

STATE OF MAINE
DEPARTMENT OF MARINE RESOURCES

Nelson Marass
NMR EMG2

Standard Aquaculture Lease Application
Suspended Culture of American Oysters
New Meadows River, West Bath

December 5, 2019

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION

Nelson Marass applied to the Department of Marine Resources (DMR) for a 20-year standard aquaculture lease on 2.30 acres.¹ The proposed site is located east of Middle Ground, in the New Meadows River, West Bath, Sagadahoc County, Maine, for the cultivation of American/Eastern oysters (*Crassostrea virginica*) using suspended culture techniques.

1. THE PROCEEDINGS

A. Site History

The proposed site is in the New Meadows River to the east of Middle Ground, a sandbar that becomes partially exposed at low water (SR 2). This section of the New Meadows River contains various aquaculture sites (SR 11). Mr. Marass currently holds three Limited Purpose Aquaculture (LPA) licenses and is listed as an assistant on eight other LPAs near, or within, the boundaries of the proposed site (SR 10). DMR first issued LPAs within this area to Mr. Marass in 2015. Peter Francisco currently holds an experimental lease, NMR EMGx, which is located ~247 feet to the east of Mr. Marass' proposed lease. Mr. Francisco's experimental lease is 3.52 acres in size and is for the suspended culture of shellfish.² Figure 1 depicts the location of the existing experimental lease site and some of the LPAs held or operated by Mr. Marass.³

¹ Applicant originally requested 2.25 acres. Based on the provided coordinates, DMR calculated the area at 2.30 acres.

² Pg. 10 of the site report lists NMR EMGx as being 1.68 in size. However, the lease is 3.52 acres in size.

³ The LPAs to the north of NMR EMGx, listed from left to right are: RVAC216, LMAR216, LMAR316, and NMAR415



Figure 1: Location of Mr. Francisco’s experimental lease site NMR EMGx in relationship to LPA sites (depicted as green circles) either held or operated by Mr. Marass. Image generated by DMR staff utilizing geo-referenced aerial photographs provided by the Maine Office of GIS and data maintained by DMR.

Mr. Francisco’s experimental lease was issued for a three-year term, beginning on June 1, 2015 and ending on May 31, 2018. Experimental leases for commercial purposes are non-renewable. Before the experimental lease expired, Mr. Francisco either needed to apply to convert the experimental lease (or portions of the lease) to a standard lease or let the experimental lease lapse. Mr. Francisco decided to apply for a standard lease.

Prior to accepting applications from Mr. Marass or Mr. Francisco, DMR staff became aware that portions of the proposals might overlap. Mr. Francisco was interested in expanding his existing operations by siting a proposed lease tract closer to Middle Ground where Mr. Marass also indicated he might apply for a site. In accordance with Chapter 2.07(1) an applicant is required to attend a pre-application meeting with “DMR staff and the harbormaster(s) and/or a municipal officer(s) or other designee(s) of the municipality(ies) in which the proposed lease is located to discuss the proposed

application.” Given that the proposed sites might overlap, DMR decided to hold a joint pre-application meeting with both applicants, and the West Bath Harbormaster.

The purpose of the joint pre-application meeting was to provide Mr. Marass and Mr. Francisco with the opportunity learn about each other’s proposals and to potentially avoid a situation where the proposed sites could overlap and therefore be considered “competing lease applications” under Chapter 2.41 of DMR’s regulations. A joint pre-application meeting would also provide the municipality with the opportunity to provide feedback on both proposals. It also made the municipality aware of the potential overlap. The joint pre-application meeting was held on March 24, 2017 and was attended by DMR staff (Jon Lewis and Amanda Ellis), both applicants, and Joe Vaillancourt the West Bath Harbormaster. At the pre-application meeting, the applicants indicated that they both intended to apply for portions of the same area. The applicants were unable to reach a resolution regarding their proposed operations and indicated that they would both move forward by submitting their respective applications.

After the pre-application meeting, Mr. Marass scheduled a scoping session, which was held on July 18, 2017. On March 9, 2018, DMR received an application from Mr. Marass, which was deemed complete on May 3, 2018. Mr. Francisco held his scoping session on March 28, 2018. DMR received an application from Mr. Francisco on May 29, 2018. A provision of law allows the experimental lease holder to continue operating their site until the Commissioner renders a final decision on the standard lease application, provided the application for the standard lease is received before the expiration of the experimental lease.

