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Second Wind: A Legal and Policy-Based Evaluation of the Block Island Wind Farm and the Legislation That Saved It Note

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WIND FARM AND THE LEGISLATION THAT SAVED IT

BRIAN M. GIBBONS

Rhode Island has recently attempted to pioneer offshore wind energy development by passing new legislation and partnering with Deepwater Wind, LLC to develop a wind farm off Block Island. This wind farm will have long-term implications, both as a demonstration project for future offshore wind energy, and as a paradigm for governmental expedition of renewable energy projects.

In support of this project, Rhode Island passed aggressive new legislation that severely constrained the discretion of the Public Utilities Commission in deciding whether a contract between Deepwater Wind and National Grid was “commercially reasonable.” The resulting controversy underscores the importance of maintaining competition between renewable energy firms in order to avoid allegations of favoritism and neglect of constituent ratepayers.

This Note traces the still-developing history of the Block Island Wind Farm, along with its accompanying legal challenges, controversies, and stakeholder perspectives, in order to extract the lessons that can be applied in future renewable energy development. The primary lesson that emerges is the political and economic price of circumventing the regulatory process through legislation that advantages one particular company.

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BRIAN M. GIBBONS*

I. INTRODUCTION

In recent years, Rhode Island has attempted to jumpstart offshore wind energy development by passing new legislation and partnering with Deepwater Wind, LLC to develop a wind farm approximately three miles southwest of Block Island. This wind farm will have long-term implications as a model for future offshore wind farm development in the northeastern United States. Deepwater Wind is already planning a “second generation” of large-scale offshore wind farms,¹ and other companies may well decide to enter the market in the near future if the Block Island Wind Farm is successful.

In 2009, the project stalled when the Rhode Island Public Utilities Commission (“PUC”) declared that the Power Purchase Agreement (“PPA”) between Deepwater Wind and distributor National Grid was not “commercially reasonable” in accordance with applicable legislation.² In response, Rhode Island passed new legislation that redefined the term “commercially reasonable” and effectively forced the PUC to approve an updated, but nearly identical contract.³ Currently, the project is moving through the permitting process, and is expected to be completed in 2015.⁴

The significantly higher cost of wind energy and the perceived favoritism to one company has made Rhode Island’s renewable energy policy widely controversial. This Note explores the legal, legislative, and regulatory path the Block Island Wind Farm has traveled since its inception through present day. It begins with a history of the Wind Farm in Part II, before delving into more intricate legal analysis in Part III.

The Block Island Wind Farm itself is a relatively small, local project with short-term consequences that can be predicted and analyzed. Part IV

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¹ *Deepwater Wind Energy Center*, DEEPWATER WIND, <http://dwwind.com/dww-energy-center/deepwater-wind-energy-center-overview> (last visited Jan. 22, 2013) [hereinafter *Deepwater Wind Energy Center*]; *Hudson Canyon Wind Farm*, DEEPWATER WIND, <http://dwwind.com/hudson-canyon/hudson-canyon-project-overview> (last visited Jan. 22, 2013).

² *In re Proposed Town of New Shoreham Project*, 25 A.3d 482, 492–93 (R.I. 2011).

³ *Id.* at 494–96.

⁴ Stephanie Turaj, *Deepwater Completion Pushed to 2015*, BLOCK ISLAND TIMES (Dec. 16, 2012), <http://block-island.villagesoup.com/p/deepwater-completion-pushed-to-2015/937011>.

of this Note explores the immediately discernible costs and benefits of the project from the perspective of different stakeholders.

Beyond the short-term consequences, the controversy and litigation surrounding the Block Island Wind Farm provide lessons applicable to future renewable energy development. A crucial question is whether the Rhode Island government's official sponsorship and aggressive, narrowly tailored legislation should serve as a model for other states. The Note concludes by evaluating the policies underlying Rhode Island's legislative and executive actions.

II. HISTORY OF THE DEEPWATER WIND BLOCK ISLAND WIND FARM

The wind power initiative in Rhode Island began in January 2006, when then-Governor Donald Carcieri announced a plan to supply 15% of the state's electricity demand from wind energy.⁵ Two years later, Rhode Island solicited proposals from private developers to construct, finance, and operate a large-scale offshore wind farm.⁶

State officials selected Deepwater Wind in September 2008 to finance and build a wind farm.⁷ The company, which was only three-years old at the time, beat out six other wind energy developers to gain exclusive rights to develop a wind farm off the coast of Rhode Island.⁸ The company's plans for Rhode Island involve two separate stages: (1) a five-turbine "demonstration-scale" wind farm located three miles southeast of Block Island,⁹ and (2) a much larger Deepwater Wind Energy Center, composed of 150 to 200 turbines located farther offshore, on the outer continental shelf approximately 30 miles east of Long Island, 15 miles southeast of Block Island, and 15 miles southwest of Martha's Vineyard.¹⁰

While Rhode Island has not contributed any funding for the project, it has worked to expedite the state and federal approval processes.¹¹ Most crucial to Deepwater's success were identical House and Senate bills that were signed into law by Governor Carcieri on June 26, 2009.¹² The legislation, effective July 1, 2010, required electric distribution companies

⁵ Timothy C. Barmann, *Change in the Wind*, PROVIDENCE J., Jan. 13, 2006, at F1.

⁶ Timothy C. Barmann, *Wind Farm Gathers Steam—Rhode Island Seeks Private Partner for Project*, PROVIDENCE J., Apr. 4, 2008, at F1.

⁷ Timothy C. Barmann, *N.J. Firm Picked to Build State's Wind Farm*, PROVIDENCE J., Sept. 25, 2008, at 1 [hereinafter Barmann, *N.J. Firm Picked*].

⁸ *Id.*

⁹ *Block Island Wind Farm*, DEEPWATER WIND, <http://dwwind.com/block-island/block-island-project-overview> (last visited Jan. 25, 2013).

¹⁰ *Deepwater Wind Energy Center*, *supra* note 1.

¹¹ See Chris Barrett, *Deepwater Moves Ahead with Wind Farm*, BLOCK ISLAND TIMES (Jan. 26, 2009), <http://block-island.villagesoup.com/news/story/Deepwater-moves-ahead-with-wind-farm-Five-to-eight-turbines-would-power-the-entire-island/88890> ("The state will provide no funding for the project, but will help steer Deepwater through a host of state and federal approval processes.").

¹² *In re Proposed Town of New Shoreham Project*, 25 A.3d 482, 489 (R.I. 2011).

to enter into long-term contracts to buy power from renewable energy developers, provided that the developer's proposals were "commercially reasonable."¹³ The law effectively gave Deepwater Wind a guaranteed buyer for its electric power.¹⁴

Rhode Island's largest electric utility company, National Grid, and Deepwater Wind settled upon a PPA in December 2009.¹⁵ But the PUC rejected the contract as not "commercially reasonable" under the 2009 legislation.¹⁶

In response, the Rhode Island General Assembly modified the applicable statute with additional legislation.¹⁷ Under the new version of the law, National Grid was specifically authorized to enter into a PPA on terms consistent with the (rejected) 2009 agreement.¹⁸ The legislation also delineated new factors for the Commission to apply in its review of an amended PPA—factors that were written specifically to strip the Commission of any authority to again reject the agreement.¹⁹ After taking into account the new legislation, the PUC approved the amended PPA in August 2010,²⁰ and the Supreme Court of Rhode Island affirmed the PUC's approval in July of 2011.²¹

At the local level, Deepwater has gained approval for the implementation of necessary research equipment,²² and the Block Island Town Council has expressed support for the project in general.²³ Most

¹³ R.I. GEN. LAWS § 39-26.1-3(a) (Supp. 2012).

¹⁴ Alex Kuffner, *Law Clears Way for Wind*, PROVIDENCE J., June 27, 2009, at 4.

¹⁵ Alex Kuffner, *Utility to Buy Wind Farm's Electricity*, PROVIDENCE J., Dec. 10, 2009, at 1.

¹⁶ *In re Proposed Town of New Shoreham Project*, 25 A.3d at 492–93.

¹⁷ R.I. GEN. LAWS § 39-26.1-7(c) (Supp. 2012) (detailing the definition of what is to be considered commercially reasonable); *In re Proposed Town of New Shoreham Project*, 25 A.3d at 494–95 (noting that the General Assembly made amendments).

¹⁸ R.I. GEN. LAWS § 39-26.1-7(a) (Supp. 2012).

