

RE: City of Belfast Proposed Aquaculture Standards - City Shoreland Ordinance

Mendelson, Meredith <Meredith.Mendelson@maine.gov>

Mon 2/27/2023 4:59 PM

To: Wayne Marshall <wmarshall@cityofbelfast.org>

Cc: Bub Fournier <directorplanning@cityofbelfast.org>; Jon Boynton <cityplanner@cityofbelfast.org>; Clark, Colin A <Colin.A.Clark@maine.gov>

Hello Wayne,

Again, I appreciate you reaching out to me to provide DMR with an opportunity to review this ordinance prior to its approval. I listened to the vimeo recording of the 2/7 council meeting to better understand this issue and the discussion there.

I will not comment on Belfast's ability to regulate land-based aquaculture activities within its shoreland zone, as I am not an expert on shoreland zoning, and it is beyond the jurisdiction of my agency. Unfortunately, I think there was some confusion about DMR's authority and how it intersects with Shoreland Zoning, and so you received some incomplete information. I'm hoping I can clarify that now, but recognize that it's late in your process and apologize for that.

In accordance with 12 MRSA § 6072 (1), the Commissioner of Marine Resources' authority to lease lands, including intertidal lands, for aquaculture is exclusive (unlike the Shoreland Zoning Act, which explicitly provides that municipalities have authority to regulate activities in the Shoreland Zone). The only exception to this would be for municipalities which have an approved municipal shellfish ordinance, which gives those municipalities the ability to issue municipal shellfish aquaculture permits under 12 MRSA § 6673 (3). However, as section 6673 makes clear, municipal authority to issue a municipal shellfish aquaculture permit does not limit in any way the exclusive authority of the Commissioner to issue leases in the intertidal zone in accordance with 12 MRSA §§ 6072, 6072-A and 6072-B. In any event, Belfast does not have an approved municipal shellfish ordinance, so section 6673 does not apply.

I could also see that perhaps the town might choose to define how it would determine approval for an intertidal lease where the municipality is the riparian land owner, as the riparian land owner's permission is required for use of intertidal land for aquaculture. But as I understood it, your proposed ordinance speaks to all potential leases within the shoreland zone, not just those on city-owned intertidal property.

As the letter I included in my prior email noted, there are numerous opportunities for municipalities to weigh in during the Department's leasing process, including on the topics contained within Belfast's proposed ordinance changes (navigation, impact on existing uses, and impact on flora/fauna). On some of these topics, municipal input is afforded even more weight than that of other members of the public. For example, we take municipal concerns about navigational impacts very seriously.

I have a number of thoughts about the language currently proposed in Section 82-511, and will try to summarize briefly here, but would be glad to discuss further if that would be helpful. Overall, the ordinance does appear to interfere to some degree with, and be preempted by, the state's exclusive jurisdiction over the leasing of state waters, including the intertidal, for purposes of aquaculture. Furthermore, many of these provisions appear to be duplicative and unnecessary, as the lease could not be issued without meeting the legislatively created decision criteria that DMR must apply, which in several instances include very similar standards. More specifically to each subsection:

(a): finfish aquaculture in marine waters is, by its nature, not going to be sited in an intertidal area; I realize you said this section has been in place for a while, but I do not see why this is needed.

(b): agree that a blanket prohibition is not appropriate, and would be inconsistent with state law (6072(1)).

(c): such an operation would likely already be excluded by DMR decision criteria for lease issuance, as well as Army Corps of Engineers permit requirements, which are required for all leases.

(d): municipal input through the pre-application or scoping phase, as well as the harbormaster questionnaire once a final application has been submitted, provides a valuable opportunity to inform both DMR's leasing process as well as the Army Corps permitting process. (Municipal input may address such things as the placement of moorings when DMR considers the location of moorings, docks and other structures when evaluating whether a proposed lease would unreasonably interfere with navigation or riparian access.)

(e): DMR's jurisdiction to issue the lease is exclusive, but I agree that the town would have authority to regulate the structure that connected it to shore.

(f): DMR's jurisdiction to issue a lease is exclusive, though subject to permission from the riparian landowner whose land to the low water mark will actually be used. However, the municipality's input regarding impact would be taken into consideration.

(g): marking requirements for leases and LPAs are established in Chapter 2.80 of DMR Regulations, and may not be altered by municipal ordinance. However, there is an exception that allows for the Commissioner to modify these requirements, and municipal input could inform that decision.

