

SLEIGHT OF UNCLEAN HAND[s]: The Cape Wind Controversy

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“This case may well be the first skirmish . . .”¹ “This action is the second skirmish in what may prove to be a protracted struggle over the construction of a wind energy plant in Nantucket Sound, Massachusetts.”²—TAURO, District Judge.

Abstract

This article addresses the question of whether §388 of the Energy Policy Act of 2005³ will sufficiently resolve the legal uncertainties surrounding the Cape Wind project and thus curb the already protracted legal battle advanced by the opponents. Part I begins by broadly examining the recent world-wide trend in the production of renewable energy, then narrowly focuses on the steps that the United States has taken to meet its renewable energy goals. Part II takes an in-depth look at the controversy surrounding why the United States has yet to tap into the offshore wind energy market, mainly focusing on how our litigious society and a few wealthy landowners have thus derailed all attempts at wind energy production in the United States. Part III examines the role of the Minerals Management Service in implementing the §388 of the Energy Policy Act of 2005 and concludes with a suggestion to further the purpose of the Act, while offering a solution to end the protracted litigation.

Part I. The Recent World-Wide Renewable Energy Movement

A global environmental crisis may be inevitable because energy demand is steadily increasing and outpacing the world-wide fossil fuel supply.⁴ The shared world-wide response is a commitment to reduce greenhouse emissions by shifting away from fossil fuel dependency. Many countries have gone further by significantly investing in the research and development and in the generation of renewable energy to reduce and replace fossil fuel consumption. Furthermore, some countries committed themselves to an absolute reduction in greenhouse emissions. For example, the countries that ratified the Kyoto Protocol agreed to legally bind themselves to reduce their greenhouse emissions below a determinable level. Thus, the global shift away from fossil fuel dependency represents a globally-felt public policy concern of accountability and commitment to insure a healthier world.⁵

¹ Ten Taxpayers Citizen Group v. Cape Wind Assocs., 278 F. Supp. 2d 98, 99 (D. Mass. 2003).

² Alliance to Protect Nantucket Sound v. U.S. Dep't of the Army, 288 F. Supp. 2d 64, 67 (D. Mass. 2003).

³ Pub. L. No. 109-58, 388(a), 199 Stat. 594, 744 (2005) (to be codified at 43 U.S.C. 1337).

⁴See Madelaine Drohan, Worldview OECD: Economist Say Global Environmental Crisis Possible, AMERICAN POLITICAL NETWORK GREENWIRE, May 30, 1997, available at WL 5/30/97 APN-GR 19 (stating “the world may suffer “massive” pollution, oil shortages and escalating conflicts over scarce natural resources as global populations and incomes grow. The demand for fossil fuels will ‘skyrocket’—and could deplete most known resources outside the Middle East—if large countries like China, India and Russia follow high-growth economic policies. . . with such as increase in fossil-fuel use, carbon emissions ‘could more than double’ by 2020 without a greater reliance on alternate energy sources”).

⁵Signed in Japan in 1997, and becoming binding upon the 40 industrialized ratifying countries, on February 16, 2005, the signers of the Kyoto Protocol agreed to limit their greenhouse emission below their 1990’s level. The European Union and its 15 member states signed the treaty. Among the European Union countries, Germany leads

To insure a healthier world, environmentally sensitive researchers continuously search for new ways to efficiently and inexpensively capture renewable energy sources. Much research has focused on how to capture oceanic energy in the form of wind, wave, ocean-current, and solar energies. The potential opportunities are as obvious as the challenges they face in transmitting the energy to land where it can be used, as well as storing unused energy in reserves for later use. Perhaps the greatest variable the researchers must address is finding a sustainable method to capture, generate, and transmit usable energy, despite the unpredictable and destructive fury that Mother Nature can impose on a whim. To address the unpredictable nature of oceanic environments, some researchers are focusing on how to capture more than one form of energy, to generate power in changing conditions.

There have been proposals to combine tidal and wind power and install tidal stream turbines on the bases of offshore wind turbines. The hybridization of wind and wave energy could enhance cost competitiveness with onshore wind facilities because of synergies that include single permitting; shared foundation/mooring infrastructure; shared deployment and operation maintenance with common facilities, equipment, and personnel; and higher capacity. However, marine-based renewable energy technologies are all at relatively earlier stages of development than offshore wind, so such amalgamated facilities are not imminent.⁶

Of the renewable sources “[w]ind energy is the fastest growing energy source worldwide at about 20 to 30% per year.”⁷ The worldwide installed capacity of onshore grid-connected wind power is about 40 GW.⁸ According to the Global Wind Energy Council, in 2005, the total newly installed wind energy capacity increased to nearly 11,800 MW, representing a one-year growth rate of 43.4%.⁹ China, the world’s second largest energy consumer, installed 500 MW of wind energy capacity last year, and expects to reach a total 2000 MW capacity by the end of 2006, if the currently approved projects and those under construction are completed before the end of the year.¹⁰

in total wind energy production. The UK is also aggressively pursuing the development of offshore wind energy production to meet their carbon reduction requirements. The Kyoto Protocol allows countries that fail to reduce their emissions to purchase carbon-credits from other countries that earned the credits for reducing their greenhouse emissions below the agreed level. The United States did not sign the Kyoto Protocol, but some states have adopted renewable energy portfolios that operate similarly to the Kyoto Protocol, by offering “green-credits” instead of “carbon credits” to subsidize the funding of renewable energy projects, which may be bought and sold.

⁶ Technology White Paper on Wind Energy Potential on the U.S. Outer Continental Shelf, Minerals Management Service Renewable Energy and Alternate Use Program U.S. Department of the Interior, at 3, May 2006, [hereinafter “Wind Energy Production”] available at http://ocsenergy.anl.gov/documents/docs/OCS_EIS_WhitePaper_Wind.pdf (last visited Jan. 9, 2007).

⁷ Id. at 3.

⁸ Id.

⁹ See U.S. LED WORLD IN WIND POWER INSTALLATIONS LAST YEAR, available at <http://www.foxnews.com/newsarchive/0,3566,185682,00.html> (last visited Jan. 9, 2007) (listing in MW, the amount of new wind power installed by the “world’s leaders” last year: United States 2430; Germany 1810; Spain 1760; India 1430; Portugal 500. The United States installed more new wind power capacity last year than any other country, but its total wind power base was still less than half of Germany’s. Total installed wind power by the world’s leaders in MW: Germany 18,440; Spain 10,030; United States 9,150; India 4,430; Denmark 3120).

¹⁰ Id. (quoting Li Junfeng of the Chinese Renewable Energy Association, who stated the goal for wind power in China by the end of 2010 is 5,000 MW).

The first experiments using wind turbines to generate electricity began in the late 1970s.¹¹ Over the past two decades, turbines have become more cost-effective, reliable, and quiet; although, the turbine size has increased.¹² Turbines convert mechanical power into electricity when the kinetic energy of the blowing wind resists the turbine blades, forcing aerodynamic lift, thus spinning the blades that turn a shaft connecting a series of gears to the center shaft of an electrical generator.¹³ Potential energy produced from the wind is directly proportional to the cube of the wind speed, thus increased wind speeds of only a few miles per hour can produce a significantly larger amount of electricity.¹⁴ Commercial wind facilities consist of a group of independently working turbines, efficiently spaced,¹⁵ that feed electricity into the utility grid.¹⁶ The major drawback is that wind resources vary by the minute, hour, day, month, and year, and these variations can affect the onshore electric power generation, transmission, and distribution systems with which they interface.¹⁷ On the other hand, a large geographical spread of wind power will reduce variability, increase predictability, and decrease the number of instances with near zero or peak output.¹⁸

In the United States, “[r]ising gasoline prices and home heating and cooling bills are reminding Americans of how dependent we are on secure, reliable sources of energy”¹⁹ and the need to end foreign energy dependence. Some states, communities, and homeowners have turned to wind power as an alternative,²⁰ recognizing the “need to diversify our energy portfolio.”²¹ Other factors such as public desire, advances in turbine technology, the extension

¹¹ See Wind Energy Production, supra note 6, at 3 (discussing the historical development of wind energy from simple uses to commercial application in response to the 1973 Arab oil embargo); see also Mukund R. Patel, Ph.D., P.E., WIND and SOLAR POWER SYSTEMS 26 (CRC Press eBook 1999) (1999) (noting that in 1979 a 2MW experimental machine was installed jointly by the Department of Energy and NASA on Howard Knob Mountain near Boone, North Carolina).

¹² See Wind Energy Production, supra note 6, at 3. In the mid-1980s, the rotor (blades and hub) diameter was about 20 m; today, rotor diameters are 100 m or more (bigger than the wingspan of a 747 aircraft), with the rotating blades covering an area the size of a football field. *Id.*

¹³ *Id.* at 4. Wind turbines harness kinetic energy of the moving air and convert it to electricity. *Id.*

¹⁴ *Id.* at 3. A turbine at a site with an average wind speed of 16 mph would produce 50% more electricity than at a site with the same turbine and average wind speeds of 14 mph. *Id.*

¹⁵ *Id.* at 4-5. The positions of the turbines are selected to ensure that each turbine operates in the wind regime for which it was designed and to prevent the air turbulence that is created by the towers and rotating blades of one turbine from interfering with the efficient operation of nearby turbines. *Id.* Such careful “micrositing” of turbines within a wind facility helps ensure that the facility, as a whole, operates with the highest possible efficiencies, regardless of wind direction. *Id.* In some land-based settings, this requires turbines to be separated by as much as 10 rotor diameters from each other. *Id.* In offshore applications, where only two wind directions are likely to predominate, the distances between turbines arranged in a line can be shortened to as little as two to four rotor diameters without creating interferences because of turbulence. *Id.*

¹⁶ *Id.* at 10.

¹⁷ *Id.* But integrating large wind facilities with the grid could present challenges. *Id.* When the grid becomes unstable, turbines in the smaller facilities can resynchronize online once the grid stabilizes. *Id.*

¹⁸ *Id.*

¹⁹ Office of the Assistant Sec’y, Land & Minerals Mgmt. U.S. Dep’t of the Interior: Oversight Hearing on the Role of the Federal Government and Federal Lands in Fueling Renewable and Alternative Energy in America: 109th Cong. 1,1 [hereinafter “Oversight Hearing”] (statement of Brenda Aird, Senior Renewable Energy Advisor).

²⁰ See Alexis Fabbri, More turning to wind power as alternative, UPI (Washington) February 10, 2006, available at LEXIS, News, By Industry & Topic, Markets and Industry News (“California has used wind energy for years, and Texas ‘has come along very fast in the past five years’”).

²¹ Oversight Hearing, supra note 19, at 1.

of the Production Tax Credit (PTC), and state renewable energy portfolio standards are all responsible for spurring growth in the production of renewable wind energy.²² For example, in 2004, Colorado voters passed a statewide initiative²³ calling for public utilities to obtain “10 percent of the energy from renewable sources by 2015.” To encourage domestic energy independence, the federal government offers subsidies under the PTC, available to large industrial wind farms that profit or sell within five years,²⁴ and allows accelerated depreciation on renewable energy projects over a five year period instead of the standard twenty year period.²⁵

Currently, federal and state subsidies operate to stimulate renewable energy growth. For example, the PTC provides an income tax credit of 1.5 cents/kilowatt-hour (adjusted annually for inflation since 1992) for the production of electricity from qualified wind energy facilities and other sources of renewable energy.²⁶ On August 8, 2005, President George W. Bush signed into law, the broad-ranging Energy Policy Act of 2005²⁷ (EP Act), containing an extension the vital PTC through December 31, 2007.²⁸ In response, the Energy Information Administration’s (EIA) 2006 Energy Outlook forecasts that “our consumption of renewable fuels will grow from 6 quadrillion BTUs in 2004 to 9.6 quadrillion BTUs in 2025” spurred by the PTC extension, advancements in renewable energy technologies, state requirements to produce renewable energy, and higher fossil fuel prices.²⁹ Significantly, this figure represents “an increase of 1.1 quadrillion more BTUs” more than estimated by the EIA in the 2005 Energy Outlook.³⁰ The EIA projects that by 2030, renewable energy will account for over 10 percent of our domestic energy production.³¹ Additionally, many states have adopted renewable energy portfolios, many

²² Id.

²³ See SMALL WIND IN COLORADO at <http://www.awea.org/smallwind/colorado.html> (last visited Jan. 7, 2007). In November 2004, Colorado became the first state ever to adopt a renewable energy standard by popular vote initiative. Amendment 37 requires Colorado utilities with 40,000 or more customers to generate or purchase a percentage of their electricity from renewable sources according to the following schedule: 3% from 2007 through 2010; 6% from 2011 through 2014; and 10% by 2015 and thereafter. See also, Using LEED-NC® in Colorado: Tips, Resources and Examples, June 2006, at 38, available at http://www.colorado.gov/rebuildco/services/highperformance/leed_co/Using_LEED-NC_in_Colorado.pdf (last visited Jan. 7, 2007).

²⁴ See Production Tax Credit Extension available at <http://www.awea.org/legislative/> [hereinafter PTC Extension] (last visited Nov. 10, 2006) (excluding small businesses and “individuals who want to install their own wind power systems for on-site power”).

²⁵ See Subsidies to a Wind Farm in Nantucket Sound, Beacon Hill Institute at Suffolk University, May 2006, at 6 [hereinafter “Subsidies”] available at <http://www.saveoursound.org/files/BHlonPubSubsidiesforCapeWind.pdf> (last visited Nov 6, 2006). The IRS helps to stimulate growth by allowing accelerated depreciation for renewable energy production companies. Id. Under Section 168, part (e), subsection (3)(b) of the Internal Revenue Code, wind farms are allowed to write off their investment costs over five years instead of the usual twenty years or more that would otherwise apply. Id. This accelerated depreciation allowance allows the project’s owner to write the cost of the project off against tax prematurely. Id. This has the effect of deferring tax payments; meanwhile the owner has the use of the funds, and this represents a benefit to the owner. Id.

²⁶ PTC Extension supra note 24 (noting the current value of the credit is 1.9 cents/kilowatt-hour of electricity produced. The credit was created under the Energy Policy Act of 1992 and applies to electricity produced by a qualified wind facility placed in service after December 31, 1992, and before January 1, 2008. The tax credit is useful only for utility-scale wind turbines, not smaller turbines used to power individual homes or businesses).

²⁷ Energy Policy Act of 2005, Pub. L. No. 109-58, 388(a), 199 Stat. 594, 744 (2005) (to be codified at 43 U.S.C. 1337).

²⁸ Id.

²⁹ Oversight Hearing, supra note 19, at 1.

³⁰ See id.

³¹ Id.

of which operate similarly to the Kyoto Protocol by allowing “green credits” to be earned by industries that reduce greenhouse emissions. The credits may be sold to industries that cannot meet the state standards. For example,

Massachusetts has put in place a Renewable Energy Portfolio Standard (RPS) law. Starting in 2003, a proportion of the electricity sold in the Commonwealth must come from new renewable generating sources; the proportion was set at 1% of the total in 2003, and is set to rise by half a percentage point annually until 2009.³²

New authorities and provisions of the EP Act of 2005³³ authorized the Department of the Interior (DOI) to promote future development of renewable energy sources under the express delegation to regulate such projects through the Minerals Management Services (MMS), the Bureau of Land Management (BLM), and the U.S. Geological Survey.³⁴ The DOI manages over one fifth of the nation’s land,³⁵ totaling approximately 500 million surface acres.³⁶ Thus, under their express delegation, the BLM and the MMS are authorized to offer lands for the production of mineral energy (renewable and non-renewable) resources consistent with environmental protection goals.³⁷ The BLM manages 262 million surface acres of Federal mineral estate, and the MMS manages approximately 1.76 billion offshore acres.³⁸ In 2003, these lands and resources accounted for 30% of the total domestic energy production, 20% of which was attributable to wind energy.³⁹ Public lands administered by the DOI produce approximately five percent of the wind energy in the United States.⁴⁰ Currently, all commercial wind energy production is located onshore.

³² Id. at 4.

³³ Pub. L. No. 109-58, 388(a), 199 Stat. 594, 744 (2005) (to be codified at 43 U.S.C. 1337).

³⁴ Oversight Hearing, *supra* note 19, at 1.

³⁵ Id.

