

Notice of Agency Rule-making Proposal

AGENCY: 13-188-Department of Marine Resources

CHAPTER NUMBER AND TITLE: Chapter 2 Aquaculture

TYPE OF RULE (*check one*): Routine Technical Major Substantive

PROPOSED RULE NUMBER (*leave blank; to be assigned by Secretary of State*):

BRIEF SUMMARY: This proposed rule makes a number of changes to comply with statutory changes made by Public Law 2021 Chapter 52. It establishes a fee for an amendment of a lease of \$200. The proposed rule specifies that the maintenance of a bond or escrow account and timely payment of rent is a minimum lease maintenance standard. The proposal also restructures section 2.90(2)(B) for greater clarity and provides that any stock or seed obtained from wild sources needs to be taken in accordance with applicable season or size limits or any other limitations concerning take. In compliance with the National Shellfish Sanitation Program (NSSP) Model Ordinance (MO), the proposed rule adds surf clams to the list of species contemplated in 2.95(A)(4)(a) and a provision that would require Department permission for any other species not listed. This proposed rule updates lease and LPA marking requirements, so that by January 1, 2023, sites must be marked with yellow floating devices that host reflective material. The floating devices must display the lease or license identifier, and the words SEA FARM. The proposed marking changes also increase the distance between floating devices from 100 yards to 200 yards. Lease and LPA license sites that have received a Private Aid to Navigation permit from the U.S. Coast Guard are exempt from the proposed requirements but must still display the lease or license identifier and the words SEA FARM. It removes the limit on the number of helpers that may be designated for an LPA that is held by a municipal shellfish committee.

Date, time and location of PUBLIC HEARING (*if any*): January 5, 2022, 5:00 p.m., in-person at the Marquardt Building, room 118, 32 Blossom Lane, Augusta; or remotely via Microsoft Teams. Remote access information is posted to DMR's website under "Meetings." An alternate public hearing may be held on January 6, 2022 at the same time and format should the January 5th hearing be cancelled. Notice of a cancellation would be posted to DMR's website.

COMMENT DEADLINE: January 16, 2022. Written comments can be emailed, mailed, or faxed to DMR using the contact information below.

CONTACT PERSON FOR THIS FILING (*include name, mailing address, telephone, fax, TTY, e-mail*):

NAME: Amanda Ellis

MAILING ADDRESS: 21 State House Station, Augusta, Maine 04333-0021

E-MAIL: dmr.rulemaking@maine.gov

TELEPHONE: 207-624-6573

FAX: 207-624-6024

TTY: 207-624-6500 (Deaf/Hard of Hearing)

Hearing facilities: If you require accommodations due to disability, please contact Melissa Macaluso at 207-624-6553.

CONTACT PERSON FOR SMALL BUSINESS IMPACT STATEMENT (*if different*): Same

FINANCIAL IMPACT ON MUNICIPALITIES OR COUNTIES (*if any*): None

STATUTORY AUTHORITY FOR THIS RULE: §§ 6072, 6072-A, 6072-B, 6072-C

SUBSTANTIVE STATE OR FEDERAL LAW BEING IMPLEMENTED (*if different*): Same

AGENCY WEBSITE: <http://www.maine.gov/dmr/rulemaking/>

E-MAIL FOR OVERALL AGENCY RULE-MAKING LIAISON: dmr.rulemaking@maine.gov

2.15 Notice of Lease Application and Hearing

3. Notice of Public Hearing. At least 30 days prior to the date of the public hearing, the Department shall provide notice of the hearing as required by 5 M.R.S.A. §9052 and by mail to the following persons:

- A. Riparian owners as listed in the application;
- B. The applicant; and
- C. Any state agency the Department determines should be notified, including the Department of Environmental Protection when the application includes activities that have a discharge into the waters of the State, Department of Inland Fisheries and Wildlife, and the Department of Agriculture, Conservation and Forestry.

