



Memorandum

To: Jennifer Cervenka, CRMC Chair and Council members

From: James Boyd, CRMC Coastal Policy Analyst

Date: July 17, 2019

Re: **Ocean SAMP Chapter 11 - 650-RICR-20-05-11** – Proposed amendments for Council consideration

The CRMC issued a **public notice** for rule-making on **June 12, 2019** for proposed amendments to Ocean SAMP - Chapter 11 - Policies of the Ocean SAMP (650-RICR-20-05-11). The June 12, 2019 amendment document is a product of several iterations and the assistance of NOAA staff over the last several months. Following the public notice, CRMC staff held a **public workshop on June 17, 2019** at Corless Auditorium, URI Bay Campus to discuss the proposed amendments. There were nine (9) attendees at the workshop: three (3) attorneys that represent the offshore wind industry; five (5) persons representing Rhode Island commercial fishing interests; and one (1) person representing a state non-governmental environmental organization. CRMC staff presented an overview of the proposed amendments, engaged in discussion with the workshop participants and answered questions.

The Council held a **public hearing** in this matter on **June 25, 2019** in conformance with R.I. Gen. Laws § 42-35-2.8. Public testimony was offered by one (1) person, a Rhode Island based energy and environmental lawyer. In accordance with the public notice, the 30-day public comment period closed on **July 12, 2019** and written comments were received from the following individuals:

Richard Fuka (RI Fishermen's Alliance) – June 18

Katie Almeida (The Town Dock) – June 24

Geri Eden (Morgan Lewis), representing Vineyard Wind – July 12

Robin Main (Hinckley Allen), representing Ørsted and Eversource – July 12

Gene Grace (American Wind Energy Association) - July 12

The written comments from the above parties are attached to this memorandum.

1. Amendments recommended to be deferred for further review and not adopted at this time

Following CRMC staff review and analysis of the written comments, it was determined that several proposed amendments need further discussion and refinement before consideration for adoption by the Council. CRMC staff intend to modify these sections partly based on the written comments, publicly notice any proposed revisions and proceed with rule-making action by the Council at a later date. **Accordingly, the following sections are recommended by CRMC staff not to be adopted as presented in the June 12, 2019 public notice and to remain unchanged from the currently effective rules:**

§ 11.9.4(C) – Proposed standards for wind farm design, including orientation, turbine spacing and navigation lanes;

§ 11.10.1(C) – Amendments to address significant long-term negative impacts and the process for considering mitigation options by the Council;

§ 11.10.1(E) – Amendments to add standards for adverse impacts and whether all feasible options have been evaluated for modifying a project before mitigation can be considered;

§ 11.10.1(O) – Amendments to add requirements for noise generated by construction and pile driving activities; and

§ 11.10.1(P) – Amendments to add requirements for cable burial associated with offshore development.

2. Minor revisions or technical corrections to proposed amendments recommended for adoption

CRMC staff also determined that some of the proposed amendments could be revised as recommended by the parties because they were minor changes or technical corrections and would not substantively change the meaning or the regulatory intent, but rather help clarify its intent and understanding by the public. These revisions to the publicly noticed regulations are shown below with the CRMC staff recommended revisions **highlighted in yellow text**. These proposed minor revisions appear to be consistent with, and a logical outgrowth of, the rules proposed in the CRMC June 12, 2019 public notice for rule-making without changing the intent or application of any definitions or rules. **Accordingly, the following proposed minor revisions are recommended by CRMC staff for Council approval.**

§ 11.3(E)(2)

2. Up to two (2) members **who are managers** representing Rhode Island seafood processing facilities; and

§ 11.8(A)(2)

2. The Council shall engage commercial and recreational fishermen in the Ocean SAMP decision-making process through the Fishermen's Advisory Board (FAB), as defined in § 11.3(E) of this Part. The FAB will provide the Council with advice on the potential adverse impacts of Offshore Development on commercial and recreational fishermen and fisheries activities, and on issues including, but not limited to, the evaluation and planning of project locations, arrangements, and alternatives; micro-siting (siting of individual wind turbines within an offshore wind farm to identify the best site for each individual structures); access limitations; and measures to mitigate the potential impacts of such projects. For more information on the FAB, see § 11.9.4(H) of this Part.

§ 11.9(C)

- C. Any assent holder of a CRMC-approved offshore development, as defined in § 11.10.1(A) of this Part, shall:

§ 11.9(C)(3)

3. Acknowledge Follow-up, in writing, any oral request or notification made by the Council, within three (3) business days and follow up in writing on such request or notification within a reasonable period of time as determined jointly by the assent holder and CRMC considering the circumstances:

§ 11.9(C)(6)

6. Conduct all activities authorized by the permit-assent in a manner consistent with the provisions of this document, the Rhode Island Coastal Resources Management Program (Subchapter 00 Part 1 of this Chapter), and all relevant federal and state statutes and regulations and policies:

§ 11.9.4(H)

- H. The Council shall appoint a standing Fishermen's Advisory Board (FAB) which shall provide advice to the Council on the siting and construction of other uses in marine waters. The FAB is an advisory body to the Council that is not intended to supplant any existing authority of any other federal or state agency responsible for the management of fisheries, including but not limited to the Marine Fisheries Council and its authorities set forth in R.I. Gen. Laws § 20-3-1 et seq. The FAB is defined in § 11.3(E) of this Part. When there are two members representing a fishing interest, only one vote may be cast on behalf of that interest. If the two members representing that fishery cannot agree on their vote then there shall be no vote for that fishery for the item under consideration. In any vote on a matter, there shall be no more than ~~6~~7 votes total for RI interests and no more than 3 votes total for MA interests. The FAB members may elect a chair and a vice-chair from amongst its members. In addition the FAB may establish rules governing its members such as a minimum number of meetings each member must attend to maintain standing as a member. FAB members shall serve four-year terms. The Council shall provide to the FAB a semi-annual status report on Ocean SAMP area fisheries related issues, including but not limited to those of which the Council is cognizant in its planning and regulatory activities, and shall notify the FAB in writing concerning any project in the Ocean SAMP area. The FAB shall meet not less than semi-annually with the Habitat Advisory Board and on an as-needed basis to provide the Council with advice on the potential adverse impacts

of other uses on commercial and recreational fishermen and fisheries activities, and on issues including, but not limited to, the evaluation and planning of project locations, arrangements, and alternatives; micro-siting (siting of individual wind turbines within an offshore wind farm to identify the best site for each individual structure); access limitations; and measures to mitigate the potential impacts of such projects on the fishery. In addition the FAB may aid the Council and its staff in developing and implementing a research agenda. As new information becomes available and the scientific understanding of the Ocean SAMP planning area evolves, the FAB may identify new areas with unique or fragile physical features, important natural habitats, or areas of high natural productivity for designation by the Council as Areas of Particular Concern or Areas Designated for Preservation.

§ 11.9.7(J)(1)

1. A goal for the offshore wind farm applicant and operator is to have operational noise from wind turbines average less than or equal to 100 dB re 1 µPa² in any 1/3 octave band at a range of 100 meters at full power production.

§ 11.10.1(A)

- A. All offshore developments regardless of size, including energy projects, which are proposed for or located within state waters of the Ocean SAMP area, are subject to the policies and standards outlined in §§ 11.9 and 11.10 of this Part. ~~(e) Except, as noted above, T~~ the Council shall not use § 11.9 of this Part ~~shall not be used~~ for CRMC concurrences or objections for CZMA federal consistency reviews. For the purposes of the Ocean SAMP, offshore developments are defined as:

§ 11.10.9(A)

- A. The Council in coordination with the Joint Agency Working Group, as described in § 11.9.7(J) of this Part, shall determine requirements for developing baseline assessments monitoring prior to, during, and post construction as specified in § 11.9.9 of this Part. For CZMA federal consistency purposes the Council must identify any baseline assessments and construction monitoring activities during its CZMA six-month review of the COP. The Council cannot require monitoring actions after its CZMA review. A detailed commercial fisheries baseline assessment, as specified in § 11.9.9(E)(1) of this Part, shall be considered necessary data and information to be filed with the applicant's consistency certification for a CZMA review and to demonstrate compliance with this enforceable policy. ~~Specific monitoring requirements shall be determined on a project-by-project basis and may include but are not limited to the monitoring of:~~

3. All other proposed amendments

With the exception of the amendments identified above in Section 1 to be deferred pending further review and discussion, including a subsequent public notice and Council action, CRMC staff recommends that all other amendments as proposed for rule-making in the June 12, 2019 public notice, including the minor changes and technical corrections identified above in Section 2, be considered for approval and adoption by the Council.

