The Development of Wind Energy in the Mid-Atlantic Region: The Legal Process and Lessons from the Cape Wind Project

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Abstract: Even though Cape Wind Associates, LLC proposed the U.S.'s first offshore wind project in 2001, the nation has yet to install its first offshore wind farm. However, the states of the Mid-Atlantic region have recognized the potential for offshore wind and have taken steps to develop this type of renewable energy in the region. In response to Cape Wind's delayed development, the federal leasing process has become more defined, but a Mid-Atlantic project will face a myriad of other statutes, regulations, and regulators, as well as an uncertain timetable, in developing an offshore wind project. A Mid-Atlantic project will also potentially encounter financing issues, litigation, and the hard tasks of weighing the environmental costs and benefits of a project. Finally, a streamlined regulatory process may negatively affect public support and places a heavy burden on the environmental reviews during the latter stages of a project.

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I. Introduction

The United States produces about a quarter of the world's greenhouse gases, while only having about 4% of the world's population. With the implications of increased amounts of carbon dioxide in the atmosphere becoming more apparent, many see the need to cut down on the nation's carbon emissions. A potential solution to this problem is the development of low-carbon or carbon-free energy, and many view offshore wind as a strong alternative energy choice. Particularly, offshore wind has the potential to generate four times the amount of energy as the U.S.'s current total generating capacity.[2]

Despite this potential, the U.S. currently has no offshore wind capacity.[3] In comparison, at the end of 2012, Europe had over 50 offshore wind facilities with more than 1,600 turbines and a total capacity just shy of 5,000 MW.[4] The lack of offshore wind capacity in the U.S. is not due to a lack of trying. In 2001, Cape Wind Associates, LLC began the process for developing the first offshore wind farm in the U.S., planned to be located off the coast of Massachusetts. The project, however, has been tied up with regulatory struggles and litigation for 12 years and has yet to begin construction.[5]

Cape Wind has faced two main obstacles: financing and the regulatory process. Currently, Cape Wind is still trying to finance the project, and it only has power purchase agreements for about 78% of the project's power. The regulatory process has taken over a decade, and virtually each step has been challenged, mostly by local residents through an extremely well-funded citizen group. With all these delays, the question becomes, would a Mid-Atlantic wind farm face similar obstacles as the Cape Wind project? Part of Cape Wind's delay was the result of an unclear federal leasing process at the project's inception, and the federal government has since taken steps to speed up the leasing of the outer continental shelf for offshore wind projects. Outside of the leasing process, though, offshore wind projects still face a myriad of state and federal regulators and requirements.

Like all new development, residents, other ocean users, and other interested parties in the area are likely to have legitimate concerns with an offshore wind farm and may oppose a potential project. The effort to streamline the regulatory process may have the effect of making the public feel like they have been left out of the initial stages of the process. However, many of the statutes involved in the offshore wind regulatory process allow for citizen involvement, and private parties can often bring suits to enforce these statutory and regulatory requirements. Therefore, those concerned with a potential Mid-

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[2] NATIONAL RENEWABLE ENERGY LABORATORY, LARGE-SCALE OFFSHORE WIND POWER IN THE UNITED STATES, EXECUTIVE SUMMARY 1 (2010), *available at* http://www.nrel.gov/docs/fy10osti/49229.pdf.

[3] A floating, grid-connected offshore wind turbine was recently installed as a demonstration project off the coast of Maine. *See* Press Release, U.S. Department of Energy, Maine Project Launches First Grid-Connected Offshore Wind Turbine in the U.S. (May 31, 2013), *available at* http://energy.gov/articles/maine-project-launches-first-grid-connected-offshore-wind-turbine-us.

[4] EUROPEAN WIND ENERGY ASSOCIATION, THE EUROPEAN OFFSHORE WIND INDUSTRY – KEY TRENDS AND STATISTICS 2012, EXECUTIVE SUMMARY 3 (2013), *available at* http://www.ewea.org/fileadmin/files/library/publications/statistics/European_offshore_statistics_2012.pdf.

[5] For another article on the delays of the Cape Wind project, see Kenneth Kimmell, *The Cape Wind Offshore Wind Energy Project: A Case Study of the Difficult Transition to Renewable Energy*, 5 GOLDEN GATE U. ENVTL. L. J. 197 (2011).

Atlantic project will have the opportunity to police the project to ensure it is complying with these requirements and challenge a project if they are able to establish standing.

All in all, the leasing process is well underway for potential projects in the Mid-Atlantic; however, these projects will still face a lot of regulatory hurdles on the state and federal levels. While waiting for these approvals, a project could be stalled in a kind of regulatory limbo. Further, these projects will face some opposition, but it should be noted that the opposition faced by Cape Wind has been unique and it is not certain whether a similarly dedicated, well-funded group would form to stop a Mid-Atlantic project. Similar to an uncertain timeline for regulatory approvals, litigation can prolong the development process for an indefinite period of time. Like Cape Wind, a Mid-Atlantic project would also likely involve environmentalists fighting over the effects and benefits of the project, with some environmental groups supporting and some groups opposing the project. As with other renewable energy projects, a project may also face the difficult tasks of weighing environmental harms if the project would have a potential adverse environmental effect. Further, the efforts to streamline the environmental review for projects in the Mid-Atlantic may have a chilling effect on public buy-in for a potential project.

Part II of this Article will discuss the status of offshore wind in the U.S., with a focus on Cape Wind and potential projects in the Mid-Atlantic. Part III will lay out the leasing process for an offshore wind project. Part IV will outline the additional hurdles that a Mid-Atlantic Wind Farm might face. Part V will analyze whether there are lessons that a Mid-Atlantic project could learn from Cape Wind.

II. The Status of Offshore Wind Projects

The U.S. National Renewable Energy Lab estimates that the U.S.'s potential for offshore wind is four times greater than the country's current total generating capacity from all sources.[6] In comparison to onshore wind projects, offshore wind is an attractive power source for the U.S. since offshore wind can be located near areas that have the most electricity demand, as the coastal and Great Lakes states use 78% of the nation's energy. Further, offshore wind can meet peak energy demands, as ocean winds correspond with periods of high power demand, especially on hot summer days.

Despite the potential for offshore wind, the U.S. has yet to install an offshore wind farm. In response to the difficulties faced by Cape Wind, the Obama Administration and the U.S. Department of the Interior (DOI) have made the permitting of offshore wind a priority. For instance, Former Secretary of the Interior Ken Salazar stated in 2012: "Offshore wind holds incredible potential for our country, and we're moving full-steam ahead to accelerate the siting, leasing and construction of new projects."[7] In his recently released Climate Action Plan, President Obama stressed the importance of reducing greenhouse gas emissions and developing renewable energy. During the President's first term, the U.S. doubled its electricity generation from wind, solar, and geothermal energy, and the plan sets the goal

[6] NATIONAL RENEWABLE ENERGY LABORATORY, *supra* note 2, at 1.

[7] Press Release, U.S. Department of Interior, Obama Administration Announces Major Steps toward Leasing for Offshore Wind Projects in Mid-Atlantic (Feb. 2, 2012), *available at* http://www.doi.gov/news/pressreleases/Obama-Administration-Announces-Major-Steps-toward-Leasing-for-Offshore-Wind-Projects-in-Mid-Atlantic.cfm.

of doubling the nation's renewable energy generation again by 2020.[8] The President's plan also affirms the administration's focus on accelerating the permitting of clean energy projects.

A. Cape Wind

Cape Wind is planned to be located off the coast of Massachusetts in Horseshoe Shoals, which is surrounded by Cape Cod, Nantucket, and Martha's Vineyard. The project will have 130 wind turbines located 5 miles offshore. With the tips of their blades, the turbines will reach 440 feet in the air. The turbines will be located closest to Craigville Beach on Cape Cod, and on a clear day, they will be visible from shore.

The location was chosen for its shallow waters, as the water is generally less than 45 feet deep. Horseshoe Shoals is also protected from stormy seas by Nantucket and Martha's Vineyard. In this location, the energy generated does not need to be transmitted over long distances, and it is estimated that the Cape Wind project would provide Cape Cod with about 75% of its power.[9] The project will also be close to the metropolitan centers of the Northeast. Because of its location, though, Horseshoe Shoal is subject to many uses. Along with commercial uses like fishing, shipping, and air traffic, the area is also a popular destination for recreational uses like boating and fishing. The area is also home to protected species like the piping plover and the right whale. Finally, the area is a favorite playground for the wealthy.

One cause for the delay of the Cape Wind project has been the project's environmental review under the National Environmental Policy Act (NEPA). Under NEPA, when a federal agency undertakes a major federal action, the agency is required to consider the environmental impacts of the action.[10] As will be discussed in more detail in Part III, both the U.S. Army Corps of Engineers (Corps) and DOI have been the lead agency for the project. When the Corps claimed initial jurisdiction, it took several years to release its Draft Environmental Impact Statement (DEIS) under NEPA.[11] When DOI took over as the lead agency for the project, it decided to perform its own, separate environmental review, which it did not complete until 2009.[12]

Cape Wind has also been subject to strong opposition. Like most new development, residents and groups in the vicinity of Horseshoe Shoals have voiced their concerns with the project. The most notable of these opponents could be members of the Kennedy family, as both the late senator Ted

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[8] EXECUTIVE OFFICE OF THE PRESIDENT, THE PRESIDENT'S CLIMATE ACTION PLAN 6 (2013), *available at* http://www.whitehouse.gov/sites/default/files/image/president27sclimateactionplan.pdf.

[9] BUREAU OF OCEAN ENERGY MANAGEMENT, CAPE WIND ENERGY PROJECT, NANTUCKET SOUND, MASSACHUSETTS: CONSTRUCTION AND OPERATIONS PLAN 2 (2011), *available at* http://www.boem.gov/uploadedFiles/BOEM/Renewable_Energy_Program/Studies/Final_Redacted_COP.pdf.

[10] 42 U.S.C. § 4332.

[11] Notice of Availability of the Draft Environmental Impact Statement for the Cape Wind Energy Project, Nantucket Sound and Yarmouth, MA, Application for Corps Section 10 Individual Permit, 69 Fed. Reg. 64,919-01 (Nov. 9, 2004).

[12] *See* MINERALS MANAGEMENT SERVICE, U.S. DEPARTMENT OF INTERIOR, CAPE WIND ENERGY PROJECT FINAL ENVIRONMENTAL IMPACT STATEMENT (2009). Some potential impacts that the environmental review considered in the Cape Wind process included the noise and traffic associated with the construction; the effect on views; the potential effect of the blades on migratory birds and bats; the potential effects of construction on fish; and the additional effects of transmission cables.

Kennedy and the environmentalist Robert Kennedy, Jr. have spoken out against the project due to its potential environmental effects.[13] However, the location of the Kennedy compound on Cape Cod has led to criticism of their position, with some accusing the Kennedys of being NIMBYS – Not in My Backyard Opponents.[14]

Several different parties have filed lawsuits against Cape Wind, including local residents, towns, and tribes. The main force behind the Cape Wind litigation has been the Alliance to Protect Nantucket Sound (Alliance). The Alliance is a well-funded organization of local residents who have sued Cape Wind at virtually every step of the development process. The Alliance claims that its "goal is to protect Nantucket Sound in perpetuity through conservation, environmental action, and opposition to inappropriate industrial or commercial development."[15] The Alliance has been very active in both grassroots organizing against the project and in bringing litigation.[16] For example, the Alliance has brought suits against Cape Wind Associates, LLC,[17] as well as multiple suits against the Corps,[18] the Massachusetts Department of Public Utilities,[19] and the Massachusetts Energy Facilities Siting Board.[20]

Some have criticized the Alliance due to the fact that one of its main funders is Bill Koch, a billionaire with a house in Osterville on Cape Cod who made his fortune in the oil industry. Others have questioned the Alliance's tactics and motivation, claiming that the Alliance's sole purpose is to stop Cape Wind. For instance, Kit Kennedy, an attorney with the Natural Resources Defense Council, a group that supports Cape Wind, has indicated that the Alliance, and not the project's lengthy environmental review, is to blame for Cape Wind's delayed development.[21]

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[13] *See* Robert F. Kennedy, Jr., *An Ill Wind Off Cape Cod*, THE NEW YORK TIMES, Dec. 16, 2005, *available at* http://www.nytimes.com/2005/12/16/opinion/16kennedy.html?_r=0; *see also* Robert F. Kennedy Jr., *Nantucket's Wind Power Rip-off*, THE WALL STREET JOURNAL, July 18, 2011, *available at* http://online.wsj.com/article/SB10001424052702304521304576447541604359376.html.