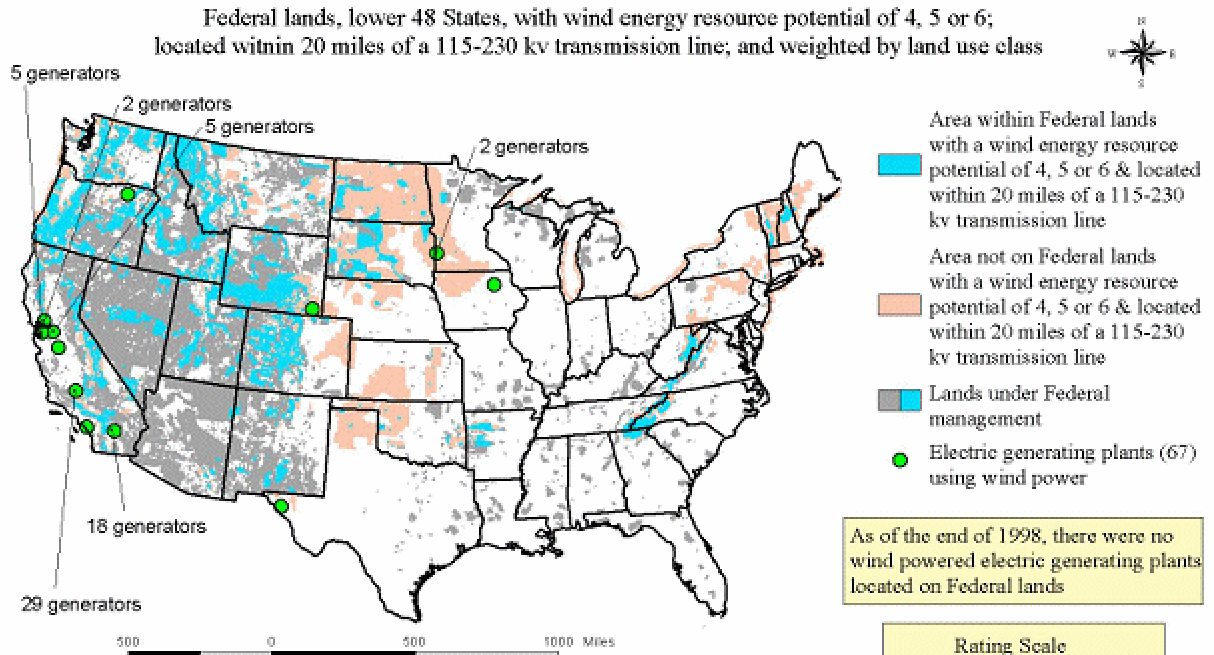
³⁶ Deputy Secretary U.S. Dep’t of the Interior: Hearing on Energy Production on Federal Lands Before the Senate Energy and Natural Resources Committee U.S. Senate, 108th Cong. 1, 3 (2003) [hereinafter Hearing on Energy Production] (statement of J. Steven Griles, Deputy Secretary of the Interior) available at <http://www.mms.gov/ooc/testimony/test22703.htm> (last visited Nov. 6, 2006).

³⁷ Id. at 3.

³⁸ Id. at 3-4.

³⁹ Id. at 4.

⁴⁰ See APPROVAL HANDED DOWN FOR LARGEST FEDERAL LAND WIND PROJECT, August 28, 2006, [renewableenergyaccess.com](http://www.renewableenergyaccess.com) available at <http://www.renewableenergyaccess.com/rea/news/story?id=45825> [hereinafter “Approval Handed Down”] (last visited on Jan 4, 2007).



Lands with high potential for wind energy are defined as areas
 - with wind energy potential of 4, 5, or 6; and
 - within 20 miles of a 115-230 kv transmission line

The acreage for these areas are then weighted using the weights in Table 1. The sum of weighted acres is the estimate of lands with high potential for wind energy.

- % that high potential Federal lands are of total U.S. high potential lands 29%
- % of total Federal lands that have high potential for wind energy 18%
- % of U.S. electric energy generated by wind power 0.1%

Rating Scale

6 - outstanding potential for wind energy generation
 5 - excellent potential for wind energy generation
 4 - good potential for wind energy generation

Source of wind energy resource potential measures:
 Wind Energy Resource Atlas of the United States
 U.S. DOE, Pacific Northwest Laboratory, Oct. 1986.
 Source of wind powered generation and wind powered electric power plant locations:
 EIA
 EPA Egrid database (1998)

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America's energy independence depends upon the use of federal lands for renewable energy projects. According to the BLM, promoting wind energy is a high priority in its efforts to enhance energy security by expanding opportunities for developing alternative, domestic sources.⁴² In 2003, the BLM, administered "some 25 wind energy right-of-way authorizations on public lands in California and Wyoming," encompassing approximately 5,000 acres and generated approximately 500 MW of electrical power.⁴³ As of April 2006, the BLM administers 22 right-of-way authorizations, but "an additional 78 rights-of-way have been approved for wind energy site testing and monitoring activities in Arizona, California, Colorado, New Mexico, Utah, Idaho, Wyoming, Nevada, Oregon, Washington and Montana."⁴⁴ Of the 262 million acres

⁴¹ See <http://www.eia.doe.gov/cneaf/solar.renewables/page/wind/wind.gif>.

⁴² Approval Handed Down *supra* note 40.

⁴³ KATHLEEN CLARK, U.S. DEP'T OF THE INTERIOR, INTERIM WIND ENERGY DEVELOPMENT POLICY (Oct. 2002), available at <http://www.blm.gov/nhp/efoia/wo/fy03/im2003-020.htm> (last visited Nov. 12 (2006) (identifying the procedure to acquire rights under federal law to construct a wind energy facility on public lands).

⁴⁴ Oversight Hearing, *supra* note 19, at 2.

available, only approximately 5,000 acres, or one-fifth of one percent, are devoted to onshore wind energy production. See map above, depicting BLM managed lands, in nine western states, capable of supporting commercial wind projects, offering large amount of space, sustainable winds, and proximity to transmission lines. Federal lands in western states could add estimated 3,200 MW of wind generated energy to the domestic supply.⁴⁵

Alternatively, the 1.76 billion acres located offshore offers a greater resource potential for wind generated energy, which could significantly further America's energy independence goals. "[T]he U.S. Department of Energy (DOE) estimates there are more than 900,000 MW⁴⁶ of potential wind energy off the coast of the United States, in many cases relatively near major population centers."⁴⁷ Development of offshore wind energy technologies has the potential to provide up to 70,000 MW of domestic generating capacity to the nation's electric grid by 2025.⁴⁸

In comparison to onshore wind projects, offshore projects can consistently generate more energy because the oceanic environment sustains higher wind speeds⁴⁹ and because wind speeds tend to increase with distance from the shore.⁵⁰ For instance, a turbine at a site with an average wind speed of 16 mph would produce 50% more electricity than at a site with the same turbine and average wind speeds of 14 mph.⁵¹ The overall size, capacity, and efficiency generates an overall greater output because smoother and less turbulent airflows offshore require less distance between turbines.⁵² Most importantly, offshore wind turbines can generate power closer to high-value coastal load centers than onshore turbines.⁵³

On the other hand, the overall capital required for an offshore project is 30 to 60% greater.⁵⁴ Additionally, costs are higher than those for onshore because offshore turbines require: more expensive foundations to account for the larger size; anticorrosive protection from the sea and salt; marine transportation and installation at sea; servicing at sea; and different technological specifications unique to the oceanic environment.⁵⁵ Operation and maintenance

⁴⁵ Id.

⁴⁶ Wind Energy Production, supra note 6, at 2. This estimate excludes the offshore zone from the shoreline to 5 nautical miles. It also excludes 67% of the potential area within 5 to 20 nautical miles from shore, to account for shipping lanes and avian, marine mammal, fish, and view shed concerns. Id. For the 20- to 50-nautical-mile zone, the exclusion was reduced to 33% where there are fewer environmental concerns and where wind facilities would not be visible from the shore. Id.

⁴⁷ See Envisioning Wind Energy for Massachusetts Communities, Proceedings of the panel discussion held at the Massachusetts State House on June 21, 2006 at 5 [hereinafter "Windscape Panel"] available at <http://www.architects.org/emplibary/WindscapePanelProceedings2006.pdf> (last visited Nov. 6, 2006).

⁴⁸ Wind Energy Production, supra note 6, at 2.

⁴⁹ Id at 4.

⁵⁰ Id. at 8.

⁵¹ Id at 3.

⁵² Id. at 4-5, see note 15 supra (discussing "micrositing"). In some land-based settings, this requires turbines to be separated by as much as 10 rotor diameters from each other. Id. In offshore applications, where only two wind directions are likely to predominate, the distances between turbines arranged in a line can be shortened to as little as two to four rotor diameters without creating interferences because of turbulence. Id.

⁵³ Id. at 6.

⁵⁴ Id at 14.

⁵⁵ Id. at 6. Offshore turbines require corrosion protection, internal climate control, high-grade exterior paint, and built-in service cranes. Id. To minimize expensive servicing, offshore turbines may have automatic greasing systems to lubricate bearings and blades, and preheating and cooling systems to maintain gear oil temperature within

costs are higher because of the remoteness, as well as cost of delay from unfavorable conditions, estimated at 1.5 to 2.0% of the capital investment.⁵⁶ Although, the costs are partially offset by energy yields that are up to 30% higher than onshore yields, economies of scale, and close proximity to high-value load centers.⁵⁷ Also, prices are expected to drop as technology improves and more experience is gained.⁵⁸

Currently, Denmark and the UK are considered the worldwide leaders in offshore wind energy planning, where 22 projects are in the pipeline totaling 11,455 MW of new capacity through 2010.⁵⁹ Denmark was the first country to produce offshore wind energy during the 1990s. Today, they are considered the leading producer of offshore wind energy. Most recently, the UK completed installation, in 2005, and the first year of operation, in 2006, of their Scroby Sands and North Hoyle offshore projects. Satisfied after one year of operation, the UK's Minister for Energy, Malcolm Wicks, stated, "[i]t was suggested earlier this week that the UK has the potential to become the Saudi Arabia of offshore wind energy. There are hurdles to overcome before achieving that status but the resource is there and we must harness it. The UK is one of the countries leading the way in this sector...."⁶⁰

Despite the obvious benefits, the government incentives-based policies designed to spur the growth of renewable energy in the United States, the worldwide increase in wind energy development, and the increasing global offshore wind energy movement,⁶¹ the United States will probably not have a fully operational offshore wind farm before the PTC expires on January 1, 2008.⁶² The reason is not because Americans lack interest. In fact, Cape Wind Associates

a narrow temperature range. *Id.* Lightning protection systems minimize the risk of damage from lightning strikes that occur frequently in some locations offshore. *Id.* There are also navigation and aerial warning lights. Turbines and towers are typically painted light blue or grey to help them blend into the sky. *Id.* The lower section of the support towers may be painted bright colors (e.g., yellow) to aid in navigation and to highlight the structures for passing vessels. *Id.*

⁵⁶ *Id.* at 14.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See Windscape Panel at 5, *supra* note 47.

⁶⁰ See Getting offshore on course, Government News Network, Aug. 10, 2006, available at <http://www.gnn.gov.uk/environment/detail.asp?ReleaseID=220055&NewsAreaID=2&NavigatedFromDepartment=True> (last visited Nov. 9, 2006). Although many countries engage in offshore wind energy production, the United States should study the UK and Denmark projects as they represent important benchmarks in the offshore wind energy industry. The large Danish project is credited as the first in the world, but as such, it also has the oldest technology. On the other hand, the UK's Scroby Sands and North Hoyle projects utilize newer and more efficient technology. Therefore, the U.S. should study the changes resulting from technological advances, amount of energy produced, and other successes and failures attributable to these projects. Resourcefully, the UK released full reports after a full year of production from their North Hoyle and Scroby Sands projects that provide objective data to aid the United States in understanding the impacts and benefits of similar projects constructed off of the American coast.

⁶¹ See Greg Watson & Fara Courtney, Nantucket Sound Offshore Wind Stakeholder Process, 31 B.C. ENVTL. AFF. L. REV. 263, 267-68 [hereinafter Stakeholder Process] (2004).

⁶² See PTC Extension, *supra* note 24 (limiting the applicability of the tax credit to "a qualified wind facility placed into service after December 31, 1992, and before January 1, 2008"); see also <http://www.ocsenergy.anl.gov/eis/how/index.cfm> (last visited Nov. 10, 2006) (listing the multi-step process in preparation of a Programmatic EIS. All existing projects are under consideration. However, step two, the scoping period, ended on July 5, 2006. Five more time consuming steps remain including the final Record of Decision. Therefore, it is unlikely that the Cape Wind Project will be operational by the January 1, 2008 PTC Extension

(CWA)⁶³ proposed America's first offshore wind project on the Outer Continental Shelf (OCS),⁶⁴ which would be the largest in the world. However, "concerned citizens' groups"⁶⁵ living near Cape Cod have opposed the project with the intent to defeat it. After spending millions of dollars and four years in litigation, the opponents are still fighting. Unlike the government supported offshore projects around the world, American energy production is generally not a government function, but rather private enterprise generates energy subject to government regulation. Accordingly, CWA is as vulnerable to lawsuits as any other non-governmental person or entity. To date, the opponents have lost every legal battle, both, in court and legislatively,⁶⁶ yet they are still winning the war because no offshore projects have been built in their backyard. The cumulative effect of the lawsuits clarified that no federal law directly addressed the issue of whether private enterprise could gain property rights from the government to construct a renewable energy project on the OCS for non-extractive purposes. Therefore, it would take an act of Congress to gain such rights.

Consequently, Congress responded by enacting Section 388⁶⁷ of the EP Act of 2005 (§388), delegating authority to the MMS to regulate alternative energy development on the OCS, as well as the authority to issue leases or rights-of-way on the OCS for the development of renewable energy and for alternate uses of existing facilities on the OCS.⁶⁸ MMS is developing rules to guide the application and permitting process for development of Renewable Energy and Alternate Use Program projects on the OCS. Currently, the MMS is preparing a Programmatic Environmental Impact Statement (PEIS) to comply with National Environmental Policy Act⁶⁹ (NEPA).

The Programmatic EIS process will (1) provide for public input concerning the scope of national issues associated with offshore alternate-energy-related use activities; (2) identify, define, and assess generic environmental, sociocultural,

deadline); see also MMS, Summary of the Project [hereinafter "Project Summary"] at 44, available at <http://www.mms.gov/offshore/PDFs/CapeWindProjectPlanFiling.pdf> (last accessed Nov. 10 2006). The Project has not requested public funding or grants, although it is eligible under Section 45 of the Internal Revenue Code because of the federal PTC. The PTC provides a general business tax credit for commercial and industrial producers of wind and certain other types of renewable energy. The Energy Policy Act of 2005 has extended the PTC through December 2007. However, since the Project is likely not to be in service by that time, it would not be eligible to receive the PTC unless Congress extends the time for projects to be placed in service.

⁶³ See generally Company History and Management Team, at <http://www.capewind.org/modules.php?op=modload&name=Sections&file=index&req=viewarticle&artid=27> (last visited Jan. 9, 2007).

⁶⁴ The Outer Continental Shelf (OCS) refers to submerged lands, subsoil, and seabed, lying between the seaward extent of the States' jurisdiction and the seaward extent of Federal jurisdiction.

⁶⁵ Pub. L. No. 109-58, 388(a), 199 Stat. 594, 744 (2005) (to be codified at 43 U.S.C. 1337).

⁶⁶ In 2001, the Ten Taxpayers Citizen's Group [hereinafter "Ten Taxpayers"] and later, in 2002, the Alliance to Protect Nantucket Sound, [hereinafter "Alliance"] concerned citizens living on Cape Cod, Martha's Vineyard and Nantucket Island united and became staunch opponents against CWA, specifically to fight CWA's proposed project. At various times they each sought to enjoin CWA from any activity on Nantucket Sound. Members of the Ten Taxpayers became members of the Alliance, which is a well funded non-profit legal entity whose stated was to prevent the degradation of the Sound ecosystem through risky and detrimental industrial development.

⁶⁷ Pub. L. No. 109-58, 388(a), 199 Stat. 594, 744 (2005) (to be codified at 43 U.S.C. 1337).

⁶⁸ See OCS Renewable Energy and Alternate Use Programmatic EIS, available at http://ocsenergy.anl.gov/documents/docs/OCS_EIS_Fact_Sheet.pdf (last visited Nov. 5, 2006).

