

January 22, 2004

Dr. Susan F. Tierney, Chair
Ocean Management Task Force
Executive Office of Environmental Affairs
251 Causeway Street
Boston, MA 02114

Re: **Initial Comments on Draft Principles and Recommendations**

Dear Ms. Tierney:

Cape Wind Associates, LLC, (“Cape Wind”) hereby submits its comments to the Draft Principles and Preliminary Recommendations released in December 2003 by the Massachusetts Ocean Management Task Force (“Task Force”) for managing the Commonwealth’s coastal resources. Cape Wind feels that the Task Force should, as an initial matter, revise its proposal to specifically identify the most important substantive threats to our coastal resources and then justify any recommendations as specific responses to such threats. The Draft Principles and Preliminary Recommendations should also be revised to recognize and avoid conflict with, or duplication of, existing Commonwealth, regional and national policies ensuring the environmental quality of the coastal zone. As more specifically set forth below, Cape Wind also feels that certain of the Recommendations should be revised so as to avoid the burdens and expenses of additional bureaucracy without any clear and corresponding policy benefit.

I. The Cape Wind Project.

Cape Wind is proposing the nation’s first offshore wind energy project, which would be capable of generating up to 420 MW of clean and renewable energy. The wind farm would be located entirely in federal waters, with only a portion of the submerged transmission cable buried beneath the coastal seabed of the Commonwealth. The Cape Wind project has been undertaken in direct response to the policy directive of the Massachusetts Legislature in the Electric Restructuring Act of 1997, which mandates minimum amounts of renewable energy and declares the “public purpose” of “generating the maximum economic and environmental benefits over time from renewable energy to the ratepayers of the Commonwealth....” The introduction of Cape Wind’s energy into the NEPOOL system would offset approximately one million tons of CO₂ each year, making Cape Wind the Commonwealth’s most meaningful proposal to address the urgent issues of greenhouse gases (“GHG”) and climate change.

Cape Wind is now in the third year of a comprehensive environmental review process being conducted jointly by Federal and State regulatory agencies, and which includes seventeen participating agencies. This joint review will result in an Environmental Impact Statement under the National Environmental Policy Act (the most comprehensive environmental review standard under Federal law), as well as an Environmental Impact Report under the Massachusetts Environmental Policy Act (“MEPA”). Notably, in Cape Wind’s ENF Certificate (#12643), the Secretary of Environmental Affairs explained that Cape Wind voluntarily consented to MEPA review of the entire Cape Wind project (including the non-jurisdictional portions thereof), as well as a greatly extended ENF comment period to allow for maximum public input, with the Secretary of Environmental Affairs concluding that “these commitments ensure that the impacts of the project will receive full disclosure in the state and regional review process....” *Id.* at 4. The current review process thus considers all relevant concerns and issues in a seamless manner, with absolutely no “gap” between federal and state review.

II. The Task Force Must First Define its Substantive Policy Objectives.

A. The Task Force Should Follow the Model of the Pew Oceans Commission and Make a Clear Initial Statement of Substantive Coastal Threats.

Cape Wind feels strongly that the Task Force should revise its Draft Principles and Preliminary Recommendations to first set forth a clear statement of substantive objectives, which would then provide a more transparent justification for any recommended remedial provisions. In this regard, the Task Force could look to the recent Report of the Pew Oceans Commission entitled “A Report to the Nation: Recommendations for a New Ocean Policy.” As an essential first step, the Pew Oceans Commission identified the following nine greatest threats to the Nation’s ocean environment, and then set forth proposals that could be justified as providing specific remediation to those identified threats:

- Non-point source pollution
- Point source pollution
- Invasive species
- Aquaculture
- Coastal development
- Overfishing
- Habitat alteration
- Bycatch
- Climate change

Pew Report at 4-5. Once the Pew Commission had identified these greatest threats to ocean quality, it then had a much stronger foundation upon which to develop remedial recommendations. While the Commonwealth may not identify all of the same substantive coastal concerns (recognizing that the Pew Commission was written from a national perspective), the Task Force could greatly improve its efforts if it would first clearly identify the substantive policy concerns that it is seeking to redress.

In its current form, the Task Force's draft documents focus largely on additional administrative structures and processes and the reallocation of agency responsibilities, with relatively little discussion of the substantive policy priorities that would provide a more clear justification for remedial recommendations. Expanded bureaucracies and additional regulation should never be an end in themselves; they should only be adopted as a means to address substantive and clearly articulated policy concerns.