From: [Grover Fugate](#)
To: [Jeff Willis](#); [Jim Boyd](#); [Dan Goulet](#); jkenyon@crmc.ri.gov; [David Ciochetto](#); [Anthony DeSisto](#); [Jennifer Cervenka](#)
Subject: Fwd: Ocean SAMP Language Change :
Date: Tuesday, June 18, 2019 11:38:41 AM
Attachments: [Language change.pdf](#)
[Untitled attachment.00040.htm](#)

Grover
Sent from my iPhone

Begin forwarded message:

From: richard fuka <captlobster@gmail.com>
Date: June 18, 2019 at 7:47:38 AM EDT
To: pbreslin@rilegislature.gov
Cc: gfugate@crmc.ri.gov, dbeutel@crmc.ri.gov
Subject: Ocean SAMP Language Change :

To all,

The new language changes of the Ocean SAMP in the Definitions section, 11.2 Line E number 2 where it speaks to the addition to two individuals to be added to the FAB are to be representatives of fish houses and are to be "managers" of fish houses is wrong.

Either the addition of the word "manager" was done just as a gross lack of understanding of how a fish house operates or the use of the word "manager" was done intentionally to exclude the fishery liaisons that are hired by the fish houses to do these very jobs such as participating on a Fisheries Advisory Board for the Rhode Island Ocean Special Area Management Plan.

I believe simply striking the word "manager" from the line in question can be done without any formal exercise to simply allow representation from two fish houses to participate on the FAB as the fish houses see fit.

Look forward to hearing from all.

Rich Fuka
President
RI Fishermen's Alliance

11.3 Definitions

- A. "Certified verification agent" or "CVA" means an independent third-party agent that shall use good engineering judgment and practices in conducting an independent assessment of the design, fabrication and installation of the facility.
- B. "Construction and operations plan" or "COP" means a plan that describes the applicant's construction, operations, and conceptual decommissioning plans for a proposed facility, including the applicant's project easement area.
- C. "Ecosystem based management" or "**EMBEBM**" means an integrated approach to management that considers the entire ecosystem, including humans. The goal of EBM is to maintain an ecosystem in a healthy, productive and resilient condition that provides the services humans want and need.
- D. "Enforceable policy" means State policies which are legally binding through constitutional provisions, laws, regulations, land use plans, ordinances, or judicial or administrative decisions, by which a State exerts control over private and public land and water uses and natural resources in the coastal zone.
- E. "Fishermen's Advisory Board" or "FAB" means an advisory body to the Council that shall be comprised of up to **eighteen-twenty (18-20)** total members, to include the following:
1. Up to two (2) members representing each of the following six Rhode Island fisheries: bottom trawling; scallop dredging; gillnetting; lobstering; party and charter boat fishing; and recreational angling; **and**
 2. Up to two (2) members who are **managers** representing Rhode Island seafood processing facilities; and
 23. ~~Up to six (6) members, who are Massachusetts fishermen who fish in the Ocean SAMP area to include four commercial fishermen and two recreational fishermen.~~
- F. "Geographic location description" or "GLD" means a geographic area in federal waters ~~consistent with the Ocean SAMP study area,~~ where certain federal ~~agency activities,~~ licenses, and permit activities pursuant to 15 C.F.R. Part 930 Subparts D and E will be subject to Rhode Island review under the ~~Coastal Zone Management Act (CZMA)~~ federal consistency provisions. Rhode Island has two federally approved GLDs (2011 and 2018).
- G. "Habitat Advisory Board" or "HAB" means an advisory body to the Council that shall be comprised of nine members, five representing marine research institutions with experience in the Ocean SAMP study area and surrounding

STRIKE
THE WORD MANAGER

From: [Dave Beutel](#)
To: [James Boyd](#)
Cc: [Lisa Turner](#)
Subject: FW: Ocean Samp comment
Date: Monday, June 24, 2019 3:51:58 PM
Attachments: [image001.png](#)
[Ocean Samp.pdf](#)

From: Katie Almeida [mailto:kalmeida@towndock.com]
Sent: Monday, June 24, 2019 3:20 PM
To: Dave Beutel
Subject: Ocean Samp comment

Hi Dave,

Please find attached my comment on the Ocean Samp document.

Thank you,
Katie



Katie Almeida

Fishery Policy Analyst

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June 24, 2019

Dear Council Members,

Please find below our comments regarding the changes to the Ocean Smp Plan:

-We are in support of the addition of two more seat of the FAB to include representation from seafood processing facilities. However, it is unwarranted to require that those two positions be held by “managers”. Companies should be free to choose who they want to represent them on the FAB. Being a “manager” should not be a requirement. Not only does it narrow down the list of contenders, but it’s not a given that “managers” are going to have the time to attend these meetings. Companies have created positions for the sole purpose of following fishery related issues, attending public meetings and sitting on boards such as the FAB. They should not be excluded simply because they don’t have the title of “manager”.

-Regarding turbine arrangement. Turbines should not be required to be arranged in a “grid pattern based on latitude and longitude with east-west rows”. Each area has different fishing patterns and behaviors. There should simply be a requirement that the company hold workshops with the industry to see what arrangement works the specific area slated for development.

We agree that the turbines should be placed at least 1nm apart from each other. Regarding transit lanes, the industry has been very vocal and consistent that the width of the lanes be at least 4nm wide.

-Proper mitigation and or compensation should be well planned and not rushed as the Vineyard Wind compensation package was. There should be some guidelines regarding this in the document. We are happy to see that shoreside facilities will be considered and included when deciding the effects of construction and operation on the fishing industry.

-Regarding the biological assessments, a requirement of a minimum of 3 complete years of surveys before offshore construction and installation activities begin should be the standard. Post construction surveys should for 5 years following construction and every 3 years following. Ideally surveys would be conducted yearly for the life of the project, but we understand the limitations.



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-The document recommends the cable to be buried at 1.5 meters (4.9 feet), however the Block Island Wind Farm cable is buried at 1.8 meters (6 feet) and has become exposed more than once. It would be wise to recommend a deeper burial to reduce the risk of exposure for all cables.

Throughout the document there is a lot of required interaction between the wind company and the Council. We would like to see the FAB have equal footing in the process going forward. It's extremely important that the very people who will be affected by construction and development be involved in every step along the way, especially when discussing turbine layout and design and research. The industry has been asking for more involvement for years now and this is the perfect time to require that.

Thank you for the opportunity to comment.

Sincerely,

Katie Almeida
Fishery Policy Analyst



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James Boyd

From: Edens, Geri <geri.edens@morganlewis.com>
Sent: Friday, July 12, 2019 9:15 AM
To: James Boyd
Cc: David Kaiser - NOAA Federal; Erich Stephens
Subject: Comments on Proposed Amendments to Ocean SAMP
Attachments: VW Comments on Proposed Ocean SAMP Amendments 7-12-19.pdf

Jim

On behalf of Vineyard Wind, I am submitting the attached comments on CRMC's proposed amendments to the Ocean SAMP Regulatory Standards. Thank you for the opportunity to provide these comments.

Geri Edens

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July 12, 2019

VIA E-MAIL

JBOYD@CRMC.RI.GOV

James Boyd
Coastal Resources Management Council
Stedman Government Center
4808 Tower Hill Road
Wakefield, RI 02879

Re: Comments on Proposed Amendments to Policies and Standards of the Ocean
Special Area Management Plan (Ocean SAMP) (650-RICR-20-05-11)

Dear Jim:

On behalf of Vineyard Wind, I am submitting comments on CRMC's proposed amendments to the Ocean Special Area Management Plan ("Ocean SAMP"). As the first utility scale offshore wind project located exclusively in federal waters to work through the federal consistency process with CRMC, we commend CRMC for proposing amendments that add clarity to the differences between the application of the Ocean SAMP's enforceable policies in state waters and for federal consistency pursuant to §307 of the Coastal Zone Management Act, 16 U.S.C. §1456 ("CZMA"). Our comments focus on provisions that need further clarification as to their application to federal consistency and we identify provisions that conflict with the Bureau of Ocean Energy Management's ("BOEM") regulation of offshore wind development in federal waters.

