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Wind Energy: Offshore Permitting

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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 clear that the United States has the authority to permit and regulate offshore wind energy development within the zones of the oceans 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 and the type of impacts incidental to such exploitation. Likewise, in the wind energy context, several federal agencies will have a role to play in permitting development and operation activities.

The Army Corps of Engineers (Corps) has exercised jurisdiction over proposed offshore wind energy facilities under the Rivers and Harbors Act and the Outer Continental Shelf Lands Act. This regulatory authority was challenged in *Alliance to Protect Nantucket Sound v. United States Department of the Army*. In that case, the U.S. Court of Appeals for the First Circuit upheld the Corps' authority to permit a preliminary data collection tower in federal waters. The reasoning behind this decision might have been applied to the permitting of larger-scale wind energy projects, although arguments against an expansive reading of Corps authority remained viable. To address these legal uncertainties, Congress passed section 388 of the Energy Policy Act of 2005 (P.L. 109-58). This provision retains the role played by the Corps in permitting under the Rivers and Harbors Act but grants ultimate authority over offshore wind energy development to the Secretary of the Interior. The provision also contains various exemptions from the regulatory regime it establishes for projects that have received certain permits prior to the enactment of the Energy Policy Act of 2005. Regulations implementing this new grant of statutory authority are likely forthcoming and could bring additional and significant nuance to the regulatory process.

This report will discuss the disputes over Corps jurisdiction prior to enactment of the Energy Policy Act of 2005 as well as the current law applicable to siting offshore wind facilities.

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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 in recent years, including the Cape Wind project off the coast of Massachusetts; Winergy's proposals off the coasts of Massachusetts, New York, New Jersey, Delaware, Maryland, and Virginia; and a Galveston-Offshore Wind, LLC project in a portion of the Gulf of Mexico under the jurisdiction of Texas.[3]

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 relationship between state and federal jurisdictional authorities. This report will also discuss the court challenges to early federal offshore wind energy permitting authorities and the effect that the enactment of the Energy Policy Act of 2005 has had on the regulatory environment.

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 (EEZ), and state-controlled waters. The federal government has differing levels of authority in each of these zones vis-a-

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[1] *See* MASS. TECH. COLLABORATIVE, U.S. DEP'T OF ENERGY, & GENERAL ELECTRIC, A FRAMEWORK FOR OFFSHORE WIND ENERGY DEVELOPMENT IN THE UNITED STATES at 9 (September 2005); 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 (August 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); *see* Texas General Land Office, Offshore Wind Energy (*available at* [http://www.glo.state.tx.us/news/archive/2005/events/offshorewind.html]).

vis the states and other nations. Even within these zones, all nations enjoy freedom of navigation and overflight as well as other internationally lawful uses of the sea, subject to certain regulatory authority granted to the coastal nation.[4] However, it seems relatively clear that the United States would have sufficient jurisdiction over each of its zones to authorize the construction and operation of offshore wind projects.

United States authority in the oceans 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.[5] Under the 1982 United Nations Convention on the Law of the Sea[6] (UNCLOS III), a coastal nation may claim sovereignty over the air space, water, seabed, and subsoil within its territorial sea.[7] United States Supreme Court precedent and international practice indicate that this sovereignty authorizes coastal nations to permit offshore development within their territorial seas.[8]

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.[9] The exact contours of U.S. authority in the contiguous zone are not clearly defined, although the United States does not claim full sovereignty.[10] 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 seabed, subsoil, and the superadjacent waters.[11] United States jurisdiction also extends over "other activities for the economic exploitation and exploration of the zone, *such as the production of*

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

[5] Proc. No. 5928 (December 27, 1988).

[6] United Nations Convention on the Law of the Sea, December 10, 1982, 21 I.L.M. 1261 (entered into force November 16, 1994) (hereinafter UNCLOS III).

[7] 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).

[8] *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).

[9] UNCLOS III art. 33.

[10] 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).

