

STATE OF MAINE
DEPARTMENT OF MARINE RESOURCES

Bailey Coffin

Standard Aquaculture Lease Application
Bottom and Suspended Culture of Shellfish
Casco Bay, Freeport, Maine

FINDINGS OF FACT AND DECISION

Bailey Coffin¹ applied to the Department of Marine Resources (DMR) for a twenty-year standard aquaculture lease on 6.83² acres west of Sow and Pigs Island in Casco Bay, Freeport, Cumberland County, Maine. The proposal is for the bottom and suspended culture of American/eastern oysters (*Crassostrea virginica*), northern quahogs (*Mercenaria mercenaria*), Arctic surf clams (*Mactromeris polynyma*), razor clams (*Ensis leei*), European oysters (*Ostrea edulis*), bay scallops (*Argopecten irradians*), and soft shell clams (*Mya arenaria*).

1. THE PROCEEDINGS

The pre-application meeting on this proposal was held on February 12, 2020, and a scoping session was held on December 2, 2020. Due to COVID-19, DMR allowed for a 2-week comment period following the scoping session to allow those who were unable to attend the opportunity to provide comments on the proposal. During this time, DMR received approximately 25 comments from 22 individuals. DMR accepted the application as complete on May 17, 2021. The hearing was held May 23 and May 24, 2023, and members of the public who wished to participate in the proceeding were required to register by May 8, 2023. Notice of the completed application and original public hearing was provided to State and Federal agencies, the Town of Freeport, riparian landowners within 1,000 feet of the proposed site, and subscribers to DMR's aquaculture email listserv. Notice of the hearing was published on April 13, 2023, and May 4, 2023, in the *Northern Forecaster*. A pre-hearing conference was held remotely on May 3, 2023. The purpose of the pre-hearing conference was to discuss the general administration of the proceeding, including hearing guidelines, procedures for applying for intervenor status, and

¹ In the period since the application was deemed complete, applicant Bailey Coffin got married and her legal name is now Bailey Pennell.

² Applicant originally applied for 6.84 acres. DMR calculations, based on the coordinates provided by the applicant, indicate the area is 6.83 acres.

requirements for pre-filed testimony. On May 9, 2023, DMR issued a procedural order detailing the conduct of the hearing and specifying the submission of pre-filed testimony, exhibits, and objections among other considerations. On May 12, 2023, DMR issued a second procedural order detailing testimony and cross-examination time limits for the parties. On May 16, 2023, DMR amended the procedural orders to remove the 10-page limit per exhibit requirement, extend the pre-filing deadline, and increase the testimony time limit for the parties.

The deadline to apply for intervenor status was May 8, 2023 and DMR received five applications for intervenor status. On May 12, 2023, Claire and Jay Martin; Sam Kapala; Bustins Island Village Corporation (BIVC); Laura Vitali; and Peter Shepard; Karen Shepard; Alison Smith; Rebecca Thacher Clarke, both individually and as power of attorney for the Island Realty Trust; Joshua Nathan Clarke, both individually and as power of attorney for the Island Realty Trust; Abigail Douglas; and Mark B. Peterson, both individually and as manager of 75 Merganser, LLC and 71 Merganser, LLC, were granted intervenor status and were consolidated into the DMR designated group, Concerned Citizens of Bustins Island and Flying Point (CCBIFP). While all applicants demonstrated that they would be substantially and directly affected, none of the applications was substantively distinctive from each other regarding the types of issues or concerns raised.

On May 23, 2023, after the first day of the hearing ended, Mr. Ken Barrows informed DMR and the parties that his interests no longer overlapped with the consolidated intervenors because the proposed changes described in the applicant’s testimony addressed his concerns. His name and the entity he represents, BIVC, were removed from the list of testifying witnesses for the intervenor and BIVC was no longer an intervenor or legal party to the proceeding.

Sworn testimony was given at the public hearing by the following individuals:

Name	Affiliation
Bailey Coffin	Applicant
Coley Mulkern, Brian Beal, Parker Hadlock	Expert Witness for Applicant
Michael Ashby, Thomas Coffin, Nora Healy, Emily Selinger	Witness for Applicant
Joshua Nathan Clarke, Peter Shepard, Alison Smith, Jay Martin, Laura Vitali, Sam Kapala	Concerned Citizens of Bustins Island and Flying Point, Intervenor
Timothy Forrester, Joseph DeAlteris	Expert Witness for Intervenor
Angela Brewer	Maine DEP

Ken Barrows, Joyce Clarkson-Veilleux, Nathan Chapnick, Sara Randall, Thomas Paul Wilbur, Amanda Moeser, Shawn Jacqueline Bohen, Crystal Canney	Interested Persons
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Charles Tetreau, Freeport Harbormaster, and LeeAnn Neal, U.S. Army Corps of Engineers, attended and responded to questions during the hearing. Katherine Tierney, Assistant Attorney General, attended acting as counsel for DMR. Additional DMR staff and members of the public attended the hearing either in person or remotely but did not offer testimony. The hearing was recorded by DMR. The Hearing Officer was Lisa White.