We applaud CRMC for creating the nation's first regulatory structure whose principal purposes include providing a framework for addressing the compatibility of the offshore wind and commercial and recreational fishing industries. We share the Ocean SAMP's goal of supporting offshore wind development as an important means to address climate change while promoting and enhancing existing uses. However, we are concerned that some of the proposed amendments to the Regulatory Standards set forth in § 11.10 seek to regulate offshore wind development exclusively in federal waters. As the National Oceanic and Atmospheric Administration ("NOAA") has explained, "enforceable policies are given legal effect by state law and do not apply to federal lands, federal waters, federal

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James Boyd
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agencies or other areas or entities outside a state’s jurisdiction, unless authorized by federal law.” NOAA, Federal Consistency Overview at 5 (rev. Jan. 2016) (“NOAA Overview”). Neither the CZMA nor the Outer Continental Shelf Lands Act (“OCSLA”), under which BOEM regulates offshore wind development in federal waters, confer such authorization. The Ocean SAMP clearly recognizes the state’s jurisdictional limitations, yet, as we discuss below, some of the proposed amendments to the policies would apply only to offshore wind development in federal waters.

Proposed Design Standards

Section 11.9.4(C) mandates that in state waters wind generator turbines “be arranged in a grid pattern based on longitude and latitude with east west rows” with a “minimum spacing of one (1) nm between all turbines and all lanes between turbines (east-west, north-south) [of a] minimum of 1 nautical mile wide.” It also requires “at least one transit lane from navigation with a minimum spacing of two (2) nautical miles . . . consistent with any adjacent wind farm transit lane(s) and any BOEM approved wind energy area transit lane plan.” While the design standard is a “General Policy” applicable only to projects in state waters, it is made operative to federal consistency by §11.10.1(E), which expressly provides that “to assist the Council with CZMA consistency certification, offshore wind energy projects *should be designed* in accordance with §11.9.4(C)(1) of this Part to avoid significant adverse impacts to commercial fishing activities.” (emphasis added)

Section 11.10.1(E) is a *de facto* regulation of offshore wind projects in federal waters because the proposed design standards set forth in §11.9.4(C)(1) could only apply to projects in federal waters. Moreover, CRMC’s rationale for the design standards is based on fishing activities that occur only in federal waters. “A state policy that would regulate or otherwise establish standards for federal agencies or federal lands or waters would not meet the CZMA’s definition of “enforceable policy” (*i.e.*, legally binding under state law).” NOAA Overview at 6; *see also*, 71 Fed. Reg. 788, 823 (Jan. 5, 2006) (“NOAA will not approve State policies that on their face contain requirements that are preempted by Federal law.”).

The Design Standards Would Only Be Applicable in Federal Waters

Based on the Ocean SAMP’s extensive analyses of areas suitable for offshore wind development in state waters, CRMC identified a Renewable Energy Zone (“REZ”). It is an approximate 11.8 square nautical mile (nm), crescent-like shaped area south of Block Island, which is just one nautical mile wide. To justify the proposed design standards, CRMC’s Cost Benefit Analysis assumes that 16, 10 MW WTGs could be located in the REZ on a 1 x 1 nm grid pattern. This is not the case.

The Block Island Wind Farm (“BIWF”) is located in the REZ and is not oriented in a grid pattern, nor are its turbines spaced 1 nm apart. This alone speaks volumes to any need for

a wind project sited in the REZ to be configured in an east-west orientation with 1 nm spacing between turbines.¹ In fact, despite the Ocean SAMP's extensive analysis of commercial and recreational fishing, which included qualitative input from fishermen, there is no mention at all that fishing within the REZ, or for that matter fishing anywhere within the Ocean SAMP study area, occurs in an east-west direction to facilitate the compatibility of fixed gear and mobile gear fishing. Rather, the Ocean SAMP explains that within the Ocean SAMP study area, Cox Ledge (located in federal waters), is used by fixed gear, as well as mobile gear fishermen, and that the fishermen have informal cooperative agreements whereby the area is used by fixed gear fishermen during certain times of the year and by mobile gear fishermen other times of the year.

Moreover, the figure in Attachment 1 demonstrates that the REZ is too small and narrow to accommodate a turbine grid with 1 x 1 nm spacing (east-west, north-south), with the BIWF oriented in a southwest to northeast configuration and the requirement to avoid areas of particular concern, *e.g.*, moraine edges. Even absent the BIWF, a "grid" pattern is simply not achievable given the REZ's curved shape and the fact that it is only approximately one nm wide. Nor could a 1 x 1 nm grid be located outside the REZ in state waters given the coastal setback requirements to protect recreational use (*e.g.* swimming, boating, diving, fishing), navigational channels, and other limitations documented in the Ocean SAMP. Given the constraints within the REZ and state waters generally, the only reason to impose a policy mandating a 1 x 1 nm design standard is to provide a basis for extending the policy to federal waters. CRMC's CZMA authority cannot be exercised in this manner.

In addition, the requirement to locate at least one 2 nm transit lane consistent with any adjacent wind farm transit lane and any BOEM approved wind energy area transit lane plan could not be implemented in the REZ. First, any "adjacent" wind farm would have to be in federal waters and BOEM's Rhode Island Wind Energy Area is not adjacent to the or other state waters. Second, for the same reason, any wind energy area transit lane plan BOEM would approve would not abut the REZ. Finally, even if such transit lanes were adjacent to the REZ, the 2 nm requirement would effectively eliminate the placement of any wind turbines within the remaining area of the REZ and could potentially require a transit lane straight through the BIWF. In fact, the only way a 2 nm transit lane could be sited in the REZ without interfering with the BIWF would be to orient the lane in a north-south direction heading into Block Island (see Attachment 2). This, of course, makes no

¹ Based only on anecdotal information, not on the best available scientific data called for by the Ocean SAMP, CRMC argues in its Cost Benefit Analysis that 1 nm spacing between turbines is necessary to ensure navigational safety and to protect against insurance companies prohibiting vessels from fishing within wind projects. Cost Benefit Analysis at 4. These concerns were not raised in the Ocean SAMP, despite its extensive engagement with fishermen. Nor are they evident as a concern in state waters by the fact that the BIWF turbines are spaced only .5 miles apart.

James Boyd
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sense and further evidences that the design standards are intended to regulate offshore wind development in federal waters.

CRMC's Rationale for the Design Standards is Based on Fishing Activity that Occurs Exclusively in Federal Waters

CRMC's Cost Benefit acknowledges that during the consistency review for the Vineyard Wind project, fishermen objected to the layout, arguing that it would "interfere with existing commercial fishing practices for fixed and mobile gear operations." Cost Benefit Analysis at 1. CRMC clearly states that its proposed design standards are based on the "RI commercial fishermen proposal" submitted to CRMC during the Vineyard Wind review in the form of an affidavit on October 4, 2018. *Id.* That affidavit describes mobile gear fishing activity that occurs only in federal waters. *See* CRMC VW Concurrence Letter, Attachment 9. In fact, the graphic attached to the affidavit shows that of the "24 thousand or more tow tracks exhibited by 21 mobile gear fishing vessels from Block Island to Nantucket," only a few tow tracks are within the REZ and none of them are in an east-west direction. *Id.* The affidavit also provides a figure to illustrate the proposed 1 x 1 nm layout, which is plotted only across the federal lease areas. The REZ is not even shown on the figure. *Id.*

Most telling, commercial fishermen explained during the Vineyard Wind federal consistency process that fishing offshore is not necessarily linear or in a straight line *until they move into the federal lease areas*. Transcript of FAB meeting, July 26, 2018 at 24 (stating that "as you move towards -- into this leased area, though, we do tow in a general east/west direction, or they tow, and we work with them and stay out of the lanes."). They further explained that "once the fixed gear fishery leaves to the south of Cox's Ledge [which is located in federal waters], we are by an unwritten law mandated to set our gear east and west." *Id.* at 24-25. Moreover, CRMC explained in its concurrence letter on the Vineyard Wind project that a typical tow "starts from southeast of the Port of Galilee heading east along the selected Loran line and continuing for approximately 15 miles through the WEA." Concurrence at 52. The typical tow CRMC described occurs exclusively in federal waters, away from the REZ; not towards the REZ or within it.

Taken together, the fact that (1) CRMC's rationale for the design standards is based solely of fishing activities in federal waters, (2) fishermen themselves describe east-west fishing not occurring until within federal waters, (3) an east-west, 1 x 1 nm layout is impractical, if not impossible, in state waters given constraints imposed by the Ocean SAMP, (4) despite its extensive analysis of commercial fishing, the Ocean SAMP does not mention a need for a 1 x 1 nm east-west lay-out (whether or not in state waters), and (5) the BIWF, the only project to be built in compliance with the Ocean SAMP, is not oriented east-west and its spacing between turbines is less than 1 nm, there can be little doubt that the proposed design standards are impermissibly directed at offshore wind projects located in federal waters only.

