

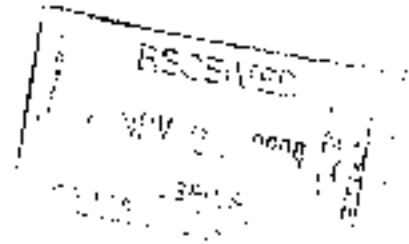


United States Department of the Interior



FISH AND WILDLIFE SERVICE

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November 23, 2009

Mr. Deerin Babb-Brott
Assistant Secretary for Oceans and Coastal Zone Management
Office of Coastal Zone Management
251 Causeway Street, Suite 800
Boston, MA 02114

Dear Mr. Babb-Brott:

Thank you for providing the U.S. Fish and Wildlife Service (Service) an opportunity to review and provide comments on the Draft Massachusetts Ocean Management Plan (Plan). The Plan is being developed as the basis for the protection and sustainable use of Massachusetts ocean and coastal waters. The following are the goals of the Plan, as described in the Executive Summary:

- sets forth the Commonwealth's goals, siting priorities and standards to ensure the effective stewardship of our ocean waters;
- identifies and protects critical resources;
- supports the development of sustainable uses, renewable energy, and necessary infrastructure;
- establishes measures that minimize conflict between existing uses and new uses; and
- provides a foundation for ongoing study and evolving management of the ocean environment.

Projects constructed in Massachusetts waters will require a Department of the Army permit. As part of the environmental review process, the Service may review and comment on an individual project's purpose and need, the alternatives analysis, site selection, avoidance, minimization and mitigation, adaptive management and post-construction studies. The Service may provide comments pursuant to, and in accordance with, provisions of the Fish and Wildlife Coordination Act (48 Stat. 401, as amended; 16 U.S.C. 661 et seq.), the Endangered Species Act (ESA) of 1973 (87 Stat. 884, as amended; 16 U.S.C. 1531 et seq.), the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 et seq.), the Clean Water Act (CWA) (33 U.S.C. 1344), the Migratory Bird Treaty Act (MBTA) (40 Stat. 775; 16 U.S.C. 703-712) and the Bald and Golden Eagle Protection Act (BGEPA) (16 U.S.C. 668-668e), as applicable.

We have reviewed the Plan and offer the following comments for your consideration:

General Comments:

Projects requiring federal actions, such as Department of the Army permits, must meet NEPA requirements. One requirement of NEPA is to develop an alternatives analysis. The alternatives analysis should not be limited exclusively to the areas identified and designated in the Plan as Wind Energy Areas, since alternatives in federal waters may also exist.

Overall, we find the concept of the Plan to be valuable and timely. The Plan is essentially a zoning map for the offshore waters under the state's jurisdiction. The Plan provides a clear roadmap of how the state envisions these waters being used. We are pleased that the Plan recognizes the need to monitor the effectiveness of management actions in achieving its goals and that this is seen to be an evolving document. We are also pleased that the Plan recognizes that one of the important ocean management activities will be addressing data variability and filling data gaps, particularly for priority issues and management concerns.

It would be helpful to have the state acknowledge and better explain its responsibilities in state 3-nautical-mile (nm) waters. For example, the provisions, mandates and responsibilities of the MBTA and BGEPA must certainly apply but appear to have been overlooked. The mention of development projects beginning at 0.3 nm beyond shoreline, except in closed areas, is confusing and needs to be clarified (p. vi). Specifically, according to the Plan, 11 or more wind turbines constitute a "commercial scale wind energy facility." What is the basis for this threshold? A mention is made about the Ocean Sanctuaries Act, but it is unclear if that statute mandates this threshold. If the Act does not, then even 31 commercial-scale wind turbines (e.g., each turbine at up to 5.0 MW capacity with a rotor-swept area 450+ feet above ground level [AGL]) could have a significant impact on migratory bird trust resources if placed and operated in unsuitable areas or if operated at the wrong times. If the statute does mandate this threshold, then an explanation of the rationale needs to be briefly presented.

