

**COMMONWEALTH OF MASSACHUSETTS
ENERGY FACILITIES SITING BOARD**

In the Matter of the Petition of Cape Wind
Associates, LLC for a Certificate of
Environmental Impact and Public Interest

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EFSB 07-8

FINAL DECISION

M. Kathryn Sedor
Presiding Officer
May 27, 2009

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The Energy Facilities Siting Board hereby GRANTS (1) the Initial Petition and (2) the Application of Cape Wind Associates, LLC for a Certificate of Environmental Impact and Public Interest for the construction of two new 115 kV electric transmission lines in Nantucket Sound and in the Towns of Barnstable and Yarmouth, Massachusetts.

I. INTRODUCTION

Pursuant to G.L. c. 164, §§ 69K-69O, Cape Wind Associates, LLC (“Cape Wind” or “Company”) has filed with the Massachusetts Energy Facilities Siting Board (“Siting Board” or “Board”) an Initial Petition and an Application seeking a Certificate of Environmental Impact and Public Interest (“Certificate”). Cape Wind seeks the Certificate to construct two new 115 kV electric transmission lines in Nantucket Sound and in the Towns of Barnstable and Yarmouth, in connection with the denial by the Cape Cod Commission of the Company’s application for Development of Regional Impact approval for the project. The Certificate, appended to this Decision as Exhibit A, has the effect of granting: (1) Development of Regional Impact Approval; and (2) eight additional state and local permits for the project.

A. Summary of the Proceeding

1. Project Description

Cape Wind proposes to construct two new 115 kV electric transmission lines, partly undersea beneath Nantucket Sound and Lewis Bay and partly on-land and underground in the Towns of Yarmouth and Barnstable on Cape Cod (“transmission project”). The purpose of the transmission project is to interconnect a proposed offshore wind-powered electric generating facility in Nantucket Sound (“wind farm”) with the regional electric grid (Exh. CW-2, at 2-3).

The transmission line route is approximately 18.4 miles in length. The route begins at the proposed wind farm on Horseshoe Shoal in Nantucket Sound, travels approximately 12.5 miles beneath Nantucket Sound and Lewis Bay, comes ashore at the southern end of New Hampshire Avenue in Yarmouth, and then travels approximately 5.9 miles underground through Yarmouth and Barnstable to an existing switching station in Barnstable (Exh. CW-2, at 2-3).¹ The

¹ As discussed in Section I.C.3, below, the scope of the current proceeding does not include the proposed wind farm, because the wind farm will be located in federal waters. Federal review and permitting of the wind farm is currently ongoing.

transmission project was approved by the Siting Board on May 11, 2005. Cape Wind Associates LLC and Commonwealth Electric Company d/b/a NSTAR Electric, EFSB 02-2, 15 DOMSB 1 (May 11, 2005). That approval was upheld by the Massachusetts Supreme Judicial Court in 2006. Alliance to Protect Nantucket Sound v. Energy Facilities Siting Board, 448 Mass. 45 (December 18, 2006). The Siting Board approved the transmission project a second time in 2008. Cape Wind Associates LLC and Commonwealth Electric Company d/b/a NSTAR Electric, EFSB 02-2A/D.T.E. 02-53 (May 1, 2008).

2. Relief Requested

On October 18, 2007, the Cape Cod Commission (“Commission”) denied Cape Wind’s application for Development of Regional Impact (“DRI”) approval, which the transmission project requires under the Cape Cod Commission Act (“CCC Act”).² Cape Wind subsequently filed an Initial Petition followed by an Application with the Siting Board pursuant to G.L. c. 164, §§ 69K-69O (“Certificate statute”).³ In its Application, Cape Wind has asked the Siting Board to grant a Certificate containing the equivalent of a DRI approval and of eight additional state and local permits identified by Cape Wind as necessary for project construction (Exh. CW-2, at 7-8). Specifically, the Company requested that the Siting Board issue a Certificate containing the equivalent of each of the following:

1. A DRI approval, ordinarily issued by the Commission pursuant to Sections 12 and 13 of the CCC Act, for construction and operation of the transmission project within Barnstable County (“DRI approval”);
2. A Chapter 91 License, ordinarily issued by the Massachusetts Department of Environmental Protection (“DEP”) pursuant to G.L. c. 91, for the placement of cables under submerged lands and flowed tidelands of Lewis Bay and Nantucket

² Pursuant to the CCC Act, any proposed development project for which an Environmental Impact Report (“EIR”) is required under the Massachusetts Environmental Policy Act (“MEPA”) is deemed to be a development of regional impact requiring Commission review and approval. See CCC Act, c. 716 of the Acts of 1989, as amended, Section 12(h) and 13; Cape Cod Commission Enabling Regulations, Section 6. Cape Wind’s transmission project required the preparation of a Draft EIR and a Final EIR (Exh. CW-1, Atts. B,C). Thus, the project requires DRI approval.

³ Both the Company’s Initial Petition and its Application are under review in this proceeding. See Sections II and III, below.

- Sound, including the intertidal shoreline area of Lewis Bay up to mean high water at the proposed cable landfall (“Chapter 91 License”);
3. A Section 401 Water Quality Certification, ordinarily issued by DEP pursuant to 314 CMR 9.00, for dredging activities and for the laying by jet-plow of undersea cables from the landfall in Lewis Bay to the Commonwealth’s three-mile jurisdictional boundary (“Section 401 Certification”);
 4. An approval ordinarily issued by the Massachusetts Highway Department (“MHD”) for access to state highways at two locations in Yarmouth and one location in Barnstable (“MHD Access Permit”);
 5. An approval ordinarily issued by the Massachusetts Executive Office of Transportation and Public Works (“EOT”) to cross under an existing rail line located on EOT property in Yarmouth (“EOT License”);
 6. A wetlands Order of Conditions, ordinarily issued by the Barnstable Conservation Commission pursuant to G.L. c. 131, §40 and the Barnstable wetlands bylaw, for construction of undersea portions of the project within coastal wetlands resources in Barnstable (“Barnstable Order of Conditions”);
 7. A wetlands Order of Conditions ordinarily issued by the Yarmouth Conservation Commission pursuant to G.L. c. 131, §40 and the Yarmouth wetlands bylaw, for construction of undersea and on-land portions of the project within wetlands resources in Yarmouth (“Yarmouth Order of Conditions”);
 8. A road opening permit, ordinarily issued by the Barnstable Department of Public Works, to place on-land cables within certain public ways in Barnstable (“Barnstable road opening permit”) and
 9. A road opening permit, ordinarily issued by the Yarmouth Department of Public Works, to place on-land cables within certain public ways in Yarmouth (“Yarmouth road opening permit”).(Exh. CW-1, at 7-8).

B. Jurisdiction

Cape Wind filed its Initial Petition and Application for a Certificate under G.L. c. 164, §§ 69K- 69O. Pursuant to these provisions, an electric, gas or oil company that proposes to construct or operate a jurisdictional energy facility in Massachusetts may seek a Certificate of Environmental Impact and Public Interest from the Siting Board, if the company is prevented or hindered from building the facility because of an adverse state or local agency permitting decision or undue agency delay. The Certificate, if granted, has the legal effect of granting the permit in question, and may grant additional project permits as well. The Siting Board makes a decision on a Certificate Application in accordance with G.L. c. 164, § 69L, which requires that an Application contain certain information and representations; with G.L. c. 164, § 69O, which requires the Siting Board to make four specific findings and opinions; and with

G.L. c. 164, § 69H, which requires the Siting Board to implement the energy policies in its statute to provide a reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost.

C. Procedural History

1. Previous Proceedings

On May 11, 2005, the Siting Board issued a final decision approving construction of the transmission project pursuant to G.L. c. 164, § 69J. Cape Wind Associates, LLC and Commonwealth Electric Company d/b/a NSTAR Electric, EFSB 02-2, 15 DOMSB 1 (May 11, 2005) (“2005 Decision”). That approval was upheld by the Massachusetts Supreme Judicial Court in 2006. Alliance to Protect Nantucket Sound v. Energy Facilities Siting Board, 448 Mass. 45 (December 18, 2006). On May 1, 2008, the Siting Board issued a final decision approving certain project changes, granting a three-year extension for commencement of project construction and, pursuant to G.L. c. 164, § 72, finding that the project is necessary, would serve the public convenience, and is consistent with the public interest. Cape Wind Associates, LLC and Commonwealth Electric Company d/b/a NSTAR Electric, EFSB 02-2A/D.T.E 02-53 (May 1, 2008) (“2008 Decision”). As discussed further, below, the Siting Board relies substantially on its analyses and findings in these decisions in the instant proceeding.⁴

2. Current Proceeding

This proceeding commenced with the filing by Cape Wind of an Initial Petition for a Certificate with the Siting Board on November 21, 2007, pursuant to G.L. c. 164, §69K (Exh. CW-1). Cape Wind then filed its Application for a Certificate on December 28, 2007, pursuant to G.L. c. 164, §69L (Exh. CW-2). The Initial Petition and Application were consolidated for review, consistent with Siting Board practice. In its Application, Cape Wind seeks from the Siting Board a Certificate granting the equivalent of (1) a DRI approval for the transmission project, and (2) eight additional state and local permits required for construction of the project (“eight additional approvals”)

⁴ The 2005 Decision and 2008 Decision are included in the record of this decision and are incorporated by reference herein. See Exhs. CW-2(N); EFSB-1.

Eight parties intervened in the proceeding: three environmental organizations, and the five governmental entities whose permits are the subject of the proceeding. The environmental groups are the Conservation Law Foundation (“CLF”), Clean Power Now, Inc. (“Clean Power Now”), and the Alliance to Protect Nantucket Sound (“Alliance”). The permit-issuing authorities are the Cape Cod Commission, the Massachusetts Department of Environmental Protection (“DEP”), the Massachusetts Executive Office of Transportation and Public Works (“EOT”), and the Towns of Barnstable and Yarmouth. Two parties received limited participant status: the Martha’s Vineyard Commission and the Town of Edgartown.

Beginning in August 2008 and continuing through October 2008, the Siting Board and the parties conducted written discovery. In August, 2008, the Company submitted prefiled direct testimony of two witnesses: Craig Olmsted, Vice President of Projects at Energy Management, Inc., the principal member of Cape Wind; and Christopher G. Rein, Senior Vice President and Principal at ESS Group, Inc., the Company’s environmental consultant. In early September 2008, the Commission submitted the prefiled direct testimony of two witnesses: Phil Dascombe, Senior Community Design Planner for the Commission, and John S. Ramsey, Senior Coastal Engineer at Applied Coastal Research and Engineering, Inc., coastal resources consultant for the Commission. DEP presented the testimony of Alex Strycky, Environmental Analyst in the DEP Waterways Program. Approximately 330 exhibits were entered into the record, consisting primarily of responses by the Company and the intervenors to information requests and record requests issued by Siting Board staff and the parties. Adjudicatory hearings were conducted on November 12 and 14, 2008. The parties filed initial briefs on December 23, 2008, and reply briefs on January 6, 2009.

Siting Board Staff prepared a Bench Memorandum that the Siting Board considered at a public meeting of the Board on March 12, 2009 (“March 12 Board meeting”). The Siting Board directed Staff to prepare a Tentative Decision granting the Certificate, and granting all nine state and local permits requested by the Company. See, Transcript of the Public Meeting of the Energy Facilities Siting Board (March 12, 2009) (“March 12 Tr.”). The Siting Board further directed Cape Wind and the Towns of Barnstable and Yarmouth to attempt to agree on conditions to be included in wetlands Orders of Conditions and street opening permits, so that the Board could consider including those conditions in the wetlands and road opening approvals to be issued in the Certificate. The Board directed the three parties to file a status report within 45 days. The Siting

Board directed, as an overall timeline, that Cape Wind and the Towns should provide agreed-upon permit conditions within 45 days of the date on which a Tentative Decision was issued. In their status reports, neither Town nor Cape Wind reported progress in reaching agreement on permit conditions. On May 11, 2009 a tentative decision was issued. On May 18, 2009, Cape Wind and the Town of Yarmouth indicated that they had reached agreement with respect to road opening matters⁵. On May 21, 2009, the Siting Board considered and unanimously approved the Tentative Decision with amendments.

3. Intervenor Jurisdictional Motions

a. Cape Cod Commission DRI Decisions

A necessary prerequisite for the institution of a Certificate proceeding is a permitting decision by “a state or local agency” that would hinder or preclude the construction of an energy facility jurisdictional to the Siting Board. G.L. c. 164, § 69K; 980 CMR 6.01. In the instant proceeding, the permitting decision that was the basis for the filing of Cape Wind’s Certificate Application was the October 18, 2007 DRI denial issued by the Commission.

On March 18, 2008, two of the intervenors, the Commission and the Alliance, filed partial motions to dismiss the Company’s Certificate Application. One ground asserted was that DRI decisions do not fall within the scope of the Siting Board’s jurisdiction under the Certificate statute. The Commission and Alliance advanced two principal arguments: (1) that the Commission is not a “state or local agency” as provided in the statute; rather, it is a Legislatively-created regional planning body; and (2) that the CCC Act provides that DRI decisions are appealable exclusively to Barnstable Superior Court or the Land Court.

In a ruling issued on July 28, 2008 (“July 28 Jurisdictional Ruling”)⁶, the presiding officer denied the motions to dismiss, finding that DRI decisions issued by the Commission are decisions within the scope of the Siting Board’s Certificate authority. The July 28 jurisdictional ruling found

⁵ See May 20 letter from D. Rosenzweig to K. Sedor, and attached letter dated April 30, 2009, from R. Donahoe to R. Burgmann. A copy of the April 30 letter is attached to, and is incorporated as part of, the Approval in Lieu of Yarmouth Road Opening Permit. The Approval is Att. 5 to the Certificate that is appended to this Decision.

