

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

In re: Cape Wind Associates, LLC)	
)	
)	OCS Appeal No. 11-01
)	
Permit No. OCS-R1-01)	
)	

**REGION’S OPPOSITION TO PETITIONERS’ MOTIONS FOR
LEAVE TO SUPPLEMENT RECORD AND TO FILE A REPLY BRIEF**

Region 1 of the U.S. Environmental Protection Agency (the Region) opposes two recent filings submitted by Petitioners Alliance to Protect Nantucket Sound and Wampanoag Tribe of Gay Head (Aquinnah). Through these filings, Petitioners seek inappropriately to add extraneous postdecisional material into the administrative record and to supplement the arguments in their petition for review. The Region respectfully requests that the Board (1) deny Petitioners’ April 5, 2011 motion to supplement the record, including its exhibit, and (2) deny Petitioners’ April 5, 2011 motion for leave to file a reply brief.

BACKGROUND

This dispute concerns an Outer Continental Shelf air permit that the Region issued to Cape Wind Associates on January 7, 2011. On February 9, 2011, Petitioners timely filed a petition for review (Petition) of the final permit. Cape Wind moved for leave to intervene and to respond to the Petition, and the Board granted that motion. On March 15, 2011, the Region filed its response to the Petition. *See In re Cape Wind Assoc., LLC*, OCS Appeal No. 11-01, Doc. No.

6.01 (Response to Petition for Review) (“Region’s Response”).¹ Cape Wind submitted its response to the Petition that same day.

After various other filings, on April 5, 2011, Petitioners filed an unsolicited reply brief, with an accompanying motion to file such brief. *See* Doc Nos. 14.01 (Petitioners’ Motion for Leave to File Reply Brief), 14.02 (Petitioners’ Reply Brief). Petitioners included with the reply brief an email message dated February 24, 2011, and also filed a motion to supplement the record with that exhibit. *See* Doc. Nos. 14.03 (Reply Brief Exhibit 1, New Bedford FOIA), 14.05 (Petitioners’ Motion to Supplement the Record), 14.06 (Motion to Supplement Record Exhibit 1, New Bedford FOIA).

ARGUMENT

1. The Board should deny Petitioners’ requests to supplement the record with postdecisional items, and strike all arguments based on those items.

The Agency’s permitting regulations “provide a timeline for the closing of the administrative record, stating that ‘[t]he record shall be complete on the date the final permit is issued.’” *In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 516 (EAB 2006) (“*Dominion I*”) (quoting 40 C.F.R. § 124.18(c)) (alterations in original). “[T]he record is closed at the time of permit issuance and . . . documents submitted subsequent to permit issuance cannot be considered part of the administrative record.” *Id.* at 518; *In re Gen. Motors Corp.*, 5 E.A.D. 400, 405 (EAB 1994) (declining to consider data provided after issuance of the final permit); *In re City of Caldwell*, NPDES Appeal No. 09-11, slip op. at 16 (EAB Feb. 1, 2011) (unpublished order denying review) (noting that the “critical cutoff” for determining what is in the administrative record is “final permit issuance; once that occurs, the record is officially closed”).

¹ All references to “Doc. No.” in this memorandum refer to numbered items on the Board’s electronic docket for this appeal, *In re Cape Wind Associates, LLC*, OCS Appeal No. 11-01.

Petitioners seek to supplement the administrative record with an email message, dated February 24, 2011, from one municipal official to another, purporting to convey Cape Wind's future project plans. As the Region's final permit was signed on January 7, 2011, this message is postdecisional by almost seven weeks, and could not possibly have influenced the Region's decision to issue an Outer Continental Shelf air permit to Cape Wind. Therefore, the message cannot be part of the administrative record. The Board should deny the request to supplement the record with this postdecisional document, and decline to consider any arguments based on this document. *See Dominion I*, 12 E.A.D. at 511 & n.31 (explaining that any references in argument to materials outside the administrative record would be treated as stricken).

2. The Board should deny Petitioners' motion for leave to file a reply brief.

Petitioners are not entitled to file a reply brief as of right. *See In re Town of Seabrook*, 4 E.A.D. 806, 810 n.6 (EAB 1993). To the contrary, "the EAB normally does not require further briefing before issuing a decision whether to grant review. However, petitioners . . . may, upon motion explaining why a reply brief is *necessary*, seek leave to file a reply brief."

Environmental Appeals Board Practice Manual (Sept. 2010) at 48 (emphasis added). Even when a reply brief is allowed, parties may not raise new issues in a reply. *See In re Upper Blackstone Water Pollution Abatement Dist.*, ND PES Appeal Nos. 10-09 through 10-12, slip op. at 8 (EAB Mar. 30, 2011); *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 126 n.9 (EAB 1999) ("New issues raised for the first time at the reply stage of these proceedings are equivalent to late filed appeals and must be denied on the basis of timeliness.").

