

STATE OF MAINE
DEPARTMENT OF MARINE RESOURCES

Aquaculture Lease Transfer Application
Suspended culture of shellfish
North of Bear Head, Bagaduce River, Brooksville

Frank S. Peasley / Greer – Tapley,
LLC
BAG BH

FINDINGS OF FACT, CONCLUSIONS OF LAW, & DECISION

1. THE PROCEEDINGS

Frank S. Peasley applied to the Department of Marine Resources (DMR) to transfer the lease BAG BH to Greer-Tapley, LLC.¹ The lease site is 5.38 acres and is located to the north of Bear Head in the Bagaduce River, Brooksville, Hancock County. The standard lease (BAG BH) was originally issued on February 28, 2011. On March 29, 2022, BAG BH was renewed for a 20-year term. The lease is authorized for the cultivation of American/Eastern oysters (*Crassostrea virginica*) and European Oysters (*Ostrea edulis*) using suspended culture techniques. The current lease expires on February 27, 2041.

The transfer application was received on January 10, 2023, and accepted as complete on March 17, 2023. Notice of the completed application and 30-day comment period was published in the *Penobscot Bay Press* on March 30, 2023. DMR also provided notice of the completed application and the 30-day comment period to the Town of Brooksville and its Harbormaster, riparian landowners within 1,000 feet of the aquaculture lease site, other state agencies, and to subscribers of DMR’s aquaculture list-serve. No comments were received. A lease transfer does not require a hearing, so no hearing was held.

2. STATUTORY CRITERIA

Aquaculture lease transfers are governed by 12 M.R.S.A. §6072(12-A) and by Chapter 2.60 of DMR’s rules, which provide that an aquaculture lease shall be transferred if: the change in lessee's identity does not violate any of the lease issuance criteria set forth in 12 M.R.S.A. §6072(7-A); the lease transfer is not intended to circumvent the preference guidelines for treatment of competing applications as set forth in 12 M.R.S.A. §6072(8); the lease is not being

¹ The transfer application notes that Greer-Tapley, LLC conducts business as ‘Tapley Cove Oyster Company.’ Leases can only be held by individuals or legal entities. If the transfer is granted, BAG BH will be held by Greer-Tapley, LLC, which is a legal entity.

held for speculative purposes; and the transfer will not cause the lessee to be a tenant of any kind in leases covering an aggregate of more than 1,000 acres².

A. Change of Holder and Issuance Criteria

Chapter 2.60(3)(A) of DMR’s regulations state the agency must determine the change in lessee's identity does not violate any of the lease issuance criteria set forth in 12 M.R.S.A. §6072(7-A).

DMR did not receive any comments concerning the lease transfer. Based on a review of the record there is no evidence to indicate that a change in lease holder would otherwise violate the original criteria for granting a standard lease.

Therefore, the change in lessee's identity does not violate any of the lease issuance criteria.

B. Preference Guidelines

Chapter 2.60(3)(B) of DMR’s regulations state the agency must consider if a transfer is intended to circumvent the preference guidelines for treatment of competing applications as set forth in 12 M.R.S.A. §6072(8).

DMR has not received any competing applications for this lease location.

Therefore, the transfer is not intended to circumvent the preference guidelines.

C. Speculative purposes

Chapter 2.60(3)(C) of DMR’s regulations provides that in determining whether a transfer is for speculative purposes, the agency must consider “whether the current lessee has conducted substantially no research or aquaculture in the lease areas during the previous lease term.”

According to the application, the lease site has been operating year-round and used to seed, cultivate, and harvest American oysters (*Crassostrea virginica*) continuously since 2010 (Transfer application, pg. 2). In addition, when the site was renewed in March 29, 2022, DMR found that it had been used throughout the course of the prior lease term. Based on the transfer application and a review of DMR’s records, Frank S. Peasley has conducted aquaculture activities on the lease site throughout its terms.

² 12 M.R.S.A. §6072(13-A)(B) states , “The commissioner may by rule authorize leases in excess of the 500-acre limit if the commissioner determines that the increase is beneficial for the management of aquaculture and is environmentally and economically appropriate”. Chapter 2.60(3)(D) states “the transfer will not cause the transferee to be a tenant of any kind in leases covering an aggregate of more than 1,000 acres.”

Therefore, the lease is not being transferred for speculative purposes.

