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

Re: Ocean Resources Management Act
Working Draft of Recommendations dated 1/27/04

I have read the working draft of the regulations. [As someone active in the marine construction industry], I have the following comments:

#1: Comprehensive Act

The stated pragmatic goal of the recommendations is to keep fisheries management "independent under the jurisdiction of the Division of Marine Fisheries". However, how can you develop a comprehensive "Ocean Resource Management Plan" if you don't include fisheries management, especially in the context of a statute which seeks to give the Secretary of the EOEA the "statutory authority to designate and protect" certain Marine Protected Areas? The recommendation states that fisheries managers and industry representatives will have an "integral role". What does that mean? Who governs in a dispute?

The justification for the Comprehensive Act is weak. We're told that "recent proposals to construct energy and telecommunications infrastructure and other projects" in state waters have revealed "gaps, overlaps and inconsistencies". By requiring an Ocean Management Plan, the Commonwealth will adopt a "proactive approach to managing ocean resources", rather than the current approach of "reacting to proposed projects on a first-come first-served basis".

- What exactly is the "gap"? If Task Force can't answer, the reference should be removed.

- This Act is directed at Cape Wind, which is located in federal waters, except for a portion of the submerged transmission bale in state waters. The only projects

proposed for Massachusetts waters are cable projects, which are not offensive and have never been the source of much controversy until Cape Wind. Fishing is regulated by DMF. Energy facilities are permitted by the Department of Telecommunications and Energy, and in certain cases, by the Energy Facilities Siting Board. Pipelines and LNG facilities are regulated by FERC. This Act will not affect the portion of Cape Wind located in federal waters. The only thing this act will affect will be Cape Wind's cable, and that's not a sufficient justification for a Comprehensive Ocean Management Act.

- Further, what's wrong with being reactive? According to the Secretary, there is no shortage of projects. Our Commonwealth operates by a system where parties propose projects, and the permitting authorities approve or reject the projects based on each authority's statute and regulations. If the projects use public facilities or lands, the authorities have additional rights to license development. Does the Task Force intend to replace this system with centralized planning, so that the Commonwealth must act before a project is proposed? Should the Commonwealth try to develop investment ideas?

Cape Wind was conceived, funded and executed without any public assistance. The project is under review by seventeen state and federal agencies, most of which have the authority to accept or reject portions of the proposal. If future projects have to wait until the Commonwealth conceives of an idea, develops the locations, and licenses the applicants, will you have a better result, or will you just stifle innovation and creativity? Is that the Task Force's recommendation for responding to issues such as global warming and renewable power? Do you really think the pubic should invest its capital in development?

#2: Coordination of Mitigation:

This recommendation says that the Commonwealth should use the existing MEPA process to allow the Secretary to determine fees for both occupation of public lands and mitigation of environmental impacts in a "one-stop" shop. The "enhanced coordination" could "benefit the permitting of smaller projects" which are not the subject of MEPA. Basically, the EOEA want to take over mitigation and compensation negotiations.

I'm not sure how this recommendation fits with #5 on Chapter 91 fees, but presumably it's designed to accomplish the same goal of raising revenue, only with a broader range of targets and a usurpation of more authority. In effect, the EOEA wants to be a "Siting Board" for coastal projects. However, as a practical matter, absent a "Comprehensive Act" each municipal, county, regional and state agency will still retain its own statutory authority to require mitigation fees and compensation as part of its individual permitting process. I can't believe that each agency will surrender this authority, which means that this recommendation just adds one more layer of uncertainty to the development process. After a project gets all of its local and state permits, you'll have to go back to the EOEA for a new determination of the "compensation to the Commonwealth (as trustee of the public trust for the occupation or use of public trust resources, and the mitigation for

environmental impacts associates with such use or occupation". Further, the recommendation extends this requirement to small projects which are not the subject of MEPA. Is that what the Task Force recommends?

