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From: Olivia Deans, Ocean and Coastal Law Fellow

Re: History of Maine Marine Aquaculture Statutes and Regulations (NSGLC-22-04-02)¹

Date: January 28, 2022

Last year, Maine Sea Grant requested assistance from the National Sea Grant Law Center (NSGLC) regarding legal research on Maine marine aquaculture laws and regulations. As we understand it, Maine Sea Grant is working to provide opportunities for community discussion regarding Maine’s aquaculture program. The NSGLC was asked to review the establishment of the marine leasing law and any subsequent major amendments to the statute and regulations. Additionally, the NSGLC was asked to provide the context behind the amendments. This document provides a historical overview of major amendments made to Maine’s aquaculture statute and regulations.

Introduction

In 1973, the Maine Legislature granted the Department of Marine Resources (DMR) the authority to lease state water for aquaculture activities.² In 1983, the DMR published regulations to implement the aquaculture laws. The original legislation prohibited a person from operating a finfish or shellfish enclosure without a lease issued by the DMR Commissioner. To obtain a lease, an applicant was required to submit an application to the Commissioner who would notify the surrounding municipalities and conduct a site assessment. The Commissioner was required to consider all written comments submitted within 30 days of the lease application. At the time, the lease length was set at 10 years. Additionally, the Commissioner was responsible for coordinating an aquaculture monitoring program with other impacted state agencies and collecting data related to the environmental and geophysical site characteristics.

¹ This product was prepared by the National Sea Grant Law Center under award number NA18OAR4170079 from the National Oceanic and Atmospheric Administration, U.S. Department of Commerce. The statements, findings, conclusions, and recommendations are those of the author and do not necessarily reflect the views of NOAA or the U.S. Department of Commerce.

² Text of the 1973 and 1983 statutes were not found. Analysis of the early historical statutes were taken from the 1991 version. *See also*, Maine Department of Marine Resources, *Fisheries and Fishery Policy in the State of Maine* (1981) available at: <https://www.govinfo.gov/content/pkg/CZIC-sh328-f57-1981/html/CZIC-sh328-f57-1981.htm>.

Today, the general legal framework set forth in the marine aquaculture statutes and regulations remains similar to the framework established in 1973. The DMR continues to be the state agency responsible for overseeing marine aquaculture in Maine. However, the Maine Legislature and the DMR have made several changes to the statutes and regulations over the past decade to expand and clarify the lease terms, process, and public notice requirements. Today, there are several types of leases available for aquaculture, including an experimental, standard, limited-purpose, or emergency shellfish lease. The procedural framework is similar to the early aquaculture statutes. An applicant must apply to the DMR Commissioner to receive a lease, and the Commissioner must analyze the lease site and provide public notice to affected parties. However, the site assessment analysis and public notice requirements have been expanded, as discussed in more detail below. Additionally, the current aquaculture statutes contain provisions for monitoring requirements and management funds. The marine aquaculture statutes are codified in Maine law at 12 M.R.S.A. §§ 6071 – 6088.³ The primary regulations governing marine aquaculture are contained in the Code of Maine Rules at 13-188 C.M.R. Ch. 2, §§ 2.05 – 2.95.

Aquaculture Lawsuits

After 1973, there were several lawsuits involving aquaculture. While the NSGLC was unable to locate early legislative history and bill text, these lawsuits may have impacted the subsequent amendments to the aquaculture statutes and regulations.

- *Sewall v. Spinney Creek Oyster Co.*, 421 A.2d 36 (1980).
In this procedural case, the DMR was sued after it granted an aquaculture lease for certain parts of the York River. The agency held a public hearing to obtain evidence of adverse effects of the proposed project without swearing in the witnesses giving testimony. The plaintiffs asserted that DMR should have held an adjudicative hearing, which would have required witnesses to be sworn into the court. The court classified the hearing as an adjudicative hearing under the Maine Administrative Procedure Act. While the Supreme Judicial Court of Maine ultimately stated it was incorrect to not swear in the witnesses, the court found it was not appropriate to void the lease because of the reliance interests on the lease. This case highlights the importance of the rulemaking and leasing procedures and the associated public notice and comment requirements. Textual amendments have been made in the Maine aquaculture statute specifying when a process is considered an adjudicatory proceeding.
- *Harding v. Commissioner of Marine Resources*, 510 A.2d 533 (1986).
In this case, a property owner sued DMR for failing to consider the effect of the proposed aquaculture project on their property value. The property owner alleged the lease should not have been granted because DMR failed to allow testimony at a public hearing regarding the aquaculture lease's effect on the property's value. The Supreme Judicial Court of Maine had to consider whether 12 M.R.S.A. § 6072(7), which states a lease may not "unreasonably interfere with ... other uses of the area," required DMR to consider the

