

Experimental Aquaculture Lease Application
Suspended Culture of Oysters
Damariscotta River, Newcastle

September 9, 2019

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION

George F. Faux, Inc., a Maine company, applied to the Department of Marine Resources (DMR) for an experimental aquaculture lease on 1.10 acres¹ located in Blackstone Narrows, Damariscotta River, Newcastle, Lincoln County, Maine, for the cultivation of American/Eastern oysters (*Crassostrea virginica*) using suspended culture techniques.

1. THE PROCEEDINGS

DMR accepted the application as complete on February 21, 2019. Notice of the completed application and 30-day comment period was provided to riparian landowners within 1,000 feet of the proposed site, the Town of Newcastle, including the Town of Newcastle Harbormaster, and other state and federal agencies. Notice of the 30-day comment period and opportunity to request a public hearing was published in the *Lincoln County News* on March 14, 2019. During the comment period, DMR received more than five written requests for a public hearing. The site report was issued on June 20, 2019 and the public hearing was scheduled for August 7, 2019 in Newcastle.

Notice of the hearing, copies of the application and DMR site report were provided to state and federal agencies for their review, the Town of Newcastle, riparian landowners within 1,000 feet of the proposed site, and subscribers of DMR's aquaculture email listserv. Notice of the hearing was published in the *Lincoln County News* on July 4 and 25, 2019. On July 24, 2019, Toni Simmons/Muscongus Bay Aquaculture applied for intervenor status in the proceeding.² As noted in the application, Ms. Simmons' company Muscongus Bay Aquaculture operates DAM GS2, a standard lease near Mr. Faux's proposed

¹ Applicant originally requested 1.12 acres. Based on the provided coordinates, DMR calculated the area at 1.10 acres.

² The deadline to submit intervenor applications was 4 p.m. on July 23, 2019. Ms. Simmons' application was submitted, via email, by N. Brylewski at 12:35 p.m. on July 24, 2019. Although the application was submitted late, DMR accepted the submission and processed the application accordingly.

experimental lease site. DAM GS2 is utilized by Muscongus Bay Aquaculture for bottom-planted, grow-out field trials for disease resistant oyster and quahog strains.³

On July 29, 2019, in accordance with Chapter 2.20(3)(A) of DMR regulations, Ms. Simmons/Muscongus Bay Aquaculture was granted limited intervenor status. Ms. Simmons/ Muscongus Bay Aquaculture was granted limited as opposed to full intervenor status, because many of the possible impacts alleged in the application appeared to speculative. The application did not contain enough information to substantiate the claims raised in the application, which made it impossible for DMR to determine whether Ms. Simmons/ Muscongus Bay Aquaculture would be substantially and directly affected by the proposed site. On July 29, 2019, in accordance with Chapter 2.29, DMR issued a procedural order specifying the deadline for the pre-filing of exhibits, witness lists, and witness testimony. The applicant and intervenor did not pre-file any exhibits, witness lists, or witness testimony.

The day of the hearing, Ms. Simmons/ Muscongus Bay Aquaculture requested that the hearing be postponed. In contemplating the request DMR considered several factors including: a) fairness to members of the public who requested a public hearing and may have expected to participate in the proceeding as originally scheduled; b) the burden placed on the applicant by a possible postponement; and c) the absence of any pre-filings. In consideration of these factors, DMR decided to hold the hearing as originally scheduled. However, DMR gave Ms. Simmons/Muscongus Bay Aquaculture the opportunity to designate an individual to testify on her behalf at the public hearing. Ms. Simmons/ Muscongus Bay Aquaculture did not designate anyone to testify on her behalf and she did not attend the public hearing.

The hearing was held as scheduled on August 7, 2019. Sworn testimony was given at the hearing by the following witnesses:

Name	Affiliation
George Faux	George F. Faux, Inc. (Applicant)
Flora Drury	Marine Scientist, DMR Aquaculture Division

Mr. Faux described aspects of the lease application and answered DMR's questions about the proposal. Ms. Drury testified about DMR's site visit. Members of the public who attended the hearing did not offer testimony and did not ask questions of any witness. There were no representatives from the municipality, other state agencies, or the federal government in attendance. The hearing was recorded by DMR. The Hearing Officer was Amanda Ellis.

³ CF: Ms. Simmons intervenor application, answer #7.

