BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

IN THE MATTER OF:	)	Appeal No. PSD 11- ___
CAPE WIND ASSOCIATES, LLC	)	EPA Permit No. OCS-R1-01
	)	
	)	

PETITION FOR REVIEW

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I. INTRODUCTION

Pursuant to 40 C.F.R. § 124.19(a), the Alliance to Protect Nantucket Sound ("the Alliance") and the Wampanoag Tribe of Gay Head/Aquinnah ("Aquinnah") petition for review of the conditions of the Outer Continental Shelf (OCS) Air Permit, EPA Permit Number OCS-R1-01, issued by the Environmental Protection Agency - New England ("Region 1") for emissions from Phase 1 (site preparation and construction of the project) and Phase 2 (operations, maintenance, and repair) of the Cape Wind Energy Project ("the project"). Region 1 issued the final permit decision at issue on January 7, 2011. A copy of the final permit is attached as Appendix A.

The permittee, Cape Wind Associates, LLC ("Cape Wind"), proposes to install and operate 130 wind turbine generators and other supporting equipment on or near the Horseshoe Shoal in Nantucket Sound, approximately 3.5 miles off the coast of Massachusetts. Cape Wind Associates, LLC is located at 75 Arlington Street, Suite 704, Boston, Massachusetts, 02116.

The Alliance is a nonprofit environmental organization dedicated to the long-term preservation of Nantucket Sound. It was formed in 2001 in response to Cape Wind's proposal to build a wind farm in the Sound. The Alliance, located in Hyannis, Massachusetts, represents more than one hundred stakeholders with concerns about the Cape Wind project.

The Wampanoag Tribe of Gay Head is a federally recognized Indian tribe located in Martha's Vineyard, Massachusetts. The Wampanoag, or "The People of the First Light," are spiritually connected to and identified by the Nantucket Sound. The Sound is a sacred place to the Aquinnah, who are concerned with the project's impact on the

Sound's physical integrity and the archeological resources under the Sound that are of special importance to the Tribe.

Section 328(a) of the Clean Air Act (CAA) requires EPA to establish air pollution control requirements for OCS sources located within 25 miles of a state's seaward boundary identical to onshore requirements. CAA § 328(a), 42 U.S.C. § 7627. State ambient air quality standards are incorporated into the federal regulations pursuant to 40 C.F.R. § 55, which applies to all OCS sources and establishes requirements to attain and maintain federal and state ambient air quality standards and compliance with part C, title I of the Clean Air Act (the Prevention of Significant Deterioration (PSD) of Air Quality requirements). EPA administers the OCS PSD permit program.

The final permit for the Cape Wind Energy Project fails to meet a number of procedural and substantive requirements, including inadequate response to comments and failure to complete the administrative record. Because certain of Region 1's conclusions, identified within, lack sufficient basis in the record and are based on findings of fact and conclusions of law that are no longer operative and are therefore clearly erroneous, review of the permit is appropriate pursuant to 40 C.F.R. § 124.19(a).

II. JURISDICTION

The Alliance and the Aquinnah (collectively "Petitioners") satisfy the threshold requirements for filling a petition for review under 40 C.F.R. Part 124. The Alliance participated in the permit process by filing comments on the draft permit and speaking at the public hearings held in the following places: Nantucket High School Auditorium; Martha's Vineyard Regional High School Auditorium, and Mattacheese Middle School Auditorium. *See* Comments on behalf of the Alliance, dated July 16, 2010, attached as Appendix B.

The Aquinnah also participated in the public hearings (*see* testimony from Bettina Washington, Tribal Historic Preservation Officer, Wampanoag Tribe of Gay Head, Transcript from public hearing at Martha's Vineyard Regional High School Auditorium, pp. 22-24, attached as Appendix G). Petitioners therefore have standing to petition the Environmental Appeals Board for review of conditions of the final permit pursuant to 40 C.F.R. § 124.19(a).

All issues raised herein were previously raised with Region 1 during the public comment period or were not reasonably ascertainable at that time, in conformity with 40 C.F.R. § 124.13.

Region 1 served the final permit decision on Petitioners by mail (*see* copy of Letter from Region 1 to Audra Parker, dated Jan. 7, 2011, attached as Appendix H), adding three days onto the 30-day period commenters have to request review of the conditions of the permit under 40 C.F.R. § 124.19(a). 40 C.F.R. § 124.20(d). The Board accordingly has jurisdiction to hear Petitioners' timely filed petition for review.

III. ISSUES PRESENTED FOR REVIEW

The Alliance respectfully requests that the Board review the following issues:

(1) Whether the Comment Period on OCS permit for the proposed project must be reopened because Region 1 –

> (a) failed to complete the administrative record at the time the final permit decision was issued in violation of federal regulation 40 C.F.R. § 124.17 and Petitioners' due process rights;
>
> (b) failed to reopen the public comment period when post-comment period submissions by Cape Wind raised substantial new questions about whether construction emissions would exceed the new one-hour NOx standard.
>
> (c) failed to provide sufficient data and analysis on the record to substantiate its conclusion that construction emissions will not exceed the new NOx standard based on Cape Wind's revised NOx modeling.

