

**NOTICE OF AGENCY RULE-MAKING ADOPTION****AGENCY:** Department of Marine Resources**CHAPTER NUMBER AND TITLE:** Chapter 2 Aquaculture Regulations**CONCISE SUMMARY:**

This rule makes a number of changes to comply with statutory changes made by Public Law 2021 Chapter 52. It establishes a fee for an amendment of a lease of \$200. The rule specifies that the maintenance of a bond or escrow account and timely payment of rent is a minimum lease maintenance standard. The rule also restructures section 2.90(2)(B) for greater clarity and provides that any stock or seed obtained from wild sources needs to be taken in accordance with applicable season or size limits or any other limitations concerning take. In compliance with the National Shellfish Sanitation Program (NSSP) Model Ordinance (MO), the rule adds surf clams to the list of species contemplated in 2.95(A)(4)(a) and a provision that would require Department permission for any other species not listed. This rule updates lease and LPA marking requirements, so that by January 1, 2023, sites must be marked with yellow floating devices that host reflective material. The floating devices must display the lease or license identifier, and the words SEA FARM. The marking changes also increase the distance between floating devices from 100 yards to 200 yards. Lease and LPA license sites that have received a Private Aid to Navigation permit from the U.S. Coast Guard are exempt from the requirements but must still display the lease or license identifier and the words SEA FARM. It removes the limit on the number of helpers that may be designated for an LPA that is held by a municipal shellfish committee.

**ADOPTED RULE NUMBER:**

(LEAVE BLANK-ASSIGNED BY SECRETARY OF STATE)

**EFFECTIVE DATE:**

(LEAVE BLANK-ASSIGNED BY SECRETARY OF STATE)

**AGENCY CONTACT PERSON:** Amanda Ellis (207) 624-6573**AGENCY NAME:** Department of Marine Resources**ADDRESS:** 21 State House Station

Augusta, Maine 04333

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## 2.15 Notice of Lease Application and Hearing

3. Notice of Public Hearing. At least 30 days prior to the date of the public hearing, the Department shall provide notice of the hearing as required by 5 M.R.S.A. §9052 and by mail to the following persons:

- A. Riparian owners as listed in the application;
- B. The applicant; and
- C. Any state agency the Department determines should be notified, including the Department of Environmental Protection when the application includes activities that have a discharge into the waters of the State, Department of Inland Fisheries and Wildlife, and the Department of Agriculture, Conservation and Forestry.

## 2.40 Lease Issuance

### ~~3. Compliance~~

~~Failure to maintain an escrow account or performance bond, to pay rental fees in a timely manner, or failure to comply with the terms of the lease, these regulations or any applicable laws shall be grounds for lease revocation.~~

## 2.44 Lease Amendments

1. The Commissioner shall not amend a lease in such a way that it materially alters the findings of the original decision, or would result in a change to the original lease conditions. Amendments may be requested only for leases issued under 12 MRSA §6072, or scientific leases issued under 12 MRSA §6072-A to add or remove species or gear type, or modify operations.
2. Requests for amending leases must be submitted on forms prescribed by the Commissioner. A fee of \$200 is due at the time of application for the lease amendment.
3. Procedure. A lease amendment is not an adjudicatory proceeding. The Department shall send a notice of the proposed amendment to the owners of riparian land within 1,000 feet of the lease site, and the municipal officers of the municipality in which the lease is located, and interested parties. The Department may also publish notice on the Department website. The notice shall state that the riparians and municipal ~~officials~~ officers may provide comments to the Department on the proposed amendment within 14 days of the date of the notice.

## 2.45 Lease Renewal

1. A lessee, on a form supplied by the Commissioner, may apply for Department approval of a lease renewal. A lessee must file with the Department an application to renew a lease at least ~~90~~ 30 days prior to the lapse of the lease. The application shall include a nonrefundable application fee of \$1,500. A lease issued for scientific research pursuant to 12 M.R.S.A. §6072-A is exempt from the renewal fee requirements in this section.

## 2.60 Lease Transfer

1. Application. A lessee, on a form supplied by the Commissioner, may apply for Department approval of the transfer of his aquaculture lease to another person for the remaining portion of the lease term. The lessee must pay the transfer fee of \$2,500 for non-discharge leases and \$5,000 for discharge leases ~~prior to the execution of the new lease at the time application for the transfer is made~~. The Commissioner may waive the application fee if the applicant demonstrates that the transfer is to the applicant's parent, spouse, sibling or child. Multiple transfers of one lease that have the effect of circumventing the application fee are not permitted.
2. Procedure. A lease transfer is not an adjudicatory proceeding. The Department shall send a notice of the proposed transfer to the owners of riparian land within 1,000 feet of the lease site, and the municipal officers of the municipality in which the lease is located. The Department shall also publish a notice in a newspaper of general circulation in the area of the lease. The notice shall state that the public, riparians, and municipal ~~officials~~ officers may provide comments to the Department on the proposed transfer within 30 days of the date of the notice.

