

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION

Spinney Creek Shellfish, Inc. applied to the Department of Marine Resources (DMR) to change the gear authorization for the standard lease PISC SC, located in the southern portion of Spinney Creek in the Town of Eliot.

1. THE PROCEEDINGS

The application was submitted to DMR on February 3, 2022 and subsequently deemed complete on February 14, 2022. Notice of the completed application and the 14-day public comment period were provided to other state agencies, riparian landowners, the Town of Eliot and its Harbormaster, and subscribers of DMR's email list-serve.

LIST OF EXHIBITS

1. Application for a change of gear authorization, deemed complete February 14, 2022
2. Original lease decision signed August 17, 2021

2. STATUTORY CRITERIA & FINDINGS OF FACT

Approval of aquaculture lease amendments is governed by 12 M.R.S.A. § 6072(13)(G) and Chapter 2.44 of DMR regulations. The statute and regulations provide that the Commissioner may grant amendments for the use of specific gear, species, and/or operational modifications on an existing lease site provided the proposed changes are consistent with the findings on the underlying lease application, do not materially alter the findings of the original decision, and would not result in a change to the original lease conditions.

A. Original Lease Decision and Limited Purpose Aquaculture Licenses (LPA)

On August 17, 2021, DMR granted PISC SC to Spinney Creek Shellfish, Inc. after finding that proposed activities met the requirements for granting a standard lease as set forth in 12 M.R.S.A. §6072 (Exhibit 2, page 12). The original decision provided authorization to cultivate American oysters

(*Crassostrea virginica*) and northern quahogs (*Mercenaria mercenaria*), using suspended culture techniques (Exhibit 2, page 12). Specifically, the decision authorized the deployment of 24 longlines, each measuring up to 180 feet in length with 25 suspended oyster cages per line for a total of 600 cages (Exhibit 2, page 6). The cages are deployed on the surface of the water from mid-March to mid-November and then they are sunk to the bottom of the site for overwintering (Exhibit 2, page 6). The original decision did not place any conditions on the lease (Exhibit 2, page 12).

At the time the original decision was processed, there were 12 Limited Purpose Aquaculture (LPA) licenses, held by the Howell family, within the boundaries of PISC SC. Thomas and Lori Howell, who own Spinney Creek Shellfish, Inc. each held four LPAs and their son Pierce Howell held the remaining four (Exhibit 2, page 8). According to DMR's records, the LPAs were initially granted in 2019 for the culture of American oysters (*Crassostrea virginica*) and northern quahogs (*Mercenaria mercenaria*) using suspended culture techniques. Specifically, gear on the LPA sites consisted of oyster ranch cages that floated on the surface of the water. The LPA operations included the same gear as the proposed lease. As noted in the original lease decision, the Howells intended to relinquish the LPAs if the lease was granted (Exhibit 2, page 8).

In 2020, as part of DMR's response to the pandemic, LPA holders could apply for temporary amendments to existing LPA sites.¹ The amendments were intended to help producers manage a surplus of market-sized product as restaurants and other buyers temporarily stopped or limited the purchasing of product.² In 2020, the Howells applied for and were granted amendments on all 12 LPA sites. The authorizations permitted the deployment of submerged cages between the previously authorized suspended cages. The submerged cages were deployed ~5 feet below the surface of the water and only a black buoy, supporting each submerged cage, was visible between each of the suspended cages. When the amendments were approved, DMR noted that the additional submerged cages were the same gear type as the previously approved suspended cages and the authorization of submerged cages would not expand the footprint of the existing LPAs.³ The LPAs were subsequently renewed in 2021.⁴ As PISC SC was granted in 2021, none of the LPAs were renewed in 2022.

¹ The amendments, if approved, allowed LPA holders to add additional gear to permitted sites in 2020. However, the gear had to be the same gear already approved for the site and had to remain within the boundaries of the previously approved LPA footprint (see 2020 LPA COVID amendment application).

² For example, restaurants or other establishments were temporarily closed or operated with a variety of additional protocols to help limit exposure to and spread of the virus. These temporary closures and protocols had the effect of reducing the demand for certain products.

³ 2020 LPA COVID amendments (see Howell file): Email from M. Mendelson to L. Howell dated May 12, 2020.

⁴ Page 3 of the PISC SC amendment application notes that the amended gear was used on the LPAs for two full seasons.

