DIVISION OF LEGISLATIVE SERVICES

DLS REPORT

Reporting on Regional and Statewide Issues

May 2005 Volume No. 3

The Report:

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- ***DLS Report*** *provides information on issues or subject matter of a regional or statewide interest to members of the Virginia General Assembly.*

Legal Issues Relating to Offshore Wind Energy Facilities

Franklin D. Munyan

Introduction

As oil prices reach record highs, there is growing support for increasing the use of renewable sources of energy to meet future energy needs. One renewable energy resource that is receiving a great deal of attention is wind power. Historically, electricity from wind farms has been more expensive than power from fossil-fueled energy facilities. However, technological advances and a federal wind energy production program, which provides a tax credit of 1.8 cents per kilowatt hour for the first 10 years of a facility's operation, have reduced the cost of electricity produced by wind turbines. In some instances, wind power costs are about 5 cents per kilowatt hour, a cost that is competitive with other sources of power.

Land-based wind power projects are operating in several areas of the United States and in foreign countries. Worldwide, about 40,000 megawatts of utility-scale wind turbines have been installed, of which 30,000 MW are in Europe and 6,300 MW are in the United States. However, while offshore wind facilities have been operating in Europe for over a decade, no offshore wind farms are operating in this country.

Pending projects would drastically change this situation. Proposals for the development of wind farms off the shores of Virginia, Maryland, New Jersey, Massachusetts, and Delaware have been announced. These proposals face opposition from stakeholders who might otherwise be expected to support such "alternative" sources of energy. Concerns have been expressed that offshore wind farms may mar the natural beauty of the coastline, interfere with fishing, and harm migratory birds.

" ... turbines would be located ... within sight of the Chesapeake Bay Bridge Tunnel and the Fishermans Island and Eastern Shore of Virginia National Wildlife Refuges. "

Virginia's Proposed Offshore Wind Project

In November 2002, New York-based Winergy LLC proposed to build a $900 million, 975 megawatt wind farm with 271 wind turbines on a 57 square mile site located five miles east of the shore of Accomack County. These plans have since been substantially scaled back. A revised plan, according to Winergy LLC's website, calls for the development of 150 wind turbines at a 25 square mile site off Northampton County. Under Phase 1 of the project, turbines would be located primarily three miles east of Smith Island. Under Phase 2 and Phase 3, turbines would stretch south and east of the Phase 1 turbines, in locations between one and three miles off the coast within sight of the Chesapeake Bay Bridge Tunnel and the Fishermans Island and Eastern Shore of Virginia National Wildlife Refuges. Each of the Danish-built turbines would stand about 400 feet tall.

According to Winergy, this site has wind speeds that make wind power economical, is located near onshore 115 kV transmission lines, is in water sufficiently shallow to allow economical construction, and has no documented record of marine mammal activity.

Winergy's proposed Virginia project may be subject to further reduction. The Department of Environmental Quality's webpage, updated September 13, 2004, reports that the energy producer will ask the Army Corps of Engineers to consider a permit for as few as 10 windmills off Smith Island at a site between five and 12 miles off the coast.

Jurisdictional Issues

Whether a wind farm will be built off Virginia's Eastern Shore may depend on the resolution of ongoing debates regarding the jurisdiction of federal regulators in the permitting process. While the Bureau of Land Management of the Department of Interior has a program under the Federal Land Policy and Management Act that regulates on-shore wind projects on federal land, no comprehensive federal scheme exists for offshore wind energy development.

The federal government's jurisdiction in the functional areas of U.S. waters varies significantly.

