

**STATE OF MAINE
DEPARTMENT OF MARINE RESOURCES**

**Maude Robin McCoy
and
James W. Balano, III**

Experimental Aquaculture Lease Application
Suspended culture of American/Eastern oysters
Wheeler Bay, St. George

PEN RIx
February 28, 2019

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION

Maude Robin McCoy and James W. Balano, III applied to the Department of Marine Resources for an experimental aquaculture lease totaling 1.07 acres¹ and located east of Ram Island in Wheeler Bay², St. George, Knox County, Maine, for the cultivation of American/eastern oysters (*Crassostrea virginica*) using suspended culture techniques. DMR accepted the application as complete on August 07, 2018. No requests for a public hearing were received during the comment period and no hearing was held.

1. THE PROCEEDINGS

Notice of the application and the 30-day public comment period were provided to state and federal agencies, riparian landowners³, the Town of St. George, and others on the Department's mailing list. Notice of the application and comment period was published in the *Courier Gazette* on September 13, 2018.

The evidentiary record before the Department regarding this lease application includes the application, the Department's site report dated January 3, 2019, and the case file. The evidence from these sources is summarized below.⁴

2. DESCRIPTION OF THE PROJECT

A. Proposed Operations

The purpose of the proposed lease is to explore the commercial feasibility of overwintering oysters in floating bags at the water's surface, in the open waters of Wheeler Bay

¹ Applicant originally requested 1.0 acres. DMR calculations in the site report, based on the provided coordinates, indicate the area is 1.07 acres.

² Referred to as "Wheeler's Bay" in application.

³ Three riparian owners located within 1,000 feet of the proposed lease site were not included in the initial public comment period. A second 30-day notice period, ending on February 19, 2019, was extended to these riparian landowners.

⁴ These sources are cited below, with page references, as CF (case file), App (application), and SR (site report).

(App 6). The applicants intend to utilize the proposed lease area for both the overwintering of oysters, and as a grow-out area, where juvenile oysters reared in a small cove in northern Wheeler Bay will be moved for the final stages of their growth, prior to reaching market size (App 6). Floating flip bags would remain on the surface of the proposed lease site throughout the year (App 7). The applicants intend to visit the site daily, weather permitting, for routine maintenance (App 6).

B. Site Characteristics

On December 6, 2018, 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 is in Wheeler Bay, east of Ram Island. The eastern Ram Island shoreline facing the proposed lease is composed of ledge and rock (SR 2). A coniferous forest and apparent residential structures are located on the island's uplands (SR 2). At mean low water, the distance from the southwest corner of the proposed lease site to the nearest point on Ram Island is less than 20 feet (SR 7). Houses and docks are located on the St. George mainland, more than 1,000 feet to the north and east of the proposed lease (SR 2).

Firm mud and sand compose the areas of the sea floor within the proposed lease observed by DMR staff (SR 12). At mean low water, water depths range between ~7.4 feet at the southwest corner of the proposed lease and ~12.3 feet at the southeast corner (SR 2). The proposed lease is in an area classified by the Department's Water Quality program as approved for the harvest of shellfish (App 1).

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 proposed lease area is located in subtidal waters to the east of Ram Island, in Wheeler Bay (SR 2). At low water, the proposed lease is located less than 20 feet to the east of Ram Island and according to the site report, "At lower tidal stages, through traffic between Ram Island and the western boundary of the proposed lease would be restricted by tidally exposed ledges" (SR 8). Riparian access to and from other shorelines will not be hindered by the proposed lease, due to the distance between these shorelines and the proposal (SR 9).

During DMR's site review, the nearest dock to the proposed lease was located on the northern shore of Ram Island, over 350 feet from the proposed lease (SR 8). Per the site report: "Although course alteration may be required at times, the Ram Island dock will remain accessible if the proposed lease is granted" (SR 8).

According to the site report, a mooring field is located to the north of the proposed lease, in Wheeler Bay (SR 9). The closest mooring is located more than 325 feet to the north of the proposed lease (SR 9). During the site visit, DMR staff observed a boat traveling north toward this mooring field; this vessel maintained a course to the east of the proposed lease site (SR 9).

During the review period, the Department did not receive any comments concerning riparian ingress and egress. Based on the absence of comments it is reasonable to conclude that there are no concerns about the effects the proposed site may have on riparian ingress and egress. Considering that the proposed lease does not block access to the dock located on the northern shore of Ram Island, and the distance between the proposed lease and the Wheeler Bay mooring field, it is reasonable to conclude that the proposed lease will not unduly affect riparian ingress and egress from existing infrastructure. Additionally, the restriction of traffic between the western boundary of the proposed lease and the eastern shore of Ram Island described in the site report does not meet the statutory standard of unreasonable interference, as vessels could still land on other parts of the Ram Island shoreline during the tidal stages when vessel traffic might be restricted.

