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THE SLIPPERY SHELF: CEDING THE PUBLIC TRUST TO ADMINISTRATIVE AMBIVALENCE IN OFFSHORE DEVELOPMENT

RACHEL GANONG*

INTRODUCTION

After ten years in the gauntlet of the administrative approval process, Massachusetts-based Cape Wind Associates secured the last of the requisite federal permits to begin construction on the nation's first offshore wind farm in January 2011.¹ While the two billion dollar project still needs financing before construction begins,² federal approval of the project sets the stage for converting the hypothetical potential of offshore wind power into a reality.

Despite this milestone, the Cape Wind saga has illustrated the difficulties encountered through the regulatory framework for offshore development.³ If the Cape Wind saga failed to attract attention to it, the regulation of offshore development activities has come under increased scrutiny with the failure of administrative oversight in the Deepwater Horizon oil leak.⁴ Exactly who governs development and safeguards enforcement of regulations in the outer continental land shelf emerged as an issue,⁵

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¹ *Cape Wind Gets Its Final Federal Permit*, BOSTON GLOBE, Jan. 8, 2011, http://www.boston.com/lifestyle/green/articles/2011/01/08/cape_wind_gets_its_final_federal_permit/.

² *Id.*

³ See Thomas Arthur Utzinger, *Federal Permitting Issues Related to Offshore Wind Energy, Using the Cape Wind Project in Massachusetts as an Illustration*, 34 ENVTL. L. REP. 10,794 (2004) (noting three possible federal permitting challenges to the Cape Wind project).

⁴ See generally *Gulf of Mexico Oil Spill*, N.Y. TIMES, Oct. 28, 2010, http://topics.nytimes.com/top/reference/timestopics/subjects/o/oil_spills/gulf_of_mexico_2010/index.html (compiling coverage and updates on the 86-day spill).

⁵ Ian Urbina, *At Issue in Gulf: Who Was in Charge?*, N.Y. TIMES, June 6, 2010, at A1 (noting that "at least a dozen federal agencies have taken part in the spill response, making decision-making slow, conflicted and confused, as they sought to apply numerous federal statutes.").

along with millions of gallons of oil, during this highly publicized environmental fiasco.⁶

While the Cape Wind approval process has theoretically ended⁷ and oil has stopped flowing from the Deepwater Horizon leak,⁸ the question of offshore development merits continued attention.⁹ For example, in October, Google and a New York financial firm agreed to invest in a five billion dollar offshore wind power transmission line that would stretch from New Jersey to Norfolk, Virginia.¹⁰ The transmission line, set for construction in 2013 but not likely to be completed before 2021, would cut down on government permitting processes by having only four connection points to land in an attempt to jump-start the American wind energy industry.¹¹ Additionally, the U.S. Department of Energy has said it intends to spend \$50.5 million over the next five years and grant expedited reviews to spur offshore wind farm development off the coasts of Virginia, Maryland, Delaware, and New Jersey in an effort to meet President Obama's goal of generating eighty percent of the nation's energy from renewable sources.¹² These expedited reviews could result in leasing more areas for wind energy production as early as the end of 2011 or the beginning of 2012.¹³ While Europe has commercially harvested wind for centuries,¹⁴ and offshore wind since the 1990s,¹⁵ construction on the Cape

⁶ *Oil Spill Count Was Right, Study Finds*, N.Y. TIMES, Sept. 24, 2010, at A16 (noting that an estimated 172–185 million gallons of oil spilled into the Gulf of Mexico as a result of the Deepwater Horizon incident).

⁷ *Cape Wind Gets Its Final Federal Permit*, *supra* note 1.

⁸ Campbell Robertson & Henry Fountain, *BP Caps Its Leaking Well, Stopping the Oil After 86 Days*, N.Y. TIMES, July 16, 2010, at A1.

⁹ See Jeremy Firestone et al., *Regulating Offshore Wind Power and Aquaculture: Messages from Land and Sea*, 14 CORNELL J. L. & PUB. POL'Y 71, 91 (2004) ("With the glaring lack of any comprehensive and consistent management framework, it is clear that a new legal regime is needed to address new ocean uses such as offshore wind power and aquaculture.").

¹⁰ Matthew L. Wald, *Offshore Wind Power Line Wins Backing*, N.Y. TIMES, Oct. 12, 2010, at A1.

¹¹ *Id.*

¹² Press Release, U.S. Dep't of Energy, Salazar, Chu Announce Major Offshore Wind Initiatives (Feb. 7, 2011), available at http://apps1.eere.energy.gov/news/progress_alerts.cfm/pa_id=476.

¹³ *Id.*

¹⁴ Peter A. Gish, *Project Financing of Renewable Energy Projects in Europe: An Improving Market*, 22 SUFFOLK TRANSNAT'L L. REV. 405, 408 (noting that Dutch businessmen were powering textile mills with wind in the seventeenth century).

¹⁵ WENDY WILLIAMS & ROBERT WHITCOMB, *CAPE WIND: MONEY, CELEBRITY, CLASS, POLITICS, AND THE BATTLE FOR OUR ENERGY FUTURE ON NANTUCKET SOUND* 15 (2007).

Wind project is expected to start by the end of 2011.¹⁶ With more investment in offshore wind farms¹⁷ and the impending construction of Cape Wind as the nation's first and world's largest offshore wind farming project,¹⁸ closer inspection of the regulatory framework for offshore wind projects is merited.

Much has already been said. The Massachusetts Supreme Court approved the state's regulatory process in August 2010, clearing yet another challenge to Cape Wind's epic permitting process by sanctioning approval for all the necessary state and local permits.¹⁹ While multiple law suits challenging the project are still pending, the federal government has also granted all the requisite permits for the project, enabling construction to start in fall 2011.²⁰ The Massachusetts Supreme Court decision, *Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Board*,²¹ called "outrageous" by opponents,²² raised questions about the extent of local governance over projects partly traversing a state's submerged lands, but physically sited in waters under federal jurisdiction.²³ If states are precluded from evaluating the overall impact of projects, even those that only fall within their jurisdiction by virtue of a cable transmission line,²⁴ then how will they be able to protect their citizens from adverse project externalities? How, too, will state officials perform their duty of safeguarding the interests of citizens as codified in public trust

¹⁶ Beth Daley, *SJC Ruling Gives Cape Wind Project Green Light to Build*, BOSTON GLOBE, Sept. 1, 2010, at A1, available at http://www.boston.com/lifestyle/green/articles/2010/09/01/sjc_ruling_gives_cape_wind_project_green_light_to_build/.

¹⁷ Wald, *supra* note 10.

¹⁸ Michael P. Giordano, Comment, *Offshore Windfall: What Approval of the United States' First Offshore Wind Project Means for the Offshore Wind Energy Industry*, 44 U. RICH. L. REV. 1149, 1150 (2010).

¹⁹ Daley, *supra* note 16, at A1.

²⁰ Beth Daley, *U.S. Gives Green Light to Cape Wind Project*, BOSTON GLOBE, April 20, 2011, http://articles.boston.com/2011-04-20/news/29451876_1_cape-wind-project-offshore-wind-audra-parker.

²¹ *Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd.*, 932 N.E.2d 787 (Mass. 2010).

²² Daley, *supra* note 16, at A1.

²³ Technically, the federal government can regulate "commerce, navigation, power generation, national defense and international affairs" even throughout a state's three-mile territorial sea, while the states are granted authority to manage these areas in ways consistent with the public trust doctrine. NAT'L OCEANIC AND ATMOSPHERIC ADMIN., PRIMER ON OCEAN JURISDICTIONS: DRAWING LINES IN THE WATER 71 (2011), available at <http://aquaculture.noaa.gov/pdf/uscopgrapocbnd.pdf>. The federal government has exclusive jurisdiction over seabed resources up to 200 miles off of its coast. *Id.*

²⁴ See Erica Schroeder, *Turning Offshore Wind On*, 98 CAL. L. REV. 1631, 1644 (2010).

doctrines,²⁵ which assert that certain resources belong to the public under the guardianship of their government?²⁶

Whether they are offshore wind farms or seabed mining operations, many of these projects sit outside the three-mile mark of a state's jurisdiction²⁷ but nonetheless impact the adjacent coastal states.²⁸ In regard to offshore wind farming, many of these impacts are positive and benefit the rest of a country cognizant of the need for renewable energy.²⁹ However, the existing regulatory framework may fail to guard against potential negative impacts to the states, particularly when viewed in light of the public trust doctrine.³⁰ These negative impacts may include impediments to navigation, disruption of fish populations, avian mortality, noise, radiation pollution, and aesthetic impairment.³¹ Failing to guard against

²⁵ The Justinian Code first codified the use of the sea and seashore for public use in 50 A.D. as part of Roman civil law, stating:

By the law of nature these things are common to all mankind—the air, running water, the sea, and consequently the shores of the sea. No one, therefore, is forbidden to approach the seashore, provided that he respects habitations, monuments, and the buildings, which are not, like the sea, subject only to the law of nations.