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. Revised gear layout introduced by the applicant at the public hearing (Exhibit 4)

2. DESCRIPTION OF THE PROJECT

A. Proposed Operations

The applicant currently holds an experimental lease, DAM GPx, which is a .62-acre site for the suspended culture of shellfish. If granted, the proposed lease site would be contiguous to the existing lease. The purpose of the proposed lease is to expand the applicant's existing commercial operations. The applicant intends to deploy up to 150 floating cages that measure $\leq 62'' \times 36'' \times 10''$ and up to 100 floating oyster bags, each measuring $20'' \times 36''$ (App 5-6, 27-32 and 37; SR 2). As originally proposed, the cages and bags would be secured to horizontal longlines that run east to west across the site. The applicant testified that the cages would be sunk to the bottom of the proposed lease site in October, and the cages would be brought back to the surface when ice is no longer present in the Great Salt Bay, which lies to the north of the proposed site. The applicant indicated that ice-out in the Great Salt Bay typically occurs by April.

In her application to intervene, Ms. Simmons/Muscongus Bay Aquaculture described her concerns related to the proposed layout of the gear and the current. Specifically, the application described:

The applicants gear will act as a sieve collecting debris (sticks, trees) as the current courses out of Great Salt Bay. If the applicant's moorings fail, all gear will course over our lease, which is on a very shallow area. The applicant has chosen to set up his gear perpendicular to the current, thus creating more force on his gear.⁴

The applicant testified that he has been observing water current in the area daily and feels that the layout he originally proposed would be suitable for the proposed operations.

However, to address the concerns raised by the intervenor, the applicant testified that he was willing to modify his original gear layout by shifting the lines approximately 30 to 40 degrees to the

⁴ CF: T. Simmons application to intervene, answer to question #3 in the application.

southeast. The applicant presented a gear drawing of the revised layout, which DMR entered into the record as Exhibit 4. Figure 1 depicts the gear layout as originally proposed in the application, referred to as "Option A" and the modified version submitted during the public hearing, referred to as "Option B." The gear layout in Option B is more parallel to the current than in Option A. If the lease is granted, the applicant indicated that he would like to be able to utilize both layouts, so that he can determine which option would work best.

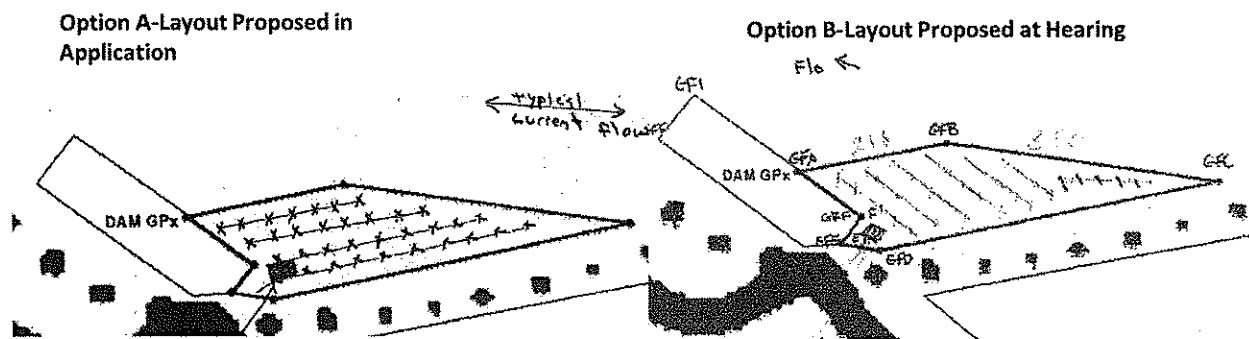


Figure 1: Layout of gear for Option A and Option B

The modified layout presented at the public hearing attempts to address the concerns raised by the intervenor. DMR staff reviewed the proposed change at the public hearing and had the opportunity to ask clarifying questions. DMR staff did not raise any objections or concerns with the revised layout. If the proposed lease is granted, DMR will allow the applicant to utilize both layouts. The applicant will be responsible for notifying DMR anytime the layout is changed between either option. If the lease is granted, DMR will include a condition that specifies the notice for a change in layout between either option.

The applicant is also proposing a 12'x16' float, which would support processing equipment including a tumbler. As originally proposed, the tumbler would be powered by a 12-volt, rechargeable battery (App 6). As operations progress, the applicant testified that a gasoline powered motor may be used instead of the rechargeable battery. The tumbler would be utilized for approximately 10 hours each week (App 6).

B. Site Characteristics

On May 8, 2019, DMR scientists visited the proposed lease site and assessed it and the surrounding area in consideration of the criteria for granting an experimental aquaculture lease. The

proposed site occupies subtidal waters between the Great Salt Bay to the north and the US Route 1 bridge to the south (SR 2). Less than 25 feet to the west of the proposed lease site is undeveloped property, which is owned by the Damariscotta River Association (DRA) (SR 2). The uplands surrounding the site are characterized by rocky intertidal areas that give way to steep banks and a mixed mature forest (SR 2).

