

Renewable Energy Permitting on the Outer Continental Shelf: You Call This a Process? Present Considerations and Recommendations for More Precise Ocean Management

“‘Since I won’t like the looks of that vast field of towers; and I won’t like their interference with glorious sailing in the sound; and I will worry about the wildlife, including porpoises and whales on their visits and several birds of endangered species on their annual migrations; and I sympathize with the already severely ailing fishing industry, whose important resource those waters are—for these reasons I am opposed to the project.’”¹

-Walter Cronkite, early August, 2003

“‘[The] location of their project is not likely to be quite as unsightly or as much of a hazard to wildlife or recreational use of the sound as I had at first believed.’”² “‘My contention is, let’s wait, and I feel that they are overreacting at this stage, that they should be taking a little more time right now to get the full story of just how much disruption of nature and of the use of the sound this project would cause.’”³

-Walter Cronkite, August 28 and 29, 2003

1. Mark Alan Lovewell, *Cronkite Withdraws Ads Against Turbines*, THE VINEYARD GAZETTE, Aug. 29, 2003, available at http://www.mvgazette.com/news/2003/08/29/cronkite_withdraws_ad.php (reviewing Cronkite’s former and current position on windfarm). The Alliance to Protect Nantucket Sound (Alliance) used Cronkite’s initial feelings against the Cape Wind project in their ads opposing the project. John Leaning, *Cronkite Spins Ad for Foes of Wind Farm*, CAPE COD TIMES, Jan. 30, 2003, available at <http://www.capecodonline.com/special/windfarm/cronkitespins130.htm> (discussing Cronkite’s participation in advertising campaign).

2. Jay Fitzgerald, *Cronkite Changes Tune on Cape Wind Project*, BOSTON HERALD, Aug. 29, 2003, available at <http://business.bostonherald.com/businessNews/business.bg?articleid=101>. After meeting with Cape Wind engineers and reviewing project plans, Cronkite changed his public stance and asked the Alliance to stop running ads featuring his earlier sentiments. *Id.* The Alliance no longer uses Cronkite’s quotes in advertisements or on their website. *Id.*; see also The Alliance to Protect Nantucket Sound website, at <http://www.saveoursound.org> (last visited Oct. 28, 2004) (featuring updates and information from Alliance to Protect Nantucket Sound).

3. Justin Pope, *Cronkite Tempers Opposition to Cape Wind Project* (Aug. 28, 2003), at http://www.cleanpowernow.org/AP_Cronkite.htm. While Cronkite has backed away from his opposition to the Cape Wind project, other local residents, such as author David McCullough, continue to oppose the project. Jennifer Peter, *Celebrities Protest Vast Wind Farm Proposed Off Mass. Coast* (Aug. 12, 2003), at http://www.enn.com/news/2003-08-12/s_7414.asp (reviewing celebrity involvement in windfarm debate). “‘I’m not against wind turbines . . . I’m against 130 of them over 400 feet tall right smack in the middle of one of the most beautiful places in America. That’s a hundred feet taller than the Capitol dome in Washington.’” *Id.*

I. SHOULD THE OCEANS BE ZONED?

In November 2001, Cape Wind Associates, LLC (CWA) applied to the United States Army Corps of Engineers (Corps) for a permit to construct a data tower in Nantucket Sound, as the initial stage of a wind power project.⁴ Local citizen organizations filed suits against both CWA and the Corps alleging that a state license was required and that the Corps lacked the authority to issue such a permit.⁵ In August 2003, the District Court for the District of Massachusetts found that the federal government had exclusive jurisdiction over the area of Nantucket Sound in question, thus negating a need for CWA to seek state approval.⁶ A month later, the District Court ruled in the Corps' favor, stating that under current legislation the Corps had the authority to issue such a permit, and had followed the few procedures in place in determining that the Cape Wind data tower was acceptable.⁷

While both cases are the subject of further judicial review, they exemplify growing concerns regarding the use of the Outer Continental Shelf (OCS), including: what are the appropriate procedures for project approval; and what office of the government, state or federal, should be responsible for making these determinations in the future?⁸ Is it appropriate to simply assign this task to a federal agency, or is more thorough action necessary, namely the

4. *Alliance to Protect Nantucket Sound, Inc. v. U.S. Dep't of the Army*, 288 F. Supp. 2d 64, 67-68 (D. Mass. 2003) (discussing background history of litigation surrounding data tower and wind project). The court refused to consider the entire Cape Wind project (the data tower *and* the wind farm). *Id.* The court instead ruled solely on the permit already issued by the Corps for the data tower, ruling against the Alliance. *Id.* The Corps continues to evaluate the wind farm, and more litigation could ensue if it issues another permit. U.S. ARMY CORPS OF ENGINEERS, NEW ENGLAND DISTRICT, Cape Wind Associates Project Fact Sheet (Oct. 20, 2003), available at <http://www.nae.usace.army.mil/projects/ma/ccwt/factsheet/pdf> (stating continuing wind farm appraisal).

5. *Alliance to Protect Nantucket Sound*, 288 F. Supp. 2d at 67 (arguing issuance of permit by Corps improper); *Ten Taxpayers Citizen Group v. Cape Wind Assocs.*, 278 F. Supp. 2d 98, 100 (D. Mass. 2003) (claiming Nantucket Sound jurisdiction ceded to Massachusetts by fisheries regulation act), *aff'd*, 373 F.3d 183 (1st Cir. 2004). In both cases, residents attempted to argue against the exclusive jurisdiction of the federal government over Nantucket Sound. *Alliance to Protect Nantucket Sound*, 288 F. Supp. 2d at 67; *Ten Taxpayers Citizen Group*, 278 F. Supp. 2d at 100.

6. *Ten Taxpayers Citizen Group*, 278 F. Supp. 2d at 101 (concluding federal government ceded jurisdiction over Nantucket Sound to Massachusetts only for fisheries regulation purposes). The proposed location of the Cape Wind project is over three miles from the coast, putting it just outside the state-controlled Coastal Zone. *Id.* at 99.

7. *Alliance to Protect Nantucket Sound*, 288 F. Supp. 2d at 76-82 (finding Corps followed self-imposed guidelines of Rivers and Harbors Act in issuing permit).

8. John Leaning, *Wind Foes Roll Up Sleeves For Court Fight: The Alliance Files Notice of Intent to Appeal a Federal Judge's Ruling*, CAPE COD TIMES, Dec. 5, 2003, available at <http://capecodonline.com/cgi-bin/print/printstory.cgi> (discussing continuing possibility of appeal and potential grounds). While the Corps continues to evaluate the wind farm project, based on the District Court's decision, CWA was able to move forward with the data tower construction. See *Alliance to Protect Nantucket Sound*, 288 F. Supp. 2d at 82 (determining permit for Cape Wind data tower legal); Cape Wind Associates, *Cape Wind Scientific Monitoring Station*, at <http://capewind.whgrp.com/> (last visited Oct. 28, 2004) (allowing site visitors access to current data from tower); U.S. ARMY CORPS OF ENGINEERS, NEW ENGLAND DISTRICT, *supra* note 4 (detailing current status of wind farm project).

development of a master plan for the use of the ocean?⁹

This Note will investigate the different possibilities for improving regulation of the OCS. It will explore existing regulation of renewable energy on the OCS, using the Cape Wind project as an example.¹⁰ It will then consider recent legislative solutions proposed to govern the approval of renewable energy projects, and whether or not these proposals reach far enough.¹¹ This Note will also consider whether a formalized ocean zoning project is a better solution.¹² Finally, this Note will discuss recommendations as to how the United States should improve the current system of OCS management.¹³

II. THE CURRENT SYSTEM OF REGULATION

Current law defines the OCS as the submerged lands that stretch between 3 and approximately 690 miles (200 nautical miles) off the United States coastline.¹⁴ The first three miles seaward from the shoreline make up the Coastal Zone, and this area is under the jurisdiction of the bordering state.¹⁵ Proposals are pending for the construction of wind power plants in state

9. See generally Fara Courtney & Jack Wiggan, *Ocean Zoning for the Gulf of Maine: A Background Paper* (prepared for the Gulf of Maine Council on the Marine Env't) (Jan. 2003), at <http://www.gulfofmaine.org/council/publications/oceanzoningreport.pdf> (investigating ocean zoning pros, cons and existing ocean zoning projects); PEW OCEANS COMMISSION, *AMERICA'S LIVING OCEANS: CHARTING A COURSE FOR SEA CHANGE* (2003), available at http://www.pewoceans.org/oceans/downloads/oceans_report.pdf (reporting results of study of United States' ocean resources).

10. See *infra* Part II (describing approval process undertaken by CWA).

11. See *infra* Part III (examining pending legislation and alternatives).

12. See *infra* Part III (considering ocean management as alternative to current legislation).

13. See *infra* Part IV (recommending most appropriate option for offshore renewable power plant siting).

14. Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1333 (2004) (asserting United States jurisdiction over continental shelf); Emily R. Scott & Ashley M. Smith, *Outer Continental Shelf Policy in the 108th Congress*, AM. GEOLOGICAL INST., Sept. 22, 2003, at <http://www.agiweb.org/gap/legis108/ocs.html> (discussing origin of OCS regulation).

