



U.S. DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Office for Coastal Management
Silver Spring Metro Center, Building 4
1305 East-West Highway
Silver Spring, Maryland 20910

Grover Fugate, Executive Director
Rhode Island Coastal Resources Management Council
Oliver H. Stedman Government Center
4808 Tower Hill Road, Suite 3
Wakefield, RI 02879

FEB 12 2020

Dear Mr. Fugate,

Thank you for the Rhode Island Coastal Resources Management Council's (CRMC's) October 15, 2019, request for approval of changes to the Rhode Island Coastal Resources Management Program pertaining to the Ocean Special Area Management Plan (SAMP). You requested that the National Oceanic and Atmospheric Administration (NOAA) Office for Coastal Management approve the changes pursuant to Coastal Zone Management Act (CZMA) regulations at 15 CFR part 923, subpart H.¹

With the clarifications, exceptions, and qualification noted below, the Office for Coastal Management approves the incorporation of the changes as part of the federally approved Rhode Island Coastal Resources Management Program. Please note that a public notice by the state of this decision is required under 15 CFR § 923.81(e)(5). The public notice should state that pursuant to 15 CFR § 923.81(f) (84 FR 38133 (Aug. 6, 2019)), the enforceable policies approved in this program change shall apply to federal consistency reviews under 15 CFR part 930 as of the date of this approval letter. Please include in the public notice the list of changes provided in this letter and send a copy of the notice to the Office for Coastal Management for our records.

CHANGES APPROVED

See the enclosed list of the changes incorporated into the Rhode Island Coastal Resources Management Program.

PUBLIC COMMENTS

The Office for Coastal Management received no comments on this program change submission. However, the submission included comments received by the CRMC on proposed changes to the Ocean SAMP as the CRMC was considering them. Included in the package were comments from representative organizations of commercial fishermen, a seafood supplier, and Vineyard Wind. In addition to comments on technical aspects of the proposed changes such as separation distances and alignments for wind turbine towers, comments also challenged the alleged underlying assumption of the scope of state authority.

¹ The decision due date, originally November 14, 2019, was extended to February 12, 2020.

The law firm Morgan, Lewis & Bockius representing Vineyard Wind submitted comments to CRMC on several existing and proposed parts of the Ocean SAMP.² However, the CRMC did not move forward with adopting the most contentious changes to the Ocean SAMP and also moved numerous parts from the Ocean SAMP § 11.10 regulatory standards (the enforceable policies for CZMA purposes) to § 11.9, which are not enforceable policies or necessary data and information for CZMA purposes. NOAA is not addressing the Morgan, Lewis & Bockius comments to the CRMC in this approval letter.

CLARIFICATIONS

The state's submission acknowledges the limits on the authority of the state in exercising its review authority under the CZMA. Prior to adoption by the CRMC, revisions were made to the proposed changes to address previous Office for Coastal Management comments to CRMC. Nonetheless, for the purpose of dispelling any mischaracterizations of that authority, the following clarifications are made regarding the Rhode Island Ocean SAMP, its requirements, and its application to activities proposed in federal waters.³

The CZMA requires that states have “a planning process for energy facilities likely to be located in, or which may significantly affect, the coastal zone, including a process for anticipating the management of the impacts resulting from such facilities.”⁴ The Office for Coastal Management recognizes and commends the CRMC the national leadership it has shown in developing planning processes and policies for the siting and development of the emerging offshore wind industry in state waters.

In federal waters, Congress has delegated the responsibility for the planning and policies regarding the siting of offshore wind facilities to BOEM through the Outer Continental Shelf Lands Act (OCSLA) and its implementing regulations. The CZMA and OCSLA regulations provide states with a role in the OCSLA planning process. The CZMA does not confer upon states the authority to manage activities within federal waters. The state may use its regulatory

² Morgan, Lewis & Bockius asserted that some of the amendments to the regulatory standards for project design could only be applicable to offshore wind development in federal waters and, thus, an impermissible breach of federal sovereignty. The comments also recommended that the amendments clarify that monetary compensation cannot be required as an enforceable policy to determine consistency under the CZMA, and that requirements such as the procedural decision point established under the proposed CRMC policies for determining best available environmental control technology should not be applicable for CZMA review purposes when those policies conflict with the statutory timeframes for conducting CZMA reviews.

