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**A SHIFT IN THE WINDS:
WHAT THE OUTER CONTINENTAL SHELF RENEWABLE ENERGY PROGRAM
AND THE DISMANTLING OF THE MINERALS MANAGEMENT SERVICE MEAN
FOR OFFSHORE ENERGY**

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I. Introduction

Beginning in 1776, when America won its independence from England, the primary sources of energy were manpower and wood.¹ Since then, America has undergone two drastic shifts in energy consumption. The first shift occurred in the middle of the nineteenth century. As the country expanded westward, the use of trains and construction of railways increased, which resulted in a demand for a more efficient source of fuel; that demand was answered by coal.² Coal was the obvious choice due to its proximity to where railroads were being built, as well as its ability to increase the distance a train could travel and the capacity a train could carry.³ At the beginning of the twentieth century, petroleum, America's next major source of energy, began to emerge, as large oil fields were discovered in Texas.⁴ The total usage of petroleum, however, would not surpass that of coal until after the Second World War.⁵ Along with the changes in energy sources, America's energy consumption continued to increase.⁶ This rising demand did not present a problem until a gap emerged between domestic energy

¹ U.S. Energy Info. Admin., *U.S. Energy History*, U.S. DEP'T. OF ENERGY (Aug. 19, 2010), <http://www.eia.doe.gov/aer/eh/eh.html>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *See id.* at fig.7.

⁶ *See id.* at fig.1.

production and consumption in the 1960s and 1970s.⁷ At this point, preventative measures should have been instilled in order to forestall any potential catastrophes resulting from America's dependence on foreign oil. Although the federal government developed initiatives to lessen America's dependence on fossil fuels, the overall result was minimal.⁸

While there is little argument that petroleum is a finite resource, there is still much debate over the size, lifespan, and harvest-ability of untapped reserves. We are, perhaps, in the next great transitional phase in energy consumption. America must move away from its dependency on petroleum, especially to the extent that it forces America to be dependent on foreign nations that have traditionally unstable governments.

Wind is a possible solution to America's dependence on foreign energy. Conceptually, the use of wind as a source of energy is not a new phenomenon. Nearly 7000 years ago, wind was harnessed and used as a propellant to move ships along the Nile River.⁹ Since then, humans have continued to manipulate the power of wind to provide energy. Wind energy technology was initially used in America as a means to extract water from the ground, but as time went on, it eventually became an important source of electricity.¹⁰ The primary benefit of wind energy is that wind occurs naturally. In direct contrast to coal and oil, there are no property rights associated with wind. Additionally, wind is a cleaner source of energy because it does not pollute the environment like fossil fuels.¹¹ This note will demonstrate why this ancient source of power, when combined with present technology, could be one of many possible solutions to end America's dependency on foreign energy.

⁷ See *id.* at fig.3.

⁸ See *id.* at fig.11.

⁹ *History of Wind Energy*, U.S. DEP'T OF ENERGY, http://www1.eere.energy.gov/windandhydro/wind_history.html (last visited Feb. 23, 2011).

¹⁰ *Id.*

¹¹ *Benefits of Wind Energy*, NAT'L RENEWABLE ENERGY LAB., <http://www.nrel.gov/docs/fy05osti/37602.pdf> (last visited Apr. 4, 2011).

First, this note will examine the history of federal jurisdiction over the outer continental shelf and the subsequent acts by the executive and legislative branches to develop the resources therein.¹² The United States first proclaimed jurisdiction over the outer continental shelf during the Truman Administration.¹³ The claim was upheld by the Supreme Court and later confirmed by Congress.¹⁴ Since Congress recognized this federal authority, almost every President has expressed a need for the reduction of dependency on foreign energy and acknowledged the importance of developing renewable sources of energy.¹⁵ Thus, for over fifty years, the United States had jurisdiction over a vast resource capable of providing alternative sources of energy, but failed to take advantage of such an opportunity.

Next, using the Cape Wind project as a case study for the beginning of the twenty-first century, this note will demonstrate the difficulties of offshore wind farm development efforts to take advantage of the aforementioned opportunity. Cape Wind received the first lease from the federal government for the construction of a renewable energy facility on the outer continental shelf.¹⁶ This note will show, however, that due to a lack of clarity and regulations, the road traveled by Cape Wind was neither direct nor easy.¹⁷ Lastly, this note will provide an overview of the Outer Continental Shelf Renewable Energy Program (OCSREP) and address the dismantling of the Minerals Management Service (MMS).¹⁸ Both will have a significant impact

¹² U.S. Bureau of Ocean Energy Mgmt., Reg., & Enfmt., *The Outer Continental Shelf*, OSC ENERGY, <http://ocsenergy.anl.gov/guide/ocs/index.cfm> (last visited Jan. 27, 2011) (“The U.S. Outer Continental Shelf consists of the submerged lands, subsoil, and seabed in a specified zone up to 200 nautical miles or more offshore from U.S. coasts.”).

¹³ See Proclamation No. 2667, 64 Fed. Reg. 48, 701 (Sept. 28, 1945).

¹⁴ See *infra* pp. 4-7.

¹⁵ See *infra* pp. 4-12.

¹⁶ See *Salazar Signs First U.S. Offshore Wind Energy Lease with Cape Wind Assocs.*, U.S. DEP’T OF ENERGY (Oct. 6, 2010), <http://www.doi.gov/news/pressreleases/Salazar-Signs-First-US-Offshore-Commercial-Wind-Energy-Lease-with-Cape-Wind-Associates-LLC.cfm>.

¹⁷ This note discusses only two of the major legal battles Cape Wind was involved in and in no way proclaims to give a comprehensive analysis of all challenges the Cape Wind project has faced.

