
Sent via email to: HouseStateGovernmentandElections@rilegislature.gov

April 8, 2025

To: Representative Evan Shanley, Chair, House Committee on State Government & Elections

Re: Save The Bay SUPPORT for H5706 - AN ACT RELATING TO WATERS AND NAVIGATION -- COASTAL RESOURCES MANAGEMENT COUNCIL

Save The Bay strongly supports House Bill 5706 which would eliminate the Coastal Resources Management Council's politically-appointed council and rename CRMC as the Department of Coastal Resources. This legislation would improve decision-making affecting our coastal resources, which are critically important to the economy, environment and culture of Rhode Island.

This legislation, if passed, would:

- Eliminate the politically-appointed council that currently makes decisions regarding our coast;
- Rename the agency as the Department of Coastal Resources;
- Establish an appointed Community Advisory Committee to advise the Department on policies and programs;
- Replace private contract attorneys with a Staff Attorney position within the Department to represent the Director and staff on all matters including hearings.

The Coastal Resources Management Council (CRMC) was created by the RI General Assembly to "to preserve, protect, develop, and where possible, restore the coastal resources of the state." CRMC plans and regulates aquaculture, offshore wind energy, shoreline access, docks, marinas and the permitting of all development within 200 feet of the coast. While CRMC's respected, professional staff of scientists, geologists, engineers and policy analysts use their expertise to review development proposals impacting our coastal resources, their findings are only recommendations to a politically-appointed, volunteer Council whose members are not required to have any expertise on coastal matters. At a time when coastal salt marshes are in peril and our shoreline is increasingly threatened by sea level rise and erosion, our state deserves a modern, accountable, and efficient coastal agency where decisions are based on sound science.

Article 1, Section 17 of the Rhode Island Constitution charges the General Assembly "to provide for the

conservation of the air, land, water, plant, animal, mineral and other natural resources of the state, and to adopt all means necessary and proper by law to protect the natural environment of the people of the state by providing adequate resource planning for the control and regulation of the use of the natural resources of the state and for the preservation, regeneration and restoration of the natural environment of the state.” Fulfilling this obligation is an ongoing process, and the General Assembly must be responsive to the realities of the present day and be willing to make changes necessary to fully and adequately meet this commitment.

The following details highlighting many of the problems with the current CRMC structure – lack of expertise of Council members, lack of transparency and accountability, persistent vacancies, poor decisions overturned by the courts, and lack of legal representation for staff in contested cases – are taken from Save The Bay’s recent comments to the National Oceanic and Atmospheric Administration (NOAA) during their October 2024 review of Rhode Island’s coastal program.

The politically appointed CRMC Council lacks expertise, is accountable to no one, and has persistent vacancies that impair CRMC’s ability to meet its program obligations.

Save The Bay has consistently observed that CRMC’s politically appointed Council structure is inherently flawed, unsustainable, and a hindrance to the implementation of Rhode Island’s Coastal Management Program. CRMC’s politically appointed Council is primarily composed of members *with no expertise in coastal science, engineering or coastal policy*. Members serve with minimal and cursory training, consisting of a less than 2-hour introduction to program highlights.

The Council’s lack of expertise, coupled with lack of any substantive formal training, as well as its persistent vacancies, leads to unfair and inequitable results for coastal applicants and coastal stakeholders. With no expertise or substantive training, the lay Council routinely rejects and/or modifies the staff’s recommendations, commonly resulting in confusing and inconsistent decisions.

For example, in an application matter heard by the Council in August 2022 (2012-08-021), the staff recommended denial of an application to replace an existing residential dwelling and upgrade an on-site septic system on a constrained lot on the backside of a developed barrier beach. For numerous reasons, the staff opined that the proposal did not comply with CRMC regulations, and did not, as designed, adequately protect coastal resources. (Staff Report, 2012-08-021). In its deliberations, a member of the Council inexplicably began to engage in mathematical computations and proposed structural and dimensional changes to the proposed project, changing the parameters of what had been reviewed by CRMC’s professional staff, and what had been sent out to public notice. The Council’s impromptu proposed and undocumented changes to the project were ultimately approved by the Council without the benefit of expert review by CRMC’s staff. The approval was granted with a hypothetical plan, a promise that the applicant would produce a new plan, and wholly without the same level of staff review afforded to other similar applications.

Complex Council decisions are frequently subject to judicial review and remand.

Inexperienced Council members with no legal background or added training frequently hear cases rife with complex legal issues requiring legal interpretation, commonly resulting in added judicial review, remand and/or reversal, *eroding the public’s trust in the agency’s decision making*.

