Ocean and Coastal Law Journal

Volume 13 | Number 1 Article 6

2007

The Latest Development In The Debate Over Nantucket Sound: Alliance To Protect Nantucket Sound, Inc. v. Energy Facilities Siting Board

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THE LATEST DEVELOPMENT IN THE DEBATE OVER NANTUCKET SOUND: *ALLIANCE TO PROTECT NANTUCKET SOUND, INC. V. ENERGY FACILITIES SITING BOARD*

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I. INTRODUCTION

Today, nearly everyone recognizes the need for the United States to diversify its energy resources. Wind energy on the Atlantic and Pacific coasts alone could generate as much as the equivalent of the current U.S. generating capacity.[1] Despite this potential,[2] not one offshore wind project exists in the United States; I argue that this is largely due to the unwieldy regulatory scheme that developers must navigate. The recent decision, *Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Board*,[3] (*Alliance*) is a prime example of how the lack of cohesiveness between the state and federal governments impede the development of this much needed energy resource.

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1. MASSACHUSETTS TECHNOLOGY COLLABORATIVE, UNITED STATES DEPARTMENT OF ENERGY & GE, A FRAMEWORK FOR OFFSHORE WIND ENERGY DEVELOPMENT IN THE UNITED STATES 12 (2005), *available at* http://www.masstech.org/offshore/final_09_20.pdf [hereinafter FRAMEWORK FOR OFFSHORE WIND ENERGY].

2. Europe is unquestionably the world leader in wind power development. *See* A. Jones & A. Westwood, *Power From the Oceans*, THE FUTURIST, Jan. 3, 2005, *available at* http://www.energybulletin.net/3881.html (last visited Oct. 25, 2007). Germany led the European Union (EU) in 2005 with approximately 18,428 mega-watts (MW) of the EU's 40,504 MW of installed wind power. News Release, The European Wind Energy Association, EU Wind Power Capacity (2005), *available at* http://www.ewea.org/fileadmin/ewea_documents/documents/press_releases/2006/060201_Statistics_2005.pdf. Denmark is also known for its standing as a large producer of wind power energy; it had installed approximately 3,122 MW by the end of 2005. *Id.* For a thorough analysis of the various international offshore systems and the challenges that offshore wind power faces see INTERNATIONAL ENERGY AGENCY, OFFSHORE WIND EXPERIENCES (2005), *available at* http://www.iea.org/textbase/papers/2005/offshore.pdf.

3. 858 N.E.2d 294 (Mass. 2006).

In *Alliance,* the Massachusetts Supreme Judicial Court considered a citizen group's appeal of a state agency's decision regarding the construction of underground and undersea electricity transmission cables integral to the first proposed offshore wind farm project in the United States.[4] The agency decided that in order to construct the electricity transmission cables the project must first obtain all other necessary federal and state authorization.[5] Against the citizen group's plea, the court upheld the agency's decision.[6]

Initially, this Note provides an overview of the permitting process for Cape Wind, including other litigation that came about during the review process. Then there is a thorough discussion of the procedural history and posture of this case. This is followed by a discussion that asserts that, given the jurisdictional uniqueness of this case, both the Board and the court acted reasonably. Ultimately, this Note concludes that the federal government must create a comprehensive permitting and regulatory framework in order to facilitate the development of future competitive offshore wind power.[7]

II. OVERVIEW OF THE CAPE WIND PROJECT

A. The Proposal

In 2001, Cape Wind Associates, LLC[8] and Commonwealth Electric Company, doing business as NSTAR Electric[9] (hereinafter Cape Wind) first proposed the development of a wind farm in Nantucket Sound.[10] If approved, this project will be the first offshore wind development in the United States.[11] The project plan consists of 130 wind turbine generators

4. *Id.* at 295.

5. *Id.*

6. *Id*.

7. This case note is limited in its discussion to this most recent decision. For a broader discussion of wind power development see Adam Dinnell & Adam 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 (2007).

8. *See* Cape Wind, LLC, http://www.capewind.org (last visited Oct. 24, 2007).

9. *See* NSTAR Electric, http://www.nstaronline.com (last visited Oct. 24, 2007).

