

Golden Gate University Environmental Law Journal

Volume 5

Issue 1 *Symposium Edition: Offshore Energy Projects:
New Priorities in the Wake of the BP Gulf Disaster*

Article 8

January 2011

The Cape Wind Offshore Wind Energy Project: A Case Study of the Difficult Transition to Renewable Energy

Kenneth Kimmell

Dawn Stolfi Stalenhoef

Follow this and additional works at: <http://digitalcommons.law.ggu.edu/gguelj>

 Part of the [Environmental Law Commons](#)

Recommended Citation

5 Golden Gate Univ. Env. L. J. 197 (2011)

This Article is brought to you for free and open access by the Academic Journals at GGU Law Digital Commons. It has been accepted for inclusion in Golden Gate University Environmental Law Journal by an authorized administrator of GGU Law Digital Commons. For more information, please contact jfischer@ggu.edu.

THE CAPE WIND OFFSHORE WIND ENERGY PROJECT: A CASE STUDY OF THE DIFFICULT TRANSITION TO RENEWABLE ENERGY

*KENNETH KIMMELL, ESQ.**
DAWN STOLFI STALENHOEF, ESQ.†

I. INTRODUCTION

The BP Gulf disaster gave us pause for many reasons, including the tragic loss of human life, the untold impacts to natural resources and the environment, the exposure of numerous shortcomings related to our piecemeal regulatory system, the discord between state and federal oversight, and corporate cost savings measures implemented at the expense of safety and sound engineering. The events that unfolded in the Gulf of Mexico, before the eyes of world, were a harsh reminder of the global imperative to minimize reliance on fossil fuels for our energy needs.

This article presents the story of one renewable energy alternative

* Kenneth Kimmell served as general counsel to the Massachusetts Executive Office of Energy and Environmental Affairs from 2007 to 2011, was responsible for overseeing the state permitting of the Cape Wind project, and was a liaison for the state with respect to the federal permitting of the project. Mr. Kimmell now serves as the Commissioner of the Massachusetts Department of Environmental Protection.

† Dawn Stolfi Stalenhoef has practiced environmental law in Massachusetts for eleven years, and has worked in both the public and private sectors. She currently serves as Counsel for the Massachusetts Department of Public Utilities. Before becoming an attorney, Ms. Stolfi Stalenhoef worked in the consulting field as an environmental scientist.

The views expressed here are the authors' personal views, and not necessarily the views of the Commonwealth of Massachusetts.

that is available wherever the wind blows strong and steady. If that alone is not sufficient enticement to read further, the authors also promise to present one of the most engaging permitting sagas ever known to this field. Indeed, the Cape Wind Energy project was held captive by the permitting process for nearly a decade – in stark contrast to numerous offshore oil projects – due to the imposition of disproportionately rigorous regulatory scrutiny and the dogged political pressure applied by a few wealthy homeowners with ocean views in the direction of the proposed wind farm.

As we collectively consider “new priorities,” renewable offshore energy projects like Cape Wind should be at the top of our list. The experience of Cape Wind in navigating the rough seas of state and federal permitting, and in many cases blazing a trail for future project proponents, is as instructive as it is compelling.

This article addresses Cape Wind, the nation’s first offshore wind energy project proposed for Nantucket Sound in federal waters adjacent to Massachusetts. Part I provides an overview of the project and its importance and describes its long and complicated permitting path. Part II analyzes how the Cape Wind experience highlights flaws in the federal permitting process and offers recommendations for remedying those flaws. Part III describes the complex jurisdictional issues that Cape Wind faced because the wind turbines are proposed to be located in federal waters, while the electric cables that transmit the electricity to the mainland would lie in the seabed of state waters. Part III also analyzes the federal and state court opinions, and relevant statutory authority, that ultimately resolved the jurisdictional disputes. Part IV concludes with a brief summary of Cape Wind’s long-term prospects.

II. THE PERMITTING OF CAPE WIND

*Lately it occurs to me, what a long, strange trip it's been.*¹

A. WHY CAPE WIND MATTERS

If completed, the Cape Wind offshore wind energy project would be one of the largest offshore wind farms in the world. The project is also one of the most significant greenhouse gas (GHG) reduction measures in our nation. It would reduce GHG emissions by an estimated 730,000 tons

¹ GRATEFUL DEAD, *Truckin'*, on AMERICAN BEAUTY (Warner Bros. 1970).

per year, which is the equivalent of taking 175,000 cars off the road each year.²

Due to its size, novelty, and colorful permitting history, the project has become a symbol of the United States' resolve to take action to reduce its greenhouse gas emissions and its dependence on fossil fuels. However, if the project is not constructed, either because of the aesthetic concerns of tenacious beachfront property owners who oppose the project or because of its large up-front costs, the world may well begin to question the United States' commitment to doing its part to avert climate change.

The project is a bellwether for the nascent offshore wind industry. The Cape Wind developers have invested over \$40 million³ and pursued the necessary permits for almost ten years. If Cape Wind never comes to fruition, many will question whether the financial markets will be willing to invest scarce capital in offshore wind.

The project also highlights the issue of where to locate wind energy facilities. There is an ongoing national debate concerning whether to build wind power facilities near "load centers," i.e., where high concentrations of people reside and demand energy. One of the advantages of Cape Wind is that it is located only five miles from the eastern seaboard, which is densely populated and has high electricity demand. In contrast, there is sufficient land available to build wind farms of Cape Wind's size in sparsely populated areas such as the Great Plains. However, these areas are typically far away from load centers, which inevitably leads to higher transmission costs and line leakage.⁴

B. PERMITTING HISTORY

The Cape Wind project is proposed for "Horseshoe Shoals" in

² Statement from Ian Bowles, Sec'y, Mass. Exec. Office of Energy & Env'tl. Affairs (Mar. 30, 2007) (announcing that he had signed the Certificate on the Final Environmental Impact Report for Cape Wind Project); *see also* Press Release, Dep't of Interior, Secretary Salazar Announces Approval of Cape Wind Energy Project on Outer Continental Shelf off Massachusetts (Apr. 28, 2010), *available at* www.doi.gov/news/doinews/Secretary-Salazar-Announces-Approval-of-Cape-Wind-Energy-Project-on-Outer-Continental-Shelf-off-Massachusetts.cfm.

³ Jim Efstathiou Jr., *Salazar Signs Cape Wind Lease*, BLOOMBERG BUSINESSWEEK (Oct. 6, 2010), *available at* www.businessweek.com/news/2010-10-06/salazar-signs-cape-wind-lease-first-for-u-s-waters.html.

⁴ Ian Bowles, Op-Ed., *Home-Grown Power*, N.Y. TIMES, Mar. 7, 2009, at A21; Ian Bowles, Sec'y, Mass. Exec. Office of Energy & Env'tl. Affairs, Testimony Before the Subcommittee on Energy and Mineral Resources and the Subcommittee on Insular Affairs, Oceans and Wildlife 2 (Mar. 24, 2009), *available at* www.mass.gov/Eoeea/docs/eea/press/testimony/2009_nat_res_ibowles.pdf.

Nantucket Sound, a large body of water bordered by the southern beaches of Cape Cod and the islands of Martha's Vineyard and Nantucket.⁵ The project consists of 130 turbines placed within a twenty-five-square-mile area.⁶ The turbines are located in federal waters, approximately five miles south of the Cape Cod town of Yarmouth, nine miles northeast of Martha's Vineyard, and thirteen miles north of Nantucket.⁷ The turbines would stand 440 feet tall and generate electricity that would be transmitted to the mainland of Cape Cod via electric cables buried beneath the seabed.⁸ The project has a nameplate capacity of 468 megawatts of power (about the same amount of electricity as a medium-sized natural gas plant). It could supply on average roughly 75% of the electricity needs of Cape Cod, Nantucket Island and Martha's Vineyard, or roughly 200,000 homes.⁹ In comparison, the next biggest existing offshore wind facility in the world, located offshore in the United Kingdom, has a nameplate capacity of 300 megawatts.¹⁰

With the important exception of the project opponents, most observers agree that Horseshoe Shoals is an ideal location for the nation's first offshore wind facility. Wind speed is the key variable, as the energy produced from wind is proportional to the cube of the wind speed.¹¹ The wind speeds in Nantucket Sound are high, averaging 19.75 miles per hour (mph),¹² which is considered "outstanding" from a technical perspective.¹³ As compared to onshore wind, the so-called "capacity" factor is also high, at 37%. This means that 37% of the time,

⁵ A site map can be found at www.doi.gov/news/doinews/images/CapeWindMap_1.jpg.

⁶ Ian Bowles, Mass. Exec. Office of Energy & Env'tl. Affairs, Certificate of the Secretary of Environmental Affairs on the Final Environmental Impact Report 2 (Mar. 2007), available at www.capewind.org/downloads/feir_cert.pdf [hereinafter FEIR CERT.].

⁷ Map of Cape Wind Site, Dep't of Interior, available at www.doi.gov/news/doinews/images/CapeWindMap_1.jpg (last visited Apr. 10, 2011).

⁸ DEP'T OF INTERIOR, MINERALS MANAGEMENT SERVICE (NOW BUREAU OF OCEAN ENERGY MANAGEMENT, REGULATION AND ENFORCEMENT), RECORD OF DECISION, CAPE WIND ENERGY PROJECT, HORSESHOE SHOALS, NANTUCKET SOUND 3 (Apr. 2010), available at www.doi.gov/news/doinews/upload/Cape-Wind-ROD.pdf [hereinafter RECORD OF DECISION].

