

Coastal Resources Management Council
Response to Public Comments
Proposed Amendments to Ocean SAMP 650-RICR-20-05-11

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). 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 following are responses to the written comments filed with the CRMC during the public notice period, June 12 through July 12, 2019. The CRMC appreciates all the comments submitted by the parties. All comments were considered and a number of revisions were made to the proposed regulations, as detailed in the CRMC staff memorandum dated July 17, 2019, and adopted by the Council. In addition, several proposed amendments to the regulations have been deferred for further modification based on the comments, and will be taken up for rule-making action by the CRMC at a later date. These deferrals are also detailed in the CRMC staff memorandum.

Comments are summarized below, followed by responses. In some cases there were similar comments between the parties, so these have been grouped together and identified as such with a single response.

§ 11.3(E)(2)

Comment: Two parties commented that the CRMC proposed addition of representation of seafood processing facilities on the Fishermen’s Advisory Board (FAB) was desirable, but that the text “who are managers” should be struck so that the fish houses can determine who is best to represent them on the FAB.

Response: The CRMC agrees with the comment and has made the appropriate revision to the regulation.

§ 11.9(C)

Comment: 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.

Response: Agreed. Revision made in this section to reference the definition of offshore development as defined at § 11.10.1(A). However, the RI Code of Regulations format does not permit capitalization of a defined term (exception for entities) unless located within a heading or subheading of the regulations.

§ 11.9(D)

Comment: Revise language to clarify optional nature of administrative fee and the scope of the projects to which it is applicable (commenter suggested the administrative fee would apply to projects with a cost of \$20,000,000 and above only).

Response: The proposed amendment is already optional in that the CRMC “may assess” an administrative fee to defray costs to conduct a CZMA review. Other than the threshold project cost, the commenter’s proposed revision is not significantly different than the CRMC proposed amendment.

§§ 11.9.4(C) and 11.10.1(E)

Comments: All three offshore wind energy representatives commented on the CRMC proposed offshore wind farm design standards for state waters under general policies at § 11.9.4(C) and for federal waters at § 11.10.1(E). Two of the commenters assert that such design standards cannot be applied in state waters, and thus cannot be applied exclusively to federal offshore waters. One commenter suggested revisions to §§ 11.9.4(C) and 11.10.1(E) to add flexibility in the application of the standards and that they should be goals instead of strict requirements. An additional comment was that the proposed standards discriminate against offshore wind development because the standards apply only to wind turbines and not to other large scale offshore developments such as LNG platforms or wave energy devices.

Another commenter suggested that rather than the proposed wind farm design standards, there should simply be a requirement that an offshore wind energy developer hold workshops with the commercial fishing industry to determine what wind farm design can work for the specific area slated for wind farm development. However, the commenter did agree that the turbines should be placed at least 1nm apart from each other and that any transit lanes be at least 4 nm wide.

Response: Notwithstanding the proposed 2 nautical mile (nm) transit lane requirement, the other two proposed design standards in § 11.9.4(C)(1), the grid pattern with east-west alignment and the 1 nm spacing between turbines, can indeed be applied to the existing Ocean SAMP renewable energy zone (REZ) located within state waters off Block Island. CRMC analysis shows that an additional nine (9) turbine foundations meeting these last two design criteria can be installed within the REZ and co-located with the existing five Block Island wind turbines. Moreover, when the REZ was established during the Ocean SAMP process a decade ago vessel transit traffic was factored into its design, thus it was not necessary to have a transit lane through the REZ.

While the proposed design standards would apply at this time to wind turbine foundations as specified in § 11.9.4(C)(1), we do not view the standard as discriminatory. The design standards were developed for the predominant activity (wind energy development) that is currently taking place within the two federally approved CRMC geographic location descriptions (GLDs). CRMC is authorized only for its listed activities within the GLDs. In the case of the GLD that includes the Vineyard Wind lease the CRMC is only authorized for purposes of federal consistency to review wind turbine towers and submerged cable. If other activities such as LNG development and wave energy devices are proposed within the GLDs, the design standards will be amended

to include those activities. However, under the current circumstances with wind energy companies filing construction and operation plans (COPs) with BOEM for new wind farms, wind energy development is the only new activity moving forward and actively being planned for at this time in southern New England offshore waters.

