

Application for Change in Gear Authorization  
New Meadows River, Brunswick

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

Nice Oyster Company, LLC applied to the Department of Marine Resources (DMR) to change the gear authorization for existing standard lease NMR WP, located in the New Meadows River in the Town of Brunswick, Cumberland County, Maine.

### **1. THE PROCEEDINGS**

The application was deemed complete by DMR on January 16, 2024. Notice of the application and the 14-day public comment period were provided to other state and federal agencies, riparian landowners, the Town of Brunswick and its Harbormaster, and others on DMR's mailing list. No public comments were received. The evidentiary record before DMR regarding this lease amendment application includes seven exhibits (see exhibit list below).

### **LIST OF EXHIBITS<sup>1,2</sup>**

1. Application for a change of gear authorization, deemed complete January 16, 2024.
2. Executed lease agreement executed on February 21, 2022
3. Original lease decision signed November 28, 2022
4. Original standard lease application, deemed complete on January 7, 2021
5. Case file

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

Approval of standard aquaculture lease amendments is governed by 12 M.R.S.A. § 6072 (13)(G) and Chapter 2.44 of DMR regulations. The statute and regulations provide that the Commissioner may grant amendments for the use of specific gear, species, and for operational modifications on an existing lease site as a result of a change in authorized species or gear, provided the proposed changes are consistent with the findings on the underlying lease application, do not materially alter the findings of the original decision, and would not result in a change to the original lease conditions.

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<sup>1</sup> Exhibits 1-3 are cited below as: Amendment Application – “App”, Original Lease decision for NMR WP – “Exhibit 2”, and Case File – “CF”.

<sup>2</sup> Page numbers are cited using the PDF page number, and not the page number written on the application.

## **A. Original Lease Decision**

On November 28, 2022, DMR granted lease NMR WP to Nice Oyster Company, LLC (Exhibit 2). DMR's Findings of Fact, Conclusions of Law, and Decision, hereinafter referred to as "the original decision", found that the evidence in the record supported the conclusion that the aquaculture activities proposed by Nice Oyster Company, LLC met the requirements for granting a standard aquaculture lease as set forth in 12 M.R.S.A. § 6072 (Exhibit 2, page 12).

The original decision provided authorization to cultivate American oyster (*Crassostrea virginica*), European oyster (*Ostrea edulis*), sea scallop (*Placopecten magellanicus*), surf clam (*Spisula solidissima*), and hard clam (*Mercenaria mercenaria*) using suspended and bottom culture techniques (Exhibit 2, page 4). The decision authorized a maximum of 1200 floating oyster bags for oysters and clams, 170 bottom cages and 30 lantern-style nets for oysters, surf clams, and sea scallops, 100 bottom trays for all species, and 30 seed boxes for oysters and clams (Exhibit 2, page 4). According to the original decision, the floating oyster bags, seed boxes, and bottom trays are arranged across a total of 10 longlines, and lantern-style nets deployed on two longlines in the southwest quadrant of the lease (Exhibit 2, page 4). A 10-foot by 12-foot wooden float was also authorized in the original decision (Exhibit 2, page 5) From December to March, all surface gear and buoys are removed, except for two winter stick buoys marking the lines and the product is overwintered in cages on the bottom or bottom-seeded (Exhibit 2, page 5).

In the original decision, the Commissioner established four conditions governing the use of NMR WP, as is allowed pursuant to 12 M.R.S.A § 6072(7-B). The conditions are:

- a. Dragging and netting mobile-gear fishing are prohibited within the lease boundaries, except by authorization of the leaseholder.
- b. Other public uses that are not inconsistent with the purposes of the lease are permitted within the lease boundaries.

In the executed lease document, the lease term for NMR WP was set for ten years, beginning on November 28, 2022, and ending on November 27, 2032 (Exhibit 3, page 1).

## **B. Proposed Changes to Gear Layout and Findings**

The leaseholder is requesting to add up to 30 Zapco cages (30-inches by 16-inches) and 30 Seapa tubes (24-inches by 8-inches) secured on site using two possible methods (App, page 7). The lease holder is requesting to have the option to secure the cages/tubes using either (2) longlines or (10) rebar staples to be placed in the southwestern corner of the proposal (App, page 5/ Figure 1). The two long lines will be 50 feet long and will be supported in place using up to (6) 2-inch PVC pipes, placed along the longlines every 10-feet (App, page 15). Longlines will be anchored using (2) 75lb mushroom anchors or (2) helical anchors (App 13). The longlines will be approximately six and a half feet below the surface at MHW and two-and-a-half-feet above the surface during MLW (App, 15). The PVC pipes will be secured in placed using dock anchors that have been counter sunk into the mud (App, 24).

In the second option, the lease holder is requesting to secure the cages/tubes using up to (10) 1/2-inch thick rebar staples (App 5). The staples will be placed end to end across 50-feet and counter sunk into

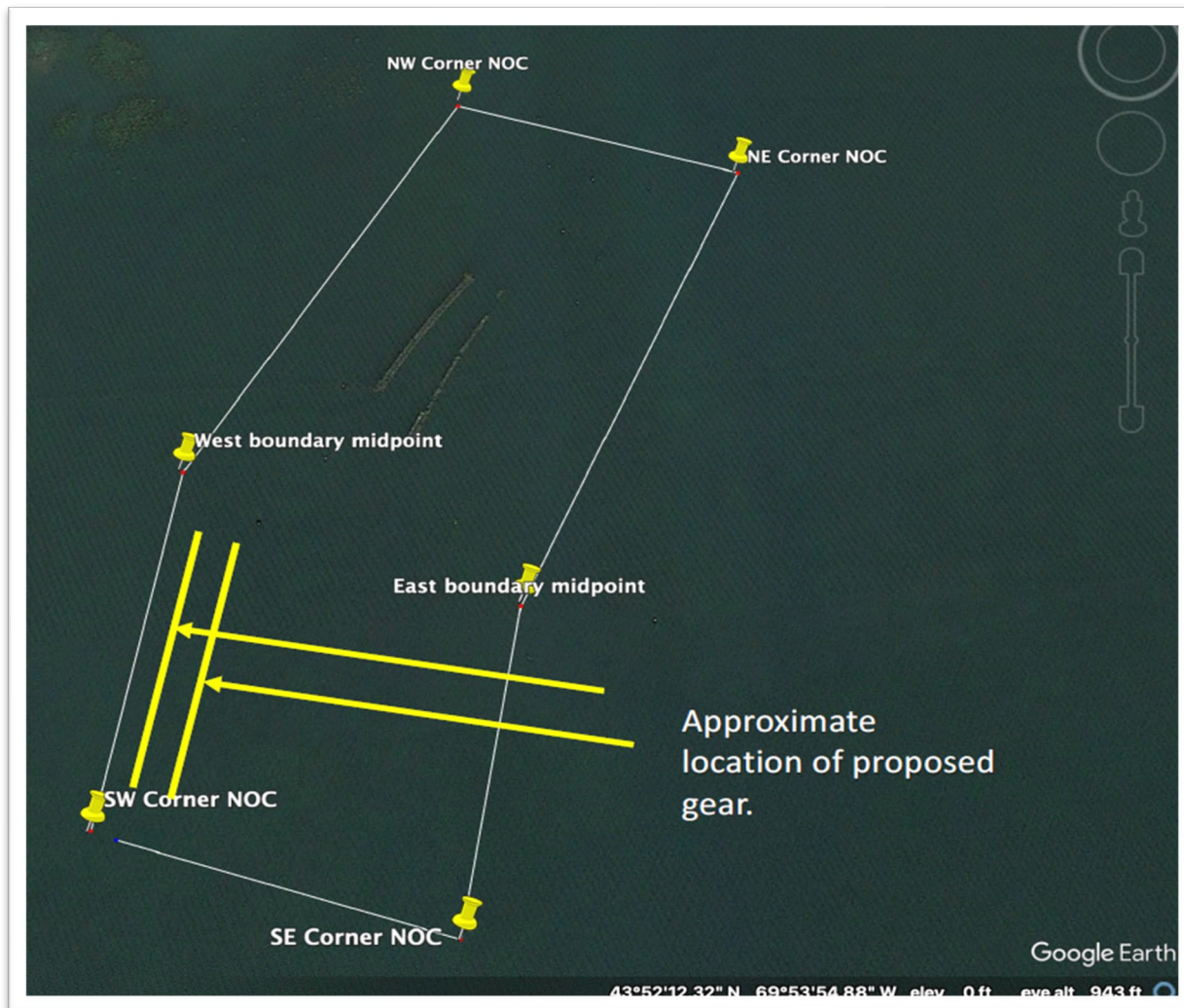


Figure 1. Approximate location of proposed longlines and Zapco or Seapa cages. Application 13

the substrate for stability (App 13). The staples will be approximately six and a half feet below the surface at MHW and two-and-a-half-feet above the surface during MLW (App, 17). All proposed gear will be on site from April 15<sup>th</sup> through November 30<sup>th</sup>, excluding the dock anchors (if used), which would remain on site year-round (App, 5).

In the original decision, a total of 10 longlines, each 150 feet in length, were permitted to hold floating oyster bags and seed boxes during the growing season and two rows of 75 bottom cages on either side of the line for overwintering. The area where the proposed 50-foot suspended longlines or rebar staples would be deployed currently contains two submerged 150-foot-long lines used for deploying lantern-style nets (Exhibit 3, page 4/ Figure 2).

Chapter 2.44 (1) states that the Commissioner may grant amendments for the use of specific gear, species, and resultant operational modifications on an existing lease site provided the proposed changes are consistent with the findings on the underlying lease application, do not materially alter the findings of the original decision, and would not result in a change to the original lease conditions.

Figure 10. Maximum structure and moorings, overhead view. NICE Oyster Company, Standard Lease Application 2020

Note: graphic shows longlines with paired rows of bags. In practice, some or all longlines might be single rows of bags, up to 10 total floating longlines and a maximum of 1200 bags.

