

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

PUBLIC EMPLOYEES FOR ENVIRONMENTAL)
RESPONSIBILITY, et al.,)
Plaintiffs,)
v.)
TOMMY P. BEAUDREAU, et al.,)
Defendants, and)
CAPE WIND ASSOCIATES, LLC,)
Intervenor.)

Civil No. 10-cv-01067-RBW-DAR
(consolidated)

ALLIANCE TO PROTECT NANTUCKET)
SOUND, et al.,)
Plaintiffs,)
v.)
SALAZAR, et al.,)
Defendants, and)
CAPE WIND ASSOCIATES, LLC,)
Intervenor.)

TOWN OF BARNSTABLE, MASSACHUSETTS,)
Plaintiff,)
v.)
SALAZAR, et al.,)
Defendants, and)
CAPE WIND ASSOCIATES, LLC,)
Intervenor.)

THE WAMPANOAG TRIBE OF GAY HEAD)
(AQUINNAH),)
Plaintiff,)
v.)
TOMMY P. BEAUDREAU, et al.,)
Defendants, and)
CAPE WIND ASSOCIATES, LLC,)
Intervenor.)

**MEMORANDUM OF THE CONSERVATION LAW FOUNDATION, THE NATURAL
RESOURCES DEFENSE COUNCIL, AND MASS AUDUBON IN SUPPORT OF
DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND IN OPPOSITION TO
PEER ET AL. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON THEIR
CLAIMS UNDER THE ENDANGERED SPECIES ACT AND MIGRATORY BIRD
TREATY ACT AND IN OPPOSITION TO THE WAMPANOAG TRIBE OF GAY
HEAD'S (AQUINNAH) MOTION FOR SUMMARY JUDGMENT**

**CORPORATE DISCLOSURE STATEMENT OF
CONSERVATION LAW FOUNDATION**

Pursuant to Rule 26 of the Federal Rules of Civil Procedure and Local Certificate Rule 7.1, the Conservation Law Foundation (“CLF”) states that it is a charitable corporation, organized under Section 501(c)(3) of the Internal Revenue Code and Chapter 180 of the Massachusetts General Laws, without any parent corporation, that it has issued no stock, and that there thus is no publicly held company that owns any such stock.

CORPORATE DISCLOSURE STATEMENT OF MASS AUDUBON

Pursuant to Rule 26 of the Federal Rules of Civil Procedure and Local Certificate Rule 7.1, the Massachusetts Audubon Society (“Mass Audubon”) states that it is a charitable corporation, organized under Section 501(c)(3) of the Internal Revenue Code and Chapter 180 of the Massachusetts General Laws, without any parent corporation, that it has issued no stock, and that there thus is no publicly held company that owns any such stock.

**CORPORATE DISCLOSURE STATEMENT OF
NATURAL RESOURCES DEFENSE COUNCIL**

Pursuant to Rule 26 of the Federal Rules of Civil Procedure and Local Certificate Rule 7.1, the Natural Resources Defense Council (“NRDC”) states that it is a charitable corporation, organized under Section 501(c)(3) of the Internal Revenue Code and under New York State law, without any parent corporation, that it has issued no stock, and that there thus is no publicly held company that owns any such stock.

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INTRODUCTION

This litigation arises from a decade-long struggle over the approval of what would be the first offshore wind project in the United States: the Cape Wind Project, located in the middle of Nantucket Sound off the Massachusetts coast, miles from the nearest shoreline. *Amici Curiae* are three non-profit organizations dedicated to environmental protection: Natural Resources Defense Council, a national environmental advocacy organization; Conservation Law Foundation, a regional New England environmental advocacy organization; and Mass Audubon, a Massachusetts-based organization dedicated to protecting birds and other wildlife. These three groups have worked together for more than ten years, first to review and ultimately, to support the Cape Wind Project for two central reasons.

First, this critically important renewable energy project will tap into Nantucket Sound's abundant offshore wind resources and provide enough pollution-free power to meet 75% of the comparable electricity demand of Cape Cod and the islands of Martha's Vineyard and Nantucket. Second, as the devastating impacts of Hurricane Sandy linger throughout much of the East Coast, and the human impacts of climate change continue to mount, it is imperative that the United States move forward immediately to develop its substantial Atlantic coast offshore wind resources, together with other forms of renewable energy and energy efficiency. The successful construction and launch of the long-delayed Cape Wind Project will demonstrate that this country indeed has the will and the technological know-how to advance toward a clean energy future that includes the sustainable and well-planned development of offshore wind.

Amici Curiae are also fully dedicated to ensuring that the federal government's process for reviewing all energy development projects – whether fossil fuel or renewable – complies with bedrock environmental laws. For that reason, we have participated in every significant phase of the regulatory approval process for the Project. We have concluded that the federal agencies that

led the Project's extensive and transparent approval process fully complied with all applicable environmental laws and that the Project will be constructed and operated in a way that is consistent with protection of avian life, marine animals and ecosystems in Nantucket Sound.¹

This brief addresses challenges raised in two separate summary judgment motions: the Plaintiffs' motion in *PEER v. Beaudreau*² and the Plaintiffs' Motion in *Wampanoag Tribe of Gay Head (Aquinnah) v. Beaudreau*. *Amici* focus on those issues on which they have greatest expertise. Section I explains why approval of the Project complied with the Endangered Species Act with respect to bird impacts and why the Federal Defendants were not required to obtain a permit under the Migratory Bird Treaty Act. Section II explains why the Federal Defendants' approval of the Project complied with the Endangered Species Act with respect to North Atlantic Right Whales and sea turtles. Section III responds to arguments raised by the Wampanoag Tribe of Gay Head (Aquinnah) based on the National Historic Preservation Act and the National Environmental Policy Act. Based on the voluminous record, and applying the appropriate legal standards, *Amici Curiae* CLF, NRDC and Mass Audubon respectfully request this Court to deny Plaintiffs' motions for summary judgment in *PEER v. Beaudreau* and *Wampanoag Tribe of Gay Head (Aquinnah) v. Beaudreau*, and grant Defendants' cross-motions for summary judgment.

INTEREST OF *AMICI CURIAE* PARTIES

I. THE *AMICI CURIAE*

A. Conservation Law Foundation

CLF is a public interest advocacy organization that works to solve the environmental problems threatening the people, natural resources, and communities of New England. Founded

¹ On November 9, 2011, *Amici Curiae* moved for *amicus* status in all of the consolidated challenges to the Cape Wind Project, seeking leave to participate broadly in these cases. Docket Document No. 101. This court granted the motion on December 23, 2011. Minute Order by Magistrate Judge Deborah A. Robinson on 12/23/2011.

² The plaintiffs in *PEER v. Beaudreau* include the Alliance to Protect Nantucket Sound, an organization whose sole mission is to stop the Cape Wind Project. Over the last decade, the Alliance has brought some thirteen legal challenges to the Project, based on a wide variety of claims.

in 1966, CLF is the nation's oldest regional environmental advocacy organization. CLF operates as a nonprofit, member-supported organization with offices located throughout New England. CLF advocates in favor of clean, renewable, and efficient energy production in New England, and has an unparalleled record in defending the region's natural resources, including in the marine environment. This scope of advocacy speaks directly to the very significant regional interests underlying CLF's involvement in this case as *amicus curiae*.

