

Legal Analysis Regarding Private Conservation Options on Rhode Island Tidal Lands

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I. Background

As part of a global effort related to Marine Conservation Agreements (see: www.mcatoolkit.org) The Nature Conservancy (TNC) is investigating if and how tidal lands in Rhode Island can be protected by private actions, specifically restoration and some form of acquisition¹ (whether fee-simple or less-than fee-simple). TNC would like to understand whether private organizations can obtain sufficient control over tidal lands so they may protect natural areas in their current condition or restore degraded shellfish beds and/or submerged aquatic vegetation (SAV) such as eelgrass, and thereafter prevent others from interfering with such restored areas by activities such as commercial shellfishing, fishing, dredging, construction of structures, and pollution.

This report assesses options for private conservation organizations to carry out conservation activities on Rhode Island tidal lands. The report furthers the initial work undertaken in 2007 by the URI IGERT Fellow, Ronan Roche, entitled “Assessment of Law, Policy, and Practice Related to Private Conservation of Tidal Lands in Rhode Island.”

II. Questions Presented

1. Is it possible for private conservation organizations to obtain a fee-simple interest in tidal lands in Rhode Island for conservation purposes, such that other conflicting uses may be excluded from and over those tidal lands?
2. Are there any other legal mechanisms whereby private conservation organizations could acquire sufficient control over areas of tidal land in Rhode Island so they may protect tidal lands or restore shellfish beds and/or SAV such as eelgrass, and thereafter prevent interference from other uses of these tidal lands and associated waters?

III. Brief Conclusions

1. The State of Rhode Island maintains ownership of tidal lands within its borders subject to the public trust doctrine, which dictates that the state holds title in a proprietary capacity to protect the public rights of fishing, commerce, navigation and the privileges of the shore. Article 1, §17, of the Rhode Island Constitution. The Rhode Island General Assembly (“General Assembly”) is authorized to grant an ownership interest in tidal lands to a private entity, but it must do so explicitly. G.L. 1956 §46-5-1.2(a). However, such a grant would not automatically grant a “fee simple” interest, as that concept is traditionally understood, because the ownership interest would still be subject to the public trust doctrine. Rather, the General Assembly would have to expressly extinguish the public trust doctrine over those tidal lands. The Rhode Island Supreme Court has stated that the General Assembly may extinguish the public trust doctrine in designated areas provided it does not cause a detriment to other tidal lands and waters and is not for purely private benefit. The Court has not, however, squarely addressed when these conditions are satisfied in the context of unfilled tidal lands. Nonetheless, the Rhode Island Supreme Court

¹ “Acquisition” in this sense could mean acquiring ownership rights, leasing rights or some other form of rights, permanent or temporary.

cases involving filled tidal lands suggest that the Court applies a deferential standard in reviewing the General Assembly's determination to extinguish the public trust doctrine. The General Assembly itself has also established through statute that it has the sole authority to make decisions regarding the public trust doctrine, and that aquaculture leases may grant exclusive use of certain tidal lands and the associated water column, including surface water. G.L. 1956 §46-5-1.2(d)(1); *id.* at §20-10-6(a).

Even if the General Assembly were to grant an ownership interest in tidal lands free of the public trust doctrine, in order for fishing activities to be excluded from the water above those tidal lands, the Rhode Island Marine Fisheries Council (MFC) would have to designate the area as a Shellfish and Marine Life Management Area (Management Area) and exclude such fishing activities from the area pursuant to the conditions of the Rhode Island Freedom to Fish and Marine Conservation Act. G.L. 1956 §20-3.2-3. A Management Area has a maximum term of five (5) years and may be renewed. MFC Regulations, §3.5.3. Additionally, the Rhode Island Coastal Resources Management Council (CRMC) would still need to grant an aquaculture assent for private restoration activities that met the definition of aquaculture.²

2. In the event that a General Assembly grant of an ownership interest in tidal lands is not possible and proposed restoration activities that meet the aquaculture definition require exclusive use (or the exclusion of particular public uses) of the tidal lands and associated water column, the next option is to obtain an aquaculture assent³ and/or lease from the CRMC and, if fishing activities must be excluded, the designation of a Management Area by the MFC. Restoration of shellfish beds and submerged aquatic vegetation appears to fall within the scope of aquaculture, which is defined as "the cultivation, rearing, or propagation of aquatic plants or animals under either natural or artificial conditions," G.L. 1956 §20-10-2(1), and the CRMC is authorized to grant exclusive use for aquaculture leases if "necessary to the effective conduct of the permitted aquaculture activities." *Id.* at §20-10-6(a). However, an MFC Management Area designation would also be required if it was necessary to exclude fishing activities from the restoration site. If fishing activities would not affect the restoration site, a Management Area designation would not be necessary. Although the CRMC aquaculture statutory framework and regulations appear to cover the shellfish bed and SAV restoration activities, Dave Alves, head of the CRMC aquaculture program, has stated that if proposed restoration activities do not require the installation of any equipment (i.e., only involved seeding and monitoring) on the ocean floor, the

² Although they have not yet been made available for public comment, Dave Alves, head of the CRMC aquaculture program, has indicated that the CRMC is currently in the process of establishing regulations for conservation/restoration assents.

³ The CRMC must authorize aquaculture activities through the issuance of an aquaculture "assent." RICRMP, §300.11(B)(2). In certain instances in CRMC, or other Rhode Island agency, regulations or guidance, the terms "permit" or "license" are used rather than "assent" in the context of aquaculture operations, but all of these terms have the same legal meaning. In this memorandum, the term "assent" will always be used to describe the legal document issued by the CRMC to authorize aquaculture activities, except where the memorandum quotes a particular statute, regulation or agency guidance. The legal authorization issued by the Rhode Island Department of Environmental Management (DEM) for possession, importation, and transportation of marine shellfish species used in an aquaculture operation, as described later in this memorandum, is referred to as a "license." In contrast with an "assent," a CRMC aquaculture lease, which authorizes use of Rhode Island tidal lands for aquaculture purposes, is required if the proposed activities require the exclusion of any public uses from the area where the aquaculture activities will occur.

establishment of an MFC Management Area would be the most appropriate legal mechanism for such activity, and in such case neither a CRMC assent nor lease would be required. However, CRMC regulations and guidance do not confirm Mr. Alves' assertion. Moreover, although the MFC Management Area designation would exclude fishing activities, it is unclear the extent to which the MFC may exclude other public trust uses and whether the MFC may affirmatively authorize the proposed restoration activities.

If restoration activities do not require exclusive use of an area (or do not need to exclude any particular public use), then only an aquaculture assent from the CRMC would be needed. CRMC aquaculture assents (and aquaculture leases) may be granted for a term not to exceed fifteen (15) years, and can be renewable upon application by the permittee for successive periods of ten (10) years, *id.* at §20-10-3, provided all conditions of the assent (or lease) have been met. Alternatively, private conservation organizations could obtain a CRMC experimental assent or education/research assent (both of which would also require a lease if exclusive use of the water column or surface was required for the activities, *see* Rhode Island Coastal Resources Management Program, at §300.11(F)(1)(f) and (h)), which would be subject to less procedural requirements, but would also be limited to a shorter term and smaller area. In addition to any required CRMC assents or leases and MFC Management Area designations, conservation organizations may also have to obtain a Rhode Island Department of Environmental Management (DEM) aquaculture license if it possesses, imports, or transports marine shellfish species used in its aquaculture operations. DEM Aquaculture Regulations, §2.2. Further, additional authorizations from other regulatory bodies may be needed to conduct restoration activities, such as the U.S. Army Corps of Engineers.

