Analysis of Deficiencies Under Current Law
for
The Review of
Coastal and Offshore Wind Energy Project Development
and
A Proposed Comprehensive Regulatory Program

Prepared by

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I. INTRODUCTION

On November 21, 2001, the Cape Wind Associates' (CWA) private development company submitted to the New England District of the U.S. Army Corps of Engineers (Corps) an application for a navigability permit under section 10 of the Rivers and Harbors Act of 1899 to develop a massive wind energy plant in Nantucket Sound. Located on federal lands and waters approximately five miles from Cape Cod, nine miles from Martha's Vineyard, and thirteen miles from Nantucket, the project CWA proposes would be the largest offshore wind plant in the world. In its most recent incarnation, the wind plant would cover 24 square miles of the Sound, consist of 130 wind towers[1] and turbines each over 400 feet tall, and connect to the mainland by means of an underground cable carrying electricity from a transmission station located in the midst of the wind plant. See Exhibit 1.

The attraction of the proposal to private entrepreneurs like CWA is easy to understand. In Massachusetts, wind energy is subject to a heavily subsidized program. Massachusetts has adopted a "renewable portfolio standard." This standard requires that a minimum percentage of retail electricity sales in Massachusetts be from renewable energy sources starting in 2003. The purpose of the standard is to create a market for renewable energy that would otherwise be noncompetitive. Massachusetts also imposes a 0.05 cent per kilowatt hour tax on electricity, which is used to support the development and promotion of renewable energy projects. In addition to the state subsidies, federal subsidies include a 1.7 cent per kilowatt hour tax credit and accelerated depreciation on capital investments. Thus, CWA stands to make large economic gains from the project.[2]

In its pursuit of these financial gains, CWA seeks to exploit a regulatory void. It is hoping that the absence of a legal program designed to govern the development of offshore wind energy projects will make it possible to 1) avoid State review of

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[1] The precise number of towers involved is unclear. Perhaps relenting to public pressure, CWA has recently announced that it plans to scale back its original proposal of 170 turbines, which would have occupied approximately 28 square miles of public waters. Even if CWA does actually scale back the project, the wind plant would still have devastating impacts on Nantucket Sound.

[2] There is considerable speculation that CWA does not intend to operate this project itself should it be permitted, but instead would sell it, for additional profit, to other investors. CWA's president, Mr. James Gordon, has "flipped" other energy projects in this manner. As president of Energy Management, Inc. (EMI), which partnered with Wind Management, LLC to form CWA, Mr. Gordon sold EMI's power plants, including two power plants that were not yet completed, in 2000 at a reported profit of $250 million.

important aspects of the project; 2) achieve a reduced level of federal scrutiny because there are no standards to govern offshore wind energy; and 3) use and occupy federal lands and waters without payment of rent or royalties, participation in competitive bidding, or acquisition of a property right.

CWA maintains that Massachusetts law does not apply to the wind energy plant itself, on the theory that it is located beyond the three-mile limit of State waters. Only the cable, CWA argues, is subject to Massachusetts' jurisdiction. CWA also argues that when reviewing the cable, the Massachusetts Energy Facility Siting Board (EFSB) is precluded from considering the related and cumulative effects of the wind plant. CWA seeks to segment the State's review so it looks at only part of the picture and ignores the most serious effects that will be caused by the wind energy plant.

On the federal side, CWA seeks to exploit what it perceives to be another loophole. No law exists to authorize the use and occupancy of federally controlled offshore lands and waters for wind energy projects. While such laws have been enacted for mineral development under the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1331 et seq., thermal energy conversion, 42 U.S.C. § 9101 et seq., and deepwater port construction, 33 U.S.C. § 1501 et seq., no similar program exists for wind energy plants. CWA takes this to mean that the lands and waters of Nantucket Sound are freely open to wind energy projects and subject to development for private purposes with no property right or grant of permission other than a simple permit authorizing an impediment to navigation under section 10.

On the basis of this theory, CWA has already built a 200-foot tower on federal lands and waters in the Sound.[3] CWA also is pushing forward aggressively with its section 10 application for the wind energy plant itself. The Corps has conducted scoping on that permit application under the National Environmental Policy Act (NEPA). Contrary to regulations and guidance published by the President's Council on Environmental Quality (CEQ), the Corps is allowing CWA's own project consultant and advocate for the proposal to prepare the Environmental Impact Statement (EIS). The Corps and CWA also have thus far refused to conduct the

[3] This tower is subject to a lawsuit filed by the Alliance under federal law, as well as a lawsuit under State law by other parties. The federal case alleges that: 1) the Corps lacks jurisdiction to issue Rivers and Harbors Act permits for non-mineral related structures in offshore waters; 2) the Corps should not have issued a permit because it is clear that CWA cannot obtain property rights to use and occupy the site; and 3) the Corps failed to comply with procedural requirements under the National Environmental Policy Act (NEPA).

studies considered necessary by federal and state wildlife agencies, and environmental organizations, to evaluate the impact of the project on birds.

Seeing this opportunity presented by the "CWA model" for private offshore wind energy development, other companies have rushed to try to secure their own section 10 permits. Within one year of CWA's proposal, nearly two dozen sites had been staked out from New England to Virginia for large-scale wind energy plants. See Exhibit 2. All of these proposals seek to follow the same regulatory path of least resistance defined by the CWA application, involving the minimal level of review provided under section 10 and without any form of land use authorization. As a result, over the last year a veritable "land rush" has occurred to establish claims for huge offshore wind energy projects.

The CWA proposal has generated extraordinary opposition and controversy. Nantucket Sound is a cherished resource of national and international significance. It possesses remarkable ecological values, including significant fish, marine life, and bird populations. It is a scenic wonder, admired for its pristine seascape and aesthetic values. The Sound also serves as a source for commercial and sport fisheries, and it is valued by millions of visitors for its beaches and recreational opportunities. The Sound is, without question, the economic lifeblood of the entire region and an environmental treasure that has thus far escaped degradation and industrialization.

The threat posed by the Cape Wind project to all of these values has mobilized a massive opposition effect. From national environmental groups to grassroots organizations; from local governments to commercial fishery interests (see Exhibit 3); from ferry lines to private property owners and businesses, virtually every affected interest has come forward in opposition to either this project or the manner in which it is being processed in the absence of an adequate regulatory program. Many of these concerns are set forth persuasively in two October 17, 2002 letters, to members of Congress and to federal officials, issued by Massachusetts Attorney General Thomas Reilly. See Exhibit 4. In those letters, Attorney General Reilly asserts that existing federal law is insufficient to authorize such a massive project. He explains that alternative energy projects are not subject to the leasing program established by the OCSLA, nor any other program applicable to federal lands. Attorney General Reilly expresses concern that inadequate consideration has been given to "all the consequences of giving away an invaluable public resource to the very first private developer to seek its use." The New Hampshire Attorney General has expressed the same view. See Exhibit 5.

While no environmental group has yet come forward to support the project itself, a few organizations with legitimate concerns over the effects of global warming

have supported the section 10 permit process as sufficient to review the proposal. These groups, led by the Conservation Law Foundation (CLF), responded to Attorney General Reilly in a November 7, 2002 letter in which they assert their support for the section 10 process. See Exhibit 6. CLF has taken this stance even though the Department of the Interior has stated that there is no existing legal mechanism to authorize offshore wind energy projects, see Exhibit 7, and Congress has recognized this need through proposed legislation (H.R. 5156) that would establish such a process.

In this report, the Alliance to Protect Nantucket Sound addresses the issues framed by the letters issued by Massachusetts Attorney General and CLF. As discussed below, there is no question that the current regulatory program for offshore wind energy projects is lacking. Section 10 provides for a navigation permit but no regulation of the commercial activity or authorization of private use of federal lands. The CWA project review stands as an anomaly in federal land and natural resource law. Nowhere else under federal law can a situation be found where private developers are allowed to proceed on an ad hoc basis to use and occupy federally controlled land and water without permission, without benefit of a comprehensive, resource-specific review, and without making payments to the United States. When a resource as valuable as Nantucket Sound is at stake, this haphazard and insufficient process cannot be used as the basis for decisionmaking.

The first section of this report explains in greater detail the reasons Attorney General Reilly is correct and why the CWA review should be terminated. It analyzes the state of the law governing the utilization of federal resources for private development purposes and shows why section 10 falls far short of the regulatory approach used in every comparable context. It also discusses the numerous specific deficiencies found in the Corps' review of the CWA proposal, thereby showing that even the section 10 process is legally authorized, it is not being adequately implemented.

While the Alliance opposes the Cape Wind project, it also recognizes the urgent need to promote wind and other forms of alternative energy. In furtherance of that objective, the second section of this report contains a proposal for a comprehensive federal program that would simultaneously protect areas like Nantucket Sound while promoting alternative energy. The intense controversy and divisive debate over the CWA proposal is proving to be a setback to responsible alternative energy development. The Cape Wind project is perhaps the worst possible "poster child" for offshore wind energy development, and the baggage it is carrying is detracting from efforts to develop consensus on how best to proceed with the review and approval of such projects. The Alliance's proposal would cure the deficiencies of

the current system and protect Nantucket Sound and similar areas while ensuring the expeditious assessment of the potential for wind energy development in the marine environment.

II. DEFICIENCIES IN CURRENT REGULATORY PROGRAM

CWA argues that the Nantucket Sound wind plant should be considered under existing law based on the premise that the "public interest" review conducted by the Corps to issue navigability permits under section 10 of the 1899 Rivers and Harbors Act, combined with the procedures of State law and NEPA, are sufficient to ensure a reasoned decision. The premise is flawed on numerous counts.

As a threshold matter, the Corps lacks jurisdiction to issue section 10 permits in offshore waters. Even if it had such authority, a section 10 permit does not confer the property rights necessary to use and occupy federal lands. The area CWA seeks to use for its powerplant is subject to federal ownership and control and cannot be exploited as proposed without express federal authorization. No mechanism exists to grant such approval. The standard approach under federal law for allowing the private use of public resources requires, under Article IV, Section 3, Clause 2 of the United States Constitution, that Congress expressly authorize the disposition of U.S. property. It is also standard for compensation to be made to the United States, typically through a competitive bidding process. No such payment structure exists for the Cape Wind project; and the developer seeks to use this land for free.

Even if the Corps has jurisdiction and a section 10 permit suffices to allow use and occupancy of these lands, the Rivers and Harbors Act is an inadequate mechanism for decisionmaking. No standards exist to govern the Corps' decisions. Instead, only a laundry list of factors to be taken into account are enumerated in a single regulation. Similar decisions made under other federal statutes require the application of specific decision criteria, usually articulated in detail by Congress and tailored to the issues associated with the proposed activity. This principle is derived from the public trust doctrine, which demands that the general interest of the public in the proper use of natural resources cannot be sacrificed, especially to private parties, without reasoned decisionmaking. The Corps of Engineers lacks the expertise to make these judgments in the area of energy development and public land use, and it should not be allowed to do so in the absence of clearly articulated standards.

The review procedure conducted to date also is seriously flawed. The Corps lacks the resources to conduct an adequate review. CWA has been allowed to play an improper role, by having its consultant and project proponent prepare what is

supposed to be an unbiased and objective EIS. Necessary studies are not being conducted. Required reviews have not been undertaken, and the public has not been provided the opportunity for sufficient input. The status of Nantucket Sound as a "marine protected area" has been ignored, and the Corps is refusing to comply with the critically important National Historic Preservation Act.

State law also does not meet the needs for comprehensive review. Indeed, CWA has resisted the full and complete application of Massachusetts law. It is seeking to avoid the jurisdiction of Massachusetts that exists over the entire Sound under the Fishery Conservation and Management Act. CWA has opposed (unsuccessfully) the participation of interested parties in the EFSB review, in an effort to stifle adverse comment. This developer also is attempting to focus the EFSB review narrowly so that the massive wind energy plant itself is not even considered. Each of these problem areas is discussed below.

A. Absence of Jurisdiction

On the most basic level, this project should not even be entertained under the Rivers and Harbors Act. The Corps does not have jurisdiction over the offshore waters within which the Cape Wind project would be located for wind energy projects. This issue is currently subject to litigation, challenging the Corps' issuance of the section 10 permit for the initial tower CWA has built on the federal lands and waters of Nantucket Sound.[4]

The Corps' authority to issue section 10 permits for offshore installations is limited to facilities erected for the extraction of minerals from the Outer Continental Shelf (OCS). Because the Corps' jurisdiction under section 10[5] extends only 3 nautical miles offshore, see 33 C.F.R. § 329.12(a), 320.2(b), the Corps therefore relies on the extension of this jurisdiction to certain activities on the OCS by the OCSLA. 43 U.S.C. § 1331 et seq. See 33 C.F.R. § 329.12(a), 322.3(b), 320.2(b) (basing

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[4] Indicative of the rush to development that the CWA proposal has brought forward, another private developer has proposed an initial tower for a wind energy project site southeast of Nantucket. It is questionable that these towers are necessary for data-gathering purposes related to their associated projects, as contended by their proponents. Instead, they serve as a device for staking out "claims" to offshore areas for these companies for later development.

[5] Section 10 prohibits unauthorized obstructions to "the navigable capacity of any of the waters of the United States." 33 U.S.C. § 403.

section 10 regulatory jurisdiction beyond the three-mile territorial sea[6] on the OCSLA). Under the OCSLA, the Corps' authority to prevent obstructions to navigation is extended to "the artificial islands, installations, and other devices *referred to in subsection (a) of this section.*" 43 U.S.C. § 1333(e)(emphasis added). Subsection (a) refers to "all artificial islands, and all installations and other device permanently or temporarily attached to the seabed, which may be erected thereon *for the purpose of exploring for, developing, or producing resources therefrom*, or any such installation or other device (other than a ship or a vessel) *for the purpose of transporting such resources.*" Id. § 1333(a)(1) (extending federal law to such installations)(emphasis added). "Resources" is not defined in the OCSLA, but "exploration," "development," and "production" are all defined in terms of "minerals." Congress defines "minerals" as "includ[ing] oil, gas, sulphur, geopressured-geothermal and associated resources, and all other minerals which are authorized by an Act of Congress to be produced from 'public lands.'" Id. § 1331(k),(l),(m),(q). Thus, activities on the OCS that are unrelated to mineral extraction or for utilizing resources from "the seabed" are simply not within the Corps' authority under the OCSLA.

The absence of Corps jurisdiction over non-mineral activities is not surprising, given the purpose of the OCSLA. Congress enacted the law in 1953 for the purpose of asserting federal jurisdiction over the OCS lands and to establish a regulatory framework for the extraction of minerals – primarily oil and gas – from those lands. See 43 U.S.C. § 1332 (declaration of policy). The OCSLA authorizes the exploration, development, and production of minerals from the OCS, and establishes a comprehensive regulatory program for granting leases and collecting royalties. See generally, 43 U.S.C. § 1331 et seq. In contrast, the OCSLA does not provide for the development of non-extractive energy resources on the OCS. Rather, Congress has provided for the authorization and regulation of other specific activities of this type in separate legislation, such as the Deep Water Port Act, 33 U.S.C. § 1501 et seq., and the Ocean Thermal Energy Conversion Act of 1980, 42 U.S.C. § 9101 et seq. Significantly, Congress has not delegated to the Corps section 10 jurisdiction on the OCS for these uses. Instead, under the Deep Water Port Act, the Secretary of Transportation is only required to consult with the Department of the Army regarding navigation issues before issuing a license for such uses. 33 U.S.C. § 1503(c)(7).

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[6] The territorial sea was extended to 12 nautical miles by President Reagan in 1988. Proclamation No. 5928, 54 Fed. Reg. 777 (December 27, 1988). The Proclamation, however, specifically declined to "extend or otherwise alter[] existing Federal or State law or any jurisdiction, rights, legal interests, or obligations derived therefrom." Id.

Under the Ocean Thermal Energy Conversion Act, the Administrator of the National Oceanic and Atmospheric Administration (NOAA) must only consult with the Coast Guard regarding navigation issues before issuing a license. 42 U.S.C. § 9111(c)(3). Clearly, Congress in no way intended the Corps to exercise general authority over uses of the OCS, much less any default authority over uses that Congress has not even authorized.

The Corps has attempted to refute this claim by arguing that the "OCSLA confers to the MMS [Minerals Management Service] the regulatory authority to lease oil and gas extraction rights, 43 U.S.C. §§ 1334-56, and to the Corps, under section 1333(e), the sole authority to allow and regulate all other structures on the OCS pursuant to Section 10." This position is asserted in the Corps' brief in the pending data tower lawsuit. Fed. Def. Mem. at 17.[7] The Corps and CWA have also argued that the legislative history of the 1978 amendments to the OCSLA establish that the Corps' jurisdiction in offshore waters is not limited to structures erected for the extraction of minerals from the OCS. Fed. Def. Mem. at 13; Cape Wind Mem. at 8-9.

The Corp's position is wrong. The OCSLA expressly vests the Corps with limited section 10 jurisdiction over only those structures on the OCS seabed "erected thereon for the purpose of exploring for, developing, or producing resources therefrom." 43 U.S.C.§ 1333(a)(1). The statute is clear that resources include oil, gas and minerals. The fact that Congress has vested the Secretary of Transportation with authority over deepwater ports and the Administrator of NOAA with authority over ocean thermal conversion facilities directly refutes the Corps' claim that it has authority over all other structures on the OCS. Clearly, the Corps does not have authority over all other structures on the OCS, either under the OCSLA or any other statute. Further more, controlling law is quite clear that the unambiguous language of the statute controls if it is in conflict with an interpretation suggested in legislative history or claimed by the Corps. See Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 254 (1992) ("When the words of a statute are unambiguous, then, . . . 'judicial inquiry is complete.'"); Ciampa v. Sec'y of Health and Human Servs., 687 F.2d 518, 525 (1st Cir. 1982) (legislative history should be used "to resolve ambiguities and not to create them").

As an alternative argument, the Corps asserts that even if it is true that the OCSLA limits the Corps' jurisdiction under section 10 to structures erected on the

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[7] Citations to briefs refer to the current case challenging CWA's initial industrial tower in Nantucket Sound. Alliance to Protect Nantucket Sound v. United States Dept. of the Army, No. 02-11749 JLT (D. Mass).

OCS seabed for oil and gas purposes, it is "reasonable to view a data tower erected in large part to evaluate the feasibility of a wind energy project as serving such a purpose." This is said to be so because "the Act's definition of 'minerals' does not exclude wind resources." Id. at 16 n. 11.

This alternative argument claims that if project opponents are right about the meaning of the OCSLA, the CWA tower is nonetheless a structure erected for the purpose of extracting resources from the OCS because wind is a "mineral." The OCSLA covers production of resources from the seabed and wind is not from the seabed. Even if wind were a mineral - truly an absurd proposition – it is still not a resource produced from "the seabed," 43 U.S.C. § 1333(a)(1), and even if it were, CWA would then be required to obtain authorization from the Minerals Management Service, which CWA did not do. As a result, there is no credible basis upon which it can be argued that the Corps has the power to grant a permit for this project.

B. Lack of Authority to Permit Use and Occupancy of Federal Lands

The fundamental, federal decision raised by CWA's data tower and wind plant proposal is not whether to issue a permit that allows a party to construct a project impeding navigation. This is an important issue, but not the key issue. Instead, the fundamental inquiry is whether the federally-controlled lands and waters of Nantucket Sound, which are held and administered in the public trust, should be used and occupied by CWA for its private purposes. In every other context under which federal lands and resources are to be used for energy development purposes or for private use, it is the question of land use and occupancy and resource utilization that drives decision-making and brings the relevant criteria into play. Peripheral issues, like navigation, are not the focal point of federal review.

Because Nantucket Sound and other offshore areas are subject to federal control, these areas cannot simply be appropriated by private parties like CWA without authorization to do so. Under the Constitution, only Congress can grant that authorization. In the OCSLA, Congress declared a policy that "the Outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public, *which should be made available* for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs." 43 U.S.C. § 1332 (emphasis added). Implicit in this statement is the need for express authorization of any use of the OCS for any purpose. Similarly, the declared intent of Congress in the Ocean Thermal Energy Conversion Act is to "*authorize* and regulate the construction, location, ownership, and operation of ocean thermal energy conversion facilities," 42 U.S.C. § 9101(a)(1) (emphasis added), and in the Deepwater Port Act, to "*authorize*

and regulate the location, ownership, construction, and operation of deepwater ports in waters beyond the territorial limits of the United States." 33 U.S.C. § 1501(a)(1) (emphasis added). Clearly, Congress considers express authorization to be a necessary prerequisite for use of the offshore area. Indeed, any unauthorized use of the OCS would constitute common law trespass and violation of the public trust doctrine (discussed below). 43 U.S.C. § 1333(a)(2)(A) (extending the criminal and civil laws of adjacent States to the OCS).

It cannot be disputed that the United States owns and controls these lands and waters. Congress enacted the OCSLA in 1953 to achieve two overarching purposes: (i) to extend federal jurisdiction and control over the OCS; and (ii) to establish a framework for how that control was to be exercised. Major amendments to the OCSLA in 1978 and 1985 upheld these objectives.

Congress asserts jurisdiction and control over the OCS in the very first substantive provision of the Act: "[T]he subsoil and seabed of the Outer Continental Shelf are subject to [the United States'] jurisdiction, control, and power of disposition as provided in this Act[.]" 43 U.S.C. § 1332(1). The wording of this provision -- particularly the wording relating to the scope of the power being asserted -- is unqualified. Federal "jurisdiction, control and power of disposition" are not limited to any one aspect or element of the OCS. The assertion of authority is comprehensive; there is no such thing as an activity involving the OCS that lies beyond the reach of the federal government's authority.

The Act's legislative history confirms the sweeping and comprehensive scope of control over the OCS. The Conference Report states that:

> the jurisdiction and control of the United States is extended to the seabed and subsoil of the entire Outer Continental Shelf adjacent to the shores of the United States instead of merely to the natural resources of the subsoil and seabed as in the original House version.

H.R. Conf. Rep. No. 83-1031, at 1(1953), *reprinted in* 1953 U.S.C.C.A.N. 2184, 2184.

Congress thus explicitly noted that the power the United States asserts over the OCS is absolute. The clear direction of Congress is that all uses or appropriations of the OCS are subject to federal control. Through the OCSLA, then, Congress asserted its power to regulate every use a party might make of the OCS, whether it be a use that

was contemplated at the time of enactment or one that is now being considered for the first time.

As noted above, the Department of the Interior, the agency responsible for managing federal offshore lands and waters, accepts this conclusion. By letter of June 20, 2002 to Vice President Cheney urging the introduction of legislation that would establish a regulatory program to govern wind energy and other uses of offshore lands and waters, Rebecca W. Watson, Assistant Secretary of the Interior for Land and Minerals Management states: "mechanisms do not currently exist by which an applicant can obtain approval from the Federal Government to utilize the OCS for non-oil and gas related activities ." See Exhibit 7. Ms. Johnnie Burton, Director of the Minerals Management Service, reiterated these concerns when she testified on H.R. 5156 and stated that there exists "no clear authority within the federal government to comprehensively review, permit, and provide appropriate regulatory oversight of such projects." Testimony of Johnnie Burton, Director, Minerals Management Service, U.S. Department of the Interior, to the House Subcommittee on Energy & Mineral Resources, July 25, 2002. See Exhibit 8.

Thus, as the responsible federal agencies concede, there is no mechanism available to authorize the central federal action required for a project like CWA's proposed wind plant – the issuance of a right to use and occupy these federal lands and waters. The issuance of a navigability permit under section 10 is of no legal effect when it comes to the question of whether CWA has obtained permission to build this project. This private developer seeking to exploit federal natural resources for private gain must first obtain a right to use and occupy these lands and waters, and there is no mechanism in place to grant such a right.

Neither CLF nor CWA point to any authority under which such use and occupancy can be granted. The issue of how CWA can obtain the property rights to appropriate 24 square miles of the federal estate is never explained. Indeed, in an ironic switch in roles from the position typically assumed by an environmental organization, CLF finds itself arguing against the federal government that a more comprehensive and detailed regulatory program is required before a development activity can proceed. On page 4 of its November 7 letter, CLF cites to Ms. Burton's statement that a more comprehensive program is needed to "provide adequate regulatory oversight" for alternative energy projects. CLF responds that section 10, combined with NEPA and State law suffice, begging the question of where the authority comes from to grant the basic right to use and occupy federal lands and waters and saying that less, rather than more, environmental review is acceptable when the development activity involved is an offshore wind plants.

CLF's position is problematic for broader reasons than the issue of its support for the procedure being used to consider the CWA application. Taken at face value, CLF's position would allow section 10 to be used for any proposed activity located on federal offshore lands and waters not subject to an existing statute. If section 10 can be used for a massive wind energy project, it also can be used for any other development, including other activities that have been proposed previously, such as large-scale aquaculture, liquefied natural gas terminals, and floating casinos.[8]

CWA's position is even more extreme: CWA argues that the federal government has never established or asserted ownership over OCS lands. CWA argues in its brief in the data tower case that "[t]he seabed beyond the three-mile limit is not 'public land,' and only The Corps and Coast Guard authorization is needed for fixed structures there." CWA Mem. at 12. CWA also states that "[t]he United States does not claim 'title or ownership in the conventional sense' with respect to the Shelf." Id. CWA is saying, in effect, offshore lands and waters area available on a first-come, first-served basis to any private developer who can obtain a section 10 permit.

In taking this position, CWA grossly misrepresents the law. In fact, the very case it relies upon, United States v. Louisiana, 339 U.S. 699 (1950) (decree at 340 U.S. 899), holds just the opposite. As decreed by the United States Supreme Court: "The United States is now, and has been at all times pertinent hereto, possessed of paramount rights in and full dominion and power over, the lands, the minerals, and other things underlying the Gulf of Mexico[.]" 340 U.S. at 699.

If CWA is correct, then section 10 serves as authority for any kind of development in offshore waters, undermining the entire premise of the extensive body of laws governing the federal estate that such use, occupancy, and development cannot be allowed without express authorization. Even the legitimate interest in promoting alternative energy is not worth such a wholesale abdication of the federal interest in OCS lands, with its attendant precedent for a host of environmentally harmful activities. As a result, until such authority has been established by Congress, there is no reason to invest in the review of specific permit applications.

In any event, the law is clear that CWA is wrong. The United States does indeed possess ownership control over this land and water. United States v. Maine,

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[8] In the past, CLF has opposed the development of at least one such project on the grounds that it would conflict with the federal public trust duties for offshore lands and waters. For example, CLF filed a lawsuit challenging an aquaculture facility subject to the section 10 process based on public trust principles. See Exhibit 9.

420 U.S. 515 (1975) (United States is possessed of paramount rights in offshore lands underlying the Atlantic Ocean, from three nautical miles from the coast seaward to the edge of the Continental Shelf) citing United States v. Texas, 339 U.S. 707, 717-19 (1950) (paramount rights include both sovereignty and ownership). No agency of the executive branch may authorize the use of federal lands without Congressional authorization, as such power is reserved to Congress under Article IV, Section 3, Clause 2 of the Constitution. If CWA wants to build a wind energy powerplant in Nantucket Sound, it needs the permission of Congress, not the Corps of Engineers.

