

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

IN THE MATTER OF:

Perry Raso

CRMC File No. 2017-12-086

INTERVENORS ANDREW WILKES AND 454 BEACH ROAD, LLC'S

SUBCOMMITTEE MEMORANDUM

Now comes Intervenors Andrew Wilkes and 454 Beach Road, LLC (together the “Intervenors” or “Objectors”), and hereby respectfully submit this Memorandum of Law and Fact in support of its request that the application of Perry Raso (the Applicant”) for assent be Denied.¹

The Subcommittee should deny the Applicant’s request for assent because the proposed shellfish farm is not in the best public interest and is not compatible with existing uses. The overwhelming credible and uncontradicted testimony and public comment the Subcommittee heard over several days demonstrates that locating a three-acre shellfish farm in the proposed location in Segar Cover will unreasonably interfere, impair, and significantly impact existing uses, and directly conflict with the use and enjoyment of such protected public trust activities as boating, fishing, swimming, navigation, and other recreational uses. The proposed farm would eliminate that area for public trust uses and otherwise significantly reduce the area available for boating, fishing and swimming (all protected public trust interests) and increase the risk of injury.

The Applicant has failed to meet his burden of demonstrating that the proposed activity will not unreasonably interfere with, impair, or significantly impact existing public access to, or

¹ These Intervenors hereby adopt, join in, and incorporate the arguments set forth in Intervenor’s Memorandum of Law and Fact submitted by Attorneys Capizzo and Boehnert.

use of, tidal waters and/or the shore. Likewise, the Applicant has failed to meet his burden of demonstrating that the proposed activity will not result in significant conflicts with water dependent uses and activities such as recreational boating, fishing, swimming, navigation and commerce. Finally, the Applicant has failed to meet his burden of demonstrating that he has a need for the proposed activity that is consistent with the best public interest and the proposed use is compatible with other existing and potential uses of the area. The Applicants failure to meet his burden with respect to any one of these requirements is sufficient to deny the request of assent.

The Subcommittee should vote to recommend denial of the application because locating a shellfish farm at the proposed location is not in the best public interest and not compatible with existing public trust uses.

1. The Applicant Has Failed To Meet His Burden Of Demonstrating That The Proposal Would Not Unreasonably Interfere With, Impair, Or Significantly Impact, Or Conflict With, Existing Uses.

As the Subcommittee is well aware, the CRMC is charged with managing the tidal waters and submerged lands as a public trust for the citizens of the state. “The leasing process must take into consideration what is best for all of the residents of the state. This is referred to as the “Public Trust Policy,” as lands are managed as a public trust for the citizens of the state by the agencies charged with regulating these lands.” (CRMC Guide to Aquaculture Applications p. 4.)

In enacting the Aquaculture Act, the General Assembly explicitly set forth a declaration of its “intent and public policy” with respect to aquaculture. *See* R.I. Gen. Laws § 20-10-1. The General Assembly recognized that aquaculture is a proper and effective method to cultivate plant and animal life. However, the Legislature made clear that aquaculture must be compatible with existing and proposed public trust uses:

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, and the compatibility of aquaculture with the environment of the waters of the state; therefore,

It is the public policy of this state to preserve the waters of this state as free and common fishery. The health, welfare, environment, 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 added). Consistent with this statutory mandate, CRMC regulations require that any proposed commercial aquaculture lease must be located “where it can be accommodated² among other uses of Rhode Island waters”. 650-RICR-20-00-1.3.1(K)(1)(a).

An applicant for a commercial aquaculture lease is required to provide information necessary for the Council 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...” Section 1.3.1(K)(3)(4)(AA) (emphasis added).

Category B Assent Requirements (f) and (j) require that the applicant:

f. Demonstrate that the alteration will not unreasonably interfere with, impair, or significantly impact existing public access to, or use of, tidal waters and/or the shore;

j. Demonstrate that the alteration or activity will not result in significant conflicts with water dependent uses and activities such as recreational boating, fishing, swimming, navigation, and commerce...

650 R.I. Code. R. 20-00-1.3.1(A) (emphasis added).

In the instant case, the Subcommittee should deny the Applicant’s request for assent because he cannot satisfy these requirements with the proposed location. Because of its location and size, the proposed shellfish farm would unreasonably interfere, impair, or significantly impact

² “Accommodate” is defined by Merriam/Webster as “to make room for”; “to give consideration to: to allow for”.

existing uses, and directly conflict with the use and enjoyment of such protected public trust activities as boating, fishing, swimming and other recreational uses.

The overwhelming credible evidence is that the proposed three-acre farm is not compatible with existing uses and activities. On the contrary, it will conflict with, and significantly impact, existing uses.

