SAVE OUR SOUND
alliance to protect nantucket sound

July 16, 2010

VIA FEDEX

Mr. Brendan McCahill
Environmental Engineer
U.S. Environmental Protection Agency – New England
5 Post Office Square
Suite 100, Attn: OEP-5-2
Boston, MA 02109-3912

Re: Cape Wind Project Outer Continental Shelf Air Permit Review

Dear Mr. Cahill:

The Alliance to Protect Nantucket Sound (APNS) hereby set forth their comments on the proposed Federal Outer Continental Shelf (OCS) Air Permit Approval (APA) for the proposed Cape Wind Project. We thank Region 1 of the Environmental Protection Agency (EPA) for your diligence with regard to the entire scope of the Cape Wind Project review, and the agency's extensive and thorough comments to and involvement with both the U.S. Army Corps of Engineers (Army Corps) and Minerals Management Service (MMS). Throughout the nearly ten-year process, your office has been a consistent voice of reason, and champion of a proper regulatory process and adherence to the requirements of statutes designed to balance interests and protect our natural resources. Now that EPA has its own decision to make on the project, we are confident that you will continue to demonstrate that same commitment to the OCS APA process. We are concerned, however, by several factors in the current OCS APA proposed permit. The purpose of these comments is to identify current deficiencies in the proposal and suggest appropriate ways of complying with existing statutory and regulatory duties.

Background

On December 17, 2008, Cape Wind Associates (CWA) submitted an OCS air permit application to EPA New England. The application is intended to cover emissions from the diesel compression ignition engine construction equipment to be used during the construction and operation of the Cape Wind project. The engines emit criteria pollutants including nitrogen oxides (NO_X), carbon monoxide (CO), particulate matter (PM), sulfur dioxide (SO_2), and volatile organic compounds (VOC). In the application, CWA provided the following information to support its statement that it will meet all air permit requirements codified in section 328(a) of the Clean Air Act (CAA) and 40 C.F.R. Part 55 and all other applicable federal requirements. According to the application, CWA will:

1. Apply Lowest Achievable Emission Rate (LAER) for NO_X emissions during the Cape Wind project construction phase (Phase 1);

2. Obtain NO_X emission reductions to offset the Phase 1 NO_X emissions;

3. Apply Best Available Control Technology (BACT) for all emissions during Phase 1 and the Cape Wind project operational phase (Phase 2);

4. Perform an air quality analysis to ensure that the emission increase from the project would not cause or contribute to a violation of any applicable National Ambient Air Quality Standards (NAAQS), which are maximum concentration "ceilings" measured in terms of total concentration of a pollutant in the atmosphere; and

5. Comply with all other state and federal regulations.

Under section 328(a) of the CAA, EPA must establish air pollution requirements for OCS sources located within 25 miles of States' seaward boundaries. These requirements and their implementing regulations at 40 C.F.R. Part 55 apply the same pollution control requirements to an OCS source that would apply to that source if it were located in the corresponding onshore area (COA), typically the onshore attainment or nonattainment area closest to the source.

On June 10, 2010, EPA issued a notice proposing to issue an OCS APA to CWA for the project's construction and operation periods (Phases 1 and 2). EPA is proposing that CWA control air emissions using the following emission control technologies and operations:

1. The use of newer low-NO_X engines installed with diesel oxidation catalysts that reduce NO_X, PM, CO, and VOC emissions; and

2. The use of ultra-low sulfur diesel (ULSD) for all construction equipment that reduces SO_2 and PM emissions.

EPA's proposal requires CWA to offset its Phase 1 NO_X emissions by purchasing 285 tons of NO_X emission reduction credits through the Massachusetts offsets trading bank. In an attempt to avoid permit revisions while allowing for necessary repair activities, EPA has proposed that CWA limit Phase 2 emissions to 49 tons per year or less.

CWA's own air quality analysis indicates that the proposed project's impacts will be below all applicable NAAQS.

