TABLE OF CONTENTS

INTRODUCTION

The following comments are submitted by the Alliance to Protect Nantucket Sound (APNS) on the Environmental Assessment and Finding of No New Significant Impact (EA/FONNSI) on the CWA Energy Project (Mar. 4, 2010). APNS's overall evaluation is that the limited analysis in the EA/FONNSI does not correct the substantial deficiencies in the Minerals Management Service's (MMS) Final Environmental Impact Statement (FEIS) for the Proposed Action, does not address a considerable amount of new information that was in MMS's possession prior to the release of the EA/FONNSI, and does not conduct a proper evaluation of the limited new information it considers. In short, the EA/FONNSI does not provide the basis for informed federal decision-making that is required under the National Environmental Policy Act (NEPA). A supplemental EIS (SEIS) is required.

I. Objectives of the Environmental Assessment

MMS has issued its 2010 EA/FONNSI purportedly to address new information "to determine if it is 'relevant to environmental concerns and bearing on the Proposed Action or its impacts.'" The EA/FONNSI indicates that MMS considered new information from the following sources:

1) MMS research and review of new scientific and technical information;
2) Comments received on the FEIS;
3) The Revised Finding, prepared in compliance with the National Historic Preservation Act (NHPA);
4) The January 28, 2010 DOI Inspector General Report (IG Report); and
5) Intergovernmental coordination and communications.[1]

It thus appears that MMS did not consider new information the APNS and numerous other parties submitted by letter over the course of the last year. Such action by MMS has resulted in a deficient administrative record and constitutes a violation of the Administrative Procedure Act. It also violates President Obama's directive for open and transparent decision-making and public involvement.[2] APNS hereby incorporates by reference all documents it has submitted to MMS

---

[1] EA/FONNSI, at 1.

[2] The Obama Administration has emphasized the importance of open governance. President Obama and Attorney General Holder, for example, announced the policy that Freedom of Information Act (FOIA) exemptions are narrow and not to be used to frustrate or impede full disclosure. In a January 21, 2009, memorandum, President Obama directed that "[a]ll agencies should adopt a presumption in favor of disclosure." 74 Fed. Reg. 4,683 (Jan. 26, 2009). The President specifically directed agencies to err on the side of document release. *Id.*

This presumption in favor of disclosure was reinforced by Attorney General Holder's March 19, 2009, memorandum to agency heads in which he "strongly encourages" agencies to make discretionary disclosures. He stated that FOIA denials will only be defended if: (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions; or (2) the disclosure is prohibited by law. Office of the Attorney General, Memorandum for Heads of Executive Departments and Agencies, "The Freedom of Information Act" (Mar. 19, 2009).

Secretary Salazar again affirmed the Administration's commitment in his July 2, 2009, memorandum to all DOI employees:

since the inception of the MMS's review of the Proposed Action in 2005. For the assistance of MMS, all such documents submitted subsequent to the FEIS are attached to these comments and listed in the Table 1 at the end of the comments. Additional attachments are also listed in Table 2.

In addition to failing to properly address the information provided by APNS over the course of the last year, the EA/FONNSI also fails to account for missing and incomplete information. The EA/FONNSI acknowledges that for several resources there is incomplete information available to analyze and disclose reasonably foreseeable environmental impacts. In each instance, the EA/FONNSI refuses to follow the requirements of the Council on Environmental Quality (CEQ) regulations which establish the process and procedure for addressing incomplete or unavailable information in a NEPA document.

The regulations governing the treatment of missing or incomplete information state:

> When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking.
>
> (a) If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.
>
> (b) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within the environmental impact statement:
>
> 1. A statement that such information is incomplete or unavailable;
>
> 2. A statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment;

> The President's memorandum and the Attorney General's guidelines do not change the requirements of the statute, but rather how we think about FOIA... The President's and Attorney General's messages extend beyond the boundaries of the FOIA. They call upon agencies to aggressively increase proactive disclosures of information that is of interest to the public... Our goal is to increase transparency.

In recognition of the vital role that the FOIA plays in our democracy in providing a means of accountability through transparency, these guidelines stress the need for all Executive Branch employees to be responsible for effective FOIA administration. Each of us must commit to making responses to FOIA requests a priority in order to fulfill both the letter and the spirit of the law...

Department of the Interior, "Freedom of Information Act Policy Guidance," (July 2, 2009).

3. A summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and

4. The agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. For the purposes of this section, "reasonably foreseeable" includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.[3]

The Department of Interior's regulations implementing NEPA state: "In circumstances where the provisions of 40 CFR 1502.22 apply, bureaus must consider all costs to obtain information."[4] Costs include "monetary costs as well as other non-monetized costs when appropriate, such as social costs, delays, opportunity costs, and non-fulfillment or non-timely fulfillment of statutory mandates."[5]

The EA/FONNSI fails to follow the requirements of either the CEQ regulation or the Department's regulation for dealing with incomplete or unavailable information relating to reasonably foreseeable adverse environmental impacts. For three different resource impacts, the EA/FONNSI establishes that there is missing information, which is relevant to the environmental issues and analysis, but that obtaining the information was either impractical (migratory bird baseline studies and avoidance of wind turbines by birds)[6], cost prohibitive (migratory bird baseline studies)[7], or simply not their responsibility to obtain (airport facilities)[8]. In each of these areas the MMS has failed to comply with the clear and simple requirements of the CEQ regulation.

Evaluating new information and developing needed information were critical. The FEIS failed to provide an adequate basis for decision-making, as stated by numerous parties. However, it is clear that MMS did not intend to actually provide the evaluation that was needed. Rather, it appears that MMS instead intended to cherry-pick information in an effort to produce a particular result – its FONNSI. The EA/FONNSI is consequently of poor quality and does not facilitate informed decision-making.

Further, the EA/FONNSI relies heavily on the January 28, 2010 Department of the Interior's Inspector General Report (IG Report). Its reliance is inappropriate. MMS is responsible for conducting its own independent analysis of environmental impacts under NEPA and other issues

---

[3] 40 C.F.R. § 1502.22.

[4] 43 C.F.R. § 46.125.

[5] *Id.*

[6] EA/FONNSI, at 11.

[7] *Id.*

[8] *Id.*, at 17-18.

as part of its Outer Continental Shelf Lands Act (OCSLA) decision-making responsibilities. MMS cannot simply abdicate its responsibility for evaluating issues to the IG, whose purpose in reviewing MMS's activities was not to determine NEPA compliance or satisfaction of OCSLA standards, but rather to respond to complaints from members of Congress and the public regarding how the review process itself was being conducted.

II. The Proposed Action and Alternatives

A. The Description of the Proposed Action Is Insufficient

The EA/FONNSI states that there have not been changes to the Proposed Action, or circumstances and information affecting the Proposed Action, that render any of the underlying assumptions for the Proposed Action or the range of alternatives invalid. Further, MMS claims that should the developer modify the proposed action by selecting a WTG with substantial differences in the specifications, MMS would review such proposed changes and determine whether additional NEPA analysis is likely.[9]

MMS's statement is incorrect. MMS should have obtained available information and evaluated it in the EA/FONNSI, rather than delaying review until after all of the comment periods have concluded. The current project description calls for the installation of 130 GE 3.6 MW WTGS, each with a maximum blade height of 440 feet. The EA/FONNSI states that MMS has received information suggesting that the GE 3.6 MW turbines are no longer available. The IG report on which the EA/FONNSI relies states that GE and European companies still manufacture a turbine with the capacity and dimension in the Proposed Action. Further, the EA/FONNSI states that if the applicant were to choose a different manufacturer, it is likely that the WTGs would be comparable in size and shape.

On March 31, 2010, the applicant announced that it had entered into an agreement with Siemens for 3.6 MW WTGs. There is no question that the height, shape and profile differ from that described in the EIS. For example, the rotor swept zone differs between the Siemens model and the GE model by 504 square meters. The rotor-swept zone of the GE turbine is 8,496 square meters, and the Siemens is listed as 9,000 square meters. This difference is obviously related to the different diameters in the rotors – Siemens is approximately 3 meters or 9.6 feet larger. If CWA intends to maintain the 75 foot clearance, which it stated through the FEIS – a measurement on which other impacts have been assessed – the towers would necessarily be higher, at least by almost 10 feet. While the applicant has stated that the Siemens turbines would be 440 feet in height, based on the Siemens-provided specifications, the clearance would necessarily be lower than 75 feet. Moreover, the larger rotor-swept zone will cause an increase in the risk to avian species by exposing a greater number of birds and bats to take. The EA/FONNSI fails to consider this impact.

Further, whether the turbine height would only be 10 feet higher remains to be seen. According to news coverage of the Greater Gabbard wind project in Europe, the Siemens 3.6

---

[9] *Id.*, at 1-2.

MW turbine height ranges up to 558 feet, 118 feet higher than that described in the FEIS.[10] Any significant change in height requires a new NEPA review, as well as new reviews by both the Federal Aviation Administration, the Department of Defense with respect to the PAVE PAWS system of military defense, and the U.S. Fish and Wildlife Service with respect to avian impacts. In addition, different and greater impacts would result under section 106 of the NHPA, necessitating renewed consultation and a new effects finding.

In any case, although the FEIS states that "the applicant may choose to use another manufacturer other than GE to produce similar WTGs depending on availability and other considerations,"[11] differences in turbine height, rotor-swept zones and other factors are important – sometimes critically important, such as in a heavy use area like Nantucket Sound, where turbine height poses substantial risks to commercial and general aviation and clearances are important for the heavy boating uses that take place on the water sheet. The EA/FONNSI does not adequately address the confusion regarding this issue, and MMS should have required the applicant to select an available turbine and provide the specifications needed before issuing this EA/FONNSI, instead of announcing its choice in the middle of the comment period. The applicant has known for some time that the GE turbine was not available. Yet MMS did not request specific information regarding this issue prior to releasing the EA/FONNSI. This approach does not provide the information needed to satisfy the informed decision-making requirement NEPA imposes. This EA/FONNSI, like the other documents released by MMS, is premature.

B. The EA/FONNSI Does Not Correct the Deficiencies in the Purpose and Need Statement or the Underlying Assumptions

The EA/FONNSI does not acknowledge any of the criticism regarding the purpose and need statement and does not reference or include updated information regarding the state of the New England energy market on which it based a number of assumptions to justify the Proposed Action.[12]

There are two core problems with the purpose and need statement, one of which is derived directly from the other. The first is that the purpose and need statement is not a statement of MMS's purpose and need, as required by NEPA and DOI's NEPA regulations. Instead, it is essentially the applicant's purpose and need for building the project. The statement has impermissibly narrowed the review by focusing not on the general region for which the facility is being proposed, but rather incorporating a number of Massachusetts-specific criteria such that virtually the only possible project to satisfy the purpose and need statement is the Proposed Action. Second, the information on which the FEIS relies regarding whether an alternative satisfies the purpose and need statement is substantially outdated. The applicant-specific information improperly included in the purpose and need statement is the same information that is out-dated and should have been addressed in this EA/FONNSI. Had MMS

---

[10] *See* http://74.125.45.132/search?q=cache:H7tV86R6rcAJ:www.mctbrattberg.se/NewsAndEvents/LatestNews/20091109-The-Greater-Gabbard-Offshore-Wind-Farm-Project.aspx+mctbrattberg.se/NewsAndEvents/LatestNews/20091109-The-Greater-Gabbard-Offshore-Wind-Farm-Project.aspx&cd=1&hl=en&ct=clnk&gl=us.

[11] FEIS, at 2-2.

[12] EA/FONNSI at 2-6.

updated the assumptions previously made about the New England energy market, it would have become clear that the Proposed Action will not meet the objectives included in the purpose and need statement. The EA/FONNSI, however, fails to address both issues.

1. The 2010 Perpetuates the Problems with the Purpose and Need Statement to Which Commentors Have Long Objected

The fundamental problem of the purpose and need statement continues to be that it focuses on the applicant's objectives and not those of the action agency. Because of the applicant-based focus, the FEIS, and now the EA/FONNSI (to the extent that it addresses any new information on the purpose and need and alternatives) excludes reasonable alternatives because those alternatives would not serve the applicant's goals (instead of the agency's) and includes assumptions that are inaccurate as a means of justifying the Proposed Action. This information has been called to the attention of MMS by APNS in post-FEIS correspondence. MMS apparently has ignored that correspondence and, as a result, the EA/FONNSI fails to include relevant information, resulting in an incorrect FONNSI and perpetuating the flaws in the FEIS.

a. The statement of purpose and need should be the agency's purpose and need, not the applicant's.

The purpose and need statement, which is derived from the agency's legal duties, should briefly indicate the underlying purpose and need to which the agency is responding.[13] The "purpose" of a proposed action should refer to the goal or objective that *the agency* is trying to achieve, and should be stated in terms of the agency's desired outcome.[14] When a private applicant is involved, the agency is to consider the needs and goals of the applicant, as well as the public interest, but the applicant's private objectives are not to be confused with, or to supplant, the *agency's* purpose.[15] As the Ninth Circuit has pointed out, "the Department of Interior has promulgated no regulations emphasizing the primacy of private interests."[16] The "need" for the proposed action is the underlying problem or opportunity that the agency is responding to with the action.[17]

In this case, the purpose and need statement impermissibly sets out four private objectives as defining characteristics of the Proposed Action. As the EA/FONNSI states, the purpose and need statement in the FEIS provides:

> The underlying purpose and need to which the agency is responding is to develop and operate an alternative energy facility that utilizes wind resources in waters offshore New England

---

[13] 40 C.F.R. § 1502.13; 43 C.F.R. § 46.420(a).

[14] See generally *National Parks & Conservation Ass'n v. Bureau of Land Management*, 586 F.3d 735, 746-48 (9th Cir. 2009) for in-depth discussion regarding BLM requirements for purpose and need statements.

[15] *Id.*

[16] *Id.*

[17] *See generally* 40 C.F.R. § 1502.13; 43 C.F.R. § 46.420(a).

> employing a technology that is currently available, technically feasible, and economically viable, that can interconnect with and deliver electricity to the New England Power Pool, and make a substantial contribution to enhancing the region's electrical reliability and regional renewable energy portfolio.

These private objectives – i.e., 1) waters offshore New England; 2) deliver electricity to New England grid on a "commercial" scale; 3) enhance the region's electrical reliability; and 4) enhance renewable energy portfolio – have nothing to do with the agency's objectives. While MMS has been directed to implement an offshore renewable energy facility, it has no mandate whatever to do so using New England winds. Nor has the task of delivering electricity to the New England Power Pool been assigned to MMS as one of its objectives. Simply stated, MMS has no particular responsibility or interest in enhancing New England's electrical reliability or regional renewable energy portfolio, or any of the other New England-specific objectives. Those are purely applicant-driven, and included for the specific purpose of advancing the applicant's private objectives.

The purpose and need statement referenced in the EA/FONNSI perpetuates existing flaws. It does nothing to address the objections regarding the applicant-focused approach.

b. The problems with the purpose and need statement stem from the applicant's inappropriate involvement in the process.

The applicant's obvious influence on the purpose and need statement has been a contentious issue since before the Corps released the DEIS. The applicant played a central role in shaping the Corps' purpose and need statement for the purpose of eliminating reasonable alternatives from consideration. Numerous comments have objected both to the purpose and need and to the applicant's involvement in devising the purpose and need statement, which was considerable.[18]

Comments provided by Roger Beers, Professor Mark Squillace, Mark Chertok, and Robert Dreher, peer reviewers of the Corps' EIS, provide substantial guidance regarding how a purpose and need statement should be devised and what the range of alternatives should look like. Similarly, Bill Futrell, Roy Clark, and Lois Schiffer published an article in the Cape Cod Times condemning the Corps's EIS. This is information that was in the Corps' CWA record, but was obviously not reviewed by MMS when the record was transferred over, and thus new information for MMS's purposes. All of the reviewers were critical of the purpose and need statement and the range of alternatives, which was in fact, substantially broader in the Corps' EIS.

Roger Beers, for example, stated that the alternatives analysis the Corps prepared – which was quite similar to MMS's – was "wholly inadequate and in violation of NEPA."[19] The analysis should consider "(1) other sites that will not affect the environment of the Nantucket Sound area, (2) smaller scale wind energy projects both within and outside of the Nantucket

[18] Attachment 39.

[19] Attachment 32.

Sound area that may pose less environmental impact than the proposed project, and (3) alternative sources of energy and conservation." Mr. Beers concluded that "NEPA does n ot allow the range of alternatives to be circumscribed by an artificially narrow definition of the project's needs and purposes – particularly, where it is driven, as it appears here, by a private applicant's self-interest."

Professor Squillace concluded that the Corps' EIS "ha[d] no heart" because the approach taken by the Corps (one that MMS has likewise followed) "cannot 'sharply defin[e] the issues and provid[e] a clear basis for choice among options' because it fails to present *any* options that can achieve that objective."[20] Mark Chertok's comments on the purpose and need statement and alternatives mirror Professor Squillace's and Mr. Beers's. Mr. Chertok explained:

> [W]hile the applicant's stated purpose and need is relevant to the determination of the proper range of alternatives that must be evaluated, it is not the sole, or even the most important, criterion. An agency is not obliged to accept an applicant's stated purpose at face value, particularly when it appears crafted to preclude the potential for a practicable alternative.[21]

Mr. Chertok concluded that the Corps should have rejected CWA's purpose and need statement because "it has improperly attempted to frame its project purpose so narrowly as to preclude the consideration of alternatives." "In essence, it appears that CWA has sought to artificially narrow its goals so that only the particular project and site it has selected would qualify."

Robert Dreher's evaluation differed little.[22] Mr. Dreher commented that "[b]road consideration of alternatives that might further the public need for electric energy, while better protecting the public interest in the waters of Nantucket Sound, is particularly appropriate given the public nature of the resources at issue, the novel character of the proposed project, and the potential for similar such proposals that may have cumulative effects on the resources of the United States continental shelf." He continued, "the Corps' evaluation of this proposal should reflect both the novel nature of the proposed wind power project, which may pose unique concerns for other public and private uses of these offshore lands and waters, an the fact that numerous similar wind power projects are being proposed or considered for other offshore locations along the United States' Atlantic coast." Mr. Dreher concluded that the Corps "is legally required to consider a broad range of alternatives to the Cape Wind project" including "alternative forms of energy generation that may serve the general public need for electric power, and alternative locations for wind power projects along the eastern coastline of the United States . . ."

In a Cape Cod Time article from 2005, Bill Futrell, Roy Clark, and Lois Schiffer commented that the Corps "has fallen woefully short in meeting its NEPA responsibilities for this project, and for offshore wind generally."[23] These NEPA experts objected that "[r]ather than

---

[20] Attachment 33 (emphasis in original).

[21] Attachment 34.

[22] Attachment 35.

[23] Attachment 36.

conducting the type of robust review needed for new energy development, or at the vey least a careful review of the single proposal, the Corps has instead adopted a limited review, looking only at 'alternatives' that are essentially the same project tin a slightly different location in Nantucket Sound."

These criticisms of the Corps' purpose and need statement and alternatives are equally applicable to that which MMS has prepared. Indeed, MMS's review was more restrictive than the Corps's. MMS considered only offshore wind projects, all of which are located in Nantucket Sound, except South of Tuckernuck. MMS considered Monomoy Shoals in the Sound, plus variations of the Proposed Action. In contrast, the Corps considered development at the Massachusetts Military Reservation; the proposed site, including the applicant's proposed alternative sub-site at Horseshoe Shoal, as well as two other sub-sites; South of Tuckernuck; and offshore New Bedford, Massachusetts, combined with a reduced footprint at Horseshoe Shoal.[24]

In addition, the IG's Counsel also determined that the purpose and need describe the applicable proposal, thereby conceding the NEPA violation.[25] The attorney stated it was within MMS's discretion to do so. Of course, MMS does not have discretion to violate NEPA. As the record before the Corps demonstrates, CWA convinced the Corps that it must defer to the applicant's economic goals in the purpose and need statement. Because the MMS purpose and need statement is even more seriously flawed than the Corps' statement, the comments of these NEPA experts confirm that the FEIS, and the EA/FONNSI, violate NEPA.

Despite this guidance, the Corps, and later MMS entirely failed to meet their legal obligations. The Corps's purpose and need statement, for example, very closely tracked the applicant's objectives.[26] Indeed, the purpose and need statement was so skewed in favor of the applicant that MMS has commented that the statement "reads like an advertisement for the Windfarm project. In fact, it almost sounds like an endorsement for the project. This is not the place to present a justification for putting a Windfarm in place." Indeed, numerous parties objected to this statement of purpose and need.[27]

Despite its criticism of the Corps's purpose and need statement, MMS's purpose and need is actually even more seriously flawed than the Corps' statement. Indeed, a quick reference to those same comments reveals why. MMS fundamentally misunderstands its duties in developing a purpose and need statement. MMS further stated that a purpose and need statement "should describe what the applicants want to do, why they want to do it offshore, and at least give some indication of the magnitude of the project."[28] MMS further explained that the "need should address what is seen as the need for the power generated by the proposal, either based on a shortfall in local supplies, or in the fact that power is expensive in the area and this would make it available to customers for less, or to more customers who can't afford it now."

---

[24] Corps's DEIS, at 1-3.

[25] IG Report, at 37.

[26] *See* APNS Comments on the Corps's DEIS, at 196-208, which are incorporated herein by reference.

[27] *See* Attachment 39.

[28] *See id.*

This, quite obviously, is not the legal standard to which MMS must adhere. Indeed, the approach that MMS describes is antithetical to NEPA regulations and DOI NEPA regulations. Council on Environmental Quality regulations state that a purpose and need statement "shall briefly specify the underlying purpose and need to which *the agency* is responding in proposing the alternatives including the proposed action."[29] DOI NEPA regulations explain:

> When a bureau is asked to approve an application or permit, the bureau should consider the needs and goals of the parties involved in the application or permit as well as the public interest. *The needs and goals of the parties involved in the application or permit may be described as background information.* However, this description must not be confused with the bureau's purpose and need for action. *It is the bureau's purpose and need for action that will determine the range of alternatives and provide a basis for the selection of an alternative in a decision.*[30]

It is no surprise that MMS perpetuated many of the same problems in its purpose and statement that the Corps's version suffered. The purpose and need statement in the Corps's DEIS read in part as follows:

> The purpose and need as independently determined by the USACE in accordance with NEPA requirements is: to provide a utility-scale renewable energy facility providing power to the New England grid. Renewable sources of energy are needed to provide additional power to meet demand and to reduce dependency on non-local, non-renewable energy sources. The proposed project would help to address the need for new renewable energy supplies to advance achievement of the Massachusetts Renewable Portfolio Standard (RPS); improve fuel source diversity of the power supply in Massachusetts; provide a new source of competitive market power to the New England region consistent with the goals of the Electric Industry Restructuring Act of 1997; and, help to buffer increases in retail energy costs to consumers resulting from existing and future fossil fuel price volatility.

Thus, the Corps included the following applicant-specific limitations: 1) supply power to New England grid; 2) advance achievement of the Massachusetts Renewable Portfolio Standard (RPS); 3) improve fuel source diversity of power supply in Massachusetts; 4) provide a new source of competitive market power to the New England region; and 5) help to buffer increases in retail energy costs to consumers resulting from existing and future fossil fuel price volatility

MMS's statement of purpose and need has not changed materially from that used by the Corps. The MMS DEIS identified the following project purpose and need:

---

[29] 40 C.F.R. § 1502.13.

[30] 43 C.F.R. § 46.420(a)(2) (emphasis added).

> The underlying purpose and need to which MMS is responding is to provide an alternative energy facility that utilizes the unique wind resources in waters offshore of New England using a technology that is currently available, technically feasible, and economically viable, that can interconnect with and deliver electricity to the New England Power Pool (NEPOOL), and make a substantial contribution to enhancing the region's electrical reliability and achieving the renewable energy requirements under Massachusetts and regional renewable portfolio standards (RPS).

Like the Corps, MMS has incorporated a number of the applicant's private goals, not as background as permitted under DOI's NEPA regulations, but as central components of its purpose and need statement – clearly prohibited under DOI NEPA regulations. The statement focuses on: 1) the waters offshore New England (compare the Corps's focus on New England); 2) the delivery of electricity to the New England grid on a "commercial" scale (compare the Corps's focus on New England); 3) enhancing the region's electrical reliability (compare the Corps' focus on diversity of power supply in Massachusetts); and 4) enhancing renewable energy portfolio (compare the Corps's focus on the Massachusetts RPS).

