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Wind Energy: Offshore Permitting

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Aaron M. Flynn
Legislative Attorney
American Law Division

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Summary

Technological advancements and tax incentives have driven a global expansion in the development of renewable energy resources. Wind energy, in particular, is now often cited as the fastest growing commercial energy source in the world. Currently, all U.S. wind energy facilities are based on land; however, multiple offshore projects have been proposed and are moving through the permitting process.

It is relatively clear that the United States has the authority to permit and regulate offshore wind energy development within the zones of the ocean under its jurisdiction. The federal government and coastal states each have roles in the permitting process, the extent of which depends on whether the project is located in state or federal waters. Currently, no single federal agency has exclusive responsibility for permitting activities on submerged lands in federal waters; authority is instead allocated among various agencies based on the nature of the resource to be exploited. In addition to basic jurisdictional questions, it is not necessarily clear that current federal law should be interpreted to apply to offshore wind energy facilities or whether new laws will be needed.

The Army Corps of Engineers (Corps) has been exercising jurisdiction over proposed offshore wind energy facilities under the Rivers and Harbors Act and the Outer Continental Shelf Lands Act. Recently, in *Alliance to Protect Nantucket Sound v. United States Department of the Army*, the U.S. Court of Appeals for the First Circuit upheld a federal district court decision that the Corps' jurisdiction under these laws was legally sound, and the Corps' decision to permit a preliminary data collection tower in federal waters was sustained. The reasoning of these courts may be applied to the permitting of larger-scale wind energy projects, although certain issues remain unresolved. It may remain arguable whether the Army Corps' jurisdiction extends to renewable energy projects in federal waters, and it is unclear whether Corps permits would provide an applicant with the necessary property rights to begin construction of an offshore wind energy facility.

Several bills were introduced in the 108th Congress to address this issue, including several versions of versions of the Energy Policy Act of 2003: H.R. 6 and S. 2095. The energy bill would have placed authority for granting easements and rights-of-way on submerged federal lands in the hands of the Secretary of the Department of the Interior. Additional 108th Congress legislation, H.R. 1183, would have placed regulatory authority in the Secretary of the Department of Commerce by amending the Coastal Zone Management Act to allow specifically for renewable energy projects and the designation of ocean areas that would make suitable candidates for development. In the 109th Congress, H.R. 907 substantially incorporates the substance of the provisions found in the energy bill from the 108th Congress.

This report will discuss the current law applicable to siting offshore wind facilities, the recent court challenges to the federal offshore permitting process, and the above-mentioned legislation that addresses offshore wind energy regulation. This report will be updated as events warrant.

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Wind Energy: Offshore Permitting

Technological advancements and tax incentives have driven a global expansion in the development of renewable energy resources. Wind energy, in particular, is now often cited as the fastest growing commercial energy source in the world.¹ Currently, unlike much of Europe,² all wind power facilities in the United States are based on land; however, multiple offshore projects have now been proposed, including the Cape Wind project off the coast of Massachusetts and Winergy's proposals off the coasts of Massachusetts, New York, New Jersey, Delaware, Maryland, and Virginia.³ These projects are relatively large undertakings requiring substantial investment: proposed wind farms, consisting of approximately 170 turbines off the coast of Massachusetts, are estimated to cost between \$500 million and \$700 million.⁴

There are multiple policy questions related to the feasibility and relative attractiveness of developing wind energy. The focus of this report, however, is the current law applicable to siting offshore wind facilities, including the interplay between state and federal jurisdictional authorities. This report will also discuss the recent court challenges to the federal offshore permitting process and recent legislation that would address offshore wind energy regulation. This report will be updated as events warrant.

Ocean Jurisdiction. The jurisdiction of coastal nations over the world's oceans extends across various adjoining and overlapping zones by operation of international conventions and by the domestic laws and proclamations of individual governments. Jurisdiction over U.S. waters is divided into four functional areas: the Territorial Sea, the Contiguous Zone, the Exclusive Economic Zone, and state-controlled waters. The federal government has differing levels of authority in each of these zones, vis-a-vis the states and vis-a-vis other nations. Even within these U.S. zones, all nations enjoy freedom of navigation and overflight as well as other internationally lawful uses of the sea, subject to the regulatory jurisdiction granted

¹ See U.S. DEP'T OF ENERGY & U.S. DEP'T OF THE INTERIOR, WHITE HOUSE REPORT IN RESPONSE TO THE NATIONAL ENERGY POLICY RECOMMENDATIONS TO INCREASE RENEWABLE ENERGY PRODUCTION ON FEDERAL LANDS at 6 (Aug. 2002).

² For an overview of offshore wind farm regulation in the United Kingdom, see, Nathanael D. Hartland, *The Wind and the Waves: Regulatory Uncertainty and Offshore Wind Power in the United States and United Kingdom*, 24 U. PA. J. INT'L ECON. L. 691 (2003).

³ Betsie Blumberg, *Wind Farms: An Emerging Dilemma for East Coast National Parks*, in NATIONAL PARK SERVICE, NATURAL RESOURCE YEAR IN REVIEW—2003 63 (March 2004).

⁴ Testimony of Attorney General Thomas F. Reilly, Subcommittee on Energy and Mineral Resources, Hearing Regarding H.R. 793, 108th Cong. (March 6, 2003) (*available at* [<http://resourcescommittee.house.gov/108cong/energy/2003mar06/reilly.htm>]).

to the coastal nation over such things as setting optimum fishing allowances.⁵ It would, however, seem relatively clear that, generally, the United States would have sufficient jurisdiction over each of its zones to authorize the construction and operation of offshore wind projects.