Without EPA's approval of the OCS APA, the Cape Wind project cannot proceed. While MMS has issued a Record of Decision (ROD) to offer a lease to CWA for the proposed project, CWA may not proceed without obtaining other necessary federal and state permits, including the OCS APA from EPA. For the reasons discussed below, EPA must review the project again using appropriate and correct standards and completing additional public review.

Clean Air Act Issues

In general, we believe EPA has appropriately identified the non-propulsion engines on the construction vessels as the primary source of emissions and that, by virtue of section 328 of the CAA, these sources are subject to the LAER requirement and the requirement to offset criteria pollutant emissions.

That said, we see important deficiencies in the EPA analysis that prevented the proposed permit from meeting the statutory requirements of the CAA, and therefore prevent EPA from approving the permit in its current state. We discuss these deficiencies in turn below.

First, EPA admits that CWA must show it will meet all NAAQS (as required by the Massachusetts rules), while claiming that CWA will not cause an exceedance of any NAAQS. *See, Attachment I to the Fact Sheet*, email from B. Hennesey to I. McDonnell, *Modeling for Cape Wind's Local Impacts Relative to the National Ambient Air Quality Standards* (June 3, 2010).

However, EPA has not modeled CWA's compliance with the new NAAQS for NO_X issued in February 2010. 75 Fed. Reg. 6,474 (Feb. 9, 2010). As you know, EPA has issued specific guidance that a new NAAQS applies to permitting decisions from its effective date forward. While the EPA guidance applies specifically to federal Prevention of Significant Deterioration permitting decisions, its reasoning applies equally to permitting decisions required by State Implementation Plans such as that in force in Massachusetts.

As EPA knows, the failure to analyze whether CWA construction activities will result in exceedances of the new NO_X NAAQS is not academic. As recently as June 29 of this year, the EPA issued a 29 page guidance document discussing reports from stakeholders "indicating that some sources – both existing and proposed – are modeling potential violations of the 1-hour NO_2 standard." *See, Guidance Concerning the Implementation of the 1-hour NO_2 NAAQS for the Prevention of Significant Deterioration Program, to Regional Administrators from S. Page, Director, Office of Air Quality Planning and Standards* (June 29, 2010). EPA is required to determine whether such programs exist in the case of the Cape Wind permit, and may not proceed to issue a permit without undertaking such an analysis.

This month, EPA also issued a new short term NAAQS for sulfur oxides. EPA has likewise provided no analysis of whether the Cape Wind project will result in exceedances of the new SO_X standard. Given that the modeling analysis referred to by EPA shows that the emissions from construction will be at least 87 percent of the previous SO_X NAAQS, and that it can be expected to be more difficult to demonstrate attainment of the short term SO_X NAAQS, it is important that EPA undertake and provide an analysis of the short term SO_X concentrations associated with the proposed construction program. Once again, without such a demonstration the agency cannot proceed to issue the requested air permit.

In addition, the emissions analysis does not capture other impacts of the project. For example, the Federal Aviation Administration has proposed to restrict the airspace for the 25

square miles surrounding the proposed project. Planes will be required to circumnavigate the area, increasing emissions. Likewise, vessels traveling in the area will be required to alter and lengthen their courses in order to avoid the project, further increasing emission levels.

We would also like to use this opportunity to highlight three additional and related issues with the proposed project and EPA's federal permitting authority: inadequate analysis of project alternatives, failure to properly consult on issues of historic and cultural preservation, and failure to consult on impacts to threatened and endangered species.

Analysis of Project Alternatives.

Additionally, EPA has an obligation to conduct an independent analysis of project alternatives. EPA has consistently expressed concern over MMS's flawed analysis of alternatives under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.* Ironically, EPA has now taken the position that no analysis of alternatives needs to be performed under the agency's CAA authority for purposes of the OCS APA.

