

**STATE OF MAINE
DEPARTMENT OF MARINE RESOURCES**

**Maude Robin McCoy
James W. Balano, III**

PEN WB

Standard Aquaculture Lease Application
Suspended Culture of Oysters
Harrington Cove, Wheeler's Bay
St. George, Maine

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION

Maude Robin McCoy and James W. Balano, III applied to the Department of Marine Resources (DMR) for a twenty-year standard aquaculture lease on 1.98 acres located in Harrington Cove, Wheeler's Bay, St. George, Maine. The proposal is for the suspended culture of American oysters (*Crassostrea virginica*). The applicants currently operate experimental lease PEN WBx within the footprint of the standard lease proposal.

1. PROCEDURAL HISTORY

The pre-application meeting on this proposal was held on January 7, 2022, and a scoping session was held on April 21, 2022. DMR accepted the final application as complete on June 24, 2022. Notice of the completed application and public hearing was provided to state agencies, the Town of St. George, riparian landowners within 1,000 feet of the proposed site, and subscribers to DMR's aquaculture email listserv. A Harbormaster Questionnaire was sent to the harbormaster, requesting information about designated or traditional storm anchorages, navigation, riparian ingress and egress, fishing or other uses of the area, among other considerations. A response was received by DMR on August 1, 2022. Notice of the hearing was published in the *Courier-Gazette* on May 2 and May 30, 2024. The public notice for the hearing stated that the proceeding would be conducted in-person and directed interested persons to register to provide testimony or ask questions during the proceeding. No applications for intervenor status were received by DMR. A public hearing on this application was held on June 18, 2024. No individuals registered to participate in the hearing and testify.

Sworn testimony was given at the hearing by James W. Balano III. The Hearing Officer was Maria Eggett.

DMR kept the record open for 30 days to provide the applicant adequate time to obtain the written permissions from riparian landowners.

The evidentiary record before DMR regarding this lease application includes the record of testimony at the hearing. The evidence from all sources is summarized below.¹

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

LIST OF EXHIBITS

1. Case file
2. Application
3. DMR site report, issued on March 25, 2024
4. Riparian permissions submitted to DMR on June 19, 2024

2. DESCRIPTION OF THE PROJECT

A. Proposed Operations

The applicants propose to culture American oysters (*Crassostrea virginica*) using suspended culture techniques (App 1,3). The applicants propose to use 270 mesh bag cages (36-inches by 26-inches by 4-inches) arranged in nine rafts of 30 bags with poly floats as well as buoys and lines to secure the rafts to the shore.

The applicants anticipate seeding oysters in July. The applicants expect to tend the site at least weekly from approximately April 1 to December 15 (App 22). The application states that at the end of November, oysters will be moved to four limited purpose aquaculture (LPA) sites that are held by one of the co-applicants for dispersal on the bottom. All gear will be removed from the site between December 15 and April 1 each year (App 23).

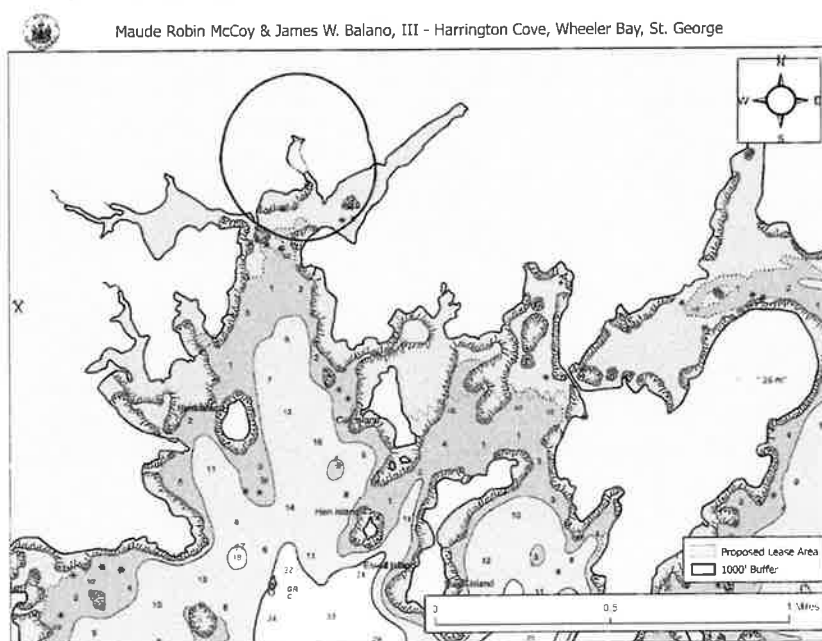


Figure 1: Proposed standard lease boundaries. Image from DMR site report.

