SAVE OUR SOUND
alliance to protect nantucket sound

September 6, 2007

Admiral Thad W. Allen
Commandant, U. S. Coast Guard
Coast Guard Headquarters
2100 Second Street, S.W.
Washington, DC 20593

Dear Admiral Allen:

On behalf of the Alliance to Protect Nantucket Sound (APNS), I am writing to comment on the approach that is being followed by the U.S. Coast Guard (USCG) to comply with section 414 of the 2006 Coast Guard and Maritime Transportation Act, Pub. L. No. 109-241. Congress enacted this law in response to the significant threat posed by the proposed Cape Wind power plant to marine navigation and public health and safety in Nantucket Sound. For the reasons set forth in this letter, APNS supports the USCG determination that more studies are needed, but only if subject to independent and objective research and full public review.

Section 414 of the Coast Guard Act provides as follows:

NAVIGATIONAL SAFETY OF CERTAIN FACILITIES.

> (a) Consideration of Alternatives.--In reviewing a lease, easement, or right-of-way for an offshore wind energy facility in Nantucket Sound under section 8(p) of the Outer Continental Shelf Lands Act (43 U.S.C. 1337(p)), not later than 60 days before the date established by the Secretary of the Interior for publication of a draft environmental impact statement, the Commandant of the Coast Guard shall specify the reasonable terms and conditions the Commandant determines to be necessary to provide for navigational safety with respect to the proposed lease, easement, or right-of-way and each alternative to the proposed lease, easement, or right-of-way considered by the Secretary.
>
> (b) Inclusion of Necessary Terms and Conditions.--In granting a lease, easement, or right-of-way for an offshore wind energy facility in Nantucket Sound under section 8(p) of the Outer Continental Shelf Lands Act (43 U.S.C. 1337(p)), the Secretary shall incorporate in the lease, easement, or

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> right-of-way reasonable terms and conditions the Commandant determines to be necessary to provide for navigational safety.

By these terms, it is clear that the USCG must *completely* evaluate and resolve the marine navigation and safety risks posed by wind energy power plant development in Nantucket Sound. This duty is not discharged by half-measures, the request for applicant information, or the identification of further studies.

To comply with section 414, the USCG must define terms and conditions that address all aspects of this risk. To date, the USCG has not met this requirement.

As we have been briefed by Rear Admiral Pekoske, the USCG has defined a limited set of terms and conditions that deal with a subset of threats to navigation safety. Those terms and conditions have been forwarded to the Minerals Management Service (MMS) for inclusion in the draft EIS under section 388 of the Energy Policy Act of 2005. Most importantly, the USCG has determined that not enough information is available to develop comprehensive terms and conditions. We are concerned and troubled that due to an apparent lack of resources, the USCG will ask the Cape Wind Associates to conduct the necessary studies and provide the missing information.

APNS is not privy to the terms and conditions that have been provided to MMS. We understand from general information, however, that they do not address the critically important, central issue related to wind energy development in Nantucket Sound: the need for mandatory minimum separation zones of at least 1 1/2 to 2 nautical miles (nms) between turbine locations and shipping lanes and ferry routes, as well as a separation of 1 nm between and among turbines. Previous correspondence from APNS and the Massachusetts Fishermen's Partnership clearly establishes the need for these zones. The minimum separation zones from established shipping and ferry routes have already been implemented in the United Kingdom where the risks of offshore wind projects to marine navigation and safety have been extensively studied. Until this central issue is addressed and resolved, all other measures are potentially irrelevant. Adequate separation zones would fundamentally alter a project like Cape Wind and its alternatives. Issues related to lighting, search and rescue, and other operational details are of little value until the bottom-line of turbine interference with marine radar is fully addressed and reasonable and realistic time and space is provided for mariners and boaters to react to avoid collisions.

We commend the USCG for recognizing the need for more information on the "big picture" issues associated with offshore wind plants and navigation, especially the need for studies on the effects of projects like Cape Wind on navigation radar. It is unacceptable, however, to call upon Cape Wind Associates (CWA) to produce such studies. As has been demonstrated time and again over the nearly six years this project has been under review, CWA cannot be relied upon to provide objective, unbiased, or publicly accessible studies and sources of data. It's "all purpose" consulting firm, Environmental Science Services, Inc. (ESS), is functioning as its permit advocate and, as a result, has not produced balanced work product that promotes the public interest. In the past, CWA has turned to ESS for its navigation work. True to form, and as demonstrated by the record and the critique prepared by The McGowan Group, and by Hyannis Marina Owner Wayne Kurker, the ESS navigation studies are seriously flawed. In the comparable situation regarding the need for additional studies on avian impacts, CWA has consistently refused to undertake the reasonable studies required by your sister agency, the U.S. Fish and Wildlife Service. Instead, CWA has cobbled together a series of deficient and inadequate studies (including the refusal to undertake the required avian radar studies) that have not addressed this underlying problem. The USCG can expect the same response from the self-interested project applicant.