As part of its more than 45-year legacy, CLF has extensive experience with the types of claims at issue in this litigation – responsible energy facility siting, mitigation of water and air pollution, and habitat and resource protection. CLF successfully has fought to prohibit drilling for oil and gas in federal waters on Georges Bank and to reduce damaging off-road vehicle use on the beaches and dunes of the Cape Cod National Seashore, advanced legal strategies to restore groundfish to the Gulf of Maine and southern New England waters, and led the legal effort to clean up Boston Harbor and other major coastal estuaries.

B. Natural Resources Defense Council

NRDC is a national nonprofit environmental organization with more than 400,000 members nationwide and more than 13,000 members in Massachusetts. NRDC uses law, science and the support of its members to ensure a safe and healthy environment for all living things. Fighting global warming pollution, protecting the marine environment and advancing a clean renewable energy future are all top priorities for NRDC. NRDC's support for the Cape Wind Project, following our decade-long participation in the federal regulatory and environmental review process, stems from these top NRDC institutional priorities. Over its 40-year history, NRDC has participated in many federal permitting processes both around the country and affecting our oceans, and has deep expertise in the legal and scientific issues involved in such agency decisions, specifically those made by the Department of the Interior. NRDC is a national

leader on clean energy policies, with deep expertise on the sustainable development and siting of renewable energy generally, and offshore wind specifically. NRDC is also a national leader in advocating for strong federal and state protection of the marine environment and resources.

C. Mass Audubon

Founded in 1896, Mass Audubon works to protect the nature of Massachusetts for people and wildlife. With over 100,000 members in Massachusetts, Mass Audubon is the largest conservation organization in New England. On behalf of its members, Mass Audubon advocates for sound environmental policies at the local, state, and federal levels. Mass Audubon has a special focus on the study and conservation of birds and waterfowl. Mass Audubon also recognizes the serious threat that climate change poses to people and wildlife and has thus made combating climate change a significant focus of its work. In addition, Mass Audubon cares for 35,000 acres of conservation land and provides education programs for 225,000 children and adults each year. Mass Audubon's interest in the Cape Wind Project grows out of its dual commitment to – and expertise in – conservation science and combating climate change.

D. Participation of *Amici* in the Administrative Review of the Cape Wind Project

All three organizations have participated extensively in the ten-year administrative process conducted by the federal agencies and officials who are named as defendants in this proceeding. This process includes (i) the Army Corps of Engineers' (ACOE) consideration of a Rivers & Harbors Act Section 10 permit for a meteorological test tower for the Project (and ensuing federal court appeals); (ii) the 2005 Draft Environmental Impact Statement (EIS) prepared by the ACOE before lead permitting authority was transferred to the Minerals Management Service (MMS) pursuant to the Energy Policy Act of 2005; (iii) the 2008 Draft EIS for Cape Wind prepared by MMS; (iv) the 2009 Final EIS (FEIS) prepared by MMS; (v) a 2010

Environmental Assessment for the Project; (vi) the 2011 Construction and Operation Plan Environmental Assessment; and (vii) state level reviews before the Massachusetts Environmental Policy Act Office, the Massachusetts Energy Facilities Siting Board, the Massachusetts Department of Public Utilities, and the Cape Cod Commission, as well as appeals that arose from these proceedings and were resolved in Cape Wind's and *Amici's* favor. *See, e.g., Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd.*, 457 Mass. 663 (2010).

Over the past three years, both CLF and NRDC have been intervening parties in Massachusetts Department of Public Utilities (DPU) proceedings that have resulted in the DPU's approval of two long-term contracts for the sale of 77.5% of Cape Wind's output to the two largest Massachusetts utilities, National Grid and NSTAR Electric. CLF and NRDC also were full parties in the subsequent appeal of the DPU's approval of the Cape Wind/National Grid contract to the Massachusetts Supreme Judicial Court, which led to that Court's affirmance of the DPU's decision. *Alliance to Protect Nantucket Sound, Inc. v. Dep't of Pub. Utils.*, 461 Mass. 166 (2011). The DPU approved the second long-term Cape Wind contract, for the sale of a portion of the Project's output to NSTAR Electric, on November 26, 2012.

E. Independent Research Conducted by Mass Audubon

Beyond, *Amici's* substantial involvement in every public review and adjudicatory proceedings regarding the Cape Wind Project, Mass Audubon has lent its tremendous expertise to ensure that Project impacts on avian species will be avoided or minimized. After the Project was proposed, Mass Audubon decided to conduct its own avian surveys to help determine potential impacts on birds. Mass Audubon staff ornithologists then developed and carried out a plan to survey bird species' use of Horseshoe Shoal and Nantucket Sound. The surveys were conducted from boats and small planes between 2002 and 2006. In the Fall of 2002, 2003, and 2004, researchers surveyed tern activity during pre-migratory staging. In the Spring of 2003 and

2004, researchers studied tern activity during breeding season. In the Winter of 2003-2004, 2004-2005, and 2005-2006, they surveyed relative waterfowl abundance within Nantucket Sound. These hundreds of hours of surveys provided Mass Audubon a wealth of information about avian activity in and around the Cape Wind Project site.

In 2006, Mass Audubon reviewed the data it had collected on avian impacts, as well as the 2004 Draft EIS, and “tentatively concluded that the project d[id] not pose an ecologically significant threat to birds and the associated marine habitat.” BOEM AR 298082. At the same time, Mass Audubon set forth a “Challenge Proposal” that defined “comprehensive and rigorous monitoring and mitigation conditions” that would reduce Project-related threats to birds and wildlife and resolve avian-related data gaps in the Draft EIS. BOEM AR 298081.

In 2010, Mass Audubon determined that the permitting agencies and Cape Wind had met this Challenge. Based on four years of agency- and Cape Wind-led avian studies, monitoring, and data acquisition as well as its own independent avian studies, Mass Audubon concluded that the Cape Wind Project “will not pose an ecologically significant threat to the birds and associated marine habitat of Horseshoe Shoal and Nantucket Sound” and declared its support for the Project. BOEM AR 227437.

II. THE CAPE WIND PROJECT REGULATORY REVIEW PROCESS

Amici limit factual description here to emphasizing three unique and noteworthy aspects of the Project and its regulatory review process.

A. The Duration and Extent of the Regulatory Review Process

The regulatory review process here was unusually lengthy and extensive. The 130-turbine, 454 Megawatt (MW) Cape Wind Project was proposed in 2001. It is the single largest renewable energy project proposed for development in New England, with the potential to supply electricity needs comparable to three-quarters of the electric power for Cape Cod,

Martha's Vineyard, and Nantucket. BOEM AR 111956. The Project has been the subject of rigorous environmental and permitting reviews before more than 17 state and federal agencies,³ and has secured all of its necessary state and federal approvals. It has been one of the most intensely scrutinized energy projects in the nation.

