UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 10-1067 RBW/DAR
TOMMY P. BEAUDREAU, et al.,	)	
Defendants,	)	
CAPE WIND ASSOCIATES, LLC,	)	
Intervenor.	)	

THE PEER ET AL. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON THEIR CLAIMS UNDER THE ENDANGERED SPECIES ACT AND MIGRATORY BIRD TREATY ACT

As authorized by the Court, the PEER et al. Plaintiffs hereby move for summary judgment on their Endangered Species Act and Migratory Bird Treaty Act claims on the grounds that there are no material facts in dispute and Plaintiffs are entitled to judgment as a matter of law. In support of this motion, Plaintiffs rely on the accompanying Memorandum, their Statement of Facts therein, and Exhibits A – F.

As previously represented to the Court, the PEER et al. Plaintiffs await resolution of the outstanding issues pertaining to the administrative record of the Bureau of Ocean Energy Management before moving for summary judgment on their National Environmental Policy Act claims.

Respectfully Submitted,

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Dated: October 10, 2012

Counsel for Plaintiffs PEER et al.

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THE PEER ET AL. PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT ON THEIR CLAIMS UNDER THE ENDANGERED SPECIES ACT AND MIGRATORY BIRD TREATY ACT

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GLOSSARY

APA	Administrative Procedure Act
BiOp	Biological Opinion
BOEM	Bureau of Ocean Energy Management, and its predecessor agencies, Bureau of Ocean Energy Management, Regulation, and Enforcement (BOEMRE) and Minerals Management Service (MMS)
COP	Construction and Operations Plan
Corps	Army Corps of Engineers
CWA	Cape Wind Associates
EA	Environmental Assessment
EIS	Environmental Impact Statement
EPA	Environmental Protection Agency
ESA	Endangered Species Act
FWS	Fish and Wildlife Service
MBTA	Migratory Bird Treaty Act
NEPA	National Environmental Policy Act
NMFS	National Marine Fisheries Service
ROD	Record of Decision
RPM	Reasonable and Prudent Measures

This lawsuit concerns the federal defendants' authorization of a massive industrial wind power facility in Nantucket Sound, off the coast of Massachusetts. Construction and operation of the project will kill migratory birds, including endangered and threatened species, harass federally listed sea turtles, and place the gravely endangered North Atlantic right whale at increased risk of ship strikes – the leading cause of the species' imperilment. In the course of approving the project, defendants contravened the safeguards that Congress established for the affected wildlife.

Plaintiffs do not doubt the importance of developing renewable energy resources in appropriate locations. But, as a federal court recently held where another wind power project violated the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-44, the objective of promoting renewable energy does not excuse a failure to scrupulously comply with federal environmental law. See Animal Welfare Inst. v. Beech Ridge Energy LLC, 675 F. Supp. 2d 540, 581-83 (D. Md. 2009) (enjoining a project in West Virginia because it would kill ESA-listed Indiana bats). Indeed, in the course of invalidating the Federal Aviation Administration's determination that the Cape Wind project does not pose a hazard to aircraft, the D.C. Circuit likewise made crystal-clear that agency approvals for Cape Wind are bound by the same standards of "reasoned decision-making" that apply to other major projects. Town of Barnstable v. FAA, 659 F.3d 28, 36 (D.C. Cir. 2011) (finding that the FAA "catapulted over the real issues and the analytical work required by its handbook"). As discussed below, defendants sidestepped their legal obligations in making the decisions under review, and hence those decisions must be remanded and set aside.

BACKGROUND

A. The Relevant Statutory And Regulatory Framework

1. The Endangered Species Act

Prompted by "concern over the rapid depletion of our Nation's, as well as the world's,

natural wildlife," Nat'l Ass'n of Home Builders of the U.S. v. Babbitt, 949 F. Supp. 1, 5 (D.D.C. 1996), Congress enacted the ESA to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b). The ESA represents Congress's "unequivocal[] state[ment] that endangered species must be afforded the highest priority." Beech Ridge, 675 F. Supp. 2d at 581. The Act imposes duties on the Secretaries of the Interior and Commerce, which have been delegated to the Fish and Wildlife Service ("FWS") and National Marine Fisheries Service ("NMFS"). 50 C.F.R. § 402.01(b).

An "endangered" species is one which "is in danger of extinction throughout all or a significant portion of its range," 16 U.S.C. § 1532(6), and a "threatened" species is "likely to become an endangered species within the foreseeable future." Id. § 1532(20). Once listed, species receive a number of important protections. First, the ESA and its implementing regulations prohibit the "take" of an endangered or threatened species without authorization. Id. § 1538(a)(1); see also 50 C.F.R. §§ 17.21, 17.31. "Take" is defined as "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." 16 U.S.C. § 1532(19). Second, under section 7(a)(2) of the Act, "[e]ach federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species." Id. § 1536(a)(2). In doing so, "each agency shall use the best scientific and commercial data available." Id.

To fulfill the mandate of section 7, federal agencies must follow a detailed consultation process. When agencies determine that their actions "may affect listed species or critical habitat," 50 C.F.R. § 402.14(a), they must enter into formal consultation with FWS or NMFS (collectively "the Service"), id., by obtaining from the relevant Service a "biological opinion ["BiOp"] as to whether the action, taken together with cumulative effects, is likely to jeopardize the continued

existence of listed species . . . ." Id. § 402.14(g)(4); see also 16 U.S.C. § 1536(b). If the BiOp concludes that agency action will result in incidental take that does not jeopardize the entire species, the Service must issue a statement quantifying the incidental take and establishing terms and conditions binding on the action agency and private applicants. Id. § 1536(b)(4). As part of the incidental take statement, the ESA provides that the Service "shall provide the Federal agency and the applicant concerned, if any, with a written statement that . . . specifies those reasonable and prudent measures that the [Service] considers necessary or appropriate to minimize [the] impact." Id. (emphases added). The BiOp, together with the incidental take statement, "alters the legal regime to which the action agency is subject." Bennett v. Spear, 520 U.S. 154, 169 (1997).

Reinitiation of formal consultation is required and "shall be requested by the Federal agency or by the Service where . . . 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" or "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 biological opinion." 50 C.F.R. § 402.16.

2. The Migratory Bird Treaty Act

Enacted to fulfill the United States' treaty obligations to protect migratory birds, the Migratory Bird Treaty Act ("MBTA") provides that "[u]nless and except as permitted by regulations made as hereinafter provided in this subchapter, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill . . . any migratory bird." 16 U.S.C. § 703(a) (emphases added); see also Missouri v. Holland, 252 U.S. 416, 434-35 (1920) (describing the "national interest of very nearly the first magnitude" in protecting migratory birds "that yesterday had not arrived, tomorrow may be in another State and in a week a thousand miles away"). FWS's list of species protected by the MBTA includes many birds that use the area where the Cape Wind project would be constructed and operated. See

50 C.F.R. § 10.13 (list of migratory birds).

The MBTA authorizes the Secretary of the Interior to promulgate regulations allowing the take of birds otherwise protected by the MBTA when doing so would be compatible with migratory bird conventions. 16 U.S.C. § 704(a). The Secretary has delegated this authority to FWS, which has promulgated regulations allowing the take of migratory birds after the issuance of a permit, under specified circumstances. See 50 C.F.R. §§ 21.11, 21.27, 21.42. FWS's regulations underscore the statute's categorical prohibition on taking migratory birds "except as may be permitted under the terms of a valid permit issued pursuant to the provisions of [the agency's MBTA regulations]." Id. § 21.11.

3. The National Environmental Policy Act

The National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-70f, is the "basic national charter for protection of the environment." 40 C.F.R. § 1500.1.[1] Its purposes are to "help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment." Id. § 1500.1(c). Thus, NEPA requires all federal agencies to prepare a comprehensive Environmental Impact Statement ("EIS") analyzing the environmental impacts of, and alternatives to, all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). To determine whether an EIS is required, federal agencies may prepare an Environmental Assessment ("EA") setting forth data and analysis bearing on the significance of the action's environmental impact. See 40 C.F.R. § 1501.4. When taking an action, agencies must also prepare a "record of decision" ("ROD") that among other matters, specifies whether the agency considered "environmentally preferable" alternatives to the chosen course of conduct. Id. § 1505.2.

[1] Although the PEER et al. Plaintiffs are not moving for summary judgment on their NEPA claim at this time, the NEPA documents prepared by defendants bear on Plaintiffs' ESA and MBTA claims. Accordingly, Plaintiffs are briefly describing the NEPA process.

B. Federal Defendants' Approval Of The Project

1. Description Of The Project

The Bureau of Ocean Energy Management ("BOEM"), an entity within the Department of the Interior, has authorized a private developer, Cape Wind Associates ("CWA"), to operate a wind power facility on 46 square miles of submerged federal lands in Nantucket Sound for a minimum of 20 years. CW119518 (description of leased area in signed lease).[2] CWA plans to conduct approximately five months of intensive geophysical surveys in the Sound prior to construction, using devices that emit extremely loud sounds to determine the composition of the seabed. NMFS1415-16.[3] The developer then will construct an electrical service platform, measuring 100 feet by 200 feet, in a shallow part of Nantucket Sound called Horseshoe Shoal, before pile driving the foundations for each of the 130 turbines 85 feet into the seabed. CW237383; CW237375.

Each turbine will reach 440 feet from the surface of the water into the air, with blades spinning through an airspace of 2.4 acres – roughly equivalent to 2 football fields. CW237378; FWS6.[4] As presently approved, the blades will spin whenever wind conditions allow, regardless of the presence of endangered or other migratory birds. FWS76-77. The facility will require both extensive boat traffic associated with construction activities and ongoing maintenance. See CW237420 ("normal activity would include two vessel trips per working day"). Although the risk of ships striking right whales is "significantly reduced when vessels travel at 10 knots or less," NMFS1513, boats associated with the project will travel "at speeds up to 21 knots." NMFS1514.

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[2] The BOEM administrative record is designated as CW---. This record includes documents from BOEM's predecessor agencies, the Minerals Management Service ("MMS") and Bureau of Ocean Energy Management, Regulation, and Enforcement ("BOEMRE").

[3] The National Marine Fisheries Service administrative record is designated as NMFS---.

[4] The Fish and Wildlife Service administrative record is designated as FWS---.

2. Federally Protected Wildlife Species In Nantucket Sound

These activities will occur in an area of exceptional ecological importance and wildlife presence free of any industrial activity even remotely comparable in scope and size to the Cape Wind project. CW157066; CW157066-157160 (describing the vast "biological resources" in the action area). Nantucket Sound is a biologically crucial habitat for migratory birds, including roseate terns and piping plovers, four species of federally protected sea turtles, and the highly imperiled North Atlantic right whale.

Roseate terns, listed as endangered under the ESA, use Nantucket Sound for courtship and staging for migration in the spring and late summer/early fall. FWS24. During spring courtship, roseate terns engage in spectacular displays to catch fish, diving from impressive heights into open water. FWS39. The project area is crucial to the species' survival and recovery. As FWS has explained, at the end of summer and beginning of fall, "there is the **potential** that every breeding adult roseate tern in the northeastern population (and their young of that year) will be in Nantucket Sound, within 20 miles of the Cape Wind Project area." FWS27; see also FWS13 (roseate terns fly distances of 20 miles or more to forage). During this time, the birds use Nantucket Sound to forage for food, rest on the water, and travel to more distant foraging areas. FWS27. Piping plovers, federally listed as threatened, also migrate through Nantucket Sound, and their nests ring the Sound. CW157165; CW241691 (map of nesting sites); FWS29 ("Approximately 50 extant piping plover breeding sites are located within the action area."). Beginning in early March, they breed, lay eggs, and raise their chicks, as well as forage on the beaches surrounding Nantucket Sound, often returning to the same beach year after year. FWS17-18. Because of the species' fragile status, state and federal wildlife officials have established piping plover monitoring programs and closed portions of beaches to human use. See FWS19; FWS20; FWS32-33. Indeed, FWS has stressed that even a small decline in adult or juvenile

survival would cause "substantial increases in extinction risk." FWS22 (also stating that "[e]levated mortality of adults or post-fledglings has the potential to quickly undermine the progress toward recovery achieved at breeding sites").

