

# SAVE OUR SOUND

alliance to protect nantucket sound

February 6, 2006

NEPA Draft Report Comments  
c/o NEPA Task Force  
Committee on Resources  
1324 Longworth House Office Building  
Washington, D.C. 20515

**Re: Staff draft report on recommendations for improving NEPA**

Dear Chairwoman McMorris, Ranking Member Udall, and Members of the House NEPA Task Force:

Thank you for the opportunity to comment on the draft recommendations of the Task Force majority staff. These comments are submitted by the Alliance to Protect Nantucket Sound, a 501(c)(3) nonprofit environmental organization dedicated to the long-term preservation of Nantucket Sound. As the Nantucket Soundkeeper, designated by the national Waterkeeper Alliance, our mission includes ensuring the wellbeing of the entire region of water lying between Cape Cod and the Islands of Martha's Vineyard and Nantucket. The Alliance's members include many dedicated environmental and business professionals who have long ties to the Cape and Islands, and its efforts have been supported by local towns, Chambers of Commerce, environmental groups, fishing and recreation groups, and public figures including Governor Romney, Senator Kennedy, Attorney General Tom Reilly and Congressman Delahunt. The Alliance's goal is to protect Nantucket Sound in perpetuity through conservation, environmental action, and opposition to inappropriate industrial or commercial development that would threaten or negatively alter the coastal ecosystem. The Alliance supports formal federal protection designation for Nantucket Sound.

The Alliance was formed in 2001 in response to a proposal by Cape Wind Associates LLC to build a 130 turbine wind energy facility in Nantucket Sound. Since 2001, we have been engaged in a protracted and difficult National Environmental Policy Act (NEPA) process to review the serious adverse impacts of Cape Wind's proposed project on the marine ecosystem and environmental values of Nantucket Sound. The NEPA process conducted for this project by the U.S. Army Corps of Engineers has unfortunately been seriously mismanaged. The

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Corps engaged the applicant's own environmental consultant to prepare the environmental impact statement (EIS), and allowed the applicant to control the NEPA review in other inappropriate respects; as a result, the range of alternatives considered in the NEPA process was improperly restricted, ignoring opportunities to generate energy from renewable resources elsewhere in New England and refusing to consider other, less environmentally-damaging locations for offshore wind plants along the Atlantic coastline. The final EIS released by the Corps was, not surprisingly, deeply flawed. Congress ultimately took the NEPA process away from the Corps, giving the Minerals Management Service (MMS) lead authority over offshore wind energy development, including this project, in the 2005 Energy Policy Act. The MMS is now beginning the Cape Wind NEPA process essentially from scratch, which hopefully will correct many of the serious shortcomings of the Corps' EIS.

From this experience, the Alliance has deep concerns about the NEPA process as it is administered by federal agencies like the Corps. We are concerned that the NEPA process may too readily be dominated by the self-interest of powerful industrial applicants, undermining the objectivity of the environmental analysis and overriding the public interest; that federal agencies may too often adopt inappropriately narrow definitions of their purpose and need and the range of reasonable alternatives that could meet their goals, short-circuiting the careful evaluation of alternatives that is at the heart of any responsible environmental review; and that ordinary citizens may often find themselves overwhelmed in a federal planning process that threatens grievous damage to their community and their environment. For these reasons, we strongly support efforts to ensure the continued integrity and accuracy of environmental reviews under NEPA and to protect the rights of affected citizens and communities to participate fully in NEPA processes, including their rights to seek judicial review if necessary.

We believe our concerns are shared by many Americans who depend on NEPA for critically-important information regarding federal projects that affect their communities. We urge the Task Force to focus its attention on ways to protect and strengthen the rights of ordinary citizens in the NEPA process.

In particular, we urge the Task Force to consider mechanisms to ensure that applicants do not take improper control of the NEPA process, as Cape Wind Associates did in our case. We believe that the key to ensuring that the responsible federal agency maintains proper control over the NEPA process is to require the agency and the applicant to enter into a memorandum of understanding at the outset of the NEPA process that effectively insulates the applicant from decision-making and establishes an objective process for selecting a third-party consultant as the EIS contractor.