While Plaintiffs suggest that the Cape Wind Project received only cursory reviews, the voluminous record reveals the extensive, painstaking review to which the Project has been subjected. In addition to the detailed Draft and Final Environmental Impact Reports undertaken for the state-jurisdictional elements of the Project, Cape Wind has been the subject of two Draft EISs, the first undertaken by the ACOE and the second by BOEM's predecessor agency, MMS, following a change in federal law with respect to oversight of offshore renewable energy projects. Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 194, § 388 (2005). It was not until January 2009, more than seven years after the Project was first proposed, that a favorable FEIS was released. Further Environmental Assessments were released in April 2010, in conjunction with a favorable Record of Decision from the Department of the Interior, and in April 2011, in connection with the consideration of Cape Wind's Construction and Operations Plan (COP). In short, the Cape Wind Project's federal environmental and permitting reviews have been lengthy, and have entailed robust and searching inquiry.

B. The Environmental Benefits of the Project and Its Environmental Support

Unlike many development projects, the Cape Wind Project has significant environmental benefits. These include the generation of power that is free of carbon and other air pollutants and that will displace dirtier forms of power generation. BOEM AR 157271-157272. The world is in the midst of a fundamental ecological crisis flowing from the combustion of carbon-intensive fossil fuels that contribute to climate change. The symptoms of this crisis already afflict Cape

³ See e.g., BOEM AR 350511-350513.

Cod and the nearby islands.⁴ Increasing storm activity and severity, associated with the early stages of climate change, place the south-facing sandy shorelines of Cape Cod at heightened peril of erosion. The anticipated extensive coastal, marine, and other climate change impacts to the natural and built environments of the Northeast – including Cape Cod and the Islands – have been laid out in detail in reports from the Union of Concerned Scientists⁵ and others.

The shorelines at risk from climate impacts include those providing critical habitat to threatened and endangered bird species. Migratory bird species, which were one focus of the review of the Project, likewise are vulnerable to climate impacts, including effects in other parts of the world that are already experiencing wrenching transformations. BOEM AR 109556. Further, many of New England's renowned cod and flounder populations are now threatened by the increased water temperatures, ocean acidity, and salinity that result from climate change. *Id.* Cape Wind's climate change and clean energy benefits do not, of course, exempt the Project in any way from the requirements of all applicable federal and state environmental laws. But the environmental and marine benefits from reducing carbon pollution through this Project, and the launch of the U.S. offshore wind industry as a whole, are significant.

These environmental benefits have generated support for the Project from the environmental community and a broad base of interests including public health advocates, labor, businesses, and others. BOEM AR 256229. It is rare to have a large-scale energy development project of any kind that has such extensive support from longstanding environmental watchdogs including *Amici* as well as other national environmental organizations (*e.g.*, Greenpeace, National Wildlife Federation, Sierra Club, Union of Concerned Scientists) and state

⁴ See *Massachusetts v. EPA*, 549 U.S. 497, 522-23 (2007).

⁵ Peter C. Frumhoff *et al.*, "Confronting Climate Change in the U.S. Northeast: Science, Impacts and Solutions," July 2007, Northeast Climate Impacts Assessment, available at www.climatechoices.org/ne at 15, 27; *see also*, Ivanna Bandura and Beverly Vucson, "Oceans in Peril: Global Warming and the New England Marine Environment," November 2006, Conservation Law Foundation.

environmental groups (*e.g.*, Environmental League of Massachusetts, Environment Massachusetts, Clean Water Action-Massachusetts, Massachusetts Climate Action Network, HealthLink). *Id.* As the record amply reflects, these groups, including the *Amici* organizations, support the Cape Wind Project because its impacts are expected to be modest compared to its benefits, especially the Project's much-needed clean energy benefits in the face of a rapidly changing climate.

C. The Project's Location

Finally, the Project is sited at a location in Nantucket Sound that is particularly well suited for a large-scale offshore wind facility. Horseshoe Shoal is characterized by shallow waters; a sandy ocean floor; opportunistic bottom-dwelling species that recolonize rapidly in the wake of disturbances; and proximity to electric demand (requiring less transmission cable and fewer transmission line losses). It is not designated as a marine sanctuary and is rarely frequented by any threatened or endangered species. And, while Nantucket Sound is a beloved, much-used and important marine waterbody, it is not a pristine wilderness area by any means.

Plaintiffs paint an inaccurate picture of the Project site that is not supported by the record. First, Plaintiffs' reference to the Project's location on "46 square miles of submerged federal lands," Plaintiffs' Br. at 5, ignores the fact that the facility's actual physical footprint will be far less than 1% of that area. BOEM AR 156969. Second, as discussed further below, Plaintiffs overstate the biological significance of the Project site with respect to threatened and endangered species, including the North Atlantic Right Whale, roseate tern, and piping plover. Plaintiffs also understate the extent of existing industrial activity in the Sound (*e.g.*, by describing the Sound as "an area free of any industrial activity even remotely comparable in scope and size to the Cape Wind project") – thereby creating a false image of a pristine wildlife sanctuary. As amply reflected in the record, Nantucket Sound is extensively used for commercial and recreational

purposes, including regular transits by high-speed passenger ferries traveling at up to 34 knots, and over 200 commercial fishing vessels. BOEM AR 157116-157218.

Plaintiffs also ignore significant mitigation measures, including vessel speed restrictions, NMFS AR 1511, exclusion zones around pile driving and other activities, trained wildlife lookouts/observers, and an Avian and Bat Monitoring Plan (ABMP) that Cape Wind is required to implement. The ABMP includes monitoring protocols such as avian acoustic monitoring, radio telemetry, aerial surveys, boat surveys, and other measures to detect impacts and inform determinations regarding any operational adjustments that might be warranted. August 15, 2012 Final Cape Wind Avian and Bat Monitoring Plan.

STANDARD OF REVIEW

The decision by the Bureau of Ocean Energy Management (BOEM) to approve the Cape Wind Project will be set aside only if found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

Review under this standard is “highly deferential” and “presumes the agency’s action to be valid.” *Env’tl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 283 (D.C. Cir.1981) (citations omitted) (finding agency’s decision reasonable and affirming grant of agencies’ motions for summary judgment). BOEM was required to “examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)); see also *Tripoli Rocketry Ass’n, Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 437 F.3d 75, 81 (D.C. Cir. 2006). Accordingly, the arbitrary and capricious standard “mandates judicial affirmance if a rational basis for the agency’s decision is presented, even though [the court] might otherwise disagree.” *Costle*, 657 F.2d at 283 (citations omitted).

In applying this standard, a federal court may not “substitut[e] its judgment for that of the agency.” *Id.* Federal courts are particularly deferential toward agency findings that involve “scientific determination[s],” *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 103 (1983), since these findings are presumed to be the product of agency expertise.

In reviewing BOEM’s fact finding, judicial review is limited to the administrative record, *see* 5 U.S.C. § 706, and the burden is on Plaintiffs to prove the particular manner in which BOEM’s actions are arbitrary and capricious. *City of Olmsted Falls, OH v. FAA*, 292 F.3d 261, 271 (D.C. Cir. 2002) (denying petition for review because the FAA’s approval of the Record of Decision was neither arbitrary nor capricious).

