

COASTAL RESOURCES MANAGEMENT COUNCIL

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

**APPLICANT PERRY RASO'S POST-HEARING MEMORANDUM OF LAW
IN SUPPORT OF HIS APPLICATION FOR A CATEGORY B STATE ASSENT
TO ESTABLISH THE PROPOSED AQUACULTURE FARM IN SEGAR COVE**

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Applicant Perry Raso (“Mr. Raso”) hereby submits his Post-Hearing Memorandum in support of his request for the Rhode Island Coastal Resources Management Council (“CRMC”) to approve his December 29, 2017 application for a Category B State Assent to establish a three-acre oyster and bay scallop farm (the “Proposed Farm”) using floated and suspended gear in Potter Pond, South Kingstown, Rhode Island (the “Raso Application” or the “Application,” attached as Exhibit 1).

For the reasons presented during the hearings on this matter and set forth herein, the Proposed Farm comports with all pertinent Coastal Resources Management Program (“CRMP”) Regulations and – by extension – the Public Trust Doctrine. Accordingly, CRMC should exercise its exclusive authority to grant aquaculture proposals by approving the Application.

INTRODUCTION

This case arises from Mr. Raso’s Application for his three-acre Proposed Farm in Potter Pond, South Kingstown. After a Staff Report, ten witnesses, and seven days of hearing, it is clear: Mr. Raso has met the Category B Assent requirements and his Proposed Farm would benefit the surrounding ecosystem while not significantly conflicting with recreational activities.

During the hearings, Kevin Hunt, David Latham, Alicia M. Cooney, Stephen Quigley, and Andrew Wilkes (collectively, “Objectors”) focused almost entirely on their claim that the Proposed Farm would *significantly* limit tubing and water skiing in Segar Cove, where the Proposed Farm would be located. As CRMC Staff has noted, the claim that “recreational boating activities will disappear” as a result of the introduction of the Proposed Farm is “just outrageous.” See transcript of David Beutel testimony on November 12, 2020 and December 4, 2020 (“Beutel Tr.,” attached as Exhibit 2) at 26:21-23. The evidence, instead, confirms that any impact on recreational activities, including water skiing and tubing, will be anything but

significant. For example, the testimony of Objectors' expert witness¹ confirmed that the number of water skiers in Segar Cove would decrease by only one user if the Proposed Farm was approved. Accordingly, Objectors' claims fall short.

Similarly, Objectors' claims that the Proposed Farm is inconsistent with the best interest of the public and the Public Trust Doctrine lack merit because the evidence presented confirms that the Proposed Farm satisfies each of the eleven Category B Assent requirements. Objectors disputed only two of those requirements: (i) whether the Proposed Farm would unreasonably interfere with, impair, or significantly impact existing public access to Potter Pond; and (ii) whether the Proposed Farm will result in significant conflicts with water dependent uses or activities. The evidence nonetheless confirms that the Proposed Farm would not unreasonably interfere with, impact or significantly impact existing public access to Potter Pond and, as set forth above, the Proposed Farm, will not result in significant conflicts with water dependent uses or activities.

The satisfaction of the remaining Category B requirements is uncontested. Specifically, the evidence confirms that:

- (1) Mr. Raso has demonstrated need for the Proposed Farm;
- (2) the Proposed Farm meets all applicable zoning ordinances, building codes, flood hazard standards, as well as all safety codes, fire codes, and environmental requirements;
- (3) Mr. Raso has provided in detail the boundaries of multiple configurations of the Proposed Farm;

¹ Mr. Wilkes – who received separate legal representation from Mr. Hunt, Mr. Latham, Ms. Cooney, and Mr. Quigley – provided no expert witness testimony throughout the course of these hearings.

(4) The Proposed Farm will not result in significant impacts on erosion or deposition processes along Potter Pond's shore or in tidal waters;

(5) The Proposed Farm will not result in significant impacts on the abundance and diversity of plant and animal life;

(6) The Proposed Farm will not unreasonably interfere with, impair, or significantly impact existing public access to or use of Segar Cove's shore or tidal waters;

(7) The Proposed Farm will not result in any significant impact to water circulation, flushing, turbidity, or sedimentation;

(8) The Proposed Farm will not harm the quality of the water in Segar Cove or Potter Pond;

(9) The Proposed Farm will not result in significant impacts to areas of historic and archaeological significance;

(10) The Proposed Farm will not result in significant conflicts with water dependent uses or activities; and

(11) Mr. Raso has taken measures to minimize any adverse scenic impact on Segar Cove. Finally, the evidence presented confirms that the addition of the Proposed Farm will not result in commercial aquaculture occupying more than 5% of Potter Pond's total open water surface area, thereby abiding by CRMP Regulations. In light of the Application's satisfaction of all of the Category B Assent requirements,² this Subcommittee should make a positive recommendation to the full Council to grant Mr. Raso's Application.

² Codified as 650-RICR-20-00-1.3.1(A)(1).

FACTUAL BACKGROUND

A. The Application

On December 29, 2017, Mr. Raso submitted the Application for the Proposed Farm that would be located in Segar Cove. Post-Hearing Statement of Facts (“SOF”) ¶ 1. Segar Cove is 53.5 acres and located in Type 2 waters. *Id.* ¶ 2-3. Mr. Raso has an existing 6.9-acre aquaculture lease in Potter Pond (the “Existing Lease”). *Id.* ¶ 8.

The Application initially proposed a rectangle shaped layout of the Proposed Farm (“Configuration A”). *Id.* ¶ 4. Configuration A’s dimensions are ten feet at the northeastern corner, thirty feet at the narrowest point along the eastern side of the Proposed Farm, and approximately seventy feet at the southern end. *Id.* ¶ 5. The closest private docks from the Proposed Farm are 480 feet to the north, 450 feet to the south, and 720 feet to the west. *See Id.* ¶ 7. After discussions with CRMC staff, on March 15, 2018, Mr. Raso submitted a proposed reconfiguration of the lease area (“Configuration B”) to minimize the western border from extending into Segar Cove. *Id.* ¶ 6.³

Thereafter, on November 18, 2019, Mr. Raso submitted a collection of photographs of Segar Cove taken at or close to 12:00 p.m. from July 25, 2019 through October 31, 2019 (with

³ CRMC posted public notice of the Application on January 3, 2018. The initial comment period was thirty days. The Town of South Kingstown (the “Town”) requested an extension of the comment period. CRMC issued a letter to the Town granting its request to extend the Public Notice End Date from February 2, 2018 to February 16, 2018. *See* SOF ¶ 26. From January 9, 2018 through December 3, 2018, CRMC received public comments, objections and letters of support for the Application. *Id.* at 27. TAs set forth in Paragraphs 28-3 of the *Statement of Facts*, the applicable State agencies and the Town provided their advisory recommendations to CRMC. *See* SOF ¶¶ 28-3. Notably, on October 4, 2017, at a meeting of the Town’s Conservation Commission (the “Commission”), voted to recommend denial of the Application. *Id.* ¶ 2. The Commission did not invite Mr. Raso to the meeting and therefore Mr. Raso did not have the opportunity to address the concerns raised by the Commission with respect to the Proposed Farms. *Id.*

the exception of three days), demonstrating that there is limited recreational use of Segar Cove, and specifically the area surrounding the Proposed Farm. SOF ¶ 10.

