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November 5, 2020

VIA FEDERAL EXPRESS & EMAILTO TONY@ADLAWLLC.NET

Anthony Desisto, Esq.
Coastal Resources Management Council
Oliver H. Stedman Government Center
4808 Tower Hill Road, Suite 3
Wakefield, RI 02879-1900

Re: CRMC File # 2017-12-086 – Pre-Hearing Opposition Filing - Virtual Hearing

Dear Anthony:

Enclosed herein please find quadruplicate filings of the following documents:

1. Proposed Witness List;
2. Proposed Exhibit List;
2. Prehearing Statement and Memorandum of Law; and
3. Motion to Intervene and Memorandum in Support of Motion to Intervene.

Please note the exhibits listed in the attached proposed Exhibit List will be forwarded under separate cover and via email (via large file share) as I am still pulling all the documents together.

Any questions please do not hesitate to contact me at (401) 439-0244.

Stay healthy and safe,

Christian F. Capizzo

CFC:dad
Enclosures
cc: Elizabeth Noonan, Esq., AP&S - enoonan@apslaw.com
Leslie Parker, AP&S - Lparker@apslaw.com
3937165.1/10373-3

STATE OF RHODE ISLAND
COASTAL RESOURCES MANAGEMENT COUNCIL

IN THE MATTER OF:

Perry Raso **CRMC File No. 2017-12-086**

PROPOSED WITNESS LIST

1. Payson R. Whitney, III, PE, ESS Group, Inc., 10 Hemingway Dr., Riverside, RI
2. Mr. Kevin Hunt, 98 Segar Court, South Kingstown, RI
3. Ms. Alicia Cooney, 95 Segar Court, South Kingstown, RI
4. Mr. Stephen Quigley, 95 Segar Court, South Kingstown, RI
5. Mr. David Latham, 298 Prospect Road, South Kingstown, RI

I reserve the right to amend this witness list prior to the hearing.

Respectfully submitted,

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

Date: 11/5/20

CERTFICATE OF SERVICE

I hereby certify that I emailed and filed in quadruplicate the within documents to the CRMC in Wakefield, Rhode Island on November 5, 2020.

Christian F. Capizzo

Mr. Anthony Desisto, Esq.
Coastal Resources Management Council
Oliver H. Stedman Government Center
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Via Email: tony@adlawllc.net

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

STATE OF RHODE ISLAND
COASTAL RESOURCES MANAGEMENT COUNCIL

IN THE MATTER OF:

Perry Raso **CRMC File No. 2017-12-086**

PROPOSED EXHIBIT LIST

1. ESS Technical Report and Figures
    a. Figure 1A Existing Conditions 2020 - Ecological & Recreational Resources
    b. Figure 1B Existing Conditions 2020 – Area Available for Towed Watersports
    c. Figure 1C Existing Conditions 2020 – NOAA Chart 13219
    d. Figure 1D Existing Conditions 2020- Areas Available for Personal Watercraft Use
    e. Figure 2 Evolution of Potter Pond Aquaculture Lease
    f. Figure 3 Water Sheet Available for Towed Water Sports in Segar Cove
    g. Figure 4A Originally Proposed Aquaculture Lease Water Sheet Available for Towed Water Sports in Segar Cove
    h. Figure 4B Modified Proposed Aquaculture Lease Areas Available for Towed Water Sports in Segar Cove
    i. Figure 4C Modified Proposed Aquaculture Lease Areas Available for Towed Water Sports in Segar Cove
    j. Figure 4D Modified Proposed Aquaculture Lease Areas Available for Personal Watercraft in Segar Cove
    k. Figure 4E Modified Proposed Aquaculture Lease Distance to Shoreline
    l. Figure 5 Segar Cove Towed Watersport Demonstration
        i. Inset A Existing Towed Watersports Condition
        ii. Inset B Proposed Towed Watersport Condition
2. Segar Cove Docks and Mooring Fields prepared by ESS
3. CV of Payson Whitney
4. Latham Photos
5. Cooney Photos
6. Hunt Photos
7. CRMC Public Statement Regarding CRMC Application #201-12-086 (RASO) dated 2/20/18
8. CRMC Semi-Monthly Meeting Minutes June 12, 2018 (Excerpt)
9. South Kingstown Conservation Commission Letter to CRMC dated 10/4/17
10. South Kingstown Waterfront Advisory Commission Letter to CRMC dated 2/15/18
11. South Kingstown Waterfront Advisory Commission minutes from hearing 2/1/18
12. South Kingstown Waterfront Advisory Commission minutes from hearing 2/14/18
13. Rhode Island Marine Fisheries Counsel meeting minutes, 3/14/18
14. Rhode Island Marine Fisheries Counsel Letter to CRMC, 4/27/18

