

NOVA SCOTIA AQUACULTURE REVIEW BOARD

P.O. Box 2223, Halifax, NS, B3J 3C4 aquaculture.board@novascotia.ca 902-722-1426

DECISION ON INTERVENOR STATUS

NSARB 2022-001
NSARB 2022-002
NSARB 2022-003

NOVA SCOTIA AQUACULTURE REVIEW BOARD

IN THE MATTER OF: Applications made by **TOWN POINT CONSULTING INC.** for **NEW MARINE SHELLFISH LICENCES/LEASES** in **ANTIGONISH HARBOUR, ANTIGONISH COUNTY** for the **SUSPENDED CULTIVATION** of **AMERICAN OYSTERS**.

BEFORE: Jean McKenna, Chair
Coleen Morrison, Vice-Chair
Roger Percy, Board Member

Town Point Consulting Inc. (TPC) has applied for three marine aquaculture licenses and leases for oyster cultivation. (AQ#1442, #1443, and #1444). The three sites are located in the outer reaches of Antigonish Harbour. (*See satellite image with overlay attached*), in the immediate vicinity of Grahams Cove. The application is now before the Nova Scotia Aquaculture Review Board (Review Board) for decision.

The Regulations made pursuant to the *Fisheries and Coastal Resources Act S.N.S. 1996, c. 25* provide for application for intervenor status:

Request for intervenor status

- 23** (1) A person may request intervenor status from the Review Board.
- (2) A request under subsection (1) must be in writing in a form determined by the Review Board and must be submitted to the Review Board no later than 10 days after the date that notice of the adjudicative hearing is published under Section 19.
- (3) No later than 10 days after the date it receives a request for intervenor status, the Review Board must decide whether to grant or refuse the request.
- (4) **The Review Board must grant intervenor status to any person requesting it who, in the opinion of the Review Board, is substantially and directly affected by the hearing.**

(5) A decision made by the Review Board with respect to intervenor status is final.

(6) No later than 5 days after deciding on a request for intervenor status, the Review Board must provide notice of its decision to the person requesting intervenor status and, if the request is granted, to each of the parties to the proceeding.

The Review Board has received 17 applications for intervenor status, including one from a group called “Friends of Antigonish Harbour (FOAH), another from a group called “Antigonish Watershed Association (AWA), and also from Community Liaison Committee (CLC). Three of the individual applicants identify as members of FOAH, and one member of AWA is also identified as a member of FOAH.

The “substantial and direct affects” variously alleged by the “opposed” applicants generally include:

- a) interference with recreational use of the Harbour (canoeing, kayaking, paddleboarding, sailing, bird watching, hunting, sport fishing);
- b) interference with adjacent property owners by disruption of view, as well as noise and resulting decrease in property values;
- c) interference with commercial lobster fishing;
- d) impairment of tourism value;
- e) environmental / biophysical concerns, including potential damage resulting from wind conditions and shallow waters.

Several of the applicants support the project, and dispute the various allegations made by those opposed to the project. They argue that the project represents environmental, economic and community benefits. They deny interference with environment, recreation, and navigation.

If approved by the Review Board, intervenor status allows the body or individual full party status, including the right to call witnesses, provide evidence including expert evidence, as well as the right to cross examine 'opposing' witnesses, subject to any limits imposed by the Review Board. The Regulations also allow the Review Board to consolidate the evidence of some parties:

25 The Review Board may require all or part of 2 or more intervenors' evidence to be consolidated if the Review Board determines that consolidation is necessary to avoid repetitive or cumulative evidence.

The Review Board may also place limits on evidence:

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(2) The Review Board may exclude anything it considers to be hearsay, irrelevant, immaterial, or unduly repetitious from the evidence presented at an adjudicative hearing.

As with the common law rules of evidence, and the Regulations, expert opinion evidence can only be offered through an expert, and the manner to do so is governed by the Regulations:

(3) A party is not entitled to present the evidence of an expert witness at an adjudicative hearing unless

(a) the evidence is in the form of a report that includes the expert's name, address, and qualifications, along with a statement of the substance of the expert's proposed evidence; and

(b) the party has provided the evidence to the Review Board and each of the other parties as required by subsection (5).