10. Ali Mostashari, Stakeholder-Assisted Modeling and Policy Design Process for Engineering Systems 208 (September 2005) (unpublished dissertation, Doctoral Research, Engineering Systems Division, Massachusetts Institute of Technology) (on file with author), *available at* http://esd.mit.edu/people/dissertations/mostashari_ali.pdf.

11. Cape Wind, *Project at a Glance*, http://www.capewind.org/article24.htm (last visited Oct. 9, 2007).

and an electrical service platform; the entire farm would extend over approximately twenty-four miles.[12] Each wind turbine, approximately 420 feet in height, would connect to a service platform with an electric transformer via undersea cables.[13]

The proposed wind farm is to be located offshore on Horseshoe Shoal in Nantucket Sound (Sound), entirely in federal waters; however, roughly half of the undersea transmission lines are within the three-mile offshore Massachusetts boundary.[14] As such, the construction of the wind farm itself is governed by federal law and is beyond the scope of Massachusetts' jurisdiction, but the construction of the transmission lines, and the regulation thereof, is not.

B. The Permitting Process

When Cape Wind originally proposed the project, the Army Corps of Engineers (Corps) was the lead agency, pursuant to Section 10 of the Federal Rivers and Harbors Act.[15] Initially, the Corps approved a 197-foot tall monitoring station in the Sound.[16] This two million dollar data tower collects both water and wind data and was a "monumental hurdle" in the permitting process.[17] In 2002, the Corps undertook the task of preparing a Draft Environmental Impact Statement (DEIS) pursuant to the National Environmental Protection Act.[18] The Corps coordinated this assessment in order to comply with the requirements of the Massachusetts Environmental Protection Act (MEPA) and the Development of Regional Impact (DRI), which is executed by the Cape Cod Commission.[19] This effort was an attempt to facilitate "joint agency and public review" of the proposed wind farm.[20] In all, the 3800 page document has an "uncharacteristically

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12. *Alliance*, 858 N.E.2d at 297. The anticipated electricity generation would "offset 802 tons of sulfur dioxide, 497 tons of nitrous oxide and 733,876 tons of carbon dioxide each year." Pam Belluck, *Plan for Wind Farm Off Massachusetts Clears State Hurdle*, N.Y. TIMES, Mar. 31, 2007, at A9.

13. *Alliance*, 858 N.E.2d at 297.

14. *Id.* The closest the proposed wind turbines will be to the shore is 4.7 miles at Point Gammon in Yarmouth and 5.5 miles at Cape Poge on Martha's Vineyard. *Id.*

15. 33 U.S.C. § 403 (2006).

16. Mandy Locke, *Wind Farm Test Tower Wins Approval*, VINEYARD GAZETTE, Aug. 23, 2002, *available at* http://www.mvgazette.com/news/2002/08/23/wind_farm_test_tower.php (last visited Oct. 24, 2007).

17. *Id.*

18. 42 U.S.C. § 2332 (2000).

19. *See* UNITED STATES ARMY CORPS OF ENGINEERS, DRAFT EIS/EIR/DRI 1.1, *available at* http://www.nae.usace.army.mil/projects/ma/ccwf/section1.pdf [hereinafter DEIS].

20. *Id.*

enthusiastic tone."[21] As for the installation of the submarine cable system, the Corps anticipated "temporary and localized marine sediment disturbance."[22] Temporary and limited disturbances are expected for benthic and shellfish resources, finfish, and protected marine animals.[23] The potential impact on birds was less optimistic, but still hopeful in that the Corps anticipated that the bird mortalities would be "unavoidable" but "infrequent."[24]

In the face of criticism over the appropriateness of the Corps as the lead agency for energy development on the outer continental shelf (OCS), Congress passed the Energy Policy Act of 2005[25] (Energy Act), which transferred the lead agency authority over to the Interior Department and subsequently that authority was delegated to the Minerals Management Services (MMS).[26] Because this is the first offshore wind power development in the United States, the permitting process is anything but streamlined. Despite agency efforts for coordination, there is a maze of both federal and state agencies that are involved in the wind farm proposal.[27] In all, nineteen agencies, each with a particular statutory mandate, are involved in the project.[28] In February 2007, Cape Wind

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21. The Cape and Islands NPR Station, *Reporters Notebook*: *1/5/07*, http://www.wgbh.org/cainan/article?item_id=3283661 (last visited Oct. 24, 2007).

