



State of New Jersey

DEPARTMENT OF ENVIRONMENTAL PROTECTION

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WILLIAM BARHAM,)	<u>ADMINISTRATIVE ACTION</u>
)	
Petitioner,)	FINAL DECISION
)	
v.)	
)	
NEW JERSEY DEPARTMENT OF)	
ENVIRONMENTAL)	OAL DKT NO.: ELU 12277-19
PROTECTION/LAND USE)	AGENCY REF. NO.: 1342-04-0017.1
REGULATION,)	(EFD180002)
)	
Respondent.)	

This Order addresses a challenge by William Barham (Petitioner) to a condition of the waterfront development individual permit that the Department of Environmental Protection, Land Use Regulation (DEP) issued on December 13, 2018, pursuant to the New Jersey Waterfront Development Act, N.J.S.A. 12:5-1 to -11, and applicable Coastal Zone Management Rules, N.J.A.C. 7:7-1 to -29.10, to “construct a fixed pier, ramp, floating dock, boat lift, and jet ski lift” along the northern edge of Petitioner’s waterfront property, located at 15 Edwards Point Road,

also known as Block 124, Lot 8, in the Borough of Rumson, Monmouth County, along the South Shrewsbury River (Property).

On January 3, 2019, Petitioner requested an adjudicatory hearing to contest the condition of the permit requiring the removal of a pre-existing fixed dock located at the eastern edge of the waterfront property prior to the construction of the proposed docking structure, due to the DEP's determination that the water area adjacent to the Property, in which both the existing and proposed docking structures are located in an area classified as shellfish habitat, as defined in N.J.A.C. 7:7-9.2, Shellfish habitat. Pursuant to this rule, only one dock or pier is permitted per single family property when located in shellfish habitat. Petitioner argued that he should not have to remove the existing dock to install a new second dock because N.J.A.C. 7:7-9.2 should not apply to the Property as shellfish were not currently identified in the vicinity of his Property. Accordingly, Petitioner submits that the DEP's condition was arbitrary, capricious, and unreasonable.

The DEP granted Petitioner's hearing request and the matter was transmitted to the Office of Administrative Law (OAL) where it was assigned to Administrative Law Judge (ALJ) Tricia M. Caliguire. On January 11, 2021, after cross motions for summary decision, ALJ Caliguire issued an initial decision (Initial Decision) finding that the DEP was entitled to summary decision because the undisputed material facts showed Petitioner had not meet his burden of proving that the DEP acted arbitrarily, capriciously, and/or contrary to regulation when it conditioned the permit to build a second dock upon the removal of the first dock, as the water areas adjacent to the Property are located in shellfish habitat. For the reasons set forth herein, I ADOPT the Initial Decision.



FACTUAL AND PROCEDURAL BACKGROUND

I ADOPT the ALJ's finding of facts as set forth in the record and discussed as follows:

The Property consists of a single-family home and has approximately 665 feet of water frontage along the north-eastern portion of Edwards Point, a peninsula that extends into the Shrewsbury River. The eastern edge of the Property is on the South Shrewsbury River, while the northern edge is located along a tributary or channel that meets the South Shrewsbury River at the portion of the peninsula where the Property is located. Petitioner Barham asserts that he is the representative of a trust that currently owns the Property.

On June 15, 2011, the DEP issued a Waterfront Development Act Permit to James T. Robinson, the prior owner of the Property. This permit legalized approximately 401 linear feet of bulkhead, and the existing 7' x 26.5' fixed dock, a 2' x 15' ramp to an 8 x 20' floating dock, as well as the construction of a 12' x 24' boat lift. This dock is located on the eastern edge of the Property. This permit also required a \$1,389.42 monetary contribution to the DEP's Shellfish Habitat Mitigation account, as the project impacted a moderate density of hard clam and soft clam production areas.

On September 25, 2018, Petitioner applied for a Waterfront Development Act individual permit to construct a second dock consisting of a fixed pier and floating dock along the northern edge of the Property, in a creek that flows into and meets the South Shrewsbury River. The proposed dock would consist of a 4' x 15' fixed pier, a 3' x 15' ramp to an 8' x 20' floating dock, one open 12' x 18' jet ski lift, and one 12' x 18' open boat lift. At the time of this application for a second dock on the northern edge of the Property, the first dock located on the eastern edge of



the Property was still present. While Petitioner argues that the current eastern facing dock does not meet the needs of the Property, Petitioner states in his certification in support of his motion for summary decision that “the existing dock remains essential to my waterfront activities and provides valuable mooring and docking for my watercraft.” Thus, Petitioner does not want to remove the existing dock, but instead add an additional dock to the property to “provide for better enjoyment and uses of 15 Edwards Point.”