B. The Task Force Should Identify Climate Change and Global Warming as the Commonwealth's Highest Priority in Plans for the Coastal Zone.

i. The Task Force Ignores the Commonwealth's Existing Climate Change Policy.

The Task Force's current proposals omit any substantive reference to global warming and climate change, an omission that is inconsistent with well-established policies of the Commonwealth, region and Nation, as well as the prevailing view of the national oceanographic community. More specifically, the Task Force should make reference to, and incorporate, the relevant provisions of the Climate Change Action Plan of the New England Governors and Eastern Canadian Premiers (August 2001), to which Massachusetts is a signatory, and which states that "proven climate science indicates that aggressive action is needed to reduce greenhouse gas emissions ["GHG"] toward the ultimate goals of stabilizing the earth's climate in eliminating the negative impacts of climate change," and thus includes "a commitment from each state and provincial jurisdiction to carry on its own planning for climate change gas reductions." *Id.* at 2. The Action Plan goes on to call for demonstrative leadership on the climate change issue, as follows:

Given these increases [in climate change] in the face of doing nothing, this plan seeks to reverse the trend. Specifically, the plan presents a set of near-term options for our region that help protect the climate, reduce GHG emissions and other pollutants, cut energy demands, and promote future job growth by harnessing sustainable energy resources in advanced technologies. Furthermore, the plan will address climate changes that have occurred and that are anticipated through a variety of adaptive measures, such as shifts in agriculture and forestry, building codes and infrastructure rehabilitation, particularly in coastal areas. By focusing on a set of concrete, achievable, near-term opportunities,

we hope to demonstrate leadership and build a foundation from which more dramatic progress can be realized.

Id. at 2. With specific reference to coastal resources, the Action Plan further provides that key climate change issues for New England include “stresses on estuaries, bays, and wetlands,” and that associated problems of coastal erosion and saltwater inundation “would likely have severe impacts on our harbors, islands, and for the many communities located near the region’s shoreline.” Id. at 3. Since the Commonwealth has already clearly articulated its climate change policy in the Action Plan, the Task Force should simply incorporate verbatim the relevant “Guiding Principles,” “Regional Goals,” and “Action Steps” of the Plan. Perhaps most notably, the Plan’s Guiding Principal Number 1 is as follows:

The need to identify constructive measures to reduce energy and non-energy related GHG emissions wherever possible, such as to ... shift to low and zero carbon energy sources, wherever economically feasible....

As for Regional Goals, the Plan also includes a mid-term GHG reduction goal “to signal a promising future for energy-efficiency and greenhouse gas-reducing technologies and to encourage the growth of related industries in the region,” as well as a long-term goal of reductions in GHG emissions of approximately 75-85% below current levels. Id. at 6. The Plan also includes an Action Item goal of reducing “the amount of CO₂ emitted per megawatt of hour of electricity use within the region by 20% of current emissions,” with the recommendation that such goal be achieved “through a combination of new renewable energy sources including solar, wind and bioenergy among others.” Id. at 13.

ii. The Pew Commission’s Climate Change Position.

The Pew Oceans Commission Report similarly identifies climate change as a top priority for ocean management planning. It thus expressly calls upon the United States and its global neighbors to do “the one thing” that can limit its effects – reduce emissions of greenhouse gases:

Climate change is likely to be an additional stress to marine ecosystems, beyond more traditional concerns, such as pollution development, and overfishing. Climate change will interact with these stressors in unpredictable ways (i.e., additively, synergistically, antagonistically) to influence the future of U.S. marine resources.

The Commission feels strongly that the U.S. and its global neighbors must do the one thing that can help directly limit the effects of climate change on the marine environment – reduce our emissions of greenhouse gases that contribute to the problem.

Only then can we assure coming generations and ourselves that the recommendations we offer will keep the bountiful seas we envision. Pew Report at 87 (emphasis added).

iii. Congressional Emphasis on Climate Change in Coastal Policy.

