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Peter F. Neronha
Attorney General

April 12, 2021

Via Electronic Mail

Ms. Jennifer Cervenka, Chair
Coastal Resources Management Council
Oliver H. Stedman Government Center
Via Mr. Jeffrey Willis, Executive Director
4808 Tower Hill Road, Suite 3
Wakefield, RI 02879-1900

[REDACTED]
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RE: *Attorney General, Peter F. Neronha's Statement of Concern In re: December 31, 2020 Coastal Resources' Management Council decision on Petition of Jamestown Boatyard, Docket No. 2019-06-014 and the agency proceedings related to it.*

Dear Chair Cervenka,

Please accept this letter addressing both the inadequacies of the Coastal Resources Management Council's (the "CRMC or Council") draft decision related to this application and the procedural path that has confused and frustrated the public's trust in the structured and formal agency decision-making process designed to protect our environment. For the reasons stated below, I respectfully request that you distribute this statement to all council members in advance of the upcoming April 13, 2021, meeting to address the above-referenced application. The Council should thoroughly evaluate the draft decision in light of the requirements established by the Rhode Island Administrative Procedures Act, R.I.G.L. 42-35 ("APA"), and otherwise correct any errors of process, law and fact.

The decision issued by the CRMC's Executive Director on December 31, 2020 (the "Draft Decision")¹, should be carefully evaluated for compliance with the APA. In particular, the Draft

¹ The December 31, 2020 decision was issued as a final agency order of the CRMC. As such, it triggered the thirty-day APA appeal period. It is clear from the transcript of the October 27, 2020 hearing, the decision itself, and the plan of the Council to ratify the December 31, 2020 decision at its meeting on April 13, 2021 that the decision issued on New Year's Eve of last year was a draft decision and not a final agency order.

Decision 1) does not clearly state whether the above-referenced application was being treated as a Category B application *in a contested case*; 2) it does not clearly state whether and how the Category B criteria in the CRMC Coastal Resources Management Program (“CRMP”) have been satisfied by the evidence in the administrative record, and; 3) the issuance of Draft Decision (so-called a final agency decision by CRMC’s Executive Director) caused a great deal of confusion for the objectors, and the public, which may have deprived objectors of their rights to timely prepare for an appeal of a final agency decision. The CRMC, like all state agencies must follow the APA, which governs its proceedings, and the CRMP, which establishes the criteria the Council must evaluate for Category B applications. The Draft Decision does not evaluate the CRMP Category B criteria and as written does not provide sufficient bases for its approval of the applicant’s permit.

First, with regard to the rules governing the hearings themselves, pursuant to CRMC Management Procedures § 1.1(B) “a proceeding before the Council shall be considered contested when a substantive formal written objection and/or request for hearing is received by the Council from any interested party.” 650-RICR-10-00-1.1(B). At the October 20, 2020 hearing, Mr. Longo, legal counsel to CRMC stated “We are not -- it was not the *Council’s intent* to allow cross-examination of witnesses because this is not a *full-blown* contested case.” Mr. Longo elaborated that it is “a *disputed case*, but it’s not a contested case.” October 20, 2020 Hearing Transcript at 58:8-14. (*Emphasis supplied*).

The Draft Decision does not explain why CRMC’s legal counsel explained to the parties, objectors, and the public that it was not the *intent* of the Council to treat the October 20, 2020, proceeding as a contested case, why Council’s *intent* is relevant to that determination, how a *full-blown* contested case is distinguished from this case or from where in CRMC’s Management Procedures the term “disputed case” comes. But the record reflects that the words “objections, objectors, objectors’ and objector’s” were used 20 times over the course of the October 20, 2020 hearing. The transcript even specifically mentions “objectors represented by counsel,” a fact which at the very least gives the appearance that formal and substantive written objections by interested parties were submitted and received by the Council at some point. See October 20, 2020 Hearing Transcript at 10:19. These same terms were used more than a half a dozen times during the October 27, 2020 hearing. Finally, testimony submitted by Attorney William Landry at the October 20, 2020, hearing suggests that a written petition in opposition to the application, signed by 500 people was filed with the CRMC. See October 20, 2020 Hearing Transcript at 78:20-24. The Findings of Fact in the final agency decision should acknowledge whether substantive and formal written objections that are relevant to the application were received by the Council, whether the application was reviewed as a contested case under the CRMC’s Management Procedures, and if not, why not as a matter of separately stated conclusions of law. Neither the public, nor a reviewing body should be made to guess as to the applicable procedures governing the hearing or the standards of review applied by the Council to this application.