(2) Whether the Region's decision to grant an OCS permit to the proposed project is clearly erroneous and must be remanded for Region 1 to provide a new analysis of the proposed project's compliance with Section 328 of the Clean Air Act and the Massachusetts State Implementation Plan as incorporated into 40 C.F.R. Part 55 because Region 1's permit decision –

> (a) Is based on findings of fact and conclusions of law made by the Mineral Management Service (MMS) that are no longer operative, due to Cape Wind's relocation of the staging for construction of the proposed project from Rhode Island to Massachusetts;

IV. STATEMENT OF THE FACTS

The issues in this petition arise in the context of an Outer Continental Shelf (OCS) permit issued under Section 328 of the Clean Air Act, 42 U.S.C. § 7627, by Region 1 of the EPA. The permit provides for the construction and operation of the Cape Wind power plant, consisting of a proposed 130 wind turbines to be located off the south coast of Cape Cod, Massachusetts. The project and its supporting functions are to be located within 25 miles of the shoreline of Cape Cod.

In issuing the permit, Region 1 relied upon the air quality analysis conducted by the Mineral Management Service (MMS) (since renamed the Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE), but referred to as "MMS" in this petition) as part of its required Environmental Impact Statement under the National Environmental Policy Act. Region 1 Response to Comments ("RTC") at 23, attached as "Appendix C." MMS analysis was based on air quality modeling and emissions information provided by the applicant, Cape Wind.

Because the corresponding onshore areas in Massachusetts and Rhode Island were classified as moderate non-attainment areas for the ozone National Ambient Air Quality Standards (NAAQS), section 176(a) of the CAA required preparation of a "conformity determination" – an analysis to determine whether the project would interfere with reasonable further progress towards attainment of the ozone NAAQS, or would "cause or contribute" to in air pollution concentrations exceeding the air quality standards for other pollutants subject to NAAQS or increase the severity of existing NAAQS exceedances. 42 U.S.C. § 7506(c)(1), CAA § 176(c)(1). The MMS did not, however, make a determination with respect to whether the project would cause or exacerbate exceedances

of the recently adopted one-hour NAAQS for nitrogen oxides (NOx) or sulfur dioxide (SO_2).

Based on the representations of the applicant, Cape Wind, the MMS's analysis assumed that, while the wind turbines were to be located off the Massachusetts shore, the construction phase of the project would be conducted from Davisville, near Point Quonset, Rhode Island. *See* MMS, Final General Conformity Determination, § 1.0, attached as Appendix D ("The proposed project would consist of the following components: […] [a] staging area during the construction phase at the Quonset Davisville Port & Commerce Park in the town of North Kingstown, Rhode Island"); *and* EPA – New England, Fact Sheet accompanying Draft OCS Permit, § IV.C.1, p. 10, attached as Appendix F (stating that "[i]f Cape Wind wishes to move its onshore staging area to another port facility, MMS may need to conduct a revised general conformity analysis").

Accordingly, the MMS examined (except for the one-hour concentrations of NOx and SOx) the potential air quality effects of construction and operation/maintenance of the project in both states. Based on the applicant's representations, the MMS determined that the emissions it analyzed from Massachusetts would not exceed 100 tons annually. Thus, MMS concluded that the project was not subject to a conformity determination with respect to Massachusetts. MMS also concluded, however, that emissions in Rhode Island would exceed 100 tons per year. Accordingly, MMS undertook a conformity determination for Rhode Island.

During the comment period on the proposed permit, Petitioners commented on a number of issues. The Alliance, in particular, commented on the MMS's failure to undertake an analysis of the potential for exceeding the one-hour NOx and SO2 NAAQS

and requested that Region 1 undertake such an analysis. Comments on behalf of the Alliance at 3.

In its Response to Comments, Region 1 stated that it had requested such an analysis from the applicant. RTC at 16. The Region reported that this analysis demonstrated that emissions from the project would not result in one-hour air pollution concentrations exceeding the new one-hour NOx and SO_2 NAAQS. However, the Region did not provide access to the model or its output used to reach this conclusion. In support of its conclusion, the Region offered only a single, four-page memorandum, containing what appear to be comments from Region 1 personnel. At the end of the memorandum, electronic icons appear for six other documents from the applicant's consultant, ESS.[1] The documents do not, however, appear in the docket for the permit, so it is impossible for Petitioners to understand or analyze them.

In October 2010, three months after the permit was issued, Petitioners learned that a fundamental assumption of the MMS's conformity determination, and of the EPA's analysis of the one-hour NAAQS, was incorrect. In both MMS's and EPA's analyses, as noted above, it had been assumed that the primary base for construction activities would be in Quonset Point, Rhode Island. Now, however, the staging location has been moved from Rhode Island to New Bedford, Massachusetts. Cape Wind has confirmed that it will be using the New Bedford staging terminal in a recent press release, dated January 7, 2011. *See* "Cape Wind Completes Permitting Process," attached as "Appendix E." As discussed below, this switch in terminal location is a substantial change in the project

[1] Note, Region 1's Memorandum shows five documents under the caption "ESS modeling"; we refer to six here, however, because an icon for an additional document on modeling, titled "Extract FY1985 Model CH on STP adjust.pdf," shows up in the Memo and we cannot ascertain whether this is part of ESS's submission to Region 1.

with implications for emissions in Massachusetts that have not been considered in EPA's final permit.[2]

Petitioners and the public cannot, at this point, determine the precise contours of this change in the project, since the record does not reflect this important new development. If, as it appears, the Cape Wind project will now be constructed primarily from New Bedford, the fundamental assumptions of the MMS's and EPA's air quality analyses are incorrect. For example, if the construction emissions will now originate in Massachusetts, it is likely that a new conformity determination will need to be done for Massachusetts. Since the MMS's earlier conformity determination is based on incorrect information, EPA will have to undertake its own analysis.

