

A MIGHTY WIND: THE TURBULENT TIMES OF AMERICA'S FIRST OFFSHORE WIND FARM AND THE INVERSE OF ENVIRONMENTAL JUSTICE

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ABSTRACT

In 2001, Cape Wind Associates announced its proposal to construct America's first offshore wind farm in the federal waters of Nantucket Sound. This declaration touched off a storm of law suits, fund raising, and protests in the press that still rages to this day. Political pundits and environmental groups of every stripe have taken some surprising positions, based solely on the location of the renewable energy source. The Alliance to Protect Nantucket Sound, posing as an environmental concern, has risen as the archrival to the wind farm. Interestingly, a closer look under the surface of this group reveals a financial juggernaut of fossil fuel funding, and instead of trying to preserve Nantucket Sound, the real issue that arises is classic NIMBY (Not In My Back Yard).

A timeline, starting from the announcement in 2001 and spanning to the selection of construction contractors in 2012, summarizes the astounding scope of litigation, politics and electrical utility contracts. Together with analysis of the major cases intended to block Cape Wind, is a look at the history of the Environmental Justice (EJ) movement. With the late entrance of Native American Tribes into the fray, the significance of EJ in current state and federal policy is now being used in reverse as a weapon to strike against Cape Wind, for the benefit of Cape Cod's well-heeled residents.

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M.W. Marinakos*

I. INTRODUCTION

In 2001, Cape Wind Associates called a press conference to announce its proposal to construct America's first offshore wind farm on Horseshoe Shoal in Nantucket Sound.¹ "Miles from the nearest shore, 130 wind turbines will gracefully harness the wind"² This first-of-its-kind project is anticipated to produce up to 420 megawatts³ of renewable energy, and has the potential of providing three quarters of the region's electricity needs.⁴ Yet, in the past ten years this project with such promise for clean energy has been met with wave after wave of litigation and well-heeled resistance from wealthy and influential landowners in Cape Cod. It seems that the controversy surrounding the proposal has generated as many arguments for or against Cape Wind as there will be turbines placed in Nantucket Sound if the project proceeds.

In direct opposition to this proposal, the Alliance to Protect Nantucket Sound (also known as "Save Our

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¹ Ariel Schwartz, *First Offshore Wind Farm in the U.S. Gets Approval After Decade of Red Tape*, FAST COMPANY.COM, Apr. 20, 2011, available at <http://www.fastcompany.com/1748633/after-a-decade-of-stalling-the-first-offshore-wind-farm-in-the-us-gets-final-approval>.

² Cape Wind: Project at a Glance, <http://www.capewind.org/article24.htm> (last visited Apr. 7, 2012).

³ *Id.*

⁴ *Id.*

Sound”),⁵ has characterized Cape Wind as an “industrial scale” development “the size of Manhattan,” with turbines “larger than the Statue of Liberty”⁶ It casts Nantucket Sound as a “national treasure” that will be compromised by introduction of the wind farm.⁷ Although the Alliance frames most of its objections in the form of environmental threats to the sound, it ignores overarching environmental benefits of clean energy. In addition, although opposition to siting the turbines in Nantucket Sound is widespread, numerous environmental groups applaud the project.⁸

Greenpeace,⁹ for example, “believe[s] that the presumption should always be in favor of renewable energy projects, unless there is specific evidence of environmental harm.”¹⁰ After reviewing the submitted draft environmental impact statement, Greenpeace “identified no such harms” and “[gave] the project [their] full institutional support.”¹¹

The most recent chapter in the Cape Wind controversy began when a complaint was filed in 2011 by two Native-American tribes charging that “[t]he Cape Wind Energy Project . . . will alter the eastern viewshed across Nantucket Sound, which is central to the identity and religion of the Wampanoag Tribe” and will “irreparably damage the seabed of Horseshoe Shoal, which holds cultural and historical significance for the

⁵ Alliance to Protect Nantucket Sound: Home Page, <http://www.saveoursound.org/> (last visited Apr. 7, 2012).

⁶ Alliance to Protect Nantucket Sound: The Cape Wind Project, http://www.saveoursound.org/cape_wind_threats/the_project/ (last visited Apr. 7, 2012).

⁷ *Id.*

⁸ *Id.*

⁹ Greenpeace, In Support of Cape Wind, <http://www.greenpeace.org/usa/en/campaigns/global-warming-and-energy/green-solutions/wind-power/in-support-of-cape-wind/> (last visited Apr. 7, 2012).

¹⁰ *Id.*

¹¹ *Id.*

Tribe.”¹²

The Tribes claim to practice a religious ceremony involving the sunrise that would be compromised by the turbines.¹³ In addition, they claim that cultural artifacts that rest on the ocean floor, in the very location where the turbines are due to be placed, will be placed in harm’s way.¹⁴

Ironically, the politically powerful and wealthy landowners underwriting the Alliance are now embracing environmental justice (EJ) arguments meant to protect low-income and of-color communities. By hitching their wagon to the tribal claims, these communities are inverting the EJ protections designed to shield low income communities with no voice in decision-making from bearing a disproportionate environmental burden. Here, the Cape Cod elite are manipulating the same tool to protect the lands of wealthy white landowners because, at bottom, they don’t want the wind farm in their watery playground. Unlike the typical EJ case where poor and minority communities can ill-afford to litigate to keep environmental problems out of their neighborhoods—this is the case of the inverse. This comment looks not only at the different points of view, but at the people behind those opinions, and what a well-funded legal arsenal can do in order to protect those interests.

The next section provides background to lay the foundation for a basic understanding of the Cape Wind project. It examines in more detail those who oppose the wind farm, and what their various interest are in taking that view. This analysis supports their true reason for

¹² Complaint, *Wampanoag Tribe of Gay Head v. Bronwich*, No. 1:11-cv-01238 (D.D.C. filed July 6, 2011) *available at* <http://turtletalk.files.wordpress.com/2011/07/1-wind-case.pdf>.

¹³ Assoc. Press, *Tribes: Wind farm would harm sacred rituals*, MSNBC.COM, Nov. 2, 2009, *available at* http://msnbc.msn.com/id/33585078/ns/us_news-environment/#.TxndOJiDrao (“The Wampanoag — the tribe that welcomed the Pilgrims in the 17th century and known as “The People of the First Light” — practice sacred rituals requiring an unblocked view of the sunrise...Tribal rituals, including dancing and chanting, take place at secret sacred sites around the sound at various times, such as the summer and winter solstices and when an elder passes.”).

¹⁴ Complaint, *supra* note 12 at 2.

the opposition to a renewable energy source: NIMBY (Not-In-My-Back-Yard). Section III highlights the broad spectrum of lawsuits that have befallen Cape Wind, an odyssey of litigation that has attempted to derail the project. Four major cases are considered in order to illustrate the convoluted permitting process for a novel project such as this, and potential pitfalls confronting similar off shore wind farms. Finally, section IV of this paper will address the emerging environmental justice issues,¹⁵ specifically how the late addition of Tribal interests to the controversy seeks to employ EJ as leverage to stop this wind farm. As the wealthy opponents of this project solicit the support of neighboring tribal communities to support their resistance to the wind farm, the true purpose of the environmental justice movement is being turned on its head.

II. CAPE WIND BACKGROUND: THE ANSWER, MY FRIEND, IS BLOWIN' IN THE WIND¹⁶

In answer to climate change and spiking levels of green house gases on our planet,¹⁷ many see renewable energy as the “golden ticket”¹⁸ to feeding the human population’s voracious hunger for energy; while at the

¹⁵ U.S. Environmental Protection Agency, *EPA New England Regional Policy on Environmental Justice*, available at <http://www.epa.gov/region1/ej/ejpolicy.html> (“EJ is the fair treatment and meaningful involvement of all people Fair treatment means that no group of people, including any racial, ethnic, or socioeconomic group, should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies.”).

¹⁶ Bob Dylan, *Blowin’ in the Wind* (Columbia Recording Studios 1962).

¹⁷ See Press Release, United Nations Framework Convention on Climate Change, UNFCCC Executive Secretary: Governments Have Unavoidable Responsibility to Make Clear Progress Towards 2011 Climate Objectives (June 6, 2011) available at http://unfccc.int/files/press/press_releases_advisories/application/pdf/pr20110606sbs.pdf.

