NEW ENGLAND FISHERY MANAGEMENT COUNCIL

Habitat/Marine Protected Areas/Ecosystems

I. STATUS

Meetings:

Committee: The Habitat Committee has not met since the last Council meeting. No meeting is scheduled at this time; the next meeting is anticipated to be in early May.

Habitat/MPA/Ecosystem Plan Development Team: The PDT met on March 3 to continue development of the Phase II Risk Assessment.

Habitat/MPA/Ecosystem Advisory Panel: The Advisory Panel has not met since the last Council meeting.

The next Advisory Panel meeting has not been scheduled at this time.

II. COUNCIL ACTION

Review / approve draft Council comments on the Minerals Management Service's Cape Wind Energy Project DEIS.

Review / approve draft Council comments on the Revised Draft Framework for Developing the National System of MPAs.

III. INFORMATION

1. PDT meeting summary dated March 3, 2008
2. Draft Council comments letter, MMS Cape Wind Energy Project DEIS
3. Draft Council comments letter, Revised Draft Framework for Developing the National System of MPAs

#1

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Habitat PDT Meeting Summary

March 3, 2008
Narragansett, RI

The PDT met on Monday, March 3, 2008 in Narragansett, RI to continue work on Phase 2 of the Omnibus Habitat Amendment.

Omnibus Phase 2 – Conceptual approach

The PDT reviewed the published Goals and Objectives for the Omnibus Amendment. Several members noted that the scope of these could be interpreted as exceeding the minimum requirements of Magnuson Act (MSA), and wondered how any competing needs would be addressed by the PDT. The Chair stated that the primary road map for Phase 2 would be provided by the MSA requirements, and that a thorough treatment would be highly likely to address most of the Council's stated Goals and Objectives. Any unaddressed or outstanding items would, however, required dedicated attention.

The PDT then reviewed the MSA requirements, and the Chair presented the PDT with a 'master' statement of purpose derived from the MSA language, as well as the EFH Final Rule published by the NMFS:

> *"Councils must act to prevent, mitigate or minimize impacts resulting from fishing actions anywhere in the Council's management unit that reduce the quality and/or quantity of waters and substrate designated as being necessary to fish for spawning, breeding, feeding or growth to maturity if there is evidence that the impacts of such actions are more than minimal and not temporary in nature, to the extent that the Council's prevention, mitigation or minimization strategy considers the nature and extent of the impact that reduces the quality and/or quantity of EFH on EFH and the long and short-term costs and benefits of potential management measures to EFH, associated fisheries, and the nation."*

For the remainder of the discussion, the PDT referred primarily to two documents; the first was the PDT Chair's 080301 memo, distributed the week prior to the meeting, and the second was Dr. Stevenson's "RA Framework" document distributed via email on March 1 and again in paper form at the meeting. The North Pacific FMC and Pacific FMC's adverse impacts assessments were also referenced, as was the US EPA's Risk Assessment framework document. These materials were distributed via internet FTP prior to the meeting and were not available in paper form.

The PDT discussed the relationship between the Omnibus' Phase 1 and Phase 2. One member asked if the underlying basis for EFH designations (survey presence and/or abundance of species aggregated over ten minute squares (TMS)) should serve dual duty as the basis for the adverse effect minimization strategy. The implication of this question is that, to be consistent, the Council could choose to consider changes in survey presence/abundance (aggregated by TMS) as

the metric for determining impacts to EFH. That is to say, any reduction in quantity (or quality?) of ten minutes squares designated as EFH could be considered prima fascia evidence of an adverse impact. A reduction in the number of TMS's that emerge as EFH based on the Phase I methods is not direct evidence of adverse impacts of fishing on benthic habitats, but it is a proxy identical in nature to that assumed in Phase I. This is a somewhat farcical interpretation. But given the level 1/level 2 data that fed into the EFH designations, it is logically consistent. The point it drives home is that the trawl survey-based EFH definitions provided in Phase 1 *are not the appropriate starting point* for a thorough review of the potential for adverse impacts to habitat from fishing. The fact that the data were insufficient to make EFH designations based on the relationship between habitats and a given species' growth, reproduction, survival or production rates (L3/4 data) does not make the job of assessing adverse impacts of fishing on habitat easier. Rather, it makes the job harder.

Discussions emphasized that the intention in Phase II is to assess the risk of adverse impacts from fishing, and evaluate spatial overlap with designated EFH post-hoc.

One PDT member asked if the baseline from which the PDT will be evaluating impacts and adversity will be some semi-virgin state, such as the year 1492. The PDT concluded that it is nearly impossible to conceive of much of the northwest Atlantic (NWA) operating area in anything other than a heavily-fished state—fishing has been a fundamental component of the ecosystem for too long to assume an alternative state. The implication for this within the assessment is that data used in determining bottom composition is assumed to be representative of an ambient environmental state that, for most areas, includes fishing. No attempt should be made to control for the effects of fishing on these data prior to developing the assessment.

A PDT member brought up the issue of seasonality, and how it affects not only the natural disturbance of the seafloor but also the composition of living shelter-providing organisms. The PDT was not prepared to reach a conclusion on seasonality or temporal scale/granularity for the assessment, but noted the importance of seasonality in this regard.

The PDT discussed the fact that disturbances to the seafloor, be they natural or anthropogenic, may be good for some species and bad for others. The effects that the PDT intends to assess are to, primarily, living and non-living shelter—the cascading impact of such effects will be discussed qualitatively, as data to do otherwise does not exist.

Several PDT members stated that an iterative approach to developing the assessment was called for, beginning with a qualitative, 'matrix-based' assessment of risk that was generically distinguished by habitat type (most likely determined by grain size) but that was not spatially explicit. Such an approach has the advantage of not requiring an extensive, time- and data-intensive process for developing a sea floor map of habitats to build a spatially explicit model upon. Furthermore, it would rely on fewer assumptions due to the reduced number of parameter estimates needed for a non-spatially-explicit assessment. The downside to such an approach is that it would not provide the Council with a level of spatial resolution that may be required to assess the costs and benefits of re-examining and potentially re-constructing the status quo approach to adverse impacts minimization. No conclusions were reached by the PDT at this point in the discussion.

Returning from the lunch break, the audience was provided an opportunity to question the PDT. One member of the audience wanted further clarification as to how the potential risk assessment (RA) results would interact with the EFH designations from Phase I. The response was that, assuming some spatial nature to the RA results, overlaps with individual species/life stage (s/ls) EFH would be calculated as part of the impacts analysis section, but as stated previously, the

PDT was not as of now intending to use specific EFH designations as endogenous components of the RA. Another audience member requested clarification on the potential inclusion of prey species as a metric for analysis. The PDT Chair quoted the EFH Final Rule, which states "*Adverse effects may include direct or indirect physical, chemical, or biological alterations of the waters or substrate and loss of, or injury to, benthic organisms, prey species and their habitat, and other ecosystem components, if such modifications reduce the quality and/or quantity of EFH.*" The same member of the audience asked if it was the intention of the PDT to include in their assessment the economic value of the protein being provided by a given amount of habitat. The PDT stated that the question was important, particularly with respect to the practicability of potential management restrictions on fishing, and that such an assessment may be attempted, recognizing that the data are insufficient for separating the specific contribution of habitats to economic fishery returns.

The PDT next discussed the "Assessment Endpoints" provided in the Chair's meeting memo, which are:

1) Adverse impacts of fishing on benthic physical structure
    - 1(a) geological structure
    - 1(b) biological structure
    - 1(c) hard and soft corals
2) Adverse impacts of fishing on prey availability
    - 2(a) Benthic fanua
    - 2(b) Pelagic fauna

There was some discussion of the appropriateness of the word "endpoints" to describe these five metrics, and while no agreement was reached on the semantics it was agreed that these represented a complete set of metrics to be assessed in the RA.