[2] Press Release, Cape Wind Associates, Cape Wind Completes Permitting Process (Jan. 7, 2011), http://www.capewind.org/print.php?sid=1174.

V. SUMMARY OF THE ARGUMENT

This petition requests that the Cape Wind OCS permit be remanded to Region 1 for a new analysis of the project's consistency with the Clean Air Act, based on correcting erroneous information regarding the location of construction support emissions. It also requests reopening the process of notice and comment in order to allow the Alliance and the general public to provide the benefit of their knowledge respecting information not made available prior to, or concurrent with, Region 1's issuance of the final permit. Because this information (concerning Cape Wind's revised modeling, as described below) has still not been made part of the administrative record available to the public online, reopening of the public comment period is necessary.

Modeling of One-Hour NOx and SO2 Standards. In response to comments by the Alliance on the proposed OCS permit, EPA requested the applicant Cape Wind to provide an analysis of whether the proposed Cape Wind project would result in concentrations of NOx and SO_2 in excess of the recently promulgated one-hour NOx and SO_2 NAAQS. RTC B1, at page 16. Based on this modeling, the Region concluded that the emissions from the project would not cause or contribute to an exceedance of either of the one-hour revised NAAQS. *Id.* While Region 1 asserts that the "modeling demonstration and supplemental responses are included in the administrative record," in fact the only support provided in the record for the Region's conclusion is an undated memorandum from EPA employee Brian Hennessey to Ida McDonnell, another EPA employee, apparently sent on December 21, 2010. Memorandum from Brian Hennessey EPA, to Ida McDonnell, EPA, "Cape Wind 1-Hour SO2 and NO2 Modeling" (Dec. 21,

2010) (hereinafter "Region 1 Memorandum"). This Region 1 Memorandum refers to six documents provided by Cape Wind or its contractors, but none of these documents appear in the record.

Because the documents supporting the Region's conclusion are not part of the record, neither Petitioners nor other members of the public were afforded the opportunity to offer their observations on the conclusions.

As the EAB has made clear, the Region *must* complete the administrative record as of the date the Region issues the final permit. The failure to complete the administrative record is not academic. Indeed, in this case the post-comment period submissions raise significant new questions.

As a result of the absence from the record of the supporting materials for the Region's conclusion, the public cannot be fully informed, and Petitioners' ability to prepare their petition for review has been hindered. As the Board has previously declared, participants are deprived of their due process rights when the record is not completed.

A recent declaration by Regina McCarthy, Assistant Administrator of the Office of Air and Radiation of EPA, grandfathered an individual power unit (Avenal) from the requirement that it demonstrate compliance with the new one-hour NO2 standard on the grounds that some applicants have experienced "unforeseen challenges with the preparation and review of information to predict the impact of proposed sources on hourly NO2 concentrations." Declaration of Regina McCarthy (Jan. 31, 2011) *Avenal v. EPA*, No. 1:10-cv-00383-RJL (D. D.C. filed Mar. 9, 2010). This proposal represents a clear departure from E.A.B. precedent: the Board has held on several occasions that

applicants must demonstrate they will not cause exceedances of newly adopted NAAQS. In any case, *Avenal* is irrelevant here, since the applicant has already prepared and submitted such modeling in this case.

Significant Alteration of the Cape Wind Project. A change in the Cape Wind project announced subsequent to the close of the comment period also requires remand to Region 1 for a new analysis of the air quality impact of the proposed project. Region 1 accepted MMS's conclusion that emissions from Massachusetts would not exceed the 100 tons/year threshold triggering a conformity determination, but would in Rhode Island. The MMS warned at the time, however, that if there were any changes in Cape Wind's construction plans, its conformity demonstration would need to be revised.

In October 2010, however, Cape Wind did change its construction plan. Massachusetts Governor Deval Patrick announced, and Cape Wind subsequently confirmed, that the Port of New Bedford would be the site of the primary emitting construction support for the Cape Wind project. This development fundamentally alters the assumptions on which Region 1 approved the OCS permit.

As a result of this change, crucial findings of fact and conclusions of law are now clearly erroneous. For example, the emissions finding for Massachusetts on which the MMS and the Region based their conclusion that no conformity determination was required for Massachusetts is now clearly erroneous. Where a petitioner demonstrates that there has been a significant change in the project that alters the factual or legal basis for the granting of the permit, the permit must be remanded to allow for a revised conformity analysis. In light of the significance of the relocation of a major emitting part of the Cape Wind project, the Board should remand the permit to the Region for a new

analysis of the proposed project to determine whether it complies with the requirements of Section 328 of the Clean Air Act.

