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Via Electronic Mail

October 12, 2021

Mr. James Boyd
Coastal Resources Management Council
Stedman Government Center
4808 Tower Hill Road
Wakefield, RI 02879
jboyd@crmc.ri.gov

RE: WRITTEN COMMENT SUBMISSION FOR:
Rules and Regulations Governing the Protection and Management of Freshwater Wetlands in the Vicinity of the Coast (650-RICR-20-00-9)

Dear Mr. Boyd:

Please accept this correspondence and its attachments as written comments submitted for the proposed adoption of new *Rules and Regulations Governing the Protection and Management of Freshwater Wetlands in the Vicinity of the Coast (*"Proposed Regulations"). The Rhode Island Builders' Association ("RIBA") has been involved in the 7-year long process of amending the wetlands regulations since before that formal process even began. It is the recently passed RIDEM Wetlands Regulations which prompted this rulemaking by CRMC and the proposed Rules and Regulations cited above. This correspondence and its attachments provide background with respect to the process and how the State got to this point, as well as thoughtful and thorough comments and objections with respect to the Proposed Regulations. These comments and objections were composed with input from an impressive team of builders, developers, property owners, wetlands professionals, engineers, and economists.

We hope that the CRMC and the State of Rhode Island representatives and officials take the time to consider these comments and objections given the undisputed detrimental impact the Proposed Regulations will surely have on the economy of the State of Rhode Island at a time when the fragility of the same is surely in question. The Proposed Regulations will make the dire situation of Rhode Island's housing crisis exponentially worse, and further limit development of additional housing units. Moreover, the Proposed Regulations will significantly impact future commercial development and expansion and will result in severe restrictions on existing structures as families and businesses require room to grow to stay in the State of Rhode Island.

The comments and opinions below and attached hereto reveal that despite the process of amended regulations beginning *in 2014*, as noted in your rulemaking notice. The resulting regulations being proposed which not only have the impacts noted above but present more questions and ambiguities than answers. This is entirely contrary to the purposes of the enabling legislation which were supposed to make the revisions to the Current Regulations possible. The Proposed Regulations would also result in countless claims for inverse condemnation for families and property owners throughout the State who may not even be aware of the

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proposed significant increase in regulatory authority. The passage of these new regulations can certainly wait until they thoroughly address the issues noted herein and in the attached documents.

I. BACKGROUND

For years, significant issues plagued the development of property in the State of Rhode Island, including: 1) lengthy permitting periods before municipal and state agencies; 2) high property acquisition costs; 3) high permitting costs and carrying costs for property during permitting; 4) lack of infrastructure to support much needed residential, commercial and mixed-use development; 5) onerous local requirements and restrictions on top of state regulations in state-regulated areas such as wetlands and septic permitting. The result of combination of these issues was inability to develop sites because of the extreme costs resulting in the same. This issue significantly contributes also to the inability of the municipalities to satisfy the "mandated" 10% affordability requirement for its housing stock implemented **thirty (30)** years ago, which, over three decades later, inexcusably remains *far* out of reach. These Proposed Regulations and the affect of limiting development and making any future development even more costly certainly does not bode well for the ability of any municipality to be able to reach their required 10% in the next three decades either.

As everyone knows, the economic downturn that occurred in the late 2000s through early 2010, resulted in the introduction of legislation by RIBA, in partnership with the State, to toll permitted projects for both State and local permitting. Additionally, knowing that the economy would bounce back, making older projects which were tolled and new projects viable again, in the mid-2010s, RIBA began introducing a number of legislative measures to address the issues noted above, some of which, though unfortunately often watered-down through the process as a result of compromise, were targeted to begin to remedy certain of these issues. For example, RIBA reduced statutory timeframes for local review of Projects which often took months for each phase of review and years for an entire project to be approved.

