

Hope on the Horizon for Offshore Wind Development? An Examination of the Regulatory Framework Rhode Island Navigated to Make the Nation’s First Offshore Wind Farm a Reality, and the Implication for California’s Ability to Adopt a Similar Approach under the Coastal Zone Management Act†

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† Article was completed in November 2016. Since this time, more developments have

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I. INTRODUCTION

The Coastal Zone Management Act (“CZMA”) provides that once the Secretary of Commerce approves a state’s coastal zone management plan, “any applicant for a federal license or permit to conduct an activity, *in or outside of the coastal zone*, affecting any land or water use or natural resource of the coastal zone of that state shall provide in the application” a certification of compliance with the “*enforceable* policies of the state’s approved program.”¹ While the National Oceanic & Atmospheric Administration (“NOAA”) has ultimate authority over the coastal management plan and related federal funding, including through continuous review by the Secretary of Commerce, the CZMA gives the state extensive authority over projects implemented beyond the coastal zone if they impact any

1. 16 U.S.C. § 1456(c) (Westlaw 1992) (emphasis added).

aspect of the coastal zone.² Recently, proponents of the Block Island Wind Farm (“BIWF”) utilized this authority to engineer a project consistent with Rhode Island’s policies and interests, expediting federal approval for the nine-mile portion of the project outside the state’s coastal zone under the jurisdiction of the Federal Bureau of Ocean Energy Management (“BOEM”) within the Department of Interior (“DOI”).³ The BIWF permitting process stands in stark contrast to the infamous Cape Wind project offshore Massachusetts that took the reverse approach by attempting to force a federally directed plan past unyielding in-state stakeholders.⁴

After establishing the reasons for why creating a more efficient permitting system is crucial, this Article examines the question of under what conditions BOEM, the lead agency in the offshore wind permitting process, delegates authority to a state so that it may permit a project in federal waters under the CZMA without running into federal preemptory roadblocks.⁵ This question is of utmost significance in California and Hawaii where projects utilizing floating turbine technology are proposed to be located in federal waters to take advantage of optimal wind gusts farther offshore.⁶ After examining the conditions favorable for federal delegation of the permitting process, this Article examines California’s coastal management plan and it’s implementing agencies to analyze whether California would be able

2. *Id.*

3. BUREAU OF OCEAN ENERGY MGMT., FINDING OF NO SIGNIFICANT IMPACT: BLOCK ISLAND WIND FARM AND BLOCK ISLAND TRANSMISSION SYSTEM 1 (2014) [hereinafter FONSI: BIWF]. See John M. Boehnert, *A New Blueprint for Coastal Zone Management*, 30 A.B.A. NAT. RES. & ENV’T 52 (2016) (describing Rhode Island’s innovative approach to offshore wind permitting for the BIWF project).

4. See JUDITH A. LAYZER, *THE ENVIRONMENTAL CASE* 308, 308–47 (Mass. Inst. of Tech. 3d ed. 2012) (discussing Cape Wind Associates, LLC’s longwinded attempt to get its proposal for a site offshore Nantucket, Massachusetts, approved at the federal and state levels, which, after 16 years, remains unsuccessful); see Lawrence Susskind and Ryan Cook, *The Cost of Contentiousness: A Status Report on Offshore Wind in the Eastern United States*, 33 VA. ENVTL. L. J. 204, 216–24 (2015).

5. Note that in the BIWF case, the Army Corps of Engineers (“CoE”) was the lead agency under the National Environmental Policy Act because development activities would take place in predominantly state waters and on state lands, and BOEM served as the cooperating agency, for leasing purposes in the Outer Continental Shelf, that was required to sign-off on CoE’s Finding of No Significant Impact. See BLOCK ISLAND TRANSMISSION SYSTEM, *infra* note 66. As this Article later discusses, however, for the projects proposed in the Pacific Ocean, BOEM will undoubtedly assume the role of lead agency where floating turbines will exist predominantly in federal waters. See NREL, *infra* note 17, at 43 (describing Oregon’s offshore wind proposal).

6. See U.S. DEP’T OF ENERGY AND U.S. DEP’T OF INTERIOR, NATIONAL OFFSHORE WIND STRATEGY 28 (2016). *Infra* note 11. But see Benjamin Fox, *The Offshore Grid: The Future of America’s Offshore Wind Energy Potential*, 42 ECOLOGY L.Q. 651, 695 (2015) (describing transmission barriers to California’s offshore wind development).

to utilize BIWF’s model strategy to expedite project approval under the CZMA without court action.

II. THE IMPORTANCE OF CREATING A MORE EFFICIENT PERMITTING SYSTEM AT THE STATE LEVEL

The CZMA recognizes that, “[t]he key to more effective protection and use . . . of the coastal zone is to *encourage the states to exercise their full authority over . . . the coastal zone* by assisting the states . . . in *developing land and water use programs for the coastal zone*, including unified . . . processes for dealing with . . . decisions of more than local significance.”⁷ The CZMA also implicitly recognizes the states’ interest in creating new energy solutions in light of climate change considerations.⁸ States like California, seeking to meet a renewables portfolio standard and to reach greenhouse gas emissions reduction targets, have a unique interest in diversifying energy generation.⁹ For California, harnessing offshore winds may be a way to deal with the problematic Duck Curve confronting the state, since offshore winds coincide with evening peak electricity demand, especially during peak summer loads.¹⁰ To date, BOEM has proposed three projects in the Pacific region to take advantage of this resource; however, a slough of permitting obstacles, evidenced by stalled projects in the Atlantic, currently deter developers from diving into the process.¹¹ The Production

7. 16 U.S.C. § 1451(i) (Westlaw 1990) (emphasis added).

8. *See id.* § 1451(j) (“The national objective of attaining a greater degree of energy self-sufficiency would be advanced by providing Federal financial assistance to meet state and local needs resulting from new or expanded energy activity in or affecting the coastal zone. . . .”); *see id.* § 1451(l) (“Because global warming may result in a substantial sea level rise with serious adverse effects in the coastal zone, coastal states must anticipate and plan for such an occurrence.”).

9. *See* Clean Energy & Pollution Reduction Act of 2015, S.B. 350, 2015–2016 Reg. Sess., ch. 547, 2015 Cal. Stat.; S.B. 32, 2015–2016 Reg. Sess., ch. 249, 2016 Cal. Stat.; Assemb.B. 197, 2015–2016 Reg. Sess., ch. 250, 2016 Cal. Stat. *See also* Fox, *supra* note 6, at 667–70 (2015) (describing how Atlantic states seek to use offshore wind to meet RPS goals).

10. U.S. DEP’T OF ENERGY, *supra* note 6, at 19–21, fig. 2.13. The “Duck Curve” describes the figure that results when graphing power demand versus time of day, due to over-generation of solar between 9am and 4pm, followed by a sharp decline in solar generation that triggers steep demand during the evening hours of 4pm to 9pm when nonrenewable generators must ramp up to meet demand.

11. *See* Potential Commercial Leasing for Wind Power on the Outer Continental Shelf (OCS) Offshore California—Request for Interest, 81 Fed. Reg. 160, 55228 (Aug. 18, 2016); Commercial Leasing for Wind Power on the Outer Continental Shelf Offshore the

Tax Credit (“PTC”) for wind—locked in for 10 years from the date the facility goes online—is \$0.023 per kWh, but it will begin to decline steadily by 20% each year starting in 2017, and will expire after 2019.¹² Likewise, the Investment Tax Credit (“ITC”) will decrease from 30% in 2016 to 12% in 2019.¹³ Seemingly, the best way to get pending projects online to take advantage of the PTC and ITC through 2019—at which point there is no guarantee of further extension—will be through state cooperation.

Rhode Island powered through each stage of the federal and state permitting processes for its BIWF project (scheduled to go online at the end of 2016) within just four years.¹⁴ It did so by taking initiative at the state level to conduct a comprehensive marine planning study that would guide the developer’s decisions, and win over both local stakeholders and the approval of federal agencies with ultimate permitting authority.¹⁵ Meanwhile, the Cape Wind project in Massachusetts has been drowning in litigation since its conception in 2001, a tug-of-war between federal permitting authorities and local interests.¹⁶ Creating efficient permitting systems is even more crucial for projects in the Pacific, where the levelized cost of offshore wind energy is much greater due to more expensive floating turbine technology situated farther offshore.¹⁷ Efficient permitting mechanisms are needed

Island of Oahu, Hawaii—Call for Information and Nominations (Call), 81 Fed. Reg. 122, 41335 (June 24, 2016). *See generally* Susskind, *supra* note 4, at 206 (“examin[ing] the costs of contentiousness in renewable energy siting and permitting efforts through the case of offshore wind energy off of the United States’ Atlantic coast.”).

12. *Renewable Electricity Production Tax Credit: Program Info*, ENERGY.GOV (2016), <http://energy.gov/savings/renewable-electricity-production-tax-credit-ptc> [<https://perma.cc/Q9HN-KV3P>] (citing the Consolidated Appropriations Act of 2016, H.R. 2029, 114th Cong. § 301).

13. U.S. DEP’T OF ENERGY, *supra* note 6, at 43–44 (stating that the ITC is more relevant in this context than the PTC because of wind development’s capital-intensive nature). *See Business Energy Investment Tax Credit*, DATABASE OF STATE INCENTIVES FOR RENEWABLES & EFFICIENCY (Feb. 20, 2017), <http://programs.dsireusa.org/system/program/detail/658>.

14. *See* Grover Fugate, *Emerging Issue: Coastal and Marine Spatial Planning: Rhode Island’s Ocean Special Area Management Plan: Leading the Way for the Nation*, 17 ROGER WILLIAMS U. L. REV. 295, 298 (2012) (stating that the local, federal, and tribal stakeholder planning processes began in 2008).

15. *See* John M. Boehnert, *A New Blueprint for Coastal Zone Management*, 30 ABA NAT. RES. & ENV’T 52, 53 (2016); *see also* Susskind, *supra* note 4, at 230–31, 240–41.

16. *See* Susskind, *supra* note 4, at 216–24; *see generally* Danielle Murray et al., *Riding the Wave: Confronting Jurisdictional and Regulatory Barriers to Ocean Energy Development*, 5 GOLDEN GATE U. ENVTL. L.J. 159, 174–78 (2011) (describing jurisdictional battles arising at the federal level for projects on the OCS, as well as the failure of the federal leasing process “to adequately recognize the added public value that local government-led projects provide.”).

17. *See* U.S. DEP’T OF ENERGY, *supra* note 6, at 16 (establishing that sites farther offshore have higher costs due to greater electric transmission, operation and maintenance costs). *See also* NATIONAL RENEWABLE ENERGY LABORATORY, 2014–2015 OFFSHORE WIND TECHNOLOGIES MARKET REPORT 55, fig. 16 (2015) [hereinafter NREL] (illustrating three current floating substructure designs—semisubmersible, tension leg platform, and

to offset these greater costs, and it would seem to be in California’s best interest to adopt Rhode Island’s approach to reduce costs associated with lengthy permitting processes and litigation.