The United States Congress has also recognized the compelling need to address global warming in the specific context of coastal zone management. In the Coastal Zone Management Act Reauthorization Amendments of 1990, Congress amended the Federal CZMA to include the following requirement that all coastal state plans address global warming: “Because global warming may result in a substantial sea level rise with serious adverse effects on the coastal zone, coastal states must anticipate and plan for such an occurrence.” 16 U.S.C.S. § 1451(l). The 1990 Act also included the following Congressional declaration confirming the urgency of the global warming problem:

Global warming results from the accumulation of man-made gases, released into the atmosphere from such activities as the burning of fossil fuels, deforestation, and the production of chlorofluorocarbons, which traps solar heat in the atmosphere and raises temperatures worldwide. ... Sea level rise will result in the loss of nature resources such as beaches, dunes, estuaries and wetlands, and will contribute to the salinization of drinking water supplies. Sea level rise will also result in damage to properties, infrastructures, and public works. There is a growing need to plan for sea level rise.

P.L. 101-508, 104 Stat. 1388-299.

iv. Climate Change Should be the Highest Coastal Priority.

Thus, existing State, regional and national policies recognize global warming and climate change as critical items affecting the management of coastal resources. The Task Force should accordingly include global warming and climate change as the highest priority planning principle. More specifically, to avoid conflicts with existing Commonwealth policy, the Task Force should incorporate verbatim Guiding Principal No. 1, the Regional Goal for Greenhouse Gas Reduction, and Action Items 1 and 5 of the Climate Change Action Plan, all of which are already the stated environmental policy of the Commonwealth. As noted in Section I above, Cape Wind is, by far, the Commonwealth’s most meaningful proposal for addressing global climate change concerns; the introduction of its energy into the NEPOOL system will displace approximately one million tons of CO₂ each year.¹

¹ CWA’s projection of CO₂ displacement is derived by the same methodology that was recently utilized by the Secretary of Environmental Affairs in EOEA# 13143 (November 26, 2003), which applies the marginal emissions rate produced by ISO-New England to projected electrical production.

C. The Task Force Should Make Renewable Energy a High Priority Objective for the Commonwealth's Coastal Zone.

The Task Force should also include provisions supporting renewable energy as a high priority objective of any coastal zone management plan. As mentioned in the preceding section, the Commonwealth has already made regional commitments to support and enhance renewable energy pursuant to the regional Climate Change Action Plan, which includes both Guiding Principles (i.e., a “shift to low and zero carbon energy sources, wherever economically feasible”) and specific Action Items (i.e., “increasing the use of renewable sources of energy and electricity production”). Furthermore, the Massachusetts Legislature has expressly identified as an important public purpose “generating the maximum economic and environmental benefits over time for renewable energy ... and fostering the formation, growth, expansion, and retention within the Commonwealth of preeminent clusters of renewable energy and related enterprises, institutions, and projects, which serve the citizens of the Commonwealth,” with the identification of targeted renewable technologies including those suitable to the coastal zone: “wind energy; ocean thermal, wave, or tidal energy...” M.G.L. c. 40J, § 4E(b), (f).

Notably, the Massachusetts Supreme Judicial Court (“SJC”) has specifically upheld this legislative determination that renewable energy is a “public purpose” that would justify the allocation of state resources in support of private development efforts. In Shea v. Boston Edison Co., 431 Mass. 251 (2000), the SJC rejected a challenge to the legislative creation of the Massachusetts Renewable Energy Trust Fund based on the argument that support for the development of renewable energy by private companies was not an appropriate “public purpose.” To reach this conclusion, the SJC relied in part upon the following determination of the Department of Telecommunications and Energy (“DTE”) as to the compelling public benefits of renewable energy:

With respect to . . . the renewable energy charge ... the Department, in its December 30, 1996, Electric Industry Restructuring Plan, stated that effective use of alternative energy resources can, among other effects, “reduce the environmental impact of providing electric service ... and further important [DTE], State and National energy goals.” The Department recounted that commentators have noted that “the use of renewable resources also contributes the following benefits: improving national energy security by decreasing reliance on foreign fuel; improving public health by reducing the number of pollutants entering the environment; reducing health and life insurance costs as a result of the overall improvements to public health; reducing the release of fossil-fuel-related carbon dioxide ... into the atmosphere, thus mitigating the factor that has been cited by many authorities as a threat to the future of the global ecosystem in agricultural enterprise [global warming].... These effects certainly benefit all citizens of the Commonwealth.