Roseate terns and piping plovers are but two of the many species of migratory birds that depend on Nantucket Sound for breeding, nesting, foraging, and migration. Dozens of other species, ranging from sea ducks to raptors to songbirds, use the waters at the surface of Nantucket Sound and the airspace above, including the space that will be occupied by enormous turbines if the project proceeds. See, e.g., CW229336 (2011 EA draft listing 42 species protected by the MBTA and noting "[t]his list does not include all of the bird species observed during surveys" of Nantucket Sound).[5]

Beneath the water's surface, Kemp's ridley, loggerhead, green, and leatherback turtles – all of which are listed as endangered or threatened – inhabit waters in and near the project area, particularly during the summer and fall. CW157163-64. The area also serves as habitat for the North Atlantic right whale, one of the rarest mammals in the world. NMFS has stated that the species is so close to the brink of extinction that "the premature loss of even one reproductively mature female could hinder the species' likelihood of recovering." NMFS1513 (2010 BiOp). Ship strikes, which cause "propeller wounds characterized by external gashes or severed tail stocks" and "fractured skulls, jaws, and vertebrae," NMFS1513, are a major cause of death for the species. NMFS7; NMFS891. In 2010, 2011, and 2012, NMFS documented sightings of right whales in Nantucket Sound and in waters to the southwest (where construction and operations boats will travel), including very large numbers of right whales who had aggregated apparently to

[5] For example, researchers have observed hundreds of northern gannets – birds that frequently fly at the height that turbines spin – during spring and fall avian studies in Nantucket Sound. See CW157335; see also CW257555 (e-mail from FWS biologist Albert Manville stating that impacts of offshore wind turbines on northern gannets may be "huge"). Similarly, BOEM's EIS acknowledged that "large numbers of songbirds" may be present during migration, CW157309, and that surveys recorded "[h]igh densities of sea ducks" in the portion of Nantucket Sound where the wind power facility will be built. CW157313.

feed. NMFS978-87 (2010 sightings of "nearly 100 endangered North Atlantic right whales," out of a population of 300 to 400); NMFS2136-39 (2011 sightings of "57 endangered North Atlantic right whales, including four mother/calf pairs"); see also Defenders of Wildlife v. U.S. Dep't of the Navy, No. 210-014, 2012 WL 3886412, *2 (S.D. Ga. Sept. 6, 2012) ("The best current estimate of minimum population [of right whales] is 313 whales.").

3. CWA's Application To Construct And Operate The Project

Although the government's consideration of the Cape Wind project has had a tortuous history, plaintiffs will highlight only those aspects of it that bear most directly on their ESA and MBTA claims. Because no major project can be built in waters of the United States without the federal government's authorization, CWA first sought a permit from the Army Corps of Engineers ("Corps") in 2001 under the Rivers and Harbors Act, which generally regulates the construction of structures in United States waters. 33 U.S.C. §§ 401-67.

The Corps prepared a draft EIS in 2004. The following year, the Energy Policy Act of 2005 amended the Outer Continental Shelf Lands Act to authorize BOEM to issue leases and approve construction and operations plans for offshore renewable energy projects. At that time, BOEM became the lead agency responsible for complying with NEPA and consulting with the Services regarding effects to ESA-listed species. Pub. L. No. 109-58, 119 Stat. 594.[6]

In 2008, BOEM prepared its own draft EIS and a Biological Assessment, CW23784-4366; NMFS28-331; during the latter part of that year, there was a strenuous effort by "the Department

[6] The Energy Policy Act of 2005 also required BOEM to promulgate regulations establishing national offshore wind development standards by May 2006, but the standards were not issued until 2009. See 30 C.F.R. §§ 285.100-.1019. The regulations provide for a "competitive lease process" pursuant to which BOEM, before opening up a particular offshore area to competitive bids, will evaluate which specific areas "are appropriate for leasing" based on relevant factors, including the "potential effect of leasing on the human, marine, and coastal environments." Id. § 285.211. In contrast, with regard to the Cape Wind project, CWA selected its preferred site, and the agencies' decisionmaking then focused on whether the company should be permitted to build at that particular location. See CW307596 (explaining that one of the "Take-A-Ways" from the Cape Wind experience is that the "Government [should] decide[] siting [in U.S. waters], not industry").

[of the Interior] as well as the [outgoing] administration" to expedite approvals for the project. CW359832. For example, a FWS biologist involved in the ESA consultation noted that "[b]ased on a timeline driven by pol[itical]" considerations, FWS was under intense pressure to complete its BiOp to be incorporated into the final EIS before the change in Administrations. FWS11914.[7]

On January 16, 2009, BOEM announced the final EIS for the project. CW199598; see also CW156892-157691. The EIS acknowledged that Nantucket Sound is enormously important to migratory birds and marine species, and that extensive construction activities and the long-term operation of 130 industrial turbines anchored in the seabed and towering above the water poses serious risks to a plethora of animals in the area. For example, although neither CWA nor BOEM ever performed the full complement of bird studies urged by FWS, the EIS stated that the numbers of birds "estimated to migrate through Nantucket Sound are estimated to be in the millions," CW157082 (emphasis added), and that, should the project proceed as proposed, birds would be at risk from both construction activities, CW157306 ("[s]uch impacts can result in changes to foraging or flight behavior resulting in increases in energy expenditure, decreased breeding success, or increased mortality"), and continuous operation of enormous spinning blades in migratory routes that birds have followed for millennia. CW157306-07 ("[o]peration of a wind facility can result in long-term disturbances including habitat loss . . . barriers to flight movements due to the presence of operating turbines . . . as well as the risk of collision with operating turbines"). The EIS also recognized that "right whales continue to die from vessel collisions," CW157413, but discounted the impact of the increased boat traffic associated with the project,

[7] See also FWS32231 (the "present Admin[istration] wants to rule on project"); FWS31785 (explanation in Interior Department Inspector General's report that the Chief for Endangered Species of the FWS northeast region and the Endangered Species Division Supervisor for FWS's Northeast Field Office "stated there was a great deal of pressure on FWS to finalize and issue the [BiOp] within the MMS timeline"); FWS895 (11/12/08 e-mail from FWS official stating that "[i]t was my understanding that we were on track to receive the BiOp on Cape Wind so that the possibility remained of being able to make a decision in early January"); FWS2412 (9/5/08 FWS conference call notes stating that "[p]olitics has driven the timeline ahead of the science needed to support some of our best prof[essional] judgment decisions").

including because "vessel routes proposed to be used by Project vessels do not occur in areas where there have been high concentrations of whale sightings." CW157414.

In April 2010, relying on the EIS and two subsequent EAs finding that there had been no significant new information warranting supplementation of the EIS – despite that BOEM had "recently learned that large aggregations of rights whales have been sighted in the vicinity of Nantucket Sound, and even within the Sound," CW312435 – BOEM issued a ROD stating that BOEM "will offer a commercial lease to CWA for the Cape Wind Energy Project." CW212088 (ROD); CW260499-525 (March 2010 EA); CW312416-45 (May 2010 EA). At the same time, the ROD conceded that a "Smaller Project Alternative" would have been environmentally preferable based on smaller impacts to "avifauna [and] threatened and endangered species," in addition to other resources. CW212099. The lease became effective on November 1, 2010, CW119511-66, and on April 19, 2011, BOEM announced its approval of the construction and operations plan ("COP") for the project. CW242418-61. At that time, BOEM issued another EA finding that the 2009 EIS did not require supplementation based on new information. See CW242419-62; CW119745.

4. Consultation With FWS Regarding Roseate Terns And Piping Plovers

During BOEM's ESA consultation with FWS, the Service, as mandated by section 7 of the Act, considered "reasonable and prudent measures" ("RPM") to minimize anticipated mortality to endangered roseate terns and threatened piping plovers from the turbines. See 16 U.S.C. § 1536(b)(4). As early as September 2007, the Service informed BOEM and CWA that it was considering establishing an RPM that would require CWA to cease operation of the turbines during very limited time frames when the risk of mortality to birds was greatest, i.e., during poor visibility conditions when many birds were likely to be migrating. See, e.g., FWS12051; see also CW202438 (further discussions on October 3, 2008 among the agencies and CWA about

development of "a measure that would require short-term feathering [shutdown] of wind turbines under certain climatological conditions in August and September in order to minimize take of roseate terns and plovers"); FWS43 (explanation by FWS that "[t]he greatest potential for roseate terns to collide with [turbines] is during crossings of the Horseshoe Shoal project area during fog and rain, during nighttime and other low light conditions").

On October 31, 2008, the Service prepared a draft BiOp that determined that the turbines would directly kill 80 to 100 endangered roseate terns and 10 threatened piping plovers over the minimum twenty-year life of the project. FWS1092.[8] The draft BiOp also stated that "the survival rate of [roseate tern] young will be reduced" if birds with dependent young are killed. FWS1092. As a measure to minimize mortality from birds colliding with the turbines, the draft BiOp set forth the following RPM:

> Operational adjustments including the feathering of [turbines] to reduce the risk of collision by staging roseate terns and, to a limited extent, migrating piping plovers transiting the rotor swept zone, thus minimizing take. The implementation of operational adjustments will be based on seasonal, visibility and weather parameters. Limitations to the extent of [turbine] shutdown will ensure that they will only incur minor changes to the Cape Wind Project.

FWS1093. The draft BiOp set forth specific "terms and conditions" to implement this RPM, see 16 U.S.C. § 1536(b)(4)(C)(iv), including that the operational adjustments would occur only during limited conditions in the spring and the fall, when the birds are migrating. FWS1094.[9]

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[8] Although FWS analyzed mortality to listed species over twenty years, this is in fact only the "minimum . . . life expectancy" of the turbines. FWS34. The projected mortality would have been commensurately greater if the Service had chosen a longer time frame based on the likelihood that, once constructed, the project will exist (and adversely affect birds) for far longer than twenty years. Indeed, in comments on a draft of BOEM's biological assessment, FWS recognized that it "must assume impacts in perpetuity," FWS5971, yet the BiOp limited its analysis to a "minimum" time frame that does not reflect the extent of likely project impacts. See Wild Fish Conservancy v. Salazar, 628 F.3d 513, 522 (9th Cir. 2010) (invalidating a BiOp which limited its analysis of project impacts to a five-year period, because the "artificial division of a continuing operation into short terms can undermine the consulting agency's ability to determine accurately the species' likelihood of survival and recovery").

[9] First, the Service confined the shutdowns to two three-to-four-week periods during peak migration. FWS1094. Second, the Service limited shutdowns to times during those periods when there is "reduce[d] visibility at turbine height . . . to less than 1/4 mile on Horseshoe Shoal," due to fog or rain, and "from sunset to 8 pm (2000 hours) and from one hour before sunrise to sunrise" during the fall migration only. Id. FWS biologists indicated that these temporary, seasonal shutdowns constituted the "only operational change" capable of minimizing take. FWS1230.

