



STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES
AND ENVIRONMENTAL CONTROL

OFFICE OF THE
SECRETARY

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Secretary's Order No. 2016-W-0049

Re: The Department of Natural Resources and Environmental Control, Division of Fish & Wildlife's Application To Approve Designated Shellfish Aquaculture As A Statewide Activity Pursuant To Section 2.5 Of 7 DE Admin. Code 7204.

Date of Issuance: December 21, 2016

Effective Date: December 21, 2016

BACKGROUND AND PROCEDURAL HISTORY

Pursuant to 7 Del. C. §6003, 6004(b) and 6006(4), the *Subaqueous Lands Act* ("SLA"), 7 Del. C. Chap. 72, and the *Regulations Governing the Use of Subaqueous Lands*, 7 DE Admin. Code 7204 ("SLA Regulations") and other relevant authority, the Secretary of the Department of Natural Resources and Environmental Control ("Department") issues this Order following a June 8, 2016 public hearing.

This Order considers the Department's Division of Fish and Wildlife ("DFW") February 26, 2016 application ("Application"), which DFW submitted to the Department's Division of Water, Wetlands and Subaqueous Lands Section ("WSLS") in order to approve the use of the SLA review procedures established under *Statewide Activity Approvals* ("SAA") procedures established in Section 2.5 of the SLA Regulations. DFW seeks to include shellfish aquaculture's use of designated subaqueous lands as a new category that is eligible to receive abbreviated SLA review of applications for shellfish aquaculture in the Inland Bays.

The DFW's designated subaqueous lands for eligibility to use the SAA procedure are within six of the eight Shellfish Aquaculture Development Areas ("SADAs"), which are areas in

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the Inland Bays that the Department established to encourage their use for shellfish aquaculture in Regulation 3801, *Shellfish Aquaculture. 7 DE Admin. Code 3801* (“Regulation 3801”). The Application implements an alternative position and compromise that considers the views of waterfront property owners that were expressed following the adoption of Regulation 3801, and encourages shellfish aquaculturalists to select the DFW’s 343 designated one-acre tracts (“SAA SADA tracts”) because the WSLs would review lease applications for the SAA SADA tracts under Section 2.5’s abbreviated application review procedure. The Application is responsive to public comments received after the promulgation of Regulation 3801 in that it reduces the number of acres that would be eligible for SAA from 442 acres that were adopted as SADAs under Regulation 3801 to 343 acres. It eliminates all 24 acres in Beach Cove (SADA IR-B) and reduces the number of acres eligible for SAA in Little Assawoman Bay from 118-to 43, including parcels located closest to waterfront properties and those identified to be potential concerns for navigation.

The WSLs provided public notice of the DFW’s Application, and thereafter received written public comments in opposition, including requests for a public hearing. The Department determined to hold a public hearing on the Application and provided public notice of a June 8, 2016 public hearing at the Millville Fire Department, Millville, Sussex County. The Department’s hearing officer, Robert P. Haynes, presided over the public hearing and approximately 60 persons attended and 26 persons presented comments. The Department also received written comments, several that were extensive, during the public comment period, which closed at the conclusion of the public hearing.

After the public hearing, Mr. Haynes requested that the WSLs and the DFW provide technical assistance for his Hearing Officer’s Report of Recommendations (“Report”). The

WSLS prepared a Technical Response Memorandum (“TRM”), which recommended that the Department approve the DFW Application because SLA review of applications to use the designated subaqueous lands for shellfish aquaculture was appropriate under the SAA procedure. The WSLS TRM would accept limiting the shellfish aquaculture in the Little Assawoman Bay SAA acreage to hard clams in response to the public comments indicating that Little Assawoman Bay was not suitable for oyster aquaculture. The DFW’s TRM provide background on the origins of the Department’s regulation of shellfish aquaculture, and supported the Application as consistent with the goals of reducing the regulatory burden and minimizing any adverse impact on property owners.

Mr. Haynes’ attached Report sets forth the complete procedural history, establishes the Record, and proposes findings of fact, reasons and conclusions. The Report discusses the public comments, most of which opposed shellfish aquaculture in general, but most specifically opposed elements of Regulation 3801. The opponents cited shellfish aquaculture’s possible adverse impacts to the Inland Bays, stating that it would harm fishing, crabbing, boating, the aesthetic views, the bird habitat, the water quality and other recreation uses. Several public comments requested that the Department amend Regulation 3801 because of shellfish aquaculture’s potential adverse impacts. Several comments, however, supported the DFW’s effort to encourage shellfish aquaculture in the SAA designated tracts. The Report recommends approval of the Application, as revised by the WSLS TRM, which would allow the requested streamlined SLA review using the SAA procedure for shellfish aquaculture lease applications within the SAA designated tracts.

Findings of Fact, Reasons and Conclusions

The Department finds that the record supports approving the DFW's Application, as revised by the WSLs TRM. The Department finds that the Report accurately reflects the procedural history, fully establishes the record for this decision, and proposes findings of fact, conclusions and reasons to support the decision to approve the Application, as revised by the WSLs TRM. The Department adopts the Report to the extent it is consistent with this Order.

The Department finds that its action to approve the Application, as revised by the WSLs TRM, is consistent with the intent of the General Assembly when in 2013 it enacted legislation, which in *7 Del. C. Chapter 20* authorized the Department to enact regulations that would allow aquaculture in the Inland Bays (Rehoboth, Indian River and Little Assawoman Bay). The DFW's TRM sets forth this background as follows:

From the time that it was tasked with regulation of the new Inland Bays shellfish aquaculture program, the Department of Natural Resources and Environmental Control (DNREC) has made many efforts to integrate shellfish aquaculture in the Inland Bays with the existing bay uses by both people and biota. At the beginning of the process, the Department's Division of Fish and Wildlife (DFW) used information and work done by the Center for the Inland Bays. The Center for the Inland Bays had previously convened a team of multiple stakeholders and interested parties that held several public meetings and culminated in a final report that led to House Bill 160 of Delaware's 147th General Assembly. The legislature signaled their support for shellfish aquaculture in the Inland Bays with unanimous passage of House Bill 160. With the passage of this bill, the DFW was charged with adopting regulations to address the new shellfish aquaculture program. During the creation of these regulations, the DFW consulted with other state and federal agencies about how different aspects of shellfish aquaculture might affect the Inland Bays, and sought public opinion with two public meetings, and then a public hearing and comment period on the regulations as required by the Administrative Procedures Act.

The law's preamble also cites some of the reasons for the legislation as follows:

WHEREAS, Delaware is the only East Coast state that does not have a shellfish aquaculture industry; and

WHEREAS, Delaware's Inland Bays (Rehoboth, Indian River, Little Assawoman, and Delaware's portion of Big Assawoman Bay) have been shown to be suitable for the growth and survival of commercial shellfish species such as oysters and hard clams; and

WHEREAS, Delaware's Inland Bays are water quality impaired and would benefit from the filtering capability of additional bivalve shellfish; and

WHEREAS, there are potential economic benefits from the fostering of a new industry in eastern Sussex County that is compatible with pre-existing recreational uses; and

WHEREAS, the Department of Natural Resources and Environmental Control historically is the agency best qualified to oversee development, regulation, and enforcement of commercial shellfish harvest and the safety of these food sources to the consuming public; and

WHEREAS, the Department of Natural Resources and Environmental Control has historically been the lead agency in issuing leases of shellfish grounds and in issuing permits for structures erected on or over sub-aqueous bottoms in conjunction with the U.S. Army Corps of Engineers so as to avoid potential navigational hazards; and

WHEREAS, the Department of Agriculture historically is the state agency best suited to the support and marketing of a new form of animal husbandry; and

WHEREAS, area restaurants and chambers of commerce welcome the idea of more locally produced shellfish, especially during those times of year when wild-caught shellfish are unavailable locally; and

WHEREAS, the Center for the Inland Bays in conjunction with the Department of Natural Resources and Environmental Control, the Delaware Department of Agriculture, the University of Delaware Sea Grant Marine Advisory Service, the Sussex County Economic Development Office, and with the participation of recreational and commercial fishing interests have met extensively and publicly to develop the scientific and educational and policy-related information to support the establishment and nurturing of a shellfish aquaculture industry in the Inland Bay.

(Emphasis added.)

In 2014, the Department administered its delegated authority to allow shellfish aquaculture in the Inland Bays by proposing Regulation 3801. The Department provided public

notice of two public meetings and a public hearing on the proposed Regulation 3801. Many persons attended the public meetings and public hearing, Thus, the Department undertook considerable effort to receive public comments on the proposed Regulation 3801.

On July 15, 2014, the Department issued Secretary's Order No. Order No. 2014-F-0013, which approved Regulation 3801 as a final regulation to go into effect August 11, 2014. The Order was not appealed. Consequently, Regulation 3801 remains in effect and has the same force and effect as a law on the public and the Department. The Department cannot change Regulation 3801 in this proceeding because this is not a proceeding to consider a proposed amendment to Regulation 3801; instead this proceeding considers only the DFW Application to include shellfish aquaculture in SAA SADA tracts as a new category to use SAA's abbreviated SLA application review procedures.

A review of Secretary's Order No. 2014-F-0013, particularly the attached DFW memorandum, finds that the Department considered all the public comments on Regulation 3801. The public comments from potential shellfish aquaculturalists on the proposed Regulation 3801 opposed using white PVC poles to mark the locations of the leased tracts. The Department considered, but ultimately decided against changing the marking requirements out of concern for protecting human safety and property. Other concerns surfaced, primarily from waterfront property owners along Little Assawoman Bay and around Beach Cove, after the promulgation of the Regulation 3801. Therefore, the Department did not adopt any changes to Regulation 3801, and it is unable to adopt any changes in this proceeding, as noted above.

The Department recognizes that Regulation 3801 provides for the comprehensive regulation of shellfish aquaculture in the Inland Bays. Section 1.0 of Regulation 3801 provides the scope of the regulation, as set forth below:

These regulations provide for a shellfish aquaculture industry in Delaware's Inland Bays that is compatible with commercial and recreational finfishing and shellfishing, boating navigation and public safety, public water access and use, and native biota. Specifically, the regulations provide a structured process and set conditions for leasing of subaqueous bottom within Delaware's Inland Bays for the culture of bivalve shellfish. **The regulations include requirements for lease: application, locations, issuance, marking, renewal, transfer, expiration, termination, condemnation and emergency relocation. The regulations further propose measures related to: shellfish aquaculture gear and marking, shellfish nursery permitting and structures, harvester license qualifications, bivalve species authorized for aquaculture, activities within subaqueous lease areas, and shellfish aquaculture reporting requirements.** (Emphasis added.)

