

Federal Consistency

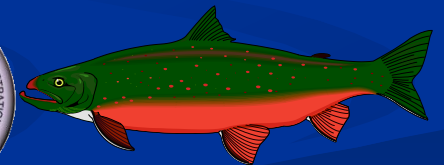


Office of Ocean and Coastal Resource Management

National Oceanic and Atmospheric Administration

<http://coastalmanagement.noaa.gov/welcome.html>

<http://coastalmanagement.noaa.gov/consistency/welcome.html>



It's An "Effects Test"...

Federal Consistency is the requirement that *Federal actions*, in or outside the coastal zone, that *affect* any land or water *use* or natural *resource* of a State's coastal zone must be consistent with the *enforceable policies* of State Coastal Management Programs.

(See CZMA Section 307 (16 U.S.C. § 1456))

“Federal Actions”

- ***Federal Agency Activities & Development Projects***
CZMA 307(c)(1), (2), 15 CFR part 930, subpart C
- ***Federal License or Permit Activities***(non-federal applicants)
CZMA 307(c)(3)(A), 15 CFR part 930, subpart D
- ***Outer Continental Shelf Plans***
CZMA 307(c)(3)(B), 15 CFR part 930, subpart E
- ***Federal Financial Assistance to State or Local Agencies***
CZMA 307(d), 15 CFR part 930, subpart F

Enforceable Policies

- Legally binding under State Law
 - Apply to State Jurisdiction and not Federal areas or agencies
 - Not Preempted by Federal Law
 - Do not discriminate against a particular group or activity
 - Consistent with CZMA requirements
 - Once superseded by other State law, no longer enforceable
- Approved by NOAA
 - Input by Federal agencies and the public
 - No incorporation by reference

Differences

Between Subpart C and D Requirements

Activities Undertaken by a Federal Agency	Federal Licenses and Permits
Submission of a consistency determination	Submission of a consistency certification
Submitted at least 90 days before final action	Submitted with/after license or permit application
State has 60 (plus 15) days to review	State has 6 months to review
Review starts when CD received (if complete)	Review starts when CC and ND&I submitted (if complete)
“consistent to the maximum extent practicable”	Fully consistent
Federal agency can proceed over objection	If objection, federal agency may not authorize the activity – applicant may appeal state objection to Secretary of Commerce
State can bring suit in court to enforce objection or seek mediation	Either or both parties can bring suit in court only after a decision issued by the DOC Secretary on appeal by the license or permit applicant

License or Permit Activities

- Non-Federal Applicants
- Listed or unlisted in State program
- Inside or Outside Coastal Zone
- Consistency certification to State
- Project must be fully consistent
- State review up to 6 months
- State objection = Federal agency cannot approve
- Applicant may appeal objection to Secretary

Running of the 6-Month Review

- Must be active federal application and a Consistency Certification (CC)
- Starts on date State receives the CC and “necessary data and information” (ND&I) – *NOT* the date State determines complete
- ND&I is described in 930.58 and in State’s CMP IF State amends program to specifically describe ND&I
- State needs to pay close attention to start of 6-month period, 30-day completeness notice, and end of the 6 months
- 6-month period cannot be “extended.” It can *ONLY* be “stayed” by *WRITTEN* agreement between State and applicant – Needs to be clear “meeting of the minds” and for a specified period

