

STATE OF MAINE
DEPARTMENT OF MARINE RESOURCES
Experimental Aquaculture Lease Application
Suspended culture of oysters
Damariscotta River, Newcastle

George Faux
DAM GPx
Docket #2017-10-E

November 15, 2017

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION

George Faux applied to the Department of Marine Resources (“DMR”) for an experimental aquaculture lease on 0.87 acre¹ located in the Damariscotta River, northeast of Glidden Point, Newcastle, Lincoln County, for the cultivation of American oysters (*Crassostrea virginica*) using suspended culture techniques. DMR accepted the application as complete on July 25, 2017. 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 which were requested to review the project, as well as to riparian landowners, the Town of Newcastle and its Harbormaster, members of the Legislature, representatives of the press, aquaculture and environmental organizations, and others on the Department’s mailing list. Notice of the application and comment period was published in the *Lincoln County News* on August 10, 2017.

The evidentiary record before the Department regarding this lease application includes the application and the Department’s site report dated October 23, 2017, as well as the case file. The evidence from these sources is summarized below.²

2. DESCRIPTION OF THE PROJECT

A. Proposed Operations

The purpose of the proposed lease site is to expand the applicant’s commercial production of oysters using a combination of suspended cages and floating bags (App 3). The applicant proposes to deploy up to six longlines, which would contain a maximum of 150 cages and 200 plastic mesh bags (App 3). The maximum cage size measures 42” wide by 10” deep by 66” long, and the plastic mesh bags measure 24” wide by 4-5” deep by 30” long (App 5). The applicant intends to use the shallower western 1/3rd of the proposed site for the deployment of floating bags, which will primarily contain seed stock (App 3, SR 7). The applicant will flip the cages and bags on a bi-weekly basis to control fouling (App 3). The

¹ The proposed area was reduced to 0.57 acre by DMR to accommodate documented eelgrass beds.

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

oysters will be harvested by hand April through November (App 3). During the winter season, December through March, all oysters will be placed into cages and submerged on the bottom of the proposed lease site (App 3). The applicant plans on using the deeper portion of the proposed lease site to overwinter the cages (App 3). The applicant intends to access the proposed site by boat, which will be launched from his personal property (App 2).

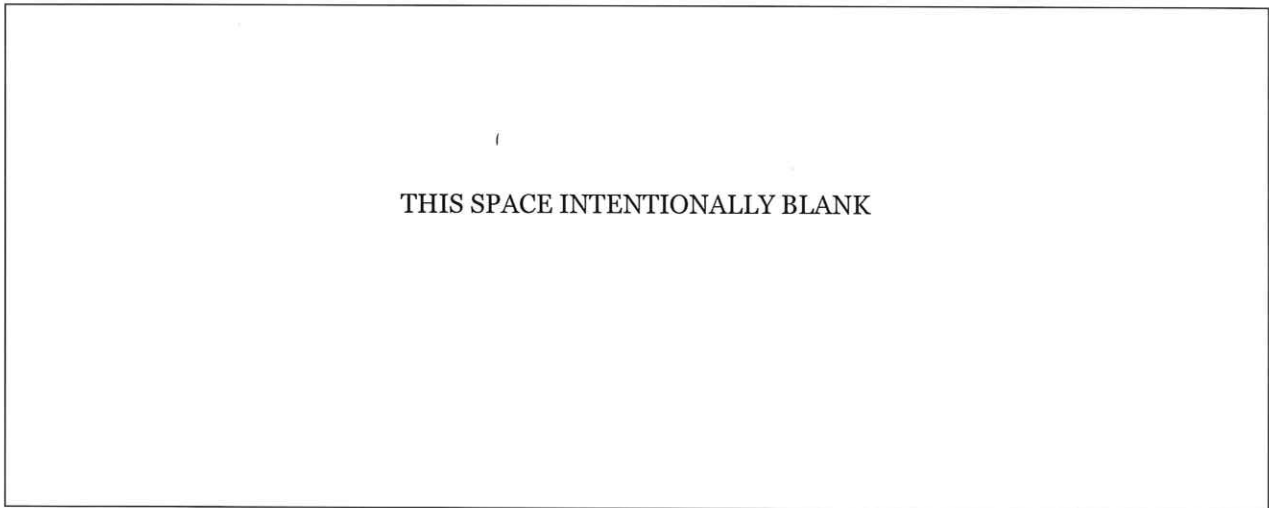
B. Site History

Mr. Faux holds two Limited Purpose Aquaculture Licenses (LPAs) within the boundaries of the proposed lease site (App 3). The LPAs were originally granted in 2014 for the cultivation of American oysters (*Crassostrea virginica*) using suspended culture techniques. Since their issuance, the LPAs have been renewed each year. Mr. Faux plans to terminate the LPAs if the lease is granted (App 3).³

