

ALERTS AND UPDATES

No Longer Tilting at Windmills: Department of the Interior Approves Cape Wind Project

April 30, 2010

After almost a decade of debate, on April 28, 2010, U.S. Department of the Interior Secretary Ken Salazar announced approval of Cape Wind, the 130-turbine wind farm proposed for construction off the coast of Massachusetts in Nantucket Sound. The development has elicited a heated response from the public and lawmakers on both sides of the aisle. Secretary Salazar acknowledged the controversy over Cape Wind, but indicated that he approved the nation's first offshore wind project because of the anticipated construction jobs and power it would supply. Secretary Salazar noted that Cape Wind would be "the first of many projects up and down the Atlantic coast." The Department of the Interior's approval may open the door for other offshore wind farms from Long Island Sound to the Great Lakes.

Unexpected Allies?

While some may perceive renewable energy and environmentalism to be closely associated, the Cape Wind project has highlighted the nuanced issues between wildlife conservation and historic preservation and renewable energy generation that relies on natural resources like wind and water. Some perhaps unexpected alliances have been forged in the project over the years.

The late U.S. Sen. Edward Kennedy (D-Mass.)—a supporter of "green" energy—opposed the project as a giveaway to a private developer, as have the Advisory Council on Historic Preservation (ACHP), the Wampanoag Tribe of Gay Head (Aquinnah) of Massachusetts, and certain wildlife and animal rights groups. Based on two Native American tribes' claims that the sound is vital to their cultural and religious practices, the U.S. National Park Service recently found that Nantucket Sound is eligible for listing in the National Register of Historic Places. U.S. Sen. Scott Brown (R-Mass.) and U.S. Rep. Bill Delahunt (D-Mass.) had allied to request that Secretary Salazar form a "consensus decision" on the project rather than issue an independent final verdict; and following the approval, Senator Brown indicated that he was "strongly opposed" to the Obama administration's decision to move forward with Cape Wind.

Allied on the opposite side, U.S. Sen. John Kerry (D-Mass.), a bipartisan group of six Northeastern state governors, including Massachusetts' Democratic Gov. Deval Patrick; Greenpeace; and the Sierra Club all support the project. Governor Patrick noted that the decision affirms the opinion that, on balance "Cape Wind is good for our environment and good for our energy needs." Sierra Club Executive Director Michael Brune hailed the approval as a "huge victory for clean energy." The *Boston Globe* and the *New York Times* also endorsed the project.

Mitigation and Litigation

Early in April 2010, the ACHP, a federal advisory panel, recommended against approving the project because of the historic and aesthetic qualities of the area, but Secretary Salazar indicated that the project as modified can move forward while preserving those qualities. Secretary Salazar indicated that Cape Wind will be required to conduct additional archaeological and marine assessments of the impact of the project on submerged resources; to take specific steps to make turbines less visible from the shore, including coloring and lighting; and to follow stringent measures during construction.

Despite these proposed mitigation measures, the project is not yet “shovel ready,” and several challenges are still expected, including those from the Alliance to Protect Nantucket Sound, Native American tribes, and wildlife and animal rights organizations. These challenges, however, are not likely to raise any issues that have not already been addressed in nine years of agency and court reviews of the potential impact of the project on everything from marine environment and historic sites to fishing, shipping and aviation. Further challenges are not likely to survive, if the project’s mitigation measures are determined to adequately protect the affected interests. In the wake of the April 22, 2010, sinking of the *Deepwater Horizon* oil-drilling rig in the Gulf of Mexico and renewed public interest in reducing U.S. dependence on fossil fuels, the Department of the Interior’s approval of Cape Wind may seem a relatively uncontroversial breath of fresh air.

Favorable Precedent for Offshore Wind Development

Offshore wind farms have been providing power throughout northern Europe and in China for several years. Cape Wind would be the United States’ first, and its approval sets both a precedent and the tone for other proposed projects. Indeed, Secretary Salazar indicated that the decade-long review and approval process for the Cape Wind project was too lengthy, and that future offshore wind projects would follow a “more rational and orderly” process. Development of several offshore wind farms have been proposed for the relatively shallow waters along the East Coast and in the Great Lakes—farms that would boost wind power’s contribution to the nation’s energy resources and provide more geographic balance to the wind industry. Until this point, wind generation has been concentrated in land-based wind farms in Midwestern and Western states. The Department of Energy has called for 20 percent of the nation’s power to come from wind energy by 2030, with 18 percent from consistently strong and steadily windy offshore sites. Still, bringing that offshore wind to onshore consumers would require potentially costly upgrades to transmission systems—indeed, Cape Wind has yet to finalize a contract with the local energy utility to carry the wind power to the shore and beyond.

Despite the remaining hurdles, the Department of the Interior’s approval of the Cape Wind project marks a turning point for the offshore wind industry in the United States. Fledgling offshore wind developers may feel more confident that the political winds appear to have shifted in their favor.

For Further Information

If you have questions about this *Alert*, please contact [James W. McTarnaghan](#) in our San Francisco office, [Jennifer D. Cook](#) in our Washington, D.C. office, any [member](#) of the [Renewable Energy and Sustainability Practice Group](#) or the attorney in the firm with whom you are regularly in contact.