III. CONDITIONS THAT MUST BE MET BEFORE BOEM WILL DELEGATE PERMITTING AUTHORITY TO A STATE

The courts have well established that a state may review a federal plan to determine whether or not it is consistent with the state’s coastal management program (“CMP”) under the CZMA.¹⁸ However, trying to obtain the inverse—federal approval for a state’s plan in federal territory—is a relatively uncharted course that Rhode Island’s BIWF project has survived without being dragged into the courtroom.¹⁹ Comparing the path the BIWF project took with that of the long-delayed Cape Wind project provides insight into what actions a developer and state should take to gain federal approval.

A. *The CZMA’s Coordination and Cooperation Requirements under 16 U.S.C. § 1456(b)*

The CZMA provides, “The Secretary [of Commerce] shall not approve the management program submitted by a state . . . unless the views of Federal agencies principally affected by such program have been adequately considered.”²⁰ In the realm of offshore wind facility permitting, many federal agencies are called into play. While BOEM within the DOI, or the Army Corps of Engineers (“CoE”) within the Department of Defense (“DOD”), will oversee the project as lead agency, many other federal

spar buoy—all moored to the seabed); *id.* at 44, 107–09 (stating that other floating turbine technologies include concrete hull and composite tower, rather than heavier steel tower—utilized by Maine’s pilot project). To date, Japan has the largest floating wind turbine (7MW) in the world. *Id.* at 19, 59 (describing the 2015 Fukushima Forward project).

18. See *Mountain Rhythm Resources v. F.E.R.C.*, 302 F.3d 958, 965 (2002) (upholding NOAA’s determination that state certification of consistency with the CMP was needed for a FERC license of hydroelectric plants located 30 miles offshore); see also *Santa Barbara Channelkeeper v. California Coastal Comm’n*, 2005 WL 2660048 (Cal. Ct. App. Oct. 19, 2005) (upholding the Coastal Commission’s consistency determination that FAA’s Aviation Facilities Plan for Santa Barbara airport was consistent with the Coastal Act).

19. See Boehnert, *supra* note 15, at 52–53.

20. 16 U.S.C. § 1456(b) (Westlaw).

agencies serve as coordinating agencies at each project stage.²¹ Some of the other key players include: (1) the National Oceanic and Atmospheric Administration (“NOAA”)—in charge of approving state or regional Marine Spatial Plans (“MSPs”)²² or CMPs—and the National Marine Fisheries Service (“NMFS”)²³ under NOAA; (2) the Coast Guard, responsible for project coordination with shipping routes and navigation concerns; (3) the Environmental Protection Agency (“EPA”) with regard to discharge permits under the Clean Water Act; and (4) the DOI’s Fish & Wildlife Service (“FWS”) with regard to the Migratory Bird Treaty Act.²⁴ As will be discussed herein, the involved agencies within the DOI must take into consideration the National Historic Preservation Act, Outer Continental Shelf Lands Act (“OCSLA”), National Environmental Policy Act (“NEPA”), and various related legislative pieces for each proposed offshore project. The DOD must take into consideration national security, operations, and radar concerns presented by offshore infrastructure.²⁵ Within the DOD, the CoE has authority over navigation under the Rivers and Harbors Appropriation Act of 1899 and dredging and filling permits under the Clean Water Act of 1977.²⁶ As will be illustrated in the following case studies, this is by no means an exhaustive list of governing agencies and the extensive legislation that may be triggered by an application.

21. The Federal Energy Regulatory Commission (“FERC”) does not have authority over offshore wind projects in the Outer Continental Shelf pursuant to the 2009 Memorandum of Understanding between FERC and the Minerals Management Services (now BOEM) within the DOI. *See generally* Rachel Salcido, *Law Applicable on the Outer Continental Shelf and in the Exclusive Economic Zone*, 58 AM. J. COMP. L. 407, 425 (2010) [hereinafter Salcido, *Law Applicable*] (“Pursuant to the MOU, DOI/MMS has exclusive authority over wind energy projects proposed for the federal OCS, and DOI/MMS grants easements, licenses and right-of-ways to occupy the federal [OCS] for alternative energy projects. . .”).

22. *See* Exec. Order 13547 (July 19, 2010) (creating the National Ocean Council to develop guidelines for executive agencies’ regional coastal and marine spatial plans).

23. For example, the applicant may have to file an “incidental harassment authorization” with the NMFS under the Marine Mammal Protection Act for construction activities (50 C.F.R. § 216.102), or periodically report to the NMFS as a special condition on a dredging permit pursuant to the Magnuson-Stevens Fishery Conservation and Management Act. *See* FONSI: BIWF, *supra* note 3, at supp. Dep’t of Army permit (Sept. 4, 2014), pt. Special Conditions, No. 25; Attachment B: Standard Operating Conditions, pp. 3–12.

24. *See e.g.*, Rachael Salcido, *Siting Offshore Hydrokinetic Energy Projects: A Comparative Look at Wave Energy Regulation in the Pacific Northwest*, 5 GOLDEN GATE UNIV. ENVTL. L.J. 109, 126–29 (2011) [hereinafter Salcido, *Siting Offshore*]; Robin Kundis Craig, *An Historical Look at Planning for the Federal Public Lands: Adding Marine Spatial Planning Offshore*, 6:1 GEO. WASH. J. OF ENERGY & ENVTL. LAW 1, 22–24 (2015) (criticizing the fragmented nature of federal marine regulation).

25. *Infra* note 157.

26. *See* Salcido, *Siting Offshore*, *supra* note 24, at 127 (describing the federal authorities for offshore hydrokinetic energy projects). *Infra* notes 38–39.

Pursuant to the Energy Policy Act of 2005, the Secretary of the Interior designated BOEM the lead agency over renewable energy activities related to production, transportation, and transmission, and over all related facilities for activities authorized under OCSLA.²⁷ With regard to onshore and offshore OCS activities, the Secretary of the Interior has discretion to enter into agreements with “affected states” for, among other things, “the facilitating of permitting procedures, joint planning and review, and . . . joint surveillance and monitoring arrangements to carry out applicable Federal and State laws.”²⁸ Where a state has an approved CMP set in place defining the parameters of the state’s program, it will be easier for the state to establish that it is an “affected state” deserving of consultation during the permitting process under the CZMA.

B. 16 U.S.C. § 1455(d) Establishes Criteria Prerequisite to Federal Approval of a State’s Coastal Management Program under the CZMA

A state’s CMP must be detailed with some level of geographic specificity, including boundaries of the program and an identification of areas of particular concern.²⁹ If these areas of concern lie outside the state’s coastal zone, the CMP must provide a Geographic Location Description establishing, with some degree of “reasonable foreseeability”, that a specifically listed permitting activity will impact the state’s coastal zone.³⁰ In addition to defining these areas per the CZMA’s mandatory terms, the BIWF project reveals that it may also be persuasive to define an “Area of Mutual Interest” in which other states in the region are willing to contribute to

27. 30 C.F.R. § 585.100 (Westlaw 2011). *See also Outer Continental Shelf*, BOEM, <https://www.boem.gov/outer-continental-shelf/> [<https://perma.cc/G2NJ-ESPY>] (last visited Mar. 22, 2018) (describing the OCS as the ocean area between the seaward extent of the state’s jurisdiction (3nm from coastline) and the seaward extent of federal jurisdiction (usually 200nm from coastline)).

28. 43 U.S.C. § 1345(e) (Westlaw 1978). An “affected state” is defined by 43 U.S.C. § 1331(f) (Westlaw) (including in listed criteria, “probability of significant impact on or damage to the coastal, marine, or human environment”).

29. 16 U.S.C. § 1455(d)(2)(A) and (C) (Westlaw 1992).

30. *See Fugate*, *supra* note 14, at 301; *see* DEP’T OF COMMERCE: NAT’L OCEANIC AND ATMOSPHERIC ADMIN., COASTAL ZONE MANAGEMENT ACT FEDERAL CONSISTENCY REGULATIONS, 71 Fed. Reg. 787 (Jan. 5, 2006) (rulemaking clarifying the states’ ability to “review proposed federal actions that would have a *reasonably foreseeable effect* on any land or water use or natural resource of a State’s coastal zone. . .”) (emphasis added).

substantive findings within the CMP.³¹ This is consistent with the White House Council on Environmental Quality's encouragement of multi-state and regional CMPs.³²

Under the CZMA, the CMP must also define "what shall constitute permissible land uses and water uses within the coastal zone which have a direct and significant impact on the coastal waters."³³ To review a particular activity that is not listed in the CMP at the time the application is submitted, the state must obtain approval from NOAA, presenting further delays.³⁴ Specifically for energy facilities that may "be located in, or which may significantly affect, the coastal zone", the CMP must include a "planning process . . . including a process for anticipating the management of the impacts resulting from such facilities."³⁵

Finally, the CMP must identify "the means by which the State proposes to exert control over the land uses and water uses" it has identified as activities that will directly impact its coastal waters, "including a list of relevant State constitutional provisions, laws, regulations, and judicial decisions."³⁶ This regulatory regime must be detailed with a "description of the organizational structure proposed to implement such management program, including the responsibilities and interrelationships of local, areawide, state, regional and interstate agencies. . ."³⁷

*C. Depending on the Geographic Location, a State May Need to Meet
Additional Conditions under the Clean Water Act and
Rivers and Harbors Appropriation Act*

Any project proposed in federal waters may require navigation authority under section 10 of the Rivers and Harbors Appropriation Act of 1899, necessitating a permit from the Secretary of the CoE and potentially an

31. See Fugate, *supra* note 14, at 305.

32. See *Final Recommendations of the Interagency Ocean Policy Task Force*, THE WHITE HOUSE COUNCIL ON ENVIRONMENTAL QUALITY 46–52 (July 19, 2010) (advocating for a "regional approach" to Coastal and Marine Spatial Planning (CMSP) "to allow for the variability of economic, environmental, and social aspects among different areas of the United States", and providing that "[o]ne of the significant benefits of [the] CMSP is to improve the ability of these authorities to seamlessly coordinate their objectives with broader planning efforts by participating in the CMSP process for areas within and beyond their jurisdictional waters. . .").

33. 16 U.S.C. § 1455(d)(2)(B) (Westlaw). See also 15 C.F.R § 930.53 (Westlaw 2012).

34. Fugate, *supra* note 14, at 301. See 15 C.F.R § 930.54 (requiring a state agency wishing to review an unlisted activity to notify the relevant federal agency or applicant within 30 days of receipt of application, or else waive review).

35. 16 U.S.C. § 1455(d)(2)(H) (Westlaw).

36. *Id.* § 1455(d)(2)(D).

37. *Id.* § 1455(d)(2)(F).