C. Site Characteristics

On September 8, 2017, 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 lease site occupies “subtidal waters between the Great Salt Bay to the north and the US Route 1 bridge to the south” (SR 2). The upland is characterized by rocky intertidal areas and steep banks that give way to mixed, mature forest (SR 2). During the site visit, tidal heights were predicted at 0.43 feet below mean water (SR 6). The proposed site is situated along the southern edge of a channel (App 5). The site report notes: “water depths are generally uniform until the channel edge, at which point depths increase dramatically along a sloping mud bank” (SR 11). At low water, recorded depths ranged from 1 foot along the western boundary to more than 10 feet along the eastern boundary (SR 7). At low water, the distance from the SW/MW boundary of the proposed lease site to the nearest point of land is <30 feet (SR 8).



³ Faux 114 and Faux 214

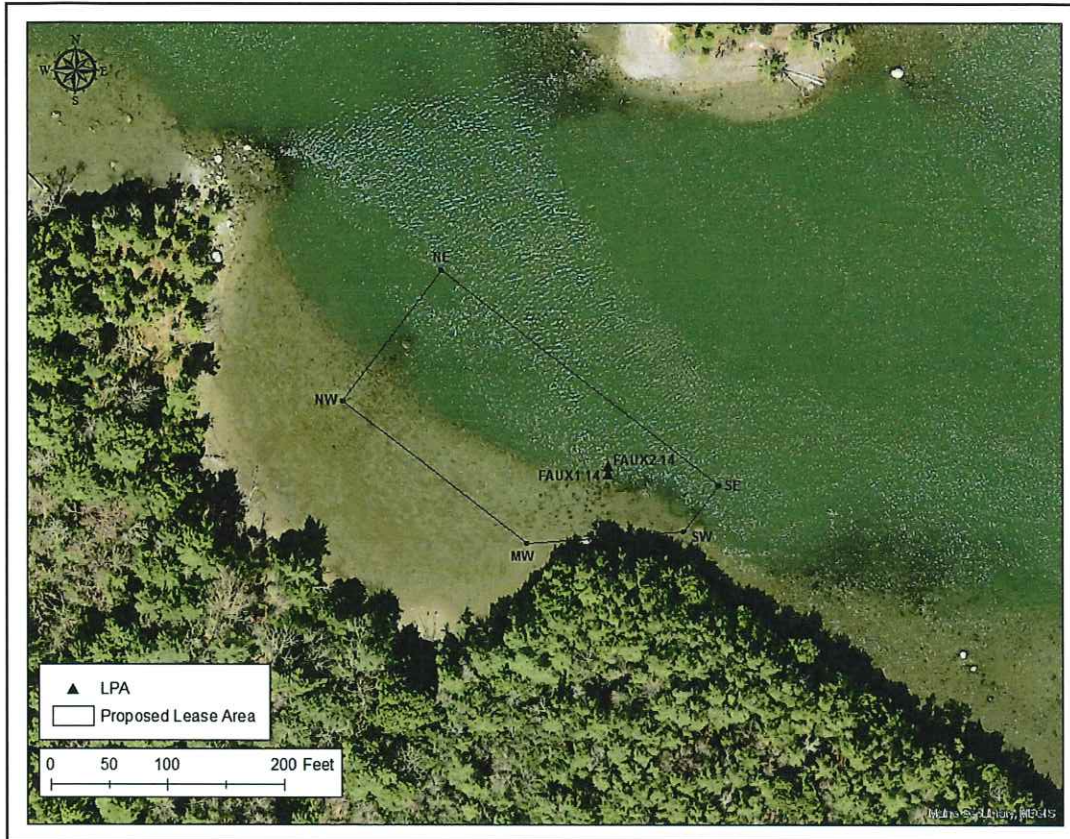


Figure 1: Depicting the proposed lease boundaries with labeled corners. The map also includes the applicant’s existing LPAs, which are located within the boundaries of the proposed lease area.

The bottom of the proposed lease site varies between rocky substrate and mud with scattered boulders (SR 11). The current speed is approximately 1.5 knots (App 4).

