For a thriving New England

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Hand Delivered
Hon. Gordon D. Fox, Speaker of the House
c/o Lynne Urbani
State House, Room 323

Rep. Helio Melo, Chair of House Finance Committee
State House 306
Providence, RI 02903

Re: Federal and State Implications of Passing H 6063

Dear Speaker Fox and Chairman Melo,

I am writing to provide you with specific information for your reference and consideration concerning the certain federal regulatory review and delay that would be triggered by transferring the Rhode Island Island Department of Environmental Management's (DEM) "permitting functions" and the Coastal Resources Management Council's (CRMC) subprograms and programs to an Executive Office of Commerce.

DEM is the state agency that has received delegated authority from the United States Environmental Protection Agency (EPA) to administer a number of state programs in lieu of the Federal program under State law. Some of the programs DEM administers include the Resource Conservation and Recovery Act (RCRA), which governs the permitting of solid and hazardous waste activities at a number of operations throughout the state, including the Central Landfill; the Clean Air Act (CAA), which governs permitting for all regulated air pollutants from stationary sources in the state whose emissions exceed certain thresholds defined by federal law; the Clean Water Act (CWA), which governs all discharges from point sources and non-point sources (*i.e.*, runoff) in the state. These programs are complex. The permitting is, by its nature, complex. Moreover, the relationship with our federal partners in administering the programs is governed by regulations, plans, and agreements that would need modifications satisfactory to the federal government prior to any transfer of functions could take place.

Specifically, prior to obtaining approval from EPA to administer a federal program at the state level, DEM would have submitted program descriptions for the various regulatory areas. The program descriptions would have included organizational charts, structure of the agency or agencies with responsibility for administering the program, a description of agency staff, number of staff, occupations, and itemization of costs of administering the program, and a description of all applicable State procedures, including permitting procedures and any State administrative or judicial review procedures.

The program description would have also included copies of permit forms, application forms, and reporting forms that the State intended to use. See 40 CFR §123.22 (a highlighted copy is included for your convenience). It is important to note that even a change as simple as placing another agency in charge of distributing forms or applications would alter the permitting procedures and the program description in a way that would trigger 40 CFR §123.62 (*Procedures for revisions*, included for your convenience). Also, before the program can be approved, it requires that the State's Attorney General to certify that the State has adequate legal authority to carry out the program, including adequate authority to issue and enforce general permits. The Attorney General cannot make such certification until any revisions to the DEM regulations are adopted and fully effective. So please bear in mind, that if State law transfers DEM's permitting functions (even if it is just to change the entity that distributes applications), DEM regulations would also have to be changed and those regulatory changes would have to comply with the State's Administrative Procedures Act providing adequate opportunity for public comment and hearing. See 40 CFR 123.23 (a highlighted copy is provided for your convenience). The delegation of a federal program is ultimately reflected in a Memorandum of Agreement (MOA) between the State and Regional Administrator of EPA. If the MOA needs to be changed to reflect changes in state law, *i.e.*, the transfer of DEM's permitting functions, the MOA must be amended through procedures set forth in 40 CFR part 123. See 40 CFR 123.24 (a highlighted copy is provided for your convenience). Finally, where the State intends to modify a program, the federal regulations are explicit: "The State shall keep EPA fully informed of any proposed modifications to its basic statutory or regulatory authority, its forms, its procedures, or priorities." 40 CFR 123.62(a) (*Procedures for revisions*). Moreover, "whenever they propose to transfer all or part of any program from the approved State agency to any other State agency, [the State] must identify any new division of responsibilities among agencies involved. The new agency is not authorized to administer the program until approved by the Administrator under paragraph (b) of this section. 40 CFR 123.62(c) (*Procedures for revisions*) (Emphasis added). I am also providing you with the *Criteria for Withdrawal of State Programs*. EPA, on its own or as the result of a petition may withdraw delegation for any number of failures of the program to adequately administered and enforced. See 40 CFR §123.63 (a highlighted copy is provided for your convenience).

The intent of the bill is entirely irrelevant to the federal agencies reviewing the program changes. They will look only to the language of the statute to determine if review and program modifications are required.

With respect to the proposed transfer of the CRMC's subprograms and programs in H6063, CLF has serious concerns. The federal Coastal Zone Management Act (CZMA) is not a delegated program, but still the National Oceanic Atmospheric Administration (NOAA) must approve all program changes. By way of recent example, I am providing you with a copy of a May 7, 2013 Public Notice informing the public that CRMC has proposed changes to the Ocean Special Area Management Plan, Chapters 8 and

11. The incorporation of these changes into the Rhode Island Coastal Resources Management Program will allow the state to review federal activities permits licenses and to seek federal assistance. If the federal Office of Ocean and Coastal Resources Management (OCRM) determines that these proposed changes are not "routine," the changes to the program would require analysis under the National Environmental Policy Act (NEPA), which could result in the need for an Environmental Impact Statement. The transfer of all of CRMC's subprograms and programs to the Executive Office of Commerce would most definitely not be considered a "routine" change and would therefore result in NEPA review, which as you know can result in a 3-6 year public and agency review. These proposed changes would also jeopardize the on-going review of the nation's first offshore wind project. As you know Deepwater Wind has submitted an application to receive a Category B assent before the CRMC. The permit would allow the company to develop a 30 MW demonstration project in Block Island Sound and would result in the construction of a bi-directional cable connecting Block Island to the mainland. This project was, and still is a priority for the General Assembly and H 6063 jeopardizes the project review. A particular concern is that if you transfer CRMC programs in the middle of a significant permit review, you may unintentionally create new procedural challenges to project approval. This proposed transfer may also jeopardize the State's consistency review authority, which is essential to ensure that the State retains some control over the portions of the proposed DWW project that pass through federal waters (*i.e.*, because the cable goes through federal waters, the Army Corps of Engineers has jurisdiction to review DWW's application and as of right now, the State maintains consistency review authority). Consistency review authority is also important in the context of the federal leasing process underway in Rhode Island Sound, and ultimately over any large-scale offshore wind project proposed to be sited in federal waters. The State spent approximately $ 9 million dollars developing the Ocean Special Area Management Plan (the Ocean SAMP). One of the central reasons for developing the Ocean SAMP was to protect the State of Rhode Island's interest in fisheries and habitat in Rhode Island Sound in the face of federal leasing. The Ocean SAMP was approved by the federal government in 2010. This means that right now, CRMC can exercise its consistency review authority in federal waters in the Ocean SAMP area. In transferring the entire coastal program (inclusive of the Ocean SAMP) to an Executive Office of Commerce, the State risks a program review by NOAA, and Environmental Impacts Statement under NEPA, and the loss of its consistency authority. The regulations that set forth the procedures for revisions to the State's coastal program can be found at 15 CFR § 923.40 (a highlighted copy is provided for your convenience).

The risks identified above are too real and too significant to not be taken seriously. H6063, as written, provides no guarantee of any benefits to small businesses, but is absolutely certain to result in disruption, confusion, and jeopardy to two of the State of Rhode Island's most valuable programs (natural resource and coastal protection).

I would be happy to discuss any of these requirements or regulations with you or your staff in greater detail any time.

Thank you for your consideration.

Respectfully,

Tricia K. Jedele
Vice President & Director of CLF's Rhode Island Advocacy Center

cc: Janet Coit, Director, DEM

Grover Fugate, Executive Director, CRMC