

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS  
COASTAL RESOURCES MANAGEMENT COUNCIL**

**RE: IN THE MATTER OF PERRY RASO  
CRMC File No.: 2017-12-086**

**APPLICANT PERRY RASO'S MEMORANDUM OF LAW  
IN RESPONSE TO OBJECTORS' OPPOSITION TO A PERMIT  
FOR THE PROPOSED ACQUACULTURE FACILITY IN SEGAR COVE**

Applicant Perry Raso submits this Memorandum of Law in response to the Pre-Hearing Statement and Memorandum of Law filed on behalf of Kevin Hunt, Alicia Cooney, Stephen Quigley, and David Latham (collectively, the "Objectors"). As discussed below, the Objectors' request that CRMC deny Ms. Raso's December 29, 2017 application (the "Application") for a Category B State Assent to establish a three-acre shellfish farm lacks merit because, contrary to the Objectors' bald assertions, (1) CRMC has exclusive authority to grant aquaculture proposals; (2) the proposed shellfish farm comports with the Public Trust Doctrine by virtue of satisfying the CRMP Category B Assent Requirements; and (3) CRMC lacks jurisdiction to adjudicate riparian right issues raised by Objectors.

**BACKGROUND OF THE APPLICATION**

The proposed three-acre shellfish farm will specifically grow and harvest scallops and oysters (the "Proposal"). The proposed site (the "Proposed Site") is southwest of Ram Point and north of the inlet into Segar Cove, Potter Pond. The total percentage of aquaculture in Potter Pond will not exceed 3.1%.

Each of the three westernmost sections of the Proposed Site will include 12 rows of 50 lantern nets consisting of four tiers, and the bottom of the lantern nets will be 1.5 feet above the sea floor at low tide. Spat bags to hold scallop seed will be attached to the submerged long lines when the scallops are in their juvenile stage. The spat bags are fine mesh soft nylon bags and have a plastic mesh inside the bag for the juvenile scallops to byss (*i.e.*, attach). When used,

each line will hold 100 spat bags. All lines will not be used for the spat bags when the scallops are in the juvenile stages; as the scallops grow they will be moved to the lantern nets: a proven method of growing bay scallops.

Each of the three easternmost sections of the Proposed Site will include 12 rows of 30 cages that are 107 feet by 206 feet. The cages are 30 inches wide by 70 inches long and 12 inches deep. Fastened to the top of each cage will be two or three (depending on the weight) black plastic floats that are 25 square feet and extend the width of the cage. The low profile floats minimize visual impacts as they will protrude out of the water three-to-four inches maximum. Eight plastic mesh oyster growing bags two-by-three feet will be inserted into each cage. The 12 rows of 30 cages will be positioned in north-to-south rows. The cages will be fastened with lines that will be anchored at the end of each section.

At the Proposed Site, six cylinder floats will mark the ends of each of the rows. Fourteen lobster pot floats will be used to mark the corners of the Proposed Site. Five-foot floats may be used to keep the scallop spat bags suspended and six-foot floats may be fixed to the long line to keep it from sinking as gear increases in weight via growth of oysters, scallops, barnacles, algae, and the like.

When the scallops and oysters have reached market size and have been on the Proposed Site for at least one year, they will be harvested and sold both locally and regionally. Animals will be transported to market either directly or by boat or a combination of boat and truck. The sorting and harvesting of oysters and scallops will be done manually onboard the boat that accesses the farm. Bags of oysters and scallops will also be brought to the existing work platform at Potter Pond for general maintenance of the oysters and scallops as well at the dock

where the tumbler is located. There will no working platform at this farm and no mechanical sorter or tumbler will be on the barge at the Proposed Site.

The Proposed Site is removed from boat traffic and situated away from the navigational channel. The long lines and floating cages will not interfere with boat traffic, as there is no commercial assemblages of shellfish in the proposed area and no recreational attraction on the adjacent shoreline.

The Proposed Site's seafloor is soft sediment. The Proposal will not affect erosion or deposition along the shore. Shellfish aquaculture increases biodiversity within the boundaries of the Proposed Site. The shellfish farms do not negatively impact native avian species, in terms of the number of colonies or amount of habitat area – including breeding and molting areas. Studies have shown that native avian species are usually more abundant in areas that contain long line systems similar to the proposed system.

