
OFFSHORE WIND: WHAT STEPS NEED TO BE TAKEN TO ENSURE IT HAS A FUTURE IN AMERICA

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Offshore wind development has failed to develop in the United States despite the growing trend toward green energy.¹ Wind turbines produce energy with no air or water pollution.² Unlike land-based farms, offshore wind farms can be larger, gather more wind, and produce more power than each one on land.³ Yet, unclear zoning laws, overlapping jurisdictions, and public opposition have entirely stopped the development of this green energy source.⁴

Massachusetts and other coastal states have yet to deal with these issues effectively, so only a few projects are beginning to take shape.⁵ The Cape Wind project claimed it would be Amer-

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¹ See Iva Ziza, Note, *Siting of Renewable Energy Facilities and Adversarial Legalism: Lessons From Cape Cod*, 42 NEW ENG. L. REV. 591, 600 (2008) (comparing the United States supply of wind power to the European supply of wind power).

² See *Frequently Asked Questions*, CAPE WIND, Feb. 15, 2011, archived at <http://www.webcitation.org/5wWFfXhdx> [hereinafter *FAQ*] (promoting the environmental benefits of wind energy).

³ See *id.* (comparing land-based and offshore wind turbine farms).

⁴ See Ziza, *supra* note 1, at 608-09 (discussing practical problems related to the implementation of the Cape Wind project). The procedural requirements—state and local permits as well as federal regulations under NEPA—are significant obstacles. See *id.*

⁵ See Ziza, *supra* note 1, at 606 (indicating that “Cape Wind would be the nation’s first offshore wind farm.”).

ica's first offshore wind farm, but ten years into development not a single turbine has been installed.⁶ NIMBY-ism, redundant sources of law, lack of clear jurisdictional boundaries, and dozens of sources of authority have stopped all forward progress.⁷ In response, Massachusetts passed the Massachusetts Ocean Management Plan in 2010, and the legislature attempted to enact the Wind Energy Siting Reform Act to address some of these issues.⁸

This Note addresses how Massachusetts has dealt with its offshore wind farm and the subsequent steps it has taken to remedy the problems encountered by Cape Wind. It will compare land-based and offshore projects to explain the differences in and provide examples for offshore zoning law. Then the Note will address the feasibility and potential future use of ocean plans in permitting. Finally, this Note will analyze state and federal regulations plus judicial review procedure for offshore wind turbines and suggest some alternatives. Offshore energy is a growing field, which is why the states, federal government, and courts need to develop a cohesive, efficient, environmentally friendly way of handling it.

I. History

A. Introduction

It is important to understand how wind is transformed into clean energy. Wind energy is captured using wind turbines

⁶ See Ziza, *supra* note 1, at 594-95 (outlining Cape Wind's history, and explaining why the project's progress has not yet begun).

⁷ See Ziza, *supra* note 1, at 605-13 (providing an overview of the complications facing Cape Wind's progress).

⁸ See Mass. Gen. Laws ch. 21A, § 4C (2010) (expanding upon the Oceans Act of 2008); *Summary of Wind Energy Siting Reform Act*, MASS.GOV, Sept. 9, 2011, archived at <http://www.webcitation.org/61h4Z7MWV> (outlining major sections of the Wind Energy Siting Reform Act).

that look like windmills.⁹ The turbine has a rotor, which typically has three aerodynamic blades that are pushed by the wind, and can be turned so they face in the direction to receive the most wind possible.¹⁰ Next, the mechanical energy of the rotating rotor goes into the generator where it is converted into electrical energy.¹¹ From there, the energy is moved through transmission lines to join energy from other turbines within the same grid.¹² The grids connect to an electronic service platform on land via a transmission line where breakers and electric relays transmit the power to electric companies or directly to power outlets.¹³

Unlike offshore wind farms, America has embraced land-based wind farms due to the available space and lower energy costs.¹⁴ However, land-based farms are limited because it is wasteful to transfer electricity over long distances, and these farms are located in sparsely populated areas.¹⁵ More than half of the United States population lives near the ocean, so offshore projects can be larger, and reach people easier, without the high transmission costs.¹⁶ Additionally, offshore winds are “typically stronger and less turbulent than land-based winds, increasing the revenue potential,” which can offset the higher costs of installa-

⁹ See *How Wind Turbines Work*, CAPE WIND, Feb. 15, 2011, archived at <http://www.webcitation.org/5wWFDzUj6> (depicting a wind turbine and its mechanical components).

¹⁰ See *id.* (explaining the mechanics of the yaw system within a wind turbine).

¹¹ See *id.* (describing the function of the transmission system).

¹² See *id.* (noting that energy from multiple wind turbines is combined into one transmission line before it reaches land).

¹³ See *id.* (explaining how wind turbine energy is connected to an existing electrical grid).

¹⁴ See Carolyn S. Kaplan, *Congress, the Courts, and the Army Corps: Siting the First Offshore Wind Farm in the United States*, 31 B.C. ENVTL. AFF. L. REV. 177, 190 (2004) (noting the impact of land-based wind farms on offshore development in America).

¹⁵ See *id.* (observing that land-based farms are typically far from dense populations, and therefore transfer costs are high).

¹⁶ See *id.* (discussing the benefits of large coastal populations being located in close proximity to potential offshore farm locations).

tion and maintenance.¹⁷ Offshore development is the next logical and necessary step in green technology.¹⁸

Wind energy is not an American technology; Europe installed the first offshore wind project and is currently leading the way.¹⁹ As of 2009, Europe had approximately twenty-five operational wind farms off its coast.²⁰ Presently, nine countries have over thirty-nine offshore wind farms comprising over 2,063 megawatts of electricity-generating capacity, with fifty-two more projects already permitted, totaling more than 16,000 megawatts.²¹ That number is likely to continue to grow dramatically, as the European Union recently committed to generating twenty percent of its energy from renewable sources by 2020.²² The United Kingdom alone plans to have a 6.6 gigawatt energy capacity from offshore wind by 2015.²³ The European Wind Energy Association has suggested consolidating permitting so developers only have to follow the European Union's regulations, and not those of each

¹⁷ See *id.* at 191 (describing the benefits of offshore wind conditions and the potential for them to be more profitable than land-based options).

¹⁸ See *id.* at 219 (predicting the future of U.S. offshore wind farm development).

¹⁹ See Ed Feo & Josh Ludmir, *Challenges in the Development and Financing of Offshore Wind Energy*, 14 ROGER WILLIAMS U. L. REV. 672, 672, 681 (2009) (observing that Europe is the world leader in offshore wind energy).

²⁰ See *id.* at 681 (illustrating Europe's adoption of offshore wind as an alternative energy source).

²¹ See JUSTIN WILKES, EUROPEAN WIND ENERGY ASS'N, THE EUROPEAN OFFSHORE WIND INDUSTRY - KEY TRENDS AND STATISTICS 2009 2 (2010), archived at <http://www.webcitation.org/62njUD5YT> (citing European offshore wind farm statistics from 2009).

²² See Feo & Ludmir, *supra* note 19, at 681 (noting the European Union's commitment and the European Wind Energy Association's estimate that capacity will increase because individual member states have set independent ambitious goals).

²³ See Feo & Ludmir, *supra* note 19, at 681 (explaining the effect the United Kingdom's pledge to utilize more green energy will have on offshore wind). The United Kingdom plans to have "15% of the country's power generated from renewable sources by 2015." *Id.*

individual country to facilitate a more efficient process.²⁴ Despite the current dual layers of regulation, the European system is the most efficient and advanced in the world.²⁵

B. Cape Wind Permitting

In contrast to Europe's advancements, America does not have a single wind turbine in its waters.²⁶ So far, no project has successfully completed the planning or permitting phases and started construction.²⁷ The most developed and controversial project is Cape Wind, off of Cape Cod, Massachusetts.²⁸ The proposed site would be the largest in the world when it is built at 420 megawatts, and consist of 130 wind turbines.²⁹ The turbines would cover twenty-four square miles off the coast of Cape Cod in an area known as Nantucket Sound.³⁰ It is expected to produce on average 170 megawatts, which is "almost 75% of the 230 megawatt average electricity demand for Cape Cod and the Islands of Martha's Vineyard and Nantucket."³¹ The project would be 6.5 miles from Cape Cod and be farther from the nearest home than any other electricity generating facility in Massachusetts.³² On a

²⁴ See Feo & Ludmir, *supra* note 19, at 686 (pointing to the EWEA's proposal to have the European Union alone permit offshore wind).

²⁵ See Feo & Ludmir, *supra* note 19, at 681 (confirming that Europe is the world leader in offshore wind energy).

²⁶ See Feo & Ludmir, *supra* note 19, at 686 (noting that no offshore wind construction has commenced in the United States).

²⁷ See Feo & Ludmir, *supra* note 19, at 686 (outlining the varied progress of certain projects).

²⁸ See Feo & Ludmir, *supra* note 19, at 688-89 (introducing the controversy regarding the Cape Wind Project).

²⁹ See Matthew C. Heerde, Note, *Don't Need a Weatherman to Know Which Way the Wind Blows: What Does the Cape Wind Decision Foretell for the Offshore Wind Energy Industry?*, 17 GEO. INT'L. ENVTL. L. REV. 253, 254 (2005) (describing the Cape Wind project as proposed).

³⁰ See *id.* at 254 (noting the location of the project in Nantucket Sound).

³¹ See FAQ, *supra* note 2 (presenting figures of average electricity that will be produced by Cape Wind).

³² See FAQ, *supra* note 2 (assuaging concerns about the proximity of Cape Wind to Cape Cod's human population).

clear day, from the closest beach on Cape Cod, the turbines would appear one-half inch above the horizon.³³

The Cape Wind project is being reviewed under the federal National Environmental Policy Act (NEPA), which requires an Environmental Impact Report (EIS), the Massachusetts Environmental Policy Act (MEPA), which requires an Environmental Impact Review (EIR), and the Development of Regional Impact (DRI).³⁴ The US Army Corps of Engineers (Corps) was the lead agency on the project, and drafted the required documents for the permitting process.³⁵ In 2005, Congress passed the Energy Policy Act of 2005 “in the face of criticism over the appropriateness of the Corps as the lead agency for energy development on the outer continental shelf (OCS).”³⁶ The Act switched power to grant an easement to the continental shelf from the Corps to the Department of the Interior who then delegated it to the Minerals Management Services (MMS).³⁷ Since then, the MMS has been renamed the Bureau of Ocean Management, Regulation and Enforcement (BOEMRE), and its subdivision, the new Bureau of Ocean Management, now handles offshore energy.³⁸ The Massa-

³³ See *FAQ*, *supra* note 2 (clarifying the visual impact on the project on the Cape).

³⁴ See *Cape Wind Permitting Update*, CAPE WIND, Oct. 28, 2010, archived at <http://www.webcitation.org/5tokzZo9y> [hereinafter *Permitting Update*] (explaining the regulations and permitting steps necessary for approval).

³⁵ See Heerde, *supra* note 29, at 254 (noting that due to the lack of federal legislation on offshore wind, the Corps had authority).

³⁶ See Jacquelyn Hadam, Note, *The Latest Development in the Debate Over Nantucket Sound: Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Board*, 13 OCEAN & COASTAL L.J. 121, 124 (2007) (supporting the passage of the Energy Policy Act of 2005).

³⁷ See *id.* (discussing the shift of authority to the Minerals Management Service regarding the Cape Wind permitting process).

