34 ELR 10794 9-2004

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Federal Permitting Issues Related to Offshore Wind Energy, Using the Cape Wind Project in Massachusetts as an Illustration

by Thomas Arthur Utzinger

Cape Cod, Massachusetts, may soon become home to something other than quaint towns and peaceful beaches. If a Massachusetts-based company named Cape Wind Associates, LLC (Cape Wind) overcomes various administrative and political hurdles, Cape Cod will become home to the first offshore wind park in the United States (Cape Wind project or the project).[1] Although no such projects currently exist in the United States, some European countries already utilize this offshore technology.[2] With completion expected in 2005,[3] the project will rival Europe's offshore wind parks. The project will have 130 turbines producing an average output of 185 megawatts and producing a maximum output of 420 megawatts.[4]

Inland wind power constitutes a small yet increasing portion of the total U.S. power generation portfolio.[5] Wind energy accounted for one-tenth of 1% of national generation as of the year 2000.[6] In contrast, coal supplied 52% of the nation's electric energy needs in 2000, with nuclear power and natural gas providing 20% and 16%, respectively.[7]

Several reasons exist for wind's low market share.[8] In addition to these, a significant reason is that only certain areas

Thomas Utzinger received a B.A. in history from Cornell University in 1999, a J.D. from Boston University School of Law in 2002, and an LL.M. in environmental law from the George Washington University Law School in 2004. He is an associate at Cooper, Rose & English, L.L.P. in Summit, New Jersey. This Article was presented to the faculty of the George Washington University Law School as a thesis, in partial satisfaction of the requirements for the degree of Master of Laws.

1. The project will be located in Horseshoe Shoal, which is part of Nantucket Sound, Massachusetts. Nantucket Sound is located in between the southern Cape Cod shore, Nantucket, and Martha's Vineyard. *See infra* Part I.A.2.
2. Denmark and the United Kingdom are pioneering offshore wind power in Europe. Denmark maintains the largest offshore wind park to date, consisting of 80 turbines with a maximum capacity of 160 megawatts (MWs). Michael Schulz, *Questions Blowing in the Wind: The Development of Offshore Wind as a Renewable Source of Energy in the United States*, 38 NEW ENG. L. REV. 415, 418 (2004). The United Kingdom has already built one offshore wind park at North Hoyle, near the North Wales coast, and another is under construction at Scroby Sands, near Great Yarmouth, England. British Wind Energy Ass'n, *U.K. in Fast Lane to Becoming World Leader in Offshore Wind*, *at* http://www.bwea.com/media/news/round2results.html (Dec. 18, 2003). Britain's Crown Estate, a U.K. national heritage custodian which leases the nation's seabed in its territorial waters, consented to 15 new offshore projects in late 2003. *Id*.
3. As of July l, 2004, the U.S. Army Corps of Engineers (Corps) is completing its review in preparation of a draft environmental impact statement (EIS). The current estimate for completion of the draft EIS is in the late summer or early fall 2004, with a permit decision in 2005. U.S. Army Corps of Eng'rs, *Fact Sheet*, *at* http://www.nae.usace.army.mil/projects/ma/ccwf/farmfact.pdf (June 23, 2004) [hereinafter *Fact Sheet*].
4. This maximum output would only occur in heavy wind conditions, with the turbines operating at peak performance. Jay S. Polachek, *Cape Cod: Twisting in the Wind?*, FORTNIGHTLY, May 15, 2002, at 34 (interview with Cape Wind President James Gordon). Typical wind turbines operate 60-80% of the time, and on average operate at full capacity 10% of the time. American Wind Energy Ass'n, *Wind Energy Fast Facts*, *at* http://www.awea.org/pubs/factsheets/FastFacts2003.pdf (last visited Apr. 12, 2004). The average yearly output of wind turbines is 30-35% capacity. *Id*. Nevertheless, the average output of the Cape Wind project will be enough to supply the cape and the islands with about 70% of the average electrical demand. Lisa Biank Fasig, *Wind Farmers Plow Ahead—Developers Choose Manufacturer, Reduce Number of Planned Turbines*, PROVIDENCE J., Jan. 22, 2003, *available at* 2003 WL 7052136.
5. Although wind production constitutes a small share of the total U.S. energy production, wind energy development has increased substantially since 1980. Total installed capacity in 1981 was 10 MWs. As of 2002, total installed capacity was 4,685 MWs. American Wind Energy Ass'n, *Wind Power: U.S. Installed Capacity (Megawatts) 1981-2003*, *at* http://www.awea.org/faq/instcap.html (last visited Apr. 6, 2004). The 80% decrease in the price of domestic wind power since 1980 is due partially to this increased production. *See* American Wind Energy Ass'n, *Buying Wind Energy on the Retail Market*, *at* http://www.awea.org/pubs/factsheets/grnmrkt.pdf (last visited Apr. 8, 2004).
6. NATIONAL ENERGY POLICY DEVELOPMENT GROUP, NATIONAL ENERGY POLICY 6-6 (2001) [hereinafter NATIONAL ENERGY POLICY].
7. *Id*.
8. Reasons for wind energy's low market share include: (1) the variability of a given turbine's energy production; (2) more expensive costs of financing; (3) reliance upon the federal production tax credit; and (4) more expensive construction costs. Small changes in wind speed dramatically affect electric power output from wind turbines. The potential energy from a turbine is proportional to the cube of the wind speed. *See* American Wind Energy Ass'n, *The Economics of Wind Energy*, *at* http://www.awea.org/pubs/factsheets/EconomicsofWind-March2002.pdf (last visited Apr. 11, 2004) [hereinafter *Wind Energy Economics*]. This means that a turbine produces 50% more energy from 16-mile-per-hour (mph) winds than from 14-mph winds. *Id*. Therefore, even in areas with excellent wind potential, daily fluctuations of small magnitude yield big differences in output and reliability. The financing of wind parks is more expensive than the financing of other energy sources. Wind parks are capital-intensive projects, which are very sensitive to interest rates. Additionally, private developers do not receive as favorable terms as do large institutional utilities. *Wind Energy Economics*, *supra*. American financiers often regard wind power projects to be more risky, which also increases the interest rate. *Id*. There is also much uncertainty due to the novelty of an offshore wind power infrastructure, probable weather-related construction delays, variable operation and maintenance costs, and the effect of harsh ocean conditions on the equipment. Renewable Energy World, *Offshore Wind Ready to Power a Sustainable Europe*, *at* http://www.jxj.com/magsanddj/rew/2002_01/ca-owee.html (last visited Apr. 8, 2004). Wind energy prices remain reasonably competitive due to the production tax credit (PTC). In turn, though, this competitiveness relies upon the PTC's continuation. The Energy Policy Act of 1992 established the PTC. Energy Policy Act of 1992, Pub. L. No. 102-486, §1212, 106 Stat. 2776, 2969-70. The PTC is a 1.5-cents-per-kilowatt-hour (kwh) tax credit that is available to businesses that build and operate wind energy facilities and sell the power to unrelated parties. The PTC may be claimed for 10 years after a new wind energy facility begins operation. *See* Christine Real de Azua, *The Future of Wind Energy*, 14 TUL. ENVTL. L.J. 485, 499-500 (2001). Since the credit is adjusted for inflation, the current PTC is 1.7 cents per kwh. *See Wind Energy Economics*, *supra*. The U.S. Congress extended the PTC in 2002 by the Job Creation and Worker Assistance Act of 2002, Pub. L. No. 107-147, §603, 116 Stat. 21, 59. *See Wind*

of the country allow for economically feasible wind power production.[9] All current wind parks exist inland, in regions that offer an appreciable and relatively consistent supply of wind.[10] Without enough wind, turbines either do not produce enough power to be financially viable, or produce adequate power but on an unpredictable basis. Building offshore wind parks takes advantage of previously untapped areas that offer a more consistent supply of higher wind speeds. Nantucket Sound is one of those places, being described as the "'Saudi Arabia of wind in the United States.'"[11]

Once a proper federal approval scheme is in place, similar projects may appear off of many shore communities by the end of this decade.[12] Before this scenario occurs, however, the courts and the U.S. Congress must confront the debated and litigated legal issues. The Cape Wind project has survived litigation in the U.S District Court for the District of Massachusetts as of 2003.[13] A single district court's approval, however, does not guarantee that the existing laws are sufficient to support a future offshore wind energy industry.

Opponents of the Cape Wind project contend that the granting of permits for these offshore structures is illegal.[14] This claim finds significant basis in three federal legal sources: the Outer Continental Shelf Lands Act (OCSLA),[15] the U.S. Army Corps of Engineers' (Corps')[16] regulations,[17] and the National Environmental Policy Act (NEPA).[18] Opponents argue that the Corps does not have authority under the OCSLA to permit wind turbine structures on the outer continental shelf (OCS).[19] In addition, they argue that Cape Wind lacks the requisite property interest in the site.[20] Fur-

Energy Economics, *supra*. This extension expired on December 31, 2003. *Id*. The wind energy industry is currently seeking an extension until 2006. *Id*. This extension would take effect provided that Congress passes the Energy Policy Act of 2003 (S. 2095). The PTC extension is contained in Title XIII of S. 2095. As of July 2004, S. 2095 is pending in the U.S. Senate. Cape Wind President James Gordon has admitted that the PTC is crucial to the project's success, saying that the project would not have been possible without the tax break. Cosmo Macero Jr., *Tax Credit Powering Windmills*, BOSTON HERALD, July 28, 2003, at A11, *available at* 2003 WL 3032738. The PTC is worth a substantial amount of money to Cape Wind. "By one analysis, if you measure by megawatt hour [(MWh)], the production credit alone is worth about $18 or $19 per MWh to Cape Wind. Put another way, based on an estimated annual output of 1.5 million [MWhs], Cape Wind's subsidy would be in the vicinity of $27 million a year." *Id*. Finally, wind energy on average is more expensive to construct and install per MW than it is for more conventional energy facilities. For example, an FPL Energy spokesperson stated that a MW of wind power costs about $1 million to develop, while natural gas projects cost $550,000 to $700,000 per MW. Environment News, *New England's EMI Plans 420 MW Nantucket Wind Farm*, *at* http://planetark.com/dailynewsstory/cfm/newsid/13035/newsDate/31-Oct-2001/story.htm (last visited Apr. 10, 2004). Thus the attractiveness of constructing wind power projects depends somewhat upon the comparative cost of natural gas and other fuels. "'When natural gas prices are high, wind is more competitive. When natural gas prices are low, wind power is less competitive.'" *Id*. FPL Energy, LLC (a subsidiary of FPL Group, Inc.) is a major developer of wind power projects. American Wind Energy Ass'n, *Wind Energy Industry Contacts*, *at* http://www.awea.org/newsroom/Industrycontacts.pdf (last visited Apr. 11, 2004).