Environmental Impact Statement (“EIS”) under NEPA.³⁸ An offshore wind project in navigable waters may also require discharge, and dredge and fill certifications under the Clean Water Act (“CWA”), where excavation will be required to lay undersea transmission cable.³⁹ Under section 401 of the CWA, states retain certification authority where “the discharge originates or will originate” in state.⁴⁰ For dumping permits related to dredging or filling activities in federal waters, the CoE has immediate authority under section 404, and the EPA has authority over all other discharge restrictions under section 402.⁴¹ BIWF’s developer received section 10 and section 404 permits from CoE to lay 20 miles of submerged transmission cable and fill for cable armoring (subject to special conditions and a five-year expiration date), but did not need discharge permits from the EPA.⁴² A wind project developer now also has the option to streamline permitting by obtaining a Nationwide Permit from CoE’s district engineers after the public has been provided with notice and an opportunity to comment on the permit.⁴³

38. See 33 U.S.C. § 403 (Westlaw 1899) (“The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build . . . [in] water of the United States, outside established harbor lines . . . except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army. . . .”); see U.S. Army Corps of Engineers Permitting Process Information (2016), <http://www.lrl.usace.army.mil/Portals/64/docs/regulatory/Permitting/PermittingProcessInformation.pdf> [<https://perma.cc/LEM6-2NUD>].

39. See Craig, *supra* note 24, at 22–23. Dredging is defined as “excavation in . . . surface waters or . . . in uplands that creates . . . surface waters.” Filling is defined as “deposition of any material (such as sand, dock pilings, or seawalls) in . . . surface waters.” *Dredge and Fill Fact Sheet*, FLORIDA DEP’T OF ENVTL. PROT. (2016), <http://www.dep.state.fl.us/water/wetlands/erp/dffact.htm>.

40. Clean Water Act of 1977, Pub. L. 114–244, 91 Stat. 1598 (1977) (codified as amended at 33 U.S.C. § 1341 (2012)).

41. *Id.* § 1344. See generally 2 SHELDON M. NOVICK ET AL., ENVTL. LAW INST. § 13:138 (2016) (citing 33 U.S.C. § 1413); see 33 U.S.C. § 1342 (National Pollutant Discharge Elimination System); see also Marine Protection, Research, and Sanctuaries Act of 1972, Pub. L. 114–229 (codified as amended at 33 U.S.C. § 1412) (EPA Dumping permit program). *But see* Mingo Logan Coal v. EPA, 829 F.3d 710, 730 (D.C. Cir. 2016) (holding that EPA had ultimate discretion to revoke CoE-issued 404 permits for two disposal sites).

42. See FONSI: BIWF, *supra* note 3, at Supp. Dep’t of Army Permit (Sept. 4, 2014), pt. Permit Conditions, pp. 1–2.

43. 33 C.F.R. § 330.1 (Westlaw 2013).

A relatively unutilized alternative exists where the state may seek federal approval of its own dredge and fill permitting program under the CWA.⁴⁴ Pursuant to 33 U.S.C. section 1344(g)(1), the state’s governor must submit “a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact . . . and a statement from the attorney general . . . *that the laws of such State . . . provide adequate authority to carry out the described program. . .*” (emphasis added). Under equivalent conditions, a state may apply to the EPA for approval of a discharge permit program under 33 U.S.C. section 1342(b). It is important to note, the Coast Guard’s determination that a permit will “substantially impair” “anchorage and navigation of any of the navigable waters” will supersede the state’s permitting authority.⁴⁵

A state may impose more stringent water quality controls than the EPA requires, applicable to the extent that excavation activities required to lay transmission cable will result in discharge.⁴⁶ For example, California’s State Water Resources Control Board prohibits all waste discharges in the state’s Areas of Special Biological Significance, which means those areas are off limits to offshore wind development.⁴⁷ However, the federal courts have demonstrated conflicting views regarding when state water standards may displace federal standards.⁴⁸ Currently, there is also a circuit split on the issue of whether a private party may bring an action under section 1365 of the CWA when a condition is violated that is unique to a state permit and not subject to any federal “effluent standard or limitation”, including conditions on non-pollutants like conductivity.⁴⁹ This may come into play when laying submerged transmission cable offshore states like California,

44. See Salcido, *Siting Offshore*, *supra* note 24, at 127 n.97 (2011) (“States, although authorized by [33 U.S.C. § 1344] to obtain delegation of permitting authority, have generally not done so. . .”).

45. 33 U.S.C. § 1344(h)(1)(F) (Westlaw 2012).

46. See 40 C.F.R. § 131.4(a) (Westlaw 2010).

47. CAL. OCEAN PROT. COUNCIL, CALIFORNIA PERMITTING GUIDANCE FOR OCEAN RENEWABLE ENERGY TEST AND PILOT PROJECTS, pt. Useful Siting Considerations, subdv. Areas of Special Biological Significance (Dec. 16, 2011).

48. See *e.g.*, PUD No. 1 of Jefferson Cty. v. Wash. Dept. of Ecology, 511 U.S. 700 (1994) (upholding state’s certification of a hydroelectric project on federal land conditioned on meeting state-set stream flow requirements); see also ENVTL. LAW INST., *supra* note 41 (citing to 33 U.S.C. § 1412(a)’s language that, “No permit shall be issued for a dumping of material which will violate applicable water quality standards”). *But see* Karuk Tribe of N. Cal. v. Cal. Reg. Water Quality Control Bd. N. Coast Region, 183 Cal. App. 4th 330 (2010) (holding that the Federal Power Act preempted California’s regulation of waste from hydroelectric dam-reservoirs); First Iowa Hydro-Electric Coop. v. Fed. Power Com., 328 U.S. 152, 167–69 (1946) (establishing federal preemption over navigable waters on ground that a dual system of permitting would be “unworkable”).

49. Roger Hanshaw, *State Courts vs. Federal Courts: Jurisdictional Battles over State Water Quality Standards*, 31 A.B.A. NAT. RES. & ENV’T 12, 12–15 (2016).

which have an interest in reviewing projects that concern the impact of electromagnetic fields on marine life, and may dictate whether a federal agency will consider those activities ripe for review under the CWA as relevant considerations during offshore wind permitting.⁵⁰

D. The Block Island Wind Farm Sheds Light on when BOEM May Opt to Rely on a State’s Coastal Management Plan in Permitting a Proposed Project

*1. BIWF’s Success Rests on Rhode Island’s Ocean Spatial Area Management Plan, the First Federally Approved Ocean-Zoning Plan under the CZMA*⁵¹

Prior to contracting a developer for the project, the Rhode Island Coastal Resources Management Council (“CRMC”)—the lead state agency overseeing the project proposal—contracted the University of Rhode Island (“URI”) to undergo a comprehensive study of coastal waters, where development activities could take place, to create a marine spatial plan (“MSP”).⁵² The CRMC facilitated discussion between URI staff, stakeholders, tribal and government agencies throughout the drafting phase of the MSP.⁵³ It also engaged the public in an intensive participation process comprised of public notice, workshops, and three hearings held by both the CRMC and Rhode Island Department of Environmental Management, prior to the CRMC’s formal adoption of the MSP on October 19, 2010.⁵⁴ Less than a year later, NOAA signed-off on the Ocean Spatial Area Management Plan (“OSAMP”) as part of the state’s approved coastal program under the CZMA.⁵⁵

There are specific aspects of OSAMP that may shed light on when NOAA will approve a MSP as part of a state’s coastal program, and which may later be persuasive to BOEM’s decision to adopt the state’s studies

50. *Infra* note 136.

51. See Boehnert, *supra* note 15, at 52–53; see also Susskind, *supra* note 4, at 240–41; see generally Joseph Dwyer, *Perceptions of the Block Island Wind Farm Process: Perspectives From Those Involved*, UNIV. OF R.I.: DIGITAL COMMONS@URI 19–23, 61–64 (2016), <http://digitalcommons.uri.edu/cgi/viewcontent.cgi?article=1850&context=theses> [<https://perma.cc/6TVG-RJ5X>].

52. Boehnert, *supra* note 15, at 52–53.

53. See Fugate, *supra* note 14, at 298–300 (describing the CRMC Executive Director’s personal account of the permitting process).

54. *Id.* at 300.

55. *Id.* at 301.

into the wind facility permitting process.⁵⁶ Identified by CRMC’s Executive Director as OSAMP’s most fundamental element, the process involved federal and tribal interests from the outset, allowing federal agencies ample opportunity to provide input.⁵⁷ Furthermore, OSAMP includes provisions for mandatory continuous long-term review.⁵⁸ Since its adoption in 2010, for example, recent amendments regarding future uses and climate change have been added.⁵⁹ OSAMP also has specific review protocol for “Areas of Particular Concern” and “Areas Designated for Preservation”, which can be attributed to the CZMA’s requirement under 16 U.S.C. section 1455(d)(2)(C).⁶⁰ Finally, OSAMP has designated an Area of Mutual Interest (“AMI”) on the OCS waters where both Massachusetts and Rhode Island governors’ have agreed that: (1) Rhode Island will integrate Massachusetts’ stakeholder data and comment into OSAMP; and (2) both states will share “fair and equitable” distribution of economic costs and benefits resulting from offshore wind development in the AMI.⁶¹ These aspects of OSAMP may give California and other states desiring to mirror Rhode Island’s state-directed approach an idea of what criteria federal agencies look to before declaring the legitimacy of a state MSP.

2. While BIWF’s Developer Had to Go Through a Mandatory Application Process at the Federal Level, the State’s Own Decision to Select the Developer and Keep Its Track Separate from the State-Directed OSAMP Process Helped Reinforce Local Stakeholders’ Trust in the Project⁶²

Rhode Island’s choice to undergo marine spatial planning studies without the developer’s involvement may have been the defining factor

56. *Id.* at 299–305. Note that this paragraph summarizes the CRMC Executive Director’s direct observations about OSAMP’s most successful qualities, which can be found at: Grover Fugate, *Emerging Issue: Coastal and Marine Spatial Planning: Rhode Island’s Ocean Special Area Management Plan: Leading the Way for the Nation*, 17 ROGER WILLIAMS UNIV. L. REV. 295, 301 (2012).

57. *Id.* at 299.

58. *Id.* at 303 (describing the long-term review components as: (a) two-year review of accomplishments, research, and permitting activities; and (b) five-year review of the entire plan).

59. *Id.* at 304.

60. *See id.*

61. BUREAU OF OCEAN ENERGY MGMT., MEMORANDUM OF UNDERSTANDING 2–3 (July 26, 2010), http://www.boem.gov/uploadedFiles/BOEM/Renewable_Energy_Program/State_Activities/RI/MA-RI%20MOU.pdf [<https://perma.cc/H32J-MV2W>].

