

**STATE OF MAINE  
DEPARTMENT OF MARINE  
RESOURCES**

**Hermit Island Oyster Company, LLC**

CAS CSHx

Experimental Aquaculture Lease Application  
Bottom Culture of American oysters  
Cape Small Harbor, Casco Bay, Phippsburg,  
Maine

August 6, 2020

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION**

Hermit Island Oyster Company, LLC applied to the Department of Marine Resources (“DMR”) for a three-year experimental aquaculture lease located east of Hermit Island, Cape Small Harbor, Phippsburg, Sagadahoc County. The proposed lease is 0.78<sup>1</sup> acres and is for the bottom culture of American oysters (*Crassostrea virginica*). DMR accepted the application as complete on December 5, 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 Phippsburg and its Harbormaster, and others on DMR’s mailing list. Notice of the application and comment period were published in the December 17, 2019 edition of the *Times Record*. The evidentiary record regarding this lease application includes the application, DMR’s site report dated July 6, 2020, and the case file. The evidence from each of these sources is summarized below.<sup>2</sup>

**2. DESCRIPTION OF THE PROJECT**

**A. Proposed Operations**

The applicant is proposing to culture American oysters using bottom culture techniques (App 4). According to the application, oysters would be placed directly on the bottom, and no gear is proposed for the site (App 4). Oysters would be planted during the summer season and harvested between the months of August and June (App 4). Harvesting will occur by hand,

---

<sup>1</sup> Applicant requested 0.76 acres. DMR calculations indicate the area is 0.78 acres.

<sup>2</sup> These sources are cited, with page references, as CF (case file), App (Application), SR (site report).

snorkeler or diver, rake, or tongs. Oysters will be sorted and graded on the applicants 18' boat, and the applicant plans to use a sorter/grader that runs off a 12-volt battery (App 6).

The proposed lease site is in a water quality area classified as “conditionally approved” by DMR’s Bureau of Public Health (App 2). Because of this, Hermit Island Oyster Company, LLC will not be allowed to harvest product from the lease when the conditional area is in a closed status. Alternatively, if Hermit Island Oyster Company, LLC wishes to be able to harvest from their lease while the area is closed, they must complete a containment reduction study, at their expense, and to DMR specifications. A condition reflecting this requirement will be included on the lease.

### **B. Site Characteristics**

The proposed lease occupies subtidal waters inside a secondary channel in Cape Small Harbor, leading to the locally-named Lobster House Cove (SR 2). Intertidal ledges leading to Small Point Hill and residential properties are located to the north/northeast of the proposal, channel waters and a small island at the entrance to Lobster House Cove are to the east/southeast, extensive tidally exposed flats, ledges and undeveloped shoreline are to the south/southwest, and channel waters of Cape Small Harbor and The Branch are located to the west/northwest (SR 2). DMR visited the proposed site on May 27, 2020, at 9:07 am. During their visit, depths at the corners of the proposed site ranged from less than 1 foot at the southeast corner of the site to ~4 feet at the northeast corner. The depth at the western boundary of the proposed site was ~2 feet during DMR’s visit. When correcting for tidal variation, depths are approximately 8.45 feet higher at the nearest high water and 0.03 feet lower at mean low water (SR 2). On the day of DMR’s visit to the site, low tide was predicated to occur at 8:54 am, with a depth of 0.03 feet above mean low water. At the time of DMR’s visit, the entire proposed lease site was subtidal (SR 2). According to the applicant, the bottom of the proposed site is a combination of mud, shell, and sand with some boulders (App 10). DMR’s site report noted that the bottom of the proposed lease site was comprised primarily of a mud-sand mix, with common periwinkle (*Littorina littorea*), blue mussel (*Mytilus edulis*), and European oyster (*Ostrea edulis*) shells and shell hash (SR 7).

### **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 DMR's site visit residential properties were observed to the north and east of the proposed lease site, and a dock and float were observed within the intertidal to the north of the boundary between the proposed site's northwest and northeast corners (SR 10). During the visit to the site, both the dock and float were inaccessible by water. Additional docks were observed to the east of the proposal, within Lobster House Cove (SR 10). DMR staff observed power and sail boats on moorings in Cape Small Harbor, the closest of which was ~265 feet to the east of the proposed lease site (SR 10). The site report notes that, while not observed during DMR's site assessment, aerial photography of the area and the application indicate that other moorings and work floats have been near the proposed lease site (SR 10). Because the applicant has requested to cultivate American oysters directly on the bottom of the proposed lease, there will be no floating or submerged gear to interfere with riparian ingress and egress. During the comment period, DMR did not receive any comments regarding riparian access. Based on the lack of public comments, and because the applicant is proposing to culture American oysters without the use of floating or submerged gear, it is reasonable to conclude that there are no concerns regarding the effects the proposed lease may have on riparian ingress and egress. It appears from this evidence that riparian ingress and egress will not be unduly affected by the proposed application.