B. Proposed Changes to Gear and Findings

The lease amendment requests authorization to utilize submerged cages on PISC SC like the former LPAs. In the lease amendment application, Spinney Creek Shellfish, Inc. indicated that the use of the submerged cages as part of the LPAs “worked extremely well and the oysters thrived at depth.”⁵ Specifically, Spinney Creek Shellfish, Inc. is requesting to deploy up to 525 submerged cages on the existing longlines between the suspended cages. The cages would be submerged ~5 feet below the surface of the water at low water⁶ In addition, 18” diameter black poly floats or buoys would be affixed to a bridle, which would be attached to the submerged cages.⁷ If the amendment is approved, only the poly balls and the existing suspended cages would be visible during deployment. The submerged gear and associated buoys would be removed from the site during the winter months (December-March).⁸ Spinney Creek Shellfish, Inc. is not requesting any other changes to PISC SC and the amendment application indicates that the additional gear would not change the current level of onsite activity.⁹

During the comment period, DMR received one submission from the Maine Department of Inland Fisheries and Wildlife (MEIF&W), which noted: “minimal impacts to wildlife are anticipated for this aquaculture lease amendment.”¹⁰ Except for the comment from MEIF&W, DMR did not receive any other feedback on the amendment request.

The statute and regulations provide that the Commissioner may grant amendments for the use of specific gear, species, and/or operational modifications on an existing lease site provided the proposed changes are consistent with the findings on the underlying lease application, do not materially alter the findings of the original decision, and would not result in a change to the original lease conditions. In this case, the proposed submerged cages are the same gear type as the suspended cages.¹¹ The submerged cages would be deployed on the existing longlines, between the suspended cages. No changes to gear layout or operations are proposed as part of the amendment request. The proposed gear is consistent with the findings in the original lease application and would not materially alter the findings of the original decision. There were no conditions placed on the original lease, so that provision is not germane to the analysis of the amendment.

⁵ Amendment application, page 3.

⁶ Amendment application, page 13.

⁷ Amendment application, page 14.

⁸ Amendment application, page 2.

⁹ Amendment application, page 3.

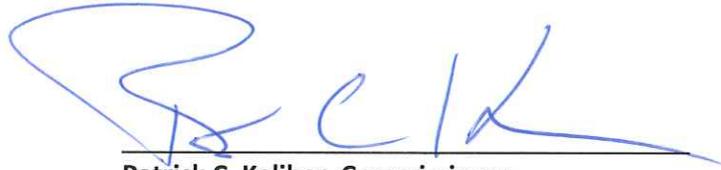
¹⁰ CF: Email from B. Settele to DMR Aquaculture dated February 28, 2022.

¹¹ This is consistent with the prior determination DMR made in deciding whether to permit the LPA gear amendment processed in 2020.

4. **DECISION**

Based on the foregoing, the Commissioner grants the request from Spinney Creek Shellfish, Inc to add submerged cages in the manner described in section 2.B. of this decision.

Dated: 6/14/22



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

**STATE OF MAINE
DEPARTMENT OF MARINE RESOURCES**

**Spinney Creek Shellfish, Inc.
PISC SC**

Standard Aquaculture Lease Application
Suspended culture of shellfish
Spinney Creek, Eliot, Maine

August 17, 2021

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION

Spinney Creek Shellfish, Inc. applied to the Department of Marine Resources (DMR) for a twenty-year standard aquaculture lease on 2.75 acres in Spinney Creek, in Eliot, York County, Maine. The proposal is for the suspended culture of American/eastern oysters (*Crassostrea virginica*) and northern quahogs (*Mercenaria mercenaria*).

1. THE PROCEEDINGS

The pre-application meeting on this proposal was held on April 3, 2019, and a scoping session was held on July 17, 2019. DMR accepted the final application as complete on August 15, 2019. A public hearing was scheduled for June 16, 2021. Due to the COVID-19 pandemic, and to limit any potential public health risks associated with gathering in groups, DMR elected to conduct the public hearing on this application remotely, using a virtual meeting platform.¹ The first public notice for the hearing, published in the April 17, 2021 edition of the *Portsmouth Herald*, indicated that the proceeding would be conducted remotely and directed interested persons to contact DMR to sign up to participate in the proceeding. The initial notice also provided information about a remote pre-hearing conference scheduled for May 17, 2021, the deadline to apply for intervenor status, the June 16, 2021 hearing date and time, and instructions on how to register to participate in the pre-hearing conference. The notice indicated that registration for the hearing would open at 8:00am on May 17, 2021 and directed individuals to DMR's website to access registration information. Copies of this notice was also sent to riparian landowners, the Town of Eliot and its Harbormaster, the Town of Kittery, state and federal agencies, and subscribers of DMR's aquaculture list serve.

