

Exhibit 9a



January 29, 2013

Matthew McMillen
Director, Environmental Compliance
DOE Loan Programs Office
U.S. Department of Energy LP 10
Room 4B150
1000 Independence Avenue, SW
Washington D.C. 20585

Dear Mr. McMillen:

The Alliance to Protect Nantucket Sound (the “Alliance”) submits these comments in response to the Federal Register notice issued on December 31, 2012, in which the Department of Energy (“DOE”) states that it has adopted the U.S. Department of Interior’s (“DOI”) Final Environmental Impact Statement (“FEIS”) for the Cape Wind Project issued on January 1, 2009. “EIS No. 20120401, *Final EIS, DOE, MA, RI ADOPTION— Cape Wind Energy Project, Construction, Operation and Maintenance, and Decommissioning of an Electric Generation Facility, Barnstable, Nantucket and Duke Counties, MA and Washington County, RI,*” 77 Fed. Reg. 77076 (Dec. 31, 2012).¹

Under the National Environmental Policy Act (“NEPA”), an agency is permitted to adopt an EIS only if it meets the standards for an *adequate* statement. 40 C.F.R. § 1506.3(a) (emphasis added). DOE cannot adopt the former Minerals Management Service’s (“MMS”)² Environmental Impact Statement (“EIS”) or subsequent Environmental Assessments (“EA”) because as illustrated by the below noted deficiencies and current record on those documents, NEPA compliance for the Cape Wind project is seriously flawed.

The Alliance has informed DOE on many prior occasions of the problems associated with the flawed and poorly-sited Cape Wind Project, and why the project is not a viable candidate for a federal loan guarantee or any other federal funding assistance.³ Enclosed with these comments is an updated record of all documents pertinent to the DOE adoption action that support the arguments set forth below. *See* Exhibit 1 and supporting CD.

¹ As discussed in the Alliance letter of January 23, 2013, DOE’s procedure for adopting the FEIS is in violation of NEPA regulations and must be republished for a new 30-day review period with an opportunity for public comment.

² MMS is the predecessor to the current federal agency, the Bureau of Ocean Energy Management.

³ The Alliance hereby incorporates by reference all prior correspondence with DOE regarding the Cape Wind project.

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Furthermore, DOE has yet to fully respond to the Alliance's pending, and long overdue, Freedom of Information Act ("FOIA") request of October 25, 2012. The Alliance, therefore, reserves the right to submit supplemental comments when DOE complies with its legal obligations under FOIA.

Granting the project a loan guarantee or other form of financial assistance would not only violate numerous federal laws, but would also place taxpayer-generated federal funds at risk due to the almost certain invalidity of other federal actions supporting the project. Some of the outstanding deficiencies and concerns of the project include:

- The FEIS and EAs for the project were inadequate when issued and used in the initial Record of Decision ("ROD"). The subsequent EA for the Construction and Operation Plan ("COP") was also deficient when adopted. The Alliance has previously submitted comments to each of these documents, noting the grounds for their deficiency, and hereby incorporates by reference these comments from DOI's NEPA record;
- Prior compliance for section 106 of the National Historic Preservation Act ("NHPA") is invalidated by: failing to review all of the historic properties that would be affected by the Cape Wind project; terminating the section 106 consultation process; not responding adequately to the recommendation of the Advisory Council on Historic Preservation; and failing to reinitiate consultation under section 106 to consider the effects of moving the staging area to New Bedford, changing the size of the project, new alternatives and other newly discovered facts;
- Violation of section 106 as a result of DOE's failure to independently consult and comply with the NHPA on this action, including the failure to consult with the Alliance which is a consulting party under section 106.;
- Violation of the Endangered Species Act ("ESA") by relying on biological opinions that fail to use the best available scientific information, failing to independently determine reasonable and prudent measures necessary or appropriate to minimize incidental take of federally listed species, and failing to reinitiate consultation under the ESA based on new information and changed circumstances;
- Violation of the Migratory Bird Treaty Act ("MBTA") for approving a project certain to kill migratory birds without obtaining a permit or other authorization;
- Failing to adequately evaluate aviation and marine navigation risks related to the Cape Wind project that create the high potential for accidents and public safety threats, and failing to adequately mitigate these risks;
- Clear evidence of political pressure:

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- Information released under FOIA from several sources confirms high level federal government efforts to assist Cape Wind in achieving agency approvals, confirming the lack of objectivity and validity of those procedures;
- A Congressional investigation for undue political influence launched July 2012, now underway by both the House Oversight and Government Reform Committee and the Transportation and Infrastructure Committee, regarding the Federal Aviation Administration's ("FAA") decision to issue a "Determination of No Hazard" to Cape Wind, which confirms political interference;
- Financial assistance to Cape Wind through a loan guarantee program due to the personal relationship between President Obama and Massachusetts Governor Patrick, an ardent supporter of Cape Wind. A June 24, 2011 email describes a request by the White House to include Cape Wind in an economic briefing for the President on the loan guarantee program. "The WH was very direct about what should be included in the slides so we don't have much flexibility." The email specifically stated that the White House wanted "1 slide on status of Cape Wind (because he [the President] has heard from Gov. Patrick a few times – they are close friends)." In the month prior and after Cape Wind was notified that its application for section 1705 assistance was put on hold, there were numerous meetings and calls between Massachusetts state officials including Governor Patrick with senior officials at DOE and the Loan Guarantee Program, including Jonathan Silver and Secretary Chu, leading directly to the post-2012 Presidential election announcement that DOE would grant this loan request;
- Deciding to grant a loan guarantee *before* the completion of the NEPA process.
- Multiple legal challenges by numerous parties:
 - In October 2011, the U.S. Court of Appeals revoked the 2010 "No Hazard" determination by the FAA. The FAA again issued a determination of no hazard for Cape Wind, ignoring the guidance of the court. The Barnstable Airport and the Alliance are appealing the latest determination. Another victory could not only again vacate the FAA's ruling but also preclude Cape Wind's ability to begin construction because of FAA conditions included in Cape Wind's lease from DOI, in turn negating the loan guarantee. In addition, invalidation of the FAA findings will expose project owners, operators and financing parties to extreme financial liability for any accident.
 - Four lawsuits are pending by a host of parties including Public Employees for Environmental Responsibility, the Wampanoag Tribe of Gayhead/Aquinnah, the Town of Barnstable, the Alliance, and others challenging determinations by DOI, the U.S. Fish and Wildlife Service, and the U.S. Coast Guard, among other agencies, for violations of NEPA, ESA, NHPA, and the Outer Continental Shelf Lands Act.
- Outstanding permit and pre-construction requirements:

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- Cape Wind cannot begin any construction prior to receiving a Letter of Authorization (“LOA”) from the National Marine Fisheries Service (“NMFS”), and the review for this authorization has not begun, nor has any application been filed for an LOA. Before an LOA can be issued, new regulations are required.
- Cape Wind is required to conduct numerous pre-construction protocols specified in the Final Cape Wind Avian and Bat Monitoring Plan (“ABMP”) approved by the Bureau of Ocean Energy Management (“BOEM”) just recently on November 20, 2012. These include months of bat surveys, acoustic monitoring, anti-perching monitoring and other protocols beginning in April 2013 and continuing through the calendar year. As discussed in the comments of Dr. Nisbet included on the attached disk, the ABMP itself is seriously flawed, in violation of the ESA and MBTA and has not been considered under NEPA.
- Cape Wind’s meteorological tower is no longer legally authorized because its permit expired in October 31, 2012. The Cape Wind lease site is partially occupied by a meteorological tower that the Army Corps of Engineers (“Corps”) permitted in 2002 under Section 10 of the Rivers and Harbors Act. 33 U.S.C. § 403. The meteorological tower was used to assess the potential lease site for wind energy purposes and other technical factors that would affect project design. With the expiration of the section 10 permit, there is no current authorization for the meteorological tower. In fact, the previous section 10 permit requires the tower to have been removed by October 31, 2012. The Corps’ jurisdiction over offshore obstructions of navigation remains intact under section 10 of the Rivers and Harbors Act and was not displaced by section 388 of the Energy Policy Act of 2005, which transferred the Cape Wind lease application from the Corps to DOI. *See* 43 U.S.C. § 1337. Section 388 of the Energy Policy Act of 2005 does not alter the existing jurisdiction of any federal agency: “Nothing in this subsection displaces, supersedes, limits, or modifies the jurisdiction, responsibility, or authority of any Federal or State agency under any other Federal law.” 43 U.S.C. 1337 (p)(9). This savings provision confirms that the authority of the Corps to issue permits for obstructions to navigation under section 10 of the Rivers and Harbors Act is not displaced. Accordingly, with the expiration of its Corps’ permit, the meteorological tower is no longer authorized under federal law.

In addition to the deficiencies and overall concerns of the project noted above, the NEPA documents DOE seeks to adopt are outdated. Since their issuance, there has been considerable new information and changed circumstances that now require a supplemental EIS. These are as follows:

- The alternatives analysis is grossly deficient, as confirmed by recent actions of BOEM and Cape Wind itself. BOEM has conceded the availability of numerous alternative sites that fall within the scope of the FEIS, and the Cape Wind developer (Energy Management, Inc.) has even expressed interest in these sites for other prospective projects. Additional offshore wind projects confirm that the technology needed for alternative locations is now economic and technically feasible.

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- The NOAA 2007 Essential Fish Habitat (“EFH”) designations for Atlantic cod (*Gadus morhus*) in Nantucket Sound, as cited in the FEIS, are outdated and inaccurate. NOAA 2007 finds Nantucket Sound to be EFH for adult Atlantic cod but not for the other life stages: eggs, larvae, and juveniles. (*See* Table 1, Appendix H, Summary of Specific Life Stage Designations for Species in ... Nantucket Sound, 2007, and Appendix B, Table B-1 Early Benthic and Pelagic Life Stages of Species with Designated EFH Potentially Present in the Proposed Action Area). Contradicting these designations, Omnibus Essential Fish Habitat Amendment 2, New England Fishery Management Council (June 2012) depicts Nantucket Sound as EFH for eggs, larvae, and juveniles (Maps 1-3). DOE and NMFS need to undertake a new consultation to make the cod EFH designations current. The other action agencies must also reinitiate consultation.
- Records released under a FOIA request to BOEM show that peer reviewers raised significant concerns about the Avian and Bat Monitoring Plan (“ABMP”) for the project. In fact, Cape Wind’s draft plan was so inadequate it prompted the Assistant Director of the state agency entrusted with protection of wildlife and endangered species to comment: “With this plan, we just will not know if bats, and probably even birds, are being killed by striking towers.” Further, the ABMP has many additional deficiencies, including the failure to: include a component of thermal imaging or infrared detection; specifically investigate actual collisions of birds with project turbines; consider state-listed species; conduct an adequate peer review; conduct adequate consultation with species experts; failure to properly plan for aerial surveys, boat surveys, and marine radar surveys to conduct adequate statistical comparisons of affected birds; and effectively coordinate the data produced from the plan to estimate collision frequency.
- A change in Cape Wind's project plans since DOI’s review, including:
 - As indicated by the Project's loan guarantee application released under FOIA, the Cape Wind project is expected to be built in phases or “Seasons.” Season A consists of 91 turbines and Season B of 39 turbines as described on page 3 of DOE’s “Application Intake Review” dated October 2010 (updated January 2011). This phased approach was explicitly rejected as an alternative during DOI's NEPA review. In addition, the FEIS and COP EA fail to consider any proposal for the newly adopted approach and its alternatives;
 - Cape Wind only has guaranteed sales through Power Purchase Agreements (“PPA”) for 101 turbines out of the project's proposed 130 turbines. *See* Order Approving Petition of Massachusetts Electric Company and Nantucket Electric Company, each d/b/a National Grid, for approval by the Department of Public Utilities of two long-term contracts to purchase wind power and renewable energy certificates, pursuant to St. 2008, c. 169, § 83 and 220 C.M.R. § 17.00 *et seq.*, Massachusetts Department of Public Utilities, Docket DPU 10-54 (Nov. 22, 2010) and Order Approving Petition of NSTAR Electric Company for approval by the Department of Public Utilities of a long-term contract to purchase wind power and renewable energy certificates,