15. RIDEM Acceptance of Proposal dated 2/2/18
16. Letter from PS&H to Mr. Dave Beutel, CRMC dated 2/1/28
17. Letter from PS&H to Mr. Dave Beutel, CRMC dated 3/27/19
18. CRMC Notice Dated March 24, 2020, CRMC File No. 2017-12-086
19. Letter from PS&H to Attorney Anthony Desisto, CRMC dated 5/19/20
20. Letter from PS&H to Attorney Anthony Desisto, CRMC dated 6/16/20
21. Raising Objections: RI Shellfish Farms Face Increasing Opposition, by Rudi Hempe, Article 41 N, RI's Ocean And Coastal Magazine, Spring/Summer 2014
22. Oyster Famers Face Off Against Objectors to Their Expansion Plans, by Ellen Liberman, Article 41 N, RI's Ocean And Coastal Magazine, Spring 2020

I reserve the right to amend this proposed Exhibit List prior to the hearing.

Respectfully submitted,
On Behalf of the Parties

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STATE OF RHODE ISLAND
COASTAL RESOURCES MANAGEMENT COUNCIL

IN THE MATTER OF:

Perry Raso **CRMC File No. 2017-12-086**

PREHEARING STATEMENT and MEMORANDUM OF LAW

Riparian and Public Trust Doctrine Rights of Certain Objectors In Opposition to a Permit For the Proposed Aquaculture Facility in Segar Cove

I. Introduction.

This Memorandum is submitted on behalf of Mr. Kevin Hunt, Ms. Alicia Cooney, Mr. Stephen Quigley, and Mr. David Latham, individuals with ownership interests in properties located on Segar Cove, a portion of Potter Pond in South Kingstown. It is submitted in opposition to a pending application (the "Application") of Mr. Perry Raso for a Coastal Resource Management Council ("CRMC") permit for a lease of three (3) acres in Segar Cove to operate an oyster and scallop aquaculture facility (the "Proposed Facility").

While substantial factual information will be presented to the Council by expert and lay witnesses pertaining to why the Application should be denied, this Memorandum is submitted at the request of the CRMC to address the riparian rights[1] of certain objectors and the asserted threatened infringement of those riparian rights by the Proposed Facility as well as to address certain threatened concomitant Public Trust Doctrine rights of the aforesaid objectors and members of the public by the Proposed Facility.

II. Riparian Rights and Public Trust Doctrine Rights.

Quite simply, under Rhode Island common law, the primary right of an owner of waterfront property, a riparian proprietor, is access to the water. The riparian proprietor has a right of access and essentially no one can do anything in front of the riparian estate to make it less accessible

[1] Riparian rights customarily refers to property rights pertaining to rivers and streams, and littoral rights customarily refers to property rights pertaining to ocean (i.e. tidal) waters. However, since the Rhode Island Supreme Court has used the terms interchangeably, perhaps since portions of many rivers in Rhode Island are tidal, such terms will be used interchangeably here.

without being liable for damages. See Clark v. Peckham, 10 R.I. 35 (R.I. 1871). For example, our Supreme Court found that the City of Providence had no authority to build a walkway and bathhouse for the benefit of the public in front of a riparian proprietor's land when the structure interfered with the riparian proprietor's rights of access to the waters of the Seekonk River. See Rhode Island Motor Co. v. City of Providence, 55 A. 696 (R.I. 1903). It should be noted that the court found that the intended infringement by a municipality for the benefit of the public was insufficient to override the riparian proprietor's rights.

The Rhode Island Supreme Court has also found that one riparian proprietor could not exercise its riparian rights to build a wharf in a way that would infringe on the riparian rights of an abutter by extending the wharf in front of the abutter's waterfront. See Thornton v. Grant, 10 R.I. 477 (R.I. 1873). In fact, under Rhode Island common law, the rights of a riparian proprietor to use and enjoy the waters of the State abutting its property are so strong that in doing so, it could materially infringe on the property rights of an abutting non-riparian proprietor.