C. Granting a Section 10 Permit for the Cape Wind Project Violates the Public Trust Doctrine

The lands, waters, resources, and even the wind that will be exploited by the Cape Wind project are public resources. As such, these resources are held in trust by the federal government for the general public. Under the landmark Illinois Central case, the government "can no more abdicate its trust over property in which the whole people are interested, like navigable waters and the soils under them, so as to leave them entirely under the use and control of private parties . . . than it can abdicate its police powers in the administration of government and preservation of peace." Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387, 453 (1892). This, of course, is precisely what the Corps has done with Cape Wind's initial wind plant tower, and is considering to do again for the entire wind energy project.

Under the public trust doctrine, the precise uses and values intrinsic in Nantucket Sound that are at risk from the Cape Wind project - wildlife, water quality, public recreation, aesthetics, and ecological integrity - are protected from government expropriation.

The public trust doctrine therefore serves as a prohibition on action by the Corps, or any other agency, to grant a private party like Cape Wind the right to use and occupy the lands, waters, and resources of Nantucket Sound. In fact, the public trust doctrine has been used to enjoin a private developer from placing shoreline fill under a Rivers and Harbors Act section 10 permit, the same mechanism CWA is seeking to use to take miles and miles of Nantucket Sound under its private control for its private gain. Lake Michigan Federation v. U.S. Army Corps of Engineers, 742 F. Supp. 441, 444 (N.D. Ill. 1990).

Concern over violations of the public trust doctrine by the Corps of Engineers in this case prompted a broad-based coalition of environmental groups to submit an

amicus curiae brief in the current lawsuit challenging the Corps' issuance of a section 10 permit for CWA's initial tower. See Exhibit 10.[9] That brief signaled the position of these groups, representing millions of members, that the Corps cannot violate this public trust by literally giving away Nantucket Sound and numerous other offshore locations to private wind energy developers. Indeed, even CLF has invoked this doctrine to sue the Corps for purposes of granting a permit to a facility it found to be objectionable, an offshore aquaculture farm. See Exhibit 9. But CLF cannot have it both ways, the Corps can no more use section 10 to relinquish the public rights in New England offshore lands and waters for a "wind farm" than it can for a "fish farm."

Concern over violation of the public trust doctrine through the permitting of this project also has been expressed by federal agencies. As stated by the U.S. Fish and Wildlife Service: "we are unsure if any federal agency has the authority to lease or convey use of these lands for the development of an energy facility. That issue not withstanding, it would be a more efficient and informative NEPA process if the alternatives analysis could step back and analyze the OCS lands of the New England Coast using a variety of siting and evaluation criteria . . . . This threshold examination would facilitate meeting the federal public trust responsibility by a public process in which decisions about zoning and uses of the OCS are made." See Exhibit 11. The Environmental Protection Agency expressed a similar view when it commented: "It is our belief that the [Cape Wind] project should not proceed through the permit process absent serious analysis of this private use of public trust resources for renewable energy development on the OCS." See Exhibit 12.

The basis for these concerns over a violation of the federal government's public trust duties is the absence of an adequate regulatory regime for making decisions regarding offshore wind energy projects and other activities not authorized by statute. It is the existence of laws such as those described above, including the OCSLA, that confer express power to allow private uses of public trust resources. In doing so, they ensure that the public trust is protected through the application of decisionmaking criteria, environmental standards, competitive bidding procedures, and compensation to the public treasury. As summarized by the coalition of environmental groups in their amicus brief, "the prudent course of action here is to give Congress an opportunity to debate the pros and cons of promoting additional development of the OCS, to develop legislation that takes all these competing values into account, and to

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[9] The court has not accepted amicus briefs supporting plaintiffs in that case.

produce a blueprint for how the nation's coastal resources are to be managed in the public interest."

D. The Existence of Land and Water Use and Occupancy Authority Would Entail More Detailed and Comprehensive Review Than Provided Under Section 10

CWA maintains that section 10, NEPA and State law bring into play all of the relevant decision making considerations and, as a result, there is an adequate basis upon which to consider this project. CLF apparently supports this view. Reference to statutes used to authorize comparable uses of federal lands and waters demonstrate the deficiencies in this proposition.

As an initial matter, it is clear that the Rivers and Harbors Act was not intended to serve this purpose. Rather, the purpose of that law is to regulate obstructions to navigation. See, e.g., Wilson v. Hudson Valley Water Company, 76 A. 560, 565 (N.Y. Ch. 1910) (explaining that "Section 10 may be searched in vain for the discovery of any affirmative grant of right or power for the construction of any instrumentality of commerce. The section is entirely negative and prohibitive in character. It is intended to prevent obstruction to navigation, and that alone. . . . To say that it is authority for the prosecution of a work or works in or under any of the navigable waters of the United States, unless those works have first been affirmatively authorized by proper authority, either state or federal, is, in my judgment, to give the section a meaning which is unsupported by any rule of construction known to the law.") In fact, Congress initially enacted section 10 in 1890, see 26 Stat. 426, 454, after the Supreme Court held that in the absence of federal legislation, the federal government was powerless to protect the nation's navigable waters from obstruction, including obstacles created by state-authorized projects. See Willamette Iron Bridge Co. v. Hatch, 125 U.S. 1 (1888). This section, with minor changes, became section 10 of the 1899 Act. Two decades later, the Corps failed in an attempt to use the Act to object to a proposed sewer in New York City, when the judge ruled that the only purpose of the law was regulation of obstacles to navigation. See U.S. Army Corps of Engineers, Brief History: Environmental Activities, at http://www.hq.usace.army.mil/history/brief3.htm.

The basis for CWA's argument that the section 10 process is adequate arises from a single provision in the Corps' regulations: 33 C.F.R. § 320.4(a). CLF has joined in this view. This provision calls for the application of a generalized and vague "public interest" test. That test simply provides that, in making a section 10 decision, enumerated factors relevant to a proposal to impede navigation must be considered, including issues such as conservation, economics, aesthetics, fish and wildlife, historic

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preservation, energy needs, etc. Based upon this generic listing of factors to be considered, CWA argues that a sound decision will be made regarding uses of the coastal and offshore waters for virtually any kind of project, including an unprecedented and massive wind energy facility.

CWA's premise may be valid for run-of-the-mill projects within the ambit of section 10, where what is at issue is the construction of a structure that would be located in waters of the United States to impede navigation, such as a pier, bulkhead, buoy, jetty or similar facility. CWA's premise is wholly inadequate for major uses of federal land and waters for projects that will exploit natural resources for private gain. In such a context, more detailed guidance and, as Ms. Burton has stated, comprehensive regulatory review and oversight is called for. Attorney General Reilly is absolutely correct on this point.

Reference need only be made to the numerous other federal programs that provide the basis for the use and occupancy of federal lands or the extraction and use of natural resources for an illustration of how such programs are typically structured. In every such instance, Congress has established programs that go far beyond the kind of review called for by the single paragraph of the Corps' regulation. All of the other programs contain common elements missing from section 10 review. These include: resource-specific environmental standards; enumerated criteria upon which a decision must be made, not mere factors to be considered; standards to guide decisionmaking on the balancing of interests in making decisions; delegation of power to the appropriate agencies with the relevant expertise; land use authorization mechanisms; competitive bidding procedures to attain use of federal resources; fair market value requirements to ensure return to the government and the taxpayers for the use of public trust resources; specification of areas to be off-limits to development; due diligence requirements for the development and use of the resource to ensure efficiency and public health and safety; enforcement and citizen suit provisions; mandatory roles for state and local governments. All of these elements are missing from section 10. The Rivers and Harbors Act was never intended to be the basis upon which land use or energy project decisions would be made. Nor does the "public interest" test of 33 C.F.R. § 320.4(a) provide adequate constraints for informed agency decisionmaking. It is simply a list of issues to consider relative to the question of whether to allow an impediment to navigation.

One of the best examples of the proper and accepted approach to authorizing the use of federal offshore lands, waters and resources is the OCSLA. This statute is the comprehensive source of authority for uses of offshore lands and waters. As originally promulgated and then further developed in its 1978 amendments, the OCSLA sought to encourage and facilitate the extraction of oil, gas, and other

minerals from the OCS. Despite the focus on oil and gas, Congress also addressed how the OCS was to be used generally, thereby indicating the intent to govern all uses of the OCS, even those uses not contemplated by Congress in 1953. The OCSLA thereby delineates a general framework to govern future policy decisions with respect to all uses of the OCS.

In developing the OCSLA, Congress noted how important it is to establish specific standards governing uses of these lands and waters. Recognizing the unique nature of federal offshore areas, Congress made it clear that business as usual under generic federal authorities such as the Rivers and Harbors Act was not enough.

To carry out this comprehensive approach to uses of offshore lands and waters, Congress articulated guiding principles in section 1332, entitled "Congressional Declaration of Policy." This section also establishes the form federal control over the OCS is to take. In essence, it comprises a list of the objectives the Act is meant to accomplish. While general in nature, collectively they serve as a set of values to guide how the U.S. will allow the OCS to be used. They describe the values that shape the United States' relationship to the OCS for all purposes, not just oil and gas. Under Section 1332, the following general principles are of particular relevance.

Environmental Safeguards. Subsection 1332(3) states that the OCS is a "vital national resource held by the Federal Government for the public" whose development should be subject to "environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs." Obviously, the Rivers and Harbors Act was not considered to be sufficient, or such a provision would not have been necessary. 43 U.S.C. § 1332(3). Subsection 1332(3) therefore provides that any use to which the OCS might be put needs to conform to a certain level of environmental safeguards.

Fair Market Value. Subsection 1332(3) also requires that any program providing for development of the OCS be in the public interest, and be consistent with principles of competition and other national needs. Id. § 1332(3). At the very least, that would require that the United States to receive fair market value for any private use of its property. The importance of such a requirement is apparent in the offshore wind energy context, where large amounts of federal land are now subject to private claims under section 10. Clearly, the United States is foregoing considerable revenue by allowing these lands to be used without compensation.

State and Local Government Involvement. Subsection 1332(4) insists that States receive sufficient assistance in dealing with any adverse consequences that may result from a given use of the OCS. Id. § 1332(4). Further, subsection 1332(5)

requires that "the rights and responsibilities of all States and, where appropriate, local governments, to protect their marine, human, and coastal environments . . . should be considered and recognized." Id. § 1332(5). These two subsections insist that any federal policy with respect to the OCS take the interests of state and local governments into account, thereby insuring that such policy will not be made in isolation. They therefore stand for the general proposition that federal OCS policy must be cognizant of the interests of affected state and local governments.

The fact that the rights of states and local governments are not being adequately protected under section 10 is very apparent by the record in this case. Attorney General Reilly has objected on this basis, joined by the chief legal officer for New Hampshire. In addition, the Towns of Barnstable and Yarmouth sought to participate in the pending lawsuit on the grounds that local government interests are not adequately addressed by the Corps under section 10. See Exhibits 13, 14.

These are the key elements of the Act's blueprint for OCS use. They do not articulate every detail; rather, they define the space within which the details must fit. They insist that however the federal government chooses to develop the OCS, the applicable policies and programs must be consistent with these principles.

The general and categorical character of the standards in section 1332 is emphasized in the legislative history. In a section headed "Purposes of the Legislation," the House Report states that:

> Congress has a special constitutional responsibility to make all needful rules and regulations respecting the territory or other property belonging to the United States. . . . The [OCSLA] is essentially a carte blanche delegation of authority to the Secretary of the Interior. The increased importance of OCS resources, the increased consideration of environmental and onshore impacts and emphasis on comprehensive land use planning, require that Congress detail standards and criteria for the Secretary to follow in the exercise of his authority.

H.R. Rep. No. 95-590, at 54 (1977), *reprinted in* 1978 U.S.C.C.A.N. 1450, 1461 (emphasis added). This passage acknowledges that the Act makes the OCS a "property" of the United States. It goes on to suggest that insofar as the OCS is such a property, Congress has a constitutional obligation under the Property Clause, U.S. Const., art. IV, § 3, cl. 2, to make "all needful Rules and Regulations" to govern it. The passage then suggests that Congress understands itself to be fulfilling that obligation by setting out certain general "standards and criteria." To the extent that

the Cape Wind project is a use of the OCS, the Property Clause requires that the standards in section 1332 apply to it. Section 10 of the antiquated 1899 Rivers and Harbors Act is no substitute for this comprehensive and contemporary approach to managing offshore lands.

Another passage in the 1977 House Report makes the same point even more explicitly:

> In addition, policy statements are included to make it clear that in administering not only the Outer Continental Shelf Lands Act, but any other act applicable, directly or indirectly to activities on the [OCS], responsible Federal officials must insure that activities in the shelf are undertaken in an orderly fashion . . . so as to safeguard the environment . . . and take into account impacts on affected States and local areas.

Id. at 127. The passage states unambiguously that these principles are meant to govern any and all activities involving the OCS. It leaves no doubt that the Act establishes a form of federal stewardship over the OCS to be shaped by those principles. This has been the intent of Congress for the past 50 years.

Having stated these general principles applicable to all uses of the OCS, Congress went on to create a specific program for oil and gas. That program consisted of detailed requirements found nowhere in the 1899 law that is argued by CWA to suffice for offshore wind energy plants. In addition, pursuant to these standards, the Department of the Interior has developed extensive, highly detailed implementing regulations.

In the OCSLA itself, Congress dictated the basic framework for allowing uses of offshore areas for oil and gas. The central elements of this program are:

- Delegation of responsibility for the program to the Secretary of the Interior. 42 U.S.C. § 1344(a).
- Publication of a five-year schedule of proposed lease sales indicating the size, timing and location of leasing activity. Id.
- Assurance of receipt of fair market value for lands leased and rights conveyed by the federal government. Id. at § 1344(a)(4).
- Provision for appropriations and staff necessary to: obtain resource information; analyze and interpret exploratory data; conduct

environmental studies; supervise operations to ensure due diligence in exploration and development of lease areas. Id. at § 1344(b).

- Annual review of the leasing program. Id. at § 1344(e).

- Implementation of procedural regulations for program management, including: receipt and consideration of nominations for any area to be offered for lease or to be excluded from leasing; public notice of and participation in development of leasing programs; review by state and local governments that may be impacted by proposed leasing; and consideration of coastal zone management program in the affected state. Id. at § 1344(f).

In addition to these statutory requirements, the Department of the Interior OCSLA regulations, which account for almost 300 pages in the Code of Federal Regulations, provide additional detail and requirements on how to make leasing and permitting decisions and how to ensure environmental protection. For example, the regulations specify performance standards, lease requirements, and reporting requirements, and provide for disqualification, special approvals, rights-of-way and easements, suspensions, extensions, and cancellations of leases for oil and gas operations. See generally, 30 C.F.R. Part 250. The regulations also detail requirements for exploration, development, and production plans, pollution prevention and control, safety systems, and safety training. See id. Other regulations govern exploration and prospecting, oil spill response and financial responsibility requirements, and operations for minerals other than oil and gas. See generally, 30 C.F.R. Parts 251 – 282. Procedures for the administration of offshore leasing programs are especially detailed, including requirements for the participation of affected States, local governments, and other interested parties, the special consideration of areas of concern, a competitive bidding process, and environmental studies. See generally, 30 C.F.R. Part 256.

When this highly specific and detailed authority is compared to the simplistic and generalized paragraph from the Corps' regulation that CWA relies upon, it becomes abundantly clear how deficient the current regulatory program is to allow the use of offshore lands and waters for massive wind energy plants like Cape Wind's. While it may not be necessary to have a regulatory program for wind energy in place as highly detailed as that for oil and gas, it cannot reasonably be argued that such significant activities can be allowed merely under a vague public interest principle guided by no standards of decision making, no articulated balancing test, and no established environmental safeguards and criteria.

To the extent, therefore, that the OCSLA does not currently address a specific potential use of the OCS or its resources, the following steps must be satisfied as a threshold matter: (1) Congress must authorize the use of the OCS for such purpose; (2) Congress must delegate responsibility to implement and oversee a program for such purpose; and (3) the agency in the executive branch to which the responsibility is delegated must implement such a program.

Reference to other laws concerning the use of federal lands and resources further highlights how inadequate the Rivers and Harbors Act section 10 approach is. In the onshore context, one of the principle sources of authority for authorizing the use of public lands for mineral extraction and other uses is the Federal Land Management and Policy Act (FLPMA). 43 U.S.C. § 1701 et seq. Like the OCSLA, this law establishes extensive requirements for authorization of use of public lands (id. §§ 1732(b), 1761(a)), delegation of authority to the federal agencies with appropriate expertise (id. § 1712(a), (b)), detailed requirements for land use decisionmaking (id. § 1712), special protection for specific areas (id. §§ 1711(a), 1712(c)(3)), and requirements for payment to the federal government (id. §§ 1734, 1751, 1764(g)).

The same principles can be found for the development of coal resources for energy-related purposes. Under the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201 et seq., again a detailed and comprehensive program exists to define environmental standards (id. §§ 1265, 1251), designate areas not subject to development (id. §§ 1272, 1281), and create a role for the states (id. §§ 1252(a), 1253, 1272(a)).

Similar concepts and requirements are recognized in the alternative energy context. Under the Geothermal Steam Act, 30 U.S.C. § 1001 et seq., Congress sought to promote the use of this form of renewable, alternative energy. Despite the goal of promoting alternative energy, Congress still saw the need to establish a comprehensive program that addresses the same considerations implicit in the OCSLA. In the Geothermal Steam Act, Congress created a mechanism for authorizing the use and occupancy of federal lands (id. § 1002), payments to the United States (id. §§ 1003, 1004), areas off-limits to development (id. § 1014(c)), and delegation to the appropriate agency with substantive expertise (id. § 1002). The fact that this program has been successfully implemented without needlessly burdening the development of this alternative source of energy is proof that this same approach can be used for offshore wind energy plants.

These principles are also embodied in statutes governing the use of other renewable resources, such as the Federal Power Act, 16 U.S.C. § 791a et seq., which governs hydroelectric power. The Federal Power Act authorizes the Federal Energy

Regulatory Commission (FERC) to issue licenses for the use and occupancy of waters and lands subject to United States control and jurisdiction and for the development of hydroelectric power. Id. § 797(e). Licenses are subject to express environmental criteria. Id. §§ 797(e), 803(j). Licensees must pay annual charges to compensate the United States for, among other things, the use, occupancy, and enjoyment of government lands. Id. § 803(e)(1). States and local governments are afforded special consideration in the licensing process. Id. § 797(f), 800(a), 818, 823a(c). States are also entitled to 37.5% of all revenues deriving from projects within their boundaries. Id. § 810(a).

In the context of the marine environment, the same principles are found in other laws. The Ocean Thermal Energy Conversion Act, 42 U.S.C. § 9101 et seq., for example, establishes the rules that govern the use of the U.S. owned waters for thermal energy facilities. This law establishes a licensing system for the location of those facilities (id. § 9111, and other sections), and requires the involvement of other agencies with relevant expertise (id. § 9111(c)). It contains specific decisionmaking criteria (id. § 9111) and environmental safeguards (id. §§ 9117, 9118). This law also delineates the specific role for coastal states (id. § 9115).

The Deepwater Port Act follows the same approach. 33 U.S.C. § 1501 et seq. Licenses are required to locate such ports. Id. § 1503. Authority to license these ports is vested in the Secretary of Transportation. Id. Decisionmaking and environmental review criteria apply. Id. §§ 1505, 1506, 1509. The role of coastal states is provided for. Id. § 1508.

Laws dealing with other uses of marine resources, besides land and water, apply similar principles. For example, the Fishery Conservation and Management Act, 16 U.S.C. § 1801 et seq., governing the use of public trust fishery resources of United States marine waters, recognizes the need for a comprehensive approach. National standards governing all uses of fishing resources are set forth. Id. § 1851. The mechanism for authorizing private parties to take fish through comprehensive plans that often require specific permits is set forth. Id. §§ 1852, 1853. A role is defined for the states. Id. § 1852. Special protection and jurisdiction is provided to specific areas. Id. § 1855(b). In particular, Nantucket Sound is recognized as unique, due to its geographic configuration, and as a result, the Act vested Massachusetts with jurisdiction over the entire Sound. Id. § 1856(a)(2)(B).

Numerous other examples could be cited from federal law. It is fair to say that it is impossible to find under the panoply of federal environmental and natural resources law any program comparable to what is being advocated by CWA – a way to allow a private party to use and occupy federal property for private purposes on a

massive scale to develop and produce energy from a public resource at no charge, with no express authorization to do so, and on the basis of a permit governed only by vague and general standards established by an agency lacking the relevant expertise. As much as alternative forms of energy deserve to be promoted, the deficiencies under the approach supported by the proponents of offshore wind power plants are far too significant to accept. The CWA approach to permitting essentially amounts to a scam being run on the public interest, and it must be brought to an immediate end so a comprehensive, fair, and effective program can be established to evaluate and manage these proposed uses of the offshore environment.

E. The Corps of Engineers Lacks the Expertise to Make the Required Decisions

The Cape Wind Project is a private energy project. It is an energy project proposed for offshore waters. It is to be located on federal land. It raises questions about the valuation of, and fair market return for, the use of public trust resources. It will require a balancing of energy benefits against unique environmental impacts on fish, birds, marine mammals, and aesthetic values. It will have serious adverse effects on historic preservation resources. Navigation is an important issue, but it is not what the Cape Wind project is all about.

In every one of these areas of interest, the Corps is not the federal agency that has the appropriate expertise or the resources to make the relevant decisions. Energy projects should be considered by agencies such as the Department of Energy, the Federal Energy Regulatory Commission, and the Minerals Management Service. Uses of offshore lands and waters should be considered by the National Oceanic and Atmospheric Administration and the Minerals Management Service. Decisions on valuation and fair market return also fall under the ambit of those agencies. Decisions regarding birds and living marine resources should be made by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service. Historic resource impacts must be adjudged in consultation with the Advisory Council on Historic Preservation and in coordination with state historic preservation officers (a procedure, as discussed below, that the Corps says does not even apply to its section 10 permits in offshore waters).

The Corps of Engineers is not equipped to make any of these judgments with the requisite degree of expertise. This is clear from the Corps' mission statement and description of purpose. The Corps' role is to plan, design, build and operate water resources and other civil works projects; to design and manage the construction of military facilities for the Army and Air Force; and to provide design and construction management support for other Defense and federal agencies. U.S. Army Corps of

Engineers, Who We Are: Our Mission, at http://www.usace.army.mil/who.html#Mission. The Corps is not equipped to determine how and under what circumstances public resources will be available for private exploitation. The issue properly within the Corps' expertise, impacts to navigation, is not the driving force for this project. Indeed, the Corps has expressed the view to the Alliance that it is not the agency that should have the lead on wind energy project development. Congress apparently agrees, as H.R. 5156, the bill introduced last year to create a program for offshore developments of this nature, would vest this responsibility in the Secretary of the Interior.

In addition to lacking the requisite expertise, the Corps does not have the resources to review this sudden proliferation of huge offshore wind projects. The complexity, controversy, and novel nature of these projects would be a challenge for any agency. This is especially true for the Corps, which has a tremendous existing regulatory burden for projects that properly belong under its area of expertise and jurisdiction. As a result, there is a serious risk that these projects, especially the forerunning and most damaging of all -- the Cape Wind project -- will not receive adequate review.[10]

F. The Section 10 Process Being Conducted By the Corps Has Numerous Deficiencies

Even if the Rivers and Harbors Act were the appropriate vehicle for a decision regarding the development of a major energy project on federal offshore lands, the manner in which this authority is being exercised by the Corps is seriously deficient and inadequate for a project of this nature. Some of the major deficiencies with the Corps' review are as follows.

1. Improper Scope

CWA entered the review of this application seeking to define the scope of review in a manner that would increase the probability of a favorable decision. It sought to do this by arguing for a narrow scope, a definition of project need that it could easily meet, and a limited set of alternatives. So far, the Corps has conceded major issues that favor CWA in this regard.

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[10] This problem has already been manifested by the Corps' NEPA process for the Cape Wind project, as described in the following section.

Development of the alternative analysis has been a matter of considerable concern. The criteria that the Corps have established as "fatal criteria," where if present effectively rule out an alternative as a viable one, have been tailored to find that only the CWA's proposed action acceptable. For example, use of the wind power class mapped at 4 or better eliminated almost all land in Massachusetts. Similarly, the "available area" criteria eliminate a number of alternatives, including all but the largest sites. Moreover, CWA so narrowly defined the term "commercial scale renewable energy facility" as to imply only a certain size power plant is subject to review, namely the kind of project CWA proposes for Horseshoe Shoals. Defining the scope of alternatives is an integral part of an EIS. By allowing CWA to participate actively in this aspect of the EIS, the Corps has made it possible for the project applicant to "stack the deck" against viable alternatives and prevent the rigorous and objective analysis required under federal law.

2. Improper Role for CWA and Its Consultant

Guidance established by the CEQ makes it clear that project applicants and their consultants who are serving in a role of promoting a project must be kept at arms-length in the preparation of an EIS. Applicants and their consultants are allowed to provide information, but they are not supposed to participate in decisionmaking or play a role in the drafting of an EIS. This is because an EIS is supposed to be objective and disinterested. The document is to be the product of the federal lead and cooperating agencies, not the applicant. The reason for this is obvious: there is far too much room for conflict of interest and bias if the applicant or its consultant/project proponent have the lead role.

CEQ has identified procedures for selecting an EIS consultant. The applicant is to provide a list of qualified consultants. These consultants must be shown to have no interest in the project. From that list, all of the cooperating agencies are to consult among themselves and select the most qualified consultant. The applicant then has the responsibility for retaining that consultant to prepare the EIS, but still must maintain a proper distance. CEQ Forty Most Asked Questions, 46 Fed. Reg. 18026, #26 (Mar. 23, 1981); 40 C.F.R. § 1506.5(c).

In other cases, the Corps has followed these requirements rigorously. The Alliance has submitted to the record, for example, an MOA entered into between the Corps and another applicant for a major offshore energy facility at the outset of an EIS where these principles were closely followed. Indeed, recognizing the complexity of that project, the Corps set forth specific requirements regarding disclosure of the relationship between the proposed EIS consultants and the applicant, requiring a

"firewall" between the EIS contractor and the applicant, and carefully separating the applicant from EIS team deliberations.

In the case of the Cape Wind project, these procedures have not been followed. In fact, the Corps has allowed CWA and its project proponent consultant, Environmental Science Services, Inc., (ESS) to play such a pervasive role in the process that the decisionmaking process and NEPA review have already been irreparably tainted.

CWA has selected ESS to prepare the EIS. Based on the information available to the Alliance, CWA never submitted the list of possible EIS contractors. Nor does it appear that the cooperating agencies (there are 13 such agencies) played any role in the selection of ESS. No conflict of interest statements was submitted for ESS until September 18, 2002, long after the NEPA process had started and ESS had been assigned the role of EIS contractor. In fact, it appears that ESS was asked to submit a perfunctory disclosure statement (one that falls far short of what has been required previously by the Corps) only after the Alliance began to express concerns about the role of CWA and its consultant.

These problems are compounded by ESS' close relationship to CWA and its open advocacy of the project. ESS has a long-established relationship with Mr. Gordon of CWA, having worked for him previously with his company EMI. In addition, ESS is the consultant responsible for preparing CWA's project proposal to the Corps. ESS is, in fact, an advocate for the project, not a disinterested and objective compiler of information and presenter of environmental analysis. ESS' bias is apparent from the very permit application it submitted on behalf of CWA, where the consultant states that the best alternative had already been identified, and the project itself was described as "exciting." While these may be the kind of assertions to be expected from a project proponent, they are inappropriate comments to be made by the consultant responsible for the EIS. These statements reveal ESS' predisposition to CWA's desired outcome.