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

#### **B. Navigation**

The proposed lease, if approved, would occupy nearly the entire channel connecting Cape Small Harbor and the Branch to Lobster House Cove (SR 10). At low tidal stages, this channel is the only navigable waterway between Lobster House Cove and open waters to the west (App 10). According to the application, and DMR's site report, commercial and recreational vessels regularly transit the area (SR 10, App 7.) However, because no gear is

proposed for the site, the proposed lease, if granted will not prevent navigation through the area. The channel is approximately 170 feet wide at mean low water, so there should be adequate room for vessels to navigate around any vessels or people working on the site for seeding or harvesting activities (SR 10). During the review period, DMR did not receive any comments regarding navigation. Based on the lack of public comments, and because the applicant is proposing to culture American oysters without the use of floating or submerged gear, it is reasonable to conclude that there are no concerns regarding the effects the proposed lease may have on navigation. It appears from this evidence that navigation in the area will not be unduly affected by the proposed application.

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

### **C. Fishing & Other Uses**

**Fishing.** During DMR's site visit on May 27, 2020, no fishing activity was observed within or near the proposed lease, but a single trap-style buoy was observed within the boundaries of the proposed lease (SR 10). DMR's site report notes that commercial shellfish harvest is expected to occur on the surrounding mudflats, and recreational hook and line fishing is also expected to occur within the area (SR 10). The application notes that lobster fishing occurs frequently within Small Point Harbor during summer months, but that the proposed lease location is not fished due to the depth (App 7). According to the applicant, clamming also occurs regularly in the adjacent intertidal areas, and recreational fishing occurs in Small Point Harbor (App 7). During the review period, DMR did not receive any comments regarding fishing. Based on the lack of public comments, and because the applicant is proposing to culture American oysters without the use of floating or submerged it is reasonable to conclude that the proposed aquaculture activities will not interfere with fishing.

**Exclusivity.** The applicant has not requested the prohibition of any activities within the boundaries of the lease site (App 9).

**Other aquaculture uses.** There are 7 Limited Purpose Aquaculture (LPA) licenses within 1 mile of the proposal (SR 11). Four of these LPAs are operated by the applicant. The closest LPAs to the proposed lease site not licensed to the applicant are more than 300 feet to the southwest of the proposal and are for the suspended culture of American and European oysters. Tidally exposed flats would separate these LPAs from the proposal, if granted (SR 11).

**Other water-related uses.** During the review period, DMR did not receive any comments detailing other water-related uses that are 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.

**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 data collected by DMR, the Maine Department of Environmental Protection and the Casco Bay Estuary Partnership indicate that, in 2013 and 2018, the nearest eelgrass to the proposed lease was approximately 3,900 feet to the north. During their May 2020 visit to the proposed site, DMR scientists did not observe any eelgrass within the boundaries of the proposal (SR 13).

During their visit to the site, DMR staff observed Canadian geese, gulls, cormorants, a great blue heron, snowy egrets, terns, piping plovers and sandpipers in the area of the proposed lease. According to the site report, the terns were actively diving for food in the shallow waters of the proposed site, while the egrets, plovers, and sandpipers were foraging on tidally exposed flats to the north, east, and south (SR 11). Except for when personnel are on the site for seeding and harvesting activities, the proposed lease, if granted, would remain free of obstructions or disturbance to waterfowl and shorebirds (SR 11).

DMR sent a copy of the application to the Maine Department of Inland Fisheries and Wildlife (MDIFW) for their review and comment. MDIFW commented that ‘minimal impacts to wildlife are anticipated for this project’.<sup>3</sup>

Based on the evidence that the proposed lease does not interact with historical eelgrass beds, and because DMR’s site report, and MDIFW’s response for review and comment 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.

---

<sup>3</sup> CF: email from R. Settele to C. Burke on January 10, 2020.

#### **E. Public Use & Enjoyment**

There are no beaches, parks, or docking facilities owned by municipal, state, or federal government within 1,000 feet of the proposed lease site.

**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 intends to source American oysters from Muscongus Bay Aquaculture in Bremen, Maine, or Mook Sea Farm in Walpole, Maine. These sources are approved by DMR.

**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, I conclude that:

1. 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, 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 0.78 acres to Hermit Island Oyster Company, LLC 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 lessee<sup>4</sup>; 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 cultivation of American oysters (*Crassostrea virginica*) using bottom culture techniques. The lessee shall pay the State of Maine rent in the amount of \$100.00 per acre per year. Because this is an experimental lease with no gear or structures and no discharge, a bond or escrow account is not required.

## **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 MSRA §6072-A (15)<sup>5</sup>. 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 purpose of the lease. The following conditions have been incorporated into the lease:

1. Because the lease is sited in a DMR Bureau of Public Health water quality area classified as “conditionally approved”, harvesting of product is prohibited when there area is closed. If the leaseholder wishes to be able to harvest product during closed periods, they must complete a containment reduction study, at their expense, and to DMR specifications.

---

<sup>4</sup> 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.”

<sup>5</sup> 12 MRS A §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: 8/06/2020



Patrick C. Keliher, Commissioner  
Department of Marine Resources