Regulation 3801 allows shellfish aquaculture to be conducted anywhere in the Inland Bays that meets the specified criteria, but encouraged shellfish aquaculture to use the 442 one-acre tracts established within the eight SADAs, identified at RB-A, RB-B, RB-C, IR-A, IR-B, LA-B, LA-C and LA-D. Following the adoption of Regulation 3801, the Department met with newly concerned citizens about the implementation of shellfish aquaculture, particularly in SADAs LA-C and IR-B. As a result of the Department's discussions, the DFW proposed a refinement that would encourage shellfish aquaculture to use the SAA SADA tracts, as described below in the DFW TRM:

As the implementation process for shellfish aquaculture in the Inland Bays continued after the adoption of the shellfish aquaculture regulations, the DFW reduced the acreage planned for aquaculture leasing in the adopted Shellfish Aquaculture Development Areas (SADAs) by seeking required subaqueous lands approval through submission of a Statewide Activity Approval (SAA) application. The SAA request includes 209 acres in Rehoboth Bay, 91 acres in Indian River Bay (the SADAs include 115 acres, a reduction of 24 acres for the SAA), and 43 acres in Little Assawoman Bay (the SADAs include 118 acres, a reduction of 75 acres for the SAA). Although all acreage in the SADA met the DFW criteria for shellfish aquaculture, the acreage excluded from the SAA request was that

most opposed by new comments from nearby residents and landowners.

The Department finds that the DFW's proposal to encourage use of the SAA SADA tracts is reasonable and supported by the record; subject to one change to DFW's Application, as recommended in the WSLs TRM based upon the public comments. The WSLs TRM agrees with the public comments regarding the concern about oyster aquaculture in the Little Assawoman Bay SAA acreage. The WSLs TRM recommends this limitation as a reasonable change and the Department agrees to this change. Consequently, only hard clam shellfish aquaculture leases in the Little Assawoman Bay may use the SAA procedure, and Regulation 3801's Section 13.0 already restricts shellfish aquaculture to oyster aquaculture for the SADAs in Rebooth Bay and Indian River Bay. The Department finds that it is reasonable to expect that shellfish aquaculturalists should select the SAA SADA tracts before any other tracts because the SAA SADA tracts avoid the standard SLA application review and instead would follow the SAA's abbreviated procedures. Thus, the Department expects that most, if not all, shellfish aquaculturalists will select the SAA SADA tracts when they make their lease selections.

Based upon the public comments, many persons near SADAs-IR-B and LA-C support the DFW's Application. Some shellfish aquaculturalists also support the DFW Application because the SAA provides an abbreviated SLA review. Nevertheless, numerous public comments opposed any shellfish aquaculture in the Inland Bays.

The Department will continue to work towards improving the shellfish aquaculture program in the Inland Bays and may consider amending Regulation 3801 in the near future. The Department may want to consider information from the implementation of shellfish aquaculture before taking any step to change it. The operation of shellfish aquaculture under Regulation

3801 will provide the Department with better information to consider any proposed shellfish aquaculture regulation amendment.

There were public comments that questioned that the DFW's Application warranted approval under SLA Regulation's Section 2.5, which is set forth below:

2.5 Statewide Activity Approvals. The Department may adopt statewide activity approvals for certain specified activities with limiting dimensions and criteria that are considered to have minimal impacts on subaqueous lands, water quality, habitats, etc.

The Department finds that the DFW Application and the record provide sufficient support for approving the Application. First, shellfish aquaculture in the SAA SADA tracts meet Section 2.5's requirements for a certain specified activity. Second, the SAA SADAs have limited dimensions. Third, the SAA SADA tracts, as within the approved SADAs, meet the SADA criteria. The Department finds that shellfish aquaculture in the SAA SADAs will have minimum impacts based upon the Delaware Aquaculture Law and Regulation 3801 in that activity conducted under a SAA avoids impacts to native clam populations in Indian River and Rehoboth Bays, prohibits oyster aquaculture under SAA in Little Assawoman Bay and could potentially achieve water quality benefits. The Department approved Regulation 3801 based upon its determination that shellfish aquaculture, as authorized by the General Assembly, could be conducted consistent with the SLA's goals to protect subaqueous lands from any undue harm; i.e., more than minimal, and be conducted consistent with the General Assembly's finding that shellfish aquaculture would improve the Inland Bays' water quality, and would protect the natural habitats, etc. from undue harm.

The WSLs' TRM provides support for including as a new category in the SAA review process as set forth below:

As stated in the Regulations Governing the Use of Subaqueous Lands, the adoption of a Statewide Activity Approval is based upon the identification of “*certain specified activities with limiting dimensions and criteria which are considered to have minimal impacts on subaqueous lands, water quality, habitats, etc.*” The establishment of the specified SADA by the Division of Fish & Wildlife defined the geographic constraints of these activities. The specific-site assessment/screening requirements (e.g. benthic surveys, navigational concerns, etc.), operational constraints (e.g. gear requirements/restrictions), and lease termination/bonding requirements spelled out in the Shellfish Aquaculture Regulations and the proposed lease language further address/minimize the impacts to subaqueous lands sufficiently to allow for the SAA consideration.

The vast majority of the public comments received by the WSLs spoke in opposition to the Shellfish Aquaculture program as a whole and requested specific modifications to the existing Shellfish Aquaculture regulations. Addressing both of these items is beyond the legal authority of the WSLs’s SAA process. The SAA process is an administrative tool used by the Department to facilitate the issuance of recurring authorizations where the underlying conditions/criteria have been previously vetted (in this case the characterization and pre-selection of the SADAs). The SAA process is not a mechanism that can be used to modify existing regulations or to permit activity in conflict with those regulations. For instance, many comments requested that the SADA areas not included in the SAA be permanently removed from the Regulations. This specific example is important on many points:

- 1.) The Statewide Activity Approval is an administrative tool to that enables the WSLs to facilitate a desired behavior by simplifying a repetitive task that meets very specific criteria. As an administrative tool, the SAA cannot be used to overrule or supersede an existing Law or Regulation. Because the Shellfish Regulations are very specific with regards to the SADA areas and the required leasehold markings, there is not the legal opportunity to permanently change or alter those regulations by this SAA. Those changes would require a formal regulatory review/change process by the Division of Fish & Wildlife beyond the scope of the WSLs; and
- 2.) The SAA does allow for the application of specific selection criteria in order for a project to be deemed eligible for processing under the SAA. The reduction of the SADA areas to the subset specified in the proposed SAA is the very application of that

selection criterion. Under the existing State regulations, Shellfish Aquaculture is permissible in the entirety of the SADAs as established throughout the Inland Bays. However, the SAA encourages the limitation of that activity to the reduced subset presented in the Division of Fish & Wildlife's application. Without the SAA in place, the entire set of SADA areas would be equally "in-play" which is in direct opposition to the desire for a reduced area expressed by many of the opponents. The reduced areas presented in the SAA are the result of the Department responding to many of the public comments received prior to the formal notice process for this SAA. As such, many of the opponents stated their appreciation for the reduced areas in the SAA but requested that those changes be made permanent. The SAA process allows us to encourage/direct the activities to the restricted subset of areas, but it cannot address the "permanence" issue. Furthermore, should the SAA process be denied there would be no mechanism to facilitate the currently proposed reductions at this time.

The above highlights that the present proceeding is on DFW's Application to use the SAA process as an administrative tool to reduce the regulatory burden to obtain the SLA authority. The SAA procedure also is the 'carrot' to encourage shellfish aquaculturalists to select the designated SAA tracts in the Chapter 20 lease selection process. The designated tracts also were the result of the Department's effort to reduce the impact on property owners, but the Department understands that not all property owners will be satisfied with the compromise, as was evident at the public hearing.

In sum, the Department, after consideration of the Record, including all public comments submitted during the public hearing process, determines that shellfish aquaculture should be included in the SAA procedure for the designated 343 SAA SADA tracts, which will allow the DFW to commence the lease selection process and leasing under Chapter 20. The Department enters the following ordering conclusions:

1. The Department has jurisdiction under its state authority pursuant to *7 Del. C. Section 6006* and *7 Del. C. Chap. 72* to make a determination on the Application to include shellfish aquaculture in designated SAA SADA tracts as an activity appropriate for SLA permitting using the SLA's SAA procedure;
2. The Department provided public notice of the Application and the public hearing that the Department held on it;
3. The Department considered all timely and relevant public comments in making this determination. This Order and the attached Report establishes the Record to support this final agency decision;
4. The WSLS shall administer the SAA procedure to include the shellfish aquaculture as an approved activity and shall allow the DFW to lease the designated one-acre SAA SADA tracts pursuant to Chapter 20's leasing authority;
5. The use of the SAA procedure for shellfish aquaculture in Little Assawoman Bay shall be limited to hard clam aquaculture within the borders of the SAA acreage.
6. The Department is mindful of providing a new market with certainty and is committed to reviewing activity conducted under the law and regulations to determine whether to consider amending Regulation 3801 following the *Delaware Administrative Procedures Act*. Such review would include, but not be limited to, requirements for marking leased areas and whether selected SADA areas might be eliminated from the regulation. Such review should commence no sooner than one year following the issuance of the first lease; and
7. The Department shall publish this Order on its web site and provide such notice of it in a manner required by the law and the Department's Regulations.



David S. Small
Secretary

HEARING OFFICER'S REPORT

TO: The Honorable David S. Small
Secretary, Department of Natural Resources and Environmental Control

FROM: Robert P. Haynes, Esquire
Senior Hearing Officer, Office of the Secretary
Department of Natural Resources and Environmental Control

RE: **The Department of Natural Resources and Environmental Control, Division of Fish & Wildlife's Application To Approve Designated Shellfish Aquaculture As A Statewide Activity Pursuant To Section 2.5 Of 7 DE Admin. Code 7204**

DATE: November 23, 2016

I. PROCEDURAL HISTORY

This Report provides the Secretary of the Department of Natural Resources and Environmental Control ("Department") with recommendations on the Department's Division of Fish & Wildlife ("DFW") February 26, 2016 Application ("Application") submitted to the Department's Division of Water, Wetlands and Subaqueous Lands Section ("WSLS").

The Application seeks to add shellfish aquaculture of designated subaqueous lands as a new category of activity that may be reviewed under Section 2.5 *Statewide Activity Approvals* ("SAA") of the Department's *Regulations Governing the Use of Subaqueous Lands, 7 DE Admin. Code 7204*. The SAA procedure provides an abbreviated review of applications for using subaqueous lands under the *Subaqueous Lands Act, 7 Del. C. Chap. 72* ("SLA"). The DFW designated areas are located within six of the eight Shellfish Aquaculture Development Areas ("SADAs") the Department approved in the Inland Bays when it adopted in 2014 *Regulation 3801 Shellfish Aquaculture, 7 DE Admin. Code 3801* ("Regulation 3801").

