

**STATE OF MAINE
DEPARTMENT OF MARINE RESOURCES**

Michael E. & Mark L. Gaffney

Standard Aquaculture Lease Application
Suspended and Bottom Culture of eastern
oysters and quahogs
Robinhood Cove, Georgetown, Maine

SAS PI

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION

Michael E. and Mark L. Gaffney (applicant) applied to the Department of Marine Resources (DMR) for a twenty-year standard aquaculture lease on 7.49¹ acres north of Little Phebe Island², in Robinhood Cove, in Georgetown, Maine. The proposal is for the suspended and bottom culture of eastern oysters (*Crassostrea virginica*) and quahogs (*Mercenaria mercenaria*).

1. THE PROCEEDINGS

The pre-application meeting on this proposal was held on January 13, 2021, and a scoping session was held on February 9, 2021. DMR accepted the final application as complete on October 26, 2021. Notice of the completed application and public hearing was provided to state agencies, the Town of Georgetown, riparian landowners³ within 1,000 feet of the proposed site, and subscribers to DMR's aquaculture email listserv. A Harbormaster Questionnaire was sent to the Georgetown harbormaster on [date] requesting information about designated or traditional storm anchorages, navigation, riparian ingress and egress, fishing or other uses of the area, ecologically significant flora and fauna, beaches, parks, and docking facilities in proximity to the proposed lease. The hearing was scheduled for November 15, 2023. Notice of the hearing was published in the *Times Record* on October 13, 2023, and October 27, 2023. The public notice for the hearing stated that the proceeding would be conducted in-person and directed interested persons to register for the proceeding if they intended to offer testimony or ask questions. It also directed interested persons to contact DMR for an intervenor application. Seventeen individuals registered to participate in the hearing. No individuals applied to intervene.

Sworn testimony was given at the public hearing held on November 15, 2023, by the following witnesses:

¹ Applicant originally requested 7.0 acres. DMR calculations indicate the area is 7.49 acres.

² Both the application and site report refer to this island as "Little Phoebe Island." The correct spelling of this island is "Little Phebe Island." The correct spelling will be used throughout the decision.

³ For purposes of notice, the Department defines "riparian owner" as a shorefront property owner, whose property boundaries are within 1,000 feet of the proposed site.

Name	Affiliation
Michael Gaffney	Applicant
David Teller, David C. Longstreet, Sharon Trabona, Robert Trabona, Robert Burns, John Teller, Clayton Norris, Tim Lotz, Ronald Shruhan	Registered members of the public

Additional DMR staff and members of the public attended the hearing but did not offer testimony. Maine State Representative Allison Hepler registered to participate at the hearing but did not offer testimony. The hearing was recorded by DMR. The Hearings Officer was Joshua Rozov.

The evidentiary record before DMR regarding this lease application includes three exhibits introduced at the hearing and the record of testimony at the hearing. The evidence from these sources is summarized below.^{4,5}

LIST OF EXHIBITS

1. Case file
2. Application
3. DMR site report, issued on October 16, 2023

2. DESCRIPTION OF THE PROJECT

A. Site History

A portion of the requested lease area has been utilized by the applicants via an experimental lease beginning in 2018 (SAS PIx). Since 2018, the applicants have cultivated eastern oysters and quahogs through suspended cultivation techniques. In accordance with 12 M.R.S.A. §6072-A(20), if the standard lease is granted, then experimental lease SAS PIx would be terminated. Figure 2 below depicts the footprints of the proposed standard lease and existing experimental lease.

B. Site Characteristics

On June 16, 2022, DMR staff assessed the proposed lease site and the surrounding area in consideration of the criteria for granting a standard aquaculture lease (SR 2). On October 11, 2023, DMR staff conducted a second site visit to assess depths at low tide and collect additional information about

⁴ Exhibits 1, 2, and 3 are cited below as: Case file – “CF”, Application – “App”, site report – “SR”

⁵ In references to testimony, “Smith/Jones” means testimony of Smith, questioned by Jones.

nearby features (SR 2). The proposed lease site is situated along the western shoreline of Robinhood Cove and is approximately 35 feet to the west of Little Phebe Island (SR 2).

DMR staff observed the bottom characteristics of the proposed lease site via one drop camera transect and one SCUBA transect (SR 3). Bottom characteristics were categorized using the Coastal and Marine Ecological Classification Standard, a national standard for describing features of the marine environment (SR 3). Sediment information was determined based on visual analysis of the video (SR 3). The bottom of the proposed lease site is primarily composed of mud with shell rubble (SR 3).

The proposed lease is currently located within an area classified as “approved for the harvest of shellfish” by the DMR Bureau of Public Health and Aquaculture (SR 10). At the time of the DMR’s site assessment in 2023, water depths were collected at the proposal corners and determined to be between 3.1 and 5.9 feet (SR 2). Correcting for tidal variation derives water depths to be approximately 10.8 to 13.6 feet at the next high tide and 1.9 to 4.7 feet at mean low water (MLW) (SR 2).

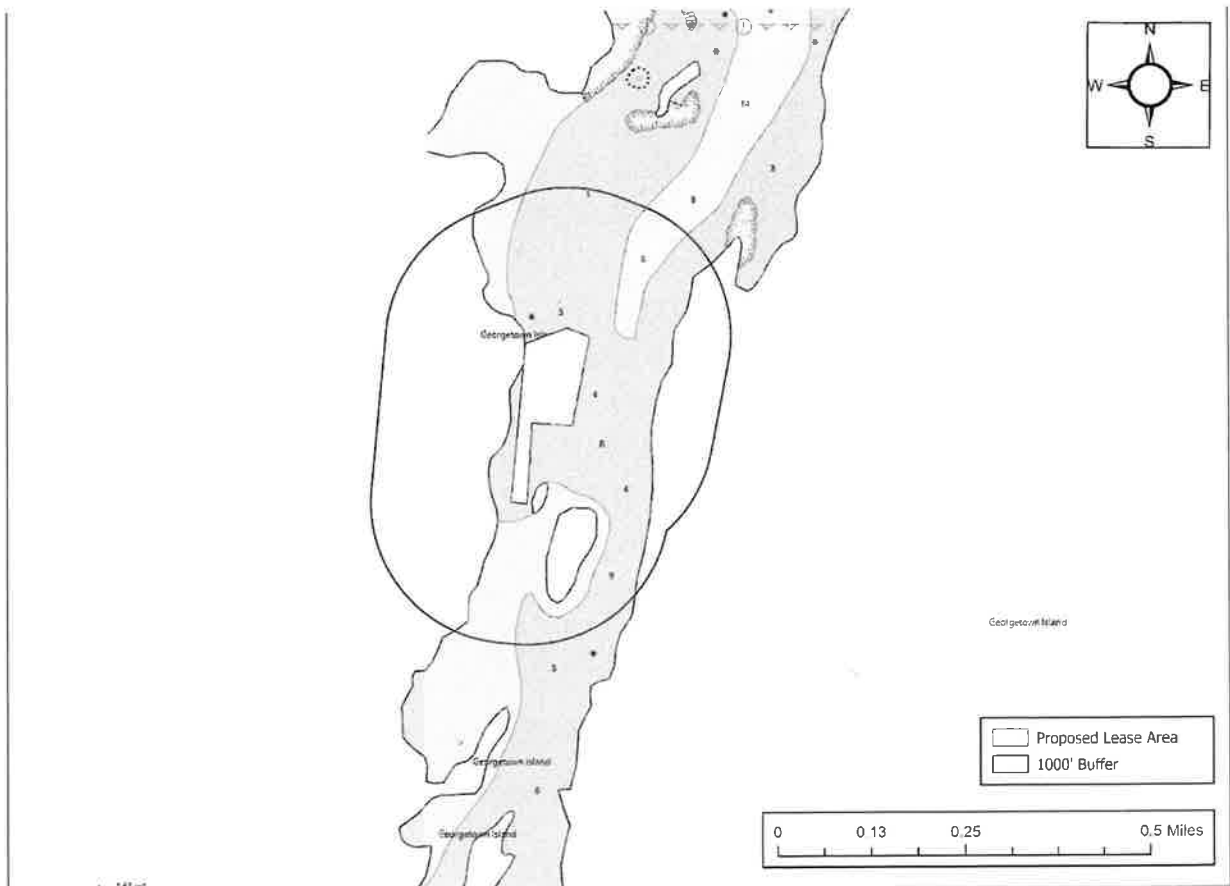


Figure 1: Proposed lease site and surrounding area. Image taken from DMR’s site report.