⁶ Cape Wind Associates, LLC, EFSB 07-8, Ruling on Motions re EFSB Jurisdiction Relative to DRI decisions and Motions re Scope of Proceeding (July 28, 2008). The Siting Board hereby adopts and incorporates this ruling into this decision by reference.

that: (1) no evidence exists of an express or implied exemption by the Legislature of DRI decisions from operation of the Certificate statute; (2) statutory language in the Certificate statute and in the Siting statute supports the conclusion that a DRI decision is a decision of a local government body as defined therein; and (3) the institution of a Certificate proceeding under the Certificate statute does not constitute the filing of a judicial appeal of a DRI decision. July 28 Jurisdictional Ruling at 2-5. At the March 12 Board meeting, the Siting Board expressly adopted the finding that the Board's jurisdiction under the Certificate statute extends to Commission DRI decisions (March 12 Tr. at 97-98).^{7, 8}

b. Proposed Wind Farm

The Commission, the Alliance, and the Town of Barnstable filed motions asserting that the scope of this proceeding should not be limited to the transmission project, portions of which are located in Massachusetts and Massachusetts waters, but should include the impacts within Massachusetts of the proposed wind farm, even though the wind farm will be located entirely

⁶ On March 14, 2009, the Commission filed a second motion to dismiss based on the assertion that the Siting Board lacks jurisdiction over Commission decisions. The Commission also filed a motion to supplement the closed record with documents pertaining to asserted wind farm impacts on aviation ("March 14 motions"). The presiding officer denied similar motions during the proceeding, as did the Siting Board at the March 12 Board meeting. Consistent with these prior rulings, the March 14 motions are denied. On April 30, 2009, the Commission filed a second motion attempting to supplement the record with information regarding asserted wind farm impacts. This motion also is denied, on the grounds that the record is closed and that, pursuant to earlier rulings, the proffered information is not relevant to this proceeding.

⁸ The Commission also asserted that the DRI denial could not serve as the basis for a certificate proceeding because (1) the DRI denial was not a final agency decision, but rather a procedural denial issued without prejudice; and (2) the DRI denial therefore does not prevent Cape Wind from proceeding with project construction. The presiding officer found that the DRI possessed several indicia of finality, that it was a final agency decision, and that its issuance bars development of the transmission project. July 28 Jurisdictional Ruling at 5-6. The Commission asserted additionally that Cape Wind did not make a good faith effort to obtain DRI approval, as it did not provide the Commission with sufficient information regarding the project. Based on the significant factual record developed in the Commission proceeding, which is part of the record in this proceeding, the Siting Board finds that Cape Wind made a good faith effort to obtain DRI approval. See also, July 28 Jurisdictional Ruling at 6-7. The Siting Board finds further that Cape Wind made a good faith effort to obtain all nine of the approvals it has requested. See Section III.C.1, below.

within federal waters. Cape Wind, CLF, Clean Power Now, and DEP asserted that the scope of the proceeding is appropriately limited to the transmission lines, consistent with extensive legal precedent including decisions of the federal courts and the Siting Board's decisions in the 2005 Decision and 2008 EFSB Decision. In the July 28 Jurisdictional Ruling, the Presiding Officer denied the intervenors' motions and, consistent with applicable precedent, limited the scope of the proceeding to the transmission lines. The Siting Board expressly adopted this jurisdictional limitation at the March 12 Board meeting (March 12 Tr. at 98).

c. Non-Final Agency Permits

The Alliance and the Town of Barnstable filed motions to dismiss that included the assertion that the Siting Board lacks jurisdiction over the eight additional permits because, at the time of the parties' motions to dismiss, no final decisions on those permits had yet been issued by the relevant agencies. The intervenors relied primarily on an interlocutory ruling in an earlier Certificate proceeding, in which the presiding officer determined that the issuance of a final agency permitting decision for each requested permit is a necessary prerequisite to the filing of a Certificate application with respect to that permit.⁹ The interlocutory ruling was not adopted -- or rejected -- by the Board. In this proceeding, the presiding officer deferred decision on this issue until the evidentiary record had been developed. See, July 28 Jurisdictional Ruling at 2, n.3. At the March 12 Board meeting, the Siting Board determined that the issuance of a final agency decision for permits other than the triggering permit is not a jurisdictional prerequisite to the filing of a Certificate Application seeking multiple permits (March 12 Tr. at 99-100). The matter of non-final agency permits is discussed further in Section III.D.2, below.

d. DEP Chapter 91 License

The Alliance's motion to dismiss included the assertion that the Siting Board lacks authority to include a Chapter 91 License in a Certificate. The Alliance asserted primarily that (1) a Chapter 91 License conveys a property interest in tidelands held in trust for the public, and the Siting Board lacks the necessary statutory authority to convey such an interest; and (2) the Certificate statute itself precludes the Board from issuing a Certificate "with respect to any lands or

⁹ See Colonial Gas Company d/b/a KeySpan Energy Delivery New England, EFSB 06-1, Ruling on Motions for Partial Dismissal (May 10, 2007).

interests therein, excluding public ways, owned or managed by any state or local government.” G.L. c. 164, § 69K. Cape Wind countered that (1) pursuant to G.L. c. 164, § 69K, the Board’s Certificate authority extends to “all” project permits, and there is no exemption for Chapter 91 Licenses; (2) in this particular case, a Certificate would not override DEP’s authority under Chapter 91, as the Certificate would incorporate DEP’s Written Determination and, pursuant to G.L. c. 164, § 69K, DEP retains responsibility for enforcement of the License; (3) the cited language is inapplicable because a Chapter 91 License does not convey a property interest; and (4) the cited language applies only to the agency action that triggers an application for a Certificate application, not to agency decisions that subsequently may be included in a Certificate.

The Siting Board finds nothing in the Certificate statute indicating that the Legislature intended to exclude any state or local permits, including Chapter 91 Licenses, from the scope of the Board’s authority under the Certificate statute. To the contrary, the statute mandates that a Certificate issued by the Board contain “all” necessary project permits. G.L. c. 164, § 69K. The Siting Board declines to create an implied exclusion of Chapter 91 Licenses from the scope of the Certificate statute in the absence of a clear showing of Legislative intent to do so. The Siting Board also finds inapplicable the cited language regarding the transfer of land owned or managed by a state or local government. Read in context, the language in Section 69K means that a petitioner may not rely upon a state agency or local government refusal with respect to public lands as a basis to file an initial petition. However, this language does not govern the scope of the Certificate, which is addressed in the third paragraph of section 69K, and which states that a Certificate takes the place of “all” state or local permits. Finally, the Siting Board notes that DEP has not objected to inclusion of the Written Determination in the Certificate to serve as the final Chapter 91 License for the project (March 12 Tr. at 89). Consequently, the Siting Board finds that its authority under G.L. c. 164, §§ 69K-69O extends to permits issued pursuant to G.L. c. 91.

II. CAPE WIND’S INITIAL PETITION

A. Standard of Review

Pursuant to the regulations implementing the Certificate statute, obtaining a Certificate is a two-step process. First, the applicant must file an Initial Petition. G.L. c. 164, § 69K; 980 CMR 6.02. For facilities other than generating facilities, the Certificate statute provides that the Siting

Board shall consider an Initial Petition if: (1) the applicant asserts at least one of the six grounds for a Petition set forth in G.L. c. 164 § 69K; and (2) the Siting Board determines that, on the merits, at least one of the asserted grounds constitutes a valid basis for granting the Initial Petition. Id.

B. Analysis and Findings

Cape Wind asserted in its Initial Petition four of the six statutory grounds upon which an Initial Petition may be based.

1. Denial Precluding Facility Construction

Cape Wind asserts that the transmission project “cannot be constructed due to any disapprovals, conditions or denials by a state or local agency or body” (Exh. CW-1, at 29); G.L. c. 164, § 69K; 980 CMR 6.02(f). As previously noted, on October 18, 2007, the Commission issued a decision denying Cape Wind’s application for DRI approval (“DRI denial”) and the project cannot be constructed without such approval (Exh. CW-2, Att. M). Accordingly, the Siting Board finds that Cape Wind has raised a valid basis for the Board’s consideration of the Company’s Initial Petition pursuant to G.L. c. 164, § 69K and 980 CMR 6.02(f).¹⁰

2. A Burdensome Condition

Cape Wind asserts that the Commission’s DRI denial “has imposed a burdensome condition or limitation on any license or permit which has a substantial impact on the responsibilities of the board as set forth pursuant to section 69H” (Exh. CW-1, at 28-29). G.L. c. 164, § 69K; 980 CMR 6.02(e).

The Siting Board’s primary mandate is to implement the energy policies contained in its enabling legislation “so as to provide a reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost.” G.L. c. 164, § 69H; 980 CMR

¹⁰ The Commission argued that it only denied the DRI due to lack of information, rather than due to an affirmative finding of non-compliance with the DRI standards. The Siting Board disagrees with that characterization, as the denial at least partially rested on non-compliance with certain MPS, as discussed in Section III.B. 3, below. Even if it were a procedural denial exclusively, the Board does not believe that this is a distinction with a difference; the statute does not exempt denials due to lack of information from its reach, except perhaps in cases in which the proponent’s failure to supply necessary information constitutes a failure to apply in good faith under Section 69L, which is not the case here.

2.02(1). In accordance with that mandate, the Siting Board has previously approved Cape Wind's proposed transmission project under G.L. c. 164, § 69J, finding that the project is needed to interconnect the proposed wind farm to the regional electric grid (Exh. CW-2, Att. N at 118). However, the transmission project cannot be constructed or operated due to the Commission's DRI denial. The denial of a permit may constitute a burdensome condition or limitation. 980 CMR 6.02(2)(e).

The Siting Board finds that the Commission's denial of the project has a substantial impact on the Siting Board's primary responsibility under G.L. c. 164, §§ 69H and 69J to provide a reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost. Accordingly, the Siting Board finds that Cape Wind has raised a second valid basis for the Board's consideration of the Company's Initial Petition, in accordance with G.L. c. 164, § 69K and 980 CMR 6.02 (2)(e).

3. Inconsistencies Among Resource Use Permits

Cape Wind asserts that "there are inconsistencies among resource use permits issued by . . . state or local agencies" for a proposed project (Exh. CW-1, at 24). G.L. c. 164, § 69K; 980 CMR 6.02 (2)(c). Cape Wind asserts that the Commission's DRI denial for the project is inconsistent with the Siting Board's approval of the project in the 2005 Decision and 2008 Decision and with the Secretary's Certificate on the project's FEIR under MEPA (Exh. CW-1, at 24).

The Siting Board and the Commission each has issued a resource-use permitting decision for the transmission project. The Siting Board's 2005 Decision, supplemented by the 2008 Decision, allows Cape Wind, subject to conditions, the use of certain land, water, wetlands, and other natural resources for the transmission of electricity. The Commission's DRI decision denies Cape Wind the use of these natural resources; it thus is inconsistent with the Siting Board's original decisions. Accordingly, the Siting Board finds that Cape Wind has raised a third valid basis for the granting of its Initial Petition, in accordance with G.L. c. 164, § 69K and 980 CMR 6.02 (2) (c).

4. Nonregulatory Issues or Conditions

Cape Wind asserts that the Commission's DRI denial imposes non-regulatory issues or conditions on the transmission project (Exh. CW-1, at 25-28). G.L. c. 164, § 69K; 980 CMR 6.02 (2)(d). A non-regulatory issue or condition "relates to matters not within the jurisdiction of the

agency in question.” 980 CMR 6.02(2)(d). Cape Wind asserts that the Commission exceeded its regulatory jurisdiction by basing its DRI denial, in part, on the status of property rights held by Cape Wind relative to the upland portion of the project, and by requiring and considering evidence pertaining to the wind farm (Exh.CW-1, at 25-28).

The Siting Board makes no determination regarding substantive limitations on the jurisdiction of the Cape Cod Commission under the CCC Act and its implementing regulations. That is a matter better left to the courts. Moreover, it is not necessary in this proceeding to reach that issue. Cape Wind has asserted three valid bases for its Initial Petition and the assertion of one is sufficient for the Board to consider an Initial Petition. Accordingly, the Siting Board makes no finding regarding the Company’s assertion that the Commission’s DRI Decision was based on a non-regulatory issue or condition as provided by G.L. c. 164, § 69K and 980 CMR 2.02 (2)(d).

C. Decision on the Initial Petition

As noted in Section II.B, above, the Company asserted in its Initial Petition four of the six grounds on which Siting Board jurisdiction to consider an Initial Petition may be based. The Siting Board has found that Cape Wind has raised three substantively valid bases for consideration of the Company’s Initial Petition. Any one of these grounds alone would be sufficient to support the granting of an Initial Petition.

Accordingly, the Siting Board GRANTS the Company’s Initial Petition.

III. THE APPLICATION

A. Standard of Review

Pursuant to G.L. c. 164, § 69O, if the Siting Board issues a Certificate for a non-generating facility, the Certificate must include the Siting Board’s findings and opinions with respect to the following: (1) the need for the facility to meet the energy requirements of the applicant’s market area taking into account wholesale bulk power or gas sales or purchases or other cooperative arrangements with other utilities and energy policies as adopted by the Commonwealth; (2) the compatibility of the facility with considerations of environmental protection, public health, and public safety; (3) the extent to which construction and operation of the facility will fail to conform with existing state or local laws, ordinances, by-laws, rules and regulations and the reasonableness of exemption thereunder, if any, consistent with the implementation of the energy policies in the

Siting statute to provide a reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost; and (4) the public interest, convenience and necessity requiring construction and operation of the facility. G.L. c. 164, § 69O. See Keyspan EFSB 06-1, at 12; Berkshire Power Development, Inc., 8 DOMSB 1, at 291 (1999) (“Berkshire Power”); IDC Bellingham, 13 DOMSB 1, at 20 (2001) (“IDC Bellingham”).

In order to provide a full review of a non-generating facility previously approved by the Siting Board in a proceeding under G.L. c. 164, § 69J, the Siting Board also (1) reviews the decision from the underlying EFSB proceeding and (2) determines the extent to which new information has been developed or the circumstances of a project may have changed in the intervening period. Additionally, the Siting Board verifies that issues raised by the state or local agency or agencies whose actions are the subject of the Application have been addressed in a comprehensive manner by the Board, either in its review of the facility under G.L. c. 164, § 69J and/or in its review under G.L. c. 164, § 69K.

B. Opinions and Findings

The four specific findings the Siting Board must make to support the issuance of a Certificate of Environmental Impact and Public Interest for a facility are discussed below.

1. Need for the Facility

Pursuant to G. L. c. 164, § 69O, the Siting Board must make a finding with respect to “the need for the facility to meet the energy requirements of the applicant’s market area taking into account wholesale bulk power or gas sales or purchases or other cooperative arrangements with other utilities and energy policies as adopted by the Commonwealth.”

