

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC EMPLOYEES FOR ENVIRONMENTAL)
RESPONSIBILITY, et al.,)
Plaintiffs,)
v.)
MICHAEL R. BROMWICH, et al.,)
Defendants, and)
CAPE WIND ASSOCIATES, LLC,)
Intervenor.)

Civil No. 10-cv-01067-RMU
(consolidated)

ALLIANCE TO PROTECT NANTUCKET)
SOUND, et al.,)
Plaintiffs,)
v.)
SALAZAR, et al.,)
Defendants, and)
CAPE WIND ASSOCIATES, LLC,)
Intervenor.)

TOWN OF BARNSTABLE, MASSACHUSETTS,)
Plaintiff,)
v.)
SALAZAR, et al.,)
Defendants, and)
CAPE WIND ASSOCIATES, LLC,)
Intervenor.)

MARTHA'S VINEYARD / DUKES COUNTY)
FISHERMEN'S ASSOCIATION, et al.,)
Plaintiffs,)
v.)
SALAZAR, et al.,)
Defendants, and)
CAPE WIND ASSOCIATES, LLC,)
Intervenor.)

THE WAMPANOAG TRIBE OF GAY HEAD)
(AQUINNAH),)
Plaintiffs,)
v.)
MICHAEL R. BROMWICH, et al.,)
Defendants, and)
CAPE WIND ASSOCIATES, LLC,)
Intervenor.)
_____)

JOINT MOTION OF THE CONSERVATION LAW FOUNDATION, THE NATURAL RESOURCES DEFENSE COUNCIL, AND MASS AUDUBON FOR LEAVE TO PARTICIPATE AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS

The Conservation Law Foundation (“CLF”), the Natural Resources Defense Council (“NRDC”), and Mass Audubon (collectively “Movants”) hereby submit this Joint Motion for Leave to Participate as *Amici Curiae* in Support of the Defendants in the above-captioned proceeding (the “Motion”). Movants request leave to participate as *amici curiae*, including with respect to the following: substantive briefing (*e.g.*, briefing on Summary Judgment Motions); status conferences and any other Court conferences regarding these cases; and through such other participation as may be appropriate or of assistance to the Court.

Counsel for Movants asked counsel for the Parties to these consolidated cases their position on this Motion. The federal agency Defendants took no position on the Motion; Defendant-Intervenor Cape Wind consented to it; and Plaintiffs did not take a position on whether to permit *amici curiae* participation, but indicated their position, detailed below, regarding the scope of such participation.

In further support of this Motion, Movants state as follows:

STATEMENT OF POINTS AND AUTHORITIES

The five above-captioned consolidated actions challenge the approval in April 2010 of an offshore wind project to be sited in federal waters in Nantucket Sound, off the coast of Massachusetts. This landmark renewable energy project, the first offshore wind project to be approved in the United States, is known as the Cape Wind Project (the “Project”) and is proposed by Defendant-Intervenor Cape Wind Associates, LLC. The three Movant non-profit environmental organizations have each participated in the decade-long regulatory and environmental review process for the Project and, at the close of the environmental review

process, announced their support for the Project because the federal agencies had satisfied all of the required legal and procedural steps and because, as a matter of policy, Movants believe the global warming, clean air, and other benefits of the Project significantly outweigh its impacts.

Each organization brings a different perspective to the Project: NRDC has a national perspective on the clean energy and oceans issues raised by the Project; CLF has a New England regional and Massachusetts-specific perspective on these issues; and Mass Audubon has a state-level perspective, with a special focus on avian and other wildlife issues. Movants believe that by jointly participating as *amici curiae* they can assist the Court in addressing the complex environmental issues raised in these consolidated cases and in resolving this litigation. Summaries of the history and perspective of each organization, as well as the three organizations' involvement in the Project's review process, are provided below.

Conservation Law Foundation

CLF is a public interest advocacy organization that works to solve the environmental problems that threaten the people, natural resources, and communities of New England. Founded in 1966, CLF is the nation's oldest regional environmental advocacy organization. CLF operates as a nonprofit, member-supported organization with offices located throughout the New England states. CLF advocates in favor of clean, renewable and efficient energy production in New England, and has an unparalleled record of advocacy in defending the region's natural resources, including in the marine environment. This scope of advocacy speaks directly to the very significant regional interests underlying CLF's request for participation as an *amicus curiae*.

As part of its more than 45-year legacy of advocating environmental causes in the New England region, CLF has extensive experience in handling the very types of claims at issue in

this litigation – responsible energy facility siting, mitigation of water and air pollution, and habitat and resource protection. In particular, CLF successfully has fought to prohibit drilling for oil and gas on Georges Bank and to reduce damaging off-road vehicle use on the beaches and dunes of the Cape Cod National Seashore, successfully advanced legal strategies to restore groundfish to the Gulf of Maine and southern New England waters, and led the legal effort to clean up Boston Harbor and other major coastal estuaries.