The proposed lease is in an area currently classified by the Department of Marine Resources Water Quality Classification program as “conditionally approved” for the harvest of shellfish (SR 8). The site report notes “the harvest of shellfish from this area will be prohibited during any malfunction at The Great Salt Bay Sanitary District Damariscotta Mills facility” (SR 8).

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 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

The Damariscotta River Association (DRA), a nonprofit conservation land trust, is the only riparian landowner within 1,000 feet of the proposed lease site (App 3, SR 9). During the site assessment DMR staff, did not observe any docks or moorings within the vicinity of the proposed lease (SR 9).

Accordinging the site report:

The surrounding uplands are dominated by steep wooded banks leading from the adjacent shoreline. The topography of the adjacent shorefront is expected to hinder even hand-carry access by individuals using the DRA properties (SR 9).

No comments were received from the DRA regarding the proposed lease site. Activities at the lease site in subtidal waters are unlikely to hamper access to and from the shore.

Therefore, I find that 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 site “occupies the western ~45-130 feet of the navigation channel between Glidden Point to the south and the Great Salt Bay to the north” (SR 9). Per the site report, “more than 230 feet of navigable waters of sufficient depth would remain to the east for any vessels that can access the general area” (SR 9). Given natural constrictions, vessel traffic within the area is limited to a combination of small outboard skiffs, and non-motorized watercraft (i.e. canoes, kayaks, etc.) (SR 9).

During the review period, DMR did not receive any comments from the Newcastle Harbormaster. Based on the absence of comments, it is reasonable to conclude that the Newcastle Harbormaster does not have any concerns about navigation.

It appears from this evidence that navigation in the area will not be unduly affected by the presence of the proposed lease site.

Therefore, I find that the aquaculture activities proposed for this site will not unreasonably interfere with navigation. The lease site must be marked in accordance with U.S. Coast Guard requirements.

C. Fishing & Other Uses

The applicant notes that “there is some use of the surrounding area by kayakers, small fishing boats, and other leases within the area” (App 3). Based on information maintained by the DMR Recreational Fisheries Program, fishing for striped bass (*Morone saxatilis*) occurs in the area (SR 9). The site report describes the following:

On September 8, 2017 one individual in an outboard powered vessel was observed hook and line fishing in the channel to the east of the proposed lease. No evidence of commercial fishing activity was observed during the Department’s site assessment (SR 9).

Recreational fishing and kayaking would be permitted within the proposed lease boundaries (App 4). No comments were received with regards to fishing and other uses of the area.

It appears from this evidence that the proposed lease site is unlikely to affect fishing in the area.

Exclusivity. The applicant is not requesting exclusive use of the proposed area.

Other aquaculture leases. Including the two LPA licenses held by Mr. Faux, there are six LPAs and three leases within one mile of the proposed site (SR 10). The closest aquaculture site, other than the LPAs held by Mr. Faux, is a standard lease located ~140 feet to the southeast and is authorized for the suspended and bottom culture of American oysters, European oysters (*Ostrea edulis*), and hard clams (*Mercenaria mercenaria*)⁴ (SR 10). Since the proposed lease represents a modest expansion of an existing aquaculture site, it is reasonable to conclude that the proposed operations are unlikely to negatively affect existing aquaculture activities in the area. In addition, the Department sent notice of the application to leaseholders within 1,000 feet of the proposed site and no comments were received.

Based on this evidence, it appears that the proposed lease will not unreasonably interfere with fishing or other uses of the area. The lease must be marked in accordance with DMR Rule 2.80⁵

Therefore, considering the number and density of aquaculture leases in the area, I find that the aquaculture activities proposed for this site will not unreasonably interfere with fishing or other uses of the area.

D. Flora & Fauna

Site Observations. During the site visit, Department staff observed a variety of flora and fauna including filamentous algae (*Chaetomorpha spp.*), bushy red weeds (*Gracilaria spp.*, *Agardhiella spp.*, *Ceramium spp.*), and razor clams (*Ensis directus*).⁶ Department staff also identified eelgrass (*Zostera marina*) within the western 1/3rd of the proposed lease site (SR 16). To prevent aquaculture gear from being deployed over the eelgrass meadow and ensure compliance with the 25-foot setback required by the Army Corps of Engineers, the western boundary of the proposed lease site will be shifted 55 feet to the northeast (SR 16). This will reduce the total size of the proposed site from the requested size of 0.87 acre to 0.57 acre.

⁴ DAM GS2

⁵ **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.
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.

⁶ For a complete list of observed species see page 12 of the site report.

