

**STATE OF MAINE  
DEPARTMENT OF MARINE RESOURCES**

**Johns River Shellfish LLC**

Lease Expansion Application  
Suspended Culture of Oysters  
Johns River  
South Bristol, Maine

**JOHN NB3**

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION**

The applicant, Johns River Shellfish LLC, is requesting a 0.68<sup>1</sup> acre expansion of JOHN NB3, which is a 6.83-acre standard lease, comprised of two tracts, located in the Johns River, South Bristol. JOHN NB3 is authorized for the suspended culture of American oysters (*Crassostrea virginica*), blue mussels (*Mytilus edulis*), European oysters (*Ostrea edulis*), and quahogs (*Mercenaria mercenaria*). The proposed expansion is to Tract 2, which is currently 4.2 acres in size. The expansion of Tract 2 by 0.68 acres is proposed for the purpose of adding a gear storage raft, relocating existing rafts to create an oyster plex, and adding equipment.<sup>2</sup>

**1. THE PROCEEDINGS**

DMR accepted the final expansion application as complete on November 8, 2022. Notice of the completed application was provided to state agencies, riparian landowners within 1,000 feet of the lease site, the Town of South Bristol, and subscribers to DMR's aquaculture email listserv. Notice of the completed application was published in the *Lincoln County News* on December 1, 2022. Pursuant to 12 M.R.S.A. § 6072 (12-C)(B) and Chapter 2.61(3), DMR provided a 30-day period for public comment.<sup>3</sup> Eighteen comments from the public were received, including thirteen in general support<sup>4</sup> of David Cheney who owns Johns River Shellfish, LLC.

The evidentiary record before DMR regarding this lease expansion application includes six exhibits (see exhibit list below).<sup>5</sup>

**LIST OF EXHIBITS**

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<sup>1</sup> Applicant originally requested 0.69 acres. DMR calculations indicate the area is 0.68 acres.

<sup>2</sup> Application page 5

<sup>3</sup> A lease expansion is not an adjudicatory proceeding and does not require a public hearing. 12 M.R.S.A. §6072 (12-C)(B), 13-188 CMR ch. 2.61(3).

<sup>4</sup> Meaning that the commenters generally spoke to Mr. Cheney's character or personal qualities. Lease expansions are processed in accordance with the criteria specified in Chapter 2.61(4)A-D which does not include the factors most commenters raised.

<sup>5</sup> Exhibits 1, 2, and 3 are cited below as: Case file – "CF", Application – "App", site report – "SR".

1. Case file
2. Application
3. DMR site report, issued on February 23, 2024
4. NAE-2020-00347 Permit
5. Original lease decision
6. August 17, 2020 Gear Amendment Decision

### **SITE HISTORY**

DMR granted the lease JOHN NB3 on May 18, 2016, having determined that the lease met the requirements for the granting of a standard aquaculture lease as set forth in 12 M.R.S.A. §6072 (Exhibit 5, pg. 14). The lease includes the following conditions:

1. The lease site must be marked in accordance with both U.S. Coast Guard requirements and DMR Rule 2.80.
2. The lessee must maintain an 85- foot by 150-foot access corridor across the south tract of the lease site. The lessee may place two work floats, a boat mooring, and oyster cages on the bottom within the corridor.
3. Dragging and shellfish harvesting, except by the leaseholder or its authorized agents, are prohibited on the lease site.
4. When harvesting by drag on the north tract, the lessee must maintain a lookout for approaching vessels, promptly communicate to them his intent to provide a safe corridor for their passage and do so at the soonest practicable time.
5. The Department may, in its sole discretion, review the lease to determine whether additional “reasonable measures” need to be taken “to mitigate noise impacts from the lease activities” during the term of the lease. Should the addition of noise reduction measures be determined reasonable and appropriate by the Department, in its sole discretion, the lease will be amended to include further conditions requiring the implementation of those measures.
6. Other public uses that are not inconsistent with the purposes of the lease are permitted within the lease boundaries.

The applicant had proposed the corridor required in Condition No. 2 in response to concerns raised by individuals who attended the public hearing and owned shorefront property near the lease. Condition No. 2 specifies that the access corridor may contain two work floats, a boat mooring, and bottom oyster cages (Exhibit 5, pg. 15). In February 2020, Johns River Shellfish, LLC applied for a gear amendment to add two

additional floats to the access corridor. On August 17, 2020, DMR denied the request, finding that the condition expressly limited the number of floats within the corridor to two and that more floats may adversely impact the intended functionality and benefit of the access corridor (Exhibit 6, pg. 7). On April 11, 2023, DMR granted a renewal of the JOHN NB3 lease for a term of twenty years.