In the 2005 Decision, the Siting Board found need for additional transmission resources to interconnect the proposed wind farm with the regional transmission grid. 2005 Decision at 20. The Siting Board found that Cape Wind and NSTAR had established that the existing transmission system was inadequate to support the proposed wind farm. Id. This finding was based on a showing by Cape Wind and NSTAR that an electric interconnection was required for Cape Wind to transmit the output of the proposed wind farm to contribute to the regional energy supply. Id. The Siting Board found that, to establish that the transmission line is needed, the wind farm must be reasonably likely to be available to contribute to the regional energy supply. Id. To establish that the wind farm is likely to be available, Cape Wind is required to submit to the Siting Board

copies of all permits required to begin installation of wind farm equipment in Nantucket Sound. Id. at 21. The Siting Board affirmed this need analysis in the 2008 Decision approving the Company's petition for a Section 72 determination of public interest and necessity. Id. at 21. In the current proceeding, Cape Wind indicated that there are no material changes with respect to the need for the project (Exhs. CW-2, at 31; APNS-CW-9). Therefore, the Siting Board finds that the proposed project is needed in accordance with G.L. c.164, §§ 69J and 69O.¹¹

¹¹ The Commission and the Alliance argue that establishing need under Section 69J does not establish need under Section 69O. Citing the language of Section 69O, they assert that the Siting Board must determine the need for the transmission project based on "the need for the [project] to meet the energy requirements of the applicant's market area, taking into account wholesale bulk power or gas sales or purchases." This argument is tantamount to insisting that Section 69O requires the Board to determine whether the *wind farm*, as opposed to the *cable* is needed. There are two serious flaws with this argument. First, the Siting Board has no jurisdiction over the wind farm; yet denying an approval of the cable because the *wind farm* is not needed is, in effect, exercising jurisdiction over the wind farm itself. Second, even if the wind farm were in state waters, as a result of the 1997 Electric Restructuring Act, the Siting Board may no longer look at the need for generating facilities, either in a facility approval proceeding under Section 69J *or* in a Certificate proceeding. See G.L. c. 164, § 69J1/4; § 69O1/2. It is not reasonable to assume that the legislature intended to prohibit the Board from directly assessing the need for generation facilities when such facilities apply for Siting Board approvals, yet intended for the Board to perform a "backdoor," indirect assessment of need for the generating facility when the Board considers a Certificate for a transmission line. At the very least, the statute is ambiguous as to this issue, and the Siting Board therefore exercises its discretion to interpret the statute in a manner that achieves the underlying purpose of the 1997 Electric Restructuring Act, which was to allow the marketplace, rather than a state regulatory body, to determine the need for generation facilities. Indeed, as discussed above, the Siting Board in the 2005 Decision addressed these issues and created a new standard of review specifically for determining the need for proposed transmission lines, like the Cape Wind lines, intended to interconnect a new or expanded generator. This new standard expressly rejected the former standard, which required looking at the need for the generating facility that would be interconnected. 2005 Decision at 16-17. The Supreme Judicial Court has affirmed the Board's new standard of review for transmission facility need. See Alliance to Protect Nantucket Sound v. Energy facilities Siting Board, 448 Mass. 45 (December 18, 2006).

2. Compatibility With Environmental Protection, Public Health and Safety

Pursuant to G. L. c. 164, § 69O, the Siting Board must make a finding with respect to the compatibility of the facility with considerations of environmental protection, public health, and public safety.

a. Prior Siting Board Review

As indicated above, the Siting Board approved construction of the transmission project in the 2005 Decision and granted the project Section 72 and project change approvals in the 2008 Decision. The Siting Board conducted a comprehensive review of the environmental impacts of the proposed transmission lines in the 2005 Decision, and updated the review based on new information regarding some issues in the 2008 Decision. In undertaking the initial and updated reviews, the Siting Board considered: (1) the construction impacts associated with installing the proposed underwater portion of the transmission lines on the marine environment for sand and sediment disturbance, eelgrass and other submerged vegetation, shellfish, fish, protected marine species, protected coastal shorebirds, marine archeology and navigation; (2) the construction impacts associated with installing the proposed upland portion of the transmission lines on land for wetlands and water resources, land resources, traffic and noise; and (3) the permanent impacts associated with the construction and operation of the proposed transmission line with regard to land use and visual impacts, and electric and magnetic fields. 2005 Decision at 53 to 95, 96 to 119. The Siting Board found that with conditions relating to eelgrass, protected coastal shorebirds, navigation, traffic and historic preservation, the environmental impacts would be minimized. 2005 Decision at 132-134.

The Siting Board compared alternatives to the proposed transmission lines, as part of (1) project approach analysis, (2) route selection analysis, and (3) comparison of primary and alternative routes. The Siting Board found that the proposed transmission lines were preferable to all alternatives with respect to environmental impacts. The Company initially identified six routes and of those selected two routes, a primary route and an alternative route. 2005 Decision at 34, 40. The Siting Board found that the Company had not overlooked or eliminated any routes which are clearly superior to the proposed project, had identified a range of practical transmission line routes with some measure of geographic diversity, and consequently, that the Company had demonstrated that it examined a reasonable range of practical siting alternatives. 2005 Decision at 50.

b. Commission

In its denial of Cape Wind's DRI application, the Commission focused on three environmental aspects of the transmission project for which it asserts that additional information, additional mitigation, or a project change was needed: (1) the general impacts of undersea cable installation using jet-plowing; (2) the impacts of undersea cable installation on eelgrass; and (3) the appropriateness of locating the project's transition vault in a FEMA V-zone and within 100 feet of a coastal bank.

First, the Commission expressed concern with the potential of jet-plowing to directly and indirectly effect eelgrass and shellfish beds (Exh. CW-2(M) at 40). The Commission referred to Minimum Performance Standard ("MPS") 2.2.3.6, which prohibits new dredging unless it is needed to accomplish a substantial public benefit and no feasible alternative exists (*id.* at 40).¹² The Commission stated that more sediment core samples and analyses were necessary to determine that the cable installation would not adversely affect eelgrass or shellfish resources (*id.*).

Next the Commission referred to MPS 2.2.3.7 which provides that development shall have "no significant adverse direct or indirect effect on eelgrass beds, unless there is no feasible alternative and the project is necessary to accomplish a public benefit" (Exh. CW-2(M) at 42). The Commission indicated that it needed more information on the location of eelgrass along the entire route (*id.* at 42; Exh. EFSB-CCC-1, at 8, 9). Specifically, the Commission asked Cape Wind to perform diver surveys extending to the entire length of the undersea cables within Massachusetts waters (approximately six miles), in addition to the diver surveys already performed by the Company within Lewis Bay (Exh. CW-2(M) at 43).

Finally, the Commission had concerns about the location of the transition vault that would connect the submarine and upland cables (Exhs. CW-2(M) at 37; EFSB-CCC-1, at 5-6). The transition vault would be located south of Shore Road under the existing pavement at New Hampshire Avenue, which is within a FEMA V-zone (Exh. EFSB-CCC-1, at 5).¹³ According to

¹² The Minimum Performance Standards are contained in the Commission's 2002 Regional Policy Plan ("RPP"), approved by the Cape Cod Commission on January 10, 2002, and adopted as Ordinance 02-03 by the Barnstable County Assembly of Delegates on March 20, 2002.

¹³ The FEMA V-zone refers to a Velocity Zone subject to wave action from a hundred-year storm (*i.e.*, a storm with 1% chance of occurring each year) (Exh. EFSB-CCC-9).

the Commission, MPS 2.2.2.1 prohibits development in a V-zone in order to ensure that new structures are not constructed in areas vulnerable to potentially damaging wave and wind action during a significant storm event or seismic event (Exh. EFSB-CCC-9; Tr. 2, at 219-220).¹⁴ The Commission stated that locating the transition vault out of the FEMA V-zone would eliminate the risk of damage to the transition vault and avoid potential redirection of floodwaters during a 100-year storm event (Exh. EFSB-CCC-9). The Commission also noted that the transition vault should be located a minimum of 100 feet landward of the coastal bank to meet requirements of MPS 2.2.2.4, which specifically prohibits any new non-water dependent development within 100 feet of the coastal bank, dune or beach (Exhs. CW-2(M) at 39; EFSB-CCC-1, at 6). Although the Commission does permit water-dependent structures and uses in the V-zone and within 100 feet of coastal resources if there is no feasible alternative, the Commission determined that the transition vault did not meet its Regional Performance Plan definition of a water-dependent use (Exh. CW-2(M) at 37, 39).¹⁵

Commission staff recommended relocating the transition vault out of the V-zone in order to comply with MPS requirements (Exhs. CW-2(M) at 37; EFSB-CCC-9). In order to relocate the transition vault outside of the V-zone, the vault would need to be moved approximately 225 feet landward (Exh. EFSB-CW-2). The Commission asserted that Cape Wind's arguments pertaining to the increased excavation associated with the relocation, as well as unsafe cable placement in a dry environment, are erroneous since if the vault were moved there would still be excavation in the same area and the cables would remain below sea-level (Exhs. EFSB-CCC-9; CCC-JR, at 5).

c. Cape Wind

The Company asserted that there is ample evidence in the record regarding the project's potential environmental impacts, including eelgrass impacts and impacts associated with

¹⁴ The DEIR and the FEIR for the project did not address the transition vault with regard to its location in the V-zone, nor did any of the intervenors in the underlying decision. The Commission submitted comments on the expanded ENF, DEIR and the FEIR, and did not discuss the location of the transition vault in the V-zone or in the coastal bank buffer zone (Exhs. CW-1(E); CW-1(F); CW-1(G)).

¹⁵ Of relevance to the transition landfall, the DEP's Waterways Regulation Program in review of the Company's application for a Chapter 91 license has determined that the proposed Cape Wind project is water dependent under the waterways regulations (Exh. APNS-CW-40(S)).

placement of the transition vault in a the V-zone, to support a finding that environmental impacts of the project would be minimized (Exhs. CLF-CW-2; CLF-CW-3; Company Initial Brief at 66). Cape Wind further asserted that the overall findings by the Commission, and its denial of Cape Wind's DRI Application are in conflict with the determinations of both MEPA and the Siting Board that environmental impacts would be minimized (Exh. CW-2, at 28).

With respect to dredging impacts, Cape Wind asserted that jet-plowing is necessary to accomplish the interconnection of the wind farm to the grid, and further asserted that no feasible alternative to the transmission project exists to accomplish that goal (Company Initial Brief at 83). Cape Wind asserted that jet-plowing is the state-of-the-art technology for the installation of underwater cables, and is recognized as having significantly lower environmental impacts than other installation methods, such as trenching (Exh. APNS-CW-20; Tr. 1, at 93). The Company stated that it performed 19 core samples in state waters, and this sampling has been deemed adequate by other permitting agencies such as DEP (Tr. 1, at 157).

The Company reiterated that its overall plan to install the submarine cables using jet-plowing has been favorably reviewed and conditioned in comprehensive reviews by the Siting Board (in the 2005 Decision and in the 2008 Decision), and by the Secretary of Environmental Affairs (in the Certificates on the DEIR and FEIR). The project also received issue-by-issue permits from DEP (in the Section 401 Water Quality Certification and the Chapter 91 Written Determination) (Exhs. EFSB-DEP-4(a); APNS-CW-24(S)). Cape Wind will be required to comply with a number of mitigation measures for minimizing jet-plowing impacts, such as time-of-year restrictions and use of a turbidity curtain during jet-plowing (Exh. EFSB-DEP-4; Tr. 2, at 408). Further, the Company will be required to monitor turbidity during jet-plowing and dredging in accordance with "The Turbidity Monitoring Plan for Massachusetts Coastal Waters" (see Section 401 Water Quality Certification) (Exh. EFSB-DEP-4, Att. B; Tr. 2, at 408-409).

Cape Wind asserted that the project will not affect eelgrass beds and noted that the Company has conducted pre-construction reconnaissance regarding existing eelgrass beds in the project area (Exh. EFSB-CW-5). The Company has committed to extensive conditions pertaining to the protection of eelgrass during cable installation, such as prohibitions on the anchoring of vessels and performance of cable work near Egg Island where eelgrass beds are located, use of turbidity curtains, pre-and post construction monitoring to include pre-aerial photographs of the entrance to Lewis Bay, an eelgrass survey two-years post-construction, and the replanting of

eelgrass if necessary (Exh. EFSB-CW-5; Tr. 1, at 187-188, 191-192). Cape Wind stated that it has performed side-scan sonar of the entire cable route as well as site-specific visual inspection by divers (Exhs. CCC-CW-15; CLF-CW-4; CLF-CW-5). Cape Wind explained that only the area off Egg Island was identified to have the potential to support eelgrass, and the eelgrass in this area will be avoided by the cable route (Exhs. EFSB-CW-5; CCC-CW-15). Cape Wind reported that it will aerially photograph the entire cable route in state waters in the month of July immediately prior to jet-plowing to confirm that the proposed route remains clear of eelgrass and to finalize the exact location of the jet-plowing (Exh. EFSB-CW-5). Further, diver surveys will be conducted during construction to ensure there are no impacts to eelgrass around Egg Island in Lewis Bay, and will be deployed elsewhere if additional eelgrass beds are identified through photography or geophysical or geotechnical investigation (id.; Exh. CLF-CW-5).

Cape Wind asserted that the underground transition vault, as proposed, would be designed and constructed to withstand inundation from floodwaters, and that the concrete seawall and pavement at the end of New Hampshire Avenue would protect the vault and roadway from significant erosion from floodwaters (Exhs. EFSB-CW-2, at 3; CLF-CW-2; Tr. 1, at 17). Cape Wind explained that in order to relocate the transition vault outside of the V-zone, the submarine cable would need to be extended upland approximately 225 feet from its terminus under the current design (Exh. EFSB-CW-2 at 2). The Company asserted that adding 225 feet of cable designed for marine use in an upland area, to cable that is designed to be used in a saturated environment, would have a negative impact on long-term cable reliability (id.). Further, the Company explained that installation of a longer section of cable would require a wider and deeper trench, 20 feet wide by 11 feet deep, versus the original design of 10 feet wide by 7 feet deep (id.).¹⁶

Cape Wind estimated that relocating the transition vault outside of the V-zone would increase project costs by \$500,000 (Exh. EFSB-CW-2, at 2). The Company calculated that the construction time at the landfall site would increase by approximately four to six weeks due to the increased excavation and dewatering necessary to install the longer cable (id.). The Company indicated that relocating the cable would also increase noise and air emissions associated with

¹⁶ According to the Company, the trench is wider to accommodate the extension of the 10-inch diameter conduits that would be installed at landfall to the relocated vault (Exh. EFSB-CW-2).

additional dewatering and excavation, and would increase traffic impacts on the neighboring residences (id. at 2-3).