Likewise, in 2013, the SBA Business Advisory Group, in partnership, introduced a statute targeted at standardizing statewide rules regarding wetlands regulations and septic (OWTS) systems. Such legislation makes clear that the State-established standardized rules govern the fields of regulation on these issues and there is not to be municipal regulations on the same issue. Municipalities had previously passed regulations governing wetlands and increasing buffer requirements in excess of the State-established regulations for the same. Municipalities also had passed ordinance provisions requiring additional setbacks for OWTS systems in excess of those required by the State of Rhode Island. Sometimes what resulted, besides a further delay in permitting for these Projects where municipalities attempted to regulate the same, was that a project would obtain state permitting approvals, then get denied on a local level for variances by local board without the expertise of DEM in wetlands or OWTS, for regulations in excess of DEM or CRMC's regulations[1].

The provision introduced, now codified at R.I. Gen. Laws § 42-64.13-10 provided:

> **(a)** The general assembly finds and declares:
>
> > **(1)** Under § 42-17.1-2, the director of the department of environmental management is charged with regulating septic systems, alterations of freshwater wetlands, and other activities that may impact waters of the state; under chapter 23 of title 46, the coastal resources management

[1] *See e.g.* Holmes v. Town of Charlestown Zoning Bd. of Review, 2010 R.I. Super. LEXIS 57 (R.I. Super. March 26, 2020); Migel v. Town of Charlestown Zoning Bd. of Review, 2007 R.I. Super. LEXIS 171; Carter Corp. v. Zoning Bd. of Review of Town of Lincoln, 98 R.I. 270, 201 A.2d 153 (1964).

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council is charged with regulating alteration of freshwater wetlands in the vicinity of the coast and other activities that impact coastal resources.

(2) The statewide standards established pursuant to these authorities may be inadequate to protect the natural resources of our state and need to be reevaluated based on current scientific data.

(3) Many municipalities have implemented stricter setback and septic disposal standards to strengthen protection of critical local environmental resources including groundwater, coastal and fresh-water wetlands, rivers and streams, and drinking supplies.

(4) Dissimilar municipal standards have resulted in a land use system wherein local governments manage watersheds and groundwater aquifers using a variety of methods resulting in diverse outcomes.

(5) The lack of a uniform process tends to burden businesses and property owners that require a predictable regulatory environment in order to be successful.

(6) Clear, predictable, and reliable standards and a regulated process are needed to foster a business climate that will grow our economy while ensuring the protection of our natural resources.

(b) No later than December 31, 2014, the Rhode Island division of planning, in consultation with the task force established in subsection (c), shall prepare and submit to the governor, the senate president, and the speaker of the house a report that is based upon current science, water resources, and wetlands protection needs, and addresses onsite waste water treatment system (OWTS) regulation and watershed planning. The report shall make recommendations that ensure the protection of this state's natural resources while balancing the need for economic development and shall:

(1) Include an assessment of the adequacy of protection afforded to wetlands and/or waters of the state under §§ 2-1-18 — 2-1-25, §§ 42-17.1-2(2) and 42-17.1-2(12), and chapter 23 of title 46;

(2) Identify gaps in protection for septic disposal and various wetlands; and

(3) Recommend statutory and/or regulatory changes that are required to protect wetlands statewide, including, that upon the establishment of such standards by the legislature, municipalities shall not adopt or enforce any local ordinances or requirements for OWTS or wetland buffers and setbacks that exceed or otherwise conflict with such recommended statewide standards.

