Dierker, Carl

From: Dierker, Carl
Sent: Friday, April 25, 2014 5:34 PM
To: Siciliano, CarolAnn; Schmidt, Lorie
Cc: Tim Williamson; Stein, Mark; Ann Williams; Minoli, Kevin
Subject: Cape Wind/ESA Issue
Attachments: 20140414_NOI_EPA Cape Wind Permit.pdf; name_beaudreu__and_date_geq_.doc

Hi Carol Ann and Lori -- Attached are:

1) District Court Decision finding flaws in BOEM's ESA consultation with the Services on the Cape Wind project; and
2) Notice of Citizen Suit by the Alliance to Protect Nantucket Sound concerning EPA's air permit for Cape Wind.

As you probably know, Cape Wind is a high profile matter, both in Region 1 and nationally. While the District Court did not invalidate or otherwise stay the biological opinion and incidental take statements resulting from BOEM's consultation with DOI, it did find a couple problems with both the NMFS determination w/re: right whales and FWS's determinations w/re: "feathering" of turbine blades to reduce avian mortality. Because we relied on BOEM's ESA consultations in issuing our CAA Outer Continental Shelf (OCS) construction permit for Cape Wind, the Alliance feels we need to respond to the court's decision. Their letter concludes:

> Accordingly, in keeping with the terms of the OCS permit, which plainly contem will take appropriate action under the very circumstances that have now arisen, EPA sh suspend the permit pending fulfillment of the remand of the two unlawful consultation has relied and a determination by the Court that those remands have been performed i fully rectifies the violations. Moreover, because it is now abundantly clear that EPA ca reasonably rely on BOEM and the Services to carry out EPA's own consultation obligatic become directly involved in the remanded consultations in order to ensure that the ESA are carried out in the manner that the Court directed.[1]

We are meeting internally and have talked with attorneys for both NMFS and FWS and, after initial review, feel we are unlikely to find it appropriate to suspend our permit. We understand that the Services are currently working diligently to correct the flaws the court found in the ESA consultation documents and will produce a response shortly. We will then need to review any addendum/modification they provide to see how it might affect the findings on which our air permit was based.

However, it will be important to coordinate closely with OGC as we work through these issues and to keep Avi in the loop as we decide how to proceed. I will provide him a brief introductory background on this matter on next Tuesday's OGC senior staff call. Mark Stein will be covering the ESA issue and Tim Williamson will be covering the air permit issue for ORC. Ron Fein, who advised the region for several years dealing with this permit as it was appealed to the EAB, has left ORC, and I'm not sure who he worked with in your respective offices, but if you let us know who we should be working with on this matter, we'll try to include them in future discussions as we develop a strategy for responding to the Alliance's letter.

Thanks,
Carl
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