¹⁸ Renewable Energy Alternate Uses of Existing Facilities on the Outer Continental Shelf, 30 C.F.R. §§ 285.100-285.1019 (2010).

on the future development of renewable energy facilities on the outer continental shelf. The OCSREP provides the clarity that was unavailable when the Cape Wind project first began. Additionally, the dismantling of the MMS removed a major obstacle for renewable energy facilities because it eliminated the conflicts of interest that were present within the MMS. In sum, there has never been a better time to actively pursue the development of renewable energy facilities on the outer continental shelf in an attempt to reduce America's reliance on foreign sources of energy.

II. History of Offshore Jurisdiction, Legislation, and Presidential Statements and Proclamations

A. Development of Federal Authority on the Outer Continental Shelf

In 1945, President Truman declared that, “[I]t [was] the view of the Government of the United States that the exercise of jurisdiction over the natural resources of the subsoil and sea bed of the continental shelf by the contiguous nation is reasonable and just....”¹⁹ Shortly thereafter, the Supreme Court handed down a series of rulings, known as the California cases, declaring the outer continental shelf to be under the jurisdiction of the United States, with certain exceptions.²⁰ In *United States v. California*, the first of these cases, the United States attempted to prevent California from issuing oil and gas leases to companies.²¹ Such leases would have allowed the companies to drill for oil in the outer continental shelf off the coast of California.²² The United States argued that the “proper exercise of [its] constitutional responsibilities requires that it have the power, unencumbered by state commitments, to determine what agreements will

¹⁹ See Proclamation No. 2667, *supra* note 13.

²⁰ *United States v. California*, 332 U.S. 19 (1947); *United States v. Louisiana*, 339 U.S. 699 (1950); *United States v. Texas*, 339 U.S. 707 (1950).

²¹ *California*, 332 U.S. at 23.

²² *Id.*

be made concerning the control and use of the marginal sea and the land under it.”²³ California responded, in part, that its original state constitution determined the state boundary to extend into the Pacific Ocean a distance of “three English miles.”²⁴ The United States Supreme Court set aside California’s claim of ownership, citing that it “was admitted on an equal footing with the original states....”²⁵ The Court also noted that “[t]he ocean, even its three-mile belt, is thus of vital consequence to the nation in its desire to engage in commerce and to live in peace with the world....”²⁶

The Court’s holding in *United States v. California* was immediately tested by Louisiana and Texas. The Court handed down rulings for both cases on the same day.²⁷ In *United States v. Louisiana*, Louisiana attempted to assert authority over the lands on the outer continental shelf lying outside the three-mile belt.²⁸ The Court rejected Louisiana’s declaration of jurisdiction over the seabed outside the marginal three-mile zone; unsurprisingly, it was the same zone at issue in *California*. The Court reasoned that if “the three-mile belt is in the domain of the nation rather than that of the separate States...the ocean beyond that limit also is,” thus resulting in the expansion of the United States’ jurisdiction over the area.²⁹

In *United States v. Texas*, the Supreme Court yet again upheld federal jurisdiction over the coastal seabed.³⁰ Unlike California and Louisiana, the state of Texas was an independent nation prior to joining the Union.³¹ Thus, the Republic of “Texas had both dominium (ownership or proprietary rights) and imperium (governmental powers of regulation and control)

²³ *Id.* at 29.

²⁴ CAL. CONST. art. XII (1849).

²⁵ *California*, 332 U.S. at 30.

²⁶ *Id.* at 35.

²⁷ See *United States v. Louisiana*, 339 U.S. 699 (1950); see *United States v. Texas*, 339 U.S. 707 (1950).

²⁸ See *Louisiana*, 339 U.S. 699.

²⁹ *Id.* at 705.

³⁰ See *Texas*, 339 U.S. 707.

³¹ *Id.* at 713.

as respects the lands, minerals and other products underlying the marginal sea.”³² However, upon admission to the Union, Texas fell into the same position as the rest of the states.³³

In 1953, Congress passed two separate acts that codified the United States’ jurisdiction over the seabed and returned limited jurisdiction to the states.³⁴ The first act was the Submerged Lands Act (SLA).³⁵ The SLA declared the “seaward boundary of each...coastal State...as a line three geographical miles distant from its coast line....”³⁶ Through the SLA, Congress released and relinquished “all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources.”³⁷ In August of the same year, Congress passed the Outer Continental Shelf Lands Act (OCSLA).³⁸ OCSLA recognized federal authority in, and jurisdiction over all, “submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in [43 U.S.C.A.] section 1301....”³⁹ Further, OCSLA marked Congress’ official recognition of the “[O]uter Continental Shelf [as] a vital national resource reserve held [in trust] by the Federal Government...which should be made available for expeditious and orderly development....”⁴⁰ This language echoed that of President Truman who, in his inaugural address, declared, “All countries, including our own, [would] greatly benefit from a constructive program for the better use of the world’s human and natural resources.”⁴¹ Thus, by the mid-1950s, all three branches of government acknowledged the importance of natural resource development and diversification. More specifically, they highlighted the

³² *Id.* at 712.

³³ *Id.* at 713. Admittance on equal footing “prevents extension of the sovereignty of a State into a domain of political and sovereign power of the United States from which other States have been excluded.” *Id.* at 719-20.

³⁴ See Submerged Lands Act of 1953, 43 U.S.C. §§ 1301-1315 (2006); Outer Continental Shelf Lands Act of 1953, 43 U.S.C. §§ 1331-1356 (2006).

³⁵ 43 U.S.C. §§ 1301-1315.

³⁶ *Id.* § 1312.

³⁷ *Id.* § 1311.

³⁸ 43 U.S.C. §§ 1331-1356 (2006).

³⁹ *Id.* § 1331(a).

⁴⁰ *Id.* § 1332(3).

⁴¹ *Inaugural Address (January 20, 1949): Harry S. Truman*, MILLER CTR. OF PUBLIC AFFAIRS, <http://millercenter.org/scripps/archive/speeches/detail/3350> (last visited June 9, 2011).

significance of development of such resources within the federal government's jurisdictional grasp of the outer continental shelf.