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

B. Navigation

The proposed lease is located northwest of a marked navigation channel that leads into Wheeler Bay (SR 9). The closest navigational aid to the proposed lease site is located greater than 2,200 feet to the south of the proposal (SR 9). During the site visit, DMR staff observed a

fishing vessel navigating into Wheeler Bay from the south (SR 9). This vessel “maintained a course through the deeper channel waters to the east of the proposal” (SR 9). More than 1,000 feet of water, with depths greater than 9 feet at all tidal stages, is available for navigation to the east of the proposed lease (SR 9).

During the review period, the Department did not receive any comments concerning navigation. Based on the absence of comments it is reasonable to conclude that there are no concerns about the effects the proposed site may have on navigation. Considering the distance available for navigation to the east of the site and the absence of comments, it appears that navigation in the area will not be unduly affected by the proposed lease application.

Exclusivity. The applicants are requesting to restrict vessel transit within the site (App 9). Restricting transit within areas of the proposed lease populated with gear is reasonable to enable the aquaculture project to be carried out while encouraging the greatest number of compatible uses of the area, as provided in 12 MRS §6072-A (15). It is unreasonable to restrict vessel traffic on sections of the proposed lease that do not contain gear. Conditions reflecting these restrictions will be included in the lease.

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 Uses

During the site visit, staff observed a single lobster buoy located along the eastern boundary of the proposed lease (SR 9). A second buoy was observed to the northwest of the proposed lease, but was presumed to be associated with the Ram Island parcel due to its proximity to an existing dock (SR 9-10). In the site report, MDMR staff acknowledged that an “accurate representation of potential [lobster] fishing activity within the area was unlikely to be observed” due to the timing of the site visit (SR 10). However, the site report went on to indicate that the proposed lease area is “unlikely to unreasonably interfere with lobstering in the area” due to the fact that “adequate room is available to the north, south, east, and west of the proposal for boats to maneuver, set, and haul gear” (SR 10).

During the review period, the Department did not receive any comments from fishermen or other user groups regarding the lease proposal. Based on the absence of public comments it is reasonable to conclude that fishermen and others do not have concerns about the proposed activities.

Other aquaculture leases. There are sixteen active Limited Purpose Aquaculture (LPA) licenses within one mile of the proposed lease; eight of these LPA licenses are held by the lease applicants (SR 10).⁵ The closest LPA license, held by an individual other than the applicants, is located more than 3,150 feet from the proposed lease (SR 10). Based on this distance, it appears that the proposed lease will not unreasonably interfere with other aquaculture uses in the area.

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

D. Flora & Fauna

Site Observations. Historical eelgrass (*Zostera marina*) data collected in 2005 indicate the presence of eelgrass beds within the boundaries and general vicinity of the proposed lease (SR 12). During the DMR site review, a depth sounder and a drop-camera were used to assess the proposed lease area for the presence of eelgrass (SR 12). According to the site report “an occasional frond of eelgrass was noted, but MDMR did not see any indication of an established bed” (SR 12).

Fisheries and Wildlife. Data maintained by MDIFW indicates that the proposed lease overlaps with Tidal Wading Bird and Waterfowl Habitat, which is defined under Maine's Natural Resources Protection Act (NRPA) as Significant Wildlife Habitat (SR 11). The Department sent a copy of the lease application to MDIFW for their review and comment. MDIFW indicated that because the site was outside of eelgrass beds, which can be a component of Tidal Wading Bird and Waterfowl Habitat, minimal impacts from the proposed lease are anticipated.⁶

Based on the lack of eelgrass beds within the proposed lease site, and the comments received from MDIFW, which did not object to the proposed lease or describe any significant interference that the proposal might have on the surrounding wildlife, it appears that the proposed lease activities 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

⁵ The lease applicants also have a second application pending DMR's review within one mile of this proposed lease.

⁶ CF: Emails from J. Perry MDIFW Environmental Review Coordinator, dated October 26, 2018 and February 15, 2019.

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

F. Source of Organisms

Seed stock for this proposed lease site will be obtained from Muscongus Bay Aquaculture, in Bremen, Maine (App 2). This is an approved source of seed stock.

Therefore, the applicant has demonstrated that there is an available source of oysters 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 the ingress and egress of any riparian owner.
- 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 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.

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 1.07 acres to Maude Robin McCoy and James W. Balano, III, 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 lessee⁷; 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/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. 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)⁸. 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. Vessel transit is prohibited within sections of the proposed lease occupied by aquaculture gear.
- C. Other public uses that are not inconsistent with the purposes of the lease are permitted within the lease boundaries.

⁷ 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.”

⁸ 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.”

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:

2/28/19



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