

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

In re:

CAPE WIND ASSOCIATES, LLC

EPA Permit No. OCS-R1-01

Appeal No. OCS 11-01

**CAPE WIND ASSOCIATES, LLC’S UNOPPOSED MOTION FOR LEAVE TO
INTERVENE AND REQUEST FOR LEAVE TO RESPOND TO PETITION**

Cape Wind Associates, LLC (“CWA”), respectfully moves for leave to intervene as a party respondent in this appeal filed by the Alliance to Protect Nantucket Sound and the Wampanoag Tribe of Gay Head (collectively “Petitioners”) and for leave to file a response to the Petition for Review. Counsel for Petitioners and the United States Environmental Protection Agency do not oppose this motion.

FACTUAL BACKGROUND

The United States Environmental Protection Agency, New England Region 1, issued the Outer Continental Shelf Air Permit No. OCS-R1-01 (“OCS Permit”) to CWA on January 7, 2011. The OCS Permit relates to CWA’s proposal to construct and operate a wind energy facility on Horseshoe Shoal in the federal waters of Nantucket Sound. Provisions contained within the OCS Permit are stipulated conditions of CWA’s lease with the Bureau of Ocean Energy Management, Regulation, and Enforcement (“BOEMRE”), which grants CWA the exclusive right to construct and operate a 454 megawatt wind energy project on the Outer Continental Shelf in Nantucket Sound.

The Cape Wind Project

CWA has been working to develop the Cape Wind Project for approximately ten years at a cost of tens of millions of dollars. The Project involves the construction and operation of an electrical generating facility comprised of 130 wind turbines arranged in a grid pattern on the shallow-water Horseshoe Shoal area of Nantucket Sound. The Project is designed to deliver a maximum of 454 megawatts of electrical energy, which will be connected to the existing electric transmission system that services Cape Cod and the New England region. The Project's annual energy production is approximately equal to the energy produced by an oil-fueled power plant that consumes 113 million gallons of oil a year or to a coal-fired power plant that consumes 570,000 tons of coal a year. In average wind conditions, Cape Wind's power output will supply 173 megawatts of power, which is approximately equal to 75 percent of the average electrical demand of Cape Cod and the islands of Martha's Vineyard and Nantucket. CWA has negotiated and executed a Power Purchase Agreement for one half of the Project's output with a retail Massachusetts electric utility, National Grid. The Project is not only significant for advancing state and federal renewable energy goals, its construction and operation will launch a new industry for offshore renewable energy. Thus, the Cape Wind Project is a major regional clean energy project in which CWA has invested great effort and financial resources in the expectation of making a significant contribution to New England's power needs, as well as to the environment.

Cape Wind Project Schedule

Large energy projects require careful planning and lead times, not just for construction but also for finance and integration into regional power systems. CWA has already invested many years of effort in obtaining governmental approvals, including two federal environmental reviews under the National Environmental Policy Act, one by the U.S. Army Corps of Engineers

and the more recent, exhaustive review by the Department of the Interior. Prompt review is necessary to enable CWA to stay on schedule. As an Intervenor, CWA will be able to assist the other parties and the Board in completing an efficient, informed review of EPA's decision to issue the OCS Permit to CWA.

The OCS Permit regulates the air pollutants emitted from vessels engaged in Outer Continental Shelf preconstruction, construction and operation activities of the proposed wind energy facility. It does not regulate operation of the eventual wind turbines themselves, or any other aspect of the Cape Wind project besides vessel air emissions. Cape Wind must also comply with other authorizations issued by other federal agencies, such as the BOEMRE.

Status of these Proceedings

On February 9, 2011, three days after the OCS Permit's automatic effective date, Petitions filed a Petition for Review ("Petition") alleging that "the final permit for the Cape Wind Energy Project fails to meet a number of procedural and substantive requirements" and that certain EPA conclusions "lack sufficient basis in the record and are based on findings of fact and conclusions of law that are no longer operative and are therefore clearly erroneous." (Dkt. 1, Petition at 7.)

On February 10, 2011, this Board requested that EPA, Region 1, prepare either a response seeking summary disposition or a response to the merits of Petitioners' contentions. (See Dkt. 2, Letter from Eurika Durr, Clerk of the Board, Environmental Appeals Board, to Carl Dierker, Regional Counsel, Regional Counsel Office, U.S. EPA, Region 1, at 1-2 (Feb. 10, 2011).) If EPA responds to the merits of the Petition, the Board also requested that EPA submit the "relevant portions of the administrative record, together with a certified index of the entire administrative record." (*Id.* at 2.) Time for the EPA's response has not expired.

CWA seeks to intervene in this proceeding to support the EPA's decision to issue the OCS Permit to CWA and to protect CWA's substantial interests in the timely completion of the Project. This motion is timely and will not delay these proceedings.