The evidentiary record before the DMR regarding this lease application includes the 26 exhibits introduced at the hearing (see exhibit list below), and the record of testimony at the hearing itself. The evidence from these sources is summarized below.³

LIST OF EXHIBITS

1. Case file (CF)
2. Application (App)
3. DMR site report dated January 22, 2022 (SR)
4. Coffin Exhibit 1: Wading Bird Habitat map
5. Coffin Exhibit 2: Eelgrass near proposed lease, 2022
6. Coffin Exhibit 3: Proposed lease also showing 2022 eelgrass
7. Coffin Exhibit 4: Summary of Changes
8. Coffin Exhibit 6: Distances to Interested Persons/intervenors
9. Coffin Exhibit 7: NOAA Chart 13290
10. Coffin Exhibit 9: Beal Study of proposed lease site
11. Coffin Exhibit 10: Brian Beal C.V.
12. CCBIFP Exhibit 1: Forrester Eelgrass Survey Report
13. CCBIFP Exhibit 2: Flycatcher Memo Report
14. CCBIFP Exhibit 3: DeAlteris Report
15. CCBIFP Exhibit 4: Sow & Pigs Island Ingress Egress maps (3 maps)

³ These sources are cited below, with page references, as CF (case file), App (application), and SR (site report). Exhibits are cited by their number in the list of exhibits (e.g., CCBIFP Exhibit 1 is Ex. 12).

16. CCBIFP Exhibit 5: Josh Clarke's Navigation Sow & Pigs Island
17. CCBIFP Exhibit 6: GPS Photographs (2 photos)
18. CCBIFP Exhibit 7: Peter Shepard Boating Observations
19. CCBIFP Exhibit 8: Recreational Boats (3 photos)
20. CCBIFP Exhibit 9: Lobster Boat
21. CCBIFP Exhibit 10: Commercial Fishing Boat
22. CCBIFP Exhibit 11: Recreational Fishing (2 photos)
23. CCBIFP Exhibit 12: Photo of Bustins boat landing
24. CCBIFP Exhibit 13: Laura Vitali's Photo of Sow and Pigs in the fog
25. CCBIFP Exhibit 14: Claire Martin's picture of eelgrass on shore
26. CCBIFP Exhibit 15: Maine DMR Shellfish Closures map

2. DESCRIPTION OF THE PROJECT

As originally proposed, the applicant intended to deploy at a maximum, 700 semi-rigid floating mesh bags (18"x36"x3") and 800 semi-rigid mesh bottom bags with wire feet (400 would measure 18"x36"x9" and 400 would measure 18"x36"x6") (App 5, 6). Bottom bags, which would be onsite throughout the year and would be used to culture all proposed species, would be deployed in up to (8) 150-foot lines located along the boundary of the northern half of the proposal. Floating bags, which were proposed to be onsite throughout the year unless there were ice-related concerns, would contain eastern oysters and northern quahogs (App 28). Floating bags would be deployed on up to (6) 150-foot lines in the northeast corner of the proposal (App 28). Although not explicitly stated in the application, it appeared that bottom culture would occur throughout the proposed lease site. Bottom planted shellfish were proposed to be harvested by hand, snorkeling, scuba diving, clam hoe, bull rake, or small drag (34" x 10") (App 11). A 10' x 20' covered float was proposed to be located near the northeast corner of the proposal (App 7).

