

**Supplemental Statement of
Cape Wind Associates, LLC**

before the

United States Commission on Ocean Policy

January 14, 2003

**Prepared by Dennis J. Duffy
Vice President of Regulation Affairs
Cape Wind Associates, LLC**

1. Introduction to Cape Wind

Cape Wind Associates is developing the nation's first offshore wind farm, which will be located in waters subject to Federal jurisdiction some five miles off the coast of Massachusetts. It will be capable of generating 420 mw of clean and renewable energy and will offset approximately one million tons of greenhouse gases each year, while lowering regional electricity prices. The applicable permit application under existing Federal law was filed with the Army Corps of Engineers (ACE) in the fall of 2001 and a comprehensive review process (including in-depth analysis of alternative locations) is now well underway. A draft environmental impact statement is scheduled to be issued in February of 2003. Cape Wind hereby offers its supplemental comments in response to assertions that (i) there is currently a lack of statutory authority for comprehensive siting review and authorization, and (ii) an open-ended prohibition on offshore renewable energy projects is appropriate.

2. The Commission Should Take Notice of Other Federal Consideration of these Issues.

The Commission should be aware that other Federal authorities have already given in-depth attention to related policy issues, such that coordination seems advisable. First, offshore renewable policy issues were recently considered by the House Subcommittee on Energy and Mineral Resources in the context of H.R. 5156, which was introduced last session after interagency policy review lead by the Department of the Interior. Second, in Alliance to Protect Nantucket Sound, et al, v. United States Department of the Army, et al, United States District Court of the District of Massachusetts Civil Action No. 02-11749 jlt,² the ACOE (as represented by the United States Attorney and the United States Department of Justice) has taken the position that the ACOE already has the requisite statutory authority to review and authorize the siting of non-extractive offshore structures. Third, as noted below, the Bureau of Land Management recently issued a new Federal policy for the review and authorization of windfarms on onshore public lands in a way that resolved many of the policy issues raised before the Commission. Reference to the foregoing efforts would avoid duplication and encourage consistent Federal policies.

3. Current Law Provides Statutory Authority for the Comprehensive Siting Review and Permitting of Non-Extractive Structures on the Outer Continental Shelf.

(a.) Comprehensive Environmental Review Standard.

As an initial matter, it is important to understand the current regulatory treatment of renewable energy projects on the outer continental shelf (OCS). Under current

² In such proceeding, the so-called Alliance has requested that the Federal court block the operation of our offshore scientific monitoring tower, which has been granted a temporary permit by the Corps for the purpose of gather meteorological data. The Alliance thus seeks to prevent even the gathering of scientific data that could confirm or disprove the suitability of the proposed site of the Cape Wind project. Its comments on national energy policy should be weighed accordingly.

Federal law, any such project requires the prior authorization of the United States in the form of a permit from by the Army Corps of Engineers under Section 10 of Rivers and Harbors Act. The ACE's powers under Section 10 have been held to constitute the "affirmative authorization" of proposed structures pursuant to delegated Congressional authority. Pursuant to such provisions, ongoing OCS wind energy projects are subjected to comprehensive review under the regulations of the ACE and require the preparation of a full Environmental Impact Statement pursuant to the NEPA. Indeed, the following provisions of the ACE's regulations (33 CFR § 325.3(c)) confirm the comprehensive scope of the currently required review proceedings:³

The decision whether to issue a permit will be based on an evaluation of the probable impact including cumulative impacts of the proposed activity on the public interest. That decision will reflect the national concern for both protection and utilization of important resources. The benefits which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. All factors which may be relevant to the proposal will be considered including the cumulative effects thereof; among those are conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shoreline erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people. (Emphasis added.)

Further, the NEPA review focuses specifically on whether the applicants have proposed the best site, including an analysis of the reasonable alternative sites. Thus, every legitimate issue of concern respecting the potential impacts of our project is being considered in the current review process, which is expressly designed to "balance" the wide range of factors affecting the public interest.

(b) Congress has not Required Compensation from Non-Extractive Offshore Structures.

While Congress has thus provided for the comprehensive siting review and authorization of non-extractive structures on the OCS (including such structures as gas pipelines, electric and telecommunications cables, radio towers, and thermal energy projects), Congress has not to date found it necessary to require compensation for such structures. In contrast, the Outer Continental Shelf Lands Act (OCSLA) provides for royalty payments pursuant to "mineral leases" authorizing the extraction, purchase and sale of submerged oil, gas and mineral deposits. In this regard, current law treats offshore wind energy projects in a manner much more comparable to the treatment of other non-extractive structures. In particular, in recognition of the special policy benefits and challenges of developing new renewable energy sources, the Ocean Thermal Energy Conversion Act (42

³ Although the ACE's focus under Section 10 permit review was in the distant past limited to navigability issues, such is no longer the case. The ACE modernized its Section 10 regulations in 1968 to require the express consideration and balancing of a comprehensive range of issues in a broad "public interest review." Thus, the suggestion that the Corps' updated review process is "narrow and anachronistic" or not designed to achieve "a responsible balance" is simply incorrect. See 42 Fed.Reg. 37122(1977) for discussion of the development of the ACE's modern review protocol.

