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

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

PETITIONERS' REPLY BRIEF

I. CONSTRUCTION STAGING LOCATION

In their Petition for Review, the Petitioners identified evidence in the record showing Cape Wind's intention to stage construction of the project out of New Bedford, Massachusetts, rather than Quonset Point, Rhode Island, as the company had represented to the Region and BOEMRE. Now new evidence confirms that Cape Wind has been deliberately deceiving federal agencies, hiding its plans to move the staging location to New Bedford after the conclusion of these proceedings and other federal reviews. In an accompanying Motion to Supplement the Record, Petitioners ask the Board to take notice of an e-mail obtained in response to a FOIA request lodged with the City of New Bedford. This e-mail was sent from Kristin Decas, the Executive Director of the New Bedford Harbor Development Commission, to the Mayor of New Bedford and the Executive Director of the New Bedford Economic Development Council. E-mail Communication from Kristin Decas to Mathew Morrissey and Mayor Scott W. Lang

(February 24, 2011) re: Cape Cod Wind Operations Plan.[1] In the e-mail, Decas relates a conversation she had with Mark Rogers, the spokesperson and Director of Communications for Cape Wind, in which Rogers admitted Cape Wind's attempt to deceive the government with respect to the location of construction staging. Decas states that:

> Mark wants us to know that their NEPA attorneys advise them to not change documented plans to avoid a full blown EIS for changes. He indicated that this [Construction and Operation] plan names Quonsett [sic] as the hub for staging, but it also notes that New Bedford is building a terminal that will be used if construction is complete in time. Being a public document, he wanted to give us the heads up, but *assured me once the operations plan is approved by NEPA [sic], they will file for a formal project change to name New Bedford as the staging hub*. His attorneys feel this is the best tact [sic] and are confident the project change should be seamless. (Emphasis added).

Id. (hereinafter "February 24 email"). Cape Wind's real plans are clear as can be in this email: once it has duped the federal regulators into signing off on the OCS air permit and EIS, Cape Wind will simply file for a formal project change, "seamlessly" renaming New Bedford as the new staging location. In this way, so it believes, Cape Wind can neatly bypass all of the cumbersome process that revealing its *actual* intentions would trigger—in other words, review of the project as it will actually be built. As the February 24 email evinces, Cape Wind is clearly gaming the system, a play Petitioners have called all along. As a legal matter, this unquestionably invalidates the Region's air permit, premised as it is on the Quonset Point staging location. Equally troubling is that Cape Wind has continued to intentionally deceive the public and the federal government throughout these proceedings. As an examination of the timing of the February 24 email makes clear,

[1] Petitioners have filed a Motion to Supplement the Record with a copy of this e-mail, which is attached as Exhibit 1 to this Reply.

Cape Wind's treatment of this issue has been carefully calculated to frustrate review by both Region 1 and the EAB. This kind of duplicity is unacceptable and should not be tolerated by the Board.

A. Timeline Leading up to the February 24 Email

In October of 2010, after Governor Patrick's announcement that Cape Wind would use New Bedford as the staging area for construction, EPA sent a letter notifying Cape Wind that it had put its "permit application on hold" until Cape Wind clarified the situation. Letter from Stephen Perkins, Director of the Office of Ecosystem Protection, EPA Region 1, to Dennis Duffy, Vice President of Regulatory Affairs, Cape Wind Associates (Oct. 29, 2010) (on file with the EAB as #6.31, Region Response to Petition for Review Exhibit 29) (stating, *inter alia*, that a change in staging location "likely affects some of the analyses and conclusions presented to EPA in the air permit application, and/or presented to other agencies for the purpose of other federal statutory requirements with which EPA must comply in issuing the air permit").

In its November 17 response to the Region's letter, Cape Wind developed the following formulaic answer: deny that it intends to use New Bedford, but nevertheless aver that in the event it decides to use the New Bedford terminal to stage the project, then it will "make appropriate regulatory filings at that time." Letter from Dennis Duffy to Stephen Perkins, *supra*. This formula has been repeated in every public communication by Cape Wind on this issue since then, including in its brief before this Board. Cape Wind Response at 8. Indeed, in its March 15 submissions to the Board, Cape Wind affirmed that "[t]he position stated in the November 17, 2010 letter [to Region 1] remains

the current position of CWA." *Id.* (citing the declaration of Mr. Gordon, Cape Wind's President, at ¶ 5).

