United States Department of the Interior

FISH AND WILDLIFE SERVICE
300 Westgate Center Drive
Hadley, MA 01035-9589

In Reply Refer To:
FWS/Region 5/ES

JUN 27 2014

Ms. Michelle Morin
Chief, Environmental Branch for Renewable Energy
Environmental Division
Bureau of Ocean Energy Management
381 Elden Street, Mailstop 1328
Herndon, Virginia 20170

Dear Ms. Morin,

This letter serves as an administrative amendment to the U.S. Fish and Wildlife Service's (Service) Incidental Take Statement (ITS) issued with the Biological Opinion (BO) dated November 21, 2008, on Cape Wind Associates (CWA) proposed wind energy facility to be located in Federal waters within Horseshoe Shoal in Nantucket Sound. The Bureau of Ocean Energy Management[1] (BOEM) began informal consultation with the Service under section 7(a)(2) of the Endangered Species Act (ESA) starting in December of 2005. On May 19, 2008, BOEM initiated formal consultation, recognizing that its proposed action of issuing a lease to CWA was likely to cause take of the endangered roseate tern and threatened piping plover. Our BO marked the culmination of BOEM's consultation.

We issue this purely administrative amendment in response to the decision by the Federal district court in *Public Employees for Environmental Responsibility et al., v. Beaudreau et al.*, 1:10-cv-01067-RBW (D.D.C., March 14, 2014). In its memorandum opinion, the Court granted summary judgment to plaintiffs on their claim that the Service "violated the ESA by failing to make an independent determination about whether the feathering operational adjustment," proposed in our October 31, 2008 draft BO, "was a reasonable and prudent measure" (RPM). In the conclusion to its memorandum opinion, the Court remanded the case to the Service to "make the required independent determination on this point" (see Opinion at p. 88). In its order, the Court remanded "this case to the [Service] for it to issue reasonable and prudent measures consistent with [its] Memorandum Opinion." We have done so. For the reasons explained below, this administrative amendment does not require re-initiation of consultation on the Service's November 21, 2008 final BO.

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[1] On October 1, 2011, the Bureau of Ocean Energy Management and Enforcement (BOEMRE), formerly the Minerals Management Service (MMS), was replaced by the BOEM and the Bureau of Safety and Environmental Enforcement (BSEE) as part of a major reorganization.

The final RPMs have not changed as a result of our analysis on remand. As directed by the Court, we hereby provide our independent evaluation of the initially proposed feathering RPM (also referenced as proposed RPM 2) and administratively amend the ITS to remove any suggestion that we may have simply delegated our authority under Section 7(b)(4)(ii) to BOEM and CWA in making our decision about the RPMs. We also confirm that the RPMs originally contained in the final BO remain reasonable and prudent.

ANALYSIS

In conducting our independent analysis on remand, we are guided by the ESA, its implementing regulations and our own Section 7 policies. According to our ESA Section 7 regulations, where the Service finds no jeopardy, we must provide in a biological opinion a written statement regarding incidental take that among other things,

> "specifies those reasonable and prudent measures that the Director considers necessary or appropriate to minimize such impact"

(50 CFR 402.14(i)(1)(ii)). Those regulations also state that:

> "[r]easonable and prudent measures, along with the terms and conditions that implement them, cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes"

(50 CFR 402.14(i)(2)). The Service/National Marine Fisheries Service ESA Consultation Handbook reiterates the regulatory criteria and concludes that "[t]he test for reasonableness is whether the proposed measure would cause more than a minor change to the project" (Handbook at p. 4-50 (1998)).

Because the Court did not vacate the BO or ITS in any respect or order re-initiation of consultation or the reopening of the administrative record, our analysis of the RPMs relies on the information available to us when we finalized the BO and ITS. Relevant to the economics of the originally-proposed feathering RPM, our analysis included, but was not limited to, the materials below:

1) A letter from James F. Bennett, MMS, to Michael Amaral, Service, New England Field Office, received November 20, 2008, and its attachments:
   - A letter from Geraldine E. Edens, McKenna Long & Aldridge, to Jill Lewandowski, MMS, dated November 18, 2008;
   - *CWA's Response to How RPM No. 2 (Operational Adjustments) Would Affect the Viability and Reliability of the Proposed Project*, dated November 5, 2008;
   - *The Fish and Wildlife Service's "Reasonable and Prudent Measure" No. 2 of the October 31st Draft Biological Opinion on the Cape Wind Proposal,* by James R. Woehr, MMS, dated November 20, 2008; and
   - *Supplemental information for Cape Wind's response to the USFWS Draft Biological Opinion*, dated November 6, 2008.

