

# MODEL PROVISIONS FOR CONSIDERATION BY MAINE MUNICIPALITIES

September 19, 2022

## TOWN OF \_\_\_\_\_ INDUSTRIAL-SCALE COASTAL WATERS AQUACULTURE ORDINANCE

### I. GENERAL PROVISIONS

- A. Authority.** This Industrial-Scale Coastal Waters Aquaculture Ordinance (“this Ordinance”) has been duly adopted and enacted by the legislative body of the Town of \_\_\_\_\_ (the “Town”) pursuant to the Maine Constitution, Article VIII, Part Second; 30-A M.R.S. §§ 2101 *et seq.*, 3001-3006; reference is also made to 38 M.R.S. §§ 2, 7, 439-A(1), (2), 480-F(3), 481, 1801, and any other enabling statutes.
- B. Purpose.** The purpose of this Ordinance is to regulate Industrial-Scale Coastal Waters Aquaculture Facilities, including (1) any structures associated with such facilities that are located below the normal high-water line or over or within Coastal Waters or Coastal Wetlands, and (2) the construction, operation, and expansion of such facilities, in order to: prevent a shortage or overburdening of public facilities and water access sites within the Town; protect existing and permitted functionally water-dependent uses; prevent loss of public and private access to Coastal Waters; prevent the displacement of traditional public and commercial uses from Coastal Waters, including lobstering and other heritage fisheries, water-based recreation, and other public trust uses; protect public and private properties from environmental pollution and other adverse effects of Industrial-Scale Coastal Waters Aquaculture Facilities; further the Town’s municipal interest in each and all of the coastal management policies set forth in 38 M.R.S. § 1801 and Section I.C, below; and protect the health, safety, and welfare of the residents of and visitors to the Town.
- C. Legislative Findings.** The Town finds that it has a municipal interest in the conservation, beneficial use, and effective management of its coastal resources, including its Coastal Waters and Coastal Wetlands. After considering the Town’s coastal management policies to (1) promote the maintenance, development, and revitalization of the Town’s ports and harbors for fishing, transportation, and recreation; (2) manage the marine environment and its related resources to preserve and improve the ecological integrity and diversity of marine communities and habitats, expand understanding of the productivity of Coastal Waters, and enhance the economic value of the Town’s renewable marine resources; (3) support shoreline management that gives preference to water-dependent uses over other uses, promotes public access to the shoreline, and considers the cumulative effects of development on coastal resources; (4) discourage growth and new development in coastal areas where, because of coastal storms, flooding, landslides or sea-level rise, it is hazardous to human health and safety; (5) encourage and support cooperative state and municipal management of coastal resources; (6) protect and manage critical habitat and natural areas of local, state, and national significance and maintain the scenic beauty and character of the coast even in areas where development occurs; (7) expand the opportunities for outdoor recreation and encourage appropriate coastal tourist activities and development; (8) restore and maintain the quality of our fresh, marine, and estuarine waters to allow for the broadest possible diversity of public and private uses; and (9) restore and maintain coastal air quality to protect the health of citizens and visitors and to protect enjoyment of the natural beauty and maritime characteristics of the Maine coast, the Town finds that additional local review is necessary for Industrial-Scale Coastal Waters Aquaculture Facilities that are currently exempt from certain state environmental review pursuant to 38 M.R.S. §§ 480-Q(10), 488(13). The Town further finds that certain Industrial-Scale Coastal Waters Aquaculture Facilities impose unreasonable adverse impacts on the Coastal Waters and other coastal resources within the Town, particularly where such activities may occur within Land-Based Aquaculture Facilities without imposing similar adverse impacts. Accordingly, the Town declares it necessary and appropriate to regulate and control Industrial-Scale Coastal Waters Aquaculture Facilities, as specifically set forth in this Ordinance.
- D. Effective Date.** The effective date of this Ordinance is the date of adoption by the Town’s legislative body.