In 1875, our Rhode Island Supreme Court decided Engs v. Peckham, 11 R.I. 210 (RI 1875). Engs and Peckham owned adjoining wharfs projecting into Newport Harbor. The wharves were separated by an open dock (i.e. open water). Peckham owned the upland bordering on the open water between the two wharves. When a harbor line was established for Newport Harbor, Peckham began filling the open dock between the two wharves. (At common law in Rhode Island, riparian owners had the right to fill out or wharf out into open water as long as they do not interfere with commerce and navigation. If they did, the action would be indictable as a nuisance. The establishment of a harbor line delineates the edge of the harbor and therefore was seen as designating how far a riparian owner could fill out or wharf out into open water without interfering with the harbor. See Greater Providence Chamber of Commerce v. State, 657 A.2d 1038, 1044 (R.I. 1995))

Peckham's filling would enhance his wharf as it would give him more land access to the wharf, while allowing the other side of the wharf to serve boats traveling to and from the open water. However, the filling would make Engs wharf unusable as he no longer would have access to the water. Engs sued Peckham on two theories; first, that he had a private right or easement in the use of the open water which could not be interfered with by filling, and secondly, that the grant of the wharf to Engs carried with it a grant of a right to use the dock (i.e. open water). The Court

rejected both arguments, finding that the only way Engs' grantor could have granted him rights in the open water was if the grantor owned that area, and he could not as title to the open water was in the state. The Court also found that Engs could acquire no private prescriptive rights to the open water, as the water was available to the public for use so no prescriptive rights would arise. The ultimate result of the court's decision was that a riparian proprietor could fill out into open water even if the result was to deny another property owner the use of an existing wharf bounding on the open water, making the wharf worthless.

These are of course all common law riparian rights, adjudicated by the Court. At that time, had an individual set up something similar to an aquaculture operation in front of the shoreline of a riparian proprietor, it is clear the courts would have enjoined such activity as an infringement of riparian rights. Today, by statute the CRMC is responsible for, *inter alia*, making determinations as to filling in tidal waters, wharfing out into tidal waters, and regulating other activities within tidal waters as well as within 200 feet inland from the coastal feature, including deciding on the location of aquaculture operations in tidal waters. However, in doing so, the CRMC exercises its authority against the backdrop of common law rights pertaining to the use of tidal waters, including riparian rights, and public trust rights of fisheries, commerce, and navigation. As CRMC's enabling statute states:

> "*Under article 1, [Section] 17 of the Rhode Island Constitution, the people shall continue to enjoy and freely exercise all of the rights of fishery, and the privileges of the shore,* ***to which they have been heretofore entitled under the charter and usages of this state****, including, but not limited to, fishing from the shore, the gathering of seaweed, leaving the shore to swim in the sea and passage along the shore". R.I. Gen. Law 46-23-1(a)(1) (emphasis supplied.) These are the Public Trust Doctrine rights."*

In <u>Greater Providence Chamber of Commerce v. State</u>, <u>supra</u>, our Rhode Island Supreme Court found that riparian rights continue to be enforceable, even as to filling in tidal waters against claims by the State. Accordingly, riparian rights as established by usages over the centuries and as reflected in Rhode Island common law still exist, as do Public Trust Doctrine rights, subject in each case to regulation by CRMC, which regulation must be mindful of these pre-existing rights, as CRMC's enabling statute clearly indicates.

Likely for this very reason, one of the factors CRMC requires an applicant for an aquaculture permit to submit information about is whether such aquaculture operation would be compatible with existing or potential uses of the area in question for Public Trust Doctrine uses. CRMC Regulations, Section 1.3.1(K)(1)(a). Here, the Proposed Facility would actually infringe on abutting property owner's private property rights, riparian property rights as well as the Parties right to exercise its historic use of Segar Cove as provided for by the Public Trust Doctrine.

Plans for the Proposed Facility have the easterly boundary as close as approximately ten feet to residential land of our clients and at its farthest point, it would be situated approximately 65 feet from residential property. To put this into perspective, for baseball fans, 65 feet is the approximate distance from the pitcher's mound to home plate. To continue the baseball analogy, ten feet from shore is approximately the span of the two batter's boxes at home plate. This proposed 10 to 65 foot proximity to residential property runs along approximately 910 feet of private property. It directly abuts the property of objectors Kevin Hunt and objectors Stephen Quigley and Alicia Cooney. Testimony will be presented that this proximity of an industrial aquaculture operation to residential properties effectively prevents access to the impacted shoreline of these residential properties by boat and it restricts water-related activities that may be engaged in from shore, thereby negatively impacting riparian rights of these property owners. Moreover, it restricts the location of a dock in the area of the Proposed Facility. Testimony will be presented by Alicia Cooney and Stephen Quigley that they wish to relocate their current dock to the area of the proposed facility because there are less subsurface rocks making it less perilous to launch and berth kayaks than the present location of their dock. The Proposed Facility would prevent that relocation, as it prevents swimming and other water activities, given its extreme proximity to their land, just as it also restricts Mr. Hunts water-related activities from his property.