U.S. authority as against other nations begins at its coast — called the baseline — and extends 200 nautical miles out to sea. The first twelve nautical miles comprise the U.S. territorial sea.⁶ Under the 1982 United Nations Convention on the Law of the Sea⁷ (UNCLOS III), a coastal nation may claim sovereignty over the air space, water, seabed, and subsoil within its territorial sea.⁸ U.S. Supreme Court precedent and international practice indicate that this sovereignty authorizes coastal nations to permit offshore development within their territorial seas.⁹

The U.S. contiguous zone extends beyond the territorial sea to twenty-four nautical miles from the baseline. In this area, a coastal nation may regulate to protect its territorial sea and to enforce its customs, fiscal, immigration, and sanitary laws.¹⁰ The exact contours of U.S. authority in the contiguous zone are not clearly defined, although the United States does not claim full sovereignty.¹¹ However, in addition to the jurisdiction specifically applicable to the contiguous zone, the jurisdiction the United States exercises over the EEZ also applies.

The U.S. EEZ extends 200 nautical miles from the baseline. In accordance with international law, the United States has claimed sovereign rights to explore, exploit, conserve, and manage EEZ natural resources of the sea-bed, subsoil, and the superadjacent waters.¹² U.S. jurisdiction also extends over “other activities for the economic exploitation and exploration of the zone, *such as the production of energy from the water, currents and winds*”¹³ and, subject to some limitations, “the establishment and use of artificial islands, installations and structures; marine

⁵ Restatement (Third) of the Foreign Relations Law of the United States, § 514 (1986).

⁶ Proc. No. 5928 (Dec. 27, 1988).

⁷ United Nations Convention on the Law of the Sea, Dec. 10, 1982, 21 I.L.M. 1261 (entered into force Nov. 16, 1994)(hereinafter UNCLOS III).

⁸ UNCLOS III arts. 2.1, 2.2, 3; *see also* United States v. California, 332 U.S. 19 (1947); Alabama v. Texas, 347 U.S. 272, 273-74 (1954).

⁹ *See* United States v. California, 436 U.S. 32, 36 (1978); United States v. Alaska, 422 U.S. 184, 199 (1975); Alabama v. Texas, 347 U.S. 272, 273-74 (1954); United States v. California, 332 U.S. 19 (1947).

¹⁰ UNCLOS III art. 33.

¹¹ United States v. De Leon, 270 F.3d 90, 91 n.1 (1st Cir. 2001); *see also* Vermilya-Brown Co. v. Connell, 335 U.S. 377, 381 (1948); Cuban Am. Bar Ass’n v. Christopher, 43 F.3d 1412, 1425 (11th Cir.1995) (control and jurisdiction is not equivalent to sovereignty).

¹² UNCLOS III arts. 56, 58.

¹³ *Id.* art. 56.1 (emphasis added).

scientific research; and the protection and preservation of the marine environment.”¹⁴ In almost all situations, the U.S. EEZ overlaps geographically with the Outer Continental Shelf (OCS), a geologically distinct area of appurtenant seabed referenced in several federal laws.¹⁵

Thus, it would seem clear that as against other nations, the United States would have legal authority to permit wind energy projects within the full range of its territorial sea, contiguous zone, and EEZ.

The relative jurisdiction of the federal government and the states is also of importance. The Submerged Lands Act of 1953¹⁶ assured coastal states title to the lands beneath coastal waters in an area stretching, in general, three geographical miles from the shore.¹⁷ Thus states, subject to federal regulation for “commerce, navigation, national defense, and international affairs” and the power of the federal government to preempt state law, may regulate the coastal waters within this area.¹⁸ The remaining outer portions of waters over which the United States exercises jurisdiction are federal waters.¹⁹

In sum, it would seem relatively clear that the U.S. federal government would have permitting authority, supported by international law, for offshore wind farms. However, federal authority would be limited by the internationally recognized right of free passage and by the jurisdiction granted to the states under the Submerged Lands Act.

Federal and State Permitting. For *onshore* wind projects on federal public lands, the Department of the Interior, through the Bureau of Land Management, has created a regulatory program under the Federal Land Policy and Management Act,²⁰ but no similarly comprehensive federal statute expressly authorizes *offshore* wind energy development at this time. Under existing law, the Army Corps of Engineers has undertaken the lead role in the federal permitting process, although some have questioned the Corps’ statutory authority to issue permits for wind energy facilities. States may also play a role in the permitting process in some instances, although their jurisdiction is more limited with regard to offshore projects located in federal waters.

¹⁴ *Id.* art. 56.1(b).

¹⁵ See U.S. Commission on Ocean Policy, *An Ocean Blueprint for the 21st Century: Final Report of the U.S. Commission on Ocean Policy, Primer on Ocean Jurisdictions: Drawing Lines in the Water*, Pre-Publication Copy 41-44 (2004), *available at* [http://www.oceancommission.gov/documents/prepub_report/primer.pdf].

¹⁶ 43 U.S.C. §§ 1301-1303, 1311-1315.

¹⁷ *Id.* § 1301(a)(2). State jurisdiction typically extends three nautical miles (approximately 3.3 miles) seaward of the coast or “baseline.” Texas and the Gulf coast of Florida have jurisdiction over an area extending 3 “marine leagues” (9 nautical miles) from the baseline. 43 U.S.C. § 1301(a)(2).

¹⁸ *Id.* §§ 1314(a), 1311(a)(2).

¹⁹ *Id.* § 1302.