³ The Office for Coastal Management notes that certain statements made by the state may contribute to public misunderstanding about the Ocean SAMP. For example, see McCann, Jennifer, *et al.*, *The Rhode Island Ocean Special Area Management Plan: Managing Ocean Resources Through Coastal and Marine Spatial Planning, A Practitioner's Guide* (2013), at p. 5 <http://www.crmc.ri.gov/samp_ocean.html>, which contains the statement “Federal agencies, including the Bureau of Ocean Energy Management, are required to fully employ the content of the Ocean SAMP and its process as they make decisions on future wind turbine development and siting.” Federal agencies are not required to fully employ the Ocean SAMP and its process. The SAMP is a “roadmap” for the *state* to follow, not federal agencies. Such statements should be corrected or removed.

⁴ 16 U.S.C. § 1455(d)(2)(H).

standards that have been recognized by the Office for Coastal Management as CZMA enforceable policies to assess the consistency of proposed federal actions with the enforceable policies of the state coastal management program and concur, concur with conditions, or object. However, the state cannot direct how an authorizing federal agency implements its statutory and regulatory requirements.

As discussed in the state's submission, CRMC will use the Ocean SAMP in applying the state's inherent regulatory authority over activities in state waters, and for reviews pursuant to the CZMA federal consistency requirements. There is a distinction between state reviews of activities proposed in state waters for conformance with state laws and CZMA reviews of activities proposed in federal waters. State approvals required as a matter of state law for activities in state waters are not required for activities proposed in federal waters.⁵ The NOAA-approved enforceable policies in the underlying standards for the state permits still apply to projects in federal waters in determining the consistency of the projects, but applicants are not required to seek separate approvals from the state apart from submitting a consistency certification and necessary data and information to the state pursuant to the requirements of the CZMA.

The CZMA encourages stakeholder participation in state reviews. The Ocean SAMP designates specific roles for the Fishermen's Advisory Board (FAB) in assisting the CRMC in determining the coastal effects of proposed projects. While the FAB may have valuable information and insights to provide as the CRMC determines the consistency of projects, the CZMA does not confer authority on entities other than the state in making CZMA federal consistency decisions. Opposition to a project by the FAB cannot be a basis for a CZMA objection; objections must be based on the CRMC's determination of consistency with NOAA-approved enforceable policies.

In approving the proposed changes to the Rhode Island Ocean SAMP, the Office for Coastal Management approves the requirement that applicants must meet with the FAB as a necessary data and information requirement under 15 CFR § 930.58 in order for the CZMA review period to start. In approving this requirement, the requirement applies only such that CRMC must make a reasonable effort in good faith to meet with the FAB during regularly scheduled meetings of the FAB, or those scheduled by the CRMC. The CRMC shall promptly schedule a meeting between an applicant and the FAB if requested to do so. Failure to do so may nullify the FAB meeting as a necessary data and information requirement.

Any state requirements that do not conform to the timeframes established in the CZMA and its implementing regulations are not applicable in the state CZMA review process.

The CRMC has adopted an administrative processing fee of \$20,000 for the costs of conducting CZMA federal consistency reviews for large-scale offshore developments, underwater cables and other projects as determined by the CRMC. The assessment and payment of administrative fees is not an enforceable policy for CZMA review purposes, and failure to pay an administrative

⁵ For examples, see the requirements for CRMC approval of mitigation in 11.10.1 G, and CRMC approval of a Construction and Operations Plan (COP) in 11.10.5 C. 2.

fee cannot be the basis for a CZMA objection. The Office for Coastal Management also notes that such fees cannot be applied to federal agencies.⁶

EXCEPTIONS

In reviewing drafts the Ocean SAMP as proposed by the CRMC to be revised, the Office for Coastal Management requested revisions related to the points above. While nearly all of the requested revisions were made and approved by the CRMC, there are two requested revisions that have not yet been addressed.

