

STATE OF MAINE
DEPARTMENT OF MARINE RESOURCES
Standard Aquaculture Lease Application
(December 4, 2007)

Charles A. Wallace
Pinkham Stream,
Steuben
Docket #2006-23

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION

On June 1, 2006, the Department of Marine Resources (“DMR”) received an application from Charles A. (“Chucky”) Wallace, d/b/a/ Petit Manan Seafood, for a 10-year aquaculture lease on 2.13 acres located in Pinkham Stream, just north of Pinkham Bay, in the coastal waters of the State of Maine, in the Town of Steuben in Washington County, for the purpose of cultivating Eastern oysters (*Crassostrea virginica*) using suspended and bottom culture techniques. The application was accepted as complete on June 12, 2006. No one intervened in this case. A public hearing on this application was held on August 20, 2007, in Steuben.

1. THE PROCEEDINGS

The evidentiary record before the Department regarding this lease application includes three exhibits introduced at the hearing (see exhibit list appended) and the record of testimony at the hearing itself. Sworn testimony was given at the hearing by the applicant, Chucky Wallace; by DMR’s Aquaculture Environmental Coordinator, Jon Lewis; and by LeeAnn Neal of the U.S. Army Corps of Engineers.

No other government agencies testified, although notices and copies of the application and DMR site report were sent to numerous state and federal agencies, including, but not limited to, the U.S. Coast Guard, the National Marine Fisheries Service, the Maine Department of Inland Fisheries & Wildlife, the U.S. Environmental Protection Agency, and the Maine State Planning Office, as well as to a number of educational institutions, aquaculture and environmental organizations, the Town of Steuben and the Steuben Harbormaster, members of the Legislature, representatives of the press, and private individuals.

At the hearing, Mr. Wallace described the proposed project. Mr. Lewis presented his site report, including a video presentation showing the bottom of the lease sites and the surrounding area. Ms Neal testified about the Army Corps of Engineers’ requirements. Each witness was sworn and subject to questioning by the Department, the applicant, and others in attendance. The hearing was recorded by DMR. No members of the public attended the hearing, and no

comments were received by DMR. The evidence from all of these sources is summarized below. [NOTE: The reference (Smith/Jones) means testimony of Smith, being questioned by Jones.]

2. DESCRIPTION OF THE PROJECT

The Application

The project incorporates and expands upon Mr. Wallace's current experimental lease. As described in the site report, it consists of two tracts located in Pinkham Stream, "a tidal creek surrounded by salt marsh and separated from the larger Pinkham Bay" (Exhibit 3, p. 3) by a narrow bridge.

Tract 1, the lower tract, lies approximately 100 feet north of the bridge in a wide, shallow area of tidal water. It consists of 2.08 acres, which include the existing southern tract of the experimental lease plus a new extension to the north (Exhibit 2, p. 6).

Tract 2, the upper tract, lies farther upstream to the north, in an area where the water narrows and flows through the wide marsh as a well-defined, brackish stream. The upper tract is .05 acres and is identical to the existing northern tract in the experimental lease (Exhibit 2, p. 5).

Mr. Wallace proposes to raise seed oysters on the upper tract, using either an upweller or ADPI bags moored in the stream, but not both simultaneously. The upweller is a 6' x 20' wooden float with foam flotation. The ADPI trays (also called "trays") are black mesh with black foam flotation, deployed in a maximum of 160 trays in 2 arrays of 80 trays each, floating in 2 parallel lines; each array occupies an area measuring 8 ft. by 60 ft. (Exhibit 2, p. 8).

Mr. Wallace will set the seed oysters out in the spring in the upweller, transfer them to the bags in summer, and plant them on the bottom of the lower tract in the fall to grow to market size over two to three years. He expects to visit the sites once or twice a week for monitoring and operations, depending on the season. Harvesting will be done by diving or by towing a small drag (Exhibit 2, p. 10).

At the hearing, Mr. Wallace stated that he has had sufficient success on the experimental lease that he decided to apply for a standard lease to continue his operation. He testified that he has discontinued the other species allowed on his experimental lease (scallops, quahogs, clams), because the low salinity at the upper tract is not conducive to raising these species (Wallace/Robinson).

Mr. Wallace testified that he understands that the lease sites both lie in an area that is classified by DMR as restricted for shellfish harvesting because of poor water quality (area 52E; map appended to application, Exhibit 2). He intends to apply for a relay site to the south, either in Pinkham Bay or in Dyer Bay, where harvested oysters can clean themselves before they are marketed (Exhibit 2, p. 10).