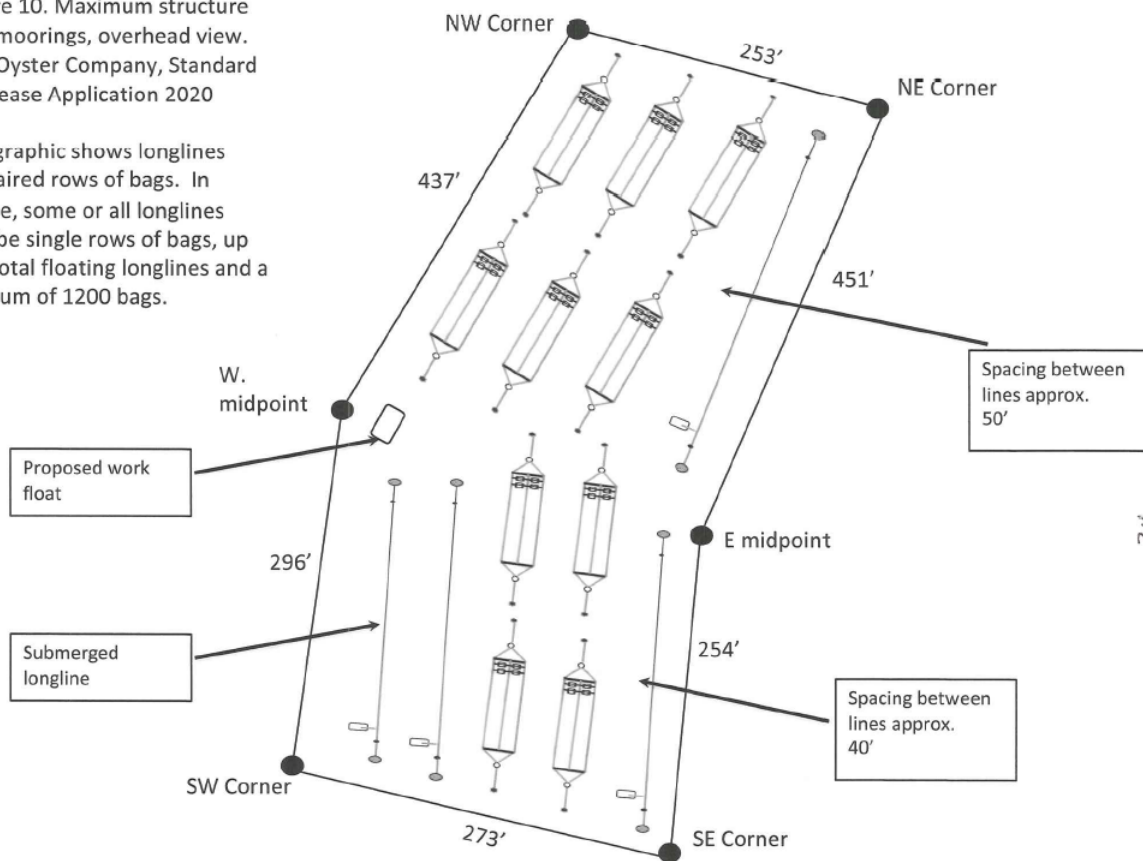


Figure 2. Gear layout of NMR WP originally permitted. Exhibit 4, page 34.

**Gear – Suspended Aquaculture.** The proposed gear modification would result in gear being exposed approximately two and a half feet above the surface of the water during low tide, which is approximately 2.9 feet (App 14). The longlines and lantern nets that were originally permitted within the area are never exposed during low tide. However, the proposed Zapco cages and Seapa tubes have a low profile and are similar to the floating gear permitted throughout the rest of the site, including a previously permitted 10-foot by 12-foot work float north of the proposed gear that sits approximately 16-inches above the surface of the water at all tide cycles. In addition, the original decision did not find that gear needed to remain submerged at all tidal stages to mitigate any unreasonable interference. The proposed gear will not result in any changes to the number of trips to the site or noise and level of on-site activity. All surface gear and buoys will be removed from December – March, except for two winter stick buoys marking the lines and to aid in spring retrieval of sunken lines (Exhibit 3, page 5).

In the original decision, DMR determined that while riparian owners attempting to access the shoreline to the west of the proposal from the water would need to transit around the proposed lease site, there would be at least 160 feet of space between the proposed site and Woodward Point to navigate through

(Exhibit 3, page 6). The lease holder is not requesting an expansion of the site and the proposed gear change will still leave adequate room to allow boaters to access Woodward Point and to access the shoreline west of the site as contemplated in the original decision.

Because the leaseholder is proposing to add similar suspended gear, no new unreasonable impacts to riparian ingress and egress, navigation, fishing, other aquaculture uses, flora and fauna, and public use and enjoyment are anticipated. Additionally, no changes in light, noise generation, or visual impact are expected from the proposed changes. No public comments concerning the proposed amendment were received by the Department.

Therefore, the proposed change is consistent with the findings on the underlying lease application and would not materially alter the findings of the original decision, including the lease conditions in place.

### **3. CONCLUSIONS OF LAW**

Based on the above findings, I conclude that:

- a. The proposed lease amendments do not violate any of the lease issuance criteria set forth in 12 M.R.S.A. §6072(7-A);
- b. The proposed lease amendments are consistent with the Commissioner's findings on the underlying lease application;
- c. The proposed lease amendments do not violate any of the conditions set forth in the original lease.

Accordingly, the evidence in the record supports the conclusion that the proposed lease amendment meets the requirements for the granting of a lease amendment set forth in 12 M.R.S.A. §6072 and in DMR Rule Chapter 2.44.

### **4. DECISION**

Based on the foregoing, the Commissioner grants the request from Nice Oyster Company, LLC for the authorization to cultivate American oyster (*Crassostrea virginica*), European oyster (*Ostrea edulis*), sea scallop (*Placopecten magellanicus*), surf clam (*Spisula solidissima*), and hard clam (*Mercenaria mercenaria*) on NMR WP, using (2) 50-foot longlines or up to (10) rebar staples for securing 30 Zapco cages and 30 Seapa cages, deployed in the manner described in section 2.B.

Dated: 7/17/2024



**Meredith Mendelson, Deputy Commissioner  
Department of Marine Resources**

**STATE OF MAINE  
DEPARTMENT OF MARINE RESOURCES**

**NICE Oyster Company, LLC**

Standard Aquaculture Lease Application  
Suspended and Bottom Culture of Shellfish  
New Meadows River, Brunswick, Maine

**NMR WP**

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

NICE Oyster Company, LLC applied to the Department of Marine Resources (DMR) for a ten-year standard aquaculture lease on 4.49 acres east of Woodward Point in the New Meadows River, in Brunswick, Maine. The proposal is for the suspended and bottom culture of eastern oyster (*Crassostrea virginica*), European oyster (*Ostrea edulis*), sea scallop (*Placopecten magellanicus*), surf clam (*Spisula solidissima*), and hard clam (*Mercenaria mercenaria*).

**1. THE PROCEEDINGS**

The pre-application meeting on this proposal was held on November 11, 2019 and a scoping session was held on October 19, 2020. DMR accepted the final application as complete on January 7, 2021. A public hearing on this application was held on October 5, 2022. No applications for intervenor status were received by the Department. Notice of the completed application and public hearing was provided to state and federal agencies, the Town of Brunswick, riparian landowners<sup>1</sup> within 1,000 feet of the proposed site, and subscribers to DMR’s aquaculture email listserv. Notice of the hearing was published in the *Portland Press Herald* on September 3, 2022 and September 13, 2022. The public notice for the hearing indicated that the proceeding would be conducted both in-person and remotely and directed interested persons to contact DMR to sign up to participate in the proceeding. Two individuals registered to participate in the hearing, including one that indicated an intention to provide testimony.

Sworn testimony was given at the October 5, 2022 hearing by the following witnesses:

<b>Name</b>	<b>Affiliation</b>
Dana Morse	NICE Oyster Company, applicant
John Swenson	NICE Oyster Company, applicant
Marcy Nelson	DMR Aquaculture Division Director
Scott Shea, John Desjardins, and Phil Jackson	Interested persons

<sup>1</sup> The Department defines “riparian owner” as a shorefront property owner.

Additional DMR staff and members of the public attended the hearing either in person or remotely but did not offer testimony. The hearing was recorded by DMR. The Hearing Officer was Lisa White.

The evidentiary record before DMR regarding this lease application includes 3 exhibits introduced at the hearing and the record of testimony at the hearing. The evidence from these sources is summarized below.<sup>2</sup>

### **LIST OF EXHIBITS**

1. Case file
2. Application
3. DMR site report, issued on May 28, 2021

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

### **A. Site Characteristics**

On May 5, 2021, DMR staff assessed the proposed lease site and the surrounding area in consideration of the criteria for granting a standard aquaculture lease (SR 2). The proposed lease site occupies subtidal waters east of Woodward Point in the New Meadows River in Brunswick. The shoreline surrounding the proposal to the west is mostly rocky leading to mixed forested, lawn, and residential uplands. The proposed lease area is in subtidal water to the west of the New Meadows River's marked navigation channel, which extends to the north and southeast of the proposal. Farther to the east, across the navigation channel, is a tidally exposed sand bar known as Middle Ground, which bisects the upper segment of the New Meadows River (NOAA Nautical Chart). To the south and southeast are the largely undeveloped Iron, Bombazine, and Upper and Lower Coombs Islands.

At the time of the Department's site assessment in 2021, water depths within the proposed lease site ranged from 8.6 feet to 19.6 feet (SR 7). Depth measurements were collected using a transom-mounted depth sounder. Department staff observed the depths of the proposed lease site at approximately 10:00 am. Correcting for tidal variation derives water depths approximately 3.4 feet greater at the nearest high water (12-23 feet) on May 5, 2021. At mean low water (MLW, 0.0 feet) depths would vary between approximately 2.9 and 13.9 feet. The bottom of the proposed lease area, as observed during the drop-camera transect, is composed of soft mud (SR 7).

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

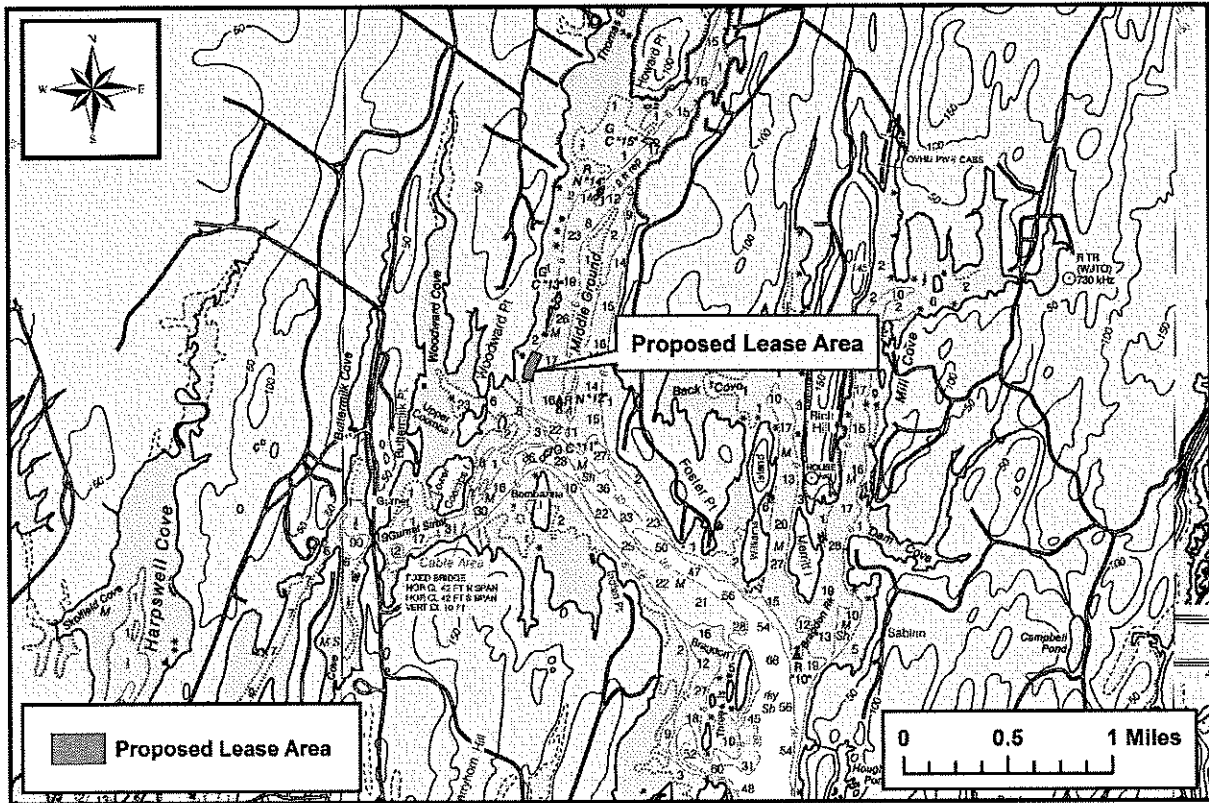


Figure 1: Proposed lease site and surrounding area. Image taken from DMR’s site report.