Under NEPA, agencies must consider a reasonable range of alternatives, including a no-action alternative, before taking any action, such as issuing a permit, that may significantly impact the quality of the human environment. The Council on Environmental Quality's (CEQ) regulations implementing NEPA at 40 C.F.R. § 1502.14 explain that a reasonable range of alternatives should be presented and compared in an Environmental Impact Statement (EIS) to allow for a "clear basis for choice among options by the decision maker and the public." CEQ guidance elaborates on this section, stating that "Section 1502.14 requires the [EIS] to examine all reasonable alternatives to the proposal. In determining the scope of alternatives to be considered, the emphasis is on what is 'reasonable' rather than on whether the proponent or applicant likes or is itself capable of carrying out a particular alternative. Reasonable alternatives include those that are practical or feasible from the technical and economic standpoint and using common sense, rather than simply desirable from the standpoint of the applicant." *Forty Most Frequently Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 Fed. Reg. 18,026, #2a(A) (March 23, 1981).

In EPA's April 5, 2002, comments on the Army Corps' Notice of Scoping, the agency recommended broadening the purpose and need statement to allow for the proper inclusion and analysis of more alternatives, and criticized the information used to evaluate the alternatives included, stating "[a]t this point, the economics of the project are poorly understood and a greater level of information will be necessary to evaluate the proposed alternative as well as other alternatives that could achieve the project purpose." *Exhibit 1.* In April 2008, EPA commented that the MMS DEIS "did not provide enough information to fully characterize baseline environmental conditions and environmental impacts of the proposed project, and did not adequately consider alternatives to avoid or minimize impacts." *Exhibit 2. For additional discussion of MMS's failure to adequately consider and analyze alternatives to the proposed project, see comments submitted by APNS, Exhibits 3 - 5.* Neither CWA nor either of the project's lead agencies provided the requested information. Nor did MMS provide any additional analysis of alternatives.

APNS recognizes that under the Energy Supply and Environmental Coordination Act of 1974, 15 U.S.C. § 793(c)(1), CAA decisions are not considered "major federal actions" and are thus exempt from the NEPA requirement that an environmental impact statement be prepared for the proposed permit. However, nothing in that Act exempts EPA from its duty to conduct an alternatives analysis, which is a duty flowing from the CAA itself.. Under NEPA at section 4332(E), federal agencies must "study, develop, and describe appropriate alternatives to recommend courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." This requirement for the analysis of alternatives exists wholly independent of the duty contained in section 4332(C) to prepare an EIS for "major federal actions significantly affecting the quality of the human environment." This independent statutory requirement applies to all agencies, including EPA, and nothing in section 793(c)(1) exempts the agency from its separate duty to evaluate alternatives. While, typically, the requirement imposed by section 4332(E) to analyze alternatives is satisfied through the preparation of an Environmental Assessment or EIS, here, given the exemption from the preparation of an EIS required by section 4332(C), EPA must prepare an independent alternatives analysis to support its permitting decision in order to meet the requirements of section 4332(E).

Section 173(a)(5) of the CAA underlines the existence of such a duty. It provides that in deciding whether to issue a nonattainment new source review permit – a requirement that is incorporated into the OCS APA at issue here – EPA must find that an analysis of alternative sites, sizes, production processes and environmental control techniques for such proposed source demonstrates that the benefits of the proposed source significantly outweigh the environmental and social costs imposed as a result of its location, construction, or modification. Clearly, this language is similar to NEPA, and in fact it is stronger than the language in NEPA because it requires substantive balancing and not just a discussion of the issues. APNS is aware of precedent to the effect that EPA can rely on NEPA statements from other agencies to satisfy this requirement. But clearly that reliance cannot extend to an analysis that EPA itself has found inadequate on numerous occasions.

Also, given EPA's prior comments on the adequacy of the alternatives analysis in the existing EIS prepared by MMS, it is clear that EPA cannot satisfy the requirements of section 4332(E) by simply adopting the alternatives analysis contained in that EIS. EPA should obtain the additional information needed to fully characterize the baseline environmental conditions and conduct its own independent analysis of a range of alternatives, rather than accept and rely on MMS's flawed findings.

