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**By Electronic Submission via www.regulations.gov (ID: BOEM-2011-0007)**

Robert P. LaBelle  
Acting Associate Director  
Offshore Energy and Minerals Management  
Office of Offshore Alternative Energy Programs (MS 4090)  
Bureau of Ocean Energy Management, Regulation and Enforcement  
381 Elden Street  
Herndon, VA 20170

**Re: Comments on Notice of Preparation of an Environmental Assessment for Cape Wind Associates' Construction and Operations Plan (Renewable Energy Lease OCS-A-0478)**

Dear Mr. LaBelle:

On behalf of Public Employees for Environmental Responsibility ("PEER"), Cetacean Society International, Three Bays Preservation, the Alliance to Protect Nantucket Sound, CALifornians for Renewable Energy, Inc. ("CARE"), Lower Laguna Madre Foundation, Martha Powers, Barbara Durkin, and Cindy Lowry, we hereby submit the following comments on the Bureau of Ocean Energy Management, Regulation and Enforcement's ("BOEMRE") notice of preparation of an environmental assessment ("EA") for Cape Wind Associates' Construction and Operations Plan ("COP").

As we have repeatedly advised the agency, in view of recently available information, BOEMRE is legally obligated to prepare a supplemental environmental impact statement ("EIS") and solicit public comment on the EIS, before allowing Cape Wind Associates to proceed in constructing and operating a wind power facility in Nantucket Sound. This new information is not limited to the approvals that Cape Wind Associates lists in its COP, and that BOEMRE reiterates in its notice that it is preparing an EA on the COP. Among the recent developments



since the January, 2009 EIS and April, 2010 EA for the project, which warrant preparation of an EIS, are:

1. The availability of information that calls into question the validity of the marine biological opinion for the project, specifically its reliance on the accuracy of visual observations of Right Whales and reduced vessel speeds to eliminate all risk that vessel traffic associated with construction and operation of the wind turbine facility will adversely affect Right Whales. See Letter from J. Almy, Meyer Glitzenstein & Crystal, et al., on behalf of PEER et al., to K. Salazar, Secretary of the Interior, et al. (Jan. 28, 2011) (Attachment 1), with Attachments (Attachments 2-4); Letter from J. Almy, Meyer Glitzenstein & Crystal, et al., on behalf of PEER et al., to K. Salazar, Secretary of the Interior, et al. (Feb. 11, 2011) (Attachment 5), with Attachments (Attachments 6-12).
2. Modification of the planned geophysical survey, which has not yet commenced, resulting in an increased estimate of 330 to 660 hours of effort, as opposed to the 35 hours estimated in 2008, and raising concerns about its impacts on marine species sensitive to the sound generated by vibracore equipment. See Attachment 1.
3. A technical report from the state of Rhode Island, which showed large differences from the EIS initially prepared for the project, in terms of the numbers and distributions of seabirds counted during the same time period over two years, and reported radar data and visual survey results that show large numbers of birds that would be at risk from wind turbines – all of which challenge the accuracy of the previous conclusions about the project’s impact on birds set forth in the EIS. See Attachment 1; Attachment 3.
4. An increase in the amount of oil that each turbine will contain, from “up to 200 gallons,” at the time of the EIS, to approximately 680 gallons, according to the COP. EIS at 5-65; COP Appendix C at 12 (describing that each turbine will contain “approximately 90 gallons of hydraulic oil and 220 gallons of gear oil” at the nacelle, plus an additional “370 gallons of transformer oil” in the tower). Thus, the risk characterization in the EIS, which was premised on a worst case scenario of a spill of 68,000 gallons, is no longer adequate. EIS at 5-65. The COP instead envisions a project that could potentially spill up to 128,400 gallons. COP Appendix C at 12 (stating that in addition to the 680 gallons of oil per turbine, the project would also encompass four transformers on the electrical service platform, each containing approximately 10,000 gallons of oil). The COP itself recognizes that a spill could have serious environmental consequences, potentially harming federally listed threatened and endangered species, migratory birds, and other species of wildlife. COP Appendix C at 19.

We believe that these developments constitute “substantial changes in the proposed action that are relevant to environmental concerns” and “significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts” that warrant preparation of a supplemental EIS. 40 C.F.R. § 1502.9(c).

