

**STATE OF RHODE ISLAND
COASTAL RESOURCES MANAGEMENT COUNCIL**

IN THE MATTER OF:

Perry Raso

CRMC File No. 2017-12-086

Intervenor’s Post-Hearing Memorandum of Law and Statement of Facts

On behalf of Mr. Kevin Hunt, Ms. Alicia Cooney, Mr. Stephen Quigley and Mr. David Latham (collectively the Intervenor), we hereby submit this Post Hearing Memorandum of Law and Statement of Facts for consideration by the Subcommittee.

SUMMARY

Perry Raso’s application for an aquaculture permit tests whether the General Assembly meant what it said, by statute, when it expressly and significantly limited CRMC’s ability to grant aquaculture permits. And the application tests whether CRMC will require compliance with its own regulations by requiring Mr. Raso to bear the burden of demonstrating: 1. that the proposed facility is compatible with existing and proposed public trust uses in the impacted area, including navigation, recreation and fisheries and; 2. 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 (650 – RICR 20-00-1, 1.3.1 (A)(1)(j)). Absent such demonstration and finding, CRMC cannot issue an aquaculture permit.

While most of CRMC’s regulatory activity is governed by its enabling act, the General Assembly enacted a separate statute addressing aquaculture and significantly limited CRMC’s ability to issue aquaculture permits. That statute allows the issuance of aquaculture permits only when it is consistent with the **best public interest**, focusing on the impact of the aquaculture project on other public trust uses, such as fishery, navigation and recreation. And the standard is not consistent with the public interest, but compliance with the **best public interest**.

CRMC regulations require an applicant to submit information and documentation demonstrating compatibility of the proposed facility with public trust uses of the impacted waters, such as fishery, navigation and recreation and demonstrating that it does not significantly conflict with recreational boating, fishing, swimming, navigation and commerce.

In the instant case, Mr. Raso's application not only failed to provide accurate and relevant information as to the impact of the proposed facility on Potter Pond and Segar Cove, but it failed to detail any material impact with public trust uses. This lack of interference with public trust uses was contradicted by South Kingstown Waterfront Advisory Commission, the Rhode Island Marine Fisheries Council, the 147 letters of objection submitted to CRMC, expert testimony and literally dozens of witnesses with years, and in many cases, decades, of experience on Segar Cove and Potter Pond.

In support of his position of no material impact, Mr. Raso submitted photographs of Segar Cove taken from late July to the end of October of 2019, all of them occurring on either side of the noon hour, showing little fishery, navigation or recreational uses. See Hearing, Vol. 1, November 12, 2020, p. 65-68. However, numerous witnesses testified that anyone familiar with activity on Segar Cove knows that the noon hour is when there is a lull in activity because people go home for lunch, and they further testified to the active and robust use of Segar Cove for boating, recreation, fishing, clamming, towed water sports, paddle boarding, kayaking, swimming, etc. and the harmful and limiting impacts the proposed facility would have on those uses.

Mr. Raso offered, as evidence of no adverse impacts on public trust uses, the testimony of two of his three expert witnesses, which testimony was not within the subject of their expertise and which was allowed subject to the weight it would be given. Moreover, those witnesses had little if any familiarity with Segar Cove, with one witness having been there only once, and the other witness having been there only three times. *See Testimony of Dr. Byron Hearing Vol. 2, November 13, 2020 p. 199-204; See also Testimony of Dr. Rice Vol. 2, November 13, 2020 p. 255; See also testimony of Dr. Rheault Vol. 3, November 17, 2020 p. 306-307.* Their testimony is entitled to no weight.

In contrast, literally dozens of witnesses with long experience on Segar Cove and Potter Pond testified to the significant conflicts posed by the proposed facility to public trust uses in Segar Cove and Potter Pond. No doubt because of the failure of Mr. Raso to meet his burden of proof, Mr. Beutel's staff report expressly failed to set forth a finding that given current uses of Segar Cove and Potter Pond, the proposed facility would be in the best public interest, just as it failed to provide any substantiation which would support such a finding.

Finally, Mr. Raso, as well as the staff report, fail to understand that the five percent rule codified in CRMC regulations is confined by its very terms to the ecological carrying capacity of aquaculture in Potter Pond. It has nothing to do with social carrying capacity, which is the impact that aquaculture would have on the ability of the public to use, recreate on, and enjoy Potter Pond and Segar Cove. Social carrying capacity is at the heart of the opposition to the proposed facility in Segar Cove. Indeed, both the applicant and Mr. Beutel misunderstand the limitations of the five percent rule, and in doing so ignored the inquiry and analysis necessary to determine whether or not the aquaculture permit can issue under the Aquaculture Act.

Mr. Raso's application asserts that five percent is the social carrying capacity of the Pond, meaning that as long as total aquaculture coverage of Potter Pond is five percent or less, you have not exceeded social carrying capacity. Mr. Beutel in both his testimony and in his staff report indicates, in response to concerns about the impact of the proposed facility on recreational activities, that, given the five percent rule, since the total aquaculture area of Potter Pond would be 3.1% if the application is granted, "*[a]ll other activities will have 97% of the pond for their opportunity.*" See *CRMC staff report dated June 2, 2020, p.3*. In other words, recreational activities are not impermissibly impinged by the proposed facility because 97% of Potter Pond remains for recreation. Not only is that not factually true, for Segar Cove is only one of only two deep water areas in Potter Pond where certain public trust recreational activities could be conducted, but it also represents a profound misunderstanding of the five percent rule.

This misunderstanding of the regulatory impact of the five percent rule is fatal to the analysis of whether or not the proposed facility is incompatible with the public trust uses of fishery, recreation and navigation. The five percent rule is a measure of ecological carrying capacity, not social carrying capacity, and to find no interference with public trust uses in reliance on the five percent rule negates the necessary inquiry required by the Aquaculture Act—the factual determination of the assessment of incompatibility between public trust uses and the construction and operation of the proposed facility--- an inquiry that was never conducted by Mr. Beutel and was not supported by the facts or testimony presented by Mr. Raso at the hearing.

DISCUSSION

1. CRMC Authority to Issue Aquaculture Permits is Limited by Statute

The CRMC enjoys broad authority to regulate coastal activity for up to three miles offshore and on land areas within 200 feet of the inland edge of a coastal feature. This authority is granted under CRMC's enabling statute, R. I. Gen. Laws 46-23-1 et seq.

However, CRMC's ability to grant permits for aquaculture facilities is specifically addressed under a different statute, R. I. Gen. Laws 20-10-1 et seq. (the "Aquaculture Act"), which restricts CRMC's ability to grant aquaculture leases. While the Aquaculture Act authorizes CRMC to grant aquaculture leases, it imposes significant restraints on the Council's ability to do so. By enacting the Aquaculture Act, the General Assembly has effectively provided that the approval of aquaculture operations in Rhode Island state waters should be limited and restricted. And this restraint is for good reason, as the improper siting of such operations can forever alter to the detriment of the public, the historic, current and future public trust uses of a body of water. More specifically, the statute authorizing aquaculture operations in Rhode Island waters provides that *"the process of aquaculture should 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 ..."*. R.I. Gen. Laws 20-10-1. (Emphasis supplied.)

This is a significant limitation. It is a legislative directive to the Council that it cannot authorize aquaculture operations where such operations would pose conflicts with the public and/or with private property owners in their enjoyment of public trust uses and riparian rights. Mr. Raso's proposed aquaculture operation poses a significant conflict with the water dependent uses and activities such as recreational boating, fishing, swimming and navigation. See 650 – RICR 20-00-1, 1.3.1 (A)(1)(j). The General Assembly further stated its clear intent that aquaculture operations not interfere with or conflict with enjoyment of public trust resources as follows: *"It is the public policy of this state to preserve the waters of this state as free and common fishery. The health, welfare, environmental, and general wellbeing of the people of the state require that the state restrict the uses of its waters and the land thereunder for aquaculture and, in the exercise of the police power, the waters of the state and land thereunder are to be regulated under this chapter."* R.I. Gen. Laws 20-10-1. (Emphasis supplied.)

As the Aquaculture Act makes clear, aquaculture is not an inherent right. In fact, it is recognized by the General Assembly that aquaculture is an activity that must necessarily be restricted to ensure that it does not interfere with the public's enjoyment of public trust resources. Permission to engage in aquaculture can only be given by the CRMC in the event it can find that such aquaculture operations will not interfere with such public trust uses. *"The CRMC...is authorized and empowered, when it shall serve the purposes of this chapter, to lease the land submerged under the coastal waters of the state...to an applicant who has been granted an aquaculture permit pursuant to the provisions of this chapter..."*. R.I. Gen. Laws 20-10-6(a). (Emphasis supplied.) The General Assembly has clearly placed the responsibility on the CRMC to ensure that any proposed aquaculture operation shall not impermissibly interfere and significantly conflict with such public trust uses.

Accordingly, CRMC regulations provide that while commercial aquaculture can be valuable to the State, it will only authorize such operations where they are not inconsistent with public trust uses and riparian rights. *"The CRMC recognizes that commercial aquaculture is a viable means for supplementing the yields of marine fish and shellfish food products and shall support commercial aquaculture in those locations where it can be accommodated among other uses of Rhode Island waters"*. 650 – RICR 20-00-1, 1.3.1 (K)(1)(a). (Emphasis supplied.)

For this reason, an applicant for an aquaculture permit is required to submit information to the CRMC in order that the CRMC may determine *"the compatibility¹ of the proposal with other existing and potential uses of the area and areas contiguous to it, including navigation, recreation, and fisheries"* (emphasis supplied), and the "degree of exclusivity required for aquaculture activities on the proposed site", as well as other matters which help the Council determine the extent of conflict with public trust uses. 650 – RICR 20-00-1, 1.3.1 (K)(3)(a).

It is unquestioned that it is the burden of the applicant to provide CRMC with sufficient relevant, compelling and convincing factual evidence which will allow CRMC to evaluate this evidence and make its determination that such proposed facility will not significantly conflict with or impermissibly interfere with such public trust uses and will be in the best public interest.

¹ Oxford Languages defines "compatibility" as a state in which two things are able to exist or occur together without problems or conflict.

2. The Applicant Failed its Burden of Demonstrating No Significant Conflict with Public Trust Uses

In the instant case, the applicant failed to meet his burden. The applicant asserted that he had personal knowledge of Segar Cove, but failed to provide any evidence pertaining to the many public trust uses in Segar Cove itself, instead focusing almost solely on the proposed lease area. Despite substantive information, testimony and evidence to the contrary, no evidence was provided by the applicant in the application or through his witnesses testimony that Segar Cove was an active area for exercise of public trust uses, such as boating, fishing, shell fishing, etc. More specifically, in response to the requirement in the application that the applicant demonstrate that this proposed project will not result in significant conflicts with water-dependent uses and activities such as recreational boating, fishing, swimming and navigation, the application provided as follows:

“In 1998 I began to commercially harvest shellfish in Potter Pond specifically in the area around the docks in the southern half of Segar Cove. I would pass the proposed site daily. For 6 years I lived in Segar Cove commuting back and forth to work via boat passing the proposed area several times a day through out [sic] the year including the summer months.

I have lived and worked on the Pond continuously for the last 19 years and over those years I have seen only a [sic] paddle craft in the proposed lease which will not be impeded if the lease is granted.

I have never seen anyone fishing or shell fishing either commercially or recreationally in the proposed area. The seafloor in the proposed area is soft and not ideal for steamers or clams, there is no aquatic vegetation and no other habitat for finfish.

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.”

See application, applicant’s response #10

Mr. Raso did testify at the hearing that based on his many years of working on Potter Pond and living on Segar Cove, he chose Segar Cove because “it was the least used part of the pond and would make the least impact on other users in the pond”. *See Hearing, Vol. 1, 11/12/20 p. 54.* Two important points about this need to be made. First, in his testimony, just as in his application, he continually tried to limit his testimony about public trust uses to the precise proposed lease area

as opposed to Segar Cove in general. *See Hearing Vol. 1, 11/12/20, 64, L. 2-15, 67, and 69, L. 14-22.*

Secondly, the determination required to be made under the Aquaculture Act of whether the proposed facility would significantly impact public trust uses is not limited to interference of such activities within the boundaries of the proposed facility area, although that is certainly something that needs to be considered and evaluated, but it also includes the adverse impact that the proposed facility could have on public trust uses outside of the footprint of the proposed facility area arising from and caused by the proposed location of the facility. As CRMC's own regulations provide, the inquiry involves not just interference within the leased area but also interference "with areas contiguous to it" (650 – RICR 20-00-1, 1.3.1(K)(3)(a)). Such interference with the public trust uses of Segar Cove was presented to Mr. Beutel in the form of 147 letters of objection and testified to in great detail at the hearing by those who recreate on Segar Cove and will be negatively impacted by the proposed facility.

