

STATE OF MAINE
DEPARTMENT OF MARINE RESOURCES

Experimental Aquaculture Lease Application
Suspended Culture of American oysters
Burnt Coat Harbor, Swan's Island

Jason and Joshua Joyce

SWAN MPx

July 26, 2019

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION

Jason and Joshua Joyce applied to the Department of Marine Resources ("DMR") for a three-year experimental aquaculture lease located in Mill Pond, Swan's Island, Hancock County. The proposed lease is 3.16¹ acres in size, and is for the suspended cultivation of American/eastern oysters (*Crassostrea virginica*). DMR accepted the application as complete on February 1, 2019. No requests for a public hearing were received during the comment period, and no hearing was held.

1. THE PROCEEDINGS

Notice of the application and the 30-day public comment period were provided to state and federal agencies, riparian landowners, the Town of Swan's Island and its Harbormaster, and others on DMR's mailing list. Notice of the application and comment period was published in the March 14, 2019 edition of the *Mount Desert Islander*. The evidentiary record regarding this lease application includes the application, DMR's site report dated May 28, 2019, and the case file. The evidence from each of these sources is summarized below.²

2. DESCRIPTION OF THE PROJECT

A. Proposed Operations

The purpose of the proposed lease site is to explore the commercial feasibility of cultivating oysters using suspended culture techniques (App 8). The applicant intends to deploy up to 2,500 floating oyster bags which would be arranged in 33 lines (App 16-19). The lines would be suspended by posts above the ocean floor, which would allow the bags to flip with the changing tides (App 16-19). The bags would be seeded between May and June and tended through November (App 8). The gear would be

¹ Applicant originally requested 4 acres. DMR calculations, based on the revised coordinates provided, indicate the proposed site is 3.16 acres.

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

removed from the proposed site in November and redeployed in May (App 9). The proposed lease site is in a water quality area classified, on the date this decision was published, as “Restricted” by DMR’s Bureau of Public Health (App 1). If the proposed lease is granted, all product will need to be relayed to an area classified as “open/approved” for a pre-determined period prior to harvest (SR 2). The applicants intend to relay product to their existing LPAs, which are located in an area classified by DMR’s Bureau of Public Health as “open/approved” for the harvest of shellfish (App 9).³

During the review period, staff in the Bureau of Public Health expressed concerns about the proposal being sited in a restricted area, because of the requirement to relay product.⁴ Staff in the Bureau of Public Health and the Aquaculture Division discussed these concerns and then contacted the applicant. The Aquaculture Division, in consultation with the Bureau of Public Health, informed the applicant that if the proposal is granted they would be subject to one of the two options listed below:

1. Complete a contamination reduction study, at the applicant’s expense and according to DMR specifications, and the receiving site will be closed for harvest for a minimum of 14 days; or
2. Do not complete a contamination reduction study and the receiving site will be closed for harvest for 60 days.

The applicant indicated that they would prefer option two. Given this, a contamination reduction study will not need to be completed, but the receiving site will be closed for harvest for 60 days.⁵ A condition reflecting this restriction will be placed on the lease.

B. Site Characteristics

On April 2, 2019, the applicants requested that the southern corners of the proposed site (A and D) be shifted 75 feet the north. The applicants shifted the southern corners of the proposal 75 feet to the north, which reduced the size of the proposal. The revised coordinates, which DMR utilized during the site assessment, are listed below.

<u>Corner</u>	<u>Latitude</u>	<u>Longitude</u>
New A/SW	44.142480°N	68.441266°W then 345.00 feet at 0.00° True to
B/NW	44.143426° N	68.441266° W then 400.00 feet at 90.00° True to
C/NE	44.143426° N	68.439742° W then 345.00 feet at 180.00° True to
New D/SE	44.142480° N	68.439742° W then 400.00 feet at 270.00° True to A.

³ The applicants hold the following eight LPAs, within one mile of the proposed site: JJOY117, JJOY217, JJOY318, JJOY418, JOJO117, JOJO217, JOJO318, JOJO418 (SR 9).