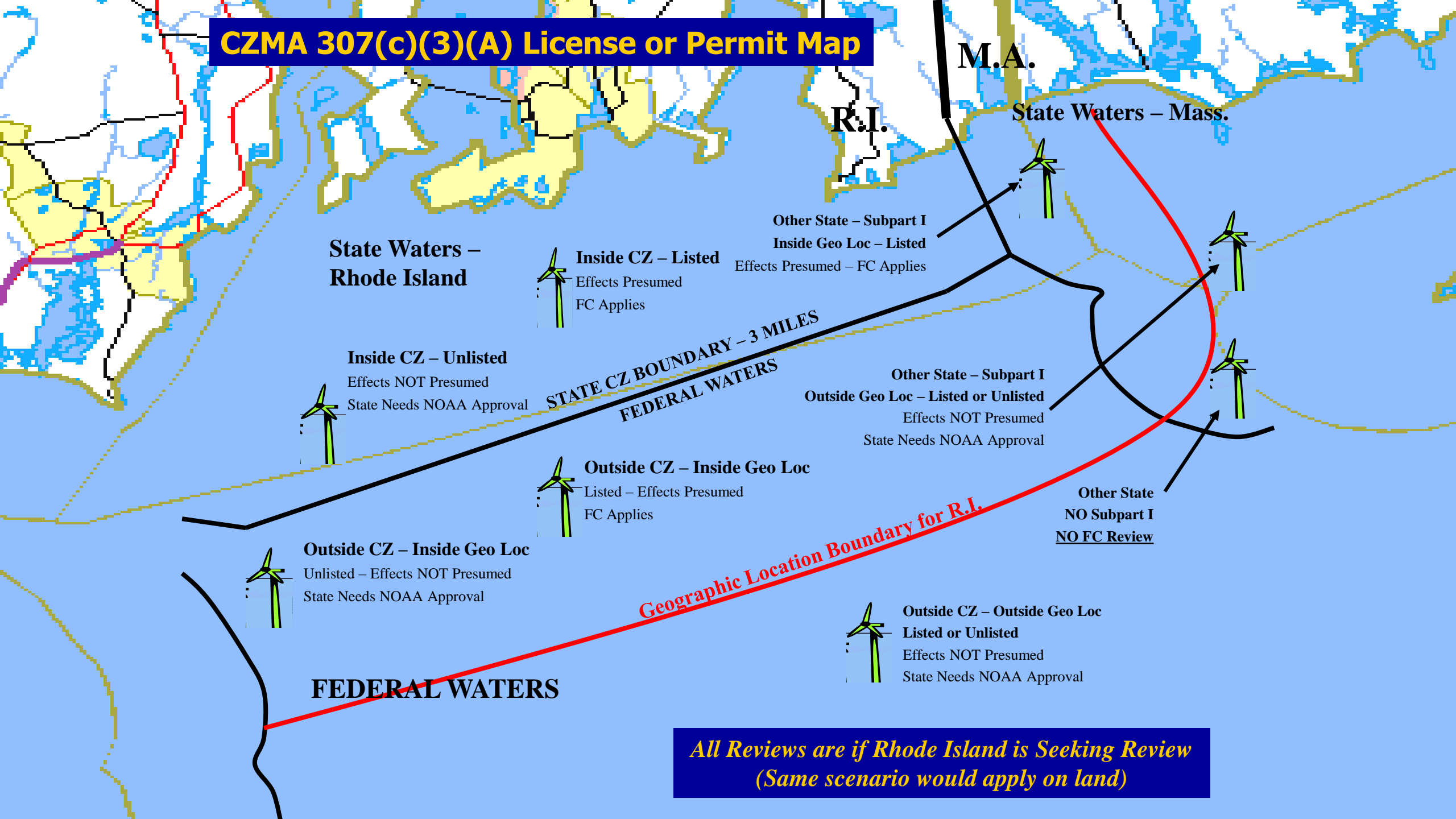
Appeals to the Secretary

- ONLY for Non-Federal Applicants – NOT for Federal Agencies or Third Parties
- Two Grounds for Secretary Override:
 1. Consistent with CZMA Objectives
 2. National Security
- If Secretary overrides State objection, Federal agency may approve or fund the activity
- States need to consider appeal criteria *during State's CZMA review* and *before* State issues objection.

Appeal Deadlines

General Coastal Zone Management Act Federal Consistency Appeal Procedures Required by the Energy Policy Act of 2005 and NOAA Regulations (See 15 CFR part 930, subpart H for further details)			
Day(s) After Receipt of Notice of Appeal		Action Required	
0		<ul style="list-style-type: none"> • Notice of Appeal received 	
30		<ul style="list-style-type: none"> • Publish Federal Register (FR) Notice of Appeal and newspaper notices. Notice <i>must</i> be published by day 30. • Public Comment Period and Federal Agency Comment Period opens. • Receipt of Appellant’s Brief and Appendix. 	
60		<ul style="list-style-type: none"> • Receipt of State’s Brief and Supplemental Appendix. • Public and Federal Agency Comment periods close unless Public Hearing Request granted. • Request for Public Hearing must be received (within 30 days of FR Notice). 	
80		<ul style="list-style-type: none"> • Receipt of Appellant’s Reply Brief. 	
60-Day Stay Granted		No Stay Granted	
250	<ul style="list-style-type: none"> • Publish Notice closing Record; Record <i>must</i> be closed on day 250 	190	<ul style="list-style-type: none"> • Day 190 is end of 160-day decision record period without stay. • Publish Notice closing Record.
310	<ul style="list-style-type: none"> • Secretary issues Decision or publishes FR Notice re: No Decision–take additional 15 days. 	250	<ul style="list-style-type: none"> • Secretary issues Decision or publishes FR Notice re: No Decision – take additional 15 days.
325	<ul style="list-style-type: none"> • Secretary issues Decision 	265	<ul style="list-style-type: none"> • Secretary issues Decision