Id. at 259 (emphasis added). In upholding the Renewable Energy Trust Fund, the SJC also cited to the express legislative declaration of “the public purpose of generating the maximum economic and environmental benefits of renewable energy” in the competitive energy marketplace, so as to foster the formation of “clusters of renewable energy and related enterprises ... which serve the citizens of the Commonwealth.” Id. at 256-57. Notably, the Legislature specifically anticipated that these “public purposes” would be fulfilled through the efforts of private industry, including “private sector investment in ... renewable energy and related enterprises,” “the stimulation of entrepreneurial activities in these and related enterprises,” and “the growth of the renewable energy provider industry.” M.G.L. c. 164, § 4E(c),(d).²

Thus, the Massachusetts Legislature, DTE and SJC have all recognized the important benefits and “public purpose” served by the commercial development of renewable energy resources. Congress has similarly recognized the important priority of supporting renewable energy development, with measures including the Production Tax Credit and the policy statements of the Energy Policy Act of 1992. The Task Force should accordingly revise its Principles and Recommendations in a manner that incorporates the Commonwealth’s existing environmental and economic policies supporting the commercial development of new renewable energy sources. Simply put, in light of the obvious physical limitations of the Commonwealth’s land-based potential for renewable energy, failure to develop substantial volumes of renewable energy in the coastal zone would effectively negate and frustrate the established policies and commitments of the Commonwealth.

D. The Task Force Should Make Environmental Justice a High Priority Objective for the Commonwealth’s Coastal Zone.

The Task Force’s Draft Principles and Preliminary Recommendations fail to highlight environmental justice as a policy objective. As with global warming and climate change, both the Commonwealth of Massachusetts and the Federal government have well-established policies that require regulatory agencies to address the disparate impacts of development activities on minority and low-income populations. The Environmental Justice Policy of the Executive Office of Environmental Affairs (“Policy”) was executed by Secretary Durand in 2002. Among other actions, the Policy:

² Such provisions also underscore the fundamental legislative objective of the Electric Restructuring Act of shifting the generation sector towards entrepreneurialism and away from centralized planning. Indeed, the Legislature specified that this shift towards entrepreneurialism would “encourage innovation, efficiency and improved services” and “open markets for new and improved technologies.” Id. at § 1(f), (g). The Legislature thus deliberately left to the innovation of industry the role of proposing new generation facilities and their locations, subject, in the case of jurisdictional facilities, to the comprehensive public interest review under the Energy Facilities Siting Act, which expressly requires an extensive analysis of potential alternative sites. Thus, the notion suggested by some that we should now move away from the new entrepreneurial (i.e. “ad hoc”) development model back towards a centralized planning model is contrary to the clear legislative policy.

[T]argets EOEPA resources to service those high-minority/low-income neighborhoods in Massachusetts where the residents are most at risk of being unaware of or unable to participate in environmental decision-making. Working with these EJ Populations, EOEPA will take direct action as part of the implementation of this policy to restore degraded natural resources (21E hazardous waste/brownfield sites), to increase access to open space and parks, and to address environmental and health risks associated with existing and potential new sources of pollution....

Environmental Justice Policy of the Executive Office of Environmental Affairs, at 4. Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," similarly directs Federal agencies to consider environmental justice issues:

Each Federal Agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States.

Executive Order 12898, 1994. The Task Force should be concerned that the current Draft Principles and Policy Recommendations, by failing to incorporate any reference to environmental justice, may inadvertently drive development activities to locations where there would be disparate impacts on minority and low-income populations. If wealthy and powerful interests use their influence to block necessary activities from areas within sight of their waterfront homes (notwithstanding clearly demonstrated public need and benefit), those activities will, by default, be driven to other locations, which would more likely include environmental justice populations. Therefore, the Task Force should amend its Draft Principles to include environmental justice as a management principle for the coastal zone.

III. The Task Force Should Clarify and Limit its Reliance on the Massachusetts Public Trust Doctrine.

Cape Wind believes that the Task Force may have placed undue reliance upon the Massachusetts Public Trust Doctrine ("Doctrine"), which seems to be a central justification for much of the proposed report. The repeated references to "public trust," however, are made without any explanation of the perceived relevance of the Massachusetts Public Trust Doctrine to the objectives or recommendations of the Task Force, a situation that has led to considerable public confusion. For example, The Task Force cites the Public Trust Doctrine as the primary reason why the Commonwealth now needs a new and "comprehensive Ocean Resource Management Act with proactive planning and regulation," but provides no explanation of how the Doctrine is relevant to that objective. It is thus essential that the Task Force avoid further

public confusion by explaining the nature and extent of its reliance upon the Massachusetts Public Trust Doctrine.