The staff report also appears to rely on comments of Mr. Raso addressing complaints of interference, which is attached to the staff report. Virtually all of the assertions made by Mr. Raso to the non-interference or limited interference both inside and outside of the proposed facility with public trust uses were contradicted in testimony to the Subcommittee by Intervenor's expert witness and numerous witnesses with years of experience on Segar Cove and Potter Pond.

First, as to the impact that the proposed facility will have on public trust uses outside of the footprint of the proposed three acre facility, Intervenor's presented a Technical Peer Review Memorandum (the "ESS Report") and expert testimony from Mr. Payson Whitney of ESS. *See Hearing Vol. 3, 11/17/20, p. 339-445. See Also ESS Report, Intervenor's Exhibit 1.* Mr. Whitney, with over 22 years of experience, was qualified as an expert in civil/coastal engineering and navigational impact assessment and testified that he had over 700 hours behind the helm of his 19 foot power boat that he had been operating for over 18 years. *Id.* at 344-349. Mr. Whitney reviewed the applicant's application and conducted a technical peer review to determine if the applicant met CRMC's requirements and determine if there were any deficiencies or inconsistencies in the application. Mr. Whitney testified that he did identify deficiencies and inconsistencies in the application, the significance of which makes it more difficult for CRMC to review. *See Hearing Vol. 3 11/17/20, p. 387-39; See also ESS Report.* Mr. Whitney testified that

his analysis focused on applicant's option B layout² which if allowed will be 280 feet wide (not 150 ft. wide as presented in the application) obstruct 913 of shoreline as close as 10 feet along Mr. Hunt and Ms. Cooney, Mr. Quigley's property. *See ESS Report, p. 1, Items 2,3,4 and Figure 4b; See also Hearing Vol. 3 11/17/20, p.384-390; See also Hearing Vol. 4, 12/4/20, p. 527.*

Ultimately, Mr. Whitney concluded that Mr. Raso failed to demonstrate that the proposed three acre facility will not result in significant conflict with recreational boating, fishing, swimming and navigation. *See Hearing Vol. 3 11/17/20, p. 421; See also (650 – RICR 20-00-1, 1.3.1 (A)(1)(j).* This statement was supported by the fact that the presence of the proposed three acre aquaculture facility would eliminate approximately 10.0 acres from the 30.3 acre aquaculture facility presently available for waterskiing and towed water sports when the 200 ft. buffer from the South Kingstown Boats and Waterways ordinance is applied to the perimeter of the 3 acre layout". This represents a 33% reduction in the Segar Cove water sheet area available for recreational uses. *See Hearing Vol. 3 11/17/20, p 397 -421; See Also, ESS Report p. 1-2 Items 5,6,7.*

Based on Subcommittee member Gomez's questions about the application of South Kingstown Boating and Waterways ordinance to the facility and applicant's rebuttal submittal at the last hearing, a further clarification may be of assistance to the Subcommittee.

Over objection of the Intervenors the Applicant was allowed to present as rebuttal evidence testimony of an expert witness, Audie Osgood, of DiPrete, and a document prepared by Mr. Osgood, regarding the application of Section 4.8 of the South Kingstown Boats and Waterways Ordinance, (Code 1971, § 6-7; Ord. of 11-9-87(1); Ord. of 3-9-92; Ord. of 6-10-02; Ord. of 5-9-11) (the "Ordinance") to towed water sports in Segar Cove. This evidence was introduced to rebut the testimony of Intervenors' expert witness, Payson Whitney, who, in his testimony and in the report his firm, ESS Group, prepared under his supervision, calculated the reduction in useable area in Segar Cove for towed water sports arising from the location of the proposed facility, after taking into consideration the reduction in such useable area occasioned by application of Section 4.8 of the Ordinance. No cross-examination of Mr. Osgood was allowed.

² ESS's analysis focused on the option B lay out because an email presented by Mr. Raso to Beutel stated that this was the revised lay out. *See Testimony of Mr. Whitney, Hearing Vol. 3, 11/17/20, p. 360-361.*

First, this testimony should not have been allowed because it did not meet the requirements for the admission of rebuttal testimony under Rhode Island law. Under Rhode Island law, the purpose of rebuttal testimony is to address new evidence which arises during the course of the proceeding which the party could not have known about and therefore could not have presented in their case in chief. Ruffel v. Ruffel, 900 A.2d 1178, 1190-1(R. I. 2006). Rebuttal testimony cannot be used to allow a party to hold back affirmative evidence during its case-in-chief. Labree v. Major, 306 A.2d 808, 819 (R.I. 1973). Only when a party introduces evidence of a new and relevant part of his case, is the other party entitled to meet and discredit such evidence in rebuttal. McGonagle v. Souliere, 324 A.2d 667, 689 (R.I. 1974). In rebuttal, the moving party is strictly entitled to give only such evidence as tends to answer new material introduced by the other party. Souza v. United Electric Railways, Co., 143 A. 780,81-2 (R.I. 1928).

The simple fact is that what Mr. Osgood was “rebutting” had been set forth in the ESS Report, dated April 10, 2020 and submitted to CRMC and Applicant’s counsel prior to the commencement of the hearing. This was not “new” material raised after the presentation of Applicant’s case which was entitled to be rebutted. Rather than presenting rebuttal evidence, the Applicant was taking a second bite at the apple of putting in their case in chief, without being subject to cross-examination.

Because the calculation of the impact of Section 4.8 of the Ordinance was set forth in the expert’s report provided to the Applicant prior to the commencement of the hearing, any contrary expert testimony was required to be introduced by the Applicant in their case in chief, and as such, their expert would have been subject to cross-examination. Allowing such testimony by way of rebuttal and precluding cross-examination was to the detriment of Intervenor and to the advantage of the Applicant.

For the same reason, submissions regarding Access to Public Records Act requests providing that no records existed for accidents on certain waterbodies in Rhode Island should not have been allowed, because the ESS Report provided to the applicant prior to the hearing made it clear that the Intervenor were addressing the safety issues arising from the location of the proposed facility in Segar Cove in an area of robust recreational and other public trust uses. “The presence of the proposed aquaculture facility would also present potential public safety/navigational safety issues...”. “Proximity to Ram Point/Navigation Safety Issues. *See*

ESS Report, 2, 6. In addition, although the APRA responses were admitted into the record, little to no weight should be given to applicant's misleading suggestion that no accidents are ever caused by aquaculture facilities in Rhode Island. First, Intervenor's never argued that any aquaculture facility anywhere increases the risk of accidents, only that facilities like the applicants, sited in an already geographically constrained area with high traffic, recreational activities, will certainly lead to accidents. How do we know this? The Subcommittee took Judicial Notice of the United States Coast Guard's 61st Annual Recreational Boating Statistics for 2019, which contains statistics on recreational boating throughout the United States and in Rhode Island. The number one cause of accidents on the water in Rhode Island in 2019 were collisions with recreational vessels while collisions with fixed objects was fourth. *See Table 33 entitled Number of Accidents By Primary Accident and Type & State 2019 (p.65); See also Table 30 entitled Accident, Casualty & Damage Data by State 2019 (p.57) and Table 32 entitled Five Year Summary of Selected Accident Data by State in 2015-2019 (p. 63).* It should be also noted that since 2015, the leading cause accidents and casualties on the water, nationwide, were due to collisions with fixed objects. *See Table 17 entitled Frequency of Events in Accidents and Casualties Nationwide. (p.37-40).*

Even if such evidence could be offered as rebuttal, it exceeded the scope of rebuttal evidence, as Intervenor's evidence as to safety applied only to the introduction of the proposed facility in Segar Cove, a small, confined water body heavily used for public trust recreational purposes.

With regard to the substance of Mr. Osgood's testimony, he calculated the useable area of Segar Cove for towed water sports by application of Section 4.8 of the Ordinance. In doing so, he calculated that towed water sports may not be engaged in within 200 feet from not only docks but from the shore as well. Mr. Osgood necessarily relied on the following provision of Section 4.8:

“(a)...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”.

This testimony and accompanying letter were offered “in rebuttal” to the ESS Report and the testimony of Intervenor's expert, Mr. Whitney.

The ESS Report did not apply the 200 foot buffer of the Ordinance to the shore. When asked on cross-examination if Mr. Whitney thought the shore was a solid object, he said yes. But as he later explained, he did not include the 200 foot buffer from the shore for water skiers because “the regulation doesn’t call out the shoreline, in that piece, where it does in the personal watercraft piece as well.” *See Hearing, Vol. 3, 11/1720, p. 459.*

Mr. Whitney is exactly correct. The regulation governing buffers for water skiing did not reference the shore. In contrast to the above-quoted buffer for water skiers and their boats, the Ordinance provides in the same Section 4.8 as follows:

“(f) No person shall operate a personal watercraft within two hundred (200) feet of swimmers, divers, **shore**, or moored vessels, except at headway speed”. (Emphasis supplied)

Accordingly, ESS was correct to not apply the 200 foot buffer for water skiers to the shore, because the relevant provision of the ordinance did not so provide. Rather, it stated that the 200 foot buffer for water skiers was to be applied to stationary or moving objects. While Mr. Whitney believed the shore could be considered a stationary object, he did not believe that the Ordinance at issue could be interpreted to read stationary object to include “shore” because elsewhere in the same section of the Ordinance it specifically referenced “shore” in establishing buffers for personal watercraft.

When the Ordinance wanted to provide for a buffer to apply to the shore, it certainly knew how to do so, but it did not do so as to water skiing. Mr. Whitney was applying the Ordinance as written. The reason the Applicant would like to impose the 200 foot buffer from the shore for water skiing is that by doing so, it significantly reduced the area available for towed water sports before consideration of the impact of the proposed facility on towed water sports, and it reduced the impact of the proposed facility on the available area for towed water sport after the application of the ordinance, because much of the proposed facility is located within 200 feet from shore. In other words, the Applicant’s expert interpreted the Ordinance to make it appear that the proposed facility would have less of an infringement on towed water sports.

The result of ESS’s calculation was that of the 53.5-acre Segar Cove, application of the Ordinance setback would reduce the area of the Cove available for towed water sports from 53.5

acres to 30.3 acres, a 23.2 acre reduction, or a 43.36% reduction. By applying the Ordinance setback to the proposed facility, ESS calculated the area available for towed watersports would be further reduced from 30.3 acres to 20.3 acres, a loss of 10 acres, or a 33% reduction.

DiPrete applied the Ordinance setback for waterskiing to the shore, despite the fact that shore was not expressly mentioned as to water skiing although it was expressly mentioned as to personal watercraft, interpreting a stationary object to include not just docks but the shore as well. By doing so, DiPrete determining that the Ordinance setback reduced the area of the 53.5-acre Cove available for towed water sports to 16.7 acres, a 36.8 acre reduction, or 68.79% reduction. (This is 13.6 acres less than ESS calculated was available after application of the Ordinance setback.) DiPrete then calculated the additional reduction in this available area for towed water sports caused by the occupancy of the proposed facility and its location, and using the Option B configuration, they found a reduction of 3.8 acres (meaning there would be 12.9 acres available for towed water sports). DiPrete did not, however, calculate the percentage reduction in area available for towed water sports caused by the location of the proposed facility. Of the 16.7 acres available for towed water sports after their calculation of the impact of the Ordinance setback, 3.8 areas would be further unusable because of the location of the proposed facility, or a reduction of 22.75%. (This reduction assumed the Option B configuration; the other configuration would have a greater reduction in useable area.)

Accordingly, even under DiPrete Engineering analysis (“DiPrete”), there is still a 22.75% reduction in available area for towed water sports caused solely by the presence of the proposed facility. What the testimony of Mr. Osgood failed to acknowledge, no doubt because cross-examination was not allowed, is that if DiPrete was correct in concluding that the Ordinance only allows 17.6 acres available for towed water sports in Segar Cove, the impact of a further nearly 4 acre reduction in this already highly compressed area would likely have greater impact on the useability of the area for towed water sports than a ten acre reduction of a 30 acre area, as calculated by ESS, reading the Ordinance as written. The more compressed the area, the greater the user conflict, and the greater the user impact by further reductions in the area.

And this impact is not just on towed water sports, as the testimony of Mr. Whitney and numerous other witnesses made clear, the location of the proposed facility forces more and more users, such as kayakers and paddle boarders, etc., into the center of Segar Cove, which is the only

area available for towed water sports. The inevitable result, as supported by testimony, is not only reduced public trust recreational opportunities but increased safety risks.

Finally, when considering the application of the Ordinance and the impact of the proposed facility, the central question is whether the proposed facility will significantly interfere with public trust uses, including recreational activities. No matter which application of the Ordinance is used, the ESS application or the DiPrete application, there can be no question that the location of the proposed facility would materially interfere with public trust recreational uses, with the result that the application must be denied under the standards imposed by the Aquaculture Act.