ARGUMENT

I. THE EVIDENCE OF RECORD REFLECTS THAT DEFENDANTS ACTED IN COMPLIANCE WITH THE ENDANGERED SPECIES ACT AND MIGRATORY BIRD TREATY ACT WITH RESPECT TO AVIAN IMPACTS.

The *Amici* organizations all have a strong, long-demonstrated interest in protecting natural resources including threatened and endangered wildlife and migratory birds. *See* pp. 3-7, *supra*. The record underlying the Project’s extensive environmental review and permitting process demonstrates that the Federal Defendants’ approval of the Project is consistent with these values and with the relevant laws that serve to protect them.

In arguing that Defendants failed to comply with the Endangered Species Act (ESA) and Migratory Bird Treaty Act (MBTA) with respect to avian species, Plaintiffs paint an inaccurate picture of both the Project site and the relevant legal framework. The record does not support Plaintiffs’ contention that the Project site is “biologically crucial” for identified species including the roseate tern and piping plover. Plaintiffs’ Br. at 6. In addition, BOEM was not required to obtain an MBTA permit from the U.S. Fish and Wildlife Service (FWS) prior to approving the Project. Nor did BOEM or FWS err in declining to adopt a wind turbine shutdown and blade

feathering RPM (“feathering RPM”) where, as here, such an RPM was not shown to be necessary or appropriate.

A. BOEM Was Not Required to Obtain an MBTA Permit from FWS Prior to Granting Cape Wind Authority to Construct under the Outer Continental Shelf Lands Act.

Plaintiffs assert that BOEM’s decision to approve the Cape Wind Project “flouts the MBTA.” Plaintiffs’ Br. at 41. The crux of Plaintiffs’ argument appears to be that BOEM was required to obtain an MBTA permit from the FWS before BOEM could issue Cape Wind a lease under the Outer Continental Shelf Lands Act and the Energy Policy Act of 2005. Plaintiffs are in error. The plain language of the MBTA does not include such a requirement, nor do Plaintiffs point to judicial precedent that would require this result. Moreover, pursuant to the Memorandum of Understanding between FWS and BOEM regarding the MBTA, the federal government has imposed a suite of mitigation measures to ensure that the construction and operation of the Cape Wind Project will be consistent with the protection of migratory birds.

The MBTA is a criminal statute that prohibits the killing of migratory birds. The MBTA declares it “unlawful at any time, by any means or in any manner[] to pursue, hunt, take, capture [or] kill . . . any migratory bird,” unless and except as permitted by regulations. 16 U.S.C. § 703(a). Pursuant to FWS regulations, no person may take a migratory bird without a valid permit except when certain conditions are met. 50 C.F.R. §§ 21.11, 21.12. The MBTA does not include a citizen enforcement provision.

Neither the MBTA nor FWS regulations mandate that a federal agency obtain an MBTA permit prior to issuing a lease or taking other regulatory action to approve a project. Because BOEM’s decision to issue Cape Wind a lease does not itself result in the direct or indirect take of migratory birds, the Act’s prohibition against “pursu[ing], hunt[ing], tak[ing], captur[ing] [or]

kill[ing] . . . any migratory bird” does not apply. 16 U.S.C. § 703(a).⁶ Moreover, BOEM’s authorization to construct does not guarantee the regulated entity immunity from MBTA enforcement. Under FWS regulations, it is the entity implementing the project that may be required to obtain an MBTA permit. 50 C.F.R. § 21.11. The rulemaking authority granted to the Secretary of the Interior by the MBTA may provide the Secretary authority to require that federal permitting agencies obtain authorization in such circumstances, but neither the MBTA on its face nor the current FWS regulations create any such a duty. 16 U.S.C. § 704(a).

The only circumstance in which a federal agency has been required to obtain an MBTA permit is when the federal agency itself undertakes physical actions – not permitting decisions – that directly or indirectly take migratory birds. *See Humane Soc’y of the United States v. Glickman*, 217 F.3d 882 (D.C. Cir. 2000) (MBTA prohibited Department of Agriculture from taking or killing migratory birds pursuant to Department’s Canada goose management plan without Migratory Bird Depredation Permit); *Ctr. for Biological Diversity v. Pirie*, 191 F. Supp. 2d 161, 167 (D.D.C. 2002), *vacated sub nom. Ctr. for Biological Diversity v. England*, 02-5163, 2003 WL 179848 (D.C. Cir. Jan. 23, 2003) (MBTA prohibited U.S. Navy’s take of migratory birds during live fire training exercises, irrespective of FWS’s denial of Navy’s permit application for the take of migratory bird during training activities).

Despite the fact that no MBTA permit was required, the federal government did address migratory bird protection in approving the Cape Wind Project through a process developed by

⁶ The MBTA is different from the Endangered Species Act in this respect. Courts have required state agencies to comply with the ESA when granting licenses to third parties because the ESA makes it unlawful not only to “take” endangered species, 16 U.S.C. § 1538(a)(1)(B), but also to “cause” such a take to be committed, 16 U.S.C. § 1538(g); *see Strahan v. Coxe*, 127 F.3d 155, 163 (1st Cir. 1997). In *Strahan*, the First Circuit relied on this additional “cause to be committed” language to find that the ESA “not only prohibits the acts of those parties that directly exact the taking, but also bans those acts of a third party that bring about the acts exacting a taking.” *Strahan*, 127 F.3d at 163. In contrast, the MBTA does not include similar language making it a crime to “cause” a take to be committed. 16 U.S.C. § 703(a).

FWS. In 2009, BOEM and FWS entered into a Memorandum of Understanding (MOU) designed to “further implement the Migratory Bird Treaty Act,” as called for in Executive Order 13,186, “Responsibilities of Federal Agencies to Protect Migratory Birds,” 66 Fed. Reg. 3853 (Jan. 10, 2001). BOEM AR 352083. The MOU requires BOEM to take certain actions to strengthen migratory bird conservation during the regulatory approval process, *id.*, but these actions do not include obtaining an MBTA permit. Instead, BOEM must “[i]ntegrate migratory bird conservation principles, as well as reasonable and feasible conservation measures and management practices,” into its approvals.⁷ BOEM AR 352088. Here, BOEM did comply with the requirements of the MOU. For example, in addition to design requirements for the project, such as elimination of perches and implementation of an avian deterrent system, BOEM required an Avian and Bat Monitoring Plan designed to monitor impacts to migratory birds such that additional mitigation measures can, if needed, be taken. BOEM AR 119780.

In sum, neither the MBTA nor any FWS regulation requires the Federal Defendants to obtain an MBTA special purpose permit prior to approving the Cape Wind Project. Instead, BOEM acted reasonably by working with FWS to develop mitigation measures in the lease terms that would minimize any impact of the Project on migratory birds.

B. The Evidence of Record Demonstrates that FWS and BOEM Acted Reasonably and in Compliance with the ESA in Declining to Require Periodic Suspension of Project Operation and Feathering of the Turbine Blades.

1. *The proposed “feathering” RPM was not adopted because it was not shown to be “necessary or appropriate” for this Project.*

Pursuant to Section 7 of the ESA, FWS was required to consult with BOEM to ensure that the continued existence of affected species would not be jeopardized by the proposed action.