2.40 Lease Issuance

~~3. Compliance~~

~~Failure to maintain an escrow account or performance bond, to pay rental fees in a timely manner, or failure to comply with the terms of the lease, these regulations or any applicable laws shall be grounds for lease revocation.~~

2.44 Lease Amendments

1. The Commissioner shall not amend a lease in such a way that it materially alters the findings of the original decision, or would result in a change to the original lease conditions. Amendments may be requested only for leases issued under 12 MRSA §6072, or scientific leases issued under 12 MRSA §6072-A to add or remove species or gear type, or modify operations.
1. Requests for amending leases must be submitted on forms prescribed by the Commissioner. A fee of \$200 is due at the time of application for the lease amendment.
3. Procedure. A lease amendment is not an adjudicatory proceeding. The Department shall send a notice of the proposed amendment to the owners of riparian land within 1,000 feet of the lease site, and the municipal officers of the municipality in which the lease is located, and interested parties. The Department may also publish notice on the Department website. The notice shall state that the riparians and municipal ~~officials~~ officers may provide comments to the Department on the proposed amendment within 14 days of the date of the notice.

2.45 Lease Renewal

1. A lessee, on a form supplied by the Commissioner, may apply for Department approval of a lease renewal. A lessee must file with the Department an application to renew a lease at least ~~90~~ 30 days prior to the lapse of the lease. The application shall include a nonrefundable application fee of \$1,500. A lease issued for scientific research pursuant to 12 M.R.S.A. §6072-A is exempt from the renewal fee requirements in this section.

2.60 Lease Transfer

1. Application. A lessee, on a form supplied by the Commissioner, may apply for Department approval of the transfer of his aquaculture lease to another person for the remaining portion of the lease term. The lessee must pay the transfer fee of \$2,500 for non-discharge leases and \$5,000 for discharge leases prior to the execution of the new lease at the time application for the transfer is made. The Commissioner may waive the application fee if the applicant demonstrates that the transfer is to the applicant's parent, spouse, sibling or child. Multiple transfers of one lease that have the effect of circumventing the application fee are not permitted.
2. Procedure. A lease transfer is not an adjudicatory proceeding. The Department shall send a notice of the proposed transfer to the owners of riparian land within 1,000 feet of the lease site, and the municipal officers of the municipality in which the lease is located. The Department shall also publish a notice in a newspaper of general circulation in the area of the lease. The notice shall state that the public, riparians, and municipal ~~officials~~ officers may provide comments to the Department on the proposed transfer within 30 days of the date of the notice.

2.61 Lease Expansion

1. Application. A lessee may apply for Department approval of a lease expansion on a form supplied by the Commissioner. A lessee is eligible to apply for an expansion 2 years from the date the lease was originally executed. If a lease contains multiple tracts, the expansion must be proportional to each tract. The dimensions of the proposed expansion must be reasonably based on the original lease dimensions.
2. Fee. An application for lease expansion shall not be considered until a nonrefundable application fee has been paid. The application fee for a lease expansion is \$500 for non-discharge leases and \$2000 for discharge leases.
3. Procedure. A lease expansion is not an adjudicatory proceeding.
 - A. After the Department has deemed the application complete, the applicant shall publish a notice of the proposed expansion in a newspaper of general circulation in the area of the lease.
 - ~~B. The applicant~~ Department shall notify all riparian owners within 1,000 feet of the lease site, and the municipal officers of the municipality in which the lease is located ~~or by mailing a copy of the lease expansion application, after it has been deemed complete by the Department, by certified mail to the address certified by the municipal clerk or Bureau of Revenue Services, Unorganized Division for unorganized territory of the~~ completed lease expansion application. The notice shall provide the state that the public, riparians, and municipal officials officers with 30 days to provide written comments about the proposed expansion. ~~may provide comments to the Department on the proposed expansion within 30 days of the date of the notice. Failure to include a copy of the receipt for certified mailing with the application will be grounds for denial of the application.~~

2.64 Experimental Aquaculture Lease Application Procedures

4. Notice of Completed Application. At the time that an application is determined complete in accordance with Chapter 2.65 the Department shall make a copy of the completed application available to the known riparian owners within 1,000 feet of the proposed lease and to ~~officials~~ officers of the municipality or municipalities in which the proposed lease would be located, or the proposed lease abuts, as listed on the application.

2.75 Minimum Lease Maintenance Standards

1. The lessee shall mark the lease in a manner prescribed by section 2.80 or the Commissioner in the lease and ensure that all structures authorized by the lease remain within the boundaries of the lease.
2. The lessee shall maintain his aquaculture lease in such a manner as to avoid the creation of a public or private nuisance and to avoid substantial injury to marine organisms.
3. The lessee is obligated for the routine collection and proper disposal of all errant gear, errant equipment, or errant solid waste from the lease site.
4. In order to prevent adverse impact to public health, the lessee shall make lawful efforts to ensure animal excrement does not accumulate on or near structures.
5. The lessee is obligated to properly contain and dispose of human waste generated during lease operations.
6. The lessee must maintain a copy of the lease's operational plan, executed lease and any amendments thereto on file and produce these documents upon request by the Department.
7. The lessee must maintain an escrow account or performance bond and pay rental fees in a timely manner.

