

November 23, 2009

To: Ian Bowles, Secretary of Energy & Environmental Affairs
Deerin Babb-Brott, Assistant Secretary for Oceans and Coastal Zone
Management, Executive Office of Energy and Environmental Affairs

From: Susan Tierney, Chair, Oceans Advisory Commission (and renewable energy
member)



On behalf of the Massachusetts Ocean Advisory Commission:

Senator Robert O'Leary

Senator Anthony Petrucci

Representative Demetrius Atsalis

Representative Viriato DeMacedo

Representative Frank Smizik

Carolyn Kirk, Mayor of Gloucester; Metropolitan Area Planning Council

John Bullard, Executive Director, Sea Education Association;

Southeastern Regional Planning and Economic Development District

Paul Niedzwiecki, Director, Cape Cod Commission

Alan Macintosh, Assistant Director, Merrimack Valley Planning
Commission

JoAnn Taylor, Coastal Planner, Martha's Vineyard Commission

Jack Clarke, Massachusetts Audubon; environmental member

John Pappalardo, Chairman, New England Marine Fishery Council;
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Laurie Burt, Commissioner, Department of Environmental Protection

Paul Diodati, Director, Division of Marine Fisheries, Department of Fish
and Game

Re: Comments on the Draft Massachusetts Oceans Management Plan

On behalf of the Oceans Advisory Commission,¹ I am pleased to submit these comments on the Draft Ocean Management Plan (“Draft Ocean Plan”), dated June 30, 2009. Individual members of the Ocean Advisory Commission may be submitting their own comments, so these reflect the statement of the entire Commission.

The Draft Ocean Plan is an extraordinary achievement. In just over a year since the Oceans Act of 2008 was enacted by the Massachusetts General Court and then signed into law by Governor Deval Patrick on May 28, 2008, the Draft Ocean Plan represents the work of countless people in our state. As directed by the Oceans Act, your staff – so capably led by Assistant Secretary for Oceans and Coastal Zone Management, Deerin Babb-Brott – has produced a plan that is rich with information, thoughtful in its recommendations for management policies and practices, and built on a process that was highly inclusive of many different stakeholders, constituencies, and interested citizens. We applaud you and your team for a tremendous effort.

We note that with this plan, Massachusetts is continuing its leadership role among the states in planning for the continued vitality and richness of state oceans. This seems appropriate to us, given the special relationship that Massachusetts citizens and our economy have had with the ocean over time. We agree with the words of the Draft Plan that start with “Massachusetts waters are rich with natural resources and busy with human activity. Our marine environment supports recreation and tourism, fishing and shellfishing, shipping and trade, and scientific research. The Commonwealth’s marine waters also harbor infrastructure that supports the well-being and standard of living of

¹ Section 4(c) of the Massachusetts Oceans Act of 2008 provided that: “(c)(i) There shall be an ocean advisory commission to assist the secretary in developing the ocean management plan. The commission shall consist of 3 members of the senate, 1 of whom shall be appointed by the minority leader of the senate; 3 members of the house of representatives, 1 of whom shall be appointed by the minority leader of the house of representatives; the director of coastal zone management or his designee; the director of marine fisheries or his designee; the commissioner of environmental protection or his designee; and 8 members to be appointed by the governor, 1 of whom shall be a representative of a commercial fishing organization, 1 of whom shall be a representative of an environmental organization, 1 of whom shall have expertise in the development of offshore renewable energy, 1 of whom shall be a representative of the Cape Cod commission, 1 of whom shall be a representative of the Martha’s Vineyard Commission, 1 of whom shall be a representative of the Merrimack Valley Planning Commission, 1 of whom shall be a representative of the metropolitan area planning council and 1 of whom shall be a representative of the Southeastern Regional Planning and Economic Development District. Members shall be appointed for terms of 3 years, except that, initially, 4 members appointed by the governor shall be appointed for terms of 2 years and 3 members appointed by the governor shall be appointed for terms of 1 year. The appointing authority may fill any vacancy that occurs in an unexpired term. The members of the commission shall be selected with due regard to coastal geographic distribution. (ii) The commission shall meet at least quarterly and at the discretion of the secretary. The commission shall hold public meetings relative to matters within the jurisdiction of the ocean management plan and shall make recommendations to the secretary for the proper management and development of the plan. The secretary shall consider the recommendations of the commission. (iii) The office of coastal zone management and division of marine fisheries shall provide technical support to the commission.”

