

7.0 REGULATORY PERMITTING AUTHORITIES AND REGULATORY REVIEWS

7.1 Coordinated Review

This filing is being submitted as a consolidation of two different environmental impact review processes. The Applicant has worked cooperatively with federal and state review agencies to coordinate and file one comprehensive document that will fulfill the project review requirements of the National Environmental Policy Act (NEPA) - Environmental Impact Statement, Massachusetts Environmental Policy Act (MEPA) - Environmental Impact Report. Both NEPA and MEPA regulations allow for and encourage the preparation of joint EIS/EIR documents for projects that can achieve consolidated review for similar scopes of study.

Furthermore, MEPA and the Cape Cod Commission have a formal process for coordinated EIR/Development of Regional Impact (DRI) review pursuant to a Memorandum of Understanding (MOU) between the two agencies.

The Cape Cod Commission reviews Developments of Regional Impact (DRI) that present regional issues or potential impacts to the resources of Cape Cod. At the proponent's request, DRI projects that are required to complete MEPA review may participate in a joint review in accordance with the MOU between MEPA and the Cape Cod Commission (Appendix 7.0-A). The MOU has been established due to the extensive overlap between the two agencies' statutory responsibilities with respect to development on Cape Cod. The joint review process allows issues that are relevant to the Commission review to be incorporated into the EIR. Cape Cod Commission DRI review continues once the Final EIR is certified by the State.

The combined review process has allowed the development of joint scopes of study that have been coordinated to facilitate joint agency and public review of the Project. Furthermore, the combined process has made it possible for joint hearings to be undertaken allowing the public to be fully informed on the multiple jurisdictional aspects. The coordination of the multiple jurisdictional reviews has further allowed for an inclusive process and for full open disclosure.

The benefits of the coordinated review are the common resolution of the scopes and issues raised by the agencies and the public. Several state and federal entities have a regulatory role or have been invited to participate as cooperating agencies in the preparation of the combined document. Cooperating agencies in addition to USACE, MEPA, and CCC include: U.S. Environmental Protection Agency (EPA), Federal Aviation Administration (FAA), U.S. Coast Guard (USCG), Federal Energy Regulatory Commission (FERC), Massachusetts Coastal Zone Management (MCZM), U.S. Fish and Wildlife Service (USFWS), National Marine Fisheries Service (NMFS), U.S. Department of Energy (USDOE), U.S. Department of Interior Minerals Management Service (USDOI-MMS), State Historic Preservation Officer/Massachusetts Historic Commission (SHPO/MHC), Wampanoag Tribe of Gay Head Aquinnah.

Please refer to Table 7-1 for a summary of regulatory review mechanisms and jurisdiction. Please refer to Figure 7-1 for a schematic of regulatory jurisdiction.

7.2 Federal Regulatory Jurisdictions and Reviews

7.2.1 Federal Environmental Impact Review

National Environmental Policy Act (NEPA) Review

Legal Authority:

Statute: 42 U.S.C. §§ 4321-4347

Regulations: Council on Environmental Quality (CEQ), 40 CFR Parts 1500-1508 "Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act", 1981.

Corps of Engineers, Department of the Army, 33 CFR Parts 230 and 325 "Environmental Quality; Procedures for Implementing the National Environmental Policy Act (NEPA); Final Rule, February 3, 1988.

Jurisdiction:

The NEPA of 1969 was implemented to ensure that Federal agencies consider the environmental impacts of their actions, and protect the quality of the environment through consideration of alternatives that would serve to avoid or minimize damage to the environment.

Process:

The CEQ regulations state that Federal agencies shall integrate the NEPA process at the earliest possible time to ensure that agency permitting decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts.

The District Engineer of the USACE will follow 33 CFR Parts 230 and 325 for environmental procedures and documentation required by the National Environmental Policy Act of 1969. The District Engineer will determine if one of the following should be prepared: (1) an Environmental Assessment resulting in a Statement of Findings (SOF); or (2) an Environmental Impact Statement (EIS), resulting in a Record of Decision (ROD). Based on the findings of the NEPA documentation, the District Engineer will ultimately determine, in accordance with the public record and all other applicable regulations, whether to issue or deny a permit.

Upon review of the Section 10 Individual Permit filed on November 11, 2001, the District Engineer determined that an EIS would be prepared. The Council on Environmental Quality (CEQ) Regulations for implementing NEPA, (40 CFR Parts 1500-1508), Section 1508.27, set forth considerations in defining the significance of proposed actions in terms of context (analyzed in context of affected region, interests and locality), and intensity (severity of impact). These considerations include:

- Impacts that may be both beneficial and adverse.
- The degree to which the proposed action affects public health or safety.
- Unique characteristics of the geographic areas such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.
- The degree to which the effects on the quality of the human environment are likely to be highly controversial.
- The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.
- The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.
- The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural or historical resources.
- The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

In summary, based on the above considerations, the USACE New England District, acting as the lead Federal Agency, determined that preparation of a NEPA EIS document is appropriate and necessary to facilitate its review under NEPA jurisdiction in order to evaluate and decide on the permit application request.

7.2.2 Federal Permit Reviews

7.2.2.1 United States Army Corps of Engineers (USACE)

USACE Jurisdiction and Review

Legal Authority:

Statute: Rivers and Harbors Act of 1899 - 33 U.S.C. § 403-405

Regulations: 33 CFR § 320-330

Jurisdiction:

Section 10 of the Rivers and Harbors Act of 1899 regulates work and structures that are located in, or that affect, navigable waters of the United States. Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for

use to transport interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the waterbody, and is not extinguished by later actions or events which impede or destroy navigable capacity.

Project Activities Subject to Jurisdiction:

The Wind Park, the installation of the submarine cable systems, and the cable landfall transition structures will be subject to regulatory permitting review and approvals under Section 10 jurisdiction because the Project will be located in designated navigable waters of the United States. Corps of Engineers authority to regulate obstructions to navigation in navigable waters was extended to artificial islands, installations and other devices located on the seabed, to the seaward limit of the Outer Continental Shelf by section 4(f) of the Outer Continental Shelf Lands Act of 1953 as amended (43 U.S.C 1333(e)). Section 403 of the Clean Water Act (CWA) jurisdiction includes discharges into the territorial sea, the contiguous zone and ocean water further offshore and Section 404 of the CWA jurisdiction includes discharges of dredge or fill material into waters of the United States. The jet plow installation of submarine cable systems or any other associated project activities will not result in a discharge of dredge or fill material into waters of the United States. Therefore, Section 403 and 404 review does not apply to the proposed project.

Current Review Status:

An Individual Permit application requesting Section 10 approval was filed on November 21, 2001 and is currently under review by USACE-NAE.

Project Compliance with USACE Standards

Project Characterization:

The construction of any structure in, over, or under any navigable waters of the United States requires a Section 10 permit. The Wind Park and submarine transmission lines are considered structures in navigable waters of the U.S. Therefore Section 10 jurisdiction applies to the proposed project.

Project Compliance Review:

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

Information necessary to evaluate the Project under the National Historic Preservation Act, Migratory Bird Treaty Act, Magnuson-Stevens Act, Fish and Wildlife Coordination Act, Endangered Species Act, Marine Mammals Protection Act, Clean Air Act, and Executive Order 12898, Environmental Justice, are included in the DEIS-DEIR. Upon receiving comments/recommendations from the appropriate agencies pertaining to the above mentioned Acts, USACE will take these comments/recommendations into consideration in determining whether, and under what conditions, to issue the Section 10 Permit.

7.2.2.2 Federal Aviation Administration (FAA)

FAA Jurisdiction and Review

Legal Authority:

Statute: 49 U.S.C. § 44718

Regulations: 14 CFR Part 77

Jurisdiction:

The FAA's authority to promote the safe and efficient use of the navigable airspace, whether concerning existing or proposed structures, is predominantly derived from 49 United States Code, Section 44718. Title 14, Code of

Federal Regulations, Part 77, Objects Affecting Navigable Airspace, was adopted to establish notice criteria for proposed construction or alteration that would protect aircraft from encountering unexpected structures. The regulations apply to structures located within any state, territory, or possession of the United States, within the District of Columbia, or within territorial waters (12NM) surrounding such states, territories, or possessions.

Project Activities Subject to Jurisdiction:

All 130 Wind Turbine Generators are subject to FAA review and authorization.

Current Review Status:

The Applicant has coordinated with the FAA in the review of potential impacts to air navigation for structures greater than 200 feet in height above ground level. On September 25, 2002, the Applicant filed a Notice of Proposed Construction or Alteration (FAA Form 7460-1) with the FAA, pursuant to 14 CFR Part 77, Objects Affecting Navigable Airspace, for each proposed WTG location. The FAA's review has considered whether the Project would be a hazard to air navigation. The FAA issued a Determination of No Hazard to Air Navigation on April 9, 2003 (see Appendix 5.12-C).

Project Compliance with FAA Standards

Project Characterization:

Any vertical structure greater than 200 feet in height must have FAA approval to avoid or minimize obstruction to navigable air space. The height of individual WTGs will exceed this 200-foot threshold (overall height of 417 feet MSL) and therefore the Project will require FAA approved lighting/markings.

Project Compliance Review:

The FAA issued a Determination of No Hazard to Air Navigation on April 9, 2003 (see Appendix 5.12-C).

7.2.2.3 United States Coast Guard (USCG)

USCG Jurisdiction and Review

Legal Authority:

Statute: 14 U.S.C. § 83

Regulations: 33 CFR Part 66.0, Subpart 66.01

Jurisdiction:

The USCG has jurisdiction over projects located in navigable waters of the U.S.

Project Activities Subject to Jurisdiction:

All 130 WTGs and the ESP are subject to USCG review for authorization to mark and light the WTGs and ESP. The USCG has safety and regulatory jurisdiction over projects located in navigable waters of the U.S.. The USCG Marine Safety Office for the Port of Providence, Rhode Island which has jurisdiction over general navigation in the project area has coordinated a Navigational Risk Assessment for the Project. This Risk Assessment was prepared at the direction of, and in consultation with, the US Coast Guard Marine Safety Office at the Port of Providence in order to provide a qualitative assessment of navigational risks related to the proposed project. The analyses required by the USCG were outlined in a letter to the USACE dated February 10, 2003 (see Appendix 5.12-A). The Navigational Risk Assessment is included as Appendix 5.12-B.