Petitioner's application included an Environmental Compliance Statement, prepared by the English Group, LLC, which included the following statement acknowledging the presence of hard and soft clams in the area around the Property's peninsula:

Shellfish Habitat regulations charting and mapping (US Fish and Wildlife Service, 1963; attached) demonstrate an absence of oyster beds, an absence of hard clams and an absence of soft clams. The “Inventory of New Jersey's Estuarine Shellfish Resources” maps (NJ Bureau of Shellfisheries, 1983; attached) demonstrate an absence of oyster beds, an occurrence of soft clam production areas, and a hard clam value of “Moderate.”

Consistent with the 1983 Inventory of New Jersey's Estuarine Shellfish Resources (Division of Fish, Game and Wildlife, Bureau of Shellfisheries) (1983 Inventory), as cited by Petitioner in his application, the DEP determined that the Property is located in viable shellfish habitat, as that term is defined by the Coastal Zone Management Rules, N.J.A.C. 7:7-9.2. Specifically, the DEP relied on the provision of N.J.A.C. 7:7-9.2(a)(2) defining shellfish habitat as an area that "is depicted as having high or moderate commercial value in . . . the 'Inventory of New Jersey's Estuarine Shellfish Resources' (Division of Fish, Game and Wildlife, Bureau of Shellfisheries, 1983-present)" in reaching the conclusion that the Property is located in shellfish



habitat. New Jersey shellfish are harvested by both commercial and recreational fisherman. In 2008, the New Jersey commercial dockside landings for estuarine shellfish were valued at approximately \$6.63 million, with shellfish typically being worth about six times the dockside value to the State's economy through processing, distribution, and retail. N.J.A.C. 7:7-9.2(m). Thus, clams having moderate commercial value may account for a significant value to commercial fisherman and the associated industries. The analysis for clam value is based on viable habitat, not the existence of the resource at any moment in time. The regulation also provides that "only one dock . . . shall be constructed per buildable lot" within shellfish habitat. N.J.A.C. 7:7-9.2(d)(3)(iv). Accordingly, on December 13, 2018, the DEP issued Waterfront Development Permit #1342-04-0017.1 (WFD 180001) to Petitioner with the condition that "[p]rior to construction of the proposed docking structure the existing fixed pier, ramp and floating dock must be removed[.]" Additionally, due to the existence of shellfish habitat, the DEP required compensation for condemnation of 697 square feet of the area documented as moderate value hard clams and soft clam production through a contribution of \$4,129.73 to the Shellfish Habitat Mitigation account.

On January 3, 2019, Petitioner submitted to the DEP's Office of Legal Affairs an adjudicatory hearing request challenging the provision of the permit. The matter was transmitted to the OAL, and an evidentiary hearing was scheduled for February 7, 2020.

The DEP filed a motion for summary decision, and accompanying certifications, on January 8, 2020. In support of this motion, the DEP argued there were no genuine issues of material fact that the Property was located in an area subject to N.J.A.C. 7:7-9.2 Shellfish habitat,



as Petitioner had quoted the 1983 Inventory in his permit application. Additionally, neither party disputed that a dock structure currently exists at the Property, and the Property is the site of a single-family dwelling located along the Shrewsbury River in shellfish habitat. Departmental rules require the DEP to condition the permit on the removal of the existing dock prior to construction on the proposed second dock pursuant to N.J.A.C. 7:7-9.2. Accordingly, the DEP argued that, as a matter of law, the DEP was entitled to a summary decision in its favor, affirming the permit condition.

Due to the COVID-19 emergency, Petitioner was granted several extensions to find an expert to inspect the Property and respond to the DEP's motion for summary decision. On July 6, 2020, Petitioner submitted a cross-motion for summary decision in his favor and a brief in opposition to the DEP's motion for summary decision. In the cross-motion, Petitioner argued that the Property is, in fact, not in shellfish habitat, and therefore, the DEP's permit condition that he remove the existing dock was arbitrary. Rather than directly disputing the DEP's characterization of the Property as shellfish habitat, Petitioner's cross-motion acknowledged that his application included an Environmental Compliance Statement, but did not rely upon the facts set forth in that statement regarding his environmental consultant's shellfish habitat characterization. Instead, Petitioner set forth a Statement of Undisputed Fact in opposite of the DEP's, supported only by his own certification and relying on an inaccurate interpretation of N.J.A.C. 7:7-9.2.