⁷ MOU Between the Department of the Interior US Minerals Management Service and the Department of the Interior US Fish and Wildlife Service Regarding Implementation of Executive Order 13186, “Responsibilities of Federal Agencies to Protect Migratory Birds,” June 4, 2009, Section F.1.

16 U.S.C. § 1536(a). After determining that there was no likelihood of jeopardy, FWS's role under ESA Section 7 was to specify reasonable and prudent measures (RPMs) that are "necessary or appropriate" to minimize impacts to endangered or threatened species. 16 U.S.C. § 1536(b)(4). Plaintiffs do not dispute the determination of "no jeopardy," but instead argue that the absence of a requirement to shut down the Project and feather the blades⁸ under certain conditions (a "feathering RPM") somehow was inconsistent with the ESA, and that FWS improperly "delegated" its authority to BOEM on this issue. Plaintiffs are wrong on both the facts and the law. While FWS initially considered a feathering RPM in its draft Biological Opinion (BiOp), the draft BiOp did not lay out any supporting rationale, and the evidence of record reflects that the draft RPM was not biologically justified to minimize impacts to species protected under the ESA – in this case, roseate terns and piping plovers. Following consultation with BOEM and the applicant, a consultation that addressed the lack of biological support for the proposed feathering RPM as well as significant information regarding its impacts on the Project,⁹ FWS appropriately released a final BiOp that did not include the feathering RPM but did include several others.

As an initial matter, it is important to consider that the Project's anticipated impacts on threatened and endangered avian species are expected to be small, that FWS reached a "no jeopardy" conclusion after extensive avian surveys and analysis, and that Plaintiffs do not challenge this determination. With respect to both the roseate tern and piping plover, the record reflects that the number of estimated mortalities is expected to be low, both in absolute numbers

⁸ "Feathering" turbine blades refers to the practice of maneuvering the blades into a position where the blade surface area exposed to the wind is minimized. Wind turbine facilities can be shut down and have their blades feathered, for example, during severe storm events when particularly high wind conditions otherwise risk damage to the equipment. This capability also can allow for operational responses to reduce impacts on avian and/or bat species.

⁹ See e.g., BOEM AR 349558 (memo from BOEM biologist Jim Woehr entitled "Thoughts on RPM 2 of Draft FWS Biological Opinion on Cape Wind," finding evidence of a biological justification for the "feathering RPM" to be "scant to non-existent").

and relative to total population, even before mitigation measures are taken into account. BOEM AR 273732, 273708. FWS independently reviewed the collision risk model developed for the Cape Wind Project to estimate tern and plover collisions, applying its own estimates for each model input factor. BOEM AR 273707. FWS conservatively estimated the number of tern collisions to be between four and five per year, *id.*, out of a population estimated at well over 10,000 even during periodic population lows. BOEM AR 273732. The anticipated low tern mortality rate is not surprising given the large distance between roseate tern nesting and foraging locations and the Cape Wind Project site, the propensity of these terns to fly at a level below the height of the turbine blades, and anticipated avoidance behavior. *See, e.g.*, BOEM AR 273672 (“the closest edge of the proposed Cape Wind turbine array is 19 miles from Bird Island [the nearest of the three most important roseate tern nesting sites in Massachusetts]”); BOEM AR 273698 (“the Horseshoe Shoal project area is not within the foraging range of any major nesting colony for roseate terns”); BOEM AR 273701 (“a large majority of terns of both species [roseate and common tern] can be expected to fly below the rotor zone [of the turbines]”); BOEM AR 273708 (“the wider spacing of turbines at Horseshoe Shoal will allow for more passive avoidance by terns transiting the project site”). The expected mortality of piping plovers was found to be even lower, as FWS “emphasize[d] that only 0.5 mortality per year is anticipated, even with conservative modeling.” *Id.* In light of the small number of estimated roseate tern and piping plover mortalities, the proposed feathering RPM could not possibly have more than a minimal impact on the expected number of takes of both avian species, regardless of its actual efficacy in reducing collision risk.

The lack of a biological basis for the proposed feathering RPM was described by a BOEM avian biologist in response to the FWS Draft BiOp. BOEM AR 349557-349558. The

biologist found that the proposed feathering RPM was not biologically justifiable for reasons including: (1) it would require shutdown of the turbines when visibility in Horseshoe Shoal is reduced to one quarter mile or less, even though such a distance “bears no relationship to the ability of terns or plovers to detect and avoid collisions with man-made structures,” *id.*; and (2) it aims to reduce collision during specific migration periods by requiring feathering in low visibility conditions, even though the birds are not expected to initiate migratory flights during times of low visibility, *id.* (“birds typically initiate autumn migratory flight under conditions associated with clearing skies and *high* visibility”) (emphasis added).¹⁰ Under these circumstances, where the feathering RPM had not been shown to be necessary and appropriate, it was reasonable for FWS not to include the feathering RPM in the final BiOp.

Moreover, in contrast to the feathering RPM, the record in this case demonstrates that it *was* appropriate to adopt different RPMs, including one that is expected to boost the population of roseate terns: the Bird Island restoration project. Bird Island, located in Buzzards Bay, is the largest and often the most productive roseate tern colony in Massachusetts. BOEM AR 273667. Erosion and salt water intrusion on Bird Island have led to a reduction in suitable nesting habitat on the island, which has decreased the number of terns that the island can support. BOEM AR 273667-273668. The planned habitat restoration on Bird Island is “likely to result in measurable increases in the number of pairs [of terns] nesting there in the future and for the projected 50-year lifetime of the restored habitat,” BOEM AR 273725, and is estimated to “offset any

¹⁰ An independent review by the Inspector General likewise concurred that the basis for the proposed RPM was lacking, noting that one of the FWS biologists that co-authored the BiOp had stated that, by contrast to the BiOp as a whole and the determination of non-jeopardy, “the RPMs were essentially just ‘tacked on’ at the end [of the *draft* BiOp] without much reflection.” FWS AR 31888. Charged with reviewing the speed and propriety of the Project’s regulatory review, including the development of the FWS BiOp, the Inspector General concluded that BOEM “*did not violate provisions of NEPA in completing the final EIS for [Cape Wind],*” and “[*n*]one of the agencies believed . . . that the expedited timeline affected their overall conclusions.” FWS AR 31870 (emphasis added).

potential roseate tern mortality that may occur from the Cape Wind Project.” BOEM AR 273733.

The Bird Island restoration project – with its expected long-term measurable benefits for the roseate tern – represents the type of measure that is “necessary and appropriate” for mitigating the modest tern impacts anticipated from the Cape Wind Project. Given that the Bird Island restoration project is expected to fully offset Cape Wind’s estimated impacts on roseate terns, neither the record nor any argument or evidence introduced by Plaintiffs supports a finding that a feathering RPM is also “necessary and appropriate” here.