The WSLS provided public notices of the Application, and thereafter received written public comments in opposition, including requests for a public hearing. The Department

determined to hold a public hearing on the Application and provided public notices of a June 8, 2016 public hearing at the Millville Fire Department, Millville, Sussex County.

I presided over the public hearing, which approximately 60 persons attended and 26 persons provided public comments. In addition, the Department received written public comments received during the public comment period that ended at the conclusion of the public hearing.

I requested technical assistance from the WSLs and the DFW, which each provided Technical Response Memorandums attached hereto.

I consider the Record, as established below, complete for purposes of issuing a final decision on the Application.

II. SUMMARY OF THE RECORD

This Report establishes the Record based upon the following: 1) the verbatim transcript of the June 8, 2016 public hearing, 2) the documents introduced as exhibits at the public hearing; and 3) this Report, including the documents cited herein and the attached TRMs.

At the public hearing, WSLs' Program Manager II, Steven Smailer, provided documents for the Record, as summarized below:¹

- DNREC Ex. 1 – DFW's February 26, 2016 Application submitted to WSLs;
- DNREC Ex. 2 – A DFW Description of the Statewide Activity Approval for Shellfish Aquaculture Activities in designated SADAs;
- DNREC Ex. 3- The public notice of the Application, as published March 23, 2016 in *The News Journal* and *The Delaware State News*;
- DNREC Ex. 4-Public written comments received in response to the public notice of the Application;
- DNREC Ex. 5 – Public notice of the June 8, 2016 public hearing published May 5, 2016 in *The News Journal* and *The Delaware State News* and

¹ The Department provides documents at its public hearings in order to assist the public in making their comments, but the Department has no legal obligation to develop the record at the public hearing.

then on May 11, 2016 for a change of location due to the amount of interest the Department received.

DNREC Ex. 6-Public comments received following the public hearing notice.

The Application sets forth DFW's proposed request to allow shellfish aquaculturalists to apply for SLA leases of designated tracts using the SAA procedure. The Application identified the designated tracts as within the SADAs and provided maps and coordinates of the perimeter of the SAA SADA designated tracts ("SAA SADA tracts").

The following persons provided public comments at the public hearing:

1) David Green spoke on behalf of the Coalition to Save Beach Cove's 300 property owner members. He thanked the Department for excluding Beach Cove area of Indian River Bay. He expressed his concern that shellfish aquaculture still could be conducted in the Beach Cove area based upon individual permit applications. He mentioned the United States Army's Corps of Engineers pending revision of Nationwide Permit 48, which he said is based on Regulation 3801.

2) Diane Maddex spoke as the founder of the Coalition to Save Beach Cove and as President of the Water's Edge Community Association's 580 owners in Fenwick Island's Delaware Seashore State Park. She questioned whether the proposed SAA for shellfish aquaculture met the requirements of Section 2.5, which required minimal impacts. She said that those seeking to use public subaqueous lands for shellfish aquaculture should have to follow the same regulatory requirements as owners who want to construct a boat pier. She indicated that the Department should not allow shellfish aquaculture in Little Assawoman Bay because it is too shallow and it would interfere with the 15,000 annual recreational users who kayak, sail and paddleboard. She also said that Little Assawoman Bay's shoreline had too much residential density to allow any shellfish aquaculture use. She commented on the cumulative impact of the

172 poles that could be installed in the subaqueous lands using drills. She suggested that instead of the poles that floats mark the shellfish aquaculture tracts. She recommended that the Department amend Regulation 3801 to reduce the SADAs. She also commented that Little Assawoman Bay had 4.7 % of its surface areas included in the SADAs while Indian River Bay had 1% and Rehoboth Bay has 2%. She said that Little Assawoman Bay was not good for shellfish aquaculture. Finally, she said that the SADA located within the Delaware Seashore State Park area was contrary to environmental policies for Delaware's State Parks because of the shellfish aquaculture was a commercial use. She claimed that the United States Department of Interior has not allowed shellfish aquaculture in national parks in the west.

3) Fred Whetzelberger spoke as a member of Seatowne Homeowners Association's 45 owners with houses next to SADA LA-B. He described how his association had responded to the damage from Hurricane Sandy by improving an outfall through the wetlands and were restoring the wetlands. He considered that any shellfish aquaculture was rezoning and would harm his property by increasing noise and visual pollution, causing increased waves from boat activity and would damage the underwater grasses and other vegetation. He indicated that Section 2.5 required certain standards and that the Department failed to meet the burden of proof. He also cited that the proposed SAA did not meet the requirements of Section 3.4 of the SLA Regulation.

4) Sally Ford spoke as an owner in the Seatowne development and questioned why one Division of the Department needed permission from another Division. She wondered if the Department's approval was a done deal. She questioned whether the Department has satisfied the SAA's requirement for minimal impacts.

5) Janet Dubbert spoke as a member of the Bayville Shores Condominium Association's 342-unit townhouse community located on Little Assawoman Bay and is part of the Coalition for Little Assawoman Bay. She thanked Secretary Small for his efforts to remove some of the SADA tracts from the proposed SAA, but she opposed any shellfish aquaculture in Little Assawoman Bay because it would conflict with the recreational use by kayakers and the visitors to the State Park. She said the use of the aquaculture cages and poles as plot boundary markers is ugly, as she depicted in a photograph. She suggested that the Department conduct an environmental impact study as provided by the SLA Regulations. She noted that shellfish aquaculture could have 43 workboats using the 43 SADAs tracts in Little Assawoman Bay. She did not know where the workboats would be launched and indicated they may cause navigational issues along with the recreational users and that the Department should coordinate with the USACE. She suggested the Department form an advisory committee to invite more concerned citizens 'to the table.'

6) Dennis Klinzing spoke in opposition to the Application because it would result in the installation of poles. He produced a representative pole decorated following the Department's standards. He comment on how ugly the pole was. He said that the Department should deny the DFW request. He noted that the Department approved only a dozen pole markers for the Little Assawoman Bay's the navigation channel. He said that marking the Little Assawoman Bay's SADA tracts would require 172 poles.

7) Rob Marinelli spoke as an owner in the Kings Grant subdivision, which has 75 homes and is part of the Coalition to Save Little Assawoman Bay. He said he was shocked by the September 2014 Regulation 3801. He said that no shellfish aquaculture should be allowed in Little Assawoman Bay because it is too shallow. He noted that the Bay is used by many

kayakers, particularly customers of Coastal Kayak. He claimed that Trip Advisor recognized Coastal Kayak as a top ranked family attraction. He stated that the shellfish farmers opposed the Regulation 3801's tract marking requirements too. He noted that the 118 tracts in Little Assawoman Bay would require 472 poles, and that 772 poles would be needed to mark all the SADA tracts. He stated that large workboats would be needed to install the poles and this activity would harm the underwater grasses. He cited Virginia's shellfish aquaculture regulation, which he said requires shellfish aquaculture to occur only where water quality is good. He said Little Assawoman Bay is too shallow. He stated that the Department should follow Section 4.7.1.1 of the SLA Regulations. Finally, he noted a 1999 Center for the Island Bay study.

8) Scott Kidner spoke as a representative of the Save our Little Assawoman Bay Coalition. He opposed any shellfish aquaculture in the Little Assawoman Bay because the 172 poles and the other shellfish aquaculture activity would result in the industrialization of the Little Assawoman Bay.

9) Paul Breger spoke in opposition to the request and did not want any shellfish aquaculture in SADA LA-D.

10) EJ Chalabala spoke against the pole markers and urged the Department to reduce the number of poles, particularly as each pole would require a survey costing the shellfish aquaculturist \$1,000-2,000. He also disputed the need for the navigational corridors if the same person leases adjacent tracts. He complained about the Department holding closed-door meetings and recommended that the Department hold a meeting of all stakeholders.

11) Ed Launay spoke as a consultant with ERI, which Save our Beach Cove hired to review the proposed shellfish aquaculture. He thanked Secretary Small for reaching out to hear the concerns of Beach Cove and he supported the proposed SAA. He stated his concern with

possible boating accidents and suggested that the Department coordinate with the Coast Guard on boating safety issues raised by shellfish aquaculture.

12) Francis Kelly spoke as a resident of Fenwick Island and he stated his concern with boating safety with the use of the SAA SADA. He also indicated that the water is too shallow and freezes during the winter. He recommended that the Department permanently remove SADA LA-D as a SADA.

13) Joanne Hess of Fenwick Island spoke about the shellfish aquaculture law and how it was enacted shortly after Hurricane Sandy, which was when many of the concerned property owners were too busy with dealing with post storm damage to be aware of the pending law. She said the proposed use for shellfish aquaculture would reduce her children's enjoyment of the area. She expressed her safety concerns with boaters hitting the cages and poles. She also said that shellfish aquaculture will not improve water quality and that the water depth is too shallow for shellfish aquaculture. She commented that Virginia's aquaculture takes place in Assateague Island in water that is 6' deep. She noted that she had not seen any study to support shellfish aquaculture in the Inland Bays. She also expressed concern that freezing would damage and dislodge the poles, such as occurred to her dock's pilings. She commented that the dislodged poles as debris would pose a threat to navigation and the environment. She provided photos as Hess Ex. 1.

14) Jill Lambertson of Fenwick Island commented in opposition to the proposed use of public space, particularly in an area used for recreational use by kayakers and paddlboarders. She said the area was too shallow for other boats. She expressed concern that the wind would cause the kayakers and paddleboarder to be carried into the SADAs. She provided a photo that was marked as Lambertson Ex. 1.

15) Craig Lambertson spoke as a resident who lives approximately 200 yards from LA-D and he expressed the concern with the adverse impact of shellfish aquaculture's cages may have on the horseshoe crabs that use the area to spawn.

16) Ethan Kleinstuber spoke on how shellfish aquaculture would ruin the use of the SADAs for recreational crabbing and how the area was a good spot to crab.

17) Somers Price, Esquire, spoke on behalf of his client Frank Sherman. He noted problems with shellfish aquaculture in Little Assawoman Bay. He provided a study of water depth that indicated only 1.8 to 2.11 water in the proposed SAA SADA. He mentioned how shellfish aquaculture would conflict with kayaking uses and that when the water freezes there would be problems with the poles. His written document was marked as Sherman Ex. 1.

18) Jennifer Adams- Mitchell spoke as the co-owner with her husband of Coastal Kayak, which has been in business for 17 years. She stated that the proposed SAA does not meet the standards for approval under Sections 2.5, 4.7, 4.7.1.1, 4.7.1.2 and 4.5.5 of the SLA Regulations. In addition, she cited that the SAA did not meet Section 3.0 of the Delaware Surface Water Quality Standards as an authorized use. She commented that the Department never contacted Coastal Kayak about the proposed shellfish aquaculture use near her business and that the shellfish aquacultural use of LA-D would harm her business because she now sends kayakers south towards LA-D. She indicated concerns with the power spraying of cages removed during the shellfish aquaculture harvesting and how power spraying would increase turbidity. She also stated that the Department should require all shellfish aquaculture equipment to be removed before storms to avoid the equipment being dislodged and becoming debris. Finally, she stated that the Department should require that the poles be kept free from barnacle that are sharp and could injure kayakers.