Although BOEM's avian biologist stated that he "did not find that the 'Reasonable and Prudent Measures' section contained anything unreasonable," CW202455 (11/5/08 e-mail), CWA objected to it, asserting, in a November 18, 2008 letter to BOEM that, although FWS had "estimat[ed] that no more than four percent of all daylight hours would be lost during the prescribed period," the RPM would adversely "affect CWA's ability to obtain financing for the project," because potential lenders would be "likely" to erroneously "assume that the project will not be able to produce power for as many as six weeks each year," FWS389-90, 392 – which was not what the draft RPM prescribed. CWA also asserted that the RPM was not "scientifically justified" because the BiOp "*assumes* that Roseate Terns may have a higher risk of collision during low visibility conditions," but that there was "no observational data on term occurrence in the project area" during such conditions. FWS394.[10]

Two days later, in a letter to FWS dated November 20, 2008, BOEM adopted CWA's position that the RPM was not a "'reasonable' measure, including because it would affect the viability of project funding, a required consideration in determining whether a measure should be deemed 'reasonable.'" FWS351. BOEM also asserted that inclusion of the RPM was "not 'necessary and appropriate to' minimize take . . . for biological reasons," FWS352, even though the agency's own EIS had found that the "risk of collision [to terns] is increased during periods of low visibility." CW157334 (emphasis added). However, evidently recognizing that FWS was the legally mandated arbiter of whether a particular RPM should be included in a BiOp, BOEM specifically requested that the "FWS provide [BOEM] with its response to this concurrence request prior to issuing any final biological opinion." FWS352.

But FWS did not provide any such "response" to the "concurrence request." Instead, on November 21, 2008 – the day after receiving the Bureau's letter – FWS issued a final BiOp

[10] As explained below, FWS has repeatedly urged BOEM and CWA to collect data on bird use of the project area during all climactic conditions, including low visibility, but they have refused to do so. See infra pp. 14-15.

largely identical to the agency's draft, except that the RPM to which CWA and BOEM objected was excised. Accordingly, the final BiOp continued to set forth FWS's rationale for inclusion of an RPM that would restrict turbine operation during poor weather in certain seasons, see, e.g., FWS56 ("Numerous studies indicate that the risk of bird collisions with turbines increases as weather conditions worsen and visibility decreases."); FWS76 ("Feathering of the rotors . . . would reduce the risk of collision by roseate terns"); FWS77 ("this 'operational adjustment' would be based on weather and day light parameters that reduce visibility, and would be limited to seasons when plovers and peak numbers of roseate terns are expected to be present (a few weeks in early to mid-May and a few weeks in late August to mid-September)"), but states explicitly that the RPM was removed solely because it "was determined by MMS and CWA" not to be an appropriate measure for minimizing incidental take. FWS77.[11]

Plaintiffs subsequently sent BOEM and FWS a formal notice that FWS had violated the plain terms of the ESA by deferring to BOEM's and CWA's desire to jettison the RPM. FWS31722-30. Plaintiffs also forwarded an extensive analysis by a leading economic consulting firm, which demonstrated that FWS's RPM would have at most a trivial effect on the project's financial viability, and that CWA's contrary assertion was unsubstantiated and based on erroneous assumptions about the amount of time that turbines would be "feathered" to protect listed birds and the effect this would have on power production. FWS31682-98. Based on this information, Plaintiffs urged BOEM and FWS to reinitiate formal consultation because the "economic analysis support[ed] FWS's original proposal to require temporary and seasonal shutdowns as [an RPM]" to minimize incidental take of listed species. FWS31680; see also 50 C.F.R. § 402.16(b)

[11] The administrative record demonstrates that FWS never made any independent assessment that the RPM devised by the Service was not "reasonable" or "prudent" within the meaning of the ESA. See, e.g., FWS869 (e-mail from FWS assistant regional director stating that the Service had played no role in determining "one way or another" whether the RPM should be removed); FWS447 (instruction from assistant regional director to biologist revising the BiOp stating that he should not "state the removal of the RPM in the form of a concurrence" with BOEM).

(requiring reinitiation of consultation when there is "new information" calling into question the validity of a BiOp). The agencies, however, never reinitiated consultation, and BOEM "failed" even "to coordinate with FWS" before rejecting the analysis as a basis for further consultation. FWS31560 (9/22/10 e-mail from FWS Solicitor stating that "FWS has not yet considered the economic analysis or addressed the need to reinitiate").

5. The Agencies' And CWA's Non-Compliance With The MBTA

Recognizing the unprecedented nature of the project, and that reliable estimates of bird mortality would only be possible with sufficient data collected prior to construction, in 2001, FWS responded to the initial project proposal by urging the applicant to collect data during "all seasons of the year, all usable airspace, all climatic conditions, and all daily temporal periods in order to capture all life cycle activities of the avian species using the project area." CW360661 (Service comments dated 2001). The following year, Service biologists again stressed the agency's position that three full years of avian studies employing continuous remote sensing technology was "by far the preferred" approach to collecting data on the numbers of birds of various species that use the Sound, particularly during bad weather when birds are susceptible to collisions. FWS26343-44. In 2005, 2006, and 2008 comments, the Service reiterated its request for the data necessary to evaluate the full extent of impacts on the millions of birds migrating through the area. See FWS3059 (April 2008 comments reaffirming the "Service recommendation that the applicant perform three (3) years of radar study on a year-round basis to establish the temporal and spatial distribution of flying vertebrates in the action area"); FWS3060 ("the Service once again recommends that the baseline information long requested by our agency be properly obtained").[12]

Yet neither CWA nor any of the action agencies ever undertook the comprehensive avian

[12] The Massachusetts Division of Fisheries and Wildlife – the state agency charged with protecting wildlife – echoed FWS's position. See, e.g., FWS6121 ("[w]e reiterate our position that construction of a large, offshore wind power generation facility in Nantucket Sound should not be permitted until a well-designed study of at least 3 years' duration is completed").

impact studies advocated by the federal agency charged with implementing the MBTA. Thus, the Supervisor of FWS's New England Field Office opined in 2008 that BOEM was making crucial decisions concerning the project:

> in the absence of important site-specific information on natural resources in, on, or in the airspace above Nantucket Sound that would be affected by the project. Chief among these are migratory birds and the benthic and pelagic resources they depend on. We noted the paucity of site-specific information from the inception of project review. Yet despite our continued recommendation that an adequate baseline be established from which to assess impacts and design minimization and mitigation measures, little information has actually been gathered . . . . It remains our opinion that much additional information in the Horseshoe Shoal region of Nantucket Sound needs to be developed to allow for a thorough identification and assessment of impacts and to identify actions which would avoid, minimize, or compensate for those effects.

FWS3047 (emphasis added); see also FWS3069 (April 2008 FWS comments that "[a]s stated in the closing comments of our July 11, 2006 scoping letter: 'We collectively have an opportunity before us now to "do this right."' Unfortunately, we have failed to do so.") (emphasis added); FWS2443 (8/1/08 e-mail from the Chief of FWS's Branch of Policies, Permits, and Regulations stating that the "Service raised significant concerns about the Cape Wind Project in our 21 April 2008 letter . . . . These issues remain unresolved." (emphasis added)).

Notwithstanding the failure of CWA and/or BOEM to carry out the studies that the expert federal agency repeatedly deemed necessary to assess the full impact on migratory birds, both FWS and BOEM have agreed that the project – "one of the largest offshore wind projects in the world," FWS3069, and "unprecedented in scope in the United States" – will inevitably kill many MBTA-protected birds, including "winter sea ducks, other water birds, and migratory passerine species." FWS2543 (9/3/08 memo from FWS's Northeast Regional Director to the Director of FWS); FWS3055-56 (FWS comments stating that "nocturnal migrants are susceptible to mass mortality on an episodic basis due to inclement wind and weather and various site conditions"). The EIS conceded that myriad species of migratory birds will be at "significant risk" from the massive turbines, see, e.g., CW157323 (anticipating "significant risks [of mortality from collisions

with turbines] to shorebirds and wading birds particularly for species of conservation interest"), and specifically concluded that impacts on some species will be "major" – defined as impacts where the "viability of the affected resource may be threatened," and the "affected resource would not fully recover even if proper mitigation is applied during the life of the proposed action or remedial action is taken once the impacting agent is eliminated." CW156903 (emphasis added).[13]

Because the project will kill migratory birds, BOEM and FWS have long recognized that CWA's request for federal permission to construct the project in United States waters unavoidably implicates the MBTA's strict prohibition on "taking" migratory birds. See, e.g., CW156952 (recognition in EIS that the MBTA applies to the project and "prohibits the taking" of migratory birds "except when specifically authorized" by FWS); CW369617 (11/7/08 briefing). Yet, although BOEM considered applying to FWS for authorization to take migratory birds under the MBTA and the Service's implementing regulations, see, e.g., CW153599-602 (discussing BOEM's view that "[t]he MBTA and its implementing regulations (50 C.F.R. § 21.27) allow for authorization of unintentional take under some circumstances [and] could be applied to renewable energy projects"), BOEM failed to do so.

6. ESA Consultation For Right Whales And Sea Turtles

BOEM also consulted with NMFS on the project's impacts to ESA-protected marine species. In 2008, NMFS issued a BiOp finding that because "whales are extremely unlikely to occur in Nantucket Sound" and because "no whales will occur along the vessel transit routes," NMFS925, the project was "not likely to adversely affect" any North Atlantic right whales. NMFS928. Analyzing the impact to the four federally listed sea turtles, the BiOp authorized take

[13] See also CW157334 ("impacts associated with collision for terns are anticipated to be major . . . due to their unstable populations"); CW157318 ("Based on the uncertainty associated with turbine collision, effects of the proposed project to the North American population of great cormorants may be significant."); CW157325 ("the project could potentially have significant risks to shorebirds and wading birds, particularly for species of conservation concern").

of 13 to 28 turtles from"harassing levels of noise," NMFS929, associated with a "one time" preconstruction geophysical survey limited to "just the project footprint." NMFS578.

In April 2010, "nearly 100 endangered North Atlantic right whales"– estimated to comprise one-third of the total population – aggregated in waters in and around Nantucket Sound, apparently attracted by food. NMFS978-87. The aggregation was directly in the "action area" defined by NMFS, which includes the footprint of the project, as well as the routes that vessels will use during construction and maintenance of the wind power facility. See NMFS1422 (action area defined in the 2010 BiOp). Given the species' extreme peril and vulnerability to ship strikes, Plaintiffs and others immediately wrote to NMFS and BOEM to raise concerns that additional high-speed ship traffic in areas where right whales forage would pose a significant risk to the species. See NMFS970-82; NMFS1585-97. Nonetheless, within days of the Service reporting the aggregation of right whales, BOEM issued its ROD approving a lease for the project. CW212087.

