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Review of Aquaculture Leasing in
Maine

Andrew Fisk, Aquaculture
Coordinator

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Review of aquaculture leasing in Maine

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2002

**Department of Marine Resources
Andrew Fisk, Aquaculture Coordinator
January 2002**

TABLE OF CONTENTS

LEGISLATIVE CHARGE 1

DMR AQUACULTURE MISSION STATEMENT 1

DMR AQUACULTURE LEASE PROGRAM OBJECTIVES 1

 GOAL 1

 OBJECTIVES 1

Sustainability..... 1

Fairness..... 1

Efficiency..... 2

 GUIDING PRINCIPLES 2

REVIEW OF LEASES AND LEASING 2

 LEASE INVENTORY 2

 LEASE TYPES..... 3

 APPLICATION VOLUME & PROCESSING TIMES 3

STAFFING OF THE DMR AQUACULTURE GROUP 7

FOCUS AREAS FOR CHANGE 9

 PUBLIC DISCLOSURE, INFORMATION, AND PARTICIPATION 9

Issue #1: The public finds the process daunting..... 9

Resolutions:..... 10

 1.1 Hold public scoping sessions on applications..... 10

 1.2 Department notifies riparians of pending applications & public hearings 11

 1.3 Improve the format & wording of published notices..... 12

 1.4 Improve the format and clarity of notices sent to riparians 13

 1.5 Create & distribute a “user’s guide” to aquaculture leasing 15

 1.6 Update the Department website to include more information 15

 1.7 Distribute press releases on hearings 15

 1.8 Pump up the volume 16

 1.9 Create an intent to file processing step for all standard lease applications..... 16

 PROCESSING OF APPLICATIONS..... 17

Issue #2: The current system can work more efficiently..... 17

Resolutions..... 18

 2.1 Identify the processing benchmarks in each application 18

 2.2 Develop a tracking database 19

 2.3 Make application baseline data collection more efficient and effective..... 20

 2.4 Government review procedures for lease applications 22

 2.5 Delegate authority to sign decision documents on experimental leases 23

 2.6 Begin experimental leases at logical times 24

 2.7 Remove requirement to publish legal notice and filing leases at registry 24

 2.8 Implement permit by rule for limited purpose aquaculture 26

 STATUTORY APPROVAL CRITERIA 26

Issue #3: Are the criteria relevant and up-to-date?..... 26

<i>Resolutions:</i>	28
3.1 Make the recreational standard explicit	28
ENFORCEMENT OF LEASE CONDITIONS	32
<i>Issue #4: Is the Department a patsy?</i>	32
Lease language on enforcement.....	32
Performance bonds.....	32
Revocation	33
Renewal.....	33
Transfer of leases	33
Transfer of marine organism permits.....	34
<i>Resolutions</i>	34
4.1 Coordinate and improve the annual lease review program.....	34
4.2 Continue to decriminalize the aquaculture statutes	36
4.3 Update the performance bond requirements	37
PERFORMANCE STANDARDS FOR AQUACULTURE LEASES	38
<i>Issue #5: Are aquaculture facilities good neighbors?</i>	38
<i>Resolutions</i>	39
5.1 Lighting limitations.....	39
5.2 Noise standards	39
5.3 Hours of operation	40
5.4 Equipment profiles / height of feed barges	40
5.5 Color of buildings and buoys.....	40
USE OF CHEMICAL THERAPEUTICS.....	41
<i>Issue #6: Reporting of chemical therapeutics</i>	42
<i>Resolutions</i>	42
6.1 Collect the required information.....	42
JURISDICTIONAL ISSUES	44
<i>Issue #7: Who does what to whom?</i>	44
<i>Resolutions</i>	44
7.1 Coordinate with DEP NPDES permitting.....	44
7.2 Clarify municipal permitting of moorings within leases	45
STAFFING SCHEMES.....	47
<i>Issue #8: There are not enough of us to go around</i>	47
<i>Resolution:</i>	48
8.1 Create a fee system to hire an additional lease reviewer and monitor.....	48
IMPLEMENTATION MATRIX.....	54
APPENDIX A: FORMS AND NOTICES.....	55

Legislative charge

Public Law 1999, Chapter 592 authorized the Department to produce a report for the Marine Resources Committee reviewing the aquaculture lease program, including an assessment of changes to the current process, applicant's rights, municipal involvement, and long term planning for aquaculture in the State.

DMR Aquaculture mission statement

The Department of Marine Resources will rigorously and efficiently site aquaculture facilities so that environmental and public resources are protected and aquaculture continues to contribute to the Maine economy and working waterfront.

DMR Aquaculture lease program objectives

GOAL

A sustainable, fair, and efficient lease process.

Objectives

Sustainability

- Maintain and improve the quality of the FAMP program¹
- Develop appropriate monitoring for shellfish, urchin, and seaweed facilities²
- Maintain an active compliance program over all aquaculture leases
- Restructure the finfish aquaculture industry to bay area management, single year class stocking, and fallowing.³

Fairness

- Increase public knowledge of the leasing program
- Increase public awareness of individual lease applications
- Improve the ability of the public to present information on lease applications

¹ The review of the finfish aquaculture monitoring program (FAMP) is being conducted separately, and will be completed by January 2003.

² The FAMP review will also address this aspect of the aquaculture program.

³ This is not addressed at length in this report.

- Ensure through regulations that aquaculture facilities are “good neighbors” with all other users of State waters.

Efficiency

- Reduce the average time to process a standard application to 365 days by 12/02
- Reduce the average time to process an experimental application with a public hearing to 180 days by 12/02
- Reduce the average time to process an experimental application without a public hearing to 90 days by 12/02
- Implement a permit-by-rule system for very small scale aquaculture operations by 5/02

Guiding principles

The Department laid a few ground rules, or guiding principles, that were used to direct this lease program assessment. They are:

- Find and implement all internal efficiencies before looking to hire additional staff.
- Make the site review process as efficient as possible at the “front end” in order to have environmental staff out in the field doing more monitoring and compliance work at the “back end.”
- Find ways to provide more information to the public on aquaculture and leasing.

Review of leases and leasing

Lease inventory

There are 1203 acres of sub tidal land currently under lease through the Department’s aquaculture program on 125 different leases. The breakdown between groups is as follows:

<u>Groups</u>	<u>Acreage</u>	<u>Number of leases</u>
Finfish	750	44 ⁴
Shellfish	445	80
Seaweed	7	1

⁴ There are only 26 active lease sites currently being used for production finfish aquaculture.

Lease types

There are two aquaculture leases generally granted by the State – “standard” and “limited-purpose” (these are called “experimental” informally). These leases differ in their spatial extent, review, and duration in order to provide some flexibility in the lease program. The intention of the “experimental” lease program, created in 1997, is to allow small commercial start-up operations, or research programs to enter the field on a shorter term basis with fewer of the upfront hurdles that are faced by “standard” applicants.

Standard Leases

Each up to 100 acres
Aggregate limit of 250 acres total
Issued for 10 years
Can be renewed
Public hearing required

Experimental Leases

Each up to 2 acres
Issued for 3 years
Cannot be renewed, unless scientific
Public hearing if 5 requests

There is a third category of aquaculture regulated by the Department through a yearly license. These operations are very small scale and operate within 400 square feet and have a restricted range of gear that can be used. These limited-purpose licenses (not leases) have not been implemented yet and are discussed below at Issue #2.

The Department also processes requests for the renewal of standard leases, which require a public hearing if there are five requests. As such these renewals can be comparable in workload to the processing of a new application. Generally however they require less administrative time to process. Leases are also transferable. The processing of a transfer request may require a public hearing provided that five members of the public request one. These proceedings are generally routine and have not been overly controversial.

Finally, there is provision in the law for the issuance of emergency leases for the purpose of relocating shellfish from contaminated areas.

Application volume & processing times

In the recent past there has been an increase in the number of lease applications submitted to the Department. Much of this recent increase was a result of the experimental lease program that was created in 1997. The recent increase in applications appears to be tapering off, however the Department expects to see a large number of standard lease applications submitted beginning next year as the first round of experimental leases expire. Generally if an experimental lease site is successful an aquaculturalist will apply for a standard lease at that same site.

Lease applications received

	<u>Total</u>	<u>Standard</u>	<u>Experimental</u>	<u>Standard Renewals</u>	<u>Standard Transfers</u>
2001 (ytd)	19	9	4	3	3
2000	50	8	35	5	2
1999	39	11	25	0	3
1998	30	6	18	1	5
1997	17	8	NA	1	8

There are currently 27 pending applications (including renewals or transfers) at the Department. The detail and age breakdown are as follows:

Pending applications

Year application submitted	Type of application	
	<u>Standard</u>	<u>Experimental</u>
2001	9	4
2000	4	4
1999	2	0
Expiring in 2002	4	17

There are numerous steps in the processing of a lease application. An analysis of several of these steps can give an indication of where there may be bottlenecks in the process. These bottlenecks may either be a result of Department, applicant or other actions.

The following charts describe the processing times for the last several years, using information up to the end of September 2001 for the two types of lease applications. The information on standard and experimental leases is broken out because all standards require a public hearing to be conducted, and experimentals have an optional public hearing requirement. The intention of the experimental lease program was to reduce processing times for smaller operations operating for only a few years that would have less impact than a standard lease.

Standard Lease Applications 1998 – 2001

(30 applications)

Table 1. Time ranges for certain processing benchmarks

	Days to receive a lease from date of submission	Days to judge application complete	Days to complete site review following acceptance	Days to schedule public hearing following site work	Days to complete draft decision following public hearing	Days for Commissioner to sign decision following 10-day comment period
Average	457	90	170	101	56	33
Minimum	142	1	1	6	1	8
Maximum	818	476	582	412	116	100

Table 2. Average processing time by year

	Average overall time in days to receive a standard lease from date of submission
2000 ⁵	439 (7)
1999	356 (6)
1998	307 (9)
1997	651 (8)

Experimental Lease Applications 1998 – 2001

(55 applications)

Table 3. Time ranges for certain processing benchmarks where no public hearing was held (n=43).

	Days to receive a lease from date of submission	Days to judge application complete	Days to complete site review following acceptance	Days to schedule public comment following acceptance	Days to complete draft decision following public comment	Days for Commissioner to sign decision following 10-day comment period
Average	104	44	52	18	19	16
Minimum	58	1	1	3	4	1
Maximum	182	241	138	89	74	43

⁵ The year indicates the year the application was submitted, so the 2000 category includes lease applications processed in 2001.

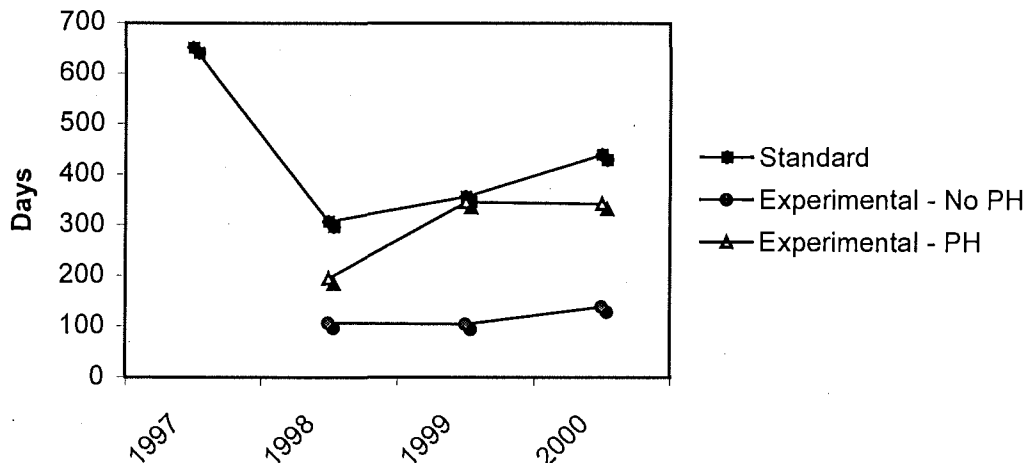
Table 4. Time ranges for certain processing benchmarks where a public hearing was held (n=12).