62. Boehnert, *supra* note 15, at 52–53. *See* Dwyer, *supra* note 51, at 63–64.

underlying BIWF's rapid permitting.⁶³ The governor's office selected the developer based on a number of criteria aimed at winning over local support, including to what extent the developer planned to stimulate the local economy by employing in-state workers.⁶⁴ Following its selection, the developer reimbursed Rhode Island for all OSAMP planning studies and began its pre-application consultation with the CoE.⁶⁵ In the BIWF case, CoE was the lead agency under NEPA since development activities would take place in predominantly state waters and on state lands, and BOEM served as the cooperating agency—for leasing purposes in the OCS—that was required to sign-off on CoE's Finding of No Significant Impact ("FONSI").⁶⁶

To secure its leasing rights, BIWF's developer submitted Right-of-Way and General Activities Plan grant applications to BOEM for the nine-mile submarine transmission connection in federal waters.⁶⁷ BOEM published a Request for Competitive Interest in 2012 through the Federal Registrar, and ultimately issued a Notice of Determination of No Competitive Interest.⁶⁸ CoE then conducted an Environmental Assessment of the developer's Site Assessment Plan ("SAP").⁶⁹ While a SAP is valid for five years before a Construction & Operations Plan ("COP") must be submitted, BIWF's approach proved to be so effective that the developer was able to submit its COP prior to this deadline with time to spare.⁷⁰ The COP involves the necessary siting considerations and often requires an EIS under NEPA⁷¹, but not in the BIWF case where CoE issued a FONSI after undergoing an

63. See Boehnert, *supra* note 15, at 52–53. Cf. LAYZER, *supra* note 4, at 337 ("in Cape Wind and other cases, distrust of private developers has figured prominently among the reasons for resistance.").

64. See Boehnert, *supra* note 15, at 52–53; see also Susskind, *supra* note 4, at 246–48 (comparing different state approaches to selecting an offshore wind developer).

65. Boehnert, *supra* note 15, at 53. Fugate, *supra* note 14, at 305.

66. BUREAU OF OCEAN ENERGY MGMT., BLOCK ISLAND TRANSMISSION SYSTEM (2015), <http://www.boem.gov/Renewable-Energy-Program/State-Activities/RI/Block-Island-Transmission-System.aspx> [<https://perma.cc/76JX-6R8Q>].

67. FONSI: BIWF, *supra* note 3, at 1–4.

68. BLOCK ISLAND TRANSMISSION SYSTEM, *supra* note 66.

69. In the case of floating offshore wind sites in the Pacific, BOEM will be the agency responsible for conducting an Environmental Assessment. See e.g., NREL, *supra* note 17, at 43 (describing Oregon's offshore wind proposal).

70. U.S. DEP'T OF ENERGY, *supra* note 6, at 36 (showing BOEM permitting process in Fig. 3.4).

71. *Id.* See also Philip E. Karmel et al., *The Proposed Wind Farm off the Shore of Long Island*, 27–09 ENVTL. LAW IN NEW YORK 143, 146 (Sept. 2016).

Environmental Assessment. BOEM approved CoE’s Environmental Assessment through a finding of compliance with the Council on Environmental Quality’s NEPA provisions, 43 C.F.R. section 46.320, and the DOI’s Manual regarding managing the NEPA process.⁷² However, the FONSI issued in 2014 was subject to conditions on the developer’s Right-of-Way and General Activities Plan grants.⁷³ Due to unavoidable impacts from noise-producing construction, BOEM conditioned permitting on Ramp-up/Soft-Start Procedures, and Shutdown Procedures.⁷⁴ During construction, the developer would be responsible for the creation of Exclusion and Monitoring Zones.⁷⁵ The developer is also subject to post-construction reporting requirements to CoE, NMFS, BOEM, and Rhode Island’s lead federal consistency agency (i.e. the CRMC).⁷⁶

At the final stage in the leasing process, the developer assigned 100% of the Right-of-Way grant to Narragansett Electric Company (a subsidiary of the United Kingdom-based utility National Grid) for the portion of submarine transmission cable on the OCS, which BOEM approved in 2015.⁷⁷ The state’s public utilities commission approved the power purchase agreement (“PPA”) in 2010 after the legislature responded to its rejection—based on a finding of not “*commercially reasonable*”—by amending this statutory term and allowing the parties to reapply with a provision more favorable to ratepayers (i.e. the \$0.24/kWh rate could decrease one-year after BIWF went online, if the developer realized significant cost savings during construction).⁷⁸ In addition to economic benefits, the commission deferred to the Rhode Island Department of Environmental Management’s advisory

72. FONSI: BIWF, *supra* note 3, at 1. See 40 C.F.R. §§ 1500–08 (Westlaw 2005) (in relevant part, § 1500.4 states, “Agencies shall reduce excessive paperwork by . . . Eliminating duplication with State and local procedures, by providing for joint preparation, and with other Federal procedures, by providing that any agency may adopt appropriate environmental documents prepared by another agency. . . .”); see 43 C.F.R. § 46.320 (providing that “(a) A Responsible Official [here BOEM] may adopt an environmental assessment prepared by another agency, entity, or person, including an applicant if the Responsible Official: (1) independently reviews the environmental assessment; and (2) finds the environmental assessment complies with this subpart and relevant provisions of the CEQ Regulations and with other program requirements.”); see U.S. DEP’T OF INTERIOR, DEPARTMENTAL MANUAL: MANAGING THE NEPA PROCESS—MINERALS MANAGEMENT SERVICE pt. 516, ch. 15 (2004).

73. See FONSI: BIWF, *supra* note 3, at 3–4.

74. *Id.* at supp. Dep’t of Army permit (Sept. 4, 2014), pt. Special Conditions, Nos. 22–23.

75. *Id.* at supp. Dep’t of Army permit (Sept. 4, 2014), pt. Special Conditions, No. 19.

76. See *id.* at supp. Dep’t of Army permit (Sept. 4, 2014), pt. Special Conditions.

77. BLOCK ISLAND TRANSMISSION SYSTEM, *supra* note 66 (citing to BOEM Assignment of Grant, No. OCS-A-0506).

78. *In Re: Review of Amended Power Purchase Agreement Between Narragansett Electric Company D/B/A National Grid and Deepwater Wind Block Island, LLC* pursuant to R.I. Gen. Laws § 39-26.1–7, Docket No. 4185, at 2–7 (Aug. 16, 2010).

opinion in finding that substantial environmental benefits warranted the BIWF project.⁷⁹

Federal and state public comment periods and participation hearings at each stage of the BIWF project were fundamental to its ultimate approval. At the state level, the CRMC and Department of Environmental Management held public hearings on the OSAMP even before bringing the developer into play; at the federal level, CoE held a 45-day public comment period on the developer's wind farm and transmission system applications.⁸⁰ Before signing off on the state-approved OSAMP, BOEM reviewed all public comment and found that the public involvement requirements were met.⁸¹

E. Meanwhile, Fifteen Years Later, the Cape Wind Project is Still Fighting to Win over Local Interests

1. Cape Wind Associates, LLC Initiated Its Project Proposal at the Federal Level in 2001, and Its Lease Was Not Signed by the Secretary of the Interior until 2010

Cape Wind's developer proposed the wind farm at the federal level in 2001, and CoE subsequently issued a corresponding draft EIS in 2004.⁸² Under the Energy Policy Act of 2005, lead federal authority shifted from CoE to the Minerals Management Service ("MMS") within the DOI.⁸³ MMS issued a new draft EIS in 2008, and the final EIS was viewed favorably by the participating federal agencies in 2009, despite obstacles that included the Federal Aviation Administration's radar concerns and the Wampanoag Tribe's aesthetic concerns (bringing the Historic Preservation Act and Advisory Council into play).⁸⁴ In 2010, the Secretary of the Interior signed the Cape Wind lease despite the Historic Preservation Advisory Council's

79. *Id.* at 50, 78, 140 (relying on fact that Block Island would be able to reduce emissions by reducing utility's reliance on diesel generators when BIWF is running).

80. *See* FONSI: BIWF, *supra* note 3, at 4–5. *See generally* Dwyer, *supra* note 51, at 22–23 (describing public meetings and outreach by the developer and public utility company).

81. *See* FONSI: BIWF, *supra* note 3, at 4–5.

82. LAYZER, *supra* note 4, at 308, 324.

83. *Id.* at 325 ("The shift in responsibility promised more delays, which opponents of Cape Wind hoped to use to frustrate the developers into giving up.").

84. *Id.* at 330–33.

recommendation of denial.⁸⁵ MMS, which had since become BOEM, issued a FONSI in 2010 and a subsequent lease to the developer.⁸⁶

2. *Challenges at the Federal Level Have Been Aggravated by Lack of Support at the Local Level, Confirmed when the Affected County's Regional Planning Entity Unanimously Denied the Developer a Permit Following Issuance of the State's Final EIR in 2007*

In 2007, the developer filed its Environmental Impact Report (“EIR”) for the proposed Cape Wind wind farm with Massachusetts’ Executive Office of Environmental Affairs, which oversees the state’s six departmental agencies including the Department of Public Utilities, Department of Energy, and Department of Environmental Protection.⁸⁷ Despite the unanimous decision of the affected county’s regional planning commission to *deny* the developer a permit, the state’s Energy Facilities Siting Board—within the Department of Public Utilities, but with independent jurisdiction to license Massachusetts’ major energy infrastructure—unanimously voted to *approve* the permit in 2009 after one year of deliberation.⁸⁸ Following an unsuccessful appeal by an alliance of project opponents in the Massachusetts Supreme Judicial Court, the Department of Public Utilities signed off on the developer’s PPA in 2010.⁸⁹ While it would appear to be smooth sailing for the developer from that point on, the Cape Wind project is still drowning in costly litigation, and its PPA has been canceled by the utilities as a result of the developer’s failure to meet financial deadlines.⁹⁰

In the 2014 case, *Public Employees for Environmental Responsibility v. Beaudreu*, numerous project opponents filed a joint challenge to BOEM’s issuance of the 2010 FONSI.⁹¹ Plaintiffs alleged violations of virtually every

85. *Id.* at 333.

86. Pub. Empl. for Envtl. Responsibility v. Beaudreu, 25 F. Supp. 3d 67, 90 (D.C. Cir. 2014), *appeal dismissed*, No. 14-5117, 2014 U.S. App. 2014 WL 3014869 (D.C. Cir. 2014).

87. LAYZER, *supra* note 4, at 328. *See generally* *The Official Website of the Executive Office of Environmental Affairs*, MASS.GOV (2016), <http://www.mass.gov/eea/agencies/> [<https://perma.cc/D89H-7P56>].

88. LAYZER, *supra* note 4, at 328–29.

89. *Id.* at 329, 334.

90. Susskind, *supra* note 4, at 221–22 (2015). Note that since the writing of this Article, Cape Wind Associates, LLC terminated its offshore wind development lease. *See* Brian Eckhouse & Joe Ryan, *What Was Once Hailed as First U.S. Offshore Wind Farm Is No More*, BLOOMBERG (Dec. 1, 2017), <https://www.bloomberg.com/news/articles/2017-12-01/cape-wind-developer-terminates-project-opposed-by-kennedys-koch> [<https://perma.cc/K7SX-86HJ>].

