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Federal district court decision appears to clear way for Cape Wind

Energy Alert

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The Federal District Court in Washington, DC has issued a lengthy ruling that appeared to substantially clear the way for Cape Wind, a large proposed offshore wind farm on Horseshoe Shoal in Nantucket Sound south of Cape Cod, Massachusetts.

The decision, issued on March 14 by Judge Reggie B. Walton in *Public Employees for Environmental Responsibility v. Beaudreu*, dismissed dozens of claims brought to invalidate federal approvals of Cape Wind and largely resolved four consolidated lawsuits filed in 2010 by the Alliance to Protect Nantucket Sound, the Town of Barnstable, the Aquinnah Wampanoag Tribe and the Public Employees for Environmental Responsibility.

The plaintiffs in the consolidated action attempted to throw the proverbial book at Cape Wind and the federal agencies that had issued approvals/authorizations for the project by claiming violations of a litany of federal statutes, including the Endangered Species Act (ESA), the National Environmental Policy Act (NEPA), the Migratory Bird Treaty Act, the Outer Continental Shelf Lands Act (Shelf Act), the Coast Guard and Maritime Transportation Act, the Rivers and Harbors Act, the National Historic Preservation Act, the Energy Policy Act of 2005, the Clean Water Act, and the Administrative Procedures Act.

Judge Walton's decision granted summary judgment, dismissing all but two of the dozens of claims asserted in the case. Although one of the plaintiffs, the Alliance to Protect Nantucket Sound, attempted to spin the result by issuing a press release entitled "Court Environmental Victory Is Major Setback For Cape Wind," **the decision is objectively read as a near total win by the proponents of Cape Wind.**

Among the arguments rejected by the court was the plaintiffs' contention that the Bureau of Ocean Energy

Management (BOEM) violated the Migratory Bird Treaty Act (MBTA) by approving Cape Wind without first obtaining a permit from the federal Fish and Wildlife Service (FWS) for the taking of migratory birds. The court held that BOEM did not violate the MBTA by merely approving a project that, if ultimately constructed, might result in the taking of migratory birds. Rather, violation of the MBTA requires an actual taking of a migratory bird without a permit, which has not occurred with the as-yet-unbuilt Cape Wind project.

The court did find for plaintiffs on two legal grounds, but those are likely to be of little moment to Cape Wind. The court concluded that FWS violated the ESA by improperly delegating to Cape Wind and BOEM a decision that “feathering of the rotors” (stopping the wind turbine generators and facing the rotors into the wind) was not a reasonable and prudent measure to reduce the risk of collision with roseate terns (an endangered species of bird). While the court remanded the matter back to the FWS for the agency to make its own “independent determination” as required by the ESA, the remedy for this statutory violation is fairly straightforward and it appears likely that FWS will simply reiterate its previous decision on the subject with revised language.

The court also found that the National Marine Fisheries Service (NMFS) violated the ESA by failing to issue an incidental take statement for the potential impacts to endangered North Atlantic right whales, which are known to traverse the area of the Cape Wind project. The court rejected NMFS’s contention that an incidental take statement was not required because NMFS concluded in its “biological opinion” that the Cape Wind project was extremely unlikely to impact right whales. The court held that where an agency determines that an incidental take “may occur,” an incidental take statement is required “even where take is unlikely.”

Although the court’s ruling requires NMFS to issue an incidental take statement to accompany its “biological opinion” on whether the Cape Wind project is likely to jeopardize the “continued existence” of the right whale, the decision is a fairly hollow victory for the plaintiffs, given that NMFS has already decided that the project’s impacts on rights whales are likely to be non-existent.

Cape Wind has been a highly controversial and politically charged project since even before its initial permit applications were submitted in 2001. **Members of the industry have been watching the Cape Wind litigation intently as a test case to determine the feasibility of permitting major offshore wind projects under the various federal administrative regimes.** While the district court’s decision in *Public Employees for Environmental Responsibility* is obviously a significant victory for the proponents of Cape Wind, the decision should also be encouraging for the entire industry because it could establish a roadmap for the acceptable scope of administrative review of future offshore wind projects under several important federal statutes, including ESA, NEPA, the Shelf Act, and others.

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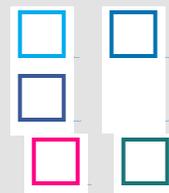
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