REVISITING FEDERALISM CONCERNS IN THE OFFSHORE WIND ENERGY INDUSTRY IN LIGHT OF CONTINUED LOCAL OPPOSITION TO THE CAPE WIND PROJECT

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Interest in developing offshore wind energy projects in the United States has increased dramatically in the last few years. A proposed project to develop an offshore wind energy facility in the shallow waters of Nantucket Sound (a project now known as "Cape Wind") has recently received all required federal, state, and local approvals to proceed. The approvals have come only after a ten-year battle over a complex and changing regulatory scheme, as well as private litigation from local citizen groups challenging every step of the

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approval process. The high cost and delay associated with the current regulatory system will likely discourage future development of wind energy projects in the United States without reform. This Note provides a summary of the current federally controlled regulatory regime and the history of the Cape Wind saga, with emphasis on two recent instances of vehement local opposition. The Note argues that given the inherently local nature of the costs and benefits of offshore wind energy, the permitting regime should be "inverted" to give the coastal states primary regulatory control over their offshore wind resources. Local control over project siting, as well as competition among the states to attract offshore wind energy development, would lead to a more efficient allocation of our nation's offshore wind energy resources and avoid the cost and delay faced by Cape Wind under the current regulatory scheme.

INTRODUCTION

The development of offshore wind energy projects in the United States has attracted greater interest in the last few years,[1] and the federal government seems to recognize the benefits of wind power, as evidenced by various tax credits and loan guarantees currently in place for the industry.[2] Nevertheless, a proposed project to develop an offshore wind energy facility in the shallow waters of Nantucket Sound – a project known as "Cape Wind" – has faced over ten years of regulatory hurdles and private litigation. The Cape Wind project has largely been viewed as a test case for offshore wind energy projects in the United States.[3] The complex and changing regulatory scheme, coupled with the cost and delay associated with private litigation from citizen groups challenging every step of the approval process, will likely discourage future development of wind energy projects in the United States without reform.

[1] Katherine A. Roek, *Offshore Wind Energy in the United States: A Legal and Policy Patchwork*, 25 NAT. RESOURCES & ENV'T 24, 24 (2011) ("Interest [in] developing offshore wind in the United States has increased dramatically over the past few years.").

[2] Erica Schroeder, Comment, *Turning Offshore Wind On*, 98 CAL. L. REV. 1631, 1631-32 (2010) ("The federal government appears to recognize the opportunities and benefits that wind power offers. In February 2009, Congress positioned wind power generation to continue its rapid growth by renewing production tax credits for wind power projects through 2012. Congress also gave the wind industry options for investment tax credits or U.S. Treasury Department grants for certain wind power projects placed in service by 2012. In addition, in July 2009, DOE announced up to $30 billion in loan guarantees for renewable energy projects, including wind power.").

[3] Tom Moroney & Jim Efstathiou Jr., *Obama Wind Farm Goals Threatened by Indian Rites, Kennedy's Parting Wish*, BLOOMBERG (Apr. 14, 2010, 9:00 PM), http://www.bloomberg.com/apps/news?pid=20601130&sid=aYGGAST8uKmc (quoting Jack Clarke, Massachusetts Audubon Society public policy director: "Everyone is waiting for Cape Wind to break the ice. There would be few investors willing to put themselves at risk if it didn't look like the U.S. was committed to renewable offshore energy.").

The Cape Wind story demonstrates that the siting of offshore wind projects leads to a unique interplay between federal and state interests. The Cape Wind turbines will be located entirely in federal waters, but electricity transmission cables will run under state waters and lands to connect to the local power grid.[4] The Coastal Zone Management Act (CZMA) provides the primary mechanism for balancing federal and state interests in U.S. coastal resources.[5] Under the regime set up by the CZMA, states are given broad discretion to create their own Coastal Zone Management Plans (CZMPs) regulating the use of resources within state waters, defined as those waters within three miles of the shoreline.[6] The federal government retains regulatory and permitting authority over all federal waters beyond three miles of the shoreline; however, the mechanism of federal consistency review extends state power further, beyond their coastal zones, by allowing states to review and sometimes overrule federal actions and permits in federal waters when the activity affects the state's coastal zone.[7] Nevertheless, the federal government retains ultimate permitting authority; the U.S. Secretary of Commerce can overrule a state's protest by finding that a permit is consistent with the objectives of the CZMA or otherwise in the interest of national security.[8]

A robust literature has developed analyzing and critiquing the regulatory scheme in place for the approval of offshore wind facilities.[9] Most commentators have focused on the complexity and incoherence of the regulatory process faced by Cape Wind, ultimately proposing regulatory modifications that *increase* federal control of the permitting process.[10] What is

[4] *See* Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd., 858 N.E.2d 294, 295-97 (Mass. 2006) (discussing the fact that half of the undersea transmission line will be outside the Massachusetts boundary and, thus, within federal waters).

[5] Schroeder, *supra* note 2, at 1634 (providing an analysis of the current regulatory framework for offshore wind power, including federal and state jurisdictions, and an explanation of the CZMA as the primary mechanism for balancing federal and state interests in this area).

[6] 43 U.S.C. §§ 1311-1312 (2006) (granting states the right to manage and develop resources within lands beneath the navigable waters that are within the boundaries of states, and stating that the seaward boundary of each state is three miles distant from the coast).

[7] Schroeder, *supra* note 2, at 1644-45 ("Therefore, state – and sometimes local – authorities ultimately have a role to play in any offshore wind project through the siting and permitting of transmission cables . . . . States will also likely consider such aesthetic and environmental considerations in the federal consistency review process, with which they may also block federal activities and permits.").

[8] 16 U.S.C. § 1456(c)(3)(A) (2006) (stating that the federal government cannot issue a license or permit until the state has concurred with the applicant's certification, unless the activity is consistent with the objectives of the statute or necessary for national security).

[9] *See, e.g.*, Roek, *supra* note 1, at 24-28.

[10] *See, e.g.*, Adam M. Dinnell & Adam J. Russ, *The Legal Hurdles to Developing Wind Power As an Alternative Energy Source in the United States: Creative and Comparative Solutions*, 27 NW. J. INT'L L. & BUS. 535, 535-36 (2007) (advocating a "National Wind

often lost in these arguments for federal preemption and mandates for offshore wind development on U.S. coasts, however, is that such projects can have considerable local impact. Even proponents of increased federal control acknowledge that, "[w]hile the most compelling benefits of offshore wind are frequently regional, national, or even global, the costs are almost exclusively local."[11]

The purpose of this Note is to continue an ongoing conversation about federalism in the development of offshore wind energy.[12] Specifically, this Note examines two recent developments in the opposition to the Cape Wind project. After receiving all required federal, state, and local approvals to proceed with the project, Cape Wind continues to face resistance from local groups. The first recent development occurred on July 6, 2011, when the Aquinnah Wampanoag Tribe of Gay Head in Martha's Vineyard, Massachusetts, filed suit in the U.S. District Court for the District of Columbia against the federal government, challenging its approval of the Cape Wind project.[13] The Tribe alleges that the project will destroy the Tribe's historical, cultural, and spiritual resources located on Horseshoe Shoal, now listed in the National Register of Historic Places.[14] In particular, the Tribe claims that the

Power Act" that would "supersede other environmental laws as the authoritative source for the regulation of all aspects of wind power projects in the United States"); Gregory J. Rigano, Note, *The Solution to the United States' Energy Troubles Is Blowing in the Wind*, 39 HOFSTRA L. REV. 201, 232 (2010) (arguing for the federal government to have "exclusive control" over permitting by passing an "Offshore Wind Energy Act"); Jacqueline S. Rolleri, Note, *Offshore Wind Energy in the United States: Regulations, Recommendations, and Rhode Island*, 15 ROGER WILLIAMS U. L. REV. 217, 220 (2010) ("[T]he federal government should consider creating new legislation for a federal Ocean Zone Management Act, which would utilize marine spatial planning."); Schroeder, *supra* note 2, at 1657-65 (comparing the struggles of Cape Wind with the relative success of offshore wind power in Denmark and proposing three specific modifications to the CZMA).

[11] Schroeder, *supra* note 2, at 1633.

[12] Writing in 2006, Robert Eberhardt sought to "start a conversation about federalism and the development of offshore wind energy by describing how states play an important role in the siting of offshore wind energy projects under current law." Robert W. Eberhardt, Note, *Federalism and the Siting of Offshore Wind Energy Facilities*, 14 N.Y.U. ENVTL. L.J. 374, 379-80 (2006) (discussing federalism issues raised by offshore wind energy development, but ultimately advocating federal legislation with preemptive effects over state control of submerged lands).

[13] Mike Seccombe, *Wampanoags Sue in U.S. Court Against Cape Wind Associates*, VINEYARD GAZETTE (July 12, 2011, 5:38 PM), http://mvgazette.com/article.php?30918.

[14] Gale Courey Toensing, *Aquinnah Wampanoag Sues Feds over Cape Wind*, INDIAN COUNTRY TODAY MEDIA NETWORK (July 14, 2011), http://indiancountrytodaymedianetwork.com/2011/07/14/aquinnah-wampanoag-sues-feds-over-cape-wind-42712 (quoting the Tribal Historic Preservation Officer as stating: "'Cape Wind will destroy our traditional cultural property, Horseshoe Shoal and the surrounding Nantucket Sound, where our Tribe has flourished and [sic] continues to utilize for significant cultural and spiritual ceremonies and practices.'").

project would disrupt the currently unobstructed view of the eastern horizon, necessary for the Tribe's sunrise ceremonies, as well as disturb the seabed of Horseshoe Shoal where the Tribe's ancestors lived and were likely buried when the shoal consisted of dry land.[15] The second recent development occurred on October 28, 2011, when, in a challenge brought by several groups of local citizens, the U.S. Court of Appeals for the District of Columbia Circuit overturned the Federal Aviation Administration's (FAA) Determination of No Hazard to Air Navigation, claiming that the FAA had misread its regulations and remanding for more thorough review.[16] In August 2012, the FAA reissued a Determination of No Hazard,[17] and local citizens again filed suit challenging the Determination.[18]

While in general the federal government has significant interests in retaining regulatory control over federal waters, within the context of offshore wind energy there may be significant benefits to allowing greater state control over the permitting process. First, opposition from citizen groups, like that faced by the Cape Wind project, may be more efficiently addressed by allowing more localized control of regulations and permitting. Second, granting states complete control over permitting may increase competition among states to attract offshore wind energy developers and lead to a more efficient and desirable allocation of offshore wind energy facilities throughout the United States.

