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January 27, 2004

BY EMAIL and FIRST CLASS MAIL
Massachusetts Ocean Management Task Force
c/o Executive Office of Environmental Affairs
251 Causeway Street, Suite 900
Boston, Massachusetts 02114-2119
Attention: Dr. Susan F. Tierney, Chairwoman

Re: **Ocean Management Task Force Draft Principles and Preliminary Recommendations**

Dear Dr. Tierney:

On behalf of the Massachusetts Chapter of the National Association of Industrial and Office Properties ("NAIOP") and the Associated Industries of Massachusetts ("A.I.M."), thank you for the opportunity to submit comments on the Draft Principles and Preliminary Recommendations (the "Draft Report") of the Massachusetts Ocean Management Task Force (the "Task Force"). The Massachusetts Chapter of NAIOP is the leading voice for commercial real estate in the state and represents the interests of companies involved with the development, ownership, management, and financing of commercial properties, consisting of over 800 members who own or manage more than 140 million square feet of office, research & development, retail and industrial space in the Commonwealth. A.I.M. is the largest employer association in Massachusetts with over 7500 members. AIM members include large and small employers from the industrial, commercial and service sectors.

NAIOP agrees with the Task Force that administration of the state's ocean resources is currently divided among several state agencies with overlapping responsibilities, a system which leads to duplication, delay, undue regulatory burden, and increased costs. NAIOP believes that your recommendation to streamline the existing system is a laudable goal. NAIOP suggests that the Task Force review the existing regulatory authority of each of the many agencies already involved in the management of ocean resources, including not only state and federal agencies but also regional agencies like the Cape Cod Commission that may have jurisdiction over certain shoreline and/or maritime activities.. Prior to any suggestion of a complete overhaul of the scheme of ocean regulation, NAIOP believes that the Task Force should note that at least some of the shortcomings identified in the Draft Report can be remedied by exercise of coordinated jurisdiction on the part of existing agencies. For instance, the Draft Report indicates that there is an inability to protect ocean resources for ecological purposes. NAIOP suggests that among existing authorities under the Division of Marine Fisheries and the Ocean Sanctuaries Act, that there may well

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be adequate authority to protect threatened ecological resources. Similarly, the Draft Report discusses the protection of estuarine areas which are already protected by the Wetlands Protection Act. In Recommendation # 12, the Task Force recommends that permit applicants be obliged to collect and report data in prescribed formats. Coordination of requests for information from existing permit issuing agencies can remedy this matter. Similarly, a dissemination of data that exists within public agencies (see Recommendation # 11) can, and frankly already has been, addressed by the Public Records Law. NAIOP recommends that only following an exhaustive examination of the existing authority of agencies and the benefits to be obtained through better coordination of existing permit programs should further regulation or statutory changes be considered.

In any effort to significantly alter the scheme of ocean regulation, existing programs which function well should be respected and preserved. For example, NAIOP has had (and has) criticisms with the workings of the Massachusetts Department of Environmental Protection's Chapter 91 program, but the program generally has worked well since its regulations were substantially rewritten approximately a dozen years ago. NAIOP does not believe that it is warranted or wise to put aside the existing Chapter 91 program. The Chapter 91 program is the chief regulatory program for shoreline development. In any proposed revamping of ocean regulations, the role of the Chapter 91 program as the primary coast line regulatory agency (meaning landward jurisdiction to the extent of the existing regulations and seaward jurisdiction at least to the maximum extent relevant to shoreline development, say, perhaps, several hundred yards) should be preserved.

The Task Force recommends that permit fees under Chapter 91 and other permit programs be altered to possibly include a value of the project as a factor in the fee for the permit. Such an approach is opposite to the 2,000 year tradition of public trust/tideland regulations. As you know, the long tradition of this law (dating to the Roman Empire) has been to encourage coordinated shoreline development. The role of government has never been that of the landlord seeking to profiteer from private development. A ready example of the mischief to be caused by such an approach would be the inevitable demand for the marine fisheries industry and the boating/shipping industries to pay permit fees based on the value of their catch or the value of their businesses derived from use of the natural resource. Certainly the marine fisheries industry could not withstand further economic challenges. Would the marine shipping industry be obliged to pay permit fees based on the value of its cargo arriving at docks or the frequency of its dockings? While these questions may seem extreme, they are the direct result of the economic value approach to permitting that has been suggested by the Task Force. As the Task Force considers the matter of permit fees, it should not ignore the significant societal benefits derived from the uses of the ocean: infrastructure placed in the ocean, shoreline development, marine recreation, marine fishing and marine transit, among others.

The Task Force recommends a "zoning-like approach" to ocean management. NAIOP draws your attention to the fact that some municipalities in the Commonwealth have within their jurisdiction harbors and other marine areas. Has the Task Force considered the effect of Home Rule and Chapter 40A? NAIOP suggests that these matters be considered in detail.

The Draft Report has at its core the concept of "allowable uses", a concept borrowed from zoning law. The Task Force should reject such an approach in favor of a "performance-based" approach to project permitting. Whereas performance standards allow for regulatory flexibility on a case-by-case basis, no list of allowable uses can anticipate potential future uses that may arise in a technological world that changes rapidly. The Task Force should also recognize that properly situated and designed infrastructure provides great benefit to the Commonwealth's overall economic and social well-being. This may be even more so in the future as potential technological advances allow us to reap the benefits of a resource-rich and biologically diverse ocean and coastline.

NAIOP reminds the Task Force that in the arena of regulatory law, inherently subjective notions such as visual, cultural and aesthetic impacts are particularly problematic and cautions that such standards often end up unworkable. This concern is particularly relevant here, given the complex nature of the ocean environment and our presently limited scientific understanding of that environment.

NAIOP also recommends that to the extent that the Task Force suggests significant policy changes (as opposed to permit coordination discussed above) that the policy changes be adopted through statutory changes. Statutory changes have the benefit of the crucible of the legislative process and discussion. NAIOP does not support sweeping and significant policy changes implemented by memorandum of agreement, policy statements or, even, regulations. Rather such changes are better adopted through legislation.

Thank you again for the opportunity to comment. NAIOP looks forward to working with the Task Force as the Draft Principles and Preliminary Recommendations are further refined.

Sincerely,

NAIOP, MASSACHUSETTS
National Association of Industrial and Office Properties

David I. Begelfer
Chief Executive Officer

cc: Secretary Ellen Roy Herzfelder, EOEA