Although the statutory framework that establishes the CRMC authority suggests that the CRMC may grant leases for activities other than aquaculture, the CRMC has not established any other leasing programs and has never granted any other type of lease for use of Rhode Island tidal lands. Therefore, the CRMC has not granted exclusive use of an area of tidal lands for any purpose other than aquaculture.⁴

Given the complicated regulatory structure and uncertainty regarding (a) the circumstances under which the General Assembly may extinguish the public trust doctrine and (b) the potential for the General Assembly to grant an ownership interest in tidal lands,⁵ conservation organizations considering protecting and restoring tidal lands should meet with the CRMC, MFC and DEM to determine, on a consensus basis, the best way to achieve each entities' goals.

IV. Analysis

⁴ According to Dave Alves at the CRMC, the CRMC does not grant leases to marinas, which is consistent with the lack of any statutory or regulatory framework for such leases. Rather, the littoral land owner has a common law right to wharf out, and only needs to obtain a CRMC assent for this purpose. As a result, the marina owner has no ownership interest in the tidal lands under the wharf, despite the fact that marinas effectively gain exclusive control of the waters within the marina.

⁵ James Boyd at the CRMC stated that the General Assembly's grant of ownership interest to the Rhode Island Yacht Club was the only such grant that he was aware of, but that he did not have any specific knowledge regarding the details of that grant.

A. Nature of Rhode Island's Ownership Interest in Tidal Lands

The state of Rhode Island maintains an ownership interest in tidal lands (i.e., those lands that lie below the high water mark⁶) within its boundaries. Rhode Island statutes describe that ownership as follows:

[t]he state of Rhode Island, pursuant to the public trust doctrine long recognized in federal and Rhode Island state case law, and to article 1, §17 of the constitution of Rhode Island as originally adopted and as subsequently amended, has historically maintained *title in fee simple* to all soil within its boundaries that lies below the high water mark ..., G.L. 1956 §46-5-1.2(a) (emphasis supplied),

[t]he legislature recognizes that under article 1, §17, the submerged lands of the state are impressed with a public trust and that the state is responsible for the protection of the public's interest in these lands. The state maintains *title in fee* to all soil within its boundaries that lies below the high water mark, and it holds that land in trust for the use of the public. In benefiting the public, the state preserves certain public rights which include but are not limited to fishery, commerce, and navigation in these waters and the submerged lands that they cover.

G.L. 1956 §46-23-1(f)(1) (emphasis supplied). Although these sections describe the nature of Rhode Island's ownership interest in its tidal lands as "title in fee simple" and "title in fee," they also clarify that the state's ownership interest in tidal lands is limited by the public trust doctrine, which the Rhode Island Supreme Court has summarized as follows:

[t]he public trust doctrine dictates that the state holds title to all land below the high water mark in a proprietary capacity for the benefit of the public. The doctrine preserves the public rights of fishery, commerce, and navigation in these waters.

Champlin's Realty Associates v. Tillson, 823 A.2d 1162, 1165 (R.I. 2003)⁷ citing Greater Providence Chamber of Commerce v. State, 657 A.2d 1038, 1041 (R.I. 1995).⁸ The public trust

⁶ See G.L. 1956 §46-23-1(f)(3)(ii) ("Tidal lands" means those lands that are below the mean high water."); see also Champlin's Realty Associates, 823 A.2d at 1166, n. 4 (same). "Mean high water" means a line of contour representing the 18.6 year average as determined by the metonic cycle and/or its equivalent as evidenced by the records, tidal datum, and methodology of the United States coastal geodetic survey within the National Oceanic and Atmospheric Administration. G.L. 1956 §46-23-1(f)(3)(iii).

⁷ In Champlin's Realty Associates, the Rhode Island Supreme Court described the historical development of the public trust doctrine in Rhode Island as follows: "[s]ince ancient times, the law has recognized the unique status of tidal lands through the public trust doctrine. The Greek philosophers set the foundation for the public trust doctrine, which was first codified in the second century Institutes and Journal of Gaius. This doctrine again was restated in the Institutes of the Justinian some four centuries later. From there, the public trust doctrine was transplanted into the English common law after the Magna Carta, and eventually sailed to this country with the colonists. In summarizing English common law, the United States Supreme Court stated: 'In England, from the time of Lord Hale, it has been treated as settled that the title in the soil of the sea, or of arms of the sea, below ordinary high water mark, is in the King; ... and that this title, *jus privatum*, ... is subject to the public right, *jus publicum*, of navigation and fishing. After the American Revolution, the original colonies, including Rhode Island, incorporated the public trust doctrine into their law and assumed ownership over tidal

doctrine has been codified in the article 1, §17, of the Rhode Island Constitution, which provides that:

the people shall continue to enjoy and freely exercise all 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; and they shall be secure in their rights to the use and enjoyment of the natural resources and enjoyment of the natural resources of the state with due regard for the preservation of their values

See also G.L. 1956 §46-23-1(a)(1) (same).

The Rhode Island Supreme Court has clarified the effect of the public trust doctrine on the nature of the State's ownership interest in tidal lands by stating that the state's ownership of tidal lands is:

characterized by at least two separate, yet tightly interwoven interests: the *jus privatum* and the *jus publicum*. The *jus privatum* relates to the state's title to tidal lands. That ownership interest, however, is subject to a public right or *jus publicum*.

Champlin's Realty Associates, 823 A.2d at 1166 (internal citations omitted).

B. Transfer of State's Ownership Interest in Tidal Lands

Rhode Island law expressly allows for the Rhode Island General Assembly (General Assembly) to transfer the state's *jus privatum* in tidal lands to private entities. *See* G.L. 1956 §46-5-1.2(a) ("The state of Rhode Island ... has historically maintained title in fee simple to all soil within its boundaries that lies below the high water mark and to any land resulting from any filling of any tidal area, except those portions of tidal lands or filled tidal lands in respect to which the state has formally granted title in fee simple to private individuals or to which title has

lands and the concurrent responsibility for managing them to benefit the public." 823 A.2d at 1166 (internal citations omitted).

⁸ In State ex rel. Town of Westerly v. Bradley, 877 A.2d 601, 606-07 (R.I. 2005), a case that did not involve ownership rights in tidal lands, but is the Rhode Island Supreme Court's most recent pronouncement of the public trust doctrine, the Court stated that: "[u]nder the public trust doctrine, the General Assembly is vested with the authority and responsibility for regulating and preserving tidal lands and may determine appropriate uses for tidal land, grant tidal land to another, or 'delegate the authority to regulate that land on the state's behalf. The state's plenary authority over tidal lands is nevertheless restricted by article 1, section 17, which preserves 'all the rights of fishery, and the privileges of the shore' to the state's inhabitants, '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; and they shall be secure in their rights to the use and enjoyment of the natural resources of the state with due regard for the preservation of their values.'" In State ex rel. Town of Westerly, the Court held that a swimmer's conviction for violating an ordinance that prohibited swimming in a breachway connecting a pond to the ocean did not violate the public trust doctrine because the swimmer had left the shore. *Id.* at 607.