(4) A party to an adjudicative hearing may submit written evidence or present oral testimony to explain their position.

(5) At least 15 days before the date of an adjudicative hearing, a party who intends to present written or visual evidence at the adjudicative hearing must provide that evidence to the Review Board through an affidavit, with a copy to each of the other parties.

In determining entitlement to intervenor status, the Review Board is required to consider the eight factors set out in subsection 3 of the Regulations:

(a) the optimum use of marine resources;

(b) the contribution of the proposed operation to community and Provincial economic development;

(c) fishery activities in the public waters surrounding the proposed aquacultural operation;

- (d) the oceanographic and biophysical characteristics of the public waters surrounding the proposed aquacultural operation;
- (e) the other users of the public waters surrounding the proposed aquacultural operation;
- (f) the public right of navigation;
- (g) the sustainability of wild salmon;
- (h) the number and productivity of other aquaculture sites in the public waters surrounding the proposed aquacultural operation;

The Review Board has previously considered the law applicable to intervenor status applications, in **Kelly Cove Salmon**, NSARB 2021-001. In that case, the Review Board applied the reasoning of Leblanc, J. in **Specter v Nova Scotia (Fisheries and Aquaculture)** 2011 NSSC 333:

.....

[59] “Public interest groups and individual advocates have usually been denied standing to challenge administrative action that raises environmental concerns, for lack of an identifiable special interest of their own” (Donald JM Brown Y John M Evans, *Judicial Review of Administrative Action in Canada*, loose-leaf (Toronto: Canvasback, 2010) _4.3443. For example, in *Friends of Public Gardens v. Halifax (City)* (1985), [1985 CanLII 5635 \(NS SC\)](#), 68 NSR (2d) 433, 13 Admin LR 272 (SCTD), the applicant was denied standing to challenge the City of Halifax’s decision not to designate certain properties near the Halifax Public Gardens as “heritage property”.

[60] However, adjacent landowners have been granted standing to challenge the issuance of permits or government decisions governing land use. In *Oakland/Indian Point Residents Assn. v. Seaview Properties Ltd.*, [2008 NSSC 209](#), the Court allowed the applicant standing to challenge a subdivision plan and development permits, noting that some of the members of the applicant association were adjacent landowners to the proposed condo development at issue. In *Lord Nelson Hotel Ltd. v. Halifax (City)* (1972), [1972 CanLII 1160 \(NS CA\)](#), 4 NSR (2d) 753, 33 DLR (3d) 98 (CA) [Lord Nelson Hotel], the Court of Appeal found that an adjacent landowner had standing to challenge the City of Halifax’s re-zoning of neighbouring property.

[61] In my view, how the test for standing is phrased is largely irrelevant. It does not matter whether a statute uses the phrase, “person aggrieved”, “person directly affected”, or “direct and personal interest”. What matters is the interpretation that is given to these phrases. This necessarily involves a textual, contextual, and purposive analysis of the applicable legislation. Involved in this interpretation is the concern of courts that an overly broad interpretation will allow mere “busybodies” to flood the courts with litigation challenging public decisions.”

[62] The key question to ask is whether a potential applicant has an economic, commercial, legal, or personal interest in a decision that is sufficiently delineated from the concerns of the general public so as to make them a “person aggrieved”.

[63] The interests of adjacent property owners may fall into any of these categories. What may set adjacent property owners apart from other potential applicants is that their proximity to the place affected by a decision makes them sufficiently different from other potential applicants.”

.....

In the context of the application of TPC, the adjacent property owners all appear to allege a personal, and in some cases, an economic interest in the outcome of this application by TPC that might be considered ‘direct’. Is the interest of the various applicants “substantial”? Is it sufficient to allow some or all of them full party status? Which, as noted above, entitles a party to call witnesses, cross examine witnesses, produce documents / exhibits.

