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# Migratory Bird Conservation and Shellfish Aquaculture in Rhode Island: Legal Issues

*Nicole Andrescavage, Rhode Island Sea Grant Law Fellow  
October 2017*

From 2014 to 2016, Rhode Island shellfish growers applied for a series of leases to produce oysters in close proximity to lands used for waterfowl hunting. The emerging conflict between these uses required the relevant agencies to seek modifications to minimize problems and highlighted a need to better understand the relevant authorities governing these agencies. This study provides an overview of how state and federal legal authorities govern the interaction of shellfish leasing and waterfowl management in Rhode Island, including whether shellfish leasing may be considered incidental take under federal law.

Rhode Island's salt ponds have long been centers of human activity and prime waterfowl habitat. Humans use the ponds for a wide array of activities, including birding, hunting, and shellfish aquaculture.<sup>1</sup> Careful management is needed to ensure that these activities do not result in user conflicts or other undesirable outcomes. However, a series of six permit applications for aquaculture leases in Ninigret and Point Judith Ponds from 2014 to 2016 raised potential conflicts between aquaculture and waterfowl.<sup>2</sup> These applications were resolved effectively through interagency and applicant consultation. However, the process highlighted a need to clarify the legal authorities for each agency to ensure that similar applications raising similar concerns are effectively addressed in the future.

Several federal and state agencies manage the uses of the ponds for aquaculture and for waterfowl and hunting. The Rhode Island Coastal Resources Management Council (CRMC) is responsible for aquaculture permitting.<sup>3</sup> The Rhode Island Department of Environmental Management (RIDEM)'s Division of Fisheries & Wildlife Division (Fish & Wildlife) is responsible for conservation of the state's waterfowl and for managing waterfowl hunting.<sup>4</sup>

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<sup>1</sup> 16-1-12 R.I. CODE R. § 100(B)(1); 16-1-12 R.I. Code R. § 100 (B)(2) (1999).

<sup>2</sup> Coastal Resources Management Council, File No. 2016-08-092 (May 1, 2017); Coastal Resources Management Council, File No. 2016-02-051 (November 28, 2016); Coastal Resources Management Council, File Nos. 2016-04-009 (November 28, 2016), 2016-05-019 (October 18, 2016), and 2016-03-024 (October 14, 2016); Coastal Resources Management Council, File No. 2015-07-087 (April 14, 2016).

<sup>3</sup> 20 R.I. GEN. LAWS § 20-10-3.

<sup>4</sup> 20 R.I. GEN. LAWS §§ 20-1-2; 20-1-4; 20-1-5; 20-1-12(a)(1).



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Finally, the United States Fish & Wildlife Service (USFWS) implements the Migratory Bird Treaty Act of 1919 (MBTA), which protects migratory waterfowl and other birds.<sup>5</sup>

Part 1 of this study provides background on the emergence of aquaculture and waterfowl as a point of conflict in Rhode Island's salt ponds. Part 2 explains the legal context governing CRMC, RIDEM, and USFWS in this area. Part 3 discusses the interaction and obligations created by the legal standards governing aquaculture permitting and waterfowl protection. Part 4 concludes with a review of the findings of the study.

## 1 Aquaculture and Hunting: Conflicts and Resolutions

Beginning in 2014, CRMC received a series of six applications for aquaculture leases to be located in proximity to waterfowl hunting areas in the salt ponds. Fish & Wildlife objected to each of these six applications because of potential impacts on habitat for at-risk migratory waterfowl<sup>6</sup> and on long-standing use of the adjacent shoreline and water for waterfowl hunting.<sup>7</sup> This section reviews the impacts identified by RIDEM and the resolution of these applications.

### 1.1 Impacts on Waterfowl

RIDEM concerns related to the applications were particularly focused on potential harm to the American Black Duck (*Anas rubripes*). Black ducks, along with other waterfowl, rely on the salt ponds as habitat, feeding, and nesting sites, particularly during the winter.<sup>8</sup> Black ducks feed on aquatic vegetation in the shallow areas ponds, including at a high concentration in these areas proposed for aquaculture.<sup>9</sup>

The black duck is a Species of Greatest Conservation Need (SGCN) in Rhode Island.<sup>10</sup> RIDEM targets SGCN proactively for conservation and management in order to avoid the

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<sup>5</sup> 16 U.S.C. §§ 703-712.

<sup>6</sup> *Id.*; *See, e.g.*, Coastal Resources Management Council, File No. 2015-07-087, "Rhode Island Department of Environmental Management Division of Fish and Wildlife, Letter of Objection, September 28, 2015," (April 14, 2016).