¹⁹ *See id.* § 39-26.1-7(c) (redefining "commercially reasonable" to "mean terms and pricing that are reasonably consistent with what an experienced power market analyst would expect to see for a project of similar size, technology, and location"). Moreover, the modified law explicitly requires that the commission "shall approve" the PPA if it is "likely to . . . further development of Quonset Business Park [where Deepwater planned to build parts of the turbines]" and if "[t]he amended power purchase agreement is likely to provide environmental benefits, including the reduction of carbon emissions." *Id.*

²⁰ *In re Amended Power Purchase Agreement Between Narragansett Elec. Co. & Deepwater Wind Block Island*, 2010 WL 3458306, at *1 (R.I.P.U.C. Aug. 16, 2010).

²¹ *In re Proposed Town of New Shoreham Project*, 25 A.3d at 486.

²² Chris Barrett, *Deepwater Seeks Weather Tower near North Light*, BLOCK ISLAND TIMES (Feb. 17, 2009), <http://block-island.villagesoup.com/news/story/Deepwater-seeks-weather-tower-near-North-Light/88936>.

²³ Dan West, *Council Supports Wind Farm Bill*, BLOCK ISLAND TIMES (May 10, 2010), <http://block-island.villagesoup.com/news/story/Council-supports-wind-farm-bill/90852>; Dan West, *Town Council Supports New Wind Contract*, BLOCK ISLAND TIMES (July 12, 2010), <http://block-island.villagesoup.com/news/story/Town-Council-supports-new-wind-contract/91175>; Dan West, *Council to Send Letter for Deepwater Loan Guarantee*, BLOCK ISLAND TIMES (Sept. 20, 2010),

importantly, Deepwater Wind has received planning board and zoning board approval for the substation necessary to provide Block Island with electricity.²⁴

Deepwater still needs approval from the U.S. Army Corps of Engineers, which recently extended its comment period through February 10, 2013.²⁵ The state Coastal Resources Management Council, is also considering a permit application and opened its comment period on November 15, 2012.²⁶ In addition, Deepwater's Environmental Report lists eleven other federal permits, seven other state permits, and three more local permits that are anticipated to be approved by the end of 2013.²⁷

Deepwater is also facing a new complaint filed by a Newport resident with the Federal Energy Regulatory Commission ("FERC"). FERC recently issued a "notice of intent not to act" on the complaint, which will allow the petitioner to file a complaint in federal court.²⁸

Now that the basic history of the Block Island Wind Farm has been recounted, the following section will explore in considerably more detail the underlying legal issues, focusing primarily on energy and environmental concerns.

III. LEGAL ISSUES AND ANALYSIS

The myriad legal issues involved in the development and approval of the Block Island Wind Farm are best divided into three categories: (1) energy regulations, (2) environmental regulations, and (3) land use regulations. This section will explore Deepwater's ongoing journey through these various legal and regulatory hurdles, while simultaneously analyzing competing arguments and counterarguments.

A. Energy Regulation

Deepwater Wind is fundamentally an energy company, with the ultimate goal of harnessing and selling wind energy for a profit. As such, the construction and operation of the Block Island Wind Farm and the

<http://block-island.villagesoup.com/news/story/Council-to-send-letter-for-Deepwater-loan-guarantee/91542>.

²⁴ Judy Tierney, *Deepwater Substation Approved*, BLOCK ISLAND TIMES (Apr. 13, 2012), <http://block-island.villagesoup.com/news/story/deepwater-substation-approved/808215>.

²⁵ Press Release, U.S. Army Corps of Eng'rs, Public Comment Period Extended to Feb. 10 on Deepwater Wind Proposal to Build Wind Turbines off Block Island Coast (Dec. 19, 2012), available at <http://www.nae.usace.army.mil/news/12/2012-127.pdf>.

²⁶ Pippa Jack, *CRMC Opens Comment Period for Deepwater Wind*, BLOCK ISLAND TIMES (Nov. 19, 2012), <http://block-island.villagesoup.com/p/crmc-opens-comment-period-for-deepwater-wind/927367>.

²⁷ DEEPWATER WIND, ENVIRONMENTAL REPORT/CONSTRUCTION AND OPERATIONS PLAN 1-8 to 1-9 (2012), available at <http://dwwind.com/docs/Environmental%20Report.pdf>.

²⁸ *Riggs v. R.I. Pub. Utilities Comm'n*, 141 FERC ¶ 61033 (2012).

Deepwater Wind Energy Center are governed by myriad energy laws and regulations. Deepwater's greatest legal challenge has come at the state level of energy regulation, where two pieces of new legislation were needed to force the Block Island Wind Farm into Rhode Island's regulatory scheme.²⁹

At the federal level, the Federal Power Act only authorizes the federal government to regulate the sale of electricity in interstate commerce.³⁰ Since only electricity rates within Rhode Island will increase as a result of the PPA between Deepwater Wind and National Grid, FERC is unlikely to assert jurisdiction. Federal tax credits for wind energy, however, will substantially increase the project's ultimate profitability.

This section details Deepwater's state-sponsored journey through the legal, legislative, and judicial system of Rhode Island. It then explains the absence of FERC jurisdiction and examines the impact of federal tax credits.

1. *Rhode Island Renewable Energy Law*

Rhode Island's energy statutes are codified in Title 39 of its General Laws, labeled "Public Utilities and Carriers."³¹ The section begins by declaring that the electricity distribution business is "affected with a public interest."³² The statute then delegates the supervision and regulation of intrastate energy services to the PUC,³³ a "quasi-judicial tribunal"³⁴ tasked with implementing and enforcing Rhode Island energy law. The PUC also provides an administrative forum for aggrieved parties seeking judicial review of its actions and decisions.³⁵ The Commission is composed of three electors selected based on experience in law, government, energy matters, and other relevant fields.³⁶ The Commissioners are appointed by the governor (pending approval by the state senate) and serve six-year terms.³⁷

Historically, Rhode Island's energy policy was focused on protecting consumers by "promot[ing] availability of adequate, efficient and economical energy . . . [with] just and reasonable rates."³⁸ The PUC was

²⁹ See R.I. GEN. LAWS § 39-26.1-3(a) (Supp. 2012) (requiring electric distribution companies to contract with renewable energy developers); *id.* § 39-26.1-7(a) (specifically authorizing Deepwater's PPA and delineating specific facets of the Block Island Wind Farm as requiring approval by the PUC); *id.* § 39-26.1-7(c)(iv) (broadening the definition of "commercially reasonable").

³⁰ 16 U.S.C. § 824(a) (2006).

³¹ R.I. GEN. LAWS § 39 (2006).

³² *Id.* § 39-1-1(a)(1).

³³ *Id.* § 39-1-1(c).

³⁴ *Id.* § 39-1-3(a).

³⁵ *Id.* § 39-1-1(c).

³⁶ *Id.* § 39-1-4(a).

³⁷ *Id.*

³⁸ *Id.* § 39-1-1(b).

specifically charged with “protecting . . . the public against improper and unreasonable rates, tolls and charges.”³⁹ As recently as 2006, Rhode Island legislatively declared that “the state’s economy and the health and general welfare of the people of Rhode Island benefit when energy supplies are reliable and least-cost.”⁴⁰

But this pure economic calculus has recently been subverted by Rhode Island’s new focus on renewable energy development. In 2004, Rhode Island codified new legislative findings encouraging the development of renewable energy sources.⁴¹ Beginning in 2007, electricity distributors were statutorily required to obtain an annually increasing percentage of their energy from renewable energy resources,⁴² including wind.⁴³ The PUC was thus faced with the challenge of promulgating new renewable energy standards within a regulatory scheme originally devised to lower consumer costs.

Predictably, difficulties arose when renewable energy proved to be far more expensive than the natural gas on which Rhode Island has almost exclusively depended.⁴⁴ When state officials first decided to partner with Deepwater to build a wind farm, Andrew Dzykewicz, Governor Carcieri’s chief energy adviser and leader of the negotiations,⁴⁵ stated that Deepwater would sell electricity at between seven and nine cents per kilowatt-hour (kWh).⁴⁶ But when it came time to negotiate the first PPA, National Grid calculated the cost of Deepwater’s wind energy at 30.7 cents/kWh, more than three times the 9.2 cents/kWh it was paying for electricity from other sources.⁴⁷ The final agreed-upon amount was 24.4 cents/kWh, with an escalator clause that would increase this price by 3.5% annually over the twenty-year contract.⁴⁸ This would culminate in a final price of 46.9 cents/kWh, with an average price of 34.5 cents/kWh over the lifetime of the PPA.

³⁹ *Id.* § 39-1-1(c).

⁴⁰ *Id.* § 39-1-1(e)(3).

⁴¹ *Id.* § 39-26-1.

⁴² *Id.* § 39-26-4; *see id.* § 39-26-2(16) (Supp. 2012) (defining “obligated entity” to include electric utility distribution companies).