The incorporation of these private objectives is problematic for another reason. As discussed below, the information informing these requirements was out-dated when the FEIS was issued. More information regarding these issues was developed and available during the last year. Yet MMS failed to address any of this new information.

In addition, MMS developed a purpose and need that even more closely limits review to the applicant's proposal by requiring the NEPA review to be limited to: 1) offshore New England (the Corps considered onshore energy sources); 2) wind only (the Corps considered other forms of renewable energy); 3) rejecting any action not within MMS's own jurisdiction (a clear violation of NEPA); and 4) establishing a "currently available" test (rather than including technologies available in the near term with fewer impacts). The net effect of these changes was to limit the EIS review to the applicant's proposal, rather than the MMS mission, in clear violation of NEPA.

2. The EA/FONNSI Fails to Consider New Information Regarding New England's Energy Supply Forecast, Which Has Been Released Since Issuance of the Project's FEIS.

Despite the comments provided by APNS on the DEIS and the FEIS regarding the energy needs of New England and the assumptions made regarding the energy market, MMS has failed to address any of the information previously provided or new information that has become available in the last year. Moreover, during the last year, new information regarding the New England energy market has become available, demonstrating conclusively that the Proposed Action does not meet the purpose and need statement because the need identified in the statement is no longer accurate. MMS should have addressed this new information in this document.

In fact, the majority of information MMS cites to is four to five years old, despite the general "update" the EA/FONNSI purports to make. Since MMS determined the purpose and need for the proposed project and issued the DEIS and subsequent FEIS, there have been significant changes to the New England energy market and supply adequacy in the region that no longer warrants the construction of the Proposed Action, at least based on the justifications provided in the FEIS. Those justifications depended substantially on incorrect assumptions about the state of the energy market in New England. Yet despite the changed circumstances of New England's energy forecast, MMS entirely fails to address new information in the EA/FONNSI. The result is that the parameters established for the proposed project no longer apply.

Specifically, contrary to statements made in the FEIS, New England is not facing a shortage of energy resources. ISO New England (ISO NE), the regional system operator for New England, implemented the Forward Capacity Market in June 2006 to promote investment in additional generation in the region. This new market has proven to be an effective way for New England to ensure its long-term reliability of the region's power supply. New England has also recently experienced an influx of additional natural gas to the region via pipelines and liquefied natural gas (LNG) terminals.

In addition, the construction of new renewable energy projects in the region has increased the amount of available generation, while at the same time maintaining a clean source of energy for New England. Massachusetts has recently produced enough renewable generation to meet its renewable portfolio standard (RPS). Similarly, other New England states have seen large increases in renewable energy generation, thus making it easier for states to fulfill their RPS goals. Consequently, the Proposed Action is no longer needed to ensure that Massachusetts and the remainder of New England states will meet their aggressive RPS goals.

Contrary to the assertions of MMS in Section 1.1 of the FEIS and DEIS, the Proposed Action is not required to meet the energy needs of the New England region. Section 1.1 of the DEIS claims that the Massachusetts "EFSB [Energy Facilities Siting Board] found there was a need for at least 110 MW of energy resources beginning in 2007 with a much greater need within the following years."[31] Additionally, MMS claims that ISONE's 2005 Regional System Plan concluded that "in order to adequately supply operable capacity, New England will need to begin to supply its own resources and rely less heavily on neighboring systems for capacity during the 2009 to 2012 planning period."[32] The electricity generation landscape of New England has substantially changed since the Massachusetts Energy Facilities Siting Board and ISONE reached these conclusions and the DEIS and FEIS were issued. Nevertheless, MMS has failed to recognize and consider this new and critical information.

---

[31] FEIS at 1-2.

[32] *Id.*

a. ISONE's Current Energy Supply and Needs Assessment Illustrates That There Is No Shortage of Energy In New England.

In March 2010, ISO NE concluded that wholesale electricity prices and the annual demand for electricity in New England were at the lowest level since 2003.[33] Additionally, ISO NE released its *2009 System Regional Plan*, which forecasted that the region "is likely to have sufficient capacity to meet electricity demand through 2018."[34] This is a significant change from the outdated information in ISO NE's 2005 Regional System Plan, upon which MMS continues to rely. ISO NE also predicts that "consumer demand for electricity is expected to grow slowly over the next decade, reflecting the impacts of the economic downturn as well as the implementation of energy-efficiency standards."[35] Thus, it is evident that New England should have enough capacity for the foreseeable future to serve demand.

Additionally, as evidenced by the growth of ISO NE's interconnection queue, the number of new renewable facilities being built in New England has greatly increased. This is in part due to the availability of federal funding dollars provided through the American Recovery and Reinvestment Act of 2009 (ARRA), such as loan guarantees through the Department of Energy, as well as the Section 1603 Payment In Lieu of Tax Credit program being administered by the Department of Treasury. There are currently over a hundred new or expanded generation projects in the planning phase seeking interconnection to the ISO NE grid. These projects would provide a total of 26,310 MWs[36] of new generation to New England's energy supply. It is noteworthy that 4,937 MWs[37] of this generation is from new, renewable energy projects, including wind, biomass, and landfill gas.

The recent determinations by ISO NE, coupled with the increase in proposed generation in New England, illustrate that New England does not need the Proposed Action to maintain sufficient capacity to serve the region.

b. The Forward Capacity Market Implemented by ISO NE Has Alleviated the Need For Additional Generation in New England.

The implementation of the Forward Capacity Market (FCM) in ISONE has proven to be a successful tool in planning for the energy needs of the region and ensuring that future demand is adequately met. The purpose of the FCM is to promote investment in additional generation in the region by giving eligible electric generators established payments for the capacity and energy they commit and make available to meet the region's forecasted energy needs. Since its

---

[33] ISO NE, "ISO New England Reports 2009 Wholesale Electricity Demand Fell to Lowest Levels in Seven Years," at 1 (Mar. 1, 2010).

[34] ISO NE, "ISO New England Releases 10-Year Power System Plan," at 1 (Oct. 16, 2009).

[35] *Id.*

[36] This number was derived from the total summer peak MW capacity of all generation projects pending in the ISO NE Interconnection Queue as of March 1, 2010. This total does not include potential generation from the Proposed Action.

[37] This number reflects the total amount of generation in the ISO NE Interconnection Queue as of March 1, 2010 that would qualify as a renewable generation resource under the Massachusetts Renewable Portfolio Standard including, but not limited to, landfill gas, wind, and biomass.

inception, the FCM has successfully secured needed generation for the region at competitive prices. The FCM auction is designed to procure capacity approximately three years (40 months) in advance of the commitment period. As explained at greater length below, the response to ISO NE's new compensation structure has been noteworthy, with generators offering electricity supply far in excess of the region's forecasted energy needs. "The Forward Capacity Market is expected to provide the capacity needed to meet resource adequacy requirements. The new Installed Capacity Requirement (ICR) is expected to grow from 32,137 MW in 2010 to a representative value of 34,454 MW by 2018."[38]

Since the market commenced, ISO NE has conducted three separate auctions to procure energy for the 2010-2013 timeframe. The First FCM auction conducted on February 6, 2008 secured 32,205 MW of supply needed to meet New England's energy needs for the 2010 to 2011 period.[39] The final clearing price of the auction was $4.50 per kilowatt-month, well below the initial starting auction price of $15.00 per kilowatt-month. The significantly lower clearing price of the auction indicates the availability of a surplus of capacity in the region. Similarly, the second auction for the FCM for needed reliability for the 2011 to 2012 timeframe produced even better results. Bidding of the 42,777 MW of eligible resources began at $12.00 per kilowatt-month and settled at $3.60 per kilowatt-month. ISO NE successfully procured the needed 32,528 MW needed for reliability, in addition to an excess of 4,755 MW of power.[40] Gordon van Welie, President and CEO of ISO NE stated that these "auction results are indicative of this market's ability to attract demand-and-supply-side resources needed throughout New England."[41] If all the resources that cleared the second FCM are in commercial operation by the 2011/2012 period, New England will need no additional physical capacity to meet its forecasted load through the 2018/2019 period (see table below).[42]

---

[38] ISO NE, *2009 Regional System Plan*, at 4 (Oct. 15, 2009).

[39] ISO NE, Press Release: *ISO New England's First Forward Capacity Market Auction Completed Successfully*, at 1 (Feb. 6, 2008).

[40] ISO NE, Press Release: *New England's Second Power Resource Auction Produces Positive Outcomes for the Region*, at 1 (Dec. 23, 2008).

[41] *Id.*

[42] *Id.* at 45.

Actual and Representative Future New England Net Installed Capacity Requirements for 2010–2018 and Potential Surplus ICAP

Year	Forecast 50/50 Peak	Representative Future Net ICR[a]	Assumed Existing ICAP[b]	Potential Surplus ICAP[c]
2010/2011	28,160	32,137	34,021	1,884
2011/2012	28,575	32,528	37,021	4,493
2012/2013	29,020	31,965	37,021	5,056
2013/2014	29,365	32,411	35,091	2,680
2014/2015	29,750	32,901	35,091	2,190
2015/2016	30,116	33,370	35,091	1,721
2016/2017	30,415	33,757	35,091	1,334
2017/2018	30,695	34,120	35,091	971
2018/2019	30,960	34,454	35,091	637

Furthermore, the results of the third FCM Auction produced similar results. More than 40,995 MW of new and existing demand-and-supply-side resources competed to provide the 31,965 MW of capacity needed to maintain reliability in New England for the 2012 to 2013 period, thus providing an excess of 4,487 MW in supply.[43] The final clearing price of the auction was a competitive price of $2.95 kilowatt-month, $6.89 lower than the starting bid price of $9.84 kilowatt-month.

The three rounds of the FCM resulted in far more supply than demand for the region, demonstrating that contrary to the claims by MMS, New England is not facing a shortage in energy. The FCM has proven to be an effective way for ISO NE to achieve its goals of long-term reliability, and ISO NE currently has and will continue to maintain a sufficient supply of energy to meet the region's needs. This data, therefore, demonstrates that the proposed project is unnecessary to ensure resource adequacy in New England.

c. New England Currently Has an Abundance of Natural Gas Supplies to Support the Existing Natural Gas Needs of the Region and Continues to Further Expand This Supply.

MMS continues to claim that there is a need for the proposed project, in light of a "limited gas supply and delivery infrastructure" for natural gas in New England. *See* Section 1.1 of DEIS and FEIS. Contrary to the claims by MMS, this information relied upon by the agency remains inaccurate. Since the FEIS for the Proposed Action was issued, the natural gas market in New England has seen additional growth, including the expansion of existing pipelines, additional natural gas supplies, new storage, and an increase in the number of LNG terminals in New England. Nonetheless, MMS has neglected to address this new information in the EA/FONNSI or even in its comments that were filed with the FEIS responding to DEIS comments raised on this issue. In fact, MMS's response comments merely restate its claim from the DEIS and FEIS that the New England region has a limited supply and delivery infrastructure for natural gas, which warrant diversification of the region's energy needs. However, MMS's

[43] ISO NE, "ISO New England's Third Forward Capacity Market Auction Concludes Successfully," at 1 (Oct. 7, 2009).

response misses the mark.[44] U.S. production of natural gas has been on the rise, which is expected to continue, as resource estimates increase additional unconventional forms of natural gas (i.e. shale) are developed.[45]

There are presently six major companies in New England serving over 2,604 miles of interstate pipeline that have a combined capacity of over 11 billion cubic feet per day.[46] These companies include: Tennessee Gas Pipeline; Maritimes and Northeast Pipeline; Algonquin Gas Transmission; Granite State Transmission; Iroquois Gas Transmission; and Portland Natural Gas Transmission System.[47] In addition to the large pipeline systems serving New England, there are also numerous smaller pipelines interconnected to larger pipeline systems, which serve niche areas within the region, including the Granite State Transmission pipeline and the PNGTS/Maritimes and Northeast Pipeline system at the southern border of New Hampshire and Massachusetts.[48]

Several major, new and expansion pipeline projects were completed in 2009, bringing additional capacity to the pipeline system in New England. These projects included the following:[49]

- Maritimes & Northeast Phase IV, which facilitates the delivery of natural gas from the Canaport LNG terminal to markets in Massachusetts, Maine, New Hampshire and Atlantic Canada. This expansion project doubles the firm mainline capacity for Maritimes & Northeast Pipeline from 400 million cubic feet per day to 800 million cubic feet per day;[50]

- 08/09 Expansion, Phases II and III operated by Iroquois Gas Transmission, which will deliver another 200 million cubic feet of natural gas per day to New England;[51]

- J-2 Loop Project operated by Algonquin and Spectra Energy, which provides additional volume and pressure support to NSTAR gas company to help NSTAR meet current and future residential and commercial natural gas demand;[52]

---

[44] MMS, Cape Wind Final Environmental Impact Statement, Appx. L, Comment Summary and Response Table, at p.79 (Jan. 2009).

[45] Northeast Gas Association, *Regional Market Update* at p.5 (Dec. 2009).

[46] Northeast Gas Association, Northeast Market At a Glance (2009), http://www.northeastgas.org/pdf/mkt_snapshot_1209.pdf.

[47] Northeast Gas Association, *Regional Market Update* at p.5.

[48] *Id.*

[49] *Id.* at 10.

[50] Maritimes & Northeast Pipeline, Press Release, *Maritimes Delivers Major New Natural Gas Supply*, http://www.mnpp.com/us/node/91 (July 15, 2009).

[51] Iroquois Gas Transmission System, "Iroquois Announces Completion of 08/09 Expansion Project," http://www.iroquois.com/documents/Iroquois_08-09Expansion3IS_PR.pdf (Nov. 2, 2009).

- Concord Lateral Expansion operated by Tennessee Gas Pipeline and El Paso, which is an expansion project providing New England with an additional 30,000 Dth per day;[53]

- Sentinel Expansion Phase II operated by Transco and Williams, which expands firm transportation capacity in the Northeast by 102 Dth per day, and increases Transco's total system capacity to approximately 8.6 bcf per day;[54] and

- Northern Bridge operated by Texas Eastern and Spectra Energy, which can transport 150 million cubic feet per day of the new Rocky Mountain natural gas supplies to the Northeast. Texas Eastern has aggressively expanded its pipeline system in the Northeast corridor over the past seven years, now making the system able to transport 4.5 Bcf per day from Ohio to the Northeast.[55]

Additionally, natural gas imports from Canada continue to be a substantial source of natural gas for New England. In particular, the Sable Offshore Energy Project in Nova Scotia provides natural gas to New England that is shipped via the Maritimes & Northeast Pipeline. Deep Panuke is another offshore natural gas field that is currently under construction and will begin providing natural gas to New England in late 2010.[56] Finally, the McCully Field of Corridor Resources in New Brunswick, Canada presently provides the Maritimes & Northeast Pipeline with 35 million cubic feet of gas daily.[57]

Larger developments in natural gas production in the Northeast have occurred in the context of shale production and growth of LNG imports. The discovery of large amounts of shale in the Marcellus Shale basin in the Appalachian Basin that stretches from West Virginia into Ohio, Pennsylvania and New York holds the potential of producing anywhere between 50 and 250 trillion cubic feet of natural gas.[58] This Basin is located directly below the Northeast providing New England an untapped resource for additional natural gas.

On the other hand, New England is seeing rapid growth in the development of additional LNG terminals, which has substantially increased the amount of LNG imports to the region. In particular, in May 2008, the Northeast Gateway Deepwater Port, located offshore of Gloucester, MA near Cape Ann, began accepting commercial deliveries of LNG and can accommodate gas

---

[52] Spectra Energy, "Spectra Energy's Algonquin Gas Transmission Files FERC Application to Extend Its System In Greater Boston," http://investors.spectraenergy.com/phoenix.zhtml?c=204494&p=irol-newsArticle&ID=1137758&highlight=J-2 (Apr. 30, 2008).

[53] Tennessee Gas Pipeline, "Northeast Pipeline Project Updates," http://www.necanews.org/dev/documents/090922_mahan_russell__3.pdf, at p.10 (Sept. 22. 2009).

[54] "Williams Completes Transco Expansion in Northeast," *Energy Pipeline News*, http://energypipelinenews.blogspot.com/2009/11/williams-completes-transco-expansion-in.html (Nov. 24. 2009).

[55] Spectra Energy, "Spectra Energy Place Northern Bridge Project Into Service," http://www.spectraenergy.com/news/releases/2009/nov/20091102_01.asp (Nov. 2, 2009).

[56] Northeast Gas Association, *Regional Market Update* at 9.

[57] *Id.*

[58] *Id.* at 7.

deliveries of up to 800 million cubic feet per day.[59] Further, in 2009, the Canaport LNG Terminal, located in Saint John, New Brunswick, became operational. The Canaport LNG Terminal has the capability of regasifying approximately 1.2 Bcf per day and delivers natural gas to the New England market via the Maritimes & Northeast (M&NE) Pipeline at the Maine Border.[60] Also, another LNG project located offshore of Gloucester, MA, the Neptune LNG Facility, can deliver between 400 and 700 million cubic feet per day.[61] These are just the LNG terminals, which became operational in the past year and do not include any proposed projects. Currently, there are three proposed LNG terminals, the Quoddy Bay LNG terminal, Downeast LNG terminal, and the Calais LNG terminal that have the potential of transporting an additional 2 Bcf per day of natural gas to the region.[62]

Based on the aforementioned information, it is apparent that New England currently has sufficient pipeline capacity and natural gas supplies to support existing natural gas demand in New England. Thus, the DEIS and FEIS inaccurately conclude that the Proposed Action is needed to increase the "limited gas supply and delivery infrastructure"[63] of New England. MMS provides little to no evidence supporting its claim that gas supplies and pipeline capacity are inadequate in New England, either currently or in the future. To the contrary, the current natural gas outlook in the region and recent developments illustrate that the development of new natural gas supplies and infrastructure is proceeding at a rapid pace. In light of these new developments since the issuance of the FEIS, MMS should be required to consider this new information and reevaluate the proposed project's purpose and need.

3. The EA/FONNSI Ignores That the Proposed Project Is Not Needed to Meet the RPS Requirements of New England.

The EA/FONNSI fails to address that if the Proposed Action ever becomes operational, there is a strong likelihood that the Massachusetts RPS and neighboring states' RPS requirements may already be subscribed to by other sources of renewable generation. Footnote 1 of Section 1.1 of the FEIS and DEIS states that by delivering approximately 182.6 MWs to the regional transmission grid, the Proposed Action will fulfill 75 percent of the State's RPS requirement for 2009. However, despite new data assessing RPS compliance in the New England states that has been released since the FEIS was issued, MMS continues to rely on outdated information and incorrectly assumes that the generation from the Proposed Action will be needed, despite its above-market costs, to satisfy the Massachusetts RPS.

---

[59] Northeast Gas Association, "Description of Pipelines/LNG Import Facilities Serving the Northeast Market, at p. 1 (Dec. 2009).

[60] ISO NE, *2009 Regional System Plan*, at p. 64.

[61] Northeast Gas Association, "Proposed LNG Import Terminal Projects, Northeast U.S. & Eastern Canada," at p.3 (Nov. 9, 2009).

[62] *Id.* at 4.

[63] *See* FEIS, at Section 1.1.

a. Massachusetts Met Its RPS Requirement In 2007 and It Is Anticipated This Trend Will Continue.

In 2008, Massachusetts passed the Green Communities Act, which set an aggressive RPS standard of 20 percent by 2020 for the state.[64] This requirement has progressively increased half a percent annually up to 2009 when the standard reached 4 percent. The RPS annual increase thereafter will be one percent until 2015.[65] The most recent report issued by the Massachusetts Division of Energy Resources ("DOER") shows that the state saw an excess supply of qualified renewable generation to meet RPS compliance in 2007.[66] The total retail load for Massachusetts in 2007 was 50,978,101 MWh, for which the RPS obligation was 1,529,359 MWh, and the total supply of renewable energy credits (RECs) was 1,606,396 MWh.[67] This resulted in an excess of 87,957 MWh of RECs that can be "banked" and used toward future RPS compliance.[68]

Unlike past years, all but one retail electricity supplier complied with the required RPS obligation, with more than 99 percent of the compliance met by New Renewable Generation.[69] In fact, the amount of New Renewable Generation in 2007 increased by 660,761 MWh.[70] It is noteworthy that this generation is derived from renewable resources outside of Massachusetts, which shows the rapid growth of renewable generation in neighboring New England states. Nevertheless, there are currently 1256 MW of RPS-I qualified Renewable Generation Units in Massachusetts alone.[71] Because applicants seeking to have their renewable generation facility qualify for the Massachusetts RPS program must be approved by the Massachusetts DOER, these resources maintain their RPS eligibility indefinitely, unless revoked or suspended by DOER.[72] Consequently, these plants are likely to continue generating output capable of meeting RPS mandates for subsequent compliance years. As this list of eligible resources grows over

---

[64] ISO NE, *2009 Regional System Plan*, at p. 83. This goal encompasses the RPS target of 15 percent, plus an Alternative Portfolio Standard (APS) of 5 percent. The APS sets electric consumption targets for competitive retail electricity supplies (i.e. load serving entities), which must use alternative technologies (i.e., combined heat and power projects, flywheel storage, gasification with carbon sequestration, paper derived fuel, and efficient stream technology) to meet the minimum APS standard of their electricity consumption. *Id.* at 82.

[65] DIV. OF ENERGY RESOURCES, MASSACHUSETTS RENEWABLE PORTFOLIO STANDARD ANNUAL RPS COMPLIANCE REPORT FOR 2007 13 (2008), http://www.mass.gov/doer/rps/rps-2006annual-rpt.pdf [hereinafter DOER REPORT].

[66] *Id.* at 3.

[67] *Id.* at 5.

[68] *Id.* The Massachusetts RPS allows for a supplier to "bank" any excess RECs for use towards its RPS compliance in the following two years. A supplier may bank up to 30 percent of its RPS obligation for that year for use towards its RPS compliance in the following two years. *Id.*

[69] *Id.* at 6.

[70] The amount of New Renewable Generation in 2006 was 938,772 MWh, compared to 1,599,533 MWh in 2007. *See Id.*, Table Two, at 8.

[71] Massachusetts Department of Energy Resources, RPS Class I-Qualified Renewable Generation Units, http://www.mass.gov/?pageID=eoeeaterminal&L=4&L0=Home&L1=Energy,+Utilities+%26+Clean+Technologies&L2=Renewable+Energy&L3=Renewable+Portfolio+Standard&sid=Eoeea&b=terminalcontent&f=doer_rps_approved&csid=Eoeea (Nov. 19, 2009).

[72] *See* 225 C.M.R. 14.06 (1)-(4).

time it further reduces the need for Proposed Action's generation to satisfy the State's RPS requirements, even over the long-term.

Furthermore, the RPS obligation for Massachusetts in 2010, the proposed operational date for CWA Project, is already fulfilled. As noted, DOER has already approved 1256 MW of RPS-I Qualified Renewable Generation Units, which qualifies for RECs. This is *almost three times* more than the RPS obligation for Massachusetts in 2010. DOER anticipates that the trends of renewable energy growth and RPS compliance in 2007 will continue during 2008.[73] Thus, there is a strong likelihood that the State's RPS obligation for 2010 will already be fulfilled when and if the CWA Project becomes operational.

b. Contrary to Claims By MMS, the Proposed Cape Project Is Unlikely to Aid Neighboring States In Meeting Their RPS Goals.

As evidenced by the growth of renewable generation in Massachusetts, other New England states are seeing a substantial rise in the construction of qualified renewable generation that will help states meet their RPS obligations. According to DOER, "[a]lthough the quantity of electricity from renewable generation sources in Massachusetts continues to grow, that growth is exceeded by an accelerating increase in supplies from northern New England biomass plants and imports from wind farm and landfill gas projects in neighboring New York, Quebec, and the Maritime Provinces."[74] This means that because the REC market is regional in nature, any states that have excess qualified renewable generation are likely to sell their additional RECs to neighboring supplies. The proposed project may, therefore, not have a market in Massachusetts or in neighboring New England states that have RPS programs if any of the states are oversupplied with RECs.[75]

According to ISO NE, applicable loads in Massachusetts, Connecticut, and Maine have been complying with their states' RPS obligations for several years, and even Rhode Island saw its first year of RPS compliance in 2007.[76] Although RPS programs will require more renewable energy to be purchased each year (until the 2014 to 2020 timeframe), the projected supply of new renewable energy in New England is expected to exceed even these increased RPS obligations. For example, there is currently an additional 15,000 MW of wind generation on the horizon in New York and the Eastern Canadian Provinces, which would provide even more qualifying renewable generation to New England.[77] This is just one example of future renewable

---

[73] DOER REPORT at 13.