Section 11.10.1(C) requires the CRMC to issue a CZMA objection if project modification or mitigation is not proposed to avoid or lessen adverse effects. The Office for Coastal Management noted that the policy should not mandate an outcome and that the CZMA federal consistency regulations provide alternatives to objections such as conditional concurrences. Such options under the regulations should not be foreclosed by a requirement that the CRMC issue an objection.

Please note that a technical correction is needed to section 11.10.1(F) which cross-references itself. It appears that the need to change the reference to section 11.10.1(G) was overlooked in revisions made to previous drafts. Also, note that for purposes of determining consistency with mitigation requirements and monetary compensation in section 11.10.1(G), the CRMC cannot compel monetary compensation as a form of mitigation through the CZMA federal consistency process, but the Council and applicant can agree to compensation as one means to meet the mitigation policy of this part.

In comments on section 11.10.5(C)(1), the Office for Coastal Management requested that provisions pertaining to CRMC approval of Site Assessment Plans (SAPs) be moved from section 11.10 to section 10.9, which only applies to state reviews under its inherent regulatory authority over projects in state waters and is not applicable in the CZMA review process. As noted above, in exercising its CZMA review authority, the state does not have the authority to require an applicant to submit to other approvals that the state would not be entitled to require or make.

Regardless of whether these changes have been made by the CRMC, the points made by the Office for Coastal Management stand, and the state must only apply its CZMA federal consistency review authority in a manner that conforms to these comments.

STANDARD QUALIFICATION

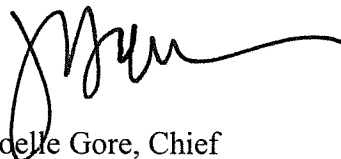
As a standard qualification applying to all program changes, states may not incorporate enforceable policies by reference. If an approved enforceable policy refers to another statute, regulation, policy, standard, guidance, or other such requirement or document, the referenced policy itself must be submitted to and approved by the Office for Coastal Management as an enforceable policy in order to be applied under the federal consistency review provisions of the CZMA. No referenced policy may be applied for federal consistency unless that policy has been

⁶ See 15 CFR § 930.41(e).

separately reviewed and approved as an enforceable policy by the Office for Coastal Management.

Thank you for your cooperation in this review. Please contact Allison Castellan at 240-533-0977, if you have any questions. For future correspondence regarding these program changes, please refer to the file number assigned to this action, RI-2019-1.

Sincerely,

A handwritten signature in black ink, appearing to read 'Joelle Gore', with a long horizontal flourish extending to the right.

Joelle Gore, Chief
Stewardship Division

Enclosure(s): Table of Approved Changes

RI-2019-1 TABLE OF APPROVED CHANGES

Please refer to the Office for Coastal Management February 11, 2020, decision letter for clarifications, exceptions and qualifications pertaining to this approval.

Legal citation	Title of policy, section, or other descriptor	Is the change new, revised, or deleted	Date effective in state	Enforceable policy	Enforceable mechanism citation
650-RICR-20-05-11.2(A)	Purpose	Revised	10/06/2019	N	N/A
650-RICR-20-05-11.3(E)	Definitions	Revised	10/06/2019	N	N/A
650-RICR-20-05-11.3(F)	Definitions	Revised	10/06/2019	N	N/A
650-RICR-20-05-11.3(H)(5) and (6)	Definitions	Revised	10/06/2019	N	N/A
650-RICR-20-05-11.5	Building on CRMC's Existing Program	Revised	10/06/2019	N	N/A
650-RICR-20-05-11.9(C)	General Policies	New	10/06/2019	N	N/A
650-RICR-20-05-11.9(D)	General Policies	New	10/06/2019	N	N/A
650-RICR-20-05-11.9.1(E)	General Policies: Ecology	Revised	10/06/2019	N	N/A