B. Site Characteristics

On June 20, 2023, DMR assessed the proposed lease site. The proposal is situated within Harrington Cove and is surrounded by a rocky shoreline leading to forested uplands. A single house was observed due east of the proposed lease area overlooking the cove where the proposal is situated.

DMR began collecting depths at the proposed site at approximately 11:30 AM. The tide was flooding with the next high tide predicted to occur at 1:33 PM. Depths were collected in the center of the proposal and determined to be between 3.3 and 7.8 feet. Correcting for tidal variations derives water depths to be approximately 5.4 to 9.9 feet at the next high tide and 0.0 to 1.2 feet at mean low water (MLW, 0.0 feet) (SR 2).

3. STATUTORY CRITERIA & FINDINGS OF FACT

Approval of standard aquaculture leases is governed by 12 M.R.S.A. § 6072. This statute provides that a lease may be granted by the Commissioner upon determining that the project will not unreasonably interfere with: the ingress and egress of riparian owners; navigation; fishing or other uses of the area, taking into consideration other aquaculture uses of the area; the ability of the lease site and surrounding areas to support existing ecologically significant flora and fauna; or the public use or enjoyment within 1,000 feet of beaches, parks, docking facilities, or conserved lands owned by municipal, state, or federal governments. The Commissioner must also determine that the applicant has demonstrated that there is an available source of organisms to be cultured for the lease site; that the lease will not result in an unreasonable impact from noise or lights at the boundaries of the lease site; and that the lease will comply with visual impact criteria adopted by the Commissioner.

A. Riparian Access

Before granting a lease, the Commissioner must determine that the proposed project “will not unreasonably interfere with the ingress and egress of riparian owners[.]” 12 M.R.S.A. § 6072(7-A)(A). In examining riparian owner ingress and egress, the Commissioner “shall consider the type of structures proposed for the lease site and their potential impact on the vessels which would need to maneuver around those structures.” Chapter 2.37(1)(A)(1)².

The applicants have operated experimental lease PEN WBx within the boundaries of this proposal for the last three years. During that time, no issues concerning riparian access have been reported.

During the site visit, DMR observed one dock within the proposed lease area. The dock is owned by one of the applicants.³ DMR also observed two privately owned piers located 530 feet southeast and 950 feet southwest of the proposal. Both piers appeared to be associated with commercial fishing activity.

² 13-188 C.M.R. ch. 2.

³ Application page 11

A Harbormaster Questionnaire was completed by the local harbormaster and submitted to DMR on August 1, 2022. The harbormaster indicated that the proposal would have very little impact on riparian ingress and egress.

Because the proposal is located in the intertidal zone, the applicants are required to obtain written permission from riparian owners for the use of any intertidal lands within the proposed lease site. For this proposal, there are three upland parcels that abut the intertidal zone in question: parcels 233-049, 233-050, and 233-057. The standard lease application includes permission to access the proposed lease site across parcel 233-057, which is owned by one of the lease applicants. However, the application did not include written permission to use the intertidal zone abutting upland parcels 233-049 and 233-050 for aquaculture activities. At the hearing, the applicant submitted written permission from the owners of both parcels, but DMR determined that the permissions were not sufficient. DMR kept the record open for 30 days to provide the applicant additional time to obtain the necessary permissions. On June 19, 2024, the applicants submitted written permission from the owners of Lots 233-049 and 233-050. Upon review, DMR determined that the documents provided adequate permissions.