VI. ARGUMENT

1. EPA Has Not Provided Support in the Record to Support a Considered Judgment that Compliance with the New NAAQS for NOx and SO_2 Has Been Adequately Demonstrated

The Alliance commented on the draft OCS permit that EPA had not modeled Cape Wind Associates' compliance with the new one-hour primary NAAQS for NOx and SO_2, issued by EPA in February and July 2010, respectively. Alliance Comments at 3. EPA stated in its RTC that it asked Cape Wind to conduct further modeling to demonstrate compliance with the new one-hour standards. RTC at 16. According to the RTC, Cape Wind submitted these modeling results to EPA on November 4, 2010, and then supplemented these via email in November and December 2010 in response to further EPA requests. *Id.* EPA states that Cape Wind's modeling and supplemental responses (via its technical consultant, ESS) are included in the administrative record, and that it has reviewed the analysis performed by Cape Wind and agrees with Cape Wind's conclusion that construction emissions will not cause or contribute to exceeding the revised one-hour NOx or SO_2 standards. *Id.*

a. The Administrative Record Is Incomplete

The public, however, has had no opportunity to examine Cape Wind's revised modeling results or conclusions—which EPA subsequently adopted—because the documents ESS sent to EPA were not made part of the administrative record,[3] as federal regulations require. 40 C.F.R. § 124.17 ("For EPA-issued permits, any documents cited

[3] EPA stated that "[a]ll data submitted by the applicant is available as part of the administrative record" which may be viewed at the EPA Region 1 office *or* obtained online at http://www.epa.gov/NE/communities/nsemissions.html. EPA, Public Notice of Proposed Federal OCS APA, Public Comment Period, and Public Hearings, at 4. ESS's materials do not appear in the online record, contrary to EPA's statements.

in the response to comments *shall* be included in the administrative record for the final permit decision") (emphasis added). In fact, the only document in the record addressing Cape Wind's compliance with the new one-hour standards is the four-page Region 1 Memorandum summarizing ESS's modeling results. The end of the Region 1 Memo, which is in pdf form, shows icons for five documents from ESS to EPA under the caption "ESS modeling furnished to Region 1 for Cape Wind" and one document labeled "Extract FY1985 Model CH on STP adjust.pdf"—but these do not appear in the record.

Federal regulations require documents cited in the agency's Response to Comments to be "added to the record as quickly as possible after their receipt." 40 C.F.R. § 124.18(c). Moreover, as the EAB has made clear, "the Region *must* complete the administrative record as of the date the Region issues the final permit." *In re American Soda*, LLP, 9 E.A.D. 280, 299 (EAB 2000) (citing 40 C.F.R. § 124.18(c) (emphasis added)); *see also In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 179 (EAB 2000) ("As we have stated in the past, 'the regulations governing PSD permitting decisions require that material relied upon in making a permit decision be included in the record'" (internal citations omitted)). Region 1, however, has failed to do so here.

This procedural violation is not academic. *See, e.g., In Re Weber*, 11 E.A.D. 241, 245 (EAB 2003) (stating that the Region's failure to strictly comply with 40 C.F.R. § 124.18 (requiring that the decision maker base the permit on the administrative record) is "error" that is neither harmless, inconsequential, nor trivial."); *In re GSX Services of South Carolina, Inc.*, 4 E.A.D. 451, 467 (EAB 1992); *and In re Ash Grove Cement Company*, 7 E.A.D. 387, 431 (EAB 1997). The submissions by ESS are critical to determining compliance with the new NAAQS, and the Alliance and others were

precluded from reviewing them. EPA's four-page Memo summarizing ESS's data and conclusions is not a valid substitute; it does not afford the public the opportunity to review ESS's raw data in its entirety, nor its models and assumptions. These are, of course, crucial to the soundness of Cape Wind's—and now EPA's—conclusions.

The public cannot be fully informed without a complete record. The lack of a complete record deprives the Alliance of its due process rights: it does not have access to the information on which Region 1 based its final permit decision. Where this information is significant to the final permit decision, as here, the EAB has ordered a reopening of the public comment period in previous cases to protect petitioners' due process rights. *See, e.g., In re GSX Services of South Carolina, Inc.*, 4 E.A.D. 451, 467 (EAB 1992) (noting that, despite the discretion usually afforded the Region, "[g]iven the significance of the addition of these [facility] location standards, however, we find that reopening the record to provide for comment is appropriate").

Federal regulations give the Regional Administrator the authority to reopen the public comment period when, as here, information submitted during or after the public comment period "raise[s] substantial new questions concerning a permit." 40 C.F.R. 124.14(b). We acknowledge that the determination of whether to reopen the public comment period is generally left to the Region's discretion. The Board, however, has ordered reopening on a number of occasions, and has done so under circumstances substantially the same as those here.

In *Ash Grove*, for example, the petitioner sought a reopening of the public comment period in order to evaluate materials added to the administrative record during and after the comment period on the draft permit. *In re Ash Grove Cement Company*, 7

E.A.D. 387 (EAB 1997). The Board remanded the permit for limited reopening of the comment period to allow public review of materials relevant to the final permit limits, where the petitioner claimed errors and oversights in the permittee's methodology. *Id.* at 431. Here, the Alliance is in an even worse position than the petitioner in *Ash Grove*, in that it still does not have access to the documents detailing Cape Wind's methodology and therefore lacks sufficient information to adequately challenge Cape Wind's conclusions. This has previously been grounds for the Board to order reopening or vacate and remand the permit. *See, e.g., In re Matter of Amoco Oil Company*, 4 E.A.D. 954, 980–81 (EAB 1997) (finding reopening appropriate when the public had been deprived of the opportunity to prepare an "adequately informed" challenge due to the inadequacy of the Region's explanation for the permit provision); *In re Prairie State Generation Station,* 12 E.A.D. 176 (EAB 2005).