	Days to receive a lease from date of submission	Days to judge application complete	Days to complete site review following acceptance	Days to schedule public hearing following site work	Days to complete draft decision following public hearing	Days for Commissioner to sign decision following 10-day comment period
Average	310	106	66	101	93	16
Minimum	169	19	1	14	14	7
Maximum	389	297	228	202	386	42

Table 5. Average processing time by year by hearing status

	Average overall days to receive lease from date of submission		
	Public Hearing	No Public Hearing	Difference
2000	342 (5)	139 (10)	203
1999	345 (2)	105 (18)	240
1998	195 (2)	76 (13)	119

Chart 1. Trend in Processing Times for all Lease Types



Most obviously these charts show that overall processing times are steadily increasing. Individual aquaculturalists who are seeking an experimental lease on a few acres are rightly frustrated that the application process can take close to one year. These numbers

can be reduced any number of ways, but as stated at the outset, it is the Department's determination to first ensure that we have achieved as many internal efficiencies as are possible before requesting additional staff.

Upon further review, these numbers also reveal that there are at least four places where the Department can focus its attention and significantly reduce processing times:

- The time it takes the Commissioner to sign the final decision document
- The time to schedule a hearing following the completion of site work
- The time it takes to draft a decision document following a public hearing
- The time it takes to conduct site reviews

Specific recommendations on processing lease applications follow below in later sections.

Staffing of the DMR Aquaculture group

There are currently seven Department positions that have direct, though not all exclusive, involvement in aquaculture. The full-time equivalency of these positions' work on aquaculture is approximately 5. The positions are:

Aquaculture Coordinator (Policy Development Specialist / General Fund)
Division of Community Resource Development / Hallowell

This position is full-time on aquaculture and currently has the responsibility for initiating, implementing, and monitoring all Department aquaculture policies. This position has also historically acted as an advocate for the appropriate development of aquaculture in Maine. As such the position is charged with working with the trade associations, University initiatives, non-profit entities such as the Maine Aquaculture Innovation Center (MAIC), and other state, federal, and international government agencies working in aquaculture.

Regulations & Information Officer (General Fund)
Office of the Commissioner / Boothbay Harbor

This position is half-time on aquaculture and half-time on Department rule-making. The responsibilities of this position include receiving and processing all applications, and scheduling public comment periods and hearings. This position is responsible for scheduling all the administrative and fieldwork requirements of an application. This person also runs hearings, drafts decisions, and leases, and responds to most public inquiries about individual applications. The Department's regulatory agenda for the past year included 43 separate rules that were adopted, 5 of which were emergency rules.

Supervises one Paralegal 1 (see below)

Paralegal I (General Fund)
Office of the Commissioner / Boothbay Harbor

This position is half-time to aquaculture and provides general administrative support to Regulations & Information Officer, including filing, processing applications, administration of leases, and scheduling hearings.

Director, Ecology Division (Division Director / General Fund)
Habitat & Aquaculture Division / Boothbay Harbor

This position is approximately one-third on aquaculture and half-time on general research programs on habitat quality and marine ecology. This position is responsible for overseeing the aquaculture monitoring staff and the overall direction and focus of the finfish monitoring fund (FAMP). Lease compliance issues originate from the work of this division.

Supervises two aquaculture monitoring specialists (see below)

Aquaculture Environmental Monitoring Coordinator (Marine Resources Scientist II / Dedicated Fund)
Ecology Division / Boothbay Harbor

This position is full-time to aquaculture and is responsible for all aquaculture monitoring that is conducted by the Department and outside contractors. This position also schedules and conducts all site work for proposed leases, and testifies at all public hearings about Department site work results.

Supervises one other monitoring specialist (see below)

Marine Specialist I (General Fund)
Ecology Division / Boothbay Harbor

This position is full-time to aquaculture and is responsible for site work, report writing, environmental monitoring, as well as various administrative tasks. This position mails applications and annual lease inventories to the public, compiles and creates the annual lease inventory, maintains records on actual fish transfers, and compiles GIS data on lease locations.

Pathologist (Marine Scientist III / General Fund)
Public Health Division / Boothbay Harbor

This position is half to three quarter time to aquaculture and is responsible for all disease issues at finfish and shellfish facilities. This position staffs the Department's Joint Fish Health Technical Committee, approves all transfer permit requests for smolts entering marine facilities, administers any disease monitoring programs (such as the Infectious Salmon Anemia program currently in place), and conducts pathology and epidemiological research on both fin and shellfish conditions.

In general, the aquaculture group has functioned well as a unit, despite being housed in several different divisions and two different locations. It is clear that the program requires continued, focused work between the staff (many of whom have other job requirements beyond aquaculture) to implement these new initiatives. There are clearly areas where the Department has not been able to adequately fulfill its duties – this is partly as a result of the many competing demands on staff, and partly a result of the unit having an agreed upon focus and scope to its work.

Focus Areas for change

The remainder of this report discusses a number of areas within the aquaculture leasing program where the Department is recommending changes. The issues are discussed and proposed recommendations put forward.

Public disclosure, information, and participation

Issue #1: The public finds the process daunting

The public frequently comments that they do not know that a lease is being proposed, what exactly an aquaculture lease entails, how they can participate in the process, or that the process itself is intimidating and difficult to navigate as a layperson. This creates cynicism and skepticism by the general public.

In addition, very often the first time a member of the public learns about the details of an application is at the public hearing. This puts them in a unique, and not generally positive frame of mind. They are processing the details of an application, venting their anger at some form of development they may know little about, and participating in a fairly rigid proceeding.

Public hearings can be daunting experiences for the average citizen who does not have experience in administrative procedures or public testimony. They are often crowded and held in large school gymnasiums and carry on for many hours late into the evening.

Resolutions:

1.1 Hold public scoping sessions on applications

Conduct an informal public meeting on pending application within 30 days of an application being determined complete and prior to the Department conducting site work. Maine Sea Grant has in the past conducted four of these meetings when they have received requests to do so from applicants. They have committed to continue conducting these meetings in conjunction with the Department as resources allow. These meetings have been very positive and serve to reduce a significant amount of opposition to projects once they formally go to public hearing.

The primary purpose is to allow the general public to understand a pending application and have an opportunity to ask questions in an informal setting. These public meetings would also be used by the Department to elicit, or “scope” issues or concerns about a particular application that they can then investigate when site work is conducted. These meetings would then serve two purposes, hopefully both beneficial to the public and the Department.

Requires statutory change _____ **Requires rule change** X

Additional funding / expense: **Minor, absorbed by SeaGrant & DMR**

Proposed draft rule change:

2.15 Notice of Lease Application and Hearing

* * *

3. Public Scoping Session

The Department shall determine at the time an application is deemed complete whether or not to conduct an informal public scoping session about a proposed aquaculture lease. This public scoping session shall be held in the municipality in which the lease is proposed and be conducted prior to the Department's site work. The purpose of this public scoping session shall be to familiarize the general public with the content of the application, allow them an opportunity to ask questions of the applicant, the Department, and Sea Grant Cooperative Extension, and provide the Department with information that can be used during field work or agency review of an application.

The applicant is required to attend and participate in these meetings when they are held.

Notice of this meeting shall be sent to all riparian landowners within 1,000' of the proposed lease and officials of the municipality where the proposed lease resides. Press releases shall also be sent to the media, and notice published in papers of general circulation in the area of the proposed lease.

1.2 Department notifies riparians of pending applications & public hearings

Change the recently enacted statutory requirement BACK to requiring that it be the Department that notifies riparians within 1,000 feet of an experimental lease. Also, clarify that notice goes out only when an application is complete. This clarification can eliminate a significant amount of confusion about competing versions of an application.

The current statutory requirement enacted this past session, in a form recommended by the Department, has not in the end been that efficient because the practical effect has been that applicants notify individuals too early in the process, and the Department ends up sending notice to these same riparians regardless.

There is also currently a statutory requirement that standard lease applicants pay for an additional advertisement, which was enacted to get around the inadequate attention paid to legal notices. This could be eliminated, because we feel the additional ads placed by the applicant amount to nothing more than an additional legal notice description that is not easily noticed by average newspaper readers.

This change, in addition to those below, make for better notification AND remove a burden on applicants.

**Requires statutory change X Requires rule change X
Additional funding / expense: Minor, absorbed by DMR through change to application fee structure.**

It is the Department's intention to amend the application fee structure to include a per address fee for each of the riparian addresses. An initial estimate would be \$2.00 per address surcharge to cover the expenses incurred by the Department.

As well, the Department would amend the application fee structure to include the cost of the public notices for the application. An initial estimate would be \$200 per application.

Proposed statutory change:

§ 6072-A. Limited-purpose lease for commercial or scientific research

5. Notice of application. ~~The applicant~~ Upon determining that an application is complete, the commissioner shall provide notice of a limited-purpose lease application to owners of riparian land within 1,000 feet of the proposed location of the lease and to the municipal officers of the municipality in which the limited-purpose lease activity would take place. The applicant shall provide the names and addresses of such riparian land owners with their application. These names shall be taken from the current property tax roster on file at a municipal office or with the Bureau of Revenue Services for unorganized territory. At the same

time, the commissioner shall publish a summary of the application in a newspaper of general circulation in the area proposed for a limited-purpose lease. A person may provide, within 30 days of receipt of notice or within 30 days of publication of a limited-purpose lease summary, comments to the commissioner on the proposed limited purpose lease.

* * *

7. Notice of public hearing. The applicant commissioner shall provide notice of a public hearing to owners of riparian land within 1,000 feet of the proposed location of the lease and to the municipal officers of the municipality in which the limited-purpose lease activity would take place. The commissioner shall publish notice of a public hearing in a newspaper of general circulation in the area proposed for a limited-purpose lease at least 30 days before the hearing.

§ 6072. Research and aquaculture leases

6. Hearing procedure.

~~D. The applicant shall give at least 2 weeks' notice of the hearing by publication of an advertisement in a newspaper of general circulation that serves the area in which or adjacent to which the lease is proposed. The advertisement must state, at a minimum, the location, date, time and purpose of the hearing and must indicate how a copy of the application and the department site review may be obtained.~~

1.3 Improve the format & wording of published notices

The Department recommends that we assume the responsibility to publish a display ad for public comment and public hearing notices in a paper of local circulation instead of the typical legal notice advertisement. The display would meet the requirements of the APA and better present the information in a graphic, visually attractive manner in a portion of the paper that is more likely to be read and noticed. This advertisement would take the place of the information that is currently presented in the legal notice section of the paper.

Requires statutory change _____ **Requires rule change** _____
Additional funding / expense: Minor, absorbed by DMR

There is little or no difference in price for placing advertisements in the legal notices section or the other sections of a newspaper. The price per column inch is the same, so depending on the final design of the advertisement the cost could be equivalent to the current text-only ad that is ordinarily run.

A sample ad is reproduced below:

Aquaculture Public Hearing



Proposed shellfish lease:

Vic Stanwood and Russell Smith are proposing to lease 1.86 acres for suspended blue mussel aquaculture located in the Douglas Islands archipelago, in Milbridge, Washington County.

MONDAY,
JULY 30, 2001
7:00 PM
MILBRIDGE TOWN
HALL
22 SCHOOL
STREET

This public hearing will be held to allow the applicants an opportunity to present their proposal and for the public to submit testimony about this proposed aquaculture lease and its effect upon riparian owners, navigation, fishing, other aquaculture uses, ecology, and other uses of the area.

For more information or copies
of the application contact:
Laurica Churchill
PO Box 8
W. Boothbay Harbor 04575
207/633-9584

Any member of the public may speak and provide comment.

Requests to intervene by those substantially and directly affected must be submitted in writing to the Department at least ten days prior to the public hearing.

Authority: 5 MRSA Section 9051 et seq. & 12 MRSA Section 6072

1.4 Improve the format and clarity of notices sent to riparians

Slightly rewrite both the comment and public hearing notices that are sent to riparians and interested parties, using journalism's five w's – what, where, when, who and why to make it more to the point. The notice should not lead with the legalese that is not of first concern to a reader, it should clearly lead with the fact that there is a public hearing on a lease application in their area.