Further, the COP indicates that Cape Wind Associates has not provided BOEMRE with information sufficient to fulfill the company's obligation under BOEMRE's regulations to produce "detailed information to assist [the agency] in complying with NEPA and other relevant laws," including information on endangered species, marine mammals, and birds. 30 C.F.R. § 285.627(a). Instead, Cape Wind Associates seeks to piggy-back onto an outdated EIS in its COP. For example, the January, 2009 EIS dismissed the project's impacts on Right Whales because it concluded that the whales would not be present in the project area or vessel traffic lanes. The following year, a large number of Right Whales aggregated within and near Nantucket Sound, disproving the assumption upon which BOEMRE had based its conclusion about the project's effects on Right Whales. Attachment 1. Nonetheless, the April, 2010 EA – which BOEMRE prepared after the agency became aware of the aggregation of Right Whales – papered over this development, stating that it did "not significantly change the impacts analyzed in the FEIS," and hence "supplementation of the EIS [was] not required." EA at 17-18. However, as we have previously explained, the January, 2009 EIS had proceeded on the explicit (and false) assumption that Right Whales will not be found in the vicinity of the project in large numbers, and therefore, the EA's conclusion that the aggregation of Right Whales did not significantly change the impacts analyzed in the EIS was demonstrably false. Instead of addressing this issue, however, the COP merely refers to the EIS and EA; the only "new information" listed is a string of approvals that the developer has secured.

Cape Wind Associates' failure to provide sufficient information to BOEMRE to allow the agency to fulfill its NEPA obligation is particularly troublesome in this instance, since the company's Mitigation and Monitoring commitments for whales draw in large part on the implementation of measures discussed in the January, 2009 EIS, which falsely concluded that endangered Right Whales would not be present. See COP at 150 (relying on the EIS at 9-24, and Appendices A and J to the EIS). Therefore, the COP itself relies on out-of-date information, in violation of 30 C.F.R. § 285.627(a).

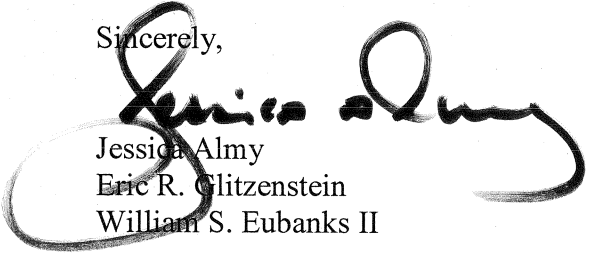
In other respects, the COP provides further support that the preparation of an EIS is warranted. The Draft Monitoring Protocols for the Cape Wind Avian and Bat Monitoring Plan, included as Appendix B to the COP, for example, propose to focus monitoring efforts on bats and the Endangered Species Act-listed Roseate Tern and Piping Plover, jettisoning any consideration of the duty BOEMRE and Cape Wind Associates have under the Migratory Bird Treaty Act ("MBTA"), 16 U.S.C. §§ 703 et seq., to avoid the take of all other MBTA-listed birds. In this respect – as well as others that would undoubtedly come to light if the public were given an opportunity to provide input on a supplemental EIS – the COP and its associated mitigation plan would benefit from the "scientific analysis, expert agency comments, and public scrutiny" essential to the NEPA process. 40 C.F.R. § 1500.1(b).

Even if BOEMRE decides that only an EA is warranted as an initial step, the legally required course here – due to the project's substantial environmental controversy, which has attracted the attention of national and local environmental organizations for nearly ten years and is the subject of litigation – is for the agency to make the draft EA available to the public and solicit comment on the content of the draft EA. See id. §§ 1506.6(c)(1), 1500.2(d). Simply asking for comments on the scope of the EA, as BOEMRE has done here, is insufficient to

satisfy the requirements of the Council for Environmental Quality (“CEQ”) regulations, which require that agencies “[p]rovide public notice of . . . the availability of environmental documents,” and that they “[s]olicit appropriate information from the public.” Id. §§ 1506.6(b) (emphasis added), 1506.6(d); see also Sierra Club v. Flowers, 423 F. Supp. 2d 1273 (S.D. Fla. 2006), vacated on other grounds by 526 F.3d 1353 (11th Cir. 2008) (requiring meaningful disclosure of documents and adequate public comment opportunities). The CEQ regulations emphasize the role of public scrutiny in implementing NEPA, but certainly, the public cannot scrutinize an EA it has not seen. See id. § 1500.1(b). Therefore, if BOEMRE is unwilling to now commit to the preparation of a supplemental EIS, the agency must at least release the draft EA for public review before it is finalized and adopted by the agency, and before BOEMRE makes a final decision on whether a supplemental EIS is warranted.

We appreciate your consideration of our comments and hope we have a further opportunity to submit substantive comments on an EIS or the draft EA.

Sincerely,



Jessica Almy  
Eric R. Glitzenstein  
William S. Eubanks II

Enclosures (12)

Cc: Luther L. Hajek, U.S. Department of Justice  
Geraldine E. Evans, Counsel for Cape Wind Associates, LLC