The westernmost sections of the Proposed Farm will include twelve rows of fifty 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. *Id.* ¶ 11. Spat bags to hold scallop seed will be attached to the submerged long lines when the scallops are in their juvenile stage. *Id.* ¶ 12. The spat bags are fine mesh soft nylon bags and have a plastic mesh inside the bag for the juvenile scallops to byss (attach). *Id.* Each line will hold 100 spat bags when they are being used. *Id.* 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. *Id.*

The easternmost sections of the Proposed Farm will include twelve rows of thirty floating cages, with each section being 107 feet by 206 feet. *Id.* ¶ 13. The cages are thirty inches wide by seventy inches and twelve inches deep. *Id.* Fastened to the top of each cage will be two or three (depending on weight) black plastic floats that are twenty-five square inches and extend the width of the cage thirty inches. *Id.* The low-profile floats will protrude out of the water three inches to four inches maximum. *Id.* ¶ 14. Eight plastic mesh oyster growing bags (two feet by three feet) will be inserted into each cage. *Id.* The twelve rows of thirty cages will be positioned in north to south rows. *Id.* The cages will be fastened with lines that will be anchored at the end of each section. *Id.*

Six-inch cylinder floats will mark the ends of each of the rows. *Id.* ¶ 15. Lobster pot floats of fourteen inches will be used to mark the corners of the Proposed Farm. *Id.* Five-inch floats may be used to keep the scallop spat bags suspended and six-inch 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. *Id.*

When the scallops and oysters have reached market size and have been at the Proposed Farm for at least one year, they will be harvested and sold locally and regionally. *Id.* ¶ 17. The scallops and oysters will be transported to market either directly by boat or a combination of boat and truck. *Id.* Harvesting methods, storage, and transportation of the product will follow all guidelines in accordance with the Interstate Shellfish Sanitation Conference, RIDEM, CRMC, and the Rhode Island Department of Health. *Id.*

B. The Staff Report

On June 2, 2020, David Beutel, who was the CRMC Aquaculture Coordinator at the time, issued a staff report recommending approval of the Application for the Proposed Farm (the “CRMC Staff Report” or the “Staff Report,” attached as Exhibit 3). *Id.* ¶ 35. Noting the numerous public comments, the Staff Report stated that of the 147 objections, seventy-nine were received from non-Rhode Island residents⁴ and many of the objections from the public appeared to be based on misinformation. Exhibit 3 (CRMC Staff Report) at 1; Exhibit 2 (Beutel Tr.) at 23:1-3. With respect to concerns related to the Proposed Farm impacting recreational uses, the Staff Report noted that the Existing Lease and Proposed Farm combined would only account for 3% of allowable aquaculture on Potter Pond with 97% remaining for all other users and activities. SOF ¶ 9. The Staff Report further noted that recreational activities will not be

⁴ The Staff Report also noted that multiple family members and neighbors submitted identical objection letters. Exhibit 3 (CRMC Staff Report) at 1.

prohibited in Potter Pond if the Proposed Farm is approved.⁵ Exhibit 3 (CRMC Staff Report) at 4.

Mr. Beutel also testified before the CRMC Subcommittee on November 12, 2020 and December 4, 2020. Mr. Beutel's testimony addressed the fifteen concerns raised by Objectors as summarized in the Staff Report. *See* Exhibit 2 (Beutel Tr.) at 24:5-29:16. Notably, Mr. Beutel confirmed that the Proposed Farm would have very little impact on navigation by boats of all types, including powerboats, sailboats, paddle boarding and kayaking. *Id.* at 26:8-20. Mr. Beutel stated that Segar Cove is "sufficiently big" so that powerboats and sailboats will still be able to operate with the presence of the Proposed Farm. *Id.* at 26:18-20. Additionally, Mr. Beutel testified that the location of the Proposed Farm was chosen based on the species and methods proposed in the Application. Specifically, Mr. Beutel described that the Proposed Farm area provides the sufficient depth to grow scallops, as well as the soft mud sedimentation necessary to operate floating and suspended gear to harvest bay scallops.⁶ *Id.* at 661:19-22. Mr. Beutel opined that the effects of the Proposed Farm are not significant and the uses of Segar Cove will be balanced if the Proposed Farm is approved. *Id.* at 663:1-4. With respect to the CRMP Category B Assent requirements, Mr. Beutel testified that it was CRMC Staff's opinion that Mr. Raso has met all of the criteria for a Category B assent. *Id.* at 30:7-24.

⁵ The Staff Report addressed the following fifteen most common topics of concern raised by public commenters: noise, tranquility, recreational fishing, clamming, wildlife, visual, navigation, recreation, property values, pollution from oysters, timing, Matunuck Oyster Bar, hunting, beach access, and Mr. Raso's current activity on Potter Pond. *See* Exhibit 3 (CRMC Staff Report) at 2-5. The Staff Report dispelled many of these concerns. *See id.*

⁶ According to Mr. Beutel, bay scallops need suspended gear so that they are not affected by winter cold or potential winter ice. Exhibit 2 (Beutel Tr.) 661:13-17.

C. CRMC Subcommittee Public Hearings

In addition to the testimony of Mr. Beutel, Mr. Raso and his experts testified before the CRMC Subcommittee on behalf of the Proposed Farm. First, Mr. Raso – a thirty-three year South Kingstown resident – testified as to his extensive experience in and knowledge of aquaculture and Potter Pond. *See* transcript of Perry Raso’s testimony on November 12, 2020 (“Raso Tr.,” attached as Exhibit 4) at 44:11-12; 62:19-63:18.⁷ Mr. Raso explained that he chose to locate the Proposed Farm in Segar Cove because, based on his many years of living and working on Potter Pond, the location of the Proposed Farm was the least used part of Potter Pond and would have the least impact on other users. *Id.* at 54:20-24. Mr. Raso testified that he very seldom observed individuals using the area for the Proposed Farm for recreational purposes. *Id.* at 64:2-15; 67:1-5.

Mr. Raso confirmed that there would not be a permanent structure or platform on the Proposed Farm. SOF ¶ 20. Additionally, Mr. Raso testified that he would not hire new employees to operate the Proposed Farm, rather he would use the same employees operating the Existing Lease to operate the Proposed Farm. *Id.* ¶ 21. Mr. Raso testified that the operating hours for the Proposed Farm from November 15 to March 15 will be from 9:00 a.m. to 3:00 p.m. to reduce the interference with migratory water fowl that use Segar Cove as a roost site during the winter. *Id.* ¶ 19. He further explained that to minimize noise, large machinery, such as tumblers and high-pressure power washers, would not be used at the Proposed Farm and agreed that his staff would not play radios. *Id.* ¶ 22. Mr. Raso testified that the day-to-day operations of the Proposed Farm would generally consist of employees hauling the lantern nets out of the

⁷ In particular, Mr. Raso holds a Bachelor’s Degree in Aquaculture and Pathology Science with a Master’s Degree in Aquaculture and Fisheries technology. *Id.* at 44:18-21. Mr. Raso also grows oysters for retail at his existing restaurant, the Matunuck Oyster Bar, and for wholesale purposes to other restaurants. *Id.* at 45:19-22.

water, emptying the lantern nets and floating cages, then separating the oysters and scallops by hand. *Id.* ¶ 23.

Mr. Raso also testified that he has taken measures to minimize adverse scenic impacts to the surrounding area. *Id.* ¶ 66. He stated that he purposefully positioned the Proposed Farm to the north so that it was not in between two docks, allowing others to navigate in and around the Proposed Farm and to go in and out of Segar Cove. Exhibit 4 (Raso Tr.) at 59:5-11.

Additionally, he testified that, based on his knowledge of Potter Pond and aquaculture, he situated the Proposed Farm so that it would increase ecosystem services. *Id.* at 80:13-21.

Audie Osgood (“Mr. Osgood”), a Professional Engineer with DiPrete Engineering, Inc.,⁸ next testified and was qualified as an expert engineer. *See* transcript of Audie Osgood’s testimony on November 12, 2020 and January 29, 2021 (“Osgood Tr.,” attached as Exhibit 6) at 129:11-131:8. Mr. Osgood testified as to the dimensions and location of the Proposed Farm and confirmed that the Proposed Farm meets applicable zoning ordinances, building codes and flood hazard standards. SOF ¶ 24. He also confirmed that the Proposed Farm would not obstruct access to Segar Cove. *Id.* ¶ 48. Mr. Osgood further explained that the Proposed Farm’s closest point to the shore is ten feet, which Mr. Osgood opined is enough space for most vessels to operate through. *Id.* ¶ 59.