See N.J. ADMIN. CODE § 7:7E-3.50, Comment 80(e) (2011). For a discussion on the public trust doctrine, see generally JACK H. ARCHER ET AL., *THE PUBLIC TRUST DOCTRINE AND THE MANAGEMENT OF AMERICA'S COASTS* (1994). For a specific discussion on the historical development of the Massachusetts Public Trust doctrine, see MASS. OFFICE OF COASTAL ZONE MGMT., *THE OCEAN AS A PUBLIC TRUST RESOURCE* (Mar. 2011), available at http://www.mass.gov/czm/oceanmanagement/waves_of_change/pdf/trpt.pdf.

²⁶ See George P. Smith II & Michael W. Sweeney, *The Public Trust Doctrine and Natural Law: Emanations Within a Penumbra*, 33 B.C. ENVTL. AFF. L. REV. 307, 308 (2006).

²⁷ *Id.* at 310; 43 U.S.C. § 1301 (2006).

²⁸ See Timothy A. Hayden, Comment, *Reception on Nantucket Sound? A Summary of Current Offshore Wind Farm Litigation and a Federal Legislative Proposal Taking Cues From Cellular Tower Legislation*, 13 PENN STATE ENVTL. L. REV. 217, 227 (2005) (listing negative impacts of offshore wind projects).

²⁹ Ronald H. Rosenberg, *Making Renewable Energy a Reality—Finding Ways to Site Wind Power Facilities*, 32 WM. & MARY ENVTL. L. & POL'Y REV. 635, 646 (2008) (noting increasing demand for electricity and the ramifications of heavy coal reliance have increased support for renewable energy).

³⁰ See Hayden, *supra* note 28, at 227 (listing negative impacts of offshore wind projects).

³¹ See *id.* (noting that offshore wind farm complaints compare to those registered against cell phone towers and “include arguments that the structures amount to eyesores, that wildlife will be adversely affected by their existence, and that they are sources of pollutants that will harm their surrounding environment. It is also argued that the culmination of these factors causes a drop in property values.”); Elizabeth A. Ransom, *Wind Power Development on the United States Outer Continental Shelf: Balancing Efficient Development and Environmental Risks in the Shadow of the OCSLA*, 31 B.C. ENVTL. AFF. L. REV. 465, 471–72 (2004) (noting that project turbines could kill birds on the “Atlantic

these negative externalities presents a problem for states, especially when meeting national wind power generation goals, and will require siting thousands of wind farms across the country both on land and offshore.³² This Note argues that before such development occurs, Congress should pass legislation allowing adjacent coastal states to issue environmental assessments of the full impact to their shores of development of wind power projects sited in federal waters. Further, this Note suggests such an analysis should require a federal response to any negative impacts before additional project approvals, thereby allowing states to exercise their role as public trust arbiters while reserving ultimate jurisdiction of federal waters to the federal government.

Such legislation is necessary in the wake of the Massachusetts Supreme Court's *Alliance* decision.³³ The case illustrates how states can yield their public trust responsibilities for sea resources to federal administrative agencies with different and often highly specific regulatory foci, leaving the public trust doctrine vulnerable and in danger of erosion.³⁴ This Note will discuss how offshore projects in federally regulated waters can negatively impact the lands and shores of neighboring states charged with protecting those resources under the public trust.³⁵ Additionally, it will propose that state and federal regulations should allow for regulatory agencies in states like Massachusetts to consider the full scope of a project's impact to their coasts even when such a project has little appreciable connection to its physical jurisdiction.³⁶

Specifically, Part I of this Note will detail the Cape Wind project and its proposed benefit. Part II will discuss the *Alliance* decision and dissent. Part III will outline considerations for siting offshore projects given the public trust roles of federal and state actors. Part IV will look at past efforts to resolve tensions between federal and state siting prerogatives. Part IV will also espouse a solution that will allow states to safeguard public trust interests without stripping federal agencies of their jurisdictional prerogatives.

Flyway," a major migration path, that magnetic fields created by electric transmission cables could interfere with aquatic species navigational abilities, and that turbine pilings could form artificial reefs jeopardizing commercially valuable indigenous fish).

³² Ransom, *supra* note 31, at 657–58.

³³ *Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd.*, 932 N.E.2d 787, 799–800 (Mass. 2010).

³⁴ See *infra* Part II.

³⁵ See *infra* Part III.A.

³⁶ See *infra* Part III.B.

I. THE CAPE WIND STORY

In many respects, the Cape Wind story represents a standard Not-In-My-Backyard conflict. Professor Ronald Rosenberg's generalization about opposition to wind power could easily be a summary of the Cape Wind saga:

Opponents of wind power usually do not dispute the benefits of the technology. Rather, they frequently concentrate on specific adverse environmental or natural resource impacts of facility siting at particular locations. To them, wind-generated power is a good thing as long as it is produced somewhere else. These opponents have been characterized as classic not in my backyard believers and those who would stifle this emerging carbon-free electrical generation. The points made by both sides in this sometimes contentious debate have been wide-ranging and always deeply felt.³⁷

But the Cape Wind story is slightly more nuanced in that the "backyard" of the Nantucket Sound belongs to everybody under the earliest expressions of the public trust doctrine in the Justinian Code, which recognizes the natural law right of mankind to the sea and other natural resources.³⁸ When a project is located in the midst of an ocean landscape, as is the case with the Cape Wind offshore wind farm,³⁹ it can tangentially impact half the nation's gross domestic product and more than half its population.⁴⁰ Given its placement in so great a public resource, it follows that the impact of this project, and similar ones, on this public resource should be comprehensively evaluated.⁴¹

The Cape Wind project has made waves since its inception, although it has not harnessed a single breeze to date.⁴² An enterprise of

³⁷ See Rosenberg, *supra* note 29, at 658–59.

³⁸ See Smith & Sweeney, *supra* note 26, at 310.

³⁹ Angela Coulombis, *A Proposed Wind Farm of Cape Cod Raises Howls; The Plan Promises Clean Energy*, PHILADELPHIA INQUIRER, Aug. 5, 2003, at A1, available at http://articles.philly.com/2003-08-05/news/25455355_1_wind-farm-cape-wind-associates-nantucket-sound.

⁴⁰ U.S. COMM'N ON OCEAN POLICY, AN OCEAN BLUEPRINT FOR THE 21ST CENTURY: FINAL REPORT 2 (2004), available at http://govinfo.library.unt.edu/oceancommission/documents/full_color_rpt/000_ocean_full_report.pdf.

⁴¹ *Id.* at 367.

⁴² Jay Lindsay, *Wanted: Buyer for Controversial Cape Wind Energy*, BOSTON GLOBE, Dec. 19, 2010, http://www.boston.com/news/local/maine/articles/2010/12/19/wanted_buyer

power developer Jim Gordon,⁴³ the Cape Wind project entails placing 130 wind turbines in the shallow waters of Horseshoe Shoal in the Nantucket Sound, five miles from Hyannis and seven miles from Nantucket Island.⁴⁴ The proposed 400-foot tall turbines would look half an inch tall on the horizon from the closest shore.⁴⁵ From an energy production perspective, the shallow site with strong winds suited the project perhaps better than any other site off U.S. shores.⁴⁶ Turbines spaced half a mile apart would be bolted in the ocean floor with steel pilings that would pump electricity through an underwater cable to transmission lines on Cape Cod.⁴⁷ The two transmission lines would traverse the Nantucket Sound and Lewis Bay under the seabed for 12.5 miles and, onshore, continue another 5.9 miles underground through the towns of Yarmouth and Barnstable until cables reach a switching station in Barnstable.⁴⁸ Through these copper and fiber optic cable lines,⁴⁹ the project would have the capacity to generate 420 megawatts of electricity in federal waters as one of the largest offshore energy projects in the world.⁵⁰

As a two billion dollar investment,⁵¹ a sum which has at least tripled from its initial investment estimate,⁵² the project promises renewable energy.⁵³ But the energy does not come cheaply: electricity generated

_for_controversial_cape_wind_energy/ (reporting that the project has incurred a decade's worth of opposition well in advance of its projected 2012 start date).

⁴³ Jeffrey Krasner, *Offshore Wind Farm Blows into Cape View*, BOSTON GLOBE, July 28, 2001, at A1 (noting that Gordon founded Energy Management, which developed power plants in three New England states during the 1980s and then sold its holdings for \$250 million before Gordon introduced the Cape Wind plan). Gordon formed Cape Wind Associates with partners Brian Braginton-Smith, a Cape Cod native who had been peddling the idea of a Cape Code wind farm for ten years, and Brian Caffyn, who ran a company that operated wind farms in Italy. *Id.* The three formed Cape Wind Associates in 2001. *Id.*

⁴⁴ *Id.*; see also *Project at a Glance*, CAPEWIND.ORG, <http://www.capewind.org/article24.htm> (last visited Oct. 13, 2011).

