

**STATE OF MAINE
DEPARTMENT OF MARINE RESOURCES**

George Faux Inc.

Standard Aquaculture Lease Application
Suspended Culture of American Oysters
Upper Damariscotta, Newcastle, Maine

DAM GP

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION

George Faux Inc. applied to the Department of Marine Resources (DMR) for a twenty-year standard aquaculture lease on 1.66¹ acres south of Great Salt Bay in the Damariscotta River, in Newcastle, Maine. The proposal is for the suspended culture of American Oysters (*Crassostrea virginica*).

1. THE PROCEEDINGS

The pre-application meeting on this proposal was held on June 11, 2021. A scoping session was held for this proposal on November 18, 2021. DMR accepted the final application as complete on February 2, 2022. Notice of the completed application and public hearing was provided to state and federal agencies, the Town of Newcastle, riparian landowners within 1,000 feet of the proposed site, and subscribers to DMR's aquaculture email listserv. Notice of the March 26, 2024, hearing was published in the *Lincoln County News* on February 22, 2024, and March 7, 2024. The public notice for the hearing stated that the proceeding would be conducted in-person and directed interested persons to contact DMR to sign up to participate in the proceeding. No individuals registered to participate in the hearing. No one applied to intervene in the proceeding.

Sworn testimony was given at the March 26, 2024, hearing by the following witnesses:

Name	Affiliation
George Faux	George Faux Inc., applicant
Meryl Grady	Maine Department of Marine Resources

Additional DMR staff and members of the public attended the hearing but did not offer testimony. The hearing was recorded by DMR. The Hearing Officer was Joshua Rozov.

The site report, published on January 26, 2024, indicated that a portion of the proposed lease is intertidal and noted that intertidal sites have certain permission requirements (SR 14). In accordance with 12 M.R.S.A. § 6072(4)(F) and 12 M.R.S.A. § 6072(3), which applies because the town of Newcastle has a

¹ Applicant originally requested 1.8 acres. DMR calculations in the site report, based on the provided coordinates, indicate the area is 1.66 acres.

municipal shellfish conservation program established pursuant to 12 M.R.S.A. § 6671, the applicant would need to provide the consent from the town of Newcastle and written permission from the upland owner, or the boundaries of the proposed site would need to be reduced so that the standard lease was no longer intertidal.

At the hearing on March 26, 2024, the applicant brought a letter from a letter from Coastal Rivers Conservation Trust, who is the upland landowner, and from Kevin Sutherland, town manager of Newcastle. The Department determined that because the letter from the upland landowner did not include express language approving the placement of aquaculture gear within the intertidal zone below their property, the letter did not meet the requirement for written permission. Additionally, DMR interprets its rules as requiring town permission to be in the form of a majority vote of the municipal officials as recorded in a public meeting and could not accept the letter from Newcastle's town manager as meeting the town approval requirement. The Department left the record open for 60 days, until May 25, 2024, for the applicant to supply the proper documentation.

On April 19, 2024, the Department received a letter from the town of Newcastle stating that on April 9, 2024, the Newcastle select board unanimously passed a motion giving consent for the intertidal portion of the proposed lease site. The letter documented the board members who made the motion, and recorded the outcome of the vote. On March 22, 2024, the Department received a letter from Coastal Rivers Conservation Trust giving express permission for a portion of the proposal to be located within their intertidal area. The Department determined that both documents meet the requirements for approval of proposals within intertidal land.

The evidentiary record before DMR regarding this lease application includes seven exhibits introduced at the hearing and while the record was held open. The evidence from these sources is summarized below.^{2,3}

LIST OF EXHIBITS

1. Case file
2. Application
3. DMR site report, issued on January 26, 2024
4. Riparian email dated February 27, 2024
5. Newcastle Town Manager Letter dated March 25, 2024
6. Riparian letter dated May 22, 2024
7. Newcastle Deputy Town Clerk letter dated April 19, 2024

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

³ In references to testimony, “Smith/Jones” means testimony of Smith, questioned by Jones.

2. DESCRIPTION OF THE PROJECT

A. Site History

The location of the proposal is currently occupied by experimental leases DAM GPx and DAM GP2x, both operated by George Faux, the applicant for this proposal (App 10). DAM GPx and DAM GP2x are currently used to cultivate oysters using oyster bags clipped to long lines (App 10). If this proposal is approved, DAM GPx and DAM GP2x would be relinquished and replaced by this standard lease (App 10).

B. Site Characteristics

On August 1, 2023, DMR staff assessed the proposed lease site and the surrounding area in consideration of the criteria for granting a standard aquaculture lease (SR 2). The proposed lease site occupies subtidal and intertidal waters in Newcastle. The southern shoreline is a mixture of cobbles and boulders leading to mossy, mixed forest uplands (SR 2). The northern shoreline surrounding the proposal is a mixture of cobble and mud with grass and mixed forest uplands throughout (SR 2). The southern corner of the proposal is approximately ten feet north of the shoreline at mean high water (MHW) and the northern boundary of the proposal is approximately 240 feet south of a point of land in Blackstone Narrows at MHW (SR 2).

The area around the site is currently classified by DMR's Water Quality Classification program as "Conditionally Approved for the harvest of shellfish by the MDMR Bureau of Public Health and Aquaculture" (SR 13).

At the time of the August 1, 2023, site assessment, according to the nearest tidal station approximately one mile downriver in Newcastle, the tide was falling (SR 2). However, due to the geography of the river and natural restrictions downstream, MDMR scientists observed that the tide was still in the flood stage upon arrival (SR 2). Therefore, MDMR scientists collected depths around the locally observed high tide (SR 2). Depths were determined to be between 3 feet and 24.9 feet (SR 2). Correcting for tidal variations derives depths to be from 0 to 20.5 feet at mean low water (MLW) (SR 2). According to derived depths, the southern corner marker closest to the shore is intertidal (SR 2). All other corners are subtidal at MLW (SR 2).

On January 5, 2024, MDMR scientists revisited the proposed site to verify derived water depths (SR 3). Upon completion of the second site visit on January 5, 2024, it was confirmed by MDMR scientists that corner MW is located within intertidal waters (SR 3). As noted in section 1 of this decision, proposed intertidal sites have certain permission requirements and documentation of the proper permissions was supplied to the Department before the record closed.