C. Proposed Operations

The applicant would cultivate eastern oysters and quahogs on the proposed lease site using suspended and bottom culture techniques (App 1-2). The site would be accessed by a 5’x16’ pile supported pier with a 3’x32’ ramp leading to an 8’x14’ landing float leading to a series of five 16’x10’ floats perpendicular to the shore below the mean high-water line (App 15). This access structure is approved by the U.S. Army Corps. (App 15). The applicants’ proposal includes a larger “north field,” and a smaller “south field” (App 12). The southern field extends downward and ends west of a landmass referred to as “Little Phebe Island.” Phebe Island is the larger island located in Robinhood Cove, Little Phebe Island is a smaller island located northwest of Phebe Island, as seen in Figure 1.

The north field would consist of 11 lines of gear, each 600’ long and spaced 30’ apart (App 12). Each 600’ line would consist of three 200’ long line segments, with 30 cages per segment (App 8). There would be 2’-6’ of separation between each cage (App 8). Each 600’ line would be secured by four equally spaced, 150lb mushroom anchors (App 12).

The south field would consist of four lines of gear, each 450’ long and spaced 20’ apart (App 12). There would be 2’-6’ of separation between each cage (App 8). Each 450’ line would be secured by four equally spaced, 100lb mushroom anchors (App 12). Each oyster cage would be a maximum of 68”x41” (App 7).

The applicant states that they intend to be on site seven days a week year-round (App 20). The applicant anticipates seeding the site in late May to early June (App 19). Juvenile oysters will be removed from the nursery boxes and placed in bags and cages in later July to mid-August (App 19). Harvesting will occur on site daily from April through October, then two times a week in the winter months (App 20). The applicant would access the proposed lease site by the pier describe above, and then with a 21’ skiff powered by a 90HP outboard motor and a 16’ skiff powered by a 25HP outboard motor (App 21). The two skiffs are tied up alongside the floats and are onsite daily (App 21). The power equipment proposed for the site includes the following:

Equipment	Description	Months of Operation/Frequency of Use
12-volt Oyster Tumbler	Powered by electricity (shore powered).	April-October/daily for two hours at a time
Shaker Table	Powered by electricity (shore powered).	April-October/daily for two hours at a time
High Volume Pump	Powered by electricity (shore powered).	Year-round/twice a week for two hours at a time
Power Washer	Gas powered	Year-round/twice a week for two hours at a time

90 hp outboard	Outboard motor on 21' scow barge used to get to proposed lease site	Year-round/daily
25 hp outboard	Outboard motor on 16' scow barge used to get to proposed lease site	Year-round/daily

At the hearing, the applicant testified that a “big motivator” for the western expansion from the current experimental lease boundary outward to the western shoreline in the proposal is to include the applicant’s floating dock within the lease boundaries (Gaffney Testimony). The applicant testified that this would allow the applicant to continue their operations without the need to obtain a wet storage permit to store oysters alongside the floats or a land-based aquaculture permit (LBA) for the applicant’s upweller (Gaffney Testimony).

The holder of a standard aquaculture lease is required to obtain applicable permits or licenses for other activities that may occur within the boundaries of the site or are otherwise affiliated with aquaculture activities on the site. For example, a flow-through wet storage permit is required when a dealer⁶ with a shellfish sanitation certificate stores shellfish on floats in a natural body of water.⁷ This is the exact activity that was referenced by the applicant at the hearing. If the applicant is classified as a dealer as defined in 12 M.R.S.A. § 6001(12) and §6856(1) who stores shellfish they have purchased on floats in a natural body of water, they would be still be required to obtain a flow-through wet storage permit for that activity, even if this standard lease application is granted and the activity is conducted within the boundaries of the lease site.

Likewise, pursuant to 12 M.R.S.A. §6085, if the applicant is culturing marine organisms in a facility not within Maine’s coastal waters, a LBA license is required. According to DMR records, the applicant has held an LBA license for a land-based upweller since 2022.⁸ At the hearing, the applicant stated the belief that this lease, if granted, would allow them to operate their existing upweller without having to maintain their LBA license (Gaffney Testimony). But even if the standard lease were granted as proposed, the applicant would still need to maintain a valid LBA license in order to operate the upweller.

3. STATUTORY CRITERIA & FINDINGS OF FACT

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

⁶ A dealer is defined as “any person who buys, sells or distributes any marine organism.” 12 M.R.S.A. § 6001(12).

⁷ 12 M.R.S.A. § 6856(1), (2-A)(B).

⁸ LBA #MELBA0018 issued to Michael and Mark Gaffney

areas to support existing ecologically significant flora and fauna; or the public use or enjoyment within 1,000 feet of beaches, parks, docking facilities, or conserved lands 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; that the lease will not result in an unreasonable impact from noise or lights at the boundaries of the lease site; and that the lease will comply with visual impact criteria adopted by the Commissioner.

A. Riparian Owners Ingress and Egress

DMR's Chapter 2 regulations⁹ require the Commissioner to examine whether riparian owners can safely navigate to their shore. In examining riparian owner ingress and egress, the Commissioner "shall consider the type of structures proposed for the lease [site] and their potential impact on the vessels which would need to maneuver around those structures." Chapter 2, § 2.37(1)(A)(1).

During the June 16, 2022, site visit DMR staff observed seven docks north of the proposal, three docks east of the proposal on the eastern shore of Robinhood Cove, and one pier to the south of the proposal (SR 5). The pier had an associated dock that was stored on shore at the time of the visit (SR 5). Additionally, four moorings were observed in the vicinity of the proposal with the two closest, 680' and 860' north of the proposal, being occupied by small powerboats (SR 5).

During the October 11, 2023, site visit DMR staff observed a vacant mooring approximately 338' to the northwest of the proposed site and a mooring field with two sailboats to the southwest of Phebe Island (SR 5).

In a harbormaster questionnaire from the Georgetown Harbormaster completed on November 24, 2021, it was stated that "this site should not have any effect on riparian owners getting to and from their property," (CF – Harbormaster Questionnaire).

While riparian landowners did provide testimony at the hearing, the testimony provided concerns about navigation in the cove generally, not specifically ingress or egress to their properties. These concerns are addressed in section (3)(B) of this decision, which pertains to navigation.

DMR received no comments from the public about impacts to riparian access and the Georgetown Harbormaster stated that the site should not have any effect on the ingress and egress of riparian landowners. Additionally, the entirety of the proposed site runs along the western side of the cove in front of a single shorefront parcel, which is owned by applicant (App 32).

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

⁹ 13-188 C.M.R. ch. 2.