Additionally, since the MMS ROD was issued on April 28, 2010, CWA has made significant changes to the proposed project that EPA must consider. According to recent testimony before the Massachusetts Department of Public Utilities by the Director of Wholesale Market Relations for the Energy Portfolio Management organization at National Grid (the utility with which CWA has entered into an MOU), CWA does not intend to implement a single-phase buildout project as described in the EIS and ROD. Instead, the developer intends to undertake a phased development in Nantucket Sound that is vastly more complex and segmented than even the phased alternative considered, and rejected as being too environmentally harmful, in the EIS.

Such an approach would deviate substantially from the proposed project as approved by MMS and from CWA's own representations to the federal government and the public. It would be remarkable if this did not result in an increase in the already substantial level of construction emissions. APNS has requested, on this basis, that the April 28 ROD be withdrawn, that the application be returned to CWA for revision to reflect the current proposal, and that should CWA intend to proceed with a phased approach, it submit a new application in accordance with 30 C.F.R. Part 285. *See Exhibit* 6.

EPA has an independent duty to consult under section 106 of the National Historic Preservation Act

EPA may not rely on the Department of the Interior for compliance with section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f, and its implementing regulations, 36 C.F.R. Part 800. To date, EPA has inappropriately sought to adopt MMS's consultations to satisfy its own section 106 compliance obligations.

On December1, 2009, four months before MMS terminated section 106 review for the Cape Wind Project, EPA sought to designate MMS as the lead federal agency for compliance with section 106 in a letter to MMS. *Exhibit 7.* In that letter, EPA asked MMS to acknowledge and accept EPA's designation by signing the space provided at the end of the letter.

In its response to EPA in a letter dated December 15, 2009, *Exhibit 8*, MMS thanked EPA for its "letter dated December 1, 2009 requesting that the [EPA] be granted consulting party status in the [NHPA] process for the proposed Cape Wind Energy Project." Effective as of the date of the letter, MMS granted to EPA consulting party status under the authority provided to MMS in 36 C.F.R. § 800.3(f)(3). MMS invited "EPA to participate in any future Section 106 consultation meetings," which means that MMS acknowledged that EPA had its own section 106 responsibilities. But MMS never acknowledged or accepted EPA's attempted designation of MMS as the lead federal agency for section 106 of the Cape Wind project under the provisions of 36 C.F.R. § 800.2(a)(2). Therefore, by a belated and ineffective attempted designation, EPA may not rely on MMS's compliance with the requirements of section 106 to discharge its own responsibilities under that statute. Having failed in that designation, under the ACHP's rules, EPA, like other federal agencies that failed to designate a lead federal agency for the Cape Wind project, "remains individually responsible for their compliance with [the section 106 rules]." *Id.*

Therefore, EPA must independently consult with the Massachusetts State Historic Preservation Officer (SHPO) as well as with the Wampanoag Tribes. To our knowledge, EPA has not initiated the required consultation with the SHPO and Tribes under section 106. It also has the independent responsibility to respond to the recommendations of the Advisory Council on Historic Preservation (ACHP), which strongly recommended to MMS that, based on unavoidable and substantial adverse effects to Tribal and cultural resources, the Cape Wind application should be denied or the project relocated to a less damaging alternative site. MMS unfortunately did not follow the ACHP's recommendations, but EPA has its own obligation to consider and respond to the ACHP's comments.

It appears from recent correspondence between EPA and MMS that EPA has attempted to comply with section 800.2(a)(2). In its air permit documentation, EPA states that MMS was the lead agency for section 106 consultation and that EPA's obligations under section 106 were satisfied by MMS. On December 15, 2009, MMS sent a letter to EPA Region 1, *Exhibit 8*, in which it informed EPA that "it is the lead agency reviewing the Cape Wind project under Section 106 of the [NHPA]. To the extent that activities regulated by EPA as part of this project need to be addressed under section 106, EPA has attempted to rely on MMS's compliance with that law. *See Fact Sheet – Outer Continental Shelf Air Permit Approval: Cape Wind Energy Project*, at page 52. There is nothing in the record, however, to indicate that EPA complied with its duties as a consulting party during any part of the section 106 process.