Thus, using Cape Wind as a case study, this Note analyzes the current regulatory scheme for offshore wind projects and the balance of federal and state control in the context of these recent developments in local opposition to the Cape Wind project. The Note proposes a regulatory solution that would "invert" the current CZMA power scheme by placing the primary permitting authority in the hands of coastal states. This, in turn, would lower the costs and barriers to entry for future offshore wind energy projects in the United States and lead to a more efficient allocation of our offshore wind energy resources. Part I provides an explanation of the current regulatory scheme

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[15] *See id.*

[16] Town of Barnstable v. FAA, 659 F.3d 28, 31, 38 (D.C. Cir. 2011) ("We find that petitioners do have standing and that the FAA did misread its regulations, leaving the challenged determinations inadequately justified.").

[17] FAA, AERONAUTICAL STUDY NO. 2012-WTE-322-OE, DETERMINATION OF NO HAZARD TO AIR NAVIGATION (2012), *available at* https://oeaaa.faa.gov/oeaaa/external/searchAction.jsp?action=displayOECase&oeCaseID=157246996; Beth Daley, *FAA Rules Cape Wind Project Poses No Hazard to Planes*, BOS. GLOBE (Aug. 15, 2012), http://www.bostonglobe.com/metro/2012/08/15/faa-rules-cape-wind-project-poses-hazard-planes/OE2wjqPigBiff4jTi31gOP/story.html.

[18] Beth Daley, *Cape Wind Plans To Buy Falmouth Marina As Operations Base*, BOS. GLOBE (Aug. 23, 2012), http://www.bostonglobe.com/metro/2012/08/23/cape-wind-buys-falmouth-marina-critics-challenge-faa-approval-project-federal-court/ykBEP2CH2Zi3lAHaqBxUtK/story.html.

under the CZMA and the Outer Continental Shelf Renewable Energy Program (OCSREP). Part II provides a brief history of the Cape Wind project up to the final approval of the project by the U.S. Department of the Interior (DOI). Part III describes the two recent impediments faced by the Cape Wind project: the lawsuit filed by the Aquinnah Wampanoag Tribe and the D.C. Circuit's rejection of the FAA's approval of the project. Finally, Part IV evaluates the balance of federal and state interests envisioned by the CZMA and the OCSREP, ultimately arguing for a revision to the CZMA that would increase local control over project siting and lead to a more efficient allocation of offshore wind facilities by allowing states to compete for projects.

I. THE CURRENT REGULATORY SCHEME: THE CZMA AND THE OCSREP

A. *The Coastal Zone Management Act*

The CZMA "provides the primary mechanisms for balancing federal and state interests in U.S. coastal reserves."[19] Control over offshore-wind-project siting is shared by state and federal governments, with jurisdiction determined geographically: states maintain control of their coastal zones, which are defined as extending three miles seaward from the coastline, and the federal government retains control of the Outer Continental Shelf (OCS) beyond that three-mile zone.[20] States are required to submit a CZMP to the Secretary of Commerce.[21] The CZMP must reflect the broad purpose of the CZMA "to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations."[22] While states are given considerable discretion over the management of their coastal zones through CZMPs,[23] such plans are nevertheless subject to the approval of the Secretary of Commerce "in accordance with rules and regulations promulgated by the Secretary . . . and with the opportunity of full participation by relevant Federal agencies."[24] Most relevant to a state's own interest in deciding whether to promote offshore wind energy within its coastal zone, the CZMA requires that state CZMPs provide "adequate consideration of the national interest involved in planning for, and managing the coastal zone, including the siting of facilities such as energy facilities which are of greater than local significance."[25]

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[19] Schroeder, *supra* note 2, at 1634.

[20] 43 U.S.C. § 1312 (2006).

[21] 16 U.S.C. § 1455(d) (2006) (listing the steps the federal government must take before approving a management program submitted by a coastal state).

[22] *Id.* § 1452(1).

[23] Schroeder, *supra* note 2, at 1645.

[24] 16 U.S.C. § 1455(d)(1).

[25] *Id.* § 1455(d)(8).

Most proposed offshore wind projects, including Cape Wind, would be located more than five miles offshore, in federal waters.[26] Thus, the electricity-generating component of most offshore wind projects, the wind turbines themselves, are subject to federal jurisdiction. State governments nevertheless play a role in the approval process of offshore wind projects under the CZMA for two reasons. First, electricity generated by such projects must be transmitted to land through cables on the seabed, which necessarily travel through the state's coastal zone. States therefore can exert control over the permitting process for the transmission-cable component of an offshore wind project by providing for such a process in their CZMPs. Second, the CZMA provides a mechanism for states to extend their role beyond the coastal zones through the process of federal consistency review.[27] Pursuant to federal consistency review, "[e]ach Federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs."[28] Under federal consistency review requirements, applications for a required federal license or permit to conduct an activity in or outside the coastal zone must include "a certification that the proposed activity complies with the enforceable policies of the state's approved program."[29] A state then has the opportunity to review the application, and either concur or object to the applicant's certification.[30] In this manner, the CZMA seeks to encourage state involvement in the management of coastal resources even outside each state's coastal zone.[31] The Secretary of Commerce, however, ultimately controls final approval of any such federal license or permit, and may overrule a state's objection by finding that "the activity is consistent with the objectives of [the CZMA] or is otherwise necessary in the interest of national security."[32]

B. *The Outer Continental Shelf Renewable Energy Program and the Dismantling of the Minerals Management Service*

As enacted, the CZMA does not explicitly mention offshore wind energy, or even renewable energy in general.[33] Only in the Energy Policy Act of 2005

[26] *See* Schroeder, *supra* note 2, at 1643 ("Analyses of offshore wind capacity typically assume that wind farms will be built in federal waters, more than five miles from the coast.").

[27] 16 U.S.C. § 1456(c)(1)(A), (c)(1)(C), (c)(3)(A) (stating that federal agencies must provide a consistency determination and establishing the procedures for that process).

[28] *Id.* § 1456(c)(1)(A).

[29] *Id.* § 1456(c)(3)(A).

[30] *Id.*

[31] *See id.* § 1452(2) (stating that one of the goals of the statute is "to encourage and assist the states to exercise effectively their responsibilities in the coastal zone").

[32] *Id.* § 1456(c)(3)(A).

[33] *See* Schroeder, *supra* note 2, at 1645 ("The CZMA mentions the development of

did Congress grant the DOI the authority to regulate the offshore wind facility permitting process.[34] Permitting authority was delegated to the Minerals Management Service (MMS), a branch of the DOI that is more familiar with offshore oil and gas extraction than renewable energy.[35] Thus, the specific treatment of the federal permitting process for offshore wind facilities remained vague and undeveloped.

Two recent changes to the federal regulatory scheme for offshore wind energy projects have provided greater clarity. First, on April 29, 2009, the DOI finalized specific regulations for offshore renewable energy as part of its Outer Continental Shelf Renewable Energy Program (OCSREP).[36] Under the authority of the Energy Policy Act of 2005, the OCSREP sets forth regulations that specifically apply to activities that "[p]roduce or support production, transportation, or transmission of energy from sources other than oil and gas."[37] The program lists three purposes: (1) to establish procedures for the issuance of leases for renewable energy production on the OCS, (2) to inform potential applicants of obligations when pursuing leases for renewable energy production on the OCS, and (3) to ensure that renewable energy activities on the OCS are conducted in a safe and environmentally sound manner.[38] Whereas prior to the promulgation of the OCSREP "there was no clear instruction as to what was required to build a renewable energy facility on the outer continental shelf," the OCSREP now provides such instruction.[39]

The second recent change to the federal regulatory scheme is the dismantling of the MMS. On May 19, 2010, following the BP Deepwater Horizon oil spill,[40] the Secretary of the Interior issued Order No. 3299, which

energy facilities in the Coastal Zone, but its language is vague . . . ."). The CZMA does mention a national interest in energy generally: "The national objective of attaining a greater degree of energy self-sufficiency would be advanced by providing Federal financial assistance to meet state and local needs resulting from new or expanded energy activity in or affecting the coastal zone." 16 U.S.C. § 1451(j).

[34] *See* 43 U.S.C. § 1337(p)(1)(C) (2006) (stating that the Secretary of the Department of the Interior, in consultation with other agencies, may grant a lease to promote the development of non-oil-and-gas resources on the OCS).

[35] 43 U.S.C. § 1337.

[36] *See* 30 C.F.R. §§ 285.100-.1019 (2010) (listing regulations pertaining to renewable energy and alternate uses of existing facilities on the OCS).

[37] *Id.* § 285.100(a).

[38] *Id.* § 285.101.

[39] Jeffrey C. Cartmell, Note, *A Shift in the Winds: What the Outer Continental Shelf Renewable Energy Program and the Dismantling of the Minerals Management Service Mean for Offshore Energy*, 7 OKLA. J.L. & TECH. 55, 18 (2011), http://www.law.ou.edu/sites/default/files/files/FACULTY/2011okjoltrev55.pdf.

[40] *Id.* at 21. Cartmell describes how the MMS, given its authority both to manage the mineral resources of the OCS in an environmentally sound and safe manner, as well as to collect mineral revenues, had a built-in incentive to be lenient with regard to safety regulations. He concludes that the dismantling of MMS "effectively removed the obvious,

"separate[d] and reassign[ed] the responsibilities that had been conducted by the [MMS] into new management structures."[41] The order divided the MMS into three separate branches: the Bureau of Ocean Energy Management (BOEM), the Bureau of Safety and Environmental Enforcement (BSEE), and the Office of Natural Resources Revenue (ONRR).[42] Under the order, the BOEM is to inherit "the conventional (e.g., oil and gas) and renewable energy-related management functions of the Mineral Management Service," including the resource evaluation, planning, and leasing processes.[43] The BSEE will likewise exercise environmental-enforcement functions, while the ONRR will take over revenue-management functions.[44] By separating the leasing, environmental-compliance, and revenue functions into separate agencies, the new system should serve to eliminate the inherent conflicts of interest that existed in the MMS, where the agency's revenue-collection function created a built-in incentive to promote lucrative offshore drilling while being lenient with safety regulations.[45] With the function of revenue collection vested in a separate agency, the other agencies should be able to perform their functions without worrying about how such performance affects their bottom line.[46] Such a structural change could portend a movement away from offshore drilling towards an increased federal interest in offshore renewable energy.