The fact that the Alliance does not have access to the material on which Region 1 based its final decision makes this case distinguishable from those in which the petitioner sought reopening solely on the grounds that it did not have an opportunity to comment on material added after the close of the public comment period. Supplementing the record post-comment period while the Region prepares its response to comments is clearly provided for in the regulations. 40 C.F.R. 124.17(b). The purpose of this "is to ensure that interested parties have full notice of the basis for final permit decisions and can address any concerns regarding the final permit in an appeal to the Board." *Ash Grove* at 431; *see also American Soda* at 299 (appeals process provides petitioners with the opportunity to question the validity of information introduced after the close of the comment period).

But the Alliance, of course, has had no such opportunity. Without the documents relevant to the modeling, Petitioners were deprived of the opportunity to adequately prepare a petition for review. *Amoco Oil Company at* 979. When the public is denied an opportunity to comment on a significant new issue, the Board will remand and require a new period for comment and consideration. *In re Indeck-Elwood, LLC*, 13 E.A.D. 126, 146–147 (EAB 2006).

b. ESS's Post-Comment Period Submissions Raise Substantial New Questions

Reopening of the public comment period is appropriate when post-comment period submissions to the record raise substantial new questions. *In re NE Hub Partners L.P.*, 7 E.A.D. 561, 586–87 (EAB 1998); *Ash Grove* at 431. The reason for this is to give the decision-maker the benefit of public comment, and the agency's response to public comments on the new question, before making a final decision. *In re Amerada Hess Corporation Port Reading Refinery*, 12 E.A.D. 1, 2 (EAB 2005).

When the new question is substantial—as here, concerning compliance with new primary national air quality standards designed to protect human health—reopening the public comment period is necessary to adequately inform the decision-maker, Region 1, on this issue. This is exactly the type of situation where an additional cycle of public comment and agency response to comment is appropriate, as the Board has recognized in ordering reopening in other cases under such circumstances. *See, e.g., Ash Grove* at 431; *Amoco* at 981; *In re GSX Services* at 467.

This issue—whether Cape Wind's construction emissions exceed the new one-hour NAAQS—has not been before the public previously. It is "new" in that making this

determination requires separate modeling for this purpose, and the public has had neither the chance to see the results of that modeling in full, nor comment on the appropriateness of the model and assumptions for this particular project and location. This is a substantive new issue that has not gone through the public comment cycle, distinguishing this case from others in which the EAB denied reopening on the grounds that the public had been able to address "these very issues" during the public comment period. *Contra In re Metcalf Energy Center*, E.A.D. 1, 30 (EAB 2001), *unpublished final order denying review*; *c.f. In re NE Hub* at 587–88 (denying reopening because the "new materials" in email confirmed a fact already in the record). Unlike in *NE Hub*, the facts in question were not already part of the record (indeed, they still do not appear there in full).

Moreover, the information Region 1 *has* provided on the revised modeling (limited to its four-page internal memorandum) appears to raise serious questions. Far from providing assurance that the Cape Wind project will not threaten attainment of the two NAAQS, the memorandum leaves a host of questions unanswered. The Region 1 memorandum refers to a group of six "Exhibits" provided by Cape Wind and ESS. If these Exhibits were available, they would no doubt shed light on the many questions left unanswered in the memorandum, but, as discussed above, the Exhibits are not included in the docket for the permit approval. Likewise, because the record does not include the modeling itself, a different modeler cannot independently test the results provided by ESS.

Without the Exhibits, petitioners have not had an opportunity to adequately prepare a petition for review on these issues. Nonetheless, a review of Mr. Hennessey's memorandum suggests a number of areas of inquiry that petitioners would want to pursue

when the Board remands the case and requires the Region to make available the relevant documents for review and comment. (The issues below are examples that could be identified from the Region 1 memorandum. Only with an opportunity to see and comment upon the entire documentary record of the one-hour NAAQS modeling can Petitioners know whether these, or other issues, are of concern).

1. According to the table on page one of the Region 1 memorandum, when the "<53" ppm Cape Wind cable laying emissions are added to the 47 ppm background, one hour NOx concentrations reach "<100 ppm."

    a. Petitioners would like to understand what the actual predicted concentrations were, and examine the margins of error around this extremely close prediction of attainment.

    b. Petitioners would like to explore the basis for the key assumption that the one-hour NOx NAAQS will not be exceeded because the movement of the cable-laying vessel means it will never be in one place long enough to exceed 100 ppm eight days.

2. The choice of monitors used to estimate the background one-hour concentrations of SO_2 and NOx needs to be explained. For example, was it justified, as the Region 1 memorandum states, that "the SO_2 monitor located in Fall River was not selected because the Brayton Point generating Station has a large local impact." To what extent will the Brayton Point and Cape Wind emissions interact?

3. The choice of assumed mixing heights needs to be explored. As the Region 1 memorandum states, "Much lower mixing heights are not unusual overwater and can produce higher air pollutant concentrations." Mixing heights could be quite low over the often cold waters off Cape Cod, which would lead to increased concentrations of pollutants.

4. Certain assumptions about the vessels, critical to the predicted concentrations of air pollutants, raise significant questions. According to the Region 1 memorandum, the model used was set to "ignore transient plume rise and stack tip downwash." The model also did not conform to a User's Guide recommendation to set the emission release point at water level for vessels. Both these assumptions reduce the predicted concentrations of pollutants.