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 a lease may be granted by the Commissioner upon determining 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

The eastern shoreline, opposite the proposed lease site, is characterized by residential properties. During the site visit, the closest observed dock was approximately 600 feet to the east of the proposal (SR 8). Per the site report: "If granted, the proposed lease is not expected to interfere with riparian access to shorefront property, docks, or moorings" (SR 8). The DRA owns property to the north and west of the proposed lease site. Access to the western portion of DRA's property is limited by the topography of the shoreline. Specifically, the site report notes that the steep wooded banks would hinder even hand-carry access for individuals that wish to utilize the DRA property to the west of the proposed site (SR 8).

The DRA property to the north of the proposed site contains a tidally exposed rocky beach that gives way to a steep wooded bank (SR 8). If the lease is granted, between approximately 200 and 260 feet of navigable water would remain between the proposed site and the DRA property to the north (SR 8). DRA is listed in the application as a riparian landowner and was provided with personal notice of the completed application and opportunity to comment on the proposal. DMR did not receive any comments from DRA about the proposal. The Newcastle Harbormaster indicated that the proposed site

“should not prevent riparian landowners from getting to and from their property.” DMR did not receive any other comments pertaining to riparian access.

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

B. Navigation

The proposed site is in the southern half of a bend in the navigational channel between the Great Salt Bay to the north and Glidden Point to the south (SR 9). The application indicates that the presence of rocks limits the type of vessels that can navigate this section of the Damariscotta River to kayaks and paddle boards (App 7). The site report also notes that vessel traffic is naturally limited to small outboard skiffs, sailboats, and hand-powered watercraft (SR 8). If the proposed lease is granted, approximately 200 feet of depth-appropriate navigable waters would remain to the north of the site for vessels that are able to access this area (SR 9).

Public access points, to the north of the proposed site, within Great Salt Bay are limited to hand-carry vessels (SR 9). The Johnny Orr Rapids, a 1.3 mile stretch of shallow rock-strewn waters, are located to the south of the proposed lease site and separate it from the closest public boat launch in the village of Damariscotta (SR 9). During the comment period and public hearing, DMR did not receive any feedback to suggest that the proposed lease site would unreasonably interfere with navigation in the area.

Therefore, the aquaculture activities proposed for this site will not unreasonably interfere with navigation. The lease site must be marked in accordance with U.S. Coast Guard requirements.

C. Fishing & Other Water Related Uses

During the site visit, DMR staff did not observe any commercial or recreational fishing activities. Commercial and recreational fishing is limited by rocks in the area and the narrowness of the channel (SR 9). The Great Salt Bay, which is located approximately 250 feet to the north of the site, is designated a Marine Shellfish Preserve (SR 9). This statutory designation prohibits the harvest shellfish and other harvest activities that involve bottom disturbance, which further limits certain fishing activities in the area (SR 9).

The application testified that fishing for striped bass occurs in the area and would be allowed within the boundaries of the proposed lease site. Based on information from DMR’s Recreational Fisheries Program, fishing for striped bass occurs primarily from the shore (SR 9). DMR staff have

observed some vessels fishing for striped bass while conducting other site visits in the area (SR 9). The Harbormaster did not raise any concerns about the effects the proposal may have on striped bass fishing in the area. During the comment period and public hearing, DMR did not receive any feedback to suggest that fishing for striped bass or other marine organisms would be unduly affected by the proposed operations.

For the reasons described above, it is reasonable to assume that the proposal will not unreasonably interfere with commercial or recreational fishing in the area.

Other aquaculture uses. As previously noted, the closest aquaculture lease site to the proposal is DAM GPx an experimental lease site operated by the applicant. If the proposed lease is granted, it will be contiguous with the existing site. The closest aquaculture site not held by the applicant is DAM GS2, which is located approximately 75 feet to the south of the proposed site. As described in section I of this decision DAM GS2 is held by Muscongus Bay Aquaculture of which Tonie Simmons has an interest.

As noted in section I of this decision, Ms. Simmons/ Muscongus Bay Aquaculture was granted limited intervenor status. However, as the procedural history demonstrates, Ms. Simmons did not pre-file any exhibits or testimony, did not attend the public hearing associated with this proceeding, or designate someone to attend on her behalf. Although Ms. Simmons did not attend the public hearing, DMR staff asked the applicant clarifying questions about his operations as they related to some of the concerns raised by Ms. Simmons. For example, the applicant clarified that proposed gear will be submerged in October and not deployed on the surface until the Great Salt Bay is free of ice in the spring. Waiting until the Great Salt Bay is free of ice would appear to address concerns related to spring ice out and the possibility of the applicant's gear scouring the bottom of DAM GS2. The applicant also attempted to address Ms. Simmons' concerns related to gear layout as described in section 2.A of this decision.

