

Department of Marine Resources

NOTICE OF AGENCY RULE-MAKING PROPOSAL

RULE TITLE: Chapter 2 Aquaculture Lease and LPA License Regulations, Updates

CONCISE SUMMARY:

The proposed amendments to Chapter 2 would update the form of application fee payments now acceptable (no application fee changes are proposed); reduce the rent for the first two years for certain leases; remove outdated language regarding discharge type leases; implement greater flexibility in the format of the LPA license applications and decision documents; require a municipal signature when an LPA is located in the intertidal area of a municipality with a shellfish program; eliminate the prohibition on LPA's between extreme low and mean low water marks in municipalities with shellfish committees; add scallops to the approved species list for LPA's and gear descriptions for scallop culture; add a new section on aquaculture lease site workers operating under the authority of a shellfish license holder; update notice provisions, and correct references throughout the chapter that have been repealed or revised. A copy of the current Chapter 2 is available online at: <http://www.maine.gov/sos/cec/rules/13/chaps13.htm>. A copy of the proposed rule is available online at the web site listed below or from the contact persons listed.

STATUTORY AUTHORITY: 12 M.R.S.A. §§6072, 6072-A, 6072-C and §6601, sub§2-A

PUBLIC HEARING: Monday, March 16, 2009, 6:00pm, DMR Large Conference Room, 194 McKown Point Road, West Boothbay Harbor.

DEADLINE FOR COMMENTS: March 26, 2009

To ensure consideration, comments must include your name and the organization you represent, if any. Please be aware that any risk of non-delivery associated with submissions by fax or e-mail is on the sender.

AGENCY CONTACT PERSON: Diantha Robinson (207-633-9531) or Laurice Churchill (633-9584)

Mail Written Comments to:

Department of Marine Resources, attn L. Churchill

ADDRESS:

PO Box 8, West Boothbay Harbor, Maine 04575-0008

WEB SITE:

<http://www.maine.gov/dmr/rulemaking/>

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TEL.: (207) 633-9584 **FAX:** (207) 633-9579 **TTY:** (207) 633-9500 (Deaf/Hard of Hearing) **Hearing facilities:** If you require accommodations due to disability, please contact Amanda Beckwith, at (207) 287-7578.

If you are unable to attend the hearing persons are encouraged to submit written comments from the receipt or posting of this notice through close of business on the deadline listed.

Additional information:

The proposed regulations would impact those persons who hold or apply for an aquaculture lease and individuals who apply for an LPA license from the Department of Marine Resources. The proposed changes per Chapter section are summarized below.

Ch. 2.10 (2) Application Requirements for Standard Leases, Fee

The Department (DMR) would like to be able to accept more forms of payment, especially personal checks. This would be a convenience for applicants. The fee changes are now out of date, and only the final fees need to be listed. This is not a fee change.

Ch. 2.15 Notice of Lease Application and Hearing

These changes allow the Department to save printing and mailing costs and reduce duplicate mailing by permitting copies of the application and site report to be made available to the public electronically, instead of mailing paper copies. The Department will continue to provide paper copies upon request. A requirement to make the site report available to the public in advance of the public hearing is added to the rule.

Ch. 2.37 (1) (B) Conditions

DEP now issues waste discharge licenses for farms that use feed or create other forms of discharge, whereas prior to 2003, this was primarily regulated by DMR. This language is no longer needed, as DEP is producing a guidance document describing which types of operations do and do not need to be licensed by DEP. DMR would provide that document to applicants and consult with DEP on questionable cases. Most applications will be clear as to whether they are a discharge or not, and so receiving a certification each time is time-consuming and wasteful. (This proposed amendment is the same for both standard and experimental leases. See Ch. 2.64(7)(B) below.)

Ch. 2.40 (6) Other Licenses

This amendment would correct references to chapters that have been revised or repealed.

Ch. 2.43 Lease Rental-Fee

The amendments would reduce the rent for the first two years of the lease term for certain leases in order to encourage wild mussel draggers to transition to aquaculture where possible, in accordance with 12 MRSA §6072(9). The term 'rental fee' would be simplified to 'rent' for clarity.

