



STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

COASTAL RESOURCES MANAGEMENT COUNCIL

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In accordance with notice to members of the Rhode Island Coastal Resources Management Council's Ocean Special Area Management Plan (SAMP) subcommittee, a meeting of the subcommittee was held on Wednesday, March 6, 2013 at 8:30 a.m. at the Offices of the Rhode Island Coastal Resources Management Council, Stedman Government Center, 4808 Tower Hill Road, Wakefield, R.I.

MEMBERS PRESENT

Anne Maxwell Livingston, Chair
Don Gomez
David Abedon
Tony Affigne
Paul Lemont

STAFF PRESENT

Grover Fugate, CRMC Executive Director
Brian Goldman, Esq., CRMC Legal Counsel

OTHERS PRESENT

Jeff Grybowski, CEO, Deepwater Wind
Terence Tierney, Esq.
Robin Main, Esq.
Tricia Jedele, CLF

Call to order. A. Livingston called the meeting to order.

Item 1. Approval of previous meeting minutes – P. Lemont made a motion to approve; D. Gomez seconded. The motion carried unanimously.

Item 2. Discussion and consideration of Deepwater Wind fee waiver request – B. Goldman briefed the members on where things are procedurally. The CRMC has received Deepwater Wind's (DWW) request for a fee waiver, as well as objections, specifically from Michael and Maggie Delia filed through their attorney, Terence Tierney. The Delias have also filed a motion to intervene, B. Goldman said, and Deepwater Wind filed an objection to that. B. Goldman told the subcommittee that the Delias, as part of their package, has also sent the CRMC a protest of the public notice, alleging it is deficient, as well as an objection to the application on its merits. The CRMC has also received dueling motions for scheduling orders and pre-hearing conferences from Deepwater and the Delias. There is also a motion from Deepwater to set a deadline for closing the period for people to file motions to intervene, B. Goldman said. He told the subcommittee that there are three things to consider in these proceedings, citing the CRMC enabling legislation, RIGL 46-23, case 6: 1) any person, firm or government agency proposing any development or operation in tidal waters below mean high water out to the extent of state jurisdiction or territorial sea should be required to demonstrate that its proposal would not conflict with any resources, management, plan or program; 2) that it would not make any area unsuitable for any uses or activities to which it is allocated by a resources management plan or CRMC program; or 3) that it would not significantly damage the environment and coast. B. Goldman said in some of the filings there have been issues raised and arguments about the so-called "joint development agreement" or JDA between the State and Deepwater Wind, whether or not the fee waiver request is consistent with that agreement, and what the agreement means in terms of these proceedings. B. Goldman said that the short answer is that the JDA has nothing to do with the CRMC proceedings. The agreement, he said, was executed between former

Governor Carcieri and Deepwater Wind, and the CRMC was not part of that. B. Goldman said this was done on purpose because the agency was going to be sitting in a quasi-judicial capacity in deciding on the application, and it wasn't appropriate for the CMRC to be involved. B. Goldman told the subcommittee that when it considers the fee waiver request, the one thing to consider is set forth in the CRMC's Management Procedures (4.36): is there an undue hardship on the applicant with the imposition of the fee? B. Goldman also commented on the need to clarify whether the Delias' motion to intervene is one on the merits of the application or on the fee waiver request. If it is on the fee, Deepwater has filed an objection to that, he said. It's not completely clear. G. Fugate reiterated B. Goldman's comments regarding the JDA.

R. Main entered herself as representing Deepwater Wind. T. Tierney entered himself as representing the Delias. T. Jedele entered herself as the vice president and director of Conservation Law Foundation.

B. Goldman introduced the fee waiver as the next item on the agenda, and asked T. Tierney for some clarification on his clients' motion. T. Tierney confirmed that his clients are seeking to intervene on the fee waiver, and also voiced an objection to the process being used by the subcommittee on this day. T. Tierney said his clients believe they are aggrieved parties in a contested case and are entitled to due process considerations. They are seeking intervenor status, he said. T. Tierney voiced his concerns and objection about the subcommittee hearing the intervention issue because he said there was no notice of hearing on that. B. Goldman told the subcommittee he saw two issues regarding the intervention question: do they have standing to intervene for purposes of contesting the fee waiver, and do they have standing to contest the application on the merits. B. Goldman recommended that the subcommittee hear the fee waiver request, then hear from T. Tierney, allow Deepwater Wind to respond, and then allow the subcommittee to make a decision on whether or not to allow the Delias to intervene on the fee waiver request. T. Tierney again expressed his objection to the intervention question being heard and possibly decided. Chair Livingston asked R. Main to respond on behalf of Deepwater Wind.

