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United States Department of the Interior



FISH AND WILDLIFE SERVICE

New England Field Office

70 Commercial Street, Suite 300

Concord, New Hampshire 03301-5087

<http://www.fws.gov/northeast/newenglandfieldoffice>

Re: Cape Wind Associates, LLC
Outer Continental Shelf (OCS) Air Permit Application
Section 7 Endangered Species Act Concurrence

December 17, 2010

Mr. Stephen Perkins, Director
Office of Ecosystem Protection
U.S. Environmental Protection Agency
6 Post Office Square, Ste 100
Boston, Massachusetts 012109-3912

Dear Mr. Perkins:

This replies to your October 25, 2010 letter addressing the Environmental Protection Agency's (EPA) obligations pursuant to section 7 of the Endangered Species Act of 1973 (ESA), 16 U.S.C. §1536, in regard to the proposed approval of an Outer Continental Shelf (OCS) air permit to Cape Wind Associates, LLC (Cape Wind). Specifically, your letter requests confirmation that EPA's consultation obligations under section 7 of the ESA have been satisfied. We concur that they have. As discussed below, we base that conclusion on: 1) our formal consultation with the Minerals Management Service (MMS) (now the Bureau of Ocean Energy Management, Regulation and Enforcement) as lead federal agency on its own behalf, and that of EPA and the Army Corps of Engineers; 2) the U.S. Fish and Wildlife Service's (Service) resulting November 21, 2008 biological opinion; and 3) additional analyses provided in your October 25, 2010 correspondence.

As a prefatory matter, on November 1, 2010, we received a copy of your October 29, 2010 letter to Mr. Dennis Duffy, Vice President of Regulatory Affairs for Cape Wind, requesting clarification on whether or not Cape Wind had revised its project plan with regard to using New Bedford, Massachusetts versus Quonset Point, Rhode Island to stage construction for the Cape Wind Project. A reply to you from Mr. Duffy, dated November 17, 2010, confirms that Cape Wind has **not** revised its project plan with regard to potential future use of a proposed marine terminal in New Bedford and requests action on its air permit application as pending with EPA.

On May 19, 2008, MMS (BOEMRE) formally requested to serve as the lead agency for the formal consultation on the Cape Wind Project, on its own behalf and that of EPA and the Army Corps of Engineers.¹ The biological opinion, which analyzes effects and provides incidental take coverage for endangered roseate terns (*Sterna dougallii*) and threatened piping plovers (*Charadrius melodus*), states (page 1) that “MMS, the lead federal agency, is also consulting with the Service on behalf of the Army Corps of Engineers (ACOE) and the Environmental Protection Agency, the additional federal agencies with approval or permitting authorities for the Cape Wind Project.” EPA’s fact sheet also properly notes that EPA has relied on the ESA consultation with MMS to fulfill its obligations under the ESA for this project.

In reply to your recent request, we have reviewed our record, including our November 21, 2008 biological opinion to MMS, EPA’s fact sheet for an Outer Continental Shelf Air Permit Approval, Cape Wind Energy Project, Horseshoe Shoal, Nantucket, Massachusetts, and EPA draft permit number OCS-R1-01. The Service concurs that the proposed EPA action of issuing an OCS air permit for the Cape Wind Project is a related and necessary component for a larger action (issuance of an OCS lease) that the Service has already reviewed and for which the Service has issued a final, non-jeopardy biological opinion. In that respect, it is important to note that EPA’s proposed air permit examines the same project that the Service previously reviewed. Thus, our underlying analyses of the proposed activities remain relevant and unchanged. However, because our November 2008 opinion to MMS did not explicitly discuss air quality effects with regard to listed roseate terns and piping plovers, this letter addresses that point and clarifies whether any of the estimated take of roseate terns and piping plovers is apportioned to EPA for its part of the larger proposed action.

As noted in your October 25, 2010 letter, EPA is not aware of any information that suggests air emissions from the construction equipment and vessels regulated by EPA’s air permit would be likely to take or cause the take of any [threatened] or endangered species, or result in adverse modification of habitat designated as critical. You have further noted that most of the emissions are far from shore, are short-lived and will be considerably less during the second year of construction. EPA’s review of Cape Wind’s emissions impact analysis shows that the project’s peak emissions will not result in exceedance of any currently attained primary or secondary National Ambient Air Quality Standard.

¹ Pursuant to the Service’s consultation regulations. “[w]hen a particular action involves more than one Federal agency, the consultation and conference responsibilities may be fulfilled through a lead agency. Factors relevant in determining an appropriate lead agency include the time sequence in which the agencies would become involved, the magnitude of their respective involvement, and their relative expertise with respect to the environmental effects of the action. The director [of the Service] shall be notified in writing by the lead agency.” 50 C.F.R. § 402.07.

The Service is similarly unaware of any information that suggests roseate terns and/or piping plovers are acutely sensitive to changes in air quality. The Service has recently completed five-year status reviews for both the piping plover and the roseate tern:

http://www.fws.gov/northeast/endangered/PDF/Piping_Plover_five_year_review_and_summary.pdf
<http://www.fws.gov/northeast/endangered/PDF/ROST%205-year%20final.pdf>

respectively, in which all recently published and much of the available unpublished scientific literature for both species was reviewed. The five-year reviews also contain an updated and comprehensive threat assessment. During preparation of the reviews, the Service found no evidence that short-term emissions from vessels and construction vehicles will result in adverse effects to plovers and terns. The Service has also reviewed a large body of scientific literature examining the many potential effects on birds from wind power development in the offshore marine environment. Many of these studies are cited in our November 2008 biological opinion. Degradation of air quality during project construction and maintenance was not identified in any of these studies as a factor likely to be of importance to birds. Additional information indicating that piping plovers and roseate terns are only seasonally present in Rhode Island and Massachusetts waters and thus are only present in the Quonset Point to Nantucket Sound area is discussed at length in the November 2008 biological opinion.

Based on the above analyses, we concur that the air permitting activities over which EPA has authority are not likely to adversely affect these or other listed species. We also conclude that EPA's proposed issuance of an OCS air permit for the Cape Wind Project will not cause "take" of those species. The Service's biological opinion finds that incidental take of roseate terns and piping plovers will be caused solely by collision with the turbines and other structures associated with the Cape Wind Project. EPA's actions authorize construction of the wind turbines and regulate the construction vessels' air emissions, but do not authorize or in any way regulate the eventual wind turbines once constructed. Although the biological opinion was prepared for each of the action agencies, and its analyses remain relevant, incidental take coverage for EPA is unnecessary, given our finding that listed species are not likely to be adversely affected by air permit-related activities.

Through this correspondence, we officially conclude this consultation, subject to potential future need for reinitiation. Please contact me or Mr. Michael Amaral of my staff 603-223-2541 if we can be of further assistance.

Sincerely yours,



Thomas R. Chapman
Supervisor
New England Field Office

Mr. Stephen Perkins, Director
December 17, 2010

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cc: Poojan Tripathi, BOEMRE
Karen Adams, ACOE
Ken Kimmel, EOEEA
FWS Reg. Sol.-D. Rothstein
Reading File
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