## 2.61 Lease Expansion

1. Application. A lessee may apply for Department approval of a lease expansion on a form supplied by the Commissioner. A lessee is eligible to apply for an expansion 2 years from the date the lease was originally executed. If a lease contains multiple tracts, the expansion must be proportional to each tract. The dimensions of the proposed expansion must be reasonably based on the original lease dimensions.
2. Fee. An application for lease expansion shall not be considered until a nonrefundable application fee has been paid. The application fee for a lease expansion is \$500 for non-discharge leases and \$2000 for discharge leases.
3. Procedure. A lease expansion is not an adjudicatory proceeding.
  - A. After the Department has deemed the application complete, the applicant shall publish a notice of the proposed expansion in a newspaper of general circulation in the area of the lease.
  - ~~B. The applicant~~ Department shall notify all riparian owners within 1,000 feet of the lease site, and the municipal officers of the municipality in which the lease is located ~~or by mailing a copy of the lease expansion application, after it has been deemed complete by the Department, by certified mail to the address certified by the municipal clerk or Bureau of Revenue Services, Unorganized Division for unorganized territory of the completed lease expansion application.~~ The notice shall provide the state that the public, riparians, and municipal ~~officials~~ officers with 30 days to provide written comments about the proposed expansion. ~~may provide comments to the Department on the proposed expansion within 30 days of the date of the notice. Failure to include a copy of the receipt for certified mailing with the application will be grounds for denial of the application.~~

## 2.64 Experimental Aquaculture Lease Application Procedures

4. Notice of Completed Application. At the time that an application is determined complete in accordance with Chapter 2.65 the Department shall make a copy of the completed application available to the known riparian owners within 1,000 feet of the proposed lease and to ~~officials~~

officers of the municipality or municipalities in which the proposed lease would be located, or the proposed lease abuts, as listed on the application.

## **2.75 Minimum Lease Maintenance Standards**

1. The lessee shall mark the lease in a manner prescribed by section 2.80 or the Commissioner in the lease and ensure that all structures authorized by the lease remain within the boundaries of the lease.
2. The lessee shall maintain his aquaculture lease in such a manner as to avoid the creation of a public or private nuisance and to avoid substantial injury to marine organisms.
3. The lessee is obligated for the routine collection and proper disposal of all errant gear, errant equipment, or errant solid waste from the lease site.
4. In order to prevent adverse impact to public health, the lessee shall make lawful efforts to ensure animal excrement does not accumulate on or near structures.
5. The lessee is obligated to properly contain and dispose of human waste generated during lease operations.
6. The lessee must maintain a copy of the lease's operational plan, executed lease and any amendments thereto on file and produce these documents upon request by the Department.
7. The lessee must maintain an escrow account or performance bond and pay rental fees in a timely manner.

## **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.
- A. Effective January 1, 2023 the marking procedures for aquaculture leases are as follows:
1. Except for a lease site that has received a Private Aid to Navigation permit from the United States Coast Guard, aquaculture leases shall be marked with yellow floating devices, such as buoys, which display the lease acronym 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 yellow floating devices shall be displayed at each corner of the lease area that is occupied or at the outermost corners. The yellow floating devices shall be readily distinguishable from interior buoys and aquaculture gear and shall host reflective

- material. In cases where the boundary line exceeds 200 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.
2. Sites that have received a Private Aid to Navigation permit from the United States Coast Guard must have the lease acronym assigned by the Department and the words SEA FARM clearly displayed on the site.
  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.~~

## **2.90 Limited-purpose aquaculture (LPA) license**

1. LPA License
  - A. No person may engage in the activities described in 2.90 and 12 M.R.S.A. §6072-C without a current LPA license issued by the Department of Marine Resources (DMR) in accordance with these regulations. An LPA license may be issued only to an individual or to a municipal shellfish management committee established pursuant to 12 MRSA §6671. The Department shall make application forms available. A non-refundable application fee in the amount of ~~\$50~~ \$100 per license application for Maine residents or ~~\$300~~ \$400 for non-residents must be paid when the application is submitted. LPA licenses expire at the end of each calendar year. No more than four (4) licenses may be held by any licensee at the same time. LPA licenses are non-transferable.
  - C. Up to three (3) assistants per license may be declared as helpers. An individual may be listed as an assistant on no more than eight (8) LPAs, other than their own, except that individuals who were listed on more than eight (8) LPAs as of March 1, 2018 may remain on the same additional LPAs until December 31, 2020, at which point they will be limited to being an assistant on no more than eight (8) LPAs. If the LPA license holder represents an educational institution, students are authorized to work under the direct supervision of the license holder who signed the application, as well as any listed helpers. If the holder of the LPA license is a municipal shellfish management committee, there is no limit to the number of individuals that may be declared as helpers.
2. Application requirements
  - B. Sources

Applications must identify the source of the stock or seed to be cultivated or grown for each species, and for hatcheries or nurseries list the current name, address and phone number of the hatchery or nursery source for each species listed under 2.90(2)(A).

