

**STATE OF MAINE
DEPARTMENT OF MARINE RESOURCES**

Arnold Francis

Standard Aquaculture Lease Application
Suspended Culture of Oysters
Smelt Brook, Dyer Bay
Steuben, Maine

DYER SB

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION

Arnold Francis applied to the Department of Marine Resources (DMR) for a twenty-year standard aquaculture lease on 3.57¹ acres located in a tidal impoundment, Dyer Bay, Steuben, Maine. The proposal is for the suspended culture of American oysters (*Crassostrea virginica*). The applicant currently operates experimental lease DYER SBx within the footprint of the standard lease proposal.

1. PROCEDURAL HISTORY

The pre-application meeting on this proposal was held on December 2, 2021, and a scoping session was held on May 4, 2022. DMR accepted the final application as complete on August 10, 2022. Notice of the completed application and public hearing was provided to state agencies, the Town of Steuben, riparian landowners within 1,000 feet of the proposed site, and subscribers to DMR's aquaculture email listserv. A Harbormaster Questionnaire was sent to the harbormaster, requesting information about designated or traditional storm anchorages, navigation, riparian ingress and egress, fishing or other uses of the area, among other considerations. No response was received by DMR. Notice of the hearing was published in the *Bangor Daily News* on July 17 and August 2, 2024. The public notice for the hearing indicated that the proceeding would be conducted in-person and directed interested persons to register to provide testimony or ask questions during the proceeding. No applications for intervenor status were received by DMR. A public hearing on this application was held on August 20, 2024. No individuals registered to participate in the hearing and testify.

Sworn testimony was given at the hearing by Arnold Francis.

The evidentiary record before DMR regarding this lease application includes the record of testimony at the hearing. The evidence from all sources is summarized below.²

¹ Applicant originally requested 3.56 acres. DMR calculations indicate the area is 3.57 acres.

² Exhibits 1, 2, and 3 are cited below as: Case file – “CF”, Application – “App”, site report – “SR”.

LIST OF EXHIBITS

1. Case file
2. Application
3. DMR site report, issued on April 23, 2024

2. DESCRIPTION OF THE PROJECT**A. Proposed Operations**

The applicant proposes to culture American oysters (*Crassostrea virginica*) using suspended culture techniques (App 1, 2). The applicant proposes to use 5,500 floating ADPI oyster bags (32-inches by 18-inches by 6-inches)³ arranged in 100-linear foot strings, as well as buoys, lines, and mooring anchors. In the winter months, the bags will be placed inside 3,973 oyster condos (45-inches by 40.5-inches by 18-inches) and submerged.

The applicant anticipates seeding oysters in April to October. The applicant expects to tend the site daily from approximately April to December, and approximately four days per week the remainder of the year (App 7). The application states harvesting may occur seven days per week, from approximately March to January, depending on ice conditions (App 9). The oyster bags or cages will be submerged sometime between October and December and brought to the surface in April to May (App 8).

³ The application listed two sizes of bags. At the hearing, the applicant clarified that when the bags are placed into the condos, attached floats will be removed and the dimensions will become 32-inches by 18-inches by 3-inches.