The only way to solve this problem is for the USCG to: 1) conduct or commission the studies itself, to be reimbursed by CWA; and 2) open the resulting studies up to public review and comment. The USCG should require CWA to pay for these studies. Should CWA refuse to pay for the studies, USCG, as a cooperating agency under NEPA, should ask the Department of the Interior, Minerals Management Service (MMS), as the lead NEPA agency, to direct CWA to do so. MMS, as the lead NEPA agency, has authority to seek reimbursement for the costs of processing requests for licenses and permits under the Independent Offices Appropriation Act, 31 U.S.C. 483a (recodified at 31 U.S.C. 9701). In the case, as here, with NEPA applications, the lead agency is required to obtain information relevant to a reasoned analysis, and that the agency must request the information that they need in order to do so. 40 C.F.R. sec.1506.5. Furthermore, the Department of the Interior NEPA Manual states that "officials responsible for the development or conduct of loan, grant, contract, lease, license, permit, or other externally initiated activities shall require applicants to the extent necessary and practicable to provide environmental information, analysis, and reports as an integral part of their applications." Department of the Interior Manual, Part 516, Ch. 1, section 1.4C (2004). As CWA has not developed the information relevant to navigational safety of its own accord, it is now up to the agencies to require them to do so.

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The USCG could readily establish a procedure to identify qualified, independent, and objective research entities to conduct this work under USCG oversight and management. CWA should have no greater role in the review and comment on this research than any other member of the public.

Only by following this approach can the USCG expect to have a reliable final product that complies with section 414, inspires public confidence, and positions MMS and the other involved agencies to make valid and balanced decisions that serve the public interest, not CWA's profit motive.

Finally, the USCG determination that more information is necessary means that MMS cannot release the draft EIS. Of the many problems and uncertainties associated with the Cape Wind proposal, marine navigation and safety interference is among the most significant. There is simply no way a meaningful proposal involving Nantucket Sound waters can be framed for public review and agency decision-making until the marine radar interference and separation zone questions have been answered. Failure to do so will deny the draft EIS essential information on a significant issue and give rise to a serious NEPA violation. *See Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 373-374 (1989) (NEPA requires agencies to take a "hard look" at the environmental effects of their planned action, even after a proposal has received initial approval. If there remains a major Federal action to occur, and if the new information is sufficient to show that the remaining action will affect the quality of the human environment in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared); *Dubois v. U.S. Dep't. of Agriculture*, 102 F.3d 1273, 1289 (1st Cir. 1996) (Even if the agency's actual decision was a reasoned one, the EIS is insufficient if it does not properly discuss the required issues; post hoc rationalization of counsel cannot overcome the agency's failure to consider and address significant issues in the FEIS).

NEPA case law strongly supports the duty of the federal government to take a strong role in obtaining the information necessary for informed decisions. For example, in the preparation of an EIS, NEPA requires a "detailed statement" related to several aspects of the proposed action and the alternatives to the proposed action. 42 U.S.C. § 4332(2)(C). Courts have interpreted the "detailed statement" requirement of section 4332(2)(C) to prohibit stubborn problems or serious criticisms from being "swept under the rug." *Silva v. Lynn*, 482 F.2d 1282, 1285 (1st Cir. 1973). "Where comments from responsible experts or sister agencies disclose new or conflicting data or opinions that cause concern that the agency may not have fully evaluated the project and its alternatives, these

comments may not simply be ignored. There must be good faith, reasoned analysis in response." *Id.*

Precedent indicates that the active engagement of cooperating expert agencies weighs heavily in favor of requiring additional work. The First Circuit has held that an EIS may be insufficient if the reviewing agency fails to address adequately criticisms from sister agencies. *Silva* found that an EIS prepared by the Department of Housing and Urban Development (HUD) was inadequate because it failed to provide the "detailed statement" required by NEPA and because the EIS did not address the concerns of other agencies relating to drainage problems at the proposed project site. *Id.* at 1282. The court specifically noted that the EIS "drew heavy fire, as being wholly inadequate, from the federal Departments of Agriculture and of Commerce, and the Environmental Protection Agency, *agencies with expertise* as to drainage problems *equal to or greater than that* of HUD." *Id.* at 1285-1286 (emphasis added).[1] The court remanded the final EIS to the district court with instructions that it be returned to the lead agency, HUD, for more detailed reasoning to support its conclusions. Under *Silva*, MMS therefore has a duty to address in detail the concerns of other agencies, including USCG, during the development of the EIS. This is particularly true because in the current case, as in *Silva*, USCG has greater expertise than MMS on navigational safety issues. If the USCG believes additional studies are necessary, MMS must support that request, in advance of issuing the draft EIS.