While in office, President Reagan solidified the Court's holding in the California cases by declaring that the United States' "Exclusive Economic Zone extends to a distance 200 nautical miles from the baseline...."⁴² Reagan's proclamation displayed the federal government's desire "to facilitate the wise development and use of the oceans...."⁴³ The United States also claims "sovereign rights...[over] the seabed and subsoil and the superjacent waters [] with regard to other activities for the economic exploitation and exploration of the zone...."⁴⁴ These activities include "the production of energy from the water, currents and winds...."⁴⁵ In summary, Reagan declared the official outer boundary of federal jurisdiction to reach the outer continental shelf, and subsequently defined the policy for which the United States should follow in regards to development of resources therein.

B. Development Through the 1970s

In the twenty-five years following the passage of both the SLA and the OCSLA, much of the focus and attention of the legislative and executive branches of the government was on a series of military conflicts, civil rights issues, the space race, and numerous social programs. However, each successive president during this time period acknowledged the importance of the development and preservation of our natural resources and/or the United States' need for energy independence. During his farewell address in 1961, President Eisenhower warned that the government, "must avoid the impulse to live only for today, plundering, for our own ease and

⁴² Proclamation No. 5030, 48 Fed. Reg. 10605, 10605 (Mar. 10, 1983).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

convenience, the precious resources of tomorrow.”⁴⁶ President Kennedy proclaimed, “A strong America...depends on its...natural resources.”⁴⁷ He additionally asserted the “need to strengthen our Nation by making the best and the most economical uses of its resources and facilities.”⁴⁸ President Johnson, in each of his State of the Union Addresses, drew attention to pollution problems in America’s air and waters; unfortunately, much of his presidency concerned the war in Vietnam.⁴⁹

President Nixon welcomed the 1970s by declaring, “The moment has arrived to harness the vast energies and abundance of this land....”⁵⁰ During this time, two events occurred that restored the Presidential interest in natural resources and energy, which had dwindled during President Johnson’s presidency. The first event was the oil embargo of the 1970s, which forced both “energy and the security of oil to the forefront of the nation’s attention.”⁵¹ In 1975, five years after the oil embargo, the end of the war in Vietnam allowed Congress and the President to direct more attention to natural resources and energy independence. A few weeks after the war ended, President Ford stressed that America “need[ed] to regain its independence from foreign

⁴⁶ *Farewell Address (January 17, 1961): Dwight David Eisenhower*, MILLER CTR. OF PUBLIC AFFAIRS, <http://millercenter.org/scripps/archive/speeches/detail/3361> (last visited June 9, 2011).

⁴⁷ *State of the Union Address (January 11, 1962): John Fitzgerald Kennedy*, MILLER CTR. OF PUBLIC AFFAIRS, <http://millercenter.org/scripps/archive/speeches/detail/5742>. (last visited June 9, 2011).

⁴⁸ *State of the Union Address (January 14, 1963): John Fitzgerald Kennedy*, MILLER CTR. OF PUBLIC AFFAIRS, <http://millercenter.org/scripps/archive/speeches/detail/5762> (last visited June 9, 2011).

⁴⁹ *State of the Union Address (January 8, 1964): Lyndon Baines Johnson*, MILLER CTR. OF PUBLIC AFFAIRS, <http://millercenter.org/scripps/archive/speeches/detail/3382> (last visited June 9, 2011); *State of the Union Address (January 4, 1965): Lyndon Baines Johnson*, MILLER CTR. OF PUBLIC AFFAIRS, <http://millercenter.org/scripps/archive/speeches/detail/4000> (last visited June 9, 2011); *State of the Union Address (January 12, 1966): Lyndon Baines Johnson*, MILLER CTR. OF PUBLIC AFFAIRS, <http://millercenter.org/scripps/archive/speeches/detail/4035> (last visited June 9, 2011); *State of the Union Address (January 10, 1967): Lyndon Baines Johnson*, MILLER CTR. OF PUBLIC AFFAIRS, <http://millercenter.org/scripps/archive/speeches/detail/5565> (last visited June 9, 2011); *State of the Union Address (January 17, 1968): Lyndon Baines Johnson*, MILLER CTR. OF PUBLIC AFFAIRS, <http://millercenter.org/scripps/archive/speeches/detail/5666> (last visited June 9, 2011); *State of the Union Address (January 14, 1969): Lyndon Baines Johnson*, MILLER CTR. OF PUBLIC AFFAIRS, <http://millercenter.org/scripps/archive/speeches/detail/5667> (last visited June 9, 2011).

⁵⁰ *State of the Union Address (January 22, 1970): Richard Milhous Nixon*, MILLER CTR. OF PUBLIC AFFAIRS, <http://millercenter.org/scripps/archive/speeches/detail/5667> (last visited June 9, 2011).

⁵¹ Fossil Energy Office of Commc’ns, *Our History*, U.S. DEP’T. OF ENERGY, <http://fossil.energy.gov/aboutus/history> (last visited Feb. 27, 2011).

sources of energy....”⁵² He further emphasized the importance of exploring “every reasonable prospect for meeting our energy needs when our current domestic reserves of oil and natural gas begin to dwindle in the next decade.”⁵³ Then, President Carter set the tone for an American energy policy that would be expanded upon in the years to come.

C. President Carter Through the End of the Century

Perhaps the first honest and open assessment by a United States President regarding energy came from President Carter in his “Address to the Nation on Energy.”⁵⁴ His speech began with the recognition that the prevention of an energy crisis, “[w]ith the exception of preventing war...[was] the greatest challenge that our country [would] face during our lifetime.”⁵⁵ President Carter then proposed actions the United States should take, recognizing they would “be unpopular...[and would] cause [Americans] to put up with inconveniences and...make sacrifices.”⁵⁶ The President also noted that domestic oil production was declining as our oil imports and energy consumption continued to rise.⁵⁷ Using the two historical transitions in sources of energy⁵⁸ as an example, Carter encouraged Americans to “prepare quickly for a third change—to strict conservation and to the renewed use of coal and to *permanent renewable energy sources*....”⁵⁹ President Carter also outlined ten principles in his energy plan to be proposed to Congress in the days following his speech.⁶⁰ He stressed the importance of “the Government tak[ing] responsibility...and [] the people understand[ing] the seriousness of the

⁵² *Address on Energy Policy (May 27, 1975): Gerald Rudolph Ford*, MILLER CTR. OF PUBLIC AFFAIRS, <http://millercenter.org/scripps/archive/speeches/detail/3985> (last visited June 9, 2011).