Taken together, these questions suggest that the Region, and the Petitioners, need to examine closely the entire modeling exercise offered by Cape Wind to demonstrate attainment of the one-hour NAAQS. The numerous questions raised by the Region 1 memorandum, without more, do not suggest that the administrative record reflects "the 'considered judgment' necessary to support the Region's permit determination." *In re Austin Powder Company,* 6 E.A.D. 713 (EAB 1997) (citations omitted); *Ash Grove* at 387 (citing cases to same effect).

c. Failure to Respond Adequately to Comments Constitutes Clear Error

Region 1's on-the-record analysis of Cape Wind's revised NAAQS modeling is severely lacking. In its four-page memorandum summarizing Cape Wind's modeling

results, the Region's own analysis (in italics) is limited to a total of *four* comments, the longest of which is six lines. As their length would indicate, the Region's comments are conclusory and fail to demonstrate the validity of Cape Wind's conclusions. For example, after a three-paragraph description of Cape Wind's individual modeling analyses, the Region's comments for this section consist of:

> *To reach a conclusion with this approach one must assume there will be no interaction among adjacent 500 m. vessel spacings and also that an hour's average total pollutant discharge will have the same air quality impact whether spread over the entire hour or confined to a few minutes. The nonguideline Inpuff model might be used to test the first assumption but probably not the second.*

Region 1 Memorandum at 3. This comment leaves unanswered even basic questions like: Was the Inpuff model used? This analysis is indecipherable without a complete record. It therefore fails to meet the standard that an agency's response to significant comments must be sufficiently detailed to support its conclusions in the final permit. *See In re General Motors, Inc.*, 10 E.A.D. 360 (EAB 2002) ("failure to provide a certain level of detail and analysis to substantiate a claim […] is fatal"). When the permitting agency has failed to provide an adequate explanation on the record for its conclusion, the Board must remand the issue for further analysis. *Id.* (remanding the permitting entity's BACT analysis when it failed to provide sufficient data on the record to substantiate its conclusion); *see also In re City of Marlborough*, 12 E.A.D. 235 (EAB 2005) (remanding a permit on the grounds that the record was "unclear" and that the Region has failed to demonstrate, in response to specific comments on this issue, that the permit will ensure compliance with applicable water quality standards); and *NE Hub* at 568 (an inadequately supported decision requires remand).

Furthermore, a permittee's submission, according to the EAB, "cannot substitute" for a complete analysis "that is fully documented, made available for public review, and ultimately adopted" by the permitting agency. *In re Knauf Fiber Glass*, E.A.D. 1,7 (EAB 1999), *unpublished Order on Motions for Reconsideration.* The Clean Air Act requires "informed public participation in the decisionmaking process." 42 U.S.C. § 7470, CAA § 160(5). Such informed public participation, as the EAB has previously recognized in remanding incomplete analyses such as this one, requires that the public has the ability to review analyses underlying the permit in "a complete format." *Knauf* at 7. A failure to respond adequately to comments by providing insufficiently detailed analyses or support in the record constitutes clear error. As the EAB has previously recognized, this necessarily requires remand because the Board cannot substantively evaluate the reasonableness of the Region's permit decision based on the analysis in the record. *See Amerada Hess* at 19 ("failure to *reasonably* respond to significant comments is itself sufficient grounds for remanding the Permit") (emphasis added).

2. EPA's Declaration in *Avenal* on Compliance with the New NAAQS Is Inapposite to this Case

On January 31, 2011, Regina McCarthy, Assistant Administrator of the Office of Air and Radiation in EPA, issued a declaration in *Avenal Power Center, LLC v. EPA*, pending before the U.S. District Court for the District of Columbia. *Avenal v. EPA*, No. 1:10-cv-00383-RJL (D. D.C. filed Mar. 9, 2010). This declaration grandfathered Avenal's PSD permit application, which is still under review by EPA, from the requirement that it demonstrate compliance with the new one-hour NO2 standard, effective February 9, 2010. According to the declaration, "applicants seeking PSD

permits to construct stationary sources of air pollution have experienced unforeseen challenges with the preparation and review of information to predict the impact of proposed sources on hourly NO2 concentrations." Declaration at 2. Consequently, EPA has determined that, under "certain narrow circumstances," it is appropriate to approve a permit application without requiring a demonstration that the source will not cause a violation of the hourly NO2 standard. *Id.* EPA proposes extending similar relief to other permit applicants who can show they are "similarly situated." *Id.*

This decision represents a clear departure from EAB precedent. It is a well-established principle, as the EAB has repeatedly held, that a permit issuer must "apply the [ ] statute and implementing regulations in effect at the time the final permit decision is made." *In re Phelps Dodge Corp.*, 10 E.A.D 460, 478 n.10 (EAB 2002) (citing other EAB decisions to same effect). As recently as a month before EPA's declaration in the *Avenal* case, the EAB found clear error requiring remand where the Region issued a final permit that did not demonstrate compliance with the new one-hour NOx NAAQS, which had been published several weeks prior to the Region issuing the permit. *In re Shell Gulf of Mexico, Inc. & In re Shell Offshore, Inc.,* No. 10-1–10-4, slip op. (EAB 2010).