In addition, CWA and ESS have been allowed to play an improper role in EIS meetings. The information available to the Alliance indicates that either CWA or ESS, and often both, have participated in cooperating agency NEPA meetings and that their role has gone beyond providing information, but has instead amounted to advocacy for desired results.

The Alliance has recently documented these concerns for a second time to the Corps. The Alliance is requesting that the NEPA review be suspended until these

problems are resolved. As noted in the Alliance's correspondence to the Corps, cooperating agencies have expressed similar concerns.

The responses provided to date to the Alliance's concerns have not addressed this problem. The Corps has asserted that the EIS is also to serve as an EIR under Massachusetts law, which provides that the applicant should be responsible for its preparation. This is no reason to give ESS and CWA the role they have been assigned. The procedures described above would allow the Corps to select an independent, objective EIS contractor, but still have CWA be responsible under Massachusetts law. The Corps is bound by federal law. If it is for some reason required under State law that ESS prepare the EIR, federal law requires the Corps to select a different contractor to prepare a separate EIS.

The Corps also has stated that it has hired a different contractor to undertake a separate review of the EIS and comments. This review cannot cure the far-reaching problems caused by using the project proponent consultant to prepare the EIS. In fact the Corps has allocated less than $25,000 for this outside review, which does not even appear to be directed at the preparation of the draft EIS but instead to focus on comments received. Such a measure would not be necessary if an objective EIS contractor had been selected.

These are serious deficiencies for a project as controversial and strongly opposed as this one. The Corps should be relying on the most rigorous of procedures to ensure objectivity. By allowing CWA and ESS to play such a pervasive and improper role, the integrity and legality of the decision process has been seriously undermined.

3. Failure to Conduct Required Bird Studies

One of the most serious environmental consequences of this project is the devastating impact it will have on birds, many of which are protected under the Endangered Species Act, the Migratory Bird Treaty Act, and the Migratory Bird Executive Order.

To date, the Corps has received clear and unequivocal recommendations that three years of studies are necessary before adequate review of bird impacts can occur. These recommendations have been provided by both the Massachusetts Audubon Society and the U.S. Fish and Wildlife Service. Unfortunately, the Corps has not accepted these recommendations. Instead, CWA and the Corps are proceeding ahead with the NEPA review on an aggressive schedule that favors the applicant's desires.

This process should be stopped now to allow these studies to be conducted and the necessary data collected.

4. Failure to Consider Cumulative Effects and Look At the "Big Picture" of Offshore Wind Energy Plant Development

As discussed previously, a common feature of regulatory programs designed to address activities in the marine environment or making use of federal lands for development activities is the consideration of programmatic impacts and alternatives. These programs begin by looking at the "big picture," on a regional or even national basis. Such an approach is necessary to ensure that any development which may be approved is first subject to long-term planning to rule out certain areas from development and to ensure that a coordinated plan has first been established.

Such an approach is particularly important for offshore wind energy projects. As the "land rush" for section 10 permits over the last year demonstrates, developers are proceeding at break-neck pace to lock-up sites for wind energy plants. See Exhibit 2. The Corps is simply processing these requests on individual permit basis. For example, a site off the coast of Virginia in a highly sensitive area is being reviewed by the Norfolk District, with no apparent coordination with the New England District. In fact, the Norfolk District has indicated that it would not even prepare an EIS on that project. Another project southeast of Nantucket is apparently being processed separately by the New England District. There is no plan the Alliance is aware of to consider in any comprehensive or cumulative way these projects or the two dozen or so projects proposed between Massachusetts and Virginia.

This is more than a deficiency inherent in section 10 and the result of the absence of an adequate regulatory program. It also is a consequence of a deficiency in the NEPA process for the Cape Wind project. Simply put, the Corps is conducting far too narrow a review. It is limiting the scope to alternative energy projects in New England, even though the Atlantic coast stretching to Virginia has been subject to numerous proposals and the resultant electricity that would be produced can readily be sent throughout the region. In addition, there is no indication that the Corps will consider the cumulative effects of these numerous projects, even though there are numerous species of birds, fish, turtles, and marine mammals migrate through this region and could be confronted with a gauntlet of massive offshore wind plants.

These are problems that would be solved under a comprehensive regulatory program. It is doubtful that the minimal procedures under section 10 could ever produce the necessary review. Certainly, as currently conducted, the review of the Cape Wind project fails to provide the necessary review and analysis.

G. The Corps Has Failed To Accord Nantucket Sound the Status of a Marine Protected Area

Nantucket Sound qualifies as a "marine protected area" (MPA) under Executive Order 13158. Section 2 defines an MPA as "any area of the marine environment that has been reserved by Federal, State, territorial, tribal, or local laws or regulations to provide lasting protection for part or all of the natural and cultural resources therein." Nantucket Sound qualifies because it is within the Cape and Islands Ocean Sanctuary (CIOS) established under the Massachusetts Ocean Sanctuaries Act (MOSA).[11]

This status as a MPA has important regulatory consequences. Under the Executive Order, all federal agencies "whose actions affect the natural or cultural resources that are protected by an MPA shall identify such actions. To the extent permitted by law and to the maximum extent practicable, each Federal agency, in taking such actions, shall avoid harm to the natural and cultural resources that are protected by an MPA." 65 Fed. Reg. 34909 (May 31, 2000).

In the case of Nantucket Sound, this mandate should mean that the Cape Wind project application would be denied. There is no way that a massive wind energy plant can be squared with MOSA or the purposes of the CIOS.

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[11] Nantucket Sound qualifies as a marine protected area under Executive Order 13158 pursuant to its protected status under state law. The Commonwealth of Massachusetts designated Nantucket Sound as part of the "Cape and Islands Ocean Sanctuary," which includes Nantucket Sound, the Cape and Islands Sanctuary includes Vineyard Sound, Buzzards Bay, the Cape Cod Canal, Pleasant Bay, and portions of the Atlantic Ocean. M.G.L. c. 132A § 13(c). Section 14 of the Act provides, "[a]ll ocean sanctuaries described in section thirteen shall be under the care, oversight and control of the department [of environmental management] and shall be protected from any exploitation, development, or activity that would significantly alter or otherwise endanger the ecology or the appearance of the ocean, the seabed, or subsoil thereof, or the Cape Cod National Seashore." Thus, the Commonwealth of Massachusetts has legislatively granted long-term protection for the natural and cultural resources in Nantucket Sound within the meaning of Executive Order 13158.

Although CWA seeks to develop federally-owned lands and waters of Nantucket Sound, pursuant to the Magnuson Stevens Fishery Act, 16 U.S.C. § 1856(a)(2)(B), the Commonwealth of Massachusetts enjoys regulatory jurisdiction over the fishery resources of the entire Sound. As long as MOSA-restrictions are reasonably related to the protection of the Sound's biological resources, MOSA policies and prohibitions are applicable to all waters of Nantucket Sound.

The MOSA protects the CIOS from "any exploitation, development, or activity that would significantly alter or otherwise endanger the ecology or the appearance of the ocean, the seabed, or subsoil thereof." M.G.L. c. 132A § 14. Prohibited activities within the CIOS include "the building of any structure on the seabed or under the subsoil; [and] the construction or operation of offshore or floating electric generating stations." Id. § 15. Although the MOSA provides some exceptions to this flat prohibition on the development of the CIOS, the type of development CWA proposes would completely negate the purposes of the MOSA. The appearance and ecology of the CIOS will be utterly destroyed by CWA's proposed power plants. There is simply no way to reconcile the goal of preserving the national treasure of the CIOS and the development CWA proposes.

The Alliance has submitted two detailed letters to the affected federal agencies describing the protected status of Nantucket Sound. The Corps' only response to date has been that this issue will be addressed in due course. The Department of the Interior has simply stated that no formal determination on the status of Nantucket Sound has been made to date. The National Oceanic and Atmospheric Administration, which manages the MPA Center, has not addressed the issue.

As a result, in what is perhaps the first and most important test of the MPA Executive Order, the responsible federal agencies are taking a pass, and Nantucket Sound is being deprived the protection it deserves under federal and state law.

H. NEPA and Other Procedural Laws Do Not Compensate for What Is Missing

CWA, supported by CLF, argues that adequate review is occurring because NEPA and other procedural laws like the Endangered Species Act and Coastal Zone Management Act (CZMA) apply. As discussed above, what is missing from the review of offshore wind energy projects -- principles of decisionmaking, standards of compliance, land use decisionmaking, etc. addressing this specific activity -- are not supplied by these laws. NEPA and the other reviews apply to all federal decisions with environmental impacts. They do nothing to bring special treatment or consideration to the Cape Wind project or other facilities. This is standard procedure for any federal action. Decisions under the OCSLA and other laws referenced above are all subject to these reviews as well, but still apply extensive additional procedures and requirements to protect the public interest. Furthermore, these procedures are not being properly applied in this case. The result is that the Cape Wind project and other offshore wind energy projects are escaping with inadequate review. Indeed, it could be argued that laws like the CZMA should be strengthened to give states a stronger role.

I. The Corps Has Refused to Apply the National Historic Preservation Act

CWA and the few groups that have supported the section 10 process as legally sufficient assert that all of the relevant procedures are being complied with and no impacts will be overlooked. This position either ignores the Corps' position regarding applicability of the National Historic Preservation Act (NHPA) or demonstrates indifference to the significant historic preservation impacts that will occur if the project is built.

The Cape Wind project will mar one of the most prized and pristine viewsheds in the United States. It will turn a remarkable natural setting, which is part of the historic integrity of numerous structures and communities on the Cape and two Islands, into an industrial park. In doing so, it will adversely affect numerous sites protected under the NHPA.[12]

The Corps, however, takes the position that the NHPA does not even apply. In its Environmental Assessment for the data tower permit, the Corps stated that "[a]s the site is located on the Outer Continental Shelf, the National Historic Preservation Act does not apply to the tower site." The Alliance has objected to this position, but the Corps has given no indication that it will accord these historic resources the protection they deserve or comply with the NHPA.[13] The review procedure for this project therefore omits one of the most important laws that provides important protection to the Nantucket Sound region.

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[12] There are almost 200 listings on the National Register of Historic Places from Barnstable (Cape Cod), Dukes (Martha's Vineyard), and Nantucket counties, including 37 historic districts. The entire island of Nantucket has been designated a National Historic Landmark.

[13] The Corps is giving superficial treatment to historic resource impacts under its generalized public interest test. This is no substitute for NHPA compliance. The formal historic preservation review process under section 106 of NHPA is detailed in 36 C.F.R. Part 800. This process includes requirements to identify consulting parties, including local governments, and invite them to participate in the review process, to consider all requests to participate as consulting parties, to notify all consulting parties of determinations made as to the effects of the proposed actions, to provide relevant documentation, to engage in further consultation with consulting parties who may disagree with determinations of no adverse effects, and, under some circumstances, to involve the Advisory Council for Historic Preservation in the review process. See generally, 26 C.F.R. Part 800.

J. State Review Procedures Are Not Adequate

CWA and the few groups supportive of the existing review process also claim that an added layer of protection is provided under Massachusetts law. In fact, CWA has been doing everything it can to limit the applicability of State review procedures.

CWA has taken all of the following positions to limit State review:

- CWA argues that the State has no jurisdiction over the location in the Sound where the project will be built, even though the FCMA clearly confers such jurisdiction, 16 U.S.C. § 1856(a)(2)(B);
- CWA argues that, under the EFSB review, only the cable can be considered, and that the related and cumulative effects of the project should be ignored;
- CWA asserts that MOSA does not apply to the wind plant, thereby seeking to render inapplicable that law's protection of the scenic and ecological values of the Sound; and
- CWA asserts that the state fisheries regulations and permitting requirements do not apply to the review of the data tower or the wind plant, despite the Commonwealth's jurisdiction over Nantucket Sounds' fishery resources.

The State's principal elected officials, Governor Romney and Attorney General Reilly, have expressed their concerns over this project. The Alliance is grateful for their support. Still, the Commonwealth itself has not sorted out all the various jurisdictional and procedural issues associated with the CWA proposal. For example, the Commonwealth has jurisdiction over the fishery resources of Nantucket Sound. 16 U.S.C. § 1856(a)(2)(B); M.G.L. c.130, § 1. Massachusetts fishery regulations require that any occupation of the tide waters within the fisheries jurisdiction of the Commonwealth is subject to the permitting provisions of Chapter 130. M.G.L. c.130, § 16. To begin the work on the data tower, therefore, CWA was required under state law to obtain a Chapter 130 license. Id. This same licensing requirement applies to the wind energy plant as well. Unfortunately, the relevant state agencies have not fully resolved the jurisdictional aspects of these regulations and their applicability to CWA's proposed work. These are issues that should have been fully resolved before the processing of the application was undertaken by the Corps. For this reason as well, the Cape Wind project review is proceeding in an ill-considered setting, under a hasty in a premature review that is placing Nantucket Sound at risk, requiring the wasteful investment of resources and causing unnecessary conflict and controversy.

III. PROPOSAL FOR A COMPREHENSIVE REGULATORY PROGRAM

The preceding discussion demonstrates the many serious deficiencies in the procedure currently being used to review CWA's application. Despite these deficiencies, the Alliance supports the expeditious development of offshore wind energy projects, if properly located and subjected to rigorous and comprehensive review. The disputes and controversy engendered by the Cape Wind project have actually slowed down the reasoned evaluation of offshore wind projects. Therefore, in the interest of promoting reasonable development of offshore wind projects and the establishment of an adequate regulatory program, the Alliance has developed principles to govern such a process. These principles should be reflected in a comprehensive federal program to guide future decisions on offshore wind energy projects.

1) Specific Congressional Direction and Standards for the Program – Because of the importance of establishing a comprehensive program for encouraging new uses in federal offshore waters, while setting standards for such activities and ensuring a fair return for such uses, Congress must exercise its responsibility to specify program elements and standards. These agencies with the relevant expertise on energy, public lands, and the marine environment must be delegated this power. Certain elements of the program, such as reliance on competitive bidding and the need for comprehensive planning to balance development against other resource values, deserve detailed authorization from Congress. The program authorization should not be so general that it leaves the substance of such an offshore program to the preferences of the policy leadership of departments, which will change over time.

2) Moratorium. No permits should be issued under the Rivers and Harbors Act or any other law for such projects until a new federal program is in place. The Cape Wind project private developer, for example, already has received such a permit for its initial wind energy project tower and has built it without obtaining any property right to do so. This facility is therefore trespassing on federal lands held in the public trust and occupying this land and water without making any payment to the United States to reimburse the taxpayer. As this action demonstrates, developers are not waiting for an adequate federal regulatory system to be developed; they are proceeding merely on the basis of a navigability permit. As a result, no permits should be issued, and a moratorium should be put in place. This should be accomplished administratively as well, in advance of a new law, so no implication is created that the section 10 permit, or its process, creates any rights under the new law.

3) Pilot Projects. Without question, alternative energy needs to be promoted. In the marine environment, however, there is little experience to draw upon to assess the feasibility or impacts of large-scale wind energy project development. Thus, while a comprehensive long-term program is implemented, progress also should be made on assessing the feasibility of offshore wind energy projects and refining the technology through the development of one or more pilot projects. Such projects could be undertaken by the private sector, subject to federal oversight, in a properly-sited location that avoids the impacts and strong public opposition of a project like Cape Wind in Nantucket Sound.

4) Lead Federal Agency. The use of coastal and offshore areas for these activities cuts across the areas of expertise and traditional jurisdiction of numerous federal agencies. Of these several agencies, it is clear that the Corps of Engineers is one of the least well-suited for making decisions regarding the use of offshore resources for energy purposes.

The Corps lacks the expertise or authority to assess the feasibility of energy projects, to determine appropriate uses of federal offshore lands and waters, and to assess adverse impacts on the marine environment. Indeed, under the OCSLA, the Corps lacks jurisdiction over offshore areas. Any new federal program will need to be vested in the proper agency or agencies. Decisions regarding authorization of plans for site-specific development and related activities should be made by the National Oceanic and Atmospheric Administration, and a stronger role should be established for states. The establishment of a leasing program and determination and collection of royalties, rent payments, and other charges should be the responsibility of the Minerals Management Service. This approach is comparable to the one used for private activities allowed on federal onshore lands, where decisions on permitting are made by the Bureau of Land Management or U.S. Forest Service and fiscal considerations are assigned to the Minerals Management Service.

5) National Academy of Sciences Study. There is no prior experience in the United States with offshore wind energy production. There is no experience anywhere in the world with a project of the magnitude of the Cape Wind proposal. Indeed, the very technology to be employed is not even available at this time. Due to the novel nature of this kind of development, careful study is required. Such development should assess the potential benefits of offshore wind energy if undertaken correctly, the negative consequences if such projects are carried out in the wrong way or in the wrong location, and the economic and technological feasibility of such projects. As a result, before any development is undertaken, the National Academy of Sciences should be commissioned to conduct a technical review of the energy, environmental, and technological issues associated with offshore wind energy

to ensure that any development that does occur is conducted so as to maximize benefits and avoid adverse impacts.

6) Comprehensive Planning Process. Before site-specific offshore wind energy proposals are considered, a comprehensive review with broad input from government agencies, industry, states and localities, environmental organization, fishery interests, tribes, and the public should be completed to identify federal coastal and offshore areas with significant potential for such development, as well as areas like Nantucket Sound that should be foreclosed from use as a result of environmental concerns or conflicts with alternative resource values.

Failure to look at the "big picture" in this manner will result in piece-meal, ad hoc decision-making, driven by individual profit-seekers, such as is occurring now under the Rivers and Harbors Act. Similar regional and national review programs have occurred in other contexts, such as offshore oil and gas fisheries management, onshore timber harvest, onshore mineral energy development, and other resource utilization activities. The same principle should apply to the marine environment for alternative energy development. The best approach is to commission a comprehensive leasing program review conducted jointly by the Departments of Commerce (NOAA) and the Interior (MMS). That review would identify areas appropriate for development and subject them to a competitive bidding process. Once leases are issued, site-specific development plans should be reviewed and approved by the National Oceanic and Atmospheric Administration. Leasing and site-specific plan decisions should be made under rigorous environmental standards, with the involvement of all relevant agencies, including state and local governments.

7) Property Rights. Offshore wind projects will require the use and occupancy of federal lands and waters. Private parties cannot simply seize federal land for their own use and profit motive, such as the Cape Wind developer already has done. An adequate federal regulatory program should establish a mechanism, to be applied in areas deemed suitable for possible development through a comprehensive review, for granting such property rights. This mechanism should rely upon competitive principles, through open competition among bidders, seeking a fair return for the government and taxpayers. The grant of such leases should be the result of a stringent environmental review program. It is this land use authorization decision that should be the focal point of federal environmental review and analysis, not the peripheral question of how such projects will affect navigability.

8) Payments. The use of areas deemed appropriate for possible development should require payments for both: 1) use/occupancy of land/water, and 2) making use of natural resources for private gain. This could best be done through

competitive bids, rental for land use, and royalties for resource exploitation. Revenues should be shared with state and local governments. Incentives, such as reduced and deferred royalty payments, can be used to promote appropriately sited wind energy projects. At present, no such system exists, and private developers are reaping the benefits by proceeding with project development for private gain at no cost for the use of federal land or resources.

9) Role for States/Local Governments. Consistent with decisions made in other contexts involving coastal and ocean resources, the affected states and local governments must have a significant role in the decision process with the federal agencies. This principle is found in the OCSLA, the CZMA, the Fisheries Conservation and Management Act, and other federal programs involving coastal and marine areas. This is particularly important because virtually all of these projects also require state and local government approval to transmit electricity to market. The role of states and local governments should be more than merely consultative or cooperating; it must call for sharing of authority and decisionmaking over all aspects of the review and ultimate decision. Where necessary, the CZMA and other laws should confirm this enhanced role.

10) Balancing Test. Proposed uses of offshore areas have both benefits and adverse effects. The decisionmaking structure must define a process under which the federal/state/local government review is charged with comparing the benefits of wind energy projects with the adverse impacts under carefully designed criteria. This cannot be a vague test, such as the one used by the Corps in its so-called "public interest" determination under the Rivers and Harbors Act. Instead, it must be a test that applies standards specifically designed for the marine environment. For example, large-scale industrial facilities in coastal and ocean areas will, in addition to environmental impacts, cause adverse economic (loss in property values, tourism, fisheries), recreational, and scenic impacts. These impacts must be accorded significant weight in the decision process and should not be sacrificed in the absence of especially strong justification for the development activity in the specific location proposed. Moreover, this analysis should not be a simple cost-benefit analysis. Consideration also must be accorded to factors such as aesthetic, fish and wildlife, and historic preservation values. Such criteria are applied routinely for federal programs that involve the use of coastal and ocean resources, and there is no reason wind energy, or other new and currently unauthorized offshore uses, should evade the same review.

Agencies with the requisite expertise must conduct the evaluation. For example, the Corps is not well-suited to balance the purported benefits of wind energy against the adverse impacts on marine life, birds, commercial and sport fishing,

aviation safety, marine safety, aesthetics, tourism, and real estate values. Agencies qualified to make judgments balancing these factors must be in command of the process and charged with the mandate to apply expressly defined and suitable criteria. Such a test would, for example, readily defeat the massive Cape Wind project, which will destroy the pristine and highly valuable resources of Nantucket Sound for an insignificant increase in power through a subsidized program that is not needed by the local and regional energy market.

11) Environmental Standards. Just as criteria for balancing the value of the proposed use against its impacts must exist, so too must specific and rigorous environmental compliance standards be established. These criteria would amount to performance standards. If a proposed activity cannot meet them, project approval should be denied. Such standards, if properly developed and rigorously applied, would ensure that areas like Nantucket Sound will not fall prey to developers seeking the cheapest location to build experimental wind plants or other development facilities.

In addition, the Corps argues that the National Historic Preservation Act does not apply to permits beyond three nautical miles. While this conclusion is in error, it should be made clear that this applies to the review of offshore wind energy project proposals.

12) Public Involvement. The public must have an adequate role in decision making. This should include public comment on all environmental documents, hearings held in impacted areas, adequate comment periods, and participation in decisionmaking through advisory bodies.

13) Citizen Suit Authority. Citizen suits should be provided for to allow for full enforcement of the environmental safeguards that would apply to such projects. No such system exists under the Rivers and Harbors Act, but must be provided for under a comprehensive coastal and offshore regulatory program. Such authority, and rules guiding its use, can be found in other laws concerned with the development of coastal and marine resources, such as the OCSLA, the Ocean Thermal Energy Conversion Act, and the Deepwater Ports Act. There is no basis to exclude such rights here.

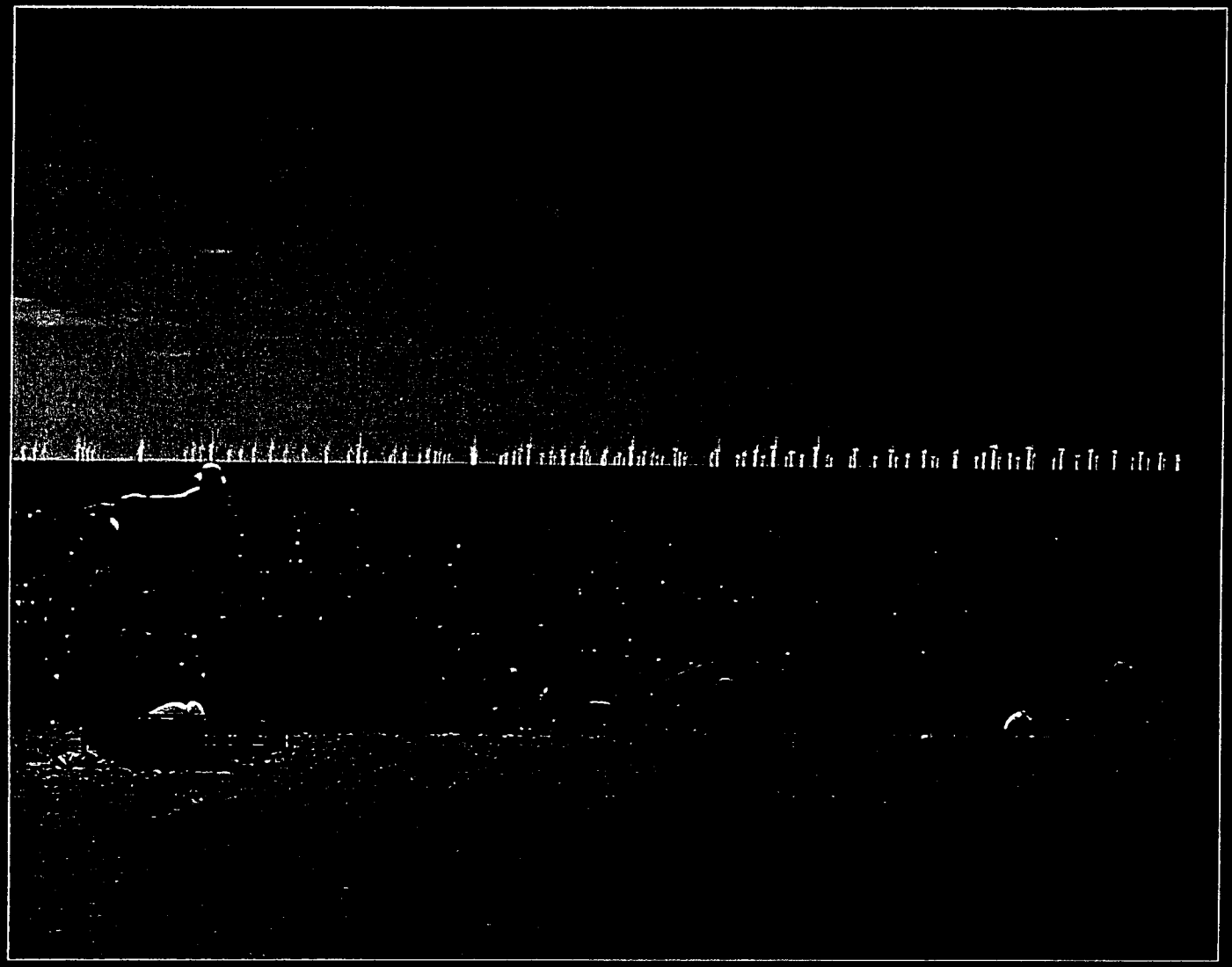
IV. CONCLUSION

Offshore wind energy projects are attempting to exploit what they see as a regulatory loophole that will allow them to use and occupy federal lands and waters for free and without adequate review. They are taking advantage of the fact that the

Corps is processing section 10 permit applications for this purpose, hoping to receive such permits before a comprehensive program is in place. In doing so, they have selected locations that maximize profits rather than minimize environmental harm. The result is an extreme anomaly in federal natural resource law. A comprehensive program must be developed that makes possible the orderly, expeditious, and environmentally sound consideration of offshore wind energy projects with full return to the federal government. Until such a program is in place, no permits should be issued for projects like the Cape Wind proposal. Ultimately, the long term conservation and management of the marine environment and the expeditious development of alternative energy will benefit from such a program.