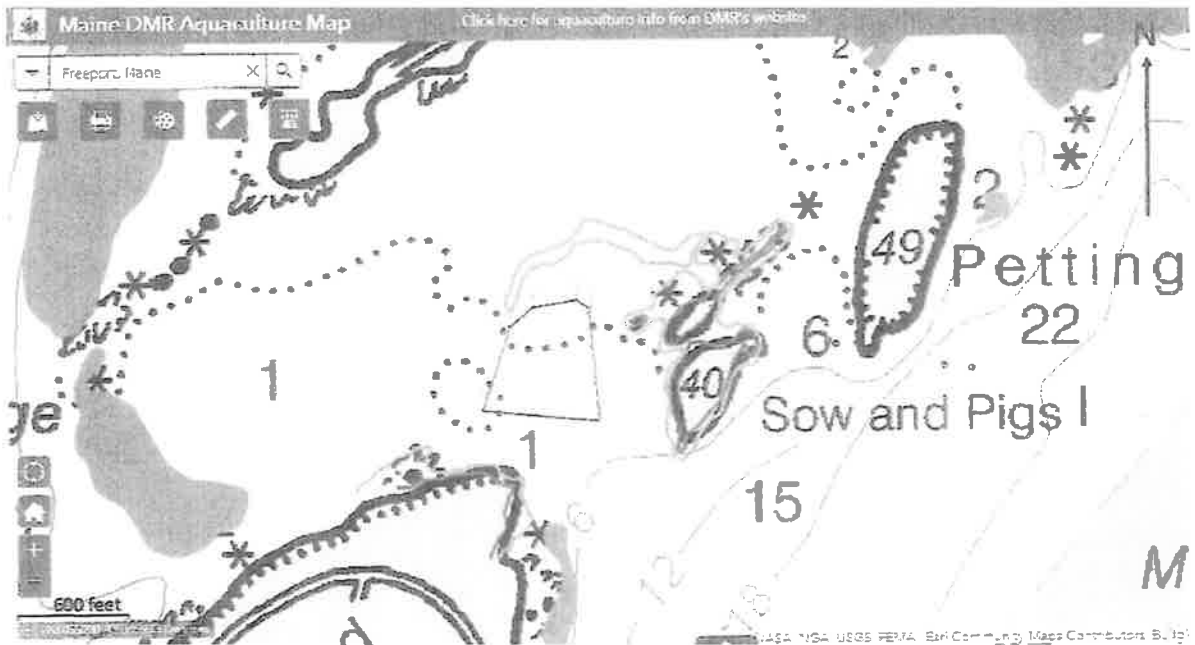


Figure 1. Vicinity Map from Original Application for 6.83 acres (App 25)

At the public hearing, the applicant presented an amended proposal. Specifically, the applicant proposed to reduce the size of the proposed lease site from 6.83 acres to 2.67 acres; to consolidate bottom gear to one area on the southeast boundary; to use high visibility corner markers (5" x 36") on corners #1, #6, and #7; to eliminate the use of a pressure washer and generator on site; to replace the 8' x 10' shed on the 10' x 20' work float with a 10' x 10' E-Z up tent; and to remove European oysters from the species list (B. Pennell testimony; Ex. 7). In place of the pressure washer, the cages would be brushed off on site or cleaned at the Harraseeket dock (B. Pennell testimony). Corner markers #2, #3, #4, and #5 would be yellow lobster buoys (B. Pennell testimony).

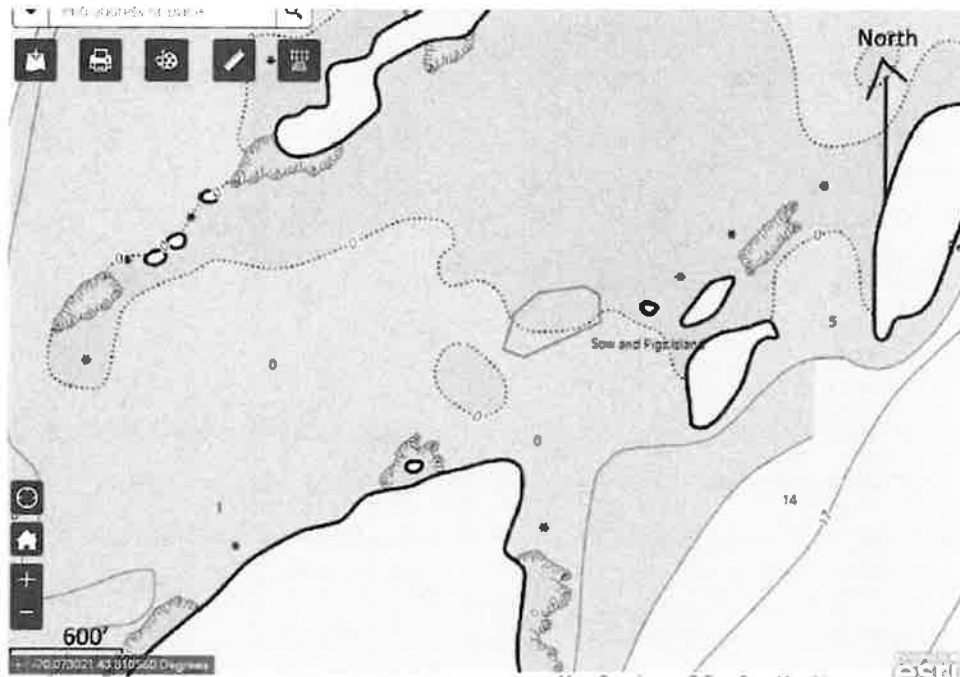


Figure 2. Vicinity Map from Proposed Changes Presented at Hearing for 2.67 acres (Ex. 7)

Discussion. The standard aquaculture lease process is robust. Standard leases have certain pre-application requirements, which are intended to provide the applicant with multiple opportunities to receive feedback on their proposed operations from DMR staff, members of the public and other stakeholders, and to make changes to their proposal prior to submitting a final application.⁴ Once a final application is submitted and deemed complete, the applicant’s ability to make changes is limited. This is to ensure that notice requirements are not frustrated as members of the public and other stakeholders should reasonably expect that a final proposal will not substantially change during adjudication.