been otherwise acquired by private individuals by judicially recognized mechanisms *prior to the effective date of this section [July 18, 2000].*) (emphasis supplied); *see also id.* at §46-23-1(f)(2) (“nothing in this chapter shall be construed to limit or impair the authority of the state, or any duly established agency of the state, to regulate filling or dredging affecting tidal lands owned by the state or *any other entity*”) (emphasis supplied). As of July 18, 2000, only an explicit grant of the state by the General Assembly is sufficient to transfer the state’s ownership interest in tidal lands.⁹ G.L. 1956 §46-5-1.2(a) (“Subsequent to the effective date of this section [July 18, 2000], no title to any freehold estate in any tidal land or filled land can be acquired by any private individual *unless it is formally conveyed by explicit grant of the state by the general assembly for public trust purposes.*”) (emphasis supplied). The Rhode Island Supreme Court has consistently confirmed that the state may transfer its ownership interest in tidal lands. *See Hall v Nascimento*, 594 A.2d 874, 877 (R.I. 1991) (“Such filled or submerged land owned in fee by the State and subject to the public trust doctrine may be conveyed by the State to a private individual by way of legislative grant, provided the effect of the transfer is not inconsistent with the precepts of the public trust doctrine.”);¹⁰ *Town of Warren v. Thornton-Whitehouse*, 740 A.2d 1255, 1259 (R.I. 1999) *citing* *Greater Providence Chamber of Commerce v. State of Rhode Island*, 657 A.2d 1038, 1040 (R.I. 1995) (“the state may grant tidal land to another ...”).

C. Transfer of State’s Regulatory Authority over Tidal Lands

The Rhode Island Supreme Court has also clarified that the state may transfer its regulatory authority over tidal lands (i.e., its *jus publicum*) to another entity, provided that it does so expressly. *See Champlin’s Realty Associates, L.P.*, 823 A.2d 1167 (“... the state could grant municipalities the authority to regulate tidal lands on its behalf”); *see also Town of Warren v. Thornton-Whitehouse*, 740 A.2d 1255 (R.I. 1999) (holding that the Coastal Resources Management Council (“CRMC”) held exclusive regulatory authority over the construction of residential, noncommercial wharves on tidal lands “[b]ecause the Legislature has not explicitly granted to municipalities the authority to regulate tidal lands or the authority to limit the common-law right [of riparian property owners] to wharf out”¹¹). In *Champlin’s Realty*

⁹ Research did not reveal any private grants of tidal land, although such a grant would appear to be possible if the state had previously granted its ownership interest in those tidal lands. However, it appears that in 1881, 962 acres of submerged land was leased to 56 oyster farmers. Ingersoll, 1881.

¹⁰ In *Hall*, the Rhode Island Supreme Court considered a title dispute concerning 10 feet of former beach area that abutted 260 feet of contiguous land created by the placing of fill from the shore into tidal lands. Although the fill was authorized by the state, that authorization had only been for a width of 50 feet. The Supreme Court determined that the plaintiff lot owner’s predecessors in title never abutted the former high water mark. Therefore, the lot owners could not claim any littoral rights and did not own any portion of the 270 feet of the shore. 594 A.2d at 876. The Supreme Court also concluded that the plaintiffs did not acquire title to the shore by adverse possession because “a private party cannot adversely possess public property.” *Id.* at 877.

¹¹ In *Thornton-Whitehouse*, the Rhode Island Supreme Court described the common-law right to wharf out as follows: “... it has long been established in Rhode Island that a riparian land owner has the right to wharf out. Under this doctrine, the riparian land owner has the right to construct whatever wharf or dock is necessary to gain access to navigable waters, as long as such construction does not interfere with navigation or the rights of other riparian land owners. As with any aspect of the common law, that right is subject to limitation by statute. In the past, the Legislature limited this right through the establishment of harbor lines that marked the point beyond which no wharf could extend. Today, it is clear that the Legislature has chosen to limit the right to wharf out by requiring land owners to gain approval from the CRMC before constructing a wharf or a dock in tidal waters, §46-23-6(2).” 740 A.2d at 1260 (internal citations omitted).

Associates, the Supreme Court considered whether the Town of New Shoreham possessed jurisdiction over commercial ferry operations occurring in the Great Salt Pond, which is a tidal water body on Block Island that is connected to the Atlantic Ocean, based on the state's 1887 grant to the town of "[a]ll the right, title and interest of the state in and to the Great Salt Pond and the land covered thereby."¹² Because there was nothing in the 1887 grant to the town that provided evidence of the state's intent to abdicate its public trust responsibilities and police power over the pond, the Supreme Court concluded that "it is apparent that the state ceded its ownership interest, the *jus privatum*, while retaining its responsibility and right to protect the public trust, the *jus publicum*." *Id.* Thus, the Supreme Court rejected the town's argument that it had exclusive jurisdiction over the pond.

D. Extinguishment of the Public Trust Doctrine

While the state may transfer its ownership interest in tidal lands,¹³ the Rhode Island Supreme Court has clarified that such a transfer "does not *ipso facto* include a relinquishment of the state's public trust responsibilities." Champlin's Realty Associates, 823 A.2d at 1167. In other words, if the General Assembly transfers the state's ownership interest in tidal lands to another entity, including a private entity, it does not automatically transfer a fee simple interest, as that concept is traditionally understood. *See id.* at 1166.¹⁴ Rather, it transfers an ownership interest that is limited by the public rights protected by the public trust doctrine; namely, fishery, commerce, navigation and the privileges of the shore, which include the right to fish from the shore, gather seaweed, leave the shore to swim in the sea, and passage along the shore.¹⁵

The Rhode Island Supreme Court has also recognized, however, the principle announced by the U.S. Supreme Court in Ill. Centl. R. R. v. Illinois, 146 U.S. 387, 435 (1892), that a state may extinguish the public trust doctrine in tidal lands within its boundaries that it has conveyed

¹² The 1887 grant also authorized the town "to cause the breach formerly existing between the Great Salt Pond and the sea, or some other way or passage for the inflowing of water from the sea into said pond to be opened between said pond and the sea, and to keep and maintain such opening so made." 1887 R.I. Acts & Resolves ch. 617, §1.

¹³ In one unpublished case, Rhode Island asserted that it may only alienate tidal lands in "unusual circumstances," without providing further clarification of what those circumstances might be. *See Newport Realty, Inc. v. Whitehouse*, 2002 WL 31867871, at *1 (R.I. Super.) (unpublished opinion). Research has not revealed any circumstances where the state has transferred its ownership interest in unfilled tidal lands. More specifically, research did not reveal any information regarding the purported transfer of tidal lands to the Rhode Island Yacht Club. *See the Assessment of Law, Policy, and Practice Related to Private Conservation of Tidal Lands in Rhode Island*, May 2007, prepared by Ronan Roche, PhD Candidate (the "Roche Report"), at 14.

¹⁴ The Rhode Island Supreme Court endorsed Justice Potter's "insightful description of the state's ownership over tidal lands," in Providence Steam-Engine Co. v. Providence and Stonington Steamship Co., 12 R.I. 348, 358 (1879) (Potter, J., concurring) (citing Joseph K. Angell, *Angell on Tide Waters*, 24 (1826)), that "[i]t has been very common to speak of the right of the State in the shore as a fee. This is proper only by analogy. To hold that the State owns the shores in fee in the same sense in which it owns a court-house or a prison, or in which the United States can own public lands, or a citizen may own land in fee, would lead to consequences which need only to be considered in order to show that such can never have been the nature of the right."

¹⁵ *See Jackvony v. Powel*, 21 A.2d 554, 558 (1941) (holding that the Rhode Island Constitution prohibits the state from permitting sections of the shore to be fenced off barring public access).