⁹ *Id.*

¹⁰ *Thanet Offshore Wind Farm*, VATTENFALL, available at www.vattenfall.co.uk/en/thanet-offshore-wind-farm.htm (last updated Mar. 16, 2011).

¹¹ DANISH WIND INDUSTRY ASSOCIATION, available at guidedtour.windpower.org/en/tour/wres/enrspeed.htm (last visited Apr. 11, 2011).

¹² FEIR CERT., *supra* note 6, at 2-13.

¹³ SUSAN F. TIERNEY, ANALYSIS GROUP, INC., STRATEGIC OPTIONS FOR INVESTMENT IN TRANSMISSION IN SUPPORT OF OFFSHORE WIND DEVELOPMENT IN MASSACHUSETTS 2-3 (Dec. 2009), available at www.analysisgroup.com/uploadedFiles/Publishing/Articles/Strategic_Options_Offshore_Wind_12-01-09.pdf.

the wind speeds are optimal for this facility, as compared to 33-34% for onshore wind.¹⁴ Moreover, the wind blows strongest in Nantucket Sound at precisely the times of peak energy demand—on hot summer and cold winter days.¹⁵

Because the site is five miles from shore, the turbines would be just visible, even on very clear days.¹⁶ They would not be visible at all when there is ocean fog, for which Nantucket Sound is well-known.¹⁷ Despite its distance from land, the site is located in shallow waters (depths between twelve and fifty feet),¹⁸ enabling the facility to use existing “monopole” technology, which has already been implemented successfully in Europe. In contrast, the technology for installing wind turbines in deeper waters is still in an experimental stage.¹⁹

The site at Horseshoe Shoals is not considered an important commercial fishery; it is not listed as important habitat for any rare marine species, and it is not located within a busy navigational channel.²⁰ One observer well-versed in offshore wind has commented, “Jim Gordon [CEO of Cape Wind] has picked the only good location in the east for a wind farm using proven technology.”²¹

Notwithstanding the apparent advantages of this site, opposition to the project has been fierce. Project opponents included the late Senator Edward Kennedy, whose family’s famous compound in Hyannis would face the project. Also in opposition are many well-heeled property owners, such as Bill Koch, who made a fortune in fossil-fuel-based industries and opposes the Cape Wind project on aesthetic grounds. Koch and others have funded a nonprofit entity named the Alliance to Protect Nantucket Sound (the Alliance), which has reportedly spent more

¹⁴ Mass. Dep’t of Pub. Utils., DPU 10-54, Decision on Petition of Massachusetts Electric Company and Nantucket Electric Company 229 n.181 (Nov. 22, 2010), *available at* www.env.state.ma.us/dpu/docs/electric/10-54/112210dpufnord.pdf.

¹⁵ *Id.* at 190.

¹⁶ See visual simulations contained in a document titled Visual Impact Assessment of Revised Layout on Multiple Historic Properties, *available at* www.boemre.gov/offshore/PDFs/VisualImpactRevised.pdf.

¹⁷ DEP’T OF INTERIOR, BUREAU OF OCEAN ENERGY MGMT., REGULATION & ENFORCEMENT, CAPE WIND ENERGY PROJECT, DRAFT ENVIRONMENTAL IMPACT STATEMENT VOL. 1 5-200 (Jan. 2008), *available at* www.boemre.gov/offshore/renewableenergy/DEIS/Volume%20I%20-%20Cape%20Wind%20DEIS/Cape%20Wind%20DEIS.pdf (ocean fog present approximately 200 days per year) [hereinafter DEIS].

¹⁸ RECORD OF DECISION, *supra* note 8, at 16.

¹⁹ *Id.*

²⁰ *Id.* at 16-25, 72-74.

²¹ Pers. cv. with Greg Watson, Senior Advisor, Clean Energy Technology, Mass. Exec. Office of Energy & Env’tl. Affairs, 2010. Greg Watson is also the Chair of Offshore Wind Energy Collaborative, which studied Cape Wind.

than \$15 million over the last ten years,²² opposed the project in numerous administrative venues, and filed approximately ten different lawsuits – all in its effort to stop the project.²³

The permitting of this project was long, expensive, and gruelingly divisive. As mentioned, Cape Wind sought permits for almost ten years until they were finally issued in 2010. One reason the permitting was so difficult is that Cape Wind was attempting to do something that had never been done before in the United States—construct an offshore wind farm. But as discussed in more detail below, the delay and expense had more to do with the tenacity of the opponents, the multitude of federal laws and permit processes and, until recently, the lack of sufficient resolve of state and federal regulators to make the necessary choices on a timely basis.

The formal permitting of the project began in 2001, when Cape Wind commenced its environmental review under the National Environmental Policy Act (NEPA) and the state version of that law, the Massachusetts Environmental Policy Act (MEPA).²⁴ At that time, the lead federal agency was the Army Corps of Engineers (the Corps), which had permitting authority over the project because it involved the dredging and filling of federal waters under section 404 of the Clean Water Act and the placement of structures under the seabed, which are regulated by the Rivers and Harbors Act.²⁵ Massachusetts recognized early on that its jurisdiction was limited to the electric cables, which would lie in state waters, while the Corps had jurisdiction over both the cables and the wind turbines, which were to be located in federal waters.²⁶ The one important exception to this was the state Office of Coastal Zone Management (CZM), which had the authority under the Coastal Zone Management Act (CZMA)²⁷ to review the impact of the turbines in state waters and determine whether the permitting of the turbines would be consistent with Massachusetts’ “enforceable” policies governing coastal development.²⁸ The role of the CZMA will be

²² Eliza Krigman, *Will The Winds Favor Cape Wind?*, NAT’L J., Feb. 21, 2009, available at nationaljournal.com/magazine/will-the-winds-favor-cape-wind--20090221?mrefid=site_search.

²³ Author Kimmell’s personal observation.

²⁴ National Environmental Policy Act, 42 U.S.C.A. §§ 4321-4370f (Westlaw 2011); Massachusetts Environmental Policy Act, MASS. GEN. LAWS ANN. ch. 30, §§ 61-62I (Westlaw 2011); FEIR CERT., *supra* note 6, at 3.

²⁵ Army Corps of Eng’rs, Cape Wind Energy Project Permit Application Cape Wind Associates, LLC, www.nae.usace.army.mil/projects/ma/capewind.htm (last visited Apr. 10, 2011).

²⁶ FEIR CERT., *supra* note 6, at 4.

²⁷ Coastal Zone Management Act, 16 U.S.C.A. §§ 1451-1466 (Westlaw 2011).

²⁸ FEIR CERT., *supra* note 6, at 2.

discussed in greater detail in Part II of this Article.

One early auspicious sign for the project was that the Massachusetts MEPA office and the Corps initially agreed to conduct a joint environmental review, allowing for coordination of information gathering, public comment periods, and timelines for state and federal agency action.²⁹

However, early on the opponents fought back hard. Among other things, the opponents' allies in Congress began a multi-year process of throwing roadblock after roadblock in the path of Cape Wind's permitting. In the summer of 2002, Senator Kennedy proposed an amendment to an energy bill that would have required a National Academy of Sciences study of renewable energy in the outer continental shelf to be conducted before any offshore facilities could be permitted.³⁰ In 2005, an amendment proposed by Senator John Warner (R-Virginia) to H.R. 1815 (the Defense Reauthorization Bill) called for a study of how wind projects might affect military radar systems,³¹ despite previous studies reportedly having shown it is not a problem.³² If the legislation had passed as amended by Senator Warner, there would have been a moratorium on the Corps' review of all offshore wind projects until the completion of the study. The purported goal of the legislation was to change the process for approving offshore energy projects and prohibit projects from moving forward until Congress established new regulations.³³ Although initially it seemed a curious alliance between Warner and Kennedy, it was eventually revealed that Senator Warner had family and friends with property on Cape Cod.³⁴

In 2006, amendments pertaining to Cape Wind were added to the

²⁹ FEIR CERT., *supra* note 6, at 4.

³⁰ Mandy Locke, *Wind Farm Test Tower Wins Approval*, VINEYARD GAZETTE, Aug. 23, 2002, available at www.mvgazette.com/news/2002/08/23/wind_farm_test_tower.php.

³¹ See generally Energy Efficiency and Renewable Energy Legislation in the 109th Congress, CRS Report for Congress 22 (June 2, 2006), available at fpc.state.gov/documents/organization/68283.pdf.

³² See AWEA Statement on "here we go again," Anti-wind Amendments in Coast Guard and Defense Legislation (Nov. 28, 2005), available at 97.74.195.121/newsroom/releases/AWEA_statement_here_we_go_again_antiwind_112805.html.

³³ Froma Harrop, *Why Liberals are Turning on Ted Kennedy*, REAL CLEAR POLITICS (Sept. 4, 2007), available at www.realclearpolitics.com/articles/2007/09/why_liberals_are_turning_on_te.html; see also Timothy Barmann, *Amendment to Defense Bill Would Stall Cape Wind Project*, THE PROVIDENCE J., Oct. 7, 2004, available at johnrsweet.com/personal/Wind/PDF/WarnerAmendmentArticle-20041007.pdf.