- *Within the first 3 geographic miles of a state's shore, all subsoil and seabed resources are managed by the state, though the Gulf of Mexico coasts of Texas and Florida are state waters extending to 9 geographical miles.*
- *The territorial sea extends from the coast out to a distance of 12 nautical miles; the federal government may claim sovereignty over the air space, water seabed, and subsoil, pursuant to the United Nations Convention on the Law of the Sea (UNCLOS).*
- *The U.S. Contiguous Zone extends beyond the territorial sea to 24 nautical miles from the coast; in this zone a coastal nation may regulate to protect its territorial sea and to enforce its customs, fiscal, immigration and sanitary laws.*
- *The Exclusive Economic Zone (EEZ) extends 200 nautical miles from the coast.*

- *The Outer Continental Shelf (OCS) is defined as the submerged lands that stretch seaward of the three mile boundary, a distance of 200 nautical miles, though it is extended if the coastal margin is geologically defined as extending beyond the 200 nautical mile limit.*

- *Beyond the OCS, the seabed is considered to be in international waters.*

The Army Corps of Engineers has undertaken a leading role in the federal permitting process under the Rivers and Harbors Act as amended by the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1331 et seq., on the theory that the Corps has the power to regulate obstructions to navigation within the navigable waters of the United States. Under the Rivers and Harbors Act, navigable waters extend three miles seaward from the coast and, under limited circumstances, on the outer Continental Shelf. The Congressional Research Service has reported that some have argued that the Corps' assertion of jurisdiction is an overly broad interpretation of its statutory authority in the absence of federal legislation explicitly addressing the permitting of offshore wind energy facilities.

Federal jurisdiction in coastal areas vis-à-vis the states is controlled by the Submerged Lands Act (SLA) of 1953, 43 U.S.C. §§ 1301-1303, 1311-1315, which gives coastal states title to submerged land within three geographical miles from the coast, recognizing the three-mile line as the official boundary of a coastal state. The SLA's granting of title to the seabed within this area to the states is subject to federal regulation for commerce, navigation, national defense, and international affairs. If a wind farm is sited within three miles of the coast in state waters, state laws and regulations would apply; but if the facility is sited further out to sea, the jurisdiction of the state is substantially limited.

Ten Taxpayer v. Cape Wind

The issue of whether or not a wind power project sited more than three miles from shore is subject to state regulation was addressed by the First Circuit Court of Appeals in *Ten Taxpayer Citizens Group v. Cape Wind Associates*, 373 F. 3d 183 (2004), cert. denied, 2005 U.S. LEXIS 804 (Jan. 24, 2005). In October 2002, plaintiffs filed suit in state court to prevent Cape Wind Associates from erecting a 197-foot scientific measurement device station (SMDS) in Nantucket Sound, on grounds that Cape Wind had failed to obtain the necessary permits under state law. Cape Wind removed the action to federal court, which dismissed the complaint. *Ten Taxpayer Citizens Group v. Cape Wind Associates*, 278 F. Supp. 2d 98 (D. Mass. 2003). On appeal, the First Circuit affirmed the district court's holding in the case implicating "the complex and rather obscure body of law that divides regulatory authority over Nantucket Sound between the state and federal governments." 373 F. 3d at 187.

Cape Wind has proposed a 130-turbine windmill farm in Nantucket Sound more than three miles offshore of Cape Cod in Horseshoe Shoals, an area that is almost completely enclosed by Massachusetts' territorial waters. As a preliminary step, Cape Wind obtained a permit for

" If a wind farm is sited within three miles of the coast . . . state laws and regulations would apply; but if the facility is sited further out . . . jurisdiction of the states is substantially limited. "

" ... even if a state law would require a permit for the SMDS, such a law would be inconsistent with applicable federal law ... "

construction of the SMDS tower from the Army Corps of Engineers under § 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 401 et seq. Ten Taxpayer acknowledged that, because the site is more than three miles from shore, the federal government has jurisdiction over the SMDS site. However, the appellants contended that Massachusetts also has jurisdiction and that Cape Wind could not build the SMDS without state regulatory approval, because Congress has specifically ceded to the state the power to regulate activities affecting fishing in Nantucket Sound.

