

Application for Change in Species

Eastern Bay

## FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION

Moosabec Mussels Inc. applied to the Department of Marine Resources (DMR) to add two species for cultivation at the existing standard lease EAST OP, located in Eastern Bay, Town of Lamoine, Hancock County, Maine.

### 1. THE PROCEEDINGS

The application was submitted to DMR on April 25, 2022. The application was deemed complete by DMR on May 13, 2022. Notice of the application and the 14-day public comment period were provided to other state and federal agencies, riparian landowners, the Town of Lamoine and its Harbormaster, and members of DMR's GovDelivery Aquaculture list. One public comment was received.

### 2. PROJECT HISTORY

On July 10, 2001, DMR granted lease EAST OP to Moosabec Mussels Inc. DMR's Findings of Fact, Conclusions of Law, and Decision, henceforth referred to as "the original decision", found that the evidence in the record supported the conclusion that the aquaculture activities proposed by Moosabec Mussels Inc. met the requirements for granting a standard aquaculture lease as set forth in 12 M.R.S.A. § 6072. The lease term was set for ten years, beginning on July 10, 2001 and ending on July 9, 2011. A renewal, approved on August 30, 2011, extended the lease expiration to July 9, 2021. A second renewal, approved on March 3, 2022, extended the lease expiration to July 9, 2041.<sup>1</sup>

### 3. STATUTORY CRITERIA & FINDINGS OF FACT

Approval of standard aquaculture lease amendments is governed by 12 M.R.S.A. § 6072 and Chapter 2.44 of DMR regulations. The statute and regulations provide that the Commissioner may grant amendments for the use of specific gear, species, and/or operational modifications on an existing lease site provided the proposed changes are consistent with the findings on the underlying lease application, do not materially alter the findings of the original decision, and would not result in a change to the original lease conditions.

#### **A. Original Lease Decision**

The original decision provided authorization for an 89.7-acre lease<sup>2</sup> to bottom cultivate blue sea mussels (*Mytilus edulis*) with drag harvesting.

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<sup>1</sup> Prior to 2017, lease terms were set for 10 years. 12 M.R.S.A § 6072 (2-A), limitation of leases, extended lease terms to not exceed 20 years.

<sup>2</sup> In some cases, especially for lease sites that have been active for many years there may be a difference between the acreage listed in a lease decision/agreement and the acreage calculated from the lease coordinates using relatively new and more accurate mapping software. The acreage for this site as listed in prior decisions and the lease agreements is 89.78 acres. However, the acreage listed in the GIS database is 89.70 acres. When such a discrepancy occurs, it is DMR's policy to use the acreage in the GIS database and update lease decisions and agreements accordingly. The difference does not change the footprint of the lease site or any other elements of the lease

In the original decision, the Commissioner established conditions governing the use of EAST OP, as is allowed pursuant to 12 M.R.S.A § 6072 (7-B). The following conditions were imposed in the original lease and subsequent renewal:

- a) The lease area shall be marked in accordance with U.S. Coast Guard and Department of Marine Resources Regulations Chapter 2.80.
- b) Dragging is prohibited by persons other than the leaseholders or their authorized agents.
- c) Lobster and crab trapping, recreational fishing, and navigation are allowed on open areas of the lease.
- d) Should ownership of Moosabec Mussels Inc., currently held jointly by Ralph and Joyce Smith, change during the term of this lease, the leaseholders shall notify the Department, which may require them to apply for a transfer of the lease.

The second renewal, executed March 23, 2022, removed Conditions (a) and (b) from the lease.

### **B. Proposed Changes to Species**

The leaseholder is requesting to add two species, Eastern oysters (*Crassostrea virginica*) and European oysters (*Ostrea edulis*), for bottom cultivation with drag harvesting.

## **4. PUBLIC COMMENT**

The Department received one response from a riparian landowner during the public comment period. The landowner stated the project is “loud and intrusive” and damaging to wildlife and the ocean substrate. The landowner indicated a preference that the project be relocated further offshore in the Atlantic Ocean or away from landowners and requested the lease not be renewed.

The current lease is not due for renewal until July 9, 2041. The proposed addition of two bottom cultivated species will not alter the approval for bottom cultivation and drag harvesting as previously decided. The addition of new shellfish species is unlikely to significantly alter the noise and visual impacts of standard project operation.