Mr. Osgood additionally addressed the application of the 200-foot buffers required under Section 4-8 of the Town of South Kingstown Boats and Waterways Ordinance (the “Town Ordinance” or the “Ordinance,” the relevant portions attached as Exhibit 7) to Segar Cove and the Proposed Farm. Exhibit 6 (Osgood Tr.) at 138:9-22. He explained that the area provided for towed-water sports in Segar Cove is already limited when applying the 200-foot buffer from the

⁸ A copy of Mr. Osgood’s resume is attached as Exhibit 5.

shoreline under the Ordinance. *Id.* at 138:14-19; 140:4-18. Specifically, Mr. Osgood testified that, when applying the Ordinance, towed-water sports currently have 16.7 of acres of Segar Cove available for towed water sports. *Id.* at 960:23-961:7; *see also* January 22, 2021 letter from DiPrete Engineering (“DiPrete Letter,” attached as Exhibit 8).

When applying the Proposed Farm to Segar Cove, Mr. Osgood testified that 75% of the Proposed Farm would be located within the 200-foot buffer leaving 11.8 acres available for towed water sports.⁹ Exhibit 6 (Osgood Tr.) at 961:8-17; Exhibit 8 (DiPrete Letter). With respect to impact of the Proposed Farm on non-towed water sport recreational activities, Mr. Osgood testified that the impact would be even less. *See* Exhibit 6 (Osgood Tr.) at 146:2-12. Mr. Osgood noted that the Proposed Farm would not restrict paddle boarding and kayaking. *Id.* at 146:6-8.

On January 29, 2021,¹⁰ Mr. Osgood provided rebuttal testimony to clarify the Objectors’ testimony on the application of 200-foot buffer to the Proposed Farm pursuant to Section 4-8 of the Town Ordinance. Mr. Osgood testified that, without the Proposed Farm, the Ordinance presently restricts 36.8 acres of Segar Cove leaving 16.7 acres available for towed water sports. *See* Exhibit 6 (Osgood Tr.) at 961:5-7. Mr. Osgood confirmed that, with the presence of the Proposed Farm, would increase the total area restricted by only 4.1 acres. *Id.* at 961:13-15. Mr. Osgood further confirmed that 11.8 acres would still available for towed water sports. *Id.* at 961:15-17.

⁹ Configuration B would provide 12.9 acres available for towed water sports. Exhibit 6 (Osgood Tr.) at 961:22-962:7; Exhibit 8 (DiPrete Letter).

¹⁰ On December 16, 2020 and January 29, 2020, the Subcommittee heard a wide-range of public comments from those both in favor and in opposition of the Proposed Farm. Public commenters were not under oath.

Dr. Carrie Byron, qualified as an expert in environmental science with a specialty as a professor in marine science, next testified at the hearing. *See* transcript of Dr. Carrie Byron’s testimony on November 13, 2020 (“Byron Tr.,” attached as Exhibit 9) at 175:15, 178:10-14; 179:1-13. Dr. Byron explained that CRMC’s “5% Rule”¹¹ constituted an agreement between stakeholders as a calculation intended to reflect the ecological carrying capacity of Rhode Island ponds. SOF ¶¶ 39-40. She further explained that the 5% Rule was calculated and agreed upon prior to the completion of her more comprehensive food web model. Exhibit 9 (Byron Tr.) at 184:13-185:20. Dr. Byron’s food web model study determined that the ecological carrying capacity in Potter Pond is 46%, a magnitude higher than the 5% Rule. SOF ¶ 41. Indeed, she confirmed that the 5% Rule from an ecological standpoint is highly conservative. Exhibit 9 (Byron Tr.) at 187:2-3. Dr. Byron testified that, based on her knowledge and expertise, the Proposed Farm will not impact the ecological carrying capacity of Potter Pond. SOF ¶ 42.

Dr. Byron stated the Proposed Farm “certainly will not harm the water quality” of Potter Pond, rather it might improve water quality and clarity. Exhibit 9 (Byron Tr.) at 187:11-19. She also opined that, based on her knowledge and expertise, the Proposed Farm will neither harm the organism abundance and diversity of Potter Pond nor impact flushing or sedimentation. SOF ¶ 43. Dr. Byron testified the Proposed Farm would have localized positive benefits such as enhanced water clarity, nutrient cycling, and provide structure and habitat by diversity. *Id.* ¶ 46¹²

¹¹ Pursuant to CRMP Regulations, in coastal salt ponds, the area occupied by commercial aquaculture shall not exceed 5% of the total open water surface area of the coastal pond below mean low water. *See* 650-RICR-20-00-1.3.1(k).

¹² Dr. Byron noted that her testimony would not change based on whether the Proposed Farm was all oysters or half oysters and half scallops. Exhibit 9 (Byron Tr.) at 190:13-16.

Dr. Michael Rice testified next as an expert in aquaculture who was involved in the development of Rhode Island's aquaculture laws and regulations. *See* transcript of Dr. Michael Rice's testimony on November 13, 2020 ("Rice Tr.," attached as Exhibit 10) at 207:3-9; 210:15-211:20. Dr. Rice testified that it was his expert opinion that the Proposed Farm will have no major effect on changing of currents, soil erosion, or turbidity. *Id.* at 219:15-17. In fact, Dr. Rice testified that scallops and oysters are filter feeders that remove phytoplankton from the water and therefore are more likely to improve water quality. SOF ¶ 44. He also confirmed that, based on his knowledge and expertise, the Proposed Farm would have very little effect on plant and animal diversity and abundance. *Id.* ¶ 65. Dr. Rice provided that the Proposed Farm would not result in significant conflicts with water dependent uses and activities such as recreational activities, including boating, fishing, swimming and navigation. *Id.* ¶ 49. Dr. Rice further opined that, based on his knowledge and expertise, the Application provides the appropriate balance of aquaculture and public access sought by CRMC in its regulations. Exhibit 10 (Rice Tr.) at 222:24-223:5.

Finally, Dr. Rheault, qualified as an expert in aquaculture, was the last expert to testify in support of the Proposed Farm. *See* transcript of Dr. Robert Rheault's testimony on November 13, 2020 and November 17, 2020 ("Rheault Tr.," attached as Exhibit 11) at 264:15-17; 266:13-267:7. Dr. Rheault testified as to the history of aquaculture in Rhode Island and specifically, as to the evolution of the 5% Rule, which he confirmed was conservative and agreed-upon based on the science at the time.¹³ *Id.* at 273:15- 275:19. Dr. Rheault further testified that the Category B Assent requirement regarding need requires applicants to demonstrate that they have completely

¹³ Dr. Rheault testified that Dr. Byron's subsequent food modeling study confirmed that Dr. Rheault's 5% Rule was a vast underestimate of the amount of shellfish that could be in the water. *Id.* at 275:4-8.

used their first three-acre aquaculture lease to avoid speculative applications. *Id.* at 276:8-21. He opined that the Application clearly demonstrates a need for the Proposed Farm and, specifically, that Mr. Raso has filled up the Existing Lease resulting in the need for additional water depth to grow scallops, which the Proposed Farm provides. *Id.* at 277:14-279:5.

Dr. Rheault further opined that Mr. Raso has taken measures to minimize adverse scenic impact by choosing low profile floating gear, which will make the gear less visible. SOF ¶ 66. He further stated that the Proposed Farm would have a low impact on recreational uses and would not impair kayaking, canoeing, or paddle boarding. Exhibit 11 (Rheault Tr.) at 287:5-16. He, in fact, testified that the Proposed Farm would enhance water-dependent uses and activities. *Id.* at 287:17-23. Based on his knowledge and expertise, he opined that the Proposed Farm will not result in significant conflicts with other water dependent uses and activities and that the Proposed Farm will not have an impact on the ecology of Segar Cove. *See id.* at 325:5-12; 327:1-22.