The second hearing notice was published in the May 17, 2021 edition of the *Portsmouth Herald*, and included details about how to apply for intervenor status and the deadline to register and participate in the hearing, which was 5:00pm on June 1, 2021. This notice also included information on where to access the hearing registration form. A copy of this notice was also published in the June 2021 edition of the *Commercial Fisheries News*.

Spinney Creek Shellfish, Inc. had previously submitted an experimental application in 2018, for a different location within Spinney Creek, but that application was withdrawn after DMR held multiple public

¹ The Department of Marine Resources uses Microsoft Teams for all virtual conferencing, so this was the platform used for the Spinney Creek Shellfish, Inc. remote hearing.

hearings. Because there was a lot of public interest and several complex issues raised during the prior proceeding, DMR elected to hold a remote pre-hearing conference on the current application. As mentioned above, this pre-hearing conference was scheduled for May 17, 2021, and the initial notice advertising the hearing on this application provided details about how to register to participate in the pre-hearing conference. The goal of the pre-hearing conference was to discuss the filing of intervenor applications and deadlines, and possible deadlines for witness lists, pre filing of issues and exhibits, and potential limits on testimony. Multiple members of the public registered to participate and were provided details on how to access the meeting, but only the applicant and DMR ultimately attended the pre-hearing conference. Participation in the pre-hearing conference was not a requirement to apply for intervenor status or to otherwise participate in the hearing.

Following the pre-hearing conference, DMR issued a procedural order on June 3, 2021 that established time limits on testimony for the applicant, their expert witness, and members of the public. The procedural order also required the applicant and their expert witness to submit copies of proposed exhibits and testimony by June 10, 2021, and required members of the public who had registered to testify to file a statement of objections they intended to raise, if any, and to pre file any exhibits they intended to offer by June 10, 2021. Members of the public were not required to pre-file testimony. Pre-filings were received by the deadline from the applicant and their designated expert witness. The procedural order also required members of the public, if they intended to testify in their capacity as a professional or expert, to file a resume and statement of what decision criteria they would testify to in their professional capacity. Dr. Stephen Jones, a research professor at the University of New Hampshire, registered to testify and submitted a copy of his resume, but did not testify at the hearing. No other pre-filings were received from members of the public.

The remote public hearing was held on June 16, 2021. No one intervened in this case. Sworn testimony was given at the March 16, 2021 hearing by the following witnesses:

Name	Affiliation
Lori Howell, Tom Howell, Jacob Madden	Spinney Creek Shellfish, Inc., applicant
Chris Mende	Applicant's expert witness
Marcy Nelson	Acting Director, DMR Aquaculture Division
Pierce Howell, Adam Augulewicz	Members of the public

LeeAnn Neal, United States Army Corps of Engineers (ACOE), attended the hearing but did not offer testimony. 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 Erin Wilkinson.

The evidentiary record before DMR regarding this lease application includes four exhibits introduced at the hearing and the record of testimony at the hearing. The evidence from these sources is summarized below.²

LIST OF EXHIBITS

1. Case file
2. Application
3. DMR site report
4. Pre-filed testimony statements and exhibits from Spinney Creek Shellfish, Inc., and Chris Mende

2. DESCRIPTION OF THE PROJECT

A. Site Characteristics

On October 25, 2019 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 occupies waters in the southern portion of Spinney Creek, in Eliot Maine (SR 2). Residential buildings and mixed forest line the shoreline of Spinney Creek (SR 2). The bottom of the proposed site consists of soft mud, and little to no changes in depth (SR 7). The proposed site is located within Growing Area WA(R1) and is currently classified as ‘restricted’ by the DMR Bureau of Public Health for the harvest of shellfish. Because of this classification, shellfish harvested from the proposed site must be relayed or deperated before it can be sold to the public. Spinney Creek Shellfish, Inc, the applicant, owns a deperation plant on the shore of Spinney Creek, and plans to deperate all shellfish harvested from the site, if granted,

A causeway located at the southern end of Spinney Creek separates the creek from the Piscataqua River, and a floodgate within the causeway controls the tidal flow in and out of the creek (SR 2) and limits the tidal variation that occurs within the creek (SR 6). Figure 1 shows the proposed lease location, DMR’s dive transect through the site, the floodgate, and the surrounding area.

