

**STATE OF MAINE
DEPARTMENT OF MARINE
RESOURCES**

Experimental Aquaculture Lease Application
Suspended Culture of American/eastern
oysters
Smelt Brook, Dyer Bay, Steuben, Washington
County

**Arnold Francis
DYER SBx**

March 26, 2021

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION

Arnold Francis applied to the Department of Marine Resources (“DMR”) for a three-year experimental aquaculture lease located in a tidal impoundment in Smelt Brook in Dyer Bay, Steuben, Washington County, Maine. The proposed lease is 3.60¹ acres and is for the suspended culture of American/eastern oysters (*Crassostrea virginica*). DMR accepted the application as complete on December 10, 2020.

1. THE PROCEEDINGS

Notice of the application and the 30-day public comment period were provided to riparian landowners, state and federal agencies, the Town of Steuben and its Harbormaster, and others on DMR’s mailing list. Notice of the application and comment period was published in the January 7, 2021 edition of *The Ellsworth American*. During the comment period, DMR did not receive any requests for a public hearing, and no hearing was held. The evidentiary record regarding this lease application includes the application, DMR’s site report dated February 23, 2021, and the case file. The evidence from each of these sources is summarized below.²

2. DESCRIPTION OF THE PROJECT

A. Proposed Operations

Oysters would be cultured using floating mesh bags that would be deployed at the surface of the water from approximately May-November and submerged below the surface of the water from November-May (App 27-28). The completed application contains an overhead view that depicts a maximum of 4,800 mesh bags deployed on 160 strings (App 26), but the gear table included in the completed application lists a maximum of 25,000 mesh bags (App 13). According to the Department’s site report, follow up communication with the applicant indicates

¹ Applicant requested 3.7 acres. DMR calculations indicate the area is 2.91 acres.

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

that they intend to deploy a maximum of 24,000 mesh bags, deployed across 800 strings measuring 100 feet in length (SR 2). Strings would be positioned in a north-south direction and arranged with either 2 or 7 strings positioned end to end. There would be a total of 112 sets of 7 strings, and 8 sets of 2 strings (SR 2). The site report notes that the maximum gear deployment of 24,000 bags fits within the boundaries of the proposed site, with approximately 2 feet between strings (SR 2).

B. Site Characteristics

The proposed lease site is in a tidal impoundment that is operated and maintained by the applicant. The surrounding upland area is undeveloped forest with one utility building that belongs to the applicant and other items or structures associated with the applicant's lobster business including the impoundment, two landed lobster fishing vessels, and two boat ramps (SR 2). The shoreline surrounding the pound is a mix of small gravel and ledge, with segments of salt marsh (SR 2). The bottom of the proposed site is primarily composed of mud, gravelly mud, and some shell rubble (SR 7).

A DMR Scientist visited the site on December 22, 2020. Because the proposed site is located entirely within a tidal impoundment, depths within the site are partially a function of the tide gate management. Depths were not collected during DMR's visit to the site, however, the application states that the lease site is above mean low water (App 1). Therefore, it is expected that if the gate were opened, the proposed site would drain completely during lower tidal stages. The application states that water depths range from 5-12 feet (App 9). For intertidal applications, written permission for use of any intertidal lands that will be used by the applicant is required to be given by the intertidal landowner. The applicant is the owner of the adjacent parcel that surrounds the proposed area. In addition, the application included a letter of consent for the proposed operations from the Town of Steuben Board of Selectmen (App 30-32).

In their review of the application, DMR's Bureau of Public health noted that there are not any concerns with the proposed operations, but if the pound were to start being used for lobsters again, they would not be able to use any medications or treatments that would impact the safety of the oysters. Should the applicant want to return to using the pound for lobsters, while continuing aquaculture operations, they are encouraged to contact DMR before doing so to discuss their plans, and no medications or treatments can be added to the pound that would impact the safety of the oysters without prior approval from DMR's Bureau of Public Health. The lease will be conditioned to reflect this.

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 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 on the lease site.

A. Riparian Access

During DMR's site visit on December 22, 2020, a small flat bottom skiff and wooden floats were observed hauled out near the SW corner of the proposed lease and the boat ramp with access to the pound (SR 10). One mooring buoy was also observed in the pound. This buoy was confirmed to belong to the applicant (SR 10). The applicant owns the parcel of land that surrounds the tidal impoundment (App 22-23), and there is no public access to the waters where the lease is being proposed. In addition, because the proposed lease is located entirely within a tidal impoundment, the impoundment is operated by the applicant, and because the applicant owns the entire area surrounding the pound, the proposal is unlikely to interfere with riparian access.

During the comment period, DMR did not receive any comments regarding riparian access. Based on the lack of public comments, and the evidence presented in DMR's site report, it is reasonable to conclude that there are no concerns regarding the effects the proposed lease may have on riparian ingress and egress.

Therefore, 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 is entirely enclosed by pound infrastructure operated and maintained by the applicant. During DMR's visit to the site, 1 mooring buoy was observed, but this was confirmed to belong to the applicant (SR 10). The proposal would comprise most of the impounded area, but approximately 15 feet would remain for navigation between the pound shoreline and the southern boundary and most of the eastern and western boundaries (SR 10). This space would likely facilitate navigation around the proposed lease site in a small vessel.

