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Congress, the Courts, and the Army Corps: Siting the First Offshore Wind Farm in the United States

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CONGRESS, THE COURTS, AND THE ARMY CORPS: SITING THE FIRST OFFSHORE WIND FARM IN THE UNITED STATES

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Abstract: Once considered an issue only for environmentalists, renewable energy has entered the mainstream dialogue as fears of climate change, acid rain, and dependence on foreign sources of fuel become more prevalent. There is now broad support for adding renewable energy, including wind power, into our nation's fuel mix. Technological advances have allowed wind power to compete with traditional fossil fuels and lessen other potentially harmful impacts. Land-based wind power is widespread globally, and offshore wind facilities have been operating in Europe for over a decade. While there are currently several proposals for large-scale offshore wind farms in the United States, no such facilities have been sited to date. An intense legal controversy has emerged, stemming from a proposal to site a wind farm off the coast of Massachusetts. The outcome of this dispute will have important consequences for future proposals for offshore wind farms.

INTRODUCTION

Scientists, policy analysts, and the public have long debated the potentially devastating impacts of traditional fossil fuels on our environment and our economy. Fears of global climate change, acid rain, health impacts, and lately reliance on foreign sources of fuel have dominated national headlines. In recent years, the winds of change have redirected the dialogue on energy policy, focusing attention on the benefits of renewable energy. Wind energy has stirred the air, generating a heated debate over the merits and drawbacks of alternatives to fossil fuels.

Until recently, the term renewable energy was found only in the lexicon of environmentalists, a throwback to the 1970s when oil prices resulted in long lines at the gas station. Yet there is now strong, broad-based support for including renewable energy in our nation's fuel

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mix.[1] Wind energy—the world's fastest growing energy resource—leads the way towards less reliance on fossil fuels.[2] In spite of its tremendous benefits, however, wind is not a holy grail, and the possibility of offshore wind farms has sparked a controversy that has captured much of the nation's attention.[3]

Historically, wind power in the United States has been land-based, often located in remote, underutilized locations.[4] In the last few years, however, there have been a number of proposals to harness offshore wind along the eastern seaboard, within miles of heavily populated areas and along a coastline valued for its fisheries, aesthetics, and recreational attributes.[5] These offshore wind farms could generate enough electricity to power entire regions, while dramatically decreasing toxic emissions and reliance on fossil fuels.[6] Yet fears of 300-foot spinning blades and blinking navigational lights blanketing the horizon have caused an uproar that threatens to drown out wind power's loudest advocates.[7]

This Article explores the debate that has developed over wind power. It begins with a brief discussion of wind power's dramatic growth abroad and, to a more limited extent, in the United States. This is followed by an accounting of technological advances and federal and state renewable energy policies, each of which impacts wind energy's costs and its ability to compete with traditional fossil fuels. To provide context, there is a brief comparison of land-based and offshore wind. The

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[1] *See* H.R. 6, 108th Cong. § 1302 (2003) (conference report; unless otherwise noted, all citation to House Bill 6 is to this version) (recognizing the need to develop the nation's renewable energy industry and including an extension of the production tax credit for various types of renewable energy, such as wind, until 2007), *available at* http://www.house.gov/rules/text_6cr.pdf (last visited Apr. 5, 2004); *see also* H.R. 5156, 107th Cong. (2002).

[2] *See* AM. WIND ENERGY ASS'N, GLOBAL WIND ENERGY MARKET REPORT 1 (2003), http://www.awea.org/pubs/documents/globalmarket2003.pdf (last visited Feb. 8, 2004) [hereinafter GLOBAL WIND ENERGY MARKET REPORT].

[3] *See* Elinor Burkett, *A Mighty Wind*, N.Y. TIMES, June 15, 2003, § 6 (Magazine), at 48; Stephanie Ebbert, *On Wind, Some Blow Hot & Cold*, BOSTON GLOBE, June 17, 2003, at A1.

[4] *See* ARI REEVES, RENEWABLE ENERGY POLICY PROJECT, WIND ENERGY FOR ELECTRIC POWER: A REPP ISSUE BRIEF 10 (2003), http://solstice.crest.org/articles/static/1/binaries/wind%20issue%20brief_FINAL.pdf (last visited Feb. 8, 2004).

[5] *See* John Leaning, *Winergy Pitches Two More Wind Farms Near Cape*, CAPE COD TIMES, Nov. 13, 2002, http://www.capecodonline.com/special/windfarm/winergypitches13.htm (last visited Feb. 8, 2004).

[6] *See* REEVES, *supra* note 4, at 14–15.

[7] *See* Alliance to Protect Nantucket Sound, Inc. v. U.S. Dep't of Army, 288 F. Supp. 2d 64, 72 (D. Mass. 2003) (challenging the construction of a wind energy plant in Nantucket Sound); REEVES, *supra* note 4, at 16.

Article then describes the most prominent offshore wind proposals in the United States, and explores the intense legal controversy that has emerged in response to a project proposed off the coast of Massachusetts—a project referred to simply as Cape Wind.[8] The contentious permitting process of the U.S. Army Corps of Engineers (the Corps), the vehement arguments of the project's supporters and detractors, the federal court's view, and Congress's response—these are all elements of Cape Wind's turbulent journey, and part of a developer's quest to site the first offshore wind farm in the United States.[9]

I. The Power of Wind

A. *Global Wind Power Developments*

Wind is often referred to as the world's fastest-growing energy source.[10] Wind energy advocates proudly proclaim that global wind power generating capacity has quadrupled over the past five years. At the end of 2002, wind was generating enough energy worldwide to power the equivalent of 7.5 million average American households.[11] The most dramatic growth has been in Europe: a total of 5871 megawatts (MW)[12] of wind energy was installed in the European Union in 2002, and total regional wind power capacity grew thirty-three percent to 23,056 MW.[13]

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[8] *See Alliance to Protect Nantucket Sound*, 288 F. Supp. 2d at 72.

[9] *See id.*; H.R. 6, 108th Cong. (2003).

[10] *See* Global Wind Energy Market Report, *supra* note 2, at 1.

[11] Am. Wind Energy Ass'n, Windpower Outlook 2003: Solid Growth for Wind Power Despite Crisis in Energy Sector 1 (2003), http://www.awea.org/pubs/documents/Outlook2003.pdf (last visited Feb. 8, 2004) [hereinafter Windpower Outlook 2003]. The generating capacity of global wind power grew from 7600 megawatts (MW) at the end of 1997 to an estimated 31,128 MW at the end of 2002. Global Wind Energy Market Report, *supra* note 2, at 1.

[12] A megawatt (MW) is 1000 kilowatts, or 1 million watts, and is the standard measure of an electric power plant's generating capacity. U.S. Dep't of Energy, Information Resources: Glossary, *at* http://www.eere.energy.gov/consumerinfo/energyglossary.html (last visited Feb. 8, 2004) [hereinafter Glossary]. A kilowatt is a standard unit of electrical power equal to 1000 watts, or to energy consumption at a rate of 1000 Joules per second. *Id.*

[13] *See* Global Wind Energy Market Report, *supra* note 2, at 2. Together, Germany, Spain, and Denmark accounted for eighty-nine percent of European wind power capacity. *Id.* In 2002, Germany installed 3247 MW of new wind power capacity for a total installed capacity of 12,001 MW; Spain installed 1493 MW of new wind capacity, to reach a total installed capacity of 4830 MW; and Denmark installed 497 MW to for a total of 2880 MW. *Id.* at 2–3. Other European countries leading the way in installed wind power capacity in 2002 included: the Netherlands with 217 MW; Italy with 103 MW; and the United Kingdom with 78 MW. *Id.* at 3. Total European installations were down only slightly in 2003.

B. *Growth of Wind Power in the United States*

Although Europe has four to five times more wind projects than the United States, the last five years have shown dramatic growth in the United States, rivaling that of Europe.[14] In 2003, wind projects were completed in seventeen states and installed wind generation reached almost 1691 MW.[15] By the end of 2003, the country's total installed capacity reached 6337 MW, "elevating the U.S. in world ranking to second place behind Germany."[16] It is widely expected that the wind power industry will continue to grow at the rate of the past five years.[17] As described below, this rapid rate of development is largely due to a combination of decreasing costs and government incentives.[18]

AM. WIND ENERGY ASS'N, GLOBAL WIND ENERGY MARKET REPORT: WIND ENERGY INDUSTRY GROWS AT STEADY PACE, ADDS OVER 8,000 MW IN 2003, at 6 (2004) *available at* http://www.awea.org/pubs/documents/globalmarket2004.pdf (last visited Mar. 28, 2004) [hereinafter GLOBAL WIND ENERGY MARKET REPORT 2004].

[14] *See* WINDPOWER OUTLOOK 2003, *supra* note 11, at 1–2. In the United States installed capacity grew from 1848 MW in 1998 to 4685 MW in 2002, a compound growth rate of twenty-six percent. GEORGE STERZINGER ET AL., RENEWABLE ENERGY POLICY PROJECT, THE EFFECT OF WIND DEVELOPMENT ON LOCAL PROPERTY VALUES 1 (2003), http://solstice.crest.org/articles/static/1/binaries/wind_online_final.pdf (last visited Feb. 8, 2004); *see also* AM. WIND ENERGY ASS'N, WINDPOWER OUTLOOK 2004: STIFF CHALLENGES, BIG OPPORTUNITIES 2 (2004) (stating that from 1999 through 2003, U.S. wind generating capacity expanded at an annual average rate of twenty-eight percent), *available at* http://www.awea.org/pubs/documents/Outlook2004.pdf (last visited Mar. 28, 2004) [hereinafter WINDPOWER OUTLOOK 2004].

[15] *See* Mike O'Bryant, *Another Year of Bust After Boom; Near Record for New Capacity in 2003 but 2004 Looking Thin*, WINDPOWER MONTHLY, Jan. 2004, at 21; *see also* WINDPOWER OUTLOOK 2004, *supra* note 14, at 2 (indicating that 1687 MW of new wind power was constructed in 2003). Wind power development is occurring in many regions of the country. *See* AM. WIND ENERGY ASS'N, WIND ENERGY PROJECTS THROUGHOUT THE UNITED STATES OF AMERICA, *at* http:// www.awea.org/projects/index.html (last modified Jan. 21, 2004). Utility-scale turbines are operating in thirty states; the states leading in cumulative capacity are: California, with 2403 MW; Minnesota, with 563 MW; Iowa, with 472 MW; and Wyoming, with 285 MW. GLOBAL WIND ENERGY MARKET REPORT 2004, *supra* note 13, at 4.

[16] O'Bryant, *supra* note 15, at 21; *see also* WINDPOWER OUTLOOK 2004, *supra* note 14, at 2 (indicating that the current installed capacity in the United States is 6374 MW).

[17] *See* STERZINGER ET AL., *supra* note 14, at 1. The Department of Energy (DOE) is working in conjunction with the American Wind Energy Association (AWEA) to attain the wind industry's goal for wind energy to provide six percent of the nation's electricity by 2020 with 100,000 MW of installed capacity. OFFICE OF ENERGY EFFICIENCY & RENEWABLE ENERGY, U.S. DEP'T OF ENERGY, WIND POWER TODAY: WIND ENERGY PROGRAM HIGHLIGHTS 3 (2002), http://www.nrel.gov/docs/fy02osti/31583.pdf (last visited Feb. 8, 2004) [hereinafter WIND POWER TODAY].

[18] *See* discussion *infra* Part I.A.1–2 and accompanying notes.

1. Technology and Costs

Technological advances have allowed renewable energy to compete with conventional sources of power.[19] Such developments have helped increase the amount of electricity produced, thereby increasing efficiency and reducing the cost per kilowatt-hour (kWh).[20] Renewable energy is now cheaper and more efficient. The costs of generating wind power have decreased by more than eighty percent in twenty years, from thirty cents per kWh in the early 1980s to less than five cents per kWh in 2002.[21] In 2001, electricity produced in high wind speed areas was sold at an average of four cents per kWh and an average of six cents per kWh in lower wind speed sites.[22] Researchers believe costs may be reduced an additional thirty to fifty percent as the technology continues to improve.[23]

By 2013, most sources of renewable energy are expected to be competitive with grid power, such as gas and coal, particularly if finan-

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[19] NAVIGANT CONSULTING, INC., THE CHANGING FACE OF RENEWABLE ENERGY A NAVIGANT CONSULTING MULTI-CLIENT STUDY 5 (2003), http://www.navigantconsulting.com/A559B1/navigant.nsf/vGNCNTByDocKey/PP522DD1693019/$FILE/NCI-RenewableEnergyStudy-publicdoc-2003-v8.pdf (last visited Feb. 8, 2004). Two decades ago, the capacity of wind turbines averaged approximately 150 kilowatts, at least five times less than the average capacity of wind turbines today. *See* OFFICE OF ENERGY EFFICIENCY & RENEWABLE ENERGY, U.S. DEP'T OF ENERGY, WIND FARMS AND WIND FARMERS, *at* http://www.eere.energy.gov/consumerinfo/refbriefs/ad2.html (last visited Feb. 8, 2004) [hereinafter WIND FARMS AND WIND FARMERS]. A 3.6 MW turbine is currently the largest offshore wind turbine in commercial operation. Drew Robb, *Technological Maturity Means Greater Acceptance: Gains Over Two Decades Point to Continued Growth*, N. AM. WINDPOWER, Feb. 2004, at 18, 18. REpower Systems AG recently unveiled plans for a prototype five MW wind turbine with a rotor diameter of 126.5 meters (415 feet), making it the largest wind turbine in the world. Press Release, REpower Systems AG, REpower Presents REpower 5M—The World's Largest Wind Turbine—At HUSUMwind (Sept. 23, 2003), *available at* http://www.repower.de/uk/news/mitteilu.htm (last visited Mar. 16, 2004). It uses the longest wind turbine blade ever built and will have a hub height of 120 meters (394 feet). *Id.*

[20] WIND FARMS AND WIND FARMERS, *supra* note 19. A kilowatt hour (kWh) is a unit of measure for electricity supply or consumption of 1000 Watts over the period of one hour, equivalent to 3412 Btu. GLOSSARY, *supra* note 12.

[21] AM. WIND ENERGY ASS'N, THE MOST FREQUENTLY ASKED QUESTIONS ABOUT WIND ENERGY 6 (2002), *at* http://www.awea.org/pubs/documents/FAQ2002%20-%20web.PDF (last visited Feb. 8, 2004) [hereinafter MOST FREQUENTLY ASKED QUESTIONS].

[22] WIND POWER TODAY, *supra* note 17, at 3. Currently, utility-scale wind turbines located on Class 6 wind sites—those in which wind speeds average 6.7 meters per second at ten meter height or sixteen miles per hour at thirty-three feet—have the capacity to generate electricity for four cents per kWh. NAT'L WIND TECH. CTR., ABOUT THE PROGRAM: LOW-WIND-SPEED TURBINES, *at* http://www.nrel.gov/wind/about_lowspeed.html (last visited Feb. 8, 2004). Generators operating at Class 4 sites—those averaging wind speeds of 5.8 meters per second at ten meter height or thirteen mph at thirty-three feet—can market wind energy at prices in the range of five to six cents per kWh. *Id.*

[23] WIND POWER TODAY, *supra* note 17, at 3.

cial incentives are available.[24] While "[m]any renewable energy options are now relatively mature technologically, . . . markets remain underexploited primarily due to higher [forward] capital costs relative to conventional options."[25] Long-term government commitment to provide incentives is critical to the success of renewable energy markets.[26]

2. Federal Energy Policy and the Federal Production Tax Credit

Wind industry advocates typically point to the Federal Production Tax Credit (PTC) as one of the main drivers of the U.S. wind market.[27] The PTC provides a 1.5 cent per kWh business tax credit, adjusted annually for inflation, for energy produced from a wind power facility during the first ten years of operation.[28] Passage of the PTC reflects Congress's recognition of the important role that wind energy can and should play in our nation's energy mix. First enacted as part of the Energy Policy Act of 1992, the PTC has been extended twice over the past five years, but each time Congress allowed the

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[24] NAVIGANT CONSULTING, INC., *supra* note 19, at 11.

