

MARINE RESOURCES COMMITTEE
Town of Bar Harbor

Agenda
Regular Meeting
Wednesday, April 20, 2022

ITEM 1

CALL TO ORDER – 4:00 p.m.
Meeting Room, Port Authority Building

ITEM 2

APPROVAL OF MINUTES - February 2022 minutes

ITEM 3

OLD BUSINESS:

- A. Updates –
 - i. Maine Shellfish Restoration and Resilience Grant

ITEM 4

NEW BUSINESS

- A. Follow up on work for 2022. Possible projects include Year 4 of the Recruitment and Predation Study, Work in Western Bay, Printed and online information.
- B. Work with other shellfish committees
- C. Contribution to Comprehensive Plan

ITEM 5

PUBLIC COMMENT PERIOD & FUTURE AGENDA ITEMS

ITEM 6

ADJOURNMENT

IN ORDER TO INSURE YOUR COMPLETE PARTICIPATION IN THIS MEETING, WE WOULD APPRECIATE YOU INFORMING US OF ANY SPECIAL REQUIREMENTS YOU MIGHT HAVE DUE TO A DISABILITY. PLEASE CALL 288-4098.

MARINE RESOURCES COMMITTEE

Town of Bar Harbor

Draft minutes from special meeting

March 23, 2022

The meeting was called to order at 4:02 pm.

Attendees; Chris Petersen-Chair, Joanna Fogg, John Avila, Matt Gerald, Scott Swann, Natalie Springuel
Ex-officio: Chris Wharff, Bar Harbor Harbormaster
Guests: David Dunton

Approval of minutes from Feb 2022 meeting: Approved 6:0

OLD BUSINESS

A. April 8 Frenchman Bay shellfish meeting. Chris P. has helped to organize a meeting in upper Frenchman Bay on April 8th mid-day that will focus on where different towns, agencies, and research groups are doing mudflat research in Frenchman Bay. We hope to add several recruitment box sites around the bay to get a more holistic picture of recruitment and other research in the bay.

B. Maine shellfish restoration and resilience grant. We spent time discussing how best to get information from harvesters during our surveys. The focus is on their activity levels (how often they are out), their history with the fishery, and changes they have observed. We also would like to know where else they harvest. We are also interested in how well harvesters understand current regulations for different species, and would like to figure out how to best educate harvesters. One suggestion was giving harvesters a survey when they get licenses, in particular if this is done electronically. Finally, we want to make sure to be respectful of harvesters time on the flats, either waiting for them to finish their work or setting up times to talk later if that works best for them.

We discussed the microbial source tracking in the grant, both for Northwest Cove and Pirate's Cove. Once we have interns, we will have individuals from DMR train people on the best way to take water samples. John A. volunteered to be trained as well.

We are still advertising for interns, we have not had a lot of interest so far, but hope to get several applications. Housing will be a problem. One committee member graciously suggested that they might be able to create some housing opportunities for 1-2 interns. Chris P. mentioned that he may be getting a grant that could help pay for additional internship help, and Schoodic Institute might also be hiring some mudflat interns that could do some work. Chris W. also said that some of his parking monitoring staff might be able to be moved around to help with the work as well.

C. Mount Desert – Otter Creek Cove study. Chris P. mentioned that the town of Mount Desert has initiated a community-driven project on the health of the Inner Harbor of Otter Creek Cove (the area north of the park road). This work is being done as a project through Thriving Earth Exchange, and Acadia National Park is collaborating as a partner and both Chris P. and Hannah Webber of Schoodic Institute are consulting scientists on the project. The town line runs down the middle of the cove, so this cove is relevant for our town as well. They will have their first listening session sometime in the second week of April at the Otter Creek Aid Society Building. Several members expressed interest in attending. If work ends up being done this year in the Cove, we may be able to share interns between this project and our work in Western Bay.

NEW BUSINESS

A. Follow up on work for 2022. We will be continuing with year 4 of our study on recruitment in Bar Harbor with small recruitment boxes at 5 sites. Our plan is to have five boxes at each site for 2022. We may also be adding some other additional sites depending on our discussions with other towns around the bay in April. These boxes will go out in late May and be retrieved in late October or early November.

B. Contribution to Comprehensive Plan. We understand that the comprehensive plan will be a long process, and the committee is interested in understanding how we can best give input into the new plan. Chris P. volunteered to reach out to the leaders of the process and ask for what information existed in the old plan and how we can best contribute moving forward. We are very interested in contributing to ideas in several areas, including water quality and working waterfront. As part of the working waterfront discussion, Chris W. gave an update on the progress on planning around the ferry terminal- surveys are being done and there have not been any decisions on how to best use the terminal property, although all indications are that it will be a multi-use facility.

