

**STATE OF MAINE
DEPARTMENT OF MARINE RESOURCES**

Nice Oyster Company, LLC

Application for Change in Species and Gear Authorization
New Meadows River, Brunswick

NMR WPx

July 29, 2019

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION

Nice Oyster Co, LLC applied to the Department of Marine Resources (DMR) to change the species and gear authorization for their existing experimental lease NMR WPx, located east of Woodward Point and south of Getchell's Ledge in the New Meadows River in the town of Brunswick, Cumberland County, Maine. The leaseholder is seeking authorization to cultivate surf clams (*Spisula solidissima*), to alter the configuration of authorized floating gear, and to install additional suspended gear on the existing experimental lease site.

1. THE PROCEEDINGS

Notice of the application and the 14-day public comment period were provided to federal agencies, riparian landowners, and the Town of Brunswick. The evidentiary record before DMR regarding this lease amendment application includes two exhibits (see exhibit list below).

LIST OF EXHIBITS¹

1. Application for a change of species and gear authorization
2. Original lease decision signed August 22, 2017

2. STATUTORY CRITERIA & FINDINGS OF FACT

Approval of experimental aquaculture lease amendments is governed by 12 M.R.S.A. § 6072-A (8) and Chapter 2.44 of DMR regulations. The statute and regulations provide that the Commissioner may grant amendments for the use of specific gear, species, and/or operational modifications on an existing lease site provided the proposed changes do not materially alter the findings of the original decision or would result in a change to the original lease conditions.

A. Original Lease Decision

On August 22, 2017, DMR granted lease NMR WPx to Nice Oyster Company, LLC (Exhibit 2, page 8). DMR's Findings of Fact, Conclusions of Law, and Decision, henceforth referred to as "the decision", found that the evidence in the record supported the conclusion that the aquaculture activities proposed by Nice Oyster Company, LLC met the requirements for granting an experimental aquaculture lease as set forth in 12 M.R.S.A. § 6072-A (Exhibit 2, page 7).

¹ Exhibits 1 and 2 are cited below as: Application – "App", DMR Decision on Lease NMR WPx - "Exhibit 2".

The decision provided authorization to cultivate shellfish using both bottom culture and suspended culture (Exhibit 2, page 7). Surface bags and bottom cages and/or trays comprise the gear authorized for the suspended culture of shellfish on NMR WPx (Exhibit 2, 2). The decision authorized surface bags to be deployed along two horizontal longlines, each approximately 200 feet in length (Exhibit 2, page 1). The decision also provided authorization for bottom cages and/or trays to be deployed along up to five submerged longlines, each approximately 350 feet in length (Exhibit 2, page 2).

Conditions imposed on lease NMR WPx, pursuant to 12 M.R.S.A § 6072-A (15) and located on page 7 of the decision, are as follows:

1. The lease site must be marked in accordance with both U.S. Coast Guard requirements and DMR Rule 2.80.
2. Dragging, lobster fishing, shellfish harvesting, and diving, are prohibited within the lease boundaries, except by authorization of the leaseholder.
3. Other public uses that are not inconsistent with the purposes of the lease are permitted within the lease boundaries.

B. Proposed Species Changes and Findings

Nice Oyster Company, LLC is requesting the authorization to cultivate surf clams (*S. solidissima*) on their existing experimental lease site NMR WPx (App 3). The leaseholder has demonstrated that there is an available source of surf clams (*S. solidissima*) for cultivation, as they propose to obtain surf clam seed from Downeast Institute, located in Beals, Maine or from Basket Island Shellfish, located in Portland, Maine (App 3). Per the application, surf clams (*S. solidissima*) could be grown using the existing gear authorized on NMR WPx and therefore no gear changes would be required (App 1).

NMR WPx is currently authorized to cultivate American oysters (*Crassostrea virginica*), European oysters (*Ostrea edulis*), bay scallops (*Aequipecten irradians*), and sea scallops (*Placopecten magellanicus*). As the addition of surf clams (*S. solidissima*) would not require gear changes to the existing lease site, the addition of this shellfish species would not cause a material deviation from the currently permitted operations. Therefore, the proposed species change is consistent with the findings of the original decision. Furthermore, the proposed species change would not result in a change to the original lease conditions.