## **2. DESCRIPTION OF THE PROJECT**

### **A. Proposed Expansion**

The applicant proposes a 0.68-acre, 75' x 400' expansion to Tract 2 of the existing lease. Tract 2 is currently authorized for two processing rafts. One raft is 12' x 18' x 3' and contains a 10' x 10' x 10' building, tumbler, and recessed storage. Connected to this raft is another raft of similar size, which is used to store market sized shellfish.<sup>6</sup> Separate from the rafts authorized for use within the JOHN NB3 lease, Johns River Shellfish, LLC has permits issued by DMR and the U.S. Army Corps of Engineers (USACOE) for wet storage floats near the vicinity of Tract 2. Wet storage is strictly an activity of certified shellfish dealers and is regulated in compliance with Chapter 94 of DMR's regulations and the relevant provisions of the National Shellfish Sanitation Program (NSSP). Permits for wet storage structures are also required from the USACOE. Pursuant to the USACOE permit, Johns River Shellfish, LLC may keep two wet storage floats near the JOHN NB3 lease but outside of its boundaries. The wet storage floats are connected to each other and together measure 22' x 14' x 3'. The wet storage floats include a wire rack to hold dive equipment, a 6' x 10' x 10' shelter covering a sorting table, a 3' x 3' x 9' outhouse building and a pump (Exhibit 4, pg. 4).

If the proposed expansion of JOHN NB3 is granted, the applicant would move the wet storage floats into the expanded JOHN NB3 lease area and connect them to the rafts already located in JOHN NB3 (App 11). The combined rafts and floats would together measure 44' x 26' x 10' and create an 'oyster plex' for the processing and storage of product (App 12). The applicant also proposes to add one 20' x 14' x 10' gear raft to JOHN NB3 to store equipment that would not be attached to the 'oyster plex' system (App 5, 11). The proposed expanded area is located to the south of the access corridor referenced in Condition No. 2.

### **B. Site Characteristics**

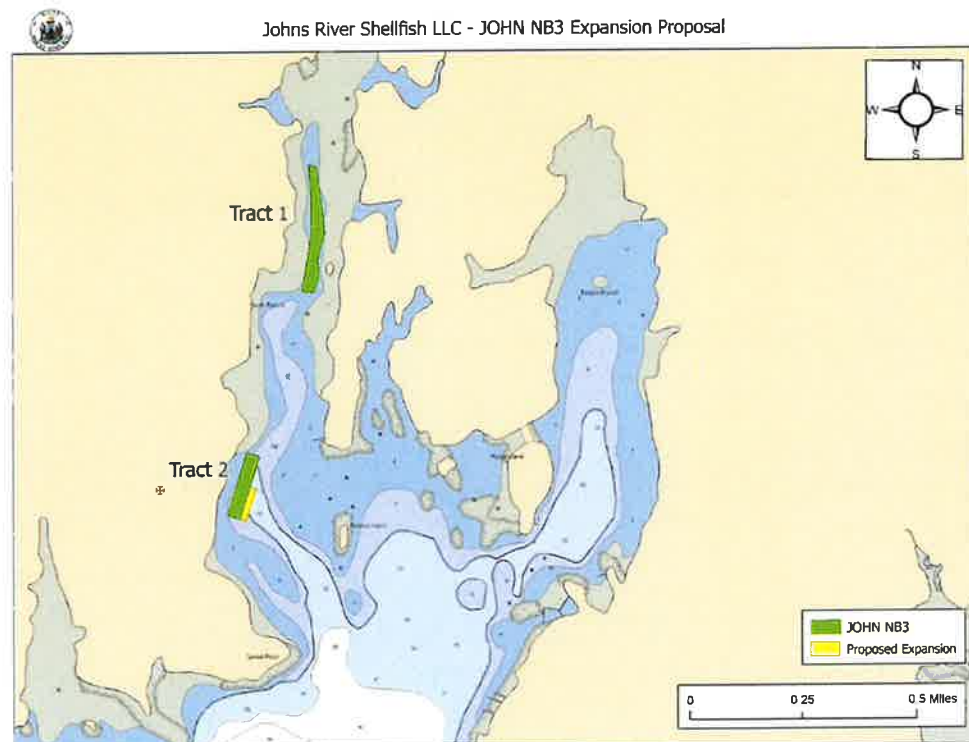
On August 22, 2023, DMR scientists assessed the proposed expansion beginning at 12:09 PM. The proposed expansion is situated in the northern branch of the Johns River in South Bristol. The nearby

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<sup>6</sup> Prior decisions refer to this storage raft as a "float." However, as part of this proposal, the applicant is proposing to add wet storage floats to the site. To avoid confusion, this decision will refer to the wet storage floats as "floats" and other floating structure as rafts.

western shore consists of forested uplands. There is one house located northeast of the proposal on the tip of a peninsula. Nearby Peabow Island, east of the proposal, has one cottage.

DMR began collecting depths at 12:11 PM, which was approximately 2.5 hours after low tide. Measured depths at corners of the proposed expansion ranged from 13.0 to 17.1 feet. Correcting for tidal variation derives water depths at the corners of the proposal at the next high tide to be from 17.1 to 21.2 feet and from 8.1 to 12.2 feet at mean low water (MLW, 0.0 feet) (SR 2).