Massachusetts citizens, such as offshore liquefied natural gas facilities, fiber optic and electrical cables, and natural gas pipelines. In addition, new activities in the marine environment are emerging, including deepwater aquaculture and wave, tidal, and wind energy.”

As you also stated in the Draft Ocean Plan’s introduction, “Given this array of activity, and the need to protect and enhance the marine environment, the draft ocean plan addresses a fundamental issue: the ocean is a public trust resource, and the Commonwealth must effectively manage the protection and use of its waters on behalf of the public for the benefit of current and future generations.” We think that the Commonwealth’s ocean planning team has lived up to the high expectations of the legislature when it enacted the Oceans Act and directed that a Draft Ocean Plan be produced by June 30, 2009. The Draft Ocean Plan is a worthwhile next step in leading the ocean planning process for the benefit of the public here in Massachusetts and elsewhere.

In this letter, we offer comments on several topics: content of the Draft Ocean Plan; the process used to prepare it; and the processes proposed for its continued evolution over time. These comments reflect high-level perspectives of the members of the Ocean Advisory Commission, since many of us hold different points of view about the details of the Draft Ocean Plan itself. Those differences do not diminish the fact that we share a common view that the Draft Ocean Plan is an important and meaningful contribution to our state’s on-going efforts to care for and support our rich ocean resources for current and future generations.

First, on the content of the Draft Ocean Plan: We think that the Draft Ocean Plan represents a thoughtful framework for relying on scientific and other technical information to guide the plan for the Commonwealth’s oceans. It is attentive to the need to balance the 15 goals set forth in the Oceans Act. The Draft Ocean Plan integrates a wide array of relevant forms of information, attempts to balance sometimes competing objectives, and advances the state of planning techniques in this newly developing area. The collection and application of many different layers of spatial information provides a rich tool for understanding the complexity of current uses of the ocean and demands for balancing protection and use in the future. While not entirely transparent in showing how such balancing decisions were made in the end, the Draft Ocean Plan does provide substantial information about the character of potentially compatible and incompatible uses of ocean waters.

The Draft Ocean Plan’s portfolio of management tools is strong, including spatial data layers, integrative compatibility/incompatibility analysis, and techniques for integrating different types of information. Additionally, the Draft Ocean Plan provides a useful framework for planning, with its reliance on the combination of both spatial siting

standards (where existing data allow for such) and performance-based measures to guide management decisions in various parts of the state's ocean. Further, the Draft Ocean Plan relies on strong technical foundations in the way that it has identified and established means to protect special, sensitive or unique marine and estuarine life and habitats (as required by the Oceans Act).

In particular, the Ecological Valuation Index is a strong and innovative methodology for characterizing the attributes and values of different parts of the ocean. We applaud this effort and hope that it continues to receive support as a useful tool in the future.

Recognizing that such a tool is focused on assembling and comparing varied ecological attributes, perhaps subsequent drafts of the plan could attempt similar approaches for other non-ecological attributes (e.g., socio-economic uses of the ocean, only some of which lend themselves to valuation in monetary terms).

In general, the Draft Ocean Plan usefully establishes three types of management area: Prohibited,² Regional Energy, and Multi-Use. "Under this approach, special, sensitive or unique natural resources and important existing water-dependent uses are provided enhanced protection in the siting, development, and operation of new uses, facilities, and activities [that is, in the "Prohibited" area]. Renewable energy facilities are screened through strict compatibility criteria, and—for commercial-scale wind projects—facilities are allowed only in designated areas. The majority of state waters in the planning area remain open to uses, activities and facilities as allowed under the Ocean Sanctuaries Act, which preserves opportunity for new and emerging uses and flexibility for future changes based on new data and technologies and social values that will change over time."

While a commendable approach to use performance-based management approaches in the Multi-Use Area, we encourage that the implementing agencies take care to be as concrete as possible in developing and applying these performance-based approaches so that the regulated and development communities, as well as the members of the public, begin to understand with increasing clarity what it means to be "allowed uses" in the Multi-Use Area.³ This will be important for ensuring that the Ocean Management Plan

² You might consider renaming the "Prohibited" area in some way (e.g., "Areas of Prohibited Uses") that better depicts the character of allowed and non-allowed uses.