“for the promotion of navigation or ‘when parcels can be disposed of without detriment to the public interest in the lands or waters remaining.’”¹⁶ See City of Providence v. Comstock, 65 A. 307, 308 (R.I. 1906) (quoting same); see also Greater Providence Chamber of Commerce, 657 A.2d at 1042 (clarifying that the Rhode Island Supreme Court’s decision in Hall, 594 A.2d 874, “acknowledges that the state *may* grant property free of the public-trust doctrine, but there was no evidence of such a grant in that record of that case.” (emphasis in original)). This principle is limited by the Rhode Island Supreme Court’s recognition of the “unique resource that tidal waters constitute and the necessity that they be held by the sovereign in a trustee capacity for the use and benefit of all citizens.” Greater Providence Chamber of Commerce, 657 A.2d at 1042. Based upon this responsibility of the state, the Court has asserted that “[t]hus these lands below the high-water mark will not be appropriated by, or conferred upon, private individuals for purely private benefit. It is this principle that forms the foundation of the public trust doctrine in Rhode Island” *Id.* Accordingly, the General Assembly may transfer the state’s ownership interest in tidal lands and extinguish the public trust doctrine over those lands and waters, but only when there will be no detriment to the public interest in remaining tidal lands and waters, and the transfer is not purely for private benefit.

The Rhode Island Supreme Court has not squarely addressed when the exclusion of public trust uses would cause detriment to the public interest in remaining tidal lands and waters or would purely benefit private interests in the context of unfilled tidal lands. Rather, the Supreme Court has only considered when the public trust doctrine has been extinguished for filled tidal lands. See Greater Providence Chamber of Commerce v. State of Rhode Island, 657 A.2d 1038, 1039 (R.I. 1995)¹⁷ (The Court established a two-part test for determining ownership

¹⁶ The U.S. Supreme Court’s full statement regarding state’s rights over tidal lands provides that: “[i]t is the settled law of this country that the ownership of, and dominion and sovereignty over, lands covered by tide waters, within the limits of the several states, belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among states.” Ill. Centl. R. R., 146 U.S. at 435.

¹⁷ In Greater Providence Chamber of Commerce v. State of Rhode Island, 657 A.2d 1038, 1039 (R.I. 1995), the Rhode Island Supreme Court considered whether the fee-simple absolute title to certain filled tidal lands was in the private-record title holders or in the state for public-trust purposes. There were three categories of properties at issue in this case. The parcels in the first category were formerly part of a tidal saltwater cove that had been created by the placing of fill below mean high tide and did not currently border on navigable or tidal water. Title to these parcels was conveyed by a land grant that was authorized by a General Assembly resolution in 1870. After the filling of the cove, these parcels were substantially improved upon for many years but no legislation during this time recognized any riparian or littoral rights in the owners of the lands bordering on the original lines of the salt water. The second category involved a parcel for which title to the tidal lands was not granted by the General Assembly, but the tidal lands had been reclaimed by filling below mean high tide out to the harbor line. Although there was no evidence in the record that the filling had occurred with the express approval of the state, the Court concluded that it would not have been allowed to occur without the tacit approval of the state on such a busy waterway. The third category involved a parcel where tidal lands were filled to a harbor line with the express approval of the state, but where the General Assembly had not granted title to such tidal lands to the littoral owner. The Rhode Island Supreme Court concluded that the title holders in each of the three categories held title in fee-simple absolute (i.e., not subject to the public trust doctrine). *Id.* at 1043-44. For the filled saltwater cove parcels, the Supreme Court concluded that the substantial improvements on the parcels over many years established the fee-simple absolute title. *Id.* For both categories involving harbor line parcels, the Supreme Court concluded that fee-simple absolute was established because “the harbor lines were a legislative determination, generally made in conjunction with the local

rights in filled tidal lands, which was to be applied on a case-by-case basis.¹⁸); Providence and Worcester Railroad, 729 A.2d 202 (R.I. 1999) (applying test announced in Greater Providence Chamber of Commerce, held that upland owner of property situated along the original shoreline of the Providence River held fee simple title to filled tidal lands located within an existing harbor line). These cases confirm that the General Assembly may extinguish the public trust doctrine in certain circumstances. *See also* Engs v. Peckham, 11 R.I. 210 (1875) (stating in dicta that the filling of land to a harbor line “excluded” the public trust rights in such property); Allen v. Allen, 32 A. 166 (1895) (stating in dicta that filling of land to a harbor line “extinguished” the public trust rights in such property). They also suggest that the Rhode Island Supreme Court applies a deferential standard in reviewing the General Assembly’s determination to extinguish the public trust doctrine because for the tidal lands filled to harbor lines in Greater Providence Chamber of Commerce, the Court relied upon the General Assembly’s past determination that filling out to the harbor lines would not interfere with fishing, commerce or navigation, without questioning the basis for the General Assembly’s determination. *See* Greater Providence Chamber of Commerce, 657 A.2d at 1044 (“The harbor lines were a legislative determination ... that encroachment on the waters to the harbor line would not constitute interference with fishery, commerce or navigation”).¹⁹ Such deference to the General Assembly’s determination regarding the public trust doctrine is consistent with G.L. 1956 §46-5-1.2(d)(1), which provides that:

[t]he general assembly, by its enactments, establishes the policies for the preservation and, in particular, for the use of natural resources of the state which are held in public trust by the state, as provided in Article 1, §17 of the Rhode Island Constitution and in this chapter. The general assembly has the responsibility and the sole authority to arrive at, and define, by its enactment, a policy balance between or among the competing proposed uses or developments for tidal lands and the respective competing assertions concerning the public

government, that encroachment on the waters to the harbor line would not constitute interference with fishery, commerce, or navigation.” *Id.* at 1044. In response to the decisions in Greater Providence Chamber of Commerce and Providence and Worcester Railroad, the General Assembly passed G.L. 1956 §46-5-1.2, which clarifies that private ownership of tidal lands may only be obtained by an explicit grant of the General Assembly.

¹⁸ The two-part test consisted of the following: “[a] littoral owner who fills his or her shore line whether to a harbor line or otherwise, with the acquiescence or the express or implied approval of the state *and* improves upon the land in justifiable reliance on the approval, would be able to establish title to that land that is free and clear. The littoral owner may pursue a course of action seeking to convey the deed to that property to himself or herself and become owner in fee-simple absolute *provided* that the littoral owner has not created any interference with the public trust rights of fishery, commerce, and navigation. Once the littoral owner acquires title to the land in this manner, the state cannot reacquire it on the strength of the public-trust doctrine alone. The state can, however, at any time, place restrictions on the filling in of shoreline provided it does so before a landowner has changed position in reliance on government permission.” *See* Greater Providence Chamber of Commerce, 657 A.2d at 1044.

¹⁹ Although it did not involve an analysis of the public trust doctrine, in State v. Cozzens, 2 R.I. 561 (1850), the Rhode Island Supreme Court stated in dicta that the state’s granting of a lease of an old oyster bed to a private individual is “conclusive of the fact that such oyster bed can be used more to the public advantage as a private bed under lease than as a public bed. We understand the object of these sections is not the benefit of the lessees of the private bed, but, by holding out motives to them to plant and cultivate oysters, to secure to the public a more abundant supply.”). In State v. Cozzens, the Rhode Island Supreme Court determined that shellfisheries are public rights which may be regulated for the public good. 2 R.I. 561.

interests in those lands, and that determination shall be deemed to be, and be accepted as, the *authoritative definition of the public interest in relation to the preservation and use of tidal lands*.