In its decision, the circuit court observed that the U.S. Supreme Court has "emphatically implemented its view that the United States has paramount rights to the seabed beyond the three-mile limit." 373 F. 3d at 189, quoting *U.S. v. Maine*, 420 U.S. 515, 526 (1975). The fact that in 1984 Congress enacted legislation declaring that all of Nantucket Sound is within the "jurisdiction and authority" of Massachusetts for purposes the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1801 et seq., did not give the state jurisdiction over the construction and operation of the SMDS. In holding that the plaintiff's claims arise under federal law, and thus that removal of the case from state court to federal court was proper, the First Circuit held that Congress, through the OCSLA, has explicitly incorporated state law on the outer Continental Shelf as federal law. As a result, the state's statutes and regulations are, by federal statute, treated as federal law to the extent they apply to the site.

The federal district court had based its decision on the rationale that the Magnuson-Stevens Act did not grant to Massachusetts complete sovereign authority over the pocket of federal waters in Nantucket Sound, but rather only gave the state authority to establish consistent fishing regulations throughout the Sound. The First Circuit reached the same result under a different theory, which may have broader applicability to other cases involving jurisdiction over off-shore projects. The circuit court first decided that the state laws that might regulate structures in tidal waters do not apply, by their own terms, to activities at the SMDS site. The circuit court then ruled that, even if a state law would require a permit for the SMDS site, such a law would be inconsistent with applicable federal law and thus not applicable as surrogate federal law. The court held:

> In our view, the OCSLA leaves no room for states to require licenses or permits for the operation of structures on the seabed of the outer Continental Shelf. Congress retained for the federal government the exclusive power to authorize or prohibit specific uses of the seabed beyond three miles from the shore. If adopted and enforced on the Outer Continental Shelf, [the state statutes], which require the approval of state agencies prior to construction, would effectively grant state governments a veto power over the disposition of the national seabed.

That result is fundamentally inconsistent with the OCSLA. 373 F. 3d at 196-197 (citations omitted).

Alliance to Protect Nantucket Sound v. United States Department of the Army

While the *Ten Taxpayer* decision addressed the applicability of state permitting requirements beyond the three-mile limit, it did not decide the issue of the jurisdiction of the Corps of Engineers to permit offshore wind energy projects. In a second case arising from the legal wrangling over Cape Wind's construction of the SMDS site in Nantucket Sound, the First Circuit held that Congress intended to give the Corps jurisdiction to issue a permit for projects that impact the navigability of United States waters under Section 10 of the River and Harbors Act of 1899. *Alliance to Protect Nantucket Sound v. Department of the Army*, 398 F. 3d 105 (1st Cir. 2005), No. 03-2604 (February 16, 2005).

The court's decision turned on an interpretation of a provision of the OCSLA that extended the Corps' § 10 regulatory authority "to prevent obstruction to navigation in the navigable waters of the United States . . . to artificial islands, installations, and other devices referred to in subsection (a) of this section." These include "all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, *which may* be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources." 43 U.S.C. § 1333 (2004) (emphasis added).

The appellants argued that the statute restricts the Corps' permitting authority on the OCS to structures related to the extraction of mineral resources, and thus the Corps lacked authority to grant a permit for construction of Cape Wind's SMDS tower. The Corps countered that its authority extends to all artificial islands, installations, and other devices located on the seabed, to the seaward limit of the OCS. The district court had agreed with the Corps in its finding that the "which may be" clause in 43 U.S.C. § 1333 (a) is not restrictive, and means that the Corps' jurisdiction extends to all structures on the outer continental shelf, including, but not limited to, those that may be used to explore for, develop, or produce resources. *Alliance to Protect Nantucket Sound, Inc. v. United States Dep't of the Army*, 288 F. Supp. 2d 64, 75 (D. Mass. 2003).

The First Circuit agreed with the appellants that the statutory text is ambiguous, and that it is not apparent whether the reference to subsection (a) that was inserted into subsection (e) of 43 U.S.C. § 1333 in 1978 refers to "all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed," or only to all such installations used to explore, develop or produce resources.