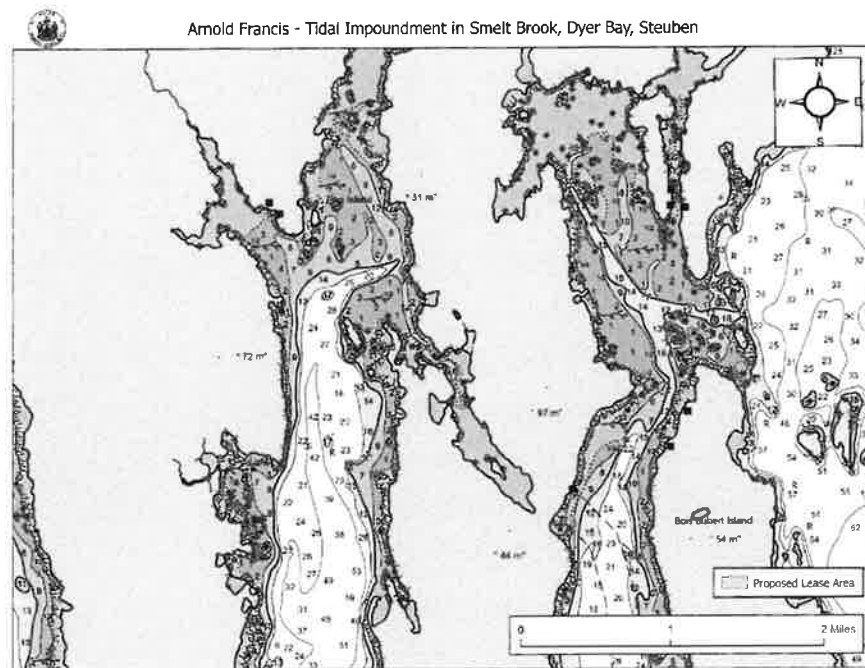


Figure 1: Proposed standard lease boundaries. Image from DMR site report.

B. Site Characteristics

On August 23, 2023, DMR scientists assessed the proposed lease site. The surrounding uplands consist of undeveloped forest.

At the time of the site visit, recorded depths were between 3.6 and 5.2 feet (Figure 2). The proposal is located entirely within a tidal impoundment that is operated and maintained by the applicant. Therefore, water depths inside the impoundment are partially a function of tidal gate management and the local tide stage. According to the applicant, the average depth within the impoundment at mean low water (MLW) is five feet. At mean high water (MHW), the depths are approximately 12 feet. If the tidal gate was opened, a portion of the proposed lease site would be above MLW, and therefore intertidal⁴ (SR 2).

⁴ Application page 11



Figure 2. Proposed lease area with site visit observations.

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 upon determining that the project will not unreasonably interfere with: the ingress and egress of riparian owners; navigation; fishing or other uses of the area, taking into consideration other aquaculture uses of the area; the ability of the lease site and surrounding areas to support existing ecologically significant flora and fauna; or 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 comply with visual impact criteria adopted by the Commissioner.

A. Riparian Access

Before granting a lease, the Commissioner must determine that the proposed project “will not unreasonably interfere with the ingress and egress of riparian owners[.]” 12 M.R.S.A. § 6072(7-A)(A). In examining riparian owner ingress and egress, the Commissioner “shall consider the type of structures

proposed for the lease site and their potential impact on the vessels which would need to maneuver around those structures.” Chapter 2.37(1)(A)(1)⁵.

The applicant has operated experimental lease DYER SBx within the boundaries of this proposal for the last three years. During that time, no issues concerning riparian access have been reported.

During the site visit, DMR observed a wooden float inside the impoundment near the proposed southwest corner. The float was attached to the impoundment structure and appeared to be associated with the current experimental lease in operation, DYER SBx. Additionally, located near the southwest corner, there was a boat ramp with access to the pound. Because the proposal is located in the intertidal zone, the applicant is required to obtain written permission from riparian owners for use of any intertidal lands within the proposed lease site. However, the applicant owns all the surrounding upland property (SR 4)(App 22).

No response to a Harbormaster Questionnaire was received by DMR.

No testimony was offered at the hearing concerning riparian ingress and egress.

Given that the proposal is located within a tidal impoundment, the applicant owns all the surrounding upland property, and no comments were received concerning impacts to riparian access, it is reasonable to assume that riparian ingress and egress will not be adversely affected.

Therefore, the aquaculture activities proposed for this site will not unreasonably interfere with the ingress and egress of any riparian owner.

B. Navigation

When examining navigation, the Commissioner considers whether the lease activities would interfere with commercial or recreational navigation around the lease area and considers the current uses of the navigational channels in the area (12 M.R.S.A. § 6072(7-A)(B); Chapter 2.37(1)(A)(2)).

The applicant has operated experimental lease DYER SBx within the boundaries of this proposal for the last three years. During that time, no issues concerning navigation have been reported.

The proposal is located in a tidal impoundment owned and operated by the applicant. There is no public boat access to the impoundment (SR 5).

No response to a Harbormaster Questionnaire was received by DMR.