By its own admission, EPA was not included as a consulting party until mid-December 2009 – eight years after the project review first began, three months before section 106 consultation was terminated, and only four months before a final decision was published. During that entire period, according to the fact sheet, EPA was passively involved, rather than truly working in cooperation with MMS to ensure that the proper process and consideration were being given to the section 106 consultation. Again, EPA has an independent responsibility to fulfill the consultation requirement set forth in section 106 of the NHPA and its implementing regulations. EPA must fulfill this requirement and, in doing so, should give proper consideration and deference to the ACHP's recommendation that the proposed project not be allowed to proceed.

Section 106 of the NHPA prohibits federal agencies from approving any federal "undertaking," including the issuance of any license, permit, or approval, without first considering the effects of the action on historic properties or cultural artifacts that are eligible for inclusion or are listed in the National Register of Historic Places (National Register). 16 U.S.C. §§ 470f, 470w(7). The goal of section 106 is to "identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects" in consultation with the SHPO, Native American tribes, and other parties with a demonstrated interest in the undertaking. 36 C.F.R. §§ 800.1(a), 800.2(a)(4). Federal agencies must also "seek and consider the views of the public" during the section 106 process and develop a plan for public involvement. *Id.* §§ 800.2(d), 800.3(e).

Under the rules promulgated by the ACHP that implement section 106, an agency must, prior to approving an undertaking: (1) identify the area of potential effects; (2) gather information from existing records, consulting parties, Indian tribes, and others likely to have relevant knowledge or concerns, and review existing information on historic properties within the undertaking's area of potential effects (including information on possible historic properties not yet identified); (3) make a reasonable and good faith effort to take the steps necessary to identify historic properties within the area of potential effects; (4) evaluate the undertaking's potential effects on historic properties; and (5) develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects. *Id.* §§ 800.3-800.7. Unless an agency terminates section 106 consultation and asks the ACHP to comment, an agency must document the measures developed and agreed-to for resolving an undertaking's adverse effects in either a Memorandum of Agreement or Programmatic Agreement. *Id.* §§ 800.6(c),

800.14(b). Alternatively, an agency may resolve adverse effects through an EIS and ROD appropriately coordinated and conditioned in accordance with the ACHP's rules and with prior notification to the SHPO and ACHP. *Id.* § 800.8(c), (c)(4).

NHPA review was first initiated during the Army Corps's review of the proposed project. While the Corps failed to comply with the NHPA through its failure to assess the visual effects on numerous properties, it nonetheless concluded that the proposed project would adversely affect 16 properties, including two National Historic Landmark properties. Following the passage of the Energy Policy Act of 2005, and as part of the 2008 DEIS, MMS undertook its own section 106 review.

After the January 2009 publication of the FEIS, the ACHP conducted a review of the proposed project. On April 22, 2010, the ACHP submitted its formal comments to Secretary of the Interior Salazar. The ACHP recommended that the Secretary not approve the proposed project, concluding that the proposed project will adversely affect 34 historic properties, including 16 historic districts and 12 individually significant historic properties on Cape Cod, Martha's Vineyard, and Nantucket Island, and six properties of religious and cultural significance to tribes, including Nantucket Sound itself. The ACHP also determined that alternatives were available that would not have adverse impacts on historic properties. On March 1, 2010, Secretary Salazar, on behalf of MMS, terminated section 106 consultation with ACHP, and requested that ACHP submit comments.

On April 28, 2010, concurrent with signing and releasing the Record of Decision, Secretary Salazar sent a letter taking the unusual step of rejecting the ACHP's comments in their entirety. MMS's revised Environmental Assessment/Finding of No New Significant Impact, posted on its website the same day, purported to address this issue, but did not adequately address the ACHP's findings and recommendations.