Current Review Status:

A Permit application to establish and operate Private Aid-to-Navigation to a Fixed Structure has not yet been filed.

Project Compliance with USCG Standards

Project Characterization:

The Wind Park constitutes a fixed structure in navigable waters of the United States which therefore requires private aids to navigation marking.

Project Compliance Review:

The Applicant has notified the USCG of the proposed construction of the Wind Park in Nantucket Sound. A navigational risk assessment performed by the Applicant has been completed and turned into the USCG for its review and determination. Furthermore, the Applicant is required to provide to the USCG evidence of the USACE permit issued on the Proposed Project.

7.2.2.4 United States Environmental Protection Agency (USEPA)**USEPA Jurisdiction and Review**Legal Authority:

Statute: Clean Water Act of 1972 - 33 U.S.C. §1342(p); Water Quality Act of 1987 § 402(p)

Regulations: 40 CFR Part 122

Jurisdiction:

USEPA is responsible for implementing certain provisions of the Clean Water Act. The Clean Water Act prohibits the discharge of pollutants into waters of the United States unless a National Pollutant Discharge Elimination System (NPDES) permit has been issued.

Project Activities Subject to Jurisdiction:

Installation of the proposed upland transmission lines and associated components will require a NPDES General Stormwater Construction permit.

Current Review Status:

An application for a NPDES General Stormwater Construction Permit will be filed prior to commencement of project construction.

Project Compliance with USEPA StandardsProject Characterization:

The proposed upland transmission line route is approximately 5.9 miles in length and therefore the Project will alter more than one acre.

Project Compliance Review:

A Notice of Intent that includes general project information and certification that the activity will not impact endangered or threatened species must be submitted to the NPDES permitting authority. The upland construction and installation activities require the contractor to develop a construction storm water pollution prevention plan (SWPPP) that includes the appropriate best management practices to minimize the discharge of pollutants from the project area. Within 30 days of completion of the installation of the upland transmission line, associated components, and final stabilization of the project area, a Notice of Termination will be filed with the permitting authority.

7.2.2.5 Section 106 of the National Historic Preservation Act, as Amended Through 2000**USACE Jurisdiction and Review**Legal Authority:

Statute: Section 106 of the National Historic Preservation Act (NHPA) of 1966, as amended through 2000; 16 U.S.C. 470f

Regulations: 36 CFR Part 800 and 33 CFR Part 325

Jurisdiction:

Section 106 of the NHPA of 1966, as amended through 2000, requires that federal agencies consider the effects of their undertakings (as defined in 36 CFR § 800.16(y)) on properties included in or eligible for inclusion in the National Register of Historic Places (known as historic properties per 36 CFR Part 800 or designated historic properties per 33 CFR Part 325, Appendix C). The USACE will fulfill the requirements set forth in the NHPA,

including consultation with the State Historic Preservation Officer (SHPO) in accordance with the implementing regulations.

Project Activities Subject to Jurisdiction:

An undertaking has an effect on a historic property when that undertaking has the potential to alter the characteristics of the property that qualified the property for inclusion in the National Register. Effects can include physical disturbance, noise, or visual effects. If an adverse effect on historic properties is found, the district engineer will notify the federal Advisory Council on Historic Preservation, consult with the SHPO, and encourage the applicant to avoid, minimize or mitigate the adverse effect(s). Ground-disturbing activities associated with construction of the Project, as well as visual effects of the aboveground WTGs, are subject to Section 106 review.

The USACE defines the permit area for the Project as the polygon encompassing the WTGs and the cable installation works areas landward to mean high water.

Current Review Status:

The regulations at 36 CFR Part 800 and 33 CFR Part 325, Appendix C require the identification of historic properties in the Project's Area of Potential Effect. This process has been completed along the proposed upland transmission routes, and is currently underway along the marine transmission route between the ESP and the Yarmouth landfall and in the vicinity of the Wind Park. Studies include development of a predictive model for the presence of potentially significant submerged archaeological resources which may exist in the offshore portions of the Project Area and a marine reconnaissance archaeological survey, as requested by the cooperating state agency Massachusetts Historic Commission (which includes the State Historic Preservation Office and State Archaeologist) and also the Massachusetts Board of Underwater Archaeological Resources. Historic properties within the viewshed of the Wind Park have been identified on Cape Cod, Nantucket and Martha's Vineyard. Visual simulations of the built Wind Park from representative locations have been completed, in accordance with USACE requirements.

Project Compliance with Section 106

Project Characterization:

Because the Project is a federal undertaking (as defined in 36 CFR § 800.16(y)), the Project is subject to review under Section 106 of the NHPA.

Project Compliance Review:

In making the public interest evaluation, the district engineer shall weigh all factors, including the effects of the undertaking on historic properties and any comments of the Advisory Council on Historic Preservation, the SHPO, and other interested parties. The district engineer will add permit conditions to avoid, minimize or mitigate adverse effects on historic properties.

7.2.2.6 National Marine Fisheries Service (NOAA Fisheries)

NMFS Jurisdiction and Review

Legal Authority:

16 U.S.C. 661 et seq. - Fish and Wildlife Coordination Act

16 U.S.C. 1801-1882 - Magnuson-Stevens Fishery Conservation and Management Act of 1976

16 U.S.C. 1531-1543; Pub. L. 93-205, as amended - Endangered Species Act of 1973

16 U.S.C. 1361-1421; Pub. L. 92-522, as amended; reauthorized in 1994 (Pub. L. 103-238) - Marine Mammal Protection Act of 1972

Jurisdiction:

NMFS is a division of the Department of Commerce and is responsible for the management, conservation and protection of living marine resources within the United States' Exclusive Economic Zone (water three to 200 mile offshore). NMFS has regulatory review and responsibilities for the management and protection of EFH as well as responsibilities under the Endangered Species Act and the Marine Mammal Protection Act.

Project Activities Subject to Jurisdiction:

NMFS is responsible for providing an assessment of the Project's likelihood to cause adverse impacts on species or habitats under their jurisdiction. They can also provide recommendations to the federal agency for mitigation actions to reduce or compensate for Project impacts, or can recommend that the federal agency denies the permit. For the Cape Wind Project, NMFS review falls into four categories: Fish and wildlife species and habitats regulated under the Fish and Wildlife Coordination Act, Essential Fish Habitat (EFH) regulated under the Magnuson Stevens Act, marine species and habitats regulated under the Endangered Species Act, and species regulated under the Marine Mammal Protection Act.

Current Review Status:

The Project is currently undergoing review.

7.3 State Regulatory Jurisdictions and Review**7.3.1 State Environmental Impact Review****MEPA Jurisdiction and Review****Legal Authority:**

Statute: M.G.L. Chapter 30 §§ 61 through 62H

Regulations: 301 CMR 11.00

Jurisdiction:

MEPA jurisdiction is triggered when an entity undertakes certain activities in the Commonwealth of Massachusetts which requires one or more State Permits but does not involve Financial Assistance. The scope of an EIR document, if required, is generally limited to those aspects of the Project within the subject matter of any required State Permits that are likely, directly or indirectly, to cause Damage to the Environment.

MEPA is the Massachusetts state environmental impact review process that includes project alternative analysis, environmental impact assessments, and analyses of consistency with applicable state regulations and policies, and implementation of appropriate mitigation measures.

Project Activities Subject to Jurisdiction:

In accordance with the Certificate issued for the Expanded Environmental Notification Form (ENF), the Secretary determined that the Project required additional MEPA review and the preparation of an Environmental Impact Report (EIR) pursuant to 301 CMR 11.03(7)(b)(4) because the Project involves the construction of a new electric transmission line greater than one mile in length with a capacity of 69 or more kV. MEPA jurisdiction applies to the upland and submarine cable system components in Nantucket Sound out to the mapped 3-mile state territorial sea boundary.

Current Review Status:

The Applicant filed an ENF with the MEPA Office on November 15, 2001. The Secretary of Environmental Affairs issued a Certificate on April 22, 2002 calling for an EIR and defining the scope of the required EIR. On May 28, 2003, the Secretary expanded the Scope of the April 22, 2002 EIR requirements to include Chapter 91 variance considerations and the Massachusetts Ocean Management Initiative.

The MEPA response to comments and copies of the comment letters are provided in Appendix 7.0-B.

7.3.2 State Permit Reviews

7.3.2.1 Massachusetts Energy Facilities Siting Board (EFSB)

EFSB Jurisdiction and Review

Legal Authority:

Statute: 164 M.G.L. §§ 69G-J

Regulations: 980 CMR §§ 1.00-12.00

Memorandum of Understanding Between the Executive Office of Environmental Affairs and the Energy Facilities Siting Board Relative to the Coastal Zone Management Plan

Jurisdiction:

The EFSB is an independent state review board within the Department of Telecommunications and Energy (DTE). The EFSB reviews proposals to construct certain energy facilities, including large power plants, electric transmission lines, and natural gas pipelines. Pursuant to G.L. Chapter 164, Section 69J and the regulations at 980 CMR 1.00, 2.00, 6.00, and 9.00, no Applicant shall commence construction of a "facility" unless a petition for approval of construction has been granted by the EFSB. Pursuant to G.L. Chapter 164, § 69G, a jurisdictional "facility" includes "a new electric transmission line having a design rating of 69 kilovolts or more and which is one mile or more in length on a new transmission corridor."

In accordance with G.L. c. 164, Section 69H, the EFSB is responsible for implementing energy policies to provide a reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost.

When reviewing proposals to construct electric transmissions lines, the EFSB is required to consider several things. First, it must evaluate the need for new transmission resources. Second, for transmission lines located within the Massachusetts coastal zone, it must consider applicable CZM program policies, as set forth in the Massachusetts Coastal Zone Management Plan.

The proposed transmission facilities fall within the Massachusetts coastal zone, which CZM defines to include all of Cape Cod, Martha's Vineyard, and Nantucket out to the mapped, three-mile state territorial sea boundary. The EFSB will therefore consider CZM Energy Policy #1.