Moreover, the applicant is proposing to put an industrial operation, complete with mechanical equipment, barges harvesting oysters and scallops, and workers yelling to each other to communicate over the noise of the machinery, literally in the back yard of property owners. Putting aside riparian right issues, traditional zoning regulations would prohibit such a juxtaposition if the facility in question was proposed to be located on land abutting residential property. Moreover, a technical report submitted to the Council indicates that it is reasonable to expect that the noise levels associated with daily operations at the Proposed Facility would likely

violate the permissible sound levels in Section 507 of South Kingstown's Supplementary Regulations [Standards for the Regulations of commercial and industrial uses] to the Code of Ordinances.

In addition to these blatant conflicts with the riparian rights of property owners which would abut the Proposed Facility, the Proposed Facility would also have profound, and impermissible, impacts on the Parties historic use of Segar Cove and Potters Pond, those public trust uses which CRMC's enabling act states that citizens *"shall continue to enjoy and freely exercise"* R.I. Gen. Law 46-23-1(a)(1). It is our intention to introduce evidence that the Proposed Facility would materially and adversely impact boating, swimming, towed water sports, fishing and other public trust uses in one of only two basins in the entire 329-acre Potter Pond which is suitable for certain of these uses.

Segar Cove presents a unique public access opportunity not available in a majority of the remainder of Potter Pond as it offers numerous public access points, docks and deep water across a 30.3 acre water sheet allowable for waterskiing, paddle boarding, kayaking, fishing and swimming far away from designated channels, fairways and mooring areas. If permitted, this 3 acre Proposed Facility will significantly limit the size of Segar Cove's water sheet presently available for these activities by eliminating 10 acres from the 30.3-acre water sheet. This represents an approximately 33% reduction in the water sheet that is available in the Segar Cove which presents potential public safety and navigational safety issues causing the Parties and possibly the public to no longer use Segar Cove for these activities. See ESS Technical Report dated April 10, 2020. We believe this evidence will conclusively demonstrate that the CRMC is without authority to issue the requested permit for the Proposed Facility, given the limitations inherent in the very statute which authorizes the CRMC to issue such permits.

III. <u>CRMC's Authority to Grant Aquaculture Leases is Restricted.</u>

The CRMC enjoys broad authority to regulate coastal activity for up to three (3) miles offshore to 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 <u>et</u> <u>seq</u>. However, CRMC's ability to grant permits for aquaculture facilities is specifically addressed under a different statute, R. I. Gen. Laws 20-10-1 <u>et</u> <u>seq</u>. (the "Aquaculture Act"), which restricts CRMC's ability to grant

aquaculture leases. While that statute 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. 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 should not authorize aquaculture operations where such operations would pose conflicts with the public and/or private property owners in the enjoyment of public trust uses and riparian rights.

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 with such public trust uses. So concerned was the General Assembly about the potential interferences of aquaculture facilities

with the enjoyment of the public and property owners of public trust resources that it actually provided that the aquaculture facilities shall be accessible to the public to the extent possible in furtherance of these uses. "The CRMC shall require all permittees to mark off the areas under permit…so placed as not to interfere unnecessarily with navigation and other traditional uses of the surfaces". R.I. Gen. Laws 20-10-9(a). *"Except to the extent necessary to permit the effective development of the species…being cultivated…, the public shall be provided with means of reasonable ingress and egress, to and from the area subject to permit, for traditional water activities such as boating, swimming, and fishing*". R.I. Gen. 20-10-9(b). Emphasis supplied.

In other words, to the extent not detrimental to the purposes for which the permit is granted, the public must be provided access to the leased aquaculture area to the extent feasible for such public trust activities as boating, swimming and fishing. Unfortunately, given that many of these aquaculture facilities are industrial operations, such public trust access is often not possible. For this reason, CRMC regulations expressly require that aquaculture operations be marked in a manner which does not obstruct access to tidal waters. CRMC Regulations, Section 1.3.1(K)(a)(3). It is axiomatic that if aquaculture operations cannot be marked in a manner which obstructs access to tidal waters, in order to receive a permit from CRMC, the aquaculture operations themselves must not obstruct access to tidal waters.

It is for this reason that 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"*. CRMC Regulations, Section 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 compatibility 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. CRMC Regulations, Section 1.3.1 (K)(3)(a).

The balancing of rights which CRMC customarily applies in the consideration of applications for aquaculture permits in order to meet it statutory obligation to be ***"consistent with the best public interest"*** requires that the Council oppose a plan which would site an industrial aquaculture operation literally in the back yard of personal residences, which would likely cause or create noises that are in violation of the permissible sound levels in Section 507 of the South Kingstown ordinances. The Project will clearly and negatively impact the use and enjoyment of riparian waters of private property owners in furtherance of their historic riparian rights, as well as the exercise of their historic rights to use and enjoy Segar Cove as provided for under Public Trust Doctrine.