With regard to locating the transition vault outside of the 100 feet of buffer zone to the coastal bank, the Company stated that the vault is proposed within existing pavement approximately 50 feet behind the coastal bank at New Hampshire Avenue (Exhs. EFSB-CW-2(a) at 8; CLF-CW-2). Cape Wind points out that the coastal bank consists of a concrete revetment and does not serve as a sediment source for coastal beaches or coastal dunes, that this revetment would protect the transition vault from wave action, and that this coastal area would not be altered by the horizontal directional drilling (“HDD”) operation as the conduits will pass beneath the resource area (Exhs. EFSB-CW-2; EFSB-CW-3). Cape Wind noted that in order to relocate the transition vault outside of the 100-foot buffer of the coastal zone and the V-zone, it would be necessary to relocate the transition vault approximately 525 feet landward, which would increase neighborhood impacts and project costs while decreasing project reliability (Exh. EFSB-CW-3; Tr. 1, at 12, 173-175).¹⁷

d. Other Intervenors

Clean Power Now asserts that with respect to eelgrass impacts and the transition vault issues, the Company has demonstrated that the cable route was carefully selected to avoid eelgrass beds, and that all unavoidable impacts from the cable installation would be indirect and minimized and/ or mitigated to the maximum extent practicable (Clean Power Now Initial Brief at 27). Further, Clean Power Now argues that none of the opponents demonstrated that Cape Wind’s studies or methodologies were flawed or inaccurate in any way or that the proposed mitigation measures were somehow individually inaccurate or collectively insufficient to protect eelgrass (id. at 28). Finally, Clean Power Now also points out that none of the opponents rebutted Cape Wind’s showing that locating the transition vault outside the V-zone would create greater and more intense environmental impacts and be more costly while decreasing reliability (id.).

¹⁷ It would be necessary to move 525 feet landward along New Hampshire Avenue to be 100 feet from coastal bank because, besides its location at the seawall, coastal bank extends at another point to a beach area east of New Hampshire Avenue, near a route segment further landward from the seawall than the selected vault location (Tr. 1, at 12).

CLF states that if Cape Wind complies with the conditions contained in its 401 Water Quality Certification, and adheres to the monitoring and mitigation plans, the project may avoid impacts to eelgrass and at the least will have no permanent impacts (CLF Initial Brief at 23). CLF asserts that neither the Commission nor any other party has refuted Cape Wind's strong showing that impacts on eelgrass will be avoided or appropriately mitigated, and that the project meets the requirements of § 69O with respect to environmental compatibility (CLF Reply Brief at 5). CLF also asserts that Cape Wind has demonstrated that the project is water dependent pursuant to the Chapter 91 regulations (CLF Initial Brief at 22). Further, CLF states Cape Wind has established that relocation of the transition vault is not feasible because it would increase environmental impacts and costs as well as reduce reliability of the cables (*id.*). Finally, given the above factors, CLF argues that the project qualifies for an exemption from the MPS's pertaining to location in a V-zone and within 100 feet of coastal bank (*id.* at 21-23).

e. Analysis

The substantive issues raised by the Commission related to questions of project impacts have been reviewed by the Siting Board in the two underlying EFSB proceedings and in the present proceeding, and the Board has re-examined these issues based on evidence that was adduced in this proceeding. With respect to marine construction impacts, the Siting Board, in the 2005 Decision found that, with implementation of conditions regarding eelgrass documentation, protected birds, and navigation, the environmental impacts of the proposed transmission lines would be minimized. 2005 Decision, 15 DOMSB 1, at 95-96. With respect to land construction impacts, the Siting Board found that, with implementation of a construction traffic condition and historic preservation condition, land construction impacts of the proposed transmission lines would be minimized. *Id.* at 109. Finding further that permanent impacts would also be minimized, the Siting Board made an overall finding that environmental impacts of the proposed transmission lines along the primary routes would be minimized. *Id.* at 120, 125. In the 2008 Decision, the Siting Board affirmed its analysis from the 2005 Decision. 2008 Decision at 23.

With regard to use of jet plowing and impacts to eelgrass, as discussed in Section III.B above, the proposed project as approved by the Siting Board in the 2005 Decision and the 2008 Decision, has not materially changed. As noted above, Cape Wind has not presented any substantive updates to the proposed project in this proceeding. Further, parties to this proceeding

have provided no significant new information. In addition, as noted above, there have been favorable reviews of the project, including the undersea and landfall cable installation methodologies, by DEP and MEPA. Finally, the Company is required through the various approvals to significant mitigation measures to protect eelgrass.

The Commission favors relocating the transmission vault outside the V-zone and also outside the buffer to the coastal bank. The Siting Board notes that the 2005 Decision and the 2008 Decision both contained descriptions, and approvals, of the landfall and the transition vaults in the same location as that analyzed and addressed in this proceeding.¹⁸ In all three reviews, the transition vault was to be located on New Hampshire Avenue, south of Shore Road. 2005 Decision at 51; 2008 Decision at 11, 13. In the 2005 Decision, the transition from the submarine to upland installation was to be accomplished using jet-plow methodology, while the later 2008 Decision approved the use of HDD technology instead of jet-plowing.

In the 2005 Decision, the Company presented, but did not favor, an alternative to the proposed method of transition vault installation. The alternative would have entailed using a 800-foot HDD rather than jet plow, with the transition vault located north of Shore Drive adjacent to the Englewood Beach recreation area, rather than south of Shore Drive. 2005 Decision at 121-125. In the 2005 Decision, the Siting Board concluded, based on the proposed location of the HDD alternative north of Shore Road, that any advantages of HDD in terms of lowered marine impacts would be minor, compared to the increased noise and traffic impacts projected for use of HDD in that location. 2005 Decision, at 122-125. The 2005 Decision therefore contained conditions directing the Company to file a project change if the landfall methodology should change from jet plow to HDD. 2005 Decision at 124, 125.

In the 2008 Decision, the Siting Board approved a change of the installation method at the landfall to a modified version of the HDD plan, which would reduce the HDD length to 200 feet and would locate the transition vault in the same location for jet-plowing, south of Shore Road. The Siting Board found that the Company's use of HDD, rather than jet-plowing for landfall construction, while keeping the transition vault south of Shore Road, would not alter in any substantive way either the assumptions or conclusions reached in the Siting Board's analysis of the project's environmental impacts in the underlying proceeding. 2008 Decision at 17. Thus, the

¹⁸ This is also the same location reviewed by the Commission.

2008 Decision approved the use of HDD, but retained approximately the same transition vault location, south of Shore Road, as approved for jet-plowing in the 2005 Decision, and as reviewed by the Siting Board in this proceeding and by the Commission in its DRI review.

In this proceeding, relocating the transition vault out of the V-zone would require moving 225 feet further landward on New Hampshire Avenue, north of Shore Road, essentially similar to the location of the HDD alternative construction method in the 2005 Decision, with attendant increase in traffic and noise impacts. In addition, in order to relocate the transition vault outside of the 100-foot buffer of the coastal bank, the transition vault would need to be placed further north along New Hampshire Avenue, further increasing traffic impacts.

The argument made by the Commission that locating the transmission vault in the V-zone would create risk to the transition vault and to the surrounding area due to wave action associated with a 100-year storm, is not persuasive. The Siting Board notes that the transition vault would not be an above-ground structure subject to unprotected wave action, rather it is to be located under the pavement; further, the homes in the area are set back from the street landward of a concrete seawall that stands between the transition vault and Lewis Bay. While the Commission in raising concerns about placement of structures in the V-zone does not distinguish above-ground and below-ground structures, it appears to the Siting Board the risks of such placement related to wave action would differ substantially for structures above and below ground. Although scour would be possible, subjecting the underground vault to wave action, the Commission failed to present evidence that scour around the transition vault would possibly damage it, or cause it to adversely affect the homes in the area, which are set back from the pavement. In sum, even in the event storms overtopped the concrete wall and eroded the pavement, it does not seem reasonable that diversion of water by an underground vault would significantly affect nearby buildings. Therefore, the impacts identified above, including increased noise, traffic, reduced reliability, and higher costs with locating the transition vault out of the V-zone and buffer of the coastal bank further north on New Hampshire Avenue, outweigh any benefits associated with avoiding the V-zone and buffer to the coastal bank.¹⁹

¹⁹ The Siting Board notes that, in raising concerns about placement of the transition vault, the Commission cites MPS 2.2.2.1 (prohibiting development in V-zones) and MPS 2.2.2.4 (prohibiting non-water dependent development in the 100-foot buffer zone to coastal bank); however, as discussed in Section III.B.3. below, the Commission may exempt a structure from such restrictions where, as here, the structure is part of a water-dependent use. The

Therefore, the Siting Board finds that construction and operation of the transmission project is compatible with considerations of environmental protection, public health and public safety.

3. Conformance with Laws and Reasonableness of Exemption Thereunder

Pursuant to G. L. c. 164, § 69O, the Siting Board must make a finding with respect to the extent to which construction and operation of the facility will fail to conform with existing state or local laws, ordinances, by-laws, rules and regulations and the reasonableness of exemption thereunder, if any, consistent with the implementation of the energy policies in the Siting statute to provide a reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost.

The Siting Board acknowledges that the granting of a Certificate in this proceeding would allow the Company to construct the transmission project, notwithstanding the Commission's DRI denial and in absence of four locally issued permits: a wetlands Order of Conditions from Barnstable and Yarmouth, and a road opening permit from each Town. Since the Commission has denied the project, the Siting Board recognizes that the transmission lines may not wholly comply with the Cape Cod Commission Act or the Commission's Regional Policy Plan.²⁰ The record in this proceeding does not demonstrate any other area of actual or potential non-conformance with local or state laws, ordinances, by-laws, rule or regulations.

Regarding state and local laws, the Siting Board reviewed, in the 2005 Decision, the environmental impacts of the transmission project in relation to regulatory programs related to wetlands 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 Siting Board found that the proposed project along the primary route would be generally consistent with the identified

project is a water-dependent use under the DEP waterways regulations (310 CMR 9.12(2)(b)(10)), and would appear to be so under the Commission's definition as well (2002 RPP at 13). In fact, the Commission's definition specifically includes as water dependent uses "those uses identified by MGL Chapter 91 regulations."

²⁰ Specifically, the project may not comply with MPS 2.2.3.6, 2.2.2.1, and 2.2.2.4. However, as discussed in Sections III.B.2. and in this Section, below, the Siting Board also considers it reasonable that the project falls into the exceptions to these performance standards.

requirements of such programs. 2005 Decision at 145. Consequently, the Siting Board found that the construction of the proposed project is consistent with current health, environmental protection, and land resource and development policies as adopted by the Commonwealth. Id. As discussed in Section III.B, above, the Company has stated that the project as presented in this proceeding has not been materially changed since the Siting Board's approval of the project in the 2008 Decision. Therefore, the Siting Board's finding in the 2005 Decision and the 2008 Decision that the proposed project is consistent with Commonwealth policies under those programs is still applicable.

Further, the transmission project has received required state regulatory approvals including: (1) a Section 401 Certification from DEP; (2) a highway access permit from EOT; (3) a license agreement from EOT, allowing the Company use and occupancy of EOT rail property; and (4) a favorable Chapter 91 Written Determination, which DEP has agreed to have included as the project's final Chapter 91 License in the Certificate to be issued in this proceeding. Therefore, the Siting Board opines that, having obtained these four state approvals, the proposed transmission project conforms to the laws or related regulatory provisions pursuant to which the approvals were issued.

The record also shows with respect to local laws that, absent DRI approval of the transmission lines, Cape Wind cannot obtain the two local approvals from the Town of Yarmouth and the two local approvals from the Town of Barnstable. However, if a Certificate is granted, the identified obstacle to pursuit and potential receipt of these four local approvals (the Commission's DRI denial) will be removed. There is no indication in the record that, with this obstacle removed, Cape Wind would be unable to obtain the required local approvals, or that any non-conformance with the laws or related regulatory provisions applicable for those approvals would exist.²¹

With respect to the reasonableness of exempting the transmission project from the need to obtain DRI approval from the Commission, such exemption would be consistent with, and is necessary to, the full implementation of the Siting Board's findings and decision in the underlying EFSB proceedings. As reasons for project approval, the Siting Board cited its finding that, upon compliance with specified mitigation measures and conditions, the construction and operation of

²¹ In fact, the record shows that Barnstable and Yarmouth each has issued a positive Order of Conditions, and Barnstable has issued a road opening permit, for a very similar project: a 34-mile underwater transmission cable between Nantucket and the Cape. See n.27, below.

the transmission project were needed, and would provide a reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost. 2005 Decision at 131-132. In the 2008 Decision, the Siting Board found that the project is necessary, will serve the public convenience, and is consistent with the public interest. 2008 Decision at 23.

The record shows that, as reasons for denying DRI approval for the transmission project, the Commission cited its finding that it could not determine the project to be consistent with certain MPS, including MPS 2.2.3.6 related to dredging prohibitions, MPS 2.2.3.7 related to avoidance of adverse effect on eelgrass beds, and MPS 2.2.2.1 and 2.2.2.4 related to prohibited uses in V-zones and coastal bank buffer.²² As discussed in Section III.B.2.a. above, the Commission maintained that to determine that the project is consistent with these above MPS, additional information, additional mitigation or project changes were needed. However, based on the record, the Siting Board finds no evidence to support non-compliance of the project with MPS 2.2.3.7, and concludes that under a reasonable interpretation of MPS 2.2.3.6, 2.2.2.1, and 2.2.2.4, the project may be exempt from these standards. The Siting Board notes that the project is a water-dependent use under the DEP waterways regulations (310 CMR 9.12(2)(b)(10)), and would appear to be so under the Commission's definition as well (2002 RPP at 13). In fact, the Commission's definition specifically includes "those uses identified by MGL Chapter 91 regulations."

With respect to project benefits, a need for the proposed project was found in the 2005 Decision and in the 2008 Decision, and no new need information was provided in the present proceeding. The Siting Board's finding that the project is needed thus remains unchanged.

