NEW ENGLAND CHAPTER
BACKCOUNTRY HUNTERS & ANGLERS

October 15, 2024

via email: czma.evaluations@noaa.gov

To: Michael Migliori, Lead Evaluator, NOAA Office for Coastal Management

Re: New England BHA Comments on Performance Evaluation of RI Coastal Resources Management Council

Backcountry Hunters & Anglers seeks to ensure North America's outdoor heritage of hunting and fishing in a natural setting. Our members consider access to public lands and waters and protection of our natural resources top priorities, recognizing that both of these things are essential to our participation in, and the perpetuation of, our outdoor traditions.

Several aspects of Backcountry Hunters & Anglers' mission overlap with the jurisdictional area and regulatory focus of the Rhode Island Coastal Resources Management Council (CRMC). As a result, the New England Chapter of Backcountry Hunters & Anglers (BHA) has worked alongside CRMC's staff to advance initiatives when our goals and interests overlap. We have also participated in Council's regulatory permitting processes to ensure BHA's perspective is considered when decisions affecting the RI's public lands, water and wildlife and access to them are made. The comments provided herein will detail BHA's experiences, observations and concerns that are relevant to NOAA's performance evaluation.

Administration – Council Membership

Since its creation over five decades ago, CRMC's structure has involved an empowered volunteer council and a subordinate professional staff. Over the last several years BHA has become increasingly concerned with the appropriateness and effectiveness of this structure for carrying out RI's coastal program.

In its 2010 performance evaluation, NOAA required that CRMC ensure additional members were appointed to fill out the council's membership. CRMC's meeting minutes show that in the terminal years of the 2019 performance evaluation the council was fully appointed with 10 members serving. Unfortunately, CRMC's ability to maintain full membership after their last performance assessment has regressed – the council had 8 members serving in 2020, 7 in 2021, 8 in 2022 & 2023, and as of October 2024 has 7. This is very concerning because the statutory quorum requirement for CRMC to conduct business is 6 members present.

NOAA's concerns in 2010 were not limited to CRMC's ability to maintain a full council of appointees – the necessary action also raised concerns about the council's ability to conduct a regular, full schedule of meetings in order to implement RI's approved coastal plan. Disappointingly, CRMC has also struggled to meet this requirement during the evaluation period. Over the last five years, CRMC's records reveal that the council has cancelled approximately 20% of its semi-monthly meetings with no clear reason provided as to why they were not held, although we suspect failure to achieve quorum is the main contributor. In 2022, the year with the highest proportion of cancellations during the evaluation period, the council scheduled 20 semi-monthly meetings and cancelled 6 of them (30%).

While we recognize that the structure that the State of Rhode Island chooses to carry out its coastal program is outside of NOAA's control (as NOAA clearly stated in the 2010 performance report, pg. 12 paragraph 2), we are concerned that the empowered volunteer council is not workable in Rhode Island at this point, as evidenced by its long-term, recurring failures both to maintain a full membership and to hold a full schedule of meetings. At a minimum, BHA urges NOAA to re-iterate and require its prior necessary action requiring the state to resolve CRMC's membership and meeting cancellation issues. Additionally, we urge NOAA to include a recommendation that the State of Rhode Island consider restructuring CRMC's statutory authority such that its full-time professional staff is empowered to carry out RI's coastal program, rather than its council of appointed volunteers, as a means to resolve CRMC's chronic appointment and meeting cancellation issues.

Administration – Hearing Officer & Legal Counsel

During its 2010 evaluation, NOAA issued a necessary action for CRMC to separate the functions of its administrative hearing officer from its legal counsel. At that time, CRMC's legal counsel was acting as the hearing officer for contested administrative cases, while also acting as a legal advisor to the staff and/or council. NOAA expressed concerns that this created a perceived and potentially real conflict of interest and called into question the impartiality of CRMC's decisions.

In 2023, a statutorily empowered administrative hearing officer was appointed by RI's Governor and confirmed by the RI Senate for the first time. Since then, one permitting application that BHA is involved with has been referred to the hearing officer as a contested matter (CRMC App. 2020-04-037). Between April 2024 and today, CRMC's hearing officer has held two pre-hearing conferences and one public hearing on 2020-04-037. During all proceedings, CRMC's legal counsel has been present beside the hearing officer. Most recently, at a public hearing on September 23, 2024, CRMC's legal counsel was not only present beside the hearing officer, but also interacted openly with the parties to the contested matter and introduced their own legal research/case law references, which directly challenged the position and rationale entered by one side in a written motion prior to the hearing. Further complicating the issue, the other party chose to represent themselves 'pro se' and has subsequently struggled to participate meaningfully in the hearing officer's quasi-judicial investigatory process. The rationale that was researched and produced by CRMC's legal counsel assisted their position with legal acumen that they almost certainly were not capable of producing themselves as non-attorneys.

