

Application for Change in Gear Authorization
Johns River, South Bristol

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION

Johns River Shellfish, LLC applied to the Department of Marine Resources (DMR) to add two work rafts on their existing standard lease JOHN NB3, located west of Peabow Island in the Johns River, in the Town of South Bristol in Lincoln County, Maine. Dave Cheney is the owner of Johns River Shellfish, LLC.

1. THE PROCEEDINGS

Notice of the application and the 14-day public comment period were provided to other state and federal agencies, riparian landowners, the Town of South Bristol and its Harbormaster, and others on DMR's mailing list. The evidentiary record before DMR regarding this lease amendment application includes the two exhibits listed below.

LIST OF EXHIBITS

1. Application for a change of gear authorization (App)
2. Original lease decision signed May 18, 2016 (Exhibit 2)

2. STATUTORY CRITERIA & FINDINGS OF FACT

Approval of standard 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 on an existing lease site provided the proposed changes are consistent with the findings of the original decision and lease conditions.

A. Original Lease Decision

A public hearing on the original lease application was held on December 7, 2015. In the original proceeding, some riparian landowners were concerned that the site would impact access to their shoreline and possible future development of a dock. Specifically, Sigrid and Heidi Sproul were concerned that floating gear proposed for the site would limit access to a portion of their shoreline opposite the

lease site (Exhibit 2, page 5). The Sprouls also felt this area was a prime location for a dock, if they decided to develop their shorefront land in the future (Exhibit 2, page 5).

After the public hearing, the record was kept open until January 8, 2016, to accept a possible agreement between the Sproul family and Mr. Cheney regarding access to the Sprouls' shoreline and construction of a potential dock¹ (Exhibit 2, page 6). On December 15, 2015, DMR sent an email to David Cheney, Heidi Sproul, and Sigrid Sproul that noted if a mutual agreement was reached it would likely lead to a condition that reflected the interests of Mr. Cheney and the Sproul family. If an agreement could not be reached, DMR would determine whether, based on the record, a lease condition would need to be imposed to mitigate any unreasonable interference with access.²

On January 7, 2016, Mr. Cheney, Cecil Burnham (South Bristol Harbormaster), Chester Rice (Selectman of South Bristol), and Sigrid and Robert Sproul met at the Sproul property to discuss access issues.³ On January 8, 2016, Mr. Cheney submitted an email to DMR, Sigrid Sproul, and the Town of South Bristol summarizing the outcome of the meeting. Mr. Cheney noted that it was decided an 85' x 150' access corridor would permit riparian access. Mr. Cheney proposed the access corridor as part of his revised plans and the email provided a written description of the location of the proposed access corridor, including a set of coordinates.

Mr. Cheney then noted that the access corridor would contain two shellfish rafts, bottom cages, and a boat mooring. If the Sproul family built a dock, the boat mooring would either be relocated within the boundaries of the site or moved outside the site. Mr. Cheney also attached a diagram, which he referred to as "Exhibit X."⁴ The diagram depicted the proposed gear set-up as described in the email. On January 11, 2016, Sigrid Sproul sent an email to DMR, which confirmed that the meeting had occurred on January 7, 2016 and that the email was her response to Mr. Cheney's proposed access corridor.⁵ Sigrid Sproul indicated that she had not seen "Exhibit X" until the January 7, 2016 meeting. Ms. Sproul wanted it made clear that her family has 85' of shore frontage and that they wanted recreational and boat access through the site regardless of any possible dock construction.

¹ CF: Email from D. Robinson to Dave Cheney, Sigrid and Heidi Sproul dated December 15, 2015

² CF: Ibid.

³ CF: Original Lease Application email from D. Cheney to D. Robison dated January 8, 2016; also see Exhibit 2, page 1.

⁴ According to the case file, "Exhibit X" is Figure 2 from the site report. "Exhibit X," which was submitted by Mr. Cheney was admitted into the record as Exhibit 7. CF: Response to Sigrid Sproul comments from April 23, 2016.

⁵ CF: Email from S. Sproul to D. Robinson dated January 11, 2016.

On April 12, 2016, DMR sent a copy of the proposed lease decision to Mr. Cheney and Sigrid Sproul for their review and comment.⁶ The proposed decision made the access corridor a condition of the lease site and was based on the description Mr. Cheney had provided to DMR and Sigrid Sproul. Based on Sigrid Sproul's response to the proposed decision, it appeared that she did not agree to the access corridor as proposed by Mr. Cheney in January 2016.⁷ On April 20, 2016, DMR received a letter from Cecil Burnham about the proposed decision. According to the letter, Mr. Burnham did not recall two floats being proposed in the corridor.⁸ Mr. Cheney wanted to keep the proposed access corridor and did not file any objections to the draft decision, which noted that two floats may be deployed in the access corridor.

