COMMENTS OF
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on the

Draft Principles and Preliminary Recommendations

of the

Massachusetts Ocean Management Task Force

February 12, 2004

Boston, Massachusetts

TO: **Susan Tierney**
Chair, Massachusetts Ocean Management Task Force

FROM: **Patrick J. Hester**
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RE: **Comments on Draft Principles and Preliminary Recommendations (as revised 1/17/04)**

DATE: **February 12, 2004**

Duke Energy Gas Transmission ("Duke Energy") submits these comments to supplement the testimony I presented at a meeting of a Task Force subcommittee on October 2, 2003. A copy of that testimony is attached.

Thank you for providing this opportunity to offer our experience and views to your work.

Duke Energy's Perspective Based on the HubLine Project

Duke Energy comes to these issues from the perspective of recently completing the development, permitting and construction of the Algonquin HubLine Project. The HubLine Project is a 30-mile 30" inch diameter, high-pressure natural gas pipeline that was buried across Massachusetts Bay from Beverly to Weymouth. The route crosses a portion of the South Essex Ocean Sanctuary and lies entirely within Massachusetts waters.

The principal permitting requirements for the HubLine Project included:

- Several rounds of environmental impact analyses under MEPA and NEPA;
- A certificate of public convenience and necessity from the Federal Energy Regulatory Commission ("FERC");
- A section 404 permit from the U.S. Army Corps of Engineers;
- A waterways license and a Section 401 water quality certificate from the Mass. Department of Environmental Protection ("MDEP");
- Consideration by state agencies of the requirements of the Ocean Sanctuaries Act;
- Orders of conditions under the Mass. Wetlands Protection Act from eleven municipal conservation commissions; and
- A consistency determination by the Mass. Office of Coastal Zone Management ("MCZM").

Over a period of nearly six years, the HubLine Project undertook a comprehensive and detailed process that included the following elements: planning; data collection; preliminary outreach to the general public, stakeholder groups, agencies and appointed and elected officials

at the federal, state, regional and municipal levels of government in order to optimize route selection and identify specific concerns; preparation of applications and public filings; public hearing and comment procedures; continued public outreach activities with the general public, stakeholders, officials and the media; permit finalization in the necessary sequence; establishment and maintenance of a Project website with real time information about the progress and impacts of the Project; and about 18 months of construction. Duke Energy's representatives participated in hundreds of face-to-face meetings with regulators, public officials and other stakeholders during that outreach and permitting process. The HubLine Project also implemented a communications plan that ensured that timely information was available on a daily basis throughout the construction process.

The overall public support for the HubLine Project arose from many factors, including the consensus that it serves an important and worthwhile public purpose – greatly increasing the capacity, reliability and flexibility of New England's natural gas transmission infrastructure by opening a high capacity route for supplies from the Canadian Maritimes. These increased supplies already are supplementing traditional natural gas supplies from the Gulf of Mexico and will contribute to a significant reduction in air emissions when compared to other fuel sources in New England.

In fact, since the HubLine pipeline went into service this past fall, it has already brought a significant improvements to the reliability and operational flexibility of the Northeast pipeline grid. During the extreme temperatures this past January, the access to Canadian supplies at the east end of the Algonquin pipeline system were essential to providing the necessary supply and required pressures to ensure gas deliveries to natural gas customers.

An equally crucial factor in permitting the HubLine Project was the consensus that while the physical impacts of constructing the HubLine Project were significant, they were temporary and subject to appropriate mitigation. Duke Energy committed early on both to using the least impacting feasible construction techniques (e.g., horizontal directional drilling) and to providing mitigation as determined appropriate during the permitting process. The resulting mitigation package, summarized at p.9 in the attached testimony from October 2003, combined with the other permitting requirements to assure that the HubLine Project would not materially harm or threaten ocean resources.

Duke Energy believes these extensive efforts by its representatives and by the public agencies produced a project that easily passes any reasonable test of the public necessity and convenience. Evidently the regulatory agencies and the public concur, for the project was permitted and no permit was appealed by any interested person. Duke Energy is enormously appreciative and respectful of the hard work and careful consideration the HubLine Project received from federal, state and local elected and regulatory officials and interested stakeholders throughout the process.