⁴ CF: Email from K. Kanwit to J. Lewis et al. dated March 13, 2019

⁵ CF: Email from J. Joyce to A. Ellis dated June 26, 2019

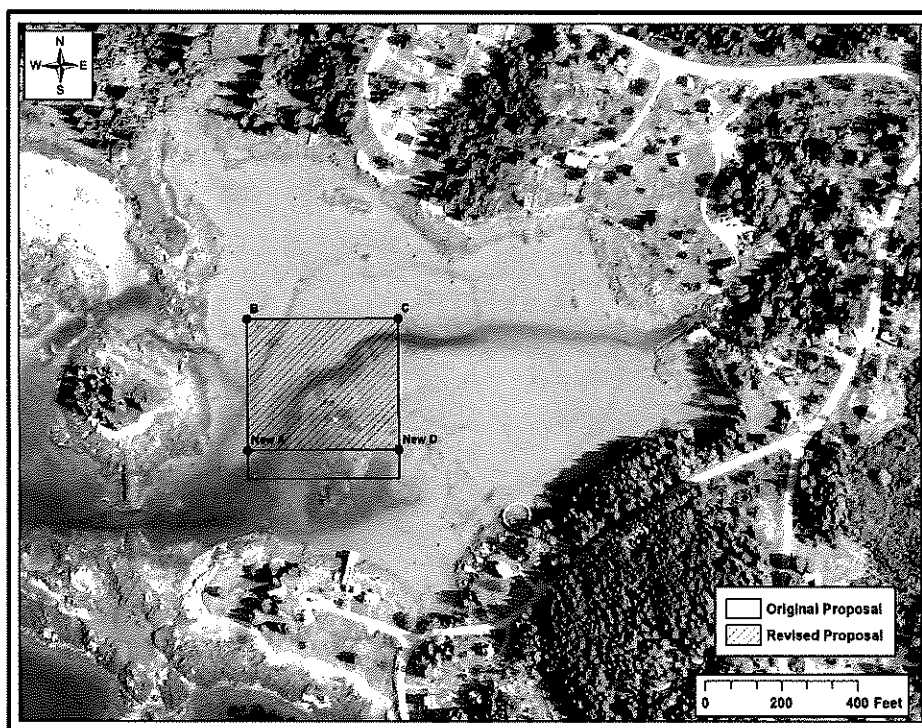


Figure 1: Location of the proposed lease site within Mill Pond.

On May 17, 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 in Mill Pond (SR 2). Residential properties characterize the immediate uplands (SR 2). Access to the pond from Burnt Coat Harbor is constricted by rock outcroppings and large boulders (SR 2). These environmental constrictions limit the size of vessels that can safely navigate into the pond (SR 2). At mean low water, corner A is ~200 feet to the nearest shoreline to the south of the proposed lease (SR 6).

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 applicant has demonstrated that there is an available source of organisms to be cultured on the lease site.

A. Riparian Access

During the site assessment, DMR staff did not observe any functioning docks along the shoreline of Mill Pond (SR 7). Extensive mudflats, which are tidally exposed, limit the placement of docks, moorings, and the use of certain watercraft within the pond (SR 7). Access to the residential properties around Mill Pond are likely limited to hand-carry vessels including canoes and kayaks (SR 7). The Harbormaster Questionnaire indicates that the proposed lease site will not interfere with the ability of riparian landowners to access their property.⁶

The Harbormaster Questionnaire notes that there is one mooring in Mill Pond, which belongs to Leslie Ranquist. As originally proposed, the lease site encompassed this mooring (SR 8).⁷ During the comment period, DMR received a letter from Mr. Ranquist indicating that the mooring is used during storms to anchor his floats. Mr. Ranquist suggested moving the proposed lease site. Mr. Ranquist's letter did not include a recommended distance from his existing mooring to the southern boundary of the proposed site.⁸ However, the Harbormaster Questionnaire indicates the following:

Mr. Ranquist suggested moving the lease site. One hundred feet to the north. To facilitate his traditional use.⁹

On April 2, 2019, the applicants moved the southern boundary 75 feet to the north. After moving the southern boundary, the proposed lease site no longer encompassed the existing mooring.

Based on the evidence in the record, Mr. Ranquist raised concerns about the location of the proposed lease site in relationship to his existing mooring. Mr. Ranquist communicated with the Harbormaster that moving the southern boundary of the proposed site 100 feet to the north would help facilitate his traditional use of the existing mooring. However, the applicants only moved the southern boundary 75 feet to the north. In consideration of the record, DMR is revising the proposed southern

⁶ CF: Harbormaster Questionnaire signed April 5, 2019

⁷ In their response to the proposed decision, the applicants challenged this assertion. The applicants noted "we would not include a mooring owned by someone else within our application." The applicants requested that the term "encompassed" be changed to "closely bordered." However, evidence in the record, including the site report, a letter from the mooring holder, and Harbormaster Questionnaire suggest that the mooring was within the original boundary. Therefore, DMR did not change the wording as the applicants requested.

