

Special House Legislative Commission to Study the Effects and Procedures for the Reorganization of the Rhode Island Coastal Resources Management Council

Wednesday, December 9, 2021

Time 2:00 PM

Meeting Notes

(Not intended as official meeting minutes)

Commission Members in Attendance: Representative Deborah Ruggiero, Representative Lauren Carson, Representative Michael Chippendale, Topher Hamblett, Stephen Land, David Baud, Richard Hittinger, Michael McGiveney, William DePasquale, Lawrence Taft, Nancy Letendre

I. Call Meeting to Order

Chair Ruggiero called the meeting to order at 2:03 PM.

II. Opening Comments: Chair Deborah Ruggiero

Chair Ruggiero welcomed Betsy Nicholson and Grover Fugate to the meeting and thanked them for their participation.

III. Presentations by: Betsy Nicholson, North Regional Director, The National Oceanic and Atmospheric Administration (NOAA) Office for Coastal Management including: an overview of NOAA relationship with CRMC; how does Rhode Island CRMC model differ from other Northeast state's coastal governance models; what is working and why? Grover Fugate, former CRMC director: an overview of his experience at Coastal Resource Management Council, lessons learned, best practices, and possible recommendations for change.

Highlights from Betsy Nicholson's Statement: NOAA's relationship with CRMC is governed by the Coastal Zone Management Act (CZMA), a federal state partnership approach to achieve coastal management goals. NOAA works alongside CRMC to protect, restore and manage coastal ecosystems and communities enabling them to adapt to changes to keep our coastal residents safe, our economy sound and our natural environment functioning as it should.

CZMA provides the flexibility that states need to design programs to address local coastal challenges and work within state and local programs. State programs can be set up in a variety of ways as long as they meet the CZMA statutory requirements. The program needs to establish coastal zone boundaries, define the types of land and water uses subject to the program, identify authorities to manage uses, include policies that are enforceable, inventory and identify areas of particular concern using a science based process, incorporate public participation processes and consider national interests including navigation, energy and defense. CRMC must ensure the implementation and enforceability and establish a process to coordinate with other programs.

NOAA administers the national program and supports implementation of the state coastal programs. NOAA provides program development, technical and financial assistance. There is a cooperative agreement each year. NOAA reviews and approves any program changes, fosters national peer to peer sharing, interprets CZMA consistency regulations and provides general guidance to implement those. NOAA also conducts periodic evaluations of programs to be sure the state is implementing the program as it is approved.

The state's role is to implement the program by working with local communities and across state agencies in coordination with federal agencies to develop enforceable policies that meet the requirements. The state implements the coastal management program which in RI includes planning, enforcement, and federal coordination.

The state manages CZMA funding requirements and implements a five year enhancement strategy that charts the direction of the agency and can make the state eligible for more competitive awards from NOAA.

Other state models: CZMA and NOAA regulation provide flexibility for how the state chooses to implement the program. States implement their programs either through a single state agency or through a network of state agencies with one lead. Most states use the network approach, but a few states including RI, CA, CT, and NC all have a single state coastal agency that conducts all CZMA activities, issues the state's coastal permits and regulations and conducts their own enforcement activities.

State programs should not be compared with each other because they are meant to meet the state specific challenges and the laws and regulations of the state. Other models include:

- Massachusetts is a networked program. The Governor's Executive Office of Environment and Energy Affairs is the designated agency and they have a MOU with many other state agencies as part of their program plan. Essentially there is one lead agency, other agencies do the permitting and the lead agency coordinates with them to do the federal consistency review.
- Maine is a networked program. It has changed designated agencies many times. Currently it is in the Department of Marine Resources. It is the only state coastal program within a fisheries agency. Maine Department of Environmental Protection typically issues licenses and permits. As the networked program has evolved over time, the staff funded by program resides in many agencies. The formal NOAA evaluations show that the fragmentation has made it challenging to maintain a comprehensive and coordinated coastal management program.
- Connecticut is the closest model to RI. It is administered by Department of Energy and Environmental Protection under the Bureau of Land and Water Resources. It is a comprehensive program with permitting and planning functions, but unlike RI, Connecticut does not have an appointed council. It is

the staff that make the permitting decisions. Another difference is that in Connecticut the development of the shoreline above mean high water is regulated at the local level under the policies of the Connecticut Coastal Resources Act with technical assistance and oversight provided by the coastal program staff. CRMC maintains control over activities along the shoreline.

- California is the other program that does have an appointed council that makes permitting decisions, but it is a much larger state with three coastal management programs and is hard to compare to RI.

What is working in RI and where has NOAA noted areas of improvement. CRMC program is a well-functioning program and is a national leader in ocean planning and hazard resilience in particular through its Ocean and Beach SAMP.