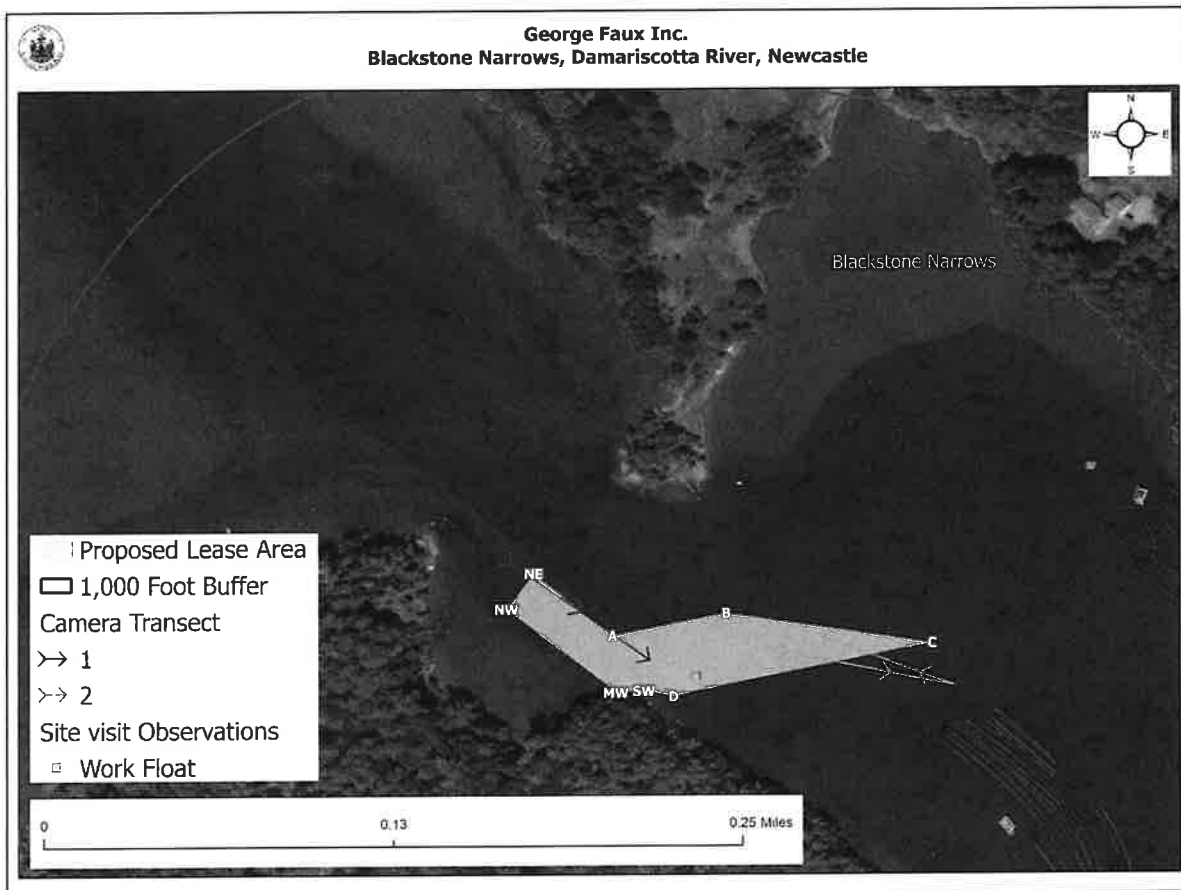


Figure 1. Proposed lease site and surrounding area. Image taken from DMR's site report.

B. Proposed Operations

The applicant proposes to culture American oysters (*Crassostrea virginica*) on the proposed lease site using suspended culture techniques (App 1-2). A total of 200 4-bag wire cages, 150 6-bag wire cages, 100 floating spat bags, and 50 wooden framed spat boxes are proposed for the site (App 4). During the growing season, longlines will either have oyster grow cages or shellfish bags attached to them (App 35-36). The oyster grow cages or shellfish bags would be attached to a longline which would float at the surface of the water (App 35). These longlines would be attached to a helix anchor placed every 50 feet (App 35). In the winter, the floats which hold up the oyster grow cages will be flooded and the cages would be sunk to the sea floor (App 35). Shellfish in shellfish bags would be consolidated into oyster grow cages during the winter and any shellfish bags would be removed from the proposal (App 36). All surface gear would be removed from the proposal in the winter (App 35).

The applicant anticipates seeding to occur in the spring of each year, by June 1st at the latest (App 7). The seeds would start in the mesh shellfish bags and be moved into cages as they grow (App 7). All

oysters would be moved into cages by October to prepare for winter when all the gear is sunk to the bottom (App 7). The applicant would be on site four times a week for routine tending and maintenance (App 7). The applicant would harvest the oysters to order and anticipates being on site a maximum of three times a week for harvesting (App 8).

The applicant proposes a raft moored on site spring through fall, and to be removed from November through March (App 5, 8) The raft would be 12 feet by 16 feet and would store the mechanical tumbler, water pump, and a sorting table (App 5, 38). The raft includes a 4'x8' roof structure to support a pop-up tent for shade, but no height is provided (App 5).

The power equipment proposed for the site includes the following:

Equipment	Description	Months of Operation/Frequency of Use
2x gas engine	5hp gas motor. Used to power the water pump and hydraulic motor	April-October
Water Pump	Used to provide water for processing raft	April-October
Hydraulic motor	Used to drive the tumbler	April-October
Mechanical tumbler	Will be used during harvest periods.	April-October
19' Carolina skiff with outboard motor	Used to access proposal and navigate throughout the proposal. Will ideal when on site.	April-October

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 Owners Ingress and Egress

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, § 2.37(1)(A)(1)⁴.

During the DMR site assessment, scientists observed a residential area along the northern shoreline of the Blackstone Narrows approximately 630 feet to the northeast of the proposal (SR 6). DMR scientists observed two houses during the site assessment (SR 6). Aerial imagery indicates that the houses are approximately 750 feet and 825 feet from the proposed lease (SR 6). DMR scientists did not observe any piers, docks, stairs, or other structures used for shoreline access (SR 6).

At the hearing, the applicant stated that he has not observed any landowners using the adjacent shore to access the Damariscotta River (Faux/Rozov). No comments regarding riparian ingress and egress were received and no riparian landowners offered testimony at the hearing.

At the time of the site visit, Department staff did not observe any structures in the vicinity of the proposal that would indicate that the area was used by riparian landowners for river access. Using aerial imagery, the nearest house is approximately 750 feet away from the proposal, which would provide ample space to allow for access. Additionally, none of the riparian landowners attended the hearing, and no testimony voicing concerns about riparian ingress and egress was received.

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

B. Navigation

The Commissioner must examine whether any lease activities requiring surface and or subsurface structures would interfere with commercial or recreational navigation around the lease area. 12 M.R.S.A. § 6072(7-A)(B). In examining navigation, the Commissioner “shall consider the current uses and different degrees of use of the navigational channels in the area in determining the impact of the lease operation.” Chapter 2, § 2.37(1)(A)(2).

The proposal is located along the southwestern shoreline of Blackstone Narrows, adjacent to a narrow passage that separates Blackstone Narrows from Great Salt Bay (SR 6). There is approximately 240 feet of water at MHW between the northern boundary of the proposal and the tip of the peninsula to the north (SR 6). The nearest navigation channel marker is over 1.5 miles downriver (SR 6). According to the site report, due to natural constraints and rapids downriver, powered vessels are not common in the

⁴ 13-188 C.M.R. ch. 2.

area (SR 6). During DMR's site assessment, scientists observed two kayakers over 1,000 feet to the northwest of the proposal, in Great Salt Bay (SR 6).

The application states that kayakers and motorboats have been observed near the proposal (App 13). Kayakers have been seen boating through the experimental lease currently in the proposal's footprint, while motorboats usually avoid the experimental lease (App 13).

At the hearing, the applicant testified to seeing boats navigating this area of the Damariscotta daily but attributed these boats to other oyster farmers in the area (Faux/Rozov). The applicant also testified to seeing kayaks in the area approximately three times a week (Faux/Rozov). The Department did not receive any testimony from the public regarding navigation in this area.

This lease proposal is located in the footprint of two experimental leases held by the applicant. These experimental leases have been in this area for approximately three years. During this time, the Department has not received any complaints or concerns about impacts to navigation caused by the experimental leases. If granted, this proposal would not expand past the current boundaries already in place. There would be approximately 240 feet of water at MHW between the northern boundary of the proposal and the tip of the peninsula to the north. This would allow ample space for vessels described to navigate eastward and westward around the proposal without concern of collision or entanglement. Additionally, kayakers have been observed utilizing the area for navigation with the current experimental leases in place.

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

C. Fishing & Other Water-related Uses

The Commissioner must examine whether the lease activities would unreasonably interfere with commercial or recreational fishing or other water-related uses of the area. (12 M.R.S.A. § 6072(7-A)(C); Chapter 2.37(1)(A)(3)). In examining fishing and other uses, the Commissioner "shall consider such factors as the number of individuals that participate in recreational or commercial fishing, the amount and type of fishing gear utilized, the number of actual fishing days, and the amount of fisheries resources harvested from the area." Chapter 2, § 2.37(1)(A)(3).

Fishing. To the north of the proposal is Great Salt Bay (SR 6). In accordance with 12 M.R.S.A. § 6961, Great Salt Bay is designated a marine shellfish preserve (SR 7). The harvesting of any shellfish species and other harvesting activities involving bottom disturbances are generally prohibited in an area designated as a marine shellfish preserve (SR 7).