[14] *See Cape Wind Responds to Robert F. Kennedy, Jr.*, CAPE WIND, http://www.capewind.org/article108.htm (last visited July 19, 2013).

[15] *About Us*, SAVE OUR SOUND, http://www.saveoursound.org/about_us/mission/ (last visited July 19, 2013). The group has also supported having Nantucket Sound designated as a marine protected area.

[16] The group has a section on its webpage devoted to its "Victories" against the Cape Wind project. *See News: Victories over Cape Wind (APNS)*, SAVE OUR SOUND, http://www.saveoursound.org/news/reader.php?id=463 (last visited July 19, 2013).

[17] *See* Town of Barnstable v. Cape Wind Associates, LLC, 27 Mass. L. Rep. 111 (Mass. Super. 2010).

[18] *See* Alliance to Protect Nantucket Sound, Inc. v. U.S. Dep't of the Army, 398 F.3d 105 (1st Cir. 2005); Alliance to Protect Nantucket Sound v. U.S. Dep't of the Army, 288 F.Supp. 2d 64 (D.Mass. 2003).

[19] *See* Alliance to Protect Nantucket Sound, Inc. v. Dep't of Public Utilities, 959 N.E.2d 413 (Mass. 2011); Alliance to Protect Nantucket Sound, Inc. v. Dep't of Utilities, 959 N.E.2d 408 (Mass. 2011).

[20] *See* Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd., 932 N.E.2d 787 (Mass. 2011); Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd., 858 N.E.2d 294 (Mass. 2006).

[21] Tom Zeller, Jr., *Cape Wind: Regulation, Litigation and The Struggle to Develop Offshore Wind Power in The U.S.*, HUFFINGTON POST, March 1, 2013, http://www.huffingtonpost.com/2013/02/23/cape-wind-regulation-liti_n_2736008.html. Kit Kennedy has stated that: "The thorough and careful environmental review helped to outline the environmental benefits of the project, identify where mitigation measures were called for and allowed for full participation and input by the public. It gave us confidence that once the environmental review was done, we had all the information on the project's benefits and impacts that we needed to support the project. The delays in moving forward with Cape Wind stem not from NEPA but largely from the well-funded opposition of a single group, the Alliance to Protect Nantucket Sound, whose sole purpose – despite its name – is to try to stop Cape Wind." *Id.*

B. Mid-Atlantic Projects

There are also a number of potential offshore wind projects in the Mid-Atlantic, and several of these projects have already secured leases to engage in specified activities on the outer continental shelf. In November 2007, DOI issued an Interim Policy[22] to authorize leases that would allow the lessee to install technology testing and offshore data collection facilities on the outer continental shelf.[23] Under the Interim Policy, four leases with a five-year term were executed in November 2009 in the Mid-Atlantic region.[24] Since two of those leases were relinquished in 2012, the two remaining Interim Policy Leases are one with Deepwater Wind LLC and one with Fishermen's Energy of New Jersey LLC.[25]

In November 2012, the Bureau of Ocean Energy Management (BOEM) issued an Outer Continental Shelf commercial lease to Bluewater Wind Delaware LLC, which is a wholly owned subsidiary of NRG Energy, Inc.[26] The lease is for a 96,430-acre area off the coast of Delaware in federal waters. NRG had planned a 300 to 450 MW project thirteen miles off the coast of Delaware, but the company has placed the project on hold due to a lack of financing. While the company continues to seek investors, it has also cancelled a power purchase agreement that it had executed to sell the power generated by the project.

As an example of a project in state waters, Fishermen's Energy is in the process of developing an offshore wind farm off the coast of Atlantic City, NJ. This project is in addition to Fishermen's Energy's Interim Policy lease discussed above. The project would have five turbines that would produce 25 MW of energy.[27] The project is fully permitted, but is awaiting approval from the New Jersey Board of Public Utilities and the Division of Rate Counsel.[28] The wind farm is a small scale project in shallow waters that is intended to demonstrate the impacts of offshore wind projects on marine and avian species for stakeholders, with the idea that larger wind projects can then be adjusted in response to these observed impacts.

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[22] The Interim Policy will be discussed in more detail in Part III below.

[23] U.S. Mineral Management Service, Request for Information and Nominations of Areas for Leases Authorizing Alternative Energy Resource Assessment and Technology Testing Activities Pursuant to Subsection 8(p) of the Outer Continental Shelf Lands Act, as Amended, 72 Fed. Reg. 62,673 (Nov. 6, 2007) [hereinafter Request for Information and Nominations].

[24] *Renewable Energy Programs Current Projects*, BUREAU OF OCEAN ENERGY MANAGEMENT, http://www.boem.gov/Renewable-Energy-Program/Current-Projects/Index.aspx (last visited July 19, 2013). The leases gave the lessees no additional commercial rights.

[25] *Id.* The two relinquished leases were with Bluewater Wind Delaware LLC and Bluewater Wind New Jersey Energy LLC. Both leases were relinquished in October 2012.

[26] Bureau of Ocean Energy Management, Renewable Energy Lease Number OCS-A 0482 (2012), http://www.boem.gov/uploadedFiles/BOEM/Renewable_Energy_Program/State_Activities/Executed%20Lease%20OCS-A(1).pdf.

[27] *Fishermen's Energy Atlantic City Windfarm (FACW),* FISHERMEN'S ENERGY, http://www.fishermensenergy.com/atlantic-city-windfarm.php (last visited July 19, 2013).

[28] *See* Tom Johnson, *Reclassifying Proposal as Pilot Project Could Help Offshore Wind Get Under Way*, NJ SPOTLIGHT, Feb. 7, 2013, http://www.njspotlight.com/stories/13/02/06/reclassifying-proposal-as-pilot-project-could-help-offshore-wind-get-underway/.

There are also several other proposed projects in the region that have yet to obtain leases. For example, Deepwater Wind has proposed multiple projects.[29] The Hudson Canyon Wind Farm would generate power for approximately 350,000 homes in downstate New York, Long Island, and northern New Jersey. The project is planned to produce 1,000 MW of power with up to 200 turbines and would be located thirty-five miles south of Long Island's west end. The Garden State Offshore Energy Project would produce 1,000 MW of power and be sixteen to twenty miles off the coast of southern New Jersey near Avalon and Ocean City. Finally, the Deepwater Wind Energy Center is a proposed 150-200 turbine project that would produce 1,000 MW of electricity for Long Island and New England. The project would be far offshore, located thirty miles east of Montauk, NY and fifteen miles south of Martha's Vineyard.

Con Edison, the Long Island Power Authority (LIPA), and the New York Power Authority (NYPA) have also proposed a 350 MW project thirteen miles off the Rockaway Peninsula in New York.[30] The project is intended to serve New York City and surrounding areas. NYPA submitted an unsolicited request for a commercial lease to the BOEM, who is currently considering the application.[31]

Finally, there is a proposed transmission project in the region. The Atlantic Wind Connection is intended to provide an offshore high voltage direct current transmission system off the coasts of the Mid-Atlantic states of New York, New Jersey, Delaware, Maryland, and Virginia. Atlantic Grid Holdings LLC submitted an unsolicited right of way application in August 2011 to build the transmission project.[32] It supplemented its application in 2013, and BOEM is considering the application.

III. The Leasing Process

Pursuant to the Submerged Lands Act, Congress gave the coastal states title to the submerged lands three miles beyond the low-water mark along their coast.[33] The act reserved for the federal government title to the submerged lands beyond this point, which is known as the outer continental shelf (OCS). All projects on federal submerged lands must obtain a lease from the federal government, while projects in state waters must obtain a lease from the state. For example, since the Cape Wind project is to be located five miles offshore, the project is in federal waters and subject to the federal leasing process. In comparison, the Fishermen's Energy wind project off the coast of Atlantic City, NJ is to be sited less than three miles from the shoreline, which makes the project subject to leasing by the state of New Jersey.

Since it was the first proposed offshore wind project, Cape Wind was a test case for the federal regulatory process. When the project was introduced, uncertainty existed as to which federal agency

[29] *See Deepwater Wind Projects*, DEEPWATER WIND, http://dwwind.com/projects (last visited July 19, 2013).
[30] *See* LONG ISLAND-NEW YORK CITY OFFSHORE WIND PROJECT, http://linycoffshorewind.com/ (last visited July 19, 2013).
[31] *Renewable Energy Programs: New York Activities*, BUREAU OF OCEAN ENERGY MANAGEMENT, www.boem.gov/Renewable-Energy-Program/State-Activities/New-York.aspx (last visited July 19, 2013).
[32] Atlantic Grid Holdings, LLC, Unsolicited Right-of-Way Grant Application for the Atlantic Wind Connection Project (Aug. 10, 2011), *available at* http://www.boem.gov/uploadedFiles/BOEM/Renewable_Energy_Program/State_Activities/ROW%20Application_Restated_FINAL.pdf.
[33] The Submerged Lands Act also provided a mechanism for states to extend their boundary under certain narrow exceptions. Both Texas and the Gulf coast of Florida have extended boundaries under these exceptions.

had the authority to permit a renewable energy project on the OCS. In response to the lengthy regulatory process that Cape Wind encountered, both Congress and DOI have taken steps to clarify the leasing process for future projects.

A. Initial Regulatory Uncertainty

When Cape Wind Associates, LLC proposed its offshore wind project in 2001, the Corps claimed jurisdiction over offshore renewable energy projects pursuant to its authority under Section 10 of the Rivers and Harbors Act.[34] Section 10 gives the Corps regulatory authority to permit projects that obstruct navigation within the nation's navigable waters and on the OCS. Pursuant to this authority, Cape Wind sought a Section 10 permit from the Corps to build a data collection tower on the OCS to collect information on the feasibility of an offshore wind facility in the area. The Corps took several years to complete its environmental review under NEPA, and when the Corps finally issued the permit to Cape Wind, the Alliance challenged the Corps' authority to do so. The case was litigated, with the court ultimately deciding that the Corps did have the authority to issue such a permit.[35]

In 2005, the authority for the Cape Wind project changed hands. Congress passed the Energy Policy Act of 2005 (EPAct) to clarify the permitting process for renewable energy projects on the OCS. EPAct authorizes the Secretary of the Interior to grant leases, easements, and rights-of-way on the OCS for activities that produce or support the production, transportation, or transmission of energy from sources besides oil and gas, as well as to allow for alternate uses of existing facilities on the OCS.[36] EPAct also specified that the law did not alter the authority of federal agencies under separate federal laws. The EPAct, therefore, did not alter the Corps' Section 10 authority under the Rivers and Harbors Act or the authority of other federal agencies under laws like the Endangered Species Act.

