

8/18/15  
P&P Agenda Item  
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July 15, 2015

Ms. Carrie Hall  
NOAA Ocean Service  
OCRM 1305 East-West Hwy  
N/ORM Silver Spring,  
MD 20910

Re: Request for a Section 312 Review

Dear Ms. Hall:

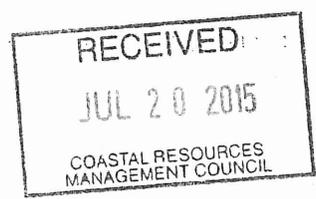
Save The Bay protects, restores and improves the ecological health of the Narragansett Bay region, including its watershed and adjacent coastal waters, through an ecosystem-based approach to environmental action; defends the right of the public to use and enjoy the Bay and its surrounding waters; and fosters an ethic of environmental stewardship among people who live in or visit the Narragansett Bay region. The policy team at Save The Bay acts as a watchdog to ensure the Bay and its watershed are protected. Our efforts include routine review of permits, regulatory amendments, and participation in public forums. Our team works closely with the staff of the Coastal Resources Management Council (CRMC) and we meet regularly with CRMC's Executive Director, Deputy Director and Coastal Policy Analyst to discuss issues of concern and share updates. CRMC staff is readily available for questions and promptly responds to requests for public records. We value the expertise and diligent work done by the limited staff at CRMC.

As you know, Section 312 of the Coastal Zone Management Act (CZMA) requires that your office periodically evaluate the performance of the CRMC. The last review was completed by NOAA in August of 2010 (2010 Review) and Save The Bay requests that another review be conducted this calendar year to address the following issues:

**Follow up -Actions Required by the 2010 Review**

Save The Bay is particularly concerned about two "Necessary Action[s]" that have not been adequately addressed and are inextricably connected. NOAA stated in its last review that:

- I. "NECESSARY ACTION: The CRMC must separate the functions of the CRMC administrative hearing officer from the functions of the CRMC legal counsel by December 1, 2010, so that no single person conducts or is responsible for both functions. The intent of this action is to prevent a real or perceived conflict of interest and to ensure that the CRMC staff members have access to legal counsel in preparation for, and at, hearings."



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II. "NECESSARY ACTION: The services of an attorney must be available to the CRMC staff on a daily basis. The CRMC must arrive at a solution to meet that requirement by December 1, 2010, so that staff has timely and sufficient legal assistance. If the solution requires additional time beyond December 1, 2010, to implement (e.g., must fulfill all state hiring or contracting procedures, or it is not feasible given state budget cycles), a later deadline must be negotiated and agreed to by OCRM."

It is Save The Bay's understanding that, in response to "Necessary Action" I, CRMC appointed one of its Council Members as the designated hearing officer and uses sub-committees to make recommendations to the full Council on more complex cases. CRMC did not hire a full time state employee as an attorney as contemplated by "Necessary Action" II. As we understand it, the attorney representing the Council and staff in 2010, Brian Goldman, hired another attorney, who sits at CRMC two or three days per week, to be present when Mr. Goldman is not present. This does not appear to fulfill the intent of the Action. It is also Save The Bay's understanding that Mr. Goldman continues to advise the staff in conducting investigations, pursuing violations, and drafting permit recommendations, and represents the Council in making decisions and drafts and/or reviews decisions rendered in contested cases.<sup>1</sup> As such, investigations, prosecutions and legal advice to those adjudicating disputes is generally done by one attorney, or his designee, and CRMC staff does not have access to an *independent* attorney "in preparation for, and at, hearings." CRMC staff does not have independent counsel present at hearings to support its findings and recommendations to the Council. Staff is entitled to independent legal advice on how to best present its findings to the Council and it is not appropriate for the same person to provide legal advice to staff and later to the Council on the same matter.