[74] *Id.* at 3.

[75] It is customary for renewable energy projects selling into New England to qualify in multiple New England RPS programs, as well as programs in Eastern Canadian Provinces, so in any year they can seek to sell their RECs into the state program offering the best prices and terms. ISO New England, *2009 Regional System Plan* at 83. It is noteworthy that Vermont has no formal RPS requirement, but has a general goal of 20 percent by 2017. ISO NE, *Update on New England Renewable Portfolio Standards (RPS) and Renewable Resources Outlook*, http://www.ripuc.org/eventsactions/docket/4050-ISO-Presentation(7-28-09).pdf at 5 (July 28, 2009).

[76] ISO NE, *2009 Regional System Plan* at 83. It is noteworthy that Vermont has no formal RPS requirement, but has a general goal of 20 percent by 2017. ISO NE, *Update on New England Renewable Portfolio Standards (RPS) and Renewable Resources Outlook* at 5.

[77] *Id.* at 23.

generation that will be developed in New England. Thus, there is a strong possibility that if this trend continues, the generation from CWA Project would not be needed in New England since the region would be meeting its RPS obligation, with a surplus remaining.

C. The Range of Alternatives Continues to be Inadequate

The EA/FONNSI perpetuates the fiction that there are no reasonable alternatives to the Proposed Action, except for those located in Nantucket Sound, and no new evidence that changes that assessment. Even with the inappropriate applicant-oriented purpose and need statement, that position is not credible. The position was not credible when the FEIS was released, and since that date, there has been considerable new activity that only underscores the implausibility of MMS's position. APNS has provided that information to MMS, but MMS elected to ignore it and, as a result, the EA/FONNSI is incorrect in claiming there is no new information requiring a supplemental EIS. No information is more important to an EIS than alternatives, and the very obvious failure of the FEIS and EA/FONNSI to consider clearly reasonable alternatives, even under the flawed purpose and need statement, renders the MMS alternatives analysis invalid.

1. A Consensus-Based Solution is Still Possible

Before addressing why the EA/FONNSI fails to correct the problems with the alternatives analysis in the FEIS, it is important to note that dozens of stakeholders and hundreds of individuals have been advocating for a consensus-based solution that would involve moving the proposed site from Horseshoe Shoal in Nantucket Sound to South of Tuckernuck Island (STI). There is no obstacle to pursuing this outcome, a fact recognized by the Advisory Council on Historic Preservation in its April 2 comments and recommendations to the Secretary. The EA/FONNSI clearly acknowledges that STI meets MMS's screening criteria and was subjected to detailed analysis: The EA/FONNSI states "[t]he alternatives that met the screening criteria, along with the Proposed Action and no action alternative were subject to detailed environmental analysis in the FEIS."[78] This supports the position of the Alliance and numerous stakeholders that it would not be necessary to reinitiate review of the STI alternative and that the proposed project in Horseshoe Shoal could be relocated with little additional effort.

Nonetheless, the EA/FONNSI makes critical errors with respect to STI as a means of justifying the Proposed Action. First, the EA/FONNSI mistakenly assumes that the foundation type required for STI is a mid-range depth technology structure.[79] At the same time, repeatedly throughout the document, there are statements that the monopile foundation which CWA proposes to use at Horseshoe Shoal is appropriate for depths up to 100 feet: "The monopile foundation technology currently available to commercial application typically limits the placement of wind energy facilities in waters less than 100 feet to ensure economic and technical feasibility."[80] The mid-range technology lattice structure refers to an overlapping area in the 65 to 147 foot range. Water depths at the STI alternative range from 15 to 100 feet. It is simply not

---

[78] EA/FONNSI, at 4.

[79] *Id.* at 5.

[80] *Id.* at 3. *See also id.* at 5.

demonstrated that STI would require lattice support structures, or that some combination of structures could not be implemented.[81] Even if lattice foundations are needed, the STI site is not unreasonable. The FEIS estimated the costs of STI to be only 12% greater, and the STI cost would be reduced to less than the proposed site if the Barnstable proposal for municipal-based financing for STI is adopted.

2. MMS Has Not Addressed Much of the New Information Provided by APNS This Year

Numerous commentors have long objected to MMS's impermissible exclusion of reasonable alternatives from review in the DEIS and the FEIS. Part of MMS's failure to address these alternatives is directly related to its improper statement of purpose and need. The EA/FONNSI does not correct these problems. The explanation provided for their exclusion was invalid when the FEIS was released, and in light of new information, is even more indefensible now. Based on new information ignored in the EA/FONNSI, but in the possession of MMS, a supplemental EIS is required.

The EA/FONNSI, for example, unreasonably focuses on monopile technology. The EA/FONNSI states that projects using monopile technology are typically located in areas that allow installation by vibratory hammer or driving ram, and that areas containing bedrock or hard substrate would require a different technology that would increase project costs.[82] But the analysis does not indicate what the increase would be, whether the increase would not be economically feasible, or what the state of the technology is. In other words, it provides no analysis. It simply states that other areas would require other technologies, which could affect project design. That fact certainly does not make an alternative infeasible.

Likewise, the EA/FONNSI discusses limitations on the distance of AC cables and HVDC cables, yet none of the alternatives eliminated exceed the distance limitations identified in the EA/FONNSI.[83] The EA/FONNSI does not address any information regarding the other factors on which it based its decision to eliminate alternatives, including wave height, or the composition of the substrate. The EA/FONNSI merely restates what is in the FEIS – that is, that Offshore Portland, Cape Ann, Boston, Nauset, and Block Island were eliminated due to a

---

[81] The FEIS concludes that STI will result in greater impacts to benthic resources. That unsupported conclusion is based on the mistaken assumption that a mid-range technology is needed for STI, rather than on differences in the benthos and benthic resources at the two sites. Differences in the benthos of the two sites are not known and thus require additional analysis. According to Richard S. LeGore, Ph.D., of LeGore Environmental Associates, the survey work that has been done makes it difficult or even possible impossible to know the impacts to these two sites.

In addition, Mr. Legore has stated that his greater concerns have been disregarded, as MMS is still relying on a wholly inadequate marine benthos survey. It is poorly conceived, poorly executed, and the data are poorly analyzed in order to arrive at the preconceived notion of unsubstantial benthic impact. To date, there has been no direct response by CWA, USACE, or MMS to any Mr. Legore's pages of commentary on the benthos studies. These comments have been disregarded and dismissed in reaching the finding of no significant impact, as MMS persists in their reliance on faulty information.

[82] EA/FONNSI, at 3.

[83] *Compare* EA/FONNSI, at 3, with FEIS, at 3-6 – 3-9.

combination of factors, none of which was addressed to determine whether there was any new information.

a. MMS Failed to Consider Reasonable Alternatives Within Its Jurisdiction

Block Island, in fact, should not have been excluded on the basis of these factors. A project that fits the purpose and need is in fact under active consideration at this time. The project, proposed by Deepwater Wind, has strong support from Rhode Island and was in fact chosen by the State in the request for proposals process. Deepwater Wind has already installed a meteorological tower and has done test borings of the ocean floor to determine optimal installations methods for the proposed project. On August 28, 2009, Deepwater Wind reported that it was conducting an array of environmental studies in and around Block Island. By the end of July, it had installed a 180-foot meteorological mast at the entrance to Great Salt Pond, a laser radar device at the other end of Block Island, and is using a temporary meteorological vessel moored about three miles off the coast of the island, all to be used to collect data to be used for measuring wind speed, strength and shear. The first phase of Deepwater's project is expected to start operations in 2013. Deepwater also plans to build a larger utility-scale offshore wind power project in federal waters, rated at 385 megawatts. Deepwater also is hoping to build a larger project in 2014 or 2015 and could grow it to 500 MW.

The viability of the Block Island development is clearly demonstrated in the attached studies by RIWINDS, a program launched by the State of Rhode Island in 2006 to promote wind development – both onshore and offshore – in the state. The scope of the attached study was to evaluate the most viable areas for wind energy development. The process screened and prioritized sites based on technical, environmental, financial and public acceptance issues. After extensive analysis, the study identified several onshore and offshore sites. The study clearly identifies two areas (areas J and K) in the waters adjacent to Block Island that not only meet the screening criteria (figure 3-18) but that are the least cost sites under evaluation (figure 6-1).

Table 6-6 shows that these identified Block Island sites – one in state waters and one in adjacent federal waters – would each support 200 MW of wind energy for a total of 400 MW.

The viability of Block Island is further confirmed by its analogue in Horns Rev 2, which is addressed in a September 24, 2009 letter sent by APNS to MMS regarding alternatives and the state of technology.[84] The North Sea is known for its hazardous weather conditions, yet will now be the site of a 209 MW facility. To the extent that MMS ruled out the other alternatives on this basis, it was in error doing so. The EA/FONNSI should have evaluated information regarding these criteria, but it failed to do so.

This alternative clearly meets the MMS screening criteria and should have been reviewed in the EIS. The recitation in the EA/FONNSI that Block Island was "eliminated from further consideration due to a combination of factors, including water depth, extreme storm wave height, and seabed substrate" does not resolve MMS's failure to address this alternative in the EIS. That

[84] Attachment 17.

site is now going forward under a State-approved process, and is clearly a reasonable alternative to the Proposed Action.

In fact, there is substantial new information regarding the state of the technology that MMS has simply failed to address, despite having such information submitted to it over the last year. APNS's September 24, 2009 letter to MMS regarding reasonable alternatives to the Proposed Action raises much of the latest information about offshore development.[85] Those comments outlined a number of reasonable alternatives that should be considered, including: the Blue H proposal for a floating deepwater commercial wind energy project located off Martha's Vineyard; the State of Rhode Island proposed two phased wind project in state waters; the Winergy Power proposal offshore of Long Island; preliminary permits issued by the Federal Energy Regulatory Commission (FERC) to over a dozen hydrokinetic, or tidal and wave energy, projects in the New England area; onshore renewable and clean energy projects; and the Commonwealth of Massachusetts' own proposed offshore wind sites in state waters, two sites that can incorporate 166 wind turbines generators (WTGs) with a capacity of 3.6 megawatts (MW). Yet, MMS addressed practically none of the information provided in that report.

The EA/FONNSI fails to consider all new information on deep water technology. The EA/FONNSI concludes that the new information regarding StatoilHydro's floating turbines, Blue H USA, and other projects demonstrate that the technology is still in the exploratory phases. The EA/FONNSI concludes that there is no new evidence to suggest that deepwater alternatives would be economically or technologically feasible.

The EA/FONNSI, however, is highly selective in the information that it considered. For example, APNS's September 24, 2009, letter regarding alternatives describes not just what Blue H has accomplished in the United States, but also what it is doing overseas. The EA/FONNSI totally ignores Blue H's installation of a prototype floating wind turbine in Italy in the summer of 2008 or that it is currently building a 2.4 MW operational floating turbine in the same location. This turbine is the first in the planned 90 MW Tricase offshore wind farm, located more than 20 kilometers distant from the coast line of Puglia. <http://www.bluehgroup.com/company-newsandpress-090312.php>.

Not only did the EA/FONNSI omit up-to-date information, the reasoning it employs in dismissing deepwater alternatives is inconsistent between the FEIS and the EA/FONNSI. The EA/FONNSI dismisses deepwater alternatives on the basis that they are not economically feasible. Yet, the FEIS states that the current range of alternatives including the Horseshoe Shoal site are also not economically viable at today's market prices. Furthermore, the availability of stimulus money equivalent to 30% of the capital cost of the project under the ARRA is also not evaluated with respect to deepwater alternatives and its effect on the economic viability of this technology.

Indeed, the EA/FONNSI is inconsistent with recent actions by MMS. Federal officials announced during a meeting in January 2010 that it planned to open up almost 4,000 square nautical miles of ocean near Martha's Vineyard for potential wind power generation.[86] As

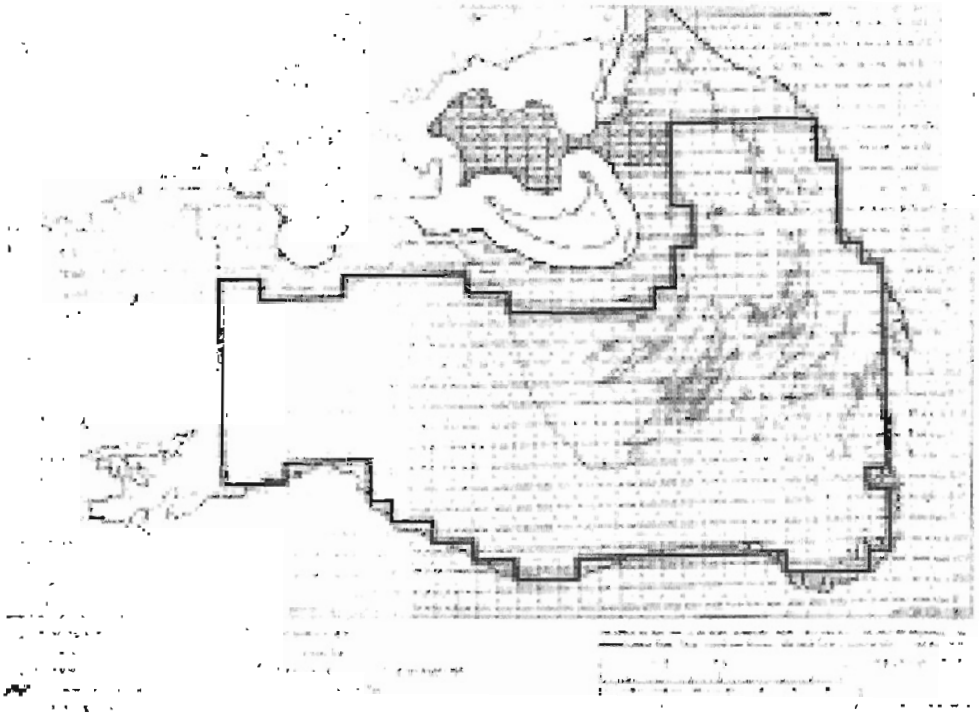
---

[85] Attachment 17.

[86] *See Federal Offshore Energy Plans Dwarf Cape Wind,* Vineyard Gazette (Jan. 29, 2010).

reported in the Vineyard Gazette, a draft Request for Interest (RFI) map presented to a renewable energy task force meeting of state, local and federal representatives on Wednesday identifies a vast arc of ocean, extending from the Rhode Island border, southwest of the Island, across to the south of the Vineyard and Nantucket, then running north and east to the entrance to Nantucket Sound.

The map, prepared by MMS comprises 448 blocks totaling 3,895 square nautical miles, for which wind power developers could bid. The boundaries of the area — which encroach about eight or nine miles from shore at their closest and extend out 22 to 50 miles — closely follow the contours of the underwater geography, between 30 and 60 meters (about 100 and 200 feet).



Clearly, based on MMS's presentation, the state of technology is more advanced than it suggests in the EA/FONNSI, given that the only parameter MMS considered was water depth. Further, MMS appears to have recognized the value of taking into account onshore effects, an issue it is assiduously ignoring despite recommendations by numerous commentors, including more recently the ACHP. Deerin Babb-Brott, Assistant Secretary of the State Office of Energy and Environmental Affairs, said that MMS and the State set a buffer zone at nine miles after consideration of developments in Europe. Such a distance helps to minimize the visual impacts of such development. It was additionally acknowledged that preference would be given to projects further from shore. Finally, it is notable that they excluded Nantucket Sound from areas of potential development.

b. Ocean Management Plan of Massachusetts

As APNS discussed in its September 29, 2009 letter to MMS, Massachusetts has been developing an Ocean Management Plan (OMP) to identify areas in state waters that could

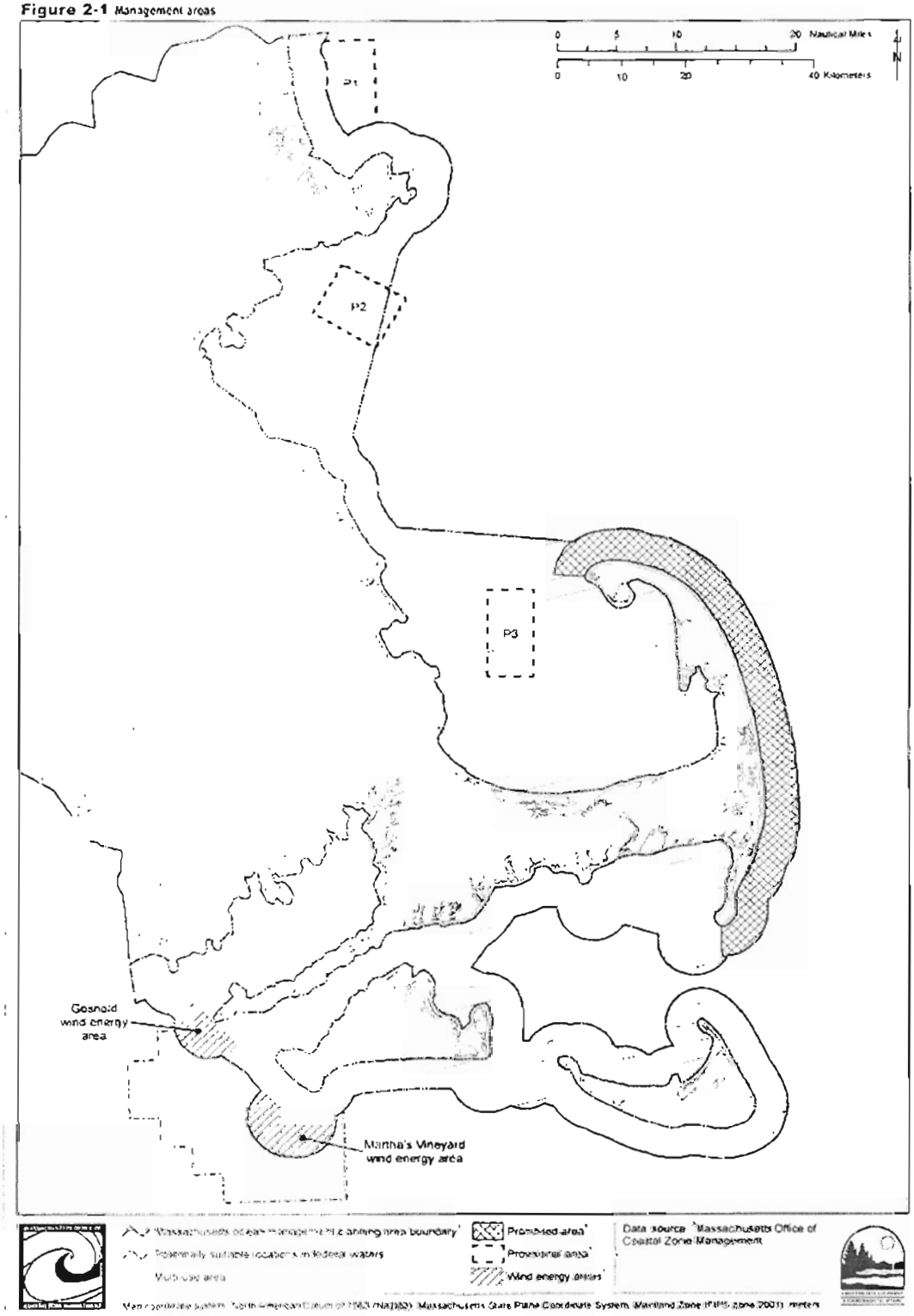
accommodate utility-scale wind projects.[87] The draft plan APNS raised with MMS included as many as 166 wind turbines, which would generate enough electricity to power some 200,000 homes, and could be built to the southwest of Martha's Vineyard: one on the far side of Noman's Land and the other off the Elizabeth Islands.

Despite raising it, MMS failed to address any of the plan in the EA/FONNSI. Since Massachusetts introduced the OMP in June, it has finalized its plan.[88] Massachusetts selected two Wind Energy Areas, based on the presence of a suitable wind resource and water depth, and the absence of conflict with other uses or sensitive resources. Massachusetts identified the Gosnold Wind Energy Area and the Martha's Vineyard Wind Energy Area for commercial development. The OMP also identifies three locations (one in federal waters adjacent to the planning area) for commercial-scale wind that are considered provisional sites. The figure below identifies projects areas.

[87] Draft Ocean Management Plan (June 30, 2009).

[88] *See* <http://www.mass.gov/?pageID=eoeeaterminal&L=3&L0=Home&L1=Ocean+%26+Coastal+Management&L2=Massachusetts+Ocean+Plan&sid=Eoeea&b=terminalcontent&f=eca_oceans_mop&csid=Eoeea>.

Figure 2-1 Management areas



Despite the considerable work the Commonwealth put into its OMP, which was released in December 2009, well before the EA/FONSSI was released, the EA/FONNSI entirely failed to address any of the project areas. These sites must be considered as alternative sites in a supplemental EIS.

c. There Are New Alternatives Outside of MMS's Jurisdiction that Should Have Been Considered in the EA/FONNSI

In addition, MMS did not consider, yet again, alternatives outside its jurisdiction. NEPA clearly requires an agency to consider alternatives that are not within the jurisdiction of the agency.[89] The requirement that an agency consider alternatives that are outside the agency's jurisdiction but meet purpose is confirmed in regulations issued by the Council on Environmental Quality (CEQ). CEQ clearly mandates that an agency consider alternatives outside the scope of its jurisdiction. In its regulations implementing NEPA, CEQ defined the scope of alternatives to be considered in an EIS as including "reasonable alternatives not within the jurisdiction of the lead agency."[90] In its later published "Forty Most Asked Questions,"[91] CEQ further explained the requirement to consider alternative outside an agency's legal jurisdiction.

> An alternative that is outside the legal jurisdiction of the lead agency must still be analyzed in the EIS if it is reasonable. A potential conflict with local or federal does not necessarily render an alternative unreasonable, although such conflicts must be considered. ... Alternative that are outside the scope of what Congress has approved or funded must still be evaluated in the EIS if they are reasonable, because the EIS may serve as the basis for modifying the Congressional approval or funding in light of NEPA's goals and policies.[92]

As noted in APNS's September 29, 2009 comments, on June 11, 2009, the Massachusetts National Guard announced a proposal to build a utility-scale wind project on the Massachusetts Military Reservation that would include up to 17 turbines, each 400 feet high. As the first of many steps toward building the project at the 22,000 acre facility on Cape Cod, the National Guard has filed a site plan for review with the Federal Aviation Administration (FAA) and the Air Force Space Command.

The plans require review by the FAA and the Air Force Space Command, which operates the PAVE PAWS radar station on the base. Both the FAA and the Air Force have already approved a 1.5 MW turbine for the base cleanup program. The National Guard proposal comes after a study released in February concluding that the Upper Cape base is a prime location for land-based wind turbines. That report, released by the state Executive Office of Energy and Environmental Affairs, said the base has the potential to host up to 46.5 MWs of electricity. (Exhibit 17). The Massachusetts Military Reservation site was not considered in the FEIS

---

[89] *Natural Resources Defense Council v. Morton,* 458 F. 2d 827, 836 (D.C. Cir. 1972).

[90] 40 C.F.R. § 1502.14(c).

[91] 46 Fed. Reg.18026 (1981).

[92] Forty Most Asked Questions, Question 2b. *See also Muckleshoot Indian Tribe v. Forest Service*, 177 F. 3d 800, 814 (9th Cir. 1999) (finding that the agency erred in refusing to consider direct purchase of land involved in a land exchange even though Congress had not appropriated money for such an exchange); *National Wildlife Federation v. National Marine Fisheries Service*, 235 F. Supp. 2d 1143, 1154 (W.D. Wa. 2002) (rejecting claim by defendant that consideration of a sediment reduction strategy for which no legislative authority exists is not required by NEPA).

because at the time it was not available. That rationale is no longer valid, as a result of the Commonwealth's plan to now develop the site.

Further, since the issuance of the FEIS, there have been significant developments in hydrokinetic permitting and technologies. MMS and FERC have issued regulations governing the permitting and licensing of offshore hydrokinetic projects, which has spurred project development in this area. Just this past April, FERC and MMS issued a MOU regarding the permitting and licensing of offshore renewable energy projects. More recently, in August 2009, FERC and MMS also released guidance on this issue to further clarify the permitting and licensing process for hydrokinetic projects. Further, on August 19, 2009, FERC and the State of Maine signed an MOU to coordinate the procedures and schedules for reviews of tidal energy projects off the coast of Maine.