⁵³ *State of the Union Address (January 12, 1977): Gerald Rudolph Ford*, MILLER CTR. OF PUBLIC AFFAIRS, <http://millercenter.org/scripps/archive/speeches/detail/5600> (last visited June 9, 2011).

⁵⁴ *Address to the Nation on Energy (April 18, 1977): Jimmy Carter*, MILLER CTR. OF PUBLIC AFFAIRS, <http://millercenter.org/scripps/archive/speeches/detail/3398> (last visited June 9, 2011).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ See *supra* text accompanying notes 1-3.

⁵⁹ *Address to the Nation on Energy (April 18, 1977): Jimmy Carter*, *supra* note 54 (emphasis added).

⁶⁰ *Id.*

challenge....”⁶¹ He also emphasized the importance of protecting the environment, “reduc[ing] demand through conservation,” and conserving the scarcest resources while making the most of those in abundance.⁶² His final suggestion was the immediate development of “new, unconventional sources of energy.”⁶³ In his closing remarks, President Carter proposed a test that should be used for his, and perhaps all, energy policies.⁶⁴ Simply put, his test asks “whether [the energy policy in question] will help our country.”⁶⁵

Three years after Carter’s speech, Congress passed the Wind Systems Energy Act (WESA).⁶⁶ WESA echoed President Carter’s concerns, noting that “[T]he United States is faced with a finite and diminishing resource base of native fossil fuels...the current imbalance between supply and demand for fuels and energy...is likely to grow...[and] it is in the Nation’s interest to provide opportunities for the increased production of electricity from renewable energy sources.”⁶⁷ WESA also called for the “Federal Government to undertake research and development...for wind energy systems, and to assist private industry, other entities, and the general public in hastening the widespread utilization of such systems.”⁶⁸ WESA declared part of the policy of the United States was “to accelerate the growth of a commercially viable and competitive industry to make wind energy systems available to the general public as an option in order to reduce national consumption of fossil fuel.”⁶⁹ WESA demonstrated the federal government’s recognition of wind as an alternative source of energy. When considered alongside OCSLA and SLA, WESA demonstrates federal jurisdiction over, and interest in, the

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Wind Energy Systems Act of 1980, 42 U.S.C. §§ 9201-9213 (3006).

⁶⁷ *Id.* § 9201(a)(1-3).

⁶⁸ *Id.* § 9201(a)(8).

⁶⁹ *Id.* § 9201(b)(3).

construction of offshore wind farms as early as the 1980s. Unfortunately, as of 2008, almost thirty years later, wind energy accounted for only a little over one percent of the United States' total energy consumption.⁷⁰

Presidents George H. W. Bush and Bill Clinton also recognized the importance and necessity of energy conservation and the development of alternative energy sources. In his second State of the Union Address, President Bush explained that his Congressional proposals included “a comprehensive national energy strategy that call[ed] for energy conservation and efficiency, increased development, and greater use of alternative fuels.”⁷¹ Near the end of his second term, President Clinton proposed “tax cuts and research and development to encourage innovation [in] renewable energy....”⁷² A year later, he asked for “a new clean air fund to help communities reduce greenhouse and other pollution, and tax incentives and investments to spur clean energy technology.”⁷³ Although, throughout the 1990s, little progress was made in regards to increasing alternative energy use and decreasing dependence on foreign oil.⁷⁴

From post-World War II through the end of the century, energy was a constant topic of interest in both the executive and legislative Branches of the United States government. During energy crises, the focus on alternative and renewable sources of energy increased. Each time a crisis was averted or weathered, the focus dissipated from alternative sources and returned to oil and gas production, resulting in increased demands and production, which often occurred in coastal waters. Regardless of all the presidential proclamations and congressional acts, by the

⁷⁰ U.S. Energy Info. Admin., *Electricity Generation From Wind*, U.S. DEP'T OF ENERGY, http://www.eia.doe.gov/energyexplained/index.cfm?page=wind_electricity_generation (last updated Aug. 23, 2010).

⁷¹ *State of the Union Address (January 29, 1991): George H. W. Bush*, MILLER CTR. OF PUBLIC AFFAIRS, <http://millercenter.org/scripps/archive/speeches/detail/3429> (last visited June 9, 2011).

⁷² *State of the Union Address (January 27, 1998): Bill Clinton*, MILLER CTR. OF PUBLIC AFFAIRS, <http://millercenter.org/scripps/archive/speeches/detail/3444> (last visited June 9, 2011).

⁷³ *State of the Union Address (January 19, 1999): Bill Clinton*, MILLER CTR. OF PUBLIC AFFAIRS, <http://millercenter.org/scripps/archive/speeches/detail/5496> (last visited June 9, 2011).