<sup>7</sup> Interview with Joshua Beuth, Wildlife Biologist, Rhode Island Department of Environmental Management Division of Fisheries and Wildlife and David Beutel, Aquaculture Coordinator, Rhode Island Coastal Resources Management Council (July 21, 2017) [hereinafter *Beuth/Beutel Interview*]. *See also, e.g.*, Coastal Resources Management Council, File No. 2016-03-024, "Rhode Island Department of Environmental Management Division of Fish and Wildlife, Letter of Objection, April 8, 2016" (October 14, 2016).

<sup>8</sup> *Beuth/Beutel Interview, supra* note 7.

<sup>9</sup> Coastal Resources Management Council, File No. 2016-02-051, "Rhode Island Department of Environmental Management Division of Fish and Wildlife, Letter of Objection, March 24, 2016" (2016).

<sup>10</sup> RIDEM, RHODE ISLAND WILDLIFE ACTION PLAN (RI WAP) (2017), <http://www.dem.ri.gov/programs/fish-wildlife/wildlifehuntered/swap15.php>.

need to list them under the Endangered Species Act (ESA).<sup>11</sup> The black duck is listed in the 2015 State Wildlife Action Plan, which is a non-regulatory plan meant to guide Fish & Wildlife’s species conservation efforts.<sup>12</sup> The Plan identifies several ways in which aquaculture activity could potentially affect black ducks; these impacts have served as the basis for DEM objections. First, the potential siting of an aquaculture lease could coincide with a portion of the pond in which the black ducks feed on submerged aquatic vegetation, preventing the ducks from accessing a food source.<sup>13</sup> Second, the noise and presence of humans working on and maintaining aquaculture sites in and around ducks habitat may present a negative anthropogenic impact because “they do not tolerate human disturbance” within approximately 250 yards of their habitat.<sup>14</sup> DEM objected to one site in particular because it could prevent ducks from utilizing a cove as refuge during “harsh winter conditions.”<sup>15</sup> DEM has suggested that the shrinking habitat and lack of food for the black ducks would result in a further decline of this species.<sup>16</sup>

## 1.2 Impacts on Hunting

Fish & Wildlife has raised concerns about impacts of the aquaculture facilities on hunting opportunities. Hunters would be negatively affected by the displacement of the black ducks (and other species) from the area, likely resulting in reduced harvest during the hunting season.<sup>17</sup> The aquaculture permit applications also presented potential safety concerns, including navigational hazards for hunters on boats and submerged gear hazards for hunting dogs that retrieve ducks from the water.<sup>18</sup>

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.* The Plan is not legally binding on CRMC, though CRMC regulations note the plan as a reason for prioritizing the black ducks and considering a project’s impacts on the species in the salt ponds. 16-1-12 R.I. CODE R. § 940(C)(7)-(C)(8).

<sup>13</sup> RIDEM, RHODE ISLAND WILDLIFE ACTION PLAN (RI WAP) (2017).

<sup>14</sup> Coastal Resources Management Council, File No. 2016-03-024, “Rhode Island Department of Environmental Management Division of Fish and Wildlife, Letter of Objection, April 8, 2016” (October 14, 2016).

<sup>15</sup> Coastal Resources Management Council, File No. 2016-02-051, “Rhode Island Department of Environmental Management Division of Fish and Wildlife, Letter of Objection, March 24, 2016” (2016).

<sup>16</sup> *See* Coastal Resources Management Council, File No. 2016-08-092 (May 1, 2017); Coastal Resources Management Council, File No. 2016-02-051 (November 28, 2016); Coastal Resources Management Council, File Nos. 2016-04-009 (November 28, 2016), 2016-05-019 (October 18, 2016), and 2016-03-024 (October 14, 2016); Coastal Resources Management Council, File No. 2015-07-087 (April 14, 2016).

<sup>17</sup> Coastal Resources Management Council, File No. 2016-03-024, “Email From Jim Arnoux to Dave Beutel, July 27, 2016” (October 14, 2016); Coastal Resources Management Council, File No. 2016-03-024, “Rhode Island Department of Environmental Management Division of Fish and Wildlife, Letter of Objection, April 8, 2016” (October 14, 2016).