During DMR's site assessment, no commercial or recreational fishing activity was observed within the boundaries or within 1,000 feet of the proposal (SR 7).

The application states that the only commercial fishing observed in the area are other oyster farms (App 13). DMR would evaluate impacts to other oyster farms as part of an assessment of other aquaculture uses in section 3(D). The applicant has observed recreational fishing for striped bass in the area and states it is compatible with the current experimental leases that are in the footprint of this proposal (App 13).

At the hearing, the applicant stated that while there may be weeks or months that go by without seeing any recreational fishing in the area, they would estimate that recreational fishing occurs 2 to 3 days a week during the busy season (Faux/Rozov).

Both the Department's site report and testimony provided at the hearing revealed that a small amount of commercial and recreational fishing occurs in this area. Additionally, the proposal is located in the footprint of already existing experimental leases DAM GPx and DAM GP2x. The Department has not received any concerns about negative impacts to fishing from the already existing lease sites. This proposal will not interfere any more than the already existing sites, due to it being the the same size and hosting the same aquaculture activity as the existing sites.

Other water-related uses. No testimony was given indicating the presence of any other water-related uses present in this area.

Therefore, the aquaculture activities proposed for this site will not unreasonably interfere with fishing and other water-related uses.

D. Other Aquaculture Uses

DMR's Chapter 2 regulations require the Commissioner to consider any evidence submitted concerning other aquaculture uses of the area. "The intensity and frequency of such uses as well as the degree of exclusivity required for each use shall be a factor in the Commissioner's determination of whether any interference is unreasonable. The number, size, location, and type of other aquaculture leases shall be considered by the Commissioner." Chapter 2, § 2.37(1)(A)(4).

The applicant currently operates experimental leases DAM GPx and DAM GP2x within the boundaries of the proposal (SR 8). The standard lease is intended to replace both DAM GPx and DAM GP2x (SR 8). There are three other active aquaculture leases within 1,000 feet of the proposal: DAM GS2 is approximately 80 feet to the south of the proposal, DAM BN is approximately 416 to the east of the proposal, and DAM BP is approximately 915 feet to the north of the proposal (SR 8). There are four limited purpose aquaculture licenses within 1,000 feet of the proposed lease site: AGRO123, BPAR216, BPAR 422, and KATW117 (SR 8).

No holders of the other aquaculture sites in the area provided comments or testimony regarding this proposal. Additionally, the proposal is in the footprint of already existing experimental leases, and the Department has not received any concerns about negative impacts to the other aquaculture uses in the

area. This proposal will not interfere any more than the already existing sites, due to it being the the same size and hosting the same aquaculture activity as the existing sites.

Therefore, the aquaculture activities proposed for this site will not unreasonably interfere with other aquaculture uses in the area.

E. Existing System Support

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). “Such factors as the degree to which physical displacement of rooted or attached marine vegetation occurs, the amount of alteration of current flow, increased rates of sedimentation or sediment resuspension, and disruption of finfish migration shall be considered by the Commissioner in this determination.” Chapter 2, § 2.37(1)(A)(5).

Site observations. At the time of the site assessment, DMR scientists conducted two drop camera transects to assess the epibenthic ecology of the proposal (SR 9). The relative abundance of epibenthic flora and fauna observed in the video transects is described below:

Species Observed	Abundance
Bladderwrack (<i>Fucus sp.</i>)	Occasional
Crab (<i>Cancer sp.</i>)	Occasional
Sea Lettuce (<i>Ulva lactuca</i>)	Common
Tunicate colonies (<i>Didemnum vexillum</i>)	Common
Red leafy algae spp.	Common
Sponge colonies	Occasional
Eelgrass (<i>Zostera marina</i>)	Occasional
Horseshoe crab (<i>Limulus polyphemus</i>)	Rare

Eelgrass. Historical records of eelgrass collected by DMR in 2010 indicate the presence of eelgrass within 1,000 feet of the proposal, directly adjacent to the proposal and potentially inside the lease boundaries near the southern corner (SR 10). The 2010 data is the most current record of mapped eelgrass in the vicinity of the proposal (SR 10). DMR scientists observed detached eelgrass floating on the surface throughout the site tangled in much of the surface gear related to the experimental lease currently operating in the proposal’s boundary (SR 10). Underwater footage collected during the site assessment indicated sporadic, sparse, individual blades of eelgrass attached to the bottom through the site inside the proposal boundaries and immediately adjacent to the proposal (SR 10).

The applicant stated in their proposal that some eelgrass has been observed in the cove during the summer, but that the applicant currently stays a minimum of 25 feet from any known eelgrass (App 12).

At the hearing, DMR staff testified that in the video footage taken during the site visit, very few individual blades of eelgrass, both within and outside the proposal area, were attached to the bottom of the sea floor (Grady Testimony). Additionally, these individual blades looked to be unhealthy (Grady Testimony). Most of the eelgrass observed was detached and floating on the surface of the water (Grady Testimony). It was the opinion of the DMR scientist testifying that the detached eelgrass most likely came from Great Salt Bay, north of the proposal (Grady Testimony).

While large amounts of detached eelgrass were observed in the area, the eelgrass that was observed to be attached was testified to as being unhealthy and very sparse. The detached eelgrass likely came from areas north of the proposal. Although the 2010 eelgrass survey does show eelgrass presence in this area, on site observations indicate that as of 2023, those eelgrass beds are no longer present.

Wildlife. During DMR's site assessment, scientists observed: double-crested cormorants (*Nannopterum auritum*), common terns (*Sterna hirundo*), Canada goose (*Branta canadensis*), herring gulls (*Larus argentatus*), a bald eagle (*Haliaeetus leucocephalus*), and a hawk (*Buteo sp.*) in the vicinity of the proposed lease (SR 12).

According to Geographic Information System data maintained by the Maine Department of Inland Fisheries and Wildlife and available through the Maine Office of GIS, Tidal Waterfowl and Wading Bird Habitat (TWWBH) is approximately 245 feet to the north and northwest of the proposal. (SR 12). 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 1,700 feet northwest of the proposal (SR 12).

In an email from Maine Department of Inland Fisheries & Wildlife, they stated that "minimal impacts to wildlife are anticipated . . ." (CF – IF&W Email dated 2/15/2022).

This site is not within TWWBH or other designated habitats or near any documented bald eagle nests. The Maine Department of Inland Fisheries & Wildlife anticipates minimal impacts to wildlife from this proposal.

Therefore, 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.

F. Interference with Public Facilities

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). Conserved lands means land in which fee ownership has been acquired by the state, federal, or municipal government in order to protect the important ecological, recreational, scenic, cultural or historic attributions of that property. In determining interference with the

public use or enjoyment of conserved lands, the Commissioner shall consider the purpose(s) for which the land has been acquired. Chapter 2, § 2.37(1)(A)(7).

The proposed lease is not within 1,000 feet of any beach, park, docking facility, or conserved lands owned by federal, state, or municipal governments (SR 13).

Therefore, the aquaculture activities proposed for this site will not unreasonably interfere with public facilities in the area.

G. Source of Organisms to be Cultured

In accordance with 12 M.R.S.A. §6072(7-A)(E), standard lease applicants are required to demonstrate that there is an available source of organisms to be cultured for the lease site. 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. Chapter 2, § 2.37(1)(A)(6).

The applicant will obtain seed from Mook Sea Farms. This hatchery is approved by DMR. Any alternative source of stock must comply with DMR's laws and rules.

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

H. Lighting

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). Rules regarding lighting apply to all exterior lighting used on buildings, equipment, and vessels permanently moored or routinely used at all aquaculture facilities, with the exception of lighting for navigation, emergencies, and construction of a temporary nature. Chapter 2, § 2.37(1)(A)(8).

The application states that no work on the proposed site would be performed after dark and that the applicant does not foresee any circumstance where the applicant might work beyond daylight hours (App 10).

Because no lights are being used on this proposal, there would not be an unreasonable interference caused by lighting.