The promulgation of the OCSREP and the dismantling of the MMS indicate a strong move toward more deliberate regulation of offshore wind energy facilities by the federal government. Nevertheless, no offshore wind energy facility has been constructed in the United States to date. The prolonged and troubled approval process faced by Cape Wind, the country's first proposed offshore wind energy facility, illustrates the complexities of the approval process, as well as the significant state and local interests that will likely come into play as similar projects develop.

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apparent, and controversial conflicts of interest that existed within the MMS." *Id.* at 22 ("This meant the MMS was in charge of collecting revenues. When taken together, these powers presented no significant problem or conflict of interest. The conflict of interest appeared when MMS also received the authority to regulate and enforce the industry.").

[41] U.S. DEP'T OF THE INTERIOR, SECRETARIAL ORDER NO. 3299, ESTABLISHMENT OF THE BUREAU OF OCEAN ENERGY MANAGEMENT, THE BUREAU OF SAFETY AND ENVIRONMENTAL ENFORCEMENT, AND THE OFFICE OF NATURAL RESOURCES REVENUE (2010).

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] Cartmell, *supra* note 39, at 20-21 ("Less time spent complying with regulations meant more time for offshore well drilling, which in turn, produced more profits for the MMS to collect.").

[46] *Id.* at 22 ("Now, BOEM is solely concerned with only the leasing process. Likewise, another agency is assigned the single purpose of enforcing regulation and safety standards; it will not matter how the BSEE affects the bottom line, because the bottom line is not its concern.").

II. A BRIEF HISTORY OF THE CAPE WIND PROJECT

In November 2001, Cape Wind Associates, LLP (CWA) applied for a permit to build a wind facility on Horseshoe Shoal in Nantucket Sound.[47] The proposed project would consist of 130 turbines, each 440 feet high, built in a grid pattern and spread over 25 square miles.[48] The wind turbines would be located more than five miles from the nearest coastline,[49] and thus within the federal waters of the OCS.[50] The location is ideal due to the consistently high winds of Nantucket Sound and the shallow water provided by Horseshoe Shoals. The BOEM reports that "the average expected production from the wind facility could provide about 75 percent of the electricity demand for Cape Cod and the Islands of Martha's Vineyard and Nantucket."[51]

The U.S. Army Corps of Engineers initially served as the lead agency in charge of the permitting process for the Cape Wind project.[52] In August 2002, the Corps of Engineers granted CWA a permit to build a meteorological tower to measure wind speeds and collect additional data that would determine whether Horseshoe Shoals was a feasible location for the project.[53]

A. *Federal Challenges*

Approval for construction of the measurement tower led to "the first skirmish in an eventual battle" brought by local citizens opposed to the project.[54] On September 24, 2002, the Ten Taxpayer Citizens Group ("Ten Taxpayer") applied for and received a temporary restraining order from the Barnstable Superior Court.[55] Ten Taxpayer is a group of citizens, each of whom "resides in Barnstable County and has great familiarity with the Horseshoe Shoal and Nantucket Sound and has economic, as well as

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[47] BUREAU OF OCEAN ENERGY MGMT., U.S. DEP'T OF INTERIOR, FACTS ON THE CAPE WIND ENERGY PROJECT 1 (2012), *available at* http://www.boem.gov/uploadedFiles/BOEM/Renewable_Energy_Program/Studies/Cape%20Wind%20Fact%20Sheet.pdf.

[48] *Id.*

[49] *Frequently Asked Questions About Cape Wind*, CAPE WIND, 1, http://www.capewind.org/downloads/faqs4.pdf (last visited Nov. 11, 2012) ("Cape Wind will be 5.2 miles from Point Gammon, a private island in South Yarmouth, 5.6 miles from Cotuit, 6.5 miles from Craigville Beach on Cape Cod. Cape Wind will be 9.3 miles from Oak Bluffs and 13.8 miles from the town of Nantucket."). The Cape Wind project would be "farther away from the nearest home than any other electricity generation facility in Massachusetts." *Id.*

[50] *Cape Wind*, BUREAU OCEAN ENERGY MGMT., http://www.boem.gov/Renewable-Energy-Program/Studies/Cape-Wind.aspx (last visited Nov. 11, 2012).

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] Ten Taxpayer Citizens Grp. v. Cape Wind Assocs., 278 F. Supp. 2d 98, 99 (D. Mass. 2003) (suggesting that litigation over the meteorological tower was probably the beginning of a more protracted legal battle).

[55] *Id.*

environmental, interests in preserving the integrity of the seabed, water and airspace over the said Shoal."[56] CWA removed the case to the U.S. District Court for the District of Massachusetts under federal question jurisdiction.[57] Ten Taxpayer argued that before CWA could begin construction of the measurement tower, they must also receive a license from the Commonwealth of Massachusetts, pursuant to state regulations regarding fisheries.[58] Ten Taxpayer relied upon a provision of the Magnuson-Stevens Fishery Conservation and Management Act,[59] which, they argued, ceded federal jurisdiction over the pocket of federal waters in Nantucket Sound to Massachusetts.[60] Ten Taxpayer argued that because construction of the tower would affect fishing, CWA was required to secure approval from Massachusetts.[61] The district court rejected Ten Taxpayer's claims of state jurisdiction, citing a pair of Supreme Court cases involving the coastal waters of Maine that confirmed the federal government's exclusive jurisdiction over all waters more than three miles from the coast.[62] In addition, the court clarified the limitations inherent in the Magnuson-Stevens Act:

> Congress did not delegate its complete sovereign authority over the pocket of federal waters in Nantucket Sound to the Commonwealth, but only that part necessary to establish consistent fishing regulations throughout the Sound . . . .
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> . . . .

[56] Ten Taxpayer Citizens Group v. Sec'y Office of Envtl. Affairs, No. 200700296, 2008 WL 4739555, at *1 (Mass. Super. Ct. Sept. 10, 2008).

[57] *Ten Taxpayer Citizens Grp.*, 278 F. Supp. 2d at 99.

[58] *Id.* at 100.

[59] 16 U.S.C. § 1856(a)(2) (2006) ("For the purposes of this chapter . . . the jurisdiction and authority of a State shall extend – (A) to any pocket of waters that is adjacent to the State and totally enclosed by lines delimiting the territorial sea of the United States . . . ; [and] (B) with respect to the body of water commonly known as Nantucket Sound, to the pocket of water west of the seventieth meridian west of Greenwich.").

[60] *Ten Taxpayer Citizens Grp.*, 278 F. Supp. 2d at 100.

[61] *Id.*

[62] *Id.* (citing United States v. Maine (*Maine I*), 420 U.S. 515 (1975)). In *Maine I*, the federal government brought suit against the thirteen states bordering the Atlantic Ocean, all of which claimed some right to the lands beyond three miles of their coasts. *Maine I*, 420 U.S. at 516-17. The Court ruled that the seabed more than three miles from shore falls under exclusive federal jurisdiction. *Id.* A second case, known as *Maine II*, clarified that the pocket of Nantucket Sound outside the three-mile coastal zone, but fully surrounded by state waters, was also subject to federal jurisdiction under *Maine I*. United States v. Maine (*Maine II*), 475 U.S. 89, 90 (1986) (rejecting Massachusetts' assertion that the Nantucket Sound is internal waters).

> . . . [N]othing in the Act supports the proposition that regulating non-fishing activities simply for the protection of fish falls under the Commonwealth's jurisdiction.[63]

The First Circuit affirmed the district court's decision, holding that "any Massachusetts permit requirement that might apply . . . is inconsistent with federal law and thus inapplicable on Horseshoe Shoals."[64] While Ten Taxpayers' suit against CWA was proceeding, another citizen group, the Alliance to Protect Nantucket Sound, also sought to halt construction of the measurement tower. The Alliance was formed in 2001 in response to CWA's proposal to build an offshore wind facility, with a mission "to protect Nantucket Sound in perpetuity through conservation, environmental action, and opposition to inappropriate industrial or commercial development."[65]

In a suit brought in the U.S. District Court for the District of Massachusetts, the Alliance sought to challenge the Army Corps of Engineers' authority to approve construction of the measurement tower.[66] Specifically, the Alliance argued that the Corps of Engineers had "jurisdiction on the OCS only over those structures erected for the purpose of extracting resources."[67] The court disagreed with the Alliance and found that the Corps of Engineers was entitled to *Chevron* deference in its interpretation of the scope of its jurisdiction on the OCS.[68] The court concluded that Congress "made crystal clear its intention

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[63] *Ten Taxpayer Citizens Grp.*, 278 F. Supp. 2d at 100-01.

[64] Ten Taxpayer Citizens Grp. v. Cape Wind Assocs., 373 F.3d 183, 197 (1st Cir. 2004). The Supreme Court denied Ten Taxpayer's petition for a writ of certiorari. Ten Taxpayer Citizens Grp. v. Cape Wind Assocs., 543 U.S. 1121 (2005) (mem.).

[65] Alliance to Protect Nantucket Sound, *Our Mission*, SAVE OUR SOUND, http://www.saveoursound.org/about_us/mission/ (last visited Nov. 11, 2012). The Alliance is composed of a staff of Cape Cod residents, and includes among a list of "stakeholders" several current and former elected officials, as well as numerous local towns and organizations. Alliance to Protect Nantucket Sound, *Stakeholders*, SAVE OUR SOUND, http://www.saveoursound.org/about_us/stakeholders/ (last visited Nov. 11, 2012).

