

STATE OF MAINE
DEPARTMENT OF MARINE RESOURCES
Experimental Aquaculture Lease Application
Damariscotta River, south of Hog I., Damariscotta
September 16, 2008

Norumbega Oyster, Inc.
Docket # 2008-04E
DAM - HI 4

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION

On January 28, 2008, the Department of Marine Resources (“DMR”) received an application from Norumbega Oyster, Inc. for a three-year experimental aquaculture lease on a 1.89-acre site located in the coastal waters of the State of Maine, southeast of Hog Island in the Damariscotta River in the Town of Damariscotta in Lincoln County, for the purpose of cultivating American oysters (*Crassostrea virginica*) and European oysters (*Ostrea edulis*) using bottom culture techniques. The application was accepted as complete on February 8, 2008. Justin Bailey intervened in this case. Because five or more requests for a hearing on this experimental lease were received, a public hearing on this application was held on August 21, 2008 in Damariscotta.

1. THE PROCEEDINGS

The evidentiary record before the Department includes three exhibits introduced at the hearing (see exhibit list below) and the record of testimony at the hearing itself. Sworn testimony was given at the hearing by: the applicant, represented by Eric Peters, and Paul Bryant, Harbormaster of Newcastle and Damariscotta.

Notices 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 Damariscotta and the Damariscotta Harbormaster, members of the Legislature, representatives of the press, various private individuals, and all riparian landowners within 1,000 feet of the site.

At the hearing, no members of the public attended. Neither the intervenor nor the individuals who had requested the hearing attended. The hearing was recorded by DMR. The Hearings Officer was Diantha Robinson. The evidence is summarized below.¹

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

LIST OF EXHIBITS

1. Case File, #2008-04E
2. Application, signed and dated January 25, 2008
3. DMR Site Report, dated July 3, 2008

2. DESCRIPTION OF THE PROJECT

Proposed Operations

The purpose of Norumbega's experiment is to determine "if final bottom culture and market harvest is commercially viable" on this site (Application, p. 2). The applicant proposes to plant between 200,000 and 300,000 oysters per year on the bottom of the site. Planting will begin as soon as the lease takes effect in 2008, with harvesting beginning in 2009 and continuing for the life of the lease. Harvesting will be done by drag and by hand with SCUBA diving (Ibid).

Other details of the proposed operation are described in the sections below.

Site Characteristics

The proposed lease site is a rectangular tract of 1.89 acres located in the upper Damariscotta River, southeast of Hog Island, more than 800 feet from the river's eastern shore. The surrounding upland is composed of fields and woods interspersed with residential development. The shoreline is "muddy tidal flats with a rocky outcropping to the northeast and Sugarloaf Ledges to the southeast" (Application, p. 3). The sea bottom at the site is "generally flat with a gradual slope to the south" (Site Report, p. 3). The bottom is a "tidally scoured area which consists of shell hash and patches of mud" (Application, p. 2).

The site is subtidal; its northeast and southeast corners, respectively, lie 159 and 201 feet seaward of the mean low water mark (Site Report, p. 2), and inspection of the site at a -1.3 ft. tide revealed the site to be under water, even at such an extra-low tide (Case File, e-mail from Marcy Nelson dated July 7, 2008). Water depths in the vicinity are relatively shallow, with minimum mean low water depths of between 2.1 to 3.7 feet on the site. Intertidal mud flats lie to the north, east, and southeast of the site (Site Report, p. 4).

According to the application, no eelgrass or submerged aquatic vegetation occurs on the site. Sand shrimp, rock crabs, green crabs, and hermit crabs are found on the site, as well as occasional horseshoe crabs (Application, p.3).

The southwest corner of the site lies .194 miles southeast of the main navigational channel (Site Report, p. 2). The waters at the site are classified by DMR as open/approved to the harvest of shellfish (Site Report, p. 5).

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 an experimental 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 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

According to the site report, shallow water and “expansive tidal mud flats and ledges” lie along the eastern shore of the Damariscotta River between the lease site and the shore. There are no docks in the vicinity of the site, and the nearest mooring is approximately 600 ft. to the north (Site Report, p. 4). According to Harbormaster Paul Bryant, the mooring has not been used since it was set in 2006, likely because the water is shallow (Paul Bryant, testimony). Mr. Bryant submitted the Harbormaster’s Questionnaire on Feb. 29, 2008 and indicated that the proposed lease will not interfere with navigation, storm anchorages, or moorings, particularly since it is a bottom lease with no gear and only marker buoys (Case file, Harbormaster Questionnaire).