Even though EPAct aimed to clarify the permitting process for renewable energy projects, there remained some uncertainty as to the jurisdiction of DOI and the Federal Energy Regulatory Commission (FERC) in connection to these projects.[37] As a result, DOI entered into a Memorandum of Understanding (MOU) with FERC in 2009 that clarified the two agencies' respective authorities.[38] The MOU gives DOI exclusive jurisdiction over all non-hydrokinetic renewable energy projects located on the OCS, including solar and wind projects. Likewise, the MOU gives FERC exclusive jurisdiction to

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[34] 33 U.S.C. §§ 407-687.

[35] Alliance to Protect Nantucket Sound, Inc. v. U.S. Dept. of Army, 288 F.Supp.2d 64, 75 (D. Mass. 2003).

[36] EPACT 2005, P.L. 109-58, § 388(e) (Aug. 8, 2005).

[37] This uncertainty became apparent in 2008 when FERC issued preliminary permits to a California energy company for a hydrokinetic project off the coast of California. FERC issued the permit pursuant to its authority under the Federal Power Act, which gives FERC the authority to permit hydroelectric projects on the "navigable waters of the United States." 16 U.S.C. § 817(b)(1) (FPA § 23(b)(1)). DOI challenged FERC's authority to issue the permit, claiming that DOI should have the authority to permit the project under EPAct due to its belief that the OCS was not within the U.S.'s navigable waters. In a FERC Order, FERC determined that the OCS was within the navigable waters of the U.S. and that EPAct did not displace FERC's authority to permit wave energy projects on the OCS under the Federal Power Act. Pac. Gas & Elec. Co., 125 FERC P 61045, 2008 WL 4612930 (FERC Oct. 16, 2008).

[38] Memorandum of Understanding Between the U.S. Department of the Interior and the Federal Energy Regulatory Commission (Apr. 9, 2009), *available at* http://www.ferc.gov/legal/maj-ord-reg/mou/mou-doi.pdf.

grant licenses for hydrokinetic projects; however, developers of these projects will also need to obtain an OCS lease from DOI for the use of the ocean bottom.[39]

B. DOI Regulation

After the passage of EPAct, the Secretary of the Interior delegated its authority under the act to the Minerals Management Service (MMS). However, following the 2010 Deepwater Horizon Oil Spill, there was concern that having one agency in charge of the revenue management, leasing, and enforcement functions for OCS projects had created conflict and impeded MMS in fulfilling its competing missions. As a result, DOI decided to re-organize the agency.

First, MMS was renamed the Bureau of Ocean Energy Management, Regulation, and Enforcement (BOEMRE). In October 2010, DOI formed the Office of Natural Resources Revenue (ONRR) to take over the bureau's revenue management functions.[40] In October 2011, DOI completed the MMS reorganization by replacing BOEMRE with two new bureaus: the Bureau of Safety and Environmental Enforcement (BSEE) and the Bureau of Ocean Energy Management (BOEM).[41] With the reorganization, DOI aimed to give each of the new bureaus and offices a clear mission and the necessary resources to fulfill these missions.[42] Under the reorganization, BOEM now handles the leasing of the OCS.

1. 2009 DOI Regulations

In April 2009, DOI published its final rules for offshore renewable energy projects on the OCS. Governed by the Outer Continental Shelf Lands Act (OCSLA), the regulations detail the process for applicants to obtain leases, easements, and rights-of-way on the OCS, as well as for alternate uses of existing OCS facilities.[43] Under the regulations, a leaseholder will have to meet certain requirements depending on the type of lease and how the lease is issued. In addition, leaseholders will have to meet environmental and safety requirements, including mechanisms for monitoring, inspections, and facility assessments.[44]

BOEM's wind energy program has four separate stages: (1) Planning; (2) Lease Issuance; (3) Approval of a Site Assessment Plan (SAP); and (4) Approval of a Construction and Operations Plan (COP).[45] The first step is aimed at locating suitable areas for offshore wind projects. Under this step-

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[39] *Id.* at 1.

[40] Bureau of Ocean Energy Management, Regulation and Enforcement, Reorganization of Title 30, Code of Federal Regulation: Office of Natural Resources Revenue, 75 Fed. Reg. 61,051 (Oct. 4, 2010).

[41] U.S. Department of Interior, Reorganization of Title 30: Bureaus of Safety and Environmental Enforcement and Ocean Energy Management, 76 Fed. Reg. 64,432 (Oct. 18, 2011).

[42] Press Release, U.S. Department of Interior, Fact Sheet: The Reorganization of the Former Minerals Management Service, www.doi.gov/news/pressreleases/loader.cfm?csModule=security/getfile&pageid=260330.

[43] 30 C.F.R. part 585 (Renewable Energy and Alternate Uses of Existing Facilities on the Outer Continental Shelf).

[44] 30 C.F.R. §§ 585.800-833; *see also* STEPHANIE SHOWALTER &TERRA BOWLING, NATIONAL SEA GRANT LAW CENTER, OFFSHORE RENEWABLE ENERGY REGULATORY PRIMER (2009), *available at* http://nsglc.olemiss.edu/offshore.pdf.

[45] BUREAU OF OCEAN ENERGY MANAGEMENT, COMMERCIAL WIND LEASE ISSUANCE AND SITE ASSESSMENT ACTIVITIES ON THE ATLANTIC OUTER CONTINENTAL SHELF OFFSHORE NEW JERSEY, DELAWARE, MARYLAND, AND VIRGINIA: FINAL ENVIRONMENTAL ASSESSMENT iii (2012), *available at*

wise process, BOEM will next issue a wind energy lease; however, obtaining a lease does not mean a project is ready to begin construction, but rather, is simply the next step in the leasing process. Under the regulations, a developer can obtain a lease through a competitive or noncompetitive process.[46] BOEM will issue leases on a competitive basis, unless it determines that no competitive interest exists for a lease after public notice. If it makes this determination, BOEM will issue a noncompetitive lease.[47]

The regulations provide for two types of leases: commercial leases and limited leases. Commercial leases are intended for the commercial production of energy on the OCS and give the developer the right to produce, sell, and deliver power created from a renewable energy project on a commercial scale.[48] Limited leases, on the other hand, are for activities that support energy production but do not produce energy to be sold, distributed, or used in another way.[49] These leases are issued for a five-year period and give the lessee an easement over a part of the OCS to install substations, lines, and pipelines.[50]

Once a developer obtains a lease for an OCS renewable energy project, the regulations contain requirements for site assessment, construction, operation, and decommissioning, as well as provisions for lease payments. The next step for commercial lessees under the regulations is to submit a Site Assessment Plan (SAP).[51] A SAP describes the activities to characterize a commercial lease and test technological devices, such as by installing meteorological towers.[52] Once BOEM approves the SAP, the commercial lessee has a five-year period to conduct a site assessment.[53]

The next step for a developer will be to submit a Construction and Operations Plan (COP), which BOEM must approve before construction on the project can begin. A COP must describe the project's planned facilities, including the project's onshore and support facilities, as well as all of the project's additional planned activities.[54] Although the SAP and COP are separate steps under the regulations, the developer does have the option to submit its COP with its SAP.[55] If the developer did not submit a COP with its SAP, the developer must submit the COP during the five-year site assessment time period.[56] Once the COP is approved, commercial leases then provide a twenty-five year term for the developer to operate the facility.[57]

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http://www.boem.gov/uploadedFiles/BOEM/Renewable_Energy_Program/Smart_from_the_Start/Mid-Atlantic_Final_EA_012012.pdf [hereinafter ATLANTIC OCS FINAL EA].

[46] 30 C.F.R. § 201. Competitive leases must meet the requirements of 30 C.F.R. §§ 585.210-225. Noncompetitive leases must meet the requirements of 30 C.F.R. §§ 585.230-232, as amended by 76 Fed. Reg. 28,178 (May 16, 2011).

[47] *Id.* § 585.201.

[48] *Id.* § 585.112. The regulations define renewable energy as "energy resources other than oil and gas and minerals as defined in 30 CFR part 580. Such resources include, but are not limited to, wind, solar, and ocean waves, tides, and current." *Id.*

[49] *Id.* § 585.112.

[50] *Id.* § 585.236.

[51] *Id.* §§ 585.605 through 585.613.

[52] *Id.* § 585.605.

[53] *Id.* § 585.235.

[54] *Id.* § 585.620.

[55] *Id.* § 585.235(a). For competitive leases, once DOI issues the lease, the developer has six month to submit a SAP or combined SAP and COP, while a noncompetitive lease does not have this preliminary term.

[56] *Id.* § 585.235.

[57] *Id.* § 585.235.

Limited leaseholders will follow a different process under the regulations. These lessees are required to submit a General Activities Plan (GAP) for the developer's resource assessment activities and technology testing.[58] BOEM must approve a GAP before activities on a lease can begin. Once BOEM approves the GAP, the developer has five years to conduct the approved activities, and the possibility exists to renew the lease.[59]

For approval, any SAP, COP, or GAP must demonstrate that the proposed activities will:

- Conform to the lease provisions and applicable laws and regulations;
- Be safe;
- Have no unreasonable interference with other OCS uses;
- Will not unduly harm or damage natural resources; property; human life; wildlife; property; the human, coastal or marine environment; or structures, objects or sites with archaeological or historical significance; and
- Use the safest, best available technology, best management practices, and trained personal.[60]

2. Efforts to Streamline the Permitting Process

Due to Cape Wind's lengthy regulatory process and the Obama Administration's focus on renewable energy, DOI has taken steps to streamline the permitting process for proposed offshore wind projects. First, the Department has tried to increase coordination with the states by establishing state task forces to identify areas that appear best suited for potential offshore development. The aim of the task forces is to help coordinate among the different levels of government and move the leasing process for renewable energy projects forward by sharing information on environmental impacts and multiple uses. In addition, the Atlantic Offshore Wind Energy Consortium is an effort to promote a regional approach to offshore wind development. DOI and ten East Coast states formed the consortium in June 2010 when the parties entered into a Memorandum of Understanding (MOU). According to the MOU, the purpose of the group is to promote "the efficient, orderly, and responsible development of wind resources on the outer continental shelf."[61]

In hopes of speeding up the approval process for offshore wind projects on the OCS, DOI announced its Smart from the Start Initiative in November 2010.[62] The program seeks to speed up

[58] *Id.* § 585.640.
[59] *Id.* § 585.652.
[60] *Id.* §§ 585.606; 585.621; 585.641.
[61] Memorandum of Understanding Between the United States Department of the Interior and the States of Maine, New Hampshire, Massachusetts, Rhode Island, New York, New Jersey, Delaware, Maryland, Virginia, North Carolina to Create an Atlantic Offshore Wind Energy Consortium to Coordinate Issues of Regional Applicability for the Purpose of Promoting the Efficient, Orderly, and Responsible Development of Wind Resources on the Outer Continental Shelf (2010), *available at* http://www.boem.gov/uploadedFiles/AtlanticConsortiumMOU.pdf.
[62] 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), http://www.doi.gov/news/pressreleases/Salazar-Launches-Smart-from-the-Start-Initiative-to-Speed-Offshore-Wind-Energy-Development-off-the-Atlantic-Coast.cfm.

offshore wind development by designating appropriate areas for projects, coordinating environmental studies, using large-scale planning, and expediting the approval process.[63] In addition to developing renewable energy, DOI has stated that the initiative's goals include strengthening national security, generating jobs in the U.S., and reducing carbon emissions.[64]

As part of the Smart from the Start process, BOEM will designate Wind Energy Areas (WEAs), through which the agency can identify areas with the best renewable energy potential and the least amount of conflicts with other uses like shipping routes and wildlife habitats. The WEA process allows for the participation of other federal agencies, and the information provided by these agencies can be used to either encourage or avoid renewable energy projects in identified areas.[65] For example, the U.S. Coast Guard may consult with DOI to determine if any of the proposed leasing areas will interfere with navigation and shipping routes, and the Department of the Defense (DOD) could consult on the leasing area's effect on training areas. Likewise, the U.S. Fish and Wildlife Service (FWS) would participate by identifying whether the area contains any critical habitat, and the National Marine Fisheries Service (NMFS) could consult on the effect on fisheries. Other agencies that could play a role include the National Oceanic and Atmospheric Administration (NOAA) and the Federal Aviation Administration (FAA). As part of the WEA program, BOEM will also undertake regional environmental assessments.

