

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

IN THE MATTER OF:)	
CAPE WIND ASSOCIATES, LLC)	Appeal No. OCS 11- 01
_____)	EPA Permit No. OCS-R1-01
)	

**PETITIONERS’ OPPOSITION TO CAPE WIND ASSOCIATES, LLC’S
MOTION FOR EXPEDITED REVIEW**

Petitioners Alliance to Protect Nantucket Sound and Wampanoag Tribe of Gay Head/Aquinnah (“Petitioners”) oppose the Motion for Expedited Review filed by Cape Wind Associates, LLC (“Cape Wind”) filed March 15, 2011. The EPA permit process should be allowed to run its course, without foreshortening related to Cape Wind’s desire to obtain federal subsidies for its project.

**I. THE PETITION RAISES ISSUES THAT REQUIRE
CAREFUL CONSIDERATION BY THE BOARD**

Cape Wind proposes to install wind turbines in the Horseshoe Shoals area of Nantucket Sound off Cape Cod, Massachusetts. The proposal is subject to air quality permitting by the U.S. Environmental Protection Agency (“EPA”). EPA Region 1, located in Boston, is responsible for the EPA air permitting process and issued a final Outer Continental Shelf (OCS) Air Permit, EPA Permit Number OCS-R1-01, to Cape Wind for the proposed project on January 7, 2011. Petitioners filed a Petition for Review of conditions of the OCS Air Permit with the EAB on February 9, 2011.

Petitioners have raised substantial issues of policy with regard to the transparency of the Region's decision-making process: whether the Region should have posted the one-hour air quality modeling ordered by the Region after the close of the comment period and supporting documents on its website; whether the Region should have provided for public comment on this additional material that raised substantial new questions about achieving the one-hour NAAQS; and whether the Region provided the public with "a certain level of detail and analysis to substantiate [its] claim," *In re General Motors, Inc.*, 10 E.A.D. 360 (EAB 2002), that the modeling demonstrated the project was consistent with attainment of the one-hour NAAQS.

Petitioners have also identified an error that goes to the heart of the air quality modeling supporting the permit. Petitioners have shown that the applicant continues to leave open the option of locating the construction support activities in a different location from the one modeled by BOEMRE, which would invalidate BOEMRE's air quality analysis for the project. In past decisions, this Board has emphasized that the Regions may not issue permits that allow the applicant to subsequently change the project. *In re Indeck-Elwood, LLC*, 13 E.A.D. 126 (EAB 2006).

The Petition raises substantial questions about the permit granted to Cape Wind that require careful consideration. How Cape Wind plans to finance the project is not part of this consideration, and the Board should not be rushed to judgment based on the applicant's choice of means to fund the project.

II. EXPEDITED CONSIDERATION IS NOT WARRANTED

The Petition before the Board raises important questions related to the transparency and accuracy of the EPA permitting process, which deserve the careful

attention of the EAB. The respondent has not provided reasons for truncating the normal process for considering these significant questions.

Cape Wind asks for expedited consideration on the grounds that a resolution of the appeal is necessary to allow operations to move forward. Motion for Expedited Consideration at 2. While that point is undoubtedly true for any project, Cape Wind offers no persuasive reason why this appeal needs to be expedited.

a. The Project Has Not Received All Necessary Permits and Approvals

To encourage expedited consideration by the EAB, Cape Wind implies that only the EPA air permit stands in the way of construction, stating that the project “has received all the state permits and approvals necessary to begin construction.” Motion for Expedited Consideration at 3. This statement is both incorrect and misleading.

According to the Construction and Operations Plan (“COP”) filed by Cape Wind in February, not all state permits have been received. Rather, the COP shows that the Massachusetts Division of Fisheries and Wildlife has not issued either a Massachusetts scientific collection permit or a Massachusetts bird banding permit. COP, Table 1.4-1 Status of Permits and Approvals as of February 2011.

Nor does the applicant mention the many federal permits it still has not obtained. However, these permits are specified in the COP. The COP identifies six outstanding permits from the following agencies: the U.S. EPA for stormwater; U.S. Coast Guard; National Marine Fisheries Service; U.S. Geological Service; U.S. Fish and Wildlife Services; and the National Park Service. *Id.* Further, while Cape Wind says it expects a federal bird banding permit to be issued in the second quarter of 2011, completion of the “pre-construction avian work” following the issuance of the bird banding permit is

anticipated to take approximately one year before installation of wind turbine generators. COP at 69. Hence the completion of permitting and preconstruction work is at least a year away, not imminent as Cape Wind’s motion would suggest.

Furthermore, the COP itself—also a prerequisite to beginning construction—has yet to be approved. BOEMRE must prepare an environmental assessment (“EA”) for the COP, which will be used to determine whether a supplemental Environmental Impact Statement (EIS) is necessary before BOEMRE decides to approve, approve with modification, or deny the COP. BOEMRE, Notice of Preparation of an Environmental Assessment, Cape Wind Associates, LLC Construction and Operations Plan (Feb. 22, 2011). Thus, Cape Wind’s statement that it “expects the COP to be approved within weeks,” Motion to Expedite Review at 2, seems distinctly optimistic.