⁴³ *Id.* § 39-26-5(a)(2) (Supp 2012).

⁴⁴ In 2009, 97% of Rhode Island’s electric power generation came from natural gas. *Fuel Sources for Electric Power Generation in My State: Rhode Island in 2009*, U.S. DEP’T OF ENERGY (Nov. 9, 2012), http://apps1.eere.energy.gov/states/electricity_generation.cfm/state=RI.

⁴⁵ Ted Nesi, *Carcieri Energy Adviser Dzykewicz Resigns*, PROVIDENCE BUS. NEWS (July 21, 2009), <http://www.pbn.com/Carcieri-energy-adviser-Dzykewicz-resigns,43686>.

⁴⁶ Barmann, *N.J. Firm Picked*, *supra* note 7. Mr. Dzykewicz also erroneously predicted that the project would not require the passage of any new legislation. *Id.* He resigned from his position in August 2009 to pursue other opportunities. Nesi, *supra* note 45.

⁴⁷ Alex Kuffner, *National Grid Says Price of Wind Power Is Too High*, PROVIDENCE J., Oct. 17, 2009, at 1.

⁴⁸ *In re Proposed Town of New Shoreham Project*, 25 A.3d 482, 491–92 (R.I. 2011).

This PPA was rejected by the PUC on March 30, 2010.⁴⁹ The PUC applied the then-existing statutory definition of “commercially reasonable” and concluded that the PPA did not meet this standard.⁵⁰ The Commission used a two-prong analysis in which it (1) compared the pricing of the PPA with other renewable energy projects, and (2) compared Deepwater’s expected internal rate of return (“IRR”) “with what an experienced power analyst would expect from other renewable energy projects.”⁵¹ The Commission found that the PPA failed both of these tests.⁵²

The first prong of the analysis required the PUC to determine the range of projects to consider in evaluating the reasonableness of the PPA pricing structure.⁵³ In doing so, the Commission refused to adopt the “self referent” interpretation of “commercially reasonable” advocated by Deepwater, which would require an exceedingly narrow (and obviously useless) comparison between the Block Island Wind Farm and projects that were identical “in nearly every facet, from . . . size, . . . location and even the benefits [rendered] to Block Island.”⁵⁴ Instead, the Commission decided that the prices in the PPA should be compared to the cost of both other proposed and existing offshore wind farms and the cost of other statutorily defined renewable energy sources.⁵⁵ In making this comparison, the PUC found “that Deepwater’s pricing was clearly higher than any technology except [photovoltaic] solar.”⁵⁶

In the second prong of the analysis, the Commission evaluated the rate of return expected to accrue to Deepwater and its investors.⁵⁷ In examining this issue, the Commission ruled that “the IRR should be sufficient to attract investors, but not more than is necessary to secure financing.”⁵⁸ In other words, ratepayers should be subsidizing the project only enough for it to be feasible, without providing too generous a profit margin for a company that was already enjoying a legally guaranteed market for its electricity. The Commission decided to rely on the testimony of an “independent power market analyst” who had “no financial stake in the outcome of the matter,” rather than Deepwater’s own financial projections.⁵⁹ Based on this testimony, the PUC found that “the IRR and resulting pricing is above that which an experienced power market analyst

⁴⁹ *Id.* at 492–93.

⁵⁰ Town of New Shoreham Project, 280 P.U.R.4th 185, 185 (R.I.P.U.C. Apr. 2, 2010), *order corrected* 2010 WL 2719959 (R.I.P.U.C. Apr. 5, 2010).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *See id.* at 213.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 185.

⁵⁸ *Id.* at 214.

⁵⁹ *Id.*

would expect to see in transactions involving newly developed renewable energy resources.”⁶⁰

In reaction to the rejection of the PPA, Governor Carcieri called the decision “extraordinarily shortsighted and narrow-minded,” and vowed to enlist state legislators in getting the Block Island Wind Farm back on track.⁶¹ Less than two months after the PUC’s initial rejection of the PPA, the Rhode Island General Assembly passed new legislation overtly supporting the Wind Farm⁶² and providing strict new instructions for the Commission to follow in reviewing a revised PPA.⁶³

The new legislation explicitly authorized Deepwater Wind and National Grid to enter into a PPA on terms consistent with the previously rejected contract.⁶⁴ The new statute also micromanaged the PUC review process so as to effectively strip the Commission of any real discretion in reconsidering the PPA. First, a new expert witness, paid for by Deepwater and hired by the Rhode Island Economic Development Corporation, was to testify regarding the terms and conditions of the contract.⁶⁵ Next, the statute redefined “commercially reasonable” to “mean terms and pricing that are reasonably consistent with what an experienced power market analyst would expect to see for a project of a similar size, technology and location, and meeting the policy goals in subsection (a).”⁶⁶ Compared to the old definition, which only directed comparison to “transactions involving newly developed renewable resources,”⁶⁷ this new definition not only restricted the comparison criteria, it added policy considerations that included the ultra-specific local goal of connecting Block Island to the mainland power grid.⁶⁸ Finally, the statute delineated new factors that

⁶⁰ *Id.* at 215.

⁶¹ Alex Kuffner, *Proposed Wind Farm off Block Island Remains Stalled*, PROVIDENCE J., Apr. 9, 2010, at 3.

⁶² R.I. GEN. LAWS § 39-26.1-7(a) (2012) (“The general assembly finds it is in the public interest for the state to facilitate the construction of a small-scale offshore wind demonstration project off the coast of Block Island, including an undersea transmission cable that interconnects Block Island to the mainland . . .”).

⁶³ *In re* Review of Proposed Town of New Shoreham Project, 25 A.3d 482, 495–97 (R.I. 2011).

⁶⁴ R.I. GEN. LAWS § 39-26.1-7(a) (2012).

⁶⁵ *Id.* § 39-26.1-7(b).

⁶⁶ *Id.* § 39-26.1-7(c)(iv). The listed policy goals were to:

position the state to take advantage of the economic development benefits of the emerging offshore wind industry; promote the development of renewable energy sources that increase the nation’s energy independence from foreign sources of fossil fuels; reduce the adverse environmental and health impacts of traditional fossil fuel energy sources; and provide the Town of New Shoreham with an electrical connection to the mainland.

Id. § 39-26.1-7(a).

⁶⁷ Town of New Shoreham Project, 280 P.U.R.4th 185, 185 (R.I.P.U.C. Apr. 2, 2010), *order corrected* 2010 WL 2719959 (R.I.P.U.C. Apr. 5, 2010).

⁶⁸ R.I. GEN. LAWS § 39-26.1-7(c)(iv).

would require approval of the PPA, including if it was “likely to . . . further development of Quonset Business Park [where Deepwater planned to build parts of the turbines],”⁶⁹ and if “[t]he amended power purchase agreement is likely to provide environmental benefits, including the reduction of carbon emissions.”⁷⁰

The second time around, adjudicating under the new legislation, the PUC approved the PPA.⁷¹ But even under the seemingly inflexible new standards, the PUC was divided. In addition to the controlling approval “by the Commission,”⁷² the three Commissioners each authored a separate opinion, with two concurrences⁷³ and one dissent.⁷⁴

The majority opinion, respecting the explicit and specific intent of the new legislation, resolved to interpret ambiguities and weigh the evidence so as to effectuate the development of the wind farm.⁷⁵ By applying the narrow new statutory definition of “commercially reasonable,” the Commission decided that the projected IRR analysis was within the zone of reasonableness.⁷⁶

The majority diverged in their analyses regarding economic benefits, and filed concurring opinions on this issue.⁷⁷ Chairman Germani and Commissioner Roberti disagreed over whether the applicable statutes required a net economic benefits test, but noted that their methodologies arrived at the same result.⁷⁸

Commissioner Bray, however, authored a vigorous dissent, arguing that the PPA was still not commercially reasonable, did not include a proper price reduction provision, and would not provide economic development benefits.⁷⁹ She rejected the majority’s deference to legislative intent, and instead “weighed the evidence and interpreted the law . . . as I would in any other case.”⁸⁰ Commissioner Bray found “absurd” the argument that the PUC was statutorily required to look only at the economic benefits of the project and not the potential for economic harm.⁸¹ She also took issue with the cost of the wind farm as projected by

⁶⁹ *Id.* § 39-26.1-7(c)(iii).

⁷⁰ *Id.* § 39-26.1-7(c)(iv).

⁷¹ Review of Amended Power Purchase Agreement Between Narragansett Elec. Co. & Deepwater Wind Block Island, No. 4185, 2010 WL 3458306, at *1 (R.I.P.U.C. Aug. 16, 2010).