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pursuant to St. 2008, c. 169, § 83 and 220 C.M.R. § 17.00 *et seq.*, Massachusetts Department of Public Utilities, Docket DPU 12-30 (Nov. 26, 2012). In addition, there is no guarantee that Cape Wind will succeed in selling the balance of its power and thus may be contemplating a final smaller footprint of 101 versus 130 turbines as reviewed by DOI. Finally, those PPAs are legally invalid and will be subject to further legal challenge;

- Cape Wind's proposed schedule for physical construction at the primary site is neither realistic, nor achievable. As indicated in a filing made by ISO New England on January 3, 2012 at the Federal Energy Regulatory Commission, "the overlapping impact analysis determined that one transmission line would be overloaded after the addition of the Cape Wind Associates LLC project. The ISO has determined that the upgrades associated with the transmission project [needed to support the Cape Wind project] are unlikely to be completed by the start of the 2015-2016 Capacity Commitment Period. In addition, the ISO and its consultants evaluated the information contained in the critical path schedule submitted by the Project Sponsor and have determined that it is unlikely that the project will achieve Commercial Operation by the start of the 2015-2016 Capacity Commitment Period." The NEPA documents DOE seeks to adopt also fail to consider the required system upgrades.
- The location of the construction staging location remains undetermined. Documents obtained by the Alliance through a FOIA request to the City of New Bedford show that Cape Wind intends to move its staging location across state lines from Quonset, RI, to New Bedford, MA. A move to a new staging location would not only require additional EPA review and public comment, but would also require additional review by DOI under NEPA, NHPA, and the ESA. Cape Wind has made it clear it is seeking to "hide" this change from NEPA review. Even if Quonset is used for part of the initial consultation, the project will ultimately make use of New Bedford, a project component not considered to date.
- New information on environmental impacts:
 - Endangered right whales were sighted in or near Nantucket Sound in the vicinity of the project area in 2010, 2011 and 2012. The 2011 sighting occurred after the April 2011 publication of the EA. The NOAA Fisheries Service announced a voluntary vessel speed restriction zone (Dynamic Management Area - DMA) in the vicinity of Nantucket Sound to protect an aggregation of right whales sighted in this area on April 25, 2011. The DMA was in effect through May 10, 2011;
 - Cape Wind conducted pre-construction geophysical and geotechnical survey activities in 2012 that provide additional benthic information as well as information on impacts to tribal cultural and archaeological resources, but that information has not been made available.

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- Post-FEIS developments evidence that much of the work related to Cape Wind will be completed in Europe, resulting in flawed analysis in the FEIS regarding job creation in the U.S. For example, the ROD currently estimates that Cape Wind will generate approximately 391 construction jobs (391 temporary full-time jobs) and approximately \$50 million will be spent on construction wages. ROD (Apr. 28, 2010) at p.22. However, with many of these jobs moving to Europe, this estimate is flawed.

Furthermore, as a result of the many changes Cape Wind has made to its project plans, the information in Cape Wind's loan guarantee application to DOE is not accurate. DOE's "application intake review" identifies Cape Wind as "project number 1211," which is eligible for both 1703 and 1705 programs. The application is described *as received by DOE on 12/23/09*; over three years later, the project has greatly changed. The following is a summary of some of the inaccuracies now present in Cape Wind's loan guarantee application:

- Cape Wind is not developing a 468 MW project as described on page 4 of Cape Wind's loan guarantee application. Cape Wind has publicly stated that it is now developing 101 turbines rather than the previously planned 130 turbines, which will reduce the project's anticipated output to 364 MW;
- Cape Wind is no longer the only project that has obtained a lease from DOI. In October 2012, DOI issued a lease to NRG Bluewater Wind to build a 450 MW offshore wind project. *See* page 4, Cape Wind Project Loan Guarantee Submission. Furthermore, Cape Wind is not the only viable option for commercial scale renewable generation close to load centers as described on page 6 of the Submission. Deepwater Wind is planning a project off the coast of Rhode Island near Block Island, and additional sites are being auctioned off this year also off the coast of Rhode Island and Massachusetts;
- The Massachusetts Department of Public Utilities did not approve a second PPA with National Grid, PPA-2 which was for 234 MW or 50% of the project's output, as described on page 5 of Cape Wind's Submission to DOE. Instead of PPA-2, Cape Wind only secured another contract with NSTAR for 27.5% of the project's output. Thus, Cape Wind only has a buyer for 77.5% of the project's output. Furthermore, if Cape Wind does not commence physical construction by December 31, 2015, the PPA with NSTAR will be terminated. *See* page 17 of NSTAR PPA (stating "Buyer shall terminate this Agreement as of December 31, 2015");
- To date, Cape Wind has lost the only federal court case (to proceed to a merits decision) on the project in the D.C. Circuit FAA litigation. Cape Wind's effort to pursue a section 10 permit for the entire project was also rejected when the First Circuit confirmed in 2005 that section 10 could only be used for a de minimis structure. That loss has already added eight years to the Cape Wind review. The pending legal challenges in federal court, which have been in effect for three years due to the defendant's numerous failed motions, further reveal legal deficiencies that are yet to be litigated on the merits and establish compelling grounds for the defeat of this ill-conceived project. DOE should not waste any additional taxpayer resources on this proposal;

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- Pages 25 to 28 of the Loan Guarantee Submission provide a list of permits and approvals needed by Cape Wind. However, since the date of the loan guarantee application's submission, the COP added additional requirements, including the need for a Federal Bird Banding permit, Federal Migratory Bird Scientific Collection permit, Scientific Research and Collecting permit, Massachusetts State Scientific Collection permit, Massachusetts Bird Banding permit, and the issuance of the Regional Cape Cod Commission Development of Regional Impact.
- Furthermore, as noted above, Cape Wind has yet to receive an LOA that is required for construction activities.

The Alliance restates for the record that DOE has failed to take the necessary steps to approve a loan guarantee or other action committing federal funds. DOE has a responsibility to administer the Federal Loan Guarantee Program in an objective and responsible manner and to protect the interests of the nation's taxpayers when utilizing taxpayer monies to fund projects under this program. In fulfilling that duty, DOE is obligated to ensure that its decision is based on an adequate and accurate record.

Thank you for considering these comments. Please contact the undersigned at (508) 775-9767 should you have any questions.

Sincerely,



Audra Parker
President and CEO

cc: The Honorable Ken Salazar, Secretary of the Interior
The Honorable Steven Chu, Secretary of Energy
David G. Frantz, Acting Executive Director, Loan Programs Office, DOE
Tommy Beaudreau, Director, Bureau of Ocean Energy Management
Laura Davis, Chief of Staff for Secretary of the Interior
The Honorable David J. Hayes, Deputy Secretary of the Interior
The Honorable Hilary Tompkins, Solicitor-Department of the Interior
Senator John F. Kerry
Senator Elizabeth Warren
Representative Darrell Issa, Chairman of House Oversight and Government Reform
Representative Fred Upton, Chairman of the House Committee on Energy and Commerce
Dr. Jane Lubchenco, Under Secretary of Commerce for Oceans and Atmosphere, and
NOAA Administrator
Admiral Robert J. Papp, Jr., Commandant, U. S. Coast Guard
Col. Philip Feir, U. S. Army Corps of Engineers
Mary L. Kendall, Acting Inspector General, Department of the Interior

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Michael Huerta, Acting Administrator of the Federal Aviation Administration
Lisa Jackson, Administrator of the Environmental Protection Agency
Nancy Sutley, Chair, Council of Environmental Quality

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Exhibit 9b



March 11, 2013

Sent via FedEx, Messenger and E-mail

Matthew McMillen
Director, Environmental Compliance
DOE Loan Programs Office
U.S. Department of Energy LP 10
Room 4B196
1000 Independence Avenue, SW
Washington D.C. 20585

Mr. Todd Stribley
DOE Loan Programs Office
U.S. Department of Energy LP 10
Room 4B196
1000 Independence Avenue, SW
Washington, DC 20585

Dear Mr. McMillen and Mr. Stribley:

The Alliance to Protect Nantucket Sound (the "Alliance") submits these comments¹ in response to the Federal Register notice issued on February 8, 2013, which reopened the review period for the Department of Energy's ("DOE") adoption of the Final Environmental Impact Statement ("FEIS") for the Cape Wind Project ("Project") issued on January 1, 2009 by the Minerals Management Service ("MMS")² of the U.S. Department of the Interior, "EIS No. 20120401, Final EIS, DOE, MA, Adoption" 78 Fed. Reg. 9388 (Feb. 8, 2013) (hereinafter "February 8, 2013 Notice").³

For the reasons stated in our previous correspondence with DOE, incorporated herein by reference, the Alliance objects to any loan guarantee or other form of financial assistance for the proposed Cape Wind Project. In spite of the lack of resolution of a number of outstanding issues

¹ All exhibits referenced in these comments can be found on the CD being filed simultaneously with these comments, entitled: "Exhibits to March 13, 2013 DOE Comments Filed by the Alliance to Protect Nantucket Sound."

² MMS is the predecessor to the current federal agency, the Bureau of Ocean Energy Management.

³ See also "Public Comment Opportunities" on DOE's website, available at <http://energy.gov/nepa/eis-0470-us-department-energy-loan-guarantee-cape-wind-energy-Project-outer-continental-shelf>.

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with the proposed Project that are critical to the viability of the Project and of its suitability for a loan guarantee, DOE appears to continue to push forward with consideration of a Section 1703 loan guarantee for the Cape Wind Project. These comments highlight the reasons why the Cape Wind Project does not meet the substantive standards required under DOE's regulations for a section 1703 loan guarantee and presents a serious financial risk to the government, and ultimately the taxpayers. Additionally, these comments raise new information that DOE is required to take into consideration in order to comply with the National Environmental Policy Act ("NEPA"), and also further illustrate why DOE cannot rely on the outdated and flawed FEIS issued by MMS in 2009.

Finally, recent information released during the open review period suggests that the decision to issue Cape Wind a loan guarantee is a pre-determined decision, and that DOE intends on rubber stamping MMS's 2009 FEIS and not conducting the necessary due diligence as required under both the DOE Loan Guarantee Program and the underlying NEPA process. In fact, on March 11, 2013, David Frantz, Acting Director of the DOE Loan Guarantee Program Office, made a presentation regarding the status of the loan guarantee program, in which his presentation explicitly stated that as part of DOE's 2013 Work Plan, DOE intends to issue at least one loan guarantee for an innovative renewables project, and cited to the Cape Wind Project.⁴ This presentation evidences clear bias on the part of COE as a cooperating agency in the NEPA process to issue a loan guarantee.

I. The Cape Wind Project Fails to Meet the Standards for Consideration Under DOE's Loan Guarantee Program.

The Section 1703 Loan Guarantee Program authorizes the Secretary of Energy to make loan guarantees for Projects that "avoid, reduce, or sequester air pollutants or anthropogenic emissions of greenhouse gases" and "employ new or significantly improved technologies as compared to commercial technologies in service in the United States at the time the guarantee is issued." 42 U.S.C. § 16513. When considering a loan guarantee application and prior to approval of a loan guarantee, DOE is required consider a number of factors to ensure that issuance of a loan guarantee, in fact, would be a prudent investment of taxpayer monies. As discussed below, the Cape Wind Project fails to meet a number of these standards as required under DOE's regulations for the Loan Guarantee Program, and any loan guarantee for it would place taxpayer monies at unreasonable risk.

A. Compliance with Environmental Laws and Regulations.

One of the primary considerations DOE must make when reviewing a Project's eligibility for a loan guarantee is "[t]he ability of the applicant to ensure that the Project will comply with all applicable laws and regulations, including all applicable environmental statutes and regulations." 10 C.F.R. § 609.7(b)(13). The Alliance has previously raised numerous concerns regarding the

⁴ See U.S. Department of Energy, "Loan Programs Office: Status Report" presentation, at slide 19 (Mar. 11, 2013).