⁶⁹ 42 U.S.C. §§ 4331 et seq.

and economic impacts associated with offshore alternate-energy-related use activities; (3) evaluate and establish effective mitigation measures and best management practices to avoid, minimize, or compensate for potential impacts; and (4) facilitate future preparation of site-specific NEPA documents—subsequent NEPA documents prepared for site-specific Renewable Energy and Alternate Use Program projects will tier off of the Programmatic EIS and Record of Decision. The Programmatic EIS will evaluate the issues associated with development, including all foreseeable potential monitoring, testing, commercial development, operations, and decommissioning activities in Federal waters on the OCS.⁷⁰

The Programmatic EIS will focus on generic impacts from the industry sector based on global knowledge and identify key issues that subsequent, site-specific assessments should consider. Projections for industry activities will be limited to those anticipated to be pursued within the next 5 to 7 years. The Programmatic EIS will focus on the environmental, cultural, and socioeconomic impacts associated with alternative approaches to the establishment of a national alternative energy program and rules.⁷¹

II. The Cape Wind Controversy

When American neighbors fight, no cost is too great, irrationality controls, and winning becomes everything. The default rule in property law is the rule of capture.⁷² Once captured, fundamentally, the owner has the right to exclude all others.⁷³ A court need only decide who has better rights—deemed paramount against the whole world except the true owner. The default property rules set the backdrop of the Cape Wind Controversy. The public owns the property rights⁷⁴ that CWA would like to capture, while the opponents determinedly intend to exclude them from obtaining.

Part II explores the Cape Wind controversy in depth by detailing the efforts made to construct the first offshore energy project in the United States, the legal issues surrounding the project, and explores the conflicting value systems between global responsibility and private property. Section A. details the objective and undisputed facts regarding the proposed project. Section B. describes the **emotionally and politically charged atmosphere surrounding the project**, the factors that exacerbated the controversy, and suggests a significant disconnect between the electorate and politicians. Sections C & D detail the protracted litigation brought by the

⁷⁰ Wind Energy Production, *supra* note 6, at 1.

⁷¹ See OCS Renewable Energy and Alternate Use Programmatic EIS Information Center, at <http://ocsenergy.anl.gov/> (last visited Nov. 5, 2006).

⁷² See e.g., *Pierson v. Post*, 3 Cai. R. 175 (N.Y. Supp. Ct. 1805) (involving a neighbor dispute regarding the pursuit and hunt of a wild fox. The fox, thought of at the time as a public nuisance, had no value other than the value of pursuing it in the hunt. In fact, good husbandry encouraged the destruction of such beasts. Here, the case is important in two respects. First, it shows how far one neighbor is willing to fight another. Second, when the fight goes to court, there is only one winner and one loser. Therefore, it results in a winner-takes-all zero sum game).

⁷³ The right to exclude others is of the most essential sticks in the bundle of rights that are commonly characterized as property; see e.g., *Dolan v. City of Tigard*, 512 US 374, 383 (1994).

⁷⁴ The Public Trust Doctrine provides that all lands seaward of the high tide mark are considered public lands, accessible to all.

“concerned citizens” groups, The Ten Taxpayers and The Alliance to Protect Nantucket Sound respectively. Section E uncovers the hidden agendas surrounding the lawsuits and the egregious effect, effectively curtailing advancement in renewable energy projects on the OCS.

A. The Proposed Cape Wind Project in Nantucket Sound Massachusetts

In 2001, CWA announced its intent to construct a \$900 million commercial offshore wind facility,⁷⁵ which would be the first of its kind in the United States and the largest in the world. Proposed for Horseshoe Shoals in Nantucket Sound, Massachusetts, the project would consist of 130 wind turbine generators, an electrical service platform, and a submarine and upland cable system, potentially capable of transmitting a maximum electrical output of 454 MW to the New England regional power grid.⁷⁶ To compensate for wind fluctuations, maintenance, repairs, and other interferences, the average actual forecasted output should produce 170 MW,⁷⁷ enough to meet 75% of the average electricity demand for Cape Cod, Martha’s Vineyard, and Nantucket Sound. Additionally, it could offset approximately a million tons of carbon dioxide annually and enough electricity to offset the consumption of 113 million gallons of oil annually.⁷⁸

Individually, the turbines will extend 417 feet tall.⁷⁹ Collectively, the turbines will be spaced across 24 square miles on the OCS between Nantucket Island and the Cape Cod mainland, although the total area, actually occupied, will only be about one acre.⁸⁰ The closest distance of any turbine to the mainland would be about 4.7 miles; specifically, about 11 miles to Nantucket Island and about 5.5 miles to Martha’s Vineyard.⁸¹ On a clear day, the turbines could be visible from these locations.

In November 2001, CWA filed the first of two permit applications with the U.S. Army Corps of Engineers (USACE), New England District, under §10 of the Rivers and Harbors Act of 1899,⁸² seeking to construct and operate a temporary scientific measuring tower (SMDS) for the purpose of collecting five years worth of data and to determine whether the site in Horseshoe

⁷⁵ See generally CapeWind at <http://en.wikipedia.org/wiki/CapeWind> (last visited Jan. 10, 2007).

⁷⁶ <http://www.nae.usace.army.mil/projects/ma/ccwf/section2.pdf>

⁷⁷ See Cape Wind Associates, FREQUENTLY ASKED QUESTIONS[hereinafter “FAQS”], available at <http://www.capewind.org/FAQ-Category4-Cape+Wind+Basics-Parent0-myfaq-yes.htm> (last visited Jan. 10, 2007).

⁷⁸ See Cape Wind Associates, CAPE WIND PROJECT AT A GLANCE, available at <http://www.capewind.org/article24.htm> (last visited Jan. 10, 2007); See supra note 4. Signing countries of the Kyoto Protocol have agreed to reduce their carbon dioxide and other greenhouse gas emissions from their 1990 levels. Countries that decrease emissions receive carbon credits, which may be traded on the market, to another country that emits greater than its 1990 level. In essence, the signors agreed to pay for their failure to reduce and are rewarded for actually reducing their emissions of carbon and other greenhouse gasses. A large wind energy plant can draw many carbon credits, provided that it replaces a significant polluter. The United States did not participate in the Kyoto Protocol, but political pressure may force a similar measure within the United States where polluting industries may earn green tags, traded like carbon credits, which will reward those industries that reduce emissions but will require payment from those who fail to reduce or increase emission of harmful gasses.

⁷⁹ See FAQS supra note 78.

⁸⁰ See New England District, U.S. Army Corps of Engineers, Cape Wind Energy Project Draft Environmental Impact Statement, Section 1.0 Executive Summary [hereinafter “Executive Summary”], at 1-10, available at <http://www.nae.usace.army.mil/projects/ma/ccwf/section1.pdf> (last visited Jan. 10 2007).

⁸¹ Id. at 1-3 and 1-4.

⁸² Rivers and Harbors Act (RHA), 10, 33 U.S.C. §401 et. seq. (2000).

Shoals could feasibly house the proposed wind project. The USACE's authority to issue permits for "any obstruction of navigable waters"⁸³ extends to "all installations and other devices permanently or temporarily attached to the seabed" under the Outer Continental Shelf Lands Act⁸⁴ (OCSLA). The SMDS logically seemed an "installation or other device" "temporarily attached to the seabed" located entirely within federal waters on the OCS.

Nothing suggested that the MMS had any jurisdiction, since its authority to issue leases was limited to the extraction of minerals from the seafloor pertaining to offshore oil and gas facilities.⁸⁵ No other federal agency had the authority to issue leases. "In submitting the application, CWA affirmed, by the signature of its agent, that it possessed, or that it will possess the property rights it needed to move forward with the data tower project."⁸⁶ Therefore, CWA relied solely on the USACE.

On December 4, 2001, the USACE announced to the public that it was considering CWA's data tower application.⁸⁷ The announcement stated that the wind energy plant would be "the subject of a separate and distinct ... review process with further opportunity for public involvement."⁸⁸ In fact, CWA had not taken any steps in furtherance of the construction of the wind park. At that time, the only project in the works was the almost 200 foot high SMDS to be located in a shallow region of the shoal "more than three miles off the coasts of both Cape Cod and Nantucket," "in water approximately thirteen feet deep"⁸⁹ "supported by three piles driven approximately 100 feet into the sea floor"⁹⁰ entirely within federal jurisdiction.⁹¹ The entire temporary tower would occupy a mere 900 square foot area of ocean waters.⁹²

The USACE invited public comment on the data tower application, and it set January 4, 2002 as the deadline.⁹³ In response to requests for additional time for public comment, the USACE subsequently extended the comment period, on more than one occasion.⁹⁴ In particular, the USACE held two public hearings for interested groups and individuals to comment on the data tower application: the first in Hyannis on April 11, 2002; and the second in Martha's Vineyard on April 11, 2002.⁹⁵ The public commenting period ended on May 13, 2002, over five

⁸³ 33 U.S.C. §403 (granting jurisdiction regulating obstruction to navigable waters of the United States).

⁸⁴ Outer Continental Shelf Lands Act (OCSLA) 43 U.S.C § 1333(a) (2004); see also 43 U.S.C. § 1333(e) (granting USACE specific jurisdiction regarding activities on the OCS).

⁸⁵ 43 U.S.C. § 1333 (authorizing the DOI to regulate "extractive resources" like oil and gas, but contained no provision for "non-extractive" uses such as wind energy).

⁸⁶ Alliance to Protect Nantucket Sound, 288 F. Supp. 2d at 68 footnote 8 (noting the same in the Administrative Record at 103-05). See 33 C.F.R. 325.1(d)(7) "The signature of the applicant or agent will be an affirmation that the applicant possesses or will possess the requisite property interest to undertake the activity proposed in the application...."

⁸⁷ Alliance to Protect Nantucket Sound, 288 F.Supp.2d at 68; see also Administrative R. at 106-07.

⁸⁸ Id.

⁸⁹ See New England District, U.S. Army Corps of Engineers, Cape Cod Wind Energy Project Environmental Assessment and Statement of Findings [hereinafter "Environmental Assessment"], at 1, available at <http://www.nae.usace.army.mil/projects/ma/ccwt/ea.pdf> (last visited Jan. 10, 2007).

⁹⁰ Alliance to Protect Nantucket Sound, 288 F. Supp. 2d at 68.

⁹¹ Ten Taxpayers Citizen Group 278 F. Supp. 2d 98, 99.

⁹² Environmental Assessment, supra note 89, at 1.

⁹³ Alliance to Protect Nantucket Sound, 288 F. Supp. 2d at 68.

⁹⁴ Id.

⁹⁵ Id.

months later than originally planned. After considering the comments and conducting its own analysis, the USACE issued an Environmental Assessment (EA)⁹⁶ and a Finding of No Significant Impact (FONSI)⁹⁷ in compliance with NEPA.⁹⁸ Thus, after responding to the public's desire for additional time and after full independent review, the USACE concluded that the SMDS tower posed a significant threat to the environment. Among many factors, the USACE found that a similar data tower was recently installed in state waters near Martha's Vineyard.⁹⁹

The comment period and hearings generated a considerable response and cooperation from federal and state agencies and the general public. On August 19, 2002, after nine months of review, the USACE issued a §10 permit to CWA that authorized it to move forward with the SMDS,¹⁰⁰ subject to certain conditions.¹⁰¹ The relevant conditions required: (1) CWA must remove the SMDS "within five years from the start of construction";¹⁰² (2) CWA must post a bond for \$300,000 for emergency repairs and removal of the tower;¹⁰³ (3) CWA must share data it collects with government agencies, educational institutions, and research organizations.¹⁰⁴

Following the nine-month review and only after obtaining the §10 permit, CWA finally planned to begin construction of the SMDS on October 7, 2002. However, on September 24, 2002, the Ten Taxpayers, a "concerned citizen's" group sought an ex parte temporary restraining order (TRO) against the construction, in state court.¹⁰⁵ Forced into a legal battle, CWA removed the case, from Barnstable Superior Court, to federal court based on federal question jurisdiction.¹⁰⁶ The district court denied the Ten Taxpayers' request for a preliminary injunction and the temporary restraining order expired by its terms. Significantly, this bold move ignited the protracted battle, by bootstrapping the Ten Taxpayers and other opponent's immediate access to the courts to stall the wind project, which was still entirely hypothetical.

Nevertheless, CWA began constructing the tower on October 27, 2002.¹⁰⁷ Construction was completed in December 2002, and the SMDS is now in operation.¹⁰⁸ The effect of the twenty day construction delay resulted in a four year delay regarding the construction of the wind project. Even though, it was not until November 21, 2002, one year and a day after originally applying for the SMDS permit, and two months after the preliminary injunction against the construction of the SMDS failed, that CWA submitted its second permit application

⁹⁶ 40 C.F.R. § 1508.9(a)(1); Environmental Assessment, supra note 89, at 1.

⁹⁷ 40 C.F.R. § 1508.13; see 40 C.F.R. § 1508.27 (listing criteria for determining the significance of environmental impacts).

⁹⁸ National Environmental Policy Act 42 U.S.C. §§ 4331 et seq.

⁹⁹ Environmental Assessment, supra note 89, at 2.

¹⁰⁰ Alliance to Protect Nantucket Sound, 288 F. Supp. 2d at 69.

¹⁰¹ Id at 68.

¹⁰² Id.

¹⁰³ Id.

¹⁰⁴ Id.

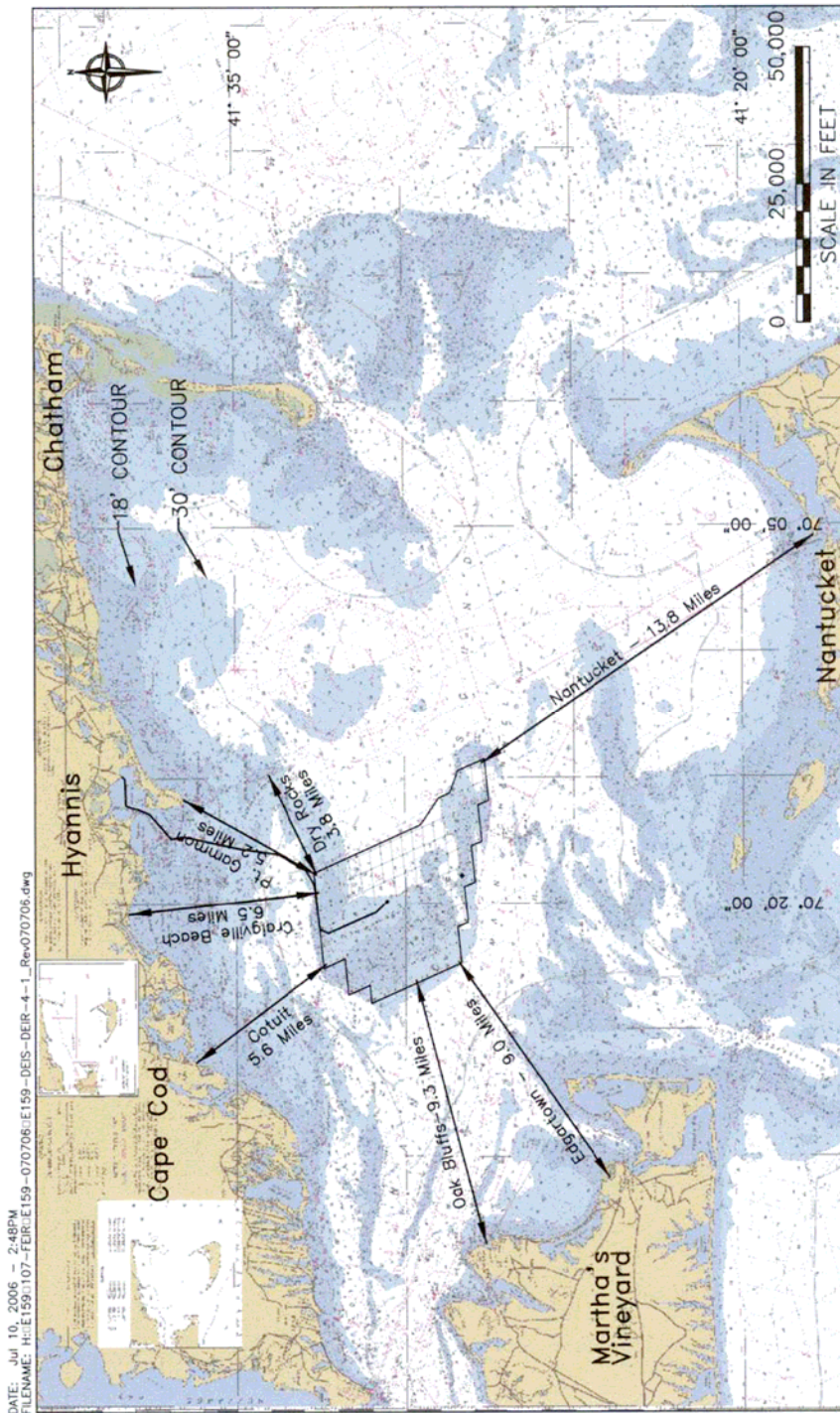
¹⁰⁵ Alliance to Protect Nantucket Sound, 278 F.Supp.2d at 99.