³⁴ *Don Young Makes Sneaky Move to Kill Wind Power Project*, SOUTH COAST TODAY, Feb. 24, 2006, at A14, available at www.southcoasttoday.com/apps/pbcs.dll/article?AID=/20060224/OPINION/302249924&cid=sitesearch; see also Barmann, *supra* note 33.

U.S. Coast Guard Reauthorization Bill in closed-door sessions (after the bills had passed both the full House and Senate, and went to conference to reconcile differences between the House and Senate versions of the bill). One such amendment, proposed by Congressman Don Young (R-Alaska), would have required a 1.5 mile buffer between the turbines and any shipping and ferry routes, despite the fact that “[t]he current rule on offshore oil and gas rigs allows them to be 500 feet from a shipping channel [and the] Cape Wind turbines would be at least 1,500 feet from the main shipping channel through Nantucket Sound.”³⁵ Another amendment, proposed by Senator Ted Stevens (R-Alaska), called for the Coast Guard Commandant to review offshore wind projects for “navigational safety,” despite the fact that the Coast Guard was already consulted on that topic during the NEPA environmental-impact-statement process. Moreover, Senator Stevens proposed language that would have given the Governor of Massachusetts (then Mitt Romney, an opponent of Cape Wind) veto power over the project.³⁶ It was reported that the proposed language had been offered by Senator Stevens at the request of Senator Kennedy.³⁷

While all of these legislative efforts ultimately failed, they added great cost and uncertainty to the project and likely would have achieved their desired objective—inducing Cape Wind’s backers to abandon the project—but for the tenacity and resilience of Jim Gordon, Cape Wind’s CEO.

Despite these legislative efforts, the state and federal agencies continued to make progress in the environmental review of the project.

³⁵ *Id.*; see, e.g., Letter from James S. Gordon to Representative Don Young (Feb. 21, 2006), available at www.capewind.org/downloads/Don_Young_022106.pdf.

³⁶ Ian Fein, *Standoff Ends on Cape Wind*, VINEYARD GAZETTE, July 7, 2006, available at www.mvgazette.com/article.php?3891; Robert Peltier, *Backroom Deals*, POWER MAGAZINE, June 15, 2006, available at www.powermag.com/issues/departments/speaking_of_power/Backroom-deals_512.html; see, e.g., House Report on Coast Guard and Maritime Transportation Act of 2006, §§ 404, 414, H.R. Rep. No. 109-413, at 20-21, 25-26 (2006), reprinted in 2006 U.S.C.C.A.N. 579, available at www.gpo.gov/fdsys/pkg/CRPT-109hrpt413/pdf/CRPT-109hrpt413.pdf.

³⁷ Tina Seeley, *White House Opposes Law Killing Wind-Power Project (Update1)*, BLOOMBERG, (May 5, 2006), available at www.bloomberg.com/apps/news?pid=newsarchive&sid=aS0zVljTeVr0 (noting comments by Cape Wind spokesman, Mark Rodgers); Kevin Dennehy & David Schoetz, *White House Opposes Move to Scrap Cape Wind*, CAPE COD TIMES, May 6, 2006, available at www.capecodonline.com/apps/pbcs.dll/article?AID=/20060506/NEWS01/305069946&cid=sitesearch; *Cape Wind and Pork-Barrel Politics*, THE WASHINGTON TIMES (May 7, 2006), available at www.washingtontimes.com/news/2006/may/7/20060507-094115-8137r/; Glen Johnson, *Romney, Healey, Reilly Criticized on Cape Wind*, SOUTH COAST TODAY, Feb. 25, 2006, at A03, available at www.southcoasttoday.com/apps/pbcs.dll/article?AID=/20060225/NEWS/302259980&cid=sitesearch.

Working cooperatively, the state MEPA office and the Corps prepared a “scope” for the joint draft environmental impact report/environmental impact statement.³⁸ After an extensive public outreach process, Cape Wind was required to assess the project’s impacts on birds, fish and marine life, commercial and recreational fishing, visual effects, noise, and historical/archeological properties.³⁹ Cape Wind was also tasked with identifying alternatives to the project, such as alternative renewable energy technologies, a land-based alternative, a shallow-water alternative in Nantucket Sound, and a deep-water alternative south of Martha’s Vineyard.⁴⁰

By 2004, the project had gained some momentum, as the Corps released a generally favorable draft environmental impact statement (DEIS).⁴¹ The project then encountered significant setbacks.

For some time, opponents of the project had objected on the grounds that there had been no underlying formal planning or leasing process. Cape Wind had simply located a site, staked a flag on it, as it were, and began permitting as if it had the necessary property rights. In response, Congress enacted the Energy Policy Act (EPACT), which created a leasing process for offshore wind in federal waters.⁴² Under EPACT, the Marine Minerals Service (MMS) of the Department of Interior, the federal agency that issues oil and gas leases in the outer continental shelf, would also issue leases for offshore wind energy.⁴³ While this legislation can be deemed a legitimate effort to establish a rational and orderly process for federal permitting of offshore wind facilities, one might also suspect that the legislation was intended to take the permitting authority away from the Corps, which seemed to favor the project at that time and had approved a draft environmental impact report.

³⁸ ARMY CORPS OF ENG’RS, ENVIRONMENTAL IMPACT STATEMENT, SCOPE OF WORK, WIND POWER FACILITY PROPOSED BY CAPE WIND ASSOCIATES, LLC, *available at* www.nae.usace.army.mil/projects/ma/ccwf/windscope.pdf (last visited Apr. 10, 2011). *See generally* 42 U.S.C.A. § 1501.7 (Westlaw 2011), which defines scoping as “an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to the proposed action.”

³⁹ ARMY CORPS OF ENG’RS, *supra* note 38.

⁴⁰ *Id.*

⁴¹ ARMY CORPS OF ENG’RS, CAPE WIND ENERGY PROJECT, DRAFT ENVIRONMENTAL IMPACT STATEMENT, *available at* www.nae.usace.army.mil/projects/ma/ccwf/deis.htm (last visited Apr. 11, 2011).

⁴² Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (Aug. 8, 2005), 42 U.S.C.A. §§ 15801-16538 (Westlaw 2011).

⁴³ For a succinct overview of this statutory change, see Final Rule, Department of the Interior, Renewable Energy and Alternate Uses of Existing Facilities on the Outer Continental Shelf, 74 Fed. Reg. 19,638-39 (Apr. 29, 2009).

Although EPACT provided a limited “grandfathering” for Cape Wind, the project essentially had to start the federal permitting process all over.⁴⁴ The MMS decided not to accept the DEIS that had been prepared by the Corps and to draft its own report instead.⁴⁵ This alone delayed the project for several years.

In the meantime, state permitting of the project encountered heavy resistance led by Governor Romney. On one occasion, Governor Romney orchestrated a highly publicized press conference on a Cape Cod beach, during which he vowed to stop the project.⁴⁶

Under Massachusetts state law, the Energy Facilities Siting Board (the Siting Board) has jurisdiction to permit the cables that would transmit the electricity from the turbines in federal waters through state waters and to the mainland.⁴⁷ Although the Siting Board had routinely approved a number of undersea electric cable projects before, it was strangely reluctant to approve this one.⁴⁸ Permitting of the Cape Wind cables, which even the project opponents conceded would have no significant adverse environmental impacts, ultimately took over three years.⁴⁹

The cables were also met with another legal obstacle: Massachusetts tidelands law. The Massachusetts Department of Environmental Protection’s ambiguous regulations were interpreted to mean that the electric cables were not a “water-dependent” use.⁵⁰ This spelled trouble, because the Department’s regulations disallowed licenses for uses in

⁴⁴ Dep’t of Interior, Minerals Management Service (now Bureau of Ocean Energy Management, Regulation and Enforcement) Office of Public Affairs, Efforts to Reach a Decision on the Cape Wind Energy Project, *available at* www.doi.gov/news/doinews/upload/Fact-Sheet-Cape-Wind-with-SOL-edits-04-28-10.pdf (last visited Apr. 11, 2011). *See generally* the Saving Provision of the Energy Policy Act of 2005, Pub. L. 109-58, 119 Stat. 594, 747 (providing that nothing in the Act “requires the resubmittal of any document that was previously submitted or the reauthorization of any action that was previously authorized with respect to a project for which, before the date of enactment of this Act – (1) an offshore test facility has been constructed; or (2) a request for a proposal has been issued by a public authority.”). Cape Wind was “grandfathered” to the extent that it was not required to resubmit previously submitted documents; however, it was required to submit additional documentation and endure additional scrutiny under an expanded federal review.

⁴⁵ Dep’t of Interior, *supra* note 44.

⁴⁶ Walter Brooks, *Run, Romney Run*, CAPECODTODAY.COM (Mar. 19, 2005), *available at* www.capecodtoday.com/modules.php?op=modload&name=News&file=article&sid=095.

⁴⁷ MASS. GEN. LAWS ANN. ch. 164 § 69J (Westlaw 2011).

⁴⁸ Author Kimmell’s personal observation.

⁴⁹ Mass. Energy Facilities Siting Bd., EFSB 02-2, Final Decision on the Matter of the Petition of Cape Wind Associates, LLC and Commonwealth Electric Company d/b/a NSTAR Electric for Approval to Construct Two 115 kV Electric Transmission Lines (May 11, 2005), *available at* www.mass.gov/Eoca/docs/dte/siting/efsb02-2/cwfp1-67.pdf.