After the review of the proposed decision ended, it became apparent that there was no agreement between Sigrid Sproul and Mr. Cheney concerning the access corridor. It also appeared that there was some disagreement or confusion about the type of gear proposed within the corridor. Absent a mutually agreed upon plan, DMR based any conditions upon information contained in the record. DMR found that the proposed operations met the criteria for granting a standard lease and, on May 18, 2016, issued a 2.6-acre standard lease (JOHN NB3) to Johns River Shellfish, LLC (Exhibit 2, page 15).

The standard lease decision authorized the culture of American oysters (*Crassostrea virginica*), European oysters (*Ostrea edulis*), hard clams/quahogs (*Mercenaria mercenaria*), and blue mussels (*Mytilus edulis*) using suspended and bottom culture techniques. The authorized gear types, on-site support structures, and equipment are as follows:

Gear Type	Description
Floating oyster cages	405 oyster cages (68" x 42" x 24) deployed in four parallel lines 30 feet apart.
Bottom cages	150 cages (30" x 30" x 4") Deployed on the bottom of the site.
Overwintering cages	30 cages deployed on the bottom of the proposed lease site.
On Site Support Structures	Description
Two Processing Rafts	One raft is 12' x 18' x 3' and contains a 10' x 10' x 10' building, tumbler, and recessed storage 6' depth; Attached to

⁶ Sigrid Sproul was not an intervenor in the matter. However, DMR sent a copy of the decision for her review given the issues around the access corridor.

⁷ CF: Response to Sigrid Sproul comments from April 23, 2016.

⁸ CF: Letter from C. Burnham to D. Robinson received on April 20, 2016.

	the raft is a float of similar size to store market sized shellfish
Power Equipment	Description
Hydraulic sorter	Powered by a 10 h.p. Honda engine, which has a second muffler installed "downstream" of the factory installed Honda muffler.
Pressure washer	Gas powered, used on the site after 8:00 a.m. and occurs only every four to six weeks.

Per the lease decision, Mr. Cheney requested that the 2.6 acres be combined with JOHN NB2, a 4.2-acre standard lease issued on February 8, 2012 to Johns River Oyster, LLC (Exhibit 2, page 14). Johns River Oyster, LLC was renamed Johns River Shellfish, LLC, but the prior company was also owned by Mr. Cheney (Exhibit 2, page 14). The 4.2-acre site is in the North Branch of the Johns River and is issued for the culture of American and European oysters and hard clams/quahogs using bottom culture techniques (Exhibit 2, page 14).

In evaluating Mr. Cheney's request, DMR found that because the two sites were located near each other in the same body of water and were part of the same aquaculture operation, they could be combined under JOHN NB3 (Exhibit 2, page 14). Under the combined lease, JOHN NB2 became the "north tract" and the 2.6-acre site became the "south tract" (Exhibit 2, page 14). The term of the combined lease, now JOHN NB3, was limited to the remainder of the term of JOHN NB2, which expires on February 7, 2022 (Exhibit 2, page 14).

B. Access Corridor, Original Lease Conditions

The final decision found that the access corridor would benefit the public by facilitating navigation to and from the shore and intertidal areas around the site (Exhibit 2, page 6). The decision also found that the corridor would benefit the Sproul family and other riparian owners by providing a direct route across the site to their shoreline (Exhibit 2, page 6). Therefore, the decision placed a condition on the lease that required an 85-foot by 150-foot access corridor. The corridor could contain two work floats, a boat mooring, and oyster cages on the bottom (Exhibit 2, page 14).

The lease conditions on JOHN NB2 were incorporated into JOHN NB3. The complete list of conditions, including the access corridor, imposed on lease JOHN NB3, pursuant to 12 M.R.S.A § 6072 (7-B) are as follows:

1. The lease site must be marked in accordance with both U.S. Coast Guard requirements and DMR Rule 2.80.
2. The lessee must maintain an 85-foot by 150-foot access corridor across the south tract of the lease site. The lessee may place two work floats, a boat mooring, and oyster cages on the bottom within the corridor. All oyster bags and similar gear must be marked with the lessee's name and contact information.
3. Dragging and shellfish harvesting, except by the leaseholder or its authorized agents are prohibited on the lease site.
4. When harvesting by drag on the north tract, the lessee must maintain a lookout for approaching vessels, promptly communicate to them his intent to provide a safe corridor for their passage and do so at the soonest practicable time.
5. The Department may, in its sole discretion, review the lease to determine whether additional "reasonable measures" need to be taken "to mitigate noise impacts from the lease activities" during the term of the lease. Should the addition of noise reduction measures be determined reasonable and appropriate by the Department, in its sole discretion, the lease will be amended to include further conditions requiring the implementation of those measures.
6. Other public uses that are not inconsistent with the purposes of the lease are permitted within the lease boundaries.