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We also urge the Task Force to consider ways to strengthen the roles of local and state governments and tribes in the NEPA process, and to improve opportunities for public involvement. We generally support the intent behind recommendation 3.1, which calls for granting tribal, state and local stakeholders cooperating agency status, and recommendation 6.1, which seeks to encourage greater consultation by federal agencies with stakeholders, although we do not believe that legislative amendments to NEPA are either necessary or prudent to achieve those goals. The key to incorporating the views of such parties into the NEPA process is to ensure that they are substantial and credible. We have worked hard to provide objective and scientifically valuable information to the federal agencies regarding the adverse impacts of the proposed Cape Wind project, rather than simply expressing our opposition to the project. The same approach has been followed by the state, local, and tribal opponents. Their views should be given greater weight not only because they reflect the views of state and local parties, but also because they are substantively based and balanced.

We are deeply concerned by some of the Task Force staff's other proposals. Proposals to redefine "major federal action" (recommendation 1.1) and to establish "unambiguous criteria" for the use of categorical exclusions, environmental assessments, and EISs (recommendation 1.3) seem likely to add new confusion to these important decision points in the NEPA process, and to result in the improper exclusion of federal projects with serious environmental effects from detailed consideration. The key in these decisions must continue to be the significance of the likely environmental impacts caused by a proposed federal action, not artificial criteria like its cost or size.

Proposals to restrict the length of EISs (recommendation 2.2) or the time that federal agencies may take to prepare them (recommendation 1.2) would seriously undercut the ability of federal agencies to take the "hard look" that NEPA requires at the environmental consequences of their actions. The experience of the Alliance in the Cape Wind NEPA process demonstrates that complex projects cannot be evaluated adequately in short, reader-friendly "public relations" documents; they require a careful and thorough review, and the public must have access to the underlying scientific and technical data to be able to confirm that the agency has not glossed over real problems. We also know from painful experience that the mere passage of time is no guarantee of adequate analysis: the Cape Wind NEPA process has dragged on for years, yet still has not resulted in a thorough, objective look at the serious impacts of the project. If the staff's recommendations were adopted, the Corps' environmental analysis would have been deemed "complete" years ago, despite its glaring deficiencies. Artificial restrictions like these on the amount of environmental analysis a federal agency needs to do will only lead to vulnerable, inadequate EISs and poorly-informed federal decisions.

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The Alliance is equally concerned with the majority staff's proposal to amend NEPA to restrict the analysis of alternatives (recommendation 5.1). Federal agencies are supposedly required under current law to consider a range of "reasonable" alternatives that could meet the purpose and need of their project. Our experience with the Cape Wind process shows how easy it is in practice for a strong-willed applicant motivated by its economic self-interest to steer a federal agency to consider an improperly narrow range of alternatives that makes the applicant's proposal look attractive, and how difficult it is for other stakeholders, like residents in affected communities, to get a fair evaluation of a broader range of alternatives. The last thing the Task Force should do is give further power to federal agencies to define alternatives narrowly. In many cases, like Cape Wind, the solution to controversy and harmful actions lies in the identification of alternatives. More, rather than less, focus on alternatives is needed.

Finally, the Alliance is deeply troubled by the staff's proposals to limit the rights of citizens to seek judicial review of federal agencies' compliance with NEPA. Judicial review is the ultimate safeguard for the NEPA process, ensuring that federal agencies fulfill their responsibilities to the American public under that law in good faith. Recommendation 4.1 speaks of creating a "citizen suit" provision in NEPA, but in fact would impose severe restrictions on the ability of ordinary Americans to have their grievances in the NEPA process heard by the courts. There are several specific problems with the staff's proposal. First, federal agencies should not be limited to considering "available information and science;" to the contrary, they should be responsible, as they are under current law, for conducting field research to gather data where available information is inadequate to permit a reasoned assessment of the impacts of a project. Second, limiting standing to parties who participate throughout a NEPA process places undue emphasis on the conduct of individual citizens, and ignores the larger public interest in ensuring full compliance with NEPA. Federal agencies should not be excused from judicial scrutiny where their environmental analysis is defective or biased simply because members of the public may not have participated in every part of the NEPA process. Finally, requiring NEPA suits to be filed within 180 days of a final decision puts unfair pressure on citizens who must struggle to review complex environmental documents and consider whether to take the serious step of engaging in a court challenge.

The Alliance is deeply concerned by the problems it has encountered in the difficult NEPA process for the Cape Wind project. Nonetheless, we are convinced more firmly than ever that NEPA is an indispensable bulwark for protecting the quality of the American environment and the rights of American citizens. With such a focus, in accordance with the recommendations set forth in this letter, the work of the NEPA Task Force can lead to the kind of measured and well-directed

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effort to improve the administration of this important law. Thank you for considering these comments, and please contact me if we can be of further assistance.

Very truly yours,



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