Petitioners' motion for leave to file a reply brief fails to explain why additional briefing is necessary for the Board's analysis in this matter, and Petitioners' proposed reply brief would not materially assist the Board in its deliberations. The first third of the reply brief discusses issues

irrelevant to the present appeal; the middle third simply repeats arguments from the Petition; and the final third introduces new arguments never before presented to the Region or the Board.

The first third of the reply brief focuses on whether Cape Wind might revise its project plan to launch from New Bedford, Massachusetts rather than Quonset Point, Rhode Island. This entire section of the reply brief rests on an email message that did not even exist when the Region made its decision, and therefore should be disallowed on this basis alone. Furthermore, Petitioners have still not offered any coherent theory for how this issue is material to this appeal. They have not proposed how the Region's air permit—which regulates Cape Wind's *Outer Continental Shelf* air emissions—crucially depends on the project's onshore staging location. Nor have Petitioners explained why the permit must be remanded *now* because Cape Wind *might later* seek approval from another agency (and, possibly but not necessarily, from the Region) to change its staging location. *Cf.* Region's Response at 85-86 & n.40. Indeed, the reply brief offers no explanation of why this issue is ripe for review. All parties agree that there is some possibility that, at some undetermined point in the future, Cape Wind might notify various government agencies of a decision to revise its project plan, and seek whichever formal approvals may be necessary. The Board should not spend its limited time attempting to ascertain the exact probability of this happening. If and when Cape Wind notifies the government of such a decision, and if it is appropriate for the Region to issue a modification to the Outer Continental Shelf air permit (which is possible but far from certain), then the relevant factual and legal issues will become ripe for review. Until then, Petitioners' argument is speculative and premature.

The middle third of the reply brief retreads arguments in the Petition regarding whether the public comment period should have been re-opened to allow public comment on the one-hour nitrogen dioxide and sulfur dioxide modeling. The Region's response provided extensive legal

argument regarding 40 C.F.R. § 124.17(b) and cited cases addressing the appropriate exercise of a region's discretion in determining whether to reopen the comment period. *See* Region's Response at 38-55. The reply brief does not explain why 40 C.F.R. § 124.17(b) is inapplicable, nor distinguish the cases cited by the Region. Perhaps remarkably under the circumstances, the reply brief provides no critique whatsoever of the detailed technical responses that the Region provided in its Response to Petition for Review. The Petition had complained about Petitioners' alleged lack of access to certain modeling files, and suggested that, after reviewing the one-hour modeling data, Petitioners would develop specific criticisms. But even after 21 days (70% of a 30-day comment period) and complete access to every modeling file in the Region's possession, and even having taken the proverbial second bite at the apple, the reply brief does not provide *any criticisms at all* of the Region's air modeling analysis.

The final third of the reply brief raises entirely new arguments, and cites for the first time in this proceeding an executive order (issued after the Region's final permit decision), a Presidential memorandum, a White House directive, a memorandum from EPA's Administrator, and EPA's Open Government Plan. Petitioners cite these documents (all of which were available to Petitioners before they filed the Petition) for their apparent theory that every permit issued by every EPA regional office (or delegated state agency) under 40 C.F.R. Part 124 must be accompanied by a complete on-line docket. This entire line of argument is foreclosed because Petitioners, despite having the opportunity to raise this argument in the Petition itself, have argued it for the first time in their reply brief. *See Upper Blackstone*, slip op. at 8; *Dominion I*, 12 E.A.D. at 595; *Knauf Fiber Glass*, 8 E.A.D. at 126 n.9. Moreover, while Petitioners cite these documents for broad statements regarding posting documents online, Petitioners do not identify any specific statement in any of these documents suggesting that every file in every EPA permit

record must be posted online. Nor do Petitioners distinguish the Board precedent that the Region cited in its response, other than by suggesting that the precedent was wrongly decided.

CONCLUSION

The Region requests that the Board deny Petitioners' motions to supplement the record and for leave to file a reply brief. If the Board allows Petitioners' proposed reply brief, the Region requests that the Board permit the Region to file a sur-reply.

Respectfully submitted,

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION 1

By its attorney,

/s/ Ronald A. Fein

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CERTIFICATE OF SERVICE

I, Ronald Fein, hereby certify that copies of the aforementioned Region's Opposition to Petitioners' Motions to Supplement Record and to File a Reply Brief were sent on the 13th day of April 2011 to the following persons in the manner described below:

Posted to CDX electronic system

Eurika Durr, Clerk of the Board
Environmental Appeals Board

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Signed: April 13, 2011

/s/ Ronald A. Fein