19) Steven Friend spoke as a potential shellfish aquaculturalist and he stated that the Little Assawoman Bay SADA was too shallow for oysters but could be used for clamming. He opposed the use of the pole markers, which he said were not needed for clamming. He commented on the secret meetings held to develop the shellfish aquaculture policies.

20) Alexander Daly spoke as a representative of the Fenwick Island Yacht Club. He noted the USACE proceeding on shellfish aquaculture in the Inland Bays. He said the proposed SAA SADA in Little Assawoman Bay would adversely impact sailing and kayaking use of the area.

21) The Honorable State Senator Gerald Hocker spoke and stated the law that approved shellfish aquaculture enacted was followed by the Department's mistake by allowing oyster farming in the Little Assawoman Bay, which he stated is too shallow and provides no dock location to unload the harvested oysters. He also opposed requiring poles for clamming operations. He indicated his support for oyster farming industry in general as providing jobs.

22) Steve Callenen spoke about the origins of Inland Bays shellfish aquaculture, which began with the Center for the Inland Bays' "Tiger team," which was a group that periodically met in Lewes beginning in 2012. He stated that the Center had tried for the past ten years to raise oysters at its James Farm location. He commented that the proposed SAA was not supported by Section 4.6.3 of the SLA Regulations. He commented that the Center for the Inland Bays support for aquaculture violated its Comprehensive Conservation Management Plan, which requires maximum public participation when the Center adopts policies. Mr. Callenen's extensive written comments were marked as Callenen Ex. 1.

23) Ron Blank from Fenwick Island spoke and opposed any shellfish aquaculture in Little Assawoman Bay because it is a heavily populated area and it should be used only for recreational clamming.

24) Mark Tingle spoke and commented that no one from the Inland Bays was on the Tiger Team, and he opposed any shellfish aquaculture in Little Assawoman Bay. He indicated that shellfish aquaculture would interfere with the Fenwick Island Yacht Club sailing regattas and that Fenwick Island's Town Council voted unanimously to oppose shellfish aquaculture.

25) State Representative Gray commented that he voted for the Shellfish Aquaculture Act, which passed without any opposition because it sounded like a good idea to help clean up the Inland Bay's water quality and would provide jobs. He stated that the Act prohibits any shellfish aquaculture use if it interferes with the recreational use. He stated his opposition to the required pole markers of the tracts.

26) Chris Bason, Executive Director of the Center for the Inland Bays, spoke in support of shellfish aquaculture and the approval of the SAA permitting procedure for a subset of the tracts included in the SADAs. He stated that oyster and clams removed nitrogen and phosphorous in the water which polluted the Inland Bays' water quality. He mentioned that the Center for the Inland Bays now operates 80 oyster growing sites in the Inland Bays and that shellfish aquaculture could provide young people with jobs.

The Record also includes the DFW's and the WSLs' TRMs, which support the use of SAA procedure for the SAA SADA tracts. The DFW TRM recommends approval of shellfish aquaculture in the designated SAA SADA tracts based upon the legislation and the Regulation 3801, which require the Department to encourage shellfish aquaculture. The TRM set forth the scientific and technical analysis that went into the Regulation 3801; however, the Department

cannot change Regulation 3801 in this proceeding. The WSLs TRM sets forth its analysis under the SLA and SLA Regulations that shellfish aquaculture's proposed use of designated public subaqueous lands would be consistent with SAA application review procedures. The WSLs TRM noted the concerns that Little Assawoman Bay may not be suitable for oyster aquaculture.

III. FINDINGS OF FACT, REASONS AND CONCLUSIONS

I find that the record established above supports approval of the DFW Application to allow shellfish aquaculturalist to apply for SLA lease authority using the SAA procedure so long as the lease is for the SAA SADA designated tracts.

I find that the Application seeks to allow shellfish aquaculturalists to use the SAA procedure for review of SLA applications to use the SAA SADAs, which are located within six of the eight SADAs. The DFW designated subaqueous lands are 343 one-acre tracts ("SAA SADA tracts") out of the 442 one-acre tracts approved within the SADAs established in 2014 with the adoption of Regulation 3801. The SAA SADAs tracts would reduce the regulatory burden associated with the SLA application review process.

Under DFW's request, any shellfish aquaculturalist who seeks a SLA lease of DFW's designated SAA SADA tracts would be able to apply under Section 2.5's abbreviated SLA application review procedure. The DFW seeks SAA approval because it would reduce the SLA's regulatory burden on shellfish aquaculturalists, would encourage shellfish aquaculturalists to select the designated tracts and thereby minimize any adverse impacts on many property owners.

I find that the WSLs should use the SAA review process for shellfish aquaculturalists' SLA applications to use SAA SADAs because of the Department's role in regulating and

encouraging shellfish aquaculture in the General Assembly's delegation of authority to the Department in Chapter 20. Chapter 20 is part of the 2013 enactment of the Delaware Aquaculture Law, and the DFW's TRM sets forth this background as follows:

From the time that it was tasked with regulation of the new Inland Bays shellfish aquaculture program, the Department of Natural Resources and Environmental Control (DNREC) has made many efforts to integrate shellfish aquaculture in the Inland Bays with the existing bay uses by both people and biota. At the beginning of the process, the Department's Division of Fish and Wildlife (DFW) used information and work done by the Center for the Inland Bays. The Center for the Inland Bays had previously convened a team of multiple stakeholders and interested parties that held several public meetings and culminated in a final report¹ *that* led to House Bill 160 of Delaware's 147th General Assembly. The legislature signaled their support for shellfish aquaculture in the Inland Bays with unanimous passage of House Bill 160. With the passage of this bill, the DFW was charged with adopting regulations to address the new shellfish aquaculture program. During the creation of these regulations, the DFW consulted with other state and federal agencies about how different aspects of shellfish aquaculture might affect the Inland Bays, and sought public opinion with two public meetings, and then a public hearing and comment period on the regulations as required by the Administrative Procedures Act.

¹Endnote citing to the Center for the Inland Bays' Final Report

The TRM cites to the Center for the Inland Bays' Final Report, which provides several scientific studies that supported the legislation. Delaware Aquaculture Law's preamble also cites some of the reasons for the legislation as follows:

WHEREAS, Delaware is the only East Coast state that does not have a shellfish aquaculture industry; and
WHEREAS, Delaware's Inland Bays (Rehoboth, Indian River, Little Assawoman, and Delaware's portion of Big Assawoman Bay) have been shown to be suitable for the growth and survival of commercial shellfish species such as oysters and hard clams; and
WHEREAS, Delaware's Inland Bays are water quality impaired and would benefit from the filtering capability of additional bivalve shellfish; and

WHEREAS, there are potential economic benefits from the fostering of a new industry in eastern Sussex County that is compatible with pre-existing recreational uses; and
WHEREAS, the Department of Natural Resources and Environmental Control historically is the agency best qualified to oversee development, regulation, and enforcement of commercial shellfish harvest and the safety of these food sources to the consuming public; and
WHEREAS, the Department of Natural Resources and Environmental Control has historically been the lead agency in issuing leases of shellfish grounds and in issuing permits for structures erected on or over sub-aqueous bottoms in conjunction with the U.S. Army Corps of Engineers so as to avoid potential navigational hazards; and
WHEREAS, the Department of Agriculture historically is the state agency best suited to the support and marketing of a new form of animal husbandry; and
WHEREAS, area restaurants and chambers of commerce welcome the idea of more locally produced shellfish, especially during those times of year when wild-caught shellfish are unavailable locally; and
WHEREAS, the Center for the Inland Bays in conjunction with the Department of Natural Resources and Environmental Control, the Delaware Department of Agriculture, the University of Delaware Sea Grant Marine Advisory Service, the Sussex County Economic Development Office, and with the participation of recreational and commercial fishing interests have met extensively and publicly to develop the scientific and educational and policy-related information to support the establishment and nurturing of a shellfish aquaculture industry in the Inland Bay
(Emphasis added)

As the above indicates, the General Assembly wanted to create a shellfish aquaculture industry in the Inland Bays. In 2014, Department administered its delegated authority to create a shellfish aquaculture industry in the Inland Bays by proposing Regulation 3801. The Department held two public meetings and a public hearing on the proposed Regulation 3801. In Secretary's Order No. Order No. 2014-F-0013 issued July 15, 2014, the Department approved proposed Regulation 3801 as a final regulation to go into effect August 11, 2014. The Order was

not appealed, and Regulation 3801 remains in effect and binding on the public and the Department and cannot be changed in this proceeding, which considers the DFW Application to include shellfish aquaculture in designated tracts as a new SAA category.

A review of Secretary's Order No. 2014-F-0013, particularly the attached DFW memorandum, finds that the Department considered public comments that raised issues that are identical to the issues some public comments raised in this proceeding. These public comments seek changes to Regulation 3801. In 2014, the Department did not adopt the suggested changes to Regulation 3801. As noted above, the Department does not have any legal authority to amend Regulation 3801 in this proceeding because this proceeding is considering DFW's Application and not a proposed amendment of Regulation 3801.

Regulation 3801 provides for the comprehensive regulation of shellfish aquaculture in the Inland Bays, as explained in its Section 1.0 set forth below:

These regulations provide for a shellfish aquaculture industry in Delaware's Inland Bays that is compatible with commercial and recreational finfishing and shellfishing, boating navigation and public safety, public water access and use, and native biota. Specifically, the regulations provide a structured process and set conditions for leasing of subaqueous bottom within Delaware's Inland Bays for the culture of bivalve shellfish. The regulations include requirements for lease: application, locations, issuance, marking, renewal, transfer, expiration, termination, condemnation and emergency relocation. The regulations further propose measures related to: shellfish aquaculture gear and marking, shellfish nursery permitting and structures, harvester license qualifications, bivalve species authorized for aquaculture, activities within subaqueous lease areas, and shellfish aquaculture reporting requirements.

Regulation 3801 allows shellfish aquaculture throughout most of the Inland Bays, but it established eight SADAs, identified at RB-A, RB-B, RB-C, IR-A, IR-B, LA-B, LA-C and LA-D

to encourage shellfish aquaculture's use based on the reduced regulatory review of these tracts because they already satisfied certain of Regulation 3801's requirements.

Following the adoption of Regulation 3801, the Department met with concerned citizens about the implementation of shellfish aquaculture, particularly in SADA LA-C and IR-B.