The PDT discussed, in several separate threads, the utility of a model-based approach such as that used in the North Pacific FMC's analysis, versus a qualitative, 'matrix-based' approach. One primary advantage of a model-based approach is that the explicit treatment of spatial data provides the Council with a theoretical basis for management measures and metrics to distinguish the potential adverse effects of fishing on habitats—the "a tow is not a tow" solution. The downsides are that data may not be sufficient to construct such a model, the time and expertise to fully develop it may not be available, and the assumptions needed to build it may reduce the utility of any potential results.

Next the PDT talked in more detail about available benthic composition data and their proper use. The question of classification scheme came up, and the PDT agreed to consider the Phase I classification scheme, at least until a critical weakness in this emerges. The scheme is:

- Mud
- Sand/Mud
- Sand
- Gravelly Sand and/or Mud
- Sandy and/or Muddy Gravel
- Gravel*
- Rocky/Hard Bottom**

** For this analysis, the term "gravel" refers to all grain sizes above a diameter of 2 mm, i.e., any sediment coarser than sand. "Gravel" therefore includes pebbles, cobbles, and even boulders.*
*** "Rocky bottom" refers to visual identification of bedrock on the seafloor, or to attempts to collect a sediment sample that failed because the bottom was so hard that no sample could be*

collected. Due tosampling limitations, rocky substrates are under represented in the substrate database.

The PDT discussed the potential for quantifying natural disturbance and recovery. No conclusions were reached. It was agreed that a conceptual model was needed before more fruitful discussions could take place. The Chair stated that a strawman model would be circulated to the PDT within a week. The meeting adjourned at approximately 4:15 PM.

#2

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DRAFT

April 4, 2008

Dr. Rodney E. Cluck, Project Manager
Alternative Energy Program
Minerals Management Service
U.S. Department of the Interior
381 Elden Street, Mail Stop 4080
Herndon VA, 20170

Re: Cape Wind Energy Project Draft Environmental Impact Statement

Dear Dr. Cluck:

The New England Fishery Management Council (Council) has reviewed the Minerals Management Service's (MMS) Draft Environmental Impact Statement (DEIS) for the Cape Wind Energy Project, and is submitting comments pursuant to Section 305(b)(3) of the Magnuson-Stevens Act, which empowers the Council to consult with federal and state agencies regarding potential impacts from development projects to essential fish habitat (EFH) for species under the Council's jurisdiction. The Council previously provided comments relating to the US Army Corps of Engineers DEIS in February of 2005.

These comments are divided into three topical areas: general comments on the DEIS, comments specific to the DEIS Sections, and recommendations.

General comments on the DEIS

- Throughout the DEIS reports prepared specifically to illustrate or analyze portions of the project are incorporated by reference. The Council on Environmental Quality (CEQ) guidelines state that "care should be taken to ensure that the statement remains an essentially self-contained instrument, capable of being understood by the reader without the need for undue cross reference" *38 Federal Register 20550, 20554* (1973). The majority of references to these reports are not incorporated into the text of the DEIS in such a way that they are "capable of being understood by the reader without the need for undue cross-reference." We do not believe that the few words contained in these references constitute a sufficient "brief description of the contents of the report," as required by CEQ. We ask that the contents of these reports be briefly summarized wherever they are referenced. Additionally, these reports do not appear to be readily available to the public. The DEIS should prominently include mention of where or how to obtain them.
- The document contains discussion of commercial and recreational fishing activities under the second-level heading "Biological Resources." We believe that this is conceptually incorrect and may confuse the reader. The endeavor of catching fish for recreation or profit should receive its own sub-heading under the "Socioeconomic Resources and Land Use" second-level heading.

This should apply consistently throughout the DEIS (i.e. Affected Environment, Environmental Consequences and Cumulative Impacts).

Comments specific to the DEIS Sections

Proposed Action

- Section 2.3.2.3 refers to the potential use of two types of scour protection around the monopiles. It would be helpful if the proponents indicated their expectations with regards to either scour mats or rock armor, as it is not clear from the document which type of scour protection the proponent actually intends to use. If the decision has not yet been made, it seems appropriate to treat the two as options for controlling or minimizing scour around monopiles. Such clarification should be extended throughout the document, allowing the impacts of each option to be explored in a more rigorous way in the Environmental Consequences Section of the DEIS.
- Section 2.4.3.4 refers to the anticipated inspection schedule for various components of the project. Scour protection and marine cables appear scheduled for inspection after one year for the former, and two years for the latter, with biennial inspections thereafter. Reference is made to the "pruden(ce)" of conducting an inspection after "any significant storm activity." The document should state specifically if this is merely a prudent action or if it is the proponent's intention, and further if such an inspection is in addition to the schedule proposed or in place of one or more scheduled inspections.

Affected Environment

- Section 4.2.5.4.2 states that Nantucket Sound is designated as "Statistical Area 58/075, which is comparable to MDMF Area 10." We believe the first part of the Statistical Area is a typographical error, and should read "...Area 538/075." Sub-area 075 is an infrequently used federal statistical area code delineating statistical sub-areas in state waters. While locating Statistical Area 538 using publically available information is possible, the boundaries for sub-area 075 are not readily available to the public. The document should provide a figure that demonstrates clearly where this sub-area is, and how it is comparable to MDMF Area 10. Absent this, it is difficult to interpret any of the fishery-dependent information included in the DEIS as it relates specifically to the proposed project.
- Section 4.2.5.4.3 summarizes interviews with "five shellfish and coastal officers" and includes summary reports regarding commercial and recreational harvesting on Horseshoe Shoal. The Council applauds the use of site-specific information to inform or enhance other available sources, but the DEIS should make clear that this sample is unlikely to be comprehensive or representative of the actual users of resources found on, in and around Horseshoe Shoal.
- Section 4.2.7.1 states "In the Northeast region, NOAA Fisheries works with the and also the MAFMC in defining essential habitat..." We believe that the New England Fishery Management Council was intended to be referenced between the words "the" and "and" in that sentence.
- Section 4.2.7.2, in the Survey of Commercial and Recreational Fishing Activities—2005, makes reference to a survey of 18 "commercial and fixed gear fisherman." While the average number of years fishing (32) for this sample group is reported in the text, this statistic is meaningless without basic descriptive statistics covering both the sample and the universe of commercial and fixed gear fisherman in question. We assume this information is included in Report No. 4.2.5-6, but it should be brought forward to the DEIS to illuminate the findings in the remainder of the section. This is especially important here given the amount of detail this section provides, detail which is based entirely on the survey. As noted in our comments on Section 4.2.5.4.3 (above), the Council applauds the use of such site-specific sociological data.