³⁸ See *Fact Sheet: The BSEE and BOEM Separation*, U.S. DEP'T OF THE INTERIOR, Jan. 19, 2011, archived at <http://www.webcitation.org/5wEDJyooA> [hereinafter *DOI Fact Sheet*] (describing the details of the separation of the new BOEMRE into two separate departments); Press Release, U.S. Dep't of the Interior, Salazar, Bromwich Announce Next Steps in Overhaul of Offshore Energy Oversight and Management (Jan. 19, 2011), archived at

chusetts Energy Facilities Siting Board (EFSB) is the state regulatory agency responsible for permitting the electric transmission line connecting the wind turbines to the power grid.³⁹ The approval and permit of these four agencies is necessary for the project to begin construction.⁴⁰

The first step in the permitting was the Corps determining the scope of the project in order to receive approval to research the site more carefully.⁴¹ The MEPA Environmental Notification Form certificate and the NEPA Environmental Assessment were jointly filed in November 2001.⁴² It included input from the seventeen participating government agencies and the public.⁴³ After three years of research and public hearings, the Corps, in November 2004, released a combined Draft EIS, Draft EIR, and Draft DRI.⁴⁴ The document is over 3,800 pages and includes all of their findings.⁴⁵ The scope of the draft included, "(1) avian; (2) marine habitat; (3) fisheries and benthic; (4) aviation; (5) telecommunication systems; (6) commercial and recreational navigation; (7) socio-economic; (8) aesthetic and landscape/visual; (9) cultural resources; (10) recreation; (11) noise and vibrations; (12) water quality; (13) electric and magnetic fields; (14) air and climate;

<http://www.webcitation.org/5wEDkyuiN> [hereinafter Salazar, Bromwich Announce Next Steps] (validating the goal of splitting the departments to allow for a unified mission within each sphere).

³⁹ See *Permitting Update*, *supra* note 34 (outlining the EFSB's authority to permit the transmission line).

⁴⁰ See *Permitting Update*, *supra* note 34 (explaining the approval process for future construction).

⁴¹ See Kaplan, *supra* note 14, at 197 (explaining the first phase of a two-step process: research).

⁴² See *Permitting Update*, *supra* note 34 (explaining the approval process for future construction).

⁴³ See *FAQ*, *supra* note 2 (describing the permitting process and degree of government review).

⁴⁴ See Ziza, *supra* note 1, at 610 (noting the joint draft permit application document released by the Corps).

⁴⁵ See James Quilter, *Timeline - the Nine-Year Saga of Cape Wind*, WIND POWER MONTHLY, Apr. 29, 2010, archived at <http://www.webcitation.org/5tom2D8DQ> (recalling the draft report and its contents).

and (15) safety.”⁴⁶ Additionally it included an analysis of alternative locations, including “one land-based alternative, three in shallow water, a single location in deep water, two or more smaller site combined, and a no-build alternative.”⁴⁷ The extensive document addresses all the issues necessary to satisfy NEPA and MEPA.⁴⁸

The next step in the permitting process came in May 2005 after a thirty-two month adjudicatory proceeding that “included 2,900 pages of transcripts and 932 exhibits;” the EFSB approved the connection of the electric lines from the wind farm to the electric transmission system in Massachusetts.⁴⁹ This ensured that once construction was complete, the electricity produced would be consumed by Massachusetts residents and businesses; due to appeals, this decision was not final until August 2010.⁵⁰ Next, in February 2007, Cape Wind filed their Final EIR, completing the Massachusetts application requirements.⁵¹ In May 2009, the Massachusetts Environmental Siting Board issued a Certificate of Environmental Impact and Public Interest granting all of

⁴⁶ Kaplan, *supra* note 14, at 200 (giving examples of what the draft included). See also Dorothy W. Bisbee, *NEPA Review of Offshore Wind Farms: Ensuring Emission Reduction Benefits Outweigh Visual Impacts*, 31 B.C. ENVTL. AFF. L.REV. 349, 355-56 (2004) (advocating for the benefits of projects to be considered rather than just the harms).

⁴⁷ Kaplan, *supra* note 14, at 200.

⁴⁸ See Ziza, *supra* note 1, at 610 (explaining the significance of joint NEPA and MEPA compliance documents).

⁴⁹ See *Permitting Update, CAPE WIND*, *supra* note 34 (discussing the process and decision of the EFSB to permit the transmission line). The ultimate affirmation of this decision is discussed below.

⁵⁰ See Jay Lindsay, *Mass. Court Rejects Challenge to Cape Wind Permit*, BOSTON GLOBE, Sept. 21, 2011, available at <http://www.webcitation.org/62yTZdC2g> (describing how the Massachusetts Supreme Judicial Court affirmed the EFSB ruling).

⁵¹ See Ziza, *supra* note 1, at 611 (noting Final EIR completion); *Cape Wind Submits Final Impact Report to Massachusetts Environmental Agency*, CAPE WIND, Sept. 21, 2011, archived at <http://www.webcitation.org/61rfXw8ks> (stating the date the Final EIR was submitted to the MEPA office).

the state and local permits necessary for the project.⁵² The Department of the Interior released the Final EIS in January 2009, and Interior Secretary Salazar released a Record of Decision approving the permit in April 2010.⁵³ The final federal step took place on October 6, 2010 when Secretary Salazar signed the nation's first offshore wind lease with Cape Wind.⁵⁴ It is a twenty-eight year lease costing approximately \$88,000 per year before the project becomes operational and over one million dollars a year afterwards, of which twenty-seven percent will go to Massachusetts.⁵⁵ Federal and Massachusetts offices and agencies have been extremely inefficient in reviewing and approving these application documents.⁵⁶

C. Cape Wind Legal Battles

In addition to the lengthy permitting processes over the land, Cape Wind has also been the subject of heated litigation, which has cost millions of dollars in legal fees and delayed the project by years.⁵⁷ The first of these cases, *Ten Taxpayer Citizens*

⁵² See Press Release, The Official Website of the Massachusetts Executive Office of Energy and Environmental Affairs, Siting Board Grants State, Local Permits to Cape Wind (Oct. 28, 2010), *archived at* <http://www.webcitation.org/5tp8K541R> [hereinafter Mass. Siting Board Press Release] (announcing state approval of Cape Wind).

⁵³ See Press Release, Cape Wind, Cape Wind Approved by Federal Government as America's First Offshore Wind Farm (Feb. 23, 2011), *archived at* <http://www.webcitation.org/5wiTLAD2d> (announcing the record of the decision approving Cape Wind's EIS).

⁵⁴ See Beth Daley, *Cape Wind Awarded Federal Lease*, BOSTON GLOBE, Oct. 6, 2010, *archived at* <http://www.webcitation.org/5tnX3MJeL> (commenting on the lease, a first of its kind, and the importance for the project).

⁵⁵ See *id.* (noting the terms of the lease).

⁵⁶ See *id.* (detailing the length of time it took between permit and approval). The lease was only signed after a permit was issued following nine years of review. See *id.*

⁵⁷ See Beth Daley, *6 Groups File First Suit to Halt Wind Farm*, BOSTON GLOBE, June 26, 2011, *archived at* <http://www.webcitation.org/62uAnI3dD> (listing the multiple suits against the Cape Wind project).

Group v. Cape Wind Associates, LLC,⁵⁸ was decided by the U.S. District Court for the District of Massachusetts on August 19, 2003.⁵⁹ The suit was over a permit Cape Wind received to build one tower in Nantucket Sound to record wind information to determine if the location was feasible for this project.⁶⁰ The Corps granted Cape Wind the permit under § 10 of the Rivers and Harbors Act of 1889.⁶¹ The Plaintiffs alleged that Cape Wind also needed to comply with Massachusetts' fishery regulations per the 1983 Amendment to the Magnuson-Stevens Fishery Conservation and Management Act.⁶² Cape Wind moved to dismiss the suit claiming that federal government has "exclusive jurisdiction over waters more than three miles from shore."⁶³ The Court concluded that nothing in the Act supports the idea that non-fishing-related activities can be regulated by Massachusetts simply because they may harm fishing.⁶⁴ Following precedent, the court concluded that the federal government has exclusive jurisdiction over Nantucket Sound, so Cape Wind did not need a Massachusetts permit for the data tower, and granted the motion to dismiss.⁶⁵

Then Ten Taxpayer Citizens Group filed an appeal, and the U.S. District Court of Appeals for the First Circuit affirmed the decision on June 28, 2004.⁶⁶ The Court noted that the Outer Conti-

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

⁵⁹ *See id.* at 101 (dismissing the case because Massachusetts does not have the authority to regulate Nantucket Sound).

⁶⁰ *See id.* at 99 (providing the primary issue in the suit).

⁶¹ *See id.* (noting the Corps' approval of a permit for Cape Wind on August 19, 2002).

⁶² *See id.* at 100 (articulating the Plaintiffs' contention).

⁶³ *See id.* at 99 (articulating Cape Wind's defense in this matter).

⁶⁴ *See Ten Taxpayers Citizen Grp.*, 278 F. Supp. 2d at 100-01 (concluding that under the Magnuson Act, Congress may only exercise authority over Nantucket Sound to the extent that it is "necessary to establish consistent fishing regulations throughout the Sound.").

⁶⁵ *See id.* at 101 (granting the motion to dismiss).

⁶⁶ *See Ten Taxpayer Citizen Grp. v. Cape Wind Assocs., LLC*, 373 F.3d 183, 186 (1st Cir. 2004) (affirming the lower court decision).

mental Shelf Lands Act of 1953 gave federal jurisdiction to anything more than three miles from shore and to anything affixed to the seabed no matter its location.⁶⁷ On the issue of whether removal to the federal district court was proper, the Court explained there was a federal question because Congress explicitly incorporated state law on the outer shelf into federal law with the OCS.⁶⁸ The Court noted that the Massachusetts Ocean Sanctuaries Act is not relevant because the Massachusetts EPA oversees it and has expressly disclaimed authority over this area of Nantucket Sound.⁶⁹ The Court stated that there is no room for states to supplement federal law, and even if there was, Massachusetts law is inconsistent with federal law.⁷⁰ Therefore, the Court affirmed the decision, and the U.S. Supreme Court denied the petition for writ of certiorari ending the case.⁷¹

Next, opponents of the project challenged the Corps' issuance of a navigability permit under § 10 of the Rivers and Harbors Act of 1899 and its compliance with NEPA with regard to the data tower.⁷² In *Alliance to Protect Nantucket Sound, Inc. v. United States Department of the Army*,⁷³ the U.S. District Court granted summary judgment for the Defendants,⁷⁴ the Plaintiffs appealed, and the Appeals Court affirmed the decision.⁷⁵ The

⁶⁷ See *id.* at 188 (summarizing the history of jurisdiction over Nantucket Sound).

⁶⁸ See *id.* at 192 (explaining that the issue arises out of federal law, and that federal courts have jurisdiction).

⁶⁹ See *id.* at 195-96 (criticizing part of the Plaintiffs' argument).

⁷⁰ See *id.* at 196 (discussing the limitations state laws face with respect to federal law).

⁷¹ See *id.* at 186 (affirming the case's dismissal); *Ten Taxpayer Citizen Grp. v. Cape Wind Assocs., LLC*, 543 U.S. 1121, 1121 (2005) (denying writ of certiorari).

⁷² See *Alliance to Protect Nantucket Sound, Inc. v. U.S. Dep't. of the Army*, 288 F. Supp. 2d 64, 66-67 (D. Mass. 2003) (describing the Plaintiffs' complaints).

⁷³ 288 F. Supp. 2d 64 (D. Mass. 2003).

⁷⁴ See *id.* at 82 (granting summary judgment).