2.80 Marking Procedures for Aquaculture Leases

1. When required by the Commissioner in the lease, aquaculture leases shall be marked with a floating device, such as a buoy, which displays the lease identifier assigned by the Department and the words SEA FARM in letters of at least 2 inches in height in colors contrasting to the background color of the device. The marked floating device shall be readily distinguishable from interior buoys and aquaculture gear.
 2. The marked floating devices shall be displayed at each corner of the lease area that is occupied or at the outermost corners. In cases where the boundary line exceeds 100 yards, additional devices shall be displayed so as to clearly show the boundary line of the lease. In situations where the topography or distance of the lease boundary interrupts the line of sight from one marker to the next, additional marked floating devices shall be displayed so as to maintain a continuous line of sight.
- A. Effective January 1, 2023 the marking procedures for aquaculture leases are as follows:
1. Except for a lease site that has received a Private Aid to Navigation permit from the United States Coast Guard, aquaculture leases shall be marked with yellow floating devices, such as buoys, which display the lease acronym assigned by the Department and the words SEA FARM in letters of at least 2 inches in height in colors contrasting to the background color of

- the device. The yellow floating devices shall be displayed at each corner of the lease area that is occupied or at the outermost corners. The yellow floating devices shall be readily distinguishable from interior buoys and aquaculture gear and shall host reflective material. In cases where the boundary line exceeds 200 yards, additional devices shall be displayed so as to clearly show the boundary line of the lease. In situations where the topography or distance of the lease boundary interrupts the line of sight from one marker to the next, additional marked floating devices shall be displayed so as to maintain a continuous line of sight.
2. Sites that have received a Private Aid to Navigation permit from the United States Coast Guard must have the lease acronym assigned by the Department and the words SEA FARM clearly displayed on the site.
 3. When such marking requirements are unnecessary or impractical in certain lease locations, such as upwellers located within marina slips, the Commissioner may set forth alternative marking requirements in an individual lease.
 - ~~4. Lease sites must be marked in accordance with the United State's Coast Guard's Aids to Private Navigation standards and requirements.~~

2.90 Limited-purpose aquaculture (LPA) license

1. LPA License
 - C. Up to three (3) assistants per license may be declared as helpers. An individual may be listed as an assistant on no more than eight (8) LPAs, other than their own, except that individuals who were listed on more than eight (8) LPAs as of March 1, 2018 may remain on the same additional LPAs until December 31, 2020, at which point they will be limited to being an assistant on no more than eight (8) LPAs. If the LPA license holder represents an educational institution, students are authorized to work under the direct supervision of the license holder who signed the application, as well as any listed helpers. If the holder of the LPA license is a municipal shellfish management committee, there is no limit to the number of individuals that may be declared as helpers.
2. Application requirements
 - B. Sources

Applications must identify the source of the stock or seed to be cultivated or grown for each species, and for hatcheries or nurseries list the current name, address and phone number of the hatchery or nursery source for each species listed under 2.90(2)(A).

~~A. with the exception of stock or seed of Hard Clam / quahog (*Mercenaria mercenaria*), Hen Clam (*Spisula solidissima*), or Soft shelled clam (*Mya arenaria*). Hatcheries or nurseries are the only permitted sources for Hard clam/quahog (*Mercenaria mercenaria*), Hen clam (*Spisula solidissima*), or Soft shelled clam (*Mya arenaria*), these clam species, unless the Department issues a shellfish transplant permit that authorizes the collection of undersized animals.~~

B. Marine algae (all seaweeds such as reds, greens, browns or kelps) and green sea urchins shall be obtained or cultured from stock originating in Maine coastal waters.

C. Any stock or seed obtained from wild sources must be taken in accordance with applicable season or size limits, or other limitations on take.