If the EFSB issues an approval for construction, its decision must be deemed, for any federal license or permit, to be consistent with state law by MCZM when conducting its federal consistency review under Section 307 of the Coastal Zone Management Act.

Project Activities Subject to Jurisdiction:

The upland electric transmission line and portions of the submarine cable system that are within the mapped three-mile state territorial sea boundary are subject to jurisdiction and regulatory review.

Current Review Status:

The Applicant and Commonwealth Electric Company d/b/a NSTAR Electric have filed a joint Petition to the EFSB, on September 17, 2002, for an approval of construction for the construction of a new electric transmission line.

In their July 2, 2004 Tentative Decision, the Energy Facilities Siting Board approved the joint petition of Cape Wind Associates, LLC and NSTAR Electric interconnection for the wind farm based upon a series of findings, set forth here, that specifically included a determination of coastal zone management consistency and a finding supporting the necessity within the coastal zone for construction of the transmission lines. The Board found the following (EFSB, 2004):

- there is a need for the capacity provided by the wind farm beginning in 2007 for reliability purposes;
- there will be a need for the renewable resources provided by the wind farm to meet regional RPS requirements;
- there is a need for the power generated by the wind farm for economic purposes;

- there is a need for additional transmission resources to interconnect the wind farm with the regional transmission grid;
- Cape Wind and NSTAR developed and applied a reasonable set of criteria for identifying and evaluating alternatives to the proposed project in a manner which ensures that it has not overlooked or eliminated any siting options which, on balance, are superior to the proposed project;
- Cape Wind and NSTAR identified a range of practical transmission line route alternatives with some measure of geographic diversity;
- the primary route would be preferable to the alternative route with respect to providing a reliable energy supply to the Commonwealth with a minimum impact on the environment at the lowest possible cost; and
- in light of related regulatory or other programs of the Commonwealth, including programs related to wetlands and riverfront protection, water supply, wellhead protection, rare and endangered species, tidelands and waterways, water quality certification, marine fisheries, coastal zone management, ocean sanctuaries, historic preservation and underwater archeology, the proposed transmission lines along the primary route would be generally consistent with the identified requirements of all such programs. Accordingly, the EFSB approved the construction of the transmission lines.

Project Compliance with EFSB Standards

Project Characterization:

The Petition is for electric transmission lines to serve the public interest by transmitting wind-generated renewable energy to the Commonwealth of Massachusetts and New England from the offshore Wind Park located in federal waters in Nantucket Sound. The Petition seeks an approval of construction of the two jurisdictional 115 kV transmission lines approximately 18 miles (12.5 miles within the Massachusetts Coastal Zone) in length in order to transmit the electricity generated by the Wind Park to the New England transmission grid.

Project Compliance Review:

In accordance with G.L. c. 164, § 69H, a petition to the EFSB has to demonstrate:

1. that additional energy resources are needed;
2. that the project is superior to alternative approaches in terms of cost, environmental impact, reliability, and ability to address the previously identified need; and
3. that the route selection process has not overlooked or eliminated clearly superior routes, and that the proposed route is superior to a noticed alternative route in terms of cost, environmental impact, and reliability of supply.

7.3.2.2 Massachusetts Department of Environmental Protection (MADEP) – Chapter 91 Waterways License

MADEP Jurisdiction and Review

Legal Authority:

Statute: M.G.L. Chapter 91

Regulations: 310 CMR § 9.00

Jurisdiction:

The Massachusetts Department of Environmental Protection (MADEP) requires written authorization in the form of a license or permit to perform any construction, placement, excavation, addition, improvement, maintenance or removal of any fill or structures in tidelands or other waterways of the Commonwealth.

In Chapter 91, the Massachusetts Waterfront Act, the Legislature specified its intention to protect the rights of the public in tidelands by ensuring that the uses and activities of tidelands are limited to water-dependent uses or otherwise serve a proper public purpose. The basic goals of the Waterways Program administered by MADEP include protecting and promoting tidelands for fishing, shipping, marine transportation, infrastructure facilities, marine terminals, and other activities and facilities that cannot reasonably be located away from tidal or inland waters.

The geographic areas subject to Chapter 91 jurisdiction include certain filled tidelands, flowed tidelands, and submerged lands out to the mapped, three-mile state territorial sea boundary.

Project Activities and Uses Subject to Jurisdiction:

Chapter 91 jurisdiction applies only to the installation and construction of the components of the proposed submarine cable transmission lines located in and over the submerged lands and flowed tidelands of Lewis Bay and Nantucket Sound, as well as the intertidal shoreline area of Lewis Bay at the proposed cable landfall location in the Town of Yarmouth. These submarine electric transmission lines and landfall transition components will serve to transmit electric energy generated from the non-jurisdictional WTGs to the existing NSTAR Electric Transmission Facilities serving Cape Cod and the New England regional transmission system.

Project Compliance with Chapter 91 Waterways License Requirements

MEPA Certificate Requirements

The MEPA Certificate issued on April 22, 2002 incorporated MADEP's initial comments into the scoping requirements for the Draft EIR, confirmed that the State jurisdiction under Chapter 91 is limited to the submarine cable system within tidelands of Nantucket sound and Lewis Bay, and found that the proposed transmission lines would be reviewed as an "infrastructure crossing facility" under the applicable Chapter 91 regulations. Therefore, the proposed submarine electric transmission lines would be eligible for a Chapter 91 Waterways License as a water-dependent use project, if, based on a comprehensive analysis of alternatives and other information that the Secretary of Environmental Affairs has determined that the that the proposed project cannot reasonably be located or operated away from tidal or inland waters. A water-dependent use project is presumed under the Chapter 91 regulations to serve a proper public purpose.

The Secretary of Environmental Affairs, however, by letter dated May 28, 3003, subsequently advised Cape Wind that MADEP had revised the foregoing position set forth in the MEPA Certificate. Such letter indicated that it was MADEP's revised position that the proposed transmission lines would be considered a nonwater-dependent use project and would require a variance under the MADEP Chapter 91 Regulations. A nonwater-dependent use project requiring a variance must demonstrate that it serves an overriding public interest under the Chapter 91 Regulations.

The Secretary of Environmental Affairs accordingly broadened the scoping requirements for the Draft EIR, directing Cape Wind to consider and evaluate project compliance with MADEP's applicable Chapter 91 variance standards.

Although Cape Wind strongly contests the revised legal position of MADEP as to the Chapter 91 licensing and/or variance requirements that will ultimately be found to apply to the Project, Cape Wind does not protest the expanded scope of the Draft EIR requested by MADEP. In the spirit of cooperation and administrative efficiency, Cape Wind has agreed to comply fully with the Secretary's request for the expanded scope of study, while reserving its right to argue its legal position under Chapter 91 when the matter arises before the appropriate forum. The following section addresses fully, and in the alternative, the information that would be necessary for the granting of either (i) a license under Section 14 (for water dependent structures) or Section 18 (for non water dependent structures) of Chapter 91 or (ii) a variance under the regulations of MADEP. Thus, the EIR/EIS will be sufficient to address the Chapter 91 licensing and/or variance requirements that will ultimately be determined to apply to the Project.

Project Characterization:

As previously described, the installation and construction of the proposed submarine electric transmission lines in submerged lands and flowed tidelands of Lewis Bay and Nantucket Sound, as well as the landfall transition components, are subject to Chapter 91 jurisdiction. The specific project components include:

Submarine Electric Cable System and Fiber Optic Cable: (offshore from the mapped, three-mile state territorial sea boundary to the present Mean High Water shoreline in Lewis Bay). This component of the Project will consist of two (2) 115 kV solid di-electric AC submarine cable circuits and two (2) fiber optic cables installed in a bundled configuration in two (2) separate trenches laid out parallel to each other, spaced approximately 20 feet apart, to a depth of -6.0 feet below the present seabed surface, for a length of approximately 6.6 miles in

Nantucket Sound and Lewis Bay. The submarine cable systems will be installed using jet plow embedment technology. Jet plow embedment is considered to be a low impact, low turbidity installation technology that minimizes direct disturbance of the seabed surface and potential adverse impacts to aquatic resources, as compared to dredging technology alternatives.

Submarine/Upland Cable System landfall Transition (within flowed tidelands at the Project shoreline at New Hampshire Avenue in the Town of Yarmouth). This component of the Project will include the installation of a temporary cofferdam in the near shore zone at the Project's shoreline landfall location along the permanent installation of horizontal directionally drilled (HDD) conduits from the upland transition vault to the seaward end of the HDD conduits. Once the HDD conduits have been installed and the submarine cable system and the upland cable system beneath the seabed have been connected to the upland transition vault, the temporary cofferdam will be removed. The seabed in the area of the temporary cofferdam will be restored to pre-construction conditions through natural shoreline processes.

The existing seawall at the end of New Hampshire Avenue was previously authorized by DPW License No. 3293.