The DFW TRM describes this process as follows:

As the implementation process for shellfish aquaculture in the Inland Bays continued after the adoption of the shellfish aquaculture regulations, the DFW reduced the acreage planned for aquaculture leasing in the adopted Shellfish Aquaculture Development Areas (SADAs) by seeking required subaqueous lands approval through submission of a Statewide Activity Approval (SAA) application. The SAA request includes 248 acres in Rehoboth Bay, 91 acres in Indian River Bay (the SADAs include 115 acres, a reduction of 24 acres for the SAA), and 43 acres in Little Assawoman Bay (the SADAs include 118 acres, a reduction of 75 acres for the SAA). Although all acreage in the SADA met the DFW criteria for shellfish aquaculture, the acreage excluded from the SAA request was that most opposed by new comments from nearby residents and landowners.

I find that the Application is reasonable and well supported because it will encourage shellfish aquaculturists to select the SAA SADA designated tracts, which will further minimize any negative impact on shorefront properties and boaters. The shellfish aquaculturalists are expected to select the SAA SADA tracts before other tracts because of the reduced regulatory burden when they apply for SLA authority under the SAA application review process as opposed to the standard SLA application procedure. I find it reasonable to assume that most, if not all SLA leases for shellfish aquaculture, will select leases that are eligible for the SAA procedure. Thus, I recommend that the Department approve the use of the SAA application process for the designated shellfish aquaculture tracts consistent with the creation of an Inland

Bays shellfish aquaculture industry and the compromise reduction in SADA tracts eligible to use the SAA application procedure.

Based upon the public comments, many persons near SADAs-IR-B and LA-C support the compromise as reflected in the DFW's Application. Some shellfish aquaculturalists also support the DFW Application because it will provide a streamlined SLA review. Nevertheless, considerable public opposition remains to any shellfish aquaculture in the Inland Bays.

Once the shellfish aquaculture commences under Regulation 3801, the Department may have better information available to it to determine if Regulation 3801 should be amended. I do not recommend that the Department amend the Application based upon the public comments except those that WSLs recommended accepting in its TRM. These public comments want the Application changed to remove oyster shellfish aquaculture in Little Assawoman Bay as a statewide activity eligible to use the SAA procedure. The WSLs recommended this change and I accept the WSLs' reasons in support of it as stated in the TRM.

I find that the Application is consistent with SLA Regulation's Section 2.5 set forth below:

2.5 Statewide Activity Approvals. The Department may adopt statewide activity approvals for certain specified activities with limiting dimensions and criteria that are considered to have minimal impacts on subaqueous lands, water quality, habitats, etc.

I find that the Application meets Section 2.5 criteria because shellfish aquaculture is a 'specified' activity and the DFW designated tracts have 'limiting dimensions' because they will be surveyed, their boundaries marked, and otherwise must comply with Regulation 3801. The General Assembly already determined that shellfish aquaculture should use the Inland Bays' subaqueous lands, albeit as regulated by the Department. Regulation 3801 regulates the shellfish

aquaculture to minimize any environmental harm, including to subaqueous lands, water quality and other environmental considerations. The WSLs TRM states that shellfish aquaculture will have minimal impacts and properly should be a statewide activity reviewed under Section 2.5's procedure, as set forth below:

As stated in the Regulations Governing the Use of Subaqueous Lands, the adoption of a Statewide Activity Approval is based upon the identification of "*certain specified activities with limiting dimensions and criteria which are considered to have minimal impacts on subaqueous lands, water quality, habitats, etc.*" The establishment of the specified SADA by the Division of Fish & Wildlife defined the geographic constraints of these activities. The specific-site assessment/screening requirements (e.g. benthic surveys, navigational concerns, etc.), operational constraints (e.g. gear requirements/restrictions), and lease termination/bonding requirements spelled out in the Shellfish Aquaculture Regulations and the proposed lease language further address/minimize the impacts to subaqueous lands sufficiently to allow for the SAA consideration.

The vast majority of the public comments received by the WSLs spoke in opposition to the Shellfish Aquaculture program as a whole and requested specific modifications to the existing Shellfish Aquaculture regulations. Addressing both of these items is beyond the legal authority of the WSLs's SAA process. The SAA process is an administrative tool used by the Department to facilitate the issuance of recurring authorizations where the underlying conditions/criteria have been previously vetted (in this case the characterization and pre-selection of the SADAs). The SAA process is not a mechanism that can be used to modify existing regulations or to permit activity in conflict with those regulations. For instance, many comments requested that the SADA areas not included in the SAA be permanently removed from the Regulations. This specific example is important on many points:

- 1.) The Statewide Activity Approval is an administrative tool to that enables the WSLs to facilitate a desired behavior by simplifying a repetitive task that meets very specific criteria. As an administrative tool, the SAA cannot be used to overrule or supersede an existing Law or Regulation. Because the Shellfish Regulations are very specific with regards to the SADA areas and the required leasehold markings, there is not the legal opportunity

to permanently change or alter those regulations by this SAA. Those changes would require a formal regulatory review/change process by the Division of Fish & Wildlife beyond the scope of the WSLs; and

2.) The SAA does allow for the application of specific selection criteria in order for a project to be deemed eligible for processing under the SAA. The reduction of the SADA areas to the subset specified in the proposed SAA is the very application of that selection criterion. Under the existing State regulations, Shellfish Aquaculture is permissible in the entirety of the SADAs as established throughout the Inland Bays. However, the SAA encourages the limitation of that activity to the reduced subset presented in the Division of Fish & Wildlife's application. Without the SAA in place, the entire set of SADA areas would be equally "in-play" which is in direct opposition to the desire for a reduced area expressed by many of the opponents. The reduced areas presented in the SAA are the result of the Department responding to many of the public comments received prior to the formal notice process for this SAA. As such, many of the opponents stated their appreciation for the reduced areas in the SAA but requested that those changes be made permanent. The SAA process allows us to encourage/direct the activities to the restricted subset of areas, but it cannot address the "permanence" issue. Furthermore, should the SAA process be denied there would be no mechanism to facilitate the currently proposed reductions at this time.

The above highlights that the present proceeding is on the Application to use the SAA process as an administrative tool to reduce the regulatory burden to obtain the SLA authority.

The SAA procedure also is the 'carrot' to encourage shellfish aquaculturalists to select the designated SAA SADA tracts in the Chapter 20 lease selection process. The designated tracts also were the result of the Department's effort to reduce the impact on property owners, but the Department understands that not all property owners will be satisfied with the compromise, as was evident at the public hearing.

In sum, I recommend, after consideration of the Record, that the Department approve the Application and allow shellfish aquaculture leasing of designated SAA SADA tracts to be

eligible to use the SLA's SAA review procedure. I recommend that the Department enter the following ordering conclusions:

1. The Department has jurisdiction pursuant to *7 Del. C. Section 6006* and *7 Del. C. Chap. 72* to make a determination on the Application to include designated shellfish aquaculture in the SAA SADA tracts as a statewide activity reviewed under the SLA's SAA procedure;
2. The Department provided public notice of the Application and the public hearing that the Department held on it;
3. The Department considered all timely and relevant public comments in making this determination. This Order and the attached Report establishes the Record to support this final agency decision;
4. The WSLS shall administer the SAA procedure to include the designated shellfish aquaculture in the SAA SADA tracts as an approved statewide activity, which shall allow the DFW's leasing of the designated one-acre SAA SADA tracts pursuant to Chapter 20's leasing authority; and
5. The Department shall publish this Order on its web site and provide such notice of it in a manner required by the law and the Department's Regulations.



Robert P. Haynes, Esquire
Senior Hearing Officer



STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES
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Technical Response Memorandum

To: Robert Haynes, Hearing Officer

Through: Virgil Holmes, Director, Division of Water *VH 9/12/16*

From: Steven Smailer, Section Manager, Wetlands and Subaqueous Lands Section *[Signature]*

Date: September 1, 2016

Subject: Shellfish Aquaculture Statewide Activity Approval (SAA)

INTRODUCTION

On February 26, 2016, the Wetlands and Subaqueous Lands Section (WLSL), Division of Water, Department of Natural Resources and Environmental Control received a request from the Division of Fish and Wildlife to establish a Statewide Activity Approval (SAA), pursuant to 7 Del. Admin. C. §7504 – 2.5 of the Regulations Governing the Use of Subaqueous Lands, to facilitate the issuance of permits for commercial shellfish aquaculture activities on public subaqueous lands in Delaware's Inland Bays. The Shellfish Aquaculture program having been established previously under 7 Del. Admin. C. 3800, Shellfish Aquaculture. If established, it is anticipated that an SAA authorization request would be submitted as part of each lease application package, and would be reviewed/processed concurrently with the lease application.

The request asked that the SAA be established for a specified subset of the Shellfish Aquaculture Development Areas (SADAs) adopted in the regulations. It is our understanding that this subset of the SADAs was the compromise/result of discussions with concerned local

citizens in an attempt to address some of their communicated concerns while allowing for the nascent aquaculture program to move closer to implementation.

The proposed SAA was placed on 20-day public notice on March 23, 2016. During this public notice period the WSLs received some initial inquiries from prospective watermen asking how they could apply for leased areas and multiple letters of objection to the Shellfish Aquaculture program in general. Most of the comments received were directly associated with the regulations already promulgated by the Division of Fish and Wildlife, and therefore beyond the scope of the WSLs SAA to address. However, sufficient meritorious comments were received for a public hearing to be scheduled for June 8, 2016. Notification for this hearing was published on May 5, 2016 and then again on May 11, 2016 when the venue was changed. Additional comments were received up to and during the public hearing. Additionally, because of the number of comments received complaining about the Shellfish Aquaculture Regulation development process as a whole and specifically the locations of the public hearings and workshops and the off-season dates on which they were held, the WSLs decided to hold the public hearing after Memorial Day in Millville.

This Technical Response Memorandum (TRM) presents the Wetlands and Subaqueous Lands Section's (WSLS) findings regarding the above-referenced SAA and the public comments received during the public notice period and those presented at the public hearing held on June 8, 2016.

SUMMARY

In response to the public notice for the proposed SAA, the WSLs received a number of inquiries from prospective watermen asking how they could apply for a lease. However, after that initial wave of interest and support, the bulk of the comments received were in opposition to shellfish aquaculture in general. Many comments requested a public hearing about the Shellfish Aquaculture program itself. Only one specific written objection spoke directly to the Statewide Activity Approval process itself and requested a public hearing accordingly. That comment spoke to the portions of the SADA in Little Assawoman Bay that were excluded from the SAA and whether consideration should be given to excluding more areas or limiting the uses. The majority of the other complaints can be grouped into three (3) main categories:

- 1.) The desire to have the portions of the SADA areas not included in the SAA permanently eliminated from the Regulations;
- 2.) The objection to the required white PVC leasehold corner markings, as specified in the Regulations; and
- 3.) A general objection to the idea of shellfish aquaculture in the Inlands Bays as a concept.