Exhibit 1

Impact from Cotuit



The Alliance to Protect Nantucket Sound www.saveoursound.org

Impact from Martha's Vineyard

The Alliance to Protect Nantucket Sound

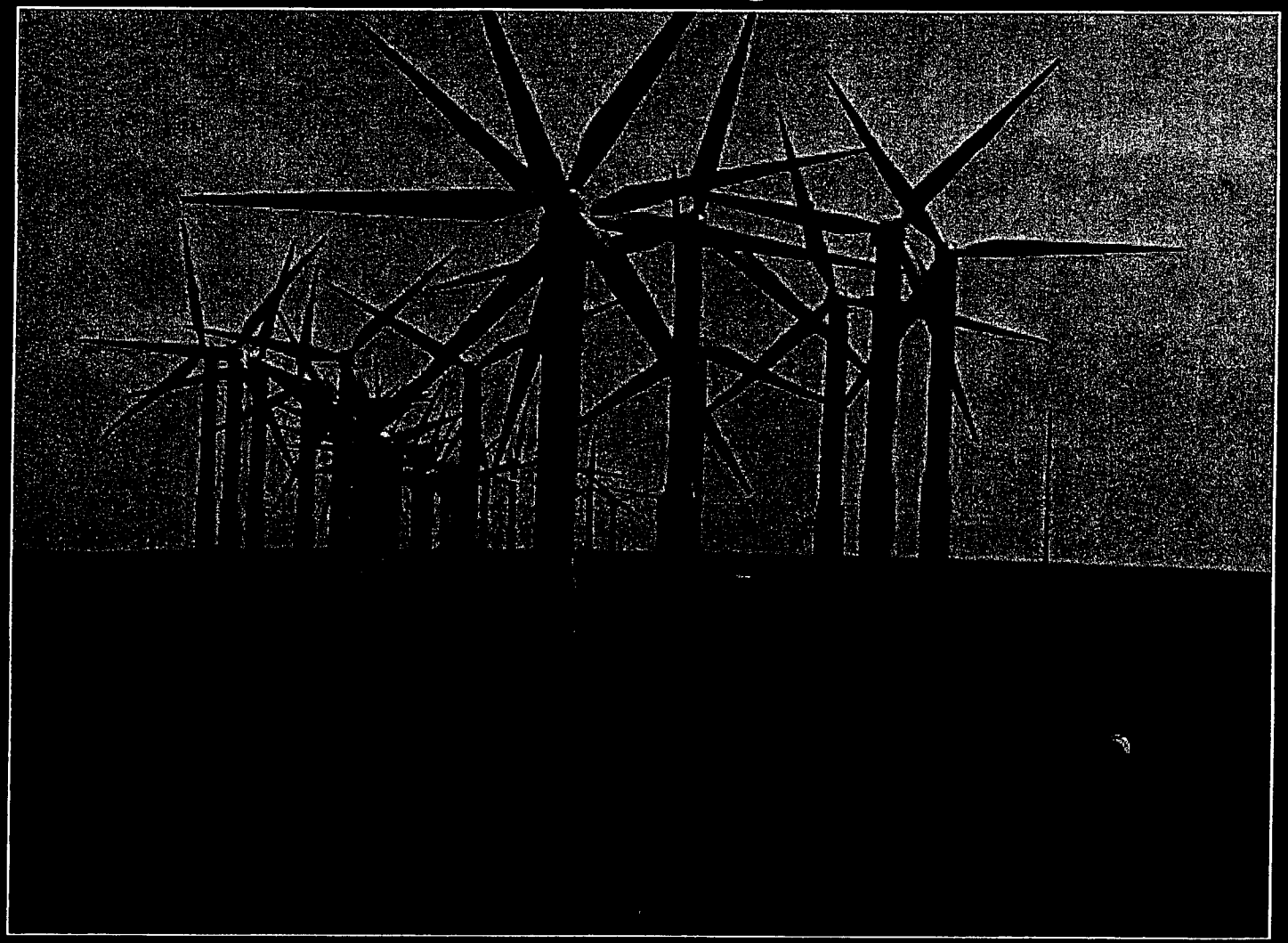
www.saveoursound.org

Impact from Hyannis

The Alliance to Protect Nantucket Sound

www.saveoursound.org

Stateline wind plant, Washington



The Alliance to Protect Nantucket Sound

www.saveoursound.org

Middelgrunden wind plant, Denmark

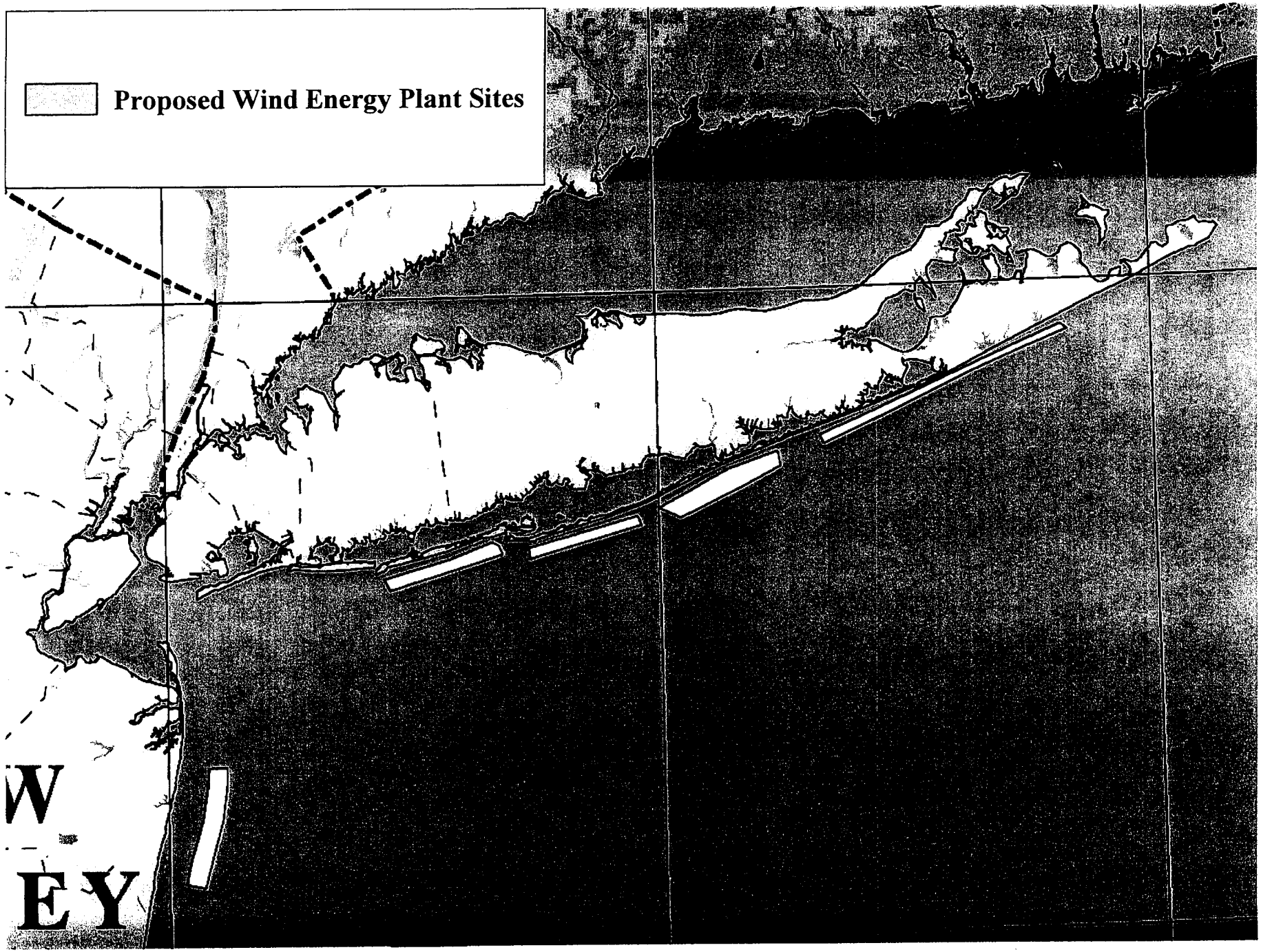
Hub height: 210 feet
Distance from shore (mi.): 3.7

Rotor diameter: 250 feet

The Alliance to Protect Nantucket Sound

www.saveoursound.org

Exhibit 2


Proposed Wind Energy Plant Sites
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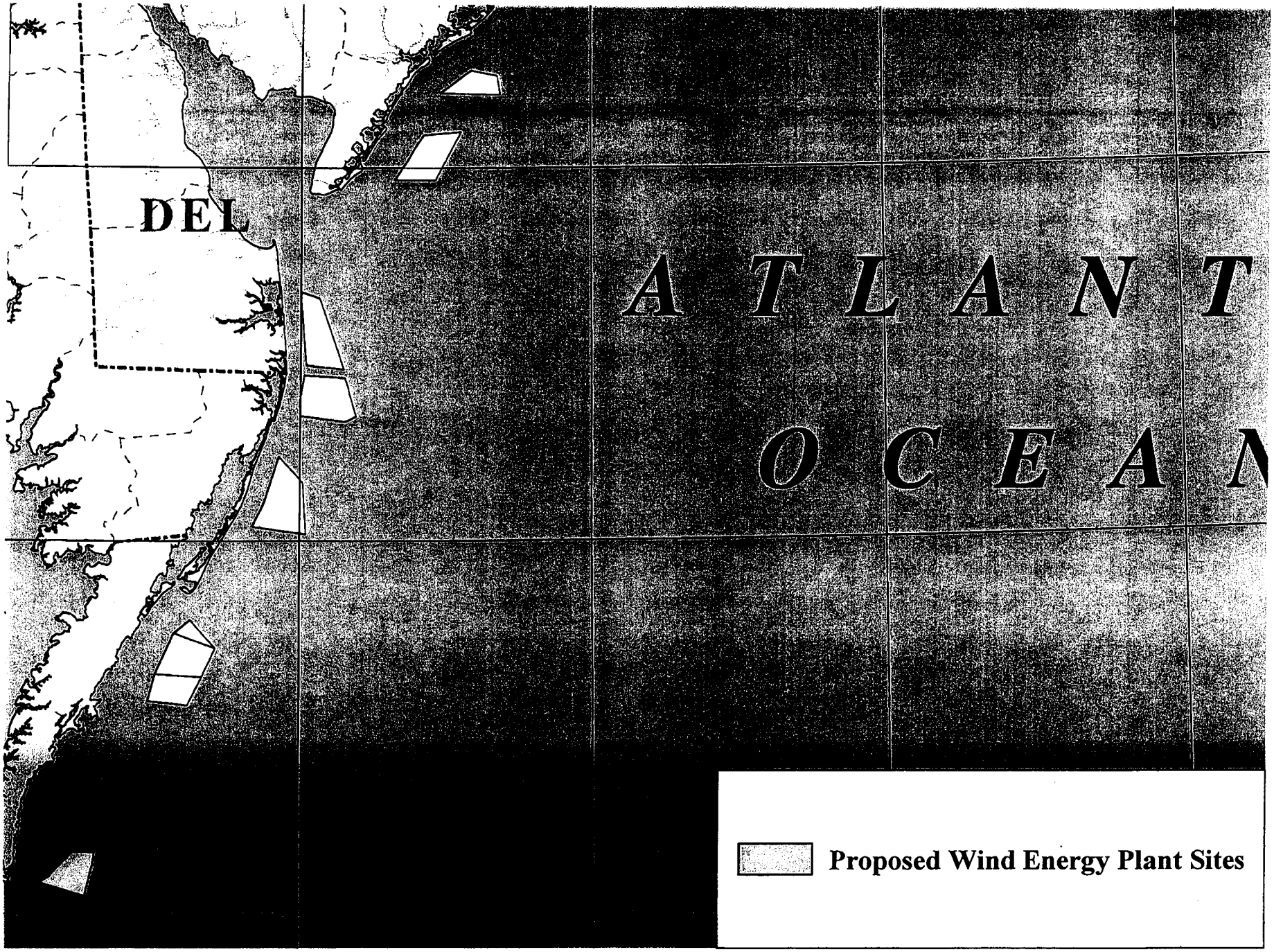
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ATLANT
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Proposed Wind Energy Plant Sites

Exhibit 3

projo.com
The Providence Journal

Shareen Davis, Ernie Eldredge: Don't be seduced by profit of wind power

01/28/2003

CHATHAM

THE CONTROVERSY that has followed the proposed wind-turbine project in Nantucket Sound almost from its inception has mostly focused on the issue as a battle between rich waterfront-property owners and the more righteous renewable-energy advocates trying to save our planet.

But the opposition to the Cape Wind project is far deeper and more substantive than simply the aesthetic opposition from people with a view of Nantucket Sound. The continuous characterization of the issue in these terms works well for the project developer, who has somehow achieved moral superiority over foes deemed more troubled about their view than the sustainability of Mother Earth.

But there are many of us Cape Codders who are also very concerned about our planet who oppose this project for what it truly is: a naked land grab by a very wealthy Beacon Hill developer, who stands to make tens of millions of dollars in energy tax credits and energy revenues from this project. If Cape Wind hadn't already drilled a 200-foot tower into the Sound's seabed, the hypocrisy of this developer's labeling his opponents as wealthy obstructionists would be funny.

Does wind power have the potential to support some of our energy needs without the polluting aspects of fossil fuels? We certainly hope so, but this project is far from saving New England, much less the earth. This project will supply something on the order of less than 1 percent of New England's electricity needs. It doesn't lessen our dependence on fossil fuels for transportation or heating. And wind may be free, but capturing that wind is hardly cheap -- and we will all feel that on Cape Cod.

Not to put our self-interest first, but our families have fished these waters for generations. Our fishery is as environmentally respectful as it can be, so we consider ourselves caretakers of our planet and, indeed, of Nantucket Sound. We're wondering when our rights to earn a living at sea and feed people took a back seat to this developer. We sat down with the developer early on in the process and asked some very direct questions about what this project would do to our fishery, and he simply had no answers. Worse, Cape Wind suggests that these towers actually increase the abundance of fish.

We know more than a little about fish, and the reality is that fish are very sensitive to changes in their environment, particularly when those changes involve massive towers with huge turbine blades incessantly spinning and vibrating. That vibration will obviously transfer to the surrounding water and permanently alter this environment to a point where it may become uninhabitable for the fish and other wildlife that call the Horseshoe Shoal home. There is no question in our minds that the vibrations are real, as will be the constant humming of the turbines.

And why is the Cape Cod Chamber of Commerce adamantly opposed to this project? Because this project would destroy the very engine of the Cape economy -- tourism -- all for a few kilowatt hours of electricity.

Is it just small-minded on the part of the pilots and airport managers who well know the flight patterns through

Exhibit 4

THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL
ONE ASHBURTON PLACE
BOSTON, MASSACHUSETTS 02108-1698

THOMAS F. REILLY
ATTORNEY GENERAL

(617) 727-2200

October 17, 2002

The Honorable Barbara Cubin, Chairwoman
Subcommittee on Energy and Mineral Resources
1626 Longworth House Office Building
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Nick Rahall, II, Ranking Minority Member
Subcommittee on Energy and Mineral Resources
2307 Rayburn House Office Building
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairwoman Cubin and Ranking Minority Member Rahall:

This past summer, Chairwoman Cubin introduced H. 5156, which is designed to allow the development of renewable energy resources on the Outer Continental Shelf. I support the objective of this proposed legislation, but believe the bill as drafted is inadequate in important respects. I am therefore writing to describe my concerns and the safeguards I believe to be necessary before we permit private developers access to this extraordinary public resource.

I certainly understand that there is insufficient time in the current session to address this topic now. I am nevertheless writing now because I believe the matter is of great importance and urge you and your Subcommittee to address it as soon as the next session begins.

Your attention to this issue is timely. Developers on both coasts, attentive to the experience in Europe with off-shore wind projects, are pursuing plans to site similar facilities here. The project closest to development is one that seeks to place a wind facility in Nantucket Sound, four and one-half miles off the coast of Massachusetts. The proposed project would consist of 170 wind turbines spread over approximately twenty-five square miles. The turbines will stand 423 feet above the water and supply an estimated average of approximately 170 MW of power (about half of the power supplied by a medium-sized fossil fuel power plant). Under the law as it now exists, this development requires no lease or the payment of any compensation for this extensive private use of public waters.

The project's developers have applied for various state and federal approvals, including a permit from the Army Corps of Engineers under Section 10 of the Rivers and Harbors Act of 1899, as amended, and the project is currently undergoing environmental review pursuant to state and federal law. But whether the project can go forward even if it obtains the requested approvals is far from clear, and the project itself is now the subject of litigation. I am deeply concerned, as well, that the public, directly or through its representatives, has not had an adequate opportunity to consider all the consequences of in essence giving away an invaluable public resource to the very first private developer to seek its use.

As the Department of the Interior recently noted, it is doubtful that such facilities can be permitted under existing federal law. See Testimony of Johnnie Burton, Director, Minerals Management Service, U.S. Department of the Interior to the House Subcommittee on Energy & Mineral Resources, July 25, 2002. This follows because: 1) the seabed of the Outer Continental Shelf is specifically exempted from the leasing program established by the Federal Land Policy Management Act (FLPMA), 43 U.S.C. Sections 1701, et seq., that is otherwise generally applicable to "public lands," and 2) wind facilities and other non-extractive uses are not covered by the mineral rights leasing program that was established by the Outer Continental Shelf Lands Act, 43 U.S.C. Sections 1801, et seq. Chairwoman Cubin introduced H. 5156 in order to address this "hole in the law" so that the United States could license off-shore projects on the Outer Continental Shelf at appropriate locations. I support that effort.

The development of renewable energy facilities is critically important to our economy, our environment and our national security. But the appeal and promise of wind need not override thoughtful planning, particularly when the project site is largely undeveloped territory like the Outer Continental Shelf. In particular, we should not move with such haste that we risk ending up siting large-scale wind projects in areas that - with proper deliberation - we may determine to be inappropriate. For this reason, the process to approve and site off-shore facilities must be comprehensive, it must assure meaningful participation by all interested parties, and it must be designed to determine how we as society might want to develop the Outer Continental Shelf. For a project like the one proposed for Nantucket Sound, such a process would assure broad public participation in determining whether the project in fact serves the public interest.

Respectfully, I believe that current draft of H. 5156 is inadequate. The proposed legislation provides only a skeletal process; the discretion placed in the Secretary of the Interior is far too broad; the environmental safeguards are incomplete; a competitive bid process to transfer public assets should be mandated, not merely authorized; and the current draft fails to mandate planning or a meaningful state role. On this last point, the states have a direct and substantial interest in preserving and protecting our natural resources, and thus should be involved throughout any planning or approval process.

I believe that the appropriate "starting point" for creating the legal basis to site off-shore wind farms should be the FLPMA, which generally applies to "public lands." As Congress declared in Section 1701 of that act, "the national interest will be best realized if public lands and their resources are periodically and systematically inventoried and their present and future use is projected through a land use planning process coordinated with other Federal and State planning efforts." The Outer Continental Shelf must be afforded at least the same protections as other public lands, for which the FLPMA requires the Secretary of the Interior to "give priority to the designation and protection of areas of critical environmental concern." 43 U.S.C. Section 1712(c).

I hope you will give favorable consideration to my comments. If you have questions, or if I can be of assistance as you review this extremely important matter, please do not hesitate to contact me directly.

Sincerely,

Thomas F. Reilly

THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL
ONE ASHBURTON PLACE
BOSTON, MASSACHUSETTS 02108-1698

THOMAS F. REILLY
ATTORNEY GENERAL

(617) 727-2200

October 17, 2002

Thomas L. Sansonetti
Assistant Attorney General
Environment & Natural Resources Division
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Gale Norton, Secretary
U.S. Department of Interior
1849 C Street, N.W.
Washington, D.C. 20240

Lieutenant General Robert B. Flowers
Chief of Engineers & Commander
U.S. Army Corps of Engineers
441 G Street, NW
Washington, DC 20314-1000

Re: Off-Shore Wind Projects

Dear Assistant Attorney General Sansonetti, Secretary Norton & General Flowers:

As you are likely aware, a private entity has proposed to build a large wind project in Nantucket Sound. In particular, the proposed project would consist of 170 wind turbines spread over approximately twenty-five square miles four and one-half miles from Cape Cod. The project developer has applied for various approvals, including permits from the Army Corps of Engineers pursuant to Section 10 of the Rivers and Harbors Act of 1899, as amended. The Corps has already issued a permit for one aspect of the project (a test tower) while the rest of the project undergoes environmental review. Based on my review of the applicable law, I do not believe the project may proceed under existing federal law even if it obtains the requested approvals. I am therefore writing to urge you to review this issue; I also urge the Corps in particular to refrain from undertaking any further action relative to off-shore facilities until the issues I will more fully describe below are resolved. Due to the significance of the pending project for the people and environment of Massachusetts, my review of the pending development of Nantucket Sound is on-going.

It is undisputed that the construction of alternative energy projects are not subject to the leasing program established by the Outer Continental Shelf Lands Act for mineral extraction projects. Nor are alternative energy projects covered by the Department of the Interior leasing program that generally applies to private use of "public lands." See Federal Land Policy Management Act, 43 U.S.C. 1701, et seq. In a pending law suit, opponents to the project are arguing that the application for a Section 10 permit for the test tower should not have been considered by the Corps because the project proponents have not acquired a lease or other property interest to occupy the sea bed. Whatever the eventual outcome of this particular litigation, there appears to be a more significant underlying legal question at issue: not whether the granting of a Section 10 authority would be valid absent a leasing program, but whether it would be sufficient to allow a private party to occupy federal land.

The Corps appears to be taking the position that Section 10 authorizes it to grant a private party sufficient authority to occupy the sea bed of the Outer Continental Shelf. Given that the Corps' jurisdiction under Section 10 appears limited (directed at least primarily at whether a project poses a navigational hazard), the legal basis of the Corps' position is not obvious. While the Outer Continental Shelf Lands Act itself refers to the issuance of Section 10 permits by the Corps, I do not see how that reference broadens the scope of the Corps' jurisdiction beyond that provided in Section 10.

In fact, the Department of the Interior apparently agrees that current law does not authorize the siting of alternative energy projects on the Outer Continental Shelf. The Department of the Interior took such a position in recent testimony before Congress. See Testimony of Johnnie Burton, Director, Minerals Management Service, U.S. Department of the Interior to the House Subcommittee on Energy & Mineral Resources, July 25, 2002. Additionally, Representative Barbara Cubin, Chairwoman of the Subcommittee on Energy and Mineral Resources, recently introduced a bill designed to plug the hole in existing law by establishing a leasing program for non-extractive uses of the Outer Continental Shelf. H. 5156. I have enclosed a letter that expresses my support for such legislative efforts, while pointing out many ways in which I believe the legislation needs to be improved. The needed improvements include the creation of a comprehensive process that assures meaningful participation by all interested parties, including the states.

I urge you to reconsider how the federal government should proceed at this time in light of this state of affairs. I do not believe the public is well served when private development of a valuable public resource occurs without clear legal authority; the potential for bad precedent and lasting harm is too great. I am deeply concerned, as well, that the public, directly or through its representatives, has not had an adequate opportunity to consider all the consequences of giving away an invaluable public resource to the very first private developer to seek its use.

I urge you to work together to review the issues and to formulate a unified legal position for the federal government on this question. Based on our expectation that your review will confirm the Department of the Interior's position that additional authority is needed, I also urge you to work with Congress to address this hole in the law. Until Congress has specified what leasing process should be required, I ask the Corps to defer undertaking any further action on pending or future permit applications and to avoid creating undue expectations in project proponents.

Sincerely,

Thomas F. Reilly

cc. Robert M. Andersen, ACE Chief Counsel
Thomas L. Koning, ACE District Engineer
Joseph Mcinerny, ACE Acting District Counsel
William G. Myers III, Solicitor, DOI
Anthony Giedt, U.S. Attorney's Office

Exhibit 5

ATTORNEY GENERAL
STATE OF NEW HAMPSHIRE
33 CAPITOL STREET
CONCORD, NEW HAMPSHIRE 03301-6397

PHILIP T. McLAUGHLIN
ATTORNEY GENERAL

STEPHEN J. JUDGE
DEPUTY ATTORNEY GENERAL

November 21, 2002

The Honorable Charles F. Bass
United States House of Representatives
218 Cannon House Office Building
Washington, DC 20515-2902

Re: Offshore Development of Wind Power

Dear Congressman Bass:

As you may already be aware, a private entity has proposed to develop an offshore wind power production project within Nantucket Sound off the coast of Massachusetts. The proposed project would consist of 170 wind turbines distributed over twenty-five square miles, ranging between four to eleven miles off the coast of Cape Cod. Other offshore wind power projects are in various stages of development. Although I am not aware of any projects proposed to be located off the New Hampshire coast, the proximity of existing projects to New Hampshire leads me to conclude that such development may be proposed.

The purpose of this letter is not to express approval or disapproval of offshore wind power or other non-extractive development of the Outer Continental Shelf. I am writing instead to urge you to review issues that are raised by the development of offshore resources. The U.S. Department of Interior has recently stated that currently there exists no clear authority within the Federal government to comprehensively review, permit, and provide appropriate regulatory oversight for non-traditional energy-related projects on Federal offshore lands. *See* Testimony of Johnnie Burton, Director, Minerals Management Service, U.S. Department of the Interior to the House Subcommittee on Energy and Mineral Resources (July 25, 2002). There currently exists a hole in the law regarding the broad oversight of such projects. Environmental safeguards and programs for leasing the Outer Continental Shelf are not yet in place.

Other federal lands are managed through a leasing program under the Federal Land Policy Management Act ("FLPMA"), 43 U.S.C. § 1701, et seq. Congress declared that it is the policy of the United States that the national interest will be best realized if the present and future uses of public lands and their resources are "projected through a land use planning process coordinated with other Federal and State planning efforts." Congress further declared that public lands should "be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural

condition." *See* 43 U.S.C. § 1701. The Outer Continental Shelf is specifically excluded from the definition of "Public Lands" in FLPMA. Thus, non-extractive uses of the Outer Continental Shelf are not afforded the same protection as other Federal lands.

A meaningful review of environmental, social and economic impacts should take place before an offshore development boom occurs. A process that assures broad public participation, including participation by the coastal states most directly impacted by such development, should be in place before the Outer Continental Shelf is developed.

Private development of the Outer Continental Shelf has already begun. There is currently no clear legal authority for the government to control or manage this activity. Very important choices must be made. These choices can only be made, however, with careful balancing of environmental, social and economic impacts through a meaningful planning process.

The exploration and development of alternative and renewable energy resources is necessary. The appeal of such development, however, should not override the national interest in preserving and protecting our natural resources. I believe that a joint and credible federal and state planning process should be in place before the Outer Continental Shelf is developed.

I request your careful attention to this important matter. If you have any questions or require assistance from my office, please do not hesitate to contact me directly.