91. Pub. Empl. for Envtl. Responsibility v. Beaudreu, 25 F. Supp. 3d 67 (D.C. 2014), *appeal dismissed*, No. 14-5117, 2014 U.S. App. 2014 WL 3014869 (D.C. Cir. 2014).

federal statute requiring a regulatory approval for the project, including the Coast Guard and Maritime Transportation Act of 2006, the Endangered Species Act, the Migratory Bird Treaty Act, the Historic Preservation Act, NEPA and OSCLA.⁹² The court rejected nearly all of these claims but granted summary judgment for plaintiffs on two issues, holding that: (1) the FWS (within the DOI) improperly deferred to BOEM and the developer in finding that an operational adjustment to the wind facility (“feathering” the turbines to reduce bird collisions) would be unreasonable in light of economic costs, and that the proposal must be remanded to FWS for an independent determination; and (2) the NMFS (within NOAA) must include an incidental take statement pursuant to the Environmental Species Act, given that its biological opinion alluded to impacts on right whales traversing the project vessels’ shipping routes.⁹³

The project opponents appealed the District Court’s decision in the 2016 case, *Public Employees for Environmental Responsibility v. Hopper*.⁹⁴ The D.C. Circuit revisited plaintiff’s challenge to BOEM’s approval of the COP without adequate geophysical and geotechnical surveys, but upheld the lower court’s determination that BOEM acted within the scope of its regulatory authority when it granted the developer a regulatory departure to secure further financing, given that BOEM still required the surveys to be completed prior to implementation of the COP.⁹⁵ However, the court held BOEM had violated NEPA by relying on inadequate surveys in its 2009 EIS, vacating the EIS and prohibiting construction until BOEM supplemented the EIS with further geological studies.⁹⁶ Despite this NEPA violation, the court did *not* vacate the developer’s lease or regulatory approvals in light of the resources already invested in the project and the State’s increasingly demanding renewable energy requirements.⁹⁷

On appeal, the D.C. Circuit rejected opponents’ contention that the Coast Guard must go back and issue recommended navigational safety terms and conditions for alternative sites, reasoning that BOEM previously ruled out those sites as infeasible in the draft EIS.⁹⁸ Regarding FWS’s determination

92. *Id.* at 94–129.

93. *Id.* at 108–10, 113–15, 130.

94. *Pub. Empls. for Envtl. Responsibility v. Hopper*, 827 F.3d 1077 (D.C. Cir. 2016).

95. *Id.* at 1084–85 (citing 30 C.F.R. § 585.103(b)(2) (2011) (prescribing BOEM’s regulatory authority)).

96. *Id.* at 1082–84.

97. *Id.* at 1083–84.

98. *Id.* at 1087.

to exclude the feathering mitigation measure, the court once again denied FWS's action as improper where, on remand, FWS had disregarded opponents' comments about the measure's economic feasibility.⁹⁹

*F. Pending Projects in the Atlantic Have Revealed Many Roadblocks in the Federal Regulatory Regime, Which Federal Agencies Have Identified and to Which They are Currently Seeking Solutions*¹⁰⁰

One of the biggest obstacles identified by those engaged in the federal offshore wind permitting process is that developers must submit financial assurance for decommissioning costs prior to construction; developers have requested more flexibility in this area where high financial stakes upfront present a tremendous disincentive to submit a project bid.¹⁰¹ In 2014, BOEM initiated a rulemaking on the issue of relaxing submission timelines at the initial SAP stage.¹⁰²

Another roadblock is the time consuming competitive leasing process.¹⁰³ BIWF's state-directed approach shows how the governor's office carefully selected a developer by looking at criteria, such as how the developer planned to stimulate the local economy.¹⁰⁴ As a result, BIWF has already created over 300 local construction-related jobs, and operating and maintenance will also require a long-term workforce.¹⁰⁵ When comparing BIWF's success to the opposition that the Cape Wind developer has confronted, history suggests that a state may be better equipped to select a developer because it is more in tune with its constituents. Arguably, this is more difficult for larger states with many overlapping agencies, like Massachusetts and California, to accomplish. Finally, a long laundry list of checkboxes at the early Environmental Assessment stage prior to SAP approval, such as an impact

99. *Id.* at 1088–90 (vacating FWS's incidental take statement).

100. *See* U.S. DEP'T OF ENERGY, *supra* note 6, at 37–38; *see generally* Fox, *supra* note 6, at 660–63 (describing regulatory challenges developers face).

101. *See id.* at 37.

102. Timing Requirements for the Submission of a Site Assessment Plan (SAP) or General Activities Plan (GAP) for a Renewable Energy Project on the Outer Continental Shelf (OCS), 79 Fed. Reg. 74, 21617–26 (Apr. 17, 2014) (to be codified at 30 C.F.R. pts. 585, 590) (extending time frame from six months to 12 months for time lessee has to submit a site assessment or general activities plan).

103. *See generally* Murray, *supra* note 16, at 176–78 (describing the cumbersome federal leasing process for projects on the OCS with respect to hydrokinetic projects).

104. Boehnert, *supra* note 15.

105. Miles Grant, *Labor Leaders Tour America's First Offshore Wind Project, See More Jobs over Horizon*, NATIONAL WILDLIFE FEDERATION (Oct. 14, 2016), <https://www.nwf.org/en/Latest-News/Press-Releases/2016/10-14-2016-Labor-Leaders-Tour-Americas-First-Offshore-Project-See-More-Jobs-Over-Horizon> [<https://perma.cc/E2BN-GFM5>]. *See* Boehnert, *supra* note 15, at 52–53.

assessment for meteorological buoy deployment, stunts initial project development and can deter developers.¹⁰⁶

IV. THE POSSIBILITY OF ADOPTING A STATE-DIRECTED PERMITTING
APPROACH IN LIGHT OF CALIFORNIA’S
REGULATORY REGIME

*A. The California Coastal Commission is the Lead Agency Responsible
for Making Federal Consistency Determinations
under the CZMA*¹⁰⁷

The California Coastal Commission (“CCC”) is tasked with making federal consistency determinations under the CZMA for all “activities that affect the coastal zone, regardless of their location.”¹⁰⁸ The CCC’s implementing legislation, the California Coastal Act of 1976 (Cal. Pub. Res. Code §§ 30000 et seq.)—approved as part of California’s Coastal Management Program (“CCMP”) by NOAA in 1978—outlines activities which the CCC must review.¹⁰⁹ Where the Coastal Act does not explicitly mention offshore wind permitting as an activity for the CCC’s review, the question arises of whether the CCMP gives the state authority to review offshore wind facilities in federal waters in light of the CZMA’s requirement that activities for consistency determinations be listed in a coastal management plan.¹¹⁰

106. U.S. DEP’T OF ENERGY, *supra* note 6, at 37, 41 (suggesting that resolved issues, including those that the BIWF project has proven insignificant, should be retired to speed up the environmental impact review process).

107. Note that the San Francisco Bay Conservation and Development Commission may also be designated the lead agency under the CZMA, depending on coastline location. This paper will not focus on the smaller SF Bay portion of coastline, which has a CMP comprised of the McAteer-Petris Act and Suisun Marsh Preservation Act, rather than the Coastal Act. Likewise, this paper will not focus on the Coastal Conservancy’s authority under the CZMA, since the Coastal Conservancy does not have specific provisions in its enacting legislation (CAL. PUB. RES. CODE § 31000 et seq.) regarding authority over the OCS.

108. CAL. COASTAL COMM’N, DESCRIPTION OF CALIFORNIA’S COASTAL MANAGEMENT PROGRAM (CCMP) (2003).

109. CAL. PUB. RES. CODE § 30008 (Westlaw 1976) (“This division shall constitute California’s coastal zone management program. . .”).

110. 16 U.S.C. § 1455(d)(2)(B) (Westlaw).

1. *Offshore Wind Facilities and Their Accompanying Transmission Infrastructure Onshore Fall Within the Coastal Act's Definition of "Coastal-Dependent Industrial Facilities"*

Without specific mention to any renewable energy facility, the Coastal Act provides that, “[c]oastal-dependent industrial facilities shall be encouraged to locate or expand within existing sites and shall be permitted reasonable long-term growth where consistent with this division.”¹¹¹ Under the Coastal Act, a “coastal-dependent development or use” is defined as “any development or use which requires a site on, or adjacent to, the sea to be able to function at all.”¹¹² Offshore wind facilities unarguably fall within this category, as do their supporting onshore transmission systems that must be sited along the coastline to connect electric generation to the grid. Furthermore, “[c]oastal-dependent developments *shall have priority* over other developments on or near the shoreline. . .” (emphasis added).¹¹³ Accordingly, offshore wind transmission systems have implicit priority over other pending development permit applications, potentially an avenue to expedite the CCC’s permitting process. However, one may also argue the Coastal Act restricts offshore wind development as “industrial facilities” to “existing sites”, which are limited to the offshore sites currently occupied by oil and gas wells.¹¹⁴

As made glaringly clear by the ongoing Cape Wind litigation, control over aesthetics is a key consideration when permitting an offshore wind facility.¹¹⁵ The Coastal Act explicitly designates the CCC as the proper body to make any federal consistency determination dealing with “aesthetics in coastal areas. . .”¹¹⁶ Although a smaller floating turbine may not present the same types of concerns over aesthetic impacts as traditional turbines have

111. CAL. PUB. RES. CODE § 30260 (Westlaw).

112. *Id.* § 30101.

113. *Id.* § 30255 (“Coastal-dependent developments shall have priority over other developments on or near the shoreline . . . [but] shall not be sited in a wetland. When appropriate, coastal-related developments should be accommodated within reasonable proximity to the coastal-dependent uses they support.”).

114. *See id.* § 30260.

115. *See* LAYZER, *supra* note 4, at 316–38; *see generally* Sean F. Nolon, *Negotiating the Wind: A Framework to Engage Citizens in Siting Wind Turbines*, 12 CARDOZO J. OF CONFLICT RESOL. 327, 338–39 (2011) (describing noise, light, and visual impacts of wind turbines as siting considerations).

116. *See* CAL. PUB. RES. CODE § 30251 (Westlaw) (“The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited and designed to protect views and along the ocean and scenic coastal areas, to minimize the alteration of natural land forms, to be visually compatible with the character of surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas.”).

presented in the Atlantic, the CCC retains authority over any project impacting views “along the ocean and scenic coastal areas. . .”¹¹⁷

The CCC’s authority also extends to “diking, filling or dredging” activities requiring state approval under the Coastal Act.¹¹⁸ Excavation operations included in offshore wind development most closely fall under the Coastal Act’s mention of “new or expanded port, energy, and coastal-dependent industrial facilities. . .”¹¹⁹ It may also be argued that they fall under “incidental public service purposes, including, but not limited to burying cables and pipes. . .” where accompanying undersea transmission cable will be laid with the benefit of providing renewable energy as a “public service.”¹²⁰ On the other hand, it could be argued that wind energy generation does not qualify as a “public service” where section 30114 of the Coastal Act explicitly excludes energy facilities from the definition of “public works facilities.”¹²¹

2. *Additional Delegation of Permitting Authority to the Coastal Commission with Regard to the Outer Continental Shelf and California’s Coastal Management Plan*

The California Code of Regulations includes special provisions regarding the CCC’s authority over projects concerning the OCS.¹²² Any plan to develop the OCS in a way that will affect California’s coastal waters must be submitted to the CCC even before the plan is submitted to the DOI under OCSLA.¹²³ Within six months of receiving the plan, the CCC must issue a decision on whether the applicant’s consistency certification complies with the CCMP.¹²⁴ Furthermore, if an associated coastal development

117. *See id.* Cf. Nolon, *supra* note 115.