³ The Draft Plan states that, "Management in the Multi-use Area is based on specific marine resources that were identified as key components of the marine ecosystem. Management in the Multi-use Area establishes a higher level of protection for special, sensitive or unique resources (SSU) in two ways. First, the ocean plan modifies the MEPA standard of "avoid, minimize or mitigate damage to the environment to the maximum extent feasible" to include a specific siting standard of "avoid, or demonstrate that there is no less damaging practicable alternative, or demonstrate that data does not accurately characterize the resource or use." Second, the ocean plan prioritizes and maps those resources, providing clear baseline information which will allow proponents, agency staff, and the public to focus on aspects of a given project of greatest potential environmental significance. The draft plan specifies 63 percent of the planning area for protection of these

provides an efficient and effective roadmap not only for the agencies charged with implementing it or with assuring that their decisions are consistent with it, but also for those who wish to undertake one or another uses in the Multi-Use Areas. As one member of the Ocean Advisory Commission put it, the Ocean Plan should make it easier to do things that are in conformity with the Plan; it shouldn't just be another layer of bureaucracy. The implementers of the Ocean Plan should embrace this fundamental purpose of the planning effort.

From a substantive point of view, we think that the Draft Ocean Plan generally errs on the side of caution in identifying locations and standards for development and use of the state's ocean resources. Like others with different perspectives on how aggressive the state should be in allowing or even promoting certain uses (e.g., large-scale wind development) versus protecting certain areas from development (e.g., more expansive interpretations of SSUs), the Ocean Advisory Commission members have different points of view on whether the Draft Ocean Plan strikes a proper balance.

Further, in light of the interrelatedness of the oceans, climate change and the usefulness of the Ocean Management Plan, we encourage it to more directly address the question of adaptation. The Oceans Act was adopted in 2008 at a time when the Commonwealth's legislature also enacted several other laws focusing on transformation towards a cleaner energy system. Shortly after the Oceans Act was signed in May 2008, three other laws were adopted: the Green Communities Act, in July 2008; the Global Warming Solutions Act, in August of 2008; and the Green Jobs Act, also in 2008. This is important context for understanding the importance of the ocean resources as well as the role of the Ocean

critical marine resources. For existing water-dependent uses, the Multi-use Area maintains the existing standard of "avoid, minimize or mitigate" but establishes a higher level of review by providing baseline information on concentrations of existing uses, identifying them as significant existing interests, and requiring that potential impacts and mitigation be addressed in MEPA review with the participation of potentially affected interests, as described in the Management Tools section of the plan. Finally, the Multi-use Area addresses the interests of sustainable uses, renewable energy, and necessary infrastructure by directing them away from impacts to the most significant resources and human activities, but otherwise allowing flexibility in their location and level of regulatory review on a project-specific basis, based on their functional requirements, scale, and potential impacts to existing uses and marine resources. For example, a pipeline project would be required to use the ocean plan's resource and use maps and identify a route for the project that does not impact whale, eelgrass, intertidal, and hard/complex habitat types; the project would be required to consult with EEA/DMF regarding the site specific fish resource areas associated with potential alternative routes. The project would have the option of demonstrating that it does avoid those resources even in otherwise mapped areas by providing an analysis of the ocean plan's data, or supplementary data, that indicates that it does not impact the specified resource. If no feasible alternative exists, the project would be required to minimize impacts and provide mitigation for unavoidable impacts. Similarly, the project would be required under MEPA to evaluate the impacts of alternative routes to areas of high commercial and recreational fishing through characterization of, and consultation with, potentially affected interests within those mapped areas. The project would be required to identify the potential economic impacts of the activity to commercial and recreational fishing as the basis for reviewing alternative routes and compensatory mitigation."

Plan in managing protection and use of, and monitoring the effects of climate change on, our ocean and coasts. The Draft Ocean Plan does a good job in considering traditional uses of natural resources in the ocean (e.g., fisheries, ecological systems), but pays insufficient attention to conditions (e.g., sea level rise, ocean warming, marine life migration, ocean current shifts, changing coastlines, impact on wetlands and fresh water, extreme weather conditions, the value of low-carbon resources) that will arise with climate change. The conditions will affect the locations of designated use areas in the plan. The Ocean Plan would be more useful if it dealt more directly with tracking/observing/responding to changes that are occurring in ocean-based systems.

The draft plan also does a good job of identifying, as the Act requires, *Special, Sensitive or Unique ("SSU") estuarine and marine life and habitats*. However, in order to truly protect those resources as well as to satisfy other goals of the Oceans Act (e.g., "value biodiversity and ecosystem health," "address climate change," and "respect the interdependence of ecosystem"), the final plan should provide for a higher level of performance standards for proposed incompatible development activities and projects in SSU's (*Chapter 114 of the Acts of 2008*, Section 2, Section 4C (vi)).