Cape Wind Project's ability to comply with all applicable laws, including NEPA, the Endangered Species Act ("ESA"), the Migratory Bird Treaty Act ("MBTA"), the National Historic Preservation Act, the Coast Guard Maritime Transportation Act of 2006, the Outer Continental Shelf Lands Act, the Rivers and Harbors Act, Clean Water Act, and Clean Air Act, among others. The record of these violations of federal law is well-developed and has been presented to DOE.

B. Legal Risks of the Project.

DOE is also required to consider "[t]he levels of market, regulatory, legal, financial, technological, and other risks associated with the Project and their appropriateness for a loan guarantee provided by DOE." 10 C.F.R. § 609.7(b)(14). DOE continues to ignore ongoing litigation that challenges the validity of the existing FEIS, and has made no effort to explain how this litigation will affect its adoption of the existing FEIS and supporting NEPA documentation with regard to consideration of the Cape Wind loan guarantee application. Specifically, there remain many legal challenges against the Cape Wind Project, including:

- A pending lawsuit by the Alliance and the Barnstable Airport, filed on August 22, 2012, appealing the Federal Aviation Administration's ("FAA") most recent "No Hazard" determination.⁵ In October 2011, the U.S. Court of Appeals vacated Cape Wind's 2010 determination of "No Hazard" by the FAA. After remanding the review back to the FAA, the FAA again issued a determination of "No Hazard" for Cape Wind, based on the same flawed reasoning. If the court vacates the FAA's determination again, Cape Wind will be precluded from beginning construction because of FAA conditions included in Cape Wind's lease from DOI. In addition, invalidation of the FAA findings will expose Project owners, operators and financing parties to extreme financial liability for any accident. Further, clear evidence of political influence on the FAA, revealed through Freedom of Information Act requests, has led to a Congressional investigation of the FAA review of Cape Wind by both the U.S. House of Representatives Oversight Committee and the House Transportation Committee. This investigation remains ongoing.
- Four lawsuits are pending by a host of parties including Public Employees for Environmental Responsibility, the Wampanoag Tribe of Gayhead/Aquinnah, the Town of Barnstable, the Alliance, and others challenging determinations by DOI, the U.S. Fish and Wildlife Service, and the U.S. Coast Guard, among other agencies, for violations of NEPA, ESA, the National Historic Preservation Act, and the Outer Continental Shelf

⁵ See *Alliance to Protect Nantucket Sound v. Federal Aviation Admin.*, No. 12-1363 (D.C. Cir. filed Aug. 22, 2012) and *Town of Barnstable v. Federal Aviation Admin.*, No. 12-1362 (D.C. Cir. filed Aug. 22, 2012). This case remains pending before the D.C. Court of Appeals.

Lands Act.⁶ These pending legal challenges have been in effect for many years now due to the defendant's numerous failed motions. These lawsuits further reveal legal deficiencies that are yet to be litigated on the merits and establish compelling grounds for the defeat of this ill-conceived Project. The National Trust for Historic Preservation has participated as an amicus curiae, confirming the existence of violations under NHPA and serious public interest consequences for historic resources.

These legal challenges present a serious risk to the viability of the Project. Thus, DOE should not waste any additional taxpayer resources on this proposal and reject Cape Wind's application for a loan guarantee. The pending lawsuits against this project are a clear indication of the legal risks presented by the Project; however, DOE continues to refuse to meet with the principal Plaintiffs of these lawsuits, in turn failing to exercise the required due diligence for this Project. In fact, while this litigation has been pending, the Alliance has requested to meet with DOE on three prior occasions and has been denied; it is reiterating its request again in this letter. Significantly, several members of Congress have expressed concern regarding DOE's adoption of the FEIS for the Cape Wind Project, citing issues relating to the development of the EIS, the numerous lawsuits associated with the project, and considerable controversy regarding the program as a whole.⁷

C. Feasibility of the Project and Likelihood of Revenues.

Third, DOE is required to consider "[t]he feasibility of the Project and likelihood that the Project will produce sufficient revenues to service the Project's debt obligations over the life of the loan guarantee and assure timely repayment of Guaranteed Obligations." 10 C.F.R. § 609.7(b)(10). Currently, Cape Wind only has a buyer for 77.5 percent of its capacity, and guaranteed sales through Power Purchase Agreements ("PPA") for only 15 years. It is not clear that this will provide sufficient revenue certainty to assure repayment of project loans, placing taxpayer monies at risk.

In fact, the Massachusetts Department of Public Utilities did not approve a second PPA with National Grid, PPA-2 which was for 234 MW or 50% of the Project's output, as described on page 5 of Cape Wind's Submission to DOE. Instead of PPA-2, Cape Wind only secured another contract with NSTAR for 27.5% of the Project's output. Thus, Cape Wind only has a buyer for 77.5% of the Project's output. See Order Approving Petition of Massachusetts Electric Company and Nantucket Electric Company, each d/b/a National Grid, for approval by the Department of Public Utilities of two long-term contracts to purchase wind power and renewable energy certificates, pursuant to St. 2008, c. 169, § 83 and 220 C.M.R. § 17.00 *et seq.*, Massachusetts

⁶ These lawsuits include: *Public Employees for Environmental Responsibility, et al. v. Salazar, et al.*, No. 1:10-cv-01067 (D.D.C. filed June 25, 2010); *Alliance to Protect Nantucket Sound, et al. v. Salazar, et al.*, No. 1:10-cv-01079 (D.D.C. filed June 25, 2010); *Town of Barnstable, et al. v. Salazar, et al.*, No. 1:10-cv-01073 (D.D.C. filed June 25, 2010); and *Wampanoag Tribe of Gay Head (Aquinnah) v. Bromwich, et al.*, No. 1:11-cv-01238 (D.D.C. filed July 6, 2011) (consolidated as 1:10-cv-01067).

⁷ See Rep. Broun and Rep. Lankford, Congressional Letter to Secretary Chu, p.1 (Feb. 28, 2013); and Rep. Broun and Rep. Lankford, Congressional Letter to Secretary Chu (Jan. 25, 2013).

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Department of Public Utilities, Docket DPU 10-54 (Nov. 22, 2010) and Order Approving Petition of NSTAR Electric Company for approval by the Department of Public Utilities of a long-term contract to purchase wind power and renewable energy certificates, pursuant to St. 2008, c. 169, § 83 and 220 C.M.R. § 17.00 *et seq.*, Massachusetts Department of Public Utilities, Docket DPU 12-30 (Nov. 26, 2012).

As a result, there is no guarantee Cape Wind will have a buyer for the remaining 22.5 percent of its output. Furthermore, if Cape Wind does not commence physical construction by December 31, 2015, the PPA with NSTAR and National Grid will be terminated. *See* page 17 of NSTAR PPA (stating “Buyer shall terminate this Agreement as of December 31, 2015”) and February 13, 2013 filing of National Grid in DPU 10-54 (exercising the Most Favored Nations Clause at Section 4.1(e) of the National Grid PPA, which adopts the requirement of construction by December 31, 2015 from the NSTAR PPA). The Project is almost certain to fail to meet this deadline. For nearly 22 years, Cape Wind has struggled to get this project underway. Despite the extraordinary, and impermissible, efforts by Governor Patrick and Secretary Salazar to make this project a reality, it has failed to move forward. Even now, the Project lacks the necessary permits to proceed with construction. Many of the authorizations that have been issued are legally deficient.

DOE, therefore, lacks the factual basis to conclude that the project will go forward, or to determine even if it goes forward that its revenue will be sufficient to repay project financing. A loan guarantee under these circumstances, unlike those for which PPAs provide assured revenue for the period of time needed to repay capital costs, is imprudent.

II. Issuance of a Loan Guarantee to Cape Wind Is Financially Risky.

Issuing a loan guarantee, no matter how small, for the Cape Wind Project presents grave financial risks to the U.S. government, and ultimately the taxpayers, due to the almost certain invalidity of other federal actions supporting the Project and strong likelihood that the Project will either be suspended or fail altogether. As noted above, granting the Project a loan guarantee or other form of financial assistance would not only violate numerous federal laws, but would also place taxpayer-generated federal funds at risk. As a requirement to issuing a loan guarantee, DOE “must ensure that ... [t]here is a reasonable prospect of repayment by [the] Borrower of the principal of and interest on the Guaranteed Obligations and other Project debt.” 10 C.F.R. §609.10(d)(9).

Based on the Cape Wind Project’s deficient NEPA process, pending lawsuits and failure to acquire a buyer for the remaining 22.5 percent of the Project’s power, the likelihood that the Cape Wind Project will succeed is questionable at best. Due to the uncertainty of many pending matters, there are a variety of scenarios that could occur after issuing a loan guarantee to Cape Wind that could result in Cape Wind defaulting on its loan guarantee. In addition to the factors discussed above, which could result in a lack of a buyer for Cape Wind’s power at a cost that would enable sufficient loan repayment, environmental and weather factors that have not

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adequately been assessed could significantly hamper the facility's operations and interrupt its revenue stream.

The presence of a previously unknown species could temporarily or even permanently suspend construction or operation of the Project. For example, the endangered North American Right Whale has been spotted in Project waters, but DOI has failed to reinitiate consultation under the ESA to account for the presence of this previously unknown and listed species. In the event, a Right Whale were to appear in the Project area once the construction or operation of the Project has begun, there is the likelihood that Cape Wind would have to suspend Project activities for an undesigned amount of time. Similarly, there is certainty that the Project will result in the take of migratory birds; yet, Cape Wind has failed to apply for a special permit under the MBTA to allow for the incidental take of these birds. As a result, the take of any migratory bird, even if incidental and unintentional, could cause the Cape Wind Project to shut down temporarily or even indefinitely. Periodic shutdown of the Project is likely to be necessary to avoid the illegal take of protected species.

Furthermore, in the event DOE issues a loan guarantee for the Cape Wind Project, and the plaintiffs to the federal litigation prevail, it is likely Cape Wind will be required to immediately cease all operations of its Project until the environmental deficiencies are resolved. This process could take years depending on the severity of the violation and could even result in a determination that the entire Project is invalid based on deficient environmental analyses and studies.

Each of these circumstances presents a scenario that could potentially interrupt the construction and/or operation of the Cape Wind Project. Any stoppage of the Project concurrently means a stoppage of a consistent revenue stream from the Project for the sale of the Project's electricity. This would directly affect Cape Wind's ability to repay the Government for its loan guarantee and any assurance that the Government's will recoup its investment on the Project. In light of the many financial risks and uncertainties of the Project, the Alliance strongly urges DOE to deny Cape Wind's loan guarantee application. To fund this Project would be an abdication of DOE's responsibility to uphold the public trust and ensure the prudent expenditure of taxpayer dollars.