The Design Standards Discriminate Against Offshore Wind Development

NOAA guidance provides that state policies should be based on effects to coastal uses or resources and not on a particular type of activity. This ensures that the policy is applicable to any type of activity that has coastal effects and will not discriminate against a particular user group. Very similar to the facts here, NOAA described the example of a state concerned with possible impacts from offshore oil and gas development on specific fishing areas proposed oil and gas specific energy policies. NOAA Overview at 7. NOAA did not approve the requirements because they imposed requirements on only one user group, when other types of activities might have the same coastal impacts.

The design standards operate in the same way. They apply to only one group of “large-scale offshore developments” as that term is defined in Ocean SAMP §11.3. Other offshore developments governed by the Ocean SAMP, *e.g.*, wave energy devices, LNG platforms, would also locate structures in waters used by commercial fishermen and potentially raise the same coastal effects. As proposed, the design standards impermissibly discriminate against one group of users to which the Ocean SAMP policies apply.

Summary and Recommendations

We understand and respect CRMC’s concerns regarding the potential impacts of project layouts in federal waters on the Rhode Island commercial fishing industry. For that reason, Vineyard Wind and other developers have *voluntarily* committed to designing all future projects within CRMC’s GLD with an east-west grid orientation with 1 nm spacing between turbine rows. Nevertheless, CRMC cannot establish standards for federal lands through an enforceable policy that is undeniably applicable only in federal waters. NOAA’s long-standing interpretation of the definition of an “enforceable policy” is that if a state policy specifically seeks to regulate an activity where state regulation is preempted by federal law, it is not legally binding under state law and would not be an enforceable policy under the CZMA. NOAA Overview at 7. Under OCSLA, Congress vested BOEM, not the states, with jurisdiction to ensure that renewable energy projects on the OCS are carried out in a manner that is, among other things, safe, protective of the environment, and preventive of interference with other reasonable OCS uses. 43 U.S.C. § 1337(p)(4). This necessarily includes regulating the design of offshore wind projects. Similar to NOAA’s example of North Carolina’s impermissible attempt to regulate low level aircraft in flight by adopting policies that imposed minimum altitude and decibel levels, and other overflight restrictions which are governed by the FAA, the design standards are an impermissible attempt to regulate the design of offshore wind projects in federal waters governed by BOEM. NOAA Overview at 7.

We strongly recommend that CRMC delete the following sentence in §11.10.1(E):

To assist the Council in concurring with CZMA consistency certification, offshore wind energy projects should be designed in accordance with § 11.9.4(C)(1) of this Part to avoid significant adverse impacts to commercial fishing activities.

We also recommend that CRMC delete in its entirety the design standards set forth in § 11.9.4(C)(1) because as shown above, they have no applicability in state waters, intrude on BOEM's exclusive jurisdiction, and discriminate against offshore wind development.

Significant Long-Term Negative Impacts

Section 11.10.1(C) defines significant long-term negative impacts on commercial and recreational fishing as the inability of commercial or recreational vessels “to access the project area because of the project design, or are limited in accessing a project area due to construction and operation activities, which result in negative economic impacts for a period of two (2) years or more.” The terms “access,” “limited access,” and “negative economic impacts” fail to provide sufficient guidance by which the policy could be imposed as a legally binding regulation.

The CZMA defines an “enforceable policy” as “state policies which are legally binding through constitutional provisions, laws, regulations, land use plans, ordinances, or judicial or administrative decisions, by which a State exerts control over private and public land and water uses and natural resources in the coastal zone.” 16 U.S.C. § 1453(6a). Under Rhode Island law, standards that provide no meaningful guidance or are too vague and indefinite cannot create enforceable rights. *Trembley v. City of Central Falls*, 480 A.2d 1359, 1365 (R. I. 1984). A statute is unconstitutionally vague if it lacks explicit standards from its application and thus delegates power that enables enforcement officials to act arbitrarily with unchecked discretion. *Fitzpatrick v. Pare*, 568 A.2d 1012, 1013 (R.I. 1990). *See also, United Nuclear Corp. v. Cannon*, 553 F. Supp. 1220 (D. R.I. 1982) (finding statute unconstitutionally vague where it failed to delineate or to suggest any standards, and failed properly to delegate rulemaking powers sufficient to create the omitted standards.). Thus, because the proposed enforceable policy is too vague as to be legally binding under Rhode Island law, it does not meet the definition of an enforceable policy under the CZMA.

Recommendation:

Consistent with a basic principle of the Ocean SAMP that all decisions should be based “on the best available science, §11.6, we recommend that CRMC define significant long-term impacts in relation to the best available data on navigational

safety and commercial and recreational fishing data (AIS, VMS, VTR). Economic impacts should be based on the best available data on fishing landing values from a project area. Indeed, for projects located in state waters, the Ocean SAMP requires an assessment of commercial and recreational fisheries effort, landings, and landings values for a project area (§11.9.9(C)(2)). While not required for federal consistency, the data is nevertheless available and should be used as the basis of determining potential economic impacts. Similarly, data is available regarding the spacing of turbines and navigational safety.

Mitigation Provisions

Section 11.10.1(C) provides that “consistent with federal permitting requirements for an activity,” the Council may decide not to consider mitigation options until the applicant has demonstrated that all “feasible” options have been evaluated for modifying the project to avoid the impacts. We are not aware of any BOEM permitting requirements that require modification of a project to avoid impacts before mitigation is considered. Rather, BOEM considers mitigation measures throughout the process, including requiring that an applicant describe in its COP how environmental impacts will be mitigated from the proposed activities.

More importantly, the requirement to modify a project before the Council would even consider mitigation measures is directly tied to the previous sentence incorporating by reference the design standards, which as shown above impermissibly regulates projects in federal waters. It is also based on §11.10.1(C)’s vague and unenforceable definition of “significant long-term negative impacts” as the inability to “access” a project area because of its design.

Even if CRMC cures the problems presented by the design standards and the vague and unenforceable definition of significant long-term impacts, the policy as written does not provide sufficient guidance as to how CRMC would determine whether modification of a project layout is not feasible. Contrary to Rhode Island law, the proposed policy would vest CRMC with unfettered discretion to determine whether a developer has shown a project modification is not feasible. *See e.g., Fitzpatrick*, 568 A.2d at 1013 (“A statute is unconstitutionally vague if it lacks explicit standards from its application and thus delegates power that enables enforcement officials to act arbitrarily with unchecked discretion.”). This puts an offshore wind developer in the untenable position of having a burden of proof without any idea as to how CRMC would determine that the burden was satisfied.

Finally, § 11.10.1(C) appropriately clarifies that for federal consistency purposes, CRMC cannot compel monetary compensation, but the Council and applicant could agree to such compensation *outside of the federal consistency process*. However, §11.10.1(F) mandates that “mitigation shall be negotiated between the Council staff, the FAB, the project

developer, and approved by the Council,” which is inconsistent with §11.10.1(C) if the intent is to include monetary compensation in the negotiations. If the Council cannot compel monetary compensation as part of the federal consistency process, it cannot compel the negotiation of monetary compensation with the staff and the FAB subject to the Council’s approval.

Recommendations

We recommend that §11.10.1(C) eliminate the requirement to modify a project before the Council will consider mitigation measures and retain the previous language that requires the applicant to modify the proposal to avoid and/or mitigate impacts.

We recommend that §11.10.1(C) define “feasible options” as those options that are technically and commercially achievable and can be implemented in a manner that allows a project to meet its purpose and need as set forth in the project’s COP.

We recommend that §11.10.1(F) be clarified to explain that mitigation negotiations between the staff, the FAB and applicant do not include the negotiation of monetary compensation for federal consistency purposes.

Construction Noise

Section 11.10.1(O) provides that construction and pile driving operations must use the best available control technology (BACT) to minimize acoustic energy (noise) impacts. To determine BACT the policy requires an applicant to provide an analysis of available wind tower designs and pile driving technologies, comparing the costs, site specific impacts to species and habitat, and availability and to use this analysis to select the acoustic energy reduction technology for the project. The policy further provides that “CRMC in consultation with the FAB and HAB shall determine if the applicant has chosen the BACT based on this analysis.” The policy cannot be applied for federal consistency for two important reasons.