9. NATIONAL ENERGY POLICY, *supra* note 6, at 6-3, fig. 6-1 (illustrating that the northeastern, Appalachian, Rocky Mountain, and West Coast regions have "good" to "excellent" wind power potential). The top four states, rated by total wind energy potential, are North Dakota, Texas, Kansas, and South Dakota, offering 1,210, 1,190, 1,070, and 1,030 billion kwhs, respectively. American Wind Energy Ass'n, *Wind Energy: An Untapped Resource*, *at* http://www.awea.org/pubs/factsheets/top20.pdf (last visited Apr. 11, 2004). The states with the most wind power production as of December 31, 2003, are California, Texas, Minnesota, and Iowa, with installed capacities of 2,043, 1,293, 563, and 471 MWs, respectively. American Wind Energy Ass'n, *Wind Power Outlook 2004*, *at* http://www.awea.org/pubs/documents/Outlook2004.pdf (last visited Apr. 11, 2004). Massachusetts' current wind energy output is 0.98 MWs. American Wind Energy Ass'n, *Massachusetts Wind Energy Development*, *at* http://www.awea.org/projects/massachusetts.html (last visited Apr. 6, 2004).

10. *See* American Wind Energy Ass'n, *The Most Frequently Asked Questions About Wind Energy*, *at* http://www.awea.org/pubs/documents/FAQ2002%20·%20web.PDF, at 3 (last visited Apr. 11, 2004) (establishing that small wind turbines require average annual wind speeds of at least 9 mph, while large utility-scale projects require an average of at least 13 mph).

11. *Corps of Engineers to Undertake Full Review of Massachusetts Offshore Wind Project*, UTIL. ENV'T REP., Feb. 8, 2002, *available at* 2002 WL 11408511.

12. Similar projects are planned by other companies such as Winergy, LLC of Shirley, New York. Winergy filed a permit application with the Corps in July 2002, for four potential wind parks off of Nantucket, Massachusetts, one of which will be developed. Beth Daley, *Second Firm Proposes Wind Energy Farm off Massachusetts Coast*, Knight-Ridder Tribune Business News: BOSTON GLOBE, July 25, 2002, *available at* 2002 WL 24838529. In February 2003, Winergy filed a separate application with the Corps for a test tower in Nantucket Sound. *Developer Files for Army Corps Okay to Build Wind Farm Near Nantucket*, ELEC. UTIL. WK., Feb. 3, 2003, *available at* 2003 WL 11143342. Winergy is "a coastal development company that handles the permitting stage of power plant projects." *Massachusetts Wind Developers Seek Permit for Up to 831 MW off Nantucket*, N.E. POWER REP., July 29, 2002, *available at* 2002 WL 11404696. Winergy has also considered other sites off of the New York, New Jersey, Delaware, Maryland, and Virginia coasts. Sonja Barisic, *Wind Farm Plan Draws Criticism*, AP ONLINE, Jan. 6, 2003, *available at* 2003 WL 2924074. Winergy's potential customers include utilities, local commercial users, and governments. *Wind Farm Plan Hits Resistance by Greens*, CINCINNATI POST, Feb. 7, 2003, *available at* 2003 WL 2910661. In January 2003, the Long Island Power Authority of New York (LIPA) requested proposals for 100 to 140 MWs of offshore wind power. American Wind Energy Ass'n, *Long Island Power Authority (LIPA) Issues Request for Proposals for Offshore Wind Power*, Jan. 22, 2003, *at* http://www.awea.org/news/news030122lipa.html. The intended project would consist of 25-50 turbines, be located about two and one-half miles offshore (in state waters), and begin operation in 2007. *LIPA May Take Bids to Build New Line to Interconnect Offshore Wind Power*, POWER MARKETS WK., Jan. 27, 2003, *available at* 2003 WL 11157806. LIPA would sign a 15-20 year power purchase agreement from the selected developer/owner. *LIPA Issues RFP for Up to 140 MW From Wind Farm*, MEGAWATT DAILY, Jan. 24, 2003, *available at* 2003 WL 11128480.

13. Alliance to Protect Nantucket Sound v. Department of the Army, 288 F. Supp. 2d 64 (D. Mass. 2003).

14. The Alliance to Protect Nantucket Sound's website lists various reasons in its Legal Concerns section as to why the Cape Wind project is illegal. The Alliance to Protect Nantucket Sound, *Legal Concerns*, *at* http://www.saveoursound.org/legal.html#TheUSArmyCorps (last visited Apr. 2, 2004) [hereinafter *Legal Concerns*]. Such legal issues include the Corps' inadequate permitting authority, Cape Wind's lack of property interest, violation of the public trust, inadequate state and local involvement, lack of framework to evaluate the proposals, segmentation of the project, need to comply with all relevant environmental laws, and Nantucket Sound's protected status.

15. 43 U.S.C. §§1331-1356.

16. "The [Corps] has been involved in regulating certain activities in the nation's waters since 1890." 33 C.F.R. §320.1(a)(1).

17. *Id.* §§320-330.

18. 42 U.S.C. §§4321-4370(d), ELR STAT. NEPA §§2-209.

19. *Legal Concerns*, *supra* note 14. The OCS is defined as "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).

20. *Id*. *See also* 33 C.F.R. §320.4(g)(6) ("The applicant's signature on an application is an affirmation that the applicant possesses or will possess the requisite property interest to undertake the activity proposed in the application."); *id.* §325.1(d)(7) (same). This Article does not

thermore, the opponents contend that the Corps must produce a full environmental impact statement (EIS) before any phase begins, even if that phase only involves installing a temporary data tower.[21] These are three nationally applicable issues that must be resolved before offshore wind power becomes common in the United States.

In addition to these national issues, the Cape Wind controversy also involves concerns of more local application. Opponents argue that the Cape Wind project will threaten Horseshoe Shoal's wildlife, impede navigation, discourage tourism, and be aesthetically unpleasing.[22] Furthermore, the opponents claim that Massachusetts should have a more influential role in the permitting decision.[23]

Although such local concerns are important, this Article does not address these issues. Impacts upon wildlife, tourism, and aesthetics may be relevant to other proposed developments in the future. However, these factors are very site-specific. Therefore, a discussion of how they relate to the Cape Wind project may not apply or be relevant to another project. This Article addresses the federal permitting issues concerning any proposed offshore project at this time.

Part I of this Article reviews the Cape Wind project's historical and factual backgrounds. Subpart A discusses the project's management, design, and history. Subpart B then addresses the subsequent litigation in which groups such as Ten Taxpayers Citizen Group and the Alliance to Protect Nantucket Sound challenged the permitting process.[24]

Part II establishes the legal background. Subpart A presents §10 of the Rivers and Harbors Act (RHA) of 1899,[25] and explains how it grants authority to the Corps over obstructions to navigation in "navigable waters." Subpart B then demonstrates how the OCSLA expanded the Corps' geographical jurisdiction. Subpart C introduces NEPA and its implementing regulations.

Part III analyzes the legal issues. Subpart A addresses whether the Corps has authority under the OCSLA to permit structures on the OCS that are not used for resource or mineral extraction, and demonstrates that the Corps does have this authority. Subpart B then assumes that the Corps has this authority, and discusses the proper stage in the construction process at which to require an EIS. The conclusion is that these projects may be segmented, exempting the initial data tower phase from the EIS process.

Part IV then reviews legislation that has been proposed in the 107th and 108th Congresses concerning offshore alternative energy production. This section includes the pending 2004 energy bill. The main purpose of this section is to illustrate how the current approval framework (or lack of framework depending upon one's view) is on the verge of dramatic change. The current jurisdictional and legal disputes, as addressed in this Article, hopefully will become irrelevant once these changes are made.

Part V concludes the thesis.

I. Historical and Factual Background

A. The Cape Wind Project

1. Cape Wind Associates, LLC

Cape Wind Associates, LLC is a Massachusetts-based company, the purpose of which is to "develop, own and operate wind-power production facilities to be developed and located in Federal Waters offshore of Cape Cod, Nantucket, and Martha's Vineyard . . . ."[26] Cape Wind is a joint venture between its management company Energy Management, Inc. (EMI), and Wind Management LLC.[27] Since 1975, EMI has developed energy conservation and pollution control projects, developed independent power projects such as six natural gas-fired electric plants, and now concentrates on renewable energy projects.[28]

2. Project Design

Construction of the Cape Wind project will occur in two phases: a temporary data tower and then the actual wind park. It is likely that other offshore wind park developments in the future will entail this two-step approach, since voluminous data must be confirmed before millions of dollars are spent on construction.[29]

The data tower[30] is a single structure that rises approximately 200 feet above the water's surface, and collects meteorological and oceanographic data.[31] The data collected include wind speed, wind direction, ocean currents, wave height, and salinity.[32] The tower received a separate permit from the Corps.[33]

The wind park will be a $700 million project[34] that will utilize 130 large turbines to generate electricity.[35] The 130

analyze the property interest issue. The court in Alliance to Protect Nantucket Sound v. Department of the Army, 288 F. Supp. 2d 64 (D. Mass. 2003) did not address the merits of this issue. The court did not require Cape Wind to prove a property interest in the OCS, but merely to affirm a property interest. *Alliance to Protect Nantucket Sound*, 288 F. Supp. 2d at 77. In fact, the court said that the regulations as written do not allow the Corps to challenge an applicant's affirmation of a property interest. *Id.* at 77-78.

21. *See Legal Concerns*, *supra* note 14.

22. *See* The Alliance to Protect Nantucket Sound, Inc., *The Worst Location*, *at* http://www.saveoursound.org/bestworst.html (last visited Apr. 2, 2004).

23. *See Legal Concerns*, *supra* note 14.

24. *Alliance to Protect Nantucket Sound*, 288 F. Supp. 2d at 64; Ten Taxpayers Citizen Group v. Cape Wind Assocs., LLC, 278 F. Supp. 2d 98 (D. Mass. 2003); Ten Taxpayers Citizen Group v. Department of the Army, No. 02-11907 (D. Mass. Nov. 5, 2002) (voluntarily dismissed).

25. §10, 33 U.S.C. §403.

26. Commonwealth of Massachusetts Corporations Division, Annual Report of Cape Wind Associates, LLC (2003), *available at* http://corp.sec.state.ma.us/corp/corpsearch/corpsearchinput.asp.

27. Schulz, *supra* note 2, at 421.

28. *Id.*

29. The purpose of the data tower is to confirm that the selected area offers conditions that will ensure the project's success.

30. The data tower is formally called a scientific measurement devices station. U.S. Army Corps of Eng'rs, *Corps Issues Permit to Cape Wind for Scientific Data Tower in Nantucket Sound*, *at* http://www.nae.usace.army.mil/news/2002-103.htm (Aug. 19, 2002).

31. U.S. Army Corps of Eng'rs, *Cape Wind Applies for Corps Permit to Install Scientific Measuring Tower in Nantucket Sound*, *at* http://www.nae.usace.army.mil/news/2001-162.htm (Dec. 4, 2001) [hereinafter *Tower Application Notice*].

32. Schulz, *supra* note 2, at 425.

33. *See infra* Part III.B.

34. Mark Reynolds, *In the Wind—Turbine Farm Plan for Cape Generates a Debate*, Providence J., June 15, 2003, *available at* 2003 WL 57177420.