It was undisputed by the Applicant himself and his witnesses that the proposed farm would exclude anyone from motorboating, sailing, jet skiing, or swimming through the farm. (95, 96, 111) Fishing would be very difficult. (97) The proposed location would push other uses (including waterskiing, tubing, sailing, and swimming) out to the center of the cove compressing the area to navigate and recreate. (158)

There was credible expert testimony that the proposed lease “would eliminate 10 acres from the 30.3-acre watershed presently available to waterskiing and towed watersports (when the 200 foot buffer from stationary objects required by the South Kingstown Boats and Waterways Ordinance is applied to the perimeter of the 3 acre layout). This represents an approximately 33% reduction in the Segar Cove watershed area available for these uses...” (ESS Group Report). (... makes the north end of Segar Cove functionally not usable for towed watersports...”)³

Public Comment

Most importantly, there was extensive Public Comment from individuals who **actually live, work and recreate in the area in question.** They are in the best position to inform the

³ The Applicant put on rebuttal testimony from Audie Osgood that recalculated the areas of Segar Cove that are impacted by applying a 200’ safety buffer to the shoreline, existing docks, and the proposed aquaculture areas. This shows that the area available for towed water sports is more condensed into the center of Segar Cove. If the Subcommittee accepts Mr. Osgood’s calculations, then the area available for towed water sports is reduced from 16.7 acres to 12.9 acres, or 40% less useable area.

Subcommittee as to what activities and uses actually occur in that area and in Segar Cove in general. Numerous members of the public who have lived, worked and recreated on Segar Cove for years testified regarding the extent of the uses and activities that take place on the Cove including power boating, water skiing, tubing, sailing, jet skiing, paddle boarding, wind-surfing, kayaking, canoeing, fishing, clamming and swimming. The overwhelming credible evidence is that there is significant uses and activities that occur in and around the proposed lease site and those uses and activities are not compatible with the proposed farm.

Andrew Wilkes testified that Segar Cove is one of only two deep water areas in an otherwise extremely shallow pond. (701, 705) There are only two places in the entire Potter Pond where towed water sports can occur: Segar Cove and what was referred to as “Skier’s Cove” in the northern basin. (702-3, 732) Mr. Wilkes testified that the proposed farm would eliminate the public’s ability to safely water ski at Segar Cove. The proposed farm would make it impossible to turn your boat around in the northern end of Segar Cove. (703, 706) As Mr. Wilkes stated: “There’s two deep water turns up in the upper pond, and there’s two in Segar Cove, and you’re going to take one away, which renders it basically useless.” (711) Mr. Wilkes explained that there is already limited room to recreate in Segar Cove. (707) The proposed location will “create a traffic and congestion nightmare.” (707) A shellfish farm at the proposed location would remove a big piece of an area to recreate. (707) Mr. Wilkes estimated that only about ten percent (10%) of Potter Pond is navigable with a motorboat. (706) Whatever the percentage, there is no dispute that most of Potter Pond is not available for most recreational uses because of water depths. (712)

Thus, there are plenty of other locations in Potter Pond (and elsewhere)⁴ to locate a shellfish farm that do not conflict with these recreational uses. (706, 712)

Richard Pacheco testified that he uses the lease area for recreational purposes such as boating and clamming. (717) Mr. Pacheco testified that if the proposal is allowed “access to the shoreline by powerboat will be nonexistent”. (717)

Mark Parsons, who kayaks and fishes in the area, testified that the proposed shellfish farm would render the area unusable and would not otherwise be compatible with existing recreational uses. (719, 722) “[A]ny notion that this lease would be a shared use area for anything other than the exclusive use of the applicant is a total fiction.” (719) Mr. Parsons experienced being blown into the equipment of the existing farm on a windy day as a “nightmare”. (720) Mr. Parsons strongly contradicted the Applicant’s self-serving photographs that purported to show minimal activity on the cove. (720-1)

Curtis Corl has been boating, fishing, kayaking and clamming on Potter Pond for 22 years. (725-26) Based on his experience, Mr. Corl opined that the proposed farm would eliminate the ability to safely water ski on Segar Cove. (726)

Christine Chase has recreated on Potter Pond her whole life. Ms. Chase pointed out that Potter Pond might seem like a large body of water, but most of it is inaccessible to boaters. (730-2) Boaters must avoid most areas of the Pond, for example Sycamore Cove, because of the weeds, rocks, and other “unknowns”. (732) Ms. Chase testified that the proposal would place an extraordinary burden on the “precious deep water areas for any motor sporting”. (732) She testified