[25] *Id.* at 5. Although in recent years the American wind power market has experienced considerable growth, "it is still both difficult and costly to finance a wind farm in the U.S. today." *See* Christine Real de Azua, *Investors Need to Notice Wind Energy's Performance*, SOLAR TODAY, Jan.–Feb. 2004, at 40. Nevertheless, wind advocates are working diligently to disabuse U.S. lenders and investors from perceptions which are arguably outdated and unfounded. *See id.* (referencing efforts by AWEA to address several considerations for financiers). For instance, while wind is variable, supporters argue that "extremely accurate predictions are possible within defined bounds of uncertainty." *Id.* In addition, they assert that "forecasting of output is improving rapidly[,] . . . wind energy equipment itself is low risk and very reliable," and wind power also provides insurance against fluctuations in the costs of power from traditional fuel sources. *Id.*

[26] NAVIGANT CONSULTING, INC., *supra* note 19, at 5–6.

[27] *See* UNION OF CONCERNED SCIENTISTS, UPDATE: WIND AND BIOMASS TAX CREDIT SAVED—AGAIN (2002), *at* http://www.ucsusa.org/clean_energy/renewable_energy/page.cfm?pageID=121 (last modified Oct. 29, 2002) [hereinafter UPDATE] (stating that production tax credits (PTCs) are "[a] key federal policy that promotes the development of renewable energy"); Diane Bailey, *Small Win in Battle for National Standard; Senate Bill Includes Minimum Standard of 10% Renewables*, WINDPOWER MONTHLY, Sept. 2003, at 49. As an example of the potential value of this credit, one estimate is that Cape Wind Associates (Cape Wind) would receive $28 million annually for ten years in PTCs once its 130 turbine wind farm is constructed. Jack Coleman, *Cape Wind Eyes Subsidy*, CAPE COD TIMES, July 26, 2003, http://www.capecodonline.com/special/windfarm/capewind26.htm (last visited Feb. 8, 2003). A federal provision "allowing accelerated depreciation against tax of investment in new equipment" also provides tax advantages. Mike O'Bryant, *Market Stymied by Policy Gridlock: Dynamics of Delay Halt Industry Ready to Roll*, WINDPOWER MONTHLY, Mar. 2004, at 45, 46 [hereinafter *Dynamics of Delay*].

[28] 26 U.S.C. § 45(a)–(b) (2000). As adjusted for 2003, the PTC currently stands at 1.8 cents per kWh. 68 Fed. Reg. 19,073 (Apr. 17. 2003) (outlining the inflation adjustment factor and the reference prices for the year 2003); *see also* 26 U.S.C. § 45(d)(2)(A).

credit to expire before acting, and then only approved short extensions.[29] Because a wind power project can take several years to permit and construct, the absence of a stable national policy regarding wind power technology has presented a major challenge to the American wind energy industry, resulting in several boom and bust cycles.[30] Uncertainty about the PTC in late 2001 led to a seventy-three percent decline in capacity additions the following year.[31] Extension of the PTC is widely viewed as necessary to provide a stable financial environment for market development of wind energy.[32]

In 2003, Congress allowed the PTC to expire for a third time, once again leading to economic uncertainty in the wind industry.[33] A three-year PTC extension was included in the conference version of House Bill 6—comprehensive energy legislation considered by the 108th Congress late in its first session.[34] Section 1302 of the bill would

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[29] The Energy Policy Act of 1992 included a PTC of 1.5 cents per kWh, adjusted for inflation, for energy produced from a new wind power facility brought on-line after December 31, 1993, and before July 1, 1999, for the first ten years of the facility's existence. Energy Policy Act of 1992, Pub. L. No. 102-486, § 1914(a), 106 Stat. 3020 (codified as amended at 26 U.S.C. § 45). In 1999, Congress extended the wind production tax credit until December 31, 2001. Ticket to Work and Work Incentives Improvement Act of 1999, Pub. L. No. 106-170, § 506(a)–(c), 113 Stat. 1922. In March 2002, Congress extended the PTC until December 31, 2003. H.R. 3090, 107th Cong. § 303(a) (2002).

[30] *See* WINDPOWER OUTLOOK 2003, *supra* note 11, at 5. In 2001, 1700 MWs of wind power capacity were installed in the United States. UPDATE, *supra* note 27. In 2002, U.S. wind development reached only 410 MW. WINDPOWER OUTLOOK 2003, *supra* note 11, at 1. According to the wind industry, this substantial decrease was due in large part to the expiration of the PTC at the end of 2001 and the delay in its reinstatement until March of 2002. *See* Mike O'Bryant, *Record Breaking Year on the Way in America; More Than 1800 MW of Projects Now in the Frame for 2003*, WINDPOWER MONTHLY, Sept. 2003, at 29 [hereinafter *Record Breaking Year*].

[31] NAVIGANT CONSULTING, INC., *supra* note 19, at 5–6.

[32] *See* MOST FREQUENTLY ASKED QUESTIONS, *supra* note 21, at 7; *Record Breaking Year supra* note 30, at 29. According to wind power advocates, "[a]lthough wind turbine efficiencies have improved to the point where electricity produced by wind is nearly competitive with other resources, developers say the U.S. wind industry needs the PTC for five to ten more years to compete head-to-head with gas and coal resources." O'Bryant, *supra* note 15, at 33.

[33] *See Energy Bill Dead for the Year Following GOP Rift Over MTBE*, NAT'L GAS WEEK, Nov. 26, 2003, *available at* 2003 WL 64743551.

[34] *See* H.R. 6, 108th Cong. § 1302 (2003). The United States had not enacted comprehensive energy legislation in over a decade, and President Bush made passing an energy bill a priority, citing economic and national security issues. *See* John J. Fialka, *Energy Bill Passes House But Fate in Senate Uncertain*, WALL ST. J., Nov. 19, 2003, at A4. The House and Senate had passed different versions of energy legislation in spring and summer 2003, and both bills included a three year extension of the PTC. *See* H.R. 6, 108th Cong. § 41002 (2003) (passed by House); H.R. 6, 108th Cong. § 1901 (2003) (Engrossed Amendment as Agreed to by Senate). Pressure to push through a bill increased after a massive power blackout in August 2003. Janet Hook, *Events Stir the Agenda in D.C.: Congress Returns to Work*

have amended § 45 of the Internal Revenue Code by extending the PTC to wind facilities originally placed in service after December 31, 1993 and before January 1, 2007.[35] The House passed House Bill 6 in a 246 to 180 vote, but Senate Republicans were unable to garner enough support to send the measure for final passage.[36] The decision to terminate debate on House Bill 6 in 2003 ostensibly delayed the issue to early 2004 when the 108th Congress returned for its second session.[37] Congressional leaders have acknowledged the importance of acting quickly to enact energy legislation that includes a PTC. Senate Majority Leader Bill Frist (R-Tenn.) announced that resuscitating the energy bill would be the top priority for Congress in 2004, while Chairman Dominici underscored the need to act quickly on the energy bill, citing the December 31, 2003 expiration of the PTC.[38]

In February 2004, Chairman Dominici introduced a pared-down version of the Energy Bill of 2003—Senate Bill 2095—which would extend the PTC through December 31, 2006.[39] Unlike House Bill 6, Senate Bill 2095 would cancel the existing inflation adjustment provision and fix the PTC at its current level of 1.8 cents per kWh for all wind projects placed in service after September 30, 2004.[40]

This Week to Face New Pressures Fueled by Turmoil at Home and Abroad While It Was on a Month-long Recess, L.A. TIMES, Sept. 1, 2003, at A1. A conference committee crafted House Bill 6 behind closed doors during late summer and fall 2003. *See* Mary O'Driscoll, *Republicans Strike Energy Deal, Schedule Conference Vote Next Week*, ENV'T & ENERGY DAILY, Nov. 14, 2003, *at* http://www.eenews.net (on file with author).

[35] H.R. 6, 108th Cong. § 1302(b)(1)(d)(1) (2003).

[36] Fialka, *supra* note 34, at A4; Mary O'Driscoll, *Senate GOP Unlikely to Pursue Energy This Week*, ENV'T & ENERGY DAILY, Nov. 24, 2003, http://www.eenews.net (on file with author). The bill collapsed under the weight of regional and partisan differences days before the Thanksgiving holiday. *See* Joe Tuini, *Energy Bill Skirmishes Approach Endgame*, WASTE NEWS, Nov. 24, 2003, *available at* 2003 WL 9784107. Among other things, members of Congress were in substantial disagreement over legislative provisions providing liability protection for producers of a fuel additive MTBE alleged to have contaminated drinking water supplies in many parts of the country. *See id.*

[37] *See* Amy Goldstein, *Bush Goes to a Balky Congress: Many of His Previous State of the Union Proposals Have Been Stymied*, WASH. POST, Jan. 20, 2004, at A11; Richard Simon, *Senate Won't Act Now on Energy Bill; After Republican Leaders Fail to Round up the Votes Needed to Cut off Debate, They Declare the Legislation Dead Until Next Year's Session*, L.A. TIMES, Nov. 25, 2003, at A10.

[38] *See* Mary O'Driscoll, *Energy Bill No. 1 Priority for 2004, Frist Says*, GREENWIRE, Nov. 26, 2003, *at* http://www.eenews.net/Greenwire.htm (on file with author). Wind energy advocates are hopeful that Congress will extend the Production Tax Credit in 2004. *See* Memorandum from the American Wind Energy Association, to AWEA Membership 1 (Jan. 20, 2004) (on file with author).

[39] S. 2095, 108th Cong. § 1301 (2004).

[40] *Id.*; Jesse Broehl, *Slimmed Down Energy Bill RE Provisions*, SOLARACCESS.COM, Feb. 27, 2004, *at* http://www.solaraccess.com/news/story?storyid=6197 (last visited Mar. 28, 2004). The inflation adjustment provision would still apply to any project placed in service before

Uncertainty about the fate of the energy bill led Senate Finance Committee Chairman Chuck Grassley (R-Iowa) to propose a one-year extension of the PTC through an amendment to Senate Bill 1637, the corporate tax bill.[41] While wind advocates would welcome the stop-gap one-year extension, they continue to argue for a three-year extension to mitigate the legislative uncertainty created by an extension that would expire again only months after enactment.[42]

According to the American Wind Energy Association (AWEA), the PTC's expiration at the end of 2003 will cause "yet another damaging 'boom-and-bust' cycle for the industry."[43] Randall Swisher, executive director of AWEA, states that "[i]t is impossible for the U.S. wind industry to maintain a steady growth rate in the present climate of uncertainty."[44] He further states that "[f]ailure to extend the PTC means that contracts are put on hold, workers are laid off, and the momentum that had built up this year in the U.S. wind energy market is once again brought to a halt."[45]

October 1, 2004. *Id.* Senate Bill 2095 would also eliminate an "exemption from the Alternative Minimum Tax . . . for the first four years of turbine operation that had been contained in [House Bill 6]." *One-year and Three-year PTC Extensions Moving on Separate Tracks*, WIND ENERGY WKLY. (Am. Wind Energy Ass'n, Wash., D.C.), Mar. 28, 2003, at 5.

[41] *See* S. 1637, 108th Cong. (2003) (amendment 2687 (2004)); Mary O'Driscoll, *Grassley Adds Energy Tax Credits to Corporate Tax Bill*, ENV'T & ENERGY DAILY, Mar. 8, 2004, *at* http://www.eenews.net (on file with author); *One-year and Three-year PTC Extensions Moving on Separate Tracks*, *supra* note 40, at 5.

[42] *One-year and Three-year PTC Extensions Moving on Separate Tracks*, *supra* note 40, at 5.

[43] *See* Press Release, American Wind Energy Association, Energy Bill Stalls in Congress; Wind Energy Production Tax Credit Will Expire Without Being Renewed (Nov. 25, 2003), *available at* http://www.awea.org/news/news031125ptc.html (last visited Feb. 19, 2004).

[44] *Id.*

[45] *Id.* According to AWEA, the impact of the failure to extend the PTC was being felt immediately after Congress announced it would put off consideration of comprehensive energy legislation until 2004. *See id.*

> In North Dakota, a state that had enthusiastically welcomed the new jobs created by the budding wind energy industry, over half of the employees at West Fargo-based DMI Industries, a manufacturer of wind turbine towers, have been laid off just prior to the holidays. In Texas, Lone Star Transportation of Fort Worth, Tex., would lose as much as $ 1.5 million in revenue per month due to the PTC delay. In 2002, a full 20% of Lone Star company revenues came from wind energy by trucking wind turbine blades, towers, generating units[,] and other equipment to development sites. Nationwide, thousands of jobs and billions of dollars in economic activity could be lost due to the delay in securing an extension.

Id. Uncertainty over the PTC's future has caused companies such as FPL Energy, the country's largest wind developer, to delay new projects until later in 2004. Diane Bailey, *Production Tax Credit Stalled*, WINDPOWER MONTHLY, Dec. 2003, at 28; *see also Dynamics of Delay*, *supra* note 27, at 46 (citing to reductions in construction due to delays in extending the PTC).

3. National Portfolio Standard

Although House Bill 6 included an extension of the PTC, the bill was criticized for not going far enough to support renewable energy by failing to include a national renewable portfolio standard (RPS).[46] An RPS generally requires that any company selling electricity in a competitive market include renewable energy as a percentage of its portfolio of generating sources.[47]

The energy bill passed by the Senate in July 2003 included an RPS, requiring major electric companies to gradually increase sales of electricity generated from wind, solar, and other renewable sources to approximately ten percent by 2020, potentially stimulating a significant U.S. market.[48] Yet a federal RPS was largely opposed by the Republican leadership, which controls Congress,[49] the White House,[50] and the conference committee charged with producing the final

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[46] *See* Press Release, Congressman James L. Oberstar, Oberstar to Oppose Controversial Energy Bill (Nov. 7, 2003), *available at* http://www.oberstar.house.gov (last visited Mar. 18, 2004). A national standard would address the fact that the majority of states have yet to create any effective renewable energy programs either through funds or standards. *See* JEFF DEYETTE ET AL., UNION OF CONCERNED SCIENTISTS, PLUGGING IN RENEWABLE ENERGY: GRADING THE STATES 4–5 (2003), http://www.ucsusa.org/documents/Plugging_In_Renewable_Energy.pdf (last visited Feb. 19, 2004). A national standard would also provide an opportunity to create a more level playing field among states that have already enacted standards, by enforcing a minimum standard that states could still choose to exceed. *See id.* at 4. Not all wind advocates see a federal RPS as a benefit, however. *Dynamics of Delay*, *supra* note 27, at 46. Nancy Rader of the California Wind Energy Association, and one of main developers of the RPS concept, "worries that [President Bush] and Congress would have passed a faulty RPS that could have preempted standards in the few states that have workable laws." *Id.*

[47] OFFICE OF ENERGY EFFICIENCY & RENEWABLE ENERGY, U.S. DEP'T OF ENERGY, STATE—POLICY ISSUES CONTENT: RENEWABLE PORTFOLIO STANDARD (RPS), *at* http://www.eren.doe.gov/state_energy/policy_content.cfm?policyid=27 (last visited Feb. 19, 2004).

[48] *See* UNION OF CONCERNED SCIENTISTS, FACT SHEET: THE SENATE RENEWABLE ELECTRICITY (PORTFOLIO) STANDARD 1 (2002), http://www2.ucsusa.org/documents/ACFzFSan3.pdf (last visited Feb. 19, 2004) [hereinafter CLEAN ENERGY FACT SHEET]. According to the Union of Concerned Scientists, the Senate RPS would have "gradually increase[d] renewable energy from about 15,000 megawatts (MW) today to 74,000 MW by 2020—enough to power about 53 million homes." *Id.*

[49] *See* Dan Morgan & Peter Behr, *Renewable Energy Provision Stalls; Conferees Will Not Consider Senate Requirement in Compromise Legislation*, WASH. POST, Sept. 30, 2003 at A4, *available at* 2003 WL 62219229. The House bill passed in April 2003 included an extension to the PTC but did not include a national renewable portfolio standard. *See* H.R. 6, 108th Cong. § 41002 (2003).

[50] Letter from Spencer Abraham, Secretary of Energy, U.S. Department of Energy, to Pete V. Domenici, Chairman, House and Senate Conference on H.R. 6, at 2 (Sept. 10, 2003), *at* http://www.solaraccess.com/download/adminposition.pdf (last visited Feb. 19, 2004).

compromise bill.[51] Facing an uphill battle, a majority of U.S. Senators signed a letter supporting a "'strong renewable portfolio standard,'" and urged the conference committee "not to leave the provision on the cutting room floor."[52] Nevertheless, the final version of the bill to emerge from the conference committee did not include an RPS.[53]

4. State Energy Policy

While members of Congress may disagree whether to enact a national RPS, over twenty-five percent of the states have established their own.[54] A state mandated RPS creates an immediate demand for renewable energy and helps to establish a marketplace by ensuring a steady increase of installed capacity. In doing so, state-based RPSs are thought to be one of the most important factors driving the development of new renewable energy sources in the United States, and are essential for the industry's long-term stability.[55] RPS requirements vary widely from state to state.[56]

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[51] *See* SENATOR BYRON L. DORGAN, WIND ENERGY, *at* http://www.dorgan.senate.gov/legislation/windenergy.cfm (last visited Mar. 19, 2004).