D. All sources of hatchery supplied seed or stock must be from hatcheries approved by DMR.

E. All shellfish stock or seed used for cultivation or grow-out that have been exposed to waters outside of an approved hatchery must originate from within the same Health Area defined under 2.05 (1) (J) as the LPA site, unless permitted by DMR as provided in (F)

F. Use of shellfish stock or seed exposed to waters outside of an approved hatchery and originating from outside the Health Area of the LPA site will require evidence that the seed or stock is consistent with the species authorized under 2.90(4) and may require evidence that the seed or stock is free from disease, and will require a permit from DMR.

~~Applications must identify the source of the stock or seed to be cultivated or grown for each species, and for hatcheries or nurseries list the current name, address and phone number of the hatchery or nursery source for each species listed under 2.90(2)(A).~~

~~All sources of hatchery supplied seed or stock must be from hatcheries approved by DMR.~~

~~All wild shellfish stock or seed used for cultivation or grow out must originate from within the same Health Area defined under 2.05 (1) (J) as the LPA site.~~

~~Use of wild shellfish stock or seed originating from outside the Health Area of the LPA site will require evidence that the seed or stock is consistent with the species authorized under 2.90(4) and may require evidence that the seed or stock is free from disease, and will require a permit from DMR.~~

C. Site location

- (1) The application must provide ~~one (1)~~ geodetic coordinates ~~in degrees/minutes/seconds to the hundredths place~~, the coordinate source (nautical chart number, the edition and its date or software name) and the datum of the coordinate source, for the center of the longest axis of the license site, and identify the directional orientation of the longest axis. The license site must be accurately depicted on a portion of a US Geologic Survey Topographic map or nautical chart.

4. Authorized Species

An LPA license may be issued only for the cultivation of the following species: blue mussel (*Mytilus edulis*), hard clam / quahog (*Mercenaria mercenaria*), hen clam (*Spisula solidissima*), American or eastern oyster (*Crassostrea virginica*), European oyster (*Ostrea edulis*), sea scallop (*Placopecten magellanicus*), soft-shelled clam (*Mya arenaria*), razor clam (*Ensis leei*), green sea urchin (*Strongylocentrotus droebachiensis*), bay scallops (~~*Argopecten*~~ *Aequipeecten irradians*), and for marine algae (all seaweeds, including kelp). Notwithstanding 12 M.R.S.A. [§6001 \(41\)](#), for purposes of 2.90, the terms “shellfish” and “seed” include sea scallops (*Placopecten magellanicus*) and bay scallops (~~*Argopecten*~~ *Aequipeecten irradians*).

6. Maintenance Standards

- A. All aquaculture gear must be maintained, and kept in a fully operational condition. The license holder is obligated to collect and or remove any loose or errant gear or equipment that is dislodged from the licensed site.
- B. Each LPA site that has gear on it must be clearly marked at each corner, centerpoint, or at each end of the gear, as is appropriate to the gear type deployed, with a marked buoy. LPA Site ID and “Sea Farm” must be clearly displayed on every buoy. The marked buoys shall be readily distinguishable from aquaculture gear.
- ~~C. LPA license sites must be marked in accordance with the United States Coast Guard’s Aids to Private Navigation standards and requirements.~~

C. Effective January 1, 2023, the marking procedures for LPAs are as follows:

1. The LPA site ID and SEA FARM must be clearly marked on every buoy.

2. Except for a LPA site that has received a Private Aid to Navigation permit from the United States Coast Guard, each LPA site that has gear on it must be clearly marked at each corner, centerpoint, or at each end of the gear, as is appropriate to the gear type deployed, with a yellow buoy. The marked buoys shall be readily distinguishable from aquaculture gear and shall host reflective material.

2.95 Water Quality Classifications and Shellfish Aquaculture

A. Compliance

4. Seed Shellstock

- (a) Seed from growing areas in the prohibited classification must be moved to approved, conditionally approved, restricted or conditionally restricted growing areas before exceeding the maximum seed size as defined below. The length is measured along the longest axis.
 - i. American oyster (*Crassostrea virginica*): 0.5 inch total length
 - ii. European oyster (*Ostrea edulis*): 0.5 inch total length
 - iii. sea scallop (*Placopectin magellanicus*): 1.5 inch total length
 - iv. bay scallop (*Argopectin irradians*): 1 inch total length
 - v. softshell clam (*Mya arenaria*): 0.75 inch total length
 - vi. hard clam (*Mercenaria mercenaria*): 0.75 inch total length
 - vii. blue mussel (*Mytilus edulis*): 0.5 inch total length
 - viii. razor clam (*Ensis directus*): 2 inches total length
 - ix. Atlantic surf clam (*Spisula solidissima*): 0.5 inch total length
 - x. Arctic surf clam (*Macromeris polynyma*): 0.5 inch total length

Seed shellstock for any species not listed in A(4)(a) may not be cultivated in prohibited areas without written approval from the Department.