35. Cape Wind originally proposed the installation of 170 turbines. Intent to Prepare a Draft Environmental Impact Statement (DEIS) for

turbines will be located in a 24-square-mile area of Nantucket Sound,[36] with Cape Cod over 4 miles to the north, Nantucket about 11 miles to the southeast, and Martha's Vineyard over 5 miles to the west.[37] The 3.6 megawatt General Electric Company (GE) Wind Energy turbines[38] consist of 246-foot-tall towers, fitted with 165-foot-long blades.[39] Buried in the ocean floor would be a power line network that interconnects the turbines.[40] The combined power will be transmitted to shore via two 115 kilovolt lines, at which point those submarine cables will connect with other underground cables that eventually link with the southeastern Massachusetts grid.[41]

3. Project Chronology

Cape Wind submitted two permit applications to the Corps for the data tower and wind park in November 2001.[42] The Corps publicly announced on December 4, 2001, that it was considering the data tower application.[43] The wind park's need for an EIS was then announced on January 30, 2002.[44] The Corps issued a permit for the data tower on August 19, 2002,[45] which led to litigation in Massachusetts state and federal courts.[46] An EIS status meeting was held on November 21, 2002.[47] As of July 2004, the Corps is conducting an extensive environmental review of Cape Wind's wind park application.[48]

B. Litigation

1. *Ten Taxpayers Citizen Group v. Cape Wind Associates, LLC*[49]

Ten Taxpayers Citizen Group (Ten Taxpayers or plaintiffs), an environmental advocacy group, sought and received a temporary restraining order on September 24, 2002, in Barnstable Superior Court, Massachusetts.[50] The temporary restraining order was for Cape Wind's construction of the data tower, planned to begin on October 7, 2002.[51] Cape Wind filed for removal of the case to the district court in Boston, Massachusetts, on October 21, 2002.[52] Construction of the data tower then began on October 27, 2002, after the temporary restraining order expired.[53]

Ten Taxpayers filed a motion to remand the case on November 5, 2002.[54] The court denied this motion, and the plaintiffs appealed to the U.S. Court of Appeals for the First Circuit on November 21, 2002.[55] The First Circuit dismissed the appeal on February 21, 2003.[56]

The case proceeded in district court until August 19, 2003, at which point the court granted Cape Wind's motion to dismiss the Ten Taxpayers' complaint as a matter of law.[57] In the lawsuit, plaintiffs claimed that Cape Wind could not construct the test tower without complying with Massachusetts' fisheries regulations and obtaining a state permit.[58] The issue was whether the tower required a state license.[59] Although the plaintiffs conceded that waters more than three miles from shore are generally under federal jurisdiction, Ten Taxpayers proposed that the federal government ceded jurisdiction to Massachusetts under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson Act).[60] The Magnuson Act in part granted jurisdiction to Massachusetts over Nantucket Sound.[61]

The court dismissed the plaintiffs' claim though, because this grant of jurisdiction over Nantucket Sound was for very

Proposed Cape Wind Energy Project, Nantucket Sound and Yarmouth, MA Application for Corps Section 10/404 Individual Permit, 67 Fed. Reg. 4414 (Jan. 30, 2002) [hereinafter Project Notice]. However, Cape Wind's January 2003, decision to use 3.6 MW GE Wind Energy turbines reduced the number to 130. "'Our goal all along was not to do 170 wind turbines. The goal was to have the capacity of 420 [MWs].'" Fasig, *supra* note 4 (statement of Cape Wind spokesperson Mark Rodgers).

36. Reynolds, *supra* note 34.

37. Project Notice, *supra* note 35, at 4415/1.

38. The new 3.6 MW turbines utilize larger generators and are designed for higher wind speeds. *Offshore Cape Cod Wind Farm to Cut Number of Turbines With New Technology*, ELEC. UTIL. WK., Jan. 27, 2003, *available at* 2003 WL 11143273. GE Wind Energy is a part of GE's Power Systems arm. GE bought Enron's wind turbine business in 2002. Beth Demain Reigber, *GE Sees Tailwind in Wind Energy as Alternatives Eyed*, DOW JONES BUS. NEWS, Sept. 12, 2003, *available at* http://www.anetenergy.com/news/030912_gewind.htm.

39. Reynolds, *supra* note 34.

40. *Id.*

41. Project Notice, *supra* note 35, at 4414/3. The electricity supplied by the Cape Wind park will generally be consumed on the cape, unless the turbines are producing more electricity than required by the cape's 230 MW average demand. At that point, the surplus power would travel to and be used on the mainland. Cape Wind Associates, LLC, *Independent Experts Agree, Cape Wind's Electricity Will Power Cape and Islands and Reduce Pollution*, *at* http://www.capewind.org (last visited Apr. 15, 2004).

42. *Fact Sheet*, *supra* note 3.

43. *Tower Application Notice*, *supra* note 31.

44. Project Notice, *supra* note 35, at 4414/3. After this public announcement, scoping meetings concerning the wind park were held on March 6 and 7, 2002. U.S. Army Corps of Eng'rs, *Public Scoping Meetings on Wind Farm Project EIS*, *at* http://www.nae.usace.army.mil/projects/ma/ccwf/scopemeeteis.pdf (Jan. 29, 2002). Public hearings were held on April 8, 2002, for the data tower and wind park and on April 11, 2002, for the data tower. *See* U.S. Army Corps of Eng'rs, *Cape Cod Wind Farm Permit Application Meeting Transcripts (PDF)*, *at* http://www.nae.usace.army.mil/projects/ma/ccwf/farmmeetings.htm (last visited Apr. 12, 2004).

45. U.S. Army Corps of Eng'rs, *Corps Issues Permit to Cape Wind for Scientific Data Tower in Nantucket Sound*, *at* http://www.nae.usace.army.mil/news/2002-103.htm (Aug. 19, 2002).

46. *See infra* Part I.B.

47. U.S. Army Corps of Eng'rs, *Wind Farm EIS Status Public Meeting Set for Nov. 21 in Bourne*, *at* http://www.nae.usace.army.mil/news/2002-142.html (Nov. 13, 2002).

48. The environmental review process is expected to continue through the summer of 2004. *See Fact Sheet*, *supra* note 3.

49. 278 F. Supp. 2d 98 (D. Mass. 2003).

50. Ten Taxpayers Citizen Group v. Cape Wind Assocs., LLC, No. BACV2002-00645 (Mass. Super. Ct.).

51. *Ten Taxpayers*, 278 F. Supp. 2d at 99.

52. Civil Docket, Ten Taxpayers Citizen Group v. Cape Wind Assocs., LLC, No. 02-CV-12046 (D. Mass.) [hereinafter Ten Taxpayers I Docket].

53. *Ten Taxpayers*, 278 F. Supp. 2d at 99.

54. Ten Taxpayers I Docket, *supra* note 52.

55. *Id.*

56. *Id.*

57. *Ten Taxpayers*, 278 F. Supp. 2d at 100.

58. *Id.* at 99.

59. *Id.*

60. 16 U.S.C. §§1801-1882.

61. *Id.* §1856(a)(2) ("[T]he jurisdiction and authority of a State shall extend . . . with respect to the body of water commonly known as Nantucket Sound, to the pocket of water west of the seventieth meridian west of Greenwich.").

limited purposes.[62] The purpose of the Magnuson Act is the regulation of fishing.[63] The court held that "nothing in the Act supports the proposition that regulating non-fishing activities simply for the protection of fish falls under the Commonwealth's jurisdiction."[64] Therefore, Cape Wind was not required to seek a state permit for the data tower.[65]

2. *Ten Taxpayers Citizen Group v. U.S. Department of the Army*[66]

Ten Taxpayers sought and received a 10-day temporary restraining order against the U.S. Department of the Army (the Army), the Corps, and Cape Wind in Barnstable Superior Court on September 27, 2002.[67] On that same day, a notice of removal to the district court in Boston was filed.[68] Once the case was removed, Cape Wind made a motion to vacate the temporary restraining order.[69] Ten Taxpayers filed a motion for a preliminary injunction.[70] On October 8, 2002, the district court denied the plaintiffs' motion for preliminary injunction.[71] The parties then voluntarily dismissed the case and the case closed on November 5, 2002.[72]

3. *Alliance to Protect Nantucket Sound, Inc. v. U.S. Department of the Army*[73]

Alliance to Protect Nantucket Sound challenged the validity of the August 19, 2002, permit for the Cape Wind data tower.[74] Filed on August 30, 2002, the Alliance to Protect Nantucket Sound, Inc. and individual plaintiffs (collectively Alliance or plaintiffs)[75] alleged several faults with the permit process, and sought equitable relief.[76] The Alliance claimed that the Corps exceeded its jurisdiction, ignored the permit application's facial deficiency, and failed to comply with procedural and substantive requirements.[77] The Corps responded to the Alliance Complaint by denying the allegations.[78]

First, the plaintiffs challenged the issuance of the permit based upon the Corps' lack of permitting authority. The Complaint's first count argued that the OCSLA does not allow the Corps to permit structures that are unrelated to oil and gas exploration and extraction.[79] The Corps' authority under RHA §10 only applies to the navigable waters of the United States within three nautical miles from shore.[80] The OCSLA extended this geographic authority for very limited purposes, none of which include permitting wind turbines.[81]

The second count charged the Corps with ignoring its own regulatory requirement.[82] The applicant for a §10 permit must affirm by its signature that it possesses or will possess a property interest in the site.[83] The Corps allegedly knew that Cape Wind possessed no such interest, since the federal government maintains exclusive control and ownership of the OCS.[84] Nor was there reason to believe that Congress would grant an interest to Cape Wind.[85]

The third count asserted a number of procedural and substantive errors in connection with the data tower permitting process. These included issuing, without comment, a finding of no significant impact (FONSI) based upon a faulty environmental assessment (EA).[86] Plaintiffs considered the EA to be erroneous because it did not analyze alternatives from a public interest perspective,[87] and segmented the entire project into (1) the data tower and (2) the actual wind park.[88]

Cape Wind then intervened in October 2002, and filed its own answer to the Alliance Complaint on November 7, 2002, denying the allegations in a more substantive manner.[89] In response to count one, Cape Wind contended that the plaintiffs' position that the OCSLA does not allow for permitting wind turbines is contrary to long-standing interpretations.[90] Regarding the property interest issue of count two, the Answer clarified the plaintiffs' assertion of government ownership. Cape Wind conceded that the federal gov-

62. *Ten Taxpayers*, 278 F. Supp. 2d at 100-01. The district court's judgment was affirmed by the U.S. Court of Appeals for the First Circuit on June 28, 2004. Ten Taxpayers Citizen Group v. Cape Wind Assocs., LLC, 2004 U.S. App. LEXIS 12914.

63. 16 U.S.C. §§1821-1824, 1826-1826(g), 1851-1854. *See also Ten Taxpayers*, 278 F. Supp. 2d at 100-01.

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

65. *Id*.

66. Ten Taxpayers Citizen Group v. Department of the Army, No. 02-CV-11907 (D. Mass. Nov. 5, 2002) (voluntarily dismissed).

67. *Challengers Win First Round Against Corps for Approving Offshore Tower*, Corps Rep., Oct. 2, 2002, *available at* 2002 WL 10834556.

68. Civil Docket, Ten Taxpayers Citizen Group v. Department of the Army, No. 02-CV-11907, (D. Mass.) [hereinafter Ten Taxpayers II Docket].

69. *Id*.

70. *Id*.

71. Joe Truini, *Windmills in a Choppy Surf: Cape Cod Wind Farm Proposal Faces Lawsuits*, Waste News, Oct. 14, 2002, *available at* 2002 WL 10367810.