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

Therefore, since no riparian owners offered testimony that the proposed lease would hinder their access, and the appropriate permissions were obtained by the applicants, the aquaculture activities proposed for this site will not unreasonably interfere with the ingress and egress of any riparian owner.

B. Navigation

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

The applicants have operated experimental lease PEN WBx within the boundaries of this proposal for the last three years. During that time, no issues concerning navigation have been reported.

The proposal is in an intertidal portion of Harrington Cove. The nearest navigational channel is approximately 2,200 feet south of the proposal. DMR did not observe any vessels operating in the vicinity of the proposal during the site assessment (SR 5).

The harbormaster indicated in the Harbormaster Questionnaire that the proposal would have no effect on navigation.

During the public hearing, no one offered testimony or evidence regarding potential impacts to navigation. Due to the distance from the main channel, it is reasonable to assume that sufficient distances for navigation remain.

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

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)).

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

Fishing. During the site assessment, DMR observed two lobster-style buoys located within the proposed lease area. Based on shallow water depth, muddy bottom composition, and the presence of an active aquaculture lease, it is likely the buoys were marking gear associated with the aquaculture lease or possibly green crab traps. DMR did not observe any commercial or recreational fishing activity within the boundaries of the proposed lease (SR 6).

The harbormaster indicated in the Harbormaster Questionnaire that there is no commercial or recreational fishing within the area of the proposal.

The Town of St. George has a shellfish conservation program in accordance with 12 M.R.S.A. § 6671 and because the site is located within the intertidal, the applicants are required to obtain consent from the municipality. The applicants provided this permission with the application.⁴

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

Other aquaculture uses: The applicants currently operate experimental lease PEN WBx within the boundaries of this proposal. If approved, this standard lease proposal would replace PEN WBx. There are four LPA sites within 1,000 feet of the proposed lease site (MMCC521, MMCC621, MMCC721, and MMCC821). All four LPAs are held by one of the applicants of this standard lease proposal.

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

Other water-related uses. The application states there is occasional kayaking and swimming in the cove (App 28). In the exclusive use section of the application, the applicants did not seek to restrict these activities if the lease is approved (App 29). During cross-examination, James Balano testified that these activities can still occur in the cove when the gear is present. No evidence or testimony was provided at the hearing concerning other water-related uses in the area.

⁴ Application page 41

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

D. Flora & Fauna

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

The applicants have operated experimental lease PEN WBx within the boundaries of this proposal for the last three years. During that time, no issues concerning flora and fauna have been reported.

Site observations. DMR conducted one drop camera transect to assess the epibenthic ecology of the proposed lease. Green crabs (*Carcinus maenas*) were common in the proposed lease footprint (SR 8).

Eelgrass. Records of eelgrass collected by DMR in 2010 indicate no mapped eelgrass presence in the boundaries of the proposal. The nearest mapped eelgrass is approximately 760 feet southwest of the proposal.⁵ No eelgrass was observed within the proposal boundaries during MDMR's site assessment (SR 8).

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 proposed lease is located within mapped Tidal Waterfowl and Wading Bird Habitat. Data collected by the United States Fish and Wildlife Service in 2022 by aerial nest survey shows the closest mapped Bald Eagle nesting site to be approximately 2.25 miles southwest of the proposal.⁶

On July 28, 2022, a Wildlife Biologist with MDIFW responded by email to a "Request for Agency Review and Comment" and stated that minimal impacts to wildlife are anticipated.⁷

During the site assessment, DMR observed gulls (*Larus* sp.) and double-crested cormorants (*Nannopterum auritum*) in the vicinity of the proposal (SR 9). No eelgrass was observed within the boundaries of the proposed site and the comments received from MDIFW did not indicate that the proposal would interfere with resources under their jurisdiction. Furthermore, the applicants have operated an experimental lease within the footprint of this site for over three years. During that time, DMR has not received any complaints or concerns about the operations impacting wildlife. Based on the

⁵ Data obtained from The Maine Office of GIS "GISVIEW.MEDMR.Eelgrass". This is the most current record of mapped eelgrass in the vicinity of the proposal.

⁶ Data obtained from USFWS "Bald_Eagle_Nests_-_Maine_2023"

⁷ Email correspondence between MDIFW and DMR

record, it appears that the proposed lease activities will not interfere with the ecological functioning of the area.

