

STATE OF MAINE
DEPARTMENT OF MARINE RESOURCES

Experimental Aquaculture Lease Application

Suspended culture of shellfish

Broad Cove, Yarmouth

Thomas Henninger

CAS BC2x

June 20, 2019

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION

Thomas Henninger applied to the Department of Marine Resources (“DMR”) for a three-year experimental aquaculture lease located west of Sunset Point in Broad Cove, Casco Bay, Yarmouth, Cumberland County. The proposed lease is 2.75 acres¹ in size, and is proposed for the suspended cultivation of American/eastern oysters (*Crassostrea virginica*). DMR accepted the application as complete on October 24, 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 landowners, the Town of Yarmouth and its Harbormaster, and others on the Department’s mailing list. Notice of the application and comment period was published in the *Northern Forecaster* on December 6, 2018.

The evidentiary record before the Department regarding this lease application includes the application, the Department’s site report dated May 1, 2019, and the case file. The evidence from each of these sources is summarized below.²

2. DESCRIPTION OF THE PROJECT

A. Proposed Operations

The purpose of the proposed experimental lease is to assess the viability of a commercial lease operation in the chosen location (App 4). American/eastern oysters (*C. virginica*) would be cultivated using floating and bottom cages, arranged in up to 16 parallel lines on the proposed site (App 10A). Up to 210 floating cages are proposed, with dimensions of 41” x 68” x 22” and up to 16 bottom cages, measuring 3’ x 4’ x 4’ are proposed (App 10A-11). During the winter months, cages would be sunk to the bottom for overwintering (App 5).

¹ Applicant originally requested 2.68 acres. MDMR calculations in the site report, based on the provided coordinates, indicate the area is 2.75 acres.

² These sources are cited below, with page references, as CF (case file), App (application), SR (site report).

B. Site Characteristics

On April 25, 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 in Broad Cove, Casco Bay (SR 2). A mixed forest and residential buildings comprise the Broad Cove uplands; the shoreline is composed of rocks, sand, and mud (SR 2). At lower tidal stages, extensive mudflats are exposed at the head of Broad Cove (SR 2).

At mean low water, the proposed lease is located approximately 1,030 feet from Sunset Point, on the eastern shore of Broad Cove, and approximately 2,000 feet from the cove's western shore (SR 4). Water depth within the proposed lease range between 13.34 and 18.14 at mean low water (SR 3). The bottom of the proposed lease site is flat and comprised of mud (SR 7).

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 water related uses of the area, taking into consideration other aquaculture uses in the 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 is located at the mouth of Broad Cove in Casco Bay (SR 5). Houses, some with docks and moorings, were observed to the east, north, and west of the proposed lease (SR 5). The closest shorefront land to the proposed lease is located over 1,030 feet to the east (SR 4). This distance provides adequate room for riparian access to and from the shoreline. At the time of MDMR's site visit on April 25, 2019, the closest mooring was observed approximately 430 feet to the northeast of the proposed lease (SR 5). The proposed lease will not impede depth appropriate vessels from utilizing this mooring due to this distance.

The Yarmouth Harbormaster stated in written comments that the proposed lease application does not interfere with the ability of riparian landowners located within 1,000 feet of the proposed lease to get to and from their property.³ During the review period, the Department did not receive any comments from members of the public concerning access to riparian owned land. Based on the absence of public comments it is reasonable to conclude that there are no concerns about the effects the proposed site may have on

³ CF: Harbormaster Questionnaire dated May 1, 2019.

riparian ingress and egress. It appears from this evidence that riparian ingress and egress will not be unduly affected by the proposed lease application.

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 to the east of the deep channel located in the center of Broad Cove (SR 5). Over 1,000 feet are located between the proposed lease and the 6-foot contour line on the western side of Broad Cove. Per the site report

This distance provides adequate room for vessels, which are naturally constrained by water depths within Broad Cove, to navigate in and out of this area via the deep-water channel (SR 5).

Additionally, over 1,000 feet are located between the proposed lease and the eastern shoreline of Broad Cove at mean low water (SR 5). Given this distance, it is unlikely that the proposed lease site will unreasonably interfere with depth-appropriate vessels navigating to the east of the proposal.