While these concerns are an important expression of the local public opinion, modifications to the established Shellfish Aquaculture Regulations are beyond the authority of the WSLs and the associated SAA process.

The comments heard during the public hearing were quite similar to those received during the public notice period with the vast majority mirroring the three categories listed above. It should

be noted that efforts were made by the Hearing Officer and WSLs staff at the start of the hearing to communicate the limited authority the SAA process has with regards to the Fish & Wildlife regulations, however that did not dissuade the expressed opinions in those regards.

While the majority of the complaints expressed were beyond the scope and authority of the SAA, a few specific topics were raised that could pertain to the proposed SAA:

- 1.) A concern was expressed as to whether a single SAA was appropriate for all three Inland Bays (Rehoboth Bay, Indian River Bay, and Little Assawoman Bay);
- 2.) A significant majority of the concerns expressed were associated with the proposed activities in Little Assawoman Bay specifically; and
- 3.) The few proponents of aquaculture that expressed their support at the hearing seemed in agreement that oyster aquaculture, specifically, was not suited for the Little Assawoman Bay.

DISCUSSION

As stated in the Regulations Governing the Use of Subaqueous Lands, the adoption of a Statewide Activity Approval is based upon the identification of “*certain specified activities with limiting dimensions and criteria which are considered to have minimal impacts on subaqueous lands, water quality, habitats, etc.*” The establishment of the specified SADA by the Division of Fish & Wildlife defined the geographic constraints of these activities. The specific-site assessment/screening requirements (e.g. benthic surveys, navigational concerns, etc.), operational constraints (e.g. gear requirements/restrictions), and lease termination/bonding requirements spelled out in the Shellfish Aquaculture Regulations and the proposed lease language further address/minimize the impacts to subaqueous lands sufficiently to allow for the SAA consideration.

The vast majority of the public comments received by the WSLs spoke in opposition to the Shellfish Aquaculture program as a whole and requested specific modifications to the existing Shellfish Aquaculture regulations. Addressing both of these items is beyond the legal authority of the WSLs’s SAA process. The SAA process is an administrative tool used by the Department to facilitate the issuance of recurring authorizations where the underlying conditions/criteria have been previously vetted (in this case the characterization and pre-selection of the SADAs). The SAA process is not a mechanism that can be used to modify existing regulations or to permit activity in conflict with those regulations. For instance, many comments requested that the SADA areas not included in the SAA be permanently removed from the Regulations. This specific example is important on many points:

- 1.) The Statewide Activity Approval is an administrative tool to that enables the WSLs to facilitate a desired behavior by simplifying a repetitive task that meets very specific criteria. As an administrative tool, the SAA cannot be used to overrule or supersede an existing Law or Regulation. Because the Shellfish Regulations are very specific with regards to the SADA areas and the required leasehold markings, there is not the legal opportunity to permanently change or alter those regulations by this SAA. Those

changes would require a formal regulatory review/change process by the Division of Fish & Wildlife beyond the scope of the WSLs; and

- 2.) The SAA does allow for the application of specific selection criteria in order for a project to be deemed eligible for processing under the SAA. The reduction of the SADA areas to the subset specified in the proposed SAA is the very application of that selection criterion. Under the existing State regulations, Shellfish Aquaculture is permissible in the entirety of the SADAs as established throughout the Inland Bays. However, the SAA encourages the limitation of that activity to the reduced subset presented in the Division of Fish & Wildlife's application. Without the SAA in place, the entire set of SADA areas would be equally "in-play" which is in direct opposition to the desire for a reduced area expressed by many of the opponents. The reduced areas presented in the SAA are the result of the Department responding to many of the public comments received prior to the formal notice process for this SAA. As such, many of the opponents stated their appreciation for the reduced areas in the SAA but requested that those changes be made permanent. The SAA process allows us to encourage/direct the activities to the restricted subset of areas, but it cannot address the "permanence" issue. Furthermore, should the SAA process be denied there would be no mechanism to facilitate the currently proposed reductions at this time.

Another specific example of the public comments/concerns expressed as it relates to the SAA process is the criticism of the specific requirements for the leasehold markings. Section 14 of the Shellfish Aquaculture Regulations stating in relevant parts:

- 14.2 It is unlawful for the aquaculture lessee to not mark each corner of a Shellfish Aquaculture Subaqueous Land Lease with a PVC pole or PVC pole buoy at least six (6) inches in diameter and extending at least five (5) feet above the surface of the water at mean high water. (Penalty Section 7 Del.C. §2012)*
- 14.3 The leaseholder shall affix an orange reflective diamond placard, measuring a minimum of 12 inches by 12 inches to each corner pole.*
 - 14.3.1 The leaseholder shall mark each corner pole with at least 24 inches of white or orange reflective material above the water line, a portion of which must be visible from all directions.*
 - 14.3.2 The leaseholder shall mark each corner placard with the corresponding lease number in three (3) inch black block lettering.*

Should the regulations have been less specific in these regards, the SAA could have been conditioned such that alternative markings could be specified. However, given the specificity of the Regulations in this regard, the SAA cannot require other markings that would be considered "unlawful" per the existing regulations.

As discussed above, the SAA cannot be used to address the two (2) most commonly expressed concerns; permanent reduction in the SADA areas, and reduced/alternate marking. However, the SAA does direct those activities to the reduced areas, albeit in a non-permanent fashion.

Given the comments received and the testimony heard during the public hearing, there may be some merit with regards to the concerns expressed regarding whether a single SAA was appropriate for all three Inland Bays. Specifically, both the proponents for, and the opponents to, shellfish aquaculture seemed in agreement that oyster aquaculture may not be appropriate in the Little Assawoman Bay. It should be noted that most of the opposition was against all forms of shellfish aquaculture, however many expressed that the possibility of floating oyster cages in Little Assawoman Bay was particularly concerning. While the WSLs would defer to the Division of Fish & Wildlife's fishery's staff regarding the technical merits of these comments, it may be appropriate to respond to these concerns by limiting SAA-authorized aquaculture activities in the Little Assawoman Bay to only hard clams.

Finally, while not discussed specifically as part of the public comments, the 5-year duration proposed for the SAA is an important factor. Many of the commenters had expressed their displeasure at what they referred to as the lack of opportunity for public comment during the Shellfish Aquaculture Regulation development process. While this has no bearing on the SAA process itself, it is important to note that Statewide Activity Approvals are issued for a fixed time period (5-years) after which any renewal would again be processed through a formal public notice/comment period.

CONCLUSION

The vast majority of the comments received by the Department were directly related to the Shellfish Aquaculture Regulations themselves or the regulatory development process thereof. The WSLs's SAA process is not able to address those regulation-specific concerns. However, the SAA process is able to place some additional scrutiny and direction on the locations and types of activities authorized in subaqueous lands. Therefore, the WSLs finds that establishing a Statewide Activity Approval (SAA) for Shellfish Aquaculture in the Inland Bays is appropriate. Specifically, the SAA can be used to position the pending aquaculture program to start in a reduced/limited fashion by:

- 1.) Directing the aquaculture activities to a limited subset of the established SADAs;
- 2.) Limit the approved activities in the Little Assawoman Bay to only hard clams aquaculture;
and
- 3.) Provide a recurring mechanism for future public comments via potential SAA renewal processes.

Additionally, while a 5-year duration was proposed for the SAA, this duration should be modified to read 5 years, or upon any modifications to the Shellfish Aquaculture regulations, whichever comes first.



Statewide Activity Approval for Shellfish Aquaculture Activities in designated Shellfish Aquaculture Development Areas (SADA)

Authorized Activity

This Statewide Activity Approval (SAA) may be used to authorize shellfish aquaculture activities within portions of the Shellfish Aquaculture Development Areas (SADA) established under 7 DE Admin Code, 3800 Shellfish Aquaculture. These areas, as identified on the attached maps, are located on public subaqueous lands jurisdictional under 7 Del. Code, Chapter 72, The Subaqueous Lands Act.

All activities must meet the Eligibility Criteria identified below, and must comply with all SAA (Permit) Conditions, in order to use this SAA. Projects which cannot comply with the Criteria or Permit Conditions will not be considered for authorization under this SAA.

Effective Period: Five (5) years from issuance or until modifications are made to 7 DE Admin Code, 3800 Shellfish Aquaculture, whichever comes first.

Authorizing Authority

This SAA has been adopted pursuant to the provisions of 7 Del. C., 7203, and the Department's Regulations Governing the Use of Subaqueous Lands § 2.5 "Statewide Activity Approvals", as administered by the Delaware Department of Natural Resources and Environmental Control, Division of Water Resources, Wetlands and Subaqueous Lands Section (WSLS).

Eligibility Criteria

1. The applicant shall possess a valid lease issued by the Delaware Division of Fish and Wildlife for the Subaqueous Lands identified in the SAA (Permit) Application
2. The proposed shellfish aquaculture activities will be located on leased tracts within the SADA identified on the attached maps.

The recipient of this SAA, hereto referred to as the permittee, is authorized to perform shellfish aquaculture activities within those identified areas, under the terms of their lease, and in accordance with the following conditions:

SAA (Permit) Conditions

1. The permittee shall abide by all terms and conditions of the shellfish aquaculture lease issued by the Delaware Division of Fish and Wildlife.

2. This permittee is only authorized to perform the requested shellfish aquaculture activities within the specific area(s) identified in the application as recorded in the associated lease(s) issued by the Division of Fish and Wildlife.
3. Shellfish aquaculture activities authorized in the Little Assawoman Bay under this SAA are limited to the cultivation of hard clams.
4. This SAA is personal and may only be transferred pursuant to the Assignment terms present in the associated lease issued by the Division of Fish and Wildlife (Term #7).
5. The permittee shall abide by all terms and conditions of Nationwide Permit Number 48 issued by the U.S. Army Corps of Engineers.
6. Impacts to subaqueous lands or wetlands not associated with the specifically authorized activities is prohibited. Any temporarily disturbed subaqueous lands or wetlands shall be returned to pre-disturbance conditions.
7. Representatives of the Department of Natural Resources and Environmental Control shall be allowed to access the property to collect any samples or conduct any tests that are deemed necessary.
8. The issuance of this SAA does not constitute approval for any activities that may be required by any other local, state or federal government agency.
9. The permittee shall protect and hold the State of Delaware harmless from any loss, cost or damage resulting from the activities authorized herein.
10. Any actions, operations or installations which are found by the Department to be contrary to the public interest may constitute reason for the discontinuance and/or removal of said action, operation or installation. Removal and restoration shall be at the expense of the permittee within thirty (60) days of receipt of written notice of revocation and demand for removal.