Next, on the process used to develop the Draft Ocean Plan: Over the course of the year since you began to implement the Oceans Act, the process was carefully designed to provide multiple opportunities to engage with and hear from different parties and members of the public about the shape and content of the Ocean Management Plan. Members of the Ocean Advisory Commission witnessed various parts of this inclusive planning process.⁴ After Governor Patrick's appointment of the members of the Ocean Advisory Commission in August, 2008, the OAC itself held seven meetings;⁵ participated in the 18 public meetings ("listening sessions") held in September and October 2008; participated in public workshops on ocean planning and management practices with the members of the Science Advisory Council, and with the Massachusetts Ocean Partnership; and then attended several of the five public hearings sponsored on the Draft Ocean Plan during September 2009. These meetings witnessed by the members of the OAC were a small fraction of the time spent by members of the state's ocean planning team in interacting with the public. But from what we observed, we know that the process was inclusive, informative, and pro-active. The willingness on behalf of EOEEA staff to continue meeting with people should also be applauded.

The process heavily involved subject matter experts (such as the members of the Science Advisory Council, and members of the state agencies with responsibility for different

⁴ According to the Draft Plan, the public participation process included "18 public meetings across the Commonwealth; 90 meetings with stakeholders such as pilots, fishermen, non-governmental organizations, and academia; and five public workshops."

⁵ These meetings were held on August 13, 2008; December 11, 2008; January 28, 2009; March 4, 2009; May 2 and 6, 2009; May 28, 2009; and September 8, 2009.

aspects of the managing ocean resources); and interested citizens and stakeholders (who made efforts to attend and speak at public meetings, send in comments, and otherwise provide important information to the process). Over the course of a year with quite-demanding deadlines, the state's ocean planning staff went out of its way to keep interested members of the public apprised of the status of the information gathering and analysis, and of the development of the Draft Ocean Plan. As directed by the Oceans Act, the Ocean Advisory Commission was directly involved making "recommendations to the Secretary for the proper management and development of the plan."

Those recommendations were based on the best available information presented by the stakeholders' participation, by the Science Advisory Council's expertise and relying upon already-existing information. A solid basis of material was compiled and used effectively in the design of the draft management plan. That being said, a number of data sources are still being presented and information will continue to become available as the Ocean Management Plan matures. The process on how to modify and update the plan to accurately reflect new information should be spelled out in the final plan and every possible effort should be made to include the most accurate information possible.

Finally, on the Draft Ocean Plan's recommendations for the process that will be used to allow the Ocean Plan to evolve over time: The Draft Ocean Plan is a beginning, not the end, of planning for the management of our off-shore waters. The Draft Ocean Plan sets forth a blueprint to guide its evolution and to ensure its relevance and value over time. The "adaptive management" plan provides for formal plan updates at least every five years; and with mechanisms to allow for immaterial and material changes to the Ocean Plan in the interim. We think that it would be useful to clarify who is eligible to raise an issue that would trigger a major update of the Ocean Plan, and to clarify the types of demonstrations that might need to be made when such a triggering event or condition is proposed. Specifically, it is only state employees, or also interested parties or citizens, who may bring to your attention certain triggers that would initiate a major update of the Ocean Plan? And what will the process be for amending and updating the Plan to include more current information prior to the 5 year review period, or whatever review period is instituted?

Climate and atmospheric science is evolving at a rate that will require an update to the plan more often than five years. The Commonwealth's environmental laws have not kept up with current science. In the last two years alone, the nation's top climatologists have dramatically changed their forecast and policy recommendations. The plan must be updated more often in order ensure that our oceans and coastal environment are managed and protected using the latest and best science available.

Given the importance of the learning that has occurred over the past few years in support of the ocean planning effort and will continue to occur as the Ocean Plan begins

to be implemented after December 2009, we feel that five years may be too long to wait before the next Plan version is developed and put in place. We view the Ocean Act's five-year cycles as guidance for the long term, and hope that you and your successors will not hesitate to move more quickly than that five year limit if evolving developments and conditions warrant commencing the plan-revision process earlier than five years from now.

In conclusion, the Ocean Advisory Commission commends the Commonwealth's ocean planning team for the Draft Ocean Plan. If it represents the quality of the first Ocean Management Plan that will be finalized at the end of this year, we are confident that it will be a relevant, informative, and hopefully quite useful tool for managing our extraordinarily important ocean resource.