CZMA 307(c)(3)(A) License or Permit Map



State Waters – Rhode Island

Inside CZ – Listed
Effects Presumed
FC Applies

Inside CZ – Unlisted
Effects NOT Presumed
State Needs NOAA Approval

Outside CZ – Inside Geo Loc
Listed – Effects Presumed
FC Applies

Outside CZ – Inside Geo Loc
Unlisted – Effects NOT Presumed
State Needs NOAA Approval

FEDERAL WATERS

Other State – Subpart I
Inside Geo Loc – Listed
Effects Presumed – FC Applies

Other State – Subpart I
Outside Geo Loc – Listed or Unlisted
Effects NOT Presumed
State Needs NOAA Approval

Other State
NO Subpart I
NO FC Review

Outside CZ – Outside Geo Loc
Listed or Unlisted
Effects NOT Presumed
State Needs NOAA Approval

STATE CZ BOUNDARY – 3 MILES
FEDERAL WATERS

Geographic Location Boundary for R.I.

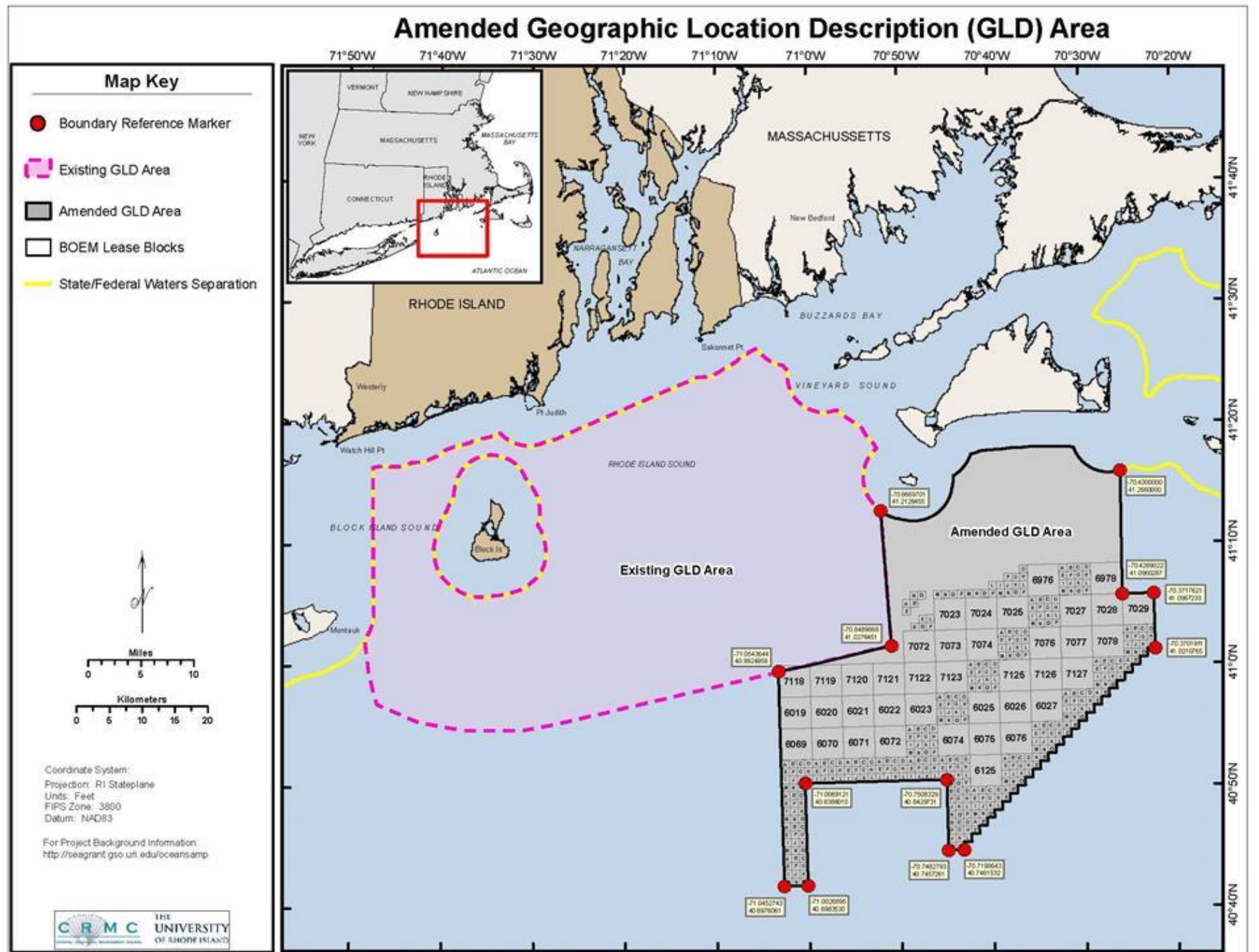
*All Reviews are if Rhode Island is Seeking Review
(Same scenario would apply on land)*