⁴ If the Applicant is looking for deep water for scallops, there are other bodies of water in Rhode Island that have abundant deep water that are not in constricted coves. (This point was made by several members of the public, (e.g., 721-2, 726)

to the difficulties navigating the pond as it is, which would only be exacerbated by locating a shellfish farm in the proposed location. “[T]here is an increasing safety concern with the small navigation area that we already have to navigate through in order to get to and from Segar Cove, Seaweed Cove, and the Skiers Cover and out to the ocean...” (732) She testified to an increase activity especially in the channel area, and the fact that the areas of the pond that are usable and navigable are too restrictive as it is. (733)

Robert Groskin, executive director of the Association of Avian Veterinarians and a member of the steering committee of the Atlantic Coastal Fish Habitat Partnership spoke about concerns he had regarding the effect that hundreds of shore birds roosting, eating and defecating in and around the farm would have. (734-6)

Dorothy Wookcock advised the Subcommittee that “you have to know the pond very well to navigate it.” (742) “[D]eep water is in short supply. Accessible deep water for recreation is vanishing in South Kingstown. Salt Pond now no longer offers safe space for towed water sports. Potter Pond [...] is really just the only public waters in South Kingstown opened to all for all types of water enjoyment...” (743) “[P]rolific eelgrass, the very shallow water, and the 200-foot South Kingstown ordinance buffer around docks and aquaculture astonishingly reduces safe public recreational space. Restricting one cove’s recreation and social carrying capacity affects the dynamics of the whole pond, whose public use has skyrocketed over this past summer and whose growing popularity is not reflected in the earlier studies presented to this body.” (743-4)

Deb McCurdy expressed that “this past summer ... [was] the busiest [she] has ever seen the pond between kayakers, tubers, waterskiing, and they all congregate where that turn is where Perry Raso’s proposed expansion is. My fear is that someone is going to get hurt.” (747)

Robert Hefner reiterated that the area of the proposed lease is not removed from boat traffic contrary to the Applicant's representation. (750) The cove is a very narrow cove and a very small cove. (750) The southern third of Segar Cove houses the South Kingstown mooring farm. The northern part is rocky and narrow and not wide enough for boats. "So that leaves the middle of the pond, which is now where Mr. Raso wants to put his oyster farm. ... There is substantial boating there." (750) "[T]his particular pond is too small, too many areas that are not navigable already.." (753) "[I]t is rather small, and with this lease it will become exceptionally small and virtually impossible for waterskiing and tubing, as well as interfering with others." (754)

Gene Corl acknowledged that "[a]nyone with firsthand knowledge of Potter Pond knows that there are only two areas where the water is deep enough to boat and tube. (758) All the other coves have grass, or rocky barriers, or are too populated with docks and boat traffic, or too shallow. (759) "In the past few years, we're now seeing more people come up the gut past the restaurant into Potter's to tube and ski because the big pond, Point Judith Pond, is pretty well farmed out." (759) Ms. Corl opined that "[i]f the proposed farm comes into Segar Cove, it would be too dangerous to ski or tube safely. I don't think either can safely coexist with the oyster farm. At my age, I wouldn't risk it, but I was a kid once, and kids being kids, they think they're invincible. So if there's an accident or someone is thrown into those floating cages and the gear there, whoever has the liability better have a lot of insurance." (760)

Bill DeMagistris stated 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. (761-2) "The three 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...." (762)

Based upon his considerable experience, in Mr. DeMagistris' opinion, "this is going to ... make utterly unsafe navigating boats in this area and other recreational activities, and it's going to increase the volume of such activities being conducted on the larger, deeper pond to the north. So its going to result in greater risk there..." (763) "If you put this 3 acres there, it is going to be too dangerous, and its going to effectively eliminate... that activity.." (765)

Vince Mattera spoke against the proposal and explained in detail why water skiing requires sufficient space. "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 motor boat requires more space. When a skier or a tube does not have enough space, the risk of danger is exponentially increased...." (769)

Douglas Campbell spoke about his first-hand observations of the extensive activity and uses occurring on Segar Cove. (773)

Dr. Pablo Rodriguez spoke about his family's uses and activities on Segar Cove including sailing, paddleboarding, kayaking, and wind surfing. (778) "And I challenge anybody that uses Segar Cove more than my family. We are in the water every day..." (778) Dr. Rodriguez spoke about how the proposed facility would interfere with his family's use of the cove and make it less safe to recreate on the cove. (780) Dr. Rodriguez is a member of Watershed Watch so he is in the cove every two weeks testing the water for bacteria, temperature and salinity. (779) Dr. Rodriguez

spoke about his concerns that the proposed farm would bring increased bacteria from roosting birds. (781-2)