⁷⁵ See *Alliance to Protect Nantucket Sound, Inc. v. U.S. Dep't of the Army*, 398 F.3d 105, 108 (1st Cir. 2005) (reviewing the case *de novo*).

permit was allowed because the focus was research, and the OCS was not restrictive on the function of the permit but rather just the type of structure.⁷⁶ The Court also reviewed the NEPA compliance of the data tower construction because Plaintiffs argued that Defendants should have circulated a draft Environmental Assessment (EA) and a finding of no significant impact.⁷⁷ In complying with NEPA, the Corps issued “public notice of Cape Wind’s Application, providing a comment period that they later extended to over five months, carrying out two public hearings, noting and responding to public comments in the EA, and conferring with federal and state environmental agencies.”⁷⁸ The Court found that Cape Wind fully complied, and as such, affirmed the summary judgment.⁷⁹

In 2005, the Massachusetts Energy Facilities Siting Board (EFSB) approved Cape Wind’s plan to construct electrical transmission lines to run from the turbines through the ocean to connect to NSTAR Electrical Company’s existing electrical grid.⁸⁰ The Massachusetts Supreme Court then affirmed the Board’s decision in *Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Board*.⁸¹ Per the DRI, Cape Wind also needed the Cape Cod Commission’s approval for the construction of the electrical lines, which was denied.⁸² So, in November 2007, Cape Wind appealed the DRI denial to the EFSB and applied for a “certificate of environmental impact and public interest,” which would allow it to proceed over the Commission’s denial if there is a broader

⁷⁶ See *id.* at 110 (holding that the research function of the permit falls within the Corps’ authority).

⁷⁷ See *id.* at 114-15 (reviewing the NEPA requirements).

⁷⁸ *Id.* at 115.

⁷⁹ See *id.* at 108 (affirming summary judgment).

⁸⁰ See *Town of Barnstable v. Mass. Energy Facilities Siting Bd.*, No. BACV20080028, 2009 WL 1449032, at *1 (Mass. Super. May 4, 2009) (noting the EFSB’s approval of the transmission lines).

⁸¹ See 858 N.E.2d 294, 295 (Mass. 2007) (affirming the EFSB’s approval of the Siting Board’s decision).

⁸² See *Town of Barnstable*, 2009 WL 1449032, at *2 (describing the two layers of approval needed in order to begin construction of the transmission line).

community need for the project.⁸³ The certificate combines all state and federal permits for the electric lines into one document.⁸⁴ The EFSB decision was pending when the Town of Barnstable and others filed a suit seeking a declaration that the EFSB lacked jurisdiction since an appeal of the Commission's decision should have been in a trial or land court.⁸⁵

Cape Wind moved to dismiss the case for failure to state a claim upon which relief can be granted.⁸⁶ It claimed that since the Town has not exhausted all of its other possible remedies—because the EFSB has not yet issued the certificate—it does not have the option to sue.⁸⁷ The Court agreed with Cape Wind that the Town of Barnstable did not have the right to seek this judgment yet, and dismissed the case on May 4, 2009.⁸⁸ Plaintiffs appealed the case, and on September 17, 2009, the Massachusetts Appeals Court affirmed the decision that the Plaintiffs lacked a right to bring the suit when they did.⁸⁹ The decision noted that after oral argument in the case, the EFSB approved the connection of the transmission lines, thus making the issue ripe.⁹⁰ The EFSB had a yearlong evidentiary period with trial-like hearings,

⁸³ *See id.* (explaining that Cape Wind sought review from the EFSB). Per the statute creating the Cape Cod Commission, appeals should be taken to the Barnstable Superior Court or to Land Court. *See id.*

⁸⁴ *See id.* (articulating the scope of the certificate). “A Certificate is ‘a composite of all individual permits, approvals or authorizations which would otherwise be necessary for the construction and operation of the facility.’” *Id.*

⁸⁵ *See id.* at *1 (claiming that the EFSB did not have authority to review the Commission's denial).

⁸⁶ *See id.* (acknowledging the Town's filing of a 12(b)(6) motion). Cape Wind and the EFSB claim that since the certificate decision is still pending, all administrative procedures have not been exhausted. *See id.* at *4.

⁸⁷ *See id.* at *1 (contending that no relief can be granted by this court).

⁸⁸ *See Town of Barnstable*, 2009 WL 1449032, at *1 (ordering the dismissal of the appealed case).

⁸⁹ *See Town of Barnstable v. Cape Wind Assocs., LLC*, No. 08-P-1879, 2009 WL 2959547, at *1 (Mass. App. Ct. Sept. 17, 2009) (affirming the Superior Court's dismissal of the case).

⁹⁰ *See id.* at *2 n.2 (explaining that since there is now a final decision, the decision is reviewable).

and Massachusetts Energy Undersecretary Berwick explained that “this proceeding has developed an unparalleled evidentiary record, and the Siting Board has made an authoritative ruling based upon that record.”⁹¹ With a final decision for Cape Wind, the Plaintiffs appealed the EFSB’s approval of the certificate.⁹² The Massachusetts Supreme Court heard the EFSB appeal and affirmed the decision on September 30, 2010, completing permitting for the electrical lines.⁹³

In early December 2009, National Grid signed a long-term contract with Cape Wind to purchase the energy it produces.⁹⁴ Initially thought as a good sign for Cape Wind, the contract has created even more controversy.⁹⁵ Under the contract, National Grid will purchase half of the power produced by the turbines.⁹⁶ The initial rate for the electricity was set at 20.7 cents per kilowatt-hour.⁹⁷ Massachusetts, Attorney General Martha Coakley

⁹¹ See Mass. Siting Board Press Release, *supra* note 52 (announcing the findings of the Siting Board).

⁹² See Brief of Intervenor-Appellee Clean Power Now, Inc. at 1, *Alliance to Protect Nantucket Sound v. Mass. Energy Facilities Siting Bd.*, 932 N.E.2d 787 (D. Mass. 2010) (No. SJ-2009-0326) (appealing the dismissal of the case).

⁹³ See *Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd.*, 932 N.E.2d 787, 791 (D. Mass. 2010) (affirming the decision of the Board, and concluding “that the challenged regulation is valid”).

⁹⁴ See Erin Ailworth, *Utility Bets on Offshore Turbine*, BOSTON GLOBE, Dec. 3, 2009, archived at <http://www.webcitation.org/5tnjEVn4C> (opining that signing the contract with National Grid was a big step for the project’s recognition).

⁹⁵ See Beth Daley, *Cape Wind Backers Blew Right by Cost*, BOSTON GLOBE, Oct. 10, 2010, archived at <http://www.webcitation.org/5tpD6CKCX> (explaining that the energy produced will cost twice the amount of traditional energy sources).

⁹⁶ See Evan Lehmann & Christa Marshall, *Cape Wind Proposal Faces a Renewed Political Storm*, NY TIMES, Sept. 10, 2010, archived at <http://www.webcitation.org/5tnjpejb5> (noting the price at which National Grid will purchase energy from Cape Wind should the contract be approved by state regulators).

⁹⁷ See Tamar Wilner, *Cape Wind PPA Slashed by 10% in Attorney General Deal*, WIND POWER MONTHLY, Aug. 2, 2010, archived at <http://www.webcitation.org/5tpDXUtsb> (announcing the price of the contract between Cape Wind Associates and National Grid).

believed the price was too high and negotiated a settlement.⁹⁸ In return for her recommendation to the Department of Public Works that it approve the Power Purchase Agreement, the price was reduced to 18.7 cents per kilowatt-hour with an annual price increase of 3.5 percent.⁹⁹ Proponents contend that the new cost will only increase current electricity rates by approximately \$1.25 a month.¹⁰⁰ Opponents argue that this electricity is nearly double the cost of traditional fossil fuels.¹⁰¹ Wal-Mart, along with other companies, has filed complaints that the price is too high and would hurt business.¹⁰² TransCanada attempted to stop the approval, arguing that the bidding process was deeply flawed.¹⁰³ The contract was reviewed and approved by the Massachusetts Department of Public Utilities.¹⁰⁴ After ten years of zoning and permitting, Cape Wind's future is still uncertain, scaring off potential developers from this green energy source.¹⁰⁵

⁹⁸ See *id.* (explaining the agreement with the Massachusetts Attorney General).

⁹⁹ See Lehman & Marshall, *supra* note 96 (noting the cost to ratepayers as a result of the new contract between Cape Wind and National Grid).

¹⁰⁰ See Lehmann & Marshall, *supra* note 96 (offering a low-cost prediction to help garner support for the contract).

¹⁰¹ See Lehmann & Marshall, *supra* note 96 (comparing opponents' arguments that the contract price is too steep).

¹⁰² See Erin Ailworth, *Wal-Mart Challenges Cape Wind's High Prices*, BOSTON GLOBE, June 17, 2010, archived at <http://www.webcitation.org/5tnjchU> (explaining Walmart's contention that high prices will hurt retailers).

¹⁰³ See Wilner, *supra* note 97 (noting TransCanada's opposition to the contract). TransCanada "filed a similar motion" regarding the Rhode Island proposed Block Island offshore wind farm. See *id.*

¹⁰⁴ See Press Release, Cape Wind, Massachusetts Approves Cape Wind/National Grid Power Purchase Agreement (Nov. 22, 2010), archived at <http://www.webcitation.org/5wWGeUpfX> [hereinafter Cape Wind Power Purchase Agreement] (approving the Cape Wind power purchase contract); Wilner, *supra* note 97 (explaining the need for Department of Public Works Approval).

¹⁰⁵ See Christa Marshall, *Despite Lease Approval, Future of Cape Wind Remains Up in the Air*, NY TIMES, Oct. 11, 2010, archived at <http://www.webcitation.org/622K8kyaS> (explaining the uncertainty of Cape Wind's future).

II. Facts

Siting and permitting land-based wind farms have met with far less resistance.¹⁰⁶ In many states, the local zoning boards are still the primary siting authority for renewable energy such as wind farms.¹⁰⁷ Several states have “developed voluntary guidelines or model ordinances for use by local governments.”¹⁰⁸ For example, Wisconsin, Montana, and Kansas use these models, and by 2007 had 364 megawatts (MW) of wind energy.¹⁰⁹ In other states, siting is based on size “with a state agency charged with siting larger scale wind energy facilities, and local zoning authorities charged with siting smaller scale projects.”¹¹⁰ Finally, Connecticut and Oregon have established siting boards authorized by state legislation to regulate all wind energy.¹¹¹ Massachusetts published a model bylaw for Massachusetts cities and towns to regulate the local permitting prior to review by the regional siting boards.¹¹² None of these permitting options are per-

¹⁰⁶ See Kaplan, *supra* note 14, at 177 (stating the global popularity of land-based wind farms).

¹⁰⁷ See Patricia E. Salkin & Ashira Pelman Ostrow, *Cooperative Federalism and Wind: A New Framework for Achieving Sustainability*, 37 HOFSTRA L. REV. 1049, 1065 (2009) (summarizing-land based permitting statutes).

¹⁰⁸ *Id.* at 1066.

¹⁰⁹ See *Energy Efficiency and Renewable Energy*, U.S. DEP'T OF ENERGY, Apr. 23, 2008, archived at <http://www.webcitation.org/625N4x98H> (providing a breakdown of each state's wind energy capacity); Nat'l Wind Coordination Committee, *State Siting and Permitting of Wind Energy Facilities*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Apr. 2006), archived at <http://www.webcitation.org/622N5Y4Kh> [hereinafter *State Siting and Permitting*] (recording the megawatt hour capacity of each state from wind turbines).

¹¹⁰ Salkin & Ostrow, *supra* note 107, at 1066.

¹¹¹ See *State Siting and Permitting*, *supra* note 109 (explaining the use of regional siting boards to zone wind energy).