15. Coastal Zone Management Act (CZMA) of 1972, 16 U.S.C. §§ 1451-1456b (2004) (delineating United States' coastal zone at three miles); see also The Submerged Lands Act, 43 U.S.C. § 1301 (2004) (defining lands beneath navigable waters as referenced by OCSLA and CZMA). As noted in the CZMA, governance of the Coastal Zone is left to the individual state, and some, including Massachusetts, allow individual municipalities to participate in coastal zone management. 16 U.S.C. § 1452 (enabling state governance of Coastal Zone); Buzzards Bay Project National Estuary Program, *Proposed Wind Farms in Buzzard's Bay*, at <http://www.buzzardsbay.org/windfarms.htm> (last visited Oct. 28, 2004) (depicting municipal borders involved in site approval); see John Leaning, *Winery Shelves Four Planned Turbine Sites*, CAPE COD TIMES, July 31, 2003, available at http://www.capecodonline.com/special/windfarm/winergyselves_31.htm (noting numerous state and federal permits required at various sites). This generally increases the number of regulations and permits required of a company seeking approval for some type of installation. Buzzards Bay Project National Estuary Program, *Proposed Wind Farms in Buzzard's Bay*, at <http://www.buzzardsbay.org/windfarms.htm> (last visited Oct. 28, 2004) (discussing permitting complexities). Massachusetts' Office of Coastal Zone Management is extremely active in maintaining regulations for these waters, and commissioned the Ocean Management Task Force to analyze the state's ocean management policies. Press Release, The Commonwealth of Massachusetts Executive Office of Environmental Affairs, Massachusetts Ocean Management Task Force Releases Draft Principles and Recommendations (Dec. 5, 2003) (on file with author) (noting task force makeup and objectives).

waters.¹⁶ Due to the more complex approval process and greater local involvement, many development companies are choosing to site wind farms in federal waters.¹⁷ While most calls for a comprehensive zoning-type plan for United States waters do acknowledge the appropriateness of state involvement, any action to undertake such planning will have to begin at the federal level because of the limited three mile reach of the states.¹⁸ For this reason, this Note will focus on federal initiatives to regulate offshore renewable energy resources in federal waters.¹⁹

In 1953, the United States government asserted control over the OCS and granted power over minerals contained therein to the Department of the Interior (DOI) with the passage of the Outer Continental Shelf Lands Act (OCSLA).²⁰ OCSLA regulates permitting and usage of the OCS for extractive uses, such as oil drilling and natural gas mining, and provides for royalties for the Federal Government.²¹ In recent years, legislators and environmental groups have heightened their scrutiny of OCSLA's regulatory process and the regulation of non-extractive alternative energy projects involving utilization of the OCS.²² As illustrated in the *Cape Wind* cases, the current procedure for any use of the OCS involves obtaining a permit from the Corps, and the Corps follows its own guidelines in determining the necessary standard of environmental review.²³

16. Buzzards Bay Project National Estuary Program, *Proposed Wind Farms in Buzzard's Bay*, at <http://www.buzzardsbay.org/windfarms.htm> (last visited Oct. 28, 2004) (comparing state and federal permitting processes).

17. *Id.* The Cape Wind project, for example, is located in federal waters, just over three miles from the coasts of Cape Cod and Nantucket. See *Ten Taxpayers Citizen Group v. Cape Wind Assocs.*, 278 F. Supp. 2d 98, 99 (D. Mass. 2003) (affirming federal jurisdiction over proposed project area), *aff'd*, 373 F.3d 183 (1st Cir. 2004); see also Winergy, LLC, *Wind Farm Status*, at <http://www.winergyllc.com/sites.shtml> (last visited Oct. 28, 2004) (describing company's proposed wind farm sites located mostly in federal waters).

18. 16 U.S.C. §§ 1451-1456b (providing limited grant of state jurisdiction); see generally PEW OCEANS COMMISSION, *supra* note 9 (recommending federal ocean management initiative). Individual states have made attempts to enact regulation in the coastal zone, however, they have no authority outside of three miles. Maureen Kelly, *From Fish Farms to Wind Farms, Oil and Gas Drilling and More: The Growing Demands on Ocean Waters Incite the Call for Zoning*, THE GULF OF MAINE TIMES (Summer 2003), available at <http://www.gulfofmaine.org/times/summer2003/zoning.html> (detailing Florida Keys management project).

19. *Infra* Part III (evaluating current legislative proposals and potential of comprehensive plan approach for ocean management).

20. Scott & Smith, *supra* note 14 (detailing history of federal regulation of OCS lands); see also OCSLA, 43 U.S.C. § 1333 (2004) (placing OCS under United States' law).

21. 43 U.S.C. § 1333 (regulating extractive energy resources on OCS).

22. See, e.g., Coastal Zone Renewable Energy Promotion Act of 2003, H.R. 1183, 108th Cong. (2003) [hereinafter H.R. 1183] (expanding states' reach under CZMA); A Bill to Amend the Outer Continental Shelf Lands Act, H.R. 793, 108th Cong. (2003) [hereinafter H.R. 793] (proposing renewable energy projects placed under DOI control); *Legislative Hearing on H.R. 793, A Bill to Amend the Outer Continental Shelf Lands Act to Authorize the Secretary of the Interior to Grant Easements and Rights-of-Way on the Outer Continental Shelf (OCS) for Activities Otherwise Authorized by that Act, and H.R. 794, the Coal Leasing Amendments Act of 2003, Before the Subcommittee on Energy and Mineral Resources*, 108th Cong. 43-47 (Mar. 6, 2003) [hereinafter *Hearings on H.R. 793*] (statement of Peter Shelley of the Conservation Law Foundation) (recommending further investigation and more specific permitting process for OCS).

23. *Alliance to Protect Nantucket Sound, Inc. v. U.S. Dep't of the Army*, 288 F. Supp. 2d 64, 67 (D.

Proposed legislation in the House of Representatives would revise this process.²⁴ Representative Barbara Cubin (R-WY) proposed House Bill 793 (H.R. 793) in February 2003.²⁵ H.R. 793 would amend OCSLA and put renewable, non-extractive uses on the OCS under the regulation of the Secretary of the Interior and the Materials Management Service (MMS).²⁶ The DOI and the MMS currently regulate extractive uses, such as oil and natural gas drilling.²⁷ Many environmental groups oppose such legislation, claiming that grouping these energy sources together will create direct competition in the approval process between renewable energy projects and less environmentally sensitive energy sources.²⁸ These environmental groups also argue that the selected agency lacks experience and familiarity with renewable energy projects.²⁹ Wind power advocates in the scientific community support H.R. 793 to the extent that it does not cause interference with projects currently in development or with the approval and siting of future projects.³⁰

Competing legislation, introduced by Representative William Delahunt (D-MA), would amend the Coastal Zone Act and put approval of renewable energy projects in the hands of the Commerce Department's National Oceanic and Atmospheric Administration (NOAA).³¹ While Delahunt's proposal seems to answer some of the concerns from environmental groups, it certainly would do little to ease the minds of local coastal communities, whose interest in promoting ecologically friendly electric power is tempered by their economic and recreational dependence on the ocean and coastline.³² Groups like the

Mass. 2003) (determining Corps' interpretation of statutes governing its own actions controls); *Ten Taxpayers Citizen Group v. Cape Wind Assocs.*, 278 F. Supp. 2d 98, 99-100 (D. Mass. 2003) (stating only permit from Corps required, and no state license), *aff'd*, 373 F.3d 183 (1st Cir. 2004). The Corps, however, is subject to the requirements of the National Environmental Protection Act, with which the *Alliance* court found the Corps had complied. *Alliance to Protect Nantucket Sound*, 288 F. Supp. 2d at 69-70 (evaluating Corps' protocols against National Environmental Protection Act requirements).

24. H.R. 793, *supra* note 22 (amending OCSLA to include renewable energy).

25. H.R. 793, *supra* note 22 (denoting bill sponsorship).

26. H.R. 793, *supra* note 22 (granting renewable energy control to Department of Interior). OCSLA currently deals with only oil and natural gas resources. OCSLA, 43 U.S.C. § 1333 (2004) (including oil and gas drilling under DOI authority).

27. Scott & Smith, *supra* note 14 (discussing potential effect of H.R. 793 and controversy surrounding it).

28. *Environmental Defense Urges Rejection Of Cubin Bill: Congress Should Not Impede Offshore Renewable Energy*, at <http://www.environmentaldefense.org/pressrelease.cfm?ContentID=2691> (Mar. 6, 2003) (criticizing H.R. 793 for negative impact on renewable energy and ocean condition); *Hearings on H.R. 793*, *supra* note 22, at 44 (statement of Peter Shelley of the Conservation Law Foundation) (expressing concerns over H.R. 793's agency selection).

29. *Hearings on H.R. 793*, *supra* note 22, at 44 (statement of Peter Shelley of the Conservation Law Foundation) (asserting MMS unprepared to work with offshore renewable energy projects).

30. *Hearings on H.R. 793*, *supra* note 22, at 40-43 (statement of Bruce H. Bailey, President of AWS Scientific, Inc.) (discussing desire for H.R. 793 to expedite and regulate wind energy projects). H.R. 793 is sufficiently vague to leave both of these qualifications in question. H.R. 793, *supra* note 22 (granting regulatory authority to DOI to establish process).

31. H.R. 1183, *supra* note 22 (proposing expanded state authority and NOAA involvement).

32. *Hearings on H.R. 793*, *supra* note 22, at 7-14 (Alliance statement) (detailing Alliance opposition to

Buzzard's Bay Coalition continue to press for the development of a more formal, forward-looking master plan for the OCS.³³ The message of these groups is clear: it is only through careful investigation and planning that the public's shared interest in the oceans can be protected.³⁴ Perhaps, just as United States communities have zoned the land, so too should the government zone the ocean.³⁵

A. What is Ocean Zoning?

"Ocean zoning" is actually a somewhat misleading term of art.³⁶ Zoning conjures up town meetings, zoning maps and local planning boards because it has typically been a regional concern, left to individual municipalities.³⁷ In terms of planning the OCS, the term refers to a much larger project on the federal level.³⁸ Zoning the OCS would involve designating uses for different sea levels, from the surface to the seabed, and would require planners to account for not just an enormous variety of uses, but also shifting populations of marine life.³⁹ While "ocean zoning" has become a clever buzzword, a more accurate moniker is comprehensive ocean management.⁴⁰

1. Zoning on Land

Zoning in the United States began with the City Beautiful Movement in the early twentieth century, and was initially a primarily aesthetic concern.⁴¹ In 1926, the Supreme Court issued its famous ruling in *Village of Euclid v. Ambler Realty Co.*,⁴² holding that zoning was a constitutional exercise of state police power when used to promote the health, safety, or general welfare of the

Cape Wind and recommendations for legislation); The Coalition for Buzzards Bay, *The Position of The Coalition for Buzzards Bay Regarding Offshore Wind Energy Development in Buzzards Bay*, at http://www.savebuzzardsbay.org/www/advocacy/wind_energy.htm (Apr. 4, 2003) (detailing organization's opposition to now-abandoned Winergy project).

33. The Coalition for Buzzards Bay, *The Position of The Coalition for Buzzards Bay Regarding Offshore Wind Energy Development in Buzzards Bay*, at http://www.savebuzzardsbay.org/www/advocacy/wind_energy.htm (Apr. 4, 2003) (calling for creation of zoning map).