2. *RPMs should be developed in coordination with the action agency and the applicant, which is exactly what occurred here.*

FWS is required by Section 7 of the ESA to identify RPMs to BOEM and may not delegate its authority to do so. Plaintiffs’ Br. at 20-22. However, contrary to Plaintiffs’ assertions, FWS may, and in fact *should*, consult with other parties in developing the RPMs. The FWS ESA Section 7 Consultation Handbook explicitly calls for FWS coordination with the action agency and applicant in developing RPMs. *See* United States Fish & Wildlife Service and National Marine Fisheries Service, “Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act,” 4-53 (March 1998) (“Reasonable and prudent measures . . . should be developed in coordination with the action agency and applicant, if any, to ensure that the measures are reasonable, that they cause only minor changes to the project, and that they are within the legal authority and jurisdiction of the agency or applicant to carry out.”). In their consultation with FWS, BOEM and Cape Wind Associates provided precisely the type of input described in the Consultation Handbook. *See San Luis & Delta-Mendota Water Auth. v. Salazar*, 666 F. Supp. 2d 1137, 1148 (E.D. Cal. 2009) (“Consultation should be undertaken cooperatively with the action agency and any applicant,

thus allowing [FWS] to develop a better understanding of direct and indirect effects of a proposed action and any cumulative effects in the action area.”) (internal quotations omitted). None of the authority relied upon by Plaintiffs supports a result to the contrary, as discussed in detail by Federal Defendants and Cape Wind in their briefs.

II. PLAINTIFFS SIMILARLY FAIL TO DEMONSTRATE ANY ESA VIOLATION WITH RESPECT TO RIGHT WHALES OR SEA TURTLES.

A. NMFS Adequately and Appropriately Considered Additional Information Regarding Right Whales that Surfaced After Preparation of the FEIS.

Even after its Final BiOp and the FEIS for the Cape Wind Project were completed, NMFS appropriately considered and responded to additional information that surfaced with respect to the presence of right whales in or near Nantucket Sound. Applying the ESA’s safeguards, NMFS reinitiated consultation with BOEM. NMFS AR 1415; 16 USC § 1536(a)(2). After conducting a thorough analysis of the best scientific data available, NMFS reasonably concluded that the additional sightings of right whales reaffirmed prior scientific research and monitoring data and reinforced the conclusion that the Project is “not likely to adversely affect” right whales. NMFS AR 1501 (“Right whales have been intensely studied in the Gulf of Maine and in Massachusetts waters.”); *see also*, NMFS AR 1425-1432 (citing several different studies conducted by various scientific organizations).

Plaintiffs attempt to portray the Cape Wind Project site (Horseshoe Shoal) and the 560 square mile waterbody within which it is located (Nantucket Sound) as hotbeds of recent right whale activity. *See e.g.*, Plaintiffs’ Br. at 17. But the record reveals that Plaintiffs’ claim is incorrect. The evidence of record demonstrates that the recent whale observations cited by Plaintiffs were not concentrated in or around the Cape Wind Project site but rather were generally observed in “Massachusetts and Rhode Island waters.” Importantly, “very few whales

[were] documented within Nantucket Sound and none within Horseshoe Shoal,” reinforcing NMFS’ conclusion that right whales are rare within these waters. NMFS AR 1499-1502.

The record reflects that “it is extremely unlikely that listed whales would occur within the project footprint and any occurrence of whales in Nantucket Sound is expected to be sporadic and transient.” NMFS AR 1502. “This is consistent with the finding that these habitats are shallower than the areas where these whales typically occur and are outside of their normal coastal migratory route.” *Id.* The record further demonstrates that while “occasional right whales have been reported off Monomoy and off Great Point . . . right whales have only *rarely been* in Nantucket Sound and *no* right whales have been [sic] sighted on Horseshoe Shoal [where the project will be built].” NMFS AR 1500-1501 (emphasis added).

NMFS reasonably concluded that the 2010 sightings supported prior scientific data indicating that whale appearances in this area are “rare, sporadic and extremely limited in duration and frequency.” NMFS AR 1502. Additionally, “all whales documented within Nantucket Sound quickly transited the area and there is no evidence of any persistent aggregations of right whales in Nantucket Sound.” NMFS AR 1501. Moreover, the 2010 sightings do not change the fact that the Project area lacks the features needed to support right whale feeding. NMFS AR 1502. The FEIS notes that “as the waters are too shallow and not productive enough for the [North Atlantic Right Whale’s] prey, their occurrence would be considered ‘rare and transient.’” BOEM AR 157162. The best available data demonstrate, based on a totality of factors, that “the habitat within Nantucket Sound is inconsistent with the habitat where right whales are typically found.” NMFS AR 1502.

Plaintiffs also incorrectly imply that re-initiation of consultation inexorably should have led to new conditions or requirements. Yet no such new conditions or requirements were

necessary or would have been reasonable where, as here, the “new” evidence of record did not support further mitigation measures beyond those already required. As noted by NMFS in the 2010 BiOp following the re-initiated consultation, “the satellite tracking data reported by Mate *et al.* (1997) as well as the sightings in 2010, support the conclusion that right whale use of Nantucket Sound is likely to be rare, sporadic and extremely limited in duration and frequency.” NMFS AR 1502 (emphasis added).

Plaintiffs cite no authority that would warrant a different result. Unlike the situation in *Chemical Manufacturers Ass’n v. EPA*, 28 F.3d 1259, 1265-66 (D.C. Cir. 1994), where the EPA relied upon a scientifically inaccurate assumption (that a particular chemical is a gas at 20°C, when in fact it is a solid), NMFS has not committed any such error here.¹¹ Rather, the additional information introduced through the 2010 sightings and considered through the reinitiated consultation reinforced and confirmed years of monitoring data demonstrating that any right whale use of the area is transient, opportunistic, and fleeting.

In short, the record reflects that NMFS appropriately upheld the ESA’s safeguards by re-initiating consultation and thoroughly analyzing the additional information and the best available scientific data. Because the additional information reinforced NMFS’ earlier findings, NMFS appropriately refrained from altering its conclusions.

B. Plaintiffs Similarly Fail to Demonstrate Reversible Error with Respect to Consideration of Ship Traffic Impacts.

Plaintiffs similarly fail to demonstrate any reversible error with respect to analysis of vessel traffic impacts. Indeed, the BiOp reflects extensive consideration of the potential impacts of project-related vessel traffic on right whales. Having analyzed all available information and

¹¹ Other authority relied upon by Plaintiffs is similarly factually distinguishable and thus unavailing. *See Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1054-55 (D.C. Cir. 2001) (finding reliance on emission model inappropriate where the emission model refuted current and observed emission rates).

taking into account the totality of the specific facts with respect to the Project site, including the water depth of the Project location and the migratory habits of right whales in the surrounding area, NMFS reasonably concluded that the “increase in vessel traffic attributable to the propose[d] project will not increase the likelihood of a whale being struck by a vessel [along the cable route or within the project footprint],” NMFS AR 1511, and that, under the circumstances, there is “not a reasonable likelihood that a construction vessel associated with the Cape Wind project will collide with a whale.” NMFS AR 1514.

Moreover, the record reflects that, in the context of this particular site and all the circumstances as outlined above, “the measures proposed by BOEM and Cape Wind are in accordance with measures outline[d] in NMFS Ship Strike Reduction Program *as the best available means of reducing ship strikes of right whales.*” NMFS AR 1513 (emphasis added). These measures include a dedicated lookout, compliance with NOAA Fisheries Regional Viewing Guidelines for the Northeast Region, and speed restrictions. *See* NMFS AR 1510-1514 (pursuant to a condition that goes beyond the geographic limitations of federal rules that are designed to protect right whales from vessel strikes, *see* 50 C.F.R. § 224.105, all Cape Wind construction vessels traveling to the Project site must maintain a speed of 10 knots or less to reduce ship strike risk).