³ Current through the Second Special Session of the 130th Legislature that adjourned on September 29, 2021. The most recent changes to the marine aquaculture statutes became effective on October 18, 2021.

neighboring property values.⁴ Ultimately, the court concluded the lease should be affirmed and the state may grant aquaculture leases without considering private land values. The court reasoned that the statute provided the conditions for DMR to consider when issuing leases and property values was not one of the listed conditions.

- *Cline v. Maine Coast Nordic*, 728 A.2d 686 (1999).
In this case, an aquaculture lease was granted by DMR for the same location as a license to operate a fishing weir. The holders of the weir license argued the aquaculture lease should not have been granted and they were not given proper notice. Ultimately, the Supreme Judicial Court of Maine held the weir license holders were estopped (prevented) from arguing the aquaculture lease should be overturned because DMR gave proper notice and considered the appropriate factors when granting the lease. Amendments clarifying the public notice procedures and lease considerations have been made subsequent to this case.

Statutory and Regulatory Amendments

1997

The Maine Legislature amended the aquaculture statute in 1997 to include a ranked preference list for limited-purpose lease areas when more than one person applies to lease an area.⁵ Additionally, the amendments establish the authority to create limited-purpose leases for commercial or scientific research. The amendments also granted the Commissioner the authority to issue emergency aquaculture leases for shellfish if specific conditions were met.

2003

Effective May 21, 2003, the Maine Legislature made several amendments to the aquaculture statutes. Some of these changes included:

- Adding a requirement that DMR notify riparian owners, intervenors, and the municipality where the lease site is located after a limited-purpose lease is granted;⁶
- Adding a requirement that the lessee of a limited-purpose lease submit an annual report of the results of scientific and commercial research for the lease area;
- Identifying factors the Commissioner must consider when granting the lease including no unreasonable interference with “significant wildlife habitat,” no interference to the surrounding marine and upland areas, no unreasonable noise or light impact, and the condition that regulations be adopted to establish visual impact criteria;

⁴ *Harding v. Commissioner of Marine Resources*, 510 A.2d 533, 536 (1986).

⁵ The preferences are first given to the person who holds a lease for the area, second to the department, third to the riparian land owner, and fourth to a person who has traditionally or commercially fished in the lease area.

⁶ See, e.g., *Cline v. Maine Coast Nordic*, 728 A.2d 686 (1999) (discussing the proper public notice requirements of the aquaculture statutes).

- Identification of factors for when a Commissioner will renew a lease, including a 90-day notice for renewal or termination, the interests of the state, a maximum lease size of 250 acres, and lease activities;
- Requirement that the Commissioner (previously the applicant) must provide public notice of hearings.
- Grant of authority to develop fees and lease rents through the rulemaking procedure; and
- Grant of authority for the Commissioner to authorize department staff to sign lease documents.

2009

On June 1, 2009 the Maine Legislature amended 12 M.R.S.A. § 6072 to increase the maximum lease area for one tenant to 500 acres. Additionally, the amendment allowed for the Commissioner to authorize leases greater than 500 acres if it is beneficial for the management of aquaculture and is appropriate. The 2009 amendments also required a person to submit an annual fallowing plan, and granted authority for the Commissioner to review the fallow assessment and approve, reject, or request changes during the lease period. Prior to 2009, a person could not be a tenant of leases covering more than 300 nonfallowed acres.⁷

2011

Effective September 11, 2011, the Maine Legislature added provisions addressing lease assignments and clarified language regarding transferability of leases. Prior to 2011, the statute only addressed monitoring and revocation of leases, not lease assignments. Under the amended framework, the Commissioner may lease the remaining time period for a terminated or revoked lease to a new tenant. The statute includes considerations for granting an assignment, such as the interests of the state, best suited lease sites, public notice, and completeness of the application. Additionally, the Commissioner must give notice to owners of riparian land within 1,000 feet of the lease site when a lease is transferred. DMR has adopted regulations determining the fees for a lease transfer.