C. Current Leasing Status

Once DOI completed its final Environmental Impact Statement (EIS) for the project, Cape Wind has moved steadily along in the permitting process. BOEM granted Cape Wind the first U.S. commercial offshore wind lease in October 2010.[66] In April 2011, BOEM approved Cape Wind's Construction and Operations Plan.[67] On the state level, Cape Wind completed state and local permitting in 2009. Cape Wind also has entered into and had approved a power purchase agreement to sell a portion of the energy from the project. Finally, the project is currently working on obtaining financing.

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[63] *Id.*

[64] U.S. Dep't of the Interior, Frequently Asked Questions: 'Smart from the Start' Atlantic OCS Offshore Wind Initiative, *available at* http://www.doi.gov/news/pressreleases/loader.cfm?csModule=security/getfile&PageID=73317 [hereinafter Smart from the Start FAQs]. As part of the Smart from the Start initiative, DOI will also move to "aggressively" process applications for offshore transmission lines. *Id.*

[65] *Id.*

[66] Bureau of Ocean Energy Management, Regulation, and Enforcement, U.S. Dep't of Interior, Renewable Energy Lease Number OCS-A-478 (Oct. 6, 2010), *available at* http://www.boem.gov/uploadedFiles/BOEM/Renewable_Energy_Program/Studies/CapeWind_signed_lease.pdf.

[67] Bureau of Ocean Energy Management, U.S. Dep't of Interior, Cape Wind Energy Project: Record of Decision Approving Construction and Operations Plan (Apr. 18, 2011), http://www.boem.gov/uploadedFiles/BOEM/Renewable_Energy_Program/Studies/Record_of_Decision42011.pdf

The leasing process has also begun in the Mid-Atlantic, with BOEM taking steps in New York, New Jersey, Delaware, Maryland, and Virginia.[68] In November 2007, MMS issued an Interim Policy, which authorized MMS to issue leases to install technology testing and offshore data collection facilities on the OCS.[69] Under the Interim Policy, MMS completed an Environmental Assessment (EA) for the issuance of Interim Policy leases off the coasts of New Jersey and Delaware in June 2009.[70] MMS then offered five leases in June 2009 that had a five-year term and gave the lessees no additional commercial rights. MMS executed four of these leases in November 2009.[71] As mentioned above, since two of those leases were relinquished in 2012, the only remaining Interim Policy Leases are one with Deepwater Wind LLC and one with Fishermen's Energy of New Jersey LLC.[72]

Under the Smart from the Start Initiative, BOEM has designated WEAs in Rhode Island, Massachusetts, New Jersey, Delaware, Maryland, and Virginia. In addition, BOEM has completed a Finding of No Historic Properties Affected for the Issuance of Commercial Leases for the WEAs in New Jersey, Maryland, Virginia, and Delaware under Section 106 of the National Historic Preservative Act.[73] On February 2, 2012, DOI announced that it had completed its NEPA analysis for the WEAs off the coasts of Maryland, Virginia, New Jersey, and Delaware.[74]

The NEPA analysis involved an EA that combined an analysis for both the lease sale and site assessment steps of the offshore development process. By conducting a regional environmental review for the first two steps of the leasing process, DOI aimed to simplify the regulatory process for offshore wind projects in the Mid-Atlantic region. In the EA, DOI concluded that that there would not be any significant environmental and socioeconomic impacts from BOEM issuing leases or from the lessees' site assessment activities in these WEAs.[75] In its review, DOI looked at the potential impacts of issuing leases in the Mid-Atlantic WEAs, including looking at the reasonable and foreseeable consequences of site assessment activities, including biological, archeological, geotechnical, and geophysical surveys.

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[68] *See State Activities,* BUREAU OF OCEAN ENERGY MANAGEMENT, http://www.boem.gov/Renewable-Energy-Program/State-Activities/Index.aspx (last visited July 19, 2013). In emphasizing BOEM's commitment to developing offshore wind in the Mid-Atlantic, BOEM director Tommy P. Beaudreau has stated that: "We are moving toward commercial-scale offshore wind energy leasing in the mid-Atlantic and adding the necessary tools to offer those leases. We considered public input and conducted a thorough analysis to ensure future projects are sited in the right places, where the wind energy potential is significant and where environmental effects and conflicts with other uses can be minimized and managed." *See* U.S. Dep't of Interior, *supra* note 7.

[69] Request for Information and Nominations, *supra* note 23.

[70] MINERAL MANAGEMENT SERVICE, U.S. DEP'T OF INTERIOR, ISSUANCE OF LEASES FOR WIND RESOURCE DATA COLLECTION ON THE OUTER CONTINENTAL SHELF OFFSHORE: ENVIRONMENTAL ASSESSMENT (2009), *available at* http://www.boem.gov/uploadedFiles/FinalEA_MMS2009-025_IP_DE_NJ_EA.pdf.

[71] *Renewable Energy Programs Current Projects*, *supra* note 24.

[72] *Id.* With respect to Interim Policy leaseholders in New Jersey and Delaware, BOEM states that it will continue to work with these leaseholders in connection with Smart from the Start Initiative. For the interim leaseholders, BOEM is "committed to facilitating a review that ultimately results in a decision on construction as soon as possible. A full site-specific environmental impact statement would likely be required for each project proposed, but as we have experienced in the onshore solar fast-track effort, these types of reviews do not have to take multiple years to complete. As part of this initiative, the Department will commit to aggressive schedules for those reviews and the required dedication of staff and resources." Smart from the Start FAQs, *supra* note 64, at 6.

[73] 16 U.S.C. § 470(f).

[74] Atlantic OCS Final EA, *supra* note 45, at iii.

[75] *Id.* at xiv. *See also* U.S. Dep't of Interior, *supra* note 7.

The EA also assessed the potential environmental impacts of site assessment activities, including the potential effects from installing and operating meteorological towers and buoys on leases in the area.

Finally, in June 2013, DOI announced that it will be holding its first offshore lease sale at the end of July 2013. The sale will be for two leases in the Rhode Island and Massachusetts WEAs and is open to nine previously approved bidders.[76]

IV. Additional Hurdles

Although DOI has taken steps to streamline the leasing process and BOEM has completed the environmental review for the lease issuance and site-assessment steps, a Mid-Atlantic offshore wind project still faces additional hurdles. In addition to having to find financing and sell the power generated, these projects will be regulated by a myriad of state and federal regulators under a host of additional statutes and regulations. Further, a potential offshore wind project faces the potential for legal challenges, as the Cape Wind project has shown.

A. Financial Issues

First, financing has the potential to be a major issue for any offshore wind project.[77] The Cape Wind project is still trying to gain financing, and its difficulty may be a warning sign to other developers. In March 2013, Cape Wind Associates, LLC announced that it had entered into an agreement with the Bank of Tokyo-Mitsubishi UFJ for a "significant amount" of its debt financing. Barclays, a global financial services company headquartered in Britain, is working with Cape Wind as its financial advisor in efforts to gain the remaining debt and equity financing for the project, which is estimated to cost around $2.5 billion.[78]

As an example of another developer facing financial woes, NRG Energy placed the active development of its offshore wind project on a near-term hold.[79] In explaining its decision, NRG cited the inability to obtain an investment partner, stating that it had approached over two dozen potential investors for the project. While the project is on hold, NRG decided to maintain its development rights and continue to look for partners and investors for the project. However, the developer has cancelled the power purchase agreement it had entered into to sell the energy from the project.

The federal government is taking steps to help finance wind projects off the nation's coasts. The Department of Energy (DOE) is currently working with DOI on advancing offshore wind. DOE's efforts are aimed at reducing the barriers facing offshore wind development, including analyzing renewable

[76] Bureau of Ocean Energy Management, U.S. Dep't of Interior, Atlantic Wind Lease Sale 2 (ATLW2) Commercial Leasing for Wind Power on the Outer Continental Shelf Offshore Rhode Island and Massachusetts: Final Sale Notice, 78 Fed. Reg. 33,898 (June 5, 2013).

[77] For more information on the difficulties in financing offshore wind projects, *see* Ed Feo & Josh Ludmir, *Challenges in the Development and Financing of Offshore Wind Energy*, 14 ROGER WILLIAMS U.L. REV. 672 (2009).

[78] Matthew L. Brown, *Cape Wind Signs with Bank of Tokyo-Mitsubishi for Project Financing*, BOSTON BUSINESS J., Mar. 19, 2013, http://www.bizjournals.com/boston/news/2013/03/19/cape-wind-financing.html?s=print.

[79] Press Release, NRG Energy, Inc., NRG to Put Offshore Wind Development on Hold for the Near Term (Dec. 12, 2011), *available at* http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MTE4MzE5fENoaWxkSUQ9LTF8VHlwZT0z&t=1.

energy markets and funding technology development, research, and demonstration projects. In 2012, DOE announced it had dedicated over $150 million in funding for seven offshore demonstration projects over the next 6 years. This funding is in addition to the $42 million DOE allocated to research and development projects in 2011.[80] DOE also awarded funding to projects in 2011 to help eliminate market barriers that are impeding the development of offshore wind in the U.S.'s coastal waters and in the Great Lakes region.[81]

DOE is also currently considering providing a loan guarantee to Cape Wind that would cover a portion of the project's costs.[82] Politicians in Massachusetts support the loan guarantee, as the state's 11-member congressional delegation sent a letter to the Secretary of Energy in support of the guarantee, citing Cape Wind's potential to bring jobs to the region and establish Massachusetts as a leader in new energy technology.[83] Certain environmental groups, such as the Massachusetts Audubon Society, the Sierra Club, and the National Wildlife Federation, have also urged DOE to approve the guarantee.[84] Other local groups, like the Alliance, are opposed to the loan guarantee, based on their general opposition to the project's potential adverse effects on the area and ability to produce expensive power.[85]

Another financial hurdle for offshore wind projects is the uncertain future existence of tax credits for renewable energy projects. Congress extended the current tax credit for wind projects until the end of 2013, but there is no guarantee that the tax credits will continue after this date. Under the credit, developers are able to choose between a production tax credit in the amount of 2.2 cents per kilowatt-hour or an investment tax credit of 30% of the project's construction costs.[86] The current tax credit differs from prior versions of the credit. Previously, projects had to be finished and providing energy to the grid to qualify for the tax credit, but under the current credit, projects only have to begin construction by the end of 2013. Since it is unknown whether the tax credit will be renewed again, projects like Cape Wind and Fishermen's Energy in New Jersey are anxious to begin construction by the end of 2013. Although it is estimated that a long-term renewal of the tax credit could cost the U.S.

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[80] *Offshore Wind Technology*, U.S. DEPARTMENT OF ENERGY, http://www1.eere.energy.gov/wind/offshore_wind.html (last visited July 19, 2013).