Although Plaintiffs continued to urge that the agencies reconsider the project's impacts on right whales, not until after Plaintiffs filed this lawsuit – including a specific claim that BOEM and NMFS were obligated to reinitiate formal consultation in view of the recent aggregation, see First Am. Compl. (Dkt. No. 10) at ¶ 86 – did the agencies do so. NMFS then issued a revised BiOp explaining that more than 90 right whales had been observed in waters southwest of Nantucket Sound, NMFS1414, with some right whale sightings in the Sound. NMFS1501. NMFS, however, concluded that "the sightings from 2010" somehow "support[ed]" the agency's prior "determination that right whales are rare visitors to Nantucket Sound." Id. The Service further stated that "[i]t is likely that if right whales were using Nantucket Sound on more than rare, unpredictable occasions, there would be documented sightings," but did not explain why the

recent aggregation did not constitute just such a "documented sighting." Id.[14]

Regarding listed sea turtles, a NMFS biologist raised concerns that, since the original BiOp, CWA had dramatically increased the scope of its preconstruction geophysical surveys from the one-time survey of 36 hours analyzed in the 2008 BiOp, NMFS830, to multiple surveys of 330 to 660 hours over five months, and she warned her colleagues at BOEM that the "far more extensive/intensive geophysical survey" would require a "new analysis of effects of the survey" that could not be "done this week or by the end of the month." NMFS1396; see also NMFS1415-16; NMFS1526. Yet at the end of that very month, apparently because "Cape Wind [wa]s antsy," NMFS1396, NMFS issued the new BiOp. NMFS1413-1570. The new BiOp provided no analysis of how the ten-fold increase would affect endangered and threatened sea turtles and, instead, authorized take of precisely the same numbers of turtles as the previous BiOp had. Compare NMFS929 (2008 BiOp authorizing take of "13-28 sea turtles" from geophysical surveys) with NMFS1536 (2010 BiOp authorizing the same).

STANDARD OF REVIEW

Plaintiffs' claims under the ESA and MBTA are reviewable under the standard of review established by the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 500 et seq., i.e., the Court "shall . . . set aside" an agency's decision if it is arbitrary, capricious, or "otherwise not in accordance with law," or if it was adopted "without observance of procedure required by law." Id. § 706(2)(A), (D). Although this standard is deferential, "[d]eference, of course, does not mean blind obedience." Garvey v. Nat'l Transp. Safety Bd., 190 F.3d 571, 580 (D.C. Cir. 1999).

[14] In 2011 and 2012, NMFS again documented sightings of right whales in and around Nantucket Sound, indicating a strong likelihood that the right whales were indeed using the action area "on more than rare, unpredictable occasions," NMFS1501, and would repeatedly use the area during the spring months when food was present. NMFS2126-39.

Rather, the Court must "perform a searching and careful inquiry into the facts underlying the agency's decision" in an effort to "ensure that the [agency] has examined the relevant data and has articulated an adequate explanation for its action." Am. Farm Bureau Fed'n v. EPA, 559 F.3d 512, 519 (D.C. Cir. 2009) (internal citations and quotation marks omitted). In addition, an agency decision is "arbitrary and capricious if the agency relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency . . . ." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

To the extent that the agencies' actions turn on the meaning of the statutes at issue, the Court's review is governed by the framework set forth in Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). Where "Congress has directly spoken to the precise question at issue," the Court "must give effect to the unambiguously expressed intent of Congress." Id. at 842-43. If the Court concludes that the "'statute is silent or ambiguous with respect to the specific issue,'" the Court will defer to an agency's interpretation, but only if it is "'based on a permissible construction of the statute.'" Id. at 843. However, such interpretations raised for the first time on judicial review warrant no deference. Vill. of Barrington, Ill. v. Surface Transp. Bd., 636 F.3d 650, 660 (D.C. Cir. 2011).[15]

[15] Plaintiffs and/or their members study, look for, observe, and appreciate the species protected by the ESA and MBTA that will be harmed by the wind power facility. Their ability to engage in these activities is injured by the decisions of FWS, NMFS, BOEM, and Corps to authorize the project based on invalid BiOps and no MBTA compliance whatsover, and thus they have standing. See (Pls. Exs. A-E) (standing declarations); see also, e.g., Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 n.4 (1986) (plaintiffs who engaged in "whale watching and studying" had standing to challenge activity that killed whales); Lujan v. Defenders of Wildlife, 504 U.S. 555, 565-66 (1992) (plaintiff who "use[s] the area affected" may "claim[ ] injury from environmental damage").

I. ALTHOUGH THE CAPE WIND PROJECT WILL KILL BIRDS PROTECTED BY THE ESA AND MBTA, DEFENDANTS HAVE FAILED TO COMPLY WITH UNEQUIVOCAL STATUTORY MANDATES FOR ADDRESSING AND MINIMIZING SUCH IMPACTS.

A. By Simply Deferring To CWA And BOEM On Whether To Require An RPM Limiting Turbine Operation During Especially Hazardous Conditions For Migratory Birds, FWS Has Violated The ESA And APA.

Section 7 of the ESA requires the Secretary of the Interior to "consult" with federal agencies whose actions, or "authoriz[ation]" of actions by other entities, may harm listed species. 16 U.S.C. § 1536(a)(2). With respect to the endangered roseate tern and the threatened piping plover, that consultation duty has been formally delegated to FWS. See 50 C.F.R. § 402.01(b). Here, FWS biologists sought to carry out that consultation duty by developing an RPM designed to minimize adverse impacts on these species by limiting turbine operation during limited times and conditions in which the listed species would be at greatest peril of being killed by turbines. Yet, when CWA and BOEM objected, FWS simply excised the RPM – the day after receiving BOEM's objection – without making an independent determination that the RPM was neither "reasonable" nor "prudent" within the meaning of the ESA, 16 U.S.C. § 1536(a)(4). In so doing, "FWS has ignored the plain language of the ESA" and issued a legally "inadequate incidental take statement" that cannot support the decisions under review. Pac. Shores Subdivision Cal. Water Dist. v. U.S. Army Corps of Eng'rs, 538 F. Supp. 2d 242, 258 (D.D.C. 2008).

1. In determining whether "Congress has directly spoken to the precise question at issue," Chevron, 467 U.S. at 842 – i.e., whether FWS can abdicate its duty to determine measures necessary to minimize the take of listed species – the first traditional tool of statutory construction focuses on the language of the statute and the specific "text" of the provision at issue. Bell Atlantic Telephone Cos. v. FCC, 131 F.3d 1044, 1047 (D.C. Cir. 1997). Section 7 provides that

if, "after consultation," FWS determines that an action can proceed in a manner that "will not violate" section 7(a)(2) (which prohibits jeopardizing the continued existence of a species), FWS "shall provide the Federal agency and the applicant concerned, if any, with a written statement that . . . specifies the impact of such incidental taking on the species," and that "specifies those reasonable and prudent measures that the [FWS] considers necessary or appropriate to minimize such impact." 16 U.S.C. § 1536(a)(4)(i)-(ii) (emphases added).

Hence, the statutory language plainly imposes an unequivocal duty on FWS to determine what RPMs are "necessary or appropriate to minimize" an action's impact on listed species. To begin with, the statute uses the imperative "shall" in directing the Service to include in its BiOp an incidental take statement that sets forth enumerated items, i.e., "there is no discretionary language in § 1536(b)(4)." Pac. Shores, 538 F. Supp. 2d at 258; id. ("An incidental take statement that fails to include terms and conditions governing the implementation of reasonable and prudent measures is 'arbitrary and capricious.'"). As this Court has held in the course of compelling FWS to carry out another specific duty that the ESA had imposed on it, the "Supreme Court has made clear 'that when a statute uses the word "shall," Congress has imposed a mandatory duty upon the subject of the command.'" Am. Lands Alliance v. Norton, 242 F. Supp. 2d 1, 10 (D.D.C. 2003) (Walton, J.) (internal citations omitted).

Moreover, Congress reinforced that duty with respect to RPMs by providing that an incidental take statement must specify "those reasonable and prudent measures that [FWS] considers necessary or appropriate to minimize such impact." 16 U.S.C. § 1536(a)(4)(ii) (emphasis added). The statute could hardly be any clearer in directing that FWS – and no other entity – has the final say as to which measures are "necessary or appropriate to minimize" adverse effects on listed species. See also Bennett v. Spear, 520 U.S. at 169-70 (the Service issues a

BiOp, which changes the "legal regime" for the action agency; an action agency disregards a BiOp "at its own peril"). Not surprisingly, therefore, the Service's own regulations require that the Service's "statement concerning incidental take" must "[s]pecif[y] those reasonable and prudent measures that the Director [of FWS] considers necessary or appropriate to minimize such impact." 50 C.F.R. § 402.14(i)(1) (emphasis added); see also id. § 402.14(g)(7) (providing that one of the "Service responsibilities during formal consultation" is to formulate an incidental take statement (emphasis added)).[16]

Further, it is well established that a federal agency charged with making a particular Congressionally-mandated determination is not at liberty simply to delegate that authority to another entity – "private or sovereign" – "absent affirmative evidence of authority to do so." U.S. Telecom Ass'n v. FCC, 359 F.3d 554, 566 (D.C. Cir. 2004) (invalidating the FCC's delegation of decisionmaking authority to state agencies); see also Defenders of Wildlife v. Gutierrez, 532 F.3d 913, 926-27 (D.C. Cir. 2008) ("Even if the Coast Guard had delegated some or all of its decisionmaking authority under the Ports and Waterways Safety Act to an outside body not subordinate to it, such as the International Maritime Organization, the delegation would be unlawful absent affirmative evidence that Congress intended the delegation.").[17]

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[16] The regulations also provide that "[r]easonable and prudent measures, along with the terms and conditions that implement them, cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes." 50 C.F.R. § 402.14(i)(2). As made clear by the regulations, as well as a "Consultation Handbook" issued by FWS and NMFS, it is the Service's ultimate responsibility under the statute to determine whether a particular measure meets this standard. See FWS31002 (Handbook providing that "when preparing incidental take statements, the Services must specify reasonable and prudent measures and their implementing conditions to minimize the impacts of incidental take that do no alter the basic design, location, scope, duration, or timing of the action" (emphasis added)). Here, FWS developed a measure that it believed met the standard while affording essential protection to listed species, but jettisoned the measure in response to CWA's objection.

[17] The case law establishes an "important distinction" between the situation here and, on the other hand, cases in which a federal officer approves a delegation of authority to a "subordinate" agency officer or agency (such as the Secretary of the Interior's delegation of ESA implementation authority to FWS), which is "presumptively permissible." U.S. Telecom Ass'n, 359 F.3d at 565.

2. The Court of Appeals has applied that precise principle in finding that FWS violated the ESA by delegating its decisionmaking authority to another party. In Gerber v. Norton, 294 F.3d 173 (D.C. Cir. 2002), the Court addressed whether, in the course of issuing an "incidental take permit" to a private developer under section 10 of the ESA, FWS had made the statutory findings required by that provision, one of which was that the developer would "minimize the impacts of the taking 'to the maximum extent practicable.'" Id. at 184 (quoting 16 U.S.C. § 1539(a)(2)(B)(ii)).[18] The Court held that "[i]t is plain on the face of the statute that it is the Service (as delegatee of the Secretary of the Interior) that must make this finding," but that the agency had unlawfully shirked that authority by allowing the developer to determine that a particular project modification (intended to reduce the number of endangered squirrels killed by automobiles) was "impracticable" on economic grounds. 294 F.3d at 185. Explaining that, "[w]hen a statute requires an agency to make a finding as a prerequisite to action, it must do so," the Court ruled that because the Service "did not make the independent finding required by the ESA," the Service approved the permit "'without observance of procedure required by law'" and acted "'otherwise not in accordance with law.'" Id. at 185-86 (quoting 5 U.S.C. §§ 706(2)(A), (D)); see also id. (citing Idaho v. ICC, 35 F.3d 585, 596 (D.C. Cir. 1994) (holding that the ICC failed to meet its responsibilities under NEPA by "deferr[ing] not only to the judgments of other agencies, but also that of . . . the licensee")).