<sup>18</sup> *Id.*

### 1.3 Resolution of Applications

Each of the objections raised by Fish & Wildlife was resolved by consultation among Fish & Wildlife, CRMC staff, and the permit seeker.<sup>19</sup> Modifications have included moving lease areas away from vegetated habitat, imposing time restrictions during hunting season, and requiring lessees to pull some gear during the winter.<sup>20</sup> In one group of applications, for example, Fish & Wildlife submitted a letter of objection to a three-part application to expand an existing lease and to obtain a lease for a new storage site in Ninigret Pond.<sup>21</sup> Fish & Wildlife objected based on negative impacts on wintering waterfowl habitat, navigational and safety hazards to waterfowl hunters and their dogs near shore, and the presence of eelgrass.<sup>22</sup> Lease stipulations were agreed after “numerous meetings” between CRMC and Fish & Wildlife and a site visit with the applicant.<sup>23</sup> The stipulations were: reduced size for the expansion to avoid a significant negative impact to wintering waterfowl; approval of a storage site and agreement to pull gear out of the water and store in the storage site during the winter to lessen concern of hazard to hunters; and working no more than three days per week after December 1 while limiting working hours to 10:00 AM to 2:00 PM from November to April.<sup>24</sup> RIDEM removed its formal objection once these resolutions were agreed.<sup>25</sup> In another case, a conflict was resolved when the applicant agreed to shift the production method from tray to bottom culture.<sup>26</sup> Other approved leases included similar consultations and agreed modifications and stipulations to minimize the conflicts between growers, waterfowl, and hunters.

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<sup>19</sup> *Beuth/Beutel Interview, supra note 7*; see also Coastal Resources Management Council, File No. 2016-08-092 (May 1, 2017); Coastal Resources Management Council, File No. 2016-02-051 (November 28, 2016); Coastal Resources Management Council, File Nos. 2016-04-009 (November 28, 2016), 2016-05-019 (October 18, 2016), and 2016-03-024 (October 14, 2016); Coastal Resources Management Council, File No. 2015-07-087 (April 14, 2016).

<sup>20</sup> See Coastal Resources Management Council, File No. 2016-08-092 (May 1, 2017); Coastal Resources Management Council, File No. 2016-02-051 (November 28, 2016); Coastal Resources Management Council, File Nos. 2016-04-009 (November 28, 2016), 2016-05-019 (October 18, 2016), and 2016-03-024 (October 14, 2016); Coastal Resources Management Council, File No. 2015-07-087 (April 14, 2016).

<sup>21</sup> Coastal Resources Management Council, File Nos. 2016-04-009 (November 28, 2016), 2016-05-019 (October 18, 2016), and 2016-03-024 (October 14, 2016).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Beuth/Beutel Interview, supra note 7.*

## 2 Agency Statutes, Regulations, and Case Law

The relationship between aquaculture and waterfowl in the salt ponds is affected by CRMC, RIDEM, and USFWS, each of which is responsible for implementing relevant statutes. This section provides an overview of these agencies and the relevant statutes.

### 2.1 CRMC

The CRMC was established “as the principal mechanism for management of the state’s coastal resources.”<sup>27</sup> Among its other functions, the CRMC has statutory authority to “grant permits for the conduct of aquaculture to any person, corporation or business entity, chartered under the laws of this state”<sup>28</sup> and to create regulations for this purpose.<sup>29</sup> Aquaculture permits grant exclusive use of the submerged lands and water column, subject to reasonable access to the area for “traditional water activities such as boating, swimming, and fishing.”<sup>30</sup>

The CRMC regulations contain provisions to identify and avoid conflicts among uses during permitting, including aquaculture permitting. Among other requirements, all applicants for any CRMC Category B permit, including an aquaculture permit, must demonstrate that:

- “the alteration or activity will not result in significant impacts on the abundance and diversity of plant and animal life;”
- “the alteration will not unreasonably interfere with, impair, or significantly impact existing public access to, or use of, tidal waters and/or the shore;” and
- “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.”<sup>31</sup>

The CRMC makes its aquaculture permitting decisions on the basis of these and other demonstrations and consistent with the more specific policies and disclosures required for aquaculture. The aquaculture regulations do not specifically consider or require avoidance or minimization of conflicts with waterfowl or hunting. However, an application for an aquaculture permit must provide a range of required information, including all information necessary for the CRMC to determine “the compatibility of the proposal with other existing and potential uses of the area and areas contiguous to it.”<sup>32</sup> In addition, aquaculture sites

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<sup>27</sup> 46 R.I. GEN. LAWS § 46-23-1(c).

<sup>28</sup> 20 R.I. GEN. LAWS § 20-10-3.

