

**STATE OF MAINE
DEPARTMENT OF MARINE RESOURCES**

Ezra, Daniel, and Lincoln Johnson

BUR SIX

Experimental Aquaculture Lease Application
Suspended Culture of Shellfish
Swan's Island, Maine

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION

Ezra Johnson, Daniel Johnson, and Lincoln Johnson¹ applied to the Department of Marine Resources (DMR) for a three-year experimental aquaculture lease located in Burnt Coat Harbor, Swan's Island, Hancock County. The proposed lease is 1.66² acres and is for the suspended cultivation of American/eastern oysters (*Crassostrea virginica*). DMR accepted the application as complete on April 23, 2021.

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 Swan's Island and its Harbormaster, and others on DMR's mailing list. Notice of the complete application and comment period was published in the May 27, 2021, edition of the *Mount Desert Islander*. Title 12 M.R.S.A. §6072-A (6) provides that the Commissioner shall hold a public hearing if five or more persons request a public hearing within the 30-day comment period. Only four requests for a public hearing were received during the comment period, however, a hearing was held at the Commissioner's discretion, as allowed by Title 12 M.R.S.A. §6072-A. Notice of the public hearing was provided to state and federal agencies, the Town of Swan's Island, riparian landowners within 1,000 feet of the proposed site, and subscribers to DMR's aquaculture email listserv. Notice of the hearing was published in the *Ellsworth American* on April 27 and May 18, 2023. The public notice for the hearing indicated that the proceeding would be conducted in-person with a remote option and directed interested persons to contact DMR to sign up to participate in the proceeding. Four individuals registered to participate in the hearing and all indicated an intention to provide testimony. After the expiration of the

¹ The original application listed Caleb MacDonald as a co-applicant. One day prior to the hearing, the three other applicants informed the Department that Mr. MacDonald was no longer part of the project.

² The applicants originally requested 1.6 acres. Department calculations, based on the provided coordinates, indicate the proposed area is 1.66 acres.

registration deadline, DMR was contacted by riparian owners, John and Gayle Crowley, who had been traveling and did not open the hearing notice until two days after the close of the registration deadline. On May 26, 2023, they submitted a request for an exception to the registration requirements to DMR. Given that they are riparian landowners, had previously submitted comments and requested a public hearing about the project, and the reason for missing the registration deadline, DMR granted a one-time exception. Therefore, the Crowleys were able to register and offer testimony.

Sworn testimony was given at the June 6, 2023, hearing by the following witnesses:

Name	Affiliation
Ezra Johnson	Applicant
Daniel Johnson	Applicant
Jason Joyce and Elijah Joyce	Members of the public
Joshua Joyce	Member of the public/Harbormaster
River and Ann Conte John and Gayle Crowley	Riparian Owners

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 Maria Eggett. The evidentiary record regarding this lease application includes the application, DMR’s site report dated December 16, 2021, and the case file. The evidence from each of these sources is summarized below.³

LIST OF EXHIBITS

1. Case file
2. Application
3. DMR site report, issued on December 16, 2021

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

2. DESCRIPTION OF THE PROJECT

A. Proposed Operations

The purpose of the proposed experimental lease site is to determine if oyster farming can be a sustainable business for the applicants (App 4). The applicants are proposing to culture shellfish using a maximum of 2,000 soft mesh bags (3-foot by 1.5-foot) and 200 wire cages (4-foot by 4-foot) as well as flotation and marker buoys (App 13). The cages may be submerged from November to April (D. Johnson testimony). Product would be harvested by hauling bags out of the water and sorting oysters on-site or at an off-site location (lobster wharf). The applicants propose to tend the site throughout the year, and seeding is proposed from June to August (App 4).