The CRMC believes that thoughtful modifications to §§ 11.9.4(C) and 11.10.1(E) could address the concerns expressed by commenters. For example, the transit lane issue could be removed as a standard with a default to any USCG approved transit lane plan for the southern New England wind energy area. BOEM will be relying upon the USCG, the federal agency with expertise in this issue, to establish vessel transiting lanes through offshore wind farm lease areas. Additionally, there may be flexibility added to § 11.9.4(C) as to when the standard would be applied. Accordingly the CRMC staff has recommended that §§ 11.9.4(C) and 11.10.1(E) be deferred for amendment until a later date.

§ 11.10.1(C)

Comments: Four comments were submitted concerning significant long term impacts specified in § 11.10.1(C) and requested that there be sufficient guidance for implementing the regulation. One commenter suggested recommended that the text “unable to access the project area” is unclear and should be clarified. Another commenter stated “proper mitigation and or compensation should be well planned and not rushed as the Vineyard Wind compensation package was.”

Response: We agree that further specificity and guidance needs to be integrated within this proposed regulation and recommend deferring § 11.10.1(C) to a later date to address all recommended deferred regulations simultaneously.

§ 11.10.1(D)(1)

Comments: One commenter recommended deleting the last four sentences of the proposed regulation starting with “However, for CZMA purposes the CRMC FAB meeting...” The commenter also stated that “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.”

Response: We disagree with the deletion of language as proposed by the commenter, as it would remove language specifically provided to CRMC by NOAA to address federal consistency timing issues. The required consultation with the FAB is specified as necessary data and information (NDI) within the regulation (both currently existing and proposed) that needs to be part of the CRMC federal consistency review. Accordingly, since the CRMC FAB meeting is NDI, the CRMC could determine in accordance with 15 CFR §§ 930.60 and 930.77 that the federal consistency review (6-month period) would not begin until immediately after the CRMC FAB meeting is held, provided all other NDI has been filed with the CRMC at the time of the applicant’s consistency certification filing. In addition, nothing prevents an applicant from having a meeting with the CRMC and FAB to fulfill the requirement in the regulation before an applicant files its consistency certification with the CRMC, provided the applicant and CRMC mutually agree as specified within the proposed amendment. Furthermore, the federal regulations at 15 CFR §§ 930.56 and 930.75 encourage early cooperation between the applicant and a state agency before the filing of a consistency certification. Thus, the proposed amendment would be in accordance with the federal regulations. Accordingly, CRMC staff recommend that the

commenter's proposed deletion of language in § 11.10.1(D)(1) be rejected for the reasons stated above.

§ 11.10.1(E)

Comments: Two commenters stated that BOEM requires mitigation throughout the COP review process, including requiring that an applicant describe in its COP how environmental impacts will be mitigated from the proposed activities. They argued that an offshore wind developer should not have to modify a project that has impacts before the CRMC will consider mitigation. Another commenter stated that the term avoided "must be removed as it contradicts other parts of OSAMP that allows for a feasibility analysis and mitigation. Also the term 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." Essentially, the commenters would prefer that CRMC defer to the BOEM process of mitigation for potential impacts.