During the public hearing, no one offered testimony or evidence regarding potential impacts to navigation. Due to the proposal’s location within a tidal impoundment, it is reasonable to assume that navigation would not be adversely impacted.

Therefore, the aquaculture activities proposed for this site will not unreasonably interfere with navigation.

⁵ 13-188 C.M.R. ch. 2.

C. Fishing & Other Uses

When examining fishing and other uses, the Commissioner considers whether the lease activities would unreasonably interfere with commercial or recreational fishing or other uses, including water-related uses, of the area (12 M.R.S.A. § 6072(7-A)(C); Chapter 2.37(1)(A)(3)). Additionally, the Commissioner considers any evidence concerning other aquaculture uses of the area (Chapter 2.37(1)(A)(4)).

The applicant has operated experimental lease DYER SBx within the boundaries of this proposal for the last three years. During that time, no issues concerning fishing and other uses have been reported.

Fishing. DMR did not observe any fishing activity within the impoundment during the site assessment. No fishing activity is expected to occur within the impoundment, except as authorized by the applicant, since the applicant owns and operates the impoundment.

The Town of Steuben has a shellfish conservation program in accordance with 12 M.R.S.A. § 6671 and because the site is located within the intertidal, the applicant is required to obtain consent from the municipality. The applicant provided this permission with the application⁶ (SR 6).

No response to a Harbormaster Questionnaire was received by DMR.

No testimony was given at the public hearing concerning impacts to commercial or recreational fisheries.

Other aquaculture uses: The applicant currently operates experimental lease DYER SBx within the boundaries of this proposal. This standard lease proposal is intended to replace DYER SBx. At the time of the site assessment, one Limited Purpose Aquaculture (LPA) license, DTIL 521, was located within the boundaries of the proposed lease site (SR 6). This license has since been relinquished. There are no other aquaculture leases or limited purpose aquaculture licenses (LPA) within 1,000 feet of the proposed lease site.

It appears that the proposed lease will not unreasonably interfere with other aquaculture activities in the area.

Other uses. The application states there are no other uses in the proposal area because it is privately-owned (App 13). No evidence or testimony was provided at the hearing concerning other uses, including other water-related uses, in the area.

Therefore, based on the information in the record, the aquaculture activities proposed for this site will not unreasonably interfere with fishing, existing aquaculture operations, or other uses of the area.

⁶ Application page 23 and 32

D. Flora & Fauna

When examining existing system support, the Commissioner considers the degree to which the use of the lease site will interfere with significant wildlife habitat and marine habitat or with the ability of the lease site and marine and upland areas to support ecologically significant flora and fauna (12 M.R.S.A. § 6072(7-A)(D); Chapter 2.37(1)(A)(5)).

The applicant has operated experimental lease DYER SBx within the boundaries of this proposal for the last three years. During that time, no issues concerning flora or fauna have been reported.

Site observations. DMR utilized a remotely operated vehicle to assess the epibenthic ecology of the proposed lease. European green crabs (*Carcinus maenas*) were common in the impoundment (SR 7).

Eelgrass. Historical records of eelgrass collected by DMR in 2010 indicate no mapped eelgrass presence within the boundaries of the proposal. The nearest mapped eelgrass is approximately 433 feet southwest of the SW corner of the proposal, separated by the impoundment structure. No eelgrass was observed within the proposal boundaries during DMR's site assessment (SR 7).

Wildlife. During the site assessment, DMR observed double-crested cormorant (*Nannopterum auritum*), sandpiper (*Scolopacidae* family), and belted kingfisher (*Megasceryle alcyon*) in the general vicinity of the proposal. According to Geographic Information System (GIS) data maintained by the Maine Department of Inland Fisheries and Wildlife (MDIFW) and available through the Maine Office of GIS (MEGIS), the proposed lease is located approximately 60 feet to the northeast of mapped Tidal Waterfowl and Wading Bird Habitat. Data collected by the United States Fish and Wildlife Service in 2022 by aerial nest survey shows the closest mapped bald eagle nesting site to be approximately 3,300 feet southwest of the proposal (SR 8).