Environmental and Socioeconomic Consequences

- Section 5.3.1.1.1 should specify which version of scour control is preferred by the project proponents, or alternatively discuss the criteria and procedures to be used in evaluating one relative to the other.
- Modeled bedform migration reveals a "3.3 to 9.8 ft per year" migration rate (Section 5.3.1.1.1). Given the project proponent's intention of burying electrical transmission lines to six feet below the seabed, more extensive discussion on the impacts of electrical transmission line exposure on commercial fishing activities should be included in the document.
- Under Section 5.3.1.3.1, the conclusion that "operation impacts on oceanographic process would vary from negligible to minor and would result in only temporary and localized effects" does not appear to be supported if rock armor is used as scour control. A permanent or semi-permanent addition of 47.8 acres of rock piles to what is described as a generally sand or course-granule-dominated bottom is not minor, temporary or localized.
- Section 5.3.2.5 should discuss the potential impacts of rock armor and scour mats on subtidal offshore resources individually. We note that the range in area covered by scour control devices could be between 2.5 and 47.8 acres. The costs and benefits associated with these two options should be more clearly delineated.
- Analysis presented in Section 5.1.5.11 (Monopiles as Fish Attracting Devices) concludes that monopiles are unlikely to attract fish due to the low rugosity of the structures. This appears to be in conflict with the analysis presented in Section 5.3.2.7.2 (WTGs Acting as Fish Attracting Devices), which extrapolates that the monopiles will attract particular fish species (Atlantic cod, cunner, tautog, black sea bass, and scup). This conflict should be reconciled.
- Section 5.3.2.8 includes no estimates of total anticipated water withdrawals during jet plow embedment. The document states that "eggs and larvae entrained…would likely suffer 100 percent mortality," and that "millions of fish eggs and larvae may be present in the withdrawn water." These two statements are difficult to interpret without estimates of anticipated water withdrawals. The potential magnitude of egg and larvae entrainment is not clearly established.

Monitoring and Mitigation

- Section 9.2 appears to use lessons learned from the Horns Rev and Nysted wind energy projects as the basis for determining appropriate mitigation and monitoring activities. Given that site-specific monitoring that has occurred since 2001 on Horseshoe Shoals, it would be appropriate to highlight lessons learned from these activities.
- Section 9.4.5 notes the expected burying of cables to 6 feet below the seabed. Section 2.4.3.4 of the Proposed Action notes "…there would be inspections of these runs conducted during the early years following their laying. A full inspection may be appropriate after the first two years, and thereafter on a random basis…" Section 9 should include further guidance on the inspection procedures and timing, as well as specify a communications plan in the event that a cable exposure is revealed through monitoring. Commercial fisherman should be included as a specific target for such communication.

Recommendations:

The Council remains concerned with the potential impacts this project may have on the habitat necessary to maintain healthy fish stocks and the impact that the project may have on commercial fisheries.

Accordingly, we have provided a broad list of conservation recommendations that the MMS should consider as a condition for permitting this project.

1. The project schedule should be revised to avoid in-water work within Lewis Bay from January 15 – May 31 of any year in order to protect sensitive life stages of winter flounder EFH.

2. The choice of scour control is of critical concern due to the variance in potential impacts to EFH and benthic communities. Analysis of the benefits and impacts of the two types of scour control (scour mats and rock armor) is inadequate for the public to provide substantive comments in this regard. Based upon the information presented, scour mats appear to be the least likely to cause an adverse impact to EFH. However, there is little data pointing to the conclusion that scour mats would become covered and no discussion of mitigation or offsetting compensation in the event that they fail to function in the ways the document anticipates. Further, 47.8 acres of rock piles are anticipated in the case of rock armor scour control, but there is little or no discussion of the potential impacts of such an extensive addition of structured bottom to the project area. The choice of scour control methods, and the rationale for that choice, must be made clear prior to project approval.

3. Require the project proponents to publish a monitoring program for scour control and transmission line burial. This monitoring program should include, at a minimum, semi-annual monitoring events in the first year and annual monitoring throughout the life of the project. A communications plan should be established to warn commercial fisherman of any exposures noted during inspections. These plans should be reviewed and approved by federal and state resource agencies prior to project approval.

Should you have questions regarding these comments, please contact Chad Demarest at 508-495-2358.

Sincerely,

John Pappalardo
Chairman

cc: Pat Kurkul, National Marine Fisheries Service
W. Peter Jensen, Mid-Atlantic Fishery Management Council
John V. O'Shea, Atlantic States Marine Fisheries Commission
Secretary Ian A. Bowles, MA Executive Office of Energy and Environmental Affairs
Paul Diodati, MA Division of Marine Fisheries
Leslie-Ann McGee, MA Coastal Zone Management

#2A

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
PROGRAM PLANNING AND INTEGRATION
Silver Spring, Maryland 20910

APR 8 2008

Dr. Rodney E. Cluck, Ph.D.
Project Manager
Alternative Energy Program
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U.S. Department of the Interior
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Herndon, Virginia 20170

Mr. Robert J. DeSista
Chief, Regulatory Division
U.S. Army Corps of Engineers
New England District
696 Virginia Road
Concord, Massachusetts 01742-2751

Dear Dr. Cluck and Mr. DeSista:

The National Oceanic and Atmospheric Administration (NOAA) has reviewed the Minerals Management Service's (MMS) Draft Environmental Impact Statement (DEIS) and the U.S. Army Corps of Engineers' (ACOE) Public Notice (NAE-2004-338-1) for the Cape Wind Energy Project. NOAA's National Marine Fisheries Service (NMFS) served as a cooperating federal agency in the development of this DEIS, and provided National Environmental Policy Act (NEPA) scoping comments to MMS on July 26, 2006. NMFS also served as a cooperating agency in the development of the ACOE's DEIS on the Cape Wind Energy Project in 2004, and provided comments on that DEIS in February 2005.

The purpose of this letter is to provide combined comments to both MMS and ACOE in accordance with their respective review processes and permitting responsibilities. The comments include two general themes that have some overlap: first, comments regarding additional information and analysis that MMS should include in the Final Environmental Impact Statement (FEIS) that may be helpful and necessary as MMS and ACOE complete their permitting and authorization processes, including their respective NEPA documents and second, comments and conservation recommendations relating to MMS and ACOE's consultation and authorization responsibilities under NOAA statutory authorities.

1) Additional Information and Analysis
In the first attachment, NOAA provides detailed comments on the information presented in the DEIS regarding impacts to fishery resources and impacts to species protected under the Marine Mammal Protection Act (MMPA), as well as significant comment on the underwater acoustics analysis.

2) Consultation and Authorization
In the second attachment, the NMFS Northeast Regional Office emphasizes two important issues with regard to MMS and ACOE consultation responsibilities:

- **Impacts to Essential Fish Habitat and Fishery Resources**

The attached letter provides the Magnuson-Stevens Fishery Conservation and Management Act (MSA) Essential Fish Habitat (EFH) conservation recommendations. We look forward to your response to our EFH conservation recommendations.

- **Impacts to Species Listed Under the Endangered Species Act**

As the lead federal agency for the Cape Wind project, MMS is responsible for determining whether the proposed action may affect any species listed under the Endangered Species Act (ESA), and for seeking consultation with NMFS for ESA-listed species under NMFS jurisdiction should that determination be made. MMS has indicated to NMFS that MMS will request initiation of formal consultation, pursuant to Section 7 of the ESA, in the spring of 2008. NOAA looks forward to working closely with MMS during Section 7 consultation.

We hope our comments will assist you. Thank you for giving us the opportunity to review this document.