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 exclusive use of the proposed lease area (App 9).

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 2005, the closest eelgrass bed was located 60 feet to the south of the proposed area (SR 11). During the site visit, DMR staff used an underwater video camera to assess the benthic ecology within the proposed lease area. DMR staff did not observe any eelgrass or other aquatic vegetation (SR 11). DMR staff did observe razor clams (*Ensis directus*) in a steep mud bank that separates the shallower western portions of the proposed site from deeper waters in the eastern portions of the site (SR 13).

DMR staff also observed 15 horseshoe crabs (*Limulus Polyphemus*) in the deeper water along the eastern portions of the proposed site (SR 13). The applicant intends to deploy floating gear from April through October, which will be kept on the bottom of the lease site during the winter months. The site report indicates that “the proposed floating gear is not expected to hinder the spring migration of horseshoe crabs into the area” (SR 13). The report further notes that “the submerged cages and bags are likely to be brought to the surface prior to the commencement of horseshoe crab migration and reproduction” (SR 13).

Fisheries and Wildlife. Based on data maintained by the Maine Department of Inland Fisheries and Wildlife (MDIFW), the proposed lease area is 575 feet to the southeast of a ¼ mile buffer for a bald eagle (*Haliaeetus leucocephalus*) nest (SR 10). An area designated as Tidal Wading Bird and Waterfowl Habitat is approximately 240 feet to the north of the proposed site (SR 10). DMR sent a copy of the lease application to MDIFW for their review and comment. MDIFW indicated that “minimal impacts to wildlife may be anticipated for the George F. Faux Inc aquaculture lease.”⁵

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.

F. Public Use & Enjoyment

Per the site report, there are no beaches, parks, or docking facilities owned by federal, state, or municipal government within 1,000 feet of the proposed lease site (SR 16).

⁵ CF: Email from R. Settele (MDIFW) to C. Burke dated March 22, 2019.

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, or docking facilities owned by municipal, state, or federal governments.

G. Source of Organisms

Seed stock for the proposed lease site will be sourced from Mook Sea Farms located in Walpole, Maine (App 1). This facility is an approved source of seed stock (SR 16).

Therefore, the applicant has demonstrated that there is an available source of American oysters (*C. virginica*) to be cultured for the lease site.

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 riparian ingress and egress.
- B. The aquaculture activities proposed for this site 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 existing aquaculture uses 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 oysters (*C. virginica*) 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 1.10 acres to George F. Faux 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 lessee⁶; however, no aquaculture rights shall accrue in the lease area until the lease is fully executed.

This lease is granted to the lessee for the cultivation of American oysters (*C. virginica*) using suspended culture techniques. The lessee shall pay the State of Maine rent in the amount of \$100.00 per acre per year. Since this is an experimental lease with more than 400 sq. ft. of structures and no discharge, a bond or escrow account is required. The lessee shall post a bond or establish an escrow account pursuant to DMR Rule 2.64 (10) (D) 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 MRSA §6072-A (15)⁷. Conditions are designed to encourage the greatest multiple compatible uses of the lease area, while preserving the exclusive rights of the lessee to the extent necessary to carry out the purposes of the lease. The following conditions shall be incorporated into the lease:

- A. The lease site must be marked in accordance with both U.S. Coast Guard requirements and DMR Rule 2.80.
- B. The leaseholder must notify DMR at least 24 hours prior to switching between either permitted gear layout (Option A or B). The notice must specify, which layout the lease holder is deploying (Option A or B). The leaseholder must also notify DMR at least 24

⁶ 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.”

⁷ 12 MRSA §6072-A (15) provides that:

“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.”

hours after the switch is complete. Unless otherwise specified by DMR, notifications must be sent to DMRaquaculture@maine.gov.

- C. Other public uses that are not inconsistent with the purposes of the lease are permitted within the lease boundaries.

7. REVOCATION OF EXPERIMENTAL LEASE

The Commissioner may commence revocation procedures upon determining pursuant to 12 MRSA §6072-A (22) and DMR Rule Chapter 2.64 (13) that no substantial research has been conducted on the site within the preceding year, that research has been conducted in a manner injurious to the environment or to marine organisms, or that any conditions of the lease or any applicable laws or regulations have been violated.

Dated: _____

9/19/19
PK



Patrick C. Keliher, Commissioner,
Department of Marine Resources