72. Ten Taxpayers II Docket, *supra* note 68.

73. Alliance to Protect Nantucket Sound v. Department of the Army, 288 F. Supp. 2d 64 (D. Mass. 2003) (denial of plaintiffs' motion for summary judgment, and granting of defendants' and intervenor's cross-motions for summary judgment).

74. *U.S. Army Corps of Engineers Permit No. 199902477*, *at* http://www.nae.usace.army.mil/projects/ma/ccwt/permit.pdf (last visited Apr. 12, 2004).

75. The plaintiffs' complaint describes the Alliance as a nonprofit organization comprised of "concerned citizens, businesses, towns and local government and civic groups, trade associations, environmental and advocacy interests, and associations of fishing interests and boaters that oppose industrialization of Nantucket Sound." Complaint for Declaratory and Injunctive Relief ¶ 6, Alliance to Protect Nantucket Sound v. Department of the Army, 288 F. Supp. 2d 64 (D. Mass. 2003) (No. 02-11749) [hereinafter Alliance Complaint].

76. *Id*.

77. *Id*. ¶ 2.

78. Defendants' Answer to Plaintiffs' First Amended Complaint for Declaratory and Injunctive Relief, Alliance to Protect Nantucket Sound v. Department of the Army, 288 F. Supp. 2d 64 (D. Mass. 2003) (No. 02-11749).

79. Alliance Complaint, *supra* note 75, ¶ 33. *See also infra* Part III.A.

80. Alliance Complaint, *supra* note 75, ¶ 32.

81. *Id.* ¶ 24.

82. *Id.* ¶ 40 (rendering the permit as "arbitrary and capricious, and abuse of discretion, and otherwise not in accordance with law . . .").

83. *Id.* ¶ 37. *See also supra* note 20.

84. Alliance Complaint, *supra* note 75, ¶¶ 38-39.

85. *Id*.

86. *Id.* ¶¶ 42, 44. *See infra* Parts II.C. and III.B. for more discussion of these terms.

87. Alliance Complaint, *supra* note 75, ¶ 43a.

88. *Id*. ¶ 43d. *See infra* Part III.B.

89. Cape Wind Associates, LLC's Answer to First Amended Complaint for Declaratory and Injunctive Relief, Alliance to Protect Nantucket Sound v. Department of the Army, 288 F. Supp. 2d 64 (D. Mass. 2003) (No. 02-11749) [hereinafter Cape Wind Answer].

90. *Id.* ¶ 37.

ernment does maintain exclusive jurisdiction and control over the OCS, but highlighted the fact that the government does not own the OCS in fee simple.[91] Finally, Cape Wind denied the argument that the Corps' environmental review was erroneous. Cape Wind asserted that the EA contained an adequate analysis on many alternatives.[92] As to whether the data tower and the wind park should be treated as one single project, Cape Wind claimed that the tower was meant to determine the final project's feasibility, but is not the first step of the actual project.[93] The data alone has independent value and use; marine and meteorological data that could "be of material assistance to commercial and recreational boaters . . . ."[94]

The court delivered an opinion denying the Alliance's motion for summary judgment and granting the Corps' and Cape Wind's cross-motions for summary judgment on September 18, 2003.[95] The decision first held that the OCSLA does allow the Corps to permit offshore wind turbines, or any other structure, on the OCS.[96] Based upon a more literal reading of OCSLA §§1333(a)(1) and 1333(e), and review of the 1978 OCSLA Amendments' legislative history, the court determined that Congress clearly intended to preserve the Corps' jurisdiction over all structures on the OCS.[97] For the property rights claims, the court did not address the underlying substantive issue. Rather, the court simply illustrated that the Corps' regulations only require that an applicant affirm a property interest.[98] It is not the Corps' role to enter into property disputes with applicants.[99] Lastly, the court did not find any NEPA violations: the Corps was not required to circulate the data tower FONSI for public review[100]; the EA's discussion of alternatives was indeed adequate[101]; the data tower could be separated from the rest of the project and did not require an EIS[102]; and impacts from removing the tower would be insignificant.[103]

The plaintiffs are appealing the court's denial of summary judgment in the First Circuit.[104] The Alliance and other individual Appellants filed a Brief on March 12, 2004.[105] Cape Wind filed its Brief on May 12, 2004, and the Army filed its Brief on May 13, 2004. The Alliance filed a Reply Brief on May 27, 2004. Oral argument is scheduled for September 16, 2004.[106]

II. Legal Background

A. The RHA[107]

The RHA granted authority to the Corps to protect navigation on the nation's navigable waters. The major sections of the RHA are §§9,[108] 10,[109] 11,[110] and 13.[111] Section 10 is relevant to this discussion.

RHA §10 prohibits obstructing the navigable capacity of the waters of the United States without authorization by Congress or the Secretary of the Army.[112] The RHA applies to the navigable waters of the United States,[113] which include the territorial seas.[114] The territorial seas include all ocean and coastal waters within a zone three geographic (nautical) miles seaward from the baseline.[115] Therefore, the Corps' traditional §10 jurisdiction applies to navigable inland waters and waters up to three nautical miles from the ordinary low tide line onshore.[116]

91. *Id*. ¶¶ 42, 35.
92. *Id*. ¶ 47.
93. *Id*. ¶ 1.
94. *Id*. The question of independent value is crucial to the segmentation issue, and is discussed in *infra* Part III.B.
95. Alliance to Protect Nantucket Sound v. Department of the Army, 288 F. Supp. 2d 64 (D. Mass. 2003) (denying plaintiffs' motion for summary judgment, and granting of defendants' and intervenor's cross-motions for summary judgment).
96. *Alliance to Protect Nantucket Sound*, 288 F. Supp. 2d at 72-77.
97. *Id.* at 73-74. *See infra* Part III.A.
98. *Alliance to Protect Nantucket Sound*, 288 F. Supp. 2d at 77-78.
99. *Id.*
100. *Id*. at 78-79.
101. *Id*. at 79-80.
102. *Id*. at 80-81.
103. *Id.* at 82.
104. The Alliance filed a notice of intent to appeal with the court on November 17, 2003. Notice of Appeal, Alliance to Protect Nantucket Sound v. Department of the Army, 288 F. Supp. 2d 64 (D. Mass. 2003) (No. 02-11749).
105. General Docket, Alliance to Protect Nantucket Sound v. Department of the Army (1st Cir.) (No. 03-2604).
106. *Id.*
107. 33 U.S.C. §401 et seq.
108. RHA §9, 33 U.S.C. §401. RHA §9 applies to permits for dams, dikes, bridges, and causeways across navigable waters. The Corps is responsible for granting permits for dams and dikes, with the consent of Congress or the state legislature for interstate and intrastate waters, respectively. As of 1966, the Secretary of Transportation is responsible for permitting bridges and causeways.
109. RHA §10, *id.* §403.
110. RHA §11, *id.* §404. RHA §11 concerns the establishment of harbor lines, which are the seaward limit for piers, wharves, and bulkheads.
111. RHA §13, *id.* §407. RHA §13, known as the Refuse Act, prohibits the discharge of refuse matter into navigable waters or into tributaries that lead into navigable waters, other than liquids from streets and sewers. Section 402 of the Clean Water Act (CWA), 33 U.S.C. §1251-1387, §1342, ELR STAT. FWPCA §§101-607, §402, assumed this program in 1972.
112. 33 U.S.C. §403. The relevant language of RHA §10 reads as follows:

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army . . . .

113. There is no exact definition of navigable waters, since the concept of navigability has evolved dramatically over two centuries, and is still subject to case-by-case determination. *See*, *e.g.*, *id.* §329.1 ("[33 C.F.R. §329] defines the term 'navigable waters of the United States' as it is used to define authorities of the [Corps]."); *id.* §329.3 ("Precise definitions of 'navigable waters of the United States' or 'navigability' are ultimately dependent on judicial interpretation . . . ."); *id.* §329.4 ("Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce."); *id.* §329.6 (interstate or foreign commerce); *id.* §329.7 (intrastate or interstate nature of waterway); *id.* §329.8 (improved or natural conditions of the waterbody); *id.* §329.9 (time at which commerce exists or determination is made); *id.* §329.10 (existence of obstructions).
114. *Id.* §329.12(a). *See also* CWA §502(7), 42 U.S.C. §1362(7).
115. 33 C.F.R. §329.12(a).
116. *Id.* §329.12(a)(1) (defining baseline).

B. The OCSLA[117]

The OCSLA was originally enacted in 1953,[118] and was amended in 1978.[119] The OCSLA applies federal law and jurisdiction to the seabed, subsoil, and permanently or temporarily fixed artificial islands and installations on the OCS.[120] The Act authorized the Secretary of the Interior to grant leases for oil and gas exploration and development.[121] The 1978 Amendments offered a more comprehensive framework for the development of the OCS.[122] The 1978 Amendments arose out of several events, most notably of which were a major 1969 oil spill from a drilling project, and the 1973 arab oil embargo.[123]

The two sections of the OCSLA that are relevant to this discussion are OCSLA §§1333(a)(1)[124] and 1333(e).[125] The following is a comparison of the 1953 and 1978 versions of these sections:

> *1953 OCSLA §1333(a)(1)* (emphasis added)
> The Constitution and laws and civil and political jurisdiction of the United States are hereby extended to the subsoil and seabed of the outer Continental Shelf and to *all artificial islands and fixed structures which may be erected* thereon for the purpose of exploring for, developing, removing, and transporting resources therefrom . . . .
> *1953 OCSLA §1333(f)*
> The authority of the Secretary of the Army to prevent obstruction to navigation in the navigable waters of the United States is hereby extended to artificial islands and fixed structures located on the Outer Continental Shelf.
> *1978 OCSLA §1333(a)(1)* (emphasis added)
> The Constitution and laws and civil and political jurisdiction of the United States are hereby extended to the subsoil and seabed of the outer Continental Shelf and *to all artificial islands, and all installations and other devices* permanently or temporarily attached to the seabed, *which may be erected* thereon for the purpose of exploring for, developing, or producing resources therefrom . . . .
> *1978 OCSLA §1333(e)*
> The authority of the Secretary of the Army to prevent obstruction to navigation in the navigable waters of the United States is hereby extended to the artificial islands, installations, and other devices referred to in subsection [1333(a)(1)].

Both the 1953 and 1978 versions of OCSLA §1333(a)(1) apply the laws and jurisdiction of the United States to artificial islands and structures on the OCS. Likewise, the 1953 §1333(f) and the 1978 §1333(e) extend the Corps' §10 authority to those structures on the OCS.

The controversial part of this language, which is discussed in Part III.A., is the meaning of the phrase "which may be erected [for the purposes of resource extraction]" in §1333(a)(1). Opponents to Cape Wind argue that the use of "may be" excludes projects not related to resource extraction. Conversely, proponents argue that the language only gives examples of some types of structures that are covered.

Another point of controversy is whether the 1978 Amendment to §1333(f) limited the Corps' jurisdiction. The 1978 version is more specific in that it qualifies the types of structures over which the Corps has authority as those structures listed in §1333(a)(1). Depending upon one's reading of "may be" in §1333(a)(1), this 1978 change could limit the Corps' §10 authority to only those structures used for resource extraction.