GROUND FOR RELIEF

Under 40 C.F.R. § 22.11, which the Board may follow as guidance here, intervention should be granted if: (1) the movant claims an interest relating to the cause of action; (2) a final order may as a practical matter impair the movant's ability to protect that interest; and (3) the movant's interest is not adequately represented by existing parties. Thus, the Board typically grants a permittee's motion to intervene and to file a response to petition for review. *See, e.g., In re USGen New England, Inc. Brayton Point Station*, NPDES Appeal No. 03-12, slip op. at 7-8, n.13 (EAB Feb. 19, 2004); *In re Phelps Dodge Corp.*, NPDES Appeal No. 01-07, slip op. at 15 (EAB May 21, 2002) (granting permittee intervention); *In re Haw. Elec. Light Co.*, PSD Appeal Nos. 01-24 through 01-29, at 1 (EAB Oct. 18, 2001) (same); (EAB Practice Manual § III.D.1 (June 2004) (The Board will "generally allow the permit applicant to respond to a petition filed by a third party petitioner if the permit applicant has filed a request to respond"); *see also id.* § III.D.4 (The Board "will entertain a motion by a permittee to participate in the proceeding.")). As the permittee, CWA has an interest related to this petition for review, a final order would impair CWA's ability to protect its interest and CWA's interest is not adequately represented by existing parties. Therefore, this Board should grant CWA's motion to intervene.

A. CWA Has a Direct Interest in This Proceeding

If the Board grants review and remands the permit, CWA will suffer real, concrete injury, among other things because regulatory delay would threaten the Project's schedule. A delayed project schedule could compromise the considerable resources CWA has expended in developing the Cape Wind Project, studying renewable energy sources, evaluating offshore wind potential in

and around Cape Cod, conducting environmental impact surveys, and gaining regulatory approval for the Cape Wind Project at the local, state, and federal levels, as well as all future benefits from the Project. It also would put at risk CWA's ability to take advantage of time-limited federal incentives for renewable energy projects.

In analogous cases, courts have found that an intervenor had standing and a right to intervene when favorable regulatory decisions could be set aside as a result of the litigation. *See, e. g., Atl. Sea Island Group, LLC v. Connaughton*, 592 F. Supp. 2d 1, 6-7 (D.D.C. 2008) (finding New Jersey had a right to intervene because it would be injured if plaintiffs received the requested declaratory relief vacating the government decision at issue because, *inter alia*, New Jersey would lose the privileges associated with that decision); *see also Natural Res. Def. Council v. Env'tl. Prot. Agency*, 99 F.R.D. 607, 609 (D.D.C. 1983). If Petitioners succeed on their claims, the requested remand could severely delay the Cape Wind Project. CWA has a concrete and compelling interest in this proceeding, because "[a] decision favorable to the [EPA] would prevent such [real, concrete] injur[ies]." *See Connaughton*, 592 F. Supp. 2d at 6; *Natural Res. Def. Council v. Env'tl. Prot. Agency*, 99 F.R.D. at 609 (When "regulatory decisions, which are obviously in the intervenors' interest [could] be set aside[,then] the intervenors can be said to have a substantial and direct interest in the subject of th[e] litigation."). The risk to CWA of delaying the OCS Permit is real and concrete.

B. Disposition of the Matter Would Impair CWA's Ability to Protect Its Interests

If CWA were not permitted to intervene, a final order would impair CWA's ability to protect its interest in the Cape Wind Project. In similar cases, courts have found that "[w]here the relief sought is to set aside agency action that affects a proposed intervenor, such relief could practically impair the proposed intervenor's interest since the proposed intervenor could no

longer rely on the agency's announced decision and would need to restart the administrative process." *Connaughton*, 592 F. Supp. 2d at 7 (citing *Am. Horse Prot. Ass'n, Inc. v. Veneman*, 200 F.R.D. 153, 158 (D.D.C. 2001)). That is the case for CWA.

Disposition of the case without CWA's participation would undermine its ability to defend its interests in the timely completion of the Project. CWA intends to start construction in the third quarter of 2011. If the OCS Permit is delayed, the start of construction will be delayed which will severely impact CWA's ability to protect the significant investments that it made in developing the Project and its ability to qualify for time-limited federal incentives for renewable energy. The practical consequences of denying CWA's intervention is that a determination favorable to Petitioners might well postpone indefinitely the Cape Wind Project. CWA is able to protect its interests only through intervention in this action.

C. CWA's Interests Are Not Adequately Represented by Existing Parties

CWA's interests are not adequately represented by the EPA. "[I]nadequacy of governmental representation' [exists] when the government has no financial stake in the outcome of the suit"—as is the case here. *Hardin v. Jackson*, 600 F. Supp. 2d 13, 16 (D.D.C. 2009) (citing *Dimond v. Dist. of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986)). While the EPA represents the overall public interest in this proceeding, CWA has additional interests in ensuring the timely completion of the Project, as well as protecting its significant financial investment in developing the Project.

Without intervention and participation in this appeal, CWA will be prejudiced. Intervention does not, however, prejudice the interest of the Petitioners or EPA and neither Petitioners nor EPA oppose this motion. CWA has valid defenses to the OCS Permit appeal and intervention would further the interests of justice.

CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, CWA should be granted leave to intervene in this proceeding and to file a response to the Petition for Review.

Respectfully submitted,

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This 24th day of February, 2011

Attorneys for Proposed Intervenor
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CERTIFICATE OF SERVICE

I hereby certify that on February 24, 2011, a copy of the foregoing Unopposed Motion for Leave to Intervene and Request for Leave to Respond to Petition was filed electronically via the Environmental Appeals Board of the U.S. Environmental Protection Agency's Central Data Exchange system.

I further certify that on February 24, 2011, a copy of the foregoing Unopposed Motion for Leave to Intervene and Request for Leave to Respond to Petition was served via U.S. Mail on the following counsel:

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