

**STATE OF MAINE**  
**DEPARTMENT OF MARINE**  
**RESOURCES**

**Portland Oyster Company LLC**

Experimental Aquaculture Lease Application  
Suspended Culture of American Oysters  
Spurwink River, Scarborough/Cape Elizabeth

October 25, 2019

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

**BACKGROUND**

Portland Oyster Company, LLC. applied to the Department of Marine Resources (“DMR”) for a three-year experimental aquaculture lease located in the Spurwink River, in Scarborough and Cape Elizabeth, Cumberland County, Maine. The proposed lease is 0.14<sup>1</sup> acres and is for the suspended cultivation of American/eastern oysters (*Crassostrea virginica*). DMR accepted the application as complete on March 15, 2019. No requests for a public hearing were received during the comment period, and no hearing was held. For the reasons described below the application is denied and a lease will not be issued.

**1. THE PROCEEDINGS**

Notice of the application and the 30-day public comment period were provided to state and federal agencies, riparian landowners, the Town of Scarborough and its Harbormaster, the Town of Cape Elizabeth and its Harbormaster, and others on DMR’s mailing list. Notice of the application and comment period was published in the April 4, 2019 edition of the *Forecaster*. The evidentiary record regarding this lease application includes the application, DMR’s site report dated August 15, 2019, and the case file.

There have been three other applications for experimental leases in the same stretch of the Spurwink River as the current Portland Oyster Company, LLC application. Matthew Hassler and Robert Willette applied for a 2.89-acre experimental lease in the Spurwink River on October 25, 2017. DMR accepted the application as complete on December 4, 2017. Portland Oyster Company, LLC applied for a 1.00-acre lease to culture American/eastern oysters using suspended culture techniques in the Spurwink River on October 16, 2017. DMR accepted that application as complete on January 11, 2018. DMR determined that portions of the

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<sup>1</sup> Applicant originally requested 0.119 acres. MDMR calculations, based on the provided coordinates, indicate the area is 0.14 acres.

Hassler/Willette proposed lease and the Portland Oyster Company, LLC proposed lease overlapped. DMR processed the applications in accordance with Chapter 2.41 and determined that the applications would be considered sequentially by the date each was deemed complete in accordance with Chapter 2.10(2)(A)(1). Because the Hassler/Willette proposal was deemed complete first, DMR processed it first in accordance with applicable laws and regulations. Based on his review of the evidence in the record, including the report of the DMR's site evaluation, the Commissioner found that the Hassler/Willett proposed aquaculture activities did not satisfy all the requirements set forth in 12. M.R.S.A §6072-A. Specifically, it was determined that the proposal would have interfered with navigation, significant flora and fauna, and fishing and other water related uses of the area. Therefore, the Hassler/Willette application was denied and no lease was issued.

After issuing a decision on the Hassler/Willette application, the Commissioner considered the application from Portland Oyster Company, LLC that was deemed complete on January 11, 2018. Because of the overlap between the respective lease sites and the similarity of aquaculture activities proposed, the Commissioner took official notice of the Hassler/Willette record, including the application, DMR's Site Report, and DMR's Findings of Fact, Conclusions of Law and Decision, and denied the Portland Oyster Company LLC application based on a finding that the Portland Oyster Company, LLC application could not meet the same criteria. No lease was issued.

On February 2, 2018 Portland Oyster Company, LLC applied for a 1.79-acre experimental lease to culture American/eastern oysters using suspended culture techniques in the Spurwink River. DMR accepted the application as complete on March 27, 2018. In rendering a decision on the February 2, 2018 application, the Commissioner considered the evidence in the record, including DMR's site report, and he took official notice of the Hassler/Willette decision dated October 1, 2018 and of the previous Portland Oyster Company, LLC decision dated January 2, 2019. The February 2, 2018 application was denied for the same reasons, and no lease was issued.

In considering the current application from Portland Oyster Company, LLC for a lease in the Spurwink River, DMR takes official notice of the October 1, 2018 decision denying a lease application submitted by Matthew Hassler and Robert Willette. DMR also takes official notice of the decisions dated January 2, 2019 and January 9, 2019, denying lease applications submitted by Portland Oyster Company, LLC.



The evidence from each of these sources is summarized below.<sup>2</sup> Evidence and details from the three previous decisions can be found on the denials section of DMR’s aquaculture website. DMR received comments and hearing requests on the previous proposals but did not receive comments in this case until after the close of the comment period. Considering the number of applications in this area (total of four, including the current application) over a relatively short period of time (2018-2019) and that three of them have been denied, it is possible that the volume of public notices concerning applications and denials for this area would have been difficult to track. The lack of comments received on the current application could be due to community members assuming it had already been denied due to the previous denials. The public had concerns about previous proposals in this area and had requested a public hearing on at least one previous application. The current application overlaps some of the same section of the Spurwink River as previous proposals, and all involved the deployment of gear. Figure one shows where the current application overlaps with the previous applications in the Spurwink River. A review of the evidence in this case suggests that although the applicants have modified their proposal a third time to reduce the overall amount of gear, it still does not ameliorate the concerns raised by previous proposals.