[11] UNCLOS III arts. 56, 58; Exclusive Economic Zone of the United States of America, Proclamation No. 5030, 48 Fed. Reg. 10,605 (March 14, 1983); Territorial Sea of the United States of America, Proclamation No. 5928, 54 Fed. Reg. 777 (December 27, 1988); Contiguous Zone of the United States, Proclamation No. 7219, 64 Fed. Reg. 48,701 (August 2, 1999).

energy from the water, currents and winds"[12] and, subject to some limitations, "the establishment and use of artificial islands, installations and structures; marine scientific research; and the protection and preservation of the marine environment."[13] 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.[14]

Thus, it would seem that generally, other nations could not interfere with U.S. 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 with respect to individual states is also of importance. The Submerged Lands Act of 1953[15] assured coastal states title to the lands beneath coastal waters in an area stretching, in general, three geographical miles from the shore.[16] 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.[17] The remaining outer portions of waters over which the United States exercises jurisdiction are federal waters.[18]

In sum, it would seem relatively clear that the 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. The attributes of existing permitting regimes at both the state and federal level are, of course, limited by the confines of current law, discussed below.

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[12] UNCLOS III art. 56.1 (emphasis added).

[13] *Id*. art. 56.1(b).

[14] *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].

[15] 43 U.S.C. §§ 1301-1303, 1311-1315.

[16] *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).

[17] *Id*. §§ 1314(a), 1311(a)(2).

[18] *Id*. § 1302.

State Permitting

States may play a regulatory role when a wind energy 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 Act[19] (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.[20] The CZMA establishes a policy of preservation alongside sustainable use and development compatible with resource protection.[21] State coastal zone management programs that are approved by the Secretary of Commerce receive federal monetary and technical assistance. State programs must designate conservation measures and permissible uses for land and water resources[22] and must address various sources of water pollution.[23]

The CZMA also requires that the federal government and federally-permitted activities comply with state programs.[24] 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.[25] Thus, states have some authority to demand 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.[26]

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[19] 16 U.S.C. §§ 1451-1464.

[20] 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://coastalmanagement.noaa.gov/mystate/welcome.html].

[21] *Id*. § 1452(1), (2).

[22] *Id*. § 1455(d)(2), (9)-(12).

[23] *Id*. § 1455(d)(16).

[24] *Id*. § 1456(c).

[25] *Id*; Sec'y of the Interior v. California, 464 U.S. 312, 315 (1984).

[26] 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.[27] 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.[28] 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).[29] 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.[30] 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.

Federal Permitting

For *onshore* wind projects on federal public lands, the Department of the Interior (DOI), through the Bureau of Land Management, has created a regulatory program under the Federal Land Policy and Management Act,[31] but a federal statute expressly governing *offshore* wind energy development was not enacted until August 2005 as part of the Energy Policy Act of 2005 (2005 EPACT). Before enactment of the 2005 EPACT, some permitting in support of offshore wind energy development had taken place under existing laws. Use of these authorities proved controversial and was the subject of a lawsuit challenging preliminary permitting actions. The previous regulatory regime, the conflicts it engendered, and the new 2005 EPACT legal authority are discussed below.

Early Regulation and Litigation

Prior to enactment of the 2005 EPACT, the Army Corp of Engineers (Corps) took the lead role in the federal offshore wind energy permitting process, claiming jurisdiction under section 10 of the Rivers and Harbors Act (RHA),[32] as amended by

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[27] *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).

[28] *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.

[29] Russell, *supra* note 27, at 241.

[30] *Id*. at App. E.

[31] 43 U.S.C. §§ 1701 *et seq*.

[32] 33 U.S.C. §§ 407-687. Section 10 was enacted in 1899, and its text has not changed substantively since that time. It states

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the Outer Continental Shelf Lands Act (OCSLA).[33] Generally, the Corps has jurisdiction under these laws to permit obstructions to navigation within the "navigable waters of the United States" and on the OCS.[34]

In addition to reviewing offshore construction for potential obstructions to navigation, the Corps examined wind energy-related development pursuant to the National Environmental Policy Act (NEPA), which generally requires analysis of the environmental impacts of federal actions.[35] Thus, pursuant to the RHA and NEPA, the Corps may have examined most of the salient issues present in an offshore wind energy proposal. Controversy arose, however, with respect to two primary issues that were litigated in *Alliance to Protect Nantucket Sound v. United States Department of the Army*.[36] First, it was unclear whether Corps jurisdiction pursuant to the RHA and the OCSLA extended to all offshore structures or only to those otherwise permitted for energy or mineral development pursuant to other OCSLA provisions. On the basis of the language of the statutes at issue, their legislative history, and Corps regulations and guidance, a federal district court and the First Circuit Court of Appeals held that the Corps is authorized to exercise RHA section 10 authority for any offshore structure, regardless of purpose, in state or federal waters.[37]

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[32] (...continued)

> 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.

[33] 43 U.S.C. §§ 1331-1356a.