For example, in 2021, the Council heard a disputed case regarding a proposed dock and boat lifts requiring several variances from CRMC regulations (2018-12-037). After a lengthy hearing with sworn testimony from multiple witnesses and legal arguments from attorneys representing interested parties, the Council voted to approve the dock and lifts. On appeal, the Rhode Island Superior Court held that CRMC's Final Agency Decision lacked "substantial evidence for [several of] the Decision's Findings of Fact" *Squibb v. Rhode Island Coastal Resources Management Council, et al.* (R.I. Super. Ct. 2023). The Council's failure to comply with the most basic requirements of the Administrative Procedures Act adds unnecessary delay to program administration and disrupts the public's trust in agency decision-making.

CRMC's Council structure lacks accountability and transparency.

In its 2020 Review of Rhode Island's coastal program, NOAA suggested that it believes that regardless of Council structure or expertise, "both councils and hearing officers *are capable of poor decisions.*" (NOAA 2020 Review) (emphasis added). However, poor decisions usually have consequences. Without consequences, there is no accountability. Without accountability, there are no corrective measures implemented to change behavior, no guardrails for future actions, and lack of public trust. A lack of accountability and transparency erodes the public's trust in CRMC, hampering its ability to effectively meet its program obligations.

Recently, the Rhode Island Supreme Court noted the importance of preserving "the public's trust in the integrity of the administrative process" in a decision reviewing the Council's demonstrably poor decision-making process in a major contested coastal application case. *Champlin's Realty Assoc. v. Tikoian, et al.*, 989 A.2d 427, 450 (2010). Long after the conclusion of numerous CRMC hearings, appeals to court, additional CRMC hearings, and after the Rhode Island Superior Court finally upheld a denial of the application, the applicant appealed the court-affirmed denial to the Rhode Island Supreme Court. While that case was pending in the court, CRMC's Council attempted to circumvent the appeal process. Looking to privately settle the case, CRMC's Council engaged in behind-closed-doors negotiations, without key litigants from the case present, and disregarded due process to the detriment of the public's trust, as well as its obligation to protect and preserve the coastal resources of the state. In overturning the Council's unlawful actions, the Rhode Island Supreme Court had to remind CRMC's Council of its obligation to engage in "an *open, traceable decision-making process* [which] is essential for an effective coastal management program." *Champlin's Realty Assoc. v. Coastal Resources Management Council, et al.*, 283 A.3d 451 at 476 (2022) (emphasis added). The Council had done the opposite by engaging in an unauthorized "private mediation" in a significant coastal permitting case in violation of CRMC's legal authority. Indeed, a "poor decision."

However, beyond a piercing Supreme Court decision, there were no consequences for the Council's breach of the public's trust or its mandates to protect the state's coastal resources. There were no administrative or legislative inquiries or studies, no new training for Council members, and no new procedures or policies set in place to prevent future breaches of due process or public trust. Without accountability and transparency, and with persistent erosion of the public's trust in CRMC, the Council structure hampers CRMC's ability to effectively meet its program obligations.

For example, last year, CRMC's staff issued a Cease-and-Desist Order, along with an assessment of penalties to a riparian property owner for illegally constructing a 600-foot long, and up to 20-foot tall rock revetment along and below the mean high water mark on an undeveloped coastline. (Cease & Desist

Order 23-0185). This same landowner previously applied for, and was denied, CRMC permission to construct a smaller rock wall in this same location. However, despite that permit denial, the landowner skipped the application process, and simply installed an illegal rock structure in, and adjacent to, jurisdictional coastal lands and waters. It is undisputed that the landowner, or its agents, built the illegal wall with no permits and no engineering or environmental review as required by state and federal law. In the opinion of CRMC staff, as well as Rhode Island's Department of Environmental Management and the federal Army Corps of Engineers, this landowner violated state and federal law.