⁸ In his letter, Mr. Ranquist indicated that four acres is too large an area for an experimental lease. Mr. Ranquist suggested that "the experimental site be reduced to half its proposed size *and* (emphasis added) give me adequate room around my mooring."

⁹ CF: Harbormaster Questionnaire dated April 5, 2019.

boundary an additional 25 feet to the north. This modification will provide 100 feet of area between the southern boundary and Mr. Ranquist’s existing mooring. According to the Harbormaster Questionnaire this distance would help facilitate Mr. Ranquist’s traditional use of the mooring.

Based on this modification, the revised acreage of the proposed lease is 2.93 acres and coordinates are as follows:

<u>Corner</u>	<u>Latitude</u>	<u>Longitude</u>
Revised A/SW	44.142549°N	68.441266°W then 319.71 feet at 0.00° True to
B/NW	44.143426° N	68.441266° W then 400.06 feet at 90.00° True to
C/NE	44.143426° N	68.439742° W then 319.71 feet at 180.00° True to
Revised D/SE	44.142549° N	68.439742° W then 400.07 feet at 270.00° True to A.

Based on the additional modifications to southern boundary of the proposed lease site, it appears that the proposal will not unreasonably interfere with Mr. Ranquist’s existing use of the mooring.

The proposed site occupies subtidal and intertidal waters. Pursuant to applicable laws and regulations, the applicant must obtain written permission from riparian owners for the use of any intertidal lands owned by the respective riparian landowner(s). The applicant submitted evidence of written permission and letters of support from applicable intertidal landowners (App 28-31). During the comment period, DMR did not receive any additional comments about riparian ingress or egress.

Therefore, based on the additional modifications to the southern boundary of the proposed lease site, the aquaculture activities will not unreasonably interfere with the ingress and egress of any riparian owner.

B. Navigation

Mill Pond is connected to Burnt Coat Harbor by a 40-foot wide channel (SR 8). The channel is surrounded by rock outcroppings and boulders, which limit the size of vessels that can navigate to the pond (SR 8). Navigation within the pond is further limited by tidally exposed mudflats (SR 9). During low tidal stages, navigation to the north, east, and west of the proposal is precluded by the mudflats. When water depths are sufficient for navigation, there is a minimum of 90 feet of space available between all sides of the proposal and the respective shoreline (SR 9). Given the existing limitations to navigation into and within Mill Pond, a minimum of 90 feet of space should provide adequate navigable area for small powerboats and hand-powered vessels to traverse around the proposal (SR 9).

The Harbormaster Questionnaire indicates that the proposed site would not interfere with navigation in designated channels.¹⁰ During the review period, DMR did not receive any additional comments related to navigation. Based on natural constrictions and the feedback received, it is reasonable to assume that the proposal will have minimal impacts on navigation within the area.

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

C. Fishing & Other Uses

Fishing. At the time of the site assessment, no commercial or recreational fishing activities were observed within the boundaries of the proposed site (SR 9). It is likely that the natural constraints to navigation within the area also limit commercial and recreational fishing (SR 9). In addition, the harvest of bivalve shellfish from Mill Pond is restricted due to bacterial pollution (SR 9). During the review period, DMR did not receive any feedback regarding commercial or recreational fishing. The proposed lease site occupies portions of the intertidal zone. Pursuant to 12 M.R.S.A. §6072-A(11), if the municipality where the proposed intertidal lease is site located has a shellfish conservation program under 12 M.R.S.A. §6671, the applicant needs to obtain consent from municipal officers. According to DMR records, Swan’s Island has a shellfish conservation program under 12 M.R.S.A. §6671. The applicant submitted evidence indicating that municipal officers consented to the proposal during a June 28, 2018 selectmen’s meeting (App 29). Therefore, the applicant has satisfied the municipal approval provision for intertidal lease sites under 12 M.R.S.A. §6072-A(11).

Other aquaculture uses. There are 16 Limited Purpose Aquaculture (LPA) licenses located within one mile of the proposed lease site (SR 9). The nearest aquaculture site is an LPA located 1,200 feet (straight line distance) from the proposed lease site (SR 9).

Other water-related uses. During the review period, the Department did not receive any comments detailing other uses of the area not already contemplated in other sections of this decision. Based on the absence of public comments, it is reasonable to conclude that there are no concerns regarding the effects the proposed lease may have on other water-related uses of the area.