[34] 33 U.S.C. § 403. 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) (hereinafter Alliance I), *aff'd*, 398 F.3d 105 (1st Cir. 2005) (hereinafter Alliance II); *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).

[35] 42 U.S.C. §§ 4321 *et seq.*

[36] Alliance I, 288 F.Supp.2d at 64.

[37] *Id.* at 75.

The second issue in the *Alliance* case was whether a section 10 RHA permit was sufficient to authorize the siting, construction, and operation of an offshore wind energy facility. Use of federal and federally controlled lands, including the OCS, requires some form of permission, such as a right-of-way, easement, or license.[38] 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.[39] Use or occupancy of the OCS without such authorization arguably may constitute common law trespass.[40] Questions over the type of authorization a section 10 permit encompasses spring, in part, from Corps regulations, which state the following:

> 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.[41]

Although issues tangentially related to OCS property interests were addressed in the *Alliance* case, the reviewing courts left the matter substantially unsettled.[42]

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[38] Several federal laws would appear to indicate that Congress intends the OCS to be used 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.").

[39] *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. Envtl. Aff. L. Rev. 300, n.96 (2004).

[40] 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 OCS. 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. Thus damages available under trespass may not be available for unauthorized construction on the OCS, while injunctive relief would appear possible even under more constrained interpretations of U.S. authority. United States v. Ray, 423 F.2d 16, 22 (5th Cir. 1970).

[41] 33 C.F.R. § 320.4(g)(6).

[42] *See* Alliance II, 398 F.3d 105, 114 (1st Cir. 2005). The courts did decide that the Corps is not required to validate existing property rights or otherwise become involved in ongoing property disputes prior to issuing a RHA permit. Alliance I, 288 F.Supp. 2d at 77-78. 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

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Accordingly, prior to enactment of the EPACT 2005, it was unclear whether a Corps permit was sufficient to authorize the use of the OCS for wind energy purposes.[43] EPACT 2005 addresses this issue by authorizing offshore wind energy project permitting without completely abrogating the Corps' authority under the RHA. This new legal authority and how it relates to earlier law are discussed below.

The Energy Policy Act of 2005

Section 388 of the EPACT 2005 seeks to address the issues raised in litigation related to offshore wind energy development by specifically establishing legal authority for federal review and approval of various offshore energy related projects. The provision amends the OCSLA by adding a new subsection that authorizes the Secretary of the Interior, in consultation with other federal agencies, to grant leases, easements, or rights-of-way on the OCS for certain activities — wind energy development among them — not authorized by other OCSLA provisions, the Deepwater Port Act, the Ocean Thermal Energy Conversion Act, or "other applicable law."[44]

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[42] (...continued)
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." 33 C.F.R. § 320.4(f). In addressing this requirement in the *Alliance* case, the First Circuit Court of Appeals held that the Corps satisfied this requirement with respect to the preliminary data tower, stating: "[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." Alliance II, 398 F.3d at 114.

[43] Other energy-related developments on the outer continental shelf, for instance, require a lease issued by the Department of the Interior (DOI), pursuant to the Outer Continental Shelf Lands Act (OCSLA), prior to development. 43 U.S.C. § 1337.

[44] 43 U.S.C. § 1337(p)(1). DOI authority to grant leases, easements, or rights-of-way on the OCS is contingent upon the permitted activities being consistent with the purposes specified by the law. The relevant property interest may only be issued if the OCS activity will

> (A) support exploration, development, production, or storage of oil or natural gas, except that a lease, easement, or right-of-way shall not be granted in an area in which oil and gas preleasing, leasing, and related activities are prohibited by a moratorium;
> (B) support transportation of oil or natural gas, excluding shipping activities;
> (C) produce or support production, transportation, or transmission of energy from sources other than oil and gas; or
> (D) use, for energy-related purposes or for other authorized marine-related purposes, facilities currently or previously used for activities authorized under ... [the OCLSA], except that any oil and gas energy-related uses shall not be authorized in areas in which oil and gas preleasing, leasing, and related activities are prohibited by a moratorium. 2005 EPACT, § 388(a), adding new 43 U.S.C. § 1337(p)(1)(A)-(D).