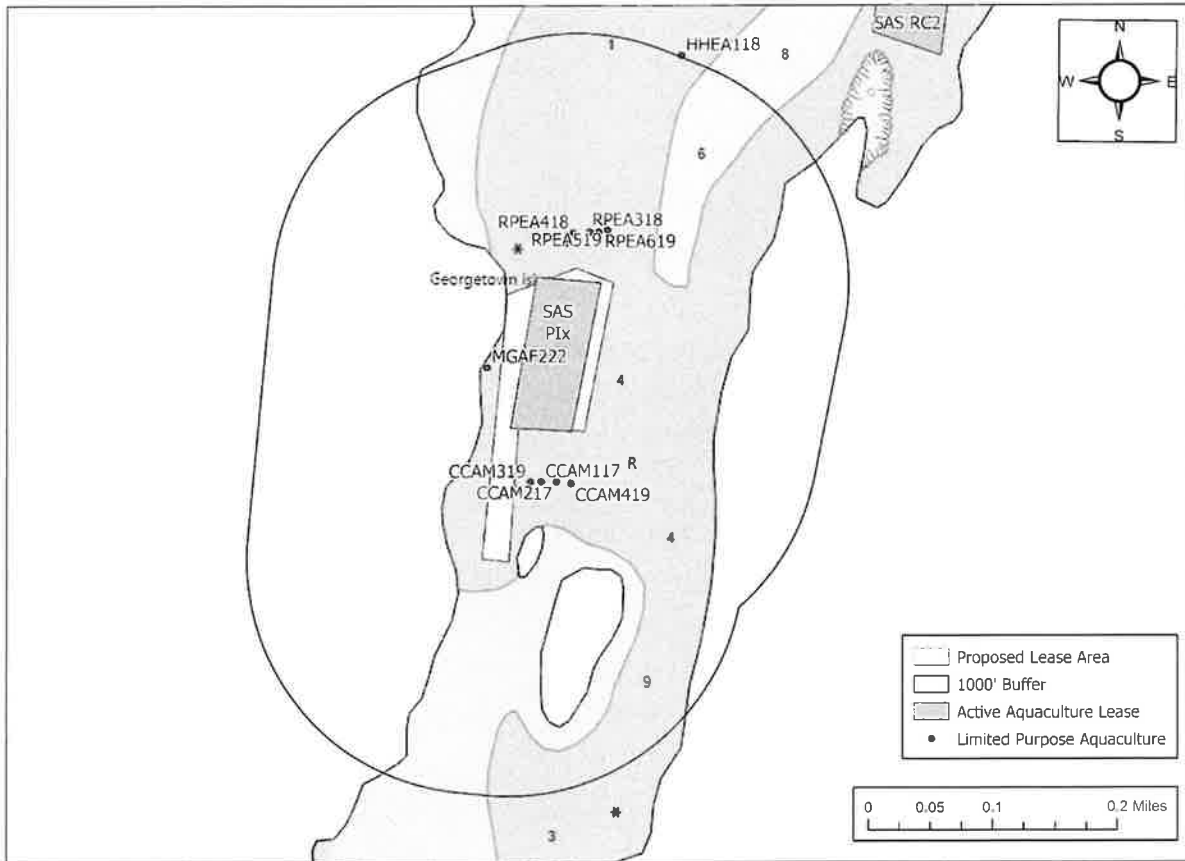


Figure 2. Proposed lease area with current active lease site and Limited Purpose Aquaculture (LPA) licenses in the vicinity of the proposal. Image taken from DMR’s site report.

B. Navigation

DMR’s Chapter 2 regulations require the Commissioner to examine whether any lease activities requiring surface and or subsurface structures would interfere with commercial or recreational navigation around the lease area. In examining navigation, the Commissioner “shall consider the current uses and different degrees of use of the navigational channels in the area in determining the impact of the lease operation.” Chapter 2, § 2.37(1)(A)(2).

The proposal is located in shallow water bordering the western shore of Robinhood Cove, with the center of the main navigational channel located approximately 250’ east of the proposal (SR 5). DMR staff did not observe any vessels operating in the vicinity of the proposal during the site assessment on June 16, 2022, or October 11, 2023 (SR 5).

The western expansion of the proposal would begin from where the current experimental lease ends and reach the western shoreline of the cove. The applicant testified that they would leave a 100’ “buffer” area free of gear from the western shoreline to the beginning of the lines of gear to allow for navigation along the shoreline (Gaffney). The applicant additionally stated that there would be a 100’ gap

between the northern field and southern field of the proposal for access east and west of the cove (Gaffney/D. Teller).

The Harbormaster questionnaire states that the proposal would have a minor effect on navigation for the sailboat operators who “choose to tack under sail up the north-south running cove. A wide channel will remain past this proposed site, but there will be 60’ less width for sailboats tacking up and down the cove past this site,” (CF – Harbormaster Questionnaire). The Harbormaster Questionnaire does not reference the southern field or the side of the cove to the west of Little Phebe Island.

Southern Boundary. If approved, the proposed expansion from the southern boundary of the existing experimental lease down to the new southern boundary in the proposal has the potential to limit navigation around the western side of Little Phebe Island. At the hearing, the applicant testified that there is little boating activity between the western shoreline and Little Phebe, but also stated that there are “a lot” of kayaks, canoes, and paddleboards, and a “few” small motorboats in that area (Gaffney). A testifying member of the public stated that they have sailed small sailboats to the west of Little Phebe Island and have observed kayaks, canoes, and small powerboats (Longstreet/Gaffney).¹⁰ Boats have been observed using the western side of Little Phebe Island during high tide (S. Trabona/Gaffney). Concern was raised that the “panhandle” of the proposal would cut off all travel around the west of Little Phebe Island (Longstreet).¹¹

Testimony was provided that it would be unlikely for mariners to navigate the waters to the west of Little Phebe Island at low tide (Burns/Rozov). DMR staff collected water depths at the proposal corners and determined the depth to be between 1.9’ and 4.7’ at mean low water (SR 2). The applicant also reports the depth at mean low water to be between 3’ and 5’ (App 23).

Taking into consideration the public testimony reporting that boating activity has been observed in the waters to the west of Little Phebe Island, and the water depth being deep enough to support shallow draft watercrafts at most points during the day, the waters to the west of Little Phebe Island do appear to be used for navigation. The southern expansion of the proposal would restrict any boat that chooses to go around the west side of Phebe and Little Phebe Island from getting back to the main navigational channel in Robinhood Cove.

The applicant testified that there would be a 100-foot gap between the gear in the northern field and the gear in southern field to allow for navigation east and west of the cove (Gaffney/D. Teller). While this gap may allow for boats to pass east to west or west to east through the proposal, the operator of a watercraft would need to be aware of this area and be comfortable utilizing it. The lease boundaries would need to be marked in accordance with DMR regulations, Chapter 2.80 and US Coast Guard Regulations. These boundary marking requirements do not distinguish areas of a proposal which do and do not have

¹⁰ Another member of the public stated they have taken their 19’ sailboat along the western side of Little Phebe Island and did it twice the past summer (D. Teller/Ellis).

¹¹ The proposed southern field was occasionally referred to as the “handle” or “panhandle” in the testimony.

gear located in them. To a mariner it would not be clear that there was a 100-foot corridor to use for this purpose. In addition, given the amount and type of vessels that utilize the area the 100-foot corridor does not adequately mitigate interference with navigation.