[66] Alliance to Protect Nantucket Sound, Inc. v. U.S. Dep't of the Army, 288 F. Supp. 2d 64, 66-67 (D. Mass. 2003). District Judge Joseph L. Tauro continued the trend of predicting lengthy litigation over the Cape Wind Project, remarking that this action was "the second skirmish in what may prove to be a protracted struggle over the construction of a wind energy plant in Nantucket Sound, Massachusetts." *Id.* at 66.

[67] *Id.* at 74. The Alliance based its argument on a close reading of the Outer Continental Shelf Lands Act (OCSLA), which refers to "'all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon *for the purpose of exploring for, developing, or producing resources therefrom*, or any such installation or other device (other than a ship or vessel) *for the purpose of transporting such resources*.'" *Id.* at 74 n.74 (quoting 43 U.S.C. § 1333(a)(1) (2006)).

[68] *I*d. at 76-77 (citing Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984)). Chevron is a much discussed case, but to put its holding succinctly, federal agencies are entitled to deference when Congress has delegated authority to the agency generally to make rules, and the specific agency interpretation at issue was promulgated in

that the Corps exert jurisdiction over both extractive and non-extractive structures on the OCS."[69] The decision was affirmed by the First Circuit, which found that Congress had not intended to restrict the Corps of Engineers' permitting authority to structures related to the extraction of mineral resources and further that Congress's intent was so unambiguous that the Corps did not require *Chevron* deference.[70]

B. *State Challenges*

Following these defeats in federal courts, the local citizen groups continued to challenge approval of the Cape Wind project in state court. Several such challenges merit discussion in the context of the federalism concerns discussed in this Note. In 2005, the Massachusetts Energy Facilities Siting Board, acting pursuant to chapter 164, section 69J of the Massachusetts General Laws, approved Cape Wind's petition to build and operate two underground and undersea electric transmission cables that would connect Cape Wind's proposed offshore wind energy facility to the regional electric power grid.[71] To guarantee that the transmission lines were not unnecessarily built, the Siting Board conditioned its approval by determining that construction on the lines could not begin until Cape Wind had successfully obtained permits required to begin construction of the wind farm, including all necessary federal approvals.[72] The Alliance objected to the timing and conditional nature of the Siting Board's approval.[73] The Massachusetts Supreme Judicial Court denied the Alliance's objections, giving "great deference to the board's expertise and experience," and holding that the conditional permit given to Cape Wind was an "effective method to accomplish its statutory obligation to determine whether there was a need for the proposed transmission lines."[74]

In March 2007, the Secretary of the Executive Office of Energy and Environmental Affairs issued a certificate approving Cape Wind's Final Environmental Impact Report (FEIR).[75] In similar fashion to the Siting Board's conditional approval of Cape Wind's proposed transmission lines, the Secretary emphasized the limited jurisdiction of the certificate: Cape Wind's

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the exercise of that authority. *Chevron*, 837 U.S. at 842-44.

[69] *Id.* at 75.

[70] Alliance to Protect Nantucket Sound v. U.S. Dep't of the Army, 398 F.3d 105, 109 (1st Cir. 2005) ("[W]e find it unnecessary to reach the question of *Chevron* deference because legislative history reveals, with exceptional clarity, Congress's intent . . . that authority under OCSLA not be restricted to structures related to mineral extraction.").

[71] Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd., 858 N.E.2d 294, 296 (Mass. 2006).

[72] *Id.* at 298.

[73] *Id.*

[74] *Id.* at 299-301.

[75] Ten Taxpayer Citizens Grp. v. Sec'y Office of Envtl. Affairs, No. 200700296, 2008 WL 4739555, at *2 (Mass. Super. Ct. Sept. 10, 2008).

Final Environmental Impact Statement was approved only with respect to that portion of the project subject to the Massachusetts Environmental Protection Act (MEPA), namely, the electric transmission cables running under only state waters.[76] In May 2007, Ten Taxpayers brought suit challenging various aspects of the certificate, and in particular, challenging the Secretary's statement of limited jurisdiction and calling for full review of the environmental impact of the project.[77] A Massachusetts superior court dismissed the suit, stating:

> MEPA and its implementing regulations make clear that the Secretary does not have authority to review those portions of the project located in federal waters. Any attempt by the plaintiff to assert that state laws are applicable and, therefore, should govern those portions of CWA's project proposed for federal waters is unavailing. Therefore, the Secretary properly limited the scope of CWA's Final Environmental Impact Report to the transmission cables, the portion of the project within the jurisdiction of state permitting agencies.[78]

In 2009, the Town of Barnstable, Massachusetts, on Cape Cod, mounted another attack on the Energy Facilities Siting Board.[79] The suit challenged the Siting Board's authority to override a decision made by the Cape Cod Commission, a Barnstable County regional planning and land use agency.[80] The Cape Cod Commission must approve any project that falls under Barnstable County's statutes as a Development of Regional Impact (DRI) before construction begins.[81] After several public hearings, on October 18, 2007, the Cape Cod Commission denied Cape Wind's DRI approval application, citing Cape Wind's failure to provide enough information for the Commission to determine the project's impact and consistency with a regional policy plan.[82] Cape Wind subsequently applied to the Siting Board for a certificate of environmental impact and public interest, approval of which would serve to override the Cape Cod Commission's decision.[83] A

[76] *Id.*

[77] *Id*.

[78] *Id*. at *6.

[79] Town of Barnstable v. Mass. Energy Facilities Siting Bd., No. BACV200800281, 2009 WL 1449032 (Mass. Super. Ct. May 4, 2009).

[80] *Id*. at *1-2.

[81] *Id.* at *2.

[82] *Id*.

[83] *Id*. In describing the Siting Board's authority, the court stated: "The . . . [Siting Board] is authorized to issue a certificate when a facility 'cannot be constructed due to any disapprovals, conditions or denials by a state or local agency or body . . .'" *Id.* (quoting Mass. GEN. LAWS ch. 164, § 69K). The purpose of endowing the Siting Board with such certification authority is to "'ensure that local boards do not use their power over licenses and permits to thwart the needs of the broader community for a reliable, affordable, and environmentally sound energy supply.'" *Id.* (quoting City Council of Agawam v. Energy

Massachusetts superior court dismissed the suit, holding that the Town of Barnstable had failed to exhaust its administrative remedies before the Siting Board, including filing briefs, presenting witnesses, cross-examining witnesses, and filing comments on the tentative decision, before seeking declaratory judgment from the court.[84]

Following the Siting Board's issuance of the certificate of environmental impact and public interest for the Cape Wind project in March 2007, the Town of Barnstable, the Alliance, and Ten Taxpayer banded together to challenge the certificate on various technical grounds.[85] In 2010, a Massachusetts Superior Court denied the plaintiffs' motion for summary judgment, holding that the plaintiffs did not meet their "difficult burden of demonstrating that the Secretary acted arbitrarily and capriciously in certifying the FEIR with respect to the portion of the project" within state jurisdiction.[86] Most important, the court emphasized that it "firmly believe[d] the plaintiffs's [sic] legitimate concerns with respect to the impacts of the Wind Farm must be addressed in the context of the federal [National Environmental Policy Act] review and permitting process."[87]

Finally, the same coalition brought another challenge to the Siting Board's issuance of the certificate.[88] This challenge also proved unsuccessful; the Massachusetts Supreme Judicial Court held that the Siting Board had properly limited its jurisdiction, and found sufficient evidence to support the Siting Board's substantive findings in support of the certificate.[89] As with all of the previous challenges at the state level, the court emphasized that ultimate approval of the project rested in federal hands: "In reviewing the siting board's decision . . . to authorize Cape Wind's construction of the transmission lines, this court approved of the siting board's determination that it was required to defer to Federal review. We do so again here."[90]

C. *Current Status of the Project*

As discussed previously, the Energy Policy Act of 2005 transferred permitting authority over offshore wind projects to the Secretary of the

Facilities Siting Bd., 437 Mass. 821, 828 (2002)).

[84] *Id.* at *4-6 (dismissing the action because the Town of Barnstable failed to exhaust its administrative remedies before the Siting Board, while further acknowledging that the Town of Barnstable had already availed itself of some of the Siting Board's remedies).

[85] Town of Barnstable v. Cape Wind Assocs., No. BACV200700506, 2010 WL 2436837, at *1 (Mass. Super. Ct. Apr. 27, 2010).

[86] *Id*. at *15.

[87] *Id.*

[88] Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd., 932 N.E.2d 787, 791 (Mass. 2010).

[89] *Id.*

[90] *Id*. at 806 (citation omitted) (citing Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd., 858 N.E.2d 294, 300-01 (Mass. 2006)).

Interior.[91] Specifically, the Secretary was given the authority to "grant a lease, easement, or right-of-way on the Outer Continental Shelf . . . if those activities . . . produce or support production, transportation, or transmission of energy from sources other than oil and gas."[92] This authority was delegated to the MMS within the Department of the Interior, which handled the permitting process for the Cape Wind Project[93] until the MMS was dismantled in May 2010.[94]

Secretary of the Interior Ken Salazar issued a Record of Decision in April 2010 declaring that the MMS would "offer a commercial lease and associated easement to Cape Wind Associates, LLC."[95] In approving the Cape Wind project, the Secretary stated, "the public benefits weigh in favor of approving the Cape Wind project at the Horseshoe Shoal location."[96] In October 2010, Secretary Salazar, then operating through the Bureau of Ocean Energy Management, Regulation and Enforcement, issued CWA an official lease to operate a wind energy facility on Horseshoe Shoals, effective November 1, 2010.[97]

Despite full federal and state approval of the project, CWA has continued to face vehement opposition from local groups, as evidenced by two recent developments in the Cape Wind saga, discussed in Part III.

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[91] *See supra* Part I.B.

[92] 43 U.S.C. § 1337(p)(1) (2006).

[93] BUREAU OF OCEAN ENERGY MGMT., *supra* note 47, at 1.

[94] U.S. DEP'T OF THE INTERIOR, *supra* note 41.