As part of the pre-application process, DMR requires a standard lease applicant to submit a written draft application and to hold a scoping session on this draft application. The draft application outlines the applicant’s initial plans for the proposed site. DMR reviews the draft application and requests further information, if necessary, before deeming the proposal ready for a scoping session. See Chapter 2.08.

The scoping session is an informal public meeting that provides an opportunity for the applicant to receive feedback on the draft application. Notice of a scoping session is posted to

⁴ See Chapter 2.07-2.08 of DMR’s regulations, found at 13-188 C.M.R. ch. 2.

DMR's website, sent to the municipality, and mailed to riparian owners within 1,000 feet of the proposed lease (who must be listed in the draft application). See Chapter 2.08(3). The applicant also publishes notice of the scoping session in the local newspaper. These meetings are an opportunity for the public to learn about the proposed lease, provide the applicant with information to inform development of the application, and ask questions about the application. See Chapter 2.08(3).

After the scoping session is held, the applicant may take up to six months to submit a final application to DMR, during which time no other applicant can apply for a lease in the same location. See Chapter 2.08(4). The applicant may take this time to consider all the feedback they have received and modify their proposal prior to submitting the final application. The applicant may make substantial changes from the draft application in preparing the final application. However, if the location of the proposed lease identified in the final application materially differs from the location described in the notices for the scoping session, DMR may require the applicant to hold another scoping session before accepting the final application. See Chapter 2.08(5)(B).

After the applicant submits a written final application, DMR reviews the application to determine whether it is complete, *i.e.*, "whether the application contains sufficient information in which a decision regarding the granting of the application may be made[.]" See Chapter 2.08(6). DMR scientists then assess the site, based on the final application, and publish a report of their observations. All standard lease applications have a public hearing, which is scheduled after the final application has been deemed complete and the DMR site report has been published. Notice of the public hearing, which references the completed final application, is provided to state and federal agencies, the municipality, riparian owners within 1,000 feet of the proposed site, and subscribers to DMR's aquaculture email listserv via GovDelivery. Notice of the hearing is also published twice in a local newspaper. Copies of the final application are made available in advance of the public hearing so that interested persons may review the final application in determining whether and how they wish to participate in the public hearing and comment process.

The scoping session on the draft application was held on December 2, 2020. Due to COVID-19, the scoping session was conducted remotely and DMR provided a 2-week comment period following the scoping session. The purpose of the comment period was to provide stakeholders with the opportunity to provide written feedback if they were unable to join the

remote proceeding. The notice of the scoping session indicated that all written comments would be forwarded to the applicant for their consideration in developing a final proposal. During the comment period, DMR received approximately 25 comments from 22 individuals. The comments raised a variety of concerns about the draft application, including possible interference with navigation, moorings, riparian ingress/egress, etc. All comments were sent to the applicant on December 17, 2020.

On February 24, 2021, the applicant submitted their final lease application to DMR. It did not substantively differ from the draft application, suggesting that the applicant elected not to modify any aspects of the operations initially presented to the public for feedback. The final application was reviewed by DMR and deemed complete on May 17, 2021. Notice of the completed application was processed on June 16, 2021. DMR's site visits occurred on July 8, 2021, July 28, 2021, and September 13, 2021. The site report, which detailed the findings from the site assessments, was published on January 22, 2022. The applicant was provided with a copy of the site report.

Chapter 2.08(6)(D) of DMR's regulations provides that if the site report reveals that one or more of the criteria for approval are unlikely to be met, DMR may ask the applicant to withdraw the application or waive the hearing. On April 22, 2022, DMR issued a letter to the applicant stating, "based on a review of the site report, which considers all applicable aspects of your proposed operations, it is unlikely DMR would find that the proposal meets the standard lease decision criteria for approval." The letter provided some examples from the site report and how those related to the applicable decision criteria. In consideration of Chapter 2.08(6)(D), DMR requested that the applicant withdraw the proposal or waive the hearing.

The letter further noted that if the applicant elected to move forward with a hearing, they would be given the opportunity to present evidence in response to the findings in the site report. Members of the public and other stakeholders could also present testimony and evidence. The letter stated that DMR could not advise the applicant on what evidence may be acceptable if they elected to move forward with a hearing. In response to the letter, the applicant decided to move forward with a lease hearing.

On May 5, 2022, the applicant contacted DMR about modifying their final application in response to feedback they had received during the scoping session held in December 2020, and subsequent meetings that they had with local stakeholders (these other meetings were not affiliated with DMR's leasing process). The applicant stated a belief that these modifications

would mitigate the points raised in DMR's April 22, 2022, letter. On May 18, 2022, DMR clarified that the final application had been deemed complete and noticed accordingly, and that any proposed changes would need to be presented under oath at the lease hearing.