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

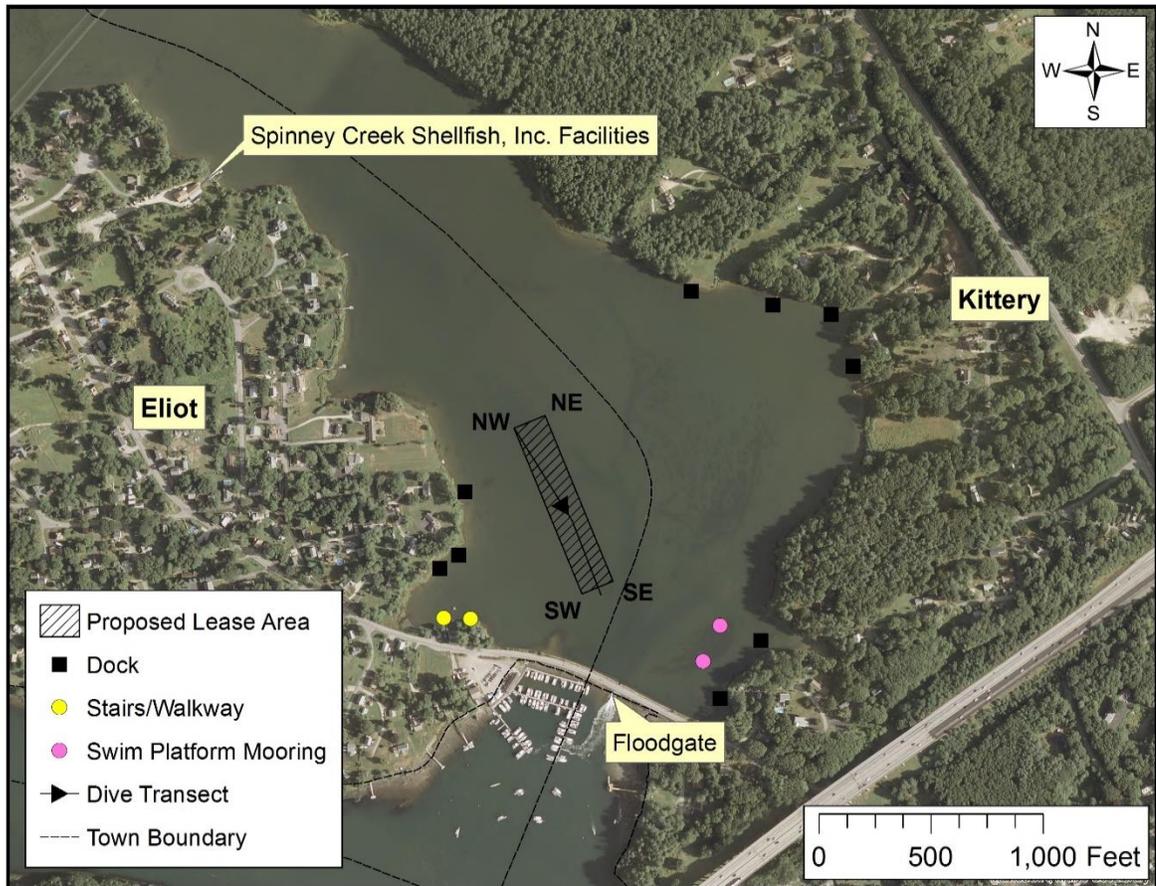


Figure 1: Proposed lease area. Image taken from DMR’s site report.

Typically, the Department plots the proposed lease coordinates using ArcMap 10.6 with digital orthophotography provided by the Maine Office of Geographic Information Systems (GIS). Where available, the digital orthophotography reflects conditions at low tide. This preliminary mapping helps the Department determine whether the proposed site may be located within the intertidal prior to conducting a site assessment. This preliminary analysis is later verified during the site assessment. During the site visit, the Department takes depth measurements within the boundary of the proposed lease site using a transom mounted depth sounder. The depth measurements are then corrected for tidal variation based on data gathered at tidal stations closest to the proposed site. These corrections are based on published tide tables and they allow the Department to approximate depths at a “0.0” tide or mean low water. The Department has utilized this method for at least 25 years. However, in this instance, depths were not collected during DMR’s visit to the site, but dive computers used by divers showed depths of approximately 7 feet along the dive transect (SR 6). Correction of the depths recorded by the dive computers for tidal variation, because of the causeway and floodgate, is unlikely to provide accurate depth information for the creek at high and low tides. Therefore, DMR did not provide this information as part of their site report (SR 6). The site report did note that it appears the proposed site remains submerged at low water when the tide gate retains water in the creek (SR 6). However, it was not immediately clear if the proposed site would retain water if the