~~A. with the exception of stock or seed of Hard Clam / quahog (*Mercenaria mercenaria*), Hen Clam (*Spisula solidissima*), or Soft shelled clam (*Mya arenaria*). Hatcheries or nurseries are the only permitted sources for Hard clam/quahog (*Mercenaria mercenaria*), Hen clam (*Spisula solidissima*), or Soft shelled clam (*Mya arenaria*), these clam species, unless the Department issues a shellfish transplant permit that authorizes the collection of undersized animals.~~

~~B. Marine algae (all seaweeds such as reds, greens, browns or kelps) and green sea urchins shall be obtained or cultured from stock originating in Maine coastal waters.~~

~~C. Any stock or seed obtained from wild sources must be taken in accordance with applicable season or size limits, or other limitations on take.~~

~~D. All sources of hatchery supplied seed or stock must be from hatcheries approved by DMR.~~

~~E. All shellfish stock or seed used for cultivation or grow-out that have been exposed to waters outside of an approved hatchery must originate from within the same Health Area defined under 2.05 (1) (J) as the LPA site, unless permitted by DMR as provided in (F)~~

~~F. Use of shellfish stock or seed exposed to waters outside of an approved hatchery and originating from outside the Health Area of the LPA site will require evidence that the seed or stock is consistent with the species authorized under 2.90(4) and may require evidence that the seed or stock is free from disease, and will require a permit from DMR.~~

~~Applications must identify the source of the stock or seed to be cultivated or grown for each species, and for hatcheries or nurseries list the current name, address and phone number of the hatchery or nursery source for each species listed under 2.90(2)(A).~~

~~All sources of hatchery supplied seed or stock must be from hatcheries approved by DMR.~~

~~All wild shellfish stock or seed used for cultivation or grow out must originate from within the same Health Area defined under 2.05 (1) (J) as the LPA site.~~

~~Use of wild shellfish stock or seed originating from outside the Health Area of the LPA site will require evidence that the seed or stock is consistent with the species authorized under 2.90(4) and may require evidence that the seed or stock is free from disease, and will require a permit from DMR.~~

#### C. Site location

- (1) The application must provide ~~one (1)~~ geodetic coordinates ~~in degrees/minutes/seconds to the hundredths place~~, the coordinate source (nautical chart number, the edition and its date or software name) and the datum of the coordinate source, for the center of the longest axis of the license site, and identify the directional orientation of the longest axis. The license site must be accurately depicted on a portion of a US Geologic Survey Topographic map or nautical chart.

#### 4. Authorized Species

An LPA license may be issued only for the cultivation of the following species: blue mussel (*Mytilus edulis*), hard clam / quahog (*Mercenaria mercenaria*), hen clam (*Spisula solidissima*), American or eastern oyster (*Crassostrea virginica*), European oyster (*Ostrea edulis*), sea scallop (*Placopecten magellanicus*), soft-shelled clam (*Mya arenaria*), razor clam (*Ensis leei*), green sea urchin (*Strongylocentrotus droebachiensis*), bay scallops (*Argopecten Aequipecten irradians*), and for marine algae (all seaweeds, including kelp). Notwithstanding 12 M.R.S.A. [§6001 \(41\)](#), for

purposes of 2.90, the terms “shellfish” and “seed” include sea scallops (*Placopecten magellanicus*) and bay scallops (*Argopecten irradians*).

## 6. Maintenance Standards

- A. All aquaculture gear must be maintained, and kept in a fully operational condition. The license holder is obligated to collect and or remove any loose or errant gear or equipment that is dislodged from the licensed site.
- B. Each LPA site that has gear on it must be clearly marked at each corner, centerpoint, or at each end of the gear, as is appropriate to the gear type deployed, with a marked buoy. LPA Site ID and “Sea Farm” must be clearly displayed on every buoy. The marked buoys shall be readily distinguishable from aquaculture gear.
- ~~C. LPA license sites must be marked in accordance with the United States Coast Guard’s Aids to Private Navigation standards and requirements.~~

C. Effective January 1, 2023, the marking procedures for LPAs are as follows:

1. The LPA site ID and SEA FARM must be clearly marked on every buoy.

2. Except for a LPA site that has received a Private Aid to Navigation permit from the United States Coast Guard, each LPA site that has gear on it must be clearly marked at each corner, centerpoint, or at each end of the gear, as is appropriate to the gear type deployed, with a yellow buoy. The marked buoys shall be readily distinguishable from aquaculture gear and shall host reflective material.