D. Aggregate lease holdings

According to DMR’s records, BAG BH is 5.38 acres in size and is the only site held by Frank S. Peasley. Greer-Tapley, LLC does not hold any aquaculture sites and neither do the shareholders, Kristen Greer & Joseph Tapley.

Therefore, if the lease transfer is granted, it would not cause Greer-Tapley, LLC to hold more than 1,000 acres.

3. LEASE CONDITIONS

The following conditions were applied to the lease by the original decision:

- 1) The leaseholder shall accommodate the need for reasonable access to and from the shore for the property adjacent to the southern boundary of the lease site.
- 2) All submerged aquaculture gear must be marked sufficiently to identify potential underwater hazards from the surface.
- 3) Small-boat navigation and recreational fishing are allowed within the open areas of the lease site.
- 4) All gear must be deployed so as to minimize shading and physical disturbance of the eelgrass occupying the bar area in the northeastern portion of the lease site.

4. DECISION

The Commissioner grants the application of Frank S. Peasley to transfer the aquaculture lease BAG BH to Greer-Tapley, LLC. The transferred lease is subject to the same terms, conditions, and obligations as set forth in the original lease, except as modified by subsequent Department decisions.

5. REVOCATION OF LEASE

The Commissioner may commence revocation procedures upon determining pursuant to 12 M.R.S. §6072 (11) 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.

6. DATE AND SIGNATURE

Dated: 8/1/2023



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

STATE OF MAINE
DEPARTMENT OF MARINE RESOURCES

Frank S. Peasley

Aquaculture Lease Renewal Application
Suspended Culture of Shellfish
North of Bear Head, Bagaduce River,
Brooksville

BAG BH

03/29/22

FINDINGS OF FACT, CONCLUSIONS OF LAW, & DECISION

In September of 2020, Frank S. Peasley applied to the Department of Marine Resources (DMR) to renew standard aquaculture lease BAG BH for a period of 20 years. The 5.38-acre lease is issued for the culture of American oysters (*Crassostrea virginica*) and European oysters (*Ostrea edulis*) using suspended culture techniques. The site is located to the north of Bear Head in the Bagaduce River, in the Town of Brooksville. The original lease term began on February 28, 2011.

1. PROCEDURE

Notice of the completed renewal application, the 30-day public comment period, and opportunity to request a public hearing, was published in the *Penobscot Bay Press* on November 5, 2020. Notice was also provided to riparian landowners within 1,000 feet of the site, the municipality, and other state agencies. Notice was sent to subscribers of DMR's aquaculture email list-serve. During the comment period, DMR received more than five requests to hold a public hearing on the renewal application, and therefore DMR was required to hold a public hearing.

Notice of the public hearing was published in the February 10 and 24, 2022 editions of the *Penobscot Bay Press*. Notice was also provided to the municipality, riparian landowners within 1,000 feet of the site and other state agencies. Notice was provided to subscribers of DMR's aquaculture email list-serve and published in the Maine Lobstermen's Association's event calendar. The hearing notice required persons who wanted to attend the hearing and provide testimony or ask questions of the applicant to register to participate in the proceeding by 5:00 p.m. on February 28, 2022. Several individuals registered to attend the proceeding, and one individual registered to testify.

The hearing was held as scheduled on March 15, 2022 at the Brooksville Town Hall. The following persons provided testimony:

Name	Affiliation
Frank and Tonyia Peasley	Applicant
Debrae Bishop	Brooksville Harbormaster
Tom Adamo and Pamela Storm	Members of the Public ¹

¹ Because time allowed, all individuals who attended the proceeding were given the opportunity to testify, even if they had not registered to do so.

Mr. and Mrs. Peasley described the aquaculture activities conducted over the previous lease term and operations at the site. Harbormaster Bishop, Mr. Adamo, and Ms. Storm provided testimony that was complimentary of the lessee's operations in the previous lease term. The Hearings Officer for the proceeding was Flora Drury.

The evidentiary record before DMR includes the following exhibits:

1. Case file
2. Application

I. STATUTORY CRITERIA

Aquaculture lease renewals are governed by 12 M.R.S.A. §6072(12) and by Chapter 2.45 of DMR's rules, which provide that an aquaculture lease shall be renewed if: the renewal will not the cause the lessee to be a tenant of any kind in leases covering an aggregate of more than 1,000 acres, the lease is not being held for speculative purposes; the Commissioner determines that renewal of the lease is in the best interest of the state; and the lease holder has compiled with the lease agreement.