On August 22, 2022, a Wildlife Biologist with MDIFW responded by email to a "Request for Agency Review and Comment", stating that minimal impacts to wildlife are anticipated.⁷

No eelgrass was observed within the boundaries of the proposed site and the comments received from MDIFW did not indicate that the proposal would interfere with resources under their jurisdiction. Furthermore, the applicant has operated an experimental lease within the footprint of this site for over three years. During that time, DMR has not received any complaints or concerns about the operations impacting wildlife. Based on the record, it appears that the proposed lease activities will not interfere with the ecological functioning of the area.

Therefore, 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.

⁷ Email correspondence between MDIFW and DMR

E. Public Use & Enjoyment

When examining interference with public facilities, the Commissioner considers the degree to which the lease interferes with public use or enjoyment within 1,000 feet of beach, park, docking facility, or certain conserved lands owned by the Federal Government, the State Government, or a municipal government (12 M.R.S.A. § 6072(7-A)(F); Chapter 2.37(1)(A)(7)).

The proposal is not within 1,000 feet of any beach, park, or docking facility owned by federal, state, or municipal governments. The nearest publicly owned conserved land, Maine Coastal Islands (Petit Manan) National Wildlife Refuge, is 835 feet southwest of the proposal (SR 10).

The applicant has operated experimental lease DYER SBx within the boundaries of this proposal for the last three years. During that time, no issues concerning impacts to the wildlife refuge have been reported. Additionally, during the public hearing, no testimony or evidence was offered regarding potential impacts to the conserved land.

Therefore, the aquaculture activities proposed for this site will not unreasonably interfere with the public use or enjoyment within 1,000 feet of beaches, parks, docking facilities, or certain conserved lands owned by municipal, state, or federal governments.

F. Source of Organisms

When examining the source of organisms, the Commissioner shall include but not be limited to, consideration of the source's biosecurity, sanitation, and applicable fish health practices (12 M.R.S.A. § 6072(7-A)(E); Chapter 2.37(1)(A)(6)).

According to the application, American oyster (*C. virginica*) would be sourced from Muscongus Bay Aquaculture in Bremen, Maine, Downeast Institute in Beals, Maine, and/or Mook Sea Farm in Walpole, Maine (App 2). These are currently approved sources for this species. If the applicant is unable to obtain stock from these facilities, then it must come from another DMR approved source.

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

G. Light

The Commissioner considers whether there will be an unreasonable impact from lighting in accordance with 12 M.R.S.A. §6072(7-A)(G) and the regulatory standards specified in Chapter 2.37(1)(A)(8). The statute specifies that a lease must not result in an unreasonable impact from light at the boundaries of the proposed site. The applicable regulation imposes specific requirements related to lighting

including a requirement that the applicant demonstrate that all reasonable measures will be taken to mitigate light impacts associated with the lease activities.

According to the application, the applicant may use four 300-lumen headlamps in the fall and winter to work beyond daylight hours (App 11). Chapter 2.37(1)(A)(8) contemplates exterior lighting used on buildings, equipment, and vessels. Therefore, the sporadic use of headlamps is not subject to the lighting standards.

Therefore, the proposed aquaculture activities will not result in an unreasonable impact from light at the boundaries of the lease site.

H. Noise

The Commissioner considers whether there will be an unreasonable impact from noise in accordance with 12 M.R.S.A § 6072(7-A)(G) and the regulatory standards specified in Chapter 2.37(1)(A)(9). The statute specifies that a lease must not result in an unreasonable impact from noise at the boundaries of the proposed site. The applicable regulation imposes specific requirements related to noise, including a requirement that the applicant take all reasonable measures to mitigate noise impacts associated with the lease activities.

According to the application, with the exception of two skiffs, no noise generating equipment will be used on-site (App 10).

Therefore, 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

Before granting a lease, the Commissioner must determine that the proposed project will be in compliance with visual impact criteria adopted by the commissioner relating to color, height, shape and mass (12 M.R.S.A § 6072(7-A)(H)). The Commissioner has adopted such regulatory standards in Chapter 2.37(1)(A)(10).