The program achieves transparency and visibility to the public and benefits from being a single agency state program to tackle tough policy issues through a comprehensive approach to planning, permitting and enforcement. That was noted in NOAA evaluations. NOAA most recently evaluated the RI program in 2020 and noted that the stakeholders and partners praised the staff for the high quality work and level of service.

The structure has worked well for the state, council members are appointed and trained and provide public notice of meetings and sufficient rationale for decisions. That has improved over time. The structure allows it to be nimble to respond to emerging issues. The Beach SAMP and Ocean SAMP are perfect examples.

By having a single agency, RI has engaged effectively with federal agencies. For example, the CZMA federal consistency process is the primary process for states to examine state issues for proposed offshore wind projects. CRMC has taken full advantage of the federal consistency provision to have a voice and influence on offshore wind projects.

NOAA has also made recommendations for improvement in 2020 and 2010. They have included the need for a strong staff transition plan and additional staff capacity given the growing issues of offshore wind and shoreline resilience. The program has tried to get more FTE's and that has been difficult.

We have expressed concern and there has been good response about the council process. Council members need to be carefully educated on the issues and state and federal requirements. CRMC now has a training program for members. NOAA has brought up issues concerning the number of members to reach a quorum, separation of legal counsel from the hearing officer role, and staff having access to legal counsel. All of these have been resolved.

In closing, most changes to the organizational structure of a state program do need to go before NOAA for approval as a program change. We can have no opinion as to what is the best organization structure for the state, that is the state's purview, the state's responsibility.

Questions:

Representative Carson asked how NOAA evaluates program structure. Betsy Nicholson responded there is a section of the CZMA that tells NOAA to periodically evaluate the program. NOAA defines focus areas and comes to the program with an evaluator, NOAA staff and a staff member from another state. The program was approved in 1978 and there have been amendments since. RI has always had a council and it is up to states to design the programs and NOAA makes sure all the requirements are met including public participation and enforceable policies.

Representative Carson remarked that the scope and workload has grown tremendously, there have been challenges to expand budget and staff. She asked when is it too much, and what have other states done. Betsy Nicholson responded that it is a worry on the federal, state and local level. Many states are facing this, especially with offshore wind. She doesn't think there is a silver bullet, we need to find efficiencies. An online permitting system could save staff resources, there is a lot of time spent finding the documents and manually processing permits. Coastal zone management is at the forefront of our most pressing climate change issues. There will be funds from the infrastructure bill. There will be money for CRMC for capacity. The single agency does allow for some efficiency, CRMC might be in a better position.

Representative Ruggiero asked how Massachusetts does permitting for wind energy. Betsy Nicholson replied that the coastal management program is under the umbrella of Executive Office of Environment and Energy. One department handles the procurement, one is handling permitting, DEP does the permitting and facts and finding and the coastal program works with the agency to implement their own enforceable policies. It is all under one roof.

Richard Hittinger asked how the commission would consult with NOAA to make sure any changes recommended are consistent with federal requirements. Betsy Nicholson replied that NOAA can work with the commission and look at preliminary recommendations with CRMC. NOAA would ultimately have to approve any changes.

Topher Hamblett stated that Save the Bay has been closely following CRMC since its inception. He cannot think of any of their work that can be offloaded, and it is growing with climate change and wind energy. The NOAA review referenced increasing staff for establishing rights of way and also to address emerging issues. A recommendation was made to increase staff for enforcement. CRMC's resources to do that are lacking significantly.

Nancy Letendre asked if there a standard by which the decision making of the council is made or are they simply there to enforce regulations. Betsy Nicholson responded that it comes back to the local and state laws and ordinances. In terms of council process our interest is that it is clear, transparent and open to the public and there is clear rationale and open discussion on decisions. Nancy Letendre asked if there are requirements that the council needs to meet consistency with state and local laws and regulations. Betsy

Nicholson responded that is a state level issue and the approved program has to meet the requirements of the CZMA.

Bill DePasquale asked if third party professions can be brought in for some of these tasks such as rights of way. Betsy Nicholson said that could be possible. That would be a CRMC decision.

Representative Ruggiero added that the penalties were increased in the FY22 budget as a response to the recommendations in the most recent NOAA evaluation.

Highlights from Grover Fugate's statement:

NOAA was not always glowing about the council, in 1986 there were only two staff members and the rest of the staff was at DEM. There was no direct relationship between the council and the staff and there was a backlog of over 3,000 applications. In 1987, the legislature transferred the staff to the council from DEM.

Permitting is one of the most important duties of the council, especially considering the public perception. CRMC attempted to streamline the application process, there are quite a few that are issued same day.