" The court resolved the ambiguity by relying on a legislative history that 'reveals, with exceptional clarity, Congress's intent that Section 10 authority under OCSLA not be restricted to structures related to mineral extraction.' "

" the court specifically reserved Judgment on the issue of 'whether Congressional authorization is necessary for the construction of Cape Wind's proposed wind energy plant … which is not at issue in the present action.' "

The court resolved the ambiguity by relying on a legislative history that "reveals, with exceptional clarity, Congress's intent that Section 10 authority under OCSLA not be restricted to structures related to mineral extraction." *Id.* at 8. Congress' conference report on the 1978 amendments to the OCSLA states that "[t]he existing authority of the Corps. . . applies to all artificial islands and fixed structures on the [OCS], whether or not they are erected for the purpose of exploring for, developing, removing, and transporting resources therefrom." *Id.* at 11, quoting H.R. Conf. Rep. No. 95-1474 at 82 (1978).

The First Circuit also dismissed the appellants' claim that the Corps violated the Administrative Process Act by issuing a permit based on Cape Wind's affirmation that it possessed a property interest in the seabed on which the SMDS was to be erected. The court agreed with appellants that there exists no mechanism by which a private entity can obtain a license to construct towers on the federal outer continental shelf, and noted:

> Whether, and under what circumstances, additional authorization is necessary before a developer infringes on the federal government's rights in the OCS is a thorny issue, one that is unnecessary to delve into in the instant case. *Id.* at 18.

Moreover, the court found that, because the SMDS tower is a temporary, simple structure that will provide data to be shared with the public, it "involves no real infringement on federal interests in the OCS lands." *Id.* Although the alleged infringement of federal property interests was found to be "entirely hypothetical in this case," the court specifically reserved judgment on the issue of "whether Congressional authorization is necessary for the construction of Cape Wind's proposed wind energy plant, a structure vastly larger in scale, complexity, and duration, which is not at issue in the present action." *Id.* at 19.

Proposed Federal Legislation

Legislation has been introduced in Congress that may address the ambiguities in the permitting process for off-shore wind power projects identified by the First Circuit. H.R. 793, introduced in February 2003 by Rep. Barbara Cubin (R-WY), would amend the OCSLA to authorize the Secretary of the Interior to grant easements on the outer continental shelf for wind energy and other non-oil and -gas related energy projects, and to require payment for the easements. The bill would give jurisdiction over the permitting of renewable energy projects on the Outer Continental Shelf to the Interior's Minerals Management Service. Competing legislation proposed by Rep. William Delahunt (D-MA) would give jurisdiction over permitting of Outer Continental Shelf projects to the Commerce Department's National Oceanic and Atmospheric Administration.

In October 2004, Senator John W. Warner (R-VA) proposed an amendment to the Defense

Authorization Bill. The amendment would have prohibited the Secretary of the Army from processing or otherwise acting on any application, including pending applications, for any wind energy project to be located on the OCS until Congress provides to the Federal Government express authorization, including authorization to establish requirements for competitive bidding; compensation to the United States for any land use rights granted; and promulgation of environmental and other standards to govern authorization of grant interests in land of the OCS for use for wind energy projects. Senator Warner's amendment was not included in the final version of the bill.

States may also weigh in on these issues. In New Jersey, acting Governor Richard J. Codey has ordered a freeze on proposals for offshore windmills for 15 months while a panel studies whether the towers would hurt the state's tourism industry or have other adverse effects.

Conclusion

While the First Circuit's recent decisions in *Ten Taxpayer* and *Alliance to Protect Nantucket Sound* resolve some questions regarding the process of obtaining approval to locate off-shore wind energy plants, important questions remain. Perhaps the biggest unresolved issue is whether a developer must obtain an easement or other right to develop a site on the outer Continental Shelf for a wind power project, and, if so, how it may be acquired. The lack of clear federal rules may be the biggest barrier to the development of wind energy projects in this country.

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The DLS Report
is an occasional publication of the
Division of Legislative Services,
an agency of the Virginia General Assembly

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