat is in the top 10% for quietness (App 3).

Mr. Cheney testified that he would do his work on the site and depart as quickly as possible and that he would not play music while working on the site.

DMR Rule 2.37 (1) (A) (9) requires applicants to “demonstrate that all reasonable measures will be taken to mitigate noise impacts from the lease activities.” It provides that “All motorized equipment used during routine operation at an aquaculture facility must be designed or mitigated to reduce the sound level produced to the maximum extent practical.”

It appears from the evidence that the applicant has worked to reduce the sound level from the equipment to the maximum practical extent. No evidence was presented either to dispute this fact or to show that further noise reduction measures were necessary or practical. Any remaining noise generated by operations on the site is consistent with that from other boats and activities in the area and 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

As the application, site report, and testimony make clear, this application is for bottom culture only. No structures will be placed in the water, and no gear will be deployed, other than buoys required by DMR to mark the boundaries of the site and any navigational markers required by the U.S. Coast Guard. As the site report notes, "These buoys would be very similar to lobster buoys that are frequently seen in the surrounding area"(SR 7), and thus they will have blend with the surroundings as viewed from the water and create no visual impact within the meaning of DMR Rule 2.37 (1) (A) (10).

Therefore, I find that the proposed lease will comply with the visual impact criteria contained in DMR Regulation 3.37 (1) (A) (10).

4. CONCLUSIONS OF LAW

Based on the above findings, I conclude that:

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

2 Navigation. The aquaculture activities proposed for this site will not unreasonably interfere with navigation, provided that the lessee maintains a lookout for other vessels during drag harvesting and promptly communicates about and provides a safe corridor for their passage, as described above. The site must be marked in accordance with U.S. Coast Guard requirements.

3. Fishing and Other Uses. 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. The lease boundaries must be marked in accordance with the requirements of DMR Rule 2.80. Boating and fishing are permitted on the site, but dragging and shellfish harvesting are prohibited by anyone other than the leaseholder or its authorized agents.

4. Flora and Fauna. 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. Public Use & Enjoyment. 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. Source of Stock. The applicant has demonstrated that there is an available source of American oysters (*Crassostrea virginica*), hard clams (*Mercenaria mercenaria*), and European oysters (*Ostrea edulis*) to be cultured for the lease site.

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

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

9. Visual Impact. 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 a standard aquaculture lease set forth in 12 M.R.S.A. §6072 and DMR Rule Chapter 2.

5. DECISION

Based on the foregoing, the Commissioner grants the requested lease of 4.2 acres to David P. Cheney, Inc., for ten years for the purpose of cultivating American oysters (*Crassostrea virginica*), hard clams (*Mercenaria mercenaria*), and European oysters (*Ostrea edulis*), using bottom culture techniques. The applicant shall pay the State of Maine rent in the amount of \$100.00 per acre per year. The applicant 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 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 (7-B).¹⁰ 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.

¹⁰ 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."

2. When harvesting by drag, the lessee must maintain a lookout for approaching vessels, promptly communicate to them his intent to provide a safe corridor for their passage, and do so at the soonest practicable time.

3. Boating and fishing are permitted on the site, but dragging and shellfish harvesting are prohibited by anyone other than the leaseholder or its authorized agents.

7. REVOCATION OF LEASE

The Commissioner may commence revocation procedures upon determining that substantial aquaculture has not been conducted within the preceding year or that the lease activities are substantially injurious to marine organisms. If any of the conditions or requirements imposed in this decision, in the lease, or in the law is not being observed, the Commissioner may revoke the aquaculture lease.

Dated: Feb 8, 2012


Patrick C. Keliher
Commissioner
Department of Marine Resources