

Meyer Glitzenstein & Crystal

1601 Connecticut Avenue, N.W.
Suite 700
Washington, D.C. 20009-1063

Katherine A. Meyer
Eric R. Glitzenstein
Howard M. Crystal
Joshua R. Stebbins
William S. Eubanks II

Telephone (202) 588-5206
Fax (202) 588-5049
www.meyerglitz.com

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By Certified Mail and E-Mail

Ian A. Bowles, Secretary
Executive Office of Energy and Environmental Affairs
100 Cambridge Street, Suite 900
Boston, MA 02114

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

Dear Secretary Bowles and Assistant Secretary Babb-Brott,

On behalf of Let Vineyarders Decide, we are writing to express our grave concerns that the Ocean Plan, as currently written in draft form, fails to consider likely conflicts with federal wildlife protection laws, and may foreclose meaningful review of offshore wind power facilities in state waters as mandated by federal environmental law. It is our understanding from reading the Ocean Plan that you acknowledge that projects will need to comply with state and federal law; however, by effectively zoning two specific areas of state waters for commercial wind power production, you risk foreclosing any meaningful consideration of alternatives with lesser environmental impacts – including the development of wind power facilities farther offshore or the decision not to develop offshore wind power – in contravention of federal law.¹

We will begin by discussing the federal wildlife laws that would be implicated by the construction of an offshore wind power facility south of the Elizabeth Islands or southwest of Nomans Island and which should be considered as you make recommendations for wind power

¹ We would like to note that several of these deficiencies were also raised by the New England Field Office of the United States Fish and Wildlife Service in the office's November 23, 2009, letter to Assistant Secretary Babb-Brott.



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development in state waters. We will then discuss how creating renewable energy areas for commercial-scale wind power may unlawfully limit future alternatives analyses under the National Environmental Policy Act and the Clean Water Act. Finally, we will conclude by proposing how you may alter the plan to comply with federal law.

I. Applicable Federal Wildlife Laws

The wildlife that will likely be harmed by a large-scale wind power project in the area identified in the draft Plan is protected by a number of federal wildlife protection laws. To begin with, the Massachusetts coast, particularly along Cape Cod and the Islands, is a major migratory bird route in the fall, with significant numbers of migrants stopping overnight on coastal lands. Wind power facilities kill birds when the birds fly into the turbine blades, and they could potentially disrupt migration by obstructing migratory pathways and introducing artificial light. Examples of bird species likely to migrate directly through the areas being set aside for wind power include Roseate Terns, Peregrine Falcons, and numerous other shorebirds, raptors, and passerines.

Most, if not all, of the migratory birds passing along Massachusetts's coast are protected by the Migratory Bird Treaty Act ("MBTA"), 16 U.S.C. §§ 703-11, which prohibits the killing or taking of migratory birds² without a permit. An operator need not intend to harm or kill birds to be liable under the MBTA; therefore the construction and operation of a wind power facility in state waters would certainly result in multiple violations of the statute.³

Similarly, the Marine Mammal Protection Act ("MMPA"), 16 U.S.C. §§ 1361-1407, imposes a moratorium on the take of all marine mammals, including whales, dolphins, porpoises, and seals. The Act defines take to include harassment, hunting, capturing, and killing. *Id.* § 1362(13). Because many marine mammals are sensitive to underwater sounds, the pile driving associated with the construction of an offshore wind power facility would likely take many or all of the marine mammals in the vicinity, in violation of the MMPA. In Denmark, for example, the construction of an 80-turbine wind power facility affected harbor porpoises in ways that would violate the MMPA. A technical report from the site states:

Combined evidence from animal densities obtained from visual surveys, behavioural observations during surveys and acoustic activity data in and outside the construction area demonstrated effects on the behaviour and abundance of animals on both short-term (hours) and long term (entire construction period) scales. Acoustic activity by the porpoises decreased dramatically on the entire Horns Reef at the onset of ramming operations and returned to higher levels a few hours after each ramming operation was completed. ... A general effect on the behaviour of animals was seen during the construction period and at distances of up to 10-15 kilometers from the construction site. Compared to observations

² Species protected by the law include all species included in the terms of conventions with Canada, Mexico, Japan, and Russia. See 16 U.S.C. § 703. This encompasses literally hundreds of species of birds of every taxonomic class found in the United States.

³ Additionally, the Bald and Golden Eagle Protection Act, 16 U.S.C. §§ 668-668d, prohibits wounding, killing, or disturbing bald or golden eagles without a permit.

before and after construction there was a decrease in non-directional swimming, a behaviour assumed to correlate with feeding activity. Animal density estimates indicates that there were fewer animals present on the entire Horns Reef during the construction period compared to observations before and after the construction phase. Jakob Tougaard *et al.*, Short-term effects of the construction of wind turbines on harbour porpoises at Horns Reef (April 9, 2003).⁴

The effect of construction and operation of marine wind power facilities on large whales has not been established, since these species do not inhabit northern Europe, where marine wind power facilities exist. It is reasonable to assume, however, based on information available about the whales' sensitivity to acoustic disturbances, that construction activities would constitute take under the MMPA.⁵

Several of the species protected by the MBTA and MMPA are also endangered or threatened species that receive even more rigorous protection under the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-44.⁶ Under the ESA, a wind power facility operator could not harass, harm, wound, or kill any listed species without first obtaining incidental take authorization from the United States Fish and Wildlife Service. In fact, a federal district judge recently halted a wind power project in West Virginia because he determined the turbines would kill endangered animals. *Animal Welfare Inst. v. Beech Ridge Energy, LLC*, RWT 09cv1519 (D. Md. Dec. 8, 2009).