IV. A CRMC Finding of No Material Conflict with Public Trust Uses is Required to Issue the Permit.

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 Council must have sufficient evidence to make a finding of no material interference with public trust uses in order to allow the Council to issue 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. CRMC Regulations, Section 1.3.1K(4)(f). As an article on CRMC's website notes (copy attached), this *"five percent rule"* goes to the carrying capacity in each pond, that 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)".

Accordingly, the five percent rule is designed to address ecological consequences, which certainly could impact other public trust uses, such as harm to fishery or shellfish, but it is not designed to address non-ecological impermissible interferences with, or conflicts with, public trust uses in the salt water pond. Such conflicts with public trust uses would prevent CRMC from issuing a permit under the Aquaculture Act, even though there was no violation of the five percent rule. For example, a proposed aquaculture project may not exceed the five percent rule but it could

nevertheless pose material interference with public trust uses, such as boating or other recreational activities. We submit that the Proposed Facility is one such project.

It is our intention to introduce evidence that the Proposed Facility would materially and adversely impact boating, swimming, towed water sports, fishing and other public trust uses by eliminating 10 acres from the 30.3-acre water sheet in Segar Cove. Essentially reducing the water sheet presently available for these activities by 33% in one of only two areas in the entire 329-acre Potter Pond which is suitable for these public trust uses. In addition, this reduction in the water sheet will compress and reduce the area for waterskiing and towed water sports in Segar Cove potentially creating public safety and navigational issues. See ESS Technical Report dated April 10, 2020. We believe this evidence will conclusively demonstrate that the CRMC is without authority to issue the requested permit for the Proposed Facility, given the limitations inherent in the very statute which authorizes the CRMC to issue such permits. The balancing of rights which CRMC customarily applies in the consideration of applications for aquaculture permits in order to meet it statutory obligation to be *"consistent with the* ***best*** *public interest"* requires that the Council oppose a plan which would site an industrial aquaculture operation literally in the back yard of the Parties' personal residences, and clearly negatively impact their use and enjoyment of the riparian waters as well as the exercise of their historic rights to use and enjoy Segar Cove as provided for under Public Trust Doctrine.

IV. Conclusion

Unlike the broad regulatory jurisdiction which the Coastal Resources Management Council enjoys pursuant to its enabling act, R. I. Gen. Laws 46-23-1 et seq., the authority of CRMC to grant leases for aquaculture facilities is more circumscribed by the Aquaculture Act. That statute 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 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*".

We submit that evidence at the hearing will amply demonstrate that the Proposed Facility is harmful to the best public interest as it would materially conflict with legitimate public trust uses

of Segar Cove by the public and by property owners alike, therefore requiring that CRMC deny the Application.

Respectfully submitted,

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(https://www.youtube.com/channel/UC7-YbK2dYh_6uhERj6WX6ag) (https://www.facebook.com/RICRMC) (https://twitter.com/RI_CRMC) (mailto:ldwyer@crmc.ri.gov?subject=CRMC eNewsletter Signup&body=Name: Town or City:)

RI Coastal Resources Management Council

...to preserve, protect, develop, and restore coastal resources for all Rhode Islanders

CRMC's 5 percent aquaculture rule seeks to balance use of salt ponds

June 4, 2018, Wakefield - Nearly a decade has passed since the Rhode Island Coastal Resources Management Council (CRMC) instituted its rule of a five-percent threshold of aquaculture use in each of the state's salt ponds. The limit seeks to balance all users and uses of the salt ponds, but conflicts still arise.

"We try to minimize conflict, but it's in every application," said CRMC Aquaculture Coordinator David Beutel at a recent presentation before the Rhode Island Saltwater Anglers Association. "You can never get rid of it completely. [But] we strive to be proactive with all stakeholders."

(images/2018_0604_aquaculture1.jpg)

Rack and bag aquaculture gear on Quonochontaug Pond

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). Under the regulations for aquaculture leasing and permitting in the Rhode Island Coastal Resources Management Program (Red Book), the "CRMC's research into the ecology of coastal waters and its understanding of ecosystem carrying capacities is always evolving and improving."

According to Robert Rheault, executive director of the East Coast Shellfish Growers Association, at the time of the study on carrying capacity, the New England Marine Fisheries Council was recommending a moratorium on new aquaculture leases because of fears that too many grown shellfish would eat all the phytoplankton and the wild stock would starve.

"I didn't believe it," he said recently. "After all, I was unable to detect a depletion of phytoplankton as the tide moves across my lease, and simple back of the envelope calculations showed that my farm was filtering only about two percent of the tidal exchange of the pond. Intuitively, it made no sense."