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

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, conserved lands owned by federal, state, or municipal governments (SR 10).

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

F. Source of Organisms

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

According to the application, American oyster (*C. virginica*) would be sourced from Muscongus Bay Aquaculture in Bremen, Maine (App 3). This is currently an approved source for this species. If the applicants are unable to obtain stock from this facility, then it must come from another DMR approved source.

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

G. Light

The Commissioner evaluates lighting in accordance with 12 M.R.S.A §6072(7-A)(G) and the regulatory standards specified in Chapter 2.37(1)(A)(8). The statute specifies that a lease must not result in an unreasonable impact from light at the boundaries of the proposed site. The applicable regulation imposes specific requirements related to lighting, including a requirement that the applicant demonstrate that all reasonable measures will be taken to mitigate light impacts associated with the lease activities.

According to the application, no lights would be used on the proposed lease site (App 25).

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

H. Noise

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

According to the application, no noise generating equipment will be used on-site (App 24).

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

I. Visual Impact

The Commissioner evaluates visual impact in accordance with 12 M.R.S.A § 6072(7-A)(H) and the regulatory standards specified in Chapter 2.37(1)(A)(10).

The application stated that yellow lines, white PVC pipe, and white marker buoys would be used on-site. The color of the other gear is black. In accordance with Chapter 2.37(1)(A)(10), approved gear colors are grays, blacks, browns, blues, and greens. In response to a question from DMR at the hearing, the applicant confirmed that if the project is approved, all surface gear will comply with the approved colors so anything that is currently proposed as yellow or white will either be gray, black, brown, blue, or green (Balano testimony). Lease sites must be marked in accordance with Chapter 2.80 of DMR's regulations, which specify that marker buoys must be yellow in color. If the lease is granted, the holder would be responsible for complying with these marking requirements.

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

6. CONCLUSIONS OF LAW

Based on the above findings, I conclude that:

- a. The aquaculture activities proposed for this site will not unreasonably interfere with the ingress and egress of any riparian owner.
- b. The aquaculture activities proposed for this site will not unreasonably interfere with navigation.
- c. The aquaculture activities proposed for this site will not unreasonably interfere with fishing or other water-related uses of the area, taking into consideration other aquaculture uses in the area.

- d. The aquaculture activities proposed will not unreasonably interfere with the ability of the lease site and surrounding areas to support existing ecologically significant flora and fauna.
- e. The aquaculture activities proposed for this site will not unreasonably interfere with the public use or enjoyment within 1,000 feet of beaches, parks, docking facilities, or certain conserved lands owned by municipal, state, or federal governments.
- f. The applicants have demonstrated that there is an available source for organisms to be cultured for the lease site.
- g. The aquaculture activities proposed for this site will not result in an unreasonable impact from light at the boundaries of the lease site.
- h. The aquaculture activities proposed for this site will not result in an unreasonable impact from noise at the boundaries of the lease site.
- i. The aquaculture activities proposed for this site will comply with the visual impact criteria contained in DMR Regulation 2.37(1)(A)(10).

Accordingly, the evidence in the record supports the conclusion that the proposed aquaculture activities meet the requirements for the granting of an aquaculture lease set forth in 12 M.R.S.A. §6072.

7. DECISION

Based on the foregoing, the Commissioner grants a lease to Maude Robin McCoy and James W. Balano, III for 1.98 acres for twenty years for the cultivation of American oysters (*Crassostrea virginica*) using suspended culture techniques. The lessees shall pay the State of Maine rent in the amount of \$100.00 per acre per year. The lessees shall post a bond or establish an escrow account pursuant to DMR Rule 2.40 (2)(A) in the amount of \$5,000.00, conditioned upon performance of the obligations contained in the aquaculture lease documents and all applicable statutes and regulations.

8. CONDITIONS TO BE IMPOSED ON LEASE

The Commissioner may establish conditions that govern the use of the lease area and impose limitations on aquaculture activities, pursuant to 12 M.R.S.A. §6072 (7-B).⁸ Conditions are designed to encourage the greatest multiple compatible uses of the lease area, while preserving the exclusive rights of the lessee to the extent necessary to carry out the purposes of the lease. No conditions shall be imposed on this lease.