**Figure 1:** Vicinity map. Image taken from DMR site report.

### **3. STATUTORY CRITERIA & FINDINGS OF FACT**

Pursuant to 12 M.R.S.A §6072 (12-C)(E), the Commissioner may grant a lease expansion upon determining that it would satisfy the criteria set forth in 12 M.R.S.A. §6072 (7-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; 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.

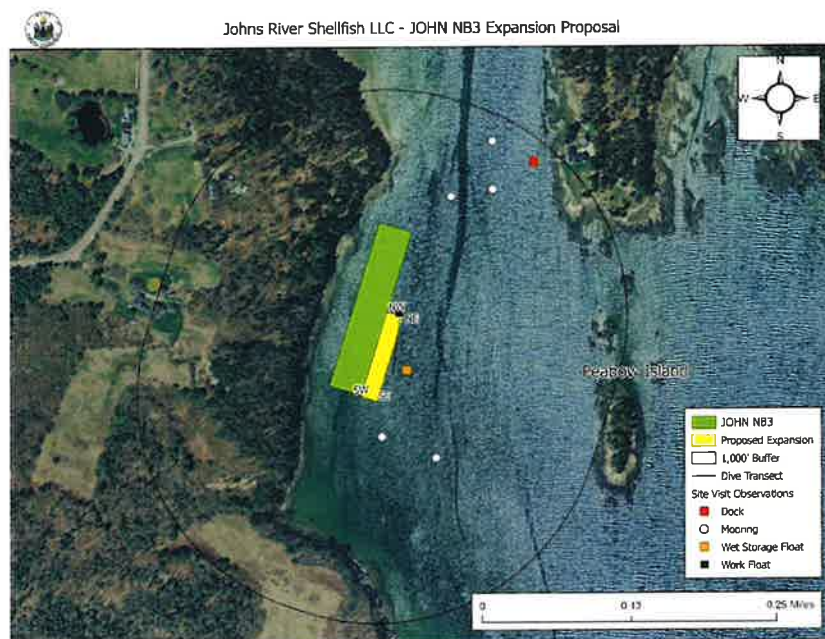
In addition, Chapter 2.61(4) provides that the expansion must be consistent with the Commissioner's findings on the underlying lease application in accordance with Chapter 2.37(A), does not violate any of the conditions set forth in the original lease, is not for speculative purposes, and will not cause the applicant to be a tenant of any kind in leases covering an aggregate of more than 1,000 acres.

#### **A. Riparian Access**

Law and rule require the Commissioner to examine whether riparian owners can safely navigate to their shore. 12 M.R.S.A. § 6072(7-A)(A); Chapter 2.37(1)(A)(1). In examining riparian owner ingress and egress, the Commissioner "shall examine whether the riparian owners can safely navigate to their shore. The Commissioner shall consider the type of shore involved and the type of vessel that can reasonably land on that shore. The Commissioner shall consider the type of structures proposed for the lease and their potential impact on the vessels which would need to maneuver around those structures." Chapter 2.37(1)(A)(1).

DMR did not observe any structures on the shoreline to the west of the proposed expansion. DMR observed one cottage on Peabow Island approximately 1,010 feet east of the proposed expansion. No dock was observed on the western shore of Peabow Island. DMR observed five moorings during the site visit. One mooring, approximately 580 feet north of the proposed expansion, had a sailboat moored to it at the time of the site visit. All other moorings were vacant. Mooring distances from the proposed expansion are as follows: 161 feet southeast, 372 feet southeast, 580 feet north, 698 feet north, and 883 feet north. There was one dock observed 910 feet northeast of the proposed expansion. There was a small powerboat and skiff tied to the dock and pier. DMR also observed a work raft and a wet storage float associated with JOHN NB3 (Figure 2) (SR 4-5).

The proposed lease expansion is adjacent to the eastern boundary of the existing lease and is to the south of the access corridor. If the expansion were granted, the applicant would move the rafts from the access corridor into the expanded area, move the permitted wet storage floats that are currently near the lease into the expanded lease area, and combine them. The lease holder would also add an additional raft within the expanded area and a mooring for a boat (App 5). According to the site report, no docks were observed along the western shoreline and based on aerial imagery in the report the western shoreline is undeveloped. There are no comments in the record alleging that the expansion would impact any riparian landowner's ability to safely navigate to their shore or reasonably land on their shore. Based on the evidence, the proposed expansion would not unreasonably impact riparian ingress and egress.



**Figure 2:** Proposed expansion area with site visit observations<sup>7</sup>. Image taken from DMR site report.

As noted in section 1 of this document, the original lease decision included Condition No. 2 requiring that the holder maintain an 85' x 150' access corridor across the center portion of Tract 2 (Exhibit 5, pg. 15). The corridor was proposed by Johns River Shellfish, LLC with the intent of facilitating navigation to the western shore, passage for striped fisherman, and providing a central area for the deployment of rafts (Exhibit 5, pg. 6). The original decision states:

No evidence was presented to show that the lease site with the gear as originally laid out in the completed application would have interfered unreasonably with riparian ingress or egress or with navigation to and from the western shore by others using the area. By reconfiguring the gear layout to provide an access corridor, Mr. Cheney is providing a benefit to the public by facilitating navigation to and from the intertidal zone and the shore beyond the proposed lease site (Exhibit 5, page 6).