22. DEIS, *supra* note 19, at 5.1.

23. *Id.*

24. *Id.* at 5.7.

25. Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594. The Energy Act did much more than simply transfer authority to MMS; it ostensibly aimed to "ensure jobs for our future with secure, affordable, and reliable energy." *Id.*

26. 119 Stat. at 895.

27. The wind farm itself is exclusively in federal waters; however, the transmission lines cross under the state waters of Massachusetts. *Alliance*, 858 N.E.2d at 297.

28. *See* Minerals Management Services, *Cooperating Agency Contacts & Responsibilities* 1-4, *available at* http://www.mms.gov/offshore/RenewableEnergy/CapeWindCooperatingAgencyContacts.pdf. The major agencies include: National Marine Fisheries Service, Army Corps of Engineers, Coast Guard, Department of Energy, Environmental Protection Agency, Federal Aviation Commission, Fish and Wildlife Service, Cape Cod Commission, Massachusetts Department of Environmental Protection, Massachusetts Executive Office of Environmental Affairs, and the Massachusetts Historical Commission. *Id.* The statutes implicated include: Magnuson–Stevens Fishery Conservation and Management Act, Marine Mammals Protection Act, Essential Fish Habitat, Endangered Species Act, Section 10 of the Rivers and Harbors Act, Section 404 of the Clean Water Act, Section 309 of the Clean Air Act, Title 14 CFR Part 77, Objects Affecting Navigable Airspace, and Section 106 of the National Historic Preservation Act. *Id.* For a detailed list of each permit required for the wind farm project see CAPE WIND, LLC, CAPE WIND ENERGY PROJECT FINAL ENVIRONMENTAL IMPACT REPORT/DEVELOPMENT OF REGIONAL IMPACT Table 1-2 (2007), *available at* http://www.capewind.org/downloads/feir/Executive%20Summary.pdf [hereinafter CAPE WIND FEIR].

submitted the Final Environmental Impact Report/Development of Regional Impact to the Massachusetts Office of Environmental Affairs in satisfaction of the MEPA and DRI requirements.[29] Just recently, the Massachusetts Secretary of Environmental Affairs approved the environmental report,[30] finding that "the environmental benefits and compensatory mitigation provided by the project are adequate to mitigate the impacts of the project occurring in Massachusetts."[31] Despite this success for Cape Wind, MMS recently stated that it would not release its Final Environmental Impact Statement until "late summer" 2007.[32] Ultimately, this delay by MMS will further push back the construction by several months.[33]

C. Litigation

From the very beginning, the Cape Wind project has been fraught with litigation. In *Ten Taxpayer Citizen Group v. Cape Wind Associates, LLC,* the plaintiffs challenged construction of the scientific monitoring tower on the grounds that Cape Wind did not obtain a license pursuant to Massachusetts state law prior to construction.[34] The First Circuit Court of Appeals affirmed the district court's dismissal of the complaint.[35] The plaintiff argued that despite the Outer Continental Shelf Lands Act of 1953 (OCSLA), which established federal control over submerged lands beyond

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29. DEIS, *supra* note 19, at 1.1.

30. Belluck, *supra* note 12.

31. Press Release, The Commonwealth of Massachusetts-The Executive Office of Environmental Affairs (Mar. 30, 2007), *available at* http://www.mass.gov/envir/press/pressreleases/033007_capewind.pdf. Under the report, Cape Wind committed to a ten million dollar mitigation package. *Id.* The terms of that package are as follows:

- "$780,000 towards the restoration of Bird Island, off the town of Marion in Buzzards Bay. At 1.5 acres in size, Bird Island provides prime nesting habitat for Roseate and Common Terns, but the island is subject to significant and accelerating erosion. The enhancement of nesting habitat on Bird Island will benefit the same tern population that is subject to potential impacts from the wind turbine array." *Id.*
- "$4.22 million towards natural resource preservation, marine habitat restoration, and coastal recreation enhancement projects in the area of Cape Cod, Nantucket, and Martha's Vineyard." *Id.*
- "An estimated $5.6 million in Federal Lease Payments over 20 years, representing 27% of the revenues received by the federal government." *Id.*

32. David Scharfenberg, *Feds Delay Report on Wind Farm,* CAPE COD TIMES, Apr. 6, 2007. Cape Wind had anticipated its release in late April 2007. *Id.*

33. *Id.*

34. 373 F.3d 183, 186 (1st Cir. 2004).

35. *Id.*

three miles, the Commonwealth exercised jurisdiction over the data tower under the Magnuson-Stevens Fishery Conservation and Management Act.[36] After a lengthy discussion of the federal and state regulatory landscape and jurisdiction, the First Circuit held that "any Massachusetts permit requirement that might apply to the [data tower] project is inconsistent with federal law and thus inapplicable on Horseshoe Shoals under the OCSLA."[37] The U.S. Supreme Court denied the petition for writ of certiorari.[38]

The Alliance also challenged the approval of the data tower in *Alliance to Protect Nantucket Sound, Inc. v. U.S. Dept. of Army*.[39] The First Circuit affirmed the grant of summary judgment in favor of the U.S. Dept. of Army and Cape Wind as the intervener.[40] The Alliance argued that the Corps was without authority to grant the permit, that the Corps acted arbitrarily and capriciously in its decision, and that the Corps' NEPA assessment was flawed.[41] The First Circuit held that although the statute was ambiguous as to the authority of the Corps to issue the permit,[42] the "legislative history reveal[ed], with exceptional clarity, Congress's intent that Section 10 authority under OCSLA not be restricted to structures related to mineral extraction."[43] The First Circuit further held that the Alliance's contention that the Corps acted arbitrarily and capriciously was "misplaced"[44] and that the Corps "fully complied" with its NEPA obligations.[45]

Cape Wind also initiated litigation. In *Cape Wind Associates, LLC v. Donelan*,[46] Cape Wind civilly sought both an injunction and monetary

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36. *Id.* at 189-90. In *United States v. Maine*, 420 U.S. 515, 523 (1975), the U.S. Supreme Court held that "the federal government has paramount rights in the marginal sea." In another case also titled *United States v. Maine*, 475 U.S. 89, 103 (1986), the Court found that "the colonists of Nantucket Sound did not effectively occupy that body of water; as a consequence, Great Britain did not obtain title which could devolve upon Massachusetts." However, Congress tempered this sweeping language with the passage of the Submerged Lands Act, 43 U.S.C. § 1301 (2000), "which grants to the states full title to the seabed within three geographical miles of their shores." *Ten Taxpayer*, 373 F.3d at 188.

37. *Id*. at 196.

38. Ten Taxpayer Citizens Group v. Cape Wind Assoc., LLC, 543 U.S. 1121 (2005).

39. 398 F.3d 105 (1st Cir. 2005).

40. *Id.* at 108.

41. *Id*.

42. *Id.* at 109. The issue was whether the Corps, under the OCSLA, could issue permits for seabed installations only for installations related to mineral extraction, or whether the Corps had the authority to issue permits for *all* seabed installations. *Id*.

43. *Id.*

44. *Id.* at 114.

45. *Id.* at 115.

46. No. 040913BLS, 2004 WL 1194739 (Mass. Super. Apr. 29, 2004). For a discussion

damages from John Donelan, the former technical and research director for the Alliance, for "sending of a false press release defaming Cape Wind through an e-mail account opened under a fictitious name, but controlled by Donelan."[47] When Donelan attempted to exercise his Fifth Amendment right under the U.S. Constitution against self-incrimination, Cape Wind moved for an order to compel Donelan to answer questions at his deposition.[48] The Massachusetts Superior Court issued the order and also advised Donelan that if he failed to answer there would be "an order refusing to allow [him] to oppose the claims brought against him in the complaint, thereby establishing liability and setting the matter down for an assessment of damages."[49]

One might expect litigation to stem from the first offshore wind project, given the complexity and coordination involved with this unfamiliar undertaking. However, one hopes that future proposals will face less opposition due to agency familiarity and coordination.