In fact, there are currently 17 hydrokinetic projects pending in New England, New Jersey, and New York, which have all received preliminary permits from FERC and have the potential to produce approximately 763 MWs of electricity. These pending hydrokinetic projects in the region are rapidly moving forward and many have already submitted the required Notice of Intent to file an application and draft application with FERC, including the time frame for consulting with federal, state, and local agencies, tribes, non-governmental organizations, and any other interested entities. Holders of preliminary permits are required to file a Notice of Intent to file an application and draft application within one year of receiving a preliminary permit. Additionally, the licensees of these projects have submitted and continue to submit required periodic progress reports to FERC that document significant progress in the development of the projects.

APNS's September 29, 2009, comments present additional new information that MMS failed to address in the EA/FONNSI. Indeed, it appears that MMS failed entirely to read the document, if the information appearing in the EA/FONNSI is any indication. Had MMS done so, it would have been clear that many of the assumptions on which it determined to eliminate alternatives were no longer valid.

III. Cultural Resources

A. Approving the Proposed Action as Proposed Would Be Inconsistent with Both the NHPA and the Preserve America Executive Order 13287 in Light of MMS's Stewardship Responsibilities for Historic Properties On and Around its Managed Properties

The ACHP concluded that approving the Proposed Action as proposed, and allowing the development of a large-scale industrial facility in the waters of Nantucket Sound directly in the view shed of numerous historic districts, structures and traditional cultural properties (TCPs), including two National Historic Landmarks, would be inconsistent with the policies and admonitions of the National Historic Preservation Act (NHPA) and Executive Order 13287 – Preserve America. The EA/FONNSI fails to consider this information.

The ACHP noted that it is the policy of the federal government "to administer federally owned, administered, or controlled prehistoric and historic resources in a spirit of stewardship

for the inspiration and benefit of present and future generations."[93] Section 1 of Executive Order 13287 adds that the policy of the federal government is also "to provide leadership in preserving America's heritage by actively advancing the protection, enhancement, and contemporary use of the historic properties owned by the Federal Government, and by promoting intergovernmental cooperation and partnerships for the preservation and use of historic properties."

The Executive Order also provides that where appropriate, executive branch departments and agencies shall advance this policy "by pursuing partnerships with State and local governments, Indian tribes, and the private sector to promote the preservation of the unique cultural heritage of communities and of the Nation and to realize the economic benefit that these properties can provide."[94] The Executive Order requires federal agencies to improve federal stewardship of historic properties by ensuring that each agency "ensure that the management of historic properties in its ownership is conducted in a manner that promotes the long-term preservation and use of those properties as Federal assets and, where consistent with agency missions, governing law, and the nature of the properties, contributes to the local community and its economy."[95] Finally, the Executive Order requires agencies to "maximize efforts to integrate the policies, procedures, and practices of the NHPA and this order into their program activities in order to efficiently and effectively advance historic preservation objectives in the pursuit of their missions."[96]

The ACHP notes that the outer continental shelf (OCS) portion of Nantucket Sound, including the area of the preferred alternative for the Proposed Action, is federal property. Therefore, given its stewardship responsibility for this property as outlined above, MMS "must exercise great care when considering any development at Horseshoe Shoal."[97] MMS's approval of the Proposed Action at Horseshoe Shoal would breach its duty of care toward that historic property, and fail in its lawful responsibility to advance the "protection, enhancement, and contemporary use" of the historic properties that will be adversely affected by the development.

Under a separate submission, APNS has provided to MMS its comments to the ACHP, the Massachusetts Historical Commission testimony to the ACHP, and the ACHP comments and recommendations to the Secretary. This documentation confirms the newly declared status of the Sound as one of the pre-eminent historic and cultural sites in the country. It also confirms the extremely significant nature of the adverse impacts of the proposed project. This is new information not considered in the EA/FONNSI, which predates the ACHP record by nearly one month. This new information alone requires a supplemental EIS.

---

[93] 16 U.S.C. § 470-1(3).

[94] *Id.*

[95] Executive Order 13287 (2003) at Section 4.

[96] *Id.* at Section 1.

[97] ACHP Comments, at 4.

B. The MMS Violated Section 106 Rules by Failing to Initiate Section 106 Review Until Too Late in the Process to Allow Full and Fair Consideration of Alternative Locations

The ACHP's rules provide that "[t]he agency official shall ensure that the section 106 process is initiated early in the undertaking's planning, so that a broad range of alternatives may be considered during the planning process for the undertaking."[98] In its comments, the ACHP concluded that in this matter, in direct contravention of this requirement, the Corps and MMS initiated section 106 review late in the planning process.[99] Indeed, the ACHP expressly found that the late engagement of the section 106 process in this matter was "a fundamental impediment to the effective exploration of solutions that could allow CWA's project goals to be met in harmony with the historic values of the area."[100]

In connection with other environmental reviews, the ACHP's rules provide that the agency should coordinate the steps of the section 106 process, as appropriate, with any reviews required under other authorities, such as the National Environmental Policy Act ("NEPA"). In this matter, once again, the ACHP found that MMS and Corps had not initiated in earnest the section 106 review of the CWA project during the NEPA scoping process.[101] If the agencies had done so, the ACHP noted, they would have opened the section 106 process "prior to the investment of time, money, and extensive planning for the preferred location."[102]

In this case, however, the ACHP found that "[c]onsequently, when the Section 106 process advanced, it was primarily to develop mitigation measures for the Project's effects rather than to consider alternatives to the Project site that might avoid adverse effects to historic properties."[103] Therefore, the ACHP found that this particular violation of the section 106 rules again had a direct impact in frustrating productive consultation toward resolution of adverse effects on historic properties.

C. MMS Failed to Make the Required Reasonable and Good Faith Efforts to Identify Historic Properties Until Too Late in the Section 106 Review

The Section 106 rules provide that the responsible federal agency must, in consultation with the State Historic Preservation Officer (SHPO) and any Indian tribe that might attach religious and cultural significance to properties within the area of potential effects (APE), make a reasonable and good faith effort to identify historic properties within the project's APE.[104]

---

[98] 36 C.F.R. § 800.1(c) (2009).

[99] ACHP Comments, at 4.

[100] *Id.*, at 4.

[101] *Id.*, at 4.

[102] *Id.*

[103] *Id.*

[104] 36 C.F.R. §§ 800.4(b) and 800.4(b)((1)(2009).

As the ACHP noted in their comments, however, in the early review of the Proposed Action under the Corps' own "Appendix C" regulations implementing section 106, that agency did not recognize its responsibility to identify previously unidentified properties. In its review, the Corps only considered "designated "historic properties (those listed in the National Register, determined eligible for listing by the Keeper of the National Register, or those that appear to meet eligibility criteria in the opinion of the Corps and the SHPO).[105]

The NHPA makes no distinction between eligible properties and "determined eligible" properties. The NHPA requires federal agencies to assess effects from an undertaking to any property "included in or eligible for inclusion in the national Register."[106] Federal courts have held that "[t]he [NHPA] definition of 'eligible property' makes no distinction between determined eligible and property that may qualify," and have refused to enforce Corps regulations that maintained such a distinction.[107]

In their comments, the ACHP noted that as a result of the Corps' reliance on their own regulations, the Corps gave no serious consideration to the possible existence of TCPs that might be affected.[108] The ACHP further found that when MMS took over lead agency status for the Section 106 review, "MMS, following the Corps' focus on designated historic properties, was slow to respond to the assertions of the tribes and other consulting parties that there were other historic properties within the APE that warranted consideration."

The ACHP acknowledged that starting in early 2009, the Secretary of the Interior finally led the review to the actions that resolved many unresolved issues, but these successful outcomes on intermediate issues came too late to allow the parties to seek in good faith real avoidance and mitigation of adverse effects, because, as the ACHP concluded, by that late date in the process, "CWA's commitment to the preferred location frustrated serious consideration of avoidance alternatives."[109] Therefore, the ACHP identified yet another instance where MMS's tardy and insufficient compliance with the section 106 rules had real negative consequences for all the parties to the consultation, and most importantly, to the ability of the agency to adequately protect the historic properties in and around Nantucket Sound.

D. MMS Failed Properly to Consult with Indian Tribes Early Enough in the Section 106 Process to Be Able to Fully and Fairly Consider Alternative Project Locations

Section 101(d)(6)(B) of the NHPA requires the agency official to consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be affected by an undertaking. The ACHP's rules explain that the agency must ensure that consultation provides the Indian tribe "a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on

---

[105] ACHP Comments, at 4. *See* 33 C.F.R. Part 325, Appendix C, §§ 1(a), 15. (2009)

[106] *See* 16 U.S.C. § 470f.

[107] *See Colorado River Indian Tribes v. Marsh*, 605 F. Supp. 1425, 1437 (C.D. Cal. 1985).

[108] ACHP Comments, at 4.

[109] *Id.*

the undertaking's effects on such properties, and participate in the resolution of adverse effects."[110]

In addition, the rules specifically provide that tribal consultation "should commence early in the planning process, in order to identify and discuss relevant preservation issues and resolve concerns about the confidentiality of information on historic properties."[111] The ACHP found that like the other rules noted above, MMS violated this provision also by the tribal consultation procedures it adopted, because MMS only initiated "earnest tribal consultation that made possible an open dialogue between the tribes and the federal agencies . . . late in the review process, after the applicant was committed to the preferred location."[112]

The ACHP also found that Corps's and MMS's early contacts with the tribes did not provide an adequate and confidential opportunity for the tribes to communicate concerns about historic properties," even though the Wampanoag tribes as early as 2004 clearly identified their concerns on the record about the effects of the CWA project on TCPs, about the importance of Nantucket Sound as a TCP, and the location of former aboriginal lands.[113]

It was a full five years later, in late 2009, that "MMS took steps to remedy deficiencies in the tribal consultation process by participating in site visits and consultation meetings on Cape Cod and the Islands." But as noted above, by that late date, the positions of the parties had completely hardened, CWA's commitment to the preferred location was unchangeable, and no further productive consultation was possible. Thus, MMS, following on the Corps' poor record of tribal consultation, also acted slowly and unresponsively, and ultimately failed in its tribal consultation obligations under the section 106 rules.

E. The Marine Archaeological Survey Work Relied on by MMS Was Insufficient for Purposes of Compliance with Section 106

In its comments on the adequacy of the underwater surveys to assess possible impacts to the sea bed from the construction of the CWA project, the ACHP concluded that, "[g]iven the limited intensity of the archaeological reconnaissance survey and the nature of construction in a marine setting, monitoring and mitigation proposals will not adequately address the potential for harm."[114]

The ACHP had found that the Marine Archaeological Sensitivity Assessment commissioned by CWA in 2003 indicated that much of Nantucket Sound would have been exposed and available for human habitation from about 12,500 to 7,000 B.P." And as late as

---

[110] 36 C.F.R. § 800.2(c)(2)(ii)(A) (2009).

[111] *Id.*

[112] ACHP Comments, at 4.

[113] *Id.*

[114] ACHP Comments, at 3.

about 1,000 B.P., "portions of the area that is now Nantucket Sound would have continued to be dry land and available to aboriginal populations for habitation and subsistence activities."[115]

The ACHP concluded that the underwater survey efforts undertaken for this project were inadequate to comply with section 106. The ACHP said: "[w]hile the marine survey effort appears to have been sufficient to assess the potential for archaeological resources in the Section 106 process, it does not provide adequate data to enable modifications to the Project, were it to be approved, to avoid adverse effects or to inform appropriate mitigation."[116] Specifically, the ACHP found that: "the coverage and spacing of the sub-bottom profiler and coring data and the depth and adequacy of coring is insufficient for locating archaeological sites and shipwrecks for mitigation purposes."[117]

Thus, MMS did not perform underwater archaeological studies sufficient to be able to know what submerged historic or prehistoric properties would be damaged or destroyed by construction of the CWA project. As the ACHP properly found, this limited survey work was insufficient to be able to know what historic properties might be destroyed, and since these effects would be "permanent, unavoidable and not subject to satisfactory mitigation," such adverse effects will be severe, and MMS has not complied with section 106 for this aspect of its review.

F. Precedent Supports Project Denial Based on Impacts to Cultural Resources

In rendering a decision in this matter, MMS should be guided by the decision made by their sister agency the Bureau of Land Management (BLM) in a very similar matter in 2001 involving the Glamis Imperial Gold Mine proposal. There, the Glamis Imperial Corporation submitted a proposal to the California State Office of the BLM pursuant to the Mining Act of 1872 seeking development of an open-pit gold mine on public lands in Imperial Valley, California. The proposed project consisted of: a 1,571-acre mine and processing area; 38 acres of water wells and utility corridors; and a 16-mile upgraded transmission line.

In October 1999, the ACHP issued formal comments asking the Secretary of Interior to deny approval of the Imperial Mine based on the ACHP's conclusion that the project would cause serious and irreparable degradation of the Indian Pass-Running man Area of Traditional Cultural Concern (ATCC), an area sacred and historic to the federally recognized Quechan Tribe. The ACHP described the Indian Pass-Running Man ATCC in terms strikingly similar to those used to describe the Nantucket Sound TCP, as follows:

> [The Indian Pass-Running Man ATCC] represents a concentration of archaeological remains indicative of ceremonial religious practices, including geoglyphs, petroglyphs, cleared circles, and trails linking this area to other areas of traditional cultural value. For the Quechan, this area represents a place of solitude, power, and a source knowledge where scenic qualities, such as an

---

[115] *Id.* at 5.

[116] *Id.*

[117] *Id.*

> unmarked landscape and unobstructed viewshed, contribute to the integrity of the historic resources and of the area's religious and cultural value.[118]

On January 17, 2001, Secretary Babbitt approved a Record of Decision (ROD) denying the requested permit and citing a number of grounds, including the ACHP's comments, in support of the decision. First among the reasons given for the denial, was that "the proposed project is located in an area determined to have nationally significant Native American values and historic properties and would cause unavoidable adverse impacts to these resources."[119] The second ground cited was that the project would "result in unavoidable adverse impacts to visual quality in this substantially undisturbed landscape.[120] An additional ground for denial was that "the identified unavoidable and adverse environmental impacts resulting from the project override the possible economic benefits that might be derived from the project."[121] All three of these grounds are very similar to the effects that would be caused by the Proposed Action if constructed at Horseshoe Shoals.

There is another parallel between the Imperial Mine and the Proposed Action that argues for similar regulatory treatment. The Imperial Mine project was to be located within the boundaries of the California Desert Conservation Area (CDCA), an area "designated by Congress in Section 601 of FLPMA [Federal Land Policy Management Act] as a region requiring special management due to its nationally significant resources."[122] The ROD concluded that the impacts of the proposed Imperial Mine project could not be mitigated to the point of meeting the statutory requirement in FLPMA that BLM must prevent "undue impairment" of the public lands in the CDCA.[123]

Similarly, in deciding on CWA's application, MMS must comply with the provisions of the Outer Continental Shelf Lands Act, Section 388 of the EPAct of 2005. That statute provides that in connection with leases, easements of rights-of-way for energy development or related purposes, "The Secretary shall ensure that any [such activity [. . .] is carried out in a manner that provides for-- . . . (B) protection of the environment; . . . (D) conservation of the natural resources of the Outer Continental Shelf; . . . and (K) public notice and comment on any proposal submitted for a lease, easement, or right-of-way . . ."[124]

The Secretary of the Interior should be guided by the regulatory action of his predecessor, applying very similar laws to a project with very similar destructive impacts to a unique area containing a high concentration of extraordinary and interrelated historic properties and

---

[118] Comment letter to Bruce Babbitt, Secretary of the Interior, from the Advisory Council on Historic Preservation, dated October 19, 1999, at 1.

[119] U.S. Department of the Interior, Bureau of Land Management, California Desert Division, "Record of Decision for the Imperial Project Gold Mine Proposal, Imperial County, California," January 17, 2001 (Imperial ROD), at 3.

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] *Alternative Energy and Alternate Uses of Existing Facilities on the Outer Continental Shelf*, 73 Fed. Reg. 39,376, 39,387 (July 9, 2008)

traditional cultural properties of national significance and critical importance to living Indian communities, and applying very similar policy and legal imperatives, make the same ultimate decision.

G. In Light of the ACHP's Findings, the Proposed Action Does Not Survive Review Under the Corps's 404(b)(1) Guidelines

The April 2, 2010 comments filed by the ACHP setting forth the significant adverse impacts of the Proposed Action on historic properties, aesthetics, and other cultural resources further underscore why the Proposed Action fails to meet the U.S. Army Corps of Engineers' public interest test or the 404(b)(1) Guidelines. The EA/FONNSI is wholly inadequate to address the failure of the Proposed Action to meet these required regulatory tests; a Supplemental EIS is essential.

Specifically, in order to issue a Section 10 or Section 404 permit, the Corps must evaluate the impacts of the proposed activity and intended use on the public interest. The regulations provide that

> ... [a]ll factors which may be relevant to the proposal must be considered including the cumulative effects thereof: among those are ... aesthetics ... historic properties ... recreation ... considerations of property ownership and, in general, the needs and welfare of the people.[125]

As APNS has explained and documented in prior comments to both MMS and the Corps, the Proposed Action fails the public interest test and MMS has not considered this serious deficiency to date.

Similarly, under the Clean Water Act Section 404(b)(1) guidelines, the Corps is required to deny a Section 404 permit if, among other things, the proposed action will "cause or contribute to significant degradation of the waters of the United States."[126] The regulation further provides that findings of "significant degradation" must be based upon appropriate factual determinations and tests required by the regulations "with special emphasis on the persistence and permanence of the effects."[127] Under the Guidelines, among other things, effects contributing to significant degradation include significant adverse effects on recreational, aesthetic and economic values.[128] In determining whether a project has a significant adverse effect on aesthetics, the Corps must consider the following:

> (a) Aesthetics associated with the aquatic ecosystem consist of the perception of beauty by one or a combination of the senses of sight, hearing, touch, and smell. Aesthetics of

---

[125] 33 C.F.R. § 320.4(a).

[126] 33 C.F.R. § 220.10(c).

[127] *Id.*

[128] *Id.*

aquatic ecosystems apply to the quality of life enjoyed by the general public and property owners.

(b) Possible loss of values: The discharge of dredged or fill material can mar the beauty of natural aquatic ecosystems by degrading water quality, creating distracting disposal sites, inducing inappropriate development, encouraging unplanned and incompatible human access, and by destroying vital elements that contribute to the compositional harmony or unity, visual distinctiveness, or diversity of an area. The discharge of dredged or fill material can adversely affect the particular features, traits, or characteristics of an aquatic area which make it valuable to property owners. Activities which degrade water quality, disrupt natural substrate and vegetational characteristics, deny access to or visibility of the resource, or result in changes in odor, air quality, or noise levels may reduce the value of an aquatic area to private property owners.[129]

As the ACHP explains in its comments, the historic properties affected by the Proposed Action are "significant, extensive, and closely interrelated." The ACHP further states that these adverse effects "will be direct and indirect, cannot be avoided, and cannot be satisfactorily mitigated." The ACHP's comments, and their impact on the Corps' ability to issue the required permits, must be considered in a full Supplemental EIS.

IV. Air Quality

The EA/FONNSI states that the new information provided in the Clean Air Act Final General Conformity (FCD) Determination does not affect the validity of the air quality analysis in the FEIS and that the predicted emissions are lower than originally calculated.

In fact, the final FCD conforms to the Clean Air Act (CAA) neither in procedure nor in substance. Not only is in inadequate under the CAA, it is not a sound basis for concluding that the new information, such that it is, does not warrant additional review.

A. MMS Has Not Complied with Binding CAA Procedures

EPA regulations specify in precise and binding detail how to make conformity determinations.[130] Those regulations state that "[a] Federal agency must make a determination that a Federal action conforms to [CAA requirements] in accordance with the requirements of this subpart before the [approval] action is taken.[131]

---

[129] 33 C.F.R. § 230.53.

[130] *See* 40 C.F.R. § 93.150 *et seq.*

[131] 40 C.F.R. § 93.150(b)(emphasis added).

Those requirements include precisely described methods for providing public notice of a draft conformity determination (DCD) and soliciting comment on it. Most notably, the regulations require:

> (a) Upon request by any person regarding a specific Federal action, a Federal agency must make available for review its draft conformity determination ... with supporting materials which describe the analytical methods and conclusions relied upon in making the applicability analysis and draft conformity determination.
>
> (b) A Federal agency must make public its draft conformity determination ...by placing a notice by prominent advertisement in a daily newspaper of general circulation in the area affected by the action and by providing 30 days for written public comment prior to taking any formal action on the draft determination. This comment period may be concurrent with any other public involvement, such as occurs in the NEPA process.[132]

MMS cannot possibly defend the procedures by which the DCD was issued. EPA's regulations quite clearly contemplate a separate proceeding for making a conformity determination, a process that will not be the same as the EIS comment process though it may be "coordinated" with it. Turning to the specifics of the conformity rule, there has been no notice to interested parties of issuance of the DCD, no "prominent advertisement" in a newspaper of general circulation, and no disclosure of analytical assumptions and methods.

Although MMS published a DCD in November 2008 and later included it unaltered as an appendix to the FEIS in January 2009, MMS never gave the required newspaper notice to start the required regulatory comment period.

As a result, APNS lost rights that are important to it, rights, which when deprived, undermine public participation and informed decision-making. Since MMS made no attempt to meet the procedural requirements for a conformity determination when it appended the DCD to the DEIS, APNS understood its inclusion as a merely informational step, and determined that comment would be appropriate when public notice had been given in the required form. APNS raised the need for a conformity determination to be made according to the required procedures repeatedly and consistently in our comments over the last two years, most notably in our comments on the FEIS. APNS FEIS Comments, at 39. MMS never suggested that inclusion of the information in the FEIS was intended to satisfy CAA requirements.

Consequently, APNS, which has played a central role in the permit proceedings from the beginning, will lose fundamental procedural rights that are clearly important to it unless MMS changes its approach.

---

[132] 40 C.F.R. § 93.156(b).

B. The FCD Also Fails to Comply with Substantive Requirements of the CAA

The FCD also fails to comply in substance with applicable legal requirements, due in no small part to the failure to expose its assumptions to public comment and criticism. Three weaknesses in particular stand out.

1. What Level of Emissions will Constructing the Proposed Project Cause?

The DCD concluded that constructing the proposed project will produce nitrogen oxides (NOx) emissions in both Massachusetts and Rhode Island that exceed levels that require a conformity determination. But the FCD relies on emissions estimates dramatically lower than those in the DCD. The DCD found that construction-related NOx emissions caused by the Proposed Project within Massachusetts would be 129 tons. The FCD, on the basis of recalculations never made available for public comment, split these emissions between two years, and estimated them at 42 tons in year 1 and 18 tons in year 2, well below the 100 tons that trigger conformity. Accordingly, the Proposed Project will not be required to take any action to mitigate its Massachusetts emissions, even though it is clear that the area of the project still violates EPA's air quality standard for ozone, to which NOx emissions contribute.

This unpublicized reversal of a key technical judgment most strongly illustrates the legal error that MMS has committed in not inviting public comment on the DCD.

2. The FCD's Promise that Emissions will be "Offset" is Not Credible

The NOx emissions from constructing the proposed project attributable to Rhode Island would exceed 139 tons in the first year of construction even using the adjusted emissions estimates in the FCD. That would trigger conformity requirements for Rhode Island. The FCD admits that the Rhode Island air quality attainment plan does not currently provide for controlling these emissions. To correct that defect, and make the applicant's construction legally permissible, the FCD suggests that these emissions would be offset.

The conformity regulations do allow projects to use offsets to balance out their new emissions, but only under strict conditions. Conformity regulations provide that for purposes of the conformity program:

> *Emissions offsets* ... are emissions reductions which are quantifiable, consistent with the applicable SIP attainment and reasonable further progress demonstrations, surplus to reductions required by, and credited to, other applicable SIP provisions, enforceable at both the State and Federal levels, and permanent within the timeframe specified by the program.[133]

The FCD, like the DCD before it, makes no effort to show that these requirements have been met. It does refer to a pool of Rhode Island offsets on which the Proposed Project might draw. However, like the DCD, it contains literally no discussion of whether those offsets meet the specific requirements of the conformity regulations.

---

[133] 40 C.F.R. § 93.152.