¹⁰⁶ Id.

¹⁰⁷ Id.

¹⁰⁸ See Brief in Opposition to Petition for Writ of Certiorari at 2, Ten Taxpayers Citizens Group v. Cape Wind Assocs., 398 F.3d 105 (1st Cir. 2005) (No. 04-648) [hereinafter "Brief in Opposition"]; Real-time data from the SMDS can be found at <http://capewind.whgrp.com/>.

with the USACE. This second permit application addressed the wind project and constituted the first formal step taken towards its construction. Specifically, CWA sought a §10 permit for the construction and operation of a wind project on Horseshoe Shoals. See map below, showing the specific area of Horseshoe Shoals where the SMDS is located and where the proposed wind project is planned.



ESS
 Group, Inc.
 Engineers
 Scientists
 Consultants

Cape Wind Associates, LLC.
 Cape Wind Project

Scale: 1"=25,000'

Cape Wind Project Locus
NOAA Chart# 13237, Nantucket Sound & Approaches

Figure 1

B. The Origins of the Polarized Public Debate

Soon after CWA announced its intention to construct the wind project on Horseshoe Shoals, the majority of the local public generally divided into two classes—proponents and opponents. The public debate quickly evolved into a two-sided battle to influence the permitting process via public opinion.¹¹⁰ Opponents and proponents bolstered their arguments with handpicked expert testimony, using their websites to disseminate one-sided information.¹¹¹ Statements at public hearings went unchallenged and unsubstantiated in the structured regulatory hearings designed to elicit passive testimony, rather than foster dialogue. Concerned citizens felt compelled to take a firm stand either “for, or against” the project, early on, most unaware of the rigorous and lengthy regulatory process that would precede any permit decision.¹¹² Consequently, very little useful information was generated.¹¹³

The Cape Cod Times, the region’s only daily newspaper, editorially opposed, both, the project and the federal regulatory permitting process from the beginning. With a closed mind, this widely read newspaper imposed its position upon its readers and challenged the elected officials representing Cape Cod, Martha’s Vineyard, and Nantucket Sound to join in the opposition.¹¹⁴ The decision to forsake neutrality on the part of such an important source of local information fueled the controversy.¹¹⁵ On the other hand, the area’s weekly periodical, the Cape Codder, took a neutral editorial position. In fact, the paper sent reporters to Europe to take a first-hand glance at the other countries’ experiences with offshore wind farms in order to share that experience with its readers.¹¹⁶

Despite this effort to garner objectivity, prominent elected officials yielded to the Cape Cod Times position and soon took a public stand against the project. Notably, republican Governor Mitt Romney and democratic U.S. Senator Edward Kennedy publicly opposed the project. Despite their bipartisan differences, they united in principle to kill the project. Governor Romney unveiled a long-term energy strategy for the Commonwealth, intended to save \$575 million over the next ten years through the use of renewable energy.¹¹⁷ Yet, he has inconsistently opposed the [Cape Wind] project, despite its approval by the Massachusetts Energy Facility Siting Board’s approval and support after a three-year review.¹¹⁸ According to the board, the potential power generation is needed, would lower electricity costs, provide air quality benefits, improve transmission quality, and contribute to the state’s Renewable Portfolio Standard.¹¹⁹ In addition, other prominent state officials, including Massachusetts Attorney General Thomas Reilly lead the fight against the project. Collectively, they publicly contend that

¹¹⁰ Stakeholder Process, *supra* note 61, at 271.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 270-71.

¹¹⁵ *Id.* at 271.

¹¹⁶ *Id.*

¹¹⁷ See Massachusetts to Pursue Emerging Technologies; Gas Supply Issues Deferred, Foster Gas Report at 5, Report No. 2605, Aug. 18, 2006, available at LEXIS, News, By Industry & Topic, Markets and Industry News.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

CWA is rushing without due diligence to exploit a public resource. They see the project as a massive power plant in the middle of a pristine landscape, threatening the local fishing industry, wrecking property values, and endangering wildlife.

Surprisingly, their opposition to the project runs afoul of the representative electorate for whom they serve. A May, 2006 survey found that “nine out of 10 state residents think it would be a good idea for Massachusetts to be ‘a national leader in using cleaner and renewable energy on a large scale by moving ahead with offshore wind power and other alternative-energy initiatives.’”¹²⁰ The survey found almost no political variation, as 90 percent of the state’s conservatives, 93 percent of the independents, and 94 percent of liberals indicated that national leadership for Massachusetts regarding renewable energy would be a good idea.¹²¹

The survey was conducted by the Civil Society Institute, a nonpartisan and nonprofit think tank that conducts extensive public opinion research into the attitude of Americans regarding energy-related issues.¹²² The survey also provided the following conspicuous message from Civil Service Institute, President, Pam Solo:

I would encourage Governor Romney, Senator Kennedy, Senator Kerry, and the rest of the MA congressional delegation to look at these survey findings very closely. The notion that wind power and the other alternative energy sources are dividing lines in Massachusetts either in terms of politics or region ... or both ... is plainly mistaken and counterproductive for our state and for the nation. What we see in this survey is a clear example of the people ‘leading the leaders.’ Massachusetts residents want action now on clean, safe renewable energy sources, including Cape Wind and other alternative energy projects. They want the state to get out in front as a true national leader solving our foreign oil dependence and the threat posed by global warming.¹²³

Still, the Alliance to Protect Nantucket Sound leads the biggest campaign against the project. The stated goal of the Alliance is to protect Nantucket Sound in perpetuity through conservation, environmental action, and opposition to inappropriate industrial and commercial development that would threaten or negatively alter the coastal ecosystem.¹²⁴ The Alliance supports formal designation of Nantucket Sound as a marine protected area.

¹²⁰ See MASSACHUSETTS SURVEY: 90 PERCENT WANT STATE TO BE U.S. LEADER IN ALTERNATIVE ENERGY, INCLUDING OFFSHORE WIND; Poll: Three Out of Five Residents of the Cape/the Islands Now Back Cape Wind Project; Strong Backing Seen For More Wind, Solar and Conservation...Before Resorting to Nuclear, PR Newswire Association, (Washington) June 7, 2006, available at LEXIS, News, By Industry & Topic, Markets and Industry News; also available at http://www.resultsforamerica.org/calendar/files/6.7.06_news_release_final2.pdf, at 1 (last visited Jan. 10, 2007).

¹²¹ Id.

¹²² Id.

¹²³ Id.

¹²⁴ See Alliance Strengthens Advocacy Hand With "Advocates For Nantucket Sound", available at <http://www.saveoursound.org/node/486> (last visited Jan. 6, 2007).

However, the Alliance is criticized for its hidden agendas. First, one of its co-chairmen, Bill Koch, has ties to the oil refinery business. That is, a business that will likely take a hit, if the Cape Wind project comes to fruition. Second, many of its members have beachfront coastal properties in direct view of the proposed project site. Third, in early 2006, the co-founder settled with CWA for \$15,000 in a defamation action brought by CWA for the issuance of a phony press release. John Donelan, a co-founder of the Alliance, admitted writing a deceptive press release about a Hyannis company cutting its ties with Cape Wind because of legal concerns—a story that was not true.¹²⁵

C. The “First Skirmish” Ten Taxpayer’s¹²⁶ Case

“This case implicates the complex and rather obscure body of law that divides regulatory authority over Nantucket Sound¹²⁷ between the state and federal governments.”¹²⁸ Nantucket Sound “presents special difficulties in distinguishing the respective spheres of state and federal jurisdiction,”¹²⁹ because it is “almost completely enclosed by Massachusetts’ territorial sea; only at the extreme eastern end of the Sound does a channel of federal water approximately one mile wide connect it to the open ocean.”¹³⁰ Nantucket Sound, at its center portion¹³¹ encompasses Horseshoe Shoals and “is more than three miles from any coast.”¹³²

Shortly before construction of the SMDS data tower began, Ten Taxpayers, among others, brought suit in state court to enjoin the proposed wind project in Nantucket Sound, Massachusetts based on the theory that the Magnuson-Stevens Fishery Conservation and Management Act (MSA)¹³³ confers jurisdiction to the state over fishing on the proposed site. In reliance on that statutory basis, they asked the court to find that the MSA also applies to structures on the seabed within the state jurisdiction, including, both, the SMDS data tower the larger proposed wind farm. To succeed on their theory, the Ten Taxpayers had to overcome the older and broader OCSLA,¹³⁴ which granted exclusive jurisdiction to the federal government.

In 1953 Congress enacted the OCSLA, which states that the subsoil and seabed of the OCS are subject to the jurisdiction, control, and power of disposition of the United States.¹³⁵ The Constitution and laws of the United States are extended under the OCLSA to the seabed and to structures erected on the seabed “to the same extent as if the outer Continental Shelf were an area of exclusive federal jurisdiction located within a state.”¹³⁶ Furthermore, to the extent not

¹²⁵ See David Schoetz & Kevin Dennehey, Cape Wind defamation suit settled for \$15,000, Cape Cod Online, Feb. 14, 2006, available at <http://www.capecodonline.com/special/windfarm/capewind14.htm> (last visited Jan. 6, 2007).

¹²⁶ See note 64 supra.

¹²⁷ Nantucket Sound is bounded to the south by the islands of Martha’s Vineyard and Nantucket, and to the north by Cape Cod. To the west of Nantucket Sound is Vineyard Sound, and to the east is the Atlantic Ocean. Horseshoe Shoal is located in the approximate middle of Nantucket Sound.

¹²⁸ Ten Taxpayer Citizen Group v. Cape Wind Assocs., 373 F.3d 183, 187 (1st Cir. 2004).

¹²⁹ Id at 190.

¹³⁰ Id.

¹³¹ Id.

¹³² Id.

¹³³ Magnuson-Stevens Fishery Conservation and Management Act 16 U.S.C. § 1800 et seq.

¹³⁴ 43 U.S.C § 1333(a) (2004)

¹³⁵ See 43 U.S.C. § 1332(1).

¹³⁶ See 43 U.S.C. § 1333(a) (1).

inconsistent with federal law, the civil and criminal laws of adjacent states are declared to be the laws of the United States applicable to the seabed of the Shelf and to structures erected on the seabed.¹³⁷ The OCLSA served as the main federal jurisdictional statute for 23 years.

Then, in 1976, Congress enacted the MSA to address serious declines of the fishing stocks in the ocean waters off the coast of the United States. The MSA confers "sovereign rights and exclusive fishery management authority" over fishery resources, extending within the "exclusive economic zone,"¹³⁸ an area that begins at the seaward boundary of state jurisdiction and extends 197 nautical miles out to sea.¹³⁹ The scope of the MSA defines who may fish,¹⁴⁰ by what means they may fish,¹⁴¹ and how much they may catch.¹⁴² Congress explicitly expressed its intent that the MSA "maintain without change the existing territorial or other ocean jurisdiction of the United States for all purposes other than the conservation and management of fishery resources...."¹⁴³ Clearly, the intent of Congress was not to circumvent the OCLSA, enacted twenty-three years before the MSA. Moreover, the Congressional record clearly evidences that the 1983 Amendment specifically included Nantucket Sound to ensure uniform fisheries management and fisheries law enforcement throughout the Sound.¹⁴⁴

The practical difficulty of administering the MSA in pockets of federal waters surrounded by state waters spurred Congress to amend the MSA in 1983 to address the confusing federalism issue. Specifically, the 1983 amendment addressed Nantucket Sound:

For purposes of this chapter ... the jurisdiction and authority of a state shall extend-

- (A) to any pocket of waters that is adjacent to the State and totally enclosed by lines delimiting the territorial sea of the United States...;
- (B) with respect to the body of water commonly known as Nantucket Sound, to the pocket of water west of the seventieth meridian...; and
- (C) to the waters of Southeastern Alaska....¹⁴⁵

The second Amendment to the MSA came in 1996, to provide additional protection for essential fish habitats, defined to include the "waters and substrate" necessary for fish spawning and growth.¹⁴⁶ The change, as amended, now requires that the Fisheries Management Councils (FMC) must,¹⁴⁷ to designate essential fish habitats for the species they manage, assess the effects of fishing practices on those habitats, and take steps to ameliorate adverse impacts caused by

¹³⁷ See 43 U.S.C. § 1333(a) (2).

¹³⁸ See 16 U.S.C. 1802(11) (defining the "exclusive economic zone").

¹³⁹ See generally, 16 U.S.C. 1811(a).

¹⁴⁰ 16 U.S.C 1821-24.

¹⁴¹ 16 U.S.C 1821.

¹⁴² 16 U.S.C 1851-54.

¹⁴³ 16 U.S.C 1801(c)(1).

¹⁴⁴ See 128 Cong. Rec. 316585 (97th Cong.2d Sess. Dec. 16, 1982) (declaring the sponsors of the Amendment's intent, including Representative Studds, was to ensure uniform fisheries management and fisheries law enforcement throughout the Sound).

¹⁴⁵ 16 U.S.C 1802(10), added by Pub. L. 104-297, 102, 110 Stat. 3559.

¹⁴⁶ 16 U.S.C. 1802(10), added by Pub.L. 104-297, 102, 110 Stat. 3559.

¹⁴⁷ 16 U.S.C. 1852(a).

fishing.¹⁴⁸ Too, any federal agency that is contemplating action that might adversely affect an essential fish habitat must consult the Secretary of Commerce, who is required to make recommendations to mitigate the impact of the proposed action on the habitat.¹⁴⁹

First, relying on the MSA, the Ten Taxpayers sought an injunction in state court. If the court refused to issue the injunction, they alternatively asked that a \$25,000 per day fine be levied against CWA for each day the SMDS remained in the site.¹⁵⁰ The complaint alleged that CWA failed to acquire the necessary permits under state law.

The Ten Taxpayers then dismissed their first suit and brought another action, again in state court, but this time omitting the federal defendants in an attempt to forum shop by destroying diversity. Even though, the Ten Taxpayers conceded that the proposed SMDS would be located in federal waters, they claimed that an amendment to MSA gave Massachusetts jurisdiction over all activities in Nantucket Sound, including those not directly related to fishing. They further alleged that CWA had failed to obtain permits required by Massachusetts law, including the Massachusetts Ocean Sanctuaries Act.¹⁵¹ In response, CWA immediately removed the case to federal district court. The Ten Taxpayers moved to remand, but the district court denied their motion without opinion.

In district court, the Ten Taxpayers attempted to claim that the scope of the USACE's review was somehow deficient, attempting to discredit the "navigability permit," as something generally issued with minimal public interest analysis. However, the USACE, in fact, performed an extensive public interest analysis including the preparation of an EA¹⁵² and FONSI¹⁵³ regarding the SMDS tower, and a DEIS for the wind project pursuant to its regulations,¹⁵⁴ consistent with U.S. v. Alaska.¹⁵⁵ The USACE continued to solicit comment and further continued working on an official EIS beyond issues of navigability.

The Ten Taxpayer's argument seized on the 1983 and 1996 amendments to the MSA as a basis to claim that state law now governs the seabed of Nantucket Sound.¹⁵⁶ Reading these amendments together, the Ten Taxpayers claimed that the MSA gave Massachusetts jurisdiction over any construction on the "substrate" of Nantucket Sound, even if no fishing-related activity

¹⁴⁸ 16 U.S.C. 1853(a)(7).

¹⁴⁹ See 16 U.S.C. §§ 1855(b)(2) and 1855(b)(4).

¹⁵⁰ Ten Taxpayers Citizens Group 373 F.3d 183

¹⁵¹ M.G.L. c. 132A, § 12(c)

¹⁵² Environmental Assessment, *supra* note 89.

¹⁵³ *Id.*

¹⁵⁴ See 33 C.F.R. § 320.4(a); see Draft Environmental Impact Statement (DEIS) available at <http://www.nae.usace.army.mil/projects/ma/ccwf/deis.htm> (last visited Jan. 10, 2007).