¹¹² See Massachusetts, Model As-of-Right Zoning Ordinance or Bylaw: Allowing Use of Wind Energy Facilities (Mar., 2009), archived at <http://www.webcitation.org/5uREo6Zwa> [hereinafter Model Bylaw] (modeling zoning regulations for cities and towns to adopt).

fect, but they provide examples of different approaches to offshore wind siting.¹¹³

In 2009, the Massachusetts Executive Office of Energy and Environmental Affairs released the Massachusetts Ocean Management Plan, which essentially zones their territory in the Atlantic Ocean.¹¹⁴ The ultimate goal was to balance the “natural, social, cultural, historic, and economic” interests in the water while considering the biodiversity and need for renewable energy.¹¹⁵ The plan divides the ocean into three Management Areas: Prohibited Area, Renewable Energy Area, and Multi-Use Area.¹¹⁶ The Renewable Energy Area is the only place where commercial wind energy can be developed.¹¹⁷ In the Multi-Use Area, facilities such as cables and pipelines needed to connect renewable energy to the shore are allowed as well as community wind farms.¹¹⁸

The Ocean Sanctuaries Act allows renewable energy on an appropriate scale.¹¹⁹ There are seven factors outlined in the plan to make the determination that the project is on an appropriate scale, but more factors than those were used in designating wind

¹¹³ See Salkin & Ostrow, *supra* note 107, at 1066 (describing local zoning regulations for wind farms). See also Model Bylaw, *supra* note 112, at 1.0 (stating that the Massachusetts model ordinance was created for preliminary review of wind energy); *State Siting and Permitting*, *supra* note 109 (outlining approaches taken by different states for wind power regulation).

¹¹⁴ See EXEC. OFFICE OF ENERGY AND ENVTL. AFFAIRS OF THE COMMONWEALTH OF MA, MA OCEAN MANAGEMENT PLAN (2009) [hereinafter OCEAN MANAGEMENT PLAN] (releasing the plan per the Ocean Act of 2008).

¹¹⁵ See *id.* at 1-1 (outlining what the Oceans Act of 2008 is proposing to the Massachusetts Ocean Management Plan).

¹¹⁶ See *id.* at 2-1 (outlining the divisions of Massachusetts territories according to the Plan).

¹¹⁷ See *id.* at 2-1 (noting the limited space for commercial wind projects).

¹¹⁸ See *id.* at 2-3 (consolidating many uses into one zone to use space as efficiently as possible).

¹¹⁹ See *id.* at 1-4 (explaining the goals of the Plan as derived from the Ocean Sanctuaries Act, one being renewable energy).

areas.¹²⁰ The plan discusses protection of the public trust, public safety, compatibility with existing uses, proximity to the shoreline, environmental protection, appropriateness of technology and scale, and the community benefit.¹²¹ For any wind or tidal project within the Multi-Use Area to meet the community benefit requirement, “the project will be required to demonstrate that the host community or communities formally support the project,” and it will provide a direct benefit to them.¹²² Within the Renewable Areas, there are two areas designated for wind based on “the presence of a suitable wind resource and water depth, and the absence of conflict with other uses or sensitive resources”¹²³ These areas cover two percent of the planning area, but may be constrained more by siting requirements.¹²⁴ The Plan allows for 266 wind turbines, and is the most comprehensive ocean management plan in the country.¹²⁵ The majority of states do not take such a proactive role, and instead address issues like this on a case-by-case basis.¹²⁶

¹²⁰ See OCEAN MANAGEMENT PLAN, *supra* note 114, at 2-4-12 (outlining seven factors in determining if a project is an appropriate scale).

¹²¹ See OCEAN MANAGEMENT PLAN, *supra* note 114, at 2-12 (discussing the factors used to evaluate whether the plan is appropriate).

¹²² See OCEAN MANAGEMENT PLAN, *supra* note 114, at 2-15 (outlining requirements meant to streamline integration of the project into local communities).

¹²³ See OCEAN MANAGEMENT PLAN, *supra* note 114, at 2-1 (addressing the purpose of the two Wind Energy Areas).

¹²⁴ See OCEAN MANAGEMENT PLAN, *supra* note 114, at 2-2 (discussing the constraints on the site capacity due to other factors).

¹²⁵ See *Massachusetts First with Ocean Management Plan for State Waters*, ENVTL. NEW SERV., Jan. 6, 2009, archived at <http://www.webcitation.org/5uRKLXWsz> [hereinafter *Mass. First with Plan*] (explaining the scope and magnitude of the Ocean Management Plan).

¹²⁶ See Env'tl. L. Inst., *Virginia Offshore Energy Development Law and Policy Review and Recommendations*, 2008 ENVTL. L. INST. 1, 31, archived at <http://www.webcitation.org/62Nf5Qlls> [hereinafter *Virginia Offshore Energy Development*] (addressing the various approaches specific states take regarding coastal management); *Ocean Special Area Management Plan Draft*, R.I. COASTAL RES. MGMT. COUNCIL, Sept. 30, 2011, archived at <http://www.webcitation.org/62AGydYqZ>.

To consolidate wind siting, Massachusetts legislators proposed the Wind Energy Siting Reform Act (“the Act”)¹²⁷ in January 2010.¹²⁸ The Senate passed it, and the House version failed;¹²⁹ however, it is currently being reintroduced for the 2011-2012 session.¹³⁰ Massachusetts commissioned a wind energy study under the Green Communities Act, which determined the current perception of Massachusetts law.¹³¹ The study determined that “(1) wind energy developers want clear siting standards; (2) Massachusetts currently has a system that requires multiple permits from multiple entities with little opportunity to appeal; and (3) Massachusetts only has ‘one-stop’ permitting for facilities larger than 100 MW.”¹³² As a result, permitting is currently a lengthy and expensive project.¹³³

Proponents of the Act argue that it addresses all of these issues facing land-based wind in one of five ways.¹³⁴ First, it re-

[hereinafter *SAMP*] (explaining how the plan will lead to more renewable energy); Press Release, Council on Environmental Quality, The Interagency Ocean Policy Task Force (July 19, 2010), *archived at* <http://www.webcitation.org/5wEAihog0> (announcing the federal government’s goal of developing an ocean plan).

¹²⁷ See S. 2260, 186th Gen. Assem. § 9 (Ma. 2010) [hereinafter MA Wind Siting Reform Act] (attempting to consolidate and clarify wind energy siting in Massachusetts).

¹²⁸ See Tad Ames, *Wind Site Bill Misses the Point of Conservation*, BOSTON GLOBE, Jan. 20, 2010, *archived at* <http://www.webcitation.org/62D1x6aHR> (critiquing the Act for its contradictions with environmental policy).

¹²⁹ See Ben Storrow, *Kulik: Wind Siting Bill Dies in House*, DAILY HAMPSHIRE GAZETTE, Aug. 5, 2010, *archived at* <http://www.webcitation.org/5tnXqozXM> (observing that opponents of the bill successfully delayed a formal vote on it).

¹³⁰ See H. 1775 187th Gen. Assem. (Ma. 2011) (presenting the current version of the MA Wind Siting Reform Act).

¹³¹ See New England Wind Forum, *A Wind Powering America Project*, U.S. DEP’T OF ENERGY, at 13, (Jan. 2010) [hereinafter *A Wind Powering America Project*], *archived at* <http://www.webcitation.org/5wiSaZHjf> (explaining that Massachusetts Senator Michael Morrissey filed the Wind Energy Siting Act in response to the Green Communities Act).

¹³² *Id.*

¹³³ See *id.* at 13-14 (describing the details of the permit process for wind farms).

¹³⁴ See Press Release, Exec. Office of Energy and Env’tl. Affairs, Massachusetts Wind Energy Siting Reform: Wind Energy Siting Reform Act - Senate Bill 2260,

quires the Siting Board to establish clear and predictable siting standards for wind facilities, which are as protective as existing state laws.¹³⁵ Second, it provides one-stop local and state permitting for projects over two megawatts.¹³⁶ In response to local concerns, if a municipality rejects the project it must be decided in court.¹³⁷ If anyone else opposes the project, they could appeal to the Siting Board.¹³⁸ Third, all Siting Board's decision are appealed directly to the Massachusetts Supreme Court.¹³⁹ Fourth, the Act will decrease permitting time from upwards of eight years to between nine and eighteen months, plus an additional year if there is a judicial appeal.¹⁴⁰ Finally, it requires a municipal representative to be on the board, and provides financial incentives to municipalities that approve wind energy projects.¹⁴¹

The New England Wind Forum reviewed the proposed legislation and concluded that the Act "gives 'as of right' permitting at the state level, and 'as of right' override of any local denial."¹⁴² Also the Forum contends that the Act would require municipalities in designated high wind areas to establish a wind energy permitting board consisting of conservation commission, planning and zoning board members.¹⁴³ The board would "receive comments from the public and other local boards," issue one permit for all local regulations, and have the ability to waive

(March 2011), *archived at* <http://www.webcitation.org/5wDxtB6Xk> [hereinafter MA Senate Bill 2260 Press Release] (outlining how the Bill will address the current wind development problems).

¹³⁵ *See id.* (outlining first advantage to new siting standards).

¹³⁶ *See id.* (explaining fundamental features of Senate Bill 2260).

¹³⁷ *See id.* (explaining that the siting board has no authority to override decisions).

¹³⁸ *See id.* (describing the next steps in the appeal process).

¹³⁹ *See id.* (establishing the final step available to appellees).

¹⁴⁰ *See* MA Senate Bill 2260 Press Release, *supra* note 134 (commenting on the expedition of the permitting time).

¹⁴¹ *See* MA Senate Bill 2260 Press Release, *supra* note 134 (addressing the last outlined benefit of the Act).

¹⁴² *A Wind Powering America Project*, *supra* note 131, at 13.

¹⁴³ *See A Wind Powering America Project*, *supra* note 131, at 13 (describing the requirement of a wind energy permitting board).

any local requirements.¹⁴⁴ Based on the assumption that the permit will be issued, any application that meets the siting standards will be automatically approved after 120 days if the board does not act.¹⁴⁵ The Act recognized some of the benefits for municipalities, which include the ability to impose an impact fee.¹⁴⁶ The Forum views the Act as positively minimizing the impact of local preemption.¹⁴⁷

Other political critics look at the Act less favorably than the New England Wind Forum.¹⁴⁸ The Boston Globe published an opinion-editorial harshly criticizing the Act.¹⁴⁹ Ames argued that the Act undermines Massachusetts' long history of conservation and strict environmental regulation, does not address the central question of "what constitutes an appropriate site?," and should list specific factors that can be considered, which should be excluded, and which are more important than others.¹⁵⁰ Without mandating these considerations, there is a fear that boards will approve projects that have significant effects in areas that were not evaluated.¹⁵¹ Only compounding this fear is the fact that the Act would allow the EFSB to waive or relax existing wind energy

¹⁴⁴ See *A Wind Powering America Project*, *supra* note 131, at 13 (detailing the functions of a wind energy permitting board).

¹⁴⁵ See *A Wind Powering America Project*, *supra* note 131, at 13 (articulating length of time of the approval process).

¹⁴⁶ See *A Wind Powering America Project*, *supra* note 131, at 13 (reviewing one of the benefits of the Act).

¹⁴⁷ See *A Wind Powering America Project*, *supra* note 131, at 13 (describing that the EFSB is the sole method of review).

¹⁴⁸ See Ames, *supra* note 128 (addressing the criticisms of the Act).

¹⁴⁹ See Ames, *supra* note 128 (arguing that the Act "assaults the integrity of the Commonwealth's environmental regulations and conservation legacy.").

¹⁵⁰ See Ames, *supra* note 128 (delineating problems with the Act).