The application states that buoys used on-site may be white, yellow, or red and lines may be white⁸ (App 6). The color of the other gear is black. In accordance with Chapter 2.37(1)(A)(10), approved gear colors are grays, blacks, browns, blues, and greens. In response to a question from DMR at the hearing, the applicant confirmed that if the project is approved, all surface gear will comply with the approved colors so anything that is currently proposed as yellow, red, or white will either be gray, black, brown, blue, or green (Francis testimony). With this change, the proposed lease would be in compliance with the visual impact standards adopted by the Commissioner.

⁸ The application also stated the buoys may be green or blue and the lines may be blue. These are approved colors for gear.

Lease sites must be marked in accordance with Chapter 2.80 of DMR's regulations, which specify that marker buoys must be yellow in color. If the lease is granted, the holder would be responsible for complying with these marking requirements.

Therefore, the equipment utilized on the proposed lease site will comply with the DMR's visual impact criteria.

6. CONCLUSIONS OF LAW

Based on the above findings, I conclude that:

- a. The aquaculture activities proposed for this site will not unreasonably interfere with the ingress and egress of any riparian owner.
- b. The aquaculture activities proposed for this site will not unreasonably interfere with navigation.
- c. The aquaculture activities proposed for this site will not unreasonably interfere with fishing or other water-related uses of the area, taking into consideration other aquaculture uses in the area.
- d. The aquaculture activities proposed will not unreasonably interfere with the ability of the lease site and surrounding areas to support existing ecologically significant flora and fauna.
- e. The aquaculture activities proposed for this site will not unreasonably interfere with the public use or enjoyment within 1,000 feet of beaches, parks, docking facilities, or certain conserved lands owned by municipal, state, or federal governments.
- f. The applicant has demonstrated that there is an available source for organisms to be cultured for the lease site.
- g. The aquaculture activities proposed for this site will not result in an unreasonable impact from light at the boundaries of the lease site.
- h. The aquaculture activities proposed for this site will not result in an unreasonable impact from noise at the boundaries of the lease site.
- i. 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.

7. DECISION

Based on the foregoing, the Commissioner grants a lease to Arnold Francis for 3.57 acres for twenty years for the cultivation of American oysters (*Crassostrea virginica*) using suspended culture techniques. The lessee shall pay the State of Maine rent in the amount of \$100.00 per acre per year. The lessee shall post a bond or establish an escrow account pursuant to DMR Rule 2.40 (2)(A) in the amount of \$5,000.00,

conditioned upon performance of the obligations contained in the aquaculture lease documents and all applicable statutes and regulations.

8. 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 M.R.S.A §6072 (7-B).⁹ 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. No conditions shall be imposed on this lease.

9. REVOCATION OF LEASE

The Commissioner may commence revocation procedures upon determining, pursuant to 12 M.R.S.A §6072 (11), that no substantial aquaculture has been conducted over the course of the lease, that the lease activities are substantially injurious to marine organisms or public health, or that any of the conditions of the lease or any applicable laws or regulations have been violated.

Dated: 12/2/24


 Patrick C. Keliher, Commissioner
 Department of Marine Resources

⁹ 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."

**STATE OF MAINE
DEPARTMENT OF MARINE
RESOURCES**

Experimental Aquaculture Lease Application
Suspended Culture of American/eastern
oysters
Smelt Brook, Dyer Bay, Steuben, Washington
County

**Arnold Francis
DYER SBx**

March 26, 2021

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION

Arnold Francis applied to the Department of Marine Resources (“DMR”) for a three-year experimental aquaculture lease located in a tidal impoundment in Smelt Brook in Dyer Bay, Steuben, Washington County, Maine. The proposed lease is 3.60¹ acres and is for the suspended culture of American/eastern oysters (*Crassostrea virginica*). DMR accepted the application as complete on December 10, 2020.