**Application Coordinates (WGS84) – 4.49 acres**

<u>Corner</u>	<u>Latitude</u>	<u>Longitude</u>
NW	43° 52' 16.27" N	69° 53' 54.82" W then 251.90 feet at 108.16° True to
NE	43° 52' 15.52" N	69° 53' 51.54" W then 454.48 feet at 204.98° True to
ME	43° 52' 11.43" N	69° 53' 54.10" W then 258.60 feet at 190.08° True to
SE	43° 52' 8.91" N	69° 53' 54.68" W then 272.55 feet at 285.91° True to
SW	43° 52' 9.62" N	69° 53' 58.27" W then 296.11 feet at 8.16° True to
MW	43° 52' 12.52" N	69° 53' 57.74" W then 435.68 feet at 34.49° True to NW.

**B. Site History**

The applicant currently holds a 2.7 acres experimental lease site, NMR WPx. The experimental lease was granted on August 22, 2017. The purpose is to explore the commercial feasibility of oyster and scallop production (NMR WPx Final Decision 2017). The primary production method involves deploying two horizontal longlines with surface bags for the cultivation of oysters. In addition to the surface bags for oysters, five longlines are submerged for the cultivation of scallops. The applicant also seeds the bottom of the lease site with oysters. The lease was amended on July 29, 2019 to authorize the cultivation of surf



clams.<sup>3</sup> The experimental lease expired on August 21, 2020. However, a provision of law, 12 M.R.S.A §6072-A(20), allows the holder of an experimental lease to continue operating the site while the Department considers the standard lease proposal, so long as the standard lease proposal overlaps a portion or all of the existing experimental lease. In this case, the standard lease proposal encompasses the entirety of the experimental lease.

### **C. Proposed Operations**

The applicant proposes to culture of eastern oyster (*Crassostrea virginica*), European oyster (*Ostrea edulis*), sea scallop (*Placopecten magellanicus*), surf clam (*Spisula solidissima*), and hard clam (*Mercenaria mercenaria*) on the proposed lease site using suspended and bottom culture techniques (App 1). A maximum of 1200 floating oyster bags for oysters and clams, 170 bottom cages and 30 lantern-style nets for oysters, surf clams, and sea scallops, 100 bottom trays for all species, and 30 seed boxes for oysters and clams are proposed for the site (App 6). The floating oyster bags and seed boxes would be arranged in a total of 10 longlines, each 150 feet in length with two rows of 75 bottom cages on either side of the line. Lantern-style nets would be deployed on two longlines in the southwest quadrant of the lease, each 150 feet in length (App 34).

The applicant anticipates seeding the site with eastern and European oysters in June or July, sea scallops in May or June, surf clams in June, and hard clams in June or July (App 9). Seeding for each species is not expected to take more than 8 hours. Bottom seeding oysters and hard clams will occur in late fall or early spring over the course of no more than 4 days.

Oyster bags will be tended by manually flipping the bag over from the boat once a week or once every other week during the summer and fall (App 9, App 10). Bottom cages will be swapped out for clean cages or scrubbed. Oysters will be thinned and graded manually twice per year. Future operations may include a battery-powered vessel-mounted sorter. Oyster harvest is done manually from the boat. Market-sized oysters will be held in a bottom cage or lantern-style net and cleaned just before sale using a battery-powered washdown pump (App 9, App 11). Bottom-planted oysters and clams will be harvested by diving, bull raking, or using tongs. Some hard clams will be raised in bottom cages that sink partway into the sediment and some will be bottom-planted. Sea scallop maintenance will be performed three times a year to clean and/or swap in clean bottom cages (App 9). The site will be visited two to three times per week, depending on the season and largely on the weekends. Each visit to the farm is expected to take 2 to 6 hours (App 9). Harvesting will be done once or twice a week for 2 to 5 hours (App 10).

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<sup>3</sup> Since that amendment was processed the Department updated statute, effective October 18, 2021, and experimental leases held for commercial purposes can no longer be amended.

Powered equipment to be used on site would include a battery-powered washdown pump and two winches. The washdown pump is a 12-volt unit operated off the boat's battery. The pump will typically be used for 1 to 2 hours when washing oysters. Both winches are 12-volt battery-powered and used sparsely to raise cages (App 11).

A 10x12 feet wooden float will be inside the lease area to serve as a work platform. It would sit 16 inches above the water surface (App 7). The float would be moored at the southern or western middle side of the lease and held in place by two 75-pound mushroom anchors, one at each end.

From December to March, all surface gear and buoys will be removed, except for two winter stick buoys marking the lines and to aid in spring retrieval of groundlines (App 10). The product will overwinter in cages on the bottom or remain at bottom with no gear if bottom-seeded. Gear moved off site for overwintering will be stored at the home of Dana Morse or John Swenson.

### **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 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 Access**

DMR's Chapter 2 regulations 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.

At the time of DMR's site assessment on May 5, 2021, moorings and docks were present, as well as a disused pier (SR 9). No vessels were observed on moorings or docks. The nearest observed mooring was approximately 200 feet to the north of the proposal. The nearest observed dock was approximately 345 feet to the north of the proposal (SR 9). Based on these distances, DMR staff conducting the site review reported that if the lease were granted, adequate space would likely remain for access to these

structures. The apparent disused pier with associated float to the west of the proposed site was in a condition suggesting that it is no longer functional.

While riparian owners attempting to access the shoreline to the west of the proposal from the water would need to transit around the proposed lease site, there would be at least 160 feet of space between the proposed site and Woodward Point (SR 9). This distance is likely sufficient for vessels capable of shore landing to navigate. DMR's site assessment stated that if granted, it is unlikely the proposed lease area would significantly hinder riparian ingress and egress.

The Brunswick Harbormaster stated that riparian owners would have sufficient room to access their properties from the water if the proposal were granted.<sup>4</sup> No public comments asserting unreasonable interference with ingress or egress were submitted. One riparian owner, Phil Jackson, testified at the October 5, 2022 hearing in support of the proposed lease.

Activities at the lease site in subtidal waters are unlikely to hamper access to and from the shore. Based on the distances from the proposal to existing structures, the Harbormaster's response, and public testimony, the Department finds that sufficient area remains for reasonable ingress and egress by riparian owners.

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

## **B. Navigation**

When examining navigation, the Commissioner considers whether the lease activities would interfere with commercial or recreational navigation around the lease area and considers the current uses of the navigational channels in the area. DMR's site assessment states the New Meadows River is heavily traveled by commercial and recreational mariners during the summer months (SR 10). The proposed site occupies area between Woodward Point and Middle Ground and is east of the New Meadows River's marked navigational channel. The site assessment states that if the proposed lease were granted it would not impede vessel flow within the main channel (SR 10). During DMR's site assessment on May 5, 2021, one motorboat was observed in the channel.

DMR's site assessment states that roughly half of the proposed lease area is within the 17-foot contour line associated with the marked navigational channel (NOAA Chart, Figure 1 on SR 1). The report goes on to say that it is unlikely that many mariners traditionally transit through the proposed lease area due to the presence of a tidally exposed mud flat to the south and Getchell's Ledge to the north (SR 10). These features act as natural barriers for vessels transiting north-south in the main navigation channel. Moreover, the applicant's existing experimental lease, NMR WPx, is also positioned so that

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<sup>4</sup> Response to the Harbormaster Questionnaire dated May 4, 2021

roughly half of the lease area is to the east of this 17-foot contour line, and to DMR Aquaculture Division's knowledge, no navigational concerns have been raised about the presence of NMR WPx. The Brunswick Harbormaster indicated that the proposed site is unlikely to cause issues with navigation in the area. No testimony concerning navigation was given at the hearing.

The Department finds that based on available information and Harbormaster input, the placement of the proposed project would still allow for commercial and recreational navigation.

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

### **C. Fishing & Other Uses**

When examining fishing and other uses, the Commissioner considers whether the lease activities would unreasonably interfere with commercial or recreational fishing or other water-related uses of the area. Additionally, the Commissioner considers any evidence concerning other aquaculture uses of the area.

**Fishing.** At the time of the Department's site assessment on May 5, 2021, two lobster (*Homarus americanus*) trap buoys were observed north of the proposal. The nearshore lobster fishery in Maine takes place during the summer and fall seasons due to the annual migration and molt cycle of lobsters. The Brunswick Harbormaster additionally indicated that there is shellfish harvesting in the general vicinity of the proposal, including a European oyster bed less than 700 feet to the north. According to the Harbormaster, most shellfish harvesters access this area by foot, and it is unlikely that the proposed lease site would impede access. Commercial harvest also occurs on Middle Ground, which is on the opposite side of the marked navigational channel as the proposed lease area.

Recreational hook and line fishing for striped bass (*Morone saxatilis*) occurs regularly throughout the New Meadows River. At the hearing, Mr. Scott Shea testified that near the proposed lease area used to be a secret spot for striper fishing. Considering the bottom topography of the proposed lease site, which is gently sloping with mud sediment, and lack of topographical features that typically attract striped bass, it is unlikely the proposal would interfere with traditional angling in the area (SR 10). Furthermore, the Brunswick Harbormaster stated that "the proposed lease area shouldn't be a problem" for recreational fishing in the general area.

During applicant testimony at the hearing on October 5, 2022, Dana Morse stated that he has only observed one commercial clam digger in the area accessing the shellfish bed from the south by boat. Mr. Morse also reported only one entanglement with a recreational fishing hook and his aquaculture gear during the three years of operating the 2.7 acres experimental lease.

Due to the location of the existing lobster fishing and shellfish harvesting and based on the Harbormaster's responses and applicant's testimony, it is unlikely that commercial or recreational fishing will be impacted by the proposed activity.