The Objectors introduced only one expert witness —Payson Whitney, a civil and coastal engineer—who provided limited relevant testimony on the Category B Assent requirements. Of the eleven CRMP Category B Assent requirements, Mr. Whitney addressed only two: (i) whether the Proposed Farm would result in significant conflicts with water dependent uses and activities such as recreational boating and navigation pursuant to 650-RICR-20-00-1.3.1(A)(1)(j); and (ii) whether the Proposed Farm would unreasonably interfere with, impair, or significantly impact existing public access to, or use of, Segar Cove pursuant to 650-RICR-20-00-1.3.1(A)(1)(f). Notably, however, Mr. Whitney’s written report submitted to CRMC failed to address whether the Proposed Farm would result in “*significant*” conflicts with recreational activities and whether the Proposed Farm would “*unreasonably*” interfere with public access, as required under the

CRMP Category B Assent requirements. *See* transcript of Payson Whitney’s testimony on November 17, 2020 and December 4, 2020 (“Whitney Tr.,” attached as Exhibit 12) at 450:17–452:18.

Mr. Whitney also restricted his testimony to the application of Section 4-8 of the Town Ordinance on Segar Cove and how the addition of the Proposed Farm would specifically impact towed water sports and personal watercrafts. *See id.* at 453:3-8. Mr. Whitney testified that the Proposed Farm would have the most impact on water skiers, however, he confirmed that the impact would only effect one water-skier at any point in time. SOF ¶ 56. With respect to personal watercrafts, such as kayaks, paddleboards, and sailboats, Mr. Whitney testified that the Proposed Farm would have even less of an impact. *Id.* ¶ 57. Mr. Whitney did not refute the testimony of the experts who testified on behalf of the Proposed Farm with respect to the nine other CRMP Category B Assent requirements.¹⁴

ARGUMENT

I. CRMC Should Exercise Its Exclusive Authority over Aquaculture Activity in Rhode Island by Granting the Application.

CRMC should exercise its exclusive authority over aquaculture activity in Rhode Island by granting the Application. The General Assembly affords CRMC “broad regulatory jurisdiction” through its enabling statute, R.I. Gen. Laws § 46-23-1, *et seq.* (the “Enabling Statute”). In doing so, the General Assembly vested CRMC with exclusive jurisdiction over Rhode Island aquaculture activity.

¹⁴ On January 20, 2021 and pursuant to the Access Public Records Act, R.I. Gen. Laws § 38-2-1, *et seq.* (“APRA”) a request was sent to was sent to RIDEM for any and all documents related to accident data of aquaculture facilities in: Point Judith Pond, Potter Pond, Green Hill Pond, Ninigret Pond (Charlestown Pond), and Quonochontaug Pond. On January 26, 2021, RIDEM responded that no requested records exist. *See* SOF ¶ 70.

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 include 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 Regulations¹⁵ 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-RICR-20-00-1.3.1(K)(1)(b) (emphasis added). Accordingly, as set forth below, CRMC should exercise its exclusive authority over aquaculture activity by granting the Application.

II. Rhode Island Law Does Not Impose Any Elevated Standard or Added Restrictions to CRMC’s Exclusive Authority to Grant the Application.

Contrary to Objectors’ repeated claim, Rhode Island law does not impose any elevated standard or added restrictions to CRMC’s Exclusive Authority to Grant the Application. Rhode Island law governing aquaculture, R.I. Gen. Laws § 20-10-1, *et seq.* (the “Aquaculture Act”) – which recognizes that “the process of aquaculture is a proper and effective method to cultivate plant and animal life” – does not impose restrictions on CRMC’s exclusive authority over

¹⁵ Codified as 650-RICR-20-00-1.1, *et seq.*

aquaculture activity. R.I. Gen. Laws § 20-10-1. 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 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. *See* transcript of Objectors’ testimony on November 17, 2020 and December 4, 2020 (“Objectors’ Tr.,” attached as Exhibit 13) at 331:21-332:1. More specifically, Objectors contend that, *per* the Aquaculture Act, the standard that CRMC must apply is whether the Proposed Facility 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.’” *Id.* at 332:4-8 (quoting R.I. Gen. Laws § 20-10-1).

Objectors ignore the fact that CRMC *already* applies this standard pursuant to its regulations and through the Category B Assent requirements. 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-RICR-40-00-1.8(A). As such, Mr. Raso’s satisfaction of the CRMP Regulations described herein constitutes satisfaction of the above-mentioned standard set forth in the Aquaculture Act.

III. Rhode Island Law Provides that Satisfaction of the CRMP Category B Assent requirements Constitutes Satisfaction of the Public Trust Doctrine.

Objectors have also alleged that CRMC should deny the Application because the Proposed Farm is contrary to the Public Trust Doctrine. *See* Exhibit 13 (Objectors' Tr.) at 335:2-7. These allegations are baseless, as it is well settled that satisfaction of the CRMP Category B Assent requirements constitutes satisfaction of the Public Trust Doctrine.

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 – such as the Proposed Farm – that satisfies the CRMP Category B Assent requirements comports with the Public Trust Doctrine.

IV. The Proposed Farm Satisfies All CRMP Category B Assent requirements.

The testimony and evidence presented to this Subcommittee evidences the Application’s satisfaction of all Category B Assent requirements. Indeed, CRMC Staff has already made this determination. *See* Exhibit 2 (Beutel Tr.) at 30:22-24; Exhibit 3 (CRMC Staff Report) at 4. Throughout the hearings on this matter, Objectors attempted to refute almost exclusively the

Proposed Farm’s compliance with only two of the eleven Category B Assent requirements, namely that (i) the Proposed Farm will not unreasonably interfere with, impair, or significantly impact existing public access to or use of Segar Cove’s shore or tidal waters; and (ii) the Proposed Farm will not result in significant conflicts with water dependent uses or activities. Not only do the challenges to those two requirements fail, but also the Application satisfies the nine remaining uncontested requirements.¹⁶

a. The Proposed Farm Will Not Unreasonably Interfere with, Impair, or Significantly Impact Existing Public Access to or Use of Tidal Waters or Shore of Segar Cove.

The Category B Assent requirements provide that Mr. Raso must “[d]emonstrate that the alteration will not unreasonably interfere with, impair, or significantly impact *existing* public access to, or use of, tidal waters and/or the shore.” 650-RICR-20-00-1.3.1(A)(1)(f) (emphasis added). As CRMC Staff has already indicated, Mr. Raso has met this requirement.

Curiously, Objectors’ complaints concerning public access fail to address *existing* public access points. More specifically, Objectors ignored the report of their own expert, who testified that each of Segar Cove’s existing four public access points is located on the cove’s western shoreline. *See* Exhibit 12 (Whitney Tr.) at 366:5-8; ESS Report (attached as Exhibit 14) at Figure 1A. The Proposed Farm would be located on the cove’s eastern shoreline. As a result, the Proposed Farm will impact exactly *zero* of the existing four public access points to Segar Cove that Mr. Whitney identified.

Moreover, there is no competent evidence that either configuration would “*unreasonably interfere with, impair, or significantly impact existing* public access to, or use of, tidal waters

¹⁶ Although Counsel for Mr. Wilkes attempted to refute that Mr. Raso has demonstrated need for the Proposed Farm (*see infra* Section IV(c)), he only did so on cross-examination and at no point provided any testimony to lend credence to his belief.

and/or the shore” (emphasis added). In fact, CRMC staff praised Mr. Raso’s “willing[ness] to work to accommodate” those concerns about public access. Exhibit 3 (CRMC Staff Report) at 4. Specifically, Mr. Raso worked with CRMC Staff and DEM to modify the original rectangular configuration submitted (*i.e.*, Configuration A). In doing so, Mr. Raso submitted to CRMC an alternative polygon configuration (*i.e.*, Configuration B) that “minimize[s] the extent of the western border into Segar Cove” – thereby minimizing any impact that the Proposed Farm might have on water-based activities. Exhibit 2 (Beutel Tr.) at 31:14-18. A map outlining and comparing Configuration A to Configuration B (the “Proposed Site Plan”) is attached as Exhibit 15.