So from Duke Energy's perspective, the existing regulatory system worked. To be sure, Duke Energy perceives room for improvements, as identified in my earlier testimony. But fundamentally, we approach the Draft Principles and Preliminary Recommendations from the view that the existing system could use adjustments, but does not warrant major overhaul. As

one of my former professors was fond of saying, "let's not throw the baby out with the bathwater."

General Comments

Duke Energy has reviewed the Draft Principles and Preliminary Recommendations in detail together with its permitting team which worked on the HubLine Project. We come away enormously impressed with the comprehensiveness, the thoughtfulness, and the far-seeing values represented by the Task Force's efforts to review and synthesize a complicated set of issues, particularly given the short time for developing the Draft Principles. However, having been "up close and personal" with the existing regulatory structure for the past six years, we differ with the Task Force in several areas.

Duke Energy's principal comments, including reservations about some elements of the Preliminary Recommendations, are:

1. The existing regulatory program needs modest improvements rather than a major overhaul.

Duke Energy believes the existing regulatory programs generally are adequate to address projects like the HubLine Project. While the plethora of overlapping programs generates some redundancies and inefficiencies and consumes more time and effort than most project developers would prefer, we do not perceive deficiencies in the capacity for appropriate public decision-makers to make the ultimate decisions about which projects should go forward and with what appropriate conditions.

We note that the Draft Principles and Preliminary Recommendations do not include any showing that the existing system is inadequate. Rather, there is a bare statement that "some gaps, overlaps and inconsistencies" exist, but none of those, certainly none of any great impact, are actually identified. Duke Energy certainly experienced some overlaps and inconsistencies in permitting the HubLine Project, but were able to work through those issues with the permitting agencies. We do not know of any major gaps that require new legislation or regulations. Again, fine-tuning and elimination of inefficiencies, redundancies and inconsistencies appear to us to be the more appropriate focus of future initiatives.

2. Detailed ocean planning is unwarranted and may hinder worthwhile progress.

The thrust of the Preliminary Recommendations is that the Commonwealth should undertake a comprehensive round of detailed planning for what uses should be allowed in which areas of the Commonwealth's marine waters. We do not believe the Task Force has clearly demonstrated the need for such an ambitious undertaking. Other than the Hibernia fiber optic cable, the HubLine Project, Cape Wind, and a handful of electric cable projects, there have not been and we do not foresee any great number of major off-shore projects facing the Commonwealth. Where the existing regulatory system provides ample tools for the Commonwealth to evaluate and approve, disapprove or condition projects within its jurisdiction,

we do not see the need for or benefit from the detailed planning exercise proposed by the Task Force.

Perhaps more importantly, we also are concerned that a set of new ocean management plans would tend to freeze into regulations the planners' momentary vision of what uses are appropriate, and would tend to hinder worthwhile endeavors that cannot be identified or even conceived now. The Task Force's proposal to review those "visions" periodically (i.e., 5-year cycles) only partially addresses the issue while adding another layer of uncertainty. We believe the existing, fairly general standards for public convenience and necessity, public benefit, and avoidance of adverse impact provide adequate tools for public decision-makers now and in the future to make the appropriate determinations on a case-by-case basis. As I stated in my testimony last October, "the important point is that neither statutes nor regulations can make provisions for everything that might or will come up in the future."

Also, we are not aware of successful examples of resource use planning, in the ocean or elsewhere, on the scale recommended here. Our observation is that broad-scale use planning produces such generalized results, which necessarily include sufficient opportunities for variances, that the plans often have little practical utility or impact.

3. The Draft Principles and Preliminary Recommendations Undervalue the Public Benefits from Infrastructure.

`The dominant theme of the Draft Principles and Preliminary Recommendations is that ocean resources and public access need much stronger protection against adverse impact from projects that need permitting, particularly infrastructure projects. The implication is that such projects pose a major threat, although there is no showing to that effect. In fact, declining ocean resource values principally have other causes (pollution from on-shore sources and, ironically, the adverse effects of water-dependent activities, e.g., pollution from vessels and over-fishing).