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

I. 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). Rules regarding noise apply to the routine operation of all aquaculture facilities, including

harvesting, feeding, and tending equipment at leases authorized by the Department of Marine Resources, with the exception of: watercraft, harvest or transport barges and maintenance equipment while underway; the unamplified human voice or other sounds of natural origin; bells, whistles, or other navigational aids; emergency maintenance and repair of aquaculture equipment; warning signals and alarms; and events not reasonably within control of the leaseholder. Chapter 2, § 2.37(1)(A)(9).

The application states that the applicant would use a 19-foot Carolina skiff with an outboard motor (App 9). Additionally, the applicant would use two gas engines on the raft located within the proposal, one for a water pump and one for a small hydraulic motor (App 9). Both motors would be bolted to the raft through a plastic drain pan to protect from any overflow (App 9). The application states that the two motors are typically used at the same time, but usually at a low revolution per minute (RPM) (App 9). The two gas engines on the raft have factory installed mufflers (App 9). At the hearing, the applicant testified that the motors will be run for approximately an hour a day, twice a week (Faux/Rozov). The applicant does not have any plans to mitigate the noise produced by the motors but testified that they would be keeping the factory installed mufflers intact (Faux/Rozov).

Chapter 2, § 2.37(1)(A)(9) states “All motorized equipment used during routine operation at an aquaculture facility must be designed or mitigated to reduce the sound level produced to the maximum extent practical.” The proposed motors are designed with mufflers attached, meaning they have been designed to reduce the sound levels produced. In addition, they would only be used for an hour a day, twice a week.

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

J. 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 specified in Chapter 2.37(1)(A)(10). Rules regarding visual impact apply to all equipment, buildings, and watercrafts used at an aquaculture facility, excluding watercraft not permanently moored or routinely used at a lease location such as harvest or feed delivery vessels. Other equipment or vessels not moored within the boundaries of a lease, but routinely used or owned by the leaseholder are subject to these requirements. Chapter 2, § 2.37(1)(A)(10).

No height for the roofing structure and pop up tent was provided. Per chapter 2 rules, “all ... structures shall be no more than one story and no more than 20 feet in height from the water line.” Chapter 2, § 2.37(1)(A)(10). Therefore, a condition will be imposed stating the roofing structure and pop up tent must comply with the rules and be no higher than 20 feet from the water line.

The application states that all gear would be black, buoys would be white, and the raft would be grey (App 6).

Chapter 2, § 2.37(1)(A)(10) states “Equipment and structures shall be painted, or be of, a color that does not contrast with the surrounding area. Acceptable hues are grays, blacks, browns, blues, and greens that have a sufficiently low value, or darkness, so as to blend in with the surrounding area.” Black and grey colored equipment would meet this criteria. Buoys within the footprint of the lease must also follow this criteria. White buoys would not meet the criteria set forth in Chapter 2, § 2.37(1)(A)(10). Therefore, a condition will be imposed stating the buoys within the lease footprint must comply with the color and hues standards in regulation as outlined in Chapter 2, § 2.37(1)(A)(10).

No color for the pop up tent was provided. Therefore, a condition will be imposed stating the pop up tent must comply with the hues in regulation as outlined in Chapter 2, § 2.37(1)(A)(10).

Therefore, the aquaculture activities proposed for this site, as conditioned, 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, the Commissioner concludes 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 of stock 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, as conditioned, 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 to George Faux Inc. for 1.66 acres for 20 years for the cultivation of American Oysters (*Crassostrea virginica*) using suspended culture techniques. Final approved coordinates for this lease are provided in Section 2A above. 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.

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 M.R.S.A §6072 (7-B).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 purposes of the lease. The following conditions shall be incorporated into the lease:

1. The roofing structure and pop up tent located on the applicants raft must comply with the visual impact rules outlined in Chapter 2, § 2.37(1)(A)(10) and be no more than 20 feet in height from the water line.
2. The pop up tent must comply with the color and hues standards in regulation as outlined in Chapter 2, § 2.37(1)(A)(10).
3. All buoys located within the lease footprint must comply with the color and hues standards in regulation as outlined in Chapter 2, § 2.37(1)(A)(10).

7. 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.

⁵ 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.”

Dated: 10/2/2024



Patrick C. Keliher, Commissioner
Department of Marine Resources

STATE OF MAINE
DEPARTMENT OF MARINE RESOURCES

George F. Faux, Inc
DAM GP2x

Experimental Aquaculture Lease Application
Suspended Culture of Oysters
Damariscotta River, Newcastle

September 9, 2019

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION

George F. Faux, Inc., a Maine company, applied to the Department of Marine Resources (DMR) for an experimental aquaculture lease on 1.10 acres¹ located in Blackstone Narrows, Damariscotta River, Newcastle, Lincoln County, Maine, for the cultivation of American/Eastern oysters (*Crassostrea virginica*) using suspended culture techniques.

1. THE PROCEEDINGS

DMR accepted the application as complete on February 21, 2019. Notice of the completed application and 30-day comment period was provided to riparian landowners within 1,000 feet of the proposed site, the Town of Newcastle, including the Town of Newcastle Harbormaster, and other state and federal agencies. Notice of the 30-day comment period and opportunity to request a public hearing was published in the *Lincoln County News* on March 14, 2019. During the comment period, DMR received more than five written requests for a public hearing. The site report was issued on June 20, 2019 and the public hearing was scheduled for August 7, 2019 in Newcastle.

Notice of the hearing, copies of the application and DMR site report were provided to state and federal agencies for their review, the Town of Newcastle, riparian landowners within 1,000 feet of the proposed site, and subscribers of DMR's aquaculture email listserv. Notice of the hearing was published in the *Lincoln County News* on July 4 and 25, 2019. On July 24, 2019, Toni Simmons/Muscongon Bay Aquaculture applied for intervenor status in the proceeding.² As noted in the application, Ms. Simmons' company Muscongon Bay Aquaculture operates DAM GS2, a standard lease near Mr. Faux's proposed

¹ Applicant originally requested 1.12 acres. Based on the provided coordinates, DMR calculated the area at 1.10 acres.

² The deadline to submit intervenor applications was 4 p.m. on July 23, 2019. Ms. Simmons' application was submitted, via email, by N. Brylewski at 12:35 p.m. on July 24, 2019. Although the application was submitted late, DMR accepted the submission and processed the application accordingly.

experimental lease site. DAM GS2 is utilized by Muscongus Bay Aquaculture for bottom-planted, grow-out field trials for disease resistant oyster and quahog strains.³

On July 29, 2019, in accordance with Chapter 2.20(3)(A) of DMR regulations, Ms. Simmons/Muscongus Bay Aquaculture was granted limited intervenor status. Ms. Simmons/ Muscongus Bay Aquaculture was granted limited as opposed to full intervenor status, because many of the possible impacts alleged in the application appeared to speculative. The application did not contain enough information to substantiate the claims raised in the application, which made it impossible for DMR to determine whether Ms. Simmons/ Muscongus Bay Aquaculture would be substantially and directly affected by the proposed site. On July 29, 2019, in accordance with Chapter 2.29, DMR issued a procedural order specifying the deadline for the pre-filing of exhibits, witness lists, and witness testimony. The applicant and intervenor did not pre-file any exhibits, witness lists, or witness testimony.

The day of the hearing, Ms. Simmons/ Muscongus Bay Aquaculture requested that the hearing be postponed. In contemplating the request DMR considered several factors including: a) fairness to members of the public who requested a public hearing and may have expected to participate in the proceeding as originally scheduled; b) the burden placed on the applicant by a possible postponement; and c) the absence of any pre-filings. In consideration of these factors, DMR decided to hold the hearing as originally scheduled. However, DMR gave Ms. Simmons/Muscongus Bay Aquaculture the opportunity to designate an individual to testify on her behalf at the public hearing. Ms. Simmons/ Muscongus Bay Aquaculture did not designate anyone to testify on her behalf and she did not attend the public hearing.