Unlike matters heard before the courts, the regulations governing this application process also allow for written or oral submissions by members of the public. If those submissions are relevant to the issues in the case, and in particular, the factors set out in Section 3, they are allowed, without the need even to establish a direct and substantial interest in the matter. They would be given no more or no less weight than that evidence given as an intervenor.

20 Members of the public may submit written comments to the Review Board during the notice period provided for an adjudicative hearing and in the manner determined by the Review Board.

32 (1) Any member of the public may participate in an adjudicative hearing by making a sworn oral statement or an affirmation providing the Review Board with all of the following information:

- (a) their name;
- (b) their place of residence;
- (c) their position on the issues, subject to any limits, terms and conditions determined by the Review Board.

(2) The Review Board must limit the duration of oral testimony given by a member of the public to 6 minutes per person.

(3) To be considered by the Review Board, a sworn oral statement or an affirmation provided by any member of the public must be in relation to one or more of the factors set out in Section 3.

Should a number of applicants be granted intervenor status, the Review Board has the authority to consolidate some or all of that evidence:

25 The Review Board may require all or part of 2 or more intervenors' evidence to be consolidated if the Review Board determines that consolidation is necessary to avoid repetitive or cumulative evidence.

If a single member of the public expressed an interest that was "substantial" to that person, that might not be "substantial" in the context of considering the s. 3 factors on the whole. Should that impact on whether the individual should be granted standing?

In addition to the intervenor applicants, there are a number of written statements in support of, and opposed to, the proposed operation. Some applicants have applied in their own right for intervenor status and have also submitted written statements. Some applicants have stated that they are also part of one of the "group / committee" applicants. The Review Board will not permit more than one presentation made by any individual, and the individuals must choose whether they wish to present as individual intervenors (if status is granted), through a group, (if a group is granted status), or through written or oral submissions.

The factors which the Board must consider in determining status are as follows: pursuant to s. 3 are as follows:

- (a) the optimum use of marine resources;
- (b) the contribution of the proposed operation to community and Provincial economic development;
- (c) fishery activities in the public waters surrounding the proposed aquacultural operation;
- (d) the oceanographic and biophysical characteristics of the public waters surrounding the proposed aquacultural operation;
- (e) the other users of the public waters surrounding the proposed aquacultural operation;
- (f) the public right of navigation;
- (g) the sustainability of wild salmon;
- (h) the number and productivity of other aquaculture sites in the public waters surrounding the proposed aquacultural operation;

The information contained in each applicant's submission is summarized below:

Conclusion

The Review Board notes that in this case, there are a substantial number of applicants for intervenor status, reflecting both positive and negative positions. There is considerable overlap and duplication. There is a need for consolidation of at least some of the evidence should they all be granted intervenor status. It would be unnecessarily cumbersome, inefficient, and costly to have evidence presented and tested by each individual.

The Review Board has determined that, although some of the applications are marginal in terms of “substantial” impact, all applicants demonstrate a direct association with Antigonish Harbour.

In *Canadian Elevator Industry Education Program (Trustees of) v. Nova Scotia (Elevators and Lifts Act)*, 2016 NSCA 80, Bryson J.A. commented:

“the merits should not matter when considering private interest standing for the simple reason that a party who has an interest in the proceeding should not need to demonstrate the strength of his case to obtain the standing to make it”

The Review Board has determined that in the particular circumstances of this case, they will all be granted intervenor status, which will provide the opportunity to challenge the project and to substantiate their allegations. Their interests are sufficiently “...delineated from the general public”, to avoid the “busybody” label. However, given the considerable overlap and duplication (noted above), they will be consolidated as follows:

1. Mary Jo MacDonald, Patrick MacDonald, Lucy MacDonald, Richard Wilgenhof, Alena Wilgenhof, Sian Newman-Smith, Rick Turner, Rowan McLean, Peter Bowler, Colleen Bowler, Friends of Antigonish Harbour, Sheila MacKinnon Hudon, William Hudon, May Goring, Manfred Goring, Antigonish Harbour Watershed Association, Rod Brady, and Mike MacDonald
2. Bill Brophy, Tim Brophy, Duncan Brophy, Daryl Beaton, and Brendon Doyle
3. Mark Genuist, Stephen Feist, and the Community Liaison Committee

The effect of consolidation, means that rather than each individual applicant being entitled to question a witness, the particular group will choose a single individual to carry out the examination of a witness.

s. 33 of the Regulations implies that questions may be directed to a body of individuals:

Questions at adjudicative hearing

- 33** (1) The Chair of the Review Board may determine the order of questioning at an adjudicative hearing.