There weren't many carrying capacity studies to compare in the literature, but one conducted in Australia for a mussel farm provided a good model, and the Aquaculture Working Group extrapolated everything to Rhode Island, making the assumption that conditions and parameters were similar. The group estimated that, based on an average planting density of five tons per acre, the industry should be able to have five percent of any water body covered with oysters before starting to trip the ecological carrying capacity, Rheault said.

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 product at which harvests are maximized; ecological carrying capacity – the stocking or farm 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," Rheault said. "It is far less than the ecological or the production carrying capacity."

All parties – representatives from the University of Rhode Island, Roger Williams University, U.S. Department of Agriculture, CRMC, RI Department of Environmental Management, R.I. Department of Health, state legislators, Save The Bay, Salt Pond Coalition, Sierra Club, and members of the aquaculture industry – involved in the work agreed that this was the best available science, and as long as the five percent was not exceeded, conditions would be favorable until there was better science to guide the industry. The working group put together a white paper which described the whole process and the NEMFC accepted the new standard. In 2010, Carrie Byron developed a proper model for carrying capacity based on local data on the various elements of the food web, and this model showed the ecological carrying capacity was closer to 45 percent in Narragansett Bay and more than 50 percent in the salt ponds.

(images/2018_0604_aquaculture2.jpg)

The crew of East Beach Farms in Ninigret Pond

"This makes far more sense when you look at historical populations: for instance in 1890 we had one-third of Narragansett Bay leased out for oyster farms and scientists reported that Narragansett Bay had the best oyster meat production per acre of any growing area on the East Coast," Rheault said.

Aquaculture is one of the most-regulated activities in Rhode Island's coastal waters. The RI Marine Fisheries Council, which serves in advisory role to the CRMC permitting process, is copied on every aquaculture public notice. All aquaculture applications are noticed to the town in which it is proposed (notices go to the town planner's office; they then share with the waterfront advisory commission, harbormaster and town conservation commission or each town's equivalent); RI Department of Environmental Management staff (Division of Fish &Wildlife, Office of Water Resources, Office of the Director, and Office of Law Enforcement); RI Department of Health; United States Coast Guard; U.S. Army Corps of Engineers (they share it with National Ocean and Atmospheric Administration Fisheries or National Marine Fisheries Service, U.S. Environmental Protection Agency, and others at RI DEM); NOAA Fisheries, Rhode Island Saltwater Anglers Association, RISA, individual commercial shellfishers who request to be on the mailing list; all commercial fishing associations in Rhode Island; Save The Bay; academia who have asked to be on mailing list; individuals who have asked to be on an aquaculture mailing list, as well as aquaculturists; the Ocean State Aquaculture Association; and East Coast Shellfish Growers' Association.

Controversy over aquaculture applications is something the industry and the CRMC have grown accustomed to, through both Beutel and Rheault said it is often unwarranted.

"Ninety-five percent of every coastal pond is available for use by all other activities, and in many cases, that five percent is not excluded for use by the existence of aquaculture," Beutel said at the RISAA meeting.

"I am surprised when people are not willing to accept five percent of a pond to be devoted towards sustainable food production," Rheault said. "Many types of aquaculture don't obstruct other users at all, except for shellfishing. For instance, bottom culture represents most of the activity in Point Judith Pond. You can sail there, fish there, water ski. The only thing we ask you not to do is help us harvest our oysters.

The total aquaculture acreage in each of the ponds is:

- Point Judith Pond – 4.94%
- Potter Pond – 1.9%
- Ninigret Pond – 3.03%
- Winnapaug Pond – 3.0%
- Quonochontaug Pond – 0.85%

According to Beutel, more than half of the aquaculture in Rhode Island is sited outside of the coastal ponds – the largest farm (46 acres) is the East Passage off of Middletown. Both Beutel and Rheault acknowledge that there are some types of aquaculture that require exclusive use. Floating gear is one method of growing that does physically occupy water area, but the lease cannot be in a navigation channel, over an eelgrass bed or in an area with an existing fishery.

"So we are taking unproductive bottom and making it productive, with obvious benefits to the economy and water quality, while the rest (95%) of the ponds are available for all the other uses," Rheault said.

(images/2018_0604_aquaculture3.jpg)

An aerial view of floating aquaculture in Pont Judith Pond (Photo courtesy of Ayla Fox)

The Permitting Process

Aquaculture activities must be permitted by the Council, and applicants might be granted exclusive use of the submerged lands and water column, including the water's surface, when the Council determined such exclusive use is necessary for the effective execution of the permitted aquaculture activities. The public is provided with means of reasonable ingress and egress to and from the lease area for traditional activities including boating, swimming, and fishing, except to the extent necessary to allow proper growing of the aquaculture species/product. The executive director of the CRMC can order removal of any facility that is in obvious disrepair or has been deemed a safety or navigation hazard, or the temporary removal of gear and cultivated species if the lease has not been used for its permitted purpose for a substantial period of time.

