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

In re:

CAPE WIND ASSOCIATES, LLC

Appeal No. OCS 11- 01
EPA Permit No. OCS-R1-01

CAPE WIND ASSOCIATES, LLC'S OPPOSITION TO PETITIONER'S MOTIONS TO SUPPLEMENT THE RECORD AND TO FILE A REPLY

Cape Wind Associates, LLC ("CWA") hereby files this opposition to Petitioners' Motions to Supplement the Record and to File a Reply Brief. For the reasons set forth below, Petitioners' motions should be denied.

Petitioners' accusations that CWA is "deliberately misleading" and "intentionally deceiving" the federal government and this Board are beyond the bounds of acceptable legal advocacy. Petitioners offer nothing more than unreliable hearsay to substantiate their untenable claims that CWA has engaged in unlawful conduct. This is an obvious tactic to disparage CWA before the Board in the hopes of salvaging a meritless petition. The Board should not tolerate conduct that in other forums is grounds for sanctions. *See* Fed. R. Civ. P. 11(b) (factual contentions must have evidentiary support and cannot be offered for improper purposes, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation). For this reason alone, the motions should be denied in their entirety.

First, the email Petitioners rely upon was authored by an unrelated third-party and sent to other third parties which purportedly recounts a conversation with a CWA employee. The email

is hearsay within hearsay being offered for the truth of the matter asserted, namely CWA's position regarding its staging area. Fed. R. Evid. 801(c) ("Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted"); *see also, State of New York v. Microsoft Corp.*, No. CIV A. 98-1233 (CKK), 2002 WL 649951 (D.D.C.) (Dist. Ct., D.C., Apr. 12, 2002) (third-party email recounting conversation with company and ascribing certain statements to company is hearsay within hearsay for which no exemption to the hearsay rules applies). As such, it is unreliable and inadmissible in administrative hearings. 40 C.F.R. § 22.22 ("The Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable or of little probative value [i.e., hearsay evidence]."

Second, the email is not inconsistent with CWA's position. CWA President James Gordon attested that "CWA supports the Commonwealth of Massachusetts' efforts to construct a proposed multi-purpose marine commerce terminal in the port of New Bedford that, if built, could serve as a staging area for the Cape Wind Project and other offshore renewable projects." Gordon Decl. ¶ 3. However, as of today, the New Bedford site remains a vacant site without the necessary port infrastructure facilities and has yet to obtain any of the construction approvals that would be required. Because CWA expects to begin construction by the end of this year, "it is unclear whether the terminal would be ready and available to meet Cape Wind's construction schedule." *Id.* For that reason, "CWA has not altered its project plans to change its staging area from Quonset to New Bedford," *id.,* nor would it prudently do so under the present conditions of uncertainty about potential developments at New Bedford. The email does not – and cannot – "prove" otherwise. As CWA has repeatedly stated, if the New Bedford facility were to become both complete and available in accordance with CWA's requirements, and CWA proposes to

utilize the facility for all or a substantial portion of its staging requirements, CWA would at such time make the appropriate regulatory filings and seek any necessary permit revisions. *Id.* at ¶ 4.

Third, CWA's staging location, whether it is Quonset Point or New Bedford, is not "highly relevant" to its OCS permit as Petitioners contend, because both locations are outside the permit's statutorily prescribed 25-mile radius. *See* 42 U.S.C. 7627(a)(4)(C); 40 C.F.R. 55.2. Emissions related to CWA's staging activities are addressed within the Bureau of Ocean Energy Management, Regulation, and Enforcement's ("BOEMRE") conformity determination, not EPA's OCS permit that is the subject of the instant proceeding. As EPA Region 1 demonstrated in its Response to Petition for Review, EPA did not rely upon BOEMRE's conformity determination because the permit is exempt from general conformity requirements. EPA Resp. at 83. Moreover, as the Region further pointed out, the Board lacks jurisdiction to review BOEMRE's conformity determination because no condition of the permit relies upon the determination. *Id.* at 82-83. Petitioners' unfounded accusations are thus irrelevant to the issues before the Board, which further evidences Petitioners' complete lack of decorum in this proceeding.

Fourth, the email, dated February 24, 2011, postdates the January 7, 2011 permit and is therefore a post-decisional document that cannot be shoehorned into the Administrative Record. The regulations provide that "[t]he record shall be complete on the date of final permit issuance." 40 C.F.R. § 124.18(c); *see In re Russell City*, PSD Appeal Nos. 10-01 – 05, 2010 WL 5573720, at *20 (E.A.B. Nov. 18, 2010). As the Board recently explained in *In re City of Cadwell*,

> Board cases interpreting this provision have established the "critical cutoff as final permit issuance; once that occurs, the record is officially closed. *E.g., Russell City*, slip op. at 115 n.106, 15 E.A.D. at ___ [sic] ("it is not appropriate to supplement the administrative record with documents the permit issuer did not consider in making its permitting decision"); *In re Dominion*

> *Energy Brayton Point Station, LLC*, 12 E.A.D. 490, 518-19 (EAB 2006). Were it otherwise and the administrative record either left open or easily supplemented, permitting processes would potentially never come to an end. *See In re BP Cherry Point*, 12 E.A.D. 209, 219-20 (EAB 2005) (describing importance of consistent procedural rules in ensuring efficiency, predictability, and finality of permitting processes).

NPDES Appeal No. 09-11, 2011 WL 345460 (EAB 2011) (declining to order the Region to reopen the administrative record and treating documents as outside the permit record). There is no valid legal justification – and Petitioners do not provide one – to supplement the record with an unreliable and irrelevant email intended to prejudice these proceedings.

Finally, because Petitioners' motion to file a reply is largely premised on Petitioners' false accusation regarding CWA's staging area, for the reasons stated above the motion for leave to file a reply should be denied. In addition, Petitioners' reply impermissibly raises new legal arguments and for that reason should be denied. *Baloch v. Norton,* 517 F.Supp.2d 345, 348 n. 2 ("If the movant raises arguments for the first time in his reply to the non-movant's opposition, the court will either ignore those arguments in resolving the motion or provide the non-movant an opportunity to respond to those arguments by granting leave to file a sur-reply."). Petitioners are not entitled to another bite at the apple. However, to the extent that the Board is inclined to allow Petitioners to file a reply, at a minimum the Board should reject the reply that has been filed and require Petitioners to re-file a pleading that does not include argument regarding, or any reference to, the unreliable hearsay statements contained in the February 24, 2011 email.

CONCLUSION

For the reasons set forth above, Petitioners' Motions to Supplement the Record and Leave to File a Reply Brief should be denied.

Respectfully submitted,

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This 12th day of April, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on April 12, 2011, a copy of the foregoing Opposition to Petitioners' Motions to Supplement the Record and to File a Reply was filed electronically via the Environmental Appeals Board of the U.S. Environmental Protection Agency's Central Data Exchange system.

I further certify that on April 12, 2011, a copy of the foregoing Opposition to Petitioners' Motions to Supplement the Record and to File a Reply was served via U.S. Mail on the following counsel:

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