

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

Tuesday, April 5

Time: 2:30 PM

Meeting Notes

(Not intended as official meeting minutes)

Commission Members in Attendance: Representative Deborah Ruggiero, Representative Arthur Handy, Representative Lauren Carson, Kendra Beaver, Jamie Hainsworth, Stephen Land, Richard Hittinger, Michael McGiveney, Paula Bontempi

I. Call Meeting to Order

Chairwoman Ruggiero called the meeting to order at 2:35.

II. Opening Comments: Chairwoman Ruggiero

Representative Ruggiero welcomed the committee members and asked them to consider the major facts and findings that the commission has uncovered.

III. Discussion on Findings by Commission Members

Council Membership: Jamie Hainsworth stated his concern with how the council members are appointed. The commission heard in testimony that the Marine Fisheries Council are selected by their qualifications and he believes the CRMC council should be selected in the same way.

Steve Land added that two seats have not been filled in quite a while. It is a problem that the council is already down two seats. Ten members is a big council, the beginning of some of the conflicts was when the council had two empty seats.

Richard Hittinger stated that part of the problem is there are a few council seats that have not been filled and there are members that have terms that have been expired for a long time. My opinion is that the council should be advisory and not the decision making body.

Kendra Beaver suggested that the council should be advisory. CRMC is unlike any other agency. She thinks the structure is inherently flawed and it should be an advisory council and that agency should be structured as an administrative agency. Everyone here applauds the staff and the executive director at CRMC. They do a good job with limited resources and are fully capable of making final agency decisions

Stephen Land suggested that the council be an appeal board. If the staff makes a decision and there is disagreement, the council could hear appeals.

Kendra Beaver remarked that as it stands the staff writes recommendations and then the council makes the decision, so the council is almost an appeal board and a decision maker as well. The council is an adjudicator, it does make the final decision. Is the suggestion the staff would make the final decision, and they would go in front of the board with a lawyer with the council members in appeal? She is not sure why an unqualified board would sit in judgment of a staff decision.

Rep. Ruggiero reminded the commission that any changes to CRMC need to be approved by NOAA.

Richard Hittinger suggested the commission look at the RI Marine Fisheries Council. He served on the council for two full terms of eight years until he became term limited. The council brings public opinion into the complicated regulatory environment. The council provides an important aspect, the public's voice, but they are not in a position where they need to know the science and engineering behind the recommendation like the staff.

Representative Carson stated that if the council remains empowered other issues should be considered, including term limits, the appointment of directors, and attendance requirements. These changes would improve its decision making capacity. If we go down the path of an advisory board maybe the board would not need as much expertise.

Representative Ruggiero stated that some of the changes suggested in previous meetings include term limits and 3 year terms for a maximum of three times. She continued that she does not think the General Assembly can statutorily require attendance. A question for the commission is if they want some specific expertise on the council. Also does the commission want to require members to be from coastal communities? We could add some guardrails that the governor and Senate would have to follow to appoint and confirm.

Paula Bontempi stated that she would favor the advisory model. There has to be representation of all the invested parties of the state. She looked at the historical cases and as an oceanographer with a background in engineering it took her a while to dig into them. She is concerned that the expert staff recommendations are just an input in the decision making.

Michael McGiveney stated that he was first opposed to the Marine Fisheries Council when it was formed about 25 years ago, but it did grow and get better. As long as the director is a person who makes sound decisions and takes everything into account. If the council is not advisory he recommends a selection process like the judges, and require attendance and term limits.

Representative Handy asked if there could be a certain threshold of attendance by the members. Currently if a member says they cannot attend they are simply excused. There might be a distinction between missing a meeting and missing a vote.

Richard Hittinger stated that members of the Marine Fisheries Council are expected to attend 90% of the meetings. This was not written into law but was understood. Some level of qualification should be required.

Representative Ruggiero asked how to put requirements in statute. One option is to require the governor to consider it.

Kendra Beaver added that there are rules about absenteeism in the practices and procedures regulations. Also, as the statute was written, the representatives from coastal communities were to be elected or appointed officials, not someone appointed just to serve on the commission. Maybe it should specify a zoning officer or planning member with knowledge of coastal environmental planning or zoning.