3 Ways to get Federal Consistency in Federal Waters

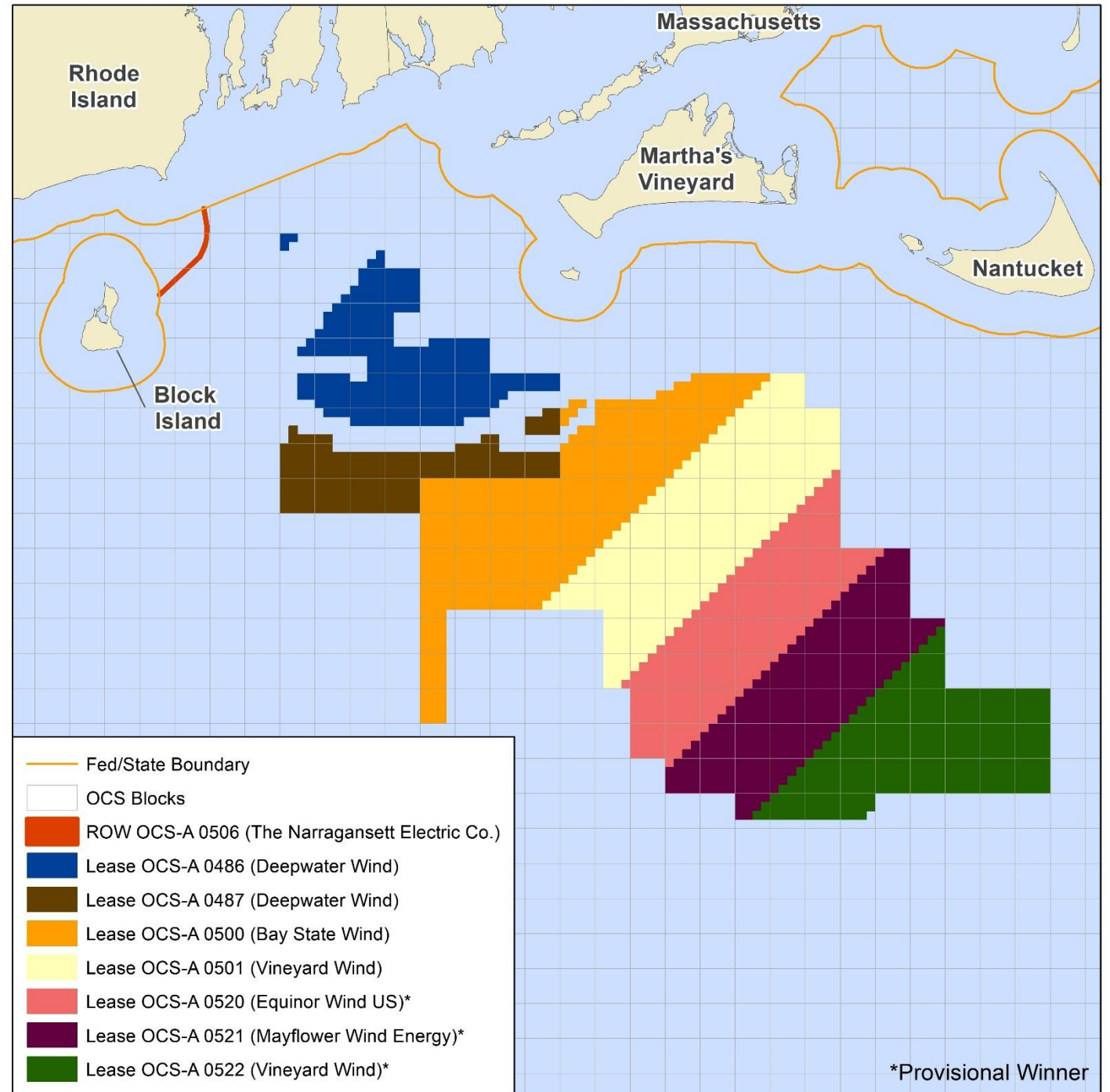
1. Unlisted Review
2. Voluntary Submittal
3. Geographic Location Description

Geographic Location Description : Federal agency, federal license or permit, and federal financial assistance activities are subject to federal consistency review if the activity occurs outside of the states coastal zone but within a GLD. This location description encompasses an area outside the coastal zone in which an activity would have reasonably foreseeable coastal effects.