Sincerely,

Rodney F. Weiher, Ph.D.
NEPA Coordinator

Attachments

cc:
Robert Varney, US Environmental Protection Agency
Michael Bartlett, US Fish and Wildlife Service
Secretary Ian A. Bowles, MA Executive Office of Energy and Environmental Affairs
Paul Diodati, MA Division of Marine Fisheries
Leslie-Ann McGee, MA Coastal Zone Management
Glenn Haas, MA Department of Environmental Protection
Paul Howard, New England Fishery Management Council
Dan Furlong, Mid-Atlantic Fishery Management Council
John V. Shea, Atlantic State Marine Fisheries Commission
Tom Bigford, F/HQ
Mary Colligan, PRD

Attachment 1

NOAA's Comments on the MMS Cape Wind Energy Project Draft Environmental Impact Statement; Cape Wind Associates, LLC Public Notice (NAE-2004-338-1)

Project Description

The proposed project would construct and operate 130 wind turbine generators (WTGs) in Nantucket Sound, Massachusetts to be connected by submarine cables to the shore at Yarmouth, Massachusetts for distribution to the existing power grid. The entire project would occupy an area of approximately 24 square miles. Cape Wind Associates proposes to build 130 WTGs on Horseshoe Shoal in Nantucket Sound. Each WTG would be mounted on a single 16.75 – 18 foot diameter monopole, and would be connected by a 33 kilovolt (kV) submarine cable to an electric service platform (ESP). The ESP would transform and transmit alternating current electricity to shore through two 115 kV submarine cables. The maximum potential electric output is expected to be 468 megawatts (MW) distributed to the power grid on shore.

Comments regarding additional information and analysis that should be included in the FEIS document

General

On page 2-2, 4th paragraph, the DEIS states that "water depths within Nantucket Sound range from 0.5 to 70 ft (0.3 to 21.3 m) MLLW." There is an error; the text should be changed to "water depths within Nantucket Sound range from 0.5 to 70 ft (0.15 to 21.3 m) MLLW."

Fishery Resources

Consideration of No-Fishing Buffer Zones

NOAA is interested in how the placement of the foundations would change fish community composition, distribution, abundance, and individual size in the general area. As the solid foundations are likely to act as an artificial reef, hence a fish attractant device, likely increases in fish abundance in the areas around the foundations may attract fishermen to these structures unless fishing restrictions in the area are enacted. For safety and security reasons, many oil platforms and liquefied natural gas facilities have no-fishing buffer zones adjacent to the facilities. The FEIS should state whether MMS has considered implementing no-fishing zones if the project goes forward. Chapter 9-3 addresses the artificial reef attractant concern, but concluded that many years of data must be collected in order to accurately assess this concern. NOAA recommends that areas around the foundations receive intensive fish monitoring.

Additional Details on the Applicant's Environmental Management System
The FEIS should provide additional details regarding the "Environmental Management System" and whether it will help quantify actual effects of the project's activities on benthic habitats and the associated living marine resources.

Temporary impacts from placement of cables within Lewis Bay and Nantucket Sound
The DEIS notes several areas of short and long period sand waves throughout the project area on Horseshoe Shoals. According to recent evaluations of fishing gear effects (Stevenson et al. 2004), the smoothing of sand ridges as a result of trawl gear can adversely affect fisheries habitat. Scup, red hake, and silver hake utilize biogenic depressions and sand wave troughs as shelter habitat (Steimle et al. 1999; Steimle et al 1999; Auster et al 2003; Lock and Packer 2004). The loss of sand ridge structure habitat can impact the forage base for predator fish. Section 5.3.2.5 and Table 5.3.2-2 of the DEIS note that the proposed project will result in approximately 809 acres (not including scour protection) of temporary impact on benthic habitats during construction. These temporary impacts result from installation of submarine cables, inner-array cables, the monopiles, and the ESP, as well as the associated anchors and anchor line sweeps.

NOAA remains concerned that these proposed temporary impacts may adversely impact sand wave habitat. Furthermore, the DEIS notes that due to material lost during the cable installation process, seabed scars of approximately 6.0 feet wide and 0.75 to 1.7 feet deep resulting from plowing activity would remain. The DEIS anticipates that the estimated recovery period would range from days on Horseshoe Shoal to many months or possibly years. While adverse impacts from cable installation and anchor line sweeps are expected to be temporary, MMS should consider providing a detailed monitoring and contingency plan for recovery of physical habitat in the FEIS.

Impacts associated with water withdrawals during jet plow operation
Section 5.3.2.8 of the DEIS and Section 5.2.3 of the EFH assessment notes that fish eggs and larvae that may be present within the project area would be impacted as a result of the water intake associated with jet plow operation. The document states that millions of fish eggs and larvae may be present in the withdrawn water, and would likely suffer 100 percent mortality. However, the DEIS does not describe the amount of water to be utilized, nor the anticipated impacts on fishery resources that result from water withdrawal. The FEIS should describe anticipated levels of water usage as well as anticipated impacts to fishery resources resulting from the proposed action.

Marine mammals
The FEIS should provide a more thorough cumulative impacts analysis of the potential adverse effects the proposed Cape Wind project would have on marine mammals. Specifically, the FEIS should analyze the potential additional adverse effects of the project as a result of increased vessel activity in an area during the construction phase and also during routine operations once the facility is constructed and becomes operational, at least from a ship strike perspective. The DEIS also failed to analyze other existing factors that might also impact marine mammals within Nantucket Sound, such as commercial and recreational fisheries, stranding events, pollution, and other human activities. The FEIS should include additional information on these impacts to marine mammals.

Underwater Acoustics Impacts Analysis

NOAA is concerned that the DEIS uses inappropriate acoustic terms to describe underwater sound and its impacts to marine mammals. Terms such as L_{eq}, L_{90}, and L_{max} are typically used to address airborne noises. All these terms address noise exposures over a given period of time, and disregard the sound pressure levels (SPLs) such as 0-peak, peak-peak, and root mean square (rms) levels that are commonly used to characterize impulse sound (such as impact pile driving) and its impact to marine mammals. Currently for marine mammals exposed to impulse noises, NMFS generally uses rms measurements to estimate the levels of impacts (e.g., 180 dB re 1 μPa rms as the onset of TTS for cetaceans). Therefore, the Level A harassment thresholds of 190 dB for pinnipeds and 180 dB for cetaceans, and the Level B harassment thresholds of 160 dB for cetacean mentioned on page 5-126 of the DEIS are all in fact rms measurements, which is not the same measurement as L_{max} used in the DEIS. For the same reason, for source and received levels of pile driving noise, the measurements should be consistent with marine mammal noise exposure criteria by using rms. Throughout the DEIS L_{eq}, L_{90}, and L_{max} are used in addressing underwater noise impacts to marine mammals and received level measurements for pile driving. These analyses do not reflect current scientific knowledge on the effects of underwater noise to marine species because the measurements used in the DEIS are different from standards and criteria used by NMFS to manage underwater noise impacts to marine mammals and other living marine resources. The FEIS should revise the analysis of acoustic impacts to make it consistent with current scientific knowledge and with the noise exposure measurements used by NMFS.

Although much is still unknown on the effects of anthropogenic sounds on marine organisms, scientific publications in this area are available as references to provide the basis for analyses on the potential impacts from pile driving and other activities to marine mammals in the proposed project area. However, the DEIS, especially in section *5.3.2.6 Non-ESA Marine Mammals* of *Chapter 5.0 Environmental and Socioeconomic Consequences*, does not provide a thorough review of the existing scientific information. This section should be revised in the FEIS to incorporate many of the important findings in this field.

Furthermore, in section *4.1.2.1.2 Below Water Noise*, and in section *5.3.2.6.1 Construction/Decommission Impacts* (page 5-124), the FEIS analysis should clarify that the dB levels for underwater sounds are measured using the reference acoustic pressure level of 1 μPa. In addition, on page 4-12 the DEIS stated that typical ambient underwater sound levels in Nantucket Sound are from L_{eq} 95 to 115 dB for surface winds of five to 30 mph. The FEIS should provide the bandwidth for this measurement.