Response: The currently effective regulation at § 11.10.1(E) states "Where the Council determines that impacts on the natural resources or human uses of the Rhode Island coastal zone through the pre-construction, construction, operation, or decommissioning phases of a project constitute significant adverse effects not previously evaluated, the Council shall, through its permitting and enforcement authorities in state waters and through any subsequent CZMA federal consistency reviews, require that the applicant modify the proposal to avoid and/or mitigate the impacts or the Council shall deny the proposal." (Emphasis added.) The Ocean SAMP development process anticipated that any offshore projects that had adverse impacts on coastal uses or resources would be modified to avoid impacts. Mitigation is defined at existing § 11.10.1(H) as "a process to make whole those fisheries user groups that are adversely affected by proposals" and includes, but is not limited to, "compensation, effort reduction, habitat preservation, restoration and construction, marketing, and infrastructure improvements." The proposed amendment is based on the CRMC's experience with the Vineyard Wind project and would require that applicants modify projects, especially for wind farm layout, when there are impacts to Rhode Island coastal resources or users. Nevertheless, staff recommends that this section be deferred to a later date to address all recommended deferred regulations simultaneously.

§ 11.10.1(I)(1)

Comments: One commenter suggested removing language in this proposed amended section making the Habitat Advisory Board (HAB) meeting prerequisite to CRMC review similar to the FAB issue in § 11.10.1(D)(1) above.

Response: See response in § 11.10.1(D)(1) above. Accordingly, CRMC staff recommend that the commenter's proposed deletion of language in § 11.10.1(I)(1) be rejected for the same reasons stated above.

§ 11.10.1(O)

Comments: Three commenters suggested that the CRMC has no authority to regulate underwater construction noise and that the CRMC should defer to BOEM's COP process and defer to any mitigation requirements that BOEM may impose on an applicant.

Response: The CRMC disputes the assertion that it has no authority to regulate underwater construction noise, especially in state waters. Nevertheless, CRMC staff recommends that the Council defer action on this proposed amendment so that staff can address issues at a later date.

§ 11.10.1(P)

Comments: Two commenters indicated that proposed § 11.10.1(P) conflicts with BOEM's design envelope approach to permitting offshore wind projects in federal waters. Additionally, 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. Another commenter stated that "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." And another commenter stated that the standard "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."

Response: The CRMC recognizes that BOEM's process with respect to cable burial as provided within a COP is minimal detail, which is precisely the problem. In the case of the Vineyard Wind project, they detailed a maximum length (10% - worst case scenario) of potentially exposed cable that would need armoring with stone or concrete mats to be almost 18 linear miles within the project area. Cable armoring will result in new bottom structure that will snag mobile gear (towed trawl nets and dredges) and potentially other fishing gear such as lobster pot ground lines, which will lead to the damage or loss of fishing gear by commercial fishing vessels and expenses related to the replacement of damaged or lost gear. Thus, the proposed amendment was intended to establish that any more than 2% of the length of all cables for a project (approximately 3.6 linear miles in the Vineyard Wind case) would be a significant adverse impact requiring mitigation. The standard does not prevent projects from going forward, rather it holds the developer accountable to the commercial fishing industry to mitigate for cable armoring impacts to commercial fishing gear damage and loss. The standard also attempted to address cable exposure for export cables that make landfall at the shoreline as a result of the exposed export cables at Block Island. Nevertheless, staff recommends that this section be deferred to a later date to address this matter adequately and all other recommended deferred regulations simultaneously.

§ 11.10.6(A)

Comments: Three commenters submitted comments concerning the CRMC requirement for a baseline assessment specified at § 11.10.6(A). Two commenters indicated that such a requirement conflicts with BOEM's jurisdiction to determine whether a project is protective of the environment and with BOEM's regulations governing baseline biological assessments included in a Construction and Operation Plan (COP). Further, it was indicated that the requirement for the baseline assessment (2 complete years to be submitted with the applicant's consistency certification as necessary data and information) was too restrictive as to the timing of the submission and puts wind area lessees holding BOEM leases within CRMC's GLD at a complete disadvantage as lessees compete for coveted power purchase agreements. Therefore, two of the commenters requested that this requirement be deleted.

One commenter requested that the standard within the regulations should be a minimum of three (3) complete years of surveys before offshore construction and installation activities begin.