Natural Resources Defense Council

NRDC is a national nonprofit environmental organization with more than 400,000 members nationwide and more than 13,205 members who reside in Massachusetts. NRDC uses law, science and the support of its members to ensure a safe and healthy environment for all living things. Fighting global warming pollution, protecting the marine environment and advancing a clean renewable energy future are all top priorities for NRDC. NRDC's support for the Project, following our decade-long participation in the federal regulatory and environmental review process and our detailed review of and comment on two federal environmental impact statements, stems from these top NRDC institutional priorities. Over its forty-year history, NRDC has participated in numerous federal permitting processes both around the country and affecting our oceans, and has deep expertise in the legal and scientific issues involved in such agency decisions, and specifically decision making by the Department of the Interior. NRDC is a national leader and advocate for clean energy policies, with deep expertise on the sustainable development and siting of renewable energy generally, and offshore wind specifically; and is also a national leader in advocating for strong federal and state protection of the marine environment and resources.

Mass Audubon

Founded in 1896, Mass Audubon works to protect the nature of Massachusetts for people and wildlife. With over 100,000 members in Massachusetts, Mass Audubon is the largest conservation organization in New England. On behalf of its members, Mass Audubon advocates for sound environmental policies at the local, state and federal levels. Mass Audubon has a special focus on the study and conservation of birds and waterfowl. Mass Audubon also recognizes the serious threat that climate change poses to people and wildlife and has thus made combating climate change a significant focus of its work. In addition, Mass Audubon cares for 35,000 acres of conservation land and provides education programs for 225,000 children and adults each year. Mass Audubon's interest in the Cape Wind Project grows out of its dual commitment to – and expertise in – conservation science and combating climate change.

Movants' Participation in the Administrative Review of the Cape Wind Project

All three organizations have participated extensively in the administrative process conducted by the federal agencies and officials who are named as defendants in this proceeding. A summary of some of the milestones in this participation is provided below.

- In April 2002, CLF submitted detailed comments on the proposed scope of the environmental impact statement and on Defendant-Intervenor Cape Wind's application for an Army Corps of Engineers "Section 10" permit for construction of a Scientific Measurement Devices Station. CLF also participated as an *amicus curiae* in the ensuing appeal of the approved Scientific Measurement Devices Station.
- In February 2005, CLF, NRDC and Mass Audubon each submitted detailed comments regarding the Draft Environmental Impact Statement prepared by the Army Corps of

Engineers, before lead permitting (and environmental review) authority was transferred to the Minerals Management Service pursuant to a change in federal law.

- In 2006, NRDC's president and members of its Energy and Oceans teams traveled to Denmark to gain a better first-hand understanding of the potential environmental impacts and benefits of offshore wind projects like that proposed by Defendant-Intervenor Cape Wind.
- In 2006, Mass Audubon issued a detailed challenge to the Project developers, laying out the environmental criteria that the Project should meet, including criteria related to data gaps and the creation of an adaptive management plan.
- In 2006, CLF and NRDC led a coalition of environmental and labor interests in successfully persuading Congress not to adopt a Coast Guard Reauthorization Act amendment that essentially would have prohibited offshore wind development in Nantucket Sound, the site of the Project.
- In April 2008, CLF, NRDC and Mass Audubon each submitted additional, detailed comments regarding the Draft Environmental Impact Statement prepared by the Minerals Management Service.
- In March 2009, CLF, NRDC and Mass Audubon each submitted detailed comments regarding the Final Environmental Impact Statement and the justification for a favorable Record of Decision.
- In March 2011, CLF and NRDC submitted detailed comments regarding the Construction and Operation Plan Environmental Assessment.
- On the state level, CLF, in some cases joined by NRDC and Mass Audubon, also has participated in proceedings concerning the Project before the Massachusetts

Environmental Policy Act Office, the Massachusetts Energy Facilities Siting Board, the Massachusetts Department of Public Utilities, and the Cape Cod Commission. CLF was an intervening party in an appeal of the comprehensive permit (comprising all necessary state and local permits) that was issued to Defendant-Intervenor Cape Wind by the Massachusetts Energy Facility Siting Board, and both CLF and NRDC were intervening parties in a Massachusetts Department of Public Utilities proceeding that resulted in the approval of a long-term contract for the sale of power from the Project to a Massachusetts electric utility, an approval now subject to an appeal pending before the Massachusetts Supreme Judicial Court where CLF and NRDC are full parties.

In sum, the three Movant organizations each have significant expertise related to the issues before the Court and a long history of involvement with the Project. In addition, each organization brings a unique national, regional, or local perspective. Accordingly, the Movants believe their joint participation as *amici curiae* may be of significant assistance to the Court in promoting the just and speedy resolution of this litigation.

