



July 25, 2016

Betsy Nicholson  
Federal Co-Lead  
Northeast Regional Planning Body  
55 Great Republic Drive  
Gloucester, MA 01930

Dear Ms. Nicholson:

The Alliance to Protect Nantucket Sound submits these comments in response to Federal Register Notice, 81 Fed. Reg. 33213 (May 25, 2016) (Department of Commerce: RIN 0648-XE633) regarding the draft Northeast Ocean Plan. The Alliance is a nonprofit environmental organization dedicated to the long-term preservation of Nantucket Sound, the unique body of water that lies between Cape Cod, Nantucket, and Martha's Vineyard. Our goal is to protect Nantucket Sound in perpetuity through conservation, environmental action, and opposition to inappropriate industrial development that would threaten or negatively alter the coastal ecosystem.

Since our inception in 2002, we have been calling for the establishment of a national ocean policy based on coastal and marine spatial planning (CMSP) to balance the protection of marine ecosystems with competing development interests. Given the emergence of new uses for our waters, comprehensive planning is critical to not only ensure that our waters are protected, but also to help expedite appropriately sited development.

We submitted the attached comments to the Interagency Ocean Policy Task Force on February 12, 2010, which responds to the federal CMSP interim framework and additional background on the unique values of Nantucket Sound, including its marine ecosystem, biological diversity, tribal and historical significance, and value to the local community for fishing, recreation, and tourism. **Attachment 1.**

The Alliance comments remain as valid today as they were over six years ago, and we ask that the Northeast Regional Planning Body adopt the recommendations set forth in these comments as guiding principles in the development of the Northeast Plan.

We also call to your attention the equally relevant recommendations submitted by Senator Kennedy and Congressman Delahunt (**Attachment 2**), and Senator Paul Kirk (**Attachment 3**), both of which commended the development of CMSP principles into a coordinated natural ocean strategy, and highlighted the importance of applying those principles to ensure the long-term protection of Nantucket Sound and the development of proper planning mechanism by

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the Department of Interior for offshore wind project leasing. These recommendations should be incorporated into the Northeast Ocean Plan.

A. General Comments

The Northeast Ocean Plan is general in nature and provides an “integrated, comprehensive, ecosystem-based, flexible, and proactive approach to planning and managing uses of the northeast marine environment.” 81 Fed. Reg. 33214. The Plan is intended to serve as a “forward-looking document” that will be applied to advance three main goals: (1) “Healthy ocean and coastal ecosystems; (2) effective decision-making; and (3) compatibility among past, current, and future ocean uses.” *Id.* It provides data to inform agency actions and “locate potential areas of conflict . . . describes best practices for inter-agency coordination as well as coordination among federal agencies, tribes, states, and stakeholders . . . and increasing coordination across these governments.” *Id.* In addition, under Executive Order 13547, each federal agency that is part of the National Ocean Council (NOC) must comply with certified regional plans. Thus, once it is certified by the NOC, the federal members of the Northeast Regional Planning Board “will use the Northeast Ocean Plan to guide and inform their actions consistent with their existing statutory and regulatory authorities.” 75 Fed. Reg. 43021 (July 19, 2010). The federal agencies will incorporate the Plan into “their pre-planning, planning, and permitting to guide and inform . . . internal and external permitting decisions, environmental compliance, resource management plans, and other actions taken pursuant to existing statutory and regulatory authorities.” 81 Fed. Reg. 33214-215. Federal compliance with the Plan must occur “to the fullest extent possible.” 81 Fed. Reg. 33215.

The Alliance recognizes and appreciates these guiding principles. It is to be hoped that the NOC and the federal members of the Northeast Regional Planning Board will indeed follow them, rather than accord them only lip service. Indeed, throughout the development of CMSP, the Department of Interior (DOI) participation in NOC, in particular the Minerals Management Service (MMS)/Bureau of Ocean Energy Management (BOEM), simply gave superficial recognition to these principles in all aspects of leasing for the Cape Wind project. In doing so, MMS/BOEM issued a lease for a large-scale wind energy project in Nantucket Sound, despite the clear conflicts with other users and resources and availability of alternatives, in violation of every cardinal principle of CMSP. As discussed in this letter, BOEM now has a clean slate upon which to consider its planning, permitting, environmental compliance and advice regarding offshore wind development in Nantucket Sound including the Cape Wind project. If BOEM follows Executive Order 13547 and conforms its advice to the Northeast Ocean Plan, it will decline to issue future authorizations of any kind to the now-suspended and legally invalidated Cape Wind project.

B. Termination of Cape Wind

Allowing projects such as Cape Wind, the industrial scale wind project proposed for the unprotected federal waters of Nantucket Sound, to move forward without first completing a national ocean zoning plan would result in harm to the environment and to the ecosystem, as a

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whole, and the industrialization of areas that should ultimately be designated as off limits to development.

However, there is an opportunity to correct this “cart before the horse” problem. Cape Wind’s lease to 46 square miles of Nantucket Sound issued by the Department of the Interior (DOI) in 2010 is currently suspended through July 2017. More importantly, a recent decision by the District of Columbia Circuit Court of Appeals, *Pub. Emps. of Env’tl. Responsibility v. Hopper*, D.C. Cir. No. 14-5301 (July 5, 2016), has vacated both the Environmental Impact Statement (EIS) issued by DOI and the Incidental Take Statement (ITS) issued by US Fish and Wildlife Service underlying the lease. Furthermore, Cape Wind has lost critical contracts to sell its power and key permits to transmit their power ashore. In early 2015, Massachusetts utilities canceled their contracts to buy Cape Wind’s power due to the developer’s failure to close on financing and meet contractual milestones. In April of this year, the Massachusetts Energy Facilities Siting Board denied extension of nine state and local permits for transmission lines needed to bring their power ashore, and these permits are no longer in effect.