Legal citation	Title of policy, section, or other descriptor	Is the change new, revised, or deleted	Date effective in state	Enforceable policy	Enforceable mechanism citation
650-RICR-20-05-11.9.3(U)	General Policies: Cultural and Historic Resources	Revised	10/06/2019	N	N/A
650-RICR-20-05-11.9.4(C)	General Policies: Commercial and Recreational Fisheries	Revised	10/06/2019	N	N/A
650-RICR-20-05-11.9.4(H)	General Policies: Commercial and Recreational Fisheries	Revised	10/06/2019	N	N/A
650-RICR-20-05-11.9.7(H)	General Policies: Offshore Renewable Energy and Other Offshore Development	Deleted	10/06/2019	N	N/A
650-RICR-20-05-11.9.8	General Policies: Application Requirements in State Waters	New	10/06/2019	N	N/A
650-RICR-20-05-11.9.9	General Policies: Baseline Assessment Requirements and Standards in State Waters	New	10/06/2019	N	N/A

Legal citation	Title of policy, section, or other descriptor	Is the change new, revised, or deleted	Date effective in state	Enforceable policy	Enforceable mechanism citation
650-RICR-20-05-11.10.1(D)	Regulatory Standards: Overall Regulatory Standards	Deleted	10/06/2019	Y	R.I. General Laws § 46-23-1 et seq.
650-RICR-20-05-11.10.1(D) (re-lettered from (E) to (D))	Regulatory Standards: Overall Regulatory Standards	Revised	10/06/2019	Y	R.I. General Laws § 46-23-1 et seq.
650-RICR-20-05-11.10.1(D)(1)	Regulatory Standards: Overall Regulatory Standards	New	10/06/2019	Y	R.I. General Laws § 46-23-1 et seq.
650-RICR-20-05-11.10.1(G)	Regulatory Standards: Overall Regulatory Standards	Revised	10/06/2019	Y	R.I. General Laws § 46-23-1 et seq.
650-RICR-20-05-11.10.1(J)	Regulatory Standards: Overall Regulatory Standards	Revised	10/06/2019	Y	R.I. General Laws § 46-23-1 et seq.
650-RICR-20-05-11.10.1(J)(1)	Regulatory Standards: Overall Regulatory Standards	New	10/06/2019	Y	R.I. General Laws § 46-23-1 et seq.
650-RICR-20-05-11.10.5(A)	Regulatory Standards: Application Requirements	Revised	10/06/2019	Y	R.I. General Laws § 46-23-1 et seq.

Legal citation	Title of policy, section, or other descriptor	Is the change new, revised, or deleted	Date effective in state	Enforceable policy	Enforceable mechanism citation
650-RICR-20-05-11.10.5(C)(1)	Regulatory Standards: Application Requirements	Revised	10/06/2019	Y	R.I. General Laws § 46-23-1 et seq.
650-RICR-20-05-11.10.5(C)(1)(g)	Regulatory Standards: Application Requirements	Revised	10/06/2019	Y	R.I. General Laws § 46-23-1 et seq.
650-RICR-20-05-11.10.5(C)(1)(h)	Regulatory Standards: Application Requirements	Deleted	10/06/2019	Y	R.I. General Laws § 46-23-1 et seq.
650-RICR-20-05-11.10.5(C)(1)(j)	Regulatory Standards: Application Requirements	Deleted	10/06/2019	Y	R.I. General Laws § 46-23-1 et seq.
650-RICR-20-05-11.10.5(C)(1)(k)	Regulatory Standards: Application Requirements	Deleted	10/06/2019	Y	R.I. General Laws § 46-23-1 et seq.
650-RICR-20-05-11.10.5(C)(1)(l)	Regulatory Standards: Application Requirements	Deleted	10/06/2019	Y	R.I. General Laws § 46-23-1 et seq.
650-RICR-20-05-11.10.5(C)(1)(m)	Regulatory Standards: Application Requirements	Deleted	10/06/2019	Y	R.I. General Laws § 46-23-1 et seq.