The current wording on the public hearing notice begins as follows:

**STATE OF MAINE
DEPARTMENT OF MARINE RESOURCES
PUBLIC NOTICE**

Acting under the authority vested in the Commissioner of the Department of Marine Resources by 5 M.R.S.A. §9052 and 12 M.R.S.A. §6072, a public adjudicatory hearing will be held on Monday, July 30, 2001 at 7:00 p.m. at the Milbridge Town Hall, 22 School Street, Milbridge, Maine, to consider the application of Vic Stanwood and Russel Smith aquaculture lease consisting of 1.86 acres, located in the Douglas Islands archipelago, west of Pond Island, Milbridge, Washington County, Maine

* * *

Rather we would suggest that it read as follows [examples reproduced in Appendix A]:

AQUACULTURE LEASE PUBLIC HEARING

MONDAY, JULY 30, 2001

7:00 PM

MILBRIDGE TOWN HALL

22 SCHOOL STREET

What is happening? Vic Stanwood and Russell Smith are proposing to lease 1.86 acres for suspended blue mussel aquaculture located in the Douglas Islands archipelago, west of Pond Island in Milbridge, Washington County, Maine.

The public hearing will be held to allow the applicants an opportunity to present their proposal and for the Department of Marine Resources, other public officials, and members of the public to ask questions and learn about this proposed aquaculture lease and its effect upon riparian owners, navigation, fishing, other aquaculture uses, ecology, and other uses of the area. The information gathered by the Department at this hearing in addition to that received during the application review period will be used in its decision whether to grant a lease to the applicants.

How do I participate? Review the application that is enclosed. Any member of the public may attend, speak, and submit evidence at the hearing. You have two ways to participate, informally or formally as an intervener. If you wish to intervene and become a legal party to the proceedings you must file a written request with the Department 10 days prior to the hearing. Requests for intervention must demonstrate how you are substantially and directly affected by the proposed application.

Whether you intervene or not there is opportunity for the public to ask questions as well as present testimony. If you wish to provide testimony about this application, please:

- Prepare your comments in advance
- Be prepared to answer questions about your testimony
- Document your comments with evidence whenever possible
- Make sure your comments are concise and relate to this application

Questions? Please contact Laurice Churchill at 633-9584 or Andrew Fisk at 624-6554. More information is available at www.state.me.us/dmr/aquaculture

Authority

This adjudicatory hearing is held under the authority of 5 M.R.S.A. §9052 and 12 M.R.S.A. §6072, which governs the conduct and operation of the adjudicatory hearing.

Requires statutory change _____ **Requires rule change** _____

Additional funding / expense: Minor, absorbed by DMR

1.5 Create & distribute a “user’s guide” to aquaculture leasing to all riparians and interested parties

A short booklet that explains each step of the lease process in plain English, and how an individual can get involved will be completed and distributed in January 2002. This booklet will be mailed to all coastal municipalities and then distributed with each riparian letter or notice that is sent by the Department.

Requires statutory change Requires rule change

Additional funding / expense: X, Absorbed by Sea Grant and Coastal Zone Program, SPO

1.6 Update the Department website to include more information

The Department has been making additional changes to the aquaculture section of its web page over the last several months. In line with the “user’s guide” the Department will post plain English directions and information on how to participate in a lease decision. All notices and advertisements will refer the reader to the web site for this additional information.

The existing lease inventory, produced only in paper form, will be made available on the web site, as will clear information on all pending, approved, and denied lease applications.

Requires statutory change Requires rule change

Additional funding / expense: X, Minor absorbed by DMR

1.7 Distribute press releases on hearings

Distribute press releases to local and regional media outlets from 7 to 14 days prior to the public hearing. The release can be of a standard format and can essentially just restate the hearing notice minus the legal authority information. The APA currently requires this be done for several Departments, DMR notwithstanding [5 MRSA 9051-A, B & C]. We would like to adopt this additional requirement by rule, rather than amending 5 MRSA.

Requires statutory change Requires rule change X

Additional funding / expense: Minor, absorbed by DMR

Proposed rule change follows:

2.15.2 Public Notice

* * *

The Department shall also distribute press releases to media outlets serving the area of the proposed lease application at least two weeks prior to the public hearing.

1.8 Pump up the volume

The Department has begun to amplify the proceedings at all public hearings in addition to the current process of taping hearings for the record. At this time it is possible to use systems owned by other Department's or to schedule hearings at facilities that have sound systems already in place.

Requires statutory change _____ **Requires rule change** _____
Additional funding / expense: _____

1.9 Create an intent to file processing step for all standard lease applications

Nobody likes to be surprised or feel as if they have been set upon. This is a logical and reasonable position for members of the public to feel they are in when any form of controversial development is proposed as a completed application in their town or neighborhood. The Department continues to believe that the public should have more information about proposed aquaculture facilities, and that this information will allow the public the opportunity to fairly, responsibly, and open-mindedly process the particulars of an aquaculture application. The Department also understands that people do not necessarily thrive on conflict and so also reasonably shy away from providing initial or preliminary information about controversial topics for fearing of getting bit, or run out of town.

So under the reasonable assumption – with some past successful experiences to back us up – the Department is proposing to institute an intent-to-file notification step to the lease application process.

This notification would be submitted to the Department and the municipality in which the farm was to be located at a very early stage in the process, prior to any one particular leasehold being precisely defined by the applicant. At the time of filing the applicant

would then be required to meet with the Department to review the application requirements, and more importantly scope the siting process with regard to whom the applicant should begin talking with about siting constraints. This would direct the applicant to begin doing the local legwork – that when done successfully in the past has allowed leases to meet with only nominal opposition – and understand local circumstances and conditions.

The Department realizes that it cannot enforce good communication and reasonable discussion about controversial issues. However this idea feels like an appropriate nudge to both sides to responsibly figure things out. There are likely concerns that this is a setup to a potential applicant. And those concerns may be valid in some cases. The Department is in no way interested in feeding an applicant to the wolves, as they might allege. If this suggestion is not seen as a meaningful opportunity to solve problems, the Department will not pursue it further.

Requires statutory change _____ **Requires rule change** X
Additional funding / expense: Minor, absorbed by DMR

Proposed rule change follows:

2.10 Application Requirements

1. Form. Aquaculture lease applications shall be submitted on forms prescribed by the Commissioner and shall contain all information required by the Commissioner for the consideration of the aquaculture project. Standard lease applicants shall submit an intent-to-file notification prior to the submission of a full application. Applications should be submitted at least 90 days in advance of any desired hearing date. Hearings on applications will not be held until both the applicant and the department have done required environmental reviews which may only be done between April 1 and November 15. Applicants are advised to request hearing dates accordingly.

2. Intent-to-file notification. This notification shall be submitted to the Department prior to any substantial site work or preparation of an application. The notification shall only indicate the species to be cultivated, the proposed size of the farm, and the municipality in which it may be located. The Department shall file this notification with the municipality after meeting with the applicant and reviewing the rules and procedures contained in this Chapter. An application cannot be determined complete unless an applicant has fulfilled the requirements of this section.

Processing of applications

Issue #2: The current system can work more efficiently

It takes too long to process either a standard or an experimental lease application. It is not fair to applicants or the public to have experimental lease applications that go to public hearing, as one example, take on average over 300 days. Starting an aquaculture operation is starting a small business, and regulatory delays cost an applicant time and opportunity particularly since there are clear seasonal windows to begin operations. It is only fair to have a process that is responsive to both the public and the applicant.

In addition the Department does not currently have adequate administrative tools, including tracking schemes, to allow for thorough and transparent evaluation of the fate of any particular application at any one point in time. We need better management tools since we are now confronted with a large and varied workload.

Resolutions

2.1 Identify the processing benchmarks in each application

Internally, the Department is waiting for different things to happen one at a time before making commitments on the next step. For example, we do not schedule a hearing on a standard application until the site work has been completed. A more effective strategy would be to completely scope and set deadlines for each significant processing benchmark once an application has been deemed complete. These dates for the site work, comment period, public hearing, and draft decision document would be submitted to the applicant so they would have an idea (but not a guarantee) of the timeline for their application.

This proposal is fraught with potential problems, which on balance may not outweigh the benefits of tighter scheduling. For instance, this idea may give an applicant an expectation that things will definitely happen by these time frames, which we can unfortunately not guarantee because of weather (although the Department does conduct site work year round) or other uncontrollable circumstances. As well this could have implications for the Department because this will require longer range prioritizing than is ordinarily done. To be frank, workloads are such and crises routinely emerge that require the shifting of priorities. However the Department, in light of the range of recommendations included in this report, feels that making this commitment to aquaculture lease processing is appropriate and reasonable.

Requires statutory change _____ **Requires rule change** X
Additional funding / expense: Minor, absorbed by DMR

Proposed rule change follows:

4. Completion

1. Upon receipt of a written application, the applicant shall receive notice by the Department that the application was received. Within ~~30~~ 10 working days of receipt of a written application, the Commissioner shall:

A. Determine whether the application is complete, containing sufficient information in which a decision regarding the granting of the application may be taken, and notify the applicant of his determination. If the application is incomplete, it shall be returned to the applicant with a written explanation of the additional information required in order to be complete.

B. When the application is complete, the Commissioner will make a determination whether the application could be granted and whether the applicant has the financial and technical capability to carry out the proposed activity. If the Commissioner makes both determination in the affirmative, he or his designee shall schedule the necessary site work, comment period, public hearing, and completion of decision documents on the application. This information shall be sent to the applicant for their information when they are notified of the completeness determination. These scheduled dates are targets and provided subject to the limitations of the Department's resources and other unforeseen circumstances. If the Commissioner or his designee determines either that the application could not be granted or the applicant lacks the necessary financial or technical capacity, the applicant shall be notified in writing of that determination and no further Department action on the application is required.

2.2 Develop a tracking database

There is currently a tracking system in place that was developed with the existing tools at hand – word processing – many years ago. It is adequate for the existing staff to use to make certain decisions and conduct some analysis. But it is not a searchable database that can be easily used to provide the varied types of information on pending and approved applications. So, a relational database needs to be created that tracks all lease applications from pending to final status. This application should be indexed on both application number as well as lease code. This database would be available in electronic form to all members of the aquaculture unit so that any staff person could easily determine the status of any particular application. This database would also be used to provide information to the public via the Department's website.

Requires statutory change _____ **Requires rule change** _____

Additional funding / expense: Minor, absorbed by DMR _____

2.3 Make application baseline data collection more efficient and effective.

The Department would like to make two changes to the way that baseline environmental information is collected. The first is by increasing the sampling intensity of water quality data submitted by an applicant; and the second by removing a requirement that the Department routinely duplicate information collected by an applicant.

The Department currently conducts a site visit to all proposed leases. The purpose of this visit is to verify the location of the lease site and investigate the application in light of the statutory approval criteria. In the case of applications where there would be a discharge, an aquaculturalist will have conducted detailed baseline assessment including water quality parameters, current, sediment analysis, and a benthic assessment, which are prescribed in the Department's rules. Presently as part of our site work following a completed application, we also collect a sample of baseline water quality information and current information as well as a dive to collect a video of the bottom. The Department's water quality and current observations are duplicative, and of shorter duration, than the applicant's information contained in the application. The collection of this duplicative information has been done to verify information submitted by the applicant. There are more effective ways of reviewing an applicant's data, and frankly the Department's collection of data is unique for state agencies' review of development applications.

The current, dissolved oxygen (DO) saturation, salinity, temperature and other water quality parameters do not need to be conducted by the Department. The elimination of this step will allow the Department to concentrate on benthic assessment and other top-side analysis, including existing uses, navigation, lease boundaries, and public resources.

Additionally the Department would like to increase the applicant's frequency of water quality sampling and specify the time of year that it is to be conducted. In line with this change and noted above in Resolution 1.9, the Department will be conducting a pre-application meeting that will allow it to specify particular requirements for environmental baseline data collection.

Requires statutory change _____ **Requires rule change** **X** _____

Additional funding / expense: **Cost savings and time; approximately 15 person days per year, based on 7 standard lease investigations** _____

Proposed rule change follows:

2.27 Department Site Review

1. On site Inspection

1. An inspection of the proposed aquaculture site and the immediate surrounding area will be conducted by the Department between April 1 and November 15, both days inclusive. The site must be marked as referenced in Chapter 2.10(5) by the applicant.

~~2. Information obtained on site will include but will not necessarily be limited to bottom composition, depth and features; typical flora and fauna; numbers of relative abundance of commercial and recreational species; evidence of fishing activity; distances to shore; and navigation channels and moorings.~~

2. Documented Information

Site specific documented information which is available will be assembled and included in the Department report, including verified proposed lease boundaries, distances to shore, navigational channels and moorings, the location of any municipally owned, state owned or federally owned beaches, parks, or docking facilities, tide, current, and temperature data, patterns of ice formation and flows, location of shellfish beds, and observed fishing activity in and around the proposed site. For environmental baselines, the Department shall conduct an adequate number of observations to substantiate conditions as submitted by the applicant. The description and location of existing or proposed aquaculture lease sites within a one mile radius of the proposed site will be included. In the event the proposed lease site is in a jurisdiction which employs a harbormaster, the Department shall request information from the municipal harbormaster about designated or traditional storm anchorages in proximity to the proposed lease.