⁴⁵ Coulombis, *supra* note 39.

⁴⁶ Krasner, *supra* note 43.

⁴⁷ *Id.*

⁴⁸ Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd., 932 N.E.2d 787, 792 (2010).

⁴⁹ *Id.*

⁵⁰ Greg Watson & Fara Courtney, *Nantucket Sound Offshore Wind Stakeholder Process*, 31 B.C. ENVTL. AFF. L. REV. 263, 264 (2004).

⁵¹ Jay Fitzgerald, *Cape Wind Rate Shock; Electricity Will Cost Twice as Much as Power Plants*, BOSTON HERALD, May 8, 2010, at Finance 14.

⁵² *Id.*; see also Krasner, *supra* note 43.

⁵³ *Project at a Glance*, *supra* note 44.

from the plant will cost twice as much as energy generated from other sources.⁵⁴ Although it would add only about five cents per day to ratepayers' electric bills, due to its high cost, the Cape Wind project would qualify for \$600 million in taxpayer subsidies.⁵⁵

High energy cost is only one objection to the project.⁵⁶ Despite its introduction into a cultural milieu of the Kyoto protocols,⁵⁷ renewable energy credits, and increasing concern about climate change,⁵⁸ the project immediately encountered criticisms due to its disruption of the horizon and potential impacts on boating.⁵⁹ Project opponents mounted a host of other environmental, constitutional, practical, and aesthetic concerns as well.⁶⁰

Proposed in the summer of 2001,⁶¹ the project is now closing in on a decade of administrative approvals and relentless resistance.⁶² For example, the project received the nation's first ever offshore wind lease in October 2010,⁶³ furnishing it with a needed step toward its goal of generating as much as seventy-five percent of Cape Cod's energy demand.⁶⁴ In the same month, project opponents filed another lawsuit complaining of government delay in satisfying a request for public documents.⁶⁵ And the battle to erect Cape Wind continues: the Massachusetts Department of Public Utilities approved a fifteen-year contract between Cape Wind and electrical service provider National Grid for the latter to purchase fifty percent of the wind project's power, concluding that the deal would benefit consumers.⁶⁶

⁵⁴ Fitzgerald, *supra* note 51; *see also* Giordano, *supra* note 18, at 1152–53 (noting that electricity from offshore projects would cost twice as much as energy derived from land-based wind farms).

⁵⁵ Fitzgerald, *supra* note 51.

⁵⁶ *See, e.g.*, Steve LeBlanc, *Group Challenges Wind Power Deal*, BOSTON GLOBE, Dec. 14, 2010, at B6.

⁵⁷ Watson & Courtney, *supra* note 50, at 264.

⁵⁸ *Id.* at 264–65.

⁵⁹ Krasner, *supra* note 43.

⁶⁰ Watson & Courtney, *supra* note 50, at 265 (noting that opponents of the project objected to the “industrialization” of Cape Cod, impacts to birds, navigation, marine life, tourism, property values, and the private, commercial use of public waters).

⁶¹ Krasner, *supra* note 43.

⁶² *See* Beth Daley, *Cape Wind Awarded the Nation's First Offshore Wind Farm Lease*, BOSTON GLOBE, Oct. 7, 2010, at B4.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Wind Farm Opponents Sue for Documents*, BOSTON GLOBE, Oct. 30, 2010, at B2.

⁶⁶ Press Release, Mass. Dep't of Pub. Utilities, Department of Public Utilities Approves Contract for Offshore Wind Power (Nov. 22, 2010), *available at* http://www.mass.gov/?pageID=eoeepressrelease&L=1&L0=Home&sid=Eoeea&b=pressrelease&f=101122_pr_cape_wind&csid=Eoeea.

However, project opponents continue to contest project approvals.⁶⁷ In the midst of this ongoing battle, and before this project and others become operational, perhaps an assessment of whether the complaints of the dissenting voices, insofar as they decry the erosion of citizens' interests in the siting of offshore wind farms, is merited. More specifically, the project spurs the question of whether the Massachusetts Supreme Court's decision in *Alliance*⁶⁸ denotes administrative ambivalence toward the interests circumscribed by the public trust doctrine in the nation's first offshore wind farm?⁶⁹ And, further, does the decision carve out a pattern at risk of being followed by other states?

II. THE DECISION

The Massachusetts Supreme Court's decision in *Alliance* materialized after the defendant Board approved Cape Wind Associates' petition to build and operate two underground, underwater electric transmission cables.⁷⁰ The approval, granted in 2005, would allow Cape Wind to connect the wind turbines to the onshore, regional electric grid.⁷¹ The court affirmed the approval of the Board based on its authority under Massachusetts General Laws, chapter 164, § 69J.⁷² That provision states in relevant part that:

Any electric, gas, or oil company proposing to construct or operate facilities in the commonwealth may petition the board for a certificate of environmental impact and public interest with respect to such facility. The board shall consider such petition providing: the electric, gas or oil company is prevented from building a facility because it cannot meet standards imposed by a state or local agency with commercially available equipment or because the processing or granting by a state or local agency of any approval,

⁶⁷ Beth Daley, *EPA Cape Wind Air Permit Challenged*, THE GREEN BLOG (Feb. 14, 2011, 08:25 PM), http://www.boston.com/lifestyle/green/greenblog/2011/02/epa_cape_wind_air_permit_chall.html (reporting that the Alliance to Protect Nantucket Sound and tribal groups have appealed the Environmental Protection Agency's recent approval for emissions during construction).

⁶⁸ See *Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd.*, 932 N.E.2d 787, 815–16 (Mass. 2010) (Marshall, C.J., dissenting in part and concurring in part).

⁶⁹ Krasner, *supra* note 43.

⁷⁰ *Id.* at 665.

⁷¹ *Id.*

⁷² *Id.*; MASS. GEN. LAWS ANN. ch. 164 § 69J (West 2011).

consent, permit or certificate has been unduly delayed for any reason . . . ; or the electric, gas or oil company believes there are inconsistencies among resource use permits issued by such state or local agencies; or the electric, gas or oil company believes that a nonregulatory issue or condition has been raised or imposed by such state or local agencies such as but not limited to aesthetics and recreation; or the facility cannot be constructed due to any disapprovals, conditions or denials by a state or local agency or body, except with respect to any lands or interests therein, excluding public ways, owned or managed by any state agency or local government.⁷³

Based on this provision, Cape Wind Associates applied for a consolidated petition because the Cape Cod Commission, which serves as the land use and regulatory agency of Barnstable County, Massachusetts,⁷⁴ unanimously denied a necessary permit for the project.⁷⁵ The denial was based on a “lack of information,” despite the fact that the plan had been under review for six years.⁷⁶ Expressing approval of the Cape Cod Commission’s decision, opponents of the project remarked that, of all of the regulatory agencies involved in the project, the Commission cared most about the interests of Cape Cod.⁷⁷ After the denial, Cape Wind applied for a streamlined approval process through Massachusetts’s Energy Facilities Siting Board rather than appeal directly to the Commission.⁷⁸ Newspapers called the move an “end run around local permit battles.”⁷⁹ The Siting Board granted the permit, giving rise to the appeal that ultimately landed before the Massachusetts Supreme Court.⁸⁰ In affirming the Siting Board’s decision,

⁷³ MASS. GEN. LAWS ANN. ch. 164, § 69K (West 2011).

⁷⁴ *CCC Act*, CAPE COD COMMISSION, <http://www.capecodcommission.org/index.php?id=15&maincatid=2> (last visited Oct. 13, 2011).

⁷⁵ Stephanie Ebbert, *Cape Cod Panel Denies Permit for Wind Farm*, BOSTON GLOBE, Oct. 19, 2007, at A1 (reporting in the lead paragraph that “A proposed Nantucket Sound wind farm that has garnered international attention went before its toughest arbiter yesterday—the locals—and lost, as a commission charged with protecting Cape Cod’s natural resources denied the project a permit.”); Jennifer Zajac, *Cape Cod Commission Denies Permit to Cape Wind*, SNL POWER DAILY NORTHEAST, Oct. 22, 2007.

⁷⁶ Zajac, *supra* note 75.

⁷⁷ *Id.*

⁷⁸ Stephanie Ebbert, *Cape Wind Seeks to Skip Permit Wars, Pressing State for Streamlined Process*, BOSTON GLOBE, Nov. 22, 2007, at B1.