Marilyn Mattera spoke in detail about the increased uses and activities in Segar Cove (784, 785) “At any give day, you will see a multiple of water activities trying to enjoy Segar Cove.” (785) Ms. Mattera’s primary concern was safety. “Safety ... 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...” (785) “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.” (786)

Matthew Wilkes spoke about all the activities and uses that he observed on a daily basis in and around the proposed lease area. (800) “So my family resides a[t] 454 Matunuck Beach Road, and we have either participated on daily basis or witnessed on a daily basis the following activities on Segar Cove: Waterskiing, tubing, boating, sailing, kayaking, fishing, clamming, paddle boarding, jet skiing, knee boarding, swimming, wake boarding, diving, boats anchoring and hanging out, canoeing, photography, and probably other activities as well almost year round in Segar Cove.” (800) “There’s a ton of activity on this cove.” (800) All of that activity will be rendered more dangerous if the proposal is approved. (802)

Deb Carreau spoke about all the uses and activities that her family has engaged in on Segar Cove over the last 10 years. She spoke about environmental changes including weed growth, algae blooms and increases in jellyfish. (804) In 2017 her son was repeatedly stung by a clinging jellyfish while clamming and they spent the night in the hospital. (804) She expressed concern that a shellfish farm in the cove will bring more jellyfish. (804) Ms. Carreau also expressed concern about navigation issues. “The channel approaching Segar Cove is also very narrow and there are many small watercrafts that go in and out of the channel. I frequently clam the channel area, and along the shore where the proposed expansion would occur it's actually one of the richest areas to clam. I would be very concerned, as so many other people have commented on, about the potential for boating accidents in that channel area. Andrew Wilkes, the first speaker, was a hundred percent correct on the navigational aspects of the pond. We carry a paddle with us all the time. As a majority of the pond is so shallow, we sometimes run aground. ... The only safe place to boat in Potter Pond is in the channel, in Segar Cove, and in the north basin. By approving this request, you reduce recreational activities associated with deep water by 50 percent.” (805)

Mark Latham spoke about his large extended family's use and activities on Segar Cove. (807-8) “[T]he proposed farm will decrease the area of use in Segar Cove what I believe to be fairly dramatically. That will effect hundreds of people.” (809) “In my opinion the results of this, having tubed hundreds and hundreds and hundreds of times and skied, et cetera, that the effective result and outcome of a farm being placed in Segar Cove will be impairment, impairment of the use of the pond in a fairly dramatic fashion. That impairment will cause the recreational area to be reduced dramatically.” (809-810) “There is, in the summer months, a great deal of activity on that pond. 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.” (810) The potential danger, ...

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.” (810) Mr. Latham proposed that a more appropriate location for the shellfish farm was in front of the Applicant’s house. (811)

Jane Enos spoke about her family’s long history with Segar Cove and the many activities they use the cove for. Ms. Enos also spoke about her husband, who has a commercial shellfishing license. He claims to have dug thousands of quahogs over the last three years from the area that the Applicant is looking to lease. (816)

Joel Thomson, among other topics, emphasized the extent of boat use in Segar Cove. “As far as boat use, people have talked about that. It's been documented that on Segar Cove alone there are 26 docks. During the boating season, it has pretty much a boat on every dock, on many of the docks two boats. Also take into account the fact that in the mooring field there are approximately north of 20 moorings, so at a minimum there are 46 boats on Segar Cove, and there is a lot more based on the fact that you also have to take into account the fact when we talk about Segar Cove, you also are talking about property owners on the other side, seaweed cove up to Matunuk Point, because Segar Cove is the recreational area for people in that area, rather than having to work your way through the shallow water to get to the northern cove that everybody has been talking about.” (822)

Sophia Weidknecht, aged 16, and her mom Jessica Weidknecht testified about the family’s many uses and activities on Segar Cove, and the importance of the cove to the family. (823-7) “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 2 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.” (828) Ms. Weidknecht also spoke about her concern for safety issues. “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.” (829)

Ed Wrobel lives on Seaweed Cove and uses Segar Cove regularly. (843) “I consider myself a direct observer, and my observations on the use of Segar Cove are very much in line with that described by the intervenors, described by the public comments that you've heard so far. It is used very regularly by the public and, frankly, is inconsistent with what Mr. Raso's testimony was. It gets a lot of use. 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. 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.” (844)

“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.” (845)

Phil Capaldi is a recreational fin fisherman from Saunderstown who actively fishes in the area of the proposed lease on Segar Cove at dawn and dusk. (852) He outlined numerous concerns relative to the environmental impacts of the proposed farm. (852- 856).