[52] W. AREA POWER ADMIN., GREEN POWER AND MARKET RESEARCH NEWS (2003), *at* http://www.wapa.gov/es/greennews/2003/oct13'03.htm (last visited Mar. 18, 2004).

> The letter—spearheaded by Sens. Jeff Bingaman (D-N.M.), Susan Collins (R-Maine), and Jim Jeffords (I-Vt.) states that "the inclusion of a strong renewable fuels portfolio standard" is necessary to help develop regional renewable energy markets and to help utilities meet future clean air requirements. It also said the use of renewable fuels "will promote fuel diversity and reduction of our substantial dependence on natural gas . . . (and) ease shortages and price spikes in our natural gas supplies."

Id.

[53] *See* H.R. 6, 108th Cong. § 1302 (2003).

[54] *See* DEYETTE ET AL., *supra* note 46, at 14; RYAN WISER ET AL., NAT'L GEOTHERMAL COLLABORATIVE, EVALUATING STATE RENEWABLES PORTFOLIO STANDARDS: A FOCUS ON GEOTHERMAL ENERGY 1–2 (2003) ("The RPS, or RPS-like mandates, [have] been established in 13 U.S. states: Arizona, California, Connecticut, Iowa, Maine, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, Pennsylvania, Texas, and Wisconsin."), http://www.geocollaborative.org/publications/RPS_Summary.pdf (last visited Feb. 19, 2004). Hawaii, Illinois, and Minnesota have "renewable goals"; Colorado, Delaware, Maryland, New York, Rhode Island, Utah, Vermont, and Washington are considering renewable portfolio standards. Kimberly Burger Capozzi, *Portfolio Standards Blow Through North America*, N. AM. WINDPOWER, Mar. 2004, at 8–9.

[55] *See* WINDPOWER OUTLOOK 2003, *supra* note 11, at 5. According to renewable energy advocates, "[s]tate RPS laws will provide for over 12,400 megawatts (MW) of new renewable power by 2012—an increase of more than 90% over total 1997 U.S. levels (excluding hydro[power])." UNION OF CONCERNED SCIENTISTS, FACT SHEET: RENEWABLE ENERGY STANDARDS AT WORK IN THE STATES 1 (2003), http://www2.ucsusa.org/documents/rps_states.pdf (last visited Feb. 19, 2004); *see also* OFFICE OF ENERGY EFFICIENCY & RENEWABLE

In addition to RPSs, a number of states provide other incentives designed to spur the generation of renewable energy, including wind power, and to help renewable energy compete with traditional fossil fuels.[57] Examples include tax credits and exemptions, rebates, grants, loans, green-labeling requirements, green power purchasing programs, and tradable renewable certificates, in the form of green tags or renewable energy credits.[58]

II. Offshore Wind

A. *European Experience with Offshore Wind*

Europeans have been constructing offshore wind farms for more than a decade; a five MW installation near Vindeby, Denmark, came online in 1991.[59] By the end of 2002, ten offshore wind farms were operating worldwide—all in Northern Europe—with a combined generating capacity of 250 MW.[60] A comprehensive study commissioned by the Corps identified a total of twenty-three offshore wind farm projects with a total capacity over 2000 MW, which have been constructed recently or which were considered certain or likely to

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Energy, U.S. Dep't of Energy, State—Policy Case Studies for Massachusetts, *at* www.eere.energy.gov/state_energy/policy_casestudies_massachusetts.cfm (last modified Feb. 17, 2004). For an analysis of the experience of states in implementing renewable portfolio standards see Bob Grace et al., N.Y. State Energy Research & Dev. Auth., Renewable Portfolio Standards: Background and Analysis for New York State (2002), http://www.nyserda.org/rpsbackgroundpaper.pdf (last visited Feb. 19, 2004).

[56] *See* Wiser et al., *supra* note 54, at 2 ("An important observation is that there is no single way to design an RPS, and ... states ... [have] crafted their policies differently, sometimes radically so.").

[57] *See generally*, Interstate Renewable Energy Council, Database of State Incentives for Renewable Energy, *at* http://www.dsireusa.org (last modified Feb. 16, 2004).

[58] *Id.*; *see generally* Am. Wind Energy Ass'n, Inventory of State Incentives for Wind Energy in the U.S.: A State by State Survey (2002), *available at* http://www.awea.org/policy/documents/inventory.PDF (last visited Mar. 28, 2004). Tradable renewable certificates (TRCs) represent the "green" non-energy attributes of electricity produced from renewable resources. Garrett Fitzgerald et al., Berkeley Lab & the Clean Energy States Alliance, Case Studies of State Support for Renewable Energy: The Experience of State Clean Energy Funds with Tradable Renewable Credits 1–4 (2003), *available at* http://eetd.lbl.gov/ea/EMS/cases/TRC_Case_Study.pdf (last visited Mar. 28, 2004). TRCs are often used to track compliance with a state's RPS. *Id.* at 1. They can also be used to "verify[] wholesale renewable energy transactions" and to facilitate the purchase of green power. *Id.*

[59] Soren Krohn, Danish Wind Energy Ass'n, Offshore Wind Energy: Full Speed Ahead (2002), *at* http://www.windpower.org/en/articles/offshore.htm (last visited Mar. 19, 2004).

[60] Reeves, *supra* note 4, at 10.

come into commercial operation in the next two to three years; all of these sites are also in Northern Europe.[61] That study included only the largest wind projects in its figures, and sources suggest the total number of offshore wind projects could be much higher. For example, according to the industry publication Windpower Monthly, there are now twenty-four German offshore wind projects planned in the North Sea outside the twelve nautical mile zone, totaling sixty-four gigawatts (GW).[62] Britain is also well-positioned to be a leader in offshore wind. In 2003, Britain launched its first large-scale offshore wind farm, siting thirty turbines four to five miles off the North Wales Coast; many more large scale projects are planned.[63]

While Europeans power ahead, wind advocates have yet to harness offshore winds in the United States. Pioneering efforts have resulted in over twenty proposals for wind farms along the U.S. eastern seaboard, but, to date, none has been built or even permitted.[64] Why is Europe ahead of the United States in the installation of offshore wind? High energy prices, excellent wind resources in the North and Baltic Seas, and the proximity of the wind resource to highly populated regions have enhanced the development of offshore wind farms in Northern Europe.[65] Europe also has aggressive government policies promoting green energy, evidenced by European support of the Kyoto agreement

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[61] C.A. MORGAN ET AL., GARRAD HASSAN & PARTNERS LTD., REVIEW OF OFFSHORE WIND FARM PROJECT FEATURES 7 (2003), http://www.nae.usace.army.mil/projects/ma/ccwf/reviewofwindfarms.pdf (last visited Feb. 19. 2004).

[62] Another four projects, for a combined 477 MW, are under development within the twelve nautical mile zone. Sara Knight, *German Offshore Process Inches Along*, WINDPOWER MONTHLY, Jan. 2004, at 29, 30. Six offshore wind plants, totalling 3475 MW, are planned for installation in the Baltic Sea outside the twelve nautical mile zone, and another four projects of 149 MW are planned for installation inside the zone. *Id.* A gigawatt is a unit of power equal to 1 billion watts, 1 million kilowatts, or 1000 megawatts. GLOSSARY, *supra* note 12.

[63] *See* Robert Lea, *A Wind-powered Windfall; Danes Poised to Cash in on the 'New North Sea Oil and Gas,'* EVENING STANDARD, Dec. 8, 2003, at 37, *available at* 2003 WL 69698734; *UK's First Major Offshore Wind Farm Goes Live*, WIND ENERGY WKLY. (Am. Wind Energy Ass'n, Wash., D.C.), Nov. 21, 2003, at 7. In December 2003, the Crowne Estate—the landowner of the seabed—granted preliminary approval to energy companies seeking to erect more than 1000 turbines off England's coast. Heather Timmons, *British Plan Major 'Wind Farm' to Generate Power Along Coasts*, N.Y. TIMES, Dec. 19, 2003, at A6 ("The wind farms . . . would generate as much as seven gigawatts of electricity—enough to supply four million households, or to meet 7 percent of Britain's energy needs.").

[64] ELISA WOOD, RENEWABLE ENERGY WORLD, THE U.S. OFFSHORE WIND MARKET, CAN IT STAY ON COURSE?, *at* http://www.jxj.com/magsandj/rew/2003_03/us_offshore_wind.html (last visited Mar. 19, 2004); *see* Doreen Leggett, *Winenergy: Are They for Real?*, THE CAPE CODDER, July 18, 2003, http://www.townonline.com/brewster/news/local_regional/cc_newcawinergy07182003.htm (last visited Mar. 19, 2004).

[65] REEVES, *supra* note 4, at 14.

to reduce emissions of greenhouse gases.[66] In contrast, lower energy prices and more abundant land based wind resources have delayed the development of offshore wind in the United States.[67]

B. *Comparing Offshore Wind to Land-Based Wind*

A combination of economics and energy policy is advancing efforts to harness offshore winds in the United States, particularly off the populated eastern seaboard where ocean depths are relatively shallow.[68]

Many of the United States' strongest wind resources are located in the Great Plains or the western part of the country; the windiest sites, however, are generally located in remote areas lacking ready access to power transmission lines.[69] Transferring the energy from remote generation sources to load centers involves high costs.[70] Significantly, more than half of the U.S. population resides on the coasts, close to potential offshore wind locations.[71] Offshore areas can accommodate larger scale projects that can service regional load centers, avoiding higher transmission costs incurred by remotely located wind farms.[72] In addition, Connecticut, Massachusetts, and New Jersey are examples of densely populated northeastern states that have established RPSs.[73] Wind is one of the lowest cost alternatives available to satisfy RPS requirements.[74]

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[66] *See* John J. Fialka, *Emissions Credits See Brisk Trading Tied to Kyoto Pact*, WALL ST. J., Dec. 5, 2003, at A4; *European Parliament Resolution to Ratify the Kyoto Climate Change Protocol*, IGA NEWS (Int'l Geothermal Ass'n, Pisa, Italy), Jan.–Mar. 2002, at 7–8, *at* http://iga.igg.cnr.it/pdf/n47.pdf (last visited Feb. 19, 2004).

[67] REEVES, *supra* note 4, at 14.

[68] Waters on the East Coast of the United States tend to be relatively shallow closer to shore, while waters are deeper along the west coast. BRUCE BAILEY, NAT'L WIND COORDINATING COMM., POTENTIAL FOR OFFSHORE WIND DEVELOPMENT IN THE UNITED STATES (2003), *available at* http://www.nationalwind.org/events/offshore/030701/presentations/bailey.pdf (last visited Mar. 19, 2004). Current technologies generally limit construction of offshore turbines to waters of fifty foot depths or less. *Id.* at 13. Thus, until technological advances allow for construction of turbines in deeper waters, offshore wind in the continental United States will likely be limited to the eastern United States and other shallow waters. *Id.* at 13, 22.

[69] NAT'L WIND TECH. CTR., *supra* note 22.

[70] *See* REEVES, *supra* note 4, at 14.

[71] *See* BAILEY, *supra* note 68, at 22.

[72] *See* REEVES, *supra* note 4, at 14.

[73] *Id.*

[74] *Id.*

Offshore winds are typically stronger and less turbulent than land-based winds, increasing the revenue potential.[75] Although the location at sea increases construction and maintenance costs, these higher costs tend to be offset by the increased chances for energy production resulting from more favorable wind conditions.[76] Reduced wind shear over water allows offshore wind farms to be designed to last for fifty years, rather than the twenty to twenty-five years typical for land-based installations.[77] Offshore wind farms can be refurbished after twenty-five years, allowing for a longer amortization period for the higher initial investment.[78]

C. *Proposed U.S. Projects*

At present, at least three distinct development entities are striving to build the first offshore wind farm in the United States.[79] Cape Wind Associates (Cape Wind), a private energy company comprised of experienced energy plant developers, proposed the first offshore wind farm after reviewing extensive data and narrowing potential locations to a single site off the coast of Massachusetts.[80] Just over a year later, the Long Island Power Authority, a non-profit public utility in New York State, issued a request for proposals for a wind farm along

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[75] *Id.* "'Due to the lack of proximity of natural barriers such as mountain ranges and urban areas, wind experiences less turbulence over water.'" Robb, *supra* note 19, at 18 (quoting Steve Zwolinski, president and CEO of GE Wind Energy).

[76] REEVES, *supra* note 4, at 14. Offshore facilities have capital costs thirty to seventy percent higher than such costs at onshore sites. *Id.* These higher costs are primarily due to "the high cost of building marine foundations, procuring installation equipment, and laying submarine cables to transmit electricity to shore." *Id.* Advances in foundation technology have led to a recent decrease in these costs. *Id.* Other costs, such as operation and maintenance, are also higher for offshore facilities as personnel and equipment must be transported to the turbines by ship, and rough seas may make turbines inaccessible. *Id.*

[77] *Id.*

[78] *See* REEVES, *supra* note 4, at 14; *see also* Robb, *supra* note 19, at 18.

[79] *See* CAPE WIND ASSOCS., AMERICA'S FIRST OFFSHORE WIND FARM IN NANTUCKET SOUND, *at* http://www.capewind.org (last visited Feb. 19, 2004) [hereinafter CAPE WIND HOMEPAGE]; LONG ISLAND OFFSHORE WIND INITIATIVE, LONG ISLAND'S OFFSHORE WIND ENERGY, *at* http://www.lioffshorewindenergy.org (last visited Feb. 19, 2004); WINERGY LLC, A COMPANY DEVOTED TO CLEAN ENERGY, *at* http://www.winergyllc.com (last visited Feb. 19, 2004). Other small-scale projects are also under construction; for instance, Hull, Massachusetts, hopes to erect a single offshore wind turbine in waters just off the coastline. Wendy Williams, *Windy Battle for the Hearts and Minds of Cape Codders Continues; U.S. Army Corps of Engineers Hearing in Falmouth*, CAPE COD TODAY, Oct. 30, 2003, http:www.capecodmedia.com/cctoday.php?sid=170 (last visited Feb. 19, 2004) [hereinafter *Windy Battle*].

[80] *See* CAPE WIND HOMEPAGE, *supra* note 79.

the southern shore of Long Island.[81] Around the same time, Winergy LLC (Winergy)—directed by two entrepreneurs with experience in marine aquaculture, but no relevant energy experience—proposed wind farms at twenty-one potential sites along the East Coast.[82]

1. Cape Wind

Cape Wind is proposing to install 130 wind turbines off the coast of Massachusetts, with a total maximum output of 420 MW.[83] If built, Cape Wind could be the largest offshore wind farm in the world.[84] The developer's preferred site—Horseshoe Shoal in Nantucket Sound, over five miles from the town of Hyannis on Cape Cod[85]—is the optimal location based on wind speeds and direction.[86] Turbines will be spaced one-half to one-third of a mile apart and connected by undersea cables.[87] Although the wind farm will be spread over a twenty-four square mile area, it will only physically occupy two acres.[88]

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[81] *See* John Leaning, *Long Island Utility Tests the Waters*, CAPE COD TIMES, May 14, 2002, http://www.capecodonline.com/special/windfarm/longisland14.htm (last visited Mar. 19, 2004).

[82] *See* Leggett, *supra* note 64.

[83] The project as originally proposed included 170 turbines. *See* Notice of Intent to Prepare a Draft Environmental Impact Statement, 67 Fed. Reg. 4414 (Jan. 30, 2002), *available at* http://www.nae.usace.army.mil/projects/ma/ccwf/NOI Cape Wind.pdf (last visited Mar. 19, 2004).

[84] Currently, the two largest wind farms in the world are both in Denmark: an offshore wind project at Nysted, with seventy-two turbines at 2.3 MWs for a total capacity of 165.6 MW, and another at Horns Rev, with eighty turbines at two MWs for a total capacity of 160 MW. Jack Jackson, *Which Is the Biggest?*, WINDPOWER MONTHLY, Sept. 2003, at 78, 78. Due to permit limitations, the official generating capacity of the Nysted wind farm is 158.4 MW. *Id.* If approved and constructed, the world's largest proposed offshore wind farm would be located off the coast of the United Kingdom, comprised of some 250 turbines capable of producing 1.2 GW. Janice Massy, *Wind in a New League off British Coast*, WINDPOWER MONTHLY, Jan. 2004, at 28, 28.