⁷² *Id.*

⁷³ *Id.* at *68 (Germani, Comm’r, concurring); *id.* at *69 (Roberti, Comm’r, concurring).

⁷⁴ *Id.* at *70 (Bray, Comm’r, dissenting).

⁷⁵ *Id.* at *63.

⁷⁶ *Id.* at *64.

⁷⁷ *Id.* at *68 (Germani, Comm’r, concurring); *id.* at *69 (Roberti, Comm’r, concurring).

⁷⁸ *Id.* at *68–69.

⁷⁹ *Id.* at *70 (Bray, Comm’r, dissenting).

⁸⁰ *Id.*

⁸¹ *Id.* at *71 (Bray, Comm’r, dissenting).

Deepwater for the purposes of the cost-savings provision,⁸² arguing that Deepwater undervalued the figure in order to retain profits if savings were achieved in the actual cost of the project.⁸³ Finally, Commissioner Bray attempted to turn the narrow definition of “commercially reasonable” against Deepwater by challenging the sufficiency of the evidence presented, opining that “the proponents of the Amended PPA failed to meet their burden of proof as to commercial reasonableness on terms and pricing.”⁸⁴

Three remarkably different interested parties attempted to challenge the PUC’s approval of the amended PPA by filing petitions for certiorari with the Supreme Court of Rhode Island.⁸⁵ Toray and Polytop, two Rhode Island plastics manufacturers, continued their fight against electricity hikes that would result from the PPA.⁸⁶ Attorney General Patrick Lynch, a vocal opponent against the project,⁸⁷ also filed a petition, though it was later withdrawn by his successor, Peter Kilmartin.⁸⁸ The final petitioner for certiorari was the Conservation Law Foundation (“CLF”), which, though in favor of “renewable energy done right,” took the position that the amended law created “an unlevel playing field that would make it impossible for developers to compete successfully for future projects.”⁸⁹

The Supreme Court of Rhode Island allowed Governor Carcieri to intervene on behalf of Deepwater Wind, along with the Rhode Island Senate President and the Speaker of the House.⁹⁰ The court denied standing to CLF to continue their appeal, declining to permit the Foundation to remain in the case based on a theory of “substantial public interest,” and leaving Toray and Polytop as the proverbial “last man

⁸² R.I. GEN. LAWS §§ 39-26.1-7(e)(i)–(ii).

⁸³ Review of Amended Power Purchase Agreement Between Narragansett Elec. Co. & Deepwater Wind Block Island, 2010 WL 3458306 at *74 (Bray, Comm’r, dissenting).

⁸⁴ *Id.* at *75 (Bray, Comm’r, dissenting).

⁸⁵ Review of Proposed Town of New Shoreham Project, 25 A.3d 482, 503 (R.I. 2011).

⁸⁶ See Review of Amended Power Purchase Agreement Between Narragansett Elec. Co. & Deepwater Wind Block Island, 2010 WL 3458306, at *5 (identifying Toray as a manufacturer using 160 million kWh per year and facing an expected rate increase of \$287,000, and Polytop as a manufacturer using 17 million kWh per year and facing an expected rate increase of \$42,000).

⁸⁷ In his last official act as attorney general, Patrick Lynch sent out a letter to local nonprofit organizations to rally opposition to the wind farm, “calling it an inside deal pushed by . . . Governor Carcieri” that would “force . . . families and businesses . . . to buy grossly overpriced electricity for the next 20 years to specifically guarantee one company’s revenues and profits.” Tracy Breton, *Outgoing Lynch Urges Groups to Fight Wind Farm Project*, PROVIDENCE J., Jan. 4, 2011, at 5.

⁸⁸ Alex Kuffner, *Kilmartin Drops Appeal over Proposed Offshore Wind Farm*, PROVIDENCE J., Feb. 5, 2011, at 3.

⁸⁹ CLF Statement on PUC Ruling on Deepwater Wind/National Grid Power Purchase Agreement, CONSERVATION LAW FOUND. (Aug. 11, 2010), <http://www.clf.org/newsroom/clf-statement-on-puc-ruling-on-deepwater-windnational-grid-power-purchase-agreement/>.

⁹⁰ *In re Review of Proposed Town of New Shoreham Project*, 25 A.3d at 503.

standing” in the litigation.⁹¹ As petitioners seeking to overturn the PUC decision, the manufacturers bore a difficult burden before the Rhode Island Supreme Court, which had to defer to the Commission’s discretion unless it “exceeded its authority or acted illegally, arbitrarily, or unreasonably.”⁹²

Toray and Polytop first contended that the Commission was overly deferential in approving the PPA, and thus essentially “rubber stamp[ed]” the contract by abdicating their proper reviewing authority.⁹³ Unconvinced by this argument, the court held that the PUC did not err in varying their normal standard of review according to the amended legislation.⁹⁴

The petitioner’s “most strident objection” centered on the transmission cable that would connect Block Island with the mainland power grid.⁹⁵ They argued that the intent of the amended legislation mandated that the PPA require construction and maintenance of the transmission cable, which the 2010 version did not, even though the (rejected) 2009 version did contain this affirmative obligation.⁹⁶ Subsequently, petitioners argued that this particular modification of the contract was illegal under the statute, and that the 2010 PPA was not “commercially reasonable” since it failed to incorporate costs for the cable.⁹⁷

The Supreme Court of Rhode Island disagreed, holding that the amended legislation did not require the PPA to provide for a transmission cable,⁹⁸ and thereby defeating the central premise of the petitioner’s cable-based argument. The court was also unpersuaded by the petitioner’s arguments concerning the statute’s policy goal of stabilizing long-term energy prices,⁹⁹ providing economic development benefits,¹⁰⁰ and providing environmental benefits.¹⁰¹

The court concluded with a rhetorical flourish, by first expressing some “trepidation” about “the General Assembly’s unwavering quest to sink this demonstration wind farm into the sediment of Rhode Island’s

⁹¹ *Id.*

⁹² R.I. GEN. LAWS § 39-5-3 (2006).

⁹³ *In re Review of Proposed Town of New Shoreham Project*, 25 A.3d at 507. This argument closely echoed a main point of contention in Commissioner Bray’s dissent. *Id.*

⁹⁴ *Id.* at 508.

⁹⁵ *Id.* at 508–09.

⁹⁶ *Id.* at 509.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *See id.* at 514–15 (“[I]t was not necessary for the commission, or the 2010 PPA, to speak directly to this [general policy goal].”).

¹⁰⁰ *See id.* at 526 (“[B]ecause the commission was not required to use a net-benefit test and because the commission properly afforded substantial deference to the EDC advisory opinion, which assessed economic benefits of \$129 million, we agree that the commission did not err in finding that the 2010 PPA met the requirements of § 39–26.1–7(c)(iii).”).

¹⁰¹ *See id.* at 526 (“The approval of the 2010 PPA creates the *likelihood* that the environmental benefits that DEM attributed to the cable will be fulfilled. As such, the commission did not err . . .”).

continental shelf.”¹⁰² In affirming the PUC’s decision, the court reiterated its deferential standard of review and the specificity of the revised statute.¹⁰³ Finally, it expressed “fervent hope” that the Legislature’s “William Seward-esque policy decision . . . proves as lucrative and majestic as the Alaska Purchase of 1867.”¹⁰⁴

Toray Plastics mounted one last challenge by filing an objection to the mutual waiver to a termination clause in the contract between Deepwater and National Grid that had been sent to the Commission on September 29, 2011.¹⁰⁵ According to Toray’s interpretation, the clause meant that if the amended PPA had not received Commission approval (including the resolution of any appeals) by June 30, 2011, then the PPA would automatically terminate unless the parties had previously agreed to mutually waive this term of the agreement.¹⁰⁶ Since the Supreme Court of Rhode Island had handed down its decision one day later, on July 1, Toray argued that the PPA was not actually in effect, and therefore the parties’ ability to waive the termination clause had expired.¹⁰⁷ Moreover, because the PUC had completed its task in reviewing the PPA, it no longer had any authority to approve a waiver of the termination clause.¹⁰⁸

The Commission predictably disagreed, asserting that it had continuing jurisdiction over the PPA in order to aid the legislative purpose of establishing the Block Island Wind Farm.¹⁰⁹ The Commission then approved the waiver of the termination clause, finding “no public policy reason to interfere” with the intention of Deepwater and National Grid to continue operating under the amended agreement.¹¹⁰

2. *Federal Wind Energy Law*

Like Rhode Island at the state level, the federal government has provided significant support to the development of wind energy in the United States. The most important support comes in the form of tax credits.

a. Federal Legislation and Tax Credits for Wind Energy

The Wind Energy Systems Act of 1980¹¹¹ marked the beginning of

¹⁰² *Id.*

¹⁰³ *Id.* at 526–27.