A. Aggregate lease holdings

BAG BH is the only aquaculture lease site held by Mr. Peasley. BAG BH is 5.38 acres in size.

Therefore, I find that the renewal of this lease will not cause the applicant to hold more than 1,000 acres.

B. Speculative purposes

Chapter 2.45(2)(A) of DMR's regulations provides that in determining whether a renewal is being conducted for speculative purposes, DMR must consider "whether the current lessee has conducted substantially no research or aquaculture in the lease areas during the previous lease term." The renewal application, and testimony provided by the applicants, the Brooksville Harbormaster, and members of the public, indicate that aquaculture activities have occurred on the site during the previous lease term. This is consistent with a review of Department records, which indicate aquaculture activities occurred on the site during the previous lease term. No evidence or testimony was presented at the public hearing that alleged the renewal was being conducted for speculative purposes.

Therefore, I find that the lease is not being held for speculative purposes.

C. Best interest of the State of Maine

In determining whether it is in the best interest of state to renew the lease, the Department takes into consideration, among other things, the potential for conflict with other new or existing uses of the area which the Commissioner determines to

be a higher use of the area from the perspective of the public interest. There is no evidence of conflicts with other new or existing uses of the area, and testimony provided by the Brooksville Harbormaster and members of the public, along with comments received during the 30-day comment period, indicated support for the applicant's current operations.

Therefore, I find that it is in the best interests of the State of Maine to renew this lease.

D. Compliance with lease

The review of the case file associated with lease BAG BH indicates compliance with the lease agreement. Furthermore, the Brooksville Harbormaster provided testimony indicating that she never hears complaints about the applicant's current operations and that the applicants are good tenants of their lease. There are no outstanding complaints regarding this lease and no evidence that the site has been operated in a manner that created a public or private nuisance or substantial injury to marine organisms.

Therefore, I find that the applicant has complied with the lease agreement during its term.

II. LEASE CONDITIONS

The following conditions were applied to the lease by the original decision:

- 1) The lease site must be marked in accordance with both U.S. Coast Guard requirements and DMR Rule 2.80.
- 2) The leaseholder shall accommodate the need for reasonable access to and from the shore for the property adjacent to the southern boundary of the lease site.
- 3) All submerged aquaculture gear must be marked sufficiently to identify potential underwater hazards from the surface.
- 4) Small-boat navigation and recreational fishing are allowed within the open areas of the lease site.
- 5) All gear must be deployed so as to minimize shading and physical disturbance of the eelgrass occupying the bar area in the northeastern portion of the lease site.

If the lease is renewed, condition "1" will be removed from the lease agreement. Chapter 2.80 of DMR's regulations specify how a lease site must be marked. In addition, lease agreements require compliance with DMR's marking requirements.


III. DECISION

The Commissioner grants the application of Frank S. Peasley to renew the aquaculture lease BAG BH for a period of twenty years. The renewed lease is subject to the same terms, conditions, and obligations as set forth in the original lease, except as modified by this decision.

IV. REVOCATION OF LEASE

The Commissioner may commence revocation procedures upon determining pursuant to 12 M.R.S. §6072 (11) 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.

VI. DATE AND SIGNATURE

Dated: 3/29/2022 

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

STATE OF MAINE
DEPARTMENT OF MARINE RESOURCES
Standard Aquaculture Lease Application
Suspended culture of oysters, Bagaduce River

Frank S. Peasley
Lease BAG BH
Docket #2010-07

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION

On March 18, 2010, the Department of Marine Resources (“DMR”) received an application from Frank S. Peasley of Brooksville, Maine, for a standard aquaculture lease on 5.38 acres located in the coastal waters of the State of Maine, in the Bagaduce River north of Bear Head in the Town of Brooksville in Hancock County, for the purpose of cultivating American oysters (*Crassostrea virginica*) and European oysters (*Ostrea edulis*) using suspended culture techniques. The application was accepted as complete on April 26, 2010. No one intervened in this case. A public hearing on this application was held on August 31, 2010, in Brooksville.

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 Brooksville and the Brooksville Harbormaster, members of the Legislature, representatives of the press, riparian landowners, and other private individuals. Notice of the hearing was published in the *Penobscot Bay Press* on July 29 and August 19, 2010 and in the *Commercial Fisheries News* August 2010 edition.