There is no question, based on the evidence and testimony presented to this subcommittee that the proposed three acre facility will compress the water sheet significantly conflicting with all recreational users, not just the one, two or three water skiers as the applicant's counsel would have you believe. The evidence is clear, the proposed three acre facility will create a public safety/navigational safety threat by compressing the area for towed water sports to the center of the cove, requiring experienced and inexperienced recreational boaters to make tighter turns at higher speeds while, leaving little margin for error in attempting to avoid a collision with another vessel or worse, a person in the water. *See Hearing Vol. 3 11/17/20, p 417 -422; See Also, ESS Report and attached figures.*

The testimony and opinion of Mr. Whitney's analysis and opinion is supported by findings of the South Kingstown Waterfront Advisory Commission which held public hearings on Mr. Raso's application on February 1, 2018 and February 14, 2018. *See meeting minutes from 2/1/18 and 2/14/18 introduced as Exhibits.* In particular this subcommittee should pay particular attention to minutes from the Commission's February 14, 2018 meeting where the members of the Commission discussed the application:

"Discussion took place. Commissioner Bedell noted that he visited the site and was on the pond recently. **He sees the point of safety and saw how the pond could get crowded, creating competition between recreational and commercial use.** Commissioner Windhurst also noted that he visited the site and is familiar with the area. Commissioner Sherry noted that he has decades of experience on the pond; and that there is no one looking out for the public's recreational interests. **There is immense pressure on Potter Pond due to the elimination of other areas where**

water skiing once took place. Compression of recreational activities is causing overcrowding and serious safety concerns.”

On February 14, 2018, the Commission voted unanimously (5-0) to object to the proposed three acre oyster and bay scallop farm in Segar Cove as detailed in CRMC file #2017-12-086 noting that it would “pose a significant negative impact on public recreational activity in that area” and notified Mr. Beutel of its findings in a formal letter sent to him on February 15, 2018.³ *See South Kingstown Waterfront Advisory Commission letter dated 2/15/18 and submitted as an Exhibit.* The Commission arrived at this finding despite the South Kingstown Harbor Master noting at the Commission’s February 1, 2018 meeting that “the 3 acres of usable water obviously constricts the area however, there are no safety concerns or issues related to the boats and waterways ordinances. *See South Kingstown Waterfront Advisory Commission Meeting Minutes dated February 1, 2018 entered as an Exhibit.*

The testimony and opinion of Mr. Whitney’s analysis and the findings of the South Kingstown Waterfront Commission are also supported by the testimony of those who live and recreate on the Cove, some who have done so for generations. This subcommittee heard testimony that the exact location of the proposed three acre facility will eliminate the “slow lane” of the Segar Cove, where everyone congregates, forcing those seeking the safety of this area of the cove for swimming, kayaking, paddle boarding, rafting, sculling, sailing, into the “fast lane”, the center of the cove. The testimony of these witnesses provides overwhelming evidence that the proposed three acre facility is in significant conflict not only with recreational boating, swimming and navigation but in significant conflict the public’s ability to conduct these recreational activities safely. The subcommittee heard from the following witnesses:

David Latham. Mr. Latham, who, along with his family, have spent their summers on Segar Cove since 1970. *See Hearing Vol. 4, 12/4/20, p. 587.* He has a bird’s eye view of all of the activity that takes place on the Cove (and in the proposed location of the facility) from his family’s home located at 298 Prospect Road at the extreme northern tip of Palmer

³ The South Kingstown Harbor Master was presented as a witness by the applicant and there was no evidence presented by the applicant as to what the Harbor Master based this statement on compared to the expert testimony and analysis on navigational impact and safety presented by the Intervenor’s expert, Mr. Whitney and how the South Kingstown boats and waterway ordinance impacts the use of the cove when applied to the proposed three acre facility.

Island. Id. at 592. He testified that he is familiar with every inch of Potter Pond and Segar Cove having literally circumnavigated the perimeter of the entire cove by swimming with mask and snorkel and by paddleboard, kayak and powerboat. Id at 589, 619; *See also Exhibit 4 Photographs*. He describes Segar Cove as oblong shape used by typically heading down the western side, heading north and turning around (Figure 4B) and that putting a farm in that section of the water is going to alter the dynamic of how the cove is used towed sports using the fat meaty center, while anybody else in a sailboat, paddleboard, raft, would typically hug that side, the north eastern side to stay out of that traffic Id. at 612-613. In his opinion, based on his decades of experience and observations of recreating on the Segar Cove, the proposed location of this facility will have a cascading negative effect “creating a smaller water sheet with more traffic in it...setting in motion a bad dynamic for all kinds of people, skiers, kayakers, paddle boarders, putting them all at risk. Id. at 615. *See Also testimony of Mr. Appleby, Hearing Vol. 6, 12/30/20, p. 882-884, “Kayakers will be forced away from the shore to more into the center of the cove and will have a much more difficult time avoiding boats using the cove for skiing or tubing. So there will be a domino effect, a cascading effect, that will substantially reduce the overall activity in the cove. For that reason, we think it's an inappropriate site to expand the proposed farm”*. Finally, I just want to emphasize and echo what Mr. Latham said earlier today. This is not simply a concern of a few homeowners on the cove. The majority of the boats we see use the cove actually come from outside the cove.”

- Alicia Cooney. Ms. Cooney a Rhode Island resident who along with generations of her family grew up in Matunuck, has spent every single summer of her life on Segar Cove and Potter Pond where she learned to swim, sail, row and quahog. *See Hearing Vol. 4, 12/4/20, p. 543-546*. She has lived on Segar Cove for 12 years and testified based on her lifelong experience of recreating and observing recreational activities on Segar Cove that: “There's really only one place that towed water sports can have enough room and they do have enough room, and it would run from east to west at the widest part of the cove going from -- if I'm looking at this map, on widest part would be right north of the label, Segar Cove, going from the west side directly east across to where the proposed oyster farm would be. So this is a circle naturally. It's a natural circle that one would take with your towed motor

sports. So there's -- all the red is, you can't go down there. Either there's docks, there's a no wake zone or there's moorings.” *See Hearing Vol. 4, 12/4/20 p. 559-562.*

When asked what type of other activity takes place in the proposed lease area she testified as follows: “Yes. So what you would do is you'd have, you know, couple motorboats with water skiers or wake boarders or rafters going around kind of taking turns, and then you would have me hugging the cove -- hugging the side to avoid the motorboats. And not so much the motorboats themselves, but the raft, the water skier, or the wake from them. So that would be me right within the perimeter of the proposed oyster farm. And then you'd have one or more folks, other paddle boarders, or other kayaks out there and someone who would be frankly on Kevin Hunt's shore just south of the southern point of the proposed oyster farm that would be doing their quahogging. That would be a typical scenario.” *Id.* at 560, 562-581; *See and Exhibit 5 Photographs produced by Ms. Cooney.*

Ms. Cooney also testified about her concerns related to the location of the proposed facility: “The proposed location is absolutely taking for the purpose of one individual a critical space in our pond that is currently shared by multiple individuals, over the course of the summer hundreds of individuals, versus just one for an industrial farm. You know, an industrial activity and a farm that would restrict the use of that absolutely critical space given the geography of that cove and make it not as useful for the rest of the people using the pond for recreation or for other people who were quahogging or fishing for their own purposes, and it will be very unsafe and in the way, in the critical spot of the cove. So that is my objection. I think that there should be a real balance here. He has a terrific farm already in a spot that cannot be shared by as many of the recreators where we are.” *Id.* at 571. She also discussed the public access points to Segar Cove which bring numerous members of the public onto the cove in kayaks, paddle boards, sunfishes and smaller boats. *Id.* at 596-597; *See Also Figure 1A of ESS Report.* These public access points from land allow the public to access Segar Cove from land which is not something the public can do in the only other deep water area in Potter's Pond, Northern Basin, as there are no public access points there. *See testimony of Mr. Latham, Hearing Vol. 4, 12/4/20, p. 611.*

- Kevin Hunt. Mr. Hunt who has lived with his family on Segar Cove since 2002, has a “birds eye view” of Potter Pond and Segar Cove May to November. He and his family have a direct site line to Mr. Raso’s current operation which is 240 yards away from his home. He and his family have waterskied, kayaked, paddle boarded, fished, rowed and swam in the exact area where the proposed three acre facility is to be located. *See Hearing Vol. 4, 12/4/20, p. 511, 530-531*. He has concerns about the close proximity that this commercial operation will be located not only to his shoreline, as close as 10 ft., but also from as close as 200 ft. from his house. The close proximity of this three acre facility will significantly conflict with his public trust uses and essentially prevent him, his family and other members from swimming, fishing, quahogging, kayaking and paddle boarding in this location. Moreover, he will not be able navigate in the area between the proposed farm and the shoreline (between 10 ft. -65 ft.) as it is too shallow, and the area has large rocks. *Id. at 528-529. See testimony of Ms. Cooney, Hearing Vol. 4, 12/4/20, p. 564 and Mr. Latham, Hearing Vol. 4, p. 622*. In addition, he has concerns about this proposed facility operating all hours of the day based on his observations and experience with Mr. Raso’s current 6.94 acre operation. *Id. at 530-532*. He along with other members of the public also have concerns that this proposed three acre farm will expand exponentially and without authorization of CRMC as Mr. Raso’s current operation expanded from 6.94 acres to 9.68 acres. *Id. at 531-534; See Also testimony of Mr. Whitney, ESS, Hearing Vol. 3, 11/17/20 p. 378-382 and ESS Report Figure 2; See also public testimony of Mr. Carl Bush, Hearing Vol. 6, 12/30/20, p. 887*.

Through his testimony Mr. Hunt described the area where the three acre facility is proposed to be located as the “slow lane” in the cove because it allows those who are not water skiing or tubing to stay out of the way essentially getting away from the activity that is happening in the center of the cove, the “fast lane” where there are jet skis pulling skiers or boats pulling skiers. *Id. at 519*. Based on his experience recreating and daily observations from his causeway he testified that as follows: “Again, every day I walk down that causeway with my dog. Very high percentage of the time there are people out there having fun. Besides the powerboats, again, there's a huge amount of traffic in that slow lane. Often there will be four, five or six paddle boards, full families with dogs on paddle boards out

there, rafting together and looking at the osprey nest. There's a lady who sculls through that area, a lot of moorings. She uses that cove and she also goes over and uses the other side of the cove. Excuse me, the other side of the pond. There are sailors who are there all the time going back and forth. It is one of the areas that you can sail in sort of safely getting back and forth when you have enough space to maneuver. You know, obviously the jet skis and the powerboats, but it's a very active area and obviously with the virus it was more active this summer. One of the safe ways of recreating with your family. That's my observation. I see this with my two eyes every day. It is very active." Id. at 526.

The testimony of Mr. Hunt, Ms. Cooney and Mr. Latham was supported by 147 letters of objection and over 42 members of the public who testified over 4 days about the significant conflict and negative impact the facility will have on the safety of those recreating on Segar Cove. Specifically, this subcommittee heard from:

- Larry Pierce. Mr. Pierce testified that he does not live on Segar Cove but is a life-long resident of Rhode Island, a former water ski director and retired licensed captain from the United States Coast Guard with over 50,000 sea miles "under his belt", disputed the facts presented by the applicant that the farm will not impact recreation on Segar Cove. *See Hearing Vol. 7, 1/29/21, p. 906-907*. In fact, he testified that the farm will impact recreation, specifically waterskiing and testified as follows, "When you enter that Segar Cove, there is a narrow channel that you enter from the east. As you get into the cove, the proposed farm sets to the north or you go in and you go to the south which remains open. There's currently just enough room in there without the farm to waterski, but just enough. One can go the length of the pond, maybe get three turns in, then turn around and go back north, get another three turns in, turn around, go back south. If you put that farm there, you have eliminated the entire north of the cove's navigable waters. It's not just where the farm is, but you need a buffer zone of access for boats to get in and out of there working and otherwise. That will eat up -- not the farm will eat up the entire north, it will eliminate waterskiing in that pond; however, people will still try to do it. They may try tubing. One of the phenomenon's in waterskiing is that when you're taking a turn, there's -- it's called cracking the whip. When you turn, the person behind the boat, no matter what they're riding, be it a tube or a ski or a skim board or what have you, will accelerate in that turn

two to three times what the boat speed is. If somebody loses it on that turn, they go flying into that -- they go flying right into that oyster farm, scallop farm. There's going to be people who are going to be hurt. Now, experienced people are going to know enough not to do it. It's the inexperienced people who will go in there and make a mess of things. For that reason alone, I object to it. *See Hearing Vol. 7, 1/29/21, p. 907-908.*

- William Leddy. Mr. Leddy testified that he is a licensed captain and retired officer from the United States Coast Guard who testified that in addition to recreational boating he uses Segar Cove for sailing, paddle boarding kayaking and shell fishing. *See Hearing Vol. 7, 1/29/21, p.913-914.* His concerns focused on the significant impact that the proposed three acre facility will have on the use of Segar Cove and testified as follows, “I believe if this lease is granted in its proposed configuration, it will have a significant impact on the traditional use of Segar Cove by creating an inherent hazard to navigation. Not only would the proposed lease force compression of existing uses of the area but compress those uses into an area now to be bounded by a serious entanglement hazard. Suppose a child tubing adjacent to the lease is accidentally thrown into this site. If an entanglement incident does occur there, who will respond? Can the Harbormaster or the Coast Guard respond to this site? Can the local volunteer fire department respond? Will any of these agencies be trained for this type of emergency?” *See Hearing volume Vol. 7, 1/29/21, p. 913-914.*
- Pablo Rodriguez. Dr. Rodriguez testified that he lives on Segar Cove with his family, has been in Rhode Island for 35 years and moved to Rhode Island because of the water. *See Hearing Vol. 5, 12/16/20, p. 778.* He testified about the significant conflict that the proposed three acre facility will have on other recreational uses on Segar Cove and safety issues due to cove becoming overpopulated. *Id.* at 784. Specifically, he testified, “ With the area beaches continually reaching capacity, the use of this pond has quickly become overpopulated. In addition, many children and families are once again using the pond for swimming, as well as using floatation devices in the low water areas, particularly at the end of Lake. At any given day, you will see a multiple of water activities trying to enjoy Segar Cove. Safety for -- safety, I'm focusing on that word – safety. I impress that word continually -- for waterskiing, wake boarding and tubing into the area will now be

impossible to maintain with the 3-acre proposal for oyster farming. The area needed to safely turn a boat pulling a skier will be significantly reduced with the addition of any oyster farming equipment in this body of water, as well as a vessel and several people a day harvesting. Boaters cannot go into the mooring field to turn while towing; therefore, restricting ability to turn the boat to a larger area of Segar Cove. A boater must also take into consideration the changing tides. The sides of the pond are shallow and rocky. Even kayakers have to safely distance themselves from the shore as skiers, jet skis, and other boats come in and out either to dock or moor their boats.” Id. at 784-785.