Sincerely,

Philip T. McLaughlin
Attorney General

cc: Governor Jeanne Shaheen

Exhibit 6

CONSERVATION LAW FOUNDATION · UNION OF CONCERNED SCIENTISTS · CAPE CLEAN AIR · GREENPEACE USA · HEALTHLINK

November 7, 2002

The Honorable Barbara Cubin, Chairwoman
Subcommittee on Energy and Mineral Resources
1626 Longworth House Office Building
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Nick Rahall, II
Ranking Member
Subcommittee on Energy and Mineral Resources
2307 Rayburn House Office Building
U.S. House of Representatives
Washington, D.C. 20515

Thomas L. Sansonetti
Assistant Attorney General
Environment & Natural Resources Division
U.S. Department of Justice
950 Pennsylvania Avenue, NW
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Gale Norton, Secretary
U.S. Department of Interior
1849 C Street, N.W.
Washington, D.C. 20240

Lieutenant General Robert B. Flowers
Chief of Engineers & Commander
U.S. Army Corps of Engineers
441 G Street, NW
Washington, DC 20314-1000

Dear Chairwoman Cubin, Ranking Member Rahall, Assistant Attorney General Sansonetti, Secretary Norton, and General Flowers:

We are writing with regard to the subject of wind energy development on the outer continental shelf. In particular, we wish to respond to concerns raised by Massachusetts Attorney General Thomas F. Reilly in his October 17, 2002 letters to you. We concur with some of the points made in Attorney General Reilly's letters. However, we disagree with him on certain points of law and on his overall conclusion that offshore wind development should be halted pending development of a comprehensive new federal review and permitting process. The existing federal review processes are, when combined with comprehensive state-level environmental review and active public participation such as are occurring in the case of Cape Wind Associates' proposal, sufficient to protect the public interest.

Our organizations and many others in Massachusetts agree that there should be a rigorous environmental review process for Cape Wind Associates' wind farm proposal and that Congress should create a comprehensive statutory framework for offshore wind energy development. We believe that the reviews the proposal is undergoing are sufficient both to provide adequate public input and to develop the assessments needed to draw informed conclusions about the acceptability of Cape Wind Associates' proposal. Furthermore, it is imperative that there be *timely* review of the proposal, and timely development of wind energy, in light of dramatic current and future damage caused by power plant emissions and the importance of wind energy as a means of mitigating that damage.

1. A Moratorium on Review of Offshore Wind Proposals Would Cause Significant Environmental Harm and Is Unwarranted.

a. Wind Is a Critical Renewable Energy Resource for New England.

Substantial reductions in emissions of greenhouse gases, nitrogen oxides, sulfur dioxide, and particulate matter from the regional power system must be achieved *soon*. Air pollution causes thousands of premature deaths in New England every year, with a substantial and well-documented part of the mortality attributable to the region's old fossil-fuel power plants. High levels of greenhouse gas pollution released today will linger in the atmosphere for many years, so delay in reducing emissions would mean that more extreme reductions would need to be made in the future. Southeastern Massachusetts has New England's heaviest concentration of coal-fired power plants.

Wind energy must be a central part of New England's energy strategy. It is affordable and uses off-the-shelf technology, while technological and/or economic issues currently limit the potential of other renewable energy sources here. *Wind energy indeed appears to represent three-quarters or more of New England's near- to mid-term renewable energy resource.* As such, it is an essential part of the region's air quality and climate protection strategy. The foremost wind resource area lies off the coast of Massachusetts. The only other places where wind energy development is feasible, in lesser quantities, are mountainous areas in northern New England. Thus the stakes are high: wind farms such as the one proposed by Cape Wind Associates could generate a significant amount of affordable, emissions-free renewable energy and substantially reduce carbon dioxide and other emissions.

b. Attorney General Reilly Misconstrues the Nature of the Section 10 Review Process.

We disagree strongly with Attorney General Reilly's recommendation that "the Corps ... refrain from undertaking any further action relative to offshore facilities until the issues [discussed in his letter to Mr. Sansonetti *et al.*] are resolved." (Reilly letter to Sansonetti et al., p. 1.) Attorney General Reilly posits that it is not clear whether the granting of a Section 10 permit "would be sufficient to allow a private party to occupy federal land." After raising this question, he leaps to a conclusion that the Corps' issuance of a Section 10 permit would imply an affirmative answer to that question. He goes on to conclude, without explanation, that the Corps should not exercise the authority, which it plainly has, to conduct a review and issue a permit under Section 10. (*Id.* at p. 2.)

Attorney General Reilly's recommendation as to how the Corps should proceed appears to be based in part on his assertion that the Corps' jurisdiction under Section 10 is directed "at least primarily at whether a project poses a navigation hazard." (*Id.*) He also expresses the apparently related concern that "the public. . .has not had an adequate opportunity to consider all the consequences of in essence giving away an invaluable public resource to the very first private developer to seek its use." (Reilly letter to Cubin *et al.*, p. 2.)

These are faulty or at least misleading premises for his conclusion that the Corps should not proceed with its review and permitting process under Section 10 and the National Environmental Policy Act. Attorney General Reilly's assertion that the Section 10 permitting process focuses on navigability issues accurately describes the Corps' regulatory program *until 1968*, but not the current state of affairs.

In 1968, the Department of the Army adopted a new policy of considering a broad range of factors in addition to navigation. This new review, which included consideration of fish and wildlife, conservation, pollution, aesthetics, ecology, and the general public interest, was adopted and is well-known as so-called "public interest review." In 1974 revisions to its Section 10 regulations, the Corps expanded public interest review factors to include economics, historic values, flood damage prevention, land use classification, recreation, water supply, and water quality. When the Corps revised and reorganized its regulations in 1977, it added three additional factors to the public interest review: energy needs, safety, and food requirements. 42 Fed. Reg. 37122 (1977)(describing historical background of the agency's practice).

The breadth of the Corps' Section 10 program is captured by the current regulatory language governing its public interest review:

> *All* factors which may be relevant to the proposal *must* be considered including the cumulative effects thereof: among those are conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people.

33 C.F.R. § 320.4(a) (emphases added). The regulations specifically highlight energy conservation and development as "major national objectives" and direct District engineers to "give high priority to the processing of permit actions involving energy projects." 33 C.F.R. § 320.4(n).

In a 1992 case before the U.S. Supreme Court, the State of Alaska challenged the validity of Section 10 permitting regulations on the ground that they authorized consideration of factors beyond navigability. The Court, after reviewing the administrative interpretation of the range of discretion extended to the Secretary of the Army and Corps of Engineers from 1968 to1991, rejected Alaska's position, finding that a narrow reading limiting the Corps' review to navigability questions was "inconsistent with the statute's language, our cases interpreting it, and the agency's practice since the late 1960's." *U.S. v. Alaska*, 503 U.S. 569, 583 (1992). Read together, Section 10 of the Rivers and Harbors Act and Section 4(f) of the Outer Continental Shelf Lands Act grant the Secretary of the Army and Corps of Engineers authority to carry out this broad public interest review and issue permits for all artificial islands and all installations and other devices permanently or temporarily attached to the seabed. 33 U.S.C. § 403; 43 U.S.C. §1333(a)(1).[1]

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[1] The legislative history of 43 U.S.C. § 1333(a)(1) makes this clear. *House Conference Report* No. 95-1474(1978) squarely addresses the issue of whether the Corps has jurisdiction to issue permits for structures unrelated to mineral extraction:

> Section 4(f) of the Outer Continental Shelf Lands Act of 1953 provides that the authority of the Corps of Engineers to prevent obstructions to navigation is extended to artificial islands and fixed structures located on the outer Continental Shelf. This authority has been used by the Corps of Engineers to regulate the construction and location of such things as artificial fishing reefs, radio towers, and a proposed gambling casino which was to be constructed on reefs. It also applies to structures erected for the purpose of exploring for and transporting resources, such as oil drilling rigs.
> [. . .]

We respectfully disagree with Attorney General Reilly's interpretation of the July 25, 2002, testimony of the Department of the Interior regarding House Bill 5156. We do not presume to have insight into Ms. Burton's thoughts beyond those she articulated in her testimony regarding House Bill 5156, but based on our reading of her testimony, we disagree with Attorney General Reilly's conclusion that the Department of the Interior has taken the position that current law does not authorize the siting of alternative energy projects on the Outer Continental Shelf.

We understand Ms. Burton's testimony, reviewed in its entirety and in context, to articulate a need for legislation to clarify and consolidate "mechanisms *currently in place* to handle requests for innovative, non-traditional energy-related projects on the Federal offshore lands." She expresses a concern that there exists "no clear authority within the Federal government to *comprehensively* review, permit, and provide appropriate regulatory oversight for such projects." (Comments to Subcommittee on Energy and Mineral Resources, July 25, 2002 (emphasis added).) Ms. Burton acknowledges that the existing process is fragmented and may deter the development of offshore energy projects. She notes in her testimony a significant negative consequence of this fragmented regime, namely that private developers must "wait for clarified authority before proceeding, or [...] proceed – with the possibility that a new statute will establish new authority with new restrictions." (*Id.*)

Together with the National Environmental Policy Act, the Corps' Section 10 regulations provide clear authority to conduct a comprehensive environmental review process and to issue permits. If these authorities are used together, and used thoughtfully and in combination with state environmental reviews, we believe they provide an adequate process until appropriate legislation can provide additional clarity and establish a process for addressing various aspects of a developer's relationship with the federal government.

c. <u>The Current Review Process, Combined With the High-Profile Nature of the Cape Wind Project, Ensure Ample Opportunity for Public Scrutiny and Participation.</u>

We agree that ample public scrutiny is essential. In addition to the federal process, the Cape Wind Project is going through extensive state-level review, which has already engendered extensive public participation. The Section 10 and National Environmental Policy Act process for the Cape Wind scientific measurement devices station (hereinafter, "SMDS") and the initial phase of those same processes for the proposed wind farm itself have entailed the extraordinary amount of public input they deserve. The public comment period on the SMDS permit application was extended beyond the normal 30-day period several times over a total of four and one-half months.

Both the public and state and federal agencies -- including the Massachusetts Executive Office of Environmental Affairs (EOEA), Coastal Zone Management Agency, Cape Cod Commission, and various resource and wildlife agencies – are participating extensively in the environmental review and permitting proceedings. EOEA is overseeing preparation of an environmental impact report for the proposed Cape

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The existing authority of the Corps of Engineers, in subsections 4(f), applies to all artificial islands and fixed structures on the outer continental shelf, whether or not they are erected for the purpose of exploring for, developing, removing and transporting resources therefrom.

H.R. Conf. Rep. 95-1474, 1978 U.S.C.C.A.N. 1674, 1680-81

Wind project under state law and has issued a lengthy and detailed scope to guide just the first phase of this process. The Massachusetts Energy Facilities Siting Board also recently opened a proceeding. In addition, the quasi-public Massachusetts Technology Collaborative has initiated a large public "stakeholder" process on the project in which dozens of public and private entities are participating; the first two meetings were held on October 10 and October 31, with a broad range of interested organizations participating. The actual risk that the public and its elected representatives will not have an adequate opportunity to consider any aspect of the Cape Wind project is, in our view, essentially nil.

Our organizations include one of the nation's leading advocates for a better-developed resource management and regulatory framework for the marine environment. In our view, the Section 10 and NEPA processes can and should be used to produce good offshore wind energy siting decisions in the near term. Given ongoing opportunities for public comment required by current law and the widespread interest the Cape Wind project has generated among citizens, advocates, and government officials, we believe that there will be very thorough scrutiny of potential negative impacts the project could have. We also think it critical that the public engage in a rigorous and open dialogue about wind energy's significant potential energy and environmental benefits.

2. Congress Should Create a Comprehensive Statutory Framework for Wind Energy Development on the Outer Continental Shelf.

There is broad agreement that Congress should provide a comprehensive statutory framework for renewable energy development on the outer continental shelf. Issues to be addressed include the need to avoid siting projects in areas that have or warrant designation as marine protected areas;[2] the nature of the property right (lease, right of way, or other) to be conveyed to a project developer; the potential need to convey such rights through a competitive process and to obtain royalties or some other quid pro quo in exchange for the conveyance of such rights; and the need for state and federal environmental and marine resource agencies, including the National Oceanic and Atmospheric Administration, to play appropriate roles in the project review and approval process.

We object to certain aspects of House Bill 5156, including its reference merely to National Marine Sanctuaries rather than to marine protected areas more broadly; its authorization of an open-ended range of energy-related activities rather than more limited and better-defined categories of such activities; and its too-limited provision for state and federal environmental and marine resource agency involvement. In addition, we urge Congress to consider possible alternative models for federal oversight of offshore wind, wave and tidal energy. In this connection, we note that ocean thermal energy is currently covered not by the Outer Continental Shelf Lands Act but by statutory provisions that are very different and found elsewhere in the United States Code (*see* Ocean Thermal Energy Conversion Act, 42 U.S.C. §§ 9101-9168).

[2] To the extent that Attorney General Reilly's letters imply that the site proposed for the Cape Wind project is one that is likely to turn out to be inappropriate for wind energy development, we note that it is premature at best to reach such a conclusion.

Exhibit 7

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

JUN 20 2002

Honorable Richard B. Cheney
President of the Senate
Washington, D.C. 20510

Dear Mr. Cheney:

Enclosed is a draft bill to provide authority to the Secretary of the Interior to grant easements or rights-of-way for energy-related projects on the Outer Continental Shelf (OCS). This legislation is being proposed by the Department of the Interior in support of the administration's National Energy Policy initiative to simplify permitting for energy production in an environmentally sound manner. This would be accomplished by establishing a uniform permitting process, coordinated among all of the appropriate Federal agencies, for energy-related project approvals that occur on the OCS.

We recommend that this draft bill be introduced, referred to the appropriate committee for consideration, and enacted.

Generally, mechanisms do not currently exist by which an applicant can obtain approval from the Federal Government to utilize the OCS for non-oil and gas related activities. Similarly, there exists no designated Federal agency that is tasked with the authority to protect the Federal interest in the OCS and to manage such activities to ensure that they are conducted in a safe and environmentally sound manner. Applicants seeking to conduct activities on the OCS that are not specifically oil or gas related have no guidance or clear direction by which to ascertain which Federal agency or agencies must be consulted in order to obtain the necessary permits to further the development of projects on the OCS.

This draft bill has been developed in an effort to remedy the problems noted above by amending the Outer Continental Shelf Lands Act (43 U.S. C. 1331 *et seq.*) to authorize the Secretary of the Interior to grant easements and rights-of-way for energy projects. The legislation would apply to both traditional and non-traditional energy projects, including, but not limited to, renewable energy projects such as wind, wave and solar energy as well as proposed offshore liquified or compressed natural gas facilities. This authority would function in much the same way that the Secretary currently oversees the development of oil and gas activities on the OCS.

The draft bill would also authorize the Secretary to allow energy or non-energy related uses of existing OCS facilities and structures previously constructed for energy purposes such as offshore staging facilities to support deep water oil and gas activities and offshore emergency medical facilities. This authority would allow the Secretary the flexibility to meet the needs of the public to ensure maximum efficient use of existing OCS structures while ensuring that any activities are undertaken in a safe and environmentally sound manner.

(1) The Secretary, in consultation with the Secretary of the Department in which the Coast Guard is operating and other relevant departments and agencies of the Federal government, may grant an easement or right-of-way on the OCS for activities not otherwise authorized in this Act, the Deepwater Ports Act (33 U.S.C. 1501 *et seq.*), or the Ocean Thermal Energy Conversion Act (42 U.S.C. 9101 *et seq.*) when such activities:

(A) support exploration, development, production, transportation, or storage of oil, natural gas, or other minerals;

(B) produce or support production, transportation, or transmission of energy from sources other than oil and gas; or

(C) utilize facilities previously used for activities authorized under this Act.

(2)(A) The Secretary shall establish appropriate forms of payment for any easement or right-of-way granted under this paragraph, which may include, but is not limited to, fees, rentals, or cash bonus payments. The Secretary may establish the fees, rentals, bonus or other payments either by rule or by agreement with the party to whom the easement or right-of-way is granted.

(B) Before exercising the authority granted under this subsection, the Secretary shall consult with the Secretary of Defense concerning issues related to national security and navigational obstruction.

(C) The Secretary may issue an easement or right-of-way for energy and related purposes as described in paragraph (1) on a competitive or non-competitive basis. In determining whether such easement or right-of-way will be granted competitively or non-competitively, the Secretary shall consider such factors as prevention of waste and conservation of natural resources; protection of the environment; the national interest; national security; human safety; and the potential return for any easement or right-of-way granted under this subsection.

(3) The Secretary, in consultation with the Secretary of the Department in which the Coast Guard is operating and other relevant departments and agencies of the Federal government and affected States, shall prescribe any necessary regulations to assure safety; protection of the environment; prevention of waste and conservation of the natural resources of the Outer Continental Shelf; protection of national security interests; and the protection of correlative rights therein.

(4) The Secretary shall require the holder of such easement or right-of-way to furnish such surety bond, as prescribed by the Secretary, and to comply with such other requirements as the Secretary may deem necessary to protect the interests of the United States.

(5) Nothing in this subsection shall be construed to displace, supercede, limit, or modify the jurisdiction, responsibility or authority of any Federal or State agency under any other Federal law. Further, this subsection shall not apply to an area on the OCS designated as a National Marine Sanctuary.

Section by Section Analysis of Proposed Legislation

ALTERNATE ENERGY-RELATED USES ON THE OUTER CONTINENTAL SHELF

SECTION (a) establishes the purposes of the amendment. The purposes include the intention to protect the economic and land use interests of the United States through the management and oversight of alternate energy-related projects on OCS lands; to establish authority for the management and oversight of alternate energy-related activities on the OCS not currently covered by existing authorities; to provide for efficient interagency coordination in the siting and permitting of these activities; and to ensure that such activities are conducted in a manner that recognizes safety; protection of the environment; prevention of waste; conservation of natural resources issues; and the protection of national security interests. The amendment provides for an overarching authority to oversee the proper development of such projects, but will not supersede any existing authority.

SECTION (b) would add a new subsection (p) to Section 8 of the OCSLA. A section-by-section analysis for subsection 8(p) to the OCSLA is listed below:

Paragraph (p)(1) authorizes the Secretary of the Interior to grant an easement or right-of-way for lands on the OCS for alternate energy-related activities—including, but not limited to renewable energy projects such as wind, wave, or solar or more traditional projects such as liquified or compressed natural gas facilities—or to support previously authorized uses of oil and gas facilities located on the OCS—including, but not limited to offshore staging facilities to

support deep water oil and gas operations and emergency medical facilities. The authorization for the Secretary is limited to activities not otherwise authorized under the Outer Continental Shelf Lands Act, the Deepwater Ports Act (33 U.S.C. 1501 *et seq.*), or the Ocean Thermal Energy Conversion Act (42 U.S.C. 9101 *et seq.*). It also provides for consultation with the Secretary of the Department in which the Coast Guard is operating and other relevant departments and agencies of the Federal Government.

Paragraph (p)(2) provides that the Secretary of Interior will consult with the Secretary of Defense prior to exercising the authority granted in this subsection in order to ensure that issues related to national security and possible obstructions to navigation are considered with respect to the siting and conduct of possible energy activities under this subsection. It also provides a mechanism for the Federal government to receive a fair return for any easement or right-of-way granted through either a competitive or non-competitive system. The provision allows the Secretary of the Interior to determine whether a particular easement or right-of-way should be issued on a competitive or non-competitive basis and to consider various factors in making that determination. The ability to grant an easement or right-of-way on a non-competitive basis will be important to new industries during periods when competition may not be possible.

Paragraph (p)(3) provides authority for the Secretary of the Interior to establish regulations to assure safety; protection of the environment; prevention of waste and conservation of the natural resources of the Outer Continental Shelf; protection of national security interests; and the protection of correlative rights. It also provides for consultation with the Secretary of the Department in which the Coast Guard is operating and other relevant departments and agencies of the Federal government and affected States. Under the OCSLA, the U.S. Coast Guard currently has special responsibilities, and those responsibilities would continue under this amendment.

Paragraph (p)(4) authorizes the Secretary of the Interior to require companies that conduct activities to maintain a bond to ensure that money will be available to complete activities in a manner that will not create a liability for the public.

Paragraph (p)(5) makes it clear that the proposed amendment will not interfere with existing statutory authorities currently exercised by other agencies. A special provision has been added that states that the provisions of subsection (p) do not apply to areas designated as National Marine Sanctuaries.

Exhibit 8

STATEMENT OF

JOHNNIE BURTON

DIRECTOR, MINERALS MANAGEMENT SERVICE
U.S. DEPARTMENT OF THE INTERIOR

BEFORE THE
HOUSE COMMITTEE ON RESOURCES
SUBCOMMITTEE ON ENERGY AND MINERAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES

HEARING ON ADMINISTRATION LEGISLATION
ON ENERGY RELATED USES OF THE OCS

July 25, 2002

Madam Chairman, thank you for the opportunity to appear before the Subcommittee today to discuss the Administration's legislative proposal to help facilitate energy-related uses on the Outer Continental Shelf (OCS). The Department is excited about H.R. 5156 and its potential to encourage innovative energy projects on the OCS. Furthermore, the legislation directly supports the President's National Energy Policy initiative to simplify permitting for energy production in an environmentally sensitive manner and also supports the Secretary of the Interior's goal of facilitating renewable energy projects. We look forward to working closely with the Committee as it further considers both the need for and merits of this proposal. Hopefully, my testimony today will help shed additional light on why the Administration submitted a legislative proposal; some highlights of H.R.

5156; and why the Department of the Interior is given the lead role in this legislative initiative.

As you are aware, this legislative proposal was officially transmitted to Congress on June 20, 2002, and introduced by Chairman Cubin, as H.R. 5156. The Bill represents the results of more than six months of extensive discussions and collaboration with all Federal agencies having permitting responsibilities on the OCS, as well as the President's Task Force on Energy Project Streamlining. More important, H.R. 5156 was developed in a consensus with our sister agencies and reflects the best efforts of the Administration to address the array of issues associated with permitting various OCS energy-related projects that are not currently covered under existing statutes.

These projects include renewable energy projects such as wind, wave and solar energy. In addition, the oil and gas industry is contemplating ancillary projects offshore that would directly support OCS oil and gas development, particularly in the deep water areas of the OCS. These projects include developing offshore staging facilities, emergency medical facilities, and supply facilities. Since there currently is no legal authority to permit these types of projects, H.R. 5156 would give the Secretary of the Interior the authority to permit and oversee energy-related activities in the OCS under the OCS Lands Act.

Why New Legislative Authority is Needed

Centralizing the overall responsibility for permitting energy-related uses under one statute and within one agency will have two significant benefits. First, it will clarify the regulatory process considerably. When the private sector initiates a specific project, it will know where to start the permitting process, and in turn, the Department would inform the applicant of other Federal permits that may be required. Likewise, the Department will be able to inform other relevant Federal agencies of the proposal, thus better facilitating its timely review and consideration. This approach has worked well for OCS oil and gas activities, in which MMS serves as the one-stop starting point for a coordinated review and approval process.

Second, it will clearly provide one agency within the Federal government with the full array of tools needed to comprehensively manage non-traditional OCS energy-related uses. In short, it will give the Department the ability to act as a "land manager" with respect to the permitting and oversight of energy-related uses of Federal submerged lands.

In considering the Administration's proposal, a logical question to ask is whether legislation is necessary to site and oversee energy-related uses on the OCS, or can it be handled under existing authorities. In fact, we asked ourselves that same question as we began to consider how to best address issues associated with the siting of such uses. After careful analysis of the mechanisms currently in place to handle requests for

innovative, non-traditional energy-related projects on the Federal offshore lands, it became clear to us that—with limited exceptions—currently there exists no clear authority within the Federal government to comprehensively review, permit, and provide appropriate regulatory oversight for such projects. The exceptions to this general rule include oil, gas and other mineral activities permitted under the OCS Lands Act (43 U.S.C. 1301 *et seq.*, Department of the Interior); offshore oil terminals permitted under the Deep Water Ports Act (33 U.S.C. 1501 *et seq.*, Department of Transportation); and projects permitted under the Ocean Thermal Energy Conversion Act (42 U.S.C. 9101 *et seq.*, Department of Commerce).

This means that the vast majority of OCS alternate energy-related projects that are or may be contemplated in the future by the private sector have no clearly defined permitting process. There is no single agency with an overarching role to coordinate that process. Instead, various Federal agencies with different responsibilities are responsible for permitting a specific part of a proposed project.

There are two obvious drawbacks to the current situation. First, this fragmented process cannot ensure that the Federal government's myriads of interests in such projects are fully considered nor can it ensure that its economic and land use interests are adequately protected. This obstacle can be best overcome by giving a single Federal agency the overall authority to coordinate and permit these projects—while acknowledging the

important role that other Federal agencies play (and will continue to play) with respect to the permitting process. The proposed legislation does just this by investing in the Department of the Interior the primary regulatory responsibility while explicitly noting that the legislation will not supercede or modify the current authority of any other Federal or State agency under existing Federal law.

A second drawback to the current situation is that the private sector, which must make the tough investment decisions regarding whether to proceed with new energy-related projects—is now forced to "agency shop" in an attempt to identify an authority that will allow them to move forward on a creative new venture. Otherwise, their only alternatives are to wait for clarified authority before proceeding, or to proceed—with the possibility that a new statute will establish new authority with new restrictions. Clearly, this situation stifles innovation in the energy arena–and, in fact, acts as a deterrent to critical investment decisions associated with offshore energy-related projects.

Already, the oil and gas industry has expressed interest in developing offshore projects that support OCS oil and gas operations in the Gulf of Mexico, such as offshore staging areas and hospitals, and has approached the Department and others to discuss these ideas. However, to date, they have not proceeded with such plans due, in part, to a lack of clear authority on the Federal level. In another case, the private sector is actively pursuing a proposed wind energy project offshore Massachusetts. This proposal is being coordinated

by the Army Corps of Engineers (COE) under its authority under the Rivers and Harbors Act since one of the permits the project must receive is a COE section 10 permit certifying that it will not be a hazard to navigation.

In sum, due to the absence of clear statutory authority for permitting the range of various energy-related uses currently being proposed or that may be proposed in the future for areas offshore, the Administration is firmly convinced that new legislation is needed in order to provide a clear and predictable regulatory regime and to fully protect the Federal government's interests in such projects.

Highlights of the Administration's Legislative Proposal

In general, the Administration's legislative proposal sets up a comprehensive framework for permitting energy-related uses on the OCS not already covered by existing statutes by amending the OCS Lands Act—specifically, it will add a new subsection (p) to section 8 of the Act. Placing this authority under the OCS Lands Act, which already provides the regulatory framework for OCS oil, gas, and mineral activities, will allow the Department to build on many of the regulatory provisions already embodied in that Act while still allowing us the flexibility to tailor those provisions to more non-traditional energy-related uses.

Specifically, the proposed legislation would grant the Secretary of the Interior the authority to—

- Grant an easement or right-of-way for energy-related activities on the OCS—including renewable energy projects, such as wave, wind, or solar projects; projects ancillary to OCS oil and gas operations, such as offshore staging areas; and energy or non-energy related uses of existing OCS facilities previously permitted under the OCS Lands Act;

- Protect the public's interest to capture fair value for the use of the Federal OCS by authorizing the Secretary to require an appropriate form of payment such as a fee, rental, or other payment for use of the seabed;

- Issue the easement or right-of-way on either a competitive or non-competitive basis, as appropriate and determined by the Secretary;

- Oversee all activities associated with a project through regulations and inspection activities to ensure safety and environmental protection;

- Pursue appropriate enforcement actions in the event that violations occur; and

- Require financial surety to ensure that any facilities constructed are properly removed at the end of their economic life.