9. REVOCATION OF LEASE

⁸ 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."

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

Dated: _____

9/16/24



Patrick C. Keliher, Commissioner
Department of Marine Resources

STATE OF MAINE
DEPARTMENT OF MARINE RESOURCES

Experimental Aquaculture Lease Application
Suspended culture of American/eastern oysters
Wheeler Bay, St. George

Maude Robin McCoy
and
James W. Balano, III

PEN WBx

January 30, 2019

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION

Maude Robin McCoy and James W. Balano, III applied to the Department of Marine Resources for an experimental aquaculture lease totaling 1.98 acres¹ located in a small cove in Wheeler Bay², St. George, Knox County, Maine, for the cultivation of American/eastern oysters (*Crassostrea virginica*) using suspended culture techniques. DMR accepted the application as complete on June 5, 2018. 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 was provided to state and federal agencies, riparian landowners, the Town of St. George, and others on the Department's mailing list. Notice of the application and comment period was published in the *Courier Gazette* on June 14, 2018.

The evidentiary record before the Department regarding this lease application includes the application, the Department's site report dated January 24, 2019, and the case file. The evidence from these sources is summarized below.³

2. DESCRIPTION OF THE PROJECT

A. Proposed Operations

The purpose of the proposed lease is to explore the commercial feasibility of increasing the density of oysters grown within a small cove located in Wheeler Bay (App 6). The applicants intend to cultivate oysters using floating flip bags, which would be configured in a line down the center of the cove. The applicant is proposing to tether the gear to the shoreline with rope, to

¹ Applicant originally requested 2.05 acres. DMR calculations in the site report, based on the provided coordinates, indicate the area is 1.98 acres.

² Referred to as "Wheeler's Bay" in application.

³ These sources are cited below, with page references, as CF (case file), App (application), and SR (site report).

ensure that, at low water, the proposed gear settles in the narrow channel of water that runs down the center of the cove (App 13 & SR 5). The site would be visited daily for routine maintenance (App 6). Between December 15th and March 31st of each year, the applicants propose to remove gear from the site (App 7).

B. Site Characteristics

On January 11, 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 intertidal and subtidal waters within the upper section of a small cove located northwest of Harrington Cove, in Wheeler Bay (SR 2). According to aerial photographs, most of this cove drains at low tide, leaving only a narrow meandering channel of water (SR 4). The shoreline of the small cove is comprised of rock and sections of marsh grass (SR 2). Houses and a mixed forest are located on the surrounding uplands (SR 2). A single house, with a set of stairs leading from the uplands to the shoreline, is located immediately east of the proposed lease (SR 2).

The boundary of the proposed lease is located in close proximity to the highwater line in the upper section of the small cove (App 5). Per page 5 of the site report:

To determine the proposed lease area's location in reference to the mean highwater mark, MDMR staff observed the extent of the previous high tide, which was predicted to be 8.62 feet in height. Coordinates taken along this 8.62-foot highwater line indicate the west side of the proposed lease is located less than five feet above the highwater line... MDMR staff were unable to access the east side of the cove, and therefore no coordinates were taken along the eastern shore's highwater line.

To address the unique nature of this application, which includes boundaries that may be located above the coastal waters⁴ of the state, and therefore beyond the extent of the Commissioner's leasing authority pursuant to 12 MRSA §6072-A(1), the rights conveyed in this lease will only extend to the highwater mark. A condition reflecting this will be included in the lease.

The proposed area is classified by the Department's Water Quality program as approved for the harvest of shellfish (App 1).

⁴ In accordance with 12 MRSA §6072-A(1) The Commissioner may "issue a limited-purpose lease for areas in, on and under the **coastal waters**" (emphasis added). 12 MRSA §6001 (6) defines "Coastal Waters" as:

"[A]ll waters of the State within the rise and fall of the tide out to the limits of the exclusive economic zone as shown on the most recently published Federal Government nautical chart, but it does not include areas above any fishway or dam when the fishway or dam is the dividing line between tidewater and freshwater."

