TESTIMONY OF
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Department of Marine Resources

The Department of Marine Resources (DMR) is testifying
In Support of
LD 2065 An Act to Amend Maine's Aquaculture Leasing Laws
Before the Committee on Marine Resources
Sponsored by Representative Hepler
Date of Hearing: February 1, 2024

Senator Reny, Representative Hepler and members of the Joint Standing Committee on Marine Resources, my name is Deirdre Gilbert, Director of State Marine Policy, Department of Marine Resources, and I am testifying on behalf of the Department in support of LD 2065. This is a Department bill, and we are grateful to Representative Hepler for sponsoring this bill on our behalf.

For the last several legislative sessions, DMR has regularly had a Department bill proposing amendments to Maine's aquaculture leasing and licensing laws. As a growing sector of the blue economy and Maine's marine economy, the Department is continually striving to identify improvements in the leasing and licensing processes while preserving the opportunities for meaningful public participation in these proceedings. This bill was developed with that same intent. For clarity, I will go through the bill section by section to explain the proposed changes.

Section 1 proposes to eliminate language that created a process for facilities for the culture of finfish or suspended culture of shellfish that preceded the creation of the leasing process, to apply for leases. The deadlines established in these sections (1992 and 1994, respectively) have long passed, and can safely be repealed.

Section 2 proposes to clarify that the findings of financial and technical capabilities that are made at the time of determining an application complete are preliminary. This is intended to preserve these topics for further exploration and consideration through the hearing process. Much can change between the time an application is accepted and when a hearing is held, and the Department would like to have clear authority to consider any new information that may come forward during the creation of the record, and prior to the issuance of a decision. The clarifications to the terminology of riparian landowners and municipal officers are clarifying changes suggested by the Office of the Revisor.

Section 3 proposes to modify the notice requirements associated with the hearings for standard lease applications. Currently, notices are published in a newspaper 2 times within the 30 days preceding a public hearing. With this change, the Department is proposing that the newspaper notice appear once. The law would also specify that the Department would provide notice in any other manner determined appropriate. Although the current requirement in law has been limited to two newspaper notices, the Department has been providing notice in a number of other ways for many years, including directly through GovDelivery lists to any member of the public interested in receiving notices, and directly to Lobster Zone Councils for the area in which the lease is proposed. Hearings are also posted to the Department's publicly accessible website.

The basis for proposing this change is twofold. While newspapers may be an effective means of communicating with some stakeholders, there is little evidence that multiple newspaper notices are an effective means of increasing awareness of the proceedings with the public. Further, given the requirements of what these notices must contain for information, they are expensive ($1000-$2000). The Department does not feel that this is the best use of limited Department resources or applicant resources. The Department continues to work toward more targeted delivery systems, so that interested individuals can receive direct electronic notice of hearings that may be of interest. As a reminder, certain parties (the lessee, the riparian land owners, and the municipal officers of the municipality in which the lease is located, and any interested parties that have provided a written request for notification) always receive direct notice of the hearing.

Section 4 would remove an existing requirement in marine resources statutes for the Department of Agriculture, Conservation, and Forestry (DACF) to maintain a list of conserved lands, and for the Department to request that information from DACF prior to holding a preapplication proceeding. We are proposing making this change because we do not feel it is appropriate for marine resource statutes to create this requirement for DACF. DACF does, as a matter of their work, maintain the conserved lands GIS layer, which is utilized by DMR and other stakeholders through the development and review of proposals. In addition, DACF receives notice of complete lease applications, and hearings when applicable.

Section 5 addresses the deadline for comments and opportunity to request a hearing on a lease renewal. Currently a person may provide comments for up to 30 days from receipt of notice of the lease renewal. "Receipt of notice" is impossible to track across different parties, as the Department cannot realistically know when someone has received something. For this reason, the Department is proposing a 30-day deadline that would be specified in the notice given to the parties who are required to receive notice. Section 5 also increases the number of requests that must be received to require a hearing to be held on a lease renewal from 5 to 25. I will speak to the rationale for that proposal later in this testimony, as that change comes up several times.

Section 6 proposes to increase the length of time of the comment period on proposed lease transfers from 14 days to 30 days. In addition to providing a longer opportunity for public comment, changing this from 14 days to 30 days will provide consistency across comment periods.

Section 7 creates a new process by which a person holding an experimental lease could convert that lease to a standard lease. This proposal was developed by the Aquaculture Division based on their experience with these specific situations. As a reminder, an experimental lease is limited to 4 acres, for a period of up to 3 years. Experimental leases may be granted for either commercial or scientific research. Only experimental leases that are granted for scientific purposes may be renewed. For that reason, if the holder of an experimental lease that is held for commercial purposes wants to continue their operations on that lease beyond three years, they must apply for a standard lease. Currently that would require a mandatory public hearing for the lease application. Section 7 proposes to create an alternative process under which the holder of an experimental lease could convert to a standard lease and which would not necessarily require a public hearing. This option would only be available to applicants seeking to lease the same lease area for the same operations, a "one to one" conversion. Any changes to the lease area or the operations would necessitate the current standard lease process.

