

**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 MOTION TO STRIKE OR IN THE  
ALTERNATIVE RESPOND TO PETITIONER'S NOTICE  
OF SUPPLEMENTAL AUTHORITY**

Cape Wind Associates, LLC ("CWA") hereby moves to strike or in the alternative for leave to file the attached response to the Alliance to Protect Nantucket Sound's ("Alliance") Notice of Supplemental Authority ("Notice"). The Notice is not merely a notice of supplemental authority, but rather a substantive reply to CWA's submission. Yet the Alliance has not filed a motion seeking leave to file a reply brief as it is required to do under the Board's Practice Manual. For this reason alone, the Board should strike the Alliance's Notice in its entirety. *See In re Carlota Copper Co.*, 11 E.A.D. 692 (EAB 2004) (rejecting Petitioners' attempt to further argue their case through a notice of supplemental authority); *see also, Randolph v. ING Life Ins. and Annuity Co.*, 486 F. Supp.2d 1, 9 n.5 (D.D.C. 2007) (striking plaintiff's response under Fed. R. Civ. P. 12(f) for failure to seek leave to file a surreply).

Nevertheless, if the Board is inclined to consider the Notice, it is factually incorrect, misleading, and not relevant to the permit at issue. CWA therefore requests that the Board grant CWA leave to file the accompanying response to the Notice.

**CONCLUSION**

For the foregoing reasons, CWA respectfully requests that the Board strike the Alliance's Notice of Supplemental Authority or in the alternative grant CWA leave to file the accompanying response.

Respectfully submitted,

/s/ Geraldine E. Edens

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This 24th day of March, 2011

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

In re:

CAPE WIND ASSOCIATES, LLC

EPA Permit No. OCS-R1-01

**Appeal No. OCS 11-**

**CAPE WIND ASSOCIATES, LLC'S RESPONSE TO PETITIONER'S NOTICE OF  
SUPPLEMENTAL AUTHORITY**

Cape Wind Associates, LLC ("CWA") files this response to the Alliance to Protect Nantucket Sound's ("Alliance") so-called Notice of Supplemental Authority ("Notice").

As a threshold matter, the Board should strike the Alliance's Notice in its entirety. It is not merely a notice of supplemental authority, but rather a substantive reply to CWA's submission. Yet the Alliance has not filed a motion seeking leave to file a reply brief as it is required to do under the Board's Practice Manual. *See In re Carlota Copper Co.*, 11 E.A.D. 692 (EAB 2004) (rejecting Petitioners' attempt to further argue their case through a notice of supplemental authority); *see also, Randolph v. ING Life Ins. and Annuity Co.*, 486 F. Supp.2d 1, 9 n.5 (D.D.C. 2007) (striking plaintiff's response under Fed. R. Civ. P. 12(f) for failure to seek leave to file a surreply). The Board should not tolerate such an obvious back-door attempt to circumvent the rules. Nevertheless, if the Board is inclined to consider the Notice, it is factually incorrect, misleading, and not relevant to the permit at issue.

The Alliance argues that CWA's Construction and Operations Plan ("COP") "reiterates the ambiguous statements in the declaration of Cape Wind President James Gordon" which CWA "erroneously cites to show that the company is committed to the Quonset Point site."

Notice at 2. There is nothing ambiguous about either Mr. Gordon's sworn declaration or the COP – CWA has not altered its project plans to change its staging area from Quonset Point. Gordon Decl. at ¶ 5. The Alliance's argument about new air quality modeling and significant changes to state implementation plans is therefore irrelevant to the permit before the Board. As Mr. Gordon clearly stated, "[i]f at some future time [the New Bedford] facility were to become both completed and available in accordance with Cape Wind's requirements and Cape Wind proposes to utilize such facility for all or a substantial portion of its staging requirements, Cape Wind would at such time make the appropriate regulatory filings and seek any necessary permit revisions." Gordon Decl. at ¶ 4. The fact that CWA has not relocated its project staging area eviscerates a principal argument supporting the Alliance's petition for review. The Notice is an obvious attempt to salvage the petition.

The Alliance also argues that CWA does not have all of the permits necessary to begin construction and therefore the Board has ample time to review the Alliance's petition. Notice at 3. Again, the Alliance is incorrect. The Alliance points to several permits for incidental activities that CWA will obtain over the course of its two and a half year construction period. Many of these are time-limited and therefore are typically obtained in the normal course of project development and closer in time to the activities for which they are needed. However, CWA has all the state and federal permits that are necessary to start construction of the project.

As CWA stressed in its motion to expedite, protracted consideration of this petition would cause CWA to suffer real, concrete injury. The uncertainty created while this petition is pending makes it difficult for CWA to secure the financing needed to commence the project and take advantage of time-limited federal incentives for renewable energy. It is therefore imperative that the Board's consideration of the Alliance's petition proceed without undue delay.

## CONCLUSION

For the foregoing reasons, CWA respectfully requests that the Board strike the Alliance's Notice of Supplemental Authority because it is an impermissible substantive reply to CWA's submission and it is factually incorrect and not relevant to the permit before the Board.

Respectfully submitted,

/s/ Geraldine E. Edens

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This 24th day of March, 2011

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 24, 2011, a copy of the foregoing Motion to Strike or in the Alternative Respond to Petitioner's Notice of Supplemental Authority 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 March 24, 2011, a copy of the foregoing Motion to Strike or in the Alternative Respond to Petitioner's Notice of Supplemental Authority was served via U.S. Mail on the following counsel:

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/s/ Geraldine E. Edens