¹⁵⁵ See *United States v. Alaska*, 503 U.S. 569, 581-83 (1992) (setting forth the broad range of discretion extended to the Secretary of the Army regarding the issuance of a Section 10 permit does not extend to a wider range of factors than just the effects of a project on navigability when making the public interest review process determination under the RHA); see also Environmental Assessment, *supra* note 89, at 1. Here, the Ten Taxpayers contend that the Section 10 permit constituted a mere navigability permit, which is improper for the project. However, the Ten Taxpayers attempted to equivocate the wind project and confuse the issue that they are in court seeking injunctive relief against the much smaller SMDS. Therefore, the public interest analysis, actually performed, extended much further than required for a navigability permit regarding a project that size that is exclusively located in federal waters.

¹⁵⁶ See Brief in Opposition, *supra* note 108 at 8.

was involved.¹⁵⁷ In effect, they contended that, as a result of these amendments to the MSA, the provisions of OCSLA granting the federal government exclusive jurisdiction over the seabed of the OCS no longer applied in Nantucket Sound.¹⁵⁸

Reaching the merits of the Ten Taxpayers' claims, the district court held that the seabed of Nantucket Sound, more than three miles from shore, was an area of exclusive federal jurisdiction.¹⁵⁹ The Court rejected the Ten Taxpayers' argument that an amendment to the MSA had transferred plenary jurisdiction over the seabed of the Sound to the state government. In the district court's view, the delegation of authority "for purposes of [the Fishery Act]" did not give Massachusetts jurisdiction over structures like the SMDS that were unrelated to any fishing activity.¹⁶⁰ Accordingly, the district court dismissed the complaint, and the Ten Taxpayers appealed.

On appeal, the Ten Taxpayers pressed their contentions that removal of their case from state court was improper because no federal question appeared on the face of their complaint, and no diversity existed. In response, CWA countered that federal jurisdiction was proper because the Ten Taxpayers' claims: (1) depended on a grant of jurisdiction under the MSA, a federal statute; (2) necessarily required resolution of a substantial federal question;¹⁶¹ and (3) federal law completely preempted state law on the OCS.¹⁶² The Court of Appeals rejected CWA's first argument, concluding that it was in essence a "federal preemption defense" and thus did not confer federal question jurisdiction.¹⁶³ On the other hand, the Court of Appeals found federal jurisdiction, under the OCSLA,¹⁶⁴ which requires that any state laws applicable to the seabed of the OCS and to structures erected on the seabed, are treated as surrogate federal law. Thus, the Ten Taxpayers' state law claims arose under federal law.¹⁶⁵ Therefore, the court never reached CWA's second and third claims.¹⁶⁶

Next, the Ten Taxpayers claimed that no gap in coverage existed between the OSCLA and MSA, regarding the federal waters of Nantucket Sound, and therefore, by virtue of the express language of the MSA, "the Commonwealth stands in the shoes of the federal government to carry out the express goals"¹⁶⁷ to protect the "essential fish habitat" and "substrate," or seabed of Nantucket Sound.¹⁶⁸ Pointing to the unique nature of Horseshoe Shoals, the Ten Taxpayers

¹⁵⁷ Id. at 8-9.

¹⁵⁸ Id. at 9.

¹⁵⁹ 278 F.Supp.2d at 100.

¹⁶⁰ Id at 100-01.

¹⁶¹ *Smith v. Kansas City Title and Trust Co.*, 255 U.S. 180 (1921) (establishing federal jurisdiction is proper when a claim requires resolution of a substantial federal question).

¹⁶² See *Beneficial National Bank v. Anderson*, 539 U.S. 1 (2003) (stating the test for federal question jurisdiction in removal cases; the court looks at the well pleaded allegations of the complaint and ignores potential defenses. A state claim may be removed to federal court only in two circumstances: when Congress expressly provides, or when federal statute wholly displaces the state law cause of action through complete preemption).

¹⁶³ 373 F.3d at 191-92.

¹⁶⁴ 43 U.S.C. § 1333(a)(2).

¹⁶⁵ 373 F.3d at 192-93.

¹⁶⁶ Id at 193, n.10.

¹⁶⁷ Petition for Writ of Certiorari at 2, *Ten Taxpayer Citizens Group v. Cape Wind Associates*, 373 F.3d 183 (1st Cir. 2004) (No. 04-684) [hereinafter *Petition for Cert.*].

¹⁶⁸ Id. at 1.

claimed the convergence of the Submerged Land Act's (SLA)¹⁶⁹ "three mile limit of state jurisdiction and the island geography of Nantucket and Martha's Vineyard" ... "results in a pocket of federal water being virtually surrounded by Commonwealth waters." Thus, specific provisions of the MSA¹⁷⁰ afford special regulatory powers to the Commonwealth, rather than the impractical effects of the otherwise plastic application, to regulate the entirety of Nantucket Sound.¹⁷¹

In this case, the requirements of the MSA were followed to the letter. Before granting CWA's application, the USACE consulted the National Marine Fisheries Service (NMFS), the lead federal agency that administers the essential fish habitat program.¹⁷² The NMFS advised the USACE that the SMDS would have only minimal impact on fish habitat, and it did not propose any conservation measures.¹⁷³ The USACE concurred in the NMFS's assessment.¹⁷⁴

The First Circuit determined whether federal question jurisdiction was proper relying upon:

To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws ... the civil and criminal laws of each adjacent state ... are declared to be the laws of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the of the **outer Continental Shelf**....¹⁷⁵

In addition, the First Circuit relied upon Supreme Court precedent that addressed the issue of the exclusive right of the federal law. Construing the language of OCSLA,¹⁷⁶ the Court held "[i]t is evident ... that federal law is 'exclusive' in its regulation of this area [the outer Continental Shelf], and that state law is adopted only as surrogate federal law."¹⁷⁷ In a later opinion, the Court once again construed the language stating, "[a]ll law applicable to **the outer Continental Shelf** is federal law, but to fill the substantial 'gaps' in the coverage of federal law, OCSLA borrows the 'applicable and not inconsistent laws of the adjacent States as surrogate federal law."¹⁷⁸ The First Circuit's construction is consistent with the Court's holdings above, reasoning that, if Massachusetts laws apply to the SMDS at all, then the OCSLA declares that those laws are to be treated as surrogate federal laws.

Therefore, the First Circuit found that the state statutes and regulations on which the Ten Taxpayers relied did not apply to the federal portion of Nantucket Sound,¹⁷⁹ and even if they did,

¹⁶⁹ Submerged Lands Act of 1953 43 U.S.C. 1301, et seq.

¹⁷⁰ 16 U.S.C. 1856(a)(2)(B).

¹⁷¹ See Petition for Cert., at 4-5, note 95 supra.

¹⁷² See 50 C.F.R. 600.920.

¹⁷³ Environmental Assessment, supra note 89 at 10-11.

¹⁷⁴ Id.

¹⁷⁵ 43 U.S.C. 1333(a)(2)

¹⁷⁶ 43 U.S.C. 1333(a)(2)

¹⁷⁷ See *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 359 (1969) (reasoning that the primary gap in federal law occurs between adjacent states).

¹⁷⁸ See *Gulf Offshore Oil Co. v. Mobil Oil Corp.*, 453 U.S. 473, 480 (1981) (limiting federal court's exclusive jurisdiction over personal injury and indemnity cases arising under the OCSLA).

¹⁷⁹ 373 F.3d at 194-95

they would be inconsistent with the federal government's exclusive power to manage and dispose of the resources of the OCS.¹⁸⁰ The Court of Appeals further noted that the Massachusetts Department of Environmental Management, the agency that administers the Commonwealth's Ocean Sanctuaries Act,¹⁸¹ had expressly disclaimed authority over Horseshoe Shoals.¹⁸²

Ultimately, the First Circuit held that CWA did not need, both, a permit from the federal government and a license from the Commonwealth of Massachusetts prior to constructing the SMDS data tower in an area of Nantucket Sound, located more than three miles off the coast of Massachusetts. The federal government has exclusive jurisdiction under the OCLSA, and the §10 RHA permit was sufficient.

D. The “Second Skirmish” The Alliance¹⁸³ Strikes

In November 2003, the second “concerned citizen’s” group filed suit and challenged the existence of the SMDS tower. In this suit, the Alliance omitted CWA as a party, naming only the USACE, thus forcing CWA to intervene. Because the Ten Taxpayers suit established that the tower is subject to federal jurisdiction and control under the OCSLA, the Alliance properly filed this suit directly in federal district court. Judge Tauro, again, dismissed the claim against USACE and CWA, but not before uttering his now famous words, “[t]his action is the second skirmish in what may prove to be a protracted struggle over the construction of a wind energy plant in Nantucket Sound, Massachusetts.”¹⁸⁴

The Alliance asserted three principal federal arguments against the construction of the SMDS: (1) the USACE lacked jurisdiction to issue a §10 permit unrelated to extraction of resources from the seabed; (2) the USACE’s decision to issue the permit was unlawful because it knew that CWA did not have and could not obtain the property interest in OCS lands that, according to the USACE regulations, it needed to undertake construction of the data tower; (3) the USACE failed in a variety of ways to satisfy its obligations under NEPA.¹⁸⁵ The opponents advanced the same arguments against the SMDS during the five-month commenting period, appear in the Administrative Record, and were taken into consideration by the USACE before the §10 permit was issued.¹⁸⁶

The reach of the USACE’s §10 permitting authority turns on a question of statutory interpretation.¹⁸⁷ The OCSLA confers federal jurisdiction over the OCS.¹⁸⁸ OCLSA, as originally enacted, extended the USACE §10 regulatory authority “to prevent obstructions to

¹⁸⁰ Id at 196-97.

¹⁸¹ M.G.L. c. 132A, § 12(c)

¹⁸² Id at 195-96.

¹⁸³ See SAVE OUR SOUND, [hereinafter “Save our Sound”] at <http://www.saveoursound.org/taxonomy/term/2> (last visited Jan. 7 2007) (identifying the entity as a 501(c)(3) nonprofit environmental organization dedicated to the long-term preservation of Nantucket Sound).

¹⁸⁴ Alliance to Protect Nantucket Sound, 288 F.Supp.2d at 66.

¹⁸⁵ 42 U.S.C. §§ 4331 et seq.

¹⁸⁶ See id at 69 (noting argument (1) in Administrative R. at 2154-55; (2) in Administrative R. at 1882, 1887-88, (3) in Administrative R. at 1908-09, 2156-57).

¹⁸⁷ Alliance to Protect Nantucket Sound, 399 F.3d at 109.

¹⁸⁸ See generally Ten Taxpayers Citizens Group, 373 F.3d at 188.

navigation in the navigable waters of the United States.”¹⁸⁹ In 1978, this grant of authority was amended to apply instead to “the artificial islands, installations, and other devices referred to subsection (a) of this section.”¹⁹⁰ Subsection (a), in turn, extends federal jurisdiction to:

*[a]ll 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, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources.*¹⁹¹

The challenged USACEs’ actions triggered judicial review under the Administrative Procedures Act (APA).¹⁹² Under the APA, a decision of an agency will be set aside only if it is found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”¹⁹³

The standard of review under the APA accords great deference to agency decision-making. Indeed, in applying the arbitrary and capricious standard, the task of the reviewing court is to determine whether the agency considered the pertinent evidence and relative factors and sufficiently articulated an explanation for its action. Assuming that the agency’s determination is within the bounds of reasoned decisionmaking it will not be set aside. A reviewing court is not to substitute its judgment for that of the agency.¹⁹⁴

First the Alliance asserted that the USACE lacked jurisdiction to issue the §10 permit for the construction and operation the SMDS tower on the OCS. Specifically, the Alliance argued that the “which may be” clause of the 1978 Amendment are words of limitation, restricting the USACE authority to issue §10 permits on the OCS only to the extraction of mineral resources.¹⁹⁵ In essence, the Alliance argues that the USACE lacks the power under OCLSA to regulate non-extractive structures on the OCS,¹⁹⁶ and even if it has the authority to issue permits for some types of structures, it does not have the authority to issue permits for temporary towers in the OCS.¹⁹⁷ Contrarily, the USACE interpreted its own regulation regarding the OCLSA amendment to provide that its §10 authority was extended to artificial islands, installations, and other devices located on the seabed, to the seaward limit of the OCS, regardless of their type or whether for extractive or non-extractive purposes.¹⁹⁸

¹⁸⁹ See 43 U.S.C. 1333(f) (1953).

¹⁹⁰ 43 U.S.C. 1333(e) (2004).

¹⁹¹ *Id.* at (a)(1) (emphasis added).

¹⁹² Administrative Procedures Act 5 U.S.C. 706(2)(A).

¹⁹³ See e.g., *Town of Norfolk v. United States Corps of Eng’rs*, 968 F.2d 1438, 1445-46 (1st Cir. 1992).

¹⁹⁴ *Alliance to Protect Nantucket Sound*, 288 F.Supp.2d at 71 (internal quotes and citations omitted).

¹⁹⁵ *Alliance to Protect Nantucket Sound*, 399 F.3d at 109; see 43 U.S.C. 1333(q) (2004). The term “resources” is not defined in OCLSA, whereas “exploration,” “development,” and “production” are all defined in terms of “mineral,” which is in turn defined as “includ[ing] oil, gas, sulphur, geopressured-geothermal and associated resources, and all other minerals which are authorized by an Act of Congress to be produced from public lands.”

¹⁹⁶ See *Alliance to Protect Nantucket Sound*, 288 F.Supp.2d at 76-77.

¹⁹⁷ See *Alliance to Protect Nantucket Sound*, 399 F.3d at 110.

¹⁹⁸ See 33 C.F.R. § 320.2(b). § 10 of the RHA all unauthorized obstruction or alteration of any navigable waters of the United States.

Under the Chevron Doctrine, an agency’s interpretation of a statute it is charged with administering is, accordingly, entitled to deference.¹⁹⁹ If the intent of congress is not clear from the face of the statute, an agency’s construction of such statute should be upheld so long as it is reasonable.²⁰⁰ If, however, the intent Congress is clear from the face of the statute, “the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”²⁰¹

The district court and First Circuit reached the same conclusion that the “which may be” clause was not restrictive, therefore the USACE had jurisdiction to issue the §10 permit, but they reached that conclusion under different rationales. The district court found that the USACE was entitled to heightened Chevron deference because it reasonably and unambiguously interpreted its own regulation consistent with the text, legislative history, and overall purpose of the OCSLA. Reviewing the district court’s findings de novo, the First Circuit rejected the interpretation below that the “which may be” clause applied to all structures “including but not limited to, those that *may be* used to explore for, develop, or produce resources.”²⁰² Instead, the First Circuit found the text of the “which may be” clause ambiguous as to whether it refers to “all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed,” or only to all such installations used to explore, develop, or produce resources.²⁰³

The First Circuit found it unnecessary to reach the question of Chevron deference because the legislative history “reveals, with exceptional clarity, Congress’s intent that Section 10 authority under OCLSA not be restricted to structures related to mineral extraction.”²⁰⁴ The First Circuit found the first prong of the Chevron Doctrine met, because using traditional rules of statutory interpretation, Congress directly spoke on the issue, and therefore its intention is law and must be given that effect.²⁰⁵ Congress expressed:

[t]he existing authority of the Corps of Engineers ... applies to all fixed structures on the [OCS], whether or not they are erected for the purpose of exploring for, developing, removing and transporting resources therefrom. The amendment ... 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 subsection (a), namely all installations and other devices permanently or temporarily attached to the seabed. It is not the intention of the conferees to limit the authority of the Corps [] as to structures used for the exploration, development, removal, and transportation of resources.²⁰⁶

¹⁹⁹ See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-45; see also *Town of Norfolk*, 968 F.2d at 1446 (applying the intra-circuit *Chevron* standard “An agency’s construction of a statute it is charged with enforcing is entitled to deference it is reasonable and not in conflict with the express intent of Congress”).

²⁰⁰ *Id.*

²⁰¹ *Id.* at 843.

²⁰² *Alliance to Protect Nantucket Sound*, 399 F.3d at 109 (citing *Alliance to Protect Nantucket Sound*, 288 F.Supp.2d at 75).

²⁰³ *Id.*

²⁰⁴ See *Alliance to Protect Nantucket Sound*, 399 F.3d at 109.

²⁰⁵ See *id.* (citing *Chevron*).

²⁰⁶ See H.R. Conf. Rep. No. 95-1474 at 82 (1978).