Mr. Francisco’s standard lease application was received on May 29, 2018, before his experimental lease expired on May 31, 2018, and therefore he has been able to continue operations on his existing lease site while DMR processes his standard lease application. Mr. Francisco’s standard lease application encompasses portions of his existing experimental lease site and proposes a second lease tract, which overlaps portions of Mr. Marass’ proposed site. Figure 2 depicts the location of the existing experimental lease, the respective standard lease proposals and the areas where they overlap.⁴

⁴ DMR staff also met with both applicants on May 15, 2017 to assist them with mapping and to provide another opportunity to try to reach resolution regarding the overlap of their sites. The applicants were unable to reach resolution at this meeting and they continued to move forward with their respective proposals.



Figure 2: Location of the existing experimental lease site NMR EMGx in relationship to the additional area Mr. Francisco has applied for. The figure also depicts the location of Mr. Marass’ standard lease proposal. Image generated by DMR staff.

On August 1, 2018, DMR sent Mr. Francisco a letter notifying him that his application was incomplete and detailing the sections of his application that needed to be revised before the application could be deemed complete. On August 2, 2018, Mr. Francisco acknowledged receipt of DMR’s letter, but he did not provide DMR with any of the materials that he was informed by that letter as being required for a complete application. On January 16, 2019, DMR sent Mr. Francisco a letter requesting that he submit a revised application by March 1, 2019. On February 12, 2019, DMR received a revised application from Mr. Francisco, which was deemed complete on March 6, 2019.

When the application was deemed complete, DMR notified Mr. Francisco that his proposal overlapped with portions of Mr. Marass,’ so it would be processed in accordance with Chapter 2.41(3) of DMR’s regulations. This regulation specifies, in part, that when DMR receives competing applications which are either in the same preference category or not in any preference category, the applications must be considered sequentially according to the date on which the application was deemed complete. Neither of the applications merit any preference category, so DMR must consider the proposals based

on when they were deemed complete. Mr. Marass' application was deemed completed on May 3, 2018, whereas Mr. Francisco's application was deemed complete on March 6, 2019. Therefore, Mr. Marass' application is being considered first.

Notice of Mr. Marass' completed application was provided to riparian landowners within 1,000 feet of the proposed site, the Town of West Bath, including the Town of West Bath Harbormaster, and other state and federal agencies. The public hearing on the application was held on August 20, 2019. Notice of the public hearing, copies of the application and DMR site report were provided to state and federal agencies for their review, the Town of West Bath, and riparian landowners within 1,000 feet of the proposed site. Notice of the hearing was published in the *Times Record* on July 17 and August 8, 2019. Notice was also published in the August 2019 edition of the *Fishermen's Voice*.

On August 5, 2019, Mr. Francisco applied for intervenor status in the proceeding. Mr. Francisco indicated in his application that the aquaculture activities will substantially and directly affect him, because he has also applied for a standard lease that overlaps a portion of the same area for which Mr. Marass has applied. Mr. Francisco further indicated that he was not currently using the area, but he believed that Mr. Marass was trying to preclude his ability to apply for a lease in the same area.⁵ On August 12, 2019, DMR denied Mr. Francisco's request for intervenor status. DMR denied the application because it found that Mr. Francisco failed to show he would be substantially and directly affected by Mr. Marass' lease should it be granted and, to the extent Mr. Francisco's interest was based on the overlap of proposed sites, because it would likely result in a situation where DMR had to consider both applications concurrently, which is contrary to the intent of Chapter 2.41(3). In compliance with applicable regulations and in procedural fairness to both aquaculture lease applicants, DMR felt it necessary to consider each proposal in separate proceedings. Regardless, Mr. Francisco was able to question Mr. Marass regarding his application and to present testimony on his own behalf in accordance with DMR's lease hearing procedures.