## **ARGUMENT**

### **I. CRMC Can Grant the Application By Exercising Its Exclusive Authority Over Aquaculture Activity in Rhode Island.**

CRMC has authority to grant the Application because CRMC has exclusive authority over Rhode Island aquaculture activity. Objectors correctly recognize that the General Assembly affords CRMC “broad regulatory jurisdiction” through its enabling statute, R.I. Gen. Laws § 46-23-1, *et seq.* (the “Enabling Statute”). *See* Objectors’ Memorandum at 9. Objectors, however, incorrectly claim that, through a separate statute, the General Assembly “circumscribed” that same authority within the context of issuing a lease for an aquaculture facility. *See id.* (citing R.I. Gen. Laws §20-10-1, *et seq.*, the “Aquaculture Act”).

Through its Enabling Statute, the General Assembly vested CRMC with exclusive jurisdiction over Rhode Island aquaculture activity. Specifically, CRMC has ““exclusive

jurisdiction below mean high water for all development, operations, and dredging, consistent with the requirements of chapter 6.1 of this title and except as necessary for the department of environmental management to exercise its powers and duties and to fulfill its responsibilities . . . .” R.I. Gen. Laws § 46-23-6(2)(ii)(A). The Rhode Island Supreme Court recognizes that the term “operations” within the Enabling Statute includes aquaculture. *See Champlin's Realty Assocs., L.P. v. Tillson*, 823 A.2d 1162, 1169 (R.I. 2003) (recognizing that the term “operations” has a “broad meaning” within the context of the Enabling Statute and includes, *inter alia*, aquaculture).

Consistent with both (1) the General Assembly’s intent; and (2) the Rhode Island Supreme Court’s interpretation of that intent, the CRMP Regulations<sup>1</sup> provide that “CRMC may grant aquaculture applicants *exclusive use of the submerged lands and water column, including the surface of the water,*” when CRMC “finds such exclusive use necessary to the effective conduct of the permitted aquaculture activities.” 650 R.I. Code. R. 20-00-1.3.1(K)(1)(b) (emphasis added).

Contrary to the Objectors’ claim, the Aquaculture Act – which recognizes that “the process of aquaculture is a proper and effective method to cultivate plant and animal life.” (R.I. Gen. Laws § 20-10-1) – does not impose restrictions on CRMC’s exclusive authority over aquaculture activity. In fact, the Aquaculture Act expressly “authorize[s] and empower[s]” CRMC to issue leases and permits for aquaculture activity. § 20-10-6(a). The Aquaculture Act further provides that CRMC may “lease the land submerged under the coastal waters of the state, including any coastal ponds. . . .” to an applicant to whom CRMC has issued an aquaculture

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<sup>1</sup> Codified as 650 R.I. Code. R. 20-00-1.1, *et seq.*

permit. *Id.* The issuance of any such lease is predicated on a CRMC finding that the lease “is necessary to the effective conduct of the permitted aquaculture activities.” *Id.*

In an apparent disregard of these provisions, Objectors claim that CRMC cannot grant the Application because the Aquaculture Act imposes on CRMC an elevated standard that restricts its leasing authority. More specifically, Objectors contend that, per the Aquaculture Act, the standard that CRMC must apply is not whether the Proposed Facility is “consistent with the ‘public interest,’” but rather whether it is “consistent with the ‘best public interest’” with “‘particular consideration given to the effect of aquaculture on the other uses of the free and common fishery and navigation.’” See Objectors’ Memorandum at 9 (quoting § 20-10-1) (emphasis in Memorandum).

Objectors’ argument ignores the fact that CRMC already applies this standard pursuant to its regulations. Indeed, the CRMP Regulations provide, in pertinent part, that “[a]quaculture shall only be conducted within the waters of the state in a manner consistent with the best public interest, with particular consideration given to the effect of aquaculture on other uses of the free and common fishery and navigation, and the compatibility of aquaculture with the environment of the waters of the state.” 250 R.I. Code R. 40-00-1.8(A). Because the Aquaculture Act does not impose an elevated standard or added restrictions to CRMC’s decision making process, it does not infringe on CRMC’s exclusive authority to grant the Application.