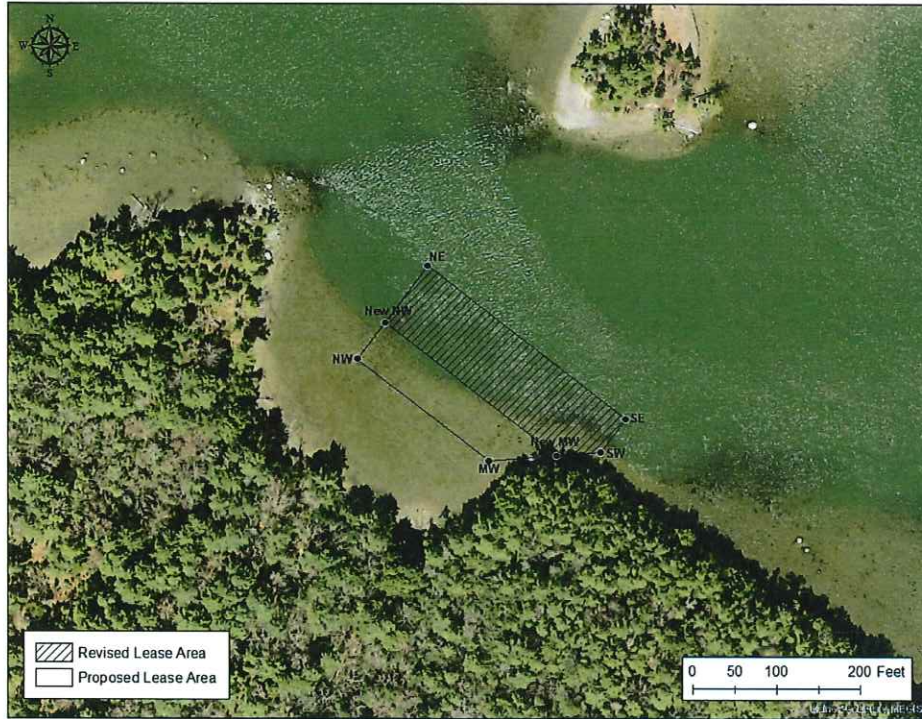


Figure 2: Depicting the revised lease area to accommodate an eelgrass meadow.

Fisheries and Wildlife. DMR sent a copy of this lease application to the Maine Department of Inland Fisheries and Wildlife (MDIFW) for their review and comment. MDIFW noted that “minimum impacts to wildlife may be anticipated.”⁷

Given that the boundaries of the site will be shifted 55 feet to the northeast to accommodate the eelgrass meadow, it appears that the culture of oysters as proposed for this lease site will not interfere with the ecological functioning of the area.

Therefore, I find that 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

According to the site report, there are no public docking facilities or beaches within 1,000 feet of the proposed lease (SR 18).

Therefore, I find that 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.

⁷ CF, Email from MDIFW to the Aquaculture Division dated August 4, 2017.

F. Source of Organisms

According to the application, seed stock for this proposed lease site will be obtained from Mook Sea Farm in Walpole, Maine.

Therefore, I find that the applicant has demonstrated that there is an available source of American oysters (*Crassostrea virginica*).

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. Given the setback for eelgrass (*Zostera marina*), 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 American 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 an experimental lease of 0.57 acre to George Faux, 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 lessee⁸; 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 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

⁸ 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.”

account pursuant to DMR Rule 2.64 (10) (D) 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)⁹. 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.

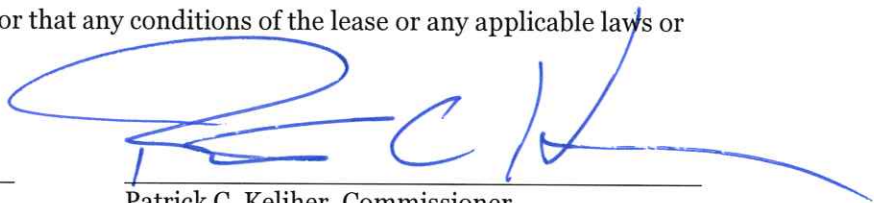
The following conditions shall be incorporated into the lease:

1. The lease site must be marked in accordance with both U.S. Coast Guard requirements and DMR Rule 2.80.
2. Other public uses that are not inconsistent with the purposes of the lease are permitted within the lease boundaries.

7. REVOCAION 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.

Date: 11/15/17



Patrick C. Keliher, Commissioner
Department of Marine Resources

⁹ 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.”