34. *Supra* note 32 (discussing concerns of coastal citizen groups).

35. *Supra* note 32 (referencing local groups demand for comprehensive ocean planning). *See generally* PEW OCEANS COMMISSION, *supra* note 9 (detailing Commission's recommendations for ocean management).

36. *See* Courtney & Wiggin, *supra* note 9, at 6-7 (detailing increased complexity and distinguishing ocean planning from land zoning).

37. *See* DANIEL R. MANDELKER, *LAND USE LAW* § 4.15 (4th ed. 1997) (describing Standard Zoning Act and providing statutory authority for local zoning).

38. *See* Ten Taxpayers Citizen Group v. Cape Wind Assocs., 278 F. Supp. 2d 98, 101 (D. Mass. 2003) (holding Nantucket Sound subject to federal jurisdiction because outside state-controlled coastal zone), *aff'd*, 373 F.3d 183 (1st Cir. 2004).

39. Courtney & Wiggin, *supra* note 9, at 7 (exploring complex challenge of ocean zoning).

40. Courtney & Wiggin, *supra* note 9, at 5 (clarifying term "ocean zoning").

41. *PRINCIPLES AND PRACTICE OF URBAN PLANNING* (W.I. Goodman ed., 1968), *reprinted in* ROBERT R. WRIGHT & MORTON GITELMAN, *LAND USE* § 4.2 (5th ed. 1997) (chronicling origins of planning movement).

42. 272 U.S. 365 (1926).

public.⁴³ Federal rulings on zoning issues are rare, and the process has generally been left to the states.⁴⁴ The states, either legislatively or constitutionally, have granted zoning authority to individual municipalities.⁴⁵

Functionally, the small, regional scale in which land zoning and planning operate has both clear advantages and drawbacks. Zoning involves creating a comprehensive or master plan, a map identifying different zones, and developing corresponding ordinances to set out and define the zones.⁴⁶ The enabling statute or local ordinances provide a process by which aggrieved parties can seek either legislative or administrative relief from zoning by proposing amendments to the zoning map or requesting use or dimensional variances.⁴⁷ The standard for review of municipal zoning is whether the town's actions were arbitrary and capricious and have no relevance to the health, safety or general welfare of the community.⁴⁸ Local zoning boards make initial determinations, but their decisions are subject to appellate review.⁴⁹ Because zoning is developed and managed locally, it becomes a varied and individualized process.⁵⁰ In the average American city or town, the task of administering zoning is small enough that the city or town can manage in great detail, without being overburdened.⁵¹ Lack of regional coordination between towns, however, can create conflicts and lack of coherence in planning.⁵²

Because land zoning deals with government limitation on the private use of property, it threatens to run afoul of the takings clause of the Constitution.⁵³

43. *Id.* at 395 (describing zoning actions as constitutional when promoting public good and not arbitrary or capricious).

44. *See generally* Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922) (finding unconstitutional taking in zoning ordinance that banned coal drilling). Most federal court cases are of this type, dealing with infringement of constitutional rights, and not of zoning itself. *Id.* at 412 (describing plaintiff's claim as unconstitutional taking of underground coal rights).

45. MANDELKER, *supra* note 37, §§ 4.15, 4.24 (discussing enabling authority). A state can enable localities to zone by an enabling statute, the town or city's charter, or by the state constitution via a Home Rule Act. *Id.*; *see also* MASS. GEN. LAWS ch. 40A (2004) (enabling Massachusetts municipalities for zoning, except Boston proper).

46. ROBERT R. WRIGHT & MORTON GITELMAN, LAND USE § 4.3 (5th ed. 1997) (describing standard master plan). A master plan is recommended by the model zoning enabling act but not required and frequently not present. *See also* MANDELKER, *supra* note 37, § 3.14 (stating majority of jurisdictions do not require plan).

47. MANDELKER, *supra* note 37, §§ 6.24, 6.40 (explaining legislative and administrative relief). Legislative relief is granted in the form of amendments to the zoning map or ordinances. *Id.* § 6.24. Relief is available on the administrative level through variances and special permits. *Id.* §§ 6.40-6.53.

48. *See* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (ruling zoning constitutional exercise of police power when not arbitrary and capricious).

49. MANDELKER, *supra* note 37, §§ 1.16, 6.52, 6.55 (describing judicial review and influence and delegation of authority to local board).

50. *See supra* note 45 (detailing general grant of power to states). The power granted to municipalities by the state legislatures allows great flexibility, but also variability in local zoning. *Id.*; *see also* MANDELKER, *supra* note 37, § 1.15 (discussing diverging state court zoning opinions).

51. *See supra* note 45 (examining powers granted to municipalities).

52. *See supra* note 45 (discussing different grants of power possible); *see also* MANDELKER, *supra* note 37, § 1.15 (noting court decisions on zoning vary).

53. MANDELKER, *supra* note 37, § 2.01 (detailing constitutional groundwork for takings issues); *see also*

Zoning action cannot deprive a land owner of all economic value of his property without being deemed a taking.⁵⁴ Land zoning requires the constant balancing of individual rights against the benefit to society.⁵⁵

Today, almost every town or city uses zoning to regulate growth, overcrowding, urban sprawl, and environmental concerns.⁵⁶ While not every municipality follows a carefully designed master plan, zoning has proven to be an efficient management tool.⁵⁷ This success may have prompted regional interest in a similar project offshore.⁵⁸

2. Zoning at Sea

While many of the same techniques could be used and similar benefits realized, zoning the ocean would be a different and much more complicated endeavor than traditional land zoning.⁵⁹ First, while land zoning involves primarily just the surface, ocean zoning would have to relate to the surface, the seabed, the column of water in between, and the airspace above.⁶⁰ It might be possible or even necessary to plan for different acceptable uses and structures at different levels, in the same area.⁶¹

In addition, zoning the ocean means planning for uses and protections that cannot be seen from the surface.⁶² Zoning would have to take into account resources that are underwater or even under the seabed, undetectable without scientific equipment.⁶³ Complicating this is the fact that habitats of living creatures are constantly moving and changing.⁶⁴ What might be a fertile halibut fishing ground one year could be the breeding area for endangered whales soon after.⁶⁵ As a result, any zoning plan would have to allow for amendment.⁶⁶ Finally, creating any sort of map requires exploration with costly technology, as opposed to land mapping.⁶⁷

Courtney & Wiggin, *supra* note 9, at 5-6 (discussing overview of land zoning).

54. *See* Penn. Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978) (holding no taking by historical classification of structure where economic use still exists).

55. MANDELKER, *supra* note 37, § 2.06 (noting balance between police power and individual rights).

56. MANDELKER, *supra* note 37, §§ 1.03-1.09 (describing variety of legitimate zoning goals).

57. *Supra* note 46 (discussing preference for, but no requirement of comprehensive plan).

58. *See Hearings on H.R. 793, supra* note 22, at 9-11 (Alliance statement) (supporting creation of zoning map).

59. *See* Courtney & Wiggin, *supra* note 9, at 17-19 (describing challenges of ocean zoning process).

60. Courtney & Wiggin, *supra* note 9, at 17-19 (noting difficulties of zoning three-dimensional ocean).

61. Courtney & Wiggin, *supra* note 9, at 17-19 (considering additional challenges presented by ocean zoning, as compared to land zoning).

62. Courtney & Wiggin, *supra* note 9, at 7, 18 (discussing evolving nature of ocean environment).

63. Courtney & Wiggin, *supra* note 9, at 20-21, 27 (observing ocean mapping possible only with costly equipment).

64. Courtney & Wiggin, *supra* note 9, at 7 (considering fluctuating ocean populations).

65. Courtney & Wiggin, *supra* note 9, at 7 (noting shifting ocean populations). Fisheries management would be a large component of any ocean zoning plan. *Id.*

66. *See supra* note 47 (reviewing land zoning amendments and relief procedures).

67. Courtney & Wiggin, *supra* note 9, at 20-21, 27 (referring to costly equipment used for sea mapping).

One aspect of ocean zoning would be far easier than land zoning.⁶⁸ On land, government concerns must be balanced against the invasion of a private citizen's property rights.⁶⁹ The OCS, on the other hand, is public trust land.⁷⁰ The rights of individual landowners are not in question.⁷¹ Thus, while the actual process of ocean zoning might be more taxing, planners would face less constitutional scrutiny.⁷²

B. Current Approval "Process" Under the Rivers and Harbors Act

With the passage of OCSLA in 1953 and the later amendments, the United States asserted her authority over the submerged lands on the OCS.⁷³ OCSLA, however, refers only to the regulation of extractive uses, such as oil and natural gas, and does not contain provisions that apply to windmills and other non-extractive uses.⁷⁴ Companies seeking approval for such projects have thus far followed the antiquated 1899 Rivers and Harbors Act, which grants approval power to the Corps for any obstruction of navigable waters.⁷⁵ The Rivers and Harbors Act is directed towards structures in navigable waterways, such as docks and breakwaters, and contains no provisions for environmental or other evaluation.⁷⁶

Despite the somewhat distant relation between the intent of the Rivers and Harbors Act and renewable energy plant construction, the Corps survived the federal court challenge to its authority.⁷⁷ The proposed location of the Cape

68. *Infra* notes 69-71 and accompanying text (considering lack of individual rights to OCS).

69. U.S. CONST. amend. V (forbidding taking of property without due process of law).

70. Courtney & Wiggin, *supra* note 9, at 7 (referring to OCS as public trust land). The Public Trust Doctrine provides that all lands seaward of the high tide mark are considered public lands, accessible to all. *Id.* Ownership of public trust land is not possible. *Id.*

71. Courtney & Wiggin, *supra* note 9, at 7, 18 (discussing public ownership of ocean).

72. Courtney & Wiggin, *supra* note 9, at 7 (noting traditional users of ocean lack standing of property owners).

73. OCSLA, 43 U.S.C. § 1333 (2004) (asserting United States' control of OCS).

74. 43 U.S.C. § 1333 (authorizing DOI to regulate oil and natural gas resources).

75. 33 U.S.C. § 403 (2004). Known as the Rivers and Harbors Act, it is short for the Protection of Navigable Waters and of Harbor and River Improvements Generally. *Id.*

76. *Id.* (describing act's content). The Rivers and Harbors Act provides in its entirety:

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

Id.