## **II. The Proposal Comports with the Public Trust Doctrine Because It Satisfies the CRMP Category B Assent Requirements.**

Objectors’ allegation that the Proposal is contrary to the Public Trust Doctrine is conclusory and baseless. The Rhode Island Supreme Court has repeatedly held that, under the Public Trust Doctrine, “the state holds title to all land below the high water mark in a proprietary capacity for the benefit of the public.” *Town of Warren v. Thornton-Whitehouse*,

740 A.2d 1255, 1259 (R.I. 1999) (quoting *Greater Providence Chamber of Commerce v. State*, 657 A.2d 1038, 1041 (R.I. 1995)). Because the Enabling Statute affords CRMC exclusive jurisdiction below mean high water for all development, operations, and dredging, it follows that CRMC “absolutely and clearly” has authority to regulate the land that the state holds under the Public Trust Doctrine. *Town of Warren*, 740 A.2d at 1259.

Rhode Island’s “statutory expression” of the Public Trust Doctrine is CRMC’s Category B Assent process. *Weaver’s Cove Energy, LLC v. Rhode Island Coastal Res. Mgmt. Council*, 583 F. Supp. 2d 259, 269 (D.R.I. 2008), *aff’d*, 589 F.3d 458 (1st Cir. 2009). It follows that an aquaculture facility that satisfies the CRMP Category B Assent requirements comports with the Public Trust Doctrine.

The CRMP Regulations provide that an applicant for a Category B Assent is required to do the following:

- a. Demonstrate need for the proposed activity or alteration;
- b. Demonstrate that all applicable local zoning ordinances, building codes, flood hazard standards, and all safety codes, fire codes, and environmental requirements will be met;
- c. Describe the boundaries of the coastal waters and land area that is anticipated to be affected;
- d. Demonstrate that the alteration or activity will not result in significant impacts on erosion and/or deposition processes along the shore and in tidal waters;
- e. Demonstrate that the alteration or activity will not result in significant impacts on the abundance and diversity of plant and animal life;
- f. Demonstrate that the alteration will not unreasonably interfere with, impair, or significantly impair existing public access to, or use of, tidal waters and/or the shore;

- g. Demonstrate that the alteration will not result in significant impacts to water circulation, flushing, turbidity, and sedimentation;
- h. Demonstrate that there will be no significant deterioration in the quality of the water in the immediate vicinity as defined by DEM;
- i. Demonstrate that the alteration or activity will not result in significant impacts to areas of historic and archaeological significance;
- j. Demonstrate that the alteration or activity will not result in significant conflicts with water dependent uses and activities such as recreational boating, fishing, swimming, navigation, and commerce; and
- k. Demonstrate that measures have been taken to minimize any adverse scenic impact.

*See* 650 R.I. Code. R. 20-00-1.3.1(A).

Additionally, the CRMP Regulations require that, in coastal salt ponds, the area occupied by commercial aquaculture shall not exceed five percent of the total open water surface area of the coastal pond. 20-00-1.3.1(K).

During the hearings on this matter, Mr. Raso will present both expert and lay testimony demonstrating satisfaction of all of the above-mentioned requirements. Notably, the addition of this aquaculture lease will not increase the area occupied by commercial aquaculture to over five percent. The testimony, instead, will demonstrate that the area that commercial aquaculture occupies in Potter Pond – including the Proposed Site – will be no greater than 3.1%.

Specifically, Mr. Raso as an experienced shellfish farmer – in Potter Pond – will testify regarding (1) the need for the Proposal; (2) why the Proposed Site is appropriate for the Proposal; and (3) the measures that have been taken to minimize any adverse scenic impact. Mr. Raso's testimony will demonstrate that the Proposal will not cause significant deterioration in the

quality of the water in the immediate vicinity, nor will it significantly impact the abundance and diversity of plants and animals in Potter Pond. Mr. Raso will provide a description of the boundaries of the coastal waters and area to be affected and demonstrate that the Proposal will not interfere with, impair, or significantly impact existing public access to or use of Potter Pond, including any water dependent uses recreational boating, fishing, swimming, navigation, and commerce.

Carrie Byron, Ph.D. (“Dr. Byron”), an expert on aquaculture and carrying capacities in aquaculture, will testify to the history of aquaculture carrying capacity in Rhode Island and the Proposal’s effects on ecological and social carrying capacity in Potter Pond. Dr. Byron will demonstrate that the Proposal will not exceed the five percent of the total open water surface area of Potter Pond. Dr. Byron’s testimony will also demonstrate that the Proposal will not result in significant impacts on erosion or deposition processes along the shore and in tidal waters. Finally, Dr. Byron will testify that the Proposal will not result in significant impacts on the abundance and diversity of plant and animal life in Potter Pond.

