FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION

John Marsh applied to the Department of Marine Resources ("DMR") for an experimental aquaculture lease on 2.58 acres located in the Medomak River, north of Hog Island, Bremen, Lincoln County, for the cultivation of American oysters (Crassostrea virginica), European oysters (Ostrea edulis), and northern quahogs (Mercenaria mercenaria) using suspended culture techniques. DMR accepted the application as complete on August 25, 2017. 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 which were requested to review the project, as well as to riparian landowners, the Town of Bremen and its Harbormaster, members of the Legislature, representatives of the press, aquaculture organizations, and others on the Department’s mailing list. Notice of the application and comment period were published in the Lincoln County News on September 9, 2017.

The evidentiary record before the Department regarding this lease application includes the application and the Department’s site report dated November 27, 2017, as well as the case file. The evidence from these sources is summarized below.²

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¹ The applicant originally requested 2.50 acres, but DMR calculations indicate the area is 2.58 acres.
² These sources are cited below, with page references, as CF (case file), App (application), SR (site report).
2. DESCRIPTION OF THE PROJECT

A. Site History

The entirety of the proposed lease is contained within the enclosed boundaries of a former lobster pound. The pound enclosures were owned by the Bremen Realty Lobster Co-op. In 2016, the Bremen Realty Lobster Co-op conveyed the lobster pound enclosures, the adjacent storefront property, and a submerged lands lease granted by the Maine Bureau of Parks and Lands, to Community Shellfish LLC. The applicant, John Marsh, is the sole owner of Community Shellfish LLC (App 1).

Image 1: Depicting the pound enclosure, looking southwest from the center of the proposed lease site. Image taken on October 12, 2017.

The proposed lease site is partially intertidal (SR 6). Intertidal experimental lease sites require, in part, the written permission of every riparian landowner whose land in the intertidal zone will be used; and the consent of municipal officers if the municipality has a shellfish conservation program pursuant to 12 MRSA §6671. The Town of Bremen has a shellfish

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3 Statutes and rules pertaining to experimental intertidal lease sites: 12 MRSA § 6072-A (8). Rules; general and lease application. ...The rules must require an applicant to, at a minimum, meet the requirements of section 6072, subsection 2, paragraph E and subsection 4, paragraphs A, B, C, F, G and J. [As shown above, paragraph F requires “the written permission of every riparian owner whose land to the low water mark will actually be used.”] The rules must also require an applicant to provide to the department proof of access to the lease area. If access will be
conservation program. The applicant has provided sufficient evidence of ownership of the shorefront property and intertidal lands on which the aquaculture lease is located. The applicant has also obtained consent from municipal officials in the Town of Bremen to locate the proposed site in the intertidal zone. Therefore, the applicant has satisfied the necessary riparian landowner and municipal permissions related to intertidal experimental lease sites.

![Figure 1: Aerial imagery depicting the boundaries of the proposed site over the pound enclosures.](image)

The area no longer functions as a lobster pound and Mr. Marsh currently holds four Limited Purpose Aquaculture Licenses (LPAs) within the boundaries of the proposed lease site (App 3). The LPAs were originally granted in 2017 for the cultivation of American oysters and northern quahogs using suspended culture techniques. The Department has not received any

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across riparian land, the applicant shall provide to the department the written permission of every riparian owner whose land will be used to access the lease area.

12 MRSA § 6072-A (11). Municipal approval. In any municipality with a shellfish conservation program under section 6671, the commissioner may not issue a limited-purpose lease under this section for the intertidal zone within the municipality without the consent of the municipal officers.

Chapter 2.64 (a) Experimental Aquaculture Lease Application Requirements (C) Required elements (6): the written permission of every owner of intertidal land in, on or over, which the experimental activity will occur. If private property is to be used for access, written permission from the property owner must be provided with the application.

Chapter 2.64 (6) Municipal Approval. The Commissioner may not issue an experimental lease for the intertidal zone within a municipality with a shellfish conservation program (12 MRSA § 6671) without the consent of the municipal officers.