First, the policy mandates requirements for which federal consistency could not be demonstrated during the 6-month review period. As CRMC acknowledges, BOEM regulations trigger the 6-month review period when BOEM issues a Notice of Intent to prepare an environmental impact statement, which typically occurs several months after a COP has been submitted. BOEM regulations further provide that when a COP is submitted after the issuance of a lease, federal consistency is conducted under 15 CFR part 930, subpart E. 30 C.F.R. §585.627(a)(9). Subpart E provides that “to assess consistency, the State agency shall use the information submitted pursuant to § 930.76,” which in this case is the COP. The BACT analysis called for in the enforceable policy is not required to be included in a COP, nor could it be because the information needed to conduct such an

analysis is not developed until well after COP submission, during the engineering phase of a project.

Selecting appropriate noise reduction technologies is not a simple exercise of comparing “available wind tower designs”² to pile driving technologies, as the policy suggests. Rather, each foundation is specifically designed for a specific location taking into account soil conditions, potential loads, water depths, available installation vessels with load capacity to lift the specific foundation, and available hammers that fit the selected foundation design. During the engineering phase of a project, in consultation with selected contractors, project engineers conduct drivability analyses to determine the equipment needed to achieve the required penetration depth at each foundation location. Knowing the equipment required to achieve penetration depth, necessarily dictates the pile driving and noise attenuation technologies that will be used. All of this occurs well after COP submission and extends through COP approval as the Facility Design and Installation Reports are prepared for BOEM review. Under no scenario could the information called for by the policy be developed within the 6-month review period. As such, NOAA cannot approve an enforceable policy that would defeat the 6-month statutory review requirement. *See e.g.*, 71 Fed. Reg. at 813.

Second, the policy impermissibly intrudes on the jurisdiction of the federal agencies. Noise attenuation requirements are addressed by BOEM and NMFS through the NEPA, Endangered Species Act, and Marine Mammal Protection Act processes under which the federal agencies assess the potential impacts of pile driving on marine mammal and fish species and specify the degree of noise attenuation necessary to protect species from harm. The degree of attenuation required, along with the engineering considerations discussed above, determine the noise reduction technologies used. Again, all of this is determined well after the 6-month consistency review period concludes.

Recommendations

Section 11.10.1(O) should be moved to the General Policies (Part 11.9) that are applicable only in state waters. Alternatively, §11.10.1(O) should make clear that CRMC cannot require the BACT analysis as part of the federal consistency process.

² It is unclear what CRMC is referring to as “available wind tower designs,” but we assume it means WTG foundations, as they are the only aspect of an offshore wind project that involves pile driving.

Cable Burial

Section 11.10.1(P) provides that all power cables “*shall*” be buried to a depth of 1.5 meters in stable, unstable, and hard bottom crossings. As CRMC acknowledges, it cannot impose requirements that occur after its CZMA review. Thus, in the same way that CRMC cannot impose monitoring requirements for federal consistency purposes, it cannot impose construction requirements. Section 11.10.1(P) clearly mandates requirements for construction that cables be buried a minimum of 1.5 meters.

Moreover, as discussed above, 15 CFR part 930, subpart E requires a state to assess consistency using the information submitted in the COP. At most, a COP would identify a target burial depth, as BOEM only requires that a COP include general information on the location, design and installation methods, testing, maintenance, repair, safety devices, exterior corrosion protection, inspections decommissioning for all cables. 30 C.F.R. § 585.626(b)(7). It is not until after COP approval, that BOEM regulations require detailed information on cable burial methods and vessels used for installation. §585.802(a)(7). For example, Vineyard Wind’s COP identified a target cable burial depth of 1.5 to 2.5 meters and described numerous tools and techniques that could be used to achieve the targeted depths.

Specifically with respect to hard bottom crossings (§11.10.1(P)(3)), the policy considers that “any and all expected areas of shallow cable burial to be a significant impact on marine organisms and the use of marine resources.” It further provides that the CRMC shall consider “cable armoring that exceeds two (2) percent of the overall length of proposed cable installation (combined length of inter-array and export cables) to be a significant coastal effect and an unnecessary impact on coastal resources and uses.” The policy imposes requirements that (1) cannot be demonstrated during the 6-month consistency review period, (2) directly conflict with BOEM’s authority, and (3) lead to an arbitrary finding of significant adverse effect for which CRMC would presumably seek mitigation or would otherwise object to an applicant’s federal consistency certification. Moreover, CRMC fails to provide any scientific basis for the 2 percent limitation.

Like the pile driving analysis discussed above, it is not until well after COP submission, and potentially well after COP approval, that project engineers in consultation with selected contractors conduct a cable burial risk analysis to determine the installation tools needed to achieve target burial depths and to identify potential areas that may require cable protection. The actual need for cable armoring is not known until construction is underway.

Moreover, the policy impermissibly conflicts with BOEM’s “project design envelope” approach to permitting offshore wind projects in federal waters. As BOEM explains, OCSLA and its implementing regulations “allow a lessee to submit a reasonable range of design parameters within a COP, and for BOEM to approve a COP containing such a range

of designs.” BOEM, Draft Guidance Regarding the Use of a Project Design Envelope in a Construction and Operations Plan (2018). The parameters may include “multiple details regarding its proposed export cable, including all *potential* installation methods, alternate routes, and landfall locations.” *Id.* BOEM further acknowledges that it would be unreasonably costly for a developer to submit with its COP the results of geophysical and/or geotechnical surveys for all potential design parameters. BOEM therefore instructs that developers likely need only submit enough geophysical and/or geotechnical survey information to allow BOEM to perform its environmental analysis, with the final submittal of more granular geophysical and/or geotechnical information submitted once final locations for facilities have been determined.

Thus, under the project design envelope, data required to identify areas where cable protection would likely be needed is not provided in the COP. Rather, the COP only provides a worst-case estimate of the potential need for cable protection based on the general characteristics of site conditions. Imposition of a 2% limit on a worst case estimate of the potential need for cable protection is an arbitrary limit that intrudes on BOEM’s authority under OCSLA to provide developers the flexibility needed to refine project designs beyond COP submission and approval. It would, in all cases lead to CRMC finding a significant adverse effect because a developer could not commit to a 2% limit during the consistency review period. Moreover, from any view 2% is an arbitrary limit. Two percent cable protection along a 10 mile cable going through a heavily fished and trafficked area of shallow water is vastly different than 2% of a 100 mile cable located many miles away from commercial fishing areas and water too deep for any boat to anchor or fish.

Recommendations

Section 11.10.1(P) should be moved to the General Policies (Part 11.9) that are applicable only in state waters. Alternatively, §11.10.1(P) could, for federal consistency purposes specify a requirement that 1.5 meters is a target burial depth but it should also make clear that CRMC cannot impose a 2% limit on cable protection for federal consistency purposes.

Baseline Assessment

Section 11.10.9 provides that “detailed commercial fisheries baseline assessment shall be considered necessary data and information to be filed with the applicant’s consistency certification for a CZMA review and to demonstrate compliance with this enforceable policy.” The enforceable policy does not define what constitutes a “commercial fisheries baseline assessment” but at the June 17, 2019 workshop CRMC clarified that for federal consistency purposes the baseline assessment requirements are set forth in §11.9.9(E)(1).

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Section 11.9.9(E)(1) requires a minimum 2 years of a pre-construction baseline biological assessment of commercial and recreational targeted species as specified in § 11.9.9(C). Section 11.9.9(C) provides that the assessment shall assess the relative abundance, distribution, and different life stages of these species at all four seasons of the year. The policy conflicts with BOEM's jurisdiction to determine under OCSLA that a project is protective of the environment and with BOEM's regulations governing baseline biological assessments necessary for inclusion in a COP. It also interferes with a lessee's exclusive right to submit to BOEM a COP without restriction as to the timing of the submission and puts lessees holding leases in CRMC's GLD at a complete disadvantage as lessees compete for coveted power purchase agreements. It also thwarts the national interest in renewable energy development on the OCS by potentially delaying a lessee's submission of a COP.

BOEM's data requirements for a COP, which is the basis for the state's review under Subpart E, do not include a requirement to collect 2 years of baseline data on the lease site nor a requirement that data be collected for all four seasons of the year. Rather, an applicant is required to provide baseline biological information specific to the lease area taking into consideration existing site specific and regional data. If existing data is not adequate, and additional surveys are warranted, BOEM requires that applicants develop a survey plan that BOEM reviews, consults with NMFS, and approves, as lessees cannot conduct any activities on a lease site, including the collection of baseline data, without authorization from BOEM. The policy effectively usurps BOEM's authority to determine the need and methods for collecting baseline biological data to support a COP by mandating a blanket two years of costly studies that may not be necessary. It also impermissibly imposes upon BOEM a requirement to authorize studies on a lease area that BOEM may deem unnecessary and which may, contrary to the national interest, delay development of renewable energy under the lease. "While the CZMA states a national policy in favor of coastal zone management, it does not on its face expand state authority to legislate in ways that would otherwise be invalid under the Commerce Clause." *Norfolk Southern Corp. v. Oberley*, 822 F.2d 388, 394-95 (1987).

