

# The Ellsworth American.

## Friends of Blue Hill Bay, DMR Square Off In Mussel Farm Case



*Written by Stephen Rappaport*

Thursday, March 13, 2008

ELLSWORTH — Lawyers for Friends of Blue Hill Bay (FOBHB) and the state appeared before Superior Court Justice Donald Marden on Friday in another round of their battle over a mussel farm in Blue Hill Bay.

Last spring, the Maine Department of Marine Resources (DMR) approved an application for a 51.4-acre mussel farm off the eastern shore of Long Island by Erick Spencer Swanson (d/b/a Mussel Bound Farm) and Maine Cultured Mussels Inc. The corporation is owned by Swanson's mother and managed on a day-to-day basis by his father.

In June, FOBHB filed a Superior Court suit to overturn DMR's decision. The Blue Hill conservation group charged that DMR accepted the venture's lease application although it was incomplete. The group also claimed that DMR ignored evidence produced at the public adjudicatory hearing on the application that the farm would unreasonably interfere with navigation and lobster fishing in the area.

Ellsworth attorney Sally Mills advanced both those arguments Friday morning.

The first question Mills asked the court to consider was "How bad does an application have to be before it is denied as a matter of law?"

Mills said Maine law requires that lease applications contain, among other things, sufficient information to identify the lease applicant as well as evidence of the applicant's financial responsibility and technical capacity to manage the proposed aquaculture operation. Despite these "shoulds," Mills said, the application failed to fully outline the farm's operating costs, so it was impossible to assess whether the applicant had sufficient wherewithal to meet those expenses.

Even worse, according to Mills, Maine Cultured Mussels produced a bank letter to the effect that Susan Swanson, the corporation's sole owner, had enough funds to bear the estimated initial costs of setting up the farm site, it wasn't at all clear that those assets would be available to the corporation.

"Her assets are no more available than Roger Rabbit's or Bill Gates's," Mills said.

Another failing, according to Mills, was that it didn't clearly explain whether the younger Swanson and the corporation were partners. If not, the application should have contained information about the finances of the Erick Spencer Swanson.

"Individually or collectively, these deficiencies are egregious," Mills argued.

FOBHB also claims that, even if the application was complete, DMR made serious mistakes in the procedure it followed during the review process. The biggest problem, according to Mills, was that the applicants described a 13-acre operation at a pre-application meeting with Blue Hill's selectmen and harbormaster, and again at a public "scoping session," but the final application for 51.4 acres covered an area "as big as three Nimitz aircraft carriers."

DMR subsequently held a public "information session" on the expanded proposal several weeks before holding the adjudicatory public hearing on the project. The agency's regulations make no provision for such a procedure, Mills said, and DMR should have forced the applicants to begin the process again with a new scoping session.

"The regulations contemplate that the applicant will get it right the first time," Mills said. "This cobbling together adds to the confusion. The (DMR) commissioner doesn't have the discretion to effectively waive the regulations."

Assistant Maine Attorney General Mark Randlett argued that it was up to DMR to determine whether an application contained enough information to proceed to a public hearing. That decision was entitled to deference from a court asked to review the proceedings.

A decision to hold a hearing doesn't prevent interested parties from raising concerns about what they believe are

deficiencies in a lease application.

At that hearing, he said, interested parties could both cross-examine the applicant and introduce evidence on the applicant's financial or technical capacity. FOBHB had the opportunity to do just that at the adjudicatory hearing, Randlett told the court.

"The issue is whether or not the department abused its discretion. That's the standard of review," Randlett said.

As for the scoping session, Randlett said, DMR had the discretion to proceed the way it did. Through the information session, "the public was in fact informed of what was intended many months ahead of time.

Randlett also argued that there was also ample evidence in the adjudicatory hearing record to support DMR's decision that the proposed mussel farm would not "unreasonably interfere" with either navigation or fishing. That is the standard set by statute, Randlett said. The court should only overturn the agency's decision if FOBHB shows that the agency's decision was "a willful or unreasonable" one.

"It may not have been a perfect process. They often aren't," Randlett said. "We may not agree with it, but that doesn't matter."

Marden took the case under advisement. No time was set for when he might announce his decision.