

Notice of Agency Rule-making Proposal

AGENCY: 13-188-Department of Marine Resources
 CHAPTER NUMBER AND TITLE: Chapter 2 Aquaculture Lease Regulations
 PROPOSED RULE NUMBER *(leave blank; to be assigned by Secretary of State)*:

BRIEF SUMMARY: On March 20, 2019, the Department of Marine Resources (DMR) received a certified rulemaking petition from qualified voters of the State of Maine to modify portions of the aquaculture lease regulations. The rule changes proposed by the petitioners include a new decision criterion, which would require DMR to consider whether there are other locations near a proposed lease site that could accommodate the proposed activities while interfering less with existing and surrounding uses of an area. The petitioners request that the proposed rule be applied retroactively, so that it would extend to a pending lease application in Maquoit Bay. In their filing, the petitioners also requested a moratorium on all pending lease applications that are greater than ten acres in size. In accordance with 5 M.R.S.A. §8055, DMR will consider the proposed rule changes filed by the petitioners.

Date, time and location of PUBLIC HEARING *(if any)*:
 May 22, 2019, 5:00PM, Conference Rm 118, Marquardt Building, 32 Blossom Lane, Augusta, ME.

COMMENT DEADLINE: June 1, 2019

CONTACT PERSON FOR THIS FILING *(include name, mailing address, telephone, fax, TTY, e-mail)*:

NAME: Deirdre Gilbert
 MAILING ADDRESS: 21 State House Station, Augusta, Maine 04333-0021
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 Hearing facilities: If you require accommodations due to disability, please contact Meredith Mendelson at 207-624-6553.

CONTACT PERSON FOR SMALL BUSINESS IMPACT STATEMENT *(if different)*: Same
 FINANCIAL IMPACT ON MUNICIPALITIES OR COUNTIES *(if any)*: None
 STATUTORY AUTHORITY FOR THIS RULE: 5 M.R.S.A. §8055
 SUBSTANTIVE STATE OR FEDERAL LAW BEING IMPLEMENTED *(if different)*: Same
 AGENCY WEBSITE: <http://www.maine.gov/dmr/rulemaking/>
 E-MAIL FOR OVERALL AGENCY RULE-MAKING LIAISON: dmr.rulemaking@maine.gov

** Check one of the following two boxes.*
X The summary provided above is for publication in both the newspaper and website notices.
 The summary provided above is for the newspaper notice only. Title 5 §8053, sub-§5 & sub-§7, ¶D. A more detailed summary is attached for inclusion in the rule-making notice posted on the Secretary of State’s website. Title 5 §8053, sub-§3, ¶D & sub-§6.

Please approve bottom portion of this form and assign appropriate AdvantageME number.

APPROVED FOR PAYMENT _____ DATE: _____
(authorized signature)

FUND	AGENCY	ORG	APP	OBJ	PROGRAM	FUNDING Profile JVC	FUND Pri JVC	FUND Line JVC
010	13A	1120	10	4946				

DEPARTMENT OF MARINE RESOURCES

Chapter 2 - Aquaculture Lease Regulations

2.37 Decision

1. After review of the agency record, the Commissioner shall issue a written decision, complete with findings of fact and conclusions of law.

The Commissioner may grant an aquaculture lease if he is satisfied that the proposed project meets the conditions outlined by 12 M.R.S.A. §6072 (7-A).

- A. Standards: In making his decision the Commissioner shall consider the following with regard to each of the statutory criteria:
 - (1) Riparian Owners Ingress and Egress. The Commissioner shall examine whether the riparian owners can safely navigate to their shore. The Commissioner shall consider the type of shore involved and the type of vessel that can reasonably land on that shore. He/she shall consider the type of structures proposed for the lease and their potential impact on the vessels which would need to maneuver around those structures.
 - (2) Navigation. The Commissioner shall examine whether any lease activities requiring surface and or subsurface structures would interfere with commercial or recreational navigation around the lease area. The Commissioner shall consider the current uses and different degrees of use of the navigational channels in the area in determining the impact of the lease operation. High tide "short cuts" shall not be considered navigational ways for the purposes of this section.
 - (3) Fishing. The Commissioner shall examine whether the lease activities would unreasonably interfere with commercial or recreational fishing or other water-related uses of the area. This examination shall consider such factors as the number of individuals that participate in recreational or commercial fishing, the amount and type of fishing gear utilized, the number of actual fishing days, and the amount of fisheries resources harvested from the area.
 - (4) Other Aquaculture Uses. The Commissioner shall consider any evidence submitted concerning other aquaculture uses of the area. The intensity and frequency of such uses as well as the degree of exclusivity required for each use shall be factors in the Commissioner's determination of whether any interference is unreasonable. The number, size, location, and type of other aquaculture leases shall be considered by the Commissioner.
 - (5) Existing System Support. The Commissioner shall consider the degree to which the use of the lease site will interfere with significant wildlife habitat and marine habitat or with the ability of the lease site and marine and upland areas to support ecologically significant flora and fauna. Such factors as the degree to which physical displacement of rooted or attached marine vegetation occurs, the amount of alteration of current flow, increased rates of sedimentation or sediment resuspension, and disruption of finfish migration shall be considered by the Commissioner in this determination.
 - (6) Source of Organisms to be Cultured. The Commissioner shall include but not be limited to, consideration of the source's biosecurity, sanitation, and applicable fish health practices.
 - (7) Interference with Public Facilities. The Commissioner shall consider the degree to which the lease interferes with public use or enjoyment within 1,000 feet of a beach,