causeway was to be removed and water able to naturally flow between the Piscataqua River and Spinney Creek.

In accordance with 12 M.R.S.A. §6072(1) the Commissioner has the authority to lease areas in, on and under the coastal waters, including the public lands beneath those waters and portions of the intertidal zone. DMR regulations Chapter 2.10(1)(M) requires written permission of riparian landowners for use of any intertidal lands they own that will be used by the aquaculture operation. The application submitted by Spinney Creek Shellfish, Inc. indicated that no portion of the proposed lease was above mean low water (APP 1), and no permission from riparian landowners was included in the application. A figure showing the proposed lease area, surrounding tax parcels, and an area identified as 'sub-tidal area', as well as a figure showing a schematic of the Spinney Creek water column in the vicinity of the proposal were both included in the application (App 18, 27).

During the public hearing on June 16, 2021, Spinney Creek Shellfish, Inc., had Mr. Chris Mende testify as their expert witness. Mr. Mende is a licensed professional land surveyor and works for Civil Consultants located in South Berwick, Maine. Mr. Mende testified that he was retained by the applicant to provide a hydrographic survey within Spinney Creek and to help define the proposed lease area (Mende, testimony). Pre-filed materials from the applicant and Mr. Mende included a vicinity map, delineating an area identified as subtidal within Spinney Creek, and a detailed picture of Spinney Creek that showed elevation points within the creek and further identified where the mean low water line would fall within the creek (Exhibit 4). Mr. Mende's testimony detailed the methods he used to conduct the survey and provided hearing participants with an overview of the information contained within the pre filed materials (Exhibit 4). During his testimony, Mr. Mende explained that he conducted a field survey of Spinney Creek on November 14, 2018 and May 9, 2019 and used a sounding rod to obtain depth measurements. He then used these measurements as well as data indicating where mean low water is at two tide stations within the adjacent Piscataqua River to determine where the mean low water line is both outside of the causeway in the river and within Spinney Creek. Mr. Mende testified that the information from the tide stations came from the Fort Point tidal station, located down river from Spinney Creek, and the Atlantic Terminal station located upriver from Spinney Creek. According to his testimony, the distance between these two stations is roughly 31,000 feet, and the gradient at normal low water elevation between the two stations is 0.93 feet. When information about mean low water at each tide station is coupled with the sounding information, Mr. Mende's testimony detailed that the survey results show a -4.15 foot contour line, which identifies the mean low water line in the adjacent Piscataqua River, and, if the causeway was taken out, that that contour line would also be the low water line within Spinney Creek. Spot elevations on the figure show bottom elevations from the survey, and that along the -4.15 foot contour line, depths would be approximately 9 feet at high tide if the causeway was removed. The proposed lease is sited within an area that is below the -4.15 foot contour line (Exhibit 4). The information provided via Mr. Mende's testimony indicates that the proposed lease is sited in an area that remains fully subtidal. During questioning, Mr. Mende was explicitly asked if the proposed site would remain subtidal if the causeway was fully removed and water able to freely flow between the river and the creek. His response was an affirmative 'yes' (Mende, testimony). Based on the

information available, it appears that the proposed lease site is in a location that would remain fully submerged at low tide.

B. Proposed Operations

The applicant proposes to culture American/eastern oysters (*C. virginica*) and northern quahogs (*M. mercenaria*) on the proposed lease site using suspended culture techniques (App 1). The applicant proposes to deploy up to 24 longlines, each measuring up to 180 feet in length, with 25 oyster cages per line, for a maximum of 600 cages (App 23). Approximately 25 feet will be available for navigation between the lines. Longlines will be deployed in groups of six, ultimately creating four ‘sections’ of longlines. According to testimony provided, while there is approximately 25 feet of space between each line, once gear is deployed the available space is reduced to about 20 feet (T. Howell, testimony). According to the application and testimony, cages will be on the surface from about mid-March to mid-November, when they are sunk to the bottom of the site for overwintering (L. Howell, testimony). Harvesting will be done by hand, by removing the mesh bags from the oyster cages (App 6). The applicant expects to service the site daily using Carolina-style skiffs with outboard engines (App 7), and they do not anticipate using any powered equipment (App 8). According to testimony, some days will require many trips to the site from the Spinney Creek facility (also located on the shores of Spinney Creek), while other days may require no or few trips (Madden, testimony).

