



WINDSOCK

Who's in charge here?

More gleanings from the just-issued "Wind Energy: Offshore Permitting" report by Aaron M. Flynn, legislative attorney with the American Law Division of the Congressional Research Service. The Service is an arm of the Library of Congress.

- Legislation has been filed to give authority to the Secretary of the Interior for granting easements and rights-of-way on submerged federal lands.

- Another proposal would put the Secretary of Commerce in charge, by amending the Coastal Zone Management Act to cover renewable energy projects and their location in ocean areas

- It appears that the Corps is correct in its interpretation of the Outer Continental Shelf Lands Act, which is that Congress did not intend to limit the agency's jurisdiction over "artificial islands and fixed structures" thereon.

- Must permission to use the seabed be obtained? Here's what the report says: "Use of federal lands, including the OCS, requires some form of permission, such as a right-of-way, easement, or license. Use or occupancy of the OCS without such authorization arguably constitutes common law trespass."

- So is Cape Wind trespassing with its data tower in Nantucket Sound? The report says: "However, the Court of Appeals for the Fifth Circuit has held that because the United States does not own the OCS in fee simple, it cannot claim trespass based on unauthorized construction on OCS. On the other hand, the court stated: '[n]either ownership nor possession is, however, a necessary requisite for the granting of injunctive relief,' because the United States has paramount rights to the OCS and an interest to protect. Thus damages, available under trespass, may not be available for unauthorized construction on the OCS, while injunctive relief would appear possible even under more constrained interpretations of U.S. Authority."

As reported last week, Flynn found that "there would appear to be no present mechanism for pro-

viding an applicant with the necessary property rights to begin construction." He noted, however, the Corps' statement that its permit does not convey any property rights and that it may issue a permit without making a determination regarding property rights. Then Flynn adds another however: "construction on the OCS without first obtaining these rights would remain unlawful.

Cape Wind Associates has said consistently that it will pay any fee that is imposed for use of federal resources.

In searching the Internet for "Congressional Research Service," one will find several sites with links to such reports, which are prepared principally for legislators. A brief check last week found no posting for the wind energy report, which is dated Nov. 1.

Comment period extended

Comments on the Draft Environmental Impact Statement on the Cape Wind Associates windfarm proposal will be accepted through Feb. 24. The decision by the U.S. Army Corps of Engineers is a victory for critics of the original 60-day comment window.

In a press statement, the Corps noted that its New England district commander, Col. Thomas Koning, made the decision to "allow the local, state and federal permit processes to be synchronized as much as possible."

Among those requesting the extension, according to the release, were the state Executive Office of Environmental Affairs, the Cape Cod Commission, and U.S. Rep. Bill Delahunt.

New Jersey may lead the way

Could the state Coastal Zone Management agency find that Cape Wind's project is inconsistent with its policies and prevent its construction? That's the possibility raised by *The Cape Codder* newspaper, which noted that CZM is one of the agencies that has yet to sign off on the proposal.

Following its lead, the paper spoke to state Sen. Rob O'Leary, who noted a decision by New Jersey's CZM agency to find Bald Eagle Power Company's plan to

build in federal waters inconsistent with the state's coastal management plan.

On Feb. 8, the *Asbury Park Press* reported that the state issued the finding on two data towers Bald Eagle had planned to erect four miles offshore. This first step was to lead to construction of test towers at nine sites from Belmar, N.J. to Block Island, then to two demonstration wind farms with two to 10 2-megawatt turbines.

Under its Seahorse Hydrogen Wind Farm plan, Bald Eagle plans to convert wind energy into clean hydrogen by use of electrolysis at sea, then package and ship the fuel to land for use by automotive fleets, buses, electric utilities and military transportation.

Bald Energy chairman Rick Carrier told the *Press* that the New Jersey decision "shot us out of the water on every issue" and said he'd put the effort on hold until a wind farm feasibility study is completed.

The Massachusetts CZM office signed off on Cape Wind's data tower on May 16, 2002.

According to its Web site, Bald Eagle Power Company is a wholly-owned subsidiary of the USA Bald Eagle Command, a non-profit environmental group founded in 1975 "to help remove the Bald Eagle from the endangered species list and to educate the public about America's living symbol." When the eagle's status was upgraded to "threatened," according to the site, Bald Eagle Power was created in 1992 to promote renewable energy.

On beyond the EIS

If you think the final EIS (Environmental Impact Statement) will be the last word on the Nantucket Sound project, the U.S. Army Corps of Engineers has a paragraph you should read.

At the end of its release on the comment period extension, the Corps appended this laundry list.

"Some of the major steps in the permitting process are: the Massachusetts Energy Facilities Siting Board has to grant a license; the DEIS must fulfill NEPA (National Environmental Policy Act) requirements; the DEIR must fulfill MEPA (Massachusetts Environmental Policy Act) requirements; the Cape Cod Commission will participate in the DEIR and FEIR review as part of the development of regional impacts pro-

cess; the local conservation commissions of Barnstable and Yarmouth must review the proposal as it relates to the Wetlands Protection Act and local wetlands bylaws and issue orders of condition; the Massachusetts DEP (Department of Environmental Protection) must provide a Chapter 91 Waterways License, and provide a Water Quality Certification and Wetlands Superseding Order of Conditions (if the local orders are appealed); the Massachusetts Coastal Zone Management Office must provide a Coastal Zone Consistency Review; and the Corps must provide a Section 10 permit for work in navigable waters."

Had enough? The last line reads, "There are additional permits, authorizations and appeals processes not listed."

Public hearings next month

The Draft Environmental Impact Statement on the Cape Wind Energy Project will be the subject of four public hearings in December. The U.S. Army Corps of Engineers has announced the following schedule:

Dec. 6 at 6 p.m.: Martha's Vineyard Regional High School, Edgartown Road, Oak Bluffs

Dec. 7 at 7 p.m.: Mattacheese Middle School on Higgins Crowell Road in West Yarmouth

Dec. 8 at 6 p.m.: Nantucket Community School, 10 Surfside Road

Dec. 16 at 7 p.m.: Massachusetts Institute of Technology, Room 10-250, 77 Massachusetts Ave., Cambridge

Registration begins an hour before each session is opened.

How to see a copy

All four volumes of the DEIS report are available at local libraries, and an electronic version may be downloaded by going to www.nae.usace.army.mil (select "projects" and then the Cape Wind windfarm permit application). A compact disc may be ordered by calling 978-318-8338.

Written comments may be submitted to wind.energy@usace.army.mil, or mailed to Cape Wind Energy project EIS Manager Karen K. Adams, U.S. Army Corps of Engineers, New England District, Regulatory Division, 696 Virginia Road, Concord MA 01742-2751. Be sure to reference file number NAE-2004-338-1.