The First Circuit declared the Alliance’s interpretation and assertion that the SMDS is not the type of structure contemplated by Congress, as straining “the Conference Report language well beyond the meaning it can bear.”²⁰⁷ Specifically, the First Circuit pointed to the USACE’s grant of permits for several structures unrelated to mineral extraction, between the 1953 and 1978, including artificial mineral reefs, radio towers, and a proposed gambling casino which was to be constructed reefs.²⁰⁸ Further, the OCLSA applies to structures erected for the purpose of exploring for and transporting resources.²⁰⁹ Finding the specific intent of Congress to not limit the USACE’s §10 authority, and finding a pre-amendment grant of authority to issue a permit for a radio tower, the First Circuit concluded that this “express language is determinative”²¹⁰ of the scope of the USACE’s authority. Therefore, it held that the USACE had the authority to issue the §10 permit CWA’s SMDS data tower.²¹¹

Second, the Alliance asserted a three-part argument claiming that the USACE failed to properly consider CWA’s lack of property interest in the OCS where the SMDS tower is located. The Alliance claimed the USACE violated its permit issuance authority pursuant to: (a) established the USACE regulations that require a §10 applicant have, in fact, the necessary property rights to the project area as a precondition to the issuance of the permit; (b) the USACE’s duty to act in the public interest, including the requirement that it consider the federal government’s interest in granting a permit to a private company on the OCS; (c) CWA’s false affirmation that it possessed the requisite property interest to construct a data tower on the OCS.

Under the USACE regulations, “[t]he application must be signed by the person who desires to undertake the proposed activity ... The signature of the applicant ... will be an affirmation that the applicant possesses or will possess the requisite property interest to undertake the activity proposed in the application.”²¹²

In response, the USACE points to another of its regulations:

*A [Corps] permit does not convey any property rights ... or any exclusive privileges. Furthermore a [Corps] permit does not authorize any injury to property or invasion of rights or any infringement of Federal, state or local laws or regulations. 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. The [Corps] will not enter into disputes but will remind the applicant of the above. The dispute over property ownership will not be a factor in the Corps public interest decision.*²¹³

²⁰⁷ See Alliance to Protect Nantucket Sound, 399 F.3d at 110.

²⁰⁸ Id.

²⁰⁹ Id.

²¹⁰ Id. at 111.

²¹¹ Id.

²¹² 33 C.F.R. 325.1(d)(7)

²¹³ See Alliance to Protect Nantucket Sound, 399 F.3d at 111 (citing 33 C.F.R. 320.4(g)(6)) (emphasis supplied); see also Environmental Assessment, supra note 89, at 13 (paraphrasing §320.4(g)(6) in response to comments about Cape Wind’s lack of property interests),

In district court, the Alliance argued that because CWA had no property interest in the proposed data tower site, it could not obtain such an interest under current law, therefore its §10 permit application ought to have been denied. The judge disagreed, and the First Circuit affirmed. The First Circuit stated the Alliance is “simply wrong,”²¹⁴ the regulations do not impose an obligation upon the USACE to resolve disputes over the ownership of public or private property. The district court noted that “even if the Corps doubted the sufficiency of Cape Wind’s property interest in the OCS lands in issue, it would not have had the authority to consider” the Alliance’s argument in review of the data tower application.²¹⁵ The First Circuit held that the USACE’s interpretation is reasonable, especially in light of the language on its face, stating that the USACE “will not enter into disputes, but will remind the applicant of its need to possess the requisite property interest.”²¹⁶ Clearly, the regulatory scheme keeps the USACE out of disputes, it does not aim to involve them in disputes.²¹⁷

So long as deference to interpretations of its own regulation is not “post hoc rationalizations offered by an agency seeking to defend past agency action against attack,”²¹⁸ an agency’s construction of its own regulation is entitled to substantial deference.²¹⁹ The USACE’s regulation requires only that a permit applicant affirm possession, and CWA, in fact, affirmed by signing its application. The goal of keeping the USACE from expending resources on evaluating the legal question of sufficiency of property interests is a reasonable one.²²⁰

The Alliance’s next argument held some weight with the First Circuit. The Alliance pointed to the fact, that despite CWA’s affirmation, the USACE must still consider the impact of the issuance of the permit on federal property rights as part of its general public interest review.²²¹ But, the First Circuit held that the USACE reasonably and found the data tower’s impact on federal property rights would be “negligible,” thus the Alliance’s argument “fails.”²²²

Lastly, the Alliance urged that CWA’s affirmation was false because no mechanism exists by which a private entity can obtain a license to construct a data tower on the federally controlled OCS, therefore the USACE the issuance of the permit on the false affirmation violated the APA as arbitrary and capricious.²²³ The First Circuit held that the question of infringement

²¹⁴ Alliance to Protect Nantucket Sound, 399 F.3d at 112.

²¹⁵ See Alliance to Protect Nantucket Sound, 288 F.Supp.2d at 78.

²¹⁶ See §320.4(g)(6) supra note 166.

²¹⁷ See Alliance to Protect Nantucket Sound, 288 F.Supp.2d at 78.

²¹⁸ See Auer v. Robbins, 519 U.S. 452, 462 (1997) (holding that where Congress has not directly spoken to the precise question at issue, the agency interpretation will be upheld as long as it is a permissible interpretation; deferring to agency interpretation in amicus brief submitted by the parties).

²¹⁹ See Visiting Nurse Ass’n of N. Shore v. Bullen, 93 F.3d 997, 1002 (1st Cir. 1996) (holding When federal agency has promulgated and published regulation pursuant to its own enabling statute, Court of Appeals reviews its interpretation of that regulation under standard even “more deferential...than that afforded under Chevron” to agency’s interpretation of statute).

²²⁰ See Alliance to Protect Nantucket Sound, 399 F.3d at 113.

²²¹ See Id.; see also 33 C.F.R. 320.4(a)(1) (stating that the impact of project on “considerations of property ownership” must be considered as a factor in the Corps’s analysis).

²²² See id.

²²³ See id.

of federal property interests is entirely hypothetical.²²⁴ In addition to noting the justiciability problem, the court pointed to the fact that the Alliance confused the issues.

The First Circuit stated:

We do not here evaluate whether congressional authorization is necessary for construction of Cape Wind's proposed wind energy plant, a structure vastly larger in scale, complexity, and duration, which is not at issue in the present action. Our analysis is limited to whether additional Congressional authorization is necessary for the data tower, which does not infringe on any federal property interest, and we conclude that it is not.²²⁵

In reaching its conclusion, the First Circuit reasoned that the Alliance's argument hinges on the veracity of CWA's affirmation, which in turn the Alliance suggest, depends on whether authorization on addition to a §10 permit is necessary for the construction of the SMDS data tower.²²⁶ The court concluded that a §10 permit is *necessary* for all structures on the OCS, unless otherwise indicated by law, but in holding so, does not determine whether such a permit is *sufficient* to authorize building on federally controlled OCS.²²⁷

NEPA was enacted in recognition of "the profound impact of man's activity on ... the natural environment..."²²⁸ and declares of the policy of the federal government "to use all practicable means and measures...to create and maintain conditions under which man and nature can exist in productive harmony...."²²⁹ It was promulgated to ensure that federal agencies consider the potential environmental consequences of proposed projects before allowing them to proceed.²³⁰ Although NEPA imposes a series of procedural requirements on federal agencies, it "does not mandate particular results."²³¹ NEPA requires that the "adverse effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs."²³²

To ensure that federal agencies comply with NEPA, thus taking a "hard look" at the environmental impacts of proposed actions, it requires the federal agency to prepare a "detailed statement," or an Environmental Impact Statement (EIS), when it proposes "major federal

²²⁴ Id. at 114.

²²⁵ Id.

²²⁶ See Id. at 113.

²²⁷ Id. at 114 (emphasis in original).

²²⁸ 42 U.S.C. § 4331(a).

²²⁹ Id.

²³⁰ See *Roberston v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (defining the scope of NEPA requirements to not constrain the Agency from deciding that other values outweigh environmental costs; finding that a discussion of steps taken to mitigate adverse environmental consequences to constitute an important ingredient in an environmental impact statement and a discussion of steps that should be taken to avoid the adverse effects; however, NEPA does not require that agencies take action to mitigate adverse effects of major federal actions or to include in every environmental impact statement detailed explanation of specific measures which will be employed to mitigate adverse impacts of proposed action).

²³¹ Id.

²³² Id.

action” “significantly affecting the quality of the environment.”²³³ The EIS should provide a detailed discussion of, among other things, “the environmental impact of the proposed action” and “alternatives to the proposed action.”²³⁴ As long as “the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs.”²³⁵ A reviewing court should use only the record in existence at the time the agency made its decision to determine whether the agency acted lawfully.²³⁶

Under NEPA, the Council on Environmental Quality (CEQ) to help further the environmental objectives, and in doing so, authorized it to enact regulations describing the environmental review procedures that federal agencies must comply under the statute.²³⁷ The CEQ “has promulgated detailed regulations setting forth when a federal agency must prepare a full [EIS] or the less extensive [EA and FONSI] and what must be included in each.”²³⁸

An agency must prepare an EA and FONSI if it finds that a proposed action “will not have a significant effect on the human environment....”²³⁹ An EA is a “concise ... document” that serves to “[b]riefly provide sufficient evidence and analysis for determining whether to prepare an [EIS] or a [FONSI].”²⁴⁰ It includes “brief discussions of the need for the proposal, of alternatives ..., [and] of the environmental impacts of the proposed alternatives....”²⁴¹ A FONSI is a brief document that “present[s] the reasons why an action ... will not have a significant effect on the human environment....”²⁴² The FONSI includes the EA or a summary of it and notes any other documents related to it.²⁴³ The USACE prepared an EA and issued a FONSI regarding the §10 SMDS permit.

Third, the Alliance asserted that the USACE failed to comply with NEPA, and thus violated CEQ’s regulations by failing to circulate for public comment the draft EA and FONSI it

²³³ 42 U.S.C. 4332(C).

²³⁴ 42 U.S.C. 4332(C)(i), (iii).

²³⁵ Id.

²³⁶ Alliance to Protect Nantucket Sound, 288 F.Supp.2d at 72.

²³⁷ See 42 U.S.C. 4342, 4344.

²³⁸ City of Waltham v. U.S. Postal Serv., 786 F. Supp 105, 113 (D. Mass. 1992) (finding that merely because the Postal Service gave less than required “hard look” to storm drainage impact of construction of mail processing facility on site containing wetlands did not require conclusion that agency’s FONSI was arbitrary and capricious in light of appropriate level of review given to traffic, wetlands, noise, land use, tax revenue, and zoning issues; it was not required to conduct a “no practicable alternatives analysis”; nor did not require that assessment process be completed before taking title; NEPA only required that review process be completed before agency made irrevocable commitment of resources; identifying facility as “preferred site,” while regulations required consideration of alternative sites, did not violate those regulations as site selection committee did not make decision as to final site at the time; failure to comply fully with public input and public notice regulations in connection with selection and environmental assessment of proposed site did not result in prejudicial error, and, thus, procedural inadequacies could not provide basis for striking down EA/FONSI process); see e.g. 40 C.F.R. §§ 1501.3, 1501.4, 1502.1, 1502.2, 1502.14, 1508.9, 1508.11, 1508.13.

²³⁹ 40 C.F.R. 1508.13; see 40 C.F.R. §§1501.3, 1501.4, 1508.9.

²⁴⁰ 40 C.F.R. 1508.9(a)(1).

²⁴¹ Alliance to Protect Nantucket Sound, 288 F. Supp. 2d at 68-69; 40 C.F.R. 1508.9(b).

²⁴² 40 C.F.R. 1508.13; see 40 C.F.R. 1508.27 (listing criteria for determining the significance of environmental impacts).

²⁴³ Alliance to Protect Nantucket Sound, 288 F. Supp.2d. at 70; See also 40 C.F.R. 1508.13.

prepared regarding the SMDS in Horseshoe Shoals. CEQ regulations require that an agency shall involve the public, to the extent practicable in preparing an EA, make diligent efforts to involve the public in preparing and implementing their NEPA procedures, provide public notice of the availability of environmental documents so as to inform those persons who may be interested and affected, and solicit the appropriate information from the public.²⁴⁴

Specifically, the Alliance argued that the narrow CEQ exception that provides “[i]n certain limited circumstances the agency shall make the FONSI available for 30 days before the agency makes its final determination whether to prepare and EIS and before the action may begin.”²⁴⁵ The Alliance asserted the applicable limited exception applies when “the nature of the proposed action is without precedent”²⁴⁶ “for Cape Wind’s two phased scheme, starting with the data tower and moving to full project development”²⁴⁷ because “Nantucket Sound is pristine, undeveloped area and because “there is no precedent for permitting a privately owned structure for wind energy, or even related research, on OCS lands.”²⁴⁸ Then, the Alliance cited Ninth Circuit dicta stating “[t]he public must be given an opportunity to comment on draft EAs.”²⁴⁹

The USACE countered that it met the requirement of involving the public “to the extent practicable” in preparing the EA by: (1) issuing public notice of CWA’s application; (2) providing a public comment period, and later extending it over five months; (3) carrying out two public hearings; (4) noting and responding to public comments in the EA; (5) conferring with federal and state environmental agencies.²⁵⁰ Further, the USACE determined that precedent exists “for this type of structure in Massachusetts’s waters,” in the form of a data tower in Martha’s Vineyard.²⁵¹

Both, the district court and the First Circuit found that the USACE did not act unreasonably, noting that nothing in the CEQ regulations triggered the circulation of a draft EA for public comment. The district court found, relying upon the USACE’s findings,²⁵² that while “[t]here are no other similar structures or devices in Horseshoe Shoals,” a data tower was permitted in state waters off Martha’s Vineyard, and CWA’s data tower was “not inconsistent with other pile supported structures in the marine environment in Nantucket Sound.”²⁵³ The First Circuit agreed that the permit for the SMDS is not without precedent, on the basis of

²⁴⁴ See Alliance to Protect Nantucket Sound, 399 F.3d at 114-15; See 40 C.F.R. 1501.4(b), 1506.6(b) (internal quotes and editing omitted).

²⁴⁵ 40 C.F.R. 1501.4(e)(2).

²⁴⁶ 40 C.F.R. 1501.4(e)(2)(ii).

²⁴⁷ Alliance to Protect Nantucket Sound, 298 F.Supp. 2d at 79.

²⁴⁸ Alliance to Protect Nantucket Sound, 399 F.3d at 115.

²⁴⁹ See Citizens for Better Forestry v. United States Dep’t of Agric., 341 F.3d 961, 964 (9th Cir. 2003) (concluding wholesale neglect of the mandatory inclusion of the public in the decision making process results in a procedural injury, and that the “added risk to the environment that takes place when governmental decision makers make up their minds without an analysis [with public comment] of the likely effects of their decision on the environment...”).

²⁵⁰ See Alliance to Protect Nantucket Sound, 399 F.3d at 115.

²⁵¹ See Environmental Assessment, supra note 89, at 10.

²⁵² Id. at 2.

²⁵³ See Alliance to Protect Nantucket Sound, 399 F.3d at 115 (citing Alliance to Protect Nantucket Sound 288 F.Supp.2d at 78-19).

physically similar structures in nearby waters.²⁵⁴ Thus, the USACE complied with the NEPA requirements, the CEQ regulations, and therefore, acted reasonably under the APA.

E. The Significance of the Litigation

Judge Tauro's famous quote recognizes something more than the cases can reveal. It reflects the flare of the policy issues with important, precedent-setting consequences for the country as a whole that were being generated and debated in an emotionally and politically charged atmosphere.²⁵⁵ The combined effect of the cases, none surviving summary judgment, represents how the bad faith of a few can hurt the whole. Here, the "few" represents the opponents and the "whole" represents the United State's renewable energy efforts in the global effort to reduce greenhouse emissions. This section illustrates how each of the opponent's arguments were set to fail, which sheds light upon why Congress responded by passing §388.