[85] MASS. ENERGY CONSUMERS ALLIANCE, WIND POWER, *at* http://www.massenergy.com/Wind.html (last visited Feb. 19, 2004) The closest land, Point Gammon, is 4.7 miles from the wind farm. ALLIANCE TO PROTECT NANTUCKET SOUND, PROPOSED LOCATION (2003), *at* http://www.saveoursound.org/chart.html (last visited Feb. 19, 2004).

[86] *See generally* CAPE WIND HOMEPAGE, *supra* note 79.

[87] CAPE WIND ASSOCS., PROJECT OVERVIEW: PROJECT CONSTRUCTION, *at* http://www.capewind.org (last visited Mar. 19, 2004); MASS. ENERGY CONSUMERS ALLIANCE, *supra* note 85.

[88] U.S. ARMY CORPS OF ENG'RS, WIND FARM PROPOSAL ENVIRONMENTAL IMPACT STATEMENT PUBLIC SCOPING SESSION 27–28 (2002) (quoting testimony of Jim Gordon, president of Cape Wind Associates), *available at* http://www.nae.usace.army.mil/projects/ ma/ccwf/4-18-02Edgartown.pdf (last visited Mar. 28, 2004); *see* CAPE WIND ASSOCS., PROJECT OVERVIEW: PROJECT AT A GLANCE, *at* http://www.capewind.org (last visited Mar. 19, 2004).

The shoal is shallow, which would arguably simplify construction and minimize interference with marine traffic and commercial fishing.

Cape Wind has installed a 196-foot high scientific monitoring station, which functions as a data or test tower.[89] Data collected will provide information on wind, waves, tide height, currents, and water temperature.[90] The data tower was permitted by the Corps pursuant to section 10 of the Rivers and Harbors Appropriations Act of 1899 (section 10 or RHA).[91] The Corps is currently preparing a draft Environmental Impact Statement (EIS) for the wind farm under the National Environmental Policy Act (NEPA).[92]

The Cape Wind project has been a lightning rod for debate over the potential benefits and impacts of an offshore wind farm, and has encountered vehement local opposition. Opponents argue the developers are simply making a "land-grab, co-opting a public resource for private gain."[93] Supporters of Cape Wind accuse its detractors, many of whom are wealthy local landowners, of crying "not in my backyard."[94] The project has been the subject of countless public meetings,

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[89] *See* Alliance to Protect Nantucket Sound, Inc. v. U.S. Dep't of the Army, 288 F. Supp. 2d 64, 69–70 (D. Mass. 2003).

[90] CAPE WIND ASSOCS., PROJECT OVERVIEW: MEASURING OFFSHORE CONDITIONS *at* http://www.capewind.org (last visited Mar. 19, 2004) [hereinafter CAPE WIND MEASURING OFFSHORE CONDITIONS].

[91] 33 U.S.C. § 403 (2000). A citizens group, the Alliance to Protect Nantucket Sound (the Alliance), appealed the U.S. Army Corps's of Engineers (the Corps's) decision to issue the section 10 permit. *See Alliance to Protect Nantucket Sound*, 288 F. Supp. 2d at 66–67. Additional information about this appeal is provided below. *See* discussion *infra* Part III.D.

[92] *See* Notice of Intent to Prepare a Draft Environmental Impact Statement, 67 Fed. Reg. 4414 (Jan. 30, 2002), *available at* http://www.nae.usace.army.mil/projects/ma/ccwf/NOI Cape Wind.pdf (last visited Mar. 19, 2004). As the issuing authority for a federal permit under section 10 of the Rivers and Harbors Appropriations Act of 1899 (RHA), the Corps is the lead agency in preparing an Environmental Impact Statement (EIS) under NEPA. *See* 42 U.S.C. §§ 4321–4370d (2000). A portion of the wind project is also located in state waters, and triggers thresholds for environmental review under the Massachusetts Environmental Protection Act, requiring an Environmental Impact Report (EIR) under state law. *See* MASS.GEN.LAWS ch. 30, §§ 61–62H (2001). The project is also subject to review by the Cape Cod Commission (CCC) as a Development of Regional Impact (DRI). *See* Cape Cod Commission Act of 1989, 1989 Mass. Acts 716. Cape Wind agreed to file one set of documents that fulfill the majority of the requirements of NEPA, MEPA, and the CCC, allowing for a coordinated review process. *See* MASS. EXECUTIVE OFFICE OF ENVTL. AFFAIRS, CERTIFICATE OF THE SECRETARY OF ENVIRONMENTAL AFFAIRS ON THE ENVIRONMENTAL NOTIFICATION FORM 4 (2002), *available at* http://www.state.ma.us/envir/mepa/downloads/12643cert.doc (last visited Feb. 20, 2004). The project is also subject to review under other federal, state, and local laws. *See* discussion *infra* Part IIIA–E.

[93] Mary Grady, *Reaping the Wind in a Brand New Age*, CONSERVATION MATTERS, Spring 2003, *available at* http://www.clf.org/CM/03Spring/reaping_the_wind_in_a_brand_new_age.htm (last visited Feb. 19, 2004).

[94] *See id.*

including a series of stakeholder meetings hosted by the Massachusetts Technology Collaborative (MTC), the commonwealth's renewable energy development agency.[95] The project has also triggered several law suits,[96] and both federal and Massachusetts lawmakers have introduced legislative alternatives that would potentially impact the development process.[97] A number of the legal issues raised by the Cape Wind project are discussed in detail below.

2. Long Island Power Authority

In January 2003, the Long Island Power Authority (LIPA) issued a Request for Proposals (RFP) to develop an offshore wind farm off the south shore of Long Island, New York. The RFP proposed a project consisting of twenty-five to fifty offshore wind turbines generating approximately 100 to 140 MW of electricity.[98] LIPA prepared a Siting Assessment that restricts the placement of wind turbines to a five square-mile area of open ocean no closer than 2.5 nautical miles from shore, with water depths averaging about sixty feet.[99] The proposed site is in reasonable proximity to three land-based substations owned and operated by LIPA. One or more of these substations could be used to connect the wind turbines to Long Island's electric grid.[100]

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[95] *See* MASS. TECH. COLLABORATIVE, MTC'S CAPE AND ISLANDS OFFSHORE WIND PUBLIC OUTREACH INITIATIVE, *at* http://www.mtpc.org/RenewableEnergy/green_power/outreach/offshore_cape.htm (last visited Feb. 20, 2004). The Cape and Islands Offshore Wind Stakeholder Process, brokered by the Massachusetts Technology Collaborative, was comprised of six meetings held between October 2002 and March 2003. *Id.* The MTC's goal was not to achieve consensus, but rather "to discover and communicate objective information relevant to the proposed project that would help decision makers and average citizens participate in the permitting process in the most informed and constructive manner possible." *Id.*

[96] *See Alliance to Protect Nantucket Sound*, 288 F. Supp. 2d at 66–67; Ten Taxpayers Citizen Group v. Cape Wind Assocs., 278 F. Supp. 2d 98, 99 (D. Mass. 2003).

[97] *See, e.g.*, H.R. 1183, 108th Cong. § 2 (2003) (promoting the "sensible development" of renewable energy in the waters of the coastal zone); S. 380, 182d Gen. Ct. (Mass. 2003) (requiring a study of the "feasibility of wind energy projects on offshore sites, including Cape Cod and Nantucket Sound").

[98] Press Release, Long Island Offshore Wind Initiative, LIPA Issues RFP for Offshore Wind Generation Project (Jan. 22, 2003), *available at* http://www.lioffshorewindenergy.org/press/2003/jan22.html (last visited Mar. 19, 2004).

[99] *Id.*; *see generally* LONG ISLAND OFFSHORE WIND INITIATIVE, *supra* note 79.

[100] Press Release, *supra* note 98; *see generally* LONG ISLAND OFFSHORE WIND INITIATIVE, *supra* note 79.

LIPA hopes the plant will be completed and generating energy by 2007.[101] In late August 2003, LIPA announced that it had narrowed the field to two potential candidates.[102] LIPA intended to make a decision in the fall but has delayed announcing the award. Sources say LIPA has narrowed its choices to New York City-based Arcadia Windpower LTD, and FPL Energy, a subsidiary of Florida Power & Light.[103] Although some have come out in opposition to the LIPA project, to date it seems to have avoided the controversy generated by Cape Wind. This muted public response may simply be due to the lack of exposure: LIPA officials have generated little publicity about the project since January 2003, and the formal permitting processes have yet to commence.[104]

3. Winergy

Winergy originally targeted twenty-one potential wind farm locations along the East Coast of the United States.[105] The company later narrowed its list to seventeen proposed sites, and most recently has focused its permitting efforts on a site off Virginia's coast.[106] The developer's intent, it appears, is not to install wind farms at all of the proposed sites—or even the vast majority of them—but to use the permitting process to eliminate the most controversial locations.[107]

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[101] *See* LONG ISLAND POWER AUTH., REQUEST FOR PROPOSALS: POWER SUPPLY FROM AN OFFSHORE WIND PARK 1 (2003), http://www.lipower.org/pdfs/projects/wind/offshore_wind_RFP.pdf (last visited Feb. 20, 2004) [hereinafter LIPA RFP]; Wendy Williams, *Shortlist Soon for Long Island 140 MW Offshore Project*, WINDPOWER MONTHLY, July 2003, at 35.

[102] Tom McGinty, *Tilting at Windmills / One Side Touts them as Clean Power; Detractors Call them Eyesores*, NEWSDAY (New York) Dec. 23, 2003, at A5, *available at* 2003 WL 69083121.

[103] *Id.*

[104] LIPA and community wind power organizations have been holding "bi-weekly" outreach meetings with concerned citizens. Williams, *supra* note 101, at 35.

[105] *See* Leaning, *supra* note 5.

[106] John Leaning, *Winergy Shelves Four Planned Turbine Sites*, CAPE COD TIMES, July 31, 2003, http://www.capecodonline.com/special/windfarm/winergyshelves31.htm (last visited Feb. 20, 2004). Within Massachusetts, two Winergy proposals—Nantucket Shoals and Davis Bank—"involve[] large wind farms in federal waters with cable connections through state waters and onto the mainland. Three other proposed projects (Winergy Falmouth, Winergy Truro, and Winergy Gloucester) involve relatively small (18MW) developments wholly within state waters and lands." 2 MASS. OFFICE OF COASTAL ZONE MGMT., WAVES OF CHANGE: THE MASSACHUSETTS OCEAN MANAGEMENT TASK FORCE TECHNICAL REPORT 149 (2004), *available at* http://www.state.ma.us/czm/moMI/technicalreport.pdf (last visited Mar. 30, 2004).

[107] *See* Leggett, *supra* note 64.

This strategy has exposed Winergy to charges of speculation and improper use of limited public resources.[108]

III. Legal Issues—The Case of Cape Wind

In attempting to respond to this deluge of offshore wind farm proposals, government regulators quickly found themselves in a reactive mode.[109] Despite the expanse of U.S. coastal resources, federal and state ocean policy had not yet caught up to the rapid developments in science and technology enabling the ocean to be used for offshore wind energy.[110] Several efforts to update and coordinate federal ocean policy were underway, but they arguably had not progressed fast enough to provide guidance to regulators reviewing permit applications for proposed projects.[111] Regulators and nongovernmental stakeholders, concerned about the environmental and economic implications of a coastline flooded with wind farms, began to ask whether existing law was adequate to address the issues posed by this new technology.[112] As the first offshore wind project to advance through the permitting process, Cape Wind found itself at the center

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[108] *See id.* Winergy's failure to pursue several of its permit applications led the Corps to "administratively close" the applications. John Leaning, *Winergy Tower Bid Tabled After Missed Deadline*, Cape Cod Times, Oct. 4, 2003, http://www.capecodonline.com/special/windfarm/winergytower4.htm (last visited Feb. 20, 2004). Winergy's strategy may have been partially influenced by its belief that it held lease agreements with the Corps and had somehow secured these sites for exclusive development. U.S. Army Corps of Eng'rs, Clarification on Corps Permitting Authorities 1, *at* http://www.nae.usace.army.mil/projects/ma/winergy/clarification.pdf (last visited Mar. 19, 2004). According to the Corps, however, this assumption is inaccurate. *Id.*

[109] *See* Steve Urbon, *Regulations Lag Behind Wind Power Technology*, Sunday Standard Times (New Bedford, Mass.), June 1, 2003, http://www.safewind.info/articles/regulations_6_1.htm (last visited Feb. 20, 2004). According to Mark Rasmussen, executive director of the Coalition for Buzzard's Bay, since "wind power has become economically feasible, there's a little bit of a gold rush going on. And this gold rush has caught public agencies who oversee the public interest in the waters offshore off-guard." *Id*; *see also* Leggett, *supra* note 64.

[110] *See* U.S. Comm'n on Ocean Policy, Homepage, *at* http://www.oceancommission.gov (last visited Mar. 19, 2004).

[111] *See id.* In September 2001, the U.S. Commission on Ocean Policy, a federal commission authorized by Congress and appointed by the President, began its work to establish findings and make recommendations for a coordinated and comprehensive national ocean policy. *Id.* A draft report is expected in early 2004. *Id.* In May 2003, the Pew Oceans Commission released its report on the state of America's oceans, the first comprehensive review of U.S. ocean policy in more that thirty years. Pew Oceans Comm'n, America's Living Oceans: Charting a Course for Sea Change, at vii (2003), *available at* http://www.pewoceans.org/oceans/downloads/oceans_report.pdf (last visited Feb. 20, 2004).

[112] *See* Anita Huslin, *Tilting Over Windmills in the Sea; Coastal Communities Consider Entrepreneurs' Plans for Energy Plants*, Wash. Post, May 20, 2003, at B1.

of a heated controversy.[113] The principals behind Cape Wind had previously developed several large energy projects in New England, and therefore probably anticipated that their project would receive a fair amount of public scrutiny.[114] Nevertheless, it is unlikely that they anticipated the maelstrom their project would actually generate.

A. *Background*

At the outset, Cape Wind envisioned a two-stage development process.[115] Cape Wind would initially construct and operate a data test tower in an area of Nantucket Sound known as Horseshoe Shoal, on the Outer Continental Shelf (OCS)—federal waters.[116] After data collection, they would construct and operate a 130-turbine wind farm.[117] In November 2001, Cape Wind submitted an application to the Corps for a section 10 RHA permit to construct and operate the data tower.[118] At the same time, Cape Wind submitted a separate application to the Corps for another section 10 permit, this one to construct and operate the wind farm on Horseshoe Shoal.[119]

In December 2001, the Corps issued a public notice, announcing that it was considering Cape Wind's data tower application.[120] The public notice stated that the wind farm would be "the subject of a

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[113] *See id.*

[114] *See* CAPE WIND ASSOCS., ABOUT CAPE WIND ASSOCIATES: COMPANY HISTORY AND MANAGEMENT TEAM, *at* http://www.capewind.org (last visited Feb. 20, 2004). Energy Management Inc., managing partner for Cape Wind, has successfully developed six natural gas fired electric generation projects. *Id.* EMI began developing energy projects in 1975, and built New England's first natural gas-fired merchant power plant in Dighton, Massachusetts in 1999. *New England's EMI Plans 420-Megawatt Nantucket Windfarm*, COMPETITIVE UTILITY (Info. Forecast, Inc., Canoga Park, Cal.), Nov. 2001, at 10, http://www.competitiveutility.com/cu112001.pdf (last visited Feb. 20, 2004).

[115] *See* Press Release, U.S. Army Corps of Engineers, Cape Wind Applies for Corps Permit to Install Scientific Measuring Tower in Nantucket Sound (Dec. 4, 2001), http://www. nae.usace.army.mil/news/2001-162.html (last visited Mar. 19, 2004).

[116] *Id.*

[117] As originally proposed, the project included 170 turbines. *See* Notice of Intent to Prepare a Draft Environmental Impact Statement, 67 Fed. Reg. 4414 (Jan. 30, 2002), *available at* http://www.nae.usace.army.mil/projects/ma/ccwf/NOI Cape Wind.pdf (last visited Mar. 19, 2004).

[118] Press Release, U.S. Army Corps of Engineers, Cape Wind Applies for Corps Permit to Install Scientific Measuring Tower in Nantucket Sound (Dec. 4, 2001), *available at* http://www.nae.usace.army.mil/news/2001-162.html (last visited Mar. 19, 2004).