2) The expert opinion of the Service's in-house economist, Dr. Andrew Laughland, who was provided the above information, and who also considered the power market and cyclical demand as of 2008: http://www.iso-ne.com/index.html.

Based on the cited materials, the review by Dr. Laughland, and my conversations with staff, we find that the draft feathering RPM would not be reasonable. In particular, I highlight Dr. Laughland's analysis of the possible reduction in the development's capacity factor (*i.e.*, the proportion of time the turbines will be online) related to peak energy production time (a possible decrease of 2.1 to 22 percent of the annual capacity factor) and demand periods (*e.g.*, summer afternoons where MwH auction prices are higher). Upon considering this range, we find that the proposed RPM would alter the proposed project's basic scope and timing, and constitutes more than a minor change to the project's intent and economic outlook.[5] Thus, the Service concludes that the draft feathering RPM should not be included in the ITS issued with the November 21, 2008 BO.

We also reviewed the other RPMs included in the November 21, 2008 ITS, and find that they are still both "reasonable and prudent" and "necessary and appropriate," so should remain unchanged.

The only needed modification to the ITS therefore is the removal of the text under the heading "Operational Adjustments" starting on page 74 and continuing for four paragraphs onto page 75 of the November 21, 2008 BO. Those paragraphs represent the Service's prior finding regarding the omission of the feathering RPM from the BO that the Court found unacceptable. The rationale provided here represents the Service's independent determination on that point. Through this letter, we make the administrative correction to the ITS by striking the above-referenced text.

The Court did not order re-initiation of consultation, nor do we conclude that re-initiation is required by our response to the remand order. The Court made no findings regarding the validity of the BO's underlying effects analysis and no jeopardy conclusion. Nor did the court invalidate the BO. The ministerial change we make here has no effect on the ultimate conclusion of the BO or the requirements of the ITS. There is therefore no reason to produce a new BO at this time. Moreover, none of the consultation triggers identified in 50 CFR 402.16 are implicated by the remand:

> [R]e-initiation of formal consultation is required where discretionary federal agency involvement or control over the action has been retained (or is authorized by law) and if:

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[2] Our determination that the feathering RPM would alter the basic scope and timing of the action, and also constitutes more than a minor change, is project specific. We do not intend it to be broadly applied to subsequent consultations. But in the context of this project, it is a sufficient basis upon which to conclude that the measure is not reasonable. It is even more compelling in light of the uncertainty that the Service expressed in our administrative record about whether or to what degree such a measure would actually reduce the take of the two protected bird species.

(1) the amount or extent of incidental take is exceeded;
(2) a new species is listed or critical habitat designated that may be affected by the action;
(3) the agency action is subsequently modified in a manner that causes an effect to the listed species or critical habitat not considered in this opinion; or
(4) new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered.

Furthermore, the Court ruled in Federal Defendants' favor on all remaining claims in the litigation, which included Claim I that alleged that the Service and BOEM violated the ESA by failing to reinitiate consultation on birds (*See* Second Amended Complaint, ECF No. 47, p. 37).

CONCLUSION

In summary, the Service has conducted the Court-ordered independent analyses of the RPMs. We find that no substantive changes to the final RPMs in the ITS issued with the November 21, 2008 BO are warranted. With the above administrative correction, the consultation is complete, and no further action by BOEM is presently required.

We are copying the Army Corps of Engineers, Department of Energy, and Environmental Protection Agency on this correspondence to make these additional action agencies aware of this ministerial change, confirm that their respective consultations remain valid and complete, and state that they may continue to rely on the BO and ITS, as herein amended.[3]

The Service looks forward to continued cooperation on this project. Should you have any questions regarding the consultation process or implementing the BO, please do not hesitate to contact me or my staff. Susi vonOettingen is the lead biologist for the consultation. You can reach her at 603-223-2541 or by electronic mail at susi_vonoettingen@fws.gov.

Sincerely,

Paul R. Phifer, Ph.D.
Assistant Regional Director
Ecological Services

cc: Jennifer L. McCarthy
U.S. Army Corps of Engineers

[3] BOEM served as the lead agency during the consultation, on its own behalf and that of the Army Corps of Engineers. The BO therefore covers both entities. DOE and EPA independently consulted with the Service, concluding with correspondence dated April 19, 2013 and December 10, 2010, respectively.

Jill Lewandowski
Bureau of Ocean Energy Management

Matthew McMillen
Director Environmental Compliance

Ida McDonnell
U.S. EPA New England, Region I