(c) The Rhode Island division of planning shall establish a task force and appoint members thereto representing a balance of the *interests to ensure the protection of this state's natural resources while recognizing the need for economic development,* and at a minimum shall include:

(1) The director of the department of environmental management or designee;

(2) The director of the office of regulatory reform or designee;

(3) The executive director of the coastal resources management council or designee;

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> **(4)** One representative each from an environmental entity and a builders' trade association;
> **(5)** At least two (2) municipal representatives;
> **(6)** At least two (2) representatives from the business community; and
> **(7)** At least one civil engineer, or one environmental engineer with experience in OWTS and wetlands regulation, and one wetlands biologist.
>
> **(d)** ***Implementation.*** The director of the department of environmental management in consultation with the director of the office of regulatory reform shall submit to the governor, the speaker of the house, and the senate president, proposed legislation establishing statewide standards identified in the report issued pursuant to subsection (b) **no later than January 31, 2015[2].**
>
> **(e)** This section shall not apply to OWTSs maintenance and cesspool phase-outs.

R.I. Gen. Laws § 42-64.13-10 (*emphasis added*).

The task force began meeting in 2014, and RIBA was represented at the same. The task force resulting in identifying issues as set forth in the meeting minutes. In addition to participation in the task force meetings, RIBA provided written feedback on two occasions to the Task Force. See "RIBA recommendations to the Legislative Task Force on Wetland and OWTS Buffers and Setbacks dated October 31, 2014 and Letter to K. Flynn regarding disagreement with the final conclusions, both attached hereto as **Exhibit A**. RIBA took issue with several items in the conclusions, including: 1) the lack of consideration of treatment systems as affecting the restrictions; 2) the extending of setbacks which are currently adequate; 3) the lack of specificity or definition as to certain items; 4) issues for existing structures with respect to expanding DEM and CRMC jurisdiction; and 5) lack of exemptions for certain pre-existing uses. *See* **Exhibit A**.

The Division of Planning published a Final Report on December 31, 2014 summarizing the statutes above, and the concerns of the Task Force. The Report specifically noted that the Directive of the Law was to create "a balance of the interests to ensure the protection of this State's natural resources while recognizing the need for economic development." *See* Final Report at page 1-3; *see also* R.I. Gen. Laws § 42-64.13-10(c). The Task force recommendations were based on the following occurrences: 1) detailed changes to State legislation (which has not yet occurred); 2) changes to the regulations (proposed); and 3) a significant increase in funding to the State agencies to allow for additional permitting and reviews due to increased jurisdiction (which has certainly not occurred, nor is it proposed in the near future[3]). What the Final Report failed to include, as required, was a detailed analysis assessing why and *how* the existing regulations were inadequate to protect these natural resources, other than some summarized conclusions contained in the Report.

In 2015 additional sections of the General Laws were amended to reflect and implement the 2013 legislation:

> Whereas the lack of uniform standards results in duplication of reviews administered by state and local governments and burdens businesses and property owners who require a predictable regulatory environment to be successful; and

[2] This section has not been amended.
[3] In fact, DEM is so significantly understaffed based on its current jurisdiction and review process that it takes as long as 6 or 9 months for a permit or wetlands review process to be completed.

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> Whereas it is recognized that statewide regulatory standards to protect freshwater wetlands, buffers, and floodplains are in the public interest, important to supporting economic vitality, and necessary to ensure protection is achieved in a consistent manner;

R.I. Gen. Laws § 2-1-18.

The legislation that passed in 2013 and again in 2014 and 2015, required the State to promulgate standards for freshwater wetlands buffers and setbacks within *twelve (12) months* of the passage of the legislation which occurred on July 10, 2015. *See* § 42-64.13-10; *see also* R.I. Gen. Laws § 2-1-20.1 (PL 2015 Ch. 218). In 2016, upon request by the State, pursuant to PL 2016 Ch. 321, the statute was amended to allow the State *eighteen (18) months* to comply, rather than twelve months. The legislation has *never* been amended since and reads:

> **(c)** Within eighteen (18) months from enactment of this section, the department and the coastal resources management council shall promulgate standards for freshwater wetland buffers and setbacks into state rules and regulations pursuant to their respective authorities.

R.I. Gen. Laws § 2-1-20.1.