With respect to project impacts, the Siting Board reviewed in detail both in the 2005 Decision, 2008 Decision, and as part of updated analysis in Section III.B, above, the wetland, water resources, and habitat impacts including impacts related to the areas that encompass MPS

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The Company's use of jet-plowing also may be exempt from MPS 2.2.3.6 as this MPS contains an exemption for dredging when it "is necessary to accomplish a substantial public benefit and no feasible alternative exists." In Section III.B.4. below, the Siting Board finds that the transmission project is in the public interest and in Section III.B.2. above, found that jet-plowing is the state of the art method for undersea cable installation, and minimizes environmental impacts more than other alternatives such as open trenching.

issues cited by the Commission. Specifically, concerns the Commission raised with respect to marine dredging, eelgrass impacts, and siting of the transition vault in a V-zone and coastal bank buffer area fall within the scope of issues the Siting Board has reviewed. Of importance to such concerns, the project seabed construction will be based on methods of in-water construction that are common for such projects, with impacts that are temporary in nature, and with adequate mitigation provisions to avoid eelgrass and monitor conditions prior to and during construction. Further, the landfall design uses state-of-the-art construction methods, minimizes both human and environmental impacts, avoids above-ground structures and is consistent with landfall designs and construction for other similar projects, including the second (2004) Nantucket cable project.

Thus, the record contains no new information to alter the view of the Siting Board that the project is needed and that project impacts would be minimized, as discussed above in Section III.B.2. In the absence of a DRI approval and the four local approvals, or a Certificate which serves in the place of such an approval, the Company cannot implement the transmission project as reviewed and approved by the Siting Board in the 2005 Decision and the 2008 Decision. The Siting Board finds that the transmission project may not comply with the Cape Cod Commission Act or 2002 RPP as interpreted by the Commission, but there is no evidence of non-compliance with any other applicable state and local laws. The Siting Board further finds, pursuant to G.L. c. 164, § 69O, that exempting the Company from the need to obtain DRI approval from the Commission for the transmission project is reasonable, and would be consistent with the Siting Board's implementation of the energy policies in G.L. c. 164 so as to provide a reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost.

4. Public Interest or Convenience

Pursuant to G. L. c. 164, § 69O, the Siting Board must make a finding with respect to the public interest, convenience and necessity requiring construction and operation of the facility.

After conducting an extensive review of the need for the transmission project, alternative routes, and potential environmental impacts, the Siting Board found in the two underlying proceedings that upon compliance with specific conditions set forth in its 2005 Decision, construction and operation of the transmission lines along the primary route is needed, and will provide a reliable energy supply for the Commonwealth with a minimum impact on the

environment at the lowest possible cost, in keeping with the Siting Board's statutory obligations under G.L. c. 164, § 69H. 2005 Decision at 131. The Siting Board found in the 2008 Decision, that the project is necessary, will serve the public convenience and is consistent with the public interest, under G.L. c. 164, §72. Nothing in the record of the instant proceeding changes any of the Siting Board's findings in the underlying proceedings.

Accordingly, the Siting Board finds, that pursuant to G. L. c. 164, § 69O, the public interest and convenience requires the construction and operation of the transmission project as described in this proceeding.

5. Good Faith Representation

Pursuant to G.L. c. 164, § 69L, one of the required elements of an Application is:

a representation by the applicant as to the good faith effort made by the applicant to obtain from state agencies and local governments the licenses, permits, and other regulatory approvals required by law for the construction or operation of the facility

G.L. c. 164,,§ 69 L (4).

The Siting Board has not previously been presented with the occasion to address the good faith requirement of G.L. c. 164, § 69L (4). There are two aspects of this requirement that the Board wishes to clarify here: (1) the necessity of including a written representation of good faith efforts in a Certificate Application and (2) the necessity of including such a representation not only with respect to the permit decision on which the Initial Petition and Application are based, but with respect to each permit sought by the applicant.

The record of the Commission's DRI proceeding, appended to Cape Wind's Certificate Application, indicates, and the Board finds, that Cape Wind made a good faith effort to obtain DRI approval from the Commission.²³ With respect to the eight additional permits, Cape Wind included in its Application a table of all project permits showing that each of these permits was applied for prior to the filing of the Company's Application in December 2007 (Exh. CW-2(C)).

²³ Cape Wind included, in its Initial Petition, a copy of the entire record of the Cape Cod Commission DRI proceeding (Exhs. CW-1, Att. E through H; CW-2, Att. O). Based on a review of that record, and the description of the DRI process in the Company's Application, the Board finds that the Company provided sufficient information to the Commission regarding the transmission project to constitute a good faith effort to obtain DRI approval for the transmission project (Exh. CW-2, at 5-7, 16-28, and Att. O).

Cape Wind provided copies of each permit application (Exhs. CW-2(D) 1 through 4). As the proceeding progressed, Cape Wind succeeded in obtaining the four state permits it had applied for; with respect to the four local permits, the Company specifically noted that it made a good faith effort to obtain them, but was precluded by operation of law from doing so. See Exh. CW-2, at 38. Thus, the Board finds that Cape Wind made a good faith effort to obtain the nine permits it has requested from the Board in this proceeding.

The Siting Board has not previously addressed the good faith requirement of Section 69L(4) with any specificity. For purposes of this proceeding, the Board therefore has accepted as demonstrative of a good faith permitting effort the Company's permit table, accompanying permit applications, and actual success in obtaining permits. The Board would expect to see similar evidence of good faith permitting efforts in future Certificate Applications. Going forward, the Siting Board asks that applicants also provide, in a single and clearly marked section of, or attachment to, an Application, a written affirmation by the applicant that, by the time the Application was filed, the applicant had made a good faith effort to obtain each permit it is requesting from the Board. Such an affirmative statement of good faith efforts to obtain necessary state and local permits is consistent with the statute and with Board's view that permitting decisions should be made, to the extent feasible, by the state and local agencies with original jurisdiction to make those decisions, unless to do so would frustrate the central goal of the Certificate statute, i.e., the removal of permitting-related obstacles to the timely development of needed new energy infrastructure.

6. Findings

The Siting Board has made the four findings that it must include in a Certificate pursuant to Section 69O, in order to issue a Certificate. Specifically, the Siting Board has found: (1) that the transmission project is needed; (2) that granting a Certificate containing approvals for the project is compatible with considerations of environmental protection, public health and safety; (3) that the project may not conform to certain aspects of the Cape Cod Commission Act and the Commission's 2002 RPP, as interpreted by the Commission, but it is reasonable to exempt the project from these requirements; and (4) that issuing such a Certificate would serve the public interest and convenience. The four findings made by the Board support the granting of a

Certificate for the transmission project so that it may go forward, and the Siting Board hereby grants such a Certificate.

C. Scope of the Certificate

As noted in Section I.A.2, above, Cape Wind has requested that the Certificate include nine separate permits identified by the Company as necessary for project construction and operation. The Siting Board considers below which of these permits should be included in the Certificate.

1. DRI Approval

On October 18, 2007, the Commission denied Cape Wind's application (Exh. CW-2, Att. M). Pursuant to the CCC Act, Cape Wind cannot proceed with development of the transmission project while the Commission's DRI denial remains in effect. Specifically, the CCC Act provides that:

the commission may approve, approve with conditions, or disapprove the development of regional impact. If the commission disapproves the development of regional impact no further work may be done on the development (emphasis added).

CCC Act, Section 13(e); Tr. 2, at 383.

The Commission's DRI denial is a complete bar to project development. Additionally, as discussed in Section D.2, below, the existence of the DRI denial precludes Cape Wind from obtaining other necessary local permits. Accordingly, the Siting Board hereby determines that the Certificate in this proceeding shall include the equivalent of a DRI approval for the transmission project. This approval is included in Exhibit A hereto, as Attachment 1.²⁴

2. The Four Local Permits

As noted above in Section I.A.2, above, Cape Wind has requested that four local permits be included in the Certificate: Unlike the Commission's DRI decision, the four local permits have not

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The Siting Board during the proceeding asked the Commission to identify appropriate conditions for inclusion in a DRI approval for the project, were such an approval to be issued by the Board. The Commission declined to provide the Board with suggested conditions (Exh. EFSB -CCC-8).

yet been reviewed or decided by the permitting bodies with original permitting jurisdiction: The four permits are:

1. a wetlands Order of Conditions under G.L. c. 131, § 40 and the local Barnstable wetlands bylaw, ordinarily issued by the Barnstable Conservation Commission;
2. a wetlands Order of Conditions under G.L. c. 131, § 40 and the local Yarmouth wetland bylaw, ordinarily issued by the Yarmouth Conservation Commission;
3. a road opening permit from the Town of Barnstable, ordinarily issued by the Barnstable Department of Public Works; and
4. a road opening permit from the Town of Yarmouth, ordinarily issued by the Yarmouth Department of Public Works.

Just as the Commission's DRI denial bars work on the transmission project, it also prevents Cape Wind from obtaining the four local permits. Specifically, pursuant to Section 12 (h) of the CCC Act ("Section 12(h)"):

Municipal agencies shall refer any proposed development which meets the standards and criteria set out by the commission for developments of regional impact to the commission for review, at which point the municipal agency's review shall be suspended until the commission has reviewed the proposed development (emphasis added).

Cape Wind applied for each of the four local permits but, pursuant to CCC Act Section 12(h), none of the four could be issued (Exhs. RR-EFSB-CW-2; RR-EFSB-TOB-1; RR-EFSB-YAR-1).²⁵ In accordance with Section 12 (h) of the CCC Act and at the request of Yarmouth, Cape Wind withdrew the two Yarmouth applications; the two Barnstable applications remain pending and have been subject to no formal action by Barnstable (Exhs. EFSB-YAR-1; EFSB-TOB-1(d)). Without a favorable DRI decision, Cape Wind is prevented from obtaining the four local permits, which the Company has duly applied for. The Siting Board finds that Cape Wind has made a good faith effort to obtain the four local approvals, as required by G.L. c. 164, § 69 L(4), and it was precluded from obtaining them not by any act or omission on the Company's part. The Board also finds that requiring Cape Wind to now commence the applicable process with the

²⁵ The Company filed its Notices of Intent with Barnstable and Yarmouth on November 15, 2007. The Company filed its applications for road opening permits with the two towns on November 13, 2007 (id.).

Towns would be contrary to the underlying purpose of Section 69K through Section 69O, which is to streamline the permitting of jurisdictional energy facilities. Thus, the four local permits shall be included in the Certificate issued in this proceeding.

As the Siting Board has done previously, the Board could have relied on our granting of DRI approval for the project to free Cape Wind to re-apply with Barnstable and Yarmouth for the four local permits. This approach was used successfully in the KeySpan proceeding, where the applicant was able to obtain the local permits it required by applying to the relevant Town boards after issuance of a Final Decision granting DRI approval.²⁶ However, as set forth below, while the Siting Board does not reject this approach for use in future cases, the Board does not employ it here, primarily (1) because the record developed in this proceeding is considerably more comprehensive than the record developed in KeySpan relative to the un-issued local permits, and (2) because of the additional delay that could be involved were the Company required to go through the full permitting process at the local level.

In this case, each of the Towns is an intervenor in the proceeding, and thus has had the opportunity to develop the record with respect to the four outstanding local permits. See, Memorandum to Parties re Potential Involvement of Certain State and Local Entities in Cape Wind Override Proceeding (January 18, 2008); Ruling on Intervention (February 15, 2008). Early in the proceeding, the presiding officer expressly indicated to the parties that the Board wished to develop a record with respect to each of the eight additional permits. With such a record, the Board could better consider the issue of whether the Board's jurisdiction extended beyond the DRI denial to include the eight additional permits, and the Board would have a record to support issuance of one or more of those permits should the Board determine that it had the jurisdiction to do so.²⁷ Each Town was issued specific discovery requests asking it to identify permit conditions it felt should be included in the wetlands and road opening permits if they were to be issued by the Board (Exhs. RR-EFSB-TOB-1; RR-YAR-1).²⁸ Each Town was given an additional post-hearing

²⁶ Colonial Gas Company d/b/a KeySpan Energy Delivery New England, EFSB 06-1 (June 22, 2007) ("KeySpan").

²⁷ See July 28 Jurisdictional Ruling at 2, n.2.

²⁸ Barnstable proposed additional eelgrass conditions (Exh. RR-EFSB-TOB-1) As discussed in Section III.B.2, above, the Siting Board reviewed eelgrass impacts comprehensively in the 2005 Decision, and included protective conditions therein. The Company also has

opportunity to develop such conditions collaboratively with the Company (March 12 Tr. at 100-102).

Additionally, each of the Towns was asked for, and provided, examples of wetlands Orders of Conditions and road opening permits it had issued. Among these examples were the actual Orders of Conditions and a road opening permits issued by each of the Towns for the Nantucket cable project, which each Town identified as similar to an Order of Conditions and road opening permit that would be issued for the Cape Wind transmission project (Exhs. EFSB-TOB-2(a); EFSB-TOB-5; EFSB-YAR-2-2(a); EFSB-YAR5).^{29, 30}

Each of the Towns also provided evidence regarding the amount of time that would be necessary for it to issue an Order of Conditions and a road opening permit for the proposed Cape Wind project. Each Town estimated that a minimum of approximately 2 months would be required for its Conservation Commission to review the Company's NOI, issue an Order of Conditions, and allow the close of the 21-day period for appeal of the permit to DEP under the

committed to extensive eelgrass protection and mitigation measures in its Section 401 Certification. The Siting Board views the conditions that are in place as adequately protective of eelgrass in the project area. Yarmouth did not provide suggested conditions, but provided copies of a Host Community Agreement and a Statement of Principles it has entered into with Cape Wind. These documents address some wetlands and road opening matters. (Exhs. CW-2(O)(S-1); CW-2(O)(S-2).

²⁹ The Nantucket cable project interconnects the island of Nantucket with the regional electric grid on the Cape. The record shows that the cable route is approximately 34 miles long. The Nantucket cable travels partly underwater through Nantucket Sound and partly underground between its landfall and a substation in Barnstable (Exh. EFSB-YAR-2). No EIR was required for the Nantucket Cable project, and the Commission did not review it as a Development of Regional Impact (Exhs. CLF-CCC-3; CLF-CCC-6). Yarmouth and Barnstable each issued a positive wetlands Order of Conditions for the project (Exhs. EFSB-YAR-2(a); EFSB-TOB-2). The record shows that, like the Cape Wind project, undersea cable installation for the Nantucket cable was done by jet-plow, and HDD was used for the transition from sea to land (Exh. CLF-CCC-1 (p) at A-15-A18). Unlike the Cape Wind project, the record shows that the Nantucket cable would have direct impacts on eelgrass and on shellfish (*id.* at A-50-A-55).