Representative Ruggiero continued that she is hearing that the statute could be a little more prescriptive, such as a zoning board member from a coastal community of 25,000 or less. That way the council member would have knowledge of zoning.

Representative Handy continued that the language could say the governor should give due consideration to include the fishing sector or planning experience. The Senate has advice and consent and that advice and consent should be based on the statute. Rather than requiring we could be specific in what the governor considers.

Richard Hittinger added that someone from marine industry or ocean engineering should be included in the recommendations.

Kendra Beaver asked if there should be the same qualifications if council is advisory or regulatory. Commission members agreed the qualifications should be included in both.

Representative Carson asked how the commission can address the open seats. If a time limit to fill seats cannot be included in statute, can language recommend that seats are appointed within six months?

Council Quorum: Jamie Hainsworth stated that if there are 10 members (9 voting members) of the council and only six show up at a meeting, only four votes are needed to carry the motion. He proposed that any permit or any item before the council should be passed only with a majority of the total members, six need to vote in the affirmative. Also, there should be a limit on how many meetings a member can be excused from in a year.

Stephen Land also suggested that any vote require the majority of the total council members, not just the majority of the members present at the meeting. Right now it does not take a majority of all the members to pass, just the majority of the people present.

Representative Handy added that it would essentially be a veto override. If a member does not show up, their vote is essentially no, because 2/3 of the body needs to vote yes.

Aquaculture: Jamie Hainsworth stated that CRMC advocates for aquaculture and also permits it, and he finds that those two activities are in conflict. CRMC does not take into consideration any local zoning ordinances or violations. Many of these aquaculture facilities use the local docks and ramps and sometimes that is not permitted. Then the municipality is stuck with enforcing the ordinance but it has no reflection on the aquaculture permit.

Jaimie Hainsworth stated that the commission heard testimony that the enforcement division is very light. CRMC has just three enforcement officers which is ridiculous with the amount of permits they issue.

Jamie Hainsworth continued if the farmer violates a local zoning ordinance, there is no ramification on the permit. The town can only go after the farmer and there is not much they can do because the farmer does not own any land in town. It makes it hard to enforce. CRMC does not take any action against their permit.

Representative Ruggiero asked about the local police, she believes they are empowered to enforce. Jaimie Hainsworth stated that violations are not in essence criminal, they are civil in nature.

Richard Hittinger added that it was his understanding local authorities do not have any enforcement authority with permit specification. If the permit says the cages cannot be more than 4 inches above the water and the harbormaster is out on patrol and they find they are 12- inches above, the harbormaster cannot do anything but refer them to CRMC

Stephen Land added that when he was harbormaster in Block Island there would be many aquaculture violations and he would have to refer it to CRMC who had very limited enforcement. If they did build the case the CRMC did not follow through. There is a problem with advocating and granting permits and then enforcing them in the same department, it does not serve the public well.

Representative Ruggiero asked if local enforcement should have jurisdiction. Stephen Land answered that it would help, local enforcement is there every day and CRMC might check it once a year. Kendra Beaver commented that CRMC does not have jurisdiction over land-based activities and that remains with the community. Maybe the communities and CRMC should have better communication about the enforcement of violations.

Paula Bontempi added that after a twenty year career in government she has seen that you cannot advocate a position in the same office that you are trying to enforce a violation. There is not a situation where that worked out well. People are disempowered by putting it in the same office.

Paula Bontempi added that from a state agency standpoint, education and public engagement using scientific and engineering facts is one thing, if there is a wing of CRMC that is responsible for enforcement we need to empower them, not disempower them.

Representative Handy added that CRMC could create a firewall within an agency, the problem is that CRMC is not traditionally an enforcement entity. It would make more sense to empower the DEM to do that and provide a budget for it. My concern about the zoning violations is the

communities that are happy with the project will not see any problems but the communities that do not like the project could use it as a way to prevent the projects from being successful.