There is an opportunity on page 1-3 for government coordination, but no mention is made regarding state-to-federal government coordination, including between Massachusetts and the Service, especially in regard to MBTA and BGEPA. MBTA is a strict liability statute and the unpermitted "take" of even one migratory bird is a violation of the statute. BGEPA is also a strict liability statute, and now contains new provisions for "take" under 50 CFR Parts 22.26 and 22.27 - especially potential impacts to nesting, migrating and overwintering bald eagles along the Massachusetts shoreline. Where "take" (i.e., disturbance or lethal take) is to occur under BGEPA, a migratory bird permit will be required. In developing and implementing this Plan, Massachusetts needs to take all steps necessary to avoid or minimize impacts to migratory birds.

The Plan contains no impact analysis. Many specific resources of importance are identified, such as Leach's storm petrels on Nomans Land Island National Wildlife Refuge (NWR) or the presence of long-tailed ducks off Great Point, Nantucket, where the Service manages the Nantucket NWR. We appreciate the recognition that these species exist in the planning area and are important resources. However, we do not see in the Plan where or how the presence of these resources, or the Ecological Valuation Index, has influenced the designation of potential uses of the ocean areas. In particular, energy development is of great concern, as a commercial wind

facility is possible off Nomans Land Island NWR and smaller-scale wind facilities could be constructed off Monomoy and Nantucket NWRs. The performance indicators which are part of the evaluation measures for the Plan, including the suggested environmental indicators, are insufficient to determine actual impacts to wildlife that spend some or all of their life cycle in, on, or over the open water. They include number of species, number of individuals, locations of species, but they do not provide any indicator of the direct or indirect impact on wildlife as a result of development of the ocean area. This is a major concern to the Service.

While we are not in principle opposed to the designation of the area off Nomans Land Island NWR as a potential wind energy area, we emphatically state that considerably more detailed information about migratory birds, including their flight patterns and use of the waters and food sources located within potential wind facility areas, will be required before the Service can support any specific project proposal. The Service and others have identified data gaps for offshore wind facilities at other locations, including Nantucket Sound. To identify the appropriate biological information that must be collected so that a revised baseline feasibility analysis can be conducted, we request that the state work closely with the Service, conservation organizations, and municipalities on Martha's Vineyard.

There appears to be only a superficial recognition in the Plan that data gaps exist, and a plan to collect required data is not presented. Furthermore, in some instances, data that were used in this Plan are insufficient. For example, page 2-2 acknowledges that there is more specific seafloor mapping information being collected by the U.S. Geological Survey. It appears that instead of using what had been collected to date, pre-existing data were used throughout the plan area. This creates a sense of uneasiness about the quality of the data used throughout the Plan.

Additionally, not only does data need to be current and accurate, but data must be presented at the appropriate scale for management needs. Much of the data presented appear to be coarse scale data. Additional, fine-tune data tied to a specific area will need to be collected to enable sound, accurate, unbiased decisions about the feasibility of proposed uses of the state's waters.

Please include all six national wildlife refuges that are in the planning area. National wildlife refuges are located on Plum Island (Parker River NWR); off Rockport (Thatcher Island NWR); in Falmouth and Mashpee (Mashpee NWR); in Chatham (Monomoy NWR); in Chilmark (Nomans Land Island NWR); and Nantucket (Nantucket NWR).

Wherever the presence of these six national wildlife refuges is mentioned in the document, it is merely to acknowledge their existence. This is not sufficient. The national significance of these six national wildlife refuges cannot be ignored. These are national resources deserving of the same level of importance and consideration as lands and waters under the jurisdiction of the National Park Service or the National Oceanic and Atmospheric Administration. Therefore, at a minimum, the conservation status of these lands needs to be better recognized and the Service needs to be included as an active participant in the planning for any activity which might occur in state waters and have an impact on the species that we are entrusted, by federal law, to protect, conserve and restore.

Specific Comments:

We appreciate the finding in the plan that commercial-scale energy projects are excluded from areas of highest value to endangered roseate terns, including the Duxbury-Plymouth area, Buzzards Bay, the outer Cape and Monomoy Islands. Similarly, stepping out to 0.3 nm will provide at least partial protection for beach-nesting, threatened piping plovers, and the tens of thousands of migrating shorebirds that use the Massachusetts coastline during their twice annual migrations.

The development of a Marine Renewable Energy Center test area (Fig. 2-15) is only briefly discussed. The role this Center will play in testing offshore wind turbine blades needs to be aligned with the role the Center should also play in avoiding or minimizing impacts to migratory birds and other trust resources.

Page 2-14: Please add Nantucket NWR to the list of lands protecting natural resources on the Cape and Islands.