A public hearing was held at the West Bath School on August 20, 2019. Sworn testimony was given by the following witnesses:

Name	Affiliation
Nelson Marass	Applicant
Laura Marass and Rob Vachon	Applicant's witnesses

⁵ CF: Francisco intervenor application

Jon Lewis	Director, DMR Aquaculture Division
Chuck Hillier, Frank Johnson, Peter Francisco, Spencer Hallowell, Rachel Warren, Francis Bartholomay, David Cooney, and James Williams	Members of the Public

Mr. Marass described aspects of the lease application and answered questions about the proposal. Mr. Lewis testified about DMR's site visit and answered questions related to Maine's aquaculture program and regulations. Members of the public offered testimony about how the proposal may affect their uses of the area. In general, members of the public who testified indicated that the requested 20-year lease term was too long in consideration of the existing uses of the area. Joyce "Jay" McCreight, Representative House District 51; Karly Perry, West Bath Town Clerk; and LeeAnn Neal, U.S. Army Corps of Engineers attended the public hearing. Representative McCreight, Ms. Perry, and Ms. Neal did not offer any testimony. The hearing was recorded by DMR. The Hearing Officer was Amanda Ellis.

B. Exhibits

The evidentiary record before DMR regarding this lease application includes the following:

1. Case file (CF)
2. Application (App)
3. Site Report (SR)
4. Picture of Aquaculture Gear in Brighams Cove (Exhibit 4)
5. Aerial Image of Brighams Cove (Exhibit 5)
6. Picture of cormorants on LPA gear (Exhibit 6)

2. DESCRIPTION OF THE PROJECT

A. Proposed Operations

The applicant is proposing two lease tracts for the cultivation of American/eastern oysters using floating cages attached to longlines (App 16). Each tract would contain 12 longlines, oriented north to south, that measure 135 feet in length (App 16). Each line would contain a maximum of 12 cages, for a total of 144 cages on each tract (App 7 and 16). Other than a 17' and 24' skiff, no powered equipment is proposed for the site (App 3-4). During the growing season, which is from April through October (depending on weather), the applicant intends to work at the proposed lease site from Monday through

Friday (App 4, Marass/Fisher). During the growing season, the cages would be flipped every two to three weeks to reduce fouling (App 3). Between November and January, the longlines and associated cages would be submerged at the bottom of each respective site (Marass/Nelson).⁶

During the public hearing, Mr. Marass confirmed that any cleaning, sorting and bagging on the proposed site would be done manually (Marass/Ellis). The application indicates that the deployment of gear would occur in phases. If the proposal is granted, during the first year of the lease term the applicant would deploy 16 longlines and in the second year 4 additional longlines would be deployed (App 4). The applicant estimates that maximum production, on a 12-month basis, would be 150,000 oysters (App 4). The proposed lease site is in an area that is classified by DMR's Bureau of Public Health as "open/approved" for the harvest of shellfish (SR 16).

During the public hearing, members of the public raised several concerns about Mr. Marass' aquaculture activities related mostly to the operation of the existing LPAs. The applicant owns property on Brighams Cove where he uses a sorter and pressure washer to process product from the LPA sites (Marass/Hillier). This property is also where the applicant intends to utilize a pressure washer and sorter to process oysters from the proposed lease site (App 4 and Marass/Hillier). Noise generated from the processing of oysters at Brighams Cove was identified as a concern by some members of the public who attended the public hearing.

When asked if the proposed lease site would increase processing volumes at Brighams Cove, Mr. Marass testified that the processing volumes would increase, but there was no indication by how much over the length of the proposed 20-year lease term, other than a reference to the maximum stocking density of up to 500,000 oysters (Marass/Hillier). Mrs. Marass indicated that the amount of time it takes to process the oysters on the LPAs "has been overwhelming at times, so starting much smaller is definitely the plan" (Mrs. Marass/Hillier). When asked if all the oysters from the proposed site would be brought to Brighams Cove for processing, Mr. Marass indicated that they initially would be processed at Brighams Cove, but that he was looking into processing product at a dock or co-op (Marass/Hillier).

Another concern raised by Chester Hillier related to aquaculture gear that was secured to a mooring in Brighams Cove. Mr. Hillier presented a photograph of the gear in question to DMR, entered into the record as Exhibit 4. Mr. Marass confirmed that the aquaculture gear was his and that it contained oysters, which were slated to be destroyed (Marass/Hillier). Mr. Marass confirmed that the

⁶ Mr. Marass was questioned by Marcy Nelson a Scientist with the DMR AQ Division.

gear had been secured to the mooring for part of the summer and it was not located on an existing lease or LPA site (Marass/Hillier, Marass/Ellis).