Rationale for Designating the Department of the Interior as "Lead" Permitting Agency

As the Administration began to actively consider the best approach for addressing issues associated with siting energy-related uses on the OCS, it became clear early on that the Department of the Interior should be given the lead role in the permitting of such projects—and the proposed legislation reflects that consensus. While there are numerous Federal agencies with permitting responsibilities on the OCS, historically the Department has been the Federal government's "land manager." The Department manages more than 500 million surface acres of land, with the MMS managing approximately 1.76 billion acres of offshore Federal lands and mineral estate. BLM manages 262 million surface acres and more than 700 million subsurface acres of Federal mineral estate.

In this role, the Department has demonstrated unparalleled experience in multiple-use land management and routinely makes decisions to balance economic activities with the need to protect the environment. For this reason, the proposed legislation fits well with the Department's core missions.

Also, the Department is the primary agency in the Federal government to oversee development of our Nation's energy resources—through BLM (onshore) and MMS (offshore). Since the proposed legislation pertains to the permitting and oversight of

energy uses on offshore Federal lands, it is only logical that any new legislative authority that may be enacted remains with the Department already entrusted with that overall responsibility.

Within the Department, MMS has many years of experience in overseeing oil, gas and mineral activities on offshore Federal lands. This experience covers many areas such as:

•Environmental expertise and research which are used to make informed decisions with regard to leasing and operations;

•Engineering expertise and research regarding emerging offshore technologies used to develop oil and gas resources and the various safety issues associated with these activities;

•Regulatory expertise in overseeing OCS oil and gas activities to ensure human safety and environmental protection; and

•A trained offshore inspection workforce that, in addition to enforcing MMS regulations, also conducts offshore inspections for the Coast Guard and EPA.

•Established working relationships with international regulators to coordinate and share information and experience on regulation of offshore energy projects to ensure safety of workers and protection of the environment.

In closing, I would again like to thank the Subcommittee for its interest in this issue and express our sincere desire to work with you on this important legislation. The Administration firmly believes that this bill will provide numerous and immediate benefits. First, it will provide for the sound management of offshore public lands by ensuring that principles of safety, environmental protection, multiple use, fair compensation, and conservation of resources are all addressed before a project is initiated. It will also provide the private sector, which desires to invest in offshore energy-related projects with certainty and predictability. Finally, the bill has the potential to help increase both our sources and supplies of energy that will be so critical to our Nation in the future. We have already seen that interest and expect to see more once a statutory framework is in place.

The Department believes strongly that we must encourage new and innovative technologies to help us meet our increasing energy needs—enactment of this legislation will be one important step in helping us meet those needs.

This concludes my written testimony. However, I would be pleased to respond to any questions from Members of the Subcommittee.

Exhibit 9

Exhibit A

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

CONSERVATION LAW FOUNDATION OF NEW ENGLAND, INC.,

Plaintiff,

v.

UNITED STATES ARMY CORPS OF ENGINEERS;

MICHAEL P. W. STONE, as he is Secretary of the Army;

LT. GENERAL HENRY J. HATCH, as he is Chief of Engineers; and

COLONEL PHILIP R. HARRIS, as he is Commander, New England Division, Army Corps of Engineers;

Defendants.

91-10488WD

COMPLAINT

I. Introduction

1. This is a civil action brought by Conservation Law Foundation of New England, Inc. ("CLF"). The action is brought for declaratory relief against the United States Army Corps of Engineers and various officials thereof (collectively referred to herein as the "Corps"). CLF brings this action in connection with permit number 198803500-R-90, issued by the Corps on December 14, 1990 (the "Permit") to American Norwegian Fish Farm, Inc. ("ANFF"). A true and complete copy of the Permit is attached hereto as Attachment A.

2. The Permit was issued under Section 10 of the Rivers and

Harbors Act of 1899, 33 U.S.C. § 403 ("Section 10"). The Corps' Section 10 jurisdiction was extended to the United States Outer Continental Shelf by Section 4(f) of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(e).

3. The Permit prompting this action authorizes ANFF to construct and to maintain indefinitely an offshore aquaculture facility (the "Facility"), to be located in the public navigable waters of the United States, approximately 37 miles due east of Cape Ann, Massachusetts. The Facility would be used to raise salmonids and/or other finfish for commercial and/or retail sale. The Permit does not require ANFF to pay any compensation to the United States for the right to the occupation, for an indefinite period, of a major area of public navigable waters.

4. Based on information and belief, the proposed Facility is unprecedented in United States waters in terms of its size, its production capacity and its offshore location in federal waters outside of state jurisdiction. Hitherto, all American "fish farming" projects have been confined to much smaller facilities, located inshore, principally in the jurisdictional waters of the states of Maine and Washington.

5. At the federal level, there is no specific statutory framework for regulating aquaculture in general or the raising of finfish in particular. There are no regulations governing the licensing of aquacultural projects by the Corps or any other federal agency. Based on information and belief, neither the Corps nor any other federal agency has ever prepared a

programmatic environmental impact statement with respect to aquaculture.

6. Based on information and belief, the Corps, in issuing the Permit, has relied solely on internal "guidelines" that seek to ensure the submission of data that the Corps deems adequate for evaluating a specific project on a case by case basis. These guidelines were developed in consultation with certain agencies selected by the Corps, with minimal opportunity for input from the public.

7. In conjunction with issuance of the Permit, the Corps issued on December 14, 1990 an environmental assessment ("EA"), pursuant to Section 102(2)(C) of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332(2)(C). A true and complete copy of the EA is attached hereto as Attachment B.

8. The Corps concluded that granting of the Permit for the Facility was not a major Federal action significantly affecting the human environment and therefore it was not required by NEPA to prepare an Environmental Impact Statement ("EIS"). In reaching this conclusion, the Corps made an inadequate evaluation of the environmental impacts of the Facility and made no attempt to address the cumulative impacts of other similar facilities that can be reasonably anticipated. Indeed, the Corps in effect rejects the need to consider cumulative impacts by asserting that each permit application will be considered on the basis of "case by case review of project specific data." EA at 9.

II. Parties

A. Plaintiff

9. Plaintiff CLF is a nonprofit, membership organization that uses law to conserve and enhance, in the public interest, New England's natural resources by improving resource management, environmental protection and public health. CLF's principal place of business is located at 3 Joy Street, Boston, Massachusetts 02108-1497. CLF has a membership of approximately 5,000, including individuals, organizations, local boards of health and conservation commissions.

10. Many of CLF's members live in the Cape Ann region, including the municipalities of Gloucester, Rockport, Manchester and Essex. They will be directly harmed by the Corps' failure to prepare an EIS by being denied the opportunity to fully scrutinize the plans for the Facility, to examine and contest the supporting environmental analyses and studies, to examine and comment on ANFF's alternatives to the Facility and mitigation analyses, and to comment knowledgeably about the full range of actual and potential impacts.

11. CLF's members also include the Gloucester Fishermen's Wives Association, Inc., the Cape Ann Vessel Association and the Massachusetts Inshore Draggermen's Association, which represent the interests of owners and crews of commercial fishing boats that operate in the Gulf of Maine and other New England waters, together with their families. The people represented by these groups will be directly affected by the adverse impacts of the

Facility, and of similar facilities that can reasonably be anticipated following the precedent of the Permit, upon the exercise of their traditional public rights of navigation and fishing in the public offshore waters of the United States. Other CLF members who will be directly affected by the adverse impacts of the Facility are the owners of several boats in the Gloucester fishing fleet, including Vito C Corporation, S Antonio Corp., C & N Fishing Corp., Zappa & Pellucia, Inc., Three Friends Vessel Corp., Mary & Josephine Corp., JPN Corp., S.S.N. Corp. and Matteo Ferrara.

B. Defendants

12. Defendant Corps is a division of the Department of the Army of the United States. Defendant Michael P. W. Stone is Secretary of the Department of the Army. Defendant Lt. General Henry J. Hatch is the Chief Engineer of the Corps, with overall responsibility for the permitting activities of the Corps. Defendant Colonel Philip R. Harris is the Commander of the Northeast Region of the Corps, with responsibility for the permitting activities of the Corps in the Northeast Region that includes Cape Ann. Defendants Stone, Hatch and Harris are being sued in their official capacity.

III. Jurisdiction and Venue

13. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1331 (federal question); 28 U.S.C. § 2201 (declaratory relief); 28 U.S.C. § 1346(a)(2) (United States as a defendant); and 5 U.S.C. § 702 (right of review under the

feed goes into growth of the fish, the remainder passing directly or indirectly as waste, feces, etc. into the marine environment.

The Administrative Process

19. ANFF filed its application for the Permit on November 25, 1988. The Corps on February 8, 1989, gave notice of a public hearing on this application.

20. In response to the Corps' request for comments on ANFF's application, CLF submitted written comments on April 14, 1989 (Attachment C hereto). CLF urged the preparation of comprehensive regulations to guide the Corps in reviewing permit applications for aquaculture projects. In the alternative, CLF maintained that the Corps, prior to establishing a policy precedent of this importance, should prepare a programmatic EIS. Such an EIS would: a) consider the legal and policy implications of closing off or restricting public use of large areas of public waters for the benefit of a single private user, without payment of compensation to the United States; b) explore the cumulative long range impacts of multiple facilities of this nature and scale on both the natural environment and on existing users of offshore waters; and c) consider in depth the criteria for siting any such facilities in public waters. In its EA, the Corps has rejected all of these recommendations.

21. In response to the Corps' request for comments on ANFF's application, the Commander of the First Coast Guard District, by memorandum dated February 24, 1989, stated the opinion that "it is not in the public interest to exclude the

mariner from such a large area" and "to effectively reserve 49 square miles of the navigable waters to the exclusive use of one commercial operation." A true and complete copy of this memorandum is attached hereto as Attachment E.

22. The New England office of the United States Fisheries and Wildlife Service, by letter dated May 10, 1989, expressed concern over potential environmental impacts and recommended phased-in establishment of the Facility, combined with a monitoring program. A true and complete copy of this letter is attached hereto as Attachment F.

23. The Northeast Regional office of the National Marine Fisheries Service ("NMFS"), by letter dated June 1, 1989 (Attachment D hereto), made a number of recommendations, including recommendations: a) that the site be moved eastward; b) that the project be reduced in size or that a programmatic EIS be prepared; c) that monitoring programs be developed to determine adverse environmental impacts and the extent of hardship on the fishing industry; and d) that a moratorium be imposed on the acceptance of further applications for permits for such projects pending the evaluation of the results of the monitoring programs.

24. NMFS reiterated these recommendations by letter dated January 25, 1990. A true and complete copy of this letter is attached hereto as Attachment G.

25. Except for moving the site eastward, the Corps has failed to follow any of the NMFS recommendations.

26. Based on information and belief, the Corps disregarded a Memorandum of Understanding with NMFS by failing to give notice to NMFS of the terms of the Permit prior to its issuance, and thereby denied NMFS the opportunity to seek further administrative review of the Permit within the Corps.

27. The New England Fishery Management Council ("NEFMC"), by letter dated May 19, 1989, expressed concern over the Corps' consideration of the ANFF application in the absence of any federal statutory framework to govern siting, user conflicts and environmental impacts. NEFMC seriously questioned the exclusion of fishermen from traditional offshore fishing areas and the privatization of public waters without a thorough review of the broader implications of such a decision. NEFMC recommended that a programmatic EIS be prepared prior to the issuance of a permit to ANFF or that the scope of the project be significantly reduced; and further recommended that a regulatory framework be developed to address its concerns. A true and complete copy of the NEFMC letter is attached hereto as Attachment H. The Corps has failed to follow any of the NEFMC recommendations.

28. By letter dated July 18, 1989, the United States Environmental Protection Agency, Region 1, ("EPA") recommended that an EIS be prepared to address the potential impacts of the project, including the effects on the commercial fishing industry and on marine mammals. A true and complete copy of the EPA letter is attached hereto as Attachment I. The Corps has rejected this recommendation.

COUNT I

29. CLF realleges and repleads Paragraphs 1-28 above.

30. Section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C), requires the preparation of an EIS prior to and in connection with "major Federal actions significantly affecting the quality of the human environment." Id.

31. Regulations implementing NEPA, promulgated by the Council on Environmental Quality at 40 C.F.R. §§ 1500 et seq. ("CEQ Regulations"), particularly 40 C.F.R. §§ 1508.7, 1508.27(b)(7), provide that the determination of whether a federal action will "significantly" affect the human environment must include a consideration of whether the proposed actions, combined with other past, present and reasonably foreseeable future actions, will have a "cumulatively significant impact on the environment." Id.

32. The Corps, in its conclusion that an EIS is not required, has violated NEPA and the CEQ Regulations by failing to consider adequately all the potentially significant direct and indirect impacts of the Facility on the human environment, including impacts on navigation, commercial fishing, water quality, aquatic organisms, and marine mammals and birds; and has violated NEPA and the CEQ Regulations by failing to consider the cumulative direct and indirect impacts on the human environment of the Facility and of other similar future facilities that are reasonably foreseeable.

33. The Corps has violated NEPA and the CEQ Regulations by

failing to file a programmatic EIS prior to issuing the Permit for the Facility, an action that the Corps should have taken in view of the unprecedented nature and size of the Facility and its location in public waters that fall solely under federal jurisdiction and especially in view of the lack of a federal regulatory structure.

34. The Corps, by issuing the Permit without preparation of an EIS, has violated NEPA and 40 CFR § 1508.27(b)(6) by failing to give adequate consideration to the precedent-setting nature of the Facility, precedent-setting both in size and in its location in offshore waters that are under exclusively federal jurisdiction.

35. The Corps, by issuing the Permit without preparation of an EIS, has violated NEPA and 40 CFR § 1508.27(b)(4) by failing to give adequate consideration to the "highly controversial" nature of the reasonably foreseeable effects of the Facility, especially its effects on the commercial fishing boats that have been accustomed to operate in or near the proposed site of the Facility.

36. The Corps has violated NEPA and the CEQ Regulations by failing to give adequate weight, in its EA, to the interference with the traditional public rights of navigation and fishing caused by effectively granting to a single private party, ANFF, the right to the exclusive use of a large expanse of approximately 47 square nautical miles of public navigable waters, an action that will have the practical effect of

drastically inhibiting navigation and commercial fishing in that area.

37. The Corps has violated NEPA and the CEQ Regulations and has acted arbitrarily and capriciously and contrary to law, in violation of Section 706 of APA, by issuing a finding of no significant impact based on an analysis of environmental impacts that wholly fails to address the issue of cumulative impacts on navigation and commercial fishing from the maintenance in federal waters of the Facility and of other similar facilities that are reasonably foreseeable.

COUNT II

38. CLF realleges and repleads Paragraphs 1-37 above.

39. The waters in which the Facility would be located and the lands under those waters are public trust resources of the United States.

40. The United States is the trustee of these resources for the benefit of the public and has an affirmative fiduciary duty, both under common law and under NEPA, to protect these resources from environmental damage and to preserve these resources for the present and future public uses for which they are adapted, particularly navigation, fishing and commerce.

41. The Corps, as an agency of the United States, has violated the public trust obligations of the United States by granting to a private party, ANFF, for its own private uses, the exclusive right to occupy indefinitely a significant portion of the public waters of the United States, thereby depriving the

public of their rights of navigation, fishing and commerce in those waters.

42. The Corps has violated the public trust obligations of the United States by granting to a private party, ANFF, the exclusive right to occupy indefinitely, and to derive economic benefits therefrom, a significant portion of the public waters of the United States without the payment of compensation to the United States for depriving the public of their rights of navigation, fishing and commerce in those waters.

43. The Corps has violated the public trust obligations of the United States by failing to recognize, acknowledge, and give explicit consideration to these public trust obligations in issuing the Permit and the EA and in rejecting the recommendation that an EIS be prepared.

COUNT III

44. CLF realleges and repleads Paragraphs 1-43 above.

45. Although the Corps has in the past issued regulations under Section 10 to govern the permitting process for special types of projects, such as artificial reefs, and despite the significant environmental, technical and economic issues raised by aquaculture facilities in general and offshore aquaculture facilities in particular, the Corps has rejected the recommendation by CLF and NEFMC for rulemaking prior to issuance of the Permit. By rejecting this recommendation, the Corps has denied the public the opportunity to review and comment on proposed permit processing procedures for aquaculture facilities.

46. The Corps' issuance of the Permit for the Facility, without having previously promulgated appropriate regulations to govern permitting of offshore aquacultural facilities, is arbitrary, capricious, and an abuse of discretion in violation of APA, 5 U.S.C. § 706.

47. The violations of NEPA and APA alleged in this complaint, as well as its violation of the public trust obligations of the United States, are causing and will cause Plaintiff CLF and its members irreparable harm for which there is no adequate relief at law.

WHEREFORE, Plaintiff CLF respectfully requests that this Court:

A. grant a declaratory judgment that the Defendant Corps has violated its non-discretionary duties under NEPA and the CEQ Regulations by reason of its failure to prepare and issue a programmatic EIS or a site-specific EIS prior to issuance of the Permit;

B. grant a declaratory judgment that the Defendant Corps, by reason of granting the Permit to ANFF, has violated the public trust obligations of the United States with respect to the public navigable waters of the United States;

C. grant a declaratory judgment that the Defendant Corps has violated APA, 5 U.S.C. § 706, by its issuance of the Permit to ANFF prior to the promulgation of comprehensive regulations governing the issuance of Section 10 permits for aquaculture projects;

such as regulated whale watching, nonlethal research, and widespread educational, aesthetic, and environmental programs relating to free-living whales, dolphins, and porpoises. Our ultimate aim is peaceful coexistence and mutual enrichment for humans and cetaceans.

The mission of the International Fund for Animal Welfare (IFAW) is to improve the welfare of wild and domestic animals throughout the world by reducing commercial exploitation of animals, protecting wildlife habitat and assisting animals in distress. It seeks to motivate the public to prevent cruelty to animals and to promote animal welfare and conservation polities that advance the well-being of both animals and people. IFAW has over two million supporters world-wide. Consistent with its mission to protect wildlife habitat from destruction and degradation, the IFAW seeks to assure that the waters along the East Coast is developed in a manner that maintains optimal habitat for animals. This need is particularly illustrated by the proposed windfarm in Nantucket Sound which would take place in hundreds of acres of important wildlife habitat.

The International Wildlife Coalition Inc. (IWC) is a non-profit conservation organization based in East Falmouth, Massachusetts. Founded in 1984, the Coalition is dedicated to public education, research, rescue, rehabilitation, litigation, legislation and international treaty negotiations concerning global wildlife and natural habitat protection issues. The IWC oversees the Whale Adoption Project (WAP) comprised of 25,000 members. WAP members adopt endangered humpback whales that migrate along the East Coast of the United States. IWC is also a founding member of the Cape Cod Stranding Network, which responds to stranded cetaceans and pinnipeds throughout Cape Cod, MA. IWC has a vested interest in any proposal for construction of facilities such as Cape Wind at Horseshoe Shoals in Nantucket Sound, a known habitat for many protected marine mammal species.

The Whale and Dolphin Conservation Society (WDCS), is a nonprofit

conservation and welfare organization representing over 70,000 members and supporters worldwide. Since its establishment in 1987, WDCS has funded and conducted extensive research on issues relating to cetaceans in the wild and in captivity, and is a respected source of information on the scientific, biological, political and legal aspects of cetacean protection. WDCS has supported over 50 conservation projects worldwide, and serves as the global voice for the protection and conservation of whales and dolphins and their environment through campaigns, scientific research, field projects, legal advocacy and educational outreach.

Three Bays Preservation, Inc. ("Three Bays") is a not-for-profit environmental organization created to protect, maintain and enhance the aquatic environment and related ecosystem of the three-bay estuary comprised of West Bay, North Bay and Cotuit Bay in Barnstable County, Cape Cod, Massachusetts, and to take action to forestall and minimize threats to the health of the Three Bay system.

ARGUMENT

1. THE FEDERAL GOVERNMENT HAS A PUBLIC TRUST OBLIGATION TO MANAGE PRIVATE USE OF THE OUTER CONTINENTAL SHELF TO PREVENT IMPAIRMENT OF THE IMPORTANT BIOLOGICAL RESOURCES LOCATED THERE.

The Cape Wind project would be located on the outer continental shelf (OCS), beyond the territorial seas, in waters subject to exclusive federal control and responsibility. Pollard's Lessee v Hagan, 44 U.S. (3 How.) 212, 217 (1845) ("[A]ll the navigable waters of the U.S. are the public property of the nation, and subject to all requisite legislation by Congress"). The OCS is public land; the waters that overlie it are public waters; and the fish and wildlife that depend upon it are public resources. Shively v Bowlby, 152 U.S. 1, 14 (1894). Even the ocean wind that Cape Wind seeks to harness is a public resource. As important as it is to develop wind energy it cannot, and need not, come at the expense of these other public trust resources.

Washington State

A proposal has been made to construct a wave energy generating plant in Olympic National Marine Sanctuary.

The scale of these proposed developments in some of the most pristine and sensitive marine environments in the country is staggering. It is inconceivable that Congress would give the Corps the power to freely dispose of public resources without placing some limits on its discretion and providing some standards for the allocation of rights to access the OCS.

3. THE CORPS LACKS AUTHORITY TO PERMIT DEVELOPMENT OF THE OUTER CONTINENTAL SHELF FOR NON-OIL AND GAS ACTIVITIES

The Corps claims authority to issue RHA § 10 permits for off-shore wind energy projects, and for many other kinds of industrial development, under § 4(f) of the OCSLA, 42 USC § 1333(e). That section provides: "The authority of the Secretary of the Army to prevent obstruction to navigation in the navigable waters of the United States is extended to the artificial islands, installations, and other devices referred to in subsection (a) of this section." In turn, subsection 1333(a) provides: "The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources, to the same extent as if the

outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State."

On their face, these provisions do not authorize the Corps to issue § 10 permits for renewable energy developments on the OCS. The OCSLA was enacted for the express purpose of authorizing and regulating the extraction of oil and gas and other minerals from the OCS.[8] There is no mention of renewable energy anywhere in the OCSLA.

Although the OCSLA does not define the term "resources," the Submerged Lands Act, enacted at the same time as the OCSLA, defines "natural resources" as follows: "The term 'natural resources' includes, without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life but does not include water power, or the use of water for the production of power . . ." 43 USC § 1301(4). The exclusion of "water power" is strong evidence that, in 1953, Congress did not have renewable energy sources in mind when it enacted the comprehensive leasing program for "mineral" development on the OCS. Further evidence is found in the subsequent enactment of the Ocean Thermal Conversion Act (OTEC) in 1980, which created a specific "legal regime which will permit and encourage the development of ocean thermal energy conversion as a commercial energy technology." 42 USC §9101(4).

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[8] The OCSLA provides: "The term 'development' means those activities which take place following discovery of minerals in paying quantities, including geophysical activity, drilling, platform construction, and operation of all onshore support facilities, and which are for the purpose of ultimately producing the minerals discovered." 43 USC §1331(i) (emphasis added). Further, the Act provides: "The term 'minerals" includes oil, gas, sulphur, geopressured-geothermal and associated resources, and all other minerals which are authorized by an Act of Congress to be produced from 'public lands' as defined in section 1704 of this title." Id. at §1331(q).

Congress also took pains in OTEC to protect public trust resources of the OCS by providing for "the protection of the marine and coastal environment, and consideration of the interests of ocean users, to prevent or minimize any adverse impact which might occur as a consequence of the development of such ocean thermal energy conversion facilities or plantships." 42 USC § 9101(5). Thus, it is highly unlikely that Congress meant to authorize the development of the OCS for wind energy without a word about the need for similar safeguards.

Not surprisingly, this is the view of the Secretary of Interior, who is the federal official charged with implementing the OCSLA In a recent letter transmitting a bill to Congress proposing a leasing program for "Alternative Energy-Related Uses of the Outer Continental Shelf," the Assistant Secretary for Lands and Mineral Management in the Department of Interior stated:

> Generally, mechanisms do not currently exist by which an applicant can obtain approval from the Federal government to utilize the OCS for non-oil and gas related activities. Similarly, there exists no designated Federal agency that is tasked with the authority to protect the Federal interest in the OCS and to manage such activities to ensure that they are conducted in a safe and environmentally sound manner.[9]

Other bills have been introduced in Congress to fill this legislative gap. In the House, H.R. 5156, the so-called Cubin Bill, was introduced in the last legislative session. Although this bill was not enacted it is likely to be re-introduced in the next session of Congress.

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[9] Letter from Rebecca Watson, Assistant Secretary , Land and Minerals Management, to the Honorable Richard Cheney, President of the Senate (June 20, 2002) (attached as Exhibit D).

The Massachusetts Attorney General has also called for federal legislation to "fill the hole" that exists with respect to managing wind energy production on the OCS. As General Reilly stated:

> The development of renewable energy facilities is critically important to our economy, our environment and our national security. But the appeal and promise of wind need not override thoughtful planning, particularly when the project site is largely undeveloped territory like the Outer Continental Shelf. In particular, we need not move with such haste that we risk ending up siting large-scale wind projects in areas that with proper deliberation we may determine to be inappropriate.[10]

The U.S. Environmental Protection Agency (EPA) has also expressed misgivings about the lack of clear authority to permit non-oil and gas OCS development. In commenting on the scope of analysis for the preparation of an environmental impact statement (EIS) on the Cape Wind project, EPA noted the current "lack of existing policy and regulation dictating which agency has authority over siting issues, whether competition should exist for development sites, how/whether easements/lease/fees should be required for the use of public property and its resources by a private corporation, and what sort of requirements should be imposed to ensure proper site restoration and management after the useful life of the project ends."[11] EPA concluded: "It is our belief that the project [Cape Wind] should not proceed through the permit process absent serious

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[10] Letter from Thomas F Reilly, Attorney General of the Commonwealth of Massachusetts, to The Honorable Barbara Cubin, Chair, Subcommittee on Energy and Mineral resources, U.S. House of Representatives. (October 17, 2002) (attached as Exhibit E).

[11] Letter from Robert Varney, Regional Administrator, USEPA Region One, to Colonel Brian E Osterndorf, District Engineer, USCOE (April 5, 2002) (attached as Exhibit F).

analysis of this private use of public trust resources for renewable energy development on the OCS."

In sum, the prudent course of action here is to give Congress an opportunity to debate the pros and cons of promoting additional development of the OCS, to develop legislation that takes all these competing values into account, and to produce a blueprint for how the nation's coastal resources are to be managed in the public interest.

CONCLUSION

For the foregoing reasons, Amici Conservationists urge the court to declare that the Corps of Engineers lacks authority to permit development on the outer continental shelf other than as expressly authorized by Congress; that Congress has not authorized renewable energy development on the OCS; and that Cape Wind's "data tower" was unlawfully erected on public lands on the OCS. Further, the Corps should be ordered to cease issuing permits for unauthorized structures on the OCS pending appropriate congressional action.

Respectfully submitted,

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Exhibit 11

United States Department of the Interior

FISH AND WILDLIFE SERVICE
New England Field Office
70 Commercial Street, Suite 300
Concord, New Hampshire 03301-5087

April 1, 2002

Colonel Brian E. Osterndorf
District Engineer
U.S. Army Corps of Engineers
New England District
696 Virginia Road
Concord, MA 01742-2751

Dear Colonel Osterndorf:

This responds to your January 23, 2002 letter and Federal Register Notice (67 FR 4414) requesting scoping comments on the proposed Cape Wind Energy Project, Nantucket Sound and Yarmouth, Massachusetts.