118. CAL. PUB. RES. CODE §30233(a) (Westlaw).

119. *Id.* § 30233(a)(1).

120. *Id.* § 30233(a)(4) (“The diking, filling, or dredging of open coastal waters, wetlands, estuaries, and lakes shall be permitted in accordance with other applicable provisions of this division, where there is no feasible less environmentally damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environmental effects, and shall be *limited to the following*. . .”) (emphasis added).

121. *Id.* § 30114 (“‘Public works’ means . . . [a]ll production, storage, transmission, and recovery facilities for water, sewerage, telephone, and other similar utilities owned or operated by any public agency or by any utility subject to the jurisdiction of the [CPUC], *except for energy facilities*”) (emphasis added).

122. Commission Procedures for Consistency Certs. for Outer Continental Shelf (OCS) Exploration, Development or Production Plans for OCS Related Federal Permits (CAL. CODE REGS. tit. 14 § 13660.1 et seq., 2016).

123. CAL. CODE REGS. tit. 14 § 13660.1(a) (Westlaw 2016).

124. *Id.* § 13660.8(a).

permit is required under the Coastal Act, the applicant must notify the CCC Executive Director at the time of submission so that he or she may decide whether consolidated review is necessary to meet statutory timelines.¹²⁵ This requirement concerning coastal development permits will apply to transmission systems associated with offshore wind farms and provides an avenue for a project applicant to seek consolidated review, further expediting the permitting process.

B. While the Coastal Commission is the Lead Agency Responsible for Making Federal Consistency Determinations under the CZMA, Many Other State Agencies Share Responsibility for Managing and Enforcing California's Coastal Management Program

The CZMA requires that a management plan include “an identification of the means by which the State proposes to exert control” over the listed activities for review, and requires “a description of the organizational structure proposed to implement such management program.”¹²⁶ Although the CCC is the primary authority responsible for implementation of the Coastal Act as a significant portion of the CCMP, many other relevant state agencies will enter the decision-making field, beyond what is mentioned in the Coastal Act.¹²⁷ With a tangle of overlapping state agency interests that have potential to muddle the permitting process (as Cape Wind has shown), BOEM may be hesitant to delegate authority to California as it did in Rhode Island’s case where there were just two apparent agencies overseeing the project at the state level (i.e. the CRMC and the Department of Environmental Management). In California’s defense, it has already established the Marine Renewable Energy Working Group of agencies to be consulted during the permitting process, perhaps alleviating the threat of administrative burden.¹²⁸

The California State Lands Commission (“SLC”)—whose jurisdiction covers uplands, tide and submerged state lands—is vested with the authority to enter into agreements with the federal government regarding mineral leases on the OCS.¹²⁹ While its enacting legislation does not explicitly extend this authority to renewables leases, to the extent that the agency SLC

125. *Id.* § 13660.12.

126. 16 U.S.C. § 1455(d)(2)(D), (F) (Westlaw).

127. *See generally* Salcido, *Siting Offshore*, *supra* note 26, at 145–46 (describing the regulatory overlap with respect to hydrokinetic projects in California).

128. *See* CAL. OCEAN PROT. COUNCIL, *supra* note 47, pt. Introduction, pt. Background.

129. CAL. PUB. RES. CODE § 6301.5 (Westlaw 1956). *See* *Monterey Oil Co. v. City Ct. of City of Seal Beach*, 120 Cal. App. 2d 31, 36–37 (1953) (“...State Lands Commission was created and was vested with the administration of and jurisdiction over state lands, including oil, gas, and other mineral lands, whether uplands, tide or submerged lands”).

previously negotiated offshore oil and gas leases with (the DOI) is shifting its attention to renewable energy technologies, SLC will likely be an instrumental player in the wind facility permitting process on the OCS.

Previous developments related to offshore wind project components lend insight into what may lie ahead for developers seeking state approval from the SLC. The 2009 AT&T Fiber Optic Cable (“AT&T”) Project across submerged lands in Morro Bay offers a particularly valuable vantage point for looking at offshore wind in California because it is situated in the same location as a pending wind farm proposal.¹³⁰ The AT&T Project required lease approval by the SLC, and issuance of a coastal development permit and consistency determination from the CCC.¹³¹ Before signing off on the lease, the SLC had the project applicant compile an EIR under the California Environmental Quality Act (“CEQA”), which included a 2007 Remotely Operated Vehicle Biological Survey of the seafloor.¹³² The EIR laid out a hard-bottom mitigation program, approved by the SLC and CCC, and had a cumulative impacts component that did not identify any marine projects in the area and excluded the five prior cable projects in the same location.¹³³ Pursuant to AB 32 (California’s Global Warming Solutions Act), the EIR also had a climate change component, requiring the developer to offset project emissions; the SLC required the applicant to report the purchase status on these carbon offsets within 60 days post-construction.¹³⁴

The AT&T Project suggests that permitting for wind facilities offshore Morro Bay will require comprehensive environmental review, but that CEQA review may replace federal review under NEPA to the extent that transmission lines will be laid in the coastal zone.¹³⁵ However, given the more stringent requirements under CEQA—namely that all impacts must be mitigated to less-than-significant—this may prove an even more lengthy

130. See Potential Commercial Leasing for Wind Power on the Outer Continental Shelf (OCS) Offshore California—Request for Interest, 81 Fed. Reg. 160, 55228 (Aug. 18, 2016).

131. ASHLEY L. ERICKSON ET AL., CENTER FOR OCEAN SOLUTIONS, INCORPORATING ECOLOGICAL PRINCIPLES INTO CALIFORNIA OCEAN AND COASTAL MANAGEMENT: EXAMPLES FROM PRACTICE 67–68 (2012).

132. *Id.* at 68–69, 69 n.36.

133. *Id.* at 79.

134. *Id.* at 82.

135. Although there is an MOU between California and FERC for coordinated CEQA/NEPA review of hydrokinetic projects, no such MOU exists between the state and BOEM regarding wind projects. See CAL. OCEAN PROT. COUNCIL, *supra* note 47, pt. Overview of California Environmental Quality Act Compliance, subdiv. Joint CEQA/NEPA Processes.

or costly process than at the federal level. One potential alleviating factor is the fact that in-state studies have already commenced regarding the impacts of transmission cable on local marine ecosystems.¹³⁶

The California Ocean Protection Council, responsible for the state's Marine Protected Area ("MPA") policy, has a Marine Renewable Energy Working Group comprised of the CCC, SLC, California Energy Commission, California Public Utilities Commission ("CPUC"), and California Department of Fish & Wildlife ("DFW"). The most recent document published by this working group, the 2011 "California Permitting Guidance for Ocean Renewable Energy Test and Pilot Projects", includes guidelines explicitly geared towards offshore wind projects both inside *and outside* of the coastal zone, and provides applicants with a map of the governing authorities and necessary permits.¹³⁷ The California DFW, which consults with the federal Bureau of Land Management within the DOI, is of utmost significance to offshore wind permitting because of its responsibility under the Marine Life Protection Act of 1999.¹³⁸ Under the Act, DFW adopted an updated Master Plan in August of 2016 for the administration of California's MPAs.¹³⁹ The question of whether this plan can be construed as the equivalent of Rhode Island's OSAMP, in terms of how federal agencies (i.e. BOEM and NOAA) may view its legitimacy for purposes of delegating permitting authorities, is addressed below in Part IV.C.1.

Assuming *arguendo* that offshore wind development is a permissible activity under the Coastal Act for the "diking, filling or dredging of open coastal waters," as argued above in Part IV.A.1., another state agency—the State Water Resources Control Board ("SWRCB")—is called into play.¹⁴⁰ The SWRCB is charged with administering the Water Quality Certification Program under section 401 of the federal CWA, requiring consultation of the Regional Water Quality Control Boards.¹⁴¹ As mentioned in Part III.C.,

136. See e.g., BUREAU OF OCEAN ENERGY MANAGEMENT, BOEM 2016-008, RENEWABLE ENERGY IN SITU: POWER CABLE OBSERVATION (2016) (study by the University of California, Santa Barbara's Marine Science Institute on impact of electromagnetic fields from undersea power cables on marine life and effectiveness of cable burial as mitigation measure).

137. CAL. OCEAN PROT. COUNCIL, *supra* note 47, pt. Introduction, app. B (providing "license and permit processing guidance for early test and pilot hydrokinetic and offshore wind projects *located in and adjacent to California marine waters*") (emphasis added).

138. See CAL. FISH & GAME CODE §§ 2850-2863 (Westlaw 1999); see generally Salcido, *Siting Offshore*, *supra* note 24, at 146-48 (describing the state's early efforts towards ocean zoning under the MLPA).

139. See CAL. DEP'T OF FISH & WILDLIFE, 2016 PLAN FOR MARINE PROTECTED AREAS (Aug. 2016).

140. CAL. PUB. RES. CODE § 30233(a) (Westlaw 1976).

141. STATE WATER RES. CONTROL BD., CWA § 401 WATER QUALITY CERTIFICATION PROGRAM: PROGRAM SCOPE AND STRATEGY (Dec. 19, 2002), http://www.waterboards.ca.gov/water_issues/programs/cwa401/docs/programscope_strategy.pdf [https://perma.cc/SVD3-LWCP].

the EPA and CoE may delegate permitting authority to the states under 33 U.S.C. section 1344(g)(1), so long as the state seeking to administer its own program has laws that “provide adequate authority to carry out the described program.” In the BIWF project, which utilized traditional anchored turbines, no discharge permits were necessary. Where floating turbine technology can be assembled on land and towed to the offshore site, avoiding the need for a heavy-lift crane and other industrial equipment, federal or state discharge permits are even less likely to be significant.¹⁴² Still, the state may wish to incorporate into its water quality program restrictions on non-pollutants beyond the scope of the CWA. For example, in permitting submerged transmission lines, California may wish to impose standards related to conductivity where it has a legitimate interest in protecting marine life.¹⁴³

C. If California Decided to Charge Ahead and Initiate an Offshore Wind Project Extending to Federal Waters, It is Unlikely that Utilization of Rhode Island’s Permitting Approach Would Survive Court Action

In addition to the daunting task of coordinating many overlapping state agencies, there are a number of other obstacles that have potential to interfere with California’s ability to emulate Rhode Island’s approach in leading the permitting process with BOEM’s approval. While it is unlikely that California would experience the same pushback from local stakeholders as Cape Wind on issues like impacts to marine life and aesthetics (since the state’s current coastal and marine studies account for these aspects at a very detailed level), it is unlikely that federal and regional interests would readily accept these studies to substantiate California’s review of offshore wind facilities in federal waters.