In section *5.3.2.6 Non-ESA Marine Mammals*, the DEIS used the hearing threshold sound level (dB_{ht}) to analyze the potential for physical injury to seals from pile driving. The DEIS also uses the hearing threshold sound levels in the analysis of the zone of influence (e.g., annoyance) for marine mammals. However, the DEIS does not provide any scientific references to support the abovementioned analyses. Current NMFS noise exposure criteria for Level B harassment (behavioral harassment in which annoyance is included) for impulse noise are 160 dB re 1 μPa rms for cetaceans and 170 dB re 1 μPa rms for pinnipeds.

In addition, the DEIS did not address any potential noise impacts to marine mammals from installation of wind turbine generators and the electric service platform, and from laying submarine cables. Construction of these structures is presumed to be conducted from barges or tugs, and would probably require operation of the vessels' dynamic positioning (DP) systems to stay at one location. Operation of a vessels DP mechanism could generate high level continuous noise and ensonify a large area with sound levels above 120 dB re 1 μPa, which has the potential to cause Level B harassment to marine mammals exposed to such levels. MMS should address these issues in the FEIS.

As a component of the MMS cooperating agency role with NMFS, MMS is encouraged to coordinate with NMFS' Office of Protected Resources well in advance of FEIS publication to improve the acoustic analyses. Should MMS find that a potential for take of marine mammals exists incidental to construction or operation of the Cape Wind Energy Project, it is beneficial for MMS to initiate MMPA authorization discussions as early as practical to facilitate a NEPA process that satisfies both MMS' and NMFS' environmental review responsibilities.

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Attachment 2

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
NORTHEAST REGION
One Blackburn Drive
Gloucester, MA 01930-2298

APR - 3 2008

Dr. Rodney E. Cluck, Ph.D.
Project Manager
Alternative Energy Program
Mineral Management Service
U.S. Department of the Interior
381 Elden Street; Mail Stop 4080
Herndon, Virginia 20170

Mr. Robert J. DeSista
Chief, Regulatory Division
U.S. Army Corps of Engineers
New England District
696 Virginia Road
Concord, Massachusetts 01742-2751

Re: Cape Wind Energy Project Draft Environmental Impact Statement; Cape Wind Associates, LLC Public Notice (NAE-2004-338-1)

Dear Dr. Cluck and Mr. DeSista:

The National Oceanic and Atmospheric Administration's National Marine Fisheries Service (NMFS) has reviewed the Minerals Management Service's (MMS) Draft Environmental Impact Statement (DEIS) and the US Army Corps of Engineers' (ACOE) Public Notice (NAE-2004-338-1) for the Cape Wind Energy Project. NMFS has served as a cooperating federal agency in the development of this DEIS, and provided National Environmental Policy Act (NEPA) scoping comments to MMS on July 26, 2006. NMFS also has served as a cooperating agency in the development of the ACOE's DEIS in 2004, and provided comments relating to that DEIS in February 2005.

The purpose of this letter is to provide combined comments to both the MMS and the ACOE in accordance with their respective review processes and permitting responsibilities. The comments relate to two general themes: first, comments relating to further potential analysis that may be helpful and/or necessary as MMS and ACOE complete their permitting process, including their respective NEPA documents; and second, comments and conservation recommendations relating to MMS and ACOE's consultative responsibilities under NMFS statutory authorities.

Project Description

The proposed project would construct and operate 130 wind turbine generators (WTGs) in Nantucket Sound, Massachusetts to be connected by submarine cables to the shore at Yarmouth, Massachusetts for distribution to the existing power grid. The entire project would occupy an area of approximately 24 square miles. Cape Wind Associates proposes to build 130 WTGs on Horseshoe Shoal in Nantucket Sound. Each WTG would be

mounted on a single 16.75 - 18 foot diameter monopole, and would be connected by a 33 kilovolt (kV) submarine cable to an electric service platform (ESP). The ESP would transform and transmit alternating current electricity to shore through two 115 kV submarine cables. The maximum potential electric output is expected to be 468 megawatts (MW) distributed to the power grid on shore.

The proposed project area within Nantucket Sound supports a large variety of finfish, and shellfish species as well as other benthic invertebrates living within or on the substrate. Sections 4.2.5, 4.2.7, and 4.2.8 of the DEIS describe the variety of living marine resources and habitats identified within the project area. The finfish data utilized for this project are from NMFS and Massachusetts Division of Marine Fisheries data sets, and are not based upon site-specific finfish sampling. As stated in our July 26, 2006 comments to MMS, in order to fully evaluate the proposed project and anticipated impacts on fishery resources the use of multi-year, site-specific fisheries sampling data is needed. Absent a site-specific resource survey, a conservative approach for inferring presence of fisheries resources must be taken for the proposed project site.

General Comments

Temporary impacts from placement of cables within Lewis Bay and Nantucket Sound
The DEIS notes several areas of short and long period sand waves throughout the project area on Horseshoe Shoals. According to recent evaluations of fishing gear effects (Stevenson et al. 2004), the smoothing of sand ridges as a result of trawl gear can adversely affect fisheries habitat. Scup, red hake, and silver hake utilize biogenic depressions and sand wave troughs as shelter habitat (Steimle et al. 1999; Steimle et al 1999; Auster et al 2003; Lock and Packer 2004). The loss of sand ridge structure habitat can impact the forage base for predator fish. Section 5.3.2.5 and Table 5.3.2-2 of the DEIS note that the proposed project will result in approximately 809 acres (not including scour protection) of temporary impact on benthic habitats during construction. These temporary impacts will be the result of the installation of submarine cables, inner-array cables, the monopiles, and the ESP, as well as the associated anchors and anchor line sweeps. NMFS remains concerned that the proposed temporary impacts may adversely impact sand wave habitat. Furthermore, the DEIS notes that due to material lost during the cable installation process, seabed scars of approximately 6.0 feet wide and 0.75 to 1.7 feet deep resulting from plowing activity would remain. The DEIS anticipates that the estimated recovery period would range from days on Horseshoe Shoal to many months or possibly years. While adverse impacts from cable installation and anchor line sweeps are expected to be temporary, a detailed monitoring and contingency plan for recovery of physical habitat should be presented within the FEIS.

Impacts associated with water withdrawals during jet plow operation
Section 5.3.2.8 of the DEIS and Section 5.2.3 of the EFH assessment notes that fish eggs and larvae that may be present within the project area would be impacted as a result of the water intake associated with jet plow operation. The documents state that millions of fish eggs and larvae may be present in the withdrawn water, and would likely suffer 100 percent mortality. However, the DEIS does not describe the amount of water to be utilized, nor the anticipated levels of impacts on fishery resources. The FEIS should describe anticipated levels of water usage as well as anticipated impacts resulting from the proposed action.

MMS and ACOE Consultative Responsibilities under the Endangered Species Act and the Magnuson-Stevens Act

NMFS is entrusted with stewardship for the Nation's living marine resources. Its statutory authorities include Congressional acts that mandate federal permitting agencies to consult with NMFS regarding these living marine resources. For example, projects involving essential fish habitat (EFH) must follow the consultation process in our EFH regulation at 50 CFR 600.905 as directed by the Magnuson-Stevens Fishery Conservation and Management Act (MSA) (16 USC 1801 *et seq.*); projects potentially involving ESA species must follow the consultation process in our ESA regulations at 50 CFR 402 as directed by the Endangered Species Act (ESA) (16 USC 1531 *et seq.*); and projects modifying a body of water must follow the consultation process directed by the Fish and Wildlife Coordination Act (16 USC 661 *et seq.*). NMFS believes that the proposed project, as outlined below, implicates the consultative requirements directed by all three statutes. The following comments and conservation recommendations are based on our NEPA comments in the above section, the DEIS, as well as information contained within the EFH assessment.