## 2.95 Water Quality Classifications and Shellfish Aquaculture

### A. Compliance

#### 4. Seed Shellstock

- (a) Seed from growing areas in the prohibited classification must be moved to approved, conditionally approved, restricted or conditionally restricted growing areas before exceeding the maximum seed size as defined below. The length is measured along the longest axis.
  - i. American oyster (*Crassostrea virginica*): 0.5 inch total length
  - ii. European oyster (*Ostrea edulis*): 0.5 inch total length
  - iii. sea scallop (*Placopectin magellanicus*): 1.5 inch total length
  - iv. bay scallop (*Argopectin irradians*): 1 inch total length
  - v. softshell clam (*Mya arenaria*): 0.75 inch total length
  - vi. hard clam (*Mercenaria mercenaria*): 0.75 inch total length
  - vii. blue mussel (*Mytilus edulis*): 0.5 inch total length
  - viii. razor clam (*Ensis directus*): 2 inches total length

- ix. Atlantic surf clam (*Spisula solidissima*): 0.5 inch total length
- x. Arctic surf clam (*Macromeris polynyma*): 0.5 inch total length

Seed shellstock for any species not listed in A(4)(a) may not be cultivated in prohibited areas without written approval from the Department.

Aquaculturists growing seed in areas in the prohibited classification must have a Department approved operations plan that includes corrective actions for addressing seed exceeding the maximum size. The approved corrective actions shall be implemented when maximum seed size is exceeded. Failure to implement the approved corrective actions will result in destruction of the seed.

- (b) Seed for LPAs must meet the requirements of the Health Areas in Chapter 2.90(3)(D) and 2.05(1)(J).
- (c) Inspection: The Commissioner and his/her agents may inspect the lease site, seed, operations, and business records of individuals cultivating seed in areas in the prohibited classification.



## **Basis Statement**

This rule makes a number of changes to comply with statutory changes made by Public Law 2021 Chapter 52. It establishes a fee for an amendment of a lease of \$200. The rule specifies that the maintenance of a bond or escrow account and timely payment of rent is a minimum lease maintenance standard. The rule also restructures section 2.90(2)(B) for greater clarity and provides that any stock or seed obtained from wild sources needs to be taken in accordance with applicable season or size limits or any other limitations concerning take. In compliance with the National Shellfish Sanitation Program (NSSP) Model Ordinance (MO), the rule adds surf clams to the list of species contemplated in 2.95(A)(4)(a) and a provision that would require Department permission for any other species not listed. This rule updates lease and LPA marking requirements, so that by January 1, 2023, sites must be marked with yellow floating devices that host reflective material. The floating devices must display the lease or license identifier, and the words SEA FARM. The marking changes also increase the distance between floating devices from 100 yards to 200 yards. Lease and LPA license sites that have received a Private Aid to Navigation permit from the U.S. Coast Guard are exempt from the requirements but must still display the lease or license identifier and the words SEA FARM. It removes the limit on the number of helpers that may be designated for an LPA that is held by a municipal shellfish committee.

The recent statutory changes increased the fees for LPA licenses from \$50 to \$100 for Maine residents and \$300 to \$400 for non-residents. In processing the proposed rule, DMR noted that it should have updated the fees for LPA licenses listed in regulation. During the public hearing, DMR explained that the LPA fees would need to be updated to reflect the statute. Therefore, the rule has been updated accordingly.

### Summary of Comments

On December 13, 2021, the rule was posted on the DMR website. Notice of the proposed rulemaking appeared on December 15, 2021 in the five major daily newspapers as published by the Secretary of State; and electronic messages were sent to individuals who subscribe to DMR’s rulemaking and aquaculture notices. A public hearing was held both in-person and remotely at 5:00 p.m. on January 5, 2022. The in-person hearing was held at DMR’s Augusta office and the remote component was held via Microsoft Teams. No members of the public attended in-person, so the proceeding was entirely remote. The comment period closed January 16, 2022.

The hearing was attended by the following individuals:

Name	Affiliation
Meredith Mendelson, Deirdre Gilbert, Marcy Nelson, Flora Drury, Cheyenne Adams, and Amanda Ellis	Maine Department of Marine Resources
Don Eley, Emily Farr, Marissa McMahan, Gabby Hillyer, Sally Mills, William Owen, and Mike Fedosh	Members of the Public

### January 5, 2022 Public Hearing Comments

#### Don Eley

I think most of you know me, but just for the record it should be stated that I am a professor emeritus in marine transportation. I spent 28 years teaching navigation at Maine Maritime Academy and had a 15-year career at sea before that. I feel I have a little bit of experience with navigational concerns. This has to do with 2.80 and the changes that you're making to that. I think there's always been some confusion, especially among some of the leaseholders as to what they're required to actually display at the lease and then what they're required to maintain and also who's responsible for ensuring that those markers are maintained correctly. It's my understanding that and this was reaffirmed today with the call to the Coast Guard in Southwest Harbor. That anyone putting up an aquaculture lease with a structure on it, including you know any floating structures in navigable waters needs to have a Private Aid to Navigation Permit from the U.S. Coast Guard.