[119] *See* Notice of Intent to Prepare a Draft Environmental Impact Statement, 67 Fed. Reg. 4414 (Jan. 30, 2002), *available at* http://www.nae.usace.army.mil/projects/ma/ccwf/NOI Cape Wind.pdf (last visited Mar. 19, 2004).

[120] U.S. ARMY CORPS OF ENG'RS, PUBLIC NOTICE 1 (2001), *available at* http://www.nae.usace.army.mil/projects/ma/ccwt/capewindfarmsllcnov2001.pdf (last visited Mar. 19, 2004).

separate and distinct permit and environmental review process with further opportunity for public involvement."[121] Also in December 2001, the Corps determined that an EIS was required for the wind farm project under NEPA.[122]

Pursuant to NEPA requirements, the Corps issued an Environmental Assessment and a Finding of No Significant Impact for the data tower.[123] On August 19, 2002, the Corps issued a section 10 permit to Cape Wind, authorizing it to proceed with the installation and operation of the data tower.[124] The decisions to issue the data tower permit and to undertake environmental impact review of the wind farm triggered private lawsuits and a flurry of Massachusetts and federal legislation designed to stop or delay the project.[125]

B. *The Law as It Exists: Permitting Under the RHA*

The Corps asserted its jurisdiction over the Cape Wind data tower and wind farm pursuant to section 10 of the RHA, as extended by the Outer Continental Shelf Lands Act (OCSLA).[126] The RHA requires a Corps permit for installation of a structure in navigable waters of the United States.[127] The Corps took the position that its jurisdiction over navigable waters of the United States is extended by the OCSLA to include all submerged lands seaward of state coastal waters which are under U.S. jurisdiction—those lands from 3 to 200 nautical miles offshore.[128]

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[121] *Id.*

[122] *See* Notice of Intent to Prepare a Draft Environmental Impact Statement, 67 Fed. Reg. 4414 (Jan. 30, 2002), *available at* http://www.nae.usace.army.mil/projects/ma/ccwf/NOI Cape Wind.pdf (last visited Mar. 19, 2004).

[123] *See* U.S. ARMY CORPS OF ENG'RS, ENVIRONMENTAL ASSESSMENT AND STATEMENT OF FINDINGS 14, *available at* http://www.nae.usace.army.mil/projects/ma/ccwt/ea.pdf (last visited Feb. 20, 2004).

[124] PR Newswire, *Corps Issues Permit to Cape Wind for Scientific Data Tower in Nantucket Sound* (Aug. 19, 2002), *available at* http://www.findarticles.com/cf_dls/m4PRN/2002_August_19/90828719/p1/article.jhtml (last visited Feb. 20, 2004).

[125] *See, e.g.*, Alliance to Protect Nantucket Sound, Inc. v. U.S. Dep't of the Army, 288 F. Supp. 2d 64 (D. Mass. 2003).

[126] Outer Continental Shelf Lands Act, 43 U.S.C. § 1337 (2000); *see Alliance to Protect Nantucket Sound*, 288 F. Supp. 2d at 70–71.

[127] 33 U.S.C. § 403.

[128] *See Alliance to Protect Nantucket Sound*, 288 F. Supp. 2d at 72–73. "The term 'outer Continental Shelf' means all submerged lands lying seaward and outside of the area of lands beneath navigable waters . . . and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control[.]" 43 U.S.C. § 1331(a). The term "'lands beneath navigable waters'" is defined as "all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a

As the issuing authority for a federal permit under section 10, the Corps is the lead agency in preparing an EIS for the wind farm project under NEPA.[129] In that capacity the Corps coordinates interagency review of the project, incorporating the input of a number of federal regulatory authorities.[130] A portion of the wind farm project is also located in state waters,[131] triggering thresholds for environmental review under the Massachusetts Environmental Policy Act (MEPA).[132] To avoid duplication of efforts, the Corps is working with Massachusetts to conduct a concurrent environmental review.[133] On the regional level, the Cape Cod Commission is authorized to review Developments of Regional Impact that present regional issues or potential impacts to the resources of Cape Cod.[134] Issues relevant to the Commission's review will be incorporated into the environmental review process.[135]

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line three geographic miles distant from the coast line of each [of the respective] State[s] . . . ." 43 U.S.C. § 1301(a)(2).

[129] Press Release, U.S. Army Corps of Engineers, Corps to Hold Public Scoping Meetings for EIS on Proposed Wind Farm in Nantucket Sound (Feb. 28, 2002), *available at* http://www.nae.usace.army.mil/news/2002-33.html (last visited Mar. 19, 2004).

[130] *See* U.S. ARMY CORPS OF ENG'RS, AGENCIES 1–2 (2003), *at* http://www.nae.usace.army.mil/projects/ma/ccwf/agencies.pdf (last visited Feb. 20, 2004). For example, the Corps describes various roles for: the U.S. Environmental Protection Agency; the Federal Aviation Administration; the U.S. Department of the Interior, Fish and Wildlife Service and Minerals Management Service; the U.S. Coast Guard; the U.S. Department of Commerce, National Marine Fisheries Service; and the U.S. Department of Energy. *Id.*

[131] *See* Submerged Lands Act, 43 U.S.C. § 1301(a)(2) (2000). Projects sited up to three miles from shore are technically on state lands per the Submerged Lands Act, which vests states with control and title over those lands. *See id.*

[132] *See* Massachusetts Environmental Policy Act, MASS. GEN. LAWS ch. 30, §§ 61–62H (2002); MASS. REGS. CODE tit. 301, § 11.01 (2003) (outlining MEPA Regulations).

[133] *See* MASS. EXECUTIVE OFFICE OF ENVTL. AFFAIRS, CERTIFICATE OF THE SECRETARY OF ENVIRONMENTAL AFFAIRS ON THE ENVIRONMENTAL NOTIFICATION FORM 5 (2002), *available at* http://www.state.ma.us/envir/mepa/downloads/12643cert.doc (last visited Feb. 20, 2004). Sometimes referred to as a little NEPA, MEPA provides state level environmental impact review. *Id.* at 3. MEPA review, however, technically applies only to those portions of the project that are located within Massachusetts, including state waters, generally within three miles from shore. *Id.* The proposed wind turbines would be sited outside of the commonwealth's jurisdiction, and, therefore, would not be subject to MEPA review. *Id.* Despite the jurisdictional limitations, Cape Wind voluntarily filed an Environmental Notification Form to allow MEPA review of the entire project, including the wind turbines. *Id.*

[134] *See* CAPE COD COMM'N, DEVELOPMENTS OF REGIONAL IMPACT (DRIs), *available at* http://www.capecodcommission.org/regulatory/driQA.htm (last visited Feb. 20, 2004).

[135] *See* MASS. EXECUTIVE OFFICE OF ENVTL. AFFAIRS, *supra* note 133. In addition to the section 10 permit process and federal, state, and regional environmental impact review, the project is subject to review and/or approval by numerous other federal, state, and local authorities. *See* MASS. GEN. LAWS ch. 164, §§ 69H–69Q (2003) (establishing an energy facilities siting board to facilitate the provision of reliable energy to the commonwealth with

In support of the EIS, Cape Wind must provide the Corps with scientific, engineering, and economic studies and analysis demonstrating that the project is in the public interest.[136] The scope of the EIS is broad, requiring an assessment of numerous potential impact areas, including: (1) avian; (2) marine habitat; (3) fisheries and benthic; (4) aviation; (5) telecommunication systems; (6) commercial and recreational navigation; (7) socio-economic; (8) aesthetic and landscape/visual; (9) cultural resources; (10) recreation; (11) noise and vibrations; (12) water quality; (13) electric and magnetic fields; (14) air and climate; and (15) safety.[137]

Although Cape Wind has stated that Nantucket Shoal is the preferred location for its wind farm, the EIS will also include an analysis of alternate locations,[138] including one land-based alternative, three in shallow water, a single location in deep water, two or more smaller sites combined, and a no-build alternative.[139] These alternatives must fulfill the project's purpose and need "to develop a commercial scale renewable energy facility providing power to the New England grid."[140]

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a minimum impact on the environment); MASS. GEN. LAWS ch. 21A, § 7 (establishing the Massachusetts Department of Environmental Protection); MASS. GEN. LAWS ch. 21A, § 4A (establishing within the Executive Office of Environmental Affairs a coastal zone management office for the purpose of securing the "objectives and benefits of the federal Coastal Zone Management Act"); MASS. GEN. LAWS ch. 40, § 8D (authorizing cities and towns in Massachusetts to establish historical commissions "for the preservation, protection and development of the historical or archaeological assets"); MASS. GEN. LAWS ch. 40, § 8C (authorizing cities and towns to establish conservation commissions for the protection of natural resources); MASS. GEN. LAWS ch. 40A (outlining local zoning authority in Massachusetts).

[136] CAPE WIND ASSOCS., FREQUENTLY ASKED QUESTIONS: QUESTIONS ABOUT THE CAPE WIND PROJECT, *at* http://www.capewind.org (last visited Feb. 20, 2004).

[137] *See* U.S. ARMY CORPS OF ENG'RS, ENVIRONMENTAL IMPACT STATEMENT: SCOPE OF WORK, WIND POWER FACILITY PROPOSED BY CAPE WIND ASSOCIATES, LLC 3–7, *available at* http://www.nae.usace.army.mil/projects/ma/ccwf/windscope.pdf (last visited Feb. 20, 2004). The permit decision will be based on the public interest factors listed at 33 C.F.R. § 320.4. *Id* at 1.

[138] *See* 40 C.F.R. § 15.02.14 (2003); *see also* 33 C.F.R. § 325 app. B(9)(b)(5)(a) (2003) (indicating that "only reasonable alternatives need to be considered in detail").

[139] Press Release, U.S. Army Corps of Engineers, Corps Announces Alternatives to be Reviewed in Windfarm EIS (Oct. 29, 2003), http://www.nae.usace.army.mil/projects/ma/ccwf/2003-122.html (last visited Feb. 20, 2004). The onshore alternative is the Massachusetts Military Reservation, on Cape Cod; the three shallow water alternatives are Horseshoe Shoal, Tuckernuck Shoal, and Hankerchief Shoal, all in Massachusetts; the combined locations alternative joins New Bedford Harbor, Massachusetts, with a reduced footprint at Horseshoe Shoal; finally, the deep water alternative is the area south of Tuckernuck Island, Massachusetts. *Id.*

[140] *See* U.S. ARMY CORPS OF ENG'RS, *supra* note 137, at 2. Existing merchant power plant projects with which the Cape Wind farm will compete are typically 200 to 1500 MW. U.S. ARMY CORPS OF ENG'RS, PUBLIC INFORMATION MEETING, OCT 29, 2003, at 8 (slide

Some individuals and interest groups have raised concerns that the EIS process has been taking too long.[141] Others have complained that the process has been too fast.[142] The Corps has taken the position that this will be "a slow and deliberate process. . . . Eventually, we are going to be issuing a draft EIS."[143] While the Corps has refused to set a specific deadline, it has indicated that a draft EIS could be available for public comment sometime in 2004.[144] Under that time frame, a final section 10 permit decision could be two years away.[145]

Cape Wind believes that the environmental review process is more than adequate, and that the data will ultimately demonstrate that building the wind farm at Horseshoe Shoal would result in significant public benefits.[146] Yet a vocal opposition argues that the Corps's existing permit authority was not intended to address a project of this magnitude, and that the review process should cease until a more detailed plan is put into place.[147]

C. *Who is for Wind Power, and Who Is Against It*

Wind advocates believe that wind power would help the United States diversify its portfolio of energy resources, providing a more stable alternative to often volatile fossil fuel prices.[148] Wind power can

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presentation), http://www.nae.usace.army.mil/projects/ma/ccwf/10-29-briefing.pdf (last visited Feb. 20, 2004).

[141] Wendy Williams, *Cape Cod Offshore Permitting: A Slow and Deliberate Process*, WINDPOWER MONTHLY, Dec. 2003, at 31.

[142] *Id.*

[143] *Id.*

[144] *See Windy Battle*, *supra* note 79. The precise timing will depend in large part on how much data needs to be collected and analyzed. *See id.*

[145] *See* John Leaning, *Judge: Corps Can Give Permit*, CAPE COD TIMES, Sept. 19, 2003, http://www.capecodonline.com/special/windfarm/judgegive19.htm (last visited Feb. 20, 2004).

[146] *See generally* CAPE WIND HOMEPAGE, *supra* note 79. According to Cape Wind, the project will supply clean energy, boost the local economy, and will have only moderate visual impacts from the shore. *See id.* At the same time, the project will not be a hazard to navigation for boats or airplanes, or pose a hazard to birds, fish, sea mammals, or the ecosystem of Horseshoe Shoal. *See id.*

[147] Wendy Williams, *Long Island Authority Hastens Selection Process for 140 MW Offshore*, WINDPOWER MONTHLY, Sept. 2003, at 47.

[148] *See* BARRY HOPKINS, THE COUNCIL OF STATE GOV'TS, TRENDSALERT: RENEWABLE ENERGY AND STATE ECONOMIES 5 (2003), *available at* http://www.csg.org/CSG/Policy/infrastructure/renewable+energy+and+state+economies.htm (last visited Feb. 20, 2004). Approximately fifty-two percent of electricity is generated by coal and seventeen percent by natural gas. *Id.* Over-reliance on any one primary source of electricity can make an economy vulnerable to severe price fluctuations. *See id.* According to a study by Industrial Energy Consumers of America (IECA), as a result of rising natural gas prices U.S. consumers paid $111

provide a local fuel source, decreasing reliance on large centralized plants connected to the high voltage transmission lines that bring power to consumers over long distances.[149] Moreover, by reducing pollution that results from burning fossil fuels, wind power can help to improve environmental conditions and public health.[150] Transitioning to renewable energy resources such as wind power can also limit development pressure on unique areas such as the Arctic National Wildlife Refuge.[151] Several prominent advocacy organizations have voiced their support for Cape Wind, although most have stopped short of endorsing the project, reserving final judgment until the

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billion more for gas between June 2000 and October 2003 than they did during the previous forty-one month period. INDUS. ENERGY CONSUMERS OF AM., 41 MONTH NATURAL GAS CRISIS HAS COST U.S. CONSUMERS OVER $111 BILLION, at 1 (2003), *available at* http://www.ieca-us.com/downloads/natgas/$111bilion.doc (last visited Feb. 20, 2004). According to IECA, average price from June 2000 to October 2003 was $4.34 per million British thermal units (MMBtu), while the average between January 1997 and May 2000 was only $2.37 per MMBtu. *Id.* at 4; *see also* THE INST. FOR AM.'S FUTURE ET AL., NEW ENERGY FOR AMERICA, THE APOLLO JOBS REPORT: GOOD JOBS & ENERGY INDEPENDENCE 3 (2004) (stating that public and private investment in clean energy technologies such as wind power, solar power, and hydrogen fuel cells will create high-wage jobs, capture growing markets, reduce our dependence on foreign oil imports, create a resilient energy system, bolster national security and clean up our environment), *available at* http://www.apolloalliance.org/docUploads/ApolloReport%2Epdf (last visited Feb. 20, 2004).

[149] UNION OF CONCERNED SCIENTISTS, CLEAN ENERGY: LESSONS FROM THE AUGUST 2003 BLACKOUT, http://www.ucsusa.org/clean_energy/renewable_energy/page.cfm?pageID=1248 (last visited Feb. 20, 2004).

[150] *See* UNION OF CONCERNED SCIENTISTS, ENVIRONMENTAL IMPACTS OF COAL POWER: AIR POLLUTION (2001), *at* http://www.ucsusa.org/CoalvsWind/c02c.html (last visited Feb. 20, 2004). According to the Union of Concerned Scientists, a typical coal plant generates carbon dioxide, the primary cause of global warming; sulfur dioxide, which causes acid rain; airborne particles, a contributor to haze and respiratory problems; nitrogen oxide, which leads to the formation of smog; carbon monoxide, which aggravates health issues; volatile organic compounds, which form ozone; mercury, which can make fish unfit to eat; arsenic, a cancer causing substance; and other toxic heavy metals. *Id.* As a contrast,

> Wind power produces no harmful emissions, and is not depleted over time. A single one megawatt (1MW) wind turbine running for one year can displace over 1,500 tons of carbon dioxide, 6.5 tons of sulfur dioxide, 3.2 tons of nitrogen oxides, and 60 pounds of mercury (based on the U.S. average utility generation fuel mix).