The Department shall initially evaluate the baseline documentation submitted by the applicant and reserves the right to request additional baseline documentation, conduct its own baseline assessment, or require repeat baseline evaluations in the event information is not adequate for review.

2.10 Application Requirements

* * *

3. Environmental Characterization and Baseline

* * *

B. Environmental baseline. Applicants that have submitted applications that involve a discharge into State waters must conduct a Department approved environmental baseline. The baseline will serve as a benchmark for monitoring the effects of farms on sediments and water

quality. The baseline requirements for the different categories of leases are as follows:

(1) ~~Structure, Discharge.~~ The baseline must include diver surveys, water quality testing including temperature, dissolved oxygen saturation or concentration, salinity, and current conducted over at least a 16-hour period on two separate occasions, where one is conducted between August 15 and September 15, and benthic analysis. The 16-hour sampling duration shall contain data from two tidal cycles and periods of darkness and daylight. The applicant shall use methods prescribed by the Department.

(2) ~~No Structure, Discharge.~~ The baseline must include a clear and decipherable video showing bottom characteristics and water quality testing, unless otherwise specified by the Department. All activities must use methods prescribed by the Department.

(3) ~~Structure, No Discharge.~~ No baseline required.

(4) ~~No Structure, No discharge.~~ No baseline required.

2.4 Government review procedures for lease applications

There has been some confusion at certain state agencies and municipalities about the timing and manner of providing comments to the Department. Currently state agencies and municipalities are simply sent a copy of the application with a general cover sheet, which has caused some confusion. The Department proposes to create a more formal agency review system for state agencies and municipalities with particular focus on harbor masters that instruct them on when comments are due and what they should be discussing in the review. In the case of municipalities, the Department proposes to have a series of specific questions that relate to both the statutory approval criteria on navigation and existing uses as well as a category requesting approval of the mooring gear specified in the application.

These review packets should continue to be sent out prior to site review. An example is attached in Appendix A.

Requires statutory change _____ **Requires rule change** _____
Additional funding / expense: Minor, absorbed by DMR _____

2.5 Delegate authority to sign decision documents on experimental leases and lease documents to Department staff

Currently the statutory language throughout Subchapter II provides the Commissioner with the authority to issue leases to any person. There is one provision in the section on standard leases (Section 6072) that authorizes the Commissioner to delegate authority to the Deputy. In general this provision is appropriate, however it is unnecessarily limiting considering the amount of experience the Department has had with aquaculture leasing and the variety of leases that are currently available. It is not necessary for the Commissioner to sign all decision documents on lease applications, nor to also have to sign the actual lease itself once a decision has been rendered. Presently there is an inappropriate amount of time spent in obtaining the Commissioner's signature on routine experimental lease applications as well as the non-discretionary action of signing a lease document.

The Department recommends that statutory language be added to Section 6072-A that allows the Commissioner to delegate authority to staff to sign decision documents on experimental lease applications. This authority would be discretionary and would require a written determination on the types of lease applications that were being delegated to which Department staff. A second part of this recommendation is to clarify that Department staff can sign all lease documents irrespective of who renders the decision. These two delegations do not violate procedural due process rights that are provided for in either the Department's statutes or the Administrative Procedures Act. It is also in keeping with other administrative agencies procedures for the issuance of permits and licenses.

Requires statutory change **Requires rule change** _____
Additional funding / expense: **Time savings in the issuance of leases;**
approximately 1 - 2 weeks _____

Proposed statutory change:

§6072. Research and aquaculture leases

1. Authority. The commissioner may lease areas in, on and under the coastal waters including the public lands beneath those waters and portions of the intertidal zone for scientific research or for aquaculture of marine organisms. The commissioner may grant a lease to any person. Except as provided in this Part, the commissioner's power to lease lands under this section shall be exclusive. For the purposes of this section, the deputy commissioner may serve in the place of the commissioner. In all cases after the signing of a decision document on a lease application, the Commissioner may delegate the authority to sign the lease to staff.

§6072-A. Limited-purpose lease for commercial or scientific research

1. Authority. The commissioner may issue a limited-purpose lease for areas in, on and under the coastal waters including the public lands beneath those waters and portions of the intertidal zone for commercial aquaculture research and development or for scientific research. The commissioner may designate in writing which Department staff may issue leases on the commissioner's behalf. For purposes of this delegation, these decisions are considered final agency actions. In all cases after the signing of a decision document on a lease application, the Commissioner may delegate the authority to sign the lease to staff.

2.6 Begin experimental leases at logical times

Because experimental lease proceedings can take longer than one year to conduct once a completed application has been submitted, the date a lease begins is often out-of-synch with growing or stocking seasons. For example, because of administrative delays an applicant's lease can end up being approved in the beginning of winter, many months after stocking can begin. Then if the lease is drafted using the approval date as the beginning of the three-year term, an applicant can lose almost a complete year on a three-year experimental lease.

The solution is to draft leases, following approval, with a beginning date that corresponds to a period of time when an applicant can actually begin work. This would require brief consultation with the applicant prior to the signing of the decision document, and requires no rule changes.

Requires statutory change _____ **Requires rule change** _____
Additional funding / expense: _____

2.7 Remove requirement to publish legal notice on lease issuance and to file leases at the registry of deeds

The process of issuing a lease begins after the signature of the decision document by the Commissioner. Before a lease becomes effective there are several steps that must be taken by the applicant. They must establish their escrow account, file a copy of the lease at the registry of deeds, and publish a legal notice in the newspaper indicating that the lease has been adopted.

The basis for the registry filing and the legal notice are to place a final document securely in the public realm to protect both the applicant and the wider public's interests. The Department proposes two changes to the rules in order to reduce obligations on the leaseholder and the Department.

The first is to replace the requirement for legal ad notice of adopted leases with the commitment by the Department to list all approved leases on its website. This is a reasonable tradeoff that saves the applicant one additional step and expense, while still easily accomplishing the objective of providing information.

The second is to remove the requirement for filing a lease at the Registry of Deeds. There is limited utility in having them on file at the Registry, because these documents are available from the Department upon request. Indeed it is likely that a member of the general public would find it much easier to request and receive a lease document (or any other item in the file) from the DMR, than through a registry search. While it is understood that title attorneys are not the only users of registries, the limited interest conveyed in a lease on public water does not seem to invite the type of title scrutiny that other registry documents would. As such, having the documents available to the public at DMR is of equal utility to this current requirement.

Requires statutory change **Requires rule change**
Additional funding / expense: Minor, absorbed by DMR

Proposed statutory change follows:

§6072-A. Limited-purpose lease for commercial or scientific research

17. Actions required of lease holder. After being granted a limited-purpose lease, a lessee shall:

~~A. Record the lease in the registry of deeds of each county in which the leased area is located;~~

~~B. Publish a notice in the newspaper in which the commissioner published notice or would have published notice of any public hearing. The notice must describe the area leased and list any restriction in the leased area;~~

CA. Mark the leased area in a manner prescribed by the commissioner; and

* * *

Proposed rule change follows:

2.40 Lease Issuance

* * *

3. Immediately following, but not before signing of the lease by the Department and the applicant, the Department will publish the issuance of the lease at its website. ~~lease must complete the following requirements:~~

~~1. file the lease or a memorandum of lease in the Registry of Deeds of the county in which the lease tracts are located, and~~

~~2. publish notice of the lease issuance in the newspapers in which the aquaculture lease hearing notices originally appeared, following Department approval of the notice.~~

2.8 Implement permit by rule for limited purpose aquaculture

Legislation was authorized in 2000 (P.L. 2000, c. 421) that allowed for limited purpose aquaculture operations covering less than 400 square feet of area to be approved by rule. This legislation was designed to augment the current experimental lease process by removing very small operations from the requirement of going through an experimental application. Rather these small-scale operations will obtain a license (not a lease) that will allow them to place gear in State waters on an annual basis. The Department has not yet written final rules to implement this legislation. There is however a substantial draft that is being reviewed internally. We expect to have these on-line in May 2002.

The implementation of these rules should have a very significant impact on reducing the application pressure on the Department.

Requires statutory change **Requires rule change**
Additional funding / expense: Minor, absorbed by DMR

Statutory approval criteria

Issue #3: Are the criteria relevant and up-to-date?

In sum, the statutory approval criteria outlined in Sections 6072, (7-A) for standard leases and 6072-A, (13) for limited purpose (“experimental”) leases work well to guide the decision-making of the Department. They are site-specific, but also have a wider locus that requires the applicant and the decision makers to look out for the other users of coastal waters. Indeed there have been numerous occasions where lease applications have been denied because the Department determined that there would be impacts on adjacent landowners or existing fisheries.

The criteria for both lease types are the same. They state that an application must have no unreasonable interference with:

- The ingress and egress of riparian owners
- Navigation
- Fishing or other uses of the area
- Ecologically significant flora and fauna
- Local, state, and federal parks and docking facilities within 1,000' of the proposed lease.

As well, the applicant must demonstrate an available source of organisms to be cultured at the lease site.

These decision criteria have remained substantially the same throughout the leasing program, with the exception of changes that were made in 1987 (P.L. 1987, c. 453) that removed language requiring that an application be in agreement with any “applicable coastal zoning statutes or ordinances” and 1999 (P.L. 1999, c. 267) that clarified that public access to a shellfish flat was to be considered fishing.

Throughout this review and in past legislative sessions, the Department has heard that there is a need to have approval criteria that address aesthetics, visual impacts, and the overall prospective siting of facilities.

After consideration, the Department continues to maintain that statutory language on aesthetics would be very problematic to equitably craft and fairly implement, given the difficulty of discerning what is acceptable in aesthetics. Rather, the Department will address this issue given our existing statutory authority to craft rules for the operation of aquaculture facilities. This question of aesthetics is discussed below in the section on performance standards (Issue #5).

This leaves the related question of whether the Department will create some form of planning and zoning scheme in order to prospectively guide the siting of aquaculture facilities. Because the Department finds the statutory criteria to be, with one minor clarification described below, a sound basis for determining the appropriateness of particular aquaculture operations we do not propose to produce a plan or a series of aquaculture zones. In addition, the Department is concerned that a siting strategy would not be adequate, or even irrelevant, to the many other potential species that could be raised in the near future. Given this unknown in the future of aquaculture and the very localized information on water quality that is required to site a facility, it is difficult to know at this point the type, resolution, and duration of data that would need to be collected for most of the coast of Maine so as to create a workable prospective siting scheme.

The Department is not aiming to duck a difficult question or a great deal of hard work (which any siting scheme would certainly amount to), but feels that the existing system combined with the proposed recommendations in this report are a sound performance-based approach to locating aquaculture facilities in Maine. While many have asked the Department to consider the analogy of municipal planning and zoning as a guide, it is important to reiterate that zoning is not the only answer to guiding development on the landscape. There are successful terrestrial examples where a performance-based approach has worked to site development. Such performance-based strategies work by having applications not locate within particular areas based on a zoning map, but require applications to fit harmoniously into the existing landscape by meeting any number of statutory and regulatory criteria.

That said, the Department does feel that the decision criteria on “fishing or other uses of the area” [Section 6072, (7-A), (C); Section 6072-A, (13), (C)] should be slightly revised in statute and rule in order to make it clear that the Department considers recreational uses in its deliberations.

Resolutions:

3.1 Make the recreational standard explicit

There are several places in statute and rule where recreation is presently considered. The first is clearly navigation where the Department looks at all types of navigational impacts on all types of vessels. The Department uses guidance in rules (Chapter 2.37) that weights the amount and type of use (i.e., routine barge use versus intermittent use by skiffs) to judge the information it receives during application review. The riparian access criteria also frequently includes recreational uses when the property owner uses their property for other than commercial purposes. As well, there is language in rule that elaborates the “fishing and other uses of the area” standard to indicate that it includes both commercial and recreational fishing.