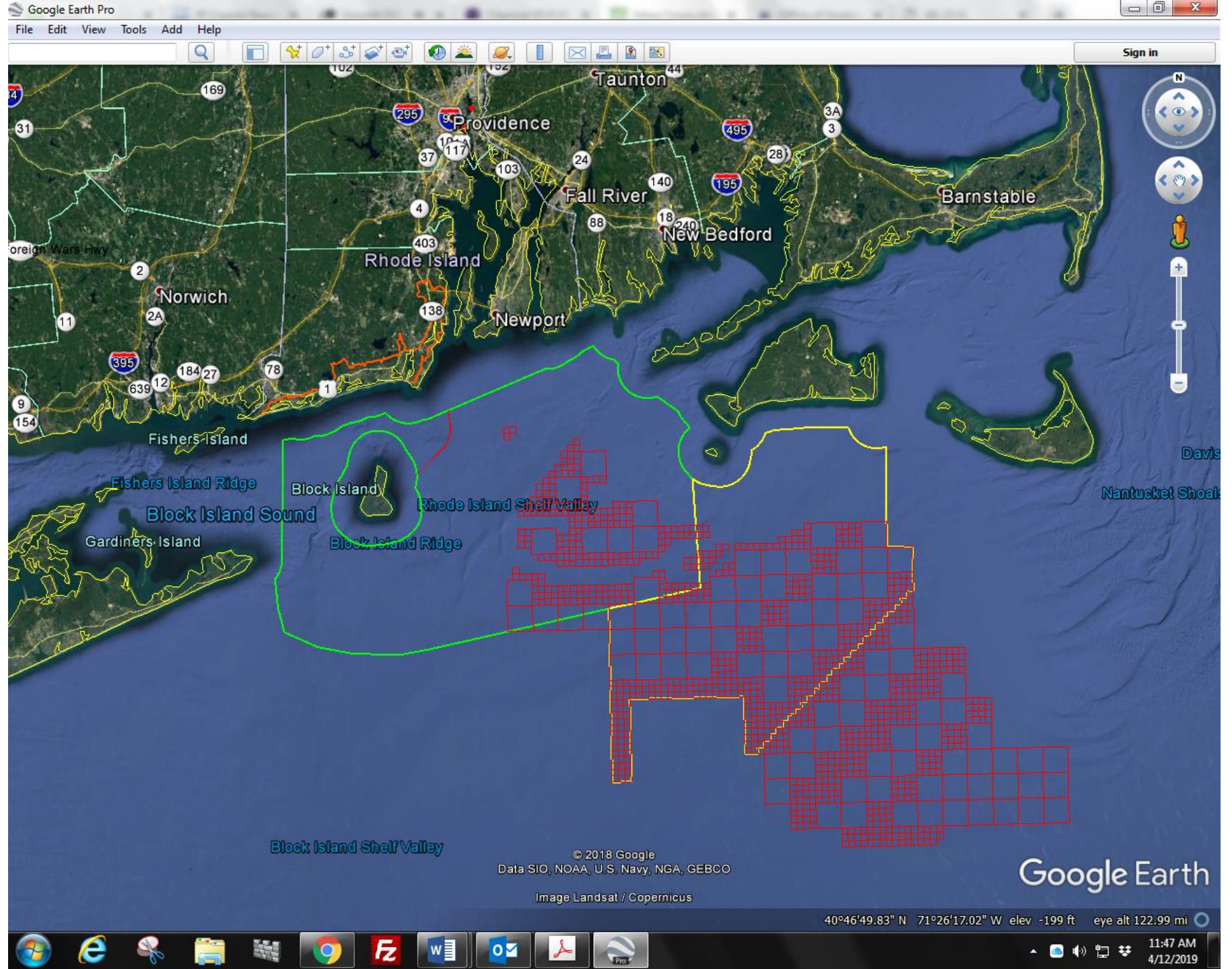
CRMC Geographic Location Description (GLD) 2011 and 2018 boundaries



U.S Department of the Interior Bureau of Ocean Energy Management (BOEM) Offshore Renewable Energy Lease Blocks



BOEM offshore
wind energy
lease blocks and
CRMC
Geographic
Location
Description
(GLD) 2011 and
2018 boundaries