Sworn testimony was given at the hearing by: Frank Peasley; DMR’s Aquaculture Environmental Coordinator, Jon Lewis; and by Darrell Fowler, Beal Lowen, Sarah Bourne, Louise Bourne, and Chris Noble.

Mr. Peasley described his proposed project. Mr. Lewis described the site visit and presented a videotape of the river bottom. Mr. Fowler, a Brooksville selectman, testified in support of the application on behalf both of the selectmen and of himself and his brothers as landowners on the Bagaduce, upriver of the proposed lease site.

Mr. Lowen testified that he navigates the river in a kayak and a skiff and that the lease operation would not interfere with his access to the river for boating. Sarah Bourne, a riparian, read a prepared statement (Exhibit 4) stating that she did not object to the proposed lease but recommending that the criteria for granting leases be expanded to include several economic factors. Louise Bourne, a riparian who lives across the river from the proposed lease site, testified that she has sailed a small boat in this part of the river in past years. While she does not object to

this lease, she fears that allowing additional leases in the future could crowd out other uses of the river. She requested that DMR not approve any additional leases between the bridge and Bear Head.

Mr. Noble is a riparian owner of Parker Island, about 430 ft. from the western end of the proposed lease site. He testified that he uses the river for recreation, including kayaking, canoeing, and swimming, in particular from the shore of his property. He supported the lease and testified that it would not interfere with his activities on the river and that the visual impact would be minimized. He agreed with Louise Bourne that further development of aquaculture in this portion of the river should be limited in order not to impede other uses.

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 four 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.¹

LIST OF EXHIBITS²

1. Case file, #2010-07.
2. Application signed and dated March 6, 2010.
3. DMR site report dated July 19, 2010.
4. Statement by Sarah and Jon Bourne dated 8-31-10.

2. DESCRIPTION OF THE PROJECT

A. Site History

The applicant currently holds three LPA licenses within the boundaries of the proposed lease site, on which he has cultivated American and European oysters since 2009.

B. Proposed Operations

The applicant proposes to continue to grow American and European oysters on the proposed lease site, using up to 3200 floating mesh bags in 60 linear arrays of 50 bags each, deployed parallel to one another with approximately 15-20 ft. between the arrays (App, p. 6). The arrays will be moored by 100-lb. cement blocks at each end.

In late fall, oysters will be removed from the floating bags and placed in wire mesh overwintering cages set on the bottom in the eastern end of the site. In spring, these cages will be removed and the oysters transferred once again to the floating bags. Throughout the spring,

¹ In references to testimony, "Smith/Jones" means testimony of Smith, questioned by Jones.

² Cited as: Case file – "CF"; Application – "App", site report – "SR".

summer, and fall, the applicant will monitor the site, hand-clean the bags, and hand-harvest the oysters, visiting the site "several times per week" in a 14-ft. Carolina skiff (App, p. 7).

Mr. Peasley is presently growing 100,000 oysters on his three LPA sites; he plans eventually to increase his stock to a maximum density of one million oysters. At full capacity, he anticipates a yearly harvest of 300,000 to 400,000 oysters (App, p. 8).

C. Site Characteristics

The proposed lease site is located in the upper portion of the Bagaduce River, south of the Bagaduce Falls Bridge and the reversing falls. It lies roughly parallel to the southerly shore of the river, along the land known as Bear Head. The south and southeast sides of the proposed lease tract are between 20 ft. and 175 ft. from shore (SR, Figure 2, pp. 2 and 4). Mr. Lewis testified that the area is "quiet" and "residential". Relatively shallow water and the low fixed bridge at the reversing falls to the north limit the size of boats that use this portion of the river.

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. 36-B, Upper Bagaduce River).

The site report describes the proposed lease site and its surroundings as follows:

The upland is dominated by a steep rocky shoreline leading to limited residential development, mature forest and open field. The topography consists of soft mud graduating to scoured bottom with a mixture of sand, gravel and cobble on approach to the deeper channel. Currents run in an east/west direction depending upon tidal stage. (SR, p. 2-3)

Mr. Lewis testified that the bottom at the southwest end of the site is composed of soft mud, becoming firmer gravel toward the northern end of the site. There is sparse eelgrass at the southwest end of the site, with a denser growth of eelgrass around the bar on the northern end (see section 3 (D), below for further discussion of eelgrass).