<u>Impacts on winter flounder within Lewis Bay</u>
The DEIS indicates that the submarine transmission cable will originate at the ESP in Nantucket Sound, transit Lewis Bay, and make landfall at New Hampshire Avenue in the town of Yarmouth, Massachusetts. At approximately 200 feet seaward of the mean low water (MLW) line, the cable will transition to horizontal directional drill (HDD) to avoid coastal resource areas. In order for this transition to occur, the applicant is proposing to excavate a pit with a cofferdam in Lewis Bay. NMFS considers the sediment types (i.e., sand and silt) and water depths (i.e., 2-16 feet) within Lewis Bay, as described in the DEIS, to be important for winter flounder spawning and juvenile development (Pereira et al.1999). As a result, the proposed cofferdam could potentially exclude approximately 2,925 square feet of winter flounder spawning habitat if utilized during the spawning and juvenile development period.

As stated within the DEIS, the submarine cable transmission system includes two cables, each with a 4-6 foot wide jet-plow trench with a 20-foot separation between. Jet-plow activity seaward of the HDD exit point will continue through Lewis Bay for a distance of over one mile. As this trench will occur over at least one mile through winter flounder EFH, we anticipate that spawning and juvenile development will be disrupted over significant areas of bay bottom if the work occurs during these sensitive time periods.

The DEIS utilizes the suspended sediment modeling program (SSFATE) in order to predict suspended sediment concentrations and deposition rates associated with cable installation within Lewis Bay. We are particularly concerned about the anticipated depth of suspended sediment deposition resulting from the activity. According to the SSFATE modeling results, deposition of suspended sediment will range from depths of 20-46 mm adjacent to the trench down to 1.0-5.0 mm a few hundred yards from the trench. Winter flounder eggs range in size from 0.74-0.85 inch diameter (Pereira et al 1999). Studies have found that sediment deposition on eggs over 0.5 mm can decrease the hatching success and delay hatching, and burial to depths of 4 mm can cause eggs to not hatch (Berry et al. 2004).

The DEIS notes that Lewis Bay has weaker tidal currents and contains higher percentages of silt and clay sediments as compared with Nantucket Sound. As such, sediments in Lewis Bay can be expected to remain in the water column for longer periods of time than sandy sediments in Nantucket Sound, and impacts may extend out greater distances from the disturbance and increase the areal extent of impact on winter flounder eggs. According to section 5.3.2.7 of the DEIS and section 6.0 of the EFH assessment, the applicant has committed to avoid in-water construction activity in Lewis Bay between January 15–May 31 of any year in order to protect sensitive life stages of winter flounder. While this commitment is reiterated in the Monitoring and Mitigation Section (9.0) of the DEIS, the dates differ from those stated above. The appropriate work restriction in order to protect winter flounder should be January 15 – May 31.

Eelgrass

As stated within the DEIS, an eelgrass bed has been identified near Egg Island within Lewis Bay. Eelgrass beds have been designated as EFH and a Habitat Area of Particular Concern (HAPC) for summer flounder by the Mid-Atlantic Fishery Management Council (MAFMC). In addition, eelgrass beds have been designated by the US Environmental Protection Agency as "special aquatic sites" pursuant to section 404(b)(1) of the Federal Clean Water Act, due to their important role in the marine ecosystem. While DEIS and SSFATE modeling states that impacts and deposition will be minimal, steps should be taken to ensure that adverse impacts on this area do not occur.

Impacts on benthic habitats resulting from scour protection alternatives

According to the DEIS, the applicant is considering whether to utilize scour mats or traditional rock armor as alternatives for WTG scour protection, with anticipated footprints of 2.5 acres and 41.8 acres, respectively. Based upon these analyses, the use of scour mats, rather than traditional rock armor, appears to be the least damaging, practicable alternative to accomplish scour protection for this project.

The DEIS identifies impacts resulting from scour mats as temporary due to the fact that mats would be anchored, and include synthetic fronds that mimic seafloor vegetation to trap sediment and become buried over time, therefore minimizing alterations to the soft-bottomed community. Although the DEIS indicates that the scour mats would become buried by sediments, NMFS believes that it is possible these mats could remain on the seafloor surface and permanently alter the soft-bottomed community. Consequently, it is our determination that an evaluation of the scour mats performance is needed.

Essential Fish Habitat Conservation Recommendations

As noted in the EFH assessment included within the DEIS, this portion of Nantucket Sound has been designated as EFH under the MSA for 18 federally managed species including, but not limited to, Atlantic cod (*Gadus moruha*), winter flounder (*Pseudopleuronectes americanus*), windowpane flounder (*Scopthalmus aquosus*), Atlantic butterfish (*Peprilus triacanthus*), summer flounder (*Paralicthys dentatus*), scup (*Stenotomus chrysops*), black sea bass (*Centropristus striata*), long finned squid (*Loligo pealei*), and short finned squid (*Illex illecebrosus*). Based upon the information available, we have concluded that the proposed project would have temporary and permanent adverse effects on EFH resulting from construction of the proposed wind park. In order to sequentially avoid, minimize, and mitigate for adverse impacts on EFH, NMFS

recommends pursuant to Section 305(b)(4)(A) of the MSA that the ACOE and the MMS adopt the following EFH conservation recommendations:

1. In order to minimize permanent impacts associated with the scour protection alternatives, scour mats should be utilized. In order to determine the success of the scour mats, a post-project monitoring plan should be developed and implemented. Should it be determined that scour mat burial does not sufficiently occur resulting in permanent benthic alteration, compensatory mitigation should be required.

2. In order to protect winter flounder spawning and juvenile development habitat within Lewis Bay, no in-water activities within Lewis Bay should occur from January 15–May 31 of any year.

3. In order to determine the recovery of sand wave habitat and soft bottomed communities from the installation of submarine cables, inner-array cables, the monopiles, the ESP, and associated anchors and anchor line sweeps, a detailed monitoring and contingency plan for recovery of physical habitat should be required. Prior to its implementation, this monitoring plan should be reviewed and approved by Federal and state resource agencies.

Please note that Section 305(b)(4)(B) of the MSA requires the federal action agency to provide NMFS with a detailed written response to these EFH conservation recommendations, including a description of measures adopted by the federal action agency for avoiding, mitigating, or offsetting the impact of the project on EFH. In the case of a response that is inconsistent with NMFS recommendations, Section 305(b)(4)(B) of the MSA also indicates that the federal action agency must explain its reasons for not following the recommendations. Included in such reasoning would be the scientific justification for any disagreements with NMFS over the anticipated effects of the proposed action and the measures needed to avoid, minimize, mitigate, or offset such effects pursuant to 50 CFR 600.920(k).

Please also note that a distinct and further EFH consultation must be reinitiated pursuant to 50 CFR 600.920(l) if new information becomes available or the project is revised in such a manner that affects the basis for the above EFH conservation recommendations. Specifically, should the FEIS include information that alters the basis for this EFH consultation, NMFS may issue additional EFH conservation recommendations, as necessary.

Endangered Species

Section 7(a)(2) of the ESA states that each federal agency shall, in consultation with the Secretary, insure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat. Any discretionary federal action that may affect a listed species must undergo Section 7 consultation. As the lead federal agency for the Cape Wind project, MMS is responsible for determining whether the proposed action may affect any listed species, and for seeking the concurrence of NMFS with that determination. MMS has indicated to NMFS that MMS will request the initiation of formal consultation, pursuant to Section 7 of the ESA, in the spring of 2008.