CRMC Staff ultimately recommended Configuration B. *See* Exhibit 3 (CRMC Staff Report) at 4. In doing so, CRMC Staff noted that both (1) the shoreline adjacent to the Proposed Farm site; and (2) the area south of the Proposed Farm site “*will be accessible regardless of whether the aquaculture site is present or absent.*”¹⁷ Exhibit 3 (CRMC Staff Report) at 2 (emphasis added). Dr. Rice – who served on the drafting team for current aquaculture legislation that set forth CRMC as the lead agency for aquaculture permitting¹⁸ – reached the same conclusion. Specifically, in his review of the Application and Proposed Farm site, Dr. Rice testified that the Application provides a “balance of aquaculture and public access sought by CRMC as set forth in that legislation.” Exhibit 10 (Rice Tr.) at 222:24-223:5. As such, Dr. Rice determined that Mr. Raso successfully demonstrated that the Proposed Farm would neither

¹⁷ Despite expressing familiarity with the CRMP Regulations, at no point does Objectors’ sole expert, Mr. Whitney, opine in his report that the Proposed Farm would either (1) unreasonably interfere with; or (2) impair existing public access to Segar Cove. *See* Exhibit 12 (Whitney Tr.) at 450:7-451:19; 452:16-17.

¹⁸ Exhibit 10 (Rice Tr.) at 209:17-23.

interfere with nor significantly impact public access or use of the tidal waters or shore of Segar Cove. *Id.* at 246:8-13.

Furthermore, as noted by this Subcommittee, there is not a meaningful difference between Configuration A and Configuration B. Exhibit 6 (Osgood Tr.) at 149:11-14.¹⁹ In fact, Mr. Raso provided expert testimony demonstrating that the difference between Configuration A and Configuration B is negligible. More specifically, from a “dimensional physical constraint standpoint,” Mr. Osgood testified that the maximum distance from either Configuration A or Configuration B to the shoreline is “approximately the same.” Exhibit 6 (Osgood Tr.) at 148:23-149:3. Mr. Osgood further testified that the northeast corner of Configuration A – which is approximately 10 feet away from the Segar Cove shoreline – would not be a problem because “10 feet is enough to get most vessels through.” *Id.* at 149:19-23. Additionally, Dr. Rheault acknowledged that neither Configuration A nor Configuration B would result in “a huge loss of fisheries access.” Exhibit 11 (Rheault Tr.) at 272:19-273:1.

For the above-mentioned reasons, neither Configuration A nor Configuration B will impact existing public access to Segar Cove.

b. The Proposed Farm Will Not Result in Significant Conflicts with Water Dependent Uses or Activities.

Mr. Raso has also satisfied the Category B requirement that the Proposed Farm “will not result in *significant conflicts* with water dependent uses and activities such as recreational

¹⁹ In fact, at the conclusion of all expert testimony, this Subcommittee stated that it *preferred* Configuration A over Configuration B, to which CRMC Staff had no objection. Exhibit 2 (Beutel Tr.) at 662:2-11. More specifically, this Subcommittee determined that the rectangular shape of Configuration A “is certainly more efficient and easier to work with.” *Id.* at 662:12-13. This is consistent with Dr. Rheault’s testimony that the “regular shape” of Configuration A is “easy to mark” with four corners, and is “relatively easy to manage.” Exhibit 11 (Rheault Tr.) at 284:6-11.

boating, fishing, swimming, navigation, and commerce.” 650-RICR-20-00-1.3.1(A)(1)(j) (the “Water Activity” prong) (emphasis added).²⁰ Contrary to Objectors’ baseless assertions – and as CRMC Staff has already recognized – the claim that “recreational boating activities will disappear” as a result of the introduction of the Proposed Farm is “just outrageous.” Exhibit 2 (Beutel Tr.) at 26:21-23.²¹ In fact, there will be no “significant conflicts” with any recreational activity.

In their attempt to convince this Subcommittee otherwise, Objectors have focused solely on water skiing and tubing, relying on Sections 4-8(1) within the Town Ordinance, which provides that:

No water skier or his/her boat shall approach any stationary or moving object closer than two hundred (200) feet, except as may be incidental to starting or finishing a run nor shall any water skier ski within any designated channels.

See Exhibit 14 (ESS Report) at 7 (providing in full Town Ordinance Section 4-8(1)). Objectors have similarly relied on Section 4-8(6) of the Town Ordinance, which provides as follows:

No person shall operate a personal water craft within two hundred (200) feet of swimmers, divers, shore, or moored vessels, except at head-way speed.

Exhibit 14 (ESS Report) at 8 (providing in full Town Ordinance Section 4-8(6)).

²⁰ Notably, at no point in his report does Mr. Whitney expressly state that there are significant conflicts with water dependent uses and activities, such as recreational boating, fishing, swimming, navigation, or commerce. *See* Exhibit 12 (Whitney Tr.) at 452:7-12.

²¹ Based on the photographic record of Segar Cove between July 2019 and October 2019 that Mr. Raso provided, CRMC Staff further concluded that Segar Cove is not “a high use area for recreational activities.” Exhibit 3 (CRMC Staff Report) at 3. A copy of this photographic record is attached as 16.

Such reliance is misplaced. Assuming *arguendo* that Rhode Island law compels CRMC to comport with the Town Ordinance,²² the proper application of the above-mentioned provisions only reveals that (1) the Proposed Farm will impact – at most – only one towed motor sport vessel at any given time on Segar Cove; (2) the Proposed Farm will reduce the watersheet available for towed water sports by fewer than five acres; and (3) the Proposed Farm will have a minimal impact on all other recreational activities on Segar Cove.

I. The Proposed Farm Will Impact – at Most – Only One Towed Motor Sport Vessel at Any Given Time on Segar Cove.

The Proposed Farm cannot significantly conflict with towed water sport activity on Segar Cove because, pursuant to the Town Ordinance, Segar Cove’s ability to accommodate towed water sport activity is already extraordinarily limited.²³

The overall watersheet of Segar Cove is approximately 53.5 acres. SOF ¶ 1. As explained *supra*, Section 3-8(1) of the Town Ordinance provides, in relevant part, that no person shall operate their towed motor sports vessel within 200 feet of any stationary objects. Section 3-8(6) of the Ordinance provides, in relevant part, that no person shall operate their towed motor sports vessel within 200 feet of, *inter alia*, “[the] shore.” As such, prior to the introduction of the Proposed Farm, the 200-foot buffer resulting from the shoreline and stationary objects reduces

²² Mr. Raso maintains that Town Ordinance cannot affect CRMC’s jurisdiction. *See Town of Warren*, 740 A.2d 1255 (R.I. 1999) (holding that a municipal ordinance is preempted when the legislature intended that its statutory scheme completely occupy the field of regulation on a particular subject). Here, because the Rhode Island General Assembly has provided CRMC exclusive authority to regulate aquaculture in Rhode Island (*see supra* Section I), the Town Ordinance has no force or effect. However, even if Rhode Island law compels CRMC to adhere to the Town Ordinance, Objectors’ claim that the Proposed Farm fails to satisfy the Water Activity prong is wholly without merit.

²³ In fact, the strictest application of the Town Ordinance would likely prevent all towed water sport activity at Segar Cove because the cove’s single entry point is only 240 feet in length. *See Exhibit 12 (Whitney Tr.) at 470:2-22.*

the available watershed for towed water sports on Segar Cove to only 16.7 acres. *See* Exhibit 6 (Osgood Tr.) at 960:23-961:7; Exhibit 8 (DiPrete Letter).