The Massachusetts Public Trust Doctrine is an ancient, but limited, judicial concept. As the Massachusetts Supreme Judicial Court explained in Boston Waterfront Dev. Corp. v. Commonwealth, 378 Mass. 629 (1979), “[a]t Roman law, all citizens held and had access to the seashore as a resource in common.” Subsequently, however, “under the English feudal law which emerged, ownership of the shore was claimed [exclusively] by the Crown,” until the time of the Magna Charta, which restored certain of the public’s coastal access rights, to be held in “public trust:”

After Magna Charta, the competing [coastal] interests were accommodated by a legal theory that defined the Crown’s rights to shore land below high water marks into two categories: a private *jus privatum*, or ownership interest, and a governmental *jus publicum*, by which the King held the land in his sovereign capacity as a representative of all the people. This later interest the Crown could not convey into private hands, since it was “held as a public trust for all subjects in their free exercise of the common rights of navigation and fishery....”

Id. at 632 (citations omitted; emphasis added.) The SJC went on to explain that this “*jus privatum/jus publicum* distinction in regards to shoreland property was carried over to the new world” and that, in Massachusetts, the public rights to use land below the low water mark were recognized by a 1641 Colonial statute which provided that “[e]very [i]nhabitant who is an householder shall have free fishing and fowling” in the waters of the Commonwealth, with a 1647 Colonial statute assuring that private wharf structures may not “stop or hinder the passage of boates or other vessels.” Id. at 633-35.

As for modern applications of the Massachusetts Public Trust Doctrine, the SJC in Boston Waterfront also noted that it had previously held that registered title to private land between high and low water must include restrictions recognizing public trust rights, such that the private title remains subject “to the easement of the public for the purposes of navigation and free fishing and fowling, and passing freely over and through the water without any use of the land underneath, wherever the tide ebbs and flows.” Id. at 645 (citations omitted). The SJC concluded that restriction on private title to submerged land below low water was also appropriate, and that “land below low water line can be granted by the State only to fulfill a public purpose, and the rights of the Grantee to that land are ended when that purpose is extinguished.” Id. See also, Opinion of the Justices to the Senate, 383 Mass. 895, 903 (1981) (“Commentators have concluded that it is within the power of the Legislature to grant private rights in public trust properties where the conveyance serves the public interest.”) These fundamental concepts of the Massachusetts Public Trust Doctrine have now largely been codified by the existing provisions of M.G.L. c. 91, §§ 14 and 18, which provide that structures in Commonwealth tidelands must “serve a proper public purpose and that said purpose shall

provide a greater public benefit than public detriment to the rights of the public in said lands” and, further, that non-water dependent projects must also be consistent with the policies of the Massachusetts Coastal Zone Management Program.

Thus, while the Massachusetts Public Trust Doctrine certainly remains an important aspect of coastal zone management, it does not provide a rationale for precluding, or implying a presumption against, uses of submerged lands that fulfill a legitimate public purpose and that provide a greater public benefit.³ Further, since its fundamental provisions have already been largely codified within Chapter 91, it is far from clear how the Doctrine could now also be the primary justification of a comprehensive new statutory regime. The Task Force should accordingly revise and clarify its references to the Massachusetts Public Trust Doctrine to focus upon its central theme of assuring “greater public benefit than public detriment to the rights of the public” in the affected submerged lands. More wide-ranging proposals may well be appropriate, but must look elsewhere for justification.

IV. Comments on Specific Task Force Recommendations.

- **Draft Principles.**

Cape Wind agrees with many of the Draft Principles set forth by the Task Force. The problem, however, is that many of the Draft Principles set forth inherently conflicting propositions or are so general as to provide little practical guidance. In particular, the wide ranging principles are laid out without any recognition of relative importance or priority and without any reference to existing environmental policies and commitments of the Commonwealth. As set forth in the comments of Robert Russell, the list of principles is so general that it is “quite capable of supporting a variety of irreconcilable viewpoints and policies.” As noted in Section II above, we would thus urge the Task Force to rethink its statement of Principles after reviewing the relevant portions of the Pew Oceans Commission Report, including, most notably, its identification of the “major threats” to the ocean environment. More specifically, the Task Force should also recognize the urgency that has been placed upon climate change and renewable energy issues in existing Commonwealth, regional and Federal policies affecting the coastal zone, and make response to such issues the highest priority principle.