Recommendations

Section 11.10.9's requirement that a detailed commercial fisheries baseline assessment is considered necessary data and information should be deleted. CRMC should, in accordance with Subpart E, rely on the commercial fisheries baseline assessment BOEM, in consultation with NMFS, deems necessary for COP approval.

General Recommendations

Section 11.4(E) incorrectly states that Areas of Particular concern and Areas Designated for Preservation, both of which are designated by CRMC in state waters, apply to activities

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in federal waters. While an applicant for a federal permit or approval must demonstrate consistency with the enforceable policies of the state, the enforceable policies do not confer jurisdiction upon the state to identify areas of concern or areas for preservation in federal waters. The reference to Areas of Particular Concern and Areas Designated for Preservation in §11.4(E) should be deleted.

Section 11.10.1(A) states that “except as noted above,” the Council shall not use §11.9 for federal consistency. It is unclear to which “except as noted above” refers. As §11.9 applies only in state waters and cannot be used for federal consistency purposes, there should be no exceptions. “Except as noted above” should be deleted.

The policies cite to BOEM’s regulations as 30 C.F.R. Part 285. The correct citation is 30 C.F.R. Part 585.

Sincerely,



Geri Edens

Attachments

CC: D. Kaiser
NOAA Office of Coastal Management

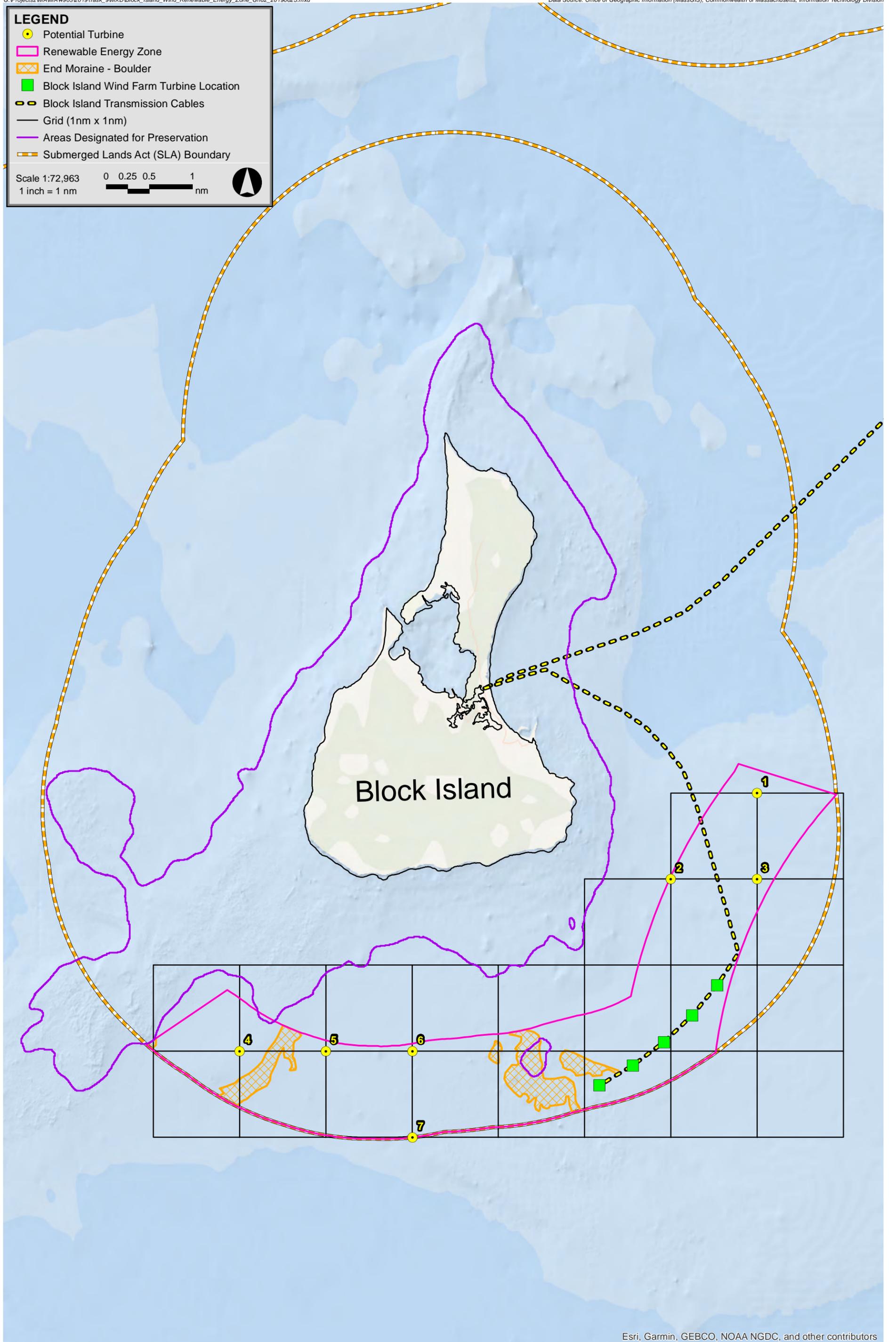
ATTACHMENT 1

LEGEND

-  Potential Turbine
-  Renewable Energy Zone
-  End Moraine - Boulder
-  Block Island Wind Farm Turbine Location
-  Block Island Transmission Cables
-  Grid (1nm x 1nm)
-  Areas Designated for Preservation
-  Submerged Lands Act (SLA) Boundary