I would like 2.80 to be clear as to what that entails. I am a little concerned that section 4 is crossed off. My suggestion would be that leases need to be marked in accordance with U.S. Coast Guard, Private Aids to Navigation (PATON) requirements be number 1 in this section. That would clearly define that the aquaculture lease operator applies for that PATON and then has that in place first. Then what is now number one would make a lot more sense, because it

says leases shall be marked except those that have U.S. Coast Guard permit. I feel the changes you are making make it more confusing and less definitive to what the lease holder is obligated to do. This is all about safety and navigation and the ability to enforce that as part of the lease. Markings are enforceable. However, in the past 20 years I have been dealing with DMR it has been difficult to get marine patrol to enforce the U.S. Coast Guard PATON requirements of a particular lease. I would like to see this section strengthen in terms of what is the requirement and how that's going to be enforced.

### **Gabby Hillyer**

My name is Gabby Hillier and I'm here today as the project coordinator for the Maine Shellfish Learning Network (MSLN) and I wanted to offer a bit of testimony on Section 2.90, particularly part one primarily in support of the addition for municipal shellfish committees to no longer have any restrictions on the number of people that are able to work on aquaculture leases. Just to give a bit of background. I work with a number of folks both at the MSLN and a number of shellfish committees across the coast. Recently, we were able to engage in research on the limited purpose aquaculture permit process and I want to also thank Flora and Marcy, who are here for helping me along and various ways on that from our research. It seems that having the limitations on the number of helpers has really impeded municipalities, who are trying to engage in conservation or restoration work around shellfish. I believe that this addition will be a great step forward and helping alleviate that burden. This will also give municipal shellfish committees, the opportunity to invite students, local community members, and others to work on LPAs as part of their conservation work.

### **William Owen**

I'm the Harbormaster in Yarmouth. I'm just wanted to comment on 2.80. I agree with the markings of the yellow buoys. I just think that maybe there should be a minimum standard size. Whether it's just on the corners or something, but I just I'm afraid that if there's not a minimum size people will use smaller buoys. In Yarmouth, we try to get people to use the LD twos as a minimum size. This might not be the right platform for this, but maybe also include some additional markings on the cages or some sort of identifier tags in case gear breaks lose and washes ashore.

## **Written Comments Received**

### **Sally Mills, Friends of Blue Hill Bay (FOBHB), received via email, January 14, 2022**

Thank you for the opportunity to comment on the proposed rule changes to Chapter 2 of the Aquaculture Regulations. My comments below are offered on behalf of my client, Friends of Blue Hill Bay, and focus on the proposed updates to the lease and LPA marking requirements.

The need for responsible marking of lease sites in compliance with US Coast Guard requirements has been a priority FOBHB since 1999. DMR markings merely confirm that the site is, in fact, an aquaculture site; it is the Coast Guard chart and lighting requirements that alert mariners in advance of a potential navigational hazard.

The US Coast Guard regulations require that every structure located in navigable waters apply for a PATON determination. There are no exceptions. The Coast Guard determines what level of marking is appropriate depending upon a number of factors. Once the determination is made, it is up to the applicant to comply and Marine Patrol to enforce. As such, the proposed changes to the DMR Regulations obscure this requirement and add a new layer of confusion.

For example, the deletions of sections 2.80(4) and 2.90(6)(C) eliminate the requirement for PATON determinations. This does not eliminate the requirement as far as the US Coast Guard is concerned, but it does remove the issue from consideration by DMR. As such, chronic noncompliance with the US Coast Guard requirements may not be grounds for lease revocation by DMR. It also gives applicants a false impression; by definition, every leaseholder requires a PATON determination, so the alternative marking requirements set out in the revised regulations are moot. Rather than delete these sections, we suggest they be moved to the top.

If the Regulations are to be amended, we suggest this be done to clarify the requirement for US Coast Guard Paton determinations, with an additional requirement for DMR markings, such as the corner "SeaFarm" buoys. In addition, we suggest that rules be added to include a process for monitoring sites by Marine Patrol, and strict consequences for leaseholder non-compliance, including termination of the lease. It is in everyone's interest for maritime safety that these sites be marked correctly.