In accordance with Chapter 2.35 of DMR's regulations, a copy of the proposed decision was sent to the applicant for their review and comment. The applicant requested that the southern boundary be permitted, but for bottom culture only (meaning there would be no gear deployed). However, even if this portion of the site were permitted for bottom culture only it would still have to be marked in accordance with Chapter 2.80 and US Coast Guard Regulations. These boundary marking requirements do not distinguish areas of a proposal which do and do not have gear located in them. A prudent watercraft operator not familiar with the cove would potentially avoid the entire lease boundary, not wanting to risk entanglement or striking aquaculture gear. Additionally, the applicant would still be operating and conducting aquaculture activities in this area. In consideration of the record, including how the area is utilized for navigation, the southern portion of the proposed lease site, regardless of culture type, would unreasonably interfere with navigation to the west of Little Phebe Island. A modification that reduces the southern expansion to the southern border of the current experimental lease would allow for navigation to continue to occur on the western side of Little Phebe Island.

Furthermore, in his comments regarding the proposed decision, the applicant requested that the Department remove the 100-foot corridor from the proposal, creating a 2-tract noncontiguous lease site. In accordance with Chapter 2.10(1)(A)(1)(b) of DMR's regulations, lease sites must be one contiguous tract unless certain exceptions are claimed and demonstrated as part of the submission of the initial application. For example, applicants may request two lease tracts to accommodate for existing uses of the area, including existing navigational corridors. In this case, granting the request for a multi-tract lease after the close of the record frustrates the intent of the application siting requirements and raises procedural concerns because the request was provided after the record had closed and it does not provide individuals with the opportunity to evaluate and comment on such a modification. Therefore, this request will not be granted.

Eastern Boundary. The applicant proposes a 50' expansion eastward from the current experimental lease area.

The distance of the northeastern corner of the proposed lease to the eastern shoreline would be 570' (SR 4). Testimony from public participants brought attention to a rocky outcropping approximately 100' west from the eastern shoreline, east northeast of the proposed lease area, that is not depicted on any navigational charts.¹² This reduces the available navigable waters in the area to approximately 470'. Because the rocky outcropping is not on any navigational charts, there is a higher risk to those sailing the cove who are not familiar with the area. In response to a draft of this decision, the applicant disputed the

¹² (Longstreet/Rozov), (Lotz).

location of the rocky outcropping and its effect on navigation around the proposed lease site. In making this determination, the Department relies on testimony from the public, which stated that the rocky area is directly across the cove from the proposal and any expansion of the lease in that direction would put boats in danger¹³, and testimony that when measured by a member of the public the rocky outcropping was approximately 475 feet east northeast of the boundary of the LPA currently in the proposal location¹⁴. Additionally, testimony was provided that there is a lot of north-south boating activity, both commercial and recreational, that occurs in the cove every day (Lotz). Further narrowing of the navigable waters in an area which has daily commercial and recreational boat traffic, in proximity to an unmapped submerged rocky outcropping, would cause unreasonable navigational risks.

The current in the cove runs 1.5 knots north and south (App 23). Testimony from the public expressed that this area is often used for sailboats transiting north and south along the cove.¹⁵ Sailing against the current, and against the wind in some weather, causes the need to tack up the cove. Testimony from the public stated that tacking against the current in the area already requires sailing close to the existing boundary of the experimental lease (D. Teller).

As the navigation channel to the east of the existing lease site is narrowed, the risk of incident when tacking up current increases, especially if multiple boats happen to be in the area at the same time. The 50' eastern expansion would further reduce the area available for tacking, which is already restricted due to the presence of the current experimental lease. While the eastern boundary of the current experimental lease does increase the time in tacking up current, the testimony did not show that the eastern boundary of the existing experimental lease unreasonably interferes with navigation.

However, as proposed in the application, the easterly expansion beyond the existing lease site would unreasonably interfere with navigation by narrowing the navigational channel even more. A modification that reduces the eastern boundary of the proposed lease site to the current eastern boundary of experimental lease SAS P1x, would maintain the existing status of navigation in this section of the cove. The Department did not receive any comments or testimony that the existing eastern boundary unreasonably interferes with navigation.

In accordance with Chapter 2.35 of DMR's regulations, a copy of the proposed decision was sent to the applicant for their review and comment. The applicant requested that the eastern boundary be permitted, but for bottom culture only (meaning there would be no gear deployed). However, even if this portion of the site were permitted for bottom culture only it would still have to be marked in accordance with Chapter 2.80 and US Coast Guard Regulations. As stated in the southern boundary discussion, the boundary marking requirements do not distinguish areas of a proposal which do and do not have gear

¹³ (Longstreet/Rozov). In addition, the applicant had the opportunity to cross-examine each person who provided testimony. The applicant did not raise concerns about these stated distances on the record, during the proceeding.

¹⁴ (Lotz).

¹⁵ (D. Teller), (S. Trabona/Rozov).

located in them and the applicant would still be operating and conducting aquaculture activities in the area. A prudent watercraft operator not familiar with the cove would potentially avoid the entire lease boundary, not wanting to risk entanglement or striking aquaculture gear.

Western Boundary. The western boundary of the proposed lease area would be situated along the western shoreline, abutting the applicant's property. As stated in the Proposed Operations section of the decision, a motivation for the western expansion is to create a contiguous lease between a dock leading from the shoreline of the applicant's property and his aquaculture gear to allow for the applicant to apply for and maintain fewer amounts of permits, specifically a wet storage permit and an LBA. However, as stated previously, if the applicant wishes to continue with these activities, he must maintain the necessary permits or licenses even if his standard lease application is granted.

At the hearing, the applicant testified that they would leave a 100' "buffer zone" between the western boundary of the lease and the start of gear to allow for boating to continue along the western shoreline (Gaffney). According to the applicant, this "buffer zone" would contain no gear and could continue to be used by recreational boaters, as well as recreational and commercial fishermen.

If the lease were granted to include the proposed 100' "buffer zone" there would be no aquaculture activities conducted within that area for the term of the lease. Pursuant to 12 M.R.S.A. §6072(1), DMR has authority to grant leases only for the purposes of conducting scientific research or *aquaculture* of marine organisms. At the time of lease renewal, DMR considers whether a lease is being held for speculative purposes.¹⁶ Such considerations include whether the lessee has conducted aquaculture in the lease area during the previous term. The hearing record demonstrates the applicant included the 100' buffer zone in the proposed lease site not for the purpose of conducting aquaculture activities there, but for the purpose of avoiding having to obtain other permits or licenses for other activities. But, for the reasons stated above, the applicant would not achieve his stated goal even if the lease did include the 100' buffer zone.

As proposed in the application, the expansion of the existing lease site westerly to the shoreline would unreasonably interfere with navigation by preventing navigation to the west of the proposed lease site. Keeping 100' from the shoreline free of gear would allow navigation to continue in this area. However, including the 100' strip within the boundaries of the proposed lease site, when no aquaculture will be conducted in the strip, may exceed DMR's authority to grant a lease for the purpose of aquaculture; and in any event, it would not achieve the applicant's goal of reducing the number of permits or licenses required for his operations. A reduction in the western boundary of the proposed lease area, to the current western boundary of experimental lease SAS PIx, would maintain the existing status of navigation to the west of the lease site. The Department did not receive any comments or testimony that the western boundary of the existing lease unreasonably interferes with navigation.

¹⁶ 12 M.R.S.A. §6072(11-A)(B)(4).