Scale 1:72,963
1 inch = 1 nm

0 0.25 0.5 1
nm

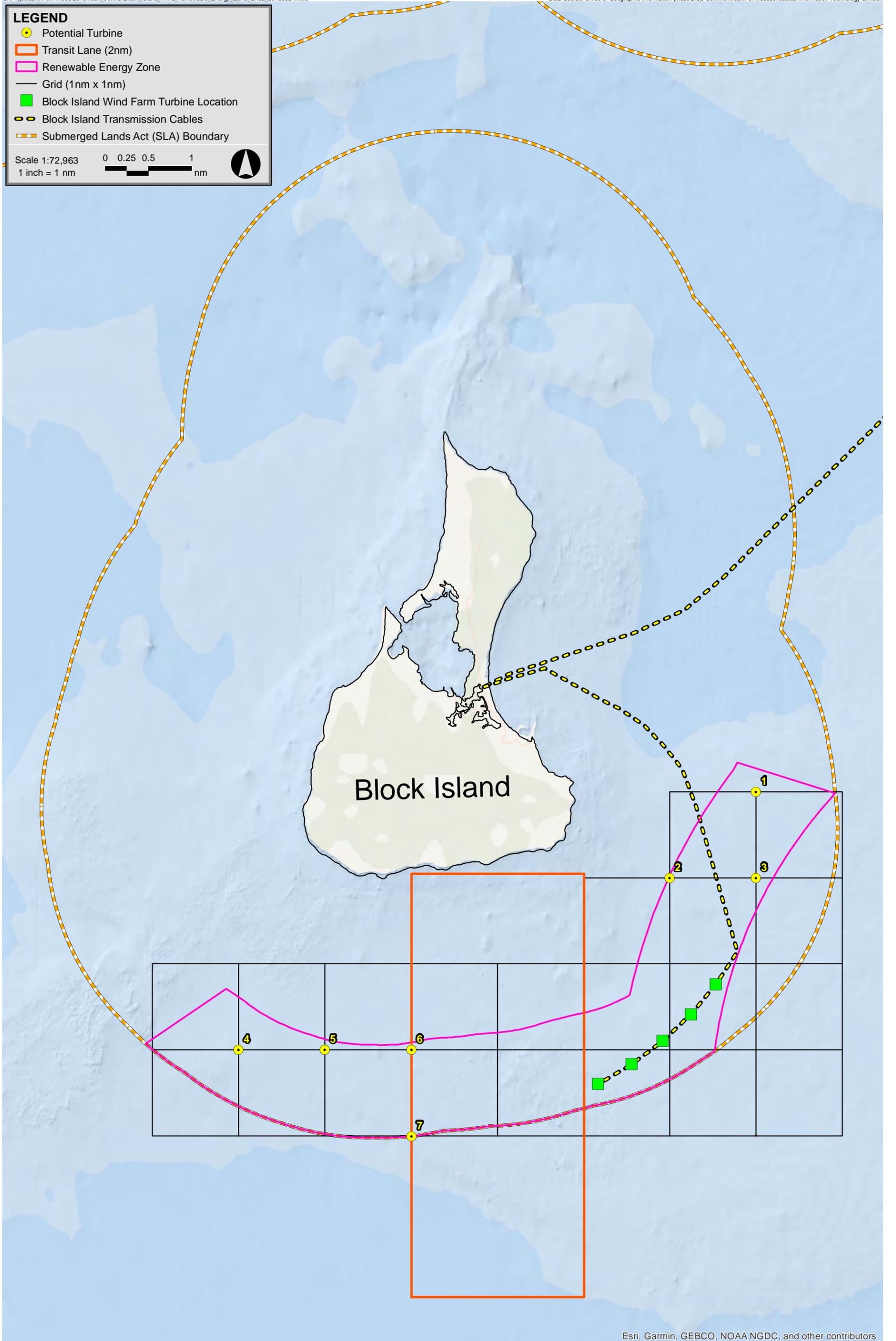


ATTACHMENT 2

LEGEND

-  Potential Turbine
-  Transit Lane (2nm)
-  Renewable Energy Zone
-  Grid (1nm x 1nm)
-  Block Island Wind Farm Turbine Location
-  Block Island Transmission Cables
-  Submerged Lands Act (SLA) Boundary

Scale 1:72,963 0 0.25 0.5 1
1 inch = 1 nm  nm 





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July 12, 2019

VIA HAND DELIVERY AND ELECTRONIC MAIL

Grover Fugate, Executive Director
James Boyd, Coastal Policy Coordinator
Coastal Resources Management Council
Oliver H. Stedman Government Center
4808 Tower Hill Road, Suite 3
Wakefield, RI 02879-1900

Re: Comments concerning proposed changes to the Ocean Special Area Management Plan
("Ocean SAMP")

Dear Grover and Jim:

This firm represents the joint venture between Ørsted and Eversource on certain offshore wind projects that will come before the Rhode Island Coastal Resources Management Council ("CRMC"). We appreciate the opportunity to provide comments on the proposed revisions to the Ocean SAMP. We believe the offshore wind industry, commercial fishing industry, and recreational interests should co-exist in a safe and reasonable manner. In that spirit, and in response to the CRMC's request for public comment on the proposed revisions to the Ocean SAMP, we submit the following:

- A brief narrative, which is below, summarizing the rationale for some significant comments. Please note that our proposed changes cover additional topics as you will see in the enclosed track changed version of the proposed regulations;
- Six copies of the enclosed chart that identifies specific sections on which we recommend changes and deletions;
- Six copies of the enclosed track changed version of the proposed Ocean SAMP regulatory changes with our suggested wording changes, which are highlighted in yellow for ease of review; and
- We will provide you with an electronic version of these materials including a Word version of our track changed version of the proposed regulations.

▶ ALBANY ▶ BOSTON ▶ HARTFORD ▶ MANCHESTER ▶ NEW YORK ▶ PROVIDENCE

Grover Fugate, Executive Director
James Boyd, Coastal Policy Coordinator
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Spacing and Alignment

Section 11.9.4 (C) proposes to require any wind farm to be laid out in a grid pattern with a minimum of 1 nautical mile between turbines. We believe that flexibility is necessary with respect to the turbine spacing. As the Council is aware, ocean floor and other conditions vary greatly, so, among other things, it may be impractical – and even impossible – to place turbines at such intervals. Accordingly, we suggest flexibility concerning spacing.

Construction Noise

Section 11.10.1 (O) establishes standards for noise created by construction and pile driving operations. Regulation of underwater acoustic activity is outside the Council's jurisdiction. Accordingly, we request that the Council not include this section in the revised Ocean SAMP.

Cable Burial Depth

Section 11.10.1 (P) establishes criteria for burial of utility power cables. Cable burial should be addressed on a case-by-case basis in response to scientific and engineering analysis of the seafloor conditions where the cable will be sited. Our recommendations reflect the fact that determinations on burial depth require analysis of each specific site.

Please do not hesitate to contact me with any questions or if you would like additional copies of the enclosed materials.

Very truly yours,



Robin L. Main

RLM
Enclosures
cc: Lisa Turner

Summary of Comments:

Proposed Ocean SAMP Section	Comment/Recommended Change
11.9 (C)	The term “offshore development” appears here and approximately 70 other places in the Ocean SAMP. In some locations, the term is capitalized “Offshore Development” and in other locations it is not. If the term is intended at all times to mean the definition of “offshore development” found in 11.10.1.A, then we recommend referencing that definition in 11.9.C (the first reference in the document) and capitalizing the term throughout.
11.9 (D)	Revised language to clarify optional nature of administrative fee and the scope of the projects to which it is applicable
11.9.4 (C)	Must have a balanced approach in supporting fisheries <i>and renewable energy development</i> . Adding the term “considers” provides flexibility in reviewing spacing and alignment of turbines on a project by project/lease by lease basis. Measurements should be goals instead of strict requirements. Must have precision on from what part of turbine spacing is measured. Beyond CRMC’s jurisdiction to mandate transit lanes.
11.9.4 (C)(1)(c)	For clarity, recommend using the defined term “offshore wind farm” instead of “wind farm.” We also recommend changing “wind farm” in Sections 11.8 (A)(2) , 11.9.4 (H) , and 11.9.7 (J)(1) to “offshore wind farm.” Modify “wind farm” to “offshore wind farm”
11.10.1 (C)	Must have some basis to determine “limited.” “Feasibility” must be carried throughout section to avoid regulatory inconsistencies. “May” gives Council discretion it needs when evaluating applications. “Unable to access the project area” is unclear and should be clarified.
11.10.1 (C)	Recommend consistency among “significant adverse impact,” “significant long-term negative impacts,” and “adverse effects.” Recommend defining “feasible options.”
11.10.1 (D)(1)	Remove all language after “However, for CZMA purposes” making FAB meeting prerequisite to CRMC review since CZMA timelines are predicated on submission of necessary data and information. Requiring meetings prior to submission of necessary information and data may lead to meetings based on incomplete data and is inconsistent with federal regulations which permit meetings only after submission of necessary data and information.
11.10.1 (E)	“Avoided” must be removed as it contradicts other parts of OSAMP that allows for a feasibility analysis and

	mitigation. “Feasibility” must be carried throughout section to avoid regulatory inconsistencies. Defining “mitigation” to certain uses potentially excludes other uses and is likely beyond CRMC’s jurisdiction – better to determine mitigation on the facts of each project.
11.10.1 (E)	Remove or alter language concerning monetary compensation for mitigation. Because the CRMC states that it cannot compel monetary compensation as mitigation, it is inappropriate to identify monetary compensation as the only potential mitigation option in this section.
11.10.1 (I)(1)	Remove language making HAB meeting prerequisite to CRMC review (similar to FAB issue)
11.10.1 (O)	Regulation of underwater construction noise is beyond CRMC’s jurisdiction; therefore removed
11.10.1 (P)	Must be determined on a project by project basis using scientifically acceptable geophysical investigation techniques with some parameters on maximum depths
11.10.1 (P)(4)	Clarify what “3.0 meters MLLW” means for certain cable landings, define “cable landings” and “sandy or erodible shorelines,” explain basis for “3.0 meters MLLW” standard.

From: [Gene Grace](#)
To: jboyd@crmc.ri.gov
Subject: AWEA RENEW Comments to RI CRMC
Date: Friday, July 12, 2019 11:14:42 PM
Attachments: [AWEA-RENEW comments to RI CRMC 7-12-19 \(003\).pdf](#)

Please find AWEA and RENEW's comments attached. Thx - Gene



Gene Grace

Senior Counsel
American Wind Energy Association

ggrace@awea.org email
202.383.2529 direct
202.657.7434 cell

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July 12, 2019

Mr. James Boyd
Coastal Resources Management Council
Stedman Government Center
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Re: AWEA Comments on Proposed Amendments to Policies and Standards of Ocean Special Area Management Plan (Ocean SAMP) (650-RICR-20-05-11)

The American Wind Energy Association¹ (“AWEA”) and RENEW Northeast, Inc.² (“RENEW”) appreciate the opportunity to comment on the Rhode Island Coastal Resources Management Council’s (“CRMC”) proposed amendments to the Ocean Special Area Management Plan (“OSAMP”). AWEA and RENEW commend Rhode Island’s long-standing leadership on offshore wind energy, including supporting development of and hosting the first offshore wind farm in the U.S., RI CRMC’s approval of Vineyard Wind, competitive procurement of 400 megawatts (“MW”) of offshore wind from Revolution Wind, a request for proposals for an additional 400 MW of renewable energy that is pending, and Governor Raimondo’s 1,000 MW by 2020 goal for clean energy, among other developments.