PUBLIC COMMENT PERIOD & FUTURE AGENDA ITEMS

Guest David Dunton had several issues that he addressed to the committee. The first two were concerns about potentially illegal shellfish harvesting, in one case involving the area around Indian and Crystal Points, and a second concern that there were individuals with town recreational licenses but commercial licenses for other municipalities that were selling their recreational catch from Bar Harbor commercially. Chris W. suggested that they meet in his office so that he could register his complaints directly with the shellfish warden.

David was also concerned about the mention of consolidating clam committees on MDI that was brought up as a future possibility at a recent meeting. David expressed his strong concern for any consolidation.

David also expressed his belief that quahogs were abundant around many shores adjacent to but outside of Bar Harbor, so that if we limited quahog catch in the town individuals would still be able to harvest locally. He suggested that a universal maximum

of 1 bushel per day for quahog commercial harvesters, similar to the one bushel limit that existed in the conservation area at Hadley Point for soft-shelled clams, could be beneficial in conserving the resource. He believed a similar limit should exist for oysters. Chris P. acknowledged these as ideas that the committee will be considering if the resource is shown to be in decline, and that any strategy moving forward would be strongly informed by the interviews we conduct this year.

David also believes that the mudflats at Hadley Point West should be surveyed, and potentially closed due to low numbers of clams. The committee believed that we would try to do a survey there later this spring with the help of David, committee members, and the public.

Meeting adjourned at 5.20 pm

1.5 conservation hours were awarded for this meeting.

Respectfully submitted by Joanna Fogg.

Clark Cove Survey Questions and Script

Background notes

- Goals of this project:
 - Get a more clear understand of the use of Clark Cove by residents, non-residents, recreational and commercial shellfish harvesters, regarding the harvesting of shellfish.
 - Provide some information / education to the people we talk to.
- We should have a brochure ready to hand out that covers at least regs re size limits, how to get harvesting licenses, red tide info, public health concerns... (we ask their knowledge level about these topics so it is an education opp)
- Below are survey questions for conducting opportunistic interviews on the shore. This is different than an oral history interview.
- Oral History Interviews would be good especially with David Dutton's Dad, David Dutton, Ben Baxter and possibly others, but that is a separate process.

Hi,

My name is _____ and I am doing an internship for the Town of Bar Harbor (Marine Resources Committee). The town is interested in getting a sense of how the resources at Clark Cove are used by residents and others. Would it be ok if I asked you a few questions for a survey I am helping conduct?

[If they say no, ask if they would be willing to tell you why not. If it feels safe, go ahead and explain what will be done with their information or attempt to alleviate their concerns. If they still turn you down, then thank them for their time and wish them a good day. Write down that you were declined]

Questions

1. What are you harvesting?
 - a. Are you here to harvest Quahogs? Oysters? Razor clams? Hen clams? Mussels?
 - b. Are you a commercial or recreational harvester?
2. Have you dug Clark Cove previously?
 - a. If yes, Going back about how many years?
 - b. For what species?
3. Have you noticed any changes to the harvest?
 - a. For example, would you say you spend more/less time to collect a peck now than previous years? [A peck is about 25lbs]
 - i. If yes, how much difference in percent of your average previous efforts
 - b. Is it easier or different to get one species now than previous years?
 - i. If yes, what species and how has it changed?
4. Which months do you usually dig here?
 - a. How many times a year would you say you dig in Clark Cove?
 - b. How many times a year would you say you dig elsewhere?
5. Size of harvest...
 - a. What is minimum quahog size you harvest?

- b. What is minimum razor clam size you harvest?
 - c. What is minimum oyster size you harvest?
 - d. Are their maximum sizes you harvest?
- 6. Are you a resident of MDI?
 - a. Year round or summer?
 - b. If yes, which town?
 - c. If no, do you live in Maine?
 - d. How important is Clark Cove to you as a place to harvest shellfish, on a scale of 1-5 (1 is not so important, 3 is neutral, and 5 is very important)
 - i. As part of your vacation experience?
 - ii. As a resident recreational harvesters?
 - iii. As a commercial harvester?
- 7. If required, would you purchase a **\$??** recreational license at the BH Municipal Building [prices differ depending on source and if for year or day, so we need to get specific about what we want to know here]
 - a. If given the opportunity, would you like to be able to purchase your recreational license online?
- 8. Shellfish and public health...
 - a. Did you check to see if there were closures due to algae blooms before coming here?
 - b. Do you chill your shellfish in transport if you are eating them raw?

MargaretMills <margaretb@fbenvironmental.com

To: Chris Petersen

Apr 14, 2022, 9:47 AM

Good Morning Chris,

Thank you for reaching out regarding Marine Resources for the BH Comprehensive Plan! My name is Maggie and I work at an environmental firm in Portland. I wanted to circle back to this offer and touch base with you about your offer to provide some assistance with our compilation of this section.