¹⁸ *Willy Wonka & the Chocolate Factory* (Paramount Pictures 1971).

same time, preventing further destruction of the atmosphere. One such group is Cape Wind Associates, a private company, and its developer, Energy Management Inc.¹⁹

A. Cape Wind Primer

The Cape Wind Project will be comprised of 130 turbines,²⁰ with towers that stand 258 feet tall and are 16 feet in diameter.²¹ The lowest turbine blade will dip to 75 feet above the surface of the water, and the highest tip of the blade will reach up to 440 feet above the surface.²² The turbines will be located at Horseshoe Shoal, a federally regulated area within Nantucket Sound, off the coast of Massachusetts.²³ Each turbine will be embedded into the sea floor and arranged on a grid pattern with the space of approximately six football fields between each turbine in a row, and each row measuring nearly nine football fields apart.²⁴ Underwater cables, buried six feet into the seabed, will transmit the electricity to a land-based facility, sited in Yarmouth, Massachusetts.²⁵ The entire project “will be spread over a twenty-four square mile area [but] it will only physically occupy two acres.”²⁶

Cape Wind’s average expected production will be

¹⁹ Cape Wind: Project at a Glance, *supra* note 2.

²⁰ Cape Wind: Frequently Asked Questions, <http://www.capewind.org/FAQ-Category4-Cape+Wind+Basics-Parent0-myfaq-yes.htm> (last visited Apr. 7, 2012).

²¹ *Id.*

²² *Id.*

²³ Ten Taxpayers Citizens Group v. Cape Wind Assocs., LLC, 373 F.3d 183, 193 (1st Cir. 2004) (“Federal law is interstitial by its nature, and no other body of law applies on the outer Continental Shelf.”).

²⁴ Cape Wind, *supra* note 20.

²⁵ *Id.*

²⁶ Carolyn S. Kaplan, *Congress, the Courts, and the Army Corps: Siting the First Offshore Wind Farm in the United States*, 31 B.C. ENVTL AFF. L. REV. 177, 192 (2004).

170 megawatts, which is almost 75% of the electricity needed by residents of Cape Cod, and the surrounding region.²⁷ The Massachusetts Department of Public Utilities has approved a fifteen-year contract to purchase half of Cape Wind's power for National Grid (a major energy distributor in New England).²⁸ NSTAR, the second-largest utility in the region, may potentially be Cape Wind's second large energy contract.²⁹ NSTAR is in a pending merger with Northeast Utilities, and such deals now come with requirements from regulators to advance clean energy goals.³⁰ This merger could lead to a much-needed agreement for distribution and use of a significant remaining portion of Cape Wind's energy.

B. Who is the Alliance to Protect Nantucket Sound? Kites rise against, not with, the wind.³¹

The Alliance is a nonprofit environmental organization dedicated to the long-term preservation of Nantucket Sound. It was formed in 2001 in response to Cape Wind's proposal to build a wind farm in the Sound. Our goal is to protect Nantucket Sound in perpetuity through conservation, environmental action, and opposition to inappropriate industrial or commercial

²⁷ 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, 539 (2007).

²⁸ Sue Reid, *Cape Wind Gathers Steam*, CONSERVATION LAW FOUND., Nov. 23, 2010, available at <http://www.clf.org/blog/clean-energy-climate-change/cape-wind-gathers-steam/>. National Grid is an international electricity and gas company and one of the largest investor-owned energy companies in the world. National Grid, Home, We are National Grid, <http://nationalgrid.com/> (last visited Apr. 18, 2012).

²⁹ Jay Lindsay, *Merger May Impact Nation's First Offshore Wind Farm*, ASSOC. PRESS, Sept. 26, 2011, available at <http://www.sunjournal.com/new-england/story/1093060>.

³⁰ *Id.*

³¹ John Neal, J. OF EDUC. FOR UPPER CAN., VOL. III at 71 (1850).

development. The Alliance supports formal designation of Nantucket Sound as a marine protected area.³²

Cape Wind, a “clean, renewable energy”³³ source, has acquired an adversary who happens to be an “environmental organization dedicated to the long-term preservation of Nantucket Sound.”³⁴ According to the Alliance’s own web presence, the Cape Wind project may potentially violate the Endangered Species Act, Marine Mammal Protection Act, the Migratory Bird Treaty Act and the Fisheries Conservation and Management Act.³⁵ Most notably, the Alliance warns of an oil spill threat from Cape Wind³⁶ in the form of “40,000 gallons of unspecified transformer oil,” and “24,700 gallons of oil in the 130 turbines.”³⁷

The question becomes, why is an environmental group opposing a green, renewable energy source? In order to answer this question, it is important to understand who the Alliance to Protect Nantucket Sound is.

William I. Koch is listed on the board of directors of the Alliance,³⁸ as the Chairman. Koch has contributed

³² Alliance to Protect Nantucket Sound: About Us, http://www.saveoursound.org/about_us/mission/ (last visited Jan. 31, 2012).

³³ Cape Wind, *supra* note 2.

³⁴ Alliance: About Us, *supra* note 32.

³⁵ Alliance: Cape Wind Threats: The Environment, http://www.saveoursound.org/cape_wind_threats/environment/ (last visited May 3, 2012).

³⁶ *Id.*

³⁷ As a comparison, the BP/ Halliburton/ Deepwater Horizon oil spill released up to 205.8 million gallons into the Gulf of Mexico. Maureen Hoch, *New Estimate Puts Gulf Oil Leak at 205 Million Gallons*, PBS NEWSHOUR, Aug. 2, 2010, *available at* <http://www.pbs.org/newshour/rundown/2010/08/new-estimate-puts-oil-leak-at-49-million-barrels.html>.

³⁸ Alliance to Protect Nantucket Sound: Our Board, http://www.saveoursound.org/about_us/board_of_directors/ (last visited Apr. 7, 2012).

over \$1.5 million dollars to the Alliance.³⁹ “The not-for-profit has raised \$11 million to date—with Koch and rich counterparts accounting for 90% of the money donated.”⁴⁰ Koch is not an environmental advocate. William Koch is the founder, owner, and chairman of the Oxbow Group, a company specializing in mining, petroleum, coke products, natural gas, and coal.⁴¹ It is no secret that Koch has made his fortune from the fossil fuel industry, and the first offshore wind farm in America just might be a toehold he’s not willing to concede to the wind power industry. It is significant to note that Koch owns a home in Osterville, Massachusetts,⁴² only 5.7 miles from the proposed Cape Wind project site.⁴³

The late Doug Yearly, former Chief Executive of the Alliance, and former Chief Executive of Phelps Dodge Corporation, a profitable copper mining concern, joined Koch.⁴⁴ Mr. Yearly was a prominent figure in the mining industry, and was named to the Mining Hall of Fame in 1995.⁴⁵ Mr. Yearly also owned a home in Osterville,

³⁹ Tim Doyle, *Koch’s New Fight*, FORBES, Sept. 21, 2006, available at http://www.forbes.com/2006/09/21/koch-gordon-nantucket-biz_cz_td_06rich400_0921nantucket_print.html.

⁴⁰ *Id.*

⁴¹ Oxbow: Philosophy, <http://www.oxbow.com/ContentPage.asp?FN=AboutPhilosophy&TS=1&ms=1&oLang>. (last visited May 3, 2012).

⁴² Doyle, *supra* note 39.

⁴³ PUB. ARCHAEOLOGY LAB., INC., CAPE WIND ENERGY PROJECT, VISUAL IMPACT ASSESSMENT OF REVISED LAYOUT ON MULTIPLE HISTORIC PROPERTIES: FINAL ENVIRONMENT IMPACT REPORT (2006), available at <http://www.boemre.gov/offshore/renewableenergy/CapeWind.htm>.

⁴⁴ Bryan Marquard, *Douglas Yearley, Mining CEO Who Led Foes of Cape Wind Plan*, BOSTON GLOBE, Oct. 11, 2007, available at http://www.boston.com/news/globe/obituaries/articles/2007/10/11/douglas_yearley_mining_ceo_who_led_foes_of_cape_wind_plan/.

⁴⁵ *Id.*

Massachusetts,⁴⁶ just 5.7 miles from the proposed Cape Wind project site.⁴⁷

The current President and CEO of the Alliance is Audra Parker who, according to the Alliance’s own site, has “consulted to a wide range of industries,” and is also a neighbor to Koch in Osterville.⁴⁸ The list of Alliance members, who are also interested parties in the continuance of the fossil fuels industry, is considerable. They may have similar sources of wealth, and similar zip codes, but they all have strong, similar interests in seeing that a large, renewable energy source does not come into existence—at least not in their backyards.

1. Strange Bedfellows

An organization headed by fossil fuel millionaires, masquerading as an environmental group, would not survive for long in a skeptical press environment. The Alliance would have been panned in the court of public opinion years ago if it were not for some additional names that do carry “green cred,”⁴⁹ and would therefore cause the public to do a double take. Consider for instance, the late Senator Ted Kennedy, noted yachting enthusiast, and his nephew, Robert F. Kennedy, Senior Attorney, for the Natural Resources Defense Council (NRDC).⁵⁰

Robert F. Kennedy is a household name when it comes to fighting for the environment.⁵¹ Yet, he wrote an

⁴⁶ *Id.*

⁴⁷ Marquard, *supra* note 44.