This southern area of the Bagaduce River is affected by the tidal restriction created by the bridge at the reversing falls. The time of high and low tide lags the predicted time for the northern part of the river by approximately three hours. Tide range in this portion of the river is two to three feet, versus a mean range of ten feet for Castine, at the river's mouth (SR, p. 3).

Mean low water depth within the area of the proposed lease, as calculated from measurements taken during the site visit, is between three and fourteen feet (SR, p. 3). According to the site report, the distance between the bottom of the floating bags in their vertical (deepest) configuration (App, p. 3) and the surface of the river bottom below will be a minimum of two feet, three inches. This distance allows adequate space for the movement of water and other marine life below the aquaculture gear.

Conversely, the submerged overwintering cages in the deepest part of the site will have at least six feet of water above them when they are deployed there in the winter months. As the site

report notes, boat traffic in this portion of the Bagaduce is likely to be limited in the colder months and dominated at all times by shallow draft vessels, because of the overall river depths and the restriction on larger, deeper-draft vessels caused by the bridge. Conflict between vessels and the submerged cages is therefore unlikely, but the site report notes that “it would be prudent of the applicant if the lease is issued to mark all submerged gear that may be subject to propeller strikes” (SR p. 3). Mr. Peasley testified at the hearing that he will mark all submerged gear in winter.

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 if s/he determines 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 some 430 ft. of river lie between the northeast corner of the proposed lease site and the nearest point on the northern shore of the river. Access to and from the northern shore, therefore, appears not to be affected by the potential existence of gear on the proposed lease site to the south. The lease site, however, lies much closer to the southern shore. Department biologists did not observe any docks or moorings along the southern shore of the river in the vicinity of the proposed lease site. They note in the site report:

If the lease were granted, shorefront property owners should have no change in their ability to reach their properties. The only property potentially affected would be adjacent to the southern boundary of the proposed lease site (Figure 2). Although this shorefront is relatively steep for easy access, and no points of access currently exist, some accommodation for access to this property should be allowed. (SR, p. 4)

Mr. Peasley testified at the hearing that he will maintain space between the arrays of floating bags for riparians to gain access to their shore. The nearest riparian property along the

south shore by the proposed lease site is owned by Mr. Peasley's uncle, whom he said he will consult. The possibility always exists, however, that either that property or the lease may at some time pass into other hands. Therefore, it will continue to be important for the leaseholder to accommodate reasonable water access to and from this property's shore, and a condition to that effect will be included in the lease. Otherwise, it appears from this evidence that the proposed lease site will not hamper the access of riparian owners to and from their shore.

Therefore, I find that the aquaculture activities proposed for this site will not unreasonably interfere with the ingress and egress of any riparian owner, provided that the leaseholder accommodates the need for reasonable access to and from the shore for the property adjacent to the southern boundary of the lease site.

B. Navigation

The proposed lease site occupies a significant portion of the navigable channel at a point where that channel runs between the southern shore and a "shoal point" of shallower water to the north. Northerly of the shoal point is a large bed of eelgrass. Minimal water depths over the shoal area and the eelgrass beyond are approximately 4-5 ft. (SR, Fig.2, p. 2). Both Mr. Lowen and Mr. Noble testified that the presence of the lease site would not interfere with their use of the river for navigation.

Before the site visit, the Department received comments expressing concern about whether the presence of aquaculture gear on the lease site occupying part of the channel would force passing boats farther north over the eelgrass beds, potentially damaging the eelgrass. Department biologists assessed this situation in the course of their site investigation.

As the site report indicates, the "deep water" channel remaining between the northern edge of the proposed lease site and the shoal point is approximately 103 ft. wide. The remainder of the channel would be taken up by the lease site to the south with its floating oyster bags. Mr. Lewis testified that, including the 4-5-ft.-deep water over the shoal point beyond the channel, there is about 150 ft. of water available for navigation south of the eel grass beds. The site report further states, "A shallow draft vessel such as a small sailboat, kayak or canoe should be able to traverse over the eelgrass bed at mid to high water with little disturbance to the benthos" (SR, p. 6).

The evidence indicates that there is adequate lateral space and adequate depth for navigation to the north of the proposed lease site by the type of smaller, shallow-draft vessels that typically navigate this portion of the river. As noted above, Mr. Peasley testified that he would mark the submerged overwintering cages to alert vessels to their presence in winter. A condition will be added to the lease requiring that submerged gear must be marked sufficiently to identify potential underwater hazards from the surface.