²⁰ 43 U.S.C. §§ 1701 *et. seq.*

The following paragraphs will describe the nature of the permitting process as it is currently being implemented and the challenges to existing Corps practice.

Federal Regulation. Currently, the Army Corp of Engineers has taken the lead role in the federal permitting process, claiming jurisdiction under the Rivers and Harbors Act (RHA),²¹ as amended by the Outer Continental Shelf Lands Act (OCSLA).²² The Corps has jurisdiction under these laws to regulate obstructions to navigation within the “navigable waters of the United States”²³ and, under what are arguably more limited circumstances, on the Outer Continental Shelf — thus the Corps has authority over structures in state and federal navigable waters. No federal legislation explicitly addresses the permitting of offshore renewable energy facilities, and the Corps position is based on what some argue is an overly broad interpretation of its statutory authority. In addition to the Corps’ review under the RHA, the views of other federal agencies that have jurisdiction by law or special subject matter expertise, along with the views of state and local agencies, are taken into consideration during the environmental review process mandated by the National Environmental Policy Act (NEPA).²⁴

NEPA requires federal agencies to take a “hard look” at the environmental consequences of their actions. In general, NEPA and its implementing regulations require various levels of environmental analysis depending on the circumstances and the type of federal action contemplated. Certain actions that have been determined to have little or no environmental effect are exempted from preparation of NEPA documents entirely and are commonly referred to as “categorical exclusions.”²⁵ In situations where a categorical exclusion does not apply, an intermediate level of review, an environmental assessment (EA), may be required. If, based on the EA, the agency finds that an action will not have a significant effect on the environment, the agency issues a “finding of no significant impact” (FONSI), thus terminating the NEPA review process. On the other hand, major federal actions that are found to significantly affect the environment require the preparation of an environmental impact statement (EIS), a document containing detailed analysis of the project as proposed, as well as other options, including taking no action at all. NEPA does not direct an agency to choose any particular course of action; the only purpose of an EIS is to ensure that environmental consequences are considered. Thus, in practice,

²¹ 33 U.S.C. §§ 407-687.

²² 43 U.S.C. §§ 1331-1356a.

²³ Corps regulations define the “navigable waters of the United States” as “those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.” 33 C.F.R. § 329.4. Under the RHA, navigable waters “includes only those ocean and coastal waters that can be found up to three geographic miles seaward of the coast.” *Alliance To Protect Nantucket Sound, Inc. v. U.S. Dept. of Army* 288 F.Supp.2d 64, 72 (D.Mass.,2003); *see also* 33 C.F.R. § 329.12(a). On the OCS, however, the Corps’ regulatory jurisdiction extends beyond that three-mile limit for, at least certain purposes. 43 U.S.C. § 1333(a)(1), (e).

²⁴ 42 U.S.C. §§ 4321 *et. seq.*

²⁵ 40 C.F.R. § 1508.4 (2003).

NEPA review will provide information on wind energy projects beyond mere impacts on navigability, and will include impacts to:

existing resources of the final alternative sites in terms of physical oceanography and geology; wildlife, avian, shellfish, finfish and benthic habitat; aesthetics, cultural resources, socioeconomic conditions, and air and water quality. Human uses such as boating and fishing will also be described.²⁶

In addition to the role interested parties and cooperating agencies may play under NEPA, certain federal agencies have independent sources of jurisdiction over specific ocean resources. Thus, they would also likely be involved in the permitting of offshore wind energy facilities. Some of the most relevant authorities are the Endangered Species Act (ESA)²⁷ and the Migratory Bird Treaty Act (MBTA).²⁸

Briefly, each of these laws makes it illegal to inflict certain kinds of harm upon designated species of plants and animals. The ESA prohibits any person, including private entities, from “taking” a “listed” species.²⁹ “Take” is broadly defined as “to

²⁶ See U.S. ARMY CORPS OF ENG’RS, ENVIRONMENTAL IMPACT STATEMENT: SCOPE OF WORK, WIND POWER FACILITY PROPOSED BY CAPE WIND ASSOCIATES, LLC 3, *available at* [<http://www.nae.usace.army.mil/projects/ma/ccwf/windscope.pdf>] (last visited Feb. 20, 2004). See also *United States v. Alaska*, 503 U.S. 569, 579-80 (1992) (holding that Corps permitting decisions under section 10 are not limited to considerations of navigation).

²⁷ 16 U.S.C. §§ 1531-1544. It should also be noted that it is perhaps arguable that the ESA does not apply in certain U.S. waters or extraterritorially. However, section 9, which prohibits the taking of listed species, specifically states that it applies in the U.S. territorial sea and upon the high seas (i.e. areas beyond national jurisdiction). 16 U.S.C. § 1538(a)(1)(A), (C). So far, all U.S. wind farm proposals have been within the boundaries of the U.S. territorial sea and would thus appear to be covered by section 9. The section 7 consultation provision described above does not appear to expressly address applicability in U.S. waters or extraterritorially; however, the law states that it applies, to “any action authorized, funded, or carried out” by a federal agency, and regulations implementing section 7 make clear that consultation is required for actions taken within the United States and on the high seas. 16 U.S.C. § 1536; 50 C.F.R. § 402.01. The extent to which the phrase “within the United States” includes portions of the ocean under U.S. sovereignty or control is unclear; however, it may arguably include the territorial sea, over which the U.S. exercises full sovereignty. The application of the ESA in areas under the jurisdiction of other nations would be more questionable but is beyond the scope of this report. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 589 (1992) (Stevens, J., concurring). In addition to ESA language pertaining to jurisdiction, the OCSLA does state that “[t]he Constitution and laws and civil and political jurisdiction of the United States are hereby extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations ... to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State....,” lending credence to the idea that the ESA will apply in U.S. waters. 43 U.S.C. § 1333(a)(1).