CRMC Enforceable Policies for Federal Consistency Activities

CRMC Ocean SAMP: 650-RICR-20-05-11

§ 11.10.1 Overall Regulatory Standards (formerly § 1160.1)

§ 11.10.1(C) - Offshore developments shall not have a significant adverse impact on the natural resources or existing human uses of the Rhode Island coastal zone, as described in the Ocean SAMP. In making the evaluation of the effect on human uses, the Council will determine, for example, if there is an overall net benefit to the Rhode Island marine economic sector from the development of the project or if there is an overall net loss. 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.**

§ 11.10.1(F) - The Council shall prohibit any other uses or activities that would result in significant long-term negative impacts to Rhode Island's commercial or recreational fisheries. Long-term impacts are defined as those that affect more than one or two seasons.

§ 11.10.1(G) - The Council shall require that the potential adverse impacts of offshore developments and other uses on commercial or recreational fisheries be evaluated, considered, and mitigated as described in § 11.10.1(H) of this Part.

CRMC Enforceable Policies for Federal Consistency Activities

CRMC Ocean SAMP: 650-RICR-20-05-11

§ 11.10.1(H) - For the purposes of fisheries policies and standards as summarized in Ocean SAMP Chapter 5, Commercial and Recreational Fisheries, §§ 5.3.1 and 5.3.2 of this Subchapter, mitigation is defined as a process to make whole those fisheries user groups that are adversely affected by proposals to be undertaken, or undertaken projects, in the Ocean SAMP area. Mitigation measures shall be consistent with the purposes of duly adopted fisheries management plans, programs, strategies and regulations of the agencies and regulatory bodies with jurisdiction over fisheries in the Ocean SAMP area, including but not limited to those set forth above in § 11.9.4(B) of this Part. Mitigation shall not be designed or implemented in a manner that substantially diminishes the effectiveness of duly adopted fisheries management programs. Mitigation measures may include, but are not limited to, compensation, effort reduction, habitat preservation, restoration and construction, marketing, and infrastructure improvements. Where there are potential impacts associated with proposed projects, the need for mitigation shall be presumed. **Negotiation of mitigation agreements shall be a necessary condition of any approval or permit of a project by the Council. Mitigation shall be negotiated between the Council staff, the FAB, the project developer, and approved by the Council.** The reasonable costs associated with the negotiation, which may include data collection and analysis, technical and financial analysis, and legal costs, shall be borne by the applicant. The applicant shall establish and maintain either an escrow account to cover said costs of this negotiation or such other mechanism as set forth in the permit or approval condition pertaining to mitigation. This policy shall apply to all large-scale offshore developments, underwater cables, and other projects as determined by the Council.

Date	Event	Comments
12/19/2017	COP filed by Vineyard Wind with BOEM	
2/19/2018	FAB meeting	General discussion of federal consistency and project status of the Vineyard Wind and adjacent projects
03/06/2018	Vineyard Wind letter to CRMC	Commitment to consult with RI fishermen and provide CRMC a voluntary consistency certification
03/20/2018	COP interagency meeting, Boston	Project introductory meeting
03/21/2018	BOEM cooperating interagency conference call	Project introductory and process meeting
04/03/2018	Federal consistency workshop with David Kaiser/NOAA OCM at URI Alton Jones campus	Attended by wind energy developer representatives including Geri Edens for Vineyard Wind
04/06/2018	Federal consistency certification filed by Vineyard Wind electronically to CRMC	No WTG layout was provided in the consistency certification. CRMC obtains a WTG layout from the COP on BOEM's website for public notice.
04/11/2018	CRMC Fishermen's Advisory Board (FAB) meeting	Vineyard Wind shows WTG layout for the first time. FAB indicates an east-west grid layout with 1 nm spacing is necessary to support continued fishing within the WDA (more important than transiting the WDA).
04/16/2018	Vineyard Wind Notice to Mariners and Fishermen	Geotechnical survey beginning on or about April 16 2018 – estimated duration 4 months. Location: Vineyard Wind lease area and export cable route between lease area and Cape Cod
04/19/2018	BOEM Scoping Meeting for Vineyard Wind COP, Kingston RI	FAB met with BOEM staff, including James Bennett, and delivered alternative east-west layout with 1 nm spacing for Vineyard Wind project
04/24/2018	BOEM Webinar	Review of lease activities and Vineyard Wind COP/lease
04/26/2018	MA Division of Marine Fisheries Notice to Fishermen	Geotechnical Surveys in the Vineyard Wind lease area and between the lease area and Cape Cod began on April 16, 2018
05/20/2018	BOEM cooperating interagency conference call	Primarily a process and schedule discussion
06/13/2018	Vineyard Wind / CRMC meeting at CRMC offices	June 13 CRMC memo provided to Vineyard Wind containing Ocean SAMP enforceable policy requirements. WTG layout redesign discussed.
06/25/18	BOEM conference call with RI state officials	Vineyard Wind COP discussion with RI