DMR also stated that while some minor changes could be presented at the hearing, there are limits to the scope of changes that can be considered after a final application is deemed complete and noticed accordingly. DMR clarified that it could not advise the applicant on what types of changes would be acceptable for purposes of evaluating and possibly granting a lease, but that withdrawing the application or waiving the hearing would not preclude them from submitting a new proposal.

The applicant elected to present changes to their proposed operations during the lease hearing, so that the completed final application, of which the noticed parties and members of the public had been given prior notice, differed substantially from what was presented and discussed at the public hearing. The changes included: reduce total acreage; re-arrange the gear layout; adjust corner marker locations, within the original proposed footprint; update gear information; revise the on-site support structure; remove pressure washer and generator; remove a species from the species list (Ex. 7). Because the aggregate changes presented during the public hearing were substantial, the public was not provided with adequate opportunity to review the modifications. To consider modifications that differ substantially from what was originally proposed in the final application would circumvent the public and personal notice requirements set forth in Chapter 2.15(1). Taken together, the aggregate changes that were presented publicly for the first time at the public hearing would require the applicant to submit a new proposal to provide the opportunity for meaningful public input and to ensure the proposal goes through all the standard lease application review stages.

Furthermore, state and federal agencies could only base their review of the application on the completed final application. It is possible that the proposed modifications, presented for the first time at the hearing, would have changed the agencies' assessment of the proposed operations and the resources they manage. Additionally, DMR's site report does not account for the reconfigured gear layout, changes to corner markers, change in maintenance activities, or other changes presented during the hearing. It is possible that if these changes had been included in the final written application, DMR's assessment of the overall proposal would have changed. Finally, the public's ability to understand the aggregate changes was impacted and, based on the

record, stakeholders did not have adequate time to review the changes and provide meaningful input.

The applicant submitted a pre-filed exhibit (Ex. 7) that summarized the changes to the final application that it proposed at the hearing, but the document was inconsistent with what was actually presented during the applicant's testimony. The ratio of 6" to 9" bottom cages was left flexible in the exhibit description, but in response to questioning by U.S. Army Corps of Engineers, the applicant stated the ratio would remain 400 of each as it was in the original application (Pennell-Neal; Ex. 7). The exhibit referred to an amended overhead view diagram, but no such figure labeled "Overhead view" was attached to the exhibit (Ex. 7). A revised gear table was not provided to include the additional corner buoy and mooring gear for the added corner marker #7.

Additionally, the evidence surrounding eelgrass observations included in the applicant's proposed modifications to the final application is unclear and inconclusive. This late change and lack of clarity are further examples of how the substantial changes made late in the process frustrate the intent of the notice requirements; these changes could not be fully considered on the fly by DMR, other noticed parties, or members of the public.

Parties to the proceeding received pre-filed exhibits—including the aforementioned Exhibit 7— one week in advance of the hearing, but members of the public did not receive notice of the proposed changes to the original application until the hearing. During the hearing, Peter Shepard, member of the CCBIFP, noted the lack of clarity between the application and what was presented during the hearing (Shepard testimony). The quantity of changes made it difficult to consider the amended proposal fully in the moment. Many of the changes were in response to comments received during the December 2, 2020, scoping session and could have been addressed much earlier in the process before the final application was submitted.

DMR's authority to entertain changes to a proposal after it has been deemed complete is discretionary. Whether such changes can be reasonably entertained depends upon a variety of factors including the scope of the changes and the ability of the public and the other stakeholders to understand and engage with those changes throughout the proceeding. In this case, to consider modifications that differ substantially from what was originally proposed and noticed at this late stage in the application process would circumvent the public and personal notice requirements set forth in Chapter 2.15(1). Therefore, the final application as it was deemed complete and noticed will be evaluated against the lease decision criteria.

3. STATUTORY CRITERIA & FINDINGS OF FACT

A. Navigation. When examining navigation, the Commissioner considers whether the lease activities requiring surface or subsurface structures would interfere with commercial or recreational navigation around the lease area. See Chapter 2.37(1)(A)(2). The proposed lease is located in subtidal waters between Sow and Pigs and Bustins Islands. DMR's site assessment states that the marked navigational channel southwest of Bustins Island is located over 4,000 feet from the proposed lease (SR 15). A shallow bar made of sand and shell borders the proposal's north and northwest boundaries (SR 3). The site report noted that the shallow bar that borders the proposal to the north also poses a natural constraint to navigation in the area (SR 13).

The applicant stated the site would be marked with yellow lobster buoys and high visibility yellow corner buoys to aid with navigation (App 28; B. Pennell testimony).