III. THE *ALLIANCE* DECISION:

A. Procedural History

On September 17, 2002, Cape Wind petitioned the Board for a permit to construct and operate two 115 kilovolt underground electric transmission lines that would run approximately eighteen miles, twelve of which would be beneath the ocean floor.[50] The transmission lines would connect the proposed wind power facility to the utility switching station.[51] The Board granted intervener status to five entities: the Alliance; the town of Yarmouth; the Massachusetts Department of Environmental Management

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of the fallout of the scandal see John Leaning, *Wind Farm Developer Sues Member of Alliance to Protect Nantucket Sound*, CAPE COD TIMES, Mar. 3, 2004.

47. No. 040913BLS, 2004 WL 1194739 at 1.

48. *Id.*

49. *Id*.

50. *Alliance,* 858 N.E.2d at 297. Both the Alliance and Cape Wind have extensive lists of organizations and individuals who support their position. For a list of the various groups that support the Alliance see Alliance to Protect Nantucket Sound, *Stakeholders*, http://www.saveoursound.org/site/PageServer?pagename=About_ Us_Stakeholders (last visited Oct. 24, 2007). For a list of the various groups that support Cape Wind see Cape Wind, LLC, *Project Supporters*, http://www.capewind.org/article 47.htm (last visited Oct. 22, 2007).

51. *Alliance*, 858 N.E.2d at 297.

Ocean Sanctuaries Program; Save Popponesset Bay, Inc.; and the Massachusetts Audubon Society.[52]

After reviewing a vast record[53] and laboring over an extensive adjudicatory process,[54] the Board concluded that Cape Wind met its burden of demonstrating that:

> (1) the transmission lines will be needed if the wind farm is built; (2) the proposed transmission line project was superior to alternative approaches in terms of cost environmental impact, reliability, and ability to address the identified needs; and (3) the proposed primary route was superior to the alternative routes in terms of cost, environmental impact, and reliability of supply.[55]

To avoid unnecessary construction of the lines, the Board approved the Cape Wind petition on the condition that Cape Wind submit all required permits for commencement of the wind farm project to the Board, prior to construction, and must notify the Board of "any changes other than minor variations to the proposal."[56] Additionally, under the current permit the company must begin construction of the wind farm "within three years of the date of the [Board's] decision."[57]

Of the Board's three conclusions, the Alliance had issue only with the first. With respect to that issue the board made the finding that "the total capacity of all existing transmission cable in Nantucket Sound would be insufficient to transmit the output of the proposed wind farm, even if they would be totally dedicated to that purpose."[58] The court affirmed that determination and the Board's decision that "construction on the lines could not begin until Cape Wind had successfully obtained permits required to begin construction of the wind farm."[59]

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52. *Id*. at 297 n.5.

53. The record comprised of 2900 pages of transcripts and 932 exhibits. Cape Wind, LLC, *Permitting Update*, http://www.capewind.org/article72.htm (last visited Oct. 24, 2007) [hereinafter *Permitting Update*].

54. The administrative process consisted of pre-filed testimony, twenty-one days of evidentiary hearings, as well as comments and arguments concerning the standard of review that the Board should apply due to the changes in the statutory mandate. *Alliance*, 858 N.E.2d at 297.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id*. at 298.

59. *Id.*

B. Applicable Law

The Board is charged with the responsibility of being the first acting agency in response to electricity transmission and generation proposals.[60] The Board is also charged with the duty to execute the legislative mandate "so as to provide a reliable energy supply for the commonwealth with a minimum impact on the environment at the lowest possible cost."[61] To fulfill this duty, the Board must "review the need for, cost of, and environmental impacts of transmission lines."[62] However, as of the adoption of the Reconstruction Act of 1997, the Board's review is limited to environmental impacts; the deregulated energy market is to determine the actual "need" for generating facilities.[63]

