

## **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION**

On November 4, 2010, the Department of Marine Resources (“DMR”) received an application from Trundy Point, LLC of Portland, Maine, for a standard aquaculture lease on 1.74 acres located in the coastal waters of the State of Maine, south of Little Chebeague Island in Casco Bay in the Town of Long Island in Cumberland County, for the purpose of cultivating blue mussels (*Mytilus edulis*) using suspended culture techniques. The application was accepted as complete on January 20, 2011. No one intervened in this case. A public hearing on this application was held on April 5, 2011, in Long Island.

### **1. THE PROCEEDINGS**

Notices of the hearing and copies of the application and DMR site report were sent to numerous state and federal agencies for their review, as well as to various educational institutions, aquaculture and environmental organizations, the Town of Long Island and the Long Island Harbormaster, members of the Legislature, representatives of the press, riparian landowners, and other private individuals. Notice of the hearing was published in the Portland Press Herald on March 1 and March 23 and in the *Commercial Fisheries News* April edition.

Sworn testimony was given at the hearing by: Peter Stocks, managing member of the applicant LLC; DMR’s Aquaculture Environmental Coordinator, Jon Lewis; and by Jim Buxton and Michael Floyd. Mr. Stocks described his proposed project. Mr. Lewis described the site visit and presented a videotape of the bottom. Mr. Buxton described briefly his observations from diving on the proposed lease site in the summer of 2010. Mr. Floyd supported the project and described his experience lobstering in the area. Each witness was subject to questioning by the Department, the applicant, the intervenors, and members of the public. The hearing was recorded by DMR. The Hearing Officer was Diantha Robinson.

The evidentiary record before the Department regarding this lease application includes three exhibits introduced at the hearing (see exhibit list below) and the record of testimony at the hearing itself. The evidence from all of these sources is summarized below.<sup>1</sup>

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<sup>1</sup> In references to testimony, “Smith/Jones” means testimony of Smith, questioned by Jones.

## **LIST OF EXHIBITS<sup>2</sup>**

1. Case file, # 2011-02.
2. Application signed and dated Oct. 19, 2010.
3. DMR site report dated Feb. 9, 2011.

## **2. DESCRIPTION OF THE PROJECT**

### **A. Site History**

The proposed lease site lies south of Little Chebeague Island in Casco Bay. The applicant currently operates four small shellfish rafts for mussel culture near the proposed site, under four limited-purpose aquaculture (LPA) licenses issued by DMR late in 2010. Mr. Stocks testified that the LPAs will be terminated if the lease is granted.

### **B. Proposed Operations**

The applicant proposes to grow blue mussels on the proposed lease site, using 40' x 40' shellfish rafts with mussels grown on dropper ropes suspended beneath the rafts. Mr. Stocks testified that he will deploy four rafts initially and may add a fifth raft in the future. He will tend the site primarily with a 43' lobster boat. Mussel spat to stock the site will be collected locally and will be supplemented by purchasing spat from a supplier in Hancock County.

The rafts will be connected to each other, spaced about 20 ft. apart and moored to four cast concrete corner blocks weighing 4,000 lbs. each. Each block will be attached to 60 ft. of 1.75-inch Coast Guard chain, weighing 30 lbs. per foot. When the blocks and chain are dropped 50 ft. to the sea floor, their momentum will drive them deep into the soft bottom. The rafts will be attached to the chain by 80 ft. of 1.5-inch polysteel rope. The mooring design is based on that used by similar mussel raft projects in Casco Bay (App., p. 12).

Work at the site will occur 4-5 days weekly in winter and 6-7 days weekly in summer. Seeding will occur 1-2 days per week. When mussels reach harvestable size, harvest activities will occur approximately 3 times each week. An additional day each week will be needed for repair and maintenance (App., p. 13).

Predator control will consist of both the presence of people on the site and the use of weighted predator nets to keep ducks away from the dropper ropes. Nets will be cleaned at least four times annually by power-washing them on-site (App., p. 12-13). Mr. Stocks stated that he will not use any chemicals, feed, or medicines at the site (Stocks, testimony).

Mussels will be harvested by lifting dropper ropes with a boom from the lobster boat and stripping the mussels from the ropes. Mussels will be de-clumped and de-byssed at the site and packed in totes for transport to shore (App., p. 14).

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<sup>2</sup> Cited as: Case file – “CF”; Application – “App”, site report – “SR”.

### **C. Site Characteristics**

The proposed lease site is located approximately 750 feet southwest of Little Chebeague Island in Casco Bay, in approximately 50 ft. of water at low tide. Overall water depths are between 57 ft. at high tide and 48 feet at low tide, sufficient to accommodate the proposed mussel-growing operations and prevent the site from icing over in winter. Department biologists inspected the site on January 31, 2011 and collected underwater video of the bottom. Although the application lists the site size as “approximately 2 acres”, the actual acreage described by the coordinates given in the application is calculated in the site report as 1.74 acres (SR, p. 3).