Several members of the public also noted that over the summer there was no activity on the LPA sites operated by Mr. Marass. Mr. Marass confirmed that there had not been any activity on the LPAs for at least two months (Marass/Fisher). Specifically, the applicant testified that he had dived the site to check on the oysters, but they had grown so fast that the oysters exceeded market size. Mr. Marass testified that to avoid red tide and stunt the growth of the oysters he left the oysters on the bottom of the LPA sites.

Discussion:

Some of the concerns raised by members of the public as they relate to the applicant's existing LPA operations are not germane to the lease decision criteria. However, the decision by the Commissioner to grant an aquaculture lease is discretionary according to 12 M.R.S.A. §6072(1) and (7-A), even if the criteria for granting a lease is met. Evidence regarding the technical capability of a lease applicant to responsibly and adequately manage a proposed lease during its term may be considered in reaching that decision. The record in this case as it relates to certain elements of the proposed operations call into question the applicant's technical ability to adequately manage the proposed lease over the course of a 20-year term.

The applicant was unable to provide sufficient details about his processing plans and volumes as they relate to the proposed lease site. The applicant's witness indicated that processing the current volume of product from the LPAs has been overwhelming at times. The applicant testified that there had not been any activity on the LPAs for the last two months, because product had exceeded market size and was being kept on the bottom of the LPAs to avoid red tide and to stunt the growth of the oysters. This makes it unclear whether the applicant will be able to process larger volumes of product from the proposed site, which represents an expansion of the existing LPA operations. In addition, the applicant testified that he had moved product from his LPAs to his mooring in Brighams Cove. This is not a DMR permitted aquaculture site.

Although the applicant intends to start smaller and grow incrementally, the record demonstrates that elements of his proposed operations could benefit from further development and consideration prior to possibly being granted a 20-year lease term. Therefore, if the lease satisfies all the decision criteria, it will be issued for a five-year term. This would give the applicant an opportunity to better assess the feasibility of the proposed operations, to evaluate the processing of product, and to demonstrate that he can adequately manage a lease of this size for a longer term.

B. Site Characteristics

On August 21, 2018, DMR scientists visited the proposed lease site and assessed it and the surrounding area in consideration of the criteria for granting a standard aquaculture lease. The proposed site occupies subtidal waters to the east of Middle Ground in the New Meadows River (SR 2). The uplands to the east of the proposed site are characterized by mixed forest and residential buildings (SR 2). DMR staff also observed docks and moorings to the east of the proposal (SR 2).