Second, the Draft Decision does not clearly state whether and how the Category B criteria laid out in the CRMP have been satisfied by the evidence in the administrative record. 650-RICR-20-00-1 *et seq.* See Attached Table (Comparing the CRMP requirements with the Findings of Fact set forth in the Draft Decision). Comparing the particularized requirements with the Draft Decision makes it clear that if approved as a final agency decision the Draft Decision would not comply

with the APA requirement to reduce the agency decision to writing. Absent adequate findings of fact and conclusions of law, there is no point for a reviewing court to examine the certified record at all. In Sakonnet Rogers, Inc. v. Coastal Resources Mgt. Council, the Rhode Island Supreme Court observed, “even if the evidence in the record, combined with the reviewing court’s understanding of the law, is enough to support the order, the court may not uphold the order unless it is sustainable on the agency’s findings and for the reasons stated by the agency.” 536 A.2d 893, 897 (R.I. 1988) (quoting 3 K. Davis, *Administrative Law Treatise*, § 14.29 at 128 (2d Ed. 1980)). And, in Cullen v. Town Council of Town of Lincoln, the Rhode Island Supreme Court reinforced its prior observations: “if a tribunal fails to disclose the basic findings upon which its ultimate findings are premised, the Supreme Court will neither search the *record* for supporting evidence nor will it decide for itself what is proper in the circumstances”). 850 A.2d 900, 904 (R.I. 2004) (emphasis in original). Moreover, incorporating staff reports by reference into a final agency decision is not the same as the Council making its own factual findings with respect to the applicable statutory criteria set forth in the CRMP. This approach simply does not satisfy the requirement that there be an explicit statement of the underlying facts supporting the findings. With regard to the adequacy of agency findings, the Rhode Island Supreme Court has stated that, “those findings must, of course, be factual rather than conclusional [sic], and the application of the legal principles must be something more than the recital of a litany.” *Id.* See Irish Partnership v. Rommel, 518 A.2d 358, 359 (R.I. 1986) (quoting May-Day Realty Corporation v. Board of Appeals of City of Pawtucket, 267 A.2d 400, 403 (R.I. 1970)).

The point being, even if there is evidence in the administrative record to support the Council’s vote on the above-referenced application, both the APA and numerous decisions from our state courts make it clear that the agency is required to adequately set forth its findings of fact in its final order and the bases for its decision. The seven Findings of Fact listed in the Draft Decision do not address all of the Category B requirements, do not provide any insight as to why the Council found the staff report or the applicant’s testimony credible or why it did not find the public testimony credible relative to the applicable criteria, and do not establish any basis for the Council’s decision. Specifically, the record contains significant evidence in the form of testimony that the applicant’s proposed expansion will exacerbate existing navigational hazards, negatively impact recreational access and endanger recreational users and small watercraft users of the cove. But the Draft Decision simply does not address any of this evidence. If the Draft Decision were to be converted to a final agency decision, unrevised, it would frustrate judicial review of the final agency decision as contemplated by the APA and would undermine the public’s trust in the agency decision-making process.

Finally, issuing the Draft Decision as a final agency order on December 31, 2020, did not conform to the approved Council motion referenced in the Draft Decision itself. See Draft Decision at 10. At the October 27, 2020 hearing, legal counsel for CRMC proposed that the task of preparing a draft decision be delegated to him so that he could prepare a decision for consideration and a final vote by the Council. See October 27, 2020 Hearing Transcript 117:21, 118:1-8 and 118:12-19. If the Council had been concerned about the appeal rights of the objectors and a narrow dredging window for the applicant that was closing fast (the dredging window being October 15 – January 31), a specific deadline for the review and ratification of the draft decision should have been established by the Council. Instead, it appears that a draft decision was issued as a final decision, such that the dredging and expansion could move forward expeditiously. This agency action,

ignoring the Council-approved procedural path created confusion for the objectors and the public, which may have deprived objectors of their rights to timely prepare for an appeal of a final agency decision, or take any other timely legal action to prevent irreversible actions by the applicant.

For the reasons set forth herein, the Attorney General respectfully requests that the Council thoroughly evaluate the Draft Decision before ratifying it as a final agency order.