It is our understanding that this consultation will be completed before an FEIS is issued. As such, these present comments will not include any conclusions regarding the likelihood of effects to listed species as it is appropriate to make such determination on effects in our Biological Opinion.

NMFS anticipates that the sections of the EIS dealing with potential impacts on endangered species will be updated to reflect the outcome of the consultation. Additionally, we expect that MMS will incorporate any Reasonable and Prudent Measures and/or Terms and Conditions included as part of an Incidental Take Statement, which may be issued accompanying NMFS Biological Opinion.

The discussion of the species listed under the ESA that may occur in the action area is complete and accurate. However, there are several areas where additional information will facilitate a more complete assessment of potential impacts on listed species.

The presence of whales and sea turtles in the action area is seasonal. As such, additional information on the proposed construction schedule, including the duration of each phase of the project (i.e., pile driving, cable laying, etc.) as well as any time of year constraints, will aid in determining the potential for the various phases of the project to impact these species. MMS should provide more information on the likely scenario for pile driving, such as the amount of time it will take to drive each pile, the number of piles to be driven each day, and how many piles are expected to be being driven at any one time.

The DEIS includes a discussion on likely impacts of pile driving on listed whales. However, the DEIS does not include a similar section for sea turtles. In order to determine if pile driving is likely to affect sea turtles, MMS should include an analysis on the likelihood of increased sound levels to cause injury or behavioral effects to sea turtles. Additionally, MMS should provide information on the distance from the piles where sound levels are likely to return to background levels.

The DEIS contains information on sound levels measured during the construction of the Utgrunden project. In order to ensure that this information is relevant to the proposed project, MMS should clarify if the piles proposed for installation by Cape Wind are the same size as those at Utgrunden, as well as whether the installation techniques are the same. Information on the type of substrate and other characteristics that might influence sound levels associated with pile driving should also be included. This information will better allow a comparison of the Utgrunden project to the proposed project.

The DEIS concludes that the proposed project will have "no effect" on whales and sea turtles, with the exception of loggerhead sea turtles, for which MMS has concluded the proposed project "may affect, but is not likely to adversely affect." The effects determination for whales and the other sea turtle species seems to be inconsistent with the body of the DEIS, which in several places discusses the likelihood of the project to affect

these species, particularly during construction. MMS should clarify their conclusions regarding likely impacts on these listed species, and ensure that the conclusions are consistent throughout the document.

We look forward to your response to our EFH conservation recommendations, as well as MMS' request for the initiation of formal consultation, pursuant to Section 7 of the ESA. Thank you for your continued coordination with NMFS regarding this project. Should you have further questions regarding these EFH comments, please contact Christopher Boelke at 978-281-9131. Questions regarding the ESA consultation process should be directed to Julie Crocker at 978-281-9328 x6530.

Sincerely,

Patricia A. Kurkul
Regional Administrator

cc:
Robert Varney, US Environmental Protection Agency
Michael Bartlett, US Fish and Wildlife Service
Secretary Ian A. Bowles, MA Executive Office of Energy and Environmental Affairs
Paul Diodati, MA Division of Marine Fisheries
Leslie-Ann McGee, MA Coastal Zone Management
Glenn Haas, MA Department of Environmental Protection
Paul Howard, New England Fishery Management Council
Dan Furlong, Mid-Atlantic Fishery Management Council
John V. Shea, Atlantic State Marine Fisheries Commission
Tom Bigford, F/HQ
Mary Colligan, PRD

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#3

New England Fishery Management Council
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John Pappalardo, *Chairman* | Paul J. Howard, *Executive Director*

DRAFT

April 4, 2008

Mr. Joseph A. Uravitch
National Marine Protected Areas Center, N/ORM, NOAA
1305 East West Highway
Silver Spring, MD 20910

Re: Comments on the Revised Draft Framework Document for Developing the National System of Marine Protected Areas and the Accompanying Environmental Assessment.

Dear Mr. Uravitch,

Thank you for the opportunity to comment on the Revised Draft Framework Document (Framework) that outlines a framework for the development of the National System of Marine Protected Areas. As you know, the Council has worked closely with the MPA Center throughout the process of developing the Marine Managed Area (MMA) definitions and inventory. We provided comments in February of 2007 on the initial draft.

We would first like to commend you and your staff on the substantial and evident work that has gone into the framework document. We note that nearly all of the New England Fishery Management Council's previous comments have been addressed. However, the Council remains concerned that the revised Draft Environmental Assessment is inadequate given the scope of the proposed framework.

Comments on the Revised Draft Environmental Assessment
Appendix D of the framework contains the revised Draft Environmental Assessment (EA) for the action to implement a national system of MPAs. The Council continues to disagree with the finding of no significant impact (FONSI) and we believe the EA, as written, is an inadequate and incomplete evaluation of the impacts of the framework. A programmatic environmental impact statement (EIS) is likely necessary, but given the casual treatment of this EA, it is impossible for the public to understand the impacts of the proposed action. We will take this opportunity to highlight the documents' most substantial deficiencies, but note that this list is not comprehensive.

- The No Action Alternative is misspecified. The EA states that the No Action Alternative would have the "MPA Executive Order … stand alone without any further detail of the process necessary for developing the national system." We believe this to be extra-legal and not a viable alternative. Section 4(a) of the Executive Order leaves the development of a national system of MPAs subject to appropriations, and an argument could be made that failure to develop such a system is a viable component of a No Action Alternative, but this is true only when appropriations are lacking. If

this is the case here, it should be stated. Further, Sections 4(c), 4(d) and 4(e) of the Executive Order each contain required actions that are not subject to appropriations. These required actions, at a minimum, should constitute a portion of the No Action Alternative.

- It does not contain a reasonable range of alternatives representative of all possible actions reasonably expected to satisfy the purpose and need. The document must include a reasonable range of alternatives for public comment. The problem is not that only two alternatives are included, but rather that no other version of a Draft Policy appears to have been seriously considered. Alternative structures that, for example, provide more or less emphasis on research, planning, gaps analysis and technical assistance than those proposed in the framework should be evaluated and considered through the public process. The assumption underlying the choice of alternatives in the existing document is that there is only one possible structure available to meet the purpose and need for action. This assumption is false and the MPA Center has obligations to both consider viable alternatives to the one proposed and to allow the public to comment on such alternatives.
- The EA does not adequately describe the Affected Environment. We note that the changes in this section since the first draft framework EA, in particular the inclusion of cursory evaluations of four valued environmental components, are evident. However, the new descriptions remain insufficient for establishing baseline conditions. Absent such, the reader is unable to adequately determine or understand the impacts of the alternatives.
- The Environmental Consequences section does not describe and analyze the anticipated environmental consequences of the proposed action and alternative(s) on the resources described in the Affected Environment. The EA does not adequately analyze the direct (conduct of the proposed action or any of the alternatives) or indirect (activities that are not a part of the proposed action or any of the alternatives but are reasonably foreseeable consequences of NOAA conducting the proposed action or alternatives) impacts as required by NEPA. The EA states that there will be impacts, but makes no attempt to discuss or evaluate precisely what these may be. Note especially that a cumulative effects analysis, a required component of an EA, includes discussion of reasonably foreseeable future actions. This is of particular importance given the programmatic nature of the framework and the myriad overlapping authorities and regulatory bodies with MPA responsibilities. The EA, as written, contains no discussion of cumulative effects. As previously stated, the document is insufficient for understanding any of the potential impacts of the proposed action or alternative(s).