park, docking facility or certain conserved lands owned by the Federal Government, the State Government or a municipal government. Conserved lands means land in which fee ownership has been acquired by the state, federal or municipal government in order to protect the important ecological, recreational, scenic, cultural or historic attributes of that property. In determining interference with the public use or enjoyment of conserved lands, the Commissioner shall consider the purpose(s) for which the land has been acquired.

(8) Lighting

Applicability. These rules apply to all exterior lighting used on buildings, equipment, and vessels permanently moored or routinely used at all aquaculture facilities, with the exception of lighting for navigation, emergencies, and construction of a temporary nature.

Exterior lighting. All exterior lighting shall be mounted in cutoff fixtures. A cutoff fixture is one that projects no more than 2.5% of light above the horizontal plane of the light fixture's lowest part. This does not include spotlights or floodlights, which are addressed below.

All exterior lighting shall be designed, located, installed, and directed in such a manner as to illuminate only the target area and to reduce glare.

Exterior lighting shall be no more than 250 watts per fixture, with the exception of required navigational lighting, spotlights and floodlights.

When harvest schedules, feed schedules, or other similar circumstances result in the need to work beyond daylight hours, spotlights or floodlights may be used to ensure safe working conditions and safe vessel operation. Such lighting shall be directed only at the work area to be illuminated, and must be the minimum needed for safe operations.

If used, all husbandry lighting shall be submersible and operated at all times below the water line, except during examination for maintenance and repair.

When necessary, security lighting may be used, but shall conform to the requirements for exterior lighting.

An applicant shall demonstrate that all reasonable measures will be taken to mitigate light impacts from the lease activities.

No provision in these rules is intended to restrict vessel lighting levels below what is necessary for safety or as is otherwise required by state or federal law.

(9) Noise

Applicability. These rules apply to the routine operation of all aquaculture facilities, including harvesting, feeding, and tending equipment at leases authorized by the Department of Marine Resources, with the following exemptions:

- Watercraft, harvest or transport barges, and maintenance equipment while underway;
- The unamplified human voice and other sounds of natural origin;
- Bells, whistles, or other navigational aids;
- Emergency maintenance and repair of aquaculture equipment;
- Warning signals and alarms; and

- Events not reasonably within the control of the leaseholder.

Mitigation:

All motorized equipment used during routine operation at an aquaculture facility must be designed or mitigated to reduce the sound level produced to the maximum extent practical.

Centralized feeding barges, or feeding distribution systems, shall be designed or mitigated to reduce noise by installing the most effective commercially available baffles at air intakes and outlets, mounting of all relevant equipment to minimize vibration between it and the hull, and using the most effective commercially available soundproofing insulation.

All fixed noise sources shall be directed away from any residences or areas of routine use on adjacent land.

An applicant shall demonstrate that all reasonable measures will be taken to mitigate noise impacts from the lease activities.

(10) Visual Impact

Applicability. This rule applies to all equipment, buildings, and watercraft used at an aquaculture facility, excluding watercraft not permanently moored or routinely used at a lease location such as harvest or feed delivery vessels. Other equipment or vessels not moored within the boundaries of a lease, but routinely used or owned by the leaseholder are subject to these requirements.

Building profiles. The size, height, and mass of buildings and equipment used at aquaculture facilities shall be constructed so as to minimize the visual impact as viewed from the water.

Height limitations. All buildings, vessels, barges, and structures shall be no more than one story and no more than 20 feet in height from the water line. Height shall be measured from waterline to the top of the roof or highest fixed part of the structure or vessel. This height limitation excludes antennae, cranes, and other similar auxiliary equipment. Structures that exist as of April 1, 2018 are exempted from the height restriction for their useful lifetime.

Roof & siding materials. Roofing and siding materials shall not be reflective or glossy in appearance or composition.

Color. Equipment and structures shall be painted, or be of, a color that does not contrast with the surrounding area. Acceptable hues are grays, blacks, browns, blues, and greens that have a sufficiently low value, or darkness, so as to blend in with the surrounding area. Colors shall be flat, not reflective, in appearance.

The color of equipment, such as buoys, shall not compromise safe navigation or conflict with US Coast Guard Aids to Private Navigation standards.

(11) Other Suitable Locations

The Commissioner shall consider whether there is a more suitable location in the vicinity of the proposed lease that could accommodate the proposed lease activities and that would interfere less with existing and surrounding uses of the area.