III. DOE Has Failed to Consider New Information About the Cape Wind Project.

As a federal agency, DOE has a responsibility to ensure that it complies with NEPA and all other federal environmental laws. NEPA requires all federal agencies to consider the potential impacts of their proposed actions. In particular, an agency is required to complete a supplemental environmental impact statement ("supplemental EIS") when new information is discovered that was not previously considered by the agency during the NEPA process. CEQ regulations require a supplemental EIS to be prepared and circulated in the same manner as the original draft and FEIS if the agency makes substantial changes in the action that are relevant to environmental concerns, or if there are significant new circumstances or information relevant to environmental

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concerns and bearing on the proposed action of its impacts.⁸ Since the issuance of MMS's FEIS in 2009 and the subsequent EAs, an overwhelming amount of new information has become available. A supplemental EIS is needed to ensure that the requirements of NEPA are fulfilled and all potential impacts of the Cape Wind Project have been adequately considered. In particular, DOE must conduct a supplemental EIS to consider the following new information:

A. Right whales.

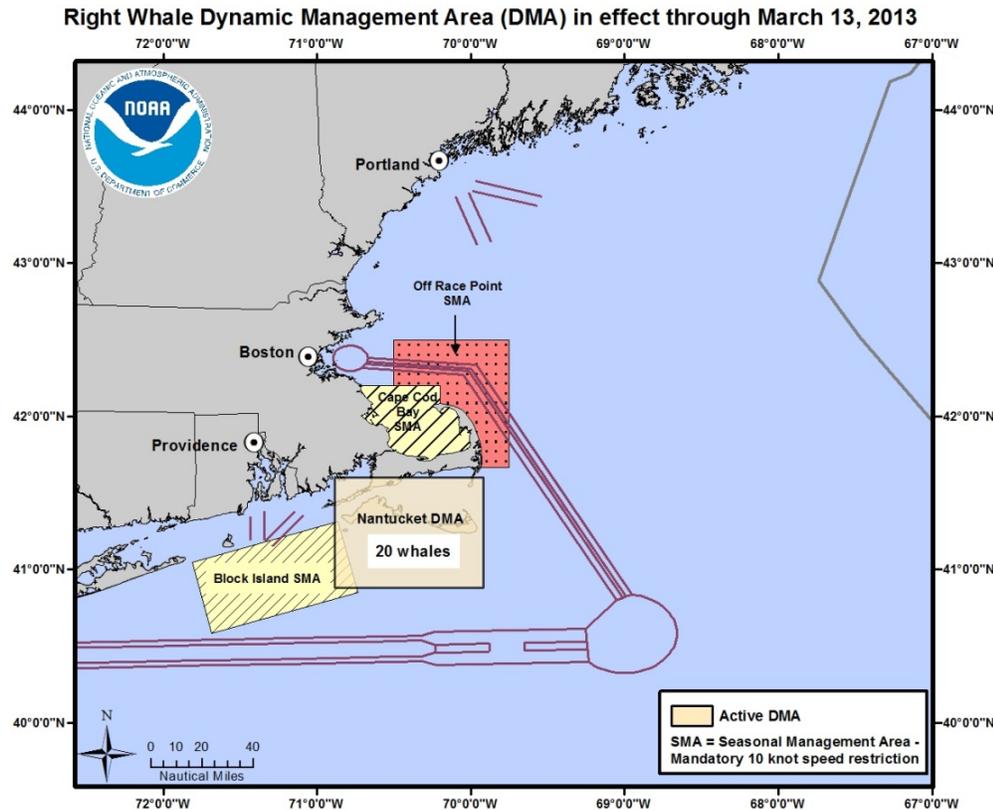
The North Atlantic right whale is a gravely imperilled marine species that is protected by both the Marine Mammal Protection Act and the Endangered Species Act. Right whale sightings have been documented along the planned vessel routes from both Quonset, Rhode Island to Nantucket Sound and from New Bedford, MA to Nantucket Sound, as well as within Nantucket Sound itself through 2011. In fact, the photo below shows the existence of right whales directly in the proposed Project area on Horseshoe Shoal (*see* Image 1).

Previous sightings of right whales in the area include a report on April 6, 2010, of a group of six right whales in Nantucket Sound. An additional two right whales were reported April 18 and 19, 2010. On April 25 and 27, 2011, there were occurrences of a group of 3 right whales and a single whale in Nantucket Sound itself.

This pattern has continued more recently. For example, in 2011 and 2012, NMFS recorded right whales in Nantucket Sound, in the nearby waters of Rhode Island Sound (southwest of Nantucket Sound), and in Vineyard Sound (the narrow water body between Martha's Vineyard and Cape Cod that leads from Rhode Island Sound to Nantucket Sound). Even more recently, on February 27, 2013, NOAA Fisheries Service announced a voluntary vessel speed restriction zone in the vicinity of Nantucket Island to protect an aggregation of 20 right whales sighted in the area on February 26, 2013. This announcement supplanted a previous voluntary speed zone that was triggered by a sighting of 8 whales. The following chart shows the dynamic management area currently in effect which covers the proposed Project area in Nantucket Sound.

⁸ See 40 C.F.R. § 1502.9(c)(2012); *New Mexico ex rel. Richardson v. Bureau of Land Management*, 565 F. 3d 683, 707 (10th Cir. 2009) (finding that a new alternative proposing new locations of activities required a supplemental EIS because it affected "environmental concerns in a different manner than previous analyses," even though the general nature of the alternative's impacts resembled those already analyzed).

IMAGE 1



Right whales have now visited the same areas every year for the past four years, indicating that sightings in and around Nantucket Sound can no longer reasonably be dismissed as anomalous, but rather reflect a new pattern of behavior that must be analyzed by new consultation under the ESA and a new Biological Opinion by the National Marine Fisheries Service.

B. Termination of National Grid PPA.

On February 13, 2013, National Grid sent a letter to the Secretary of the MA Department of Public Utilities regarding a second amendment to the Power Purchase Agreement (PPA) between Cape Wind and National Grid. This amendment adopted a requirement already contained in Cape Wind's contract with NStar stating that physical construction of Cape Wind must commence by December 31, 2015 or the contract would be terminated.

Physical construction is defined as "any physical installation of equipment or materials into the seabed of the Facility construction site that is integral to the assembly of the wind turbine generation units included in the Facility". If physical construction does not commence prior to December 31, 2013, National Grid "shall terminate this Agreement as of December 31, 2015."

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Cape Wind has stated each year for numerous years that it will start construction the following year, yet it has been unable to meet these timeframes. In fact, even its required preconstruction geotechnical and geophysical surveys, which were to be completed in the spring/summer of 2012, are now being scheduled for continuation during the spring/summer of 2013. There is no reason to believe that construction by December 31, 2015, is a likely result. There are several scenarios DOE should consider in which Cape Wind would not be able to meet the December 31, 2015 deadline, thus voiding both contracts and subjecting taxpayer money to great risk. For example, if the US Court of Appeals once again sides with the Alliance and the Town of Barnstable in the appeal of the FAA's determination of no hazard, it could easily miss the deadline. The last review by the FAA after the Court remand took almost one year with over two years between the two previous determinations. The FAA issued its 2012 determination which is the subject of the current appeal in August of 2012. The previous determination was well over two years prior in May of 2010.

C. Alternatives.

As documented in our previous comments to DOE on January 29, 2013, and as discussed further below, there are many feasible alternatives which were not considered in the evaluation of Cape Wind and which should now be considered as a requirement of NEPA. Contrary to the premise of the FEIS, Cape Wind is not the only viable option for commercial scale renewable generation close to load centers. Deepwater Wind is planning a Project off the coast of Rhode Island near Block Island, and additional sites are being auctioned off this year also off the coast of Rhode Island and Massachusetts. In addition, Fishermen's Energy is developing a Project off the coast of New Jersey and BOEM has granted a lease to NRG for a Project off the coast of Delaware.

Deepwater Wind

Deepwater Wind has announced a signed agreement with Siemens to buy the company's latest offshore wind turbines for deployment in Block Island. Under the agreement, Siemens will supply five of its new 6.0-megawatt direct drive offshore wind turbines for a 30 megawatt Project. This will be the first Project in the United States, and one of the first anywhere in the world, to use the new turbine, which will be commercially available for the Project.

The Project will be located in Rhode Island state waters 4.5 km southeast of Block Island covering an area of 5 km² and includes a transmission cable connecting the island to the mainland grid for the first time. According to nautical charts, the area depth ranges from 18 m to 30 m; the developer stated depth range is 23 m.

Pursuant to a heavily litigated but now approved 20-year power purchase agreement, National Grid has agreed to buy all of the output from the Project. In August of 2010, the RI Public Utilities Commission agreed to a 20 year PPA with National Grid to buy from Deepwater at 24.4 cents per kWh for the first year with 3.5% annual increases. On Oct 2, 2012 Deepwater Wind submitted final state and federal permit applications. The Project is scheduled to be in the construction phase in 2014. Depending on the permitting process and final turbine specifications, Deepwater Wind could be the first offshore wind farm.

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NRG Bluewater Wind

NRG Bluewater Wind was granted the second federal lease, and the first under the “Smart from the Start” initiative, to build a 450 MW offshore wind Project in October 2012. BOEM granted the company the right to lease 96,430 acres in federal waters 11 nautical miles off the coast of Delaware. The lease grants NRG Bluewater Wind Delaware LLC the exclusive right to submit wind development plans for the area.

In addition, to these other projects, BOEM's own notices now confirm that there may be new sites available for the Project that must be considered in a supplemental EIS. There are land based alternatives. For example, at the Mass Military Reservation on Cape Cod, a 1.5 MW Fuhrlaender turbine was installed in 2009 and a 1.5 MW GE turbine was installed in 2011.

Fishermen's Energy

Fishermen's Energy is developing a 25-megawatt Project. In contrast to Cape Wind and other Projects, the New Jersey-based consortium is starting with a demonstration project near shore. It is siting its five-turbines each at 5 MW within the three miles of state-controlled waters off Atlantic City. The state Board of Public Utilities (BPU) is reviewing Fishermen Energy's proposed pilot Project. By summer of 2013, the BPU will determine whether Fishermen's Atlantic City wind farm qualifies for OREC incentives. The location is 2.8 miles off Atlantic City in state waters covering an area of 2 km² at a distance from shore of 5 km. The depth according to nautical charts is 10 m to 13 m; the depth range as stated by the developer is 10 to 12 m.

The Project cost is \$200 million. On December 12, 2012, DOE awarded \$4 million of funding for completion of engineering, design and permitting phase. Additionally, Fishermen's Energy remains under consideration for the selection of awards of up to \$47 million over the next four years. According to the Fishermen's website, the proposed project is fully permitted with the New Jersey Department of Environmental Protection, NU Green Acres Approval, New Jersey Tidelands license, and Atlantic City easement approvals. The Army Corps of Engineers has also issued a construction permit. The construction target for this project is 2013 with operations in 2014.

It is noteworthy that in the FEIS, DOI ruled out alternatives from further environmental analysis “because of physical limitations and/or constraints due to (1) water depth (should be 100 feet [30 meters] in depth to be considered economically feasible)... and (5) the availability of technology to develop the site (development of floating platform technology for use in water depths >150 feet [45 meters] is beyond the milestones scheduled for project development).” FEIS at E-6. However, as evidenced by developments in offshore wind energy, neither of these bases is valid. Deepwater Wind is moving forward with an offshore wind energy project in Block Island Sound that would exist in waters up to 150 feet deep. Similarly, NRG Energy has also proposed another offshore wind project, Bluewater Wind, off the coast of Delaware, which will be in waters ranging from 100-160 feet deep. Bluewater Wind is the second project to receive a

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federal lease, which was issued by DOI in October 2012. Further, StatOil North America Inc. is also moving forward with a floating turbine offshore wind energy project off the coast of Maine, HyWind Maine, that would be in water depths of 460 to 520 feet. Thus, the abundance of projects in locations previously eliminated from consideration in the FEIS due to a lack of technology clearly shows that the technology necessary to build projects on these alternative sites does, in fact, exist.

D. Weather conditions.

There has recently been new information (fall 2012) released on weather impacts on offshore wind turbines further adding to the risk of the proposed Cape Wind Project. A report by Kimberly Diamond called 'Extreme Weather Impacts on Offshore Wind Turbines: Lessons Learned' describes some of the risks:

- “Due to more intense weather conditions than originally anticipated, hundreds of offshore wind turbines in Europe are undergoing extensive repair.”
- “Extreme weather conditions have also caused about four fifths of all North Sea offshore turbines to sustain failing grouted connections.”
- “Hundreds of millions of dollars in repairs are associated with rectifying this grouting issue.”
- “Sea floor dynamics, including wave conditions, tides, currents, water flow velocity, marine growth, terrain, and ice formation, can create chronic scour, or the depletion of seabed sediment. Scour can cause erosion around offshore turbine bases located in sandy soils, making such turbines’ foundation anchoring less sturdy and reducing the turbines’ stability.”
- “Similar to scour, sand wave migration can cause cable exposure. Sand wave migration rate can have adverse consequences for turbine cable installations. This is because if a cable was originally buried under a sand crest on the ocean floor, it can become exposed if the crest migrates and leaves a trough in its place.”
- “Cable exposure is an expensive and difficult problem to fix. Few installation vessels available globally can lay subsea cables or conduct cable repairs.”
- “Anticipated global temperature increases and elevated sea levels associated with climate change may impact offshore wind turbines scheduled to be located in U.S. waters.”
- “Carnegie Mellon University researchers found that turbines placed in U.S. waters may be vulnerable to hurricane-force extreme winds because offshore turbines currently on the market are only designed to withstand Category 1 hurricane wind speeds.