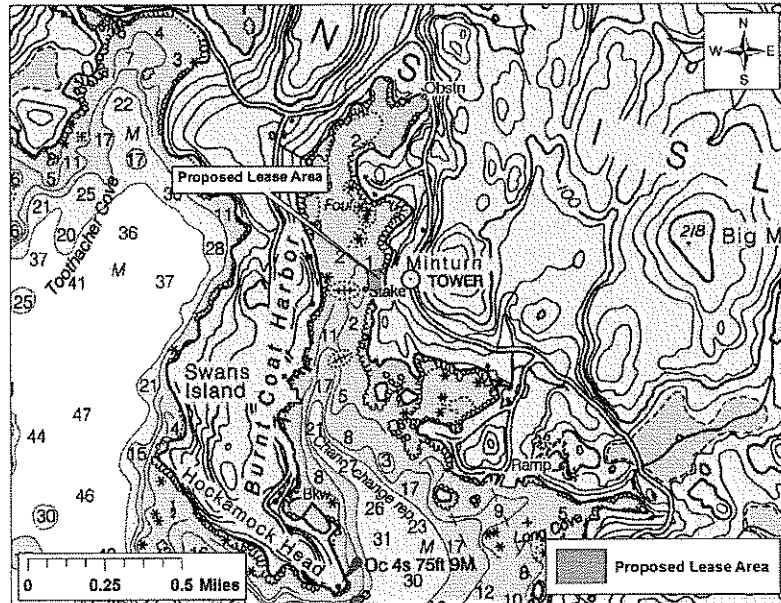


Figure 1: Vicinity map. Image generated by DMR staff.⁴

B. Site Characteristics

On June 24, 2021, DMR staff visited the proposed experimental aquaculture lease. DMR staff arrived in the vicinity at 11:50 am when the tide was ebbing.

⁴All figures in this report were created in ArcMap version 10.8 using digitized NOAA Nautical Charts or geo-referenced aerial photographs provided by The Maine Office of GIS (orthoCoastalDownEastCoast2008).

The proposed lease occupies subtidal waters in Burnt Coat Harbor, Swan’s Island. The adjacent shoreline is rocky, with a section of marsh grass that leads to a residential and mixed forest upland. To the southwest of the proposal is an active harbor with a mooring field and lobster buying stations. The western shore of Burnt Coat Harbor, across from the proposal, is developed with residential buildings (SR 2).

3. STATUTORY CRITERIA & FINDINGS OF FACT

Approval of experimental aquaculture leases is governed by 12 M.R.S.A. §6072-A. This statute provides that a lease may be granted by the Commissioner of DMR upon determining that the project will not unreasonably interfere with the ingress and egress of riparian owners; with navigation; with fishing or other water related uses of the area, taking into consideration other aquaculture uses in the area; with the ability of the lease site and surrounding areas to support existing ecologically significant flora and fauna; or with the public use or enjoyment within 1,000 feet of beaches, parks, or docking facilities owned by municipal, state, or federal governments. The Commissioner must also determine that the applicants have demonstrated that there is available source of organisms to be cultured on the lease site.

A. Riparian Access

The proposed lease is located near the eastern shore of upper Burnt Coat Harbor, Swan’s Island. The shoreline has moderate residential development, with the nearest dock observed approximately 255 feet to the northeast of the proposal, near what appears to be a boat house. A residential building was observed on the shoreline to the north of the nearest dock, and approximately two additional structures were observed farther from the shoreline on higher elevation uplands to the east of the proposal, one of which appears to be marked as “Minturn Tower” on NOAA Nautical Charts. Additional residential buildings were noted along the shoreline of the cove to the north of the proposal, and along the western shore of Burnt Coat Harbor. Three moorings were observed near the western and southern boundaries of the proposal during DMR’s site assessment on June 24, 2021, the nearest of which was 120 feet to the west. One inflatable raft and multiple hauled-out floats were observed on the shoreline to the south of the proposal near a stone wharf, an area that appears to be referred to as Adams Point by locals (SR 8).

A Harbormaster Questionnaire was requested from the Swan’s Island Harbormaster on May 17, 2021. No response was received.

During the comment period for this proposal, several comments were received from riparian landowners regarding their use of the proposed lease area to access their shorelines. Concerns that the proposed operations would interfere with transit to moorings from shore, transport of floats for winter storage, and moored boat swing, all of which were stated to occur within the proposed lease boundaries.