C. Landowner and Municipal Permissions

Documents included in the application indicate that lease co-applicant Maude Robin McCoy holds title to the intertidal area on which the proposed lease is located, along with a five-foot parcel extending inland from the highwater mark and around the small cove (App 28-38). Maude Robin McCoy granted written permission for the proposed lease operations to occur on her property, as is required for intertidal lease applications by DMR Rule 2.64 (2)(C)(6) (App 27). Municipal consent to the proposed lease was granted by the Chair of the St. George Select Board on May 17, 2018, as is required by 12 M.R.S.A. §6072-A(11) (App 26).⁵

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

During MDMR's site visit, no docks or moorings were observed within the northern section of the small cove, in which the proposed lease is located (SR 7). A house, with a stairway leading from the uplands to the shoreline, was observed to the east of the proposed lease (SR 7). Per the site report: "the use of this stairway should not be impeded by the proposed lease" (SR 7).

A pier is located south of the small cove, and over 450 feet from the proposed lease (SR 7). Due to its' location outside of the small cove in which the proposed lease is located, it is "unlikely that access to and from this pier will be hindered if the proposed lease is granted" (SR 7). According to the St. George Harbormaster, the application does not interfere with the ingress or egress of riparian owners located within 1,000 feet of the proposed lease.⁶

⁵ This provision specifies: "In any municipality with a shellfish conservation program under section 6671, the commissioner may not issue a limited purpose lease under this section for the intertidal zone within the municipality without the consent of the municipal officers."

⁶ CF: Harbormaster Questionnaire dated June 12, 2018.

During the review period, the Department did not receive any other comments concerning riparian ingress or egress. Based on the absence of comments it is reasonable to conclude that there are no concerns about the effects the proposed site may have on riparian ingress and egress. It appears from the evidence provided in the site report, the harbormaster's statement, and the lack of public comment, that riparian ingress and egress will not be unduly affected by the proposed lease application.

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

B. Navigation

At higher tidal stages, the proposed gear would be oriented in a long, thin tract located in the center of a small cove in northern Wheeler Bay (App 13 & SR 8). At low tide, the cove drains almost entirely, leaving only a narrow channel of water; aquaculture gear is proposed to occupy the entirety of this channel (App 13).

According to the site report, navigation into the cove is limited by boulders and ledge (SR 8). Per the site report:

At higher tide stages, when small boats could navigate into the cove, floating gear would populate a long and skinny tract in the cove's center. According to the application, these tracts would be held in place with sink rope attached to the shoreline. It appears, therefore, that depth-appropriate vessels would be able to navigate over these sinking ropes, if the lease were granted.

At lower tidal stages, navigation within the upper section of the cove is not supported by the width and depth of channel that remains (SR 8). According to the St. George Harbormaster, the proposed activities do not interfere with navigation in designated channels.⁷

During the review period, the Department did not receive any comments from members of the public concerning navigation. Based on the absence of public comments it is reasonable to conclude that there are no concerns about the effects the proposed site may have on navigation. Considering the existing restrictions to navigation in the proposed lease area and the harbormaster's statement indicating that the proposed lease does not interfere with navigation in designated channels, it appears that navigation in the area will not be unduly affected by the proposed lease application.

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

⁷ CF: Harbormaster Questionnaire dated June 12, 2018.

C. Fishing & Other Uses

Fishing and other uses. During the site visit on January 11, 2019, no commercial or recreational fishing activities were observed in the vicinity of the proposed lease (SR 8). According to the St. George Harbormaster, commercial and recreational fishing within the area of the proposed lease are “non-existent”.⁸ Per page 8 of the site report: “It is likely that the natural constraints to navigation, and the fact that most of the proposed lease site drains at low tides, limit the commercial and recreational uses of the area.”

According to the site report, “fishing or fowling that might occur within the intertidal area encompassed by the proposed lease, would not be prevented if the proposed lease were to be granted” due to the fact that, at low water, rope tethers are the only gear proposed to span the intertidal zone (SR 8 & App 13). The site report indicates that individuals could “step over or under these ropes” when utilizing the proposed intertidal area (SR 8).