C. NEPA[126]

NEPA's two objectives include the prevention of environmental damage, and the assurance that federal agencies consider environmental issues in making decisions.[127] A major way of satisfying these objectives is through preparation of a detailed statement for major federal actions significantly affecting the quality of the human environment.[128] This detailed statement, more commonly known as an EIS, should address: (1) the proposed action's environmental impacts[129]; (2) unavoidable adverse impacts[130]; and (3) alternatives.[131] Regulations issued by the Council on Environmental Quality (CEQ) expand upon these terms and requirements.[132]

The CEQ regulations offer a comprehensive treatment of NEPA's requirements. Of these, the crux of an agency's consideration of environmental impacts is whether or not to issue an EIS. Agency proposals to which an EIS may apply (major federal actions) include: (1) rules and regulations[133]; (2) formal plans[134]; (3) programs[135]; and (4) approval of projects.[136] The Corps' granting of permits for the Cape Wind project falls under the fourth category. A proposal may definitely require an EIS[137]; may be categorically excluded and not require an EIS[138]; or may fall in between these two groups.[139] For this last group, the CEQ regulations mandate

117. 43 U.S.C. §§1331-1356.

118. Pub. L. No. 83-212, 67 Stat. 462 (1953).

119. OCSLA Amendments of 1978, Pub. L. No. 95-372, 92 Stat. 629 (1978).

120. 43 U.S.C. §1333(a)(1).

121. Donald T. Kramer, *Construction and Application of §4 of Outer Continental Shelf Lands Act of 1953 (43 U.S.C. §1333), Relating to Laws Applicable to Subsoil and Seabed of Outer Continental Shelf and Artificial Islands and Fixed Structures Erected Thereon*, 163 A.L.R. FED. 1, 34 (2000).

122. *Id*. at 35.

123. *Id*. at 34-35.

124. 43 U.S.C. §1333(a)(1).

125. *Id.* §1333(e). This section was originally numbered §1333(f).

126. 42 U.S.C. §§4321-4370(f), ELR STAT. NEPA §§2-209.

127. NICHOLAS C. YOST, NEPA DESKBOOK 5 (1998) [hereinafter NEPA DESKBOOK]. *See also* NEPA §§2, 102(2), 42 U.S.C. §§4321, 4332(2).

128. 42 U.S.C. §4332(2)(C).

129. *Id.* §4332(2)(C)(i).

130. *Id.* §4332(2)(C)(ii).

131. *Id.* §4332(2)(C)(iii).

132. The CEQ is an organization within the executive office of the president that adopts NEPA regulations applicable to all agencies and oversees agencies' implementation of those regulations. NEPA DESKBOOK, *supra* note 127, at 7. *See also* NEPA §202, 42 U.S.C. §4342. The CEQ regulations are found at 40 C.F.R. §§1500-1517 (2002).

133. 40 C.F.R. §1508.18(b)(1).

134. *Id.* §1508.18(b)(2).

135. *Id.* §1508.18(b)(3).

136. *Id.* §1508.18(b)(4).

137. *Id.* §1501.4(a)(1).

138. *Id.* §1501.4(a)(2).

139. *Id.* §1501.4(b).

that an agency will first prepare an EA,[140] and then either find need for an EIS,[141] or determine that the proposal will not result in any significant environmental impact.[142]

If the agency determines that an EIS is necessary, the next step is "scoping."[143] Scoping is the agency's process of determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action.[144] In order to achieve this task, the agency must first properly delineate the proposal itself.[145] To the extent that several actions are involved in one proposal, the agency will decide if those actions all fall under the scope of one EIS if they are (1) connected actions, meaning closely related,[146] (2) cumulative actions with cumulative impacts,[147] and (3) actions that share adequate similarity.[148]

III. Analysis of Legal Issues

A. Does the Corps Have Jurisdiction to Grant Permits for Structures on the OCS, If Those Structures Are Not Related to the Extraction of Oil, Gas, and Minerals?

The plaintiffs in *Alliance to Protect Nantucket Sound* alleged in their complaint that the Corps cannot rely upon the OCSLA to issue a permit for the data tower, since the tower "is not an installation or other device erected for the purpose of exploring for, developing, or producing oil, gas, or any other mineral within the meaning of [the] OCSLA."[149] Therefore, as the complaint continues, "the [Corps] is without jurisdiction to issue the permit."[150] Resolution of this matter depends upon the OCSLA's historical context, statutory interpretation, the appropriate level of deference for that interpretation, and legislative history.

1. First Argument Against Jurisdiction: The OCSLA's Historical Context

Opponents to the claim that the Corps maintains §10 jurisdiction over structures on the OCS that are not related to resource development first point to the historical context of the OCSLA.[151] The argument is that the OCSLA has applied only to the extraction of natural resources in the past.[152]

The concept of the OCS primarily derives from the 1945 Truman Proclamation.[153] In order to promote development of oil and mineral resources offshore, President Harry S. Truman proclaimed that the nation's jurisdiction and control extended over the natural resources of the subsoil and seabed of the OCS.[154] The Geneva Convention recognized this claim.[155]

The Truman Proclamation led to litigation over states' rights over the submerged lands offshore. The U.S. Supreme Court ruled in 1947, that the federal government held paramount rights over the submerged lands within three miles of the California coast.[156] Similar cases reflected this holding in 1950.[157]

In response to these cases, Congress passed the Submerged Lands Act (SLA) in 1953, which was signed by President Dwight D. Eisenhower.[158] Although President Truman had been opposed to giving states control over any submerged lands, President Eisenhower supported the concept.[159] The SLA gave coastal states rights to the resources found in submerged lands up to three miles offshore.[160] However, even after the SLA, there was still an open question of how the federal government was to manage the mineral resources on the OCS.[161]

Congress therefore passed the OCSLA in 1953,[162] a few months after the SLA. The OCSLA amended the SLA, and provided for federal authority over mineral resources on the OCS.[163] The 1953 OCSLA allowed the Secretary of the Interior to lease portions of the OCS for natural resources development.[164] By the 1970s, however, revision of the OCSLA was deemed necessary because the 1953 Act was not specific enough for the Secretary to effectively manage the OCS.[165]

Given that the Truman Proclamation, the SLA, and the 1953 OCSLA all dealt with offshore mineral development, Cape Wind opponents now argue that OCSLA §1333 is specifically limited to structures used for those purposes. The argument is based upon the fact that "nothing but the development of oil and related minerals is discussed [in those documents]."[166] In turn, the policies and concerns leading up to the 1953 OCSLA "[make no reference] to the development of renewable sources of energy on the [OCS]."[167]

140. *Id.* §1501.4(b). An EA may still be performed as a supplement to an EIS. NEPA Deskbook, *supra* note 127, at 10. An EA is a concise public document which does the following: (1) briefly provides evidence of an analysis for a determination of whether or not to initiate an EIS; (2) facilitates preparation of an EIS; and (3) discusses the proposal, alternatives, and impacts. 40 C.F.R. §1508.9.

141. 40 C.F.R. §1501.4(c).

142. *Id.* §1501.4(e).

143. *Id.* §1501.7.

144. *Id*.

145. *Id*. §1502.4 ("Agencies shall make sure the proposal which is the subject of an [EIS] is properly defined . . . . Proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement.").

146. *Id.* §1508.25(a)(1).

147. *Id.* §1508.25(a)(2).

148. *Id.* §1508.25(a)(3).

149. Alliance Complaint, *supra* note 75, ¶ 33.

150. *Id*. ¶ 34.

151. *See*, *e.g.*, Schulz, *supra* note 2, at 430-34.

152. *Id*.

153. H.R. Rep. No. 95-590, at 56 (1977).

154. *Id*. *See also* Exec. Order. No. 9633 (1945).

155. H.R. Rep. No. 95-590, at 56.

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

157. United States v. Texas, 339 U.S. 707 (1950); United States v. Louisiana, 339 U.S. 699 (1950).

158. Submerged Lands Act, ch. 65, 67 Stat. 29 (1953) (codified as amended at 43 U.S.C. §§1301-1315).

159. *See* Schulz, *supra* note 2, at 431.

160. H.R. Rep. No. 95-590, at 57.

161. *Id.*

162. Ch. 345, 67 Stat. 462 (1953) (codified as amended at 43 U.S.C. §§1331-1356).

163. H.R. Rep. No. 95-590, at 57.

164. *Id*.

165. *Id*.

166. Schulz, *supra* note 2, at 434.

167. *Id*.

2. Second Argument Against Jurisdiction: The 1978 Amendments Restricted the Corps' Jurisdiction

The plaintiffs' complaint in *Alliance to Protect Nantucket Sound* argues that the 1978 OCSLA Amendments limited the Corps' jurisdiction over structures on the OCS.[168] Previously, the 1953 Act made a general pronouncement that the Secretary of the Army's authority was extended "to artificial islands and fixed structures located on the [OCS]."[169] This language suggests that the Corps had jurisdiction over any type of structure, because this section does not make any reference to structures "which may be erected [for the purposes of resource extraction]."[170] The 1978 Amendment introduced seemingly more limiting language, which is offered by opponents as evidence that the Corps may not permit wind turbines on the OCS.[171]

The 1978 OCSLA Amendments changed the 1953 OCSLA §1333(f).[172] The amendment to §1333(f) introduced a specific reference to the types of structures over which the Corps may exert jurisdiction:

> Section 4 of such Act is amended . . . in subsection (f), by striking out "artificial islands and fixed structures located on the [OCS]" and inserting in lieu thereof "the artificial islands, installations, and other devices referred to in subsection (a) . . . ."[173]

This referred to §1333(a)(1), which mentions artificial islands and installations "which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom . . . ."[174] The plaintiffs focused upon the term "which may be" as a limiting clause.[175] This view reads OCSLA §1333(a)(1) in a narrow manner, as mandating that the only structures covered are those that are related to resource extraction.[176]

3. First Argument for Jurisdiction: Statutory Interpretation

The Corps has historically maintained that the current OCSLA §1333(e) does not limit its jurisdiction to only certain types of structures.[177] The Corps' regulations state that the OCSLA extended its authority to structures on the OCS, but does not qualify the types of structures.[178] Furthermore, a 1988 regulatory guidance letter to developers who wished to build casinos on the OCS explicitly stated that a §10 permit was required for any structure, "regardless of the purpose they would serve."[179] Even if there is an argument that the 1953 OCSLA only applied to mineral resources and that the 1978 Amendments narrowed the Corps' jurisdiction, the Corps' own interpretation of OCSLA §1333 is entitled to deference.