Ch. 2.64(4) & (5) Experimental Aquaculture Lease, Notice provisions

These changes allow the Department to save printing and mailing costs and reduce duplicate mailing by permitting copies of the application to be made available to the public electronically, instead of mailing paper copies. The Department would continue to provide paper copies upon request. A requirement to make the site report available to the public in advance of a public hearing is added to the rule. Two typographical errors in the rule are corrected, as well.

Ch. 2.64(7)(B) Conditions

The DEP now issues waste discharge licenses for farms that use feed or create other forms of discharge, whereas prior to 2003, this was primarily regulated by DMR. This language is no longer needed, as DEP is producing a guidance document describing which types of operations do and do not need to be licensed by DEP. DMR would provide that document to applicants and consult with DEP on questionable cases. Most applications will be clear as to whether they are a discharge or not, and so receiving a certification each time is time-consuming and wasteful. (This proposed amendment is the same for both standard and experimental leases. See Ch. 2.37(1)(B) above.)

Ch. 2.90(1)(D) Limited-purpose aquaculture (LPA) license, LPA License

The references in paragraph 2 would be updated.

Ch. 2.90(1)(E) Limited-purpose aquaculture (LPA) license, LPA License

This rule change would give the Department the flexibility in the format of the LPA license applications and decision documents. It would not change the criteria by which an LPA is evaluated.

Ch. 2.90(2)(D)(3) Limited-purpose aquaculture (LPA) license, Application requirements, Required Signatures (new paragraph 3, the existing paragraph would be renumbered as 4)

This amendment would require that if an LPA is to be located in between extreme low water mark and mean low water mark in a municipality with a shellfish management program, there is a review step to ensure the LPA activity would not interfere with the municipal shellfish committee's activities. (Also see Ch. 2.90(3)(B) below.)

Ch. 2.90(2)(F)(2) Gear description

(b) Shellfish rafts, associated predator nets and spat collectors

The prohibition listed in the last sentence would be removed.

(e) Lantern nets and pearl nets

Pearl nets would be added.

(h) Scallop spat collector bags

New definitions would be added for scallop spat collecting.

(i) Scallop ear hangers

(Also see Ch. 2.90(4) below.)

Ch. 2.90(3)(B) Site Limitations, Territorial waters

Eliminates the prohibition on LPA licenses between extreme low and mean low in municipalities with shellfish committees. 12 MRSA §6072-C (2) still requires that LPA licenses be located below mean low water. (Also see Ch. 2.90(2)(D)(3) above.)

Ch. 2.90(3)(C)(3) Site Limitations, Exemption for shellfish less than 25mm in size

Correction to citation.

Ch. 2.90(4) Authorized Shellfish Species

Adds scallops to the approved species for culture on an LPA license site. There has been growing interest in the culture of scallops, and LPA's would be a convenient way for scallop fishermen or others to try scallop culture in various places to find suitable sites before applying for a full lease.

Ch. 2.92 Aquaculture lease site workers operating under the authority of a shellfish license holder. (New)

This is to follow up on a law passed by the legislature in 2008 (12 MRSA §6601, sub§2-A), which explicitly permitted unlicensed crew members to work on an aquaculture site under the authority of a licensed shellfish harvester. Pursuant to 12 MRSA §6406 however, a crew member whose shellfish harvester license has been suspended will be ineligible to work on a shellfish aquaculture site under this provision.

Ch. 2.95(A)(4) Water Quality Classifications and Shellfish Aquaculture

To correct references to chapters and documents, which have been revised or repealed.

Proposed rulemaking – see underlined or ~~deleted~~ text below:

2.10 Application Requirements for Standard Leases

2. Fee. An application shall not be considered complete unless a non-refundable application fee has been paid in ~~cash or by certified check~~. The amount of the fee is determined by the nature of the aquaculture activity proposed. The application fees for no discharge leases and discharge leases are as follows:

APPLICATION FEES:	No Discharge leases	Discharge leases
Effective January 1, 2005:	\$500	\$1,000
Effective January 1, 2006:	\$1,000	\$1,500
Effective January 1, 2007:	\$1,500	\$2,000

2.15 Notice of Lease Application and Hearing

1. Notice of Completed Application

At the time that an application is determined to be complete in accordance with Chapter 2.10(4), the Department shall ~~forward~~make a copy of the completed application available to the known riparian owners within 1,000 feet of the proposed lease and to the officials of the municipality or municipalities, including the harbormaster if applicable, in which the proposed lease would be located, or the proposed lease abuts, as listed on the application.