77. Alliance to Protect Nantucket Sound, Inc. v. U.S. Dep't of the Army, 288 F. Supp. 2d 64, 82 (D.

Wind Project is on Horseshoe Shoals, in federal waters in Nantucket Sound.⁷⁸ CWA applied for permits for both a data tower and a wind farm from the Corps under the Rivers and Harbors Act section 10 (section 10).⁷⁹ The Corps, pursuant to its own regulations and the National Environmental Protection Act, held a series of public hearings, issued an Environmental Assessment and a Finding of No Significant Impact, and granted the permit to CWA for construction of the data tower.⁸⁰ The district court held that under OCSLA and the Rivers and Harbors Act, the Corps had the authority to issue permits for construction on the OCS, and that the Corps satisfied both its own regulations and those of NEPA.⁸¹

OCSLA provides for lease or easement rights for the uses specified within it, namely oil and natural gas drilling.⁸² The current Corps section 10 permitting process under which Cape Wind is proceeding, does not contain a provision that requires a company seeking a permit to obtain or even demonstrate any kind of property rights over the proposed site.⁸³ The submerged lands on the OCS belong to the United States, yet the sole agency authorized to evaluate and permit a wind farm has no provision or requirement for obtaining a lease or easement.⁸⁴ In *Alliance to Protect Nantucket Sound v. U.S. Department of the Army*,⁸⁵ the district court ruled that the Corps was not to become involved in “property disputes.”⁸⁶ According to the *Alliance to Protect Nantucket Sound* decision, the Corps can apparently take the applicant at their word as to property rights.⁸⁷

Mass. 2003) (upholding authority of Corps to issue permit to CWA). This case was specific to the permit issued by the Corps to CWA for the construction of a “data tower.” *Id.* The Corps is still in the process of completing impact reviews of the actual Cape Wind windpower plant. U.S. ARMY CORPS OF ENGINEERS, NEW ENGLAND DISTRICT, *supra* note 4 (detailing current status of project).

78. *Ten Taxpayers Citizen Group v. Cape Wind Assocs.*, 278 F. Supp. 2d 98, 101 (D. Mass. 2003) (affirming federal jurisdiction of OCS beyond three mile coastal zone where no statutory preemption), *aff’d*, 373 F.3d 183 (1st Cir. 2004).

79. *Alliance to Protect Nantucket Sound*, 288 F. Supp. 2d at 65-67 (chronicling history of CWA application process).

80. *Alliance to Protect Nantucket Sound*, 288 F. Supp. 2d at 68-69 (reviewing Corps’ process in following Corps and National Environmental Protection Act guidelines before issuing permit). In *Alliance to Protect Nantucket Sound*, the court noted that an agency was entitled to great leeway in interpreting its own regulations. *Id.* at 71-72.

81. *Id.* at 78-79 (approving depth and length of Corps’ evaluation). The court also determined that there was no need for the Corps to circulate the Environmental Assessment or the Finding of No Significant Impact for public review, as the Corps was reasonable in classifying the project as one with precedent. *Id.* (evaluating Corps actions under NEPA).

82. OCSLA, 43 U.S.C. § 1333 (2004) (granting DOI power to convey property rights for oil and gas drilling).

83. *Alliance to Protect Nantucket Sound, Inc. v. U.S. Dep’t of the Army*, 288 F. Supp. 2d 64, 76-78 (D. Mass. 2003) (determining applicant’s assertion of property rights satisfied Corps’ regulations).

84. *Id.* (holding Corps not responsible for property issues on OCS).

85. 288 F. Supp. 2d 64, 68-69 (D. Mass. 2003).

86. *Id.* at 77-78 (stating property rights not Corps concern in section 10 permitting).

87. *Id.* (holding signature of applicant sufficient indication of property interest).

The *Cape Wind* cases indicate that the process for approval for renewable energy projects on the OCS requires only a permit from the Corps, which is issued after public hearings and some environmental evaluation.⁸⁸ Supporters of these projects and the companies proposing their construction argue that this process is sufficient and oppose proposals that would place permitting authority within a federal agency, such as the DOI.⁸⁹ On the other end of the spectrum, residents of coastal communities clamor for further study, and to that end Massachusetts' Attorney General Thomas Reilly has requested a moratorium on all windfarm projects until the implementation of more detailed federal guidelines.⁹⁰ Moreover, in the midst of all the controversy, CWA is gathering data from a completely operational data tower in Nantucket Sound, while the Corps continues its evaluation of the windfarm.⁹¹

Windpower has proven to be an efficient power source.⁹² In the case of Cape Wind, commerce has leapt ahead of the legislature, leaving confused and angry shoreline residents in its wake.⁹³

88. *Id.* at 68-69. (detailing approval process undertaken by CWA and the Corps). As OCSLA in its current iteration is specifically limited to oil and natural gas resources on the OCS, there is apparently no other agency with authority over renewable energy projects on the OCS. OCSLA, 43 U.S.C. 1333 (2004) (asserting United States' authority over oil and gas, but not non-extractive uses). *But cf.* PRELIMINARY REPORT OF THE U.S. COMMISSION ON OCEAN POLICY, GOVERNORS' DRAFT, WASHINGTON, D.C. 300, April 2004 (reporting on Federal Energy Regulatory Commission jurisdiction over tidal or wave power out to twelve nautical miles); Carolyn Elefant, *Regulation of Offshore Renewables Development—Existing Regulatory Regime and Proposals for Improvement*, at <http://www.his.com/israel/loce/ocean.html> (suggesting government might classify wind farm as hydropower regulated under Federal Energy Regulatory Commission).

89. *Hearings on H.R. 793*, *supra* note 22, at 45-47 (statement of Peter Shelley of the Conservation Law Foundation) (criticizing DOI's lack of experience with renewable energy and supporting authority of section 10 process). While these groups are against this particular piece of legislation, most acknowledge that some additional federal regulation is necessary. *Id.* at 43. Shelley also makes reference to leases for non-extractive power plants, acknowledging, perhaps, the property rights issue argued in the *Alliance* case. *Id.* at 46 (recommending legislation authorizing term leases for renewable projects); *see supra* note 74 (discussing lack of Corps requirement for actual property ownership for section 10 approval). Both H.R. 793 and Shelley's recommendations would provide a mechanism by which companies desiring approval for a renewable energy plant would obtain leases from the federal government for the submerged lands. H.R. 793, *supra* note 22 (placing lease approval with DOI); *Hearings on H.R. 793*, *supra* note 22, at 46 (statement of Peter Shelley of the Conservation Law Foundation) (arguing need for leases for renewable energy plants, as opposed to easements).

90. Jack Coleman, *Kennedy Calls for Federal Study*, CAPE COD TIMES, Mar. 8, 2003 (discussing Massachusetts politicians' actions regarding Cape Wind project). While they oppose H.R. 793, many environmental groups are also opposed to such a moratorium, fearing loss of economic interest in such projects. *Hearings on H.R. 793*, *supra* note 22, at 46 (statement of Peter Shelley of the Conservation Law Foundation) (voicing opposition to moratorium on offshore wind projects).

91. Cape Wind Associates, *Cape Wind Scientific Monitoring Station*, at <http://capewind.whgrp.com/> (last visited Oct. 28, 2004) (allowing site visitors access to current data from tower); US ARMY CORPS OF ENGINEERS, NEW ENGLAND DISTRICT, *supra* note 4 (relating current status of project).

92. Winergy LLC, *Some Interesting Facts About the World We Live In*, at <http://www.winergyllc.com/facts.shtml> (last visited Oct. 28, 2004) (discussing negative impact of traditional electricity production and advantages of wind power).

93. *See generally* Alliance to Protect Nantucket Sound, Inc. v. U.S. Dep't of the Army, 288 F. Supp. 2d 64 (D. Mass. 2003) (challenging CWA's ability to proceed without state permit); Ten Taxpayers Citizen Group v. Cape Wind Assocs., 278 F. Supp. 2d 98 (D. Mass. 2003) (arguing state jurisdiction over Nantucket Sound),

III. WHAT ARE THE OPTIONS?

The opinions of interested parties vary from enthusiastic calls for new legislation to grudging acceptance of a need for it.⁹⁴ Revision of the current process is probably forthcoming, if for no other reason than the complete absence of a mechanism to convey any sort of property right to a company seeking to pursue a renewable energy project on the OCS.⁹⁵ This Note will investigate two pieces of federal legislation from the 108th Congress and then consider the potential of a comprehensive “ocean zoning” plan.⁹⁶

A. HR 793: A Proposal to Amend the Outer Continental Shelf Lands Act

In February 2003, Representative Cubin introduced H.R. 793 to amend the OCSLA and grant leasing and permitting authority over renewable energy projects on the OCS to the DOI and the MMS.⁹⁷ Although H.R. 793 has thus far failed to make it out of the Resources Committee, it remains the leading statutory solution, and continues to attract attention and debate.⁹⁸

H.R. 793 is practically identical to H.R. 5156 of the 107th Congress, also proposed by Representative Cubin, which likewise failed to make it out of the Resources Committee.⁹⁹ The rapid advancement of the Cape Wind project, along with the rising number of proposals for additional offshore projects has intensified political pressure on this issue.¹⁰⁰

H.R. 793 would give the DOI and the MMS responsibility for the control of renewable energy, in addition to oil and natural gas on the OCS.¹⁰¹ The proposal would amend section 8 of the OCSLA and give the Secretary of the Interior a general grant of power to establish a regime for renewable energy projects.¹⁰² The amendment would allow the Secretary to grant easements or

aff'd, 373 F.3d 183 (1st Cir. 2004); *Hearings on H.R. 793*, *supra* note 22, at 7 (Alliance statement) (expressing desire for citizen involvement in new approval process).

94. *Hearings on H.R. 793*, *supra* note 22, at 7 (Alliance statement) (arguing legislation necessary to convey property rights); *id.* at 43 (statement of Peter Shelley of the Conservation Law Foundation) (conceding legislation needed).

95. *Supra* notes 80-87 and accompanying text (considering potential property rights issues with non-extractive uses).

96. *Infra* Part III (evaluating current alternatives for OCS management).