**Exclusivity.** The applicant requests that mobile-gear fishing, such as dragging and netting, be prohibited within the lease boundaries to avoid gear conflicts and entanglement (App 17). If the proposed lease is granted, this request is reasonable, and enforceable under provisions of law (see 12 M.R.S.A. §6073(2)). A condition reflecting this restriction will be included in the lease.

**Other aquaculture uses.** Twenty-three Limited Purpose Aquaculture (LPA) licenses and 2 active leases are located within 1 mile of the proposed lease (SR 11). The nearest active lease, which is overlapping with and intended to be replaced by the proposal, is the applicant's existing experimental lease, NMR WPx, approved for the suspended and bottom culture of shellfish. The closest active lease not associated with the applicant, NMR EMG<sup>5</sup>, is to the east of Middle Ground and is approved for the suspended culture of shellfish. The nearest LPA is CBUR219, which is over 1,700 feet to the southwest and approved for the suspended culture of American/eastern oysters. Access to, and navigation around, the nearby aquaculture sites is unlikely to be impacted by the proposal, if the lease were to be granted.

No testimony was received by other aquaculture lease or license holders in the area to indicate they have concerns regarding the proposed activities. Based on this evidence, it appears that the proposed lease will not unreasonably interfere with other aquaculture activities in the area.

**Other water-related uses.** To the west and northwest of the proposal, Woodward Point Preserve offers public access to a hand-carry boat launch. Kayaks and paddleboards are most likely to use this launch (SR 10). The application stated that kayak, canoe, and rowing scull traffic transits to the east of the proposal (App 16).

At the hearing on October 5, 2022, Mr. Scott Shea, local kayak guide and owner of Seaspray Kayaking, gave testimony stating that hundreds, if not thousands, of recreational kayakers transit the New Meadows River during the summer months. Seaspray Kayaking has approximately 40 to 50 people on the river a day in the summer through guided tours and rentals. Iron Island, south of the proposal, is a frequent stop by kayakers on the river. Kayak renters are advised to stay on the west shore, out of the main navigation channel for safety.

The Department finds that sufficient evidence of heavy recreational use of the waters near the project site exists in the record. However, the Department also finds that ample area for recreational use of the waters will remain if the project is approved, since there has been while the experimental site has

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<sup>5</sup> The Site Report mentions a second lease, NMR EMG2, since the report was written that lease has been terminated.

been in operation. The Department finds that the burden for safe passage and recreation lies with the resource user and the approval of this proposal will not impede all options for safe recreation, as the project site would remain open, depending on weather conditions, to transiting kayakers and paddleboarders.

**Therefore**, the aquaculture activities proposed for this site will not unreasonably interfere with fishing, existing aquaculture operations, or other water-related uses of the area.

**D. Flora & Fauna**

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

**Site observations.** On May 5, 2021, DMR staff conducted a drop camera transect to assess the epibenthic ecology of the area. The observed bottom was soft mud. Other organisms were noted occasionally and are listed below:

Species Observed	Abundance
Moon jelly ( <i>Aurelia aurita</i> )	Abundant
Clam holes	Abundant
Horseshoe crab ( <i>Limulus polyphemus</i> )	Rare

**Eelgrass.** According to historical data collected by DMR in 2018, the nearest documented presence of eelgrass (*Zostera marina*) is approximately 900 feet to the southeast of the proposed lease site. Additionally, no eelgrass was observed during DMR’s underwater assessment on May 5, 2021 (SR 12).

**Wildlife.** On May 5, 2021, moon jellies (*Aurelia aurita*) were abundant in the water column and a single horseshoe crab (*Limulus polyphemus*) was observed (SR 11).

According to GIS data maintained by the Maine Department of Inland Fisheries and Wildlife (MDIFW), the intertidal areas to the west of the proposal, is designated Tidal Wading Bird and Waterfowl Habitat (TWWH) that is considered Significant Wildlife Habitat under Maine’s Natural Resource Protection Act. The proposed lease is over 600 feet from designated TWWH (SR 13). The proposal is over 200 feet to the northeast of Great Blue Heron (*Ardea herodias*), a Species of Special Concern in Maine, habitat (SR 13). According to U.S. Fish and Wildlife Service data, the proposed lease is over 2,000 feet from the 660-foot buffer around a documented bald eagle (*Haliaeetus leucocephalus*) nest (SR 13). Bald eagles are no longer a Species of Special Concern in Maine, but they are protected under federal law by the

Bald and Golden Eagle Protection Act (16 U.S.C. 668-668c) of 1940. Furthermore, on April 26, 2021, a MDIFW wildlife biologist responded by email to a “Request for Agency Review and Comment” stating that “minimal impacts to wildlife are anticipated.”

Based on this evidence, it appears that the proposed lease site will not interfere with the ecological functioning 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.

#### **E. Public Use & Enjoyment**

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.

Getchell’s Ledge, owned by the Maine Bureau of Parks and Land and a designated “Coastal Island”, is located approximately 590 feet from the proposed lease site at mean low water (SR 14). The proposal would not interfere with the public use or enjoyment of the ledge. There are no other beaches, parks, docking facilities, or conserved lands owned by federal, state, or municipal government within 1,000 feet of the proposed lease site. The nearest conserved land, Woodward Point, is 140 feet to the west of the proposal and is held in private conservation by Maine Coast Heritage Trust (SR 14). Although privately-owned conserved lands are not included in the decision criteria for granting standard leases, as per DMR Regulations Chapter 2.37(1)(A), access to this preserve was considered under navigation.

No testimony concerning public lands 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.

#### **F. Source of Organisms**

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.

The applicant will obtain eastern oyster (*Crassostrea virginica*) from Muscongus Bay Aquaculture and/or Mook Sea Farm; European oyster (*Ostrea edulis*) from Muscongus Bay Aquaculture and/or Downeast Institute; sea scallop (*Placopecten magellanicus*) from Pine Point Oyster Company; surf clam

(*Spisula solidissima*) from Downeast Institute; and hard clam (*Mercenaria mercenaria*) from Muscongus Bay Aquaculture and/or Downeast Institute (App 3). These hatcheries are approved by DMR.

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

#### **G. Light**

According to the application, no lights would be used on the proposed lease site and no work would occur beyond daylight hours, except in extreme circumstances (App 12). The applicant testified that in the case of an emergency where lighting was necessary, they would partner with Marine Patrol and potentially use a 12-volt light for navigation. There was no public testimony provided at the hearing to indicate there was concern regarding light associated with the proposed activities.

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

#### **H. Noise**

According to the application, an electric washdown pump, used for cleaning oysters, and an electric winch, for raising cages, will be used on site (App 11). An electric, tube-style grader may be added in the future.

The pump is used intermittently and pumps water on-demand. The winches run off battery, not a combustion engine. Winches are used sparsely during a visit. If a grader is eventually used, it would occur once or twice per year and be stored off-site. All powered equipment is electric running off a 12-volt battery and generating less noise than gas-powered equipment. After cages are raised, grading and harvesting is done by hand, which minimizes noise. Boat noise is kept to a minimum by turning off the outboard engine when it is not needed (App 12). One vessel has a 4-stroke Honda, known for its quiet operation. The other vessel has a 2-stroke Evinrude, when this engine needs to be replaced, the applicant will use a 4-stroke model on this vessel.

Based on this evidence, it appears that any noise generated by the proposed operations is unlikely to have a significant effect at the boundaries of the lease site.

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

#### **I. Visual Impact**

The applicant plans to deploy floating oyster bags for oysters and clams, bottom cages and lantern-style nets for oysters, surf clams, and sea scallops, bottom trays for all species, and seed boxes for oysters



and clams as described in Section 2B, above. The work float would be a natural wood color and sit 16 inches above the water's surface. Except for surface buoys and foam floatation in the spreader bars, the gear will be green, gray, black, or brown in color. Surface buoys will be white, orange, or any highly visible, preferred color. Foam is blue in color. The gear proposed by the applicant complies with DMR's height and visual impact limitations.

**Therefore**, the equipment utilized on the proposed lease site will comply with the DMR's visual impact criteria.

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

Based on the above findings, I conclude that:

- a. The aquaculture activities proposed for this site will not unreasonably interfere with the ingress and egress of any riparian owner.
- b. The aquaculture activities proposed for this site will not unreasonably interfere with navigation.
- c. The aquaculture activities proposed for this site will not unreasonably interfere with fishing or other water-related uses of the area, taking into consideration other aquaculture uses in the area.
- d. The aquaculture activities proposed will not unreasonably interfere with the ability of the lease site and surrounding areas to support existing ecologically significant flora and fauna.
- e. 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.
- f. The applicant has demonstrated that there is an available source of eastern oyster, European oyster, sea scallop, surf clam, and hard clam seed to be cultured for the lease site.
- g. The aquaculture activities proposed for this site will not result in an unreasonable impact from light at the boundaries of the lease site.
- h. The aquaculture activities proposed for this site will not result in an unreasonable impact from noise at the boundaries of the lease site.
- i. The aquaculture activities proposed for this site 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 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 NICE Oyster Company, LLC for 4.49 acres for 10 years for the cultivation of eastern oyster (*Crassostrea virginica*), European

oyster (*Ostrea edulis*), sea scallop (*Placopecten magellanicus*), surf clam (*Spisula solidissima*), and hard clam (*Mercenaria mercenaria*) using suspended and bottom culture techniques. Final approved coordinates for this lease are provided in Section 2A above. 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 2.40 (2)(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).<sup>6</sup> 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.

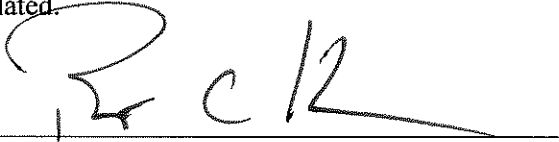
The following conditions shall be incorporated into the lease:

- a. Dragging and netting mobile-gear fishing are prohibited within the lease boundaries, except by authorization of the leaseholder.
- b. Other public uses that are not inconsistent with the purposes of the lease are permitted within the lease boundaries.

**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: 11/28/22

  
Patrick C. Keliher, Commissioner  
Department of Marine Resources

<sup>6</sup> 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."

**STATE OF MAINE  
DEPARTMENT OF MARINE RESOURCES**

**NICE Oyster Company, LLC**

Standard Aquaculture Lease Application  
Suspended and Bottom Culture of Shellfish  
New Meadows River, Brunswick, Maine

**NMR WP**

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

NICE Oyster Company, LLC applied to the Department of Marine Resources (DMR) for a ten-year standard aquaculture lease on 4.49 acres east of Woodward Point in the New Meadows River, in Brunswick, Maine. The proposal is for the suspended and bottom culture of eastern oyster (*Crassostrea virginica*), European oyster (*Ostrea edulis*), sea scallop (*Placopecten magellanicus*), surf clam (*Spisula solidissima*), and hard clam (*Mercenaria mercenaria*).