Segar Cove is already a geometrically constrained area as Subcommittee Member Reynolds recognized it to be when she asked Mr. Whitney, “even without the oyster farm it (the cove) already appears constrained geometry wise for waterskiing” *See Hearing Vol. 3, 11/17/20 p. 439-440*. It is clear based on the maps and figures provide in ESS’s Report that Segar Cove, one of only two deep water coves is constrained. *See ESS Report and Figures 1-5*.

Dr. Rodriguez’s passionate testimony only highlights the significant conflict on uses and negative impact on safety that will be exacerbated if a three acre facility is allowed to be located on the cove. This is especially true with the influx of the public who are accessing the cove from public access points on land (none exist in the Northern Basin identified in ESS Figure 1A and 1C) from other bodies of water or from their own properties on the Pond. His testimony continued as follows: “The entire Potter Cove has seen a dramatic increase of recreational use over the past several years alone. Another critical issue to be considered is many boaters from the upper Potter Pond have been moving to Segar Cove. The upper pond is a very popular waterskiing area and has become so congested that boaters are using Segar Cove as an alternative, therefore, increasing the boater activity there. There are many boats coming into the area from other parts of Point Judith Pond, that you frequently have to anchor and wait your turn because only two boats can navigate safely. There's that word again, "safely." While towing the skier or tuber, we have to -- right now, this past year, my family have gone out to try to ski in that area because Segar Cove was adjusted [sic]. We went down to Potter Cove, and we were not able to ski there either. We ended up waiting and then getting discouraged and ending up going back at six o'clock at night to ski. One morning the children went out at 5:30 to ski. *See Hearing Vol. 5, 12/16/20, p. 785-786; See Also Testimony of Paul Hooper, Hearing Vol. 6, 12/29/20 p.864-869* where he stated, “I

am the gate keeper Potter Pond...you can't get to the pond without going past my house...and that 80% of all boats going into Potter Pond have a tow rope to go skiing and tubing in the only two deep water areas on the Pond.”. *See Also Testimony from Ms. Cooney, Hearing Vol. 4, 12/4/20, p. 583.*

- Bill Demagistras. Mr. Demagistris has lived on the Segar Cove with his family for over 15 years, recreated on the Cove with his relatives, friends and grandchildren on skis, paddle boards, kayaks and inflatables. *See Hearing Vol. 5, 12/16/20, p. 761.* He testified to his concerns and significant conflict the proposed three acre facility will have on other recreational uses on the cove: “And I can tell you that the very portion of Segar Cove, the 3 acres which would be used for the extension of the oyster and scallop farm, is an absolutely essential area and a margin of error area for boats navigating and pulling skiers and inflatables and tubes in this area. It is absolutely essential. Waterskiing and tubing is not an exact science. You must be very careful and cognizant of anything that could possibly result in collisions with the young people, typically, who are on -- being pulled on the skis. And the very area applied for here, the 3 acres is not really 3 acres. It's much bigger than that because of the necessity of avoiding the area completely, which compresses the size of the area in which this kind of activity goes on. So, essentially, what you're dealing with very emphatically, is the elimination of safe waterskiing and recreational activities, including tubing from this area. *Id.* at 761-762. Mr. Demagistris continued with his concerns about the impact of the proposed three acre facility in the Segar cove: “As has been mentioned before, Segar Cove is not a big -- is not a big area, but it is an appropriate area for the conduct of the skiing and the recreational activities. As a witness -- an expert witness for Mr. Raso said, he doesn't think that the cove is big enough right now for skiing. Well, it is. Of course, you have to be careful. The point is, if you put this 3 acres there, it is going to be too dangerous, and it's going to effectively eliminate -- I know I won't go in there anymore, and I -- you know, a lot of people go in there now, and it's going to end that activity. And that is not justified. The need versus the expense at which it is taken simply doesn't justify it. *Id.* at 765.

Then there was the testimony of Jessica Weidknecht and her 16 year old daughter Sophia.

- Sophia Weidknecht. Sophia, who despite being nervous, testified that Matunuck was her and her sister's second home and that Potters Pond is the "unchanging constant in her life" that makes her feel totally and completely at home that will . *See Hearing Vol. 6, 12/30/20, p. 823-243*. She and her sister have explored "every inch of the pond" and spent hours paddle boarding, kayaking, sailing, jet skiing, tubing and trying to make it up on one ski. *Id.* At the young age of 16, she even recognizes that if the farm goes in it will be extremely dangerous for her and her sister to go into that area if they fall and get caught under the water. *Id.*
- Jessica Weidknecht. Ms. Weidknecht followed her daughter's testimony and stated that she has been coming to Matunuck for 47 years, where generations of her family (including her daughters) learned to swim, quahog, fish, and sail and observe the osprey nest in the proposed area of the facility. *See Hearing Vol. 6, 12/30/20, p 825*. She testified that they can no longer quahog or kayak in the "flats" where Mr. Raso's current operation is because it is off limits and too dangerous due to the size of the farm, the cages and buoys. *Id.* at 826. She testified from "the heart of a mom with two young daughters" who use Segar Cove all the time. She testified that, "We've taught our daughters the importance of actually splashing when they fall off their skis because of the amount of boats that are coming through there so that they are safe and they keep themselves safe. So when they splash falling off their skis, the jet ski, kayaks to let other recreational users know we are there, and they need to be safe. It's really engrained in all of the adults and especially into the kids in that area that we need others to know that we're in the water so not to run us over. That's just life at Segar Cove and they all have been taught to do that which kind of tells you the amount of kids that are in there at that area." *Id.* at 827. *See also Testimony of David Latham Hearing Vol. 4, 12/4/20, p. 615-616.*

Jessica was not only concerned about her daughters' safety but the safety of all kids, teenagers and adults who recreate on Segar Cove. She continued her testimony:

"And really for us moms, I don't want to worry about major danger factors due to the decrease in space on the pond. The countless nets and buoys under water, floating cages, Segar Cove has a really narrow entrance as it is. So the amount of boats coming in and

out daily with oyster farm workers and on the Matunuck Oyster Bar tours that I know happen on these large barges, which are offered to clients of Mr. Raso's restaurant year round, is only going to bring more disruption, noise and significant increased danger to all of us who use that area. As a mother of these two young daughters, and I've got nieces and nephews, I'm terrified to let them use it. As you all know, there's been a great deal of conflict and the farm is not even there yet. *Id.* at 829. She concluded with the following plea to this subcommittee. "So, therefore, I'm asking you to please not let the farm destroy what so many generations have enjoyed over all the years. I ask that you please stop removing public property for public business and private wealth. We know that there are other areas that would be better for this proposed farm. I ask that you please look into those. Mr. Raso once said, and I quote, "I'm worried about my own business, but my business relies on the community. It's part of my business to help the community when I can." End quote. So, Committee, we're just asking you that you please find it in your hearts to help us now and keep this place what it's been generation after generation. It's a place we love and we want to use, and as a mom, a place that I want to keep safe for my girls to be able to go out there and ski and have fun and make memories for their own kids and for future generation. *Id.* at 830.

- Vince Mattera. Mr Mattera testified that he grew up in Matunuck, has spent every summer of his life on Segar Cove and spent countless hours on Segar Cove, sailing, rowing, fishing, crabbing claiming tubing, waterskiing with family and friends. *See Hearing Vol. 5, 12/16/20, p. 766*. He testified about his concerns about safety due to the compression of the water sheet, "Segar Cove has always been the bunny slope. It's where people learn, and it's safe. I felt very safe teaching my two daughters when they were ten years old how to waterski on Segar Cove." *Id.* at 767.

For those members of the subcommittee that have never waterskied, he provides an excellent explanation of what actually takes place on the water and the significant conflict the proposed three acre facility will have not only on recreational boating and navigation but on the safety of those on the water. He testified as follows:

“Teaching somebody to waterski takes a lot of time and patience. You have to get the person in the water with their tips of the skis up. Then you have to put the rope between them while slowly moving forward to take out the slack. It may sound simple, but more times than not one ski floats behind the person, and they end up in the splits, or they end up with both skis behind them and they're on their bellies. So the boat has to circle around, help the person re-set, and this usually happens several times before the person actually even has the tow rope in their hand. And, finally, when the person is set and has the rope in their hand, the operator of the boat has to look back to make sure that the person is ready to go, while looking forward to make sure that no one is coming. And they take out the rope -- the slack out of the rope. When it's taut, you give it the gas, and with any luck the person on the back is dragged out of the water, but most often the person falls flat on their face, and the process starts again. You're pulling the rope, you circle around, the person puts the skis on, you put the tips up, give it the gas, take out the slack, and they fall down. And this happens over and over and over again. So my point, is that it's not easy to learn how to waterski, and it's not easy to drive a boat while teaching someone to waterski, but yet these two things have been happening on Segar Cove for generations. Segar Cove has always provided the perfect environment for both.” Id. at 767-768.

Finally, Mr. Mattera concluded his testimony focusing on his concerns about the impact that the proposed three acre facility will have on the safety of those participating in towed watersports on Segar Cove:

“Segar Cove has a long, safe boating history. To the best of my knowledge, over the past 60 summers, there's never been a serious boating accident or injury on Segar Cove. Reducing the water space on Segar Cove with either Plan A or Plan B will make Segar Cove less safe for all those who use it. Reducing the water space will increase waves from boats and require boater -- powerboaters to make hairpin turns at the north end of the cove. The proposed plans, both A and B, severely narrow the space to about 100 feet at that end of the cove. Pulling a person behind a motorboat requires more space. When a skier or a tube does not have enough space, the risk of danger is exponentially increased.” Id. at 768-769.

Mr. Mattera's long history with Segar Cove, his experience driving power boats since 13 years old and towing water skiers and tubers for close to 50 years qualifies him to make the following statement:

"Compressing all the ski and tube activities into the center of the cove will create excess boat waves, which also makes it more difficult to remain on a tube or skis. Hitting another boat's wake while you're on a tube will send the tube into the air and eject those who are upon it. These conditions do not presently exist because there's sufficient space for the waves to dissipate. The proposed plan will change the water conditions and will alter the historical use of this cove there will continue to be the same number of, if not more, boaters on Segar Cove using it as they have in the past, but now they'll be doing it less safely. There are no monitors to limit the number of boats on Segar Cove. There are no lanes to keep you 200 meters or feet from other boats. The same activity will go on, but in a lot less space. And that's what makes it unsafe." Id. at 770 -771.