Project Compliance with Chapter 91 License Standards

In accordance with the requirements of 310 CMR 9.31(1), Summary of License & Permit Requirements, the proposed Project would comply with the identified basic requirements for license issuance. Specifically, the Project:

- Includes only structures and fill for uses that have been categorically determined to be eligible for a license. In particular, the Legislature at Section 14 of Chapter 91 specifically determined that submerged cables of the type proposed are eligible for licensing, even when they extend beyond harbor lines, as follows: "The said department may license ... the construction or extension of a pipe line, conduit, or cable under tide water beyond any established harbor line; provided, that such pipeline or conduit is entirely imbedded in the soil and does not in any part occupy, or project into such tide water...." Since the submerged cables will be entirely so imbedded, the proposal falls squarely within such legislative provision. Further, pursuant to the provisions of 310 CMR 9.32(1)(a)(2) the submarine cable system, a structure for a water-dependent use, is located below the high water mark. In addition, the placement of the cofferdam, which will be utilized exclusively for a water-dependent purpose, will be a temporary structure and will be completely removed immediately upon completion of the proposed work.
- The Project has been designed to comply with the applicable environmental regulatory programs of the Commonwealth, according to the provisions of 310 CMR 9.33. The Project is currently under review by the various applicable agencies.
- The Project has been designed to conform to local zoning laws according to the provisions of 310 CMR 9.34
- The Project has been designed to comply with the applicable standard governing the preservation of water-related public rights, according to the provisions of 310 CMR 9.35 because the proposed electric transmission lines are a submarine cable system buried 6 feet below the present seabed. Pursuant to 310 CMR 9.35(2)(a)(1), the proposed submarine cable system will not interfere with public rights of navigation such as movement of boat, vessel, float or other watercraft since the submarine cable system will be buried beneath the seabed. Furthermore, the Project will not extend into or over any existing channels such as to impede free passage, impair line of sight for navigation, require the alteration of an established course of vessels, alter tidal action or other currents, adversely affect the depth or width of any existing channels, and/or impair the ability of the public to pass freely upon the waterways and to engage in transport or loading/unloading activities. The proposed submarine cable system will be published in the Notice to Mariners before installation begins and will be noted on all applicable NOAA marine charts. Pursuant to 310 CMR 9.35(2)(b), the proposed submarine cable system will not interfere with public rights of free passage over and through the water. The proposed submarine cable system will not interfere with the rights of floating on, swimming in, or otherwise moving freely within the water column. Pursuant to 310 CMR 9.35(2)(c), the proposed submarine cable system will not interfere with public rights associated with a common landing, public easement, or other historic legal form of public access from the land to the water that may exist on or adjacent to the project site. Pursuant to 310 CMR 9.35(3)(a), the proposed submarine cable system will not interfere with public rights of fishing and fowling, result in an obstacle to the public's ability to fish or fowl in waterways areas adjacent to the project site or result in the elimination of a traditional fishing or fowling location used extensively by the public since the submarine cable system will be buried a minimum of 6 feet below present seabed. Furthermore, the proposed Project will not interfere with public rights to walk or

otherwise pass freely on tidelands for purposes of fishing, fowling, navigation, swimming, strolling, or other recreational activities. The submarine cable system will be buried a minimum of six feet below the present seabed and will therefore not affect water-related public rights. In-water construction activities associated with the submarine cable system will have temporary and localized effects and no permanent adverse impacts to navigation, fishing or fowling will occur within Lewis Bay or Nantucket Sound.

- The Project has been designed to comply with the applicable standards governing the protection of water-dependent uses, according to the provisions of 310 CMR 9.36, because the proposed submarine cable system is buried a minimum of 6 feet below the present seabed. The proposed submarine cable system will preserve the availability and suitability of tidelands that are in use for water-dependent purposes. The Project will have no temporary or permanent impacts to tidelands or private access to littoral/riparian areas. Furthermore, the Project does not include any non-water-dependent uses, and will not displace any existing or former water-dependent uses. The proposed Project is not located within a Designated Port Area. The proposed Project will not preempt water-dependent-industrial-uses within Lewis Bay or Nantucket Sound.
- The Project has been designed to comply with the applicable standards governing the engineering and construction of structures, according to provisions of 310 CMR 9.37. The proposed Project is a submarine cable system that will be installed via jet plow embedment and HDD. The proposed submarine cable system Project located within the mapped 3-mile state territorial sea boundary does not include any structural components. The submarine cable system will not restrict the ability to dredge any channels. Furthermore, the proposed submarine cable system will require minimal maintenance but is accessible if repair is necessary.
- The Project has been designed to comply with the applicable standards governing dredging and disposal of dredge material, according to the provisions of 310 CMR 9.40. The HDD excavation pit includes a excavation of up to approximately 840 cubic yards of sediment. No discharge of dredged or fill material will occur within Waters of the U.S as a result of these activities. The excavated shoreline material will be placed in trucks and disposed of off-site at an approved upland disposal facility. Furthermore, the cofferdam delineating the limits of excavation will be temporary structure removed after installation is complete.
- The Project has been designed so that it does not deny access to its services in a discriminatory manner, as determined in accordance with the constitution of the Commonwealth of Massachusetts, or the United States of America, or with any statute, regulation, or executive order governing the prevention of discrimination. The proposed submarine cable will have no adverse impacts on navigational access, mooring and/or anchoring. There will be no restrictions to fishing due to the installation of the submarine cable system. The proposed submarine cable system will improve navigation by providing aids-to-navigation.

Standards For Nonwater-Dependent Infrastructure Facilities

Pursuant to 310 CMR 9.55(1), nonwater-dependent infrastructure facilities on tidelands must include mitigation and/or compensation measures to avoid or minimize detriments to the water-related interests of the public. In the event that the Project is ultimately determined to not be water dependent, the interests protected under 9.55(1) which are applicable to the proposed project would be protected as follows:

- The proposed project will have no detrimental affect on maritime commerce, industry, recreation and associated public access along the submarine cable system route or within the vicinity of the cable system. Temporary impacts to traffic flow along the cable/conduit routing will be mitigated appropriately to ensure that no significant disruption of existing water-dependent uses will occur. All work within the waterway will be temporary, localized and short term. Once the submarine cable system is installed, there are no anticipated impacts to commercial or recreational navigation activities since the submarine cable system will be buried approximately six feet below the seafloor. Transportation impacts associated with the installation of the submarine transmission line work will be temporary in nature. Installation of the submarine cable system will take approximately two to four weeks for jet plow embedment.
- Living marine resources will be temporarily affected by the proposed project. Direct wetland impacts will be minimized through the use of hydraulic jet plowing. The use of hydraulic jet plowing within Nantucket Sound and Lewis Bay at the landfall will minimize sediment disturbance and will have temporary impacts to the shoreline and coastal wetland resource areas at the landfall. Impacts to the finfish and the benthic community will also be minimized through the use of jet plow technology. The Project will have temporary impacts on the designated recreational shellfish area managed by the Town of Yarmouth in Lewis Bay. Cape Wind is working with the Town of Yarmouth on the appropriate restoration mitigation for the shellfish bed.
- The proposed project will have no long-term impact on water quality. Potential water quality impacts will be limited to temporary localized sediment disturbance along proposed submarine cable system route during

cable installation. Chemical analysis results indicate that constituents of concern present in sediment samples from Lewis Bay and Nantucket Sound are at concentrations below the levels that would cause either chronic or long-term biological impacts and should pose little or no risk to water quality. SPCC and O&M Plans will be implemented during system construction and operation to prevent potential impacts to water quality that could result from spills of fuel, lubricating oils, or other substances associated with the use of marine vessels and machinery. Long-term effects of the Project will be beneficial by reducing the need for transport of fossil fuels that have in the past, negatively impacted aquatic resources, avian habitat, and marine water quality conditions.

- The proposed project will have no effect on flood or erosion-related hazards on lands subject to the 100-year storm event or to sea level rise. The proposed submarine cable system will be located within Coastal Bank, Coastal Beach, and Land Subject to Tidal Action, however, the submarine cable system will not adversely affect these resource areas with respect to wave action, the movement of sediment, storm damage prevention, flood control, post-construction shellfish productivity, or marine fisheries. Work within Land Subject to Coastal Storm Flowage is temporary in nature and will not alter any elevations or the ability of the land to provide storm damage prevention or flood control. Once the work is complete, the roadway will be returned to pre-existing conditions. The existing vertical seawall will be removed in order to install the conduits for the cable system but will be replaced with new cast in place concrete wall.
- The proposed project has no long-term impact on public views and/or visual quality in the natural and built environment of the shoreline. Impacts to public views and/or visual quality during construction will be temporary, localized and short term. Once the submarine cable system is installed, there are no anticipated impacts public views and/or visual quality in the natural and built environment of the shoreline since the submarine cable system will be buried approximately six feet below the seafloor.
- No upland historic properties, such as historic sites, districts and archaeological resources, and no potentially significant prehistoric archaeological resources have been identified within the Project's APE along the upland transmission line route. The route will be located within paved roadways and a cleared NSTAR ROW. Offshore, the 115 kV transmission line route was re-routed to avoid Bishops and Clerks Shoal, where three shipwrecks have previously been reported. A marine archaeological reconnaissance survey, including geophysical remote sensing and advancement of vibracores, has been conducted under the direction of a marine archaeologist within the area of potential effect of the revised 115 kV cable route, to identify targets that may be potential submerged archaeological resources. Data is currently under review.

Project Compliance with Chapter 91 Standards for Variance

In response to the revised position and request of MADEP, the following section addresses how the proposed project would comply with Chapter 91 Variance standards, pursuant to 310 CMR 9.21, if a variance is ultimately determined to be necessary. Pursuant to 310 CMR 9.21(1)(a), a Chapter 91 variance will be granted if there are no reasonable conditions or alternatives that would allow the project to proceed in compliance with 310 CMR 9.00. In its variance application, a proponent must provide among other information as set forth at 310 CMR 9.21(2)(a), a "description and supporting documentation of the overriding public interest served by the project" pursuant to 310 CMR 9.21(2)(a)(6). With specific reference to this "public interest" test, MADEP has indicated that "[i]n determining that the delivery of renewable energy by Cape Wind is a public interest to provide the basis for the issuance of a variance, the [MADEP] will take into account the findings on need by the [] Siting Board. As you know, the [Siting Board] has the statutory mandate to ensure a reliable energy supply with a minimum impact on the environment at the lowest possible cost, and there are recent requirements promoting renewable energy generating resources." (June 3, 2003 letter from MADEP Assistant Commissioner Philip Weinberg to Mr. Gordon of Cape Wind). Thus, a Siting Board finding that the electric transmission line is needed for reliability and economic purposes, while mitigating environmental impacts and minimizing costs, will be integral to MADEP's Chapter 91 determination of the public interest served by the transmission lines. Indeed, the EFSB's Tentative Decision (EFSB 02-2) of July 2, 2004, includes the findings that (i) "there is a need for the capacity provided by the wind farm beginning in 2007 for reliability purposes", (ii) "there will be a need for the renewable resources provided by the wind farm to meet regional RPS requirements", and (iii) "there is a need for the power generated by this wind farm for economic purposes" (EFSB, 2004).

Regional and State Renewable Energy Mandates

Over and above the individual determination of need made by the EFSB, the proposed Project meets the overriding public interest standard by responding to the state statutory mandates for the immediate need for

non-emitting, new renewable energy resources. These statutory mandates are also supported by regional and state governments, legislative committees, and energy planning agencies.