## E. Applicability.

1. Exempt Activities. The following activities are exempt from the requirements of this Ordinance:
  - a. The operation of a Coastal Waters Aquaculture Facility legally existing as of the Effective Date, except as provided in Section I.E.3.b.
  - b. The construction, operation, or expansion of a Land-Based Aquaculture Facility.
  - c. The construction or operation of a Community-Scale Coastal Waters Aquaculture Facility (including the placement of any structure associated with such facility below the normal high-water line or over or within Coastal Waters), or the expansion of a Community-Scale Coastal Waters Aquaculture Facility so long as the resulting facility remains a Community-Scale Coastal Waters Aquaculture Facility.
2. Prohibited Activities. The following activities are prohibited by this Ordinance:
  - a. The construction, operation, or expansion of an Industrial-Scale Coastal Waters Aquaculture Facility (including the placement of any structure associated with such facility below the normal high-water line or over or within Coastal Waters) that is not in compliance with the requirements of this Ordinance.
  - b. The expansion of any Coastal Waters Aquaculture Facility legally existing as of the Effective Date if the resulting facility would be an Industrial-Scale Coastal Waters Aquaculture Facility that is not in compliance with the requirements of this Ordinance.
3. Permit Required. The following activities are subject to the provisions of this Ordinance, including the permit requirements in Section III:
  - a. The construction, operation, and expansion of an Industrial-Scale Coastal Waters Aquaculture Facility (including the placement of any structure associated with such facility below the normal high-water line or over or within Coastal Waters).
  - b. A Coastal Waters Aquaculture Facility legally existing as of the Effective Date where a lessee seeks to renew a submerged lands lease (issued by the Maine Bureau of Parks and Lands (“BPL”) pursuant to 12 M.R.S. § 1862) or aquaculture lease (issued by the Maine Department of Marine Resources (“DMR”) pursuant to 12 M.R.S. §§ 6072, 6072-A, or 6072-B) and the lease renewal proposes or authorizes a lease area greater than five acres.

## II. DEFINITIONS

All provisions of this Ordinance shall be liberally construed to protect the health, safety, and welfare of the inhabitants of the Town. In the construction of this Ordinance, the word “including” means “including, but not limited to” and references to Maine statutes and Maine state department or agency rules include any amendments and successor provisions. In addition, the following definitions apply:

- A. Adverse Visual Impact** — The negative effect of a regulated activity on the visual quality of a landscape when viewed from a Scenic Resource.
- B. Aquaculture Area** — The aggregate surface area of Coastal Waters used by a Coastal Waters Aquaculture Facility (but not a Land-Based Aquaculture Facility) including: (i) nets, pens, submersible cages, or other enclosures; (ii) buoys, platforms, or other technology for feeding and storage for equipment; (iii) waste management systems; (iv) floating structures or work platforms; and (v) loading and docking facilities located over or within Coastal Waters. The aggregate surface area of any BPL or DMR lease area(s) proposed or approved pursuant to 12 M.R.S. §§ 1862, 6072, 6072-A, or 6072-B is *prima facie* evidence of the size of an Aquaculture Area.