- Ed Wrobel. Mr. Wrobel testified that he lives on Potters pond, is a direct observer of the activities on Segar and uses Segar Cove regularly for boating, skiing, tubing and paddle boarding and swimming. *See Hearing Vol. 6, 12/30/20, p. 843-844*. Specifically, he testified about his concerns related the conflicts in use, the compression of the water sheet caused by the farm and ultimately, the safety of his nine year old grandson:

"From a practical standpoint, the proposed farm would just make the use for towing sports impractical and I agree, a potentially dangerous one. I heard earlier. Again, I developed these thoughts on my own, and it's very clear that many people share that same concern. With having a nine-year-old grandson, I'm going to be very reluctant to use that cove. The first time a child or a teenager or an adult for that matter falls off a tube and falls into the apparatus, it's going to be really unfortunate. I think, again, from a practical standpoint the analysis concluded one less skier is the only impact. I don't think that is accurate. Again, for those who are concerned about safety, it really effectively eliminates the use of that cove. Some will use it, but with increased risk is what the issue is. I also want to emphasize the entrance to the cove, it is relatively narrow. It will have work boats, not just the farm itself, but work boats coming and going. So that will have an impact on the cove as well. Like so many others, I'm supportive of Perry's restaurant, of his current operation. We

support the local business. I appreciate you've got a difficult job deciding on the balance. There's been a lot of discussion about balance, and there's a requirement for balance. So I just suggest that with the existing seven-acre farm that's there and the associated work, we have some level of balance now. And expanding that, the addition of this new farm, would decidedly tip the balance in favor of one individual at the expense of the public. *See Hearing Vol. 6, 12/30/20, p. 843-846.*

In support of his position that Segar Cove was the least used part of Potter Pond, the applicant introduced into the record numerous photographs taken from July 25 through October 31, 2019 on almost a daily basis showing pictures of Segar Cove with little or no public trust activities. All such pictures were taken in a narrow band of time around the noon hour and showed little or no public trust activities. The pictures were taken either by Mr. Raso or a colleague, sometimes from land and sometimes from a boat. *See Hearing, Vol. 1, 11/12/20, p. 65-68.* A review of these pictures demonstrates that for the most part, whatever was the subject of the picture, it showed limited public trust activities.

Although several witnesses testified to the fact that around the noon hour there is a lull in activity on Segar Cove as people go home or out to eat for lunch, two other points need to be made about these pictures. First, these pictures obviously captured only a single moment in time. But more importantly, these pictures were not taken by a camera set in one location photographing all of Segar Cove at a preset designated time during each day. Rather, the pictures were taken on a day-to-day basis by Mr. Raso or a colleague. On any particular day, Mr. Raso or his colleague decided what to include in a picture, and therefore, what to exclude from a picture. It is therefore impossible to conclude that the pictures submitted into evidence by Mr. Raso accurately portrayed the public trust uses on Segar Cove even during the normally non-busy noon hour, for the nanosecond of each day they represent.

Despite this fact, Mr. Beutel based his decision that the facility would have no significant impact on water dependent activities and uses such as recreational boating, fishing, swimming and navigation. *See 650 – RICR 20-00-1, 1.3.1 (A)(1)(j).* In addition to the 147 letters of objection submitted by members of the public there was testimony at the hearings from literally dozens of witnesses with years, and in many cases decades, of firsthand experience living and/or recreating

on Segar Cove and Potter Pond demonstrated that the application and the statements of Mr. Raso were inaccurate and self-serving.

Over the course of four days, 42 witnesses testified in opposition to the project, and most of them detailed, based on extensive experience on Segar Cove or Potter Pond, how active it is for power boating, sail boating, towed water sports, fishing, clamming, paddle boarding, kayaking etc.

The net result of the failure of the applicant to provide accurate and complete information is that the staff report failed to accurately understand the intensive and broad range of public trust uses on Segar Cove and therefore, it failed to recognize that the proposed facility would significantly and impermissibly interfere with public trust uses, requiring the denial of the application.

In direct contrast to the application and testimony of Mr. Raso at the hearing, testimony in opposition to the application including the following:

- Jane Enos. Ms. Enos a 3rd generation resident of Matunuck testified about her observations of activities on Segar Cove including “needing every single inch of that pond to ski” and it being the “best little places to teach your kids how to fish”. *See Hearing Vol. 6, 12/30/20, p.812-818*. Specifically, she testified about her husband Gary Enos, a commercial shellfisherman, who shellfishes in the same area as the proposed facility. She testified that: “And over the last three years...he has literally dug over 10,000 quahogs from the area that’s designated to be the new Segar Cove leased shellfish farm.” *Id.* at 816.
- Kevin Hunt. Mr. Hunt testified that his secret spot to fish off his property is in the same area where the farm is proposed and that he will no longer be able to do so. He stated, “Also along that side of my property is, it's not going to be anymore, but it's my secret fishing spot. I get a lot of fishing there in all times of seasons, not just when there's hatching. I see other people use that as well. *See Hearing Vol. 4, 12/4/20, p. 519*.
Mr. Hunt also testified that he has observed shell fishing in the proposed lease area:
“Q: Did you observe any type of shell fishing in that area where the proposed farm is going to be?” A: Definitely, you know, I was surprised that they said no shell fishing. I see on a regular basis, both wild and commercial shell fishing. Those of you who have done shell fishing, it's hard work. These commercial shell fishermen are back there on a regular basis.

If they were taking clams out of that area, they certainly wouldn't be bad. So I've seen them regularly there....I talked to this gentleman, Gary Anderson, who is a commercial fisherman standing right in the spot that Perry wants to use for his aquaculture farm". *See Hearing Vol. 4 12/4.20, p. 522-3; See also Exhibit 6 Picture of Gary Anderson.*

- David Latham. Mr. Latham testified to his observations about fishing and shell fishing in that area: "Q: What other observations have you made such as shellfishing or fishing in that area. A: There's -- this is what -- you know, what is stupefying about the staff report was that -- and in the application, Mr. Raso is saying there's no shellfish there. Then the report says, well, we tested it for shellfish and there's only one clam per square meter. I'm here to tell that you there are more clams than that there. You can go out there with a rake and get them yourself, and you'll get a bucket or two. I know the people do it commercially there. They harvest clams there. I've been clamming there. I've got soft shell clams there and hard shell clams there. It's a great place to get clams. *See Hearing Vol. 4 12/4/20 p. 619-620.* Mr. Latham continued, "...When the worm hatches there, it's a great place to catch striped bass. We used to catch a lot of soft shelled steamer clams back when Mr. Raso started digging clams commercially. I well remember when that first started. There were soft shell clams all over the pond, and you could get just pails full of them and they disappeared a little bit. *See Hearing Vol. 4, 12/4/20, p. 594; See Also Rhode Island Marine Fisheries Council Letter dated April 27, 2018, p. 2, bullet #3.*

Almost as important as the above testimony is the findings of the Rhode Island Marine Fisheries Council ("RIMFC") which under Rhode Island General Laws 20-10-5 is obligated to review the application to determine whether the proposed three acre facility is "consistent with competing uses engaged in the exploitation of marine fisheries". On March 14, 2018 the RIMFC held a public hearing where Mr. Raso presented his application and extensive public comments, written and oral was taken. *See RIFMC Meeting Summary Minutes, March 14, 2018 entered an Exhibit.* This information provided at this hearing included objections from:

- The Rhode Island Saltwater Anglers Association Kayak Committee because the proposed area is used for kayak fishing during the worm hatch (p.2);

- Mr. Michel Marinelli who testified that the area is constantly used from April to September/October for recreational fishing and shellfishing (p.2);
- Mr. Garry Ennis who testified that he commercially shellfishes in the lease area for both steamers and quahogs and kayakers fish there all year (p.2);
- Mr. Phil Capaldi who testified that the proposed lease site is used recreationally, and he will no longer fish there if the lease is there (p.2).

As a result of the evidence and testimony provided at this hearing, the RIMFC was unable to provide a positive recommendation to CRMC with half of the RIMFC finding that the proposed facility is not consistent with competing uses engaged in the exploitation of the marine fisheries and the other half finding it was consistent. The RIMFC Chair notified Mr. Beutel at CRMC of the split vote and a summary of the findings of the RIMFC members in a formal letter dated April 27, 2018. *See April 27, 2018 letter from RIMFC to Mr. Beutel, CRMC, entered as an Exhibit.*

According to the Chair of the RIMFC, the members that held that Mr. Raso's application is not consistent offered the following rationale:

- “Wild harvest activities including shellfishing and finfishing, do occur in Potter Pond, including the general area of the lease proposal. The record includes (50+/-) comments from anglers and local residents who maintain that the proposal conflicts with those Activities.”
- “Notwithstanding the challenge of determining the nature and extent of the wild-harvest activities that occur in a specific area targeted by the proposal, if the proposal were approved, the placement of gear in the area would effectively preclude most wild harvest activities, particularly finfishing in the lease area. Potter Pond is known to be a hot spot for recreational fishers targeting striped bass within the footprint of the lease site, if approved, would become impracticable, given the high likelihood of getting snagged on the aquaculture gear”.
- “ While shellfish densities in the specific site area targeted by the lease proposal are relatively low now, they could increase over time, as is often the case with shellfish populations that have peaks and valleys. Some fishermen said they fished the area between the shore and proposed aquaculture lease area both commercially

and recreationally. This makes the area more attractive for shellfishing as it can be reached from shore by boat by fishermen and residents.”

Mr. Ballou, the chair of the RIMFC concluded this letter by stating “The Council offers these varying perspectives with the understanding that they will be *thoughtfully* considered by CRMC as the lease proposal is subject to additional review and decision”.

Despite Mr. Beutel acknowledging in his testimony that CRMC received many objections from the public his staff report was completely dismissive of the “147 written objections”, noting as follows:

“In this age of social media the mis-information provided to people was substantial. Even today, the website [save potter pond] provides incorrect information to viewers. Templates for letters of objection circulated through the community. Reviewers will note that multiple family members and neighbors submitted identical objections. Of the 147 objections, 79 were received from non-RI residents and 68 were received from RI residents. Fourteen letters of support were received from Rhode Island residents.”

See CRMC staff report dated June 2, 2020, From David Beutel to Jeffrey M. Willis, Interim Executive Director, CRMC File No. 2017-12-086, p. 1-2.

The suggestion is that the large number of objection letters for a project of this sort were fueled by misinformation, used duplicate form letters and had individual letters signed by individual family members and was dominated by out-of-state residents. Our review comes to a markedly different conclusion.

First, most of the letters we reviewed made it clear they came from owners of property in proximity to Potter Pond, making them residents, even if many of them had a different state of domicile, or from Rhode Islanders using Potter Pond. Secondly, there were literally dozens and dozens of letters giving the writers personal, and often years long, experience with Potter Pond and their personal concern as to the impact of the proposed facility on Segar Cove and Potter Pond.

While many of these letters were not form letters, they did express a common concern, being that Segar Cove is one of only two areas on Potter Pond suitable for power boating, sailing, water skiing and other towed water sports, and the location of the proposed facility will condense the available area for these recreational activities and make it more hazardous to engage in these

activities, as well as in swimming, kayaking, and paddle boarding. These concerns for interference with such public trust recreational activities, and they were not just limited to towed water sports but included boating and sailing as well, came from years of experience on Segar Cove and Potter Pond.

A great many of these letters also expressed concern for the reduction in available area for swimming, kayaking and paddle boarding. As the letters, as well as testimony at the hearing, demonstrated, those with experience on Potter Pond do not expect to be kayaking or paddle boarding over the oyster farm and they are greatly concerned about the loss of recreational area arising from the location of the facility in Segar Cove, and the further congestion and safety hazards this will cause.

While the staff report did not seriously evaluate the interference of the proposed facility with public trust recreational uses, based upon a clear misunderstanding of the five percent rule, as will be discussed below, such interference is critical to a determination of whether a permit should issue, and those with years of recreational experience on Segar Cove and Potter Pond are providing their judgment as to this significant interference based on their experience. We would urge the Subcommittee to read these thoughtful letters of objection, some of which are attached to this Memorandum. *See attached public comment letters submitted to CRMC and which are already part of the CRMC File. See also Hearing Vol. 2, 11/13/20, p. 256-259.*

With regard to the photographs submitted by Mr. Raso around the noon hour over a period of months, a number of witnesses testified to the fact that there is generally a lull in activity on Segar Cove around lunch time, and there is significant use in the morning, late afternoon and early evening when many people get out of work. For example, there was the following testimony:

- Kevin Hunt. Mr. Hunt testified that: “It’s what I observed. I think you heard from some witnesses who have been there a day or you’ve seen some, you know, moment-in-time photos. But as I said, I’m there every day. With my own eyes I see a great deal of activity on Segar Cove. As I said, some of these moments in time don’t depict the busy time there, which is usually in the evening, when again these hardworking families come home and bring their family out for tubing and waterskiing and recreating....You know, obviously the jet skis and the powerboats, but it’s a very active area and obviously with the virus it was more active this summer. One of the safe ways of recreating with your family. That’s

my observation. I see this with my two eyes every day. It is very active.”. *See Hearing Vol. 4, 12/4/20, p.525 – 526.*