To date, we have included data on existing conditions for the following marine resources:

1. Maine Healthy Beaches data on beach safety thresholds
2. Landings data for Lobster, Elver, Blue Sea Mussel, Softshell Clam, Sea Scallop, Bloodworms, Sandworms, and Atlantic Crab
3. NSSP Classifications for Softshell Clam
4. Cruise Ship Water Quality Monitoring
5. Aquaculture - *Do you have total value by species for aquaculture in Bar Harbor?*
6. Some limited data on Eelgrass presence from MDIBL
7. Significant wildlife habitat and rare/threatened/endangered species locations

At this point in time, we are focused on 'existing conditions' for marine resources - so identifying what the current status is of these resources, trends and changes observed, and existing threats to them. Once we work through this portion of Plan development, we will work with the committee and community on strategies and future planning. In this context, I would love to hear what the current priorities are for the Marine Resource committee as well as what threats and changes/trends you have seen for marine resources in the Town. And if I have missed anything significant that is important to the Town, please let me know!

You are welcome to write out your thoughts via email or we can have a zoom conversation at some point together.

Thanks again!

Maggie

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Maggie Mills

Hydrologist/Project Manager

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cpetersen response 4.14.22

Maggie,
I'll bring this up and share this email with the committee for our meeting next Wednesday. My guess is that you won't be able to get the aquaculture information because with the small number of aquaculturists it will be considered proprietary information, but I'll check on that. Thanks for the update,
Chris

March 24th email from me to the comp plan folks:

Michele (with a cc to Kyle and Misha),

As the comprehensive plan work begins to take shape, the marine resource committee is happy to play a role in moving the work forward, by reviewing what was in the past plan, giving feedback on ideas, or giving some of our own priorities to the group. I don't know the best way for us to plug into this process moving forward. You three seem like very likely suspects to be able to answer that question, or at least to give some suggestions.

and to Kyle and Misha - thanks for taking on this role, it seems like a very large commitment and I'm happy to see two really good people in this position.

Thanks for any guidance/advice any of you might have,

Chris

Chair, BHMRC

MEMORANDUM

January 12, 2022

To: Protect Maine's Fishing Heritage Foundation
From: Agnieszka A. Dixon and David M. Kallin
Drummond Woodsum
Re: Model Aquaculture Development Moratorium

I. MODEL AQUACULTURE DEVELOPMENT MORATORIUM

At your request, we have prepared the enclosed Model Aquaculture Development Moratorium Ordinance (the "Moratorium"). Once adopted by a municipality, the ordinance will establish a 180-day moratorium on aquaculture development within the geographic boundaries of that municipality. Under the Moratorium, aquaculture development is defined as:

. . . the construction or operation of a commercial facility on, in, or over Maine's coastal waters (including submerged lands and intertidal lands) for the culture of finfish in nets, pens, or other enclosures or for the suspended culture of any other marine organism, that (i) is located in whole or in part on, in, or over the territorial coastal waters of the Town and (ii) exclusively occupies an aggregate surface area of coastal waters greater than five (5) acres. "Industrial-Scale Aquaculture Development" includes any onshore development and water access ways associated therewith or related thereto.

Thus, once enacted by a municipality, the Moratorium would temporarily defer all large-scale offshore commercial finfish aquaculture development within a municipality's geographic boundaries.

II. MUNICIPALITIES HAVE LEGAL AUTHORITY TO ADOPT THE MORATORIUM

You have asked whether a municipality has the legal authority to adopt the Moratorium. For the reasons explained next, in our view, a municipality does have the legal authority to adopt the Moratorium pursuant to express statutory authority to adopt moratoria and its broad municipal home rule powers.

A. A Moratorium is a Type of Local Ordinance That Is Expressly Allowed Under Maine Law.

A moratorium is a type of ordinance or regulation approved by a municipal legislative body (the voters with a town meeting form of government, or the city/town council in a municipality with a council form of government) that "temporarily defers" development by withholding local permits, authorizations, or approvals that are necessary for that development.¹

Under state law, a municipality is allowed to adopt a moratorium on the processing or issuance of local development permits and licenses so long as the municipality determines that (1) the moratorium is necessary to prevent a shortage or overburden of public facilities, and/or (2) the municipality's existing

¹ 30-A M.R.S. § 4301(11).

regulations are inadequate to prevent serious public harm from the development.² Accordingly, if a municipality presently has no ordinances or regulations affecting aquaculture development, it is likely that the municipality will be able to make one or both of these determinations. The enclosed Moratorium contains findings relevant to these two determinations, and any municipality contemplating adopting it should review and, as appropriate, modify these findings to reflect the specific circumstances affecting that municipality.

B. Municipalities Have Broad Power To Enact Local Ordinances (Including Moratoria), and Such Ordinances Are Presumed Valid.