POSITION OF THE PARTIES TO THIS MOTION

Movants have consulted with the Parties to seek their position on this Motion. The federal agency Defendants took no position; Defendant-Intervenor Cape Wind consented to the Motion. Plaintiffs PEER et al., the Town of Barnstable, the Alliance to Protect Nantucket Sound, and the Wampanoag Tribe of Gay Head (Aquinnah) have asked Movants to include the following statement in this Motion, which the Martha's Vineyard/Duke County Fisherman's Association also joins:

The Plaintiffs PEER et al., the Town of Barnstable, the Alliance to Protect Nantucket Sound, and the Wampanoag Tribe of Gay Head (Aquinnah) defer to the Court on whether to accept amicus briefs. If the Court does so, these Plaintiffs believe that, given the extensive briefing that will take place by the parties and the fact that a number of interests

are likely to seek to participate on both sides of the case in an amicus capacity, the Court should order that all amicus submissions that may be made on either side must (1) be limited to a single merits brief of no more than 15 pages, (2) avoid to the extent practicable duplicating the parties' arguments, and (3) be filed within seven days following the filing of the brief of the party that the amicus is supporting. Plaintiffs believe that any participation beyond this, and particularly the extensive involvement sought by the proposed amici here (such as participating in all conferences), is unnecessary to advance any legitimate interest not already being represented in this multi-party litigation, contrary to the usual parameters of amicus involvement, and will impede and render unwieldy this already complex litigation.

THE SCOPE OF *AMICI CURIAE* PARTICIPATION SOUGHT IS WITHIN THE COURT'S DISCRETION AND WILL ASSIST THE COURT IN DETERMINING THE ISSUES IN THESE CONSOLIDATED CASES

The scope of participation by an *amicus curiae* can take differing forms depending on the facts and circumstances of the case and the value added by the participation. “[I]t is solely within the discretion of the Court to determine the fact, extent, and manner of participation by the amicus.” *Cobell v. Norton*, 246 F. Supp. 2d 59, 62 (D.D.C. 2003). The goal of *amicus curiae* participation is to provide the benefit of “unique information or perspective that can help [the] court beyond help that lawyers for parties are able to provide.” *In re Vitamins Antitrust Litig.*, No. MDL No. 1285, 2002 WL 34499542, at *5 (D.D.C. Dec. 18, 2002).

Movants ask that the Court exercise its discretion to allow Movants to participate in substantive briefing (*e.g.*, briefing on Summary Judgment Motions); status conferences and any other Court conferences regarding these consolidated cases; and through such other participation as may be appropriate or of assistance to the Court. First, Movants clearly understand the role of the *amicus curiae* to be one of assistance to the court in its decision on the substantive issues and will work to not duplicate the arguments of the Parties. Second, Movants note that permitting them to join status conferences and other Court conferences should not disrupt those conferences, and that allowing them to hear the issues discussed and any instructions provided

by the Court will help Movants focus their participation in a way that is most helpful to the Court. Third, Movants CLF, NRDC, and Mass Audubon agree to file all briefs and other papers jointly. However, Movants request that the Court defer ruling on the consolidation of Movants with potential additional *amicus curiae* until the identity of such entities is known. Movants also suggest that the Court defer setting page limits for *amici curiae* participation until page limitations are set for all Parties to the consolidated cases. Finally, Movants note that the *amici curiae* participation requested is more modest than the level of participation granted to conservation groups in a number of other cases. *See, e.g., State v. Director, U.S. Fish and Wildlife Service*, 262 F.3d 13, 15 (1st Cir. 2001) (describing “amicus-plus” status, including “the right to submit briefs (including arguments not presented by the government), a limited right to call and cross-examine witnesses”); *United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 992 (2d Cir. 1984) (noting that trial court allowed *amici curiae* to call their own witnesses and cross-examine witnesses).

For the reasons stated above, Movants believe that the limitations on their *amici curiae* participation proposed by the Plaintiffs are unnecessary and should not be imposed.

WHEREFORE, the Conservation Law Foundation, the Natural Resources Defense Council, and Mass Audubon respectfully request that the Court grant their Joint Motion for Leave to Participate as *Amici Curiae*. A proposed order is attached.

Dated: November 9, 2011

Respectfully submitted,

/s/ Jerome C. Muys, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Joint Motion of the Conservation Law Foundation, the Natural Resources Defense Council, and Mass Audubon for Leave to Participate as *Amici Curiae* and Proposed Order, has been filed through the ECF system on this 9th day of November, 2011, and notice of said filing will be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

/s/ Jerome C. Muys, Jr.
Jerome C. Muys, Jr.