(emphasis supplied). In addition, the statutory framework for aquaculture in Rhode Island established by the General Assembly authorizes exclusive use of tidal lands and the associated water column by the aquaculture leaseholder, at least for the term of the lease and associated assent. *See* G.L. 1956 §20-10-6(a) (“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 ... and the water column above those submerged lands, to an applicant who has been granted an aquaculture permit ...; provided that the CRMC finds that a lease giving the applicant *exclusive use of the submerged lands, and water column, including the surface water*, is necessary to the effective conduct of the permitted aquaculture activities.”) (emphasis supplied). Thus, the General Assembly itself has established that it has the authority to extinguish the public trust doctrine, at least in certain circumstances, which may include aquaculture applications. The Rhode Island Supreme Court has noted that while the public trust doctrine is “firmly embedded in American jurisprudence. Such common law is in force in Rhode Island except as it has been changed by local legislation or custom.” *See Greater Providence Chamber of Commerce*, 657 A.2d at 1042; *see also Comstock*, 65 A. at 308 (same).

In conclusion, if the General Assembly was persuaded to grant tidal lands, and limit the public trust doctrine over those lands, to a private organization for conservation purposes that would benefit the public and not cause a detriment to surrounding tidal lands and waters, such a determination would likely be upheld by the Rhode Island Supreme Court if challenged.²⁰

E. Rhode Island Freedom to Fish and Marine Conservation Act

Even in the event that the General Assembly expressly granted title in tidal lands free of the public trust doctrine, as well as any littoral/riparian owners’ rights to wharf out onto such tidal lands, fishing activities over those tidal lands could only be excluded if the state satisfies the Rhode Island Freedom to Fish and Marine Conservation Act, which provides as follows:

the general assembly finds and declares: ... [v]arious management measures, including the closure of marine waters or portions thereof to fishing, can be utilized to manage fish, shellfish, crustaceans, essential marine habitats or other marine resources, but such measures must be developed in response to specific conservation or restoration needs, be based on the best currently available scientific information, and emanate from an open management and regulatory process, incorporating full input from all affected stakeholders, conducted

²⁰ If the General Assembly were to grant tidal lands free of the public trust doctrine, a private conservation organization would still have to obtain any other applicable authorizations, including an aquaculture assent, from the CRMC, DEM and MFC to conduct restoration activities that meet the definition of aquaculture. *See e.g.*, G.L. 1956 §46-23-6(4)(i) (authorizes CRMC to issue, modify, or deny permits for any *work* in, above or beneath the areas under its jurisdiction, including conduct of any form of aquaculture) (emphasis supplied); *see also Providence and Worcester Railroad*, 729 A.2d 202, 208 (R.I. 1999) (noting the distinction between G.L. 1956 §46-23-6(4)(i) (authority over *work* in) and G.L. 1956 §46-23-6(4)(iii) (authority over *use* of)).

pursuant to the general laws of the state of Rhode Island, G.L. 1956 §20-3.2-2, and

the marine waters of Rhode Island, or portions thereof, shall not be closed to recreational or commercial fishing unless such closure is: (1) deemed necessary in order to protect, manage or restore marine fish, shellfish, crustaceans, and associated marine habitats or other marine resources, protect public health or safety or address some other public purpose; (2) based on the best currently available scientific information; and (3) developed via public review and stakeholder input through chapter 35 of title 42 and other applicable state law, and with the advice of the marine fisheries council; except where the director deems it necessary to institute a closure via emergency rule, in which case the regulation must meet the standard set forth by chapter 35 of title 42 and have an effective period of not more than one hundred twenty (120) days.

G.L. 1956 §20-3.2-3.²¹

i. Implementation by Rhode Island Marine Fisheries Council

The Marine Fisheries Council (MFC), which has regulatory jurisdiction over all marine animal species within the jurisdictional territory of Rhode Island, is authorized, after holding a public hearing,²² to promulgate regulations that govern the “opening and closing of areas within the coastal waters to the taking of any and all types of fish, lobsters, and shellfish.” G.L. 1956 §20-3-2(5); MFC Regulations, §3.2.²³ The MFC implements this authority, on the advice of and in cooperation with the DEM Director, through Shellfish and Marine Life Management Areas (Management Areas), which may be designated for the purpose of “enhancing the cultivation and growth of marine species, managing the harvest of marine species, facilitating the conduct by the Department of experiments in planting, cultivating, propagating, managing, and developing any and all kinds of marine life, and any other related purpose.” G.L. 1956 §20-3-4; MFC Regulations, §3.4. The MFC regulations further clarify that Management Areas may be made for the following purposes:

²¹ Moreover, “[a]ny marine waters of Rhode Island, or portions thereof, that are closed to recreational or commercial fishing shall be reopened if and when the original justification for such closure ceases to apply.” G.L. 1956 §20-3.2-3(b).

²² The Director of the DEM may act to open or close any area within coastal waters for a limited time where he or she “reasonably believes that a delay would adversely affect the public purposes sought to be served by Title 20 of the General Laws of Rhode Island and/or would pose a danger to the public health.” MFC Regulations, §3.5.7. Additionally, the MFC may close any or all of the coastal waters of the State to the taking of any or all types of fish, lobsters and shellfish, without requirement of notice of hearing, where it determines that a biological emergency exists which imminently threatens the marine resources of the state subject to the provisions of §42-35-3(b) (i.e., may be effective for a period no longer than 120 days renewable once for a period not to exceed 90 days). *Id.* at §3.8.

²³ The Rhode Island MFC regulations reviewed for this memorandum were set to become effective on December 15, 2008.

[c]onducting experiments in planting, cultivating, propagating, managing, and developing any and all kinds of shellfisheries or finfisheries, ... protecting shellfisheries and finfisheries from overfishing, ... encouraging the development and growth of any and all shellfisheries or finfisheries, or for any other purpose related to the protection, maintenance, and/or propagation of fisheries resources.

Id. at §3.5.1. Once it designates a Management Area, the MFC must promulgate regulations that it deems necessary for the protection of the “animal life and property” in the Management Area, including “exclusion or restriction of persons from the area or the prohibition of certain activities within the areas or other restrictions as it may deem necessary.”²⁴ *Id.* at §3.4; G.L. 1956 §20-3-4 (same). The regulations further clarify that Management Area designations may include:

restrictions on the quantities, types, or sizes of shellfish or finfish which may be taken in such area, the times during which shellfish or finfish may be taken, the manner or manners in which shellfish or finfish may be taken, or may close such area to the taking of shellfish or finfish altogether.

Id. at §3.5.2. A Management Area designation must not exceed five years, and may be renewed at the end of its initial term. *Id.* at §3.5.3.²⁵

Accordingly, in order to exclude commercial and/or recreational fishing activities from an area of tidal lands where a restoration project involving shellfish beds or aquatic vegetation is proposed to be undertaken, the MFC would need to establish such area as a Management Area (i.e., demonstrate that the conditions of G.L. 1956 §20-3.2-3 were satisfied) and promulgate regulations that excluded such fishing activities. Dave Alves, head of the CRMC aquaculture program, has stated that if restoration activities do not require the installation of any equipment (i.e., only involved seeding and monitoring) on the ocean floor, the establishment of an MFC Management Area would be the most appropriate legal mechanism for such activity. In such case, Mr. Alves clarified that neither a CRMC assent nor lease would be required. However, CRMC regulations and guidance do not appear to confirm Mr. Alves’ assertion, and if cultch is used, a CRMC assent is likely required. Moreover, although the MFC Management Area designation would exclude fishing activities, it is unclear the extent to which the MFC has authority to exclude other public trust uses from the Management Area, such as swimming and navigation, and to affirmatively authorize the proposed restoration activities.