1. Ability of Coastal and Marine Plans to Meet Federal Procedural Standards under the CZMA

California’s 2016 Master Plan adopted under the Marine Life Protection Act surely meets the CZMA’s requirement that management programs include “an inventory and designation of areas of particular concern within the coastal zone,” and would appear to be a valid marine spatial plan

142. See NREL, *supra* note 17, at 43.

143. See Hanshaw, *supra* note 49, at 12–15; see also BOEM, RENEWABLE ENERGY IN SITU: POWER CABLE OBSERVATION, *supra* note 136.

to supplement the CCMP for purposes of consistency determinations.¹⁴⁴ However, the Plan’s adoption process, detailed in section 2859 of the California Fish & Game Code, seems to fall short of the CZMA’s requirement that “the views of Federal agencies principally affected by such program have been adequately considered” prior to approval by the Secretary of Commerce.¹⁴⁵ Recalling the OSAMP process detailed above in Part III.D.1., the public comment periods and participation hearings that Rhode Island underwent to trigger BOEM’s finding of compliance with all public involvement requirements resemble section 2859’s adoption prerequisites.¹⁴⁶ However, while drafting OSAMP entailed continuous opportunity for input by federal agencies, adoption of California’s 2016 Master Plan was almost exclusively state-interest based.¹⁴⁷ Section 2859 requires no federal agency signature on the final document, whereas NOAA needed to sign off on OSAMP to formalize the plan as part of Rhode Island’s management program. By comparison to the OSAMP process, the implication is that before California may undertake any future attempt to lead a wind-permitting project in federal waters, it will need to undergo *additional marine spatial planning studies* in conjunction with *the relevant federal agencies* listed in Part III.A. Furthermore, the Master Plan fails as it stands now because it only provides locations where projects *cannot* exist (e.g. MPAs), and does not designate geographic location descriptions for activities the state has an interest in reviewing. Without adequate marine spatial studies, BOEM will require the developer to undergo the normal federal permitting processes discussed above in Part III.D.2.: (1) an Environmental Assessment for the SAP; and (2) an EIS for the COP.

Unlike the 2016 Master Plan, NOAA approved the Coastal Act as part of the CCMP in 1978. Therefore, BOEM is likely to defer solely to the provisions of the Coastal Act, rather than to the Master Plan, when

144. 16 U.S.C. § 1455(d)(2)(C) (Westlaw). *See generally* Murray, *supra* note 16, at 194 n.160 (“In California at least, the California Marine Life Protection Act (MLPA) may provide a useful vehicle for marine spatial planning (MSP) and ecosystem-based management.”).

145. 16 U.S.C. § 1456(b) (Westlaw).

146. CAL. FISH & GAME CODE § 2859 (Westlaw 1999) (stating that adoption may take place only “after public review, not less than three public meetings” and “at least two public hearings” regarding the draft plan; and a “review and comment period by the Joint Committee on Fisheries and Aquaculture following the commission’s adoption of the master plan. . .”).

147. *See* CAL. DEP’T OF FISH & WILDLIFE, *supra* note 139, at vi–vii, 10 (describing the state agencies involved in the adoption of the Marine Life Protection Program (MLPP), and stating that “[t]he MLPP also seeks input from bodies including *California* Tribes and Tribal governments, an MPA *Statewide* Leadership Team (MLST) that is comprised of agencies and partners that have significant authority related to MPAs or marine sanctuaries, and partners in the *California* Collaborative approach. . .” (emphasis added)).

considering the state's ability to permit offshore wind facilities. However, California has left itself susceptible to challenge by other regional entities not included in CCMP's drafting process. If California employed Rhode Island's approach in selecting its preferred developer based upon criteria designed to boost the state's economy—such as the developer's level of dedication to contracting local manufacturers and workers—it could be subject to a dormant commerce clause (“DCC”) challenge. Arguably, the selection process is discriminatory in purpose because it aims to create jobs that benefit the local economy, barring out-of-state interests from participating. It would be difficult for California to defend against this DCC challenge on any other grounds than the market participation doctrine, discussed below in Part IV.C. However, California might be able to minimize its risk of challenge by incorporating an Area of Mutual Interest (“AMI”) into the CCMP, as OSAMP did to entitle Massachusetts to its fair share of economic benefits resulting from BIWF's generation. With regionalization of the state's independent system operator on the table, California should insulate itself from future challenge and boost its credibility at the federal level by creating an AMI before submitting any future marine and coastal studies for NOAA's signature.¹⁴⁸

2. *Offshore Wind is Not Within the Coastal Act's Contemplation*

The argument may be raised that where “offshore wind development” is not explicitly mentioned in the Coastal Act, the state has no authority to make a consistency determination under CZMA because the CCMP lacks the crucial element that a management program include “a definition of what shall constitute permissible land uses and water uses within the coastal zone which have a direct and significant impact on the coastal waters,” including a planning process for specific energy facilities.¹⁴⁹ Under this narrow approach, if a state does not have a particular activity that it wishes to review associated with a geographic location in its CMP at the time the project proposal is submitted, the state must get NOAA's approval for that specific unlisted activity.¹⁵⁰ Under the more lenient approach argued above in Part IV.A.1., offshore wind development falls under the Coastal Act's listed activities of “industrial development” or “coastal-dependent

148. See Exec. Order No. 13,547, 75 Fed. Reg. 43,023 (July 19, 2010) (directing development of *regional* coastal and marine spatial plans).

149. 16 U.S.C. § 1455(d)(2)(B), (H) (Westlaw).

150. See Fugate, *supra* note 14, at 301.

development”]; furthermore, the state has explicit authority under section 30233(a) of the Coastal Act to issue dredging permits for any “new or expanded port, energy, and coastal-dependent industrial facilities. . .”

The federal circuit courts have held preemption in the instance of state dredging programs where the state’s CMP did not explicitly identify projects outside coastal waters as subject to a state consistency finding. In *Weaver’s Cove Energy, LLC v. Rhode Island Coastal Res. Mgmt. Council*, the court held that the Natural Gas Act preempted the Rhode Island Coastal Resources Management Council’s attempt to utilize state dredging requirements to block a liquid natural gas project in Massachusetts that would require dredging in Rhode Island state waters, but within a federal navigation channel.¹⁵¹ The court reasoned that the proposed activity fell beyond the activities listed in Rhode Island’s plan for a consistency determination under the CZMA, finding narrowly that “[a]bsent language in Rhode Island law to the contrary, we presume state laws, like this one, not to have extraterritorial effect.”¹⁵² Furthermore, the Supreme Court has stated in dicta that it will not uphold a state’s right to make a consistency determination under the CZMA if that specific activity is not listed for review in the state’s plan.¹⁵³ While the Supreme Court originally held that activities on the OCS are beyond the scope of the CZMA’s consistency determination requirements because they do not directly affect the coastal zone, the “directly affecting” language was eliminated by a legislative amendment providing for an “effects test” with no geographical boundaries.¹⁵⁴ Thus, in order to be eligible for a consistency determination, the state need

151. *Weaver’s Cove Energy, LLC v. R.I. Coastal Res. Mgmt. Council*, 589 F.3d 458, 472–75 (1st Cir. 2009).

152. *Id.* at 471. *See also* *AES Sparrows Point LNG, LLC v. Smith*, 527 F.3d 120, 122–27 (4th Cir. 2008) (holding that a county bill banning liquid natural gas terminals in a coastal area was subject to conflict preemption by the Natural Gas Act since the bill was never submitted to NOAA for approval under the CZMA and thus, not part of a federally-approved coastal management plan).

153. *Cal. Coastal Comm’n v. Granite Rock Co.*, 480 U.S. 572, 590–91 (1987) (finding that the state waived its right to review the unlisted activity because it did not notify the federal agency or applicant of its intent to review within 30 days of receipt of the application).

154. DEP’T OF COMMERCE, *supra* note 30, at 789 (referring to the 1990 amendments to CZMA § 307). *See e.g.*, *Sec’y of the Interior v. California*, 464 U.S. 312, 315 (1984) (holding that DOI’s sale of oil and gas leases on the OSC is not an activity “directly affecting” the coastal zone under CZMA, rendering a consistency determination unnecessary for sale of federal oil and gas leases offshore California). *But see* (Stevens, J. dissenting) (quoting Senate Report on the 1976 CZMA Amendment, “One of the specific federally related energy problem areas for the coastal zone is, of course, the potential effects of Federal activities on the Outer Continental Shelf beyond the State’s coastal Zones, including Federal authorization for non-Federal activity, but under the act as it presently exists, as well as the S. 586 amendments, if the activity may affect the State coastal zone and it has an approved management program, the consistency requirements do apply. . .”).

only show that the activity would have a “*reasonably foreseeable effect* on any land or water use or natural resource of a State’s coastal zone. . . .”¹⁵⁵

This line of precedent suggests that California would not survive challenge to its review of offshore wind permitting as an unlisted activity. California will need to amend the Coastal Act to include: (1) offshore wind facilities as a specific activity requiring a consistency review; and (2) a planning process specific to siting these type of energy facilities. It must receive NOAA and DOI approval on this change before reviewing developers’ applications under the CZMA. If the state took these steps within 30 days of a project’s submission, offshore wind projects would likely meet the effects test in light of the fact that legislation already recognizes the CCC’s crucial role in approving projects on the OCS, as discussed in Part IV.A.2. above.¹⁵⁶

3. Navigation Concerns

As witnessed in the Cape Wind project, any offshore project could be exposed to challenge by the Department of Defense, Coast Guard, or Federal Aviation Administration, where it has the potential to interfere with radar for national security or commercial interests such as the flight industry.¹⁵⁷ In California, there are a number of navigation concerns related to Navy and Coast Guard operations, as well as to private vessels.¹⁵⁸ The West Coast Offshore Vessel Traffic Risk Management Project Report in 2002 identified that “risk of a grounding/collision generally increases the closer a vessel transits to shore. . . .” with the highest risk area “generally no more than 25 miles from land along the entire West Coast.”¹⁵⁹ The already-pending proposed project offshore California falls within this zone (15nm offshore Morro Bay) and it is likely that any future projects will also

155. DEP’T OF COMMERCE, *supra* note 30, at 789 (referring to the 1990 amendments to CZMA § 307).

156. *See* 15 C.F.R. § 930.54(a)(1) (Westlaw) (requiring a state agency wishing to review an unlisted activity to notify the relevant federal agency or applicant within 30 days of receipt of application, or else review is waived).

157. *See* LAYZER, *supra* note 4, at 327–28, 330, 332; *see also* Salcido, *Law Applicable*, *supra* note 21, at 416–17; *see generally* Nolon, *supra* note 115, at 330 (discussing siting considerations for wind projects).

158. *See* Salcido, *Siting Offshore*, *supra* note 24, at 127–28.