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- “Replacing a severely damaged turbine also may not be cost effectiveConsider what may happen if numerous turbines in an offshore wind farm simultaneously experience severe damage.”⁹

E. Navigation risk.

The public safety risks and marine navigation threats posed by this project are extreme. A massive administrative record confirms that not only do these risks exist, but that the U.S. Coast Guard, BOEM, and now DOE are ignoring these risks in the interest of promoting the Cape Wind Project as designed. The failure to protect public safety, marine navigation, and fishing in Nantucket Sound are especially arbitrary and capricious considering the actions the federal government is taking for other offshore wind projects. The FEIS is clearly deficient in failing to consider this new information and issuance of a loan guarantee to a project the very risks that federal agencies are seeking to avoid elsewhere confirms that the standards of the section 1703 program cannot be met. Documentation of these risks is included in the attached timeline with exhibits.

Additionally, a new study issued by the McGowan Group, entitled "Report of: A Comparative Analysis of The Development and Application of Marine Navigation Safety and Marine Environmental Protection Criteria for Offshore Renewable Energy Installations"¹⁰ concluded that the Cape Wind Project is fatally flawed as currently designed and sited, and is incompatible with the needs of marine transportation in Nantucket Sound. The study included with these comments also found that the Project is an unnecessary and unacceptable threat to the current-day and future users of Nantucket Sound's waterways.

F. Aviation risk.

The Turbines also present significant safety risks to aviation. The Turbines are approximately 440 feet tall, and are located in the middle of a heavily-trafficked flight corridor, and in close proximity to three airports – the Barnstable Municipal Airport, the Nantucket Memorial Airport, and the Martha's Vineyard Airport. Because of their height and location, the turbines are subject to FAA review under 49 U.S.C. § 44718, FAA's implementing regulations at 14 C.F.R. Part 77 ("Part 77 regulations"), and FAA's Order 7400.2J ("*Procedures for Handling Airspace Matters*" (Feb. 9, 2012), pursuant to which, FAA is required to review new structures to determine

⁹ Diamond, Kimberly E., "Extreme Weather Impacts on Offshore Wind Turbines: Lessons Learned," *Natural Resources & Environment*, 27:2 (Fall 2012), available at <http://www.lowenstein.com/files/Publication/23b0d113-b158-4a06-a140-9c2e76fa6b25/Presentation/PublicationAttachment/a677f0c5-52bc-4af4-b09c-9d183737da5a/Extreme%20Weather%20Impacts%20on%20Offshore%20Wind%20Turbines.pdf>.

¹⁰ The McGowan Group, "Report of: A Comparative Analysis of The Development and Application of Marine Navigation Safety and Marine Environmental Protection Criteria for Offshore Renewable Energy Installations" (Mar. 11, 2013).

whether they would result in an obstruction of the navigable airspace or an interference with air navigation facilities and equipment or the navigable airspace.

FAA initially issued Determinations of No Hazard for all 130 Turbines on May 17, 2010 (2010 Determinations). On October 28, 2011, the Circuit Court of Appeals for the District of Columbia Circuit vacated and remanded the 2010 Determinations because FAA had misapplied its own Order and regulations by finding that the Turbines would not have an adverse aeronautical effect on flight operations, despite admitted interference with flights, solely because the Turbines did not meet FAA's technical definition of an "obstruction."¹¹ The Court found that FAA had misinterpreted its own binding Order thereby "cutting the process short" and failing to "assess the risks" posed by the Turbines. On remand, the Court directed FAA to "address the issues and explain its conclusion."

On August 15, 2012, following remand, FAA issued new Determinations of No Hazard (2012 Determinations) for all 130 Turbines. Rather than follow the Court's instructions, however, FAA again *repeated* the very same misinterpretation of its Order that the Court had rejected; it once again failed to consider evidence demonstrating that a substantial number of regularly-occurring flights would be affected; it failed to address radar impacts identified by its own experts; and it imposed radar mitigation that its own experts concluded may not be sufficient.

As summarized below, the evidence before FAA has consistently demonstrated that the Turbines *will* interfere with air navigation facilities and the navigable airspace; thus DOE cannot reasonably rely on FAA flawed review process to conclude that there will be no safety impacts to aviation.

1. FAA Has Never Examined Evidence of the Impacts To Visual Flight Rule (VFR) Operations.

The Turbines would impose a wide range of adverse effects on the use of the navigable airspace. These effects include:

- Impacts to VFR flights far in excess of FAA's own threshold for significance. FAA Exhibit 1 at 15-16 (2009 MITRE Report); FAA Exhibit 2 (2012 MITRE Report).
- VFR pilots being forced to fly at or below 500' in the project area during the frequent periods of marginal VFR weather. FAA Exhibit 3 (June 2010 Comments) at 9-10; FAA Exhibit 4 (NOAA Climatological Table).
- VFR flights being compressed to a lower altitude because of weather conditions, thereby coming within 500' of the Turbines, in violation of 14 CFR §91.119, FAA Exhibit 5 (FAA's VFR Compressibility Effects Report).

¹¹ *Town of Barnstable v. FAA*, 659 F.3d. 28, 35-36 (D.C. Cir. 2011).

- Impacts to VFR arrivals to and departures from Barnstable Airport. FAA Exhibit 6 (LaForge Affidavit).
- Adverse impacts to existing VFR collision avoidance practices in the area. FAA Exhibit 6.
- Additional significant and adverse effects, including the “clear risk of collision” with the Turbines. FAA Exhibit 7; *see also* FAA Exhibit 8.

As the D.C. Circuit Court noted, “the record contains numerous contentions indicating that the wind farm might pose just such a safety risk.”¹² Nevertheless, FAA continues to cut the process short and avoid examining this evidence. FAA Exhibit 9 at 3 (2012 Determinations) (“there is no need to analyze whether the proposed wind turbines would have an adverse effect [on VFR operations]”).

2. The turbines will adversely impact radar facilities.

FAA has acknowledged that the Turbines would impair the operation of area radars. *Barnstable*, 659 F.3d at 35. However, despite its own evidence to the contrary, it consistently concludes that there will be no physical or electromagnetic effects to air navigation facilities. For example:

- FAA dismissed evidence of shadowing¹³ effects to secondary (beacon)¹⁴ radar. FAA’s own experts predicted *severe* impacts to aircraft operations below 500 feet and *moderate* impacts to beacon radar for 1.5 [nautical miles (nmi)] behind the wind turbines. FAA Exhibit 10 (2009 Radar Report) at 15, 34; FAA Exhibit 11 (2012 FAA Technical Operations Staff Report). FAA dismissed this evidence on the grounds that pilots do not fly in this area. However, FAA’s own evidence shows that there *are* a significant number of low-level operations – sometimes up to 9 flights a day – directly over the proposed Project site below 949’. FAA Exhibit 2 at 7 & A-9; FAA Exhibit 12 (2009 Alliance Letter) at 6 (J.A. 362).
- FAA unreasonably dismissed evidence of shadowing effects to primary (search) radar. FAA has admitted that there *will* be shadowing impacts to primary radar. FAA Exhibit 10 at 34; FAA Exhibit 9 at 5. Further, FAA’s own report demonstrates that there could be impacts when either the Nantucket or the Otis radar is out of service. FAA Exhibit 10 34.

¹² *Barnstable*, 659 F.3d at 32.

¹³ Wind turbines, due to their height and width, can obstruct a radar’s coverage. The loss of coverage occurring behind the turbine is referred to as a radar shadow.

¹⁴ Beacon radar (also referred to as transponder or secondary radar) is a communications system between a ground station interrogator at the radar and a transponder in an aircraft. The system therefore only works when aircraft are equipped with transponders.

Thus, when the Nantucket ASR-9 is out of service, all operations below 1,500 feet, *including all approaches to Nantucket*, would be directly compromised. FAA did not analyze these issues or provide any substantial reason why these issues were not a concern. Moreover, even if beacon radar were functioning when the search radar failed, *only aircraft with transponders would be protected*. This is critical because a significant portion of air traffic in Nantucket Sound is *not* equipped with transponders, and therefore would be affected by loss of search radar functionality. FAA Exhibit 13 at ¶16 (Breault Affidavit).

- FAA failed to address evidence of decreased probability of detection for primary radars. FAA experts concluded that the probability of detection for the ASR-9 “may decrease” as a result of clutter. FAA Exhibit 9 at 5; FAA Exhibit 11. In some instances, FAA concluded that this probability of detection would drop far below acceptable levels. FAA Exhibit 10 at 12 (“If the blades are moving with a large radial component with respect to the radar, *detection over each wind turbine will approach zero.*”) FAA, however, summarily dismissed this evidence. FAA Exhibit 9 at 5.
- FAA failed to fully analyze impacts to the Truro ARSR-4. FAA’s Report concluded that the probability of detection for the ARSR-4 over the wind farm will be *below* acceptable levels (*i.e.*, below 80 % probability of detection) at altitudes of *up to 3,500’*. FAA Exhibit 10 at 13, Fig. 9a. A significant amount of traffic occurs below 3,500’ that would be affected. FAA Exhibit 1 at 11-15.
- FAA did not take into account the unique weather conditions in Nantucket Sound. FAA never addressed evidence regarding the effects of local temperature inversions that can “duct” the radiated energy closer to the earth surface. FAA Exhibit 14 (2010 ARTS Report) at 4; FAA Exhibit 15 (2010 Brookner Comments) at 2. The effect of such weather events is to intensify reflected energy, and to cause more returns, at higher intensity, which, in turn, increases the clutter on the controllers’ display, further complicating air traffic controllers’ ability to manage traffic in the area. *Id.* This weather condition is very likely to occur in the summer months in Nantucket Sound – at precisely the same time when the area experiences higher levels of traffic.
- The 2012 Determinations failed to impose radar mitigation measures that FAA itself identified as necessary. The 2009 FAA Radar Report made several recommendations, including the need to modify and update digital displays, to ensure that there were no radar performance problems before the Turbines were installed, and to take winter and summer baseline recordings before the Turbines were installed. FAA Exhibit 10 at iv FAA’s 2010 Radar Report also included various recommendations, including revising the Cape TRACON airspace and procedures to restrict air traffic in the Project area to only aircraft with beacon responders. FAA Exhibit 16 at 17. FAA failed to include these as required mitigation measures in the 2012 Determinations and failed to provide any reasonable explanation for why they were omitted. See FAA Exhibit 9.

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3. FAA has identified no reasonable mitigation for acknowledged impacts to the ASR-8.

FAA has admitted that the Turbines would create adverse impacts to the Otis ASR-8 radar, (FAA Exhibit 17 at 5 (2010 Determinations)). To address these known impacts, FAA relied on a tiered-mitigation plan. First, it requires the installation of a TDX-2000 post-processor to the affected radar. Second, in the event that the TDX-2000 upgrade proves unsuccessful, FAA required Cape Wind to place \$15 million in escrow to pay for installation of a new ASR-11 radar system to replace the existing ASR-8. Third, FAA acknowledges that even the ASR-11 may not work, in which case, it is prepared to close the airspace to aircraft without transponders. See FAA Exhibit 9; FAA Exhibit 16 at 17. As outlined below, this mitigation plan is insufficient.