The bottom of the site is composed of firm sand beneath a shallow layer of finer material. High currents apparently scour the bottom (SR, p. 6). The area around the site is currently classified by the Department’s Water Quality Classification program as “open/approved for the harvest of shellfish” (Area No. 13).

### **3. STATUTORY CRITERIA & FINDINGS OF FACT**

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 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, docking facilities, or conserved lands 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; 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**

The site report indicates that the only land within 1,000 feet of the proposed lease site is Little Chebeague Island, which at its closest point is calculated by DMR biologists to be 757 feet to the northeast. Little Chebeague Island is owned by the Maine Department of Conservation, Bureau of Parks and Lands and is undeveloped; thus, the State of Maine is the only riparian landowner within 1,000 feet of the proposed lease site. Long Island, approximately 3,500 feet easterly of the site, is the nearest inhabited land.

No docks or moorings were observed in the vicinity of the lease by Department biologists during the site visit; the nearest docks are located on Long Island (SR, p. 4). To the Department’s knowledge, Little Chebeague is used by the public mainly for recreation, particularly along its beaches.

The evidence shows that the proposed lease site is located well away from the shore and will not interfere with access to and from Little Chebeague Island.

**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**

Although DMR mailed a Harbormaster Questionnaire to the Town of Long Island, it was not returned. The site report notes that the proposed lease will put an area approximately 120 ft. by 620 ft. off-limits to navigation. The report notes:

The proposed lease site is approximately 1,680 feet outside the navigational corridor as described by buoys "6", "8" and "12" (Figure 3). Vessels rounding the south end of Little Chebeague Island are likely to travel to the south of the proposed lease. Local traffic venturing north of the proposed lease site would have approximately 430 feet of navigable water between the site and the 18-foot depth contour.

No testimony or comments were provided to indicate that the proposed site might hamper vessels transiting through the surrounding waters. Based on all the evidence, it is apparent that the proposed lease has been carefully sited and will not interfere with boat traffic in the vicinity. The applicant will be required to mark the lease site in accordance with U. S. Coast Guard requirements.

**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**

Mr. Stocks testified that in selecting a site for the proposed lease, he consulted with lobstermen from Long Island and Chebeague Island, as he did not want to displace anyone who fishes in the area (Stocks, testimony).

The site report states that during the site visit on January 31, 2011,

no commercial or recreational fishing was observed in the vicinity of the lease site. This is not surprising considering the season. One dragger was observed fishing with a cable in the water approximately 1 mile to the south. During a previous visit to the area on July 10, 2009, Department staff observed limited lobster fishing (~12 buoys) to the north and east of the proposed site; between the existing lease site CAS LCI and the south end of Little Chebeague Island. All of these buoys were marked with "LIC 6852" and the F/V "Gram Marie" was in the vicinity (Figure 3). (SR, p. 4)

At the public hearing, Michael Floyd, a lobsterman from nearby Long Island, testified that he supports the proposed lease. He said that he has fished in the proposed lease area, most recently in the fall of 2010 around the four small mussel rafts on the LPA sites, but he has “never caught too much there”. The mussel rafts proposed for the lease site would not affect his fishing business, he said, and he has not heard that “mussels are any problem” (Floyd, testimony).

No comments were submitted to the Department and no testimony was presented at the public hearing to indicate any concerns about the proposed site and its potential effect on fishing in the area. The evidence indicates that while some level of commercial and recreational fishing is likely to occur in the vicinity of the proposed lease, it is unlikely that the presence of the aquaculture lease site will interfere significantly with fishing. The lease must be marked in accordance with DMR Rule 2.80.<sup>3</sup>

**Other aquaculture leases.** According to the site report, other than the four LPA license sites nearby that are part of the applicant’s operations, the nearest aquaculture site is lease CAS LCI, located approximately 630 feet to the northeast of the proposed lease site. Mr. Stocks holds four other LPA licenses approximately 1,400 feet to the northwest of the proposed site which are also part of his mussel farming operation. Other leases and licenses are located well over a mile away. The site report concludes that the proposed lease activities are far enough away that they will not interfere with other aquaculture sites in the area (SR, p. 5).

**Exclusivity.** Mr. Stocks testified that fishing within the site boundaries would be acceptable to him, provided there is no interference with the rafts and mooring lines.

Because dragging appears to be incompatible with the aquaculture project, dragging will be prohibited on the lease site. Navigation and other forms of fishing will be permitted in open areas of the lease.