²⁸ 16 U.S.C. §§ 703-712.

²⁹ Under the ESA, species are listed as either “endangered” or “threatened” based on the risk of their extinction. An “endangered” species is “any species which is in danger of extinction throughout all or a significant portion of its range” A “threatened” species is “any
(continued...)

harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct.”³⁰ Additionally, a federal agency permitting or undertaking action that could impact a protected species is subject to section 7 of the ESA, which requires consultation with the U.S. Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS or NOAA Fisheries), depending upon the species affected.³¹

The section 7 consultation process involves several initial steps leading to a determination of whether a listed species or its designated critical habitat is present in a project area.³² If a species or critical habitat is present, then the permitting/acting federal agency must prepare a biological assessment, evaluating the potential effects of the action.³³ If the acting federal agency determines that a project may adversely affect a listed species or critical habitat, formal consultation and preparation of a biological opinion is required.³⁴ The biological opinion contains a detailed analysis of the effects of the agency action and contains the final determination as to whether the proposed action is likely to jeopardize the species or destroy or adversely modify its critical habitat.³⁵ If review results in a jeopardy or adverse modification determination, the biological opinion must identify any “reasonable and prudent alternatives” that could allow the project to proceed.³⁶ Projects that will result in a level of injury to a species or habitat that will fall short of jeopardizing survival may still be approved subject to certain terms.³⁷ The agency may be allowed to “take” some individuals of a listed species without triggering penalties under the act. These incidental takings are to be described in a statement accompanying the biological opinion.³⁸ Takings allowed under the consultation process are deemed consistent

²⁹ (...continued)

species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” 16 U.S.C. §§ 1532(6), (20).

³⁰ 16 U.S.C. § 1532(19).

³¹ *Id.* § 1536(2).

³² 50 C.F.R. § 402.12(c) (2004). It should also be noted that some protections also attach to “candidate” species, i.e. those proposed but not officially listed. Under current law, an agency must “confer” with the appropriate Secretary if agency action will likely jeopardize the continued existence of any candidate species or adversely modify critical habitat proposed for designation. This is distinct from the section 7 consultation process, less formal, and meant to assist planning early in the process should the species be listed and more definite protections attach. *See* 16 U.S.C. § 1536(a)(4); 50 C.F.R. § 402.10.

³³ 50 C.F.R. § 402.12(b), (d) (2004).

³⁴ *Id.* § 402.14(e).

³⁵ *Id.* § 402.14(h).

³⁶ *Id.* § 402.14(h)(3).

³⁷ *Id.* § 402.14(i).

³⁸ *Id.* § 402.14(i)(1)(i)-(v).

with the ESA; thus, they are not subject to penalties under the act, and no other authorization or permit is required.³⁹

The MBTA is the domestic law that implements U.S. obligations under separate treaties with Canada, Japan, Mexico, and Russia for the protection of migratory birds.⁴⁰ The MBTA generally prohibits the taking, killing, possession, transportation, and trafficking in of migratory birds, their eggs, parts, and nests.⁴¹ Like the ESA, the general ban on taking protected birds can be waived under certain circumstances. Pursuant to section 704, the Secretary of the Interior is authorized to determine if, and by what means, the taking of migratory birds should be allowed.⁴² FWS is responsible for permitting activities that would otherwise violate the MBTA. Its regulations at 50 C.F.R. § 21 make exceptions from permitting requirements for various purposes and provide for several specific types of permits, such as import and export permits, banding and marking permits, and scientific collection permits.⁴³ More general permits for special uses are also provided for under the regulations, although an applicant must make “a sufficient showing of benefit to the migratory bird resource, important research reasons, reasons of human concern for individual birds, or other compelling justification.”⁴⁴

It would not appear that FWS has promulgated regulations specific to the sort of unintentional harm caused by the rotating turbines of wind energy projects; thus, it is not clear that the permitting process provided for under current regulations is immediately applicable to wind energy projects.⁴⁵ The Service has, however, adopted voluntary, interim guidelines for minimizing the wildlife impacts from wind energy turbines.⁴⁶ As these guidelines indicate, compliance does not shield a company from prosecution for MBTA violations; however, “the Office of Law Enforcement and Department of Justice have used enforcement and prosecutorial discretion in the past regarding individuals, companies, or agencies who have made good faith efforts to avoid the take of migratory birds.”⁴⁷

³⁹ 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i)(5).

⁴⁰ Birds that receive protection under the MBTA are listed at 50 C.F.R. 10.13 (2003).

⁴¹ 16 U.S.C. § 703.

⁴² 16 U.S.C. § 704.

⁴³ 50 C.F.R. §§ 21.11-21.26 (2003).

⁴⁴ *Id.* § 21.27.

⁴⁵ *See* 69 Fed. Reg. 31074 (June 2, 2004) (“Current regulations authorize permits for take of migratory birds for activities such as scientific research, education, and depredation control. However, these regulations do not expressly address the issuance of permits for incidental take.”).

⁴⁶ U.S. Fish and Wildlife Service, Interim Guidelines to Avoid and Minimize Wildlife Impacts from Wind Turbines, (May 2003) (*available at* [<http://www.fws.gov/r9dhcbfa/wind.pdf>]).

⁴⁷ U.S. Fish and Wildlife Service, Memorandum, Service Interim Guidance on Avoiding and Minimizing Wildlife Impacts from Wind Turbines at 2 (May 2003).