(h): DMR's decision criteria does not address water quality specifically, but does require that a proposal not unreasonably interfere with marine habitat or the ability of the area to support ecologically significant flora and fauna. If a discharge permit is required, DEP would be the agency of jurisdiction.

(i): DMR's decision criteria here is : The lease will not unreasonably interfere with significant wildlife habitat and marine habitat or with the ability of the lease site and surrounding marine and upland areas to support existing ecologically significant flora and fauna.”

(j): Again, the Department's leasing authority is exclusive.

(k): The applicant would not be able to obtain a lease from DMR without written consent from the riparian land owner for lease proposals where the intertidal land of that owner is used. “Written permission of every riparian owner whose land to the low water mark will be actually used” is a threshold requirement in the application for a lease.

I don't know how familiar you are with our leasing process, so forgive me if this is already well understood, but I wanted to flag a couple of critical mechanisms and opportunities for the city to engage in DMR's leasing process:

- Municipalities receive personal notice of all lease proposals within their jurisdiction;
- Municipalities are automatically granted intervenor status upon written request;
- If any portion of the proposed site is located in the intertidal area AND the municipality has an approved shellfish conservation program, the applicant has to get consent from the municipality;
- DMR sends the harbormaster a questionnaire to complete about the proposal; and
- Municipal officials can attend pre-application meetings, scoping sessions, and should attend hearings to provide their feedback. In addition, some towns and cities will post notice of a hearing on their website, some communities have committees (i.e. Harbor Committee) that review lease proposals and provide feedback to DMR, other towns will send a representative to the hearing to provide testimony or other evidence.

I have discussed this issue with Colin and both of our AAGs to ensure we are all on the same page about this going forward. Please do not hesitate to reach out to me, or to any DMR staff, if you have questions regarding the aquaculture program. We would be glad to work with you to clarify the municipality's opportunities to participate in and inform our leasing process and address any issues that may arise. Thanks again for the opportunity to provide comment.

To: Clark, Colin A <Colin.A.Clark@maine.gov>; Moesswilde, Morten <Morten.Moesswilde@maine.gov>; Gilbert, Thomas <Thomas.Gilbert@maine.gov>; Steve Wilson <ceo@cityofbelfast.org>; Wayne Marshall <wmarshall@cityofbelfast.org>

Subject: Re: belfast SWS

Thanks Colin. The State's clear response is much appreciated, and we intend to propose clarifying this in the proposed amendments.

Bub Fournier
Director, Planning and Codes Department
City of Belfast
131 Church Street Belfast, ME 04915
(207) 338-3370 X125
directorplanning@cityofbelfast.org

From: Clark, Colin A <Colin.A.Clark@maine.gov>

Sent: Wednesday, December 14, 2022 10:49 AM

To: Bub Fournier <directorplanning@cityofbelfast.org>; Moesswilde, Morten <Morten.Moesswilde@maine.gov>; Gilbert, Thomas <Thomas.Gilbert@maine.gov>; Steve Wilson <ceo@cityofbelfast.org>; Wayne Marshall <wmarshall@cityofbelfast.org>

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I have spoken with them and their feeling is that is the aquaculture is located below the low tide mark is regulated by DMR anything landward of that would be under SLZ review. I hope this helps clear it up a bit I know I learned something with this exercise. Also here is a link that the AGs sent along <https://www.maine.gov/dmr/fisheries/shellfish/municipal-shellfish-management-program/general-shellfish-ordinance-information> which might provide some helpful information for the town.

Colin A. Clark
Shoreland Zoning Coordinator in the Bureau of Land Resources
Maine Department of Environmental Protection
Tel (207) 441-7419
www.maine.gov/dep

From: Bub Fournier <directorplanning@cityofbelfast.org>

Sent: Wednesday, December 14, 2022 10:37 AM

To: Clark, Colin A <Colin.A.Clark@maine.gov>; Moesswilde, Morten <Morten.Moesswilde@maine.gov>; Gilbert, Thomas <Thomas.Gilbert@maine.gov>; Bub Fournier <ceo@cityofbelfast.org>; Wayne Marshall <wmarshall@cityofbelfast.org>

Subject: Re: belfast SWS

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Hi Colin,

Have you heard anything from the AG's office on this as of yet? I reached out to our City Atty, and they haven't provided a solid response yet. Thanks for looking into this.