The law also makes clear that federal agencies with permitting authority under other federal laws retain their jurisdiction, despite enactment of this subsection.[45] Thus, the Corps, consistent with the *Alliance* case, will continue to permit offshore development pursuant to the RHA, and other federal agencies with jurisdiction over issues related to energy development, such as species impacts, will be similarly unaffected. The law does not specify which agency will take the lead role in coordinating federal permitting and responsibility for preparing NEPA analysis. However, several provisions within section 388 of the 2005 EPACT may indicate that DOI is charged with primary responsibility. The law directs the Secretary of the Interior to consult with other agencies as a part of its leasing, easement, and right-of way granting process.[46] DOI is also responsible for ensuring that activities carried out pursuant to its new authority provide for "coordination with relevant federal agencies ...."[47] The precise division of responsibilities, however, will depend upon the regulations that DOI eventually issues and any memoranda of understanding negotiated by the stakeholders with regard to relative roles in the permitting process. On December 30, 2005, the Minerals Management Service, within DOI, issued an Advance Notice of Proposed Rulemaking, seeking comments on the development of regulations to implement section 388 and proposed regulations are likely forthcoming.[48]

Although section 388 provides DOI with significant latitude in crafting a regulatory regime for offshore wind energy development, the law does address certain aspects of the property interest granting process expressly. First, the law directs that leases, easements, and rights-of-way are to be issued on a competitive basis, subject to some exceptions described *infra* at pp. 11-12.[49] The Secretary is further authorized to provide for the duration of any property interest granted under this subsection and to provide for suspension and cancellation of any lease, easement, or right-of-way.[50] The law directs the Secretary to establish a system of "royalties, fees, rentals, bonuses, or other payments" that will ensure a fair return to the United States for any property interest granted under this provision.[51] Beyond this general guidance, however, the agency would seem to be free to determine what constitutes a fair return and to require whatever payment systems it deems appropriate.

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[45] *Id*. § 1337(p)(9). For additional discussion, see *infra* pp. 12-16.

[46] *Id*. § 1337(p)(1).

[47] *Id*. § 1337(p)(4).

[48] 70 *Fed. Reg*. 77345 (December 30, 2005).

[49] 43 U.S.C. § 1337(p)(3).

[50] *Id*. § 1337(p)(5).

[51] *Id*. § 1337(p)(2)(A).

The law also provides that 27 percent of the revenues collected by the federal government under this program from any project located wholly or partially within the area extending three nautical miles from state submerged lands are to be paid out among coastal states located within 15 miles of the project's geographic center.[52] The distribution is to be done in an equitable manner based on the states' proximity to the project.[53] More than one state may be eligible to receive a portion of these revenues, depending upon the location of a project.

The division of payments among states is to be based upon a formula that equitably distributes revenues based on the proximity of the project to the affected states' offshore boundaries. The law establishes that states that have a "coastline that is located within 15 miles of the geographic center of the project" are entitled to a revenue share.[54] This may prove controversial in some instances to the extent that there have not been determinative offshore boundaries between states. The Minerals Management Service has prepared administrative boundaries for use in a variety of circumstances, including the determination of "'affected state' status under the Coastal Zone Management Act and the OCS Lands Act ..." and to help "define appropriate consultation and information sharing with States."[55] The notice informing the public that these boundaries have been established does not appear to specifically state that they will be determinative in questions over revenue sharing under section 388; however, these boundaries could form the basis for making determinations as to proximity to state waters and, therefore, could affect the distribution of revenues.

In addition, the law appears to authorize considerable regulation of impacts associated with offshore development by requiring the Secretary to ensure that "any activity under this subsection" be carried out in a manner that adequately addresses specified issues, including environmental protection, safety, protection of U.S. national security, and protection of the rights of others to use the OCS and its resources.[56] In addition, specific financial security requirements are also established by this subsection. The law requires the holder of a section 388 property interest to "provide for the restoration of the lease, easement, or right-of-way" and to furnish a surety bond or other form of security, leaving the amount and the exact purposes to which any forfeited sums will be applied to the Secretary's discretion.[57] Further, in conjunction with the authority to require some form of financial assurance, the Secretary is empowered to impose "such other requirements as the Secretary

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[52] *Id.* § 1337(p)(2)(B).

[53] *Id.*

[54] *Id.*

[55] 71 *Fed. Reg.* 127 (January 3, 2006).

[56] 43 U.S.C. § 1337(p)(4). The Minerals Management Service also appears to have adopted this interpretation, stating: "MMS interprets the authority granted in section 388(a) of the Energy Policy Act of 2005 to issue leases, easements or rights-of-way as also providing MMS authority to regulate or permit the activities that occur on those leases, easements or rights-of-way, if those activities are energy related." 70 *Fed. Reg.* 77345, 77346 (December 30, 2005).