F. Coastal Resources Management Council Leasing of Tidal Lands

If a grant of tidal lands from the General Assembly is not possible, private conservation organizations would need to obtain a CRMC aquaculture assent and possibly an associated lease, along with any other applicable authorizations for restoration activities that meet the definition of aquaculture. CRMC personnel have indicated that any aquaculture lease that involves twenty-

²⁴ Upon the designation of a Shellfish and Marine Life Management Area, the Director of the DEM must place any stakes, bounds, buoys, or markers with the words “Rhode Island Department of Environmental Management” plainly marked on them, as will approximate the Management Area. MFC regulations, §3.4.

²⁵ Research did not reveal additional guidance regarding whether a Management Area may be renewed at the end of subsequent terms.

five acres or more requires the approval of the General Assembly, as a matter of policy.²⁶ The CRMC is authorized to manage and plan for the preservation of the coastal resources of the state. G.L. 1956 §46-23-1(f)(2). As part of its authority, the CRMC was required to develop a system for the leasing and licensing of submerged and filled lands, and to ensure such leases and licenses are consistent with the public trust. *Id.* For large scale filling projects that involve twenty-five (25) acres or more, any lease of tidal lands, or any license to use those lands, is subject to approval by the direct enactment of the General Assembly. *Id.* Prior to the enactment of legislative action for such a project, the CRMC must review any requests for leases, licenses to use the land, and other authority to use the land and provide a recommendation to the General Assembly. *Id.* For projects that do not involve the filling of tidal land of twenty-five (25) acres or more, the CRMC is “delegated the sole and exclusive authority for the leasing of submerged and filled lands and giving licenses for the use of that land.”²⁷ *Id.*

G. CRMC Aquaculture Assents and Leases

The General Assembly has established a statutory framework for aquaculture leases, where aquaculture is defined as “the cultivation, rearing, or propagation of aquatic plants or animals under either natural or artificial conditions.” G.L. 1956 §20-10-2(1). The General Assembly described its intent for this program by stating, in relevant part, that:

[w]hereas, R.I. Const., Art. I, Sec. 17, guarantees to the people the right to enjoy and freely exercise all rights of fishery and imposes on the general assembly the responsibility to provide for the conservation of water, plant, and animal resources of the state; and whereas, it is in the best public interest of the people and the state that the land and waters of the state are utilized properly and effectively to produce plant and animal life; and whereas, the process of aquaculture is a proper and effective method to cultivate plant and animal life; and whereas, 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 well being 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 policy power, the waters of the state and land thereunder are to be regulated under this chapter.

G.L. 1956 §20-10-1.

²⁶ This guidance was reported in the Roche Report at 14. Mr. Alves and James Boyd at the CRMC both confirmed that this is the current CRMC policy.

²⁷ The authority granted to the CRMC to issue leases and licenses for tidal lands does not “limit or impair the obligation of the applicant to obtain all applicable regulatory approvals.” G.L. 1956 §46-23-1(f)(2). Although G.L. 1956 §46-23-1(f)(2) would appear to grant the CRMC the authority to grant leases specifically for conservation purposes (i.e., outside the framework for aquaculture leases), the CRMC has only established a leasing program for aquaculture operations. However, see footnote 42 for additional clarification.

i. CRMC Aquaculture Leases

The CRMC is specifically authorized to lease tidal lands, and the water column above those tidal lands, to an applicant who has been granted an aquaculture assent by the CRMC, provided that “the CRMC finds that a lease giving the applicant *exclusive use of the submerged lands, and water column, including the surface water*, is necessary to the effective conduct of the permitted aquaculture activities.”²⁸ *Id.* at §20-10-6(a); *see also* CRMC regulations (i.e., the Rhode Island Coastal Resources Management Program (RICRMP), §300.11(B)(2) (“The CRMC may grant aquaculture applicants exclusive use of the submerged lands and water column, including the surface water, when the Council finds such exclusive use is necessary to the effective conduct of the permitted aquaculture activities. Except to the extent necessary to permit the effective development of the species of animal or plant life being cultivated by the permittee, the public shall be provided with means of reasonable ingress and egress to and from the area subject to an aquaculture lease for traditional water activities such as boating, swimming, and fishing.”). The General Assembly has established the extent to which public uses may be excluded from an area subject to an aquaculture assent and lease, by stating that:

[e]xcept to the extent necessary to permit the effective development of the species of animal or plant life being cultivated by the permittee, the public shall be provided with a means of reasonable ingress and egress to and from the area subject to permit for traditional water activities such as boating, swimming and fishing. All limitations upon the use by the public of the areas subject to the permit shall be clearly posted by the permittee pursuant to regulations by the CRMC.

Id. at 20-10-9(b).²⁹ Accordingly, a CRMC aquaculture assent and a lease over the tidal lands covered by the assent are both required for the aquaculture permittee to have exclusive use, or to exclude any particular uses (i.e., be able to restrict other public trust uses),³⁰ over the submerged lands and water column, including the surface water, over those lands.

a. Terms and Conditions of Aquaculture Leases

CRMC leases must be subject to the terms and conditions of the CRMC aquaculture assent, and any renewal of such assent, and failure to comply with the conditions of the assent or the associated CRMC regulations is grounds for termination of the lease at the discretion of the

²⁸ The CRMC regulations and guidance do not clarify how the CRMC determines if exclusive use is “necessary to the effective conduct of the permitted aquaculture activities.”

²⁹ The CRMC regulations describe the CRMC enforcement authority over aquaculture assents by stating that “[a]ny person who maliciously and willfully destroys, vandalizes, or otherwise disrupts aquaculture activities permitted by the Council shall be in violation of an order of the Council and liable to all fines and penalties under law.” RICRMP, §300.11(F)(1)(b).

³⁰ As described earlier, only the MFC may exclude fishing activities under the Rhode Island Freedom to Fish and Marine Conservation Act. Although a CRMC aquaculture lease may exclude competing private uses from the area comprising the lease, as a practical matter, a CRMC lease cannot exclude all sources of pollution from a leased area.

CRMC. *Id.* at §20-10-6(c).³¹ The CRMC is authorized to lease tidal lands and the water column above those lands for a term “concurrent with the term of the aquaculture permit and may be renewed from time to time upon renewal of the aquaculture permits.” *Id.* at §20-10-6(b). The CRMC may grant assents for the conduct of aquaculture to any person, corporation or business entity, chartered under the laws of Rhode Island, for a term not to exceed fifteen (15) years, and shall be renewable upon application by the permittee for successive periods of ten (10) years, provided all conditions of the permit have been met.³² *Id.* at §20-10-3; *see also* RICRMP, §300.11(B)(5) and (7).

ii. CRMC Aquaculture Assents - Prerequisites

The CRMC may only authorize aquaculture³³ activities by assent. RICRMP, §300.11(B)(2). The CRMC may not grant an aquaculture assent prior to the consideration of recommendations regarding such permit by both the Director of the DEM and the MFC.³⁴ *Id.* at 20-10-5(b); RICRMP, §300.11(C)(1). In reviewing the application for an aquaculture assent, the Director of the DEM, or his or her designee, must determine whether the proposed aquaculture activities are (1) not likely to cause an adverse effect on the marine life adjacent to the area to be subject to the permit and the waters of the state, and (2) not likely to have an adverse effect on the continued vitality of indigenous fisheries of the state. *Id.* at 20-10-5(c); RICRMP, §300.11(C)(1). The MFC must determine whether the proposed aquaculture activities are

³¹ In addition, any unauthorized assignment or sublease of the area subject to a CRMC aquaculture lease shall be grounds for the termination of the lease at the discretion of the CRMC. G.L. 1956 §20-10-6(d). The CRMC assesses the following annual fees for aquaculture leases, in addition to certain application fees: \$75 for half an acre or less, and \$150 for a half to one acre and \$100 dollars for each additional acre. RICRMP, §160(C)(1).