¹⁰⁴ *Id.* at 527.

¹⁰⁵ *Narragansett Electric Co. & Deepwater Wind Block Island*, 2012 WL 423628, at *1 (R.I.P.U.C. Jan. 24, 2012).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at *1–2.

¹⁰⁸ *Id.* at *2.

¹⁰⁹ *Id.* at *9.

¹¹⁰ *Id.* at *10.

¹¹¹ Wind Energy Systems Act of 1980, Pub. L. No. 96-345, 94 Stat. 1139 (1980).

earnest federal support for wind energy.¹¹² In passing the Act, Congress asserted that “it is the proper and appropriate role of the Federal Government to undertake research and development, to participate in demonstration programs for wind energy systems, and to assist private industry, other entities, and the general public in hastening the widespread utilization of such systems.”¹¹³ The Act authorized the Secretary of Energy to encourage the development of wind energy technology through grants, loans, and other forms of financial assistance.¹¹⁴

The Block Island Wind Farm is a privately funded venture backed by New York hedge fund D.E. Shaw & Co.¹¹⁵ Though Deepwater Wind has not received grants and loans under the Wind Energy Systems Act, it is set to receive sizable federal tax credits. The Energy Policy Act of 1992¹¹⁶ first introduced a renewable electricity production credit,¹¹⁷ which was extended through 2012 by the American Recovery and Reinvestment Act of 2009,¹¹⁸ and most recently extended for one more year as part of the “fiscal cliff” budget deal passed on January 1, 2013.¹¹⁹ Under the tax scheme, Deepwater would choose between taking a Production Tax Credit of 2.2 cents/kWh produced,¹²⁰ or an up-front Investment Tax Credit (“ITC”) equal to thirty percent of the Block Island Wind Farm’s development expenditures.¹²¹ CEO Jeff Grybowski indicated that Deepwater would choose the ITC in order to secure up-front financing for the project.¹²²

b. Federal Energy Regulation: No Concurrent Jurisdiction

Energy regulation is handled either at the state or federal level, but not

¹¹² 4 MARY SCARBROUGH & REUVEN HOCH, WEST’S FEDERAL ADMINISTRATIVE PRACTICE § 4650 (3d ed. 1996 & Supp. 2012).

¹¹³ 42 U.S.C. § 9201(a)(8) (2006).

¹¹⁴ *Id.* § 9205(c).

¹¹⁵ Ted Nesi, *Deepwater Wind’s Key Backer Hits Skids*, WPRI.COM (Sept. 29, 2010, 4:13 PM), http://www.wpri.com/dpp/money/business_news/deepwater-winds-key-backer-hits-skids.

¹¹⁶ Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (1992).

¹¹⁷ SCARBROUGH & HOCH, *supra* note 112.

¹¹⁸ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1101, 123 Stat 115, 319 (2009); Christopher Riti, Comment, *Three Sheets to the Wind: The Renewable Energy Production Tax Credit, Congressional Political Posturing, and an Unsustainable Energy Policy*, 27 PACE ENVTL. L. REV. 783, 805 (2010).

¹¹⁹ Stephanie Turaj, *Wind Tax Credits Extended*, BLOCK ISLAND TIMES (Jan. 11, 2013), <http://block-island.villagesoup.com/p/wind-tax-credits-extended/945113>.

¹²⁰ The renewable energy production credit is 1.5 cents per kWh, adjusted for inflation and rounded to the nearest multiple of 0.1 cent. 26 U.S.C. §§ 45(a)–(b) (2006). In 2012, the IRS listed the credit as 2.2 cents per kWh. I.R.S. Notice 2012-35, 2012 I.R.B. 937, 940 (May 21, 2012).

¹²¹ See Mitchell Ward, *The PTC and Wind Energy: Restructuring the Production Tax Credit as a More Effective Incentive*, 11 HOUS. BUS. & TAX L.J. 455, 473 (2011) (“A taxpayer may now irrevocably elect to take an Investment Tax Credit (ITC) in lieu of the [Production Tax Credit] for wind facilities . . . limited to thirty percent of the property’s basis . . .”).

¹²² Turaj, *supra* note 119.

concurrently.¹²³ The Federal Power Act authorizes the FERC to regulate the sale of electricity in interstate commerce, leaving jurisdiction over intrastate matters to individual states.¹²⁴

The PUC assumed jurisdiction for regulating the PPA between Deepwater and National Grid, and this jurisdiction was not challenged during the proceedings that culminated in the 2011 Supreme Court of Rhode Island decision.¹²⁵ One party, however, has filed a federal complaint attempting to argue for federal jurisdiction over the PPA. Benjamin Riggs, a longtime opponent of the project, filed a complaint with FERC arguing in part that the Block Island Wind Farm's "electricity will be fed into the New England grid and presumably be sold in interstate commerce."¹²⁶ The complaint then argues that under applicable federal law, the rates charged in the PPA are not "just and reasonable."¹²⁷

Riggs's jurisdictional presumption is likely based on the fact that National Grid distributes electricity outside of Rhode Island, specifically to New York and Massachusetts.¹²⁸ But two factors make it highly unlikely that power from the Block Island Wind Farm will actually be transmitted out of Rhode Island. First, the demonstration-scale project will produce only a small fraction of Rhode Island's energy needs; there is certainly no need to transmit excess power to neighboring states. Second, Rhode Island took some of the sting out of requiring National Grid to buy above-market renewable energy by authorizing "financial remuneration and incentives" that allow the electricity purchased from Deepwater to be marked up by 2.75%.¹²⁹ This state-legislated utility increase is paid by Rhode Island ratepayers, and there would be no way for National Grid to collect this remuneration from out-of-state electricity consumers.

Regardless of where the electricity actually flows, it is highly unlikely that FERC would attempt to assert federal jurisdiction after three years of state litigation. FERC recently issued a "notice of intent not to act" on Riggs's petition.¹³⁰ While this notice contains no reasoning for the inaction, it can be inferred that FERC thought that the federal energy

¹²³ See 16 U.S.C. § 824(a) ("Federal [electric energy] regulation . . . extend[s] only to those matters which are not subject to regulation by the States.").

¹²⁴ 16 U.S.C. § 791a, 824(a) (2006).

¹²⁵ See *In re* Proposed Town of New Shoreham Project, 25 A.3d 482, 486–503 (R.I. 2011) (recapping the case's procedural and factual background, with no mention of a jurisdictional challenge).

¹²⁶ Complaint at 3, Riggs v. R.I. Pub. Util. Comm'n, No. EL 12-100 (F.E.R.C. Aug. 22, 2012).

¹²⁷ *Id.*; see also 16 U.S.C. § 824d(a) (2006) (requiring that all rates and charges be "just and reasonable").

¹²⁸ NATIONAL GRID, <https://www1.nationalgridus.com/CorporateHub> (last visited Feb. 7, 2013).

¹²⁹ See R.I. GEN. LAWS § 39-26.1-4 (Supp. 2012); Alex Kuffner, *Utility to Buy Wind Farm's Electricity*, PROVIDENCE J., Dec. 10, 2009, at 1 ("[A] 2.75-percent markup on electricity generated from renewable sources . . . is allowed by state law.").

¹³⁰ Riggs, 141 FERC ¶ 61033 (Oct. 18, 2012).

claims were jurisdictionally baseless and not worth adjudicating.

The FERC notice does allow Mr. Riggs to bring an action in federal court,¹³¹ which would be a more sensible place to address his separate argument that Rhode Island has violated the dormant Commerce Clause by statutorily favoring one in-state renewable energy source.¹³² This part of Riggs's original FERC complaint incorporates arguments made by TransCanada (a rival renewable energy developer) on the application of the Commerce Clause in the First Circuit.¹³³

The TransCanada/Benjamin Riggs dormant Commerce Clause arguments are theoretically sound but attenuated by the multistep application of the allegedly unconstitutional statute, and by the overstretching of prior judicial holdings to accommodate this application. The practical application of the modified Long-Term Contracting Standard for Renewable Energy¹³⁴ is unquestionably to facilitate the development and commercial success of one particular wind energy project by one particular in-state company. That application, however, depends on the interaction of the renewable energy standard that requires electricity distributors to purchase a certain percentage of energy from renewable sources, and the separate legislation giving explicit direction to the PUC in approving the PPA between Deepwater and National Grid.¹³⁵ More specifically, Section 39-26.1-7 requires National Grid to buy power from Deepwater that counts "as part of the minimum long-term contract capacity,"¹³⁶ allegedly to the detriment of out-of-state renewable energy producers seeking their own slice of that required percentage.¹³⁷

This argument is flawed because even though the law creates a statutorily-required renewable energy market and then helps one Rhode Island company within that market, out-of-state renewable energy companies are still not necessarily excluded from selling electricity in Rhode Island. Therefore, the law falls short of paralleling *Wyoming v. Oklahoma*,¹³⁸ in which the Supreme Court struck down an Oklahoma law requiring its coal-fired power plants to purchase at least 10% of their coal from local sources.¹³⁹ Moreover, even if the law were found to be discriminatory, the policy goal of connecting Block Island to the mainland

¹³¹ *Id.*

¹³² Complaint at 4, Riggs v. R.I. Pub. Util. Comm'n, No. EL 12-100 (F.E.R.C. Aug. 22, 2012).