<sup>29</sup> *Id.* § 20-10-11.

<sup>30</sup> 16-2-1 R.I. CODE R. § 300.11(B).

<sup>31</sup> *Id.* § 300.1.

<sup>32</sup> *Id.* § 300.11(D).

must not be sited or operated so as “to obstruct public access to and from tidal waters.”<sup>33</sup> Other relevant siting restrictions also apply, notably including a requirement that aquaculture activities must avoid and mitigate impacts on submerged aquatic vegetation (“SAV”), which the regulations note is an important resource for waterfowl.<sup>34</sup>

The CRMC aquaculture permitting process includes several steps. To obtain a permit and lease, applicants are required first to submit a Preliminary Determination (“PD”) application. “Preliminary determinations provide advice as to the required steps in the approval process, and the pertinent ordinances, regulations, rules, procedures and standards which may be applied to the proposed development project.”<sup>35</sup> A formal application for a CRMC permit can be submitted only after CRMC has completed the PD report, and the formal application must be prepared in accordance with the recommendations in the PD report.<sup>36</sup> The CRMC then issues a public notice of the application, and a public meeting must be held if one or more “substantive objections” are raised, including “potential for significant adverse impacts” on “biological communities, including vegetation, shellfish and finfish resources, and wildlife habitat.”<sup>37</sup>

The permitting process includes opportunities for interagency consultation. In practice, the CRMC provides PD applications to RIDEM staff for comment. In addition, the CRMC is required to notify the director of RIDEM and the Marine Fisheries Council (“MFC”) when a completed formal application is received. The director of RIDEM must review the permit application to determine if the activities proposed are “[n]ot likely to cause an adverse effect on the marine life adjacent to the area.”<sup>38</sup> CRMC cannot approve an application without prior “consideration of recommendations by both the director and the MFC.”<sup>39</sup>

CRMC has created additional relevant requirements for any CRMC-regulated activities occurring in the salt ponds through the Salt Ponds Region Special Area Management Plan (“Salt Ponds SAMP” or “SAMP”).<sup>40</sup> The SAMP lists the policies of the Council in the salt ponds, which include management and protection of SAV and state that the black duck is a “high priority species for conservation” and that both the duck and its vegetated habitat “have a high priority for protection by the Council.”<sup>41</sup> The SAMP also requires the CRMC to

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<sup>33</sup> *Id.* § 300.11(F)(i).

<sup>34</sup> 16-2-1 R.I. CODE R. § 300.18(B)(9)-(10), (C)(2).

<sup>35</sup> 16-1-12 R.I. CODE R. § 900(B)(7) (salt pond region SAMP regulations).

<sup>36</sup> 16-2-1 R.I. CODE R. § 300.11(C)(3).

<sup>37</sup> *Id.* § 110.2(B); 16-2-1 R.I. CODE R. § 110.3(A)(3).

<sup>38</sup> 20 R.I. GEN. LAWS § 20-10-5(c)(1).

<sup>39</sup> *Id.* § 20-10-5(a)-(b); 16-2-1 R.I. CODE R. § 300.11(C)(1).

<sup>40</sup> 16-1-12 R.I. CODE R. §§ 100-1000.

<sup>41</sup> *Id.* §§ 940(C)(5); 940(C)(7).

“consider project impacts on waterfowl species including their habitat and nutritional resources such as vegetation, shellfish, and fish.”<sup>42</sup>

## 2.2 RIDEM Fish & Wildlife

RIDEM has “authority and responsibility over the fish and wildlife of” Rhode Island, including marine waters.<sup>43</sup> It may create and enforce rules and regulations necessary for the management of these resources.<sup>44</sup> Rhode Island fish and wildlife statutes and RIDEM regulations provide for management of both hunting and wildlife protection.

RIDEM is specifically authorized to regulate hunting (e.g., seasons, bag limits), including by issuing regulations prohibiting the “taking. . . of any species” and the “taking, molestation, or disturbance in any way of nesting, breeding, or feeding sites of any species. . .”<sup>45</sup> In addition, state statutes address a variety of hunting-specific issues, such as licensing, hunting for particular species, and shooting preserves.<sup>46</sup> Birds are protected under these statutes. Specifically, “[n]o person shall pursue, hunt with intent to kill, take, destroy, or have in his or her possession any wild bird or birds at any season of the year unless harvested or taken in accordance with rules and regulations promulgated by the director.”<sup>47</sup>