Gerber squarely controls this case. Here, it is equally "plain on the face of the statute" that FWS must make its own determination as to whether a particular RPM is a "reasonable" and "prudent" means of minimizing take, and yet the Service expressly deferred to other entities –

[18] Where a private party's action will incidentally take a listed species but no federal action is involved, the private party may seek incidental take authorization under section 10 of the Act. See 16 U.S.C. § 1539(a)(2)(B).

including the regulated party – in lieu of "independently [making] such a finding." 294 F.3d at 184-85. Indeed, exactly as in Gerber, the Service's BiOp and other record documents were "careful to state" that the RPM was jettisoned based solely on the "views" of other entities, and "do not contain any analysis whatsoever as to whether" the Service itself was convinced that the RPM should be abandoned. Id. at 185; see supra pp. 12-13.[19]

3. While the Court's "inquiry begins with the statutory text, and ends there as well if the text is unambiguous," Bedroc, Ltd. v. United States, 541 U.S. 176, 183 (2004) – as it is here – the legislative history and declared purpose pertaining to the provision at issue reinforce the statutory language. When Congress provided for the inclusion of incidental take statements in BiOps, it explained that they would "specify those reasonable and prudent measures that must be followed to minimize takings of individuals," and that FWS (as delegatee of the Secretary) "may use discretion in determining such measures." S. REP. NO. 97-418, at 20; see also H.R. REP. NO. 97-567, at 26 (1982) (an incidental take statement must include RPMs "which the Secretary considers necessary or appropriate to minimize such impact[s]" on listed species).

Moreover, one of Congress's central purposes in creating the section 7 consultation process was to ensure that action agencies and project proponents would not have the ultimate say on what measures should be adopted to protect listed species. Indeed, Congress recognized that

[19] That Gerber is controlling here is reinforced by the ESA's legislative history. The "incidental take statement" requirement in BiOps, which was added to the statute in 1982, was designed to ensure that private parties whose anticipated takings were reviewed through the section 7 consultation process (because their projects involve federal permits or funding) would be treated in essentially the same manner as private parties who seek such take authorization through the section 10 "incidental take permit" process at issue in Gerber. See S. REP. NO. 97-418, at 22 (1982) ("In enacting the [ESA] in 1973, Congress was well aware that one of the most effective protections for conserving endangered wildlife was a proscription on taking. The [incidental take statement] is not intended to weaken this tool; rather, it is meant to provide Federal agencies and applicants with some certainty as to whether they may be liable for the takings provision of the [ESA] if . . . the action agency or applicant has in good faith taken all reasonable and prudent steps necessary to minimize or avoid incidental takings.").

section 7 was needed precisely because, left to their own devices, agencies such as BOEM would inevitably view their "primary missions" as far more important than the conservation of imperilled wildlife. Tenn. Valley Auth. v. Hill, 437 U.S. 153, 185 (1978). As explained by Senator John Chafee, one of the principal architects of the ESA:

> [E]ach one of my colleagues is fully aware of the commitments that many line agencies have to the completion of proposed projects, in many instances with less than appropriate attention to other important factors such as endangered species. . . . They want to get projects built. To allow a single agency head to determine the advisability of destroying a species or completing the agency's project as proposed, seems a bit like putting the fox in charge of the henhouse.

CONG. RESEARCH SERV., A Legislative History of the Endangered Species Act of 1973, As Amended (excerpts attached as Exhibit F), at 995 (emphases added); id. at 1012 (statement of Sen. Malcom Wallop) (explaining why the Senate should reject an amendment that would delegate judgments on species impacts to action agencies "whose basic problem in life is not endangered species but the efficient carrying out of whatever that agency is designed to do"); see also Defenders of Wildlife v. Salazar, 842 F. Supp. 2d 181, 188 (D.D.C. 2012) ("[T]he Service . . . [is] independent from the Action Agencies. The job of the Action Agencies is, naturally enough, to get their projects accomplished. They cannot help but put their major efforts into completion of their statutory mission. The Service Agencies on the other hand approach the ESA issues with an independent, impartial, and objective eye."); id. (finding valid concerns that a rule which eliminated the Service's role in Section 7 consultations under certain circumstances essentially "ask[ed] the fox to watch the henhouse").

4. Hence, because FWS's delegation of the RPM decision to CWA and BOEM undermines Congress's deliberate allocation of responsibility in the consultation process, it contravenes not only the "particular statutory language at issue," but also "the language and design of the statute as

a whole." Household Credit Servs., Inc. v. Pfennig, 541 U.S. 232, 239 (2004) (internal citation omitted); cf. U.S. Telecom Ass'n, 359 F.3d at 565-66 (explaining that a "delegation to outside entities increases the risk that these parties will not share the agency's 'national vision and perspective' and thus may pursue goals inconsistent with those of the agency and the underlying statutory scheme" (internal citation omitted)).[20]

In flouting Congress's choice to assign a specific task to a particular agency, defendants' actions are very similar to those this Court deemed invalid in National Mining Association v. Jackson, 816 F. Supp. 2d 37 (D.D.C. 2011). In that case, although the Clean Water Act ("CWA") "establishes the Corps as the principal player in the permitting scheme" that applies to certain discharges, and the statute "delineate[s] discrete roles" for the Environmental Protection Agency ("EPA") in the process, the Corps and EPA had agreed on a process that authorized EPA to play a larger role. Id. at 44. Rejecting the government's argument that, because Congress did not expressly foreclose the EPA from this expanded role, the "court should 'presume a delegation of power from Congress absent an express withholding of such power,'" the Court reasoned that:

> Congress' decision to adopt Section 404 of the Clean Water Act and specifically identify the Corps as the permitting authority, and then to denote specific instances in which the EPA and the Corps were to coordinate their efforts, and to assign the EPA discrete functions, precludes the Court from accepting the federal defendants' argument that Congress simply intended to prescribe a statutory minimum in regard to the EPA.

Id. at 45 (quoting Ry. Labor Execs. Ass'n v. Nat'l Mediation Bd., 29 F.3d 655, 659 (D.C. Cir. 1994)).

The same result must be reached here. The ESA makes FWS the principal entity

[20] The record in this case amply illustrates why Congress made the judgment that an action agency like BOEM should not be entrusted with determining what is necessary to conserve listed species. As explained, BOEM pressured FWS to expedite its review so that the project could be approved, see supra pp. 8-9, and in this Court BOEM has stated that it has a "significant interest in the development of . . . the Cape Wind Project." Doc. 131 at 10.

responsible for implementing section 7 of the ESA, and Congress specifically charged it with crafting an incidental take statement embodying RPMs for minimizing the take of listed species. Where Congress wanted the action agency and/or a permit applicant to play a specific role in the process, the ESA says so. See, e.g., 16 U.S.C. § 1536(c) (directing action agency to prepare "biological assessments" under certain circumstances). Accordingly, the Court should find that the BOEM and CWA unlawfully "exceeded the statutory authority afforded [them] by the [ESA]," and that FWS failed to discharge its statutory duty. Nat'l Mining Ass'n, 816 F. Supp. 2d at 45; see also FWS2298 (9/15/08 conference call notes recognizing that it is "our [FWS] oblig. to include in our [BiOp] Reas. & Prud. measures to minimize the level" of incidental take).[21]

5. Finally, the subversion of the statutory scheme was especially egregious in light of the facts in this case. FWS biologists pursued the temporary feathering RPM because they believed that it was essential to ameliorate project impacts in light of certain unique risks associated with, and features of, the project. For example, although all section 7 incidental take statements must include "reporting requirements," 16 U.S.C. § 1536(b)(4)(C)(iv) – so that FWS and action agency will know "[i]f the amount or extent of taking specified in the incidental take statement is exceeded," thus triggering reinitiation of consultation, 50 C.F.R. § 402.16(a) – the Service biologists repeatedly recognized that there is no effective way to ascertain when individual terns or plovers have been killed in a vast ocean environment.[22]

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[21] Apparently recognizing that the BiOp is legally vulnerable, following issuance of the BiOp, BOEM asserted that "FWS had independent biological grounds for rejecting the RPM." FWS31560. This is revisionist history; at the time the RPM was jettisoned, FWS never stated it had "independent biological grounds" for eliminating the RPM.

[22] See, e.g., FWS2443-44 (8/1/08 e-mail from the Chief of FWS's Branch of Policies, Permits, and Regulations stating that "no effective techniques for post-construction monitoring exist"); FWS3068 (4/21/08 FWS comments stating that BOEM intended to "set in motion an adaptive management process that would be doomed to failure because effective techniques to perform post-construction monitoring simply do not exist"); FWS2297 (9/15/08 handwritten notes stating that "we'll have a hard time assessing whether the [incidental take limit] was exceeded"); FWS2410 (9/5/08 meeting notes stating that "[r]ight now no confidence that we can measure [incidental take] for

Indeed, the BiOp flatly concedes that "[post-construction monitoring may not be able to sufficiently document take of roseate terns and piping plovers resulting from collisions" with the turbines. FWS76 (emphasis added). Accordingly, FWS biologists believed that limiting turbine operation during periods of highest threat to the species was necessary to "make[] up for [the] inability to monitor" for bird deaths in any meaningful way, FWS1912, as well as to incorporate an essential safeguard in view of the inherent risks associated with an unprecedented project of this magnitude. See FWS2411 (9/5/08 meeting notes stating that it is "[a]t least theoretical" that "nearly the entire [northeastern population of roseate terns] will have exposure to collision [mortality] from the project"); FWS2544 (9/3/08 Memorandum from the Northeast Regional Director to FWS Director stating that "[d]ue to the newness of wind energy technology in the marine environment and our lack of understanding of tern and plover flight behavior on Nantucket Sound, the level of take cannot be closely estimated with confidence").

In short, in developing the temporary shutdown RPM under these circumstances, FWS biologists endeavored to "develop the biological opinion with the available information giving the benefit of the doubt to the species," as the ESA requires. FWS31015 (emphasis added); see also Sierra Club v. Marsh, 816 F.2d 1376, 1386 (9th Cir. 1987). Yet, in acceding to CWA's and BOEM's insistence that the RPM be eliminated, the Service made no effort (and, indeed, was afforded no time) to consider what impact the elimination of the RPM might have on related features of the BiOp. Even if FWS could lawfully defer to other parties concerning the RPM – and it could not – the dictates of reasoned decisionmaking at least obligated the Service to assess whether other features of the BiOp needed to be revisited, such as the BiOp's conceded failure to

project"); FWS990 ("Does CWA or MMS really think their monitoring plan will detect take?"); FWS3068 ("We are deeply concerned by this approach because it implies that the applicant can effectively monitor the very resources post-construction they have been unable to monitor during pre-construction studies.").

adopt effective "reporting requirements" for the incidental take that is far more likely to occur without the take minimization measure advocated by FWS biologists. 16 U.S.C. § 1536(b)(4)(C)(iv).[23]

B. By Approving A Project That Will Inevitably Kill Migratory Birds Without Authorization From FWS, BOEM Has Flouted The MBTA.