**1. THE PROCEEDINGS**

The pre-application meeting on this proposal was held on November 11, 2019 and a scoping session was held on October 19, 2020. DMR accepted the final application as complete on January 7, 2021. A public hearing on this application was held on October 5, 2022. No applications for intervenor status were received by the Department. Notice of the completed application and public hearing was provided to state and federal agencies, the Town of Brunswick, riparian landowners<sup>1</sup> within 1,000 feet of the proposed site, and subscribers to DMR’s aquaculture email listserv. Notice of the hearing was published in the *Portland Press Herald* on September 3, 2022 and September 13, 2022. The public notice for the hearing indicated that the proceeding would be conducted both in-person and remotely and directed interested persons to contact DMR to sign up to participate in the proceeding. Two individuals registered to participate in the hearing, including one that indicated an intention to provide testimony.

Sworn testimony was given at the October 5, 2022 hearing by the following witnesses:

<b>Name</b>	<b>Affiliation</b>
Dana Morse	NICE Oyster Company, applicant
John Swenson	NICE Oyster Company, applicant
Marcy Nelson	DMR Aquaculture Division Director
Scott Shea, John Desjardins, and Phil Jackson	Interested persons

<sup>1</sup> The Department defines “riparian owner” as a shorefront property owner.

Additional DMR staff and members of the public attended the hearing either in person or remotely but did not offer testimony. The hearing was recorded by DMR. The Hearing Officer was Lisa White.

The evidentiary record before DMR regarding this lease application includes 3 exhibits introduced at the hearing and the record of testimony at the hearing. The evidence from these sources is summarized below.<sup>2</sup>

### **LIST OF EXHIBITS**

1. Case file
2. Application
3. DMR site report, issued on May 28, 2021

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

### **A. Site Characteristics**

On May 5, 2021, DMR staff assessed the proposed lease site and the surrounding area in consideration of the criteria for granting a standard aquaculture lease (SR 2). The proposed lease site occupies subtidal waters east of Woodward Point in the New Meadows River in Brunswick. The shoreline surrounding the proposal to the west is mostly rocky leading to mixed forested, lawn, and residential uplands. The proposed lease area is in subtidal water to the west of the New Meadows River's marked navigation channel, which extends to the north and southeast of the proposal. Farther to the east, across the navigation channel, is a tidally exposed sand bar known as Middle Ground, which bisects the upper segment of the New Meadows River (NOAA Nautical Chart). To the south and southeast are the largely undeveloped Iron, Bombazine, and Upper and Lower Coombs Islands.

At the time of the Department's site assessment in 2021, water depths within the proposed lease site ranged from 8.6 feet to 19.6 feet (SR 7). Depth measurements were collected using a transom-mounted depth sounder. Department staff observed the depths of the proposed lease site at approximately 10:00 am. Correcting for tidal variation derives water depths approximately 3.4 feet greater at the nearest high water (12-23 feet) on May 5, 2021. At mean low water (MLW, 0.0 feet) depths would vary between approximately 2.9 and 13.9 feet. The bottom of the proposed lease area, as observed during the drop-camera transect, is composed of soft mud (SR 7).

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

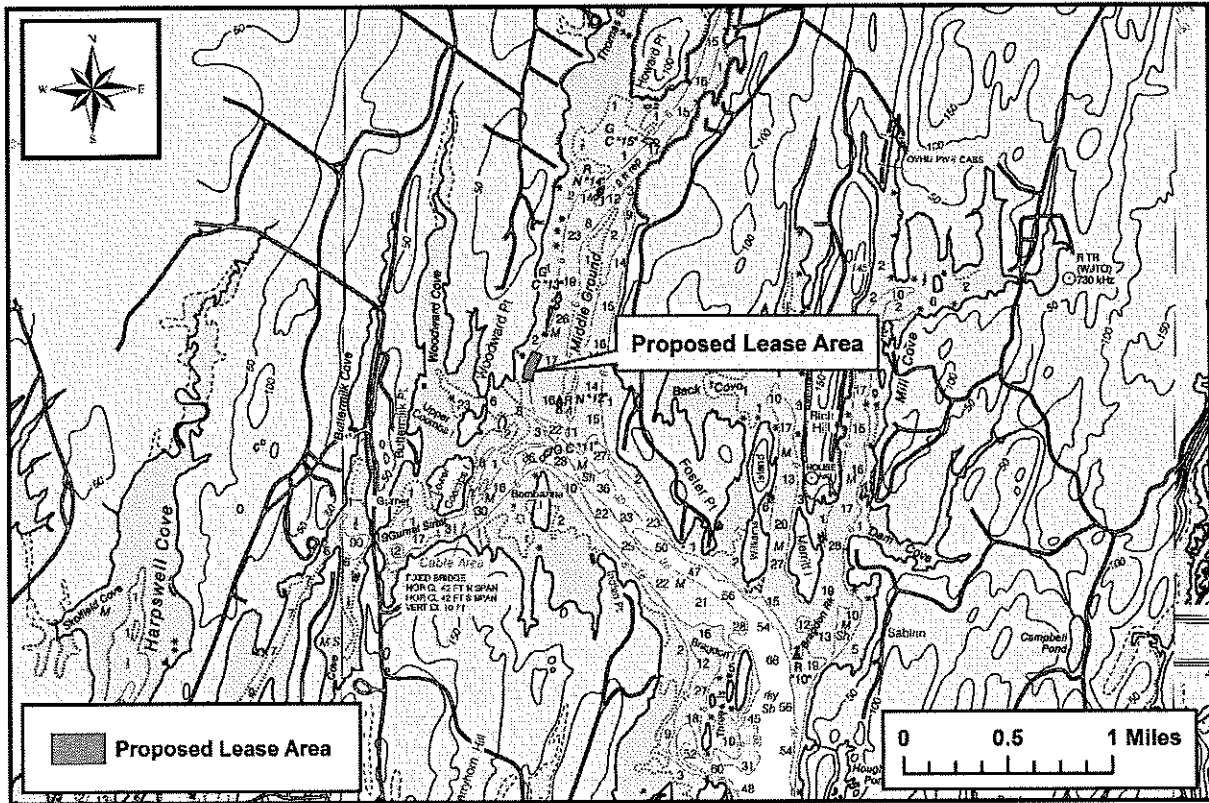


Figure 1: Proposed lease site and surrounding area. Image taken from DMR’s site report.

**Application Coordinates (WGS84) – 4.49 acres**

<u>Corner</u>	<u>Latitude</u>	<u>Longitude</u>
NW	43° 52' 16.27" N	69° 53' 54.82" W then 251.90 feet at 108.16° True to
NE	43° 52' 15.52" N	69° 53' 51.54" W then 454.48 feet at 204.98° True to
ME	43° 52' 11.43" N	69° 53' 54.10" W then 258.60 feet at 190.08° True to
SE	43° 52' 8.91" N	69° 53' 54.68" W then 272.55 feet at 285.91° True to
SW	43° 52' 9.62" N	69° 53' 58.27" W then 296.11 feet at 8.16° True to
MW	43° 52' 12.52" N	69° 53' 57.74" W then 435.68 feet at 34.49° True to NW.

**B. Site History**

The applicant currently holds a 2.7 acres experimental lease site, NMR WPx. The experimental lease was granted on August 22, 2017. The purpose is to explore the commercial feasibility of oyster and scallop production (NMR WPx Final Decision 2017). The primary production method involves deploying two horizontal longlines with surface bags for the cultivation of oysters. In addition to the surface bags for oysters, five longlines are submerged for the cultivation of scallops. The applicant also seeds the bottom of the lease site with oysters. The lease was amended on July 29, 2019 to authorize the cultivation of surf

clams.<sup>3</sup> The experimental lease expired on August 21, 2020. However, a provision of law, 12 M.R.S.A §6072-A(20), allows the holder of an experimental lease to continue operating the site while the Department considers the standard lease proposal, so long as the standard lease proposal overlaps a portion or all of the existing experimental lease. In this case, the standard lease proposal encompasses the entirety of the experimental lease.

### **C. Proposed Operations**

The applicant proposes to culture of eastern oyster (*Crassostrea virginica*), European oyster (*Ostrea edulis*), sea scallop (*Placopecten magellanicus*), surf clam (*Spisula solidissima*), and hard clam (*Mercenaria mercenaria*) on the proposed lease site using suspended and bottom culture techniques (App 1). A maximum of 1200 floating oyster bags for oysters and clams, 170 bottom cages and 30 lantern-style nets for oysters, surf clams, and sea scallops, 100 bottom trays for all species, and 30 seed boxes for oysters and clams are proposed for the site (App 6). The floating oyster bags and seed boxes would be arranged in a total of 10 longlines, each 150 feet in length with two rows of 75 bottom cages on either side of the line. Lantern-style nets would be deployed on two longlines in the southwest quadrant of the lease, each 150 feet in length (App 34).

The applicant anticipates seeding the site with eastern and European oysters in June or July, sea scallops in May or June, surf clams in June, and hard clams in June or July (App 9). Seeding for each species is not expected to take more than 8 hours. Bottom seeding oysters and hard clams will occur in late fall or early spring over the course of no more than 4 days.

Oyster bags will be tended by manually flipping the bag over from the boat once a week or once every other week during the summer and fall (App 9, App 10). Bottom cages will be swapped out for clean cages or scrubbed. Oysters will be thinned and graded manually twice per year. Future operations may include a battery-powered vessel-mounted sorter. Oyster harvest is done manually from the boat. Market-sized oysters will be held in a bottom cage or lantern-style net and cleaned just before sale using a battery-powered washdown pump (App 9, App 11). Bottom-planted oysters and clams will be harvested by diving, bull raking, or using tongs. Some hard clams will be raised in bottom cages that sink partway into the sediment and some will be bottom-planted. Sea scallop maintenance will be performed three times a year to clean and/or swap in clean bottom cages (App 9). The site will be visited two to three times per week, depending on the season and largely on the weekends. Each visit to the farm is expected to take 2 to 6 hours (App 9). Harvesting will be done once or twice a week for 2 to 5 hours (App 10).

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<sup>3</sup> Since that amendment was processed the Department updated statute, effective October 18, 2021, and experimental leases held for commercial purposes can no longer be amended.

Powered equipment to be used on site would include a battery-powered washdown pump and two winches. The washdown pump is a 12-volt unit operated off the boat's battery. The pump will typically be used for 1 to 2 hours when washing oysters. Both winches are 12-volt battery-powered and used sparsely to raise cages (App 11).

A 10x12 feet wooden float will be inside the lease area to serve as a work platform. It would sit 16 inches above the water surface (App 7). The float would be moored at the southern or western middle side of the lease and held in place by two 75-pound mushroom anchors, one at each end.

From December to March, all surface gear and buoys will be removed, except for two winter stick buoys marking the lines and to aid in spring retrieval of groundlines (App 10). The product will overwinter in cages on the bottom or remain at bottom with no gear if bottom-seeded. Gear moved off site for overwintering will be stored at the home of Dana Morse or John Swenson.