Mr. Whitney’s calculation regarding the reduction in watershed due to the Proposed Farm is flawed because, despite acknowledging that the shoreline is a “stationary object,” he inexplicably failed to treat it as such for purposes of Section 4-8(1) of the Town Ordinance.²⁴ Exhibit 12 (Whitney Tr.) at 449:22-450:3. Even more puzzling is Mr. Whitney’s failure to account for the shoreline when Section 4-8(6) of the Ordinance expressly establishes a 200-foot buffer from the shore. *See id.* at 438:14-24. As such, Mr. Whitney erroneously reported to this Subcommittee that, prior to the introduction of the Proposed Farm, the South Kingston Ordinance provides for 30.3 acres of towed water sports activity on Segar Cove – nearly double the actual acreage currently available. *See id.* at 457:10-459:10.

Even assuming *arguendo* that the 30.3-acre overestimation was accurate – which it is not – Mr. Whitney testified that a watershed of that size could safely accommodate only “two [or] maybe three vessels . . . doing small loops.” *Id.* at 463:15-19. Assuming that there were no other stationary or moving objects within a 200-foot vicinity, Mr. Whitney agreed that the introduction of the Proposed Farm would limit that capacity to one or two vessels. *Id.* at 464:1-6. Put simply – and *per* the testimony of Objectors’ expert – the introduction of the Proposed Farm would impact *at most* only one towed motor sport vehicle at any given time on Segar Cove. *Id.* at 464:7-9.

²⁴ This Subcommittee similarly expressed confusion with Mr. Whitney for not having applied the 200-foot buffer rule to the shoreline, pursuant to Section 4-8(1) or Section 4-8(6). *See* Exhibit 12 (Whitney Tr.) at 436:23-437:23. When this Subcommittee asked Mr. Whitney to explain this decision, Mr. Whitney did not address why he did not apply the shoreline buffer to his calculations. *See id.* at 437:24-438:24.

2. The Proposed Farm Will Not Result in Significant Conflicts with Recreational Activity Because It Will Reduce the Watersheet Available for Towed Water Sports on Potter Pond by Fewer than Five Acres.

By failing to incorporate the shoreline buffer, Mr. Whitney's calculations misattribute the impact of an already-existing 200-foot restriction to the introduction of the Proposed Farm. As such, Objectors have substantially overestimated the Proposed Farm's impact on available acreage for towed water sports on Segar Cove.

Having ignored the 200-foot shoreline buffer, Mr. Whitney represented to this Subcommittee that the introduction of the Proposed Farm would limit the available watersheet at Segar Cove for towed water sports by 10.0 acres. *See id.* at 457:10-459:10. This figure is incorrect. Had Mr. Whitney properly factored in the shoreline buffer, he would have recognized that the Proposed Farm under Configuration A would reduce the watersheet available for waterskiing activity by only 4.1 acres, or by *less than one half* of what Mr. Whitney represented to this Subcommittee. *See Exhibit 8 (DiPrete Letter).*²⁵

Notably – and as this Subcommittee recognized – the introduction of the Proposed Farm will impact the amount of watersheet available for towed motor sports only at Segar Cove. *See Exhibit 12 (Whitney Tr.)* at 442:1-4. Indeed, the Proposed Farm will have no impact on any towed motor sport activity that occurs at the northern basin of Potter Pond, which spans approximately 67.3 acres total (compared to Segar Cove's 53.5 total acres) and is appropriately known as "Skier's Cove." *Exhibit 4 (Raso Tr.)* at 84:4-10; *Exhibit 12 (Whitney Tr.)* at 442:1-23. In fact, according to Objector Alicia Cooney, Skier's Cove is "very conducive" to using motorized water vehicles. *Exhibit 13 (Objectors' Tr.)* at 555:20-24. As such, Skier's Cove is

²⁵ Similarly, Configuration B for the Proposed Farm would reduce the watersheet available for waterskiing activity by only 3.5 acres. *See Exhibit 8 (DiPrete Letter).*

“where people usually tube or ski.” Exhibit 4 (Raso Tr.) at 84:7-11. Therefore, the introduction of the Proposed Farm using Configuration A would only reduce the combined 120.8-acre area of Segar Cove and Skier’s Cove by 4.1 acres, or by less than 3%. For the above-mentioned reasons, the introduction of the Proposed Farm will not result in significant conflicts with towed water sport activities on either Segar Cove or Potter Pond generally.

3. The Proposed Farm Will Not Significantly Impact Non-Towed Water Sport Recreational Activities on Segar Cove.

The introduction of the Proposed Farm will not significantly impact non-towed water sport recreational activities on Segar Cove, including but not limited to paddle boarding, kayaking, swimming, sail boating, or fishing. Configuration A for the Proposed Farm will occupy only three of the total 53.5 acres in Segar Cove. The Ordinance provisions do not impose any restrictions on non-towed water sport vessels.²⁶ As such, with the introduction of the Proposed Farm, over 94% of Segar Cove (*i.e.*, 50.5 acres) will remain entirely unaffected for non-towed water sport activity. Exhibit. 6 (Osgood Tr.) at 146:2-12.

With respect to navigation, CRMC Staff has already recognized that the Proposed Farm will have “very little impact” on self-powered craft – including but not limited to paddle boards and kayaks – because they are “easy to manipulate through and around all kinds of different

²⁶ The use of the term “water skier” within Section 4-8(1) of the Ordinance makes clear that the provision applies solely to waterskiing vessels. Additionally, the use of the term “personal water craft” within Section 4-8(6) makes clear that the provision applies solely to towed motor sports vessels. *See generally* Section 4-8 of the Ordinance, titled “Water skiing, swimming and *personal water craft (jet skis, etc.)*” (emphasis added). Indeed, expanding the meaning of “personal water craft” within Section 4-8(6) to non-towed water sports vessels would run contrary to the doctrine of *eiusdem generis*, which provides that the a general term within a statute (*e.g.*, personal water craft) should be constructed to embrace terms only similar to the specific ones provided (*e.g.*, jet skis). *See Eiusdem generis—Classification by enumeration*, 2A *Sutherland Statutory Construction* § 47:18 (7th ed.). Therefore, Section 4-8(6) regulates exclusively towed water sports vessels.

areas.” Exhibit 2 (Beutel Tr.) at 26:8-12. CRMC Staff further determined that “[s]ailing would be minimally effected.” *Id.* at 663:8. Objectors’ expert witness similarly agrees that the introduction of the Proposed Farm would impair motor sport vehicles more than it would impair paddle boats, canoes, and kayaks. Exhibit 12 (Whitney Tr.) at 453:9-12.

CRMC Staff has further determined that the Proposed Farm will not significantly impact the recreational fishing experience at Potter Pond. Exhibit 3 (CRMC Staff Report) at 2. This is consistent with the conclusion of South Kingstown Harbormaster Mike Stach, who stated that the Proposed Farm site is “not a common fishing area.” *See* February 1, 2018 South Kingstown Waterfront Advisory Commission Meeting Minutes (attached as Exhibit 17) at 3. Accordingly, the Proposed Farm will not significantly conflict with recreational activities.

c. Mr. Raso Has Demonstrated Need for the Proposed Farm.

The Application satisfies the need requirement. *See* 650-RICR-20-00-1.3.1(A)(1)(a).²⁷ Contrary to Objectors’ belief and cross-examination on this issue, the commercial implications of the Proposed Farm can be probative in demonstrating need. Specifically, CRMC has previously determined that an aquaculture farm expansion proposal satisfies the first prong of the Category B Assent requirements when the demonstrated need is based on business growth. More specifically, in January 2015, CRMC received an application from the owner of Ninigret Oyster Farm to construct and maintain a three-acre aquaculture farm expansion in Ninigret Pond in Charlestown, Rhode Island. *See* CRMC Public Notice of Case No. 2015-01-051 (attached as Exhibit 18).

²⁷ Dr. Robert Rheault – whom this Subcommittee accepted as an expert in aquaculture – testified that, within the context of aquaculture, an individual demonstrates “need” for expansion simply when they have shown that they are already using their allotted acreage for aquaculture and require additional space to conduct additional aquaculture. *See* Exhibit 11 (Rheault Tr.) at 276:8-21.