- The TDX-2000 will not resolve acknowledged impacts. FAA Exhibit 18 (2010 Brookner/Picard Report).
- FAA itself does not think that the TDX-2000 is sufficient. FAA Exhibit 19 (2012 Alliance letter with FAA FOIA Responses).
- FAA documents indicate that the decision to rely on the TDX-2000 (in lieu of requiring the “best option”) was based in large part on the cost of upgrading to an ASR-11, rather than on objective assessment of how best to mitigate the acknowledged interference issues. FAA Exhibit 19
- There is substantial evidence that the ASR-11 will *not* solve radar interference caused by the Turbines. FAA Exhibit 19. (FAA Talking Points state that “not even the ASR-11 will mitigate the clutter completely or in such a way that there will not be occasional loss of detection of ... aircraft without transponders”).
- Replacing the existing radar equipment may not be feasible. FAA Exhibit 20 (Kalinowski Testimony).
- Closing the airspace altogether would, itself, be a hazard. FAA has concluded that “as a last resort” FAA would simply revise the Cape area airspace and air traffic control procedures to restrict air traffic in the Project area to only aircraft with transponders. This essentially defers the hazard analysis until *after* the Turbines are constructed, thereby expressly inviting the possibility that the Turbines may prove to be hazards after construction. Indeed, this is contrary to FAA’s own experts that conclude that: “[FAA’s] Tech Ops should ensure that there are no performance problems with the ASR-8 or the ASR-9 prior to installation of any wind turbines.” FAA Exhibit 10 at iv (emphasis added).
- The ASR-11 upgrade has not worked under real world conditions. The very same technical upgrades proposed to mitigate the acknowledged radar impacts from the Cape Wind Project did not work at Travis Air Force Base in California (Travis). As a result,

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there are severe impacts to the airspace near Travis, namely that uncontrolled traffic cannot be detected. Exhibit 21 (Travis AFB, MidAir Collision Avoidance Pamphlet).

G. The National Historic Preservation Act.

DOE also cannot rely on the National Historic Preservation Act procedures by BOEM. As noted in previous correspondence, Secretary Salazar improperly terminated consultation and failed to provide a valid basis for over-ruling the unprecedented recommendation by the ACHP to deny the project due to the availability of alternatives. The record is now clear, based on BOEM's own actions, that the very alternative relied on by the ACHP and rejected by Salazar are in fact reasonable. Thus, the Salazar ACHP letter can no longer be invoked. In addition, DOE has not properly terminated consultation on its own accord, as required by the section 106 regulations. No additional consultation has been conducted with the Alliance and other consultation parties, although it appears that DOE did contact the Tribe for this purpose. As noted by the recently released CEQ guidelines for NHPA and NEPA compliance, it was essential to start the section 106 process early during the review of the proposed project -- at the scoping stage. To the contrary, MMS left this action to late in the game, when it was too late to conduct a valid review. DOE has compounded this error by failing to undertake its own section 106 process. Finally, DOE has not updated the list of affected historic properties to account for changes over the last three years. For all of these reasons, DOE must withhold further action on the CW application until it conducts a valid section 106 process.

IV. The 2009 FEIS Cannot be Relied Upon Because It Is Flawed and Outdated.

The Alliance has previously summarized the many deficiencies of the 2009 FEIS, and will, therefore, not restate them again in these comments but hereby incorporates by reference all prior comments. The Alliance, however, notes that as evidenced by the number of pending lawsuits, it is evident that the 2009 FEIS was inadequate at the time it was issued. New information (as noted above) confirms that other alternatives existed at the time the FEIS was released and establishes the need for a supplement EIS. CEQ regulations require a supplemental EIS to be prepared and circulated in the same manner as the original draft and FEIS if there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action of its impacts.¹⁵ This further confirms that the heart of the 2009 FEIS—the alternatives analysis— was deeply flawed and deficient in adequately analyzing all viable alternatives to the Cape Wind Project. Further, the administrative record that has emerged through the pending litigation demonstrates a lack of objectivity and clear bias on behalf of the action and cooperating agencies. Finally, the mere passage of time of over four years since the

¹⁵ See 40 C.F.R. § 1502.9(c)(2012); *New Mexico ex rel. Richardson v. Bureau of Land Management*, 565 F. 3d 683, 707 (10th Cir. 2009) (finding that a new alternative proposing new locations of activities required a supplemental EIS because it affected "environmental concerns in a different manner than previous analyses," even though the general nature of the alternative's impacts resembled those already analyzed).

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issuance of the 2009 FEIS creates a basic duty on the part of the action agency to complete a supplemental EIS.

In addition, the FEIS relies on the mistaken assumption that Cape Wind will generate local jobs. As discussed in the Associated Press story, "Mass. co says no deal with Cape Wind," (Mar. 11, 2013), Cape Wind's promise of jobs is illusory and appears to have been manufactured to bolster the record for a favorable decision. DOE should ignore all such representations in the record, and must undertake a new analysis of the local jobs issue.

The Alliance further reiterates its request to meet with DOE in response to the December 31, 2012 notice adopting DOI's EIS for the Cape Wind Project and providing a public comment period, and the February 8, 2013 notice extending the public comment period for this proceeding. This request by the Alliance to meet with DOE constitutes its fourth request to meet with the agency.¹⁶ As the Alliance has highlighted before, in order to comply with NEPA, federal agencies are required to include the public in the NEPA decision-making process. Specifically, section 1506.6(a) of NEPA requires that agencies must "make diligent efforts to involve the public in preparing and implementing their NEPA procedures," as well as "solicit appropriate information from the public." 40 C.F.R. 1506.6(d).

Additionally, pursuant to 40 C.F.R. 1506.3(b), because DOE was not a cooperating agency for the Cape Wind FEIS, the FEIS is required to be recirculated under NEPA, which initiates a review period. As specified in the amended February 8, 2013 Notice, a deadline of March 11, 2013 has been set for this review period. The Alliance is seeking to meet with DOE pursuant to this notice to ensure DOE has sufficient information to fulfill its due diligence obligation under NEPA and the DOE Loan Guarantee Program before expending taxpayer dollar to fund the Cape Wind Project. The Alliance does not seek to meet with DOE regarding Cape Wind's pending loan guarantee application itself or any information that would be considered proprietary. Thus, the sensitive nature of the loan guarantee application process should not serve as a reason to deny the Alliance's request to meet.

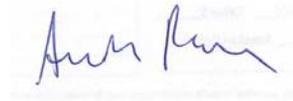
There are numerous other renewable Projects in queue for consideration of a loan guarantee or other federal funding that do not present the risks or negative effects of Cape Wind. DOE should not sacrifice the opportunity to fund other viable and sound Projects in the name of this highly conflicted Project. DOE is under an obligation to the American taxpayers to administer the Federal Loan Guarantee Program in a conscientious and objective manner that utilizes taxpayer monies responsibly and upholds the public trust. In order to fulfill this duty, DOE must conduct a thorough due diligence review of the proposed Cape Wind Project that takes into account new information on the Project. Further, DOE must act sensibly when determining whether to issue a loan guarantee for this Project and ensure it does not place taxpayers dollars at risk. DOE should, therefore, set aside the extensive political pressure it is under to approve this specific project at this flawed location and act in the public interest to deny the loan guarantee application.

¹⁶ The Alliance has previously submitted requests to meet with DOE on November 6, 2012, December 19, 2012 and January 17, 2013. To date, DOE has either denied or ignored the Alliance's requests to meet.

Mr. McMillen
Mr. Stribley
March 11, 2013
Page 19 of 19

Thank you for considering these comments. Please contact the undersigned at (508) 775-9767 should you have any questions.

Sincerely,



Audra Parker
President and CEO

cc: The Honorable Ken Salazar, Secretary of the Interior
The Honorable Steven Chu, Secretary of Energy
David G. Frantz, Acting Executive Director, Loan Programs Office, DOE
Tommy Beaudreau, Director, Bureau of Ocean Energy Management
Laura Davis, Chief of Staff for Secretary of the Interior
The Honorable David J. Hayes, Deputy Secretary of the Interior
The Honorable Hilary Tompkins, Solicitor, Department of the Interior
Senator William Cowan
Senator Elizabeth Warren
Representative Darrell Issa, Chairman of House Oversight and Government Reform
Representative Fred Upton, Chairman of the House Committee on Energy and Commerce
Dr. Kathryn Sullivan, Acting NOAA Administrator
Admiral Robert J. Papp, Jr., Commandant, U. S. Coast Guard
Col. Philip Feir, U. S. Army Corps of Engineers
Mary L. Kendall, Acting Inspector General, Department of the Interior
Michael Huerta, Acting Administrator of the Federal Aviation Administration
Bob Perciasepe, Acting Administrator of the Environmental Protection Agency
Nancy Sutley, Chair, Council of Environmental Quality

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Exhibit 9c



April 22, 2013

Sent via Messenger and E-mail

Matthew McMillen
Director, Environmental Compliance
DOE Loan Programs Office
U.S. Department of Energy LP 10
Room 4B196
1000 Independence Avenue, SW
Washington D.C. 20585

Mr. Todd Stribley
DOE Loan Programs Office
U.S. Department of Energy LP 10
Room 4B196
1000 Independence Avenue, SW
Washington, DC 20585

Dear Mr. McMillen and Mr. Stribley:

The Alliance to Protect Nantucket Sound (the "Alliance") submits these follow-up comments in response to the Federal Register notice issued on February 8, 2013, which confirmed the ongoing review period for the Department of Energy's ("DOE") adoption of the Final Environmental Impact Statement ("FEIS") for the Cape Wind Project ("Project") issued on January 1, 2009 by the Minerals Management Service ("MMS")¹ of the U.S. Department of the Interior, "EIS No. 20120401, Final EIS, DOE, MA, Adoption" 78 Fed. Reg. 9388 (Feb. 8, 2013) (hereinafter "February 8, 2013 Notice").² As you know, under the National Environmental Policy Act ("NEPA"), the review period for the FEIS does not close until a Record of Decision is formally issued for the proposed action, 40 C.F.R. §1505.2, thus the following comments and the attached timeline of relevant events³ must be considered by DOE when evaluating the adequacy of the Project's FEIS.

¹ MMS is the predecessor to the current federal agency, the Bureau of Ocean Energy Management.

² See also "Public Comment Opportunities" on DOE's website, available at <http://energy.gov/nepa/eis-0470-us-department-energy-loan-guarantee-cape-wind-energy-Project-outer-continental-shelf>.

³ The Alliance has previously filed a timeline of relevant events related to Cape Wind's Loan Guarantee application with its prior comments letters submitted on January 29, 2013 and March 11, 2013. The timeline attached to these comments represents an updated version incorporating events since the March 11, 2013 version of the timeline was submitted to DOE.

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Since the Alliance submitted comments on March 11, 2013, new information not previously evaluated during the Project's NEPA process has come to light that must be considered by DOE during its evaluation of the Project's FEIS for a Section 1703 loan guarantee. For the reasons stated in our previous correspondence with DOE, which is incorporated herein by reference, the Alliance objects to any loan guarantee or other form of financial assistance for the proposed Cape Wind Project. To date, there remain a number of unresolved issues regarding the Project's viability and safety that DOE must address under NEPA and require a supplemental Draft EIS.

I. The Lacking Geophysical and Geotechnical Data for the Cape Wind Project Creates Additional Financial Risk.

The administrative record produced by BOEM during the pending litigation reveals that Cape Wind's critical geophysical and geotechnical studies are lacking and to date BOEM has still not completed the necessary studies. The failure to conduct these studies greatly increases the risk of substantial delays in construction, major cost overruns and potentially the viability of the entire Project. The Loan Guarantee Program requires that DOE consider "[t]he levels of market, regulatory, legal, financial, technological, and other risks associated with the Project and their appropriateness" before issuing a loan guarantee to a developer. *See* 10 C.F.R. § 609.7(b)(14). Thus, DOE is under an obligation to consider this new information in the review process.