Since the adoption of municipal “home rule” in 1969, Maine municipalities have had the power to enact ordinances—including moratoria—on most subjects without the necessity of state enabling laws. The Legislature intended home rule to be a broad grant of local authority: the home rule statute provides that the ordinance power granted to municipalities, being necessary for the welfare of the municipalities and their inhabitants, is to be liberally construed to effect its purpose, and there is a rebuttable presumption that an ordinance is a valid exercise of a municipality’s home rule authority. Thus, both the Maine Constitution and state law provide a strong basis for the adoption of ordinances by municipalities. As a result, courts favor upholding local ordinances if they are subject to legal attack, and the burden rests on the person attacking an ordinance to prove that it violates home rule (and not on the municipality to prove that it does not).

This general grant of ordinance power is circumscribed in three situations: (1) when state law expressly prohibits local regulation; (2) when state law provides for the Legislature and municipalities to share authority over a subject matter; or (3) when state law is silent with respect to local regulation and a court determines that the Legislature intended to prohibit local regulation because such local action would frustrate the purpose of a state law. Together, these limitations are known as the doctrine of preemption.³

The first category (express preemption) and the second category (shared authority) are usually obvious because the prohibitions to locally regulate a subject area or the division of regulatory powers are expressly written into state law.⁴ With respect to the third category (implicit preemption), the analysis is more complex. Although determining whether an ordinance is implicitly preempted by state law is nuanced, the lessons that can be drawn from the dozen or so Maine court cases on point can be summed up as follows: First, as noted above, the general rule is that a local ordinance is presumed valid. Second, it is not enough for a court to find that there is a conflict or an inconsistency between a state law and a local ordinance; rather, a court must find that the Legislature has enacted a comprehensive scheme for regulating the same subject matter and the local regulation is so inconsistent with the state law that it would frustrate the purpose or actual operation of the state law.⁵

² 30-A M.R.S. § 4356(1).

³ There are other bases for challenging the validity of a municipal ordinance, such as its constitutionality, but there is likewise a presumption favoring the constitutional validity of ordinances and courts are therefore reluctant to invalidate them on constitutional grounds. *See Britton v. Town of York*, 673 A.2d 1322, 1323 (Me. 1996); *see generally* 5 McQuillin Mun. Corp. § 19:6 (3d ed.) (constitutionality of ordinances; constitutionality favored). Indeed, successful challenges to moratoria on constitutional grounds are rare. This is because it is well-established that any party challenging an ordinance must prove “the *complete absence* of any state of facts that would support the need for the enactment.” *Tisei v. Town of Ogunquit*, 491 A.2d 564, 569 (Me. 1985) (citing *Gabriel v. Town of Old Orchard Beach*, 390 A.2d 1065, 1071 (Me. 1978) and *State v. Rush*, 324 A.2d 748, 753 (Me. 1974)) (emphasis added).

⁴ *See, e.g.*, 12 M.R.S. § 13201 (establishing express limits on local regulation of matters within the jurisdiction of the Maine Department of Inland Fisheries and Wildlife by stating that a municipality may not enact any ordinance regulating, among other things, hunting, trapping, or fishing or the operation of ATVs, watercraft, or snowmobiles); 22 M.R.S. § 2429-D (stating that a municipality may regulate certain medical marijuana operations and listing with specificity the subject areas that municipalities may not regulate).

⁵ *See Portland Pipe Line Corp. v. City of S. Portland*, 2020 ME 125, 240 A.3d 364; *Dubois Livestock, Inc. v. Town of Arundel*, 2014 ME 122, 103 A.3d 556; *State of Maine v. Brown*, 2014 ME 79, 95 A.3d 82; *Smith v. Town of Pittston*, 2003 ME 46, 820 A.2d 1200; *Sawyer Env'tl. Recovery Facilities v. Town of Hampden*, 2000 ME 179, 760 A.2d 257;

C. The Maine Legislature Left Room for Municipalities to Regulate Aquaculture Development.

There is no state law that expressly prohibits municipalities from regulating aquaculture development; thus, local ordinances regulating aquaculture development are not expressly preempted. State law does, however, confer leasing authority over such projects to a state agency—namely, the Department of Marine Resources (DMR). As explained next, in reviewing the relevant statutes and case law, it appears that the Legislature has left room for municipalities to enact local ordinances to regulate aquaculture development.

The state law governing DMR’s leasing authority (referred to here as Chapter 605)⁶ grants the Commissioner of DMR the exclusive authority to issue aquaculture leases “in, on and under the coastal waters, including the public lands beneath those waters and portions of the intertidal zone.”⁷ Just because a state agency has leasing authority over state-owned lands or waters, however, does not mean that those lands and waters cannot be subject to local regulation. Next, we discuss two cases in point—one concerning “functionally water-dependent uses” in the shoreland zone, and the other concerning the transportation and loading of crude oil onto marine vessels in Maine’s coastal waters.