⁴⁸ Town of Barnstable: Assessing Division, *available at* <http://www.town.barnstable.ma.us/Assessing/propertydisplayscreen12.asp?searchparcel=166037&searchtype=name&mappar=&ownname=parker&streetno=&streetname=&Start=&Ofset=> (last visited Apr. 7, 2011).

⁴⁹ Credits or credibility for living an environmentally friendly lifestyle or engaging in environmentally advantageous activities.

⁵⁰ *See generally* Nat. Res. Def. Council, <http://www.nrdc.org/> (last visited Apr. 7, 2012).

⁵¹ Pace Law School, Pace University: Faculty, <http://www.pace.edu/school-of-law/faculty-0/full-time-faculty/kennedy-jr-robert-f> (last visited Apr. 7, 2012) (“Professor Robert F. Kennedy, Jr. is Chairman of the Board of the Waterkeeper Alliance, having

op-ed piece for the New York Times in 2005 opposing the green energy project.⁵² “I wouldn’t build a wind farm in Yosemite National Park. Nor would I build on Nantucket Sound”⁵³ While Robert Kennedy cites danger to marine life and migratory birds, he suggests placing the project further offshore and building thousands of turbines.⁵⁴ Thinking critically, would thousands of turbines still pose the same, if not a greater “threat” to marine life and seabirds, as 130 turbines closer to the Kennedy Compound in Hyannis Port, 6.2 miles from the proposed site?⁵⁵ Mr. Kennedy’s article speaks of the danger to tourism, fishing and lost jobs,⁵⁶ but never addresses the million-dollar elephant in the room; the so-called NIMBY attitude, NOT IN MY BACK YARD!⁵⁷

Senator Kennedy’s opposition to Cape Wind subsided in a legislative jousting match in which he had

previously served as its president. He also is a Professor of Environmental Law at Pace Law School, as well as Co-Director of the Pace Environmental Litigation Clinic. Professor Kennedy serves as Chief Prosecuting Attorney for the Hudson Riverkeeper Fund and Senior Attorney for the Natural Resources Defense Council, directing NRDC’s Estuary Enforcement Project. Through these organizations, and in conjunction with the clinic, he has brought successful legal actions prosecuting governments and companies for polluting the Hudson River and Long Island Sound. Kennedy has successfully argued cases to expand citizen access to the shoreline, to promote environmental justice, and to protect New York City’s water supply and reservoirs.”).

⁵² Robert F. Kennedy, Jr., *An Ill Wind Off Cape Cod*, N.Y. TIMES, Dec. 16, 2005, available at <http://www.nytimes.com/2005/12/16/opinion/16kennedy.html>.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Katharine Q. Seelye, *Big Wind Farm Off Cape Cod Gets Approval*, N.Y. TIMES, Apr. 28, 2010, available at <http://www.nytimes.com/2010/04/29/science/earth/29wind.html?pagewanted=all>.

⁵⁶ Kennedy, *supra* note 52.

⁵⁷ See Barak D. Richman & Christopher Boerner, *A Transaction Cost Economizing Approach to Regulation: Understanding the NIMBY Problem and Improving Regulatory Responses*, 23 YALE J. ON REG. 29, 37 (2006).

to strike a compromise.⁵⁸ A provision known as the Stevens Amendment⁵⁹ would have given the final veto of Cape Wind to then Republican Governor of Massachusetts, Mitt Romney, also a vocal opponent of Cape Wind.⁶⁰ The wrangling, however, over this provision held up the vote granting funding to the Coast Guard via the Coast Guard and Maritime Transportation Act of 2006⁶¹ to which the anti-cape wind amendment was linked.⁶² The now compromised Coast Guard bill grants authority to the Coast Guard commandant to decide whether the wind farm will pose navigational threats,⁶³ not Mitt Romney, or his successors.⁶⁴

Another strange bedfellow is the Senior Senator of Massachusetts, John Kerry. Senator Kerry has been

⁵⁸ Kevin Dennehy, *Kennedy Bends on Cape Wind Stand*, CAPECODONLINE.COM, May 27, 2006, available at <http://www.capecodonline.com/apps/pbcs.dll/article?AID=/20060527/NEWS01/305279973&cid=sitesearch>.

⁵⁹ Authored by Senator Ted Stevens (R) -Alaska Republican.

⁶⁰ Joan Vennoch, *Cape Wind: Too 'Ugly' for the Rich?*, BOSTON GLOBE, Dec. 14, 2004, available at <http://pqasb.pqarchiver.com/boston/access/763400051.html?FMT=ABS&FMTS=ABS:FT&type=current&date=Dec+14%2C+2004&author=JOAN+VENNOCHI&pub=Boston+Globe&edition=&startpage=A.23&desc=CAPE+WIND%3A+TOO+%60UGLY%27+FOR+THE+RICH%3F>.

⁶¹ H.R. 889, 109th Cong. (2006).

⁶² Dennehy, *supra* note 58.

⁶³ H.R. Rep. No. 109-413, at 26 (2006) (Conf. Rep.) (“SEC. 414. OPINIONS REGARDING WHETHER CERTAIN FACILITIES CREATE OBSTRUCTIONS TO NAVIGATION . . . (d) WIND ENERGY FACILITY . . . (1) IN GENERAL.—An offshore wind energy facility may not be constructed in the area commonly known as ‘Nantucket Sound’ unless the construction of such facility is approved by the Commandant of the Coast Guard . . . (3) LIMITATION ON APPROVAL.—The Commandant may not approve the construction of a facility described in paragraph (1) if . . . (B) the Commandant determines that the facility creates a hazard to navigation.”).

⁶⁴ Kevin Dennehy & David Schoetz, *Compromise Bill Removes Veto Threat Over Cape Wind*, CAPECODONLINE.COM., June 22, 2006, available at <http://www.capecodonline.com/apps/pbcs.dll/article?AID=/20060622/NEWS01/306229991&cid=sitesearch>.

active in climate change legislation, notably the nearly enacted Kerry-Boxer Climate Bill.⁶⁵ Intended to create American green collar jobs, the law sought to impose a cap-and-trade scheme among emitters of greenhouse gasses.⁶⁶ Yet, this legislative environmentalist remained somewhat noncommittal towards Cape Wind, an obviously green collar project.⁶⁷ It has been suggested that Senator “Kerry’s reluctance to weigh in on Cape Wind stems from continued deference to the Kennedy family.”⁶⁸

Fast-forward two years, and Kerry has changed his posture: “[t]his innovative project is poised to create jobs and kick start a whole new industry in the United States.”⁶⁹ What changed for Senator Kerry may be the death of Senator Kennedy in 2009 that “coincided with the beginning of the final phase of permitting for Cape Wind.”⁷⁰ Incidentally, Senator Kerry has a home on Brant Point in Nantucket, Massachusetts,⁷¹ approximately twelve miles away from the Cape Wind site.⁷²

⁶⁵ Clean Energy Jobs and American Power Act, § 1733, 111th Cong. (2009).

⁶⁶ *Id.*

⁶⁷ Kate Sheppard, *Blowing in the Wind*, MOTHERJONES.COM, Dec. 4, 2009, available at <http://www.motherjones.com/politics/2009/12/john-kerry-cape-wind>.

⁶⁸ *Id.*

⁶⁹ Assoc. Press, *Kerry Urges Feds to OK Loans for Cape Wind*, CAPECODONLINE.COM, Feb. 18, 2011, available at <http://www.capecodonline.com/apps/pbcs.dll/article?AID=/20110218/NEWS11/110219758&cid=sitesearch>.

⁷⁰ Sheppard, *supra* note 67.

⁷¹ Assoc. Press, *Five Kerry Homes Valued at Nearly \$33M*, Mar. 22, 2004, available at http://www.usatoday.com/politicselections/nation/president/2004-03-22-kerry-homes_x.htm.

⁷² PUB. ARCHAEOLOGY LAB, *supra* note 43.

2. The Most Trusted Man in America

Finally, the late Walter Cronkite, the most trusted man in America,⁷³ according to some polls, lent his support to the wind farm's opponents, the Alliance. Cronkite had a home in Martha's Vineyard,⁷⁴ roughly ten miles from the Cape Wind site.⁷⁵ The Alliance featured him in television ads, stating his opposition to the wind farm and its potential spoiling of the sound. Cronkite began to rethink his position when he read "that the Bush administration intended to relax Clean Air Act standards for coal-fired power plants – a move he considered 'a terrible blow' to the hope of reducing pollutants in the atmosphere."⁷⁶ Mr. Cronkite cared about the environment and protecting the natural resources that surrounded his home, yet he publicly endorsed the Alliance.