**Yvonne Wilkinson and Michael Pinkham, Town of Gouldsboro, received via email,  
January 13, 2022**

We are writing this letter in response to changes being proposed to the Aquaculture Regulations. The Town of Gouldsboro is one of approximately 75 towns who have a Municipal Shellfish Ordinance. Under Title 12 Section 6671, we are granted the right to engage in conservation within the intertidal of our municipality. We believe that requiring municipalities to apply for a LPA permit to undertake these conservation efforts granted to their town under the law is adding an unnecessary restriction on activities that the law already allows. We believe that a municipality should be able to report to the area biologist on what they are planning to do for conservation in their respective town, and if the area biologist approves, the municipality should be able to proceed without requirements for additional applications, fees and review. We see that the proposed changes would allow more than 3 helpers to work on the LPA, if we were allowed to do conservation the way the law states, this change wouldn't be necessary.

The Town of Gouldsboro just renewed their LPA for the upcoming year at the cost of \$100.00 and a quiz. A municipality shouldn't be required to apply or pay for a permit.

We heard that the reason for a municipality to have a LPA permit is because we would be using aquaculture gear. We will give you this comparison, pickup trucks were built to move materials commercially from one place to another-today pickup trucks are being used as much for passenger vehicles as they are being used to move commercial products. There are many more arguments about things that were developed for one thing and are now being used for another. When the Aquaculture regulations were written, we are sure that no one thought that a municipality would have to go such great lengths and think so far outside the box to help replenish their clam flats. With this all being said, we think that the Department of Marine Resources should reconsider the requirement for a municipality to acquire an LPA to do conservation work when they have Municipal Shellfish Ordinance.

Another problem with having to apply for an LPA is that you have to notify the riparian landowners which is a requirement that a municipality shouldn't have to do. The working waterfront has changed with folks moving here from away and buying up the shore front property. Some don't want to see anyone or anything on the shore in front of them. This could have a negative effect on necessary conservation work to be done by a municipality. We would point out again that Title 12 section 6671 gives the town the ability to conduct conservation activities in the intertidal. We think that DMR should make the threshold for determining whether a LPA is required be based on the words "commercial", "municipal" or "scientific research" and whether the purpose of the project is commercial, municipal, or scientific. We would like to thank you for taking the time to read and consider our thoughts as you move forward with any regulations involving a municipality.

**Paul Plummer, Town of Harpswell, received via email, January 12, 2022**

The Town of Harpswell supports the proposed changes to Section 2.80; Marking Procedures for Aquaculture Leases. The Aquaculture Division is aware that the Town of Harpswell has been requesting LPA and Leases holders to use yellow corner buoys with reflective tape to help keep uniformity for boaters and commercial fishermen and Northern Casco Bay. With a statewide regulation, this would help boaters better understand when they come across a yellow buoy. Although the proposed change uses the word "Lease", we hope that this regulation will also apply to LPA's as it keeps consistency all around.

**Gabrielle Hillyer, Maine Shellfish Learning Network, received via email, January 5, 2022**

My name is Gabrielle Hillyer (she/her pronouns) and I am providing comment on behalf of the Maine Shellfish Learning Network (MSLN) in support of the change to 2.90: Limited Purpose Aquaculture (LPA). The Maine Shellfish Learning Network has a mission to promote learning, leadership, and equity in Maine and Wabanaki wild clam and mussel fisheries. In alignment with this mission, we believe that this change will support municipal shellfish conservation and management. Over the last year, the MSLN along with Manomet has engaged in collaborative and participatory research in order to provide support for municipal shellfish committees who are

engaging in applying for limited purpose aquaculture leases (LPA). This research had three goals: 1) interview key informants, as well as engage in many off-the-record conversations about the LPA application process to gather recommendations on how to improve it; 2) develop a LPA Workbook, which goes into detail and serves as a guide for municipalities applying for LPAs; 3) develop subsequent web pages on themudflat.org (MSLN website) that create an online platform for the information in the workbook. Based on this research multiple recommendations were drafted including removing limitations on the number of shellfish harvesters, students or research participants that can work on a LPA held by a municipal shellfish committee meeting. Based on this research, as well as follow up meetings with staff members of the Maine Department of Marine Resources Aquaculture Group, the Maine Department of Marine Resources Public Health Bureau, and the Maine Department of Marine Municipal Shellfish Management Group, we have recommended this proposed change, to exempt a municipality if they are the license holder from the number of individuals that can be declared as helpers, as a first step in alleviating the burden for municipalities engaging in the LPA process. Municipal shellfish committees are using LPAs in a unique way, to promote the conservation and restoration of wild shellfish populations across the coast. We believe this change will support these efforts moving forward.