Legal citation	Title of policy, section, or other descriptor	Is the change new, revised, or deleted	Date effective in state	Enforceable policy	Enforceable mechanism citation
650-RICR-20-05-11.10.5(C)(1)(n)	Regulatory Standards: Application Requirements	Deleted	10/06/2019	Y	R.I. General Laws § 46-23-1 <i>et seq.</i>
650-RICR-20-05-11.10.5(C)(1)(o)	Regulatory Standards: Application Requirements	Deleted	10/06/2019	Y	R.I. General Laws § 46-23-1 <i>et seq.</i>
650-RICR-20-05-11.10.5(C)(1)(p)	Regulatory Standards: Application Requirements	Deleted	10/06/2019	Y	R.I. General Laws § 46-23-1 <i>et seq.</i>
650-RICR-20-05-11.10.5(C)(1)(q)	Regulatory Standards: Application Requirements	Deleted	10/06/2019	Y	R.I. General Laws § 46-23-1 <i>et seq.</i>
650-RICR-20-05-11.10.5(C)(2)(h)	Regulatory Standards: Application Requirements	Deleted	10/06/2019	Y	R.I. General Laws § 46-23-1 <i>et seq.</i>
650-RICR-20-05-11.10.5(C)(2)(i)	Regulatory Standards: Application Requirements	Deleted	10/06/2019	Y	R.I. General Laws § 46-23-1 <i>et seq.</i>
650-RICR-20-05-11.10.5(C)(2)(j)	Regulatory Standards: Application Requirements	Deleted	10/06/2019	Y	R.I. General Laws § 46-23-1 <i>et seq.</i>

Legal citation	Title of policy, section, or other descriptor	Is the change new, revised, or deleted	Date effective in state	Enforceable policy	Enforceable mechanism citation
650-RICR-20-05-11.10.5(C)(2)(k)	Regulatory Standards: Application Requirements	Deleted	10/06/2019	Y	R.I. General Laws § 46-23-1 et seq.
650-RICR-20-05-11.10.5(C)(2)(l)	Regulatory Standards: Application Requirements	Deleted	10/06/2019	Y	R.I. General Laws § 46-23-1 et seq.
650-RICR-20-05-11.10.5(C)(2)(m)	Regulatory Standards: Application Requirements	Deleted	10/06/2019	Y	R.I. General Laws § 46-23-1 et seq.
650-RICR-20-05-11.10.5(C)(2)(n)	Regulatory Standards: Application Requirements	Deleted	10/06/2019	Y	R.I. General Laws § 46-23-1 et seq.
650-RICR-20-05-11.10.5(C)(2)(o)	Regulatory Standards: Application Requirements	Deleted	10/06/2019	Y	R.I. General Laws § 46-23-1 et seq.
650-RICR-20-05-11.10.6	Regulatory Standards: Design, Fabrication and Installation Standards	Deleted	10/06/2019	Y	R.I. General Laws § 46-23-1 et seq.
650-RICR-20-05-11.10.7	Regulatory Standards: Pre-Construction Standards	Deleted	10/06/2019	Y	R.I. General Laws § 46-23-1 et seq.

Legal citation	Title of policy, section, or other descriptor	Is the change new, revised, or deleted	Date effective in state	Enforceable policy	Enforceable mechanism citation
650-RICR-20-05-11.10.8	Regulatory Standards: Standards for Construction Activities	Deleted	10/06/2019	Y	R.I. General Laws § 46-23-1 <i>et seq.</i>
650-RICR-20-05-11.10.6 (re-numbered from 11.10.9 to 11.10.6)	Regulatory Standards: Baseline Assessment Requirements	Revised	10/06/2019	Y	R.I. General Laws § 46-23-1 <i>et seq.</i>