"I hope that over time society will change and eventually embrace more aquaculture," Rheault added. "Shellfish aquaculture has great positive benefits to the ecology of the ponds – both as habitat for juvenile fish and for eutrophication mitigation – and for the economy."

For more information on the permitting process for aquaculture leases, go to http://www.crmc.ri.gov/aquaculture.html (http://www.crmc.ri.gov/aquaculture.html) and also to the Red Book, http://www.crmc.ri.gov/regulations/RICRMP.pdf (http://www.crmc.ri.gov/regulations/RICRMP.pdf) (beginning on page 181 (Section K).

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(http://www.ri.gov/)
An Official Rhode Island State Website

STATE OF RHODE ISLAND
COASTAL RESOURCES MANAGEMENT COUNCIL

IN THE MATTER OF:
Perry Raso **CRMC File No. 2017-12-086**

MOTION TO INTERVENE

Mr. Kevin Hunt, Mr. David Latham, Ms. Alicia M. Cooney and Mr. Stephen Quigley (the "Parties") move to intervene in this matter concerning Perry Raso's application for establishment of a three-acre oyster and bay scallop farm (the "Project"). In support of their motion, the Parties rely upon their supporting memorandum.

Respectfully submitted,
On Behalf of the Parties

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CERTFICATE OF SERVICE

I hereby certify that I emailed and filed in quadruplicate the within documents to the CRMC in Wakefield, Rhode Island on November 5, 2020.

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STATE OF RHODE ISLAND
COASTAL RESOURCES MANAGEMENT COUNCIL

IN THE MATTER OF:
Perry Raso **CRMC File No. 2017-12-086**

MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

I. BACKGROUND & ARGUMENT

Mr. Kevin Hunt, Mr. David Latham, Ms. Alicia M. Cooney and Mr. Stephen Quigley (the "Parties") move to intervene in this matter concerning Perry Raso's application for the establishment of a three (3) acre oyster and bay scallop farm (the "Project"). On February 1, 2018 the Parties, through legal counsel, notified CRMC of their substantive objections to the Project and requested a hearing to present testimony and evidence in support of said opposition. The Parties are uniquely situated compared to other entities, agencies and members of the public that have concerns about the Project. Mr. Hunt and his family has owned property on Segar Cove located at 98 Segar Court in South Kingstown, Rhode Island since 2002 and represents the 3rd generation of Matunuck residents who have recreated on Potter Pond since 1957. His property is on a point of land on the eastern section of Segar Cove. Ms. Cooney, Mr. Quigley and their family own property on Segar Cove located at 95 Segar Court in South Kingstown, Rhode Island. Her family and the extended Cooney Family, including her father and grandfather have recreated on Segar Cove and Potter Pond for over 90 years. Ms. Cooney and Mr. Quigley bought their house with a dock located on Segar Cove. Mr. Latham and his family have owned property on Segar Cove located at 298 Prospect Road, South Kingstown, Rhode Island and have recreated on Potters Pond for the better part of a half a century. The Project located is directly across from the Latham Family Property and dock.

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". CRMC Regulations, Section 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 compatibility 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. CRMC Regulations, Section 1.3.1 (K)(3)(a). The balancing of rights which CRMC customarily applies in the consideration of applications for aquaculture permits in order to meet it statutory obligation to be ***"consistent with the best public interest"*** requires that the Council grant intervenor status and hear testimony from the Parties, private property owners whose private property rights, historic riparian rights and historic right to use and enjoy Segar Cove will be significantly and negatively impacted by an industrial aquaculture operation that is literally in their backyard.

Here, the Proposed Facility would actually infringe on abutting (Hunt, Cooney and Quigley) property owner's private property rights, riparian property rights as well as negatively impact their rights, as provided for under the Public Trust Doctrine, to recreate on Segar Cove. Plans for the Proposed Facility have the easterly boundary as close as approximately ten feet to residential land of our clients and at its farthest point, it would be situated approximately 65 feet from residential property. To put this into perspective, for baseball fans, 65 feet is the approximate distance from the pitcher's mound to home plate. To continue the baseball analogy, ten feet from shore is approximately the span of the two batter's boxes at home plate. This proposed 10 to 65 foot proximity to residential property runs along approximately 910 feet of private property. It directly abuts the property of objectors Kevin Hunt and objectors Stephen Quigley and Alicia Cooney.