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; with navigation; with fishing or other uses of the area, taking into consideration other aquaculture uses of the area; with the ability of the lease site and surrounding areas to support existing ecologically significant flora and fauna; or with the public use or enjoyment within 1,000 feet of beaches, parks, 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

The proposed lease is in the southern section of Spinney Creek. During DMR’s visit to the site on October 25, 2019, docks and a variety of vessels were observed along the shores of the creek (SR 7). Figure 1 shows the location of the docks observed nearest to the proposal. The closest dock along the eastern shore of Spinney Creek is approximately 710 feet away from the nearest point on the proposed lease, and along the western shore the closest dock is approximately 310 feet from the nearest point on the proposed lease. DMR’s site report notes that it is unlikely the proposed lease would prevent riparian access along

the Spinney Creek shoreline (SR 7). The site report did note that between the western shore of Spinney Creek and the proposed lease there is about 340 feet at the nearest point, and that riparian landowners travelling from the shoreline immediately west of the proposal may need to alter traditional routes to and from their properties to avoid the proposed gear (SR 7). Due to the shallow nature of the water within the creek, vessel size is likely already limited within the creek, and most vessels would likely still be able to navigate within the creek if the proposed lease were approved. In addition, the applicant is proposing to have roughly 20 feet of space between lines of floating gear, so individuals with appropriately sized vessels would be able to transit through the proposed lease site, if needed.

During the hearing, no testimony was provided from riparian landowners, or others, indicating that riparian ingress or egress was a concern. Given that the evidence in the site report indicates access to and from the Spinney Creek shoreline should not be prevented by the proposal, and there appears to be ample space to navigate between and around the proposed site, it appears that riparian access will not be prevented or unduly affected by the proposed lease.

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

B. Navigation

The causeway prevents navigation between Spinney Creek and the Piscataqua River, and there are no public boat launches with the creek (SR 8). As such, navigation within Spinney Creek is limited to boats owned or hosted by riparian landowners on the creek, or to vessels that can be carried down the causeway. During DMR's visit to the site on October 25, 2019 a variety of vessels were observed on docks or hauled out along the creek's shore, including kayaks, sailboats, powerboats, rowboats, and canoes (SR 8). The presence and large variety of boats indicates heavy riparian use of the creek for boating and other water-related activities. As discussed above, the closest docks are 340 and 710 feet away from the proposed site, and the closest points on the shoreline are 340 and 700 feet from the proposal (SR 8). The applicant is proposing 20 feet of spacing between each line of gear on the site, and this spacing would likely allow most vessels observed by DMR to transit through the proposed lease site, if needed. At the hearing, no public testimony was received to indicate there is concern about the ability to navigate within Spinney Creek if the proposal is granted. Representatives of Spinney Creek Shellfish, Inc. testified at the hearing that they do not feel navigation would be unreasonably impacted by the proposal, and that individuals are welcome to transit within the site, but that they do ask that individuals not touch the gear or the oysters (L. Howell, testimony). Testimony from the applicant also stated that they've observed many types of boats on the creek, but that most boating activity appears to occur on the weekends (Madden, testimony). Testimony provided from P. Howell and A. Augulewicz (both current employees of Spinney Creek Shellfish, Inc.) indicate they do not feel navigation is unduly impacted by the lease, and they did not feel their ability to recreate or boat on the creek would be impacted. Other members of the public, including some riparian landowners, attended the hearing but did not ask questions or offer

testimony to indicate there was any concern about navigation within the creek if the proposal were to be approved.

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

C. Fishing & Other Uses

Fishing. During their visit to the site, DMR staff observed two lobster buoys near the floodgate to the south of the proposed lease (SR 8). During a previous visit to Spinney Creek on June 8, 2018 DMR had observed approximately 7 lobster buoys in the same location (SR 8). According to the site report, no other buoys were observed outside this location in the creek, and because the proposed lease isn't located in a deeper hole observed in aerial imagery, where the observed two buoys were located, it is unlikely the proposal would interfere with lobster fishing (SR 8). No testimony was received to indicate there is concern regarding the proposed lease and interference with lobster fishing.