The decision further explains that the access corridor would also provide a benefit to shorefront owners on the western shoreline by providing a direct route to their shore. In consideration of the public benefit, DMR granted Mr. Cheney's request to add the corridor as a condition of the lease. The proposed expansion would remove rafts from the corridor, thereby increasing, not decreasing, riparian access via the corridor.

**Therefore,** the aquaculture activities proposed for this site would not unreasonably interfere with the ingress and egress of any riparian owner and are consistent with the findings on the underlying lease application.

<sup>7</sup> For clarity purposes, only Tract 2 of JOHN NB3 is shown in this figure.

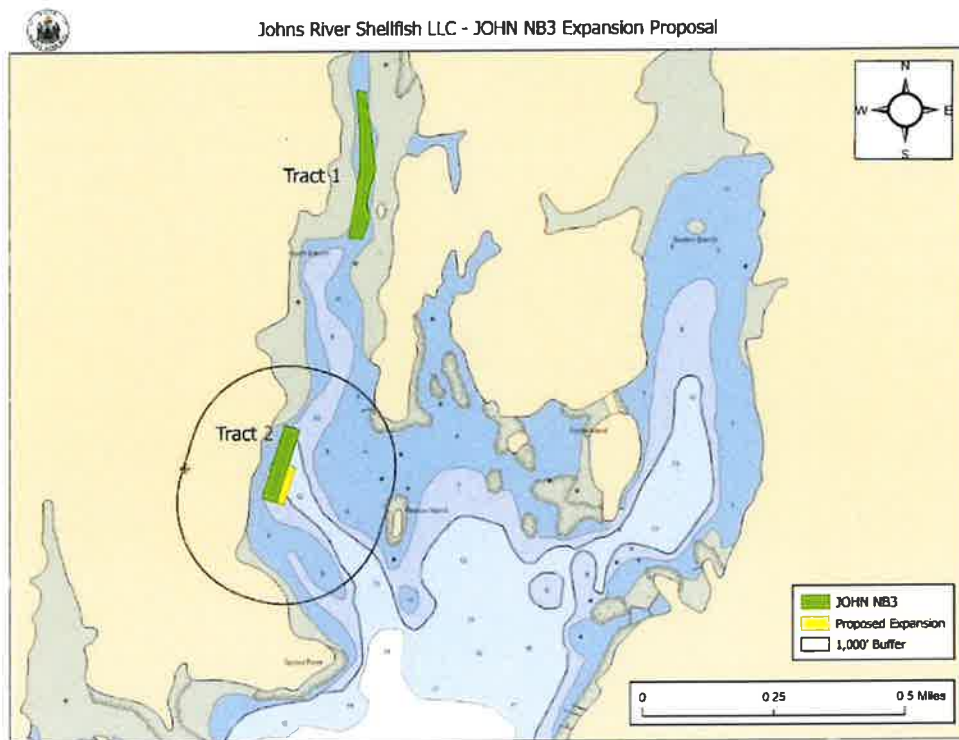
## **B. Navigation**

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

Tract 2 of JOHN NB3 is partially located in the deepest part of the navigational channel in this segment of the Johns River (see Figure 3). The original decision states that this is the primary navigational channel leading into the north branch of the river and that vessel traffic is expected to be both commercial and recreational in nature (Exhibit 5, pg. 7). The original decision further states that lobster fishing is known to occur upstream from the site, that clam harvesting occurs on tidally exposed flats to the north of the site, and striped bass fishing occurs in the area (Exhibit 5, pg. 7). Skiffs, canoes, kayaks, and jet skis are vessels that are likely to transit through the area (Exhibit 5, pg. 7).

The expansion proposal expands the site eastward towards and further into the navigational channel that leads to the northern branch of the river (SR 5). Rachel Walker stated that the channel is already narrow and that expanding the proposed site would restrict boating particularly at lower tidal stages. The comment also states that other boats associated with recreational fishing or other activities navigate within the area. During the site visit, three moorings and one dock with a pier were observed to the north of the proposed expansion. One mooring was occupied by a sailboat and a powerboat and skiff were tied to the dock and pier.





**Figure 3:** Navigational channels in the vicinity of the proposed lease area.

The proposed expansion extends into an already constricted channel. When considering the existing footprint of JOHN NB3, the usable channel is approximately 293 feet wide. At the most constricted point, the expansion as proposed would reduce that usable channel by almost 25%. Based on the original decision, there are a variety of vessels that are used in the area for commercial and recreational purposes. The site report for the proposed expansion documented a sailboat, powerboat, skiff, moorings, and docks within the area. Public comment on the expansion request submitted by Rachel Walker indicates that recreational and commercial vessels regularly navigate within the area.