⁵⁰ 310 MASS. CODE REGS. 9.12(1)(b) (Westlaw 2011).

submerged tidelands unless the uses were water-dependent.⁵¹ In order to obtain a license, Cape Wind would need a variance which is time-consuming and difficult to obtain.⁵²

By 2005, the project faced a highly uncertain future. However, in 2006 when Deval Patrick was elected Governor of Massachusetts, the tide shifted back in favor of the project. As a candidate, Patrick had backed the Cape Wind project.⁵³ And as Governor, he appointed Ian Bowles, a strong clean-energy supporter, as his Secretary of the Executive Office of Energy and Environmental Affairs.⁵⁴

The election results fundamentally changed the landscape of the state-level permitting process. In March 2007, Massachusetts approved the final environmental impact report,⁵⁵ which then allowed the state's permitting agencies to issue permits for the cables. In 2008, the state revised its tideland regulations to specify that electric cables that connect to offshore wind turbines are water-dependent and therefore licensable under state tidelands law.⁵⁶

However, the project then ran into interference from the Cape Cod Commission (Commission), a regional planning agency that shared jurisdiction over the electric cables with the state. The Commission was clearly reluctant to approve Cape Wind's electric cables, even though they were functionally indistinguishable from other cables in Nantucket Sound that bring electricity to the islands of Nantucket and Martha's Vineyard.⁵⁷ Rather than deny the cables outright, the Commission demanded extensive additional information, including information on the wind turbines themselves, despite the fact that the turbines were outside of the Commission's jurisdiction.⁵⁸ The Commission also balked at making a decision until the federal environmental review was completed even though that review was focused on the turbines outside of the

⁵¹ 310 MASS. CODE REGS. 9.32(1)(a)2 (Westlaw 2011).

⁵² 310 MASS. CODE REGS. 9.21 (Westlaw 2011).

⁵³ See, e.g., Deval Patrick, Democrat for Governor, *Moving Massachusetts Forward, Energy Independence and Environmental Stewardship* (Oct. 18, 2005), available at [mehrco.web.officelive.com/Documents/Deval Patrick on municipal utilities.pdf](http://mehrco.web.officelive.com/Documents/Deval_Patrick_on_municipal_utilities.pdf); Jack Coleman, *Deval Patrick to Endorse Cape Wind*, CAPE COD TODAY, Oct. 17, 2005, available at www.capecodtoday.com/news259.htm.

⁵⁴ See, e.g., *Official Patrick Administration Cabinet Announcement*, THE BOSTON GLOBE, Dec. 15, 2006, available at www.boston.com/news/globe/city_region/breaking_news/2006/12/official_patric_1.html#.

⁵⁵ FEIR CERT., *supra* note 6.

⁵⁶ 310 MASS. CODE REGS. 9.12(b) (Westlaw 2011).

⁵⁷ Author Kimmell's personal observation.

⁵⁸ *Id.*

Commission's jurisdiction.⁵⁹ When Cape Wind refused to further extend the timeline to allow for this additional review, the Commission denied a permit for the cables.⁶⁰

The project proponents had recourse. Under a law enacted amidst the energy crisis of the early 1970's, the Massachusetts Energy Facilities Siting Board had the authority to "override" local denial of an energy facility permit and issue a composite permit that covered all the necessary approvals under state law.⁶¹ The Siting Board—the same agency that under Governor Romney had delayed issuing an approval for the electric cables for three years —issued a decision in 2009 overriding the Commission's rejection of the project.⁶²

The permitting at the federal level, however, remained a serious obstacle. Although the Cape Wind environmental impact reports dealt comprehensively with the issues and demonstrated that Horseshoe Shoals was the superior site, federal permitting was delayed for another eighteen months due to an expansive historic review process under section 106 of the National Historic Preservation Act.⁶³

Section 106 provides that when a federal action may have a significant adverse effect on properties that are listed or eligible for listing on the National Historic Register, the federal permitting agency (here, the MMS) has to consider the effect of the federal action on such properties. The agency must also consult with the State Historic Preservation Officer (SHPO) and others whose properties may be affected.⁶⁴

During the environmental review process, Cape Wind evaluated the potential historic impacts of the project as required by state and federal authorities. Cape Wind identified twenty-eight properties of historic significance along south-facing beaches of Cape Cod and areas in Martha's Vineyard and Nantucket with potential views of the project; and then the Minerals Management Service added a twenty-ninth property.⁶⁵ Cape Wind simulated the views of the turbines from locations

⁵⁹ *Id.*

⁶⁰ Decision of the Cape Cod Commission, Oct. 18, 2007, Development of Regional Impact, Project JR 20084.

⁶¹ MASS. GEN. LAWS ANN. ch. 164, § 69K (Westlaw 2011).

⁶² Final Decision, EFSB 07-08.

⁶³ 16 U.S.C.A. § 470 (Westlaw 2011).

⁶⁴ 16 U.S.C.A. §§ 470(a), (f) (Westlaw 2011).

⁶⁵ DEP'T OF INTERIOR, MINERALS MANAGEMENT SERVICE (NOW BUREAU OF OCEAN ENERGY MANAGEMENT, REGULATION AND ENFORCEMENT), DOCUMENTATION OF SECTION 106 FINDING OF ADVERSE EFFECT 30, tbl.4.1 (Brandi M. Carrier Jones ed., 2008), available at www.boemre.gov/offshore/RenewableEnergy/PDFs/FAE_Final.pdf.

representative of these properties.⁶⁶ In general, the simulations showed that on a very clear day, the turbines would be visible at the edge of the horizon from the coastal locations on Cape Cod approximately five miles away, slightly visible from Martha's Vineyard locations (nine miles) and even less visible from Nantucket (thirteen miles).⁶⁷ Although it did not make sense to move the project to another location to mitigate this impact since Horseshoe Shoals was otherwise deemed to be the best site, Cape Wind did make efforts to mitigate the impact by reducing the number of turbines from 170 to 130. It also modified the location to increase the distance from certain historic sites (among them, the Kennedy compound in Hyannis).⁶⁸

Late in the historic consultation process, a new obstacle was thrown in Cape Wind's path. In 2009, the Mashpee Wampanoag Tribe and the Wampanoag Tribe of Gay Head petitioned the MMS to find that *all* of Nantucket Sound—a 600-square-mile water body—be deemed eligible for listing on the National Register of Historic Properties as a “traditional cultural property.”⁶⁹ The tribes contended that they participated in “sunrise ceremonies” in which they viewed the sunrise to the east, and listing all of Nantucket Sound on the Register would protect their ceremonial views from Cape Wind's turbines.⁷⁰

The MMS rejected this claim, finding that Nantucket Sound met none of the criteria for listing. The MMS noted that Cape Wind had performed an extensive archeological search of the seabed and found no artifacts or other evidence of human habitation. The MMS also cited published guidance from the National Register discouraging the listing of water bodies, because they typically lack defined boundaries and tight connection to a specific cultural practice. Moreover, the MMS found that Nantucket Sound itself was not a sacred site; rather, it was the viewshed from tribal land *over* the sound that was important. However, that view had been studied during the environmental review process and could be addressed without listing all of Nantucket Sound on the National Register.⁷¹

⁶⁶ *Id.* at 10-24.

⁶⁷ *Id.* at 3, fig.2.1 (visual simulations included in the environmental impact statement).

⁶⁸ Press Release, Dept. of the Interior, Secretary Salazar Announces Approval of Cape Wind Energy Project on Outer Continental Shelf off Massachusetts (Apr. 28, 2010), *available at* www.doi.gov/news/doinews/Secretary-Salazar-Announces-Approval-of-Cape-Wind-Energy-Project-on-Outer-Continental-Shelf-off-Massachusetts.cfm.

⁶⁹ Mashpee Wampanoag Tribe 2009-RES-022, Horseshoe Shoal Resolution; Letter from Wampanoag Tribe of Gay Head to National Park Service (Sept. 17, 2009).

⁷⁰ *Id.*

⁷¹ DEP'T OF INTERIOR, MINERALS MANAGEMENT SERVICE (NOW BUREAU OF OCEAN

The Massachusetts SHPO, who is not appointed by the Governor, appealed the MMS's determination to the Keeper of the National Register. The SHPO argued that all of Nantucket Sound should be listed on the register. While noting that no archeological remains had been found, the SHPO claimed that this did not matter, because Nantucket Sound had once been dry land and it could be expected that "Native Americans would have occupied the exposed lands."⁷²

In a highly unusual move, the Keeper of the National Register accepted the theories of the SHPO, overturned the findings of the MMS, and found that all of Nantucket Sound was eligible for listing as a traditional cultural property on the National Register.⁷³

This decision emboldened the project opponents. The consultation process came to an impasse when the Wampanoag tribes and the SHPO refused to engage in a discussion about mitigation and instead insisted that the project start the permitting from scratch at a different location.⁷⁴ The impasse required Secretary of Interior, Kenneth Salazar, to refer the matter to the Advisory Council on Historic Preservation for a recommendation before MMS could issue a decision.