¹⁵¹ See Ames, *supra* note 128 (cautioning against over-aggressive boards not reviewing carefully enough).

standards.¹⁵² The most common critique was that the Act cut out municipalities' voice in the process.¹⁵³

Permitting offshore wind farms is becoming a more pressing issue as both federal and state agencies are taking steps toward installing turbines.¹⁵⁴ The federal government per the Outer Continental Shelf Lands Act of 1953 has jurisdiction extended to anything beyond the three-mile line and to anything affixed to the seabed no matter its location.¹⁵⁵ In 2009, the Department of the Interior released a final rule on leasing offshore land to be used for renewable energy.¹⁵⁶ The rules aim to "ensure the orderly, safe, and environmentally responsible development of renewable energy sources on the OCS."¹⁵⁷ In late 2010, Secretary Salazar announced a new permitting process to promote efficiency in siting, leasing, and construction of new offshore energy

¹⁵² See Ames, *supra* note 128 (admonishing the Act for reducing environmental standards in the name of green energy).

¹⁵³ See Gabrielle Gurley, *Siting Reform Bill a Wind Breaker*, COMMONWEALTH MAGAZINE, Aug. 6, 2010, archived at <http://www.webcitation.org/5wDyerU7r> (explaining opponents' concern for the loss of "home rule traditions").

¹⁵⁴ See *In Clean Tech, Governor Has Led, But More Needs to Be Done*, BOSTON GLOBE, Jan. 4, 2011, archived at <http://www.webcitation.org/5wDwcZaP1> [hereinafter *Clean Tech*] (announcing Massachusetts' goal of being a frontrunner in wind energy).

¹⁵⁵ See Outer Continental Shelf Act, 43 U.S.C. §1337(g)(2) (2011) (establishing federal jurisdiction over oceans).

¹⁵⁶ See Renewable Energy and Alternate Uses of Existing Facilities on the Outer Continental Shelf, 30 C.F.R. §§ 250, 285, 290 (2009) (finalizing rule on leasing offshore land); Press Release, Bureau of Ocean Energy Mgmt., Regulation and Enforcement, BOEMRE to Undertake Conventional Rulemaking Process for Offshore Renewable Energy Rule (Jan. 24, 2011), archived at <http://www.webcitation.org/5wEE7yKYm> [hereinafter BOEMRE Rulemaking] (announcing a newly proposed rule to simplify offshore leasing by reducing repetitive public comment waiting periods in noncompetitive leases).

¹⁵⁷ See Renewable Energy and Alternate Uses of Existing Facilities on the Outer Continental Shelf, 74 Fed. Reg. 19,638 (Apr. 29, 2009) (establishing a procedure for leasing so that it will be done efficiently and in compliance with existing laws).

projects.¹⁵⁸ Additionally, the Department of the Interior and the Department of Energy signed a Memorandum of Understanding in June 2010.¹⁵⁹ The goal of the Memorandum is to expedite the development of wind and tidal energy projects on the outer continental shelf in accordance with national policy.¹⁶⁰ States are also working together to develop offshore wind energy.¹⁶¹ Rhode Island and Massachusetts recognized they both have an interest in promoting offshore wind off of their mutual coasts.¹⁶² The plan covers 400 square miles of ocean that each state intends to develop using Rhode Island's ocean zoning plan.¹⁶³ The growing

¹⁵⁸ See Press Release, U.S. Dep't of the Interior, Salazar Launches 'Smart from the Start' Initiative to Speed Offshore Wind Energy Development off the Atlantic Coast (Nov. 23, 2010), *archived at* <http://www.webcitation.org/5wECSF7n0> [hereinafter 'Smart from the Start' Press Release] (announcing the new permitting process); *Salazar Wants Quicker Wind-Power Permitting*, BOSTON GLOBE, Nov. 24, 2010, *archived at* <http://www.webcitation.org/5wEBqbDaV> [hereinafter *Salazar Wants Quicker Permitting*] (describing Salazar's "smart permitting process" proposal).

¹⁵⁹ See *Memorandum of Understanding Between the United States Department of Interior Bureau of Ocean Energy Management, Regulation, and Enforcement and the United States Department of Energy Office of Energy Efficiency and Renewable Energy for the Coordinated Deployment of Offshore Wind and Marine and Hydrokinetic Energy Technologies on the United States Outer Continental Shelf 1*, Oct. 12, 2011, *archived at* <http://www.webcitation.org/62Nh5Z9CO> [hereinafter *DOI & DOE Memo*] (establishing a working relationship between the two agencies with regard to offshore energy).

¹⁶⁰ See *id.* at 1 (aiming to "prioritize and facilitate environmentally-responsible deployment of commercial-scale offshore wind and marine and hydrokinetic" energy together).

¹⁶¹ See *Memorandum of Understanding between the State of Rhode Island and the Commonwealth of Massachusetts*, 2, Feb. 15, 2011, *archived at* <http://www.webcitation.org/5wWbpJuBd> [hereinafter *RI & MA Memo*] (outlining the development plan between Massachusetts and Rhode Island).

¹⁶² See *id.* at 1 (agreeing to jointly explore federal waters by both states for offshore development purposes).

¹⁶³ See Beth Daley, *Mass., Rhode Island to Jointly Explore Wind Farms in Federal Waters*, BOSTON GLOBE, July, 26, 2010, *archived at* <http://www.webcitation.org/5uRDzFWsp> (dissecting the purpose of the partnership between Massachusetts and Rhode Island); Alex Kuffner, *R.I., Mass. to Work Together on Offshore Wind Power*, PROVIDENCE JOURNAL, July 27, 2010,

trend toward offshore wind necessitates a concise and clear plan for its development.¹⁶⁴

The federal government's policy and opinion of offshore wind is still very unclear.¹⁶⁵ Congress has yet to offer a clear viewpoint from more than a handful of members.¹⁶⁶ By contrast, many government agencies have policies concerning siting wind energy, which are all conflicting and non-unified.¹⁶⁷ The White House is the only unambiguous government unit; President Obama believes it is an important component of making America competitive globally, but has yet to clearly outline a plan and implement it.¹⁶⁸ Until there is a clear policy and plan established, these inconsistencies will deter potential developers.¹⁶⁹

archived at <http://www.webcitation.org/5uRE5R2qa> (illustrating the "area of mutual interest" in which the two states will work together).

¹⁶⁴ See Kuffner, *supra* note 163 (discussing how Rhode Island and Massachusetts are addressing the need for a concise plan).

¹⁶⁵ See, e.g., Energy Efficiency and Renewable Energy Wind and Hydropower Technologies Program – Federal Wind Siting Information Center, *Wind Siting Policies and Regulations*, U.S. DEP'T OF ENERGY, Aug. 19, 2008, *archived at* <http://www.webcitation.org/5wE7e6v90> [hereinafter *Wind Siting Policies*] (showing only one federal regulation on point thus far).

¹⁶⁶ See *id.* (listing the agency's individual policies for siting wind energy projects).

¹⁶⁷ See *id.* (delineating the government agencies with policies on wind siting).

¹⁶⁸ See CNN Wire Staff, *Obama Touts Clean Energy a Day After State of the Union Speech*, CNNPOLITICS, Jan. 26, 2011, *archived at* <http://www.webcitation.org/5wE8WXlyB> [hereinafter *Obama Touts*] (articulating that clean energy is necessary for America to compete globally).

¹⁶⁹ See Merrill Jones Barradale, *Impact of Policy Uncertainty on Renewable Energy Investment: Wind Power and PTC*, 12, Oct. 7, 2011, *archived at* <http://www.webcitation.org/62G6ei9BQ> (discussing the disparaging effects of policy instability on wind energy investment).

III. Analysis

A. Land vs. Offshore Permitting

As described above, land-based wind farms have achieved far greater success than offshore projects.¹⁷⁰ This is because there are increased complications and issues that developers face when they move offshore.¹⁷¹ States generally only have authority over the first three miles of ocean off their coast, so the federal government can be involved.¹⁷² States have developed land-based zoning ordinances; Massachusetts has created a model ordinance for towns and cities to personalize, which gives suggestions for the most common problems.¹⁷³ Once in the ocean, the federal government has jurisdiction over the project and the state has jurisdiction over the transmission lines and the energy produced.¹⁷⁴ Additionally, there is no clear policy or strategy for offshore wind developed by the federal government.¹⁷⁵

B. Ocean Plans and Their Role in Permitting

Massachusetts is the first state in the nation to develop a comprehensive zoning plan of the ocean under its control.¹⁷⁶ The Management Plan takes a few different steps in dealing with off-

¹⁷⁰ See Kaplan, *supra* note 14, at 180 (noting that in 2003, America's land-based wind power was rated second in the world for total capacity).

¹⁷¹ See Kaplan, *supra* note 14, at 196 (explaining that states and the federal government could not keep up with wind technology developments).

¹⁷² See 43 U.S.C. §1337(g)(2) (codifying rule that first three miles from the shore are under state jurisdiction and the federal government has jurisdiction over everything further out).

¹⁷³ See Model Bylaw, *supra* note 112 (modeling zoning regulations with suggestions for land-based wind siting).

¹⁷⁴ See Ziza, *supra* note 1, at 607-08 (asserting that the Energy Policy Act of 2005 gives jurisdiction to the Department of the Interior).

¹⁷⁵ See Kaplan, *supra* note 14, at 196 (describing failed attempts at a coordinated "federal ocean policy").

¹⁷⁶ See *Mass. First with Plan*, *supra* note 125 (highlighting the importance of the nation's first ocean management plan).

shore wind.¹⁷⁷ The first step was to designate certain areas explicitly for wind within the Renewable Areas.¹⁷⁸ There are two such areas based on “the presence of a suitable wind resource and water depth, and the absence of conflict with other uses or sensitive resources.”¹⁷⁹ Additionally, there are three provisional sites for commercial wind, one of which is located in federal waters, that “passed the exclusionary screening process but appear to have potentially more significant technical limitations, cumulative impacts, and/or less suitability for wind energy.”¹⁸⁰ More research would need to be done on those sites to determine feasibility before commercial projects could be permitted.¹⁸¹ This first step does set out commercial areas, but projects still need to overcome extensive permitting and work with local, regional, state, and federal agencies.¹⁸²

The second step in the Plan was to consider the role of community wind projects.¹⁸³ Community wind projects are allowed in both the Renewable Energy Wind Areas and the Multi-

¹⁷⁷ See OCEAN MANAGEMENT PLAN, *supra* note 114, at 2-1-3, 2-12-13 (designating commercial wind areas, community wind projects, and setting permitting factors).

¹⁷⁸ See OCEAN MANAGEMENT PLAN, *supra* note 114, at 2-1-2 (designating areas for wind and tidal energy developments).

¹⁷⁹ See OCEAN MANAGEMENT PLAN, *supra* note 114, at 2-1 (describing the Renewable Areas and their function). One zone is subject to MEPA, but “shall be permitted in this area subject to reasonable conditions developed in consultation with local officials.” *Id.* at 2-2. The other zone’s scale will be determined by the Martha’s Vineyard Commission subject to the review of the regional planning authority. *See id.*

¹⁸⁰ See OCEAN MANAGEMENT PLAN, *supra* note 114, at 2-2 (evaluating potential sites and reasons why they were not designated renewable areas).

¹⁸¹ See OCEAN MANAGEMENT PLAN, *supra* note 114, at 2-2 (noting that Massachusetts has stopped research on these sites but has not limited other research).

¹⁸² See OCEAN MANAGEMENT PLAN, *supra* note 114, at 2-2 (detailing the extensive permitting process and its effects on commercial projects).