In their public comment letter dated December 16, 2020, BIVC noted that Bustins Island operates a boat ramp on the north-west corner of the island. Lionel Plante Associates barge vessels regularly service the island from April to October delivering propane, road and building maintenance supplies, private contractor equipment and building materials, and transporting municipal safety vehicles including fire and sanitation equipment for maintenance and repairs. The letter indicated that the proposed bottom seeding zone, southwest seeding zone and southwest corner buoy would impede barge access to the boat ramp and landing zone⁵.

During DMR's site assessment on July 8, 2021, two motored vessels and one kayak were observed navigating in the vicinity of the proposal. These vessels all launched from, or landed on, either Bustins or Sow and Pigs Islands. During the site visit on July 28, 2021, a kayak launched from Sow and Pigs Islands (SR 15).

At the hearing, multiple people testified that they recreationally navigate the area and that the proposed lease site would be a hindrance to navigation. Mr. Jay Martin, member of CCBIFP, testified that "the passage is extremely active" in the vicinity of the proposed lease with recreational, commercial, and residential boat traffic (J. Martin testimony). Most of the individuals who testified also testified that if the lease were granted, it would interfere with recreational pleasure boats and kayaks in the area, especially at certain tidal stages. Mr. Joshua

⁵ At the hearing, Captain Coley Mulkern testified that the amended lease site proposed during the hearing, with the new gear configuration also proposed at the hearing, would not impede safe access for the barge to the one landing zone on Bustins Island. However, the changes proposed by the applicant at the hearing did not address navigation concerns for all vessel types.

Nathan Clarke, member of CCBIFFP, testified that the proposed work float and floating bags would be right in the path he typically travels to access Sow and Pigs Island using a variety of vessels, including kayaks, canoes, 2 hp skiff, 10 hp metal boat, day sailor, and 90 hp Whaler (Clarke testimony; Ex. 15). Mr. Clarke noted that this route was not a short cut but was effectively a driveway to and from his family's property. Mr. Clarke noted that to access his family's home on Sow and Pigs Island he either docks at the current active dock on the east side of the island using the whaler or anchors in the cove on the west side with the skiff. He noted that the dock on the west side of the island was in use up until five years ago, the east side dock is too exposed, and his family will likely repair the west side dock and use it again (Clarke-Moeser). He also stated that having gear in that area would make the already difficult to navigate shallow and sandbar constrained waters even more challenging to navigate and that he transits the area at night and in bad weather. Mr. Shepard submitted a log of observed water activity from one day with a variety of vessels that included kayaks, skiffs, outboard powerboats, inboard powerboats, a twin engine powerboat, a cabin cruiser, the Lionel Plante barge, and a sailboat (Ex 18). Mr. Shepard stated in his testimony that the travel ways in and around the proposed lease from his property on Lower Flying Point were not short cuts used during certain tides. Mr. Clarke, Mr. Shepard and Mr. Sam Kapala submitted pre-filed exhibits with their own GPS tracks showing vessel transits passing through the proposed lease area multiple times (Ex. 16, Ex. 17).



CCBIFFP - Exhibit 5

Figure 3. Joshua Nathan Clarke GPS tracks for one month of travel (Ex 16)



CCBIFP - Exhibit 6

Figure 4. Peter Shepard GPS tracks for two seasons of travel (Ex 17)



Figure 5. Sam Kapala GPS tracks (Ex 17)

Mr. Kapala also testified to the busy water traffic and that he has observed as many as 17 kayaks in a single convoy, powerboats anchoring in the channel west of Sow and Pigs Island and dozens of other vessels of all shapes and size transiting the area (Kapala testimony). Mr. Nathan Chapnick, from the Freeport Kayak Club, testified about the navigational hazard the proposed

lease poses to kayakers because it would force kayakers to be in closer proximity to powerboats and the gear would present an entanglement risk (Chapnick testimony).

Discussion. During the hearing, DMR heard arguments on both sides regarding navigation impacts and considered all the testimony. For the reasons explained above, this discussion focuses on testimony and evidence relevant to the lease site as proposed in the final application and to the navigation decision criteria as described in Chapter 2.37(1)(A)(2). Based on the record, vessels wishing to travel to Sow and Pigs and Bustins Islands, the channel and swimming hole adjacent to Sow and Pigs Island, or beyond the islands may be required to alter course to avoid the proposed lease site, especially at times when the site is being tended or harvested. The navigational ways that would be impacted are not high tide short cuts. The traditional route of the barge that services Bustins Island cuts through the proposed lease area and into the portion of the proposed lease that would contain gear⁶. The deviated vessel traffic may increase congestion resulting in possible navigational safety concerns in an area already heavily transited in the summer.