In April 2010, the Advisory Council issued its decision, recommending that the Secretary deny approval of the project.⁷⁵ The Advisory Council opined that views from the twenty-eight historic properties would be harmed, because people viewing these sites would see turbines on a very clear day at the edge of the horizon.⁷⁶ The Council further feared that installing the foundations in the seabed could harm archeological remains, notwithstanding the fact that none had been found at the project site. Additionally, the Council credited the tribes' claim that the wind turbines would mar sunrise ceremonies.⁷⁷

The Advisory Council's letter was met with a well-coordinated and politically powerful response. The governors of six coastal states (Massachusetts, Rhode Island, New York, New Jersey, Maryland and

ENERGY MANAGEMENT, REGULATION AND ENFORCEMENT), NATIONAL REGISTER OF HISTORIC PLACES DETERMINATION OF ELIGIBILITY NOTIFICATION FOR NANTUCKET SOUNDS (Oct. 9, 2009).

⁷² Letter from Brona Simon to Christopher Horrell, at 1 (Nov. 5, 2009). The SHPO also relied on the tribe's history of using the Sound for fishing and navigation, and tribal legends of a giant named Maushop, who was said to have created islands within Nantucket Sound and caused ocean fog with his pipe.

⁷³ DEP'T OF INTERIOR, NATIONAL PARK SERVICE, NATIONAL REGISTER OF HISTORIC PLACES DETERMINATION OF ELIGIBILITY NOTIFICATION FOR NANTUCKET SOUND (Jan. 4, 2010), *available at* www.capecodonline.com/static/pdf/nantucketsound.pdf.

⁷⁴ Author Kimmell's personal observation.

⁷⁵ www.scribd.com/doc/29625545/Cape-Wind-Comments-by-ACHP.

⁷⁶ *Id.*

⁷⁷ *Id.*

Delaware), all of which were entertaining proposals for offshore wind farms, wrote Secretary Salazar to urge rejection of the Council's approach.⁷⁸ The governors stated, "If the [Council's] approach to historic preservation is adopted, it would establish a precedent that will make it difficult, if not impossible, to site offshore wind projects anywhere along the eastern seaboard."⁷⁹ The governors argued that historic protection typically involves preventing the destruction of a historic building, or building a new structure in a historic district that is discordant with the history.⁸⁰ Here, however, the Council was calling for the rejection of Cape Wind not to protect historic buildings or districts, but to protect against views of the wind farm many miles away.

In April 2010, Secretary Salazar rejected the Council's recommendation and issued a Record of Decision⁸¹ that cleared the way for the final permits to be issued in late 2010. At a press conference, when asked to identify the most important consideration to his decision, Secretary Salazar cited the letter from the six governors.⁸²

Once the permitting was completed, the inevitable lawsuits from project opponents followed. The Alliance to Protect Nantucket Sound filed numerous suits challenging the state approvals. Ultimately, the Alliance lost each suit, the state approvals have been affirmed, and all of the lawsuits dismissed.⁸³ The Alliance also has filed numerous suits in federal court challenging approvals by the MMS.⁸⁴ Those suits are still pending.

To summarize: Cape Wind first sought its permits in 2001. It took almost ten years before the permits were finally issued in late 2010. During that time, state regulators were reluctant to permit an otherwise routine electric cable, the federal permitting process changed midstream, and Cape Wind was essentially required to restart the permitting process from scratch. Along the way, numerous attempts were made to kill the project legislatively and through litigation. And several federal agencies assisted the project opponents in delaying and almost derailing the project with unprecedented and expansive notions of historical

⁷⁸ Letter from Governors of Atlantic Coastal States to Ken Salazar, Secretary, Dep't of Interior (Apr. 23, 2010), *available at* multimedia2.heraldinteractive.com/misc/GovernorsLetter.pdf.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ DEP'T OF INTERIOR, MINERALS MGMT. SERV., RECORD OF DECISION, CAPE WIND ENERGY PROJECT, HORSESHOE SHOAL, NANTUCKET SOUND, (April 28, 2010), *available at* www.boemre.gov/offshore/renewableenergy/PDFs/CapeWindROD.pdf.

⁸² Author Kimmell's personal observation.

⁸³ *Id.*

⁸⁴ *Id.*

protection.

C. REFORMING THE PERMITTING PROCESS

The Cape Wind saga reveals that the current permitting process for offshore wind energy projects is broken. If the nation is serious about developing offshore wind energy projects along its coasts, Congress must advance reform.

One place to look for inspiration, ironically, is Massachusetts. Despite its reputation for long and protracted siting battles, Massachusetts has instituted two major reforms that could serve as models for federal reform of offshore wind-project permitting.

The first model reform is a “one-stop permitting” law that enables the State Energy Facilities Siting Board to issue a single permit and eliminates the need for any additional state or local permits.⁸⁵ Enacted during the energy crisis of the early 1970’s, this law ensures that state and local agencies do not block power plants and infrastructure needed for a reliable energy supply. The law allows the Siting Board to step in when an energy project proponent is denied a necessary permit or experiences significant delays, including those caused by litigation.⁸⁶ The Siting Board has broad representation: it is composed of the Executive Office of Energy and Environmental Affairs, the Department of Environmental Protection, the Department of Energy Resources, the Department of Public Utilities, and three citizen members representing labor, environmental, and consumer interests.⁸⁷ It has wide jurisdiction and can review all of the various impacts of energy facilities that would be examined by state or local permitting agencies. It may also receive the input of all state and local agencies that would otherwise be called upon to grant permits.⁸⁸ This authority ensures that all issues and all possible objections are heard once, rather than multiple times by multiple agencies. And unlike with most permits issued by state agencies, the appeals process is streamlined. Indeed, there is but one appeal of a Siting Board approval, which goes directly to the state Supreme Judicial Court.⁸⁹

As noted above, this law was crucial to the success of Cape Wind’s permitting on the state level, because it ensured that the permitting of the

⁸⁵ MASS. GEN. LAWS ANN. ch. 164, § 69K (Westlaw 2011).

⁸⁶ *Id.*

⁸⁷ MASS. GEN. LAWS ANN. ch. 164 § 69H (Westlaw 2011).

⁸⁸ MASS. GEN. LAWS ANN. ch. 164, §§ 69N, 69O (Westlaw 2011).

⁸⁹ MASS. GEN. LAWS ANN. ch. 164 § 69P (Westlaw 2011).

electric cables would not get bogged down in other state and local level permitting, or be delayed by judicial appeals of such permit decisions. Had this law not been in place, it is likely that Cape Wind would still be in litigation with the Cape Cod Commission over its denial of the electric cables and would be defending the license issued by the Department of Environmental Protection allowing the cables to be placed in Massachusetts' tidelands.

There is no comparable "one-stop permitting" option for offshore wind projects available at the federal level. While the EPACT established that the MMS (now referred to as the Bureau of Ocean Energy Management, Regulation, and Enforcement, or BOEMRE) plays the leading-agency role for issuance of an offshore lease, numerous other federal agencies such as the Army Corps of Engineers, Environmental Protection Agency, Federal Aviation Administration, and the Coast Guard will still need to issue separate approvals for the project. Federal agencies, including the U.S. Fish and Wildlife Service, National Park Service, and the Advisory Council on Historic Preservation, will also play significant "consultative" roles. Rather than having the appeals of the permits lodged in one court, federal law provides for multiple appeals in various federal courts that will have to be resolved before the project can finally proceed. This multiplicity of permitting and consultative agencies, and numerous potential judicial appeals, is a formula for delay, confusion, redundancy, and inconsistency. In short, it is a boon for the forces of inertia.

A second key reform in Massachusetts occurred after Cape Wind entered the scene. Some objected to Cape Wind's proposal because there was no planning process that preceded the project. Instead, as noted, Cape Wind essentially staked out its ground and then requested permits.

To reform this so-called "ad hoc" approach, the Massachusetts legislature passed the Oceans Act of 2008.⁹⁰ The Act directed the Secretary of Energy and Environmental Affairs to prepare an ocean plan to govern the uses of Massachusetts' coastal waters.⁹¹ Among other things, the Act allowed for offshore wind facilities to be constructed in Massachusetts waters, provided they are of "appropriate scale" and are consistent with the plan.⁹²

⁹⁰ 2008 Mass. Acts 114.

⁹¹ MASS. GEN. LAWS ANN. ch. 21A § 4C (Westlaw 2011).

⁹² MASS. GEN. LAWS ANN. ch. 132A § 15(2)(b) (Westlaw 2011); *see, e.g.*, Press Release, Mass. Exec. Office of Energy & Env'tl. Affairs, Patrick Administration Releases Final Blueprint for Managing Development in State Waters (Jan. 4, 2010), *available at* www.mass.gov/?pageID=eoeepressrelease&L=1&L0=Home&sid=Eoeea&b=pressrelease&f=100104_pr_ocean_plan&csid=Eoeea ("Under the Ocean Act and the ocean management plan, the concept

To devise the plan, the Secretary empanelled two stakeholder advisory groups, held approximately eighty public hearings in coastal communities, and collected extensive data on the current uses of the coastal waters. In addition, the Secretary identified areas containing important commercial and recreational fisheries, significant marine mammal habitats, navigational channels and rare bird habitats.⁹³ All of this data was layered in GIS mapping systems that graphically depicted the areas where offshore wind turbines should not be located so as to avoid conflict with competing uses. The mapping revealed that there were two large areas not encumbered by these incompatible uses; an area southwest of Martha's Vineyard, and an area to the west of the small town of Gosnold.⁹⁴ The plan provides that a commercial-scale offshore wind facility is "presumptively" appropriate in these areas and entitled to state permits.⁹⁵ While any project in these areas would still need to obtain state and local permits, the permits would be a mechanism to impose conditions upon the use, rather than deny it altogether.⁹⁶ In essence, the ocean plan is akin to the zoning of coastal waters, such that the designation of certain areas within the coastal waters creates "zones" where wind energy can be pursued as of right (e.g., without the need for a permit or variance).⁹⁷

The advantages of a planning/zoning model over ad hoc permitting are manifest. The planning/zoning process is deliberate and involves the public in decision-making. The process encourages the examination of a wide range of alternative sites and is designed to select the best locations. Once the best locations are selected, the developer is assured of a

of 'appropriate scale' includes such factors as protecting interests associated with fishing, fowling and navigation; insuring public safety; and minimizing incompatibility with existing uses and visual impacts."); *see also* Massachusetts Ocean Management Plan, ch. 2, tbl.2-2 (Dec. 2009) (providing a list of factors to be used by regional planning authorities in defining the "appropriate scale" of a proposed wind energy project).