C. Proposed Gear Changes and Findings

As previously noted, there is an 85-foot by 150-foot access corridor across the south tract of the lease site, which contains two existing rafts. Johns River Shellfish, LLC is requesting authorization to add two additional work rafts to the access corridor, adjacent to the existing floats. Each raft would measure 22' x 14' x 3' (App 5). One raft would contain a 10' x 6' x 10' enclosed structure to store a sorting table, and a 3' x 3' x 10' structure for a sanitary facility (App 4). An 8' tall lobster wire fence would run along the north and east side of the raft for air-drying fouled gear (App 4). The other raft would serve as an additional work area for the loading and unloading of gear (App 2).

According to the application, no additional gear or other equipment is proposed for the site (App 3). The operations would remain the same, but the additional floats would help streamline existing operations by providing additional work space (App 3). However, if the amendment is granted, the application also indicates that an existing tumbler motor would be moved to one of the proposed rafts in order to build an engine box to reduce the noise levels on the site (App 3).

During the comment period, several individuals wrote to DMR expressing concerns about existing site operations, including the current level of noise. The comments also raised questions related to the design of the proposed sanitary facility, and what impacts the site and certain elements of the amendment request, if granted, would have on property values. Some commenters questioned how the extra noise and activity might impact wildlife. Several of the individuals who submitted questions indicated that they were at the original hearing, or that they were riparian landowners.

DMR also received a comment from Cecil Burnham, South Bristol Harbormaster. The comment specifies that the corridor currently allows for passage through the lease site.⁹ Mr. Burnham felt that the lease holder should not be allowed to deploy additional gear in the corridor. Mr. Burnham further indicated that the area is sensitive to nearby landowners and that he had been contacted by at least one riparian landowner about the request.

Discussion:

In evaluating lease amendment requests, Chapter 2.44(1) of DMR's regulations specify that an amendment cannot materially alter the findings of the original decision or change the original lease conditions. Chapter 2.44(4) further specifies that the amendment cannot violate any of the lease issuance criteria set forth in 12 M.R.S.A. §6072(7-A) and must be consistent with the Commissioner's findings on the underlying lease application in accordance with Chapter 2.37(A).

The lease is currently conditioned so that the lease holder must maintain an 85-foot by 150-foot access corridor across the south tract of the lease site. The condition lists the gear that is allowed within the access corridor as including two work floats, a boat mooring, and oyster cages on the bottom within the corridor. The applicant is proposing to add two additional floats within the access corridor. The proposed floats are 22' x 14' x 3,' which are longer than the floats currently permitted within the corridor (12' x 18' x 3').

The access corridor and permitted gear within that area were part of the original record and were proposed, in part, to alleviate some of the concerns raised at the public hearing by riparian landowners. Two more rafts within the access corridor would likely exacerbate concerns raised by landowners and the Harbormaster when the original lease was under consideration. DMR conditioned the lease to include the access corridor and associated gear within that area to mitigate some of the issues identified by the Sproul family and other riparian landowners. Since the purpose of the condition, in part, was to mitigate the

⁹ CF: Letter from C. Burnham to DMR received March 10, 2020

potential for interference with riparian access, allowing more gear would contradict the purpose of such a condition.

Furthermore, the condition expressly limited the number of floats within the corridor to two. The addition of more floats may adversely impact the intended functionality and benefit of the access corridor. For example, there would be less open space available for navigation, which can limit accessibility through that specific area. Again, this is an outcome that is contrary to the intent of the condition itself. The intent or purpose of the condition aside, the access corridor is expressly conditioned to allow two floats. If the amendment request were granted, four rafts would be deployed within the access corridor. This would violate a condition of the original lease, which limits the number of floats in the access corridor to two.

Therefore, for the reasons described above, the amendment request would result in a change to the original lease conditions and would be inconsistent with findings in the original decision as they relate to the access corridor.

3. DECISION

The Commissioner denies the amendment request from Johns River Shellfish, LLC to add two floats to the access corridor on the southern tract of JOHN NB3.

Dated: _____

7/17/2020



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