After completion of the construction phase, two small, highly maneuverable vessels may travel at speeds up to 21 knots. Plaintiffs wrongly assert that these vessels will be transiting to the Project site from New Bedford (and across Buzzards Bay), when in fact they will be originating in Falmouth, directly on Nantucket Sound, in accordance with the COP. NMFS AR 1420-21, 1511; BOEM AR 237420. Moreover, as to any transits across Buzzards Bay, NMFS reasonably concluded that “whales are infrequent” in the Bay. NMFS AR 1514. As the record

reflects, Buzzards Bay is a water-body that is intensively used by, among others, recreational boaters and commercial shipping, BOEM AR 157137, 157212, 157443, reinforcing FWS' conclusion that the infrequency of whale sightings is indeed an indication of the infrequency of whales. Moreover, lookouts will be posted on all vessels; it is expected that vessel operators will monitor the Northeast U.S. Right Whale Sightings Advisory System; and vessels must reduce speed, increase vigilance, or alter course accordingly if whales are observed.¹²

None of the cases cited by Plaintiffs justifies a reopening of NMFS' analysis as Plaintiffs demand here. In *National Wildlife Federation v. NMFS*, 524 F.3d 917, 933 (9th Cir. 2008), the court found NMFS' BiOp inadequate because NMFS segmented its analysis of project impacts, ignored impacts of the non-discretionary elements of the challenged project, and failed to take cumulative impacts into account. In the present case, by contrast, there was no segmentation, and NMFS did indeed consider anticipated actual and cumulative impacts. NMFS 1487-1496.

Plaintiffs also erroneously rely on *Pacific Shores Subdivision California Water District v. U.S. Army Corps of Engineers*, 538 F. Supp. 2d 242, 261 (2008), in support of their argument that the ESA required NMFS to issue an incidental take statement. In *Pacific Shores*, however, FWS was obligated to issue an incidental take statement when there was a likelihood, albeit a "low likelihood," that a take would occur. *Id.* In the present case, by contrast, NMFS conducted a reasoned analysis of the best available science and concluded – based on all the factors specific

¹² Plaintiffs incorrectly assert (Plaintiffs' Br. at 44, n. 36) that NMFS erred in relying, in part, on the understanding that Cape Wind would comply with the Northeast U.S. Right Whale Sightings Advisory System (SAS). In support of their flawed argument, Plaintiffs cite *NRDC v. Evans*, 279 F. Supp. 2d 1129, 1181 (N.D. Cal. 2003). In that case, the agency relied solely on a *non-binding*, ineffective mitigation measure to reach a finding of "no jeopardy" to a protected species. In the present case, by contrast, NMFS reasonably reached a conclusion of "no jeopardy" by thoroughly analyzing the various *binding* measures, the migration patterns of right whales, and the history of strikes in the area. Furthermore, as NMFS memorialized in the 2010 BiOp, "the measures proposed by BOEM and Cape Wind are in accordance with measures outline[d] in NMFS Ship Strike Reduction Program as the best available means of reducing ship strikes of right whales." NMFS AR 1513.

to the Project's location – that “the vessel activity associated with the proposed action is *not likely to adversely affect* right, humpback, fin or sei whales.” NMFS AR 1515 (emphasis added).

In short, Defendants complied with the ESA with respect to right whales by thoroughly analyzing the proposed Project and its potential impacts, including by reinitiating consultation when additional information surfaced. None of the arguments or authority put forward by Plaintiffs warrants a determination to the contrary.

C. Plaintiffs Fail to Demonstrate Error in NMFS' Assessment of Sea Turtle Impacts.

Plaintiffs contend that NMFS failed to assess adequately the impact of noise from geophysical surveying equipment on listed sea turtles in the Project area, because the size of the survey area and duration of survey activity increased between the 2008 and 2010 BiOps without a corresponding increase in the estimate of impacted turtles. Plaintiffs' Br. at 44. As discussed by Federal Defendants (FD Br. at 45) and Cape Wind (CW Br. at 44), Plaintiffs are demonstrably incorrect in asserting a failure to assess impacts throughout the survey area: the record clearly shows that NMFS considered impacts on sea turtles throughout the survey area, including along the 115kV submarine cable route. Moreover, in challenging NMFS' analysis of sea turtle impacts, Plaintiffs also conveniently – but erroneously – ignore a shift in the surveying technology considered in the 2008 and 2010 BiOps.

In the 2008 BiOp, NMFS considered the potential use of a number of commercially available instruments for the geophysical surveys, including an air gun, boomer, sparker, and chirper. NMFS AR 920. To compute the number of turtles impacted by the surveying, in the 2008 BiOp NMFS conservatively assumed the use of an air gun, which has the largest sound impact zone of all devices considered. *Id.*

In the 2010 BiOp, by contrast, when NMFS reassessed its initial opinion based on a proposed increase in geophysical survey hours, the applicant and BOEM identified the specific acoustic equipment that would be used to perform the geophysical surveying for the Project: a boomer and a chirper. NMFS AR 1527-1528. The sound impact zones of these two devices are significantly smaller than that of the air gun assumed in the 2008 BiOp. *Id.* Plaintiffs ignore the fact that this reduction in impact counterbalanced the increase in surveying hours, and that NMFS took *multiple* variables into account in its updated analysis. Accordingly, Plaintiffs' arguments challenging the analysis of sea turtle impacts under the ESA and APA are unavailing.

III. BOEM SATISFIED ITS OBLIGATIONS UNDER NHPA TO CONSULT WITH THE TRIBE, AND UNDER NEPA TO CONSIDER POTENTIAL IMPACTS TO SUBSISTENCE FISHING AND CULTURAL AND HISTORIC RESOURCES.

Plaintiff the Wampanaog Tribe of Gay Head (Aquinnah) has moved for summary judgment under the National Historic Preservation Act (NHPA) and the National Environmental Policy Act (NEPA). The Tribe claims that BOEM (1) failed to conduct sufficient consultation regarding historic sites; (2) gave inadequate consideration to the Project's potential impacts on subsistence fishing; and (3) failed to prepare a supplemental EIS in response to information on potential effects on historic and cultural resources. None of these claims has merit.

A. BOEM Complied with NHPA in Conducting Timely and Meaningful Consultation with the Tribe.

Section 106 of NHPA requires federal agencies to account for the effects of their actions on historic sites by consulting with tribes about their historic properties. 16 U.S.C. § 470f. BOEM conferred with the Tribe about the Project as early as 2005, soliciting information about the Project's potential impacts to cultural and historic resources. Whether or not these early meetings are classified as "official" consultation under Section 106, the information and views aired during those meetings informed BOEM's subsequent decision making about the Project.

Even if, as the Tribe asserts, official Section 106 consultation did not commence until July 2008, the Section 106 process was still timely and complete. The Cape Wind Record of Decision was signed on April 28, 2010, nearly two years after Section 106 consultation “officially” began, and following the close of the Section 106 process. Neither NHPA nor its implementing regulations impose a timeline for the Section 106 process. With the information BOEM collected at its early meetings, the agency already had a deep understanding of the Tribe’s concerns by July 2008.