[81] *Id.*

[82] *EIS-0470: U.S. Department of Energy Loan Guarantee for the Cape Wind Energy Project on the Outer Continental Shelf of Massachusetts, Nantucket Sound,* U.S. DEP'T OF ENERGY, http://energy.gov/nepa/eis-0470-us-department-energy-loan-guarantee-cape-wind-energy-project-outer-continental-shelf (last visited July 19, 2013). In its review, DOE has adopted DOI's 2009 Final Cape Wind Energy Project EIS and the May 2010 and April 2011 Cape Wind Environmental Assessments as DOE's Final EIS. DOE has noted that "[t]he adequacy of the Department of the Interior final EIS is the subject of judicial action." *Id.*

[83] AP, *Mass. Lawmakers Back Cape Wind Loan Guarantee Bid*, BOSTON.COM, Apr. 5, 2013, http://www.boston.com/news/local/massachusetts/2013/04/05/mass-lawmakers-back-cape-wind-loan-guarantee-bid/USkxMLSkJ5rWuprRyixXFI/story.html (last visited July 19, 2013).

[84] Phil Taylor, *Cape Wind Project Announces Financial 'Milestone'*, ENVIRONMENT & ENERGY PUBLISHING, LLC, Mar. 19, 2013, *available at* http://www.capewind.org/news1315.htm. Other groups include Greenpeace, the Conservation Law Foundation, and the Natural Resources Defense Council.

[85] AP, *supra* note 83; *see also* http://www.saveoursound.org.

[86] For an in-depth analysis of renewable energy tax credits, *see* Kevin M. Walsh, *Renewable Energy Financial Incentives: Focusing on Federal Tax Credits and the Section 1603 Cash Grant: Barriers to Development*, 36 ENVIRONS ENVTL. L. AND POL'Y J 207 (2013).

Treasury around $12 billion over a ten-year time period, industry advocates argue that the projects will generate enough taxable activity to cover these costs.[87]

A final financial hurdle for an offshore wind project may be its ability to sell the electricity produced by the project. Compared to fossil fuels, wind energy has a relatively high cost, which results in higher electricity rates.[88] Cape Wind has currently secured power purchase agreements (PPAs) for 77.5% of the power that will be generated from the project.[89] Once a developer enters into a PPA, the agreement will have to be reviewed and approved by a state utility entity. In addition, citizens may challenge the utility board's approval of the PPA, as the Cape Wind project has shown.

B. Additional Regulation

Despite DOI's attempts to streamline the leasing process, offshore wind projects still face a plethora of state and federal regulators. On the federal level, besides DOI's authority under OCSLA and EPAct to lease the OCS for renewable energy projects, many other statutes and regulations are involved in the federal process. When EPAct gave jurisdiction to DOI for leasing, it also specified that federal agencies that had authorities under separate federal laws would retain their jurisdiction.

Several major federal environmental statutes will play a role in the federal regulatory process. For instance, NEPA applies to major federal actions and requires federal agencies to consider the environmental impacts of these actions.[90] When reviewing the action, the federal agency is supposed to consider the action's environmental impacts along with other factors and goals, including the social and economic responsibilities for future generations.[91] NEPA does not mandate that environmental goals have priority over other goals, and gives the federal government discretion in weighing these factors. NEPA is only procedural; it imposes no substantive mandates on federal agencies, but it does compel these agencies to consider the environmental effects of their actions.

In addition, the Coastal Zone Management Act (CZMA) allows states to be involved in the review of an offshore wind project. The CZMA is an example of cooperative federalism, as it is a state-federal partnership to manage coastal resources whose federal use may affect the state. State participation in the CZMA program is voluntary, but states are encouraged by federal grant money to develop coastal management programs. Under the CZMA, participating states develop a coastal management plan (CMP) and designate a coastal zone for the state. Once a state adopts a CMP, certain federal actions and activities must then be consistent with these plans. The activities and actions include:

- Federal Agency Activities;
- Federal Development Projects;
- Applications for Federal License or Permits;
- OCS Plans; and

[87] Matthew L. Wald, *The Wind Industry Gets to Draw Another Breath*, THE NEW YORK TIMES, GREEN BLOG, Jan. 3, 2013, http://green.blogs.nytimes.com/2013/01/03/the-wind-industry-gets-to-draw-another-breath/.
[88] *Offshore Wind Technology*, supra note 80.
[89] Taylor, *supra* note 84.
[90] National Environmental Policy Act, 42 U.S.C. §§ 4321-4370(h).
[91] 42 U.S.C. § 4332.

- Applications of local government for Federal assistance.[92]

The CZMA requires a consistency review for any of the above activities that will affect state coastal waters.[93] Federal agency activities and federal development projects must be consistent to the maximum extent practicable with the CMP's enforceable policies.[94] The federal agency must provide to the state agency a consistency determination for these actions.[95] Applicants for federal licenses and permits for activities that will affect the coastal zone must provide a certification that the proposed activity complies with and will be conducted in a manner that is consistent with the state's CMP. The federal agency cannot issue the license or permit until the state concurs or presumptively concurs with the certification, though there are procedures for the Secretary of Commerce to intervene.[96]

For applicants with OCS Plans, the applicant needs to attach to its application a consistency certification, and like federal licenses and permits, the Secretary can intervene if the state does not concur with the certification.[97] Finally, state and local governments submitting applications for federal assistance that will affect the coastal zone must indicate the views of the appropriate state or local agency concerning the relationship of the activities to the state's CMP. A federal agency cannot approve a project that is inconsistent with the CMP's policies, but the Secretary of Commerce can allow a project to go forward if it is in the interest of national security.[98]

For competitive leases under DOI regulations, BOEM will complete its NEPA review for the lease issuance and site assessment steps at the same time.[99] Similarly, BOEM will also complete the CZMA consistency reviews for the lease issuance and site assessment steps simultaneously for competitive leases.[100] However, if the SAP contains different impacts than those consider in the NEPA and CZMA reviews when the lease was issued, BOEM may decide that another NEPA and CZMA review needs to

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[92] 16 U.S.C. § 1456(c).

[93] *Id.* § 1452. Congress enacted the CZMA in 1972 "to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations." The CZMA was a response to the 1969 Santa Barbara blowout, to lure states into accepting OCS leases which were consistent with state plans for their own coastal zones.

[94] *Id.* §§ 1456(c)(1)(A) and 1456(c)(2).

[95] *Id.* § 1456(c)(1)(C). The federal agency must provide this certification at the "earliest practicable time" but no later than 90 days before final approval of the federal activity, unless the federal and state agencies agree to a different schedule. The CZMA does provide the President with the ability to exempt certain activities from this requirement if the activity is in the paramount interest of the U.S. *Id.* § 1456(c)(1)(B).

[96] *Id.* § 1456(c)(3)(A). This certification must be part of the application to the licensing or permitting agency, and the applicant needs to send a copy to the state or designated state agency. The state then has six months to review the certification and tell the federal agency whether the state concurs or objects to the applicant's certification. If the state does not act within six months, the state is presumed to have concurred with the certification.

[97] *Id.* § 1456(c)(3)(B). A copy of this certification must also go to the state. The state then has three months to concur or object to the certification. If the state does not act, its concurrence is presumed after three months. The state also has the ability to explain to the Secretary, the federal agency, and the applicant why its review is delayed.

[98] *Id.* § 1456(d).

[99] 30 C.F.R. § 585.611.

[100] *Id.* § 585.612. For non-competitive leases, the lessee needs to submit its CZMA consistency certification with its SAP and send a copy to the state agency that handles CZMA reviews. *Id.*

be completed.[101] In that case, the state would have another consistency review opportunity. Further, BOEM will perform a site-specific environmental review when the lessee submits its COP.[102]

The Endangered Species Act (ESA) will also likely play a role in the development of a Mid-Atlantic offshore wind farm. The purpose of the ESA is to protect and recover imperiled species and the ecosystems upon which they depend. One way the ESA protects endangered and threatened species and their habitats is by prohibiting the "take" of listed animals. The ESA defines "take" broadly and includes actions that "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or an attempt to engage in any such conduct."[103] However, the ESA contains a procedure for a person or entity to obtain a permit, known as an Incidental Take Permit, which allows the actor to lawfully take an endangered species if the main purpose of the activity is not to take the species.[104] The ESA also requires federal agencies to use their legal authorities to promote the conservation purposes of the ESA and to consult with the U.S. Fish & Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS), as appropriate, to ensure that the effects of any action the agency authorizes, funds, or carries out is not likely to jeopardize the continued existence of a listed species.[105]

The above statutes are only some examples of federal laws that could govern an offshore wind project. In addition, some other federal statutes that may come into play are the Magnunson-Stevens Fishery Conservation & Management Act; Migratory Bird Treaty Act; National Marine Sanctuary Act; Marine Mammal Protection Act; National Historic Preservation Act; Marine Protection, Research, and Sanctuaries Act; Clean Water Act; Clean Air Act; Federal Aviation Act; Federal Power Act; Ports and Waterways Safety Act; and the Rivers and Harbors Act. Some other agencies that may be involved include the U.S. Environmental Protection Agency, the Coast Guard, the National Oceanic and Atmospheric Administration and its sub-agencies like the Office of Ocean and Coastal Resource Management, the Federal Aviation Administration, and additional agencies in the Department of the Interior.[106]

On the state level, a project also has to go through additional hurdles. A project in federal waters will have to gain the appropriate state approvals for the portions of the project in state waters, such as transmission cables, or for any structures on land. Projects will also have to comply with other relevant state laws, such as environmental and land use laws. For example, the Fishermen's Energy Atlantic City Windfarm that will be located in state waters off the coast of New Jersey had to obtain a permit from the New Jersey Department of Environmental Protection, a New Jersey Green Acres Approval, a New Jersey Tidelands License, and an easement from Atlantic City. In addition, because a project completely in state waters may still have to obtain some federal permits, the Fishermen's Energy project had to obtain a Clean Water Act § 404 Permit from the U.S. Army Corps of Engineers for its dredge and fill

[101] *Id.*
[102] *Id.* § 585.627.
[103] 16 U.S.C. § 1532(19).
[104] *Id.* § 1539. An Incidental Take Permit gives the permit holder immunity from civil and criminal penalties under the ESA. Applications for a permit must include a Habitat Conservation Plan, which is meant to minimize or mitigate the proposed activity's harmful effects on the endangered species.
[105] *Id.* § 1536(a)(2).
[106] U.S. DEPT. OF ENERGY, A NATIONAL OFFSHORE WIND STRATEGY: CREATING AN OFFSHORE WIND ENERGY INDUSTRY IN THE UNITED STATES 11-12 (2011), *available at* https://www1.eere.energy.gov/wind/pdfs/national_offshore_wind_strategy.pdf.

activities.[107] Finally, states need to approve the project's utility-related approvals, like energy siting decisions and power purchase agreements. Although the Fishermen's Energy project has received all its permits, the project is still awaiting approval from the New Jersey Board of Public Utilities and the Division of Rate Counsel.[108]

C. Legal Challenges

With Cape Wind, the developers and government agencies have faced a litany of legal challenges by those who are concerned with the project's impact. For the most part, Cape Wind and the government have prevailed in these suits, but these legal challenges have slowed the progress of the project. Although Cape Wind was the first proposed offshore wind project, it seems reasonable to think the amount of litigation surrounding the project is extraordinary. However, Cape Wind has demonstrated the types of suits that could be brought against an offshore wind project. These claims can be broken into three broad categories: regulatory, environmental, and utility-related challenges.

1. Regulatory Challenges

Since offshore wind projects have to fulfill many statutory and regulatory requirements, a project can be challenged if it does not meet these requirements. Regulatory claims involve challenges questioning an agency's authority or whether the agency's action has followed the proper procedures (specific challenges under environmental statutes will be discussed below). With Cape Wind, the project's opponents have challenged the actions of regulators in issuing permits and approvals for the project, including challenges to the Corps' issuance of a permit under the Rivers and Harbors Act, Native American tribes' challenges under the National Historic Preservation Act, and challenges to the Federal Aviation Administration's No-Hazard Finding.