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.[180] stated that courts confront two questions when reviewing an agency's interpretation of a statute that it administers.[181] The first question is whether Congress directly spoke to the question at issue, meaning that congressional intent is clear.[182] If this is the case, then the court and the agency must give effect to that expressed intent.[183] If congressional intent is unclear and the statutory language is silent or ambiguous, however, then the second question is whether the agency's interpretation is based upon a permissible and reasonable construction.[184] The agency's interpretation need not be the only permissible interpretation.[185] Consequently, agency regulations will be upheld "unless they are arbitrary, capricious, or manifestly contrary to the statute."[186]

Although it is possible that OCSLA §§1333(a)(1) and 1333(e) are sufficiently clear as to authorize the Corps' jurisdiction over all OCS structures, it is more likely that §1333(a)(1) is ambiguous. The court in *Alliance to Protect Nantucket Sound*[187] expressed its belief that the 1978 OCSLA was sufficiently clear.[188] The court focused upon the use of the words "*all* artificial islands" and "*all* installations" in the statute as an indication that Congress intended jurisdiction over *all structures* (some of which may be used for resource extraction).[189]

This may be true. Nevertheless, the *Alliance to Protect Nantucket Sound* opinion does not focus upon the words "which may be [used for resource extraction]" enough to unequivocally establish that §1333(a)(1) is clear. As long as the section may be interpreted to mean that the Corps should only have jurisdiction over structures related to resource extraction, as the Alliance claims,[190] then it seems doubtful

168. Alliance Complaint, *supra* note 75, ¶¶ 24, 33-34.

169. 43 U.S.C. §1333(f).

170. *Id*. *See also* United States v. Ray, 423 F.2d 16 (5th Cir. 1970) (interpreting the 1953 OCSLA, and holding that an offshore construction project on the OCS that would install caissons and pilings requires a §10 permit from the Corps).

171. *Alliance to Protect Nantucket Sound*, 288 F. Supp. 2d at 73-74.

172. Pub. L. No. 95-372, §203(e)(2) (1978).

173. *Id*.

174. 43 U.S.C. §1333(a)(1).

175. *See* Alliance Complaint, *supra* note 75, ¶ 24.

176. *See*, *e.g.*, Schulz, *supra* note 2, at 439:

> [T]he [Corps'] regulatory jurisdiction over "navigable waters" is limited to three miles from shore; as such, it needs to rely on the OCSLA for an extension of its authority to regulate beyond three miles. But, the OCSLA only gives the [Corps] special regulatory powers for obstruction to navigation for installations or other devices erected for the purpose of exploring for, developing, or producing oil, gas, or any other mineral within the meaning of the OCSLA.

177. 33 C.F.R. §320.2(b). *See also id.* §§322.3(b), 322.5(f).

178. *Id.* §320.2(b).

179. U.S. Army Corps of Eng'rs, *Regulation of Artificial Islands, Installations, and Structures on the U.S. Outer Continental Shelf*, Regulatory Guidance Letter 88-08 (July 20, 1988) (expired Dec. 31, 1990).

180. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842, 14 ELR 20507 (1984).

181. "[A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." United States v. Mead Corp., 533 U.S. 218, 226-27 (2001). Although the U.S. Department of the Interior has primary responsibility over the OCS, the Corps' administration of §10 permits on the OCS entitles it to deference in its interpretation of the OCSLA. Alliance to Protect Nantucket Sound v. Department of the Army, 288 F. Supp. 2d 64, 76-77 (D. Mass. 2003).

182. *Chevron*, 467 U.S. at 842.

183. *Id*.

184. *Id*. at 843.

185. *Id*. n.11.

186. *Id*. at 844.

187. 288 F. Supp. 2d at 64.

188. *Id.* at 75.

189. *Id*. (emphasis added).

190. Alliance Complaint, *supra* note 75, ¶¶ 25, 33-34.

that congressional intent is really apparent. It does not matter ultimately, though, because even if §1333(a)(1) is ambiguous, then the analysis shifts to the reasonableness of the Corps' interpretation.[191]

The Corps' position that the OCSLA allows the agency to issue §10 permits for any structure on the OCS is reasonable for two reasons. First, the terms "which may be" in §1333(a)(1) could either be restrictive or merely suggestive. There is no definitive guidance or indication of intent as to this particular matter. The original purpose of the OCSLA was the development of minerals and resources on the OCS. Yet there is no official indication that the approval of structures that serve alternate purposes *but are still related to energy development* are absolutely impermissible. Second, the legislative history for the 1978 OCSLA Amendments does state that the amendments were not intended to alter the original 1953 grant of jurisdiction.

4. Second Argument for Jurisdiction: 1978 Legislative History

The legislative history for the 1978 OCSLA Amendments[192] contains a clear statement that the alteration of the old §1333(f) was not meant to change the Corps' authority. The House Conference Report for S. 9[193] discusses the change to §1333(f), which inserted a specific reference to the structures as listed in §1333(a)(1). The report states the following:

> This authority has been used by the Corps of Engineers to regulate the construction and location of such things as artificial fishing reefs, radio towers, and a proposed gambling casino that was to be constructed on reefs. It also applies to structures erected for the purpose of exploring for and transporting resources, such as oil drilling rigs. The existing authority of the Corps of Engineers, in [§1333(f)], applies to all artificial islands and fixed structures on the [OCS], *whether or not they are erected for the purpose of exploring for, developing, removing and transporting resources therefrom*. The [A]mendment to [§1333(f)] is not intended to change the scope of this authority, but merely to conform the description of the types of structures, no matter what their purpose, to the types of structures listed in [§1333(a)(1)].[194]

This is very clear as to congressional intent. Since OCSLA §§1333(a) and 1333(f) are not so clear as to the Corps' appropriate authority, reference to legislative history is therefore appropriate and useful.[195]

B. Assuming That the Corps Has Jurisdiction to Permit Wind Turbines on the OCS, What Portion of an Offshore Wind Project Is Subject to an EIS?

Although NEPA segmentation issues often arise in the context of highway construction,[196] they can factor into any EIS scoping matter. In the case of Cape Wind, the Corps treated the tower separately, and issued an EA instead of subjecting the tower to the overall environmental review.[197] This was a correct decision, because the data tower's existence is independent of the wind park, and it also has independent utility.

1. Three Types of Actions Subject to a Single EIS

Before one reaches the conclusion that the data tower should not be included in the project's scoping, the most relevant category of reviewable action must be determined. 40 C.F.R. §1508.25 establishes three categories of actions that may be addressed in an EIS.[198] These three actions are: (1) connected actions,[199] (2) cumulative actions,[200] and (3) similar actions.[201] At best, the Corps' permitting of the Cape Wind data tower arguably falls under connected actions.

2. Two Categories That Do Not Apply

Cape Wind phases one and two are not cumulative actions. Actions are cumulative if when taken into consideration together, they "have cumulatively significant impacts and should therefore be discussed in the same impact statement."[202] The impacts to be considered may be broad and reasonably foreseeable.[203] Cape Wind phases one and two are not cumulative because, regardless of the environmental impacts of the final wind park, the impacts of the temporary data tower are negligible. The data tower involves driving three steel pilings 100 feet into the seabed.[204] In its EA, the Corps determined that of all the pubic interest factors relevant to the tower, there may be some potential impact on wildlife as the pilings are driven into the seabed.[205] However, those impacts "are being mitigated by permit conditions," and "[o]ther impacts to fish and wildlife species in the area are expected to be non-consequential due to the size

191. *Alliance to Protect Nantucket Sound*, 288 F. Supp. 2d at 76.

192. S. 9, 95th Cong. (1978), Pub. L. No. 95-372, 92 Stat. 629 (1978).

193. H.R. Conf. Rep. No. 95-1474 (1978).

194. *Id.* at 81-82 (emphasis added).

195. A court should resort to using legislative history when a statute's text is ambiguous. Otherwise it is not appropriate, or at least less useful. *See*, *e.g.*, American Civil Liberties Union v. Federal Communications Comm'n, 823 F.2d 1554, 1568 (D.C. Cir. 1987) (declining to consult legislative history because definition of basic cable service was written "with crystalline clarity," and noting that legislative history is useful only when statutory language is "genuinely ambiguous") (quoting FAIC Securities, Inc. v. United States, 768 F.2d 352, 362 (D.C. Cir. 1985)).

196. *See*, *e.g.*, Preserve Endangered Areas of Cobb's History, Inc. v. Corps of Eng'rs, 87 F.3d 1242, 26 ELR 21449 (11th Cir. 1996) (holding that the Corps was correct in segmenting a county road construction project and in not requiring an EIS); Conservation Law Found. v. Federal Highway Admin., 24 F.3d 1465 (1st Cir. 1994) (determining that segmentation of a four-lane highway project in Rhode Island was proper).

197. U.S. Army Corps of Eng'rs, *Environmental Assessment and Statement of Findings for Application No. 199902477*, at 14, *at* http://www.nae.usace.army.mil/projects/ma/ccwt/ea.pdf (last visited Apr. 31, 2004) ("I find that based on the evaluation of environmental effects discussed in this document, the decision on this application [for the data tower] is not a major federal action significantly affecting the quality of the human environment. Hence, an [EIS] is not required.") [hereinafter Corps EA].

198. 40 C.F.R. §1508.25(a).

199. *Id.* §1508.25(a)(1).

200. *Id.* §1508.25(a)(2).

201. *Id.* §1508.25(a)(3).

202. *Id.* §1508.25(a)(2).

203. *Id.* §1508.7 (defining cumulative impact as something that "results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions . . .").

204. *Tower Application Notice*, *supra* note 31.

205. Corps EA, *supra* note 197, at 4.

and design of the project."[206] Given that the relatively small impacts from one tower are miniscule compared to the potential effects of the 130-tower wind park, there is no need to incorporate the data tower into the overall project as being cumulative.

Phases one and two may be similar, but not to a significant extent. Similar actions are those activities that "have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography."[207] In this case, the only similarity between phases one and two is general geography, and even then only to a limited degree. The data tower was erected in 2002, and it will be disassembled before the wind park's construction begins. The tower is located in Nantucket Sound, but the 900 square feet used to support the tower cannot compare to the 24 square miles that the wind park will occupy.[208] The tower is also smaller than the actual wind turbines, and it does not require the embedded network of electrical cables that the wind park will require.[209]

3. Connected Actions

The only category of activity that can arguably apply is that of connected actions. Connected actions are "closely related and therefore should be discussed in the same impact statement."[210] There are three subcategories of connected actions, those that: (1) automatically trigger other actions[211]; (2) depend upon other previous or simultaneous actions in order to proceed[212]; and (3) are interdependent upon a broader action in order to be justified.[213]

The data tower and the wind park do not in any way satisfy the first two subcategories. Cape Wind's installation of the data tower does not automatically trigger the wind park.[214] The data tower was not required in order to proceed with the wind park, although it is very helpful for determining the most effective design for the wind park.[215] In addition, although the Corps granted a permit for phase one, phase two is still undergoing a stringent environmental review. The ultimate outcome and future of the proposed wind park as designed is not definite. The data tower also does not depend upon other simultaneous actions or circumstances, since by definition it is the first phase of a two-phase project.

Opponents of the current Cape Wind project, and of other future projects, could argue that phases one and two are nevertheless connected and therefore should be addressed together in an EIS. There is indeed an identifiable link between the two phases, in that the data tower was built to facilitate the wind park's ultimate design and construction. If the tower's installation and purpose is solely justified by the proposed wind park, then there would be interdependency. If, however, the data tower could be erected regardless of whether the wind park is constructed, then the Corps cannot be accused of improperly segmenting the project.

The determining factor in this case is whether the data tower can exist without the wind park being built, and vice versa. The fact that Cape Wind chose to build a data tower in order to confirm the wind park's viability does not matter. This is a question of function and not of intent.