1. THE PROCEEDINGS

Notice of the application and the 30-day public comment period were provided to riparian landowners, state and federal agencies, the Town of Steuben and its Harbormaster, and others on DMR’s mailing list. Notice of the application and comment period was published in the January 7, 2021 edition of *The Ellsworth American*. During the comment period, DMR did not receive any requests for a public hearing, and no hearing was held. The evidentiary record regarding this lease application includes the application, DMR’s site report dated February 23, 2021, and the case file. The evidence from each of these sources is summarized below.²

2. DESCRIPTION OF THE PROJECT

A. Proposed Operations

Oysters would be cultured using floating mesh bags that would be deployed at the surface of the water from approximately May-November and submerged below the surface of the water from November-May (App 27-28). The completed application contains an overhead view that depicts a maximum of 4,800 mesh bags deployed on 160 strings (App 26), but the gear table included in the completed application lists a maximum of 25,000 mesh bags (App 13). According to the Department’s site report, follow up communication with the applicant indicates

¹ Applicant requested 3.7 acres. DMR calculations indicate the area is 2.91 acres.

² These sources are cited, with page references, as CF (case file), App (Application), SR (site report).

that they intend to deploy a maximum of 24,000 mesh bags, deployed across 800 strings measuring 100 feet in length (SR 2). Strings would be positioned in a north-south direction and arranged with either 2 or 7 strings positioned end to end. There would be a total of 112 sets of 7 strings, and 8 sets of 2 strings (SR 2). The site report notes that the maximum gear deployment of 24,000 bags fits within the boundaries of the proposed site, with approximately 2 feet between strings (SR 2).

B. Site Characteristics

The proposed lease site is in a tidal impoundment that is operated and maintained by the applicant. The surrounding upland area is undeveloped forest with one utility building that belongs to the applicant and other items or structures associated with the applicant's lobster business including the impoundment, two landed lobster fishing vessels, and two boat ramps (SR 2). The shoreline surrounding the pound is a mix of small gravel and ledge, with segments of salt marsh (SR 2). The bottom of the proposed site is primarily composed of mud, gravelly mud, and some shell rubble (SR 7).

A DMR Scientist visited the site on December 22, 2020. Because the proposed site is located entirely within a tidal impoundment, depths within the site are partially a function of the tide gate management. Depths were not collected during DMR's visit to the site, however, the application states that the lease site is above mean low water (App 1). Therefore, it is expected that if the gate were opened, the proposed site would drain completely during lower tidal stages. The application states that water depths range from 5-12 feet (App 9). For intertidal applications, written permission for use of any intertidal lands that will be used by the applicant is required to be given by the intertidal landowner. The applicant is the owner of the adjacent parcel that surrounds the proposed area. In addition, the application included a letter of consent for the proposed operations from the Town of Steuben Board of Selectmen (App 30-32).

In their review of the application, DMR's Bureau of Public Health noted that there are not any concerns with the proposed operations, but if the pound were to start being used for lobsters again, they would not be able to use any medications or treatments that would impact the safety of the oysters. Should the applicant want to return to using the pound for lobsters, while continuing aquaculture operations, they are encouraged to contact DMR before doing so to discuss their plans, and no medications or treatments can be added to the pound that would impact the safety of the oysters without prior approval from DMR's Bureau of Public Health. The lease will be conditioned to reflect this.

3. STATUTORY CRITERIA & FINDINGS OF FACT

Approval of experimental aquaculture leases is governed by 12 M.R.S.A. §6072-A. This statute provides that a lease may be granted by the Commissioner of DMR upon determining that the project will not unreasonably interfere with the ingress and egress of riparian owners; with navigation; with fishing or other water related uses of the area, taking into consideration other aquaculture uses in the 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, or docking facilities 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 on the lease site.

A. Riparian Access

During DMR's site visit on December 22, 2020, a small flat bottom skiff and wooden floats were observed hauled out near the SW corner of the proposed lease and the boat ramp with access to the pound (SR 10). One mooring buoy was also observed in the pound. This buoy was confirmed to belong to the applicant (SR 10). The applicant owns the parcel of land that surrounds the tidal impoundment (App 22-23), and there is no public access to the waters where the lease is being proposed. In addition, because the proposed lease is located entirely within a tidal impoundment, the impoundment is operated by the applicant, and because the applicant owns the entire area surrounding the pound, the proposal is unlikely to interfere with riparian access.

During the comment period, DMR did not receive any comments regarding riparian access. Based on the lack of public comments, and the evidence presented in DMR's site report, it is reasonable to conclude that there are no concerns regarding the effects the proposed lease may have on riparian ingress and egress.