The Zoning Enabling Act was amended at the same time in 2015 by the same Public Law, to specifically note the new legislation and the purpose of the same to standardize regulations in the State, rather than having 39 different requirements and/or restrictions on development:

> **(b)** Upon the effective date of this section, a city or town shall no longer be authorized to adopt as a provision of its zoning ordinance new requirements that specify buffers or setbacks in relation to freshwater wetland, freshwater wetland in the vicinity of the coast, or coastal wetland or that specify setback distances between an onsite wastewater treatment system and a freshwater wetland, freshwater wetland in the vicinity of the coast, or coastal wetland.
>
> **(c)** Upon promulgation of state regulations to designate wetland buffers and setbacks pursuant to §§ 2-1-18 through 2-1-28, cities and towns shall be prohibited from applying the requirements in existing zoning ordinances pertaining to both wetland buffers and onsite wastewater treatment system setbacks to development applications submitted to a municipality after the effective date of said state regulations. All applications for development that were submitted to a municipality prior to the effective date of state regulations designating wetland buffers and setbacks, will remain subject to, as applicable, the zoning provisions pertaining to wetland buffers or setbacks for onsite wastewater treatment systems that were in effect at the time the application was originally filed or granted approval, subject to the discretion of the municipality to waive such requirements. Nothing herein shall rescind the authority of a city or town to enforce local zoning requirements.

R.I. Gen. Laws § 45-24-30.

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In 2016, new regulations were first proposed. RIBA sent various letters calling out issues with respect to the proposed regulations and increase in state jurisdiction in the form of significantly increased buffers and setbacks. *See* **Exhibit B**, "Wetland Regulations Revisions as Drafted as of June/2016," August 1, 2016 letter to Alicia Good, and October 26, 2016 letter to Erik Goodwin of the Office of Regulatory Reform. This correspondence noted the significant impact of the regulations on the land in Rhode Island, including the only remaining developable land in Rhode Island, and the economic impact of the combination of such stringent wetlands regulations with restrictive zoning from municipalities. The correspondence also continued to note the inconsistency of the regulations and confusion as written. Lastly, the correspondence made suggestions based specifically on the legislative directive to "*ensure the protection of this state's natural resources while recognizing the need for economic development.*" *See* **Exhibit B**, October 26, 2016 Letter.

From that point in 2016 to 2019, there was no activity with respect to the proposed regulations, that RIBA is aware of, especially since it was involved from the inception. In March 2019, a presentation was made on proposed new regulations, to which RIBA responded, taking issue with provisions of the same. *See* **Exhibit C**, March 27, 2019 Letter.

Now, without addressing the significant concerns of RIBA and the professionals who commented on the proposals, and without addressing the very real issues facing the State of Rhode Island with respect to the economic and housing crisis, DEM, in November of 2020, made available the Proposed Regulations, increasing its jurisdiction, (oftentimes without a significant basis in science) leaving many ambiguous provisions and undefined terms and restrictions, all the while failing to support the same with a required economic study showing the lack of significant impact and failing to address and balance the need for economic development---the requirement in the legislative directive and mandate for new regulations *in the first place*.

II. ISSUES WITH THE PROPOSED REGULATIONS

A. Economic Impact

As noted in the legislative mandate or directive in the first instance, the need for protection of the state's natural resources must be balanced with the need for economic development. *See* R.I. Gen. Laws § 42-64.13-10. Moreover, R.I. Gen. Laws 42-35.1-3 requires the submission of Economic Impact Statement ("EIS") "prior to the adoption of any proposed regulation that may have an adverse impact on small businesses…" Such EIS **must** include the following:

> **(1)** An identification and estimate of the number of the small businesses subject to the proposed regulation;
> **(2)** The projected reporting, recordkeeping, and other administrative costs required for compliance with the proposed regulation, including the type of professional skills necessary for preparation of the report or record;
> **(3)** A statement of the effect or probable effect on impacted small businesses;
> **(4)** A description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation.