## **5. DEPARTMENT FINDINGS**

As DMR Rule Chapter 2.44 (1) states that “the Commissioner shall not amend a lease in such a way that it materially alters the findings of the original decision, or would result in a change to the original lease conditions”, this amendment proposal will be considered in light of the original decision and lease conditions.

The current application proposes to add two new species for cultivation. The proposed source for stock is approved by the Department and, therefore complies with DMR Chapter 2.37(1)(A)(6) Source of Organisms to be Cultured. No changes to existing operations are anticipated beyond the species addition.

As the proposed source of stock is approved by DMR and there are no proposed changes to cultivation or harvest methods, the proposal is consistent with the findings of the underlying lease application, would not materially alter the findings of the original decision, and would not result in a change to the original lease conditions.

## **6. CONDITIONS**

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agreement. Using the acreage from the GIS database helps ensure that acreage is consistent across the leasing program.

Conditions (c) and (d), established by the original lease, as listed in Section 2A, shall remain imposed on the project.

**7. DECISION**

Based on the foregoing, the Commissioner grants the request from Moosabec Mussels Inc. for the authorization to add two species, Eastern oysters (*Crassostrea virginica*) and European oysters (*Ostrea edulis*) for bottom cultivation with drag harvesting at lease EAST OP.

Dated: 8/8/22



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

**STATE OF MAINE**

**DEPARTMENT OF MARINE RESOURCES**

Aquaculture Lease Renewal Application

Bottom culture of blue mussels

Eastern Bay, Lamoine

**Moosabec Mussels, Inc. and Ralph**

**Smith, Sr.**

**EAST OP**

March 3, 2022

## **FINDINGS OF FACT, CONCLUSIONS OF LAW, & DECISION**

Moosabec Mussels, Inc. applied to the Department of Marine Resources (DMR) to renew the aquaculture lease EAST OP for a period of 20 years. The 89.70<sup>1</sup>-acre lease is issued for the bottom culture of blue sea mussels (*Mytilus edulis*) located in Eastern Bay, Town of Lamoine in Hancock County. This lease was initially issued on July 10, 2001 and subsequently renewed on August 30, 2011.<sup>2</sup>

### **1. PROCEDURE**

Notice of the 30-day public comment period and opportunity to request a public hearing was published in the *Ellsworth American* on May 27, 2021. Notice was also provided to riparian landowners within 1,000 feet of the site, the Town of Lamoine, federal and other state agencies and sent to subscribers of DMR's aquaculture email list-serve. A public hearing on a lease renewal is required if DMR receives five or more requests for a public hearing during the comment period. DMR only received two requests for a public hearing. Therefore, no public hearing was held on the renewal request.

### **2. STATUTORY CRITERIA**

Aquaculture lease renewals are governed by 12 M.R.S. §6072(12) and by Chapter 2.45 of DMR's rules, which provide that an aquaculture lease shall be renewed if: the lessee has complied with the lease agreement during its term; the Commissioner determines that renewal of the lease is in the best interest of the state; the renewal will not cause the lessee to be a tenant of any kind in leases covering an aggregate of more than 1,000 acres; and the lease is not being held for speculative purposes.

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<sup>1</sup> In some cases, especially for lease sites that have been active for many years there may be a difference between the acreage listed in a lease decision/agreement and the acreage calculated from the lease coordinates using relatively new and more accurate mapping software. The acreage for this site as listed in prior decisions and the lease agreements is 89.78 acres. However, the acreage listed in the GIS database is 89.70 acres. When such a discrepancy occurs, it is DMR's policy to use the acreage in the GIS database and update lease decisions and agreements accordingly. The difference does not change the footprint of the lease site or any other elements of the lease agreement. Using the acreage from the GIS database helps ensure that acreage is consistent across the leasing program.

<sup>2</sup> The 2011 renewal decision added Moosabec Mussels Inc. as a co-lessee.

**A. Compliance with lease**

The review of the case file associated with this lease indicates compliance with the lease agreement. There are no outstanding complaints regarding this lease. **Therefore, I find** that the applicant has complied with the lease agreement during its term.