In further support of these public interest mandates, the New England Governors/Eastern Canadian Premiers' Climate Action Change Plan, joined in by the Commonwealth of Massachusetts, calls for the immediate development of new renewable energy resources, which include indigenous wind power, in order to achieve reductions in greenhouse gasses.

The Massachusetts Legislature enacted Chapter 164 of the Acts of 1997, An Act Relative to Restructuring the Electric Utility Industry in the Commonwealth, Regulating the Provision of Electricity and Other Services, and Promoting Enhanced Consumer Protection Therein. A central requirement of the Act was the development and implementation of a Massachusetts Renewable Energy Portfolio Standard, which requires increasing percentages of new renewable power to be provided by distribution companies in Massachusetts for the use of Massachusetts consumers. According to the Massachusetts Division of Energy Resources, potential sources of new renewables are so limited that, by the end of 2004, Massachusetts will be short by over 400 megawatts of qualifying new renewable power. The Chairmen of the Joint Committee on Energy and the Joint Committee on Government Regulations have both joined in urgently recommending development of new renewable resources as quickly as possible in the Commonwealth, advising the Massachusetts Ocean Management Task Force that the Legislature, in 1997, aggressively committed to the development of renewable energy projects for Massachusetts and continues to do so.

In response to EOEAs May 28, 2003 letter, asking for an evaluation of Project conformance with the applicable Chapter 91 variance standards, the following information is provided, while Cape Wind reserves its rights to argue its position as to the statutory requirements applicable to the project in the appropriate regulatory and/or judicial forum.

The Commissioner of MADEP may waive the application of any other section of 310 CMR 9.00 by making a written finding following a public hearing that:

- 310 CMR 9.21(1)(a): there are no reasonable conditions or alternatives that would allow the project to proceed in compliance with 310 CMR 9.00.

There would be no reasonable conditions or alternatives that would allow the project to proceed in compliance with 310 CMR 9.00 if it was found that a submarine cable system serving a proposed offshore wind energy generating facility could not be reviewed as either a infrastructure facility or infrastructure crossing facility. The submarine cable system must be located in marine or tidal waters to serve its public purpose for the proposed project by delivering new renewable energy from the WTGs located offshore to the NSTAR system and the regional New England transmission grid. As discussed above, the WTGs must be located offshore because the alternatives analysis determined that there is no reasonable land-based alternative to the Proposed Alternative.

- 310 CMR 9.21(1)(b): the project includes mitigation to minimize interference with the public interests in waterways and that the project incorporates measures designed to compensate the public for any remaining detriment to such interests.

The proposed Chapter 91 jurisdiction applies to the Project's activities associated with structures in flowed tidelands associated with the construction and maintenance of the submarine cable system and associated fiber optic cable as well as the shoreline landfall transitions to the upland underground-electric cable system. The proposed submarine cable system will not impede navigation, fishing or fowling since the submarine cable system will be buried a minimum of six feet below the present bottom of the seafloor. The Project does not interfere with nor restrict the public rights of navigation for the same reasons. Therefore, adequate burial of the submarine cable below the seabed surfaces avoids or minimizes and potential negative impacts to public use of this waterway or for general and unrestricted navigation. Therefore, the Project does not create any public detriment which would necessitate compensation for public rights in tidelands.

- 310 CMR 9.21(1)(c)(1): the variance is necessary to accommodate an overriding municipal, regional, state, or federal interest.

As discussed herein, an affirmative order from the EFSB will demonstrate overriding public interest and need. The EFSB ruling/certification process is responsible for implementing state energy policies to provide a reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost.

Furthermore, as set forth in the MCZM consistency section, the federal consistency determination by MCZM will confirm that the Project conforms with important state interests reflected in the MCZM plan. The Project will also accommodate overriding regional interest in addressing climate change concerns, as evidenced by the New England Governors or Eastern Canadian Premiers August 2001 Climate Change Action Plan and the January 2004 Commonwealth of Massachusetts Sustainable Development Principles.

- 310 CMR 9.21(2)(1): An identification of the regulation(s) from which the variance is sought. If the proposed submarine cable system and associated HDD conduits could not otherwise be approved pursuant to 9.12(2) or 9.12(3) then a variance may be required under these Sections.

- 310 CMR 9.21(2)(2): a description of alternative designs, locations, or construction methods which would achieve the purpose of the project without the need for the variance.

In the event that it is determined that a Chapter 91 license is not available, no alternative would achieve the purpose of the project without the need for the variance. As discussed above, the WTGs must be located offshore because the alternatives analysis determined that there is no reasonable land-based alternative to the Proposed Alternative.

- 310 CMR 9.21(2)(3): an explanation of why each of the alternatives is unreasonable.

Eight upland alternative site locations, as described in detail in Section 3.4.2.1 of the DEIS-DEIR, were evaluated against a set of preliminary siting criteria. Based upon the evaluation of upland alternatives, the Massachusetts Military Reservation was determined to be the only alternative upland location which warranted more detailed site-specific analysis and review.

Nine offshore alternative site locations, described in Section 3.4.2.2, were evaluated against each of the preliminary siting criteria. Based upon the preliminary evaluation of the offshore alternatives, Nantucket Sound and an area South of Tuckernuck Island were determined to warrant more detailed site-specific analysis and review.

Through the preliminary screening of 17 locations throughout New England, the Corps of Engineers identified four Alternatives for additional environmental review and comparison purposes:

- Massachusetts Military Reservation: a Terrestrial Alternative
- Nantucket Sound (including the Applicant's proposed Alternative sub-site at Horseshoe Shoal, as well as two other sub-sites): an Offshore Shallow Water Alternative
- South of Tuckernuck Island: an Offshore Deeper Water Alternative
- Offshore of New Bedford, Massachusetts, combined with a reduced footprint at Horseshoe Shoal: a Combination Alternative

These additional alternative analyses also concluded that Nantucket Sound was the only technically and economically feasible environment for installation of an offshore Wind Park based on completion of comprehensive analyses conducted by the USACE for each alternative location (see Section 3.4.3). As a result, Horseshoe Shoal was found to be the most technically, environmentally and economically feasible location for the proposed Project and was therefore advanced as the Project's Proposed Alternative. This analysis is summarized in Table 3-58.

As described in detail in Section 3.5, the Applicant identified six alternative transmission line routes, including submarine and upland transmission components that appeared reasonable, to provide the necessary interconnection between the ESP at the Proposed Alternative on Horseshoe Shoal and the proposed interconnection point to the existing New England electric transmission system at the Barnstable Switching Station. This evaluation on this alternative routes are currently being reviewed before the EFSB. Through this evaluation, which included technical feasibility, costs, reliability, and environmental impacts of a geographically diverse set of options, the preferred approach of connecting the transmission line from the Wind Park to the Barnstable Switching Station was shown to be superior to other approaches. The process ultimately resulted in the identification of a preferred route that was superior to others evaluated in terms of balancing reliability, cost and environmental impacts, and the spectrum of alternative routes evaluated reflects the appropriate degree of geographical diversity.

- 310 CMR 9.21(2)(4): an analysis of any detriments to interests of the public in waterways due to the proposed project and an explanation of how the detriments have been minimized.

The installation of the submarine cable system will not result in any detriments to public rights or interests in tidelands. The submarine cable system will be buried a minimum of 6 feet below the seafloor. The transition vault located on the upland at the end of New Hampshire Avenue will be underground. The installation of the submarine cable and the transition vault would have temporary and limited construction effects. Therefore, no permanent impacts to navigation, fishing or fowling will result. Furthermore, public access and use of the waterways will not be impeded by the installation, operation or maintenance of the submarine cable system.

- 310 CMR 9.21(2)(5): a description of the measures that will be provided to compensate for any remaining detriments to public interests in waterways

The installation of the submarine cable and transition vault does not produce any detriments to public rights in waterways as demonstrated by previous MADEP approvals of similar projects when the submarine cable systems are adequately buried beneath the seabed surface. Therefore, no compensation is necessary.

- 310 CMR 9.21(2)(6): a description and supporting documentation of the overriding public interest served by the project, if applicable;

The public interest mandates the development of reliable, non-emitting renewable energy projects. As set forth in the Commonwealth's Sustainable Development Principles, the quality of life for Massachusetts citizens depends upon decisions made that will conserve natural resources by increasing the supply of renewable energy and encouraging the development of projects that create such energy sources; Development Principle No. 5., January 2004.

The New England Governors/Eastern Canadian Premiers' August 2001 Climate Change Action Plan also ties the public interest directly to the encouragement and development of non-emitting renewable energy sources. As set forth in Action Item 5: The Reduction of Greenhouse Gases from the Electricity Sector; the Commonwealth has joined in the recommendation for achieving reductions of greenhouse gasses by developing new renewable energy sources, including solar, wind, and bioenergy.

Finally, service of the public interest was made analogous to the development of wind power by the Secretary of Environmental Affairs in her December 26, 2003 MEPA Certificate, EOE # 13143, where she stated that the promise of significant air quality benefits from wind power and the availability in Massachusetts of a virtually emissions-free, indigenous power source directly served the interests of the citizens of Massachusetts. She also stated that "[t]he Commonwealth has an obligation to its citizens to promote renewable energy. For the foreseeable future, wind power is by far the most promising renewable energy technology for Massachusetts."

Consequently, public necessity and the overriding public interest standard is satisfied by the installation of the cable which is necessary for the implementation of the Project.

7.3.2.3 MADEP –Water Quality Certification

MADEP Jurisdiction and Review

Legal Authority:

Statute: Section 27 of the Massachusetts Clean Water Act and M.G.L. c. 21, §§ 26-53,

Regulations: 314 CMR §§ 4.00 and 9.00

Jurisdiction:

The MADEP requires that any activity that results in a discharge of dredged material, dredging, or dredged material disposal greater than 100 cubic yards to waters subject to regulation by the U.S. Army Corps of Engineers, Federal Energy Regulatory Commission or other federal agency, must obtain a Water Quality Certification stating that such Dredging Activities will comply with state water quality standards and other appropriate requirements of state law.