⁷⁹ *Id.*

⁸⁰ *Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd.*, 932 N.E.2d 787, 795 (Mass. 2010).

the Supreme Court noted that Massachusetts's permit approval considered not the entire wind farm, but only the portions of the project physically located within Massachusetts territory, reciting in its opinion the following explanation of this fact by the Secretary of the Executive Office of Energy and Environmental Affairs:

Because M[assachusetts] E[nvironmental] P[olicy] A[ct] (like the Cape Cod Commission Act) is the product of state law, not federal law, MEPA review (and by extension Cape Cod Commission review) applies only to those portions of the project that are located within Massachusetts, including its territorial waters (generally within three nautical miles of the low water mark of the shore). The proposed [wind farm] is located outside of Massachusetts and, therefore, is not subject to state regulatory requirements. There is one notable exception [F]ederal law (pursuant to the Coastal Zone Management Act) specifically delegates review authority over projects in federal waters to the Coastal Zone Management Office of the adjacent coastal state⁸¹

The petitioners asserted that the Siting Board was obliged to consider the in-state impacts of the entire wind farm, not just of the cables within Massachusetts's physical jurisdiction.⁸² Specifically, they asserted the Siting Board was obliged to consider "impacts of the wind farm's turbine generators on 'state waters, air space, lands, and public safety'" because of allegations that the wind farm would harm "navigation, aviation, fisheries, birds, and water quality, as well as create an increased set of risks relating to public safety and environmental damage that a town such as Barnstable will be forced to confront."⁸³

The Massachusetts Supreme Court rejected this claim for two reasons: first, because the definition of "facility" under review by the Siting Board explicitly encompassed only the transmission lines,⁸⁴ and, secondly,

⁸¹ *Id.* at 792 n.6.

⁸² *Id.* at 803.

⁸³ *Id.* at 803 n.31.

⁸⁴ *Id.* at 803–04.

because the project in federal waters enjoyed exclusive federal jurisdiction.⁸⁵ On this latter point, the court noted that:

the express assertion of exclusive Federal power and control over the outer continental shelf, defined in the O[uter] C[ontinental] S[helf] L[ands] A[ct] as all submerged lands lying in navigable waters beyond three miles from shore,⁸⁶ . . . serves to preempt any attempt by the Commonwealth or its agencies to regulate structures or facilities placed in that area.⁸⁷

To hold otherwise would give states veto power over disposition of the seabed in contravention of the Outer Continental Shelf Act.⁸⁸ By considering the impact of the transmission cables only, the court said that the state discharged its public trust doctrine obligations.⁸⁹

Petitioners also claimed that the Energy Facilities Siting Board improperly granted Cape Wind a tidelands license among its consolidated approvals because it lacked the requisite grant of authority from the legislature to act in connection with the state's tidelands, which are "both owned and held in trust by the Commonwealth to protect the public's rights in them."⁹⁰ The court held that the legislature did imbue the Siting Board with public trust responsibilities and, therefore, it validly acted with respect to Massachusetts's tidelands in issuing the tidelands permit.⁹¹ The court further noted that Siting Board could "stand in the shoes" of the Massachusetts Department of Environmental Protection in considering public trust implications of issuing the requisite permits.⁹² "There is no mention of public trust rights or obligations in § 69K,⁹³ but there does not need to be," the court noted, referencing the provision that allows the Massachusetts Department of Environmental Protection, as the statutory

⁸⁵ *Id.* at 804.

⁸⁶ *See* 43 U.S.C. § 1331(a)(2) (2006).

⁸⁷ *Alliance*, 932 N.E.2d at 804.

⁸⁸ *Id.* at 804–05.

⁸⁹ *Id.*

⁹⁰ *Id.* at 798.

⁹¹ *Id.* at 800.

⁹² *Id.*

⁹³ MASS. GEN. LAWS ANN. ch. 164, § 69K (West 2011).

guardian of the state's public trust resources, to delegate that responsibility to the Siting Board.⁹⁴ Explaining, the court noted that:

[t]he Legislature has designated DEP as the agency charged with responsibility for protecting public trust rights in tidelands through the c. 91 licensing program,⁹⁵ and where a tidelands license is necessary for a proposed facility, the Legislature has, in § 69K,⁹⁶ expressly vested authority in the siting board to act in DEP's stead with respect to the initial permitting decision.⁹⁷

Although it concluded that the Siting Board possessed legislatively delegated authority to determine public trust impacts,⁹⁸ significantly, the court did not discuss the Siting Board's capacity to make public trust impact determinations on behalf of the Department of Environmental Protection,⁹⁹ except to note that certain positions within the DEP overlap with key positions on the Siting Board, allowing the DEP to continue playing a role in the management of even its delegated authority.¹⁰⁰ Furthermore, the court did not note whether the record in fact indicated that the Siting Board considered the public trust implications of granting a permit.¹⁰¹

Amid other legislative contentions, petitioners also claimed the Siting Board could have found a hook to review the entire Wind Farm project under a provision requiring conformity of Siting Board projects with existing law and the reasonableness of exemption from the ordinary permitting process.¹⁰² However, the court concluded, as before, that this provision "does not trump the exclusivity of Federal" jurisdiction over the project.¹⁰³ As a result, the court found that while the Siting Board could act as Massachusetts's public trust agent, the state was preempted from considering total impact of the wind farm because such consideration

⁹⁴ *Alliance*, 932 N.E.2d at 799.

⁹⁵ *Tidelands Jurisdiction (M.G.L. c.91)*, OFFICE OF GEOGRAPHIC INFO., <http://www.mass.gov/mgis/tidelands.htm> (last visited Oct. 13, 2011).

⁹⁶ MASS. GEN. LAWS ANN. ch. 164, § 69K (West 2011).

⁹⁷ *Alliance*, 932 N.E.2d at 799–800.

⁹⁸ *Id.* at 801–02.

⁹⁹ *See id.*

¹⁰⁰ *Id.* at 800–01 n.29.

¹⁰¹ *See id.*

¹⁰² *Id.* at 813.

¹⁰³ *See Alliance*, 932 N.E.2d at 813.

“would be tantamount to” veto power of the project, thereby infringing on federal prerogative.¹⁰⁴

A. *Dissent*

While four justices signed the majority's decision,¹⁰⁵ Chief Justice Margaret H. Marshall, with whom Justice Francis X. Spina joined, dissented on the grounds that the decision undermined the public trust doctrine.¹⁰⁶ The dissent disagreed with the majority's conclusion that the Energy Facilities Siting Board had authority to act as dispositor of Massachusetts's coastal areas and warned about far-reaching implications of the decision, noting, “[a] wind farm today may be a drilling rig or nuclear power plant tomorrow.”¹⁰⁷ It further recognized the potentially dire consequences of failing to consider the implications of federally governed projects on adjacent states' coasts.¹⁰⁸ Such lapses could inadvertently jeopardize the public trust covenant between Massachusetts and its citizens.¹⁰⁹ Relevant to this discussion, Marshall wrote:

The public trust doctrine and government energy policy are not at odds. Indeed, they are complementary. Both express the people's paramount interest in the wise and fruitful use of natural resources. Today's opinion, however, casts these two allies in opposition, and exalts regulatory expediency at the cost of fiduciary obligation. By issuing a certificate pursuant to G.L. c. 164, § 69K, which purports to include the “equivalent” of a G.L. c. 91 tidelands license, the siting board has purported to act as the protector of the public's long-standing rights under the public trust doctrine without the necessary express legislative authority to do so. Its usurpation of the Commonwealth's fiduciary responsibility to the people, and DEP's complicit agreement with that usurpation, should not be condoned. Moreover, even if the siting board had the authority to act, it has failed to exercise its role of fiduciary on behalf of the public because it failed to consider the in-State impacts of the wind farm.¹¹⁰

¹⁰⁴ *Id.* at 804–05.

¹⁰⁵ *See id.*

¹⁰⁶ *Id.* at 815 (Marshall, C.J., dissenting in part and concurring in part).

¹⁰⁷ *Id.* at 816.

¹⁰⁸ *Id.*

¹⁰⁹ *Alliance*, 932 N.E.2d at 816.

¹¹⁰ *Id.* at 824.

Regardless of whether the Siting Board had authority to act, the dissent concluded that the Commonwealth failed to discharge its public trust duties. The majority, however, felt the state could not discharge those duties without infringing on clearly established federal grants of power, presumably leaving the public trust responsibilities to be the bailiwick of the regulating federal agencies.¹¹¹

III. THE PROBLEM

A. *Who is Defending the Public Trust?*

One of the first problems with the *Alliance* court's decision is that it relieved the state from public trust responsibilities, presumably shifting that responsibility to the federal government agencies with jurisdiction over the bulk of the project.¹¹² Ocean-based renewable energy development presents an even greater challenge to the government's application of the public trust doctrine.¹¹³ In the Cape Wind decision, it is unclear what state agency is considering the project's impact on the public trust,¹¹⁴ although those involved agree it merits consideration.¹¹⁵ If, as Massachusetts's highest court declared, states are preempted from this task,¹¹⁶ how much greater will be the vagueness surrounding federal responsibility for it? For instance, not until 2009—eight years after the project was underway—did federal agencies allocate responsibility for the project.¹¹⁷ As one author notes, agencies tasked with regulating renewable energy development need coordination to act cohesively and effectively in the renewable energy arena.¹¹⁸ In fact, the federal government itself, through the U.S.