¹⁸³ See OCEAN MANAGEMENT PLAN, *supra* note 114, at 2-13 (determining the siting and performance standard for community-scale wind projects).

use Areas.¹⁸⁴ All wind projects are subject to mandatory review of its Environmental Impact Report, plus the community in whose waters the turbines are located must “receive direct economic benefit.”¹⁸⁵ For community scale projects “the renewable energy benefits (e.g., energy, jobs) will stand for any royalty fees” to the town, whereas commercial projects must pay royalty fees to the town for a “percentage of total energy production.”¹⁸⁶ Community wind projects in Multi-Use Areas are presumptively excluded from Special, Sensitive, or Unique Marine and Estuarine Life and Habitat (SSU) areas.¹⁸⁷ To overcome that presumption there must be a determination of Least Environmentally Damaging Practicable Alternative, “rebuttable by determinations of LEDPA, no significant alteration or inaccurate data” and in non-SSU areas the standard is to “[a]void, minimize and mitigate impacts.”¹⁸⁸ The plan promotes Community wind projects by providing economic incentives and two zones for it, but still maintains strict requirements to ensure that the community and state have authority.¹⁸⁹

The third key step in offshore wind energy made by the Plan is deciding which factors to consider in determining the scale of the project.¹⁹⁰ The Plan discusses the seven criteria for appropriateness: protection of the public trust, public safety,

¹⁸⁴ See OCEAN MANAGEMENT PLAN, *supra* note 114, at 2-1, 2-3 (allowing community-scale wind energy in renewable and multi-use areas).

¹⁸⁵ See OCEAN MANAGEMENT PLAN, *supra* note 114, at 2-15 (delineating the review process and requirements for community-scale wind projects).

¹⁸⁶ See OCEAN MANAGEMENT PLAN, *supra* note 114, at 3-6 (establishing royalty fees and an exception for community-scale wind projects).

¹⁸⁷ See OCEAN MANAGEMENT PLAN, *supra* note 114, at 2-13 (designating high siting standards for community-scale wind projects in SSU areas).

¹⁸⁸ See OCEAN MANAGEMENT PLAN, *supra* note 114, at 2-13 (setting requirements to overcome presumptions).

¹⁸⁹ See OCEAN MANAGEMENT PLAN, *supra* note 114, at 2-1, 3-6 (explaining the economic components of community wind projects).

¹⁹⁰ See OCEAN MANAGEMENT PLAN, *supra* note 114, at 2-11 (explaining that the Oceans Act allows renewable energy “of appropriate scale,” and attempting to define what “appropriate scale” means).

compatibility with existing uses, proximity to the shoreline, environmental protection, community benefit, and appropriateness of technology and scale.¹⁹¹ Exclusionary factors include a one-mile buffer from the shoreline, high concentrations of marine avifauna and whales, water-dependent marine uses and regulated air space.¹⁹² Additionally, Appendix Three maps out other factors that led to the final areas being chosen.¹⁹³ These criteria will be important for future developers in Massachusetts to consider when to select a location and complete an Environmental Impact Report, as well as for other states to use in developing their own plan.¹⁹⁴

Texas attempted to complete a similar plan in 2003 called "Plan for Sustainable Energy," which called for an increase in the production of renewable energy, especially wind.¹⁹⁵ Texas has jurisdiction over water 10.6 miles into the ocean, as opposed to the three-mile barrier that most states have, which means more wind farms can be developed without federal involvement.¹⁹⁶ The plan does not provide a consolidated review process, and many state agencies are still involved in permitting.¹⁹⁷ Virginia

¹⁹¹ See OCEAN MANAGEMENT PLAN, *supra* note 114, at 2-12 (outlining factors and noting how they are addressed in the plan).

¹⁹² See OCEAN MANAGEMENT PLAN, *supra* note 114, at app. 3-1 (excluding certain areas for renewable energy based on these initial factors). Other factors considered include: Coast Guard-designated navigation areas, eelgrass and intertidal flats, ferry routes, areas of significant commercial fishing effort and value, and direct transit navigation routes for shipping and fishing. See *id.*

¹⁹³ See OCEAN MANAGEMENT PLAN, *supra* note 114, at app. 3-1-21 (mapping certain factors which were considered in designating renewable energy areas).

¹⁹⁴ See OCEAN MANAGEMENT PLAN, *supra* note 114 at 3-2 (describing how the criteria concerning potential environmental impact are used to determine the necessity of an EIR).

¹⁹⁵ See *Virginia Offshore Energy Development*, *supra* note 126, at 60 (summarizing Texas's plan for its coastal waters).

¹⁹⁶ See *Virginia Offshore Energy Development*, *supra* note 126, at 61 (noting the variance in the typical Outer Continental Shelf Act as it applies to Texas).

¹⁹⁷ See *Virginia Offshore Energy Development*, *supra* note 126, at 61-62 (outlining the state agencies with jurisdiction over offshore wind projects located within Texas's jurisdiction).

funded a review of its offshore energy potential, which generated a report with recommendations for the future.¹⁹⁸ Rhode Island is currently developing their own plan called the Ocean Special Area Management Plan (the Ocean SAMP), which will consider federal waters as well as states ones.¹⁹⁹

The feasibility of ocean plans depends on many factors, the first of which involves finding a way to unify the current piece-meal system across the states.²⁰⁰ A possible solution is the national ocean plan currently under development.²⁰¹ A federal plan would only cover federal waters, so it would be necessary for Congress to require all states by the ocean to create their own plans.²⁰² In order for the plans to provide the consolidated, efficient system developers and permitting bodies are looking for Congress would need to set certain guidelines for the states to follow in their plans.²⁰³ A good place to start would be using Massachusetts and Rhode Island as case studies to determine what could work on a larger scale.²⁰⁴ Finally, a national compre-

¹⁹⁸ See, e.g., *Virginia Offshore Energy Development*, *supra* note 126 (reporting on the potential for offshore energy in Virginia and the status of other states).

¹⁹⁹ See *SAMP*, *supra* note 126, at Executive Summary 1 (describing the goals of the Ocean SAMP). The Ocean SAMP requires the Coastal Resources Management Council to “uphold both its obligations to preserve, protect, develop, and where possible, restore the coastal resources of the state . . .” *Id.*

²⁰⁰ See Executive Office of the President, *supra* note 126 (discussing the need to strengthen ocean governance and coordination).

²⁰¹ See Executive Office of the President, *supra* note 126 (explaining the federal government’s goal of and plan for an ocean plan).

²⁰² See Josh Eagle et al., *Ocean Zoning and Spatial Access Privileges: Rewriting the Tragedy of the Regulated Ocean*, 17 N.Y.U. ENVTL. L.J. 646, 667 (2008) (observing that congressional action is necessary to answer jurisdictional questions and delegate ocean zoning authority).

²⁰³ See *id.* at 665 (noting that Congress would need to “lay out principles to guide those are drafting the initial plan.”). There are many factors that could be considered in siting, and Congress would need to prioritize those. See *id.*

²⁰⁴ See Jacqueline S. Rolleri, *Offshore Wind Energy in the United States: Regulations, Recommendations, and Rhode Island*, 15 ROGER WILLIAMS U. L. REV. 217, 239-45 (2010) (explaining that the Massachusetts and Rhode Island plans are good resources when developing a plan).

hensive ocean plan would be expensive and time-consuming to develop.²⁰⁵ Ocean plans may be helpful in the future but will not solve any of the current siting problems, and the plans themselves must overcome significant hurdles before federal-state plans align to regulate the industry.²⁰⁶

C. Suggestions for State and Federal Permitting Regulations and Process

i. State Level

Massachusetts legislators proposed the Wind Energy Siting Reform Act (“the Act”) in order to consolidate the wind energy permitting process.²⁰⁷ The bill failed,²⁰⁸ but is currently being reintroduced.²⁰⁹ The Act attempted to reduce excessive permitting times and costs for land based wind projects, which will be developed in Massachusetts.²¹⁰ The greatest opposition to Cape Wind and most wind projects is from the local towns and citizens.²¹¹ To overcome those obstacles the Act would require a

²⁰⁵ See Suzanne C. Breselor, *Renewable Energy Permitting on the Outer Continental Shelf: You Call This a Process: Present Considerations and Recommendations for More Precise Ocean Management*, 38 SUFFOLK U. L. REV. 193, 214-15 (2004) (noting that a project would take years, be a significant financial investment, and require heavy federal regulation). There is no “easy fix” for the problem, not even ocean zoning. *Id.* at 214.

²⁰⁶ See *id.* at 214 (citing current problems between federal and state interaction).

²⁰⁷ See MA Senate Bill 2260 Press Release, *supra* note 134 (attempting to consolidate and correct wind siting laws in an effort to promote its development).

²⁰⁸ See Storrow, *supra* note 129 (explaining the failure of the bill due to a delay of vote until midnight on the final day of the session).

²⁰⁹ See H.R. 1775 (noting the reintroduction of the MA Wind Siting Reform Act).

²¹⁰ See MA Senate Bill 2260 Press Release, *supra* note 134 (outlining main features of Act).

²¹¹ See *e.g.*, Justin Rice, *Opposition is Vocal at Salem’s First Winter Park Wind Turbine Forum*, BOSTON GLOBE, Aug. 3, 2011, archived at <http://www.webcitation.org/63FRDSR6i> (noting the opposition of town residents at an open town hall meeting); Michael Marciano, *Colebrook Residents*

municipal representative to be on the Siting Board and other organizations could appeal the Board's decision to the state Supreme Court.²¹² Yet, if that town rejects the project, the issue will be decided in court in the same lengthy, expensive manner it currently is.²¹³ The Act only applied to land-based wind farms but provides a good framework for legislation regarding future offshore turbines.²¹⁴

The Act's goal is to consolidate permitting, but because of lack of clarity, limits, and too much local control, it fails to achieve that purpose.²¹⁵ The Act claims that it will provide one-stop local and state permitting for projects over two MW, but there are caveats.²¹⁶ Only projects larger than two MW are entirely eligible for this fast track permitting, which means smaller projects must still comply with existing laws.²¹⁷ Also if a town denies a permit because the project does not meet the standards, or a regional planning agency denies a permit based on comprehensive wind energy-siting standards that have been approved by the Department of Energy Resources, the EFSB cannot overrule them and grant the permit.²¹⁸ The permitting Act specifically addresses permitting "turbines, foundations, and ancillary facilities such as roadways, transmission or distribution lines, substations, and

Voice Opposition to Wind Turbines, WINSTED JOURNAL, Mar. 25, 2011, archived at <http://www.webcitation.org/63FRs9HU4> (highlighting an instance of vocal town opposition at a hearing involving a wind turbine project).

²¹² See MA Senate Bill 2260 Press Release, *supra* note 134 (requiring local involvement in the problem to allay fears of towns being shut out of the process).

²¹³ See MA Senate Bill 2260 Press Release, *supra* note 135 (noting positive for local opponents of project and also short falls of Act).

²¹⁴ See S.R. 2660 (specifying that Senate Bill 2260 applies to land-based wind projects).

²¹⁵ See Gurley, *supra* note 153 (outlining the streamlining goal of the permitting process while showing the concerns of opponents).

²¹⁶ See Gurley, *supra* note 153 (explaining ways the "expedited permitting process" can be derailed).

²¹⁷ See MA Senate Bill 2260 Press Release, *supra* note 134 (explaining that small scale wind projects would still need to follow the regulatory scheme).

²¹⁸ See MA Senate Bill 2260 Press Release, *supra* note 134 (acknowledging the limited power of the EFSB under the proposed plan).

any other buildings, structures or equipment needed to generate and deliver electricity powered by wind.”²¹⁹ Cape Wind needed special permits for each item so the Act’s system will be more efficient, but it is unclear if research stations prior to development and underwater pipeline permits will be included, which would truly make it a comprehensive permit.²²⁰

The Act fails to address two key issues that Cape Wind faced: cost and leasing land.²²¹ The law should deal with the cost of the energy. Cape Wind opponents criticized it for being too expensive,²²² and the Department of Public Utilities had to review their purchase contract.²²³ Massachusetts Governor Patrick recently announced his goal of having the Massachusetts Clean Energy Center research, develop, and work with the industry to develop less expensive wind technology.²²⁴ He believes that new research along with the Act will decrease costs based on the fact that litigation and time exponentially increased the cost of Cape Wind.²²⁵ While decreasing the cost is important, there should be a quicker method of approving contracts proposed by the legislature.²²⁶ A second issue completely ignored by the Act is the process of leasing state land for wind projects.²²⁷ States need to

²¹⁹ S.R. 2660.