97. H.R. 793, *supra* note 22 (proposing OCSLA amendments and new agency authority).

98. See John Leaning, *Energy Bill Will Not Have Loophole*, CAPE COD TIMES, Jan. 12, 2004 (discussing controversy over changes to H.R. 793 and potential reintroduction).

99. A Bill to Amend the Outer Continental Shelf Lands Act, H.R. 5156, 107th Cong. (2002) [hereinafter H.R. 5156]; *Hearings on H.R. 793*, *supra* note 22, at 45 (statement of Peter Shelley of the Conservation Law Foundation) (referring to failure of similar bill).

100. Cape Wind Associates, *Cape Wind Project Timeline*, at <http://www.capewind.org/modules.php?op=modload&name=Sections&file=index&req=viewarticle&artid=26&page=1> (last visited Oct. 28, 2004) (showing project status and continuing progress); U.S. ARMY CORPS OF ENGINEERS, NEW ENGLAND DISTRICT, *supra* note 4 (relating current status of Cape Wind project).

101. H.R. 793, *supra* note 22 (amending OCSLA to include renewable energy projects).

102. H.R. 793, *supra* note 22 (granting power to Secretary of Interior to regulate renewable energy on

rights-of-way and to charge one-time or yearly payments for the use.¹⁰³ Other important additions allow for the Secretary to promulgate regulations for evaluation of applications on a competitive or non-competitive basis, and demand that easement-holders post a form of security before commencing construction.¹⁰⁴ Within this general grant of power, the Secretary would have the authority to design and implement a system for appropriate review of plant proposals, project approvals, and ongoing regulation.¹⁰⁵

H.R. 793, however, is vague and somewhat general, and does not list specific undertakings for the Secretary.¹⁰⁶ The intent of the amendment is apparently to hand the DOI control of renewable energy projects and allow it to develop its own system to answer the many concerns raised by the current wind farm proposals.¹⁰⁷ Under the circumstances, it is somewhat difficult to evaluate the potential of H.R. 793 to resolve the debate. If enacted, interested parties would essentially have to wait and see how the Secretary chose to wield the new amendment powers before they could understand its effect.¹⁰⁸

The supporters of the proposed amendment to OCSLA tout it as a natural progression.¹⁰⁹ Proponents cite DOI's demonstrated experience and successful regulation of extractive OCS uses as evidence that enlarging the scope of its powers is a logical step.¹¹⁰ Supporters acknowledge that H.R. 793 is broad, but claim it is appropriately so, because it will allow the DOI flexibility in shaping a regulatory regime for offshore renewable energy.¹¹¹ The Director of the MMS, Johnnie Burton, notes that even though H.R. 793 is a broad sweep, it is still a large step toward clarifying a murky situation.¹¹² According to Burton, the DOI and MMS are prepared to design a process that would include input from affected states and provide for appropriate safety and environmental review.¹¹³ Scientists in support of wind power also support the absence of any

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103. H.R. 793, *supra* note 22 (explaining property right allocation).

104. H.R. 793, *supra* note 22 (describing powers granted to Secretary).

105. H.R. 793, *supra* note 22 (granting Secretary power to design regulation). The broad language of the amendment lists goals and abilities that the Secretary would have without specifying limits to these powers. *Id.*

106. H.R. 793, *supra* note 22 (allowing broad discretion to Secretary in establishing regulations); *Hearings on H.R. 793*, *supra* note 22, at 10 (Alliance statement) (criticizing H.R. 793 for lack of specificity).

107. H.R. 793, *supra* note 22 (enabling DOI to design renewable energy regime).

108. *See* H.R. 793, *supra* note 22 (granting broad power to DOI without specific requirements).

109. *Hearings on H.R. 793*, *supra* note 22, at 23 (statement of Johnnie Burton, Director, Minerals Management Service, DOI) (discussing amendment appropriate OCSLA extension).

110. *Hearings on H.R. 793*, *supra* note 22, at 25 (statement of Johnnie Burton, Director, Minerals Management Service, DOI) (referencing DOI and MMS experience with oil and natural gas on the OCS).

111. *Hearings on H.R. 793*, *supra* note 22, at 24 (statement of Johnnie Burton, Director, Minerals Management Service, DOI) (commenting on flexibility of OCSLA and amendment).

112. *Hearings on H.R. 793*, *supra* note 22, at 25 (statement of Johnnie Burton, Director, Minerals Management Service, DOI) (noting amendment will clarify process).

113. *Hearings on H.R. 793*, *supra* note 22, at 25 (statement of Johnnie Burton, Director, Minerals Management Service, DOI) (describing potential forms of regulation for renewable proposals).

specific rents or qualifications specified in H.R. 793.¹¹⁴ Among the private companies seeking to construct wind farms, the response to H.R. 793 is again mild, because Corps approval will still be necessary.¹¹⁵ It appears that, due to the absence of any specifically stringent requirements for approval, the scientists and wind farm companies have little or no objection to DOI supervision of renewable energy on the OCS.¹¹⁶

While everything Director Burton claims the DOI and MMS could do under H.R. 793 is certainly possible, opponents have voiced concern that the statute's vagaries leaves the details of the program entirely up to this agency, because it contains almost no specific requirements.¹¹⁷ For example, the Alliance to Protect Nantucket Sound (Alliance) vigorously supports legislation at the federal level, but finds H.R. 793 far too general.¹¹⁸ The Alliance has demanded Congress develop a comprehensive program to handle proposed projects and ongoing supervision of such projects.¹¹⁹ In addition, the Alliance has called for a moratorium on all offshore renewable energy projects until Congress implements such a program.¹²⁰ The comprehensive program envisioned by the Alliance would "encourage wise and needed energy development, guarantee a fair return for the taxpayers, set uniform standards for environmental protection, and provide extensive state, local and public participation in the process."¹²¹ The Alliance contends that the OCSLA provides quite clear

114. *Hearings on H.R. 793*, *supra* note 22, at 43 (statement of Bruce H. Bailey, President, AWS Scientific, Inc.) (noting appropriateness of Secretarial discretion in establishing payments for easements and rights-of-way). As land-based wind farms pay for the use of the land they occupy, there is no reason to believe that the wind industry would object to reasonable payments for the same rights offshore. *Id.* Land-based projects, however, currently enjoy preferential review for projects on public lands. *Id.* Wind power supporters would like to see the DOI establish similar programs for offshore projects, should H.R. 793 become law. *Id.* Unlike oil and natural gas, renewable energy plants would not deplete or remove anything from the OCS, giving support to arguments for reduced payments for this use. *Id.*

115. Email from Bob Link, President, Winergy LLC, to Suzanne C. Breslor, Student, Suffolk University Law School (Feb. 4, 2003, 16:39 EDT) (on file with author) (recognizing authority permanently vested in Corps).

116. *See supra* notes 114-15 (discussing testimony and commentary by scientific community and private wind developer).

117. *Hearings on H.R. 793*, *supra* note 22, at 8-9 (Alliance statement) (claiming H.R. 793 lacks specificity).

118. *Hearings on H.R. 793*, *supra* note 22, at 8-9 (Alliance statement) (voicing support for more specific legislation).

119. *Hearings on H.R. 793*, *supra* note 22, at 10-13 (Alliance statement) (describing necessary regulation).

120. *Hearings on H.R. 793*, *supra* note 22, at 9 (Alliance statement) (demanding project approvals halted while legislation developed). Wind farm proponents counter that a moratorium will be far more than a temporary set back. *Id.* at 46 (statement of Peter Shelley of the Conservation Law Foundation). Groups such as Environmental Defense, the Conservation Law Foundation, and the Union of Concerned Scientists argue that a moratorium at this stage will stifle interest from private companies. *Id.* Others point out that the United States is already behind Europe in taking advantage of this resource, and that further delay is inappropriate. Sonal Patel, *Offshore Wind Farms: Who is Taking the Wind Out of Their Sails?* 4 (2003) (unpublished paper, George Washington University Law School) (describing United States as lagging behind European nations).

121. *Hearings on H.R. 793*, *supra* note 22, at 9 (Alliance statement) (supporting comprehensive plan for OCS). Based on the Alliance's federal court case, it is apparent that the group's number one concern is the lack

guidance for oil and natural gas drilling, allowing for a competitive bidding process, and supervision and input from affected states.¹²² Moreover, the Alliance would support a provision that made more sections of OCSLA applicable to renewable energy projects.¹²³

Several environmental groups have expressed opposition to H.R. 793.¹²⁴ These groups object to non-extractive energy uses falling under the control of an administrative agency with little or no experience and familiarity with these projects.¹²⁵ Many suggest responsibility for renewable energy oversight should go to agencies with ocean management experience, such as NOAA and the National Marine Fisheries Service.¹²⁶ Like the Alliance, these groups also urge that any federal legislation on the subject should mandate state involvement.¹²⁷ Essentially, those opposed to H.R. 793 object on the grounds that the statute lacks specificity, and therefore does nothing to solve existing concerns and places the responsibility for ironing out these details in the wrong hands.¹²⁸

The fate of H.R. 793 remains uncertain, however, it is the second iteration of the legislation.¹²⁹ In November 2003 Representative Cubin added a provision to the Energy Policy Act of 2003 which would have made similar amendments to OCSLA as H.R. 793.¹³⁰ As a practical matter, the actual structure of a DOI-

of state and public input on the current Corps approval process. See *Alliance to Protect Nantucket Sound, Inc. v. U.S. Dep't of the Army*, 288 F. Supp. 2d 64, 78 (D. Mass. 2003).

122. *Hearings on H.R. 793*, *supra* note 22, at 10 (Alliance statement) (considering OCSLA provisions regarding extractive resources as template for non-extractive uses).

123. *Hearings on H.R. 793*, *supra* note 22, at 10 (Alliance statement). H.R. 793 amends only section 8 of OCSLA. H.R. 793, *supra* note 22 (revising OCSLA to include renewable resources).

124. *Hearings on H.R. 793*, *supra* note 22, at 45 (statement of Peter Shelley of the Conservation Law Foundation) (arguing H.R. 793 overly broad and lacking sufficient structure.)

125. *Hearings on H.R. 793*, *supra* note 22, at 45 (statement of Peter Shelley of the Conservation Law Foundation) (criticizing H.R. 793 for lack of DOI experience with renewable energy). Environmentalists also claim DOI management of oil and natural gas resources has been environmentally damaging. *Id.*

126. *Hearings on H.R. 793*, *supra* note 22, at 45-46 (statement of Peter Shelley of the Conservation Law Foundation) (calling for larger role for NOAA and National Marine Fisheries Service, and criticizing DOI involvement).