Duke Energy believes that the use of the Commonwealth's waterfront and ocean areas for appropriately located and conditioned infrastructure does not pose any significant threat to ocean resources now and will not in the future. Infrastructure projects like the HubLine Project are essential to the Commonwealth's future growth and prosperity; otherwise, the Commonwealth risks that the sources of capital for building necessary infrastructure will seek more receptive locations. Most important, infrastructure projects should not be presumed to be inconsistent with the public interest.

Indeed, historically, a chief purpose of Chapter 91 waterways licensing was to encourage the development of wharfs, piers, bridges and other infrastructure, whether public or private, so as to promote the overall economic and social development of those times. The transition from a maritime economy to a digital economy should not cause the Commonwealth to cease its encouragement of the use of ocean areas for necessary and appropriate infrastructure. Where, as with the HubLine Project, land-side alternatives either are infeasible or, on balance, would cause more significant adverse impacts, the Commonwealth should not impose disincentives against appropriately located and conditioned oceanside projects. Duke Energy strongly urges the Task

Force to recognize and take into much more careful consideration that useful infrastructure projects, not just ocean resources, also are imbued with the public interest.

Comments on Particular Recommendations

Recommendation #1 – Comprehensive Ocean Resources Management Act

Consistent with the first of the general comments provided above, Duke Energy does not perceive a need for comprehensive legislation. The existing regulatory structure is sufficiently powerful and flexible to deal with the foreseeable needs for public management of the Commonwealth's ocean resources. The Task Force has not clearly or convincingly demonstrated why comprehensive legislation is necessary.

If the Governor and the Secretary of the Executive Office of Environmental Affairs ("EOEA") conclude, however, that major changes to the existing regulatory scheme are necessary, we do not believe such changes should be implemented simply through modifications to existing regulations. Rather, any significant changes should receive consideration through the legislative process, where more general societal interests can be balanced against the values of protecting ocean resources. Noting the apparent undervaluation of the benefits of infrastructure development, Duke Energy is concerned that major changes achieved simply through regulatory revisions would tend to impose inappropriate new burdens without adequate consideration of more general social needs. Significant rebalancing of the impositions upon infrastructure development should occur only through the legislative process. In fact, the Task Force appears to have arrived at the same conclusion as noted in its "Implementation Plan" under Recommendation #1. Duke Energy looks forward to participating actively in that process.

Recommendation #1 also suggests legislation to impose new types of fees on infrastructure development in the ocean. These certainly warrant legislative consideration, particularly where there are significant constitutional questions. The suggestion of fees based on the economic value of an interstate project, for instance, likely would violate the Commerce Clause of the U.S. Constitution. See Western Oil & Gas Ass'n. v. Cory, 726 F.2d 1340 (9th Cir. 1983), aff'd, 471 U.S. 81 (1985). Further, imposing additional costs on infrastructure means imposing such costs upon the customers of regulated entities and ultimately upon consumers. Imposition of additional types of fees should occur only through the legislative process.

See also Duke Energy's comments on Recommendation #5, which also concerns licensing fees.

Recommendation #1 now incorporates portions of Recommendation #8 from the public draft the Task Force issued in December 2003, which concerned public participation procedures. Duke Energy believes that existing procedures such as MEPA, NEPA, and the public notice and comment procedures for the various permits and approvals, coupled with the really substantial informal communications any major project must undertake with regulators, public officials and affected stakeholder groups, already provide, and in fact encourage, ample opportunity for public participation. Duke Energy's experience with the HubLine Project did not suggest that

additional public participation would have been useful or meaningful. Our experience is that such efforts often reach the point of diminishing returns. While Duke Energy supports and welcomes robust public participation in decision-making about its projects, the Task Force has not shown that additional public participation procedures are necessary or appropriate.

Finally, another element of this recommendation is that the Secretary of EOEA should hold the principal responsibility for the Commonwealth to determine whether projects in ocean areas meet applicable standards of public interest and minimizing environmental impact. Generally, Duke Energy supports that approach, which largely tracks current law. Duke Energy must note, however, that in some circumstances even in state waters the Commonwealth's role is subordinate to federal decision-makers such as the FERC or the U.S. Coast Guard. The Draft Principles and Preliminary Recommendations do not account for the federal role, but any development of new legislation or policies in Massachusetts necessarily must take federal law and authority into account.

