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January 4, 2023

Kimberly Korioth
Rhode Island Infrastructure Bank
235 Promenade Street
Providence, RI 02908

Delivered via email: kkorioth@riib.org

Re: Objection to the proposed OSCAR Regulations- 650-RICR-30-05-01

Dear Ms. Korioth,

Save The Bay worked with General Assembly, regulatory agencies, municipalities and community groups to win passage of the statute and then secure OSCAR's first $4 million for grants. We appreciate the RI Infrastructure Bank's support for the OSCAR legislation, and its willingness to administer OSCAR program grants.

Save The Bay has reviewed the draft regulations for the Ocean State Climate Adaptation & Resilience Fund, and submits the following comments. We believe it is imperative that the regulations guiding project selection and grant funding adhere to the OSCAR statute. The legislative intent of the Ocean State Climate Adaptation and Resilience Fund (OSCAR) is set forth in R.I Gen. Laws 46-23.3-2 (1) and accurately summarized in the public notice issued by the Coastal Resources Management Council (CRMC).

"The purpose of the proposed regulations is to establish the Ocean State Adaptation and Resilience Fund (OSCAR) which will provide funding for adaptation and resilience projects on public lands. *Grants from OSCAR will help to advance projects that protect or enhance coastal or riverine habitat* that help to address climate change impacts (emphasis provided).

The legislature clearly defined adaptation and resilience projects, established a technical advisory committee to review applications, enunciated the criteria to be considered and granted joint authority to the Department of Environmental Management (DEM or the Department) and CRMC to determine which projects would be funded. DEM and CRMC are required to consider the recommendation of the Technical Advisory Committee and notify the RIIB of the projects to be funded. The role of the Rhode Island Infrastructure Bank (RIIB or the Bank) is solely to administer the fund.

The proposed regulations do not carry out the intent of the statute: They attempt to add additional criteria or requirements in Section 1.6 C. (i.e., "overall spending targets by project type; preferences for projects that align with the state's prevailing economic development plan." [1] There is nothing in the statute that permits creating spending

[1] Even if the criteria were authorized it is unclear how "spending targets by types" is defined or how the "state's prevailing economic plan" is defined.

targets by type or considering "prevailing economic development plan." The intent of the statute is to award funds for projects that provide ecological benefits to coastal or riverine habitats: It is not an economic development fund.

Another section of the regulations exceeds that statutory authority granted to the three agencies. Section 1.10 of the proposed regulations attempts to give the "Bank, Council, and/or Department" the authority to waive or vary any provisions of the regulations or change requirements. Section 46-23.3-4(d)[2] lists the factors to be taken into consideration by the technical advisory committee in "prioritizing the selection of projects" and provides the TAC, DEM and CRMC jointly with the obligation to consider the statutory factors delineated. The law requires that the statutory factors shall be considered and therefore may not be waived. The TAC, DEM and CRMC are all constrained by the statute and are given the authority to consider additional factors consistent with the statutory intent.

Further, the attempt to empower each agency the authority to waive, vary or add requirements is not permitted by the law. CRMC and DEM may jointly include additional criteria in evaluating projects consistent with the statutory intent, but may not do so individually. Moreover, the Bank does not have the statutory authority to even determine which projects are funded, let alone change or waive requirements.

Attached please find our detailed redlined comments on the draft regulations for your consideration. Some of the comments are directed at clarifying the language, however, our main concern and objection to the draft regulations is that they do not effectuate the plain language or legislative intent of the statute and exceed the statutory authority provided to the three agencies.

Thank you for considering Save The Bay's comments on these draft regulations. We would welcome the opportunity to work with you to address our concerns.

Sincerely,

Topher Hamblett
Director of Advocacy

Cc: The Hon. Ryan Pearson, Majority Leader, RI Senate
The Hon. Camille Vella-Wilkinson, House Committee on Finance

[2] The factors include consistency with sea level rise projections, coastal habitat restoration strategy, nonpoint source pollution control plan, enhancing public access, creation of replacement of habitat losses that benefit fish and wildlife resources, and water quality improvements.

