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**RECREATIONAL ANGLERS
WORKING TO CONSERVE, PROMOTE, AND ENHANCE MARYLAND'S
MARINE RESOURCES**

November 21, 2017

Via email to bill.morgante@maryland.gov

William Morgante, Wetlands Administrator
State of Maryland Board of Public Works
80 Calvert Street, Room 117
Annapolis, MD 21401

Re: Notice of Exception & Request for Personal Appearance
Tidal Wetlands Case No. 15-0757 (Man O War Shoal)
Applicant: Maryland Department of Natural Resources

Mr. Morgante:

On behalf of the approximately 2,000 members of Coastal Conservation Association Maryland (“CCA Maryland”), we hereby provide these comments to you individually in your role as the Wetlands Administrator and also to the State of Maryland Board of Public Works (the “Board”), regarding the Maryland Department of Natural Resources’ (“DNR”) application for a state tidal wetlands license to dredge Man O War Shoal in Baltimore County (the “Application”). For the reasons stated herein, CCA Maryland takes exception to the Maryland Department of Environment’s (“MDE”) recommendation for approval of the Application, and also takes exception to the recommended conditions for a tidal wetlands license, all pursuant to COMAR 23.02.04.09A.

I. Background

As you know, CCA Maryland is a non-profit, grassroots organization that prides itself on its efforts to advance the conservation and wise use of the natural resources of Chesapeake Bay and the coastal areas of Maryland for the benefit and enjoyment of all of the state’s citizens. As recreational anglers and like-minded individuals that spend considerable time on the water, we are active and long-time participant in fisheries management in the state, Chesapeake Bay and Atlantic coastal waters. We work closely and cooperatively with governmental entities and other stakeholder groups to support science-based conservation and management efforts.

Having been actively involved in the public discussion on oyster management issues and the Application itself for more than a decade, CCA Maryland truly appreciates and respects the many sides of this debate. However, when we step back and evaluate the merits of the

Application we continue to find fault in its underlying basis and proposed execution that shows the proposed activities remain inconsistent with the State's requirements for both the MDE and Board.

Regardless of the merits of the Application itself, without a clear and achievable purpose for the proposed activity that benefits all of Maryland's citizens, a fiscal plan and binding funding commitment to see that plan through, and a strong demonstration that the greater goal of restoring oyster populations Bay-wide would be served by such severe action, CCA Maryland has not and cannot support or condone any dredging of fossil shell from Man O War Shoal or from any other historic bar in Chesapeake Bay.

II. Exceptions to the MDE Recommendation

In evaluating the Application, the Board is required to consider, "the interests and rights of the general public in State tidal wetlands."¹ "Public interests are the demonstrable environmental, social, and economic *benefits which would accrue to the public at large* as a result of a proposed action or activity involving State wetlands and which would exceed all demonstrable environmental, social, and economic costs of the proposed action or activity."² "In determining the public interest in a request for . . . severance of materials from State wetlands, *the Board of Public Works shall consider the ultimate project and beneficial purposes to be served.*"³

DNR stated in its Application that the intent of the proposed project "is to acquire shell that can be used in several ways to restore oyster populations and oyster fisheries in the Bay."⁴ However, the disposition and purpose for that shell to be dredged from Man O War Shoal has not been provided. DNR has suggested that shell dredged from Man O War could be allocated 90% to sanctuaries and 10% to managed public harvest areas or aquaculture, 50% to sanctuaries and 50% to managed public harvest areas or aquaculture, or even 25% to sanctuaries and 75% to managed public harvest areas or aquaculture.⁵ In fact, the R&R states that "[u]ltimately, [DNR] will utilize comments from the public and the Oyster Advisory Commission to develop an allocation plan."⁶

The failure of DNR to specify just how any dredged shell would be used- which is and would remain the property of the citizens of Maryland- is a truly material issue for a variety of reasons. This critical shortcoming arguably prevents the Wetlands Administrator and the Board from being able to properly complete its required analysis as to exactly what is "the ultimate project and beneficial purposes to be served" and "what . . . benefits would accrue to the public at large . . ."⁷ If fossil shell from the proposed project is placed in sanctuaries, then it's quite reasonable to find that a greater share of the "benefits" (for the sake of this argument) would accrue to a relatively greater proportion of Maryland's citizens, with a rate of return that data and science

¹ COMAR 23.02.04.01A.

² COMAR 23.02.04.01B(1) (emphasis added).

³ COMAR 23.02.04.01B(2) (emphasis added).

⁴ Maryland Department of Natural Resources (DNR), Project Description, p. 1.

⁵ *Id.*

⁶ Maryland Department of the Environment (MDE), Report & Recommendation (R&R), p. 6.

⁷ See COMAR 23.02.04.01B.

clearly shows is effectively compounded by the direct and indirect benefits to the Bay and its ecosystems. If the fossil shell from the proposed project is placed in managed harvest reserve areas or is used for aquaculture, then it's quite reasonable to find that a greater share of the "benefits" (for the sake of this argument) would accrue to a relatively smaller proportion of Maryland's citizens and years of data and evidence from the historic "put and take" program demonstrates is generally not sustainable.