[95] MINERALS MGMT. SERV., U.S. DEP'T OF THE INTERIOR, DECISION DOCUMENT: CAPE WIND ENERGY PROJECT, HORSESHOE SHOAL, NANTUCKET SOUND 2 (2010), *available at* http://www.boem.gov/uploadedFiles/BOEM/Renewable_Energy_Program/Studies/CapeWindROD.pdf. The Bureau of Ocean Energy Management, Regulation and Enforcement issued a further Record of Decision on April 18, 2011. BUREAU OF OCEAN ENERGY MGMT., REGULATION AND ENFORCEMENT, U.S. DEP'T OF THE INTERIOR, RECORD OF DECISION: CAPE WIND ENERGY PROJECT, HORSESHOE SHOAL, NANTUCKET SOUND 1 (2011), *available at* http://www.boem.gov/uploadedFiles/BOEM/Renewable_Energy_Program/Studies/Record_of_Decision42011.pdf (indicating that the first Record of Decision merely authorized the issuance of a lease for the project, whereas the second Record of Decision approved CWA's Construction and Operation Plan).

[96] *Secretary Salazar Announces Approval of Cape Wind Energy Project on Outer Continental Shelf off Massachusetts*, U.S. DEP'T OF THE INTERIOR (Apr. 28, 2010), http://www.doi.gov/news/doinews/Secretary-Salazar-Announces-Approval-of-Cape-Wind-Energy-Project-on-Outer-Continental-Shelf-off-Massachusetts.cfm.

[97] BUREAU OF OCEAN ENERGY MGMT., *supra* note 47, at 1.

III. RECENT DEVELOPMENTS IN THE OPPOSITION TO CAPE WIND

A. *Wampanoag Tribe Opposes Location of Proposed Site*

In October 2009, two Native American tribes, the Aquinnah and Mashpee Wampanoag Tribes, entered the scene threatening to significantly delay federal approval of the Cape Wind project.[98] The Tribes claimed that the project "would disturb their spiritual sun greetings and submerged ancestral burying grounds."[99] In an effort to protect the area, the Tribes requested that Nantucket Sound be placed on the National Register of Historic Places.[100] On November 19, 2009, the MMS submitted a request to the National Park Service for a determination of National Register eligibility for Nantucket Sound.[101] The request was made in response to the disagreement between the MMS, which opposed listing on the National Register, and the Massachusetts State Historic Preservation Officer of the Massachusetts Historical Commission, the Mashpee Wampanoag Tribe, and the Aquinnah Wampanoag Tribe of Gay Head , all of whom argued that the Sound is eligible for listing in the National Register.[102] In January 2010, after reviewing the documentation submitted by all parties and conducting an onsite visit, the National Park Service ultimately sided with Massachusetts Historical Commission and the Tribes, stating:

> Nantucket Sound is eligible for listing in the National Register as a traditional cultural property and as an historic and archeological property associated with and that has yielded and has the potential to yield

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[98] Beth Daley, *2 Tribes Object to Cape Wind Turbines; Say Nantucket Sound Is Cultural Property*, BOS. GLOBE (Oct. 26, 2009), http://www.boston.com/lifestyle/green/articles/2009/10/26/2_tribes_object_to_cape_wind_turbines/ (describing how the two tribes sought to thwart the project for historical and religious preservation reasons).

[99] *Id.* In particular:

> Both Wampanoag tribes emphasize that they believe their people traversed, lived on and buried their dead, and otherwise used the land that is now beneath the waters of the Sound in areas such as Horseshoe Shoal, before the land was submerged. Further, each tribe has maintained a continuous association with and use of the Sound for economic and other purposes such as shell fishing, fishing, making practical and ceremonial objects from species taken from Nantucket Sound, recreation and tourism, and as a central focus of traditional cultural practices and beliefs such as those relating to the Maushop and Squant/Squannit stories, greeting the new day, and for celestial observations.

NAT'L PARK SERV., U.S. DEP'T OF THE INTERIOR, NATIONAL REGISTER OF HISTORIC PLACES DETERMINATION OF ELIGIBILITY COMMENT SHEET 4 (2010), *available at* http://www.nps.gov/nr/publications/guidance/NantucketSoundDOE.pdf.

[100] Dominic Spinelli, Note, *Historic Preservation & Offshore Wind Energy: Lessons Learned from the Cape Wind Saga*, 46 GONZ. L. REV. 741, 753 (2011).

[101] NAT'L PARK SERV., *supra* note 99, at 1.

[102] *Id.*

> important information about the Native American exploration and settlement of Cape Cod and the Islands.[103]

This designation initiated another review process for Cape Wind, this time under the National Historic Preservation Act (NHPA).[104] The NHPA requires federal agencies to take into account the effects of a proposed project on properties listed or eligible for listing on the National Register prior to the issuance of a permit.[105] As a result of the listing of Nantucket Sound on the National Register, on January 13, 2010, Secretary Salazar hosted a consultation meeting with all parties, and announced his intention to finalize a decision on the proposed project after a period of public comment.[106] During the consultation meetings a number of mitigation efforts were discussed, including various measures to limit the visual impact of the turbines, lowering the turbine height, and financial compensation to the Tribes.[107] The Massachusetts State Historic Preservation Officer and the Tribes, however, did not believe the mitigation measures would be effective.[108] Secretary Salazar determined that further consultation would not be productive and officially terminated consultation on March 1, 2010.[109] The final stage in the Section 106 review process calls for the Advisory Council on Historic Preservation (ACHP) to issue its recommendation on the project.[110] In April 2010, the ACHP recommended that the Secretary not approve the Cape Wind project, finding that the "historic properties affected by the Project are significant, extensive, and closely interrelated," and that the "[a]dverse effects on historic properties will be direct and indirect, cannot be avoided, and cannot be satisfactorily mitigated."[111] Nevertheless, Secretary Salazar retained sole authority to approve or deny Cape Wind's application,[112] and on April 28, 2010, Secretary Salazar approved the Cape Wind project, as previously discussed.[113]

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[103] *Id.* at 2.

[104] Spinelli, *supra* note 100, at 753.

[105] 16 U.S.C. § 470f (2006).

[106] BUREAU OF OCEAN ENERGY MGMT., TERMINATION OF NHPA SECTION 106 CONSULTATION FOR THE CAPE WIND ENERGY PROJECT 1 (2010), *available at* http://www.offshorewindhub.org/sites/default/files/resources/mms_3-1-2010_terminationnhpasection106_0.pdf (declaring the Secretary of the Interior's plan in consideration of Nantucket Sound's new legal status).

[107] *Id.* at 5-7.

[108] *Id.* at 5-6.

[109] *Id.* at 1.

[110] 36 C.F.R. § 800.9 (2011) (outlining the ACHP's review process).

[111] ADVISORY COUNCIL ON HISTORIC PRES., COMMENTS OF THE ADVISORY COUNCIL ON HISTORIC PRESERVATION ON THE PROPOSED AUTHORIZATION BY THE MINERALS MANAGEMENT SERVICE FOR CAPE WIND ASSOCIATES, LLC TO CONSTRUCT THE CAPE WIND ENERGY PROJECT ON HORSESHOE SHOAL IN NANTUCKET SOUND, MASSACHUSETTS 1-2 (2010), *available at* http://www.achp.gov/docs/CapeWindComments.pdf.

[112] *See* 36 C.F.R. § 800.7 (2011) (requiring that the head of the agency take into account

On July 6, 2011, the Aquinnah Wampanoag Tribe of Gay Head filed suit against the BOEM in the U.S. District Court for the District of Columbia.[114] The Tribe in its complaint stated:

> The Project will harm the Tribe's religious, cultural, and economic interests by degrading the Nantucket Sound ecosystem and, in particular, disturbing the currently unblemished view of the eastern horizon, both of which are of immense spiritual importance to the Tribe; by disrupting or preventing fishing on Horseshoe Shoal as a source of sustenance, subsistence, and income for individual tribe members; and by disturbing the sea bed, which may result in irreparable damage to historically significant and culturally and spiritually important archaeological resources.[115]

In a public statement, Bettina Washington, Tribal Historic Preservation Officer, claimed that "Cape Wind will destroy our traditional cultural property, Horseshoe Shoal and the surrounding Nantucket Sound, where our Tribe has flourished and [sic] continues to utilize for significant cultural and spiritual ceremonies and practices."[116]

The complaint further alleges that the BOEM and Secretary Salazar authorized the Cape Wind project without adequately considering these adverse impacts and without conducting meaningful consultation with the Tribe, in violation of their duties under the National Environmental Policy Act and the NHPA.[117] In particular, the Tribe recounts multiple occasions during the BOEM's Environmental Impact Statement approval phase in which the Tribe requested that the BOEM engage in formal government-to-government consultations with them to ensure an adequate evaluation of the project.[118] Despite the Tribe's presence at several public hearings, and a visit by the BOEM to the Tribe's reservation, the Tribe alleges that the BOEM inadequately considered the project's adverse impact, especially given the listing of Horseshoe Shoal on the National Register as a Traditional Cultural Property mid-way through the approval process.[119] The Tribe acknowledges that Secretary Salazar, in finding that "public benefits support approval of the

all the Council's comments before issuing a final decision).

[113] *See supra* Part II.C.

[114] Toensing, *supra* note 14.

[115] Complaint at 4-5, Wampanoag Tribe of Gay Head v. Bromwich, No. 1:11-cv-01238 (D.D.C. filed July 6, 2011).

[116] Toensing, *supra* note 14.

[117] Complaint, *supra* note 115, at 2-3 ("BOEMRE and Secretary Salazar authorized this Project without adequately considering and analyzing the adverse impacts to the Tribe's cultural and historic resources . . . and without conducting meaningful consultation with the Tribe . . . in violation of their duties under the National Environmental Policy Act and the National Historic Preservation Act.").

[118] *Id.* at 11-21.