State Regulation. States may also play a regulatory role, whether the project is proposed for construction in federal or state waters. State jurisdiction over projects located in federal areas is substantially circumscribed; however, under the Coastal Zone Management Act⁴⁸ (CZMA), states are explicitly granted some regulatory authority. In general, the CZMA encourages states to enact coastal zone management plans to coordinate protection of habitats and resources in coastal waters.⁴⁹ The act establishes a policy of preservation alongside sustainable use and development compatible with resource protection.⁵⁰ Under the act, state coastal zone management programs that are approved by the Secretary of Commerce receive federal monetary and technical assistance. State programs must designate land and water conservation measures and permissible uses,⁵¹ and must address various sources of water pollution.⁵²

Of particular importance here, the CZMA also requires that the federal government and federally permitted activities comply with state programs.⁵³ Responding to a Supreme Court decision that excluded OCS oil and gas leasing from state review under the CZMA, Congress amended the “consistency review” provision to include the impacts on a state coastal zone from federal actions in federal waters.⁵⁴ Thus, states have some authority to assure themselves that federally-permitted projects in federal waters will not result in a violation of state coastal zone management regulation.

In addition to consistency review, projects to be constructed in state waters, including any cables that would be necessary to transmit power back to shore, are subject to all state regulation or permitting requirements. Coastal zone regulation varies significantly among the states. The CZMA itself establishes three generally acceptable frameworks: (1) “State establishment of criteria and standards for local implementation, subject to administrative review and enforcement;” (2) “[d]irect State land and water use planning and regulation;” and (3) regulation development and implementation by local agencies, with state-level review of program decisions.⁵⁵

⁴⁸ 16 U.S.C. §§ 1451-1464.

⁴⁹ Coastal U.S. states and territories, including the Great Lakes states are eligible to receive federal assistance for their coastal zone management programs. Currently, there are 33 approved state and territorial plans. Of eligible states, only Illinois does not have an approved program. *See* National Oceanic and Atmospheric Administration, Office of Ocean and Coastal Resource Management, State and Territory Coastal Management Program Summaries, *available at* [<http://www.ocrm.nos.noaa.gov/czm/czmsitelist.html>].

⁵⁰ *Id.* § 1452(1), (2).

⁵¹ *Id.* § 1455(d)(2), (9)-(12).

⁵² *Id.* § 1455(d)(16).

⁵³ *Id.* § 1456(c).

⁵⁴ *Id.*; *Sec’y of the Interior v. California*, 464 U.S. 312, 315 (1984).

⁵⁵ 16 U.S.C. § 1455(d)(11).

Within these frameworks, several states, such as New Jersey, California, and Rhode Island, centralize authority for their programs in one agency.⁵⁶ In New Jersey, for instance, the state Department of Environmental Protection (through the Coastal Management Office within the Commissioner’s Office of Policy, Planning, and Science) is the lead agency for coastal zone management under several state laws.⁵⁷ The majority of states, however, operate coastal zone management programs under “networks” of parallel agencies, with various roles defined by policy guidance and memoranda of understanding (MOUs).⁵⁸ In Massachusetts, for instance, coastal zone management is tended to by a variety of agencies, including the Departments of Environmental Protection, Environmental Management, Fisheries and Wildlife, and Food and Agriculture, the Metropolitan District Commission, the Energy Facilities Siting Board, and the Executive Office of Transportation and Construction.⁵⁹ Based on a series of MOUs, each agency is obligated to issue and apply state regulations and permits consistently with the state’s coastal zone management program.⁶⁰ Thus, depending on the state with jurisdiction, offshore wind energy projects can be subject to comprehensive regulation with permitting authority located within multiple state and local level agencies.

Corps Regulation Challenge. The authority of the Army Corps of Engineers to permit offshore wind energy-related projects was recently challenged in *Alliance to Protect Nantucket Sound v. United States Department of the Army*.⁶¹ The case deals with the two primary obstacles to the current federal system applied to offshore wind energy permitting: (1) the limits of Corps jurisdiction on the Outer Continental Shelf and (2) whether there is a current lack of administrative authority to convey OCS property rights for renewable energy purposes.⁶² In September 2003, a Massachusetts district court granted summary judgment in favor of the Army Corps interpretation, at least with respect to construction of an initial data gathering tower, although its reasoning might be applicable to the larger-scale wind farm project itself. On appeal, the holdings of the district court were upheld by the United States Court

⁵⁶ See Rusty Russell, *Neither Out Far Nor In Deep: The Prospects for Utility-Scale Wind Power in the Coastal Zone*, 31 B.C. ENVTL. AFF. L. REV. 221, 240-41 (2004).

⁵⁷ E.g. Freshwater Wetlands Protection Act N.J.S.A. 13:9B; Flood Hazard Area Control Act, N.J.S.A. 58:16A; Wetlands Act of 1970, N.J.S.A. 13:9A; Waterfront Development Act, N.J.S.A. 12:5-3; NJ Water Pollution Control Act - N.J.S.A. 58:10A; Coastal Area Facility Review Act (CAFRA), N.J.S.A. 13:19; Tidelands Act, N.J.S.A. 12:3.

⁵⁸ Rusty Russell, *supra* note 23, at 241.

⁵⁹ MASSACHUSETTS OFFICE OF COASTAL ZONE MGMT., MASSACHUSETTS COASTAL ZONE MANAGEMENT PLAN 113-121 (Mar. 2002), *available at* [<http://www.state.ma.us/czm/managementplan.pdf>].