During the review period, the Department did not receive any comments from fishermen or other user groups regarding the lease proposal. Given the harbormaster’s statement indicating a lack of commercial and recreational fishing in the area of the proposed lease, the evidence that fishing or fowling within the intertidal area of the proposed lease would not be prevented by the proposed activities, and the absence of public comments expressing concerns regarding interference with fishing or other uses of the area, it is reasonable to conclude that the proposed lease is unlikely to unreasonably affect fishing activities or other uses of the area.

Other aquaculture leases. There are eight active Limited Purpose Aquaculture (LPA) licenses within one mile of the proposed lease, all of which are held by the lease applicants (SR 8).⁹ Based on this evidence, it appears that the proposed lease will not unreasonably interfere with other aquaculture uses in the area.

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

D. Flora & Fauna

Site Observations. During the site visit, MDMR staff observed mallard ducks (*Anas platyrhynchos*) in the vicinity of the proposed lease site (SR 9). Based on historical eelgrass (*Zostera marina*) data collected in 2005, the nearest documented eelgrass bed was more than 700 feet to the south of the proposed lease (SR 10).

⁸ CF: Harbormaster Questionnaire dated June 12, 2018.

⁹ The lease applicants also have a second application pending DMR’s review within one mile of this proposed lease.

Fisheries and Wildlife. Data maintained by MDIFW, indicates that the proposed lease overlaps with Tidal Wading Bird and Waterfowl Habitat, which is defined under Maine's Natural Resources Protection Act (NRPA) as Significant Wildlife Habitat (SR 9). The Department sent a copy of the lease application to MDIFW for their review and comment. MDIFW indicated “minimal impacts are anticipated”.¹⁰

Based on the lack of eelgrass beds within the proposed lease site and the comments received from MDIFW, which did not object to the proposed lease or describe any significant interference that the proposal might have on the surrounding wildlife, it appears that the proposed lease activities will not interfere with the ecological functioning of the area.

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

E. Public Use & Enjoyment

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 11).

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.

F. Source of Organisms

Seed stock for this proposed lease site will be obtained from Muscongus Bay Aquaculture, in Bremen, Maine (App 2). This is an approved source of seed stock.

Therefore, the applicant has demonstrated that there is an available source of oysters 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 the ingress and egress of any riparian owner.
- B. The aquaculture activities proposed for this site will not unreasonably interfere with navigation.

¹⁰ CF: Email from J. Perry MDIFW Environmental Review Coordinator, dated June 19, 2018.

- C. 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.
- 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/Eastern 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 the requested experimental lease of approximately 1.98 acres to Maude Robin McCoy and James W. Balano, III, 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 lessee¹¹; however, no aquaculture rights shall accrue in the lease area until the lease is fully executed. The lease granted pursuant to this decision is limited to areas that are within Maine coastal waters. To the extent the lease boundaries, as proposed by the applicant, are located outside coastal waters, the lease shall be reduced to only those areas that are within coastal waters.

This lease is granted to the lessee for the cultivation of American/Eastern 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 account pursuant to DMR Rule 2.64 (10) (D) in

¹¹ 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.”

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)¹². 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. Other public uses that are not inconsistent with the purposes of the lease are permitted within the lease boundaries.
- C. The rights conveyed in this lease extend only to areas in, on, or under the coastal waters¹³, to which the Commissioner's leasing authority extends pursuant to 12 MRSA §6072-A(1). The placement of gear outside of coastal waters is not covered by this lease.

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: January 30, 2019



Patrick C. Keliher, Commissioner,
Department of Marine Resources

¹² 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."

¹³ In accordance with 12 MRSA §6072-A(1) The Commissioner may "issue a limited-purpose lease for areas in, on and under the **coastal waters**" (emphasis added). 12 MRSA §6001 (6) defines "Coastal Waters" as:

"[A]ll waters of the State within the rise and fall of the tide out to the limits of the exclusive economic zone as shown on the most recently published Federal Government nautical chart, but it does not include areas above any fishway or dam when the fishway or dam is the dividing line between tidewater and freshwater."