The hearing was held as scheduled on August 7, 2019. Sworn testimony was given at the hearing by the following witnesses:

Name	Affiliation
George Faux	George F. Faux, Inc. (Applicant)
Flora Drury	Marine Scientist, DMR Aquaculture Division

Mr. Faux described aspects of the lease application and answered DMR's questions about the proposal. Ms. Drury testified about DMR's site visit. Members of the public who attended the hearing did not offer testimony and did not ask questions of any witness. There were no representatives from the municipality, other state agencies, or the federal government in attendance. The hearing was recorded by DMR. The Hearing Officer was Amanda Ellis.

³ CF: Ms. Simmons intervenor application, answer #7.

Exhibits

The evidentiary record before DMR regarding this lease application includes the following:

1. Case file (CF)
2. Application (App)
3. Site Report (SR)
4. Revised gear layout introduced by the applicant at the public hearing (Exhibit 4)

2. DESCRIPTION OF THE PROJECT

A. Proposed Operations

The applicant currently holds an experimental lease, DAM GPx, which is a .62-acre site for the suspended culture of shellfish. If granted, the proposed lease site would be contiguous to the existing lease. The purpose of the proposed lease is to expand the applicant's existing commercial operations. The applicant intends to deploy up to 150 floating cages that measure $\leq 62'' \times 36'' \times 10''$ and up to 100 floating oyster bags, each measuring $20'' \times 36''$ (App 5-6, 27-32 and 37; SR 2). As originally proposed, the cages and bags would be secured to horizontal longlines that run east to west across the site. The applicant testified that the cages would be sunk to the bottom of the proposed lease site in October, and the cages would be brought back to the surface when ice is no longer present in the Great Salt Bay, which lies to the north of the proposed site. The applicant indicated that ice-out in the Great Salt Bay typically occurs by April.

In her application to intervene, Ms. Simmons/Muscongus Bay Aquaculture described her concerns related to the proposed layout of the gear and the current. Specifically, the application described:

The applicants gear will act as a sieve collecting debris (sticks, trees) as the current courses out of Great Salt Bay. If the applicant's moorings fail, all gear will course over our lease, which is on a very shallow area. The applicant has chosen to set up his gear perpendicular to the current, thus creating more force on his gear.⁴

The applicant testified that he has been observing water current in the area daily and feels that the layout he originally proposed would be suitable for the proposed operations.

However, to address the concerns raised by the intervenor, the applicant testified that he was willing to modify his original gear layout by shifting the lines approximately 30 to 40 degrees to the

⁴ CF: T. Simmons application to intervene, answer to question #3 in the application.

southeast. The applicant presented a gear drawing of the revised layout, which DMR entered into the record as Exhibit 4. Figure 1 depicts the gear layout as originally proposed in the application, referred to as “Option A” and the modified version submitted during the public hearing, referred to as “Option B.” The gear layout in Option B is more parallel to the current than in Option A. If the lease is granted, the applicant indicated that he would like to be able to utilize both layouts, so that he can determine which option would work best.

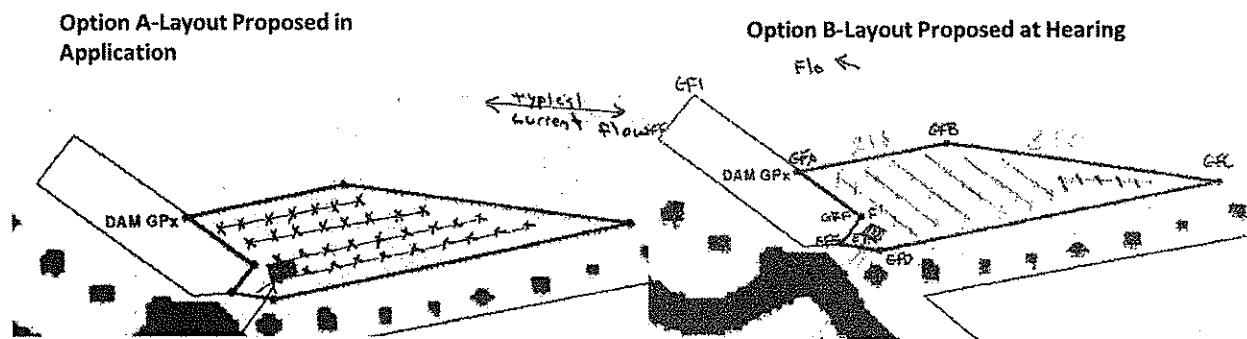


Figure 1: Layout of gear for Option A and Option B

The modified layout presented at the public hearing attempts to address the concerns raised by the intervenor. DMR staff reviewed the proposed change at the public hearing and had the opportunity to ask clarifying questions. DMR staff did not raise any objections or concerns with the revised layout. If the proposed lease is granted, DMR will allow the applicant to utilize both layouts. The applicant will be responsible for notifying DMR anytime the layout is changed between either option. If the lease is granted, DMR will include a condition that specifies the notice for a change in layout between either option.

The applicant is also proposing a 12'x16' float, which would support processing equipment including a tumbler. As originally proposed, the tumbler would be powered by a 12-volt, rechargeable battery (App 6). As operations progress, the applicant testified that a gasoline powered motor may be used instead of the rechargeable battery. The tumbler would be utilized for approximately 10 hours each week (App 6).

B. Site Characteristics

On May 8, 2019, DMR scientists visited the proposed lease site and assessed it and the surrounding area in consideration of the criteria for granting an experimental aquaculture lease. The

proposed site occupies subtidal waters between the Great Salt Bay to the north and the US Route 1 bridge to the south (SR 2). Less than 25 feet to the west of the proposed lease site is undeveloped property, which is owned by the Damariscotta River Association (DRA) (SR 2). The uplands surrounding the site are characterized by rocky intertidal areas that give way to steep banks and a mixed mature forest (SR 2).

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 upon determining that the project will not unreasonably interfere with the ingress and egress of riparian owners; with navigation; with fishing or other uses of the area, taking into consideration the number and density of aquaculture leases in an area; with the ability of the lease site and surrounding areas to support existing ecologically significant flora and fauna; or with the public use or enjoyment within 1,000 feet of beaches, parks, 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 for the lease site.

A. Riparian Access

The eastern shoreline, opposite the proposed lease site, is characterized by residential properties. During the site visit, the closest observed dock was approximately 600 feet to the east of the proposal (SR 8). Per the site report: "If granted, the proposed lease is not expected to interfere with riparian access to shorefront property, docks, or moorings" (SR 8). The DRA owns property to the north and west of the proposed lease site. Access to the western portion of DRA's property is limited by the topography of the shoreline. Specifically, the site report notes that the steep wooded banks would hinder even hand-carry access for individuals that wish to utilize the DRA property to the west of the proposed site (SR 8).

The DRA property to the north of the proposed site contains a tidally exposed rocky beach that gives way to a steep wooded bank (SR 8). If the lease is granted, between approximately 200 and 260 feet of navigable water would remain between the proposed site and the DRA property to the north (SR 8). DRA is listed in the application as a riparian landowner and was provided with personal notice of the completed application and opportunity to comment on the proposal. DMR did not receive any comments from DRA about the proposal. The Newcastle Harbormaster indicated that the proposed site

“should not prevent riparian landowners from getting to and from their property.” DMR did not receive any other comments pertaining to riparian access.

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

B. Navigation

The proposed site is in the southern half of a bend in the navigational channel between the Great Salt Bay to the north and Glidden Point to the south (SR 9). The application indicates that the presence of rocks limits the type of vessels that can navigate this section of the Damariscotta River to kayaks and paddle boards (App 7). The site report also notes that vessel traffic is naturally limited to small outboard skiffs, sailboats, and hand-powered watercraft (SR 8). If the proposed lease is granted, approximately 200 feet of depth-appropriate navigable waters would remain to the north of the site for vessels that are able to access this area (SR 9).