In his cross-motion for summary decision, Petitioner stated that: a) the area of the creek in which Petitioner proposed to build a second dock has "never been designated as shellfish habitat;" b) that the DEP's "Inventory of New Jersey's Estuarine Shellfish Resources: Hard Clam Stock



Assessment Navesink and Shrewsbury Rivers (Division of Fish, Game and Wildlife, Bureau of Shellfisheries, Survey Year 2015)" (2015 Inventory), published in 2017, reported low density for hard clams in the area of the proposed second dock; c) that the area of the proposed second dock "is not designated by the State of New Jersey as a shellfish culture area;" and d) that the "area is not designated as productive at N.J.A.C. 7: 25-24, Leasing of Atlantic and Delaware Bay Bottom for Aquaculture." Petitioner argued that because the area was not depicted in 2015 as having a high or moderate commercial value, the area can no longer be considered by regulatory definition a shellfish habitat, regardless of the 1983 Inventory. Thus, because the Coastal Zone Management Rules only restrict properties with single family dwellings within shellfish habitat to one single noncommercial dock, pier, or boat mooring, Petitioner argued that the permit condition is not sanctioned by law and was not issued in accordance with the DEP's rules and regulations.

In support of his motion asserting that the proposed area is not in shellfish habitat, Petitioner submitted as an exhibit a report dated May 6, 2020, prepared and conducted by Michael Lucey of Waters Edge Environmental, LLC, (Lucey Report) wherein Lucey evaluated the proposed docking structure and Property. In the report, Lucey "assumes that the tributary as well as the main Shrewsbury River, specifically in this location, is not considered to be a shellfish habitat, as defined in the [Coastal Zone Management] Rules, specifically N.J.A.C. 7:7-9.2 Shellfish Habitat." Lucey goes on to state that "[n]o determination as to whether this site is in or partially in a Shellfish Habitat is provided in this evaluation."

Additionally, Petitioner's cross-motion asserted that, even if the proposed dock area was found to be in shellfish habitat, he cannot be made to comply with the regulation as it is void for



vagueness as applied to this situation. To this point, Petitioner argued that the language of N.J.A.C. 7:7-9.2(a)(2) clearly "designates a shellfish habitat as one that is depicted as having high or moderate commercial value according to the maps set forth therein," but that, regardless of the language of the regulation, the DEP has impermissibly expanded its scope of what constitutes shellfish habitat in its application of N.J.A.C. 7:7-9.2.

Petitioner cited to the DEP's Division of Land Resource Protection's website, wherein the DEP posts the following disclaimer above its listing of the most current shellfish maps:

The below detailed shellfish distribution maps depict areas that have a current shellfish density equal to or greater than 0.20 shellfish per square foot, or have a history of natural shellfish production. For a complete review of a particular site, all maps within the time series for that area should be consulted. For example, if a map from 1983 shows the area in question as having a "moderate density" of hard clams, while a newer map shows "low density", the property is still considered shellfish habitat and subject to the shellfish habitat rules as such.

It should be noted that these maps do not include undocumented, regulated shellfish areas. These areas, which are not depicted on these maps, are also regulated as Shellfish habitat by the Division of Land Use Regulation. Conclusive evidence concerning the presence/absence of shellfish requires site inspections and habitat assessments.

Therefore, these shellfish maps alone are not sufficient to determine the presence/absence of regulated shellfish habitat. This is a compilation of data merely for informational purposes. The NJDEP does not warrant or guarantee the quality or completeness of the content on this website. State of New Jersey shall not be held liable for improper or incorrect use of the data described and/or contained herein. This disclaimer applies both to individual use of the data and aggregate use with other data.