3. The FCDs Projection of Reductions in Vessel Emissions is Not Credible

Despite the FCD's reliance on offsets, the FCD also admits that the required offsets might not be available. If they are not, the FCD suggests several options for reducing emissions from the vessels largely responsible for the NOx emissions. In neither case does it provide any detail to speak of about how this would be done. The FCD states:

> Assuming that Cape Wind is granted the lease for development of its wind energy project, the company will identify, negotiate for, secure, and purchase available [offsets] in Rhode Island. Concurrently with this process, Cape Wind will, if necessary, implement measures to reduce emissions from vessels and diesel engines used in the construction activities. Cape Wind identified the use of a NOx reducing catalyst ... and exhausts gas recirculation ... as potential control technologies. The NOx reductions that could be achieved range from 28 to 56 tons per year ... Cape Wind would have to procure services from companies that either operate equipment with one of these control technologies or agree to terms that include the retrofit of the engines.[134]

The FCD makes clear that the applicant has no idea how to achieve these reductions beyond a general sense that the technology is "potential[ly]" available. It leaves for future determination the type of technology, the vendor, the choice between renting vessels with the technology installed (if there are any) and retrofitting existing vessels, the emissions testing that will be required to verify performance before committing to a technology, and the monitoring requirements to determine in-use compliance.[135]

4. The FCD's Projection of Overall Emissions Reductions is not Credible and is too General to Support a Conformity Determination

Finally, the FCD leaves completely undetermined the extent to which emissions reductions will be obtained from offsets, and the extent to which they will be obtained by emission controls on vessels. Even the FCD concedes that only 56 tons of emissions reductions can be expected from vessel controls. Thus, it is entirely possible that Proposed Project may be unable to meet its conformity obligations if any significant number of the offsets the FCD has identified become unavailable or fail to meet regulatory requirements,

In short, the discussion in the FCD completely lacks the specificity one would expect in an actual compliance plan. It is more an outline for a conformity determination than the conformity determination itself.

Moreover, even if one were to overlook – and one should not – MMS's failure to invite public comment on the DCD, if the FCD is allowed to stand, it would exempt from public comment **all** the critical decisions on actual conformity compliance. The decisions on such

---

[134] FCD, at 9.

[135] FCD, at 9.

central points as whether emissions offsets met the established regulatory requirements, or vessel emission controls had been shown to work, or whether compliance procedures were adequate, would all be made by the regulators themselves without any public input.

This outcome is prohibited by the CAA. EPA's conformity regulations provide that:

> When necessary because of changed circumstances, mitigation measures may be modified so long as the new mitigation measures continue to support the conformity determination. Any proposed change in the mitigation measures is subject to ... reporting requirements ... and ... public participation requirements.[136]

The FCD violates these requirements because it is so generally worded that nothing that the applicant might do in the future would qualify as a "modification" to its terms. This is not a defensible reading of the legal requirements.

V. Avifauna

This document purports to summarize new information received by MMS since the issuance of the FEIS in January 2009, and concludes that the new information does not warrant further review. Not only does the document fail to address major deficiencies in the FEIS and FEIR, the response is also deficient.[137]

A. Migratory Birds Baseline Studies

The EA/FONNSI reaffirms MMS's previous conclusions that the type of radar capable of detecting birds has an inadequate range, would be cost-prohibitive and is incapable of detecting birds from the shore. The EA/FONNSI acknowledges that the migratory bird baseline study issues "investigated by the IG Report" were "relevant to environmental concerns and impacts of the Proposed Action...."[138] The EA/FONNSI claims that there was no reason to "revisit" the failure to conduct the migratory bird baseline studies requested by the FWS, because it had previously determined that the studies were impracticable, cost prohibitive and not likely to produce useful information...."[139]

This single conclusory statement fails to meet any of the requirements established under 40 C.F.R. § 1502.22(a). MMS has provided no support or justification in the EA/FONNSI (or in any other NEPA document related to this project) for its "conclusion" that the cost of obtaining the information would be cost prohibitive.[140] Indeed, given that the overall cost of the project is estimated to be in the range of $1.6-$2 billion, the EA/FONNSI fails to explain or provide any

---

[136] 40 C.F.R. § 93.160(e).

[137] Comments of Dr. Ian Nisbet (Mar. 24, 2010). Attachment 42.

[138] EA/FONNSI, at 11.

[139] *Id.* at 11.

[140] We note that the CEQ regulations uses the term "exorbitant" rather than "prohibitive" in describing how cost to obtain information will be analyzed in determining not to obtain the relevant information.

rationale for the statement. There is no estimate of the cost of the requested study[141] and no analysis of why the cost would be "prohibitive" in the context of this Proposed Action. Absent this information, the EA/FONNSI's conclusions are simply arbitrary and capricious.

Further, MMS ignores the fact that the applicant actually conducted and reported several months of radar studies, both from a jack-up barge on-site and from the nearby shore at Cape Poge. Consequently, additional studies are feasible and would **not** be cost-prohibitive. The applicant itself regarded the information on bird movements tracked from Cape Poge as valuable in providing surrogate information on bird movements over Nantucket Sound close to the proposed project site, including information on birds flying towards or away from the site that would have flown through it. Although the applicant's radar studies were inadequate in scope and reporting, they nevertheless yielded information that could have been extremely useful in assessing collision risks posed to birds by the proposed project. In particular, they clearly demonstrated that the applicant's estimates of the numbers of birds flying through the project area at rotor height were grossly underestimated. MMS's dismissal of these and all other findings from the radar studies was totally unjustified and constituted a fatal flaw in its assessment.

Further, MMS's conclusion that radar capable of detecting birds has an inadequate range and is cost-prohibitive is belied by the activities of other developers. In fact, several projects have conducted or are conducting substantial radar studies. For example, the Winergy Plum Island wind energy demonstration project has installed Plum Island Wind Park - Avian Radar System using the MERLIN system. The Plum Island Wind Park is a privately funded research, development and demonstration wind energy project. The project is located offshore over two miles east of Orient Point off the northeastern tip of Long Island, New York. The MERLIN system will collect one year of data from a shore location on bird activity near three turbines located near shore. The system will be installed onto an offshore met tower for collection of data the second year of the project with full remote system control and data collection.

Similarly, Long Island Offshore Wind Park - GMI used two MARS units to monitor avian activity and migration patterns in the study area. GMI biologists recorded avian observations during the fall and spring migrations. In addition to the onshore avian radar system, an offshore MARS unit collected horizontal and vertical data to study the passage rates, flight directions, altitudes, and area distribution of birds within the proposed wind park. Furthermore, a land based project in Texas, smaller than CWA Project with a 283 MW nameplate capacity, Gulf Wind I, has collected over 2 years of 24 hour data.

Further, even if the EA/FONNSI had satisfied the requirements of 40 C.F.R. § 1502.22(a), there is no attempt to satisfy the requirements of subsection 1502.22(b). The EA/FONNSI contains no summary of existing credible scientific evidence, as required by subsection 1502.22(b)(3) and no attempt to provide an evaluation of impacts based on theoretical

---

[141] The only reference to the cost of the study in the EA/FONNSI is a vague reference to language in the IG Report which "explained in further detail MMS's conclusions that the radar studies would be ... cost prohibitive." EA/FONNSI at 11. However, the only reference to cost of these studies in the IG report is a statement of an avian biologist who concluded that "multiple radars would need to be placed on the tower at a rental cost of 250,000 apiece, which does not include operation and maintenance costs to run the radar 24/7 over three years." IG Report at 13-14.

approaches or research methods generally accepted in the scientific community. The failure to provide any of the analysis and information required by section 1502.22 is a fatal flaw in MMS's conclusion that the studies are not likely to produce useful information. MMS should prepare a supplemental EIS which addresses this issue by fully complying with the requirements of 40 C.F.R. § 1502.22.

B. Avoidance of Wind Turbines by Birds

In its EA/FONNSI, MMS acknowledges that it failed to address the issue "of the sensitivity of the models used in the FEIS to small errors" and admits that such information is "relevant to the Proposed Action."[142] The EA/FONNSI also asserts that "currently available technology," which would provide accurate information exists, but it would be "impracticable, cost-prohibitive and unlikely to provide [more] reliable information ... than the studies discussed in the FEIS." Then, citing 40 C.F.R. 1502.22(a), the EA/FONNSI concludes that any the new information (i.e., the sensitivity of the modeling to small errors) would "not result in any significant changes to the conclusions in the FEIS about collision risk to birds."[143] There is no further information provided to support this bald conclusion. Even though the EA/FONNSI cites to 40 C.F.R. § 1502.22(a) as support for its conclusion, there is no attempt whatsoever to comply with the requirements of that regulation. Indeed, if MMS truly believes that section 1502.22(a) applies to this topic, then either the missing information would be supplied, or the requirements of section 1502.22(b) would be fulfilled. Given that the EA/FONNSI contains no summary of existing credible scientific evidence,[144] and no evaluation of impacts based on theoretical approaches or research methods generally accepted in the scientific community,[145] MMS's reliance on 40 C.F.R. 1502.22(a) is misplaced. MMS should delay any decision on the proposed project pending the preparation of a supplemental EIS which fully complies with the requirements of section.1502.22 on this issue.

C. Energy Demand by Birds

MMS cites new information on increased energy demands on birds that may be forced to divert around a wind power facility, but concludes that this new information indicates that energy demands may have been overestimated in the FEIS.[146] This conclusion is based on MMS's premise that "[b]ecause the Proposed Action project site is located more than 5 miles from shore, it is not located between breeding/nesting sites and offshore foraging sites." This assertion is illogical, incompetent and patently incorrect. The FEIS cited at length the applicant's own studies demonstrating that terns, including Roseate Terns, and other waterbird species commute through the project site on a regular basis. In my previous comments, I calculated that terns probably make more than 100,000 transits of the site each year. I also calculated from CWA's radar reports that hundreds of thousands of birds, including terns, transit

---

[142] EA/FONNSI, at 11.

[143] *Id.* at 12.

[144] 40 C.F.R. § 1502.22(b)(3).

[145] *Id.* § 1502.22(b)(4).

[146] Comments of Dr. Ian Nisbet (Mar. 24, 2010). Attachment 42.

the area each month. It is patently ridiculous for MMS to assert in this EA/FONNSI that birds would not pass through the area and hence are not subject to diversion.

D. MOU – MMW/FWS

The EA/FONNSI asserts that the June 4, 2009, FWS/MMS MOU on migratory birds "provides a new programmatic approach that will be applicable to future projects such as the Proposed Action, but does not raise issues, identify impacts or lead to conclusions different from those reached in the FEIS regarding the proposed impact of the Proposed Action on birds or the adequacy of the proposed mitigation and monitoring plan."[147]

The EA/FONNSI discussion of this issue is, in fact, incorrect and self-serving. In fact, the existence of the new "programmatic approach" (Study AT-10-01) under the MOU confirms that additional information on bird impacts is now available, and was available long before the EA/FONNSI was released. Under 40 C.F.R. 1502.22, the information that would be obtained through the MOU approach, an approach that MMS recommends, must be obtained and incorporated into the NEPA review. Rather than have no effect on the process for the record, the MOU therefore confirms that more work must be done before any decision other than lease denial can be issued.

The claim that the bird and bat monitoring plans are sufficient is divorced from the reality of the record. Multiple parties have criticized that plan as inadequate. Nothing has been done to cure these deficiencies. Moreover, even though the EA/FONNSI cites to the IG Report on the MOU, it conveniently ignores the IG Report's critical discussion of that plan.[148] In that Report, FWS confirmed that the Bush Administration's rush to complete the review process for the Proposed Action before the end of its term compromised the monitoring plan.[149] In particular, the FWS noted the serious flaws in the plan caused by the failure to obtain peer review. Because nothing has been done to cure theses defects, the monitoring plan cannot serve as a basis for providing the legally required level of protection to birds and bats.

With respect to the MOU itself, the EA/FONNSI overlooks the deficiencies in that agreement. The MOU purports to implement President Clinton's Executive Order on Migratory Birds, Number 13186. In fact, the MOU falls substantially short of meeting that requirement.

Executive Order (EO) 13186, *Responsibilities of Federal Agencies To Protect Migratory Birds*, was issued by President Clinton to further to purposes of the Migratory Bird Treaty Act[150], and to direct executive departments and agencies to take certain actions to implement the Act.[151] Under the EO, federal agencies are required to enter into a Memorandum of Understanding

---

[147] EA/FONNSI, at 13.

[148] This issue is discussed in greater detail in the Alliance's response to the IG's Report, submitted separately and hereby incorporated by reference.

[149] *See* IG's Report, at 9-17.

[150] 16 U.S.C. §§ 703 *et seq.*

[151] 66 Fed. Reg. 3,853 (Jan. 17, 2001).

(MOU) with the FWS outlining how the agency will promote the conservation of migratory birds. As discussed below, the FWS/MMS MOU fails to meet the standards of the Order.

EO 13186 was signed during the final days of the Clinton Administration. Under the EO, each federal agency taking actions that have, or are likely to have, a measurable negative effect on any migratory bird population, is directed to develop and implement, within 2 years, a MOU with FWS to promote the conservation of those populations. The EO directs agencies to establish protocols for implementation of the MOU and reporting accomplishments, and sets forth a series of specific orders for the agencies to employ, as practicable:

- Integrate bird conservation principles, measures, and practices into agency activities, and minimize to the extent practicable the impacts of agency actions on migratory bird resources;

- Restore and enhance migratory bird habitat;

- Prevent or abate the pollution or harmful alteration of the environment for the purpose of migratory bird protection;

- Design migratory bird habitat population conservation principles, measures, and practices, into agency plans and planning process, and coordinate with other agencies and non-federal partners;

- As possible, ensure that agency plans and actions promote the programs and recommendations of comprehensive migratory bird planning efforts;

- Ensure that environmental analyses of federal actions, such as those required by NEPA, evaluate the effects of agency actions and plans on migratory birds;

- Give FWS notice prior to conducting an action intended to take migratory birds, or report annually to FWS on the number of individuals of each species intentionally taken during any agency action;

- Minimize intentional take of species of concern;

- Within agency authority, control the import, export, and establishment in the wild of species that may harm migratory bird resources;

- Promote the exchange of resources and information related to the conservation of migratory bird resources;

- Provide training and information to appropriate agency employees on methods and means of avoiding or minimizing the take of migratory birds, and conserving and restoring migratory bird habitat;

- Promote migratory bird conservation in international activities;

- Recognize and promote the recreational values of birds; and

- Develop partnerships with non-federal entities to promote bird conservation.

Additionally, the EO outlines agency responsibilities with regard to incidental take, and how those responsibilities should be addressed in the MOU:

> [The agency should] identify where unintentional take reasonably attributable to agency actions is having, or is likely to have, a measurable negative effect on migratory bird populations, focusing first on species of concern, priority habitats, and key risk factors. With respect to those actions so identified, the agency shall develop and use principles, standards, and practices that will lessen the amount of unintentional take, developing any such conservation efforts in cooperation with the Service. These principles, standards, and practices shall be regularly evaluated and revised to ensure that they are effective in lessening the detrimental effect of agency actions on migratory bird populations. The agency also shall inventory and monitor bird habitat and populations within the agency's capabilities and authorities to the extent feasible to facilitate decisions about the need for, and effectiveness of, conservation efforts.

The MOU between FWS and MMS does not come close to meeting these standards. Responsibilities are broken down between mutual obligations, obligations of MMS, and obligations of FWS. Under the MOU, MMS has the responsibility to:

> 3. Expand the current MMS practice of including migratory birds in the scope of environmental review, with emphasis on species of concern. This includes reviewing, identifying, and evaluating the effects of proposed actions on migratory birds, including potential take and degradation of habitat. Consider designing, implementing, and supporting studies to assist in MMS environmental reviews and in planning the MMS studies program, to the extent practicable.
>
> a. Expand the current practice of evaluating reasonable alternatives in environmental reviews to avoid or minimize adverse effects to migratory birds or degradation of their habitats. This includes: 1) identifying information needs related to OCS renewable energy, oil, gas and other mineral development using the established planning and priority setting procedures established under the Environmental Studies Program. The MMS's Environmental Studies Program defines information needs and implements studies where feasible, designed to assess the effects of MMS-approved OCS activities on the human, marine, and coastal environments within MMS jurisdiction; 2)implementing studies to develop practices to avoid or minimize impacts to migratory birds; and 3) implementing studies to determine how to improve evaluation of impacts;

b. Assess and estimate the effects of proposed actions on migratory birds and their habitats, through the project planning process, including the NEPA. Use best available demographic, population, and habitat data in the assessment of effects upon migratory birds. If sufficient data are unavailable, acquire necessary data by working with Federal, State, and other partners (e.g., work with FWS to conduct offshore bird surveys);

c. Engage in early planning and scoping with the FWS to proactively address migratory bird conservation, and initiate appropriate actions to avoid or minimize impacts to migratory birds as a result of a proposed action. When developing the list of species to be considered in the planning process, it should be noted that current lists of species of concern are not necessarily inclusive nor accurate for many offshore birds because of the lack of information on their populations, distribution, and trends;

d. Inventory and monitor migratory birds and their habitat within the agency's capabilities and authorities to better understand the need for, and effectiveness of, conservation efforts tied to projects under the MMS authority;

e. Maintain and enhance efforts to prevent or abate the pollution and degradation of migratory bird habitats directly or indirectly resulting from MMS-regulated activities by including appropriate stipulations to leases, conditions on approvals, and compliance monitoring;

* * *

5. Identify, in coordination with the FWS, MMS-issued OCS leases and other areas for support facilities that have the potential to adversely affect migratory bird populations (range-wide or important regional/local populations), including breeding, migration, or wintering habitats. The MMS shall develop and implement, in cooperation with the FWS, reasonable and feasible conservation measures that would avoid or minimize adverse impacts to migratory birds or enhance the quality of habitat used by migratory birds.

a. With respect to those actions so identified to potentially have adverse effects on migratory bird populations (as described above), the MMS shall provide for sequential mitigation, as defined by 40 C.F.R. § 1508.20 and in accordance with Service Mitigation Policy (46 FR 7644). This may include an applicant or lessee establishing funds or other off-site mitigation for conservation to compensate adverse impacts to migratory birds through habitat restoration or enhancement. However, the appropriateness and practicality of

implementing any specific conservation measure will be determined on a case-by-case basis.

b. The effectiveness of measures considered necessary to minimize impacts to migratory birds will be monitored and reviewed on a regular basis. The MMS will incorporate new information regarding their efficacy and consider the need for modifications or additions to the measures. The MMS will seek the cooperation of the FWS in evaluating their effectiveness.

This list of actions does not measure up to the EO. Most important, while the MOU contains basic language regarding the incidental take of migratory birds, it falls well short of what is required. The EO requires agencies to, with respect to actions resulting in incidental take, "develop and use principles, standards, and practices that will lessen the amount of unintentional take." The MMS MOU offers a significant number of proposed studies, future coordination efforts, and other suggestions. However, it fails to offer a single concrete suggestion for the minimization of incidental take that agency project managers can use to apply to proposals. The MMS MOU does not develop or call for the use of a single principle, standard, or practice meant to address incidental take, and thus fails to properly implement the EO. It certainly fails to address enforcement. These deficiencies in the MOU, as they relate to violations of law that will result if the CWA project is granted a lease, are discussed in the 60-day letter that the Alliance has joined other groups in signing.[152]

Finally, the EA/FONNSI, the MOU, and the IG's Report beg the question of how MMS can take any action, other than lease denial, given the significant number of protected migratory birds that are likely to be taken illegally. This issue has been addressed in detail in the record. It is also summarized in the 60-day notice of intent to sue. Indeed, the FWS Deputy Division Chief for the Division of Migrating Bird Management concedes this point in the IG's Report, where he states that FWS could not legally provide such a release of liability to an agency because there is currently no regulatory framework in place that would allow FWS to "exempt" an agency from provisions of the MBTA.[153] As noted in the 60-day letter, MMS is not only violating the MBTA by failing to address the migratory bird incidental take problem, the issuance of a lease would violate the Administrative Procedure Act as well, a cause of action that can be brought by third parties.

In addition to its "drop back and punt" approach to incidental take, the MOU fails to address other important aspects of the Clinton EO. For example, the EO requires agencies pursuant to their individual MOUs to "restore and enhance the habitat of migratory birds" as practicable. Echoing the same failure to meaningfully address incidental take, the MOU merely provides that MMS and FWS collaborate at some unknown time to identify "best practices" for conserving and restoring bird habitats. And the only provision in the MOU arguably applicable to the EO's habitat obligations is equally weak: MMS promises to develop and implement "conservation measures" to "enhance the quality of habitat used by migratory birds." However,

---

[152] Attachments 27, 28, and 30.

[153] IG Report, at 20.

a careful reading reveals several flaws that underscore the MOU's overall non-compliance with the EO. First, MMS inappropriately restricts its "habitat restoration and enhancement" obligations under the EO by waiting until FWS is available to "collaborate." Second, the MOU fails to mention "restoration" at all for any resulting conservation measures. And third, even if such measures are developed, their implementation will be on a "case-by-case" basis. In sum, the MOU fails to provide any specific measures to comply with the EO, and even those that arguably touch upon its mandates are limited to unenforceable, ineffective, and illusory promises of migratory bird conservation. To say the MOU represents a "programmatic approach" to addressing impacts to migratory birds and their habitats is misleading and disingenuous.

E. The Failure to Require Project Shutdown to Protect Birds Is Based On Insufficient and Outdated Information

As discussed in detail in the record, MMS unlawfully dictated that FWS remove from the incidental take statement in its biological opinion the requirement for project shutdown during limited periods. It did so by accepting, without independent analysis, the applicant's superficial and qualitative assertion that to do so would impede or prevent CWA from obtaining financing. The unlawful action is addressed in a 60-day notice of intent to sue under the Endangered Species Act. In addition, the enclosed new information technical report from Dr. Jonathan Lesser exposes the fallacy of the applicant's argument and MMS's willingness to accept it. This new information requires NEPA review and the establishment of the shutdown requirements. The EA/FONNSI is completely silent on this issue, and thus the record remains deficient on this critically important requirement for protecting birds.

VI. Marine Mammals

The EA/FONNSI compounds the deficiencies in the FEIS in discussing the impact of the energy plant on marine mammals and other marine species.

As previously discussed in APNS comments, a lease cannot be issued until after the Marine Mammal Protection Act (MMPA) incidental take authorizations MMS concedes are necessary have been issued. The courts have confirmed that, when it is known that marine mammals will be taken by an action seeking federal approval, the underlying action cannot be approved until the MMPA take authorizations have been issued.[154] The form or level of take is irrelevant.

For the Proposed Action, MMS appears to take the position that the lease is all-encompassing and that no further authorizations are required (contrary to the shared approach dictated by the OCS renewable energy regulations) before the lease is issued. In this regard, the Proposed Action is very different than the approach used for oil and gas activities that result in incidental take of marine mammals, where separate requirements for approval of activities occur at the seismic, exploration and development stages. Each of those discrete approval steps is associated with separate marine mammal and ESA take authorizations. Because MMS asserts that the act of lease issuance is a sufficient basis for the applicant to proceed without further

---

[154] *Kokechik Fishermen's Ass'n v. Secretary of Commerce*, 839 F. 2d 795, 802 (D.C. Cir. 1988), *cert. denied sub nom., Verity v. Center for Envt'l Educ.*, 488 U.S. 1004 (1989).

government approval, the EA/FONNSI is legally incorrect in asserting that all that is necessary is that "a copy of the MMPA authorizations must be provided to MMS prior to commencement of any activities allowed under any MMS-issued lease..."[155] Until the applicant applies for and obtains a MMPA incidental take authorization, no lease can be issued.

In addition to this significant legal problem, the EA/FONNSI (and, by extension the FEIS and the NMFS biological opinion (BiOp)) are insufficient and flawed for their failure to consider relevant information and properly analyze impacts. Significant additional deficiencies in this regard are as follows:

A. Failure to adequately address exposure to risk of vessel collisions

The EA/FONNSI, and the NMFS BiOp, make the same mistake of asserting that "in general, right whales can be anticipated to be in Massachusetts waters from December through July"[156] This is an old characterization, and it is not based on the best available information. There are passive acoustic monitoring buoys in Cape Cod Bay, Stellwagen Bank and the Great South Channel that have recorded right whales year round.[157] These buoys are operated by Cornell University and are government funded. There is no monitoring south of Cape Cod (though there was some done in Long Island Sound). But right whales can be found here year round.

Both construction and work/maintenance vessels will be coming from Quonset Point RI, and the BiOp and MMS NEPA analysis state that "as explained throughout this document, whales are not expected to occur in the project footprint or along the cable route." If, however, vessels are coming from Quonset Point, they must cross the entrance to Buzzards Bay, and the record does not address the multiple sightings of right whales transiting the Cape Cod Canal (which can only be done by entering Buzzards Bay). Instead, MMS (and NMFS) mistakenly focus their analyses of sightings/exposure on the project site in the Sound (the "footprint").