Prior to the Cape Wind litigation, the U.S. v. Maine decisions²⁵⁶ established that Horseshoe Shoals, the current SMDS site and proposed wind project site, lies on the OCS governed exclusively by federal law under the OCSLA²⁵⁷. For purposes of the OCSLA, the Court held that the United States was entitled to exercise sovereign rights over the seabed and subsoil of the Atlantic Ocean lying more than three miles from shore to the exclusion of the coastal states.²⁵⁸ Specifically, the Court rejected Massachusetts' attempt to carve an exception for Nantucket Sound, holding that the Sound consisted partly of, both, state waters and federal waters.²⁵⁹

Placed into perspective the "citizens' lawsuits" had nothing to do with the wind project whatsoever. The entire litigation efforts were designed to equivocate the environmental effects of the large wind to the environmental impacts caused by the tiny the SMDS, which the USACE issued a Finding Of No Significant Impact. Insignificantly, the SMDS occupies a mere *900 square feet*²⁶⁰ of the ocean surface, whereas the average home size in Orleans, Massachusetts, located on Cape Cod, is 1800 square feet, or twice the size of the square footage occupied by the SMDS.²⁶¹ Combining the insignificance of the SMDS with the following factors suggests, at the very least, that the legal claims were brought in bad faith to delay the wind project including: (1) the preemptive strike by the ex parte temporary restraining order (TRO) Ten Taxpayers forced a legal battle; (2) the timing of the claims; (3) the MSA jurisdiction claim for a matter unrelated to fishing; (4) the Alliance's equivocation of the SMDS with the larger hypothetical wind project; (5) the Alliance's delay tactic in arguing against Chevron Deference despite "exceptional

²⁵⁴ Id.

²⁵⁵ Stephanie Ebbert, On Wind, Some Blow Hot and Cold, BOSTON GLOBE, June 17, 2003, at A1.

²⁵⁶ See United States v. Maine, 420 U.S. 515 (1975) [hereinafter Maine I] (setting forth the principle that the seabed of the Atlantic Ocean within the United State's territorial waters, not more than three miles from the shore, is within the exclusive federal jurisdiction); See United States v. Maine, 475 U.S. 89 (1986) [hereinafter Maine II] (clarifying that areas of Nantucket Sound, which are outside of the three mile coastal zone, are subject to the general rule of exclusive federal jurisdiction); 43 USC §§1331(a) and 1301.

²⁵⁷ See Outer Continental Shelf Lands Act

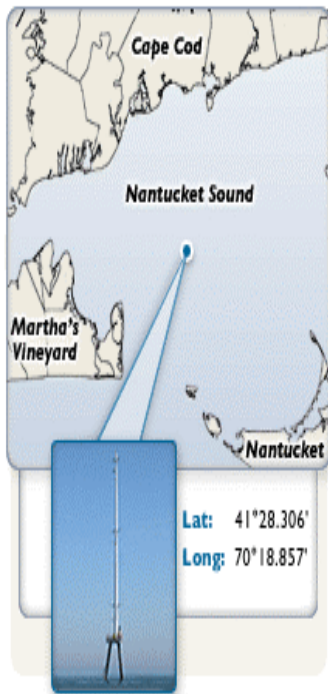
²⁵⁸ See Maine I, 420 U.S. 515 (1975)

²⁵⁹ Maine II, 475 U.S. 89 (1986)

²⁶⁰ See Environmental Assessment, *supra* note 89, at 1.

²⁶¹ See www.town.orleans.ma.us/pdf/departments/planning/lcp.pdf (last visited Nov. 1, 2006).

[Congressional] clarity”; and (6) the Alliance’s confusion equivocating NEPA procedures to absolutely guarantee results.



First, the Ten Taxpayers initial claim depended upon an ex parte TRO.²⁶² Generally, the movant must establish that the harm or threatened harm is immediate. The Ten Taxpayers rushed to enjoin the construction of the SMDS on September 24, 2002, two weeks before CWA planned to begin construction of the SMDS on October 7, 2002. Two weeks hardly seems immediate, since the Ten Taxpayers participated in the eight months of review before the issuance of a §10 permit by the USACE. Next, the harm must be irreparable. An express condition of the permit limited the SMDS could remain on the OCS to a period of five years. The hidden motive behind the ex parte TRO bootstrapped the Ten Taxpayers, by forcing CWA litigate well beyond the preliminary injunction phase. In effect, this bold move forced CWA into a defensive position, before it could prepare for the four year legal battle that would ensure. 20 days late, construction began on October 27, 2002. More importantly, the backdoor entrance into court delayed the wind project more than four years through appeals.

Second, the Ten Taxpayers brought suit before the second §10 application was submitted to the USACE. At the time the suit was filed, CWA had merely announced its intent to construct the wind project; yet, no formal steps had been advanced by CWA. In fact, on December 4, 2001, the USACE announced its intent to open public commenting and specified that the SMDS is separate and distinct from the proposed wind energy project. In addition, the Environmental Assessment specified that the wind energy project had a separate permit process and the federal EIS is ongoing.²⁶³ Clearly, any attempt to equivocate the projects merely confused the issues. Also, a condition of the §10 permit required that the SMDS be removed within 5 years, or December 2007, yet, the Ten Taxpayers continued their fight until certiorari was denied by the Supreme Court on January 24, 2005. A reasonable person would not fight the existence of a tower permitted for “not longer than five years.” Most importantly, the opponents made up their minds by 2002 that they were committed to killing the project, thus ignoring the lengthy review process. Without fully understanding the specifics of the project and how to influence the decision making, the opponents effectively closed the door to mutual gains. The question remains, if the project is constructed, will the opponents be happy with the result?

²⁶² Generally, courts are reluctant to impose ex parte TROs. The majority of courts require that significant efforts to notify a defendant that a TRO request will be made because the movant will suffer imminent irreparable harm before a hearing can be held.

²⁶³ See Environmental Assessment, *supra* note 89, at 5. The larger wind farm project with 170 turbines has generated considerable controversy and interest both for and against the project and is the subject of a separate permit process and federal EIS that is ongoing. *Id.* This permit decision is only for the single data tower but many of the comment letters and many of the oral statements at the public hearings commented not only on the data tower itself but also on the merits of the larger wind farm project. It seems as if most of those who commented on the data tower also wished to express an opinion on the larger wind farm project even though we tried to make it clear we were evaluating them separately. *Id.*

Third, the Ten Taxpayer's claim conferring state jurisdiction under the MSA constituted a processed legal argument to forum shop for more favorable state courts. Obviously, some biases existed by the low burden required for the issuance of the ex parte TRO, notwithstanding the state has an interest in reversing the US v. Maine decisions regarding control over Nantucket Sound. More importantly, the SMDS is not a fishing related activity, thus the Ten Taxpayers attempted to conflate jurisdiction over fish habitat, with unlimited jurisdiction over structures. Therefore, this claim was a meritless attempt to find a jurisdictional hook where none existed. Additionally, any attempt to "stand in the shoes" of the state would be unfounded. Massachusetts has not brought any challenge. In fact, on May 10, 2005, the Massachusetts Energy Facility Siting Board (MEFSB) voted to approve CWA's transmission line, following a 32-month adjudicatory review process.²⁶⁴ Their process included a review of 932 exhibits and testimony from expert witnesses from all sides, whose statements produced 2,900 pages of written transcripts.²⁶⁵

Fourth, the purpose of the SMDS, itself, was to determine the *feasibility* of the wind project. The First Circuit correctly found that the tower's existence was a sufficient condition to the wind project, but refused to determine that it necessarily established the future of the wind project. Thus, no matter how hard the Alliance tried to confuse the issue, it lacked standing to enjoin the wind project through the SMDS litigation.

Fifth, the Alliance submitted comments, which became incorporated into the Administrative Record, yet it later sued USACE under the Chevron Doctrine. The Chevron Doctrine requires a substantial showing by the challenger to prove that the agency acted arbitrary and capricious. Whether the agency considered the pertinent factors and sufficiently articulated an explanation for its action "within the bounds of reasoned decision making." Since the Alliance knew that it made comments, it had standing. However, challenges rarely succeed, but they can significantly delay. Appeals are de novo, again lengthening the litigation process. Finally, the First Circuit never reached Chevron Deference because the legislative history revealed "exceptional clarity." Therefore, the Alliance either suffered from incompetent lawyering or its intent constituted pretext to delay the wind project.

Sixth, the existence of a similar tower on Martha's Vineyard poses the same environmental impacts as the SMDS. The Alliance attempted to distinguish the two towers in three ways, but in doing so revealed its hidden purpose, contrary to its own express stated goals.²⁶⁶ Under NEPA the Alliance distinguished the inconsistency by: (1) ignorance of the existence of the Martha's Vineyard tower, claiming that the SMDS is without precedent, yet the court pointed to the fact that the USACE relied upon the existence of the Martha's Vineyard tower before issuing the permit; (2) asserting the USACE "should not be allowed to cite the existence [of the Martha's Vineyard Tower]"²⁶⁷ because it is in state waters, but the court found

²⁶⁴ SEE THE MASSACHUSETTS ROLE IN REVIEWING CAPE WIND, (May 3 2006) available at http://www.capewind.org/mass_roll.pdf (last visited Jan. 9, 2007)).

²⁶⁵ Id.

²⁶⁶ See Save Our Sound, supra note 156. Our goal is to protect Nantucket Sound in perpetuity through conservation, environmental action, and opposition to inappropriate industrial or commercial development that would threaten or negatively alter the coastal ecosystem. Id. The Alliance supports formal designation of Nantucket Sound as a marine protected area. Id.

²⁶⁷ Alliance to Protect Nantucket Sound 288 F.Supp 2d at 79.

it irrelevant “[n]either the location nor nature of ownership” render its environmental impact different from the Martha’s Vineyard tower²⁶⁸; (3) Alliance argued that the Martha’s Vineyard tower was built by a public entity for “benevolent purposes,” but the Alliance ignores that a condition of the §10 that requires CWA to share data with government agencies, educational institutions, and research organizations.²⁶⁹ In addition, the Alliance argued the USACE lacked jurisdiction because the 1978 OCSLA amendment limited their reach, but the court found that permits were issued for radio towers prior to the amendment, thus authorization was clearly proper after the amendment, as it expands rather than contracts the §10 permitting authority. The Alliance never challenged the construction of the Martha’s Vineyard tower, located in state waters. Therefore, the Alliance is less about conservation, environmental action, and opposition to industrial and commercial development than it promotes.

These six factors examine the values of the stakeholders, but what is at stake? The Alliance, posing as an environmental protection organization, probably loses more credibility through inconsistencies over issues like the Martha’s Vineyard tower, than it does shaping environmental policy. If they addressed the real aesthetics and property value issues behind their position, potentially, they could open the door to solutions not yet explored. Further, the site is nowhere near the homes. More than three miles is more than an adequate distance to respect the rights of the public and add to the renewable energy supply. The Massachusetts residents, electricity customers, the United States, and the global population should not tolerate anymore delay by a small minority of opponents. It is bad public policy to encourage similar behavior based on private property owners’ perceived fears regarding a project that promises so much, yet may take so little.

Part III. Section 388 of the EP Act 2005

Broadly speaking, the United States shares the global view regarding greenhouse emissions, and encourages renewable energy generation. Recently, energy policy has become a hot topic for other reasons. Mainly, America’s dependence on foreign oil from the Middle East and Venezuela exposes a vulnerability to less than friendly political regimes, thus new domestic supplies must be utilized to displace foreign dependency. Also, short-term destruction caused by natural disasters, like Hurricane Katrina, remind us of that vulnerability and the need to broaden the domestic energy portfolio. However, energy generation is a function of private enterprise. The government is generally limited to regulation, authorization, and subsidization.

Regarding renewable energy on the OCS, Congress had to respond for at least a few reasons. First, America cannot sit idly and ignore the growth of offshore projects around the world. Second, the lack of federal law specific to renewable energy projects on the OCS was an unforeseen oversight because wind generated energy technology did not constitute cost-effective option, rather than a deliberate intent to suppress its use by Congress. Additionally, the OCS is federally controlled and requires uniform application of general laws to the extent practicable, but still allow some flexibility to deal with issues of uniqueness. Third, had the litigation favored the opponents of the Cape Wind project, precedent would open the door encouraging wealthy coastal land owners to form “alliances” forcing litigation that would advance their selfish

²⁶⁸ Id.

²⁶⁹ Id.

motives above the betterment of all. A bad message would be sent that the fundamental right to exclude, includes within the bundle of rights, an unobstructed view of objects more than three miles at sea on the OCS. That goes too far.

Congress responded by amending §8 the OCSLA through §388 of the EP Act of 2005,²⁷⁰ broadly granting authority to the Secretary of the Interior and the MMS to regulate non-extractive renewable energy production on the OCS and to issue the requisite property interest to a private enterprise. Essentially, §388 authorizes the federal government to grant a legal interest to a private enterprise that engages in renewable energy production on OCS. Section A. generally describes how §388 will change the energy policy of the United States by addressing the goals of the Act. Section B. briefly describes egregious conduct of a few Senators, most notably Ted Kennedy, who attempted to insert language into a bill with the intent that it would kill the Cape Wind project. Section C. discusses a common goal between CWA and the Alliance and suggests a mutually beneficial alternative that may promote both their interests regarding research and development of deep water floating turbines. CWA could capture more wind, produce more output, and realize greater profits, and the Alliance could move the project from Horseshoe Shoals by redirecting its funds away from the protracted battle, to the funding of the research project.

A. Section 388 Generally and its Goals

Prior to the passage of §338 of the EP Act of 2005,²⁷¹ Cape Wind and other projects were permitted under the existing regulatory framework. OCSLA limited the Secretary of the Interior's authority over OCS activities to the mineral extraction, which is commonly understood to mean oil, gas, sand, and gravel.²⁷² When the opponents seized and centered their legal claims around the fact that no federal framework existed governing offshore wind projects, and after the courts refused to grant the requisite property rights on the OCS, Congress was forced to act.

Section 338 of the EP Act of 2005 extends the Secretary's authority and directs the issuance of a regulatory regime to: (1) grant leases, easements, and rights-of-way on the OCS for activities that produce or support production, transportation, or transmission of energy; (2) require the collection of payments and revenue-sharing with coastal states for the energy related uses on the OCS; (3) require grantees to furnish surety bonds or other security to protect the interests of the public and the interests of the U.S.; (4) the regulatory regime must issue regulations in consultation with other federal agencies and "the Governor of any affected State."²⁷³

The MMS will now also manage the alternative energy-related uses on Federal OCS lands, act as a lead agency for coordinating the permitting process with other Federal agencies, and monitor and regulate those facilities used for alternative energy

²⁷⁰ Pub. L. No. 109-58, 388(a).

²⁷¹ Id.

²⁷² See Guy R. Martin & Odin Smith, *The World's Largest Energy Facility in Nantucket Sound?* 31 B.C. Envtl. Aff. L. Rev. 285, 296 (2004).

²⁷³ See Pub. L. No. 109-58, 388(a), 199 Stat. 594, 744 (2005) (to be codified at 43 U.S.C. 1337); see also See Notice of Intent to file Prepare an Environmental Impact Statement, 71 Fed. Reg. 30693, 30693, (Dept. of the Interior May 30, 2006).

production and energy support services.²⁷⁴ Commentators requested intergovernmental collaboration and community input and participation, as part of the PEIS review. Specifically, it was requested that the MMS work with federal and state agencies in order to streamline the permitting process. For example, transmission lines in state-managed waters will require permitting through state agencies. Therefore, the new procedures and regulations should be established to work consistently with federal state and local government policies, and the local, state, and federal agencies working in renewable energy projects should equally be clearly defined.

Notably, §388:

Section (a) Amends § 8(p) of OCSLA and now allows the Secretary of the Interior to issue Leases, Easements and Rights-of-way for Energy and Energy Related Purposes in cooperation with the United States Coast Guard (USCG) as the lead agency to help in siting the proposed projects, which will help by bringing localized knowledge for the unique issues associated with different areas of the OCS;

- (1) (C) defines the scope in include: produce or support production, transportation, or transmission of energy from sources other than oil and gas;
- (2) Secretary shall establish royalties, fees, rentals...to ensure a fair return to the United States...
 - (B) Secretary shall provide ... payment of 27 percent ... from projects located wholly or partially within ...State submerged lands;
- (3) Except with respect to ... section 388(d) ... the Secretary shall issue ... on a competitive basis unless the Secretary determines after public notice ... there is no competitive interest;
- (4) The Secretary shall ensure (k) public notice and comment (l) oversight, inspection, research, monitoring, and enforcement;
- (5) LEASE DURATION, SUSPENSION, AND CANCELLATION
- (6) SECURITY the Secretary shall require the holder ...
 - (A) furnish a surety bond or other security...
 - (B) comply with ... requirements ... to protect the interests of the public and the U.S.; and
 - (C) provide for the restoration....
- (7) The Secretary shall provide ... with the Governor of any State or the executive of any local government that may be affected....
- (8) The Secretary, in consultation with the Secretary of Defense, Secretary [in Department where Coast Guard] is operating, Secretary of Commerce, heads of other relevant [federal] agencies, and the Governor of any affected state, shall issue any necessary regulations....
- (9) ... Nothing ... displaces, supersedes, limits, or modifies the jurisdiction, responsibility, or authority of any Federal or State Agency under any other Federal law.

