

October 19, 2009

Deerin Babb-Brott, Director
Massachusetts Office of Coastal Zone Management
251 Causeway Street, Suite 800
Boston, MA 02114

RE: Draft Massachusetts Ocean Management Plan

Dear Mr. Babb-Brott:

The Cape Cod Commission (Commission) has received the draft Massachusetts Ocean Management Plan (the Plan or OMP) issued by the Executive Office of Energy and Environmental Affairs (EOEEA) on June 30, 2009. The Cape Cod Commission applauds the effort and level of analysis that has gone into development of this plan, particularly with the time constraints imposed by the Oceans Act of 2008. We also appreciate recognition of the Commission's and Martha's Vineyard Commission's jurisdiction as regional regulatory review agencies in the draft OMP.

As you are aware, the Cape Cod Commission was established in 1990 to protect the Cape's sensitive resources, including natural habitats, water quality (both fresh and salt), historic, cultural, and recreational values, and to ensure balanced economic growth, adequate capital facilities, and the provision of an adequate supply of affordable housing. The planning and regulatory roles provided by the Cape Cod Commission Act allow the Commission to protect the resources that make the Cape a desirable place to live, work, and play.

Projects requiring preparation of an Environmental Impact Report (EIR) under the Massachusetts Environmental Policy Act (MEPA) also require Commission review as a Development of Regional Impact, reflecting common state and regional interests in ensuring that sensitive resources are adequately protected from the impacts of development. With these goals as context, the Cape Cod Commission offers comments on the draft OMP in the following five areas. Our key points are summarized to the left of each discussion point.

1) JURISDICTIONAL CONCERNS

Include Cape Cod Commission regulatory review over community-scale wind projects.

The Ocean Management Plan (“OMP”) provides that “community-scale wind projects” in the Multiuse Area are subject to development of regional importance [sic] review by regional planning agencies with regulatory authority. Page 4–12, second bullet. By definition, “community-scale wind projects” consist of ten turbines or fewer. By contrast, the OMP makes no provision for RPA review of “commercial-scale wind projects” which consist of more than ten turbines. If a project with ten or fewer turbines qualifies as a Development of Regional Impact, a project with eleven or more turbines will necessarily have an even greater impact and should be subject to review as a Development of Regional Impact by the applicable regional planning agency.

Allow the Cape Cod Commission to work with the Office of Coastal Zone Management to define “appropriate scale” for proposals within its jurisdictional area.

The OMP definition of “appropriate-scale renewable energy facilities” makes no provision for the Cape Cod Commission or the Martha’s Vineyard Commission to determine what is the appropriate scale for the territorial waters within each agency’s jurisdiction. The OMP should be revised to provide that the appropriate scale of renewable energy facilities within the jurisdictions of the Cape Cod Commission and Martha’s Vineyard Commission be defined by those commissions with guidance from the Office of Coastal Zone Management. For example, a definition of appropriate scale should take account of the distance of wind turbines from the shore, the height of the wind turbines, the number of wind turbines, the concentration (density) of the wind turbines, any adverse effects on marine or air traffic control radars and the amount of energy expected to be generated from a proposed project. The two regional planning agencies can prepare regulations that take account of these and other relevant factors that may be specific to their respective Renewable Energy Areas and may have a different set of parameters for community-scale wind projects within the Multiuse Area.

The Cape Cod Commission and the Barnstable Assembly of Delegates are particularly well suited to prepare and adopt such regulatory definitions in the context of the Regional Policy Plan. With the assistance of CZM, the definitions in the RPP regulations can be varied over time

to take account of changes in technology as it may affect wind energy and tidal and ocean energy devices.

Continue recognition of Cape Cod Commission review of Developments of Regional Impact (DRIs).

Pursuant to the Cape Cod Commission Act, Chapter 716 of the Acts of 1989, § 12(i), the Cape Cod Commission classifies any development project that requires an Environmental Impact Report (EIR) as a Development of Regional Impact (DRI), to be reviewed by the Cape Cod Commission. The Commission also reviews DRIs pursuant to the Commission Enabling Regulations Governing Review of Developments of Regional Impact. The OMP should recognize and integrate DRI review of offshore development projects into the process of managing uses in the Ocean Planning Area.