**Figure 1:** Identifies where the current proposed lease application overlaps with previous applications in the Spurwink River.

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

## **2. DESCRIPTION OF THE PROJECT**

### **A. Proposed Operations**

The purpose of the proposed experimental lease site is to determine if oysters grow efficiently in the Spurwink River (App 8). The application describes a proposed lease area that measures 3 feet wide and is approximately 1,725 feet long. A maximum of 200 bottom oyster cages, each measuring 4' L X 3' W X 1' H, would be deployed along the length of the lease. The applicant proposes 6 feet of spacing between cages, with a buoy marking every 5th cage or 40 feet (App 8-10). Portland Oyster Company has proposed using a power washer one or two weekends a year, for up to 4 hours per day. Previous applications by Portland Oyster Company for a lease in the Spurwink River were for 4 longlines containing 500 cages each, and for 2 longlines containing 500 oyster bags each<sup>3</sup>. Previous applications did not include the use of a power washer.

### **B. Site Characteristics**

On July 24, 2019 DMR visited the proposed site and assessed it and the surrounding area in consideration of the criteria for granting an experimental aquaculture lease. Staff arrived at the site at 10:50am, after gaining access via the Rte. 77 hand-carry boat launch maintained by the Rachel Carson National Wildlife Refuge (RCNWR) (SR2). DMR staff observed the site from the late-ebb stage, through slack low water, and into the early flood stage; water depths ranged from 2-4 inches to less than 3 feet (SR 9-10). Tidally exposed sandbars and beach, leading to saltmarsh and the Rachel Carson National Wildlife Refuge (RCNWR), dominate the immediate uplands to the west of the site. To the west of the proposed site, beyond the saltmarsh, there are residential properties (SR 2). The site report describes tidally exposed flats that lead to marsh grass (*Spartina alterniflora*) and mixed forest along the eastern shore of the Spurwink River (SR 2).

## **3. STATUTORY CRITERIA & FINDINGS OF FACT**

Approval of experimental aquaculture leases is governed by 12 M.R.S.A. §6072-A. This statute provides that a lease may be granted by the Commissioner of DMR upon determining that the project will not unreasonably interfere with the ingress and egress of riparian owners; with navigation; with fishing or other water related uses of the area, taking into consideration other aquaculture uses in the area; with the ability of the lease site and surrounding areas to support

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<sup>3</sup> Application from Portland Oyster Company dated February 2, 2018 (pages 18-19) and application from Portland Oyster Company dated October 16, 2017 (pages 19-20).



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 available source of organisms to be cultured on the lease site.

### **A. Navigation**

During the site visit, staff observed two individuals on paddleboards to the north of the proposed lease area, and two individuals in a tandem kayak hauled out on the beach to the west of the proposed site (SR 12). During their site visit, DMR staff observed the kayakers navigate through the proposed lease area and back toward the RCNWR boat launch, located about a mile to the northeast of the proposed lease area (SR 12).

At low tidal stages, the Spurwink River is inaccessible to all vessels other than those that can travel through less than 1 foot of water or be portaged over exposed sandbars (SR 12). As noted in the site report, and in the application (App pages 8 and 19), at low tidal stages, cages resting on the river bottom will be exposed or submerged less than two feet below the surface of the water (SR 10).

One public comment, received after the close of the comment period, expressed concern with the proposed aquaculture activities because the water is very shallow in the area, and that while boaters are likely to seek the deeper portions of the river while paddling, the presence of concrete blocks and oyster cages along the river could be a navigational hazard.<sup>4</sup> Although it was received after the close of the comment period, the commenter echoed concerns shared during previous comment periods for applications in the Spurwink River. Comments in response to previous applications in the Spurwink River indicate that the bottom of the river is heavily influenced by shifting sandbars each year. So, while the channel may be located away from the proposed activities one year, it may be impacted in subsequent years.<sup>5</sup>

Previous decisions for applications in the Spurwink River<sup>6</sup> noted that the area is heavily used by canoes, kayaks, and stand up paddleboards. While the current application from Portland Oyster Company seeks authorization for substantially less gear than previous applications, they are proposing to deploy up to 200 cages along a line measuring 1,725 feet long. Gear will stretch along more of the river, which increases the length of river along which boaters, swimmers, and other recreational vessels may interact with the gear. The application proposes 6 feet of spacing

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<sup>4</sup> CF: Email to M. Nelson from J. Weiss on August 22, 2019.