RIDEM has issued regulations under these authority that are directed at and govern hunting activity. As a result, they do not expansively address “taking, molestation, or disturbance” other than through hunting. For this purpose, RIDEM regulations indicate that “[a]llowed methods of taking and prohibited methods of taking migratory birds and waterfowl, are the same as set forth in” the MBTA.<sup>48</sup>

## 2.3 United States Fish & Wildlife Service

USFWS is the agency in the Department of Interior responsible for implementation of a variety of federal laws related to fish and wildlife, including the MBTA and ESA. Among other provisions, the MBTA makes it unlawful for any person to “take” “any migratory bird, any part, nest, or egg of any such bird” except as permitted by regulation.<sup>49</sup> Taking migratory birds in violation of the Act and regulations, or of state law or regulations, is a

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<sup>42</sup> *Id.* § 940(C)(8).

<sup>43</sup> 20 R.I. GEN. LAWS §§ 20-1-2; 20-1-4; 20-1-5.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* § 20-1-12(a).

<sup>46</sup> *Id.* ch. 20-13-19.

<sup>47</sup> *Id.* § 20-14-1.

<sup>48</sup> 25-8-33 R.I. CODE R. § 9.11(O).

<sup>49</sup> *See* 16 U.S.C. § 703.



violation.<sup>50</sup> The MBTA does not define “take,” but USFWS has done so by regulation. “Take” under the MBTA means “to pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to pursue, hunt, shoot, wound, kill, trap, capture, or collect.”<sup>51</sup>

The Secretary of the Interior is directed to issue regulations governing “when, to what extent, if at all, and by what means” to allow taking and other prohibited activities.<sup>52</sup> USFWS regulations issued under this authority identify prohibited methods of taking, as well as a requirement for the development of annual hunting regulations.<sup>53</sup>

### **3 Governance of Conflicts Between Aquaculture and Hunting**

Aquaculture permitting decisions in the salt ponds must comply with all legal requirements, including both required permitting processes and hunting and conservation regulations. This section considers how these separate requirements work in concert to determine the extent of the CRMC’s obligation to accept RIDEM objections related to waterfowl issues.

#### **3.1 Limitations on CRMC Aquaculture Permitting Arising from CRMC Statutes and Regulations**

Rhode Island aquaculture permitting authorities contain several provisions that may limit the CRMC’s authority to issue a permit that conflicts with waterfowl or hunting opportunities.<sup>54</sup> These include compatibility with other uses; public access; impacts on plant and animal life; and consideration of RIDEM input. This section examines whether each of these provisions requires the CRMC to accept RIDEM recommendations.

##### *3.1.1 Compatibility with Other Uses*

Aquaculture permit applications must demonstrate that “the activity will not result in significant conflicts with water-dependent uses and activities” and include information necessary for the CRMC to determine “the compatibility of the proposal with other existing and potential uses of the area and areas contiguous to it.”<sup>55</sup> These requirements apply only to the applicant’s duty to provide information to the CRMC. They do not place substantive

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<sup>50</sup> 50 C.F.R. §§ 20.71 (violation of federal law), 20.72 (violation of state law).

<sup>51</sup> 50 C.F.R. § 10.12. *See also id.* § 10.11 (noting applicability of general definition throughout subchapter, including to MBTA regulations).

<sup>52</sup> 16 U.S.C. § 704.

<sup>53</sup> 50 C.F.R. §§ 20.20-20.26 (take restrictions); 20.100-20.110 (annual regulations).

<sup>54</sup> 20 R.I. GEN. LAWS § 20-10-3; 20-10-5(a)-(b); 16-2-1 R.I. CODE R. § 300.11(C)(1); 16-1-12 R.I. CODE R. § 940(C)(7)-(C)(8).

<sup>55</sup> 16-2-1 R.I. CODE R. § 300.11(D).

obligations for the CRMC to make explicit determinations that a permit will not create significant conflicts or will be compatible with existing uses. While the permitting process includes processes to avoid and minimize conflicts, such as PD and interagency consultation requirements, the CRMC appear to have discretion to issue an aquaculture permit even if it may result in some impacts on other existing or potential uses, so long as that permit is consistent with all mandatory permitting requirements.