No other commercial or recreational fishing was observed by DMR on October 25, 2019. On the previous trip to the area in 2018, DMR did observe boats raking for northern quahogs within the creek, but outside of where the proposed lease is located (SR 8). In his testimony, Mr. Madden stated that he has observed recreational fishermen near the floodgate catching flounder and striped bass, but that this activity should not be impacted by the proposed lease operation (Madden, testimony). Pierce Howell testified that most of the recreational fishing occurs in the deepest part of the creek, far enough away from the proposed site that it should not interfere (P. Howell, testimony).

During the dive of the proposed site, DMR did observe clam holes in abundance and northern quahogs were commonly observed. Questions regarding how the applicant intends to culture northern quahogs were asked at the hearing, but no testimony was provided from fishermen or others to indicate there is concern about the proposed lease interfering with any wild shellfish harvesting that may occur within the creek. In his testimony, Pierce Howell indicated he is a licensed shellfish harvester, and has fished in the creek, but did not express concern regarding the proposal and his ability to continue any wild shellfish harvesting (P. Howell, testimony).

Based on this evidence, it appears that the proposed lease will not unreasonably interfere with commercial or recreational fishing activities in the creek.

Other aquaculture uses: There are 12 Limited Purpose Aquaculture (LPA) licenses located within Spinney Creek. Thomas and Lori Howell, owners of Spinney Creek Shellfish, Inc. (the applicant) each hold four of these licenses, and their son, Pierce Howell, holds the remaining four (SR 9). If the lease is granted, they intend to relinquish all these LPA licenses.

Based on this evidence, it appears that the proposed lease will not unreasonably interfere with other aquaculture activities in the area.

Other water-related uses. During the site visit on October 25, 2019, DMR staff did not observe other water-related uses of the proposed lease area. However, given the large variety of vessels observed along the shorelines of Spinney Creek, water-related uses such as swimming and waterskiing

likely occur within the creek. While navigation through the lease site may be possible by vessels that can navigate within the 20-foot-wide corridors between gear, some activities, like waterskiing, would likely be prevented from occurring within the proposed lease boundaries. Members of the public that attended the hearing indicated there are varied uses of the creek but did not testify or otherwise indicate that they felt the proposed lease would interfere with their ability to continue to use Spinney Creek for water based activities. The site report indicates that if the proposed 2.75-acre lease is approved, there will be approximately 120 acres within Spinney Creek that remain open and available for other uses (SR 9). In addition, the applicant has not requested any specific exclusive use of the site, and indicated they welcome boaters, paddlers, swimmers, etc. to navigate through the site. They only ask that recreational fishermen avoid casting lines within the proposed lines of gear so as not to become entangled and that individuals do not handle or remove their gear (App 11). As such, there should be little to no interference with individuals wishing to access the area for water-related uses.

Therefore, 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

Site observations. DMR scientists conducted a dive transect of the proposed site on October 25, 2019. The bottom of the proposed site is composed of soft mud (SR 11). Northern quahog and other bivalve shells were observed throughout the dive transect, as were holes in the sediment that were likely made by bivalves (SR 11). Mud snails, benthic diatoms, green crabs, tunicates, sea stars, and other marine organisms and algae were also observed (SR 11). The application states that multiple species of crabs, American lobster, multiple fish and shrimp species, jellyfish and muskrats are all found in or around the creek (App 9). In response to questioning, the applicant indicated that they also see different species of birds visiting the area, including cormorants, seagulls, and rarely, terns. Their testimony indicates the birds come and go, and they do not use any bird deterrent measures on existing LPAs in the creek (L Howell and J. Madden, testimony).

Eelgrass. In their application and testimony, Spinney Creek Shellfish Inc. indicated that there is no eelgrass within the proposed lease site (App 9; J. Madden testimony). Data collected by DMR indicated that, in 2010, eelgrass beds with 0-10% coverage were located within the proposed lease area, and that eelgrass beds with the same approximate coverage were also found about 150 feet to the east and 390 feet to the southeast of the proposal (SR 12, 13). DMR did not observe any eelgrass during their visit to the site on October 25, 2019 (SR 12). A representative from the Army Corps of Engineers (ACOE), attended the hearing but did not offer any testimony regarding impacts to eelgrass.