The Department proposes to make the recreation criteria explicit and precise by amending the fishing and other uses standard so that it relates only to extractive uses. Previously this standard has been interpreted by the Department, courts, and others to include recreation generally. Then an additional standard that is specific to commercial and noncommercial recreation is proposed to follow the existing language on public facilities. This additional standard also has clarifying rule language.

In addition to the clarifying change on recreation, the Department proposes to slightly rearrange the criteria for clarity. The proposed language below deletes the current criteria and rewrites them in a slightly different order. The entire section is written in underlined text, but the new language on recreation has been highlighted in gray to guide the reader to the substantive change.

Requires statutory change Requires rule change
Additional funding / expense: Minor, absorbed by DMR

Proposed statutory change:

Repeal:

§ 6072. Research and aquaculture leases

~~7-A. Decision.~~ The commissioner may grant the lease if the proposed project meets the following conditions as defined by regulation:—

~~A. Will not unreasonably interfere with the ingress and egress of riparian owners;—~~

~~B. Will not unreasonably interfere with navigation;—~~

~~C. Will not unreasonably interfere with fishing or other uses of the area taking into consideration the number and density of aquaculture leases in an area. For the purposes of this paragraph, "fishing" includes public access to a redeemable shellfish resource, as defined by the department, for the purpose of harvesting, provided that the resource is commercially significant and subject to a pollution abatement plan that predates the lease application, that includes verifiable activities in the process of implementation and that is reasonably expected to result in the opening of the area to the taking of shellfish within 3 years;—~~

~~1999, c. 267.—~~

~~D. Will not unreasonably interfere with the ability of the lease site and surrounding areas to support existing ecologically significant flora and fauna;—~~

~~E. The applicant has demonstrated that there is an available source of organisms to be cultured for the lease site; and—~~

~~F. The lease does not unreasonably interfere with public use or enjoyment within 1,000 feet of municipally owned, state owned or federally owned beaches and parks or municipally owned, state owned or federally owned docking facilities.—~~

§ 6072-A. Limited-lease for commercial or scientific research

13. Decision.

[Decision language in this section is the same as in 7-A;
not repeated here]

Replace both sections with the revised decision criteria as follows:

Decision. The commissioner may grant the lease if the proposed project meets the following conditions as defined by regulation:

A. A project shall not unreasonably interfere with:

1. ingress and egress of riparian owners;

2. commercial and recreational navigation;

3. fishing or other natural resource extraction uses of the area taking into consideration the number and density of aquaculture leases in an area. For the purposes of this paragraph, "fishing" includes public access to a redeemable shellfish resource, as defined by the department, for the purpose of harvesting, provided that the resource is commercially significant and subject to a pollution abatement plan that predates the lease application, that includes verifiable activities in the process of implementation and that is reasonably expected to result in the opening of the area to the taking of shellfish within 3 years;

4. the ability of the lease site and surrounding areas to support existing ecologically significant flora and fauna;

5. public use or enjoyment of either municipally owned, state owned or federally owned beaches, parks or docking facilities located within 1,000 feet of the proposed project;

6. other commercial or non-commercial recreational uses of the lease area and surrounding waters.

B. The applicant has demonstrated that there is an available source of organisms to be cultured for the lease site.

Proposed rule change:

2.37 Decision

A. Standards: In making his decision the Commissioner shall consider the following with regard to each of the statutory criteria:

(1) Riparian Owner Ingress and Egress. The Commissioner shall examine whether the riparian owner can safely navigate to his/her shore. The Commissioner shall consider the type of shore involved and the type of vessel that can reasonably land on that shore. He/she shall consider the type of structures proposed for the lease and their potential impact on the vessels which would need to maneuver around those structures.

(2) Navigation. The Commissioner shall examine whether any lease activities requiring surface structures would interfere with commercial and recreational navigation around the lease area. The Commissioner shall consider the current uses and different degrees of use of the navigational channels in the area in determining the impact of the lease operation. For example: A lease area adjacent to the usual course of a barge in tow shall be held to a stricter standard than one in an area frequented by only outboard skiffs. High tide "short cuts" shall not be considered navigational ways for the purposes of this section. Any surface structures that could be within 50' of a restricted channel at low tide must be marked with retro reflective tape and a radar reflector.

(3) Fishing. The Commissioner shall examine whether the lease activities would unreasonably interfere with fishing or other natural resource extraction uses of the area. This examination shall consider such factors as the number of individuals that participate in recreational or commercial fishing, the amount and type of fishing gear utilized, the number of actual fishing days, and the amount of fisheries resources harvested from the area.

(4) Other Aquaculture Uses. The Commissioner shall consider any evidence submitted concerning other aquaculture uses of the area. The intensity and frequency of such uses as well as the degree of exclusivity required for each use shall be factors in the Commissioner's determination of whether any interference is unreasonable. The number, size, location, and type of other aquaculture leases shall be considered by the Commissioner.

(5) Existing System Support. The Commissioner shall consider the degree to which the use of the lease site will interfere with the ability of the area to support ecologically significant flora and fauna. Such factors as the degree to which physical displacement of rooted or attached marine vegetation occurs, the amount of alteration of current flow, increased rates of sedimentation or sediment resuspension, and disruption of finfish migration shall be considered by the Commissioner in this determination.

(6) Source of Organisms to be Cultured.

(7) Interference with Public Facilities. The Commissioner shall consider the degree to which the lease interferes with public use or enjoyment of municipally owned, state owned or federally

owned beaches, parks, or docking facilities. Leases may not unreasonably interfere with such beaches, parks, or docking facilities.

(8) Other Recreational Uses. The Commissioner shall consider the degree to which the waters within and around the lease area are currently used for either commercial or non-commercial recreation, aside from fishing as outlined in subsection 3 above. This standard is not an aesthetic or visual determination of impact. It is a determination of whether or not the proposed project will unreasonably interfere with existing recreational uses of State waters. This standard does not include consideration of conservation easements or use of adjacent islands or shoreline.

Enforcement of lease conditions

Issue #4: Is the Department a patsy?

There is a public perception that the Department inadequately enforces lease conditions, and as some determined critics have alleged, industry and the Department are in complete cahoots. It is the Department's position that we have done an adequate job in monitoring and enforcing lease conditions, but like everything else there is always room to do better. It would be helpful to review the current mechanisms and procedures that are in place before discussing any further resolutions. In general, there is enforcement authority in the lease document itself, the use of performance bonds, in rules on renewals & transfers, the movement of fish, and classification of current statutory requirements being enforced as either misdemeanors or Class D crimes.

Lease language on enforcement

Currently each lease describes the terms of default, which include the nonpayment of rent; bankruptcy, fraud of creditors; receivership; abandonment; lack of use where the term of art is "substantially no aquaculture has been conducted"; and noncompliance with any provision of the lease within 30 days after notice by the State.

Performance bonds

Performance bonds were originated after the abandonment of an aquaculture lease in Belfast Harbor. Marine Patrol had to clean up the site and the State absorbed the costs for the removal of the gear. The use of performance bonds, while seen by some as

onerous, is a reasonable tool for the State to ensure that gear abandonment does not get picked up by the public purse. However, the current levels of bonding suffer from the Goldilocks effect, some are “too hot” and some are “too cold.” To wit however, some are just right. More below.

Revocation

In order to act upon any of the above conditions, the State must hold a public hearing that is an adjudicatory proceeding under the APA. The Department has revoked one lease during the history of the aquaculture program, and that was for the lack of use provision.

There is statutory language [Section 6072 (11)] on revocation which sets out the lack of use provision, a provision on husbandry that requires aquaculture to not be “substantially injurious to marine organisms, and the blanket adherence to the lease conditions provision. The Department has codified this section in its rules, with little additional elaboration except to specify that failure to establish an escrow account (a condition of the lease) also is grounds for revocation. The Department does outline a requirement that it annually review all leases for compliance [Chapter 2.42], in order to develop the basis for any revocations or other recommendations. The annual review is discussed more fully below.

Renewal

Standard leases have a ten-year duration and, unlike commercial experimental leases, can be renewed following their term. However in order to qualify for a renewal the Department must make findings as to the following statutory criteria [Section 6072 (12)]. The Commissioner must find that the lease was “substantially” used; lease conditions, laws, and rules were abided, including the 250-acre cap; and it is in the “best interests of the State to renew the lease.” The Department’s rules elaborate that “best interests” can include conflicts with new or existing uses of the site that are determined to a higher use of the area [Chapter 2.45].

Transfer of leases

Aquaculture leases are transferable when the purpose of the transaction is non-speculative or is not designed to end run the preference conditions outlined in Section 6072. As such, when corporate entities change hands or individual operators choose to sell facilities, leases may be transferred. There is general enforcement authority in the transfer provision in that transfers cannot be granted if the operator is in violation of the conditions of their lease.

Transfer of marine organism permits

The Department also exercises substantial authority over the operation of aquaculture facilities through its transfer permit system. The transfer permits, codified in Chapter 24 of the Department's rules, regulate the placement of all marine organisms into any State waters. In the case of shellfish aquaculture, there are restrictions on the source of organisms and the authority to place limitations on their use when used as broodstock. In the case of finfish aquaculture, the rules require that all hatchery-reared smolt⁶ be certified as disease-free prior to being transferred to marine cages.

In deciding whether to issue a transfer permit for finfish the Department is obligated to consider "the effects of any previous introduction of the same or similar species;" "the relationship of the species of marine organism to be introduced with other members of the recipient area ecosystem; and the "effects of infectious or contagious diseases, pests or parasites which might be associated with the species of marine organism to be introduced upon other members of the ecosystem of the recipient area" [Chapter 24.15].

The Department has not extensively used this authority in the past to deny a transfer permit. However in our current discussions with the finfish farmers on moving to bay management areas, we have reiterated that we will use this authority to ensure that appropriate changes to husbandry, hygiene, and stocking is undertaken when spring stocking comes around next year. In addition the results of this year's FAMP reviews have stipulated remedial action for six separate sites, where the issuance of any further transfer permits is contingent upon the completion of a successful remediation plan outlined by the Department.

Resolutions

4.1 Coordinate and improve the annual lease review program

As was described above, there are statutory requirements for leaseholders to report annually to the Department [Sections 6072 & 6072-A] as well as regulatory requirements [Chapters 2.42 and 2.64] to conduct an annual review of aquaculture leases. The statutory requirements are fulfilled by the use of standard report forms that are sent out by the Department to all leaseholders. There are two separate reports, one that is sent to all standard leaseholders that records the amount of harvest and allows for leaseholders to report any problems, and to detail their plans for the coming year. The second report fulfills the requirements of the experimental leasing program that asks each experimental

⁶ Smolts are the stage at which the salmonids raised in Maine have undergone physiological changes that allow them to live in salt water. Once smoltification occurs there is a limited time in which to transfer the smolts from the freshwater hatcheries to the marine cages.

leaseholder for a report on the nature of the commercial or scientific research that was conducted on the lease.

The other routine review process occurs via the finfish aquaculture monitoring program (FAMP). The FAMP reviews sites twice yearly (spring and fall) with a video transect of the bottom of farms, annually for dissolved oxygen levels, and biannually for the "critter check" where the benthic community is surveyed.

The Department routinely works with farm operators when FAMP data is received to review management strategies and require remedial changes. However, over time the process has become less formalized and it is not apparent to the public that the Department, or operators, take any direct action as a result of monitoring. This is not as it should be. Consequently, the Department will begin this year to formalize its annual lease review under the direction of the environmental monitoring staff. The Department will make a yearly written determination on each lease issued that it meets all conditions and requirements that are imposed upon it.

It is important to reiterate at this point that the Department has stipulated a range of different remediation projects at a number of different sites as a direct result of FAMP data. These actions have included mandatory fallowing periods, reductions in stocking, relocation of pen systems, withholding of transfer permits, and routine requirements to clean up nets or other equipment that had been dropped from pens.

For those sites that require some form of remedial action, such as changes in stocking, equipment usage, or general operations, the Department will provide the operator with specific actions that must be taken in order to remain in compliance with the terms of their lease. These remedial plans will be placed on file at the Department in order to maintain an adequate written record. This continued environmental monitoring will be coordinated with the DEP's oversight of the discharge limits regulated through the NPDES permit system.

Because there is not yet a fully elaborated scheme of shellfish lease monitoring, the Department will initiate the formalized annual environmental lease review on just the finfish facilities. Following the completion of the FAMP review at the end of 2002, the shellfish facilities will be brought formally into the routine monitoring of aquaculture leases. However, the Department will continue to monitor shellfish leases to the extent of its ability and will provide specific documentation to shellfish operators when problems are identified. The section below at Issue #8 discusses proposals for increased shellfish monitoring.