In accordance with Chapter 2.35 of DMR's regulations, a copy of the proposed decision was sent to the applicant for their review and comment. The applicant stated that the western boundary would expand approximately 200 feet from the current boundary, not 100 feet as stated above. In the application for this proposal, this western "expansion" from the current boundary to the new proposed boundary is repeatedly labeled as an additional 100 feet (App 5, 12). Additionally, using ArcGIS Pro version 2.9 and the coordinates supplied by the applicant, Department staff measured the distance from the northwestern corner of the current lease site to the proposed northwestern corner of the expanded lease site, as depicted in Appendix A, and measured approximately 124 feet. As seen in Appendix A Figure 3, this distance is the widest section of the western expansion, which gets narrower until the expansion reaches the southwestern corner of the current lease site. Therefore, the proposed westward expansion is at most 124 feet from the current lease boundary, not 200 feet as stated by the applicant in response to the draft decision. Contrary to the applicant's statements, the proposed western expansion would not have enough room for a 100-foot equipment-free buffer and two additional lines of gear, with 30 feet between each line (App 12).

Reduction in Size. Given the unreasonable interference with navigation presented by the proposed lease site and other considerations as detailed above, if DMR grants a standard lease to the applicant, the proposed lease area would be reduced from 7.49 acres to 4.12 acres to allow for navigation to occur without unreasonable interference along the western side of Little Phebe Island, along the shoreline west of the lease site, and in the main navigational channel to the east of the lease site. The eastern, southern, and western boundaries of the standard lease site as modified would be contiguous with those boundaries of the applicant's existing experimental lease. For the revised coordinates and reduction images, see Appendix A.

Therefore, as modified as stated in this decision, the aquaculture activities proposed for this site will not unreasonably interfere with navigation.

C. Fishing & Other Water-related Uses

DMR's Chapter 2 regulations require the Commissioner to examine whether the lease activities would unreasonably interfere with commercial or recreational fishing or other water-related uses of the area. In examining fishing and other uses, the Commissioner "shall consider such factors as the number of individuals that participate in recreational or commercial fishing, the amount and type of fishing gear utilized, the number of actual fishing days, and the amount of fisheries resources harvested from the area." Chapter 2, § 2.37(1)(A)(3).

Fishing. In the application, the applicant states that there is occasional striped bass trolling in the area, around six times a year (App 25). At the hearing, the applicant stated that their current lease site has attracted fishing to the area (M. Gaffney Testimony). The applicant claimed that they have noted an

increase in the amount of striped bass around the lease site, which has led to an increase in fishing in and around their gear lines (M. Gaffney Testimony).

A member of the public, R. Trabona, testified that pogie/bunker¹⁷ frequent Robinhood Cove, and that fishing boats enter the cove to catch them (R. Trabona Testimony). Mr. Trabona did state that while the boats tend to favor the eastern side of the cove, and the proposal is located on the western side of the cove, the boats do frequent the entire cove (R. Trabona Testimony). Mr. Trabona was unsure if these fishermen are commercial or recreational fisherman (R. Trabona Testimony). Mr. Trabona stated that he sees fishing in the cove in approximately 18-foot boats from the middle of June to the end of August (Trabona/Rozov) Mr. Trabona testified that fisherman do stick predominantly to the eastern side of the cove (Trabona/Gaffney). While there was testimony that both commercial and recreational fishing do occur in the cove, R. Trabona stated that the view from his property to the proposal is obstructed and he is unable to tell if fishing occurs near or within the boundaries of the proposal (Trabona/Ellis).

Another member of the public testified that they see recreational fishing every day when it is in season and saw one lobsterman fishing in the cove regularly in the summer of 2023 (Lotz/Rozov). One other member of the public testified that he sees fisherman in the cove frequently during fishing season, sometimes as many as six times a day (Shruhan/Ellis).

Mr. Trabona testified that mussels and soft-shell clams are present along the shoreline in Robinhood Cove (R. Trabona Testimony). Mr. Trabona has seen individuals clamming along the south end of Phebe and Little Phebe Island on a semi-regular basis (R. Trabona Testimony).

When making a decision, the Commissioner “shall consider such factors as the number of individuals that participate in recreational or commercial fishing, the amount and type of fishing gear utilized, the number of actual fishing days, and the amount of fisheries resources harvested from the area.” Chapter 2, § 2.37(1)(A)(3). The original application stated that fishing only occurs around the proposal approximately six times a year. The hearing record demonstrates that fishing in Robinhood Cove and around Phebe and Little Phebe Island is a popular activity during the fishing season, for both recreational and commercial fishing vessels.

While the proposed lease, with the dimensions as proposed in the application, may have unreasonably interfered with recreational and commercial fishing in the area, the proposal as modified as stated in this decision will not. The proposed lease site as modified does not extend any further to the east, south, or west than the applicant’s existing experimental lease, and it extends only slightly further to the north than the existing lease. There was no testimony to indicate either that the existing experimental lease boundaries unreasonably interfere with existing fishing activities, or that expanding the lease to the north as proposed would unreasonably interfere with existing fishing activities in the area. Because of

¹⁷ Common name used to refer to Atlantic menhaden (*Brevoortia tyrannus*).

these factors, the proposal, as modified as stated in this decision, will not unreasonably interfere with recreational and commercial fishing in the area.

Other water-related uses. No testimony relating to other water-related uses was given at the hearing.

Therefore, the aquaculture activities proposed for the site, as modified as stated in this decision, will not unreasonably interfere with fishing or other water-related uses of the area.

D. Other Aquaculture Uses

DMR's Chapter 2 regulations require the Commissioner to consider any evidence submitted concerning other aquaculture uses of the area. "The intensity and frequency of such uses as well as the degree of exclusivity required for each use shall be a factor in the Commissioner's determination of whether any interference is unreasonable. The number, size, location, and type of other aquaculture leases shall be considered by the Commissioner." Chapter 2, § 2.37(1)(A)(4).

The applicant currently operates experimental lease SAS PIx within the boundaries of the proposal. If a standard lease were granted, SAS PIx would be terminated (SR 7). There are nine limited purpose aquaculture (LPA) sites within 1,000' of the proposed lease site: CCAM117, CCAM217, CCAM319, CCAM419, MGAF222, RPEA318, RPEA418, RPEA519, and RPEA619 (SR 7). LPA site MGAF222 is held by the applicant.

DMR did not receive any comments from LPA holders regarding the proposed site in relation to their license sites.

Therefore, the aquaculture activities proposed for this site will not unreasonably interfere with other aquaculture uses in the area.

E. Existing System Support

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 support ecologically significant flora and fauna. "Such factors as the degree to which physical displacement of rooted or attached marine vegetation occurs, the amount of alteration of current flow, increased rates of sedimentation or sediment resuspension, and disruption of finfish migration shall be considered by the Commissioner in this determination." Chapter 2, § 2.37(1)(A)(5).

Site observations. DMR staff conducted SCUBA and drop camera transects to assess the epibenthic ecology of the area. The observed bottom of the proposed lease site is primarily composed of mud with shell rubble (SR 3). Organisms were noted and are listed below:

Species Observed	Abundance
Sugar Kelp (<i>Saccharina latissimi</i>)	Occasional

Eelgrass. According to data collected by DMR in 2010, there has not been a historical presence of eelgrass documented within the proposal or the immediate vicinity (SR 8). No eelgrass was observed within the proposal boundaries during DMR’s site assessment (SR 8).

Wildlife. According to GIS data maintained by the Maine Department of Inland Fisheries and Wildlife (MDIFW), the western portion of the proposed lease is located within designated Tidal Wading Bird and Waterfowl Habitat. On November 24, 2021, a MDIFW wildlife biologist responded by email to a “Request for Agency Review and Comment” stating that “minimal impacts to wildlife are anticipated” (SR 9). MDIFW did not attend the public hearing to provide testimony.