For example, the Wampanoag Tribe of Gay Head (Aquinnah) filed a lawsuit, claiming that BOEM had not followed the proper procedures set forth in Section 106 of the National Historic Preservation Act.[109] In its case, the tribe claimed that BOEM inadequately considered Cape Wind's potential impact on subsistence fishing and should have done a supplemental environmental review to look at the project's potential effects on cultural and historic resources.

The opponents to Cape Wind have also brought multiple cases against the Corps while it had initial jurisdiction over the project. For instance, the Alliance challenged the Corps' authority to issue a permit to build a structure to collect scientific data on the OCS, claiming that the OCSLA only provides the Corps with the authority to issue permits for structures that are related to mineral extraction.[110] The First Circuit rejected this claim, even though the court found that the OCSLA's language was not clear on the issue. In making this finding, the court relied on the act's legislative history, which revealed

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[107] *See Fishermen's Energy Atlantic City Windfarm, supra* note 27.
[108] *See* Johnson, *supra* note 28.
[109] Memorandum of Amici Curiae at 25, The Wampanoag Tribe of Gay Head (Aquinnah) v. Beaudreau, Civil No. 10-cv-01067-RBW-DAR (consolidated) (D. D.C. Dec. 14, 2012).
[110] Alliance to Protect Nantucket Sound, Inc. v. U.S. Dept. of the Army, 393 F.3d 105 (1st Cir. 2005).

Congress did not intend to limit the Corps' Section 10 authority to structures for mineral extraction.[111] Based on this, the court ruled that Section 10 applies to all artificial islands and fixed structures on the OCS.[112]

In another challenge to the Corps' authority, a group claimed that Cape Wind needed to consult with the state of Massachusetts on fishery issues and comply with other Massachusetts laws before construction on a scientific data tower could begin.[113] The plaintiffs argued that Massachusetts had authority over fishery issues under the Magnunson-Stevens Fishery Conservation and Management Act (MSA) even if the tower would be in federal waters, due to the tower's effect on the state's fishery. The First Circuit rejected the plaintiff's claims and reaffirmed the jurisdiction of the federal government on the OCS.[114] Under the MSA, the court reasoned, a state may have the authority to regulate fishing in federal waters, but activities on the seabed are the exclusive jurisdiction of the federal government under the OCSLA. Otherwise, states would have a veto power over projects on the OCS.

In the only successful legal challenge of the Cape Wind project to date, the town of Barnstable and the Alliance challenged the Federal Aviation Administration's (FAA) no-hazard determination, claiming the agency did not properly consider the project's danger to local aviation, violated its governing statute, and misread its regulations.[115] The FAA had based its finding on a provision in its handbook that stated a project would adversely affect navigation if the structure was taller than 500 feet. Since the

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[111] *Id.* at 109.

[112] The claim revolved around a provision of the OCLSA that extended the Corps' RHA jurisdiction "to prevent obstruction to navigation in the navigable waters of the United States … to artificial islands and fixed structures on the [OCS]." *Id.* With the 1978 amendments to the OCSLA, Congress changed the reference to artificial islands, so that federal jurisdiction would apply to "all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources."

[113] Ten Taxpayer Citizen Group v. Cape Wind Associates, LLC, 373 F.3d 183 (1st Cir. 2004).

[114] The court ruled that the regulation of the seabed and attached structures is the exclusive jurisdiction of the federal government for projects in federal waters. Further, the court stated that OCSLA left no room for states to also require permits or licenses for structures on the OCS. Finally, the court ruled that the MSA did not amend or repeal any provisions of OCSLA.

[115] Town of Barnstable, Massachusetts v. Federal Aviation Administration, 659 F.3d 28, 31 (D.C. Cir. 2011). In the case, the FAA claimed that the plaintiffs lacked standing and that the claims on the merits were flawed. The U.S. District Court for the D.C. Circuit found that the plaintiffs did have standing. To have Article III standing, a plaintiff must show three things: injury, causation and redressability. All the parties here agreed that the plaintiffs were able to show injury, based on the risk of collisions and the inconvenience to pilots and other members of the Alliance and for the town who operated a municipal airport. However, the FAA argued that the plaintiffs lacked causation and redressability since the FAA's no-hazard determination was not binding on the Department of Interior's decision on whether the project could ultimately go forward. To show causation and redressability, plaintiffs have the burden of showing "that their injuries are fairly traceable to the challenged conduct and that any ultimate success on the merits would yield a 'significant increase in the likelihood that [they] would obtain relief that directly redress the inju[ries] suffered.'" *Id.* at 31 (*quoting* Utah v. Evans, 536 U.S. 452, 464 (2002)). However, the D.C. Circuit found that the plaintiffs had made the requisite showing for standing, despite the fact that the FAA's finding was not binding on DOI. This was based on the fact that DOI conditioned Cape Wind's lease on Cape Wind receiving the FAA's final determination and complying with any mitigation measures, as well as DOI's focus on safety measures. *Id.* at 34. For a more in-depth analysis of this case, see Michael DeLoreto, *Judicial Review of the Aviation Hazard Determination for Cape Wind: Why the FAA Got it Wrong*, 6 SEA GRANT L. & POL'Y J. 187 (2013).

Cape Wind project would only be 440 feet in the air, the FAA found that the project would not have an adverse effect.[116] However, the U.S. District Court for the D.C. Circuit stated that other parts of the FAA handbook listed additional ways that a project could have an adverse effect, such as if the project would change a regular flight altitude or course. By relying on only one of these provisions, the court found that the FAA did not weigh the other factors in the handbook. Thus, the court found that the agency's review of the Cape Wind project was flawed since the agency had not adequately addressed all of the project's issues or explained the agency's finding.[117]

2. Environmental Challenges

The second category of litigation that the Cape Wind project has faced includes claims brought under environmental statutes like NEPA or the ESA, as well as under similar state statutes. These challenges often involve claims based on the project's potential effect on wildlife or the natural environment. The claims have also been based on alleged deficiencies in an agency's environmental review.

With its passage of the federal environmental statutes, Congress aimed to provide broad protection for our nation's resources. Many of these statutes provide mechanisms for private citizens to challenge an agency's actions under the statute to ensure that the agency has complied with the act's provisions. For example, parties can challenge an agency's actions under NEPA by claiming that the actions were arbitrary and capricious under the Administrative Procedure Act (APA), and parties have taken advantage of this ability to challenge an agency's NEPA review. For instance, it has been estimated that between 2001 and 2009 there was an annual average of 126 NEPA challenges filed, along with an average of 24 temporary restraining orders and preliminary and permanent injunctions to halt projects based on deficient NEPA reviews.[118]

Consistent with this, the Cape Wind project has faced multiple NEPA challenges. For example, the Alliance, the Public Employees for Environmental Responsibility (PEER), and other parties filed a suit against MMS (before it was reorganized into BOEM).[119] The parties claimed MMS violated NEPA and the APA by not adequately considering the project's possible alternatives, as well as its effect on wildlife, including right whales and migratory birds.

The Alliance also brought a NEPA claim that challenged the Corps' NEPA review, claiming that the Corps was required to circulate for public comment a draft finding of no significant impact (FONSI) or

[116] *Id.* at 35. The provision in the handbook stated: "[a] structure would have an adverse [aeronautical] effect upon VFR air navigation if its height is greater than 500 feet above the surface at its site, and within 2 statute miles of any regularly used VFR route."
[117] *Id.* at 36.
[118] Jim Vines, Stephanie Salek & Kelsey Desloover, *Reforming NEPA Review of Energy Projects*, KING AND SPALDING ENERGY NEWSLETTER (2012), *available at* www.kslaw.com/library/newsletter/EnergyNewsletter/2012/December/article.html.
[119] Public Employees for Environmental Responsibility v. Bromwich, Civil No. 1:10-cv-01067-RBW-DAR (D.C. Dist. June 25, 2010), *see also* Press Release, Public Employees for Environmental Responsibility, Heavy Toll on Wildlife Prompts Lawsuit Against Cape Wind, June 25, 2010, http://www.peer.org/news/news-releases/2010/06/25/heavy-toll-on-wildlife-prompts-lawsuit-against-cape-wind-/.

environmental assessment (EA) in its review of a Section 10 permit application.[120] Under NEPA, an agency is only required to circulate draft EAs in limited circumstances, including when a project is without precedent. The plaintiffs argued this was one of those situations because Cape Wind was the first offshore wind project on the OCS.[121] The Corps had decided it was not required to circulate the draft documents since there were already similar structures in the area, such as a data tower in the waters near Martha's Vineyard. The First Circuit deferred to this reasoning, holding that the Corps had adequately provided for public notice and comment and complied with NEPA.

Some of these environmental statutes also provide for citizen suits, giving the public the opportunity to serve as private attorney generals to help often over-burdened agencies enforce the statute's requirements. For instance, the ESA has a strong citizen suit provision that allows any person to bring a suit in federal court to enjoin anyone who is allegedly violating the ESA or its implementing regulations. By including this provision, Congress wanted to encourage private citizens to bring suits that will benefit the public interest. With Cape Wind, the Alliance, PEER, and other parties used this provision to file a suit against MMS, alleging that the agency had violated the ESA with a flawed biological opinion.[122] In their complaint for declaratory and injunctive relief, the parties claimed that the biological opinion would allow roseate turns and piping plovers to be killed without adequate safeguards and other measures that would minimize the take of the species. The case is still on-going, with summary judgment motions scheduled to be filed this summer.

Finally, suits could be brought under additional environmental statutes. For instance, the Alliance has claimed that the project poses a risk to migratory birds listed under the Migratory Bird Treaty Act (MBTA) since the project lies in one of the world's largest routes for migratory birds, the Atlantic Flyway.[123] The Alliance has also made public statements that the project could violate the Marine Mammal Protection Act (MMPA) if the project kills, harms or harasses marine mammals like dolphins and whales.[124]

3. Utility-Related Challenges

The third category of claims involves utility-related challenges. These are usually challenges to state agency decisions regarding the approval of the utility aspects of the project, such as siting decisions or power purchase agreements. In the Cape Wind cases, the Massachusetts courts have deferred to the state agency decisions.

For instance, the Alliance, along with the town of Barnstable and other parties, challenged the Massachusetts Energy Facilities Siting Board's decision to grant a certificate to Cape Wind to construct underground electric transmission lines for the project.[125] Among other issues, the parties challenged the board's decision that it only had jurisdiction to consider the impacts of the transmission lines and

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[120] Alliance to Protect Nantucket Sound, Inc. v. U.S. Dept. of the Army, 393 F.3d 105 (1st Cir. 2005).
[121] *Id.* at 115.
[122] Public Employees for Environmental Responsibility, *supra* note 119.
[123] *Id.*
[124] *Cape Wind Threats: The Environment*, SAVE OUR SOUND, http://www.saveoursound.org/cape_wind_threats/environment/ (last visited July 19, 2013).
[125] Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Board, 932 N.E.2d 787 (Mass. 2010).

not the effects of the rest of the wind farm that were not connected to the transmission project. The court rejected the Alliance's claims and upheld the board's decision to issue the certificate.[126]

In addition, several cases have been brought against the Massachusetts Department of Public Utilities regarding its review and approval of power purchase agreements (PPAs) for the Cape Wind project. Pursuant to Section 83 of the Massachusetts Green Community Act, when reviewing a PPA for a renewable energy source, the department is directed to determine whether the project will: (1) enhance the state's electricity reliability; (2) help moderate "system peak load requirements"; (3) be a cost-effective contract for the state's ratepayers; and (4) create jobs for the state, if feasible. The department must also consider the contract's costs and benefits, and the statute directs the department to only approve contracts that are cost-effective, long-term means for procuring renewable energy.

