

**STATE OF MAINE
DEPARTMENT OF MARINE RESOURCES**

Experimental Aquaculture Lease Application
Suspended culture of American/eastern oysters
Wheeler Bay, St. George

**Maude Robin McCoy
and
James W. Balano, III**

PEN WBx

January 30, 2019

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION

Maude Robin McCoy and James W. Balano, III applied to the Department of Marine Resources for an experimental aquaculture lease totaling 1.98 acres¹ located in a small cove in Wheeler Bay², St. George, Knox County, Maine, for the cultivation of American/eastern oysters (*Crassostrea virginica*) using suspended culture techniques. DMR accepted the application as complete on June 5, 2018. 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 was provided to state and federal agencies, riparian landowners, the Town of St. George, and others on the Department's mailing list. Notice of the application and comment period was published in the *Courier Gazette* on June 14, 2018.

The evidentiary record before the Department regarding this lease application includes the application, the Department's site report dated January 24, 2019, and the case file. The evidence from these sources is summarized below.³

2. DESCRIPTION OF THE PROJECT

A. Proposed Operations

The purpose of the proposed lease is to explore the commercial feasibility of increasing the density of oysters grown within a small cove located in Wheeler Bay (App 6). The applicants intend to cultivate oysters using floating flip bags, which would be configured in a line down the center of the cove. The applicant is proposing to tether the gear to the shoreline with rope, to

¹ Applicant originally requested 2.05 acres. DMR calculations in the site report, based on the provided coordinates, indicate the area is 1.98 acres.

² Referred to as "Wheeler's Bay" in application.

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

ensure that, at low water, the proposed gear settles in the narrow channel of water that runs down the center of the cove (App 13 & SR 5). The site would be visited daily for routine maintenance (App 6). Between December 15th and March 31st of each year, the applicants propose to remove gear from the site (App 7).

B. Site Characteristics

On January 11, 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 within the upper section of a small cove located northwest of Harrington Cove, in Wheeler Bay (SR 2). According to aerial photographs, most of this cove drains at low tide, leaving only a narrow meandering channel of water (SR 4). The shoreline of the small cove is comprised of rock and sections of marsh grass (SR 2). Houses and a mixed forest are located on the surrounding uplands (SR 2). A single house, with a set of stairs leading from the uplands to the shoreline, is located immediately east of the proposed lease (SR 2).

The boundary of the proposed lease is located in close proximity to the highwater line in the upper section of the small cove (App 5). Per page 5 of the site report:

To determine the proposed lease area's location in reference to the mean highwater mark, MDMR staff observed the extent of the previous high tide, which was predicted to be 8.62 feet in height. Coordinates taken along this 8.62-foot highwater line indicate the west side of the proposed lease is located less than five feet above the highwater line... MDMR staff were unable to access the east side of the cove, and therefore no coordinates were taken along the eastern shore's highwater line.

To address the unique nature of this application, which includes boundaries that may be located above the coastal waters⁴ of the state, and therefore beyond the extent of the Commissioner's leasing authority pursuant to 12 MRSA §6072-A(1), the rights conveyed in this lease will only extend to the highwater mark. A condition reflecting this will be included in the lease.

The proposed area is classified by the Department's Water Quality program as approved for the harvest of shellfish (App 1).

⁴ In accordance with 12 MRSA §6072-A(1) The Commissioner may "issue a limited-purpose lease for areas in, on and under the **coastal waters**" (emphasis added). 12 MRSA §6001 (6) defines "Coastal Waters" as:

"[A]ll waters of the State within the rise and fall of the tide out to the limits of the exclusive economic zone as shown on the most recently published Federal Government nautical chart, but it does not include areas above any fishway or dam when the fishway or dam is the dividing line between tidewater and freshwater."

C. Landowner and Municipal Permissions

Documents included in the application indicate that lease co-applicant Maude Robin McCoy holds title to the intertidal area on which the proposed lease is located, along with a five-foot parcel extending inland from the highwater mark and around the small cove (App 28-38). Maude Robin McCoy granted written permission for the proposed lease operations to occur on her property, as is required for intertidal lease applications by DMR Rule 2.64 (2)(C)(6) (App 27). Municipal consent to the proposed lease was granted by the Chair of the St. George Select Board on May 17, 2018, as is required by 12 M.R.S.A. §6072-A(11) (App 26).⁵

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 upon determining that the project will not unreasonably interfere with the ingress and egress of riparian owners; with navigation; with fishing or other uses of the area, taking into consideration the number and density of aquaculture leases in an 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 for the lease site.