³ It is also well recognized that the Public Trust Doctrine has developed almost exclusively as a matter of state law, such that comments referring to the differing coastal laws of other states do not reflect upon the import of the Massachusetts Public Trust Doctrine. See, e.g., Shively v. Bolby, 152 U.S. 1, 26 (1894) (“The forgoing summary of [public trust] laws of the original States shows that there is no universal or uniform law on this subject, but that each State has dealt with the lands under tide waters within its borders according to its own views of justice and policy.... Great caution, therefore, is necessary in applying precedents in one State to cases arising in another.” Emphasis added.) Thus, the rulings of the SJC alone are dispositive as to the meaning and extent of the Massachusetts Public Trust Doctrine.

- **Recommendation #1: New and Comprehensive Ocean Resource Management Act.**

Cape Wind believes that it is premature to endorse the concept of a new and comprehensive Ocean Resource Management Act. Such an act would, while preserving all existing regulatory authority, provide for “Ocean Resource Management Plans” imposing additional “compulsory guidance” and “use standards.” It would also establish “alternative management scenarios” to “assign responsibilities for implementation of plan elements” and “articulate the mechanisms through which the plan will be implemented.” The Draft Recommendations do not yet specify the state’s organizational/decision-making structure under the Act, but the administrative “lead role” could be assigned to the Secretary of Environmental Affairs, a “new Inter-Secretariat Council” or an unidentified “new appointed regulatory board.” Although the Report gives no estimate of the additional costs of establishing new regulatory entities and administering the additional regulation of the new Act, it does state that there would be “requirements that certain agency regulatory and budgetary actions be consistent with the Ocean Resource Management Plans.”

Cape Wind does not feel that this recommendation has been sufficiently defined or justified to be recommended at this time. In this regard, we concur with the following comments of the Massachusetts Bays Program:

We are concerned that the Task Force’s recommendations give the appearance that existing authorities have been dismissed as being inadequate. Having worked extensively with the Ocean Sanctuaries Act and Chapter 91 and their associated regulations, we believe that they can provide a good framework for the Task Force goals. We also believe that the Task Force should carefully consider the value of maintaining the diversity of agency involvement for the planning, adoption and enforcement of Ocean Management Plans.

Cape Wind concurs that there has not yet been the requisite showing that the agencies now charged with implementing various aspects of the Commonwealth’s coastal zone policies are not doing, or cannot do, an effective and coordinated job under the current law. Further, although the Task Force also cites to the Massachusetts Public Trust Doctrine as another justification for a new and comprehensive act, the Doctrine has already been largely codified into existing law, and is thus not a proper basis for additional proposals that go well beyond the established limitations of the Doctrine, as defined by the courts of Massachusetts. In sum, there does not seem to be a showing of a substantive policy need that would justify a new and comprehensive Act, with the associated costs and burdens of an additional regulatory bureaucracy.

- **Recommendation #2: Streamlining State Planning and Regulatory Review.**

Cape Wind supports the recommendation that the Commonwealth seek to “streamline the state planning of regulatory review processes that exist under current law,” and to avoid duplicative actions that lead to unneeded delays and regulatory burdens, thereby enhancing both “accountability and efficiency.” What remains unclear, however, is how this Recommendation #2 could be reconciled with the foregoing Recommendation #1. As discussed in the prior section, Recommendation #1 “would retain and strengthen existing environmental protections,” and also introduce new and additional regulatory requirements, including “compulsory guidances” and “use standards,” all to be administered by a still undetermined, and perhaps additional new regulatory entity. Thus, “streamlining” is an entirely worthwhile goal, but one which is difficult to reconcile with the additional regulation and bureaucracy proposed under Recommendation #1.