Michael A. Rice, Ph.D. (“Dr. Rice”), an expert on fisheries and aquaculture, will testify to the benefits of aquaculture and this Proposal specifically. Dr. Rice’s testimony will further demonstrate that the Proposal will not result in significant impacts on the abundance of diversity of plant and animal life nor will it have significant impacts on erosion or deposition processes along the shore and in the tidal waters of Potter Pond. Dr. Rice will also testify that the Proposal will not result in significant impacts to water circulation, flushing, turbidity, and sedimentation in Potter Pond. His testimony will demonstrate that the Proposal will have no significant deterioration in the quality of the water in the immediate vicinity. Dr. Rice will also testify regarding the balance of public access to the water and the Proposal – specifically, whether the



Proposal unreasonably interferes with access to the water or significant conflicts with water dependent uses.

Robert Rheault, Ph.D. (“Dr. Rheault”), an expert in aquaculture and carrying capacities in aquaculture, will provide testimony regarding the ecological impact of aquaculture in Rhode Island waters and, specifically, the impact of the current proposal. Dr. Rheault will also provide testimony regarding public access to the water and any impact on water dependent uses, such as those raised by the Objectors. Dr. Rheault will further testify regarding the need for the Proposal. Moreover, Dr. Rheault will testify that the Proposal will not result in significant impacts on erosion or deposition processes along Potter Pond’s shore and in its tidal waters. Dr. Rheault’s testimony will demonstrate that the Proposal will not result in significant impacts to water circulation, flushing, turbidity, and sedimentation, nor will it impact the diversity of plant and animal life or lead to the deterioration of the quality of water in the immediate vicinity of the Proposed Site.

Audie Osgood (“Mr. Osgood”), a professional engineer with DiPrete Engineering, will present a site plan depicting the location of the Proposed Site and describe the boundaries of the coastal waters and land area in relation to it including addressing the effects of the Town of South Kingstown’s ordinance which attempts to regulate water skiers, tubers and personal watercraft.

The above-mentioned testimony, along with Mr. Raso’s application and exhibits, will demonstrate that the Proposal satisfies the Category B Assent requirements. Accordingly, the Proposal comports with the Public Trust Doctrine, and Objectors’ bald assertions to the contrary are without merit.

### **III. CRMC Cannot Consider Objectors' Arguments Concerning Riparian Property Rights because CRMC Lacks the Jurisdiction To Do So.**

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CRMC cannot consider Objectors' arguments concerning their purported riparian rights in relation to the Proposed Site because CRMC does not have jurisdiction to do so. The Objectors argue that CRMC should deny the Application because the Proposed Site would infringe upon their riparian property rights as abutting property owners. Objectors' argument is predicated on the assumption that CRMC has jurisdiction to adjudicate riparian rights.

The Objectors are mistaken. Although the Enabling Statute provides, in relevant part, that CRMC "is authorized to exercise . . . operating functions [that] are essential to the management of coastal resources, the express list of such functions includes "[e]nforcing and implementing riparian rights in the tidal waters *after judicial decisions.*" R.I. Gen. Laws § 46-23-6(4)(v) (emphasis added). Put simply – and contrary to Objectors' unsubstantiated claim – the text of the statute unambiguously affords the responsibility of adjudicating riparian rights to the judiciary and not CRMC.

Consistent with the above-mentioned statute, it does not appear that CRMC has ever attempted to assert jurisdiction over the competing interests of riparian property owners.<sup>2</sup> For the above-mentioned reasons, CRMC cannot consider the arguments that Objectors raise concerning their purported riparian property rights.

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<sup>2</sup> In their attempt to argue that CRMC has jurisdiction to enforce riparian property rights, Objectors fail to reference a single administrative decision in which CRMC did so. Tellingly, Objectors instead rely on five separate judicial opinions spanning nearly 175 years in which the Rhode Island Supreme Court has adjudicated riparian rights.

**CONCLUSION**

For the above-mentioned reasons, Mr. Raso respectfully requests that CRMC grant its Application for a Category B State Assent to establish a three-acre shellfish farm.

Respectfully submitted,  
PERRY RASO  
By his Attorneys,

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Dated: November 11, 2020

**CERTIFICATE OF SERVICE**

I hereby certify that on November 11, 2020, I sent a true copy of the foregoing via email to the following:

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