Cape Wind's attempt to avoid a new permitting process, and now a remand of the permit, by issuing this response has thus been ongoing since at least November. Petitioners pointed to this hide-the-ball tactic in their Petition for Review,[2] only to have Cape Wind fire back that Petitioners' claims were "baseless." Cape Wind Response at 7. Perhaps they really meant "not yet public."

In private, however, Cape Wind continues to assure New Bedford that once the regulators have been fooled into approving the permits and NEPA analysis, it will change the location of staging for the construction phase to New Bedford. The February 24 email reveals the purpose of the ambiguity in Cape Wind's formulaic answer: in public, Cape Wind repeats the formula in Mr. Gordon's declaration, which leaves open the option of switching to New Bedford while trying to appear committed to Quonset Point. But as the February 24 email makes evident, Cape Wind's apparent waffling on the staging location is not even merely "keeping its options open": rather, the statements that conflicted with Cape Wind's November pronouncement to EPA (such as the January 7 press release announcing it instead had selected the New Bedford site) were actually slips, accidental airings of the real plan by Cape Wind's communications staff.

Cape Wind now attempts to pull the same ploy with the EAB. The February 24 email from Ms. Decas, however, puts Cape Wind's formulaic answer into relief: they are not waffling, they are merely waiting.

[2] Citing to a January 7, 2011 press release by Cape Wind identifying New Bedford as the new staging location (incidentally the same day Region 1 issued the air permit premised on a Quonset Point staging location).

B. Legal Significance for the EAB Proceeding

Relevant to the proceedings at hand, the issuance of a permit based on air quality analysis that assumes construction will be staged out of Quonset Point is clear error. This error is highly consequential from the perspective of a permit proceeding. Cape Wind suggests that a change in construction basing would require nothing more than some minor paperwork. But as the Board knows, moving the major source of emissions from the project from one state to another will require new air quality modeling and the revision of the Massachusetts SIP. In turn, that will mean a new attainment demonstration by the Commonwealth and a new permit proceeding, including a new BACT demonstration, by Cape Wind. It will almost certainly require Cape Wind to locate and purchase additional emission offsets from sources within Massachusetts.

Because the permit is based on a clear error, it must be remanded to the Region for a new air quality analysis using New Bedford as the staging location.

II. REOPENING THE COMMENT PERIOD

Region 1 concedes that reopening the public comment period is necessary where new data provides entirely new information "critical" to the agency's determination on a permit. Region 1 Response at 42 (citing *Cmty. Nutrition Inst.*, 749 F.2d 50, 58 (D.C. Cir. 1984)). This recognition, however, is difficult to square with the Region's response, which in effect argues that the modeling data submitted post-comment is neither new nor critical. This assertion is directly contradicted by the facts.

A. New Modeling Data Submitted Post-Comment Raises Substantial New Questions

The Region conflates identifying an issue with the opportunity to substantively address it through public comment. Thus, Region 1 states, "the very fact that Petitioners submitted detailed comments on 1-hour NO2 and SO2 modeling during the public comment period indicates that Petitioners have had an opportunity to address these issues." Region 1 Response at 42. The "detailed comments" to which the Region refers, however, consist of no more than a bare statement noting that EPA has not modeled Cape Wind's compliance with the new NAAQS for NOx and SOx and asking it to do so. Alliance Comments on the Proposed OCS Air Permit at 3 (July 16, 2010). If raising an issue also satisfies the opportunity to address it, this would create quite the catch-22: the public could not review what is not before it, but in the course of flagging the omission, would forego their opportunity to comment—at least according to the Region's logic.

The Region's attempt to characterize the issue of compliance with the new NAAQS as "already before the public" in this case would seriously undermine the public comment procedure. Region 1 Response at 42. Under this logic, an applicant could well circumvent substantive public comment merely by omitting material information from the permit application, only to have the public expend their "opportunity" for review and comment by merely pointing out required data was missing.