Requires statutory change _____ **Requires rule change** _____
Additional funding / expense: _____

4.2 Continue to decriminalize the aquaculture statutes

As with all marine resource statutes, unless indicated otherwise a violation is considered to be a Class D crime, which is a felony requiring a criminal prosecution and a court proceeding. Because the Department has ample enforcement authority in the mechanisms described above, and the prosecution of felonies is a significant administrative and judicial task requiring higher standards of evidence to prove guilt, we are recommending the *continued* decriminalization of the aquaculture statutes to misdemeanor status. Fines would continue to be directed to the General Fund.

This would mean, among other things, the failure to submit required information under the FAMP program or payment of lease fees would be considered a civil penalty subject to a fine. The proposed misdemeanor classification would not be structured so that violations of lease conditions or egregious operating conditions become just a “cost of doing business.”

Currently various sections and subsections of the aquaculture law have been decriminalized. They are:

Section 6072, subsection 1-A: requirement to hold a lease

If you conduct aquaculture in State waters without a lease you are subject to a fine of up to \$1,000 for each day of the violation.

Section 6072-C: limited purpose aquaculture licenses

Similarly, if you conduct aquaculture on the limited scale provided for in this section (400 square feet or lease with particular gear) you are subject to a fine not less than \$100 or more than \$500.

Section 6073: exclusivity of, interference with leases

There are two provisions here, one for interfering with the rights granted in a lease and the other for possessing cultchless American oysters without a permit. This is essentially a poaching provision as only cultchless American oysters are allowed to be cultured in Maine. The penalty for both provisions is a fine not less than \$1,000.

Section 6078: payment of production fee to FAMP fund

The failure to pay the production fee of 1 cent per harvested pound of finfish is a fine not to exceed \$1,000.

Those sections that are not currently decriminalized are:

Section 6074. Special license.

This provision allows the Commissioner to issue a special license authorizing research, aquaculture, or education that exempts the holder from natural resource laws. These licenses must be approved by the Advisory Council. An example of a recent special license is the work being conducted on spat collection and grow

out through the Scallop Stock Enhancement Project. Special licenses are particular in focus and of limited duration.

Section 6077. Aquaculture Monitoring Program

The requirement that companies report data requested by statute or the Commissioner, or participate in monitoring programs is tied to the holding of a lease. However, it is assumed that failure to report this data would be considered a Class D crime as there is no explicit civil penalty provision here. While the requirement for an aquaculture operation to submit information has not been decriminalized, there are specific penalties against individuals that solicit or discloses any confidential information that has been submitted as required in this section. Solicitation is a Class D crime, but disclosure is a civil penalty not to exceed \$5,000.

Section 6079. Aquacultural use of antibiotics; notice.

The requirement to post notice on the use of antibiotics is a Class D crime as no civil penalties are explicitly stated in this section.

Because the list of sections that have been decriminalized is incomplete, the Department recommends that language be added to Subchapter II that would therefore cover Sections 6071 through 6081. This blanket language would be in addition to the existing language in the four sections (Sections 6072, 6072-C, 6073, and 6078) that have fine levels appropriate to the requirements of those particular sections.

Requires statutory change **Requires rule change** _____

Additional funding / expense: _____ **Net savings in staff time to prosecute civil cases / minor revenue** _____

Proposed statutory change:

Section 6070. Violation. A person who violates any portion of this subchapter or any regulation authorized thereunder is subject to a civil penalty, payable to the State, of no more than \$1,000 for each of day of the violation unless fines are stipulated otherwise in sections 6071 et seq.

4.3 Update the performance bond requirements

To reflect current and actual costs of remediation, the Department proposes to modify the current bond levels for the structure / discharge and the structure / no discharge categories of aquaculture leases. The structure / discharge category, which includes all the finfish facilities, needs to be increased because these facilities have a large amount of equipment on site, and \$5,000 is inadequate to cover any amount of remedial work beyond the most

basic. The structure / no discharge category is not accurate enough to cover the range of different gear scenarios on these shellfish leases. In some cases, \$5,000 is excessive for a small sorting raft and some mooring buoys. So a graduated performance bond that was linked to the area of gear on the lease would solve this problem.

Requires statutory change _____ **Requires rule change** X
Additional funding / expense: _____

Proposed rule change:

2.40 Lease Issuance

2. Applicant Responsibilities. Within 30 days of the Commissioner's decision and prior to issuance of the lease, the applicant must complete the following requirements:

1. establish an escrow account or secure a performance bond in the amount required by the Department in the draft lease. The amount is to be determined by the nature of the aquaculture activities proposed for the lease site as follows:

Category of Aquaculture Lease

No structure, no discharge	\$ 500.00
No structure, discharge	\$ 500.00
Structure, no discharge	\$5,000.00
<u>Total combined area of all structures on lease</u>	
<u>≤400 square feet</u>	<u>\$1,500</u>
<u>>400 square feet</u>	<u>\$5,000</u>
Structure, discharge	\$5,000.00 <u>\$25,000</u>

Performance standards for aquaculture leases

Issue #5: Are aquaculture facilities good neighbors?

Throughout the history of the aquaculture leasing program there has been concern expressed by riparian landowners that aquaculture operations have an adverse impact on the landscape. These comments are not unique to the larger finfish farms, but have been levied with equal intensity against all different types of shellfish operations as well. As a result the Department has in the past conditioned individual leases to control for their

external effects. However the effort has been ad hoc and incremental. The Department recommends that rules be developed which will clearly lay out the Department's expectations of what it means for an aquaculturalist to be a good neighbor. Many of these standards are already met by operators, and as such these rules would codify what are currently best practices. However it is anticipated that there would be new additional standards that would make improvements beyond current best practices and provide certainty to the public.

Resolutions

5.1 Lighting limitations

Lighting can be used in several distinct ways at an aquaculture facility, either as navigational beacons, area lighting for work, and at finfish facilities to encourage growth. This last option has not been used in Maine and is not generally seen as a viable husbandry tool here, although it is frequently a concern of the public. The Department feels that there are ample and adequate standards on navigational lighting that is administered by the United States Coast Guard, as such lighting standards would only address husbandry and area lighting. The following standards are being considered:

- Husbandry lighting would be prohibited.
- Area lighting would be governed through several types of standards that would specify the types of fixtures, their luminosity, and extent of use. The intention of these standards is to eliminate glare, light trespass, and energy waste.
- All fixtures used for area lighting will be required to be full cut-off, or shielded. These fixtures direct all light downward and directly light only the area that is needed.
- Spot and flood lighting will be prohibited, except in emergency circumstances.
- Aside from emergency and navigational lighting, all area fixtures will have a wattage limitation to prevent excess lighting.
- Exterior area lighting must be off when staff is not present on the site.

5.2 Noise standards

Like all commercial operations aquaculture facilities generate noise as a result of their daily operations. The Department recognizes that this is perfectly acceptable and unavoidable when it occurs within the bounds of neighborliness. There are many different users of the coast, most of whom generate noise of one form or another as they conduct their business. Without unfairly singling out aquaculturalists, the Department proposes that general noise limits measurable at the boundary of a lease be crafted.

These limits, expressed in decibels as well as frequency, would be reasonable for an operator to meet as well as guarantee that any particular operation not cause an unnecessary nuisance. The aim is to reduce the chronic noise to a level that is not an impact on adjacent users.

These standards would exempt the noise created by the vessel engines while they were in transit. In addition to the standards all portable feed blowers, portable generators, or equipment not contained within a structure on the lease would have a requirement to either be muffled or contained within a muffler box to further reduce chronic noise levels on site.

5.3 Hours of operation

As with other of these performance standards, the Department has routinely inserted hours of operation as a condition of a lease approval in response to particular concerns. However the public would benefit from having clear standards that regulated the hours of operation to daylight hours or some appropriate time range with reasonable exceptions for emergencies and unusual circumstances.

5.4 Equipment profiles / height of feed barges

The Department has wrestled with this issue during some of its more recent lease proceedings. As a condition of approval on the Black Island facility operated by Atlantic Salmon of Maine, the Department restricted the height of the feed barge in response to riparian concerns. There are a number of simple and equitable standards that can be crafted that will work to keep equipment and building profiles within reasonable and workable boundaries.

5.5 Color of buildings and buoys

Buildings & structures

There are a variety of types of structures associated with aquaculture leases. For the most part it is the finfish leases that have larger and more varied types of structures, including feed barges and work buildings on barges. The Department will propose simple standards on color that will require all structures to have a gray or other hue that causes the structures to blend into the marine landscape.

Buoys in shellfish leases

While floatation and marking buoys at shellfish leases sites are generally low-key in coloration, there have been occasions where buoys have been either very brightly colored or cobbled together out of second-hand material. Because a shellfish lease can contain a number of buoys to float trays the visual impact of garishly colored buoys can be quite noticeable to riparians. The Department will propose simple standards for floatation and marker buoys that prevent the use of highly visible colors. These standards would not contradict Coast Guard requirements for navigational markers or compromise safety standards.

Use of chemical therapeutics

Among the many questions that the public has about finfish aquaculture is the amount and type of chemical therapeutics are used. The department has collected a year's worth of historical information from three of the finfish companies in order to provide some background for this discussion. This information follows.

In the last twelve months at 26 possible different sites the following compounds were applied:

Compound	Brand name	Type	Amount of active ingredient	Number of sites
Oxytetracycline	Terramycin	Antibiotic	349 kg	5 sites
Emamectin benzoate	SLICE	Parasitide	594 g	10 sites
Cypermethrin	EXCIS	Parasitide	778 L	5 sites

Of these compounds, oxytetracycline, is a fully-approved new animal drug (ANAD, in FDA lingo). The other two sea lice treatments are (or were) used under the investigational new animal drug program (INAD). Cypermethrin is no longer used as its manufacturer pulled it from the U.S. market.

There are a number of approved new animal drugs (ANAD) for use in aquaculture on the market. They are marketed under different brand names, but the compounds approved for use on species raised in Maine are:

Compound	Brand names	Type
Tricaine methanesulfonate	Finquel	Anesthetic
Formalin	Formalin-F; Paracide-F; Parasite-S	Fungicide; control of external trematodes
Sulfadimeth-oxine and ormetoprim	Romet 30	Antibiotic
Oxytetracycline	Terramycin (TM-100)	Antibiotic

As well there are approximately 100 investigative new animal drugs (INADs) for aquaculture that are currently under review at FDA, including the current INAD for

emamectin benzoate (SLICE). The Department was not able to determine the exact number of these that were proposed for use with salmonids.

However, it is important to also point out that the trend is toward the greater use of vaccines that are administered at the hatchery prior to the smolts being placed at the marine cages. There are at least 15 vaccines approved for use in salmonids. These vaccines are used to control the bacterial infections of furunculosis, vibriosis, and enteric red-mouth diseases. There are trial vaccines being tested to control for the viral infection of infectious salmon anemia (ISA).

Issue #6: Reporting of chemical therapeutics

There are two places in the aquaculture statute that directly address the reporting of the use of chemical therapeutics, Sections 6077 and 6079.

The current statutory wording in Section 6079 requires that public notice be provided on the use of antibiotics. This section was incorporated into statute in 1991 and amended in 1997. The intention was for the public to have access to information about the extent and nature of the use of antibiotics. This provision has not been enforced by the Department and is not, as far as we know, used by finfish farms. Finfish farms closely track the use of antibiotics and other chemical therapeutics and have information on their use.

The current statutory wording in Section 6077 requires that the Commissioner collect information on the incidence of disease and the use of chemical therapeutics. The Department has not done this in a comprehensive or routine fashion to date. While there is routine discussion about the extent and type of disease outbreaks on farms through the Department's fish health technical committee, this information is not regularly monitored with the exception of the recent outbreaks of infectious salmon anemia (ISA), which is very closely monitored and tracked.

While it is our assessment that the Department has a responsible handle on disease outbreaks at farms, we have not been routinely collecting data on the use of chemical therapeutics in the same way we have been collecting harvesting and feed usage on a monthly basis. This is easy enough to do, and we have made amendments to our harvest report forms that are submitted by the farms.

Resolutions

6.1 Collect the required information

Amend the existing monthly harvest report form to clarify that it include information on the use of chemical therapeutics. A draft of this form is included in Appendix A. The authority for this currently exists in our statute, in Section 6077, subsection F and G (see below).