C. Proposed Gear Changes, Operational Modifications, and Findings

Nice Oyster Company, LLC is authorized to deploy a total of five submerged longlines and two surface longlines on experimental lease NMR WPx (Exhibit 2, 1-2). The submerged lines, which measure approximately 350 feet in length are used to anchor bottom cages and/or trays, while the surface longlines, which measure approximately 200 feet in length, are deployed to hold paired surface bag (Exhibit 2, 1-2).

Nice Oyster Company, LLC is requesting the authorization to install a ~350-foot surface longline holding up to 30 shellfish bags, measuring 30" x 20" x 36", that would be suspended vertically in the water

column in a configuration similar to lantern nets² (App 1 & 12). This surface longline is proposed to replace one of the permitted submerged longlines and the associated bottom cages and/or trays (App 12).

The leaseholder is also requesting to modify the configuration of the existing surface bags on NMR WPx from two longlines holding paired surface bags to four longlines holding single surface bags. The two additional surface longlines, which are proposed to measure approximately 150 feet, would replace one of the currently permitted submerged longlines and associated bottom cages and/or trays (App 12).

The proposed changes would replace two submerged longlines on NMR WPx with surface longlines holding surface or midwater gear. Despite the fact that there are no proposed changes to the number of surface bags to be deployed on the existing lease site, the proposed operational modifications would increase the number of surface longlines from two, 200 -foot surface longlines to four, 200-foot surface longlines and one ~350-foot longline and would introduce a gear type that was not considered during the original application process. Therefore, the proposed changes to the gear type and configuration would materially alter the findings of the original decision for experimental lease NMR WPx.

3. DECISION

Based on the foregoing, the Commissioner grants the request from Nice Oyster Company, LLC for the authorization to cultivate surf clams (*S. solidissima*) on experimental lease NMR WPx but denies the leaseholder's gear amendment requests, including both the gear type and configuration amendments.

Dated: July 29, 2019



Patrick C. Keliher, Commissioner
Department of Marine Resources

² These shellfish bags are referred to in the application as "lantern nets" due to their similarity to this equipment type (App 1).

STATE OF MAINE**DEPARTMENT OF MARINE RESOURCES**

Experimental Aquaculture Lease Application

Suspended and bottom culture of shellfish

New Meadows River, Brunswick

Nice Oyster Company, LLC**NMR WPx**

Docket #2017-06-E

August 22, 2017

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION

Nice Oyster Company LLC, a Maine company, applied to the Department of Marine Resources (“DMR”) for an experimental aquaculture lease on 2.7 acres located in the New Meadows River, east of Woodward Point and south of Getchell’s Ledge, Brunswick, Cumberland County, for the purpose of cultivating American/Eastern oysters (*Crassostrea virginica*), European oysters (*Ostrea edulis*), bay scallops (*Aequipecten irradians*), and sea scallops (*Placopecten magellanicus*) using suspended and bottom culture techniques. DMR accepted the application as complete on June 6, 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, the DMR site report, 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 Brunswick and its Harbormaster, members of the Legislature, representatives of the press, aquaculture and environmental organizations, and others on the Department’s mailing list. Notice of the application and comment period was published in the *Brunswick Times Record* on June 23, 2017.

The evidentiary record before the Department regarding this lease application includes the application and the Department’s site report dated August 14, 2017, as well as the case file. The evidence from these sources is summarized below.¹

2. DESCRIPTION OF THE PROJECT**A. Proposed Operations**

The purpose of the proposed lease site is to explore the commercial feasibility of oyster and scallop production using a combination of culture techniques including longlines, surface shellfish bags, bottom cages and/or trays, and bottom seeding (App 3). The primary production method involves deploying two horizontal longlines, measuring ~200 feet, to support 150 surface bags for the cultivation of

¹ These sources are cited below, with page references, as CF (case file), App (application), SR (site report).

oysters (App 3, SR 2). The bags will be flipped on a weekly or bi-weekly basis to limit biofouling (App 3). During the winter months, the bags will be removed from the site and the oysters will be transferred to bottom gear or moist air storage (App 3).