BHA is concerned that what is currently occurring between CRMC's hearing officer and legal counsel is akin to the issue that NOAA required CRMC to resolve in 2010. Now that a hearing officer has been appointed pursuant to RI's statutes, they are required to *"be devoted full time to these administrative duties, and shall not otherwise practice law while holding office nor be a partner nor an associate of any person in the practice of law" (RIGL § 46-23-20.1).* In contrast, there are no such impartiality requirements of CRMC's legal counsel, who as a private practice law firm can generally practice law elsewhere, can lobby the government on behalf of other entities, and can even be retained simultaneously as legal counsel for a coastal municipality that has been directly involved in and taken specific advocacy positions on the contested matter currently before the hearing officer. Further, it is unclear why CRMC's hearing officer, who is statutorily required to be proficient in legal matters as a practicing attorney, requires the assistance of CRMC's legal counsel to conduct investigatory hearings on contested permit applications. Finally, given that the contested permit application will inevitably return to the CRMC for a final decision once the hearing officer has completed their investigation, it will be nearly impossible to view the council's decision as impartial because the facts that the decision will rely upon had been influenced by the participation their own legal counsel, rather than being a product exclusively of an independent, impartial hearing officer and the parties to the contested matter.

BHA urges NOAA to re-iterate its necessary action from 2010, requiring the functions of CRMC's administrative hearing officer and CRMC's legal counsel to be completely independent, especially given that CRMC finally has a hearing officer appointed pursuant to the statute. Further, NOAA should issue a recommendation related to the potential conflict of interest that arises from CRMC's legal counsel simultaneously acting as legal counsel to a coastal municipality that from time to time is involved in matters that appear before the council.

Public Access – Shoreline Access Law & Rights-of-Way

Protecting and enhancing access to public lands and waters is central to BHA's mission and subsequently this is the area where BHA's interests are most aligned with CRMC. During the performance evaluation period CRMC made significant progress within this focus area, although there are still some room to improve.

During their 2023 legislative session RI's General Assembly passed a law that corrected a flawed 1982 RI Supreme Court ruling, effectively replacing a scientific but practically unidentifiable boundary with a new, identifiable demarcation line on RI's beaches and rocky shores below which Constitutional shoreline rights and privileges are protected. CRMC's staff, and particularly the Executive Director, were integral to the crafting of the law, which was rigorously debated by a legislative study commission between the 2021 and 2022 legislative sessions. After its enactment, CRMC created an informational webpage linked to QR-coded placards at designated rights-of-way and other shoreline access points to inform the public on the practical application of the new law, and where, exactly, shoreline rights are protected. Additionally, CRMC's staff has conducted webinars, presentations, and beach walks to further educate the public.

Compared to the prior evaluation period, during which CRMC made little progress on designating rights-of-way, at least nine new ROWs in three different coastal communities have been designated during the evaluation period. The majority, and potentially all, of the newly designated ROWs were relatively non-contentious, and essentially existed on property owned and maintained by the municipalities within which they occur. In contrast, CRMC's ROW Subcommittee and legal counsel has spent approximately the last eighteen months engaged in researching a very contentious potential ROW in Westerly, where progress seems to be throttled by CRMC's relatively small legal budget and the availability of volunteer council members to hold meetings. As a general trend, BHA is concerned that CRMC lacks sufficient financial and legal resources to carry out its work, and further that public-benefit functions such as ROW research and designation seem to be disproportionately impacted when bandwidth is limited.

Also relevant to ROWs, around 2022 CRMC's staff, in collaboration with URI's Coastal Institute, created an interactive ROW tool that provides visual references and access to each ROW's designation documentation. We cannot understate the value of this resources to the access-seeking public, as it centralizes relevant information in an easy-to-use, visual interface that is considerably more useful than anything that may have existed prior.

Protection of Natural Resources/Coastal Habitat

Through their Coastal and Estuary Habitat Restoration Program and Trust Fund, CRMC has consistently funded projects focused on restoring and enhancing coastal habitats in partnership with the Narragansett Bay National Estuarine Research Reserve. Relative to BHA's members, who are primarily hunters and anglers, these projects are vital to the fish and game species that we value most. Projects include restoration of coastal marsh and marine habitats that are important to migratory waterfowl, and fish passage/dam removal projects that benefit the state's diadromous fisheries.

In contrast, CRMC's council has been lackadaisical about addressing a major violation that is currently damaging sensitive coastal habitat perpetrated by the Quidnessett Country Club in North Kingstown, who constructed an unpermitted riprap revetment approximately 600 feet long more than one year ago. The country club's property is located adjacent to type 1 conservation waters, where shoreline hardening is prohibited under all circumstances. After CRMC's staff issuing a notice of violation, the club petitioned CRMC to re-classify the water type such that their illegal sea wall might be allowed to remain after a "cost of doing business" fine is paid. Rather than following the advice of their staff and compelling its removal, the council continues to draw out the process and provide the country club with additional opportunities to "make their case", while their illegal development continues to block public access and damage the surrounding coastal environment. Further complicating the matter, the country club has retained the former council chair to represent them before the current council, making it extremely difficult to determine whether the deference that they receive is appropriate, or if it somehow relates to residual favoritism for the former council chair, who presided over more half of the council's currently serving members only a few years ago.

As our comments have detailed, BHA feels that CRMC has excelled in some facets of its work, particularly the work that CRMC's staff has led related to public access despite their relatively limited resources. In contrast, we have some structural and practical concerns related to CRMC's empowered council and its conduct that we urge NOAA to resolve through necessary actions or recommendations.

Thank you for the opportunity to provide input, and for your consideration of our comments.

Sincerely,

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