The benefit of this option is the increased efficiency in the Department's processing of lease applications in situations where a lease holder has been operating without any conflicts with the decision criteria for at least three years. It has been our experience that when someone is continuing the same footprint and activities that they have been conducting under an experimental lease, there is often no attendance at the mandatory public hearing. This process would allow the Department to forgo the hearing, unless the Department decides to hold one in its discretion, or it is requested by 25 or more persons.

Section 8 simply authorizes the Department to develop procedural rules for lease conversions, as we currently have for lease issue, transfer, review, assignment, expansion or revocation.

Section 9 makes a similar change for experimental leases as was previously described for standard leases, such that the 30-day comment period would run not from the receipt of notice, but would be specified in the notice provided to owners of riparian land or municipal officials. For individuals not receiving direct notice, the 30-day comment period would begin with the publication of the lease summary in the newspaper.

Section 10 proposes to increase the number of requests that would require a hearing on an experimental lease from 5 to 25. For clarity, this would mean that there are 3 situations where the number of requests necessary to require the Department to hold a hearing has been increased from 5 to 25. These are: an application for an experimental lease, an application for a standard lease renewal, and an application for a conversion from an experimental lease to a standard lease (which would only be available in limited circumstances).

Under current law, applications for standard leases are required to have a public hearing. For experimental leases or lease renewals, the Department provides notice of the application, and there is a 30-day comment period. During that comment period, the Department might receive substantive comments regarding the potential impact of the proposed lease on one of the decision criteria. The Department might also receive a request for a hearing without any specific concern identified.

If the Department receives comments that pertain to the hearing criteria, we would hold a hearing, regardless of the number of requests received, in order to receive that information on the record and inform the lease decision. And in fact, the Department always has the discretion to hold a hearing, regardless of whether or not we receive any specific requests to do so. Currently, if the Department receives 5 or more requests for a hearing, we are required to hold a hearing, regardless of whether the basis for requesting the hearing is expressed.

The Administrative Procedures Act does not specify a threshold for a number of requests to hold an adjudicatory hearing. For other processes, it is either specified in the topic-specific statute (as it is here) or left to the agency's discretion. The reason the Department has brought forward a proposal to raise the number which requires a hearing is our experience with how that threshold has played out in practice. We have regularly had the experience where five or more requests are received, but none of the individuals who requested the hearing attend.

It may not seem like a tremendous burden to hold a hearing that no one attends, and without a deeper understanding of what it entails, there may appear to be no cost to simply erring on the side of holding a hearing with minimal requests. However, it is important to understand that the Department invests tremendous staff time and resources in holding these hearings. Beyond the work involved in scheduling the hearing, securing the venue, providing proper notice, etc, the hearings officer assigned to the application must thoroughly prepare for the hearing, which can mean an investment of 40-200 hours of staff time depending on the complexity of the case. Further, whenever the Department invests these resources in a hearing that does not have any participation, that is a hearing opportunity that is lost to another applicant that is in the queue. For some context to better understand the significance of these opportunities, the Department is currently able to hold between 15-18 hearings in a calendar year which compares to a total of 91 applications received in 2022. As a reminder, we are required to hold hearings for standard lease applicants, so any otherwise discretionary hearings that we are holding for no reason is negatively impacting other applicants. You have heard from fledgling aquaculture businesses about the impacts of long wait times from the point of lease application to lease decision, and the current low threshold to mandate a hearing is contributing to that dynamic.

If based on what you hear today, 25 requests to mandate a hearing seems too high, I would just again remind you on the Department's discretion to hold a hearing based on even one request highlighting a concern related to the decision criteria. Our years of experience with the threshold of 5 strongly suggests it is too low; any number higher than that would be an improvement over the current situation.

Section 11 explains that if a person applies for a conversion of an experimental lease to a standard lease prior to the expiration of their experimental lease, the experimental lease remains in effect until the commissioner makes a decision on their standard lease application. If the standard lease is denied, the existing experimental lease will terminate 30 days after the commissioner's decision.

Finally, Section 12 was proposed by the Office of the Revisor for consistency with the change in Section 4, which removes the requirement that we are imposing for DACF to maintain a list of conserved lands. However, DACF will still be maintaining the list of conserved lands, so rather than repeal this section it would be appropriate to have a municipality review DACF's publicly available information prior to issuing a municipal shellfish aquaculture permit.

In closing, we know the committee is well aware of the competing pressures and desires the Department is under when it comes to aquaculture leasing. We are sure that those of you with coastal districts hear regularly from both growers and landowners that we move both too slow, and too fast, respectively. Given the demands on this program and the adjudicatory nature of the leasing process, there is not tremendous scope for change to alter this dynamic. The issues before you in this bill are proposals that the Department has weighed for many years before advancing. Again, we fundamentally believe based on our lived experience with these issues, that these are relatively modest amendments to our existing processes that would not adversely impact the opportunity for public input into these proceedings.

Thank you for your consideration, and I would be happy to answer any questions you might have.