Even assuming *arguendo* that BOEMRE determined that a supplemental EIS was not necessary, BOEMRE’s preparation of the EA, which is likely to include a public review period for the EA and be followed by a new record of decision (“ROD”), will require additional time. Of course, BOEMRE may or may not approve the COP at the end of its process. Given that BOEMRE has yet to even issue the EA, even under this scenario a final determination on the COP “within weeks” is dubious at best. The EAB need not truncate its review of the Petition on the grounds that construction of the project is otherwise ready to proceed, as Cape Wind here implies.

b. Whether Cape Wind Receives Federal or State Subsidies Is Not the Concern of the EAB

The purpose and jurisdiction of the EAB is to review the correctness of permitting and other decisions under the Clean Air Act. An applicant’s financing arrangements are

not the concern of the Board and the Board has no authority to base its decisions on factors relating to the financing of the applicant's project.

Moreover, although Cape Wind asks the Board to truncate its normal process because the public "financing incentives" it wishes to obtain are "time-limited" and require that construction or operation of the proposed project begin "by a certain date," Cape Wind never provides the EAB with the relevant date. The motion indicates that Cape Wind is referring to the financial incentives provided by the American Recovery and Reinvestment Act of 2009 ("ARRA"). Motion for Expedited Consideration at 3. The EAB should be aware that the incentives under ARRA are currently available until December 31, 2011, and that Congress recently extended the deadline for one year.

c. Expediting Consideration Will Not Produce Jobs or Economic Growth

Expedited consideration is not necessary in order to "preserve and create jobs," "promote economic recovery," and "provide long-term [economic] benefits," as suggested in Cape Wind's Motion. In fact, the proposed project will destroy jobs and depress New England's economy.

This conclusion is compelled by the fact that the Cape Wind project requires massive public subsidies in order to compete with more economically efficient sources of electric power. Testimony before the Massachusetts Department of Public Utilities ("DPU") established that in mid-2010 the average overall market futures price for electricity for delivery in 2013 for the New England Independent System Operator was \$53.86/MegaWatt hour ("MWhr"). Testimony of Dr. Jonathan Lesser, Ph.D. before the Commonwealth of Massachusetts, Department of Public Utilities, D.P.U. 10-54 (July 30, 2010) (Exhibit 1 to this Opposition) ("Lesser Testimony") at 120. But the 2013 base

price of power under the Cape Wind Power Purchase Agreement (“PPA”) is \$187/MWh (increased by 3.5 per cent each year over the term of the PPA). *Id.* at 119. The difference, \$133.14/MWhr, is the amount of the subsidy provided by the ratepayers of Massachusetts for Cape Wind power in the year 2013.

In the same proceeding, direct testimony of a witness for National Grid, the purchaser of the power from the proposed Cape Wind project, indicated that federal subsidies through the Investment Tax Credit and Production Tax Credit would amount to \$56/MWhr. Direct Testimony of Madison N. Milhous, Jr. before the Massachusetts Department of Public Utilities, D.P.U. 10-54 (June 4, 2010) (Exhibit 2 to this Opposition) at 18-19.¹

These state and federal subsidies in effect increase the price of electric power in New England and the United States, which in turn will depress economic growth and cause the loss of jobs. In the hearings before the DPU, Dr. Lesser testified that his “research indicates that for each \$1 million increase in electric costs above market prices, seven jobs would be lost.” Lesser Testimony at 135. He concluded that if both PPAs for Cape Wind power were priced equivalently, the ratepayer subsidies to Cape Wind would cause the annual loss of “almost 1,180 jobs in 2013 increasing to over 1,600 jobs by the year 2020” in Massachusetts, far exceeding the 150 jobs created by “the direct, indirect, and induced effects of operations and maintenance personnel” on the Cape Wind project in the state. Lesser Testimony at 135-136. Thus, Dr. Lesser concluded that construction of the Cape Wind project “is not an effective – or rational – economic development

¹ Mr. Milhous testified that the price of power produced by Cape Wind would equal \$207/MWhr, but that without the two federal tax subsidies the price would increase to \$235/MWhr, a difference of \$28/MWhr. Milhous also testified that the \$28/MWhr difference reflected only 50 percent of the actual financial impact of the federal tax subsidies. *Id.*

strategy.” *Id.* at 136-137 (contrasting the Cape Wind project with other lower-cost renewable projects in response to National Grid’s RFP). In sum, the testimony before the DPU serves to refute Cape Wind’s claim that the project will preserve jobs and foster economic recovery, and that expedited review is warranted in order to obtain such benefits.

CONCLUSION

For the foregoing reasons, the Motion for Expedited Consideration filed by Cape Wind should be denied.

Respectfully submitted,

/s/ Richard E. Ayres

Richard E. Ayres
Ayres Law Group
1615 L Street, N.W., Suite 650
Washington, DC 20036
Tel: (202) 452-9200
Fax: (202) 416-0155
ayresr@ayreslawgroup.com

Counsel for The Alliance to
Protect Nantucket Sound

CERTIFICATE OF SERVICE

I hereby certify, pursuant to the Rules of the Environmental Appeals Board of the U.S. Environmental Protection Agency, that on March 23, 2011, a copy of the foregoing Petitioners' Opposition to Cape Wind Associates, LLC's Motion for Expedited Review, with accompanying Exhibits, was filed electronically with the Environmental Appeals Board via the Central Data Exchange system. I further certify that copies of the foregoing documents were served via U.S. mail on counsel of record for Cape Wind Associates and EPA Region 1.

/s/ Richard E. Ayres

Richard E. Ayres