159. U.S. COAST GUARD, WEST COAST OFFSHORE VESSEL TRAFFIC RISK MGMT. PROJECT: FINAL REPORT 60–61 (July 2002). *See id.*

exist in this zone, which means coordinating shipping interests will add another layer to the permitting complexity.¹⁶⁰

In order to insulate itself from challenge, any state-directed permitting process would need to consult these federal agencies regarding the specific activity proposed. Therefore, California will need to amend its CCMP to include offshore wind as an activity with specific provisions—devised from federal input—outlining the process for siting facilities with respect to navigation. As it stands, DFW’s Master Plan of the marine zone is insufficient in its failure to include navigation concerns—unlike OSAMP, which includes provisions pertaining to shipping lanes and air traffic concerns.

4. *Without Adequate Environmental Studies of the Project Location, the California Public Utilities Commission is Unlikely to Approve the Requisite Power Purchase Agreement*

The Marine Renewable Energy Working Group’s guidelines suggest that any request for a PPA will be subject to the CPUC’s environmental review under CEQA prior to issuance of a Certificate of Public Convenience and Necessity for infrastructure connections.¹⁶¹ However, the BIWF project suggests that a state utilities commission may rely on prior studies showing the environmental benefits of a project in authorizing a PPA, as discussed above in Part III.D.2. Since California lacks a federally approved marine spatial plan like OSAMP, the CPUC only has the 2016 Master Plan to rely on in deciding the most appropriate location to place undersea transmission line.¹⁶² While the Master Plan may eliminate some need for future environmental studies, any developer seeking approval for an offshore wind project will likely need to undergo extensive CEQA review through the CPUC or SLC (as shown above in Part IV.B. for the AT&T Project), taking anywhere from one month to a year depending on impact level.¹⁶³

160. See Salcido, *Siting Offshore*, *supra* note 24, at 127–28 (describing implications for hydrokinetic projects).

161. See CAL. OCEAN PROT. COUNCIL, *supra* note 47, pt. California Public Utilities Commission.

162. See Salcido, *Siting Offshore*, *supra* note 24, at 146–47 n.217 (2011) (stating that California developed the first ocean zoning initiative, but has since been surpassed by Massachusetts). Now California has also been surpassed by Rhode Island’s OSAMP.

163. See CAL. OCEAN PROT. COUNCIL, *supra* note 47, pt. California State Lands Commission, subdiv. Timeline.

D. California Case Law Suggests a Number of Potential Legal Theories that the State May Use to Avoid Preemption of Its Wind Permitting Authority

Rivaling the abundance of case law establishing federal preemption of state permitting authority for projects in federal waters, there is an equal abundance of favorable precedent for offshore state permitting of federal projects where a state interest exists. For example, in *Mountain Rhythm Resources v. F.E.R.C.*, the Ninth Circuit held that a state certification was needed for hydroelectric plants located 30 miles offshore, upholding NOAA's determination that the projects were located in the state's coastal zone.¹⁶⁴ Furthermore, in *Cal. Coastal Comm'n v. Granite Rock Co.*, the Supreme Court upheld the CCC's coastal development permit requirement for mining activity in a national forest located on federal land within California where the state's regulation was not in conflict with governing federal land use statutes.¹⁶⁵

California may also establish jurisdiction over the permitting process by way of undergoing most construction activities in state. Unlike traditional wind turbines, floating turbine assembly will take place in state at port, doing away with many of the harmful marine impacts associated with the construction of offshore projects in the Atlantic.¹⁶⁶ As a result, California would not likely be subject to the special conditions that CoE and BOEM placed on BIWF's permits in Rhode Island, as detailed above in Part III.D.2. The laying of undersea transmission cable would be supervised by the SLC, including by way of comprehensive CEQA review, as in the AT&T Project mentioned above.

Alternatively, California may seek refuge from federal preemption (as well as any DCC challenges)¹⁶⁷ under the market participation doctrine in the case that an offshore wind facility is owned by the state, thus allowing

164. *Mountain Rhythm Resources v. F.E.R.C.*, 302 F.3d 958, 965 (9th Cir. 2002).

165. *Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 586–87 (1987) (emphasizing that the CCC had authority where it wished to regulate, not prohibit, land uses impacting its coastal zone). *But see* *Sierra Club v. Cal. Coastal Comm'n*, 35 Cal. 4th 839, 854–55 (2005) (upholding the CCC's declaration that it lacked authority under CEQA and CZMA to deny a permit because of coastal zone impacts where housing development was situated *outside* the coastal zone).

166. *See* U.S. DEP'T OF ENERGY, *supra* note 6, at 28.

167. *See* *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 498 F.3d 1031, 1040 (2007) (describing the origins of the market participation doctrine in the dormant Commerce Clause context).

the state to exert control over the permitting process to protect its interests as a market participant and not a regulator. In *Town of Atherton v. Cal. High-Speed Rail Authority*, the court held that the state had authority to do CEQA review of a rail project under the market participation doctrine's exception to federal preemption by the Interstate Commerce Commission Termination Act, on ground that "[u]ndergoing full CEQA review of the decision . . . serves the state's interest in reducing adverse environmental impacts as part of its *proprietary action in owning and constructing* the [high-speed train]. . ." (emphasis added).¹⁶⁸ The court utilized the *Cardinal Towing* test under which a state may demonstrate its action is either: (1) "proprietary by showing that the challenged conduct reflects its interest in efficiently procuring goods or services"; or (2) not regulatory because of its narrow application.¹⁶⁹ With regard to the first prong, the court cited *Engine Manufacturers Ass'n v. South Coast Air Quality Mgmt. Dist.*, which upheld regulations directing state and local governments to choose vehicles meeting certain emissions standards in striking down a federal Clean Air Act preemption challenge.¹⁷⁰ In *Engine Mfrs. Ass'n*, the Ninth Circuit emphasized the market participation doctrine still applies where the state or local government is seeking to further its nonmonetary policy goals (i.e., "efficient procurement" means procurement that serves the state's purposes—which may include purposes other than saving money—just as private entities serve their purposes by taking into account factors other than price in their procurement decisions.).¹⁷¹ Applying this approach to the state's offshore wind development, California would seem to meet the *Cardinal Towing* test where it has a keen interest in "efficient procurement" by furthering its Renewables Portfolio Standard and greenhouse gas emissions reduction targets. However, California would only be able to invoke the market participation doctrine exception to exert control over the permitting process if offshore wind facilities were to be *wholly owned by the state*. The extent to which this would be possible has not been explored by any states to date, most likely because the state as a developer would not be able to take advantage of the PTC or ITC.¹⁷²

168. *Town of Atherton v. Cal. High-Speed Rail Author.*, 228 Cal. App. 4th 314, 336 (2014). *But see* *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 639–43 (2d. Cir. 2005) (holding that Interstate Commerce Commission Termination Act preempted the state's environmental land use law).

169. *Town of Atherton*, 228 Cal. App. 4th at 335 (citing to *Johnson v. Rancho Santiago Cmty. C. Dist.*, 623 F.3d 1011, 1024 (9th Cir. 2010)).

170. *Id.* at 335–36 (citing *Engine Mfrs. Ass'n*, 498 F.3d 1031, 1044 (2007)).

171. *Engine Mfrs. Ass'n*, 498 F.3d at 1046.

172. *See generally* Susskind, *supra* note 4, at 246–48 (highlighting the two ways states have initiated offshore wind development ((1) state selects developer through

Another option exists where California could bid in BOEM's leasing process, allowing the state to secure the position of overseeing initial site studies and the negotiation of a PPA before handing off the project to a private developer who could utilize the PTC and ITC. Recently, New York unveiled plans to employ this approach in the federal auction of a site off Long Island. Not surprisingly, the developer of BIWF (Deepwater Wind LLC) plans to let New York's Energy Research and Development Authority march ahead in the leasing process, knowing from experience that a state-directed planning process can be pivotal to whether a project will succeed.¹⁷³ Similarly, if California planned to have the CCC or another qualified state agency bid in the pending federal Request for Offers for the proposed site off Morro Bay, the state might be able to secure a path imitating Rhode Island's cautious but efficient planning and permitting processes. The state could bid for a limited lease from BOEM for a five-year term to conduct more extensive spatial studies in consultation with federal agency interests, and later do its own state-led competitive solicitation process for a developer to take over on a commercial lease for a 25-year construction and operations term.¹⁷⁴ Given that the state already has a Marine Renewable Energy Working Group dedicated to studying potential siting of offshore wind farms, this option—which would provide the state with a time window to seek federal approval of an updated CCMP naming offshore wind as an activity for review under the CZMA, and to consult the relevant federal agencies—seems the most amenable to California's desire to lead permitting decisions.

competitive process; or (2) state enters into a partnership with a private developer), and showing that the latter has only been attempted in Maine and New York).

173. Joe Ryan, *Long Island Offshore Wind Auction Attracting Energy Giants*, BLOOMBERG (Oct. 27, 2016), https://www.bloomberglaw.com/product/blaw/document/X8PU1BC00000?resource_id=1fea88ce89454567b0f71e73698ecdda. *But see* Gerald B. Silverman, *Largest U.S. Offshore Wind Farm Approved for Long Island Waters*, BLOOMBERG (Jan. 25, 2017) (showing that, after this paper was written, Deepwater Wind LLC won the bid and gained approval at the state level to build the 90MW South Fork Wind Farm offshore Montauk, New York).

174. *See* CAL. OCEAN PROT. COUNCIL, *supra* note 47, pt. Bureau of Ocean Energy Management, subdiv. Outer Continental Shelf Ocean Renewable Energy Leases.

V. CONCLUSION

In light of the lessons gleaned from offshore wind project proposals in the Atlantic, California still has a voyage ahead of itself before it may assume a role at the helm steering a state-directed permitting approach. While its federally approved CCMP is a step, it is not by any means a comprehensive list of activities for state review—without any mention to renewable energy facilities—and is lacking in its failure to incorporate a MSP with specific geographic locations for offshore energy facility activities. Even to the extent that the California DFW recently filled this void with a detailed Master Plan for the MPAs in the coastal zone, the state failed to include federal and regional interests in the drafting and adoption processes, which will preclude NOAA approval and negate BOEM's willingness to defer to state studies. On the up side, California has a Marine Renewable Energy Working Group ready to dive into the consulting process, a factor that may ease the burden of eventual interagency review for any state or federal wind facility affecting the coastal zone.

California has all the pieces laid out in front of it for compilation, but the next step is to engage stakeholders beyond state agencies, including federal, regional and Tribal agencies, and members of the public. As costs of floating turbine technology gradually decline, now is the time for the state to take the initiative to indicate an interest in reviewing wind facilities on the OCS through a revision of its CCMP (i.e. including offshore wind development as a listed activity with an associated geographic location, a supplementary marine spatial plan, and a designated Area of Mutual Interest) and a subsequent request for federal approval. As demonstrated herein, without incorporating these elements into the CCMP, California leaves itself exposed to challenge from federal and regional entities that were not consulted regarding navigation, economic, environmental, and various other concerns.