Page 2-16: The description of Nomans Land Island NWR implies, by the word "currently," that there could be a change in management or ownership. Nomans Land Island was transferred in its entirety from the U.S. Navy to the Service in 1998. Extensive cleanup has occurred on the refuge, but due to the continued safety hazards posed by the presence of unexploded ordnance on the refuge, and in compliance with the terms of the transfer agreement, the refuge will stay closed to all public use. Furthermore, the U.S. Navy maintains a restricted area around the island within which no boat traffic is allowed. Closure to public use extends beyond visitation by the general public. It also denotes use by others. This restriction, along with federal laws that all public uses of a refuge must be appropriate, compatible, and contribute to the purpose of the refuge if it is an economic use, signifies that no infrastructure to support offshore wind facilities will be allowed on Nomans Land Island NWR.

Page 2-22: The roseate tern, piping plover, and northeastern beach tiger beetle are all protected under the Endangered Species Act of 1973, and law enforcement and recovery programs for these species are administered by the Service. All three species are found on Monomoy NWR. Piping plovers nest on coastal beaches in all of the regional planning areas, and roseate terns nest and stage during the post-breeding season at many coastal locations throughout the state, including, in particular, Buzzards Bay and the outer Cape.

Pages 2-22 and 2-23: Federal statutes, regulations and policies pertinent to the planning context of this Plan fail to mention MBTA, RGEPA—or where any federal projects might be constructed within Massachusetts state waters—as they relate to the Migratory Bird Executive Order (EO 13186) addressing where take by a federal agency "is occurring or is about to occur." These omissions need to be addressed.

Page 3-13: In the Compatibility Assessment, under the heading of significance of potential impacts to natural resources (Table 3-5), virtually no mention is made about the known and potential impacts of electrical generation, transmission and distribution lines to migratory birds. Bird collisions and electrocutions represent a significant nationwide impact and should be briefly discussed, including a recommendation to use the current published electrocution and collision

avoidance *Suggested Practices* documents published by the Avian Power Line Interaction Committee to avoid or minimize take in all projects that would be developed under this Plan. The 1994 collision avoidance document is currently being revised and should be updated by late 2010. The 2006 electrocution avoidance document is current. Sand and gravel mining have direct impacts on rafting and feeding areas for sea ducks, especially habitat for the long-tailed duck briefly discussed in the Plan. Impacts of these activities need to be discussed in greater detail. Navigation aids should use bird-friendly lighting, where possible not using steady-burning red 1-810 lights, but instead replacing such lights with minimum intensity white strobe, red strobe or strobe-like, or red blinking incandescent lights.

Page 3-20 "...targeted additional protection" is mentioned. In addition to this we recommend you add the need to assess the effects of cumulative impacts to migratory birds of all projects approved under this Plan. In Table 3-7, mention is made regarding special, sensitive and unique [wild]life and habitats, with a brief mention of species of concern including arctic, least and common terns and their critical habitat areas; a "significant population" of long-tailed ducks; and protection for colonial waterbird important nesting areas. The reader must go to Appendix 4-2 to get any specific details regarding these issues. Such issues should be discussed in detail within the text, and peer-reviewed sources published in the scientific literature should be cited as supporting evidence whenever they are available. No mention is made about potential impacts to more common species such as plunge-diving Northern gannets, as well as common and red-throated loons—provided they overwinter in these areas—which could be potentially put at risk during wintertime. If scoters are potentially put at risk by wind energy projects or sand and gravel mining, these concerns need to be addressed.

Table 4-1 (Exclusionary factors for renewable energy areas). We recommend that this section better justify and explain what species and behaviors (e.g., nesting, staging, and critical foraging) will be included among the exclusionary criteria considered. We suggest you add "rafting" to this category since this behavior may be different from staging or foraging. Once again, the reader must go to Appendix 4-2 to learn slightly more about what colonial nesting waterbird species will be protected and at what threshold (i.e., >100 pairs) protection will be afforded. The selection of the 100 pair threshold should be justified with a scientific reference.

Page 3-23: Please include piping plover in this list or explain why this state- and federally-listed species, which migrates through the planning area and lives in coastal habitats, as do terns, is not considered in this Plan as a special, sensitive or unique species.

Page 4-3: Please include piping plover in this assessment.