[57] 43 U.S.C. § 1337(p)(6).

considers necessary to protect the interests of the public and the United States."[58] Thus, the Secretary, depending on how these authorities are exercised, may potentially regulate many aspects of any industry that is permitted to operate on the OCS under this subsection of the OCSLA.

The 2005 EPACT also contains a provision expressly providing for a state consultative role in the permitting process. Section 388 requires the Secretary of the Interior to provide for coordination and consultation with a state's Governor or the executive of any local government that may be affected by a lease, easement, or right-of-way granted under this new authority.[59] In addition, the law makes clear that it does not affect any state's claim to "jurisdiction over, or any right, title, or interest in, any submerged lands."[60] Thus, states will remain primary in those areas comprising state offshore waters, and should a state dispute the extent of its offshore territory, such claims are unaffected by the Secretary's new grant of authority under this law.

2005 EPACT Exemptions

As described above, section 388 of the EPACT 2005 sets forth procedures for granting a lease, easement, or right-of-way in federal waters when the property interest will be used for certain specified purposes, including wind energy production.[61] However, subsection (d) exempts certain actions from specific section 388 requirements. This "savings provision" states that the law does not require

> the resubmittal of any document that was previously submitted or the reauthorization of any action that was previously authorized with respect to a project for which, before the date of enactment of this Act —
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> (1) an offshore test facility has been constructed; or
>
> (2) a request for a proposal has been issued by a public authority.[62]

Thus, where a project has resulted from a public entity's request for proposals or where a project is associated with an existing offshore test facility, previously submitted documents do not need to be resubmitted and previously authorized actions do not need to be reauthorized, essentially maintaining the status quo with respect to these projects.[63] This provision does not seem to exempt *unauthorized* actions associated with the exempted actions, or, indeed, any other aspect of the related project, from a requirement to comply with the property interest acquisition provisions of section 388. Thus, siting and construction of an offshore data tower, such as Cape Wind's data tower in Nantucket Sound, would not have to be reauthorized. However, any activity that had not been authorized before August 8,

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[58] *Id.*

[59] *Id.* § 1337(p)(7).

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

[61] *Id.*

[62] *Id.* § 388(d).

[63] *Id.*

2005, such as the construction of additional facilities, would appear to be subject to the requirements of section 388.

Section 388 also contains two exceptions to the general requirement that a property interest issued under this provision be granted on a "competitive basis": (1) if the Secretary of the Interior determines that there is no competitive interest, or (2) if the project meets the criteria established by the savings provision in subsection (d).[64] The first exemption, requiring a finding of no competitive interest, is relatively straightforward, although additional details may be provided at the administrative level. The second exemption proves more complex in that it may apply more broadly than the savings provision itself. As the text of the law indicates, "projects that meet the criteria established under section 388(d)" are exempted from competitive property interest acquisition.[65] It is not clear that the "projects" referenced are limited to the actions (such as a data tower constructed at the time of the 2005 EPACT's enactment) previously authorized. Subsection (d) appears to use the term "project" more broadly, such that a "project for which ... an offshore test facility has been constructed ..." might encompass all future offshore development that would be supported by, or is in some way related to, a qualifying test facility.[66] It is also possible that a "project" for which a test facility has been constructed could be interpreted more narrowly, such that the term "project" would include only those actions authorized in conjunction with the test facility itself. In short, because there is no definition provided for "project" in the law, it would seem likely that the administering agency would be responsible for providing a definition that is reasonably supportable by the law.

Additional Regulation Under Existing Law

In addition to the regulatory regime authorized by section 388, it is also noteworthy that a variety of laws pre-dating the enactment of the 2005 EPACT remain applicable to offshore wind energy development. Indeed, the 2005 EPACT makes clear that the enactment of section 388 does not affect the jurisdiction, responsibility, or authority of any federal or state agency operating under other federal law.[67] Thus, it would seem clear that the state role provided for by the CZMA and the Corps permitting authority provided by the RHA, both described above, remain intact. Other federal laws that are likely to be relevant in the permitting process are described below.

First, the Department of the Interior as well as any cooperating federal, state, or local entities[68] are required to undertake an environmental review process mandated

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[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] 43 U.S.C. § 1337(p)(9).