Therefore, I find that the aquaculture activities proposed for this site will not unreasonably interfere with navigation, provided submerged aquaculture gear is marked.

C. Fishing & Other Uses

The site report indicates that no commercial or recreational fishing was observed by Department biologists in the vicinity of the proposed lease site at the time of the site visit on June 25, 2010. As the report notes, access to this portion of the Bagaduce River by larger vessels, such as draggers, is limited by the bridge over the reversing falls. The entire proposed lease area is subtidal, so the lease activities will not interfere with clam digging or marine worm harvesting. “Minimal lobster and crab fishing” can be expected in the area, as can recreational hook and line fishing, according to the site report, which also notes that “limited quantities of commercially exploitable species were observed” during the underwater investigation of the site (SR, p. 5). No comments or testimony were presented to indicate any concerns regarding possible conflict with fishing.

The evidence indicates that while some level of commercial and recreational fishing is likely to occur in the upper Bagaduce River, it is unlikely that the presence of the aquaculture lease site will interfere significantly with fishing of any kind. Testimony of Mr. Noble and Mr. Lowen, who use the river for boating and swimming, indicated that the lease will not interfere with their activities. The lease must be marked in accordance with DMR Rule 2.80.³

Other aquaculture leases. According to the site report, the nearest aquaculture site is a 4-acre oyster farm, lease BAG SB, approximately one-half mile west of the proposed lease site. That leaseholder also holds a Limited Purpose Aquaculture License (LPA), LEA-1-09, adjacent to his lease site. The site report concludes that the proposed lease activities are far enough away that they will not interfere with these other aquaculture sites (SR, p. 5).

Exclusivity. Mr. Peasley states in his application, “There is no need to restrict recreational fishing, or any current form of navigation including kayaking, canoeing or other

³ **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.

small boats in open areas of [the] site. Impact of this lease site on existing uses will be minimal” (App, p. 10). The evidence supports the conclusion that small-boat navigation and recreational fishing can be allowed within the open areas of the lease site.

Therefore, considering the number and density of aquaculture leases in the area, I find that the aquaculture activities proposed for this site will not unreasonably interfere with fishing or other uses of the area, provided that small-boat navigation and recreational fishing are allowed with the open areas of the lease site.

D. Flora & Fauna

Many species of marine flora and fauna were observed by Department biologists during the site visit. Flora included seaweeds, drift algae, and patches of eelgrass. Fauna included hermit and horseshoe crabs, sand shrimp, sea stars, sticklebacks, blue mussels, finger sponges, and frilled anemones. Polychaete worm egg masses abounded, “suggesting a healthy worm population within the benthos” (SR, p. 5-6).

The site report notes that while many terrestrial animals and birds inhabit the upper Bagaduce, the floating oyster bags pose no risk to them (SR, p. 7). According to maps issued by the Maine Department of Inland Fisheries and Wildlife, there are no essential habitats for endangered and threatened species within one-quarter mile of the site. While copies of the application were provided to the Maine Departments of Environmental Protection and Inland Fisheries and Wildlife for review, no comments were received from either agency.

Mr. Lewis testified at the hearing that oysters filter 30 to 50 gallons per day of water, have minimal impact on the environment of the river, and serve to clarify and purify the water. In response to questions about the use of medicines or other treatments to remedy any oyster disease, he stated that the proposed lease would be a “zero discharge” operation, and no extraneous substances are allowed to be added to the water (Lewis/L. Bourne).

Eelgrass (*Zostera marina*). The Department has previously noted the presence of eelgrass in the vicinity of the lease site, so Department biologists paid particular attention to the presence or absence of eelgrass during their ecological assessment of the site. The site report notes that they located eelgrass in two general areas within the lease boundaries, a “sporadic and sparse” or “patchy” area in the shallower southwest corner of the site and a “slightly heavier presence” of eelgrass in the northeast corner of the proposed lease site around an existing bar (SR, p. 6, and Fig. 3, p. 7). With respect to this second patch, the report states:

The proposed lease area encroaches on this small bar by approximately 150 feet. If the lease were granted the applicant should pay particular attention so as to limit shading and physical disturbance (i.e. dragging, smothering with cages etc.) of the eelgrass occupying the bar area.