⁷⁴ See *U.S. Energy History*, *supra* note 1.

end of the twentieth century the United States had achieved only minimal reductions in its dependence on foreign oil and failed to implement any meaningful alternative energy facilities.⁷⁵

III. Cape Wind

Cape Wind Associates (CWA) first proposed the construction of a commercial wind farm on the outer continental shelf in the fall of 2001.⁷⁶ The facility is expected to contain 130 wind turbines.⁷⁷ At their highest and lowest points, the blade tips will be 417 “and 75 feet above the surface of the water.”⁷⁸ The Cape Wind project will provide up to an estimated seventy-five percent of the average electricity demand for the surrounding areas, which includes Martha’s Vineyard and Cape Cod.⁷⁹ Needless to say, the energy benefit from the wind facility would be substantial. Cape Wind will be located off the coast of Massachusetts, near Nantucket Sound in a location known as Horseshoe Shoal.⁸⁰ This area is subject to federal jurisdiction and, consequently, is considered to be within the United States’ exclusive economic zone.⁸¹

Initially, the Army Corps of Engineers served as the lead federal agency in charge of the Cape Wind project.⁸² The first step in the Cape Wind project was the construction of a “scientific measurement tower,” which would “collect data...to determine if [Horseshoe Shoals was] a feasible location for a...permanent windmill farm.”⁸³ The Army Corps of Engineers granted a permit to CWA to construct the tower, pursuant to the Corps’ authority “under §10 of

⁷⁵ The chronological analysis of Presidential speeches, acts of Congress, and decisions of the Court ends at this point to demonstrate the environment that existed when the Cape Wind project first began.

⁷⁶ *Facts on the Cape Wind Energy Project*, BUREAU OF OCEAN ENERGY MGMT., REG., & ENFMT., <http://www.boemre.gov/offshore/RenewableEnergy/PDFs/CapeWindFactSheet10-14-2010.pdf> (last visited Apr. 13, 2011).

⁷⁷ *Frequently Asked Questions About Cape Wind*, CAPE WIND, <http://www.capewind.org/downloads/faqs4.pdf> (last visited Jan. 8, 2011).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Cape Wind Project Status*, BUREAU OF OCEAN ENERGY MGMT., REG., & ENFMT., <http://www.boemre.gov/offshore/RenewableEnergy/CapeWind.htm> (last updated Feb. 22, 2011).

⁸³ *Ten Taxpayers Citizen Grp. v. Cape Wind Assocs. (Ten Taxpayers I)*, 278 F. Supp. 2d 98, 99 (D. Mass. 2003).

the Rivers and Harbors Act of 1889.”⁸⁴ Ten Taxpayers Citizens Group challenged the permit in Massachusetts district court, claiming that prior to construction of the tower, CWA must also comply with state regulations regarding fisheries.⁸⁵

The court ultimately found in favor of CWA, citing *Maine I*, *Maine II*, and the Magnuson-Stevens Fishery Conservation and Management Act, which was the same authority the plaintiffs were attempting to use in their favor.⁸⁶ In *Maine I*, the United States brought suit against all thirteen states bordering the Atlantic Ocean;⁸⁷ all of which claimed some right to the lands outside the three-mile belt of the outer continental shelf.⁸⁸ The United States sought a decree from the Court recognizing its jurisdiction outside the three-mile belt.⁸⁹ The Court found for the United States, holding that their decision in the California cases also applied to states along the Atlantic Coast.⁹⁰ The Court in *Maine II* determined that the waters in Nantucket Sound were also subject to federal jurisdiction.⁹¹ This decision came after an appeal from the state of Massachusetts claiming they had “ancient title” to the land.⁹² Since the Magnuson-Stevens Fishery Conservation Act gave regulatory authority over fishing back to coastal states, Ten Taxpayers argued that, because the construction of a tower would affect fishing, the state had authority to approve the construction.⁹³ In light of their broad statutory interpretation, the Court determined the Act did not support the regulation of “non-fishing activities...for the protection of fish....”⁹⁴ On appeal, the First Circuit Court of Appeals upheld the District Court’s ruling,

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 100-01.

⁸⁷ *See* *United States v. Maine (Maine I)*, 420 U.S. 515 (1975).

⁸⁸ *See id.* at 517-18.

⁸⁹ *See id.* at 517.

⁹⁰ *See id.* at 521.

⁹¹ *See* *United States v. Maine (Maine II)*, 475 U.S. 89, 103-05 (1986).

⁹² *See id.* at 91.

⁹³ *Ten Taxpayers Citizen Grp. v. Cape Wind Assocs. (Ten Taxpayers I)*, 278 F. Supp. 2d 98, 99 (D. Mass. 2003).

⁹⁴ *Id.* at 101.

again determining that “any Massachusetts permit requirement that might apply...is inconsistent with federal law and thus inapplicable on Horseshoe Shoals....”⁹⁵ A subsequent “[p]etition for writ of certiorari to the United States” Supreme Court was denied.⁹⁶

While Cape Wind was in litigation with Ten Taxpayers, Alliance to Protect Nantucket Sound (Alliance) sued the Army Corps of Engineers.⁹⁷ Alliance “was formed in 2001 in response to [CWA’s] proposal to build a wind farm in the Sound” with the goal “to protect Nantucket Sound in perpetuity through conservation, environmental action, and opposition to inappropriate industrial or commercial development.”⁹⁸ While Alliance “supports wind power as an alternative energy source,” it “oppose[s] the proposed Cape Wind” project.⁹⁹ Basically, Alliance had a “not in my backyard” mentality that is often associated with environmental suits. Meaning, they support the development of alternative sources of energy, so long as those developments do not occur within a close proximity to them.¹⁰⁰ In its challenge, Alliance argued that “the Corps lacked the authority to issue” the permit to CWA for the construction of a research tower.”¹⁰¹

Originally, the Secretary of the Army had authority to permit construction of structures in navigable waters of the United States;¹⁰² this authority was later extended to include “artificial islands, installations, and other devices.”¹⁰³ The Secretary of the Army eventually delegated

⁹⁵ Ten Taxpayers Citizens Grp. v. Cape Wind Assocs. (*Ten Taxpayers II*), 373 F.3d 183, 197 (1st Cir. 2004).

⁹⁶ Ten Taxpayers Citizens Grp. v. Cape Wind Assocs., 543 U.S. 1121 (2005).

⁹⁷ Alliance to Protect Nantucket Sound, Inc. v. U.S. Dep’t of the Army (*Alliance I*), 288 F. Supp. 2d 64, 67 (D. Mass. 2003).