Recommendation #2 – Coordination of Mitigation

Based on our experience with the HubLine Project, Duke Energy certainly agrees that EOEA and its constituent agencies should continue to strive to coordinate and streamline their procedures. The Task Force should press for improved coordination, however, on all of the key issues, not just mitigation. As indicated in my earlier testimony, there are several different regulatory standards for evaluating whether a proposed project meets the public interest. The Secretary of EOEA should take a pro-active role in assuring that the different agencies within EOEA's jurisdiction work together to arrive at a common approach under each of those standards.

Such improvements are also unlikely to come from any new legislation or regulations. Large projects in the ocean almost always present a unique configuration of issues, stakeholder groups, and applicable regulatory programs, so invariably the review procedures will require a case-specific response by the affected decision-makers. As a direct consequence, the most important change to achieve coordination and streamlining is cultural change within the regulatory agencies, interest groups, and top-level leadership to assure that decisions are teed up properly and do not become subject to "analysis paralysis" or intra-government turf wars.

In addition, Duke Energy remains concerned that decision-makers who are chiefly charged with environmental protection may lack the institutional mechanisms or policy support for considering important social values and public benefits other than environmental protection. The undervaluing of the benefits of infrastructure projects in the Draft Principles and Preliminary Recommendations, as discussed above, is just the immediate example. While streamlining its permitting procedures for ocean-based projects, the Commonwealth must also take care to assure that the decision-makers are both enabled and required to provide adequate consideration to the full range of affected interests.

Recommendation #3 – Offshore Resources and federal/regional/state coordination

Duke Energy agrees that the Commonwealth should coordinate its activities with the other pertinent regulatory and planning agencies, and that MCZM's program policies warrant review and updating. Those efforts should occur on a continuing basis, however, and do not require any new legislation. Any new MCZM policies should maintain flexibility to allow appropriate balancing of resource protection and resource utilization as new types of uses are proposed, and should avoid locking in any momentary visions of what uses are appropriate to the exclusion of uses yet unforeseen.

Recommendation #4 – Ocean Sanctuary Act Revisions

Duke Energy supports revisions to the regulations under the Ocean Sanctuary Act. As indicated in the Draft Principles and Preliminary Recommendations, the existing regulations apparently were designed to prohibit activities, potentially including the HubLine Project, which are entirely appropriate if properly located and conditioned. The legislative history of the Ocean Sanctuaries Act does not support such stringent regulation, and the regulations should be rewritten to conform to the original intent of the legislation.

Recommendation #5 – Fee Structures

Duke Energy is fully prepared to shoulder fair licensing fees for the use of public resources, including placement of facilities below the ocean bottom, where such fees are calculated on the basis of fair market value. As indicated in the Draft Principles and Preliminary Recommendations, the existing licensing fees under Chapter 91 are based on rental concepts, consistent with basing fees on fair-market value. Review and adjustments to the Chapter 91 license fees may be appropriate at this time, and Duke Energy would not object so long as any revised fees remained based on rental or fair market values.

Duke Energy does not support, however, the imposition of new types of licensing fees based on the value of a project (as opposed to the value of the project's use of a resource), or based on the impacts of a project. First, fees based on project value are not fees, they are taxes. See Emerson College v. City of Boston, 391 Mass. 415 (1984). Projects such as the HubLine Project are separately subject to property taxation, and should not be subjected to a separate, redundant form of property taxation in the name of licensing fees.

Second, fees based on project impacts are extremely problematic. How would the positive social benefits of a project be counted, especially where the social benefits warranting a determination that a project has a public purpose presumably far outweigh any adverse impacts that would be used to calculate the fee? Further, the regulator's proper goal is to require project proponents to completely avoid or minimize any adverse impacts. Conflicting incentives could arise if regulators were expected to raise revenues, particularly revenues dedicated to the regulator's own agency programs, based on the adverse impacts of projects.

Finally, Duke Energy's experience is that the "potential environmental impacts" of a proposed project are easily exaggerated and often far exceed the actual environmental impacts of

a properly conditioned project. Duke Energy would have grave concerns over licensing fees that are established at the inception of a project. At that point the concerns over the potential environmental impacts of a project may be overstated, particularly because there is no basis for measuring the actual environmental impacts at that stage.