R.I. Gen. Laws § 42-35.1-3. Moreover, Executive Order 15-07 sets forth requirements for proposed new rulemaking, including that:

> Rules shall not impose an undue burden upon those persons or entities who must comply with the rules; . . .

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> Rules shall avoid negative business, employment, and overall economic impact. If demonstrated through evidence as necessary despite a negative business, employment and overall impact, the rules shall be designed to minimize such impact.

Executive Order 15-07 at Paragraph 2(2) and 2(8).

As noted by the Office of Management and Budget, the State was directed to complete an additional study, a "regulatory flexibility analysis" in accordance with R.I. Gen. Laws 42-35.1-4. Such requirement provides that:

> **(a)** Notwithstanding any general or public law to the contrary, prior to the adoption of any proposed regulation on and after January 1, 2010, each agency shall prepare a regulatory flexibility analysis in which the agency shall, where consistent with health, safety, environmental, and economic welfare consider utilizing regulatory methods that will accomplish the objectives of applicable statutes while minimizing adverse impact on small businesses. The agency shall consider, without limitation, each of the following methods of reducing the impact of the proposed regulation on small businesses:
>
> **(1)** The establishment of less stringent compliance or reporting requirements for small businesses;
>
> **(2)** The establishment of less stringent schedules or deadlines for compliance or reporting requirements for small businesses;
>
> **(3)** The consolidation or simplification of compliance or reporting requirements for small businesses;
>
> **(4)** The establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and
>
> **(5)** The exemption of small businesses from all or any part of the requirements contained in the proposed regulation.

R.I. Gen. Laws § 42-35.1-4.

Rather than an EIS, as required, or a Flexibility Analysis, as required, the agency purports to base their determines on a "Cost-Benefit Analysis of Proposed Changes to the Freshwater Wetlands Regulations," Dated October 2020, with no author listed. The Cost-Benefit analysis is a far cry from an EIS or Flexibility Analysis as required by § 42-35.1-3 and§ 42-35.1-4. In fact, the first 19 pages of the Cost-Benefit analysis detail the proposed technical changes in the Proposed Regulations versus the Current Regulations. The next 15 pages discusses "societal benefits" and benefits to the wetland systems as a result of the Proposed Regulations. The following 8 pages then attempts to present the costs associated with the Proposed Regulations. However, based on the statutory requirements for an EIS and Flexibility Analysis, and as detailed in the attached feedback from well-renowned experts, Dr. Elliot Eisenberg, Dr. Laura Beaudin and Dr. Edinaldo Tebaldi, the "Cost-Benefit" Analysis falls far short of requirements and is fatally-flawed and entirely incomplete in its analysis. *See* **Exhibit D**, Letters Dated December 14, 2020 and December 16, 2020, as well as a January 7, 2021 letter from RIBA to ORR.

RIBA relies on the detailed flaws pointed out in the attached correspondence from numerous experts to support its argument that the Cost-Benefit Analysis is insufficient, incomplete and inadequate to both support the Proposed Regulations and satisfy the statutory mandates for the studies.

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RIBA looks forward to the review of the revised Proposed Regulations and a more thorough and compliant EIS and Flexibility Analysis as a result of these and other written comments as well as the testimony at the public hearing given the mandate of. Executive Order 15-07 which encourages public participation and notes that the proposed rules with their associated EIS "*shall* be updated to reflect new information provided by public comment." (*emphasis added*).

In addition to the flawed and incomplete EIS and lack of a Flexibility Study, RIBA also questions whether, since the OMB made a finding of significant impact, the Proposed Regulations can even validly move forward. Certainly, the requirement for, and the study itself are not just a formality or surplusage in the General Laws.