Respectfully submitted,

Attorney General
Peter F. Neronha

By his attorney,

/s/ Tricia K. Jedele

Tricia K. Jedele
Chief of the Environment & Energy Unit

TITLE	SUBSECTION TITLE	CITE	REQUIREMENTS	JAMESTOWN BOATYARD DECISION
CRMP: 1.1.10 Climate Change and Sea Level Rise	N.A.	CRMP §1.1.10	Therefore, the policies of the Council may take into account different risk tolerances for differing types of public and private coastal activities. In addition, the Council will regularly review new scientific evidence regarding sea level change.	5. The Council hereby adopts and incorporate the findings made by the CRMC Staff; 6. The Council hereby finds that the Applicant has met its burdens of proof under the applicable sections of the CRMP or SAM Plan, and agrees with the staff recommendations which meet the variance criteria.
CRMP: 1.2.1 Areas under Council Jurisdiction	D. Type 3 High-Intensity Boating	CRMP §1.2.1(D)	Type 3 waters and the adjacent shoreline, while utilized intensely for the needs of the recreational boating public, nevertheless retain numerous natural assets of special concern to the Council. These include coastal wetlands, and the value these areas provide as fish and shellfish spawning and juvenile rearing grounds. These factors must be weighed when the Council considers proposals that may impact these assets.	5. The Council hereby adopts and incorporate the findings made by the CRMC Staff; 6. The Council hereby finds that the Applicant has met its burdens of proof under the applicable sections of the CRMP or SAM Plan, and agrees with the staff recommendations which meet the variance criteria. 7. Based on the foregoing, there is not a reasonable probably of conflict with a plan or program for management of the State's coastal resources as well as damage to the coastal environment of the State of Rhode Island
CRMP: 1.3.1 In Tidal and Coastal Pond Waters, on Shoreline Features and their Contiguous Areas	A. Category B Requirements	CRMP §1.3.1(A)(1)(a)	Demonstrate the need for the proposed activity	5. The Council hereby adopts and incorporate the findings made by the CRMC Staff; 6. The Council hereby finds that the Applicant has met its burdens of proof under the applicable sections of the CRMP or SAM Plan, and agrees with the staff recommendations which meet the variance criteria. 7. Based on the foregoing, there is not a reasonable probably of conflict with a plan or program for management of the State's coastal resources as well as damage to the coastal environment of the State of Rhode Island
		CRMP §1.3.1(A)(1)(b)	Demonstrate all applical local zoning ordinances, building codes, flood hazard standards, and all safety codes, fire codes, and environmental requirements have or will be met	
		CRMP §1.3.1(A)(1)(c)	Describe the boundaries of the coastal waters and land area that is anticipated to be affected	
		CRMP §1.3.1(A)(1)(d)	Demonstrate that the alteration or activity will not result in significant impacts on erosion and/or deposition processes along the shore and in tidal waters	
		CRMP §1.3.1(A)(1)(e)	Demonstrate that the alteration or activity will not result in significant impacts on the abundance and diversity of plant and animal life	
		CRMP §1.3.1(A)(1)(f)	Demonstrate that the alteration will not unreasonably interfere with, impair, or significantly impact existing public access to, or use of, tidal waters and/or the shore	
		CRMP §1.3.1(A)(1)(g)	Demonstrate that the alteration will not result in significant impacts to water circulation, flushing, turbidity, and sedimentation;	
		CRMP §1.3.1(A)(1)(h)	Demonstrate that there will be no significant deterioration in the quality of the water in the immediate vicinity as defined by DEM	
		CRMP §1 3.1(A)(1)(i)	Demonstrate that the alteration or activity will not result in significant impacts to areas of historic and archaeological significance	
		CRMP §1 3.1(A)(1)(j)	Demonstrate that the alteration or activity will not result in significant conflicts with water dependent uses and activities such as recreational boating, fishing, swimming, navigation, andcommerce	
		CRMP §1.3.1(A)(1)(k)	Demonstrate that measures have been taken to minimize any adverse scenic impact (see § 1.3.5 of this Part)	
		CRMP §1 3.1(A)(2)	Each topic shall be addressed in writing and include detailed site plans and a locus map for the proposed project	
	D. Recreational Boating Facilities	CRMP §1.3.1(D)(2)(d)	The Council shall require persons proposing to construct new marina facilities or proposing to expand existing marina facilities to undertake measures that mitigate the adverse impacts to water quality associated with the proposed activity. Applicants shall apply for a Water Quality Certificate from the RI Department of Environmental Management and Army Corps of Engineers Permit, concurrent with their application to CRMC.	5. The Council hereby adopts and incorporate the findings made by the CRMC Staff; 6. The Council hereby finds that the Applicant has met its burdens of proof under the applicable sections of the CRMP or SAM Plan, and agrees with the staff recommendations which meet the variance criteria. 7. Based on the foregoing, there is not a reasonable probably of conflict with a plan or program for management of the State's coastal resources as well as damage to the coastal environment of the State of Rhode Island
CRMP §1.3.1(D)(2)(e)		The construction of marinas, docks, piers, floats and other recreational boating facilities located on tidal lands or waters constitutes a use of Rhode Island's public trust resources. Due to the CRMC's legislative mandate to manage Rhode Island's public trust resources for this and subsequent generations, the Council must assess all proposed uses of public trust lands or waters on a case-by-case basis, examine reasonable alternatives to the proposed activity, and ensure that the public's interests in the public trust resources are protected.		
CRMP §1.3.1(D)(9)(c)		In evaluating the facility proposal, the applicant must demonstrate that: (1) Potential impacts have been or can be avoided to the maximum extent practicable when considering existing technology, infrastructure, logistics, and costs in light of approved project purposes; and (2) Impacts have been or can be minimized to an extent practicable and appropriate to the scope and degree of those environmental impacts; and (3) Any unavoidable impacts to aquatic and terrestrial resources have been or will be mitigated to an extent that is practicable and appropriate.		
I. Dredging and Dredged Materials Disposal		CRMP §1 3.1(I)(2)(b)	b. All materials to be dredged for either open water disposal or upland disposal must be classified by the Department of Environmental Management (DEM) based upon an approved analysis process.	5. The Council hereby adopts and incorporate the findings made by the CRMC Staff; 6. The Council hereby finds that the Applicant has met its burdens of proof under the applicable sections of the CRMP or SAM Plan, and agrees with the staff recommendations which meet the variance criteria. 7. Based on the foregoing, there is not a reasonable probably of conflict with a plan or program for management of the State's coastal resources as well as damage to the coastal environment of the State of Rhode Island