Project Activities Subject to Jurisdiction:

The transition of the interconnecting 115 kV submarine transmission lines from water to land will be accomplished through the use of HDD methodology in order to minimize disturbance within the intertidal zone and near shore area. To further facilitate the HDD operation, a temporary cofferdam will be constructed at the end of the boreholes. The cofferdam will be approximately 65 feet wide and 45 feet long and will be open at the seaward end to allow for manipulation of the HDD conduits. Approximately 840 cubic yards of sediment will be excavated from the cofferdam. The excavated material will be disposed of at an approved upland disposal location. No removal of sediment outside of the cofferdam will be required.

Current Review Status:

A Water Quality Certification has not yet been filed with the MADEP.

Project Compliance with MADEP**Project Characterization:**

The installation of the submarine cable system will require the removal of sediment from Lewis Bay.

Project Compliance Review:

The proposed submarine and upland transmission cable route will be designed to fully comply with all applicable federal, state, and local water quality and wetland performance standards.

7.3.2.4 Massachusetts Coastal Zone Management (MCZM)**Jurisdiction and Review****Legal Authority:**

Federal Consistency Review: 16 U.S.C §§ 1451 to 1465

State CZMA: 301 CMR 20.00-21.00

Jurisdiction:

Mapped coastal zone of Massachusetts includes the lands and waters within an area defined by the seaward boundary of the state's mapped territorial sea (generally 3 miles from shore), extending from the Massachusetts/New Hampshire border south to the Massachusetts/Rhode Island border, and landward to 100 feet inland of specified major roads, rail lines, or other visible rights-of-way. The coastal zone includes all of Cape Cod, Martha's Vineyard and Nantucket.

Federal consistency jurisdiction extends to any federally licensed or permitted activities occurring in the Outer Continental Shelf (OCS) that may have a reasonably foreseeable effect on land or water uses or natural resources of the Massachusetts coastal zone (15 CFR 930.11(b)).

Project Activities Subject to Jurisdiction:

Federal Consistency Review jurisdiction extends from the inland coastal zone boundary out to the mapped 3-mile state territorial sea boundary. It may also extend into waters of the Outer Continental Shelf for federal activities that may reasonably be expected to affect the Massachusetts Coastal Zone.

Current Review Status:

The Applicant filed with MCZM for a Federal Consistency Certification on November 21, 2001. The CZM Review is currently being coordinated.

Project Compliance with MCZM Standards**Project Characterization:**

The CZM Plan and the regulations of the EFSB which implements the CZM Program, at 980 CMR 9.01(2), define "coastally dependent energy facilities" as facilities that utilize the indigenous energy resources of the coastal zone, serve as a transfer point between ocean and land, transmit or transport energy from a transfer point or other energy facility located in the coastal zone to an inland or other coastal location or store energy or energy

resources necessary for trans-shipment from the ocean, for surge storage, or to supply coastal energy facilities and maritime industries. The CZM Plan further defines whether certain energy facilities are coastally dependent. Transmission lines are coastally dependent where transmitting or transporting energy to, from, or within the coastal zone. Renewable energy generating sources such as ocean thermal, wave, or tidal energy sources are coastally dependent. Other technologies, such as wind power generation, may be determined to be coastally dependent based upon the nature of the specific project proposal. CZM implements this policy through inclusion of its policies in the Energy Facilities Siting Board review and through federal consistency review of energy projects proposed in the coastal zone.

The EFSB Tentative Decision approved the joint petition of Cape Wind Associates, LLC and NSTAR Electric interconnection for the wind farm based upon a series of findings, set forth here, that specifically included a determination of coastal zone management consistency and a finding supporting the necessity within the coastal zone for construction of the transmission lines. The Board found the following:

- there is a need for additional transmission resources to interconnect the wind farm with the regional transmission grid;
- Cape Wind and NSTAR developed and applied a reasonable set of criteria for identifying and evaluating alternatives to the proposed project in a manner which ensures that it has not overlooked or eliminated any siting options which, on balance, are superior to the proposed project;
- Cape Wind and NSTAR identified a range of practical transmission line route alternatives with some measure of geographic diversity;
- the primary route would be preferable to the alternative route with respect to providing a reliable energy supply to the Commonwealth with a minimum impact on the environment at the lowest possible cost; and
- in light of related regulatory or other programs of the Commonwealth, including programs related to wetlands and riverfront protection, water supply, wellhead protection, rare and endangered species, tidelands and waterways, water quality certification, marine fisheries, coastal zone management, ocean sanctuaries, historic preservation and underwater archeology, the proposed transmission lines along the primary route would be generally consistent with the identified requirements of all such programs. Accordingly, the EFSB approved the construction of the transmission lines.

Therefore, the transmission line and the facility is a facility that utilizes the indigenous energy resources of the coastal zone, serves as a transfer point between ocean and land, and transmits or transports energy from a transfer point or other energy facility located in the coastal zone to an inland or other coastal location and therefore is a coastally dependent energy facility.

Project Compliance Review:

The Project has been designed to be consistent with the CZM program policies and principles. The specific CZM enforceable program policies and principles that are relevant to the Project are listed below accompanied by a brief description of the manner in which the Project is consistent with those policies and principles and their underlying authorities.

Habitat Policy #1 – Protect coastal resource areas including salt marshes, shellfish beds, dunes, beaches, barrier beaches, salt ponds, eelgrass beds, and fresh water wetlands for their important role as natural habitats.

The proposed Project has been sited and designed, and would be operated and maintained, in a manner that will avoid, minimize, or otherwise mitigate potential impacts to coastal resources. The proposed transmission line route avoids direct alteration to salt marshes, dunes, beaches, barrier beaches, salt ponds, eelgrass beds, and freshwater wetlands along the submarine and upland transmission line route; please refer to Section 5.8 for more details. Erosion and sedimentation control measures will be utilized along the proposed route where appropriate.

Potential impacts to shellfish resources from submarine cable installation activities will be localized, temporary and short-term resulting primarily from direct sediment disturbance. Recolonization of the disturbed area will occur naturally upon completion of construction and installation. Cape Wind will work with the Yarmouth and Barnstable Town Shellfish Constable to appropriately avoid and minimize impacts to designated shellfish areas from installation of the submarine cables in Lewis Bay.

Energy Policy #1 – For coastally dependent energy facilities, consider siting in alternative coastal locations. For non-coastally dependent energy facilities, consider siting in areas outside of the coastal zone. Weigh the environmental and safety impacts of locating proposed energy facilities at alternative sites.

The Applicant has considered siting the proposed Project in alternative locations and has determined that the proposed location is the most practicable design of the Project with the least adverse impacts on the environment and aquatic ecosystem. For a more detailed discussion on alternatives analysis please refer to Section 3.0 of this document.

Energy Management Principle #1 – Encourage energy conservation and the use of alternative sources such as solar and wind power in order to assist in meeting the energy needs of the Commonwealth.

The Project would make available the output of and would provide clean, renewable energy to meet the needs of the Commonwealth. The Project represents an opportunity for Massachusetts and New England to promote environmentally compatible clean energy generation on a commercially viable scale (up to 454 MW) for distribution into the regional Northeastern power grid.

The generation of renewable energy by the Project will result in an equivalent decrease in energy generation by non-renewable sources and an associated decrease in carbon dioxide emissions. Carbon dioxide has been identified as a “greenhouse gas” and is linked to global warming, rising sea levels, coastal erosion and habitat destruction. Reductions in greenhouse gas emissions may have beneficial impacts on coastal resources.

Public Access Policy #1 – Ensure that developments proposed near existing public recreation sites minimize their adverse effects.

The proposed submarine transmission line route makes landfall approximately 1,000 feet southeast of Englewood Beach. The transmission line will be placed in New Hampshire Avenue, which borders the beach. No impacts will occur to the beach since the transmission line will be placed below grade within existing public ROWs. The installation of the transition vault for the transition of submarine transmission line to upland transmission line will be placed entirely below grade and preexisting grade will be reestablished.

The proposed route would not result in: (1) degradation of the recreation experience through changes in site character, air pollution or noise; (2) obstruction of or limiting public access; or (3) water pollution.

Protected Areas Policy #3 - Ensure that proposed developments in or near designated or registered historic districts or sites respect the preservation intent of the designation and that potential adverse effects are minimized.

No portion of the Project area has been identified within or near an historic area or historic site in the Coastal Zone. However, offshore components of the Project are expected to be visible at specific onshore historic properties listed or eligible for listing on the National Register. A Visual Impact Assessment (VIA) has been completed, and a Programmatic Agreement is under development which will contain stipulations to minimize or mitigate adverse visual effects at two National Historic Landmarks, four historic districts and 10 individual properties (see Sections 5.10.4.3.2 and 5.10.5, and Appendices 5.10-F and 5.10-G).

Coastal Hazard Policy #1 – Preserve, protect, restore, and enhance the beneficial functions of storm damage prevention and flood control provided by natural coastal landforms, such as dunes, beaches, barrier beaches, coastal banks, land subject to coastal storm flowage, salt marches, and land under the ocean.

Potential effects from the construction of the transmission line within wetland jurisdictional areas at the proposed landfall location will meet the performance standards for work near coastal landforms established in the Massachusetts Wetlands Protection Act Regulations and, if applicable, in the local wetland bylaws of Yarmouth.

The proposed transmission line will not adversely affect the coastal bank with respect to wave action or the movement of sediment along this route option. In addition, the proposed submarine transmission line for the proposed route option will be installed beneath the coastal bank by horizontal directional drilling, so as to avoid open excavation that could be exposed to wave action and potential erosion.

Coastal Hazard Policy #2 – Ensure construction in water bodies and contiguous land areas will minimize interference with water circulation and sediment transport. Approve permits for flood or erosion control projects only when it has been determined that there will be no significant adverse effects on the project site or adjacent or downcoast areas.

The proposed Project and associated transmission lines will not divert, restrict or otherwise interfere with the flow of either fresh or salt water and it will not change existing salinity gradients or sediment transport functions of the waters of Nantucket Sound and/ or Lewis Bay. In addition, the Project will not change tidal or freshwater circulation patterns in Nantucket Sound and/or Lewis Bay.

Ports Policy #3 – Preserve and enhance the capacity of Designated Port Areas (DPAs) to accommodate water-dependent industrial uses, and prevent the exclusion of such uses from tidelands and any other DPA lands over which a state agency exerts control by virtue of ownership, regulatory authority, or other legal jurisdiction.