⁶⁰ *Id.* at App. E.

⁶¹ *Alliance to Protect Nantucket Sound v. United States Department of the Army*, 288 F.Supp.2d 64 (D. Mass. 2003) (hereinafter *Alliance I*).

⁶² *Id.* at 67. Additional arguments were also presented regarding the adequacy of the Corps’ NEPA analysis.

of Appeals for the First Circuit.⁶³ The following paragraphs discuss the jurisdiction concerns as well as the interpretation accepted in the *Alliance* case.

Corps OCS Jurisdiction. The first major issue facing offshore wind energy projects is the applicability of the Rivers and Harbors Act and the Outer Continental Shelf Lands Act to these projects. Section 10 of the Rivers and Harbors Act authorizes the Army Corps to review and permit any project that would obstruct the “navigable waters of the United States.”⁶⁴ Under this law, as interpreted by the Corps, jurisdiction is limited to state-controlled waters.⁶⁵ Thus, it would seem relatively clear that the Corps has permitting jurisdiction under the Rivers and Harbors Act for any wind energy project that would be sited in state-controlled portions of the territorial sea.

The OCSLA extends the Corps’ jurisdiction to the OCS, although it has been argued that renewable energy projects to be sited in federal waters are beyond the scope of the Corps’ extended jurisdiction. In general, the OCSLA authorizes the Department of the Interior to lease certain mineral resources of the submerged lands in federal waters.⁶⁶ Leasing of the seabed specified minerals can, thus, only occur for specified purposes. 43 U.S.C. § 1333(e) of the OCSLA extends Corp navigability permit jurisdiction to the OCS. It states:

The authority of the Secretary of the Army to prevent obstruction to navigation in the navigable waters of the United States is extended to the artificial islands, installations, and other devices referred to in subsection (a) of this section.⁶⁷

43 U.S.C. § 1333(a), referenced in (e) states, in relevant part:

The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, *which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom*, or any such installation or other device (other than a ship or vessel) for the purpose of *transporting* such resources⁶⁸

The meaning of this section may be subject to differing interpretations. Arguably, the language of these provisions indicates that Corps permitting authority on the OCS is limited to those structures that might be built and used for the purpose of exploring for, developing, producing, or transporting the resources that have been extracted from the seabed. Such an interpretation would appear to exclude wind

⁶³ *Alliance To Protect Nantucket Sound, Inc. v. U.S. Dept. of Army*, 398 F.3d 105 (1st Cir. 2005) (hereinafter *Alliance II*).

⁶⁴ 33 U.S.C. § 403.

⁶⁵ 33 C.F.R. § 329.12.

⁶⁶ *See generally* 43 U.S.C. § 1337.

⁶⁷ 43 U.S.C. § 1333(e).

⁶⁸ 43 U.S.C. § 1333(a)(1).

energy facilities from the Corps' OCS authority. On the other hand, the district court in the *Alliance* case found significance in the use of the word "may," holding that Corp jurisdiction extends to all structures that *may or may not* be used to explore for, develop, or produce resources.⁶⁹ It is arguable, however, that the phrase "may be" implies only that construction may or may not occur and does not indicate that the designated purposes are optional. Thus, the language of the statute can be read so as to deny Corps jurisdiction over offshore renewable energy projects; however, OCSLA legislative history and agency interpretation indicate that Congress did not intend to limit the Corps' authority to structures used for mineral exploration, development, extraction, or transportation, as discussed below.

Army Corps regulations do not explicitly address the extent of its authority on the OCS. They do recognize that Corps jurisdiction over the OCS is based on the OCSLA, stating that Corps jurisdiction has been extended to "artificial islands, installations, and other devices located on the seabed, to the seaward limit of the outer continental shelf..."⁷⁰ Notably, unlike the OCSLA itself, this provision does not make reference to the purpose for which these structures are used, arguably indicating that the Corps interprets its jurisdiction broadly. Additionally, Guidance Letter 88-08, a Corps policy statement and not itself enforceable law, interprets the legislative history of the OCSLA to indicate that Congress intended that the Corps regulate all OCS structures regardless of the purpose served, including even such things as offshore gambling casinos.⁷¹ The Letter does not provide the analysis leading up to this conclusion; however, the district court in the *Alliance* case relied heavily on the statute's legislative history in upholding the Corps interpretation, according the Corps deference under the *Chevron* standard.⁷²

As originally enacted, the OCSLA provided that the jurisdiction of the Corps "extended to artificial islands and fixed structures located on the outer Continental

⁶⁹ *Alliance I*, 288 F. Supp.2d 64, 75 (D. Mass. 2003).

⁷⁰ 33 C.F.R. § 320.2(b).

⁷¹ Army Corps of Engineers, Regulatory Guidance Letter 88-08 (July 20, 1988), *available at* [<http://www.usace.army.mil/inet/functions/cw/cecwo/reg/rgls/rgl88-08.htm>]. Guidance Letter 88-08 was set to expire in 1990; however, the Corps indicates that unless superseded by subsequently issued regulations or guidance letters, "the guidance provided in RGL's generally remains valid after the expiration date." *See* Army Corps of Engineers, Regulatory Guidance Letters, *at* [<http://www.usace.army.mil/inet/functions/cw/cecwo/reg/rglsindx.htm>]. Regulations and subsequent guidance letters do not appear to address or revise the Corps position contained in the 1988 opinion.