### **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 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 Access**

DMR's Chapter 2 regulations 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.

At the time of DMR's site assessment on May 5, 2021, moorings and docks were present, as well as a disused pier (SR 9). No vessels were observed on moorings or docks. The nearest observed mooring was approximately 200 feet to the north of the proposal. The nearest observed dock was approximately 345 feet to the north of the proposal (SR 9). Based on these distances, DMR staff conducting the site review reported that if the lease were granted, adequate space would likely remain for access to these

structures. The apparent disused pier with associated float to the west of the proposed site was in a condition suggesting that it is no longer functional.

While riparian owners attempting to access the shoreline to the west of the proposal from the water would need to transit around the proposed lease site, there would be at least 160 feet of space between the proposed site and Woodward Point (SR 9). This distance is likely sufficient for vessels capable of shore landing to navigate. DMR's site assessment stated that if granted, it is unlikely the proposed lease area would significantly hinder riparian ingress and egress.

The Brunswick Harbormaster stated that riparian owners would have sufficient room to access their properties from the water if the proposal were granted.<sup>4</sup> No public comments asserting unreasonable interference with ingress or egress were submitted. One riparian owner, Phil Jackson, testified at the October 5, 2022 hearing in support of the proposed lease.

Activities at the lease site in subtidal waters are unlikely to hamper access to and from the shore. Based on the distances from the proposal to existing structures, the Harbormaster's response, and public testimony, the Department finds that sufficient area remains for reasonable ingress and egress by riparian owners.

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

## **B. Navigation**

When examining navigation, the Commissioner considers whether the lease activities would interfere with commercial or recreational navigation around the lease area and considers the current uses of the navigational channels in the area. DMR's site assessment states the New Meadows River is heavily traveled by commercial and recreational mariners during the summer months (SR 10). The proposed site occupies area between Woodward Point and Middle Ground and is east of the New Meadows River's marked navigational channel. The site assessment states that if the proposed lease were granted it would not impede vessel flow within the main channel (SR 10). During DMR's site assessment on May 5, 2021, one motorboat was observed in the channel.

DMR's site assessment states that roughly half of the proposed lease area is within the 17-foot contour line associated with the marked navigational channel (NOAA Chart, Figure 1 on SR 1). The report goes on to say that it is unlikely that many mariners traditionally transit through the proposed lease area due to the presence of a tidally exposed mud flat to the south and Getchell's Ledge to the north (SR 10). These features act as natural barriers for vessels transiting north-south in the main navigation channel. Moreover, the applicant's existing experimental lease, NMR WPx, is also positioned so that

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<sup>4</sup> Response to the Harbormaster Questionnaire dated May 4, 2021



roughly half of the lease area is to the east of this 17-foot contour line, and to DMR Aquaculture Division's knowledge, no navigational concerns have been raised about the presence of NMR WPx. The Brunswick Harbormaster indicated that the proposed site is unlikely to cause issues with navigation in the area. No testimony concerning navigation was given at the hearing.

The Department finds that based on available information and Harbormaster input, the placement of the proposed project would still allow for commercial and recreational navigation.

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

### **C. Fishing & Other Uses**

When examining fishing and other uses, the Commissioner considers whether the lease activities would unreasonably interfere with commercial or recreational fishing or other water-related uses of the area. Additionally, the Commissioner considers any evidence concerning other aquaculture uses of the area.

**Fishing.** At the time of the Department's site assessment on May 5, 2021, two lobster (*Homarus americanus*) trap buoys were observed north of the proposal. The nearshore lobster fishery in Maine takes place during the summer and fall seasons due to the annual migration and molt cycle of lobsters. The Brunswick Harbormaster additionally indicated that there is shellfish harvesting in the general vicinity of the proposal, including a European oyster bed less than 700 feet to the north. According to the Harbormaster, most shellfish harvesters access this area by foot, and it is unlikely that the proposed lease site would impede access. Commercial harvest also occurs on Middle Ground, which is on the opposite side of the marked navigational channel as the proposed lease area.

Recreational hook and line fishing for striped bass (*Morone saxatilis*) occurs regularly throughout the New Meadows River. At the hearing, Mr. Scott Shea testified that near the proposed lease area used to be a secret spot for striper fishing. Considering the bottom topography of the proposed lease site, which is gently sloping with mud sediment, and lack of topographical features that typically attract striped bass, it is unlikely the proposal would interfere with traditional angling in the area (SR 10). Furthermore, the Brunswick Harbormaster stated that "the proposed lease area shouldn't be a problem" for recreational fishing in the general area.

During applicant testimony at the hearing on October 5, 2022, Dana Morse stated that he has only observed one commercial clam digger in the area accessing the shellfish bed from the south by boat. Mr. Morse also reported only one entanglement with a recreational fishing hook and his aquaculture gear during the three years of operating the 2.7 acres experimental lease.

Due to the location of the existing lobster fishing and shellfish harvesting and based on the Harbormaster's responses and applicant's testimony, it is unlikely that commercial or recreational fishing will be impacted by the proposed activity.

**Exclusivity.** The applicant requests that mobile-gear fishing, such as dragging and netting, be prohibited within the lease boundaries to avoid gear conflicts and entanglement (App 17). If the proposed lease is granted, this request is reasonable, and enforceable under provisions of law (see 12 M.R.S.A. §6073(2)). A condition reflecting this restriction will be included in the lease.

**Other aquaculture uses.** Twenty-three Limited Purpose Aquaculture (LPA) licenses and 2 active leases are located within 1 mile of the proposed lease (SR 11). The nearest active lease, which is overlapping with and intended to be replaced by the proposal, is the applicant's existing experimental lease, NMR WPx, approved for the suspended and bottom culture of shellfish. The closest active lease not associated with the applicant, NMR EMG<sup>5</sup>, is to the east of Middle Ground and is approved for the suspended culture of shellfish. The nearest LPA is CBUR219, which is over 1,700 feet to the southwest and approved for the suspended culture of American/eastern oysters. Access to, and navigation around, the nearby aquaculture sites is unlikely to be impacted by the proposal, if the lease were to be granted.

No testimony was received by other aquaculture lease or license holders in the area to indicate they have concerns regarding the proposed activities. Based on this evidence, it appears that the proposed lease will not unreasonably interfere with other aquaculture activities in the area.

**Other water-related uses.** To the west and northwest of the proposal, Woodward Point Preserve offers public access to a hand-carry boat launch. Kayaks and paddleboards are most likely to use this launch (SR 10). The application stated that kayak, canoe, and rowing scull traffic transits to the east of the proposal (App 16).

At the hearing on October 5, 2022, Mr. Scott Shea, local kayak guide and owner of Seaspray Kayaking, gave testimony stating that hundreds, if not thousands, of recreational kayakers transit the New Meadows River during the summer months. Seaspray Kayaking has approximately 40 to 50 people on the river a day in the summer through guided tours and rentals. Iron Island, south of the proposal, is a frequent stop by kayakers on the river. Kayak renters are advised to stay on the west shore, out of the main navigation channel for safety.

The Department finds that sufficient evidence of heavy recreational use of the waters near the project site exists in the record. However, the Department also finds that ample area for recreational use of the waters will remain if the project is approved, since there has been while the experimental site has

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<sup>5</sup> The Site Report mentions a second lease, NMR EMG2, since the report was written that lease has been terminated.

been in operation. The Department finds that the burden for safe passage and recreation lies with the resource user and the approval of this proposal will not impede all options for safe recreation, as the project site would remain open, depending on weather conditions, to transiting kayakers and paddleboarders.

**Therefore**, the aquaculture activities proposed for this site will not unreasonably interfere with fishing, existing aquaculture operations, or other water-related uses of the area.

**D. Flora & Fauna**

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

**Site observations.** On May 5, 2021, DMR staff conducted a drop camera transect to assess the epibenthic ecology of the area. The observed bottom was soft mud. Other organisms were noted occasionally and are listed below:

Species Observed	Abundance
Moon jelly ( <i>Aurelia aurita</i> )	Abundant
Clam holes	Abundant
Horseshoe crab ( <i>Limulus polyphemus</i> )	Rare

**Eelgrass.** According to historical data collected by DMR in 2018, the nearest documented presence of eelgrass (*Zostera marina*) is approximately 900 feet to the southeast of the proposed lease site. Additionally, no eelgrass was observed during DMR’s underwater assessment on May 5, 2021 (SR 12).

**Wildlife.** On May 5, 2021, moon jellies (*Aurelia aurita*) were abundant in the water column and a single horseshoe crab (*Limulus polyphemus*) was observed (SR 11).

According to GIS data maintained by the Maine Department of Inland Fisheries and Wildlife (MDIFW), the intertidal areas to the west of the proposal, is designated Tidal Wading Bird and Waterfowl Habitat (TWWH) that is considered Significant Wildlife Habitat under Maine’s Natural Resource Protection Act. The proposed lease is over 600 feet from designated TWWH (SR 13). The proposal is over 200 feet to the northeast of Great Blue Heron (*Ardea herodias*), a Species of Special Concern in Maine, habitat (SR 13). According to U.S. Fish and Wildlife Service data, the proposed lease is over 2,000 feet from the 660-foot buffer around a documented bald eagle (*Haliaeetus leucocephalus*) nest (SR 13). Bald eagles are no longer a Species of Special Concern in Maine, but they are protected under federal law by the

Bald and Golden Eagle Protection Act (16 U.S.C. 668-668c) of 1940. Furthermore, on April 26, 2021, a MDIFW wildlife biologist responded by email to a “Request for Agency Review and Comment” stating that “minimal impacts to wildlife are anticipated.”

Based on this evidence, it appears that the proposed lease site will not interfere with the ecological functioning 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.

#### **E. Public Use & Enjoyment**

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.

Getchell’s Ledge, owned by the Maine Bureau of Parks and Land and a designated “Coastal Island”, is located approximately 590 feet from the proposed lease site at mean low water (SR 14). The proposal would not interfere with the public use or enjoyment of the ledge. There are no other beaches, parks, docking facilities, or conserved lands owned by federal, state, or municipal government within 1,000 feet of the proposed lease site. The nearest conserved land, Woodward Point, is 140 feet to the west of the proposal and is held in private conservation by Maine Coast Heritage Trust (SR 14). Although privately-owned conserved lands are not included in the decision criteria for granting standard leases, as per DMR Regulations Chapter 2.37(1)(A), access to this preserve was considered under navigation.

No testimony concerning public lands 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.

#### **F. Source of Organisms**

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.

The applicant will obtain eastern oyster (*Crassostrea virginica*) from Muscongus Bay Aquaculture and/or Mook Sea Farm; European oyster (*Ostrea edulis*) from Muscongus Bay Aquaculture and/or Downeast Institute; sea scallop (*Placopecten magellanicus*) from Pine Point Oyster Company; surf clam

(*Spisula solidissima*) from Downeast Institute; and hard clam (*Mercenaria mercenaria*) from Muscongus Bay Aquaculture and/or Downeast Institute (App 3). These hatcheries are approved by DMR.