¹¹¹ *Id.* at 804 (majority opinion).

¹¹² *See id.*

¹¹³ Gail Osherenko, *New Discourses on Ocean Governance: Understanding Property Rights and the Public Trust*, 21 J. ENVTL. L. & LITIG. 317, 369 (2006). Osherenko notes, "[n]ew uses, such as offshore renewable-energy development; open-water aquaculture; offshore, floating, LNG terminals; and mining of deep-sea vents would present a challenge for government trustees as each would entail closure of some areas to public access." *Id.*

¹¹⁴ *See Alliance*, 932 N.E.2d at 803–04 (indicating that some confusion existed regarding which agency, if any, could consider the project's impact).

¹¹⁵ *See id.* at 817.

¹¹⁶ *Id.* at 804.

¹¹⁷ Giordano, *supra* note 18, at 1158–59 (noting that the Minerals Management Service ("MMS") and Federal Energy Regulatory Commission disputed the jurisdiction over the Cape Wind project until signing a Memorandum of Understanding in 2009 that gave MMS jurisdiction over offshore wind farms).

¹¹⁸ *See* Sanya Carleyolsen, *Tangled in the Wires: An Assessment of the Existing U.S.*

Commission on Ocean Policy, has called for a comprehensive overhaul of regulatory oversight of offshore wind development.¹¹⁹ As part of that recommendation, the commission's report specifically calls for legislation providing for comprehensive offshore management that is both based on the premise that the oceans are a public resource and considers state, local, and public concerns.¹²⁰ But, as of yet, "there is no comprehensive and coordinated federal regime in place to regulate offshore wind energy development or to convey property rights to use the public space of the [Outer Continental Shelf] for this purpose."¹²¹

Further, one need look only to the example of the Deepwater Horizon oil spill to see the potential for negative consequences due to such a lack of coordinated federal management of offshore activities.¹²² A presidential panel investigating the spill concluded that "the accident and subsequent oil spill were the result of a cascade of management failures, regulatory oversights, missed signals and time-saving shortcuts that combined to take eleven lives and produce the worst offshore oil release in the nation's history."¹²³ Leaving the responsibility for the public trust to trickle through such administrative lapses in future offshore development would render Chief Justice Marshall's dissent ominously prescient: "The court's ruling to the contrary establishes a dangerous and unwise precedent, which has far-reaching consequences. A wind farm today may be a drilling rig or nuclear power plant tomorrow."¹²⁴

B. *Who Should Be Guarding the Public Trust?*

To avoid such management failures and lack of regulatory oversight in future offshore development, change is needed. The Massachusetts Supreme Court did not have a law providing for a state-generated environmental impact statement of the entire project,¹²⁵ and resultantly, they

Renewable Energy Legal Framework, 46 NAT. RESOURCES J. 759, 781–82 (2006).

¹¹⁹ See U.S. COMM'N ON OCEAN POLICY, *supra* note 40, at 368.

¹²⁰ *Id.*

¹²¹ *Id.* at 368.

¹²² John M. Broder, *Digging Deeper on Macondo*, N.Y. TIMES: GREEN BLOG, (Feb. 17, 2011, 1:09 PM), <http://green.blogs.nytimes.com/2011/02/17/digging-deeper-on-macondo/?scp=9&sq=Deepwater%20Horizon%20spill&st=cse>.

¹²³ *Id.*

¹²⁴ *Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd.*, 932 N.E.2d 787, 816 (Mass. 2010).

¹²⁵ See *id.* at 813 (indicating that in-state impacts were not "reasonable" and thus were preempted by federal review).

might not have had the right tools in their shed to reach a result that would preserve their role as public trust doctrine guardians.¹²⁶ Yet, they did have indirect legislative direction that the state wanted to preserve its role as public trust guardian as a result of Massachusetts's Ocean Act of 2008 ("the Act").¹²⁷

The Act provided for an "ocean management plan" to manage the Commonwealth's waters and submerged lands in accordance with the public trust doctrine, but it did not allow for contemplation of projects outside the Commonwealth's coastal waters.¹²⁸ The seaward boundary of each coastal state is three miles from its coast.¹²⁹ Thus, the Act does not contemplate the Cape Shore wind project,¹³⁰ but it illustrates how comprehensive governance of projects like offshore wind farms is challenging when the states control waters three miles out and the federal government regulates waters beyond the three-mile mark.¹³¹

Massachusetts legislators touted the plan as a form of ocean zoning that would allow the state to balance ocean development and natural resources according to a statewide plan instead of on a patchwork, case-by-case basis.¹³² According to the text of the Act, the express intention of the plan is that "[t]he ocean waters and ocean-based development of the commonwealth, within the ocean management planning area described in this section, shall be under the oversight, coordination and planning authority of the secretary of energy and environmental affairs, hereinafter referred to as the secretary, in accordance with the public trust doctrine."¹³³ Despite this explicit alignment of ocean development with the public trust doctrine, the Act falls short of allowing Massachusetts to assess the public

¹²⁶ *See id.* Because the court determined that the in-state impacts were unreasonable, this may have inhibited the Commonwealth's ability to argue for preservation of its role over the public trust doctrine.

¹²⁷ MASS. GEN. LAWS ANN. ch. 21A, § 4C (West 2011).

¹²⁸ *Id.*

¹²⁹ 43 U.S.C. § 1312 (2006).

¹³⁰ *See generally* Katie Zezima, *Massachusetts Law to Manage and Protect Ocean Waters*, N.Y. TIMES, May 29, 2008, at A15.

¹³¹ PEW OCEANS COMM'N, AMERICA'S LIVING OCEANS: CHARTING A COURSE FOR SEA CHANGE 26 (May 2003), available at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Protecting_ocean_life/env_pew_oceans_final_report.pdf (noting how the bifurcation of regulatory authority complicates comprehensive ocean governance). Beyond the state's three-mile territorial sea, the federal sovereignty over the seas extends twelve miles, though the United Nations Convention on the Law of the Seas grants federal governments exclusive control over ocean resources up to 200 miles from their shores. *Id.*

¹³² *See id.*; Zezima, *supra* note 130, at A15.

¹³³ MASS. GEN. LAWS ANN. ch. 21A, § 4C (West 2011).

trust doctrine impacts of projects outside of the state's territorial waters because it encompasses only those projects located within them.¹³⁴ Nor could the state of Massachusetts exert jurisdiction over projects located primarily in federal waters absent a waiver or delegation of federal authority to the adjacent coastal state.¹³⁵

Still, the Act garnered praise as a step in the right direction towards more cohesive management of the nation's sea resources, as called for by a 2003 Pew Ocean Commission report,¹³⁶ which provides part of a possible solution to allowing adjacent coastal states to command a response to negative impacts of projects in federal waters off their shores.¹³⁷ The report calls for the federal government to revamp federal ocean laws to better protect ocean resources in the face of increasing ocean development.¹³⁸ The report noted that "[t]he principal laws to protect our coastal zones, endangered marine mammals, ocean waters, and fisheries were enacted thirty years ago, on a crisis-by-crisis, sector-by-sector basis."¹³⁹ The result has rendered chaos for ocean management: "[p]lagued with systemic problems, U.S. ocean governance is in disarray."¹⁴⁰ The current state of affairs prompted the Commission to call for reformation of the federal government's relationship to ocean resources, with the report noting, "[m]ost importantly, we must treat our oceans as a public trust."¹⁴¹ The report advocates implementing ocean zoning guided by a National Ocean Policy Act and administered by regional authorities.¹⁴²

Implementing the Pew Ocean Commission's recommendations would aggrandize the Massachusetts Ocean Act of 2008 by installing a comprehensive ocean management policy and consequent zoning,¹⁴³ administered through regional councils.¹⁴⁴ While the plan calls for participation from various government officials and a broad range of stakeholders,¹⁴⁵ it

¹³⁴ See *id.* (noting that these provisions only apply to development within the Commonwealth).

¹³⁵ See, e.g., 16 U.S.C. § 1455 (2006) (authorizing the U.S. Secretary of Commerce to allocate power to states to implement their own coastal management programs).

¹³⁶ Zezima, *supra* note 130.

¹³⁷ See PEW OCEANS COMM'N, *supra* note 131, at 57–58 (noting that the Report recommends that states create and enforce water quality standards).

