

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

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

**PETITIONERS’ RESPONSE TO RESPONDENTS’ OPPOSITION TO MOTIONS  
TO FILE REPLY BRIEF AND TO SUPPLEMENT THE RECORD**

The Alliance to Protect Nantucket Sound and the Wampanoag Tribe of Gay Head/Aquinnah (collectively, “Petitioners”) file this response to address two points in the Oppositions filed by Respondents Region 1 of the U.S. Environmental Protection Agency (“Region 1”) and Cape Wind Associates, LLC (“Cape Wind”) to Petitioners’ Motion for Leave to File a Reply Brief and Motion for Leave to Supplement the Record.

**1. The February 24 Email Submitted to Supplement the Record Is  
Admissible in this Proceeding and Highly Probative**

The EAB should grant the Alliance’s Motion to supplement the record with the February 24<sup>th</sup> email from Kristin Decas because it is highly probative of Cape Wind’s intent to use New Bedford rather than Quonset Point as the base for staging construction of the project. Whether it would be considered hearsay or not under the Federal Rules of Evidence, it should be admitted under the more relaxed procedural rules applicable in an administrative process such as this one.

Cape Wind errantly cites a federal district court case excluding hearsay under the Federal Rules of Evidence as authority for the inadmissibility of hearsay in administrative proceedings. Cape Wind Opposition at 2. However, the EAB has previously allowed hearsay when the declaration has probative value. *In re Rocky Well Service, Inc. & Edward J. Klockenkemper*, 14 E.A.D. \_\_\_, 17, n.15 (EAB 2010) (concurring with the Regional Judicial Officer issuing the decision below that hearsay does not rob the declarations offered in the case of their probative value on an issue before the Board). Thus, Cape Wind's hearsay argument is irrelevant.

The email is highly probative on a factual issue directly before the Board that is critical to the Board's review of a condition of the permit under review. In deciding whether to remand the permit to the Region, the Board must consider factual evidence showing that Cape Wind intends to move the staging location for construction that would invalidate the environmental analysis on which the proposed permit is based. The email evidences Cape Wind's plans to do so, despite Cape Wind's assertion that the email is "not inconsistent" with its stated position that Quonset Point will remain the staging location. Cape Wind Opposition at 2. If more evidence were needed, the City of New Bedford announced on April 22, 2011 that the City will break ground this summer on construction of the New Bedford terminal in order to support Cape Wind's installation.<sup>1</sup>

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<sup>1</sup> *Construction to start this summer on NB port facility to support Cape Wind*, South Coast Today, April 22, 2011, available at <http://www.southcoasttoday.com/apps/pbcs.dll/article?AID=/20110422/NEBULLETIN/105010333/-1/ARCHIVE>. In addition, according to a statement by Cape Wind's President James Gordon, Cape Wind will not start construction until the end of 2011, if not 2012, which would provide time for the New Bedford facilities to be developed for this purpose. Edward F. Maroney, *Cape Wind Boards Hy-Line for Joint Venture*, The Barnstable Patriot, Mar. 25, 2011, available at [http://www.barnstablepatriot.com/home2/index.php?option=com\\_content&task=view&id=24191&Itemid=30](http://www.barnstablepatriot.com/home2/index.php?option=com_content&task=view&id=24191&Itemid=30).

Region 1’s opposition to supplementing the record with the February 24 email is similarly unpersuasive. The Region contends that the Decas email message should be disallowed, one, because it is “post-decisional” (discussed below), and two, because “they [Petitioners] have not proposed how the Region’s air permit [...] crucially depends on the project’s onshore staging location.” Region 1 Opposition at 4. The Region offers this statement to explain why, in its view, the staging location issue—and attendant email—could not be “material to this appeal.” *Id.* Yet, as Petitioners have previously pointed out, the Region’s own actions belie the argument it now makes. As previously referenced before the Board, the Region placed Cape Wind’s OCS air permit application “on hold” until the issue of where the staging was to be located was clarified. Letter from Stephen Perkins, Director of the Office of Ecosystem Protection, EPA Region 1, to Dennis Duffy, Vice President of Regulatory Affairs, Cape Wind Associates (Oct. 29, 2010) (on file with the EAB as #6.31, Region Response to Petition for Review Exhibit 29) (stating that a change in staging location “likely affects some of the analyses and conclusions presented to EPA in the air permit application, and/or presented to other agencies for the purpose of other federal statutory requirements with which EPA must comply in issuing the air permit”). By the Region’s own admission, evidence relevant to the staging location is not “extraneous” to Cape Wind’s air permit.

Strong evidence is now before the Board that New Bedford will support some, if not all, of the staging activities for the Cape Wind project. In fact, if true, the Decas email suggests that information on this important factual issue may have been withheld from the Region. The clear course of action is for the Board to remand the permit to Region 1 to conduct additional fact-finding.

## **2. Changes In the Project Render the Permit Defective, Regardless of Whether the Evidence Is Post-Decisional**

Region 1 argues that because the email message post-dated its issuance of Cape Wind's permit, the Board must strike all arguments based on the email. This is incorrect in two significant ways. Foremost, Petitioners raised the staging location issue in their Petition for Review; the email serves only to provide further evidentiary support for a factual issue in play at the time the permit was issued.

Second, striking this evidence would result in a faulty review of the permit. The Board has previously made clear that a project alteration that changes the substance of the permit, "allowing for construction of a facility that is physically different than the one permitted, and which may potentially have different emission characteristics," "at a minimum [ ] raises substantial new questions about the permit" that requires it be remanded. *In re Indeck-Elwood LLC*, 13 E.A.D. 126, 148 (EAB 2006) (finding the permit defective on this condition). Thus, the Region's post-decisional argument is immaterial to the soundness of the permit. Even *if* the Region had correctly issued the permit based on the administrative record before it at the time,<sup>2</sup> a permit would have to be reconsidered for a changed project under the holding in *Indeck*. The email is factual evidence that the Region must take into account in conducting a new review of Cape Wind's application.

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<sup>2</sup> Petitioners do not concede the permit was correctly issued.

## CONCLUSION

The Board should grant Petitioners' Motions to File a Reply Brief and to Supplement the Record for the foregoing reasons. Based on the arguments advanced and evidence cited therein, the Board should grant the Petition for Review.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify, pursuant to the Rules of the Environmental Appeals Board of the U.S. Environmental Protection Agency, that on April 27, 2011, a copy of the foregoing Petitioners' Response to Respondents' Opposition to Motions to File Reply Brief and to Supplement the Record was filed electronically with the Environmental Appeals Board via the Central Data Exchange system. I further certify that copies of the foregoing documents were served via U.S. mail on counsel of record today.

/s/ Richard E. Ayres

Richard E. Ayres