Structures are confined to Tract 2, the upper tract, where suspended culture techniques will be used. Tract 1, the lower tract, will be used only for bottom culture. Mr. Wallace seeks sufficient exclusivity to allow him to place surface gear on Tract 2. The application indicates that

no limitation is sought on recreational fishing, boating, or other activities (Exhibit 2, p. 12, item 6 (b) (2)).

Other details of the proposed operation and the nature of the site are described in the sections below.

Site Report

Mr. Lewis presented his site report and showed the video of the bottom recorded during the site inspection. He confirmed the description of the site contained in the application, saying it is located in a quiet area of salt marsh, with steep banks along the sides of Pinkham Stream flanking a flat bottom. Salinity is relatively low because of the influx of fresh water into the marsh, particularly at the upper site; Mr. Lewis noted that this could cause slower growth in oysters. Visibility is poor in the upper tract, which has a soft bottom; the stream there is approximately 30 ft. wide and 3 to 5 feet deep at mean high water (Exhibit 3, p. 4). The upper tract occupies most of the width of the channel here, with marsh grasses bordering both sides of the stream (Exhibit 2, p. 2).

The lower tract has saltier water, with a bottom of firm mud and sand and “a scattering of cobble and larger rocks”; water depth is 6 to 9 feet, increasing gradually from south to north (Exhibit 2, p. 3). Mr. Lewis observed a few oysters on the lower tract, which were likely placed on the site by Mr. Wallace. Mr. Lewis stated that placing oysters on the bottom of the lower tract would cause no ecological harm (Lewis, direct).

Tidal flow runs north-south in Pinkham Bay Stream, but currents are negligible, according to the Site Report (Exhibit 3, p. 4). The shallow, protected location of the stream makes it likely to freeze in the winter (Exhibit 3, p. 9), but Mr. Wallace testified that any oysters should be on the bottom of Tract 1 by that time and should not be affected. He does not intend to leave gear on Tract 2, even on the bottom, over the winter (Wallace/Robinson).

Ms. Neal testified for the U.S. Army Corps of Engineers. She noted that the Corps had previously issued a permit for Mr. Wallace’s experimental lease and that he would need a new permit for the structures on the upper tract. Commercial fishing and boating would continue to be allowed by the Corps, except in the area covered by structures (Neal, direct).

STATUTORY CRITERIA

Approval of standard aquaculture leases is governed by 12 M.R.S.A. §6072. This statute provides that a lease may be granted by the Commissioner of DMR if s/he determines that, taking into consideration the number and density of aquaculture leases in an area, the project will not unreasonably interfere with the ingress and egress of riparian owners; with navigation; with fishing or other uses of the area; with significant wildlife habitat and marine habitat or with the ability of the site and surrounding marine and upland areas to support ecologically significant flora and fauna; or with the public use or enjoyment within 1,000 feet of a beach, park, docking

facility or certain conserved land owned by the Federal Government, the State Government, or a municipal governmental agency. 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; that the lease will not result in an unreasonable impact from noise or lights at the boundaries of the lease site; and that the lease will be in compliance with visual impact criteria adopted by the Commissioner relating to color, height, shape and mass.

A. Riparian Access

Ten riparian owners were personally notified of the application and the hearing; none of them commented on the application. Mr. Wallace testified that only he and his family have houses near the sites; his property lies along the stream, so he has access to the lease sites directly from his own land. There are no moorings in the stream, according to both the application and the site report. The site report states that it is unlikely that docks or moorings would be placed in the stream, given that it is a “shallow, winding waterway” through an extensive salt marsh with little development along the shore and access to Pinkham Bay restricted by the depth of water under the bridge (Exhibit 3, p. 8). There appear to be no riparian activities that would be disrupted by the lease sites.

THEREFORE, I FIND that the aquaculture activities proposed for these sites will not unreasonably interfere with the ingress and egress of any riparian owner.

B. Navigation

The application and site report both note the limited amount of vessel traffic in Pinkham Stream. The stream itself is narrow, winding through a broad salt marsh. It is separated from Pinkham Bay by a small bridge under which boats can navigate only at high tide. Once tide begins to ebb, the concrete forms beneath the bridge are exposed, restricting access. Small skiffs, kayaks, and similar boats can be launched into the stream from shore above the bridge or navigate under the bridge at high tide (Exhibit 3, p. 8). The application notes that one or two small vessels per week operate within 500 feet of the sites in summer. No boating occurs on the stream in winter, as it freezes (Exhibit 2, p. 12).

The lower tract will be used for bottom culture only, and the sole gear on the site will be the required marking buoys. This site is in a relatively wide area of water, and the site report notes that navigation there will be unhindered (Exhibit 3, p. 8).