- Jessica Weidknecht. Ms. Weidknecht, who has recreated on the cove for generations and more recently with her two daughters testified about her observations of activity on Segar Cove testified that: “I've listened to Mr. Raso's testimony. I've heard him say that he's lived in the area and on Segar Cove for years, and that he rarely sees any recreational activity on the pond. For someone who has spent countless hours on the pond, visiting his oyster farm, and the new proposed location, he knows that that is not true. And that in itself worries me because he knows that this place is used all the time. If you were to sit on a dock at Segar Cove and video from 8 to 7, you would probably see at least 10 to 20 different boats a day being used for all kinds of activity, usually with young children being towed, fishing, swimming, everywhere. And when I say everywhere, I mean everywhere. It is all over the pond. People come from all over the East Coast to use that area. They rent or buy homes on Segar Cove because it's one of the few ponds where these activities happen. The option of water sports happening on the north cove or third cove, I don't know what they actually call it, what the real name of it is, it is increasingly difficult as it's more crowded than ever before. So if you have tried to ski there, it is too crowded or busy with anchored boats, partying, fishing, and all that kind of stuff. *See Hearing Vol. 6, 12/30/20, p. 828.*
- Andrew Wilkes. Mr. Wilkes who lives on the cove directly across from the proposed location testified that he uses the cove for all kinds of water, fishing and navigational activities, that there is a lot of activity on the cove throughout the day, that he and his family water ski regularly and that based on his observations the leased area is a frequently used area. *See Hearing Volume 5, 12/16/20, p.698-713.*
- Ed Wrobel. Mr. Ed Wrobel testified that he is direct observer of Segar Cove, it is used very regularly by the public, that it gets “a lot of use” which is inconsistent with Mr. Raso’s testimony.” *See Hearing Vol. 6, 12/30/20, p. 843.* Specifically, he testified that “It focuses on the point there again are only these two areas with deep water navigable for powerboats,

for sailboats. I use it regularly myself and my family and our friends for boating, skiing, tubing, paddle boarding, swimming. And whether it's tubing, paddle boarding or even just leisurely boating and hanging out, we often find ourselves in that specific area of the proposed farm. If there are skiers and tubers in the center, you need to stay out of the center of the cove. It's kind of a safe place to be. Plus it's simply a pleasant area to be to enjoy the scenery and wildlife and so forth. Tubing and so forth, I tow my grandson in the tube. It's the closest one. The third cove is often busy, the northern cove as you've been hearing about." Id. at 843-844.

Not only did numerous witnesses detail the extensive recreational, navigation and fishing activities on Segar Cove, but numerous witnesses clearly established that Segar Cove was only one of two areas in the entire Potter Pond (consisting of 329 acres) suitable for towed water sport and other recreational activities, given the generally shallow waters, mooring fields and high weed content of most of Potter Pond. *See testimony of Mr. Latham. Hearing Vol. 4, 12/4/20, p. 598-603; See also testimony of Mr. Whitney Hearing Vol. 3, p. 366-368 and ESS Report and Figure 1.* Although, the net result is that the significant adverse impact on towed water sports testified to at the hearing, as summarized above, the proposed location of the three acre facility will have the additional impact of significantly conflicting with other recreational activities for most of the entire Potter Pond. Such testimony included the following:

- Pablo Rodriguez. Dr. Rodriguez testified that he lives on Segar Cove with his family, has been in Rhode Island for 35 years and moved to Rhode Island because of the water. *See Hearing Vol. 5, 12/16/2020, p. 778.* He challenged anybody to show that they use the Segar Cove more than his family as they are in or on Segar Cove every day whether on one of their two sailboats, jet skis, paddleboards, kayaks or windsurfers. Id. at 778. He testified as to the significant conflict the proposed location of the three acre farm will have on his ability (as well as others) to sail in the cove and presented an image of Segar Cove and the limited area there is to sail and windsurf. Id at 780. Specifically, he testified: "So when you are in a sailboat, especially on a Beetle Cat, you can see here the wind direction coming from the south and southwest. The red line is the tack that I need to take to get into the cove. You don't have a lot to -- a lot of space to maneuver because this gap right here, you see where the yellow spots are, those are rocks; so the narrow entrance to Segar Cove is

very, very difficult to maneuver on my sailboat; therefore, I need to use this path in order to get in. When the wind is really, really tight and hard in the summer, when the sea breeze kicks in, if there's somebody boating in there, jet skiing, tubing, waterskiing, I have no other choice but to take that tack. So with the new farm, I am not going to be able to come in with the boat, or I'm going to have to do four or five tacks in front of that very, very narrow entrance, which is blinded by the people coming from this direction into the cove. So this is a real, real issue for me as a sailor and as a wind surfer, and it represents a security issue for all the kids, all the grandkids that are members of our family that use this area.” Id at 780.

- Beverly Hodgson. Ms. Hodgson whose family has lived on Potter Pond for 35 years and has observed the recreational use of the Segar Cove “at all hours” from her windows and deck. *See Hearing Vol. 7, 1/29/21, p. 924*. She testified that her family are big users of small row boats, sunfishes and single sculls. Id. at 924. Based on her experience over 35 years, the safest place to row a scull, kayak, paddleboard is to hug the shoreline that Mr. Raso’s farm “will now block off”. Id. at 925. She further testified that, “I’ve often had to row like mad to get out of the way of water skiing or tubing in this area so that I am not hit or swamped by a close wake. If you allow Mr. Raso to monopolize the area for his exclusive use, that recreation is going to be gone, as it won't be safe to enter the cove for fear of being hit or swamped by a speedboat, so we will effectively lose the use of that cove. Ours is not the only scull on the pond. This past summer more sculls have used the cove along with increased numbers of the kayaks and paddle boards which likewise need to stay in areas away from the route of speedboats. Id. at 925.
- Mark Latham. Mr. Latham testified that he is the brother of Intervenor David Latham and reiterated the fact that generations of his family have enjoyed Segar Cove and Potter Pond for over 50 years. *See Hearing Vol. 6, 12/30/30, p. 806*. He testified as the number of different ways that his family and friends have used the cove including, skiing, tubing sailing, paddle boarding, barefooting, swimming hundreds of times. Id. at 807-810. He also testified about his concerns about conflict of uses: “ I learned how to bare foot on that pond, I learned how to ski on that pond, my kids have learned how to ski on that pond.

There is, in the summer months, a great deal of activity on that pond. I have taught a bunch of kids how to ski and a bunch of kids tubing. My experience has been it's a fairly dicey situation in a water area that is used by a bunch of people to teach kids and safely boat and tube kids, recreational activities, when there are other boats in the area. When you decrease that area where those activities will happen, it's going to -- in my opinion, it's going to increase the danger of the use of that pond. The potential danger, I forget who spoke about it, all it's going to take is one time in a busy summer weekend where a kid's popped off the tube and a boat comes around because it can't go through the proposed farm, goes into a ski area, that doesn't see a kid in the water and the potential outcome of that is devastating. Absolutely devastating and is not worth that risk in my opinion. Id. at 810.

Accordingly, the impact on towed water sports is not just an impact on Segar Cove, it is an impact on all of Potter Pond as it significantly reduces the ability to engage in such recreational activities in one of the only two deep water areas where such activities can be accommodated on the entire pond.

Mr. Raso also sought to utilize two of his three expert witnesses to support the position that the proposed facility does not impermissibly interfere or significantly conflict with public trust uses of Segar Cove and Potter Pond.

Following is an exchange between Dr. Michael Rice⁴, one of three expert witnesses called by Mr. Raso, and Mr. Raso's counsel:

“Q. ...Dr. Rice, do you have an opinion based on your experience and review of the materials and review of the site as to whether the proposed farm could result in significant conflicts with water dependent uses and activities such as recreational activities, including boating, fishing, swimming and navigation?”

MR. WAGNER: Objection for the record.

A. Well, it has to do with sort of the semantics of the word “significant”. I take it that this use of the word significant would be a large, humongous sort of outlandish, and my answer to that is absolutely not. The applicant Perry Raso has gone to great pains to be as accommodating as he possibly can, and this is sort of the evidence by starting off with one configuration of the firm trying to work with some objectors

⁴ It should be noted that Dr. Rice is the same individual who voted in favor of Mr. Raso's application to CRMC as a member of the Rhode Marine Fisheries Council at its meeting on March 14, 2018. See p.5 Meeting Summary Minutes from the RIMFC March 14, 2018 meeting and entered as an Exhibit.

changing it and coming up with the various polygons, and as being as accommodating as possible. I believe this body, sort of given all of the data presented here, could essentially come up with a solution to satisfy most of the people and interests in the pond.”

See Hearing Vol. 2, 11/13/20, p. 222.

Not only did Dr. Rice not answer the question, but he also created his own standard of what level of interference with public trust uses would be prohibited, a standard found nowhere in regulation. Not surprisingly, Mr. Raso’s counsel sought to clarify Dr. Rice’s testimony on redirect, as follows:

“Q. And finally, Dr. Rice, based on your review of the application and your expertise, does this application as [sic] the full three acres provide the balance of aquaculture and public access sought by the CRMC legislation?”

MR. WAGNER: Objection for the record.

A. Yes, it does. It basically fulfills all of the requirements and it has been gone through very extensive review according to the procedures that the statute that Attorney Capizzo has pointed out including the Marine Fisheries Council.”

See Hearing, Vol 2, November 13, 2020, 262-263

However, on cross examination, Dr. Rice conceded he had only been to Segar Cove three times (*Hearing, Vol. 2, 11/13/20, p. 255*), he testified he is not an expert on recreation (*Hearing, Vol. 2, 11/13/20, p. 240*), and as indicated in his answer above, he based his opinion that the proposed facility would not interfere with public trust uses on his review of the application and his expertise, which expertise did not include expertise in public trust recreation. Accordingly, his opinion was not based on familiarity with the public trust uses on Segar Cove or Potter Pond, nor on his familiarity with Segar Cove or Potter Pond.

Dr. Rice’s testimony was admitted over objection subject to the weight to be given such testimony. His testimony on the question of whether the proposed facility would interfere with public trust uses of Segar Cove and Potter Pond obviously should be entitled to no weight. He quite simply did not know what he was talking about.

Mr. Raso’s third expert witness, Dr. Robert Rheault, was also asked his opinion as to “whether or not the proposed farm would result in significant conflicts with water-dependent uses and activities such as recreational boating, fishing, swimming and navigation”. After objections

to his testimony, he was allowed to proceed. His testimony is so incoherent it is impossible to summarize. *See Hearing, Vol. 2, 11/13/20, p. 287-288.* Despite the fact that Dr. Rheault was only in Segar Cove once, in the late fall, well after the active summer season, in response to another question he did manage to state the opinion that “in my mind this is one of those spots that’s almost ideal because you have to try and find a spot that impairs the least number of people to the least extent possible...But when you find a spot that is sort of out of the way that is tucked to the side and impairs the least amount of space, and the least amount of users, in the most insignificant fashion, to me that seems like a perfect spot to try and squeeze in a little bit of aquaculture.” *See Hearing, Vol. 2, 11/13/20, 273.*

In other words, based on one visit to Segar Cove in the late fall, Dr. Rheault concluded Segar Cove was removed from any material recreational activities. Clearly, Dr. Rheault’s testimony as to whether the proposed farm would adversely impact public trust uses should be entitled to no weight whatsoever.

3. Misunderstanding of the Regulatory Impact of the Five Percent Rule Precluded the Finding of Impermissible Interference with Public Trust Uses

The five percent rule is codified in CRMC regulations and provides as follows:

“The maximum area occupied by aquaculture leases in the coastal salt ponds is five percent (5%) of the total open water surface area of the salt pond below MLW. **This limit is established based upon the current knowledge of ecological carrying capacity models.**” (Emphasis supplied.)

650-RICR 20-00-1, 1.3.1(K) (5)(a)(20). See also 1.3.1(K)(4)(f).

In an article on CRMC’s website, CRMC explained the basis of this rule as follows:

“The CRMC adopted the percentage rule in 2009 after much study on carrying capacity in the ponds and bay. Carrying capacity is the maximum amount of shellfish aquaculture that can occur in a given water body without unacceptable ecological impact to that body of water (from a biological and ecological perspective).”

In that same article, Robert Rheault, executive director of the East Coast Shellfish Growers Association, who also served as an expert witness for the applicant before the Subcommittee, had this to say:

“There are several types of carrying capacity: physical carrying capacity-the total area of marine farms that a physical space can accommodate; production carrying capacity-the stocking density of a project at which harvest are maximized; ecological carrying capacity-the stocking or far density which causes unacceptable ecological impacts; and social carrying capacity- the level of farm development that causes unacceptable social impacts.

In Rhode Island it is the social carrying capacity that really determines how much aquaculture we can put in a location...It is far less than the ecological or the production carrying capacity.”

http://www.crmc.ri.gov/news/2018_0604_aquaculture.html#:~:text=June%20%2C%202018%2C%20Wakefield%20%2D,ponds%2C%20but%20conflicts%20still%20arise

Despite the fact that by its express terms the five percent rule deals only with ecological carrying capacity, Mr. Raso characterized the five percent rule this way in his application, when asked to “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:

“While the ecological carrying capacity of shellfish aquaculture in Potter Pond or any RI estuary would be well over 50% of surface area the social carrying capacity of RI estuaries has been studied and understood to be at 5% (Byron et al 2011)...”.