The overlap of the Tidal Wading Bird and Waterfowl Habitat and the proposed lease site occurs within 100’ of the shoreline. As modified for the reasons discussed above in the navigation analysis, the modified proposed lease site would not overlap with designated Tidal Wading Bird and Waterfowl Habitat.

No testimony concerning flora and fauna was given at the hearing. Based on this evidence, it appears that the proposed lease site will not impact the ecological functioning of the area.

Therefore, the aquaculture activities proposed for this site, as modified as stated in this decision, will not unreasonably interfere with the ability of the lease site and surrounding areas to support existing ecologically significant flora and fauna.

G. Source of Organisms to be Cultured

When examining the source of organisms, the Commissioner shall include but not be limited to, consideration of the source’s biosecurity, sanitation, and applicable fish health practices. Chapter 2, § 2.37(1)(A)(6).

The applicant will obtain seed from Mook Sea Farm and Downeast Institute. These hatcheries are approved by DMR. Any alternate source of stock must comply with DMR’s laws and rules.

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

F. Interference with Public Facilities

When examining interference with public facilities, the Commissioner considers the degree to which the lease interferes with public use or enjoyment within 1,000 feet of beach, park, docking facility, or certain conserved lands owned by the Federal Government, the State Government, or a municipal government. Conserved lands means land in which fee ownership has been acquired by the state, federal,

or municipal government in order to protect the important ecological, recreational, scenic, cultural or historic attributions of that property. In determining interference with the public use or enjoyment of conserved lands, the Commissioner shall consider the purpose(s) for which the land has been acquired. Chapter 2, § 2.37(1)(A)(7).

There are no beaches, parks, docking facilities, or conserved lands owned by federal, state, or municipal governments within 1,000 feet of the proposed lease site (SR 15). No testimony concerning public lands or facilities was given at the hearing.

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

H. Lighting

The Commissioner evaluates lighting in accordance with 12 M.R.S.A §6072(7-A)(G) and the regulatory standards specified in Chapter 2.37(1)(A)(8). The statute specifies that a lease must not result in an unreasonable impact from light at the boundaries of the proposed site. The applicable regulation imposes specific requirements related to lighting, including a requirement that the applicant demonstrate that all reasonable measures will be taken to mitigate light impacts associated with the lease activities. Rules regarding lighting apply to all exterior lighting used on buildings, equipment, and vessels permanently moored or routinely used at all aquaculture facilities, with the exception of lighting for navigation, emergencies, and construction of a temporary nature. Chapter 2, § 2.37(1)(A)(8).

The applicant stated in their application that they do not have plans to use lights on their proposed lease site (App 22). The applicant did testify that they would work at the site before daylight hours in the winter seasons and would use headlamps at that time (Gaffney/Rozov). According to § 2.37(1)(A)(8),

when harvesting schedules, feed schedules, or other similar circumstances result in the need to work beyond daylight hours, spotlights or floodlights may be used to ensure safe working conditions and safe vessel operations. Such lighting shall be directed only at the work area to be illuminated, and must be the minimum needed for safe operations.

Given this language, the use of headlamps to work before daylight hours is not unreasonable.

Therefore, the aquaculture activities proposed for this site will not result in an unreasonable impact from light at the boundaries of the lease site.

I. Noise

The Commissioner evaluates noise in accordance with 12 M.R.S.A §6072(7-A)(G) and the regulatory standards specified in Chapter 2.37(1)(A)(9). The statute specifies that a lease must not result in an unreasonable impact from noise at the boundaries of the proposed site. The applicable regulation imposes specific requirements related to noise, including a requirement that the applicant take all

reasonable measures to mitigate noise impacts associated with the lease activities. Rules regarding noise apply to the routine operation of all aquaculture facilities, including harvesting, feeding, and tending equipment at leases authorized by the Department of Marine Resources, with the exception of: watercraft, harvest or transport barges and maintenance equipment while underway; the unamplified human voice or other sounds of natural origin; bells, whistles, or other navigational aids; emergency maintenance and repair of aquaculture equipment; warning signals and alarms; and events not reasonably within control of the leaseholder. Chapter 2, § 2.37(1)(A)(9).

The applicant would use a 21' skiff with a 90hp Yamaha 4-stroke outboard and a 16' skiff with a 25hp Yamaha 2-stroke outboard to get onsite every day (App 21). Only one skiff would be operated each day (App 21). The applicant would operate an oyster tumbler, shaker table, high volume pump, and power washer (App 21). The tumbler, shaker table, and high-volume pump would be powered electrically, while the power washer would be gas powered (App 21). The tumbler and shaker table operation would be seasonal, being used two hours at a time, and the high-volume pump would be used twice a week for two hours at a time (App 21). All equipment would be operated on floats attached to the shore (App 21.)

The applicant stated that the switch to mostly electric powered equipment will reduce the noise produced by the proposal (App 21). The equipment will also be operated from the shoreline opposed to being operated on open water (App 21). Additionally, the boats will only need to travel 100' to the gear and the applicant has stated that the boats will be operated "almost entirely at idle speed" (App 21).

No testimony concerning noise was given at the hearing.

The applicant has taken steps to mitigate noise by switching their equipment to electric powered, operating the gear from the shore, and will be operating their watercrafts at idle speed in an area which is trafficked by other small motorboats.

Therefore, the aquaculture activates proposed for this site will not result in an unreasonable impact from noise at the boundaries of the lease site.

J. Visual Impact

The Commissioner evaluates visual impact in accordance with 12 M.R.S.A §6072(7-A)(H) and the regulatory standards specified in Chapter 2.37(1)(A)(10). Rules regarding visual impact apply to all equipment, buildings, and watercrafts used at an aquaculture facility, excluding watercraft not permanently moored or routinely used at a lease location such as harvest or feed delivery vessels. Other equipment or vessels not moored within the boundaries of a lease, but routinely used or owned by the leaseholder are subject to these requirements. Chapter 2, § 2.37(1)(A)(10).

The applicant states their oyster cages would be black and gear buoys would be blue. According to § 2.37(1)(A)(10),

equipment and structures shall be painted, or be of, a color that does not contrast with the surrounding area. Acceptable hues are grays, blacks, browns, blues, and greens that have

a sufficiently low value, or darkness, so as to blend in with the surrounding area. Colors shall be flat, not reflective, in appearance.

The oyster cages and gear buoys will meet this standard. Lease buoys will be yellow in accordance with Chapter 2, § 2.80(1).

Therefore, equipment proposed for the lease site will comply with the visual impact criteria contained in § 2.37(1)(A)(10).

4. CONCLUSIONS OF LAW

Based on the above findings, I conclude that:

- a. The aquaculture activities proposed for this site, as modified, will not unreasonably interfere with the ingress and egress of any riparian owner.
- b. The aquaculture activities proposed for this site, as modified, will not unreasonably interfere with navigation.
- c. The aquaculture activities proposed for this site, as modified, will not unreasonably interfere with fishing or other water-related uses of the area.
- d. The aquaculture activities proposed for this site, as modified, will not unreasonably interfere with other aquaculture uses in the area.
- e. The aquaculture activities proposed for this site, as modified, will not unreasonably interfere with the ability of the lease site and surrounding areas to support existing ecologically significant flora and fauna.
- f. The aquaculture activities proposed for this site, as modified, will not unreasonably interfere with the public use or enjoyment within 1,000 feet of beaches, parks, docking facilities, or certain conserved lands owned by municipal, state, or federal governments.
- g. The applicant has demonstrated that there is an available source of stock to be cultured for the lease site.
- h. The aquaculture activities proposed for this site, as modified, will not result in an unreasonable impact from light at the boundaries of the lease site.
- i. The aquaculture activities proposed for this site, as modified, will not result in an unreasonable impact from noise at the boundaries of the lease site.
- j. The aquaculture activities proposed for this site, as modified, will comply with the visual impact criteria contained in DMR Regulation 2.37(1)(A)(10).