4 CF, Warranty deed to Community Shellfish LLC recorded October 19, 2016.

5 CF, Town of Bremen selectboard meeting minutes from December 21, 2017 whereby a majority of municipal officials consented to the applicant’s proposal in the intertidal zone.
complaints regarding the operation of these licenses. Mr. Marsh plans to terminate the LPAs if the lease is granted (App 2).6

B. Proposed Operations

The purpose of the proposed lease site is to expand the applicant’s commercial production of American oysters, European oysters, and northern quahogs using primarily floating bags (App 3). The floating bags will measure 36” x 16” x 6” and be attached to a series of moored line arrays (App 3). The bags will be flipped on a regular basis to control fouling (App 3). The applicant also intends to deploy bottom cages for the cultivation of European oysters and northern quahogs (App 4). The wire mesh cages will measure 4’x4’x4’ and will contain bags (App 4). Harvesting, grading, and culling will be conducted on the site and in upland facilities owned by Community Shellfish LLC (App 4).

C. Site Characteristics

On October 12, 2017, 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 lease site occupies “intertidal and subtidal waters within an existing lobster pound located in the Medomak River” (SR 2). The upland is characterized by commercial and residential buildings (SR 2). The commercial buildings are owned by Community Shellfish LLC and are currently used as a buying station for lobster and other shellfish (SR 2). A single residential building is located “upland of the northern portion of the proposed lease site” (SR 2). The shoreline across from the proposed lease site is undeveloped and contains deciduous trees (SR 2). A mooring field, several ramps, floats, and the hull of the “Cora F. Cressey” are located to the south of the proposed site (SR 2). The site report notes:

At the time of the Department’s site assessment, all corners of the proposed lease were exposed indicating that the site is both intertidal and subtidal. According to the applicant, the water depth at the center of each lobster pound is approximately 4 feet at low tide (SR 6).

The western boundary of the proposed feet is less than 20 feet from the nearest upland (SR 5). The bottom of the proposed lease site is characterized by mud and firm gravel (App 5). The proposed lease is in an area currently classified by the Department of Marine Resources Water Quality Classification program as “approved for the harvest of shellfish” (SR 6).

6 JMAR117, JMAR217, JMAR317, and JMAR417.
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 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 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**

Mr. Marsh, via Community Shellfish LLC, owns the shorefront property and intertidal lands on which the entire pound enclosure and proposed lease is located. The pound enclosure has been in place for several decades and it seems reasonable to conclude that riparian landowners in the area are accustomed to maneuvering around the pound structure ergo the proposed lease site, if they so choose. All aquaculture gear will be deployed within the existing pound enclosure, so the proposed lease site would not create an interference with riparian access to and from the shore. Furthermore, during the review period, DMR sent notice of the application to known riparian landowners within 1,000 feet of the proposed lease site. The Department did not receive any comments from riparian owners. Based on the absence of comments, it is reasonable to conclude that the riparian landowners do not have any concerns about their ingress and egress. The site report indicates that the proposal “will not interfere with the ingress and egress of riparian owners nearby the proposed lease” (SR 6). It appears that activities at the lease site are unlikely to hamper riparian access to and from the shore.

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

**B. Navigation**

The entirety of the proposed lease is contained within the enclosed boundaries of a former lobster pound, which limits navigation within the area. For example, only small vessels at certain tides would be able to access the proposed area through breaches in the eastern wall of the lobster pound (SR 6). The site report notes that “the proposed lease will not interfere with boats navigating in the area” (SR 6). During the review period, DMR did not receive any
comments from the Bremen Harbormaster. Based on the absence of comments, it is reasonable to conclude that the Bremen Harbormaster does not have any concerns about navigation. Given that the proposed lease site is located within an enclosure, DMR will require alternate marking requirements pursuant to Rule 2.80(3). Mr. Marsh will be required to place signs on the outside of the pound that indicate aquaculture gear is deployed within the enclosure. A condition reflecting this requirement will be included in the lease.

It appears from this evidence that navigation in the area will not be unduly affected by the presence of the proposed lease site. The lease must be marked in accordance with DMR Rule 2.80.

Therefore, I find that 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

The application notes “there is currently no alternative use of the area nor is there purposeful activity such as shellfish harvest” (App 5). During the site visit, staff did not observe any commercial or recreational fishing activities (SR 6). Per the site report:

It is unlikely that the proposed aquaculture lease will interfere with fishing and other water-related uses in the area. This is due to the fact that the proposed lease area is enclosed and therefore only small vessels at certain tides are able to access the lease over the small breaches in the eastern wall of the lobster pound that encloses the proposed lease (SR 6).

It appears from this evidence that the proposed lease site is unlikely to affect fishing in the area.