None of these important developments is described in the Northeast Plan. In fact, the Plan incorrectly describes Cape Wind as being in the “project financing phase” with construction “slated to begin” upon the completion of financing in the link for the Cape Wind lease on the Interactive Map for Energy Infrastructure in the Data Portal. This description must be revised to indicate that the lease is suspended, that construction is prohibited, and that no financing efforts are underway. In addition, the attached BOEM fact sheet for the Cape Wind project is incorrect because it does not reflect the D.C. Circuit decision and the need for Cape Wind and BOEM to not only cure the EIS and ITS defects, but also to obtain an incidental take permit. Finally, on page 183, the Plan states there is no provision under the Migratory Bird Treaty Act (MBTA) for invalid take authorization, but the D.C. Circuit decision requires such a permit before construction could commence. The Plan should make it clear that Cape Wind is required to obtain such a permit.

At this juncture, termination of Cape Wind’s suspended lease would avoid additional controversy and delay and allow the allocation of resources to responsibly sited projects located in Wind Energy Areas identified by DOI through the public planning process used in the “Smart from the Start” initiative put in place after Cape Wind. Termination of the lease would help meet the critical goals and guiding principles of the ocean zoning process as well as protect the Cape and Islands environment, economy, tribal heritage, and public safety. Given the availability of alternatives in Wind Energy Areas designated for development and consistent with the stated principles of the ocean plan, the time to act is now. Cape Wind could still proceed in a better location without the controversy, without the adverse impacts it would create in the Sound, and without future litigation. The Northeast Plan should be revised to reflect the fact that the leasing that has occurred south of Massachusetts and in Rhode Island waters was conducted pursuant to CMSP principles whereas Cape Wind’s lease was not. As a result, future action by BOEM to comply with the Plan will have to result in termination of Cape

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Wind's suspended lease if CMSP principles are adopted due to the extreme conflict associated with this project.

C. Nantucket Sound as a TCP

As a natural treasure that must be preserved and protected, Nantucket Sound has long been under consideration for Sanctuary designation. The Alliance 2010 letter outlines previous state and federal designations and efforts to protect the Sound. It is important to note that in 2010, Nantucket Sound was also been deemed eligible for listing on the National Register of Historic Places as a Traditional Cultural Property (TCP).

On January 4, 2010, the National Park Service (NPS) issued a formal determination of eligibility for Nantucket Sound as a TCP under the National Historic Preservation Act. The NPS determined that Nantucket Sound is eligible "for listing in the National Register as a traditional cultural property and as an historic and archaeological property associated with and that has yielded and has the potential to yield important information about the Native American exploration and settlement of Cape Cod and the Islands."

This determination confirmed the Aquinnah Wampanoag and Mashpee Wampanoag Tribes long standing position that Nantucket Sound is eligible for listing as a TCP. The Tribes believe their people traversed, lived on, buried their ancestors and otherwise used the land that is now submerged beneath the waters of Nantucket Sound. The Tribes have also continued their modern day association with the Sound for economic and other purposes including fishing, recreation, tourism, and as a central focus of traditional cultural practices. The Tribes' position was also supported by the Massachusetts State Historic Preservation Officer (SHPO). The current draft Plan fails to recognize the status of all of Nantucket Sound as a TCP. For example, the map of historic properties in the Data Portal identifies other such properties but makes the glaring omission of including the precedent-setting Nantucket Sound eligibility finding.

D. Marine Transportation

The draft plan also fails to provide information regarding the very unique and complex nature of marine transportation, navigation, and public safety in Nantucket Sound. These factors have twice (2006, 2015) caused Congress to pass special laws to protect navigation in the Sound with special attention to the harmful impacts from the Cape Wind project. Most recently, the 2015 Coast Guard Reauthorization Act requires the USCG to conduct a Port Access Route Study (PARS) for Nantucket Sound, applying the same principles that have been applied to previous PARS studies and that would preclude the issuance of lease for a project like Cape Wind because of its proximity to major navigation and vessel routes. Indeed, the PARS methodology used by the Coast Guard embodies CMSP principles, but has never been applied to Nantucket Sound. The Plan should be clear that this study is now underway and could very well result in marine navigation protection measures that preclude offshore wind energy development at the Cape Wind site. The Alliance comment letter on the USCG PARS study proposal is attached to these comments. **Attachment 4**

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E. Long-Term Protection of Nantucket Sound

The Alliance supports the comments of the late Senator Edward Kennedy and former US Congressman William Delahunt, as communicated in a July 8, 2009, letter to President Obama, that "because this is the first true "top to bottom" review of our nation's oceans policies, we ask that the Northeast Regional Planning Board give full consideration to providing protected status for Nantucket Sound." We support the long term protection of Nantucket Sound because of its unique attributes, its long history of consideration as a national marine sanctuary, a sanctuary in state waters, and its current status as a TCP eligible for listing on the National Register of Historic Places.

F. Conclusion

Nantucket Sound is clearly a body of water worthy of long-term protection, and Cape Wind is a project that should not be allowed to industrialize such a unique area. We request that the Northeast Plan be revised to include the information needed for all Planning Body members and, in particular, federal agencies to take the notice necessary to implement a national ocean zoning process which recognizes that Nantucket Sound is a designated TCP eligible for listing in the National Register of Historic Places, that the current uses of the Sound, such as fishing, marine navigation, and recreation, be protected, and that Cape Wind's lease be terminated so that this national treasure can be made off limits to inappropriate commercial development, and ultimately accorded protected status under federal law.

Thank you for considering these comments. Please let me know if we can be of further assistance and include the Alliance on your mailing list.



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