³⁰ In KeySpan, in contrast, no record evidence regarding potential permit conditions was developed.

state Wetlands Protection Act (Exhs. EFSB-TOB-7; EFSB-YAR-7).³¹ Barnstable and Yarmouth each has a local wetlands bylaw as well; Barnstable estimated that a minimum of 3½ months would be required for issuance of an Order of Conditions under its local bylaw (Exhs. RR-EFSB-YAR-1(b); EFSB-TOB-8).³² With respect to road opening permits, each of the Towns estimated that it would require approximately 30 days for the issuance of a preliminary road-opening approval (Exhs. EFSB-TOB-8; EFSB-YAR-8).

The Siting Board concludes that, in the relatively unusual situation where an applicant has made a good faith effort to obtain certain necessary project permits, but is precluded by operation of law from obtaining them, it may be appropriate to avoid further permitting delay by including the otherwise unobtainable local permits in a Certificate, as opposed to requiring the applicant to undertake an entire de novo permitting process. This is particularly true where, as here: (1) the Siting Board has comprehensively reviewed, and has approved, the project three times over a span of seven years; (2) other state agencies with major permitting authority over the project have reviewed and approved it, including DEP and MEPA; (3) the relevant local permitting entities have had an opportunity to participate actively in the Certificate process, including the opportunity to provide the Siting Board with suggested conditions for the proposed project; and (4) the record contains examples of the types of permits in question, issued by the same agencies for a very similar project.

Accordingly, the Siting Board hereby determines that the Certificate in this proceeding shall include the equivalent of the following approvals:

- a wetlands Order of Conditions under G.L. c. 131, §40 and the local Barnstable wetlands bylaw;
- a wetlands Order of Conditions under G.L. c. 131, §40 and the local Yarmouth wetlands bylaw;
- a road opening permit from the Town of Barnstable; and
- a road opening permit from the Town of Yarmouth.

³¹ This period does not include the time necessary for DEP to issue a Superseding Order of Conditions, administrative appeal of that decision within DEP, or potential subsequent judicial appeal of DEP's decision to Superior Court and beyond.

³² This figure does not include the time required for subsequent appeal to Superior Court and beyond.

These approvals are included in Exhibit A as Attachments 2-6.³³ These approvals include conditions based on each Town's conditions in the Nantucket cable matter.

3. The Four State Approvals

a. DEP Chapter 91 License

Cape Wind applied for a Chapter 91 License on December 14, 2004, and submitted an updated application on October 6, 2008. DEP conducted a public hearing on November 5, 2008 (Exh. RR-EFSB-CW-5). Pursuant to G.L. c. 91, DEP on December 22, 2008 issued a favorable Written Determination and Draft License for the transmission project ("Written Determination") (Exh. APNS-CW-24(S)).³⁴ On January 9, 2009, the Alliance and the Town of Barnstable filed with DEP an administrative appeal of the Written Determination (Exh. RR-EFSB-CW-2(S)(2)(1)).

DEP has expressly stated that it has no objection to including the Written Determination as the Chapter 91 License for the project in a Certificate to be issued by the Board in this proceeding, provided that all conditions contained in the Written Determination are included (March 12 Tr. at 89). Including the Written Determination in the Certificate will eliminate potentially substantial delay in the construction and operation of a project that the Siting Board has twice approved, and, in this proceeding, has found to be needed and in the public interest. If the Determination is not included in the Certificate, issuance of a final Chapter 91 License will be delayed, at a minimum, until the pending administrative appeal has been resolved. That appeal, and possible subsequent judicial appeals, could delay the project significantly. Accordingly, the Siting Board hereby determines that the Certificate in this proceeding shall include the equivalent of a final Chapter 91 License, which shall be the Written Determination issued by DEP on December 22, 2008. This approval is incorporated in Attachment A.

³³ The Board's inclusion of these local permits in the Certificate is not intended to, and shall not be construed to affect any obligations with respect to local review that the Company has incurred under contractual agreements with any municipality.

³⁴ Pursuant to the waterways regulations, DEP found that the transmission project is a water-dependent use (Exh. RR-EFSB-DEP-2).

b. Section 401 Certification

DEP granted a Section 401 Certification for the project on August 14, 2008 (Exh. EFSB-DEP-4(a)). The appeal periods for the Section 401 Certification have passed and no appeals were filed (Exh. RR-EFSB-CW-5). However, Cape Wind seeks to have the 401 Certification included in the Certificate on the ground that the permit may be subject to collateral attack in a pending Barnstable Superior Court action challenging the Secretary's MEPA certificate for the project ("Barnstable MEPA action") (Tr. 1, at 117-120).

G.L. c. 164, § 69K provides that a Certificate must include "all" project permits. In general, the Siting Board does not construe this directive to require the inclusion of permits that have already been issued, particularly if the appeal period has run. In this case, however, if the state court petitioners were to prevail in their MEPA action, the validity of the Section 401 Certification might be called into question, as the 401 Certification contains Section 61 Findings that rely, in part, on the Secretary's Certificate. Indeed, the plaintiffs' in the pending Barnstable MEPA action are seeking this very relief in their complaint.³⁵ Including the Section 401 Certification in the Certificate would eliminate this uncertainty as well as the attendant delay that would result if, for example, re-issuance of the MEPA Certificate and the 401 Certification were to be required. The Siting Board has twice approved the transmission project, and in this proceeding, has found the project to be needed and in the public interest. DEP has stated that it has no objection to including the Section 401 Certification in a Certificate, provided that all conditions contained in the 401 Certification are included (March 12 Tr. at 89). Accordingly, the Siting Board hereby determines that the Certificate issued in this proceeding shall include the Section 401 Certification issued by DEP on August 14, 2008. This approval is included in Attachment A.

c. The MassHighway Access Permit and EOT License

The Massachusetts Highway Department issued a Highway Access Permit for the transmission project on July 22, 2008 (RR-EFSB-CW-5). The EOT issued a License for Use and Occupancy for the project on September 17, 2008 ("EOT approvals"). The state court petitioners in the Barnstable MEPA action assert the issuance of the DEP Section 401 Certification and the

³⁵ See Town of Barnstable et al v. Cape Wind Associates, LLC et al, Memorandum of Decision and Order, BACV2007-00506 (June 17, 2008), attached to June 23, 2008 letter from David S. Rosenzweig, Esq. to M. Kathryn Sedor, Esq.

MHD Highway Access Permit as jurisdictional bases for the state court action. Town of Barnstable v. Cape Wind Associates, LLP, BACV2007-00506, Memorandum of Decision and Order at 5 (December 17, 2008).

If the state court petitioners were to prevail in their MEPA action, the validity of the two EOT permits could conceivably be called into question, even though these permits contain no Section 61 Findings. Including the EOT permits in the Certificate would eliminate this uncertainty as well as the delay of waiting for a final judicial decision on the adequacy of the MEPA Certificate and the resulting impact, if any, on the two EOT permits. The Siting Board finds it appropriate to include the EOT permits in the Certificate, to allow the project to go forward without the possibility of additional delay arising from the pending state court MEPA action. Accordingly, the Siting Board hereby determines that the Certificate in this proceeding shall include the MassHighway Access Permit and the EOT License. These approvals are set forth in Attachment A.

IV. CONCLUSION

The Siting Board GRANTS the Initial Petition and the Application of Cape Wind Associates, LLC for a Certificate of Environmental Impact and Public Necessity. Pursuant to G.L. c. 164, § 69 K, the granted Certificate "shall be in the form of a composite of all individual permits, approvals, or authorizations which would otherwise be necessary for the construction and operation of the facility." To that end, the granted Certificate is a composite permit including the equivalent of: (1) a DRI approval, (2) a Chapter 91 License, (3) a Section 401 Water Quality Certification; (4) a MassHighway Access Permit; (5) an EOT License; (6) Town of Yarmouth wetlands Orders of Conditions, (7) a Town of Yarmouth road opening permit; (8) a Town of Barnstable wetlands Orders of Conditions ; and (9) a Town of Barnstable road opening permit.

This Final Decision, the appended Certificate of Environmental Impact and Public Interest, and the nine approvals contained in the Certificate each are conditioned on compliance by the Company with Conditions C.1 through C.7 set forth in the Certificate.

M. Kathryn Sedor

M. Kathryn Sedor
Presiding Officer

Dated this 27th day of May, 2009

**COMMONWEALTH OF MASSACHUSETTS
ENERGY FACILITIES SITING BOARD**

In the Matter of the Petition of Cape Wind
Associates, LLC for a Certificate of
Environmental Impact and Public Interest

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EFSB 07-8

EXHIBIT A TO FINAL DECISION IN EFSB 07-8

**CERTIFICATE OF ENVIRONMENTAL IMPACT AND
PUBLIC INTEREST**

Pursuant to its authority under G.L. c.164, §§69K-69O, the Energy Facilities Siting Board hereby GRANTS (1) the Initial Petition and (2) the Application of Cape Wind Associates, LLC (“Cape Wind” or Company”) and (3) issues this Certificate of Environmental Impact and Public Interest (“Certificate”) to Cape Wind. This Certificate constitutes Attachment A to, and is part of, the Final Decision in EFSB 07-8.

V. **SCOPE OF CERTIFICATE**

In accordance with G.L. c. 164, § 69K, this Certificate “shall be in the form of a composite of all individual permits, approvals or authorizations which would otherwise be necessary for the construction and operation of the facility” and it acts in the place of the nine permits referenced below. The Certificate authorizes the applicant to construct and operate two new 115 kV electric lines for the purpose of connecting a proposed offshore wind generating facility in Nantucket Sound with the regional electric grid on Cape Cod (“transmission project”), as approved by the Siting Board in Cape Wind Associates, LLC and Commonwealth Electric Company d/b/s NSTAR Electric, EFSB 02-2, 15 DOMSB 1 (May 11, 2005) (“2005 Decision”), Cape Wind Associates, LLC and Commonwealth Electric Company d/b/s NSTAR Electric, EFSB 02-2A/D.T.E. 02-53 (May 1, 2008) (“2008 Decision”).

VI. **APPROVALS**

This Certificate contains the following nine approvals (collectively, “Approvals”):

1. An approval that is the equivalent of a DRI approval, ordinarily issued by the Cape Cod Commission pursuant to Sections 12 and 13 of the Cape Cod Commission Act. This approval is appended hereto as Attachment 1;
2. An approval that is the equivalent of a wetlands Order of Conditions, ordinarily issued by the Barnstable Conservation Commission pursuant to G.L. c. 131, §40 and the Barnstable wetlands bylaw, to install undersea portions of the project within coastal wetlands resources in Barnstable (“Barnstable Order of Conditions”). This approval is appended hereto as Attachment 2;
3. An approval that is the equivalent of a wetlands Order of Conditions ordinarily issued by the Yarmouth Conservation Commission pursuant to G.L. c. 131, §40 and the Yarmouth wetlands bylaw, to install undersea and on-land portions of the project within wetlands resources in Yarmouth. This approval is appended hereto as Attachment 3;
4. An approval that is the equivalent of a road opening permit, ordinarily issued by the Town of Barnstable Department of Public Works, to install cables within certain public ways in Barnstable. This approval is appended hereto as Attachment 4;
5. An approval that is the equivalent of a road opening permit, ordinarily issued by the Town of Yarmouth Department of Public Works, to install cables within certain public ways in Yarmouth. This approval is appended hereto as Attachment 5.
6. An approval that is the equivalent of a Chapter 91 License, ordinarily issued by the Massachusetts Department of Environmental Protection (“DEP”) pursuant to G.L. c. 91. This approval comprises the “Written Determination Pursuant to M.G.L. c. 91, Waterways Application No. W08-2480, Cape Wind Associates LLC-Submarine Cable Electric Transmission Facility, Flowed Tidelands of Lewis Bay and Nantucket Sound, Barnstable and Yarmouth” issued by DEP to Cape Wind Associates, LLC on December 28, 2008. This approval is marked as

Exhibit RR-EFSB-CW-2(S) in the EFSB 07-8 Certificate proceeding and is incorporated by reference in its entirety into this Certificate.

7. An approval that comprises the “401 Water Quality Certification, Application for BRP WW 07, Major Dredging, Lewis Bay and Nantucket Sound, in the Municipalities of Barnstable and Yarmouth” issued by DEP to Cape Wind Associates, LLC on August 15, 2008. This approval is marked as Exhibit EFSB-DEP-4(a) in the EFSB 07-8 Certificate proceeding and is incorporated by reference in its entirety into this Certificate.
8. An approval that comprises the “MassHighway Permit, Barnstable, Yarmouth, Permit #: 5-2008-0246” issued by the Massachusetts Highway Department on July 22, 2008. This approval is marked as Exhibit EOT-MC-1 in the EFSB 07-8 Certificate proceeding and is incorporated by reference in its entirety into this Certificate.
9. An approval that comprises the “Executive Office of Transportation and Public Works License Agreement, Cape Wind Associates, LLC, Yarmouth, Massachusetts, Hyannis Secondary” dated September 17, 2008. This approval is marked as Exhibit EFSB-EOT-7 in the EFSB 07-8 Certificate proceeding and is incorporated by reference in its entirety into this Certificate.

VII. CONDITIONS

The granting by the Siting Board of this Certificate and each of the Approvals herein is subject to the following conditions:

C.1 Conditions A-J of the 2005 Decision and Condition K of the 2008 Decision are incorporated by reference into and are conditions to this Certificate. Conditions A-K are incorporated by reference herein.

C.2 The 2008 Decision provides that construction of the proposed project must begin within three years of the issuance date of that Decision, i.e., around and about May 1, 2011. That date remains unchanged by this Certificate. Each of the nine approvals granted in this

Certificate also shall expire on or about May 1, 2011, if construction of the transmission project has not yet begun by that date. Extensions may be granted by written request to the Siting Board filed prior to the expiration date.

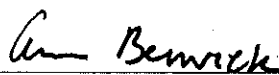
C.3 The applicant has an absolute obligation to construct the project in conformance with all aspects of the project as presented to and approved by the Siting Board in the underlying Decisions. The applicant is required to notify the Siting Board of any changes other than minor variations to the project so that the Siting Board may determine whether to inquire further into a particular issue. The applicant is obligated to provide the Siting Board with sufficient information on changes to the project to enable the Siting Board to make these determinations.

C.4 The applicant shall provide a copy of this Certificate, including all Attachments, to its general contractor prior to the commencement of construction.

C.5 In accordance with G.L. c. 164, § 69K, no agency shall require any approval, consent, permit, certificate or condition for the construction, operation, or maintenance of the project. No agency shall impose or enforce any law, ordinance, by-law, rule or regulation nor take any action nor fail to take any action which would delay or prevent construction, operation, or maintenance of the project.

C.6 In accordance with G.L. c. 164, § 69K, that portion of the Certificate which relates to subject matters within the jurisdiction of a state or local agency shall be enforced by such agency as if it had been directly granted by such agency.