1. Functionally Water-Dependent Uses

Functionally water-dependent uses are defined in state law to include uses that must be located on submerged lands or must have direct access to coastal waters, such as finfish and shellfish processing, fish-related storage and retail and wholesale marketing facilities, shipyards, boat building facilities, marinas, and industrial uses dependent on water-borne transportation or requiring large volumes of cooling or processing water that cannot be located or operated at an inland site.⁸ Under Maine’s mandatory shoreland zoning law, functionally water-dependent uses must be regulated by every Maine municipality having coastal waters within its territorial boundaries.⁹ Typically, a municipality will establish a “Maritime Activities District” within the shoreland zone that identifies which functionally water-dependent uses are allowed within its territory and sets standards that such uses must meet as part of a local permitting process.

It is not unusual for a municipality to impose additional local controls over these uses pursuant to its home rule authority by, for example, also requiring a functionally water-dependent use to secure local planning board site plan approval. Likewise, municipalities have clear authority to adopt environmental standards applicable to these and other uses. Indeed, under several of Maine’s environmental protection laws—including the Natural Resources Protection Act (“NRPA”) and Maine’s air quality law—the authority to

Perkins v. Town of Ogunquit, 1998 ME 42, 709 A.2d 106; *International Paper Co. v. Town of Jay*, 665 A.2d 998 (Me. 1995); *School Committee of Town of York v. Town of York*, 626 A.2d 935, 939 (Me. 1993); *Central Maine Power v. Town of Lebanon*, 5711 A.2d 1189 (Me. 1990); *Midcoast Disposal, Inc. v. Town of Union*, 537 A.2d 1149 (Me. 1988); *Tisei v. Town of Ogunquit*, 491 A.2d 564 (Me. 1985); *Ullis v. Town of Boothbay Harbor*, 452 A.2d 153 (Me. 1983); *Schwanda v. Bonney*, 418 A.2d 163 (Me. 1980); *Begin v. Town of Sabattus*, 409 A.2d 1269 (Me. 1979).

⁶ 12 M.R.S. ch. 605, sub-ch. 2 §§ 6071-6088 (hereafter, “Chapter 605”).

⁷ 12 M.R.S. § 6072(1).

⁸ See 38 M.R.S. § 436-A (defining functionally water-dependent uses for purposes of the mandatory shoreland zoning law). Although the mandatory shoreland zoning law applies only to shoreland areas (defined, *inter alia*, to include areas within 250 feet of the normal high-water line of any great pond, river or saltwater body), municipalities may extend the geographic scope of their shoreland zoning framework beyond shoreland areas pursuant to their home rule powers.

⁹ See 38 M.R.S. § 438-A (requiring municipalities to adopt zoning and land use control ordinances with respect to all shoreland areas, consistent with the Maine Department of Environmental Protection (MDEP) minimum shoreland zoning guidelines). In its guidelines, MDEP notes that municipalities may apply “many different techniques . . . to tailor an ordinance to reflect local goals and resources” with respect to regulating functionally water-dependent uses as part of its waterfront management strategy. See 06-096 C.M.R. ch. 1000 § 9 (note). The MDEP guidelines advise that municipalities may adopt ordinances that “may be much more specific [than the MDEP model guidelines] about what types of functionally water-dependent uses should be permitted,” and expressly allow municipalities to “make use of more than one type of waterfront district, [] include standards for assessing the impact of proposed development on water dependent uses, and [] include specific provisions to encourage certain types of public benefits.” *Id.*

regulate activities in order to protect natural resources and public health is expressly shared between the Maine Department of Environmental Protection (MDEP) and municipalities.¹⁰

Importantly, if a permanent structure associated with a functionally water-dependent use is located on submerged or intertidal lands, a lease from the Bureau of Parks and Land (BPL) must be secured. Much like the DMR leasing program, the state law governing the BPL submerged lands leasing program (referred to here as Chapter 220)¹¹ authorizes the Director of BPL to lease submerged and intertidal lands owned by the State for various functionally water-dependent uses, including offshore projects such as tanker ports, ship berthing platforms, and pipelines.¹² As with Chapter 605, Chapter 220 does not expressly prohibit municipalities from regulating any of the uses that are subject to the BPL leasing scheme. Indeed, any such interpretation would likely run afoul of the mandatory shoreland zoning law which, as discussed, requires municipalities to regulate functionally water-dependent uses in the shoreland zone.

Notably, Chapter 220 carves out an exception to BPL’s leasing program for any aquaculture development project that secures a lease from the Commissioner of DMR under Chapter 605.¹³ Thus, it appears that the Legislature intended to assign to DMR the responsibility of issuing a subset of leases—namely, aquaculture development leases—that would otherwise have been within BPL’s jurisdiction under Chapter 220. This division of labor among sister agencies makes logical sense, and it is a strong indicator that the Legislature intended to create a statutory framework where the state remains exclusively responsible for *leasing* state-owned lands for various water-based enterprises. Nothing about this statutory leasing authority, however, facially prevents municipalities from regulating those same enterprises under their home rule powers. As discussed above, municipalities may likely do so as long the local regulations do not frustrate the purpose or actual operation of these licensing statutes.