- **Recommendation #3: Updating of CZM Program Policies.**

Cape Wind concurs that the CZM office should continue to periodically review the Commonwealth’s enforceable CZM program policies for updating, as appropriate, consistent with the Commonwealth’s overall substantive policy objectives. Cape Wind does note, however, that the CZM plan was recently updated in 2002. Consistent with our comments above, we believe that any updating of the CZM Plan should endeavor to be consistent with the existing environmental policies and commitments of the Commonwealth, and great care should be taken not to undercut or conflict with such provisions. In particular, the CZM should consider, in its next update of the Plan, provisions that would be more clearly consistent with Commonwealth’s most recent climate change policies and commitments, as reflected in the Regional Climate Change Action Plan. More specifically, CZM should consider more clearly articulating its support for renewable energy applications in the coastal zone, as consistent with the provisions of the Climate Change Action Plan, including its Action Item 5 (“The Reduction of Greenhouse Gases from the Electricity Sector”), which calls for a 20 percent reduction in electricity-related CO₂ emissions through, among other things, “new renewable energy sources including solar, wind and bioenergy.” Such revisions and clarifications to the CZM Plan would likely be particularly acceptable to the Secretary of Commerce, in light of the strong Federal recognition of urgency as to climate change issues, particularly those affecting the coastal zone.

- **Recommendation #4: Revision of Ocean Sanctuary Act (OSA) and Regulations.**

The Task Force report in its current form provides little explanation or rationale for why any change to the OSA or the regulations thereunder would be appropriate. The Report simply states that the OSA was drafted in the 1970’s and that the Act and its regulations “have generated questions” with regard to issues of compliance. The nature and scope of such questions, however, is not apparent from the text of the current draft, nor is the perceived rationale for “updating” the regulations in the absence of legislative revision to the statutory

mission of the OSA. Accordingly, the Task Force should either provide such a rationale or delete this recommendation.

- **Recommendation #5: Revised Fees Under Chapter 91.**

Recommendation #5 seems to be somewhat internally inconsistent; it states that current fees charged under Chapter 91 should be “adjusted (i.e., increased or decreased,” yet it also states that current fees “are artificially low,” an implication that all fees would be increased. Also questionable is the statement that “Chapter 91 fees should develop ways to further protect water dependent uses.” Such a proposition does not seem to be in any way supported by the legislative provisions of Chapter 91, which provide somewhat different review standards for water dependent and non-water dependent uses, but do not appear to suggest any protective preferences or distinctions as to fees or compensation. Indeed, if the intent of Recommendation #5 is to move towards fees based upon “economic value,” water-dependency would not seem to be a relevant factor. To the extent that changes in fee policies are proposed, the Task Force should also be mindful of the restrictions imposed by the Commerce Clause and Import Clause of the United States Constitution upon the fees that may be imposed by a state upon offshore transmission or transportation facilities utilized in the furtherance of interstate commerce.⁴

- **Recommendation #6: Standards for Presentation of Visual and Aesthetic Impact.**

The establishment of reasonable consistent standards for analysis of visual and aesthetic impacts seems to be a worthy objective. At the same time, the Report appropriately acknowledges that “visual and aesthetic impacts are inherently subjective” such that a fair and accurate presentation of aesthetic impact will still leave the need to make an essentially subjective policy determination, when aesthetics are balanced with all other relevant public interest factors and policies. Cape Wind suggests in particular that standards for the analysis of visual and aesthetic impacts incorporate environmental justice principles, as noted above.

- **Recommendation #7: Improved Agency Coordination.**

Cape Wind concurs with the recommendation that continuing efforts be made to facilitate greater inter-jurisdictional coordination and cooperation, so as to avoid any potential or unnecessary delays, overlaps or conflicts. The current ongoing review of the Cape Wind project, including the portions of submerged cable within the jurisdiction of the Commonwealth, is an excellent example of effective state and federal agency cooperations, the single and coordinated environmental review process conducted in a manner that satisfies both the requirements of the National Environmental Policies Act and the Massachusetts Energy Policies Act.

⁴ See, Western Oil and Gas Assoc. v. Cory, 762 F.2d 1340, 1345 (9th Cir. 1984), aff’d 83 L.Ed.2d 25 (California’s volumetric “rental” charges for submerged land occupied by transmission facilities used in interstate commerce were held to be invalid as “a disguised revenue raising measure” and “form of tribute” that was disproportionate to the benefits conferred by the State, in violation of both the Commerce Clause and the Import Clause of the United States Constitution.)

- **Recommendation #8: Public Notification Requirements.**

Cape Wind concurs with the recommendation that steps be taken to assure adequate notice to the public and ample opportunity for public comment. Such recommendations should, however, also be applied to the activities of the Task Force itself. As reflected in numerous comments to date, the Task Force effort has already engendered substantial concern by releasing its Preliminary Recommendations only two business days prior to the public hearing. These concerns have only been exacerbated by the Task Force's decision to undertake substantive policy discussions and revisions, as well as release additional documents, during the pendency of the written comment period. In order to avoid the appearance of a closed process with a predetermined outcome, the Task Force should take great care to avoid similar events in the future. In particular, to the extent that any additional documents are released, adequate time for public consumption and consideration should be allowed in the establishment of dates for further written comments.