Exclusivity. The applicant requests that powerboating be prohibited within the boundaries of the proposed site (App 11). Restricting powerboating within the boundaries of the lease site is reasonable to enable the aquaculture project to be carried out while encouraging the greatest number of compatible

¹⁰ CF: Harbormaster Questionnaire signed April 5, 2019

uses of the area, as provided for in 12 M.R.S.A. §6072-A (15). Conditions reflecting these restrictions will be included in the lease.

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

According to data maintained by the Maine Department of Inland Fisheries and Wildlife (MDIFW), the proposed site is located within an area designated as Tidal Wading Bird and Waterfowl Habitat (SR 8). DMR sent a copy of the application to MDIFW for their review and comment. MDIFW indicated that “minimal impacts are anticipated.”¹¹

Data collected by DMR, in 2008, indicate that the nearest eelgrass bed was located ~650 feet to the south of the proposed site (SR 12). The proposed lease, if granted, will not result in physical disturbance to this existing eelgrass bed (SR 12).

Based on the evidence, it appears that the proposed aquaculture activities will not unreasonably 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

The proposed lease site is located ~280 feet from the highwater line of Mill Point Park, which is owned by the Town of Swan’s Island. At low water, the proposed site is located on intertidal lands associated with the parcel (SR 12). The applicant submitted the minutes from a June 28, 2018, Swan’s Island Selectmen’s meeting, indicating that the Town of Swan’s Island consented to the proposed activities and will allow the applicants to access to the proposed site from Mill Point Park (App 29). At mean low water, the proposed site is ~635 feet to the east of Parks Island, which is owned by the State of Maine and designated as a “Coastal Island” (SR 13).¹² DMR sent a copy of the application to the Maine Department of Agriculture, Conservation, and Forestry (DACF) for their review and comment. However, no comments from DACF were received.¹³

¹¹ CF: Email from J. Perry (MDIFW) to C. Burke dated May 8, 2019.

¹² The certified municipal tax maps list the owner of the Parks Island as “unknown” (see App 22). However, based on data maintained by The Maine Office of GIS it is state conserved lands and designated as a “Coastal Island.”

¹³ The application was sent to staff in the Bureau of Parks and Lands, which is part of DACF

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 municipal, state, or federal governments.

F. Source of Organisms

The applicant intends to source American oysters from Muscongus Bay Aquaculture in Bremen, Maine which is a DMR approved hatchery (SR 12).

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

4. CONCLUSIONS OF LAW

Based on the above findings, I conclude that:

1. Given the additional modifications to the southern boundary, the aquaculture activities proposed for this site will not unreasonably interfere with the ingress and egress of any riparian owner.

2. Given the modifications to the southern boundary, the aquaculture activities proposed for this site will not unreasonably interfere with navigation.

3. The aquaculture activities proposed for this site will not unreasonably interfere with fishing or other uses of the area, taking into consideration the number and density of aquaculture leases in the area.

4. 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 2.93 acres to Jason and Joshua Joyce 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 lessee¹⁴; however, no aquaculture rights shall accrue in the lease area until the lease is fully executed.

This lease is granted to the lessee for the suspended culture of American/eastern oysters (*Crassostrea virginica*). 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 (12) (B) in the amount of \$5,000.00, conditioned upon performance of the obligations contained in the aquaculture lease documents and all applicable statutes and regulations.

6. CONDITIONS TO BE IMPOSED ON LEASE

The Commissioner may establish conditions that govern the use of the lease area and impose limitations on aquaculture activities, pursuant to 12 MRSA §6072-A (15)¹⁵. Conditions are designed to encourage the greatest multiple compatible uses of the lease area, while preserving the exclusive rights of the lessee to the extent necessary to carry out the purposes of the lease.

The following conditions shall be incorporated into the lease:

1. The lease site must be marked in accordance with both U.S. Coast Guard requirements and DMR Rule 2.80.
2. Unless permission is granted by the leaseholder, powerboating is prohibited within the boundaries of the lease site.
3. All product must be relayed to an aquaculture site in an area classified as “open/approved” by the Department of Marine Resources, Bureau of Public Health. After product relay, the receiving site will be closed for harvest for 60 days.

¹⁴ 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.”

¹⁵ 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.”

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: July 26, 2019



Patrick C. Keliher, Commissioner
Department of Marine Resources