⁹⁸ *About Us*, ALLIANCE TO PROTECT NANTUCKET SOUND, http://org2.democracyinaction.org/o/6891/content_item/aboutus (last visited Apr. 13, 2011).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Alliance I*, 288 F. Supp. 2d at 67.

¹⁰² Rivers and Harbors Act of 1899, 33 U.S.C. § 403 (2006).

¹⁰³ Outer Continental Shelf Lands Act of 1953, 43 U.S.C. § 1333(e) (2006).

these powers to the Chief of Army Engineers,¹⁰⁴ whose authority extended to “the subsoil and seabed of the [OCS] and to artificial islands, and all installations and other devices...attached to the seabed....”¹⁰⁵ Alliance argued that the Corps lacked the authority to issue a permit to CWA for the erection of the tower because the Corps only had “jurisdiction on the OCS...over structures erected for the purpose of extracting resources.”¹⁰⁶ After a discussion about administrative interpretation of statutes and the deference given to such interpretations, the court found “the Corps [was] entitled to *Chevron* deference in its interpretation....”¹⁰⁷ The Corps believed that 43 U.S.C. § 1333(a) did not limit its authority to issue permits only for structures that would extract resources.¹⁰⁸ The court found that Congress “made crystal clear its intention that the Corps exert jurisdiction over both extractive and non-extractive structures on the OCS.”¹⁰⁹ Thus, the Corps’ interpretation of the statute was valid.

Alliance appealed the district court’s determination that the Corps had the authority to issue the section 10 permit to the First Circuit Court of Appeals.¹¹⁰ Again, using *Chevron* the court found the “legislative history reveals...Congress’ intent....”¹¹¹ Congress had already stated that it did not intend “to limit the authority of the Corps [of Engineers] as to structures used for the exploration, development, removal, and transportation of resources.”¹¹² This legislative history negates Alliance’s assertion that 43 U.S.C. § 1333(a) “is restrictive, and limits the Corps’

¹⁰⁴ Processing of the Department of the Army Permits, 33 C.F.R § 325.8(a) (2010).

¹⁰⁵ 43 U.S.C. §1333(a)(1) (2006).

¹⁰⁶ *Alliance I*, 288 F. Supp. 2d at 74.

¹⁰⁷ *Id.* at 77; *see Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (explaining that in the first step of *Chevron* the court must determine whether Congress has spoken to the precise question at issue. If Congress has, in fact, spoken directly to the question at issue, the court must give effect to the intent of Congress.).

¹⁰⁸ *Id.* at 74.

¹⁰⁹ *Id.* at 75.

¹¹⁰ *Alliance to Protect Nantucket Sound v. U.S. Dep’t of the Army (Alliance II)*, 398 F. 3d 105 (1st Cir. 2004).

¹¹¹ *Id.* at 109.

¹¹² *Id.* at 110.

permitting authority on the OCS to structures related to the extraction of mineral resources.”¹¹³

In the end, the court affirmed the district court’s ruling, holding the Corps, through the acts of Congress, had authority to issue permits and the ability to issue a “permit for Cape Wind’s...tower.”¹¹⁴

Although the court officially recognized the Corps’ authority in 2005, Congress transferred that authority to the Secretary of the Interior with an amendment to section eight of the OCSLA.¹¹⁵ This amendment was part of the Energy Policy Act of 2005¹¹⁶ and gave the Secretary of the Interior authority to “grant a lease, easement, or right-of-way on the Outer Continental Shelf...if those activities produce or support production, transportation, or transmission of energy from sources other than oil and gas.”¹¹⁷ At this point, the Minerals Management Service, an agency within the Department of the Interior, took over the Cape Wind project.¹¹⁸

On October 6, 2010, the Secretary of the Interior, Ken Salazar, gave CWA its official lease,¹¹⁹ effective November 1, 2010.¹²⁰ This marked a major victory for Cape Wind. However, that victory came after almost ten years of wading through uncharted waters, aside from the court proceedings. In 2001, when the Cape Wind project began, there was a lack of regulations and procedures, which was coupled with the MMS’ interest in minimizing alternative energy sources and maintaining oil and gas exploration and development on the outer continental shelf.

¹¹³ *Id.* at 108.

¹¹⁴ *Id.* at 111.

¹¹⁵ Outer Continental Shelf Lands Act of 1953, 43 U.S.C. § 1337 (2006).

¹¹⁶ Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594.

¹¹⁷ *Id.* § 388, 119 Stat. at 744 (codified as amended at 43 U.S.C. §1337(p)(1)(C)).

¹¹⁸ *Facts on the Cape Wind Energy Project*, BUREAU OF OCEAN ENERGY MGMT., REG., & ENFMT., <http://www.boemre.gov/offshore/RenewableEnergy/PDFs/CapeWindFactSheet10-14-2010.pdf> (last visited Apr. 13, 2011).

¹¹⁹ *See Salazar Wind Energy Lease*, *supra* note 16.

¹²⁰ *Official Lease*, U.S. DEP’T OF ENERGY (Oct. 6, 2010), http://www.boemre.gov/offshore/RenewableEnergy/PDFs/CapeWind_signed_lease.pdf (providing a copy of the actual lease).

Recently, two events occurred that should legitimately promote and facilitate the development of wind energy systems on the outer continental shelf. These two events are the regulations promulgated by and set forth in the Outer Continental Shelf Renewable Energy Program (OCSREP) and the dismantling of the Minerals Management Service.