**FOR THE STATE OF DELAWARE
FOR STATEWIDE ACTIVITY APPROVAL (SAA)
FOR SHELLFISH AQUACULTURE ACTIVITIES
IN SHELLFISH AQUACULTURE
DEVELOPMENT AREAS (SADA)**



Applicant/Company Name and Address

Applicant Phone () _____

Activity Location Information

SADA Area(s)

Rehoboth Bay

- RB - A
- RB - B
- RB - C

Indian River Bay

- IR - A

Little Assawoman Bay (Hard Clams)

- LA - B
- LA - D

Lease Acre Identification

A. Associated Div. of Fish and Wildlife Shellfish Aquaculture Land Lease No.: _____

B. Total # of plots leased: _____
(Please attach location plan)

C. Do you currently have other Shellfish Aquaculture approvals (SAA or Permit) issued by the Wetlands and Subaqueous Lands Section for other locations? Y N

If yes, list the Shellfish Aquaculture Approval/Permit Number(s):

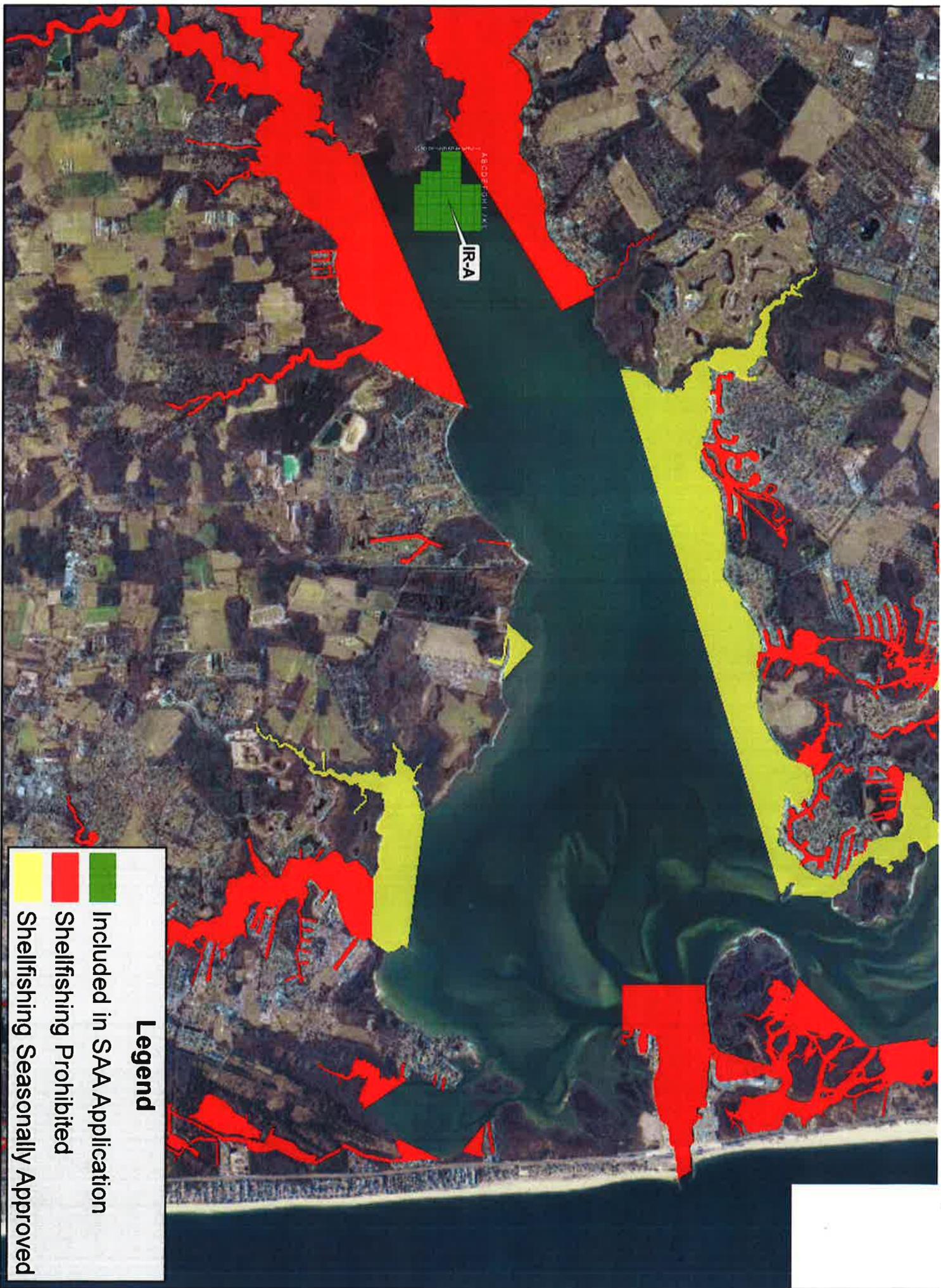
Applicant's Signature: _____ **Date:** _____

I hereby certify that the information on this form and on the attached plans are true and accurate to the best of my knowledge. I understand that the Department may request information in addition to that set forth herein if deemed necessary to appropriately consider this application. I grant Permission to the authorized Department representative(s) to enter upon the premises for inspection purposes during working hours.

Manager's Signature: _____ **Date:** _____

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Figure 1. Indian River Bay Shellfish Aquaculture Statewide Activity Approval (SAA) Request.



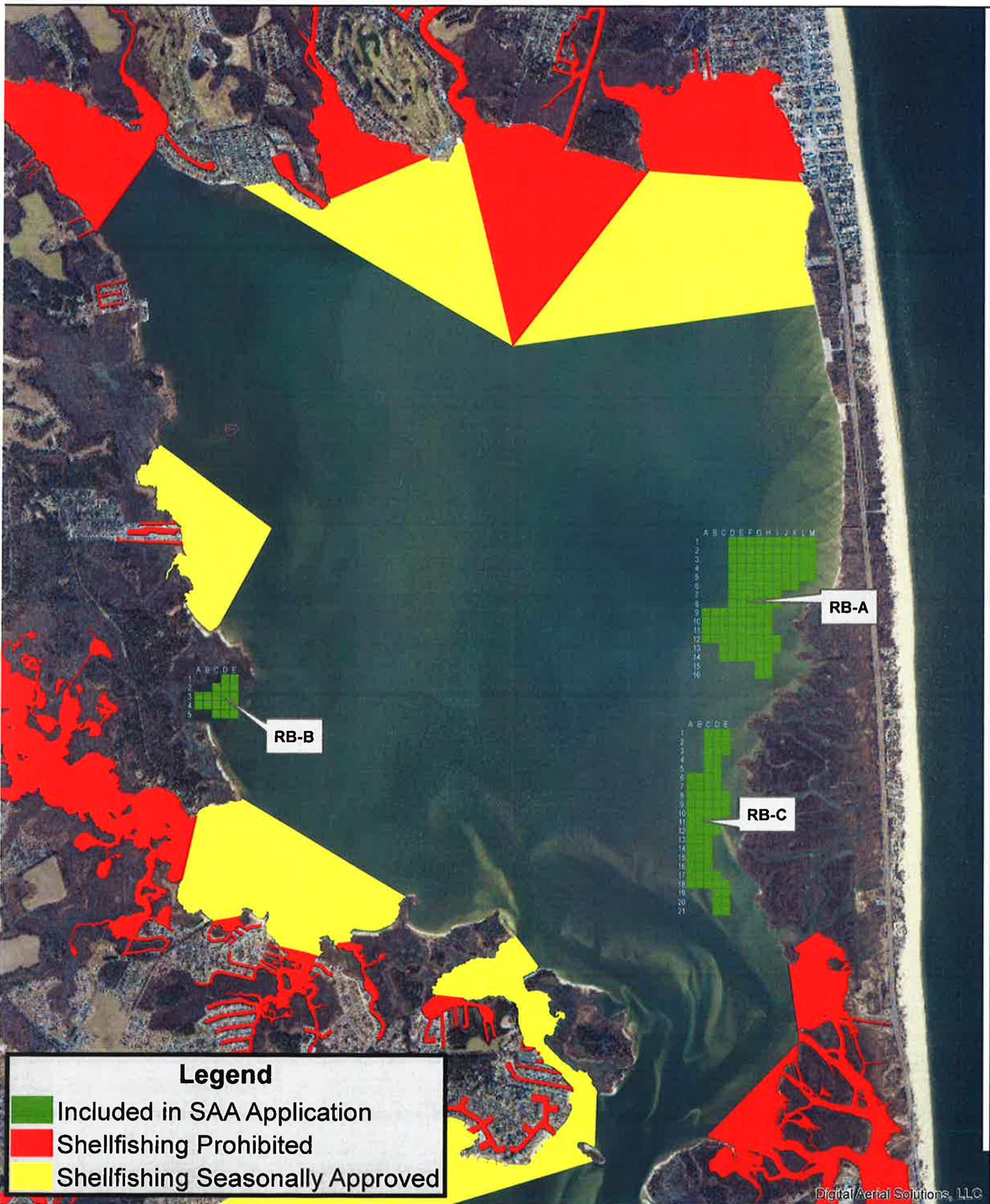
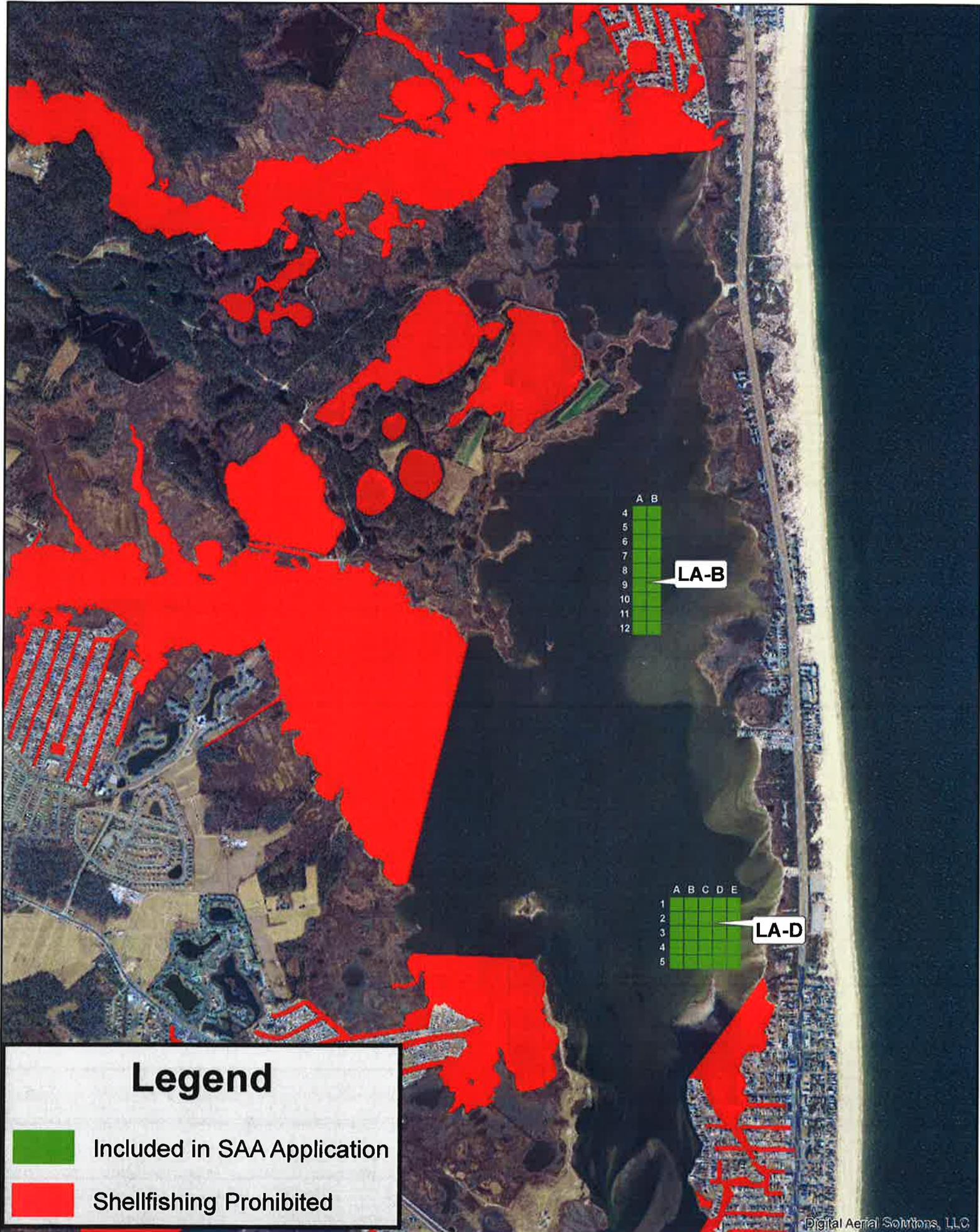