It is clear from this evidence that the bottom lease site will not hamper riparian landowners’ access to or 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 Harbormaster noted in his Questionnaire that the lease site will not interfere with navigation, being a bottom lease with no gear in the water (Case file, Harbormaster Questionnaire). The Site Report notes that the site is located nearly two-tenths of a mile east of the navigational channel and that because of the shallow water around the site, only “those vessels intending to access the nearby shoreline are expected to transit through the area of the proposed lease” (Site Report, pp. 2, 4). Thus, the site is well away from the channel in shallow water with limited boat traffic. Because the lease is for bottom culture, it will not contain any gear that would hamper even these vessels.

The lease is required to be marked in accordance with the requirements of the U. S. Coast Guard’s Private Aids to Navigation (PATON) program.

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

C. Fishing & Other Uses

Fishing. According to the Site Report, “recreational and charter angling for striped bass does occur in the area” (Site Report, p. 4). Because of the shallow water, lobster and crab fishing is rare. The mudflats to the north, east, and southeast are used to harvest clams and worms. Commercially important species do not occur on the site in significant numbers, and because of that and the shallow water, dragging and diving for shellfish and sea urchins are not expected to occur within the lease area. The Harbormaster also noted that fishing is rare in the vicinity of the lease site (Site Report, pp. 4, 6; Case File, Harbormaster Questionnaire). Thus, it appears that the activities on the lease site will not interfere with fishing in the area.

Exclusivity. Because this will be a bottom lease for oysters, the applicant requested exclusive rights to harvest shellfish on the site. No dragging or dive harvesting by persons other than the applicant or his authorized assistants will be permitted.

Other aquaculture leases. Of the 22 aquaculture lease sites in the Damariscotta River, twelve lie within one mile of the proposed lease and are all used for cultivating oysters (Site Report, p. 5). The Site Report concludes that the proposed activities on this lease site “will not interfere with access to existing aquaculture sites within the river” (Site Report, p. 5).

Marking. The lease must be marked in accordance with DMR Rule 2.80²

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.

²**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.

D. Flora & Fauna

There are no Essential Habitats for threatened and endangered species within one-quarter mile of the proposed lease site. While seals may occasionally haul out on the Sugarloaf Ledges to the south of the site, the Harbormaster noted that they are distant enough from the lease that activity there is unlikely to disturb them. No evidence was presented to show that the lease would interfere with any flora and fauna on or near the lease site nor with the surrounding environment.

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 report of the Harbormaster, there are no government-owned beaches, parks, or docking facilities located within 1,000 ft. of the proposed lease site (Case File, Harbormaster's Questionnaire).

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

The applicant listed three hatcheries as sources of stock for this project: Marshall Point Sea Farms in Port Clyde, Maine; Muscongus Bay Aquaculture in Bremen, Maine; and Sandy Cove Hatcheries in Harrington, Maine. In response to a question from the Hearings Officer, he testified that he has obtained European oyster stock from Marshall Point Sea Farms (Peters/Robinson). Clearly, Norumbega has access to sources of stock for both American and European oysters.

Therefore, I find that 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.

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 shall 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. Fishing, including lobstering, will be allowed on the lease site, but dragging and dive harvesting will be prohibited by anyone other than the applicant or his assistants. 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*) and European oysters (*Ostrea edulis*) 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 1.89 acres to Norumbega Oyster, Inc., 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 applicant³; however, no aquaculture rights shall accrue in the lease area until the lease is fully executed. This limited-purpose (experimental) lease is granted to the applicant for the purpose of cultivating American oysters (*Crassostrea virginica*) 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. As this is an experimental lease with no structures and no discharge, no bond or escrow account is required.

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)⁴. Conditions are

³ 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.”

⁴ 12 MRSA §6072-A (15) provides that:

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. Fishing, including lobstering, will be allowed on the lease site, but dragging and dive harvesting will be prohibited by anyone other than the applicant or his assistants.

7. REVOCATION OF LEASE

The Commissioner may commence revocation procedures if s/he determines 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: 9/16/08

/s/ George Lapointe
George D. Lapointe (Commissioner)
Department of Marine Resources

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