¹³⁸ *Id.* at x–xi.

¹³⁹ *Id.* at vii.

¹⁴⁰ *Id.* at viii.

¹⁴¹ *Id.* at x.

¹⁴² *Id.* at 34.

¹⁴³ See Zezima, *supra* note 130.

¹⁴⁴ PEW OCEANS COMM'N, *supra* note 131, at 33.

¹⁴⁵ *Id.* at 103.

creates new governmental bodies¹⁴⁶ at the expense of bypassing existing governmental zoning structures rooted in the American tradition of local land use governance.¹⁴⁷

This is perhaps detrimental to states' roles as public trust guardians when local governments, who traditionally hold such zoning authority,¹⁴⁸ are situated nearest the project and, resultantly, may be best attuned to the negative externalities of offshore projects and most cognizant of the public's interest in those resources affected by a particular offshore project.¹⁴⁹ As discussed below, and as illustrated by the Cape Wind conflict, shifting ocean zoning authority to a new federal agency, even one peppered with local stakeholders, might aggravate existing tensions between offshore development, national policy considerations, and an American tradition of local control.

IV. SITING THE POWER AS KEY TO SITING WIND FARMS AND OTHER OFFSHORE PROJECTS

Perhaps contributing to the Cape Wind conflict is the dissonance between the presupposition of local land use controls and national policy advancement. The latent tension between local land use control and national policy objectives could be mitigated by a cohesive national oceanic policy and consequent zoning, as suggested by the Pew Commission report.¹⁵⁰ A national ocean policy that heeds the traditional structure of American zoning governance may both chill paralyzing conflict and elevate discourse regarding appropriate offshore development.¹⁵¹ The concept of local control over what space is used for what purpose has deep-seated origins in local governance: as Rosenberg suggests, “[t]he practice of state and

¹⁴⁶ *Id.* at 33–34.

¹⁴⁷ See R. Seth Davis, *Conditional Preemption, Commandeering, and the Values of Cooperative Federalism: An Analysis of Section 216 of EPACT*, 108 COLUM. L. REV. 404, 426 (2008) (noting that states have historically regulated land use, utilities, and local eminent domain).

¹⁴⁸ See Frank B. Cross, *The Folly Of Federalism*, 24 CARDOZO L. REV. 1, 30 (noting that police protection, sanitation, and zoning are part of a myriad of local government functions).

¹⁴⁹ See, e.g., Ransom, *supra* note 31 (citing negative impacts noted by neighbors and opponents of offshore wind farms).

¹⁵⁰ PEW OCEANS COMM'N, *supra* note 131, at 33–34.

¹⁵¹ See Davis, *supra* note 147, at 450 (noting that the federal government can preempt states' voices in electric facilities siting process by withdrawing a regulatory scheme altogether). Instead, the author recommends that “[t]he Court should require Congress, when it threatens conditional preemption, to allow states to still have input into, though not control over, the resulting federal preemptive regulation.” *Id.*

local government supremacy over direct land utilization has strong support in American concepts of federalism and enacting federal preemption would interfere with traditional land use control authority and would likely be very politically unpopular in many parts of the United States.”¹⁵² Clearly, the Cape Wind project has illustrated how unpopular removing local control from significant development can be.¹⁵³

Perhaps the resistance to surrendering local control comes with good reason. Zoning powers were delegated to states, which in turn delegated such powers to municipalities and counties,¹⁵⁴ due to federalism’s assumption that decision-making should occur at the most local level with capacity to solve the problem at issue.¹⁵⁵ Whether local governments have the “capacity” to exhaustively analyze the impacts of an offshore wind farm might be arguable given that their perspective is often limited to localized concerns¹⁵⁶ at the expense of broader concerns, like a national interest in encouraging renewable energy generation.¹⁵⁷

Additionally, a community’s rapid decision-making processes may too hastily assess project impacts, thereby permitting long-term harm.¹⁵⁸ Control over zoning and implementation of renewable energy infrastructure traditionally lies with local governments, which consequently can use their role to promote national renewable energy goals.¹⁵⁹ Clearly, this was not the case with the Cape Cod Commission, which delayed project approvals with seemingly insatiable requests for information.¹⁶⁰

While these concerns are valid,¹⁶¹ the same rationale for seating decision-making power closest to those it affects would seem to suggest that communities can capably assess the particular project impacts affecting their shores, navigable waterways, and citizens, thereby supporting

¹⁵² Rosenberg, *supra* note 29, at 671–72.

¹⁵³ See LeBlanc, *supra* note 56 (noting that the Cape Wind project is one of the most litigated public utilities projects in the state’s history).

¹⁵⁴ 101A C.J.S. *Zoning & Land Planning* § 7 (2010).

¹⁵⁵ Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area*, 66 MD. L. REV. 503, 511 (2007).

¹⁵⁶ See Ebbert, *supra* note 75 (noting the Cape Code Commission—the local agency that denied a permit to Cape Wind—has “a reputation for being extremely stringent in assessing developers’ plans”).

¹⁵⁷ See Rosenberg, *supra* note 29, at 678.

¹⁵⁸ *Id.* at 674.

¹⁵⁹ Carleyolsen, *supra* note 118, at 781–82.

¹⁶⁰ See *Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd.*, 932 N.E.2d 787, 793 (Mass. 2010) (noting the Cape Cod Commission’s multiple public hearings, deadline extensions for further consideration, and requests for additional information in reviewing the Cape Wind project).

¹⁶¹ Rosenberg, *supra* note 29, at 674.

the assertion that local governments should have some command of how spaces surrounding them are used. For instance, local communities have staged complaints that radiation from wind turbines could pollute the water and that turbine supports could attract jellyfish populations that would cause a corresponding decrease in fish, thereby affecting local fishermen.¹⁶² Without local fishermen to raise these concerns impacting their livelihood, this negative impact, however small, to the biodiversity of the proposed project site might not be so zealously emphasized.

Also, corollary to the proposition that community oversight of project impacts leads to parochial decision-making¹⁶³ is that state and federal agencies may not make decisions in the best interests of individual communities in an effort to achieve broader policy goals. This is especially true when federal and state alternatives to local decision-making stand to receive significant revenues from the proposed projects. This is the case in the Cape Wind project, where a twenty-eight year lease for operating offshore wind turbines will generate \$88,278 in annual federally assessed fees, more when the project becomes operational, twenty-seven percent of which will go to the Massachusetts commonwealth.¹⁶⁴ In times of shrinking public budgets, such inducements might sway policy makers, even inadvertently, towards project approval while understating negative project impacts.¹⁶⁵ Because those closest to the project may best be able to articulate negative policy impacts,¹⁶⁶ local governments should play an active role in articulating negative externalities from offshore development projects as part of a state's fulfillment of its role as guardian of the public trust.

While local governments should play an active role by guiding development of projects in federal waters, national policy goals could be too easily thwarted if local communities, or even states, held veto power for offshore projects marginally impacting their shores, despite the fact that such projects promise renewable energy benefits to a much larger

¹⁶² Hayden, *supra* note 28, at 229.

¹⁶³ See Rosenberg, *supra* note 29, at 675.

¹⁶⁴ Patrick Cassidy, *Offshore Wind Farm Lease Now Official*, CAPE COD TIMES, Oct. 7, 2010, <http://www.capecodonline.com/apps/pbcs.dll/article?AID=/20101007/NEWS/10070315/-1/NEWSLETTER100>.

¹⁶⁵ Rena I. Steinzor, *Unfunded Environmental Mandates and the "New (New) Federalism": Devolution, Revolution, or Reform?*, 81 MINN. L. REV. 97, 182–83 (1996).

¹⁶⁶ Daniel B. Rodriguez, *The Role of Legal Innovation in Ecosystem Management: Perspectives from American Local Government Law*, 24 ECOLOGY L. Q. 745, 750–51 (1997).

segment of the population than resides within their town lines.¹⁶⁷ While understanding the *Alliance* dissent's warning against polarizing the stewardship of ocean resources with furtherance of national energy policy goals,¹⁶⁸ it is important to note that the public trust doctrine should not be commandeered in the name of many to serve the private desires of a few,¹⁶⁹ a charge Cape Wind project opponents have encountered in their opposition to the project.¹⁷⁰ Yet in cases where competing values stake a claim to public trust doctrine arguments, such policy tensions are perhaps best left to resolution by the people, to whom powers are reserved by the Constitution's Ninth and Tenth Amendments.¹⁷¹ Resolving these overarching policy conflicts could well be done through a comprehensive revamping of ocean legislation as suggested by the Pew Commission¹⁷² and as recommended by the U.S. Commission on Ocean Policy.¹⁷³

Given the need for federal policy to establish a comprehensive offshore wind power regulatory scheme,¹⁷⁴ the siting of offshore projects located in federal territorial waters should well be the prerogative of federal administrative agencies.¹⁷⁵ Yet, to best resolve the tension between the benefits and tradition of local oversight and the need for efficacy in implementing a comprehensive national policy,¹⁷⁶ heed should be given to the state's role in enforcing the public trust doctrine¹⁷⁷ and, consequently, to negative externalities flagged by those trustees of the public trust as provided for by statutes like the Massachusetts Ocean Act of 2008.¹⁷⁸ To achieve this framework of complete federal jurisdiction concordant with the state's public trust role, Congress can act on the U.S. Commission on

¹⁶⁷ See Rosenberg, *supra* note 29, at 675.