Public access points, to the north of the proposed site, within Great Salt Bay are limited to hand-carry vessels (SR 9). The Johnny Orr Rapids, a 1.3 mile stretch of shallow rock-strewn waters, are located to the south of the proposed lease site and separate it from the closest public boat launch in the village of Damariscotta (SR 9). During the comment period and public hearing, DMR did not receive any feedback to suggest that the proposed lease site would unreasonably interfere with navigation in the area.

Therefore, the aquaculture activities proposed for this site will not unreasonably interfere with navigation. The lease site must be marked in accordance with U.S. Coast Guard requirements.

C. Fishing & Other Water Related Uses

During the site visit, DMR staff did not observe any commercial or recreational fishing activities. Commercial and recreational fishing is limited by rocks in the area and the narrowness of the channel (SR 9). The Great Salt Bay, which is located approximately 250 feet to the north of the site, is designated a Marine Shellfish Preserve (SR 9). This statutory designation prohibits the harvest shellfish and other harvest activities that involve bottom disturbance, which further limits certain fishing activities in the area (SR 9).

The application testified that fishing for striped bass occurs in the area and would be allowed within the boundaries of the proposed lease site. Based on information from DMR’s Recreational Fisheries Program, fishing for striped bass occurs primarily from the shore (SR 9). DMR staff have

observed some vessels fishing for striped bass while conducting other site visits in the area (SR 9). The Harbormaster did not raise any concerns about the effects the proposal may have on striped bass fishing in the area. During the comment period and public hearing, DMR did not receive any feedback to suggest that fishing for striped bass or other marine organisms would be unduly affected by the proposed operations.

For the reasons described above, it is reasonable to assume that the proposal will not unreasonably interfere with commercial or recreational fishing in the area.

Other aquaculture uses. As previously noted, the closest aquaculture lease site to the proposal is DAM GPx an experimental lease site operated by the applicant. If the proposed lease is granted, it will be contiguous with the existing site. The closest aquaculture site not held by the applicant is DAM GS2, which is located approximately 75 feet to the south of the proposed site. As described in section I of this decision DAM GS2 is held by Muscongus Bay Aquaculture of which Tonie Simmons has an interest.

As noted in section I of this decision, Ms. Simmons/ Muscongus Bay Aquaculture was granted limited intervenor status. However, as the procedural history demonstrates, Ms. Simmons did not pre-file any exhibits or testimony, did not attend the public hearing associated with this proceeding, or designate someone to attend on her behalf. Although Ms. Simmons did not attend the public hearing, DMR staff asked the applicant clarifying questions about his operations as they related to some of the concerns raised by Ms. Simmons. For example, the applicant clarified that proposed gear will be submerged in October and not deployed on the surface until the Great Salt Bay is free of ice in the spring. Waiting until the Great Salt Bay is free of ice would appear to address concerns related to spring ice out and the possibility of the applicant's gear scouring the bottom of DAM GS2. The applicant also attempted to address Ms. Simmons' concerns related to gear layout as described in section 2.A of this decision.

In consideration of the record and the issues discussed at the public hearing, it seems reasonable to conclude that the proposed operations will not present an unreasonable interference with other aquaculture leases in the area.

Exclusivity. The applicant is not requesting exclusive use of the proposed lease area (App 9).

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

D. Flora & Fauna

DMR Site Observations. Based on historical eelgrass (*Zostera marina*) data, in 2005, the closest eelgrass bed was located 60 feet to the south of the proposed area (SR 11). During the site visit, DMR staff used an underwater video camera to assess the benthic ecology within the proposed lease area. DMR staff did not observe any eelgrass or other aquatic vegetation (SR 11). DMR staff did observe razor clams (*Ensis directus*) in a steep mud bank that separates the shallower western portions of the proposed site from deeper waters in the eastern portions of the site (SR 13).

DMR staff also observed 15 horseshoe crabs (*Limulus Polyphemus*) in the deeper water along the eastern portions of the proposed site (SR 13). The applicant intends to deploy floating gear from April through October, which will be kept on the bottom of the lease site during the winter months. The site report indicates that “the proposed floating gear is not expected to hinder the spring migration of horseshoe crabs into the area” (SR 13). The report further notes that “the submerged cages and bags are likely to be brought to the surface prior to the commencement of horseshoe crab migration and reproduction” (SR 13).

Fisheries and Wildlife. Based on data maintained by the Maine Department of Inland Fisheries and Wildlife (MDIFW), the proposed lease area is 575 feet to the southeast of a ¼ mile buffer for a bald eagle (*Haliaeetus leucocephalus*) nest (SR 10). An area designated as Tidal Wading Bird and Waterfowl Habitat is approximately 240 feet to the north of the proposed site (SR 10). DMR sent a copy of the lease application to MDIFW for their review and comment. MDIFW indicated that “minimal impacts to wildlife may be anticipated for the George F. Faux Inc aquaculture lease.”⁵

Based on this evidence, it appears that the culture of oysters as proposed for this lease site 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.

F. Public Use & Enjoyment

Per the site report, there are no beaches, parks, or docking facilities owned by federal, state, or municipal government within 1,000 feet of the proposed lease site (SR 16).

⁵ CF: Email from R. Settele (MDIFW) to C. Burke dated March 22, 2019.

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, or docking facilities owned by municipal, state, or federal governments.

G. Source of Organisms

Seed stock for the proposed lease site will be sourced from Mook Sea Farms located in Walpole, Maine (App 1). This facility is an approved source of seed stock (SR 16).

Therefore, the applicant has demonstrated that there is an available source of American oysters (*C. virginica*) to be cultured for the lease site.

4. CONCLUSIONS OF LAW

Based on the above findings, I conclude that:

- A. The aquaculture activities proposed for this site will not unreasonably interfere with riparian ingress and egress.
- 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 uses of the area, taking into consideration existing aquaculture uses in the area.
- D. The aquaculture activities proposed for this site will not unreasonably interfere with the ability of the lease site and surrounding areas to support existing ecologically significant flora and fauna.
- E. 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.
- F. The applicant has demonstrated that there is an available source of American oysters (*C. virginica*) 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 1.10 acres to George F. Faux Inc., 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 lessee⁶; 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 oysters (*C. virginica*) 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 (10) (D) in the amount of \$5,000.00, conditioned upon performance of the obligations contained in the aquaculture lease documents and all applicable statutes and regulations.

6. CONDITIONS TO BE IMPOSED ON LEASE

The Commissioner may establish conditions that govern the use of the lease area and impose limitations on aquaculture activities, pursuant to 12 MRSA §6072-A (15)⁷. 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:

- A. The lease site must be marked in accordance with both U.S. Coast Guard requirements and DMR Rule 2.80.
- B. The leaseholder must notify DMR at least 24 hours prior to switching between either permitted gear layout (Option A or B). The notice must specify, which layout the lease holder is deploying (Option A or B). The leaseholder must also notify DMR at least 24

⁶ 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."

⁷ 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."

hours after the switch is complete. Unless otherwise specified by DMR, notifications must be sent to DMRaquaculture@maine.gov.

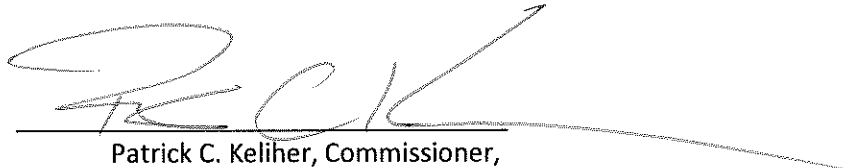
- C. Other public uses that are not inconsistent with the purposes of the lease are permitted within the lease boundaries.

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: _____

9/19/19
PK



Patrick C. Keliher, Commissioner,
Department of Marine Resources

STATE OF MAINE
DEPARTMENT OF MARINE RESOURCES
Experimental Aquaculture Lease Application
Suspended culture of oysters
Damariscotta River, Newcastle

George Faux
DAM GPx
Docket #2017-10-E
November 15, 2017

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION

George Faux applied to the Department of Marine Resources (“DMR”) for an experimental aquaculture lease on 0.87 acre¹ located in the Damariscotta River, northeast of Glidden Point, Newcastle, Lincoln County, for the cultivation of American oysters (*Crassostrea virginica*) using suspended culture techniques. DMR accepted the application as complete on July 25, 2017. No requests for a public hearing were received during the comment period, and no hearing was held.