The proposed Project will not impair the capacity of any Designated Port Area. Major construction activities will likely be supported by onshore facilities located in Quonset, Rhode Island. The operation and maintenance for the Project will be based on utilizing two locations: one for the parts storage and larger maintenance supply vessels and the second being closer to the site for crew transport. The maintenance operation will be based in New Bedford, Massachusetts and will also deploy several crew boats out of Falmouth, Massachusetts. The New Bedford facility will be located on Popes Island and will include dock space for two 65-foot maintenance vessels as well as a warehouse for parts and tool storage and crew parking. An offsite warehouse will also be utilized to increase parts storage.

The New Bedford facility will be where tools, spare parts and maintenance materials will be organized to support the daily work assignments. These will be loaded into small containers and assigned to each of the work teams and loaded onto the maintenance vessel for deployment to the wind farm site. The maintenance vessel will then go to the WTG or ESP and offload the containers to the work crews.

Dock space will be rented in Falmouth Inner Harbor to provide space for two crew boats between 35 and 45 feet overall length and one smaller (20-25 foot) high-speed emergency response boat. The crew boats will bring work crews to Horseshoe Shoal where they will be transferred to the WTG, ESP or the larger maintenance vessels. The number of individuals that will normally be transported out of Falmouth on a daily basis will be 9 plus the boat crew of 2.

Ocean Resources Policy #1 – Support the development of environmentally sustainable aquaculture, both for commercial and enhancement (public shellfish stocking) purposes. Ensure that the review process regulating aquaculture facility sites (and access routes to those areas) protects ecologically significant resources (salt marshes, dunes, beaches, barrier beaches, and salt ponds) and minimizes adverse impacts upon the coastal and marine environment.

The Project would involve no aquaculture activities or facilities and this Policy is thus not applicable.

Ocean Resources Policy #2 – Extraction of marine minerals will be considered in areas of state jurisdiction, except where prohibited by the MA Ocean Sanctuaries Act, where and when the protection of fisheries, air and marine water quality, marine resources, navigation and recreation can be assured.

The Project would involve no extraction of marine minerals and this Policy is thus not applicable.

Ocean Resources Policy #3 – Accommodate offshore sand and gravel mining needs in areas and in ways that will not adversely affect shorelines areas due to alteration of wave direction and dynamics, marine resources and navigation. Mining of sand and gravel, when and where permitted, will be primarily for the purpose of beach nourishment.

The Project involves no offshore sand or gravel mining and this Policy is thus not applicable.

Growth Management Principle #1 – Encourage, through technical assistance and review of publicly funded development, compatibility of proposed development with local community character and scenic resources.

This Project involves no publicly funded development and this Policy is thus not applicable.

7.3.2.5 Massachusetts Highway Department (MHD)

MHD Jurisdiction and Review

Legal Authority:

Statutes: M.G.L. Chapter 81 § 21

Jurisdiction:

The MHD's primary responsibilities are the design, construction and maintenance of the Commonwealth's state highways and bridges.

Project Activities Subject to Jurisdiction:

MHD jurisdiction would apply to the installation of the upland transmission line route via trenchless technologies (i.e horizontal directional drilling, horizontal boring, or pipe jacking) under the state highways Route 28 and Route 6. In addition, the Project will require Mass Highway access agreements for maintenance access to the upland cable system occurring within state highway ROWs.

Current Review Status:

The Applicant will be required to file a Permit to Access State Highway from the Mass Highway Department.

Project Compliance with MHD

Project Characterization:

The installation of the upland transmission line route requires work within two state highways, Route 28 and Route 6. The upland transmission line route will be installed under Route 28 and Route 6 overpass via trenchless technologies.

Project Compliance Review:

Engineering plans and specifications will be provided showing that there is safe and efficient access to the state highways thereby protecting the operational integrity of these roadways. Plan review and approval will be based on the standards presented in the Manual on Uniform Traffic Control Devices, and any technical policies issued by MHD. The project must also receive the M.G.L. Chapter 30, Section 61 findings of MHD.

7.3.2.6 Massachusetts State Archaeologist (MSA), Massachusetts Historical Commission (MHC)

MSA/MHC Jurisdiction and Review

Legal Authority:

Statutes: M.G.L. c. 9 § 27C

Regulations: 950 CMR 70.00

Jurisdiction:

MSA and MHC seek to protect the public's interest in state archaeological resources by controlling activities that will disturb archaeological properties, and by setting standards for conducting archaeological field investigations in Massachusetts. The upland electric transmission line and portions of the submarine cable system that are within the three-mile state territorial seas limit are subject to MSA/MHC permits for archaeological field investigations.

Project Activities Subject to Jurisdiction:

Archaeological field investigations to assess the presence or absence of archaeological resources in the Project's area of potential effect.

Current Review Status:

Permits were obtained from the State Archaeologist for an archaeological reconnaissance field survey and for an intensive (locational) archaeological field survey along the upland transmission route. These surveys have been completed. Cape Wind will file a permit application for an archaeological field investigation in state territorial waters, if these studies are required, based upon the results of the marine archaeological reconnaissance survey currently underway.

Project Compliance with MSAProject Characterization:

The Project will involve ground disturbance along the upland transmission route and along the submarine 115 kV transmission cable system route in state territorial waters.

Project Compliance Review:

MHC has determined that no further archaeological investigation of the proposed terrestrial upland cable route is required. Field surveys have found no archaeological sites that meet the criteria of eligibility (as defined in 36 CFR Part 60) for listing in the National Register of Historic Places within the upland transmission cable's Area of Potential Effect.

7.3.2.7 Massachusetts Board of Underwater Archaeological Resources (MBUAR)**MBUAR Jurisdiction and Review**Legal Authority:

Statutes: M.G.L. c. 6, section 179-180

Regulations: 312 CMR 2.0-2.15

Jurisdiction:

MBUAR protects underwater archaeological resources located within the inland and coastal waters of the Commonwealth.

Project Activities Subject to Jurisdiction:

A permit is required from MBUAR before conducting any activities that may disturb a shipwreck or other underwater archaeological resource within or under inland or coastal waters of the Commonwealth.

Current Review Status:

A review of existing geophysical marine survey data and historical information has been conducted by a marine archaeologist, to identify possible shipwrecks and other archaeological resources that may be within the Project Area. A predictive model for potential submerged archaeological resources has been developed. A marine archaeological reconnaissance field survey, including remote sensing and advancement of vibracores, was conducted during the Summer of 2003. The data is currently being analyzed by the cultural resources management firm. Cape Wind will apply to MBUAR for reconnaissance and excavation permits, if needed, if these permits are found to be required in or under inland or coastal waters of the Commonwealth within the Project Area.

Project Compliance with MBUAR

Project Characterization:

The Project will involve ground disturbance in state territorial waters along the 115 kV transmission cable system route, and at the seaward side of the HDD conduit in Lewis Bay.

Project Compliance Review:

In progress.

7.3.3 State Regulatory Reviews

7.3.3.1 Massachusetts Division of Marine Fisheries (MADMF)

MADMF Jurisdiction and Review

Legal Authority:

Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1856 – State Jurisdiction.

Statute: MGL c. 130

Regulations: 322 CMR §§ 1.00 – 12.00

Jurisdiction:

MADMF is primarily responsible for the protection and enhancement of the Commonwealth's marine fishery resources and for the promotion and regulation of commercial and sport fishing. In addition, for the exclusive purpose of managing highly migratory and Outer Continental Shelf fishery resources, state regulatory jurisdiction extends to that part of the pocket of water west of the seventieth meridian west of Greenwich in Nantucket Sound necessary to establish consistent fishing regulations throughout the Sound.

Project Activities Subject to Jurisdiction:

During the environmental assessment phase of project development and permitting (through the MEPA Review Process), the Division of Marine Fisheries will perform an analysis of Project effects on existing fisheries resources. In addition, MADMF will also review and consider potential effects of the Project on highly migratory and/or Outer Continental Shelf fishery resources.

Current Review Status:

On-going

Project Compliance with MADMF

Project Characterization:

The Project Area is designated as an essential fish habitat for several fishery resources.

Project Compliance Review:

The Magnuson-Stevens Act requires the assessment of potential impacts to fishery resources within the geographic jurisdiction prescribed by Section 1856 of the Act. The Applicant has prepared an EFH Assessment for review during the DEIS-DEIR process.

7.3.3.2 Massachusetts Department of Conservation and Recreation (MADCR)

MADCR Jurisdiction and Review

Legal Authority:

Statute: 132A M.G.L. §§13, 16 and 18

Regulations: 302 CMR § 5.00

Jurisdiction:

DCR protects the ecology and appearance of the waters in the five (5) state-designated ocean sanctuaries (out to the mapped 3-mile state territorial sea boundary). Portions of Nantucket Sound are located within the Cape and Islands Ocean Sanctuary.

Project Activities Subject to Jurisdiction:

The proposed Wind Park will be located outside of DCR's Ocean Sanctuaries' jurisdiction. However, portions of the submarine cable connecting the Wind Park to the landfall will be within Ocean Sanctuaries' jurisdiction.

Project Compliance with MADCRProject Characterization:

The project is an electric transmission line located within the Cape and Island Ocean Sanctuary.

Project Compliance Review:

A transmission line is a permitted use in an Ocean Sanctuary if approved by the Energy Facilities Siting Board pursuant to the Ocean Sanctuaries Act at c.132A §16 and 3.02 CMR 5.08(3).

7.3.3.3 Massachusetts Historical Commission (MHC)/State ArchaeologistLegal Authority:

Statutes: see below

Jurisdiction:

The MHC has been invited to participate as a cooperating agency in the preparation of the USACE's Environmental Impact Statement for the Project. The MHC provides comments to MEPA for the Environmental Impact Report, under M.G.L c. 9 § 27C and regulations at 950 CMR 70.00 and 71.00.

Project Activities Subject to Jurisdiction:

MHC will advise MEPA as to the presence or absence of significant archaeological or historic resources that could be affected by the Project, and, if those effects are determined to be adverse, will comment on measures to avoid, minimize and/or mitigate those effects.