If CRMC's Council operated in accordance with CRMC's own rules and was held accountable for past mistakes highlighted in scathing court decisions chiding the Council for its lack of a fair and transparent process, this case would proceed like any other enforcement case. It would be treated as a typical administrative enforcement matter, be assigned to CRMC's hearing officer as required by law and be subject to an orderly, transparent and fair process that affords all parties to make its case to an impartial hearing officer. Indeed, this case should be handled as an "*open, traceable decision-making process* [which] is essential for an effective coastal management program." *Champlin's Realty Assoc. v. Coastal Resources Management Council, et al.*, 283 A.3d 451 at 476 (2022) (emphasis added). Instead, without citing any authority, and without engaging in an understandable or transparent process, CRMC's Council inexplicably voted to allow a separate hearing where the landowner subject to the CRMC enforcement action could make its case to change the rules that formed the foundation of CRMC's Cease-and-Desist Order. Providing the alleged violator an opportunity to petition CRMC to change the rule governing the water type impacted by the alleged violation undermines the agency's ability to enforce its Cease-and-Desist Order. It also wholly disincentivizes compliance with Rhode Island's coastal program if alleged violators can simply tie the lay Council in knots for months as it attempts to change the rules to negate a staff-issued enforcement action. (While the Council ultimately denied the requested after-the-fact rule change, the illegal wall remains in place, now over 580 days since it was illegally constructed.)

Additionally, the lack of public trust caused by an arbitrary process that overtly devalues the deterrent effect of enforcement unfairly disempowers and flatly disrespects CRMC's professional staff. Erratic, inconsistent and overturned agency decisions, as well as confounding Council decisions to offer hearings to alleged violators to change the rules rather than providing for an orderly and transparent process to enforce its rules, compounds the public's lack of trust in the agency. CRMC staff are further burdened to overcome that loss of trust by engaging in protracted and unnecessary hearings and related communications that divert resources from an overburdened permitting and enforcement staff. Council decisions that wholly fail to signal an equitable, reasoned and fair process, and court decisions that shine a spotlight on the Council's lack of transparency are distractions that undermine CRMC's ability to strongly implement its management program.

Persistent Council vacancies impair CRMC's ability to effectively meet its program obligations.

Despite NOAA's 2020 finding that fully seating the 10-member Council is necessary to avoid delays and allow CRMC to efficiently implement its management program, Rhode Island's executive branch has persistently failed to fully seat the Council over the last several years. (The last time that all 10 seats were filled was 2019.) Volunteer Council members come and go, and hearing outcomes depend on the votes of Council members who happen to be present at a given hearing. The lack of a fully seated Council causes periodic cancellation of its meetings for lack of a quorum, delays, and continuances of lengthy hearings. It also hampers CRMC's progress on consequential regulatory decisions that bear directly on ocean-dependent economic activities, such as offshore wind and aquaculture permitting. This impairs CRMC's

ability to effectively and productively manage coastal development in an orderly and efficient manner as required under its management program.

Empowering CRMC's Executive Director with final administrative decision-making authority on day-to-day permitting and enforcement decisions does not conflict with Rhode Island's approved "direct permit" program structure and is consistent with the executive authority and accountability of other cabinet-level directors in Rhode Island's state government. It also puts the science-based decision-making where it belongs - in the hands of the coastal experts. Such transfer of administrative decision-making would not impact the ability of the public to participate by providing public comment at public hearings, or in conjunction with administrative hearings heard by hearing officers.

Save The Bay supports the replacement of the current Council structure with an appointed stakeholder-driven community advisory council – as proposed in H5706 - with relevant coastal expertise and experience that advises CRMC as it relates to policy and programs.

CRMC still lacks effective legal counsel for its professional staff at contested hearings.

Since 2010, NOAA's performance evaluations have consistently expressed on-going concern with the lack of access to legal counsel for CRMC staff. However, in 2024, CRMC staff remains at a persistent and definitive disadvantage without adequate access to legal representation.

In 2010, NOAA emphasized CRMC's responsibility "to ensure CRMC staff members had access to legal counsel . . . *at hearings*" to prevent real or perceived conflicts of interest . . ." (emphasis added). In 2020, NOAA cited the part-time availability of legal counsel at CRMC staff headquarters as an accomplishment. However, this accommodation, albeit an improvement, failed to cure the lack of legal representation for CRMC at full Council hearings.

At CRMC's Semi-Monthly Council hearings, designated as "meetings" on CRMC's calendar, applicants and petitioners appear before the Council commonly represented by attorneys. This can also occur at CRMC's subcommittee "meetings", or hearings, where a contested matter is before the subcommittee. At these "meetings", which are, in fact, contested hearings, attorneys for applicants, petitioners, and sometimes, objectors, present legal arguments, present expert witness testimony (under oath) and are provided with an opportunity to rebut points made in the CRMC staff recommendation, and arguments raised during public comment. Referring to the Council proceedings as "meetings" is misleading when witnesses for applicants are giving sworn testimony under questioning by lawyers, and those lawyers are offering legal arguments on behalf of their client.