In the 2010 Review, NOAA stated that the intent of the first action set forth above was "to prevent a real or perceived conflict of interest and to ensure that the CRMC staff members have access to legal counsel in preparation for, and at, hearings." Clearly, the intent has not been achieved. The conflict of interest and perception of impropriety persists and is exacerbated by the fact that a series of Governors has refused to appoint hearing officers as required by law. R.I. Gen. Laws § 46-23-20.1(a) provides that the Governor "shall" appoint two hearing officers and one "shall" be designated as the chief hearing officer. Appointments are mandatory. Section § 46-23-20.1(e) allows a subcommittee to hear a contested case **only if** a finding is made that "hearing officers are otherwise engaged and unable to hear a matter in a timely fashion..." This section does not contemplate that hearing officers would not be appointed; subcommittees are only permitted if appointed hearing officers are busy and unable to conduct a timely hearing. Section § 46-23-20 recognized that there would be a delay between the promulgation of the statute and the appointment of hearing officers; however, a twenty-five year delay was not anticipated and it does not change the 1990 mandatory duty to appoint hearing officers and the requirement that hearing officers determine contested cases. It is unclear whether decisions rendered by the Council, as opposed to statutorily mandated hearing

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<sup>1</sup> Although there are some cases where staff gets advice from an attorney hired by Mr. Goldman.

officers, are subject to challenge for non-compliance with the statute.

Independent hearing officers were required for the Department of Environmental Management (DEM) through legislation passed in 1989, (R.I. Gen. Laws. § 42-17.7-1). In May of 1990, DEM's newly established Office of Adjudication commenced hearings conducted by hearing officers in accordance with the *Administrative Rules of Practice and Procedure for the Administrative Adjudication Division for Environmental Matters*, a practice that has continued to this day. Similarly, the General Assembly in 1990 enacted legislation requiring the appointment and use of qualified hearing officers for CRMC cases, but hearing officers were never appointed. The Council has carried on as a politically-appointed body that sometimes decides permitting and enforcement matters contrary to the opinions and findings of staff with appropriate expertise. Decisions about whether the application meets the CRMP should be made by the qualified biologists and engineers with the assistance of independent legal counsel and ultimately decided by an impartial neutral third party- a hearing officer as required by law.

Even if it were legally permissible for the Council to continue to render decisions, they are not required to have any training in the subject matter. When variance or special exception requests come before the Council, staff may find that the application does not meet the goals and policies of the Coastal Resources Management Program but sometimes they defer to the Council to decide whether to grant the permit. Special exceptions and variances are granted, despite staff opinion which is based on knowledge and expertise. Again, such determinations should be made by staff with the requisite expertise and knowledge in their fields. Further, the legislature not only mandated the appointment of hearing officers but enunciated that they must be "attorneys-at-law, who, prior to their appointment, shall have practiced law for a period of not less than five (5) years." R. I. Gen. Laws § 46-23-20.1(a). Moreover, in order to promote impartial decisions, the hearing officers must not be otherwise engaged in the practice of law. R. I. Gen. Laws § 46-23-20.1(c). Members of the Council rendering decisions are also generally otherwise employed.

In terms of the cost to provide independent hearing offices and an in-house lawyer for staff, the governor could start by appointing one hearing officer and assessing the need for a second one or share hearing officers with the DEM Office of Adjudication and pay the cost. Use of the DEM Office of Adjudication would avoid unnecessary expense and duplication of staff and facilities. It would likely not cost much more to have in-house full time counsel and share a hearing officer than the current budget allotted to outside counsel (approximately \$160,000.00). The implementation of the regulations in a contested case should be, and in many states is, in the hands of full time trained staff, with the assistance of an in-house attorney. An impartial process and level playing field should not be compromised, particularly for minimal cost. Further, outside counsel have other clients in their practices as opposed to a full-time dedicated attorney who will not have other clients.