Accordingly, the evidence in the record supports the conclusion that the proposed aquaculture activities, modified as stated in this decision, meet the requirements for the granting of an aquaculture lease set forth in 12 M.R.S.A. §6072.

5. DECISION

Based on the foregoing, the Commissioner grants the requested lease to Michael and Mark Gaffney for 4.21 acres for 20 years for the cultivation of eastern oysters (*Crassostrea virginica*) and quahogs (*Mercenaria mercenaria*) using suspended and bottom culture techniques, modified as stated in this decision and according to the revised coordinates and reduction images provided in Appendix A to this decision. The lessee shall pay the State of Maine rent in the amount of \$100.00 per acre per year. The lessee shall post a bond or establish an escrow account pursuant to DMR Rule 2.64(12)(A) 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.

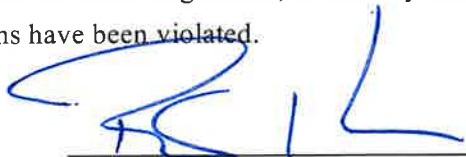
6. CONDITIONS TO BE IMPOSED ON LEASE

The Commissioner may establish conditions that govern the use of the lease area and impose limitations on aquaculture activities, pursuant to 12 M.R.S.A §6072 (7-B).¹⁸ 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. No conditions shall be imposed on the lease.

7. REVOCAION OF LEASE

The Commissioner may commence revocation procedures upon determining, pursuant to 12 M.R.S.A §6072 (11), that no substantial aquaculture has been conducted within the preceding year, that the lease activities are substantially injurious to marine organisms, or that any of the conditions of the lease or any applicable laws or regulations have been violated.

Dated: PK 8/00/24



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

¹⁸ 12 MRSA §6072 (7-B) states: “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.”

Appendix A

Revised Coordinates (WGS84) – 4.12 Acres

<u>Corner</u>	<u>Latitude</u>	<u>Longitude</u>	
A	43.817273°	-69.746844°	then 190.8 feet at 68° True to
B	43.817468°	-69.746173°	then 123.4 feet at 123° True to
C	43.817289°	-69.745776°	then 643.2 feet at 191° True to
D	43.815555°	-69.746227°	then 262.6 feet at 273° True to
E	43.815587°	-69.747221°	then 622.6 feet at 9° True to A



Figure 3. Proposed lease area, revised proposed lease area, and current experimental lease area. Created in ArcGIS Pro version 2.9 using digitized NOAA Nautical Charts.



Figure 4. Revised proposed lease area. Created in ArcGIS Pro version 2.9 using digitized NOAA Nautical Charts.



JANET T. MILLS
GOVERNOR

STATE OF MAINE
DEPARTMENT OF MARINE RESOURCES
21 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0021

PATRICK C. KELIHER
COMMISSIONER

Dear Mr. Gaffney:

DMR has reviewed your application for a species amendment for your experimental aquaculture lease, SAS P1x, located in Robinhood Cove, Georgetown. Your request was processed in accordance with DMR Regulations Chapter 2.44, and no public comments were received. After careful review, we find that the request to add hard clams/northern quahogs (*Mercenaria mercenaria*) to your lease does not violate any of the lease issuance criteria set forth in 12 M.R.S.A. §6072(7-A), is consistent with the findings of the original decision, and would not result in a change to the original lease conditions. Therefore, your request has been approved, effective on the date of this letter.

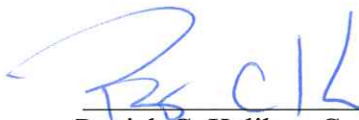
An updated summary of the species approved for your lease is provided below.

Approved Species
American oysters (<i>Crassostrea virginica</i>)
Hard clams/northern quahogs (<i>Mercenaria mercenaria</i>)

The following conditions, which were imposed on your lease remain in place:

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.

Please retain a copy of this letter for your records. Your original lease application and decision, any previously approved amendments, and this amendment approval letter, may serve as the operational plan for the lease.



 Patrick C. Keliher, Commissioner,
 Department of Marine Resources

Date 5/24/2020

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

Michael and Mark Gaffney
SAS PIx
Docket #2017-17-E

March 5, 2018

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION

Michael and Mark Gaffney applied to the Department of Marine Resources (“DMR”) for an experimental aquaculture lease on 3.99 acres¹ located in Robinhood Cove, north of Phebe Island, Georgetown, Lincoln County, for the suspended culture of American oysters (*Crassostrea virginica*). DMR accepted the application as complete on November 15, 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, riparian landowners, the Town of Georgetown, and others on the Department’s mailing list. Notice of the application and comment period were published in the *Times Record* on December 1, 2017. The evidentiary record before the Department regarding this lease application includes the application and the Department’s site report dated March 1, 2018, as well as the case file. The evidence from these sources is summarized below.²

2. DESCRIPTION OF THE PROJECT

A. Site History

Michael Gaffney holds a Limited Purposed Aquaculture license (LPA), within the boundaries of the proposed lease site, for the suspended culture of American oysters.³ The LPA was issued in 2017 and the Department has not received any complaints regarding the operation of the license. Mr. Gaffney plans to terminate the LPA if the lease is granted (App 3).

B. Proposed Operations

The purpose of the proposed lease is to explore the commercial feasibility of oyster production using a combination of floating cages and bags (App 3). The cages and bags will be suspended along the surface of the water from six long-lines that measure 250 feet in length (App 3). The applicant will flip the

¹ The applicant originally proposed a lease of 4.32 acres. DMR staff, with the applicant’s consent, modified the boundaries to ensure the site was no greater than 4.00 acres in size. See page 2 of the site report for additional details.

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

³ MGA117

cages to control fouling (App 3). The bags will be removed from the proposed lease site and cleaned with a power washer on a nearby float owned by the applicant (App 3). In the winter months, the cages will be submerged along the bottom of the proposed site (App 16). The oysters will be harvested by hand from the cages (App 3).

C. Site Characteristics

On February 13, 2018, DMR staff assessed the proposed lease site and the surrounding area in consideration of the criteria for granting an experimental aquaculture lease. The proposed lease site occupies subtidal waters off the western shore of Robinhood Cove, north of Phebe Island (SR 2). The uplands along the western shore of Robinhood Cove are characterized by a mixed forest and a few residential buildings (SR 2). No buildings were observed on the eastern shore of the Cove, or on Phebe Island (SR 2). At mean low water, water depths at the corners of the proposed site vary between ~2.5 and 4 feet (SR 6). The proposed lease is an area currently classified by the Department’s Water Quality Classification program as “approved for the harvest of shellfish” (SR 6).

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 closest property to the proposed lease site is owned by the applicant, Michael Gaffney, and is located on the western shore of Robinhood Cove (App 2, SR 7). Department staff observed a pier that extends from the applicant’s property and is located ~98 feet to the west of the proposed site (SR 7). Two moorings located within the boundaries of the proposed lease site were also noted (SR 7). The two moorings are owned by the applicant (App 7). A third mooring was observed ~60 feet to the north of the proposed lease site (SR 7). Department staff contacted the mooring’s owner, who did not think the proposed operations would affect his mooring (SR 7). The next closest mooring is ~862 feet to the north of the proposed lease site (SR 7). The proposed lease site is ~286 feet to the north of Little Phebe Island and ~493 feet north of Big Phebe Island (SR 7). Per the site report: “it is unlikely that the proposed lease will negatively impact riparian ingress and egress to and from either of these islands” (SR 7).