**B. Best interest of the State of Maine**

In determining whether it is in the best interest of the state to renew the lease, DMR takes into consideration, among other things, the potential for conflict with other new or existing uses of the area which the Commissioner determines to be a higher use of the area from the perspective of the public interest.

DMR provided the Maine Department of Inland Fisheries and Wildlife (MEIF&W) with an opportunity to review and comment on the renewal application. On June 7, 2021, MEIF&W submitted a comment, which noted that the site intersects with Tidal Waterfowl and Wading Bird Habitat. MEIF&W indicated that if predator netting is used it should be a certain mesh size. MEIF&W also recommend minimizing the size of the float and site to a practical extent to help minimize any potential impacts to waterfowl and wading birds.

DMR reviewed the comments and noted that some of the feedback did not reflect permitted operations on the site. For example, the lease holder does not use predator netting. To help provide additional clarification, DMR responded to MEIF&W and clarified that the proposal is to renew an existing lease site and no predator netting was proposed as part of the renewal request. DMR also included a copy of the 2011 renewal decision for MEIF&W to review.

On September 30, 2021, MEIF&W clarified that since nets are not proposed the feedback specific to mesh size no longer applied. However, MEIF&W recommended that barges or boats not be allowed to ground out on reefs, aquatic beds, or mudflats. They also recommended minimizing the float size and project footprint to the extent practicable to minimize impacts to waterfowl and wading bird populations.<sup>3</sup>

**Discussion:**

The lease is authorized for the free planting of mussels, so the use of gear or floats is not permitted by DMR. The mussels are harvested via drag, which is a legal activity in Maine. Although some of MEIF&W's initial recommendations were not applicable to the existing operations, the feedback is generally advising that the lease holder take practical measures to minimize potential impacts to the resources under MEIF&W's jurisdiction. If the lease renewal is granted, the holder should follow applicable recommendations provided by MEIF&W. However, based on a review of the record, there is no evidence to suggest that the project footprint needs to be minimized as MEIF&W suggested.

DMR received a comment from Kathleen Rybarz<sup>4</sup> indicating that the Town of

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<sup>3</sup> CF: Email from R. Settele to A. Ellis (9/30/21). The comments did not indicate that waterfowl and wading bird populations were being adversely impacted by the size of the site or operations.

<sup>4</sup> Ms. Rybarz submitted her comment (and hearing request) in her capacity as a select person for the Town of Lemoine. However, other Town Officials clarified that Ms. Rybarz's feedback did not represent the Town.

Lamoine “will be opening up some of the land adjacent to the lease to the public.” Ms. Rybarz speculated that more people may try to access the open land from the shore. However, the lease is for bottom culture only and there are no conditions restricting public use of the lease site for navigation or recreation purposes.

Therefore, the lease site would not preclude access to the shore.

**Therefore, I find** that it is in the best interests of the State of Maine to renew this lease.

**C. Aggregate lease holdings**

According to DMR records, EAST OP, which is 89.70 acres is the only lease site held by Moosabec Mussels, Inc. and Ralph Smith, Sr.

**Therefore, I find** that the renewal of this lease will not cause the lessee to hold more than 1,000 acres.

**D. Speculative purposes**

Chapter 2.45(2)(A) of DMR’s regulations provides that in determining whether a renewal is being conducted for speculative purposes, DMR must consider “whether the current lessee has conducted substantially no research or aquaculture in the lease areas during the previous lease term.” The renewal application indicates that mussels were cultivated during the previous lease term.<sup>5</sup> This is consistent with a review of the record, which indicates aquaculture activities occurred on the site during the previous lease term.

**Therefore, I find** that the lease is not being held for speculative purposes.

**3. LEASE CONDITIONS**

The following conditions were applied to the lease by the original decision:

- a) The lease area shall be marked in accordance with U.S. Coast Guard and Department of Marine Resources Regulations Chapter 2.80.
- b) Dragging is prohibited by persons other than the leaseholders or their authorized agents.
- c) Lobster and crab trapping, recreational fishing, and navigation are allowed on open areas of the lease.
- d) Should ownership of Moosabec Mussels, Inc., currently held jointly by Ralph and Joyce Smith, change during the term of this lease, the leaseholders shall notify the Department, which may require them to apply for a transfer of the lease.