On June 25, 2010, numerous parties, including APNS, filed a lawsuit in federal district court, challenging MMS's decision to issue the lease on the basis of, among other things, its failure to properly identify historic properties, analyze the negative impacts of the proposed project on those properties, or afford parties such as ACHP an appropriate opportunity to comment and consult on those impacts, as well as MMS's termination of the consultation process prior to developing any means to avoid or mitigate that harm.

EPA may not simply rely on MMS and Secretary Salazar's decision not to follow the ACHP's recommendations. Rather, EPA must itself either acknowledge or expressly adopt Secretary Salazar's response, or issue its own response to the ACHP letter. The regulations at 36 C.F.R. § 800.7(a) provide that an agency official, the SHPO or tribal representative, or the ACHP may determine that further consultation will not be productive and terminate consultation. "Any party that terminates consultation shall notify the other consulting parties and provide them the reasons for terminating in writing." *Id.* However, the act of termination removes *only* the terminating party from the section 106 responsibility. Since EPA requested and was given status as a cooperating agency for purposes of section 106, it has a duty to continue the consultation process, or must itself terminate its involvement in the process.

This is especially true given that EPA has been involved in virtually none of the section 106 consultation process to this point. It did not properly designate MMS as lead agency for section 106 review, and avoided any section 106 compliance until the process was terminated and such compliance rendered moot. Because there was not a proper or adequate designation of MMS as lead agency for purposes of EPA's federal requirements, EPA is expressly responsible for completing its own section 106 review.

EPA has an independent duty to comply with the Endangered Species Act

EPA also has an independent duty to comply with the Endangered Species Act (ESA), 16 U.S.C. §§ 1531 *et seq.* The current ESA record does not apply to the EPA's OCS APA. This means that EPA must initiate ESA section 7 consultation for the effects of its actions on both bird and whale species.

The ESA was enacted to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." *Id.* § 1531(b). The ESA defines the term "conservation" as the use of "all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided [by the ESA] are no longer necessary" – that is, to recover species so that they no longer need ESA protection. *Id.* § 1532(3). The ESA requires the Secretary of the Interior to issue regulations listing species as "threatened" or "endangered" based on the present or threatened destruction, modification, or curtailment of a species' habitat or range; overutilization for commercial, recreational, scientific, or educational purposes; disease or predation; inadequacy of existing regulatory mechanisms; or other natural or manmade factors affecting the species' continued existence. *Id.* § 1533(a)(1).

Once listed as threatened or endangered, a species receives a number of important protections. First, under the ESA and its implementing regulations, it is illegal for anyone to "take" an endangered or threatened species. *Id.* § 1538(a)(1); *see also* 50 C.F.R. §§ 17.21, 17.31. The term "take" is defined as "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." 16 U.S.C. § 1532(19). Second, under section 7(a)(1) of the ESA, each federal agency must "utilize [its] authorities in furtherance of the purposes" of the ESA, *id.* § 1536(a)(1), and under section 7(a)(2), "[e]ach federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency...is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species." *Id.* § 1536(a)(2). In fulfilling these requirements, "each agency shall use the best scientific and commercial data available." *Id.*

To ensure that the mandate of section 7 is carried out, Congress and federal officials charged with implementing the ESA have established a detailed consultation process that must be followed by federal agencies whose actions may affect endangered or threatened species. Under this process, "[e]ach Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat." 50 C.F.R. § 402.14(a). If such a determination is made, the agency must, prior to making any final

determination, enter into "formal consultation" with the U.S. Fish and Wildlife Service (FWS) by requesting that FWS issue a "biological opinion as to whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat." *Id.* § 402.14(g)(4); *see also* 16 U.S.C. § 1536(b).

When FWS concludes that agency action may result in incidental take that does not rise to the level of jeopardy to the entire species, FWS must issue a statement as part of a biological opinion that specifies the impact of the incidental take and sets forth the terms and conditions with which the action agency and private applicants must comply. *Id.* § 1536(b)(4).