I must say, as [the wind farm] was presented to me, I had to clench my teeth to be sure I didn't get hysterical It sounded like such a ghastly invasion of this wonderful body of water I will confess, also, that I did not do my own homework as I should have before making the statements. I did not and I can only regret that now.⁷⁷

⁷³ *Poll: Trust in Corporations Waning*, USA TODAY, July 16, 2002, available at http://www.usatoday.com/money/2002-07-15-trust-poll_x.htm ("That slogan wasn't born out of marketing machinery but out of research. An Oliver Quayle survey in 1972 gave him a "trust index" of 73%, which was 17 points higher than then-president Richard Nixon's. In a 1974 Phillip-Sindlinger survey, Cronkite was chosen most trusted of television newsmen.").

⁷⁴ Jazmine Ulloa & Eric Moskowitz, *Martha's Vineyard Remembers Walter Cronkite*, BOSTON.COM, July 18, 2009, available at http://www.boston.com/news/local/breaking_news/2009/07/marthas_vineyard.html.

⁷⁵ PUB. ARCHAEOLOGY LAB., *supra* note 43.

⁷⁶ Stephanie Ebbert, *Cronkite Urges Full Review of Wind Farm Proposal*, BOSTON GLOBE, Aug. 29, 2003, available at http://www.boston.com/news/local/articles/2003/08/29/cronkite_urges_full_review_of_wind_farm_proposal/.

⁷⁷ *Id.*

3. Not In My Back Yard!

Not In My Back Yard, or NIMBY, is defined as “a socially desirable land use that broadly distributes benefits, yet is difficult or impossible to implement because of local opposition.”⁷⁸ In the case of Cape Wind, the socially desirable land use includes the supply of up to 75% of the power needs of the local community, in a state where demand is predicted to exceed capacity by 2013,⁷⁹ prevent rolling blackouts,⁸⁰ and reduce about 734,000 tons of carbon dioxide emissions in New England.⁸¹

In the difficult or impossible to implement side of the equation, there are the wealthy residents of the surrounding Cape Cod region who have formed groups such as the Alliance to fight the wind farm through the courts.⁸² Those in opposition to the wind farm have been careful not to engage in a pure, head-on NIMBY argument; mostly because they are savvy enough to know that it would not play well in the mainstream media, and it would shine an unwanted light on class warfare in the midst of a bad recession, and looming energy crisis. Instead, opponents cite dangers to the fishing and tourism industry, environmental concerns like saving a pristine body of water, or wildlife protection issues surrounding

⁷⁸ Richman & Boerner, *supra* note 57.

⁷⁹ Glen Johnson, *Governor Unveils Plan to Reduce Energy Demand: Alternate Power Would Raise Supply*, BOSTON GLOBE, Aug. 12, 2006, available at http://www.boston.com/news/local/articles/2006/08/12/governor_unveils_plan_to_reduce_energy_demand/.

⁸⁰ *Id.*

⁸¹ Cape Wind, *supra* note 2.

⁸² *Osterville Oil-i-garth, Bunny Mellon, Financed Edwards Love Child*, CAPECODTODAY.COM, June 5, 2011, available at <http://www.capecodtoday.com/blogs/index.php/2011/06/05/osterville-oil-i-gath?blog=53> (Rachel “Bunny” Mellon, heiress, and resident of Osterville, MA, “was richly involved in the seasonal trophy homeowner’s efforts to stop America’s first offshore wind farm for . . . Ted Kennedy” and called John Sherman, Cape Wind’s lawyer, “a traitor to your class.”).

whales and waterfowl.⁸³

Unguarded quotes, however, from the notables tell the true story. William I. Koch states his NIMBY motivations very clearly when he offered, “I don’t want this in my backyard.”⁸⁴ His late ally, Douglas Yearly was a little more descriptive when he predicted: “[i]t’s a monstrous project It will be a Christmas tree out there every night.”⁸⁵ Audra Parker’s attempt at skirting the issue resulted in: “it’s not an issue of being NIMBY, it’s an issue of being the wrong location for Cape Wind.”⁸⁶

The strange bedfellows of the Alliance were equally unguarded with their public utterances, especially in regard to a gem from Senator Ted Kennedy: “[b]ut don’t you realize—that’s where I sail!”⁸⁷ Senator Kennedy’s nephew waxed poetic when he wrote: “[h]undreds of flashing lights to warn airplanes away from the turbines will steal the stars and nighttime views.”⁸⁸ Former Massachusetts Governor, Mitt Romney was less poetic when he stated bluntly, “I’ve seen wind farms, and they are not pretty.”⁸⁹ “You can’t just have someone plunk something down wherever the hell they want,” came from Senator John Kerry.⁹⁰ Finally, after reviewing his position on the wind farm, Walter Cronkite had this to say: “[i]t’s a waste area, really.” “It’s so shallow that it’s almost like being on land . . . [n]obody would sail through

⁸³ Alliance: Cape Wind Threats: The Environment, *supra* note 35.

⁸⁴ Doyle, *supra* note 39.

⁸⁵ Marquard, *supra* note 44.

⁸⁶ *Cornerstone Conversation: Audra Parker, CEO of the Alliance to Protect Nantucket Sound*, GREEN ENERGY REP., Mar. 11, 2010, at http://www.facebook.com/note.php?note_id=359086950899.

⁸⁷ Froma Harrop, *Why Liberals Are Turning on Ted Kennedy*, REALCLEARPOLITICS.COM, Sept. 04, 2007, available at http://www.realclearpolitics.com/articles/2007/09/why_liberals_are_turning_on_te.html.

⁸⁸ Kennedy, *supra* note 52.

⁸⁹ Vennoch, *supra* note 60.

⁹⁰ Sheppard, *supra* note 67.

it.”⁹¹

II. CAPE WIND LITIGATION: A MIGHTY WIND.⁹²

A. Timeline of Events

An overall timeline is required to appreciate the true scope of Cape Wind resistance and just how far a well-funded, NIMBY argument can be taken.

December 2001: Cape Wind Associates announced its plans in a public hearing. Over the next months, parties start to line up to oppose the project.⁹³

August 2002: Cape Wind received a permit to build a scientific tower to collect data for proper EIS evaluation of the wind farm.⁹⁴ Construction was delayed by a restraining order from the Ten Taxpayers Group’s state suit, which was later dropped.⁹⁵

December 2002: Greenpeace, Union of Concerned Scientists and Natural Resources Defense Council announce its support of Cape Wind.⁹⁶ The scientific data tower construction is completed.⁹⁷

June 2004: *Ten Taxpayers v. Cape Wind* is decided in favor of Cape Wind. Injunction against building a scientific measuring device in Nantucket Sound is denied.⁹⁸

November 2004: U.S. Army Corps of Engineers (USACE) report contains favorable findings for the wind farm. Public debate period and hearings ensue.⁹⁹

⁹¹ Ebbert, *supra* note 76.

⁹² A MIGHTY WIND (Castle Rock Entertainment 2003)(A “mockumentary” about a reunion of comically confused folk singers).

⁹³ Schwartz, *supra* note 1.

⁹⁴ *Ten Taxpayers*, 373 F.3d at 186.

⁹⁵ *Id.*

⁹⁶ Schwartz, *supra* note 1.

⁹⁷ Cape Wind: Cape Wind Scientific Monitoring Station-Current Conditions, <http://capewind.whgrp.com/> (last visited Apr. 7, 2012).

⁹⁸ *Ten Taxpayers*, 373 F.3d at 197.

⁹⁹ Schwartz, *supra* note 1.

February 2005: Alliance to Protect Nantucket Sound launches its first salvo, in an 800-page report, criticizing the USACE. The EPA and the Department of the Interior call for more research.¹⁰⁰ *Alliance v. U.S. Dept. of the Army* is decided in favor of USACE & Cape Wind; ruling that the data tower built in the sound was properly permitted.¹⁰¹

August 2005: Legislative wrangling takes jurisdiction from the favorable USACE and gives it to the Minerals Management Service (MMS), who requires a new environmental review.¹⁰²

October 2007: The Cape Cod Commission rejects the Cape Wind proposal.¹⁰³

January 2009: Final Environmental Impact Statement submitted to MMS. The agency finds it favorable to Cape Wind.¹⁰⁴

February 2009: FAA says that the wind farm could interfere with radar.¹⁰⁵

August 2009: Senator Ted Kennedy dies. Political pundits loyal to the Kennedys start to rethink their positions in a favorable light to Cape Wind.¹⁰⁶

October 2009: The Cape Cod Commission denies a permit for buried electrical transmission lines.¹⁰⁷ *Eight years* after announcing Cape Wind, two Native American Tribes protest the project because it would interfere with religious rituals and gravesites. The tribes lobby for Horseshoe Shoal to be put on the National Register of

¹⁰⁰ *Id.*

¹⁰¹ *See Alliance to Protect Nantucket Sound, Inc. v. U.S. Dep't of the Army*, 398 F.3d 105 (1st Cir. 2005).