In addition to the duty to respond to the requests from other agencies, MMS has an independent duty to address gaps and discrepancies in the data that it relies on to ensure that its final determinations and decisions are well reasoned. Under 40 C.F.R § 1502.24, agencies must ensure the scientific integrity of the discussions and analyses in EISs.

Several cases require additional study when there is scientific uncertainty, and not simply data gaps. In *Roosevelt Campobello Internat'l Park Comm'n v. EPA*, 684 F.2d 1041 (1st Cir. 1982), for example, the First Circuit required a supplemental EIS to incorporate additional real-time simulation studies on oil spills. The court found that the testimony of the EPA and the Coast Guard confirmed the need for a supplemental EIS, and specifically directed that the studies be conducted. The court explained that:

[1] The Energy Policy Act of 2005 specifically requires MMS to consult with other agencies and ensure the protection of the environment while maintaining all other protections under federal law. *See, e.g.*, Energy Policy Act of 2005, Pub. L. No. 109-58 § 388(a) (2005).

> It may very well be that, after conducting real time simulation studies and any other tests and studies which are suggested by the best available science and technology, the most informed judgment of risk of a major oil spill will still have a large component of estimate, its quantitative element being incapable of precise verification. But at least the EPA will have done all that was practicable prior to approving a project with potentially grave environmental costs.

Id. at 1055. As the court held: "NEPA provides an additional ground for overturning the issuance of a permit until the studies have been conducted, circulated, and discussed." *Id.*

Initial studies have suggested the presence of a significant risk in the project area to navigational safety posed by the presence of wind turbines. NEPA requires that MMS address this issue and respond to the concerns raised by its cooperating agencies with greater subject-matter expertise regarding the need for more comprehensive navigational safety studies.[2] If a draft EIS is released including only the minimal USCG recommendations developed to date, and without the supplemental studies, a supplemented draft will need to be published after incorporating that information and making the inevitable changes in the proposed power plant location. The Council on Environmental Quality (CEQ), the executive agency responsible for NEPA implementation, has clearly stated that "NEPA is about informed decisions," and that regardless of the outcome of any permitting decision, "NEPA does require that decision-makers be informed of the environmental consequences of what they decide to do." CEQ, *A Citizen's Guide to the National Environmental Policy Act: Having Your Voice Heard*, at 6 (Feb. 2007). NEPA itself, CEQ regulations for the implementation of NEPA, and NEPA case law confirm the authority and obligation of the federal government agencies to obtain information needed to make these informed decisions.
NEPA regulations provide that agencies are to obtain information relevant to reasonably foreseeable adverse impacts if such information is essential to a reasoned choice among alternatives, so long as the costs associated with obtaining the information are not exorbitant. Specifically, 40 C.F.R. § 1502.22(a) states that "[i]f incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned

[2] CEQ has stated that where a cooperating agency has legal obligations and responsibilities with respect to a proposal, the agency has "an independent legal obligation to comply with NEPA." *CEQ Forty Most Asked Questions*, Question 30 (1981). CEQ has also stated that "if the cooperating agency determines that the EIS is wrong *or inadequate, it must prepare a supplement* to the EIS, replacing or adding any needed information." *Id.* (emphasis added).

choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include that information in the environmental impact statement

Based on the concerns raised in this letter, APNS requests that the USCG:

1) make public at this time the results of its review and recommendations to date, including the additional studies and information required to comply with section 414 of the Coast Guard Authorization Act;

2) establish a formal process, including public input, to select a contractor to prepare an independent and objective analysis of the unresolved issues necessary to develop Nantucket Sound terms and conditions; and

3) advise MMS, through the USCG status as a cooperating agency, that publication of the draft EIS cannot occur until these studies are completed and comprehensive terms and conditions are developed. APNS requests the opportunity to meet with you regarding this important issue.

Thank you for considering these concerns. Please contact me if you have any questions regarding the APNS position.

Very truly yours,

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