The best test in this area of law arises from the U.S. Court of Appeals for the Ninth Circuit case of *Trout Unlimited v. Morton*.[216] *Morton* involved a challenge to an EIS for a dam and reservoir project.[217] The first phase involved the dam itself.[218] The second and later phase was an irrigation project.[219] Challengers claimed that the EIS for the dam project was inadequate because it did not take into account the second phase, (even though the second phase has not been approved by the Secretary of the Interior).[220] The challengers' argument relied upon cases in which a series of interrelated steps constituted a single plan.[221] The court distinguished those cases from the dam situation because the dam project was not dependent upon subsequent phases of the development plan.[222] As a test, the court proposed that interdependency exists when "[it] is such that it would be irrational, or at least unwise, to undertake the first phase if subsequent phases were not also undertaken."[223]

Another instructive case in this area is *Wetlands Action Network v. U.S. Army Corps of Engineers*.[224] *Wetlands Action Network* involved a multiple-phase real estate development plan. One of the phases involved filling in several acres of federally delineated wetlands, which required a Clean Water Act (CWA)[225] §404 permit from the Corps.[226] Challengers to the permit argued that the Corps improperly divided the project into three phases, one of which did not require an EIS.[227] The Corps claimed that each phase of the development plan had independent viability.[228] The court determined that one phase could be built even if another phase was not built.[229] As in the Cape Wind situation, even though the project's developer in *Wetlands Action Network* intended that multiple phases complement each other, the fact was that each single phase did not affect the other.

The rule to be discerned from these cases is that even though a master project may consist of multiple phases, there is no interdependency if one phase can proceed even if another does not proceed. In the Cape Wind situation, the Corps did grant a permit for the data tower, but there is a small chance that the Corps may not grant a permit for the

206. *Id*.

207. 40 C.F.R. §1508.25(a)(3).

208. *See* Corps EA, *supra* note 197, at 1.

209. Reynolds, *supra* note 34.

210. 40 C.F.R. §1508.25(a)(1).

211. *Id.* §1508.25(a)(1)(i).

212. *Id.* §1508.25(a)(1)(ii).

213. *Id.* §1508.25(a)(1)(iii).

214. *Tower Application Notice*, *supra* note 31.

215. Corps EA, *supra* note 197, at 9 (stating that "[a]lthough the data is intended to be used by the applicant to assist them in the engineering design for the wind project, it is not mandated by any regulatory requirement").

216. 509 F.2d 1276, 5 ELR 20151 (9th Cir. 1974).

217. *Id*. at 1278.

218. *Id*. at 1279.

219. *Id*. at 1284.

220. *Id*. at 1284-85.

221. *Id*. at 1285.

222. *Id*.

223. *Id*.

224. 222 F.3d 1105, 31 ELR 20051 (9th Cir. 2000).

225. 33 U.S.C. §§1251-1387, §1344, ELR Stat. FWPCA §§101-607, §404.

226. *Wetlands Action Network*, 222 F.3d at 1111.

227. *Id*. at 1112.

228. *Id*. at 1111.

229. *Id*. at 1119.

wind park because of potential environmental impacts. Although it is unlikely, the chance that something may prevent the wind park from being constructed as planned means that the data tower's existence does not depend solely upon the wind park's viability.

From Cape Wind's perspective, the use of a data tower is not mandatory. It is just a form of insurance. Hypothetically, the data tower could have indicated that the wind park would not be feasible, resulting in an alteration of the plans or even abandonment of the project. Conversely, a less risk-adverse company may have undertaken the same project without first using a data tower, relying only upon already available scientific information. Regardless of the situation, the Cape Wind project passes the *Morton* test. It is not irrational for Cape Wind, or any other developer, to undertake the first phase without knowing if the second phase will ever come to fruition. It is undesirable if a project cannot be completed, but that is the risk that each developer takes. It would only be irrational to not begin testing until after the Corps has completed a prolonged review process for the entire project.

4. Independent Utility

That the data tower exists solely for the proposed wind park is the Alliance's argument in the Cape Wind litigation.[230] Cape Wind responded in its answer that the data tower does not exist solely to support the project.[231] In turn, Cape Wind distinguished the tower from the project by arguing for independent utility[232]:

> [The] research obtained at the [data tower] will have significant independent utility, including providing a facility for gathering data on the wind, ocean, current, and atmospheric conditions in Nantucket Sound; information which will allow for a better understanding of our ocean environment and atmosphere, and be of material assistance to commercial and recreational boaters, among others.[233]

At first glance, Cape Wind's claim seems disingenuous. Surely the company did not erect the data tower for the benefit of the general population's understanding of the local environment. This is true. Cape Wind did install the tower in order to assess Nantucket Sound's suitability for the wind power project. If the information gained is later useful to the community, then that is an added benefit. However, as with the connectedness analysis above, a project's nature depends upon its function, and not upon the builder's intentions. In this case, even though Cape Wind erected the data tower with the wind park in mind, that does not mean that the data gathered has no other uses outside of the project's realm.

230. Alliance Complaint, *supra* note 75, ¶ 15 ("The sole basis for the construction of this facility is support of Cape Wind's development of its overall wind power project.").

231. Cape Wind Answer, *supra* note 89, ¶ 1.

232. *Id*.

233. *Id*.

IV. Recently Proposed Federal Legislation

A. H.R. 5156, 107th Cong. (2002),[234] H.R. 793, 108th Cong. (2003)[235]

Rep. Barbara Cubin (R-Wyo.) sponsored H.R. 5156 and introduced it on July 18, 2002.[236] H.R. 5156 was referred to the U.S. House of Representatives House Committee on Resources on July 18, 2002, and referred to the Subcommittee on Energy and Mineral Resources on July 23, 2002.[237] The subcommittee held hearings on July 25, 2002, after which no further legislative action was taken.[238] Representative Cubin introduced a nearly identical bill on February 13, 2003 (H.R. 793).[239] H.R. 793 (Cubin Bill) was referred to the House Committee on Resources on February 13, 2003, and referred to the Subcommittee on Energy and Mineral Resources on February 21, 2003.[240] No formal legislative action was taken.[241]

These bills sought to create a system in which the Secretary of the Interior could grant easements and rights-of-way on the OCS.[242] Activities subject to this system would include (1) the "exploration, development, production, transportation, or storage of oil, natural gas, or other minerals"[243] and (2) the "production, transportation, or transmission of energy from sources other than oil or gas."[244] Naturally, the latter activity subjects offshore wind power facilities such as the Cape Wind project to the Secretary's authority. In turn, these easements and rights-of-way would be obtained by either a competitive or noncompetitive basis.[245] Those parties that obtained easements or rights-of-way would be subject to annual or one-time payments.[246]

The added benefits of this legislation would be the centralization of management of offshore energy-related projects, and the establishment of a structured process for project applicants.[247] This would be more efficient because a company like Cape Wind would start the permitting process with the U.S. Department of the Interior (DOI), which would then act as a manager and facilitator with other agen-

234. The official title of H.R. 5156 was "To amend the Outer Continental Shelf Lands Act to protect the economic and land use interests of the Federal Government in the management of outer continental shelf lands for energy-related and certain other purposes, and for other purposes."

235. The official title of H.R. 793 was "To amend the Outer Continental Shelf Lands Act to authorize the Secretary of the Interior to grant easements and rights-of-way on the Outer Continental Shelf for activities otherwise authorized by the Act."

236. The bill's status is available on the Internet at http://thomas.loc.gov/bss/d107query.html (last visited Apr. 20, 2004).

237. *Id*.

238. *Id*.

239. The bill's status is available on the Internet at http://thomas.loc.gov/bss/d108query.html (last visited Apr. 20, 2004).

240. *Id*.

241. *Id*.

242. H.R. 5156, 107th Cong. §1(b) (2002); H.R. 793, 108th Cong. §1(b) (2003).

243. *Id*.

244. *Id*.

245. *Id*.

246. *Id*.

247. *Outer Continental Shelf Energy Leasing: Hearings on H.R. 5156 Before the House Comm. on Resources, Subcomm. on Energy and Mineral Resources*, 107th Cong. (2002) (statement of Johnnie Burton, Director, Minerals Management Service, U.S. DOI).

cies and with the applicant.[248] There would be no more controversy over which agencies may participate in such permitting decisions.[249] In return for this certainty, wind energy companies would pay for easements and rights-of-way.[250]

Commentators, however, noted that although these bills address one problem through agency coordination, there remains the problem of identifying suitable lands on the OCS for future projects,[251] and the proper allocation of OCS lands.[252] Although it is not apparent that Representative Cubin intended that H.R. 5156 and H.R. 793 address all these matters, any final revision of the current permitting scheme will have to be comprehensive so that future project developers do not encounter uncertainty.

B. Coastal Zone Renewable Energy Promotion Act of 2003, H.R. 1183, 108th Cong. (2003)

Opposed to the Cape Wind project's progress due to the lack of a federal approval scheme, Rep. William D. Delahunt (D-Mass.)[253] introduced H.R. 1183 on March 11, 2003.[254] The bill was referred to the House Committee on Resources, and on March 25, 2003, it was referred to the Subcommittee on Energy and Mineral Resources and to the Subcommittee on Fisheries Conservation, Wildlife, and Oceans.[255] The bill stalled in subcommittee, as attempts to incorporate it into the 2003 Energy Bill were unsuccessful.[256]

H.R. 1183 directs the Secretary of Commerce, acting through the Administrator of the National Oceanic and Atmospheric Administration (NOAA), to select sites, develop regulations, and govern renewable energy in the marine environment.[257] The basis for this bill was the belief that existing laws do not address adequately the issues raised by offshore wind energy facilities, and that revised laws are necessary before offshore development may proceed.[258] The bill amends several sections of the Coastal Zone Management Act (CZMA)[259] to achieve these purposes.[260]

H.R. 1183 first amends CZMA §309(a)[261] to identify objectives. Among these are: (1) identifying priority locations; (2) ensuring access for fishing; (3) environmental reviews; (4) navigational and public safety; (5) payment for removal of facilities; (6) assessing the need for renewable facilities; and (6) taking into account national security.[262]

The bill then adds a new section to the end of the current CZMA. The proposed CZMA §314 contains many requirements for constructing renewable energy facilities in ocean waters. Those who intend to install such facilities must obtain a license.[263] In order to receive a license, applicants must first give the Secretary of Commerce written notice of intent, after which the Secretary shall publish in the *Federal Register* the requirements for a license application for the particular site, and shall request proposals.[264] Applications will be evaluated according to proposed energy production, economic impact, environmental impacts, and displacement of current services.[265] Before the Secretary issues a license, many other factors must be considered, including recommendations from the Secretary of Defense, the Corps, and the U.S. Coast Guard; consultation with the Secretary of Transportation and the Secretary of Energy; review of environmental and commercial impacts; and the payment of fees.[266] The application must be subject to notice and comment, and the affected coastal area would host a public hearing.[267] Completed licenses are subject to fees and annual royalties.[268]

C. Energy Policy Act of 2003, S. 2095, 108th Cong. (2004)

The current 2004 energy bill that is pending in the U.S. Senate is a carryover from the past congressional session. It contains language pertaining to regulation of OCS energy production that is nearly identical to the Cubin Bill.[269] However, there is concern that the language may exempt the Cape Wind project from such regulation. The legislative history of S. 2095 establishes the context.