Prior to this adoption, the "need" determination was the primary focus of the Board.[64] To determine the "need" for generating facilities that fell outside the Board's jurisdiction, the Board established a two prong test, commonly known as the Turner Falls standard.[65] Under the Turner Falls standard, the Board could "consider whether the energy from the new generator was needed to improve the reliability of the power supply system, or to increase economic efficiency."[66]

However, in 1997 the legislature explicitly undermined the viability of the Turner Falls standard when it limited the Board's authority to review the "need" for new generating facilities: "[n]othing in this chapter [relating to generating facility siting] shall be construed as requiring the [B]oard to make findings regarding the need for, the cost of, or alternative sites for a generating facility."[67] Accordingly, the Board adopted a new standard. Rather than developing a new standard at the beginning of the evidentiary hearing, the Board waited until the close of evidence.[68] At that point, each

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60. MASS. GEN. LAWS ANN. ch. 164, § 69J 1/4 (West 2007). *See also* ch. 164, § 69G (defining "facility" and "generating facility" of which the Board has initial jurisdiction).

61. MASS. GEN. LAWS ANN. ch. 164, § 69H (West 2007). The Board is composed of "the chairman and two additional commissioners of the department, the secretary of environmental affairs . . . the director of economic development . . . the commissioner of energy resources . . . and three public members" who are appointed by the governor for three year term. *Id.* Of the public members, two "shall be experienced in environmental and consumer matters and one of whom shall be experienced in matters relating to the development of energy facilities." *Id.*

62. *Id.*

63. *Id.*

64. *Alliance,* 858 N.E.2d at 296.

65. *Id.*

66. *Id.*

67. MASS. GEN. LAWS ANN. ch. 164, § 69J 1/4 (West 2007).

68. *Alliance,* 858 N.E.2d at 297.

party briefed and argued for a particular standard of review.[69] Ultimately, the Board established the following standard of "need" for the Cape Wind proposal: "it would consider (1) whether the 'existing transmission system is inadequate to interconnect the new or expanded generator' and (2) whether the 'new or expanded generator is likely to be available to contribute to the regional energy supply.'"[70]

An aggrieved party may appeal a decision of the Board to the court for judicial review.[71] As in most administrative review procedures, the court is highly deferential to the Board.[72] In this case, the Alliance bore the heavy burden of proving that the Board's decision was invalid.[73]

C. The Arguments

The Alliance challenged only one of the Board's conclusions: that "the transmission lines will be needed if the wind farm is built."[74] But, confusingly, the Alliance conceded that if Cape Wind obtained all necessary permits that the transmission lines would be needed.[75] However, the Alliance still argued that the Board's decision to conditionally permit the transmission lines was an improper delegation of its statutory duty to make an independent finding of need.[76]

The Alliance further made a quasi-due process argument that it was misled to rely upon the twenty-year old Turner Falls standard; that when the Board "announc[ed] and appl[ied] a new standard of review for need after the record was closed," it had denied the Alliance its due process rights.[77] That argument failed miserably. The court noted that all of the parties to this case "were aware that the 1997 Restructuring Act had changed the rules with respect to the manner in which the board evaluates the need for proposed energy facilities."[78]

The Board countered that it had "properly exercised its discretion to adopt the new standard during adjudication, because the earlier standard was an adjudicatory one, and because the standard applied only to a limited

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69. *Id.*

70. *Id*. at 300.

71. MASS. GEN. LAWS ANN. ch. 164, § 69P (West 2007) (establishing an arbitrary and capricious standard of review for Board determinations); ch. 25, § 5.

72. *Alliance,* 858 N.E.2d at 299.

73. *Id.*

74. *Id.* at 298.