General Comments

By letter dated December 31, 2001, the Service provided preliminary scoping comments to Secretary Robert Durand on the expanded Environmental Notification Form for the Massachusetts environmental review process for the Cape Wind Project. We hereby incorporate our December 31, 2001 comments (copy enclosed) into these scoping comments as they were prepared with the intent of serving as scoping comments for a joint MEPA/NEPA process. Mr. Brian Valiton of your staff was provided a copy of the December 31, 2001 comments at the time they were issued to help insure an orderly coordination and scoping process.

Rather than reiterate the issues we raised in our December 31, 2001 letter to Secretary Durand, we would like to use this opportunity to focus on the fact that we believe the siting proposal by Cape Wind on outer continental shelf lands may benefit from a two-step evaluation process similar to that for oil and gas development. The first step should include a broad-based zoning or master planning analysis of the OCS lands off the New England coast to determine which lands and waters are environmentally suitable for potential development for wind, wave, and perhaps other forms of energy development. The second step would involve a detailed evaluation of those areas which are potentially suitable for projects like the Cape Wind Energy proposal.

Specific Comments

The lands on which the Cape Wind Energy Project would be situated are part of the federal outer continental shelf. Currently, we are unsure if any federal agency has the authority to lease or convey use of these lands for the development of an energy facility. This issue notwithstanding, it would be a more efficient and informative NEPA process if the alternatives analysis could step back and analyze the OCS lands off the New England Coast using a variety of siting and evaluation criteria and determine which areas of the OCS would be environmentally suitable for the development of offshore wind, wave, and perhaps other energy resources. This threshold examination would facilitate meeting the federal public trust responsibility by providing a public process in which decisions about zoning and uses of the OCS are made. Unfortunately, the Corps Notice of Intent on the Cape Wind Energy Project speaks only to the evaluation of alternative sites on Nantucket Sound, not to the broader public policy issue involving zoning and land use planning to identify appropriate uses of federal trust property and related trust resources. Without this important threshold step, the Corps, EOEA, cooperating agencies, and others cannot adequately examine a reasonable range of alternative sites for wind energy development on the OCS. For instance, absent the above broad scale siting and evaluation process, we would have no way of knowing whether or not Nantucket Sound would be determined to be an acceptable OCS area for potential development as a wind resource area. By moving forward as proposed in the Notice of Intent, the EIS process creates the presumption that Horseshoe Shoal and other Nantucket Sound sites are reasonable alternative sites for wind energy development when, in fact, they may not be suitable.

Accordingly, the Service believes the Corps should step back and conduct a zoning and siting evaluation of the OCS lands off the New England Coast for wind and wave energy development, using an open public process, as a necessary first step to create a more efficient NEPA process. The results of the zoning and siting evaluation should then be used to select reasonable alternative ocean sites (which may or may not include Nantucket Sound) for wind and wave energy development.

The range of alternatives in the EIS will clearly be affected by the manner in which the project purpose and need are defined. The Corps should define the project purpose and need more broadly than the applicant's stated purpose. We believe the project purpose should be defined as the production of electricity for use in the New England power grid. Under this broader project purpose, the alternatives in the EIS would need to include all reasonable generation sources, not just renewable energy; various sizes of generation capacity, not just a 420 mw-sized facility; and generation locations encompassing the entire New England Power grid, not just the Cape Cod area.

The Corps should consider utilizing a tiering concept to screen the universe of alternative generation sources, sizes and locations into smaller and smaller pools to get to a short list of reasonable alternatives. The Corps, EOEA, and the cooperating agencies should commit to developing screening criteria to tease apart the reasonable alternatives from the larger group of potential alternatives.

Regarding the search for alternative generation sources, sizes and locations, the EIS will need to examine the need for power in the New England power grid, consider whether excess capacity exists with existing facilities and whether excess capacity exists with approved but not yet constructed facilities. This analysis should also consider the various regional expansion projects associated with the Sable Island, N.S. natural gas field such as the proposed Neptune offshore direct current power line and an as-yet unnamed offshore natural gas pipeline that would serve various New England cities and the New York-New Jersey area. Other projects under consideration for development or decommissioning could also affect the need for power and the economics of various generation sources on the regional grid.

We anticipate that information on recently proposed, approved, or constructed energy projects including generation sources, sizes and locations could be obtained from the various state energy and planning offices, public utility commissions, energy facility siting board(s), and from the New England Power Pool. This recent market information should provide useful data for determining what constitutes a viable commercial scale facility within the various generation sources as well as providing data on total capacity of the various generation sources or categories in the New England power grid, e.g., natural gas, renewables, etc.

I am sure you will agree that getting the alternatives analysis properly framed is one of the biggest challenges facing the Corps, EOEA, and the cooperating agencies. The fact that both public property and resources are proposed for privatization with this first-of-its-kind large scale wind energy development makes the task more daunting. Should you have questions about these scoping comments, feel free to contact me or Mr. Vern Lang of this office at 603-223-2541.

Sincerely yours,

Michael J. Bartlett
Supervisor
New England Field Office

Enclosure

Exhibit 12

April 5, 2002

Colonel Brian E. Osterndorf
District Engineer
United States Army Corps of Engineers
696 Virginia Road
Concord, Massachusetts 01742-2751

RE: Cape Wind Project Draft Environmental Impact Statement Scoping Comments

Dear Colonel Osterndorf:

EPA New England appreciates the opportunity to comment on the scope of analysis for the preparation of a Draft Environmental Impact Statement (DEIS) for the Cape Wind Associates, LLC (Cape Wind) proposal to construct a wind-powered electrical generation facility (wind farm) in Nantucket Sound off the coast of Cape Cod, Martha's Vineyard and Nantucket. Based on the applicant's information, we understand that the project will feature 170 wind turbines spread across 28 square miles of Nantucket Sound that would produce up to 420 megawatts of energy. The 426 foot tall turbines would produce energy that would be transmitted via submarine cables to an electrical service platform where it would be converted and transferred to Cape Cod via two 115KV submarine cables. While preparing these comments, EPA has reviewed applicant-generated information contained in its application to the Corps of Engineers (Corps) for Section 10 authorization and recent comments offered by a number of state and federal agencies, as well as the public. This letter sets forth our specific concerns about the scope of analysis for the DEIS.

EPA commends the Corps for deciding early on that an EIS should be prepared pursuant to the National Environmental Policy Act (NEPA) to support decision-making regarding the Cape Wind proposal to construct a wind farm in Nantucket Sound. That decision paves the way for a comprehensive analysis of this challenging and precedent-setting project. In addition, EPA fully supports the efforts of the Corps and the Massachusetts Executive Office of Environmental Affairs to integrate their respective reviews within a combined DEIS/DEIR under NEPA and Massachusetts Environmental Policy Act (MEPA). This joint review should improve the public review process and streamline the environmental review for the project.

The Corps-sponsored scoping sessions were well attended and featured a valuable transfer of questions, concerns and suggestions about both the project and the types of information that

should be included in the DEIS/DEIR. Discussion at each meeting demonstrated significant public interest in a comprehensive evaluation. Continued interagency coordination across federal, state and local jurisdictions will be critical for ensuring that the DEIS/DEIR adequately informs the various regulatory reviews that will follow.

As you know, the generation of electricity from fossil fuels is the single largest industrial source of air pollution in New England. Because of these fossil-fuel power plant emissions, New England continues to experience too many days of unhealthy air and too much degradation of the environment, including acidification of lakes and streams, mercury deposition, visibility impairment, greenhouse gas emissions, and excessive nitrogen loading to our ecosystems. In addition, apart from air emissions, fossil fuel burning power plants can cause environmental harm from their withdrawal of cooling water from, and their discharge of heated water to, the region's waterways. There are also many adverse environmental impacts associated with the extraction, refining and transportation of fossil fuels to be used in the New England market. Consequently, **EPA New England strongly supports an increase in the amount of electricity generated in the region from renewable resources such as wind power. However, no shift to renewable energy, either through the development of this or any other project, can be made without a complete understanding of the environmental impacts and tradeoffs associated with each alternative.**

EPA looks forward to coordinating with the Corps and other local, state and federal interests as work is done to determine the appropriate scope of analysis for the project and as specific investigations are developed to gauge the level of impact associated with each alternative under consideration. Off-shore wind farm operations, such as the one proposed by Cape Wind, raise a number of public policy concerns and environmental questions that must be carefully addressed. These issues are summarized below.

Determination of the Range of Alternatives

The Council on Environmental Quality's (CEQ's) regulations implementing NEPA at 40 CFR Part 1502.14 explain that a reasonable range of alternatives should be presented and compared in the DEIS to allow for a "clear basis for choice among options by the decision maker and the public." Moreover, CEQ's "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations" explain that "Section 1502.14 requires the DEIS to examine all reasonable alternatives to the proposal. In determining the scope of alternatives to be considered, the emphasis is on what is 'reasonable' rather than on whether the proponent or applicant likes or is itself capable of carrying out a particular alternative. Reasonable alternatives include those that are practical or feasible from the technical and economic standpoint and using common sense, rather than simply desirable from the standpoint of the applicant."

Framing an appropriate purpose and need statement is a key element in the development of a range of alternatives for analysis, as the alternatives flow directly from it. The proponent's application states that the project's purpose is "to generate up to 420 MW of clean, renewable wind-generated energy that will be transmitted and distributed to the New England regional

power grid, including Cape Cod and the Islands...." While we think the applicant's proposed purpose statement is a good starting point, we recommend it be modified to make it less constraining for the purposes of the NEPA analysis and determining the range of alternatives to be investigated in the DEIS/DEIR. As a starting point, we suggest that the purpose statement be modified by striking the words "clean" (as it is somewhat vague and open to interpretation) and "wind-generated" (too limiting) and the phrase "including Cape Cod and the Islands..." (as a geographic aspect is implied in the New England Power Grid component of the statement). Finally, we suggest that specific reference to a particular size for the project be dropped from the purpose statement and that it be replaced with language descriptive of a commercially viable renewable energy facility. With these changes, the basic project purpose statement would read, "The project's purpose is to develop a commercially viable renewable energy facility that will generate electricity distributed to the New England regional power grid."

EPA looks forward to working with the Corps and other federal agencies in a cooperative fashion to establish an appropriate basic project purpose through the Highway Methodology Process. The characterization of need provided by the applicant should be fully supported by the analysis provided in the DEIS/DEIR. Following that step, the agencies should work closely to agree on an acceptable range of alternatives to be considered in the DEIS/DEIR. At this point the range of alternatives could include renewable energy generation from a number of sources of different sizes/generation capacities, both on and offshore, or combinations of sources/types of facilities, that would supply power to the New England power grid. The analysis should fully analyze the rate of development of new wind technology and the likelihood that currently infeasible alternatives may become feasible in the near future (e.g., placement of turbines in deeper waters). The alternatives list would also, of course, include the applicant's proposal as well as the No-Build scenario.

Analysis of Alternatives

Once a complete list of alternatives is identified, the Corps should consider developing an interagency work group (including federal and state participation) to develop screening criteria, tailored to this case and linked directly to the statement of purpose and need, that will support decisions to eliminate or retain alternatives for additional analysis in the DEIS/DEIR. As alternatives advance through the screening process we expect that increasing levels of information and analysis will be necessary to evaluate tradeoffs and to support decision-making.

The Corps' analysis of alternatives will require a thorough and independent examination of the applicant's claims regarding a number of factors including:

- project size and proposed site;
- project need;
- potential benefits;
- potential costs/impacts; and,
- renewable energy technology.

At this point, the economics of the project are poorly understood and a greater level of information will be necessary to evaluate the proposed alternative as well as other alternatives that could achieve the project purpose. The discussion of alternatives should include the impact on electricity rates in New England and a discussion of fuel diversity, and the potential for future supply constraints, reliability problems, and price increases associated with over-reliance on a particular fuel source.

A thorough assessment of the relative environmental tradeoffs of each alternative should be provided in the DEIS/DEIR. As you know, the record is brimming with a wide range of important and thoughtful comments offered by our federal and state colleagues as well as by industry groups and the public. Each of these comments must be carefully considered during the development of the scope for the DEIS/DEIR. At this point in the scoping process the list of potential impacts that should be addressed is lengthy. While we recognize that the consideration of impacts must be tailored for each alternative under consideration, it currently appears that the list of issues to be explored includes: avian impacts, marine impacts (to recreational and commercial fisheries, marine mammals, benthic habitat, circulation, physical conditions, and overall ecology), visual impacts, noise and vibration impacts, aviation impacts, impacts to communication/transmission networks, commercial and recreational navigation/use, and direct and secondary impacts to the local/regional economy (recreation, tourism, fishing, coastal property values, etc.).

The analysis should discuss the environmental benefits/avoided impacts of alternatives under consideration when compared to each other and to other forms of non-renewable energy production. For example, the discussion should include avoided upstream environmental impacts associated with the mining of coal, the drilling for oil and natural gas, the refining of petroleum, and the transportation of these materials to New England. Other issues that should be part of the comparison include hazardous material usage and storage, thermal loads associated with fossil fuel fired plants, and the potential for impacts such as impingement and entrainment of fish and larvae in cooling water intakes at fossil fuel-fired plants. In addition, the analysis should describe the situations where an alternative might displace other forms of energy generation and the relative impacts/benefits of such a shift in energy production.

The DEIS/DEIR should establish a baseline from which impacts of the project alternatives can be discerned and evaluated. The same baseline information should then also be used going forward to evaluate the impacts of any project that may be constructed. The tradeoff analysis should also consider emissions offsets from criteria pollutants and CO_2 and the relative environmental costs incurred and avoided from the development of various forms of renewable energy. The tradeoff analysis should also address the environmental and societal impacts of climate change on the ecosystems being studied in the course of developing the EIS, and the incremental role that each renewable carbon-neutral energy generation project can play in mitigating those impacts. During the course of a recent interagency discussion, the Corps suggested that "topic specific" working groups would help focus the discussion on particular issues as the DEIS/DEIR is developed. We think this idea has merit and should be pursued.

Public Trust Issues

The DEIS/DEIR must fully consider the public trust implications of siting a facility in federal waters. The proposed wind farm would spread across 28 square miles of Nantucket Sound. With the exception of two transmission cables and a portion of a proposed "wind wake buffer zone," the project will be located beyond the three mile limit of state waters in federal waters on the outer continental shelf (OCS). Increasing public concern has focused on the lack of an established process (exclusive of the Corps Rivers and Harbors Act Section 10 authority) through which the federal government can effectively deal with a number of precedent setting issues associated with the proposed project. These include but are not limited to: the lack of existing policy and regulation dictating which agency has authority over siting issues, whether competition should exist for development sites, how/whether easements/leases/fees should be required for the use of public property and its resources by a private corporation, and what sort of requirements should be imposed to ensure proper site restoration and management after the useful life of the project ends. These issues grow in importance as we learn about other proposals for offshore energy projects in New England and other coastal areas of the United States.

EPA, NOAA, and the Corps, among others, are participants in a Department of Interior working group focused on possible modifications to the Outer Continental Shelf Lands Act (OCSLA) that would address transmission of energy projects and renewable energy development on the OCS. To date, draft language for possible legislation focuses on the granting of easements/rights-of-way and the establishment of "fees to assure [that the public receives] fair market value for rights conveyed." The preliminary considerations also contemplate competitive or non-competitive granting of easements/rights-of-way. The DOI efforts are timely and each of these issues remains ripe for analysis in the DEIS/DEIR. Moreover, heightened public interest in the project warrants the establishment of clear public policy to fill the "gap in the process" in advance of decision-making that will follow the NEPA process. If this does not occur in a timely fashion outside the NEPA process, the Corps will need to thoroughly explore these public policy issues in the DEIS/DEIR.

The Cape Wind project is the first of what appears likely to be a number of proposals to develop renewable energy facilities off the coast of New England. We believe these projects, if properly sited to avoid impacts, may offer a tremendous opportunity to New England in moving toward a more sustainable and more diverse energy future. Given these implications, it is all the more imperative that the public trust issues raised by such projects be resolved thoughtfully and quickly. It is our belief that the project should not proceed through the permit process absent

serious analysis of this private use of public trust resources for renewable energy development on the OCS. Several strategies to deal with the existing policy void are apparent:

- The Corps could proceed with the current DEIS/DEIR analysis in a manner that fully incorporates the results of ongoing decision-making of the interagency work group and/or subsequent legislative action;
- In recognition of the pressing need for clear public policy on this issue, and in view of the fact that multiple wind power proposals are under consideration for New England offshore waters, the Corps or another appropriate agency (e.g. the Department of the Interior) could develop a programmatic EIS that takes a comprehensive look at potential sites for offshore renewable energy development and provides information that can then be used for site specific applications for individual projects;
- The Corps could proceed with the DEIS for this project absent an external process to deal with the lack of clear policy–in this instance the Corps would conduct its own comprehensive investigation of public trust issues associated with the project and its alternatives.

We believe that an analysis with no consideration of public trust issues and absent any national policy/regulation that governs the use of OCS lands for renewable energy generation is not an appropriate option. EPA is concerned with the lack of policy/regulation and recommends that the agencies meet to discuss the various options to develop an appropriate strategy. We also recommend that the Corps consider coordinating with the Council on Environmental Quality on this challenging issue. EPA looks forward to reviewing the Corps' draft scope of work for the DEIS with particular attention to this fundamental issue and to future discussions about the merits of various approaches.

Coordination/Communication

Close interagency coordination throughout the preparation of the DEIS/DEIR is critical. To that end, EPA intends to work as a cooperating agency to help define the scope of analysis and to offer input on how specific issues should be addressed in the DEIS. We encourage the Corps to keep an open dialogue with local, state and federal agency representatives throughout the process, with particular attention to agencies such as the Cape Cod Commission that have a long history representing the interests of the resident population that feels it would be most impacted by the applicant's proposed project. The communication strategy should include updates on the DEIS at important milestones, as public policy around the use of the OCS evolves, and should consider the release of relevant study findings as they become available. The work by the Corps so far during the scoping process bodes well for an open public process.

Finally, we suggest that the Corps distribute a draft of the final scope for the DEIS to the interagency group to make sure that there is general consensus on the scope of alternatives and the impact analysis. We are willing to work with Corps staff to help facilitate this effort if necessary and we look forward to participating in upcoming interagency coordination meetings and reviewing draft documents as appropriate and as our resources allow. We hope that the

Corps will allocate sufficient resources to support a comprehensive analysis and independent review of applicant generated information/analysis that will be incorporated into the DEIS. Should you have any questions or wish to discuss our concerns, please contact me or Timothy Timmermann of EPA New England's Office of Environmental Review at 617/918-1025. Thank you for the opportunity to provide scoping comments.

Sincerely,

Robert W. Varney
Regional Administrator

cc:

The Honorable Edward M. Kennedy, U.S. Senate
The Honorable John F. Kerry, U.S. Senate
Representative William Delahunt
Secretary Robert Durand, Executive Office of Environmental Affairs
Margo Fenn, Cape Cod Commission
Michael J. Bartlett, United States Fish and Wildlife Service
Peter D. Colosi, National Marine Fisheries Service
Barry Drucker, United States Department of Interior
Albert Benson, United States Department of Energy
J. Mark Robinson, Federal Energy Regulatory Commission
Thomas W. Skinner, Massachusetts Office of Coastal Zone Management
Vincent Malkoski, Massachusetts Division of Marine Fisheries
Charles J. Natale, Jr., Environmental Science Services, Inc.
Len Fagan, Cape Wind Associates, LLC

Exhibit 13

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ALLIANCE TO PROTECT NANTUCKET SOUND, INC., RONALD BORJESON, WAYNE KURKER, SHAREEN DAVIS, and ERNEST ELDREDGE, Plaintiffs, v. UNITED STATES DEPARTMENT OF THE ARMY; HONORABLE THOMAS E. WHITE, SECRETARY OF THE ARMY; UNITED STATES ARMY CORPS OF ENGINEERS; LT. GENERAL ROBERT B. FLOWERS, CHIEF OF ENGINEERS, UNITED STATES ARMY CORPS OF ENGINEERS; COLONEL THOMAS L. KONING, DISTRICT ENGINEER, UNITED STATES ARMY CORPS OF ENGINEERS, Defendants.	CIVIL ACTION NO. 02-11749 JLT

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND SUPPORTING MEMORANDA.

The Town of Barnstable hereby requests leave of the Court to file a brief of *amicus curiae* in support of Plaintiff's motion for summary judgment. The Town has over 47,820 residents living in the Town's seven villages: West Barnstable, Hyannis, Centerville, Osterville, Marstons Mills, Cotuit, and Barnstable. Centerville, Hyannis, Osterville, and Cotuit each border on the southern coastline of the Cape, facing the area of Nantucket Sound Cape Wind Associates has proposed to be industrialized. The Town, through its council, develops, adopts and enacts

policies and ordinances that it believes promote and enhance the general welfare of the town. In addition, the Town actively participates as a member of the Cape Cod Commission, which has as its mission the protection of the Cape's "unique natural, coastal, historical, cultural and other values which are threatened by uncoordinated or inappropriate uses of the region's land and other resources."

The Town's economy depends largely on Nantucket Sound's aesthetic, biological and natural resources. Tourism is a mainstay of the Town's economy and Cape Wind Associate's proposed development will adversely impact tourism, directly harming our interests and the interests of those we represent. The Town is opposed to the construction of any phase of Cape Wind Associate's plan to industrialize Nantucket Sound. If Cape Wind Associates is allowed to proceed, its planned development will mar the aesthetic, biological and recreational resources of the Sound and will jeopardize tourism, an industry upon which we largely depend. Finally, if this process is deemed sufficient to allow the development of the outer continental shelf, without a significant participatory role carved out for local interests, the ability of local, coastal governments to protect their interests and shape the future of their localities will be seriously undermined.

Amicus is filing this brief to share the interests of the Town which have gone unheard due to the lack of process currently available for the development of the outer continental shelf. We also object to the unwise precedent approval which the data tower creates. The Town's brief focuses specifically on the impacts our Town, and any other local coastal governments, will experience if Cape Wind Associates is permitted.

Attorneys for amicus have contacted Plaintiffs, Defendants and Intervenors to request their consent to file this brief. Plaintiffs Alliance to Protect Nantucket Sound have consented to

the filing of this brief. At this time, Defendants and Intervenors have not taken a position on whether or not to consent to the filing of this brief.

For all of the foregoing reasons, amicus respectfully requests the Court's permission to file their brief in support of Plaintiff's motion for summary judgment.

Dated: December 12, 2002.

Respectfully Submitted,

TOWN OF BARNSTABLE, Amicus Curiae,
By their Attorneys,

ROBERT D. SMITH, Town Attorney
[B.B.O. No. 469980]
RUTH J. WEIL, First Assistant Town Attorney
[B.B.O. No. 519285]
T. DAVID HOUGHTON, Assistant Town Attorney
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TOWN OF BARNSTABLE
367 Main Street, New Town Hall
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

C. A. No. 02-11749 JLT

ALLIANCE TO PROTECT NANTUCKET SOUND, INC., RONALD BORJESON, WAYNE KURKER, SHAREEN DAVIS, ERNEST ELDREDGE, DAVID ELLSWORTH, ROBERT HAZELTON, OSTERVILLE ANGLERS CLUB, INC., and HYANNIS ANGLERS CLUB, INC.

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF THE ARMY, HONORABLE THOMAS E. WHITE, SECRETARY OF THE ARMY; UNITED STATES ARMY CORPS OF ENGINEERS, LT. GENERAL ROBERT B. FLOWERS, CHIEF OF ENGINEERS, UNITED STATES ARMY CORPS OF ENGINEERS; COLONEL THOMAS L. KONING, DISTRICT ENGINEER, UNITED STATES ARMY CORPS OF ENGINEERS,

Defendants.

MEMORANDUM OF *AMICUS CURIAE*, TOWN OF BARNSTABLE, IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGEMENT.

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INTRODUCTION.

The Town of Barnstable ("Town") files this brief in support of the Plaintiffs' opposition to the Army Corps of Engineers' ("Corps") review of Cape Wind Associates' ("CWA") proposed wind plant project. On August 19, 2002, the Corps approved the construction of a 200-foot tall tower, the stated purpose of which is the collection of data purportedly needed for the design of CWA's proposed wind plant. The implications of the Corps' decision to issue CWA its requested permit reach far beyond a 200-foot tall structure breaching Nantucket Sound's water sheet. By permitting CWA's proposed data tower, the Corps has in effect opened the Outer Continental Shelf ("OCS") lands to development and given private developers *de facto* authority to shape public policy. With Corps permits in hand, private developers can now dictate where, when and how the development of the OCS will proceed without having to consider the interests of local government or the public whom they represent.

INTEREST OF AMICUS.

The Town of Barnstable has a strong interest in protecting Nantucket Sound's aesthetic, biological, and recreational resources. Our interest derives from the role these resources play in the local economy. Tourism, second homeowners, retirees, and residents working off-Cape account for more than half of the Cape's economic base.[1] Any threat to the Sound's natural resources – and the Town believes that the construction of a field of 40-story structures over 28-square miles of the Nantucket Sound water sheet poses a significant threat to the Sound's natural resources – potentially jeopardizes the economic vitality of our Town. In addition, the Sound played an integral part in the history and culture of Cape Cod, provided the livelihood of generations of fisherman, and has shaped

[1] See http://www.massconnect.state.ma.us/content/initiatives/Part_2_Cape_and_Islands_8.pdf.

the character of the entire region. The Town, therefore, files this brief to express views that they feel were not adequately considered throughout the review of CWA's data tower application.

BACKGROUND

Local governments are typically accorded the opportunity to participate in decisions that will directly impact their interests. The review of CWA's proposed development in Nantucket Sound, a resource on which the Town and its residents rely, is unusual in the startling lack of opportunity for the Town to participate. The Town believes that fundamental deficiencies in federal law have prevented their views from being adequately considered.

I. Nantucket Sound and the Welfare of Cape Communities.

The history and character of Cape Cod are inextricably linked to the waters of Nantucket Sound. Although originally settled by farmers, it is the sea that has guided the Cape Cod's economic development over the last three centuries. The whaling industry, which began on the Cape and eventually moved across the Sound to Nantucket, grew over 150 years to become the largest whaling center in the world. Mackerel and cod fishing reached their peak in the mid-1850's. The Cape's non-agricultural businesses mainly supported the whaling and fishing industries, with the production of ropes, sails, ships, canvas and anchors.

Today, the region's economy is no less linked to the Sound. In fact, the Cape Cod Commission explains that, "[m]any of the characteristics of Cape Cod that enhance its residents quality of life are derivatives of, or defined by, the marine waters of Cape Cod Bay, the broader Gulf of Maine, and the Atlantic Ocean. Preserving these waters, the

natural resources they support, and the lifestyles that are associated with them are the foundation of our traditional maritime communities."

Indeed, the very health and prosperity of our community depends on the aesthetic, recreational, and biological resources of the Sound. Marine science-related industries are a significant part of the Massachusetts economy, particularly those industries located on the Cape and Islands. The region's marine-related industries include fisheries, aquaculture, electronics, marine instrumentation, tourism, biotechnology, and environmental technologies. Although the traditional cod and haddock fisheries have declined in recent years, the Cape leads the Commonwealth in the development of new approaches to fisheries management, alternative species for wild harvest, and expanded opportunities in aquaculture.

Tourism on the Cape is similarly thriving. In 2002, the Cape and Islands posted $971 million in direct domestic travel expenditures. These expenditures generated $275 million in payroll and 12,350 jobs in the region. Nineteen percent of all domestic travel to Massachusetts goes to the Cape and Islands. And of the 4.7 million annual visitors, 48.3% go to the area's beaches.