- C. Coastal Waters** — All territorial waters of the Town that are within the rise and fall of the tide seaward to the 3-nautical-mile line as shown on the most recently published Federal Government nautical chart, but not including areas above any fishway or dam when the fishway or dam is the dividing line between tidewater and fresh water. Coastal waters include Coastal Wetlands and the waters over submerged lands and intertidal lands.
- D. Coastal Waters Aquaculture Facility** — A commercial facility for the culture of finfish in nets, pens, or other enclosures or for the suspended culture of any other marine organism, where the culturing of the organism occurs principally over or within Coastal Waters. A Coastal Waters Aquaculture Facility may include structures and elements necessary or incidental to the operation of the facility that are located on land within the Town, but does not include any structures or elements of a Land-Based Aquaculture Facility. A Coastal Waters Aquaculture Facility is classified as follows:
  - 1. **Community-Scale** — A Coastal Waters Aquaculture Facility that exclusively occupies an Aquaculture Area of five acres or less.
  - 2. **Industrial-Scale** — A Coastal Waters Aquaculture Facility that exclusively occupies an Aquaculture Area greater than five acres. For purposes of this definition, two or more Aquaculture Areas that are not contiguous but are located within 1,000 feet of each other are considered part of the same Aquaculture Area.
- E. Coastal Wetlands** — All tidal and subtidal lands; all areas with vegetation present that is tolerant of salt water and occurs primarily in a salt water or estuarine habitat; and any swamp, marsh, bog, beach, flat, or other contiguous lowland that is subject to tidal action during the highest tide level for the year in which an activity is proposed as identified in tide tables published by the National Ocean Service.
- F. Land-Based Aquaculture Facility** — A commercial facility for the culture of finfish in nets, pens, or other enclosures or for the suspended culture of any other marine organism, where the culturing of the organism occurs principally on land. A Land-Based Aquaculture Facility may include structures and elements that are located over or within Coastal Waters without altering its designation as a Land-Based Aquaculture Facility so long as the facility is subject to review pursuant to the Site Location of Development Act and Natural Resource Protection Act and does not seek exemption therefrom pursuant to 38 M.R.S. §§ 480-Q(10), 488(13).
- G. Mitigation** — Any action taken or not taken to avoid, minimize, rectify, reduce, or eliminate actual or potential adverse environmental impact, including Adverse Visual Impact.
- H. Practicable** — Available and feasible considering cost, existing technology, and logistics based on the overall purpose of the activity.
- I. Scenic Resource** — Public natural resources, public lands or waters, or publicly accessible land protected by a conservation easement visited by the general public, in part for the use, observation, enjoyment, and appreciation of natural or cultural visual qualities.

### **III. REVIEW PROCEDURES, SUBMISSION REQUIREMENTS, AND REVIEW CRITERIA FOR INDUSTRIAL-SCALE COASTAL WATERS AQUACULTURE FACILITIES**

- A. Review Procedures; Submission Requirements.** Before constructing, operating, or expanding an Industrial-Scale Coastal Waters Aquaculture Facility, a permit must be obtained from the Town’s Planning Board in accordance with the following procedures.
  - 1. Application; Notice. At least 14 days before the Planning Board meeting on which the applicant appears on the agenda, the applicant must submit to the Town five copies of an application. Before filing the application to the Planning Board, the applicant must notify, by certified mail, return receipt requested: (i) all owners of property located within 1,000 feet of any property line of any land-based components of the proposed facility located within the Town; (ii) all riparian owners adjacent to which the

Aquaculture Area is located; and (iii) the municipal officers of the Town. The notice must contain a brief description of the proposed facility and a map identifying the location of the proposed facility, including the Aquaculture Area. The applicant must submit copies of such notices, the list of notice recipients, and certified mail receipts as part of the application.