[<https://www.nj.gov/dep/landuse/shellfish.html>]

Petitioner argued that in the DEP's statement above, the definition of shellfish habitat is not necessarily limited to the language set forth in N.J.A.C. 7:7-9.2(a)(2), but that shellfish habitat is actually any "areas that have ever been designated as having a shellfish distribution of moderate or high commercial value, and even regulate areas [as shellfish habitat] that are 'undocumented' or not depicted on the [maps designated by N.J.A.C. 7:7-9.2(a)(2)]," thus it is beyond its rule-making authority to regulate in this manner. Thus, Petitioner argued that the DEP's position on what constitutes shellfish habitat impermissibly expands the language of the regulation and is therefore unconstitutional as applied to Petitioner. Additionally, Petitioner argued that the language of the regulation is unconstitutionally vague as applied in laying out which inventory would apply in this instance, where there is conflicting information regarding commercial value. Petitioner also argued that the DEP's application of the rule in this instance is arbitrary where the DEP chose to only look to the 1983 Inventory, particularly where the 2015 Inventory demonstrated that the proposed dock area is not a shellfish habitat, according to the regulatory language.

In its response to Petitioner's constitutional argument, the DEP argued that the OAL does not have jurisdiction to rule on that issue. Further, the DEP argued, the regulation is not so vague that persons of common intelligence, such as Petitioner's consultant who produced the Environmental Compliance Statement, would not have to guess at its meaning or differ as to its application.



After reviewing the submissions, the ALJ asked for clarification about the reported reduction of shellfish near the Property between 1983 and 2015, and the impact, if any, of this apparent change on a finding of habitat. In response to these specific questions raised by the ALJ, supplemental briefs were filed by the DEP on November 13, 2020, and by Petitioner on December 3, 2020.

In its supplemental papers, the DEP submitted the expert certification of the DEP's Principal Biologist, Kira Dacanay, author of the 2015 Inventory. Dacanay certified to the criteria that the DEP can use in determining shellfish habitat. As to the Petitioner's property, Dacanay cited to the documents she reviewed in forming her opinion that shellfish habitat exists for hard clams in both the existing dock and proposed dock locations at the Property. Particularly, those documents included: 1) the Property survey submitted by Petitioner to the DEP; 2) the 1963 "Distribution of Shellfish Resources in Relation to the New Jersey Intracoastal Waterway," authored by the U.S. DEP of Interior; 3) the 1983 Inventory; and 4) the 2015 Inventory. All of these documents are available to the DEP's Bureau of Shellfisheries and posted on the DEP's website.

Dacanay certified that shellfish habitat exists at the location of both the existing and proposed dock areas at the Property on the Shrewsbury River, and that both areas have a history of natural shellfish production for soft and hard clams, and therefore meet the definition of shellfish habitat. Specifically, Dacanay opined that:



The one-time finding of a lower density of a shellfish population within an area historically documented as supporting moderate and/or high densities of shellfish is insufficient to conclude the area is no longer capable of supporting shellfish populations and does not preclude future increases in density. There is no evidence from the 2015 Inventory indicating that the area around the applicant's docks is no longer in shellfish habitat or that these areas lack the characteristics to continue functioning as a shellfish habitat. Instead, it simply shows a lower density of hard clams as of 2015 and that soft clams had not set there recently.

The DEP relied on Dacanay's expert certification in support of the DEP's assertion that its decision to condition Petitioner's permit on his removal of the existing dock was not arbitrary, as both areas are unequivocally shellfish habitat.

Petitioner's December 3, 2020, supplemental submission focused on the disparity between how the DEP and its expert define shellfish habitat and how the regulation defines shellfish habitat. Specifically, Petitioner argued that where the regulations provide specific criteria for defining shellfish habitat, the ALJ need not look to the expert certification on the matter to determine whether or not the area in question is shellfish habitat.

INITIAL DECISION

On January 11, 2021, ALJ Caliguire issued an initial decision granting the DEP's motion for summary decision and denying Petitioner's cross motion for summary decision. ALJ Caliguire found that there were no material facts at issue, and that the issue in dispute was over the application of N.J.A.C. 7:7-9.2. As this was a matter of law, and not of fact, this matter was appropriate for summary decision. ALJ Caliguire also found that the Petitioner had not met his burden of proof to show that the DEP was arbitrary, capricious, and/or not in accordance with or



supported by the law and/or regulations in requiring Petitioner to remove the existing dock before building the new one.