Paul Hooper has lived on Potter Pond for 50 years. (864-5) He is a boater, fin fisherman, crabber. He actively fin-fishes in the area. (865) He spoke about safety and navigation issues. “I listened to all the testimony and I read the staff report. And when these people go up and ski, this isn't a rotary that everybody is going around to the left. This is chaos. People are looking for ways. And then you've got boats, you've got docks, you've got jet skis. It changes fast. I mean, you got people whipping their heads around. If someone falls off into the water, one lady said she taught

her kids how to splash the water. That's the truth. So, I mean, it's a pile of spaghetti. It may start off everybody going one way like a race truck, but it doesn't. You are all over the road. It's really crazy.” (867) “I am a fisherman. I fish the cinder worm hatch. It happens different places in May. It's an incredible site. You have these worms reproducing. In the winter I still have a skiff in the water. We call it dredging for striped bass. I fish all the time. In fact, I was back there the other day in Segar Cove fishing for stripers. There would be a place that would be denied and I would never get another chance.”(868)

Janice Loisel spoke about her family’s regular use of Segar Cove, particularly tubing and water skiing, contrary to the Applicant’s noon-time photos. (870-872)

Steven Quigley has lived on Segar Cove for the past 15 years. He spoke of the “steady increase of people and families waterskiing, using jet skis, kayaking, paddle boarding, clamming, and rafting in this area that is directly in front of [his] house and along Ram's shoreline”. (872) Mr. Quigley also spoke of the proximity of the proposed farm to his house. “Mr. Raso would place his industrial operation less than 250 feet from our house with all the noise from the equipment being used, the workers communicating over the noise of any machinery and equipment, and the comings and goings of work barges as such operation requires.” (874) Mr. Quigley also raised safety concerns for those recreating near the equipment. (875-7)

Robert Appleby lives on Segar Cove. He spoke about the significant activity that occurs on the cove. “On any given day in the summer you'll see on the cove motorboating, waterskiing, tubing, wake boarding. In fact, many boats at the same time. Personal watercraft jet skis became very popular just in the last few years. We have seen an expansion of the activity in jet skis. In addition to the motor craft, we see sail boating. I think in the earlier session someone talked about a Beetle Cat. That Beetle Cat boat is frequently in our cove almost on a daily basis and often sails

right in front of our home, and we enjoy that quite a lot, watching that boat in front of our house. You also heard a lot of Sunfish come in the cove to sail throughout the cove. Kayaking, paddle boarding, clamming, there's a boat that frequently clams in the area of the proposed site along that shore. We see that frequently during the summer months, fishing, and even occasionally I have seen people swimming out there, which I think is much more ambitious than I would undertake myself. It can get quite busy on a summer afternoon, especially weekend summer afternoons.

I do have a dock and a motorboat, a 19-foot 18 motorboat, and we do enjoy tubing out on the cove. But I will freely confess, I am not the most experienced boater and so it's usually my practice to wait until like 5:00 in the afternoon when things start to quiet down because during the middle of the afternoon it can be quite busy on the cove. So any suggestion that Segar Cove is lightly used, either in an absence sense or relative to the rest of the pond, is simply not correct. That is not our experience, and it's quite the opposite.” (881-2)

“In fact, as it's been said multiple times in this hearing, there really are only two areas in Potter Pond that can be used for substantial water recreational activities, the northern cove and Segar Cove. Much of the pond is profoundly shallow and really a navigation way between the northern cove, Segar Cove, and the outlet of the pond to Point Judith Pond. And taking those uses away will have a dramatic detrimental effect to recreational uses in the pond at large.” (882)

“I also want to emphasize that the effect of the proposed farm will not be limited simply to the impact on towed water sports. It certainly -- there certainly will be an effect on towed water sports, and I think the testimony we heard during the hearing indicated that where tube boats might be able to ski and tube at one time now, it will be down to one boat. That's a 50 percent reduction in activity. Given the number of boats we see in the cove, to go waterskiing or tubing, that's a substantial reduction in the opportunities for that type of activity in the pond at large. But from our

vantage point, in our home in Segar Cove, the effect of reducing the water sheath or the area that's available for waterskiing or tubing will have a cascading or domino effect on all the activities that happen in the cove. Right now we can watch the Beetle Cat sail right before our house while another boat is tubing north of that sailboat in the cove. Where the proposed lease is intended to be established will drive that -- those skiing boats, those tubing boats, into the area right before our home where that sailboat is sailing. So that opportunity for that combined use of the cove will start to diminish. 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. And many of those boats are boats that we only see once or twice a year representing people who occasionally come to Potter Pond, vacationers like my wife and I were for many years before we owned our own home there. Hundreds of people, maybe thousands of people, are effected by the expansion of this farm into one of the few areas that can be used in the pond for recreational use. So something precious will be lost unequivocally. I urge you to consider that in making your decision...." (882-884)