1. THE PROCEEDINGS

Notice of the application, and the 30-day public comment period were provided to state and federal agencies which were requested to review the project, as well as to riparian landowners, the Town of Newcastle and its Harbormaster, members of the Legislature, representatives of the press, aquaculture and environmental organizations, and others on the Department’s mailing list. Notice of the application and comment period was published in the *Lincoln County News* on August 10, 2017.

The evidentiary record before the Department regarding this lease application includes the application and the Department’s site report dated October 23, 2017, as well as the case file. The evidence from these sources is summarized below.²

2. DESCRIPTION OF THE PROJECT

A. Proposed Operations

The purpose of the proposed lease site is to expand the applicant’s commercial production of oysters using a combination of suspended cages and floating bags (App 3). The applicant proposes to deploy up to six longlines, which would contain a maximum of 150 cages and 200 plastic mesh bags (App 3). The maximum cage size measures 42” wide by 10” deep by 66” long, and the plastic mesh bags measure 24” wide by 4-5” deep by 30” long (App 5). The applicant intends to use the shallower western 1/3rd of the proposed site for the deployment of floating bags, which will primarily contain seed stock (App 3, SR 7). The applicant will flip the cages and bags on a bi-weekly basis to control fouling (App 3). The

¹ The proposed area was reduced to 0.57 acre by DMR to accommodate documented eelgrass beds.

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

oysters will be harvested by hand April through November (App 3). During the winter season, December through March, all oysters will be placed into cages and submerged on the bottom of the proposed lease site (App 3). The applicant plans on using the deeper portion of the proposed lease site to overwinter the cages (App 3). The applicant intends to access the proposed site by boat, which will be launched from his personal property (App 2).

B. Site History

Mr. Faux holds two Limited Purpose Aquaculture Licenses (LPAs) within the boundaries of the proposed lease site (App 3). The LPAs were originally granted in 2014 for the cultivation of American oysters (*Crassostrea virginica*) using suspended culture techniques. Since their issuance, the LPAs have been renewed each year. Mr. Faux plans to terminate the LPAs if the lease is granted (App 3).³

C. Site Characteristics

On September 8, 2017, DMR scientists visited the proposed lease site and assessed it and the surrounding area in consideration of the criteria for granting an experimental aquaculture lease.

The proposed lease site occupies “subtidal waters between the Great Salt Bay to the north and the US Route 1 bridge to the south” (SR 2). The upland is characterized by rocky intertidal areas and steep banks that give way to mixed, mature forest (SR 2). During the site visit, tidal heights were predicted at 0.43 feet below mean water (SR 6). The proposed site is situated along the southern edge of a channel (App 5). The site report notes: “water depths are generally uniform until the channel edge, at which point depths increase dramatically along a sloping mud bank” (SR 11). At low water, recorded depths ranged from 1 foot along the western boundary to more than 10 feet along the eastern boundary (SR 7). At low water, the distance from the SW/MW boundary of the proposed lease site to the nearest point of land is <30 feet (SR 8).

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³ Faux 114 and Faux 214

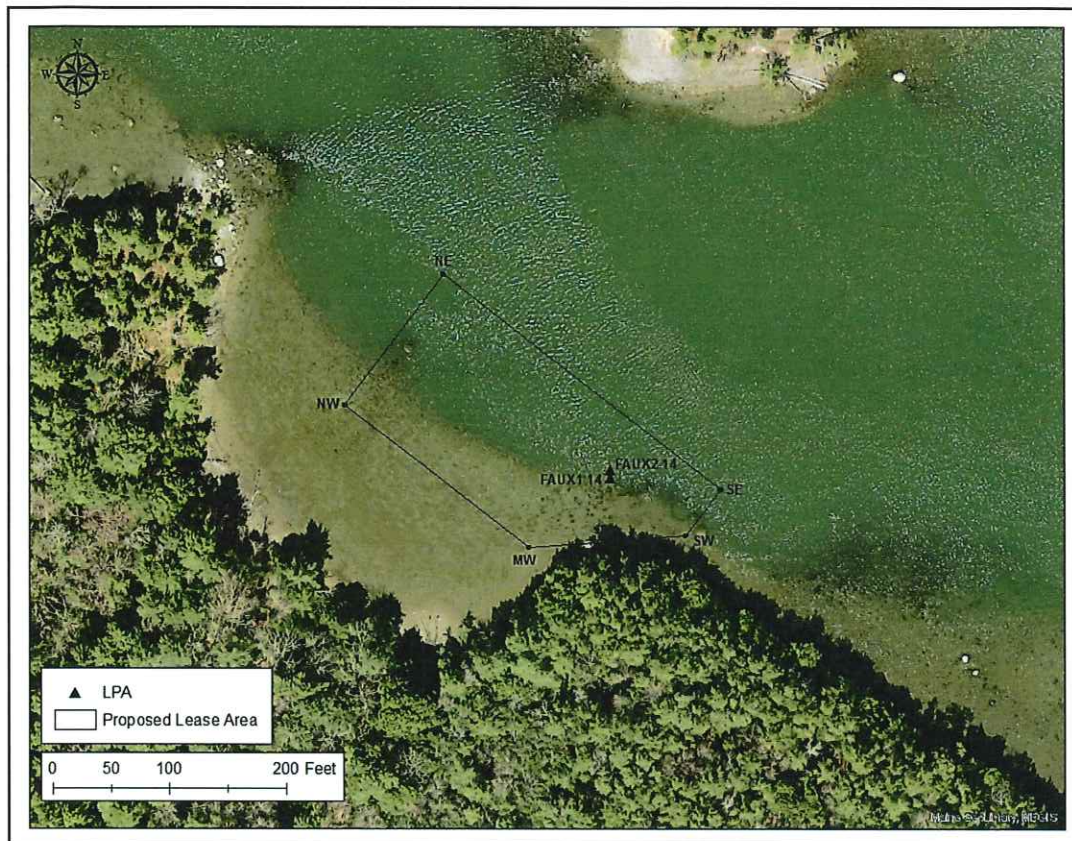


Figure 1: Depicting the proposed lease boundaries with labeled corners. The map also includes the applicant's existing LPAs, which are located within the boundaries of the proposed lease area.

The bottom of the proposed lease site varies between rocky substrate and mud with scattered boulders (SR 11). The current speed is approximately 1.5 knots (App 4).

The proposed lease is in an area currently classified by the Department of Marine Resources Water Quality Classification program as “conditionally approved” for the harvest of shellfish (SR 8). The site report notes “the harvest of shellfish from this area will be prohibited during any malfunction at The Great Salt Bay Sanitary District Damariscotta Mills facility” (SR 8).

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 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, 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 for the lease site.

A. Riparian Access

The Damariscotta River Association (DRA), a nonprofit conservation land trust, is the only riparian landowner within 1,000 feet of the proposed lease site (App 3, SR 9). During the site assessment DMR staff, did not observe any docks or moorings within the vicinity of the proposed lease (SR 9).

According to the site report:

The surrounding uplands are dominated by steep wooded banks leading from the adjacent shoreline. The topography of the adjacent shorefront is expected to hinder even hand-carry access by individuals using the DRA properties (SR 9).

No comments were received from the DRA regarding the proposed lease site. Activities at the lease site in subtidal waters are unlikely to hamper access to and from the 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.

B. Navigation

The proposed lease site “occupies the western ~45-130 feet of the navigation channel between Glidden Point to the south and the Great Salt Bay to the north” (SR 9). Per the site report, “more than 230 feet of navigable waters of sufficient depth would remain to the east for any vessels that can access the general area” (SR 9). Given natural constrictions, vessel traffic within the area is limited to a combination of small outboard skiffs, and non-motorized watercraft (i.e. canoes, kayaks, etc.) (SR 9).