Recommendation #6 – Visual, cultural and aesthetic impacts

The Task Force proposes to recommend that regulators should develop common methodologies and standards for assessing the visual, cultural and aesthetic impacts of proposed projects in state waters. Duke Energy views this recommendation as establishing a worthy goal, but one which will be very difficult to fulfill. As discussed above, almost any significant project will generate a unique configuration of issues that will require a fairly unique set of impact analyses. The Task Force has not clearly shown that there are existing forms of impact analyses that would be useful to develop in advance of considering particular projects. We are concerned that substantial effort could be devoted to this effort, but it would produce only general criteria rather than specifically useful techniques.

Also, Duke Energy perceives a risk that elaborate analyses of potential impacts can lead to "analysis paralysis." It is easier to pose hard questions about potential impacts than to develop detailed answers. Regulatory agencies should be cautious before establishing expectations and procedures for elaborate impact analyses of multiple issues. Unrealistic goals will not be met which can lead to very substantial and disruptive stakeholder dissatisfaction.

Finally, Duke Energy is concerned that techniques for impact analyses sometimes can lend a patina of objectivity to what fundamentally are often subjective value judgments. Whether or not such new techniques are developed, the Task Force should recognize that public decision-makers ultimately can, should and must make their decisions based on a complex balancing of many legal, social, political, environmental and aesthetic value judgments. We elect our leaders, who appoint our public administrators and professional staff, and expect such administrators to apply their judgment and discretion within the confines of legal standards and procedures. In its final recommendations, the Task Force should expressly acknowledge this discretionary component of public decision-making, and not obscure it by recommendations implying that these difficult value judgments can be resolved through better analytic techniques.

Recommendation #7 – Increased State Authority to Protect Sensitive Areas

Duke Energy's experience with the HubLine Project suggests that existing authority and procedures, while not perfect, are sufficient. Through pre-application communications with stakeholder groups and regulators, the HubLine Project route was selected to avoid sensitive areas such as eelgrass beds and shellfish areas. This route was further refined during the permitting process to minimize impacts on sensitive resources, and conditions in the permits assured that impacts were minimized wherever sensitive resources were proximate to the construction process. Based on our experience, we do not see that additional designations are necessary or appropriate.

Duke Energy recognizes that the Commonwealth does not currently have authority to establish definitive "no touch" zones, even under the Ocean Sanctuary Act. We believe that approach is appropriate, because the existing permitting procedures provide ample authority for regulators to protect sensitive areas while also allowing appropriate uses in areas that are somewhat sensitive. Keeping that flexibility is not only important but is essential.

Recommendations #8 to #13 – Data Collection and Dissemination Efforts and Advisory Group of Marine Scientists

Duke Energy supports these recommendations. Indeed, funding for seafloor mapping efforts in the South Essex Ocean Sanctuary was among the projects funded by Duke Energy as mitigation for the temporary impacts from the HubLine Project. We agree that the Commonwealth should establish standard protocols for data collection and seek to consolidate the data in a readily accessible location.

With respect to characterization of the uses of ocean resources, however, the Task Force should caution against confusing actual uses and use levels with usage goals that stakeholder groups may wish to protect or promote even though they are not realistic. Otherwise, real benefits from actual projects may be lost to protect "uses" that are not very likely or significant.

Recommendation #14 – Climate Change

Duke Energy commends the Task Force for recognizing that the Commonwealth's ocean resources should be managed with attention to the most significant threat facing our current uses of the state's waters. That threat does not necessarily come from projects occurring in those waters; indeed, such projects as the HubLine Project are part of the solution to other environmental threats such as deteriorating air quality. Duke Energy does not believe, however, that managing the state's ocean resources to address the effects of climate change requires the Commonwealth to undertake comprehensive zoning within its ocean jurisdiction. Rather, it is sufficient for the Commonwealth to make far-sighted applications of its existing regulatory tools.

TESTIMONY OF

PATRICK J. HESTER

Vice President and General Counsel, Duke Energy Gas Transmission – East

Before the

MASSACHUSETTS

OCEAN MANAGEMENT TASK FORCE

October 2, 2003

Boston, Massachusetts

Members of the Committee:

Thank you for inviting me here today to discuss the permitting and construction of our Hubline natural gas pipeline project.