¹³³ *See id.* at 2, 4 (describing TransCanada's Commerce Clause argument).

¹³⁴ R.I. GEN LAWS § 39-26.1 (Supp. 2012).

¹³⁵ *See supra* Part III.A.1.

¹³⁶ R.I. GEN LAWS § 39-26.1-7(h) (Supp. 2012).

¹³⁷ *See* Motion to Dismiss for TransCanada at 4, Riggs v. R.I. Pub. Util. Comm'n, No. EL 12-100 (F.E.R.C. Aug. 22, 2012) ("Thus the Subsection 7 PPA (if it is approved) will reduce the volume that may be won by any other generators seeking to compete for long-term contracts pursuant to the LTC Statute.").

¹³⁸ 502 U.S. 437 (1992).

¹³⁹ *Id.* at 455, 461.

power grid could potentially qualify as a “legitimate local purpose” without practical “non-discriminatory alternatives” sufficient to satisfy constitutionality.¹⁴⁰ The cost of the undersea transmission cable is prohibitive without the incentive of the Wind Farm, the Wind Farm cannot be financed without the PPA, and the PPA would not have been approved without the revised legislation.

Of course, the federal lawsuit has not even been filed yet, so it is somewhat premature to evaluate the strength of the case before a complaint is available for review. Still, it appears that Mr. Riggs faces an uphill battle in continuing to pursue these constitutional arguments.

B. *Environmental Regulations*

Although the Block Island Wind Farm is intrinsically a clean energy project predicted to have positive environmental effects,¹⁴¹ it is still subject to myriad federal and state environmental regulations and permitting procedures. At the state level, Deepwater Wind has benefited from official state sponsorship in navigating the regulatory process.¹⁴² Therefore, significant resistance from state environmental agencies is unlikely. At the federal level, however, government agencies making decisions affecting the project must follow specific permitting processes under the Administrative Procedure Act, which requires public notice of proposed rulemaking followed by opportunities for public comment and participation.¹⁴³

1. *Rhode Island Environmental Law*

Two state agencies have significant regulatory authority over the Block Island Wind Farm: the Coastal Resources Management Council (“CRMC”), and the Department of Environmental Management (“DEM”). The CRMC issues work permits within Rhode Island’s coastal zone,¹⁴⁴ which Deepwater will need in order to construct a wind farm and transmission cable within state waters. The DEM is primarily concerned with the local environmental effects of the project, including water

¹⁴⁰ *Family Winemakers of Cal. v. Jenkins*, 592 F.3d 1, 9 (1st Cir. 2010).

¹⁴¹ The RIPUC unanimously concluded that, at the very least, carbon emissions would be reduced by eliminating Block Island’s reliance on diesel generators except as a backup in case of a cable outage. *In re Proposed Town of New Shoreham Project*, 25 A.3d 482, 526 (R.I. 2011).

¹⁴² See Chris Barrett, *Deepwater Moves Ahead with Wind Farm*, BLOCK ISLAND TIMES (Jan. 26, 2009), <http://block-island.villagesoup.com/news/story/Deepwater-moves-ahead-with-wind-farm-Five-to-eight-turbines-would-power-the-entire-island/88890> (“The state . . . will help steer Deepwater through a host of state and federal approval processes.”).

¹⁴³ 5 U.S.C. §§ 553(b)–(c) (2006).

¹⁴⁴ ABOUT THE CRMC, <http://www.crmc.ri.gov/aboutermc.html> (last visited Feb. 13, 2013).

pollution and threats to endangered species.¹⁴⁵

a. Coastal Resources Management Council

The CRMC issues work permits for any work done “in, above, or beneath” Rhode Island state waters.¹⁴⁶ Though Deepwater’s application is still pending,¹⁴⁷ CRMC assent is all but guaranteed, given that the original Joint Development Agreement (“JDA”) between Deepwater and the state requires the state to “use all reasonable efforts within its lawful authority . . . to cause CRMC to grant to DWW [Deepwater Wind] upon DWW acquiring all necessary permits and approvals . . . and at commercially reasonable terms the right to use the submerged lands.”¹⁴⁸ Under the JDA, CRMC is even required to assist and advocate for the project with other agencies: “The CRMC shall make all reasonable efforts to expedite the SAMP [Special Area Management Plan] and to obtain all associated necessary federal, state, and local government permits and approvals. The State shall advocate on behalf of the Project, where appropriate, with Federal Agencies and State Agencies.”¹⁴⁹ Assuming the CRMC adheres to this contractual language, it would seem that it has no real choice in whether to permit the Block Island Wind Farm. After CRMC assents, negotiations can begin for a submerged lands lease at “commercially reasonable” terms.¹⁵⁰

Despite the contractual predisposition towards approval, CRMC will still need to carefully examine the project in accordance with its statutory permitting requirements. Under Rhode Island law, Deepwater has the burden of demonstrating that project will not: “(i) [s]ignificantly adversely affect any shellfish management area as designated by the department of environmental management or the marine fisheries council; (ii) [b]e in a significant conflict with the marine ecology within or adjacent to the state’s territorial waters; or (iii) [s]ignificantly harm or destroy existing fishing grounds.”¹⁵¹ Deepwater’s application undoubtedly satisfies the first two criteria; the Wind Farm is even located in a designated “Renewable Energy Zone” that has been pre-established by the CRMC and specifically

¹⁴⁵ See DEEPWATER WIND, ENVIRONMENTAL REPORT/CONSTRUCTION AND OPERATIONS PLAN 1-9 (2012), <http://dwwind.com/docs/Environmental%20Report.pdf> (listing Rhode Island Pollution Discharge Elimination System General Permit for Storm Water Discharge and a consultation under the Rhode Island Endangered Species Act as required DEM approvals for the Block Island Wind Farm).

¹⁴⁶ R.I. GEN. LAWS § 46-23-6(4)(i) (2007).

¹⁴⁷ Deepwater anticipates CRMC approval in the second quarter of 2013. DEEPWATER WIND, *supra* note 145, at 8 tbl.1.3-1.

¹⁴⁸ JOINT DEVELOPMENT AGREEMENT BETWEEN THE STATE OF RHODE ISLAND AND DEEPWATER WIND, RHODE ISLAND, LLC 9 (2009), available at http://www.cfcri.com/Joint_Development_Agreement_1-2-2009_1.pdf.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*; DEEPWATER WIND, *supra* note 145, at 1-9.

¹⁵¹ R.I. GEN. LAWS § 46-23-18.1(c) (2007).

designed to minimize potential impact.¹⁵² In regards to fishing, Deepwater admitted in its Environmental Report that construction of the project would result in “moderate, short-term impacts,” but denied that the effects would be “long-term or significant.”¹⁵³ Additionally, the turbines have been sited “to allow access both around and through the Project Area” in order to minimize the detriment to marine uses such as fishing.¹⁵⁴

b. Department of Environmental Management

The DEM is linked to the project in three ways: wetlands protection, the protection of endangered species, and the issuance of permits for storm water discharge. Bringing a cable ashore both on Block Island and in Narragansett will impact wetlands, and therefore requires permits from the DEM.¹⁵⁵ DEM regulations require a permit for any “*project* or activity which may *alter* any *freshwater wetland*.”¹⁵⁶ In securing these permits, Deepwater will be required to avoid and minimize impacts to freshwater wetlands, taking into account a number of specifically listed issues.¹⁵⁷

Deepwater has also consulted with the DEM about the impact on wildlife; over fifty threatened and endangered species were identified as potentially occurring within the project’s vicinity.¹⁵⁸ Deepwater proposed alternate cable routes and turbine layouts in order to mitigate the impact on these species.¹⁵⁹ Finally, the actual construction of the Wind Farm and the laying of its accompanying cables will require Rhode Island Pollution Discharge Elimination System General Permits for Storm Water Discharge Associated with Construction Activity.¹⁶⁰

As with the CRMC, project resistance from the DEM is highly unlikely. In fact, the DEM issued an advisory opinion supporting the project that was taken into consideration in evaluating the PPA.¹⁶¹ Given

¹⁵² DEEPWATER WIND, *supra* note 145, at ES-2.