**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

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<sup>3</sup>**2.80 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.

with fishing or other uses of the area. Dragging will be prohibited on the lease site. Navigation and other forms of fishing will be permitted in open areas of the lease.

#### **D. Flora & Fauna**

During the site visit, Department biologists observed few species of marine fauna, mainly mud shrimp and burrowing anemones. The site report notes the lobsters and crabs may be present in the area during the summer months. Fronds of non-rooted eel grass and other non-rooted aquatic vegetation that apparently drifted into the area were observed on the bottom, but no attached eel grass was noted (SR, p. 6).

Copies of the application were provided to the Maine Departments of Environmental Protection and Inland Fisheries and Wildlife for review, but no comments were received from either agency. Little Chebeague Island and the surrounding waters are not classified as Essential or Significant Habitats. The site report notes that Little Chebeague Island is identified by the Maine DEP as a Tidal Wading Waterfowl Habitat, but the proposed lease site is approximately 750 feet away from the island across open water, so wading birds should not be affected by the lease activities.

The evidence indicates no flora and fauna in the vicinity of the proposed lease that would be adversely affected by the aquaculture operations.

**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**

Mr. Stocks testified that he will not use the shore of Little Chebeague Island in connection with his aquaculture operations. The site report states:

Little Chebeague Island is owned by the State of Maine, Bureau of Parks and Land. The beach at the south end of Little Chebeague Island may be visited by recreational boaters for day trips. Other than the sight of low-profile mussel rafts, users of this publicly-owned beach should be unaffected. (SR, p. 6)

Based on this evidence, it appears that the proposed lease operations will not affect the public use of Little Chebeague Island.

**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 or certain conserved lands owned by municipal, state, or federal governments.

## **F. Source of Organisms**

The application indicates that the sources of stock for this proposed lease site are local spat collected on the lease site and seed purchased from Evan Young of Hancock, Maine (App, p. 1).

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

## **G. Light**

The application indicates that no lights will be used at the proposed lease site and that night work would only take place in the case of an emergency (App, p. 16). Mr. Stocks testified that he plans to use solar-powered navigation lights as safety markers, depending on the approval of the U.S. Coast Guard.

The applicant will be bound by any lighting requirements imposed by the U. S. Coast Guard for navigation purposes.

**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 site report states:

The applicant has proposed using a diesel powered lobster boat (ubiquitous in the area), hydraulics, wash down hoses, and power washing equipment. The power source for this equipment is below deck of the lobster boat and therefore should produce little external noise. Anticipated noise levels from lease activities would be similar or less than other waterborne activities in the area. (SR, p. 6)

Based on this evidence, it appears that any noise generated by operations on the site is unlikely to have a significant effect at the boundaries of the lease.

**Therefore, I find** that the aquaculture activities proposed for this site will not result in an unreasonable impact from noise at the boundaries of the lease.

## **I. Visual Impact**

The only structures proposed for the lease site are mussel rafts. The site report notes:

Mussel rafts proposed for this lease site are the standard in the mussel raft industry. Rafts would extend approximately three feet above the water when unseeded and 1-2 feet above the water when full. The rafts are a mixture of steel gray beams, natural wood cross-members and black floats. (SR, p. 7)

The Department's visual impact rule requires structures and gear on lease sites to blend with the surroundings as much as possible. The rafts are low-profile and built of materials in colors that will blend well with the surroundings.

**Therefore, I find** that the equipment, buildings, and watercraft to be used at the proposed lease site 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, 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. The lease site must be marked in accordance with U. S. Coast Guard requirements.
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. The lease boundaries must be marked in accordance with the requirements of DMR Rule 2.80. Dragging will be prohibited on the lease site. Navigation and other forms of fishing will be permitted in open areas of the lease.
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 blue mussels (*Mytilus edulis*) 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 1.74 acres to Trundy Point, LLC for ten years for the purpose of cultivating blue mussels (*Mytilus edulis*) using suspended 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 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)<sup>4</sup> 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. Dragging is prohibited on the lease site. Navigation and other forms of fishing are permitted in open areas of the lease.

**7. REVOCAION OF LEASE**

The Commissioner may commence revocation procedures upon determining pursuant to 12 MRSA §6072 (11) and DMR Rule Chapter 2.42 that no substantial aquaculture has been conducted within the preceding year, that the lease activities are substantially injurious to marine organisms, or that any of the conditions of the lease or any applicable laws or regulations have been violated.

Dated: 5/13/11

/s/ Norman H. Olsen  
Norman H. Olsen  
Commissioner  
Department of Marine Resources

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<sup>4</sup> 12 MRSA §6072 (7-B) states: "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."