Therefore, the aquaculture activities proposed for this site will not unreasonably interfere with the ingress and egress of any riparian owner.

B. Navigation

The proposed lease site is entirely enclosed by pound infrastructure operated and maintained by the applicant. During DMR's visit to the site, 1 mooring buoy was observed, but this was confirmed to belong to the applicant (SR 10). The proposal would comprise most of the impounded area, but approximately 15 feet would remain for navigation between the pound shoreline and the southern boundary and most of the eastern and western boundaries (SR 10). This space would likely facilitate navigation around the proposed lease site in a small vessel.

Because the proposal is located entirely within the tidal impoundment that is operated by the applicant, and is mostly surrounded by the applicant's property, there is no public boat access to the waters where the lease is proposed (SR 9).

During the review period, DMR did not receive any comments regarding navigation. Based on the lack of public comments, the evidence in the site report, and because the proposal is located within a tidal impoundment operated by the applicant, it is reasonable to conclude that navigation in the area will not be unduly affected by the proposed application.

Therefore, the aquaculture activities proposed for this site will not unreasonably interfere with navigation.

C. Fishing & Other Uses

Fishing. During DMR's site visit on December 22, 2020, no fishing activity was observed within the pound, and no commercial fishing is expected to occur within the pound boundaries (SR 10). DMR did observe two hauled out lobster boats near the proposed SW corner of the lease. These vessels were confirmed to be associated with the applicant's lobster business (SR 10). The completed application stated that there is some clamming in the area, but that the proposal would not affect any fishing due to its location within the lobster pound (App 10). No comments were received regarding fishing in the area during the comment period.

Based on the lack of public comments, and the evidence in the record, it is reasonable to conclude that the proposed aquaculture activities will not unreasonably interfere with fishing.

Exclusivity. The applicant indicated that they already have exclusive use of the area as they are the owner of the lobster pound and surrounding land. Because the location of the proposed lease is surrounded by property owned by the applicant, and there is no public access to the impoundment, the lease will not be conditioned to expressly prohibit any uses as the public already does not have access to this space.

Other aquaculture uses. There are 12 Limited Purpose Aquaculture (LPA) licenses and 1 pending lease application within 1 mile of the proposal. The pending lease application is a second application submitted by the applicant, Arnold Francis. The LPA licenses within 1 mile of the site are held by the applicant and two other individuals, both of whom are members of the applicant's family. The application states that all LPAs located within the lobster pound would be relinquished if the proposed lease is granted (App 8).

Other water-related uses. During the review period, DMR did not receive any comments detailing other water-related uses that are not already contemplated in other sections

of this decision. Based on the absence of public comments, it is reasonable to conclude that there are no concerns regarding the effects the proposed lease may have on other water-related uses of the area.

Therefore, considering the other aquaculture uses of the area, the activities proposed for this site will not unreasonably interfere with fishing or other water related uses of the area.

D. Flora & Fauna

Historical eelgrass (*Zostera marina*) data collected by DMR in 2009 indicate that the closest eelgrass observed in Dyer Bay was more than 400 feet to the west of the proposed lease (SR 12). During DMR's visit to the site on December 22, 2020, no eelgrass was observed from the shoreline of the pound (SR 12).

According to data maintained by the Maine Department of Inland Fisheries and Wildlife (MDIFW), the proposed lease is located approximately 60 feet to the northeast of Tidal Wading Bird and Waterfowl Habitat (SR 12). The proposed lease is also more than 2,600 feet to the east of the United States Fish and Wildlife Service's mandated 660-foot protective buffer around a bald eagle nest (SR 12).

During the review period for this application, DMR sent the application to the MDIFW for their review and comment, and they indicated that "minimal impacts to wildlife are anticipated for this project."³

DMR did not conduct an underwater assessment of the proposed lease area but did conduct a walk around the shoreline of the impoundment and observed clam holes and casings, rockweed, common periwinkles, barnacles and mud shrimp (SR 12). The applicant reports that periwinkles, mussels, and green crabs have been observed in the pound (App 10). No public comments were received regarding the flora and fauna in the area.