2. Personal Notice of Public Hearing

At least 30 days prior to the date of the public hearing, the Department shall mail a copy of the notice of hearing and make copies of the lease application and the Department site report available, ~~lease application and chart describing the lease area~~ to the following persons:

- Riparian owners as listed in the application;
- The municipality or municipalities in which the lease area is located, or the proposed lease abuts;
- The applicant; and
- Any public agency the Department determines should be notified, including but not limited to, State Planning Office, Department of Environmental Protection, Department of Conservation, Department of Inland Fisheries and Wildlife, Regional Planning Office, United States Coast Guard, and United States Army Corps of Engineers.

2.37(1) Decision

B. Conditions

(Note: second paragraph only)

The Commissioner may grant the lease on a conditional basis until the lessee has acquired all the necessary federal, state and local permits. ~~A lease may not be finally approved unless the Commissioner has received certification from the Department of Environmental Protection (DEP) that the project will not violate the standards ascribed to the receiving waters classification, 38 M.R.S.A. §465-B and DEP has issued any required National Pollution Discharge Elimination System Permit governing the discharge of pollutants pursuant to section 402 of the Clean Water Act and 38 MRSA §413.~~ The Commissioner may require environmental monitoring of a lease site (see Chapter 2.40(7)) and may establish any reasonable requirements to mitigate interference, including but not limited to restrictions on:

- specific stocking limits, feeding requirements, husbandry techniques and harvesting methods;
- the size and shape of gear, nets, or enclosures;
- the deployment and placement of gear; and
- the timing of various project operations.

2.40 Lease Issuance

6. Other Licenses

The lease holder is responsible for obtaining any requisite licenses and special licenses from the Department prior to beginning operations.

Persons who are issued an aquaculture lease pursuant to 12 M.R.S.A. §6072 for shellfish must also comply with DMR regulations Chapters 2.95, 9 and 7 or 45-2415, 21 and 23 in accordance with the National Shellfish Sanitation Program Model Ordinance for the sanitary control of shellfish.

2.43 Lease Rental Fee

Rental shall be payable hereunder as follows:

Fifty dollars (\$50) per acre per year for the first two years of the term of new leases for the bottom culture of blue mussels. This discount only applies to leases which are the result of new lease applications declared complete.

by DMR during the calendar years 2009, 2010, and 2011. Beginning with the third year of the term of the lease, the standard lease rent of one hundred dollars (\$100) per acre per year will apply.

One hundred dollars (\$100) per acre, per year for all other leases.

All rent is payable on or before October 1 of each year throughout the term of the lease.

2.64 Experimental Aquaculture Lease

4. Notice of Application and Comment Period.

A. Notice of Completed Application

At the time that an application is determined complete in accordance with 2.64(2)(E), the Department shall ~~forward~~ make a copy of the completed application available to the known riparian owners within 1,000 feet of the proposed lease and to officials of the municipality or municipalities in which the proposed lease would be located, or the proposed lease abuts, as listed on the application.

C. Comment Period

Any person may provide the Commissioner with written comments on the experimental lease application. At least 30 days prior to the deadline for comments, the riparian landowners listed in the application and the municipality or municipalities in which the proposed lease would be located, or the proposed lease abuts, shall receive a summary of the application, a statement ~~on~~ of the manner and time within which comments ~~may be~~ may be submitted to the Department and the process for requesting a public hearing. At least 30 days prior to the deadline for comments, the Department shall publish a summary of the application in a newspaper of general circulation in the area proposed for an experimental lease.

5. Public Hearing. The Department may hold a public hearing on the proposed experimental lease. If 5 or more persons request a public hearing in writing within the established comment period, the Department must hold a public hearing.