(2) The Chair may exclude any question that, in the opinion of the Chair, is outside of the terms of reference of the Review Board or is needlessly repetitive in nature.

(3) The Chair may limit the number of questions that may be asked at an adjudicative hearing.

(4) A question addressed to a group of persons representing a party may be directed to a specific member of the group or all members present in person.

However, the Review Board will in this case follow its practice, that is, a single witness will be sworn at a time, and questioned in keeping with the most usual litigation process (direct, cross, and re-direct). To the extent that this is seen as a variation on the regulations, the Board relies on s. 27:

Review Board authority

27 (1) If procedures are not provided for in these regulations or in the Act, the Review Board may do whatever is necessary and permitted by law to enable it to effectively and completely adjudicate on the matter before it.

(2) The Review Board may dispense with, amend, vary or supplement all or part of the procedures for adjudicative hearings set out in these regulations if it is satisfied that the special circumstances of the application before it so require or it is in the public interest to do so.

We will leave it to the parties as to how they will present a consolidated case. However, if any applicant is unable or unwilling to work in the groups as determined, they may use one of the alternative means of presenting their case to the Review Board through written or oral submission.

We will hear from the parties as to the order of presentation, with the exception that the Minister will present first, followed by TPC. The oral statements from the public will conclude the proceedings, with written submissions having been entered on the record by virtue of posting on the Review Board's webpage.

Finally, we note that some of the applicants relied upon information that might fall within the category of "expert opinion". If any of the groups choose to present expert opinion evidence, they must comply with Regulation 30(3) in so doing. The same requirement applies to any written or oral submissions by members of the public.

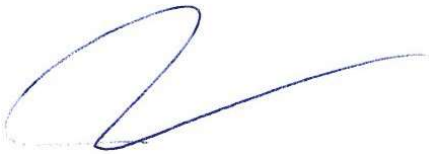
DECISION:

The Review Board has determined that all intervenor applicants will be granted intervenor status and will be consolidated as follows:

- 1. Mary Jo MacDonald, Patrick MacDonald, Lucy MacDonald, Richard Wilgenhof, Alena Wilgenhof, Sian Newman-Smith, Rick Turner, Rowan McLean, Peter Bowler, Colleen Bowler, Friends of Antigonish Harbour, Sheila MacKinnon Hudon, William Hudon, May Goring, Manfred Goring, Antigonish Harbour Watershed Association, Rod Brady, and Mike MacDonald**
- 2. Bill Brophy, Tim Brophy, Duncan Brophy, Daryl Beaton, and Brendon Doyle**
- 3. Mark Genuist, Stephen Feist, and the Community Liaison Committee**

Pursuant to subsection 23(5) of the Aquaculture Licence and Lease Regulations, a decision made by the Board with respect to intervenor status is final.

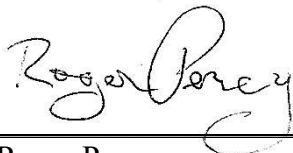
DATED at Halifax, Nova Scotia this **17th** day of **March**, 2023.