Figure 2. Rehoboth Bay Shellfish Aquaculture Statewide Activity Approval (SAA) Request.



Legend

- Included in SAA Application
- Shellfishing Prohibited

Figure 3. Little Assawoman Bay Shellfish Aquaculture Statewide Activity Approval (SAA) Request.



STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES
& ENVIRONMENTAL CONTROL
DIVISION OF FISH & WILDLIFE
89 Kings Highway
Dover, Delaware 19901

**OFFICE OF THE
DIRECTOR**

Phone: (302) 739-9910
Fax: (302) 739-6157

TECHNICAL RESPONSE MEMORANDUM

TO: Robert Haynes, Hearing Officer
FROM: John Clark, Fisheries Administrator
DATE: November 21, 2016
SUBJECT: Shellfish Aquaculture Statewide Activity Approval (SAA)

From the time that it was tasked with regulation of the new Inland Bays shellfish aquaculture program, the Department of Natural Resources and Environmental Control (DNREC) has made many efforts to integrate shellfish aquaculture in the Inland Bays with the existing bay uses by both people and biota. At the beginning of the process, the Department's Division of Fish and Wildlife (DFW) used information and work done by the Center for the Inland Bays. The Center for the Inland Bays had previously convened a team of multiple stakeholders and interested parties that held several public meetings and culminated in a final reportⁱ that led to House Bill 160 of Delaware's 147th General Assembly. The legislature signaled their support for shellfish aquaculture in the Inland Bays with unanimous passage of House Bill 160. With the passage of this bill, the DFW was charged with adopting regulations to address the new shellfish aquaculture program. During the creation of these regulations, the DFW consulted with other state and federal agencies about how different aspects of shellfish aquaculture might affect the Inland Bays, and sought public opinion with two public meetings, and then a public hearing and comment period on the regulations as required by the Administrative Procedures Act.

As the implementation process for shellfish aquaculture in the Inland Bays continued after the adoption of the shellfish aquaculture regulations, the DFW reduced the acreage planned for aquaculture leasing in the adopted Shellfish Aquaculture Development Areas (SADAs) by seeking required subaqueous lands approval through submission of a Statewide Activity Approval (SAA) application. The SAA request includes 209 acres in Rehoboth Bay, 91 acres in Indian River Bay (the SADAs include 115 acres, a reduction of 24 acres for the SAA), and 43 acres in Little Assawoman Bay (the SADAs include 118 acres, a reduction of 75 acres for the

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SAA). Although all acreage in the SADA met the DFW criteria for shellfish aquaculture, the acreage excluded from the SAA request was that most opposed by new comments from nearby residents and landowners.

Several concerns were voiced in the June 8, 2016 Public Hearing on the Statewide Activity Approval Process for Delaware Shellfish Aquaculture Activities. Among those concerns were human safety, impacts on other animals and negative impacts of gear on the bay bottom of the Inland Bays. Many of the speakers at the meeting mentioned that they were afraid that aquaculture gear would be dangerous for boaters, swimmers, and other bay users. This was also a major consideration of the DFW when structuring regulations for aquaculture. In the interest of safety, both for other users of the bay and to protect the investment of aquaculturists in gear and shellfish, the DFW consulted its Enforcement officers for recommendations. The Enforcement officers are on the Inland Bays often, are familiar with the current recreational and commercial uses of the bays and thus know well the common accidents, incidents, and injuries sustained on the bays. It was their recommendation that aquaculture areas be marked at the corner of each leased acre with PVC poles, and that cages be marked individually with floats, so that other users would be aware of the obstacles and be better able to avoid accidents.

Several people at the hearing voiced concerns about the interaction of wildlife and aquaculture gear, specifically whether birds and horseshoe crabs would be adversely affected by oyster cages in Little Assawoman Bay. Assuring that shellfish aquaculture does not harm the bays' natural biota has been a priority in Delaware. The Center for the Inland Bays used data from hard clam sampling in the Inland Bays ⁱⁱ to suggest locations for aquaculture—the basis for the areas that were further refined and eventually became the SADA—that would avoid high densities of natural hard clams. In regulations, the DFW incorporated a maximum threshold density, “the Department shall not issue a Shellfish Aquaculture Subaqueous Land Lease for any acreage where the Department determines the presence of a mean density of two (2) or more hard clams per square yard per acre” ⁱⁱⁱ to help protect natural hard clams. And, before aquaculture regulations and SADA locations were finalized, the DFW consulted its Wildlife Species Conservation & Research Program's avian biologists regarding this issue, with no concerns regarding bird/aquaculture interactions in Little Assawoman Bay expressed. The U.S. Fish and Wildlife Service was also provided with the SADA locations and Delaware's aquaculture legislation and regulations and reviewed them for conflict with wildlife with no bird or horseshoe crab concerns raised. Included in Delaware's shellfish aquaculture regulations is language to help protect birds around aquaculture leases, stating “It is unlawful to use canopy predator nets, or any barrier netting out of the water on a Shellfish Aquaculture Subaqueous Land Lease or shellfish nursery structure.” ^{iv} There have been instances where birds benefitted from shellfish aquaculture gear. In one study, birds were strongly attracted to shellfish aquaculture gear, the researchers wrote, “this offers a rare example in which introduction of an industry leads to positive effects on wildlife populations.” ^v And, in Maine, there is currently a

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concern that one shellfish aquaculture farm may be attracting birds.^{vi} We were unable to find any peer-reviewed studies indicating that shellfish aquaculture impedes horseshoe crab reproduction. Furthermore, most gear for shellfish aquaculture is designed to specifically exclude predators, as growers want to protect their investment.

The effects of shellfish aquaculture gear and markings disturbing the bay's bottom are temporary. Shellfish aquaculture is recognized by the U.S. Army Corps as minimal impact by its inclusion in the Nationwide Permits "Under Section 404 of the Clean Water Act, the U.S. Army Corps of Engineers (Corps) can issue general permits to authorize activities that have minimal individual and cumulative adverse environmental effects."^{vii} DFW also worked to ensure that the gear would be removed rather than abandoned after the end of a lease through inclusion of shellfish aquaculture bond requirements "the leaseholder is responsible for all equipment, gear, cultured shellfish, or materials placed on the lease site for aquaculture purposes, and remains responsible for gear that has been found adrift or unattended outside the boundaries of the lease."^{viii}

Positive impacts on the local economy and water quality were aspects of shellfish aquaculture that were highlighted by both the Center for the Inland Bays and the legislature, as they enabled the leasing of the Inland Bays. The Center for the Inland Bays supported shellfish aquaculture as an industry that "can provide significant economic benefits to coastal communities while improving the water quality and enhancing the habitat value of Delaware's most imperiled estuaries, the Inland Bays."^{ix} The legislature echoed this sentiment in the introduction to the unanimously approved House Bill 160, "WHEREAS, Delaware's Inland Bays are water quality impaired and would benefit from the filtering capability of additional bivalve shellfish; and WHEREAS, there are potential economic benefits from the fostering of a new industry in eastern Sussex County that is compatible with pre-existing recreational uses"^x

Delaware's legislators signaled their strong support for shellfish aquaculture in the Inland Bays by unanimously approving House Bill 160. The DFW is invested in starting and maintaining a shellfish aquaculture program in Delaware's Inland Bays that can share resources with the current users of the bays and not threaten the natural biota. Safeguards have been placed on the program to help protect people using the bays, wildlife of the bays, and to make shellfish aquaculture gear compatible with the natural bottom.

ⁱ Final Report of the Shellfish Aquaculture Tiger Team to the Board of Directors of the Delaware Center for the Inland Bays. 2013. Delaware Center for the Inland Bays.

https://www.inlandbays.org/wp-content/documents/Tiger_Team_Report_Full.pdf

ⁱⁱ http://darc.cms.udel.edu/ibsa/hard_clam_survey.pdf

ⁱⁱⁱ 7 DE Admin Code 3801 (6.2.1)

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iv 7 DE Admin Code 3801 (23.14)

v Zydelis, R., D. Esler, M. Kirk, and W.S. Boyd. 2008. Effects of off-bottom shellfish aquaculture on winter habitat use by molluscivorous sea ducks. *Marine and Freshwater Ecosystems*.

vi <http://www.ellsworthamerican.com/maine-news/army-corps-hears-thomas-bay-oyster-farm-arguments/>

vii <https://www.epa.gov/cwa-404/nationwide-permits-chronology-and-related-materials>

viii 7 DE Admin Code 3801 (7.1) & (11.12)

ix https://www.inlandbays.org/wp-content/documents/Tiger_Team_Report_Full.pdf

x House Bill No. 160, as amended by House Amendment No. 1. Delaware House of Representatives 147th General Assembly. August 28, 2013

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