127. *Hearings on H.R. 793*, *supra* note 22, at 46 (statement of Peter Shelley of the Conservation Law Foundation) (calling for state environmental agency and gubernatorial input in review and permitting processes).

128. *Hearings on H.R. 793*, *supra* note 22, at 46 (statement of Peter Shelley of the Conservation Law Foundation) (discounting H.R. 793's selection of DOI as monitoring agency); *id.* at 10 (Alliance statement) (calling H.R. 793 unspecific); see *supra* notes 117-27 (discussing opposition arguments against H.R. 793).

129. See H.R. 5156, *supra* note 99 (representing earlier attempt to pass similar legislation); see also Jack Coleman, *What's in Bill for Wind Farm?*, CAPE COD TIMES, Jan. 3, 2004 (considering additions to federal energy bill and upcoming debates on exemptions); Leaning, *supra* note 98 (speculating on reintroduction of 2003 Energy Policy Act to Congress in 2004).

130. Energy Policy Act of 2003, H.R. 6, 108th Cong. § 321 (2003) [hereinafter H.R. 6] (adding OCSLA amendments providing for alternate energy-related uses). Section 321, like H.R. 793, grants authority to the DOI, but includes language requiring consultation with the Secretary of Defense and "other appropriate agencies concerning issues related to national security and navigational obstruction." *Id.* The section requires the promulgation of regulations within 270 days of the enactment of the act. *Id.* In other respects, this version of Representative Cubin's OCSLA amendments are no different than earlier attempts. See H.R. 5156, *supra* note 99; H.R. 793, *supra* note 22 (amending OCSLA to grant DOI control over alternative energy projects on

managed offshore renewable energy program would remain largely unclear until the Secretary promulgated regulations.¹³¹ In the meantime, concerns surrounding the pending wind projects have led to an argument on whether Congress should allow an exception to the application of H.R. 793 or any similar legislation for projects already proceeding under the Corps processes.¹³²

A savings provision added to the Energy Policy Act version of the OCSLA amendments would exempt projects in construction or approval phases from “any resubmittal of documents previously submitted or any reauthorization of actions previously authorized.”¹³³ This provision has enraged the opponents of projects such as Cape Wind, who claim such “special treatment” would exempt such projects deemed appropriate by Congress from review.¹³⁴ The MMS argues that this savings provision does not create an across-the-board exemption, and would merely serve to eliminate the need for companies like CWA to resubmit applications for approval already granted.¹³⁵ Lawmakers and citizen groups, as well as private developers and the scientific community will be watching the future of H.R. 793 and the Energy Policy Act of 2003 closely.

B. H.R. 1183: Coastal Zone Renewable Energy Promotion Act of 2003

In March of 2003, Representative William Delahunt (D-MA) and Representative Saxton (R-NJ) introduced House Bill 1183, the Coastal Zone Renewable Energy Promotion Act of 2003 (H.R. 1183), as an alternative solution to the offshore renewable energy crisis.¹³⁶ H.R. 1183 would amend

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131. H.R. 6, *supra* note 130 (granting similarly vague powers to Secretary of Interior); H.R. 793, *supra* note 22 (allowing Secretary of Interior broad discretion to establish regime).

132. *Hearings on H.R. 793*, *supra* note 22, at 43 (testimony of Bruce H. Bailey, President, AWS Scientific, Inc.) (calling for special consideration to existing projects in order to avoid delay); Leaning, *supra* note 98 (discussing potential consideration for existing projects). Were H.R. 793 or the Energy Policy Act to become law, Corps section 10 approval would still be required for any project. 33 U.S.C. § 403 (2004) (requiring Corps approval for projects interfering with navigation in navigable waters).

133. H.R. 6, *supra* note 130 (including savings provision for projects already underway).

134. Leaning, *supra* note 98 (relating Alliance members' concerns about savings provision).

135. Leaning, *supra* note 98 (quoting deputy director of MMS regarding savings provision). Specific language regarding projects with existing test facilities has led the Alliance to argue that Cape Wind is receiving special treatment. *Id.* (reporting citizen outcry over provision); *see also* H.R. 6, *supra* note 130 (allowing exemptions for projects undergoing approval or construction).

136. H.R. 1183, *supra* note 22. Representative Delahunt represents the Tenth District of Massachusetts, which includes Cape Cod and the islands of Martha's Vineyard and Nantucket. *Website of Representative Bill Delahunt*, at <http://www.house.gov/delahunt/welcome.htm> (last visited Oct. 28, 2004). Delahunt has faced tremendous pressure from his constituency regarding the Cape Wind project, and proposed H.R. 1183 to remedy the lack of state and local involvement in the Corps' permitting process. Coleman, *supra* note 90 (describing Delahunt's bill as response to perceived failings of H.R. 793). Windpower companies have also targeted New Jersey, Representative Saxton's state, for potential windfarm development. *See* Todd B. Bates, *An Answer on Energy: Blowing in the Wind? Wind Turbines Proposed Offshore*, ASBURY PARK PRESS, Oct. 5, 2003, available at <http://www.jerseyshorenuclearwatch.org/JerseyShoreNuclearWatch%20An%20Answer%20On%20Energy%20-Oct%205%202003%20APP.htm> (describing proposed windfarm projects in New Jersey); Colleen Diskin, *New Jersey Debates Harvesting Wind for Renewable Energy*, CAPE COD TIMES, Nov. 10, 2003,

the Coastal Zone Management Act of 1972 and put regulating authority for non-extractive renewable energy projects in the hands of NOAA.¹³⁷ The bill provides guidelines for licensing approval, as well as specifying fees and acceptable locations for renewable power projects.¹³⁸

The CZMA in its current form defines the Coastal Zone as limited to the three-mile mark from the shoreline.¹³⁹ Title II of H.R. 1183 would add a section to the CZMA to include renewable energy projects seaward of the coastal zone in the Commerce Department's approval authority, through NOAA.¹⁴⁰ This section would provide strict procedures for the application and granting of a license to a corporation interested in constructing a renewable energy plant on the OCS.¹⁴¹ In addition to listing requirements for consultation with other potentially affected agencies and the public, Title II of H.R. 1183 sets forth a competitive system for potential sites.¹⁴² When a company submits a letter of intent to the Secretary, this section would require mandatory posting in the Federal Register, and a minimum of a sixty-day period during which the Secretary would accept competing proposals for the same location.¹⁴³ The Secretary would then evaluate all the applications together, subjecting them to public comment and the requirements of the statute.¹⁴⁴ This includes an environmental impact statement, approval of the Secretaries of Transportation and Energy and the Corps, and an evaluation of the project's effects on fishing, boating, marine life and cultural or historic areas.¹⁴⁵ In this way, the proposal addresses the lack of competition for desirable locations, a major weakness of the current Corps section 10 approval process.¹⁴⁶ The approval process under H.R. 1183 would not be on a first-come, first-served basis.¹⁴⁷ Ideally, this process would grant a license to the most efficient energy producer with the

available at <http://www.capecodonline.com/special/windfarm/winery10.htm> (reviewing New Jersey windfarm plans); Winergy LLC, *Wind Farm Status*, at <http://www.wineryllc.com/index.shtml> (last visited Oct. 28, 2004) (discussing Five Fathom Bank I, II, and III, three proposed windfarm sites in federal waters).

137. CZMA, 16 U.S.C. § 1451-1456b (2004) (outlining program to encourage state maintenance and protection of Coastal Zone); H.R. 1183, *supra* note 22 (naming NOAA overseeing agency for renewable energy on OCS).

138. H.R. 1183, *supra* note 22 (adding CZMA section providing licensing process for renewable energy projects). H.R. 1183 specifically amends CZMA § 1453 and § 1456b, and adds an additional section. *Id.*

139. 16 U.S.C. § 1453(1) (defining "coastal zone" as three miles).

140. H.R. 1183, *supra* note 22.

141. H.R. 1183, *supra* note 22 (setting out amended licensing process for OCS).

142. *See generally* H.R. 1183, *supra* note 22 (detailing competitive process for license approval).

143. H.R. 1183, *supra* note 22 (requiring Federal Register listing of applications by Secretary of Commerce and window for additional applications).

144. H.R. 1183, *supra* note 22 (outlining competitive evaluation process).

145. H.R. 1183, *supra* note 22 (listing prerequisites for granting license).

146. *Hearings on H.R. 793, supra* note 22, at 9-10 (Alliance statement) (criticizing H.R. 793 and current process for lack of competition for sites).

147. *Hearings on H.R. 793, supra* note 22, at 9-10 (Alliance statement) (arguing first-come, first-served approval inappropriate management); *supra* note 141 (detailing competitive approval process for renewable power locations on OCS).

least negative impact on the environment and the coastal communities.¹⁴⁸

H.R. 1183 Title II also incorporates license terms and conditions.¹⁴⁹ It requires that applicants pay an application fee and that license holders pay an annual rent.¹⁵⁰ In addition, Title II requires bonding for the purpose of removal of the facility in the event that the license is no longer effective.¹⁵¹ The section also reiterates that no license can be granted, nor annual fee established, without public notice and comment.¹⁵²

A concern of the Cape Wind opponents is not only the lack of a competitive and thorough approval process, but also the alleged need for advanced planning in the siting of renewable energy plants.¹⁵³ H.R. 1183 Title II would authorize the overseeing agency to immediately begin identifying "priority sites" for renewable energy projects.¹⁵⁴ H.R. 1183 would authorize the Secretary to reduce licensing fees to encourage use of priority sites.¹⁵⁵ Not only does H.R. 1183 provide a potential economic incentive for siting projects in previously identified priority areas, it mandates that approval for any project not located in such an area be accompanied by a determination that the desired location conforms to the priority site criteria.¹⁵⁶ By adding this requirement of priority site identification, H.R. 1183 would necessitate the creation of something akin to a comprehensive plan.¹⁵⁷ In this way, H.R. 1183 would begin to resemble the structure of an ocean zoning plan, but as it would not attempt to plan for all possible uses, the priority site provision would be less complex.¹⁵⁸

Perhaps the most significant difference between H.R. 793 and H.R. 1183 is not the specificity reflected in H.R. 1183.¹⁵⁹ After all, nothing in H.R. 793 would prevent the implementation of similar requirements.¹⁶⁰ The important

148. H.R. 1183, *supra* note 22 (listing evaluation criteria for licensing); *see also Hearings on H.R. 793, supra* note 22, at 46 (statement of Peter Shelley of the Conservation Law Foundation) (calling for competitive term leases for renewable sites).