The MBTA prohibits killing migratory birds "by any means or in any manner" "[u]nless and except as permitted by regulations." 16 U.S.C. § 703(a). FWS has promulgated regulations establishing criteria for MBTA permits, including a regulation, 50 C.F.R. § 21.27, that authorizes a permit when an applicant – which can be a private entity or a federal agency – demonstrates a "compelling justification." Id. This year, for example, NMFS applied to FWS for a permit under this regulation that would "authorize incidental take of two [species of] migratory birds . . . by NMFS in its regulation of the shallow-set longline fishery" in Hawaii. Special Purpose Application: Hawaii Longline Fishery, 77 Fed. Reg. 1501, 1502 (Jan. 10, 2012). If granted, the permit would "authorize incidental take of migratory birds" that will be killed as an inevitable albeit unintended effect of the fishing lines regulated by NMFS. Id.

Here, BOEM has approved the Cape Wind project in patent violation of the MBTA and its permitting scheme. Although the record reflects widely varying predictions as to how many migratory birds CWA's wind power facility will kill, and how overall populations will suffer as a result – especially because the full data FWS sought has never been collected – it is indisputable that the facility will "take" large numbers of migratory birds protected by the MBTA, and it is likewise clear that BOEM authorized operation of the facility despite the fact that neither BOEM

[23] Further compounding FWS's abdication of its section 7 duties, when Plaintiffs submitted to the agencies a detailed economic analysis completely rebutting CWA's assertion that the RPM would wreak havoc on the project's finances, and sought reinitation of formal consultation, the Service did not even address the need for consultation in light of the information but, rather, again simply deferred to BOEM and CWA. See supra p. 14.

nor CWA has obtained a FWS permit to take migratory birds.[24] Moreover, compliance with the MBTA would result in important benefits for migratory birds. For example, FWS – which, as explained, has consistently called for more extensive studies of bird use and risk, especially during poor weather conditions in migration seasons, see supra pp. 14-15 – could insist that such studies be performed as a condition of granting take authorization. See, e.g., FWS18741-45 (FWS's judgment in 2002 that three full years of bird studies are necessary before construction to "avoid the siting of preventable environmental hazards to migratory birds and . . . provide an adequate information base" for permits under the MBTA).[25]

There is no legal justification for BOEM's approval of a major project that contravenes the MBTA. The EIS acknowledges that the MBTA categorically "prohibits the taking, killing, possession, transportation, and importation of migratory birds . . . except when specifically authorized by the Department of the Interior." CW156952; see also FWS5944; CW359278. The government itself has routinely argued – including in bringing criminal enforcement actions – that

[24] See supra pp. 14-16; FWS31618 (independent analysis by leading avian biologist Dr. Ian Nisbet concluding that "[e]ven using Cape Wind's estimate of 0.968 for the avoidance parameter . . . about 90 [birds and flocks of birds] would collide with the rotors every day"); CW369477 (Mass Audubon estimates of "2,300 to 6,600 collision deaths per year"); FWS5359-60 (analysis by Dr. K. Shawn Smallwood, finding that Cape Wind's massive turbines may kill 18 to 36 as many birds as older, smaller wind facilities, which kill an estimated 2.19 birds per turbine per year); Corps Draft EIS at 5-126 (included in FWS AR but not bates-labeled) (estimating "single digit[]" sea duck mortalities at each turbine each year, resulting in thousands or tens of thousands over the 20-year lifespan of the facility). Had BOEM carried out the preconstruction surveys called for by FWS, it would have been in a far better position to reliably predict bird impacts. Its failure to do so not only contravenes the MBTA, but NEPA regulations as well, as recognized by agency biologists. See, e.g., FWS3061 (4/21/08 FWS comments explaining that statements in the EIS "regarding the basic lack of information" were "applicable to all birds, not just the piping plover, red knot, and other shorebirds because the applicant and MMS have not conducted the field studies to obtain the information necessary for an informed analysis as required by 40 CFR 1502.22"); FWS12675 (3/22/07 e-mail describing FWS's belief that BOEM should require CWA to "fill the data gaps" that FWS had identified, pursuant to NEPA).

[25] Indeed, NMFS's application for MBTA authorization under FWS's "special use" regulation, see supra p. 29, incorporates "the use of measures to avoid and minimize take of migratory birds." 77 Fed. Reg. at 1502. Additionally, FWS has stated that if such authorization is granted, the agency will "condition[] the permit" on NMFS's commitment to analyze whether particular kinds of fishing gear are killing birds and to "develop . . . remedies" to further reduce take. 77 Fed. Reg. at 1502-03.

the MBTA applies to activities that will inevitably, even if unintentionally, kill migratory birds. For instance, when an energy corporation convicted under the MBTA moved to vacate the judgment on the grounds that the MBTA only prohibits unauthorized hunting and other conduct intended to kill birds, the government forcefully argued that "the MBTA extends beyond hunting, trapping or poaching and reaches conduct by corporations like CITGO that result in the taking and killing of migratory birds." Gvt. Br. at 1 United States v. CITGO Petroleum Corp., No. 06-563, 2012 WL 3866857 (S.D. Tex. Sept. 5, 2012) (ECF No. 770) (emphases added). The government demonstrated that the plain language of the Act, which prohibits taking migratory birds "at any time, by any means or in any manner," permits no other plausible reading. Id. at 2-4 (emphases added); id. at 6-9 (government arguing that the MBTA's legislative history also requires that its prohibitions apply to incidental takes of migratory birds); Gvt. Br. at 6 United States v. Apollo Energies, 611 F.3d 679 (10th Cir. 2010) (No. 1018262748) ("'the MBTA applies to both intentional and unintentional behavior'" (quoting the district court opinion)); see also Coal. for Responsible Regulation v. EPA, 684 F.3d 102, 134 (D.C. Cir. 2012) ("On its face, the word 'any' has an expansive meaning, that is, one or some indiscriminately of whatever kind." (internal citation omitted)).

Many other courts have also found MBTA liability for takes "incidental" to an otherwise lawful activity. The Tenth Circuit, for example, held an energy company liable for its failure to avoid takes of migratory birds by bird-proof oil drilling equipment, even though the company did not intend to violate the Act. United States v. Apollo Energies, 611 F.3d 679, 686 (10th Cir. 2010); see also id. at 685 (citing First, Second, Third, Fourth, Sixth, Seventh, and Eighth circuit decisions, as well as a Fifth Circuit decision "holding misdemeanor MBTA violations are strict liability crimes"); United States v. CITGO, 2012 WL 3866857 at *8; United States v. Moon Lake

Elec. Ass'n, 45 F. Supp. 2d 1070, 1072-83 (D. Colo. 1999) (MBTA prohibits the predictable albeit unintentional killing of protected birds by power lines); United States v. Corbin Farm Serv., 444 F. Supp. 510, 532-36 (E.D. Cal. 1978) (MBTA prohibits the incidental killing of protected birds by pesticide poisoning).[26]

Indeed, that the MBTA applies in such situations should be beyond serious dispute given Congress's reaction to the ruling in Center for Biological Diversity v. Pirie, 201 F. Supp. 2d 113 (D.D.C. 2002), vacated sub nom. Ctr. for Biological Diversity v. England, No. 02-5163, 2003 WL 179848 (D.C. Cir. Jan. 23, 2003). In response to Judge Sullivan's holding that the incidental take of migratory birds caused by the Navy's military training exercises violated the MBTA, id., Congress enacted the National Defense Authorization Act for FY 2003, which expressly recognized FWS's authority to regulate incidental take. Pub. L. No. 107-314, § 315, 116 Stat. 2458. Section 315 of that Act provides that "the Secretary of the Interior shall exercise the authority of that Secretary under [Section 704(a) of the MBTA] to prescribe regulations to exempt the Armed Forces for the incidental taking of migratory birds during military readiness activities[.]" Id. (emphasis added). The Act, therefore, did not bestow new authority on FWS to regulate incidental take, but directed it to exercise its existing authority under the MBTA to authorize incidental take by the Armed Forces under prescribed circumstances. Accordingly, as the government has recognized, the MBTA's restrictions plainly apply to activities that incidentally result in the take of migratory birds.[27]

[26] But see United States v. Brigham Oil & Gas, 840 F. Supp. 2d 1202, 1211 (D.N.D. 2012).

[27] See also S. REP. NO. 99-445, at 16 (1986), reprinted in 1986 U.S.C.C.A.N. 6113, 6128 (MBTA amendment requiring scienter for felony violations does not foreclose a strict liability standard in other contexts). Notably, even in the case of military operations, Congress did not direct FWS to exempt such operation wholesale, but rather, to ensure that they are conducted with plans designed to minimize bird mortality. See Pub. L. No. 107-314, § 315; 50 C.F.R. § 21.15.

It is also well established in this Circuit that federal agencies such as BOEM are bound by the MBTA and that their actions or approval of actions in violation of that Act are "contrary to law" under the APA. Am. Bird Conservancy v. FCC, 516 F.3d 1027, 1031 (D.C. Cir. 2008) ("[T]he MBTA applies to federal agencies."); Humane Soc'y of the U.S. v. Glickman, 217 F.3d 882, 886 (D.C. Cir. 2000). Here, the FWS solicitor told BOEM that, absent a plan that prevents bird kills, BOEM "will not be able to make a passable argument that it has accounted for impacts to migratory birds, or that its actions serve as a functional equivalent of an MBTA permit" – and yet BOEM neither sought MBTA authorization nor required CWA to do so. CW140817.

Instead of requiring effective measures to prevent MBTA violations, BOEM and FWS have simply "agreed to obtain monitoring data, designed to reflect the actual [deaths of] migratory species, before establishing triggers or thresholds" for protections. CW242442 (emphasis added). But this approach will, at best, monitor for inevitable violations rather than comply with the law. Nowhere in the MBTA does Congress permit federal agencies to authorize actions certain to kill migratory birds with nothing more than aspirations to count the dead bodies – although even accurate monitoring will be impossible, see CW257555; FWS2443-44 – and an informal agreement that, perhaps, they will get around to addressing the problem later.

Nor can BOEM rely on FWS's prosecutorial discretion to avoid liability under the MBTA. See, e.g., CW156952 (FWS's "Office of Law Enforcement and Department of Justice have used enforcement and prosecutorial discretion in the past regarding individuals, companies, or agencies who have made good faith efforts to avoid the take of migratory birds"). Rather, it is plainly "contrary to law" for a federal agency to approve a project that will inevitably violate the MBTA, regardless of the theoretical possibility of later prosecution. E.g., HSUS v. Glickman, 217 F.3d at

886.[28]

In short, BOEM approved a lease and COP for a facility that BOEM knows will kill migratory birds in violation of federal law. Under clear Circuit precedent, that is a patent MBTA violation that the Court is obligated to remedy. HSUS v. Glickman, 217 F.3d at 886.[29] Yet, here, BOEM, while indisputably aware of the tension between its approval for the project and the requirements of the MBTA, simply sidestepped the required process. This result is "contrary to law" and must be set aside. 5 U.S.C. § 706(2)(A); accord HSUS v. Glickman, 217 F.3d at 886; Nw. Envtl. Def. Ctr. v. Bonneville Power Admin., 477 F.3d 668, 682-86 (9th Cir. 2007).[30]

II. THE ESA CONSULTATION FOR RIGHT WHALES AND SEA TURTLES VIOLATES THE ESA AND IS ARBITRARY AND CAPRICIOUS.

A. NMFS Failed To Respond Meaningfully To Information Establishing That Right Whales Use The Action Area.

As noted, the right whale is "one of the most critically endangered large whale species in the world." Defenders v. Guitierrez, 532 F.3d 913, 915 (D.C. Cir. 2008) (internal quotation marks omitted). NMFS's 2010 BiOp determined that boat strikes are a grave threat, NMFS1488, and "the premature loss of even one reproductively mature female could hinder the species' likelihood

[28] Indeed, the notion that one component of the Interior Department will approve the Cape Wind project, knowing that it will violate the MBTA, and then another component of the Interior Department will prosecute the very same project for MBTA violations borders on the ludicrous, especially since FWS has never prosecuted a single wind power project for MBTA violations. See FWS4761 (statement of the chairwoman of the House subcommittee on fisheries, wildlife and oceans).