07/02/2018	CRMC issues 3-month letter required by 15 CFR § 930.78(a) to Vineyard Wind and BOEM	Describes Ocean SAMP enforceable policies and provides an alternative WTG layout with transit lanes to minimize adverse impacts to RI-based commercial fishermen.
07/16/2018	Vineyard Wind provides response to CRMC 3-month letter	Vineyard Wind disputes information in CRMC 3-month letter particularly coordination with FAB. Questions other Ocean SAMP requirements.
07/24/2018	Vineyard Wind/CRMC Meeting at CRMC Offices	Discussion of 3-month letter, CRMC proposed alternative WTG layout and pre-FAB meeting discussion
07/25/18	Vineyard Wind files revised COP with CRMC	COP dated July 23, 2018 and includes some confidential information
07/26/2018	Joint meeting of CRMC Fishermen's Advisory Board (FAB) and Habitat Advisory Board (HAB) specifically to review and discuss Vineyard Wind project	RI commercial fishermen detail need for E-W WTG orientation with 1 nm spacing to support continued fishing and discuss additional environmental/fisheries impact concerns such as pile driving noise. FAB indicates failure to go with E-W orientation a "deal breaker". Erich Stephens indicates Vineyard Wind open to considering E-W orientation.
07/30/2018	Vineyard Wind & CRMC execute 1 st stay agreement	Agreement stays CRMC review period for 2 months with CRMC decision due by December 6, 2018
08/02/2018	BOEM cooperating interagency conference call	Discussion includes CRMC proposed E-W preferred alternative and confirmation that neighboring wind farm proposals (Bay State Wind and Deepwater Wind South Fork) will be oriented E-W to accommodate fishermen.
08/09/2018	Letter to BOEM from CRMC Executive Director Fugate	Recommends a preferred alternative consisting of an E-W orientation for all turbines and ESPs, 1 nm spacing and a 2 nm transit corridor. The letter was a follow-up to the August 2, 2018 interagency conference call.
08/09/2018	Vineyard Wind / CRMC meeting at CRMC offices	Discussion of VW efforts to eliminate 12 WTGs, and relocate others. Confirmation that future phase will be E-W. Provide compensation to fishermen for impacted area not E-W. VW met with FAB members and FAB response was all E-W or nothing. VW states full scale redesign/reorientation E-W not feasible. VW notes BOEM departure request, scheduling, FDR/FIR issues.

08/22/2018	BOEM cooperating interagency conference call	Discussion of DEIS alternatives, "hybrid" alternatives; "mix & match" alternative; alternative to include E-W orientation with 1 nm spacing.
10/03/2018	Commercial Fisheries Center of Rhode Island files affidavit with CRMC and other parties	Affidavit provides basis and agreement for E-W orientation with 1 nm spacing.
10/15/2018	BOEM cooperating interagency conference call	Additional G&G work requirements discussed for E-W orientation with 1 nm spacing and 2019 deadline for federal investment tax credit. CRMC suggests phasing the project to move forward with turbines where G&G work has been completed in close proximity to E-W alignment.
10/12/2018	RI Marine Fisheries Council files recommendation letter with CRMC	RIMFC vote to support E-W alignment with 1 nm spacing for all wind farms in southern NE waters.
10/24/2018	RI Dept. of Environmental Mgmt. issues commercial fisheries report addendum	Addendum shows increase of commercial fishing harvest value from wind energy areas based on improved analysis methodology.
10/25/2018	BOEM interagency meeting/conference call	Discussion of WTG array layout; CRMC proposed E-W layout with 1 nm spacing alternative for salvaged turbines with phasing based on available G&G; project viability and obligations; considerations of array layout changes (G&G), departures; timelines; fisheries compensation, etc.
11/01/2018	RI state agencies/RI Governor's Office/BOEM/Vineyard Wind meeting at RI Dept. of Administration	Discussion of BOEM EIS process, east-west alternative, potential phasing of Vineyard Wind project
11/5/2018	Vineyard Wind issues notice for Fisheries Monitoring Plan scoping workshops	Workshops to identify needs for wind farm pre- and post-construction fishery assessments. Vineyard Wind has yet to provide a required pre-construction fisheries monitoring plan to the CRMC.
11/09/2018	Vineyard Wind provides letter proposing large turbine alternatives and files COP revisions dated 10/22/18 with the CRMC	VW proposes 3 alternative layouts using a larger capacity (9.5MW) turbine and reducing number of turbines to 84. Additionally proposes to withdraw the COP appendix III-R alternative and replace with the 3 large turbine alternatives. VW asserts modifying layout to achieve complete E-W orientation with 1 nm spacing is not a viable alternative. VW discloses executed PPA's totaling 800 MW are on file with the MA DPU for review and approval. VW discloses turbine and cable specific G&G data and required analysis filed with BOEM on October 22, 2018.

