Center for Coastal Studies

December 29, 2003

To: Susan Tierney, Chair, Massachusetts Ocean Management Task Force

From: Peter Borrelli, Executive Director

Re: Draft Principles and Preliminary Recommendations

As you have heard from many sources, the Commonwealth does not have a comprehensive ocean policy. Nor is it starting from scratch. This is, after all, the Bay State and over the past three decades the state has developed a broad array of environmental policies and programs that apply to ocean resources directly or indirectly. Your preliminary gap analysis has identified some shortcomings, while also pointing to ways of improving what is already in place.

Starting Point

At the recent public meeting in Yarmouth, I remarked that I thought the task force was taking its charge too literally by limiting its investigation to, as you wrote in your cover memo to the draft recommendations, "the oceans of the Commonwealth." At the Yarmouth hearing, Jim Hunt elaborated, stating that the task force's charge was limited to state waters.

One of the basic principles of any ocean study is that ecosystem boundaries and political boundaries are not one and the same. Thus far, we have made credible progress dividing the ocean for reasons of economic and national security. But management of the ocean itself, even of the waters closest to our shores, is relatively primitive. In draft principle #3 (Respect the Interdependence of Ecosystems), the task force acknowledges that "…state ocean management policies …should be coordinated with other jurisdictions." But the findings and recommendations that follow examine this proposed coordination only in terms of what the state should do.

Given the Commonwealth's extensive and complex coastline, it is imperative that you consider, at the very least, the interface with federal waters, as well as the various federal management programs that affect state waters and coastal areas. In the long run, the Commonwealth cannot have a comprehensive management regime that does not dovetail with that of the federal government. More to the immediate point, I believe you will find that if you pursue this line of investigation, you will find a number of examples of federal/state inconsistency. This year's oil spill in Buzzards Bay highlighted a number of such issues, not to mention the tragic consequences of not having a comprehensive and coordinated strategy for ocean protection. Such inconsistencies should be enumerated.

Nantucket Sound

Earlier this year the Center for Coastal Studies issued a report that reviewed the uses and natural resources of Nantucket Sound, as well as the Commonwealth's history since the 1970s to protect it. Most notably in 1981, with input from all of the departments that then comprised EOEA, the secretary of environmental affairs and attorney general nominated Nantucket Sound as a national marine sanctuary. This proposal, which I believe deserves serious consideration and direct response from the current task force, addressed one of the most egregious examples of poor ocean management; namely, the arbitrary jurisdictional division of a body of water. The actual configuration of federal waters, sometimes referred to as the "hole in the doughnut," more closely and comically resembles a tropical

fish or pig. Symbolically, it represents a lot of what is wrong with ocean management at both the federal and state level.

While some task force members may be understandably reluctant to explore this issue because of the current debate over wind energy development, it is precisely because no comprehensive ocean management policy or program exists that the controversy must be taken seriously by the task force. The issue at this point is not whether wind energy development is compatible with Nantucket Sound, but whether the Commonwealth has any notion whatsoever of how to plan and to protect its marine resources, while pursuing its goals relative to clean energy. In my judgment there is a serious policy vacuum that requires your immediate attention and firm action by the administration.

Draft Principles

I find draft Principles # 2 through # 6 well stated and a solid foundation upon which to build. Principle #1 (Protect the Public Trust), on the other hand, clearly contradicts Principles # 3 (Value Biodiversity) and # 4 (Foster Sustainable Use). I believe it is also misinterprets the public trust doctrine as it is currently applied to natural resource management in the United States.

The misinterpretation, I believe, lies in the second sentence, which reads: "Management of ocean resources should *maximize* societal benefits while *minimizing* harm to the public's right to use and enjoy the ocean." (Emphasis added.) I suspect that what the author(s) of this sentence had in mind was the concept of balancing use and protection, which would be consistent in most instances with Principles # 2 through # 6. I will return to this momentarily, but I believe strongly that the words 'maximize' and 'minimizing' should be deleted, as their everyday meaning is quite clear. How is it possible to maximize use and minimize harm? And if balance is what you are striving for, is this truly what the public trust doctrine is all about?

The concepts of maximizing and minimizing or of balancing use and protection topple when you factor in government's responsibility to protect the rights of future generations. Unless one marginalizes the rights and needs of future generations, resources held in public trust must be protected with even greater care, not only because of basic uncertainties about the future but because of the limitations of our knowledge. The task force apparently recognizes this in part in Principle # 2 when it states that "A diversity of marine species also provides important societal benefits, some yet to be discovered." Given how little we know about the ocean, compared to terrestrial environments, a policy of maximizing known societal benefits today could easily erode future societal benefits.

I believe that the public trust can only be protected if the underlying management principle is one of precaution. But even the precautionary principle may be too narrow a construct.

A review of case law around the nation finds that the public's use of public trust resources can include what one might call "non-use." For example, as early as 1971, the California Supreme Court (Marks v. Whitney) expanded the public trust doctrine to include protection of public trust resources in their natural state. In 1993 the California State Lands Commission similarly found that "…the public has the right to use water resources for navigation, fisheries, commerce, environmental preservation and recreational and as ecological units for scientific study, as open space, as environments which provide food and habitats for birds and marine life and as environments which favorably affect the scenery and climate of the area."

Recommendation #1

While there is always merit in streamlining existing statutes and programs, I believe that the task force is quite correct in concluding that the extent of the Commonwealth's ocean resources is too vast and the issues too complex and challenging to solely rely on streamlining and reorganization. The proposed

Ocean Resource Management Act makes a great deal of sense and parallels initiatives in a number of other states, Canadian provinces, and European countries.
As you promote this idea publicly, it may be worth noting that the state and federal government have been drawing lines on nautical charts for sometime for both single and multi-purposes. What is missing is an overall, comprehensive planning process.