Several different parties filed separate claims against the department regarding its decisions under Section 83. In one case, the plaintiff Melone wanted to intervene in the department's Section 83 review of the PPA, claiming that the Cape Wind project would adversely effect him as a beachfront property owner on Martha's Vineyard by altering his view, diminishing his property value, and causing contaminants to wash up on his property.[127] The department denied Melone's request to intervene, reasoning that his claims went beyond the considerations of a Section 83 proceeding.[128] The court upheld the department's decision and ruled that the department acted within its discretion to decide whether to let a party intervene. The court reasoned that since the Section 83 proceeding was to determine the PPA's cost-effectiveness, Melone's environmental and other concerns went beyond the scope of the department's review.[129]

The Alliance also brought a case regarding a Cape Wind PPA. The Alliance has motioned to reopen the record in the department's Section 83 review, and the department had denied this motion.[130] The Alliance was seeking to have the department review PPAs from other New England wind projects, which the Alliance claimed were highly relevant to the department's cost-effectiveness review under Section 83.[131] The court upheld the department's ruling, as well as the department's requirement that the motioning party provide a compelling reason for reopening a hearing once the agency had issued its final decision in the matter.[132] In addition, the court upheld the department's reasoning that the PPAs

[126] *Id.* at 805-06.

[127] Melone v. Department of Public Utilities, 967 N.E.2d 596 (Mass. 2012).

[128] *Id.* Melone claimed he had standing because he was an abutter of the project and a ratepayer. The department determined that his abutter status was irrelevant, the Attorney General had intervened to represent the ratepayers, and Melone was not even a National Grid ratepayer since the company did not serve Martha's Vineyard. The court ruled that even if Melone was a ratepayer, he did not have a particularized interest in the proceeding and the Attorney General had already intervened.

[129] *Id.* at 1009. Melone also sought judicial review of the department's approval of one of the PPA's, which was denied. The court also upheld this denial, applying the same reasoning as its decision to uphold the department's decision to deny Melone's motion to intervene since he was not an aggrieved party.

[130] Alliance to Protect Nantucket Sound, Inc. v. Department of Public Utilities, 959 N.E.2d 408 (Mass. 2012). The department had denied Alliance's first two motions, but the Alliance did not appeal these denials.

[131] *Id.*

[132] *Id.* at 412. In reviewing the department's denial, the court gave the department a deferential standard of review, rejecting the Alliance's claim that the denial implicated the Commerce Clause of the U.S. Constitution, which would require the court to independently review the department's decision.

from other wind projects were cumulative of evidence already in the record and did not show previously undisclosed or unknown information.

In an additional PPA case, the Alliance and other parties filed suit to have the department's approval of the PPA reversed and remanded.[133] The parties claimed that the department improperly found the PPA to be cost effective.[134] Again, the court deferred to the department and remanded the case to the county court, directing the single justice to affirm the department's decision.

V. Lessons from Cape Wind

More than a decade after the Cape Wind process started, there are some glimmers of hope for a developer hoping to get a wind farm project underway in the Mid-Atlantic region, as there is a support for offshore wind projects on both the federal and state levels. On the federal level, both DOI and the Obama administration have voiced support for developing wind energy off the nation's coasts. Due to Cape Wind's decade long journey to obtain an OCS lease, Congress and DOI have taken steps to better define the leasing process, and under this new process, BOEM has already issued another commercial lease to a project off the coast of Delaware and will hold its first lease sale in the summer of 2013.

Further, BOEM's regional approach to planning, identifying WEAs, and performing environmental reviews should also help speed up the development process. With the issuance of its regional EA in 2012, BOEM has already finished its environmental review for the lease sale and site assessment steps of the leasing process for the WEAs in New Jersey, Delaware, Maryland, and Virginia. For future leases in these WEAs, the project-specific environmental review will most likely occur when the developer submits a COP for a particular project.[135]

On the state level, the Mid-Atlantic states have each taken steps to bring the industry to their respective states, such as by passing laws to encourage the industry's development. For example, in 2010, New Jersey passed the Offshore Wind Development Act to encourage the development of wind energy off the state's coast, with the aim that the industry would grow the state's economy and create jobs.[136] The law includes an offshore wind renewable energy certificate program "for businesses that construct manufacturing, assemblage and water access facilities to support the development of qualified offshore wind projects."[137]

Likewise, in announcing the Maryland Offshore Wind Energy Act of 2013, the Governor's office discussed how bringing the industry to the state would be beneficial to Maryland. The office discussed benefits like job creation, reduction in public health costs, and price stability for Maryland ratepayers. Further, the Maryland Department of Business & Economic Development projects that offshore wind

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[133] Alliance to Protect Nantucket Sound, Inc. v. Department of Public Utilities, 959 N.E.2d 413 (Mass. 2012).
[134] *Id.*
[135] As stated earlier, BOEM could do another review if it believes a developer's Site Assessment Plan merits a new review.
[136] Offshore Wind Economic Development Act, N.J. Senate Bill 2036 (2010). *See* Marshall B. McLean, *Offshore Wind: Will New Jersey Take the Opportunity to Lead?*, CLIMATE LAWYERS BLOG, Feb. 7, 2013 http://www.climatelawyers.com/post/2013/02/07/Offshore-Wind-Blog.aspx.
[137] Press Release, State of New Jersey, Governor Christie Signs Offshore Wind Economic Development Act to Spur Economic Growth, Encourage Energy as Industry (Aug. 19, 2010), *available at* http://www.state.nj.us/governor/news/news/552010/approved/20100819a.html.

will have almost a $1.3 billion economic impact on the state over five years and state tax revenues of $5.6 million.[138]

Currently, the Mid-Atlantic states appear to be working together on a regional approach for developing offshore wind. In June 2009, the Governors of New York, New Jersey, Delaware, Maryland, and Virginia formed the Mid-Atlantic Regional Council on the Ocean (MARCO) to create a regional, collaborative group to maintain and improve the region's ocean and coastal resources.[139] A part of the effort is to ensure that the Mid-Atlantic's ocean resources continue contributing to the region's economic health. The agreement identified priorities for the group, including establishing a regional approach for the sustainable development of offshore renewable energy.[140] However, multiple states in the region are attempting to become the state with the first offshore wind project, recognizing the economic and intangible benefits that an initial project can have for a state. In this race to be first, it will be interesting to see if regional cooperation breaks down and if any potential jurisdictional challenges develop between the states.

For a potential Mid-Atlantic offshore wind project, there are still a lot of regulatory hurdles for a project to get through, and the timetable for these approvals is unknown. For instance, although the Fishermen's Energy Atlantic City Windfarm is fully permitted, the project is in limbo while it awaits the approval of the New Jersey Board of Public Utilities and the Division of Rate Counsel. Because of this regulatory limbo, some have advocated further streamlining the permitting process.[141]

In addition, there are other aspects of a project that should be considered. By looking at Cape Wind, one can see that these projects might face difficulties in financing the projects, as well as the potential for litigation. Policy-makers might also have to engage in the difficult analysis of weighing the environmental costs and benefits of a project and should be aware of the potential effects of streamlining the regulatory process.

A. Financial Issues

As the Cape Wind and NRG project in Delaware have shown, offshore wind still faces a huge obstacle in securing financing. The good news is that the federal government has shown some willingness to help with these financial issues. DOE has dedicated funding to demonstration renewable energy projects and research, as well as to projects that will consider how to eliminate the market barriers for offshore wind. However, Cape Wind is still waiting to hear whether DOE will grant a loan guarantee to the project, which is another example of the regulatory limbo encountered by offshore wind developers.

Further, while developers and investors are encouraged by the extension of the federal tax credit

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[138] *Offshore Wind for Maryland*, OFFICE OF GOVERNOR, http://www.governor.maryland.gov/wind.asp (last visited July 19, 2013).

[139] Mid-Atlantic Governors' Agreement on Ocean Conservation (2009), *available at* http://www.midatlanticocean.org/agreement.pdf.

[140] Recently, MARCO worked with the Environmental Law Institute in developing a guide for offshore wind. ENVIRONMENTAL LAW INSTITUTE, A GUIDE TO STATE MANAGEMENT OF OFFSHORE WIND ENERGY IN THE MID-ATLANTIC REGION (2013), *available at* http://www.midatlanticocean.org/owe_April2013.pdf.

[141] *See* Jeffrey Thaler, *Fiddling as the World Floods and Burns: How Climate Change Urgently Requires a Paradigm Shift in the Permitting of Renewable Energy Projects*, 42 ENVTL. L. 1101 (2012).

for renewable energy projects, the tax credit has only been extended through the end of 2013 and its future availability is uncertain. To be eligible for the credit, a project will need to begin construction by the end of the year. Since it is unknown whether the tax credit will be renewed again, projects like Cape Wind and Fishermen's Energy in New Jersey are anxious to begin construction by the end of the year.[142] However, even if a project begins construction, it will still need to meet additional eligibility requirements in order to receive the credit.

If a project is able to become eligible for this tax credit, the developers will have to choose either a production tax credit (PTC) or investment tax credit (ITC) by determining which credit it thinks would be more beneficial for the project.[143] The PTC is a credit of 2.2 cents per kilowatt-hour of electricity that the project produces in its first ten years. This credit is tied to the amount of electricity generated by the project, and therefore, its amount is uncertain. The ITC, on the other hand, is a one-time credit for 30% of the project's costs during the year the project begins commercial operations, so the developer will know the amount of the ITC when deciding what credit to take.

B. Potential for Litigation

A Mid-Atlantic wind farm would face the same litigation risks as Cape Wind with similar regulatory, environmental, and utility-related claims. Private citizens will be able to use the mechanisms in the major environmental statutes to ensure that a project will not have adverse impacts, meets the statutory and regulatory requirements, and has not overlooked potential negative consequences of the project in a race to development. For example, the Alliance's challenge of the FAA's no-hazard determination helped make sure that Cape Wind would comply with the agency's regulations and not impede aviation in the area. However, although projects need to comply with these regulations and statutes, there is the potential for parties to use these tools as way to frustrate the development of a project, as many believe the Alliance has done.

Like Horseshoe Shoals, the Mid-Atlantic has other uses that might pose problems for proposed projects, is home to protected species, and is in the Atlantic Flyway. It is also likely that a Mid-Atlantic wind farm would face some NIMBY opposition, as the Mid-Atlantic has its own cluster of wealthy property owners who have fought to preserve their views in the past. For instance, property owners in New Jersey have filed a condemnation suit against their town, claiming that sand dunes built by the town have damaged their view and taken their property. The property owners have continued this suit even after the dune, which protected their property from Hurricane Sandy, has been mostly destroyed

[142] For more information on the implications of the tax credit for the Cape Wind project, see Patrick Cassidy, *Wind Tax Credits Survive*, CAPE COD TIMES, Jan. 3, 2013, http://www.capecodonline.com/apps/pbcs.dll/article?AID=/20130103/NEWS/301030341.

[143] For an in-depth analysis of renewable energy tax credits, see Walsh, *supra* note 86.

by the storm.[144] Of course, one way to avoid this opposition is to site a project out of sight from the beach, but the further offshore a project is, the more complicated construction becomes.

The Alliance has provided opponents of future wind projects with a successful game plan for stalling and frustrating a project. Another developer may have abandoned a project that faced such consistent opposition, and the opposition mounted against Cape Wind may make some developers wary of entering into the offshore wind market. Further, consistent opposition may make investors reluctant to finance a project. On the other hand, the Alliance tactics are unique in comparison to other environmental interest groups and residents near a potential Mid-Atlantic wind farm may not be willing or able to form such a coordinated, well-funded group as the Alliance.