11/13/2018	CRMC semi-monthly meeting	Vineyard Wind requests stay agreement. Council denies request
11/19/2018	CRMC FAB meeting	FAB votes to reject Vineyard Wind large-turbine alternatives because layout is not E-W and turbine spacing less than 1 nm.
11/27/2018	CRMC semi-monthly meeting	Vineyard Wind requests stay agreement. Council approves request with conditions to expeditiously work directly with fishermen and to provide weekly progress reports to CRMC.
11/29/2018	Vineyard Wind & CRMC execute 2 nd amended stay agreement	Agreement stays CRMC review period with CRMC decision due by January 28, 2019.
01/03/2019	CRMC FAB meeting	Discussion on progress of compensation proposal by Vineyard Wind. FAB members voiced concern and confirmed that Vineyard Wind has yet to have discussions with FAB members and provide a compensation proposal for FAB review and approval. Note that VW has had since November 27 Council meeting to work with fishermen.
1/15/19	Vineyard Wind & CRMC execute 3 rd amended stay agreement	CRMC and Vineyard Wind enter into stay agreement specifically to allow time for Vineyard Wind to present a compensation package and negotiate with the FAB. Agreement stays CRMC review period with CRMC decision due by February 1, 2019.
01/15/2019	CRMC FAB meeting	Vineyard Wind refuses to present compensation package at FAB meeting, wants to meet in private with FAB and CRMC. Vineyard Wind delivers compensation package electronically to the FAB and CRMC on 1/16/19
1/25/19	Vineyard Wind & CRMC execute 4 th amended stay agreement	CRMC and Vineyard Wind enter into stay agreement to allow time for Vineyard Wind to present a compensation package and negotiate with the FAB. Agreement stays CRMC review period with CRMC decision due by February 19, 2019.

1/31/19	Vineyard Wind filing with CRMC	Vineyard Wind files a letter with supplemental materials (277 pages) requesting that the CRMC proceed with the scheduled February 12, 2019 Council meeting for a final decision on the consistency certification and COP.
02/07/19	Meeting between CRMC, FAB and Vineyard Wind	Discussion of Vineyard Wind's mitigation/compensation package proposal.
02/08/19	Meeting between CRMC, FAB and Vineyard Wind	Mitigation/compensation negotiations begin in earnest. CRMC, FAB and Vineyard Wind execute side agreement for engaging in productive compensation and mitigation discussions with a schedule.
02/11/19	Vineyard Wind & CRMC execute 5 th amended stay agreement	CRMC and Vineyard Wind enter into stay agreement to allow time for mitigation/compensation negotiations with the FAB. Agreement stays CRMC review period with CRMC decision due by March 1, 2019.
02/11/19	Meeting between CRMC, FAB and Vineyard Wind	Mitigation/compensation negotiations
02/13/19	Meeting between CRMC, FAB and Vineyard Wind	Mitigation/compensation negotiations
02/14/19	Meeting between CRMC, Vineyard Wind and via telephone FAB Chair and attorney	Mitigation/compensation negotiations
02/20/19	Meeting between CRMC staff, CRMC legal counsel and Vineyard Wind legal counsel	Side agreement and concurrence discussions
02/21/19	Meeting between CRMC staff, CRMC legal counsel and Vineyard Wind legal counsel	Side agreement and concurrence discussions
02/23/2019	CRMC FAB meeting	Discussion and action regarding Vineyard Wind compensation proposal and recommendation to CRMC for 2/26/19 Council meeting.
02/26/2019	CRMC semi-monthly meeting	Discussion and action on Mitigation/compensation proposal and consistency determination.
02/28/19	CRMC issues federal consistency concurrence pursuant to CZMA regulations 15 CFR Part 930, Subpart E	Vineyard Wind 800MW wind farm still needs MA CZM concurrence and BOEM COP approval and ROD