Johns River Shellfish, LLC is proposing to deploy floating rafts within the footprint of the expansion, which would reduce navigable waters in an already constricted channel, which is the primary navigational channel to the north branch of the river. Given the current uses of this area, expanding the lease further into the primary navigational channel to deploy the proposed floating structures would unreasonably interfere with navigation in the area.

**Therefore**, the aquaculture activities proposed for the expansion would unreasonably interfere with navigation and would not be consistent with the findings on the underlying lease application.

### **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 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)).

**Fishing.** During DMR's site assessment, no commercial or recreational fishing activity was observed in the vicinity of the proposed expansion. There was one individual observed working at JOHN NB3 during the site visit (SR 6). During the comment period, fishing was noted to occur in the general area, but none of the comments described specific impacts to fishing activities should the expansion be approved. Vessels associated with fishing activities may transit the area, but navigational considerations are addressed in the previous section. The original decision stated that commercial and recreational fishing are likely to occur in the area, but it was unlikely that the lease site would interfere with fishing of any kind (Exhibit 5, pg. 8).

**Other aquaculture uses.** The applicant currently operates standard lease JOHN NB3. There are no other leases or Limited Purposed Aquaculture (LPA) sites within 1,000 feet of the expansion proposal (SR 6). DMR did not receive comments about other aquaculture uses within the area.

**Other water-related uses.** No concerns about potential impacts on other water-related uses were received by DMR. The original decision did not describe other water-related uses of the area.

**Therefore,** the aquaculture activities proposed for this site would not unreasonably interfere with fishing, existing aquaculture operations, or other water-related uses of the area. These findings are consistent with the original lease decision.

#### **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)).

**Site observations.** On August 22, 2023, DMR conducted a transect utilizing SCUBA to assess the epibenthic ecology of the proposed lease expansion. The relative abundance of epibenthic flora and fauna observed in the video transect is described below in Table 1 (SR 7).

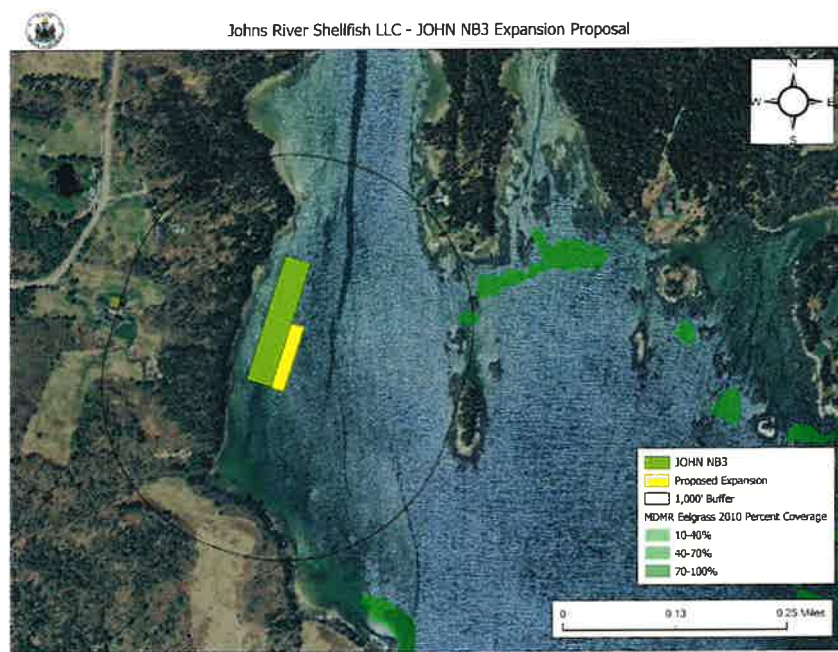
**Table 1.** Species observed on underwater footage.

Species Observed	Abundance
Crab ( <i>Cancer</i> sp.)	Occasional

Sugar Kelp ( <i>Saccharina latissima</i> )	Occasional
American oyster ( <i>Crassostrea virginica</i> )	Occasional
Seaweed ( <i>Ascophyllum</i> sp.)	Occasional

### Eelgrass (*Zostera marina*)

Historical records of eelgrass collected by DMR in 2010 indicate mapped eelgrass approximately 916 feet east of the proposal (Figure 4).<sup>8</sup> No eelgrass was observed during DMR’s 2023 site assessment. The original decision also states that no eelgrass was present within the boundaries of the existing lease (Exhibit 5, pg. 8).



**Figure 4.** Mapped eelgrass (*Z. marina*) in the vicinity of the proposed expansion.

**Wildlife.** 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 closest mapped Tidal Waterfowl and Wading Bird Habitat is approximately 470 feet northwest of the proposal. Data collected by the United States Fish and Wildlife Service in 2023 by aerial nest survey shows the closest mapped bald eagle nesting site to be approximately 1.38 miles southwest of the proposal.

<sup>8</sup> Data obtained from The Maine Office of GIS “GISVIEW.MEDMR.Eelgrass”. This is the most current record of mapped eelgrass within the vicinity of the proposal.