Testimony will be presented that this proximity of an industrial aquaculture operation to residential properties effectively prevents access to the impacted shoreline of these residential properties by boat and it restricts water-related activities that may be engaged in from shore, thereby negatively impacting riparian rights of these property owners. Moreover, it restricts the location of a dock in the area of the Proposed Facility. Testimony will be presented by Alicia

Cooney and Stephen Quigley that they wish to relocate their current dock to the area of the proposed facility because there are less subsurface rocks making it less perilous to launch and berth kayaks than the present location of their dock. The Proposed Facility would prevent that relocation, as it prevents swimming and other water activities, given its extreme proximity to their land, just as it also restricts Mr. Hunts water-related activities from his property.

In addition, based on the location of the Parties properties on Segar Cove, the Proposed Facility would also have profound, and impermissible, negative impacts on their use of Segar Cove, a public trust use, which CRMC's enabling act states that citizens ***"shall continue to enjoy and freely exercise"*** R.I. Gen. Law 46-23-1(a)(1). It is our intention to introduce evidence that the Proposed Facility would materially and adversely impact the Parties ability to engage in boating, swimming, towed water sports, fishing and other public trust uses in Segar Cove, one of only two basins in the entire 329-acre Potter Pond which is suitable for certain of these uses.

Segar Cove presents unique and direct access to the Parties from their respective properties on Segar Cove. In addition, Segar Cove also presents public access opportunities not available in a majority of the remainder of Potter Pond as it offers numerous public access points, docks and deep water across a 30.3 acre water sheet allowable for waterskiing, paddle boarding, kayaking, fishing and swimming far away from designated channels, fairways and mooring areas. If permitted, this 3-acre Proposed Facility will significantly limit the size of Segar Cove's water sheet presently available for these activities by eliminating 10 acres from the 30.3-acre water sheet. This represents an approximately 33% reduction in the water sheet that is available in Segar Cove, which presents potential public safety and navigational safety issues causing the Parties and possibly the public to no longer use Segar Cove for these activities. We believe this evidence will conclusively demonstrate that the CRMC is without authority to issue the requested permit for the Proposed Facility, given the limitations inherent in the very statute which authorizes the CRMC to issue such permits.

The Parties have witnessed firsthand, having lived on Segar Cove for many years, the extent of recreational activity taking place on the cove and because of location of their respective properties on Segar Cove, they will be directly affected by the Project. Accordingly, the Parties

seek to intervene in this matter to participate as a party and to introduce evidence concerning the significant negative impact the Project will have on them and on Segar Cove including but not limited to the infringement and impact on their respective riparian rights and the profound, and impermissible, direct negative impacts on their use of Segar Cove as provided for under the Public Trust Doctrine. In addition to the aforementioned alleged injuries, the Parties have standing to intervene as they have raised questions of law and fact that are in common with the main proceeding.

II. LEGAL STANDARD

The CRMC Management Procedures permit individuals to intervene in any proceeding on the grounds that: 1) the person is entitled by law to the status of a party; 2) the person could have been a complainant in such proceedings; or 3) the person has a complaint or defense which has a question of law or fact in common with the main proceeding. 650-RICR-10-0011.1 (E)(2). In order to satisfy the standing requirement, "a complaining party must allege such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues." *Watson* v. *Fox,* 44 A.3d 130, 135 (R.I. 2012). Essentially, this requires individuals seeking to intervene to allege injury in fact. *E. Greenwich Yacht Club* v. *Coastal Res. Mgmt. Council,* 376 A.2d 682, 684 (1977) ("The question is whether the person whose standing is challenged has alleged an injury in fact... if he has, he satisfies the requirement of standing.") (quoting *Rhode Island Ophthalmological Soc. v. Cannon,* 317 A.2d 124, 129 (1974)). The alleged injury must be concrete, particularized and actual or imminent - it may not be speculative or conjectural. *Watson* 44 A.3d at 135-36. The Rhode Island Supreme Court requires a person's alleged injury to be "'particularized' and that he must 'demonstrate that he has a stake in the outcome that distinguishes his claims from the claims of the public at large.'" *Id.* (quoting *Bowen v. Mollis,* 945 A.2d 314, 317 (R.I. 2008)).

III. CONCLUSION

Without question, the Parties meet the requirements for intervention given the immediate and direct adverse impact on their property rights, their historic and continued exercise of their

public trust rights and their historic riparian rights. For these reasons, the Parties respectfully request that CRMC grant their motion to intervene and permit them to participate in the matter as a party.

Respectfully submitted,
On Behalf of the Parties

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