**Regulations Governing Penalties** NOAA's stated concern in the 2010 Review about the appearance of impropriety is also perpetuated by the lack of clear regulations governing the enforcement process. Although not a statutory mandate or identified by the 2010 NOAA

Review, it is critical for regulations to be established that govern the imposition of penalties for enforcement of the CRMP. The calculation of penalties and amounts imposed should be determined based on properly promulgated penalty regulations (similar to DEM's Administrative Penalty Regulations) to promote transparency and ensure that penalties are imposed fairly and consistently. It is unclear how R.I. Gen. Laws § 46-23-20.1(a) is interpreted by the Council given the lack of assessment of enforcement data. Violators of the CRMP may gain an advantage over those that comply with the law; penalties may not be sufficient to deter future noncompliance and a violator may not be required to pay the economic benefit it may have gained from non-compliance.<sup>2</sup> For example, a property owner who cuts a buffer and obtains a water view may be fined a minimal amount while the owner enjoys the view for a number of years. An unobstructed water view is likely to enhance the value of property. Without a substantial penalty and requirement that the buffer be completely restored and replanted (rather than simply allowed to regrow), there is no deterrent for cutting the buffer. In addition to environmental damage, it is simply unfair to an abutting owner who complies with the CRMP and does not cut the buffer or enjoy a waterview.

Further, in some enforcement cases after-the-fact permits are granted. "After the fact" permits should not be issued. A site must be restored after it was disturbed by a violation so that the site can be properly evaluated. It should also cost more, in terms of time and money, to violate the law rather than violate and later ask for forgiveness from the Council.

#### **Additional Resources Required for Enforcement and to Designate Public Rights-of-Ways**

**Enforcement Staff.** There are only two staff members responsible for enforcement in the state for the area within two hundred feet of its 420 miles of coastline, and at least one additional staff member is needed to ensure that permits are complied with and activities are not occurring within CRMC jurisdiction that violate the CRMP. Given staff limitations, CRMC staff are only able to respond to reported violations and not able to conduct routine permit-compliance inspections. In addition, enforcement staff should be available to routinely compile enforcement statistics and make the information available to the public online. Information should be on the CRMC website that includes the number of violations issued annually, type of violation, penalty imposed, whether the violation(s) were corrected, and amount of penalty collected. It is our understanding that there are currently over one hundred unresolved cases pending<sup>3</sup>. Further, the number of violations issued by CRMC has dropped from a high of 123 in 2006 to a low of about 71 violations in 2014. If enforcement information were compiled and made readily available to the public, Rhode Islanders would be able to evaluate whether the Coastal Resources Management Program (CRMP) is being effectively and consistently enforced

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<sup>2</sup> The economic benefit from noncompliance should be imposed for all violations and should be specifically required to be calculated through properly promulgated penalty regulations. See, Rule 10 (c) of the *Department of Environmental Management Rules and Regulations for the Assessment of Administrative Penalties*. example below benefit to property owner cutting a water view increase value of property.

<sup>3</sup> Enforcement cases must be tracked. For example, a 2004 violation, followed by a Council Order for restoration and payment of a penalty was supposed to be filed in Superior Court in November of 2010. It has still not been filed. CRMC meeting minutes dated October 26, 2010 re: 2004-0081 Thomas Whittington.

and steps have been taken to deter future noncompliance. Additional funds are also needed to develop and operate a database for enforcement and permitting statistics. Enforcement should have sufficient staff to conduct routine permit compliance inspections, including checks on emergency permits, and compile statistics on permits and enforcement. The use of hearing officers in the enforcement process will promote consistency, predictability, transparency and accountability and create a level playing field for all regulated parties.

Freshwater Wetlands Staff. Further, changes in the Freshwater Wetlands Act enacted by the Rhode Island General Assembly in 2015 expand CRMC jurisdiction over the area regulated. Expanded jurisdiction will necessitate at least additional staff to process and review freshwater wetland permit applications. Existing staff will also have additional duties of promulgating regulations in furtherance of the legislative change.

Funding/Public Rights-of-Way.