2. Submission Requirements. An application for an Industrial-Scale Coastal Waters Aquaculture Facility must contain the following materials:
  - a. Application and Escrow Fees.
    - (i) A nonrefundable application fee of \$250, payable by check to the Town.
    - (ii) An escrow fee of \$1,000, which must be used by the Town to pay for all expenses reasonably related to the Planning Board's review of the application, including publishing notices of public hearings and hiring independent consulting and legal services to review technical and legal submissions associated with the application. Whenever the balance in the escrow account is drawn down by 50%, the Town shall notify the applicant and require that the balance be brought back up to the original deposit amount. Any balance remaining after a decision on the application must be returned to the applicant.
  - b. Applicant Information. (i) The name, mailing address, phone number, and email address of the applicant, its principal representative, and all parties involved in preparing the application; and (ii) the general organizational structure of the applicant.
  - c. Right, Title, or Interest. Evidence of the applicant's right, title, or interest in the properties associated with the proposed facility, including the Aquaculture Area, (i) by deed, lease, purchase and sale agreement, option to purchase, or some other legal proof of interest, and (ii) by copy of a pending application for, or final grant of, any submerged lands lease issued by the BPL pursuant to 12 M.R.S. § 1862 or any aquaculture lease issued by the DMR pursuant to 12 M.R.S. §§ 6072, 6072-A, or 6072-B. The rights must be of sufficient term and duration for the proposed activity including the decommissioning and removal of any structures at the end of such activity.
  - d. Technical Capacity. Evidence of the applicant's ability to undertake the design, construction, and operation of the facility in compliance with applicable law, including: (i) a statement of the applicant's prior experience in aquaculture; (ii) the names and qualifications of all key personnel involved with the design, construction, and operation of the facility; (iii) a list of any warnings or discipline issued by the DMR and any criminal record to the applicant or any key personnel involved in the project; and (iv) a list of all aquaculture facilities operated, in whole or in part, by the applicant (including its parent companies, subsidiaries, predecessors, or related persons) in the U.S. and abroad. The applicant shall have the technical ability to design, construct, operate, and maintain the proposed facility in a manner consistent with this Ordinance.
  - e. Financial Capacity. Evidence of sufficient financial capacity to undertake the design, construction, and operation of the facility in compliance with applicable laws. Evidence to demonstrate financial capacity must include: accurate and complete cost estimates of the development; time schedules for construction of all phases proposed; and evidence of funds in the form of a letter from a financial institution, governmental agency, or other funding entity indicating a commitment to provide to the applicant a specified amount of funds and the uses for which the funds may be utilized. In cases where one or more limited liability corporations are part of the applicant's corporate structure, evidence must be submitted describing the applicant's corporate structure and demonstrating that the proposed financing is clearly linked from the financing institution to the applicant. If the project will be self-financed, evidence must include copies of bank statements of accounts held by the applicant or other evidence indicating that funds are available and have been set aside for the project.

- f. Existing Conditions Plan. A plan showing existing conditions of the Aquaculture Area, and the area within one nautical mile of the Aquaculture Area, superimposed on a nautical chart (including BPL and DMR lease boundaries and abutting lessee information, if any; existing functionally water-dependent uses and traditional public and commercial uses within the Aquaculture Area and surrounding waters, including lobstering and other heritage fisheries, water-based recreation, and other public trust uses).
  - g. Project Description. A written narrative with detailed information describing existing conditions of the Aquaculture Area and the proposed facility (including siting, construction, and operation timeline and details). The narrative must explain how the facility will comply with each of the review criteria in Section III.B.
  - h. Alternatives Analysis. A report that analyzes whether a less impactful Practicable alternative to the proposal exists. Determining whether a Practicable alternative exists includes: (i) utilizing, managing, or expanding one or more other sites that would avoid the impacts considered by the Planning Board under Section III.B; (ii) reducing the size, scope, configuration, or density of the project as proposed, thereby avoiding or reducing the impacts considered by the Planning Board under Section III.B; (iii) developing alternative project designs that avoid or lessen the impacts considered by the Planning Board under Section III.B; and (iv) demonstrating the need, whether public or private, for the proposed facility.
  - i. Scenic Impact. The Planning Board may require a visual impact assessment if a proposed facility appears to be located within the viewshed of, and has the potential to have an unreasonable adverse impact on, a Scenic Resource. If required, a visual impact assessment must be prepared by a design professional trained in visual assessment procedures or as otherwise directed by the Planning Board.
  - j. State and Federal Applications and Permits. Upon request of the Planning Board, copies of applications submitted by the applicant for any required state and federal approvals, permits, and licenses, and any such issued approval, permits, and licenses.
  - k. Additional Information. Any additional information requested by the Planning Board to assist it in determining whether the proposal complies with this Ordinance or other applicable ordinances.
3. Completeness Review. Within 30 days of the receipt of the application, the Planning Board shall determine whether the application is complete. An application is complete upon submission of the required fees and all information required by this Ordinance. If the application is incomplete, the Planning Board must notify the applicant of the information necessary to deem the application complete and must set a date by which the additional information must be submitted. If the information is not submitted by that date, the application must be returned to the applicant.
  4. Technical and Professional Reviews. The Planning Board may retain technical and legal evaluations of an application, conducted by one or more qualified, independent firms or consultants, if the Planning Board deems such evaluation is reasonably necessary to assist in its review of the application. Reviews may include: a technical analysis of the effects of the proposal on public and private water access ways, functionally water-dependent uses, and traditional public and commercial uses within the Aquaculture Area and the surrounding Coastal Waters, including lobstering and other heritage fisheries, water-based recreation, and public trust uses; analysis of applicable federal and state requirements; legal review; or analysis of any issues relevant to the review criteria in Section III.B. Costs incurred by the Town related to such evaluations must be borne by the applicant out of the escrow fee.
  5. Public Hearing. The Planning Board must hold a public hearing on the application. Notice of the hearing must be provided as follows:
    - a. By the Applicant: In writing, at least 14 days prior to the hearing, to (i) all owners of property located within 1,000 feet of any property line of any land-based components of the proposed facility