⁹³ Ian Bowles, Sec'y, Mass. Exec. Office of Energy & Env'tl. Affairs, Cover Letter to Final Massachusetts Ocean Plan (Dec. 31, 2009), *available at* www.env.state.ma.us/eea/mop/final-v1/v1-front.pdf.

⁹⁴ MASS. EXEC. OFFICE OF ENERGY & ENVTL. AFFAIRS, MASSACHUSETTS OCEAN MANAGEMENT PLAN 2-1 to 2-3, Figure 2-1 (Dec. 2009), *available at* www.env.state.ma.us/eea/mop/final-v1/v1-complete.pdf.

⁹⁵ MASS. EXEC. OFFICE OF ENERGY & ENVTL. AFFAIRS, MASSACHUSETTS OCEAN MANAGEMENT PLAN 2-1 through 2-3 (Dec. 2009), *available at* www.env.state.ma.us/eea/mop/final-v1/v1-complete.pdf; *see also* MASS. GEN. LAWS ANN. ch. 132A § 18 (Westlaw 2011) (once the plan is issued, all permitting must be consistent with the plan).

⁹⁶ MASS. EXEC. OFFICE OF ENERGY & ENVTL. AFFAIRS, MASSACHUSETTS OCEAN MANAGEMENT PLAN 2-2 (Dec. 2009), *available at* www.env.state.ma.us/eea/mop/final-v1/v1-complete.pdf.

⁹⁷ *See, e.g.*, Massachusetts Ocean Management Plan, ch. 2.

predictable outcome.

The federal government's process, in contrast, is still driven by the project proponent's individual choice of sites. While there is now a leasing process administered by BOEMRE, the primary function of BOEMRE is to select a lessee that offers the best financial bid.⁹⁸ There is no statutory ocean planning authority under federal law with an agency empowered to make zoning/planning designations of appropriate sites for offshore wind projects. Nor is there any process to assure developers that if they select certain sites and abide by known performance standards, they will receive a permit.⁹⁹

Thus, the Cape Wind experience both highlights the need for reform and provides models for the types of reform that are needed.

III. STATE VERSUS FEDERAL JURISDICTION – A COMPLEX ISSUE

*The sea is no one's private property; rather it is a commons that belongs to all the people, through ownership by the respective coastal States extending three miles from shore.*¹⁰⁰

Future proposals for offshore energy projects will likely trigger both federal and state jurisdiction. As was the case with Cape Wind, even where a turbine installation is located in federal waters, invariably the power will need to be brought to shore via transmission lines running through state waters. When this happens, determining jurisdiction over the project and its corresponding permitting requirements can be challenging. Again, Cape Wind's experience with this arduous process is instructive. This section provides an overview of the statutory and common-law framework governing offshore wind projects, and it analyzes how the jurisdictional issues regarding Cape Wind were resolved by the federal and state courts.

⁹⁸ Final Rule, Department of the Interior, Renewable Energy and Alternate Uses of Existing Facilities on the Outer Continental Shelf, 74 Fed. Reg. 19,638-39 (Apr. 29, 2009).

⁹⁹ However, President Obama has issued an executive order to establish ocean planning similar to Massachusetts' ocean plan. Jim Tankersley, *Obama to Launch Ocean Initiative*, L.A. TIMES, July 19, 2010, available at articles.latimes.com/2010/jul/19/nation/la-na-obama-ocean-20100719. It remains to be seen what, if any, regulatory significance will attach to this plan, once completed.

¹⁰⁰ Mass. Office of Coastal Zone Mgmt., *The Ocean as a Public Trust Resource*, available at www.mass.gov/czm/oceanmanagement/waves_of_change/pdf/trpt.pdf (last visited Apr. 11, 2011).

A. STATE AND FEDERAL JURISDICTION OVER THE OCEAN

i. *Federal Statutory Authority*

The Submerged Lands Act (SLA) of 1953¹⁰¹ was enacted in response to a U.S. Supreme Court case that had transferred land historically under the control of states into the hands of the federal government. Resolution of the dispute would determine who had title to coastal lands containing valuable oil and mineral deposits. In *United States v. California* (1947), the Court adopted the federal government's view that its responsibility for national defense and international relations concerns gave rise to title that was paramount to the rights of California to the underwater lands located three miles seaward of its shoreline.¹⁰² Congress objected to the Supreme Court's interpretation of coastal rights and passed the SLA to affirm the states' full title to the seabed (i.e., "lands beneath navigable waters") within three geographical miles of their shores.¹⁰³

Pressure for oil and gas exploration rights was also the impetus for passage of the Outer Continental Shelf Lands Act (OCSLA).¹⁰⁴ The OCSLA defines the bounds of federal waters beyond the three-mile SLA zone.¹⁰⁵ It makes the Constitution, laws, and civil and political jurisdiction of the United States fully applicable to the Outer Continental Shelf (OCS) and establishes national rules for the leasing and development of natural resources in the seabed outside of state territory. The OCSLA also provides a federal cause of action for any person aggrieved by a violation of those rules and vests jurisdiction to hear such cases in the federal district courts.¹⁰⁶

ii. *Federal Litigation*

In 2002, members of the Alliance to Protect Nantucket Sound, through *Ten Taxpayers*,¹⁰⁷ sued Cape Wind in state court claiming that it had failed to obtain necessary state permits before erecting a data

¹⁰¹ 43 U.S.C.A. § 1301 et seq. (Westlaw 2011).

¹⁰² *United States v. California*, 332 U.S. 19 (1947).

¹⁰³ 43 U.S.C.A. §§ 1301, 1311, 1312 (Westlaw 2011) (with few exceptions).

¹⁰⁴ 43 U.S.C.A. § 1331 et seq. (Westlaw 2011).

¹⁰⁵ 43 U.S.C.A. § 1331(a) (Westlaw 2011).

¹⁰⁶ 43 U.S.C.A. §§ 1333(a)(1), 1337, 1349(a)(1), (b) (Westlaw 2011).

¹⁰⁷ *Ten Taxpayers Citizen Grp. v. Cape Wind Assocs., LLC*, 278 F. Supp. 2d 98 (D. Mass. 2003).

collection tower in Nantucket Sound, and seeking an injunction to prevent construction of the data tower. Cape Wind removed the case to federal court on the basis of federal question jurisdiction, and the *Ten Taxpayers* plaintiffs moved to remand. They claimed that state jurisdiction relied on authority granted to Massachusetts under federally delegated power to regulate fisheries and fish habitats through the Magnuson-Stevens Act, which requires state approval for structures erected in the Nantucket Sound seabed. They further contended that this authority applied broadly and included any activity that affected fishing in Nantucket Sound. Cape Wind filed a motion to dismiss, attaching two letters from the Massachusetts Department of Environmental Management (the agency possessing the relevant regulatory authority) in which the agency *disclaimed* authority over activities in Horseshoe Shoals, and arguing that the *Ten Taxpayers* plaintiffs lacked standing to assert authority on behalf of the state. On August 19, 2003, the district court granted Cape Wind's motion, holding that although Congress had delegated authority to regulate fisheries in Nantucket Sound to Massachusetts, it was a specific grant of authority and not general regulatory authority over all "environmental disturbances that could impact fishing."¹⁰⁸ No state permits were required where there was no state authority to permit the data tower.

On appeal, the *Ten Taxpayers* plaintiffs argued that there was a lack of subject matter jurisdiction, so the district court should have remanded, and they also appealed the dismissal of their complaint.

The First Circuit decided the appeal in 2004. The court noted that "[t]his case implicates the complex and rather obscure body of law that divides regulatory authority over Nantucket Sound between the state and federal governments."¹⁰⁹ The court recounted the legislative and adjudicatory history that established the jurisdictional divide as it stands today, noting that the OCSLA represents "a sweeping assertion of federal supremacy over the submerged lands outside the three-mile SLA boundary," and that subsequent case law has confirmed this authority.¹¹⁰

In 1976, the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) established that "exclusive fishery management authority" in the OCS rests with the federal

¹⁰⁸ *Ten Taxpayers*, 278 F. Supp. 2d at 101.

¹⁰⁹ *Ten Taxpayer Citizens Grp. v. Cape Wind Assocs., LLC*, 373 F.3d 183 (1st Cir. 2004).