Having cited *In re Shell Gulf of Mexico* in the declaration, the Assistant Administrator is aware of EAB's decisions on this point of law. Declaration at 2. From the declaration, it appears that the rationale for deviating from the general principle of requiring permit applications to comply with the law in effect at the time the final permit is issued are the "unforeseen challenges" that Avenal and others are experiencing with the preparation and review of the revised NOx modeling. To the extent that this is the basis for grandfathering the permit application, however, it is inapposite to Cape Wind—

Cape Wind has completed its own modeling and submitted these results to the Region. It is not, therefore, "similarly situated" to Avenal. In sum, the basis EPA provided for grandfathering does not exist here.

As a matter of procedural rights, EPA stated that it is required to provide the public with an opportunity to comment on its proposal before it can issue a final decision exempting Avenal from the requirement to demonstrate compliance with the new NO2 standard. Declaration at 2. The same, then, would be required if Cape Wind were to ask for similar grandfathering. This result, however, would be absurd in Cape Wind's case, where the modeling data has already been generated, and reviewed by the Region. Moreover, this material, as a matter of law, is required to have already been included in the administrative record.

Given these circumstances, it is illogical to pretend that the modeling was not done—especially since the final permit is premised on the conclusions from this very modeling—and allow reopening of the public comment period on a proposal to exempt Cape Wind from having to do such modeling because it is too difficult. Public comment should instead be reopened to allow review of what *was* already done in this case.

3. The Permit Must be Remanded Because the EPA Final Permit Decision Is Based on Findings of Fact and Conclusions of Law that are No Longer Operative and Therefore Clearly Erroneous

Under section 328(a)(1) of the Clean Air Act, the requirements for air pollution sources within 25 miles of the seaward boundary of a state "shall be the same as would be applicable if the source were located in the corresponding onshore area." 42 U.S.C. § 7627(a)(1), CAA § 328(a)(1). Emissions from "any vessel servicing or associated with an OCS source, including emissions while at the OCS or en route to or from the OCS

source" within 25 miles of the source are "considered direct emissions from the OCS source." 42 U.S.C. § 7627(a)(4)(C), CAA § 328 (a)(4)(C). EPA is responsible for determining whether the project will "attain and maintain Federal and State ambient air quality standards" and whether it will "comply with the provisions of Part C of Title I of the [Clean Air] Act." 40 C.F.R § 55.1. When, as here, the construction of the source is subject to the requirement to prepare an environmental impact statement under the National Environmental Policy Act, 42 U.S.C. 4321, EPA coordinates its review to the extent reasonable and feasible. 40 C.F.R. § 55.6(b)(6).

In the 2008 OCS consistency update for Massachusetts, EPA updated 40 CFR part 55 to incorporate by reference Massachusetts's approved state implementation plan regulations and its nonattainment area New Source Review (NSR) regulations. Thus, in considering the OCS permit here, the agency applies the Massachusetts state implementation plan and NSR programs, as incorporated into the federal OCS regulations. *See* EPA, Fact Sheet – Outer Continental Shelf Air Permit Approval: Cape Wind Energy Project (Appendix F) at 14.

In the case of the Cape Wind project, the Minerals Management Service (MMS) of the Department of the Interior prepared an environmental impact statement that included an analysis of the impact of the construction and operation of the Cape Wind project on air quality. As permitted by 40 C.F.R. § 55.6(b)(6), EPA did not prepare a separate air quality analysis, but accepted the analysis done by the MMS for purposes of issuing its OCS air permit. MMS Final General Conformity Determination: Cape Wind Energy Project (Dec. 2009) ("MMS Conformity"). But the MMS's determination is now

clearly erroneous and EPA therefore must undertake a new air quality analysis using correct assumptions about the configuration of the project.

The MMS analysis was based on certain representations by Cape Wind regarding the location of various elements of the project, such as the construction support functions, and maintenance after the wind farm is fully constructed. The wind turbine generators themselves were to be located in the waters off the coast of Massachusetts, and certain service functions were planned to be operated from harbors in Massachusetts. However, the support functions for construction of the wind farm were, according to MMS, to be located in Quonset, Rhode Island. MMS Conformity at 6 ("The staging site for all Cape Wind construction operations would be located in the Port of Davisville at Quonset Point in Rhode Island").

Both the Rhode Island and Massachusetts corresponding onshore areas were classified as "moderate nonattainment areas" for ozone under the Clean Air Act. The MMS undertook separate conformity analyses for each jurisdiction. MMS concluded that neither total emissions of nitrogen oxides (NOx) nor those of volatile organic compounds (VOC) into the air adjacent to the State of Massachusetts would exceed the 100 tons per year threshold that triggers a conformity review. Consequently, the MMS did not undertake a conformity determination for Massachusetts. MMS Conformity at 5.

Emissions of NOx into Rhode Island's air were, however, projected to exceed 100 tons in year one. The MMS therefore undertook a conformity analysis, concluding that Cape Wind would have to commit to the purchase of 139.4 tons of NOx offsets and equip its vessels with emission controls in order to meet its conformity obligation and obtain its permit. MMS Conformity at 8.

The MMS conformity analysis was premised on the assumption that Quonset Point, Rhode Island, would be "the staging site for all Cape Wind construction operations." MMS Conformity at 6. MMS warned, however, that "[I]f there are any changes in Cape Wind's construction plan, this conformity determination may need to be revised." MMS Conformity at 10.