⁷² As established in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, an agency's interpretation of a statute it is charged with administering it is entitled to special deference. If Congressional intent is not clear from the face of a statute, agency interpretation is generally upheld so long as it is reasonable. *Chevron*, 467 U.S. at 842-45 (1984). If Congressional intent is clear from the face of the statute, "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 843. *See also* *Alliance II*, 398 F.3d 105, 109-11 (1st Cir. 2005).

Shelf,” making no explicit reference to the purpose of such structures.⁷³ The provision was subsequently amended, taking on its current form so as to reference the resource development purposes of OCS structures. However, as the legislative history indicates, at the time of the amendment, Congress understood the Corps’ jurisdiction under the OCSLA to apply to all artificial islands and fixed structures on the OCS, regardless of purpose.⁷⁴ Further, the conference report indicates that Congress did not intend to limit the Corps’ jurisdiction in this respect, but rather to conform the section to other amended provisions.⁷⁵ On appeal, the Court of Appeals for the First Circuit held that this legislative history clearly indicated that Congress intended the Corps to exercise jurisdiction over all structures to be constructed on the OCS, and that this “express legislative intent is determinative of the scope of the Corps’s authority.”⁷⁶ Thus, under the district and appellate court rulings, the Corps is authorized to exercise RHA section 10 authority for any offshore structure.

Use of the OCS. An additional issue relevant to the construction of offshore wind facilities is the matter of who may authorize the use of the federally-controlled submerged lands of the OCS. Use of federal and federally controlled lands, including the OCS, requires some form of permission, such as a right-of-way, easement, or license.⁷⁷ Thus, because any wind turbines would be attached to the seabed of the OCS, some authorization to occupy the submerged lands of the OCS would be required before construction could legally take place. Use or occupancy of the OCS without such authorization arguably constitutes common law trespass.⁷⁸ However, the Court of Appeals for the Fifth Circuit has held that because the United States does not own the OCS in fee simple, it cannot claim trespass based on unauthorized construction on OC⁷⁹S. On the other hand, the court stated, “[n]either ownership nor possession is, however, a necessary requisite for the granting of injunctive relief,” because the United States has paramount rights to the OCS and an interest to protect.⁸⁰ Thus damages, available under trespass, may not be available for

⁷³ Act of Aug. 7, 1953, ch. 345, 67 Stat. 462 § 4(f).

⁷⁴ H.R. Conf. Rep. No. 95-1474 at 82 (1978), reprinted in U.S.C.C.A.N. at 1674, 1681.

⁷⁵ *Id.*

⁷⁶ *Alliance II*, 398 F.3d at 111.

⁷⁷ Several federal laws would appear to indicate that Congress intends usage of the OCS to be undertaken only when permission has been expressly granted. *See* 43 U.S.C. § 1332(1), (3) (“the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition;” *see also* 42 U.S.C. § 9101(a)(1)(stating that the purpose of the Ocean Thermal Energy Conversion Act is to “authorize and regulate the construction, location, ownership, and operation of ocean thermal energy conversion facilities.”).

⁷⁸ *See* 43 U.S.C. § 1333(a)(2)(A) (applying the criminal and civil laws of states adjacent to the OCS as federal law); *see also* Guy R. Martin, *The World’s Largest Wind Energy Facility in Nantucket Sound? Deficiencies in the Current Regulatory Process for Offshore Wind Energy Development*, 31 B.C. Env’tl. Aff. L. Rev. 300, n.96 (2004).

⁷⁹ *United States v. Ray*, 423 F.2d 16, 22 (5th Cir. 1970).

⁸⁰ *Id.*

unauthorized construction on the OCS, while injunctive relief would appear possible even under more constrained interpretations of U.S. authority.

Whether construction of an OCS wind energy facility could be authorized under the RHA permitting process alone was expressly left undecided in the *Alliance* case.⁸¹ Several property rights issues were addressed, however. In the *Alliance* case, the plaintiffs claimed that the Corps, knowing that the project applicant would not be able to acquire the requisite property rights to construct its project, had acted unlawfully by issuing its RHA permit.⁸² The district and appellate courts both held that the Army Corps is not required to validate existing property rights or otherwise become involved in ongoing property disputes prior to issuing a RHA permit.⁸³ The Alliance to Protect Nantucket Sound argued that because the applicant for the permit could not legally obtain the requisite property rights, the Corps was in violation of its own regulations.⁸⁴ Corps regulations state:

A DA [Department of the Army] permit does not convey any property rights, either in real estate or material, or any exclusive privileges. Furthermore, a DA permit does not authorize any injury to property or invasion of rights or any infringement of Federal, state or local laws or regulations. The applicant's signature on an application is an affirmation that the applicant possesses or will possess the requisite property interest to undertake the activity proposed in the application. The district engineer will not enter into disputes but will remind the applicant of the above. The dispute over property ownership will not be a factor in the Corps public interest decision.⁸⁵

The Corps interprets these regulations to require only that an applicant affirm that it possesses or will possess the requisite property rights prior to construction. The *Alliance* courts found the agency's interpretation to be "entirely consistent with its regulations."⁸⁶ Despite the Army Corps regulation, additional laws do require the Corps to consider property rights in granting RHA permits. In determining if issuance of a RHA permit is in the public interest, the Corps, under its own regulations, is obligated to consider the "effects of the proposed work [i.e. offshore structure] on the outer continental rights of the United States."⁸⁷ The effect of this regulatory requirement was addressed in the *Alliance* litigation. The First Circuit Court of Appeals held that in analyzing whether the preliminary data tower would infringe on federal OCS property rights, the Corps reasonably determined that any

⁸¹ See *Alliance II*, 398 F.3d 105, 114 (1st Cir. 2005).