Aquaculturists growing seed in areas in the prohibited classification must have a Department approved operations plan that includes corrective actions for addressing seed exceeding the maximum size. The approved corrective actions shall be implemented when maximum seed size is exceeded. Failure to implement the approved corrective actions will result in destruction of the seed.

- (b) Seed for LPAs must meet the requirements of the Health Areas in Chapter 2.90(3)(D) and 2.05(1)(J).
- (c) Inspection: The Commissioner and his/her agents may inspect the lease site, seed, operations, and business records of individuals cultivating seed in areas in the prohibited classification.

Rule-Making Fact Sheet

(5 M.R.S., §8057-A)

AGENCY: Department of Marine Resources

NAME, ADDRESS, PHONE NUMBER OF AGENCY CONTACT PERSON:

Amanda Ellis, Department of Marine Resources, 21 State House Station, Augusta, Maine 04333-0021 Telephone: (207) 624-6573; web address: <http://www.maine.gov/dmr/rulemaking/>

CHAPTER NUMBER AND RULE: Chapter 2 Aquaculture

STATUTORY AUTHORITY: §§ 6072, 6072-A, 6072-B, 6072-C

DATE AND PLACE OF PUBLIC HEARING(S): January 5, 2022; in-person at DMR's Augusta office and remote via Microsoft Teams. January 6, 2022 may be utilized as an alternate date if the hearing on January 5, 2022 needs to be postponed.

COMMENT DEADLINE: January 16, 2022

PRINCIPAL REASON(S) OR PURPOSE FOR PROPOSING THIS RULE: [*see* §8057-A(1)(A)&(C)]

The purpose of this proposed rule is to provide compliance with recent statutory changes, to address feedback concerning aquaculture site marking requirements, and clarify that wild sources of stock or seed must be taken in compliance with existing laws.

IS MATERIAL INCORPORATED BY REFERENCE IN THE RULE? ___YES___X___NO [§8056(1)(B)]

ANALYSIS AND EXPECTED OPERATION OF THE RULE: [*see* §8057-A(1)(B)&(D)]

This rule is expected to provide greater clarity to LPA holders concerning source of stock, ensure consistency with recent statutory changes, and update marking requirements for aquaculture sites. The proposed changes to the marking requirements are intended to help improve the visibility of aquaculture sites and ensure that all sites are clearly marked with SEA FARM and the lease or license site identifier.

BRIEF SUMMARY OF RELEVANT INFORMATION CONSIDERED DURING DEVELOPMENT OF THE RULE (including up to 3 primary sources relied upon) [*see* §§8057-A(1)(E) & 8063-B]:

Consultation with Marine Patrol and staff in DMR's Bureau of Public Health, evaluation of the recent statutory changes, and the site marking requirements were developed from meetings held between DMR staff and a small group of harbor masters, fishermen, and aquaculturists in early 2021.

ESTIMATED FISCAL IMPACT OF THE RULE: [*see* §8057-A(1)(C)]

Enforcement of the proposed rule will not require additional activity in this agency. Existing enforcement personnel will monitor compliance during their routine patrols. Existing holders of aquaculture lease and LPA sites may have costs associated with coming into compliance with the new marking requirement. However, the proposed requirements would not become effective until January 1, 2023, which is intended to provide current site holders with the opportunity to prepare for compliance. This proposal was also developed with input from some aquaculturists.

FOR EXISTING RULES WITH FISCAL IMPACT OF \$1 MILLION OR MORE, ALSO INCLUDE:

*ECONOMIC IMPACT, WHETHER OR NOT QUANTIFIABLE IN MONETARY TERMS:
[see §8057-A(2)(A)]*

*INDIVIDUALS, MAJOR INTEREST GROUPS AND TYPES OF BUSINESSES AFFECTED AND HOW
THEY WILL BE AFFECTED: [see §8057-A(2)(B)]*

BENEFITS OF THE RULE: [see §8057-A(2)(C)]

Note: If necessary, additional pages may be used.