#3: Offshore Resources Coordination

Who can argue with a recommendation to "promote federal/regional/state cooperation, ecosystem management, and consistency among activities that affect the state's coastal resources"? Note here the explicit reference to the "development of a federal/state coordinated management plan for Nantucket Sound" (emphasis added) as a random example of what is intended in this section.

How does this proposal differ from CZM "consistency review"? Further, the Task Force should understand that cooperation and memorandums of understanding work both ways at boundaries. Will other states or the federal government have the right to approve Massachusetts' use of its resources? Should Rhode Island be able to prevent thermal discharges into Mount Hope Bay? Be careful what you wish for.

#5: Fee Structure

This recommendation increases a new class of "Chapter 91" fees based on "the economic value of public trust lands" and the impact of the regulated activities "on the public's ocean resources", but then excludes projects on filled tidelands and projects along the immediate waterfront from the new fees. What's left? The only private project which will be subject to these new fees will be the Cape Wind project, and perhaps the Nantucket cable. These fees will be used to "perform the studies, evaluations, assessments and plans" for the Ocean Management Plan.

Can a recommendation be directed more clearly at Cape Wind? The statement that projects along the waterfront are "typically" required to provide constructed public facilities and related subsidies in lieu of 'market' rent" is not true. Some large projects have these requirements, but not the many projects located on both private and public lands, such as harbors, marinas and piers throughout the Commonwealth.

Before accepting the recommendation, the Task Force should consider the implications:

- It's difficult enough to justify development of a new ocean project. If the Commonwealth enacts a new tax based on an unknown economic value, how will any new projects be developed and financed? How will public projects be funded, unless they are excluded like harbor projects?

- Is this a realistic way to fund the considerable costs of developing a Plan? If projects are not developed, who will pay the fees? Will the costs be part of the Commonwealth's budget?

- As a practical matter, what's the economic value of the flowed tidelands disturbed by a cable or a pipeline? What's the value of a road? Chapter 91 solves the problem by establishing a fixed fee based on the area used. At least a developer can know the cost and calculate it into the project. Does the Commonwealth expect to tax based on the value of a project, or the value of the item being carried, or the value of the access provided?

- The United States Supreme Court precedent is strongly against charging fees for interstate transmission projects that are "disguised revenue raisers".

#6: Common Standards for Subjective Impacts

The recommendation proposes "uniform sets of methods and standards" to assess "visual, cultural and aesthetic" impacts. Again, several agencies have developed standards for different purposes because they have separate concerns and statutory mandates. As we have discovered with Cape Wind, one size does not fit and can not fit all projects and all statutes. Should on-shore projects be subject to the same impact on the seashore as off-shore projects? Should a house be built within the viewshed of a beach?

The existing system seems to be working. Let each agency have its own standards.

#7: Designation of Protected Areas

We come back to the same point as the first recommendation: How do you reconcile the Secretary's authority to designate certain protected areas, without giving the Secretary the authority to "supercede or weaken any existing authority to manage or protect the marine species and habitats or other ocean-based natural of cultural resources"? The present system of overlapping jurisdictions may not be perfect, but does the Task Force want to create a "central planning" system? Why not leave this power with the legislature so that the designation and delisting of Marine Protected Areas won't change with each administration?

#14: Climate Change

We appreciate the reference to the importance of climate change in any comprehensive ocean management plan. If we don't do everything we can to arrest global warming, there will be little ocean left to manage. However, we are concerned with the designation of authority to the Secretary to "designate certain areas of the state's ocean resources as protected for energy development and use":

- The trend of the Commonwealth has been to deregulate the production of energy, shifting the burden of investment to private capital. The viability of a renewable energy site depends on multiple variables (technical, seismic, locational and temporal), well beyond the grasp of agency personnel. Private parties risking their own capital on development should propose sites, not the Secretary.

- The recommendation should be that in determining protected areas, the Secretary recognize the importance of renewable energy, and allow that activity to continue where the protected area has significant wind or tidal resources.

Very truly yours,
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