¹¹⁰ *Id.* at 188; *see also* *United States v. Maine*, 420 U.S. 515, 522, 524 (1975) ("control and disposition" of the seabed is "the business of the Federal Government rather than the States," and "paramount rights to the offshore seabed inhere in the Federal Government as an incident of national sovereignty").

government.¹¹¹ It also preserved the authority granted to the states to regulate resources, including fisheries, within the three-mile SLA boundary.¹¹² To further complicate matters of jurisdiction, the geography of Nantucket Sound is such that almost the entirety of the Sound (excepting its center portion, which includes Horseshoe Shoals) is encompassed by Massachusetts' three-mile territorial sea.¹¹³

Although it is true that the U.S. Supreme Court has confirmed that the area beyond three miles from any Massachusetts shore is outside the state's jurisdiction,¹¹⁴ Congress also passed legislation that expanded Massachusetts' authority over the *entire* Nantucket Sound for the purposes of the Magnuson-Stevens Act.¹¹⁵ The *Ten Taxpayers* plaintiffs argued that the expanded jurisdiction under the Magnuson-Stevens Act, which allows Massachusetts to regulate fisheries concerns in the entire Nantucket Sound, also gives rise to broader state authority to regulate construction of Cape Wind's data tower in Horseshoe Shoals.¹¹⁶

Relying on language in the OCSLA, the court affirmed federal question jurisdiction in that the OCSLA subsumes all state law (to the extent it is "applicable and not inconsistent") as if it were federal law, to fill in any gaps that may exist in regulating the OCS.¹¹⁷ Therefore, the *Ten Taxpayers* plaintiffs' claims, "though ostensibly premised on Massachusetts law, arise under the 'law of the United States' under § 1333(a)(2)."¹¹⁸ Regarding their substantive claim as to the relevance of Massachusetts regulations to activity in Horseshoe Shoals, the court readily found that there was no basis for such regulation regarding the activity proposed.

In our view, the OCSLA leaves no room for states to require licenses or permits for the erection of structures on the seabed on the outer Continental Shelf. Congress retained for the federal government the exclusive power to authorize or prohibit specific uses of the seabed

¹¹¹ 16 U.S.C.A. § 1811 (Westlaw 2011).

¹¹² 16 U.S.C.A. § 1856(a)(1) (Westlaw 2011).

¹¹³ Nantucket Sound is surrounded on three 'sides' by mainland Massachusetts, Cape Cod, and the islands of Martha's Vineyard and Nantucket. On the remaining side is a channel that connects the Sound to the open ocean and federal waters. Only the area of Horseshoe Shoals—at the deep center of Nantucket Sound—is outside the reach of the three-mile boundary from any of the Massachusetts shorelines that surround it.

¹¹⁴ See *United States v. Maine*, 475 U.S. 89 (1986).

¹¹⁵ 16 U.S.C.A. § 1856(a)(2)(B) (Westlaw 2011).

¹¹⁶ *Ten Taxpayer Citizens Grp. v. Cape Wind Assocs., LLC*, 373 F.3d 183, 190 (1st Cir. 2004).

¹¹⁷ 43 U.S.C.A. § 1333(a)(2) (Westlaw 2011).

¹¹⁸ *Ten Taxpayer*, 373 F.3d at 193.

beyond three miles from shore. If adopted and enforced on the outer Continental Shelf, statutes . . . [that] require the approval of state agencies prior to construction . . . would effectively grant state governments a veto power over the disposition of the national seabed. That result is fundamentally inconsistent with the OCSLA.¹¹⁹

Moreover, the court noted that the regulatory agency with authority for one of the two relevant permitting schemes had specifically disclaimed authority in this case.¹²⁰ The dismissal of plaintiffs' claims was affirmed, with the court holding that "any Massachusetts permit requirement that might apply to [the data tower] is inconsistent with federal law and thus inapplicable on Horseshoe Shoals under the OCSLA."¹²¹ In the end, *Ten Taxpayers* leaves no room for doubt that the federal government maintains exclusive authority for permitting in the OCS.

B. AUTHORITY TO CONSIDER IN-STATE IMPACTS OF FEDERAL ACTIVITY (IN FEDERAL WATERS)

i. *Public Trust*

The Public Trust Doctrine (PTD)¹²² provides that:

[P]ublic trust lands, waters and living resources in a State are held by the State in trust for the benefit of all of the people, and establishes the right of the public to full enjoy public trust lands, waters and living resources for a wide variety of recognized public uses. The doctrine also sets limitations on the States, the public, and private owners, as well as establishing the responsibilities of the States when managing these public trust assets.¹²³

¹¹⁹ *Ten Taxpayer*, 373 F.3d at 196-97 (citations omitted).

¹²⁰ *Id.* at 195.

¹²¹ *Id.* at 197.

¹²² "Under this doctrine, which has evolved from ancient Roman and English common law, governments have an obligation to protect the interests of the general public (as opposed to the narrow interests of specific users or any particular group) in tidelands and in the water column and submerged lands below navigable waters." U.S. Commission on Ocean Policy, *Primer on Ocean Jurisdictions: Drawing Lines in the Water* 41 (pre-publication copy).

¹²³ COASTAL STATES ORGANIZATION, *PUTTING THE PUBLIC TRUST DOCTRINE TO WORK: THE APPLICATION OF THE PUBLIC TRUST DOCTRINE TO THE MANAGEMENT OF LANDS, WATERS AND LIVING RESOURCES OF THE COASTAL STATE I* (2d ed. June 1997), available at media.coastalstates.org/Public%20Trust%20Doctrine%202nd%20Ed%20%201997%20CSO.pdf.

Numerous federal and state cases have reaffirmed the validity of the PTD over time, including the seminal case of *Illinois Cent. R. Co. v. Illinois* (1892), which acknowledged states' rights and responsibilities with respect to their jurisdictional waters and held that no state can divest its duties under the PTD.¹²⁴

Today, the 1900-year-old concept of sovereign ownership of tidelands subject to a public trust is still among the most important and far-reaching doctrines in American property law, for two reasons. First, by virtue of holding public property rights out to the 3-mile limit of the U.S. territorial sea, each coastal state has far greater latitude in protecting societal interests than is generally the case on land, where most property is owned privately and government regulation must operate within the constitutional limits of the so-called "police power." Second, American courts for more than three centuries have reiterated that the trust, as the word implies, is so solemn an obligation of government that it cannot be extinguished, even though title to the lands in question might be conveyed to private parties in certain circumstances.¹²⁵

ii. *Coastal Zone Management Act*

After a California oil spill in 1969, Congress passed a series of federal environmental laws, including NEPA and the CZMA. The CZMA¹²⁶ established that "[t]here is a national interest in the effective management, beneficial use, protection, and development of the coastal zone."¹²⁷ It attempts to balance the competing needs and uses of resources within the coastal zone.¹²⁸ The CZMA also encourages states to use their management planning such that "priority consideration [should be] given to coastal-dependent uses and orderly processes for siting major facilities related to national defense, energy, fisheries development, recreation, [and] ports and transportation," among other things.¹²⁹

A key element of the CZMA and its implementation is the

¹²⁴ *Id.*; *Illinois Cent. R. Co. v. Illinois*, 146 U.S. 387 (1892).

¹²⁵ Dennis Ducsik, Mass. Office of Coastal Zone Mgmt., *The Public Trust Doctrine in Massachusetts Coastal Law* (2008), available at www.mass.gov/czm/coastlines/2008/ebbflow/trust.htm.

¹²⁶ 16 U.S.C.A. § 1451 et seq. (Westlaw 2011).

¹²⁷ 16 U.S.C.A. § 1451(a) (Westlaw 2011).

¹²⁸ 16 U.S.C.A. § 1452(1), (2) (Westlaw 2011).

¹²⁹ 16 U.S.C.A. § 1452(2)(D) (Westlaw 2011).

establishment of “enforceable program policies” by participating states. States’ coastal program policies are “enforceable” because they derive authority from existing state statutes and regulations. With a CZM-approved Coastal Management Plan (CMP), states may consider in-state impacts of federal activities in federal waters and determine whether these activities are consistent with the states’ CMPs through CZM’s consistency review provisions.¹³⁰

The CZMA requires that federal agency activities be consistent with state CMPs. However, the degree to which individual proponents of a project must comply with state coastal policies varies. For example, while the federal government must comply “to the maximum extent practicable,”¹³¹ a private party bears a heavier burden. A federal government agency must prepare a “consistency determination” to demonstrate to a state that it complies with the coastal policy.¹³² However, private applicants for federal license or permit activities,¹³³ applicants for OCSLA Plans,¹³⁴ and applicants for federal financial assistance activities¹³⁵ must *certify* to the affected states that the proposed activities are consistent with the enforceable policies of the state CMP.¹³⁶

At least as to private parties, the CZMA has teeth.¹³⁷ If CZM does not concur with a party’s “consistency certification,” the project cannot obtain permits or licenses from any federal agency.¹³⁸ There are timelines after which applications are presumptively approved,¹³⁹ and the statute contains provisions for appealing to the Secretary of Commerce to override disapproval by a state on the basis that the proposed activity “is consistent with the objectives of [the CZMA] or is otherwise necessary in the interest of national security.”¹⁴⁰ Nevertheless, the CZM

¹³⁰ 16 U.S.C.A. § 1456 et seq. (Westlaw 2011).

¹³¹ 16 U.S.C.A. § 1456(c)(1)(C) (Westlaw 2011).