Planning in the absence of coherent and site-specific goals and objectives can be a frustrating and fruitless process. The task force is correct, therefore, in recognizing the need to first define specific planning areas and secondly to define the goals and objectives for those areas. In many instances the goals and objectives may be obvious or already exist or exist de facto. For example, the combination of industrial zones, shipping lanes, recreational islands, and public beaches that comprise Boston Harbor just about covers fills in the map. The issue in this area, therefore, may not be the use zones but the most effective means of governing; especially as some of the uses are intrinsically incompatible. By way of contrast, the Atlantic shoreline of Cape Cod is relatively simple to plan, as the predominant uses: natural resource protection, recreation, boating, and fishing are not only compatible with one another but about the only uses that protect the resource itself. To a great extent this is dictated by the federal government's designation of the Cape Cod National Seashore and reflected in the state's Ocean Sanctuary Act.

With respect to the Ocean Sanctuary Act, it should be obvious to the task force that the full potential of this act has not been realized. The agencies charged with its implementation have still not developed aesthetic criteria called for in the act. And no administration to date has effectively used it as a declaration of state policy in dealing with a number of development projects that have arguably undermined the legislative intent of the act. Incidentally, if it has not already done so, the task force would be well advised to confer with some of its original authors. Former senator Jack Aylmer, for example, is still active and living on Cape Cod.

Recommendation #2
To some extent the Commonwealth finds itself in much the same position as the federal government in the early 1970s, when an independent commission concluded that nobody was "in charge" of the oceans. That finding led to the creation of NOAA and of high ranking administrators within the federal bureaucracy. Thirty years later another national commission seems poised to recommend that decision making be elevated even higher within the federal bureaucracy.

I agree that serious consideration should be given to appointing a high ranking official or board to deal with matters of planning and policy. Given the current "super-agency" structure of Massachusetts environmental governance, enhancing the role of the EOEA secretary seems a logical option. But it could be argued that EOEA is already too big and terrestrially oriented. The current thinking shared by the two national ocean commissions and many others, for example, is that protection of ocean resources is not as high a national priority as it ought to be and that the root cause of this may be its subordination within NOAA, which is not a cabinet-level department, but an administration within the Department of Commerce.

Indeed, the harder one examines the current structure of state government, the more one can make a case for a greater degree of departmentalization instead of consolidation. One important reason for this is that good resource management ultimately depends more on leadership than bureaucratic structure. Our ocean resources need an advocate within government who can hold his or her own with other department heads and who has the ear of the governor and credibility with the legislature.

Recommendation #3
Assuming passage of an Ocean Resource Management Act, the state's CZM program should be incorporated into the new department or agency. In the meantime, its role should be enhanced wherever possible, beginning with increased funding and expansion of its planning capabilities.

Considerable authority already exists within the CZM program for developing compatibility determinations. By its own admission CZM in recent years has been largely driven by the state permitting process and has not been a pro-active planning and policy making agency. Once again, one must examine the issues of priority and leadership.

Recommendation #4
The general thrust of this recommendation seems to be to undermine the broad conservation purpose of the Ocean Sanctuaries Act, the administration of which has been largely neglected. If there is concern within the "regulated community" or "among agencies with responsibilities for reviewing projects in existing sanctuaries" why not create an agency to manage the sanctuaries? A memorandum of understanding (as included in Recommendation #4) developed by the departments of Environmental Protection, Conservation and Recreation, and Environmental Policy might serve to have those these three agencies on "the same page," but how does this enhance the management of the sanctuaries? It might be helpful if the task force were to address the issue of the future status of the sanctuaries. If in your judgment the sanctuaries were only created to prohibit certain activities, then it would be a simple matter of incorporating those prohibitions into various state policies and regulations. However, the legislative intent of the 1970s may have been much broader. Indeed, the very use of the term "sanctuary" indicates that the Legislature was designating these areas as "special places" or to use the term that later came into use, "areas of critical environmental concern."

The task force recommends that "…the OSA regulations should be updated relating to the Public Necessity and Convenience Test to provide greater clarity to the regulated community…" No doubt this would be helpful to some, but as the ocean resources are public trust resources, isn't the first priority to development management plans for the oceans sanctuaries?

Recommendation #6
The task force in Recommendation #6 calls for the development of methodologies and standards for analysis and where possible mitigation of visual, cultural and aesthetic impacts. This is entirely within the scope of the Ocean Sanctuaries Act and the general planning authority of CZM. What is needed is direction and funding.

Recommendation #9
Much of what the task force has recommended as flowing from passage of an Ocean Resource Management Act can indeed be carried out by existing environmental agencies, as noted in Recommendation #9. Designating areas for special levels of protection should be one of the highest priorities of all state environmental agencies. The Division of Marine Fisheries has in fact taken this part of its mandate seriously in the case of commercial fisheries and marine mammals, although more could be done. But once again, priority, leadership, staffing, and funding are needed. A fully functioning Ocean Sanctuaries program working in concert with other environmental agencies might be a more effective way to proceed.

Recommendations 10-15
Each of these recommendations clearly and accurately defines the need for long-term monitoring, resource inventorying, and information dissemination as necessary components of an effective program of ocean management. The funding requirements of such programs must be taken seriously by both the administrative and legislative branches of state government. And should a separate agency or

department be created for the purpose of managing the state's ocean resources, research and monitoring should be one of its major objectives. This might best be accomplished by the creation of a separate marine research institute within the state management agency. Given the number of public and private marine research institutions already in the state, consideration should also be given to a research grant program administered by the newly created agency.