**Bailey Bowden [comment was signed by Harold Hatch, Phil Rapp, and Sylvia Tapley]  
Town of Penobscot, received via email, January 5, 2022**

The Town of Penobscot Selectboard would like to comment on the proposed change to the Department of Marine Resources Rule 2.9 Limited-purpose aquaculture (LPA) licenses, that will allow municipalities with a Shellfish Conservation Committee to have more than three people listed on any LPA license. According to DMR Rule Chapter 2 section 2.05 Definitions: "Aquaculture" means the culture or husbandry of marine organisms by any person. In order to qualify as aquaculture, a project must involve affirmative action by the individual to improve the growth rate, survivability or quality of the marine organism. In compliance with Title 12 Chapter 6671, many Municipal Shellfish Conservation Committees routinely undertake projects such as roughing flats, encourage shellfish spat settlement, predator netting, seed transplants, and the opening and closing of flats, all which meet the legal definition of Aquaculture and are allowed without an aquaculture permit. We believe that in the spirit of the co-management system that any municipal conservation project that involves the husbandry of shellfish should be consulted with, approved, and permitted by the DMR Municipal Shellfish Program staff at no cost to the municipality. Furthermore, we believe that requiring municipalities to obtain licensing from another Division within the Department is inconsistent with existing conservation measures, places an extra burden on municipal staff, requires the municipality to expend funds, and is not keeping with the intent of co-management. In conclusion, we believe a municipality that has an approved Municipal Shellfish Conservation Ordinance should be exempt from all aquaculture rules. The seed that is raised will be spread on the municipality's flats for the use of the general public - not a private commercial enterprise.

**Lewis Pinkham, Town of Milbridge, received via email, December 30, 2021**

We are writing in response to changes being proposed to the Aquaculture Regulations. The Town of Milbridge has a Municipal Shellfish Ordinance and as required by Title 12 section 6671 we are required to adhere to the Department of Marine Resource-Procedural Rules Chapter 7. The Chapter requires a Shellfish Management plan which a requires a municipality to do municipal conservation. These conservation plans require the DMR Commissioner approval. Some municipalities are doing conservation that currently falls under the Aquaculture Regulations. We feel this puts an extra burden on municipalities that is not needed. There are some riparian landowners that just do not want anyone out in front of their property which can make conservation work very hard to accomplish.

**Glen Melvin, Waldoboro Shellfish Committee, received via email, December 30, 2021**

Towns up and down the coast are equally discouraged with your LPA program. Big surprise! Here's a couple thoughts,, *Checking with the "neighbors" requirement?? God forbid a Fishing Industry trying to save itself upsets a transplant or ruins their view. Wasn't this addressed during the "rights to fish" thing? Fee increase (or any fee at all)?? This is a good idea for an Industry like ours that barely scrapes by. After all,, You got Windmills to buy! Waldoboro had to get a permit on their LPA permit. Permits are a good time for people that dig in the mud for a living. That doubled the fun! LOVE the required test idea! That spawned some of the best jokes among Waldoboro diggers. All you do when you make it difficult for diggers and/or towns (like the BS Waldoboro has had to go through for the past 2 years) is discourage growth. For us, It's just not worth the headaches. I would not do it again. And the state wonders why towns don't take the lead. All my love, Glen Melvin. Vice-Chair, Waldoboro Shellfish.*

**DMR's Response to Comments**

DMR reviewed the comments received and noted that they were mostly specific to the proposed marking requirements and municipal shellfish conservation activities that meet the definition of aquaculture. DMR's response to those comments are provided below:

**Municipal Shellfish Conservation and Aquaculture Activities**

The provisions of 12 M.R.S.A. §6671 and the associated regulations in Chapter 7 of DMR's rules, give municipalities the authority to manage certain aspects of shellfish harvest and conservation within the municipality, including licensing, limiting harvest activities, limiting the species or amount of shellfish taken on a daily basis by licensed harvesters, etc.

When the conservation activities of a municipal shellfish program meet the definition of aquaculture, they are required to obtain either a Limited Purpose Aquaculture (LPA) license or lease. These requirements are irrespective of 12 M.R.S.A. §6671 and the provisions Chapter 7. To date, municipal shellfish programs conducting activities that meet the definition of aquaculture have elected to obtain LPAs. The LPAs have certain application and notice

requirements [i.e. providing an opportunity for riparian landowners within 300 feet of a proposed LPA the opportunity to provide written comments on the application], which some municipalities noted were burdensome in consideration of their participation in a shellfish conservation program.

This proposed rule removes the limit on the numbers of helpers that may be designated for an LPA that is held by a municipal shellfish committee, which increases the number of persons who can assist with those sites. This was intended to help alleviate some of concerns raised by municipal shellfish programs, who may have multiple people helping with conservation programs.

The rule did not propose eliminating any other requirements for municipalities or otherwise exempting shellfish programs from needing to obtain an LPA or lease when the conservation activities meet the definition of aquaculture. However, DMR understands the general interest from municipalities in trying to streamline the permitting of their conservation efforts. DMR is committed to working with municipalities on trying to address this larger issue in consideration of other rules or laws that intersect with these types of projects.