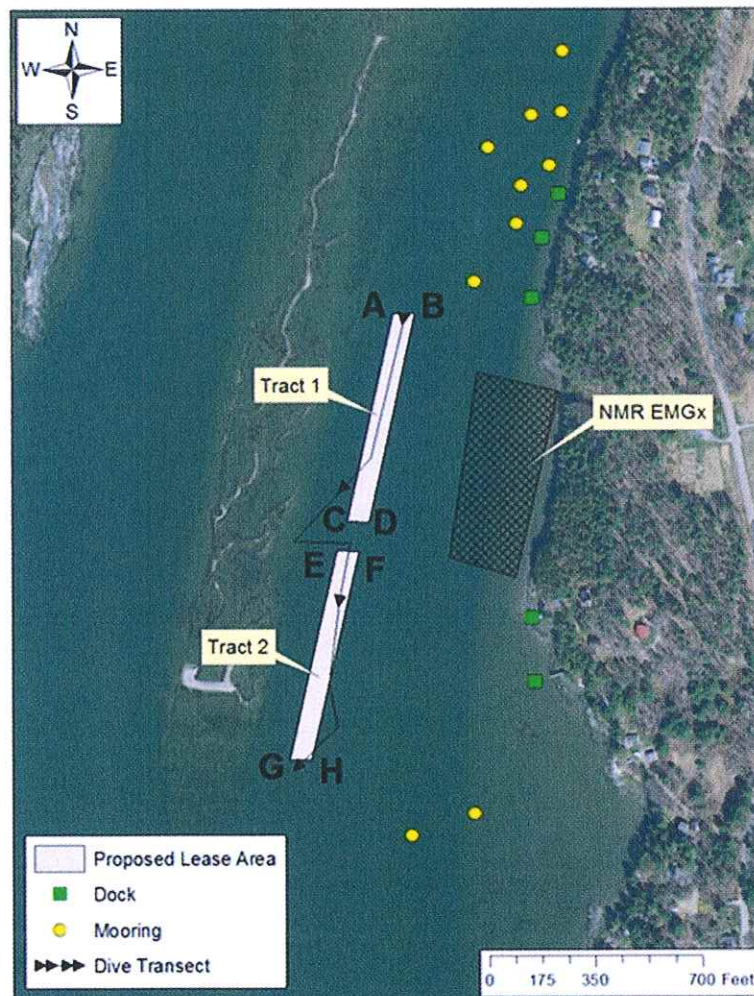


Figure 3: Image of the proposed lease site with labeled corners. Image also depicts the existing lease site in relationship to observed docks and moorings.

Correcting for mean low water, depths at the corners of the proposed lease tracts ranged between 9 and 12 feet (SR 2). At mean low water, corner B of Tract 1 is ~380 feet to the nearest point of the land on the eastern shoreline (SR 7). At mean low water, corner H of Tract 2 is ~525 feet to the

nearest point of land on the eastern shoreline (SR 7). The distance between Tract 1 and Tract 2 is ~100 feet (SR 7). The eastern boundary of proposed Tract 1 (corners B-D) are closest to the existing experimental lease site (SR 7). If the proposed lease was granted there would be ~245 feet of navigable area between Tract 1 and the experimental lease site (SR 7).

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 upon determining that the project will not unreasonably interfere with the ingress and egress of riparian owners; with navigation; with fishing or other water related 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, docking facilities, or conserved lands 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 comply with visual impact criteria adopted by the Commissioner.

A. Navigation

The marked main navigational channel is located to the west of Middle Ground (SR 9). Staff observed powerboats navigating within the main channel (SR 9). Middle Ground is a natural barrier between the marked navigational channel and the proposed lease site, so it is unlikely that the proposed site would affect navigation within the main channel (SR 9). Given the number of riparian landowners on the eastern shore of the New Meadows River, it is likely that “frequent and ample” navigation occurs to the east of Middle Ground (SR 9). To access the main channel and avoid the natural barrier created by Middle Ground, riparian owners on the eastern side of the river likely navigate south past or through the proposed lease area (SR 9). Several moorings and docks were located to the north of proposed Tract 1 (SR 9). The closest mooring to Tract 1 is ~220 feet to the northeast (SR 9).

At the closest point, Tract 1 of the proposed site is ~380 feet from the eastern shore of the New Meadows River (SR 9). The experimental lease NMR EMGx is located off the eastern shoreline of the New Meadows River and is parallel to Tract 1 of the proposed site (SR 9). At the closest points boats navigating in the area would have ~245 feet of navigable area between proposed Tract 1 and the

existing experimental lease site, provided the proposal is granted (SR 9). DMR staff observed “No Wake” buoys between the proposed site and existing experimental lease, which indicates that powerboats must operate at low speeds (SR 9).

Boats operating to the west of the proposed site would have ~100 feet of navigable area between the proposed site and areas where depths begin to become shallow in association with Middle Ground (SR 9). If the application is granted, there would be ~100 of navigable area between the two proposed lease tracts, which would be a suitable distance for draft appropriate vessels that wish to navigate east-west over Middle Ground (SR 9).

During the public hearing, Spencer Hallowell indicated that Middle Ground shifts, so it is unlikely that ~100 feet of navigable area would remain to the west of the proposal over a 20-year lease term. Some members of the public testified about the types of vessels that typically navigate to the east of Middle Ground and frequency of use. Rachel Warren testified that there is a lot of boat traffic in this section of the river. Ms. Warren utilizes a rowing shell that is approximately 20 feet in length and frequently sees power boats navigating within the area that are between 17 and 19 feet in length.