A. Riparian Access

During MDMR's site visit, no docks or moorings were observed within the northern section of the small cove, in which the proposed lease is located (SR 7). A house, with a stairway leading from the uplands to the shoreline, was observed to the east of the proposed lease (SR 7). Per the site report: "the use of this stairway should not be impeded by the proposed lease" (SR 7).

A pier is located south of the small cove, and over 450 feet from the proposed lease (SR 7). Due to its' location outside of the small cove in which the proposed lease is located, it is "unlikely that access to and from this pier will be hindered if the proposed lease is granted" (SR 7). According to the St. George Harbormaster, the application does not interfere with the ingress or egress of riparian owners located within 1,000 feet of the proposed lease.⁶

⁵ This provision specifies: "In any municipality with a shellfish conservation program under section 6671, the commissioner may not issue a limited purpose lease under this section for the intertidal zone within the municipality without the consent of the municipal officers."

⁶ CF: Harbormaster Questionnaire dated June 12, 2018.

During the review period, the Department did not receive any other comments concerning riparian ingress or egress. Based on the absence of comments it is reasonable to conclude that there are no concerns about the effects the proposed site may have on riparian ingress and egress. It appears from the evidence provided in the site report, the harbormaster's statement, and the lack of public comment, that riparian ingress and egress will not be unduly affected by the proposed lease application.

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

B. Navigation

At higher tidal stages, the proposed gear would be oriented in a long, thin tract located in the center of a small cove in northern Wheeler Bay (App 13 & SR 8). At low tide, the cove drains almost entirely, leaving only a narrow channel of water; aquaculture gear is proposed to occupy the entirety of this channel (App 13).

According to the site report, navigation into the cove is limited by boulders and ledge (SR 8). Per the site report:

At higher tide stages, when small boats could navigate into the cove, floating gear would populate a long and skinny tract in the cove's center. According to the application, these tracts would be held in place with sink rope attached to the shoreline. It appears, therefore, that depth-appropriate vessels would be able to navigate over these sinking ropes, if the lease were granted.

At lower tidal stages, navigation within the upper section of the cove is not supported by the width and depth of channel that remains (SR 8). According to the St. George Harbormaster, the proposed activities do not interfere with navigation in designated channels.⁷

During the review period, the Department did not receive any comments from members of the public concerning navigation. Based on the absence of public comments it is reasonable to conclude that there are no concerns about the effects the proposed site may have on navigation. Considering the existing restrictions to navigation in the proposed lease area and the harbormaster's statement indicating that the proposed lease does not interfere with navigation in designated channels, it appears that navigation in the area will not be unduly affected by the proposed lease application.

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

⁷ CF: Harbormaster Questionnaire dated June 12, 2018.

C. Fishing & Other Uses

Fishing and other uses. During the site visit on January 11, 2019, no commercial or recreational fishing activities were observed in the vicinity of the proposed lease (SR 8). According to the St. George Harbormaster, commercial and recreational fishing within the area of the proposed lease are “non-existent”.⁸ Per page 8 of the site report: “It is likely that the natural constraints to navigation, and the fact that most of the proposed lease site drains at low tides, limit the commercial and recreational uses of the area.”

According to the site report, “fishing or fowling that might occur within the intertidal area encompassed by the proposed lease, would not be prevented if the proposed lease were to be granted” due to the fact that, at low water, rope tethers are the only gear proposed to span the intertidal zone (SR 8 & App 13). The site report indicates that individuals could “step over or under these ropes” when utilizing the proposed intertidal area (SR 8).

During the review period, the Department did not receive any comments from fishermen or other user groups regarding the lease proposal. Given the harbormaster’s statement indicating a lack of commercial and recreational fishing in the area of the proposed lease, the evidence that fishing or fowling within the intertidal area of the proposed lease would not be prevented by the proposed activities, and the absence of public comments expressing concerns regarding interference with fishing or other uses of the area, it is reasonable to conclude that the proposed lease is unlikely to unreasonably affect fishing activities or other uses of the area.