### **U.S. Coast Guard Marking Requirements and Enforcement**

Two commenters suggested that DMR should enforce marking requirements that are the jurisdiction of U.S. Coast Guard. The commenters also felt that the proposed marking changes should be modified further to require site holders to consult with the U.S. Coast Guard to determine if a federal permit is required. One commenter also suggested that the rule include a process for site monitoring by Marine Patrol.

DMR has statutory authority over aquaculture leases and licenses and the regulations contained in Chapter 2 reflect that authority. Other state or federal agencies may have authority over certain aspects of aquaculture sites depending upon the operations. It is the responsibility of aquaculturists to know and comply with all other rules and laws that may apply to their site(s) or operations. DMR has the authority to enforce laws and rules under its jurisdiction. DMR cannot enforce U.S. Coast Guard marking requirements.

The proposed rule clarifies how LPA and lease sites should be marked. The requirements vary slightly, depending upon whether the site has obtained a PATON permit from the U.S. Coast Guard. It is the responsibility of aquaculture site holder to consult with the U.S. Coast Guard about what federal permits, if any, may be required. However, all sites need to comply with the marking requirements set forth in DMR's regulations.

Lease and license sites are inspected on an annual basis by DMR. Personnel who inspect the sites check to ensure the sites are properly marked. Outside of annual inspections, if DMR is made aware that a site is not properly marked in the manner contemplated in DMR's regulations, Marine Patrol would follow up with the site holder.

The proposed marking requirements reflect input provided by some municipalities, harbor masters, fishermen, and industry members. These stakeholders wanted greater consistency in how sites were marked and to improve the visibility of sites for mariners. The U.S. Guard also



provided guidance concerning how aquaculture sites are permitted in First District waters [this includes Maine] and this information was taken into consideration. DMR anticipates issuing guidance about the new marking requirements to industry. The guidance would note that site holders are responsible for consulting with the U.S. Guard to determine if PATON is necessary.

### **Specifying Buoy Sizes and Requiring Gear Marking**

One commenter suggested specifying the minimum sizes for marker buoys, in case persons used smaller markers, which might limit visibility. The regulations require that marker buoys display the acronym of the aquaculture site assigned by DMR and the words SEA FARM be displayed in letters of at least 2 inches in height. In addition, the rule language specifies that markers must be “readily distinguishable” and markers must “clearly” show the boundary of the site. Given these requirements, it is likely that the markers will be of a size that maintains visibility. Specifying a specific size may be too prescriptive given the variability in operations between sites. However, if someone deployed markers that were not clearly visible, DMR has the authority to follow-up with the site holder. In addition, not including a minimum size would provide an opportunity for a municipality to specify a size, if they felt that was necessary. Therefore, DMR is not proposing to set a minimum marker size at this time. The commenter also suggested that gear also be marked. However, the scope of changes contemplated as part of this rulemaking only include site marking.

## Rule-Making Fact Sheet

(5 M.R.S., §8057-A)

AGENCY: Department of Marine Resources

NAME, ADDRESS, PHONE NUMBER OF AGENCY CONTACT PERSON:

Amanda Ellis, Department of Marine Resources, 21 State House Station, Augusta, Maine 04333-0021 Telephone: (207) 624-6573; web address: <http://www.maine.gov/dmr/rulemaking/>

CHAPTER NUMBER AND RULE: Chapter 2 Aquaculture

STATUTORY AUTHORITY: §§ 6072, 6072-A, 6072-B, 6072-C

DATE AND PLACE OF PUBLIC HEARING(S): January 5, 2022; in-person at DMR's Augusta office and remote via Microsoft Teams. January 6, 2022 may be utilized as an alternate date if the hearing on January 5, 2022 needs to be postponed.

COMMENT DEADLINE: January 16, 2022

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

The purpose of this proposed rule is to provide compliance with recent statutory changes, to address feedback concerning aquaculture site marking requirements, and clarify that wild sources of stock or seed must be taken in compliance with existing laws.

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)]

This rule is expected to provide greater clarity to LPA holders concerning source of stock, ensure consistency with recent statutory changes, and update marking requirements for aquaculture sites. The proposed changes to the marking requirements are intended to help improve the visibility of aquaculture sites and ensure that all sites are clearly marked with SEA FARM and the lease or license site identifier.

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]:

Consultation with Marine Patrol and staff in DMR's Bureau of Public Health, evaluation of the recent statutory changes, and the site marking requirements were developed from meetings held between DMR staff and a small group of harbormasters, fishermen, and aquaculturists in early 2021.

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

Enforcement of the proposed rule will not require additional activity in this agency. Existing enforcement personnel will monitor compliance during their routine patrols. Existing holders of aquaculture lease and LPA sites may have costs associated with coming into compliance with the new marking requirement. However, the proposed requirements would not become effective until January 1, 2023, which is intended to provide current site holders with the opportunity to prepare for compliance. This proposal was also developed with input from some aquaculturists.

**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.*