As the Region itself notes from EAB precedent, an important factor in reopening the comment period is "whether a new round of notice and comment would provide the first opportunity for interested parties to offer comments that could persuade the agency to modify its rule." Region 1 Response at 42 (quoting *In re Dist. of Columbia Water &*

Sewer Auth., 13 E.A.D. 714, 759 (EAB 2008) (internal citations omitted)). Certainly, the first opportunity the public had to comment on modeling for the new NAAQS—other than to note that it was not done—would have been in a new round of notice and comment after Cape Wind submitted the new data to the Region. Thus, reopening the comment period would have afforded the first opportunity to offer meaningful comment potentially affecting the agency's determination.

Regarding the substantiality of the questions raised by the new modeling, the Region states that even if the modeling data presented new questions, "the information supplied by the air dispersion modeling analysis was not critical to the Region's final permit decision, because the Region was not required to conduct a 1-hour NO_2 or SO_2 dispersion modeling analysis in the first place," and that in ensuring compliance with the NAAQS it has "the discretion to determine, on a case-by-case basis, whether air dispersion modeling is required." Region 1 Response at 46. Having determined such modeling *was* required, however, the Region cannot then claim that this analysis is immaterial to its final permit decision. In fact, the modeling analysis for the 1-hour NO_2 and SO_2 standards is central to the air permit, as the Region's issuance of the permit is premised on ensuring that emissions from the project do not result in air quality exceeding the NAAQS.

B. Failure to Reopen the Comment Period In This Instance Constitutes an Abuse of Discretion

Taken as a whole, the Region's position severely undermines the public comment procedure. The Region's stance—one, that the 1-hour modeling is not critical and therefore cannot raise "substantial" questions, and two, that pointing out an omission

satisfies the public's "opportunity" for comment—indicates a perfunctory approach fundamentally inconsistent with the purpose served by public comment. As the EAB has previously made clear, "the idea behind the regulations [requiring response to comments from the record] is that the *decision maker* have the benefit of the comments and the response thereto to inform his or her permit decision." *In re Weber # 4-8*, 11 E.A.D. 241, 245 (EAB 2003) (emphasis in the original). Yet the Region's action with regard to public comment on this issue in would prevent the public comment period from functioning as the regulations envision. In deciding not to reopen the public comment period after receiving new data central to the air permit, the Region necessarily limited all public comment on compliance with the 1-hour NO_2 and SO_2 standards to the Alliance's previous point that such modeling was required but had not yet been done. This decision has the effect of denying the decision maker the benefit of public comment in informing the permit decision—its primary function.

Instead, the Region offers that parties denied the opportunity to comment are free to challenge conditions of the permit through the appeals process—a suggestion that neglects, at least if taken seriously, the fundamental purpose served by the public comment period. It also indicates that in the Region's view, apparently, the appropriate place for a technical discussion of the air quality modeling exercise is in front of the Board, which is citizens' only recourse after the permit has been issued. As this Board has often pointed out, the Regions, not the Board, are the appropriate forums for resolution of such technical issues.

Failing to reopen the comment period in this instance constitutes an abuse of the Region's discretion, especially where it was apparent that the Alliance sought the

opportunity for review and substantive comment on the 1-hour modeling analysis by virtue of requesting it. Under such circumstances, the Board should remand the permit for a limited reopening of the comment period on the issue of the 1-hour modeling analysis.

C. Transparency

Citing 40 C.F.R. Part 124, the Region takes the position that it had no obligation to place online, or, indeed, even in a publicly accessible file at the regional office, the documents related to the modeling conducted by Cape Wind regarding attainment of the one hour NO_2 and SO_2 NAAQS. Region 1 Response to Petition for Review at 25.

The Region attempts to escape Petitioners' criticism of the proceeding's lack of transparency by referring to the definition of the administrative record for purposes of review in 40 CFR Part 124. By definition, the Region says, all of the items related to the one-hour modeling exercise were part of the "administrative record." Region's Brief at 22. But this definitional ploy does not address the issue Petitioners have raised, namely, the Region's failure to inform the public and seek its input on the new modeling analysis performed.