¹⁰² Schwartz, *supra* note 1.

¹⁰³ *Id.*

¹⁰⁴ Record of Decision for the Cape Wind Energy Project, 75 Fed. Reg. 34153 (June 16, 2010).

¹⁰⁵ Schwartz, *supra* note 1.

¹⁰⁶ *Id.*

¹⁰⁷ *See Town of Barnstable v. Cape Wind Assocs., LLC*, 27 Mass. L. Rep. 111 (Mass. Super. Ct. 2010).

Historic Places.¹⁰⁸

April 2010: The Department of the Interior rejects the call for the National Register, and approves the project, so that Cape Wind may begin construction.¹⁰⁹ *Town of Barnstable (and Alliance) v. Cape Wind* decided. While the Cape Cod Commission denied the necessary permits, Cape Wind could go to Energy Facilities Siting Board (EFSB) and obtain a valid “composite certificate.”¹¹⁰

June 2010: Massachusetts Audubon Society issues press release saying Cape Wind “will not pose an ecologically significant threat to the birds and associated marine habitat”¹¹¹

August 2010: *Alliance v. Energy Facilities Siting Bd.* decided.¹¹² Court ruled that Cape Wind made good faith effort to obtain energy approvals, EFSB could grant a composite certificate that would allow Cape Wind to implement undersea and underground cables to connect to the electrical grid in Massachusetts.¹¹³

November 2010: A deal is struck to purchase half of the energy by National Grid.¹¹⁴

April 2011: Construction is approved by the Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE, which took over for MMS).¹¹⁵

July 2011: Native American Tribes, with the support of

¹⁰⁸ Schwartz, *supra* note 1.

¹⁰⁹ *Id.*

¹¹⁰ *Town of Barnstable v. FAA*, 659 F.3d 28 (D.C. Cir. 2011).

¹¹¹ Press Release, Mass Audubon, Mass Audubon Supports Cape Wind Energy Project (June 25, 2010) *available at* <http://www.massaudubon.org/news/index.php?id=1482&type=press>.

¹¹² *See Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd.*, 932 N.E.2d 787 (Mass. 2010).

¹¹³ *Id.*

¹¹⁴ Schwartz, *supra* note 1.

¹¹⁵ Press Release, Salazar Announces Approval of Cape Wind Energy Project Construction and Operation Plan (Apr. 19, 2011) *available at* <http://www.doi.gov/news/pressreleases/Salazar-Announces-Approval-of-Cape-Wind-Energy-Project-Construction-and-Operations-Plan.cfm>.

the Alliance, filed a complaint to launch their suit to stop construction.¹¹⁶

September 2011: There is a possible deal in the works with NSTAR to purchase the remainder of Cape Wind's power.¹¹⁷

October 2011: Court overturns FAA determination of "no hazard" and remands to FAA for further reasoned decision-making.¹¹⁸

February 2012: NSTAR agreed to a fifteen-year contract to purchase 129 megawatts of power from Cape Wind as part of a larger merger with Northeast Utilities.¹¹⁹

April 2012: As of April of 2012, the Alliance cites multiple lawsuits pending against Cape Wind, associated energy companies, and governmental agencies.¹²⁰ Cape Wind announces their selection of three construction companies as a joint contracting venture.¹²¹

B. Analysis of Past Cases

There have been a multitude of cases filed by a diverse number of parties, challenging various statutes and government agency decisions. This section lays out four of the major cases that have so far shaped the statutory patchwork needed to cover Cape Wind's bid to build. The first case, although not filed by the Alliance, lays the groundwork of exactly where the wind farm "is" and determines who controls it. The following three cases

¹¹⁶ See Complaint, *supra* note 12.

¹¹⁷ Lindsay, *supra* note 29.

¹¹⁸ *Town of Barnstable*, 659 F.3d at 36.

¹¹⁹ *NSTAR and Northeast Utilities Reach Comprehensive Merger-Related Agreements with Massachusetts DOER and Massachusetts Attorney General*, N.Y. TIMES, Feb. 16, 2012, available at http://markets.on.nytimes.com/research/stocks/news/press_release.asp?docTag=201202151455BIZWI RE_USPRX___BW6564&feedID=600&press_symbol=218204.

¹²⁰ Alliance to Protect Nantucket Sound: Legal Appeals, available at <http://www.saveoursound.org/news/reader.php?id=18> (last visited Apr. 18, 2012).

¹²¹ Press Release, Cape Wind Selects Construction Contractor (Apr. 11, 2012) available at <http://www.capewind.org/news1250.htm>.

name the Alliance as a party and challenge who may issue what permit, the adequacy of the environmental research, and who determines permission for the onshore power cables. These four cases are hardly the sum of legal jousting to prevent the wind farm. Sadly, this includes a defamation suit by Cape Wind against John Donelan,¹²² Technical and Research Director of the Alliance.¹²³ Mr. Donelan sent an allegedly fake press release¹²⁴ from a supposedly local Cape Cod company, to the State House Newswire Service, declaring that it will refuse to do business with Cape Wind.¹²⁵ After prevailing in the suit, Cape Wind donated the \$15,000 settlement to “Housing Assistance Corporation of Cape Cod, the organization [that] provides assistance to low income families having difficulty paying rent and energy bills.”¹²⁶

In *Ten Taxpayers Citizens Group v. Cape Wind Associates, LLC* (Ten Taxpayers), the plaintiffs appealed a dismissal by the district court of its proposed injunction to stop the installation of a scientific measuring station in the Horseshoe Shoals area of Nantucket Sound.¹²⁷ Cape Wind required the device to measure waves, ocean temperature, weather conditions and other data in order to properly prepare its environmental impact statements with the most accurate facts it could gather.¹²⁸ The data tower would be in place for five years to complete these tasks, after which, it would be removed.¹²⁹ Ten Taxpayers originally brought suit in state court, insisting that Cape

¹²² *Cape Wind Assoc., LLC v. Donelan*, 17 Mass. L. Rep. 645 (Mass. Super. 2004).

¹²³ *Cape Wind Accepts \$15,000 Settlement in Defamation Lawsuit*, ENVIRONMENTNEWSWIRE.COM, Feb. 13, 2006, available at <http://www.ens-newswire.com/ens/feb2006/2006-02-13-09.asp#anchor2>.

¹²⁴ *Donelan*, 17 Mass. L. Rep. at 647.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Ten Taxpayers*, 373 F.3d at 186.

¹²⁸ *Id.*

¹²⁹ *Id.*

Wind did not obtain the required state permits from Massachusetts.¹³⁰ This action was subsequently removed to federal court and then dismissed.¹³¹ While Taxpayers acknowledge that the wind farm sight is more than three miles offshore, placing it squarely within federal jurisdiction under the terms of the Outer Continental Shelf Lands Act,¹³² they argued “Congress [had] ceded to Massachusetts the power to regulate any activity affecting fishing in Nantucket Sound.”¹³³ Because that meant getting approval from the state, the plaintiffs sought to block construction or levy a fine of \$25,000 for every day that the tower was in place.¹³⁴ The Appellate court acknowledged the patchwork of seemingly conflicting laws affecting jurisdiction over this body of water.¹³⁵ It concluded that while the Magnuson-Stevens Act “defined all of Nantucket Sound to be within the jurisdiction and authority of Massachusetts,”¹³⁶ “Congress [had] explicitly incorporated state law on the outer Continental Shelf as federal law” and therefore, the permit from the United States Army Corps of Engineers was all that Cape Wind needed.¹³⁷ This ruling was later appealed, but the Supreme Court denied certiorari in January of 2005.¹³⁸

After the wind farm site was found to be fully within federal jurisdiction,¹³⁹ the Alliance brought suit to challenge the permit. In *Alliance v. Department of the*

¹³⁰ *Id.* at 185-86.

¹³¹ *Id.* at 187.

¹³² 43 U.S.C. §1301 (2000).

¹³³ *Ten Taxpayers*, 373 F.3d at 187.

¹³⁴ *Id.*

¹³⁵ *Id.* at 192.

¹³⁶ *Id.* at 190.

¹³⁷ *Id.* at 196-97.

¹³⁸ *Ten Taxpayer Citizens Group v. Cape Wind Assocs., LLC*, 373 F.3d 183 (1st Cir.), *cert. denied*, 543 U.S. 1211 (2005).