Other aquaculture leases. There are eight active Limited Purpose Aquaculture (LPA) licenses within one mile of the proposed lease, all of which are held by the lease applicants (SR 8).⁹ Based on this evidence, it appears that the proposed lease will not unreasonably interfere with other aquaculture uses in the area.

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

Site Observations. During the site visit, MDMR staff observed mallard ducks (*Anas platyrhynchos*) in the vicinity of the proposed lease site (SR 9). Based on historical eelgrass (*Zostera marina*) data collected in 2005, the nearest documented eelgrass bed was more than 700 feet to the south of the proposed lease (SR 10).

⁸ CF: Harbormaster Questionnaire dated June 12, 2018.

⁹ The lease applicants also have a second application pending DMR’s review within one mile of this proposed lease.

Fisheries and Wildlife. Data maintained by MDIFW, indicates that the proposed lease overlaps with Tidal Wading Bird and Waterfowl Habitat, which is defined under Maine's Natural Resources Protection Act (NRPA) as Significant Wildlife Habitat (SR 9). The Department sent a copy of the lease application to MDIFW for their review and comment. MDIFW indicated “minimal impacts are anticipated”.¹⁰

Based on the lack of eelgrass beds within the proposed lease site and the comments received from MDIFW, which did not object to the proposed lease or describe any significant interference that the proposal might have on the surrounding wildlife, it appears that the proposed lease activities will not 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

There are no beaches, parks, or docking facilities owned by federal, state, or municipal government within 1,000 feet of the proposed lease site (SR 11).

Therefore, 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.

F. Source of Organisms

Seed stock for this proposed lease site will be obtained from Muscongus Bay Aquaculture, in Bremen, Maine (App 2). This is an approved source of seed stock.

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

4. CONCLUSIONS OF LAW

Based on the above findings, I conclude that:

- A. The aquaculture activities proposed for this site will not unreasonably interfere with the ingress and egress of any riparian owner.
- B. The aquaculture activities proposed for this site will not unreasonably interfere with navigation.

¹⁰ CF: Email from J. Perry MDIFW Environmental Review Coordinator, dated June 19, 2018.

- C. 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.
- D. 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. 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.
- F. The applicant has demonstrated that there is an available source of American/Eastern oysters (*Crassostrea virginica*) 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 approximately 1.98 acres to Maude Robin McCoy and James W. Balano, III, 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 lessee¹¹; however, no aquaculture rights shall accrue in the lease area until the lease is fully executed. The lease granted pursuant to this decision is limited to areas that are within Maine coastal waters. To the extent the lease boundaries, as proposed by the applicant, are located outside coastal waters, the lease shall be reduced to only those areas that are within coastal waters.

This lease is granted to the lessee for the cultivation of American/Eastern oysters (*Crassostrea virginica*) using suspended culture techniques. 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 (10) (D) in

¹¹ 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.”

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)¹². 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:

- A. The lease site must be marked in accordance with both U.S. Coast Guard requirements and DMR Rule 2.80.
- B. Other public uses that are not inconsistent with the purposes of the lease are permitted within the lease boundaries.
- C. The rights conveyed in this lease extend only to areas in, on, or under the coastal waters¹³, to which the Commissioner's leasing authority extends pursuant to 12 MRSA §6072-A(1). The placement of gear outside of coastal waters is not covered by this lease.

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: January 30, 2019



Patrick C. Keliher, Commissioner,
Department of Marine Resources

¹² 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."

¹³ In accordance with 12 MRSA §6072-A(1) The Commissioner may "issue a limited-purpose lease for areas in, on and under the **coastal waters**" (emphasis added). 12 MRSA §6001 (6) defines "Coastal Waters" as:

"[A]ll waters of the State within the rise and fall of the tide out to the limits of the exclusive economic zone as shown on the most recently published Federal Government nautical chart, but it does not include areas above any fishway or dam when the fishway or dam is the dividing line between tidewater and freshwater."