RI has created the most comprehensive and powerful coastal management statutes in the country and is the envy of other states. Most regulatory programs are based on the fact that nothing will change. CRMC makes decisions that go out 50 to 75 years. Things are changing rapidly in the natural system, much faster than our bureaucratic and legal systems. That is a major challenge for any organization engaged in these issues. The regulations need to continue to evolve and change because the environment is continuing to evolve and change.

SAMPs provide an opportunity to target certain areas and adapt to changes. As Executive Director, I tried to keep an eye on the horizon and put programs in place to reflect the changes on Rhode Island's doorstep. The Ocean SAMP was started in 2007 and adopted in 2010 and is considered the gold standard in marine special planning in the US.

The other major SAMP that has been recognized nationally is the Beach SAMP. It is unique in its structure and approach to climate change. Our shoreline has changed significantly in just 20-30 years. The changes are occurring on timelines that were previously unheard of. Beach SAMP started a year before Hurricane Sandy. Federal dollars came to the agency after the hurricane and CRMC learned from the shoreline damage caused by the storm. No other state or federal agency has been able to come close to what RI built. RI can now anticipate what the future will look like and react to that.

One of the major problems the council will face is a changing environment, it needs to have its regulations and programs anticipate what the environment will look like and try to stay ahead of the issues before they become major problems.

Questions:

Representative Ruggiero asked what CRMC should be thinking about in the next ten years. Grover Fugate responded that sea level rise is a land use issue, and that is an issue that typically lies in the local municipalities' realm. CRMC and URI have a lot of expertise in-house that would help the municipalities. There are legal and economic challenges that we have not seen yet. Trying to build a collaborative process that reaches out to the academic institutions as well as the municipalities is a way to address this and leverage resources and build more cooperative relationships. The problem is not going to go away.

Richard Hittinger asked if there is a problem with the structure when you have a final decision on very scientific matters being made by a political council. Grover Fugate responded that the staff compares the application to the state regulations and presents the results to the council. If the council deviates from the staff recommendations they are required to say why. Sometimes there are good reasons to deviate from the staff's recommendations, in a contested case the staff does not have the benefit of hearing the presentations that are made by the applicants or objectors. Therefore the council may want to deviate from the recommendations of the staff based on the evidence that they heard during the hearings.

Grover Fugate continues that sometimes the questions that come before the council are much more complex than whether they should grant a permit or not. For example, the Deepwater decision was not easy even though they were in conformance with regulation and most everyone testified in favor. The council had to figure out how to oversee a construction project with no design standards that had no process in place for monitoring construction. If there was a catastrophic failure in the field the debris would be on the floor of the ocean and the state would be responsible. The council had to build in protection for the state from scratch. A certificated verification agent (CVA), an independent engineering firm, was put in place and reported directly to the council and would give the council reports on the construction. It is required that the CVA is still in place for the event of major storms and yearly inspections.

Representative Ruggiero asked what happens if the council does not cite the reason for the deviation from staff recommendations. Grover Fugate responded that in the long term it might become an issue for another NOAA 312 and also their decision might be overturned in legal proceedings.

Michael McGiveney asked if there are plans for the continuation of knowledge after staff leave or retire. Is there a way to keep the person on to train the next person? Grover Fugate responded that many former staff are willing to go back and mentor but they can't return and get compensated because of their pensions. He would support a provision to allow staff to come back and work for a year after retirement without reducing pension. There is a lot of lost knowledge that was gained over some painful experiences that would be nice to preserve.

Topher Hamblett stated that he disagrees with Grover Fugate that the functions done by the council cannot be done by staff supported by full time legal counsel. He asked if there is any reason to perpetuate the current arrangement where the CRMC Executive Director and staff do not have a separate attorney at council hearings. Grover Fugate replied that he believes the council should continue in its current form, there could be some room for improvement in training, but CRMC is the model that everyone looks to in the nation. There is no reason why there cannot be a separate legal counsel for the staff at those hearings. The hearings would become a more formal contested process.

Representative Ruggiero commented that this study commission could recommend a CRMC nominating commission similar to the judicial nominating commission that would vet and nominate a council member and limit terms to three terms. Grover Fugate responded that the majority of the public criticism about the council is it is a purely political body and the appearance of new council members is often a surprise. Having something similar to the judicial nominating committee provides a selection process that is more open and transparent, people can be questioned and you may improve the quality of council members. Grover Fugate responded that if the commission considers term limits, please take into account that it sometimes takes two years for a council member to get their feet under them.

Representative Chippendale asked if there is an abundance of people who want to serve on the commission. Grover Fugate stated that because the Governor's office handles the selection process he does not know how many people have expressed interest.

IV. Closing Comments: Chair Deborah Ruggiero

Chair Ruggiero announced the next meeting will have public testimony and will be held in January. She will notify members as soon as a date is determined.

V. Adjournment

Meeting adjourned at 1:57 PM.