



MEMORANDUM

TO: Jeffrey Willis, Director, CRMC

FROM: Kevin Sloan, Coastal Policy Analyst, CRMC

CC: CRMC Renewable Wind Team;
Anthony DeSisto, CRMC Legal Counsel

RE: RICRMC's Federal Consistency Review Authority and Application of Enforceable Policies for Glacial Moraine Habitat

DATE: August 18, 2022

Issue Presented:

An inquiry was recently made by Robin Main, counsel for Revolution Wind, to David Kaiser, Senior Policy Analyst of NOAA, regarding how CRMC applies its enforceable policy regarding Areas of Particular Concern (APC) and the rebuttable presumptive exclusion of offshore development within APC in the CRMC Geographic Location Description (GLD) areas in state and federal waters.¹ Specifically, Revolution Wind argues the application of the presumptive exclusion in federal waters is an unauthorized state regulatory action prohibited by the CZMA. At the request of Mr. Kaiser, CRMC met with him to discuss this issue on April 11, 2022 where Mr. Kaiser appeared to agree with Revolution Winds' position. However, Mr. Kaiser explained CRMC can use its enforceable policies for the protection of glacial moraine in federal waters under CRMC's CZMA Federal Consistency review authority in management measure talks with Revolution Wind. CRMC agrees with this premise and explains below.

I. State Enforceable Policies Under the CZMA

“Enforceable policy” is defined at 15 CFR § 930.11(h).² The definition states a “State agency may identify *management measures* which are based on enforceable policies [that] would allow [an] activity to be conducted consistent with the enforceable policies of the program.” (emphasis added).³ Per the NOAA Office for Coastal Management CZMA Federal Consistency Overview document, “enforceable policies are given legal effect by state law and do not apply to federal lands, *federal waters*, federal agencies or other areas or entities outside a state's jurisdiction, unless authorized by federal law (the CZMA does not confer such authorization)” (emphasis

¹ OSAMP § 11.10.2(B).

² 15 CFR § 930.11(h).

³ *Id.*

added).⁴ However, where a state, such as Rhode Island, has NOAA approved GLD areas in federal waters, state enforceable policies are applicable within the area and a wind developer must be compliant with state enforceable policies.

II. Ocean SAMP § 11.10.2(B) Presumptive Exclusion is Not Applicable in Federal Waters

The presumptive exclusion is not applicable in federal waters because it amounts to the state regulating federal activity. According to a June 15, 2021 presentation by David Kaiser, “States may review, *not manage*, federal actions.”⁵ Put another way, a State can review a wind developer’s Consistency Certification to determine if adequate management measures are included to make a project consistent with State enforceable policies. A State’s policies cannot, on their face, tell a developer it cannot do something. Ocean SAMP § 11.10.2(B) states on its face that “All... offshore development, or any portion of a proposed project shall be presumptively excluded from APCs” (i.e. glacial moraine). The presumptive exclusion is rebuttable, but the notion that a developer would be automatically excluded from placing Wind Turbine Generators (WTGs) in a specific location equates to a state regulatory action.⁶ The same logic applies to the OSAMP GLD maps because those maps would create a de facto enforceable policy for BOEM.⁷ Therefore, according to Mr. Kaiser, the presumptive exclusion, APC designations, and the GLD maps indicating where APC are located are not enforceable in federal waters.

III. Applying Mr. Kaiser’s Logic Expands the Application of CRMC’s Enforceable Policy for the Protection of Glacial Moraine Habitat

a. Protecting glacial moraine habitat as the enforceable policy basis for CRMC’s Federal Consistency review

Based on the April 11 meeting with Mr. Kaiser, CRMC’s Federal Consistency review will be based on the policy surrounding the protection of glacial moraine habitat. CRMC’s policy basis for designating glacial moraine as APC is that moraine serves as unique and complex habitat which promotes biodiversity.⁸ As a result, “glacial moraines contain valuable habitats for fish and other marine life, [and] they are... important to commercial and recreational fishermen.”⁹ Due to moraine habitat’s importance to Rhode Island fishermen, coastal communities, and other coastal resources, the CRMC will rely on this policy, and not the

⁴ CZMA Federal Consistency Overview, Office for Coastal Management, NOAA, February 24, 2020.

<https://coast.noaa.gov/czm/consistency/applying/>

⁵ Coastal Zone Management Act Review for Offshore Renewable Energy Projects: Intergovernmental Renewable Energy Task Force for the Gulf of Mexico, June 15, 2021, slide 8 (David Kaiser presenting).

<https://www.boem.gov/renewable-energy/state-activities/noaa-national-ocean-service-czma-david-kaiser>

⁶ CRMC meeting with David Kaiser (NOAA) on APC, April 11, 2022, page 1-2.

⁷ *Id.* at 2.

⁸ See OSAMP § 11.10.2(C)(3).

⁹ *Id.*

presumptive exclusion or APC designation, to ensure Revolution Wind uses adequate management measures to avoid or mitigate impacts to glacial moraine habitat.¹⁰

b. *Relying on the policy for protecting glacial moraine habitat expands the application of CRMC's review within the Revolution Wind lease area*

CRMC's interpretation of Mr. Kaiser's comments is that relying on the policy basis of protecting and preserving glacial moraine in the GLD area expands the application of where CRMC may further protect glacial moraine and seek mitigation measures as necessary. Mr. Kaiser stated in the April 11th meeting that CRMC can rely upon information submitted by BOEM and Revolution Wind including maps with more recent data showing more expansive glacial moraine habitat within the project area than what is mapped in the OSAMP.¹¹ Mr. Kaiser went on to say that if an area contains glacial moraine, CRMC can use that information in mitigation talks to require more robust management measures by Revolution Wind. Thus, following Mr. Kaiser's logic, CRMC is not bound to reviewing Revolution Wind's management measures strictly within the OSAMP mapped glacial moraine areas, can consider newly identified glacial moraine habitat as part of any mitigation negotiations, and can base a Federal Consistency objection on a failure by the developer to use adequate management/mitigation measures to comply with the enforceable policies.

¹⁰ Under 15 CFR § 930.11(h) "A State agency...must base its [Federal Consistency] objection on enforceable policies." Assuming Mr. Kaiser is right, and APC and the presumptive exclusion do not exist in federal waters because they are regulatory mechanisms, any CRMC objection would fail on appeal based on the regulatory language. However, by relying on the policy of protecting APC, CRMC satisfies the quoted objection requirement.

¹¹ See OSAMP § 11.10.2 Figures 3, 4; CRMC meeting with David Kaiser (NOAA) on APC, April 11, 2022, page 3.