This level of tourism can significantly impact the region's environment. In fact, the beauty and uniqueness of Cape Cod lead to an unprecedented growth boom in the 1980's. The region, however, has taken care to protect its resources by establishing the Cape Cod Commission in 1991. The Commission's mandate is to protect the Cape's unique natural, coastal, historical, cultural and other values that were being threatened by uncoordinated or inappropriate uses of the region's natural resources. During the last decade, Cape residents indicated that they were primarily concerned that the Commission protect groundwater,

encourage only clean, light industries, cultural facilities and neighborhood businesses, and restrict development which they felt would harm the character of the Cape, such as new, large hotels, malls and factory outlets.

Not only does the Cape enjoy an unusual degree of local protection, but also a number of state and federal laws similarly protect the Sound. Nantucket Sound is unique in that the federal government and the Commonwealth of Massachusetts jointly manage its resources.[2] And until now, this combination of federal, state and local laws, which establish rigorous environmental standards, strong restrictions on the development and exploitation of natural resources, and abundant opportunities for local government to participate in non-local decision-making processes, were sufficient to protect the Town's interests.

The problem that CWA's applications raise is a novel one, not just for the Town, but also for the nation as a whole. CWA is proposing to develop a site that lies approximately five miles south of the coast of Cape Cod on what is purported to be federal land located on the OCS.[3] The OCS is not extensively regulated because, in fact, there has been little need for such regulation. The principal developmental activities occurring on the OCS involve mineral extraction, an activity that Congress addressed when it passed the Outer Continental Shelf Lands Act ("OCSLA") almost a half-century ago. Unfortunately,

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[2] Although the federal government understands the waters of Nantucket Sound to be the property of the United States, see *United States* v. *Maine*, 475 U.S. 89 (1986), Congress has conferred jurisdiction to the Commonwealth under the federal Fisheries Conservation and Management Act. 16 U.S.C. §1856(a)(2)(B).

[3] The CORPS is treating CWA's proposed development as falling within federal jurisdiction on OCS lands. Although the Town's view diverges from the CORPS's on this point, we decline to press the issue here. Instead, for the purpose of this brief only, amicus discusses the inadequacy of the Rivers and Harbors Act of 1899 to permit CWA's development, as if it were occurring on federal lands.

the OCSLA has no application to non-extractive activities. Nor does any other federal law apply to CWA's proposed activities.

The absence of any federal law governing CWA's proposed use of the OCS, or any other private developer's, has effectively deprived the Town of a full and fair opportunity to relate its concerns regarding the industrialization of the Sound. While the Town actively engages in federal and state decision-making processes to protect its interests, it cannot do so in this case because there is no federal decision-making process applicable to CWA's proposal. Without a federal regulatory procedure that authorizes this type of use of OCS lands, including a mechanism by which private parties can obtain the property rights it needs to appropriate public trust resources and an opportunity for local governments to protect those resources as necessary, private parties cannot build on the OCS.

This regulatory gap is widely acknowledged. Nonetheless, the Corps has mistakenly determined that it has jurisdiction to review CWA's proposed activities under section 10 of the Rivers and Harbors Act of 1899 ("RHA"), an act passed more than a century ago to regulate obstacles in the navigable waters of the United States. The RHA, however, was never intended for this purpose and is completely inadequate to handle a proposal as complex as CWA's. The RHA does not authorize the construction of any structure on the OCS for energy development; it does not authorize the use of public lands and waters for private development; and it does not adequately account for the important interests of local governments.

The Corps is using an inapplicable and inadequate statute to review CWA's proposed data tower and 28-square mile energy plant. The RHA affords no one the jurisdiction to review this project, establishes no standards or means by which such

proposals should be evaluated and offers no way for the public to participate meaningfully. Unless the data tower permit is revoked, our Town, as well as numerous other coastal municipalities, will lose their ability to protect their interests. More problematically, if the permit for CWA's tower is not invalidated, the Corps will have determined, without Congressional input, that an RHA permit is sufficient authority to build a 420-kilowatt power plant on public resources, without environmental safeguards and without compensating the public.

II. Current Federal Law Protecting Offshore Resources

A. The OCSLA (Outer Continental Shelf Lands Act).

The OCS is relatively undeveloped, but what development has occurred, has occurred under laws specifically crafted for the purpose. One example is the Outer Continental Shelf Lands Act ("OCSLA").

Congress enacted the OCSLA so that the public-trust resources of the OCS would be developed in a safe and environmentally sound manner. The OCSLA reflects Congress' recognition both of the need for a comprehensive program to govern oil and gas exploration and the importance of providing state and local government with the opportunity to participate in federal policy and planning decisions relating to exploration for, and development and production of, minerals on the OCS. The OCSLA provides a system for federal decision-making that covers all aspects of OCS oil and gas development, including: (1) the development of national and regional energy programs; (2) the review of such projects on a regional basis, including cumulative effects of multiple projects; (3) the mechanism for conferring property rights under which private parties would be allowed to use and occupy public lands and waters; (4) a mechanism for

obtaining a fair monetary return to the United States and the states[4] (and, through them, affected local governments); and (5) the application of environmental standards tailored to the unique circumstances and resources of the OCS. Congress established this comprehensive program to authorize all aspects of private oil and gas energy development on federal lands of the OCS.

Local government is granted a special role under the OCSLA. Congress recognized that because the development of the OCS will significantly impact coastal areas, local governments may "require assistance in protecting their coastal zones [from the] adverse effects of such impacts." 43 U.S.C. §1332(4). In addition, Congress appreciated the need for affected local government to have "an opportunity to participate . . . in the policy and planning decisions made by the Federal Government relating to" the OCS. Id. To ensure that "the rights and responsibilities of . . . local governments . . . be considered and recognized," id. §1332(5), Congress provided opportunities for local governments to review development and production plans, id. §1351(3), and submit recommendations regarding the size, timing, or location of proposed lease sales, id. §1345(a). Local governments can also review draft environmental impact statements, id. §1351(f), and submit comments and recommendations on development and production plans which are not found to be major Federal actions, id. §1351(g). Finally, twenty-seven percent of all revenues from production within 3 miles seaward of the federal/state

[4] In 2000, the Department of Interior's Minerals Management Service, the agency responsible for administering the OCSLA, collected nearly $8 billion from mineral revenues and has collected more than $110 billion since its creation in 1982. See http://www.gomr.mms.gov/homepg/whatsnew/techann/2002-026and27.html. Nearly $1 billion from those revenues go into the Land and Water Conservation Fund for the acquisition and development of state and Federal park and recreation lands.

boundary go to the state, id. §1337(g), and a portion of those revenues are passed on to the local governments, id. §1356a(d)(3).

Congress has allowed private parties to use other public trust resources under different statutory authorities. The Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§1701-1784, and the Mineral Leasing Act, 30 U.S.C. §§181-263, for example, govern the use of federal land for wind projects. Similarly, the Ocean Thermal Energy Conversion Act of 1980, 42 U.S.C. § 9101-9168, establishes a licensing program for facilities and plantships that would convert thermal gradients in the ocean into electricity. Likewise, the Fishery Conservation and Management Act, 16 U.S.C. §§1701-1784, prescribes the system for allowing private use of the fish resources of federal waters. Each of these laws allows private parties to use public resources and stipulates the conditions for their use. In addition to providing a mechanism for ensuring that the natural resources to be exploited are not degraded, each of these laws provide an opportunity for state and local participation so that non-federal voices are heard during the decision-making process.

Simply put, Congress has never enacted equivalent authorization to develop the OCS for wind energy generation. The OCSLA does not apply to OCS-based wind energy projects. The Minerals Management Service – the agency responsible for implementing the OCSLA – has stated that there is no legal mechanism governing use of the OCS for wind plants and that it does not have jurisdiction over CWA's proposal. AR 2459, 32. Indeed, Congress has acknowledged this legal vacuum by introducing legislation to create

such authority.[5]

The Corps' review of CWA's data tower application therefore raises a host of unresolved issues. First, there is no Congressional delegation of authority to any agency to evaluate or authorize offshore wind plants. Second, Corps has exceeded its jurisdiction by reviewing CWA's proposal. Third, no federal agency, including the Corps, can confer on a private developer a property interest in OCS lands. This regulatory void allows developers to circumvent consideration of our interests. In effect, private developers seeking to exploit this gap in the regulatory process will determine public policy for OCS wind development with no input from the public.

In fact, the current approach to reviewing OCS wind development has spawned a "wind rush" to build wind projects along the eastern seaboard. As many as 20 projects have been proposed along the East Coast in the last few months, and the Corps is processing all of these requests under the RHA. Private developers should not be able to exploit this regulatory void by building private energy plants on the basis of a permit issued under an act designed to regulate obstacles in the nation's navigable waters. Nor should private developers be able to dictate public policy and exclude local interests such as ours.

B. The National Environmental Policy Act.

In addition to participating in a decision-making process under resource-specific laws like the OCSLA, the Town also participates in procedures established by the National

[5] H.R. 5156, introduced by Rep. Barbara Cubin on July 18, 2002, would amend the OCSLA to allow the Secretary of the Interior to grant easements or rights-of-way on the OCS for activities not currently authorized under the OCSLA, including the development of alternative energy sources. H.R. 5156, 107th Cong. §1(b) (2002). This bill was not passed and is generally regarded as inadequate to ensure protection of the marine environment.

Environmental Policy Act ("NEPA"). NEPA applies to all federal decisions affecting the environment and requires an agency to consider the impacts of a proposed action. The Act's strength and effectiveness rely entirely on the thoroughness of agency review procedures.[6]

The public comment procedures are indispensable to NEPA's efficacy, and local governments are granted a special role under the NEPA process. "[I]t is the continuing policy of the Federal Government, in cooperation with State and local governments, . . . to use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony." 42 U.S.C. §4331(a) (1976) (emphasis added). See, e.g., *Denver* v. *Bergland*, 695 F.2d 465, 484 n.16 (10th Cir. 1982); *Maryland-National Capital Park & Planning Comm'n.* v. *United States*, 487 F.2d 1029, 1036 (D.C. Cir. 1973) (explaining that the "question of significance takes on a distinctive cast in the context of land use planning" and that "much may turn on whether the Federal Government conforms to or deviates from local or regional regulations of land use").

NEPA regulations clearly define a role for local governments by directing federal agencies to "consult . . . early with State and local agencies." 40 C.F.R. §1501.2. The lead agency must undertake a scoping process that "invites" the participation of affected local agencies, id. §150.7(a)(1), and local agencies are allowed to request "time limits," id. §1501.8(c). The agency must "cooperate with State and local agencies to the fullest extent especially out of deference to controversial issues and local concerns. Id. §1506.6(c).

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[6] The document relied upon for this review is called an environmental impact statement (EIS). In certain cases, the federal agency may prepare an environmental assessment (EA) to evaluate impacts and determine if an EIS should also be prepared. A finding of no significant impact (FONSI) is issued when the EA review determines that EIS is not needed.

The Council on Environmental Quality ("CEQ") issued a memorandum on the role of state and local governments in the NEPA process that reiterates, "the NEPA mandate that Federal agencies responsible for preparing NEPA analyses and documentation do so in cooperation with State and local governments." Memorandum from James Connaughton, CEQ Chair, to Federal agencies (February 4, 2002). (See: //ceq.eh.doe.gov/nepa/regs/cooperating/cooperatingagenciesdistributionmemo2.htm). The benefits of cooperation with local governments in the preparation of EAs and EISs include "fostering intergovernmental trust (e.g., partnerships at the community level) and a common understanding and appreciation for various governmental roles in the NEPA process."

Of particular importance in this case is the mandate that in situations such as the one at hand, the agency must allow for public comment on the draft FONSI/EA before making a final decision. 40 C.F.R. §1501.4(e)(2). The Town was not offered the opportunity to comment on the Corps' draft FONSI/EA. Our ability to take advantage of the opportunities that NEPA affords us depends on the willingness of the reviewing agency to share information and invite our participation. Openness and transparency in the federal decision-making process are elemental so that we can participate meaningfully. Because we were unable to express our concerns in response to a draft EA/FONSI about the lack of authority for this project, the lack of property rights on the part of the developer, and the strong potential for the proposed activities to devastate the basis of our economy, the Town was deprived of one of the few, precious opportunities to be heard on this controversial plan.

ARGUMENT.

The Town believes that Congress has not vested authority in the Corps to process permits for wind energy facilities on the OCS. The Corps does not have jurisdiction over the type of development that Cape Wind proposes. Even if the Corps had jurisdiction, it should not have exercised that jurisdiction when it is clear that CWA does not and cannot possess a valid property right to occupy the OCS, a prerequisite under the Corps' regulations. Finally, the Corps failed to grant us an adequate opportunity to understand the agency's grounds for action, to comment on that reasoning, and to explore less harmful alternatives during the NEPA process.

I. The Corps Is Not the Agency Responsible for Development of Nantucket Sound.

As both Massachusetts Attorney General Thomas Reilly and New Hampshire Attorney General Philip T. McLaughlin have observed, there is no federal program in existence that covers any aspect of this project. Both Attorneys General share the position that current law is insufficient to permit the project because "1) the seabed of the Outer Continental Shelf is specifically exempted from the leasing program established by the Federal Land Policy Management Act (FLMPA), 43 U.S.C. Section 1701 et seq., that is otherwise generally applicable to 'public lands,' and 2) wind facilities and other non-extractive uses are not covered by the mineral rights leasing program established by the Outer Continental Shelf Lands Act, 43 U.S.C. Sections 1801 et seq." Letter from Mass. Attorney General Thomas Reilly to Reps. Barbara Cubin and Nick Rahall, 2 (October 17, 2002) and Letter from N.H. Attorney General Philip T. McLaughlin to Rep. Charles F. Bass (November 21, 2002). See Exhibits 1 and 2. Attorney General Reilly has thus urged the Corps to refrain from reviewing CWA's, and any other proposed OCS wind energy

plant. Letter from Mass. Attorney General Thomas Reilly to Assistant Attorney General T.L. Sansonetti, Secretary of Interior G. Norton, and Lieutenant General R.B. Flowers (October 17, 2002). See Exhibit 2.

The Town agrees that the Corps should not be processing permits for wind energy facilities for at least two reasons. First, the law is clear that the Corps does not have power under the RHA to issue permits for wind energy facilities on the OCS. Section 10 of the Rivers and Harbors Act requires authorization from the Corps for the construction of any structure in or over any navigable water of the United States, the excavation/dredging or deposition of material in these waters or any obstruction or alteration in navigable waters. Under the OCSLA, Congress specifically extended the Corps' RHA authority to the OCS, but only for certain specific structures. 43 U.S.C. §1333(e). These structures are the artificial islands, installations, and other devices erected on the OCS "for the purpose of exploring for, developing, producing, or transporting mineral resources from the OCS." Id. §1333(a); see also id. §1331(k), (l), (m), (q) (definitions). The Corps admits in its EA that the data collection tower is not intended for any of these specific purposes, but rather is intended to collect data necessary to design the proposed wind farm. AR 2593. Therefore, the Corps does not have the authority to issue permits for wind energy facilities on the OCS.

Second, the RHA is an inappropriate vehicle for the evaluation of any aspect of wind power projects, including this initial tower. The RHA process has the single purpose of keeping navigable waters free of unreasonable obstruction. The process does not assess the need for power; it does not assess the balance between the power produced and the environmental impacts; it does not provide a means to confer property rights; it does not

establish or allow for the collection of royalties, rent, or other compensation; it does not invoke environmental standards tailored to offshore-wind projects; and seabed impacts; and it does not provide the state or any local governments an adequate role in the review process. Instead, the RHA is an antiquated 1899 law designed to prevent unreasonable obstructions to the nation's navigable waters by requiring parties to obtain permits to build docks, piers, bulkheads and similar structures. The RHA simply does not address the issue-specific considerations provided for by laws that govern the use of public resources. Therefore, even though NEPA requires a project applicant to satisfy other environmental statutes such as the Endangered Species Act or the Migratory Bird Treaty Act when seeking an RHA permit, review under these acts does not, and cannot, adequately address questions unique to the proper disposition of OCS land for energy generation. These acts can only protect the public resources they were enacted to protect. Similarly, the RHA is inadequate to address the special circumstances of hi-tech offshore energy plants.

The Corps' consideration and permitting of the data tower is, therefore, not only *ultra vires*, but is also completely premature. The Corps should have resolved the jurisdictional issues first. The Corps should have evaluated the tower with the whole project. If the Corps were to reject CWA's wind farm application, the purported need for the tower would be obviated. Conversely, a process that results in the approval of the wind farm with 170 structures more than twice the height of the data tower is hardly likely to result in a denial of an additional data tower. In fact, the data tower is entirely unnecessary given the numerous alternative sources of data, as well as alternative means of collecting the data. It is clear that Cape Wind has persisted in its plans to construct this tower so that

it can establish its rights to build on the Sound's seafloor on the basis of a section 10 permit.

II. CWA Cannot Stake a Private Claim to Public Trust Resources.

Nantucket Sound is a natural public resource that belongs to all citizens. Labeling the tower a research facility does not negate the fact that CWA's tower is a private structure placed on public land for private purposes.

Corps regulations preclude the development CWA is proposing. Corps regulations clearly require a permit applicant to have property rights to undertake the permitted activity in the proposed location. 33 C.F.R. § 325.1(d)(7). In the case of offshore wind facilities, all parties concede there is no basis upon which to obtain such a property right. CWA cannot satisfy the property rights requirement of Corps regulations and to affirm that it can, in its application for a section 10 permit, is a blatant misrepresentation to a federal agency. The Corps recognizes that CWA is incapable of obtaining the necessary property rights for the RHA permit. AR 32. Although the Corps is relying on agency policy that prohibits the consideration of property disputes when processing section 10 permits, the Corps is mistaken if it thinks that this issue is in dispute. There is no dispute regarding whether CWA has property rights in the OCS; it does not. The OCS is the property of the federal government and, therefore, the federal government is the only party capable of its disposition. The federal government has not provided for the disposition of this property for the purposes CWA is proposing. Thus, there can be no dispute that the CWA does not have the requisite property interest. In the absence of an actual dispute, the Corps should have denied the issuance of the RHA permit.

III. The Town Did Not Have Adequate Opportunity to Participate in the Review of the CWA Proposal.

or poles of lesser height and complexity; (6) land-based facilities from which data could be extrapolated; (7) greater use of existing data; and, (8) combinations of the foregoing.

Alternatives to CWA's plan, even if not ideal for CWA, would have allowed research and data collection to proceed without legal controversy or public outcry. The purpose of the public comment requirements of NEPA is to ferret out such options so that an agency may consider them before taking action. Indeed, such review lies at the heart of NEPA. See *Half Moon Bay Fisherman's Mktg. Ass'n* v. *Carlucci*, 857 F.2d 505, 508 (9th Cir. 1988). Had the Town had the opportunity to work closely with the Corps, this intractable conflict might have been avoided. This Court should, therefore, invalidate the permit and remand the matter to the Corps for review and action in accordance with law.

CONCLUSION.

For the reasons discussed in this brief, the Town of Barnstable supports Plaintiffs' request for summary judgment and respectfully requests that this Court grant Plaintiffs' motion for summary judgment.

Dated: December 12, 2002.

Respectfully Submitted,
TOWN OF BARNSTABLE, Amicus Curiae,
By their Attorneys,

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Endnotes

[1] See
http://www.massconnect.state.ma.us/content/initiatives/Part_2_Cape_and_Islands_8.pdf

[2] Although the federal government understands the waters of Nantucket Sound to be the property of the United States, see *United States* v. *Maine*, 475 U.S. 89 (1986), Congress has conferred jurisdiction to the Commonwealth under the federal Fisheries Conservation and Management Act. 16 U.S.C. §1856(a)(2)(B).

[3] The CORPS is treating CWA's proposed development as falling within federal jurisdiction on OCS lands. Although the Town's view diverges from the CORPS's on this point, we decline to press the issue here. Instead, for the purpose of this brief only, amicus discusses the inadequacy of the Rivers and Harbors Act of 1899 to permit CWA's development, as if it were occurring on federal lands.

[4] In 2000, the Department of Interior's Minerals Management Service, the agency responsible for administering the OCSLA, collected nearly $8 billion from mineral revenues and has collected more than $110 billion since its creation in 1982. See http://www.gomr.mms.gov/homepg/whatsnew/techann/2001-026and27.html. Nearly $1 billion from those revenues go into the Land and Water Conservation Fund for the acquisition and development of state and Federal park and recreation lands.

[5] H.R. 5156, introduced by Rep. Barbara Cubin on July 18, 2002, would amend the OCSLA to allow the Secretary of the Interior to grant easements or rights-of-way on the OCS for activities not currently authorized under the OCSLA, including the development of alternative energy sources. H.R. 5156, 107th Cong. §1(b) (2002). This bill was not passed and is generally regarded as inadequate to ensure protection of the marine environment.

[6] The document relied upon for this review is called an environmental impact statement (EIS). In certain cases, the federal agency may prepare an environmental assessment (EA) to evaluate impacts and determine if an EIS should also be prepared. A finding of no significant impact (FONSI) is issued when the EA review determines that EIS is not needed.

[7] The general NEPA regulations promulgated by the Council on Environmental Quality control the Corps' actions. 40 C.F.R. §1500.3. In addition, the Corps violated its own NEPA public review requirements. Under 33 C.F.R. §230.11, public review is required in cases where "feasibility" and "continuing authority" are at issue. Those questions go to the heart of the debate over the tower, which lacks authority and is not feasible on the basis of jurisdictional grounds and the absence of a property right.

CERTIFICATE OF SERVICE
& SERVICE LIST

Barnstable, ss: December 12, 2002.

I hereby certify under the pains and penalties of perjury, that I caused to be mailed by first-class mailing, postage prepaid, a copy of the above document to the attorneys for the interested parties on the date written above as follows:

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ALLIANCE TO PROTECT NANTUCKET SOUND, RONALD BORJESON, WAYNE KURKER, SHAREEN DAVIS, and ERNEST ELDREDGE, Plaintiffs, v. UNITED STATES DEPARTMENT OF THE ARMY; HONORABLE THOMAS E. WHITE, SECRETARY OF THE ARMY; UNITED STATES ARMY CORPS OF ENGINEERS; LT. GENERAL ROBERT B. FLOWERS, CHIEF OF ENGINEERS, UNITED STATES ARMY CORPS OF ENGINEERS; COLONEL THOMAS L. KONING, DISTRICT ENGINEER, UNITED STATES ARMY CORPS OF ENGINEERS, Defendants.	**CIVIL ACTION NO. 02-11749 JLT**

ORDER

Upon consideration of *amicus curiae* Town of Barnstable's motion for leave to file its brief of *amicus curiae* in support of Plaintiffs' motion for summary judgment, it is, this _____ day of _____, 200__,

ORDERED, that the motion for leave to file brief of *amicus curiae* in support of Plaintiffs' motion for summary judgment is hereby granted.

_____
The Honorable Joseph L. Tauro
United States District Judge

[2002-0254\motamisj]

Exhibit 14

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ALLIANCE TO PROTECT NANTUCKET SOUND, RONALD BORJESON, WAYNE KURKER, SHAREEN DAVIS, and ERNEST ELDREDGE Plaintiffs, v. UNITED STATES DEPARTMENT OF THE ARMY; HONORABLE THOMAS E. WHITE, SECRETARY OF THE ARMY; UNITED STATES ARMY CORPS OF ENGINEERS; LT. GENERAL ROBERT B. FLOWERS, CHIEF OF ENGINEERS, UNITED STATES ARMY CORPS OF ENGINEERS; COLONEL THOMAS L. KONING, DISTRICT ENGINEER, UNITED STATES ARMY CORPS OF ENGINEERS, Defendants.	CIVIL ACTION NO. 02-11749 JLT

TOWN OF YARMOUTH'S MOTION FOR LEAVE TO JOIN THE TOWN OF BARNSTABLE AS AMICI CURIAE IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND SUPPORTING MEMORANDA

The Town of Yarmouth hereby moves for leave to join the Town of Barnstable's previously filed brief of amicus curiae in support of plaintiff's motion for summary judgment. The Town of Yarmouth considers the brief of amicus curiae, submitted by the Town of Barnstable on [date], to reflect Yarmouth's concerns and objections to the manner in which Cape Wind Associates' plan to develop Nantucket Sound is being evaluated. The brief is entirely consistent the Yarmouth's conviction that local government must have an active and integral role

in the review and approval of any offshore project that has the potential for impacting the Town's interests.

Like the Town of Barnstable, Yarmouth is acutely interested in any development activities that have the potential to affect the aesthetic, environmental and recreational qualities of Nantucket Sound. The Town of Yarmouth is located on the central portion of Cape Cod, bordered by both Cape Cod Bay on the Cape's northern coast and Nantucket Sound on the Cape's southern coast. The 28.2 square mile Town is comprised of three villages: South Yarmouth, West Yarmouth, and Yarmouthport.

From the time the Town of Yarmouth was first settled, Nantucket Sound has played an important role in the Town's historical and economic development. Early settlers relied upon the natural resources of the Sound – lobster, mackerel, cod, scallops, etc. – for their sustenance. During the 19th century, so many of the Cape's men, including many from the Town of Yarmouth, found their vocation in maritime-related activities that the Cape was referred to by historians as the "greatest nursery of seamen in North America."

The Town's rural character, shaped by its community of fisherman and farmers, changed during the end of the nineteenth century when the Town became a popular vacation destination. Today tourism is the cornerstone of the Town's economy, accounting for 23.1 percent of employment on the Cape. In fact, the Town's year-round population in 2000 was approximately 24,800, but this figure more than doubles during the summer. The Town's economic health is directly dependent on its tourism-related businesses, and the Town seeks to protect that health by participating in the decision making processes that directly affect its interests.

For these reasons, the Town of Yarmouth respectfully requests the Court's leave to be added to the Town of Barnstable's brief of amicus curiae in support of plaintiff's motion for

summary judgment. Yarmouth is satisfied with the amicus brief, as filed, and seeks leave only to join in that brief.

Respectfully submitted,

_____

Attorney for the Town of Yarmouth

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ALLIANCE TO PROTECT NANTUCKET SOUND, RONALD BORJESON, WAYNE KURKER, SHAREEN DAVIS, and ERNEST ELDREDGE

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF THE ARMY; HONORABLE THOMAS E. WHITE, SECRETARY OF THE ARMY; UNITED STATES ARMY CORPS OF ENGINEERS; LT. GENERAL ROBERT B. FLOWERS, CHIEF OF ENGINEERS, UNITED STATES ARMY CORPS OF ENGINEERS; COLONEL THOMAS L. KONING, DISTRICT ENGINEER, UNITED STATES ARMY CORPS OF ENGINEERS,

Defendants.

CIVIL ACTION NO. _____

ORDER

Upon consideration of the Town of Yarmouth's request for leave to join the Town of Barnstable's brief of amicus curiae in support of plaintiff's motion for summary judgment, it is this ____ day of _____, 2002 ORDERED that the motion is granted.

_____
The Honorable Joseph L. Tauro
United States District Judge

Copies to:

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion for Leave to Join the Town of Barnstable as Amici Curiae in Support of Plaintiff's Motion for Summary Judgment has been served this ____ day of _____, 2002, by first class mail, on:

_____
Attorney