[68] These entities may request cooperating agency status pursuant to NEPA implementing regulations and thereby contribute to the environmental analysis process.

by the National Environmental Policy Act (NEPA).[69] NEPA requires federal agencies to take a "hard look" at, and to disclose, 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."[70] In situations where a categorical exclusion does not apply, an intermediate level of review, an environmental assessment (EA), may be required. If, on the basis of 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, NEPA review will likely provide information on wind energy projects, including 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.[71]

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),[72] the Marine Mammal Protection Act (MMPA),[73] and the Migratory Bird Treaty Act (MBTA).[74]

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[69] 42 U.S.C. §§ 4321 *et. seq*.

[70] 40 C.F.R. § 1508.4.

[71] *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]. *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).

[72] 16 U.S.C. §§ 1531-1544.

[73] 16 U.S.C. §§ 1361-1407.

[74] 16 U.S.C. §§ 703-712.

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.[75] "Take" is broadly defined as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct."[76] 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.[77]

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.[78] 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.[79] 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.[80] 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.[81] 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.[82] 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.[83] 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

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[75] 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 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).

[76] 16 U.S.C. § 1532(19).

[77] *Id.* § 1536(2).

[78] 50 C.F.R. § 402.12(c). 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.

[79] 50 C.F.R. § 402.12(b),(d).

[80] *Id.* § 402.14(e).

[81] *Id.* § 402.14(h).

[82] *Id.* § 402.14(h)(3).

[83] *Id.* § 402.14(i).

opinion.[84] Takings allowed under the consultation process are deemed consistent with the ESA; thus, they are not subject to penalties under the act, and no other authorization or permit is required.[85]

The MMPA prohibits, with certain exceptions, the taking of marine mammals in U.S. waters and by U.S. citizens on the high seas, as well as the importation of marine mammals and marine mammal products into the United States. The statute is jointly administered by the Department of Commerce (through NOAA/NMFS) and the Department of the Interior (through FWS).[86] Among the statutory exceptions to the moratorium is a provision allowing NMFS or FWS to authorize, for a period of not more than five consecutive years, the "incidental" taking of small numbers of marine mammals.[87] Such incidental takes may be authorized only upon a finding that the take will have a negligible impact on the species or stock and will not have an unmitigable adverse impact on the availability of the species or stock for taking for subsistence purposes by Alaskan natives as authorized by other sections of the MMPA.[88]

The regulations establish procedures for administering the MMPA, including application for authorization for incidental take of small numbers of marine mammals.[89] These regulations set forth the procedures for submission of requests for such authorization to the NMFS or FWS, standards for review and the form of the authorization.[90]

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.[91] The MBTA generally prohibits the taking, killing, possession, or transportation of, and trafficking in, migratory birds, their eggs, parts, and nests.[92] 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.[93] FWS is responsible for permitting activities that would otherwise violate the MBTA.

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[84] *Id.* § 402.14(i)(1)(i)-(v).

[85] 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i)(5).

[86] The statute defines Secretary as the Secretary of the department in which NOAA is operating (Commerce) for purposes of regulation related to all members of the order Cetacea (whales and porpoises) and all members, except walruses, of the order Pinnipedia (seals). The statute defines Secretary as Secretary of the Interior (operating through the FWS) with respect to all other marine mammals (manatees, dugongs, polar bears, sea otters and walruses). 16 U.S.C. § 1362(12)(A).

[87] 16 U.S.C. § 1371 (5)(A).

[88] 16 U.S.C. § 1371 (5)(A)(i).

[89] 50 C.F.R.§18.27 (FWS regulations); 50 C.F.R. Part 216, Subpart I (NMFS regulations).

[90] *Id.*

[91] Birds that receive protection under the MBTA are listed at 50 C.F.R. § 10.13.

[92] 16 U.S.C. § 703.

[93] 16 U.S.C. § 704.

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.[94] 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."[95]

It does 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.[96] The Service has, however, adopted voluntary, interim guidelines for minimizing the wildlife impacts from wind energy turbines.[97] 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."[98]

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. The Energy Policy Act of 2005 provides the Department of the Interior with authority to grant offshore property interests for the purpose of wind energy development and appears to grant the Secretary of the Interior the authority to regulate activities resulting from such development. Additional laws that pre-date the enactment of the Energy Policy Act of 2005 continue in force and also appear likely to remain a source of regulation, despite the apparent primary authority granted to the Department of the Interior. Further, states also may claim a role in the permitting of offshore wind energy development pursuant to authorities granted under existing federal law.

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[94] 50 C.F.R. §§ 21.11-21.26.

[95] *Id*. § 21.27.

[96] *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.").

[97] 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/habitatconservation/wind.pdf].

[98] *Id.* at 2.