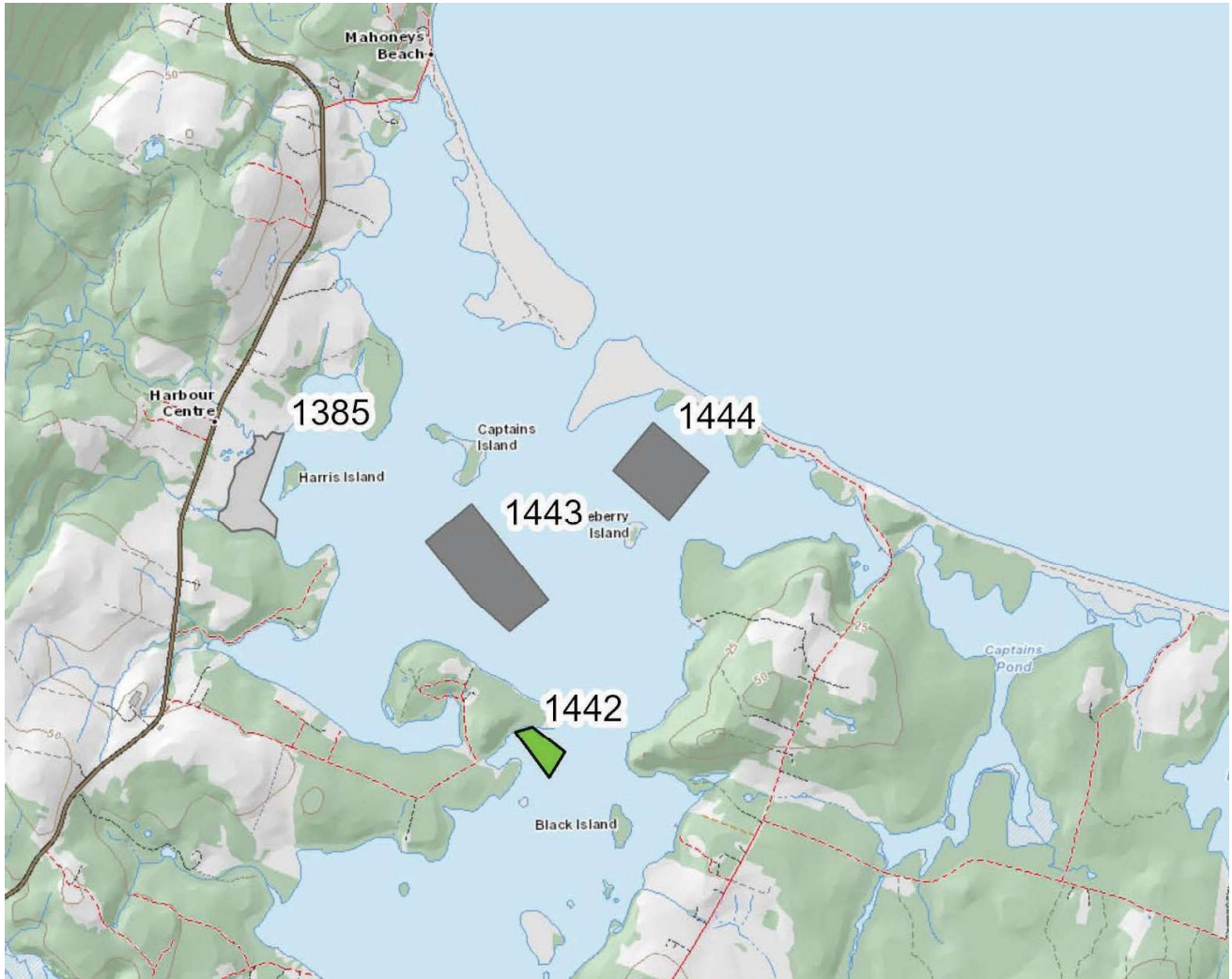
Jean McKenna,
Chair, Nova Scotia Aquaculture Review Board