### *3.1.2 Public Access*

Aquaculture permits must be subject to reasonable public ingress and egress for “traditional water activities,” “except to the extent necessary to permit the effective development of the [cultivated] species.”<sup>56</sup> Aquaculture sites also cannot “obstruct public access to and from tidal waters.”<sup>57</sup> Waterfowl hunting appears likely to be a “traditional water activity” as it is a long-standing activity in the salt ponds that requires public access to and use of waters for retrieval. The CRMC aquaculture policies thus could be read to limit the CRMC’s authority to issue permits that would eliminate access for hunting. This limitation appears to have a narrow reach, however, as bottom gear may be unlikely to undermine safe access for retrievers in most locations, and human hunters primarily use the shore in this location. As a result, this limitation would likely have only a marginal impact on aquaculture permitting in areas in proximity to hunting blinds or waterfowl habitat.

### *3.1.3 Impacts on Plant and Animal Life*

Aquaculture permit applicants must demonstrate that their proposed activities will not significantly impact plant or animal life, and aquaculture activities must avoid and mitigate impacts on submerged aquatic vegetation (“SAV”).<sup>58</sup> The Salt Pond SAMP regulations include additional SAV and black duck protections, including a requirement that the CRMC must “consider project impacts on waterfowl species including their habitat and nutritional resources such as vegetation, shellfish, and fish.”<sup>59</sup> Under these authorities, the CRMC must evaluate and consider whether an aquaculture project may affect waterfowl habitat, and it is precluded from issuing a permit that does not avoid and mitigate impacts on SAV. Because SAV is waterfowl habitat, this requirement is likely to provide some limits on the Council’s authority to issue a permit in areas in high use by waterfowl. However, it does not appear to limit the CRMC’s permitting authority in areas used by waterfowl but where SAV

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<sup>56</sup> *Id.* § 300.11(B).

<sup>57</sup> *Id.* § 300.11(F)(i).

<sup>58</sup> *Id.* § 300.18(B)(9)-(10), (C)(2).

<sup>59</sup> 16-1-12 R.I. CODE R. § 940(C)(8).

is not present, so long as those waterfowl impacts are “considered” during the permitting process.

### 3.1.4 Consideration of RIDEM Input

The CRMC is required to notify RIDEM when it receives an aquaculture permit application and cannot issue permits without prior “consideration” of RIDEM recommendations. While the “consideration” requirement could theoretically require the CRMC to accept RIDEM recommendations, neither precedent nor the plain meaning of “consideration” suggest that this interpretation is likely.

As “consideration” has not been defined in statute or regulation, it is reasonable to consider its dictionary meaning. This meaning of the word “consider” suggests that the Council may, but is not required to, conform to RIDEM input: “consideration” is “[s]omething that may be taken into account when forming an opinion.”<sup>60</sup> This definition does not suggest that a consideration need be a dispositive factor in a decision.

Courts appear to agree with a limited meaning of this term. While no judicial decision has interpreted the meaning of this requirement in relation to the aquaculture, the Supreme Court of Rhode Island noted in *Sartor v. Coastal Resources Management Council* that hearings with evidence by the subcommittee and full CRMC were sufficient to support a finding on designation of a contested public right-of-way: “we note [] that both the CRMC rights-of-way subcommittee and the full CRMC considered all applicable matters set forth in subpart (f) in conducting proceedings with regard to the disputed public right-of-way.”<sup>61</sup> This decision supports an interpretation of “consider” in which CRMC can meet its obligation by “conducting proceedings,” such as public meetings and Council meetings, where RIDEM recommendations are raised.

## 3.2 Limitations on CRMC Aquaculture Permitting Arising From RIDEM Authorities

Limitations on CRMC aquaculture permitting may arise not only from its own statute and regulations, but may be required by other statutes, including those implemented by RIDEM. However, in this instance, RIDEM does not appear to have legal authority to require CRMC to deny or modify an aquaculture permit based on potential negative impacts to migratory birds.

While the director of RIDEM may issue regulations prohibiting “taking, molestation, or disturbance in any way of nesting, breeding, or feeding sites of any species,” current RIDEM

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<sup>60</sup> BLACK'S LAW DICTIONARY (10th ed. 2014).

<sup>61</sup> *Sartor v. Coastal Res. Mgmt. Council*, 542 A.2d 1077, 1080 n.5 (R.I. 1988).

regulations do not limit CRMC action.<sup>62</sup> In particular, CRMC permitting does not constitute a prohibited “taking” of waterfowl under Rhode Island law. Prohibited take under RIDEM regulations is based on prohibitions in the federal MBTA. As explained in more detail in the following section, the MBTA’s take definition does not extend to habitat modification or disturbance, and the Act does not apply to agency permitting actions that may result in bird mortality or other forms of incidental take. As a result, it is unlikely that CRMC would be found to “take” waterfowl under state law when it issues permits.