As described above, more significant eelgrass beds lie beyond the lease boundaries to the north, east, and southwest of the site in shallow water. During the site visit, Department biologists “ground-truthed” the existing aerial data shown in Figure 3 of the site report (SR, p. 7) and verified the locations of the eelgrass beds to the north of the channel. They observed “a minimum of approximately 150 feet of navigable water between the northern boundary of the proposed lease site and the southern extent of the continuous eelgrass bed to the north” dispelling concerns about possible conflict between small boats and the eelgrass beds in the area remaining available for navigation with the aquaculture gear in place (SR, p.6).

Based on this evidence, it appears that the proposed lease will not harm the marine and terrestrial life existing around the proposed lease site, provided the applicant follows the recommendation in the site report with respect to protecting the eelgrass in the northeastern part of the site. A condition to that effect will be included in the lease.

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, provided that the applicant deploys his gear so as to minimize shading and physical disturbance of the eelgrass occupying the bar area in the northeastern portion of the lease site.

E. Public Use & Enjoyment

According to the site report, “there are no public docking facilities or beaches within 1000 feet of the proposed lease. The nearest public boat launch, at the bridge, is located more than 3500 feet to the northwest” (SR, p. 7).

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 “Maine hatcheries and growers such as but not limited to Muscongus Bay Aquaculture and Pemaquid Oyster Co. (App, cover page).

Mr. Lewis testified that moving European oysters in anywhere in Maine requires a permit from the Department, since they are classified as “restricted” in order to prevent the spread of disease. Movement of American oysters from within the waters between Ocean Point, Linekin Neck, Boothbay and Pemaquid Point, Bristol (including the Damariscotta and Johns Rivers), is also restricted and requires a permit from the Department under DMR Rule 24.05. The applicant must abide by these restrictions in obtaining stock for his lease site.

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. 8). The site report states that the applicant will be bound by any lighting requirements imposed by the U. S. Coast Guard for navigation purposes, while noting that “It is unlikely the U.S. Coast Guard would require Private Aids to Navigation in this sheltered, lightly traveled (relatively speaking) portion of The Bagaduce River” (SR, p. 8).

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: “There will be no powered equipment used except for the before mentioned Carolina skiff. All seeding, cleaning, grading and harvesting will be done by hand. The skiff will be used to maneuver in the site” (App, p. 8).

The site report observes that “Except for a 14’ skiff with an outboard motor, the applicant proposes no powered equipment for this farm. The skiff itself is not beyond the scope of normal traffic for this area” (SR, p. 7).

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

Mr. Peasley testified that the orange boundary markers used on the site at the time of the hearing will be replaced with darker colors, as described in the application (Peasley/L. Bourne). The site report notes that “The proposed floating bags are of a small profile and muted color (black). The same type of equipment is currently being used by Mr. Peasley at his 3 Limited Purpose Aquaculture (LPA) license sites (Figure 2)” (SR, p. 7). The overwintering cages will be deployed under water and will not be visible. No other structures will be placed on the site, other than any navigational aids that may be required.

The Department’s visual impact rule requires structures and gear on lease sites to blend with the surroundings as much as possible. The evidence shows that this will be the case on the proposed lease site.

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, provided that the leaseholder accommodates the need for reasonable access to and from the shore for the property adjacent to the southern boundary of the lease site.

2. The aquaculture activities proposed for this site will not unreasonably interfere with navigation, provided that submerged aquaculture gear is marked sufficiently to identify potential underwater hazards from the surface. The lease site shall 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. Small-boat navigation and recreational fishing shall be allowed within the open areas of the lease site.

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, provided that all gear is deployed so as to minimize shading and physical disturbance of the eelgrass occupying the bar area in the northeastern portion of the lease site.

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 American and European oysters 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 5.38 acres to Frank S. Peasley for ten years for the purpose of cultivating American oysters (*Crassostrea virginica*) and European oysters (*Ostrea 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 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)⁴ 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. The leaseholder shall accommodate the need for reasonable access to and from the shore for the property adjacent to the southern boundary of the lease site.
3. All submerged aquaculture gear must be marked sufficiently to identify potential underwater hazards from the surface.
4. Small-boat navigation and recreational fishing are allowed with the open areas of the lease site.
5. All gear must be deployed so as to minimize shading and physical disturbance of the eelgrass occupying the bar area in the northeastern portion of the lease site.

⁴ 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."

7. REVOCATION 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: 2/28/11

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