It's a bit daunting to come before you and talk about how the permitting processes went, when most of our regulators are *here* - but I've always felt that the public – private relationship in the permitting process is much more productive as a collaborative venture. So I view this as a great opportunity to talk frankly and honestly about what I think went well and what didn't.

I'd prefer to answer your questions rather than talk, but let me just give you a few quick insights from my side of the table.

First, let me say …overall things went well.

- **The project got permitted,**
- **no one has legally challenged any part of the permitting process,**
- **no material environmental damage has been observed or found,**
- **there are several important new environmental initiatives underway as a result of the project mitigation, *and***
- **we are on the verge of adding an enormously new and valuable component to our region's energy infrastructure.**

This was a big project – and a complicated one.

I know many of you have lived this project with us, but for those of you who have not, let me make a few explanations beyond what Arthur and Paul laid out for you.

Our region, and particularly New England, has been forced to rely extensively on foreign oil for our energy, electricity and heating needs for most of our lives.
The price swings and international political dynamics associated with this over the past 30 years has put New England at a distinct economic disadvantage and at times has threatened the security of our energy supply.

The only alternative solution *readily* available was natural gas, but *our* natural gas supply historically needed to come from either the Gulf of Mexico, far western Canada or via LNG tankers from foreign lands.

Then about a decade ago, reserves of natural gas off the coast of eastern Canada, in the vicinity of Sable Island became economically recoverable. These plentiful supplies were planned to be produced and brought to shore by a consortium of energy companies including Exxon, Mobil and Shell. However, there was no way to get this nearby natural gas to <u>our</u> market area, <u>our</u> power plants, <u>our</u> homes, without building a significant new pipeline structure to transport the gas.

That is why the Maritimes & Northeast Pipeline Project came into being and subsequently the Algonquin Hubline Project.

In order to meet the economic, environmental, electricity reliability, public health and energy needs – all truly important and legitimate *public* interests - of our state and citizens, we needed to construct the Hubline Project to bring the benefits of Sable gas to Greater Boston and eastern Massachusetts.

But we faced a regulatory and statutory scheme that had never envisioned, nor previously accommodated, the permitting of such a project. That is why our experience may be so valuable for you to consider.

Three decades ago, when the Clean Water Act and the Wetlands Protection Act and most of our environmental statutes were first adopted, people never thought about this type of pipeline. They also never thought about aquaculture being a major issue for our oceans policy. Now aquaculture is routinely something we all support and want to foster. The point being, just because it wasn't thought about, doesn't mean it isn't something we all may want to accommodate.

Three decades from today we may be viewing our oceans as a critical source of drinking water through desalinization or as a major component of our energy mix using wave action energy.

The important point is that neither statutes nor regulations can make provisions for everything that might and will come up in the future.

There is a political axiom that says:

"You cannot legislate morality"

It is equally true that "You cannot regulate good judgment".

You, on this Commission, have an auspicious challenge as you ponder

- **what should we use our oceans for,**
- **how do we determine what public interests supercede others,**
- **who should be involved in making these momentous decisions –**

but <u>remember</u> that as hard as you try, you cannot envision every project or type of project – good or bad – that will present itself to our officials and regulators. Therefore I urge you to provide for, to build in, and to recognize the need and value of ensuring flexibility in our regulatory framework, in order to accommodate the next great public interest project that might come along.

We actually began the planning of the Hubline Project in 1998 and had our first meeting at Environmental Affairs on the topic in 1999.

We planned for the project for two years before we filed our first application in October of 2000.

Permitting took almost exactly two years from October 2000 until September of 2002.

Construction began on September 28, 2002 and today we are virtually complete.
The last piece of pipe was installed over the weekend and we are now completing the few remaining tie-ins.

So, to give you an idea of what went into the project from a timeline point of view:

- **Two years of preliminary planning and outreach**
- **Two years of permitting**
- **One year of construction**
- **And a virtual lifetime of post-construction monitoring**

Because it is the permitting aspect you expressed the most interest in, we have a simple handout that gives you the sequence of major permit steps along the way.

Virtually every agency person in this room can attest to the huge number of meetings, volumes of paper and countless hours of analysis that went into each and every one of those line items.