The reference to Byron refers to Dr. Byron, who also was an expert witness for Mr. Raso, and, as will be discussed below, Dr. Byron never testified that the social carrying capacity of Rhode Island estuaries is five percent, quite to the contrary.

Similarly, Mr. Beutel’s staff report demonstrates a misunderstanding of the five percent rule as well. In discussing the impact of the proposed facility **on recreation and boating activities**, the staff report says “[p]lease note the 5% rule...if this site is permitted [P]otter Pond will be at 3% of allowable aquaculture activity. All other activities will have 97% of the pond for their opportunity.” This reference was repeated a second time in the staff report.

This represents a serious misunderstanding of CRMC’s own regulations governing aquaculture. The five percent rule, by its very terms, applies only to ecological carrying capacity, it does not apply to social carrying capacity, which implicates recreational and public trust uses.

In other words, the staff report indicates that if the proposed aquaculture facility would occupy less than five percent of Potter Pond, even though there may be adverse impacts on public trust uses, that is not an issue because there is 95% or more of the pond available for those uses.

The five percent rule simply does not apply to social carrying capacity issues, and, as the applicant's own expert previously wrote in the above-referenced article on CRMC's website, social carrying capacity is much more restrictive than the five percent rule.

This misunderstanding of the five percent rule was confirmed in Mr. Beutel's testimony to the Subcommittee.⁵ Under questioning from attorney Wagner, the following discussion occurred:

MR. WAGNER: Now, the five percent rule is designed to address ecological consequences, correct?

MR. BEUTEL: I think you heard the testimony of Carry Byron and Dr. Rheault, Dr. Byron and Dr. Rheault, and that really the five percent rule is a social carrying capacity. It was originally based on ecological carrying capacity and the results of Dr. Byron's Ph. D work showed that five percent was really miniscule compared to the overall ecological carrying capacity of for aquaculture.

MR. WAGNER: So you think five percent applies to more than the ecological issues?

MR. BEUTEL: I think the five percent rule is important, but it is mostly because of social carrying capacity. Social issues."

See Hearing Vol. 4, 12/4/20, p. 669-670.

Contrary to Mr. Beutel's testimony, in their testimony, both Dr. Byron and Dr. Rheault made it clear that the five percent rule applied only to ecological carrying capacity, that social carrying capacity was different, and that social carrying capacity was a much more limiting factor in allowing aquaculture that was ecological carrying capacity. As Dr. Byron stated: "And the way that it was agreed on 5 percent would be the rule, is that the 5 percent was based on a calculation intended to reflect the ecological carrying capacity of the system". *See Hearing Vol. 2, 11/13/20, 20, p. 180-181.*

⁵ The record should reflect that Mr. Beutel testified before the Subcommittee on two occasions, November 11, 2019 and December 4, 2019. Neither Applicant's Counsel or Intervenor Counsel were allowed to question or cross examine Mr. Beutel at the November 11, 2019 hearing. Mr. Beutel was brought back by the Subcommittee to testify on December 4, 2019 to provide "clarifying questions with respect to his staff report" with instructions and several admonishments to Intervenor's legal counsel not to cross examine him. *See Hearing Vol. 4, 12/4/20, p. 658-687.*

As Dr. Byron noted in defining social carrying capacity: “And then the fourth type of carrying capacity is social carrying capacity which is the level—development above which would cause unacceptable social impacts. There are many different ways to describe, define and quantify social carrying capacity, and its highly dependent the interests and the values of the humans of that place or that system. *See Hearing Vol. 2, 11/13/20, p. 183.*”

Dr. Byron did go on to say that the 5 percent rule “was intended when it was first calculated to be was intended to be an ecological carrying capacity. Whether over time that has shifted to a social carrying capacity I think is a matter of debate.” *See Hearing Vol. 2, 11/13/20, p. 198.*

But as she confirmed under cross examination:

Q. MR. CAPIZZO: Okay. So the 5 percent rule only applies to ecological impact. I think you said it was debatable as to whether that applies to the social impact; is that correct?

A. DR. BYRON: Right. The intention of calculating that 5 percent rule was to capture the ecological carrying capacity.

Q. Mr. CAPIZZO: Not the social?

A. DR. BYRON: Not the social.”

See Hearing Vol. 2, 11/13/20, p. 200.

And there can be no debate that the five percent rule as codified in CRMC regulations pertains only to ecological carrying capacity, not to social carrying capacity.

Dr. Rheault, who was instrumental in developing the five percent rule, testified that it was social carrying capacity that was a more limiting factor in approving aquaculture operations than the five percent rule. *See Hearing Vol. 3, 11/1720,p. 273-7 and 312-4.*

It would appear that in considering whether the proposed project would impermissibly interfere with or conflict with public trust uses of Segar Cover and Potter Pond, the staff report simply felt there was no real issue for investigation since more than 95% of the Pond was available for use, no matter how significant the restrictive impact of public trust uses in Segar Cove.

However, this is not the regulatory standard, and CRMC has no basis in regulation or statute to hold that even if there is significant interference with public trust uses, if such

interference is limited to less than five percent of the water body, there is no violation of the Aquaculture Act.

Not only is this a profound regulatory misunderstanding, but it ignores the factual extent of the interference with public trust uses by the proposed facility. This error is particularly striking because testimony at the hearing repeatedly established that for most power boating and water-towed sports, Segar Cove was one of only two deep water areas in the entire Potter Pond which were conducive to such activities. It is also particularly striking given that dozens of witnesses familiar with public trust uses of Segar Cove and Potter Pond testified about the significant adverse interference the proposed facility would have on boating, fishing clamming and other recreational uses. Examples of such testimony included the following:

- Phil Capaldi. Mr. Capaldi testified that he was not a “tuber, water skier or riparian right landowner but a recreational fin fisherman who fishes in Segar Cove at dawn and dusk and not high noon. *See Hearing Vol. 6, 12/30/20 p. 851*. He testified that “The lease space in Segar Cove, if developed will be gone forever...it will be gone for recreational use forever” *Id.* at 852. He continued: “Has any lease in Rhode Island been returned to public use? No. This acreage in Segar Cove will be gone. A lease is for 15 years. There's only one time to object when the public discovers that a lease application has been applied for. The onus is on the public. Once an area of state submerged land is developed, it will never return to public use. I'm not allowed in the process to object to a renewal or a sale.” *Id.* at 852.
- Luis James. Mr. James testified that he and his family have lived in Matunuck for a decade and does not live on the Pond. *See Hearing Vol. 7, 1/29/21, p.915*. He testified that, “We live within a mile, we are on the pond frequently, we kayak an awful lot and paddle board, do a lot of clamming and fishing, of course, just like a lot of other folks. We do this all hours in a day during the summer and off season, even though it's cold. We're out there with frozen hands and feet, you know, but it's worth it of course. As mentioned by others, we've clammed very often. We get tons of clams near that proposed leased area. I guess we're a bit better clammers than Perry, I guess, but as my towering clam shell pile will attest to, we're pretty productive. And because it's in that area, we're very concerned about the site that's being proposed, the productive clamming area. *Id.* at 915-916.

He further testified about his observations and personal experiences related to clamming, fishing and wildlife in the area of the proposed three acre facility, “It’s my personal experience that the pond, that that cove area in particular is a very clear and thriving environment as well as a delicate one. That’s the status right now. The osprey nests -- there are osprey nests on the shoreline to the east of that project, there’s Kingfishers, weasels, all manner of wildlife on the land, and they are there today. In the water there are plenty of fish, all types of fish, stripers, there is healthy flora in the water, and that’s today. I’ll note that the shell fishing in that area hasn’t been closed any time over the past ten years that I’ve been clamming there. This is not a hypothetical. Those are the conditions today. Id. at 918.

Mr. James closed with the following passionate statement regarding why Mr. Raso’s application is the wrong project in the wrong place : “So in closing, and I know I’m running against my time here, but in general as the Board is being stewards of public land and waterways, you shouldn’t accept any project proposed in Segar Cove, this one or any in the future, that’s nothing less than absolute and has overwhelming and an unequivocal net benefit. We are really relying on you using your commonsense to assess the many issues that are associated with this application. The unfortunate thing about it is the Applicant has nothing to lose and all to gain, and the public is put in a defensive position to kind of defend what we have and basically with no upside. In this case, I’m sorry to say, but the only one definable and most certain benefit, and being really critical about whether or not there are any, is going to accrue to the community of one, and I’m sorry to say it’s the Applicant itself. It will be at the expense of the community and the public and who have been exemplary stewards of the cove and of the pond for so many years. Id. at 922-923.

- Douglas Campbell. Mr. Campbell whose house looks down at Segar Cove, has been recreating on the cove for over 60 years, learned to waterski on the cove and testified that: “Today there are 15 to 20 times as much activity on Potter’s Pond”. See *Hearing Vol. 5, 12/16/20 p. 772*.

He testified about his observations of activities on the cove: “So from our house we see, you know, waterskiing, we see sailing, even sculls occasionally. We kayak and canoe in the area. And I remember canoeing out to see the oyster beds years and years ago, and one time I went around the corner and all of a sudden I said, Oh, there are 200 black ducks out there. And the new kind of sliding system that Perry had put in, you know, it's incredible. He's done an incredible job. I admire what he's done with the restaurant, with the farm, with everything he's done. And we frequently kayak out there and see it. But it's -- visually it's away from the boats, it's away from things. It's visually a real change. It's a challenge, though. I also would go down on Sunday mornings, and Roberto, who is with the Cornell Osprey Project, every Sunday would come, and they were monitoring the osprey and the baby osprey for years. And as we kayaked through the area where he's -- Perry's proposing, there's an osprey nest. We stay 40 yards away, and they are just terrified. You know, they chirp, chirp, chirp, chirp, chirp, chirp. And, of course, the osprey that nest on the other side of the Segar Cove are frequently flying back and forth and fishing. I think it would totally disrupt their life there.....You know, it's just an inappropriate use...And I do think it disrupts a very quiet, undisturbed bay and coastline. And I think people forget the boats that are coming in servicing the oystering or scalloping that are coming back and forth polluting. They're also adding a lot of territory to the use area, and, of course, that's a very narrow entry into the cove. It's just an over and inappropriate use. Id. at 773-774.

Indeed, a review of the staff report leads to the conclusion that there was no understanding of the obligation to determine whether there was significant interference with public trust uses. For example, when addressing public written complaints about interference of the proposed project with navigation, including boating, water skiing, tubing, kayaking, paddle boarding, etc, the staff report states that “[t]he significance of effect is debatable, as is the amount of navigational activity that occurs in Segar Cove”.

It is clear that the Staff report did not recognize that it is the significance of such interference which the Aquaculture Act requires CRMC to determine. And as to complaints regarding interference with recreational activities, including boating and swimming, as previously

noted, the staff report relies on its misunderstanding of the five percent rule to note that such activities can be engaged in on the remaining 97% of Potter Pond.

Additionally, the staff report appears to see the violation as not whether there is significant interference with public trust uses but whether there is prohibition of such uses in an area greater than five percent of the waterbody. As the staff report states:

“Segar Cove in Potter Pond has recreational activities. Mr. Raso has observed that they are limited. Any aquaculture project in Segar Cove will affect the recreational activities. Some of these activities may occur on the site and others adjacent to the site. Will those activities be prohibited in Potter Pond if this site is approved? No, those activities will still occur in Potter Pond.”

That, however, is not the applicable test. The test under the Aquaculture Act is not whether the public trust activity is prohibited, although that would certainly constitute significant and material interference with public trust uses. The test is whether there is incompatibility, significant interference and conflict, with such public trust uses, and 42 witnesses with a great deal of familiarity of Segar Cove and Potter Pond testified that there would be such significant interference, based on their years of experience observing and recreating on Segar Cove and Potter Pond.

Given the plain directive of the statute which authorizes CRMC to issue aquaculture permits, it is unquestioned that a permit may not issue if the proposed aquaculture facility would pose a material conflict with public trust uses. Accordingly, the CRMC must have sufficient evidence to make a finding of no material interference with public trust uses in order to allow the issuance of an aquaculture permit. And it is the applicant who bears the burden of providing that evidence to CRMC.

Such a finding cannot be avoided by pointing to the fact that the proposed aquaculture use in the salt pond in question, when taken with all other aquaculture uses in that salt pond, would not occupy an area exceeding the limit imposed by CRMC of five percent (5%) of the particular salt pond. 650 – RICR 20-00-1, 1.3.1(K)(4)(f).

For example, a proposed aquaculture project may not exceed the five percent rule (as it pertains to ecological carrying capacity) but it could nevertheless pose material interference with

public trust uses, such as boating or other recreational activities. Based on the abundant testimony submitted to the Subcommittee, it is clear the proposed facility is one such project.