Carl Bush lives near Snug Harbor and spends a lot of time in Potter Pond. (884-5) Mr. Bush testified about the activity on Segar Cove and the incompatibility of the proposed farm. "I've been there a lot, and I see an awful lot of boat activity, and this will adversely effect boating activity. Anybody who tells you, yeah, you still can get through this -- I believe the things are supposed to be ten feet apart or something -- yeah, you could still get through. You would have to

be very careful if you're using an outboard motor. I think you would have to be real careful if you were falling off a surfboard or whatever, and unusable with a towed device. I wouldn't want to get in there. Who knows what kind of wires, traps, et cetera one could get tangled in.” (887)

Larry Pierce is a licensed U.S. Coast Guard captain and a navigator with over 50,000 sea miles. He is an experienced water skier and sailor. (906-907) He waterskies on Segar Cove three mornings a week in the summer. (909-910) Mr. Pierce spoke about the impact the proposed farm would have on recreation, especially waterskiing. “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... 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 phenomenons 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 skim board or what have you, will accelerate in that turn tow to three times what the boat speed is. If somebody loses it on that turn, they go flying 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.” (907-8)

William Leddy is a retired Coast Guard officer and a licensed captain. He lives on Washington Street in Matunuck and boats, sails, paddle boards, kayaks and shellfishes in Segar Cove. (913-14) Mr. Leddy opined that the proposed lease “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? ... “ (914)

Louis James has lived in Matunuck for a decade. He kayaks, paddleboard, fishes and clams in the summer and in the off-season. (915) Mr. James testified that the proposed lease area is a “productive clamming area” and that he gets “tons of clams” there.” (915-6) Mr. James described that unique qualities of Segar Cove including that it is a small and sheltered and isolated cove, and it’s got a very narrow channel.” (916) “[I]t’s protected by land in the west so the leeward area stays really calm even during windy days. So that’s an ideal spot for families to play most of the time, most of the day, on or off season.” (916-17) Mr. James spoke about the thriving environmental condition of the cove and questioned the Applicant’s “narrative” that the farm would environmentally enhance Segar Cove. (918-19) Mr. James questioned what impact the hundreds of gulls and cormorants that are attracted to the buoys used on floating oyster gear and the defecation will have on the environment. (919) Mr. James spoke about safety issues and the impact the farm would have on people who are active in the area, “and there’s lots of activity.” (919)

“So the point is, there’s no doubt that if you eliminate a portion of that Segar Cove and you reduce the size of that usable waterway there, and given that folks will continue to use the water way, as they have for decades, ... there’s going to be the higher risk and God forbid a result of physical harm to us.... [T]he Board should recognize that there’s potential safety issues created

when there's more traffic that is forced out to the Potter Pond area in that channel that's north of the existing lease..."(920-1)

Beverly Hodgson has lived on Matunuck Point for 35 years. Ms. Hodgson spoke about the various activities she has observed and engaged in on Segar Cove. She spoke of the "considerable traffic" in the cove. (925) "The way to stay safe for those of us in skulls or kayaks and paddle boards is to hug the shoreline that Mr. Raso wants to block off. I've often had to row like mad to get out of the way of waterskiing or tubing in this area so that I'm not hit or swamped by 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." (925) Ms. Hodgson spoke of the increasing use of skulls, kayaks and paddleboards in the cove. (925) Ms. Hodgson also disputed that small boats can pass between rows of oyster floats. (926) "You have overwhelming evidence that the expansion would limit recreational use and present safety hazard." (927)

Interested Parties

The South Kingstown Conservation Commission recommended denial of the application, because it found that the project does not meet CRMC's regulatory requirements, and the proposed lease area is "excessive in size and could be reduced to minimize impacts". (Exh. 9.) Likewise, the South Kingstown Waterfront Advisory Commission unanimously passed a motion to file an objection to the project "noting that it would pose significant negative impact on public recreational activity in that area". (Exh. 10.)

The Rhode Island Marine Fisheries Council was unable to recommend to the CRMC that the project is consistent with competing uses. The motion to do so failed 3-3. (Exh. 13, 14.) Half

of the Fisheries Council members found that the proposal was inconsistent with competing uses of the fisheries.

The Staff Recommendation

The Council should reject the “Staff Recommendation” in this case. The Staff Report acknowledges that kayak and boat fishermen operate throughout Potter Pond, and that the area can be good for fishing. The Report acknowledged that locating a shellfish farm on the proposed site will have an effect on boating, water skiing, tubing, and paddle boarding. However, the Report concluded that the “significance of [the] effect is debatable”.