149. H.R. 1183, *supra* note 22 (listing terms and conditions for issuance and continuation of license).

150. H.R. 1183, *supra* note 22 (describing fees required for licensing). The section does not set the actual fees, rather it leaves the amount of the fees to be determined by the Secretary. *Id.*

151. H.R. 1183, *supra* note 22 (describing bonding requirements).

152. H.R. 1183, *supra* note 22 (noting public comment required for license approval and annual fee determination). The impetus for the bill arose largely from the public outcry and frustration of local officials at the lack of required public comment and state approval under the existing Corps system. Coleman, *supra* note 90 (discussing Massachusetts politicians' actions regarding Cape Wind project).

153. *Hearings on H.R. 793, supra* note 22, at 11 (Alliance statement) (demanding research into acceptable sites for renewable plants).

154. H.R. 1183, *supra* note 22 (requiring priority site identification according to CZMA principles and guidelines).

155. H.R. 1183, *supra* note 22 (granting Secretary permission to reduce project fees for priority sites). The provision also authorizes reduced fees for small projects and projects with reduced environmental effects. *Id.*

156. H.R. 1183, *supra* note 22 (noting requirements for non-priority site approval).

157. *See infra* notes 181-86 and accompanying text (discussing comprehensive plan for all OCS uses).

158. *See infra* notes 181-86 (considering complexity of ocean zoning project).

159. H.R. 1183, *supra* note 22 (setting forth specific requirements for approval).

160. *Supra* notes 106-07, 117-19, 121-24, 128 and accompanying text (discussing open-ended and broad nature of H.R. 793). H.R. 793 would leave the actual structure of the renewable energy regime to the discretion

distinction between H.R. 793's grant of power to the DOI and MMS, and H.R. 1183's allocation to the Department of Commerce and NOAA, reflects a more serious question: whether renewable energy projects should be considered energy projects or ocean installations?¹⁶¹ H.R. 793 would group renewable energy together with natural gas and oil drilling, and probably subject it to similar approval standards.¹⁶² In contrast, the drafters of H.R. 1183 reasoned that renewable energy does not extract anything from the seabed, and therefore should be subject to different management.¹⁶³

While no hearings on H.R. 1183 have been held, it would presumably find a warm response with those parties opposed to H.R. 793.¹⁶⁴ Environmental groups, such as Environmental Defense, the Conservation Law Foundation and the Union of Concerned Scientists, and citizens' groups like the Alliance have expressed the need for a congressional solution with specific regulation and for NOAA control.¹⁶⁵ Provisions of H.R. 1183, however, would make the bill specifically apply to projects currently under development, thereby increasing the scope of the approval process for existing projects.¹⁶⁶ Proponents of wind power have asserted that delaying current and proposed projects will harm the renewable power industry by jeopardizing the investments of these private companies.¹⁶⁷

Representative Delahunt proposed H.R. 1183 in response to the Cape Wind situation, in which local residents and the state government found themselves shut out of the Corps' approval process.¹⁶⁸ H.R. 1183 is far more detailed than H.R. 793 and proponents face an uphill battle arguing for NOAA control, as the DOI and MMS have the longer history of permitting other energy resources on the OCS.¹⁶⁹ On the other hand, NOAA's experience with fisheries

of the DOI. *Id.*

161. See *Hearings on H.R. 793*, *supra* note 22, at 25 (statement of Johnnie Burton, Director, Minerals Management Service, DOI) (supporting DOI authority); *id.* at 46 (statement of Peter Shelley of the Conservation Law Foundation) (referring to NOAA's experience with ocean regulation).

162. *Supra* notes 109-13 (discussing grant of power to DOI/MMS under OCSLA). See *Hearings on H.R. 793*, *supra* note 22 (statement of Johnnie Burton, Director, Minerals Management Service, DOI) (citing DOI experience with oil and natural gas as support for H.R. 793).

163. See H.R. 1183, *supra* note 22 (defining renewable energy resource as non-extractive); see also *Hearings on H.R. 793*, *supra* note 22, at 46 (statement of Peter Shelley of the Conservation Law Foundation) (arguing renewable development different from extractive resources).

164. See *supra* notes 117-28 and accompanying text (exploring opposition to H.R. 793 and reasons). H.R. 1183 answers the criticism regarding the lack of specificity and agency choice in H.R. 793. H.R. 1183, *supra* note 22 (listing licensing requirements and NOAA control).

165. *Hearings on H.R. 793*, *supra* note 22, at 46 (statement of Peter Shelley of the Conservation Law Foundation) (recommending establishment of specific guidelines and NOAA control); *id.* at 10-14 (Alliance statement) (calling for more specific congressional mandate).

166. See H.R. 1183, *supra* note 22.

167. See *Hearings on H.R. 793*, *supra* note 22, at 46 (statement of Peter Shelley of the Conservation Law Foundation) (arguing moratorium on wind project development unnecessary and harmful).

168. See *Hearings on H.R. 793*, *supra* note 22, at 9 (Alliance statement) (criticizing lack of state and local resident input in Corps process); Coleman, *supra* note 90 (referring to Delahunt's intent to propose legislation).

169. See H.R. 1183, *supra* note 22 (identifying proposed licensing requirements).

management demonstrates the agency's familiarity with regulation of the marine environment, and implicates its involvement.¹⁷⁰ Further, strong support by citizen and environmental groups could sustain H.R. 1183.¹⁷¹

C. The Call for "Ocean Zoning"

As discussed above, the siting of renewable power facilities on the OCS is the subject of great debate everywhere from Congress to local town meetings.¹⁷² Yet the issue can be viewed as but one small piece of a larger concept.¹⁷³ Renewable energy is just one of the many issues that would fall under an ocean zoning plan.¹⁷⁴

1. How Would Ocean Zoning Work?

While zoning on land is firmly vested in the states, the management of the OCS is under federal control.¹⁷⁵ The CZMA granted power to states to create management programs for their coastal zones, and many have taken advantage of this.¹⁷⁶ As previously discussed, seaward of the three-mile mark, the OCS is under exclusive federal jurisdiction.¹⁷⁷ This sets the stage for a federally controlled zoning program.¹⁷⁸

Some ocean "zones" already exist.¹⁷⁹ Federal conservation legislation established Marine Protected Areas (Protected Areas), where interference by commercial and sometimes recreational users is limited.¹⁸⁰ NOAA designates

170. *Hearings on H.R. 793*, *supra* note 22, at 46 (statement of Peter Shelley of the Conservation Law Foundation) (recommending NOAA oversight for renewable energy projects).

171. *Supra* Part III.B (considering different groups' support of H.R. 1183). H.R. 1183 provides specifically for input from governors of affected states, thereby potentially engendering support among the governors, a powerful lobby. H.R. 1183, *supra* note 22.

172. *See supra* Part I (chronicling Cape Wind debate).

173. *See generally* PEW OCEANS COMMISSION, *supra* note 9 (describing all areas encompassed in ocean management).

174. *See* Courtney & Wiggin, *supra* note 9 (discussing ocean zoning scope).

175. OCSLA, 43 U.S.C. § 1333 (2004) (granting federal jurisdiction over OCS).

176. *Id.*; *see* Courtney & Wiggin, *supra* note 9, at 9-10 (examining coastal zone projects in Massachusetts and New Jersey); *supra* notes 15 and 18 (discussing examples of state coastal zoning planning in Massachusetts and Florida). H.R. 1183 would increase funding to states electing to design thorough coastal zone management plans. H.R. 1183, *supra* note 22.

177. *Ten Taxpayers Citizen Group v. Cape Wind Assocs.*, 278 F. Supp. 2d 98, 101 (D. Mass. 2003) (determining OCS falls under federal jurisdiction), *aff'd*, 373 F.3d 183 (1st Cir. 2004).

178. *Id.* (ruling OCS controlled by federal, not state government).

179. Courtney & Wiggin, *supra* note 9, at 9-15 (discussing zones created by individual federal statutes).

180. Courtney & Wiggin, *supra* note 9, at 9-15 (defining Protected Area). A Protected Area is established by federal statute, and can limit use of the area and subject it to local planning. *Id.* Nantucket Sound was nominated for Protected Area status in 1980, albeit unsuccessfully. Doreen Leggett, *Should Nantucket Sound Become a Marine Sanctuary?*, UPPER CAPE CODDER, Nov. 7, 2002, available at http://www.townonline.com/news/local_regional/tol_ucc_11072002.htm. Representative Delahunt has revived the possibility of having the Sound classified this way, as an alternate means of preventing the Cape Wind project from moving forward. *Id.*

and manages fisheries, where it closely monitors fish stocks and regulates fishing.¹⁸¹ However, different statutes created all of these zones and they are regulated by different agencies.¹⁸² No comprehensive plan controls or explains their existence, and they have little or no relation to each other.¹⁸³ Existing examples of ocean zones demonstrate that creating zones is possible, but fall far short of functioning as a zoning map.¹⁸⁴

Creating a comprehensive management plan for the OCS would involve mapping, establishing regulations, and designating an oversight authority.¹⁸⁵ Congress could create a new agency charged with ocean management, and task it with creating the comprehensive plan.¹⁸⁶ The agency would create the map and the different zones, and develop a method for challenging or changing the zoning in a particular area.¹⁸⁷ This would allow the plan to evolve and function as plans do on land.¹⁸⁸ The agency would have to grapple with the question of how best to create and assign zones and handle petitions for amendments or administrative relief.¹⁸⁹ One possible solution would be to create several regional (as opposed to one national) zoning boards to manage portions of the OCS under a general grant of zoning power from the agency.¹⁹⁰ While the regional approach may result in less consistency in zoning, it would be more flexible in taking into account the different demands on different areas of the OCS.¹⁹¹

In the alternative, Congress could vest this power in an existing agency, such as NOAA or the DOI, both of which have experience and current authority over OCS activities.¹⁹² In any event, the agency responsible for the creation, implementation, and management of a national ocean zoning plan should be required to collaborate with other interested agencies and coastal states.¹⁹³

181. Courtney & Wiggin, *supra* note 9, at 15 (considering United States' fisheries management).

182. Courtney & Wiggin, *supra* note 9, at 15, 27 (noting lack of uniform control or authority over existing zones).

183. Courtney & Wiggin, *supra* note 9, at 15, 27 (criticizing absence of cohesive zoning plan).

184. Courtney & Wiggin, *supra* note 9, at 15, 27 (noting lack of relation between existing zones).

185. Courtney & Wiggin, *supra* note 9, at 6-8 (detailing functional requirements of ocean zoning); see PEW OCEANS COMMISSION, *supra* note 9, at 102-03 (describing recommended federal ocean act).