<sup>5</sup> Comment sent to DMR from Z. Whitener received May 21, 2018.

<sup>6</sup> Hassler/Willette decision dated October 1, 2018; Portland Oyster Company decision dated January 2, 2019; Portland Oyster Company decision dated January 9, 2019.

between cages and the placement of marker buoys every 40 feet. Due to the popularity of the Spurwink River for recreational uses such as boating and swimming, it is likely that any amount of gear could cause navigational issues. Six feet of spacing is not large enough for a boater to maneuver through if they were to attempt to navigate through the lease, should water levels allow. Many of the kayaks and paddleboards popular in the area are longer than 6 feet in length. A previously submitted letter from RCNWR<sup>7</sup> indicated many of the kayaks used in the river are 15-17 feet. Access to the western shoreline, which is characterized by tidally exposed sandbars, will be unlikely during low tidal stages due to shallow water depths and lack of maneuverability due to proposed gear (SR 12).

Based on the evidence, the proposed lease is situated in an area that is heavily utilized by recreational vessels at all tidal stages and would significantly change how recreational users navigate the area.

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

## **B. Fishing & Other Uses**

During their site visit, DMR staff did not observe any commercial or recreational fishing near the proposed lease site (SR 13). However, the site report indicates that shellfish harvesting is likely to occur in the intertidal area around the lease, and soft-shell clam (*Mya arenaria*) shells were prevalent throughout the proposed lease site (SR 13).

According to data maintained by DMR's Recreational Fisheries Program, shoreline angling occurs from the Higgins Beach area through the mouth of the Spurwink River (SR 13). Daytime activity ranges from May to October, with 1-4 anglers toward the beginning and end of the fishing season, and 5-8 anglers during the peak of the season (SR 13). A comment letter submitted by the RCNWF<sup>8</sup> noted that the area is heavily used by sportsmen, fishermen, and recreational boaters, and that the RCNWF also manages hunting and fishing programs in areas in the Spurwink Division. The applicant has proposed that a power washer will be used a couple of weekends per year, for up to 4 hours per day. Such activity could impact hunting, fishing and other recreational uses of the river during those times. RCNWF was concerned that the aquaculture activities previously proposed could disturb the hunting and fishing activity and

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<sup>7</sup> CF: Letter from RCNWF dated May 17, 2018 submitted during the comment period for Portland Oyster Company LLC Application deemed complete on March 27, 2018

<sup>8</sup> CF: Letter from RCNWR to DMR dated May 17, 2018, submitted during the comment period for Portland Oyster Company LLC Application deemed complete on March 27, 2018.



given the popularity of those activities during the same times as the current proposal<sup>9</sup>, RCNWF would likely have the same concerns today. In addition, DMR received several comments from members of the public during comment periods for previous applications in the Spurwink River indicating the area is heavily used for various recreational activities (boating and fishing). DMR's site report indicates that recreational angling and hunting from shore and boat would remain unhindered north and south of the proposed lease, but that recreational angling within and to the west of the proposed lease will be constrained, especially at low water due to shallow water depths and the presence of submerged gear (SR 13).

The evidence indicates that recreational fishing and boating occurs frequently in the area. If a lease were granted, fishing would be limited within the boundaries of the lease site or the area to the west of the lease. Due to the popularity of the Spurwink River for recreational fishing and boating, the presence of any aquaculture gear in the area is likely to interfere with such activities.

It appears that the proposal would significantly alter existing water based uses of the area, including recreational fishing and boating. The Department has previously denied three lease applications for aquaculture activities near and within the boundaries of this proposal.

**Therefore**, the aquaculture activities proposed for this site will unreasonably interfere with fishing and other water related uses of the area.

### **C. Flora & Fauna**

During DMR's site review staff walked or kayaked the entire proposed lease site and surrounding area (SR 14). The site report notes that the ecology of the proposed lease area has not noticeably changed since DMR's previous visit to the area on May 22, 2018 (SR 14). Staff observed a variety of marine flora and fauna including periwinkles, sand shrimp, green and hermit crabs, soft-shell clams, and algae (SR 14). Canada geese, gulls, common terns, Bonaparte's gulls, snowy egrets, great egrets, great blue heron, and sparrows were observed throughout the saltmarsh and along the intertidal shore (SR 15). Terns were observed foraging throughout the area, and one was observed providing food to a fledgling to the west of the proposed lease site (SR 15). RCNWF previously commented that the area has quite a diversity of birds, including least terns, least sandpipers, semi-palmated sandpipers, semi-palmated plovers, American black ducks and common eiders<sup>10</sup>.