C.7 This Certificate shall be appealable only by timely appeal of the 2009 Decision to the Massachusetts Supreme Judicial Court, in accordance with G.L. c. 25, § 5 and G. L. c.164, § 69P.


Ann Berwick, Acting Chair
Energy Facilities Siting Board

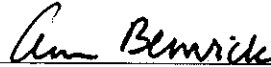
ATTACHMENT 1

EFSB 07-8, CAPE WIND ASSOCIATES, LLC

CERTIFICATE OF ENVIRONMENTAL IMPACT AND PUBLIC INTEREST

APPROVAL IN LIEU OF A DEVELOPMENT OF REGIONAL IMPACT
APPROVAL

1. Pursuant to its authority under G.L. c. 164, §§ 69K-69O, the Energy Facilities Siting Board hereby grants to Cape Wind Associates, LLC an Approval in lieu of Development of Regional Impact Approval as provided by Sections 12 and 13 of the Cape Cod Commission Act, to Cape Wind Associates, LLC. To that extent, this Approval authorizes construction and operation of the transmission project as approved by the Energy Facilities Siting Board in Cape Wind Associates, LLC and Commonwealth Electric Company d/b/a NSTAR Electric, EFSB 02-2, 15 DOMSB 1 (May 11, 2005); and Cape Wind Associates, LLC and Commonwealth Electric Company d/b/a NSTAR Electric, EFSB 02-2A/D.T.E. 02-53 (May 1, 2008).
2. This Approval is issued subject to Conditions C.1 through C.7 in the Certificate of Environmental Impact and Public Interest that is appended as Exhibit A to the Final Decision in Cape Wind Associates, LLC, EFSB 07-8 (May 27, 2009).



Ann Berwick, Acting Chair
Energy Facilities Siting Board

ATTACHMENT 2


EFSB-07-8, CAPE WIND ASSOCIATES, LLC **CERTIFICATE OF ENVIRONMENTAL IMPACT AND PUBLIC INTEREST**

APPROVAL IN LIEU OF TOWN OF BARNSTABLE ORDERS OF CONDITIONS

1. Pursuant to its authority under G.L. c. 164, §§ 69K-69O, the Energy Facilities Siting Board hereby grants to Cape Wind Associates, LLC an Approval in lieu of a wetlands Order of Conditions pursuant to the Massachusetts Wetlands Protection Act, G.L. c. 131, § 40 (“Wetlands Act”) and in lieu of an Order of Conditions pursuant to the Town of Yarmouth wetlands bylaw (“wetlands bylaw”).
2. This Approval authorizes construction and operation of the transmission project as approved by the Energy Facilities Siting Board in Cape Wind Associates, LLC and Commonwealth Electric Company d/b/a NSTAR Electric, EFSB 02-2, 15 DOMSB 1 (May 11, 2005); and Cape Wind Associates, LLC and Commonwealth Electric Company d/b/a NSTAR Electric, EFSB 02-2A/D.T.E. 02-53 (May 1, 2008).
3. This Approval is issued subject to Conditions C.1 through C.7, in the Certificate of Environmental Impact and Public Interest that is appended as Exhibit A to the Final Decision in Cape Wind Associates, LLC, EFSB 07-08 (May 27, 2009).
4. This Approval does not grant any property rights or any exclusive privileges; it does not authorize any injury to private property or invasion of private rights.
5. Any fill used in connection with the proposed project shall be clean fill. Any fill shall contain no trash, refuse, rubbish, or debris, including but not limited to lumber, bricks, plaster, wire, lath, paper, cardboard, pipe, tires, ashes, refrigerators, motor vehicles, or parts of any of the foregoing.
6. No work shall be undertaken until this Approval has been recorded in the Registry of Deeds or the Land Court for the district in which the land is located, within the chain of title of the affected property. In the case of recorded land, no work the Approval also shall be noted in the Registry’s Grantor Index under the name of the owner of the land upon which the proposed work is to be done. In the case of registered land, the Approval also shall be noted on the land Court Certificate of Title of the owner of the land upon which the propose work is to be done. The reporting information shall be submitted to the Yarmouth Conservation Commission, on a form provided by the Conservation Commission and stamped by the Registry of Deeds.
7. Upon completion of the proposed work, the Company shall submit a Request for Certificate of Compliance (WPA Form 8A) to the Conservation Commission. The certificate of Compliance shall be recorded at the Registry of deeds.

Siting Board grants a project change, notice of such change shall be filed with the Conservation Commission.

9. The Agent or members of the Conservation Commission and Department of Environmental Protection shall have the right to enter and inspect the area subject to this Approval, and may require the submittal of any data in the Company's possession reasonably deemed necessary by the Conservation Commission or Department for that evaluation.
10. This Approval shall apply to any successor in interest or successor in control of the property subject to this Approval and to any contractor or other person performing work subject to this Approval.
11. Prior to the start of work, and if the project involves work adjacent to a Bordering Vegetated Wetland, the boundary of the wetland in the vicinity of the proposed work area shall be marked by wooden stakes or flagging. Once in place, the wetland boundary markers shall be maintained until a Certificate of Compliance has been issued by the Conservation Commission.
12. All sedimentation barriers shall be maintained in good repair until all disturbed areas have been fully stabilized with vegetation or other means. During construction, the Company or its designees shall inspect the erosion controls on a daily basis and shall remove accumulated sediments as needed. The Company shall immediately control any erosion problems that occur at the site and shall also immediately notify the Conservation Commission, which reserves the right to require additional erosion and/or damage prevention controls it may deem necessary. Sedimentation barriers shall serve as the limit of work unless another limit of work line has been approved by this Approval.
13. The applicant shall be responsible for having a copy of this Approval on the job site at all times.
14. A pre-construction review shall be arranged by the contractor with the Conservation Administrator. This review shall occur prior to any work.
15. The applicant shall attempt to coordinate with Barnstable for the transportation of an agent of the Barnstable Conservation Commission to the construction area.



Ann Berwick, Acting Chair
Energy Facilities Siting Board

ATTACHMENT 3


EFSB-07-8, CAPE WIND ASSOCIATES, LLC **CERTIFICATE OF ENVIRONMENTAL IMPACT AND PUBLIC INTEREST**

APPROVAL IN LIEU OF TOWN OF YARMOUTH ORDERS OF CONDITIONS

1. Pursuant to its authority under G.L. c. 164, §§ 69K-69O, the Energy Facilities Siting Board hereby grants to Cape Wind Associates, LLC an Approval in lieu of a wetlands Order of Conditions pursuant to the Massachusetts Wetlands Protection Act, G.L. c. 164, § 40 (“Wetlands Act”) and in lieu of an Order of Conditions pursuant to the Town of Barnstable wetlands bylaw, Barnstable Ordinances XXVII (“wetlands bylaw”).
2. This Approval authorizes construction and operation of the transmission project as approved by the Energy Facilities Siting Board in Cape Wind Associates, LLC and Commonwealth Electric Company d/b/a NSTAR Electric, EFSB 02-2, 15 DOMSB 1 (May 11, 2005); and Cape Wind Associates, LLC and Commonwealth Electric Company d/b/a NSTAR Electric, EFSB 02-2A/D.T.E. 02-53 (May 1, 2008).
3. This Approval is issued subject to Conditions C.1 through C.7, in the Certificate of Environmental Impact and Public Interest that is appended as Exhibit A to the Final Decision in Cape Wind Associates, LLC, EFSB 07-08 (May 27, 2009).
4. Eelgrass beds shall be avoided and turbidity screens deployed. Prior to commencement of work and during the course thereof, the Town shall be given advance notice of construction activity.
5. This Approval does not grant any property rights or any exclusive privileges; it does not authorize any injury to private property or invasion of private rights.
6. Any fill used in connection with the proposed project shall be clean fill. Any fill shall contain no trash, refuse, rubbish, or debris, including but not limited to lumber, bricks, plaster, wire, lath, paper, cardboard, pipe, tires, ashes, refrigerators, motor vehicles, or parts of any of the foregoing.
7. No work shall be undertaken until this Approval has been recorded in the Registry of Deeds or the Land Court for the district in which the land is located, within the chain of title of the affected property. In the case of recorded land, the Approval also shall be noted in the Registry’s Grantor Index under the name of the owner of the land upon which the proposed work is to be done. In the case of registered land, the Approval also shall be noted on the Land Court Certificate of Title of the owner of the land upon which the proposed work is to be done. The recording information shall be submitted to the Conservation Commission, on a form provided by the Conservation Commission and stamped by the Registry of Deeds.

8. Notice of any project change affecting wetlands resources that is filed with Energy Facilities Siting Board shall be filed with the Conservation Commission. If the Siting Board grants a project change, notice of such change shall be filed with the Conservation Commission.
9. The Agent or members of the Conservation Commission and Department of Environmental Protection shall have the right to enter and inspect the area subject to this Approval, and may require the submittal of any data in the Company's possession reasonably deemed necessary by the Conservation Commission or Department for that evaluation.
10. This Approval shall apply to any successor in interest or successor in control of the property subject to this Approval and to any contractor or other person performing work subject to this Approval.
11. Prior to the start of work, and if the project involves work adjacent to a Bordering Vegetated Wetland, the boundary of the wetland in the vicinity of the proposed work area shall be marked by wooden stakes or flagging. Once in place, the wetland boundary markers shall be maintained until a Certificate of Compliance has been issued by the Conservation Commission.
12. All sedimentation barriers shall be maintained in good repair until all disturbed areas have been fully stabilized with vegetation or other means. During construction, the applicant or its designees shall inspect the erosion controls on a daily basis and shall remove accumulated sediments as needed. The applicant shall immediately control any erosion problems that occur at the site and shall also immediately notify the Conservation Commission, which reserves the right to require reasonable additional erosion and/or damage prevention controls it may deem necessary. Sedimentation barriers shall serve as the limit of work unless another limit of work line has been approved by the Conservation Commission.
13. Within one month of the receipt of this Approval and prior to the commencement of any work approved herein, the recording requirement in Condition 6, above, shall be complied with.
14. It is the responsibility of the applicant, the owner and/or successor(s) and the project contractors to ensure that all conditions of this Approval are complied with. The applicant shall provide copies of the Approval and approved plans to project contractors prior to the start of work. Conservation Commission Forms A and B shall be completed and returned to the Commission prior to the start of work.
15. The Conservation Commission shall receive written notice one week in advance of the start of work. A pre-construction review shall occur with the Conservation Commission or Administrator prior to the start of work.
16. Staked haybales backed by trenched-in siltation fencing shall be set along the approved on-land work limit line to the extent necessary in consultation with the Conservation Agent. Effective sediment controls shall remain until the site is stabilized with vegetation.

18. Storage of equipment and materials shall be outside wetlands resource areas (excepting coastal plain).
19. Stamped as-built plans shall be promptly filed with the Department of Public Works
20. No area shall be left unvegetated for more than 30 days, given seasonal considerations. All areas disturbed during construction shall be revegetated as soon as practicable following completion of work at the site. Mulching shall not serve as a substitute for the requirement to revegetate disturbed areas at the conclusion of work.
21. At the completion of work, or by the expiration of this Approval, the applicant shall request in writing from the Conservation Commission a Certificate of Compliance for the work herein permitted. Barnstable Conservation Commission Form C shall be completed and returned with the request for a Certificate of Compliance. Where a project has been completed in accordance with plans stamped by a registered professional engineer, architect, landscape architect or land surveyor, a written statement by such professional person certifying substantial compliance with the plans and setting forth what deviation, if any, exists with the record plans shall accompany the request for the Certificate of Compliance. At the time of the request for a certificate of Compliance, an updated sequence of color photographs of the undisturbed buffer zone shall also be submitted.
22. The applicant shall maintain a copy of this Approval on the job site at all times.



Ann Berwick, Acting Chair
Energy Facilities Siting Board

ATTACHMENT 4

EFSB 07-8, CAPE WIND ASSOCIATES, LLC **APPROVAL IN LIEU OF TOWN OF BARNSTABLE ROAD OPENING PERMIT**

1. Pursuant to its authority under G.L. c. 164, §§ 69K-69O, the Energy Facilities Siting Board hereby grants to Cape Wind Associates, LLC an Approval in lieu of a road opening permit from the Town of Barnstable. To that extent, this Approval authorizes construction and operation of the transmission project as approved by the Energy Facilities Siting Board in Cape Wind Associates, LLC and Commonwealth Electric Company d/b/a NSTAR Electric, EFSB 02-2, 15 DOMSB 1 (May 11, 2005); and Cape Wind Associates, LLC and Commonwealth Electric Company d/b/a NSTAR Electric, EFSB 02-2A/D.T.E. 02-53 (May 1, 2008).
2. This Approval allows road openings in Spyglass Hill Road, Midpine Drive, Marstons Lane, Iris Lane, Oakmont Rd., Dromoland Lane and Mary Dunn Rd.
3. This Approval is issued subject to Conditions C.1 through C.7, in the Certificate of Environmental Impact and Public Interest that is appended as Exhibit A to the Final Decision in Cape Wind Associates, LLC, EFSB 07-08 (May 27, 2009).
4. The applicant shall conform to all applicable Massachusetts General Laws and Town of Barnstable ordinances.
5. The applicant shall be responsible for all work performed in connection with this Approval, and shall have adequate insurance for any injuries to persons or property resulting from such work. The applicant agrees to indemnify the Town of Barnstable against liability resulting from any negligent act or omission of the applicant or its contractors in connection with this Approval. The applicant shall be responsible for trench maintenance during the period of construction as well as trench repairs caused by settlement or poor construction for a period of one year from the date of project completion.
6. Cutting of pavement is prohibited at all times unless prior approval is given by contacting the Department of Public Works, which approval shall not be unreasonably withheld.
7. The applicant shall call DIGSAFE and the Department of Public Works at least 72 hours prior to initiating any work.
8. All repair work shall meet Massachusetts Department of Public Utilities Street Restoration Standards.
9. The names, addresses, and 24-hour, 7-day/week phone numbers shall be provided to the Department of Public Works, Police and Fire Department of at least two contacts to handle emergency requirements such as settled trenches. In the event a road opening failure presents a nuisance or public safety problem, the applicant shall respond to all trench restoration requests from the Town within 48 hours.

10. The 3-page April 30, 2009 letter to R. Burgmann, Town of Barnstable, from R. Donahoe, Cape Wind Associates, LLC, including the 3 attached pages of diagrams, is incorporated herein, and is attached hereto.