Of the four individuals that requested a public hearing be held, two riparian owners registered and testified at the hearing. One testified in favor of the project and stated the current operations⁵ do not directly impact their use of the harbor (R. Conte testimony). The second set of riparian owners, John and Gayle Crowley, testified that the project as proposed would adversely impact access to both their mooring and their dock⁶. Mr. and Mrs. Crowley stated when the wind blows from the west, their vessel on its mooring may extend into the lease boundaries (Crowley testimony). The Crowleys stated the swing radius of their boat (a 54-foot trawler) on its mooring is 144 feet. The potential for this extension into the lease area was noted by DMR staff at the time of the site visit, although staff lacked specifics to make a definitive determination (SR 10). In an email dated May 23, 2021, the Crowleys provided GPS coordinates for their mooring. Using this information, DMR plotted the mooring location in relation to the proposed lease boundaries. DMR mapping indicates the western boundary of the proposed site is closest to the mooring, and there would be approximately 150 feet of space between the western boundary and the mooring location. Therefore, given the mooring coordinates and swing radius provided by the Crowleys, it is unlikely their moored vessel would swing into the lease area.

During the hearing, the Crowleys also testified they must approach the mooring directly down wind. The Crowleys stated that in poor conditions multiple attempts may be required to successfully place the boat on the mooring and in a westerly wind, the potential for inadvertent intrusion into the lease site and possible gear entanglement is increased. In order to provide for safe approach to the mooring, DMR will reduce the western boundary of the proposed site by 25 feet to provide for additional navigable area. The reduced acreage and revised coordinates are included below.

Per the site report, the closest dock is approximately 255 feet from the proposed lease. Additionally, there is a stone wharf on Adams Point. The site report notes the distance from the lease boundary to the Point is approximately 185 feet (SR 12). In their written comments, the Crowleys stated the components of their seasonal pier are stored on Adams Point during the winter month and “the most direct route available to float these pieces is directly through the proposed lease area. Otherwise, it would require additional time, labor, and effort.” Stored floats were observed on Adams Point during DMR’s site assessment, which occurred on June 24, 2021. The site report, which considered the Crowley’s comment, also noted the most direct route from either the riparian’s dock or Adams Point marginally overlaps with the proposed lease area. The site report acknowledges changing course slightly to avoid the proposed aquaculture gear appears possible (SR 10), which may add time and/or expense to

⁵ The applicants currently hold LPAs within the proposed lease boundaries. R. Conte did not express any concerns about the proposed experimental lease.

⁶ The Crowley’s also indicated that the proposed site would impact their property values. However, impacts to property values is not a criterion that DMR can consider when evaluating a proposal.

the process of float haul-out and installation each year (SR 11). If the lease is granted, the applicants indicated the cages would typically be submerged from November through April. During the hearing, it was noted that the Crowley’s float had been stored in their yard, not on Adams Point stone wharf, for the last two years.

Based on the record, it is possible that the proposed site may require some changes to float deployment. For example, a different route may be required to transport the float to and from Adams Point and the change in route may have other implications. However, the proposed site would not preclude the transport of the float or otherwise hinder installation and the other implications, like the possibility of increased costs for moving the floats were speculative. It may also be possible to use preferred haul routes at times of year when gear may be submerged (usually November through April). If the lease is granted, it would not preclude the ability of the riparian owners or others to navigate through or within the site as conditions allow.

Therefore, given the reduced size to account for mooring approach, the aquaculture activities proposed for this site will not unreasonably interfere with the ingress and egress of any riparian owner.

Revised Coordinates – 1.46 Acres

<u>Corner</u>	<u>Latitude</u>	<u>Longitude</u>
NE	44.1488299° N	-68.4442642° W then 343.28 feet at 179.48° True to
SE	44.1478879° N	-68.4442612° W then 169.0 feet at 266.92° True to
SW	44.1478656° N	-68.4449046° W then 337.3 feet at 353.27° True to
NW	44.1487871° N	-68.4450457° W then 206.0 feet at 85.36° True to NW corner.