Based on this evidence, it appears that activities at the lease site are unlikely to hamper riparian 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

At mean low water, the eastern boundary of the proposed lease is ~580 feet from the eastern shore of Robinhood Cove (SR 7). Per the site report, “boats navigating north and south in the area will have adequate room to navigate” (SR 7). At mean low water, the proposed lease site is ~89 feet to the east of Robinhood Cove’s western shoreline (SR 7). The water depths at this location are shallow, which limits the size of vessels that can navigate in the area during most tides (SR 7). However, appropriately sized vessels would still be able to navigate between the proposed lease site and the western shoreline of Robinhood Cove (SR 7). In addition, there are two LPA licenses situated between the proposed lease site and Little Phebe Island, which is ~286 feet to the south of the proposed area. Per the site report: “if granted, navigation north of the Phebe Islands will remain possible but navigable space will be diminished” (SR 7).

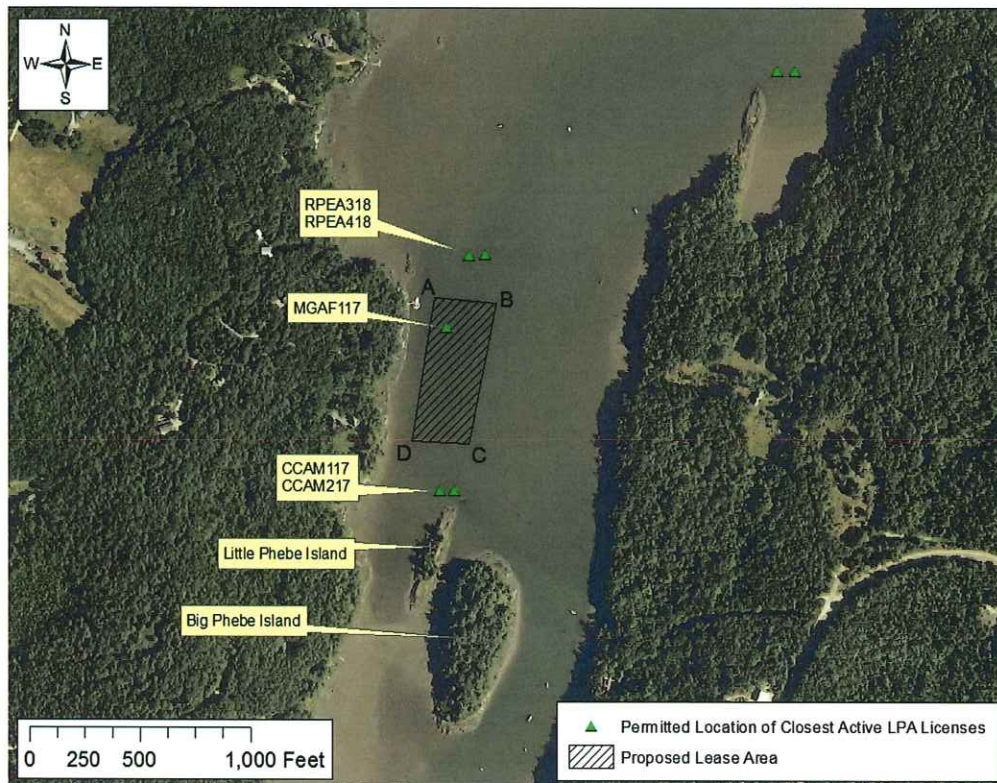


Figure 1: Depicting the LPA sites between the proposed lease and Little Phebe Island. Image generated by Department staff on February 23, 2018.

During the review period, DMR did not receive any comments from the Georgetown Harbormaster. Based on the absence of comments, it is reasonable to conclude that the Georgetown 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. The lease must be marked in accordance with DMR Rule 2.8o.⁴

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

C. Fishing & Other Uses

The site report notes: “due to the timing of MDMR’s site visit, fishing and other water-based activities that may occur on or near the proposed lease during the warmer months were not observed” (SR 8). Except for neighboring aquaculture operations, there is “very little use of this area by others” (App 4). Other LPA holders, who have operations near the proposed site transit the area as they use floats and property owned by Michael Gaffney to service their respective farms (App 4). Michael Gaffney notes: “none of these uses will change with my expansion from a single LPA to a lease on the same site” (App 4). The Department did not receive any comments from fishermen or other individuals in the area. Based on the absence of comments, it is reasonable to conclude that fishermen and other water-based user groups do not have any concerns with the proposal.

It appears from this evidence that the proposed lease site is unlikely to unreasonably affect fishing or other water dependent uses in the area.

Exclusivity. The applicants are not requesting exclusive use of the proposed lease area.

Other aquaculture leases. There are ten LPA licenses within one mile of the proposed lease site (SR 8). Not including the LPA license held by Michael Gaffney, the closest aquaculture site is a LPA license held by Ryan Pearl for the suspended culture of American oysters (*C. virginica*)⁵. Mr. Pearl’s LPA site is ~205 feet to the north of the proposed lease operation. Michael Gaffney discussed the proposal with Mr. Pearl and the Department notified other LPA license holders within 1,000 feet of the proposed site of the application (App 4). No one raised any objections to the proposed lease site, therefore it is reasonable to conclude that it will not unreasonably interfere with other aquaculture operations.

4 2.8o Marking Procedures for Aquaculture Leases

- A.** 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.
- B.** 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.
- C.** 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.
- D.** Lease sites must be marked in accordance with the United State’s Coast Guard’s Aids to Private Navigation standards and requirements.

⁵ LPA Acronym: RPEA418

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. Historical eelgrass (*Zostera marina*) cover data collected by DMR, in 2005, indicate that eelgrass was not present within one mile of the proposed lease site (SR 9).

Fisheries and Wildlife. The proposed site is situated ~62 feet to the west of designated Tidal Wading Bird and Waterfowl Habitat (SR 10). The Maine Department of Inland Fisheries and Wildlife (MDIF&W) reviewed the application and noted: “As this lease appears to be outside of mapped Tidal Waterfowl and Wading Bird Habitat, minimal impacts to wildlife are anticipated.”⁶

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

Per the site report: “the proposed lease site is not within 1,000 feet of any beach, park, or docking facility owned by municipal, state, or federal governments” (SR 11).

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.

F. Source of Organisms

The applicant will source stock from Mook Sea Farms in Walpole, Maine.

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

⁶ CF: Email from J. Perry (MDIF&W) dated December 15, 2017.

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 American oysters (*C. virginica*).

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

The Commissioner grants an experimental lease of 3.99 acres to Michael and Mark Gaffney, 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 lessee⁷; 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 (*C. virginica*) using suspended culture techniques. The lessee shall pay the State of Maine rent in the amount of \$100.00 per acre per year. Since this is an experimental lease with more than 400 sq. ft. of structures and no discharge, a bond or escrow account is required. The lessee shall post a bond or establish an escrow account pursuant to DMR Rule 2.64 (10) (D) in 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 M.R.S.A §6072-A (15)⁸. 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:

⁷ 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.”

⁸ 12 M.R.S.A §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. The lease site must be marked in accordance with 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 M.R.S.A §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: _____

3/5/18



Patrick C. Keliher, Commissioner
Department of Marine Resources