Page 4-12: Commercial wind turbines are restricted to renewable energy areas, but "community-scale turbines"—anything less than 11 turbines (each turbine could still be up to 5 MW with a rotor-swept area of 450+ feet above ground level)—could be constructed in other areas according to this Plan. No environmental requirements are cited in this Plan, other than a mention of "avoiding, minimizing and mitigating to the maximum extent feasible." This issue represents a major shortcoming and needs to be clarified. The [land-based] Wind Turbine Federal Advisory Committee (FAC) has developed a tiered approach for assessing risk from wind development, has crafted a draft recommendation for a general build-no build scenario, and

the FAC is also finalizing a recommendation to the Service regarding buffers. While these issues pertain to land-based wind development, the principles also apply to offshore wind development and should be mentioned in this Plan, especially once the Service receives the FAC recommendations and finalizes its land-based turbine guidelines.

Page 4-14: Only the roseate tern is referenced in regard to potential impacts from sand and gravel mining. Potential impacts to other avifauna should also be discussed. The Management Tools section (p. 4-19) lacks any specifics, as do the Performance Measures (p. 5-4) and Applied Scientific Research (p. 5-8) sections. In the Exclusions section (Appendix 2-2), the reader is told to avoid high concentrations of avian resources. Terms such as "high concentrations" and "avoidance" need to be defined, along with the inclusion of peer-reviewed reference materials that substantiate these recommendations. The origin of the 0.3 nm exclusion buffer needs to be discussed in more detail. This is problematic since it treats all species equally, implying that the buffers of 0.3 nm for the double-crested cormorant are equally as important and critical as those for the leach's storm petrel or the roseate tern.

Appendix 4-4: For the long-tailed duck, a Critical Avian Habitat Dataset compiled by Massachusetts Audubon Society was prepared for this Plan. The dataset was apparently used to determine priority areas for protection. The Plan should include a brief review of the development and evolution of the dataset, research protocol(s) used for assessment (including methods), and the inclusion of any statistical tests performed (with confidence intervals).

Page BA-44: The Baseline Assessment recognizes the use of coastal areas by shorebirds. The Service has confirmed that shorebirds eat horseshoe crab eggs when they stop at Monomoy NWR during spring migration. We have also confirmed that Monomoy NWR and its environs (including South Beach) support significant numbers of red knots during fall migration. In addition to the designation of Monomoy NWR as an Important Bird Area (IBA), the refuge has also been designated a Western Hemispheric Shorebird Reserve Network (WHSRN) site of regional importance. It received this designation in 1999 largely due to the fall migration, which starts in July and continues through October, in which more 30,000 shorebirds alone stage on the refuge. WHSRN sites represent critical feeding and resting areas for hemispheric conservation of shorebirds. Please acknowledge this in the final Plan.

Fig. 2-4 is a somewhat confusing map. We recommend that it be reconfigured to better delineate habitats that are potentially high risk areas. References should also be included with the map for each of the species mentioned. Use of the mouth of the Merrimack River off Newburyport out to at least 1 nm by roseate terns should be added to the figure (FWS unpubl. data, 2009).

Page BA-99: The Baseline Assessment identifies the six national wildlife refuges that are adjacent to or within the study area. Please note that there are no "National Wildlife Areas"; all are "National Wildlife Refuges." Moreover, Plum Island is not the name of the refuge, it is the Parker River National Wildlife Refuge. People refer to it as Plum Island, as that is the name of the land mass on which the refuge is located, but it would be more appropriate here to identify it solely as Parker River National Wildlife Refuge.

Mr. Deeric Babb-Brett
November 23, 2009

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Thank you again for the opportunity to comment on the Plan. This effort represents an excellent start; however, we encourage significantly more detail and clarification be included in the final Plan. Please contact Maria Tur at 603-223-2541 if you have any questions or if you would like to discuss our comments. We look forward to continuing to work with you and your staff on this important endeavor.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'T. Chapman', with a long horizontal line extending to the right.

Thomas R. Chapman
Supervisor
New England Field Office

Mr. Deerin Babb-Brott
November 23, 2009

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cc: EPA, Tim Timmerman
EPA, Matt Schweisberg
NMFS, Chris Boelke
ACOE, John Sargent
USFWS, Libby Herland
USFWS, Albert Manville
USFWS, Diane Lynch
USFWS, Alex Hoar
Reading file
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