The upper tract will contain either the upweller in a float measuring 6 ft. by 20 ft. or two parallel arrays of ADPI bags totaling 16 ft. wide (Exhibit 3, p. 8), depending on the phase of operations. According to the site report, the stream width at the upper tract is approximately 25 ft. Mr. Wallace testified that it is between 25 and 30 ft., and he agreed with the recommendation in the site report (Exhibit 3, p. 8) that he leave a 10 ft. open corridor on the upper site to allow for

passage by the limited number of small boats that might use the stream for kayaking, bird watching, and duck hunting (Wallace, direct).

Provided this corridor is maintained for access in the narrow part of the stream on the upper tract, the lease sites will not restrict navigation. Boating will be allowed on the open areas of the lease.

THEREFORE, I FIND the aquaculture activities proposed for these sites will not unreasonably interfere with navigation.

C. Fishing & Other Uses

The application notes that there is no fishing or dragging in the area of the lease sites or nearby (Exhibit 2, p. 3). The site report cites occasional recreational fishing off the bridge below the lower tract but notes that the stream does not support lobster or shellfish and that there are no mud flats for clam or worm harvesting (Exhibit 3, p. 5). The Steuben Harbormaster did not return the questionnaire sent to him by DMR, but he did return such a form with regard to the experimental lease in 2002, where he noted that there were no existing fisheries in the area and that the only regular activities in the area were recreational canoeing and waterfowl hunting (Exhibit 3, p. 10).

According to the site report, the nearest aquaculture site is DYER BP, 1.4 miles to the south in Dyer Bay; that lease is for the bottom culture of mussels. The site report concludes that given the distance between the sites and the plan to harvest the Pinkham Stream sites by diving, “the proposed activities should have no negative effects (i.e., siltation) on the existing farm in Dyer Bay” (Exhibit 3, p. 9).

It appears that there is little, if any, fishing activity in the vicinity of the lease sites and that there are limited other uses, none of which will be affected by the lease sites, provided the access corridor is maintained through the upper tract. Fishing will be allowed on the open areas of the lease.

THEREFORE, I FIND that the aquaculture activities proposed for these sites will not unreasonably interfere with fishing or other uses of the area.

D. Habitat, Flora & Fauna

The Site Report describes the estuarine ecology of the lower tract, where a variety of marine plants and invertebrates was found during the site inspection on June 14, 2007, including numerous algae species as well as rockweed, kelp, cord weed, and marsh grass. Epibenthic fauna included amphipods, sand shrimp, worms, moon jellies, mussels, clams, sea peaches, periwinkles and green crabs (Exhibit 3, p. 5).

The upper tract contained no flora and few epibenthic fauna except amphipods and sand shrimp; it resembles a freshwater marsh more than a marine area (Exhibit 3, p. 5). The Report notes that a number of birds were sighted, including Canadian geese and mergansers, as well as a

beaver dam, and states “[w]ith very little shorefront development and limited boat access it is an important wildlife habitat, especially for waterfowl” (Exhibit 3, p. 5).

At the request of the Maine Department of Inland Fisheries and Wildlife, DMR placed conditions on the experimental lease to limit the use of gear to the upper tract and require the applicant to consult with MDIF&W before using predator controls at either tract. These conditions were placed on the lease because the wetland around Pinkham Stream has been designated as Significant Wildlife Habitat under the Natural Resources Protection Act and in particular as “High Value Waterfowl-Wading Bird Habitat”. Although MDIF&W did not comment on the standard lease application, DMR’s biologists recommend that the conditions placed on the experimental lease be continued on the standard lease, if it is granted (Exhibit 3, p. 10).

Mr. Wallace testified that he has no objections to the continuation of these conditions. He said that the only predators on his oysters to date have been green crabs, and his control technique is to plant on the bottom only oysters that are larger than those that the crabs attack (Wallace/Robinson).

No other concerns regarding the ecology of the lease sites have been raised, and Mr. Lewis testified, as noted above, that planting oysters on the bottom would not harm the ecology of the sites.

THEREFORE, I FIND that the aquaculture activities proposed for these sites will not unreasonably interfere with significant wildlife habitat and marine habitat or with the ability of the lease site and surrounding marine and upland areas to support ecologically significant flora and fauna.

E. Public Use & Enjoyment

According to the application, “No federal projects or structures...lie within 2000’. No state or federal beaches, parks, or docking facilities lie within 1000 feet of the proposed sites” (Exhibit 2, p. 5). A review by the State Planning Office revealed no conserved lands within 1,000 feet of the site (Exhibit 1, e-mail from R. Collin Therrien to Mary Costigan, Jan. 24, 2006).

THEREFORE, I FIND that the aquaculture activities proposed for these sites will not unreasonably interfere with the public use or enjoyment within 1,000 feet of a beach, park, docking facility, or certain conserved land owned by the Federal Government, the State Government, or a municipal governmental agency.