On December 7, 2022, a Wildlife Biologist with MDIFW responded by email to a “Request for Agency Review and Comment” stating minimal impacts to wildlife are anticipated for this project.<sup>9</sup>

There is no evidence to suggest that the proposed expansion will have any negative impact on the ecology of the area. The original decision also found that the lease site would not unreasonably interfere with flora or fauna.

**Therefore,** the aquaculture activities proposed for this site would not unreasonably interfere with the ability of the lease site and surrounding areas to support existing ecologically significant flora and fauna. This is consistent with the finding of the original lease decision.

#### **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, docking facility, or other conserved lands owned by federal, state, or municipal governments (SR 10). This is consistent with the findings of the original lease decision, which also found that the site was not within 1,000 feet of any beach, park, docking facility, or other conserved lands owned by federal, state, or municipal governments (Exhibit 5, pg. 10).

**Therefore,** the aquaculture activities proposed for this site would 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. This is consistent with the finding of the original lease decision.

#### **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)). No changes to the source of stock are proposed.

**Therefore,** the applicant has demonstrated that there is an available source of stock to be cultured for the lease site. This is consistent with the finding of the original lease decision.

#### **G. Light**

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<sup>9</sup> Email correspondence between MDIFW and DMR.

The Commissioner evaluates lighting in accordance with 12 M.R.S.A §6072-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.

The original decision states that no lights, including permanent light sources would be used (Exhibit 5, pg. 11). Except in the event of an emergency, all work would occur during daylight hours. The expansion application states that LED lighting would be used inside a raft building (App 14). The lighting would be used on rainy days to help illuminate workspaces. DMR received public comment, from a shorefront property owner, stating that the addition of lighting would be intrusive to their residence.

The lighting provisions in Chapter 2.37(1)(A)(8) address exterior lighting used on buildings, equipment, and vessels that are permanently moored or routinely used at all aquaculture facilities. The expansion application indicates that the lights would be used inside a building on the raft. The building has windows. While interior lighting is not expressly contemplated in regulation, the lighting standards were intended to address circumstances where lighting that is used within the lease boundaries would be visible to the outside. In this case, the building has windows, so lights used in the building would create a light source within the lease boundaries that is visible to the outside. The expansion application does not provide the wattage of the lights, fixtures, or steps taken to mitigate impacts from the light source. Because the original application did not include the use of the lights, the findings of the original decision concluded that there would be no unreasonable impacts from light at the boundaries of the lease site. In consideration of the record, there is not enough information for DMR to determine if the proposed use of lights in the expanded area would satisfy the requirements in Chapter 2.37(1)(A)(8).

**Therefore**, due to the lack of sufficient information, DMR is unable to determine if the proposed lighting would result in an unreasonable impact at the boundaries of the lease site.

#### **H. Noise**

The Commissioner evaluates noise in accordance with 12 M.R.S.A §6072-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 including directing fixed noise sources away from residences or areas of routine use on adjacent land.

The original decision noted that aside from outboard motors, the only other noise inputs are a hydraulic sorter and a portable gas-powered pressure washer. The sorter is powered by a 10 horsepower

(h.p.) Honda engine that is contained within a box, mounted using rubber vibration dampening pads, and has a second muffler installed “downstream” of the factory installed Honda muffler (Exhibit 5, page 11).

The original decision found that the applicant had taken all reasonable measures to mitigate noise associated with the use of the pressure washer and sorter with a 10 h.p. engine by enclosing the engine in a box, using rubber vibration dampening pads and installing a second muffler (Exhibit 5, pg. 11). The decision also noted that the applicant was proposing to use the noise generating equipment on an intermittent basis (Exhibit 5, pg. 11). In addition, DMR placed condition No. 5 on the original lease, so it had authority to impose additional mitigation measures to address noise concerns should they become an issue during the term of the lease. In explaining the basis for condition No. 5, the original decision states:

It appears from the information in the application, the DMR site report, and testimony at the hearing that Mr. Cheney has taken all reasonable measures to mitigate noise impacts from the lease activities as required by the rule. Nevertheless, should noise become a problem during the term of the lease, the Department needs to have the ability to require additional mitigation, if necessary. Consequently, the lease will contain a condition subjecting it to review by the Department to determine whether additional “reasonable measures” needs to be taken “to mitigate noise impacts from the lease activities” during the term of the lease (Exhibit 5, pg. 12).

Based on these findings and the addition of Condition No. 5, the decision concluded that the activities would not result in an unreasonable impact from noise at the boundaries of the lease (Exhibit 5, pg. 12).