B. Navigation

The proposed lease is located in shallow waters to the east of the end of a deep-water channel in upper Burnt Coat Harbor. It is unlikely that heavy navigation use of the proposed area occurs, beyond riparian landowners and recreational mariners. South and southwest of the proposal is a busy harbor with a mooring field, lobster buying station(s), docks/piers, and both commercial and recreational vessel traffic (SR 12). The site report states that if the site were to be granted, it is unlikely to interfere with traditional vessel flow in greater Burnt Coat Harbor (SR 12).

During DMR’s site assessment on June 24, 2021, two kayakers were observed paddling in a northerly direction near the western boundary of the proposal. In the application, the applicants requested

exclusive use of the area, which may prevent recreational boating within the lease footprint. However, during the hearing the applicants clarified that kayakers or appropriately sized watercraft would be allowed to transit the site (E. Johnson, D. Johnson testimony).

Multiple comments were submitted to DMR during the comment period indicating that the requested lease area is regularly used by pleasure craft and recreational mariners due to the calm and protected nature of this part of the harbor (CF). In particular, one commenter indicated that they transit through the proposed lease area from Adams Point to access their mooring in the harbor.⁷ The precise location of the mooring is not specified in the comment, but access to and from Adams Point is unlikely to be unreasonably hindered if the proposed lease, which is ~185 feet to the north at the nearest point, were granted. Most navigation to Adams Point is expected to occur in an east to west direction to access the deep-water channel to the west, or to and from points south, thereby avoiding the need to transit through the proposal, which is located to the north (SR).

As noted in the riparian access section above, the most direct route to transport the Crowley's pier components to Adams Point may be impacted and an alternate route may need to be employed. While this is an impact to navigation, the Department finds that as such activity occurs twice a year, typically, it is not an unreasonable interference.

Based on the evidence, it appears that the proposed lease location will not unreasonably impact navigation.

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

C. Fishing & Other Uses

Fishing. At the time of DMR's site assessment on June 24, 2021, moderate lobstering activity was observed to the northwest of the proposal. As the lobster fishery in Maine follows the annual migration and molt cycle of lobsters (*Homarus americanus*), fishing effort could be more prevalent in the area or in closer proximity to the proposal during the late summer and/or fall. Although some signs of clams (castings and holes in the sediment) were observed in the deeper/western half of the proposal during the underwater assessment conducted on June 24, 2021, a DMR Area Biologist submitted a comment for this proposal on November 30, 2021, stating that the proposal is "not in a good clamming location."⁸

⁷ Email from A. Conte (6/26/2021)

⁸ Email from D. Nault dated 11/30/2021

The application states commercial and recreational activity occur more than 200 feet from the proposed lease area (App 6 and 7). During the comment period, members of the public stated that lobster fishing occurs closer than 200 feet and recreational fishing occurs within the lease boundaries (CF). At the hearing, other members of the public testified it is not a productive area, and therefore, no significant fishing activity takes place in that portion of the harbor (Jason, Joshua, and Elijah Joyce testimony).

Based on the testimony given at the hearing by members of the public regarding interference with fishing and the Department's site observations, it is reasonable to conclude that there are no concerns regarding the potential effect of the proposed lease on commercial and recreational fishing activities in the area.

Exclusivity. The applicants initially requested that only oyster farming by the leaseholders be permitted within the boundaries of the proposed lease site (App 8, E. Johnson testimony). However, during the hearing, the applicants clarified the intent to exclude certain activities was to prevent malicious or inadvertent harm to their gear. Title 12 M.R.S.A. §6073(2) states it shall be unlawful to interfere with the rights provided in a lease. Therefore, statute already addresses their concerns and no condition will be imposed on the lease, if granted.

Other aquaculture uses. There are 16 Limited Purpose Aquaculture (LPA) licenses and one lease within one mile of the proposal. Three LPA licenses are held by the applicants and are located within the proposed lease boundaries.⁹ According to the application, these would be relinquished if the lease is granted.¹⁰ The nearest aquaculture site not held by an applicant is approximately 1,850 feet to the north of the proposal and is approved for the suspended culture of shellfish. (SR 14).