²⁷⁴ Id.

Section (d) Savings Provision—Nothing in the amendment ... requires resubmittal ... of any document previously submitted ... previously authorized ... before ... this Act—(2) a request for a proposal has been issued by a public authority.

Section (e) Nothing ... shall ... alter, limit, or modify ... State ... jurisdiction over ... any right, title, or interest in, any submerged lands.

B. Congressional Bad Faith and Egregious Conduct

“In April, 2006, Senator Ted Kennedy (D-Mass), Senator Ted Stevens (R-Alaska), and Representative Don Young (R-Alaska), in a closed door session, added a provision to the Coast Guard Appropriations bill (H.R. 889) that would have given the Massachusetts governor power to block the Cape Wind project.”²⁷⁵ “Kennedy worked behind the scenes with other senators to push a provision into the Coast Guard bill to give Governor Mitt Romney—another opponent—the ability to veto the project even if it clears all other legal hurdles.”²⁷⁶

Through the DOI, the USCG was given the authority under the EP Act of 2005, to determine the navigation threats of the proposed project. The inserted language gave governors of affected states the authority to veto proposed projects off their shores. Significantly, it would have given Governor Mitt Romney, a long-time opponent of the Cape Wind project the authority to veto the project in its entirety. Then came letters of protest, a string of stinging editorials in national newspapers, and most critically, opposition to the policy from key members of Congress across the country.²⁷⁷ After winning in litigation and after the passage of §388, the project almost died by this back door session.

On June 27, 2006, House lawmakers approved unanimously a provision that instead, gives strict authority to the commandant of the USCG, Adm. Thad Allen. Both sides of the controversy are happy with the news.²⁷⁸ For CWA it preserves the “arbitrary and capricious” accountability standard, under which politicians, themselves, are not accountable.²⁷⁹ Opponents are pleased because some of the turbines may be relocated under the Coast Guard’s power to impose “reasonable conditions” to remove any navigability threats.²⁸⁰ Additionally, the new authorization delegates the local Coast Guard official to play a role in the agency’s deliberations to administer localized knowledge in conjunction with the potentially affected areas.

C. Alternatives and Recommendations

The Cape Wind controversy illustrates that the more uncertain our regulations, technologies, and knowledge bases, large projects will be stalled by those resistant to change.

²⁷⁵ Standoff Ends on Cape Wind, House of Representatives Passes Coast Guard Spending Bill, Eliminating Governor's Veto for Offshore Wind Farms, Ian , Vineyard Gazette, [hereinafter “Governor Veto”] July 7, 2006 available at http://www.mvgazette.com/news/2006/07/07/wind_farm_bill.php (last visited on Jan. 8, 2007).

²⁷⁶ Rick Klein, Opponents say Cape Wind had ‘sweetheart deal’, Boston Globe (May 5, 2006) available at <http://www.saveoursound.org/node/460> (last visited Nov. 7, 2006) [hereinafter Sweetheart Deal].

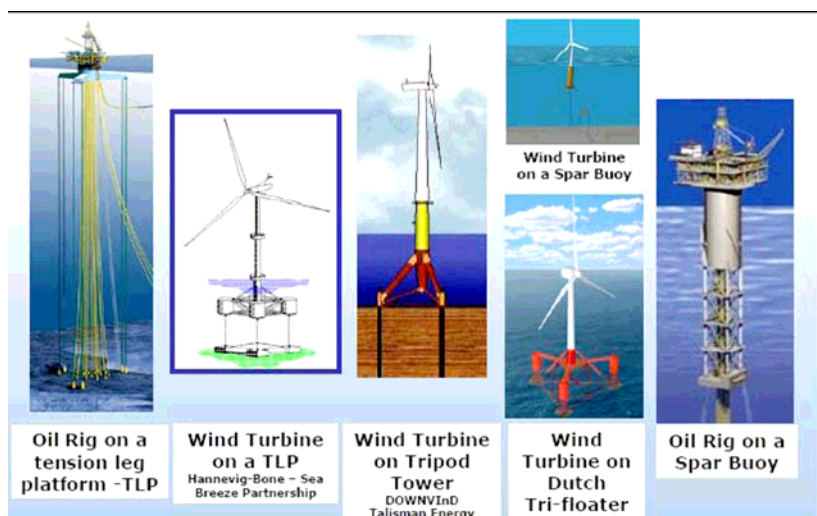
²⁷⁷ Governor Veto

²⁷⁸ Id.

²⁷⁹ Id.

²⁸⁰ Id.

§388 of the EP Act of 2005, provides centralized structure and a uniform mechanism for



developers, scientists, and the public to interact and exchange ideas. Further, much of the confusion regarding the use of the OCS will be avoided to streamline similar projects in the future. Also, the public will have a better understanding of the permitting process, and significant steps will be taken to ensure that their communities and environment will be protected. At the worst, the

Cape Wind controversy will guide the MMS in drafting the PEIS to foresee which problems are likely to arise and disseminate reliable information before another controversy erupts. As the offshore wind energy movement is in its infancy, ongoing steps must be taken to reexamine projects and proposals to insure that any potentially negative effects may be abated or eliminated. The DOI and DOE should work to encourage research and development to achieve the most efficient commercial exploitation of offshore wind resources.

Current technology requires a water depth of less than 30 meters to pile the turbine tower to the seabed.²⁸¹ The Cape Wind project is located in the shallow region of Horseshoe Shoals. Researchers suggest that the future trend is to move projects out to deeper waters where a large amount of potential United States offshore wind resources are in waters deeper than the current technology limit of about 30 meters.²⁸² Borrowing technology from the offshore oil and gas platforms, the future of offshore wind energy will involve deepwater floating turbine systems. The floating platforms can be installed in higher wind regimes farther from shore where they will be out of sight and away from environmentally sensitive areas closer to shore.²⁸³ Perhaps, if the technology were available today, the Cape Wind controversy could have been avoided.

It is possible that floating structures developed for offshore oil and gas industries can be adapted for wind turbines.²⁸⁴ Floating platforms may be the most economical means of deploying offshore wind turbines at these sites. For instance, the wind resource potential between 5 and 50 nautical miles off the coast of the United States, most of which is deepwater, is estimated to be more than the total currently installed electrical generating capacity of entire

²⁸¹ Wind Power Today, Robert Thresher at <http://usinfo.state.gov/journals/itgic/0605/ijge/thresher.htm> (last visited Jan 8, 2007)..

²⁸² Wind Power Today, Robert Thresher at <http://usinfo.state.gov/journals/itgic/0605/ijge/thresher.htm> (last visited Jan 8, 2007).

²⁸³ See Robert Thresher, Thresher “Offshore Energy Hearing, Full Committee Hearing, April 19, 2005,” Dr. Robert Thresher, Director, National Wind Technology Center, National Renewable Energy Laboratory, Golden, Colorado, prepared statement[hereinafter “Thresher Statement”], at http://energy.senate.gov/hearings/testimony.cfm?id=1463&wit_id=4184 (last visited Jan. 9, 2006).

²⁸⁴ See Wind Energy Production, supra note 6, at 9; See also Thresher Statement supra note 283.

United States, and near to densely populated major coastal urban populations.²⁸⁵ In depths up to 900 m floating turbines will allow access to offshore areas where an estimated 750,000 MW of wind resource potential exists.²⁸⁶ To capture the wind resource and reach the economies of scale needed to make the far offshore sites financially viable, it is generally believed that 5-MW or larger turbines will be needed.²⁸⁷ Structurally, sufficient buoyancy is needed to support the weight of the turbine and to restrain pitch, roll, and heave motions caused by wind and wave forces, under normal and storm conditions.²⁸⁸

Basically, a floating structure will replace conventional steel monopiles or concrete bases attached to the seabed similar to those proposed for Cape Wind.²⁸⁹ When the technology becomes available, the additional capital costs for the wind turbines will not be significantly higher than current turbines in shallow water.²⁹⁰ The vision for floating platform systems is that they will be mass produced and assembled in a local dry dock facility, towed out to sea, anchored, and plugged into the electrical connector to an undersea cable that delivers the power to shore.²⁹¹ Through economies of scale and mass production at local U.S. shipyards, work at sea would be minimized, high paying manufacturing jobs would be created, and competitive energy costs could be achieved.²⁹² See figure above illustrating different conceptual designs.

In the arena of floating wind energy platforms, a pathway composed of a comprehensive R&D program, commercial demonstration, and subsequent mass production can probably reduce costs by 50% or more.²⁹³ MIT and UMASS, Woods Hole Oceanographic Institution, are sharing a nearly \$600,000, one-year pilot grant to begin the design of the next generation of offshore wind turbines that will not only avoid the controversy dogging the Nantucket Sound proposal, but tap into a vast amount of wind energy.²⁹⁴

If this technology were available, the entire project on Horseshoe Shoals could be displaced and moved out of sight. Presumably, CWA would be more profitable by capturing greater sustainable winds, thus generating a greater output. The Alliance would gain the preservation of Horseshoe Shoals and eliminate any aesthetic concerns. Finally, America would finally contribute to the global effort by promoting the latest offshore wind energy technology. Since the Cape Wind is on hold until the MMS completes the PEIS, now is a good time for the Alliance and CWA to see if they can share this common goal.

²⁸⁵ Feasibility of Floating Platforms Systems for Wind Turbines available at http://www.saveoursound.org/files/97_FeasibilityFloating.pdf (last visited Jan. 6 2007).

²⁸⁶ See Wind Energy Production, *supra* note 6, at 9.

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ Musial et al., "Future for Offshore Wind Energy in the United States," Preprint for Energy Ocean 2004, [hereinafter "Preprint"] Palm Beach, Florida, June 28–29, 2004, at 6, at <http://www.nrel.gov/docs/fy04osti/36313.pdf> (last accessed Jan. 9, 2007).

²⁹⁰ See Save Our Sound, Feasibility of Floating Platforms Systems for Wind Turbines available at 1, available at http://www.saveoursound.org/files/97_FeasibilityFloating.pdf (last visited Jan. 6 2007).

²⁹¹ See Thresher Statement, *supra* note 283.

²⁹² *Id.*

²⁹³ Preprint, *supra* note 289, at 6.

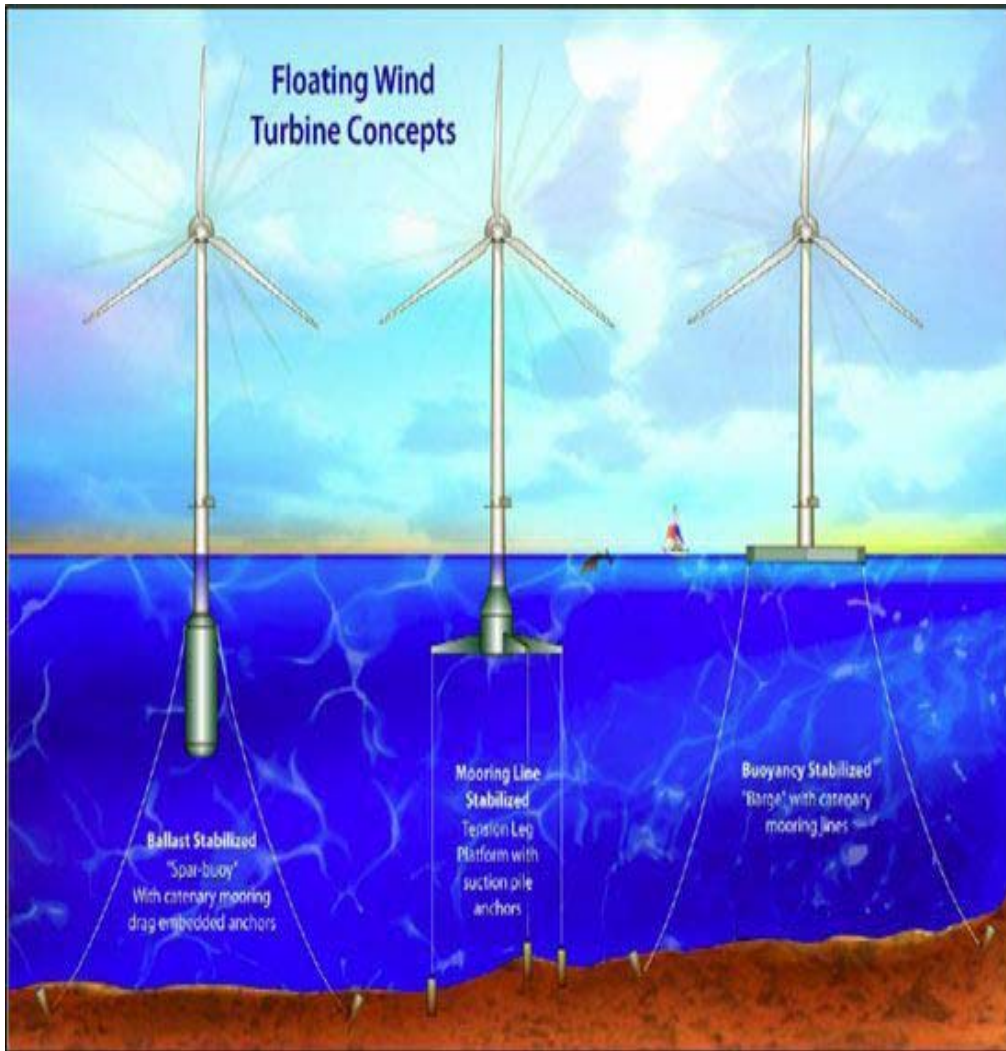
²⁹⁴ See Azom.com, RESEARCHER EXPLORES POTENTIAL OF DEEP-WATER WIND FARMS at <http://www.azom.com/news.asp?newsID=2589> (Last Visited Jan. 10, 2006).

In 2004, the Alliance spent \$2,407,882 to fight the project.²⁹⁵ At that time, the Alliance planned “to dedicate \$5 million per year for 2005 and 2006 to challenge the proposed wind plant and to bring resolution to the issue. We intend to raise 100% of this \$10 million objective through private donation.” Significantly, that figure represents only one-quarter of the pilot grant between MIT and UMASS. In other words, the Alliance spent four times more money to lose legislatively and to lose in court, than funds the research that may obviate the need to fight at all.

§388 EP Act of 2005²⁹⁶ provides a great mechanism for a centralized and uniform regulatory framework that, had it been in place from the beginning, it would have diffused much of the controversy. However, to end the protracted battle, CWA and the Alliance must work together and explore common goals. Perhaps CWA could agree to hold off on the project on Horseshoe Shoals and consult with the researchers, in exchange for the Alliance to agree to end the protracted battle by diverting its donations to the research project with UMASS and MIT. The Alliance has a proven track record of exceeding its multimillion dollar donation goal each year, drawing from a tiny pool of opponents. Surely, it could generate a staggering amount, if it sought donations from the common pool of those who want more energy from deeper water and those who want to protect Nantucket Sound.

²⁹⁵ See Cape Cod Today, ABOUT THE ALLIANCE TO PROTECT NANTUCKET SOUND http://www.capecodtoday.com/downloads/ccs_fundraising.htm (Last Visited Jan. 10, 2006).

²⁹⁶ Pub. L. No. 109-58, §388(a).



Conclusion

The United States policy is consistent with the global view to reduce greenhouse emissions, as well as furthering its own goals to diversify the domestic energy portfolio. Fueled by misinformation from the start, the Cape Wind controversy took on a life of its own. The opponents seized on the absence of a centralized and uniform federal framework surrounding projects like the Cape Wind project on the OCS. Throughout the protracted struggle, the intent federal government could not be any clearer; the DOI encourages renewable energy projects on public lands through the BLM and the MMS. Forcing Congress to act, §388 of the EP Act of 2005 opens the door for a wide range of new uses and a combination of uses on existing oil and gas structures on the OCS. However, §388 cannot end the protracted battle unless and until the Alliance puts down its sword. Commonality exists for CWA to concede the project on Horseshoe Shoals, if piled turbines will become a thing of the past. To encourage the shift to deep water turbines, the Alliance should divert the costs it would use to fight the project and solicit more funds to encourage the deepwater floating turbine research. In other words, sound participation between the stakeholders may save the Sound.