AWEA and RENEW’s comments primarily focus on proposed standards that are both unworkable from the perspective of the offshore wind industry and conflict with the Bureau of Ocean Energy Management’s (“BOEM”) regulation of offshore wind

¹ AWEA is a national trade association representing a broad range of entities with a common interest in encouraging the expansion and facilitation of wind energy resources in the United States. AWEA’s more than 1,000 member companies include wind turbine manufacturers, component suppliers, project developers, project owners and operators, financiers, researchers, utilities, marketers, customers, and others.

² RENEW is a non-profit association uniting environmental advocates and the renewable energy industry whose mission involves coordinating the ideas and resources of its members with the goal of increasing environmentally sustainable energy generation in the Northeast from the region’s abundant, indigenous renewable resources. RENEW members own and/or are developing large-scale renewable energy projects, energy storage resources and high-voltage transmission facilities across the Northeast. They are supported by members providing engineering, procurement and construction services in the development of these projects and members that supply them with multi-megawatt class wind turbines.



development in federal waters. For the reasons discussed below, AWEA recommends that CRMC delete these various standards.

I. COMMENTS

a. Design Standards

Section 11.9.4(C) requires wind turbines in state waters to meet various design standards. For instance, they must “be arranged in a grid pattern based on longitude and latitude with east-west rows” with a “minimum spacing of one (1) nautical mile [(“nm”)] between all turbines and all lanes between turbines (east-west, north-south) [of a] minimum of 1 [nm] wide.” Even though this design standard is listed as a “general policy” applicable only to state waters projects, section 11.10.1(E) nevertheless explicitly applies this policy to the federal consistency review.³ This would, in effect, impermissibly require the consistency review for federal waters to account for strict offshore wind energy standards that have not been approved by a federal agency. For example, in light of the requirement to avoid areas of particular concern, the renewable energy zone (“REZ) is too small and narrow to accommodate a turbine grid pattern with 1 x 1 nm spacing (east-west, north-south). As such, it would appear that the focus of these design standards is really with respect to extending to federal waters through CRMC’s CZMA authority. This clearly intrudes upon federal jurisdiction in this area.

It is also worth noting that CRMC explains that these design standards are based on the RI commercial fishermen proposal submitted to CRMC during the Vineyard Wind review. However, as that proposal describes mobile gear fishing activity that occurs only in federal waters and the fishermen themselves describe east-west fishing occurring only in federal waters, the impracticality of 1 x 1 nm layout in state waters seems self-evident. Again, the proposed design standards are impermissibly directed at federal waters.

³ Section 11.10.1(E) states “to assist the Council with [Coastal Zone Management Act (‘CZMA’)] consistency certification, offshore wind energy projects should be designed in accordance with § 11.9.4(C)(1) of this Part to avoid significant adverse impacts to commercial fishing activities.”



In order to rectify this situation, AWEA recommends that CRMC delete the sentence in section 11.10.1(E) that states in concurring with CZMA consistency certification, offshore wind energy projects be designed in accordance with the design standards listed in section 11.9.4(C)(1) as it intrudes on BOEM’s jurisdiction. AWEA also recommends that CRMC delete the design standards section set forth in section 11.9.4(C)(1), as it is not workable in state waters.

B. Significant Long-Term Negative Impacts

Section 11.10.1(C) defines significant long-term negative impacts on commercial and recreational fishing as the vessels’ inability “to access the project area because of the project design, or are limited in accessing a project area due to construction and operation activities, which result in negative economic impacts for a period of two (2) years or more.” This language is too vague to provide sufficient guidance to be enforceable. As such, because the proposed language does not provide explicit standards, it cannot be an enforceable policy under the CZMA. Instead, AWEA recommends that CRMC define significant long-term impacts using the best available data on navigational safety and commercial and recreational fishing data, and economic impacts should be based on the best available data on fishing landing values from a project area.

C. Mitigation Provisions

BOEM does not currently have any permitting requirements that mandate modification of a project to avoid impacts before mitigation is considered. In fact, BOEM considers mitigation measures throughout the process, including in the applicant’s Construction Operation Plan (“COP”). Nevertheless, section 11.10.1(C) states that “consistent with federal permitting requirements,” the Council may decide to not consider mitigation options until the applicant demonstrates that all “feasible” options have been evaluated for modifying the project to avoid impacts.



AWEA recommends the elimination of the requirement in section 11.10.1(C) to modify a project before the Council will consider mitigation measures. Instead, consistent with the approach adopted by BOEM, the applicant should be allowed to modify the proposal to avoid and/or mitigate impacts up to and through the COP stage.

D. Construction Noise

Section 11.10.1(O) mandates the applicant's use of the best available control technology ("BACT") to minimize construction and pile driving noise impacts and requires the applicant to provide an analysis of available wind tower designs and pile driving technologies. This policy is not achievable and intrudes on BOEM's jurisdiction. Specifically, the CRMC's policy requiring a BACT analysis is neither required in a COP nor possible, since section 11.10.1(O)'s required information is not developed until well after COP submission. During the COP engineering phase, each foundation is designed considering a multitude of location-specific factors, which determines the use of what pile driving and noise technologies will be employed. Because these analyses occur well after COP submission, it is not possible to collect section 11.10.1(O)'s required information within the 6-month review period. Further, NOAA has not approved, nor should it, an enforceable policy that would defeat the 6-month statutory review requirement. AWEA recommends that section 11.10.1(O) should be deleted because CRMC cannot require the BACT analysis as part of the federal consistency process.

E. Cable Burial and Cable Armoring

Section 11.10.1(P) impermissibly conflicts with BOEM's approach to permitting offshore wind projects in federal waters.⁴ Even though CRMC cannot impose

⁴ The Outer Continental Shelf Lands Act ("OCSLA") and its implementing regulations "allow a lessee to submit a reasonable range of design parameters within a COP, and for BOEM to approve a COP containing such a range of designs."



construction requirements in federal waters, section 11.10.1(P) mandates that all power cables “shall” be buried to a minimum depth of 1.5 meters. BOEM has that authority, and it is not until after COP approval that BOEM regulations require detailed information on cable burial methods and vessels used for installation.⁵ Similarly, section 11.10.1(P)(3) considers “any and all expected areas of shallow cable burial to be a significant impact on marine organisms and the use of marine resources.” However, again, it is not until well after COP submission, that a cable burial risk analysis is conducted to determine the installation tools needed to achieve target burial depths and to identify potential cable protection areas; in short, cable armoring needs are unknown until construction is underway.

AWEA recommends that the regulation require case-by-case investigation and not have any targets on cable burial and armoring. In addition, these requirements for cable protection for state waters should also be evaluated on case-by-case basis.

G. Baseline Assessment

CRMC’s proposed baseline assessment policy conflicts with BOEM’s jurisdiction to determine under OCSLA a project’s environmental protection and with BOEM’s regulations governing baseline biological assessments included in a COP. Specifically, section 11.10.9 states “detailed commercial fisheries baseline assessment shall be considered necessary data ... to be filed with the applicant’s consistency certification for a CZMA review and to demonstrate compliance...” CRMC has further clarified that the baseline assessment requirements for federal consistency require a minimum of 2-years pre-construction baseline biological assessment of commercial and recreational targeted species, as specified in § 11.9.9(C). However, in BOEM’s COP, there is no requirement to collect 2-years of lease site baseline data for all four seasons. Rather, an applicant must provide baseline biological information specific to the lease area’s site- and regional-specific data. Thus, by mandating two years of studies, section 11.10.9 intrudes on

⁵ See 585.802(a)(7).



BOEM's authority to determine the need and method for collecting baseline biological data and may delay renewable energy development.

AWEA recommends the elimination of section 11.10.9's requirement that a detailed commercial fisheries baseline assessment be considered necessary data for a consistency review. Instead, CRMC should rely on the commercial fisheries baseline assessment that BOEM, in consultation with NMFS, requires for COP approval.

II. CONCLUSION

Thank you in advance for your consideration of the issues raised in these comments, and please do not hesitate to contact AWEA if we can provide additional information.

Sincerely,

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