Representative Handy added that advocating for an industry is different than advocating for a particular project. DEM advocates for the commercial fishing industry and also enforces it. Kendra Beaver agrees with Representative Handy. CRMC can promote aquaculture and permit it as long as it meets the regulations.

Michael McGiveney spoke on the Bay SAMP process. There will be better rules made through this process. Aquaculture has grown and CRMC has learned some lessons. The new regulations and guidelines will help define where aquaculture can be and help with the conflicts.

Kendra Beaver added that CRMC is an enforcement agency, they enforce permits and violations. They are understaffed but they have an enforcement docket, they issue penalties. They don't say no as much because they don't have the staff to make the decision.

Richard Hittinger stated that the simplest way to make the connection is to make the local government a party to the permit. If the local government is a signing party to the permit they would have the authority to enforce the permit.

Michael McGiveney added that when the aquaculture coordinator position was first posted the Shellfisherman's Association was opposed to it, but the aquaculture coordinators to date have been very fair. A lot depends on the person you hire.

Representative Ruggiero added that there should be a public hearing to let the community know that an aquaculture farm may be coming. They have to communicate with the community before the permitting process so people are not blindsided. We could require public notification and a public hearing before any permits are issued. I also think we should look at enforcement on land based activities.

Representative Ruggiero stated that two issues she is hearing are local enforcement should have jurisdiction on land based activities and a public hearing should be hosted in the community before an aquaculture permit is issued.

Full time Staff Attorney: Kendra Beaver stated that CRMC is an important agency and should be treated like other agencies and have an in-house attorney that represents them. The staff makes technical decisions and deserve to have an attorney represent them before whatever body will be making the decision.

Representative Ruggiero asked if the attorney would represent both the staff and the council if there is a contested case. Kendra Beaver suggested that there are sufficient funds to pay a full time CRMC staff attorney and hire an attorney to attend council meetings and write the decisions for the council. We all recognize the value of the CRMC and their expertise and their opinions should be treated fairly.

Representative Ruggiero asked if the proposal is for separate attorneys for the staff and the council. Kendra Beaver responded yes, the council attorney could be hired as an outside counsel, similar to what a community board would have.

Representative Handy asked if that would lead to a legal adversarial position.

Kendra Beaver responded that in the current structure it is difficult for CRMC staff to write a strong recommendation because the attorney who helps write the recommendation will also be the same attorney writing the council opinion, and the council opinion could go against the recommendation. It can be difficult with one attorney to do both jobs. This agency should have one attorney that represents it, and the council if it remains the decision maker, should hire their own.

Representative Ruggiero asked members what the benefits of a full time attorney would be. Paula Bontempi answered that it would provide unbiased input. Michael McGiveney added that it would be their only job. Representative Ruggiero added that there would be no conflict of interest. Stephen Land added CRMC is going into uncharted territory with off-shore wind and sea level rise and it would be helpful to have someone who knows the legal issues. Richard Hittinger stated that it would add consistency to the decision making because they will understand the regulation in depth.

Sven Risom could not attend the meeting and sent recommendations that support an in-house attorney as well.

Representative Ruggiero suggested that the in-house attorney could be required in statute.

Representative Handy stated that CRMC has had the same person as an outside attorney for an extended period of time. DEM routinely struggles to keep their lawyers because they get hired elsewhere after a couple of years' experience. Outside counsel knows how to deal with conflict-of-interest, lawyers deal with it all the time when they have more than one client.

Kendra Beaver responded that there are lawyers that have been at DEM for more than 20 years. If CRMC was able to have an attorney help them write their recommendation, there would be more transparency in the staff opinion. The staff would not have to write it in a deferential way and not have to defer to the council.

Representative Ruggiero stated that the commission has covered the CRMC Council appointments, the potential for a full time staff attorney and aquaculture. We will need another meeting to cover the hearing officer, whether or not the executive director should be appointed by the governor and if the council should be advisory or empowered.

IV. Next Steps: Chairwoman Ruggiero

There will be one more meeting of the commission and members will be notified when it is scheduled.

V. Adjournment

The commission adjourned at 3:45.