Because the proposal is located entirely within the tidal impoundment that is operated by the applicant, and is mostly surrounded by the applicant's property, there is no public boat access to the waters where the lease is proposed (SR 9).

During the review period, DMR did not receive any comments regarding navigation. Based on the lack of public comments, the evidence in the site report, and because the proposal is located within a tidal impoundment operated by the applicant, it is reasonable to conclude that navigation in the area will not be unduly affected by the proposed application.

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

C. Fishing & Other Uses

Fishing. During DMR's site visit on December 22, 2020, no fishing activity was observed within the pound, and no commercial fishing is expected to occur within the pound boundaries (SR 10). DMR did observe two hauled out lobster boats near the proposed SW corner of the lease. These vessels were confirmed to be associated with the applicant's lobster business (SR 10). The completed application stated that there is some clamming in the area, but that the proposal would not affect any fishing due to its location within the lobster pound (App 10). No comments were received regarding fishing in the area during the comment period.

Based on the lack of public comments, and the evidence in the record, it is reasonable to conclude that the proposed aquaculture activities will not unreasonably interfere with fishing.

Exclusivity. The applicant indicated that they already have exclusive use of the area as they are the owner of the lobster pound and surrounding land. Because the location of the proposed lease is surrounded by property owned by the applicant, and there is no public access to the impoundment, the lease will not be conditioned to expressly prohibit any uses as the public already does not have access to this space.

Other aquaculture uses. There are 12 Limited Purpose Aquaculture (LPA) licenses and 1 pending lease application within 1 mile of the proposal. The pending lease application is a second application submitted by the applicant, Arnold Francis. The LPA licenses within 1 mile of the site are held by the applicant and two other individuals, both of whom are members of the applicant's family. The application states that all LPAs located within the lobster pound would be relinquished if the proposed lease is granted (App 8).

Other water-related uses. During the review period, DMR did not receive any comments detailing other water-related uses that are not already contemplated in other sections

of this decision. Based on the absence of public comments, it is reasonable to conclude that there are no concerns regarding the effects the proposed lease may have on other water-related uses of the area.

Therefore, considering the 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

Historical eelgrass (*Zostera marina*) data collected by DMR in 2009 indicate that the closest eelgrass observed in Dyer Bay was more than 400 feet to the west of the proposed lease (SR 12). During DMR's visit to the site on December 22, 2020, no eelgrass was observed from the shoreline of the pound (SR 12).

According to data maintained by the Maine Department of Inland Fisheries and Wildlife (MDIFW), the proposed lease is located approximately 60 feet to the northeast of Tidal Wading Bird and Waterfowl Habitat (SR 12). The proposed lease is also more than 2,600 feet to the east of the United States Fish and Wildlife Service's mandated 660-foot protective buffer around a bald eagle nest (SR 12).

During the review period for this application, DMR sent the application to the MDIFW for their review and comment, and they indicated that "minimal impacts to wildlife are anticipated for this project."³

DMR did not conduct an underwater assessment of the proposed lease area but did conduct a walk around the shoreline of the impoundment and observed clam holes and casings, rockweed, common periwinkles, barnacles and mud shrimp (SR 12). The applicant reports that periwinkles, mussels, and green crabs have been observed in the pound (App 10). No public comments were received regarding the flora and fauna in the area.

Based on the evidence that the proposed lease does not interact with historical eelgrass beds, and because no other comments were received regarding the flora and fauna in the area, it appears that the proposed aquaculture activities for this lease site will not interfere with the ecological function 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.

³ CF: Email from R. Settele to C. Burke on January 8, 2021.

E. Public Use & Enjoyment

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

Therefore, the aquaculture activities proposed for this site will not unreasonably interfere with public use or enjoyment within 1,000 feet of beaches, parks, or docking facilities owned by federal, state, or municipal governments.

F. Source of Organisms

The applicant intends to source oysters from Downeast Institute in Beals, Maine or Muscongus Bay Aquaculture in Bremen, Maine. Both are approved sources for American/eastern oyster.

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

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. 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 stock 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 3.60 acres to Arnold Francis 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 lessee;⁴ 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/eastern oysters 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 (12)(B) 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 MSRA §6072-A (15)⁵. 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 purpose of the lease. The following conditions have been imposed on this lease:

⁴ 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.”

⁵ 12 MRSA §6072-A (15) provides that:

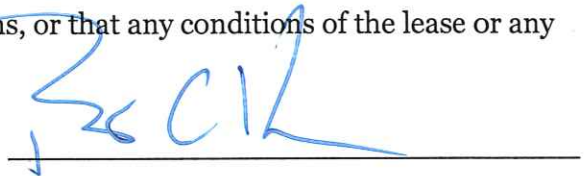
“The commissioner may establish conditions that govern the use of the leased area and limitations on the aquaculture activities. These conditions must encourage the greatest multiple, compatible uses of the leased area, but must also address the ability of the lease site and surrounding area to support 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.”

1. Should the applicant use the pound for lobsters while continuing aquaculture operations, they are encouraged to contact DMR before doing so to discuss their plans, and no medications or treatments can be added to the pound that would impact the safety of the shellfish without prior approval from DMR's Bureau of Public Health.

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.

Dated: 3/26/31



Patrick C. Keliher, Commissioner

Department of Marine Resources