The staff report also appears to rely on comments of Mr. Raso addressing complaints of interference, which is attached to the staff report in a two page, undated, unsigned document entitled “Response to the letters of objection to the 3 acres shellfish lease in Segar Cove”. Mr. Beutel in his testimony confirmed that he relied on the photos submitted by Mr. Raso and the revised map, Option B, in determining that the three acre proposed facility would not pose a significant conflict on water dependent uses such as recreational boating, fishing, swimming and navigation. *See Hearing Vol. 4, 12/4/20, p. 681-682. See Also* (650 – RICR 20-00-1, 1.3.1 (A)(1)(j)). Virtually all of the assertions made by Mr. Raso to the non-interference or limited interference of the proposed facility with public trust uses were contradicted in testimony to the Subcommittee, as already referenced herein, by numerous witnesses with years of experience on Segar Cove and Potter Pond.

The staff report submitted to the CRMC Subcommittee and recommending approval of the application demonstrates beyond question that this report, which should have presented objective evidence and judgment to the Subcommittee and the Council on the merits of the application, never seriously considered, let alone evaluated, the “effect of aquaculture on other uses of the free and common fishery and navigation”, as required by the Aquaculture Act. Moreover, the staff report never seriously considered, let alone evaluated, “the compatibility of the proposal with other existing and potential uses of the area and areas contiguous to it, including navigation, recreation, and fisheries”, as required by CRMC’s regulations (650 – RICR 20-00-1, 1.3.1 (K)(3)(a)).

4. CONCLUSION

As an administrative agency, the Coastal Resources Management Council has only the authority it is expressly granted by statute, and no more. Little v. Conflict of Interest Commission, 397 A. 2d 884 (R.I. 1979). (“Administrative agencies such as the Commission are statutory creations possessing no inherent common-law powers. An agency cannot modify the statutory provisions under which it acquired power, unless such an intent is clearly expressed in the statute”. Id. at 886.)

The statute at issue, the Aquaculture Act, mandates that aquaculture facilities are to be restricted and can only be licensed when “consistent with the **best** public interest” (emphasis supplied) and with “particular consideration given to the effect of aquaculture on the other uses of the free and common fishery and navigation”, R.I. Gen. Laws 20-10-1, in order to ensure there is no material conflict with boating, fishing, navigation and other protected public trust uses. Notably, the standard to be met is not that it be consistent with the “public interest” but a higher standard, that it be consistent with the “best public interest”. Absent such a determination, CRMC is without authority to issue an aquaculture permit.

Pursuant to regulation, applicants for aquaculture permits are required to submit information in order to determine “the compatibility of the proposal with other existing and potential uses of the area and areas contiguous to it, including navigation, recreation and fisheries”. 650 – RICR 20-00-1, 1.3.1 (K)(3)(a).

The applicant utterly failed to meet that burden, professing familiarity with Segar Cove in its application but failing to recognize and acknowledge the extensive public trust uses of the Cove, and providing self-serving photographs of limited areas of the Cove (on a daily “pick and choose” basis) during the noon hour when activity on the Cove is light. In stark contrast, dozens of witnesses with years of experience on Segar Cove and Potter Pond testified as to the robust use of Segar Cove for all manner of boating, recreation, fishing and shell fishing, and numerous witnesses testified that there was a lull in usage of Segar Cover during the lunch hour.

The testimony of over 42 witnesses with long experience on Potter Pond and Segar Cove repeatedly contradicted the applicant’s self-serving application and testimony.

In seeking to determine whether the proposed facility materially interferes with public trust recreational uses in violation of the Aquaculture Act, the Subcommittee must weigh all the evidence presented. As CRMC’s legal counsel has suggested numerous times during these hearings, not all evidence is entitled to the same weight. The weight, or credibility of the evidence, is to be determined by numerous factors, including whether an expert is testifying to something within or outside of his or her area of expertise, whether the witness has substantial or little experience with the subject of his or her testimony, and whether the testimony is detailed and explicit, giving one an opportunity to understand its basis, or whether it is cursory and conclusory, not giving one an opportunity to understand its basis.

In the case of witnesses for the intervenors, testimony was presented by literally dozens of witnesses who detailed extensive experience on Potter Pond and Segar Cove. Two of these witnesses whose testimony is summarized above, addressed interference with boating and recreational uses had Captain's licenses, one was a waterski instructor with 11 years' experience, many were residents with decades of experience living on the pond and engaging in boating, fishing, clamming, kayaking, paddle boarding, swimming, etc. on Potter Pond and in Segar Cove. One witness, an experienced sailor, testified as to the significant interference posed by the proposed facility with the ability to sail on Segar Cove, and another witness, an experienced sculler, testified to the significant interference posed by the proposed facility to scullers, paddle boarders, and kayakers because the area they would use to enjoy their recreation would be displaced by the location of the proposed three acre facility, given that for safety reasons they needed to hug the shore to avoid the towed water sports in the middle of the cove.

In stark contrast, only a handful of the Applicant's witnesses testified as to whether the proposed facility would interfere with public trust recreational uses or pose safety hazards. These included two of his experts, both testifying outside of their area of expertise and both with virtually no experience on Potter Pond and Segar Cove, and one whose testimony was so incoherent it was impossible to summarize.

As for other witnesses testifying on behalf of the Applicant as to there being no material interference with public trust recreational uses and/or as to there being no safety issues, these included the following:

- Faye Pantazopoulos. Ms. Pantazopoulos, the creative director of the South County Tourism Council, had this to say on safety issues: "The farm would be visible enough for people to steer clear of it, and parents should be cautious of allowing small children unsupervised in the pond whether there's a farm there or not. Any activity out on the water can be dangerous and caution should be executed [sic] by anyone engaging in water recreation." *See Hearing Vol. 7, 1/29/21, 2021, p. 905.*
- Thomas Leasca. Mr. Leasca, who testified he is on the Board of Directors of Camp Fuller, which is "trying to partner up with Perry" also testified about the "yahoos" going too fast on the pond, and had this to say in support of the proposed facility not causing a safety

hazard: “Some people—I’ve heard a lot of people talk about jet skiing, waterskiing in that pond. It’s dangerous. It’s shallow and you have to be real careful. There was a death many many years ago by a youngsters [sic] waterskiing in that pond.” *See Hearing Vol.7, 1/29/21,p. 911-12*

- Chris Roebuck. Mr. Roebuck, a commercial fisherman, who testified he spent over 40 years on Potter Pond, also testified that “I’ve been waterskiing and knee boarding for 40 years on that pond, and I’ve almost hardly ever seen a person in that particular part that all these people say that is their favorite recreational area. I’ve been waterskiing for 40 years, and everybody who waterskis goes to the north end of the pond.” *See Hearing Vol. 7, 1/29/21,p. 940-41.*

Such testimony may in part be explained by the testimony of attorney Beverly Hodgson, who has lived on Potter Pond with a view of Segar Cove for 35 years, who testified: “I note you have heard from a few people who support the dedication of Segar Cove to Mr. Raso’s business, and some have not mentioned that they are business colleagues, or others have admitted that they live nowhere near Segar Cove so they don’t care about limitations on our recreation there”. *See Hearing Vol. 7, 1/29/21,p. 926.*

That being said, it is the job of the Subcommittee to carefully weigh and evaluate the testimony you have heard in order to determine whether the proposed facility should be permitted, given the substantial restrictions of the Aquaculture Act.

As Ms. Hodgson further testified in her public comment: “As a lawyer, I know your job is to apply the standards of the applicable regulations. You’re not deciding whether aquaculture is good, or whether Perry Raso’s restaurant is good, or whether he had difficulties in his youth, but only whether the particular location would have adverse impact on recreational and other uses that are important to Rhode Islanders and to our coastal resources. You have overwhelming evidence that the expansion would limit recreational use and present a safety hazard, and the inescapable conclusion that you should reach is recommending a denial of his application.”. *Id.* at 927

CRMC’s staff report did not do what it was obligated by statute to do--determine the level of interference the proposed project would pose for recreational uses, navigation, fishing and shell

fishing, etc.. Instead, the staff report noted the interference with boating, water skiing, tubing, kayaking, paddle boarding etc., stated that the proposed project “will have an effect on all of these activities” but that the “significance of effect is debatable, as is the amount of navigational activity that occurs in Segar Cove”. Rather than make the required analysis, the staff report relied on a misunderstanding of the five percent rule to conclude that as long as such activities were not prohibited on Potter Pond and could be conducted elsewhere on the remaining 97% of Potter Pond, there was not issue. In doing so, the staff report was asserting a regulatory standard that CRMC has not adopted, as well as a standard in direct conflict with the limited statutory authority granted CRMC by the Aquaculture Act to issue aquaculture permits.

As testimony of the applicant’s own expert witnesses demonstrated, and as the express language of the five percent rule make clear, the five percent rule pertains only to ecological carrying capacity, and not social carrying capacity, which is the basis of the opposition to the proposed project. If CRMC wishes to impose a new regulatory standard, it must go through the rule-making process, but in doing so, it cannot contradict the mandate of the Aquaculture Act.

In the instant case, the staff report not only failed to apply the proper, and required, statutory standard, but it, along with Mr. Raso failed to properly apply CRMC’s own regulatory standard. This failure is something no court should countenance, and it is a failure that this Subcommittee should not countenance.

Given the testimony presented, it is unquestioned that the proposed facility will materially interfere with a number of protected public trust recreational activities, including in particular with towed water sports, in one of the only two areas in all of Potter Pond suitable for towed water sports, that it will increase safety risks for users of public trust resources, including boaters, swimmers, skiers, paddle boarders, kayakers, etc., that it will seriously constrain the uses, including access to public trust waters, of 913 feet of shoreline owned by two of the intervenors, given the location of the proposed facility from 10 feet to 65 feet from their shoreline, that it will restrict and significantly conflict with other water dependent activities including recreational boating, swimming, fishing and navigation because it significantly compresses the area safely available for such activities in Segar Cove.

This Subcommittee must balance the interests of one individual, who wants to expand his commercial business and diversify his product by growing scallops in one of only two deep water

areas in Potter Pond. As this Subcommittee is well aware, Segar Cove is not the only deep water area available to Mr. Raso in Rhode Island to locate his three acre proposed facility. It is well known that Rhode Island has over 400 miles of coastline, outside of Potter Pond, where he could have located his three acre facility, but he chose not to. We know this as Mr. Beutel testified that “ He (Raso) has not presented an application for outside Potter Pond”. *See Hearing Vol. 4, 12/4/20 p. 683.*

Then why did Mr. Raso choose Segar Cove, a highly recreated, geographically constrained cove to locate his three acre facility? Or better yet, why did he not choose the Northern Basin of Potter Pond where he resides. The answer simply is that Segar Cove is the most convenient location for his business needs as it is close to his restaurant, close to his current 7 acre oyster facility, an easier commute for his barges and workers and expands access for his tour boats and dinner cruises.

The role of CRMC and this Subcommittee is to “Preserve, protect, develop and restore coastal resources for *ALL* Rhode Islanders” not one individual’s commercial interests and certainly not at the sacrifice of public trust uses. If this Subcommittee recommends approval of this application it will forever alter the public trust uses for *ALL* that use and live on Segar Cove.

If the Aquaculture Act means what it says, and we believe it does, it is not possible for this Subcommittee to make a finding of no significant conflict with public trust uses, and therefore, no permit may issue to allow the applicant to construct its proposed aquaculture farm in Segar Cove.

Because the applicant failed to meet his burden of demonstrating that the proposed three acre facility will not significantly conflict and not materially interfere with public trust uses of navigation, recreation and fishery, the applicant must be denied.

{Remainder of Page Intentionally Left Blank – Signatures on Next Page}

Respectfully submitted,
On Behalf of the Parties,



Christian Capizzo, Esq.
Partridge Snow & Hahn, LLP
40 Westminster Street, Suite 1100
Providence, RI 02903
Tel: 401-861-8200
Via Email: ccapizzo@psh.com



John M. Boehnert, Esq.
Law Offices of John M. Boehnert, Ltd.
50 South Main Street
Providence, RI 02903
Phone: 401-595-5995
Via Email: jmb@jmblawoffices.com

Date: 2/5/21

CERTIFICATE OF SERVICE

I hereby certify that I emailed the within documents to the CRMC in Wakefield, Rhode Island on February 5, 2021.



Christian F. Capizzo

Mr. Anthony Desisto, Esq. (Via Email only)
Coastal Resources Management Council
Oliver H. Stedman Government Center
4808 Tower Hill Road, Suite 3
Wakefield, RI 02879-1900
Via Email: tony@adlawllc.net

Elizabeth Noonan, Esq. (Via Email Only)
Leslie Parker, Esq. (Via Email Only)
Adler Pollock & Sheehan, P.C.
One Citizens Plaza, 8th Flr.
Providence, RI 02903
Via Email: Enoonan@apslaw.com
Via Email: LParker@apslaw.com

Dean J. Wagner, Esq. (Via Email Only)
Shechtman Halperin Savage, LLP
1080 Main Street
Pawtucket, RI 02869
Via Email: dwagner@shslawfirm.com