A. Notice of Public Hearing. *[Note: no change to this paragraph proposed.]*

(2) a short, plain statement of the nature and purpose of the proceeding, ~~and~~ the nature of the experimental lease application, and directions on how to obtain copies of the lease application and site report from the Department;

7. Decision.

B. Conditions. 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. ~~A lease may not be approved unless the Commissioner has received certification from the Department of Environmental Protection that the project will not violate the standards ascribed to the receiving waters classification in Title 38, §465-B. The~~ Commissioner may require environmental monitoring of a lease site (see Chapter 2.37) and may establish any reasonable requirement to mitigate interference, including but not limited to those restrictions outlined in Chapter 2.37(1)(B).

2.90 Limited-purpose aquaculture (LPA) license

1. LPA License

D. *(Note: second paragraph only)*

Persons who are issued a limited-purpose aquaculture (LPA) license pursuant to 12 M.R.S.A. §6072-C must comply with DMR regulations Chapters 2.95, 9 and / or 15-20 established in accordance with the National Shellfish Sanitation Program Model Ordinance for the sanitary control of shellfish and Chapters 21, 23 and 24-24.

E. The Department may issue an LPA license when it determines that the requirements of 12 M.R.S.A. §6072-C and these rules have been met. In making this determination, the Department shall consider the information contained in the application, as well as other information relevant to the license criteria. ~~The Department shall issue a written decision, which shall include findings of fact and conclusions of law, granting or denying the LPA license application.~~

2.90 Limited-purpose aquaculture (LPA) license

2. Application requirements

D. Required Signatures

(3) If the proposed location is above the extreme low water mark in a municipality with a municipal shellfish management committee established pursuant to 12 MRSA §6671, the signature of the chairperson of the municipal shellfish management committee, which shall verify that the proposed LPA will not unreasonably interfere with the activities of the municipal shellfish management program.

~~(3)~~(4) (Note: No other proposed changes to this paragraph than renumbering.)

2.90 Limited-purpose aquaculture (LPA) license

2. Application requirements

F. Site Plans

(2) Gear description

(b) Shellfish rafts, associated predator nets and spat collectors

A shellfish raft is similar to a floating dock utilized as a working platform from which seed shellfish are suspended or contained by some form of device in which the shellfish are reared to a market size product. The raft may also be used as a work site to seed, sort, clean or harvest product and perform maintenance on the culture devices. A typical blue mussel raft is a floating square frame with beams spaced every foot spanning the raft width from which numerous ropes or dropper lines are suspended but do not touch the seafloor, to inhibit predators climbing up the ropes to eat the mussels. Seed mussels are attached to dropper lines mechanically or by hand with a biodegradable cotton mesh and prevented from slipping off the lines by the placement of 6-inch pegs every foot or so. The vertical profile of an unseeded raft ranges from 2.5 feet above the water surface to roughly a 1-foot elevation when seed mussels are attached. A shellfish raft can be a solid platform from which shellfish tray racks and or mesh bags containing shellfish are suspended beneath the raft in the water. The suspended devices would be accessed through openings similar to a trap door in the surface of the float. Predator nets are commonly suspended with weights for adequate tension and have large diagonal mesh openings of at least four (4) inches. Dropper lines may be used to collect mussel spat from the water column when they attach to the lines. ~~For purposes of this regulation the use of specialized spat collection devices or gillnet material placed in onion bags are not included.~~

(e) Lantern nets and pearl nets

A lantern net typically is a five or ten tier set of circular nets of approximately 18-inch diameter and 6-inch depth suspended from a central line. Mesh sizes typically vary from 1/8-inch mesh to 1.5-inch mesh size. A pearl net is a single, pyramidal mesh enclosure that is used to hold shellfish. Pearl nets are typically tied together in a string extending vertically in the water column.

(h) Scallop spat collector bags

Scallop spat collector bags are mesh bags containing additional mesh material to increase the volume of the bags. They are placed in the water column to catch larval scallops and allow settlement and initial growth inside the bags. Multiple collector bags are often attached to a single vertical line.