[119] *Id.*

Project," stated that "the tribal consultation process and the historic preservation-related discussions, begun in 2005, have been the primary focus of attention for the entire Department over nearly the past year."[120] Nevertheless, the complaint alleges that the BOEM failed to adequately analyze Cape Wind's adverse impacts on the Tribe and failed to supplement its Final Environmental Impact Statement when the project was found to impact a National Register Traditional Cultural Property.[121]

Upon filing, the case was joined with another action pending against the BOEM that also challenged the final approval of the Cape Wind project. This other case was brought primarily by local citizens and groups, including the Alliance to Protect Nantucket Sound and the Town of Barnstable, Massachusetts.[122] Plaintiffs claim that the BOEM has failed "to follow a coherent, objective, lawful decision-making process" and allege that "Federal review of the Proposed Project has proceeded in a biased, ad hoc fashion for years without adequate foundation," and that the BOEM's "actions have interfered with the public's right to participate meaningfully in the review of the Proposed Project."[123] As this Note goes to press, the Tribe has filed a motion for summary judgment, but no substantive orders have been issued.[124]

B. *D.C. Circuit Overturns FAA Approval of the Project*

Cape Wind notified the Federal Aviation Administration of its proposed construction of an offshore wind energy facility, which is required by federal regulations.[125] After a preliminary investigation, the FAA issued a Notice of Presumed Hazard and initiated more extensive aeronautical studies to decide whether the project would "result in an obstruction of the navigable airspace or an interference with air navigation facilities and equipment or the navigable airspace."[126] The FAA also circulated a public notice of these studies and invited interested persons to submit comments.[127] The FAA "ultimately issued 130 identical Determinations of No Hazard, one for each of the proposed wind turbines."[128] In the determinations, the FAA concluded that the turbines "would have no substantial adverse effect on the safe and efficient utilization

[120] *Id.* at 21-22.

[121] *Id.* at 24-27.

[122] *Bromwich*, No. 1:10-cv-01067 (D.D.C. filed June 25, 2010) (indicating that the Tribe's action was consolidated with another action).

[123] First Amended Complaint for Declaratory and Injunctive Relief, at 4-5, *Bromwich*, No. 1:10-cv-01067 (D.D.C. filed Sept. 13, 2011).

[124] *See* Wampanoag Tribe of Gay Head Motion for Summary Judgment, Public Emps. for Envtl. Responsibility v. Bromwich, No. 1:10-cv-01067 (D.D.C. filed Oct. 29, 2012).

[125] Town of Barnstable v. FAA, 659 F.3d 28, 30 (D.C. Cir. 2011) (citing 14 C.F.R. § 77.13 (2011)).

[126] *Id.* (quoting 49 U.S.C. § 44718(b) (2006)).

[127] *Id.*

[128] *Id.*

of the navigable airspace by aircraft or on the operation of air navigation facilities."[129] Although it ultimately decided that the project was not a hazard, "its decision was contingent on Cape Wind's implementing a number of measures to mitigate the turbines' adverse impact on nearby radar facilities."[130] The Town of Barnstable and the Alliance to Protect Nantucket Sound challenged the FAA's Determinations of No Hazard, arguing that the FAA violated its governing statute, misread its own regulations, and arbitrarily and capriciously failed to calculate the dangers posed to local aviation.[131]

The court first addressed the petitioners' standing. Of the three prerequisites to Article III standing – injury, causation, and redressability – the FAA conceded only the petitioners' injury claim, including the risk of collisions and delay for flights over Nantucket Sound, which would impact some members of the Alliance and the Town of Barnstable.[132] The court, however, concluded that the petitioners had sufficiently demonstrated causation and redressability in addition to injury.[133] The court found that the Department of the Interior had assigned the FAA a significant role in the decisionmaking process, to the extent that if the FAA had instead determined that the Cape Wind project posed such a hazard as the petitioners alleged, DOI was significantly more likely to revoke or modify its lease to Cape Wind.[134]

The petitioners submitted evidence containing numerous contentions that the Cape Wind project might pose a considerable safety risk to aviation in Nantucket Sound.[135] The court agreed, stating: "While of course the wind farm may be one of those projects with such overwhelming policy benefits

[129] *Id.* at 30-31 (quoting FAA, AERONAUTICAL STUDY NO. 2009-WTE-322-OE, DETERMINATION OF NO HAZARD TO AIR NAVIGATION 1 (2010)).

[130] *Id.* at 31.

[131] *Id.*

[132] *Id.* (stating that the FAA acknowledged that the project would affect some members of the Alliance who travel by plane over the proposed wind farm area and would affect the Town of Barnstable as owner and operator of the town's municipal airport).

[133] *Id.* at 32 (finding petitioners showed sufficient likelihood that DOI would take seriously and act upon an FAA hazard finding).

[134] *Id.* ("[T]he evidence seems . . . to show that Interior would take an FAA finding of hazard very, very seriously.").

[135] *Id.* at 32-33 ("For example, petitioners cite evidence that the many pilots who regularly operate under visual flight rules . . . near the proposed wind farm would have a difficult time staying beneath the foggy and otherwise inclement weather that often plagues Nantucket Sound, while at the same time maintaining a safe distance from the wind turbines. . . . Petitioners also submitted evidence that attempts to circumvent the turbines would not solve the problem. Such attempts, said the CEO and president of Island Airways after reviewing the volume of traffic and its multiple layers, would be 'problematic because even horizontal diversions of only one or two miles can further compress air traffic into concentrated corridors.'" (citation omitted)).

(and political support) as to trump all other considerations, even as they relate to safety, the record expresses no such proposition."[136]

On the merits, the court agreed with petitioners that the FAA improperly applied its own regulatory handbook.[137] The FAA can find a hazard if the proposed structure would have a "substantial adverse effect" on a "significant volume of aeronautical operations."[138] In determining that the Cape Wind facility posed no hazard to aeronautical operations, the court found that the FAA relied solely on section 6-3-8(c)1 of the handbook, which states that a structure would have an adverse effect upon air navigation if its height is greater than 500 feet above the surface (the proposed wind turbines would stand at 440 feet above the sea).[139] The court concluded that the FAA improperly "leapt to the conclusion that the turbines would not have an adverse effect" when a clear reading of section 6-3-8(c)1 of the handbook identifies a structure over 500 feet as merely one of potentially many circumstances in which a structure could have an adverse effect.[140] This "misplaced reliance" on section 6-3-8(c)1, particularly in light of the evidence presented by the petitioners, convinced the court that the Cape Wind project "may very well be such a hazard."[141] The court vacated the FAA's Determinations of No Hazard and remanded so that the FAA could address the issues raised in the court's decision and explain its conclusion.[142]

In August 2012, the FAA, after revisiting its aeronautical study and considering fourteen public comments submitted by local citizens and aviators, again issued a Determination of No Hazard to Air Navigation.[143] Using notably stronger language than in its earlier Determination, the FAA released a statement to the media explaining that it "has determined that the proposed construction of the 130 wind turbines, individually and as a group, has *no effect* on aeronautical operations."[144] The Alliance to Protect Nantucket

[136] *Id.* at 33.

[137] *Id.* at 34 (finding that by failing to adhere to its own guidelines, the FAA did not adequately justify its conclusions).

[138] FAA, ORDER JO 7400.2G, PROCEDURES FOR HANDLING AIRSPACE MATTERS §§ 6-3-5, 7-1-3(e) (2008).

[139] *Town of Barnstable*, 659 F.3d at 34-35 (citing FAA, *supra* note 138, § 6-3-8(c)1) (criticizing the fact that the FAA's finding of no adverse effect relied exclusively on § 6-3-8(c)1).

[140] *Id.* at 35 (referring to section 6-3-3 of the report as providing more general guidelines for what may constitute an adverse effect).

[141] *Id.* at 36 ("Any sensible reading of the handbook . . . would indicate there is more than one way in which the wind farm can pose a hazard . . . .").

[142] *Id.*

[143] FAA, *supra* note 17, at 1 (concluding the proposed wind farm "does not exceed obstruction standards and would not be a hazard to air navigation" provided applicable lighting standards are met).

[144] Daley, *supra* note 17 (emphasis added); *cf. Town of Barnstable*, 659 F.3d at 30-31

Sound, in turn, has again filed suit in federal court challenging the FAA's Determination of No Hazard.[145] This time, however, the Alliance is advancing an accusation that the FAA's Determination of No Hazard was reached under political pressure from the Obama Administration, at the expense of safety concerns.[146] An August, 2012 press release from the Alliance alleges that recently leaked internal FAA emails revealed officials' concern that it would be "very difficult politically to refuse approval."[147] Indeed, a congressional investigation into the FAA's approval[148] resulted in a letter to the President asserting that "[d]ocuments show that your personal interest in the Cape Wind offshore wind farm may have created pressure on career officials to approve the project."[149] As this Note goes to press, the Alliance's challenge continues to be litigated.

IV. THE PROBLEM AND A PROPOSED SOLUTION

A. *The Problem: Failure in the Current Federal-State Balance of Powers*

Interest in developing offshore wind energy projects in the United States has increased dramatically in the last few years.[150] Yet the complex and changing regulatory scheme, coupled with the high cost and delay associated with private litigation from citizen groups challenging every step of the approval process, will likely discourage future development of wind energy projects in the United States without reform. The problem can be traced to a failure in the current federal-state balance of powers: a disconnect between the federal approval process and the inherently local nature of offshore wind energy.

Both the opposition by the Wampanoag Tribe and the overruling of the FAA's approval further illustrate this disconnect between the interests of the

("In [its 2010] determinations, the FAA concluded that the turbines 'would have *no substantial* adverse effect on the safe and efficient utilization of the navigable airspace by aircraft or on the operation of air navigation facilities.'" (emphasis added) (quoting FAA, *supra* note 129, at 1)).

[145] Alliance to Protect Nantucket Sound v. FAA., No. 12-1363 (D.C. Cir. *petition for review filed* Aug. 22, 2012).

[146] Press Release, Alliance to Protect Nantucket Sound, Alliance Files Appeal of Politically Driven FAA "No Hazard" Ruling on Cape Wind (Aug. 23, 2012), *available at* http://www.saveoursound.org/press_releases/reader.php?id=20 ("[T]he agency has ignored very real public safety concerns all for the sake of political expediency.").

[147] *Id.*

[148] *See* Daley, *supra* note 17 (characterizing the FAA's re-examination as proceeding "amid a backdrop of a congressional investigation").

[149] *See* Press Release, Alliance to Protect Nantucket Sound, *supra* note 146 (referencing a letter from the Chairman of the House Committee on Oversight and Government Reform, Rep. Darrell Issa, to President Obama).