In addition to the surface bags, five longlines, measuring ~350 feet will be submerged in order to anchor 30 bottom cages and/or trays for the cultivation of scallops (App 3, SR 2). The cages will be periodically lifted from the bottom for maintenance and harvesting purposes (App 3). Gear will be cleaned on land rather than on the proposed site (App 3).

The applicant also intends to seed the bottom of the lease site with oysters and harvest them with a small drag (less than 3 feet wide), bull rake, and/or diving (App 3, SR2). Operations will occur from March through December, and the applicant expects to be on the site one to two days per week (App 4).

B. Site History

Dana Morse, who has an interest in Nice Oyster Company LLC, holds two Limited Purpose Aquaculture Licenses (LPAs) within the boundaries of the proposed lease site (SR 10). One LPA was granted in 2014 and the other in 2016 for the cultivation of American/Eastern oysters (*Crassostrea virginica*). Since their respective issuance, the LPAs have been renewed each year and the Department has not received any complaints regarding the operation of any of these licenses. Dana Morse plans to terminate the LPAs if the lease is granted (App 3, SR 10).

C. Site Characteristics

On July 26, 2017, DMR scientists visited the proposed lease site and assessed it and the surrounding area in consideration of the criteria for granting an aquaculture lease.

The proposed lease site “occupies subtidal waters between Woodward Point to the west and Middle Ground to the east” (SR 2). The upland is characterized by exposed ledge that leads to a mixed forest and fields (SR 2). At mean low water, the distance from the western boundary of the proposed lease site to the nearest point of land is ~149 feet (SR 8). Water depths, at mean low water, ranged from 4.4 feet at the northwest corner to 8.7 feet at the northeast corner (SR 7). The bottom of the proposed lease is characterized by a layer of soft mud with “gently sloping” topography (App 5). The current speed is approximately 0.5-1.0 knots (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 9).

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

During the site assessment staff observed one dock and two moorings within the vicinity of the proposed lease (SR 9). The nearest of the two moorings is ~290 feet to the north of the proposed lease site; at the time of the site assessment it was used to secure a small Boston Whaler (SR 9). The dock is situated ~363 feet to the north; at the time of the site assessment it contained two rowing shells and small row boat (SR 9). A dilapidated pier is located along Woodward Point and is ~262 feet from the proposed site (SR 9). According to the site report, "riparian owners' ability to access the main navigation channel from their dock and mooring would be maintained if the proposed lease is granted" (SR 9).

Activities at the lease site in subtidal waters are unlikely to hamper 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 proposed lease site is located along the western edge of a marked navigation channel (SR 10). The channel runs north-south between the western shore of the New Meadows River and the Middle Ground ledges; at mean low water, more than 675 feet of open, navigable water lie between the east side of the proposed lease site and Middle Ground (SR 10). According to the site report, "a minimum of 145 feet of navigable water would remain between the proposed lease and the western shore of the New Meadows River" (SR 10). The majority of motorized vessels will likely traverse the marked channel, while shallow draft vessels capable of navigating the area at mean low water will be able to travel between the proposed lease site and the western shore of the river (SR 10). During the review period, DMR did not receive any comments from the Brunswick Harbormaster. Based on the absence of comments, it is reasonable to conclude that the Brunswick Harbormaster does not have any concerns about navigation.

It appears from this evidence that navigation in the area will not be unduly affected by the presence of the proposed lease site.

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 applicant notes that the proposed area "gets little direct use," and commercial fishing within the proposed lease boundaries is "very limited or non-existent" (App 5). The site report describes the following:

On July 26, 2017, limited commercial fishing activity was observed within the immediate vicinity of the proposed lease site. Lobster trap buoys were common ($n = >20$) in the deeper channel waters to the north and east of the proposal. The nearest observed apparent trap buoy ("9") was located 280 feet to the northeast. One individual was observed hauling traps around the tidally exposed ledges to the north (SR 10).

Recreational fishing occurs throughout the river, but the applicant notes that it is concentrated around Getchell's Ledge, which is located north of the proposed site (App 5). In addition, recreational fishing would be permitted within the proposed lease boundaries (App 5). No comments were received with regards to fishing and other uses of the area.