IV. The Outer Continental Shelf Renewable Energy Program

A. Introduction to and Authority for The Program

The Outer Continental Shelf Renewable Energy Program, otherwise known as Renewable Energy and Alternate Uses of Existing Facilities on the Outer Continental Shelf, sets forth regulations that specifically apply to activities that “[p]roduce or support production, transportation, or transmission of energy from sources other than oil and gas.”¹²¹ OCSREP also regulates activities that “[u]se, for energy related purposes or for other authorized marine-related purposes, facilities currently or previously used for activities authorized under the OCS Lands Act.”¹²² The program contains ten different subparts. The first seven deal with general provisions; issuance of outer continental shelf renewable energy leases; rights-of-way grants (ROWs), rights-of-use, and easement grants (RUEs) for renewable energy activities; lease and grant administration; payments and financial assurance requirements; plans and information requirements; and facility design, fabrication, and installation.¹²³ Subpart H pertains to environmental safety and management, inspection, and facility assessments for activities conducted under Site Assessment Plans (SAPs); Construction and Operations Plan (COPs); and General Activities Plan (GAPs).¹²⁴ Subparts I and J cover decommissioning and RUEs for

¹²¹ Renewable Energy Alternate Uses of Existing Facilities on the Outer Continental Shelf, 30 C.F.R. § 285.100(a) (2010).

¹²² *See id.* § 285.100(b).

¹²³ *See id.* §§ 285.100-285.714.

¹²⁴ *See id.* § 285.800.

energy and marine related activities using existing outer continental shelf facilities.¹²⁵ The final version of OCSREP was published in the Federal Register on April 29, 2009, and became effective on June 29, 2009.

B. How the Program Finally Provides Clarity

As demonstrated by Cape Wind, prior to the passage of the OCSREP there was no clear instruction as to what was required to build a renewable energy facility on the outer continental shelf. The OCSREP now provides such information. The program has three declared purposes. First, it “[e]stablish[es] procedures for issuance and administration of leases, right-of-way (ROW) grants, and right-of-use and easement (RUE) grants for renewable energy production on the Outer Continental Shelf (OCS). . . .”¹²⁶ Next, it “[i]nform[s] [lease holders] and third parties of [their] obligations when [undertaking] activities authorized in [OCSREP].”¹²⁷ OCSREP’s third, and final, purpose is to “[e]nsure that renewable energy activities on the OCS . . . are conducted in a safe and environmentally sound manner, in conformance with the requirements of . . . [OCSLA], and other applicable laws and regulations. . . .”¹²⁸ The OCSREP then sets out the responsibilities of the MMS, which include the “[p]rotection of the environment, . . . [c]onservation of natural resources of the OCS, . . . [a] fair return to the United States, . . . [and] [o]versight, inspection, research, monitoring, and enforcement of activities authorized by a lease or grant. . . .”¹²⁹

As previously stated, essentially no thorough permitting process existed prior to the OCSREP for potential investors and companies, such as Cape Wind, to follow. Now, under the

¹²⁵ See *id.* §§ 285.901-285.1019 (For the purposes of this paper, the parts pertaining specifically to alternate uses of existing facilities will not be discussed).

¹²⁶ See *id.* § 285.101(a).

¹²⁷ See *id.* § 285.101(b).

¹²⁸ See *id.* § 285.101(c).

¹²⁹ See *id.* §§ 285.102(a)(2), (4), (8), (12).

OCSREP, there is clarity regarding the leasing process for offshore alternative energy facilities. Leases must be conducted either “on a competitive basis, ...[or if MMS] determine[s]...there is no competitive interest, ...noncompetitively....”¹³⁰ MMS has the authority to issue two separate types of leases. The first, a commercial lease, “convey[s] the access and operational rights necessary to produce, sell, and deliver power....”¹³¹ The second type, a limited lease, will “convey access and operational rights for activities on the OCS...support[ing] the production of energy, but...not result[ing] in the production of electricity or other energy product for sale, distribution, or other commercial use....”¹³² Limited leases are “issued for site-assessment purposes only or for site assessment and development and testing of new or experimental renewable technology.”¹³³ These two distinct lease provisions demonstrate the importance of both commercial production and the research necessary to reach to the commercial production level. Commercial and limited leases are issued in two forms: long term (thirty years) and short term (five years).¹³⁴ The MMS may also “issue OCS leases, ROW grants, and RUE grants to a Federal agency or a State....”¹³⁵ These particular leases are “for renewable energy research activities that support the future production, transportation, or transmission of renewable energy.”¹³⁶ ROW grants “authorize[] the holder to install on the OCS cables, pipelines, and associated facilities...[for] the transportation or transmission of...energy product from renewable energy projects.”¹³⁷ RUE grants “authorize[] the holder to construct and maintain facilities...on the OCS that support the production, transportation, or transmission of electricity or other energy

¹³⁰ See *id.* § 285.201.

¹³¹ Overview of the Project Development Process, 74 Fed. Reg. 19647 (Apr. 29, 2009).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ 30 C.F.R. § 285.238(a).

¹³⁶ See *id.*

¹³⁷ See *id.* § 285.300(a).

product from any renewable energy resource.”¹³⁸ Requests for renewals may be approved by the MMS, at its discretion, if the requests are “to conduct substantially similar activities as were originally authorized under the lease or grant[s].”¹³⁹

The system of leases and grants under the OCSREP provides the previously non-existent framework needed for the development of renewable energy sources on the outer continental shelf. As demonstrated by CWA’s long battle, no definite path existed to obtain a lease for alternative energy facilities on the OCS, which prevented potential investors and companies from pursuing development opportunities. Now with a concrete process, interest in development is growing in over fifteen coastal states and Hawaii.¹⁴⁰ However, even though there was finally clarity, the MMS still presented one final obstacle.

V. The Problems MMS Presented to Offshore Development of Renewable Energy and

What the Dismantling of the MMS Means

A. Problems MMS Presented

In January 1982, Secretarial Order No. 3071 created the MMS, under the authority “provided by Section 2 of Reorganization Plan No. 3 of 1950.”¹⁴¹ According to an MMS departmental manual, MMS was “responsible for managing the mineral resources on and energy-related or other authorized marine-related purposes across the OCS in an environmentally sound and safe manner and to timely collect, verify, and distribute mineral revenues.”¹⁴² The assurance of safety and collection of revenues were both handled by the MMS. Thus, from its inception, MMS had an economic incentive to be lenient with regards to safety regulations. Less time

¹³⁸ See *id.* § 285.300(b).