72.80 Marking Procedures for Aquaculture Leases

1. When required by the Commissioner in the lease, aquaculture leases shall be marked with a floating device, such as a buoy, which displays the lease identifier assigned by the Department and the words SEA FARM in letters of at least 2 inches in height in colors contrasting to the background color of the device. The marked floating device shall be readily distinguishable from interior buoys and aquaculture gear.

2. The marked floating devices shall be displayed at each corner of the lease area that is occupied or at the outermost corners. In cases where the boundary line exceeds 100 yards, additional devices shall be displayed so as to clearly show the boundary line of the lease. In situations where the topography or distance of the lease boundary interrupts the line of sight from one marker to the next, additional marked floating devices shall be displayed so as to maintain a continuous line of sight.

3. When such marking requirements are unnecessary or impractical in certain lease locations, such as upwellers located within marina slips, the Commissioner may set forth alternative marking requirements in an individual lease.

4. Lease sites must be marked in accordance with the United State’s Coast Guard’s Aids to Private Navigation standards and requirements.
Exclusivity. The entirety of the proposed lease is contained within the enclosed boundaries of a former lobster pound and the applicant owns the intertidal lands and the adjacent shorefront.

Other aquaculture leases. Other than the four LPA licenses held by Mr. Marsh, there are no other aquaculture sites within a one-mile radius of the proposed site (SR 7).

Based on this evidence, it appears that the proposed lease will not unreasonably interfere with fishing or other uses of the area.

Therefore, considering the number and density of aquaculture leases in the area, I find that the aquaculture activities proposed for this site will not unreasonably interfere with fishing or other uses of the area.

D. Flora & Fauna

Site Observations. During the site visit, Department staff observed rockweed (Fucus sp.), periwinkles (Littorina sp.), and green crabs (Carcinus maenad) within proposed lease site (SR 7). The site report notes that: “American oysters (C. virginica), which were likely from the active LPAs within the proposed lease site, were also seen” (SR 7). Historical eelgrass (Zostera marina) cover data collected by DMR, in 2005, indicated that eelgrass was present “with a 70-100% density within the northern portion of the proposed lease site (SR 7). However, during the site assessment eelgrass was not observed (SR 7).

Fisheries and Wildlife. DMR sent a copy of this lease application to the Maine Department of Inland Fisheries and Wildlife (MDIFW) for their review and comment. MDIFW noted that “minimum impacts to wildlife are anticipated.”

It appears that the culture of American oysters (Crassostrea virginica), European oysters (Ostrea edulis), and northern quahogs (Mercenaria mercenaria) as proposed for this lease site will not interfere with the ecological functioning of the area.

Therefore, I find that 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 public docking facilities or beaches within 1,000 feet of the proposed lease (SR 9). However, the hull of the “Cora F. Cresse,” a five-masted schooner, which is listed on the National Register of Historical Places is located ~70 feet to the southwest

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9 CF, Email from MDIFW to the Aquaculture Division dated September 11, 2017.
of the proposed lease site. The site report indicates that “the proposed lease will not interfere with public enjoyment of this historic place” (SR 9).

Therefore, I find that 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 Mook Sea Farm in Walpole, Maine; Muscongus Bay Aquaculture in Bremen, Maine; and.

Therefore, I find that the applicant has demonstrated that there is an available source of American oysters (Crassostrea virginica), European oysters (Ostrea edulis), and northern quahogs (Mercenaria mercenaria).

4. CONCLUSIONS OF LAW

Based on the above findings, I conclude that:

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

2. The aquaculture activities proposed for this site will not unreasonably interfere with navigation.

3. 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.

4. 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.

5. 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.

6. The applicant has demonstrated that there is an available source of American oysters (Crassostrea virginica), European oysters (Ostrea edulis), and northern quahogs (Mercenaria mercenaria).

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 an experimental lease of 2.58 acres to John Marsh, 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 lessee\(^{10}\); 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 (*Crassostrea virginica*), European oysters (*Ostrea edulis*), and northern quahogs (*Mercenaria mercenaria*) 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)\(^{11}\). 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:

1. The lease site must be marked in accordance with U.S. Coast Guard requirements, and pursuant to DMR Rule 2.80(3) the lessee is required to place signage on the outside of the pound that includes the lease identifier assigned by DMR and indicates aquaculture gear is deployed within the enclosure.

\(^{10}\) 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."

\(^{11}\) 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.

Date: 1/8/2018

Patrick C. Keliher, Commissioner
Department of Marine Resources