¹⁶⁸ *Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd.*, 932 N.E.2d 787, 824 (Mass. 2010).

¹⁶⁹ See Smith & Sweeney, *supra* note 26, at 317.

¹⁷⁰ See, e.g., Williams & Whitcomb, *supra* note 15, at xxiv.

¹⁷¹ See Smith & Sweeney, *supra* note 26, at 317.

¹⁷² See PEW OCEANS COMM'N, *supra* note 131.

¹⁷³ U.S. COMM'N ON OCEAN POLICY, *supra* note 40, at 1.

¹⁷⁴ *Id.* at 366 (noting the lack of a coordinated federal regime).

¹⁷⁵ See 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).

¹⁷⁶ Rosenberg, *supra* note 29, at 674–75.

¹⁷⁷ See, e.g., MASS. OFFICE OF COASTAL ZONE MGMT., THE OCEAN AS A PUBLIC TRUST RESOURCE, http://www.mass.gov/czm/oceanmanagement/waves_of_change/pdf/trpt.pdf (last visited Oct. 13, 2011) (representing Massachusetts's conception of its public trust responsibilities).

¹⁷⁸ See ch. 21A, § 4C, *supra* note 127.

Ocean Policy's recommendation to strengthen partnerships with non-federal agencies, particularly states, to manage off shore development.¹⁷⁹ How to do this raises another discussion.

V. BALANCING STATE STAKES AND FEDERAL RIGHTS

A. *Borrowing from Previous Efforts*

Offshore development is not the first harbinger of the tensions between local control and national policy in facility siting.¹⁸⁰ As Rosenberg notes:

Analogies where federal law [has] preempted state law in matters of facility siting do exist. For instance, § 704 of the 1996 Telecommunications Act dealt with the local government regulation of the location of cellular telephone towers. There, to neutralize local NIMBY (Not in My Backyard) sentiment that would block the establishment of a national communications network, Congress recognized limited substantive grounds for the denial of local siting permission. In addition, it created federal court jurisdiction to consider rejected or delayed siting requests and to order approval.¹⁸¹

In fact, the Telecommunications Act has specifically been summoned as a pattern for eliminating conflict from offshore wind farm projects.¹⁸² Of significance is the fact that the Telecommunications Act of 1996 chose to waive some of its federal prerogative in working with the existing zoning frameworks of would-be host communities to cell phone towers.¹⁸³ As one

¹⁷⁹ U.S. COMM'N ON OCEAN POLICY, *supra* note 40, at 360 (noting recommendations "to strengthen the coordination of ocean policy at the federal level, but also to increase the involvement of nonfederal governmental and nongovernmental stakeholders" and "to significantly enhance the ocean and coastal partnership between the federal government and state, territorial, tribal, and local governments," recognizing that "much of the responsibility for managing the nation's ocean and coastal resources rests with nonfederal authorities").

¹⁸⁰ See Hayden, *supra* note 28, at 226.

¹⁸¹ Rosenberg, *supra* note 29, at 671.

¹⁸² See Hayden, *supra* note 28, at 226; Patricia E. Salkin & Ashira Pelman Ostrow, *Cooperative Federalism and Wind: A New Framework for Achieving Sustainability*, 17 HOFSTRA L. REV. 1049, 1092 (2009).

¹⁸³ Hayden, *supra* note 28, at 232.

author on the subject notes, “[f]ederal legislation could have completely preempted the laws of the state and local governments which dealt with cellular towers but chose not to, instead allowing those entities to express their values within certain federally created constraints.”¹⁸⁴

Allowing communities to zone according to their own values without preempting national policy goals facilitates the siting of cell phone towers under the Telecommunications Act.¹⁸⁵ However, significant differences between cell towers and offshore wind farms may make it an imperfectly analogous template for offshore development. A significant difference is that those projects located in federal territorial waters would be developed in waters three miles off any state’s coast¹⁸⁶ rather than within the communities themselves, and to give local communities exclusive zoning rights may result in locality-centric zoning that would counter the public trust proposition that ocean resources belong to the people at large, not exclusively to those that reside near its coasts.¹⁸⁷

While providing for local guidance of offshore development, in keeping with traditional American land governance customs, is crucial to helping states fulfill their role as public trust arbitrators, granting localities the ability to restrict projects in federal waters would place the interest of the public at large in the hands of the few. Thus, while the Telecommunications Act of 1996 instructs on the importance of waiving some federal prerogatives in order to include local governments in the development of offshore projects,¹⁸⁸ it is an incomplete model for resolving the tensions between safeguarding the public trust and promoting national policy in favor of renewable energy.

B. Towards a Future Offshore Framework

How then can states and local communities be allowed to assess the full impact of offshore projects on their coasts, thereby better registering erosion to the public’s interest in ocean resources, while preserving federal jurisdiction of projects within federal waters? I propose the answer lies in allowing states and, through their delegated power, their communities to analyze the impact of the entire offshore project through their independently generated environmental assessments as required under the

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 230–32.

¹⁸⁶ See 43 U.S.C. §§ 1301, 1337(g)(7) (2006).

¹⁸⁷ See MASS. OFFICE OF COASTAL ZONE MGMT., *supra* note 177.

¹⁸⁸ Hayden, *supra* note 28, at 232.

National Environmental Policy Act.¹⁸⁹ To understand why the act needs alteration, however, one must first understand the legislative landscape of the relevant provisions.

In the first place, the Outer Continental Shelf Lands Act allows the Department of the Interior to grant leases, easements, and rights-of-way to lands on the Outer Continental Shelf for activities that promote energy production from sources other than gas and oil.¹⁹⁰ Thus, this law allows the federal government to cede control of offshore areas to private parties.¹⁹¹ The Cape Wind project's need for a lease from the Department of the Interior's Mineral Management Service ("MMS," now the Bureau of Ocean Energy Management, Regulation, and Enforcement)¹⁹² prompted the federal government's environmental review of the project through an Environmental Impact Statement as required under the National Environmental Policy Act ("NEPA").¹⁹³ Under NEPA, the lead federal agency was responsible for preparing the review,¹⁹⁴ which was done independently of the adjacent coastal state of Massachusetts.¹⁹⁵ As expected with so controversial and publicized a project, the Cape Wind project spurred copious amounts of public participation in the project, receiving more than 42,000 comments as the MMS compiled its Environmental Impact Statement.¹⁹⁶ The MMS logged and responded to each of these comments¹⁹⁷ before issuing

¹⁸⁹ 42 U.S.C. § 4331 (2006).

¹⁹⁰ MINERALS MGMT. SERV., U.S. DEP'T OF THE INTERIOR, CAPE WIND ENERGY PROJECT FINAL ENVIRONMENTAL IMPACT STATEMENT E-1 (Jan. 2009) [hereinafter CAPE WIND FINAL ENVIRONMENTAL IMPACT STATEMENT], available at <http://www.boemre.gov/offshore/RenewableEnergy/CapeWindFEIS.htm>.

¹⁹¹ *Id.*

¹⁹² *Frequently Asked Questions*, BUREAU OF OCEAN ENERGY MGMT., REGULATION, AND ENFORCEMENT, <http://www.boemre.gov/ooc/newweb/frequentlyaskedquestions/frequentlyaskedquestions.htm> (last visited Oct. 13, 2011).

¹⁹³ CAPE WIND FINAL ENVIRONMENTAL IMPACT STATEMENT, *supra* note 190, at E-1. In fact, the Minerals Management Service's Environmental Impact Statement was the second environmental review triggered by NEPA. A prior draft EIS had been issued by the Army Corps of Engineers before the Energy Policy Act of 2005 transferred lead federal regulatory authority from the Army Corps of Engineers to the Bureau of Ocean Energy Management, Regulation, and Enforcement (formerly the Minerals Management Service) within the Department of the Interior. *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Permitting Update*, CAPEWIND.ORG, <http://www.capewind.org/article72.htm> (last visited Oct. 13, 2011).

¹⁹⁶ CAPE WIND FINAL ENVIRONMENTAL IMPACT STATEMENT, *supra* note 190, at E-5.