As it turned out, there are such changes. The staging location has since been moved from Rhode Island to New Bedford, Massachusetts. Cape Wind has confirmed that it will be using the New Bedford staging terminal in a recent press release, dated January 7, 2011. *See* "Cape Wind Completes Permitting Process," attached as Appendix E.

At a minimum, this announcement indicates that the emissions data used in the MMS's conformity determinations are no longer operative. While it is not possible from these statements to be certain whether all of the 139.4 tons of NOx from the construction support activities that MMS assumed would be emitted in Rhode Island will now be added to the 42.4 tons of NOx MMS identified as being emitted from Massachusetts sources, it is clear that the changed circumstances have made obsolete the emission numbers assumed in the MMS's conformity determination.

In light of this change, at least the following critical findings of fact and conclusions of law in the MMS conformity determination appear to be "clearly erroneous." 40 C.F.R. § 124.19(a)(1):

1. The finding of fact that Quonset, Rhode Island would be the "staffing site for all Cape Wind Construction operations." (MMS Conformity at 6).

2. The finding of fact that emissions of NOx in Rhode Island would exceed 100 tons in the first year of construction. (MMS Conformity at 7).
3. The conclusion of law that a conformity determination was necessary for Rhode Island. (MMS Conformity at 7).
4. The finding that NOx emissions from construction activities in Massachusetts would not exceed 100 tons in year one. (MMS Conformity at 5).
5. The conclusion of law that "no general conformity determination is needed for Massachusetts." (MMS Conformity at 5).

The EAB may grant review when a permit decision is based on a clearly erroneous finding of fact or conclusion of law. 40 C.F.R. § 124.19(a); *In re Knauf Fiberglass, GmbH*, 8 E.A.D. 121 (EAB 1990); *In re RockGen Energy Ctr.*, 8 E.A.D. 536, 540 (EAB 1999) (*RockGen*). Typically, the Board has granted review on due process principles when significant changes have been made in response to comments without sufficient explanation. The Board has held that such changes must be explained in order to "provide the permittee or other parties with an opportunity to prepare an adequately informed challenge to the permit addition." *Amoco Oil Company* at 981; *Indeck-Elwood* at 147; *City of Marlborough* at 244–245 (identification of changes "ensures that interested parties have an opportunity to adequately prepare a petition for review and that any changes in the draft permit are subject to effective review" (internal citations omitted)); *In re ConocoPhillips Co.*, 13 E.A.D. 768 (EAB 2008) (permit remanded

because permit issuer failed to identify changes to the permit or reasons why such changes were made).

As the Board has recognized, this same due process principle applies with respect to an issue that could not have been raised during the comment period because it was "not reasonably ascertainable." *RockGen* at 540. *See also In Re Weber*, 11 E.A.D. 241 (EAB 2003) (permit remanded where agency issued final permit without first issuing response to comments); *In re Prairie State Generation Station,* 12 E.A.D. 176 (EAB 2005) (permit vacated where agency issued permit decision without putting response to comments in the record). The courts also have remanded permit decisions where the project has been changed without opportunity for input from citizens. *See, e.g., Natural Resources Defense Council v. EPA,* 279 F.3d 1180 (9th Cir. 2002).

In the case of Cape Wind, the facts on which the permit decision was based have significantly changed, rendering the findings of fact and conclusions of law incorrect. Just as MMS warned, the conformity determination will need to be redone in light of the significant change in the configuration of the project. It now appears that there may be no basis for the conformity determination made for Rhode Island, since some or all of the emissions from the construction phase of the project have now been moved to Massachusetts. On the other hand, MMS's earlier decision not to do a conformity determination for Massachusetts is no longer supported in the record, since the addition of emissions previously assumed to come from Rhode Island may push Massachusetts over the 100 ton per year threshold, triggering a conformity determination. Without the correct information, the administrative record cannot possibly reflect the "'considered judgment' necessary to support the Region's permit determination." *Ash Grove at* 417

(internal citations omitted). In light of these significant changes to the project, the Board should remand the permit to the Region and EPA to determine the correct project configuration and provide a current analysis of the consistency of the proposed project with Section 328 of the Clean Air Act, and with the Massachusetts State Implementation Plan as incorporated into 40 CFR Part 55, including an analysis of alternative sites for the project.

VII. CONCLUSION

For these reasons, Petitioners respectfully request that the Board grant review and remand the permit to Region 1 for a new analysis and comment period on the compliance of the proposed project with the requirements of Section 328 of the Clean Air Act, employing correct assumptions concerning the location and emissions of construction activities; and that the Board order a reopening of the public comment period on the issue of the revised NOx modeling to allow the public to see and comment on the documents and reasoning regarding attainment of the one-hour NOx NAAQS.

Respectfully submitted, February 9, 2011.

/s/ Richard E. Ayres

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CERTIFICATE OF SERVICE

I hereby certify, pursuant to the Rules of the Environmental Appeals Board of the U.S. Environmental Protection Agency, that on February 9, 2011, the foregoing was filed electronically with the Clerk of the Environmental Appeals Board using the Central Data Exchange. The foregoing will be served as paper copies on interested parties in this matter, Cape Wind Associates, and EPA Region 1, by mail.

/s/ Richard E. Ayres

Richard E. Ayres