¹³⁹ *Id.* at 188.

Army, the Alliance argued that the United States Army Corps of Engineers (USACE) decision to permit was arbitrary and capricious.¹⁴⁰ Further, the Alliance argued that the Corps failed to comply with the National Environmental Policy Act requirements “for evaluating the data tower's environmental impacts.”¹⁴¹ The district court granted summary judgment for the Department of the Army and the appeal process ensued.¹⁴² As to the Section 10 permit of the Rivers and Harbors Act of 1899,¹⁴³ the Appellate Court found that the USACE in fact did have the authority, under the Outer Continental Shelf Lands Act (OCSLA), extending to “all installations . . . attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources”¹⁴⁴ Further, the court determined that this was not limited to mineral extraction. As a result, developing resources on the Outer Continental Shelf (OSC) could include renewable energy exploration.¹⁴⁵ The Corps was ruled to have acted reasonably in light of Cape Wind not having property rights on the OCS, because the data tower did not interfere with federal interests in the area.¹⁴⁶ Finally, the USACE was in compliance with NEPA, as there was no requirement to circulate a draft Environmental Assessment or the Finding Of No Significant Impact (FONSI).¹⁴⁷ The Corps was found to have properly involved the public, when it provided a comment period lasting five months.¹⁴⁸ Additionally, it

¹⁴⁰ Alliance to Protect Nantucket Sound, Inc. v. U.S. Dep’t of the Army, 398 F.3d 105, 108 (1st Cir. 2005).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ 33 U.S.C. §403 (1899) (Projects that require dredging or filling as a part of installation, within federal waters, require approval from the Chief of Engineers.).

¹⁴⁴ Alliance v. U.S. Dep’t of the Army, 398 F.3d at 108.

¹⁴⁵ *Id.* at 109.

¹⁴⁶ *Id.* at 114.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 115.

held two public hearings, the responses from which were included in the Environmental Assessment.¹⁴⁹ While the Alliance argued that the FONSI had to be circulated, because the nature of the data tower was unprecedented in the region, the Corps pointed to a similar tower situated in state waters just off of Martha's Vineyard.¹⁵⁰ Summary judgment was upheld¹⁵¹ and the data tower, which had been completed the previous year, remained in place.

Because the Alliance could not prevent the installation of the data tower, it turned its attention to the transmission cables necessary to carry the generated power to the grid in a suit captioned, *Town of Barnstable v. Cape Wind*.¹⁵² Without these permits, the wind farm project would be cancelled because it had no way to deliver its generated power to the grid. Here, Cape Wind did not have the protection of a purely federal zone, as the cables had to pass through state waters, come ashore to a platform in Yarmouth, MA, and extend to NSTAR Electric Company's right-of-way to supply the grid.¹⁵³

Cape Wind filed an Environmental Impact Review (EIR) with Massachusetts EPA (MEPA) who had jurisdiction over the portion of the cable project that will be in state territory.¹⁵⁴ The Draft EIR (DEIR) was certified in 2005, and Cape Wind was given detailed guidelines for required findings of fact to include in the Final EIR (FEIR).¹⁵⁵ The FEIR was certified by MEPA in 2007 as being in proper compliance; however, the Cape Cod Commission, a local permitting agency, denied

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 116.

¹⁵² *See* *Town of Barnstable v. Cape Wind Assocs., LLC*, 27 Mass. L. Rep. 111 (Mass. Super. Ct. 2010).

¹⁵³ *Barnstable v. Cape Wind*, 27 Mass. L. Rep. 111 at 112.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

approval for the cable project.¹⁵⁶

Also during this time, the Bush Administration's Federal Energy Policy Act of 2005, took jurisdiction of Cape Wind's Project from the relatively supportive USACE and gave it to the Minerals Management Service (MMS),¹⁵⁷ who demanded a new Draft EIS, and caused more delays.¹⁵⁸ Despite all of this, the court found that while the Secretary of MEPA was rational in certifying the FEIR, it was now a moot point.¹⁵⁹ Because the Cape Cod Commission had denied Cape Wind a required permit, despite the fact that the Commission received similar information that resulted in approval from other agencies, Cape Wind decided to take an alternate route.¹⁶⁰ Instead of appealing to the Commission, Cape Wind went to the Energy Facilities Siting Board, who issued a "Composite Certificate."¹⁶¹ The composite certificate gave the project everything it would need to satisfy permitting requirements in state controlled waters and land.¹⁶² Because Cape Wind had obtained the Composite Certificate, "no state agency or local government shall impose or enforce any law . . . nor take any action . . . which would delay or prevent construction . . . of such facility."¹⁶³

The next suit was brought against the Energy Facilities Siting Board, because it issued the Composite Certificate,¹⁶⁴ "a composite of all individual permits, approvals or authorizations which would otherwise be necessary for the construction and operation of the

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 112.

¹⁶³ *Id.* at 118.

¹⁶⁴ *See Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd.*, 932 N.E.2d 787 (Mass. 2010).

facility.”¹⁶⁵ Cape Wind requested the certificate to serve as the equivalent of approval from the Cape Cod Commission along with satisfying eight other State and local permit requirements.¹⁶⁶ Ultimately, the court made clear that legislative intent gave the siting board authority to grant the Composite Certificate, which serves as the equivalent of multiple local permits, including that of the Commission, and that the agency acted reasonably in reviewing the environmental impacts of the Cape Wind project.¹⁶⁷

IV. WHERE DO WE GO FROM HERE?¹⁶⁸

"This fight is not over Litigation remains the option of last resort. However, when the federal government is intent on trampling the rights of Native Americans and the people of Cape Cod, we must act. We will not stand by and allow our treasured public lands to be marred forever by a corporate giveaway to private industrial energy developers." –Audra Parker¹⁶⁹

Yet, litigation is exactly what the Alliance has in

¹⁶⁵ *Id.* at 794.

¹⁶⁶ *Id.* at 799 (Composite Certificate . . . contains a DRI approval under the Cape Cod Commission Act, a Chapter 91 License ordinarily issued by DEP, the previously issued DEP Section 401 Water Quality Certification, a wetlands Order of Conditions under the Barnstable Conservation Commission by-laws, a wetlands Order of Conditions under the Yarmouth Conservation Commission by-laws, a road opening permit ordinarily issued by the Barnstable Department of Public Works, a road opening permit ordinarily issued by the Yarmouth Department of Public Works, the previously issued MHD highway permit, and an Executive Office of Transportation and Public Works License Agreement).

¹⁶⁷ *See generally id.* at 787.

¹⁶⁸ *Buffy the Vampire Slayer: Once More with Feeling* (UPN television broadcast Nov. 6, 2001).

¹⁶⁹ *Lawsuits Take Aim at America's First Offshore Wind Farm*, ENV'T NEWS SERV., May 2, 2010, available at <http://www.ens-newswire.com/ens/may2010/2010-05-02-091.html>.

mind. The Alliance web site lists five pending legal appeals and other potential legal challenges.¹⁷⁰ One of these challenges was in opposition to the Federal Aviation Administration's decision to downgrade its concerns over the wind farm's potential interference with radar to "No Hazard," when Cape Wind agreed to pay \$1.5 million for radar enhancement.¹⁷¹ The Alliance and the Town of Barnstable, however, finally "won" a suit in October of 2011, when the U.S. Court of Appeals in the District of Columbia overturned the FAA's ruling.¹⁷² The Court found that the FAA review failed to comply with the regulations in its own handbook and the finding of "No Hazard" would have to be revisited."¹⁷³

A. Environmental Justice

Environmental justice is defined as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations and policies."¹⁷⁴ The call for environmental justice arose in the wake of discoveries that low-income communities and communities of color bear a disproportionate share of the burdens of pollution and undesirable land uses such as

¹⁷⁰ Alliance to Protect Nantucket Sound: Legal Appeals, *supra* note 120.

¹⁷¹ Beth Daley, *Cape Wind Gets FAA Okay*, BOSTON GLOBE, May 17, 2010, available at http://www.boston.com/lifestyle/green/greenblog/2010/05/by_beth_daley_globe_staff_6.html.

¹⁷² See Alliance to Protect Nantucket Sound: Legal Appeals, *supra* note 120 (characterizing litigation as "won"). In actuality, the case was vacated and remanded to FAA for "reasoned decision-making" in accordance with its handbook. *Town of Barnstable v. FAA*, 659 F.3d at 32.