Require programmatic Environmental Impact Reports (EIRs) for Renewable Energy Areas.

The draft OMP calls for 150 wind turbines in the Renewable Energy Areas. These should be the subject of a programmatic EIR before their number or size is fixed in the OMP. The size and number should be decided after the EIR is completed, before a policy commitment covering those points is written into the OMP.

2) POTENTIAL CHANGES TO ENVIRONMENTAL REGULATIONS

Identify proposed changes to state environmental regulations.

The plan (p.4–21) recommends that “Changes be made to regulations that govern Chapter 91, 401 Water Quality Certification, the Wetlands Protection Act, the Massachusetts Environmental Policy Act, the Ocean Sanctuaries Act and the state Coastal Zone Management Program to harmonize existing regulatory programs with the provisions of the Ocean Plan.” The nature and/or extent of changes to environmental regulations must be identified in the OMP.

3) NEW SITING STANDARD FOR EIR

Improve protections to SSUs by the proposed new MEPA standard.

The plan proposes a new siting standard for EIRs proposed in Areas of Special, Sensitive or Unique Resources (SSU) in the multi-use area, which comprises the majority of the planning area. The proposed standard of “avoid, demonstrate no practicable alternative, or demonstrate that data in the plan does not accurately characterize the resource or use” needs changes. If left as is, the vague

standard could facilitate inappropriate development in sensitive resource areas. For example, it is unclear whether a town wishing to install a community wind turbine proximate to their shores could locate it within an SSU. In addition, a proponent wishing to demonstrate that the data establishing an SSU are inaccurate does not have guidance as to whether a year's worth of data showing that the resource is absent is adequate, or whether 10 years of data would be required.

4) SCENIC AND CULTURAL RESOURCES NOT ADDRESSED IN OMP

Incorporate protection of scenic and cultural values into the plan.

The draft OMP does not address the potential visual impact of various forms of ocean development on the region's unique natural, historical and cultural resources. The Commission Act directs the Commission to protect these resources and to ensure balanced economic development. Cape Cod is a region that depends heavily on tourism for its economy. The final OMP must therefore address both the visual and the economic impacts of ocean development on unique natural and cultural resources. The Oceans Act makes numerous references to scenic and cultural resources. The fifteen planning principles in the draft OMP appear to direct the plan to consider these resources. The OMP Appendix also identifies techniques for identifying visual resources. Despite these references, the draft plan fails to incorporate protection of unique scenic and cultural values into the methodology for siting wind turbines and other facilities that could impact visual resources.

The State of Rhode Island's ocean planning acknowledges scenic resources, as do other recent planning efforts in Europe. A separate map layer for visual resources of high value should be a component of the plan so that impacts to significant natural and cultural areas that are a critical component of the region's economy can be considered. At a minimum, that layer should identify known scenic vistas from public areas, large expanses of natural lands, and significant historic resources along the coastline. To address visual impacts on significant open vistas and distinctive cultural areas, the plan should take into account the proximity of proposed developments to the coastline and to pristine areas, and evaluate the extent that the

viewshed from these areas will be altered. The economic impacts of proposed developments should be evaluated similar to the way the plan considers economic impacts on recreational boating use.

Explicitly recognize the cultural significance of the ocean to the Wampanoag Tribe.

It is imperative that the plan address the cultural significance of the ocean waters to the Wampanoag Tribe in the region. The review process must include Tribe representation, in conjunction with an assessment of visual impacts as noted above. In addition, the plan must acknowledge that underwater archaeological resources (including the potential for Native American sites, also known as paleosols) are a constraint for sand mining projects, as they are certain to be impacted by mining activities.

5) TRUST FUND ADMINISTRATION AND DISBURSEMENT

Clearly define the collection and disbursement mechanisms of the proposed Trust Fund.