The Region argues the crabbed position that it has "no obligation to provide an electronic copy of any part, let alone the entirety, of the administrative record," citing *In re Russell City Energy Center* (EAB Nov. 18, 2010) as authority for this position. Region's Brief at 24. With all due respect, the position articulated in *Russell City Energy Center* is inconsistent with a Memorandum and Executive Order of the President of the United States and the implementing policies of the Administrator of the Environmental Protection Agency. As an Executive Branch agency, the Board is obliged to enforce an

Executive Order of the President, which requires the Region to go beyond the minimum requirements of Part 124 in order to seek the views of the public and promote openness in government. Rather than argue for the minimum openness, the Region is required by directives from the President to make the administrative record accessible, by posting it online so that citizens can have easy access to understand and provide informed comment on the proposed permit.

On his first full day in office, President Barack Obama signed a Memorandum to the heads of all executive departments and agencies directing them to "promote[] accountability and provide information for citizens about what their Government is doing." Barack Obama, Memorandum to Heads of Executive Departments and Agencies 74 Fed. Reg. 4685 (Jan. 26, 2009). The President directed agencies to "find and harness new technologies to put information . . . online and readily available to the public." *Id.*

In a subsequent Executive Order on regulation, the President ordered agencies to "provide . . . timely online access to the rulemaking docket . . . including relevant scientific and technical findings." Executive Order 13,563, "Improving Regulation and Regulatory Review," 76 Fed. Reg. 3821, 3822 (Jan. 18, 2011).

Pursuant to the President's 2009 Memorandum, the Director of the federal Office of Management and Budget (OMB) issued a directive to agency heads to implement the "presumption of openness that the President has endorsed." Memorandum for the Heads of Executive Departments and Agencies, "Open Government Directive," Dec. 8, 2009 at 1. The Director mandated that: "each agency shall take prompt steps to expand access to information by making it available online in open formats. With respect to information, *the presumption shall be in favor of openness* . . . ." *Id.* at 2 (emphasis added). Agencies

were also directed to "proactively use modern technology to disseminate useful information, *rather than waiting for specific requests*." *Id.* (emphasis added).

Immediately after her nomination, EPA Administrator Lisa Jackson stated that in her administration, EPA would operate "in a fishbowl." Honorable Lisa Jackson, Memorandum to All EPA Employees (Jan. 23, 2009). She pledged that the agency "will carry out the work of the Agency in public view *so that the door is open to all interested parties*." *Id.*

Pursuant to the order of the Director of OMB, EPA has adopted a formal "Open Government Plan" designed to assure that the agency actively seeks public input. "What is new," the agency says the Open Government Plan Discussion Forum on its website, "is our commitment to reach out to more stakeholders . . . ."[3] As part of the agency's Open Government program, the website boasts that the agency has provided electronic access to "more than 12,000 proposed rulemakings," and has "received and posted [online] approximately 280,000 public comments and 200,000 Agency scientific, legal and technical analyses." EPA Open Government Plan, Section C(1)(b).

In light of these prodigious accomplishments, it is difficult to understand why Region 1 should find it so difficult to post the administrative record for a single permit decision online to "promote[] accountability and provide information for citizens about what their Government is doing," in the words of the President of the United States.

Administrative review boards, such as the U.S. EPA Environmental Appeals Board (EAB), have consistently recognized that Executive Orders and Secretarial Directives are binding on agencies for purposes of administrative appeals.

[3] http://blog.epa.gove/opengovplan/transparency/#more-23.

For example, in *Fort Berthold Land and Livestock Association v. Great Plains Regional Director*, 35 IBIA 266 (2000) the appellant Association sought a review of the Interior Board of Indian Appeals (IBIA) decision to increase the minimum annual grazing rental rate for the reservation. The Board vacated and remanded that decision on grounds unrelated to the Regional Director's position that the directives do not create an enforceable right. However, the IBIA clearly directed that every effort be made to achieve compliance with presidential directives:

> In contending that the directives do not create an enforceable duty to consult, the [Great Plains] Regional Director misses one very salient point: The Board is not a Federal Court, in which Appellant has sought to enforce an Executive Branch directive. Instead, it is part of the Executive Branch agency whose Secretary issued some of the directives under discussion and which answers directly to the President, who issued the remaining directives. While a federal court may or may not read the various directives as establishing a right enforceable in Federal court, that does not answer the question of whether the Board, which speaks for the Secretary of the Interior, may conclude that consultation was required under the directives.