In satisfying the Category B Assent requirements, the applicant stated that the aquaculture farm expansion was necessary “[i]n order to meet the current demands from [its] customers.” *Id.* The applicant further stated “more space and gear [would] be necessary for the growth of [its] business.” *Id.* CRMC approved the application and issued a permit for the proposed farm expansion on June 10, 2015. *See* Application Details for Case No. 2015-01-051 (attached as Exhibit 19 and available at CRMC’s Online Permit Database).

Here – similar to the Ninigret Pond matter – Mr. Raso has demonstrated that he needs more space and gear in order to grow his business. Based on his experience and review of all material documents, Dr. Rheault determined that Mr. Raso “has clearly filled up the space of his existing lease.” Exhibit 11 (Rheault Tr.) at 277:14-279:5. Moreover, Dr. Rheault testified that, in order to grow scallops and use lantern nets, Mr. Raso needs greater water depth than what his current lease provides. *Id.* at 277:14-279:9. The Proposed Farm provides Mr. Raso the necessary depth to further engage in responsible aquaculture: a practice that CRMC recognizes has “a net positive effect on the environment.” 650-RICR-20-00-1.3.1(K)(1)(a).

Having expressly stated that Mr. Raso’s “desire to expand his oyster farming business is admirable,”²⁸ CRMC Staff already determined that Mr. Raso’s Proposed Farm site is “a legitimate location” to do so. Exhibit 2 (Beutel Tr.) at 29:13-16. For the aforementioned reasons, Mr. Raso has demonstrated need for the Proposed Farm.

d. The Proposed Farm Meets all Applicable Zoning Ordinances, Building Codes, Flood Hazard Standards, and all Safety Codes, Fire Codes, and Environmental Requirements.

The Category B Assent requirements provide that Mr. Raso must “[d]emonstrate that all applicable local zoning ordinances, building codes, flood hazard standards, and all safety codes,

²⁸ Exhibit 3 (CRMC Staff Report) at 4.

fire codes, and environmental requirements will be met” in constructing and maintaining the Proposed Farm. 650-RICR-20-00-1.3.1(A)(1)(b). The uncontroverted testimony of Mr. Osgood – whom this Subcommittee recognizes as a professional engineer²⁹ – confirms Mr. Raso’s satisfaction of this requirement.

Upon reviewing the Proposed Farm site and surrounding area and applying his engineering expertise thereto, Mr. Osgood determined that the Proposed Farm meets all applicable zoning ordinances. Exhibit 6 (Osgood Tr.) at 141:20-24. Moreover, in Mr. Osgood’s expert opinion, the Proposed Farm does not violate any building codes or flood hazard standards because no such codes or standards would apply to the Proposed Farm. *Id.* at 142:1-9.

South Kingstown Harbormaster Mike Stach similarly determined that there were “no safety concerns or issues related to the [Town] [O]rdinance.” Exhibit 17 (Feb. 1, 2018 Water Advisory Board Minutes) at 3. With respect to environmental requirements, it is undisputed that the introduction of the Proposed Farm will not lead to any increase in storm water runoff because there is no land site component to the Proposed Farm. *Id.* at 142:16-143:1. As such, the Proposed Farm has no environmental water impact and therefore does not require any Rhode Island Pollutant Discharge Elimination System (“RIPDES”) permit. *See id.* at 142:16-143:4.

e. Mr. Raso Has Provided in Detail the Boundaries of Multiple Configurations of the Proposed Farm.

The Application satisfies the requirement that the “boundaries of the coastal waters and land area that are anticipated to be affected” by the introduction of the Proposed Farm. 650-RICR-20-00-1.3.1(A)(1)(c). In his initial application dated December 27, 2017, Mr. Raso

²⁹ Exhibit 6 (Osgood Tr.) at 129:11-131:8.

provided the coordinates of the initial configuration of Proposed Farm (*i.e.*, Configuration A). *See* Exhibit 1 (Raso Application) at 8. In a revised application dated March 15, 2018, Mr. Raso provided the coordinates of an alternative configuration of the Proposed Farm (*i.e.*, Configuration B). *See id.* at 22-25.

f. The Proposed Farm Will Not Result in Significant Impacts on Erosion or Deposition Processes Along the Shore or in Tidal Waters.

Mr. Raso satisfied the Category B Assent requirement to demonstrate that the Proposed Farm “will not result in significant impacts on erosion and/or deposition processes along the shore and in tidal waters.” 650-RICR-20-00-1.3.1(A)(1)(d). Dr. Michael Rice – whom this Committee accepted as an expert in aquaculture³⁰ – concluded that the Proposed Farm should have “no major effect” on erosion on the shore because there is “no reason to believe” that the Proposed Farm would lead to an increase in erosion. Exhibit 10 (Rice Tr.) at 219:9-20.

Similarly, Dr. Carrie Byron – whom this Subcommittee recognizes as an expert in environmental science with a specialty in marine science³¹ – testified that she could not foresee “how the [Proposed Farm] could impact soil erosion or deposition.” Exhibit 9 (Byron Tr.) at 188:23-189:6. In fact, Dr. Robert Rheault – concluded that the Proposed Farm “if anything . . . would slow the effects of the boat wakes” on the shore of Rocky Beach, thereby *mitigating* the impact of erosion. Exhibit 11 (Rheault Tr.) at 279:16-280:8. At no point did Objectors cross-examine the above-mentioned experts on their respective determinations, nor did Objectors present expert testimony to rebut them. Such uncontroverted expert testimony confirms that Mr. Raso has satisfied this Category B Assent requirement.

³⁰ Exhibit 10 (Rice Tr.) at 210:15-20.

³¹ Exhibit 9 (Byron Tr.) at 178:4-179:13.

g. The Proposed Farm Will Not Result in Significant Impacts on the Abundance and Diversity of Plant and Animal Life.

Mr. Raso satisfied the requirement to demonstrate that the Proposed Farm “will not result in significant impacts on the abundance and diversity of plant and animal life.” 650-RICR-20-00-1.3.1(A)(1)(e). Relatedly, the CRMP Regulations require that, in coastal salt ponds, the area that commercial aquaculture occupies shall not exceed 5% of total open water surface area of the coastal pond. 20-00-1.3.1(K). The Proposed Farm satisfies both requirements.

Not only did CRMC Staff already determine that the addition of the Proposed Farm would result in a maximum of 3% of allowable aquaculture activity in Potter Pond,³² but also Dr. Byron determined that the addition of the Proposed Farm “will not harm” the Pond’s ecology. Exhibit 9 (Byron Tr.) at 187:4-7. In reaching this finding, Dr. Byron relied on her food web model to examine the ecological carrying capacity³³ of Potter Pond, meaning “the level of [aquatic] farm development above which would have unacceptable ecological impacts.” Exhibit 9 (Byron Tr.) at 183:11-14. By examining the transfer of energy between species, Dr. Byron’s food web model provides “a description of the ecosystem and how it’s operating” as well as “a tool” to quantitatively examine the effect that Proposed Farm will have Potter Pond’s ecosystem. *Id.* at 184:17-185.

Dr. Byron’s “published,” “peer reviewed,” and “highly cited” model reveals that the true carrying capacity of Potter Pond is 46% – as opposed to the “highly conservative” 5% figure that the CRMP Regulations set forth. *Id.* at 186:14-187:3. Nonetheless, Dr. Byron’s review of the

³² Exhibit 3 (CRMC Staff Report) at 4.

³³ Dr. Byron’s expert conclusions did not concern Potter Pond’s social carrying capacity, the science for which – as Dr. Byron testified – is “not settled,” “highly subjective” and probably the “least well understood” of the carrying capacity metrics. Exhibit 9 (Byron Tr.) at 206:11-22.

Application revealed that the Proposed Farm “will not impact the ecological carrying capacity” of Potter Pond. *Id.* at 186:3-10. In fact, Dr. Byron testified that it is possible that the addition of the Proposed Farm will provide habitat biodiversity. *Id.* at 189:7-13; *see also* Exhibit 1 (Raso Application) at 5 (“Shellfish farms have also shown to increase the abundance of eel grass in and around farms in Rhode Island.”).