According to the expansion application, no additional sources of noise beyond those previously approved are proposed (App 14). However, the expansion application also states that a 16 h.p. hydraulic pump and a 13 h.p. water pump are used on the work floats (App 9). The application states this equipment is in an insulated engine box (App 9). The application also states a 100-watt generator would be used to power interior lights and would be mounted on the exterior of the building (App 9). The application states that the noise generating equipment would be located further away from certain shorefront parcels (App 14). In comments submitted to DMR, concerning the expansion, Rachel Walker stated in part:

The current lease has created a significant impact from noise generated from the operation procedures. Under the current lease, the noise processing equipment has not been intermittent as the operation generates noise that can be continuously heard throughout the duration of the day. The expansion of the lease proposes operations that would generate a greater noise impact with additional machinery and on a daily basis seven days a week. The expansion proposal indicates numerous sources of noise generating equipment (tumbler motor, water pump and generators) along with “the same Honda water pump”. Notably, the drafted expansion indicates the use of a 13 HP water pump, which is in contrast to the 10 HP water pump approved for in the original lease. Despite the contention that machinery would be relocated further away from the Walker residence and the impact of noise would therefore be mitigated, the expansion, location and creation of the ‘oyster plex’

in fact moves closer to our property with no abatement from the sound that carries over the water and to the point.<sup>10</sup>

If approved, the expansion application would authorize noise generating equipment additional to what was authorized by the original lease, which would be used on rafts located within the expanded area. Because the rafts would be stationary, the noise generating equipment used on them would be fixed sources. As such, the applicant must demonstrate that the fixed noise sources would be directed away from any residences or areas of routine use on adjacent land. If approved, the application would expand the site eastward closer to Peabow Island, which is approximately 1,010 feet at MLW from the proposal (SR 4). DMR observed one cottage on Peabow Island (SR 4). The application does not provide what measures would be taken to direct noises away from Peabow Island or surrounding areas. Although the application indicated the expansion would move noise generating activities further away from some residences, one commenter provided evidence that the noise generating activities would be moved closer to their residence.

The expansion application also proposes the addition of a 16 h.p. hydraulic pump, a 13 h.p. water pump, and a 100-watt generator. Based on a review of the record, the evidence suggests that use of this additional noise generating equipment would result in increased noise from what was originally approved. The application notes that insulated boxes would be used for the pumps and that the 100-watt generator would be mounted to the side of a building. However, there are not enough details in consideration of the record to determine if these are reasonable measures to mitigate additional noise impacts. The original decision found that the use of rubber pads and second mufflers were appropriate mitigation measures for noise. In addition, because noise was such a significant concern, the underlying findings of the original decision were based on a condition allowing DMR to impose additional mitigation measures should noise become problematic. The comments received for the proposed expansion state that there is a significant impact from the noise generated by the current operations.

**Therefore,** the aquaculture activities proposed for this site will result in an unreasonable impact from noise at the boundaries of the lease expansion and would be inconsistent with DMR's findings about noise on the underlying lease application.

## **I. Visual Impact**

The Commissioner evaluates visual impact in accordance with 12 M.R.S.A §6072-A(H) and the regulatory standards specified in Chapter 2.37(1)(A)(10). These standards specify the measures an applicant

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<sup>10</sup> Additional comments by the public concerning noise impacts from the current lease were also received by the DMR. Ms. Walker's comments are referenced because they were most specific to the application under consideration and relevant criteria.

must take to mitigate visual impacts of the lease site. For example, the standards establish allowable construction materials, heights of structures, and the color of gear among other considerations.

The original decision found that all equipment, buildings, and watercraft to be used on the site complied with DMR's visual impact criteria (Exhibit 5, pg. 13). Chapter 2.37(1)(A)(10) states that equipment must be a color that does not contrast with the surrounding area. Acceptable hues are grays, blacks, browns, blues, and greens. The original application proposed to use orange colored bushel baskets or totes for containing the product while sorting on the raft or processing boat. Orange is not an acceptable hue, but the original decision noted that the baskets will be used intermittently while processing and are not permanent features of the site (Exhibit 5, pg. 13).

Currently, the lease site includes one raft that is 12' x 18' x 3' and contains a 10' x 10' x 10' x 10' building, tumbler, and recessed storage. Connected to this raft is another raft of similar size, which is used to store market sized shellfish. The original decision found that these rafts complied with DMR's visual impact criteria (Exhibit 5, pg. 13). Johns River Shellfish, LLC also has permits for two wet storage floats, located outside the boundaries of the lease, which are connected and together measure 22' x 14' x 3'. The floats include a wire rack to hold dive equipment, a 6' x 10' x 10' shelter covering a sorting table, a 3' x 3' x 9' outhouse building and a pump (Exhibit 4, pg. 4).

If the proposed expansion is granted, the applicant would combine the rafts on JOHN NB3 with the wet storage floats and locate them within the expansion area (App 11). The combined floats would measure 44' x 26' x 10' and create an 'oyster plex' for the processing and storage of product (App 12). The applicant also proposes to add one 20' x 14' x 10' gear raft to store equipment (App 5, 11). Based on the dimensions, the proposed raft, including the rafts combined with the wet storage floats comply with DMR's visual impact criteria. The application states the rafts would be comprised of pressure treated wood, black plastic drums, and black lobster wire fencing (App 11). These colors comply with DMR's visual impact criteria.