The ALJ reviewed the submissions by the parties, including the certifications and exhibits by Petitioner and Dacanay, to determine whether the Property has a history of natural shellfish production, and/or is depicted as having a high or moderate commercial value in the Inventory of New Jersey's Estuarine Shellfish Resources (Division of Fish, Game and Wildlife, Bureau of Shellfisheries, 1983-present). The ALJ concluded that the proposed site has a history of natural shellfish production because the rules define shellfish habitat as including an area with a "history of natural shellfish production according to data available to the New Jersey Bureau of Shellfisheries," N.J.A.C. 7:7-9.2(a)(2), and the 1983 Inventory, which both qualifies as data available to the Bureau and is acknowledged by the DEP and Petitioner in his application, indicate that the proposed site was in shellfish habitat in the past. Accordingly, the ALJ concluded that the proposed site has a history of natural shellfish production, and thus qualifies as shellfish habitat per the regulation.

ALJ Caliguire noted that Petitioner did not make use of the opportunities afforded by N.J.A.C.7:7-9(2)(b) to demonstrate by clear and convincing evidence that the proposed area "lack(s) the physical features necessary for the support of a shellfish population," and was therefore, by regulatory definition, not shellfish habitat. The ALJ determined that Petitioner did not avail himself of the available regulatory relief where his original consultant found that the Property was in shellfish habitat and Petitioner had not provided an expert certification to the contrary. ALJ Caliguire also reasoned that Petitioner did not provide an expert certification that



the proposed site was no longer a suitable habitat for shellfish; to the contrary, Petitioner only introduced the report of an environmental consultant, who assumed that the proposed site was not located in shellfish habitat and therefore was able to conclude that the proposed site met regulatory requirements for a second dock.

The ALJ concluded that Petitioner could not meet his burden of proving that the DEP acted arbitrarily, capriciously, and/or contrary to regulation when it conditioned the permit to build a second dock on the removal of the first dock as the Property is located in shellfish habitat, as defined at N.J.A.C. 7:7-9.2. With respect to Petitioner's contention that the conditional permit issued by the DEP and its application of N.J.A.C. 7:7-9 to the Property was void for vagueness, beyond the DEP's rule-making authority, and unconstitutional, the ALJ refrained from conducting any review of these claims, finding that such review was beyond the jurisdiction of the OAL.

I find that Summary Decision in favor of the DEP is appropriate, as the undisputed facts in the record show that Petitioner's permit application failed to show that the proposed site has no history of natural shellfish production, and failed to make any showing that the proposed area lacks the physical features necessary to support shellfish production under N.J.A.C. 7:7-9.2.

DISCUSSION

Under N.J.A.C. 1:1-12.5, a party is entitled to summary decision where the moving party shows that there is no genuine issue as to any material fact challenged and should prevail as a matter of law. E.S. v. Div. of Med. Assistance & Health Servs., 412 N.J. Super. 340, 350 (App. Div. 2010). When a party moves for summary decision, in order to prevail, the non-moving party must submit responding affidavit(s) setting forth specific facts to show that there is a genuine issue



that can be determined only in an evidentiary hearing. N.J.A.C. 1:1-12.5(b); see Housel v. Theodoridis, 314 N.J. Super. 597, 604 (App. Div. 1998) (to defeat a summary judgment motion, the non-moving party cannot simply “sit on his or her hands,” but must present specific facts showing there is a genuine issue for trial). Like the standard for summary judgment under N.J. Court Rule 4:46-2, the standard on a motion for summary decision requires the court or agency to determine whether the evidence, when viewed in the light most favorable to the non-moving party, is “sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.” Piccone v. Stiles, 329 N.J. Super. 191, 194 (App. Div. 2000) (quoting Brill v. Guardian Life Ins. Co., 142 N.J. 520, 523 (1995)). And even though the allegations of the pleadings may raise an issue of fact, if the other papers show that, in fact, there is no real material issue, then summary judgment should be granted. Leslie Blau Co. v. Alfieri, 157 N.J. Super. 173, 201 (App. Div. 1978) (citing Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 75 (1954)).

The ALJ’s ruling granting summary decision in favor of the DEP, and denying the Petitioner’s cross motion for summary decision, was appropriate under these circumstances. Initially, the area in which Petitioner proposed to construct a second docking structure on the Property had been, as acknowledged in the Petitioner’s own application, identified in the 1983 Inventory as shellfish habitat, and thus qualifies as historic shellfish habitat per the Coastal Zone Management Rules. Petitioner failed to provide any expert opinion to the contrary in support of his assertion that the proposed area was not, in fact, shellfish habitat. Second, while the regulations provide property owners an opportunity to submit information that would allow the DEP to



determine the area is not shellfish habitat, Petitioner failed to demonstrate that the proposed area lacked the physical characteristics necessary to support a shellfish population.