If you have any questions, please feel free to contact Chad Demarest at 508-495-2358 or via email at cdemarest@nefmc.org.

Sincerely,

John Pappalardo
Chairman

cc: FMC Executive Directors and Council Chairs

#4

North Pacific Fishery Management Council

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April 10, 2008

Mr. Joseph A. Uravitch
National MPA Center, N/ORM
1305 East-West Highway
Silver Spring, MD 20910

Dear Mr. Uravitch:

Thank you for the opportunity to review the Revised Draft Framework for Developing a National System of MPAs. On behalf of the North Pacific Council, I offer the following comments regarding two main areas of concern: (1) the nomination/delisting process and regional fishery management council authorities in that regard; and, (2) the scope of 'avoiding harm to resources protected by an MPA', and again, the regional fishery management councils' authorities in that regard. While this revised draft may be viewed as a light at the end of the tunnel, some of us fear that light may be the headlight of a train headed our way. The desire to have many of our closure areas recognized as MPAs may be outweighed by the increased regulatory burden, decreased management flexibility, and potential subjugation of our management authorities under the Magnuson-Stevens Act.

MPAs are not chosen for scenic or aesthetic value like a national park; rather, they are chosen for scientific and conservation value and their nature and function dictate a direct, ongoing Council role in their management. In that same view, we expect MPAs to play a crucial role in our ecosystem-based management approach, and therefore the Councils ability to successfully implement ecosystem-based management will be compromised if we have little or no control over MPA designation and management. One possible solution may rest in the ability to use the ecosystem planning process to describe the role of MPAs in ecosystem-based management, and consequently the Councils' role in MPA management.

We of course have discussed these concerns previously at the Council Coordination Committee meetings, but the draft framework still does not adequately describe the role and authorities of regional fisheries management councils relative to the primary concerns noted above. Relative to the nominating/delisting process, the response to comments on this very issue still does not fully answer the question of what agency makes the final determination on an MPA nomination, and where the Councils fit in the definition of 'agency'. The language contained in footnote 8 (citing the example of the "Federal Fishery Management Councils and their unique role with NMFS...") simply states that "*In these cases...the multiple managing entities shall be consulted throughout the nomination process.*" We would like to get clarification as to what happens if the Council and NMFS disagree on an MPA nomination, or if the Council wished to remove an area from MPA designation. Some previous experiences where NOAA has been required to 'consult' with the Councils have resulted in a pro-forma consultation with no meaningful Council input (see NEPA revisions pursuant to the recently reauthorized Magnuson-Stevens Act).

Virtually all potential MPAs that regulate fishing were developed by the Councils as amendments to their fishery management plans (FMPs). The Council has always maintained flexibility to make adjustments to FMPs to meet ever changing management needs, environmental conditions, and changes in fisheries. Yet

it appears that the Council may potentially lose flexibility and authority to modify MPAs (such as changing the boundary of an area once it is designated as am MPA), or eliminate MPAs from its FMPs, with the insertion of yet another layer of potentially conflicting authority.

FMP amendments and implementing regulations already undergo extensive public comment through public hearings and formally through the Federal Register. As proposed by the draft framework, an additional formal public comment process established through the MPA Center will increase administrative costs, could further delay time critical fishery regulations, and will be potentially confusing to affected stakeholders. The draft framework identifies goals and priority conservation objectives which were not explicitly set forth in the EO13158. Some of these priorities may be better addressed with tools other than MPAs, but the push to identify and implement MPAs through the national system may limit equal consideration of these other measures. MPAs may not always be the best solution, yet the NOAA MPA center will be actively promoting the designation of MPAs, which may take precedent over other possible management tools.

Implementation of each of these priority conservation objectives through establishment of MPAs could eventually create an extremely complex and overwhelming suite of areas. As we discovered when we identified essential fish habitat areas for FMP species, every spot of the ocean is essential for at least one managed species for breeding, feeding, or growth to maturity. The MPA framework goals and priorities would greatly expand the list of areas of concern. When the other MPA framework priority objectives are added in (e.g., biogenic habitats, diversity, geological features, ESA species, rare species, migratory species, education, cultural and historic sites, fishing grounds, maintaining natural age/sex structure of fish, bycatch mitigation), the potential areas for inclusion as national MPA sites becomes astronomically large – perhaps encompassing the entire U.S. EEZ at the extreme.

The Council remains very concerned about the no-harm provision. EO13158 states that "*Each Federal agency whose actions affect the natural or cultural resources that are protected by an MPA shall identify such actions. To the extent permitted by law and to the maximum extent practicable, each Federal agency, in taking such actions, shall avoid harm to the natural and cultural resources that are protected by an MPA.*" This raises a number of concerns that are not addressed in the draft framework. For example, are management agencies required to avoid harm to <u>all</u> resources protected within an MPA? Or, are the management agencies required to avoid harm to <u>all</u> resources protected by an MPA regardless of where they occur? Or, are the management agencies required to avoid harm only to the resources for which the MPA was specifically designed to protect (if the particular MPA identified these resources) <u>within</u> the MPA, or everywhere? And who makes the determination about what resources are protected by an MPA?

For example, the Bristol Bay Red King Crab Savings Area was designed to protect red king crab and their habitats by prohibiting bottom trawling and dredging year-round within most of this area. A small portion of the area is open to bottom trawling, with a limited bycatch allowance, during years of high crab abundance. This area also contains essential fish habitat for a variety of other commercially exploited resources (such as rock sole, yellowfin sole, Tanner crab, Pacific cod, and pollock), and is utilized by other biological resources not currently harvested (e.g., seastars, worms, mollusks). Therefore, the all-important question is what resources are protected by the MPA? Is it just the crab, the fish too, or all resources that may occur within the MPA? And are we required to avoid harm to these resources outside of the MPA? And, even if we assumed the simplest case of red king crab as the only resource and protection was only required within the MPA itself, who would make a determination that allowing some bottom trawling within the MPA meets the avoid harm to the maximum extent practicable threshold – NOAA or the Council?

In our case, Federal MPAs in the North Pacific were specifically designed to protect Steller Sea lions, Pacific walrus, red king crab, blue king crab, Tanner crab, snow crab, pollock, Pacific halibut, Chinook

salmon, chum salmon, Pacific herring, and Primnoa corals. In addition, there are MPAs that are designed to protect all the resources within it. For example, what specific resources are protected by the MPAs that include the seamounts, the Sitka pinnacles, other MPAs established to conserve essential fish habitat? Who makes that determination?

The draft framework says that the meaning of terms such as "avoid harm" and "extent practicable", are dependent upon the agency's interpretation. Further, the draft framework says that the determination of whether an agency, in taking such actions, is avoiding harm to those resources, to the extent permitted by law and to the maximum extent practicable, will be made by the individual agency using its existing review process and authorities. So, for the initial nomination of existing MPAs, does that mean NOAA or the Council would need to prepare additional analyses to evaluate if, in fact, federally authorized activities (e.g, fisheries) avoid harm to the resources to the extent permitted by law and to the maximum extent practicable?

As you note in the Environmental Assessment document prepared for the draft framework, MPAs are a contentious subject, and it is likely that NMFS and/or the Regional Fishery Management Councils will be challenged on every decision point in the MPA nomination and evaluation process. Without further clarification of these overlapping (or conflicting) authorities, we see a potential train wreck coming, and the potential for endless litigation over the nominations and the avoid harm provisions. We urge that clarification of the process and authorities be made as soon as possible, and be included in the revised framework.

Sincerely,

Chris Oliver
Executive Director

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Council Executive Directors