2. *Oil Transport*

Under the Maine Coastal Conveyance Act (“CCA”), the MDEP is authorized to issue licenses for the operation of oil terminal facilities located in state waters, including the operation of marine tank vessels used to transport oil to such facilities.¹⁴ In July 2014, the City of South Portland adopted a local ordinance under its home rule authority, known as the Clear Skies Ordinance, which effectively banned the bulk loading of crude oil onto any marine tank vessel in the City’s harbor.¹⁵ Soon thereafter, the Portland Pipe Line Corporation, which had been unloading crude oil from vessels in the City’s harbor for years pursuant

¹⁰ NRPA expressly provides that “[n]othing in [NRPA] may be understood or interpreted to limit the home rule authority of a municipality to protect the natural resources of the municipality through enactment of standards that are more stringent than those found in [NRPA].” 38 M.R.S. § 480-F(3). Similarly, the air quality law provides that “[n]othing in this chapter shall be construed as a preemption of the field of air pollution study and control on the part of the State” and further provides that municipalities may “adopt and enforce air pollution control and abatement ordinances, to the extent that these ordinances are not less stringent than this chapter or than any standard, order or other action promulgated pursuant to this chapter.” 38 M.R.S. § 597; *see also International Paper Co. v Town of Jay*, 665 A.2d 998, 1002 (holding that the Town of Jay Environmental Control and Improvement Ordinance, which prohibits emission of air pollutants without a permit issued by the Town of Jay Planning Board, is not preempted by state law because the Legislature clearly expressed its intention not to occupy the field of air pollution control and because the ordinance compels a more stringent level of emissions compliance than state standards and therefore advances the same purposes expressed by the state law).

¹¹ *See* 12 M.R.S. §§ 1862(2) (submerged lands leasing program).

¹² *Id.*

¹³ *See* 12 M.R.S. § 1862(10).

¹⁴ 38 M.R.S. §§ 545. The MDEP’s jurisdiction under the CCA extends to 12 miles from the coastline. *Id.* § 544(1).

¹⁵ Specifically, the Clear Skies Ordinance is a compilation of amendments to the City’s Zoning Ordinance, which prohibit the bulk loading of crude oil onto any marine tank vessel. *See* Zoning Ordinance of the City of South Portland, Maine, §§ 27-786, 27-922, 27-930.

to an MDEP oil terminal facility license, filed suit against the City asserting that the Clear Skies Ordinance is preempted by the CCA.¹⁶ The Maine Law Court, however, concluded that it is not.¹⁷

Not unlike NRPA and the air quality law, under the CCA, the authority to deal with the hazards and threats posed by oil transfers in Maine’s coastal waters is expressly shared between the MDEP and municipalities. Specifically, the CCA provides that “[n]othing in [the CCA] may be construed to deny any municipality . . . from exercising police powers” so long as the municipal regulation is not in “direct conflict” with the CCA or any MDEP rule or order adopted under authority of the CCA.¹⁸ Accordingly, the Court determined that the Legislature expressly recognized municipal authority to exercise local police power and in so doing made clear that it did not intend to “occupy the field” of oil pollution control for the purposes set out in the CCA, which include preserving the “seacoast of the State as a source of public and private recreation . . . and as a source of public use and private commerce in fishing, lobstering and gathering other marine life used and useful in food production and other commercial activities.”¹⁹

The Court also determined that nothing in the Clear Skies Ordinance is in “direct conflict” with the MDEP’s exercise of its licensing powers under to the CCA because the Clear Skies Ordinance “does not purport to require the MDEP to do anything that the CCA says it may not do, nor does it bar the MDEP from doing what the CCA says that it may do.”²⁰ In short, the Court reasoned that it is possible to comply with both the Clear Skies Ordinance and the MDEP oil terminal facility license because the Ordinance simply bars an activity that the MDEP license *allows*, but does not *require*—namely, loading crude oil from storage tanks onto marine tank vessels in the City’s harbor.²¹

The Portland Pipe Line case illustrates that a municipal ordinance may regulate the same subject matter as a state law without being preempted by implication.²² It also illustrates that, even when a municipal ordinance bans an activity that is authorized by a state license issued pursuant to a statutory licensing framework, the ordinance is not likely to be implicitly preempted because, as the Law Court stated, a “license” is a “permission to act”— and, consequently, the activities permitted thereunder do not have to occur.²³ Thus, a municipal ordinance that bans an activity for which a state license may be granted does not invariably “frustrate the purposes of a state law or prevent the efficient accomplishment of a defined state purpose.”²⁴

Much like the MDEP licensing framework for oil terminal facilities located in state waters, the licensing framework for aquaculture development is permissive: nothing about a DMR aquaculture license *requires* an operator to act on that license. Accordingly, a municipal ordinance that regulates or bans aquaculture development is not likely to frustrate the purpose or actual operation of Chapter 605, the DMR aquaculture licensing law.