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

#### **G. Light**

According to the application, no lights would be used on the proposed lease site and no work would occur beyond daylight hours, except in extreme circumstances (App 12). The applicant testified that in the case of an emergency where lighting was necessary, they would partner with Marine Patrol and potentially use a 12-volt light for navigation. There was no public testimony provided at the hearing to indicate there was concern regarding light associated with the proposed activities.

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

#### **H. Noise**

According to the application, an electric washdown pump, used for cleaning oysters, and an electric winch, for raising cages, will be used on site (App 11). An electric, tube-style grader may be added in the future.

The pump is used intermittently and pumps water on-demand. The winches run off battery, not a combustion engine. Winches are used sparsely during a visit. If a grader is eventually used, it would occur once or twice per year and be stored off-site. All powered equipment is electric running off a 12-volt battery and generating less noise than gas-powered equipment. After cages are raised, grading and harvesting is done by hand, which minimizes noise. Boat noise is kept to a minimum by turning off the outboard engine when it is not needed (App 12). One vessel has a 4-stroke Honda, known for its quiet operation. The other vessel has a 2-stroke Evinrude, when this engine needs to be replaced, the applicant will use a 4-stroke model on this vessel.

Based on this evidence, it appears that any noise generated by the proposed operations is unlikely to have a significant effect at the boundaries of the lease site.

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

#### **I. Visual Impact**

The applicant plans to deploy floating oyster bags for oysters and clams, bottom cages and lantern-style nets for oysters, surf clams, and sea scallops, bottom trays for all species, and seed boxes for oysters

and clams as described in Section 2B, above. The work float would be a natural wood color and sit 16 inches above the water's surface. Except for surface buoys and foam floatation in the spreader bars, the gear will be green, gray, black, or brown in color. Surface buoys will be white, orange, or any highly visible, preferred color. Foam is blue in color. The gear proposed by the applicant complies with DMR's height and visual impact limitations.

**Therefore**, the equipment utilized on the proposed lease site will comply with the DMR's visual impact criteria.

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

Based on the above findings, I conclude that:

- a. The aquaculture activities proposed for this site will not unreasonably interfere with the ingress and egress of any riparian owner.
- b. The aquaculture activities proposed for this site will not unreasonably interfere with navigation.
- c. The aquaculture activities proposed for this site will not unreasonably interfere with fishing or other water-related uses of the area, taking into consideration other aquaculture uses in the area.
- d. The aquaculture activities proposed will not unreasonably interfere with the ability of the lease site and surrounding areas to support existing ecologically significant flora and fauna.
- e. 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.
- f. The applicant has demonstrated that there is an available source of eastern oyster, European oyster, sea scallop, surf clam, and hard clam seed to be cultured for the lease site.
- g. The aquaculture activities proposed for this site will not result in an unreasonable impact from light at the boundaries of the lease site.
- h. The aquaculture activities proposed for this site will not result in an unreasonable impact from noise at the boundaries of the lease site.
- i. The aquaculture activities proposed for this site 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 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 NICE Oyster Company, LLC for 4.49 acres for 10 years for the cultivation of eastern oyster (*Crassostrea virginica*), European

oyster (*Ostrea edulis*), sea scallop (*Placopecten magellanicus*), surf clam (*Spisula solidissima*), and hard clam (*Mercenaria mercenaria*) using suspended and bottom culture techniques. Final approved coordinates for this lease are provided in Section 2A above. 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 2.40 (2)(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).<sup>6</sup> 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:

- a. Dragging and netting mobile-gear fishing are prohibited within the lease boundaries, except by authorization of the leaseholder.
- b. Other public uses that are not inconsistent with the purposes of the lease are permitted within the lease boundaries.

**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: 11/28/22

  
Patrick C. Keliher, Commissioner  
Department of Marine Resources

<sup>6</sup> 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."

**STATE OF MAINE  
DEPARTMENT OF MARINE RESOURCES**

**Nice Oyster Company, LLC**

Application for Change in Species and Gear Authorization  
New Meadows River, Brunswick

**NMR WPx**

July 29, 2019

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

Nice Oyster Co, LLC applied to the Department of Marine Resources (DMR) to change the species and gear authorization for their existing experimental lease NMR WPx, located east of Woodward Point and south of Getchell's Ledge in the New Meadows River in the town of Brunswick, Cumberland County, Maine. The leaseholder is seeking authorization to cultivate surf clams (*Spisula solidissima*), to alter the configuration of authorized floating gear, and to install additional suspended gear on the existing experimental lease site.

**1. THE PROCEEDINGS**

Notice of the application and the 14-day public comment period were provided to federal agencies, riparian landowners, and the Town of Brunswick. The evidentiary record before DMR regarding this lease amendment application includes two exhibits (see exhibit list below).

**LIST OF EXHIBITS<sup>1</sup>**

1. Application for a change of species and gear authorization
2. Original lease decision signed August 22, 2017

**2. STATUTORY CRITERIA & FINDINGS OF FACT**

Approval of experimental aquaculture lease amendments is governed by 12 M.R.S.A. § 6072-A (8) and Chapter 2.44 of DMR regulations. The statute and regulations provide that the Commissioner may grant amendments for the use of specific gear, species, and/or operational modifications on an existing lease site provided the proposed changes do not materially alter the findings of the original decision or would result in a change to the original lease conditions.

**A. Original Lease Decision**

On August 22, 2017, DMR granted lease NMR WPx to Nice Oyster Company, LLC (Exhibit 2, page 8). DMR's Findings of Fact, Conclusions of Law, and Decision, henceforth referred to as "the decision", found that the evidence in the record supported the conclusion that the aquaculture activities proposed by Nice Oyster Company, LLC met the requirements for granting an experimental aquaculture lease as set forth in 12 M.R.S.A. § 6072-A (Exhibit 2, page 7).

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<sup>1</sup> Exhibits 1 and 2 are cited below as: Application – "App", DMR Decision on Lease NMR WPx - "Exhibit 2".



The decision provided authorization to cultivate shellfish using both bottom culture and suspended culture (Exhibit 2, page 7). Surface bags and bottom cages and/or trays comprise the gear authorized for the suspended culture of shellfish on NMR WPx (Exhibit 2, 2). The decision authorized surface bags to be deployed along two horizontal longlines, each approximately 200 feet in length (Exhibit 2, page 1). The decision also provided authorization for bottom cages and/or trays to be deployed along up to five submerged longlines, each approximately 350 feet in length (Exhibit 2, page 2).

Conditions imposed on lease NMR WPx, pursuant to 12 M.R.S.A § 6072-A (15) and located on page 7 of the decision, are as follows:

1. The lease site must be marked in accordance with both U.S. Coast Guard requirements and DMR Rule 2.80.
2. Dragging, lobster fishing, shellfish harvesting, and diving, are prohibited within the lease boundaries, except by authorization of the leaseholder.
3. Other public uses that are not inconsistent with the purposes of the lease are permitted within the lease boundaries.

## **B. Proposed Species Changes and Findings**

Nice Oyster Company, LLC is requesting the authorization to cultivate surf clams (*S. solidissima*) on their existing experimental lease site NMR WPx (App 3). The leaseholder has demonstrated that there is an available source of surf clams (*S. solidissima*) for cultivation, as they propose to obtain surf clam seed from Downeast Institute, located in Beals, Maine or from Basket Island Shellfish, located in Portland, Maine (App 3). Per the application, surf clams (*S. solidissima*) could be grown using the existing gear authorized on NMR WPx and therefore no gear changes would be required (App 1).

NMR WPx is currently authorized to cultivate American oysters (*Crassostrea virginica*), European oysters (*Ostrea edulis*), bay scallops (*Aequipecten irradians*), and sea scallops (*Placopecten magellanicus*). As the addition of surf clams (*S. solidissima*) would not require gear changes to the existing lease site, the addition of this shellfish species would not cause a material deviation from the currently permitted operations. Therefore, the proposed species change is consistent with the findings of the original decision. Furthermore, the proposed species change would not result in a change to the original lease conditions.

## **C. Proposed Gear Changes, Operational Modifications, and Findings**

Nice Oyster Company, LLC is authorized to deploy a total of five submerged longlines and two surface longlines on experimental lease NMR WPx (Exhibit 2, 1-2). The submerged lines, which measure approximately 350 feet in length are used to anchor bottom cages and/or trays, while the surface longlines, which measure approximately 200 feet in length, are deployed to hold paired surface bag (Exhibit 2, 1-2).

Nice Oyster Company, LLC is requesting the authorization to install a ~350-foot surface longline holding up to 30 shellfish bags, measuring 30" x 20" x 36", that would be suspended vertically in the water

column in a configuration similar to lantern nets<sup>2</sup> (App 1 & 12). This surface longline is proposed to replace one of the permitted submerged longlines and the associated bottom cages and/or trays (App 12).

The leaseholder is also requesting to modify the configuration of the existing surface bags on NMR WPx from two longlines holding paired surface bags to four longlines holding single surface bags. The two additional surface longlines, which are proposed to measure approximately 150 feet, would replace one of the currently permitted submerged longlines and associated bottom cages and/or trays (App 12).

The proposed changes would replace two submerged longlines on NMR WPx with surface longlines holding surface or midwater gear. Despite the fact that there are no proposed changes to the number of surface bags to be deployed on the existing lease site, the proposed operational modifications would increase the number of surface longlines from two, 200 -foot surface longlines to four, 200-foot surface longlines and one ~350-foot longline and would introduce a gear type that was not considered during the original application process. Therefore, the proposed changes to the gear type and configuration would materially alter the findings of the original decision for experimental lease NMR WPx.

### **3. DECISION**

Based on the foregoing, the Commissioner grants the request from Nice Oyster Company, LLC for the authorization to cultivate surf clams (*S. solidissima*) on experimental lease NMR WPx but denies the leaseholder's gear amendment requests, including both the gear type and configuration amendments.

Dated: \_\_\_\_\_

July 29, 2019

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

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<sup>2</sup> These shellfish bags are referred to in the application as "lantern nets" due to their similarity to this equipment type (App 1).

**STATE OF MAINE**  
**DEPARTMENT OF MARINE RESOURCES**  
Experimental Aquaculture Lease Application  
Suspended and bottom culture of shellfish  
New Meadows River, Brunswick

**Nice Oyster Company, LLC**  
**NMR WPx**  
Docket #2017-06-E  
  
August 22, 2017

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

Nice Oyster Company LLC, a Maine company, applied to the Department of Marine Resources (“DMR”) for an experimental aquaculture lease on 2.7 acres located in the New Meadows River, east of Woodward Point and south of Getchell’s Ledge, Brunswick, Cumberland County, for the purpose of cultivating American/Eastern oysters (*Crassostrea virginica*), European oysters (*Ostrea edulis*), bay scallops (*Aequipecten irradians*), and sea scallops (*Placopecten magellanicus*) using suspended and bottom culture techniques. DMR accepted the application as complete on June 6, 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, the DMR site report, and the 30-day public comment period were provided to state and federal agencies which were requested to review the project, as well as to riparian landowners, the Town of Brunswick and its Harbormaster, members of the Legislature, representatives of the press, aquaculture and environmental organizations, and others on the Department’s mailing list. Notice of the application and comment period was published in the *Brunswick Times Record* on June 23, 2017.