The DEP promulgated the Coastal Zone Management Rules pursuant to numerous statutes, including the Waterfront Development Act, N.J.S.A. 12:5-1-11, in order to effect the New Jersey Coastal Management Program goals, and in pertinent part:

- Support healthy coastal ecosystems by protecting, enhancing and restoring coastal habitats and their living resources to promote biodiversity, water quality, aesthetics, and recreation, and managing coastal activities to protect natural resources and the environment, N.J.A.C. 7:7-1.1(c)(1)(i)-(ii);
- Achieve effective management of ocean and estuarine resources by administering the safe and environmentally sound use of coastal waters and beaches to protect natural, cultural and aesthetic resources, promote safe navigation, and provide recreational opportunities, N.J.A.C. 7:7-1.1(c)(2)(iii); and
- Promote safe, healthy and well-planned coastal communities and regions by managing coastal activities and fostering well-planned communities and regions that sustain coastal economies and protect the natural environment and, N.J.A.C. 7:7-1.1(c)(6)(i)(4), (7).

In furtherance of these goals, the Coastal Zone Management Rules take a holistic approach to harmonizing the protection of New Jersey's valuable natural resources, such as shellfish habitat, with the rights of private property owners. The State's interest in protecting shellfish habitat, an important natural resource in New Jersey, and the public's interest in recreational boating related activities has been balanced by the DEP through this rule. It has often been recognized that there is an inherent conflict between protecting the shellfish resource habitat and recreational boating related activities, which are both important water dependent activities in New Jersey. Shellfish habitat, particularly in the Shrewsbury River, is one of New Jersey's valuable natural resources



and is vulnerable to the effects of human activity. The shellfish habitat in and around the Shrewsbury River is "highly productive shellfish habitat. The Navesink and Shrewsbury rivers are unique in that only three estuaries within the State have commercial soft clam densities." N.J.A.C. 7:7-9(m).

N.J.A.C. 7:7-9.2(a) defines shellfish habitat as "an estuarine bay or river bottom which currently supports or has a history of production" for hard clams, soft clams, eastern oysters, bay scallops, or blue mussels, and as an area which meets one or more of the following criteria:

1. The area has a current shellfish density equal to or greater than 0.20 shellfish per square foot;
2. The area has a history of natural shellfish production according to data available to the New Jersey Bureau of Shellfisheries, or is depicted as having high or moderate commercial value in the Distribution of Shellfish Resources in Relation to the New Jersey Intracoastal Waterway (U.S. Department of the Interior, 1963) and/or "Inventory of New Jersey's Estuarine Shellfish Resources" (Division of Fish, Game and Wildlife, Bureau of Shellfisheries, 1983-present);
3. The area is designated by the State of New Jersey as a shellfish culture area as authorized by N.J.S.A. 50:1 et seq. Shellfish culture areas include estuarine areas presently leased by the State for shellfish aquaculture activities or hard clam relay, transplant and transfer as well as those areas suitable for future shellfish aquaculture development; or
4. The area is designated as productive at N.J.A.C. 7:25-24, Leasing of Atlantic and Delaware Bay Bottom for Aquaculture.

This rule makes clear under N.J.A.C. 7:7-9.2(a) that an area need only meet one of the following four criteria to be considered shellfish habitat. N.J.A.C. 7:7-9(a)(1) contemplates the current shellfish density of a specific area, while N.J.A.C. 7:7-9(a)(2) considers a particular area's



historic shellfish productivity in determining habitat. N.J.A.C. 7:7-9(a)(3) and (4) address areas directly designated by the DEP as shellfish habitat. Accordingly, under N.J.A.C 7:7-9(a), the DEP must weigh both current and historic shellfish characteristics when making a determination of shellfish habitat. The reason for this broad consideration was explained by Dacanay, who noted that fluctuations in density from year to year do not indicate an area is no longer shellfish habitat, as "shellfish populations . . . are dynamic, increasing and decreasing in density over time within suitable habitat. These natural changes are revealed when new surveys are completed by the Bureau of Shellfisheries." Thus, once habitat is established in any of these Inventories, that habitat is monitored for density fluctuations "historically," or over time. Dacanay certified that she had reviewed the 1963 Shellfish Distribution, the 1983 Inventory, and the 2015 Inventory for the Property. Both the 1963 Shellfish Distribution and 1983 Inventory showed moderate commercial value and soft clam production area at the Property, while the 2015 Inventory showed low density for hard clams. In her certification, Dacanay clarified that the 2015 Inventory showed evidence within the Shrewsbury River of these natural population fluctuations over time, with certain sampling stations increasing in density compared to the 1983 inventory. Ultimately, Dacanay explained that "the shellfish habitat rule reflects an understanding of shellfish life history characteristics by protecting areas of known present or historical habitat in order to ensure the availability of suitable habitat for colonization by future generations in concert with the natural cycles." Dacanay explained that both hard and soft shell clams "are dynamic, increasing and decreasing in density over time within suitable habitat." Dacanay found that both the existing and proposed docks were within an area with a history of 1 natural shellfish production for soft and