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From: Clark, Colin A <Colin.A.Clark@maine.gov>
Sent: Wednesday, November 30, 2022 11:01 AM
To: Bub Fournier <directorplanning@cityofbelfast.org>; Moesswilde, Morten <Morten.Moesswilde@maine.gov>; Gilbert, Thomas <Thomas.Gilbert@maine.gov>; Steve Wilson <ceo@cityofbelfast.org>; Wayne Marshall <wmarshall@cityofbelfast.org>
Subject: RE: belfast SWS

I will talk with the Ag's office and get their take on it. I would advise that you talk with the town attorney to get their take on the issue as well

Colin A. Clark
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From: Bub Fournier <directorplanning@cityofbelfast.org>
Sent: Wednesday, November 30, 2022 10:42 AM
To: Clark, Colin A <Colin.A.Clark@maine.gov>; Moesswilde, Morten <Morten.Moesswilde@maine.gov>; Gilbert, Thomas <Thomas.Gilbert@maine.gov>; Bub Fournier <ceo@cityofbelfast.org>; Wayne Marshall <wmarshall@cityofbelfast.org>
Subject: Re: belfast SWS

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Thanks for responding, Colin.

Clearly the guidance from the State indicates Belfast has jurisdiction on aquaculture operations that are tied to shore. I am looking for a direct response to the following question: **Does the municipality have jurisdiction on aquaculture operations that are not connected to shore?** Kelp, mussels grown on floats, etc.? There are concerns about operations in our harbor areas which extend to the town line. If we do not have jurisdiction regarding non-attached operations, we will need to strike sections from the proposed language.

Again, we are considering adopting language, and a public hearing is scheduled soon, so a quick reply is much appreciated. Thanks again.

Sincerely,

Bub Fournier
Director, Planning and Codes Department

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From: Clark, Colin A <Colin.A.Clark@maine.gov>
Sent: Thursday, November 17, 2022 2:21 PM
To: Bub Fournier <directorplanning@cityofbelfast.org>; Moesswilde, Morten <Morten.Moesswilde@maine.gov>; Gilbert, Thomas <Thomas.Gilbert@maine.gov>; Steve Wilson <ceo@cityofbelfast.org>; Wayne Marshall <wmarshall@cityofbelfast.org>
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Thanks for reaching out on this. I am sure DMR has the ultimate authority on these but given that your ordinance is likely to have the following language and aquaculture in the land use table then the municipality does have some authority on this situation. I would believe that the towns role is more in terms of whether they are allowed in the municipality and if so which zone they would be allowed in.

I hope this helps some

2. **Applicability.** This Ordinance applies to all land areas within 250 feet, horizontal distance, of the
- normal high-water line of any great pond or river,
 - upland edge of a coastal wetland, including all areas affected by tidal action, or
 - upland edge of a freshwater wetland,

and all land areas within 75 feet, horizontal distance, of the normal high-water line of a stream.

This Ordinance also applies to any structure built on, over or abutting a dock, wharf or pier, or other structure extending or located below the normal high-water line of a water body or within a wetland.

TABLE 1. LAND USES IN THE SHORELAND ZONE

LAND USES

DISTRICT

SP RP LR LC GD

CFMA

14. Aquaculture	PB	PB	PB	yes	yes	yes
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Colin A. Clark
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From: Bub Fournier <directorplanning@cityofbelfast.org>
Sent: Thursday, November 17, 2022 1:10 PM
To: Clark, Colin A <Colin.A.Clark@maine.gov>; Moesswilde, Morten <Morten.Moesswilde@maine.gov>; Gilbert, Thomas <Thomas.Gilbert@maine.gov>; Bub Fournier <ceo@cityofbelfast.org>; Wayne Marshall

<wmarshall@cityofbelfast.org>

Subject: Re: belfast SWS

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Hi Colin,

The Belfast Planning Board is bringing a fairly major update to our SZ ordinance forward with a public hearing most likely occurring in Dec. 14th, 2022. One thing that has come up is the State guidelines on aquaculture as a regulated use for SZ ordinances. From speaking with our Harbormaster, Harbor Advisory Committee, and hearing from folks at DMR, it is their belief that DMR has sole jurisdiction of aquaculture located below High Annual Tide. Can you respond to this notion from the DEP's perspective and also give us some direction regarding how to interpret the State's guidelines for SZ in Chapter 1000 that include aquaculture uses? Thanks, and please feel free to call to discuss.

Sincerely,

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