Ms. Warren also testified that there is a lot of kayaking on the weekends. Ms. Warren noted that if the proposal was granted it would be challenging to navigate the rowing shell if other boats were also trying to navigate within the same area. David Cooney also testified that if the proposal is granted it will restrict navigation within the area. Leeann Fischer, a resident of West Bath who sails in the area, felt that it would be very difficult to maneuver a sail boat in the ~245 feet between Tract 1 and the experimental lease.⁷

The record indicates that although the proposal is outside the main navigational channel, there is a lot of vessel traffic to the east of Middle Ground. Vessel traffic appears to be mostly powerboats, kayaks, rowing shells, and sailboats. If granted, Tract 1 at its closest point, would be ~245 feet from the boundary of the existing experimental lease NMR EMGX. Some of the vessels described during the public hearing including kayaks, powerboats, and rowing shells could navigate within the ~245 feet between proposed Tract 1 and the existing experimental lease.

However, as noted in the site report and supported by public testimony the area is frequently utilized by a variety of vessels for navigational purposes. Granting Tract 1 as proposed could create a navigational hazard in the area whereby all vessel traffic to the east of Middle Ground is diverted to the ~245 feet between Tract 1 and the existing experimental lease. This could have the potential to become

⁷ Ms. Fischer was not under oath. She was asking Mr. Lewis questions about the feasibility of sailing in the area if the lease was granted as proposed.

a safety hazard as multiple powerboats, kayaks, rowing shells, and/or other vessels attempt to traverse the space between Tract 1 and the existing experimental lease. This could be especially problematic for vessels operating under sail. These impacts could also unreasonably interfere with the ability of mariners to access the observed moorings to the north of Tract 1.

In consideration of existing navigational uses of the area and the impacts described above, it appears that Tract 1 will unreasonably interfere with navigation in the area and, therefore, the lease with respect to Tract 1 would be denied for this reason. Tract 2 is located to the southwest of the existing experimental aquaculture lease and is ~525 feet to the eastern shoreline of the New Meadows River (SR 7). This would provide for an adequate navigable area in consideration of the types of vessels and frequency of use within the area, and therefore does not pose an unreasonable interference with navigation.

In consideration of the denial of Tract 1, the aquaculture activities proposed for this site (as limited to Tract 2) will not unreasonably interfere with navigation. The lease site must be marked in accordance with U.S. Coast Guard requirements.

B. Riparian Access

For the reasons described in section 2.A. of this decision Tract 1 has been denied, so this section contemplates riparian access in relation to Tract 2.

To access the main channel and avoid the natural barrier created by Middle Ground, riparian owners on the eastern side of the river likely navigate south past or through the proposed lease area (SR 9). During the site visit, staff observed docks and moorings along the eastern shoreline of the New Meadows River (SR 8). The closest observed dock and mooring were ~390 feet and ~220 feet respectively to the northeast of proposed Tract 1 (SR 9). However, for the reasons described in section 2.A Tract 1 has been denied. Tract 2 is located to the southwest of the existing experimental aquaculture lease and is ~525 feet to the eastern shoreline of the New Meadows River (SR 7).

During the public hearing, Peter Francisco, a riparian landowner on the eastern side of the New Meadows River and holder of the existing experimental lease testified that his family has permits for four moorings in front of his home. Mr. Francisco was concerned that it would be difficult for mariners to access the moorings if the proposal is granted. However, the moorings are currently not deployed (Francisco/Ellis). Mr. Francisco indicated that he may decide to deploy the moorings in the future. In addition, Mr. Francisco's existing experimental lease is located off his shorefront property. It is unclear

where the moorings would be deployed in front of his home given the presence of the existing experimental lease site.

In consideration of the evidence, the denial of Tract 1, and that Mr. Francisco is not currently utilizing the moorings, it is unlikely that the proposal will unreasonably interfere with the ingress and egress of riparian landowners.

Therefore, the aquaculture activities proposed for Tract 2 will not unreasonably interfere with riparian ingress and egress.