[150] *See* Roek, *supra* note 1, at 24 (discussing legal, policy, and community hurdles currently impeding development in spite of growing interest).

federal government on the one hand, and state and local interests on the other hand. In both instances the federal government has pursued a hard line in favor of the Cape Wind project. The DOI fully approved the project despite a warning from the Advisory Council on Historic Preservation that the project would have significant adverse effects on historic properties. The FAA similarly issued a Determination of No Hazard presumably based only on a cursory application of its regulations, and possibly under political pressure from the Obama Administration. In both instances more localized entities – Native American tribes, local citizen groups, towns, and even state agencies – have expended considerable resources to express their various views in opposition to the Cape Wind project.[151]

To date, the overruling of the FAA's approval is the only legal victory on the part of the project's opposition.[152] But whatever the merits of the opposition's legal claims, the process has demonstrated the inefficiency of the current regulatory scheme. The decision of whether the Cape Wind project should go forward has now dragged on more than a decade. The saga has been an incredible waste of resources and time, as the federal government attempts to fit a square peg in a round hole, with local opposition mounting complaints with all levels federal and state agencies and courts to confuse and delay the process. There must be a more effective way to efficiently and optimally allocate the harvesting of coastal wind energy throughout the United States.

B. *The Proposal: Inverting the CZMA Scheme in the Context of Wind Energy*

Under the current CZMA scheme, the federal government retains regulatory and permitting authority over all federal waters beyond three miles of the shoreline.[153] While states have the ability to contest federal actions and permit approvals through the process of federal consistency review,[154] the federal government retains ultimate permitting authority.[155]

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[151] The Alliance to Protect Nantucket Sound reported expenses of $10,955,645 for the years 2007 to 2010 alone. *Alliance to Protect Nantucket Sound, Inc.*, GUIDESTAR, http://www2.guidestar.org/organizations/10-0008105/alliance-protect-nantucket-sound.aspx (last visited Nov. 12, 2012) (requires website registration; IRS Forms 990 for Alliance to Protect Nantucket Sound, Inc. from 2008-2010 on file with author) (reporting total expenses on line eighteen of IRS Form 990 of $3,557,378 for 2007; $3,223,171 for 2008; $1,655,629 for 2009; and $2,519,467 for 2010).

[152] *See supra* Part II.

[153] *See supra* Part I.

[154] Schroeder, *supra* note 2, at 1645-46 ("The CZMA mechanism of federal consistency review extends state power further, past [states'] coastal zones, by allowing states to review and sometimes overrule federal actions and permits in federal waters.").

[155] 16 U.S.C. § 1456(c)(3)(A) (2006) (permitting the Secretary of Commerce to overrule a state's protest by finding a permit consistent with the objectives of the CZMA or otherwise in the interest of national security).

This Note proposes to invert the current CZMA power structure as it pertains to state and federal roles in the context of offshore wind energy. Under this proposed plan, coastal states would be given regulatory and permitting authority over proposed offshore wind energy projects, even beyond the traditional three-mile boundary of state control. Whereas under the current CZMA scheme states retain a "negative" veto power over federal permits issued in contravention of a state's CZMP, under this proposal the states would have "positive" control over the initial decision of whether to issue a permit to an offshore wind energy project. This proposal would not involve a dramatic change in course for the states, because a coastal state's offshore wind energy policy would continue to be embodied in each state's existing CZMP.

Furthermore, whereas under the current system the federal government retains both the authority to issue permits and the ultimate authority to overrule a state's protest, under this proposal the federal government would have only a "negative" power to review and overrule state permitting actions. Thus, the federal government would continue to retain the ultimate authority to overrule a state permit issuance if it is in violation of federal regulations or if doing so would be otherwise in the interest of national security.[156] In short, the federal government would be handing regulatory and permitting power over offshore wind energy project siting to the states, while retaining the power to overrule siting decisions that are inconsistent with existing federal regulations.

Lastly, allocating regulatory and permitting authority to the states would not abrogate the federal government from incentivizing offshore wind energy. To the extent the federal government continues to have an interest in promoting the development of offshore wind energy projects, it would be free to do so through its present tax incentive scheme. The federal government currently employs several tax incentive programs, including the option of a production tax credit per kilowatt hour of electricity produced from wind energy facilities[157] and an investment tax credit for placing a wind energy facility into service before the end of 2012.[158] A policy of promoting offshore wind energy focused through tax incentives would result in more consistency and integrity in the permitting and siting process than under what seems to be the Administration's current policy of merely lowering the diligence of agency

[156] For a similar proposal describing a possible reverse-CZMA approach, in which states undertake permitting and the federal government makes consistency determinations in the context of the management of fisheries, see Alison Rieser, *Defining the Federal Role in Offshore Aquaculture: Should It Feature Delegation to the States?*, 2 OCEAN & COASTAL L.J. 209, 231 (1997).

[157] I.R.C. § 45 (2006) (detailing eligibility and other provisions for tax credits available to producers of electricity from certain renewable resources).

[158] *Id.* (providing that wind facilities placed into service in 2009, 2010, 2011, or 2012 qualify for the investment tax credit).

review, as observed by the D.C. Circuit Court in its overruling of the FAA's endorsement of the Cape Wind project.[159]

C. *Benefits of the Proposal*

Federal control over the regulatory process under the CZMA has not been a successful method of promoting the efficient development of offshore wind facilities. Shifting control over the regulatory and permitting processes from the federal government to the individual coastal states has the potential to more efficiently allocate the United States' offshore wind energy resources in two ways. First, with regulatory and permitting authority in the hands of the states, lobbying efforts would be engaged in an environment of more direct political accountability: the state legislatures. Likewise, local opposition to permitting decisions would be mounted in only one forum: the state courts. Second, allowing states to craft their own offshore wind energy regulatory practices could foster competition among them to encourage project development where it is most desired, or stated equivalently, where it is least costly.

1. Local Control over Project Siting

Previous scholarship has argued for a federal mandate for wind power development, to "counteract narrow-minded state and local opposition."[160] But this brute force strategy doesn't solve the "problem" of local opposition; it bulldozes over it and assumes that such opposition is uninformed, or at least myopic, and therefore unworthy of consideration. The experience of Cape Wind has shown that whatever its motives, local opposition can present a very real barrier to offshore wind development. The proposal here to shift control of offshore wind permitting to the states would more efficiently integrate local concerns into the development process.

In a dissent from the Massachusetts Supreme Judicial Court's opinion upholding approval of Cape Wind's Final Environmental Impact Statement, Chief Justice Marshall proclaimed: "The stakes are high. As we have recently seen in the Gulf of Mexico, the failure to take into account in-State consequences of federally authorized energy projects in Federal waters can have catastrophic effects on State tidelands and coastal areas, and on all who

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[159] *See supra* Part III.B.

[160] Schroeder, *supra* note 2, at 1657-63 ("The CZMA should be revised to include an explicit mandate to states to permit, and possibly even to promote, offshore wind energy . . . ."). Before reaching this conclusion, Schroeder made the following observation:

> While the most compelling benefits of offshore wind are frequently regional, national, or even global, the costs are almost exclusively local. The U.S. regulatory framework is not set up to handle this cost-benefit gap. As a result, local opposition has stalled offshore wind power development, and inadequate attention has been paid to its wide-ranging benefits.

Id. at 1633.

depend on them."[161] Chief Justice Marshall refers to the devastating environmental and economic impacts of the BP oil spill of April 2010,[162] while the Cape Wind opposition predominately fears damage to aesthetic, cultural, and historic resources. But these are only differences in kind (and perhaps magnitude) of harm, not in relevance. Just as fishermen in the Gulf of Mexico felt the economic impact of the loss of fish stocks in the wake of the oil spill,[163] the Alliance and the Wampanoag Tribe fear a significant loss of resources, as evidenced by the considerable time and financial resources they have expended to defend them.[164]

Indeed, drawing analogies to the federalism concerns involved in offshore oil drilling in the Gulf of Mexico is particularly illuminating. In her article *Federalism and Offshore Oil Leasing Resources*, Margaret A. Walls concluded that the current system of federal ownership and regulation of offshore oil drilling on the Outer Continental Shelf was leading to an inefficient amount of development.[165] In particular, Walls made the prescient observation that because citizens of the coastal states "bear all of the costs and reap very few benefits, they have strong incentives to fight development."[166] Walls argued that efficiency would be enhanced if states owned the Outer Continental Shelf lands off their coasts: "They would then take into account all of the benefits and costs of leasing and, as long as they acted to maximize the welfare of their citizens, would lease the efficient amount of land."[167]

What strengthens the argument for the proposal here, however, is further illustrated by the *differences* between offshore oil drilling and offshore wind energy. For offshore oil, the impacts are even less local: oil is extracted off the shore of a coastal state, may be refined in another state, and then shipped

[161] Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd., 932 N.E.2d 787, 816 (Mass. 2010) (Marshall, C.J., concurring in part and dissenting in part). For full discussion of the decision, see *supra* Part II.B.

[162] Campbell Robertson, *Search Continues After Oil Rig Blast*, N.Y. TIMES (Apr. 21, 2010), http://www.nytimes.com/2010/04/22/us/22rig.html (describing the circumstances of the explosion at the Deepwater Horizon oil drilling rig and the initial response).

[163] *NOAA Closes Commercial and Recreational Fishing in Oil-Affected Portion of Gulf of Mexico*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. (May 2, 2010), http://www.noaanews.noaa.gov/stories2010/20100502_fisheries.html (recognizing the economic impact on fishermen in announcing the closure of oil-polluted areas).

[164] That is, from the amount the Alliance and the Wampanoag Tribe have expended on opposing the Cape Wind project, one can infer that the Alliance and the Wampanoag Tribe calculate the expected damage of the Cape Wind project to their interest in local resources to be *at least as high* as that amount. The Alliance has expended over $10 million to oppose the project from 2007 to 2010 alone. *See supra* note 151.

[165] Margaret A. Walls, *Federalism and Offshore Oil Leasing Resources*, 33 NAT. RESOURCES J. 777, 794 (1993).