While the recreational use and navigation of the area is likely greatest during the day and during summer months, testimony indicates that use of the area occurs at night and from March to November (Clarke testimony, Clarke-Moeser⁷). Adding aquaculture activities to an area already busy with vessel traffic would compound navigational constraints in an area that is difficult to access at certain tides due to a naturally occurring sandbar.

The Department finds that based on available information and hearing testimony, there is a high degree of vessel use in and around the proposed lease site and that the proposed lease would be a navigational hazard due to the popularity of this route for accessing Sow and Pigs Island and surrounding waters.

Therefore, the aquaculture activities proposed for this site will unreasonably interfere with navigation.

B. Flora & Fauna. When examining existing system support, the Commissioner considers the degree to which the use of the lease site will interfere with significant wildlife habitat and marine habitat or with the ability of the lease site and marine and upland areas to

⁶ Even if the reduced size of the proposed lease discussed at the public hearing were evaluated for purposes of this decision, while the reduced lease size may have addressed BIVC's concerns for safe navigation of the barge, the reduced lease size would still significantly interfere with navigation by small transit and recreational vessels for the reasons discussed herein.

⁷ Question from member of public, Amanda Moeser.

support ecologically significant flora and fauna. See Chapter 2.37(1)(A)(5). Again, for the reasons explained above, this analysis focuses on testimony and evidence relevant to the lease as proposed in the final application.

Site observations. On July 8, 2021, DMR staff conducted drop camera transects through the proposed lease to assess the epibenthic ecology of the area and returned on July 28, 2021 to conduct snorkel and scuba transects throughout the site (SR 18). The bottom of the deeper sections of the proposal are composed of semi-firm mud, while shallower sections are dominated by predominantly softshell clam (*M. arenaria*), northern quahog (*M. mercenaria*) and European oyster (*O. edulis*) shell hash. Epibenthic macro flora and fauna observed during the drop camera, snorkel, and dive transects are listed below:

Species Observed	Abundance
Benthic diatoms	Abundant in sections of proposal with mud bottom
Epiphytic Bryozoan on Eelgrass	Abundant on eelgrass
Eelgrass (<i>Zostera marina</i>)	See eelgrass section below
Common Periwinkle (<i>Littorina littorea</i>)	Abundant in portions of lease with shellhash bottom
Colonial Tunicate (<i>Didemnum sp.</i> and/or <i>Botrylloides sp.</i>)	Common
Hermit Crab (<i>Pagarus sp.</i>)	Common
European Oyster (<i>Ostrea edulis</i>)	Live organisms common along northern boundary, occasional in shallow sections of proposal
Red filamentous algae	Common
Slippersnail (<i>Crepidula fornicata</i>)	Common
Barnacles (<i>Semibalanus balanoides</i>)	Occasional
Green crab (<i>Carcinus maenus</i>)	Occasional
Northern Quahog (<i>Mercenaria mercenaria</i>)	Occasionally observed at surface of sediment
Knotted Wrack (<i>Ascophyllum nodosum</i>)	Rarely Attached
Horseshoe Crab (<i>Limulus polyphemus</i>)	Rare
Terebellid Worm (<i>Amphripite sp.</i>)	Rare

Wildlife. According to GIS (Geographic Information System) data maintained by the Maine Department of Inland Fisheries and Wildlife (MDIF&W) and available through the Maine Office of GIS, the northern and western portions of the proposed lease overlap with an area of emergent wetland-mudflat complex that is Tidal Waterfowl and Wading Bird Habitat (SR 25). Tidal Waterfowl and Wading Bird Habitat is considered a Significant Wildlife Habitat in Maine. Additionally, the proposed lease is located approximately 45 feet from the 660-foot buffer around a bald eagle (*Haliaeetus leucocephalus*) nest located on Sow and Pigs Island that was listed as unoccupied in 2018. The proposed lease is located over 1,000 feet from the 660-foot buffer around a bald eagle nest listed as occupied by a breeding pair in 2018. Bald eagles are no longer recognized in Maine as a Species of Special Concern. However, they are protected by the Federal Bald and Golden Eagle Protection Act (16 U.S.C. 668-668c). Email correspondence between DMR staff and US Army Corps of Engineers⁸ indicates that a typical recommendation from the U.S. Fish and Wildlife Service might include restricting the project activities within 660 feet of the bald eagle nest to between August 16th and January 31st, unless the nest is inactive. On July 16, 2021, a Request for Agency Review and Comment was sent via email to MDIF&W (SR 26). No response was received.