C. Fishing & Other Water Related Uses

During the site visit, DMR staff observed a lobster boat operating to the south of the proposed lease site (SR 9). DMR staff did not observe any lobster buoys in the immediate vicinity of the proposed lease site but noted that it is possible lobstermen utilize the area (SR 9). No lobsters were observed during the dive transect of the proposal (SR 9). The proposed lease site is subtidal, so it is unlikely to interfere with any intertidal harvest activities within the area (SR 9). In addition, harvesters will still be able to access the sandbar on Middle Ground from the west and east (SR 10). DMR staff did not observe any recreational fishing, but according to DMR's Recreational Fishing Division, striped bass and mackerel fishing is popular in the area (SR 10).

During the public hearing, Frank Johnson who lobster fishes in the area testified that his primary concern with the proposal was the requested 20-year lease term, which he felt was too long. Mr. Johnson indicated that he sometimes lobster fishes in the area and that the fishing can be good. Some members of the public indicated that striped bass fishing occurs in the area. None of the applicable testimony indicates that commercial or recreational fishing will be unduly affected by the proposed lease operations. The primary concern identified by the individual who lobster fishes in the area was the overall term of the lease not possible impacts to commercial fishing activity. Furthermore, for the reasons described in section 2.B of this decision, the acreage of the proposal has been reduced.

For the reasons described above, there is no evidence in the record compelling a finding that the lease, as limited to Tract 2, would unreasonably interfere with commercial or recreational fishing in the area.

Other aquaculture uses. As previously noted, the closest aquaculture lease site to the proposal, not held by the applicant, is the experimental lease NMR EMGx. This experimental lease is ~245 feet from proposed Tract 1 and is operated by Mr. Francisco. The experimental lease is for the suspended culture of shellfish. Mr. Francisco has applied to DMR to convert the experimental lease into a standard lease.

Mr. Francisco's application also includes applying for additional acreage near and around the existing experimental lease site. Mr. Marass currently holds three LPA licenses and is an assistant on eight additional licenses held by Laura Marass and Ron Vachon that are near or within the proposed lease area (SR 10).

At the public hearing, Mr. Francisco submitted a photo taken by a neighbor depicting roosting cormorants on Mr. Marass' LPA gear (Exhibit 6). Mr. Francisco felt that cormorants roosting on gear could be problematic for public health. Mr. Lewis testified that cormorants roost on a variety of structures including docks, moorings, etc. Mr. Lewis noted that DMR's Bureau of Public Health routinely monitors water quality for fecal coliforms. In addition, tidal exchange helps to turnover the water in the area. According to the applicant, all 11 LPAs will be relinquished if the proposal is granted (App 4). For the reasons described in section 2.B of this decision Tract 1 has been denied. This was the closest Tract to Mr. Francisco's existing experimental lease site (SR 10).

In consideration of the record and the issues discussed at the public hearing, it seems reasonable to conclude that the proposed operations will not present an unreasonable interference with other aquaculture leases in the area.

Exclusivity. The applicant is not requesting that other uses of the proposed lease area be excluded or otherwise prohibited (App 6).

Therefore, considering the existing aquaculture activities, the proposed site will not unreasonably interfere with fishing or other water-related uses of the area.

D. Flora & Fauna

DMR Site Observations. Based on historical eelgrass (*Zostera marina*) data, in 2002, the closest eelgrass bed was located 100 feet to the west of the proposed area (SR 13). DMR staff did not observe eelgrass during the underwater site assessment, which occurred on July 10, 2018 (SR 13). DMR staff observed softshell clam (*Mya arenaria*), hard clam (*Mercenaria mercenaria*), blue mussel (*Mytilus edulis*), and European oyster (*Ostrea edulis*) shells on the sea bottom to the west of the proposed site (SR 11). DMR staff also observed Canada geese (*Branta canadensis*), double-crested cormorants (*Phalacrocorax auritus*), herring gulls (*Larus argentatus*), and a bald eagle (*Haliaeetus leucocephalus*) in the vicinity of the proposed lease site (SR 14).