There is no question that the applicants and petitioners who arrive with attorneys and who then present expert witness testimony and legal arguments are at an advantage over an unrepresented party before the Council. Sadly, in addition to applicants who may be unable to afford a lawyer and experts to argue and testify on behalf of their project in front of the Council, CRMC staff are also at the same disadvantage. During these "meetings", or hearings, CRMC staff is merely provided an opportunity to give an overview of its recommendations contained in the CRMC staff report and is available to answer questions from the Council. At no time is the CRMC staff provided legal advice or counsel during these "meetings", or hearings, nor is there a CRMC attorney designated to argue on behalf of the legal and regulatory merits of the staff's recommendation. There is no CRMC attorney present to cross-examine an applicant's or petitioner's witnesses, nor object to testimony presented by the applicant or petitioner that might be

irrelevant, speculative, based on hearsay, or otherwise prejudicial to the Council's consideration of the merits of the issue before it.

Periodically, if an applicant's or petitioner's witness strays far afield, or an attorney for an applicant is abusive, CRMC's legal counsel will rein in the proceedings back to order and civility. However, that is nowhere near the same as having active legal representation for the CRMC staff during these proceedings. Without access to legal representation at these proceedings, CRMC's staff is at a distinct disadvantage which can influence the outcome of these hearings. This lack of parity disallows the Council from being able to fully and fairly evaluate all the evidence and legal arguments prior to making its decision.

Since NOAA's last review, CRMC's private contract attorneys are more available to provide legal counsel to CRMC's staff during normal business hours, which is a notable improvement. However, that is not equal to, nor in any way a substitute for, a full-time staff attorney dedicated to providing legal representation to CRMC staff. In fact, CRMC is the only environmental regulatory agency in Rhode Island that does not have at least one full-time state-employed staff attorney. The persistent lack of access to legal representation for CRMC staff at Council hearings and contested subcommittee "meetings" also not only unfairly affects the outcome of those proceedings but is also demoralizing to the CRMC staff who are repeatedly present but unrepresented at Council hearing after Council hearing. Lack of equitable access to legal counsel also perpetuates the *real or perceived conflicts of interest* that arise from such a lopsided process.

The persistent lack of access to legal services for CRMC's staff at hearings denies CRMC's staff *equal legal representation* in contested cases before a panel that makes final agency decisions. It results in an unfair process where final decisions (or recommended decisions by a subcommittee) in contested cases are reached without the benefit of equal legal representation *for the state's coastal experts*. Failure to provide legal representation to CRMC's staff at hearings defies NOAA's repeated calls for action intended to avoid *real or perceived conflicts of interest* and jeopardizes the consistent and fair implementation of CRMC's coastal program. Lack of consistency and fairness not only threatens the integrity of the process but also threatens CRMC's ability to protect the functions and values of the coastal zone, coastal ecosystems, and the land and water resources of our state.

CRMC Council still hears contested cases, despite the appointment of an administrative hearing officer that is required by law to hear all CRMC contested cases.

In their 2020 review, NOAA commended CRMC for separating the functions of an administrative hearing officer from the Council's lawyer to *avoid a real or perceived conflict of interest*. However, complete separation of functions has not occurred, continuing the perception of conflicts of interest and resulting in inconsistent and erratic implementation of CRMC's own regulations and Rhode Island law. Although there is a CRMC hearing officer, charged by Rhode Island law to hear "all contested cases," it *does not hear* "all contested cases."

NOAA first identified this conflict-of-interest issue when CRMC's legal counsel also served as the hearing officer. Fortunately, and with vigorous advocacy by Save The Bay and other groups, the General Assembly finally funded and hired a full-time CRMC hearing officer. With a full-time and fully funded agency hearing officer in place, CRMC is firmly equipped to comply with the legal mandate that "all contested cases, all contested enforcement proceedings, and all contested administrative fines shall be

heard by the administrative hearing officers, or by subcommittees” . . . if the hearing officer is “otherwise engaged.” R.I. Gen. Laws § 46-23-20; and see R.I. Gen. Laws § 46-23-20.1(e).

Currently, although contested enforcement and administrative penalty matters are assigned to be heard by the CRMC hearing officer, only “some” contested cases are referred to the hearing officer. In determining which contested cases are assigned to the CRMC hearing officer, the CRMC Council has adopted an inconsistent process that affords the Council full and unaccountable discretionary power over which cases are heard by the CRMC hearing officer.

CRMC’s rules define when a case is considered a “contested case,” and therefore appropriate to be heard by CRMC’s administrative hearing officer. CRMC Management Procedure Rule 1.1 (B) defines “contested case” and contains *three triggers* that send a case to a hearing officer. They are: 1.) “When a *substantive formal written objection*” is submitted by “any interested party”; AND/OR 2.) when a “*request for hearing* is received by any interested party”; or 3.) upon the “request for hearing by any four (4) members of the Council.” CRMC Management Procedure Rule 1.1 (B).