³² Although G.L. 1956 §46-23-16 authorizes the CRMC to “grant permits, licenses, and easements for tidal lands for any term of years or in perpetuity,” the potential term of aquaculture leases and assents is limited by G.L. 1956 §20-10-3. Additionally, although the Rhode Island Supreme Court has not ruled on the issue, it noted that “the granting of a permit in perpetuity by the CRMC could conceivably implicate concerns of an impermissible delegation of legislative authority.” Providence and Worcester Railroad, 729 A.2d 202, 208 n.8 (R.I. 1999).

³³ For the purpose of the CRMC, marine aquaculture is defined as “the culture of salt tolerant aquatic species under natural or artificial conditions in tidal waters and coastal ponds including but not limited to: fish farming utilizing pens, tanks or impoundments; the culture of shellfish on the sea floor, in cages, or suspended from structures in the water; and the culturing of aquatic plants.” RICRMP, §300.11(A)(1).

³⁴ In submitting an application for an aquaculture permit, the following information must be included: (1) name and address of applicant, (2) description of the location and amount of submerged land and water column subject to the permit; (3) a description of the aquaculture activities to be conducted, including whether the activities are experimental or commercial, a description of the species to be managed or cultivated, and a description of the method or manner of aquaculture activities. G.L. 1956 §20-10-4. Prior to submitting a formal Category B application for aquaculture activities within tidal waters, applicants must first submit a Preliminary Determination application for the proposed project in accordance with CRMC procedures. CRMC regulations, §300.11(C)(3). A formal application may be submitted only after the receipt of the completed Preliminary Determination report. *Id.* Applicants must submit with their application all required information as specified in the most recent version of the CRMC aquaculture checklist. CRMC regulations, §300.11(C)(4). Additional requirements for aquaculture Assent applications are described in §300.11(D), which include providing sufficient information for the CRMC to determine, *inter alia*, (1) the compatibility of the proposal with other existing and potential uses of the area and areas contiguous to it, including navigation, recreation and fisheries, (2) the degree of exclusivity required for aquaculture activities on the proposed site, and (3) the cumulative impact of a particular aquaculture proposal in an area, in addition to other aquaculture operations already in place.

consistent with competing uses engaged in the exploitation of the marine fisheries. *Id.* at 20-10-5(d); RICRMP, §300.11(C)(1). The CRMC prohibits private aquaculture activities in uncertified waters (i.e., restricted areas as defined by the National Shellfish Sanitation Program) that contain significant shellfish stocks potentially available for relay into certified public waters for free and common fishery.³⁵ *Id.* at §300.11(E)(2) and (B)(8). Additionally, introduction of non-indigenous species is prohibited unless protocols are in place to ensure that no accidental releases into the state's waters can occur.³⁶ *Id.* at §300.11(E)(4).

a. DEM Aquaculture License

The DEM has promulgated regulations for the aquaculture³⁷ of marine species, which describe the permits, licenses and conditions under which aquaculture may be conducted. If conservation organizations work within DEM's wild shellfishing transplant program, or obtains shellfish from a state-approved hatchery, DEM aquaculture licenses would not be required. However, if the shellfish are obtained from other sources, a CRMC aquaculture assent may not be issued until an aquaculture license for the possession, importation, and transportation of marine shellfish species used in an aquaculture operation is obtained from DEM. RICRMP, §300.11(C)(2). DEM aquaculture licenses may not be granted for species that are not endemic to Rhode Island without the prior approval of the Director of DEM, with the advice of the Biosecurity Board. DEM Aquaculture Regulations, §2.4.³⁸ The DEM aquaculture license specifies the conditions governing the taking, possession, sale, importation and transportation of cultured crops utilized in the aquaculture lease. *Id.* at §2.2.³⁹ Unless modified by the DEM,

³⁵ Aquaculture projects, other than shellfish aquaculture proposed for not-approved areas, may be granted by the CRMC provided that the applicant provides sufficient evidence that no harm to public health or safety will result. RICRMP, at §300.11(B)(8)(b). In the case of shellfish aquaculture, such activities shall be prohibited unless the applicant provides written statements from the directors of the departments of environmental management and health certifying that the proposed activity is consistent with the requirements of the National Shellfish Sanitation Program. *Id.*

³⁶ These protocols will be reviewed by the CRMC Bio-Security Board before an assent is issued. RICRMP regulations, §300.11(E)(4). Any proposed modifications to the permitted operation will be reviewed by the Bio-Security Board before an assent modification can be issued. *Id.* The issuance of an assent under these stipulations can be revoked if a release of non-indigenous species takes place during the term of the assent. *Id.*

³⁷ "Aquaculture" is defined under these regulations as "the cultivation, rearing or propagation of aquatic plants or animals, hereinafter referred to as cultured crops, under natural or artificial conditions." DEM Aquaculture Regulations, §1.2. "Cultured crops," in turn, is defined as "aquatic or marine animals or plants: (i) that are in the location, water column or artificial conditions specified in a valid aquaculture permit issued pursuant to RIGL section 20-10-3 or that have been taken by the holder of such permit from the location, water column or artificial conditions specific in such permit, or (ii) that have been produced by aquaculture methods outside the state and have not been commingled with wild stocks that are in or have been removed from the water of the state...." DEM Aquaculture Regulations, §1.9. In contrast, "wild stock" is defined as "natural resources, including aquatic or marine animals or plants, which grow within the waters of the state, and are not cultured in any way." *Id.*

³⁸ The RICRMP also includes this requirement. *See* §300.11(C)(10) (Applicants who propose to introduce non-indigenous species into an aquaculture setting are required to design a protocol that will be reviewed by the Bio-Security Board prior to issuance of an assent). This review can occur concurrently with the aquaculture application process. *Id.*; *see also* G.L. 1956 §20-10-1.1 and 1.2.