BOEM's regulations require applicants to conduct extensive geophysical and geotechnical studies *before* it approves a project's construction and operations plan ("COP"). Specifically, the regulations require COPs to include, in relevant part, the survey results of shallow hazards, geological, geotechnical and archeological surveys. *See* 30 C.F.R. §285.626(a). However, in this case, BOEM issued the COP in spite of inadequate geophysical and geotechnical information on the Project with the requisite surveys not having been conducted.

Email communications that have surfaced in the administrative record for the pending litigation show MMS admitting that the Cape Wind project's geophysical and geotechnical studies are lacking. In an October 17, 2006 email from Richard Clingan of BOEM, Clingan states: "Unfortunately, CWA has not acquired sufficient geophysical data and information to adequately delineate in detail geologic hazards and conditions in the vicinity (1000m radius) of even one proposed turbine location based on MMS requirements for shallow hazards surveys." Attachment A. Brian Jordan, an archeologist at the Department of Interior ("DOI") Headquarters, stated that he agreed with Mr. Clingan's assessment and "[i]t might be that, when all is said and done, they [Cape Wind] are going to need to resurvey the area." Attachment B.

In another email from BOEM, Wright J. Frank states that "Cape Wind has done survey work on the area where they wish to install 130 offshore wind turbines. The contractor they hired to do this work, ESS, has sent us the report describing the work done and the results. Our analysis of these submissions appears to reveal large gaps. We have informed Cape Wind of these gaps repeatedly and often. ... Cape Wind has indicated that they may not be able to conduct further

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surveys before receiving their project financing. We are giving Cape Wind an opportunity (on short notice) to demonstrate to us that the surveys already completed meet our requirements, if they can do so." Attachment C.

The ground for allowing the Cape Wind project to proceed, despite missing information that is critical to assessing the safety and economic stability of the project, was not science; but, rather Cape Wind's refusal to commit its own funds to conduct the research federal law requires. As set forth in an email from Dennis Daugherty to the Solicitor of DOI: "...because it [Cape Wind] does not have approximately \$30 million to expend on geological/cultural survey work, it has asked BOEM not to put into the lease a term requiring that the survey be conducted before it submits a COP for approval. Rather they ask that it require the surveys be conducted before actual construction." Attachment D. BOEM was well aware that the COP was deficient and approval was inconsistent with federal regulations: "CWA is correct that the ROD and letter to the Advisory Council on Historic Preservation did not specify that the surveys had to be completed before submittal of a COP. Those documents said that it was needed before construction... As the briefing paper acknowledges, this conflicts with a BOEM regulation which requires core drilling results be submitted with the COP." *Id.*

These emails clearly depict a failure on the part of Cape Wind to conduct all necessary geological and geophysical surveys for the Project. They also confirm that MMS did not conduct a legally sufficient analysis of this important issue, and that the NEPA compliance for the COP was not legally sufficient. Simply put, MMS cut corners and violated NEPA and its regulations to help Cape Wind meet its schedule for project approval. These surveys are especially critical to determining whether Project monopiles can be properly installed and grounded in the sea bed, as well as the cost and effort required to do so. Without this information, there is no guarantee that the Project can be properly constructed or is even viable. As a result, DOE should not issue a loan guarantee for the Project until this information can be adequately reviewed. Issuing a loan guarantee for Cape Wind without this information puts taxpayer dollars at risk in the event the Project is delayed or ultimately fails. According to a study issued by the Society for Underwater Technology Offshore Site Investigation and Geotechnics ("OSIG") Committee issued in 2005, geophysical and geotechnical surveys for offshore wind projects are central to the development of this technology due to the challenging locations in which many of these projects are cited. See "Guidance Notes on Site Investigations for Offshore Renewable Energy Projects" (2005) (Attachment E). According to OSIG,

The important of site investigation for any offshore project cannot be overstated. A site investigation is a critical step in any seabed risk management process and is vital to ensure the success of any offshore project. Fit-for-purpose design is critical in the offshore environment where design conservatism is not a logical mitigation for seabed risk and installation problems can cause significant schedule and cost over-runs. A recent survey of European offshore windfarm projects

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concluded that *approximately 25% of total project capital* could be directly attributed to the chosen foundation system. ...A properly designed, managed and executed site investigation is critical to the success of any offshore renewables project.

Id. at 7. Based on this estimate, \$650 million in project capital costs for Cape Wind are attributed to the Project's foundation system. Thus, a failure to properly examine the Project's geophysical and geotechnical issues renders the economic assertions for the whole project unsubstantiated. Further, potential cost overruns due to inadequate geotechnical and geophysical surveys would increase overall project costs and the Project's viability in the event Cape Wind could not finance the overruns.

In summary, emails from the administrative record – on which DOE purports to rely – demonstrate that BOEM did not have the information its regulations require because for years Cape Wind refused to conduct the very studies that are needed to properly characterize the site so that the Project foundation can be safely designed in a cost effective manner. Cape Wind refused to invest the \$30 million required to develop a safe facility, but now asks DOE to issue a loan guarantee for millions more. The lack of information regarding the geophysical and geotechnical surveys has the potential to cause delays, cost overruns for the Project and may even cause the Project to ultimately fail. DOE should not issue a loan guarantee for the Project until it has the information it is statutorily required to assess, including the "market, regulatory, legal, financial, technological, and other risks associated with the Project."

DOE must "ensure that ... [t]here is a reasonable prospect of repayment by [the] Borrower of the principal of and interest on the Guaranteed Obligations and other Project debt." 10 C.F.R. §609.10(d)(9). Without the required geophysical and geotechnical data, DOE cannot legally issue a loan guarantee. Further, this new information raises significant questions regarding the Project's viability and prospect that Cape Wind could repay a loan guarantee if issued. Thus, issuing a loan guarantee for Cape Wind without this information puts taxpayer dollars at risk in the event the Project is delayed or ultimately fails and would violate DOE's legal obligations.

II. FOIA Documents Reveal Cape Wind Intends to Move Its Staging Location to New Bedford, Massachusetts.

Documents recently obtained by the Alliance through a FOIA request to the City of New Bedford show that Cape Wind intends to move its staging location across state lines from Quonset, RI to New Bedford, MA. Moving the Project's staging location would not only require additional review by the Environmental Protection Agency ("EPA") and public comment under the Clean Air Act, but would also require additional review by the DOI under NEPA, the National Historic Preservation Act, and the Endangered Species Act ("ESA"). Cape Wind has made it clear it is seeking to "hide" this change from NEPA review. Even if the Quonset site is

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used for part of the initial construction, the Project will ultimately make use of the New Bedford site, a project location not considered to date.

The FOIA documents received show that Cape Wind has signed a Letter of Intent recently to move forward with the location of its staging area at New Bedford. A suggested agenda for a November 20, 2012 meeting of the City of New Bedford with the Massachusetts Clean Energy Center included an item, "Letter of intent/Cape Wind lease terms." Attachment F. A November 9, 2012 email from Matthew Morrissey at the New Bedford Economic Development Center to the Massachusetts Clean Energy Center states "We have confirmed with Cape Wind that they are willing to allow the City's Leadership Team to review any documents associated with their LOI [Letter of Intent] and their Lease." Attachment G.

It is apparent that Cape Wind has been speaking regularly with the City of New Bedford about making New Bedford the staging area and proposed terminal for the Project. A June 8, 2012, email confirms a proposed meeting on June 10, 2012 with Cape Wind contractors, Jim Gordon, the President of Cape Wind, and other Cape Wind team members with the New Bedford mayor's office. Further, on July 2, 2012, Jim Gordon sent Matthew Morrissey an e-mail inquiring if "we could move our meeting to this Friday at 10am. ...to bring you and Mayor Mitchell up to date on some Cape Wind developments." Attachment H.

On August 22, 2012, Mr. Morrissey wrote an e-mail to Edward Anthes-Washburn, Executive Director of the New Bedford Harbor Development Commission, stating that Mark Rodgers, the Communications Director for Cape Wind, had called him yesterday. "This is the gist of what he has said and will continue to say. Cape Wind is committed to the Comm of MA [Commonwealth of Massachusetts] and the port of NB [New Bedford] to deploy from, so long as it is ready when we are ready. Both projects seem to be tracking along the same time frame." Attachment I.

Furthermore, additional e-mails confirm Cape Wind's intent to move the Project's staging area to New Bedford from Quonset. On June 25, 2012, Pierre Bernier of Maritime International sent an email to Edward Anthes-Washburn and Eric Bethany, of a transportation company named Bellville Rodair, stating "Thank you for sending us your cargo details, the equipment is obviously for the Cape Wind ocean windmill farm project. For your guidance the project would be handled in New Bedford at South Terminal, a new berth location in the planning process that should be opened for business winter 2014." Attachment J. Additionally, on September 24, 2012, Mr. Anthes-Washburn emailed Mr. Morrissey stating "Finally, I've reached out to Pierre and we're going to meet tomorrow so I can get a better idea of how he envisions other cargo operations happening during the staging of Cape Wind and other offshore wind projects." New Bedford officials have also been meeting with Siemens, Cape Wind's wind turbine supplier, as evidenced by a November 15, 2012, email from Neil Mello, Mayor Mitchell's Chief Aide, to the General Counsel at Cashman Equipment Corporation, another Cape Wind contractor, stating "We have meetings on the 19th (discussing the O&M Program for CW)" Attachment K.

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Based on the above-noted correspondence, it is clear Cape Wind intends to relocate its staging area from Quonset to New Bedford, which would prompt the need for additional environmental reviews. These reviews would further delay construction and operation of the Project, and add additional risk to the overall viability of the Project.

III. Flaws in Cape Wind's Proposed Design.

Numerous concerns have been raised regarding the proposed grout connection technology Cape Wind intends on using to connect the monopiles for the Project to the remainder of the wind tower. This technology would employ a grouted connection to connect the transition piece of the turbine to the pile that is driven in the seabed. Although, grout connection technology has been utilized by the oil and gas industry on drilling and production platform jackets for many years, studies are now showing that this technology may not be safe for offshore wind projects due to the potential for bending of the wind turbine grout connection.

An article published in March 2012 by industry expert Dr. Chris Golightly explains that "the grout in offshore oil and gas pile to jacket connections is usually always in compression, primarily because of the heavy axial dead weight of platforms. In wind turbine monopile connections though, the situation is different. Since severe lateral cyclic bending occurs during extreme wind and wave loading conditions, the dead weight is proportionally much lower and bending predominates. As a result, this leads to periodic tensile stressing of the competitively strong but extremely brittle grouts, which eventually crack and crumble. This can result in failure, settlement, tower tilting and the structure frequently ending up resting on internal support brackets which are not designed for that purpose." Golightly, Chris, "Gambling with grout: worth the risk?," A Word About Wind (Mar. 12, 2013) at 2 (Attachment L). Dr. Golightly has raised concerns that Cape Wind may still be planning to construct using the grout connection technology is method, when several European wind developers are clearly abandoning it for other technologies.

Other experts in the industry have raised similar concerns. Also in March 2012, experts in Europe published another article that concluded grouted connections on offshore wind towers may fail due to the stresses of wind load on the connection. Specifically, the article stated that "for large circular cylinders subjected to bending moments the concrete confinement can never be assure under all loading conditions. It was proved that even under the probability of annual wind load, that the grout could be subjected to high tensile stresses beyond the strength of the grout." Prakhya, Ganga, Chen Zhang, Neil Harding, "Grouted connections for monopiles – limits for large wind turbines," The Structural Engineer at p. 40 (March 2012) (Attachment M). The experts also recommended that additional testing be conducted to predict the behaviors of grouted connections and further confirm the shortfalls of this technology in the context of offshore wind.

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Cape Wind has yet to fully disclose the technology it will employ with regard to the wind towers; however, this remains a critical issue that affects the structural soundness of the Project and must be addressed.