186. See PEW OCEANS COMMISSION, *supra* note 9, at 107 (calling for creation of national ocean agency).

187. See *supra* note 47 (explaining procedures for land zoning).

188. See *supra* note 47 (examining land zoning relief procedures). Ocean zoning raises the issue of who would have standing in court to raise a challenge. Courtney & Wiggin, *supra* note 9, at 6-7 (describing absence of private ocean ownership). This issue may be resolved by the addition of a citizen suit provision, allowing private suits for enforcement. PEW OCEANS COMMISSION, *supra* note 9, at 104.

189. See *supra* note 47 (relating local procedures for land zoning).

190. See PEW OCEANS COMMISSION, *supra* note 9, at 104 (considering possibility of regional boards).

191. See Courtney & Wiggin, *supra* note 9, at 18-19 (recommending stakeholder involvement when zoning). While perhaps less consistent, regional ocean zoning would be potentially more accurate. *Id.* at 14 (describing moratorium on oil drilling until 2012 for entire North Atlantic). For example, the ocean and desired uses off the coast of Massachusetts are most likely different from those in the Gulf of Mexico. *Id.*

192. OCSLA, 43 U.S.C. § 1333 (2004) (granting control of OCS to DOI for oil and natural gas drilling); Courtney & Wiggin, *supra* note 9, at 14-15 (referring to fisheries management).

193. See Courtney & Wiggin, *supra* note 9, at 26 (discussing agencies with ocean authority); PEW OCEANS

The development of an ocean management plan would provide numerous benefits now and in the future.¹⁹⁴ A truly *comprehensive* plan would balance competing interests, and provide an amendment process to allow the program to evolve.¹⁹⁵ A zoning plan would be forward-looking and anticipate, rather than react to, advances in technology.¹⁹⁶ The plan would be made up of formal decisions on the best uses for specific areas, and would not make case-by-case determinations or award leases on a first-come, first-served basis.¹⁹⁷ Interested parties would know in advance where wind farms, for example, could be located, thereby minimizing disagreements about project sites, and allowing the focus of project evaluation to be on the benefits of the project itself.¹⁹⁸

Current United States ocean policy lacks coherence and any kind of overarching goal for management.¹⁹⁹ Congress has dolled out authority to different agencies via federal statutes.²⁰⁰ There is no plan, no relation between grants of authority, and no real way to resolve conflicts between uses—all of which has led to the current situation with renewable energy.²⁰¹ The proposed statutes H.R. 793 and H.R. 1183 will simply add to this body of uncoordinated ocean policy.²⁰²

Ocean zoning, however, is certainly no “easy fix.”²⁰³ Creating an ocean zoning regime would take years and a significant financial investment.²⁰⁴ The project would call for intense federal regulation that would have a direct impact on coastal states.²⁰⁵ While many research studies have determined that a need

COMMISSION, *supra* note 9, at 107-08 (listing departments to be included on National Oceans Council). Departments and agencies requiring input would include the Department of Energy, the Corps, the EPA, NOAA, DOI, MMS, the Coast Guard, the State Department, the Department of Defense, the Department of Transportation and the Department of Homeland Security, among others. PEW OCEANS COMMISSION, *supra* note 9, at 107-08.

194. See PEW OCEANS COMMISSION, *supra* note 9, at 102-108 (considering current ocean condition and methods to improve), Courtney & Wiggin, *supra* note 9, at 26-27 (noting future impact of zoning project).

195. Courtney & Wiggin, *supra* note 9, at 17-19 (recommending stakeholder involvement in process); see also *supra* note 47 (detailing revision and relief processes for land zoning).

196. PRELIMINARY REPORT OF THE U.S. COMMISSION ON OCEAN POLICY, GOVERNORS’ DRAFT, WASHINGTON, D.C. 63-66, April 2004 (issuing recommendations for ocean management plan). With a zoning plan in place, the current renewable energy “hole” would not have happened. *Id.* (discussing plan’s ability to incorporate new uses).

197. See *Hearings on H.R. 793*, *supra* note 22, at 9 (Alliance statement) (criticizing lack of competitive or comparative project evaluation).

198. See H.R. 1183, *supra* note 22 (incorporating concept of pre-designated sites in proposed amendment); *Hearings on H.R. 793*, *supra* note 22, at 10-11 (Alliance statement) (calling for pre-designation of sites for windfarms).

199. *Supra* notes 182-84 and accompanying text (referring to otherwise-formed zones).

200. *Supra* notes 182-84 and accompanying text (discussing lack of organized ocean policy).

201. See *supra* notes 83-87 and accompanying text (considering Corps as sole authority over renewable projects and issue with property rights).

202. *Supra* Parts III.A-B (analyzing provisions of H.R. 793 and H.R. 1183).

203. *Supra* Part III.C (considering challenges of ocean zoning).

204. See Courtney & Wiggin, *supra* note 9, at 23 (describing extended process mapping fifteen percent of Gulf of Maine).

205. See *Ten Taxpayers Citizen Group v. Cape Wind Assocs.*, 278 F. Supp. 2d 98, 101 (D. Mass. 2003)

for such management exists, ocean zoning would be years away from implementation, require copious funding and resources, and not resolve any immediate issues regarding OCS usage.²⁰⁶

IV. CONCLUSION

Overall, the development of a comprehensive ocean management plan would provide clear and thorough guidance to developers interested in renewable energy offshore, provided that the project received appropriate congressional guidance and funding. But even under the best circumstances, this would be a large undertaking that would span many years. What would happen in the meantime? Nothing would prevent projects like Cape Wind from moving forward with only Corps approval, without any property rights or lease payments. This would short-change local residents, state governments and United States taxpayers. On the other hand, a moratorium on all offshore renewable energy development of a year or more would effectively put an end to the investment opportunity foreseen by developers like CWA and Winergy. With plans on hold for an indefinite period of time, these companies would have trouble staying in business.

The United States has a need for increased energy independence now. Delaying the construction of alternative power plants will do nothing to stave off our reliance on foreign oil and natural gas. Sadly, ocean zoning is simply too far off to be the answer to the renewable energy issue.

Yet the vagaries of H.R. 793 provide little reassurance that the bill would establish a successful and reliable process. H.R. 793 would certainly resolve the federal government's concern with preventing private companies from using public trust land rent-free, but the bill does not provide for state input, nor does it enthusiastically encourage alternative power. While not a serious threat to the market dominance of natural gas and oil, the lack of measurable standards in H.R. 793 will do nothing to ensure that renewable energy will get a fair shake under the control of the MMS.

Representative Delahunt's H.R. 1183 provided specific guidelines for a renewable energy regime under NOAA authority. Unfortunately, the bill has piqued little interest. The ideas within H.R. 1183 answered many concerns, yet it was quite clearly a reaction to perceived failings of H.R. 793, the Cape Wind situation in Massachusetts and similar circumstances in New Jersey. Also, the stringency of the provisions could prove discouraging to developers.

Congressional action which incorporates the strong points of all of these alternatives is the most appropriate solution. Ocean zoning is ideal, but would or will come too late. H.R. 1183's priority site designation would create a

(determining no state jurisdiction), *aff'd*, 373 F.3d 183 (1st Cir. 2004).

206. Courtney & Wiggin, *supra* note 9, at 23 (noting vast scope of Gulf zoning project); PEW OCEANS COMMISSION, *supra* note 9, at 103-09 (detailing particulars of management project).

forward-looking plan for renewable siting. Provided such sites were identified with input from all sides, developers, environmentalists, and coastal communities would be comfortable.

Both bills allow for the establishment of fees in exchange for lease or use rights. This provision is necessary and acceptable to developers; however, these rights should be conferred as lease rights, with recurring rents, as opposed to one-time payments. H.R. 1183's provisions requiring developers to post an adequate bond to cover removal should be part of any legislation. This is standard treatment for power plants, and is necessary to protect the public interest in the OCS.

The two bills diverge in their selection of agency oversight. While the level of detail of H.R. 1183's licensing requirements should be preserved, ultimately Congress should recognize that renewable energy plants are power plants that will operate along side oilrigs and natural gas lines. Renewable energy projects should fall under the governance of the DOI with mandatory cooperation with the Department of Energy. NOAA consultation should also be required, especially for the identification of priority sites. NOAA's experience lies in protecting the ocean resources, as evidenced by its fisheries management. MMS experience and oversight of the OCS should not be brushed aside simply because it currently does not have any experience with alternative energy. With the appropriate amount of statutory guidance, renewable energy projects can thrive under DOI/MMS oversight.

In essence, this Note advocates a new bill that would incorporate the priority site designation and the specificity of the process outlined in H.R. 1183, with H.R. 793's selection of the DOI as the controlling agency. Ideally, the United States will follow the recommendations of the Pew Oceans Commission report and create a new agency to guide OCS use, at which time oversight for all uses in the area would fall under the new agency's authority.

There is a hole in the United States policy for managing the Outer Continental Shelf, and renewable energy projects have fallen squarely inside of it. Congress must act quickly to provide a process for the approval of these projects to ensure protection of the public interest and promotion of alternative energy. If such action is not taken quickly, a band-aid solution—a hasty amendment tacked on to other legislation—will probably pass in the near future, and will not provide appropriate consideration for all interested parties.

Walter Cronkite, one of the most respected figures in American journalism, has had a difficult time resolving this issue. With appropriate congressional action, local citizens will no longer be put in a position of having to choose between unspoiled coastline and alternative energy.

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