²²⁰ See *id.* (failing to address whether research stations and underwater pipeline permits will be included in consideration for permitting).

²²¹ See *id.* (failing to address the cost of energy and the procurement of land).

²²² See Lehmann & Marshall, *supra* note 96 (highlighting the opposition’s argument against Cape Wind’s energy prices).

²²³ See Cape Wind, Power Purchase Agreement, *supra* note 104 (announcing the approval of the energy purchase contract between Cape Wind and National Grid).

²²⁴ See *Clean Tech*, *supra* note 154 (explaining a plan to gain additional funding to help Massachusetts meet its ultimate goal of reducing the cost of offshore wind energy).

²²⁵ See *Clean Tech*, *supra* note 154 (announcing a possible solution to the high costs associated with Cape Wind).

²²⁶ See *Clean Tech*, *supra* note 154 (explaining the need for a quicker approval process).

²²⁷ See S.R. 2660 (lacking language that deals with leasing state land). See also *Salazar Wants Quicker Permitting*, *supra* note 158 (presenting a state initiative

address how developers can lease their lands on the continental shelf so the process is clarified and simplified in the future.²²⁸

A reason that offshore wind is more complicated is the addition of even more government agencies.²²⁹ Not only are the state and federal governments reviewing the project, but other neighboring states may be forced to deal with the impacts of such a project.²³⁰ Rhode Island and Massachusetts recently signed a Memorandum of Understanding explaining their joint commitment to collaboration in developing offshore wind.²³¹ The agreement provides that Rhode Island's Ocean SAMP will guide all development in the designated "area of mutual interest."²³² Massachusetts will be considered a stakeholder, and community outreach programs in the state are required for development.²³³ The agreement explains the arbitration process for dispute resolution and appoints representatives from each state to handle the environmental review process.²³⁴ Each state will only support a project that the other does when the Department of the Interior permits the project.²³⁵ Although the agreement does not provide specifics about coordination plans, it is a good first step, and pro-

that does address the facilitation of siting, leasing, and constructing new wind projects).

²²⁸ See *Salazar Wants Quicker Permitting*, *supra* note 158 (discussing the need for federal and state officials to work together to regulate leases).

²²⁹ See *RI & MA Memo*, *supra* note 161, at 2 (establishing a procedure for dealing with multiple governments).

²³⁰ See *Kuffner*, *supra* note 163 (observing that both Massachusetts and Rhode Island have interests in the same offshore area).

²³¹ See *RI & MA Memo*, *supra* note 161 (agreeing to work together). See also *Kuffner*, *supra* note 163 (explaining the coordinated development process by Rhode Island and Massachusetts).

²³² See *RI & MA Memo*, *supra* note 161, at 2 (establishing SAMP as the governing document for development).

²³³ See *RI & MA Memo*, *supra* note 161, at 3 (outlining the role Massachusetts will play and the plan to involve local citizens).

²³⁴ See *RI & MA Memo*, *supra* note 161, at 4 (planning how future disagreements will be handled and through whom coordination will run).

²³⁵ See *Kuffner*, *supra* note 163 (noting the specific requirements of the mutual agreement between Massachusetts and Rhode Island).

vides a procedure to handle any future disagreements so the area can be efficiently developed.²³⁶

ii. Federal Level

The first issue with the current federal regulatory scheme is the lack of uniformity and clarity of procedure and policy across the government branches and agencies.²³⁷ According to the Department of Energy, there are at least six other government organizations with policies on wind siting.²³⁸ The Department of the Interior, the Environmental Protection Agency, and the United States Army Corps of Engineers are the key players involved in the process.²³⁹ The sheer amount of agencies with an opinion and regulatory authority over offshore wind creates a complicated problem.²⁴⁰

In addition to the agencies and departments, other federal opinions have a significant impact on wind energy development.²⁴¹ President Obama, in his 2011 State of the Union ad-

²³⁶ See Kuffner, *supra* note 163 (describing the role of the Memorandum to prevent future conflict).

²³⁷ See *Wind Siting Policies*, *supra* note 165 (describing that there are six governmental agencies with different wind siting policies).

²³⁸ See *Wind Siting Policies*, *supra* note 165 (delineating the government agencies with policies on wind siting). The Bureau of Land Management explains how to implement the Record of Decision on the EIS of wind projects. *Id.* The Department of Defense has policy statements concerning wind farms and their affect national security. *Id.* The U.S. Fish and Wildlife Service has established a Wind Turbine Siting Working Group. *Id.* The U.S. Forest Service, National Telecommunications and Information Administration, and Federal Aviation Administration all have policies on how wind turbines will affect items under their control. *Id.*

²³⁹ See Salkin & Ostrow, *supra* note 107, at 1076-77 (noting the key players among all government agencies).

²⁴⁰ See Salkin & Ostrow, *supra* note 107, at 1078 (addressing the need for developers to coordinate with many different federal agencies).

²⁴¹ See *Obama Touts*, *supra* note 168 (focusing on Obama's clean energy push).

dress, made green energy a priority.²⁴² He set an ambitious goal of producing eighty percent of America's electricity from clean energy sources by 2035.²⁴³ In order to achieve that goal, there will need to be a clear government permitting and development plan for this type of energy. As a first step the Department of the Interior and the Department of Energy signed a Memorandum of Understanding in June 2010.²⁴⁴ The agreement focuses on commercial-scale offshore wind energy and provides the outline for a working relationship so the departments can develop it efficiently.²⁴⁵ Noticeably absent from the discussion is Congress.²⁴⁶ There is currently no federal legislation governing offshore wind energy development.²⁴⁷ Cape Wind proves that Congress needs to enact a regulatory scheme including "an affirmative statement by Congress of its position on offshore wind energy development, a defined coordinate permitting procedure . . . and an expedited regulatory process for future projects."²⁴⁸ There are too many agencies with divergent objectives currently; Congress needs to outline the federal government's role and policies.²⁴⁹

The second biggest issue with the current federal regulatory scheme is the lack of clear standards.²⁵⁰ There are no out-

²⁴² See *Obama Touts*, *supra* note 168 (articulating that clean energy is necessary for America to compete globally).

²⁴³ See *Obama Touts*, *supra* note 168 (explaining the President's ambitious clean energy goals).

²⁴⁴ See *DOI & DOE Memo*, *supra* note 159 (agreeing to work together to facilitate offshore green energy development).

²⁴⁵ See *DOI & DOE Memo*, *supra* note 159 (outlining objectives, review, funding, and administration of agreement).

²⁴⁶ See *Hadam*, *supra* note 36, at 134 (advocating for Congress to have a voice in the solution).

²⁴⁷ See *Hadam*, *supra* note 36, at 134 (discussing the importance of streamlined federal policy for harnessing wind energy potential in the future).

²⁴⁸ See *Hadam*, *supra* note 36, at 134 (stressing the need for further congressional action).

²⁴⁹ See *Hadam*, *supra* note 36, at 134 (stressing the need for a singular policy).

²⁵⁰ See *Feo & Ludmir*, *supra* note 19, at 679-80 (observing that conflicting federal roles leads to confusion).

right restrictions on height, distance of land, construction practices, or endangered species among other issues.²⁵¹ Congress needs to establish not only a plan for how the permitting process should be handled administratively, but also needs to “establish a clear position on the common complaints that accompany wind farms.”²⁵² Right now each project is being developed independently without a consistent regulatory process.²⁵³ This issue is called “regulatory uncertainty” because authorities can reject a permit or add conditions, which increase the cost of the project, which the developers were unable to foresee.²⁵⁴ If there were uniform guidelines, then developers would know how to plan their projects from the outset and would facilitate further development.²⁵⁵ One way the government is attempting to solve this problem is establishing an ocean plan, but the project is far from complete.²⁵⁶ Straightforward regulations on fundamental issues are required for developers to feel comfortable even attempting to navigate the regulatory emptiness.²⁵⁷

The final overall problem with the federal regulatory system for offshore wind is the redundant and inefficient system for granting permits.²⁵⁸ There are three main issues with the per-

²⁵¹ See *Wind Siting Policies*, *supra* note 165 (observing multiple agencies with general wind programs but few strict rules).

²⁵² See Hadam, *supra* note 36, at 134 (pinpointing a clear congressional need where wind farm permitting and policy is concerned).

²⁵³ See Salkin & Ostrow, *supra* note 107, at 1084 (advocating for a uniform regulatory scheme to “facilitate the increased deployment of wind projects necessary to reach [federal renewable energy goals].”).

²⁵⁴ See Heerde, *supra* note 29, 269-70 (defining “regulatory uncertainty,” which “refers to those risks inherent in obtaining any necessary licenses or permits to construct and operate a project from a regulatory authority.”).

²⁵⁵ See Salkin & Ostrow, *supra* note 107, at 1084 (arguing that guidelines would decrease barriers to development).

²⁵⁶ See Executive Office of the President, *supra* note 126 (noting the federal government’s goal of developing an ocean plan).

²⁵⁷ See Executive Office of the President, *supra* note 126 (explaining the plan’s goal of simplifying ocean management).

²⁵⁸ See Hadam, *supra* note 36, at 134 (highlighting one particular congressional oversight).

mitting system: the Smart Permitting process, agency reorganization, and collaboration with states; Secretary of the Interior Salazar has recently acknowledged the shortcomings of the current permitting process.²⁵⁹ In November 2010, he introduced a plan for smart permitting to replace the maze of regulations, called "Smart From the Start."²⁶⁰ Under Salazar's plan, the Department of the Interior would work with eleven states on the Atlantic coast to identify possible wind farm sites.²⁶¹ He hopes the new process will reduce the waiting time for a lease from seven years to two years.²⁶²

Under the "Smart from the Start" plan, the potential sites will undergo site assessment and an initial NEPA environmental assessment with the coordination of other government agencies.²⁶³ If there are no significant impacts detected, then developers will be offered leases on these lands as soon as 2012, and they will then need to complete their own NEPA review of the specific project.²⁶⁴ A similar plan is being developed for transmission lines.²⁶⁵ As of early 2011, a few sites are already under consideration and federal-state task forces have been established in nine Atlantic states.²⁶⁶ The plan seems effective in reducing

²⁵⁹ See 'Smart from the Start' Press Release, *supra* note 158 (announcing that the new "Smart from the Start" permitting process is intended to address problems with current system).

²⁶⁰ See *Salazar Wants Quicker Permitting*, *supra* note 158 (describing the impact of Salazar's "smart permitting process" proposal).

²⁶¹ See *Salazar Wants Quicker Permitting*, *supra* note 158 (outlining the first phase of the plan).

²⁶² See *Salazar Wants Quicker Permitting*, *supra* note 158 (explaining the ultimate goal of the permitting overhaul).

²⁶³ See 'Smart from the Start' Press Release, *supra* note 158 (announcing improvements in the new permitting process).

²⁶⁴ See 'Smart from the Start' Press Release, *supra* note 158 (explaining the consolidated leasing process and its effects).

²⁶⁵ See 'Smart from the Start' Press Release, *supra* note 158 (foreshadowing the release of a similar process for leasing land to be used for transmission lines from the project to the land).