Because no eelgrass was observed during DMR's sit visits, and the site report and ACOE did not indicate any concern regarding eelgrass, the proposed aquaculture activities should not adversely impact eelgrass within the proposed site.

Wildlife. Data maintained by the Maine Department of Inland Fisheries and Wildlife (MDIFW) indicate that there is no Endangered, Threatened, or Species of Special Concern Habitat, Tidal Wading Bird

and Waterfowl Habitat, or Seabird Nesting Islands within 1,000 feet of the proposed site (SR 12). The Department sent a copy of the lease application to MDIFW for their review and comment and MDIFW indicated that “minimal impacts to wildlife are anticipated for this project.”³

Based on this evidence, it appears that the proposed 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.

E. Public Use & Enjoyment

There are no beaches, parks, docking facilities, or conserved lands owned by the federal, state, or municipal governments within 1,000 feet of the proposed site (SR 13). DMR’s site report noted that a parcel labeled as “Old right-of-way” is located approximately 600 feet from the proposed site, and that tax maps indicated this parcel is owned by the Portsmouth Harbor Association, but that according to the town of Kittery Tax Assessor, this organization is not associated with the municipality nor is it municipally-owned (SR 13).

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

The applicant lists Mook Sea Farm in Walpole, Maine, and Muscongus Bay Aquaculture, located in Bremen Maine as the sources of stock for both American oysters and northern quahogs (App 2). These hatcheries are both approved sources by DMR.

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

G. Light

According to the application, no lights would be used on the proposed site and no work would occur beyond daylight hours, except for an emergency or unusual situation (App 9). There was no testimony provided at the hearing to indicate there was concern regarding light associated with the proposed activities.

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

H. Noise

According to the application, no power equipment would be used on the site (App 9; L. Howell and J. Madden testimony). The applicant intends to service the site via Carolina-style skiffs with standard

³ CF: Email to C. Burke from R. Settele dated September 12, 2019.

outboard engines (App 6). Testimony stated that once the boat(s) have arrived on site to complete work the engines run at idle or are turned off, so noise from these boats should be minimal (J. Madden, testimony). The number of trips to the site each day, and amount of time spent on site varies based on the season as well as the specific work that needs to be completed each day. Some days there may be many trips to the site, other days only one or none (J. Madden, testimony). At the hearing, there was no testimony offered to indicate there is concern about levels of noise from within the boundaries of the proposed lease site. Based on this evidence, it appears that any noise generated by the proposed operations is unlikely to have a significant effect at the boundaries of the lease site.

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 applicant plans to deploy oyster cages (41.5” x 36” x 22.3”) with mesh bags deployed inside the cages (App 4). No support structures are proposed for the site. The gear proposed by the applicant complies with DMR’s height and visual impact limitations.

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

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.
- 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 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, 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 American oyster and northern quahogs seed 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.

5. DECISION

Based on the foregoing, the Commissioner grants the requested lease to Spinney Creek Shellfish, Inc. for 2.75 acres for twenty years for the cultivation of American/eastern oysters (*Crassostrea virginica*) and northern quahogs (*Mercenaria mercenaria*) using suspended culture techniques. The lessee shall pay the State of Maine rent in the amount of \$100.00 per acre per year. The lessee shall post a bond or establish an escrow account pursuant to DMR Rule 2.40 (2)(A) in the amount of \$5,000.00, conditioned upon performance of the obligations contained in the aquaculture lease documents and all applicable statutes and regulations.

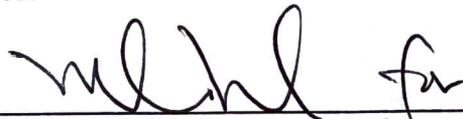
6. CONDITIONS TO BE IMPOSED ON LEASE

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).⁴ Conditions are designed to encourage the greatest multiple compatible uses of the lease area, while preserving the exclusive rights of the lessee to the extent necessary to carry out the purposes of the lease. No conditions have been imposed on this lease.

7. REVOCAION 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 within the preceding year, that the lease activities are substantially injurious to marine organisms, or that any of the conditions of the lease or any applicable laws or regulations have been violated.

Dated: 8/17/21



Patrick C. Keliher, Commissioner
Department of Marine Resources

⁴ 12 M.R.S.A §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."