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

D. Flora & Fauna

Historical eelgrass (*Zostera marina*) data collected by DMR indicates that, in 2008, the closest observed eelgrass bed was located approximately 280 feet to the southwest of the proposal. No eelgrass was observed during the underwater video transect conducted on June 24, 2021 (SR 16).

According to Geographic Information System (GIS) data maintained by the Maine Department of Inland Fisheries and Wildlife (MDIF&W) and available through the Maine Office of GIS, the proposal is

⁹ LPA licenses: DJOH118, EJOH118, and LJOH118. A fourth LPA, CMAC118, was located within the boundaries of the proposed lease and was renewed for 2023. Through contact with the license holder, DMR confirmed the license was renewed without his knowledge. DMR revoked the license as of June 29, 2023. If any gear remains from the license on-site, it will be incorporated into the new lease or removed.

¹⁰ Application, page 8

located entirely in Tidal Waterfowl and Wading Bird Habitat. This habitat type is defined under Maine's Natural Resources Protection Act (NRPA) as Significant Wildlife Habitat. Several bird species were observed during DMR's site assessment conducted on June 24, 2021, including double-crested cormorants (*Phalacrocorax auritus*), various gulls (*Larus sp.*) and crows (*Corvus sp.*).

A comment submitted by an MDIF&W Wildlife Biologist on June 7, 2021 states "We . . . recommend that barges or boats not be allowed to ground out on reefs, aquatic beds, or mudflats. We recommend minimizing the float size and project footprint to the extent practicable to minimize impacts to waterfowl and wading bird populations" (SR 15). Due to the water depth and proposed equipment, grounding out is unlikely at the site. No one provided testimony concerning these issues during the public hearing.

Based on the evidence that the proposed lease does not interact with historical eelgrass beds and MDIF&W's review comments, and because DMR's site report does not contain concerns regarding the impact of the proposed lease on the surrounding ecosystem, it appears that the proposed aquaculture activities for this lease site will not interfere with the ecological function of the area.

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

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.

DMR finds that public use or enjoyment within 1,000 feet of beaches, parks, or docking facilities owned by federal, state, or municipal governments will not be unduly affected by the proposed application.

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

F. Source of Organisms

The applicant proposes to obtain stock at Muscongus Bay Aquaculture in Bremen, Maine. This hatchery is currently listed as an approved source for the proposed stock.

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

4. CONCLUSIONS OF LAW

Based on the above findings, the Department concludes that:

1. With a reduction in size, the aquaculture activities proposed for this site will not unreasonably interfere with the ingress and egress of any riparian owner.

2. The aquaculture activities proposed for this site will not unreasonably interfere with navigation.

3. The aquaculture activities proposed for this site will not unreasonably interfere with fishing or other uses of the area.

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

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

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

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

5. DECISION

Based on the foregoing, the Commissioner grants the requested experimental lease of 1.46 acres to Ezra Johnson, Daniel Johnson, and Lincoln Johnson, 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 lessees¹¹; however, no aquaculture rights shall accrue in the lease area until the lease is fully executed.

¹¹ DMR Rule 2.64 (14) provides:

This lease is granted to the lessees for the suspended cultivation of American/eastern oysters (*Crassostrea virginica*). The lessees 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 lessees shall post a bond or establish an escrow account pursuant to DMR Rule 2.64 (10) (s) 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.

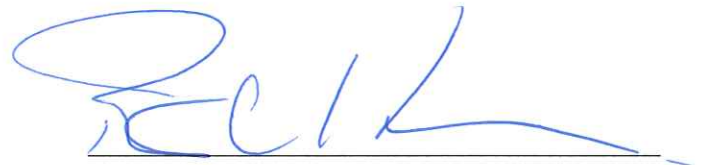
6. CONDITIONS TO BE IMPOSED ON LEASE

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).58 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 are imposed on this lease.

7. REVOCATION OF EXPERIMENTAL LEASE

The Commissioner may commence revocation procedures upon determining pursuant to 12 M.R.S.A §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: 8/17/2023



Patrick C. Keliher, Commissioner
Department of Marine Resources

“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.”