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<sup>9</sup> CF: Letter from RCNWR to DMR dated May 17, 2018, submitted during the comment period for Portland Oyster Company LLC Application deemed complete on March 27, 2018.

<sup>10</sup> CF: Letter from RCNWR to DMR dated May 17, 2018, submitted during the comment period for Portland Oyster Company LLC Application deemed complete on March 27, 2018.

Based on data maintained by the Maine Department of Inland Fisheries and Wildlife (MDIFW), the proposed lease site is located within an area categorized as “Essential Habitat” for least terns and piping plovers, which are listed as endangered in the State of Maine (SR 16). The proposed site also lies within saltmarsh sparrow habitat, which is a species of concern in the State of Maine (SR 16). The proposed lease and surrounding shallow subtidal and saltmarsh are also classified as Tidal Wading Bird and Waterfowl Habitat, which is defined under Maine’s Natural Resources Protection Act as Significant Wildlife Habitat (Sr 16).

Essential Habitats are areas, established through rule-making, that have physical or biological features that are essential to the conservation of an endangered or threatened species.<sup>11</sup> The proposed site is in an area essential to the nesting, feeding, and brood rearing for least terns and piping plovers, which are designated as state endangered species. During the site visit, staff observed least terns actively foraging throughout the area. At full production, 200 cages would be used along a single line that is 1725 feet long. The applicant intends to service the site on a consistent basis, as the applicants tend to the gear and harvest product. The applicant anticipates the need to use a power washer a couple of times per year, up to four hours a day. DMR sent a copy of the lease application to MDIFW for its review and comment. Per their email to DMR on May 2, 2019<sup>12</sup>:

“these are our two recommendations for the Portland Oyster lease in Saco. I also verbally conveyed these recommendations in a phone conversation with the applicant (Todd Gutner) last week

1. Increase the spacing of the buoys from 40 feet to 80 feet.
2. Pressure washing: we asked that any pressure washing not occur from mid-May through the end of August to minimize impacts to State Endangered least terns. Todd raised the issue of unknowns associated with frequency of fouling of the cages in the river. It was decided that pressure washing would be avoided from mid-May through the end of August, but in the event that the cages became fouled during that period the applicant would contact one of our regional Wildlife Biologists ahead of time to discuss the situation and come to resolution prior to pressure washing (Todd—please correct me if you remember differently!)

As this proposed lease is located in Essential Habitat for least tern, MDIFW must formally evaluate the project, when the lease details and timing of operations have been finalized, just prior to the Maine Department of Marine Resources approval and issuance of necessary required permits.”

Based on the evidence, the gear and associated activities may displace and disturb the state endangered least tern. MDIFW also indicated they must still formally evaluate the project before approving and issuing required permits and are uncomfortable with the spacing of buoys and pressure washing activity as proposed by the applicant. Initial comments received from MDIFW suggest that the use of a pressure washer may be acceptable but not from mid-May through the end of August. Should the need to use a pressure washer arise the applicant would

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<sup>11</sup> See: <https://www.maine.gov/ifw/fish-wildlife/wildlife/endangered-threatened-species/essential-wildlife-habitat/pplt-nests.html>

<sup>12</sup> CF: Email to C. Burke from J. Perry dated May 2, 2019



need to contact MDIFW to discuss. MDIFW previously raised concerns about applications for oyster aquaculture in the Spurwink River and indicated that activity in the river could unreasonably harm foraging opportunities for the endangered least tern<sup>13</sup>. While the proposed activities are for less gear than previous applications in the same area, when considering the location of the proposed lease within identified Essential Habitat, the purpose of such a habitat designation, the documented presence of state endangered least terns with the boundaries of the proposed lease site, feedback from MDIFW, and the prevalence and diversity of birds found in the area, it is reasonable to conclude that the proposal will unreasonably interfere with the ecological functioning of the area.

**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 fauna.

#### **4. CONCLUSIONS OF LAW**

The evidence in the record supports the conclusion that the proposed aquaculture activities do not meet all the requirements for granting an experimental lease set forth in 12 M.R.S.A §6072-A. Since the application fails to satisfy all the criteria, it must be denied.

#### **5. DECISION**

Based on the foregoing, the Commissioner denies the application of Portland Oyster Company, LLC for a lease to cultivate American/Eastern oysters (*Crassostrea virginica*) using suspended culture techniques on 0.14 acres in the Spurwink River, in Scarborough and Cape Elizabeth, Cumberland County, Maine

Dated: 10/25/19



Patrick C. Keliher, Commissioner  
Department of Marine Resources

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<sup>13</sup> MDIFW agency comments, received via email on August 22, 2018, regarding the Portland Oyster Company application deemed complete on March 27, 2018.