[29] Here, the violation is more egregious than that at issue in HSUS v. Glickman, because, once again, BOEM is an entity within the Interior Department – which is ultimately responsible for implementing the MBTA, as well as the international treaties underlying the statute. If any component of the federal government should scrupulously comply with the Congressionally mandated process for obtaining authorization to take migratory birds, it is the Interior Department.

[30] A Memorandum of Understanding between BOEM and FWS, which states that BOEM will engage in conservation efforts for migratory birds, CW352083, cannot substitute for compliance with the MBTA, especially since it was adopted after BOEM prepared the EIS and approved the lease. CW164435 (statement by BOEM's bird biologist that applying the Memorandum to Cape Wind was "an *ex post facto* exercise"); see also CW312431-32 (2010 EA characterizing the Memorandum as applying only to future projects).

of recovering." NMFS1513. However, despite right whale presence in the project area, NMFS1013, and the projected increase in boat traffic in waters where right whales swim, NMFS1415-16, NMFS1421, the BiOp concluded that the project is "not likely to adversely affect" right whales, NMFS1534, and thus did not establish conditions for the incidental take of any whales. See NMFS1536. Neither the BiOp's dismissal of the facility's impacts on right whales in Nantucket Sound, NMFS1501, nor its assurance that the likelihood of collision with ships going to and from port is "discountable," NMFS1514, can be reconciled with the administrative record.

1. NMFS's 2010 BiOp Arbitrarily Dismissed Right Whale Use Of Nantucket Sound.

The 2008 BiOp's conclusion that Cape Wind would pose no risk to right whales assumed that "right whale occurrence in the action area [wa]s extremely rare, with transient individuals likely to overlap only sporadically with the eastern extremes of the action area between December and June," NMFS901, based on the biological assessment's assertion that "underdevelopment of whale prey species [occur] in Nantucket Sound." NMFS138; see also NMFS93. In April 2010, however, 96 right whales aggregated in the waters in and around Nantucket Sound, "responding to a rich prey resource." NMFS1021-25 (article in Right Whale News); see NMFS1013 (map identifying right whales in and around Nantucket Sound). These 96 individuals comprised approximately one-third of all living right whales, see NMFS1432, including, most critically, two first-time mothers with calves. NMFS998; see also NMFS1017 (recording 19 births for the total population in 2010). Again in 2011 and 2012, right whales, including four mother-calf pairs in 2011, congregated in the area, "actively surface feeding, indicating dense patches of [the] zooplankton on which right whales feed." NMFS2138; accord http://www.nefsc.noaa.gov/psb/surveys/SASInteractive2.html.

In the face of new information on right whale use of Nantucket Sound and nearby waters, the agencies were obligated under the ESA to reinitiate consultation to determine whether the "best scientific and commercial data available" continued to support their determination that the project posed no threat to right whales. 16 U.S.C. § 1536(a)(2). Here, the evidence clearly established the whales' presence in the action area in direct contradiction to the central premise that underpinned the previous conclusion that the facility will not harm right whales. The 2010 BiOp, however, while admitting that "several right whales were observed in or near Nantucket Sound," including one whale within 5 kilometers of the facility footprint, concluded, bizarrely, that "the sightings from 2010 supports [sic] the determination that right whales are rare visitors to Nantucket Sound," and that "there is no evidence . . . of an increasing trend of usage of the area." NMFS1501. In other words, confronted with a factual development that completely undermined its previous premise, NMFS not only failed to revise its opinion accordingly, but, rather, insisted that the recent evidence of right whale use of Nantucket Sound somehow supported its position that right whales do not use the area.

If this does not constitute arbitrary and capricious decisionmaking, then nothing does. As the D.C. Circuit has stated, "if one should learn that [a] prediction is certainly wrong . . . then it would be wrongheaded in the extreme to persist in the original assumption." Chemical Mfrs. Ass'n v. EPA, 28 F.3d 1259, 1265 (D.C. Cir. 1994). Here, NMFS's conclusion flies in the face of the record and thus fails to "reflect a rational connection between the facts found and the choice made, as well as [provide] a reasonable explanation of the specific analysis and evidence upon which [it] relied." Defenders v. Salazar, 842 F. Supp. 2d at 189 (quoting Bluewater Network v.

EPA, 370 F.3d 1, 21 (D.C. Cir. 2004)) (internal quotation marks omitted).[31]

In a similar factual context, the D.C. Circuit found that the EPA was obligated to better explain why it continued to adopt particular projections "in the face of evidence suggesting [such] projections were erroneous." Appalachian Power Co. v. EPA, 249 F.3d 1032, 1053 (D.C. Cir. 2001). In that case, the agency set emissions limits for power plants and other facilities based on state-by-state projections of additional electricity generation by the regulated facilities. Id. at 1051. States' historic use, however, exceeded the future projections. Id. at 1053. Because the agency failed to address "what appear[ed] to be stark disparities between its projections and real world observations," the Court remanded the determination "so that the agency [could] fulfill its obligation to engage in *reasoned* decisionmaking." Id. at 1054-55; see also Judulang v. Holder, 132 S. Ct. 476, 479 (2011) ("When an administrative agency sets policy, it must provide a reasoned explanation for its action. That is not a high bar, but it is an unwavering one."); Am. Radio Relay League v. FCC, 524 F.3d 227, 241 (D.C. Cir. 2008) (finding that an agency's "conclusory" response to data undermining a factor critical to the agency's determination failed to "substitute for a reasoned explanation, for it provide[d] neither assurance that the Commission considered the relevant factors nor a discernable path to which the court may defer" (internal citation omitted)).

Here, not only did the 2008 BiOp explicitly rely on the agency's projection that right whales would be absent from the action area as a central basis for its conclusions about the facility's effects on the species, NMFS901, but the agencies reinitiated consultation for the very

[31] Because the whales were responding to food sources in the area, they will likely return year after year. In fact, this spring, right whales have yet again been documented in close proximity to Nantucket Sound. See NMFS, "North Atlantic Right Whale Sighting Survey and Sighting Advisory System," http://www nefsc.noaa.gov/psb/surveys/ SASInteractive2 html (showing "definite" sightings of one right whale in Vineyard Sound on March 24, 2012, and three right whales in Vineyard Sound on April 19, 2012) (last accessed Oct. 6, 2012).

purpose of considering new information that obviously disproved this premise: the aggregation of "an unusually large number of [right whales], including two mother/calf pairs." NMFS1073-74. Thus, the 2010 BiOp's assertion that extensive sightings in 2010 "supports" a prior finding of "rare" use of Nantucket Sound, NMFS1501, is patently arbitrary and capricious. The BiOp must be remanded so that NMFS may address "what appear to be stark disparities between its projections and real world observations." Appalachian Power, 249 F.3d at 1054.

2. The BiOp Does Not Reasonably Address The Effects Of High-Speed Ship Traffic On Right Whales.

The 2008 BiOp found that boat traffic that "would not exist but for the proposed action," NMFS909, posed a "discountable" risk to right whales, because "no whales [we]re expected to occur along the routes" of boats traveling to and from port. NMFS910. The 2010 BiOp, however, conceded that "occasional large whales, including right . . . whales, are likely to occur in Buzzards Bay and in the waters transited by project vessels traveling between New Bedford, MA and the project site in Nantucket Sound." NMFS1499 (emphasis added). Crucially, as explained by NMFS and BOEM, boat traffic associated with the project will travel at speeds that pose serious risks to right whales. The 2010 BiOp admitted, as did the 2008 BiOp and BOEM's biological assessment, that right whales are extremely vulnerable to ship strikes, NMFS1512, NMFS910, NMFS60, and that "the risk of ship strike is significantly reduced when vessels travel at 10 knots or less." NMFS1513 (emphasis added); see also NMFS911 (2008 BiOp stating that traveling at or below 10 knots "is likely to reduce the chance for collision"); NMFS135 (biological assessment stating that "[c]ollisions with vessels that are moving at slower speeds . . . are less likely"); Defenders v. Guitierrez, 532 F.3d at 915-16 (describing the vulnerability of right whales to collisions with fast-moving ships); Defenders v. Navy, 2012 WL 3886412 at *11 ("[S]hip strikes

are the greatest source of mortality for right whales."). Yet neither NMFS nor BOEM is requiring that the boats associated with the project travel at speeds deemed protective of right whales. To the contrary, while simultaneously describing the very conditions most dangerous for right whales – boats carrying maintenance crews traveling at speeds as high as 21 knots, NMFS1514 – and conceding that the "best available science" now confirms right whales' presence in the waters these boats will use, NMFS1498-99, the BiOp arbitrarily dismisses the likelihood that vessels will collide with right whales.

The 2010 BiOp admits that maintenance boats will travel from port to the facility and back over 20 years of operation at speeds of up to 21 knots, twice as fast as the limit NMFS has deemed safe for right whales. NMFS1514. These boats will traverse Buzzards Bay, where "whales, including right . . . whales are likely to occur." NMFS1499. Nonetheless, the BiOp concludes that the operation of the wind power facility will have no impact on right whales – without ever considering slowing maintenance boats, and without justifying how an additional 15,000 to 20,000 vessel crossings over the minimum life of the project will not result in even a single collision with a right whale in the absence of any effective, binding measures to minimize risk.[32]

Repeatedly, the BiOp affirms that the single best measure to reduce right whale mortality from boat collisions is to reduce speeds. See, e.g., NMFS1479 ("A key component of [NMFS's] right whale ship strike reduction strategy is the proposed implementation of speed restrictions for vessels . . . ."); NMFS1513 ("[O]f 41 ship strike accounts that reported vessel speed, no lethal or severe injuries occurred at speeds below ten knots, and no collisions have been reported for

[32] "Cape Wind will maintain two support vessels [and] has estimated that each vessel will make one trip to the project site on each day that the weather is suitable. Thus, the maintenance associated with the Cape Wind project will result in up to two additional vessels in the action area each day." NMFS1514. Given that the boats will make up to four crossings a day over the 20-year life of the project (each boat going to the facility and then returning to port), as many as 19,200 vessel crossings will take place that would not occur but for the project.

vessels traveling less than six knots."); NMFS1513 ("Most ship strikes have occurred between large vessels operating at speeds of 13-15 knots or greater . . . [and] the probability of a ship strike resulting in death decreases significantly for vessels traveling at 15 knots compared to 11.8 knots and . . . decreases even further for vessels traveling at 10 knots or less."); id. ("[T]he risk of ship strike is significantly reduced when vessels travel at 10 knots or less."). For that reason, Plaintiffs, NMFS2124-25, The Humane Society of the United States, CW48144, and Sierra Club, CW243585, urged NMFS to impose speed limits on boats in waters where right whales may occur. See also CW48466 (comments from the Whale and Dolphin Conservation Society expressing concern over the risk of ship strikes from the "additional 1,008 vessel trips annually" expected for maintenance, where no "speed restrictions will be placed on vessels at any time"). Yet nowhere in the BiOp does NMFS ever consider whether speed restrictions are necessary to prevent maintenance crew vessels from severely injuring or killing one or more right whales over the 20 years that the facility will operate.[33]

Instead, in an attempt to downplay the significance of high-speed boats carrying maintenance crews, the BiOp dismisses "[t]he small number of additional transits (2 per day) contributed by maintenance support vessels represents a minimal increase in overall vessel traffic in the area," NMFS1514, without ever analyzing whether 15,000 to 20,000 additional high-speed vessel crossings will put right whales at increased risk of death or injury. Far from a "minimal increase" of vessel use in the area, these tens of thousands of trips through waters potentially occupied by right whales would not occur "but for" Cape Wind. NMFS1510. Given that the

[33] The construction crew boats pose a risk to right whales not only in Buzzards Bay, but also in the waters between the Bay and Nantucket Sound. See NMFS975 (depicting 2010 aggregation, including a mother/calf pair in Vineyard Sound, which exists between Martha's Vineyard and Gosnold, Cuttyhunk, and the other islands off of Woods Hole); NMFS2136 (2011 dynamic management area designated by NMFS); see also "Sighting Advisory System," http://www.nefsc noaa.gov/psb/surveys/SASInteractive2.html (sightings of one right whale in Vineyard Sound on March 24, 2012, and three right whales in Vineyard Sound on April 19, 2012) (last accessed Oct. 6, 2012).