### 3.3 Limitations on CRMC Aquaculture Permitting Arising From the MBTA

The MBTA could limit the CRMC’s issuance of aquaculture permits if issuance of a permit could be considered a “take” under the Act. This section considers whether and how the MBTA applies to shellfish aquaculture impacts on waterfowl in this context and whether CRMC might be subject to the Act.

#### 3.3.1 Habitat Modification and Disturbance as “Take” Under the MBTA

The MBTA prohibits “take” of waterfowl, but the scope of the definition of take under the MBTA regulations is more limited than under other wildlife conservation statutes and does not apply to the primary effects of shellfish aquaculture on waterfowl. As discussed above, these effects primarily include displacement, loss of habitat, and behavior modification.<sup>63</sup> These impacts appear to constitute harm or harassment of the waterfowl, which are considered take under the ESA, but not the MBTA.

The definition of “take” is more limited under the MBTA than under the ESA. While the MBTA defines “take” means “to pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to pursue, hunt, shoot, wound, kill, trap, capture, or collect,”<sup>64</sup> the ESA additionally includes “harass” and “harm” in its definition.<sup>65</sup> “Harm” is further defined in USFWS regulations to include “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.”<sup>66</sup> Harass is defined as “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent

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<sup>62</sup> 20 R.I. GEN. LAWS § 20-1-12(a)(1); 20-1-12(b).

<sup>63</sup> See, e.g., Wendy L. Walsh, USFWS, BIOLOGICAL OPINION ON THE EFFECTS OF EXISTING AND EXPANDED STRUCTURAL AQUACULTURE OF NATIVE BIVALVES IN DELAWARE BAY, MIDDLE AND LOWER TOWNSHIPS, CAPE MAY COUNTY, NEW JERSEY ON THE FEDERALLY LISTED RED KNOT (*CALIDRIS CANUTUS RUFUS*) 109 (2016) (identifying similar impacts associated with shellfish aquaculture on federally listed species).

<sup>64</sup> 50 C.F.R. § 10.12. See also *id.* § 10.11 (noting applicability of general definition throughout subchapter, including to MBTA regulations).

<sup>65</sup> 16 U.S.C. § 1532(19) (take means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”).

<sup>66</sup> 50 C.F.R. § 17.3.

as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.”<sup>67</sup>

Court decisions suggest that displacement, habitat loss, and behavior modification are harm and/or harassment under the ESA and therefore are not forms of take regulated under the MBTA. In particular, the Ninth Circuit Court of Appeals concluded in a challenge to a timber sale that “[h]abitat destruction caused ‘harm’ to owls under the ESA but does not ‘take’ them within the meaning of the MBTA.”<sup>68</sup> Under this interpretation, it is unlikely that the impacts of aquaculture cited by RIDEM would be considered “take” under the MBTA.

### 3.3.2 Agency Liability Under the MBTA

A second inquiry under the MBTA is whether the Act applies to agency permitting actions. Relevant federal decisions suggest that the MBTA applies to agencies, but that this application does not extend to permitting or regulatory actions that do not authorize intentional take. Under these decisions, the MBTA does not appear to apply to CRMC permitting of aquaculture sites.

Courts have decided several cases regarding whether the MBTA applies to federal agencies, with opposing results. The Eighth and Eleventh Circuits have held that the Act does not apply to federal agencies, noting that the sovereign is not a “person” subject to the Act’s criminal provisions.<sup>69</sup> However, the D.C. Circuit convincingly rejected these holdings in *Humane Society of the United States v. Glickman*, where it held the Department of Agriculture subject to the MBTA for direct take of Canadian Geese.<sup>70</sup>

The compliance obligations of agencies subject to the MBTA do not appear to extend to permitting. To date, courts and USFWS have universally agreed that the MBTA does not require a permit for agency regulatory actions authorizing activities that may result in incidental take, as it is not a proximate cause for that take. In a recent case, the Ninth Circuit Court of Appeals declined to find that the MBTA applied to an agency wind turbine

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<sup>67</sup> *Id.*

<sup>68</sup> *Seattle Audubon Soc’y v. Evans*, 952 F.2d 297, 302 (9<sup>th</sup> Cir. 1991).

<sup>69</sup> *Sierra Club v. Martin*, 110 F.3d 1551, 1555 (11<sup>th</sup> Cir. 1997) (“The MBTA, by its plain language, does not subject the federal government to its prohibitions. . . . The penalties for violating its prohibitions are set forth in 16 U.S.C. § 707, which provides that a ‘person, association, partnership, or corporation’ will be guilty. . . .”); *Newton Cy. Wildlife Ass’n v. U.S. Forest Serv.*, 113 F.3d 110, 115 (8<sup>th</sup> Cir. 1997).