The evidentiary record before the Department regarding this lease application includes the application and the Department’s site report dated August 14, 2017, as well as the case file. The evidence from these sources is summarized below.<sup>1</sup>

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

#### **A. Proposed Operations**

The purpose of the proposed lease site is to explore the commercial feasibility of oyster and scallop production using a combination of culture techniques including longlines, surface shellfish bags, bottom cages and/or trays, and bottom seeding (App 3). The primary production method involves deploying two horizontal longlines, measuring ~200 feet, to support 150 surface bags for the cultivation of

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<sup>1</sup> These sources are cited below, with page references, as CF (case file), App (application), SR (site report).

oysters (App 3, SR 2). The bags will be flipped on a weekly or bi-weekly basis to limit biofouling (App 3). During the winter months, the bags will be removed from the site and the oysters will be transferred to bottom gear or moist air storage (App 3).

In addition to the surface bags, five longlines, measuring ~350 feet will be submerged in order to anchor 30 bottom cages and/or trays for the cultivation of scallops (App 3, SR 2). The cages will be periodically lifted from the bottom for maintenance and harvesting purposes (App 3). Gear will be cleaned on land rather than on the proposed site (App 3).

The applicant also intends to seed the bottom of the lease site with oysters and harvest them with a small drag (less than 3 feet wide), bull rake, and/or diving (App 3, SR2). Operations will occur from March through December, and the applicant expects to be on the site one to two days per week (App 4).

### **B. Site History**

Dana Morse, who has an interest in Nice Oyster Company LLC, holds two Limited Purpose Aquaculture Licenses (LPAs) within the boundaries of the proposed lease site (SR 10). One LPA was granted in 2014 and the other in 2016 for the cultivation of American/Eastern oysters (*Crassostrea virginica*). Since their respective issuance, the LPAs have been renewed each year and the Department has not received any complaints regarding the operation of any of these licenses. Dana Morse plans to terminate the LPAs if the lease is granted (App 3, SR 10).

### **C. Site Characteristics**

On July 26, 2017, DMR scientists visited the proposed lease site and assessed it and the surrounding area in consideration of the criteria for granting an aquaculture lease.

The proposed lease site “occupies subtidal waters between Woodward Point to the west and Middle Ground to the east” (SR 2). The upland is characterized by exposed ledge that leads to a mixed forest and fields (SR 2). At mean low water, the distance from the western boundary of the proposed lease site to the nearest point of land is ~149 feet (SR 8). Water depths, at mean low water, ranged from 4.4 feet at the northwest corner to 8.7 feet at the northeast corner (SR 7). The bottom of the proposed lease is characterized by a layer of soft mud with “gently sloping” topography (App 5). The current speed is approximately 0.5-1.0 knots (App 5).

The proposed lease is in an area currently classified by the Department of Marine Resources Water Quality Classification program as “approved for the harvest of shellfish” (SR 9).

### **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**

During the site assessment staff observed one dock and two moorings within the vicinity of the proposed lease (SR 9). The nearest of the two moorings is ~290 feet to the north of the proposed lease site; at the time of the site assessment it was used to secure a small Boston Whaler (SR 9). The dock is situated ~363 feet to the north; at the time of the site assessment it contained two rowing shells and small row boat (SR 9). A dilapidated pier is located along Woodward Point and is ~262 feet from the proposed site (SR 9). According to the site report, “riparian owners’ ability to access the main navigation channel from their dock and mooring would be maintained if the proposed lease is granted” (SR 9).

Activities at the lease site in subtidal waters are unlikely to hamper access to and from the shore.

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

#### **B. Navigation**

The proposed lease site is located along the western edge of a marked navigation channel (SR 10). The channel runs north-south between the western shore of the New Meadows River and the Middle Ground ledges; at mean low water, more than 675 feet of open, navigable water lie between the east side of the proposed lease site and Middle Ground (SR 10). According to the site report, “a minimum of 145 feet of navigable water would remain between the proposed lease and the western shore of the New Meadows River” (SR 10). The majority of motorized vessels will likely traverse the marked channel, while shallow draft vessels capable of navigating the area at mean low water will be able to travel between the proposed lease site and the western shore of the river (SR 10). During the review period, DMR did not receive any comments from the Brunswick Harbormaster. Based on the absence of comments, it is reasonable to conclude that the Brunswick Harbormaster does not have any concerns about navigation.

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

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

#### **C. Fishing & Other Uses**

The applicant notes that the proposed area “gets little direct use,” and commercial fishing within the proposed lease boundaries is “very limited or non-existent” (App 5). The site report describes the following:

On July 26, 2017, limited commercial fishing activity was observed within the immediate vicinity of the proposed lease site. Lobster trap buoys were common ( $n = >20$ ) in the deeper channel waters to the north and east of the proposal. The nearest observed apparent trap buoy ("9") was located 280 feet to the northeast. One individual was observed hauling traps around the tidally exposed ledges to the north (SR 10).

Recreational fishing occurs throughout the river, but the applicant notes that it is concentrated around Getchell's Ledge, which is located north of the proposed site (App 5). In addition, recreational fishing would be permitted within the proposed lease boundaries (App 5). No comments were received with regards to fishing and other uses of the area.

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

**Exclusivity.** The applicant requests that dragging, lobster fishing, and diving be prohibited within the lease boundaries to avoid gear conflicts and entanglement (App 5). Such a restriction is reasonable in order to enable the aquaculture project to be carried out while encouraging the greatest number of compatible uses of the area, as provided in 12 MRS §6072-A (15). A condition reflecting this restriction will be included in the lease.

**Other aquaculture leases.** Including the two LPA licenses held by Dana Morse, there are one lease and 22 LPAs within one mile of the proposed site, all of which are held for the culture of American oysters (*Crassostrea virginica*) (SR 10). The closest aquaculture site, other than the Morse LPAs, is located ~1,245 feet to the east and separated from the proposed lease site by Middle Ground, an intertidal bar (SR 10). It is reasonable to conclude that the proposed operations are unlikely to negatively affect existing aquaculture activities in the area.

Based on this evidence, it appears that the proposed lease will not unreasonably interfere with fishing or other uses of the area. The lease must be marked in accordance with DMR Rule 2.80<sup>2</sup>

**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.

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<sup>2</sup>**2.80 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.

**D. Flora & Fauna**

**Site Observations.** During the site visit, Department staff observed a flock of common eiders (*Somateria mollissima*) roosting on floating bags utilized in the operation of Dana Morse’s LPAs, two snowy egrets (*Egretta thula*) on tidally exposed rocks, and three bald eagles (*Haliaeetus leucocephalus*) perched on Woodward Point (SR 12). Data collected by DMR, between 2001 and 2010, does not indicate the presence of eelgrass within the vicinity of the proposed lease site (SR 11). The closest documented eelgrass beds are more than 800 feet to the east of the proposed lease site (SR 11).

**Fisheries and Wildlife.** DMR sent a copy of this lease application to the Maine Department of Inland Fisheries and Wildlife (MDIFW) for their review and comment. MDIFW noted that “there are no mapped resources of MDIFW jurisdiction in this area.”<sup>3</sup>

Based on this evidence, it appears that the culture of oysters and scallops as proposed for this lease site will not interfere with the ecological functioning of the area.

**Therefore, I find** that the aquaculture activities proposed for this site will not unreasonably interfere with the ability of the lease site and surrounding areas to support existing ecologically significant flora and fauna.

**E. Public Use & Enjoyment**

According to the site report, there are no public docking facilities or beaches within 1,000 feet of the proposed lease (SR 14).

**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**

According to the application, seed stock for this proposed lease site will be obtained from the following:

<p><b>Mook Sea Farm</b> Route 129 Walpole, ME 04573</p>	<p><i>Crassostrea virginica</i></p>
<p><b>Muscongus Bay Aquaculture</b> 24 Seal Ledge Lane Bremen, ME 04551</p>	<p><i>Crassostrea virginica, Ostrea edulis, Aequipecten irradians</i></p>
<p><b>Basket Island Shellfish</b> PO Box 64 Portland, ME 04108</p>	<p><i>Crassostrea virginica</i></p>

<sup>3</sup> CF, Email from MDIFW to the Aquaculture Division dated June 21, 2017.

<b>Downeast Institute</b> 39 Wildflower Lane Beals, ME 04611	<i>Ostrea edulis</i>
<b>Pine Point Oyster Company</b> 10 Pine Ridge Road Cape Elizabeth, ME 04107	<i>Placopecten magellanicus</i>
<b>Marsden Brewer</b> 88 N. Stonington Road Stonington, ME 04681	<i>Placopecten magellanicus</i>

A separate permit is required for the movement of European Oysters (*Ostrea edulis*) within the State of Maine, pursuant to DMR Rules, Chapter 24.10. The applicant will be required to obtain such a permit before European Oysters (*Ostrea edulis*), are transferred to the proposed site.

**Therefore, I find** that the applicant has demonstrated that there is an available source of American/Eastern oysters (*Crassostrea virginica*), European oysters (*Ostrea edulis*), bay scallops (*Aequipecten irradians*), and sea scallops (*Placopecten magellanicus*).

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

Based on the above findings, I conclude that:

- A. The aquaculture activities proposed for this site will not unreasonably interfere with the ingress and egress of any riparian owner.
- B. The aquaculture activities proposed for this site will not unreasonably interfere with navigation.
- C. 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.
- D. 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. 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. The applicant has demonstrated that there is an available source of American/Eastern oysters (*Crassostrea virginica*), European oysters (*Ostrea edulis*), bay scallops (*Aequipecten irradians*), and sea scallops (*Placopecten magellanicus*) 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 2.7 acres to Nice Oyster Company LLC., 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<sup>4</sup>; 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 purpose of cultivating American oysters (*Crassostrea virginica*), European oysters (*Ostrea edulis*), bay scallops (*Aequipecten irradians*), and sea scallops (*Placopecten magellanicus*) using bottom and 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 MRSA §6072-A (15)<sup>5</sup>. 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:

- A. The lease site must be marked in accordance with both U.S. Coast Guard requirements and DMR Rule 2.80.
- B. Dragging, lobster fishing, shellfish harvesting, and diving are prohibited within the lease boundaries, except by authorization of the leaseholder.
- C. Other public uses that are not inconsistent with the purposes of the lease are permitted within the lease boundaries.

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<sup>4</sup> 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.”

<sup>5</sup> 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.”

**7. REVOCATION 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: \_\_\_\_\_

5/22/17



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