BiOp admits that there is "general agreement that right whale recovery is negatively affected by [human sources of] mortality," and that ships are the primary sources of human-caused mortality, NMFS1432, NMFS was obligated to analyze whether increased daily boat traffic directly attributable to maintenance of the power facility will put right whales at risk of at least one ship strike over the 20-year lifespan of the wind power facility. See FWS31114 (ESA consultation handbook stating that "[i]f the take would not occur but for the proposed action, then the Services must describe the amount or extent of such anticipated incidental take").

The BiOp's concession that "a large number of commercial shipping and fishing vessels" already use the area, NMFS1514, highlights why such analysis is critical, given the right whales' admitted vulnerability to ship strikes. See Nat'l Wildlife Fed'n v. NMFS, 524 F.3d 917, 929 (9th Cir. 2008) (rejecting a BiOp that "evaluated the effects of the proposed action as compared to the reference operation, rather than focusing its analysis on whether the action effects, when added to the underlying baseline conditions, would tip the species into jeopardy"). Rather than assess the level of increased risk over these degraded baseline conditions, NMFS instead discounted the incremental harm to an already highly imperilled species – an approach that has been squarely rejected by courts as violating the ESA by allowing "a listed species [to] be gradually destroyed, so long as each step on the path to destruction is sufficiently modest." Nat'l Wildlife Fed'n, 524 F.3d at 930; see also id. ("This type of slow slide into oblivion is one of the very ills the ESA seeks to prevent."); accord Wild Fish Conservancy, 628 F.3d at 524; Ctr. for Biological Diversity v. Salazar, 804 F. Supp. 2d 987, 998-99 (D. Ariz. 2011).

Nor can the Service abrogate its duty to assess the increased risk to right whales from these vessels by asserting generally, in reference to all listed species and all vessel traffic, that "determin[ing] how a particular number of vessel transits or a percentage increase in vessel traffic

will translate into a number of likely ship strike events or percentage increase in collision risk" is "difficult" based on "limited information available regarding the incidence of ship strike and the factors contributing to ship strike events." NMFS1510. As Judge Kennedy held in a case where FWS "established that [listed] brown pelicans [we]re present in the affected area and admitted that the brown pelicans face a greater risk of take as a result of the [action]," the "possibility of take" requires the Service "to issue an incidental take statement." Pac. Shores, 538 F. Supp. 2d at 261. Thus, NMFS must analyze the likelihood that vessel traffic will take a right whale and issue a BiOp with an incidental take statement that accords with that determination. See also Defenders v. Navy, 2012 WL 3886412 at *20 (BiOp calculated the probability that vessels associated with a project would strike a right whale in any year and over a five-year period); Greenpeace v. NMFS, 80 F. Supp. 2d 1137, 1150 (W.D. Wash. 2000) (finding a violation of the ESA where NMFS "failed to analyze and develop projections based on information that was available"); Natural Res. Def. Council v. Kempthorne, 506 F. Supp. 2d 322, 360 (E.D. Cal. 2007) ("[A]n agency cannot abdicate its responsibility to evaluate the impacts of an action on a species by labeling available information 'uncertain,' because doing so violates Congress' intent that the agencies 'give the benefit of the doubt to the species.'" (quoting H.R. CONF. REP. NO. 96–697, 96th Cong., 1st Sess. 12, reprinted in 1979 U.S.C.C.A.N. 2572, 2576)).[34]

NMFS's reliance on "proposed mitigation measures" to support its determination that "the likelihood of the maintenance support vessels resulting in collision with a whale is discountable"

[34] This issue is critically important because the BiOp's conclusion that the project will not jeopardize the right whale is based on its determination that no aspect of the construction and operation is likely to take right whales. NMFS1534. Given that the death of a single breeding female "could hinder the species' likelihood of recovering," NMFS1513, a change in the agency's take authorization would necessitate a new analysis of whether the facility will jeopardize the right whale. See CBD v. Salazar, 804 F. Supp. 2d at 1000 (finding a determination of how the proposed action affects the species' recovery cannot be "contradicted by other passages in the BiOp that indicate that the . . . proposed action, when added to the underlying baseline conditions, might tip the species into jeopardy, or further deepen the jeopardy by causing additional harm where baseline conditions already jeopardize the species.").

is specious. NMFS1514. The BiOp in fact requires only one measure to minimize the risk that boats will hit right whales – the use of a "[l]ookout" on the boats, NMFS1515 – but the administrative record is replete with evidence that merely looking out for right whales is not a reliable way to detect their presence, let alone avoid collisions, and therefore lookouts alone cannot sufficiently minimize the risk that the fast-moving vessels pose to right whales. See, e.g., NMFS1604-08. Visual observations are impossible in darkness, during adverse weather, and when whales are submerged, NMFS1604, and difficult when the whales are at the water's surface, due to the whales' dark color and low profile in the water. NMFS1608. Additionally, the likelihood of observing a right whale from a boat "decreases drastically as transit speed increases," CW243583, a serious consideration here given that the BiOp states that the boats will be traveling at speeds up to 21 knots. NMFS1514; see also CW243583 (Sierra Club's citation to a NMFS technical memorandum, finding that observations "can often be less than 20-30% even in good sighting conditions, and as low as 0% at night").[35]

Further, right whales themselves do not reliably avoid oncoming boats. A BOEM report on endangered and threatened species in Nantucket Sound concluded that "even though they can theoretically hear approaching ships . . . right whales d[o] not respond to the sounds of approaching vessels or the actual vessels," only reacting when the vessels are in "very close range," thereby being unable to avoid ship strikes. CW214900. Thus, visual observation is insufficient to eliminate the risk that maintenance vessels will collide with right whales.

Because NMFS failed to adequately analyze whether the facility will kill or harm right whales and failed to require sufficient safeguards to protect whales from fast-moving boats –

[35] Compare with Defenders v. Navy, 2012 WL 3886412 at *11 (describing elsewhere the Navy's "aerial surveillance flights during calving season" and the use of "extreme caution and operation [of boats] at a slow, safe speed" in areas where right whales may occur).

particularly the speed limit that NMFS itself has recognized as essential – the BiOp is arbitrary and capricious and violates the ESA's "best available" science standard.[36]

B. NMFS And BOEM Failed To Analyze The Effect Of Much More Intensive Geophysical Surveys On Listed Sea Turtles.

The agencies also violated the ESA and APA by failing to analyze the effect of noise from greatly expanded preconstruction surveys on listed sea turtles. NMFS admits that the "geophysical" surveys, which use equipment that emits loud sounds to determine the composition of the seabed, will "take" sea turtles by disrupting the turtles' behavior. NMFS1527. The 2008 BiOp found that the best available scientific information supported the conclusion that a one-time survey of "approximately 36 hours," NMFS830, and covering only "the project footprint," NMFS635, would take 13 to 28 turtles. NMFS929. When Cape Wind Associates informed the agencies that the geophysical surveys will take 330 to 660 hours – 10 to 20 times as many hours as previously planned – and now include not only the footprint of the facility but also the transmission line to shore, NMFS1526, NMFS should have engaged in a "new analysis of the effects" of this "far more extensive/intensive geophysical survey," NMFS1396, but refused to do so. See also FWS31088 (ESA consultation handbook, which states that "[t]he effects of a

[36] The only other purported "mitigation" measure that NMFS cites in concluding that the risk of collision for maintenance vessels is not incorporated as a binding term and condition in the BiOp. On December 6, 2010, BOEM's protected species biologist informed Cape Wind that "there will likely be one additional mitigation [which] will be to monitor the [right whale] Warning System (Sighting Advisory System) and should be something very simpl[e] to incorporate." CW245899. However, NMFS abandoned the mitigation measure – which would have required boats associated with the project to monitor the Sighting Advisory System, which informs mariners of right whales in the area – leading a NMFS marine biologist to explain that "[t]here are no new terms and conditions, reasonable and prudent measures, or the like." CW156121. Thus, neither NMFS nor BOEM may rely on any "expect[ations] that vessel operators will monitor the Northeast US Right Whale Sightings Advisory System," since operators are not even required by the BiOp to use that system to monitor for right whale presence, let alone to slow down vessels in response, since such so-called "mitigation" is not required by the BiOp. NMFS1514; see also Natural Res. Def. Council v. Evans, 279 F. Supp. 2d 1129, 1181 (N.D. Calif. 2003) (finding a BiOp failed to use the best available information where it "incorrectly assume[d]" that a technology's ability to detect members of the protected species "would minimize their likelihood of exposure" without any requirement that the "vessel would necessarily shut down on detection").

proposed action on listed species . . . depend largely on the duration of its effects"). Instead, the Service published, and BOEM relied upon, a BiOp that acknowledged the expanded geophysical surveys but did not analyze how longer periods of exposure to loud noises will affect the turtles, or authorize additional take. Compare NMFS929 with NMFS1536.

Further, the BiOp is inconsistent. The Service stated in 2010 that "[t]he survey area includes the entire project footprint where wind turbines will be installed and the 115kV submarine cable route," NMFS1526 (emphasis added), as compared to the survey considered in 2008, which would have encompassed "[o]nly the project footprint on Horseshoe Shoal." NMFS779. However, in calculating the number of turtles that the survey will take, the Service used an area of 148 square kilometers, NMFS1536, a figure identical to the area used to calculate take in 2008, NMFS921, without ever accounting for the take of turtles using waters along the 12.5-mile submarine cable route. Thus, yet again, an agency responsible for ensuring that the Cape Wind facility complies with federal laws – in this case, the ESA – "failed to supply any apparent analysis of the record evidence" on an issue of critical importance. Town of Barnstable, 659 F.3d at 35. Because the Service's BiOp papered over an important aspect of the action likely to take listed species, it violates the ESA and APA.[37]

CONCLUSION

For the foregoing reasons, the Court should vacate and remand the agencies' decisions at issue. A proposed order embodying this relief is attached.

[37] Because BOEM has an "independent, substantive duty under ESA [section] 7 to ensure that its actions are not likely to jeopardize" endangered species, its reliance on FWS's and NMFS's unlawful BiOps also violates the ESA and APA. CBD v. Salazar, 804 F. Supp. 2d at 1010. Likewise, the Corps relied on these defective opinions in issuing a permit for the project under Section 404 of the Clean Water Act. Corps13:1-36.

Respectfully submitted,

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