Beyond the first issue of encouraging you to "build-in" flexibility in your regulations and programs, the second issue I would point out is that, at least in the case of our project, we would never have survived without the up-front recognition on the part of the Governor and Secretary that there was an important enough public benefit to be served that our project should be given a fair shot to prove itself.

Equally important, at the state level, was the early designation by the Secretary of a *single* person to work *"inside"* with all of the various agencies and programs to ascertain the real issues that needed to be solved. Anne Kelley played that role at the beginning of our project and it was invaluable.

You know the different permitting programs better than I ever will, but let me give you a couple of the programs and standards that we knew we had to meet.

We had to get through MEPA on the state level and NEPA at FERC – both verifying that we had done an exhaustive alternatives analysis, minimized our impacts to the greatest extent possible and proposed sufficient mitigation to offset any impacts. FERC then determines if the project is in the public convenience and necessity. MEPA must

determine we had shown the least damaging feasible alternative to accomplishing the public benefit.

Then, we had to demonstrate to the DEM (now DCR) that we would not significantly alter or endanger the ecology or appearance of the ocean, seabed or subsoil AND that we were a project that met their test for public necessity and convenience under the Ocean Sanctuaries Act.

But first we had to prove to the DEP, under Chapter 91, that we met a proper public purpose, that our public benefits outweighed our public costs and that we were properly designated as "water- dependent".

That water-dependent designation by DEP and the Secretary, although required for DEM's determination of public necessity and convenience, is not binding on DEM, nor should it be confused with the need to separately demonstrate to CZM that the project is "coastally-dependent", cannot be feasibly located away from the tidal waters and meets the 6 energy related policies under their federal consistency review.

- **Least damaging feasible alternative**
- **Public convenience and necessity**
- **Proper public benefit**
- **Water dependent**
- **Coastally dependent**

Five significant public use tests – all with different standards – made by different people – from different agencies – with different sets of priorities - made at different points in the permitting timeline – but all trying to get to the same question:

Do the benefits of this project warrant the state saying "yes" to the use of our waters for it?.

From an outsider-point-of-view, this is complex and at times confusing. For most – it would be insurmountable.

THAT may in fact be the proper policy outcome of your deliberations.

Everybody knows we need to manage our oceans in a manner that protects our fisheries (which I'll point out we had a bumper lobster catch this year) AND we all know that we need to ensure *nothing* diminishes our water quality.

But the array of regulatory hurdles currently in place sets these two parameters not only above all other public interests, but in practicality eliminates most other public uses from consideration. That may in fact be the policy you want to maintain, but recognize it IS an affirmative decision to do so.

Our own experience was that you COULD work your way through it – predominantly using an army of lawyers and consultants and greatly expanding the cost of the project – but that it was doable.

What was more difficult was to see the tension between regulatory agencies and resource agencies.

Regulatory agencies need input from the resource agencies, but resource agencies – properly act as advocates not regulators. Therefore, the resource agencies operate with none of the legal, policy or political boundaries that regulatory agencies must and should follow.

This dynamic often leads to one of two outcomes: Either the regulatory agency is accused of not properly taking the resource agency's views and expertise into full account

OR - the regulatory agency is paralyzed until there is unanimity of opinion among the resource agencies as well.

To be honest, from our experience, this is a bigger issue at the federal level than at the state level – but it something for you to be aware of.

One word about mitigation:
Everybody here, I am sure, is aware of the mitigation package negotiated by the Secretary during the MEPA process. That package totaled $9.93M and included some great things like:

- **$1.7M for the Massachusetts Bay Monitoring Program**
- **$100,000 for a UMASS Lowell Research Initiative**
- **$5.3M to rebuild and make usable Peddock's Island**
- **$1.5M for the CZM - led Ocean Sanctuary and Inner Harbor Mapping Project**
- **$1M for the DEM Conservation Trust as well as money for the Save the Harbor Save the Bay Quincy Shores Initiative and environmental educational assistance for the regions schools.**

What may not be known to everyone was that beyond that $10M, we paid a straight Chapter 91 fee of nearly $2M, we created a dedicated fund for the Mass Bay Lobstermen of a half million dollars, we paid individual municipality mitigation totaling approximately $2.5M, and after we missed the Time of Year construction windows we paid the Marine Mammals & Fisheries Conservation Trust $4.9M.