Further, parties looking to file a legal challenge to a project will have to establish standing. For example, in his challenge to the Section 83 review of a Cape Wind PPA, a property owner claimed he had standing to challenge the review because he was an abutter of the project and a ratepayer. The state department charged with reviewing his challenge determined that his abutter status was irrelevant, that the Attorney General had already intervened to represent the ratepayers, and that he was not even a National Grid ratepayer since the company did not serve Martha's Vineyard. The Massachusetts Supreme Court agreed, ruling that even if the property owner was a ratepayer, he did not have a particularized interest in the proceeding and, furthermore, the Attorney General had already intervened to protect the ratepayers' interests.[145] As this holding is only controlling in Massachusetts, and Mid-Atlantic state courts may be faced with different standing claims associated with challenges to proposed wind farms, Mid-Atlantic wind farm developers would be wise to engage other ocean users and interest groups during the early stages of a project to hear and address concerns.[146]

Cape Wind has demonstrated that these projects can generate a large amount of public interest. For instance, the Corps's initial NEPA review received approximately 5,000 public comments. However, the streamlining and regionalizing of the federal environmental review process following Cape Wind, may result in interested parties in the Mid-Atlantic being unaware of the initial environmental review and the opportunity to provide comments. Although the public will have an opportunity to provide comments when a developer submits a COP for a particular project, those interested in the process may feel as though the lease issuance and site assessment review occurred without their input. For many, this may result in the feeling that the development process has begun without them and that their feelings or concerns have not been heard.

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[144] In determining the amount of just compensation for Harvey Cedar's partial taking of an easement to build a dune on the Karans' property, the trial court ruled that the jury could not consider the dune's storm-protection benefits since storm protection is a general, and not a special, benefit. As a result, the jury awarded the Karans $375,000 in just compensation based on the dune's adverse effect on the Karans' view, and the appellate court approved this amount. Harvey Cedars v. Karan, 40 A.3d 75 (N.J. Super. Ct. App. Div. 2012). However, the Supreme Court of New Jersey recently reversed and remanded this decision, holding that just compensation should be calculated using the property's fair market value immediately before and after the partial taking and that all non-speculative and reasonably calculable benefits should be included in the calculation, regardless of whether the benefit is general or special. Harvey Cedars v. Karan, 2013 WL 3368225, at *18-19 (N.J. July 8, 2013).

[145] Melone v. Department of Public Utilities, 967 N.E.2d 596 (Mass. 2012).

[146] For a further analysis on this point, *see* David Frulla, George M. Hagerman, Jr. & Michele Hallowell, *Found in the Wind: The Value of Early Consultation and Collaboration with Other Ocean Users for Successful Offshore Wind Development*, 17 ROGER WILLIAMS U. L. REV. 307 (2012).

As a result, the potential may exist that decreased public participation during the early stages of a project might negatively affect public support for a project. One of the best ways that a potential offshore wind farm may avoid strong opposition is to gain public buy-in for the project. With a streamlined environmental review, there is some risk that the public and opponents will feel like they have not been given a meaningful voice in the process, which may give rise to stronger opposition to the project. This opposition may actually slow down development, which is the precise situation that streamlining seeks to prevent. With this potential cause of opposition, it is again important for the developers and relevant government agencies to engage and work with the other interested parties and ocean users at the earliest stages of a project as possible.

C. Dueling Environmentalists and Weighing Environmental Costs and Benefits

Renewable energy projects have faced an interesting dynamic, with many of these projects seeing environmentalists both fighting for and against a project. These "dueling environmentalists" often focus on an environmental aspect or effect of a project, while questioning the other side's position and commitment to the environment. With this dynamic, those opposing the projects are using the toolkit provided for citizen participation under the major environmental statutes and regulations to file legal challenges against the projects.

Cape Wind, like other renewable energy projects, has faced dueling environmentalists. There are multiple parties who are challenging the project based on the alleged environmental costs of the project, including Robert F. Kennedy, Jr., a prominent environmentalist who has been a notable and visible opponent of the project. Kennedy has been outspoken in voicing his concern with the project's potential effect on the region's fishermen.[147] The Alliance has also been outspoken on the environmental effects of Cape Wind, and like Kennedy, is concerned with the impacts to local fishermen and avian species.[148] The Alliance also opines that Cape Wind will not help reduce greenhouse gas emissions, combat global warming, or improve air quality in the area, as the project will

[147] *See* Robert F. Kennedy, Jr., *supra* note 13.

[148] *Cape Wind and the Environment,* SAVE OUR SOUND, http://www.saveoursound.org/myths_vs_facts/environment/ (last visited July 19, 2013). On its website, the Alliance states:

> Cape Wind threatens the marine environment and would harm the productive, traditional fisheries of Nantucket Sound. From the bottom up, the construction and operation of Cape Wind's 25 square mile industrial plant threatens benthic, marine, and avian species. In addition to the lengthy and destructive construction process that would include dredging, jet plowing, and pile driving, the plant's 10 story Electrical Service Platform would hold 40,000 gallons of hazardous oil in the middle of the 130-turbine array. Cape Wind's proposed site, Horseshoe Shoal, is a traditional and lucrative fishing ground where many hardworking local fishermen earn up to 50%-60% of their annual income. The Massachusetts Fishermen's Partnership, which represents 18 commercial fishing organizations, says that navigation of mobile fishing gear between the 130 towers would be hazardous or impossible and, in short, Cape Wind would displace commercial fishing from Nantucket Sound. The electrical service platform (ESP) below would soar 10 stories high, cover 1/2 an acre, and contain 40,000 gallons of undisclosed oil that, in the event of a rupture, would reach Cape and Islands beaches within 5 hours.

Id.

not cause local fossil fuel power plants to close.[149] On the other hand, there is a contingent of environmental groups who are supportive of the project, including the Sierra Club, the Natural Resources Defense Council (NRDC), and Greenpeace. These groups believe the project addresses the nation's need to reduce carbon emissions. Further, these parties maintain that the effects of renewable energy on wildlife are small compared to other energy projects.

In taking these positions, each side has questioned the other side's contentions and motivation. Through his opposition, Kennedy has discussed the potential effect on the region of environmentalist supporting Cape Wind. For instance, in an editorial for the New York Times, Kennedy wrote: "Many environmental groups support the Cape Wind project, and that's unfortunate because making enemies of fishermen and marina owners is bad environmental strategy in the long run. Cape Cod's traditional-gear commercial fishing families and its recreational anglers and marina owners have all been important allies for environmentalists in our battles for clean water."[150]

Likewise, the groups supporting the project have criticized the lawsuits brought by groups like the Alliance, claiming that the group is not truly interested in protecting the environment, but rather, only wants to protect their views and property values. In fact, members of these groups have compared their own lawsuits challenging certain projects and the Alliance's litigation tactics against Cape Wind. Recently Sue Reid of the Conservation Law Foundation (CLF) stated that "[a]ll of these environmental groups like CLF and the Natural Resources Defense Council and the Sierra Club and Greenpeace and all these groups that engage in litigation – not even periodically but regularly – do so relatively surgically, and we look for when there's a problem with a proposed development project or a regulatory process. We focus on the biggest issues and target those and go after them, when necessary, with litigation."[151] In comparing these groups to the Alliance, Reid stated that the Alliance is "a whole different animal" that has been bringing suits "in connection with basically every single regulatory approval, whether it's related to the contracts or the environmental reviews or the permitting – every single turn has been challenged."[152]

Regardless of the motivation of these suits, it is difficult to determine how to weigh competing environmental harms against each other. Offshore wind projects may or may not have impacts on the region's fisheries, marine mammals, migratory birds, and other aspects of the marine environment. But if there is an adverse environmental effect, policy makers will be forced to engage in a difficult balancing test to consider the environmental costs and benefits of a project.

In considering the balance between environmental costs and benefits, policy makers considering a Mid-Atlantic project will have to decide what environmental benefit should prevail: protecting species or decreasing carbon emissions? Going forward with low-carbon or carbon-free energy projects may have immediate effects on species in a region, as a potential project could threaten wildlife. For

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[149] *Global Warming*, SAVE OUR SOUND, http://www.saveoursound.org/myths_vs_facts/global_warming/ (last visited July 19, 2013). The group alleges that the project will do nothing to improve air quality in the area, which experiences air pollution that comes from power plants in the Midwest. Further, the Alliance contends that the project could actually worsen air pollution in the area by forcing dirtier power plants to go online to compensate when the wind is not blowing offshore.

[150] Robert F. Kennedy Jr., *supra* note 13.

[151] Zeller, *supra* note 21.

[152] *Id.*

instance, opponents to Cape Wind have emphasized the project's effect on New England's fisheries. To them, the project jeopardizes an important ecological and economic component of the area.

On the other hand, considering the projected effects of climate change, wildlife in these regions may be imperiled in the long run. Scientists are predicting that if carbon emissions are not reduced, climate change will have a real effect on the range and ultimate survival of certain species. For example, projected temperature increases in the Northeast region of the U.S. are expected to influence the range of cod, as well as the timing and location of spawning for the fishery.[153] For the project's supporters, renewable energy projects like Cape Wind are necessary to protect the long-term ecological health of the region, including the long-term stability and survival of the area's fisheries. Further, the proponents of the project stress that offshore wind will have a lesser impact on these resources than other energy projects.

For both policy-makers and the public at large, the answer to what environmental harms should be addressed, all things considered, will involve a hard balancing test. Interested parties will have to decide if they are willing to risk some present harm to species in the hope that these energy projects will aid the overall survival of these species in the future and ultimately help the environment. Of course, another factor that will go into this analysis is the other costs and benefits of a potential project, such as the economic benefits and potential for job creation in the region. Further, there is the potential that these projects could be developed in a way that would not harm or would have only a minimal effect on the environment. Ultimately, decision-makers will be faced with the following dilemma: what is more important – avoiding immediate harm or aiding the future environment? The answer is not certain or easy to decipher.

In considering environmental harms, this review will have to be done in connection to the particular aspects of individual projects. Policy makers should be aware of the large-scale environmental reviews done at the initial stages of a project, as there is always the potential with streamlining that a hasty review will occur that overlooks important environmental impacts. Further, by streamlining the initial environmental reviews of the lease issuance and site assessment steps, BOEM has placed a large burden on the review of a developer's COP for environmental effects. Because of the emphasis on an individual review at this point in a project's development, policy makers and interested parties will have to seriously and carefully consider a project's impacts to ensure adequate review.

VI. Conclusion

The path to developing an offshore wind project is anything but easy, and developers may not be as steadfast as Cape Wind Associates, LLC in pursuing the development of a potential project. For potential Mid-Atlantic projects, the good news is that the leasing process and connected environmental reviews are more defined than when Cape Wind first proposed its project in 2001. However, the regulatory process is still anything but simple, as there is a maze of additional federal and state agencies, laws, and regulations involved in the process. Further, these projects still face financial issues, in both securing financing and power purchase agreements to sell the power generated by the project.

[153] U.S. GLOBAL CHANGE RESEARCH PROGRAM, REGIONAL CLIMATE IMPACTS: NORTHEAST, GLOBAL CLIMATE CHANGE IMPACTS IN THE UNITED STATES (2009), *available at* http://nca2009.globalchange.gov/coasts.

DOI has made efforts to streamline the leasing process, and others have advocated for further streamlining on both the federal and state level. However, the potential exists that by streamlining, public participation will be pushed until latter stages of individual projects, negatively affecting public buy-in for the project. This feeling of being left out of the process could strengthen the opposition of other ocean users and interest groups to the project. Further, projects may have environmental impacts that need to be considered, and decision-makers may have a hard decision to make in weighing environmental harms and benefits. Finally, a streamlined process should not overlook or fail to adequately consider these potential environmental impacts.