¹⁶ *Portland Pipe Line Corp. v. City of South Portland*, 947 F.3d 11, 14 (1st Cir. 2020). Specifically, the company had been unloading crude oil from vessels in South Portland’s harbor, stored the oil in above-ground tanks, and then sent the oil via a pipeline to Canada—all pursuant to an MDEP oil terminal facility license originally issued in 1979. *Id.* at 13. In 2010, the company sought and secured a renewal license from the MDEP, which authorized it to reverse the flow of the crude oil and thereby transport the oil from Canada to the United States via the South Portland terminal. *Id.* at 13-14. On appeal, the First Circuit Court of Appeals certified three questions to the Law Court concerning state law preemption.

¹⁷ *Portland Pipe Line Corp. v. City of South Portland*, 2020 ME 125, ¶ 2; 240 A.3d 364.

¹⁸ *Id.* at 11 (quoting 38 M.R.S. § 556).

¹⁹ *Id.* ¶ 26; 38 M.R.S. § 541 (enumerating the purposes of the CCA).

²⁰ *Id.* ¶ 14.

²¹ *Id.* ¶ 17.

²² *Id.* ¶¶ 24-26.

²³ *Id.* ¶¶ 17-19.

²⁴ *Id.* ¶¶ 23, 25 (quoting *Dubois Livestock, Inc.* 2014 ME 122, ¶ 13, 103 A.3d 556).

III. CONCLUSION

In sum, the Legislature has enacted a comprehensive scheme for leasing state-owned submerged lands, but it appears to have left room within that scheme for municipalities to regulate aquaculture development located on or above those lands. For all of the reasons discussed above, in our view, Maine municipalities with coastal territory have the legal authority to adopt the enclosed Moratorium for the purpose of evaluating and, as appropriate, enacting permanent ordinances to regulate industrial-scale aquaculture development.

We trust this memorandum is responsive to your request. If you have any further questions, please do not hesitate to contact us.

TOWN OF _____
MORATORIUM ORDINANCE REGARDING
INDUSTRIAL-SCALE AQUACULTURE DEVELOPMENT

Section 1. Title; Authority.

This ordinance, duly enacted by the legislative body of the Town of _____ (the “Town”) and entitled the “Moratorium Ordinance Regarding Industrial-Scale Aquaculture Development,” is referenced herein as the “Moratorium.” This Moratorium is adopted pursuant to the Town’s home rule authority under Article VIII, Part Second, of the Maine Constitution and 30-A M.R.S. § 3001; 30-A M.R.S. § 4356; and any other enabling statutes.

Section 2. Necessity.

The Town makes the following findings:

- A. Developers have expressed interest in and are pursuing the development of an Industrial-Scale Aquaculture Development project within Maine’s coastal waters, which is on a scale larger than previously achieved in North America.
- B. The aquaculture leasing statutes and rules administered by the Maine Department of Marine Resources, which were established by the Maine Legislature in 1977 pursuant to Public Law P.L. 1977 c. 661, § 5, at a time when large-scale aquaculture operations were not contemplated, do not adequately address the risks to municipalities presented by the siting, construction, and operation of Industrial-Scale Aquaculture Development.
- C. The Town’s comprehensive plan, ordinances, and regulations are inadequate to prevent serious public harm that could result from the siting, installation, and operation of Industrial-Scale Aquaculture Development within the Town.
- D. In particular, without appropriate local regulation, the siting, construction, and operation of Industrial-Scale Aquaculture Development within the Town could result in substantial adverse impacts on the Town, including, but not limited to:
 - (1) A shortage or overburdening of public facilities such as roads, waste management systems, and water access sites;
 - (2) Adverse environmental and scenic effects;
 - (3) The lack of regulatory or financial assurances that such development will be properly sited, constructed, operated, and decommissioned;
 - (4) Incompatibility with existing and permitted functionally water-based uses;
 - (5) Loss of public and private access to Maine’s coastal waters, including to the intertidal zone; and
 - (6) The displacement of traditional public and commercial uses from Maine’s coastal waters, including lobstering and other heritage fisheries, water-based recreation, and other public trust uses.