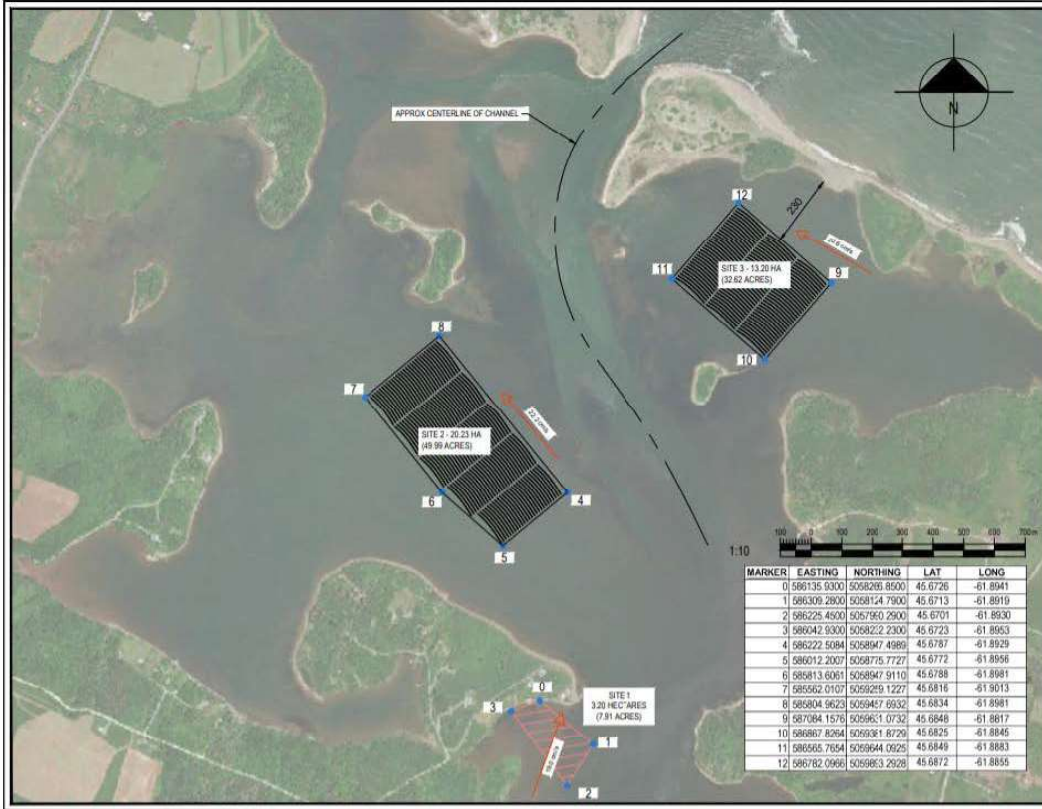


Coleen Morrison,
Vice-Chair, Nova Scotia Aquaculture Review Board



Roger Percy,
Member, Nova Scotia Aquaculture Review Board





Town Point Consulting Inc.
 20 SERRANT ROAD
 HARBOR CROSSING ROAD SOUTH, BOX 212
 Phone (902) 471-2686

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NOTES:
 1. ALL UNITS IN METRES UNLESS OTHERWISE NOTED.

A	ISSUED FOR PERMIT	REP.	ISSUE DATE
REV.	DESCRIPTION	BY	DATE

PROJECT NAME
TOWN POINT OYSTER FARM

JOB LOCATION
ANTIGONISH, NS

DRAWING TITLE
PROPOSED LEASE AREAS

OWN BY:	A.C.	ENG BY:	E.P.
DES BY:	E.P.	SHD NO:	-

SCALE: AS SHOWN

DRAWING NO:	REV:
S-1	A

MARKER	EASTING	NORTHING	LAT	LONG
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1	586309.2800	5058124.7900	45.6713	-61.8919
2	586325.4900	5057803.2900	45.6701	-61.8930
3	586042.9300	5058232.2300	45.6723	-61.8953
4	586222.5084	5058947.4989	45.6787	-61.8929
5	586012.2007	5058775.7727	45.6772	-61.8958
6	585813.6061	5058947.9110	45.6788	-61.8981
7	585562.0107	5059259.1227	45.6816	-61.8913
8	585804.9623	5059457.6932	45.6834	-61.8981
9	587084.1576	5059631.0732	45.6848	-61.8817
10	586987.8264	5059381.8729	45.6825	-61.8845
11	586565.7654	5059644.0925	45.6849	-61.8883
12	586782.0966	505983.2928	45.6872	-61.8855