¹⁵³ *Id.* at 4-214 to 4-215.

¹⁵⁴ *Id.* at 4-214.

¹⁵⁵ See Letter from Robert N. Gagnon, P.E., Chief, Office of Customer and Technical Assistance, R.I. Dep’t of Env’tl. Mgmt., to Cliff McGuinness, Block Island Power Co. (Jan. 31, 2012), *available at* <http://dwwind.com/docs/appendices/Appx-A%20Agency%20Correspondence.pdf> (asserting the need for a wetlands permit on Block Island Power Company property); DEEPWATER WIND, *supra* note 145, at tbl.1.3-1 (listing Coastal and Freshwater Wetlands Permit under state permits, approvals, and consultations).

¹⁵⁶ 25-16-24 R.I. CODE R. § 5.01(A) (LexisNexis 2010).

¹⁵⁷ *Id.* § 10.02(D).

¹⁵⁸ Letter from Clint Plummer, Vice President, Dev., Deepwater Wind Holdings, to Cathy Sparks and Christopher Raithel, R.I. Dep’t of Env’tl. Mgmt. (Nov. 2, 2009), *available at* <http://dwwind.com/docs/appendices/Appx-A%20Agency%20Correspondence.pdf>.

¹⁵⁹ *Id.*

¹⁶⁰ DEEPWATER WIND, *supra* note 145, at 8 tbl.1.3-1.

¹⁶¹ Review of Amended Power Purchase Agreement Between Narragansett Elec. Co. & Deepwater Wind Block Island, Docket No. 4185, 2010 WL 3458306, at *38 (R.I.P.U.C. Aug. 16, 2010).

the DEM's conclusion of "substantive environmental benefits" of the Wind Farm,¹⁶² it would be inconsistent for them to raise serious objections during the permitting process.

2. *Applicable Federal Environmental Law*

Although Deepwater Wind should have little trouble gaining necessary approvals from the DEM and CRMC, the Block Island Wind Farm is also subject to federal regulations administered by the U.S. Army Corps of Engineers ("USACE") and the Department of Interior Bureau of Ocean Energy Management.¹⁶³ These agencies must follow specific protocol in issuing the necessary permits, in accordance with both the Administrative Procedure Act,¹⁶⁴ and the National Environmental Policy Act.¹⁶⁵ Additionally, the federal permitting agencies are required to comply with the Endangered Species Act ("ESA") and the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson-Stevens").¹⁶⁶ Even with the opportunity for public comment, Deepwater is unlikely to encounter problems with applicable federal environmental law, given early indicators and the relatively narrow jurisdiction of the federal agencies involved.

a. U.S. Army Corps of Engineers

The USACE has jurisdiction over the Block Island Wind Farm under § 10 of the Rivers and Harbors Act¹⁶⁷ and § 404 of the Clean Water Act.¹⁶⁸ The Rivers and Harbors Act gives the USACE jurisdiction over obstructions in navigable waters,¹⁶⁹ and the Clean Water Act gives them jurisdiction over dredging and filling permits,¹⁷⁰ which Deepwater will need in order to place its turbines on the seabed and run underwater transmission cables.

Deepwater has filed permit applications with the USACE, which opened a comment period on October 2, 2012¹⁷¹ and later extended the comment period through February 10, 2013.¹⁷² The USACE public notice lists broad criteria for evaluating the project, calling for a cost-benefit

¹⁶² *Id.*

¹⁶³ DEEPWATER WIND, *supra* note 145, at 1-6.

¹⁶⁴ 5 U.S.C. § 553 (2006).

¹⁶⁵ 42 U.S.C. § 4332 (2006).

¹⁶⁶ DEEPWATER WIND, *supra* note 145, at 1-6 to 1-7.

¹⁶⁷ 33 U.S.C. § 403 (2006).

¹⁶⁸ *Id.* § 1344.

¹⁶⁹ *Id.* § 403.

¹⁷⁰ *Id.* § 1344.

¹⁷¹ 45 *Day Public Notice*, U.S. ARMY CORPS OF ENGINEERS 1 (Sept. 23, 2012), <http://www.nae.usace.army.mil/Regulatory/Public%20Notices/09/2009-00789.pdf>.

¹⁷² Press Release, U.S. Army Corps of Eng'rs, Public Comment Period Extended to Feb. 10 on Deepwater Wind Proposal to Build Wind Turbines off Block Island Coast (Dec. 19, 2012), *available at* <http://www.nae.usace.army.mil/news/12/2012-127.pdf>.

analysis that includes all relevant factors, including conservation, economics, aesthetics, environmental concerns, navigation, energy needs, and the needs and welfare of the people.¹⁷³ Though this would seem to give the USACE almost unlimited discretion in deciding whether to approve the project, it will in all likelihood only scrutinize the environmental and navigational aspects of the Wind Farm, in accordance with its original statutory jurisdiction.

In deciding whether to issue a permit, the USACE must evaluate specific environmental effects of the project to ensure that it complies with the ESA¹⁷⁴ and Magnuson-Stevens.¹⁷⁵ The District Engineer has made a preliminary determination that neither the wind farm nor the transmission cable is likely to adversely affect endangered species or have a substantial adverse effect on fish and invertebrate species, though further consultation with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service will be conducted before the USACE issues its final decision.¹⁷⁶ Regarding fish and invertebrate habitat degradation, the Public Notice explained that Deepwater Wind minimized impacts by siting the turbines and cables “to avoid direct impacts to important habitats such as eelgrass and hard bottom substrates known to be used by some species.”¹⁷⁷

USACE Project Manager Michael Elliott said at the outset of the permitting process that he did not “see any big deal breakers.”¹⁷⁸ In addition, the USACE recently approved Cape Wind, another wind farm project off the coast of Cape Cod.¹⁷⁹ These indicators suggest that Deepwater will not encounter significant opposition from the USACE.

b. Bureau of Ocean Energy Management

The Bureau of Ocean Energy Management (“BOEM”) is the federal agency responsible for offshore renewable energy programs.¹⁸⁰ In order to run a transmission cable through federal waters, Deepwater Wind must

¹⁷³ 45 Day Public Notice, *supra* note 171, at 4.

¹⁷⁴ 16 U.S.C. § 1536(a)(2) (2006) (“Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species . . .”).

¹⁷⁵ *Id.* § 1855(b)(2) (“Each Federal agency shall consult with the Secretary with respect to any action authorized, funded, or undertaken, or proposed to be authorized, funded, or undertaken, by such agency that may adversely affect any essential fish habitat . . .”).

¹⁷⁶ 45 Day Public Notice, *supra* note 171, at 5.

¹⁷⁷ *Id.*

¹⁷⁸ Pippa Jack, *Comment Period Opens for Deepwater Windfarm*, BLOCK ISLAND TIMES (Oct. 5, 2012), <http://block-island.villagesoup.com/p/comment-period-opens-for-deepwater-windfarm/904828>.

¹⁷⁹ *Id.*

¹⁸⁰ *About BOEM*, BUREAU OF OCEAN ENERGY MGMT., <http://www.boem.gov/About-BOEM/index.aspx> (last visited Feb. 13, 2013).

secure a Right-of-Way grant from BOEM.¹⁸¹ As the first step in this process, BOEM issued a “Notice of Determination of No Competitive Interest,” meaning that no other parties are competing with Deepwater for the ROW.¹⁸² Deepwater then submitted a General Activities Plan, which awaits evaluation by the Bureau.¹⁸³ BOEM will now cooperate with the USACE in the NEPA process and with regard to the ESA and Magnuson-Stevens,¹⁸⁴ obviating the need for a separate and redundant proceeding. Future complications with the BOEM are unlikely for Deepwater, given their limited mission of ensuring that renewable energy activities “are conducted in a safe and environmentally sound manner.”¹⁸⁵

C. Land Use Regulations

The foregoing sections discussed federal and state regulation of Deepwater Wind’s use of the seabed for its wind farm and transmission cables.¹⁸⁶ But the Block Island Wind Farm will also require substantial terrestrial construction, both on Block Island and in Narragansett, the mainland town where the transmission cable is planned to go ashore. This construction must be approved through local land use and zoning processes.

Deepwater’s first inroads into local land use involved the implementation of research equipment. The Southeast Light Foundation rented space to Deepwater for a light detecting and ranging system to monitor bird patterns, and the Town of New Shoreham rented space on a communications tower for equipment to monitor bat activity.¹⁸⁷ The local Town Council also voted to allow the installation of a temporary meteorological tower used to collect wind data.¹⁸⁸ The substation that would actually distribute electricity, however, required more exhaustive review by multiple local land use authorities.