The Staff Report failed to properly analyze the Category B Assent Requirements with respect to use conflicts and failed to set forth the required findings to support the recommendation. Instead of properly evaluating the tremendous amount of evidence of use conflicts (including 147 letters of objection that detailed the public trust uses and activities that conflict with the proposed location), the Report (and testimony in support) assumed that because the area occupied by aquaculture leases is less than five percent (5%) of the total water surface of Potter Pond, then “[a]ll other activities will have 97% of the pond for their opportunity”.

Aquaculture Coordinator, David Beutel acknowledged in his testimony that he applied the five percent rule to “social issues”. (Transcript at 669-670.) This is contrary to CRMC regulations which utilize the 5% rule for the ecological carrying capacity only.⁵ Instead of evaluating whether the Applicant adequately demonstrated that the proposed location will not unreasonably interfere

⁵ “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.” 650-RICR 20-00-1, 1.3.1(K)(5)(a)(20); 1.3.1(K)(4)(f).

with, impair, or significantly impact existing uses, or result in significant conflicts with public trust activities, Mr. Beutel relied on the five percent rule to do the work it was not designed to do. This is clear error and the Staff Recommendation should be rejected.

It should also be noted that counsels for the Objectors were not permitted to cross-examine Mr. Beutel despite the fact that he was permitted to testify twice at the Subcommittee hearing. Under the Administrative Procedures Act (APA), “A party may conduct cross examinations required for a full and true disclosure of the facts.” R.I. Gen. Laws. § 42-35-10.⁶ For some reason, counsels were instructed (and required) to limit their questioning of Mr. Beutel to “clarifying questions” only. Restricting the questions put to Mr. Beutel limited the Objectors’ ability to demonstrate the flaws in his recommendation.⁷

In any event the Subcommittee should reject the staff recommendation for the reasons stated above and rely upon their own assessment of the testimony and public comment. The Objectors respectfully suggest that the overwhelming credible evidence shows that the Applicant is unable to meet his burden of demonstrating that the proposal would not unreasonably interfere with, significantly impact, or conflict with existing public trust uses.

⁶ Pursuant to the Management Procedures of the CRMC, “Hearings required or permitted shall be conducted in accordance with appropriate rules of law and these rules and regulations...” 650-RICR-10-00-1 1.5.3(A). Although the CRMC rules do not explicitly provide for the cross-examination of staff members in contested cases, the rules provide that “[i]n the event that no interested party in opposition to the application appears at the subcommittee, and the applicant has not requested the opportunity to examine staff members or other state agency commentators, then the matter shall be declared an uncontested case and be assigned to the next undocketed regular Council meeting.” 650-RICR-10-00-1 1.5.3(G). The rules clearly contemplate that staff members are subject to examination.

⁷ One public commenter remarked “...I believe [Mr. Beutel] came across as a biased witness, like an extension of Mr. Raso’s team, not subject to cross-examination, not subject to swearing in...” (722-723)

2. The Applicant Has Failed To Meet His Burden Of Demonstrating The Need For The Proposed Activity.

Finally, the applicant has also not demonstrated the requisite **need** for three additional acres of waters that are held in public trust for all the citizens of this state. The very first Category B Assent Requirement states that the applicant is required to “[d]emonstrate the need for the proposed activity or alteration”. 650 R.I. Code. R. 20-00-1.3.1(A)(1).

At the Public Hearing there was contradicting discussion from several witnesses as to the meaning of this requirement. The Subcommittee should disregard statements by witnesses about statutory construction or legislative intent. It is generally improper for witnesses to instruct the Subcommittee as to applicable principles of law. The Objectors respectfully suggest that the Subcommittee should use its common sense to determine if the Applicant needs an additional three-acre farm at the expense of the public.

Additionally, in deciding whether the applicant satisfied the requirement that he demonstrate need for the proposed lease, the words in the regulation should be given their plain and ordinary meaning. *See 5750 Post Road Medical Offices, LLC v. E. Greenwich Fire Dist.*, 138 A.3d 163, 167 (R.I. 2016). For example, “need” is defined by the Oxford English dictionary as “[c]ircumstances in which something is necessary, or that require some course of action; necessity.” “Necessary” is defined as “[r]equired to be done, achieved, or present; needed; essential.”

The requirement that an applicant demonstrate “need for the proposed activity” should be read in the context of the entire statutory scheme related to aquaculture. “[I]ndividual sections of a statute [are considered] in the context of the entire statutory scheme, not as if each section were independent of all other sections.” *Id.* The “whole act rule” of statutory construction “requires that

we consider the entirety of a statute or ordinance, rather than view specific provisions in isolation." *Ryan v. City of Providence*, 11 A.3d 68, 74 (R.I. 2011). "Statutes relating to the same subject matter should be considered together so that they will harmonize with each other and be consistent" with their general objective scope.