Condition “a” pertains to site marking. Lease holders are required to mark sites in accordance with DMR’s regulations and marking is further specified in lease agreements. Condition “b” is enforceable under other provisions of law (see 12

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<sup>5</sup> See page 1 of the renewal application.

M.R.S.A. §6073(2)), so it does not need to be included as a condition of the lease. Therefore, if the renewal is granted these conditions will be removed from the lease agreement as they are already contemplated in applicable regulation or enforceable under relevant law.

**4. DECISION**

The Commissioner grants the application of Moosabec Mussels, Inc. and Ralph Smith, Sr. to renew the aquaculture lease EAST OP for a period of twenty years. The renewed lease is subject to the same terms, conditions, and obligations as set forth in the original lease, except as modified by this decision.

**5. REVOCAION OF LEASE**

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

**6. DATE AND SIGNATURE**

Dated: 3/3/2022   
**Patrick C. Keliher, Commissioner,  
Department of Marine Resources**

STATE OF MAINE  
DEPARTMENT OF MARINE RESOURCES  
Renewal Application  
Bottom culture of mussels  
Eastern Bay

Ralph L. Smith, Sr. &  
Moosabec Mussels Inc.  
Lease EAST OP  
Docket # 2010 35R

## FINDINGS OF FACT, CONCLUSIONS OF LAW, & DECISION

On November 17, 2010, the Department received an application from Ralph L. Smith, Sr. to renew, for a period of ten years to July 9, 2021, his aquaculture lease for 89.78 acres for bottom culture of blue sea mussels (*Mytilus edulis*) located in Eastern Bay, in the Town of Lamoine, Hancock County, Maine. This lease was initially issued on July 10, 2001.

### 1. PROCEDURE

Notice of the application for lease renewal and the public comment period was published in the *Commercial Fisheries News* March 2011 edition and in the *Ellsworth American* on February 24 and March 10, 2011. The public, riparian landowners within 1,000 feet of the lease site, and other interested persons were given 30 days to submit comments or to request a hearing on the application for lease renewal. Two comments and one request for a hearing on this application were received by the Department during the comment period.

### 2. STATUTORY CRITERIA

Applications for aquaculture lease renewals are governed by 12 M.R.S.A. §6072(12) and by Chapter 2.45 of the Department's rules, which provide that an aquaculture lease shall be renewed if: the lessee has complied with the lease agreement during its term; the Commissioner determines that renewal of the lease is in the best interest of the state; the renewal will not cause the lessee to be a tenant of any kind in leases covering an aggregate of more than 1,000 acres; and the lease is not being held for speculative purposes.

#### A. Compliance with lease

My review of the records of this lease discloses that all annual reports have been filed, rent has been paid in a timely manner, the bond has been kept current, and the site has passed inspections by DMR Marine Patrol. There are no outstanding complaints regarding this lease.

**Comments received.** Both comments were submitted by riparian landowners within 1,000 ft. of the lease site. Vicki Salsbury said she had lived at her present location since 2007 and was "concerned for the ecosystem of nearly 90 acres of the ocean floor where the boat is dragging." She wrote, "We feel a hearing would be beneficial."

Gerard Carriere complained that dragging occurs outside the lease boundaries in the intertidal area at high tide; that the “noisy, diesel-smelling dragger” operates very close to his home and yard, and “hours of dragging” with noise and diesel smell spoil his time outdoors; that the boat is often left moored on or near the lease site; that the noise of the engine and of mussel-washing are a problem; that the water off his shore is getting murkier every year and now contains silt from dragging, as well as suds and other debris. Mr. Carriere also inquired whether septic facilities are provided on the dragger for crew who work long hours.

The Department responded to both letters and sent copies to Mr. Smith for his review. Although the complaints about dragging in proximity to the riparians’ land are understandable, dragging is a legal activity in Maine, the lease was issued for bottom mussel culture with drag harvesting, and there is no indication that dragging is being conducted on or around the lease site in a manner that violates any marine resources laws or rules. Mooring a boat at a location for less than six months does not require a mooring permit from the U.S. Army Corps of Engineers; whether it requires a permit from the Town of Lamoine depends on the mooring ordinance, if any. None of these allegations indicates a failure by the applicant to comply with the lease agreement.