[166] *Id.*

[167] *Id.*

nationwide, or even internationally.[168] In contrast, wind energy is converted to electricity immediately and fed directly into the local electric power transmission network.[169] In that sense, offshore wind energy is more akin to traditional land-based electricity generating facilities, whose siting and permitting are subject to state control.[170] Ultimately, the only distinction between offshore wind energy facilities and their land-based counterparts is that the former happen to extend three miles offshore, triggering federal permitting jurisdiction.

What results under the current system is an imbalance of power where the federal government controls regulation of an inherently local concern, leading to an inefficient allocation of offshore wind resources. The proposal here would correct this imbalance by shifting permitting power to the states. This in turn would enhance democratic accountability.[171] As Justice Sandra Day O'Connor observed in *New York v. United States*, "[w]here Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people."[172] With more direct political accountability, each state's permitting scheme would more accurately reflect the collective interests of its citizens in promoting offshore wind energy, likely reducing the occurrence and magnitude of local opposition to permitting decisions. In addition, any such local opposition that does occur would be focused in only one forum: the state courts. This proposal would free up federal agencies to deal only with concerns of national magnitude, and only after localized

[168] *See Wells to Consumer Interactive Diagram*, AM. PETROLEUM INST., http://www.api.org/aboutoilgas/ (last visited Nov. 12, 2012) (depicting the pathway of oil and natural gas from exploration to consumer).

[169] *See Frequently Asked Questions About Cape Wind*, *supra* note 49, at 2 ("In order to get the electricity generated by the winds on Horseshoe Shoal into homes, schools and businesses on Cape Cod, Cape Wind will connect into the electric grid at the Barnstable substation through underground cables. From there, the electricity will follow the path of least resistance and be consumed by electric consumers closest to the source, typically on the Cape and Islands.").

[170] *See, e.g.*, *Energy Facilities Siting Board*, MASS. EXECUTIVE OFF. OF ENERGY & ENVTL. AFF., http://www.mass.gov/eea/energy-utilities-clean-tech/energy-facilities-siting-board/ (last visited Nov. 12, 2012) (stating that the Massachusetts Energy Facilities Siting Board's "primary function is to license the construction of major energy infrastructure in Massachusetts, including large power plants, electric transmission lines, natural gas pipelines and natural gas storage facilities").

[171] *See* Timothy Meyer, Note, *Federalism and Accountability: State Attorneys General, Regulatory Litigation, and the New Federalism*, 95 CALIF. L. REV. 885, 885 (2007) (stating that the effort in recent Supreme Court decisions to limit federal power over states "is linked to a conception of democratic accountability, which suggests that, at least in some instances, federal regulation is less directly accountable to citizens than state regulation" (citing Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992))).

[172] *New York*, 505 U.S. at 168 (1992).

concerns are resolved at the state level, making federal involvement more worthwhile and preserving those resources. Thus, granting states control over permitting decisions would allow for more efficient management of local opposition.

Lastly, there need not be any concern of "reverse preemption" as a result of state control of offshore wind facility permitting under this proposal, whereby the federal government would lose control over an area of national interest. First, under the proposal, the federal government would still participate in a consistency review process in which state permitting decisions could be reviewed and overruled if inconsistent with federal regulations or otherwise in the interest of national security. Second, to the extent there are purely national benefits of offshore wind energy development, such as decreased reliance on foreign oil, and the reduction of greenhouse gases that contribute to climate change, these can be internalized through the government's current tax incentive schemes.[173]

2. Competition Among States for Wind Energy Projects

Allowing states to control the permitting process pursuant to their existing CZMPs would also foster competition between the states, leading to a more efficient allocation of offshore wind energy facilities. Through the political process, state legislatures can craft their own policies reflecting their citizens' interests in pursuing offshore wind energy. In turn, firms wishing to develop offshore wind projects would be incentivized to do business in states with more favorable policies toward development. In this manner, allowing individual states to encourage, or to discourage, the development of offshore wind projects would improve efficiency and social welfare by incentivizing project allocation in the lowest cost area.

There need not be any concern of a "race to the bottom" among the states, whereby states wanting desperately to attract offshore wind could so degrade their CZMPs as to render the resulting offshore wind projects somehow dangerous to humans or the environment. All *onshore* wind energy facilities are currently subject to state permitting control, as are any offshore wind energy facilities that may be located entirely within three miles of a state's coastline. Furthermore, under the proposal here the federal government would still undertake a consistency review, and offshore wind projects would be subject to the same federal regulations applicable to all onshore and offshore wind projects currently under full state permitting authority.

There is great potential for offshore wind energy throughout the coastal United States. In 2009, the National Renewable Energy Laboratory conducted

[173] *See supra* Part IV.B. For a similar argument in the context of offshore oil development, see Walls, *supra* note 165, at 794 ("[A]ny national benefits from *not* developing [offshore energy facilities] can be internalized through the conditional grants of the CZMA or a similar program." (emphasis added)).

an assessment of offshore wind energy resources throughout the country.[174] The group concluded that "[o]ffshore wind resources have the potential to be a significant domestic renewable energy source for coastal electricity loads."[175] In addition, the data demonstrated that all coastal states possess large areas of ocean off their coasts with the wind speed, ocean depth, and distance from the shore ideal for offshore wind energy collection.[176] Moreover, there is demonstrated interest from the states themselves. Katherine Roek, in her article, *Offshore Wind Energy in the United States: A Legal and Policy Patchwork*, provides a list of state-by-state efforts to promote wind energy, through legislation or otherwise.[177] Proposals for projects are currently being explored in many states, including Rhode Island,[178] South Carolina,[179] New York,[180] New Jersey,[181] and even another project in Massachusetts.[182]

[174] MARC SCHWARTZ, ET AL., NAT'L RENEWABLE ENERGY LAB., ASSESSMENT OF OFFSHORE WIND ENERGY RESOURCES FOR THE UNITED STATES (2010), *available at* http://www.nrel.gov/docs/fy10osti/45889.pdf.

[175] *Id.* at 5.

[176] *See id.* at 14-22.

[177] Roek, *supra* note 1, at 26-27.

[178] *Deepwater To Build First U.S. Offshore Wind Farm*, REUTERS, Oct. 13, 2011, *available at* http://www.reuters.com/article/2011/10/13/us-deepwater-wind-idUSTRE79C0YC20111013 (discussing how Rhode Island may host the first offshore wind farm thanks in part to the state's having "moved decisively after concluding offshore wind power should be part of its energy mix"); Kyle Alspach, *RI Wind Farm Would Double Cape Wind*, BOS. BUS. J. (Dec. 9, 2010, 10:10 AM), http://www.bizjournals.com/boston/news/2010/12/09/ri-wind-farm-would-double-cape-wind.html (describing Deepwater Wind, LLC's proposed 200-turbine, 1000-megawatt wind farm off the Rhode Island coast).

[179] *Connecticut Contractor Lands Key Role in Planned Off-Shore Wind Farm*, ENGINEERING NEWS-RECORD N.Y. (Dec. 14, 2009), http://newyork.construction.com/new_york_construction_news/2009/1214_Off-ShoreWindFarm.asp (announcing the selection of a contractor as consultant to South Carolina's state-owned electric utility in its efforts to construct an offshore meteorological tower to research wind energy potential).

[180] Press Release, Con Edison Media Relations, LI-NYC Wind Farm Collaborative Applies for Federal Lease for Offshore Site, Supports Gov. Cuomo's Clean Energy Plans (Sept. 15, 2011), *available at* http://www.coned.com/newsroom/news/pr20110913.asp (proposing and advocating construction of a 350-megawatt wind farm thirteen miles offshore from Long Island's Rockaway Peninsula).

[181] Matthew L. Wald, *Offshore Wind Is a Bit Closer, Backers Say*, N.Y. TIMES GREEN (Oct. 13, 2011, 7:15 AM), http://green.blogs.nytimes.com/2011/10/13/offshore-wind-is-inching-closer-backers-say/ (suggesting that the plans of Fisherman's Energy to construct a six-turbine wind farm just off Atlantic City may reflect support from New Jersey's Offshore Wind Development Act).

[182] *A History of Proposed Wind Farms in Buzzards Bay*, BUZZARDS BAY NAT'L ESTUARY PROGRAM, http://www.buzzardsbay.org/windfarms.htm (last visited Nov. 12, 2012) (discussing proposals dating from 2002 for construction of a wind farm in Massachusetts' Buzzards Bay).

Surely the organizations behind these proposals, and their investors, have followed the saga of Cape Wind closely, and are likely discouraged by the prospect of their own ten-year battle up and down the state and federal regulatory processes and court systems in the face of local opposition. Under the proposal here, offshore wind energy developers would likely face less uncertainty and lower costs as they navigate the permitting process. Local concerns are more likely to be incorporated at the legislative level into the states' CZMPs. Potential developers would then be able to review these plans and choose proposed locations based on the lowest expected costs of regulatory compliance and local opposition. Thus, allowing states to compete for offshore wind development through their own state policies would lead to a more efficient allocation of offshore wind energy facilities.

CONCLUSION

The experience of Cape Wind has demonstrated that the current regulatory scheme for offshore wind energy is flawed. The policy of the federal government is to promote wind energy, and there is great potential for offshore wind energy development throughout the United States. Yet the test case for U.S. offshore wind energy, to which the eyes of all potential developers are fixed, remains stuck in regulatory limbo. The federal government, perhaps overeager in its approval of the Cape Wind project at every turn, has found its decisions challenged aggressively by local opposition groups and even in one instance overruled by the judiciary.

The proposal presented in this Note acknowledges the reality of the predominately local impact of offshore wind facilities and suggests that the interests of potential developers and local citizens alike would be better served with permitting power in the hands of the states instead of the federal government. There is nothing intrinsic to this proposal that would lead to an increase in offshore wind development. Indeed, the Cape Wind project itself may very well not be approved if Massachusetts were to fully control the permitting process. But potential developers would face less uncertainty and fewer wasted resources with permitting power vested in the states. State legislatures could craft their own policies reflecting their citizens' interests in pursuing offshore wind energy, allowing for more efficient management of local opposition. Offshore wind energy developers, in turn, could choose among the states that offer the most favorable environment for development. The result would be more certainty surrounding the expected costs of development, and thus a more efficient allocation of the nation's offshore wind energy resources.