In total we made cash payments of $20 million as a direct result of mitigation for the project – not including any individual landowner payments.

In this day and age we all recognize the need for and legitimacy of mitigation payments. But it would behoove you to think through whether the Commonwealth would get a "bigger bang for the buck" by centralizing the location and process for ascertaining and prioritizing the Commonwealth's needs and desires in such mitigation.

And it is important to understand, especially in a tightly public utility-regulated environment such as energy delivery, that such mitigation can in fact throw the economics of a project over the edge of feasibility.

On a slightly more mundane level let me hit just a few final points:

- **Chapter 91 has tried to codify good judgment in detailed regulations and the result is that virtually nobody can understand what is needed or what the proper tests to be applied are.**
- **On the other extreme, the Ocean Sanctuaries Act doesn't even have a permitting process that can tell you how to apply for their approval. Unlike the originally envisioned ocean-version of ACECs that looks at discreet areas and underlying resources to be protected, the Ocean Sanctuaries Act Program has now designated most of our coastline and marine areas in huge swaths. This makes the total preservation ethic embodied in the ACEC program and the original OSA regs impractical to maintain over a long period of time.**
- **Both the Chapter 91 and the Ocean Sanctuaries Act programs need to build in the flexibility that would allow good, proper judgment and maintain popular political support for their important missions.**
- **For a project this complex, with this many regulatory approvals, stay mindful of the fact that as you move through the various sequential permits, you run the risk of having to "loop back" again and again as the project is modified over and over again.**
- **And the sequencing of various permits where one agency will not act until another issues its determination adds a considerable amount of delay to the process. The cascading effect that changes to a project has on this permitting regime can be deadly to a project.**
- **Because of the MEPA process being applicant-generated and the NEPA process being Agency-generated, as well as the difficult secrecy rules between the applicant and the agency's consultants under NEPA, as much as we tried, we could not make the federal and state environmental reviews simultaneous. This led to frustration**

from agency personnel, citizen groups and others about the volume and complexity of documents, reviews and comments. This cost public participation as much as it cost us.

As I said in the beginning, in spite of these observations, the process can and does work. Otherwise I wouldn't be here today with a fully permitted and constructed Hubline Project. However as you ponder improvements, I have our "Top 10" suggestions:

1. **Advise any major project applicant to do lots of up-front work with the agencies, the elected and appointed officials and other citizens and stakeholders and accommodate those that do. FERC has recently been advocating this approach.**
2. **Relook at the Chapter 91 regs and the Ocean Sanctuaries Program and "build-in" legitimate flexibility for the regulators to use when something new and worthwhile comes along.**
3. **Find a means when someone wants to use our oceans for an early and sustainable recognition of the public benefit, at the highest level possible, that will not guarantee an ultimate yes, but will guarantee a fair shot through the process.**
4. **Designate someone early in the process that has the authority and standing with all of the various agencies to truly act as an internal coordinator of issues and concerns – a coordinator, NOT a decision maker.**
5. **Analyze the existing 5 "Public Use" tests already embodied in our regulations and determine if they can/ or should be more closely aligned.**
6. **Be cognizant of the tensions between wanting resource agency expertise and input to regulatory decisions and the regulators needs to balance various competing needs and interests without becoming immobilized.**
7. **Build into the regulatory programs an automatic means to accommodate later changes made for later permitting programs without the need to go back and start all over again.**
8. **Centralize mitigation negotiations and make them binding on all state agencies, for the benefit of the Commonwealth as a whole versus individual programs.**

9. **Work with the federal agencies (and potentially local Con Comms. We had to go through 19 Con Comms.) to find better ways to accommodate joint reviews in order to make it easier for agency personnel and the general public.**
10. **And lastly, protect MEPA. It is the only place in state government where the project <u>as a</u> <u>whole</u> gets viewed, analyzed, and altered, balancing all the competing environmental needs of the Commonwealth.**

Obviously I am not a government regulator or an elected or appointed official. But I am a concerned citizen and someone who has lived the environmental regulatory process pertaining to ocean use for five years now. I hope these insights are taken as helpful ideas and not in any measure as criticism. The professionalism we have had extended to our team by the state has been remarkable – and your charge is even more so.
Thank you.

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