
A New Blueprint for Coastal Zone Management

John M. Boehmert

The nation's first offshore wind farm is now under construction in Rhode Island waters off the coast of Block Island. The five-turbine demonstration project, which will power 17,000 homes, is scheduled to be operational by the end of this year. While this is the only offshore wind farm under construction in the United States, it has not been for want of trying.

The U.S. Department of Energy reported that in 2015, after fifteen years of development efforts, thirteen offshore wind farm projects were in various stages of planning and development in twelve states, with Cape Wind first applying for permits in Massachusetts in 2001. Cape Wind was fully permitted after nine years but has been stalled in litigation and disputes over power purchase contracts, which have effectively prevented financing of the project. Yet the Rhode Island project was fully permitted in approximately three years.

What does Rhode Island know that may benefit other states in offshore permitting efforts? Rhode Island has effectively demonstrated how relatively new ocean planning tools can be combined with existing provisions of coastal zone management regulations to dramatically reduce permitting time for complex projects, increase protection of offshore waters, and extend state influence over federal waters.

Rhode Island undertook marine spatial planning of almost 1,500 square miles of state and federal waters in order to identify and protect (in state waters) sensitive areas and to designate the best areas for the location and development of offshore wind farms. Marine spatial planning may be thought of as a process to study and understand current conditions and uses of the ocean waters and seabed and to harmonize them with desired ecological goals and uses, such as commercial and recreational uses. Perhaps more simply stated, marine spatial planning is designed to provide sufficient information to facilitate ecological protection, while allowing or fostering development or other uses of the ocean's waters.

The information developed during Rhode Island's significant marine spatial planning exercise was then utilized to draw state regulations that governed the use and development of designated state waters, effectively zoning the ocean in order to facilitate offshore wind farm development. The net result was the permitting of an offshore wind farm in record time, without the requirement of an environmental impact statement, given the studies already performed as a part of the marine spatial planning.

Rhode Island made a critical decision as it approached the process: the state, through its coastal regulator, the Coastal Resources Management Council (CRMC), would control studies that would normally be done by a developer, and the state would use those studies to zone offshore areas to locate a wind farm and identify sensitive areas requiring protection. Rather than the developer conducting studies to demonstrate to the satisfaction of the state that the area chosen for a wind farm is safe and appropriate, the state undertook the burden, and therefore had a high level of confidence in the work done.

The effort by the state of Rhode Island was motivated by the desire to meet statutory and executive order requirements for increasing alternative energy production in Rhode Island and by the recognition that meeting the requirements would require offshore wind energy development. The program proceeded on a dual track, one run by the CRMC and the other by the Governor's office.

First, the CRMC sought and received state funding of approximately \$3.2 million to conduct the offshore marine spatial planning studies. The studies at issue included everything from the travel of the right whale (the rarest of large whales and an endangered species), bird migration, fish distribution, and sensitive environmental areas, to name just a few. The sensitive environmental areas were identified and protected from development. The studies even identified the most cost-effective wind farm locations.

These studies were arranged with a single short-form contract, for the state engaged the University of Rhode Island School of Marine Sciences and Department of Ocean Engineering to conduct all the studies. Not only did these faculties include some internationally known experts in the areas being studied, the university even had its own 185-foot ocean research vessel.

The studies were conducted over a two-year period, and the state arranged a stakeholder group of interested parties to vet and comment on the study results. The stakeholder group included representatives of the fisheries interests, who were skeptical at best and opposed at worst to any offshore development, environmental groups, coastal communities, energy interests, and others.

The stakeholder process was open and transparent and proved so successful that even the fisheries interests ultimately supported the regulatory plan developed, known as the Ocean Special Area Management Plan or Ocean SAMP. The Ocean SAMP contained detailed regulations governing use of the offshore waters for development of wind farms, effectively zoning the state waters to protect sensitive areas and allow renewable energy development in other areas, similar to land-based zoning.

The second track of the process was run out of the governor's office, and that process vetted and selected a preferred developer for the development of a five-turbine demonstration wind farm project. A number of interested developers applied, and selection criteria included not just financial ability, expertise, and past experience in offshore development, but also what efforts the selected developer would make to increase economic development opportunities in Rhode Island, such as locating facilities in the state in support of the project.

The successful developer, Deepwater Wind, was selected, and agreed to reimburse the state \$3.2 million for the marine spatial planning studies undertaken by the state. That made sense, as the developer would have had to do the studies itself, perhaps at greater costs. The successful developer also supplemented the state studies with its own studies.

The two processes—work out of the governor's office to select a preferred developer and development of the Ocean SAMP—were kept separate, to avoid any potential influence of the developer on the regulatory process. In fact, while the preferred developer was allowed to attend the stakeholder meetings because they were open to the public, it was not allowed to participate in the process.

Because the state had effectively zoned the offshore waters

for wind farm locations, the developer did not have to defend its choice of location. Studies had indicated already that the areas so designated would not interfere with the migration of the right whale, and would not interfere with such habitats and activities as ocean commerce, sensitive ecological areas, shipping channels, fishing areas, or sensitive support habitats for fish, among others.

As a result, the preferred developer had permits in hand within two years of filing applications, although much work was done before the formal applications were filed. No environmental impact statements were required, given the extensive studies done by the state. In addition, the fisheries interests and environmental interests supported the final Ocean SAMP. CRMC's executive director, Grover Fugate, estimated that the Ocean SAMP cut five years from the permitting time that would normally be required for an offshore development project.

The resulting Ocean SAMP was the first federally approved ocean zoning plan under the Coastal Zone Management Act of 1972 (CZMA), edging out Massachusetts, which was first to develop its own Ocean Plan but which was not first to receive required federal approval. Rhode Island's federal approval was facilitated by state officials working closely with the federal regulators during the entire Ocean SAMP development process. At the end of the day, the federal regulators were familiar with the plan, had been consulted along the way, and had only relatively minor comments before approval. Most of those comments focused on making it clear that the Ocean SAMP regulated only state waters.

Moreover, the state used the results of the studies in the Ocean SAMP area, which included federal waters, to demonstrate that a wide range of activities requiring federal permits

in federal waters would likely impact state waters. This allowed Rhode Island to apply for a Geographic Location Determination under existing CMZA regulations, which gives a coastal state the right to veto the activities of private parties seeking permits in offshore waters for various activities, including offshore construction, if the state finds under the CZMA's federal consistency program that those activities would be inconsistent with the enforceable policies of the state's coastal zone management program.

In effect, Rhode Island used the extensive research done for the Ocean SAMP in both state and federal waters to justify extending the state's influence over extensive federal waters abutting its state waters, and to increase protection of state waters and the goals and policies of its state coastal zone management plan. Private parties seeking permits for designated activities in the federal waters of the Ocean SAMP study area must now convince Rhode Island that those activities are not inconsistent with the state's coastal zone management policies.

In essence, new ocean planning techniques were used to exploit existing provisions of federal coastal zone regulations to zone offshore state waters, to facilitate the development of offshore alternative energy facilities in record time, and to increase the influence of Rhode Island over federal permitting of private parties (and federal entities to a lesser extent) in abutting federal waters.

Other states may have much to learn from the Rhode Island ocean zoning blueprint. 🌳

Mr. Boehnert practices real estate and environmental law in Providence, Rhode Island, and is the author of Zoning the Oceans: The Next Big Step in Coastal Zone Management (American Bar Association 2013). He may be reached at jmb@jmblawoffices.com.