Additionally, the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801-82, asserts federal jurisdiction over all fish species in the exclusive economic zone ("EEZ") within 200 nautical miles from the coast. Under the Magnuson Act, the National Marine Fisheries Service has designated essential fish habitat that includes "those waters and substrate necessary to fish for spawning, breeding, feeding or growth to maturity." *Id.* § 1802(10). While the designation of essential fish habitat is primarily used to manage fisheries, it does signify areas of particular conservation value to fish species, which should be considered in determining the environmental effects of an action or viable alternatives. The areas identified by the Draft Ocean Plan for commercial wind power production – south of the Elizabeth Islands and southwest of Nomans Island – serve as essential fish habitat for a number of species, including Atlantic Cod, Atlantic Herring, Ocean Pont, Red Hake, Silver Hake, Window Pane Flounder, and Winter Flounder.

⁴ <http://www.hornsrev.dk/Miljoeforhold/miljoerapporter/Hornsreef%20porpoises%202002.pdf> (last accessed Dec. 9, 2009).

⁵ In addition, both the low-level noise from operation and the obstruction presented by the existence of an array of more than 10 turbines could potentially harass whales in violation of the MMPA.

⁶ For a list of species protected by both the MBTA and the ESA, visit the United States Fish and Wildlife Service website at <http://www.fws.gov/migratorybirds/RegulationsPolicies/mbta/compare.pdf> (last accessed Dec. 8, 2009). The species of particular concern in these locations are the roseate tern and the piping plover. For a list of animals found in Massachusetts that are also listed under the ESA, visit the MassWildlife website http://www.mass.gov/dfwele/dfw/nhosp/species_info/mesa_list/mesa_list.htm (last accessed Dec. 9, 2009). The list includes several whales, as well as Loggerhead, Green, Hawksbill, Kemp's Ridley, and Leatherback turtles.

II. Alternatives Analyses Required by the National Environmental Policy Act and Clean Water Act

The National Environmental Policy Act (“NEPA”) – 42 U.S.C. §§ 4321-70f – and the Clean Water Act (“CWA”) – 33 U.S.C. §§ 1251-1387 – both require that federal or federally approved actions affecting water resources must evaluate the environmental impacts of proposed actions, as well as alternatives to such actions. NEPA is triggered any time there is a major federal action. A permit to discharge dredged or fill material⁷ from the construction of monopoles in coastal waters, for example, would result in both NEPA and CWA review, since the Army Corps of Engineers would need to comply with NEPA in its decision whether to issue the permit.

The analysis of alternatives under NEPA is “the heart of” the document the agency prepares under the law: an environmental impact statement. 40 C.F.R. § 1502.14. By laying out the various options, the agency identifies a clear basis for its decision to pursue an action. In order to facilitate such a review, the implementing regulations require that the agency rigorously explore and objectively evaluate a “no action” alternative. *Id.* § 1502.14(d). Where a wind power developer seeks to get a federal permit, the “no action” alternative under NEPA would enable the agency to compare the environmental effects of constructing the facility to the status quo.

Similarly, the CWA requires the Army Corps to determine that no “practicable alternative to the proposed discharge [exists] which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences” before the agency can issue a permit. *Id.* § 230.10(a). This standard requires that private developers seek project sites with the least damaging environmental effects. Where an activity does not require an aquatic site, there is a rebuttable presumption under the CWA that there are practicable and environmentally preferable alternatives. *Id.* § 230.10(a)(3). Generally, these two alternatives analyses work hand in hand. In fact, the CWA regulations state that the analysis under NEPA “will in most cases provide the information for the evaluation of alternatives” under CWA. *Id.* § 230.10(a)(4).

By effectively zoning two (and only two) areas of state waters as appropriate for commercial wind power production, the Ocean Plan could be viewed as an effort to constrain the alternatives analyses that will have to be undertaken for any project under NEPA and the CWA. Such a constraint would be especially inappropriate here, where the Ocean Plan does not comprehensively address the wildlife impacts, or wildlife protection laws, enumerated above.

III. Conclusion

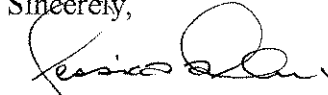
In its final plan, the state should make crystal clear that it is not precluding either the consideration of wildlife effects under federal law or any agency’s ability to take a hard look at reasonable alternatives to permitting a wind power facility at a particular site. Therefore, we urge that you include explicit language in the final Ocean Plan that affirms the fact that nothing

⁷ The Clean Water Act prohibits the discharge of any pollutants into navigable waters without a permit. 33 U.S.C. § 1311(a).

in the plan precludes or limits federal or state agencies from considering alternatives to offshore wind power facilities – particularly those involving alternative locations and the “no action” alternative. Further, the Plan should avoid making any suggestion that the state has pre-selected a particular site as the appropriate location for offshore wind power development, as a wind power facility would necessarily need to comply with federal environmental laws.⁸

We appreciate your consideration of our concerns, and we welcome the opportunity to discuss these matters with you more fully.

Sincerely,



Jessica Almy
Eric Glitzenstein

Cc: Deval L. Patrick, Governor (by mail)
Timothy P. Murray, Lieutenant Governor (by mail)

⁸ The Plan may also be in tension with state or local laws. This letter, however, focuses on federal natural resource protection laws.