The following reports have not been considered. First, the NMFS Sightings Advisory System (SAS) reports that in 2004, opportunistic sightings in Nantucket Sound; 2005 opportunistic sighting up against the inside of the Island of Nantucket; and 2006 opportunistic sightings along/near Rhode Island Route.[158],[159]

The NE Aquarium also states that there are sightings of whales in the Canal (including a mother /calf pair in 2005.[160] This is also cited in a "response to comments" section on the Mirant Power Plant in the Canal.[161] This report states that the Center for Coastal Studies

---

[155] EA/FONNSI, at 13-14.

[156] BiOp, at 71.

[157] <http://www.listenforwhales.org/netcommunity/Page.aspx?pid=430>.

[158] <http://rwhalesightings.nefsc.noaa.gov/>.

[159] *See also* <http://www.capecodonline.com/apps/pbcs.dll/article?AID=/20081204/NEWS/812040315/-1/rss01>.

[160] <http://adoptrightwhales.blogspot.com/2009/02/why-are-whales-missing.html>.

[161] *See* <http://www.epa.gov/ne/npdes/mirantcanal/pdfs/Canal-RTC-SectionXIII.pdf>.

estimates that the whales enter the Canal "once every few years." This section of the Mirant report also mentions other whale species.

The NMFS surveys for the sightings advisory system (SAS) do not go into the Sound and do not look at Buzzards Bay either. Further, the survey flights for the SAS only operate January – June, so no winter sightings (including that on 12/08 in the Canal) would be in the "official" NMFS reports. And the fact that there are no systematic surveys (and that there are opportunistic sightings) supports the position that reporting activities have not been adequate. The EA/FONNSI and BiOp also fail to consider the Dynamic Management Maps that are also available on the NMFS SAS website, and that include a few dynamic management areas that extend into the Sound. Indeed, in March of this year, NMFS designated a right whale dynamic management area for the Sound itself, and important indication of the potential presence of critically endangered right whales in Nantucket Sound.

The BiOp states that "as no whales are expected to occur along the routes where project vessels will transit or in the project footprint where construction and maintenance vessels will occur, increase in vessel traffic attributable to the proposed project will not increase the likelihood of a whale being struck by a vessel. As no whales are likely to occur where project vessels will be operating, NMFS has determined that the likelihood of an interaction between a project vessel and a whale is discountable."[162] Considering that neither NMFS nor MMS have thoroughly evaluated the sightings in the area from Quonset RI to Nantucket Sound (i.e., there is no discussion of non-systematic sightings and they have not tried acoustic monitoring), it seems premature to decide there is no likely increase in exposure to (and risk from vessels).

In addition, crew vessels will be running at 21 knots, which is faster than the 10 kts that NMFS recommends in areas of risk. Though they will have posted lookouts, these vessels may not be adequate to sight whales or turtles. For example, a Stellwagen Bank Sanctuary research vessel, of a similar design to a standard crew vessel and with more than one posted lookout, hit and seriously injured a right whale in 2009. Thus, the proposed mitigation plan is not adequate, particularly since speeds are supposed to be lower near Buzzards Bay in the spring and <60 foot crew vessels (like both the project's crew vessels and the Sanctuary vessel) are exempted from complying with these speed restrictions.

B. Noise Effects and Right Whales

The BiOp and EA/FONNSI purport to address sound levels. The BiOp, for example, states that noise will be over the 160dB threshold out to 3.4 miles. It also states that "the nearest whale sighting was approximately 18 km from the project site." But there is no citation provided for this conclusion and it appears, from the discussion provided above, to be wrong. Further, the noise will be audible at distances greater than 3.4 km (though at sound levels less than 160 dB) and these lower sound levels might still be enough to make whales want to re-route their travels to avoid continual noise even if the noise is not at a "startle" level of 160 dB. For example, bowheads have "deflected" their migrations at noise levels during seismic exploration that are below 160 dB and may begin to "deflect" at distances "on the order of 35km."[163] If right whales

---

[162] BiOp, at 82.

[163] *See* response to question 6, <http://www.nmfs.noaa.gov/pr/pdfs/permits/shell_openwater_iha_addendum1.pdf>.

move further offshore to avoid inshore noise in the Sound, they may be placed at greater risk of encountering ships or fishing activity that are documented to be further offshore. That may increase their risk and the possible negative impact of displacement of migration further offshore is not discussed. Neither the BiOp nor the EA/FONNSI address this important issue.

C. Other ESA-listed Whales

Other species have been through the Canal as well (thus going thru Buzzards Bay), including humpback whales.[164] The NMFS sightings database is biased against other species, thus surveys are for detecting right whales and do not generally include other species. NMFS survey effort is directed to determining where right whales are during the "high use" time and then directing dynamic management efforts (e.g., slowing ships) for any areas with aggregations of right whales. The presence of other endangered whales in the Sound is well documented, however, and neither the BiOp nor the EA/FONNSI account for this information.[165]

D. Sea Turtles

The EA/FONNSI and the BiOp need to be revised to reflect the recent proposal to uplist loggerhead turtles to endangered from threatened. Like right whales, this critically endangered species requires maximum protection. The EA/FONNSI, and the NMFS BiOp, fail to provide this level of protection, and do not even include the necessary information. In addition to the need for revision due to the proposed uplisting, it is insufficient to rely on 10-year old data on leatherback entanglement. Moreover, as noted previously, lookouts are not adequate to guard against collisions when boats are traveling as fast as 21 knots.

VII. Competing Uses in the Vicinity of the Proposed Action

A. Navigation Features

The EA/FONNSI improperly concluded that the information provided by the USCG and discussed in the IG Report is consistent with the analysis of navigation impacts in the FEIS; therefore, the information is not deemed significant and will not change or add to the discussion of environmental effects in the FEIS.[166] In fact, the drafters of the EA/FONNSI must not have

---

[164] *See* <http://www.epa.gov/ne/npdes/mirantcanal/pdfs/Canal-RTC-SectionXIII.pdf>.

[165] *See* <http://www.mvgazette.com/article.php?23128>; and <http://www.ccchfa.org/programs/documents/2009BOATERSGUIDEwebfinal.pdf>.

[166] The FEIS includes a "Report on the Effect of Radar Performance of the Proposed Cape Wind Project" and an "Advanced Copy of Findings and Mitigation" from USCG, *see* Appendix M, which concludes that the Proposed Action could result in moderate impacts on navigation safety, due to radar interference resulting from the proposed installation of WTGs. The study, commissioned by the USCG, documents the challenges for radar observers: USCG confirmed that it will be more difficult - though not unreasonably so - for vessels to distinguish targets within the wind farm. The radar study also points out that radar interference decreases with decreasing distance to the radar; in other words, the objects that a vessel operator would be most concerned with - those closest to his location - show up clearly on radar, while those objects further away and therefore of lesser concern are intermittently distorted. While there is disagreement over the severity of the interference, the radar study discussed in the FEIS concludes that interference is unavoidable, it is moderate, and it can be managed with prudent operation of any vessel in accordance with the collision regulations.

read the IG's analysis of the USCG process; it provides a devastating analysis of a process that ignored established rules for public safety, departed dramatically from past USCG practice, and fundamentally misconstrued the law. MMS can in no way rely on such a flawed USCG process.

While the EA/FONNSI confirms that the Proposed Project would cause radar interference for marine navigation, it incorrectly dismisses this as unavoidable and states that it can be managed with prudent vessel operation. It also mistakenly places the burden on marine users rather than on the developer through possible avoidance by relocation of the project to an alternative site. As has been stated by numerous marine stakeholders and is confirmed by the APNS correspondence with the USCG, the intent of section 414 was not to place the burden on mariners, but rather to impose terms and conditions for the wind energy facility operator. For example, a Passenger Vessel Association (PVA) 12-3-08 memo on the legislative history of section 414 of Public Law 109-214 states, "By enacting section 414, congress clearly expected the Coast Guard to mandate terms and conditions that will provide for safe navigational use. Section 414 does not require, anticipate, or allow a balancing act between navigational safety and project development." The PVA memo goes on to state that "the Coast Guard's mandate is to protect navigational uses, not allow project development at the expense of mariners." It concludes by stating that "the reasonable terms and conditions are to be imposed on and adhered to by the operator of the wind energy facility. Section 414 does not contemplate impositions on or requirements for the operators of ferries and other vessels." Thus, the conclusion that the risks posed to mariners from the proposed project could be managed with prudent vessel operation mistakes the Coast Guard's obligations.

Moreover, the new information on which the EA/FONNSI relies – that is, the information addressed in the IG's report and provided by the USCG – is inaccurate. The IG Report addressed complaints that MMS failed to adequately address impacts on navigation safety and was prepared to approve the Proposed Action prior to receipt of the USCG's terms and conditions to mitigate these impacts. On June 24, 2009, months after the release of the FEIS, the USCG officially informed MMS that the Proposed Action will: 1) have a moderate impact on navigation safety, but sufficient mitigation measures are available to reduce risk to an acceptable level; and 2) have negligible impacts to Coast Guard missions, and may in some circumstances facilitate the success of certain missions. These two conclusions are based on a flawed simulation and analysis, in that the traffic levels considered in the Coast Guard's model do not match the daily vessel population and activity in, and adjacent to, the footprint of the Proposed Action. In fact, based on review by radar experts, the probable effects on navigation radar are that the Proposed Action will increase the risk of collision for users of Nantucket Sound. There are no "significant mitigation measures" that will reduce risk to an acceptable level.

Furthermore, the EA/FONNSI fails to correct the IG report's complaints that MMS failed to adequately address impacts on navigation safety. The cover letter for the IG report clearly states that the concerns of all of the major transportation interests in the area of the proposed project have not been addressed. Her January 29, 2010, letter to Secretary Salazar confirms "that several transportation entities located in the CWA Project area, including all three local airports and the two major ferry operators, feel their concerns and comments about the impact of the project to the navigational safety of the area were not adequately considered by MMS." A supplemental EIS is necessary to address these complaints for entities transporting over 3 million

passengers per year through Nantucket Sound and operating 400,000 flights per year carrying millions of passengers over the Sound.

Finally, even if the approach adopted by MMS and the USCG were appropriate, the conclusions in the EA/FONNSI are inconsistent. The EA/FONNSI states that the USCG's final assessment determined that no specific mitigation measures are required beyond the terms and conditions submitted to MMS for the FEIS. However, in the absence of specific mitigation measures, there is no means of ensuring navigational safety and no opportunity for public review of these mitigation measures before they are put in place. Indeed, potential measures identified include: the creation of a specially marked channel through the turbine array, creation of routing measures such as the two-way route currently in use in Buzzards Bay, and/or creation of a Regulated Navigation Area to govern or manage vessel activity. The FEIS does not take into account the environmental impacts associated with these reasonably foreseeable measures. "Specially marked channels" and prescribed routing could alter historic ferry routes with the likelihood of increasing transit time, fuel use, and crew costs.[167] In the absence of project denial or relocation to a better site such as STI – which has the support of marine navigation interests including the ferry operators, commercial fishing organizations, and local marinas - it is the responsibility of MMS to ensure that mitigation measures are specified and evaluated for their environmental impacts.

B. Airport Facilities – FAA Hazard Determination

On February 13, 2009, the Federal Aviation Administration (FAA) issued a "Presumed Hazard Determination" (PHD) for the Proposed Action. The PHD determined that the Proposed Action creates a hazard to air navigation. FAA is in the process of conducting aeronautical studies to determine if the Proposed Action can be changed in order to eliminate the air hazard it currently poses. The EA/FONNSI acknowledges that the information concerning possible hazards to air navigation is relevant to the analysis of adverse effects to the human environment.[168] The EA/FONNSI also notes that the FAA is in the process of completing its study of the issues. However, despite acknowledging that the information that is relevant to the analysis of adverse environmental effects is missing, and that the information is obtainable (the EA/FONNSI admits that the FAA is currently in the process of conducting a study of adverse effects to air navigation and that it will be completed soon), the EA/FONNSI concludes that the information is not needed because "CWA could not begin construction under the proposed action until CEA's receipt of the FAA's final determination on whether a hazard exists and compliance with any resulting mitigation measures."

The EA/FONNSI's conclusion on the need to consider the information being developed by the FAA relating to adverse environmental impacts violates the primary premise of 40 C.F.R. 1502.22, i.e., if the information is "essential to a reasoned choice among alternatives, and the overall costs of obtaining it are not exorbitant, the agency **shall** include the information in the

---

[167] Of course, none of the above deals with the "taking" of 25 square miles of productive fishing grounds by making the area inaccessible to mobile gear fishermen.

[168] EA/FONNSI, at 18.

environmental impact statement."[169] Here, the MMS simply chooses to ignore the information based on an erroneous theory that by preventing any construction of the approved project until the results of the FAA study are factored into the final design of the project, MMS has somehow satisfied all requirements of NEPA, apparently including compliance with 40 C.F.R. 1502.22. However, the clear absence of finalized information on impacts to air navigation, and the express acknowledgement that the missing information is in the process of being developed by the FAA creates a prima facie example of the applicability of 40 C.F.R. 1502.22 to an agency's NEPA obligations. The only legally defensible course of action by the MMS in light of the clear lack of final information relating to hazards to air navigation resulting from the project is to wait the brief period of time until the FAA completes its study. Once FAA issues its final determination, MMS must then either deny the project if a final hazard determination is made, or prepare a supplemental EIS which addresses the impacts determined by the FAA study, together with any changes to the applicant's proposed project required mitigation measures developed by the FAA to avoid the creation of a hazard to air navigation.

The EA/FONNSI also misstates the information that was available to MMS at the time of the release of the FEIS. The EA/FONNSI states that at the time of publication of the FEIS, the FAA had not issued its final determination and therefore, there were no conclusive statements in the FEIS concerning impacts to aviation safety. This is false as a PHD had been issued. Furthermore the FEIS completely misrepresented the aviation safety issue by classifying impacts to aviation safety as minor to negligible and by including obsolete FAA information.

The FAA had provided its PHD to MMS prior to publication of the FEIS. Not only was the PHD ignored in the FEIS, an obsolete, no hazard determination was included. The IG Report states "it should be noted that MMS did include FAA's previous findings that the project would: 'have no substantial adverse effect on the safe and efficient utilization of the navigable airspace by aircraft or on the operation of air navigation facilities' in the final EIS that was published on January 16, 2009."

The FAA PHD was issued on February 13, 2009. The IG Report states that the FAA notified MMS of the PHD by phone on January 14th and by email on January 15th. Although the FEIS had already been delivered to EPA at this time, MMS stated in an interview in the IG Report that the EIS could be held back from publication in the Federal Register scheduled for January 16, 2009, and that after release of the FEIS, MMS could issue a supplemental EIS. Neither of these actions was taken despite a finding of radar interference to air traffic control and the resulting issuance of an actual PHD by the FAA. The IG report agent noted "the final ES was published in the Federal Register on January 16, 2009 without any indication that the FAA would be issuing a presumed Hazard Determination for the project."[170]

In addition to its failure to comply with 40 C.F.R. § 1502.22 in considering possible impacts to air navigation caused by the project, the MMS's conclusion that it need not wait for the results of the FAA's study of hazards to air navigation, and possible mitigation measures designed to eliminate the hazard, presents a fatal flaw in its NEPA analysis. The EA/FONNSI is

---

[169] 40 C.F.R. 1502.22(a)(emphasis added).

[170] IG Report, at 31.

remarkably candid in admitting that information about adverse impacts from the Proposed Action "to the safe and efficient use of navigable airspace by aircraft and on the operation of air navigation facilities" is relevant to MMS's decision on the proposed project.[171] The MMS is equally candid in disclosing that it has no expertise in assessing possible impacts on air navigation and must rely on the FAA to assess that issue.[172] However, in the EA/FONNSI, MMS states that no supplemental EIS is needed to consider the final results of FAA's assessment of impacts on air navigation because the FAA's hazard determination is "a presumption to preserve the status quo." This "presumption to preserve the status quo" leads MMS to conclude that none of the FAA's factual findings and determinations need to be disclosed as part of an EIS for the proposed project. As outlined below, MMS's fractured definition of preservation of status quo under NEPA, and its consistent refusal to consider impacts to air navigation based on a misplaced reliance on the FAA to consider environmental impacts of the proposed project caused by changes in air navigation patterns present two fatal flaws that can only be eliminated through a supplemental EIS after the FAA finalizes its air hazard analysis and determination.

1. The Status Quo is Only Preserved by Delaying any Decision on the CWA Application Until FAA Issues its Final Air Hazard Determination and MMS Publishes a Supplemental EIS Addressing the FAA's Determination

A foundational requirement of NEPA is that agencies should take no action to approve or undertake a proposed project until all reasonably foreseeable environmental impacts have been considered in an EIS or EA. Until all facts that are relevant to the analysis of environmental impacts are known, an agency may not proceed to a final decision. Under NEPA the "status quo" to be preserved in the absence of all relevant facts is no final agency action on a proposed project. Thus, the "status quo" for the Proposed Action is no action by MMS on the application. However, as indicated in the EA/FONNSI, MMS clearly intends to take final action on the Proposed Action, even though it has acknowledged that it will take that action without all of the relevant facts about hazards to air navigation and possible mitigation measures needed to eliminate hazards. The EA/FONNSI claims that the status quo is preserved because the applicant may not undertake construction until FAA has completed air hazard navigation process and has made mitigation recommendations. The only valid means to preserve the "status quo" under NEPA, when relevant facts remain unknown, is not to take final action on the Proposed Action.

In addition, the EA/FONNSI concludes that no supplemental EIS is necessary based on the mistaken belief that the "determination is a presumption serving to preserve the status quo until FAA completes their study" and thus, "the new information cannot be characterized as significant." This is wholly incorrect according to the IG Report. While the public notice issued on April 25, 2007, was a default finding while aeronautical studies were underway, the actual PHD issued on February 13, 2009, was the result of FAA review culminating in an actual finding of physical or electromagnetic interference. It is not a presumption; nor is the FAA conclusion insignificant. The February 13, 2009, PHD stated that the FAA found that each of the 130 structures "exceed obstruction standards and/or would have an adverse physical or

---

[171] EA/FONNSI, at 17.

[172] *See* IG Report, at 29.

electromagnetic effect upon navigable airspace or air navigation facilities." This new information alone requires a supplemental EIS.

2. Impacts to Safe Navigation of Airspace Determined by the FAA's Final Air Space Hazard Determination Must be Considered in a Supplemental EIS.

The need to delay a final decision pending a full analysis of FAA's final hazard determination (including mitigation measures required by that determination) in an EIS is bolstered by the fact that FAA does not subject its final air hazard determinations to any form of NEPA analysis. Yet, as MMS acknowledges, FAA's final air hazard determination may require CWA to change the footprint or height of the project in order to mitigate hazards to air navigation. The possible environmental impacts caused by changes to the physical layout and specifications of the project must be analyzed in a supplemental EIS before MMS makes a final determination. The possible mitigation measures may result in substantial changes to the project. For example, to reduce radar clutter, the FAA may require that the height of the turbines be reduced. To improve safety under visual flight rules, the FAA may require that turbine-free flight corridors be established within the footprint of the project in order to ensure that aircraft can safely operate between the airports in the vicinity of the project. Any of these changes to the project configuration would require additional analysis of environmental impacts of the reconfigured project, and that analysis must be factored into any final decision on the application.[173]

Another problem with the EA/FONNSI is that it is biased toward an ultimate determination of no hazard by the FAA. The EA/FONNSI states that if "the FAA concludes a hazard exists, it would then, if possible develop mitigation measures to reduce or eliminate such a hazard." It also states "the FAA will complete its study and if, required, develop mitigation measures if a hazard is found." These statements ignore the distinct option that no effective mitigation measures will be available and that the FAA will issue a final hazard determination on some or all of the proposed turbines. This scenario is totally lacking from the discussion in the EA/FONNSI.

MMS must delay taking any final action on the Proposed Action until the FAA's final air hazard determination is issued, and mitigation measures required by that determination are analyzed in a supplemental EIS.

---

[173] As noted earlier in Section II. A. of these comments, the applicant recently announced that it has entered into a contract for the purchase of wind turbines to be used for the project. Because the height, shape and profile of the contracts that have been purchased by the applicant differ substantially from the turbines described in the EIS, not only must a supplemental EIS be prepared that addressed the possible changes in environmental impacts caused by these new turbines, but the FAA must prepare a new air hazard determination based on the specifications of the new turbines. Because the FAA's current study assumes a height of 440 feet for the turbines, any increase in the height of the turbines caused by an increased length of the turbine rotors must be considered in determining whether the new turbines pose a hazard to air navigation.

3. By Issuing a Final Determination in Advance of Analysis of FAA's Final Air Hazard Determination, MMS Will be Violating its Own Regulation Governing the Consideration of Safety in Granting Applications for Off-Shore Energy Production Facilities

An integral part of MMS's responsibilities in issuing off-shore renewable energy leases is to ensure that the project is carried out in a manner that provides for safety.[174] MMS, before granting a lease, requires the operator to submit plans demonstrating that its facility does not compromise public safety, and that it conforms to all applicable laws, regulations and requirements. FAA's air hazard determination is a crucial element of the safety assessment of any off-shore wind turbine facility. Until the FAA completes its air hazard determination process, and the applicant can demonstrate that it has complied with all air hazard mitigation measures developed by the FAA, the MMS cannot make a final determination on the applicant's project. Given MMS's acknowledgement that it has no expertise in air safety, and that it relies on the judgment of the FAA in determining whether the project poses air safety issues,[175] MMS cannot proceed to a final determination until it receives a final air hazard determination from the FAA and obtains adequate assurances from the applicant that all of FAA's mitigation measures are incorporated into the design of the project and will function as designed by the FAA.

C. The Failure of the EIS to Consider Coastal and Marine Spatial Planning and to Take Consensus-Based Approach Violates General Guidance and Regulatory Requirements

The EA/FONNSI states that because the Interim Framework states that coastal and marine spatial planning is not meant to delay or halt existing or pending plans and projects, no additional analysis is needed to address and evaluate marine spatial planning specifically.

Any decision to approve the Proposed Action prior to completing at least an informal plan for ocean zoning and the shared use of ocean resources is premature. Regardless of whether the Interim Framework requires individual projects to be deferred or not, there is substantial authority necessitating some review of the issue in the EIS. Both the Pew Oceans Commission (in 2003) and U.S. Commission on Ocean Policy (in 2004) strongly recommended the development of coastal and marine spatial planning and consensus-based management. DOI's NEPA regulations, finalized on October 2008, before the release of the FEIS, calls for comprehensive consultations and consensus-based management approach to project planning and development. MMS's Alternative Energy regulations, finalized in July 2008, call for the same. The recent Presidential directive issued in June 2009 by President Obama, which mandates the development and implementation of a national system of coastal and marine spatial planning, simply re-emphasizes the need for consideration of these important issues, before federal decision-making takes place. Despite these clear directives, and regulatory requirements, MMS

---

[174] 30 C.F.R.§ 285.102(a)(1).

[175] IG Report, at 29.

has chosen to ignore these issues, as if the Proposed Action falls entirely outside of MMS's otherwise applicable regulatory requirements.[176]

APNS has consistently recommended that the Corps first, and then MMS employ a consensus-based management process under a comprehensive ocean policy. When all of the competing uses and values of Nantucket Sound are considered and all stakeholders heard, APNS has long argued that the conclusion would be that Horseshoe Shoal is not an appropriate location for the Proposed Action. In a January 22, 2009, letter to Secretary Salazar, APNS again asked that the Administration *first* establish a comprehensive offshore ocean policy and renewable energy program *before* considering individual projects. Almost seven years earlier (July 25, 2002), APNS provided written testimony to the House Resources Committee, commenting on the need for legislation to authorize offshore renewable energy development, and a marine spatial planning program to be developed and applied prior to any decision on the Proposed Action. APNS noted that any areas for development must be "balanced against other factors that would include competing resources and economic values in the area, the nature of federal or state protection of marine resources in the area, the opinions of the adjacent state and local governments, and other factors. Such a process is intended ultimately to make available for development areas that have high potential for energy production, but present few conflicts for enabling development to occur."