¹³² *Id.*

¹³³ 16 U.S.C.A. § 1456(c)(3)(A) (Westlaw 2011).

¹³⁴ 16 U.S.C.A. § 1456(c)(3)(B) (Westlaw 2011).

¹³⁵ 16 U.S.C.A. § 1456(d) (Westlaw 2011).

¹³⁶ 16 U.S.C.A. § 1456(c)(3) (Westlaw 2011).

¹³⁷ As of March 2010, there were 141 state appeals of consistency review determinations. Of those, thirty-two were dismissed or overridden by the Secretary of Commerce on procedural grounds, and forty-four were heard. Of the appeals that were heard, the Secretary of Commerce decided to override the state objections in only fourteen cases. *See Appeals to the Secretary of Commerce Under the Coastal Zone Management Act (CZMA) (Mar. 10, 2010)*, available at coastalmanagement.noaa.gov/consistency/media/appealslist.pdf.

¹³⁸ 16 U.S.C.A. § 1456(c)(3)(A) (Westlaw 2011).

¹³⁹ 16 U.S.C.A. § 1456(c)(3)(A), (B)(ii) (Westlaw 2011).

¹⁴⁰ 16 U.S.C.A. § 1456(c)(3)(A), (B)(iii) (Westlaw 2011).

consistency review offers significant potential for states wanting to exert greater control over activities in federal waters that may have impacts on in-state coastal resources.

Although it had been clearly established in *Ten Taxpayers* that the federal government has exclusive permitting authority over Cape Wind's wind farm since it would be located in federal waters, Cape Wind still had to obtain approval for the undersea transmission cables that are necessary to bring the wind energy to the power grid on land.¹⁴¹ As noted previously, the Cape Cod Commission had denied approval of the cables, and Cape Wind applied to the Massachusetts Energy Facilities Siting Board (EFSB)¹⁴² for a certificate of environmental impact and public interest to override the Cape Cod Commission's denial.

The Alliance to Protect Nantucket Sound intervened in the EFSB proceeding. It had no serious objection to the cables, which in all material respects would be identical to several other electric cables that already run from the mainland of Cape Cod to Nantucket and Martha's Vineyard. The Alliance objected to the turbines in federal waters. Having lost the *Ten Taxpayer* litigation, the Alliance did not claim that the Siting Board had jurisdiction *per se* over the turbines. Instead, the Alliance made a subtle and nuanced argument designed to overcome *Ten Taxpayers* using a different strategy. This time, the Alliance claimed that while the Siting Board's jurisdiction was limited to the cable, the Board could, and indeed must, consider the *impacts* of the wind farm on Massachusetts waters. In the Alliance's view, the Board could refuse to permit *the cable* if it concluded that the wind farm itself would cause unacceptable impacts. To bolster this approach, the Alliance filed a motion to expand the scope of the EFSB proceedings to include consideration of the wind farm (or at least the impacts of the wind farm within Massachusetts waters).¹⁴³

Cape Wind and the Conservation Law Foundation, a nonprofit environmental group that supports the project, filed motions to exclude evidence of impacts from the wind farm and confirm that the Siting Board's jurisdiction was over the cable only.¹⁴⁴ Abiding by the state's

¹⁴¹ Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd., 932 N.E.2d 787, 791-92 (Mass. 2010).

¹⁴² EFSB's mandate is "to provide a reliable energy supply for the commonwealth with a minimum impact on the environment at the lowest possible cost." MASS. GEN. LAWS ANN. ch. 164, § 69H (Westlaw 2011).

¹⁴³ Mass. Energy Facilities Siting Bd., EFSB 07-8, Ruling on Motions Re EFSB Jurisdiction Relative to DRI Decisions and on Motions Re Scope of Proceeding 7 (July 28, 2008), *available at* www.capecodtoday.com/downloads/jurisdiction_0728.pdf.

¹⁴⁴ *Id.* at 7-8.

prior decisions during the environmental review, the Siting Board confirmed that its jurisdiction was limited to the cables and that it did not have the authority to review the wind farm.¹⁴⁵ Thus, the Siting Board refused to admit expert testimony from the Alliance on the impacts of the wind farm,¹⁴⁶ and ultimately issued a certificate for the cable. The Alliance appealed to a single justice of the Massachusetts Supreme Judicial Court, and the case was reported to the full bench for disposition.

On appeal, the Alliance challenged the EFSB's decision to issue its omnibus "certificate" on a variety of grounds. The most potent objection was its claim that the Siting Board had abdicated its public trust responsibilities by refusing to consider in-state impacts of the wind farm.¹⁴⁷

The Alliance decried what it saw as a false segmenting of the project into discrete components (e.g., the federal component including the turbines, and the state component as limited to the transmission lines.), challenging EFSB's "'semantic fiction' of a stand-alone 'transmission project.'"¹⁴⁸ They attempted to distinguish *Ten Taxpayers*, arguing that the case did not address a state's authority to consider in-state impacts of the project in federal waters.¹⁴⁹

In a 5-2 decision, the court rejected the Alliance's challenge. The court held that the Siting Board's governing statute limited its review to the project for which the proponent sought a license, in this case, the electric cables. The court also reasoned that if the Board did what the Alliance requested—review the impacts of the wind farm and deny or condition the electric cable on that basis—it would in effect be asserting jurisdiction over the cable, in violation of *Ten Taxpayers*. In other words, the Board would do indirectly (deny the cable a permit and thereby kill the project) what it could not do directly (assert jurisdiction over the wind farm).¹⁵⁰ The court also relied heavily on the fact that the project "has undergone extensive scrutiny by Federal and State agencies."¹⁵¹ The

¹⁴⁵ *Id.* at 9-10.

¹⁴⁶ Mass. Energy Facilities Siting Bd., EFSB 07-8, Final Decision on the Matter of the Petition of Cape Wind Associates, LLC for a Certificate of Environmental Impact and Public Interest 7-8 (May 27, 2009), available at www.env.state.ma.us/dpu/docs/siting/efsb07-8/52709cwford.pdf.

¹⁴⁷ Brief of the Towns of Aquinnah, Chilmark and Edgartown as Amicus [sic] Curiae at 10, *Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd.*, 932 N.E.2d 787 (Mass. 2010) (No. SJC 01596).

¹⁴⁸ *Id.* at 18, 20.

¹⁴⁹ *Id.* at 24, 25.

¹⁵⁰ *Alliance*, 932 N.E.2d at 804-05.

¹⁵¹ *Id.* at 805.

court specifically acknowledged that Cape Wind had been subjected to NEPA review, and that the CZM certified that the entire Cape Wind project will be consistent with Massachusetts' CMP.¹⁵² The CZM certification was particularly relevant, because CZM, a state agency, performed precisely the review that the Alliance claimed was needed—to examine the in-state impacts of the wind farm to ensure that the wind farm was consistent with the state's protective laws.

In a searing dissent, then-Chief Justice Marshall expressed her disagreement with the court's ruling regarding public trust matters, noting that a "wind farm today may be a drilling rig or nuclear power plant tomorrow."¹⁵³ She expressed concern about the broader precedent of undermining the state's public trust obligations and argued that a more thorough consideration of in-state impacts would not necessarily be preempted by federal law ("Comity within our Federal system has more meaning than the court's crabbed approach").¹⁵⁴ Finally, overlooking the crucial role that CZM played in assessing the impact of the wind turbines on state waters, Justice Marshall contended that the court's decision casts the public trust doctrine and government energy policy in opposition and "exalts regulatory expediency at the cost of fiduciary obligation."¹⁵⁵

While the jurisdictional issue was a close call, as reflected by the divided court, the majority had the better argument when one considers the overriding federal interest in developing offshore wind energy. It serves public policy goals for wind facilities to be located as far offshore as possible to avoid interfering with near-shore uses of water bodies and arousing public opposition. This means locating wind facilities in federal waters, more than three miles from shore. Every such facility will require a cable through state waters to transmit the electricity. Were Justice Marshall's opinion accepted by the majority, every state could use its permitting authority over the electric cable as an indirect means of blocking a wind farm in federal waters. This would be akin to giving each state a veto over its respective segment of a national highway or an interstate gas pipeline. The result would inevitably thwart the national goal of developing offshore wind as an alternative energy source. In contrast, the majority opinion does not hand the state an indirect veto over wind farms in federal waters. However, states still have a significant say, both as participants in the federal environmental review process and

¹⁵² *Id.*

¹⁵³ *Id.* at 816 (Marshall, C.J., dissenting).

¹⁵⁴ *Id.* at 823-24.

¹⁵⁵ *Id.* at 824.

through their coastal zone management authorities. Those authorities can deny a consistency certification, subject to the authority of the Secretary of Commerce to overturn such decisions when significant national interests are implicated.

IV. CONCLUSION

As of the date of this writing, Cape Wind's prospects look favorable. All of the federal and state permits have been acquired, though the former are currently on appeal. Cape Wind has signed a contract to sell half of its output to a Massachusetts utility company and is actively seeking buyers for the other half of the electricity. Thus, notwithstanding all of the legislative obstacles, permitting delays, and litigation, Cape Wind is moving closer to construction. However, its apparent success is in spite of, not because of, our laws and regulatory processes. The Cape Wind experience, while helpful in resolving certain issues (such as the allocation of jurisdiction between state and federal authorities), clearly illustrates the need for significant reform if we are to have a robust offshore wind energy industry.