located within the Town; and (ii) all riparian owners adjacent to which the Aquaculture Area is located. Notice must be by certified mail, return receipt requested. Notice must also be given by certified mail to any neighboring municipalities or tribal governments if any portion of the proposed facility abuts or crosses a municipal boundary including as projected into Coastal Waters. The notice must include the name of the applicant, a brief description of the proposal, and a map identifying the proposed location of the facility (including the Aquaculture Area). The applicant must present a copy of the notice and proof of notification to the Planning Board.

b. By the Town: By publishing a notice of the date, time, and place of the public hearing in a newspaper of general circulation within the Town, and in a conspicuous public place at least 14 days prior to the hearing. Costs incurred by the Town in providing this notice must be borne by the applicant out of the escrow fee.

6. Decision. After a public hearing, the Planning Board must deliberate and issue written findings of fact and conclusions of law that set forth the reasons it approves, approves with conditions, or denies the application based on the review criteria in Section III.B. Applications that are denied by the Planning Board may not be resubmitted before the passage of one year from the denial.

7. Expiration of Permit. Any permit granted under this Ordinance expires if the facility is not substantially started within one year or in commercial operation within two years of the date of issuance. Any such permit also expires if the facility is not in commercial operation for any consecutive two-year period.

**B. Review Criteria.** Before issuing a permit authorizing an Industrial-Scale Coastal Waters Aquaculture Facility, the Planning Board must affirmatively find that the proposal complies with each of the following review criteria. The burden of proof rests solely with the applicant.

1. Technical and Financial Capacity. The applicant must possess the necessary technical expertise and financial capacity to design, construct, operate, and decommission the facility in compliance with all applicable local, state, and federal ordinances, laws, rules, and approvals, and the review criteria in this Ordinance. The Planning Board may consider evidence regarding the applicant's prior conduct as a measure of willingness and ability to meet all conditions of approval established by the Planning Board.

2. Unreasonable Community Impacts. In making findings under this subsection 2, the Planning Board must consider both the direct effects of the proposed facility and its effects in combination with existing and reasonably anticipated aquaculture operations in the vicinity of the proposed facility. The facility must not unreasonably impact the following factors: (The facility will be considered to result in an unreasonable impact on the following uses and resources if there is a Practicable alternative to the facility that would lessen the impact on that use or resource. The applicant shall provide an analysis of alternatives to demonstrate that a Practicable alternative does not exist.)

a. No Adverse Effect On Existing Uses. The proposal will not unreasonably interfere with existing recreational, fishing, or navigational uses. In making this determination, the Planning Board will consider existing and reasonably anticipated uses and users of the Aquaculture Area and surrounding areas on land and water, including: (i) traditional public and commercial uses such as lobstering and other heritage fisheries, (ii) water-based recreation, (iii) nearby residential and commercial operations on land within one nautical mile of the proposed facility, and (iv) public trust uses.

b. No Adverse Visual Impact. The proposal will have no unreasonable Adverse Visual Impact on existing and reasonably anticipated use and enjoyment of Scenic Resources. In making this determination, the Planning Board will consider the type, area, and intransience of the proposal related to the Scenic Resources that will be affected by the proposal, the significance of the Scenic Resources, and the degree to which the use or viewer expectations of the Scenic Resources will be altered, including alteration beyond the physical boundaries of the Aquaculture Area. The Planning Board will also consider any proposed Mitigation, Practicable alternatives to the proposal that will have less visual impact, and cumulative effects of frequent minor alterations on Scenic Resources.