As noted in the January 22, 2009, letter as well as a November 9, 2005 letter sent to former Secretary Norton by over 20 national and local environmental groups, this principle finds its basis in the statement and recommendations of independent policy organizations. In 2003, the Pew Oceans Commission issued a report stating that "Congress and the President should begin by enacting a National Ocean Policy Act, significantly adjusting our nation's attitude toward the sea and establishing the standards and expectations necessary to achieve healthy, productive, and resilient marine ecosystems." The following year, the U.S. Commission on Ocean Policy echoed this theme: "A comprehensive offshore management regime is needed that enables us to realize the ocean's potential while safeguarding human and ecosystem health, minimizing conflicts among users, and fulfilling the government's obligation to manage the sea in a way that maximizes long-term benefits for all the nation's citizens." In 2005, over 200 leading marine scientists issued a *Scientific Consensus Statement on Marine Ecosystem-Based Management*, which stated: "The current state of the oceans requires immediate action and attention. Solutions based on the integrated ecosystem approach hold the greatest promise for delivering desired results."

The approach advocated by the two ocean reports was strengthened by the second source of authority – the recent Presidential directive on Ocean Policy calls for the development of a national ocean policy and coastal and marine spatial planning process. On June 12, 2009, President Obama released a directive on Ocean Policy. The directive established an Interagency Ocean Policy Task Force (Task Force), led by the Council on Environmental Quality (CEQ). The Task Force was charged with developing a recommendation for a national ocean policy ensuring the protection, maintenance, and restoration of oceans, coasts, and the Great Lakes. It has also been tasked with recommending a framework for improved stewardship and effective

---

[176] *See* EA/FONNSI, at 18 (stating that "the FEIS did not discuss and evaluate marine spatial planning specifically . . .").

coastal and marine spatial planning (CMSP). On September 10, 2009, the Task Force released an *Interim Report*, which contained recommendations and a brief overview of the suggested national ocean policy, policy coordination framework, and implementation strategy.

Under the directive, the Task Force issued the *Interim Framework for Effective Coastal and Marine Spatial Planning* on December 14, 2009. The *Interim Framework* recommends consideration of a new approach to planning and managing uses and activities in the coastal and marine environment. Under the *Interim Framework*, CMSP is envisioned as a regional process, developed cooperatively among federal, state, tribal, and local authorities, regional governance structures, and with significant stakeholder and public input. "In practical terms, CMSP provides a public policy process for society to better determine how the ocean, coasts, and Great Lakes are sustainably used and protected now and for future generations."[177]

As the EA/FONNSI notes, the framework "recommends consideration of a new approach to planning and managing uses and activities in the coastal and marine environment," including the development of regional CMSP involving cooperative development between Federal, state, tribal, and local authorities, regional governance structures, stakeholders, and the public.[178] The EA/FONNSI also states that "the FEIS did not discuss and evaluate marine spatial planning specifically," but excuses this omission because "the language in the Interim Framework itself states that [CMSP] is not meant to delay or halt existing or pending plans and projects such as the Proposed Action."[179]

CMSP has not yet been finalized, but the consensus-based approach it promotes is required under current law. Included with these comments are the numerous requests to MMS to be involved in this process, all of which have been ignored or rejected.[180] While MMS is correct in noting that the Task Force does not intend any projects to be held back until the CMSP Framework process has been completed, the agency improperly limits the consideration that it must give to the conservation objectives and policy goals identified by the Task Force thus far. As discussed above, the primary purpose of CMSP is not to provide a regulatory framework, but rather a process for input from different levels of government, tribes, stakeholders, and the public, in an effort to reach meaningful and appropriate consensus-based decisions.

APNS has continued to raise the issue of the development of a national ocean policy in the context of consensus-based management. On February 10, 2009, APNS sent a letter to Secretary Salazar praising the Secretary's comments in a press conference regarding a comprehensive energy plan for the OCS and requesting that "MMS be directed to take the necessary steps to place the CWA project on a track for full review *after* the implementation of your comprehensive OCS plan." This same theme has been echoed in comments submitted on July 21, 2009, to the Task Force, as well as written testimony submitted on November 4, 2009, to the U.S. Senate Subcommittee on Oceans, Atmosphere, Fisheries and Coast Guard in response to a hearing entitled *Future of Ocean Governance: Building Our National Ocean Policy.* As

---

[177] *Interim Framework* at 1.

[178] EA/FONNSI, at 18.

[179] *Id.*

[180] Attachments 1, 2, 13, 16, and 18.

recently as February 23, 2010, APNS submitted a letter to Undersecretary Hayes regarding a proposed consensus resolution for the dispute over the siting of the CWA project, noting again that the Obama Administration's proposal for marine spatial planning provides a process for avoiding the dispute caused by the current proposal.

Additionally, the goal of wide-ranging collaboration and participation at the core of CMSP has been captured, and is required under the DOI NEPA regulations at 43 C.F.R. § 46.110. The DOI NEPA regulations at 43 C.F.R. Part 46 were finalized on October 15, 2008.[181] The rule codifies the concept of consensus-based management, and requires the incorporation of "direct community involvement in consideration of bureau activities subject to NEPA analyses, from initial scoping to implementation of the bureau decision."[182] It "seeks to achieve agreement from diverse interests on the goals of, purposes of, and needs for bureau plans and activities, as well as the methods anticipated to carry out those plans and activities...In incorporating consensus-based management in the NEPA process, bureaus should consider any consensus-based alternative(s) put forth by those participating persons, organizations or communities who may be interested in or affected by the proposed action.... The Responsible Official must, whenever practicable, use a consensus-based management approach to the NEPA process."[183]

Finally, the idea of collaboration and consultation is firmly entrenched in the July 9, 2008, MMS regulations at 30 C.F.R. Part 285 governing the development of offshore alternative energy under section 8(p) of the Outer Continental Shelf Lands Act.[184] The regulations at section 285.203 direct MMS to coordinate with relevant federal agencies, state governors, local officials and tribal representatives that may be affected by renewable energy leases. Under the basic objectives of the regulations at section 285.102(e), MMS may invite those parties to participate in a joint task force or joint planning or coordination agreement to better facilitate widespread participation and collaboration. Project proponents are also urged to conduct preliminary outreach early in the project process by contacting interested and affected parties and stakeholders in order to promote project compatibility and consultation with those most directly impacted by the proposal.[185]

MMS has failed to take into account any of these policy guidelines and mandates, in spite of all of the strong and long-standing initiatives promoting the use of CMSP, and regulatory requirements to collaborate and use a consensus-based management approach when reviewing project proposals. These concepts are not new, and have been present for much of the period during which MMS has been reviewing the Proposed Action. There is no excuse for the MMS's systematic failure to take these initiatives into consideration and follow the requirements of its own regulations to better manage the competing uses and values of the marine resources in question.

---

[181] 73 Fed. Reg. 61,292 (Oct. 15, 2008).

[182] 43 C.F.R. § 43.110(a).

[183] *Id.* §§ 46.110(b)-(c).

[184] 73 Fed. Reg. 39376 (July 9, 2008).

[185] 30 C.F.R. § 285.203.

D. Nantucket Sound Now Meets the Formal Definition of a Marine Protected Area Under Executive Order 13158, Requiring Denial of the Project

Concurrent with the submission of these comments, APNS has filed with the Secretary and the Administrator of National Oceanic Atmospheric Administration a formal petition to designate Nantucket Sound as a marine protected area under Executive Order 13158.[186] This status is clearly required as a result of the keeper's determination of eligibility, the MHC's findings of the Sound as a traditional cultural proposal, the Tribe's similar determinations, and the confirmation of the unique historical status issued by the ACHP. These findings, and the APNS petition are new information that is nowhere considered in the EA/FONNSI and require evaluation at this time.

VIII. Cumulative Effects

A. The EA/FONNSI Fails to Consider the Exorbitant Costs of the Transmission Upgrades That Are Required to Connect the Proposed Project to the Grid and All Associated Environmental Impacts.

MMS has consistently neglected to consider the additional socioeconomic and environmental impacts that will be incurred as a consequence of integrating the proposed project's generation into the transmission grid. NEPA "places upon an agency the obligation to consider every significant impact of a proposed action" and "ensures that the agency will inform the public that it has indeed considered environmental concerns in its decision-making process."[187] Significant impacts include, but are not limited to, economic, ecological, aesthetic, historic, health and cultural effects.[188] In spite of this legal requirement, MMS has failed to consider in the EA/FONNSI, FEIS, and DEIS the socioeconomic costs associated with upgrading the transmission system, which will be socialized among the ratepayers of New England and Massachusetts in particular, as well as all resulting environmental impacts. MMS must be required to analyze these significant impacts prior to approving the proposed project.

There is little doubt that the proposed project will require substantial upgrades to the region's existing transmission system, thus resulting in environmental impacts to the surrounding area. However, MMS has yet to conduct an assessment of the costs of the required transmission upgrades and resulting environmental effects of this project, because this critical information is being withheld by the project developer and ISO NE. Nevertheless, since the issuance of the DEIS and FEIS, there have been numerous studies which have concluded that it will cost billions to expand the current transmission system in New England to meet reliability in the region and effectively integrate new wind generation. In addition, MMS has not considered the recently approved ongoing negotiation between Cape Wind and National Grid for a Power Purchase Agreement (PPA) which is likely to be an above market priced contract that would result in an additional burden to MA ratepayers.

---

[186] Attachment 31.

[187] *Baltimore Gas & Electric v. NRDC*, 462 U.S. 87, 97 (1983).

[188] 40 C.F.R. §1508.8 (2009).

ISO NE has estimated that it will cost $10 billion to build enough transmission to accommodate 8,500 MW of wind generation in New England.[189] In its 2030 Power System Study, ISO NE further broke down this cost estimate to reflect the addition of new onshore and offshore wind generation to New England. Based on this study, even the lowest estimates of the addition of 2,000 MW of offshore wind in New England will require the construction of another 1,015 miles of transmission line and would cost between $3.6 billion and $6.0 billion.[190] It is arguable that almost a quarter of this estimated generation (462 MW) would be due to the CWA project, thus making the proposed project responsible for transmission upgrades ranging from upwards of a billion dollars to $1.5 billion, which would be born by the ratepayers of Massachusetts. Because the amount of electricity demand in an area determines a state's proportionate share of upgrade costs, Massachusetts would be responsible for 45.5 percent of all related transmission costs.[191] This means that the ratepayers of Massachusetts, not the developer, will be burdened with billions in associated upgrade costs for the proposed CWA Project.

Additionally, ISO NE recently reported on the progress of transmission construction in Massachusetts in its *State of the States Report.* NSTAR has proposed a series of transmission upgrades for Southeast Massachusetts to improve flexibility and ease reliance on local generating resources for Cape Cod. The short-term upgrades include substation and transmission upgrades, costing an estimated $86.5 million, and the long-term upgrade of a new 345 kV line from Southeast Massachusetts to Cape Cod, which will cost approximately $110 million.[192] It is noteworthy that this is just one of many upgrades that will be required to integrate additional offshore wind into the grid.

Furthermore, in the Joint Coordinated System Plan, a study conducted by all of the regional independent system operators, the ISOs found that it would cost a minimum of $50 billion to expand the current transmission system of the Eastern Interconnection, which includes New York and New England, by 10,000 miles to support increased generation. This estimate is based on the assumption that the present renewable portfolio standard (RPS) requirements remain in effect for all states and 5 percent of all generation comes from relatively local, onshore sources of wind.[193] However, based on the aggressive RPS standards of states, a more realistic estimate of the costs of integrating 20 percent wind generation in the Eastern Interconnection would require the addition of 15,000 miles of transmission and would cost another $30 billion, for a total cost of $80 billion.[194]

---

[189] *Lack of Federal Policy Dogs New England*, Platts Megawatt Daily at 1 (Mar. 29, 2010)

[190] ISO NE, NEW ENGLAND 2030 POWER SYSTEM STUDY, at 23, available at http://www.iso-ne.com/committees/comm_wkgrps/othr/clg/mtrls/2010/feb22010/iso_eco_study_report_draft_sept_8.pdf (Sept. 2009).

[191] ISO New England, "EBC Energy Seminar: New England Transmission Update," at 8, available at http://www.ebcne.org/fileadmin/pres/Steve_Rourke.pdf (Apr. 2, 2009)

[192] ISO NE, ISO ON BACKGROUND, STATE OF THE STATES, at 44, available at http://www.iso-ne.com/nwsiss/pr/2010/final_2010_march_backgrounder_presentation.pdf (Mar. 2010).

[193] JOINT COORDINATED SYSTEM PLAN, *available at* http://www.jcspstudy.org/, at 8 (2008).

[194] *Id* at 9.

Thus, based on these reports, it is evident that on both a micro and a macro scale, the integration of additional offshore wind generation into the grid will cost billions and result in substantial environmental effects to the region. Consequently, MMS should be required to consider these adverse effects prior to approving the proposed project.

B. The EA/FONNSI Does Not Address New Information Regarding the Cumulative Effects of the Proposed Action

There are numerous project proposals in the region that should have been considered in the EA/FONNSI. Not only did MMS's FEIS fail to account properly for the cumulative impacts of the Proposed Action, MMS has perpetuated that failure in this EA/FONNSI.

1. Rhode Island

In the DEIS, MMS rejected Block Island because of extreme storm waves and areas of rock or bedrock. The site rejected by MMS has now been selected by Deepwater Wind for its project using a newer technology than the Proposed Action. The Deepwater Wind project came about through a well-structured offshore wind energy development plan directed by Rhode Island Governor Donald L. Carcieri. In a transparent bidding process, the Deepwater Project was selected against six other projects. Deepwater Wind entails two major phases of wind development: Phase One, the Block Island project, will be a 20 MW project in state waters. It is expected that construction of Phase One will begin in late 2010 and be completed in late June 2012. In Phase Two, Deepwater Wind will construct a utility-scale project in a separate location, capable of producing 1.3 million MWh annually. Not only is Block Island an alternative that should have been considered, MMS must also consider it in its cumulative impacts analysis. In addition, the other sites identified in the RIWINDS report should also be considered in the cumulative impacts analysis.

2. Massachusetts

As noted above, Massachusetts finalized its Ocean Management Plan in December 2009.This plan identifies areas suitable for renewable energy development, and initiates a five-year program of high-priority research. Unlike MMS's approach with respect to the Proposed Action, the final plan includes stronger and more detailed siting and performance standards associated with important environmental resources and revised management provisions for Regional Planning Authorities regarding wind energy development.

The OMP identifies two Wind Energy Areas designated for commercial-scale wind energy facilities based on the presence of a suitable wind resource and water depth, and the absence of conflict with other uses or sensitive resources. These areas—which constitute 2% percent of the planning area's 2,144.5 square miles—are anticipated to accommodate approximately 150 3.6 megawatt (MW) turbines at full build-out.

The Gosnold Wind Energy Area is designated for commercial wind energy development .Community-scale wind energy development is also allowed within the Gosnold Wind Energy Area. The Martha's Vineyard Wind Energy Area is designated for wind energy development at a scale to be determined by the Martha's Vineyard Commission. The OMP also identifies three locations (one in federal waters adjacent to the planning area) for commercial-scale wind that are

considered provisional sites. These areas passed the exclusionary screening process but appear to have potentially more significant technical limitations, cumulative impacts, and/or less suitability for wind energy. MMS should have considered the cumulative impacts of the OMP in the EA/FONNSI.

3. Maine

The Maine Ocean Energy Task Force submitted its final report to Governor Baldacci on December 31, 2009.[195] The Report includes recommendations that Maine:

- Make a major commitment to development of offshore wind, tidal, and wave power;
- Commit to a goal of installation of 5 gigawatts (5,000 megawatts) of offshore wind energy generating capacity in Maine's coastal waters and adjoining federal waters by 2030, and to a goal of timely and efficient development of tidal energy resources at optimal locations in Maine's coastal waters, including but not limited to those in the Passamaquoddy Bay region;
- Improve the siting, permitting and governance framework for renewable ocean energy development;
- Move aggressively to support strengthening Maine's current out-dated transmission and distribution infrastructure, incorporating smart-grid technologies, and explicitly recognize in law the need for new transmission and distribution capacity to achieve the State's wind power and energy conversion goals; and
- Support the financing and development of renewable energy goals by requiring the Maine Public Utilities to issue a Request for Proposal for renewable ocean energy generation where the rate impact is reasonable.

The EA/FONNSI fails to consider the cumulative impacts of Maine's new program.

4. Deepwater

Blue H has announced plans to develop a deepwater water wind energy project 23 miles southwest of Martha's Vineyard and has been ready, for over a year, to evaluate the site pending MMS approval. Blue H has an application before MMS to test its system and has support from the entire Massachusetts Congressional Delegation. MMS has granted Blue H permission to secure the permit from the Army Corps of Engineers, and Blue H has submitted its application. Blue H hopes to moor the test platform off the coast by 2010 to collect vital data. The long-term goal is to have 120 turbines floating in 167 feet of water, generating 420 MWs.

---

[195] <http://www.renewnewengland.com/2010/01/maine-ocean-energy-task-force-submits-final-report-.html>.

5. East Coast

Apex Wind Energy Corp., based in Charlottesville, and Seawind Renewable Energy Corp., near Richmond, submitted unsolicited proposals in August and September to federal regulators to lease space 12 to 25 miles off Virginia Beach for wind farms. MMS is looking at the two applications, but will eventually seek applications from other potential developers. As MMS is better aware, there are numerous other proposals that should have been addressed in the cumulative impacts analysis in the EA/FONNSI.

CONCLUSION

In summary, the EA/FONNSI does not address the serious deficiencies in the FEIS for the Proposed Action. Further, the review of new information is partial, at best, and inaccurate. MMS should deny the Proposed Action or prepare an SEIS or relocate the project to STI.

SAVE OUR SOUND
alliance to protect nantucket sound

June 23, 2010

Michael R. Bromwich
Director, Bureau of Ocean Energy Management,
Regulation and Enforcement
Department of the Interior
1849 C Street, NW
Washington, DC 20240

Re: Cape Wind Energy Project, MMS-2010-MM-0006-0105

Dear Director Bromwich:

In recognition of, and in response to, the serious deficiencies in the federal decisions on the proposed Cape Wind project, the Alliance to Protect Nantucket Sound has filed a Petition for Discretionary Review Under 14 C.F.R. § 77.37 of Case Nos. 2009-WTE-332-OE through 2009-WTE-461-OE, with the Federal Aviation Administration (FAA) on June 16, 2010. As demonstrated by the enclosed petition, the FAA is clearly in error and has placed the public's safety at risk in its May 17 Determinations on the proposed Cape Wind energy plant. To the extent the Minerals Management Service's (MMS) decision to offer a lease to Cape Wind is based on the FAA action, it is also a violation of federal law. The Alliance has documented this issue extensively in the record of the MMS review and by letter of March 16, 2010, under the Outer Continental Shelf Lands Act.

Pursuant to FAA Order 7400.2G ¶ 9-2-1(c), the filing of the Petition means that FAA's May 17, 2010 Determinations of No Hazard in Case Nos. 2009-WTE-332-OE through 2009-WTE-461-OE are not and "will not become final pending disposition of the petition." As the FAA stated in its May 17, 2010 Determinations of No Hazard to Air Navigation, at p. 2: "This determination becomes final on June 26, 2010 unless a petition is timely filed. In which case, this determination will not become final pending disposition of the petition."

Because FAA's May 17, 2010 Determinations are not final determinations by operation of law as a result of our petition, Cape Wind may not begin construction of the Project, pursuant to the MMS Record of Decision. This prohibition applies to any action that would be deemed "construction" under the U.S. Department of Treasury, Payments for Specified Energy Property in Lieu of Tax Credits Under the ARRA (March, 2010). The Alliance requests that MMS enforce the "no construction of any kind" limitation against Cape Wind. Further, MMS may not proceed with any further actions that depend on receipt of FAA's determination of no hazard.

4 Barnstable Road, Hyannis, Massachusetts 02601
▫ 508-775-9767 ▫ Fax: 508-775-9725

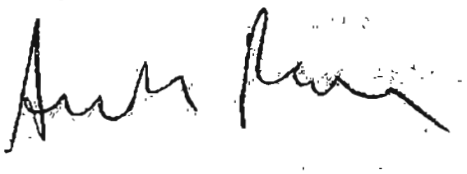
www.saveoursound.org

a 501 (c)(3) tax-exempt organization

The petition is now a part of the record of the Cape Wind proceeding. To the extent any further action will be taken related to the Cape Wind application, the Petition must be considered prior to taking such actions.

Thank you for your attention to this matter.

Sincerely,



Audra Parker
President and Chief Executive Officer

Enclosures

cc: Honorable David J. Hayes, Deputy Secretary of the Interior
Charles S. McLaughlin, Jr., Esquire

4 Barnstable Road, Hyannis, Massachusetts 02601
▫ **508-775-9767** ▫ **Fax: 508-775-9725**

www.saveoursound.org

a 501 (c)(3) tax-exempt organization

SAVE OUR SOUND
alliance to protect nantucket sound

June 15, 2010

Edith V. Parish
Manager, Airspace and Rules Division -- Room 423
Federal Aviation Administration
800 Independence Avenue, N.W.
Washington, DC 20591

RE: Petition for Discretionary Review of the Determination of No Hazard to Air Navigation, Aeronautical Study Nos. 2009-WTE-332-OE through 2009-WTE-461-OE (May 17, 2010)

Dear Ms. Parish:

The Alliance to Protect Nantucket Sound submits this Petition for Discretionary Review pursuant to 14 C.F.R. § 77.37, requesting that the Federal Aviation Administration (FAA) reverse the 130 individual Determinations of No Hazard to Air Navigation in FAA Aeronautical Study Nos. 2009 WTE-332-OE through 2009 WTW-461-OE issued on May 17, 2010, for Cape Wind Associates' proposal to construct 130 wind turbine generators in Nantucket Sound. This petition incorporates by reference the petition filed by the Town of Barnstable in this same matter, including all exhibits and supporting materials.

The 2010 Determinations must be reversed pursuant to 14 C.F.R. Part 77 and FAA Order No. 7400.2G because the proposed Cape Wind Project would create a substantial adverse effect on aviation by impairing the operation of existing FAA radar facilities, requiring a significant volume of VFR operations to change their regular course or altitude, having a substantial adverse impact on IFR operations, and derogating airport capacity/efficiency. This Petition is being filed within 30 days of the issuance of the 2010 Determinations.

The FAA must reverse the 130 Determinations of No Hazard to construct 130, 440-foot wind turbines within a 25 square mile area in Nantucket Sound under a highly travelled air corridor between the three airports in Barnstable, Martha's Vineyard, and Nantucket. The FAA has a duty to issue Determinations of Hazard for each proposed wind turbine in the Cape Wind Project because the structures will create a substantial adverse effect on air navigation.

The proposed Cape Wind Project is a hazard to air navigation because the evidence before the FAA demonstrates conclusively that the Cape Wind Project would have a substantial adverse effect by: (1) interfering with the operation of existing FAA radar facilities; (2) requiring changes to existing VFR and IFR routes, and forcing a significant volume of aeronautical operations to change their regular course and/or altitude; and, (3) limiting the capacity and efficiency of the

4 Barnstable Road, Hyannis, Massachusetts 02601
▫ 508-775-9767 ▫ Fax: 508-775-9725

www.saveoursound.org

a 501 (c)(3) tax-exempt organization

Barnstable Municipal Airport, the Nantucket Memorial Airport and the Martha's Vineyard Airport.

The Project would have a substantial adverse effect on existing FAA radars.
FAA has ample evidence, including the 2010 Determinations, which acknowledge that radar interference would occur. The proposed wind turbines would be in direct line-of-sight (LOS) of the three existing radars in the area surrounding Nantucket Sound and would, therefore, create a variety of adverse effects, including: shadowing, false targets, clutter, reduced probability of detection (PD), and track seduction. Moreover, FAA has identified no mitigation measures that are proven to be effective under the specific conditions in Nantucket Sound. In fact, the tiered approach to mitigation used in the Determinations (installation of a TDX 2000, then ASR 11 upgrade, then restricted airspace) confirms that the FAA understands that its technical mitigation measures may not resolve the radar interference issue. In addition, none of these scenarios addresses the impacts to VFR operations and, in fact, the last resort mitigation of restricting the airspace would only exacerbate the VFR issue.

Furthermore, allowing 130 hazards to be built before testing the efficacy of available mitigation measures has expressly been rejected by the federal courts. For example, the U.S. Court of Appeals for the District of Columbia Circuit recently vacated a series of FAA Determinations of No Hazard where the Agency had ultimately decided to defer the question of potential adverse effects until after the facilities were built (*Clark County v. FAA*, 2008).

Ultimately, unless FAA can identify a mitigation measure that it can *demonstrate* will be effective under the real world weather, fleet mix and air traffic conditions in Nantucket Sound, it must issue Determinations of Hazard. And at this point, the only proven mitigation for Line of Sight (LOS) interference is to avoid locating wind turbines in radar LOS. Therefore, FAA is obligated to issue Determinations of Hazard for each of the Project's wind turbines.