Additionally, based on his experience and review of all relevant materials, Dr. Rice determined that the addition of the Proposed Farm would have little effect on plant and animal diversity and abundance.³⁴ The DEM’s Division of Fish and Wildlife (“DFW”) and Division of Marine Fisheries (“DMF”) similarly concluded that “[t]he adverse impacts to marine fisheries and wildlife and their habitat from the [Proposed Farm] would be minimal.” *See* February 2, 2018 DEM Letter (attached as Exhibit 20). Such uncontroverted expert testimony confirms that Mr. Raso has satisfied this Category B requirement.

h. The Proposed Farm Will Not Result in Any Significant Impact to Water Circulation, Flushing, Turbidity, or Sedimentation.

Mr. Raso has further demonstrated that the Proposed Farm “will not result in any significant impacts to water circulation, flushing, turbidity, and sedimentation.” 650-RICR-20-00-1.3.1(A)(1)(g). The uncontroverted expert testimony of both Dr. Byron and Dr. Rice make clear Mr. Raso’s satisfaction of this requirement. Indeed, based upon her review of all relevant materials, Dr. Byron cannot foresee how the Proposed Farm could possibly impact flushing or sedimentation. Exhibit 9 (Byron Tr.) at 188:16-22. Performing a similar review, Dr. Rice further

³⁴ Dr. Rice also noted that Dr. Byron’s work on ecology systems modeling “is recognized globally as the gold standard in this area,” reiterating Dr. Byron’s conclusion that the Proposed Farm addition would not result in significant impacts on plant or animal diversity or abundance. Exhibit. 10 (Rice Tr.) at 220:2-9.

determined that “there should be no major effect on changing of currents or anything of the sort that might increase scouring, erosion, [or] turbidity.” Exhibit 10 (Rice Tr.) at 219:9-20.

In fact, according to Mr. Raso – who has over 18 years of experience in the aquaculture industry, including, but not limited to farming oysters, scallops, and seaweed – stated the Proposed Farm may have a slight *positive effect* on turbidity. Indeed, the oysters of the Proposed Farm would feed on excess phytoplankton that naturally occurs in the water. *See* Exhibit 4 (Raso Tr.),” at 77:1-78:13. While phytoplankton generally improve the quality of the water in which they feed, an excess number of phytoplankton will take oxygen out of the water following a long and sunny day, thereby depriving other organisms of this necessary resource. *Id.* Oysters and other filter-feeding organisms serve to reduce the amount of phytoplankton, which increases the amount of dissolved oxygen available to other living things and ultimately improves biodiversity. *Id.*; *see also* Exhibit 1 (Raso Application) at 5 (stating that studies have shown that “oysters actually reduce the amount of total suspended solids including chlorophyll,” thereby “making more dissolved oxygen available to other organisms.”).

i. The Proposed Farm Will Not Harm the Quality of the Water in Potter Pond or Segar Cove.

Mr. Raso has demonstrated that the Proposed Farm will not result in “significant deterioration in the quality of water in the immediate vicinity as defined by DEM.” 650-RICR-20-00-1.3.1(A)(1)(h). The unrefuted expert testimony, as well as the staff testimony and report, confirms that the Proposed Farm will in fact improve the water quality. Indeed, both (1) the denitrification process; and (2) the harvesting of the oysters will “remove nitrogen from the water,” thereby *improving* the quality of the water. Exhibit 2 (Beutel Tr.) at 27:19-23. CRMC Staff has confirmed that oyster farming at the Proposed Farm will “provide net positive ecosystem services” through the denitrification process. Exhibit 3 (CRMC Staff Report) at 3.

In addition, Dr. Byron testified that the addition of the Proposed Farm “certainly will not harm the water quality” of Potter Pond. Exhibit 9 (Byron Tr.) at 187:11-18. In fact, the mixture of both scallops *and* oysters at the Proposed Farm “may act to improve the [pond’s] water quality and clarity because, as “filter feeders,” both will “tak[e] plankton particles out of the water, [thereby] improving that water quality.” *Id.* at 190:2-18. Dr. Rice similarly determined that, due to the removal of phytoplankton, the presence of filter feeders at the Proposed Farm (*i.e.*, scallops and oyster) is “more likely” to help than harm the water quality at Potter Pond. Exhibit 10 (Rice Tr.) at 219:21-220:1. The above-mentioned conclusions also extend to Segar Cove, given that the two bodies of water are connected. Exhibit 9 (Byron Tr.) at 187:20-188:5.

Objectors did not present any expert testimony to refute the above-mentioned testimony of CRMC Staff, Dr. Byron, or Dr. Rice. Accordingly, the uncontested evidence makes clear that the Proposed Farm will not harm the water quality in either Potter Pond or Segar Cove.

j. The Proposed Farm Will Not Result in Significant Impacts to Areas of Historic and Archaeological Significance.

Mr. Raso has satisfied the requirement of demonstrating that the Proposed Farm “will not result in significant impacts to areas of historic and archaeological significance.” 650-RICR-20-00-1.3.1(A)(1)(i). The Rhode Island Historical Preservation Heritage Commission (“RIHPHC”) has confirmed that the Proposed Farm “will have no effect on any significant cultural resources,” namely any resources that are “listed on or eligible for listing on the National Register of Historic Places.” *See* January 10, 2018 RIHPHC Letter (attached as Exhibit 21). At no point have Objectors attempted to refute RIHPHC’s above-mentioned determination.

k. Mr. Raso Has Taken Measures to Minimize Any Adverse Scenic Impact.

Mr. Raso has taken the requisite measures “to minimize any adverse scenic impact” on Segar Cove. 650-RICR-20-00-1.3.1(A)(1)(k). CRMC Staff recognizes that Mr. Raso adopted

low profile floating cages in order to minimize the visual impact of the Proposed Farm. Exhibit 2 (Beutel Tr.) at 25:24-26:4. Similarly, floats will be covering the suspended gear for the bay scallops in order to “have less of a visual impact on the low profile oyster cages.” *Id.* at 26:4-7; *see also* Exhibit 1 (Raso Application) at 6 (stating that the proposed floats “have reduced in size to 5 inch x 5 inch in order to reduce visibility of the gear.”). Moreover, the Proposed Farm’s lantern nets – with exception to its buoys – will be submerged, as will be the farm’s soft mesh spat bags. Exhibit 4 (Raso Tr.) at 48:10-15. There will be no permanent or unoccupied platforms at the Proposed Farm site; nor will there be any unoccupied boats. *Id.* at 48:16-17; 85:5-11.

V. Any Argument that Objectors May Raise Concerning Riparian Property Rights is Improper Because CRMC Lacks the Jurisdiction to Address Any Such Argument.

It remains unclear whether Objectors are, in fact, alleging that the introduction of the Proposed Farm constitutes a violation of theirs or others’ riparian rights. Indeed, Objectors represented to this Subcommittee that they “are not seeking to enforce or implement [Objectors’] riparian right[s]” because these hearings are not “a battle of one riparian right over another riparian right.” Exhibit 13 (Objectors’ Tr.) at 338:4-8. However, in the same breath, Objectors claimed that they are testifying to explain that “Mr. Raso’s facility will interfere with their riparian rights.” *Id.* at 338:8-11.

Ultimately, the lack of clarity in Objectors’ above-mentioned representations is immaterial, as CRMC unambiguously lacks the jurisdiction to address any arguments concerning riparian rights. Indeed, 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 water *after judicial decisions.*” R.I. Gen. Laws § 46-23-6(4)(v) (emphasis added).

CONCLUSION

For the aforementioned reasons, Mr. Raso respectfully requests that this Subcommittee approve his application for a Category B State Assent to establish the Proposed Farm on Potter Pond.

Respectfully submitted,
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Dated: February 5, 2021

CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2021, I sent a true copy of the foregoing via email to the following:

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