Despite the clear language of Management Rule 1.1 (B), in contested application matters, petitions for rulemaking, and other contested matters, including contested rights-of-way, the Council has interpreted this rule in contravention of the plain and ordinary language of the rule. Before hearing a case, the Council engages in a preliminary deliberation to decide if public comments submitted for or against a potentially “contested case” are “substantive” in nature. Recently, and appropriately, this determination is aided by a staff recommendation contained in the staff report. If, in these instances, the Council agrees by a majority vote that one or more public comment is deemed “substantive,” it refers the matter to the hearing officer. If it does not deem any comments as “substantive,” the Council proceeds to hear the matter.

However, in many instances, even if the Council does not deem any comments as “substantive,” a *request for hearing* may have been received from an interested party which should automatically trigger a referral to the agency hearing officer as contemplated by Rule 1.1(B). Instead, in those instances, the Council explicitly ignores that part of its rule, does not refer the contested application hearing, petition for rulemaking, or other contested matter to a hearing officer, and *hears the case itself*. The Council, in ignoring the plain language of Rule 1.1(B) where it states that a case will be heard by a hearing officer “when a substantive objection is submitted... AND/OR when a request for hearing is received” reserves broad and unfettered authority over which cases are referred to the impartial agency hearing officer.

In a recent Rhode Island Supreme Court case reviewing a CRMC contested application matter, the Court applied a clear standard for interpreting a CRMC regulation. See *Champlin’s Realty Assoc. v. Coastal Resources Management Council, et al.*, 283 A.3d 451, 475 (R.I. 2022). In *Champlin’s*, the Court noted that if the regulation was “clear and unambiguous,” the Court would interpret the words in the regulation according to their “plain and ordinary meaning.” *Id.* (quoting *Ruggiero v. City of Providence*, 893 A.2d 235, 237 (R.I. 2006)). CRMC legal counsel is presumably well-acquainted with Rhode Island controlling law, especially from a case he recently litigated on behalf of CRMC, so it is unclear why CRMC legal counsel advises the Council to ignore the plain and ordinary meaning of the words “and/or” in its own rules.

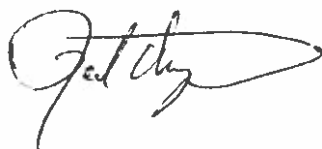
For example, in an application matter heard before the Council on November 28, 2023 (2020-07-031), an interested party submitted an objection to the application, and a request for a hearing. CRMC’s staff reviewed the objection and recommended that the objection did not meet the definition of “substantive.” The Council agreed, and determined that the objection was not substantive, and proceeded to hear the

case. However, that interested party had also submitted a *request for a hearing*. In its rejection of the request for a hearing as one of the circumstances that fulfilled the definition of a “contested case” and therefore triggering a referral of the case to the agency hearing officer, the Council’s legal counsel advised that the “and/or” language in Rule 1.1(B) was “not binding” and essentially ignored the second trigger in Rule 1.1(B). Despite receiving a “request for a hearing,” the Council, *not the hearing officer*, heard the case. While an administrative agency has some latitude in interpreting its own rules, it cannot operate outside of well-established rules of regulatory interpretation, especially when such rules have been so clearly and recently articulated in one of its own cases. Further, as recently highlighted by the Rhode Island Supreme Court, and relevant to NOAA’s programmatic review, [t]he obligation of protecting Rhode Island’s marine resources falls primarily on the CRMC, as does the challenging task of balancing the myriad interests in and to the tidal waters and adjacent upland areas. In light of the many competing activities and the intense public interest which they generate, **it is of the utmost importance that the CRMC operates under a clear set of parameters.** *Champlin’s Realty Assoc. v. Coastal Resources Management Council, et al.*, 283 A.3d 451, 455 (R.I. 2022) (emphasis added).

Failure to adhere to its own regulations and refer all contested cases, not just “some contested cases,” to the hearing officer also results in inequitable and disparate outcomes for applicants trying to determine whether their cases may or may not be referred to a hearing officer and jeopardizes the consistent and fair implementation of the coastal program.

Thank you for considering our comments in support of House Bill 5706.

Sincerely,

A handwritten signature in black ink, appearing to read "Jed Thorp", with a long horizontal flourish extending to the right.

Jed Thorp
Director of Advocacy
Save The Bay
jthorp@savebay.org