The Project would have a substantial adverse effect on VFR operations.
There are over 400,000 flights per year in the air corridor between Barnstable Municipal Airport, Nantucket Memorial Airport, and Martha's Vineyard Airport, with two-thirds concentrated in the summer season and many of the flights operating at low altitudes under VFR conditions. Flight data compiled by Harris Miller, Miller and Hanson (previously provided to FAA) show the volume of low altitude VFR traffic in the Project area and conclude that flights regularly and daily fly over the Project area at very low altitudes. Daily operations on the observed days ranged from 14 to 22 operations. That translates into thousands of affected flights annually. Any structure or group of structures that requires the rerouting of this many flights clearly creates a substantial adverse effect as defined by FAA, and must, therefore, be determined to be a hazard. In this case, the impacts to VFR traffic are clearly significant and adverse.

The Project area is an area of known marginal visibility particularly during peak summer months, averaging 22 days of fog each month and overcast over 40% of the time. VFR pilots must remain 500 feet below clouds, which often means flying at or below 500 feet above water. This would no longer be possible over the 25 square mile Project area. This problem is exacerbated over Nantucket Sound because weather conditions can change abruptly, often forcing pilots to descend rapidly to get under the fog, creating a clear risk of collision with the wind turbine generators.

The FAA's own Determinations have concluded that "some aircraft operating under (VFR) may have to alter their altitude or route of flight..." This conclusion alone establishes that the proposed turbines would create "adverse effects" to VFR operations. Under FAA's binding rules, a proposed structure would have a substantial adverse effect if there is a combination of adverse effect and a significant volume of aeronautical operations. In turn, a "significant volume" is defined as anything more than one aeronautical operation per day no matter the type of operation. The record before FAA clearly establishes that a "substantial" number of regularly occurring VFR operations would be forced to change course and/or altitude if the Project were built.

However, the FAA attempts to dismiss the ample evidence of impacts to VFR operations by relying on the faulty proposition that there cannot be an "adverse effect" because the turbines are not "obstructions." Regardless of their height, the turbines are hazards because they would cause a significant number of VFR operations to change regular flight course or altitude. The question of whether or not the turbines are also "obstructions" as defined by height is immaterial.

The FAA compounds their error in focusing on the 500-foot threshold because VFR aircraft are clearly permitted to operate below 500 feet AGL when operating over open water. The fact that aircraft are permitted to operate below 500 feet in the Cape Wind Project area, the frequent periods of marginal VFR weather in the Nantucket Sound, and the substantial volume of low-flying VFR traffic in the area, obligates the FAA to examine impacts of the proposed Project on VFR operations, regardless of the height of the Turbines, and conclude that the turbines constitute a hazard to air navigation.

The Project would have a substantial adverse effect on existing IFR operations.
There are also concerns specific to IFR traffic. There are two low altitude airways (Victor airways) over or adjacent to the proposed Project: V-141 and V-146. IFR traffic only uses cardinal altitudes starting with 2,000 feet and rising in 1,000-foot increments. The current minimum obstacle clearance (MOC) altitude is 1,200 feet plus 300 feet above the highest obstacle. With the proposed wind turbines at 440' ASL, the new MOC altitude would be 1940' (1200' + 440' + 300'), leaving only a 60' margin between the MOC and the lowest IFR altitude.

This would force the rerouting of aircraft into narrow, concentrated flight corridors, reduce air traffic dispersion horizontally and vertically, push more VFR aircraft into IFR corridors, and

reduce altitude separation for opposite direction traffic. This would tend to overload an already overburdened IFR system and would directly impact IFR operations.

Moreover, of the approximately 400,000 total annual operations in the Project area, approximately half are IFR operations. Thus, the adverse effects to IFR operations described above rise to the level of "substantial adverse effects" and FAA is, therefore, obligated to issue Determinations of Hazard for the Cape Wind Project.

The Project would have a substantial adverse effect on airport capacity/ efficiency.
As discussed above, the Project would force existing VFR traffic to change regularly used routes to avoid Cape Wind's turbines, compressing VFR traffic into already crowded IFR corridors. The degraded radar performance would further reduce the effective capacity of the IFR corridors by requiring greater separation to offset the reduced radar performance. In addition to the impact on both IFR and VFR operations, this would have the further effect of reducing the effective capacity of our airports by forcing different aircraft types with different speeds into a single corridor with in-trail spacing requirements, limiting airfield capacity to the capacity of the ATC system. The result would be increased cancellations and extremely long delays. This would have a substantial adverse effect on airport capacity/efficiency, which, by itself, is an independent basis upon which FAA must issue Determinations of Hazard.

Based on the previous discussion and incorporating by reference the petition filed by the Town of Barnstable, the FAA should grant this petition and terminate all 130 determinations of No Hazard to ensure compliance with FAA's statutory mandates. Thank you.

Sincerely,

Audra Parker
President and CEO

Cc: Senator Scott Brown
Congressman William Delahunt
Congressman James Oberstar

4 Barnstable Road, Hyannis, Massachusetts 02601
▫ 508-775-9767 ▫ Fax: 508-775-9725

www.saveoursound.org

a 501 (c)(3) tax-exempt organization

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 1
1 CONGRESS STREET, SUITE 1100
BOSTON, MASSACHUSETTS 02114-2023

December 1, 2009

Dr. Andrew D. Krueger
Alternative Energy Programs
U.S. Dept. of the Interior
Minerals Management Service
381 Elden Street, MS 4090
Herndon, VA 20170

Re: Cape Wind Energy Project

Dear Dr. Krueger:

As we have discussed, your signature below will confirm that the Mineral Management Service (MMS) will assume lead Federal agency status for the purpose of National Historic Preservation Act (NHPA) section 106 compliance for the Cape Wind Energy Project. Under the Advisory Council on Historic Preservation (ACHP) regulations at 36 CFR Part 800, the Cape Wind Energy Project is a Federal undertaking. More than one Federal agency is involved in this undertaking.

In accordance with 36 CFR § 800.2(a)(2), as the United States Environmental Protection Agency's (EPA) designee, MMS will identify the appropriate official to serve as the agency official to fulfill the collective responsibilities of EPA and the MMS under section 106. In addition, although EPA recognizes that as the lead Federal agency, MMS will take the lead on drafting relevant agreements as part of the NHPA section 106 process, EPA would appreciate the opportunity to review and, if appropriate, be a signatory to these documents.

We request that you sign this letter in the signature block provided below. By signing this letter, MMS acknowledges and accepts EPA's designation of MMS as the lead Federal agency for NHPA compliance in connection with the Cape Wind Energy Project. In addition, please return a signed copy of this letter to EPA.

Should you have any questions or concerns about this letter, please feel free to contact Ida McDonnell in my office at 617-918-1653, or LeAnn Jensen in the EPA Region 1 Office of Regional Counsel at 617-918-1072.

Sincerely,

Stephen Perkins, Director
Office of Ecosystem Protection

cc: John Eddins, Advisory Council on Historic Preservation
Brona Simon, Massachusetts Historical Commission
Karen Adams, Army Corps of Engineers
Bruce Bozum, Mohegan Indian Tribe
John Brown, Narragansett Indian Tribe
Michael Thomas, Mashantucket Pequot Tribe
Bettina Washington, Wampanoag Tribe of Gay Head (Aquinnah)
George Green, Mashpee Wampanoag Tribe
Brendan McCahill, EPA Region 1
LeAnn Jensen, EPA Region 1

Acknowledgement by the Mineral Management Service

_____ _____

Name: Date
Title:

rec'd 12/21/09

United States Department of the Interior

MINERALS MANAGEMENT SERVICE
Washington, DC 20240

DEC 15 2009

Mr. Stephen Perkins
Director, Office of Ecosystem Protection
U.S. Environmental Protection Agency
Region 1
1 Congress Street, Suite 1100
Boston, Massachusetts 02114

RE: Section 106 Consultation for Cape Wind Energy Project

Dear Mr. Perkins:

Thank you for your letter dated December 1, 2009, requesting that the U.S. Environmental Protection Agency (EPA) be granted consulting party status in the National Historic Preservation Act (NHPA) Section 106 consultation process for the proposed Cape Wind Energy Project.

The Energy Policy Act (EPAct) amendments to the Outer Continental Shelf Lands Act granted the Secretary of the Department of the Interior—and, through delegation, the Minerals Management Service (MMS)—the discretionary authority to grant leases, easements, or rights of way on the Outer Continental Shelf (OCS) for renewable energy activities. Pursuant to this authority, the MMS has conducted an independent and comprehensive environmental review of the proposed Cape Wind Energy Project and has issued both a draft environmental impact statement (EIS) and a final EIS.

The MMS is the lead agency reviewing the Cape Wind Energy Project proposal. Pursuant to 36 C.F.R. Section 800.3 (f)(3), the lead agency official may invite others to participate as consulting parties in the Section 106 process. The MMS recognizes that the EPA may have responsibilities to fulfill under Section 106 of the NHPA relating to the issuance of permits for this project (similarly, the U.S. Army Corps of Engineers (USACE) has responsibilities to fulfill in its issuance of a Section 10 permit). The MMS grants the request for the EPA to have consulting party status, effective the date of this letter, and invites the EPA to participate in any future Section 106 consultation meetings. The MMS recognizes that the EPA may adopt the findings and conclusions of this process to help fulfill its regulatory obligations under Section 106. We have provided the following background and references to get your office up to speed with the Section 106 consultation process.

Background Information on the Project

In November 2004, a joint draft environmental document for the Cape Wind Energy Project (Draft EIS/Environmental Impact Report (EIR)/Development of Regional Impact Report (DRI)) was published by the USACE, the State of Massachusetts, and the Cape Cod Commission. In

August 2005, with the passage of the Energy Policy Act, the MMS became the lead Federal agency for the Cape Wind Energy Project. In February 2007, the State of Massachusetts and the Cape Cod Commission published a final EIR/DRI for the Cape Wind Project while the MMS draft EIS was still in preparation. The visual impact analysis in the final EIR/DRI concluded that the following historic properties would be subject to adverse visual effects from the proposed project:

- Falmouth:
  - Nobska Point Light Station
- Barnstable:
  - Cotuit Historic District
  - Col. Charles Codman Estate
  - Wianno Historic District
  - Wianno Club
  - Hyannis Port Historic District
  - Kennedy Compound (NHL)
- Chatham:
  - Montgomery Point Lighthouse
- Tisbury:
  - West Chop Light Station
- Oak Bluffs:
  - East Chop Light Station
  - Dr. Harrison A. Tucker Cottage
- Edgartown:
  - Edgartown Village Historic District
  - Edgartown Harbor Lighthouse
  - Cape Poge Light
- Nantucket:
  - Nantucket Great Point Light
  - Nantucket National Historic Landmark District

The MMS analysis was prepared using the same list of historic properties and visual simulations that were used to prepare the Determination of Effect published in the final EIR/DRI for the State of Massachusetts (Public Archeological Laboratory (PAL), *Cape Wind Energy Project Visual Impact Assessment of Revised Layout on Multiple Historic Properties: Final Environment Impact Report*, September 2006). This report can be found online at: *http://www.capewind.org/downloads/feir/Appendix3.11-C.pdf*

Using the ACHP regulations for assessment of adverse effects found at 36 CFR 800.5, the MMS outlined a methodology and list of criteria to use in assessing the visual effects of the project on historic properties within the project's Area of Potential Effect. The results of this visual analysis were published on December 29, 2008, in the *Finding of Adverse Effect for the Cape Wind Energy Project*. The document can be found online at http://www.mms.gov/offshore/AlternativeEnergy/PDFs/FAE_Final.pdf. The MMS prepared this document after consideration of comments received during formal Section 106 consultation meetings and from written comments submitted on the draft EIS. In response to comments

received from the consulting parties, the MMS incorporated the following changes into the assessment of adverse visual effects for the project, including:

- Revising the methodology used to assess adverse visual effects to historic properties and Tribal areas of religious and cultural importance to conform to the methodology used in the original analysis completed by the USACE when they were lead Federal agency for the project.

- Evaluating 30 additional specific historic properties identified in writing by consulting parties, which had not previously been assessed nor evaluated for National Register eligibility.

- Including a specific sacred historic site identified by the Mashpee Wampanoag Tribe on the list of adversely affected properties.

The *Finding of Adverse Effect for the Cape Wind Energy Project* concludes that there will be an adverse visual effect on 28 historic and one Tribal properties resulting from the proposed project. The Finding includes all documentation required pursuant to 36 CFR 800.11(e), as well as a description of alternatives to the project that have already been considered or raised by the consulting parties, and proposed modifications already included in the design or included as proposed terms and conditions of approval that could avoid, minimize or mitigate the adverse effects. Please note that the Finding effectively concludes the portions of the consultation related to 36 CFR 800.4 and 800.5.

Additional Documents for the Section 106 Consultation Process

A series of marine archaeological reports and surveys were completed within the offshore project area by the Public Archaeology Laboratory (PAL), Pawtucket, Rhode Island. These reports include:

1. Marine Archaeological Sensitivity Assessment, Cape Wind Energy Project (June 2003)
2. Preliminary Marine Archaeological Sensitivity Assessment: Cape Wind Energy Project Alternatives: Horseshoe Shoal; Combination New Bedford/Buzzards Bay and Reduced Horseshoe Shoal; Monomoy and Handkerchief Shoals; Tuckernuck Shoal; and South of Tuckernuck Island, Massachusetts (January 2004)
3. Marine Archaeological Reconnaissance Survey: Cape Wind Energy Project (March 2004)
4. Cape Wind Terrestrial Alternative: Massachusetts Military Reservation, Bourne and Sandwich, Massachusetts (March 9, 2004)
5. Supplemental Marine Archaeological Reconnaissance Survey of Revised Layout Offshore Project Area (January 26, 2006)

The reports are available online at:

Report No. 1, 3, and 4: *http://www.nae.usace.army.mil/projects/ma/ccwf/app510c.pdf*
Report No. 2: *http://www.nae.usace.army.mil/projects/ma/ccwf/app3i.pdf*

Report No. 5: *http://www.capewind.org/downloads/feir/Appendix3.11-B.pdf*

The Cultural Resource sections of the Cape Wind Energy Project final EIS are Section 4.3.5 (Description of the Affected Environment) and Section 5.3.3.5 (Environmental and Socioeconomic Consequences). Additional reports from the EIS that may be useful include: (available online at http://www.mms.gov/offshore/RenewableEnergy/PDFs/FEIS/Section10.0Bibliography.pdf):

- **Report No. 4.3.4-1**. Public Archeological Laboratory (PAL). 2006. Cape Wind Energy Project Visual Impact Assessment of Revised Layout on Multiple Historic Properties: Final Environmental Impact Report. Nantucket Sound: Cape Cod, Martha's Vineyard, and Nantucket, Massachusetts. PAL Report No. 1485.05. Prepared for Cape Wind Associates, L.L.C., Boston, Mass. Pawtucket, R.I. September 2006.

- **Report No. 5.3.3-2**. Environmental Design & Research, P.C. 2003. Visual Simulation Methodology. Cape Wind Project. Cape Cod, Martha's Vineyard and Nantucket, Massachusetts. Prepared for Cape Wind Associates, L.L.C., Boston, Mass. Syracuse, N.Y. November, 2003.

Also, a list of Section 106 participants is enclosed with this letter.

Summary of Meetings

Recognizing that the proposed action could adversely affect historic and cultural properties, the MMS initiated formal consultation under Section 106 of the NHPA. To date the MMS has conducted seven separate meetings related to Section 106 consultations for the Cape Wind Energy Project, including:

- **July 23, 2008**-MMS held the first full Section 106 consultation meeting.
- **September 8, 2008**-MMS held the first separate Tribal Section 106 consultation meeting.
- **September 9, 2008**-Second full Section 106 consultation meeting.
- *December 29, 2008-MMS released its Finding of Adverse Effect (Finding) for the project.*
- **Jan 29, 2009**-Third full Section 106 consultation meeting to discuss the Finding Document and to begin discussions on possible mitigation of adverse effects, and steps towards reaching consensus on a Memorandum of Agreement (MOA).
- **April 28, 2009**-Fourth full Section 106 consultation meeting. The meeting was devoted to discussion of mitigation and steps towards reaching consensus on a MOA.
- **June 3, 2009**-MMS held the second separate Tribal Section 106 consultation meeting.
- **June 16, 2009**-Fifth full Section 106 consultation meeting to continue discussion on mitigation and steps towards reaching consensus on a MOA.

Meetings have been paused since June 2009 while the MMS is addressing important issues raised by the Advisory Council on Historic Preservation (ACHP) and the Massachusetts State Historic Preservation Officer (SHPO). Currently the MMS is in the final stages of addressing these issues, including the eligibility of Nantucket Sound for listing as a Traditional Cultural

Property (TCP) on the National Register of Historic Places (NRHP). We are working closely with the National Park Service (NPS), the ACHP, the SHPO, and all Section 106 consulting parties (including the Mashpee Wampanoag Tribe and the Wampanoag Tribe of Gay Head/ Aquinnah) to address these issues so that we can schedule the next meeting and bring the consultation to a conclusion. Once the Section 106 consultation process is concluded, the MMS will issue a record of decision on the project.

While the EPA is entering the process later than other consulting parties, the EPA may participate and express its views related to resolving the adverse effects pursuant to 800.6 at or before the next Section 106 consultation meeting, the date of which is yet to be determined. Additional details regarding the scheduling of the next meeting will be sent to all the consulting parties via a separate email.

We look forward to working with all consulting parties to reach consensus on a MOA for the proposed Cape Wind Energy Project. Should you have any questions about the Section 106 consultation process for the Cape Wind Energy Project, please feel free to contact our Federal Preservation Officer, Dr. Christopher Horrell, at 504-736-2796 or Christpher.Horrell@mms.gov.

Sincerely,

Andrew D. Krueger, Ph.D.
MMS Renewable Energy Program

Enclosure: Section 106 Consultation Participant List

cc: Brona Simon, Massachusetts State Historic Preservation Officer
Dr. John Eddins, Advisory Council for Historic Preservation

Cape Wind Energy Project
Section 106 Consulting Parties Contact List
(Updated as of November 21, 2008)

John T. Eddins, Ph.D.
Historic Preservation Specialist/Archaeologist
Advisory Council on Historic Preservation
1100 Pennsylvania Avenue, NW, Suite 809
Washington, D.C. 20004
Ph: 202-606-8553
Fax: 202-606-0321
jeddins@achp.gov

Brona Simon
State Historic Preservation Officer
Massachusetts Historical Commission
The MA Archives Building
220 Morrissey Boulevard
Boston, MA 02125
Ph: 617-727-8470
Brona.Simon@state.ma.us

Bettina Washington
Tribal Historic Preservation Officer
Wampanoag Tribe of Gay Head (Aquinnah)
20 Black Brook Road
Aquinnah, MA 02535-9701
Ph: 508-645-9265
bettina@wampanoagtribe.net

George (Chuckie) Green
Tribal Historic Preservation Officer
Mashpee Wampanoag Tribe
P.O. Box 1048
Mashpee, MA 02649
Ph: 508-477-0208
cgreen1@mwtribe.com

John Brown
Tribal Historic Preservation Officer
Narragansett Indian Tribe
Narragansett Indian Longhouse
PO Box 700
Wyoming, RI 02898
Ph: 401-376-1100
brwnjbb@aol.com

Bruce Bozsum, Chairman
Mohegan Indian Tribe
5 Crow Hill Road
Uncasville, CT 06382
Ph: 860-862-6100
Fax: 860-862-6115
cfodell@mohegan.nsn.us

Michael J. Thomas, Chairman
Mashantucket Pequot Tribe
P.O. Box 3060
Mashantucket, CT 06338
Ph: 860-396-6554
Fax: 860-396-6288
lciccarone@mptn.org

David Saunders
Bureau of Indian Affairs
Eastern Regional Archaeologist
545 Marriott Dr., Suite 700
Nashville, TN 37214
Ph: 615 564 6840
Fax: 615 564 6571
david.saunders@bia.gov

Bill Bolger
National Park Service
Northeast Region
200 Chestnut Street, Room 370
Philadelphia, PA 19106
Ph: 215-597-1649
Bill_Bolger@nps.gov

Karen Adams
U.S. Army Corps of Engineers
New England District
696 Virginia Road
Concord, Massachusetts 01742-2751
Ph: 978-318-8828
Karen.K.Adams@nae02.usace.army.mil

Ida McDonnell
Environmental Protection Agency, Region 1
Air Permits, Toxics and Indoor Air, Office of Ecosystem Protection
One Congress St, Suite 1100
Boston, MA 02114
PH: 617-918-1653
Mcdonnell.Ida@epamail.epa.gov

Roberta Lane
Program Officer & Regional Attorney
Northeast Office, National Trust for Historic Preservation
7 Faneuil Hall Marketplace, 4th Floor.
Boston, MA 02109
Ph: 617-523-0885
Fax: 617-523-1199
roberta_lane@nthp.org

Elizabeth Merritt
National Trust for Historic Preservation
785 Massachusetts Ave. NW
Washington DC 20036
Elizabeth_Merritt@[illegible]

Craig Olmsted
Project Manager
Cape Wind Associates, LLC.
75 Arlington Street
Boston, Massachusetts 02116
colmsted@capew[illegible]

Sarah Korjeff
Cape Cod Commission
3225 Main St. PO BOX 226
Barnstable, MA 02630-0226
Ph: 508-362-3828
Fax: 508-362-3136
skorjeff@capecodcommission.org

Jim Powell, Commissioner
Martha's Vineyard Commission
P.O. Box 1507
West Tisbury, MA 02575
Ph: 800-693-9960
OldMayhewFarm@[illegible]

Audra Parker
Alliance to Protect Nantucket Sound
4 Barnstable Rd.
Hyannis, MA 02601
Ph: 508-775-9767
Fax: 508-775-9725
audra@saveoursound.org

Joann Buntich, Director, Growth Management
Town of Barnstable
Town Hall
367 Main Street
Hyannis, MA 02601
Ph: 508-862-4678
joann.buntich@town.barnstable.ma.us

Carey Murphy, Selectman
Town of Falmouth
Town Hall
59 Town Hall Square
Falmouth, MA 02540
Ph: 508-495-7320
carey.murphy@falmouthmass.us

John J. Cahalane, Vice Chair/Selectman
Town of Mashpee
Town Hall
16 Great Neck North
Mashpee, MA 02649
Ph: 508-539-1400
jcahalane@ci.mashpee.ma.us

E. Suzanne McAuliffe, Chair/Selectman
Town of Yarmouth
Town Hall
1146 Route 28
S. Yarmouth, MA 02664
Ph: 508-362-5250
smcauliffe@yarmouth.ma.us

Ronald Bergstrom, Selectman
Town of Chatham
Town Hall
549 Main Street
Chatham, MA 02633
Ph: 508-945-5100
ronbergstrom@comcast.net

James Merriam, Town Administrator
Town of Harwich
Town Hall
732 Main Street
Harwich, MA 02645
Ph: 508-430-7513
jmerriam@town.harwich.ma.us

Robert Canevazzi, Town Administrator
Town of Dennis
Town Hall
P.O. Box 2060
South Dennis, MA 02660
Ph: 508-760-6149
rcanevazzi@town.dennis.ma.us

Pam Dolby, Town Administrator
Town of Edgartown
Town Hall
70 Main Street
Edgartown, MA 02539
Ph: 508-627-6180
pdolby@edgartown-ma.us

Roger Wey, Selectman
Town of Oak Bluffs
P.O. Box 1327
21 Wamsutta Avenue
Oak Bluffs, MA 02557
Ph: 508-693-7887
rwey@ci.oak-bluffs.ma.us

John R. Bugbee, Town Administrator
Town of Tisbury
Town Hall
P.O. Box 1239
Vineyard Haven, MA 02568
Ph: 508-696-4203
jbugbee@ci.tisbury.ma.us

Mark Voigt
Nantucket Historic Commission
Town Building
16 Broad Street, 1st Floor
Nantucket, MA 02554
Ph: 508-228-7268
[redacted]

Barbara Hill
Executive Director
Clean Power Now
569 Main Stree
PO Box 2717
Hyannis, MA 02601
Ph: 508-775-1196
[redacted]

Richard White, Town Manager
Town of Dennis
Town Hall
P.O. Box 2060
South Dennis, MA 02660

Interested Party

Neil Good
56 Scituate Road
Mashpee, MA 02649