¹⁷³ *Id.*

¹⁷⁴ *Environmental Justice*, U.S. Environmental Protection Agency, <http://www.epa.gov/environmentaljustice/> (last visited May 3, 2012).

landfills.¹⁷⁵

In a study done by the Government Accountability Office (formerly the General Accounting Office) (GAO) on siting of hazardous dumpsites, findings pointed to a correlation between these toxic activities and poor and minority communities.¹⁷⁶ This 1983 GAO memorandum concluded that “[b]lacks make up the majority of the population in three of the four communities where the landfills are located. At least 26 percent of the population in all four communities [has] income below the poverty level”¹⁷⁷

The idea that poor or minority communities bear the brunt of environmental hazards within their communities took root. Eleven years later, President Clinton addressed the issue of environmental justice in Executive Order 12898.¹⁷⁸ The order charged Federal Agencies with “identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations”¹⁷⁹ Further, it stressed inter-agency cooperation between the EPA and seventeen other named entities as well as public participation in the process.¹⁸⁰

Good intentions aside, the environmental justice process is not without its own set of obstacles. An April 2011 report outlined the attempts of the EPA to use

¹⁷⁵ Jeanne Zokovitch Paben, Environmental Justice and Ethical Considerations in Energy Development, presented at the Florida Bar Association Environment and Land Use Law Section Annual Update: Power to the People 2011 (Aug. 11, 2011) at 3, *available at* http://www.eluls.org/2011/annual_update/1284-02-zokovitch.pptx.

¹⁷⁶ U.S. General Accounting Office, *Siting of Hazardous Waste Landfill and Their Correlation with Racial and Economic Status of Surrounding Communities*, GAO-RCED-83-168, B-211461 (1983), *available at* <http://archive.gao.gov/d48t13/121648.pdf>.

¹⁷⁷ *Id.*

¹⁷⁸ Exec. Order No. 12,898, 3 C.F.R. 859 (Feb. 11, 1994), *reprinted as amended in* 42 U.S.C. § 4321 (2006).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

Recovery Act dollars¹⁸¹ to meet its goals in considering environmental justice needs of “minority, low-income and tribal/indigenous areas disproportionately burdened by environmental and health concerns.”¹⁸² While the EPA Administrator has made environmental justice a priority issue in all agency decision-making, the report found that “without targeting data, EPA will not be able to meet the environmental justice requirements of EO 12898.”¹⁸³

In response, the EPA released “Plan EJ 2014” in September of 2011.¹⁸⁴ In this plan, the EPA recognized both the twentieth anniversary of Executive Order 12898, and provided a roadmap on how to better communicate between agencies, enforce compliance, and improve community involvement in disproportionately affected areas.¹⁸⁵ Among the stated goals are to lend legal assistance to environmental policy-makers as well as “recognition that [the EPA] has statutory obligations to comply with Title VI of the Civil Rights Act of 1964 and other nondiscrimination laws.”¹⁸⁶

According to 2010 census figures, Cape Cod is “94% white, 1.79% black, .5% Native American, .8%

¹⁸¹ Recovery.gov, About the Recovery Act, *available at* http://www.recovery.gov/About/Pages/The_Act.aspx (last visited Jan. 31, 2012) (“On Feb. 13, 2009, Congress passed the American Recovery and Reinvestment Act of 2009 A direct response to the economic crisis, the Recovery Act has three immediate goals: Create new jobs and save existing ones, Spur economic activity and invest in long-term growth, Foster unprecedented levels of accountability and transparency in government spending.”)

¹⁸² OFF. OF INSPECTOR GEN., REP. NO. 11-R-0208, EPA FACED MULTIPLE CONSTRAINTS TO TARGETING RECOVERY ACT FUNDS (2011), *available at* <http://www.epa.gov/oig/reports/2011/20110411-11-R-0208.pdf>.

¹⁸³ *Id.*

¹⁸⁴ U.S. ENVIRONMENTAL PROTECTION AGENCY, PLAN EJ 2014 (2011) *available at* <http://www.epa.gov/environmentaljustice/resources/policy/plan-ej-2014/plan-ej-2011-09.pdf>.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

Asian/Polynesian, and 1.3% were Hispanic/Latino.”¹⁸⁷ This is hardly the picture of a minority or tribal community. With an average household income of \$56,991,¹⁸⁸ Barnstable County is certainly not a low-income region. Together with the abundance of evidence that citizens of the community have ready access to courts and Congress, this community certainly does not qualify for the protections under the umbrella of environmental justice. Ironically, however, after a multitude of lost legal battles, the Alliance is turning to this very issue in order to gain leverage in the fight against Cape Wind.

B. The Mashpee Wampanoag Tribe and the Wampanoag Tribe of Gay Head

Widespread attention has been paid to the Alliance’s support of a suit by two Native American Tribes, alleging that the wind farm will disturb its religious rituals and burial grounds on the ocean floor where the turbines are due to be placed.¹⁸⁹ The Mashpee Wampanoag Tribe and the Wampanoag Tribe of Gay Head (Aquinnah) describe a religious ritual where they greet the rising sun, and claim that this ritual will be destroyed by turbines on the horizon.¹⁹⁰

The Department of the Interior has met with the Tribes in “Government-to-Government meetings” on more than eighteen occasions in order to reach a compromise on mitigation measures.¹⁹¹ Talks were broken off and a

¹⁸⁷ *Cape Cod Loses Residents in Latest Census*, CAPECODTODAY.COM, Mar. 23, 2011, available at <http://www.capecodtoday.com/blogs/index.php/2011/03/23/cape-cod-population-totals?blog=233>.

¹⁸⁸ U.S. Census Bureau, “State & County QuickFacts”, available at <http://quickfacts.census.gov/qfd/states/25/25001.html> (last visited May 3, 2012).

¹⁸⁹ Complaint, *supra* note 12 at 2.

¹⁹⁰ *Id.*

¹⁹¹ Briefing Document, Minerals Mgmt. Serv., Termination of NHPA Section 106 Consultation for the Cape Wind Energy Project (2010), available at <http://www.boemre.gov/offshore/renewableEnergy/CapeWind.htm>.

report was issued in February of 2010, citing that the Tribes were unwilling to negotiate on their bid to register Nantucket Sound as permanently protected under the National Historic Preservation Act.¹⁹² The Tribes expressed that the wind farm would partially obstruct their horizon and that the farm “will introduce elements that are out of character with the ceremonial use of the property.”¹⁹³ They also complained that the implanting of the turbines into the seabed would damage their religious, historical and cultural identity, despite the fact that “[a]nalysis of the vibracores collected at these locations contained no evidence of cultural remains.”¹⁹⁴ Additionally, the turbines are not permanent installations, but are scheduled to be removed after thirty years of operation,¹⁹⁵ and are required by a 2005 energy bill to post a bond for the restoration of Horseshoe Shoal upon termination.¹⁹⁶ Various mitigation measures were proposed including redesigning the wind farm, lowering the height of the turbines, painting them a different color, altering the use of aviation lighting, additional archeological surveys, and financial investments in “cultural support and activities that will honor and advance Tribal interests.”¹⁹⁷ The talks were officially ended on the clear message from the Tribes that no mitigation measures were acceptable.¹⁹⁸ After Secretary of State, Kenneth Salazar, announced that the Cape Wind Project had been approved, despite objections, the Tribes filed suit in July of 2011.¹⁹⁹

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ Charles Kleekamp, *Energy Bill Guarantees Shared Use of Public Property*, BARNSTABLE PATRIOT, Oct. 21, 2005, available at <http://www.capewind.org/modules.php?op=modload&name=News&file=article&sid=493>.

¹⁹⁷ Briefing Document, *supra* note 191.

¹⁹⁸ *Id.*

¹⁹⁹ Complaint, *supra* note 12.

Both the Alliance and the Tribes publicly deny that they are working together,²⁰⁰ although the Alliance has expressed a positive opinion on the tribal position. Quoting Audra Parker of the Alliance, “it would be great news if their claim for historic preservation was what finally killed the project altogether.”²⁰¹ The support from the Alliance does not end with positive press quotes. In a nineteen-page letter, appealing to the State Historic Preservation Officer (June 2009), on Alliance letterhead, the Alliance and both Tribes allege the shortcomings of the Minerals Management Service (MMS) in its evaluation of Cape Wind’s environmental impact statement, in light of the National Historic Preservation Act.²⁰²

A press release on the Alliance site in February 2011 announced a joint appeal of the EPA’s Outer Continental Shelf Air Permit by the Alliance and the two Tribes.²⁰³ Additionally, the U.S. Court of Appeals for the District of Columbia revoked the FAA’s finding of “No Hazard” in a suit filed by the town of Barnstable, the Alliance and Mashpee and Aquinnah Wampanoag Tribes (Oct. 2011).²⁰⁴ It is evident that the Tribes’ interest has reached beyond the claim of historical preservation, as their legal maneuvering is now merging into lockstep with the Alliance.