This lack of an adequately defined purpose is further compounded when you consider the financial cost of the proposed project. It is quite unclear and simply unknown just how DNR intends to pay for a vast majority of this proposed multi-year project, including any of the studies and other proposed conditions that are presented as a critical and absolutely necessary part of the project. Currently, public funds underwrite a significant portion of the public commercial oyster industry (including \$2,000,000 this most recent fiscal year from the Maryland Port Administration for oyster recovery activities largely benefitting the commercial industry). Just how would the expenditure of public funds associated with this proposed project "accrue to the greater good", especially when the vast majority of shell recovered at considerable financial and ecologic cost could readily be used for short term financial gains benefitting a relatively select few?

Further undermining the alleged requirement for the project is the fact that comprehensive and strenuous studies of the Harris Creek restoration project show that oyster densities on stone-based substrate materials averaged approximately four times than on shell-base reefs (and 22 times higher than reference reefs).⁸ Furthermore, unlike ten years ago when the legislative requirement for DNR to make an application to dredge fossil shell was passed, the cost of such alternative materials is now commonly equal to or less than the cost of dredged shell.

We would also like to take this opportunity to better clarify the record as to public comment on the Application. MDE's Report and Recommendations ("R&R") states that, "[t]he Delmarva Fisheries Association, Inc., the Tidal Fish Advisory Commission, and one citizen submitted letters in support of the oyster restoration. The Clean Chesapeake Coalition and several watermen also provided comments in support of the project."⁹ It then goes on to state, "Citizens expressed concerns over the restoration efforts. . . ."¹⁰ What the MDE failed to note in its R&R was that it was actually 54 individual citizens and groups providing written comment opposing the project and 21 individual citizens and groups providing oral comment in opposition at the two public hearings held on the Application.¹¹

III. Exceptions to MDE's Proposed Conditions

Should the Administrator and Board eventually determine that the issuance of a license is reasonable in accordance with the best interests of the State, CCA Maryland believes the MDE's

⁸ National Oceanic and Atmospheric Administration, 2016 Oyster Reef Monitoring Report, July 2017, p. 19.

⁹ MDE, R&R, p. 7.

¹⁰ *Id.*

¹¹ Three individuals and groups submitted written comment in support of the Application, with eight individuals and groups providing oral comment in support of the Application at the two public hearings.

proposed license conditions fall far short and as such, take exception to the proposed conditions for the following reasons.

Lack of Required Financial Assurance, and Mitigation

As discussed in detail above, it is quite unclear and completely undefined just how shell from this proposed project- which remains the property of the citizens of the State of Maryland- would be used. The Board's regulations specify that wetlands license may be issued contingent upon and subject to certain financial assurances and mitigation requirements among other conditions.¹² Given the complete lack of uncertainty as to potential environmental impacts (as evidenced by the proposed requirements for concurrent studies), clarity as to eventual use of any dredged fossil shell, and lack of any certainty of understanding as where adequate funding might come to execute the project pursuant to and in full compliance with any conditions issued, CCA Maryland believes this proposed Licensee would be an ideal candidate for the State of Maryland, as represented by the Board itself, to require certain financial assurance and mitigation requirements to ensure these studies and monitoring are actually completed and the interests of the public at large are served.

Overboard Disposal

As recreational anglers, our members are deeply concerned about both the short and long-term impacts this proposed project may have on Man O War Shoal. As you know, any application that propose overboard disposal of dredged materials into the open waters of the State- such as being proposed by DNR at Man O War Shoal- is required to submit substantial specific information regarding the disposal of such materials "at the time of application."¹³ In response to a direct question from the National Marine Fisheries Service as to its Application, DNR stated "[t]he dredging process, since the start of the [dredging] program in 1960, has always involved discharging sediment and shell "fines" back into the [dredge] cut, such that the cut is partially filled but not entirely filled, leaving viable topography. This discharging of material into the cut has been approved and required by the permitting agencies every permit cycle since 1960."¹⁴

CCA Maryland thinks that it's safe to say that standards required in the 1960s with regards to oyster management might need to be reconsidered in 2017 and beyond. In fact, CCA Maryland believes the Board's regulations requiring DNR to provide substantial and detailed studies regarding the proposed impacts of this proposed overboard discharge prior have not been satisfied by DNR. We believe these requirements must be adequately completed, compiled, and reviewed as a prerequisite condition for consideration of this Application.

IV. Request for Personal Appearance before the Board of Public Works

¹² See COMAR 23.02.04.14C, D. Note the Board's regulations do not specifically exclude governmental units from these possible conditions, as they specifically do for other possible conditions such as the requirement to pay direct compensation as provided by COMAR 23.02.04.15A.

¹³ COMAR 26.24.03.05B(1).

¹⁴ DNR, Letter to Abigail Hopkins of U.S. Army Corps of Engineers, Baltimore District, August 19, 2016, response to NMFS (1).

Pursuant to COMAR 23.02.04.09B, CCA Maryland hereby respectfully requests the opportunity for a personal appearance before the Board in order for our representatives to further discuss the basis for our opposition to the Application, our exceptions to the MDE's recommendation to approve, and our exceptions to the conditions proposed for the issuance of a Tidal Wetlands License.

Please do not hesitate to contact Dr. Ken Lewis, CCA Maryland's point person on this issue, at 443-578-8277 or kenbonnyl@verizon.net should you have any questions or concerns or require further information.

Respectfully,



Frank Bonanno
Chairman



David Sikorski
Executive Director