However, the expansion application also states that colored baskets and colored bags (purple, white, or red) will be used on the rafts. These baskets and bags are used to sort product (App 12). Chapter 2.37(1)(A)(10) states that equipment must be a color that does not contrast with the surrounding area. Acceptable hues are grays, blacks, browns, blues, and greens. According to the expansion application, black lobster wire fence will be used to secure gear storage on the gear raft (App 11). The application also includes images of what appear to be totes stored on the rafts (App 9, 10). This suggests that the totes, including baskets and bags may remain on the raft for extended periods and would not be a transient feature. Therefore, the storage of purple, white, and red gear on the floats would not comply with DMR's visual impact criteria. It is also inconsistent with the findings of the underlying lease application which found that orange baskets or totes were used only intermittently while processing and were not otherwise visible.



Therefore, if the expansion is approved, it will include a condition that totes, baskets, and bags cannot be visible from the boundaries of the site unless the lease operator is physically present on the site.

**Therefore**, if approved with the condition that totes, baskets, and bags cannot be visible from the boundaries of the site unless the lease operator is physically present on the site, the proposed expansion would comply with DMR's visual impact criteria.

#### **K. Original Lease Conditions**

In response to the lease expansion application, DMR received comments from the Walker family concerning the corridor, which is the subject of condition No. 2. Specifically, Rachel Walker cited the denial of the 2020 amendment request to add additional rafts within the corridor as a basis to deny the expansion request and any additional rafts. Rachel Walker stated:

In denying the amendment request from Johns River Shellfish LLC on August 17, 2020, the DMR found that the proposed amendment expressly violated a condition of the original lease (limiting the number of floats [rafts] in the access corridor expressly to two) and specifically emphasized the proposal for the addition of more floats [rafts] may adversely impact the intended functionality of the access corridor along with the available space available for navigation through the area.

The discussion concerning the access corridor in the amendment decision states:

Furthermore, the condition expressly limited the number of floats [rafts] within the corridor to two. The addition of more floats [rafts] may adversely impact the intended functionality and benefit of the access corridor. For example, there would be less open space available for navigation, which can limit accessibility through that **specific area** [emphasis added]. Again, this is an outcome that is contrary to the intent of the condition itself. The intent or purpose of the condition aside, the access corridor is expressly conditioned to allow two floats [rafts]. If the amendment request were granted, four rafts would be deployed within the access corridor. This would violate a condition of the original lease, which limits the number of floats [rafts] in the access corridor to two (Exhibit 6, page 7).

Condition No. 2 is specific to an 85' x 150' access corridor to the western shoreline and the number of rafts that can be located within the corridor itself. The findings in the amendment decision were specific to the number of rafts proposed in the access corridor. The decision did not address the addition of rafts or infrastructure in other areas within the lease site because no such request was presented. The expansion application does not propose adding more rafts to the access corridor; to the contrary, it proposes moving rafts outside of the corridor. Therefore, the proposed expansion, if granted, would not violate condition No. 2.

Noise was raised as a concern in the original lease proceedings, which led DMR to impose a condition allowing the agency to set further mitigation measures if noise became a problem over the course of the lease. Condition No. 5 states:

The Department may, in its sole discretion, review the lease to determine whether additional “reasonable measures” need to be taken “to mitigate noise impacts from the lease activities” during the term of the lease. Should the addition of noise reduction measures be determined reasonable and appropriate by the Department, in its sole discretion, the lease will be amended to include further conditions requiring the implementation of those measures.

Condition No. 5 authorizes DMR to amend the lease to require implementation of additional noise reduction measures. The condition itself is not violated by the proposed expansion. Instead, for the reasons discussed above, the applicant has failed to show that its proposed activities satisfy the criteria in Chapter 2.37(1)(A)(9).

As for the remaining original lease conditions, they are either specific to the north tract of the site or prohibit others from dragging or shellfish harvesting within the boundaries of the site, none of which would be violated by the proposed expansion.

**Therefore**, the expanded aquaculture activities proposed for this site would not violate any of the conditions set forth in the original lease.

#### **L. Speculative Purposes**

Chapter 2.61(4)(C) of DMR’s regulations provides that in determining whether an expansion is proposed for speculative purposes, DMR must consider “whether the lessee has conducted substantially no research or aquaculture in the lease areas during the previous lease term.” The lease site is actively conducting aquaculture and has been doing so during the previous lease term.

**Therefore**, the lease expansion is not for speculative purposes.

#### **M. Aggregate Holdings**

According to DMR records, the only other lease held by the applicant is 3.36-acres in size.

**Therefore**, if approved, the lease expansion would not cause the applicant to be a tenant of any kind in leases covering an aggregate of more than 1,000 acres.

#### **4. Conclusions of Law**

The evidence in the record demonstrates that the proposed aquaculture activities do not satisfy all the requirements for granting a lease expansion as set forth in 12 M.R.S.A §6072(12-C). Therefore, the application must be denied.

#### **5. Decision**

Based on the foregoing, the application of Johns River Shellfish LLC for an expansion of lease JOHN NB3 is denied.

Dated: \_\_\_\_\_

9/9/29



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