USC 9101) provides for the Federal permitting of non-extractive thermal energy projects on the OCS, but does not require any lease payments or royalties to the Federal government. To the contrary, such act makes available certain financial assistance for the construction and operation of ocean thermal energy facilities. If some new legislation were considered, we would find offshore wind energy projects to be for more analogous to other non-extractive structures than to the offshore drilling and extraction of oil and gas.

4. **The Federal Government has Recently Resolved Many of The Same Issues in Developing its New Policy for Siting Wind Farms on On-Shore Public Lands.**

On October 16, 2002, the Bureau of Land Management of the Department of Interior issued its new Interim Wind Energy Development Policy, Inst. Memo No. 2003-020 (the “BLM Policy”), for the siting review and authorization of private wind farm proposals on on-shore public lands, a process that raised or considered many of the same policy concerns now facing the Commission. Perhaps most importantly, the BLM Policy found that “the President’s National Energy Policy encourages development of renewable energy resources, including wind energy, as part of an overall strategy to develop a diverse portfolio of domestic energy resources for our future.” Specific provisions include the following:

“First-Come” Permit Review. Although the authorization of on-shore wind farms pursuant to competitive bidding processes was specifically considered, the BLM Policy rejected such approach in favor of “first come” review of individual project proposals. The Government decided that “the processing of wind energy right-of-way applications on a first come basis is consistent with the President’s National Energy Policy and will encourage the access to public lands for renewable energy resource assessments and development.”

- **Pending Applications.** It also determined that “pending applications will be processed consistent with the guidance provided by [the BLM Policy] prior to the acceptance of new applications for the same lands.”
- **Applicant Capability.** Further, in order to discourage the potential for land speculation, the BLM Policy provides for a review of the applicant’s technical and financial capability and further provides for authorizations to lapse if not pursued in a timely manner with due diligence.
- **Priority Review.** The new Policy provides that, in recognition of the pressing need to develop alternative energy sources, wind farm applications will be given a high priority for timely processing and review.

Thus, many of the wind power issues raised before the Commission have recently been reviewed and resolved by the Federal government, and much of the analysis of the BLP Policy would apply with equal force to offshore wind projects. At a minimum, the interest of consistent Federal policy should cause the Commission to carefully consider the recent consideration of comparable issues in the BLM Policy.

5. A Moratorium on Renewable Energy Projects would be Contrary to National Interests.

Throughout its comments, the Alliance and others urge the Commission to recommend that Federal agencies responsible for regulating the OCS “defer decisions” for an unstated and open-ended period of time, presumably until Congress changes the current laws to be more to their liking. A proposed moratorium, however, is contrary to the National interest and the express provisions of Executive Order 13212, “Actions to Expedite Energy-Related Projects,” which recognizes the compelling National need “to take additional steps to expedite the increased supply and availability to our Nation,” and directs each Federal agency to conduct statutory review of proposed energy facilities in an expedited manner, as follows:

Increased production in transmission of energy in a safe and environmentally sound manner is essential to the well being of the American people. In general it is the policy of this administration that executive departments and agencies shall take appropriate action to the extent consistent with applicable law to expedite projects that will increase the production, transmission, or conservation of energy.

The need for expedited action is even greater in this case, since the Cape Wind project, as a non-combustion generating source, represents the most practical and immediately available means to effect a major impact on greenhouse gas emissions. Application of the marginal emission rate factors calculated by the New England Independent System Operator (“ISO-NE”) to Cape Wind’s forecasted electrical output indicates that the project would offset more than one million tons per year of CO₂, making it the region’s most important and immediately available climate change response.

Notably, when a “moratorium” to block the Cape Wind project was previously suggested, it was the overwhelming consensus of the major environmental and consumer advocacy groups that a moratorium is both unnecessary and inappropriate. Attached in this regard are the letters of the Conservation Law Foundation, Union of Concerned Scientists, GreenPeace USA, Healthlink, Cape Clean Air, MassPIRG and the National Resource Defense Council each of which strongly opposes a moratorium or delay of the Cape Wind project. In particular, the Conservation Law Foundation letter stressed the “it is imperative that there be timely review of the proposal, and timely development of wind energy, in light of dramatic current and future damage caused by power plant emissions and the importance of wind energy as a means of mitigating that damage,” with such letter concluding, that the provisions of current law are sufficient to ensure an effective governmental decision on the siting of the Cape Wind project:

Our organizations include one of the Nation’s leading advocates for better development resource management and regulatory framework for the marine environment. In our view, the Section 10 and NEPA processes can and should be used to produce good offshore wind energy siting decisions in the near term. Given ongoing opportunities for public comment required by current law and the wide spread interest the Cape Wind project has generated among citizens, advocates and governmental officials, we believe there will be very thorough scrutiny of potential negative impacts the project could have.