Id. at 271. Furthermore, the Board stated that "on remand, the Regional Director might wish to reconsider whether the position taken in her answer brief is consistent with the Federal policy which was clearly articulated in the Presidential and Secretarial directives." *Id.*

The EAB has indicated, by virtue of its review of EPA's compliance with various Executive Orders, that the agency must follow them and that its failure to do so leaves the agency open to attack. In several instances, the EAB has contemplated EPA's compliance with the Executive Order entitled "Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations." Exec.

Order 12,898, 59 Fed. Reg. 7629, 7629 (Feb. 11, 1994).[4] *See Shell Gulf of Mexico Inc. and Shell Offshore Inc.,* Appeal Nos. OCS 10-01; OCS 10-02; OCS 10-03; OCS 10-04 (CONSOLIDATED), 15 E.A.D. ___ (2010) (hereinafter "Shelf Gulf"); *Beeland Group, LLC, Beeland Disposal Well #1*, UIC Appeal No. 08-02, 14 E.A.D. ___ (2008); *Upper Blackstone Water Pollution Abatement District*, NPDES Appeal Nos. 08-11 to 08-18 & 9-06, 14 E.A.D. ___ (2010); *Shell Offshore, Inc. (Kulluk Drilling Unit and Frontier Discoverer Drilling Unit)*, OCS Appeal Nos. 07-01 & 07-02, 13 E.A.D. 357 (2007).

In *Shell Gulf*, for instance, the EAB explicitly stated that "Federal agencies are required to implement this [executive] order 'consistent with, and to the extent permitted by, existing law.'" *Shell Gulf*, 15 E.A.D. at 63 (citing Exec. Order 12,898, 59 Fed. Reg. at 7632 (Feb. 11, 1994)). The Board went on to require the Region to comply fully with the applicable Executive Order, finding that "[c]ompliance with a NAAQS standard that the Agency has already deemed inadequate [. . .] cannot by itself satisfy a permit issuer's responsibility to comply with the Executive Order." *Id.* at 75. In sum, then, this Board's own precedent requires the Regions to comply with executive orders to the full extent permitted by existing law. Failing to make the documents in the record easily accessible to the public through the simple—and permitted, even encouraged—act of online posting falls short of this standard.

The Region's claim that they are not even required to collect the entire administrative record together at the Regional office is a vestige of an earlier day, before the Internet made it easy to provide citizens timely and convenient access to public documents, and, more importantly, before the Memorandum and Executive Order of the

[4] The Board has correctly ignored disclaimers in such Executive Orders, e.g., Section 6-609, of E.O. 12,898, which states that the order "is not intended to, nor does it create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States."

President. The Board is bound by these Presidential directives, as well as the policies of the EPA, and must insure that the regional offices comply with them just as headquarters must. The federal administrative process in Boston should be no less transparent than it is in Washington, D.C.

III. CONCLUSION

1. Petitioners have established clear error on the part of the Region in granting a permit based on an assumption that the construction activities for the planned project will occur at Quonset Point, Rhode Island, when in fact Cape Wind has been hiding its actual intention to locate these activities at New Bedford, Massachusetts. Petitioners ask that the Board remand the permit with instructions to the Region to redo its air quality analysis based on staging the construction activities out of New Bedford, Massachusetts.

2. Petitioners also request that, to the extent not provided for in the remedy under (1), *supra*, the Board remand the permit for a limited reopening of the public comment period on the one-hour NAAQS modeling. Petitioners also ask the Board to require the Region to place all documents included in the administrative record online, together with any new documents received or generated in response to the Board's remand under points (1) or (2).

Respectfully submitted,

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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 April 5, 2011, a copy of the foregoing Petitioners' Reply Brief and accompanying Exhibit 1 were filed electronically with the Environmental Appeals Board via the Central Data Exchange system. I further certify that copies of the foregoing documents were served via U.S. mail on counsel of record today.

/s/ Richard E. Ayres

Richard E. Ayres