B. Conditions

The Commissioner may establish conditions that govern the use of the leased area and limitations on the aquaculture activities, including but not limited as follows:

- (1) A harbormaster and/or a municipal officer or other designee of the municipality in which the proposed lease is predominantly located may recommend that the Commissioner establish conditions on a proposed lease in writing to the Department during the comment period. The Department shall consider any conditions recommended by the municipality, and the Department shall provide a written explanation to the municipality at the time a proposed decision is written if any of the requested conditions will not be included in the lease.
- (2) The Commissioner may grant the lease on a conditional basis until the lessee has acquired all the necessary federal, state and local permits.
- (3) The Commissioner may require that environmental monitoring be conducted on lease sites. Such monitoring shall: be conducted by the applicant or the applicant's agent; be undertaken on a schedule to be determined by the Commissioner; and shall include the information designated by the Commissioner in the lease decision, which may include, but is not limited to, an analysis of water chemistry, phytoplankton, zooplankton, and fish larvae profiles. The results of such monitoring shall be summarized in a written report and submitted to the Department within 90 days of completion of each study.
- (4) The Commissioner may establish any reasonable requirements to mitigate interference, including but not limited to restrictions on:
 - (a) specific stocking limits, feeding requirements, husbandry techniques and harvesting methods;
 - (b) the size and shape of gear, nets, or enclosures;
 - (c) the deployment and placement of gear; and
 - (d) the timing of various project operations.
- (5) Within 120 days after the hearing on an application, the Commissioner shall render a final decision.
- (6) The Commissioner's denial or approval of a lease application shall be considered final agency action for purposes of judicial review.

Note: The complete rule-making petition may be accessed on DMR's website:
<https://www.maine.gov/dmr/laws-regulations/proposed-rulemaking.html>

Rule-Making Fact Sheet

(5 M.R.S., §8057-A)

AGENCY: Department of Marine Resources

NAME, ADDRESS, PHONE NUMBER OF AGENCY CONTACT PERSON:

Deirdre Gilbert, Department of Marine Resources, 21 State House Station, Augusta, Maine 04333-0021 Telephone: (207) 624-6576 web address: <http://www.maine.gov/dmr/rulemaking/>

CHAPTER NUMBER AND RULE: Chapter 2 Aquaculture Lease Regulations

STATUTORY AUTHORITY: 5 M.R.S.A. §8055

DATE AND PLACE OF PUBLIC HEARING(S): May 22, 2019, 5:00PM, Conference Rm 118, Marquardt Building, 32 Blossom Lane, Augusta, ME

COMMENT DEADLINE: June 1, 2019

PRINCIPAL REASON(S) OR PURPOSE FOR PROPOSING THIS RULE: [*see* §8057-A(1)(A)&(C)]

On March 20, 2019, the Department of Marine Resources (DMR) received a certified rulemaking petition from qualified voters of the State of Maine to modify portions of the aquaculture lease regulations. The rule changes proposed by the petitioners include a new decision criterion, which would require DMR to consider whether there are other locations near a proposed lease site that could accommodate the proposed activities while interfering less with existing and surrounding uses of an area. The petitioners request that the proposed rule be applied retroactively, so that it would extend to a pending lease application in Maquoit Bay. In their filing, the petitioners also requested a moratorium on all pending lease applications that are greater than ten acres in size. In accordance with 5 M.R.S.A. §8055, DMR will consider the proposed rule changes filed by the petitioners.

IS MATERIAL INCORPORATED BY REFERENCE IN THE RULE? ___ YES ___ X NO [§8056(1)(B)]

ANALYSIS AND EXPECTED OPERATION OF THE RULE: [*see* §8057-A(1)(B)&(D)]

The petitioners did not submit specific information regarding analysis and expected operation of the proposed rule. DMR has filed the proposed rule in accordance with 5 M.R.S.A. §8055.

BRIEF SUMMARY OF RELEVANT INFORMATION CONSIDERED DURING DEVELOPMENT OF THE RULE (including up to 3 primary sources relied upon) [*see* §§8057-A(1)(E) & 8063-B]:

DMR did not develop this proposed rule. The petitioners did not provide a summary of relevant information, or sources they utilized to develop the proposal.

ESTIMATED FISCAL IMPACT OF THE RULE: [*see* §8057-A(1)(C)]

These proposed amendments would likely require additional activity in this agency. Based on the filing, the proposed rule would compel DMR to “adopt a process” that requires the agency to consider whether other locations would be more suitable for a proposed lease site than what was originally selected by an applicant.

FOR EXISTING RULES WITH FISCAL IMPACT OF \$1 MILLION OR MORE, ALSO INCLUDE:

ECONOMIC IMPACT, WHETHER OR NOT QUANTIFIABLE IN MONETARY TERMS:

[*see* §8057-A(2)(A)]

INDIVIDUALS, MAJOR INTEREST GROUPS AND TYPES OF BUSINESSES AFFECTED AND HOW THEY WILL BE AFFECTED: [see §8057-A(2)(B)]

BENEFITS OF THE RULE: [see §8057-A(2)(C)]

Note: If necessary, additional pages may be used.