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

Exclusivity. The applicant requests that dragging, lobster fishing, and diving be prohibited within the lease boundaries to avoid gear conflicts and entanglement (App 5). Such a restriction is reasonable in order 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). A condition reflecting this restriction will be included in the lease.

Other aquaculture leases. Including the two LPA licenses held by Dana Morse, there are one lease and 22 LPAs within one mile of the proposed site, all of which are held for the culture of American oysters (*Crassostrea virginica*) (SR 10). The closest aquaculture site, other than the Morse LPAs, is located ~1,245 feet to the east and separated from the proposed lease site by Middle Ground, an intertidal bar (SR 10). It is reasonable to conclude that the proposed operations are unlikely to negatively affect existing aquaculture activities in the area.

Based on this evidence, it appears that the proposed lease will not unreasonably interfere with fishing or other uses of the area. The lease must be marked in accordance with DMR Rule 2.80²

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.

²**2.80 Marking Procedures for Aquaculture Leases**

- A. 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.
- B. 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.
- C. 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.
- D. Lease sites must be marked in accordance with the United State's Coast Guard's Aids to Private Navigation standards and requirements.

D. Flora & Fauna

Site Observations. During the site visit, Department staff observed a flock of common eiders (*Somateria mollissima*) roosting on floating bags utilized in the operation of Dana Morse's LPAs, two snowy egrets (*Egretta thula*) on tidally exposed rocks, and three bald eagles (*Haliaeetus leucocephalus*) perched on Woodward Point (SR 12). Data collected by DMR, between 2001 and 2010, does not indicate the presence of eelgrass within the vicinity of the proposed lease site (SR 11). The closest documented eelgrass beds are more than 800 feet to the east of the proposed lease site (SR 11).

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 "there are no mapped resources of MDIFW jurisdiction in this area."³

Based on this evidence, it appears that the culture of oysters and scallops 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

According to the site report, there are no public docking facilities or beaches within 1,000 feet of the proposed lease (SR 14).

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

According to the application, seed stock for this proposed lease site will be obtained from the following:

Mook Sea Farm Route 129 Walpole, ME 04573	<i>Crassostrea virginica</i>
Muscongus Bay Aquaculture 24 Seal Ledge Lane Bremen, ME 04551	<i>Crassostrea virginica</i> , <i>Ostrea edulis</i> , <i>Aequipecten irradians</i>
Basket Island Shellfish PO Box 64 Portland, ME 04108	<i>Crassostrea virginica</i>

³ CF, Email from MDIFW to the Aquaculture Division dated June 21, 2017.

Downeast Institute 39 Wildflower Lane Beals, ME 04611	<i>Ostrea edulis</i>
Pine Point Oyster Company 10 Pine Ridge Road Cape Elizabeth, ME 04107	<i>Placopecten magellanicus</i>
Marsden Brewer 88 N. Stonington Road Stonington, ME 04681	<i>Placopecten magellanicus</i>

A separate permit is required for the movement of European Oysters (*Ostrea edulis*) within the State of Maine, pursuant to DMR Rules, Chapter 24.10. The applicant will be required to obtain such a permit before European Oysters (*Ostrea edulis*), are transferred to the proposed site.

Therefore, I find that the applicant has demonstrated that there is an available source of American/Eastern oysters (*Crassostrea virginica*), European oysters (*Ostrea edulis*), bay scallops (*Aequipecten irradians*), and sea scallops (*Placopecten magellanicus*).

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*), European oysters (*Ostrea edulis*), bay scallops (*Aequipecten irradians*), and sea scallops (*Placopecten magellanicus*) 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 2.7 acres to Nice Oyster Company LLC., 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 lessee⁴; 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 purpose of cultivating American oysters (*Crassostrea virginica*), European oysters (*Ostrea edulis*), bay scallops (*Aequipecten irradians*), and sea scallops (*Placopecten magellanicus*) using bottom and 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)⁵. 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. Dragging, lobster fishing, shellfish harvesting, and diving are prohibited within the lease boundaries, except by authorization of the leaseholder.
- C. Other public uses that are not inconsistent with the purposes of the lease are permitted within the lease boundaries.

⁴ 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."

⁵ 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: _____

5/22/17A handwritten signature in blue ink, appearing to read 'P. C. Keliher', written over a horizontal line.

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