As set forth above, the Aquaculture Act requires that aquaculture must be "consistent with the best public interest, with particular consideration given to the effect of aquaculture on other uses." R.I. Gen. Laws § 20-10-1. The Public Trust Doctrine requires the CRMC to consider what is best for all of the residents of the state. Thus, an applicant is required to demonstrate a need for the proposed activity that is consistent with the "best public interest" in the context of "other uses of the free and common fishery and navigation".

Here, the Applicant's stated need is "[t]o produce Rhode Island farm raised shellfish to meet an increasing demand". It is undisputed that the Applicant's expressed need is for commercial, not research or educational, purposes. This is an important distinction given the Public Trust Doctrine.

It is undisputed that the Applicant already utilizes 6.9 acres of public trust property in Potter Pond for his commercial purposes. The Applicant is requesting that an additional three acres of public trust property be reallocated for his exclusive commercial purposes because he has a "need" to satisfy the increasing demand of his business to produce more shellfish.

There was testimony from the Public (that is supported by Applicant's website) that the Applicant sells oysters across the country (and even offers free shipping to the Northeast). "As we now know from his website that he appears to be wholesaling his oysters and selling his seafood online to be shipped nationally. What does that do for local tourism? Or is it about business? Ms.

Twiss mentioned balance, and Mr. Raso's proposed expansion is not about balance. It's about more and more business for him.” (873)

The demand that is the basis for the Applicant’s purported “need” comes not merely from Rhode Island residents who are being asked to sacrifice their public trust uses, but from people across the country. Thus, the applicant is seeking the maximum additional acres in order to grow additional shellfish, not just for his local restaurant, not for the benefit of the residents of the state, but so he can ship shellfish out of state to benefit his own economic interests.

The Objectors respectfully suggest that in the context of the intent and public policy of the Aquaculture Act and the Public Trust Doctrine, there has not been an adequate demonstration as to why the applicant “needs” an additional three acres and why it would be in the best Public interest to grant him virtually exclusive use of another three acres to the detriment of the Public.

As one public commenter stated: “But what this is about is looking at the overall cost benefit and the people impacted. So in this case we’ve got one person who’s going to benefit from it, and you’ve got, like, hundreds that are going to suffer for it.” (725) Another public commenter stated: “Perry is my neighbor and a generous man. I love his restaurant where I head immediately during the off season. His carryout business sustained by family all summer... I know that he’s our state’s poster child whose restaurant is advertised as one arrives at the airport. I appreciate that he’s an extraordinary entrepreneur, but he always wants more, I know that he’s applying for more, but I have seen no evidence that Perry really needs more. Our pond cannot take more. Too many have discovered this beautiful and secluded recreational treasure. Enough is enough.” (744)

This is not an application for a shellfish farm in Narragansett Bay where conflicts with existing uses can more easily be avoided. The Applicant seeks to locate the farm in the compressed space of Segar Cove close to his business for his own personal convenience and profit.

Pursuant to the Council's Public Trust Policy, "the leasing process must take into consideration what is best for all of the residents of the state, not the commercial interests of a single individual who already utilizes 6.9 acres of the Public's land. The Applicant has failed to meet his burden of demonstrating the need for the proposed activity.

Conclusion

The Subcommittee should vote to recommend denial of the Applicant's request for assent. The credible evidence and testimony made clear that locating a shellfish farm in the proposed location in Segar Cove is not in the best public interest and it would not be compatible with existing public uses.

The Applicant has failed to meet his burden of demonstrating that the proposal would not unreasonably interfere with, impair, or significantly impact, and conflict with, existing public uses. (Category B Assent Requirement (f)). Likewise, that Applicant has failed to meet his burden of demonstrating that the proposed farm will not result in significant conflicts with uses and activities such as recreational boating, fishing, swimming, navigation and commerce. (Category B Assent Requirement (j)). Finally, the Applicant has failed to meet his burden to demonstrate the "need" for an additional three acres and why it would be in the best Public interest to grant him virtually exclusive use of another three acres to the detriment of the Public. (Category B Assent Requirement (a)). The Applicants failure to meet his burden with respect to any one of these requirements is sufficient to deny the request for assent.

The Committee should vote to recommend that the application for assent be Denied.

Respectfully submitted,

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By their attorneys

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CERTIFICATE OF SERVICE

I certify that on this 5th day of February, 2021 I served this document via electronic mail upon the following parties:

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