2012

In 2012, the Maine Legislature and DMR amended provisions regarding lease renewal and preference for limited-purpose leases. In Maine, there are several types of leases that vary in cost, size, and time. Some leases are renewable and some are not. Limited-purpose leases are annual, renewable leases for aquaculture operations less than 400 square feet. Generally, a limited-purpose lease is used to try out a new area or for small enterprises.⁸

Prior to 2012, when more than one person applied to lease an area, preference was given first to DMR, second to the riparian owner, and third to the person who traditionally fished in the area. After the amendment, preference is given first to the person who holds a lease for a portion

⁷ The definition of “fallow” was amended from “a lease site without cultured fish, shellfish, scallops and gear except marked mooring blocks,” to mean “a lease site without cultured organisms.”

⁸ See also, State of Maine Department of Marine Resources, *Aquaculture Lease Applications and Forms*, Accessed Jan. 25, 2022, Available at: <https://www.maine.gov/dmr/aquaculture/forms/index.html>.

of the area and applied for the lease before the lease expired. Preference is then given to DMR, third to the riparian owner, and fourth to the person who traditionally fished in the area. Additionally, language was added to the renewal section of the statute to specify that when a person with a lease applies to renew the lease, the lease remains in effect until the Commissioner issues a decision on the renewal application. If the renewal is denied, then the lease expires 30 days after the determination.

2014

In 2014, the Maine Legislature clarified the regulation process. Under the statute, the Commissioner is granted authority to adopt or amend regulations for specified activities. The Maine Legislature directed the Commissioner to adopt regulations to authorize specific aquaculture species that could be grown in the state. In 2014, the Maine Legislature amended the statute to add that “a change in authorization is not an adjudicatory proceeding.”⁹ This may be significant because adjudicatory proceedings generally require different public notice and comment requirements and procedures than a rulemaking procedure issued by an agency.

2017

In 2017, minor amendments were made to 12 M.R.S.A. § 6072, the statutory provision covering research and aquaculture leases. The Maine Legislature clarified the process for recording deeds and changed the agency name from Division of Parks and Public Lands to Bureau of Parks and Lands. Additionally, the statute was amended to include a provision classifying a violation of a condition of a lease as a civil violation with a minimum \$100 fine.

An amendment modifying the lease term was also enacted in 2017. Prior to 2017, the statute stated “a lease shall not exceed a term of 10 years.” The 2017 amendment stated “a lease *may* not exceed a term of 20 years.”¹⁰ The plain language of the statute suggests that before 2017 a lease term must be 10 years. After the 2017 amendments, the statutory language suggests the Commissioner has discretion to set a different lease length as long as the term does not exceed 20 years.

2021 Amendments

In September 2021, the Maine Legislature amended the marine aquaculture leasing and licensing statutes.¹¹ The changes include:

- An increase in the fees for limited purpose leases from \$50.00 to \$100.00 and a grant of authority to impose the addition of special fees at the discretion of the Commissioner. 2 M.R.S.A. § 6072-A, J.

⁹ See also, *Sewall v. Spinney Creek Oyster Co.*, 421 A.2d 36 (1980) (discussing the leasing processes classifications and the public notice requirements tied to those classifications).

¹⁰ 12 M.R.S.A. § 6072-(2)(A) (emphasis added).

¹¹ See State of Maine Department of Marine Resources, *Updates to Aquaculture Leasing and Licensing Statutes*, October 18, 2021, Available at: https://www.maine.gov/dmr/aquaculture/documents/AQstatutechanges_10.18.21.pdf.

- Specification that fees for lease transfers are due at the time of application. 12 M.R.S.A. § 6072-12-A-C.
- The addition of a new ground for lease revocation proceedings. Such proceedings may now be based on operating a site that is substantially injurious to public health or violating minimum maintenance standards. 12 M.R.S.A. § 6072-A.
- Addition of a provision that states experimental leases for commercial purposes may not be amended. 13-188 C.M.R. Ch. 2, § 2,65.
- Change in the due date for applications to renew a lease. Such applications are now due 30 days prior to expiration instead of 90 days prior to expiration. 12 M.R.S.A. § 6072-12.¹²

¹² The statute has been updated to allow a 30-day time period for lease renewal, but the regulation, 13-188 C.M.R. Ch. 2, § 2.45 has not been updated from the previous 90 day requirement.