R. Main said she disagreed that the Delias and T. Tierney have standing to present an argument against the fee waiver request, citing a 2012 R.I. Supreme Court case that speaks to that issue ("Watson vs. Fox"). B. Goldman read parts of the case and told the subcommittee he agreed it was on-point. Chair Livingston agreed to allow T. Tierney to speak on how his clients satisfy the requirement for intervenor status, keeping it on the fee waiver only. T. Tierney objected again. P. Lemont asked T. Tierney how his clients' property rights would be affected by a fee waiver. T. Tierney said because the fee waiver goes to whether the application is properly before the Council, and he alleges it is not. P. Lemont commented that if the subcommittee does not grant the waiver, T. Tierney's argument is moot, is it not? T. Tierney said yes.

T. Affigne said he didn't understand how any individual citizen, rate payer or taxpayer has particular standing to intervene on what has historically been an administrative decision within the CRMC about the level and timing of fees that are paid, and the extent to which CRMC staff and Council have the authority to modify fees appropriately. D. Gomez said he was in favor of moving forward, adding that this would ultimately go before the Council for a decision as well. B. Goldman said that, yes, it would be the subcommittee's recommendation to the full Council. ***Chair Livingston asked for a motion, and P. Lemont made a motion to deny intervenor status for purposes of contesting the fee waiver request, clarified by B. Goldman. It was seconded by D. Gomez. It was a unanimous approval of the motion to deny.***

Chair Livingston directed the subcommittee back to the issue of Deepwater Wind's fee waiver request. B. Goldman said the burden of proof is on Deepwater Wind to demonstrate undue hardship.

R. Main introduced herself and Deepwater Wind CEO Jeff Grybowski as a witness. She reiterated that DWW was selected as the preferred developer, and tied to that was the JDA which required DWW to make a \$3.2 million deposit into the State's renewable energy fund to pay for some of the costs associated with the development of the Ocean Special Area Management Plan. It was unprecedented, she said. In addition to that money, DWW has spent more than \$6 million on studies associated with the SAMP and their proposed project, R. Main said. These studies are available to the public, as well as the CRMC, URI and even other developers. This, she said, puts DWW at a disadvantage compared to other projects – they company has spent more than \$9 million and is now being asked to pay close to \$700,000 in fees under a formula that she challenges the subcommittee is not developed for this type of project. It would be the highest fee ever charged by CRMC for a project, she said. R. Main reiterated that DWW has committed to pay for all of the hearing, notice, stenographer and overtime (administrative) costs, but is asking that the subcommittee recognize that it's an undue hardship to pay another \$700,000 in fees.

B. Goldman swore in J. Grybowski, CEO of DWW. T. Tierney entered an objection. J. Grybowski spoke of his history with the company, the process of DWW entering into the JDA, the contribution of moneys toward the SAMP and additional studies, and the types of studies done by DWW. R. Main provided some photos. Someone in the audience said they could not hear the testimony, and requested the meeting be postponed in order for a microphone and audio system to be set up. Chair Livingston said there are extra copies of the photos available, and invited anyone who could not hear to move closer. There was some discussion of the different dollar figures mentioned, and R. Main proposed an exhibit on that. B. Goldman marked it as Deepwater Wind Exhibit 1 for identification. T. Tierney objected to discussion of an exhibit not pre-disclosed. J. Grybowski described the exhibit as a summary of the survey, environmental and other permitting work done by DWW to-date, and a summary of commitments DWW has made for future survey work. He confirmed that the total of costs associated with that work was approximately \$6.7 million, plus the \$3.2 million is correct. The exhibit was marked full. R. Main asked J. Grybowski to expound on the \$1.6 million figure in the exhibit. He explained it is the sum of future studies DWW has agreed to, some of which have already begun. R. Main asked what the estimated project cost (EPC) is. He said that based on the two separate applications for the wind farm and the transmission cable, the EPC is approximately \$182 million. The transmission system's EPC is about \$50 million, J. Grybowski said, so the total is approximately \$232 million. He told the subcommittee that the estimated fees associated with both applications is actually a total of approximately \$675,000. R. Main asked him what DWW's position is on the fee waiver, and J. Grybowski said that it's the company's position that they have made extraordinary investments, not just in the project, but in the understanding of Block Island's biology, ecology and geology. Other developers will no doubt benefit greatly from DWW's contributions, he said, as will the public from the studies done. DWW will also likely be reaching agreements with impacted stakeholders – commercial fishing is one – that will lead to mitigation, he said. J. Grybowski said he would simply like the subcommittee to consider all of these things, that DWW is happy to pay a fee, and suggested a sort of fee schedule with an upfront payment of \$150,000 or \$200,000 and that the remainder be put forth in further studies or mitigation payments.