Ann Berwick

Ann Berwick, Acting Chair
Energy Facilities Siting Board



75 Arlington Street
Suite 704
Boston, MA 02116
617-904-3100
Fax: 617-904-3109
www.capewind.org

April 30, 2009

Robert A. Burgmann, P.E.
Town Engineer
Town of Barnstable
Department of Public Works
230 South Street, 4th Floor
Hyannis, Massachusetts 02601

RE: Cape Wind Project – Transmission Line Location

Dear Robert:

Thank you for meeting with me on April 28th to discuss the procedures associated with installation of our proposed underground transmission lines through certain roadways in the Town of Barnstable (the "Town"). The meeting was very productive and allowed us to develop a common understanding of the construction methods and protocols that will apply to the construction of the subject transmission lines.

I want to take this opportunity to memorialize our discussions, as referenced below, and to welcome your comments or corrections as appropriate.

- Construction will occur through a portion of the Town within the existing NSTAR Electric Company ("NSTAR") transmission right-of-way ("ROW") in which NSTAR has longstanding property rights for utility facilities. For your information, NSTAR will ultimately own the two new transmission lines located within its ROW. As we discussed, the routing is depicted in the Request for Transmission Line Location Submittal dated November 13, 2007.
- Cape Wind will likely be responsible for the construction of the transmission lines. It intends to utilize the open trench method for the installation of transmission lines along the entire route within the NSTAR ROW in the Town, as depicted in the initial submittal dated November 13, 2007.
- There will be seven (7) road crossings in the Town, six (6) of which will occur along or across public roadways (*i.e.*, Spyglass Hill Road, Midpine Drive, Iris Lane, Oakmont

Road, Dromoland Lane and Mary Dunn Road)¹ and one (1) that may be considered a private way (i.e., Marstons Lane).

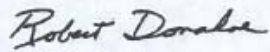
- During the meeting, you mentioned that the license that will be granted to the contractor prior to construction will be only for those crossings that are public ways. Having discussed this with our attorneys, I am told that municipalities in Massachusetts have the authority to permit road crossings for utility facilities over both public and private roadways that are open for public use and that have been maintained by the Town for long periods of time. Boston Edison Company v. Town of Sudbury, 356 Mass. 406, 425 (1969). In any event, the existing NSTAR easement for its transmission ROW covers any areas subject to private property rights of abutting landowners so there should be no issues with respect to the rights to occupy both public and private roadways traversed by the proposed transmission lines.
- The contractor ultimately selected must comply with the most current rules and regulations for street excavation at said time of issuance.
- A copy of said rules and regulations and a copy of the list of contractors that have met the town's criteria to perform street excavations were provided to me. In addition, it is understood that, if we select a contractor not listed, that contractor can apply to be included on the Department of Public Work's ("DPW") accepted list provided they agree to meet the criteria set forth in the Town's rules and regulations for street excavations.
- The DPW prefers that the construction activity be conducted from the months of April 1st to Memorial Day and then from Labor Day until December 1st. The purpose of the Town's preference for this schedule is: (a) to reduce traffic issues during the summer months; and (b) to recognize the closing of asphalt batch plants during the winter months. However, the DPW would reasonably allow roadway construction before and after those dates in areas in which excavation will not generally pose a substantial impact to the flow of traffic. The primary area of concern for traffic impact to the DPW is at the intersection of Dromoland Lane and Mary Dunn Road.
- It was suggested by you that an informal pre-introduction discussion of project construction may also be appropriate with the Water, Police, Fire and School Departments in order to provide them with some background and to afford them an opportunity to identify any specific concerns prior to the commencement of construction.

I believe these items were the major topics of our discussion. I greatly appreciate your insights and cooperation throughout this process. If there is anything that I missed or you do not concur with, please let me know at your convenience and I will make the mutually agreed-to modifications.

¹ For your additional background, according to mapping we received from the Town several years ago, the area of Dromoland Lane and Mary Dunn Road where the lines will be located is a public way and not a private way. I have attached a copy of those maps for your review.

Letter to Mr. Burgmann
April 30, 2009
Page 3

Sincerely,

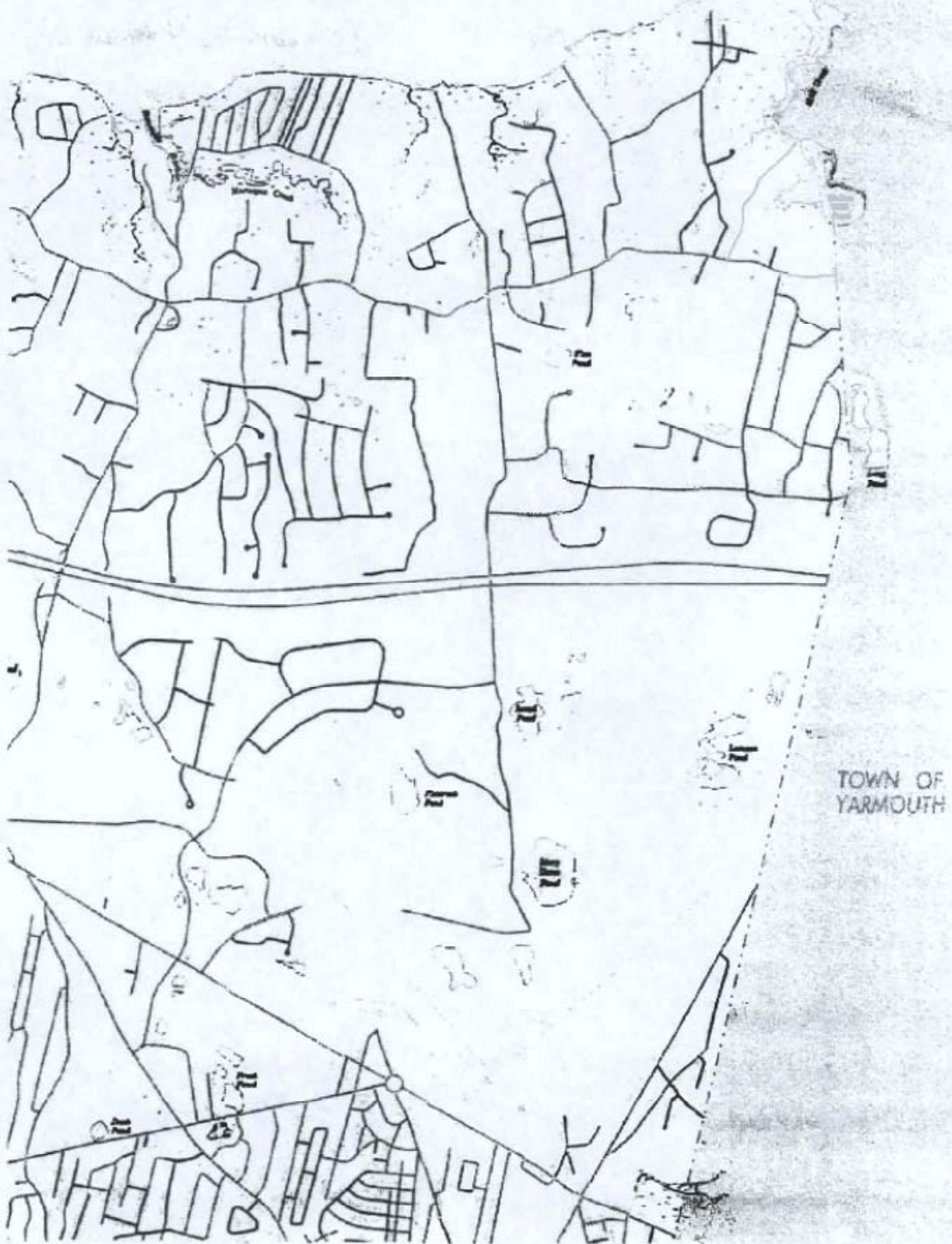
A handwritten signature in cursive script, reading "Robert Donahoe".

Robert E. Donahoe
VP Environmental Services

Attachments

CC: R. Connors, NSTAR
D. Rosenzweig, Esq.
C. McLaughlin, Esq.

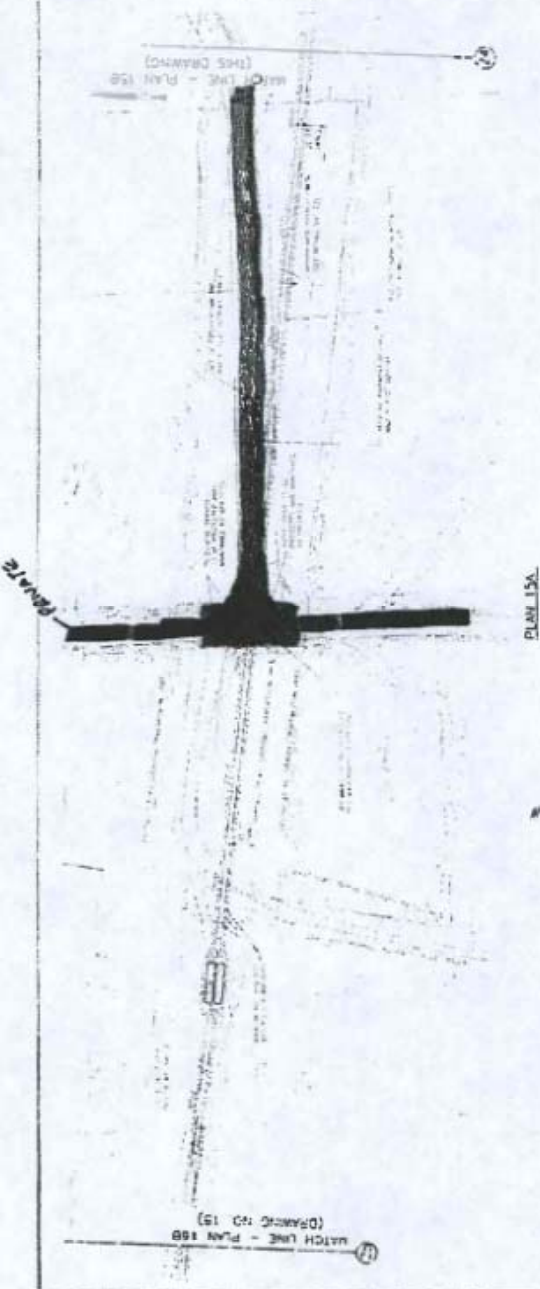
Barnstable Harbor



Cape Wind
Energy for life

NOT TO SCALE
THIS DRAWING IS FOR
GENERAL INFORMATION
ONLY. IT IS NOT TO BE
USED FOR CONSTRUCTION
OR ANY OTHER PURPOSE.
ALL DIMENSIONS ARE IN
FEET AND INCHES.
ALL ANGLES ARE IN DEGREES.
ALL TOLERANCES ARE AS
SHOWN.

7 8700




ATTACHMENT 5

EFSB 07-8, CAPE WIND ASSOCIATES, LLC **CERTIFICATE OF ENVIRONMENTAL IMPACT AND PUBLIC INTEREST**

APPROVAL IN LIEU OF TOWN OF YARMOUTH ROAD OPENING PERMIT

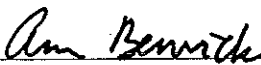
1. Pursuant to its authority under G.L. c. 164, §§ 69K-69O, the Energy Facilities Siting Board hereby grants to Cape Wind Associates, LLC an Approval in lieu of a road opening permit from the Town of Yarmouth. To that extent, this Approval authorizes construction and operation of the transmission project as approved by the Energy Facilities Siting Board in Cape Wind Associates, LLC and Commonwealth Electric Company d/b/a NSTAR Electric, EFSB 02-2, 15 DOMSB 1 (May 11, 2005); and Cape Wind Associates, LLC and Commonwealth Electric Company d/b/a NSTAR Electric, EFSB 02-2A/D.T.E. 02-53 (May 1, 2008).
2. This Approval allows specifically road openings in Willow Street, Higgins Crowell Road, Berry Avenue and New Hampshire Avenue.
3. This Approval is issued subject to Conditions C.1 through C.7, in the Certificate of Environmental Impact and Public Interest that is appended as Exhibit A to the Final Decision in Cape Wind Associates, LLC, EFSB 07-08 (May 27, 2009).
4. The applicant shall conform to all applicable Massachusetts General Laws and Town of Yarmouth ordinances.
5. The applicant shall be responsible for all work performed, and shall have adequate insurance for injuries to persons or property resulting from such work. The applicant agrees to indemnify the Town of Yarmouth against liability resulting from any negligent act or omission of the applicant or its contractors in connection with this Approval. The applicant shall be responsible for trench maintenance during the period of construction as well as trench repairs caused by settlement or poor construction for a period of one year from the date of project completion.
6. Cutting of pavement is prohibited unless prior approval is given by contacting the Department of Public Works, which approval shall not be unreasonably withheld.
7. The applicant shall call DIGSAFE and the Department of Public Works at least 72 hours prior to initiating any work.
8. All repair work shall meet Massachusetts Department of Public Utilities Street Restoration Standards.

9. The names, addresses, and 24-hour, 7-day/week phone numbers shall be provided to the Assistant DPW Director, Police and Fire Department of at least two project contacts to handle emergency requirements such as settled trenches. In the event a road opening failure presents a nuisance or a public safety problem, the applicant shall respond to all trench restoration requests from the Town within 48 hours.



Ann Berwick, Acting Chair
Energy Facilities Siting Board

APPROVED by the Energy Facilities Siting Board at its meeting of May 21, 2009, by the members and designees present and voting. **Voting for** approval of the Tentative Decision, **as amended:** Ann Berwick (Acting EFSB Chair/Designee for Ian A. Bowles, Secretary, Executive Office of Energy & Environmental Affairs); Rob Sydney, (Designee for Commissioner, DOER); James Colman (Designee for Commissioner, DEP); Robert Mitchell (Designee for Secretary, EOHED); Paul J. Hibbard, Chairman, DPU; Tim Woolf, Commissioner DPU; and Penn Loh, Public Member.



Ann Berwick, Acting Chair
Energy Facilities Siting Board

Appeal as to matters of law from any final decision, order or ruling of the Siting Board may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the order of the Siting Board be modified or set aside in whole or in part. Such petition for appeal shall be filed with the Siting Board within twenty days after the date of service of the decision, order or ruling of the Siting Board, or within such further time as the Siting Board may allow upon request filed prior to the expiration of the twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the clerk of said court. (Massachusetts General Laws, Chapter 25, Sec. 5; Chapter 164, Sec. 69P).