The current ESA record does not cover this action by the EPA. EPA is correct in asserting that it is named a cooperating agency of sorts for purposes of the FWS Biological Opinion. *See, Fact Sheet – Outer Continental Shelf Air Permit Approval: Cape Wind Energy Project*, at page 51. However, neither the FWS Biological Opinion, nor the National Marine Fisheries Service (NMFS) Biological Opinion, both of which are included in Appendix J to the January 2009 FEIS, includes any discussion of EPA's OCS APA. While the FWS Biological Opinion purports to cover EPA, it does not reflect the actual subject of EPA's decision and need for consultation. The NMFS Biological Opinion does not reference EPA at all. Both Biological Opinions are solely and exclusively focused on the MMS determination of whether to offer an OCS lease, and are too narrow in scope to adequately consider the air quality factors critical to EPA's current decision that are necessary to meet the section 7 consultation requirement.

Moreover, both of the Biological Opinions are defective, and both MMS and FWS have been sued for their failure to comply with the ESA. MMS unlawfully allowed CWA to dictate the terms of the incidental take statement for impacts to birds. It did so by overruling the FWS's recommendation, relying instead on a flawed economic argument by CWA. Neither FWS nor MMS questioned CWA's erroneous and self-serving claim that the temporary project shutdown required to protect birds would destroy the viability of the proposed project. EPA should not allow CWA or political interference to perpetuate this error; rather, the ESA demands that the best available science control agency decisions. *Id.* § 1536(a)(2). EPA therefore must initiate, from the beginning, a new ESA section 7 compliance, which would require a new formal consultation with FWS and NMFS. This is particularly important because EPA's permit is necessary for the project to proceed. All species impacts are therefore attributable to EPA's decision whether to issue the OCS APA.

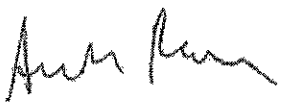
In the course of approving this project, MMS consulted with FWS on CWA's application to construct and operate the proposed project in federal waters traversed by federally endangered Roseate Terns and in close proximity to the beaches where threatened Piping Plovers nest. In its Biological Opinion, FWS determined that the wind power facility will kill at least 80 to 100 Roseate Terns and up to ten Piping Plovers over the first twenty years of the project. FWS estimated those expected levels of take based on the same data the agency had previously dismissed as insufficient to measure the proposed project's impacts on birds. In comments on MMS' DEIS for the project earlier that same year, FWS stated that the "paucity of site-specific information" on migratory birds prevented MMS from accurately characterizing the project's

environmental impact. Without collecting additional data, requiring the developer to do so, or adopting a precautionary approach and giving the benefit of the doubt to the federally listed species, FWS used the *same data* to project the levels of take that it determined did not rise to the level of jeopardy to the species under the ESA. Further, the agency ignored its own previously published interim guidance on avoiding and minimizing wildlife impacts from wind turbines. Finally, even though FWS had found that CWA should shut down the turbines on a temporary and seasonal basis to reduce bird kills, it did not require such mitigation as a term and condition of the incidental take authorization in the draft Biological Opinion because MMS and CWA rejected a shutdown as too costly. FWS never made an independent finding of whether a temporary shutdown would be reasonable and prudent under the circumstances, but rather outright rejected the measures in the final Biological Opinion based solely on the resistance of MMS and the lease applicant.

In short, the ESA section 7 consultation conducted between MMS and FWS was incomplete and faulty, and based on improper and inadequate data. It therefore cannot be used as the foundation for federal agency decision-making. Furthermore, while EPA claims that the OCS APA is covered by the consultation with MMS, the record indicates that this is not the case. At a minimum, EPA is under an obligation to contact FWS for a list of listed species potentially affected by the OCS APA, and must complete a Biological Assessment.

Thank you for your consideration of these comments.

Very truly yours,



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