Current Review Status:

A Project Notification Form was filed in November of 2001. A permit application for a Reconnaissance Archaeological Survey of two alternative upland transmission line routes was filed in March 2003 with the State Archaeologist at MHC. Permit No. 2246 was issued, and the survey was completed. A permit application was filed in September 2003 for an Intensive (Locational) Archaeological Survey of the proposed upland transmission line route. Permit No. 2595 was issued, and the survey was completed. MHC determined that no archaeological sites were found within the proposed upland route's Area of Potential Effect (APE) that meet the Criteria for Eligibility (as defined in 36 CFR Part 60) for listing on the National Register of Historic Places. No further archaeological investigations are required by MHC along this route. A marine archaeological sensitivity assessment and a marine archaeological reconnaissance survey have been completed on the Project's offshore APE. No further archaeological investigations are recommended within state territorial waters. The reports are currently under review at USACE, MHC and MBUAR. An assessment of visual impacts to onshore historic properties / districts is currently underway.

Project ComplianceProject Characterization:

Construction of the Project will involve ground disturbance in state uplands and territorial waters, and federal waters. The Project's wind turbines will alter existing views.

Project Compliance Review:

Adverse impacts, if any, to cultural resources determined to be significant will be avoided, minimized or mitigated in consultation with the applicable regulatory agencies.

7.4 Regional Regulatory Jurisdictions and Reviews

Cape Cod Commission (CCC) Jurisdiction and Review

Legal Authority:

Cape Cod Commission Act
Regional Policy Plan

Jurisdiction:

The CCC is a regional land use planning and regulatory agency created by an Act of the Massachusetts General Court in 1989. CCC reviews projects that display regional issues such as water quality, traffic flow, historic values, open space, natural resources, and economic developments. The Commission's regulatory powers are typically limited to reviews of large-scale developments affecting one or more towns on Cape Cod. These types of developments are typically referred to as "Developments of Regional Impact" (DRIs).

Project Activities Subject to Jurisdiction:

CCC jurisdiction is limited to installation of the submarine portion of the cable that is located within the mapped 3-mile state territorial sea boundary and the upland transmission cable and all activities associated with the upland transmission line route. Pursuant to Section 12(i) of the Cape Cod Commission Act, any proposed development project for which the Secretary of Environmental Affairs requires the preparation of an EIR shall be deemed a DRI.

Current Status:

The Applicant has filed a joint ENF/DRI review form to have the Cape Wind Project reviewed as a Development of Regional Impact due to its size, complexity, and location

Project Compliance with CCC

Cape Cod Commission DRI review continues once the Final EIR is certified by the State. To be approved by the Cape Cod Commission, the project must be consistent with the Cape Cod Regional Policy Plan, the local comprehensive plan, and the local development bylaws. The project must also show that the benefits to Cape Cod outweigh the detriments.

7.5 Local Regulatory Jurisdictions and Reviews

7.5.1 Yarmouth Conservation Commission

Yarmouth Conservation Commission Jurisdiction and Review

Legal Authority:

Statute: M.G.L. Chapter 131 Section 40
Regulations: 310 CMR 10.00
Rivers Protection Act - Chapter 258 of the 1996 Acts
Yarmouth Wetlands By-Laws and Regulations (Chapter 143)

Jurisdiction:

To protect the Commonwealth's wetland resources, the Massachusetts Wetlands Protection Act, Rivers Protection Act and regulations and the Yarmouth Wetlands By-laws require approval from the Yarmouth Conservation Commission before activities can take place that would impact jurisdictional wetlands.

Project Activities Subject to Jurisdiction:

MADEP and the Town of Yarmouth jurisdiction will include the submarine portion of the transmission line located within the mapped 3-mile state territorial sea boundary and upland cable components of the Project. The Yarmouth Conservation Commission exercises jurisdiction over the installation of the upland cable located within

the statutory 100-foot buffer zone abutting wetland resources, and the submarine portion of cable located in Lewis Bay and out to the mapped 3-mile state territorial sea boundary .

Current status:

A Notice of Intent has not yet been filed with the Yarmouth Conservation Commission.

Project Compliance with Yarmouth Conservation Commission

Project Characterization:

Wetlands have been identified in the vicinity of the Project Area seaward and within the state territorial limit of Nantucket Sound and Lewis Bay, and along the upland transmission cable route.

Project Compliance Review:

The proposed submarine and upland transmission cable route will be designed to fully comply with all applicable federal, state, and local wetland performance standards.

7.5.2 Barnstable Conservation Commission

Barnstable Conservation Commission Jurisdiction and Review

Legal Authority:

Statute: M.G.L. Chapter 131 Section 40

Regulations: 310 CMR 10.00

Rivers Protection Act - Chapter 258 of the 1996 Acts

Barnstable Wetlands Protection Ordinance (Article 27)

Jurisdiction:

To protect the Commonwealth's wetland resources, the Massachusetts Wetlands Protection Act, Rivers Protection Act and regulations and the Barnstable Wetlands Ordinance require approval from the Barnstable Conservation Commission before activities can take place that would impact jurisdictional wetlands.

Project Activities Subject to Jurisdiction:

MADEP and the Town of Barnstable jurisdiction will include the submarine portion of the transmission line located within the mapped 3-mile state territorial sea boundary and upland cable components of the Project. The Barnstable Conservation Commission jurisdiction is the installation of the portion of the submarine cable route located in the town of Barnstable waters in Lewis Bay and along the NSTAR Electric ROW to the Barnstable Switching Station.

Current status:

A Notice of Intent has not yet been filed with the Barnstable Conservation Commission.

Project Compliance with Barnstable Conservation Commission

Project Characterization:

Wetlands have been identified in the vicinity of the Project Area seaward and within the state territorial limit of Nantucket Sound and Lewis Bay, and along the upland transmission cable route.

Project Compliance Review:

The proposed submarine and upland transmission cable route will be designed to fully comply with all applicable federal, state, and local wetland performance standards.

7.5.3 Yarmouth Department of Public Works

Yarmouth Department of Public Works Jurisdiction and Review

Legal Authority:

Local Regulations

Jurisdiction:

The Department of Public Works has jurisdiction over access to town roadways, town easements and town ROWs.

Project Activities Subject to Jurisdiction:

The Project is subject to DPW jurisdiction for the installation of the upland cable system within town owned roadways, easements, and ROWs.

Current Status:

The Applicant has not yet filed for a Permit for Street Opening from the Yarmouth DPW.

Project Compliance with Yarmouth Department of Public Works

Project Characterization:

The installation of the upland transmission line route requires work within approximately 4 miles of town owned roadways.

Project Compliance Review:

Engineering plans and specifications will be provided showing the proposed locations of the conduits and upland transmission line route.

7.5.4 Barnstable Department of Public Works

Barnstable Department of Public Works Jurisdiction and Review

Legal Authority:

Local Regulations

Jurisdiction:

The Department of Public Works has jurisdiction over access to town roadways, town easements and town ROWs.

Project Activities Subject to Jurisdiction:

The Project is subject to DPW jurisdiction for the installation of the upland cable system within town owned roadways, easements, and ROWs.

Current Status:

The Applicant has not yet filed for a Permit for Street Opening from the Barnstable DPW.

Project Compliance with Barnstable Department of Public Works

Project Characterization:

The installation of the upland transmission line route requires work within approximately 1.5 miles of town owned roadways.

Project Compliance Review:

Engineering plans and specifications will be provided showing the proposed locations of the conduits and upland transmission line route.

7.6 Consistency with Other Relevant Regulations and Policies

7.6.1 Consistency with 1997 Electric Utility Industry Restructuring Act

The Project is fully consistent with Massachusetts' landmark Electric Utility Industry Restructuring Act, Chapter 164 of the Acts of 1997. The Act declared that "it is vital that sufficient supplies of electric generation will be available to maintain the reliable service to the citizens and businesses of the Commonwealth" and that primary objectives of the restructuring effort included "enhanced environmental protection goals." Id., at Sec. 1. More specifically, the Act at Section 50, codified at G.L. c. 25A §11F, introduced a State renewable portfolio standard ("RPS") that requires that specified minimum percentages of retail sales within Massachusetts must come from new renewable resources, which are defined to include wind energy proposals such as the Project. Such minimum percentages commence in 2003 with 1%, and increase annually at a rate of one-half of 1% through 2009, and increase thereafter at the discretion of the Massachusetts Division of Energy Resources. Thus, Massachusetts law encourages and requires the development of new renewable resources such as the Project.

The consistency of the Project with the Act was confirmed in a letter dated December 18, 2001, from the four Joint Chairs of the Committee on Government Regulations and Committee on Energy of the Massachusetts Legislature submitted in the course of the scoping stage of this Project review. Such letter advised that "Cape Wind is exactly the type of project we envisioned when we enacted the Restructuring Act. The 454 MW Wind Park proposed by Cape Wind Associates will provide affordable, efficient and clean energy. Equally important, it will provide jobs and environmental benefits for Massachusetts residents. It is a critical component in maintaining fuel diversity in the region...."

Project consistency with the RPS is addressed in Section 2.0 and Appendix 2.0-A.

7.6.2 Consistency with Executive Order 385 – Planning for Growth

The proposed project is consistent with Executive Order 385 – Planning for Growth. The proposed Project has been sited and designed, and will be constructed, operated and maintained, in a manner that avoids, minimizes, or otherwise mitigates potential impacts to environmental resources within the Project Area. As described in Sections 3.5, 4.0 and 5.0, avoidance and minimization of environmental impacts were key criteria in the equipment selection, siting and design of the submarine and upland transmission route, the Yarmouth landfall, and the transition vault. The alternatives analysis demonstrates that this is the most practicable route with the least adverse impacts on the environment and aquatic ecosystem. Furthermore, the Applicant evaluated and selected cable system installation methodologies that would result in avoidance and/or minimization of environmental impacts.

This Application demonstrates that the cumulative benefits of the Project will outweigh the potential impacts to the environmental quality and resources. Potential impacts to existing land uses, navigation, and environmental resources will be minor, temporary, and limited to the short-duration construction period. Whenever possible, Project routing, design, and installation methods and means have been selected to avoid or minimize potential adverse impacts to surrounding land uses and environmental resources. Where indirect or direct impacts could not be avoided or minimized, appropriate mitigation measures will be employed to reduce these impacts to the greatest extent practicable.