F. Source of Organisms

The application lists three Maine hatcheries as sources of oyster seed for the lease sites.

THEREFORE, I FIND that the applicant has demonstrated that there is an available source of American or Eastern oysters (*Crassostrea virginica*) to be cultured for the lease site.

I. Light

The application notes that no lights will be used on the sites and no operations will occur after daylight, except in an emergency.

THEREFORE, I FIND that the aquaculture activities proposed for these sites will not result in an unreasonable impact from light at the boundaries of the lease site.

H. Noise

The application states that the upweller in the upper tract is silent in operation, and that the applicant will use a low-horsepower outboard motor on his skiff to tend the sites from the water (Exhibit 2, p. 10). The Site Report notes that DMR has received no complaints during the three years the applicant has operated his experimental lease in the same location.

THEREFORE, I FIND that the aquaculture activities proposed for these sites will not result in an unreasonable impact from noise at the boundaries of the lease.

I. Visual Impact

The gear on the upper tract is either black or the color of natural wood; it consists of a float containing an upweller, plus arrays of black mesh ADPI bags floating at the surface (Exhibit 2, p. 9). The visual impact of this gear is minimal and well within the requirements of our rule.

THEREFORE, I FIND that the proposed lease will comply with the visual impact criteria contained in DMR Regulation 2.37(1)(A)(10).

4. CONCLUSIONS OF LAW

Based on the above findings, and taking into consideration the number and density of aquaculture leases in the area, 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, provided that: the lease site is marked in accordance with U.S. Coast Guard and DMR requirements, that an open navigational corridor is maintained on the upper tract, and that boating is allowed in open areas of lease.
3. The aquaculture activities proposed for this site will not unreasonably interfere with fishing or other uses of the area, provided that fishing is allowed on the open areas of the lease.
4. The aquaculture activities proposed for this site will not unreasonably interfere with significant wildlife habitat and marine habitat or with the ability of the lease site and surrounding marine and upland areas to support ecologically significant flora and fauna, provided that no

gear, other than marking buoys is used on the lower tract and that the applicant consults with the Maine Department of Inland Fisheries and Wildlife before using predator controls on either tract.

5. The aquaculture activities proposed for this site will not unreasonably interfere with the public use or enjoyment within 1,000 feet of a beach, park, docking facility or certain conserved land owned by the Federal Government, the State Government, or a municipal governmental agency.

6. The applicant has demonstrated that there is an available source of American or Eastern oysters, *Crassostrea virginica*, to be cultured for the lease site.

7. The aquaculture activities proposed for this site will not result in an unreasonable impact from light at the boundaries of the lease site.

8. The aquaculture activities proposed for this site will not result in an unreasonable impact from noise at the boundaries of the lease site.

9. The aquaculture activities proposed for this site will comply with the visual impact criteria contained in DMR Regulation 2.37(1)(A)(10).

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.

5. DECISION

Based on the foregoing, the Commissioner grants the requested lease of 2.13 acres to the applicant for 10 years from the date of this decision for the purpose of cultivating American or Eastern oysters, *Crassostrea virginica*, using suspended and bottom culture techniques. The applicant shall pay the State of Maine rent in the amount of \$100.00 per acre per year. The applicant shall post a bond or establish an escrow account pursuant to DMR Rule 2.40 (2) (A) in the amount of \$5,000.00, conditioned upon his 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 (7-B)¹. Conditions are designed to encourage the greatest multiple compatible uses of the lease area and support the ecology of the site 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 12 MRSA §6072 (7-B) 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.”

1. The lease sites shall be marked in accordance with the requirements of the U.S. Coast Guard and DMR Rule Chapter 2.80.
2. Fishing and boating shall be allowed in the open areas of the lease.
3. The lower tract, Tract 1, shall be used for bottom culture only and shall not contain any structures other than marking buoys as required under condition #1.
4. The lessee shall consult with the Maine Department of Inland Fisheries and Wildlife before using any form of predator control in the lease area.
5. The lessee shall maintain a 10-foot wide corridor of open, navigable water between the floating gear on the upper tract, Tract 1, and the eastern shore of the stream.

7. REVOCATION OF LEASE

The Commissioner may commence revocation procedures if he determines that substantial aquaculture has not been conducted within the preceding year or that the lease activities are substantially injurious to marine organisms. If any of the conditions or requirements imposed in this decision, in the lease, or in the law is not being observed, the Commissioner may revoke the aquaculture lease.

Dated: _____

George D. Lapointe (Commissioner)
Department of Marine Resources

8. LIST OF EXHIBITS

1. Case file #2006-23, Chucky Wallace d/b/a/ Petit Manan Seafood
2. Application, stamped "Received" June 1, 2006
3. DMR Site Report, dated July 9, 2007