Fisheries and Wildlife. Based on data maintained by the Maine Department of Inland Fisheries and Wildlife (MDIFW), the proposed lease area is located within Tidal Wading Bird and Waterfowl Habitat (SR 14). The proposed site is also located ~1,455 feet to the north of a ¼ mile buffer for a bald

eagle (*Haliaeetus leucocephalus*) nest (SR 14). In addition, the proposed site is located ~1,500 to the east of designated habitat for the great blue heron (*Ardea herodias*), which is listed as a Species of Special Concern in Maine (SR 14). DMR sent a copy of the lease application to MDIFW for their review and comment. MDIFW indicated that "Given that this proposed lease is in close proximity to two other separate leases, no additional impacts are anticipated."⁸

Based on this evidence, it appears that the culture of oysters as proposed for this lease site will not interfere with the ecological functioning of the area.

Therefore, 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

Per the site report, "there are no publicly-owned beaches, parks, docking facilities, or conserved lands owned by municipal, state, or federal government within 1,000 feet of the proposed lease site" (SR 15). Although not owned by municipal, state, or the federal government, the Hamilton Audubon Sanctuary is located ~975 feet to the east of the proposed site, which is the closest conserved land to the proposed site (SR 15).

Therefore, the aquaculture activities proposed for this site will not unreasonably interfere with the public use or enjoyment within 1,000 feet of beaches, parks, docking facilities, or certain conserved lands owned by municipal, state, or federal governments.

F. Source of Organisms

The applicant intends to obtain stock from the following approved source:

Source	Location	Species
Muscongus Bay Aquaculture	Bremen, Maine	Eastern/American oysters

Therefore, the applicant has demonstrated that there is an available source of stock to be cultured for the lease site.

G. Light

⁸ CF: Email from J. Perry (MDIFW) to C. Burke dated July 9, 2018.

According to the application, except for navigation or marking purposes, lights will not be used at the proposed lease site (App 4). DMR's lighting regulations provide an exception for these purposes.

Therefore, 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

As previously noted in other sections of this decision, except for the use of two skiffs no other powered equipment is proposed for the site. Cleaning, sorting, and bagging of oysters will occur off the lease site. Any maintenance and construction of oyster cages will also occur off site.

Therefore, 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 noted in section 2.A of this decision, the applicant intends to deploy floating cages to cultivate oysters. The gear is primarily black and green in color (App 3). Two skiffs would be used to service the proposed lease site. Per the site report: "the aquaculture equipment and vessels...meet the visual impact standards as set forth in MDMR Regulation Chapter 3.37(A)" (SR 17).

Therefore, equipment and structures proposed for the lease site will comply with the visual impact criteria contained in DMR Regulation 2.37 (1) (A) (10).

4. CONCLUSIONS OF LAW

Based on the above findings, I conclude that:

- a. The aquaculture activities proposed for this site will not unreasonably interfere with the ingress and egress of any riparian owner.
- b. Based on the denial of Tract 1, the aquaculture activities proposed for this site, as modified, will not unreasonably interfere with navigation.
- c. 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.
- d. 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. 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. The applicant has demonstrated that there is an available source of American/eastern oysters (*Crassostrea virginica*) to be cultured for the lease site.
- g. The aquaculture activities proposed for this site will not result in an unreasonable impact from light at the boundaries of the lease site.
- h. The aquaculture activities proposed for this site will not result in an unreasonable impact from noise at the boundaries of the lease site.
- i. 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 an aquaculture lease set forth in 12 M.R.S.A. §6072.

5. DECISION

Based on the foregoing, the Commissioner grants Tract 2 of the proposed lease in the amount of 1.12 acres to Nelson Marass for a term of five years for the cultivation of American/eastern oysters (*Crassostrea virginica*) using suspended culture techniques. The lessee shall pay the State of Maine rent in the amount of \$100.00 per acre per year. The lessee shall post a bond or establish an escrow account pursuant to DMR Rule 2.40 (2)(A) in the amount of \$5,000.00, conditioned upon 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 M.R.S.A §6072(7-B).⁹ 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.

⁹ 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."

The following conditions shall be incorporated into the lease:

- a. The lease site must be marked in accordance with both U.S. Coast Guard requirements and DMR Rule 2.80.
- b. Other public uses that are not inconsistent with the purposes of the lease are permitted within the lease boundaries.

7. REVOCATION OF LEASE

The Commissioner may commence revocation procedures upon determining pursuant to 12 M.R.S.A §6072(11) and DMR Rule Chapter 2.42 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.

Dated: _____

12/5/19



Patrick C. Keliher, Commissioner
Department of Marine Resources