The Tribe also argues that BOEM was required to “defer” to the advice of the Advisory Council on Historic Preservation that the Project not be approved. That is not the law. NHPA affords the Council no more than a “reasonable opportunity to comment.” 16 U.S.C. § 470f. The Council is purely an advisory body that has no authority to impose substantive requirements on an agency. *See, e.g., Paulina Lake Historic Cabin Owners Ass’n v. U.S. Dep’t of Agric. Forest Serv.*, 577 F. Supp. 1188, 1192 n.1 (D. Or. 1983); *Ill. Commerce Comm’n v. Interstate Commerce Comm’n*, 848 F.2d 1246, 1260-61 (D.C. Cir. 1988). Following termination of Section 106 consultation, the Secretary of the Interior was required only to “take into account the Council’s comments in reaching a final decision on the undertaking.” 36 C.F.R. § 800.7(c)(4). So long as the Secretary’s actions were not arbitrary and capricious, the Secretary had full discretion to act contrary to the Council’s recommendations. *See Com. of Pa. v. Morton*, 381 F. Supp. 293, 299 (D.D.C. 1974). As required, the Secretary considered and responded to the Council’s comments. *See Secretary’s Response to the Advisory Council’s Final Comments on the Cape Wind Energy Project* (April 28, 2010). BOEM complied fully with Section 106.

B. BOEM Adequately Assessed Impacts on Subsistence Fishing.

The record contradicts the Tribe's characterization of BOEM's review of fishing impacts from the Cape Wind Project. The FEIS reflects a comprehensive analysis of impacts on *all* local fisheries and fishing activities, which addresses concerns about subsistence fishing.

First, BOEM specifically examined potential effects to local shellfish populations that are important to traditional tribal fishing, including blue mussel, sea scallop, surf clam, soft shell clam, and quahog. BOEM AR 157103. BOEM reviewed available scientific literature, state information, and commercial harvest data. BOEM AR 157103-157104. The agency also conducted independent surveys of fishermen and municipal shellfish management program officials, and completed independent studies on shellfish populations. BOEM AR 157106-157107. BOEM addressed effects of the "constant vibrations" of the wind turbines on the aquatic ecosystem, concluding that "underwater sound levels from the [turbines] are not anticipated to cause physical harm or behavioral changes" to studied fish species, eggs, and larvae. BOEM AR 204921. BOEM also considered effects on local fish populations of vessel traffic associated with the Project (including noise, lights, and vibrations), as well as ecological health and exposure effects of electric magnetic fields on fish. BOEM AR 157225-157226; 157289-157291. These analyses all support BOEM's conclusion that cumulative impacts on fish and shellfish resources from Project operations are expected to be minor. BOEM AR 157556.

Second, BOEM analyzed potential impacts of the Project on recreational fishing, which includes fishing for "home consumption" (*i.e.*, subsistence). BOEM AR 157137-157138. BOEM found "little evidence" to suggest adverse effects on marine recreational fishing from construction and operation of the Project. BOEM AR 157133.

BOEM's comprehensive review of potential Project impacts on aquatic resources, including tribal subsistence fish and shellfish, satisfied the agency's obligation to take a "hard

look” at the environmental consequences of the Project. *See NRDC v. Hodel*, 865 F.2d 288, 294 (D.C. Cir. 1988) (holding that “sufficient discussion of relevant issues . . . [necessary] to make a reasoned decision” constitutes the requisite hard look) (internal quotation marks omitted). The record supports BOEM’s conclusions regarding minimal impacts on subsistence fishing.

C. BOEM Was Not Required to Prepare a Supplemental EIS.

In January 2010, after the release of the FEIS, the Keeper of the National Register of Historic Places determined that Nantucket Sound is eligible for inclusion on the Register, and BOEM identified five additional sites as Traditional Cultural Properties. BOEM then undertook an Environmental Assessment (EA) to examine whether there were substantial changes in the Project or significant new circumstances or information warranting further environmental review. In April 2010, BOEM issued a Finding of No New Significant Impact, concluding that the analyses in the FEIS remained valid. BOEM AR 155448. The Tribe challenges that finding, claiming that NEPA requires a supplemental EIS when there is “significant new . . . information” bearing on the proposed action or its impacts. 40 C.F.R. § 1502.9(c). Contrary to the Tribe’s claims, a supplemental EIS was not warranted, because BOEM had already considered effects on the Sound and culturally significant sites, and because the changes in designation did not constitute significant new information that would alter the agency’s analysis.

BOEM took a hard look at the implications of the new legal designations in its EA and correctly reaffirmed its prior analysis of Project impacts. The FEIS identified potential impacts to culturally important areas in the Sound and discussed mitigation. *See* BOEM AR 312427. It examined visual impacts to tribal areas of traditional cultural and religious importance. BOEM AR 157456 and 157463. Having considered effects on Traditional Cultural Properties, the FEIS acknowledged that other properties might be utilized by tribal members for the same or similar

purposes and might be subject to the same effects. *See* BOEM AR 312427. All of the newly designated Traditional Cultural Properties are within the area previously examined. *Id.*

The new historic and cultural designations were changes in legal status only. Such changes do not constitute significant new information triggering the need for a supplemental EIS unless they result in a physical change in activities in the project area or otherwise alter the analysis of impacts. In this instance, BOEM correctly determined that the new designations had no bearing on the impacts it had already identified or on the Project itself. *Compare Swanson v. U.S. Forest Serv.*, 87 F.3d 339, 344 (9th Cir. 1996) (finding that designation of salmon as a threatened species did not trigger need for a supplemental EIS where Forest Service's previous finding of unlikely impact on salmon did not depend on salmon's non-threatened status) *and Or. Natural Desert Ass'n v. Bureau of Land Mgmt.*, Civ. No. 08-1271-KI, 2011 WL 5830435, at *10 (D. Or. Nov. 15, 2011) (holding designation of species as threatened or endangered was not significant new information because species was treated as sensitive species in EIS), *with NRDC v. U.S. Army Corp of Eng'rs*, 399 F. Supp. 2d 386, 405 (S.D.N.Y. 2005) (designation of Newark Bay as study area for Remedial Investigation/Feasibility Study required supplemental EIS for dredging project because environmental impact of dredging at the same time as RI/FS activities may alter environmental impact of dredging), and *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 559 n.5 (9th Cir. 2000) (designation of sensitive species requires supplemental EIS where Forest Service did not earlier consider effect of proposed timber sales on those species).

BOEM took the requisite hard look at Project effects on historic and cultural resources; the new designations "provided no new information and raised no new concerns that had not already been identified." BOEM AR 312426. A supplemental EIS was not warranted.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' Motions for Summary Judgment and should grant Defendants' Cross-Motions.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum of the Conservation Law Foundation, the Natural Resources Defense Council, and Mass Audubon has been filed with the Clerk of Court through the CM/ECF system on this 14th day of December, 2012, and notice of said filing will be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

/s/ Benjamin Longstreth
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