Eelgrass. DMR observed eelgrass within and nearby the proposed lease area in drop camera, snorkel, and scuba transect video footage collected on July 8 and July 28, 2021 (SR 20). On these dates, eelgrass beds were observed near Corner 6 of the proposal. Exposed eelgrass rhizomes with occasional blades were observed in the center of the southern half of the proposal and outside of original Boundary 5-6. Exposed rhizomes without blades were observed in the center of the proposal and south of original Boundary 6-1 (SR 21). The DMR site report included photos of what appears to be rooted eelgrass (SR 22, SR 23). Eelgrass was also observed within the proposal during an eelgrass survey conducted in 2018 by the Maine Department of Environmental Protection (MDEP) in cooperation with the Casco Bay Estuary Partnership; the survey transect cut through the southern portion of the proposed lease. According to MDEP, this eelgrass observation was omitted from the MDEP maintained feature layer⁹ in error, but underwater video conducted in 2018 as part of this survey shows “sparse but regularly distributed, healthy appearing eelgrass” within the proposed lease area.¹⁰ A 2001 eelgrass survey in the area conducted by the DMR shows that in 2001, there was a dense eelgrass bed throughout

⁸ Email from J. Jacobson to C. Adams, received on June 22, 2020

⁹ MEDEP maintained SDE Feature Class “GISVIEW.MEDEP.Eelgrass2018”

¹⁰ Communication between M. Nelson (DMR) and A. Brewer (MDEP), January & July 2021.

the entirety of the proposed lease. However, a 2013 eelgrass survey conducted by MDEP in cooperation with the Casco Bay Estuary Partnership shows no eelgrass within the proposal.

In his pre-filed testimony Dr. Brian Beal, expert witness for the applicant, stated that he visited the site in 2022 and did not document any eelgrass present (Ex. 10) although he stated that he did not survey the portion of the proposed lease where DMR documented eelgrass in the site report. Ms. Angela Brewer, MDEP, testified that MDEP mapped eelgrass in the area in 2018 (Brewer testimony). Mr. Timothy Forrester, expert witness for the intervenor, stated in his pre-filed testimony that he observed eelgrass in the original proposed lease boundary in 2021 (Ex. 12).

Discussion. The evidence indicates that eelgrass has been documented in and around the original lease proposal as recently as 2021. The Department finds that based on available information, the proposed operations will unreasonably interfere with the ability of the lease site and surrounding areas to support eelgrass.

Therefore, the aquaculture activities proposed for this site will unreasonably interfere with the ability of the lease site and surrounding areas to support existing ecologically significant flora and fauna¹¹.

For the reasons described above, DMR determines that the lease as proposed in the final application would not meet all the criteria specified in Chapter 2.37(A)(1-10)¹². The applicant was previously informed that the final application was unlikely to meet the criteria specified in Chapter 2.37(A)(1-10) and was provided the opportunity to withdraw the application. The applicant chose to move forward with the final application.

4. CONCLUSIONS OF LAW

The evidence in the record demonstrates that the proposed aquaculture activities do not satisfy all the requirements for granting a standard lease set forth in 12 M.R.S.A §6072. Specifically, the Commissioner finds:

1. The proposed aquaculture activities will unreasonably interfere with navigation.

¹¹ Even if the proposal as modified during the public hearing were considered, the Department would not be able to make a finding on the impact to ecologically significant flora because the evidence is inconclusive. The modified proposal was not detailed and too many changes were proposed, which made it difficult for DMR and others in attendance to adequately consider the new proposal.

¹² If the application were evaluated based on the proposal as modified at the hearing, for the reasons discussed in footnotes 6 and 11, the Commissioner still would not be satisfied that all of the lease decision criteria in Ch. 2.37(A)(1-10) were met based on the evidence in the administrative record.

2. The proposed aquaculture activities will unreasonably interfere with the ability of the lease site and surrounding areas to support existing ecologically significant flora and fauna.

Furthermore, the modifications proposed by the applicant during the public hearing did not provide the noticed parties or the public with adequate notice in accordance with Chapter 2.15(1) and cannot be reasonably considered. Some federal and state agencies' review of the lease proposal, DMR's site visits, and advance review of the application by other noticed parties and the public were all based on the information contained in the applicant's final application. Presenting substantial modifications at the public hearing did not give reviewers or the public an adequate opportunity to assess and evaluate the modified proposal. Finally, even if the Commissioner were to consider the proposed modifications to the final application, the evidence in the administrative record does not satisfy the Commissioner that the lease decision criteria would be met.

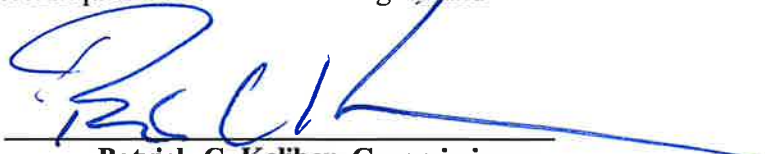
For these reasons, the application must be denied.

5. DECISION

Based on the foregoing, the application of Bailey Coffin for a lease to cultivate shellfish using bottom and suspended culture techniques west of Sow and Pigs Island is denied.

Dated:

March 27 2024



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