REEVES, *supra* note 4, at 4. Wind power also does not require cooling water nor the mining, transportation or storage of fuel. UNION OF CONCERNED SCIENTISTS, WIND POWER: CLEAN, SUSTAINABLE, AND AFFORDABLE (2002), *available at* http://www.ucsusa.org/CoalvsWind/w01.html (last visited Jan. 21, 2004).

[151] *See* DR. JAMES J. MACKENZIE, WORLD RES. INST., FACING THE UNITED STATES' OIL SUPPLY PROBLEMS: WOULD OPENING UP THE ARCTIC WILDLIFE REFUGE (ANWR) COASTAL PLAIN REALLY MAKE A DIFFERENCE? (2001), http://www.wri.org/climate/anwr.html (last visited Feb. 20, 2004).

permitting process is complete. In November 2003, a letter from the Conservation Law Foundation and the Union of Concerned Scientists, along with other environmental and public health groups, petitioned federal lawmakers not to delay the review of offshore wind farm proposals.[152] These organizations believe that

> Wind is a critical renewable energy resource for New England where air pollution, primarily from coal-fired power plants, causes thousands of premature deaths every year. Substantial reductions in emissions of greenhouse gases, nitrogen oxides, sulfur dioxide, and particulate matter from the regional power system must be achieved *soon* to halt global warming and protect New England's air and water.[153]

Wind power critics argue that wind's benefits are overstated, citing to negative visual and aesthetic impacts,[154] the alleged risk posed to birds and other avian species,[155] and the lack of a regulatory process

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[152] Press Release, Conservation Law Foundation, Environmental Advocates Support Ongoing Review Process for Cape Wind Project (Nov. 7, 2002), *available at* http://www.clf.org/hot/20021107.htm (last visited Feb. 20, 2004).

[153] *Id.* (emphasis added).

[154] *See* GREEN NATURE, PROPOSED CAPE COD WIND FARM FACES OPPOSITION, *at* http://www.greennature.com/article1031.html (last visited Feb. 20, 2004); WIND STOP.ORG, HOME, *at* http://www.windstop.org/pages/1/index.htm (last modified Feb. 21, 2004). Critics claim that if offshore wind farms are permitted, otherwise serene ocean vistas will become a "steel forest" of towers, with hundreds of flashing navigational lights. *See* WIND STOP.ORG, *supra*. Wind power opponents worried about their property values may take comfort in a study by Researchers for the Renewable Energy Policy Project (REPP). *See* STERZINGER ET AL., *supra* note 14, at 2. The study was funded by the federal government and looked at property value changes of 25,000 properties within the view shed of wind projects at least ten MW in size and operating between 1998 and 2001. *Id.* at i, 1–2. The results of this study suggest that there is no support for the claim that wind development will harm property values. *Id.* at 2.

[155] The Massachusetts Audubon Society voiced its concerns regarding Cape Wind's potential avian impacts:

> Site selection is important in minimizing the avian risks of windfarms. This particular project site is an area with one of the highest concentrations of seaducks and terns on the Atlantic seaboard. The shoals at this location provide ample feeding opportunities for birds. The site is also located along a major migratory bird flightway. *We do not agree with the [applicant's] unsupported conclusions that avian risks are small or that bird use in the area is low.*

Letter from John J. Clarke, Director of Advocacy, Massachusetts Audubon Society, to Bob Durand, Secretary, Executive Office of Environmental Affairs 1–2 (Dec. 13, 2001), *available at* http://www.saveoursound.org/pdfs/audubon.pdf (last visited Feb. 21, 2004); *see also Avian Issues Resurface at Altamont Wind Farm*, SOLARACCESS.COM (Jan. 29, 2004), *at* http://www.solaraccess.com/news/story?storyid=5978 (last visited Feb. 21, 2004); Wendy Williams, *Positive Start to Mitigating Bat Kills*, WINDPOWER MONTHLY, Mar. 2004, at 30; Wendy

designed to allocate offshore resources for public use.[156] High-ranking commonwealth officials, including Governor Mitt Romney and Attorney General Thomas F. Reilly, have come out against the project, at least until a more defined legislative and regulatory review process has been established.[157] A number of bills aimed at limiting ocean development have been introduced in the Massachusetts general court (or legislature),[158] and the commonwealth's Environmental Affairs Secre-

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Williams, *Wildlife Problems in Search of Solutions*, WINDPOWER MONTHLY, Jan. 2004, at 50 (detailing a two-day meeting in November 2003 including representatives from industry, government, wildlife groups, and wildlife agencies that found little consensus on the meaning of "biological significance"); *see generally* NAT'L WIND TECH. CTR., AVIAN LITERATURE DATABASE, *at* http://www.nrel.gov/wind/avian_lit.html# (last visited Feb. 21, 2004).

[156] *See* Alliance to Protect Nantucket Sound, Inc. v. U.S. Dep't of Army, 288 F. Supp. 2d 64, 67, 78 (D. Mass. 2003) (challenging the Corps's decision based, in part, on the assertion that there exists no proper regulatory scheme under which to proceed with this project).

[157] *See* Stephanie Ebbert, *On Wind, Some Blow Hot & Cold*, BOSTON GLOBE, June 17, 2003, at A1; Donna Goodison, *Ocean 'Zoning' Will Top Agenda for Task Force*, BOSTON HERALD, June 4, 2003, at 37.

> There is no question that the sensible development of new sources of energy is one of the most important energy matters facing us today. Indeed, offshore wind projects present exciting possibilities for the development of renewable energy resources. The controversy surrounding a recent proposal to build a large wind energy facility in Nantucket Sound, however, highlights the *immediate need* to develop a meaningful process at the Federal level to carefully review these types of proposals.

Proposed Amendments to the Outer Continental Shelf Lands Act: Hearing on H.R. 793 Before the House Subcomm. on Energy and Mineral Resources, 108th Cong. (2003) [hereinafter Hearing on H.R. 793] (testimony of Thomas F. Reilly, Attorney General, Massachusetts), *available at* http://resourcescommittee.house.gov/108cong/energy/2003mar06/reilly.htm (last visited Feb. 21, 2004); *see also* Brief of Amicus Curiae the Commonwealth of Massachusetts at 2, Alliance to Protect Nantucket Sound, Inc. v. U.S. Dep't of Army, 288 F. Supp. 2d 64 (D. Mass. 2003) (No. 03-2604).

[158] *See* S. 380, 182d Gen. Ct. (Mass. 2003), *available at* http://www.state.ma.us/legis/bills/st00380.htm (last visited Feb. 21, 2004). Senate Bill 380 requires "a study into the feasibility of wind energy generation in Massachusetts. Said study shall include an analysis of possible locations and prohibitions for the creation of wind energy projects on offshore sites . . . ." *Id.* The analysis examines potential locations in light of project costs, environmental impacts, the potential for public-private partnership, and community impacts "in terms of historic uses, values and aesthetics." *Id.* Massachusetts House Bill 963 limits ocean development until further studies show that the proposed development "does not present a coastal hazard, create adverse economic or aesthetic impacts, or significantly alter or otherwise endanger the ecology or the appearance of the ocean, the seabed or the subsoil thereof." H.R. 963 182d Gen. Ct. (Mass. 2003), *available at* http://www.state.ma.us/legis/bills/house/ht00963.htm (last visited Mar. 19, 2004).

tary appointed an Ocean Management Task Force to develop a comprehensive plan to manage the commonwealth's ocean resources.[159]

U.S. Representative William Delahunt (D-Mass.), whose district includes Nantucket Sound, commissioned a study to help him determine whether to file legislation to designate Nantucket Sound a National Marine Sanctuary.[160] Representative Delahunt also introduced legislation authorizing the licensing of renewable energy projects in federal waters, discussed in detail below.[161] U.S. Senators Edward M. Kennedy (D-Mass.) and John F. Kerry (D-Mass.) have both done their best to stay out of the fray. While Senator Kennedy supports wind energy, he has repeatedly voiced concerns about how offshore wind energy projects will be regulated.[162] Senator Kerry, a presidential candidate, has likewise expressed his support for renewable energy but has

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[159] MASS. OFFICE OF COASTAL ZONE MGMT., MASSACHUSETTS OCEAN MANAGEMENT INITIATIVE, *at* http://www.state.ma.us/czm/oceanmgtinitiative.htm (last modified Jan. 26, 2004). Governor Romney announced the Massachusetts Ocean Management Initiative in March of 2003. *Id.* The Ocean Management Task Force issued its final report in March, 2004. *See generally* 1 MASS. OFFICE OF COASTAL ZONE MGMT., WAVES OF CHANGE: THE MASSACHUSETTS OCEAN MANAGEMENT TASK FORCE REPORT AND RECOMMENDATIONS (2004), *available at* http://www.state.ma.us/czm/MOMI/finalrpts.htm (last visited Mar. 31, 2004); 2 MASS. OFFICE OF COASTAL ZONE MGMT., *supra* note 106.

[160] Nantucket Sound had previously been nominated for designation as a National Marine Sanctuary in the early 1980s. Press Release, Congressman Bill Delahunt, Reilly/Delahunt Seek Romney Help to Protect Nantucket Sound (Feb. 26, 2003), *available at* http://www.house.gov/delahunt/nantucketsound.htm (last visited Mar. 31, 2004). In October 2002, U.S. Representative Delahunt requested a review of existing literature pertaining to the biological resources and environmental protection of water of Nantucket Sound. *See* CTR. FOR COASTAL STUDIES, REVIEW OF STATE AND FEDERAL MARINE PROTECTION OF THE ECOLOGICAL RESOURCES OF NANTUCKET SOUND, at i (2003), http://www.coastalstudies.org/coastalsolution/CCS_Report_1-28-03.pdf (last visited Feb. 21, 2003). Representative Delahunt's district includes, in part, Cape Cod and the Islands of Martha's Vineyard and Nantucket. *See* CONGRESSMAN BILL DELAHUNT, HOME, *at* http://www.house.gov/delahunt/welcome.htm (last visited Mar. 5, 2004).

[161] H.R. 1183, 108th Cong. § 2(b) (2003); *see infra* text accompanying notes 198–219.

[162] Stephanie Ebbert, *Kennedy Retreats on Wind Farm Amendment*, BOSTON GLOBE, July 31, 2003, at B1. Senator Kennedy had initially supported draft legislation that would have given a state's governor veto power over offshore wind farms. *See id.*

> Kennedy, describing himself as "a strong supporter of renewable energy," cited rising oil costs, looming war with Iraq and air pollution as reasons that "wind energy must obviously be further explored as an important source of clean energy."
>
> But, he said, gaps in federal policy need to be corrected before proposals such as a Nantucket Sound wind farm should be built.

Jack Coleman, *Kennedy Withholds Support, for Now: Senator says Federal Control a Must in Offshore Projects*, CAPE COD TIMES, Mar. 15, 2003, http://www.capecodonline.com/special/windfarm/kennedywithholds15.htm (last visited Feb. 22, 2004).

not issued a formal opinion on the project, and is reportedly waiting to hear about the results from the Corps's EIS.[163]

The most vocal opponent of Cape Wind has been the Alliance to Protect Nantucket Sound (the Alliance), which at one time had the support of former CBS news anchor Walter Cronkite, the "most trusted man in America."[164] With diverse support ranging from wealthy homeowners to working-class fishermen, the Alliance has set out to defeat Cape Wind.[165] The Alliance argues that Cape Wind is aggressively proceeding with the development despite the "complete absence of federal authority for such a project."[166] According to the Alliance, no federal framework exists to evaluate any aspect of the project, including whether private companies have any right to occupy OCS lands or how such development should be allowed to proceed.[167] The Alliance disputes that the section 10 permitting process of the RHA, created in 1879 and administered by the Corps, is an appropriate mechanism to regulate the development of large-scale wind energy plants in public waters.[168] In its place, the Alliance advocates for a federal programmatic approach that would: (1) identify appropriate locations for wind projects; (2) provide zoning that would set standards to ensure that environmental, public safety, economic, aesthetic, cultural, and navigational issues are appropriately considered; (3) ensure competitive bidding to

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[163] *See* Sam Dealey, *Wind Farm is an Issue for Kerry*, THE HILL, June 18, 2003, http://www.hillnews.com/news/061803/kerry.aspx (last visited Feb. 22, 2004); Stephanie Ebbert, *Senate Votes for Panel on Energy*, BOSTON GLOBE, July 11, 2003, at B1.

[164] *See* Stephanie Ebbert, *On Wind, Some Blow Hot and Cold*, BOSTON GLOBE, June 17, 2003, at A1. Walter Cronkite, a Martha's Vineyard homeowner, once served as a poster-child for the wind farm's critics, vehemently opposing Cape Wind in television and radio advertisements sponsored by the Alliance. *See id.* He later asked the Alliance to pull the advertisements; Cronkite said he began reconsidering his position in late August 2003, "after reading that the Bush administration intended to relax Clean Air Act standards for coal-fired power plants—a move he considered 'a terrible blow' to the hope of reducing pollutants in the atmosphere." Stephanie Ebbert, *Cronkite Urges Full Review of Wind Farm Proposal*, BOSTON GLOBE, Aug. 29, 2003, at B1. In August 2003, after meeting with Cape Wind president Jim Gordon, he stated "that the heated opposition to the project is 'premature,' and that he would withhold further judgment until an environmental impact study is complete." *Id.*

[165] *See* ALLIANCE TO PROTECT NANTUCKET SOUND, SAVE OUR SOUND ALLIES: WHO'S CONCERNED, *at* http://www.saveoursound.org/allies.html (last visited Mar. 19, 2004).

[166] *See* Alliance to Protect Nantucket Sound, Inc. v. U.S. Dep't of Army, 288 F. Supp. 2d 64, 67, 78 (D. Mass. 2003) (challenging Cape Wind's project on the basis of environmental concerns as well as the lack of a regulatory framework governing its construction).

[167] *See* ALLIANCE TO PROTECT NANTUCKET SOUND, FREQUENTLY ASKED QUESTIONS, *at* http://www.saveoursound.org/faq.html (last visited Feb. 22, 2004).

[168] *See* Alliance To Protect Nantucket Sound, Inc. v. U. S. Dep't of the Army, 288 F. Supp. 2d 64, 69 n.27 (D. Mass. 2003).

obtain development rights; (4) mandate royalty payments; (5) divide jurisdiction between the Department of the Interior and the National Oceanic and Atmospheric Administration; and (6) require prior acceptance of a wind energy project by state and local governments.[169]

Much of the dispute between Cape Wind and the Alliance has played out in newspaper editorial pages, amidst allegations on both sides of misrepresentation and deceit.[170] In August 2002, however, the Alliance dramatically raised the stakes by moving the battle into the courtroom. Shortly after the Corps issued a section 10 permit to Cape Wind authorizing it to install a data tower, the Alliance filed suit in the U.S. District Court for the District of Massachusetts.[171]

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[169] *Id.*

[170] *See generally* ALLIANCE TO PROTECT NANTUCKET SOUND, LOCAL NEWS AND OPINION, *at* http://www.saveoursound.org/localopp.html (last visited Mar. 19, 2004). For example, the Alliance used the caption "they are anything but 'small masts' on the horizon" to describe their photo simulations of the wind farm from Hyannis. *Id.* Cape Wind asserts that the Alliance's photographs exaggerate the view from the shore because they allegedly magnified a portion of the shore and inserted 130 turbines into the small area depicted. Press Release, Cape Wind Associates, LLC, Alliance is Altering and Distorting Visual Simulations, (Oct. 7, 2003), *available at* http://www.capewind.org (last visited Feb. 22, 2004). In March, 2004, Cape Wind filed a lawsuit alleging that the former research director for the Alliance maligned the company by sending a fraudulent press release to an on-line information system. Jack Coleman, *Wind Farm E-mailer Hit with Restraining Order: A Founder of the Opposition Group Agrees Not to Destroy Evidence He Tried to Defame Cape Wind*, CAPE COD TIMES, Mar. 5, 2004, http://www.capecodonline.com/special/windfarm/windfarm045.htm (last visited Mar. 31, 2004); Beth Daley, *Ploy Roils Wind Farm Debate: Official Resigns Over Bogus Story*, BOSTON GLOBE, Mar. 4, 2004, at B3.