The information submitted via this mechanism is confidential per Section 6077, subsection 4. However aggregated or summarized information could be produced and distributed at a bay-wide level of resolution that would allow for the public to know the extent of chemical therapeutic use in an area.

§6077 Aquaculture Monitoring Program

2. Data requirements. The commissioner shall ensure that, at a minimum, information in the following site-specific categories is collected and organized in such a manner as to allow effective enforcement of all laws pertaining to finfish aquaculture at individual facilities:

- A. Geophysical site characteristics, including currents and bathymetry;
- B. Benthic habitat characteristics and effects, including changes in community structure and function;
- C. Water column effects, including water chemistry and plankton;
- D. Feeding and production data sufficient to estimate effluent loading;
- E. Smolt and broodstock introduction and transfer data;
- F. Disease incidence and use of chemical therapeutics; and
- G. Other ancillary information as the commissioner may find necessary.

§6079. Aquacultural use of antibiotics; notice

1. Notice required. When introducing an antibiotic into the waters of the State at a research site under section 6072-A or an aquaculture leasehold site, a person shall post written public notice in the municipality nearest the leasehold site in the same location as that generally used to post notice of town meetings or city elections. The notice must include the following information:

- A. The name and address of the aquaculture leaseholder and an in-state telephone number for the leaseholder that can be called to get further information on the antibiotic application;
- B. The name of the person or persons responsible for applying the antibiotic;
- C. The name of the antibiotic to be applied;

- D. The dosage to be applied;
 - E. The time and duration of treatment; and
 - F. The date of posting.
- 1991, c. 381, §7; 1997, c. 231, §7.

Jurisdictional issues

Issue #7: Who does what to whom?

The aquaculture statute spells out that the Commissioner of Marine Resources has “exclusive” [Section 6072] authority to issue leases, with some clarifications and exceptions. There are however other state and local areas of jurisdiction that warrant discussion. This report does not review the several pending Federal initiatives surrounding aquaculture that include the endangered species act listing and federal discharge standards.

The Department has worked over the years to closely coordinate aquaculture permitting with other government agencies in order to ensure that decisions are made as concurrently as possible, and so do not overly burden an applicant with multiple applications and permit procedures. The most significant coordination has been with the U.S. Army Corp of Engineers, where one application package was created to allow an applicant the ability to submit both a lease application and an Army Corp permit. The Army Corp relies on the Department’s administrative record, as well as its own deliberations to issue a permit in close coordination with the Department’s lease. This is a model the Department would like to continue developing as other issues arise.

Presently the newly developed National Pollutant Discharge Elimination System (NPDES) permit program at DEP and the regulation of moorings by municipalities are two areas where the Department wants to ensure good coordination and no duplication.

Resolutions

7.1 Coordinate with DEP NPDES permitting

The Department has always had a joint role in the regulation of aquaculture with the DEP because of the state’s water classification program [38 MRSA, 4-A] that characterizes coastal waters, as well as stipulates whether and how aquaculture may operate in these classifications. Over time, the Department has closely integrated the water quality classification – and other Federal permitting from the U.S. Army Corp of Engineers (as described above) – requirements into its leasing program, making for an efficient system.

The pending issuance of National Pollutant Discharge Elimination System (NPDES) permits to finfish facilities by the state Department of Environmental Protection (DEP) creates an additional state action that must be completed prior to an aquaculturalist assuming a lease site. There is the potential here to lengthen the processing time of an application if attention is not paid to the administrative process surrounding the NPDES permit.

The Department has been working closely with DEP in the development of its new Clean Water Act permitting program (NPDES) for aquaculture, including both the permit standards and the administrative procedures. This permitting program is a new initiative following an EPA determination that they would begin issuing discharge permits for finfish aquaculture operations. Previously, the EPA was not issuing discharge permits for these operations. We are both confident that the two Departments can create an efficient and effective program that does not add unnecessary delay or paperwork to the process. DMR anticipates that the two Departments will coordinate the application submission requirements as well as the permit review process so that DEP will be able to determine to what extent a proposed lease application would conform to its general permit requirements as the lease was being reviewed by DMR. This would allow the applicant, the State, and the DEP to know which applications did not fit within general permit requirements and so would require specific NPDES permit requirements. This type of coordination would allow the DEP and DMR decisions to be rendered essentially together, and so preventing a second consecutive process for an applicant.

Requires statutory change _____ **Requires rule change** _____
Additional funding / expense: Minor, absorbed by DMR

7.2 Clarify authority and process by which municipalities permit moorings within leases

Towns have used their authority granted in Title 38, sections 1 – 11 to issue permits for moorings on aquaculture facilities after a lease has been approved by the State. On occasion towns have imposed additional permit requirements on moorings associated with a lease after a lease has been issued by the Department. In one case this amounted to numerous public hearings that added substantial time and redundancy to the process. There also appears to be some efforts to craft local ordinances that tie the issuance of a local mooring permit to a local review of effluent discharge and an aquaculture facility's impact on scenic, ecological, recreational, and commercial fishing resources. In short, a second review and approval process.

The Department does not want to exclude the role of harbormasters or municipalities in the review of aquaculture leases, including the oversight of moorings. Rather we are interested in ensuring that the review of moorings and associated issues is resolved during the Department's review of a lease and not afterward. The Department relies on the local expertise of harbormasters to assess navigational and traditional fisheries

impacts of an aquaculture lease, as well as the sufficiency of moorings that are described in detail in each lease application.

The Department will continue to work closely with municipal harbor masters to identify issues of concern to a town that can be addressed during the existing lease process. The Department will work to ensure that our review procedures are accurately gauging the harbor master's assessment of the mooring equipment associated with a lease. With respect to a municipality's role in the review of a lease, it is also important to note that municipalities must be granted intervener status on applications if they request to be involved in the Department proceedings. With respect to moorings and anchorages the municipalities also have the ability to work directly with the Army Corp of Engineers with regard to the permit that is issued to all leases following DMR approval. The Corp also relies heavily on local harbor masters for their input on aquaculture leases.

The Department proposes to amend our statute to ensure that the authority to grant leases includes the exclusive authority to regulate moorings associated with aquaculture operations within the boundaries of a lease. Any change to statute should be clear that it regulates ONLY those moorings needed for the aquaculture operation that are within the bounds of the lease. For example, there may be (as has happened in the past) circumstances where a riparian landowner or someone else may have, or request, a mooring within a lease boundary. That permitting authority would not be preempted and would remain with the local municipality.

Requires statutory change **Requires rule change** _____
Additional funding / expense: _____

Proposed statutory change follows:

§6072. Research and aquaculture leases

1. Authority. The commissioner may lease areas in, on and under the coastal waters including the public lands beneath those waters and portions of the intertidal zone for scientific research or for aquaculture of marine organisms. The commissioner may grant a lease to any person. Except as provided in this Part, the commissioner's power to lease lands and regulate moorings within the boundaries of a lease under this section shall be exclusive. The Commissioner's authority to issue leases supercedes the authority of a municipality to determine the placement of, and to regulate moorings and anchorage equipment associated with an aquaculture operation within the boundaries of a lease as defined in 38 MRSA, section 1, et seq.. For the purposes of this section, the deputy commissioner may serve in the place of the commissioner.

§6072-A. Limited-purpose lease for commercial or scientific research

1. Authority. The commissioner may issue a limited-purpose lease for areas in, on and under the coastal waters including the public lands beneath those waters and portions of the intertidal zone for commercial aquaculture research and development or for scientific research. The Commissioner's authority to issue leases supercedes the authority of a municipality to determine the placement of, and to regulate moorings and anchorage equipment associated with an aquaculture operation within the boundaries of a lease as defined in 38 MRSA, section 1, et seq..

§6072-B. Emergency aquaculture lease for shellfish

1. Authority. The commissioner may issue an emergency aquaculture lease for areas in, on and under the coastal waters including the public lands beneath those waters and portions of the intertidal zone for the emergency aquaculture relocation of shellfish from an area for which a lease has been issued pursuant to section 6072 or section 6072-A when the health and safety of those shellfish are threatened. The Commissioner's authority to issue leases supercedes the authority of a municipality to determine the placement of, and to regulate moorings and anchorage equipment within the boundaries of a lease as defined in 38 MRSA, section 1, et seq..

§6072-C. Limited-purpose aquaculture license

1. License required. It is unlawful for a person to engage in the activities authorized under this section without a current limited-purpose aquaculture license or a lease issued under this Part authorizing the activities. The Commissioner's authority to issue licenses supercedes the authority of a municipality to determine the placement of, and to regulate moorings and anchorage equipment within the boundaries of a license as defined in 38 MRSA, section 1, et seq..

Staffing schemes

Issue #8: There are not enough of us to go around

As was stated at the outset, this review sought to first examine all possible savings of time and efficiencies in order to both improve processing times *and* best use existing staff resources. However it is clear that there is significant need for additional staff at the front end of the process to issue leases, as well as the back end of the process to improve and expand the monitoring program to shellfish farms for both environmental, lease compliance, and public health issues.

Resolution:

8.1 Create a structured, and equitable fee based system to hire an additional lease reviewer and shellfish monitor

In the current budget climate where future revenue projections continue to decline there is little option to creating additional staff positions except by the use of a dedicated funding source beyond the General Fund. The Department proposes to institute a fee-based program that will capture dedicated revenues from annual lease payments and application fees.

The Department proposes to hire two positions, one that will process lease applications and one that will work jointly in the environmental monitoring and public health programs.

The leasing position would report directly to the Regulations & Information Officer and would be based in the Boothbay Harbor facility. The responsibilities would initially include reviewing and processing experimental lease applications and coordinating the implementation of the permit by rule program. This staff person would gradually assume responsibility for increasingly more complex lease applications and public hearings. The position would be an Environmental Specialist III (Range 23).

The monitoring and pathology position would report directly to the Pathologist, but would have joint responsibilities in the Public Health division and the Division of Ecology / Aquaculture Environmental Monitoring program. The position would be a Marine Resources Specialist 2. The joint responsibilities will allow the Department to better monitor the increasing number of shellfish aquaculture leases in terms of general compliance with lease conditions, as well as monitoring the intra-state movement of shellfish with respect to disease and biotoxins. The Department is currently unable to adequately monitor shellfish aquaculture facilities for disease and biotoxins and in order to safeguard the growth of the industry, needs to do so more thoroughly. The creation of this position will be coordinated with a planned revamp of the Department's shellfish health program as codified currently in Chapter 24 of its rules.

Position budget detail

Environmental Specialist 3 (Range 23)

Personal Services \$56,864
All Other \$ 5,500

Marine Specialist 2 (Range 19)
Personal Services \$50,517
All Other \$12,300

Total required, first year: \$125,182

Funding detail

The Department proposes that these positions would be funded by a dedicated revenue source derived from an increase in annual lease fees as well as an increase in application fees.

Currently there is a standard fee of \$50 for each leased acre, irrespective of the type of lease or species raised. The Department feels that an equitable leasing fee based on the lease type could be created that would fund these two positions. The Department currently has the authority to increase lease fees beyond the statutorily defined minimum of \$50 [12 MRSA Section 6072 (9)], but does not currently have the authority to create a dedicated fund to pay for these positions.

Presently the application fee structure is based on the size of lease for a standard application, where costs are:

- \$100 for less than one acre;
- \$250 for 1 to 10 acres;
- \$500 for 11 to 50 acres;
- \$1,000 for 51 to 100 acres;

or, a flat \$100 charge for experimental leases.

The Department is proposing to amend the existing *Salmon Aquaculture Monitoring, Research and Development Fund* which is the fund that collects the 1 cent per pound fee on harvested salmon, so that its work is not restricted to just salmon operations. The fund would be renamed the *Aquaculture Monitoring, Research and Development Fund* to reflect its broader mission. The change would allow the Department to place lease fees beyond the \$50 minimum and any additional application fee beyond the amounts currently specified in rule in this fund and so broaden monitoring and staffing for the processing of leases.

The revision of the mandate of the existing fund would mean that several revenue streams would reside in this one fund, but would be tracked and expended separately in order to maintain the direction of the finfish monitoring program, paid solely by the 1 cent per pound harvest tax, and the funding of the leasing position and the additional shellfish monitor.