The Yarmouth Harbormaster indicated that the proposed lease does not interfere with navigation in designated channels.⁴ During the review period, the Department did not receive any public comments regarding navigation. Based on the absence of public comments, it is reasonable to conclude that there are no concerns regarding the effects the proposed lease may have on navigation within the area. It appears from this evidence that navigation in the area will not be unduly affected by the proposed lease application.

Therefore, the aquaculture activities proposed for this site will not unreasonably interfere with navigation.

C. Fishing & Other Uses

Fishing. According to the Yarmouth Harbormaster, little to no commercial and/or recreational fishing activities occur within the area of the proposed lease.⁵ During the site visit on April 25, 2019, no fishing activities were observed within the lease site, but two buoys that may have marked lobster traps were observed to the west of the proposed lease (SR 5). In the site report, DMR acknowledged that commercial and recreational uses of this area are likely “more prevalent in the summer months” (SR 7). If granted, the location and size of the proposed lease would not prevent commercial or recreational fishing activities from occurring in Broad Cove.

Given the absence of public comments expressing concerns regarding interference with fishing, it is reasonable to conclude that there are no concerns about the effects the proposed site may have on commercial or recreational fishing. It appears from this evidence that the proposed lease is unlikely to unreasonably affect commercial and recreational fishing activities in the area.

⁴ CF: Harbormaster Questionnaire dated May 1, 2019.

⁵ CF: Harbormaster Questionnaire dated May 1, 2019.

Other aquaculture uses. Eight Limited Purpose Aquaculture (LPA) licenses and one standard aquaculture lease are located within one mile of the proposed lease (SR 5). The closest of these is a LPA license located within the proposed lease site and held by the applicant (SR 5). The closest aquaculture operation held by another individual is LPA license SBER117, which is located approximately 700 feet to the southeast of the proposed lease and permitted for the suspended culture of shellfish (SR 6). Due to this distance, and the absence of public comments concerning the impact of the proposal on existing aquaculture operations, it is unlikely that the activities proposed by the applicant will negatively impact existing aquaculture leases and licenses in the area. Based on this evidence, it appears that the proposed lease will not unreasonably interfere with other aquaculture uses in the area.

Other water-related uses. During the site visit on April 25, 2019, DMR staff did not observe other water-related uses of the proposed lease area not described elsewhere in this decision. During the review period, the Department did not receive any public comments detailing other uses of the area. Based on the absence of public comments, it is reasonable to conclude that there are no concerns regarding the effects the proposed lease may have on other water-related uses of 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

Data collected in 2018 and 2013 show the closest documented eelgrass (*Zostera marina*) beds to be located approximately 120 and 130 feet respectively from the proposed lease site (SR 7). During MDMR's site review, no eelgrass was observed when assessing the bottom of the proposed lease via a remotely operated vehicle (SR 7).

Data maintained by the Maine Department of Inland Fisheries and Wildlife (MDIF&W), show that the proposed lease is located approximately 260 feet from Tidal Wading Bird and Waterfowl Habitat, and 850 feet to the northeast of Essential Habitat for the roseate tern (SR 7 & 8). DMR sent a copy of the lease application to MDIFW for their review and comment. MDIFW indicated: "minimal impacts to wildlife are anticipated".⁶

Based on the evidence that the proposed lease does not intersect with historical eelgrass beds or mapped wildlife habitat, and because DMR's site report does not contain concerns regarding the impact of the proposed lease on the surrounding ecosystem, it appears that the culture of shellfish, 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

⁶ CF: Email from J. Perry, MDIF&W Environmental Review Coordinator, dated January 15, 2019.

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 9).

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

American/eastern oyster seed would be obtained from Mark Green, in Peaks Island, Maine (App 1). This source is approved by MDMR.

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

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 stock 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 2.75 acres to Thomas Henninger 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.

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."

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:

1. The lease site must be marked in accordance with both U.S. Coast Guard requirements and DMR Rule 2.80.
2. 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: _____

6/20/19



Patrick C. Keliher, Commissioner
Department of Marine Resources

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."