ATTACHMENT TO SAVE THE BAY COMMENTS ON DRAFT REGULATIONS (830-RICR-10-35-01)

TITLE 830 – INFRASTRUCTURE BANK

CHAPTER 10 – PROGRAMS

SUBCHAPTER 35 – Ocean State Climate Adaptation and Resilience Fund

Part 01 – OCEAN STATE CLIMATE ADAPTATION AND RESILIENCE FUND POLICIES AND PROCEDURES

1.0 Jointly Promulgated Regulation

Rhode Island Infrastructure Bank, Rhode Island Coastal Resources Management Council, and Rhode Island Department of Environmental Management jointly promulgate 830-RICR-10-35-01, "Rules and Regulations for Ocean State Climate Adaptation and Resilience Fund".

1.1 Purpose and Scope

A. The following Policies and Procedures of Rhode Island Infrastructure Bank (the "Bank"), Rhode Island Coastal Resources Management Council (the "Council"), and Rhode Island Department of Environmental Management (the "Department") have been established to govern the award of grants ~~provision of financial assistance~~ from the Ocean State Climate Adaptation and Resilience Fund ("OSCAR") in accordance with R.I. Gen. Laws §46-23.3-1, et seq.~~to applicants~~ for adaptation and resilience projects on public lands. Grants from OSCAR will ~~help to~~ advance projects on public land that~~and~~ protect or enhance coastal or riverine habitats to address climate change impacts.

1.2 Authority

These rules and regulations are promulgated pursuant to the authority provided by R.I. Gen. Laws § 46-12.2-4 and § 46-23.3-1 et seq.~~, 7~~, 42-35-5.

1.3 Definitions

A. Except as otherwise defined herein, the words and phrases used within this Part shall have the same meaning as the words and phrases in R.I. Gen Laws § 46-23.3-2, as amended.

B. For the purposes of this Part, the following terms are defined as follows:

1. "Approved Project" means an ~~eligible~~ adaptation and resilience project as defined in R.I. Gen. Laws § 46-23.3-2(1) ~~and~~ approved by the Department and the Council pursuant to R.I. General Laws §46-23.3-6(a).

2. "Applicant" means any entity which owns or controls public land as defined by R.I. General Laws §46-23.3-2(8) which files an application for an OSCAR grant.

3. "Successful Applicant" means an Applicant for an Approved Project that is awarded an OSCAR grant.

1.4 Grant Awards ~~Financial Assistance~~

A. These Policies and Procedures govern the award of grants~~provision of financial assistance available~~ to Applicants for adaptation and resilience projects. ~~Financial assistance shall be in the form of G~~grants shall be awarded in amounts as determined by the Council and the Department to be distributed by the Bank.

B. Requests for grants~~financial assistance~~ shall be submitted in writing by the Chief Executive Officer or other authorized officer of the Applicant to the Council and the Department in accordance with the open solicitation process pursuant to R.I. Gen. Laws § 46-23.3-6.

Commented [1]: Will there be forms provided by CRMC and DEM?

1.5 Permitted Projects and Eligible Costs

A. Permitted Projects shall be those defined in R.I. Gen. Laws § 46-23.3-2. et seq. ~~Categories~~

1. The following categories of projects on public land will be considered, either alone or in combination, and include but are not limited to projects ~~on public land~~ that protect or enhance coastal or riverine habitats to address climate change impacts. These include, but are not limited to:

    a. Projects that reduce the vulnerability of low-lying infrastructure on public land through measures that include removal and relocation of infrastructure.

    b. Restoration of river and stream floodplains, including regrading of banks.

    c. Revegetation.

    d. Acquisition of that area of land necessary to maintain and preserve public access.

    e. Redesigning, resizing, and replacing culverts and bridge spans at existing wetland crossings.

f. Additional ~~projects~~ adaptation and resilience projects deemed to be eligible under R.I. Gen. Laws §46-23.3-2 and 5.

2. The following categories of projects that are not eligible are defined in R.I. Gen Laws § 46-23.3-5 (b) and include the following:

a. Projects mitigating any current, planned, or future projects that degrade, fill, or otherwise destroy coastal, estuarine, or riverine habitats.

b. Projects fulfilling any liability for restoration required by any local, state, or federal agency pursuant to an environmental or public health enforcement action.

c. Projects elevating, repairing, or replacing infrastructure, or constructing new infrastructure, in its existing location that is experiencing climate change impacts, except as otherwise provided in R.I. Gen. Laws § 46-23.3-5.

d. Projects constructing new, or repairing existing shoreline protection structures; provided, however, that existing shoreline protection structures on public parks may be repaired.

e. Constructing roads or bridges.