CRMC is charged with designating public rights-of-way (ROWs) to the shore. CRMC's goal "is to designate at least one (1) public right-of-way for each mile of shoreline." *Designation of Public Rights-of-Way to the Tidal Areas of The State, Progress Report (ROW Report)* for July 2004 through June 2005. While Public ROWs have been created through state purchases and requiring developers to provide access, no progress has been documented on CRMC's list of potential ROWs for nearly a decade.<sup>4</sup> Additional funding is necessary to support the often time-consuming title work required to address the listed properties.

	2005	2014
Sites Designated as Public ROWs	221	221
Sites that are Not Resolved	35	34
New Sites Under Review	24	25

Issues Requiring Legislative Action: Council Members and Penalties

Number and Qualifications of Council Members. The issue of unfilled vacancies on the Council also needs to be addressed legislatively. There are currently ten members of the Council appointed by the Governor. The 2004 amendment to the Rhode Island Constitution precludes legislators from serving on state boards, commissions, or other state or quasi-public entities that exercise executive power, and vested the Governor with appointment power with respect to members of any state or quasi-public entity exercising executive power, subject to the advice and consent of the Senate.<sup>5</sup> By statute, the Governor has the right to appoint eight members to the Council. It is unclear whether the Governor has the authority to appoint all sixteen

<sup>4</sup> Facts taken from the 2004-2005 and 2013-2014 ROW Reports.

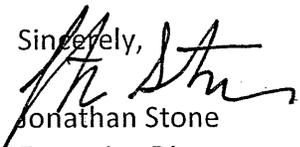
<sup>5</sup> In Re Advisory Opinion from the House of Representatives (CRMC), 911 A.2d 274 (R.I. 2008).

members or only eight but the number of Council members should be either eight or sixteen. The current number of ten Council members practically addresses the need to ensure a quorum is present but is either six short of a full Council or in violation of the law.

Maximum Penalty to Deter Violations. In addition to legislation clarifying the number of Council members, legislation should be introduced to increase the maximum penalty that may be imposed. In the 2010 Review, NOAA suggested that CRMC work with the Governor and the General Assembly to increase the maximum administrative penalty for CRMC notices of violation and Cease and Desist orders. No progress has been made to date. Currently, the chairperson or executive director has statutory authority to assess an administrative penalty of not more than twenty five hundred dollars (\$2,500) for each violation. R.I. Gen. Laws § 46-23-7.1(1). After the Council issues a Cease and Desist Order, both the Council and the Executive Director are authorized to assess additional penalties of not more than five hundred dollars (\$500) for each day during which the violation continues. However, the maximum penalty that may be imposed in the aggregate is ten thousand dollars (\$10,000). Id. Although the Executive Director and Council rarely impose the maximum penalty, they must have the authority in egregious situations to impose a penalty that exceeds the current statutory aggregate in order to compel timely restoration and deter future violations.

Summary of Request In summary, Save The Bay is requesting a Section 312 review during this calendar year. We would like you to consider the need to appoint independent hearing officers and separate legal counsel for staff as well as the critical need for two additional staff at CRMC (one to ensure the CRMP is enforced and one to process freshwater wetlands applications). Action is also required to make progress on designating ROWs and legislative action is needed on the number of Council members and increased penalties interpreted through properly promulgated penalty regulations. Save The Bay also submits that it is imperative that NOAA follow through on reviewing the 2010 "Necessary Actions" and determine if CRMC adequately complied with the mandated acts and whether it is holding hearings in compliance with Rhode Island law. It is unclear why Rhode Island Governors, over a period of twenty-five years, have been unwilling to disturb the hearing process at CRMC where cases are adjudicated by political appointments and failed and/or refused to comply with the statutory mandate to appoint hearing officers. Such business as usual is contrary to the law.

Sincerely,

  
Jonathan Stone

Executive Director

CC: Anne Livingstone, Chair, Coastal Resources Management Council  
The Honorable Governor Gina Raimondo  
Allison Castellan, Program Specialist, NOAA  
Grover Fugate, Executive Director, CRMC