- **Recommendation #9: Administrative Ability to Declare Sanctuary Zones.**

The recommendation that the "the Commonwealth should ensure that the environmental agencies have statutory authority to designate and protect areas" has not been justified by the rationale set forth to date. The essence of this recommendation seems to be a shift of the traditionally legislative function of declaring sanctuary zones to the executive branch, acting through any of its environmental agencies. We think that should be an unwise shift of legislative power. In the past, the Massachusetts legislature has acted effectively when a compelling case has been made as to the need for designated sanctuary zones within the coastal waters, as evidenced by the Ocean Sanctuaries Act and the amendments thereto. Giving the power to declare sanctuaries to every environmental agency would also create the possibility of balkanized and conflicting prohibitions. For example, the conduct of a currently allowed activity (such as commercial fishing) in any particular area could be theoretically vetoed by any of the multiple agencies with some aspect of regulatory jurisdiction. Complications could also result when activities actively supported by one environmental agency could be vetoed by a sanctuary declaration of another agency. For these very reasons, the power to declare prohibitive sanctuary zones is properly left exclusively within the power of the Legislature.

- **Recommendations #10-12: Enhanced Data Trend Analysis.**

Cape Wind is not in a position to offer substantial comment on these data-gathering and analytical recommendations. While Cape Wind recognizes the value of standardization and general availability of available data, these recommendations seem to represent a very substantial new regulatory undertaking, with correspondingly large requirements of administrative personnel and budgetary funding. As an initial matter, it would seem important to provide some sort of analysis of the additional resources and expenses that would be required to satisfy these recommendations. Ultimately, the wisdom of these recommendations should be resolved through the normal appropriations process.

- **Recommendations #14-15: Use Characterization Data and Analysis.**

Cape Wind is similarly not in a position to offer detailed comments on these recommendations. Again, however, these efforts seem to require a very substantial dedication of administrative personnel and budgetary resources, an estimation of which should be included in any revised draft of the Task Force Report. Again, the ultimate decision as to whether the associated benefits are justified should be determined in the normal course of the appropriations process.

V. The Task Force Should Minimize Unnecessary Commercial Disruption.

The Task Force should be concerned that, by proposing to comprehensively rework a statutory and regulatory framework that has been established over centuries, it could inadvertently introduce a measure of financial uncertainty that could negatively impact the progress of all activities in or affecting the coastal zone. In this respect, Cape Wind cites the cautionary words of Federalist Paper 62:

[G]reat injury results from an unstable government. The want of confidence in the public councils damps every useful undertaking, the success and profit of which may depend on a continuance of existing arrangements. What prudent merchant will hazard his fortunes in any new branch of commerce when he knows not but that his plans may be rendered unlawful before they can be executed? What farmer or manufacturer will lay himself out for the encouragement given to any particular cultivation or establishment, when he can have no assurance that his preparatory labors and advances will not render him a victim to an inconstant government? In a word, no great improvement or laudable enterprise can go forward which requires the auspices of a steady system of national policy.

Federalist Paper 62. In this regard, the proposed Draft Principles and Policy Recommendations could affect not just energy projects, but all aspects of coastal commerce, including the recreational boating industry, commercial fishing, waterfront property ownership, commercial real estate development, and the financial lending community. Cape Wind urges the Task Force to use great care before dismissing the present legislative and regulatory system. In accordance with our recommendation in Section II above, the Task Force should focus first on providing a clear and detailed description of any substantive weaknesses or gaps perceived within the present system. The Task Force should further avoid an open-ended period of commercial uncertainty by clarifying that its recommendations would be prospective in nature and not affect projects already under regulatory review.

Dr. Susan F. Tierney, Chair
January 22, 2004
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We thank you for this opportunity to offer initial comments and look forward to further involvement.

Very truly yours,

A handwritten signature in blue ink that reads "Dennis J. Duffy". The signature is written in a cursive style with a large, stylized "D" and "F".

Dennis J. Duffy
Vice President of Regulatory Affairs