[171] Complaint for Declaratory and Injunctive Relief, Alliance To Protect Nantucket Sound, Inc. v. U.S. Dep't of the Army, 288 F. Supp. 2d 64 (D. Mass. 2003) (No. 02-11749). A separate citizens group brought a lawsuit against Cape Wind in state court, which was removed to the U.S. District Court for the District of Massachusetts. Ten Taxpayers Citizen Group v. Cape Wind Assocs., 278 F. Supp. 2d 98, 99 (D. Mass. 2003). In that case, in light of the federal government's exclusive jurisdiction over waters more than three miles from shore—and the absence of any applicable delegation of that jurisdiction—Judge Tauro issued an opinion rejecting the plaintiffs' argument that Cape Wind was required to secure a license under chapter 91 of the Massachusetts General Laws prior to constructing the test tower. *See id.* at 99–101. The plaintiffs appealed Judge Tauro's decision and the case is currently pending in the U.S. Court of Appeals for the First Circuit. Ten Taxpayers Citizen Group v. Cape Wind Assocs., 278 F. Supp. 2d 98, (D. Mass. 2003), *appeal docketed*, No. 03-2323 (1st Cir. Sept. 26, 2003). The Alliance also intervened in the proceedings before the Massachusetts Energy Facility Siting Board (EFSB) regarding the transmission line to connect the wind farm to the New England power grid. Cape Wind Assocs., No. 02-2/02-53 (Mass. Energy Facility Siting Bd./Dep't of Telecomm. & Energy filed Nov. 27, 2002), *available at* http://www.state.ma.us/dpu/siting/reladepact.htm (last visited Feb. 22, 2004). Discussion of the EFSB proceedings is beyond the scope of this paper.

D. *The Courts*

The Alliance's lawsuit challenged the Corps's decision to issue a section 10 permit to Cape Wind.[172] Several arguments were put forth by the Plaintiffs. First, the Alliance objected to the Corps taking jurisdiction over the Cape Wind permit application, arguing that the agency lacks the authority to issue a section 10 permit for activities on the OCS unrelated to the extraction of gas, oil, and minerals from the seabed.[173] Even if the RHA applied, the Alliance asserted, the Corps should have denied the permit application because Cape Wind does not have and could not obtain the requisite property interest to construct a data tower on the OCS; as the Alliance pointed out, there is currently no mechanism by which the federal government can confer a property interest in OCS lands for wind energy development.[174] Finally, the Alliance alleged procedural deficiencies in the developer's proposal that violate NEPA.[175]

The Alliance had high hopes for success, publicly proclaiming that the law was on their side.[176] But on September 18, 2003, Judge Joseph Tauro denied the Plaintiffs' claim on all counts, dashing the Alliance's wish for an early victory "in what may prove to be a protracted struggle over the construction of a wind energy plant in Nantucket Sound, Massachusetts."[177]

In addressing the Corps's authority to issue a section 10 permit for the data tower, the district court found that the case law has

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[172] *See* Alliance to Protect Nantucket Sound, Inc. v. U.S. Dep't of the Army, 288 F. Supp. 2d 64, 66–67 (D. Mass. 2003). While the subject matter of this lawsuit is limited to the data tower, the arguments presented and the courts' decision address many of the issues and claims that could arise in future litigation involving the wind farm. *See* SETH KAPLAN, CONSERVATION LAW FOUND., STATEMENT OF CLF CLEAN AIR AND CLIMATE CHANGE PROJECT DIRECTOR SETH KAPLAN REGARDING AUGUST 18, 2003 DECISION BY JUDGE JOSEPH TAURO ON CAPE WIND LAWSUIT (2003), *at* http://www.clf.org/hot/cape_wind_data_tower_statement.htm (last visited Feb. 22, 2004).

[173] *See Alliance to Protect Nantucket Sound*, 288 F. Supp. 2d at 72.

[174] *See id.* at 77–78.

[175] *See id.* at 78. The Plaintiffs alleged that the Corps: (1) failed to circulate certain documents for public comment; (2) did not adequately consider alternatives to the data tower; (3) acted improperly in reviewing the data tower application separate from the wind farm application; and (4) did not consider the environmental effects of removal of the data tower. *See id.* at 78–82.

[176] *See generally* ALLIANCE TO PROTECT NANTUCKET SOUND, LEGAL CONCERNS, *at* http://www.saveoursound.org/legal.html (last visited Mar. 19, 2004).

[177] *Alliance to Protect Nantucket Sound*, 288 F. Supp. 2d at 66. Referring to Ten Taxpayers Citizen Group v. Cape Wind Associates, Judge Tauro noted that Plaintiffs' challenge to the Corps's decision to issue Cape Wind a permit was the "second skirmish" in the battle between Cape Wind and its opponents decided in federal court. *Id.*

"evolved in such a way that, today 'a permit from . . . the Corps . . . is required for the installation of any structure in the navigable waters' of the United States."[178] The court went on to explore the extent of the Corps's section 10 authority over OCS lands, considering the language of the OCSLA as it was originally drafted, the 1978 amendments to the act, the legislative history of those amendments, and the Corps's interpretation of its own authority.[179] The district court rejected the Plaintiffs' argument that Congress, in amending the OCSLA in 1978, had restricted the Corps's authority to issue section 10 permits on the OCS to "those structures erected for the purpose of extracting resources."[180] Rather, the court upheld the Corps's interpretation of the relevant statutory language, finding that its section 10 authority extends to "all 'artificial islands, installations, and other devices located on the seabed, to the seaward limit of the [OCS],' including, but not limited to, those that '*may be*' used to explore for, develop, or produce resources."[181]

The district court also rejected the Plaintiffs' belief that the Corps's regulations "'require that an applicant have sufficient property rights as a prerequisite for a permit.'"[182] Rather, the court found that the Corps's regulations are designed to keep the Corps out of property disputes, and "require only that a permit application '*affirm*[] that the applicant possesses or will possess the requisite property interest to undertake' its proposed activity."[183] Finally, the court found that the Corps satisfied its obligations under NEPA.[184]

Judge Tauro's *Alliance to Protect Nantucket Sound* decision was the judicial equivalent of a green light, authorizing Cape Wind to proceed to build its data tower, even without a federally granted property

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[178] *Id.* at 72 (citing PUD No. 1 v. Wash. Dep't of Ecology, 511 U.S. 700, 722 (1994)).

[179] *Id.* at 72–73.

[180] *Id.* at 74–76.

[181] *Id.* at 75.

[182] *Id.* at 77–78 (citing Pls.' Br. at 11).

[183] *Alliance to Protect Nantucket Sound*, 288 F. Supp. 2d at 77.

[184] *Id.* at 78–82 (outlining NEPA's requirements and finding that (1) "[t]he Corps, therefore, did not act unreasonably in deciding not to circulate a draft FONSI or EA" for public comment; (2) "[t]he Corps' treatment of project alternatives was reasonable"; (3) "the Corps did not act wrongfully in considering the two permit applications separately from one another," or "in any way seek to avoid its NEPA requirements in considering the data tower application apart from the wind energy plant application"; and (4) "[p]laintiffs' unsupported allegations that the towers' removal will cause environmental impacts beyond those associated with its construction are not enough to overcome the Corps' reasonable conclusion to the contrary").

interest.[185] While the decision was limited to the test tower, it addressed many of the same legal issues that would likely arise in permitting the wind farm—issues which could be addressed by federal legislation.[186]

Judge Tauro may have been correct in predicting a lengthy struggle. In November 2003, the Alliance filed a notice of intent to appeal, and the case is now on the docket of the United States Court of Appeals for the First Circuit. In December 2003, the Alliance filed its Statement of Issues with the Court of Appeals.[187]

In March, 2004, after several extensions of time granted by the court of appeals, the Alliance filed its fifty-one page brief.[188] In its

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[185] *See* Alliance to Protect Nantucket Sound, Inc. v. U.S. Dep't of the Army, 288 F. Supp. 2d 64, 78–82 (D. Mass. 2003).

[186] *See id.* According to Seth Kaplan, a lawyer for the Conservation Law Foundation, "Congress could eventually decide that wind projects would need to pay rent to use federal waters. '(But) until Congress speaks one way or another, you can't say they are prohibited from being out there.'" Jon Chesto, *Reilly: Congress Must OK Windmills: No Rules Guide Cape Cod Project, Filing Says*, BOSTON HERALD, Mar. 12, 2004, at 35.

[187] *See* Appellants' Designation of the Contents of the Appendix and Statement of Issues, Alliance to Protect Nantucket Sound, Inc. v. U.S. Dep't of the Army, 288 F. Supp. 2d 64 (D. Mass. 2003), *appeal docketed*, No. 03-2604 (1st Cir. Nov. 24, 2003). The following issues were set out by the Alliance:

> (1) Did the U.S. Army Corps of Engineers . . . exceed its authority under the Outer Continental Shelf Lands Act in issuing a permit under Section 10 of the Rivers and Harbors Act of 1899 for a structure on the [OCS] which is not related to the exploitation of mineral resources?
> (2) Did the Corps violate its own regulations by issuing a Section 10 permit for a structure on the OCS for which the applicant indisputably does not, and, short of an Act of Congress, cannot, possess the requisite property interests to construct?
> (3) Did the Corps violate the National Environmental Policy Act by failing to circulate the Environmental Assessment and Finding of No Significant Impact for public comment?

Id. at 2.

[188] *See* Appellants' Brief, Alliance to Protect Nantucket Sound, Inc. v. U.S. Dep't of the Army, 288 F. Supp. 2d 64 (D. Mass. 2003), *appeal docketed*, No. 03-2604 (1st Cir. Nov. 24, 2003). Even if the Alliance did not pursue its appeal, there are numerous other forums in which the Alliance and other opponents could potentially challenge the wind farm. For example: (1) the Alliance will have an opportunity to comment on the Draft Environmental Impact Statement, 40 C.F.R. § 1503 (2004); (2) the Alliance has intervened in Cape Wind's proceedings before the Massachusetts Energy Facility Siting Board; (3) the Alliance could pursue its belief that the proposal would violate the commonwealth's Ocean Sanctuaries Act, chapter 132A, sections 12A–16F and 18 of the Massachusetts General Laws and 302 Mass. Regs. Code § 5.00, and/or seek to designate Nantucket Sound as a National Marine Sanctuary, 16 U.S.C. § 1431 (2000); and (4) numerous other permits are required, such as a permit from the Massachusetts Department of Environmental Protection pursuant to chapter 91 of the Massachusetts General Laws, and local wetlands permits from the

brief, the Alliance disputes the district court's ruling that the Corps's section 10 authority is extended by the OCSLA "to all structures on the OCS, regardless of purpose," arguing that this interpretation is "contrary to the plain language of the OCSLA."[189]

> [The district court] placed inappropriate reliance on legislative history that is in direct conflict with the plain language of the statute. . . . In addition, the district court failed to give any deference to the contrary interpretation by the Department of the Interior, the agency charged with administering the OCS under the OCSLA.
>
> Construing the OCSLA to extend Corps jurisdiction to non-mineral activities on the OCS, as . . . accepted by the district court, in effect, encourages, and in fact did lead to, the unauthorized use and occupancy of federally-owned sea bottom lands. It did so without compensation to the United States, without a mechanism for fair or competitive access to those lands, without designation of a lead federal agency with the relevant expertise, and without an oversight or regulatory program that exists for every other Congressionally authorized use of OCS lands.[190]

The Alliance also disagrees with the district court's holding that the Corps does not have the authority to consider an applicant's lack of property rights to use and occupy federal offshore lands:

> [T]he Corps' own regulations require an applicant to affirm that he has, or will acquire, the requisite property rights to undertake the activity proposed. 33 C.F.R. § 320.4(g)(6); 325.1(d)(7). In effect, the district court ruled that such an affirmation, although required, need not be truthful, and the Corps may grant the false application with impunity. Although Corps regulations provide that the Corps will not involve itself in property disputes, *id.*, in the context of the OCS there is no possible property dispute, as federal ownership of the OCS is conclusively established as a matter of federal law. There is no possibility that the Cape Wind developers can obtain the re-

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Barnstable and Yarmouth Conservation Commissions. MASS. GEN. LAWS ch. 40, § 8C (2002).

[189] Appellants' Brief, *supra* note 188, at 18.

[190] *Id.* at 18–19.

> quired property rights, absent an Act of Congress. In such a case, issuance of the permit in willful disregard of the fact that property interests have not been, nor can be, obtained, violates the Administrative Procedur[e] Act . . . as arbitrary and capricious and contrary to the public interest, and will lead to unauthorized "squatting" on federal lands, based solely on a navigability permit issued with full complicity by the Corps.[191]

Finally, the Alliance argues that the district court's ruling that a draft environmental assessment or finding of no significant impact need not be circulated for public comment is inconsistent with federal regulations and in direct conflict with case law precedent.[192]

In late March, 2004, the court granted the Corps an extension until May 12, 2004, to file its brief. The court has scheduled oral argument for June 8, 2004.[193]

E. *The Law as It Might Be: Proposed Amendments to the OCSLA*

While the case was still pending before Judge Tauro, Cape Wind's opponents demanded that a moratorium be imposed on all offshore wind farm development until Congress enacted more comprehensive legislation.[194] Other interested parties, including several non-governmental organizations, argued that the current regulatory framework was adequate, at least until a more suitable policy could be put into place.[195]

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[191] *Id.* at 19.

[192] *Id.* at 19.

[193] *See* Alliance to Protect Nantucket Sound, Inc. v. U.S. Dep't of the Army, 288 F. Supp. 2d 64 (D. Mass. 2003), *appeal docketed*, No. 03-2604 (1st Cir. Nov. 24, 2003).

[194] *See* ALLIANCE TO PROTECT NANTUCKET SOUND, LEGAL CONCERNS, *at* http://www.saveoursound.org/legal.html (last visited Mar. 5, 2004). "There are currently at least 19 other similar proposals pending from coastal Maine to Virginia. There must be a moratorium on this development until all legal issues . . . are resolved." *Id.*

[195] *See Hearing on H.R. 793* (Testimony of Peter Shelley, Vice President, Conservation Law Foundation), *available at* http://www.clf.org/hot/HR_793_Congressional_Testimony.pdf (last visited Mar. 5, 2004). Mr. Shelley stated that:

> [O]ur organizations do not believe Congress should impose an economically and potentially environmentally damaging moratorium on offshore wind development pending enactment of such a comprehensive statutory framework.
>
> The absence of a federal asset management framework for renewable energy does not compromise environmental protection of the [OCS] and its resources from the impacts of development. Given existing permitting authority and environmental regimes, it would be a mistake to put review of offshore wind proposals on hold. Together with the National Environmental Policy Act, the Army Corps of Engineers' Section 10 regulations provide clear

Members of the 107th and 108th Congresses introduced several bills governing the use of federal offshore resources for renewable energy projects. In February 2003, Representative Barbara Cubin (R-Wyo.) introduced House Bill 793, an act to amend the OCSLA, which currently authorizes the Secretary of the Department of the Interior to manage oil and gas exploration on the OCS.[196] If enacted, House Bill 793 would have expanded the Department of the Interior's jurisdiction, authorizing the implementing agency, the Mineral Management Service (MMS), to grant property interests, such as an easement or right-of-way, for renewable energy projects on the OCS.[197]

The MMS has many years of experience overseeing oil and gas activities on offshore federal lands and believes it is well-suited to take on responsibility for offshore wind energy development.[198] But others disagree, arguing that the oversight of offshore renewable energy projects in the oceans should include a leading role for federal agencies with a direct marine regulatory and habitat mission, such as the Na-

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> authority to conduct a comprehensive environmental review process and to issue permits after consultation with all relevant agencies and entities. If these authorities are used together, and used thoughtfully and in combination with state environmental reviews, we believe they provide an adequate process until appropriate legislation can provide additional clarity and establish a process for addressing various aspects of a developer's relationship with the federal government, such as leases and royalties.

Id.; *see also* Press Release, The Cape & Islands Renewable Energy Collaborative, Supporters of Renewable Energy Jointly Oppose Moratorium on Offshore Projects (Feb. 10, 2003), *available at* http://www.vma.cape.com/~relweb/CIREC_moratorium_statement.pdf (last visited Mar. 5, 2004). "A moratorium would needlessly delay national, regional, state, and local strategies that are attempting to address pressing societal concerns by accelerating the transition to renewable sources of energy." *Id.* The final report of the Massachusetts Ocean Management Task Force, released in March 2004, did not call for a moratorium on projects within state jurisdiction; the report reasoned that a moratorium would potentially chill appropriate development. 1 MASS. OFFICE OF COASTAL ZONE MGMT., *supra* note 159, at 31; *see also* John Leaning, *Task Force Resisted Block to Wind Farm*, CAPE COD TIMES, Mar. 25, 2004, http://www.capecodonline.com/cctimes/taskforce25.htm (last visited Mar. 31, 2004).