75. *Id.*

76. Brief of Petitioner-Appellant at 14, *Alliance*, 858 N.E.2d 294 (No. SJC-09689).

77. *Id.*

78. *Id*. at 299.

number of cases."[79] Additionally, the Board argued that the conditional permit was a "sensible and effective method to accomplish its statutory responsibility."[80] In the end, the court deferred to the judgment of the Board.[81]

D. Judicial Rationale

Both the Board's decision to "announce a new approach" for transmission line proposals and "the timing of that decision" were within the scope of the Board's discretion.[82] Despite the Alliance's arguments, the court was unconvinced that the Alliance was not given a sufficient opportunity to be heard on the issue of determining the new standard required under the 1997 Restructuring Act. Dumbfounded, the court stated that "[t]he Alliance cannot seriously claim that it lacked reasonable notice of the substance of the issues or a chance to prepare its case."[83] From the beginning of the process, all the parties involved were aware that the 1997 Amendments changed the standard by which the Board would review the need for the transmission lines.[84] Moreover, at the end of the hearing, all parties briefed and argued in front of the Board for their desired standard.[85] By choosing this course, the Board "was able to consider the legal question in a specific factual context."[86] Additionally, this approach "maximized the likelihood that the standard it developed would be workable and grounded in the evidence."[87]

As for the Board's decision to conditionally permit the transmission lines, the court found that there was "nothing improper."[88] In fact, the court held that the Board's decision "was an effective method to accomplish its statutory obligation to determine whether there was a need for the proposed transmission lines."[89] The court seemed particularly compelled by both the fact that the wind farm, excluding the several miles of transmission lines,

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79. Brief of Respondent-Appellee at 18, *Alliance*, 858 N.E.2d 294 (No. SJC-09689).
80. *Id.* at 26.
81. *Alliance,* 858 N.E.2d at 302.
82. *Id.* at 299.
83. *Id.* at 299-300.
84. *Id.* at 299.
85. *Id.*
86. *Id*.
87. *Id.*
88. *Id.* at 300. *See also* Andover v. Energy Facilities Siting Board, 758 N.E.2d 117 (Mass. 2001) (affirming a decision by the Board that effectively conditioned its approval on the facility secured the necessary air quality permits).
89. *Alliance,* 858 N.E.2d at 300.

is completely beyond the jurisdiction of the Board (and the Commonwealth) and by the statutory requirement that the Board is the first state agency to approve such projects.[90] A hint of practicality also played into the court's decision:

> If the [B]oard incorrectly predicted that the wind farm would not get its permits, then the transmission lines would have been unnecessarily rejected. If it incorrectly predicted that the wind farm would get its permits, then it would have permitted the construction of the transmission lines to go forward unnecessarily.[91]

These compelling reasons were compounded by the "uncommon jurisdictional issues" that surround the entire project.[92] The court had no trouble siding with the Board on all issues.

IV. DISCUSSION

One of the Alliance's concerns was that this conditional approval would result in a "rubber stamp" for the remaining agencies to approve the project.[93] From the beginning, Cape Wind framed this project, both to the public and to other agencies, as though it was approved by the Board, without conditions. For example, in the Executive Summary of the Cape Wind Energy Project Final Environmental Impact Report/Development of Regional Impact, Cape Wind stated that the Board "*approved* [Cape Wind's] petition regarding the in-state transmission facilities . . . [t]hus . . . *such findings should guide further State agencies*."[94] One can also see

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90. MASS. GEN. LAWS ANN. ch. 164, § 69J (West 2007) ("No applicant shall commence construction of a facility at a site unless a petition for approval of construction of that facility has been approved by the [B]oard . . . . In addition, no state agency shall issue a construction permit for any such facility unless the petition to construct such facility has been approved by the [B]oard and the facility conforms with any such long-range forecast.").

91. *Alliance,* 858 N.E.2d at 300.

92. *Id.* at 302.

93. *See* Brief of Petitioner-Appellant at 36-37, *Alliance*, 858 N.E.2d 294 (No. SJC-09689). Sarcastically, the Alliance stated that the Board's determination of need goes something like this: for example, an agency "should issue the [permit] because the [Board] has found that the project will be needed once the [agency] issues the [permit]." *Id.* at 36 n.1. The Alliance equated the conditional approval based on the "likely to be available" standard adopted by the Board as one that would allow Cape Wind to "simply file copies of their other permits once they are obtained, and the transmission lines become 'needed' . . . . The legislature intended the [Board] to be more than a mail drop in determining whether projects with potential impacts as significant as transmission facilities are needed." *Id*. at 40.