G. Fugate said he wanted to clarify for the record that the Ocean SAMP was paid for out of the renewable energy fund, and as part of the JDA the developer was required to reimburse that fund so that fund could then be used. It was put in an escrow account, he said, so that funds would be available for other studies or work. One more point of clarification, G. Fugate said, was that Narragansett Electric actually paid the highest fee ever before CRMC, a total of \$800,000. D. Abedon asked when that was, and G. Fugate said the 1990s. G. Fugate added that the DWW project is under one file number, despite DWW pursuing it as two separate applications. It is one project to the CRMC, he said, because the components are integral. The Council may decide to issue two assents, an A and B portion, but it is considered one project. The Army Corps is considering it one project. The Environmental Assessment is being prepared accordingly.

P. Lemont asked J. Grybowski questions pertaining to the rates, and J. Grybowski said they were already set at 24 cents. P. Lemont asked if DWW had prior knowledge that the CRMC would be assessing a fee. J. Grybowski said DWW knew, but that there is discretion under CRMC regulations to set the fee structure, which they are asking for. P. Lemont sought additional clarification on DWW's position in regards to the fee. T. Affigne asked for clarification on who shares the cost and benefits. J. Grybowski confirmed that it is the investors, the rate payers and the taxpayers. T. Affigne said the rate payers wouldn't be impacted by the fee, so that leaves the investors and public. The fees, he said, are to spread the cost of the operation of the coastal program across all of the applicants who participate in that program, set by a formula so the largest developers pay a larger fee than the smaller developers. Even the fees individual applicants pay only partially reimburse in a sense the rest of the State's taxpayers and citizens for the cost of managing the program, T. Affigne said. He also asked for more clarification on why DWW considers the fee an undue hardship. J. Grybowski said that under the CRMC regulations, it is characterized as an excessive fee. D. Abedon said he saw the process as a benefit to DWW, and not all cost. D. Gomez said he agreed, and that he saw it as a cost of doing business, something DWW was aware of. T. Affigne asked whether the development costs were part of the discussion when the rate was being agreed to. J. Grybowski said that broadly speaking, yes. T. Affigne then said that in a way, then, the rate payers are involved because they have been predetermined to pay a higher energy cost in order to support the development cost of the project, including fees, the Ocean SAMP contribution, etc. J. Grybowski said theoretically, yes, but in reality the costs of permitting the project far outweighed DWW's initial application.

Chair Livingston entertained comments from the public. T. Tierney commented on some issues he would have raised if he and his clients had been granted intervener status. T. Jedele of CLF commented on the importance of getting the question of party status correct moving forward; that it is important for the Council to consider what parties have rights going forward, even though they might not have filed a motion to intervene.

Ms. Ben Riggs, Newport commented in objection to the fee waiver request.

Mr. Larry Ehrhardt commented that he has submitted written testimony, but commented about rates and suggested the Council pursue the issue if warranted. He also commented that he's opposed to the fee waiver request.

Senator Dawson Hodgson commented that he's submitted written testimony, and that he is opposed to the fee waiver.

Mr. Sean McGarry, New Shoreham Town Council member, commented that he is opposed to the fee waiver.

Mr. Chris Warfel, New Shoreham Town Council member, commented that he has submitted written testimony, but commented that he was opposed to a fee waiver.

Ms. Karen Shabshelowitz commented that she is opposed to the fee waiver and voiced her concerns as a Narragansett resident that DWW has not yet come to an agreement with the town over the cable landing.

Mr. Patrick Brady commented that he was opposed to a fee waiver, echoed the concerns of the previous commenter, and suggested the process be postponed until DWW has an agreement from the town on the cable and from National Grid.

Mr. Michael Delia and Ms. Maggie Delia commented that they are opposed to the fee waiver.

Ms. Katie Holmens commented that she is opposed to the fee waiver.

P. Lemont then made a motion that the fee waiver be denied. It was seconded by D. Gomez. Chair Livingston asked for discussion and then commented that she was inclined to grant the fee waiver because of the considerable investment made by DWW. She added that she was interested in some payment in accordance with what J. Grybowski had said during his testimony, and reminded the subcommittee that

this was a recommendation. D. Gomez commented that he didn't think the CRMC should be setting a precedent up right now and should follow its own plan. P. Lemont said he agreed and that there was no proof showing an undue hardship. *He reiterated his motion.* T. Affigne said he was going to support P. Lemont's motion. *The motion passed, with Chair Livingston voting against.*

Item 3. Discussion of public comments received, motions and objections (Deadline for motions to intervene; Next steps for Deepwater Wind application consideration and process) – B. Goldman said that it would be fine to hold this item until the next meeting, but suggested the subcommittee establish a deadline for motions to intervene. D. Abedon suggested the deadline be the next meeting. There was some discussion of timing for the next meeting, and the subcommittee decided to make March 22, 2013 the deadline for filing motions to intervene. R. Main requested 10 days for DWW to respond to the motions to intervene. The next meeting was scheduled for Friday, April 5 at 9 a.m. at Narragansett Town Hall.

P. Lemont made a motion to adjourn, and it was seconded by D. Abedon. The meeting adjourned at 11 a.m.

Respectfully Submitted,

Laura Dwyer