While this change would significantly expand the range and amount of revenue received, the proposed new fund would actually differ little in authority from the existing Salmon Aquaculture Fund in that both have the ability to hire staff to process lease applications and monitor leases. The new fund would simply be expanded to cover all aquaculture in the state, a logical extension of the fund's responsibilities.

The Department would also make a corresponding change to the existing oversight board to the Salmon fund, so that it was composed of representatives from both the finfish and shellfish sectors.

The Department proposes to create the fee structure via rule-making after a more thorough analysis of how to allocate costs and incorporate the existing Salmon fund.

Requires statutory change **Requires rule change**
Additional funding / expense: **Revenue increase to cover program costs** _____

Proposed statutory change:

Repeal:

Section 6078. Salmon Aquaculture Monitoring, Research and Development Fund

Replace with:

§6078-A. Aquaculture Monitoring, Research and Development Fund

1. Fund established. All income received by the commissioner under this section must be deposited with the Treasurer of State, tracked according to its source, and be credited to the Aquaculture Monitoring, Research and Development Fund, referred to in this section as the "fund," which is established as a nonlapsing fund. Any interest earned on this money must also be credited to the fund.

2. Fees assessed.

A. Production fees for finfish.

(1) A person producing finfish in aquacultural facilities subject to section 6072 shall pay to the commissioner a fee of 1¢ per pound of whole fish harvested. The person shall pay the fee within 30 days of harvest. Timely payment of the fee is a condition of any lease granted under section 6072 for the production of salmon in net-pen aquacultural facilities. The commissioner may assess a late payment charge on any overdue payments computed at the annual interest rate established by the State Tax Assessor under Title 36, section 186. The commissioner may establish by rule any procedural requirements for collection of the fee including without limitation monthly reporting of harvest amounts and reporting forms. Failure to pay the fee is a civil violation punishable by a civil penalty not to exceed \$1,000.

(2) The Commissioner may develop an alternative production fee schedule based on the amount of feed that is used at finfish facilities. Such an alternative production fee shall be designed to return an equivalent and sufficient revenue stream to the production fee in 2.A.1 in order to support the purposes of this program. The Commissioner may adopt routine, technical rules to carry out the purposes of this section.

B. Lease fees.

In accordance with the authority of the Commissioner to levy lease rents [Section 6072 (9)], the Commissioner shall implement by rule a fee structure for lease rents that are in addition to the minimum \$50 per acre. Any fee assessed in addition to this \$50 shall be credited to the fund. Failure to pay the fee is a civil violation punishable by a civil penalty not to exceed \$1,000.

C. Accounting.

Fees received from this section shall be accounted separately within the fund, so that at any point the commissioner or Advisory Council may determine the total fund balance and expenditures attributable to either revenue source.

3. Expenditures; purpose. The commissioner may make expenditures from the fund to develop effective and cost-efficient water quality licensing and monitoring criteria, analyze and evaluate monitoring data and process lease applications. In developing a program of expenditures, the commissioner shall consult with the Aquaculture Advisory Council established under Title 5, section 12004-I, subsection 57-B. The commissioner may contract for services privately or under memoranda of agreement with other state agencies.

4. Additional revenues. The commissioner may expend annual revenues in excess of the operating expenses of a program under subsection 4 to address matters that the

commissioner determines are of an emergency nature to the State's aquaculture industry, to address matters that the commissioner determines are of long-term interest to the State's aquaculture industry or to rebate revenues to all those persons who paid fees under subsection 3. A rebate must be in the same proportion to the total of all rebates as the recipient's fees for that period are to the total of all fees levied for that period.

The commissioner shall consult with the Aquaculture Advisory Council established under Title 5, section 12004-I, subsection 57-C when determining expenditures under this subsection.

5. Reports. On or before February 1st of each year, the commissioner shall report to the joint standing committee of the Legislature having jurisdiction over marine resource matters on all expenditures made from the fund in the previous fiscal year and on all work accomplished and planned. The committee may introduce and report legislation it determines necessary to modify the provisions of this section.

6. Transfers from existing accounts. The Department is authorized to transfer the existing balance and encumbrances from the Salmon Aquaculture Monitoring, Research, and Development Fund at any time prior to its lapsing to the Aquaculture Monitoring, Research, and Development Fund in order to fund any of the activities outlined in this section.

Repeal:

§6080. Maine Salmon Aquaculture Advisory Council

Replace with:

§6080-A. Aquaculture Advisory Council

1. Appointment; composition. The Aquaculture Advisory Council, referred to in this section as the "council" and established by Title 5, section 12004-I, subsection 57-B, consists of 5 members. The commissioner or the commissioner's designee is a nonvoting, ex officio member of the council. The commissioner shall appoint 4 members from the State's aquaculture industry. No more than 2 of the appointed members may represent similar segments of the State's aquaculture industry.

2. Term. Council members serve for 3 years and continue serving until a successor is duly appointed and qualified. In the case of a vacancy, the commissioner shall promptly fill the vacancy.

3. Purpose. The council shall make recommendations to the commissioner concerning expenditures from the Aquaculture

Monitoring , Research and Development Fund for the purposes described under section 6078, subsections 4 and 7.

4. Chair and officers. The council annually shall choose one of its members to serve as chair for a one-year term. The council may select other officers and designate their duties.

5. Meetings. The council shall meet at least once each year. It may also meet at other times at the call of the chair or the chair's designee or the commissioner or the commissioner's designee. In the cases where a meeting is not held, specific authorizations may be approved by written poll conducted via US Mail, telecopier, or electronic mail.

Implementation matrix

Because this report contains a range of different recommendations that will be implemented via administrative changes, rules, policies, and statutes, the following chart lists in summary form the type of changes and their current status.

Resolution	Implementation			Needs Funding	Status	Completion
	Admin.	Rule	Law			
1.1 Public Scoping Sessions		X			Initiated	Spring '02
1.2 DMR notifies riparians		X	X		Pending	Summer '02
1.3 Revise public notices		X			Complete	
1.4 Revise mailings	X				Complete	
1.5 Create "user's guide"	X				Complete	
1.6 Update website	X				Initiated	Summer '02
1.7 Distribute press releases		X			Initiated	Summer '02
1.8 Amplify hearings	X				Initiated	
1.9 Intent to file application		X			Pending	Summer '02
2.1 Processing benchmarks		X			Pending	Summer '02
2.2 Tracking database	X				Pending	Spring '02
2.3 Revise data collection		X			Pending	Spring '02
2.4 Gov't review procedures	X				Initiated	Spring '02
2.5 Delegate signatures		X	X		Pending	Summer '02
2.6 Begin leases at logical times	X				Pending	Winter '02
2.7 Revise notice requirements		X	X		Pending	Summer '02
2.8 Permit by rule		X			Initiated	Spring '02
3.1 Recreational approval criteria		X	X		Pending	Summer '02
4.1 Improve annual lease review	X				Initiated	Fall '02
4.2 Continue decriminalization			X		Pending	Summer '02
5.1 Performance standards		X			Pending	Summer '02
6.1 Chemical therapeutic data	X				Complete	Jan '02
7.1 Coordination on NPDES	X				Initiated	Spring '02
7.2 Mooring authority	X		X		Pending	Summer '02
8.1 Staffing		X	X	X	Pending	Summer '02

Appendix A: Forms and notices

Aquaculture public comment notice mailer

Aquaculture public hearing notice mailer

Government agency review form

Harvest reporting form



ANGUS S. KING, JR.
GOVERNOR

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

GEORGE D. LAPOINTE
COMMISSIONER

AQUACULTURE LEASE APPLICATION

What is happening? Vic Stanwood and Russell Smith are proposing to lease 1.86 acres for suspended blue mussel aquaculture located in the Douglas Islands archipelago, west of Pond Island in Milbridge, Washington County, Maine.

The proposed experimental lease would grant Vic Stanwood and Russell Smith an exclusive license to use the lease area for the culture of blue mussels using a floating raft. Other compatible commercial and recreational would be permitted within the boundaries of the lease.

The application for this operation has been determined to be complete by the Department and a site review has been conducted.

How do I participate? The Department will accept written testimony from members of the public during this comment period. If you have testimony that you would like to provide please read the application that is enclosed with this notice. Please make sure your testimony is clear and concise and relates to the application that is enclosed.

The Commissioner does not intend to hold a public hearing on this application unless a hearing is requested in writing by five or more interested parties.

COMMENTS OR REQUESTS FOR HEARINGS ARE DUE ON OR BEFORE:

January 5, 2002

Laurice Churchill

Department of Marine Resources

PO Box 8

West Boothbay Harbor, ME 04575

Questions? Please contact Laurice Churchill at 633-9584 or Andrew Fisk at 624-6554. More information is available at www.state.me.us/dmr/aquaculture

Authority

12 M.R.S.A. §6072-A



ANGUS S. KING, JR.
GOVERNOR

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

GEORGE D. LAPOINTE
COMMISSIONER

AQUACULTURE LEASE PUBLIC HEARING

**MONDAY, JULY 30, 2001
7:00 PM
MILBRIDGE TOWN HALL
22 SCHOOL STREET**

What is happening? Vic Stanwood and Russell Smith are proposing to lease 1.86 acres for suspended blue mussel aquaculture located in the Douglas Islands archipelago, west of Pond Island in Milbridge, Washington County, Maine.

The public hearing will be held to allow the applicants an opportunity to present their proposal and for the Department of Marine Resources, other public officials, and members of the public to ask questions and learn about this proposed aquaculture lease and its effect upon riparian owners, navigation, fishing, other aquaculture uses, ecology, and other uses of the area. The information gathered by the Department at this hearing in addition to that received during the application review period will be used in its decision whether to grant a lease to the applicants.

How do I participate? Review the application that is enclosed. Any member of the public may attend, speak, and submit evidence at the hearing. You have two ways to participate, informally or formally as an intervener. If you wish to intervene and become a party to the proceedings you must file a written request with the Department 10 days prior to the hearing. Requests for intervention must demonstrate how you are substantially and directly affected by the proposed application.

Whether you intervene or not there is opportunity for the public to ask questions as well as present testimony. If you wish to provide testimony about this application, please:

- Prepare your comments in advance
- Be prepared to answer questions about your testimony
- Document your comments with evidence whenever possible
- Make sure your comments are concise and relate to this application

Questions? Please contact Laurice Churchill at 633-9584 or Andrew Fisk at 624-6554. More information is available at www.state.me.us/dmr/aquaculture

Authority

This adjudicatory hearing is held under the authority of 5 M.R.S.A. §9052 and 12 M.R.S.A. §6072, which governs the conduct and operation of the hearing.



ANGUS S. KING, JR.
GOVERNOR

STATE OF MAINE
DEPARTMENT OF
MARINE RESOURCES
P.O. BOX 8, MCKOWN POINT
W. BOOTHBAY HARBOR, MAINE 04575

GEORGE D. LAPOINTE
COMMISSIONER

REQUEST FOR REVIEW AND COMMENT PENDING STANDARD AQUACULTURE LEASE APPLICATION

Date: December 27, 2001

Applicant: _____

Location: _____

Application number: _____

Special notes: _____

COMMENTS DUE BY:

DRAFT

The Department of Marine Resources has requested the following agencies or organizations to provide comment on the enclosed complete STANDARD lease application.

- Department of Environmental Protection
Attn:
- Department of Inland Fisheries & Wildlife
Attn:
- Atlantic Salmon Commission
Attn:
- Department of Conservation, Submerged Lands
Attn:

- US Army Corp of Engineers
Attn:
- Department of Marine Resources, Marine Patrol
Attn:
- Selectboard & Harbormaster, Town of:
Attn:
- Other:
Attn:

Comments or recommended conditions (attach additional pages as necessary):
(Harbormasters, please complete the questions on the following page)

Signature: _____ Date: _____

Do you plan on attending and testifying at the public hearing? ___ YES ___ NO

HARBORMASTERS QUESTIONNAIRE:

1) Does this application interfere with navigation?

2) Are there any moorings within the boundary of this lease?

DRAFT

3) Does the proposed lease interfere with any traditional storm anchorages?

4) Does this application interfere with the ability of any riparian owners to get to and from their property?

5) What is the extent and type of commercial and recreational fishing within the area of the proposed lease?

6) Is the mooring gear specified in the application adequate and appropriate?

7) Does the proposed lease unreasonably interfere with any local, state, or federally owned beaches, parks, or docking facilities that are within 1,000 feet of the lease area?