<sup>70</sup> 217 F.3d 882, 888 (D.C. Cir. 2000); *see also* *Fund for Animals v. Norton*, 281 F. Supp. 2d 209, 217 (D.D.C. 2003) (“the law of this Circuit is clear: a plaintiff may sue a federal agency under the APA for violations of the MBTA.”); *Mahler v. U.S. Forest Serv.*, 927 F. Supp. 1559, 1579 (S.D. Ind. 1996) (“the APA permits challenges to agency action that is contrary to law; it is reasonable because citizens can reasonably expect, at least generally, that the government should abide by the same laws imposed on private citizens.”).

permitting decision, characterizing the decision as “purely regulatory action[] that does not constitute[] or even proximately cause, an unlawful take under the MBTA.”<sup>71</sup> Similarly, the District Court for the District of Maine held that:

“[t]he relationship between the Corps' regulatory permitting activity and any potential harm to migratory birds appears to be too attenuated to support a direct action against the Corps to enforce the MBTA's prohibition on ‘takes.’ The Corps simply exercised its authority to permit dredging and fill activity; the Corps will not construct the project or operate the project when it is completed; and the Corps is not the owner or trustee of the land in question.”<sup>72</sup>

Additionally, the Southern District of California held in *Backcountry Against Dumps v. Chu* that the Department of Energy was not in violation of the MBTA for acting in its regulatory capacity to permit a wind farm operation's electric cable.<sup>73</sup> These cases suggest that the MBTA does not apply to CRMC permitting of an aquaculture sites.<sup>74</sup>

## 4 Conclusion

This study has outlined the legal duties and obligations that apply to shellfish aquaculture permitting in sites that may conflict with waterfowl conservation and hunting activity. It suggests that current CRMC regulations impose few mandatory limits on aquaculture permitting in these sites, provided that the Council complies with process requirements, including consultation, and that the permits avoid SAV and allow for access for traditional water uses, including hunting. Conversely, RIDEM and USFWS authorities present few limitations on RIDEM, as aquaculture impacts on waterfowl do not constitute take under

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<sup>71</sup> *Protect Our Cmty's. Found. v. Jewell*, 825 F.3d 571, 585-86 (9th Cir. 2016) (“Instead, the BLM's decision to grant Tule's right-of-way request was many steps removed in the causal chain from the potential commission of an unlawful ‘take’ caused by wind-turbine collisions.”); *accord* *Protect Our Cmty's. Found. v. Salazar*, No. 12cv2211-GPC(PCL), 2013 U.S. Dist. LEXIS 159281, at \*54 (S.D. Cal. Nov. 6, 2013).

<sup>72</sup> *Friends of the Boundary Mts. v. United States Army Corps of Eng'rs*, 24 F. Supp. 3d 105, 114 (D. Me. 2014).

<sup>73</sup> *Backcountry Against Dumps v. Chu*, 215 F. Supp. 3d 966, 986 (S.D. Cal. 2015), *reconsideration denied sub nom.*, *Backcountry Against Dumps v. United States Dep't of Energy*, No. 3:12-CV-03062-L-JLB, 2016 WL 6268473 (S.D. Cal. June 9, 2016), and *modified on reconsideration sub nom.*, *Backcountry Against Dumps v. United States Dep't of Energy*, No. 3:12-CV-03062-L-JLB, 2017 WL 2988273 (S.D. Cal. Jan. 30, 2017).

<sup>74</sup> Research for this study did not identify any MBTA challenges to state agency actions. Such actions would require an independent cause of action under state law, such as a state Administrative Procedure Act. See, e.g., *Barrington School Committee v. R.I. State Labor Rel. Bd.*, 608 A.2d 1126, 1130 (R.I. 1992) (“The General Assembly enacted the APA in 1962 to establish a single and exclusive method of obtaining judicial review of agency action.”). Provided that such a cause of action exists, it is logical to presume that a court would find federal cases persuasive, as links between state and to federal agency permitting actions and take appear similarly attenuated.

the MBTA, and the CRMC does not appear subject to the Act during the permitting process. Given the limited extent of the legal obligations governing conflicts between aquaculture and hunting, ongoing maintenance of close links and cooperation among agencies will remain important for the successful navigation of future aquaculture applications raising these issues.