

US EPA ARCHIVE DOCUMENT



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
NORTHEAST REGION
55 Great Republic Drive
Gloucester, MA 01930-2276

DEC 30 2010

James J. Kendall, Chief
Environmental Division
Bureau of Ocean Energy
Management, Regulation and Enforcement
US Department of the Interior
Washington, DC 20240

Re: ESA Consultation for Cape Wind

Dear Mr. Kendall,

Enclosed is the biological opinion (Opinion), issued under Section 7(a)(2) of the Endangered Species Act (ESA), for the Bureau of Ocean Energy Management, Regulation and Enforcement's (BOEM) regarding the proposed construction, operation and future decommissioning by Cape Wind Associates, LLC of a wind energy project on Horseshoe Shoal in federal waters of Nantucket Sound, Massachusetts. BOEM's authority to approve, deny, or modify the proposed action derives from the Outer Continental Shelf Lands Act (43 U.S.C. § 1331 et seq.) as amended by the Energy Policy Act of 2005 (P.L. 109-58). The proposed action also requires the issuance of a permit from the US Army Corps of Engineers for sediment disturbing work, pursuant to Section 10 of the Rivers and Harbors Act and issuance of an Outer Continental Shelf Air Permit from the US Environmental Protection Agency (EPA) pursuant to the Clean Air Act that regulates the pollutants emitted from the preconstruction, construction and operation activities of the proposed wind energy facility. This Opinion is based on information provided in BOEM's Cape Wind Energy Project Nantucket Sound Biological Assessment (BA), the Final Environmental Impact Statement for the project (FEIS), correspondence with the BOEM and EPA, and other sources of information.

Consultation was previously concluded between BOEM and NMFS with an Opinion dated November 13, 2008. In that Opinion, NMFS concluded that the proposed action was likely to adversely affect but was not likely to jeopardize the continued existence of the loggerhead, Kemp's ridley, leatherback or green sea turtles. Additionally, NMFS concluded that the proposed action was not likely to adversely affect right, humpback or fin whales and, therefore, was not likely to jeopardize the continued existence of these whale species. NMFS also concluded that the action would not affect hawksbill turtles, shortnose sturgeon, or sperm, blue or sei whales as these species do not occur in the action area. Because no critical habitat is designated in the action area, none would be affected by the proposed action.



In the spring of 2010, over 90 North Atlantic right whales were observed in Rhode Island Sound and nearby waters, including areas to be transited by project vessels originating from the staging site at Quonset, RI. While right whales were not sighted in the area proposed for construction (i.e., the project footprint on Horseshoe Shoal within Nantucket Sound), right whales were observed in nearby areas and along the route that would be used by vessels moving between the project footprint and the project staging area near Quonset, RI. When compared to sightings in previous years, these sightings represent a higher than average number of right whales in the action area and nearby areas. As noted in BOEM's July 13, 2010 letter to NMFS, these sightings represent new information that when analyzed may reveal effects of the action that may affect listed species in a manner or to an extent not previously considered. As such, NMFS concurred with BOEM's determination that reinitiation of consultation was appropriate; specifically, to consider the new information on the presence of right whales in the action area. Consultation was reinitiated on July 26, 2010.

The enclosed Opinion supersedes the Opinion issued on November 13, 2008; however, the conclusions are the same. In this Opinion, NMFS concludes that the proposed action is likely to adversely affect but is not likely to jeopardize the continued existence of the loggerhead, Kemp's ridley, leatherback or green sea turtles. Additionally, NMFS has concluded that the proposed action is not likely to adversely affect right, humpback or fin whales and, therefore, is not likely to jeopardize the continued existence of these whale species. NMFS has also concluded that the action will not affect hawksbill turtles, shortnose sturgeon, or sperm, blue or sei whales as these species do not occur in the action area. Because no critical habitat is designated in the action area, none will be affected by the proposed action.

Incidental take is defined as take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. Under the terms of section 7(b)(4) and section 7(o)(2) of the ESA, taking that is incidental to and not intended as part of the agency action is not considered to be prohibited under the ESA provided that such taking is in compliance with the terms and conditions of this Incidental Take Statement. The Incidental Take Statement (ITS) accompanying this Biological Opinion, pursuant to Section 7 (b)(4) of the ESA, exempts the incidental taking of a certain number of sea turtles by harassment during the pile driving and high resolution geophysical survey. As explained in the ITS, exposure of sea turtles to sound levels between 160dB and 180dB will be considered harassment because that level of noise will disturb sea turtles and their normal behaviors (i.e., resting, foraging or migrating through the area) will be interrupted. Any sea turtles located within 3.4km of the pile being driven will be exposed to these disturbing noise levels and are likely to exhibit avoidance behavior which would cause the alteration of normal behaviors. As loggerhead, Kemp's ridley, green and leatherback sea turtles are likely to be present in the action area and exposed to potentially harassing sound levels, harassment of any of these species could occur and NMFS anticipates that the 3-7 sea turtles exposed to harassing noise levels during each pile driving event could be individuals of any of these species. Additionally, NMFS has estimated that between 13 and 28 sea turtles will be exposed to harassing levels of noise during the high resolution geophysical survey. These sea turtles are expected to be a combination of loggerhead, Kemp's ridley, green and leatherback sea turtles. As sea turtles are only likely to occur in the action area between June and November, only pile driving occurring during these months will result in the

harassment of sea turtles. Similarly, effects to sea turtles from the high resolution geophysical survey would only occur if the survey took place between June and November.

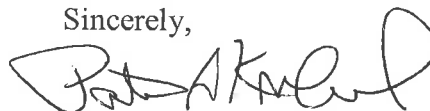
The ITS specifies five reasonable and prudent measures (RPMs) necessary to minimize and monitor take of listed species. The RPMs outlined in the ITS are non-discretionary, and must be undertaken so that they become binding conditions for the exemption in section 7(o)(2) to apply. Failure to implement the terms and conditions through enforceable measures may result in a lapse of the protective coverage of section 7(o)(2). Monitoring that is required by the ITS will continue to supply information on the level of take resulting from the proposed action.

This concludes formal consultation with BOEM, ACOE and EPA regarding the proposed construction, operation and future decommissioning by Cape Wind Associates LLC of a wind energy project on Horseshoe Shoal. Reinitiation of consultation is required and shall be requested by BOEM or by NMFS, where discretionary Federal involvement or control over the action has been retained or is authorized by law and: (a) the amount or extent of incidental take is exceeded; (b) if new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered in the consultation; (c) if the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the consultation; or (d) if a new species is listed or critical habitat designated that may be affected by the identified action.

As you know, the Opinion only considers effects to species listed by NMFS as threatened or endangered. Several species protected under the Marine Mammal Protection Act (MMPA), including gray seals, harbor seals, and harbor porpoise occur in Nantucket Sound and may be affected by project construction and operation. It is our understanding that coordination with NMFS Office of Protected Resources regarding MMPA authorization is currently ongoing.

We look forward to continuing to work cooperatively with your office to minimize the effects of energy projects on listed species in the northeast region. For further information regarding any consultation requirements, please contact Julie Crocker at (978)282-8480 or by e-mail (Julie.Crocker@noaa.gov). Thank you for working cooperatively with my staff throughout this consultation process.

Sincerely,



Patricia A. Kurkul
Regional Administrator

cc: Lewandowski- BOEM
McDonnell – EPA R1
Adams – ACOE

File Code: Section 7 MMS/BOEM Cape Wind Nantucket
PCTS: F/NER/2010/03866