Response: The CRMC is deleting most of the requirements in § 11.10.6(A) and moving them to § 11.9.9 for state waters. However, the one remaining requirement as an enforceable policy in federal waters is for a commercial fisheries baseline assessment, consistent with § 11.9.9(E)(1), as necessary data and information to be submitted by the applicant as part of a consistency certification filing with the CRMC. The assessment is a requirement of the applicant's COP, as necessary data and information, also required by § 11.10.5(C)(2)(e), which is not being amend and will remain unchanged as a result of these amendments.

BOEM's requirements are not being usurped in any way by the CRMC requirement at § 11.10.6(A). BOEM requires, in part, only a "description of the results of a biological survey" as specified at BOEM's regulations at 30 CFR § 585.626(a)(3). In the CRMC's view, BOEM's requirement does not address coastal effects on Rhode Island coastal resources and users, as it does not specify a minimum period of data collection nor a requirement for obtaining data during all four seasons of the year. In addition, under BOEM's regulations it would not have sufficient baseline data as part of the FEIS process and COP approval on which to assess any future potential impacts from construction or operation of a wind farm. Accordingly, BOEM's requirement lacks specificity and is wholly inadequate to obtain the data necessary to accurately characterize the fishery resources and to provide sufficient data to aid in an assessment of impacts that an offshore renewable energy project may have on the fishery resources once construction is completed and wind farm operations are ongoing. This position is consistent with the CRMC's comments to NOAA on April 5, 2019 concerning NOAA's Advanced Notice of Proposed Rulemaking (NOAA-NOS-2018-0107).

Consistent with the existing Ocean SAMP requirements, the CRMC required from Deepwater Wind for the five turbine Block Island project two (2) years of pre-construction commercial fisheries baseline assessments (Deepwater actually delivered 3 years due to construction delays), two (2) years of assessments during construction and almost three (3) years of assessments post-construction. Coincidentally, NOAA Fisheries also required two (2) years of pre-construction commercial fisheries baseline assessments for the Block Island project.

The CRMC is only requesting two (2) years of commercial fisheries baseline assessment as part of the COP submission to the CRMC, which is consistent with existing requirements at § 11.10.5(C)(2)(e) and with the assessments required by other federal agencies. With appropriate planning wind energy companies can conduct fisheries baseline assessments concurrent with geophysical and geotechnical studies necessary to prepare a COP. As an example, Vineyard Wind started offshore investigations in the fall of 2016 and did not submit their COP to BOEM until December 2017. In addition, Vineyard Wind's federal consistency certification was not filed with the CRMC until April 2018. Vineyard Wind with some planning could have completed two years of fisheries baseline assessments for their entire lease area in accordance with the proposed requirements of § 11.10.6(A) and filed same with their consistency certification to the CRMC. Thus, such a requirement would not put companies with offshore BOEM leases with the CRMC GLDs at a competitive disadvantage with other offshore wind companies, nor would it delay a lessee's submission of a COP.

General comments not specific to any one section

Comment: Throughout the regulations there is a lot of required interaction between the wind companies and the Council. We would like to see the FAB have equal footing in the process going forward.

Response: The FAB is strictly advisory to the CRMC as specified in § 11.9.4(H), which states in part, “[t]he 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.*” In addition, the federal regulations at 15 CFR Parts D (Consistency for Activities Requiring a Federal License or Permit) and E (Consistency for Outer Continental Shelf (OCS) Exploration, Development and Production Activities) specify that the state agency only, as that term is defined at 15 CFR § 930.11(o), has responsibilities for review and response to federal consistency certifications. Moreover, “[a] designated State agency is required to uniformly and comprehensively apply the enforceable policies of the State’s management program, efficiently coordinate all State coastal management requirements, and to provide a single point of contact for Federal agencies and the public to discuss consistency issues.” See 15 CFR § 930.6. Accordingly, the FAB cannot have “equal footing” as the CRMC in the federal consistency review process.