- E. As a result, the siting, construction, and operation of Industrial-Scale Aquaculture Development within the Town has the potential to pose a serious threat to the health, safety, and welfare of the Town and its residents and visitors.
- F. The Town needs time to evaluate the need for and to prepare reasonable ordinances and regulations governing the siting, construction, operation, and decommissioning of Industrial-Scale Aquaculture Development within the Town and to secure voter approval for such ordinances and regulations.
- G. The Town, with assistance from its municipal reviewing authorities and other departments, intends to study its plans, ordinances, and regulations to determine the regulatory implications of siting, constructing, operating, and decommissioning Industrial-Scale Aquaculture Development within the Town, and to consider what additional or different ordinance provisions and regulations, if any, might be appropriate for such development.
- H. It is anticipated that such a study, review, and preparation of plans, ordinances, and regulations will take not more than 180 days from the Date of Applicability of this Moratorium.
- I. In the judgment of the legislative body of the Town, the foregoing findings constitute an emergency within the meaning of 30-A M.R.S. § 4356 requiring immediate legislative action.

Section 3. Moratorium.

The Town does hereby declare a moratorium on (a) the siting, installation, construction, operation and expansion of Industrial-Scale Aquaculture Development; (b) the acceptance or processing of any application, proposal, or request pending on or after the Date of Applicability for Industrial-Scale Aquaculture Development; and (c) the issuance of any development permit or other form of regulatory approval or any other action or decision by a board, officer, official, employee, agent, or department of the Town related to Industrial-Scale Aquaculture Development; provided, however, that this moratorium shall not apply to Industrial-Scale Aquaculture Development in existence as of the Date of Applicability unless or until such Development requires a new or renewed lease pursuant to 12 M.R.S. § 6072.

Section 4. Definition.

For purposes of this Moratorium, “Industrial-Scale Aquaculture Development” means the construction or operation of a commercial facility on, in, or over Maine’s coastal waters (including submerged lands and intertidal lands) for the culture of finfish in nets, pens, or other enclosures or for the suspended culture of any other marine organism, that (i) is located in whole or in part on, in, or over the territorial coastal waters of the Town and (ii) exclusively occupies an aggregate surface area of coastal waters greater than five (5) acres. “Industrial-Scale Aquaculture Development” includes any onshore development and water access ways associated therewith or related thereto.

Section 5. Effective Date.

This Moratorium shall become effective immediately upon its adoption by the legislative body of the Town (the “Effective Date”) and shall remain in full force and effect for a period of up to but no longer than 180 days from the Date of Applicability, unless extended, repealed, or modified pursuant to applicable law or until a new ordinance regulating Industrial-Scale Aquaculture Development or amendments to one or more existing Town ordinances or regulations addressing such development are adopted by the Town, whichever shall first occur.

Section 6. Date of Applicability.

Notwithstanding 1 M.R.S. § 302 or any other law to the contrary, and regardless of the Effective Date, this Moratorium shall govern and apply to all proceedings and applications for Industrial-Scale Aquaculture Development that were or are pending before any municipal reviewing authority on or any time after January 18, 2022 (the “Date of Applicability”) and, to the extent allowed by 30-A M.R.S. § 3007(6), shall nullify the issuance of any final approval of a municipal reviewing authority made on or at any time after the Date of Applicability.

Section 7. Conflicts; Savings Clause.

Any provisions of the Town’s ordinances that are inconsistent with or conflict with the provisions of this Moratorium are hereby repealed to the extent applicable for the duration of this moratorium. If any section or provision of this Moratorium is declared by a court of competent jurisdiction to be invalid, such a declaration shall not invalidate any other section or provision.

Section 8. Violations.

If any Industrial-Scale Aquaculture Development is sited, constructed, or operating in violation of this Moratorium, each day of any continuing violation shall constitute a separate violation of this Moratorium and the Town shall be entitled to all rights available to it pursuant to 30-A M.R.S. § 4452, including, but not limited to, fines and penalties, injunctive relief, and its reasonable attorneys’ fees and costs in prosecuting any such violations.

EMERGENCY DECLARATION

The Town declares the existence of an emergency because the Town’s comprehensive plan, ordinances, and other regulations are insufficient to prevent serious public harm that could be caused by the siting, construction, or operation of Industrial-Scale Aquaculture Development, as defined in this Moratorium, and because the Town needs time to review the potential adverse impacts that may be caused by Industrial-Scale Aquaculture Development and consider amendments to one or more of its ordinances or regulations to mitigate any such impacts on the Town and its residents and visitors. This Moratorium shall be effective immediately upon enactment and shall remain in effect for 180 days from the Date of Applicability, unless it is extended, repealed, or modified in accordance with applicable law.

Given under our hands this ___ day of _____, 2022.

A Majority of the Municipal Officers of the Town of _____, Maine.

Attest: A true copy of an ordinance entitled, “Moratorium Ordinance Regarding Industrial-Scale Aquaculture Development,” as certified to me by the municipal officers of the Town of _____, Maine, on the ___ day of _____, 2022.

Town Clerk
Town of _____