¹³⁹ See *id.* § 285.425.

¹⁴⁰ *Renewable Energy: State Activities*, BUREAU OF OCEAN ENERGY MGMT., REG., & ENFMT, <http://www.boemre.gov/offshore/RenewableEnergy/StateActivities.htm> (last updated Feb. 24, 2011).

¹⁴¹ Sec. Order No. 3071 (Jan. 19, 1982) (on file with author).

¹⁴² U.S. Dep’t of the Interior, Departmental Manual, Pt. 118 Ch. 1 §1.3 (Mar. 20, 2006).

spent complying with regulations meant more time for offshore well drilling, which in turn, produced more profits for the MMS to collect. As the recent Final Report on the BP Oil Spill correctly pointed out, “From birth, MMS had a built-in incentive to promote offshore drilling in sharp tension with its mandate to ensure safe drilling and environmental protection.”¹⁴³

Under OCSREP, MMS had the authority to grant leases for renewable energy facilities.¹⁴⁴ At face value, this was not an apparent problem. However, it must also be considered in conjunction with the other authority and responsibilities the MMS received under the regulation. MMS was also responsible for “establish[ing] practices and procedures to govern the collection of all payments due to the Federal Government....”¹⁴⁵ This meant the MMS was in charge of collecting revenues. When taken together, these powers presented no significant problem or conflict of interest. The conflict of interest appeared when MMS also received the authority to regulate and enforce the industry.¹⁴⁶ Even more disturbing, was that MMS was in charge of both offshore oil and gas production, and the development of offshore renewable energy production. It is not difficult to envision the conflicts that arise between these two sources of energy. The more MMS pushed for oil and gas development, the less attention renewable energy received, and vice versa with renewable energy taking the focus away from oil and gas.

B. The Solution

On May 19, 2010, in the wake of the BP Deepwater Horizon oil spill, Secretary of the Interior Ken Salazar issued Order No. 3299 with the “purpose to separate and reassign the

¹⁴³ Nat’l Comm’n on the BP Deepwater Horizon Oil Spill and Offshore Drilling, *Final Report*, OILSPILLCOMMISSION.GOV (Jan. 11, 2011), http://www.oilspillcommission.gov/sites/default/Files/documents/4_OSC_CH_3.pdf.

¹⁴⁴ 30 C.F.R. § 285.100.

¹⁴⁵ *Id.* § 285.102(d).

¹⁴⁶ *Id.* § 285.102(b).

responsibilities that had been conducted by the Minerals Management Service into new management structures.”¹⁴⁷ A separation of the responsibilities was intended to “improve the management, oversight, and accountability of activities on the Outer Continental Shelf.”¹⁴⁸ The order divided the MMS into three separate agencies: the Bureau of Ocean Energy Management (BOEM), Bureau of Safety and Environmental Enforcement (BSEE), and the Office of Natural Resources Revenue (ONRR). BOEM received the “conventional and renewable energy-related management functions of the [MMS].”¹⁴⁹ BSEE will exercise the “safety and environmental enforcement functions of the [MMS] including, but not limited to, the authority to inspect, investigate...[and] levy penalties.”¹⁵⁰ Finally, ONNR will take over the “royalty and revenue management functions of the [MMS] included, but not limited to, royalty and revenue collection.”¹⁵¹

Through his order, Secretary Salazar effectively removed the obvious, apparent, and controversial conflicts of interest that existed within the MMS, including the inherent conflicts based on the duties of the service, and those not so obvious as a result of competing types of energy. Now, BOEM is solely concerned with only the leasing process. Likewise, another agency is assigned the single purpose of enforcing regulation and safety standards; it will not matter how the BSEE affects the bottom line, because the bottom line is not its concern. Perhaps the most important part of the secretarial order was the creation of the ONNR, because the most inherent conflict arose concerning revenue. With revenue collection vested in a separate agency, the other agencies will be able to perform their functions without the prior conflict.

¹⁴⁷ Sec. Order No. 3299 (May 19, 2010).

¹⁴⁸ *See id.*

¹⁴⁹ *See id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

VI. Conclusion

Over the past fifty years much interest has emerged concerning the development of our nation's resources. The Courts recognized the federal government's power to develop on the Outer Continental Shelf a half century ago. Although this power has been primarily used for oil and gas production, it was recognized and can now be used for alternative sources of energy. Past Presidents discussed research in renewable energy and its importance, and although they achieved little, they were able to publicize the idea. Congress also attempted to implement programs encouraging the development of renewable sources of energy. Though, unfortunately, oil and gas remained major sources of energy due to their large demand and relative affordability. Meanwhile, the amount of energy produced by renewable resources has risen slowly. However, implementation of the Cape Wind offshore wind farm will bring a new dawn to America. The acts of Congress, the Court, and the President laid the foundation for improvements over the last ten years regarding the development of renewable energy facilities on the outer continental shelf. Through persistence, their words and actions were finally put into action by Cape Wind in 2001.

A few short years ago, only two major roadblocks prevented the renewable energy industry from truly becoming a major factor on the outer continental shelf. The first of these was the lack of regulations and clarity. Now under OCSREP, it is clear as to who has the authority to issue leases, and what requirements must be met in order to obtain and keep a lease. The second major roadblock was the Minerals Management Service. Essentially, there was no way the MMS would allow for the renewable energy industry to become a major player on the outer continental shelf. The MMS could not be overruled or avoided no matter how much other

regulation and authority was codified; however, it could be dismantled. The dissolution of the MMS marked an end of an oil and gas only era on the outer continental shelf.

There is no guarantee that the renewable energy industry will actually emerge and become a major player on the outer continental shelf. The foundation has been laid and the path paved, but now the renewable energy industry must put the policies, procedures, and regulations developed over the past sixty years into action, in order to reduce our country's dependence on foreign energy and begin America's next great shift in energy consumption.