²⁶⁶ See *BOEMRE Director Discusses Future of Offshore Renewable Energy at Offshore Wind Power Conference*, BUREAU OF OCEAN ENERGY MGMT., REGULATION AND

lease waiting times and highlighting possible development sites.²⁶⁷ More specifics of the plan are due later in 2011; as of now, its downfall is that it does nothing to facilitate Environmental Impact Statement approvals or integrate agency policies.²⁶⁸

A possible solution for the inefficient permitting is agency reorganization.²⁶⁹ In January 2011, Secretary Salazar announced that the Bureau of Ocean Energy Management, Regulation and Enforcement (formally MMS) would be divided into two separate departments.²⁷⁰ Now the Bureau of Ocean Energy Management ("BOEM") will handle leasing, plan administration, and NEPA analysis.²⁷¹ The goal of the division is to make the permitting process smoother, establish a clear change of command, and eliminate "bureaucratic paralysis."²⁷² The hope is that BOEM will no longer have conflicting missions of environmental protection and energy development.²⁷³ BOEM will only handle all renewable energy programs offshore.²⁷⁴

So far, the new reorganization is proving successful.²⁷⁵ For example, BOEM has taken steps to reduce redundancy in non-

ENFORCEMENT, Feb. 3, 2011, *archived at* <http://www.webcitation.org/5wECo2gxL> [hereinafter *BOEMRE Director Discusses Future*] (updating the status of the new permitting process).

²⁶⁷ See 'Smart from the Start' Press Release, *supra* note 158 (summarizing the goals and plan for the "Smart from the Start" proposal).

²⁶⁸ See 'Smart from the Start' Press Release, *supra* note 158 (explaining the basics of the plan and that details will emerge in the future).

²⁶⁹ See DOI *Fact Sheet*, *supra* note 38 (outlining changes underwent by the DOI to better handle resource development and energy management).

²⁷⁰ See DOI *Fact Sheet*, *supra* note 38 (describing the details of the separation).

²⁷¹ See DOI *Fact Sheet*, *supra* note 38 (clarifying the new roles of the departments).

²⁷² See DOI *Fact Sheet*, *supra* note 38 (projecting the ways in which this separation will bolster the importance of environmental review and analysis).

²⁷³ See DOI *Fact Sheet*, *supra* note 38 (announcing the overall objectives the Department expects the split to facilitate).

²⁷⁴ See DOI *Fact Sheet*, *supra* note 38 (detailing the responsibilities of BOEM and BSEE after split).

²⁷⁵ See, e.g., Salazar, Bromwich Announce Next Steps, *supra* note 38 (predicting continued success for the offshore wind initiative as the most recent adminis-

competitive leases of the continental shelf.²⁷⁶ In addition, BOEM has proposed a rule that is currently going through the conventional rulemaking process.²⁷⁷ If approved it will allow the Department of the Interior to send only one request for interest in leasing an areas if there is no competition.²⁷⁸ Currently, even if only one entity responds to the request, the agency must send out a second request to ensure no one else is interested.²⁷⁹ Reducing this step could potentially cut six-to-twelve months off the leasing process.²⁸⁰ This rulemaking demonstrates that a focused agency can be efficient.²⁸¹

The federal permitting system lacks collaboration between the federal government and the states.²⁸² Secretary Salazar has started to fix this issue with the development of federal-state task forces.²⁸³ Some critics have suggested a “cooperative federalism” system of regulation.²⁸⁴ Federal law would outline the basics of the regulatory system and then empower the states to implement the system in accordance with the federal guidelines.²⁸⁵ The U.S. essentially operated under that system in de-

trative action); BOEMRE Rulemaking, *supra* note 156 (noting the elimination of redundant step in the leasing process).

²⁷⁶ See BOEMRE Rulemaking, *supra* note 156 (announcing a proposed rule to simplifying offshore leasing).

²⁷⁷ See BOEMRE Rulemaking, *supra* note 156 (noting the current status of the rule).

²⁷⁸ See BOEMRE Rulemaking, *supra* note 156 (outlining the components of the rule).

²⁷⁹ See BOEMRE Rulemaking, *supra* note 156 (acknowledging the need to make sure there is no alternative interest in an area prior to acquiring a lease).

²⁸⁰ See ‘Smart from the Start’ Press Release, *supra* note 158 (explaining the benefit of a new rule for lease waiting times).

²⁸¹ See, e.g., BOEMRE Rulemaking, *supra* note 156 (emphasizing that the new department process will reduce time through elimination of redundancy).

²⁸² See *BOEMRE Director Discusses Future*, *supra* note 266 (outlining what Salazar has begun to fix).

²⁸³ See *BOEMRE Director Discusses Future*, *supra* note 266 (describing state-federal task forces and how they will accelerate the process).

²⁸⁴ See Salkin & Ostrow, *supra* note 107, at 1054 (defining “cooperative federalism”).

²⁸⁵ See Salkin & Ostrow, *supra* note 107, at 1090-91 (explaining how telecommunications can provide a model for energy development federalism).

veloping Cape Wind in that there were general federal policies, and Massachusetts (and its court system) filled in the gaps.²⁸⁶ The largest problem with this system is the lack of uniformity across state lines and the uncertainty it creates for developers since a development in Virginia will likely not follow Massachusetts court decisions.²⁸⁷ There needs to be more specific federal regulations that allow for some local tailoring based on the specific situation.²⁸⁸ The specific regulations should at a minimum prohibit local governments from banning projects, and require them to issue written decisions in a reasonable time.²⁸⁹ These steps will ensure a working relationship with the states, and the process will be smoother by setting out guidelines for each sovereign to follow.²⁹⁰

²⁸⁶ See, e.g., *Alliance to Protect Nantucket Sound*, 398 F.3d at 108 (evaluating agency action for adherence to the law); *Ten Taxpayer Citizen Group*, 373 F.3d at 187 (discussing the MA Department of Environmental Management's disclaimer of authority); *Ten Taxpayer Citizen Group v. Cape Wind Assocs.*, 278 F. Supp. 2d at 99 (examining the validity of Cape Wind's permit); *Alliance to Protect Nantucket Sound*, 288 F. Supp. 2d at 66-67 (analyzing the scope of the permit); Brief of Intervenor-Appellee Clean Power Now, Inc. at 1, *Alliance to Protect Nantucket Sound, Inc.*, 932 N.E.2d 7878 (No. SJ-2009-0326) (opining as to the validity of the issuance of a certificate permitting transmission lines); *Alliance to Protect Nantucket Sound, EFSB*, 858 N.E.2d at (delineating Board approval for the construction of a wind farm in federal waters); *Town of Barnstable*, 2009 WL 1449032, at *4 (clarifying the jurisdictional dispute).

²⁸⁷ See Heerde, *supra* note 29, at 269-70 (explaining the various risks developers face).

²⁸⁸ See Salkin & Ostrow, *supra* note 107, at 1086 (asserting the importance of involving the local jurisdiction in the siting process).

²⁸⁹ See Salkin & Ostrow, *supra* note 107, at 1092 (outlining the bare minimum of what the federal government should be able to do with regard to federal regulations).

²⁹⁰ See Salkin & Ostrow, *supra* note 107, at 1092 (highlighting the benefits of having an established model for states to follow).

iii. Judicial Review

Cape Wind has fought and won numerous courtroom battles, but has spent millions of dollars and years in the process.²⁹¹ The first judicial problem is sorting out when a legal issue is ripe for court determination.²⁹² A Massachusetts superior court believes that “allowing the administrative process to run its course before permitting judicial review gives the agency in question ‘a full and fair opportunity to apply its expertise to the statutory scheme which, by law, it has the primary responsibility of enforcing.’”²⁹³ Unless it is clearly not within the agency’s powers, it is best to wait until the process is finished, rather than intermittently halting the process to decide legal issues.²⁹⁴ Some commentators advocate limiting access to courts entirely and leaving the process to agency review.²⁹⁵ By restricting provisions within most environmental statutes that allow citizen suits, organizations would not have as much power to delay the project.²⁹⁶ Yet, those same enabling statutes allow groups to fight against environmentally hazardous projects such as heavy logging, and therefore need to be protected.²⁹⁷

²⁹¹ See *Town of Barnstable*, 2009 WL 1449032, at *4 (reviewing the convoluted process required by agencies to even establish that a court has jurisdiction, and that judicial review is appropriate in the first instance).

²⁹² See *id.* (explaining the need for the judicial process to run its course).

²⁹³ *Id.*

²⁹⁴ See *id.* (advocating against allowing standing for an agency sue over every decision).

²⁹⁵ See Ziza, *supra* note 1, at 624 (considering alternatives to judicial review). “The current system allows a groups like the Alliance, whose reasons for opposing a project might be entirely non-legal, to litigate as long as it has the funds—simply because there is never a shortage of willing lawyers or potential legal claims, no matter how far-fetched they might be.” *Id.*

²⁹⁶ See Ziza, *supra* note 1, at 621 (explaining the merits of limiting organization access to courts). Additionally, statutes can be modified or repealed at both the federal and state levels. See *id.*

²⁹⁷ See Ziza, *supra* note 1, at 625 (analyzing the downside of reducing citizen participation in the permitting process).

The perfect balance between courts and agency decision-making was already decided by the United States Supreme Court and needs to be applied to these offshore wind cases.²⁹⁸ In *Chevron U.S.A., Inc. v. National Resources Defense Council*,²⁹⁹ the Court established the *Chevron* test on how to review agency decisions.³⁰⁰ The first part of the two-part test requires the court to ask if Congress has ever spoken to the statutory issue in question.³⁰¹ If it has, the express intent of Congress is binding.³⁰² But if, as is the case with offshore wind, Congress has not spoken about it, then the court proceeds to the second step.³⁰³ The court then asks if the agencies' view is permissible, and if they find it is, the court cannot impose its own interpretation of the statute.³⁰⁴ The Department of the Interior's opinion should be granted great deference because it has special knowledge, but citizens should still have access to the courts.³⁰⁵

IV. Conclusion

Cape Wind has somehow overcome ten years of litigation and found its way through unchartered state and federal permitting process to become the nation's first permitted offshore wind farm. Hopefully this tumultuous process will provide the motiva-

²⁹⁸ See *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 866 (1984) (establishing the "*Chevron* deference" test to determine how much deference to give an agency's interpretation of a statute it administers).

²⁹⁹ 467 U.S. 837 (1984).

³⁰⁰ See Ziza, *supra* note 1, at 625-26 (outlining the *Chevron* deference test and the process by which courts analyze an agency's interpretation of a statute).

³⁰¹ See Ziza, *supra* note 1, at 625-26 (articulating part one of the *Chevron* test).

³⁰² See Ziza, *supra* note 1, at 626 (providing one possible outcome of the first part of the two-part *Chevron* test).

³⁰³ See Ziza, *supra* note 1, at 626 (explaining how to administer the second part of the *Chevron* test); Hadam, *supra* note 36, at 134 (observing the lack of Congressional opinion regarding offshore wind).

³⁰⁴ See Ziza, *supra* note 1, at 626 (outlining the purpose of the second part of the *Chevron* test). The Court in *Chevron* concluded that agency decisions should be upheld unless they are clearly inconsistent with the statute, or are arbitrary and capricious. See *id.*

³⁰⁵ See *Chevron*, 467 U.S. at 866 (establishing the agency deference standard).

tion and incentive to fix the system. Currently there is no real permitting or leasing process, which is slowing down the development of this green energy. States need to develop ocean plans with designated areas for offshore green energy, along with a concise system of permitting with clear standards and process for judicial review. The federal government has attempted many of these suggestions through the Department of the Interior's Bureau of Ocean Energy Management. If the BOEM continues to become more efficient and begins to speak for the rest of the government agencies, as well as the President and Congress, then progress will be likely. Finally states need to work with the federal government and each other in an efficient manner. Offshore wind farms can become a prominent future in the United States if the government makes the changes to keep up with this new technology.