**Therefore, I find** that the applicant has complied with the lease agreement during its term.

#### **B. Best interest of the State of Maine**

In determining whether it is in the best interest of state to renew the lease, the Department takes into consideration, among other things, the potential for conflict with other new or existing uses of the area which the Commissioner determines to be a higher use of the area from the perspective of the public interest. There is no evidence of conflicts with other new or existing uses of the area.

**Therefore, I find** that it is in the best interests of the State of Maine to renew this lease.

#### **C. Aggregate lease holdings**

DMR records show that this applicant holds 89.78 acres under his sole aquaculture lease.

**Therefore, I find** that the renewal of this lease will not cause the applicant to lease more than 1,000 acres.

#### **D. Speculative purposes**

In determining whether the lease is being held for speculative purposes, the Department considers whether substantially no aquaculture or research has been conducted on the lease site. The applicant has conducted aquaculture on the lease site during the lease term, as shown by the annual reports he has filed with the Department.

**Therefore, I find** that the lease is not being held for speculative purposes.

### **3. OTHER ISSUES**

#### **A. Adding Moosabec Mussels Inc. as Co-Lessee**

Mr. Smith has requested that his corporation, Moosabec Mussels Inc., be added to the lease as co-lessee. Moosabec was incorporated in Maine in 1984 and is owned equally by Mr. Smith and his wife, Joyce. Mr. Smith provided all the information about Moosabec's financial and technical capacity that is required of a new applicant for a standard lease, and this information shows Moosabec to be qualified on its own to hold an aquaculture lease.

According to Mr. Smith, Moosabec has always funded the mussel lease operation and buys all the mussels the lease produces. Mr. Smith wishes to secure ownership of the lease as part of his business operations by including his business corporation as a co-lessee.

Adding a new lessee to an existing lease generally constitutes a transfer of the lease, which would require the lessee to apply to the Department for a lease transfer. Under the specific circumstances of this case, however, the Department has determined that a lease transfer is not occurring for the following reasons: the corporation was formed by Mr. Smith and has been in existence for most of the life of this lease; the corporation is wholly owned by Mr. Smith and his wife, Joyce Smith; the purpose of adding the corporation to the lease is to avoid expiration of the lease in the event of Mr. Smith's death in order to allow for the continued viability of the mussel business; the lease has been continuously operated by Mr. Smith in conjunction with the corporation as part of his mussel business; and Mr. Smith has represented that there is no intent to transfer ownership or control of the corporation to any person other than by inheritance by family members. Should ownership or control of the corporation change in future, the Department reserves the right to review the situation and require a transfer application, if the facts appear to warrant it. A condition to this effect will be added to the renewed lease.

Therefore, Moosabec Mussels Inc. will be added as a co-lessee of lease EAST OP, along with Mr. Smith.

#### **B. Lease Conditions**

The following conditions are carried over from the original lease and will apply to the renewed lease:

1. Lobster and crab trapping, recreational fishing, and navigation are allowed on the open areas of the lease.
2. Dragging is prohibited by persons other than the leaseholders or their authorized agents.
3. The lease area shall be marked in accordance with U.S. Coast Guard requirements and Department of Marine Resources rules Chapter 2.80.

The following condition will be added to the renewed lease:

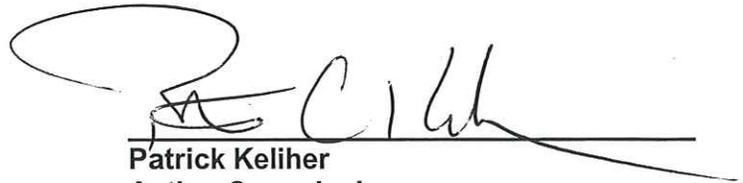
4. Should ownership of Moosabec Mussels, Inc., currently held jointly by Ralph and Joyce Smith, change during the term of this lease, the leaseholders shall notify the Department, which may require them to apply for a transfer of the lease.

#### **4. DECISION**

The Commissioner of Marine Resources grants the application of Ralph L. Smith, Sr. to renew his aquaculture lease EAST OP for a period of ten years, to July 9, 2021. Moosabec Mussels Inc. is authorized to be added as a co-lessee. The renewed lease is subject to the lease conditions as described above and otherwise to the same terms, conditions, and obligations as set forth in the original lease.

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

8/30/2011



Patrick Keliher  
Acting Commissioner  
Department of Marine Resources