B. Project Costs

1. The following types of costs are eligible to be paid for from ~~financial assistance~~ grant awards provided from OSCAR pursuant to this Part:

a. Consulting services including but not limited to p~~P~~lanning, design, environmental, historic preservation and, engineering services. ~~, or other professional consulting services.~~

b. Legal and other professional services directly related to the project and project development.

c. Plants and p~~P~~lanting materials ~~s, reforestation, landscaping.~~

d. Construction or implementation.

e. Materials needed ~~for~~ to complete the project.

f. Monitoring, oversight, and inspection services.

g. Personnel costs directly related to the performance of the project.

h. Community outreach and engagement.

2. Grant awards from OSCAR shall not be used for the following ~~:Types of costs that are ineligible to receive monies from OSCAR include:~~

a. Administrative costs including clerical support, monthly utility expenses, the purchase of office equipment, personnel costs associated with fund raising for the nongovernmental entity, etc.

b. State or federal lobbying costs.

c. Response costs for emergency response actions caused or exacerbated solely by the applicant or their agents or assigns.

d. Any fines, damages, assessments, settlements or other monies paid in connection with any litigation or administrative proceeding with any local, state or federal regulatory agencies.

1.6 Grant Application & Review

A. The grant application shall be in a form acceptable to the Council and the Department as prescribed in any open solicitation period which shall occur at least annually.

Commented [2]: A form should be provided

B. The Technical Advisory Committee (TAC), established pursuant to R.I. Gen. Laws § 46-23.3-3, shall review all grant applications. The Council and the Department shall consider the advisory opinion of the TAC ~~review and approve all grant applications~~ prior to approving or denying a grant application. ~~after consultation with the Technical Advisory Committee established in R.I. Gen. Laws §46-23.3-3.~~ The meeting of the TAC ~~shall~~ be public and all discussions and documents shall be public records.

C. Applications shall be reviewed based upon ~~a minimum project readiness standard; overall spending targets by project type; preferences for projects that align with the state's prevailing economic development plan and;~~ the criteria established in R.I. Gen. Laws § 46-23.3-4(d).; and other factors set forth ~~criteria as identified~~ by the Council and Department during the open solicitation period.

Commented [3]: What is a project readiness standard? It may be relevant if the term was defined.

The additional criteria (overall spending targets by project type and prevailing economic development plan) should be eliminated. They are not contemplated by the statute and do not further the statutory intent. The agencies do not have the authority to alter the statutory provisions that give it power or the clear statutory meaning- this is not an economic development act- this is about funding projects on public land that protect coastal or riverine habitats to address climate change impacts...

Commented [4]: Criteria is in the statute- can't change the law or regs during the solicitation process

D. Following recommendation by the Technical Advisory Committee and approval by the Council and Department, the Council and Department shall notify the Bank of the Approved Project(s) from the open solicitation period and the Bank shall, subject to the funds available within OSCAR, award funding to the Successful Applicants.

1.7 Grant Reporting Requirements

A. Following an award, Successful Applicants shall provide information to the Bank, Council, and Department regarding the Approved Project that satisfies the reporting requirements of R.I. Gen. Laws §46-23.3-6, ~~or~~ and as otherwise requested by the Bank, Council, and/or Department.

B. Successful Applicants shall provide the Bank, Council, and/or Department with other information or reports as and when the Bank may reasonably require.

1.8 Grant Agreements

There will be a Grant Agreement for each award of approved financial assistance outlining the terms and conditions of the grant, as applicable.

1.9 Compliance with Federal, State and Local Law

The Applicant must comply with all applicable federal, state and local laws and regulations.

1.10 Modifications

Where deemed appropriate by the ~~Bank,~~ Council, and/~~or~~ the Department, ~~waiver or~~ modification ~~variation~~ of any provision ~~s~~ herein may be made or ~~or~~ additional project requirements may be added. Any modification or additional project requirement must be consistent with R.I. Gen. Laws 43-23.3-1 et seq.

Commented [5]: Each agency should NOT separately have the authority to waive regulatory provisions. The RIIB does not have the statutory authority to determine which projects are funded. It would create inconsistent results and defeat the intent of the statute. No objection to DEM and CRMC together deciding to vary or add requirements in furtherance of the statutory intent.

1.11 Severability

If any provision of these Regulations is ~~Part or the application thereof is~~ held invalid by a court of competent jurisdiction, the remainder of these Regulations~~is Part~~ shall not be affected thereby. The invalidity of any section or sections or parts of any section or sections shall not affect the validity of the remainder of this Part.