[196] H.R. 793, 108th Cong. (2003) (amending the Outer Continental Shelf Lands Act (OCSLA) to authorize the Secretary of the Interior to grant "easement[s] or right[s]-of-way of the Outer Continental Shelf for activities not otherwise authorized in this Act"). House Bill 793 is substantially similar to House Bill 5156, introduced by Representative Cubin in July, 2002. H.R. 5156, 107th Cong. (2002) (creating a program for offshore development in the secretary of the interior).

[197] The Minerals Management Service now administers offshore programs such as gas and oil leasing pursuant to authority delegated by the Secretary of the Department of the Interior. *See* MINERALS MGMT. SERV., ABOUT THE MINERALS MANAGEMENT SERVICE, *at* http://www.mms.gov/aboutmms/ (last visited Mar. 5, 2004).

[198] *Hearing on H.R. 793* (testimony of Johnnie Burton, Director, Minerals Management Service).

tional Oceanic and Atmospheric Administration (NOAA) and the National Marine Fisheries Service.[199] Dissatisfied with the provisions of House Bill 793, Representative William Delahunt (D-Mass.) proposed competing legislation in March 2003, giving authority over offshore renewable energy projects to NOAA through amendments to the Coastal Zone Management Act of 1972.[200]

Testifying before Congress on House Bill 793, representatives of the wind industry indicated a willingness to make fair payments to the government for easements and rights-of-way similar to those already applicable for land-based wind projects on federal property.[201] They advocated for a process that would encourage developers to invest the time and financial resources necessary to identify productive wind sites, arguing against a competitive bid process for government-identified sites.[202] At the same time, supporters of Cape Wind voiced their belief that it would be inherently unfair to change the rules in the middle of the game. They argued that where a developer has invested substantial time and resources, and has complied with existing permitting requirements, it should not be subject to laws and regulations that were

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[199] *See id.* (testimony of Peter Shelley, Vice President, Conservation Law Foundation), *available at* http://www.clf.org/hot/HR_793_Congressional_Testimony.pdf (last visited Mar. 5, 2004).

[200] H.R. 1183, 108th Cong. § 2(b) (2003). If enacted, House Bill 1183 would have amended the Coastal Zone Management Act to expand statutory procedures and policies for the location of renewable energy facilities in the marine environment. *Id.* § 101. It prescribed licensing requirements for the operation of renewable energy facilities in waters under federal jurisdiction seaward of the coastal zone. *Id.* § 314. It also instructed the Secretary of Commerce, through NOAA, to identify and evaluate locations within such waters that have the greatest potential for producing energy from renewable energy facilities. *Id.* § 2(b).

[201] *Hearing on H.R. 793* (testimony of Bruce H. Bailey, President, AWS Scientific, Inc.), *available at* http://www.awea.org/policy/documents/BaileyTestimony030603.pdf (last visited Mar. 5, 2004). Land-based wind projects developed on federal property are subject to rental fees assessed by the Department of the Interior's Bureau of Land Management (BLM). *See* BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, INSTRUCTION MEMORANDUM, PUB. No. 2003-020, INTERIM WIND ENERGY DEVELOPMENT POLICY (2003). The BLM is currently preparing a programmatic EIS to evaluate issues associated with wind energy development on Western public lands administered by the BLM. Notice of Intent to Prepare a Programmatic Environmental Impact Statement, 68 Fed. Reg. 59,814 (Oct. 17, 2003); *see also* WIND ENERGY DEV. PROGRAMMATIC EIS INFO. CTR., HOMEPAGE, *at* http://windeis.anl.gov/index.cfm (last visited Mar. 5, 2004).

[202] *See Hearing on H.R. 793* (testimony of Bruce H. Bailey, President, AWS Scientific, Inc.), *available at* http://www.awea.org/policy/documents/BaileyTestimony030603.pdf (last visited Mar. 5, 2004); *see also* BUREAU OF LAND MGMT., *supra* note 201.In contrast to House Bill 793, Delahunt's bill would have required the federal government to identify priority locations for renewable energy facilities in the coastal zone and established a competitive bidding process. *See* H.R. 1183, 108th Cong. (2003).

not in place at the time the project was initially proposed.[203] This message was not lost on certain members of Congress, as the proposed legislation evolved and morphed into yet another bill.

Proposed amendments to the OCSLA eventually made their way into comprehensive energy legislation considered by Congress in November 2003, in the form of House Bill 6, dubbed "The Energy Policy Act of 2003." House Bill 6 was a conference report crafted under the leadership of Senator Pete Dominici (R-N.M.), Chairman of the Senate Energy and Natural Resources Committee, and Representative W.J. "Billy" Tauzin (R-La.), Chairman of the House Energy and Commerce Committee. Tucked away in House Bill 6 was a section entitled "Alternate Energy-Related Uses on the Outer Continental Shelf."[204] Although efforts to pass House Bill 6 collapsed before the measure could be voted on by the Senate, the language of section 321 provides a revealing glimpse as to Republican leaders' latest thinking on this issue.[205]

Section 321 proposed amending section 8 of the OCSLA, authorizing the Secretary of the Interior to grant limited property interests on the OCS for energy-related and other purposes.[206] Included in such purposes are alternative energy-related uses such as wind, solar, and ocean—tidal, wave, and thermal—energy.[207] Under the proposed bill, the Secretary of the Interior, acting through MMS, would be authorized to grant a lease, easement, or right-of-way on the OCS for certain activities not otherwise authorized.[208] Among other things, such activities may include those that "produce or support production, transportation, or transmission of energy from sources other

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[203] *See Hearing on H.R. 793* (testimony of Bruce H. Bailey, President, AWS Scientific, Inc.), *available at* http://www.awea.org/policy/documents/BaileyTestimony030603.pdf (last visited Mar. 5, 2004).

> It is requested that offshore wind projects already underway not be disadvantaged by new rules that would cause unnecessary and expensive delays or the need to begin a new application process. Considerable effort has already been taken to work with state and federal agencies to fulfill permitting requirements in an environmentally responsible way.

Id.; *see also* BUREAU OF LAND MGMT., *supra* note 201.

[204] H.R. 6, 108th Cong., § 321 (2003).

[205] *See id.*

[206] *Id.* The amendments do not apply to any of the fourteen designated National Marine Sanctuaries on the OCS, including Stellwagen Bank, a rich commercial and recreational fishing ground off the coast of Massachusetts. *See* NAT'L OCEAN SERV., NAT'L OCEANIC & ATMOSPHERIC ADMIN., NATIONAL MARINE SANCTUARIES, *at* http://www.sanctuaries.nos.noaa.gov/ (last modified Dec. 15, 2003).

[207] H.R. 6, 108th Cong., § 321 (2003).

[208] *Id.*

than oil and gas . . . or . . . use, for energy-related or marine-related purposes, facilities currently or previously used for activities authorized under [the OCSLA]."[209]

The proposed bill provides that a developer receiving a grant of lease, right-of-way, or easement in the OCS may be required to make payments, such as fees, rentals, and bonus monies, to the federal government.[210] These payments may not be assessed on the basis of throughput or production, leaving MMS to develop a formula for assessing value, such as a flat fee per acre.[211] The holder of any lease, easement, or right-of-way would be required to furnish a surety bond or other form of security, and to comply with any other requirements that the Secretary of the Interior considers necessary to protect federal interests.[212]

While the proposed energy bill would have expanded the authority of the Department of the Interior, it would not have displaced, superseded, limited, or modified the jurisdiction, responsibility, or authority of any federal or state agency under any other federal law.[213] The bill also did not specify precisely how federal agencies with concurrent jurisdiction, such as the Corps and MMS, would balance their roles.[214] If enacted, the bill would likely have altered the calculus for deciding who would be the lead agency for purposes of environ-

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[209] *Id.* § 321(a)(1)(B)–(C); *see* John Leaning, *Wind Farm's Regulatory 'Gap' Filled*, CAPE COD TIMES, Sept. 25, 2003, http://www.capecodonline.com/special/windfarm/windfarmzxs25.htm (last visited Mar. 5, 2004). The amendment also allows these property interests to be granted for limited other purposes, such as exploration, development, production, transportation, or storage of oil, natural gas, or other minerals. *Id.* As a result, the bill has been criticized for potentially opening the OCS to energy projects other than renewable energy, such as oil and gas. *Id.*

[210] *See* H.R. 6, § 321(a)(2).

[211] *See id.* § 321.

[212] *Id.* § 321(a)(6).

[213] *Id.* § 321(a)(7).

[214] *See* John Leaning, *Bill May Create a Shift in Wind: Authority for Offshore Turbines Could be Moved to the Minerals Management Service*, CAPE COD TIMES, Nov. 4, 2003, http://www.capecodonline.com/special/windfarm/billmay4.htm (last visited Mar. 5, 2004). Walter Cruickshank, Deputy Director of MMS, stated that "[t]he day we get the authority, we'll be on the phone with the Army Corps of Engineers, with Cape Wind and with the state to set up a meeting on how to work through the transition." *Id.* Karen Adams, wind farm project review manager for the Corps, stated: "[i]f any other agency does have jurisdiction, it will be in addition to ours." John Leaning, *Interior Agency Set to Oversee if Bill Approved*, CAPE COD TIMES, Nov. 26, 2003, http://www.capecodonline.com/special/windfarm/interioragency26.htm (last visited Mar. 5, 2004) [hereinafter *Interior Agency Set to Oversee*].

mental impact review for projects subject to NEPA.[215] In an effort to clarify the respective roles of various federal agencies, the bill mandated that the National Academy of Sciences institute a study to "assess existing Federal authorities for the development of such [renewable energy] resources ... and ... recommend statutory and regulatory mechanisms for such development."[216]

House Bill 6 identified a number of issues that may require further regulation. These include the need to: (1) ensure safety; (2) protect the environment; (3) prevent waste; (4) conserve the natural resources of the OCS; (5) protect national security interests; and (6) protect correlative rights in the OCS.[217] Although opponents of Cape Wind had called for a moratorium on wind projects until a broader federal review process could be developed, House Bill 6 would not put a halt to proposed projects while more detailed regulations were to be developed.[218]

Section 321 of House Bill 6 is substantially similar to House Bill 793, the bill introduced by Representative Cubin in February 2003.[219] Important new language, however, was tacked on at the end of section 321 in the form of a "savings clause," carefully crafted to address two projects already in the pipeline: Cape Wind and LIPA's Long Island Sound proposal.[220] The additional language would have applied to any project "for which offshore test facilities have been constructed before the date of enactment" or "for which a request for proposal has been issued by a public authority,"—and the projects proposed by

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[215] *See Interior Agency Set to Oversee, supra* note 214. According to Mr. Cruickshank, project location, lease conditions, rental fees, bonding requirements, and similar issues would evolve throughout NEPA's continuing EIS process. *Id.*

[216] H.R. 6, 108th Cong. § 352(b)(1)(B)–(C) (2003). Along with the mandates set out above, section 352 of House Bill 6 required that "the Secretary of the Interior shall contract with the National Academy of Sciences to ... study the potential for the development of wind, solar, and ocean energy ... on the [OCS]." *Id.* § 352(b)(1)(A).

[217] *See id.* § 321(a)(4)(B)(i)–(vii).

[218] *See id.* § 321(c).

[219] *Compare id.* § 321(a)(1)(A)–(B) (giving the Secretary of the Interior the authority to grant limited property interests on the OCS to "support exploration, development, production, transportation, or storage of oil, natural gas, or other minerals"), *with* H.R. 793, 108th Cong. § 1(a)(2) (2003) (providing "an administrative framework for the oversight and management of energy-related activities on the Outer Continental Shelf, consistent with other applicable laws").

[220] Jack Coleman, *What's in Bill for Wind Farm? Wording in the Federal Energy Measure is Open to Conflicting Interpretation from Parties Involved*, CAPE COD TIMES, Jan. 3, 2004, http://www.capecodonline.com/special/windfarm/whatzxsbill3.htm (last visited Mar. 5, 2004).

Cape Wind and LIPA were the only projects to satisfy these criteria.[221] Under the proposed legislation, those projects would not be required to resubmit "'documents previously submitted'" nor obtain "'reauthorization of actions previously authorized.'"[222] In spite of this protective language, Cape Wind and LIPA arguably did not receive complete regulatory relief: while the savings clause does not require the proponents to go back to the drawing board for permits, it does not explicitly grandfather the projects from the new legislation.[223]

When Congress failed to pass comprehensive energy legislation in late 2003, the OCS provisions of House Bill 6 were put on hold. Senate Bill 2095, a piece of comprehensive energy legislation introduced in February, 2004, includes language identical to section 321 of House Bill 6.[224] In a politically-charged presidential election year, however, regional and partisan differences may continue to derail the energy bill and its wind-related provisions. Even if Congress manages to enact energy legislation, there is no guarantee the OCS provisions, in whole or in part, will survive the legislative process. This may leave it to the court of appeals to act first, without any guidance from the legislative branch. At the time this Article went to print, the outcome of both the legislative debate and the court's review were uncertain.

Conclusion

The future of offshore wind development in the United States remains unsettled. The federal Production Tax Credit, critical to wind energy's financial feasibility, expired December 31, 2003, and has yet to be renewed, serving as a pawn in the ongoing political negotiations to enact comprehensive energy legislation. Members of Congress continue to contemplate the appropriate mechanisms and authority to regulate renewable energy projects in federal waters. While the legislative branch

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[221] *Id.* Both the Cape Wind project and the LIPA project would have satisfied the savings clause criteria. *Id.* Pursuant to the section 10 permit issued by the Corps in August 2002, Cape Wind constructed a data test tower in Horseshoe Shoal that is currently collecting information regarding wind, wave, tide height, current, and water temperature. *See* Cape Wind Measuring Offshore Conditions, *supra* note 90. In January 2003, the LIPA released a Request for Proposals to develop an offshore wind park consisting of twenty-five to fifty offshore wind turbines that would produce approximately 100–140 MW of electricity. *See* LIPA RFP, *supra* note 101, at 1.

[222] John Leaning, *Energy Bill Will Not Have Loophole: Amendment on Offshore Projects Will Apply to Cape Wind, Official Says*, Cape Cod Times, Jan. 12, 2004, http://www.capecodonline.com/special/windfarm/energybill12.htm (last visited Mar. 19, 2004)

[223] *Id.*

[224] *See* S. 2095, 108th Cong. § 321 (2004).

deliberates, the U.S. Court of Appeals for the First Circuit is poised to reconsider a federal district court judge's ruling that the Corps has adequate jurisdiction to issue a section 10 permit for a data tower sited in federal waters. Unless Congress acts first, the appellate court's decision will hold important precedence for any future litigation.

Amidst this turbulent background, the permitting process for Cape Wind's wind farm inches forward. The Corps continues to make labored progress towards drafting an EIS, which will then be subject to public comment before it is finalized and the Corps issues a decision. After the federal, state, and regional environmental impact process is complete, Cape Wind must obtain permits from federal, state, and local authorities, opening up new avenues for opponents to challenge the project. On the state level, the Massachusetts Ocean Management Task Force has proposed a restructuring of the approach to coastal zone management. The Task Force envisions the passage of legislation—a Comprehensive Ocean Resources Management Act—that could have broad ramifications for Cape Wind, and any other project proposed in the commonwealth's coastal zone.

The LIPA and Winergy projects are proceeding at a similarly slow pace. LIPA has yet to announce a developer and Winergy has let many of its permit applications lapse. The wind power gold rush may be slowing down, with legislative uncertainty causing America to fall further and further behind its European counterparts.

In spite of this uncertainty, the potential opportunity for offshore wind remains upbeat. Wind is currently the most cost-effective form of renewable energy eligible to achieve state mandated renewable energy portfolio standards. Wind turbine efficiencies will eventually enable wind power to compete against traditional fossil fuels without government subsidy. Advances in technology may some day allow offshore wind farms to be sited in deeper waters, minimizing aesthetic impacts. Technological improvements and better siting techniques may minimize avian impacts. Concerns regarding the environment and public health, national security, and volatile fossil fuel prices continue to sway public opinion. Sooner or later, it appears certain that the United States will harness its offshore wind resources. Yet it remains to be seen whether the nation's first offshore wind farm will be built in Nantucket Sound, off the south shore of Long Island, along the coast of Virginia, or somewhere else along the thousands of miles of U.S. coastline.