¹⁹⁷ MINERALS MGMT. SERV., U.S. DEP'T OF THE INTERIOR, CAPE WIND ASSOCIATES FINAL RECORD OF DECISION, at 3 (Apr. 28, 2010) [hereinafter CAPE WIND FINAL RECORD OF DECISION], available at <http://www.boemre.gov/offshore/RenewableEnergy/PDFs/CapeWindROD.pdf>.

a commercial lease granting Cape Wind Associates exclusive use of the leased area subject to lease conditions.¹⁹⁸

Although the federal review yielded enormous public participation, which undoubtedly highlighted the public's interest in the use of the project area,¹⁹⁹ it did not specifically address the state's interest in preserving the public trust.²⁰⁰ While it addressed many of the issues, like fishing and navigation, which often are associated with the public's interest,²⁰¹ MMS did not look at the project to assess whether the use and impact of the analyzed categories comported with the public's interest in stewarding those resources.²⁰²

Because MMS has no such public trust role, this function could have been accomplished had the state issued an analysis of the project specifically analyzing whether the project best served the public's interest in its resources. Instead, the project was analyzed with a cost-benefit approach to the national energy goals.²⁰³ The Record of Decision granting approval of the lease noted that "the Department finds that the benefits to the American public justify the lease offer for the Project on Horseshoe Shoal in the Nantucket Sound,"²⁰⁴ citing an expectation that approving a lease for the nation's first offshore wind energy facility would spur change in national energy trends.²⁰⁵ In addition, the Environmental Impact Statement concluded that most of the anticipated impacts were minor or negligible, with a few exceptions for possible minor-to-moderate impacts to birds resulting from operation of the project.²⁰⁶ The Department

¹⁹⁸ *Id.* at 4.

¹⁹⁹ See CAPE WIND FINAL ENVIRONMENTAL IMPACT STATEMENT, *supra* note 190, at E-5 (noting that over 42,000 comments were received).

²⁰⁰ See CAPE WIND FINAL RECORD OF DECISION, *supra* note 197, at 5. (noting the decision to approve the Cape Wind lease came after assessing impacts to geology, noise, oceanographic processes, climate and meteorology, air quality, water quality, electric and magnetic fields, terrestrial vegetation, coastal and intertidal vegetation, terrestrial and ocean faunas other than birds, avifauna, subtidal offshore resources, non-ESA marine mammals, fisheries, essential fish habitat, threatened and endangered species, socioeconomic resources and land use, population and economics, environmental justice, visual resources, cultural resources, recreation and tourism, navigation and transportation, airport facilities and aviation traffic, navigational safety, and communications).

²⁰¹ See MASS. OFFICE OF COASTAL ZONE MGMT., *supra* note 177.

²⁰² CAPE WIND FINAL RECORD OF DECISION, *supra* note 197, at 5–6 (noting that the decision is to be made after government-to-government consultation with affected Indian tribes, but making no mention of consultation with state governments).

²⁰³ See *id.* at 5.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ CAPE WIND FINAL ENVIRONMENTAL IMPACT STATEMENT, *supra* note 190, at E-12.

of the Interior's environmental review of the project granted the commercial ocean lease after a cost-benefit analysis of the project, concluding that the project's significant benefit favored ceding exclusive control of the project area to Cape Wind Associates.²⁰⁷

Stating the project in terms of costs and benefits, however, may denigrate the government's duty to manage the public trust in ocean resources to a tradable commodity, which may serve the purposes of the involved federal agency while inadvertently bypassing public trust considerations.²⁰⁸ This problem may be mitigated by allowing states to conduct an assessment of an offshore wind project, which would be beneficial for several reasons, according to Rosenberg:

State agencies can formulate a more structured process for consideration of siting approval following a model of decisionmaking having an information-based assessment, a hearing and a final decision. With this clear administrative structure, interested parties would have a better idea of the basis for the decision to approve or disapprove of the siting proposal. In addition, the state agency would be more likely to have the institutional competence to assess the project's impacts. Its personnel would be more likely to have the education and training in general environmental impact analysis as well as in the analysis of socioeconomic, cultural resource and utility engineering considerations.²⁰⁹

Allowing states to generate project impact statements, through the lens of their role as public trust guardians, would incorporate the American tradition of local land use governance, provide assessment of impacts by those likely to know them, and allow the federal government to retain control of the siting and permitting process.²¹⁰

Because environmental reviews, which in this case would be broadened to project impact reviews, are not records of decision,²¹¹ the federal

²⁰⁷ See *id.* at E-1, E-12 (showing need compared to minor impacts).

²⁰⁸ See Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 186 n.67 (1997) (noting arguments that the management of renewable resources often focus on a narrow range of economic values, excluding information regarding non-commodity values such as protection of biodiversity).

²⁰⁹ Rosenberg, *supra* note 29, at 677.

²¹⁰ *Id.* at 671–72.

²¹¹ See CAPE WIND FINAL ENVIRONMENTAL IMPACT STATEMENT, *supra* note 190, at 1–3.

government would not be thwarted in attempts to site offshore projects should they determine the need for those projects. Instead, comprehensive offshore management legislation could include a provision that would require the lead federal government agency²¹² to respond to each of the project impacts and public trust analysis compiled by the state, while leaving the record of decision within the purview of the lead federal agency. This requisite federal response may be a mere acknowledgment of a project impact or outright denial of all or part of the project. The important aspect of the proposal is having a designated party, in this case the adjacent coastal states and their communities, vet the project representing the interest of the people as public trust guardians.

Additionally, withholding public trust obligations from the federal government could foster a healthy federalism tension between twin national policy interests in renewable energy and economic development and the sometimes competing position of public stewardship of ocean resources as defined by the public trust.²¹³ This tension may serve to strengthen awareness of the duty to the public to preserve common ownership of ocean resources while permitting affected states and their communities to exercise a stronger voice in a process of exclusive federal prerogative.

CONCLUSION

The Massachusetts Supreme Court missed a prime opportunity to protect the state's interest in the public trust with its decision in *Alliance*.²¹⁴ Yet, the court did not have the legal means to decide a case to further both the interests of the public trust in natural resources and national policy in creating renewable energy.²¹⁵

²¹² With most offshore development projects, the lead federal governmental agency would likely be the Department of the Interior's Bureau of Ocean Energy Management, Regulation and Enforcement, which is the federal agency responsible for overseeing the safe and environmentally responsible development of energy and mineral resources on the Outer Continental Shelf, or the waters between the state's territorial seas and the seaward extent of federal jurisdiction. *About BOEMRE*, BUREAU OF OCEAN ENERGY MANAGEMENT, REGULATION, AND ENFORCEMENT, <http://www.boemre.gov/aboutBOEMRE/> (last visited Oct. 13, 2011).

²¹³ See Ryan, *supra* note 155, at 510–11 (noting undefined and overlapping areas of state and federal authority highlight inherent tensions between problem solving, checks and balances, localism, and other characteristics of American federalism).

²¹⁴ *Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd.*, 932 N.E.2d 787 (Mass. 2010).

²¹⁵ *Id.* at 787.

Although the Cape Wind project was not bound by the Ocean Act of 2008,²¹⁶ states contemplating future projects could use this document as an indication of legislative preference in making decisions about how to analyze impacts of offshore projects. Furthermore, the Outer Continental Shelf Lands Act should be amended to include an independent assessment by states in their role as public trust defenders to analyze the impacts of an entire offshore project to their coasts and to the interests of the national public who would access the commonly owned ocean resources from their coasts. Once rendered, the analysis could prompt a federal response to the stated project impacts and state-rendered recommendation on the project's impact to public trust interests.²¹⁷ This would ensure that such interests have an independent safeguard, established by the federal system, that would advocate for such interests before a federal government with additional policy concerns.²¹⁸ Given the proposals for large-scale investment in offshore wind energy,²¹⁹ other states, especially Virginia, New Jersey, and Maryland, should take preemptive opportunity to enact similar legislation that specifically protects public trust interests in offshore development affecting their shores. The U.S. Congress should also amend the Outer Continental Shelf Lands Act to allow for state-generated assessments of impact to the public trust resources and require the responsible federal agency to respond to that assessment.

By doing so, the public can ensure protection of the commonly owned sea and shore to benefit all citizens, freeing federal agencies to balance the need for renewable energy against an independent assessment of detriments to the public's interest in the utilized resources. Initiative by the states to register the public trust interests, combined with action by Congress to allow for adjacent coastal states' independent assessment of an entire project located off their coasts, will prevent the public trust doctrine from escaping notice amidst a hodgepodge of inter-agency administrative reviews and approvals.

²¹⁶ See *id.* at 803–04; Zezima, *supra* note 130.

²¹⁷ Rosenberg, *supra* note 29, at 683.

²¹⁸ *Id.*

²¹⁹ See *supra* notes 10 & 12 and accompanying text.