The final OMP should address the mechanisms for collecting and disbursing the mitigation fees and rent collected from development activities. The Plan must specify that mitigation directly benefit communities impacted by the development. The Cape Cod Commission assesses mitigation payments in direct relationship to impacts protected by the Commission Act, and recommends that the OMP take a similar approach for impacts to resources protected by the Ocean Sanctuary Act. As a separate item, it is important that the state assess user fees for the use of public property and for the indirect impacts to the public trust rights and the public's rights to a pristine resource. The final plan must clearly distinguish between mitigation payments and user fees, and define the purposes for each type of assessment in order to guide future rule making. In addition, mitigation payments and user fees collected by the state must be kept in separate accounts.

ADDITIONAL COMMENTS

In addition to the above concerns, the Commission offers the following comments for your consideration:

Maintain many excellent components of the plan.

- The Commission supports many aspects of the OMP, which it does not wish to see changed in the final plan.

These plan components include but are not limited to the cap of 10 turbines per planning area, the demonstration of the economic benefits of community scale wind to the community and the community's support of the project, the prohibition on any activities in the Cape Cod Ocean Sanctuary, and the presumption that special, sensitive and unique (SSU) areas are not appropriate for development.

Identify more Prohibited Areas.

- The plan should go further in identifying prohibited areas for specific uses. While limitations in the quality or detail of data for certain resources precluded definitively delineating prohibited areas in this draft plan, substantial public and expert vetting of the data and policy decisions used in identifying the SSUs is necessary. We trust that the OMP commitment to revisit the maps between plan revisions will allow for appropriate refinement of those areas, if or when better data becomes available. The Commission agrees with the use of the SSU areas in conjunction with the exclusionary criteria for specific uses. As the accuracy of the SSUs becomes more accepted, more of these areas should become prohibited for specific uses.

Improve protection for ocean systems, species, and habitats from incremental and cumulative damage over time.

- The plan does not adequately or clearly address the importance of maintaining ocean ecosystem health. While the work on the SSUs is a critical component of the plan, activities that may be permitted outside of these areas (and especially those within), may, over time, result in a gradual but eventual erosion of the overall ecosystem. The general public may not be aware of gradual changes to ocean resources. Like overdevelopment of our land resources (evidenced, for example, by the water quality impacts in our estuaries and ponds), overdevelopment of the ocean may ultimately leave us with a compromised ecosystem. Throughout the document, the plan must consistently address the significance of maintaining ocean systems, species, and habitats.

Ensure continued stakeholder participation in all plan revisions.

- Subsequent plan revisions, which are slated to occur every five years, will go through a similar process to the one employed in the development of the draft plan. That process allowed for substantial public comment, which we applaud. We would like the final OMP to address how stakeholders will have a voice in future plan revisions.

Explain the 10-turbine cap.

- The plan should discuss how the wind turbine cap was determined, and why 10 turbines are defined as “utility scale.” Also, as the cap pertains to regional planning areas, the final plan should clearly identify the boundaries between planning areas.

Clarify the plan’s authority related to projects in federal waters.

- The permitting of cables may provide access to projects that are located within federal waters and are inconsistent with the OMP (for example, the plan notes existing cables heading east from Eastham across the Cape Cod Ocean Sanctuary, where the OMP prohibits any additional development). What is the nature and capacity of these cables? How does the plan address projects proposed in federal waters that are inconsistent with the plan’s intent to protect the Cape Cod Ocean Sanctuary?

Address the costs of decommissioning developments, environmental disasters, and unpredicted impacts.

- The plan must address who will bear the costs of decommissioning developments, environmental disasters, or impacts that the permitting process did not predict. One may address this by requiring developers to establish escrow accounts, adjusted annually for inflation and protected specifically for decommissioning costs, for these eventualities prior to the permits being issued.

Continue to promote energy conservation.

- In addition, integral to the success of the state’s energy policy initiatives as manifest in the OMP, is a renewed and vigorous focus on energy conservation measures. We strongly support the state’s investment in energy conservation programs and education.

Thank you for the opportunity to comment on the draft Ocean Management Plan.

Respectfully submitted,

John D. Harris, Chairman
Cape Cod Commission

Cc: Cape legislative delegation
Cape town planners
Cape Boards of Selectmen
Martha’s Vineyard Commission
Nantucket Planning and Economic Development Commission
Cape Cod Bay Council