B. Technical, Procedural and Other Issues with Proposed Regulations

The first issue outlined in our attachments is that there is a significant increase in the jurisdiction of the State, estimated at least another 23,900 acres in the State. Approved projects, constructed buildings, and projects in the pipeline would all be significantly impacted by this increase in jurisdiction (and even more additional red tape). As Mr. Marcus points out in his analysis attached as **Exhibit E**, these buffer areas now sought to be included in the Proposed Regulations are not wetlands but are treated as such. Additionally, there is no analysis as to why or how the Current Regulations are not adequate to protect these areas, especially in light of the additional regulations in place already regarding stormwater management and soil erosion and sedimentation control. Mr. Marcus also notes the ambiguity in these regulations, which would lead only to the exacerbation of the problem facing property owners and developers in not knowing what their property rights are and the costs to develop their properties.

Mr. Marcus also notes that the Proposed Regulations fail to consider and include necessary exemptions, as detailed on page 3 of his report. Mr. Marcus notes the inconsistency between the purposes of the new regulations being consistency, transparency and standardization versus the Proposed Regulations, where his concerns still remain. *See* **Exhibit E** at page 3. Mr. Marcus notes one truly significant issue with the Proposed Regulations in that the State is attempting to move toward land use planning restrictions in its Proposed Regulations, when these items are subjects of municipal regulation and oversight. On the other hand, the Proposed Regulations attempt to require Municipal involvement at the wetlands permitting initial stages, which defeats the purpose of one agency reviewing the applications and is directly inapposite to the concerns that prompted the legislation in the first place[4] and what is detailed in the task report---leading to delayed review and still, in reality, two levels of review and input on matters that should be left to the state agencies with the authority and knowledge to regulate the same. *See* **Exhibit E** at page 3.

Importantly, Mr. Marcus sets forth an analysis with respect to comparison of regulations from the States of Connecticut, Maine, Vermont, New Hampshire and the Commonwealth of Massachusetts. *See* **Exhibit E** at pages 4, and 8-10. Additionally, Mr. Marcus provides detailed comments with respect to his issues and concerns, including the ambiguity in certain Proposed Regulations and the lack of a scientific basis for others. *See* **Exhibit E** at pages 4-8.

RIBA reiterates the faults, errors, and issues with the Proposed Regulations in the attached Memorandum at **Exhibit F**. RIBA's Memorandum on the Proposed Regulations points out the drastic impacts

[4] "**(4)** Dissimilar municipal standards have resulted in a land use system wherein local governments manage watersheds and groundwater aquifers using a variety of methods resulting in diverse outcomes." R.I. Gen. Laws § 42-64.13-10(a).

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on the western portion of the State of Rhode Island which is already subject to burdensome zoning restrictions regarding minimum lot size and frontage requirements, making dense development an impossibility in most instances. The Proposed Regulations, as RIBA concludes on the western portion of this State, which contains the vast majority of the remaining developable land in Rhode Island, has a significant impact on the developability of this portion of the State. *See* **Exhibit F** at page 2. RIBA's issues, once again, are detailed in this Memorandum. Moreover, we submit just a mere sampling of the Projects in the State that would have been impossible or significantly reduced if the Proposed Regulations applied. *See* **Exhibit G**. A review of these plan sheets shows the significant impact of the Proposed Regulations on a variety of types of development.

There is a reason the OMB found that there is an adverse impact on small businesses. This cannot be ignored. Now is not the time to impose even more burdensome regulations and red tape, without adequate vetting analysis and flexibility, taking into account, as required, the true need for economic development. The passage of these Proposed Regulations in final form, will serve no purpose other than to stop pending developments in their tracks, stop further development, and result in an onslaught of litigation with inverse condemnation, tolling and constitutional claims. RIBA is willing, as always, to partner in good faith to find a path forward, but this is not the way. RIBA has consistently called out the issues with these Proposed Regulations and has made suggestions on how to best amend the regulations, where necessary. RIBA is made of a team and membership of highly qualified professionals from all aspects who have provided feedback thus far.

Thank you in advance for your attention to this matter.

Very truly yours,

John Marcantonio – Executive Officer

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