Based on the evidence that the proposed lease does not interact with historical eelgrass beds, and because no other comments were received regarding the flora and fauna in the area, it appears that the proposed aquaculture activities for this lease site will not interfere with the ecological function of the area.

Therefore, 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.

³ CF: Email from R. Settele to C. Burke on January 8, 2021.

E. Public Use & Enjoyment

There are no beaches, parks, or docking facilities owned by municipal, state, or federal government within 1,000 feet of the proposed lease site.

Therefore, the aquaculture activities proposed for this site will not unreasonably interfere with public use or enjoyment within 1,000 feet of beaches, parks, or docking facilities owned by federal, state, or municipal governments.

F. Source of Organisms

The applicant intends to source oysters from Downeast Institute in Beals, Maine or Muscongus Bay Aquaculture in Bremen, Maine. Both are approved sources for American/eastern oyster.

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

4. CONCLUSIONS OF LAW

Based on the above findings, I conclude that:

1. The aquaculture activities proposed for this site will not unreasonably interfere with the ingress and egress of any riparian owner.
2. The aquaculture activities proposed for this site will not unreasonably interfere with navigation.
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.
4. The aquaculture activities proposed for this site will not unreasonably interfere with the ability of the lease site and surrounding areas to support existing ecologically significant flora and fauna.
5. The aquaculture activities proposed for this site will not unreasonably interfere with the public use or enjoyment within 1,000 feet of beaches, parks, or docking facilities owned by municipal, state, or federal governments.
6. The applicant has demonstrated that there is an available source of stock to be cultured for the lease site.

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-A.

5. DECISION

Based on the foregoing, the Commissioner grants the requested experimental lease of 3.60 acres to Arnold Francis for three years, the term of the lease to begin within twelve months of the date of this decision, on a date chosen by the lessee;⁴ however, no aquaculture rights shall accrue in the lease area until the lease is fully executed. This lease is granted to the lessee for the cultivation of American/eastern oysters using suspended culture techniques. The lessee shall pay the State of Maine rent in the amount of \$100.00 per acre per year. Since this is an experimental lease with more than 400 sq. ft. of structures and no discharge, a bond or escrow account is required. The lessee shall post a bond or establish an escrow account pursuant to DMR Rule 2.64 (12)(B) in the amount of \$5,000.00, conditioned upon performance of the obligations contained in the aquaculture lease documents and all applicable statutes and regulations.

6. CONDITIONS TO BE IMPOSED ON LEASE

The Commissioner may establish conditions that govern the use of the lease area and impose limitations on aquaculture activities, pursuant to 12 MSRA §6072-A (15)⁵. 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 purpose of the lease. The following conditions have been imposed on this lease:

⁴ DMR Rule 2.64 (14) provides:

“The term of the lease shall begin within 12 months of the Commissioner’s decision, on a date chosen by the applicant. No aquaculture rights shall accrue in the lease area until the lease term begins and the lease is signed.”

⁵ 12 MRSA §6072-A (15) provides that:

“The commissioner may establish conditions that govern the use of the leased area and limitations on the aquaculture activities. These conditions must encourage the greatest multiple, compatible uses of the leased area, but must also address the ability of the lease site and surrounding area to support ecologically significant flora and fauna and preserve the exclusive rights of the lessee to the extent necessary to carry out the lease purpose. The commissioner may grant the lease on a conditional basis until the lessee has acquired all the necessary federal, state and local permits.”

1. Should the applicant use the pound for lobsters while continuing aquaculture operations, they are encouraged to contact DMR before doing so to discuss their plans, and no medications or treatments can be added to the pound that would impact the safety of the shellfish without prior approval from DMR's Bureau of Public Health.

7. REVOCATION OF EXPERIMENTAL LEASE

The Commissioner may commence revocation procedures upon determining pursuant to 12 MRSA §6072-A (22) and DMR Rule Chapter 2.64 (13) that no substantial research has been conducted on the site within the preceding year, that research has been conducted in a manner injurious to the environment or to marine organisms, or that any conditions of the lease or any applicable laws or regulations have been violated.

Dated: 3/26/31



Patrick C. Keliher, Commissioner

Department of Marine Resources