²⁰⁰ Kate Sheppard, *Cape Wind Delay a Big Win for Dirty Energy Interests*, MOTHERJONES.COM, Jan. 6, 2010, available at <http://motherjones.com/mojo/2010/01/cape-wind-delay-big-win-dirty-energy-interests>.

²⁰¹ *Id.*

²⁰² Letter from Glenn G. Wattley, President & CEO of the Alliance to Protect Nantucket Sound, George “Chuckie” Green, THPO, Mashpee Wampanoag Tribe, and Bettina Washington, THPO, Wampanoag Tribe of Gay Head Aquinnah, to Brona Simon, State Historic Preservation Officer (June 23, 2009) available at http://www.capecodtoday.com/downloads/apns_letter_to_brona_simon.pdf.

²⁰³ Alliance: Press Release: APNS and Wampanoag Tribe File Appeal of the EPA O, http://www.saveoursound.org/press_releases/indexba09.html?press_release_KEY=123 (last visited Apr. 7, 2012).

²⁰⁴ *Town of Barnstable v. FAA*, 659 F.3d at 36.

However, the members of the Tribe do not speak with one voice, as evidenced by a letter and attached petition signed by additional Tribe members to Secretary Salazar, citing that they knew of no such religious rituals involving the sun.²⁰⁵ Jeffrey L. Madison, author of the letter, discloses that he does work for a law firm retained by Cape Wind, but is not under its influence.²⁰⁶ He further states that certain members of his Tribe are politically motivated to fabricate ceremonial rituals, and “I do not believe that they understand that creating ceremony to achieve political objectives undermines the credibility of our legitimate cultural values and our people as a whole.”²⁰⁷ The most dubious piece of evidence against claims of sacredness of the ceremonial properties is a wind energy feasibility study, commissioned by the Wampanoag Tribe of Gay Head (Aquinnah), on the potential of building its own utility-sized wind farm on tribal lands.²⁰⁸ “The Tribe has tried to get the message out that the Tribe is not necessarily against wind. We need to decide whether this is *right for us, right culturally*.”²⁰⁹

The partnership between affluent denizens of Cape Cod and two Native American Tribes seeks to take advantage of the well-meaning EJ movement. EJ was meant to protect poor and underrepresented populations in order to equalize environmental burdens, or to mitigate the pollution sources and health risks already in their communities.²¹⁰ The goals were meant to encourage

²⁰⁵ Letter from Jeffrey L. Madison, former member of the Tribal Council of the Aquinnah Tribe, to Kenneth Salazar, Secretary of the Interior (Feb. 9, 2010) *available at* <http://www.mvtimes.com/marthas-vineyard/pdfs/aquinnah/cape-wind-letter-20100225.pdf>.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ Steve Myrick, *Wampanoags Evaluate Wind Power on Tribal Lands*, MVTIMES.COM, Nov. 18, 2010, *available at* <http://www.mvtimes.com/marthas-vineyard/article.php?id=3488>.

²⁰⁹ *Id.* (emphasis added).

²¹⁰ U.S. Environmental Protection Agency, *Environmental Justice Basic Information*, <http://www.epa.gov/compliance/environmentaljustice/basics/index.html> (last visited May 3, 2012).

greater public participation with federal agencies and to identify issues of “health of and environment of minority populations and low-income populations.”²¹¹ This ideal is being co-opted by a non-minority population²¹² with easy access to representation and a deep-pocket NIMBY agenda. The key to wielding EJ for their own advantage is to align with a minority population within their region, as they seem to have done with the Native American Tribes. Because the new directives from the EPA require governmental agencies to consider EJ in multiple areas such as rulemaking and especially permitting (for example, a new wind farm), there is no choice for the agencies but to take a hard look at the concerns of the Tribes in regard to Cape Wind.²¹³ According to the Alliance’s web site, Nantucket Sound is an unspoiled water body, and there have been no accusations of current pollution or health hazards, as the wind farm has yet to be built.²¹⁴ The only way for these NIMBY neighbors to reach the EJ argument in this case, is to advance complaints of the potential decimation of *cultural* health and environment of the local tribal groups and to wield that sword in order to strike down Cape Wind, a nearly pollution-free energy source.

The result of the Tribes’ collaboration with the Alliance is based on one simple thing- dollars. The Alliance strives to protect what it already has: top property values, and energy dollars derived from industry and fossil fuels.²¹⁵ The Tribes strive to gain a piece of the future: energy dollars from building and controlling its own wind farm installation along with hundreds of thousands of dollars of accompanying governmental grants and subsidies.²¹⁶ Positive enforcement initiatives

²¹¹ Exec. Order No. 12,898, *supra* note 178.

²¹² Census, *supra* note 188.

²¹³ PLAN EJ 2014, *supra* note 184.

²¹⁴ Alliance to Protect Nantucket Sound: The Sound, *available at* http://www.saveoursound.org/Nantucket_sound/the_sound (last visited Apr. 7, 2012).

²¹⁵ Doyle, *supra* note 39.

²¹⁶ Myrick, *supra* note 208.

such as the EPA's Plan EJ 2014, opens new doors to those who choose to align themselves with minority or tribal interests.²¹⁷ The art and artifice of environmental justice is improperly being wielded to gain leverage with policy makers, agencies and possibly the courts. The noble policies behind Environmental Justice, protecting vulnerable communities that traditionally lack political might, are being commandeered by the rich and powerful for their own selfish purposes—making the tribal communities pawns in their litigation game.

V. CONCLUSION

This comment has given voice to the opinions on multiple sides of the Cape Wind controversy. It has examined the proponents' arguments for the wind farm project itself and the case for its construction. It has also investigated the opposition with its thinly disguised fossil fuel bias and the political connections behind some of its more unlikely allies. The NIMBY problem is the underlying cause of why a renewable energy source was so unwelcome in an affluent area that clearly needed additional power sources. The timeline of events was laid out, which gave a bird's eye view of the wind farm fracas. Looking at the timeline, it is evident that opponents are chameleon-like in their arguments against the project latching on to whatever complaint or forum is handy to attempt to derail Cape Wind. Four of the major lawsuits were addressed in order to illustrate just how far NIMBY will drive these well-heeled litigants. Ultimately, the goals of environmental justice are being subverted as the wealthy and powerful hide behind tribal groups in yet another effort to stymie construction of the new wind power generators. The collaboration between the main opposition group and two Native American Tribes in order to gain use of new EPA initiatives were brought to light. This marriage of convenience suggests similar wealthy litigants may seek the support of environmentally disadvantaged groups in the future in order to employ this tactic.

There are other organizations considering the construction of offshore wind farms. A cursory read of the

²¹⁷ PLAN EJ 2014, *supra* note 184.

Cape Cod's regional newspaper articles may give those groups pause. After a decade of litigation, agency decisions, and even a defamation suit, who can blame future entrepreneurs for hesitating, when they explore the trail of litigation that Cape Wind has travelled? There are at least two associations that are already engaging in the permitting process in order to place wind farms in the Great Lakes, but those groups are no doubt carefully watching to see what happens in Cape Cod.²¹⁸ The Great Lakes region poses many of the same challenges: affluent locals with lakefront properties,²¹⁹ enclosed bodies of water partially subject to state regulation with the interior waters belonging to Federal jurisdictions,²²⁰ and native cultural heritage concerns.²²¹

At its worst, Cape Wind serves as a cautionary tale to those who wish to tilt at windmills. At its best, Cape Wind is a story of perseverance in the face of well-funded opposition. Whether one sees the turbines as blight on the horizon, or as "kinetic art," the awful truth is that the growing population in this country is going to be using increasing amounts of energy. The "base load" energy sources such as coal-fired plants are not going to be closed in the immediate future, and wind farms like Cape Wind are not going to replace them. A second hard look at new nuclear power plants will have to be taken into consideration as utility companies reassess their portfolios in light of new legislation. However, despite public opinion, market forces and political divisiveness, the time may be coming soon, where, alongside the conventional energy generators, there may be no alternatives but to embrace alternative energy.

²¹⁸ Richard Mertens, *Wind Farm in the Great Lakes? Big Potential Meets Big Opposition*, CHRISTIAN SCI. MONITOR, Mar. 1, 2010, available at <http://www.csmonitor.com/USA/2010/0301/Wind-farm-in-the-Great-Lakes-Big-potential-meets-big-opposition>.

²¹⁹ *Id.*

²²⁰ Victoria Pebbles, *Siting Wind Farms in the Great Lakes Region: Policy Summary and Analysis*, RENEWABLEENERGYWORLD.COM, Oct. 15, 2010, available at <http://www.renewableenergyworld.com/rea/news/article/2010/10/siting-wind-farms-in-the-great-lakes-region-policy-summary-and-analysis?page=1>.

²²¹ *Id.*