94. CAPE WIND FEIR, *supra* note 28, at 1-2 (emphasis added).

numerous examples of this on the Cape Wind website. For example, Cape Wind states that "the [Board] *approved* the interconnection of the cables to the electric transmission system in Massachusetts."[95] Another example is within the original press release; the Board "voted today to *approve* the interconnection of Cape Wind's buried electric cables to the electric transmission system in Massachusetts."[96]

Unquestionably, the conditional approval by the Board was couched in definitive terms throughout the remainder of the permitting process. Despite this criticism of the way in which Cape Wind framed the Board's approval, the court's rational for affirming the Board's conditional approval seems quite practical and reasonable given the circumstances. In addition, there are at least two unstated rationales for the court's approval. First, Massachusetts adopted a renewable portfolio standard (RPS) in 2002.[97] Under the RPS, Massachusetts committed to produce four percent of its annual electricity from renewable resources (i.e., solar photovoltaic, solar thermal, wind, ocean thermal, wave, tidal, fuel cells, landfill methane gas and biomass) by 2009 and to increase this by one percent each year.[98] Second, this was a "nearly 32-month review process," and the court was not going to overrule the Board's decision lightly due to the time, energy, and work product that went into this decision.[99] The jurisdictional uniqueness—the combined federal and state regulatory authority and the fact that the Cape Wind project is the first offshore wind project in the United States—required a flexible approach by all involved.

The new standard adopted by the Board is a far more tailored and focused approach than the Turner Falls standard. This new standard allows the Board and the parties to limit the scope of their analysis of new generating facilities in order to carry out the statutory mandate of the legislature.

V. CONCLUSION

Despite the early coordination efforts of the federal and state government, Cape Wind's path toward approval was blurry at best. Initially, there was an effort to coordinate the regulatory process of the

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95. *Permitting Update, supra* note 53 (emphasis added).

96. Cape Wind, LLC, *Cape Wind passes major regulatory milestone*, May 10, 2005, http://www.capewind.org/news375.htm (last visited Oct. 24, 2007) (emphasis added).

97. 225 CMR § 14.07 (2007).

98. *Id.*

99. Brief of Intervener-Appellee at 12, Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Board, 858 N.E.2d 294 (Mass. 2006) (No. SJC-09689).

federal and state governments, but Cape Wind has since decoupled the process in its effort to move forward at the state regulatory level, despite delays at the federal level.[100] This case demonstrates the overall need for the United States to establish a comprehensive management scheme for offshore wind energy development. This management scheme should include an affirmative statement by Congress on its position on offshore wind energy development, a defined and coordinated permitting procedure between MMS and state governments,[101] and an expedited regulatory process for future projects. Additionally, Congress should establish a clear position on the common complaints that accompany wind farms.[102]

One commenter stated that the Cape Wind project is "critical to the future of offshore wind in the United States. Its success or failure is likely to set a precedent for future developments in the country."[103] Also, "public acceptance of offshore wind facilities is linked to development of a credible planning and permitting process that ensures the recognition of public benefits from use of the resource."[104] If the United States wind energy capacity is to be harnessed, the review process must be comprehensive and streamlined in order for projects of this sort to obtain financial backing. Absent such a process, and thus capitalization, the future of offshore wind energy proposals is bleak. Congress should not let this energy potential simply blow by.

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100. *See* Belluck, *supra* note 12.

101. Because the states control the first three miles offshore and because most wind power is most efficient further out, the types of jurisdictional issues are surely to present themselves in nearly all offshore wind development projects.

102. The common complaints include the visual impact of the structures, wildlife concerns, noise pollution, and a potential for a decline in property values. Timothy A. Hayden, *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 ST. ENVTL. L. REV. 217, 227 (2005) (presenting an interesting factual comparison between wind turbines and cell phone towers).

103. Jones, *supra* note 2. "If regulators approve this wind farm, new and existing players are likely to take advantage of the potential and generate many proposals for new projects. On the other hand, if regulators reject the project, and effectively cancel it, the consequences could be dire for the entire U.S. industry." *Id.*

104. FRAMEWORK FOR OFFSHORE WIND ENERGY, *supra* note 1, at 5.