³⁹ In order to receive a DEM aquaculture license, the applicant must submit an operational plan, which specifies, at a minimum, the following information: description of the design and activities of the aquaculture facility,

aquaculture licenses are automatically renewed every January first, provided that the proper annual reports of aquaculture activities conducted that year are filed on the required form no later than December first of each year. *Id.* at §2.2. The DEM has enforcement authority, including authority to issue penalties, over aquaculture licenses. *Id.* at §3.1-3.3.

b. Other Potential Prerequisites

Depending on site-specific circumstances, restoration activities may require additional permits or authorizations. If a proposed aquaculture activity affects submerged aquatic vegetation (SAV), which includes eelgrass and widgeon grass, the requirements of the RICRMP at §300.18 would have to be complied with. In short, these provisions require that it be determined whether SAV may be affected, and if so, that the impacts be avoided or minimized. Where alterations of freshwater wetlands may occur, the applicant for an aquaculture assent must first obtain a permit from the DEM Division of Freshwater Wetlands prior to applying with the CRMC. CRMC regulations, §300.11(C)(5). If the aquaculture project involves any in-water structures, such as netting, cages, boxes or floats, a U.S. Army Corps of Engineers permit is required under §10 of the Rivers and Harbors Act, 33 U.S.C. §403, which would also trigger the requirement for a water quality certification from the DEM under §401 of the Clean Water Act, 33 U.S.C. §1341. Similarly, CRMC may not approve an application for an aquaculture assent prior to the issuance of a Rhode Island Pollutant Discharge Elimination System (“RIPDES”) permit, if such permit is required. DEM Aquaculture Regulations, §2.1. Aquaculture operations may trigger the need for assessment of archeological sites for the Rhode Island Historic Commission and would have to comply with any applicable CRMC zoning requirements. For example, in multi-purpose waters (which include (1) large expanses of open water in Narragansett Bay and the Sounds which support a variety of commercial and recreational activities while maintaining good value as a fish and wildlife habitat; and (2) open waters adjacent to shorelines that could support water-dependent commercial, industrial, and/or high-intensity recreational activities) aquaculture leases shall be considered if the Council is satisfied there will be no significant adverse impacts on the traditional fishery.⁴⁰ RICRMP, §200.4.

iii. CRMC Aquaculture Assents - Procedures for Obtaining

CRMC approval of an aquaculture assent is subject to a public hearing, in accordance with Rhode Island administrative law. *Id.* at 20-10-5(e). More specifically, aquaculture assent applications are reviewed under the Category B process as defined by the RICRMP,⁴¹ which

specific location and boundaries of the aquaculture lease and facility, types and locations of structures, species to be cultured, source of these programs (i.e., wild or cultured), procedures to prevent contamination, program of sanitation and maintenance, description of the water source including details of water treatment, program to maintain water quality, maintenance records, and shell stock will be harvested. *Id.* at §5.1. Aquaculture operations must be practiced only in strict compliance with the approved operational plan. *Id.* The current version of the DEM aquaculture regulations do not include algae culture requirements, but include detailed shellfish culture requirements. *See id.* at §7.0 and 8.0.

⁴⁰ The full scope of the CRMC zoning regulations are beyond the scope of this memorandum.

⁴¹ Section 300.1 of the RICRMP provides that: “[a]ll persons applying for a Category B Assent are required to: 1. Demonstrate the need for the proposed activity or alteration; 2. Demonstrate that all applicable local zoning ordinances, building codes, flood hazard standards, and all safety codes, fire codes, and environmental requirements have or will be met; local approvals are required for activities as specifically prescribed for

requires a 30-day public notice period followed by consideration and approval by the full Council. If substantive objections⁴² are submitted during the public comment period, the application may be evaluated by a subcommittee at a public hearing before being considered by the full Council. If the aquaculture assent application is approved, the CRMC may require a performance bond to be posted by the applicant to cover the cost of clean-up operations and gear removal should the site be abandoned. The bond coverage amount is set by the CRMC. If the application is granted, the applicant must abide by the stipulations prepared for the aquaculture operation and conditions of the aquaculture lease. The lease agreement is prepared by the CRMC and forwarded to the applicant. Lease fees must be paid in full by January 1st of each operation year. The annual report forms will be provided to the aquaculture permit holders during the month of December, prior to the due date.

a. Reduced Procedures for Specialized Assents

The CRMC aquaculture regulations authorize the Executive Director of the CRMC to issue three types of aquaculture assents without the need for approval by the full Council. These include experimental assents, commercial viability assents,⁴³ and education/research assents. RICRMP, at §300.11(F). Experimental assents may be issued for operations expressly for the purpose of developing and testing new gear or techniques for aquaculture operations, with the following conditions: (1) applicants may be approved for up to three separate sites, with up to an area of 1,000 square feet for each site, provided the sites are not within 500 feet of one another; (2) the assents are valid for a period not to exceed three years; and (3) a lease may be required and the sale of any aquaculture product is not allowed. *Id.* at §300.11(F)(1)(f).

nontidal portions of a project in Sections 300.2, 300.3, 300.6, 300.8, 300.9, 300.11, 300.13, 300.15 and 300.17; for projects on state land, the state building official, for the purposes of this section, is the building official; 3. Describe the boundaries of the coastal waters and land area that are anticipated to be affected; 4. Demonstrate that the alteration or activity will not result in significant impacts on erosion and/or deposition processes along the shore and in tidal waters; 5. Demonstrate that the alteration or activity will not result in significant impacts on the abundance and diversity of plant and animal life; 6. 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; 7. Demonstrate that the alteration will not result in significant impacts to water circulation, flushing, turbidity, and sedimentation; 8. Demonstrate that there will be no significant deterioration in the quality of the water in the immediate vicinity as defined by DEM; 9. Demonstrate that the alteration or activity will not result in significant impacts to areas of historic and archaeological significance; 10. Demonstrate that the alteration or activity will not result in significant conflicts with water-dependent uses and activities such as recreational boating, fishing, swimming, navigation, and commerce, and; 11. Demonstrate that measures have been taken to minimize any adverse scenic impact (see Section 330).”

⁴² Substantive objections are defined by one or more of the following: (1) threat of direct loss of property of the objector(s) at the site in question; (2) direct evidence that the proposed alteration or activity does not meet all of the policies, prerequisites, and standards contained in applicable sections of this document; (3) evidence is presented which demonstrates that the proposed activity or alteration has a potential for significant adverse impacts on one or more of the following descriptors of the coastal environment: (a) circulation and/or flushing patterns; (b) sediment deposition and erosion; (c) biological communities, including vegetation, shellfish and finfish resources, and wildlife habitat; (d) areas of historic and archaeological significance; (e) scenic and/or recreation values; (f) water quality; (g) public access to and along the shore; (h) shoreline erosion and flood hazards; or (4) evidence that the proposed activity or alteration does not conform to state or duly adopted municipal development plans, ordinances, or regulations. RICRMP, §110.3

⁴³ Commercial viability permits may only be issued for the express purpose of determining if a particular site is suitable for commercial aquaculture. RICRMP, §300.11(F)(1)(g).

Education/research assents are subject to the same conditions as experimental assents, but the Executive Director of the CRMC may grant extensions to education/research assents, where each extension may not exceed three years. *Id.* at §300.11(F)(1)(h). Experimental assents may not be extended. *Id.* at §300.11(F)(1)(f). Assents that do not comply with the conditions specified for experimental or education/research assents must be approved by the full CRMC. *Id.* at §300.11(F)(1)(f) and (h).

iv. CRMC Aquaculture Assents - Conditions

CRMC assents are subject to several general conditions. Where the CRMC confirms that public uses may be excluded from an area subject to an aquaculture lease, the permittee must post all authorized limitations upon the use by the public. RICRMP, §300.11(F)(1)(c). If the CRMC determines that an approved aquaculture operation is not actively “farmed” for a period of one year, the assent and lease shall be deemed null and void and the site shall be returned to the State’s free and common fishery.⁴⁴ *Id.* at §300.11(B)(6).

⁴⁴ James Boyd (CRMC) clarified that active monitoring would be sufficient to satisfy the “active farming” requirement in the context of conservation activities. Dave Alves (CRMC) also stated that the CRMC is in the process of developing new regulations that would clarify the “active farming” requirement.