An application may be denied if the Planning Board finds that the proposal will have an unreasonable impact on the visual quality of any protected natural resources (as defined in 38 M.R.S. § 480-B) as viewed from a Scenic Resource, even if the proposal has no Practicable alternative and the applicant has minimized the proposed alteration and its impacts as much as possible through Mitigation.

- c. No Adverse Effect On Habitats; Fisheries. The proposal will not unreasonably harm any significant wildlife habitat, freshwater wetland plant habitat, threatened or endangered plant habitat, aquatic or adjacent upland habitat, travel corridor, freshwater, estuarine or marine fisheries or other aquatic life, as those terms are used or defined in 38 M.R.S. §§ 480-B, 480-D. In determining whether there is unreasonable harm to significant wildlife habitat, the Planning Board may consider proposed Mitigation if that Mitigation does not diminish in the vicinity of the proposal the overall value of significant wildlife habitat and species utilization of the habitat and if there is no specific biological or physical feature unique to the habitat that would be adversely affected by the proposal.
- d. No Adverse Effect On Natural Environment. The applicant has made adequate provision for fitting the facility harmoniously into the existing natural environment, and the facility will not adversely affect existing uses, scenic character, air quality, water quality, or other natural resources in the municipality or in neighboring municipalities. In making this determination, the Planning Board may consider the effect of noise from the proposal. In determining whether an applicant has made adequate provision for the control of noise generated by the facility, the Planning Board shall consider any quantifiable noise standards of the municipality in which the development is located and of any municipality that may be affected by the noise and, in the absence of such standards, may apply noise standards promulgated by any department or agency of the State of Maine.

**C. Conditions of Approval.** The Planning Board may impose any conditions of approval it determines necessary to meet the requirements of this Ordinance. Such conditions may include restrictions on hours of operation of the facility and any associated transport of finfish or other marine organisms, including on weekend and holiday hours, to avoid or minimize community impacts from the facility.

#### **IV. ENFORCEMENT, INSPECTIONS, APPEALS, LEGAL**

- A. Enforcement.** The following acts or omissions constitute a violation of this Ordinance: (1) constructing, operating or expanding a Coastal Waters Aquaculture Facility that is prohibited by this Ordinance; (2) constructing, operating, or expanding an Industrial-Scale Coastal Waters Aquaculture Facility without a permit as required by this Ordinance; (3) constructing, operating, or expanding an Industrial-Scale Coastal Waters Aquaculture Facility not in compliance with permit conditions; (4) any material misstatement of fact in any notice, application, or supporting documentation filed with the Town; (5) failure to comply with the review criteria in this Ordinance; or (6) failure to comply with any provision of this Ordinance. This Ordinance shall be enforced by the municipal officers of the Town or their duly authorized designees.
- B. Inspections.** The Code Enforcement Officer and the Town's Harbormaster, may, at any time, enter and inspect any aquaculture facility in order to determine compliance with any provision of this Ordinance.
- C. Appeals.** Any person aggrieved by a decision, action, or failure or refusal to take action of the Planning Board may appeal to the Maine Superior Court in accordance with Rule 80B of the Maine Rules of Civil Procedure.
- D. Legal.** If any section, part of a section, or any provision this Ordinance is declared by a court of competent jurisdiction to be unconstitutional, invalid, or unenforceable, such declaration shall not affect the validity or enforceability of the Ordinance as a whole, or any part of provision other than that specifically declared to be unconstitutional, invalid, or unenforceable. This Ordinance does not relieve a person of the obligation to comply with all other applicable state, federal, or local laws, rules, and ordinances. Whenever a provision of this Ordinance conflicts with or is inconsistent with another rule or ordinance administered by the Town, the more restrictive provision shall control.