In April 2003, both the House and Senate introduced energy bills.[270] The House version, H.R. 6,[271] did not address alternative energy production on the OCS.[272] The Senate version, S.14,[273] did contain a section that was similar to the Cubin Bill.[274] S. 14, §110 amends OCSLA §1337 by estab-

248. *Id*.

249. *Id*.

250. *Outer Continental Shelf Lands; Federal Coal Resources: Hearings on H.R. 793 Before the House Comm. on Resources, Subcomm. on Energy and Mineral Resources*, 108th Cong. (2003) (statement of Bruce H. Bailey, President, AWS Scientific, Inc.).

251. *See, e.g.*, *Outer Continental Shelf Lands; Federal Coal Resources: Hearings on H.R. 793 Before the House Comm. on Resources, Subcomm. on Energy and Mineral Resources*, 108th Cong. (2003) (statement of Thomas F. Reilly, Massachusetts Attorney General) (suggesting identifying sites in advance that "provide the greatest source of energy with the least damage to the environment").

252. *See*, *e.g.*, Schultz, *supra* note 2, at 447 ("however, the proposed legislation lacks substance in providing exactly how or in what manner easements and rights of way will be granted in submerged lands and to whom").

253. Representative Delahunt's congressional district includes Cape Cod.

254. The bill's status is available on the Internet at http://thomas.loc.gov/bss/d108query.html (last visited Apr. 21, 2004).

255. *Id*.

256. Donna Goodison, *Ocean "Zoning" Will Top Agenda for Task Force*, Boston Herald, June 4, 2003, *available at* 2003 WL 3027075.

257. H.R. 1183, 108th Cong. §§202, 2(b) (2003).

258. *Id*. §§2(a)(4)-(5).

259. 16 U.S.C. §§1451-1465, ELR Stat. CZMA §§302-319. The CZMA was enacted in 1972. It allows coastal states to voluntarily manage and protect coastal zones in a cooperative federal-state effort. CZMA §303, 16 U.S.C. §1452. States develop coastal management plans, and federal activities that are reasonably expected to affect the coastal zone's land or water use or natural resources must show consistency with the plan. CZMA §307, 16 U.S.C. §1456.

260. H.R. 1183, 108th Cong. §§3, 101, 201.

261. CZMA §309(a), 16 U.S.C. §1456b(a) (coastal zone enhancement objective defined).

262. H.R. 1183, 108th Cong. §101(1).

263. *Id.* §201.

264. *Id*.

265. *Id*.

266. *Id*.

267. *Id*.

268. *Id*.

269. *Compare* S. 2095, 108th Cong. §321 (2004), *and* H.R. 793, 108th Cong. §1(b) (2003).

270. The bill's status is available on the Internet at http://thomas.loc.gov/bss/d108query.html (last visited Apr. 22, 2004).

271. The Energy Policy Act of 2003, H.R. 6, 108th Cong.

272. Representatives Cubin and Delahunt's bills were being considered separately in committee in the spring of 2003.

273. The Energy Policy Act of 2003, S. 14, 108th Cong.

274. *Id.* §110.

lishing an OCS easement or right-of-way program regulated by the Secretary of the Interior, which partially applies to the "production, transportation, or transmission of energy from sources other than oil and gas . . . ."[275] The provision also mandated a fair return for easements and rights-of-way.[276]

The Senate ultimately adopted H.R. 6, but with major changes. H.R. 6 passed the House on April 11, 2003, was received by the Senate on April 29, 2003, and was placed on the Senate's legislative calendar in May 2003.[277] In the meantime, between May and July 2003, both S. 14 and H.R. 6 were pending in the Senate.[278] Due to excessive debate in the Senate over S. 14, the Senate voted on July 31, 2003, to adopt the previous year's energy bill, H.R. 4, instead.[279] H.R. 4[280] had passed the Senate but did not survive conference committee in October 2002.[281] In this strategic move meant to get an energy bill to conference, the Senate passed H.R. 6 amended with the text from H.R. 4.[282]

Although H.R. 6 and H.R. 4 did not contain language concerning alternative energy development on the OCS, the final conference report did contain such language. H.R. 6 was significantly revised in conference.[283] Language nearly identical to the Cubin Bill was inserted into H.R. 6 sometime during conference.[284] Conference Report 108-375[285] contained §321 ("Alternate energy-related uses on the Outer Continental Shelf").[286] Section 321 amends OCSLA §1337, and provides that the Secretary of the Interior "may grant a lease, easement, or right-of-way" on the OCS.[287] Activities that involve the "production, transportation, or transmission of energy from sources other than oil and gas" are subject to this scheme.[288] As in the Cubin Bill, leases,[289] easements, and rights-of-way would be obtained either competitively or noncompetitively, and would be subject to payments and fees.[290] The conference report's later explanation of each title and subtitle does not offer any commentary on §321.[291]

The post-conference report H.R. 6 almost passed as the 2003 energy bill. However, a Senate filibuster prevailed over Senate Majority Leader William Frist's (R-Tenn.) motion to invoke cloture.[292] The Senate filibuster was primarily due to H.R. 6's waiver of liability for methyl tertiary butyl ether.[293]

The 2003 energy bill returned in the 108th Congress' second session, this time as S. 2095 (Energy Policy Act of 2003).[294] S. 2095 was introduced in the Senate on February 12, 2004, and is pending as of July 2004.[295] S. 2095 contains the same §321 as in the H.R. 6 conference report.[296]

Section 321 is also why Conference Report 108-375 and S. 2095 are controversial to proponents of stricter OCS regulation. Both the conference report and S. 2095 contain a savings provision for §321.[297] Concerning the resubmittal of documents or reauthorizations, the savings provision states that §321 does not apply to projects "for which offshore test facilities have been constructed."[298] This may mean that any project that has already installed a test facility (such as Cape Wind and its data tower)[299] need not submit to new reviews or regulatory hurdles. This is the more selective interpretation, suggesting that the Cape Wind project need not go through more permitting and studies, but may still come under the DOI's jurisdiction if S. 2095 becomes law.[300] Another interpretation, however, suggests that the savings provision completely exempts Cape Wind from §321's oversight.[301] There is no definitive indication as to the drafter's intent.

V. Conclusion

Even if the Cape Wind project manages to survive the appeal in the First Circuit, other proposed projects in the near future may face similar litigation. Despite the best argu-

275. *Id*. §110(a).

276. *Id*.

277. The bill's status is available on the Internet at http://thomas.loc.gov/bss/d108query.html (last visited Apr. 21, 2004).

278. S. 14 was considered by the Senate between May and July 2003. H.R. 6 was received in the Senate on April 29, 2003, and remained on the calendar between May and July 2003. Information on each bill's status is available on the Internet at http://thomas.loc.gov/bss/d108query.html (last visited Apr. 21, 2004).

279. American Feed Industry Ass'n, *Senate Pulls 11th Hour Ploy; Passes Previous Energy Bill*, *at* http://www.afia.org/Feedgram_Articles/August_12_2003/Energy_Bill.html (last visited Apr. 22, 2004) [hereinafter *11th Hour*].

280. The Energy Policy Act of 2002, H.R. 4, 107th Cong.

281. The bill's status is available on the Internet at http://thomas.loc.gov/bss/d107query.html (last visited Apr. 22, 2004).

282. *11th Hour*, *supra* note 279 ("Senate Minority Leader Tom Daschle (D-S.D.), who came up with the idea, summed it up best: 'This just gets us to conference. After that, it's wide open.'").

283. This was intended after the Senate passed H.R. 4. *11th Hour*, *supra* note 279 ("Senate Energy Committee Chair Pete Domenici (R-Ariz.) said he supported the compromise action because 'I'll rewrite the whole bill in conference.'").

284. 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, *at* http://www.saveoursound.org/news/timesart10304.html (last visited Apr. 22, 2004).

285. H.R. Conf. Rep. No. 108-375 (2003).

286. *Id.* at 80-81.

287. *Id*. at 80. The Secretary of the Interior would work through the Minerals Management Service.

288. *Id*.

289. The Cubin Bill did not mention leases. *See* H.R. 793, 108th Cong., §1(b) (2003).

290. H.R. Conf. Rep. No. 108-375, at 80.

291. *Id*. at 450.

292. *Senate Vote to End Filibuster on Energy Bill Fails*, *at* http://groups.msn.com/AAEA/energy.msnw (last visited Apr. 22, 2004).

293. *Id.* ("A main sticking point that caused the energy bill to fail was the methyl tertiary butyl ether (MTBE) liability exemption. The exemption provides protection from lawsuits for makers of the fuel additive MTBE, which has been found to contaminate groundwater.").

294. S. 2095, 108th Cong. (2004).

295. The bill's status is available on the Internet at http://thomas.loc.gov/bss/d108query.html (last visited Apr. 22, 2004).

296. *Compare* S. 2095, 108th Cong. §321, *with* H.R. Conf. Rep. No. 108-375, at 80-81.

297. H.R. Conf. Rep. No. 108-375, at 81; S. 2095, 108th Cong. §321(c).

298. *Id*.

299. Section 321 does not mention Cape Wind by name. However, Cape Wind is the only project to date to fit the terms of S. 2095, 108th Cong. §321(c). *See* Coleman, *supra* note 284 ("Cape Wind attorney Dennis Duffy agreed the provision would affect the Nantucket Sound project, but denied Cape Wind lobbied for it and was uncertain of its origin.").

300. *Cape Wind Shows Its D.C. Clout: Political Maneuverings Behind "Alternative" Energy Are Starting to Look Very Much Like the Old-Fashioned Washington Business-as-Usual*, Cape Cod Voice, Dec. 2003, *at* http://www.saveoursound.org/edits/ccvoiceedit121803.html (last visited Apr. 22, 2004).

301. *See id*.

ments offered by Cape Wind's proponents, there is no uniform answer yet as to what the federal government's proper role is in permitting offshore wind projects. Although this Article addressed two of the major federal law issues, many other issues will also arise. This is why some nationwide system to manage this promising industry is necessary.

There are several possibilities to remedy this situation. So long as Congress creates a centralized system that demarcates the procedures for applications, review, and interagency responsibilities, then offshore wind energy will prosper in this country. Each of the proposed bills discussed in Part IV have merit in that they attempt to establish a centralized system. The Cubin Bill places primary authority in the DOI. Representative Delahunt's bill names NOAA as the lead agency. Another option would be to clarify OCSLA §1333(a)(1) and formally grant permitting authority to the Corps. This would involve amending the disputed language concerning what kinds of structures the Corps may permit. Although the OCSLA primarily addresses conventional resources such as oil and gas, the Corps has the expertise to evaluate and permit turbine structures on the OCS. If this were the case, though, the Corps should still share responsibility with the DOI or NOAA, since overall management of the OCS is not the Corps' responsibility.

Regardless of what formal system is created, Congress should ensure that the system encourages offshore wind project development, and does not impede it. There is a sensible way to develop this new energy source in a manner that is well planned and yet competitive. If this does occur, then the costs of building offshore wind parks will decrease in time, and energy companies may become inclined to adopt offshore wind power as a more conventional energy source.