IV. Presence of the North Atlantic Right Whales In the Project Area.

The North Atlantic right whale is a gravely imperilled marine species that is protected by both the Marine Mammal Protection Act and the ESA. Right whale sightings have been documented along the planned vessel routes from both Quonset, Rhode Island to Nantucket Sound and from New Bedford, MA to Nantucket Sound, as well as within Nantucket Sound itself through 2011. For the past four years, right whales have now visited the same areas annually, indicating that sightings in and around Nantucket Sound can no longer reasonably be dismissed as anomalous, and in fact illustrate a the regular presence of the species in the Project area.

Numerous photos of the right whales document their presence in Nantucket Sound. However, photos taken as far back as 2004 (*see* below Images 1-3) show a North Atlantic right whale mother and calf nursing in Nantucket Sound between Martha's Vineyard and Nantucket. The report issued to the National Oceanic Atmospheric Administration regarding this spotting is attached as Attachment C. Additionally, IMAGE 4 below illustrates the proximity of this right whale spotting to the proposed Project area. The NEPA process for the Project did not contemplate the presence of the North Atlantic right whale in the proposed Project area. The abundance of new information confirming the presence of this species in the area cannot be ignored and must be analyzed by engaging in new consultation under the ESA and a new Biological Opinion by the National Marine Fisheries Service.

IMAGE 1:



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IMAGE 2:

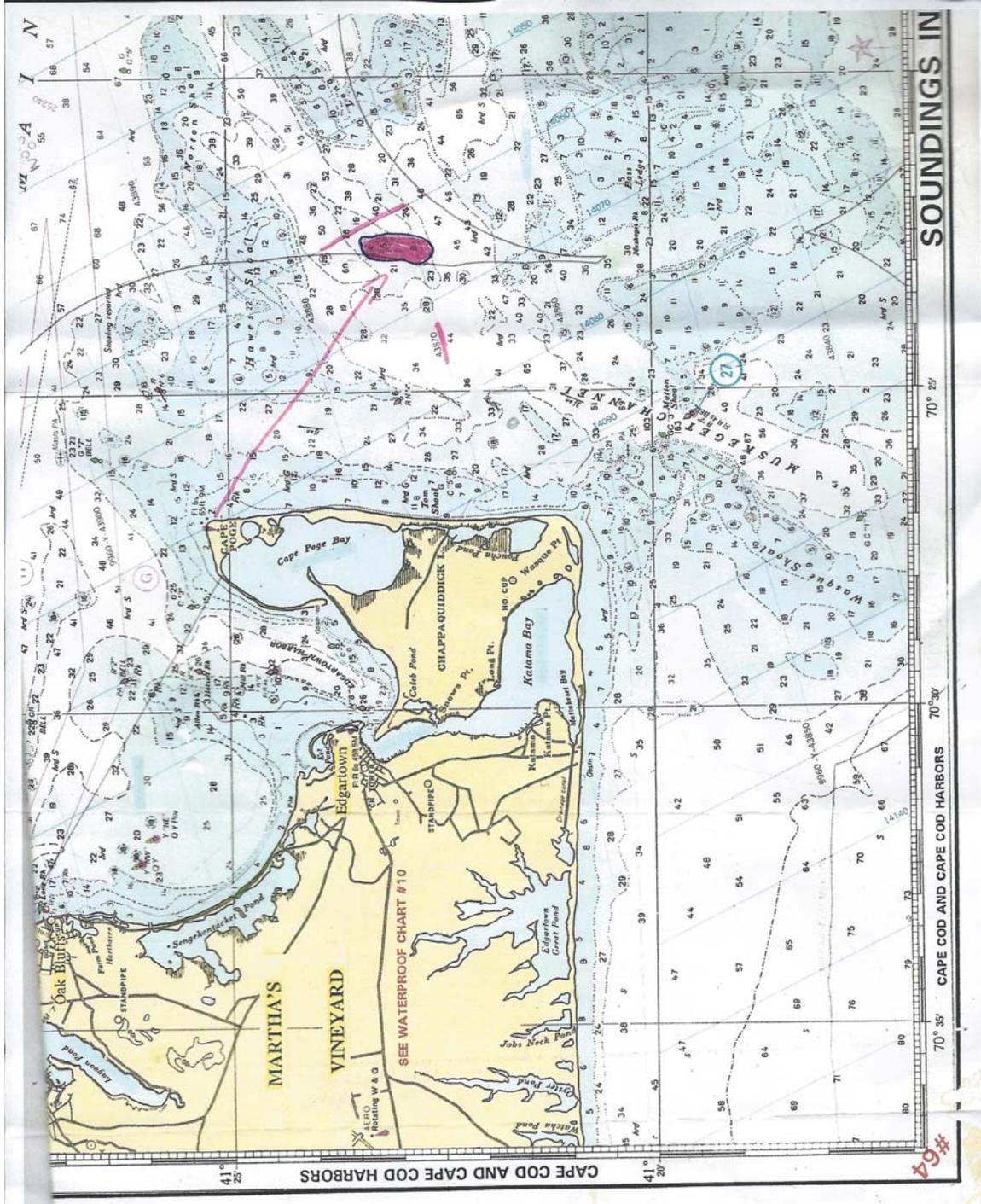


IMAGE 3:



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IMAGE 4:



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V. Study Shows Adverse Effects of Pile Driving on Harbor Porpoises.

In addition to right whales, there are a number of other marine mammals present in the Project area that will be adversely affected. In its Notice for Incidental Harassment Authorization ("IHA") issued on February 1, 2013, 78 Fed. Reg. 7402, in response to Cape Wind's application for an IHA authorization, the National Oceanic Atmospheric Administration identified the marine mammals with known occurrences in Nantucket Sound that could be harassed by high resolution geophysical survey activity in the Sound. Harbor porpoises were identified as one of the marine mammals present in the proposed Project's footprint.

A recent study funded by the German Federal Ministry for the Environment, Nature Conservation and Nuclear Safety, coordinated by the Federal Maritime and Hydrographic Agency (BSH), studied the effects of pile driving of monopiles on harbor porpoises at the first offshore wind farm "Alpha Ventus" in the German North Sea and concluded that the pile driving had adverse effects on the porpoises. *See* Attachment N. The Alpha Ventus wind farm was constructed in 2008 and 2009 approximately 45 km north off the German coast and used percussive piling for the foundations of 12 wind turbines at the project. Each turbine had a rating of 5 megawatts ("MW") for a total project capacity rating of 60 MW. The study conducted visual monitoring of harbor porpoises prior to, during construction, and after operation of the wind farm. Specifically, 15 aerial line transect distance sampling surveys were conducted from 2008 to 2010. Additionally, from 2008 to 2011, static acoustic monitoring with echolocation click loggers was performed at 12 positions. In total, 1,392 harbor porpoise sightings were recorded. *Id.* at p. 1.

The harbor porpoise is particularly vulnerable to disturbances, injury, or death from anthropogenic activities, including by-catch in fisheries, prey depletion, vessel traffic, habitat degradation and noise from activities, such as the installation and operation of marine facilities. *Id.* at p.2. "The most significant threat to marine mammals from offshore wind energy is most probably pile-driving impact noise." *Id.* The visual surveys of the harbor porpoises during and after pile driving illustrated a strong avoidance response within 20 km of the noise source. *Id.* at p. 1. Also, generalized additive modeling of static acoustic monitoring data showed a negative impact of pile-driving on porpoises. Specifically, the surveys showed that porpoises were displaced from their original locations due to noise created from pile-driving. *Id.*

In the case of the Alpha Ventus wind farm, the project was only a total of 12 turbines, yet the pile driving of the project's monopiles had a significant adverse effect on the harbor porpoise. In the case of Cape Wind, the number of monopiles installed will be 11 times the amount at the German project, which raises concerns that local species be suffer even greater harms from the project's construction.

VI. The Avian Bat and Monitoring Plan Fails to Include Thermal Imaging for Birds, Despite the Fact That Both the Framework in the FEIS and the Draft Protocols for the COP Indicated It Would.

The framework for the Avian Bat and Monitoring Plan ("ABMP") incorporated into the FEIS clearly envisioned the use of multiple thermal imaging devices mounted on turbines to record bird collisions – including devices on the turbines "nearest to Monomoy, the perimeter close [] to the mainland, the remainder of the perimeter, and the interior turbines." *See* FEIS, Appx. N; *see also* FEIS at 9-22 (stating that "CWA *will* install a Thermal Animal Detection System (TADS) or similar" (emphasis added)). According to the framework, thermal imaging "is the only remote method for detection of bird-turbine collisions that is developed for offshore use," and unlike radar monitoring, such imaging allows for species-identification, so that its use would provide data on which species of birds were colliding with the turbines. *Id.*

The COP incorporated a draft protocol for the ABMP, which called for the continuous monitoring of bird collisions through year-round use of two thermal imaging devices "capable of recording collisions at night and during foggy conditions, which is not possible with conventional cameras." The documents that the Alliance received through FOIA requests reveal that "FWS and BOEM continue[d] to question the utility of deploying just two [thermal imaging devices] as a monitoring device on a 130 turbine project." *See* Attachment O. FWS strenuously called for a requirement for more thermal imaging devices in the ABMP. *See* Attachment P. However, the final AMBP – which was never subjected to NEPA compliance, nor issued for public notice and comment – abandoned the use of thermal imaging devices altogether. As Dr. Ian Nisbet explained in his previous report to DOE (included as part of the Alliance's January 29, 2013 submission to DOE), this is a major deficiency:

[Arguments that] using TADS would be cost-prohibitive in addition to being unlikely to provide sufficient data to assess incidental take . . . are both specious and outdated. The purpose of most of the ABMP is to determine whether collisions are or are not rare, as claimed in the FEIS. To assume that they are rare and consequently to refrain from looking for them is a dereliction of responsibility. Thermal imaging is the *only* way to detect actual collisions at offshore facilities and hence to assess incidental take.

See Attachment Q (Nisbet letter at 1 (internal citation omitted)). Thus, the final ABMP remains ill-equipped to assess bird mortality that will result from collisions with the Cape Wind project. In short, we will never know how many birds Cape Wind kills, and of what species, because the only accurate way of gathering that data has been inexplicably excised from the ABMP.

DOE must consider this information under NEPA and conduct a thorough due diligence review of the proposed Cape Wind Project that takes into account new information on the Project. DOE is under an obligation to the American taxpayers to administer the Federal Loan Guarantee Program in a conscientious and objective manner that utilizes taxpayer monies responsibly and

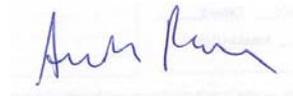
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Mr. McMillen
Mr. Stribley
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upholds the public trust. DOE must act sensibly when determining whether to issue a loan guarantee for this Project and ensure it does not place taxpayers dollars at risk. Therefore, DOE should act in the public interest to deny the loan guarantee application and ignore political pressure to issue a loan guarantee for the Cape Wind project.

Thank you for considering these comments. Please contact the undersigned at (508) 775-9767 should you have any questions.

Sincerely,



Audra Parker
President and CEO

cc: The Honorable Sally Jewell, Secretary of the Interior
The Honorable Steven Chu, Secretary of Energy
David G. Frantz, Acting Executive Director, Loan Programs Office, DOE
Tommy Beaudreau, Director, Bureau of Ocean Energy Management
Laura Davis, Chief of Staff for Secretary of the Interior
The Honorable David J. Hayes, Deputy Secretary of the Interior
The Honorable Hilary Tompkins, Solicitor, Department of the Interior
Senator William Cowan
Senator Elizabeth Warren
Representative Darrell Issa, Chairman of House Oversight and Government Reform
Representative Fred Upton, Chairman of the House Committee on Energy and Commerce
Dr. Kathryn Sullivan, Acting NOAA Administrator
Admiral Robert J. Papp, Jr., Commandant, U. S. Coast Guard
Col. Philip Feir, U. S. Army Corps of Engineers
Mary L. Kendall, Acting Inspector General, Department of the Interior
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