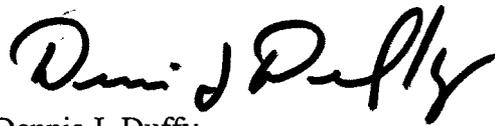
The Commission should thus discount the request of the Alliance to Protect Nantucket Sound, whose real purpose is to prevent the authorization (or even the review) of a particular project and urge the prompt and thorough completion of the ongoing review of the Cape Wind application consistent with Executive Order 13212.

6. Conclusion

Cape Wind has undertaken the Nation's first offshore wind project largely in response to Federal and State inducements, incentives and policy directives. We urge the Commission to follow a course of action that allows the timely review of applications pending in full compliance with existing law, consistent with Executive Order 12312, so that the public may realize the benefits of this new and promising energy sector. There is no realistic alternative to Cape Wind that offers comparable public benefits regarding cleaner air and climate change, lower energy prices, energy independence and economic development. Most importantly, if the Commission ultimately decides to recommend substantive statutory revisions, it can and should do so in a manner that does not unduly delay or disrupt projects already under development.

Please feel free to call if you should have any comments or questions.

Sincerely,



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The Commonwealth of Massachusetts

House of Representatives

State House, Boston 02133-1054

January 15, 2003

Senator Harry Reid
528 Hart Senate Building
Washington, D.C. 20510

Re: Moratorium on Renewable Energy Project

Dear Senator:

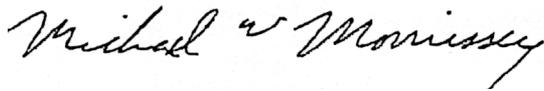
We are writing to oppose any attempt to legislatively block or delay the ongoing regulatory review of the Cape Wind project. This groundbreaking project would be located off the coast of Massachusetts and produce 420 megawatts of clean and renewable sources of energy, reduce our dependency on foreign sources, and offset approximately one million tons of greenhouse gases per year, all while reducing regional electricity prices. As we understand it, there have been discussions regarding a Senate appropriations rider that would, without a hearing on the merits and before comprehensive environmental reports are completed, preclude the expenditure of governmental funds for the continued review of this critically important project.

As you may know, this project filed its permit applications in 2001 and has been undergoing one of the most comprehensive and exhaustive environmental reviews ever undertaken in this region at a cost of millions of dollars. This process is being conducted on a coordinated basis by state and Federal agencies, and involves a full Environmental Impact Statement under the NEPA, and will specifically include a full analysis of the reasonable alternative sites and technologies. The mandatory scope of issues being reviewed under current law includes environmental, aesthetic, fish and wildlife, navigation, recreation, energy and other factors, as well as the general needs and welfare of the people. The ongoing process also affords extraordinary and continuing opportunities for public participation and comment. We also understand that the draft EIS (which will be based upon scientific studies and data) is expected to be available as early as next month.

We wish to strongly support the timely review and development of affordable, clean, and reliable resources for the Commonwealth, and the Cape Wind project is exactly the type of project that encapsulates these attributes of renewable energy. Equally important, Cape Wind will provide jobs and environmental benefits for Massachusetts residents. It is also a critical component in maintaining fuel diversity in the region, a concern exacerbated by over-dependence upon foreign fuel supply. The Cape Wind project is also a unique opportunity to step to the forefront of the worldwide renewable energy market.

In light of these compelling public benefits, we strongly believe that any prohibition or moratorium by appropriation would be an inappropriate way to address issues that are so critical to the Nation's and Commonwealth's interest. If parties have substantive concerns with this or any other renewable energy project, it would be more appropriate to address such concerns in the pending regulatory proceedings.

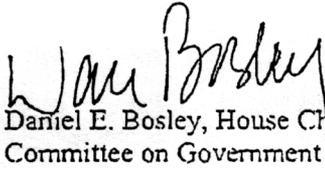
Sincerely yours,



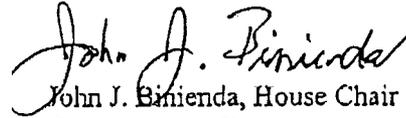
Michael W. Morrissey, Senate Chair
Committee on Government Regulations



Susan C. Fargo, Senate Chair
Committee on Energy



Daniel E. Bosley, House Chair
Committee on Government Regulations



John J. Binienda, House Chair
Committee on Energy

cc. Senator Edward M. Kennedy
Senator John F. Kerry