During the review period, DMR did not receive any comments from the Newcastle Harbormaster. Based on the absence of comments, it is reasonable to conclude that the Newcastle Harbormaster does not have any concerns about navigation.

It appears from this evidence that navigation in the area will not be unduly affected by the presence of the proposed lease site.

Therefore, I find that the aquaculture activities proposed for this site will not unreasonably interfere with navigation. The lease site must be marked in accordance with U.S. Coast Guard requirements.

C. Fishing & Other Uses

The applicant notes that “there is some use of the surrounding area by kayakers, small fishing boats, and other leases within the area” (App 3). Based on information maintained by the DMR Recreational Fisheries Program, fishing for striped bass (*Morone saxatilis*) occurs in the area (SR 9). The site report describes the following:

On September 8, 2017 one individual in an outboard powered vessel was observed hook and line fishing in the channel to the east of the proposed lease. No evidence of commercial fishing activity was observed during the Department’s site assessment (SR 9).

Recreational fishing and kayaking would be permitted within the proposed lease boundaries (App 4). No comments were received with regards to fishing and other uses of the area.

It appears from this evidence that the proposed lease site is unlikely to affect fishing in the area.

Exclusivity. The applicant is not requesting exclusive use of the proposed area.

Other aquaculture leases. Including the two LPA licenses held by Mr. Faux, there are six LPAs and three leases within one mile of the proposed site (SR 10). The closest aquaculture site, other than the LPAs held by Mr. Faux, is a standard lease located ~140 feet to the southeast and is authorized for the suspended and bottom culture of American oysters, European oysters (*Ostrea edulis*), and hard clams (*Mercenaria mercenaria*)⁴ (SR 10). Since the proposed lease represents a modest expansion of an existing aquaculture site, it is reasonable to conclude that the proposed operations are unlikely to negatively affect existing aquaculture activities in the area. In addition, the Department sent notice of the application to leaseholders within 1,000 feet of the proposed site and no comments were received.

Based on this evidence, it appears that the proposed lease will not unreasonably interfere with fishing or other uses of the area. The lease must be marked in accordance with DMR Rule 2.80⁵

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.

D. Flora & Fauna

Site Observations. During the site visit, Department staff observed a variety of flora and fauna including filamentous algae (*Chaetomorpha spp.*), bushy red weeds (*Gracilaria spp.*, *Agardhiella spp.*, *Ceramium spp.*), and razor clams (*Ensis directus*).⁶ Department staff also identified eelgrass (*Zostera marina*) within the western 1/3rd of the proposed lease site (SR 16). To prevent aquaculture gear from being deployed over the eelgrass meadow and ensure compliance with the 25- foot setback required by the Army Corps of Engineers, the western boundary of the proposed lease site will be shifted 55 feet to the northeast (SR 16). This will reduce the total size of the proposed site from the requested size of 0.87 acre to 0.57 acre.

⁴ DAM GS2

⁵ **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.

⁶ For a complete list of observed species see page 12 of the site report.

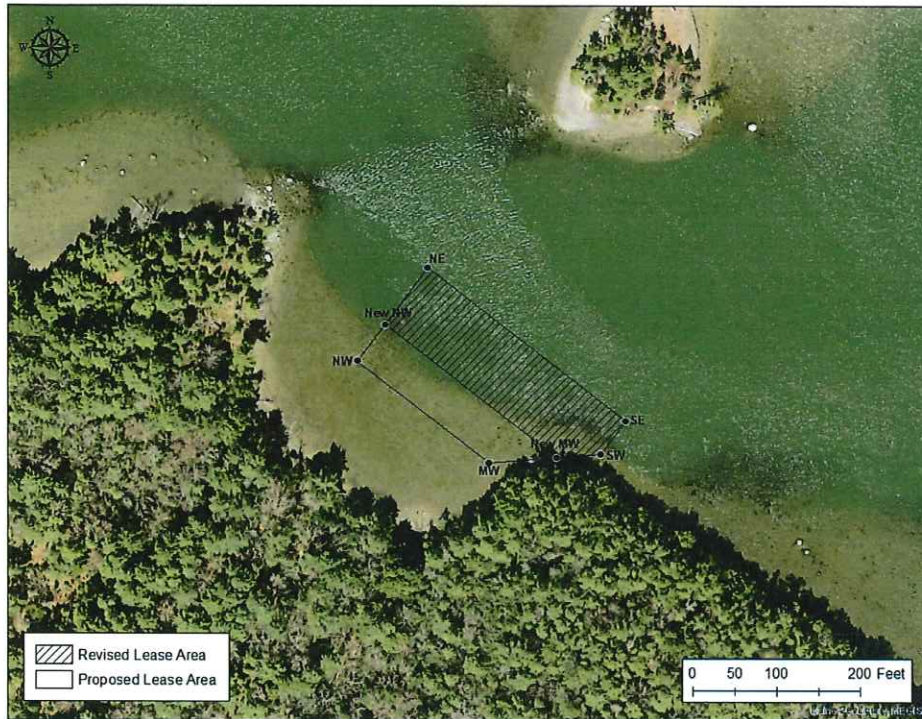


Figure 2: Depicting the revised lease area to accommodate an eelgrass meadow.

Fisheries and Wildlife. DMR sent a copy of this lease application to the Maine Department of Inland Fisheries and Wildlife (MDIFW) for their review and comment. MDIFW noted that “minimum impacts to wildlife may be anticipated.”⁷

Given that the boundaries of the site will be shifted 55 feet to the northeast to accommodate the eelgrass meadow, it appears that the culture of oysters as proposed for this lease site will not interfere with the ecological functioning of the area.

Therefore, I find that the aquaculture activities proposed for this site will not unreasonably interfere with the ability of the lease site and surrounding areas to support existing ecologically significant flora and fauna.

E. Public Use & Enjoyment

According to the site report, there are no public docking facilities or beaches within 1,000 feet of the proposed lease (SR 18).

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 owned by municipal, state, or federal governments.

⁷ CF, Email from MDIFW to the Aquaculture Division dated August 4, 2017.

F. Source of Organisms

According to the application, seed stock for this proposed lease site will be obtained from Mook Sea Farm in Walpole, Maine.

Therefore, I find that the applicant has demonstrated that there is an available source of American oysters (*Crassostrea virginica*).

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. Given the setback for eelgrass (*Zostera marina*), 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 American oysters (*Crassostrea virginica*) 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 an experimental lease of 0.57 acre to George Faux, 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 lessee⁸; 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 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. 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

⁸ 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."

account pursuant to DMR Rule 2.64 (10) (D) in the amount of \$5,000.00, conditioned upon performance of the obligations contained in the aquaculture lease documents and all applicable statutes and regulations.

6. CONDITIONS TO BE IMPOSED ON LEASE

The Commissioner may establish conditions that govern the use of the lease area and impose limitations on aquaculture activities, pursuant to 12 MRSA §6072-A (15)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.

The following conditions shall be incorporated into the lease:

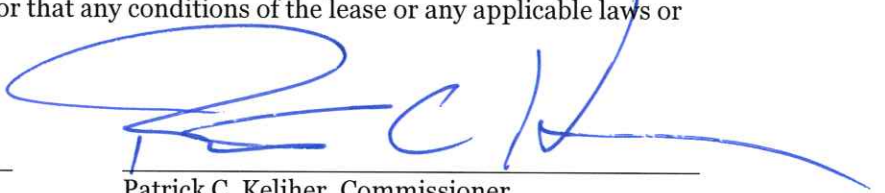
1. The lease site must be marked in accordance with both U.S. Coast Guard requirements and DMR Rule 2.80.
2. Other public uses that are not inconsistent with the purposes of the lease are permitted within the lease boundaries.

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.

Date: _____

11/15/17



Patrick C. Keliher, Commissioner
Department of Marine Resources

⁹ 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.”