hard clams, thus precluding the DEP from issuing a permit for a second dock at the Property to protect the viable habitat of the soft and hard clams in the area. Thus, the presence of clams in one year is not necessarily indicative of the future density of clams in a historically viable shellfish habitat.

This natural fluctuation has been observed in studies of shellfish in the vicinity of the Property, and protecting the historical habitat ensures availability of suitable habitat for colonization by future generations in concert with natural cycles. In her certification Dacanay explained that the change in shellfish density is influenced by several environmental conditions, such as water temperature, salinity, current, and the availability of food. These environmental conditions are the result of natural cycles, dependent factors such as storm events, and regional and local weather. Dacanay explained that shellfish densities may also change as a result of disease, predation, or harvest pressure. A "one-time finding of a lower density of a shellfish population within an area historically documented as supporting moderate and/or high densities of shellfish is insufficient to conclude the area is no longer capable of supporting shellfish populations and does not preclude future increases in density." Once shellfish habitat is established by a designation of high or moderate density, that area is considered by the DEP to have the physical features necessary for the support of a shellfish population over time, and fluctuations in density alone are insufficient to indicate a change in a determination of shellfish habitat. N.J.A.C. 7:7-9(a)(2).



Since the shellfish habitat rule N.J.A.C. 7:7-9.2 clearly prohibits development of a second dock or pier in shellfish habitat, the permit decision including a condition for removal of the existing dock was neither arbitrary, capricious, nor unreasonable. In fact, such condition was required by law.

Notwithstanding, Petitioner was afforded an opportunity under N.J.A.C. 7:7-9.2(b) to dispute this regulatory determination by clear and convincing evidence that the area in question – by whatever means the area was designated as historic shellfish habitat – no longer has the physical characteristics necessary to support a shellfish population, or is no longer capable of supporting a shellfish population over time. Here, however, Petitioner failed to utilize this process, nor did he support his claim that the proposed area was not shellfish habitat by the means promulgated by the DEP. Petitioner also failed to place any affidavit, expert certification, or other evidence before the ALJ showing that there is a genuine issue of material fact that the proposed area is not in shellfish habitat. N.J.A.C. 1:1-12.5(b). Petitioner solely relied on arguments made in his brief that because the 2015 Inventory showed low hard clam density, and the 2015 Inventory rendered the 1983 Inventory incorrect, the proposed area was not a shellfish habitat. Petitioner failed to support these assertions either by his own certification or by the expert report attached thereto. Indeed, his permit application noted the existence of shellfish habitat at the Property and a subsequent expert report made "[n]o determination as to whether this site is in or partially in a Shellfish Habitat..." Petitioner cannot prevail by providing no evidence contrary to DEP's decision.



With respect the Petitioner's constitutional challenge to the DEP's application of N.J.A.C. 7:7-9.2 as applied to Petitioner arguing that the shellfish habitat rule is void for vagueness, any argument Petitioner has with respect to the DEP's application and enforcement of the regulation to this circumstance is a challenge to the regulation itself, and as such, is within the exclusive province of the Appellate Division and could not properly be decided by the ALJ or me in this decision. Rivkin v. Department of Environmental Protection, 96 N.J.A.R.2d (EPE) 353 (OAL lacked jurisdiction over property owner's constitutional challenge to denial of waterfront development permit for two docks on grounds that proposed construction would conflict with shellfish habitat regulation), accord R. 2:2-3(a)(2). Notwithstanding, based on the record, there is no indication that the shellfish habitat rule is void for vagueness in its applicability.

For the reasons above, I ADOPT the ALJ's findings.

IT IS SO ORDERED.

DATE: October 1, 2021



Shawn M. LaTourette, Commissioner
New Jersey Department of
Environmental Protection