⁸² *Alliance I*, 288 F.Supp. 2d 64, 67 (D. Mass. 2003).

⁸³ *Id.* at 77-78.

⁸⁴ See *id.* at 77.

⁸⁵ 33 C.F.R. § 320.4(g)(6).

⁸⁶ *Alliance I*, 288 F.Supp. 2d at 78; *Alliance II*, 398 F.3d at 112-13.

⁸⁷ 33 C.F.R. § 320.4(f).

infringement would be negligible.⁸⁸ The court stated “[i]t is inconceivable to us that permission to erect a single, temporary scientific device, like this, which gives the federal government information it requires, could be an infringement on any federal property ownership interest in the OCS.”⁸⁹ Thus, the Corps fulfilled its statutory and regulatory obligations under the RHA and OCSLA and did not act arbitrarily or capriciously in issuing the data tower permit.

It is not clear that each of these issues would be decided the same way in the context of a permit application for a larger-scale wind farm. While it is unclear if Congress intended the RHA, as amended by the OCSLA, to authorize use of federally controlled offshore areas for renewable energy purposes,⁹⁰ the First Circuit Court of Appeals appears to have, at least in dicta, expressed its opinion that the RHA permit does not convey any property rights or exclusive privileges with respect to public lands.⁹¹ In such a situation, if the Army Corps could not again conclude that impacts to federal property interest would be negligible, it may be unable to issue a section 10 RHA permit for a wind energy facility.

Recent Legislation. Several bills that address offshore wind facility siting have been introduced. H.R. 907 would amend the OCSLA to authorize the Secretary of the Department of the Interior to grant easements or rights-of-way on the OCS for activities, such as renewable energy projects, not otherwise authorized in the OCSLA or other law.⁹² Among other things, H.R. 907 would require the Secretary to establish “reasonable forms of annual or one-time payments” that are not based on “throughput or production” for any property interests granted under its provisions, and would also authorize the Secretary to establish “fees, rentals, bonus, or other

⁸⁸ Alliance II, 398 F.3d at 114.

⁸⁹ *Id.*

⁹⁰ Section 10 was enacted in 1899, and its text has not changed substantively since that time. It states:

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same. 33 U.S.C. § 403.

⁹¹ *Id.* at 112.

⁹² H.R. 907, 109th Cong. (2005); *see also* H.R. 793, 108th Cong. (2003); H.R. 5156, 107th Cong. (2002).

payments” that would not appear to be subject to these limitations.⁹³ Additionally, the bill would require the Secretary to consult with other federal agencies and to prescribe any necessary regulations to assure “safety, protection of the environment, prevention of waste, and conservation of the natural resources of the outer Continental Shelf, protection of national security interests, and the protection of correlative rights therein.”⁹⁴

Very similar language was contained in several versions of the Energy Policy Act of 2003, H.R. 6⁹⁵ and S. 2095⁹⁶ from the 108th Congress. Section 321 of both bills contained a measure not found in H.R. 907 that would have excluded projects constructed before the date of the bill’s enactment or for which a request for proposal had been issued by a public authority from resubmitting “documents previously submitted” or obtaining “reauthorization of actions previously authorized.”⁹⁷

A different approach was taken in H.R. 1183,⁹⁸ also from the 108th Congress, which would have amended the Coastal Zone Management Act to provide for the location and permitting of renewable energy facilities in the marine environment.⁹⁹ Unlike H.R. 907, this bill would have applied solely to the siting of renewable energy facilities, defined in the bill as “a source of energy that is regenerative and is produced without depleting or otherwise diminishing the resource from which such energy is derived. Such term includes, but is not limited to, solar, thermal, and wind energy sources.”¹⁰⁰ The bill would have established a federal licensing program, managed under the authority of the Secretary of Commerce, for facilities in federal waters. Among other things, the bill contained provisions requiring environmental, national security, and safety regulation in consultation with other agencies and would have required the Secretary of Commerce to identify those waters under federal jurisdiction with the greatest renewable energy potential.¹⁰¹

Conclusion. Interest in developing offshore wind energy resources continues to grow, and projects are already in the initial stages of development. It would seem clear that the United States, vis-a-vis other nations, would have the right to permit offshore development in its territorial sea and on the Outer Continental Shelf, subject to state authority over offshore areas under the Submerged Lands Act. Currently,

⁹³ H.R. 907, 109th Cong. § 1(b) (2003) (amending 43 U.S.C. 1337 and adding new subsection (p)).

⁹⁴ *Id.*

⁹⁵ H.R. 6, 108th Cong., § 321 (2003).

⁹⁶ S. 2095, 108th Cong. § 321 (2004).

⁹⁷ *Id.* § 321(c).

⁹⁸ H.R. 1183, 108th Cong. § 2(b) (2003).

⁹⁹ *Id.* § 101.

¹⁰⁰ *Id.* § 3(a) (amending 16 U.S.C. 1453 and adding new subsection (17)).

¹⁰¹ *Id.* § 202.

there is no federal law that expressly authorizes an agency to transfer property rights or license the use of federal offshore areas for renewable energy purposes. It is also questionable whether the Army Corps of Engineers, which has jurisdiction under the Rivers and Harbors Act and the Outer Continental Shelf Lands Act to permit obstructions to navigability, may authorized the use of the OCS for offshore wind development under current law. Multiple pieces of legislation have been introduced in the 108th and 109th Congresses to respond to these concerns, each proposing different regulatory regimes. At this time, however, offshore wind energy projects continue to move forward despite legal uncertainty as to permitting and regulatory authority.