(i) Scallop ear hangers

Scallop ear hangers are devices that attach individual scallop shells to suspended line.

2.90 Limited-purpose aquaculture (LPA) license

3. Site Limitations

B. Territorial waters

LPA license sites must be located within Maine's territorial waters as defined in 12 M.R.S.A. §6001(48-B) and below the mean low water mark pursuant to 12 M.R.S.A. §6072-C(2) and below the extreme low water mark in towns that have a DMR approved Municipal Shellfish Program (MSP) that stipulates its jurisdiction extends to extreme low water.

2.90 Limited-purpose aquaculture (LPA) license

3. Site Limitations

C. DMR Water Quality Program Closure Areas

(3) Exemption for shellfish less than 25mm in size.

An LPA license site that rears or contains only shellfish 25mm or less in size may be located within prohibited areas pursuant to DMR regulations Chapter 2.95(1)(A)(4). All movement of cultured shellfish from a license site under this exemption must be conducted pursuant to DMR regulations in Chapter 2.95 and 21, which govern the relaying or movement of shellfish from these areas to areas suitable for harvesting.

2.90 Limited-purpose aquaculture (LPA) license

4. Authorized Shellfish Species

An LPA license may be issued only for the cultivation of the following shellfish species: Blue Mussel (*Mytilus edulis*), Hard Clam / quahog (*Mercenaria mercenaria*), Hen Clam (*Spisula solidissima*), American or Eastern oyster (*Crassostrea virginica*), European Oysters (*Ostrea edulis*), Sea scallop (*Placopecten magellanicus*) and the Soft shelled clam (*Mya arenaria*).

2.92 Aquaculture lease site workers operating under the authority of a shellfish license holder.

1. Individuals not licensed pursuant to the following statutes may nonetheless work on aquaculture lease sites and transport or sell the cultured product produced on those sites, provided they are authorized to do so by a license holder who either holds the aquaculture lease for the site or is employed by the lease holder. The license holder must direct and oversee the work of the unlicensed individuals. Licenses covered by this rule include:

A. A commercial shellfish license pursuant to 12 MRSA §6601 (2-A);

B. A mussel hand-raking license pursuant to 12 MRSA §6745 (2-A); or

C. A mussel boat license pursuant to § 6746 (2-A).

Such unlicensed individuals shall keep a copy of the appropriate license with them while working with, transporting, or selling the cultured product and shall present it to DMR upon request.

2. Aquaculture leaseholders shall maintain records of any unlicensed individuals working pursuant to any such licenses, including:

A. The names and addresses of the individuals;

B. The dates on which they worked; and

C. The name(s) and license number(s) of the license holders under whose authority they worked.

The records shall be made available for inspection by DMR upon request.

2.95. Water Quality Classifications and Shellfish Aquaculture

A. Compliance

4. Seed Shellstock source: Seed that comes from an approved hatchery will not require a permit, except for any applicable permits for importation or introduction. Seed that comes from any growing area in the approved classification or the conditionally approved classification in the open status will not require a permit. Seed that comes from growing areas in any other classification will require a permit. A permit may be issued by the department provided that:

(a) The movement of the seed is approved by the Commissioner if it is from a growing area in other than the approved or conditionally approved classification. Applications may be requested to be mailed by writing the Department of Marine Resources, attn: Public Health Division, 21 State House Station, Augusta, Maine 04333-0021 or may be printed from the Department's web site:-

<http://www.maine.gov/dmr/crd/forms/shellfish%20import%20application%202004.pdf>;

(b) Seed from growing areas in the restricted or prohibited classification have poisonous or deleterious substances that are at or below acceptable levels.

(c) Seed from growing areas in the prohibited classification are cultured for a minimum of 6 months.

(d) Seed for LPAs must meet the requirements of the Health Areas in Chapter 2.90(3)(~~BC~~)(3) and 2.05(4)(1)(~~J~~).

(e) Inspection: The Commissioner and his/her agents may inspect the lease site, seed, operations, and business records of seed permit holders.

If you are unable to attend the hearing persons are encouraged to submit written comments from the receipt or posting of this notice through close of business on the deadline listed.