Rhode Island state law dictates that municipalities establish both a planning board¹⁸⁹ and a zoning board of review.¹⁹⁰ The Town of New

¹⁸¹ See 30 C.F.R. § 585.300(a) (2012) (“An ROW grant authorizes the holder to install on the OCS [Outer Continental Shelf] cables, pipelines, and associated facilities that involve the transportation or transmission of electricity or other energy product from renewable energy projects.”).

¹⁸² Notice of Determination of No Competitive Interest, 77 Fed. Reg. 47,092, 47,092 (Aug. 7, 2012).

¹⁸³ DEEPWATER WIND, *supra* note 145, at 8 tbl.1.3-1.

¹⁸⁴ Notice of Determination of No Competitive Interest, 77 Fed. Reg. at 47,092.

¹⁸⁵ 30 C.F.R. § 585.101(c) (2012).

¹⁸⁶ See *supra* Part III.B.

¹⁸⁷ Chris Barrett, *Deepwater Seeks Weather Tower Near North Light*, BLOCK ISLAND TIMES (Feb. 17, 2009), <http://block-island.villagesoup.com/news/story/Deepwater-seeks-weather-tower-near-North-Light/88936>.

¹⁸⁸ Chris Barrett, *Council Allows Deepwater MET Tower*, BLOCK ISLAND TIMES (Mar. 9, 2009), <http://block-island.villagesoup.com/news/story/Council-allows-Deepwater-met-tower/88999>.

¹⁸⁹ R.I. GEN. LAWS § 45-22-1 (2009).

Shoreham on Block Island has chartered both of these boards in accordance with state law,¹⁹¹ along with a state-authorized historic district commission.¹⁹² The Planning Board issues advisory opinions and recommendations on zoning matters.¹⁹³ The powers and duties of the Zoning Board of Review include authorizing variances¹⁹⁴ and special-use permits,¹⁹⁵ and referring matters to the Planning Board or Historic District Commission.¹⁹⁶

On Block Island, Deepwater Wind has already received approvals from all three local land use boards/commissions for its substation to be located on Block Island Power Company property. First, the Historic District Commission issued a favorable advisory opinion, with the condition that power lines be buried wherever possible,¹⁹⁷ followed by a Certificate of Appropriateness for construction.¹⁹⁸

From the Zoning Board of Review, Deepwater needed both construction approval and a variance for increased pole height for power lines.¹⁹⁹ In April 2012, the Zoning Board approved Deepwater's application for construction and conditionally allowed the variance.²⁰⁰

In addition to approval for the substation, Deepwater secured easements from the Town Council for cables and manhole installations, along with a work permit for the beach area where it plans to bring a cable ashore.²⁰¹ In exchange for the easements, Deepwater agreed to include fiber optics with its cable connection to the mainland,²⁰² along with a

¹⁹⁰ *Id.* § 45-24-56.

¹⁹¹ NEW SHOREHAM, R.I., HOME RULE CHARTER art. IX, §§ 901, 903 (2010).

¹⁹² Historic district commissions are authorized, but not required. R.I. GEN. LAWS § 45-24.1-3(a) (2009).

¹⁹³ *Id.* § 45-22-7(c).

¹⁹⁴ *Id.* § 45-24-57(1)(iv).

¹⁹⁵ *Id.* § 45-24-57(1)(v).

¹⁹⁶ *Id.* § 45-24-57(1)(vi).

¹⁹⁷ Judy Tierney, *HDC Approves Deepwater Siting and Massing Plan*, BLOCK ISLAND TIMES (Feb. 1, 2012), <http://block-island.villagesoup.com/p/hdc-approves-deepwater-siting-and-massing-plan/201327>.

¹⁹⁸ Dan West, *Deepwater Gets First Approval with Long Permitting Road Ahead*, BLOCK ISLAND TIMES (Feb. 28, 2012), <http://block-island.villagesoup.com/p/deepwater-gets-first-approval-with-long-permitting-road-ahead/219692>.

¹⁹⁹ Dan West, *Deepwater Faces Tough Questioning by Zoning Board*, BLOCK ISLAND TIMES (Feb. 4, 2012), <http://block-island.villagesoup.com/p/deepwater-faces-tough-questioning-by-zoning-board/203933>.

²⁰⁰ The transmission poles were allowed only if a subsequent study found that underground lines were not feasible. Judy Tierney, *Zoning Approves Deepwater Substation*, BLOCK ISLAND TIMES (Apr. 6, 2012), <http://block-island.villagesoup.com/p/zoning-approves-deepwater-substation/804606>.

²⁰¹ Stephanie Turaj, *Fiber Optics Now Part of Deepwater Cable*, BLOCK ISLAND TIMES (June 24, 2012), <http://block-island.villagesoup.com/p/fiber-optics-now-part-of-deepwater-cable/842165>.

²⁰² *Id.* The fiber optic connection is important to many islanders because the island currently relies on slow and unreliable DSL for its Internet service. *Id.*

reported payment of \$350,000.²⁰³

Finally, Deepwater will need approval from the Town of Narragansett in order to bring its transmission cable ashore on the mainland side of the Block Island Sound. The company was still negotiating with Narragansett for an easement as of January 2013.²⁰⁴

IV. POLICY ANALYSIS

The most remarkable aspect of the Block Island Wind Farm's legal history is the fervor with which Governor Carcieri and the state legislature created and altered Rhode Island law in order to accommodate the project.²⁰⁵ Governor Carcieri has long been the project's most vocal champion, with rhetoric like "we have the opportunity to once again control our economic destiny, to lead the nation in the creation of a new industry, and to create hundreds, if not thousands, of good paying jobs for Rhode Islanders."²⁰⁶

On the other hand, vocal project opponent and former Rhode Island Attorney General Patrick Lynch called the Wind Farm "an inside deal pushed by . . . Governor Carcieri . . . [that would] force . . . families and businesses . . . to buy grossly overpriced electricity for the next 20 years to specifically guarantee one company's revenues and profits."²⁰⁷

It will likely take decades before the wisdom or foolishness of the Block Island Wind Farm can fully be judged and analyzed. Whether it turns out to be a catalyst for new clean energy development or a state-sponsored bilking of Rhode Island electricity consumers depends on a multitude of long-term economic and governmental factors that are difficult to predict before the turbines have even started spinning. But it is possible to at least examine the short-term implications of the project from the perspective of different stakeholders. This section outlines and analyzes the most immediate effects of the Block Island Wind Farm for both Block Island residents and electricity ratepayers on the Rhode Island mainland, before speculating on the long-term implications of the Wind Farm as a demonstration project for the viability of offshore wind in the

²⁰³ Tamar Wilner, *US Block Island Offshore Project Takes Step Forward*, WIND POWER MONTHLY (June 29, 2012, 3:17 PM), <http://www.windpowermonthly.com/news/rss/1139388/US-Block-Island-offshore-project-takes-step-forward/>.

²⁰⁴ Betty J. Cotter, *Narragansett Wary of Deepwater's Block Island Cable Connection Plan*, BLOCK ISLAND TIMES (Jan. 26, 2013), <http://block-island.villagesoup.com/p/narragansett-wary-of-deepwaters-block-island-cable-connection-plan/949407>.

²⁰⁵ See *supra* Part III.A.1.

²⁰⁶ *Governor Carcieri Commends Deepwater and National Grid for New Power Purchase Agreement*, DEEPWATER WIND (Jan. 31, 2013), <http://dwwind.com/deepwater-news/governor-carcieri-commends-deepwater-and-national-grid-for-new-power-purchase-agreement>.

²⁰⁷ Tracy Breton, *Outgoing Lynch Urges Groups to Fight Wind-Farm Project*, PROVIDENCE J., Jan. 4, 2011, at 5.

United States. It concludes by reflecting on the complex regulatory frameworks entailed in the permitting process, and whether and how this system could be improved for future renewable energy projects.

A. *Block Island Residents*

Depending on personal priorities, Block Island residents and homeowners have both the most to gain from the Wind Farm and the most to lose. The primary benefit to Islanders is the anticipated reduction in electricity costs by being connected to the mainland power grid. But people on Block Island also stand to incur significant aesthetic harm in the obstruction of ocean vistas by spinning wind turbines. Balancing these factors can be a largely subjective exercise, primarily due to the inherent difficulty in quantifying aesthetic harms. Nonetheless, the logical place to start is with anticipated electricity savings in order to quantify the primary economic benefit.

Block Island is currently powered by diesel generators supplied by truckloads of diesel fuel delivered by ferry.²⁰⁸ As a result, Islanders pay some of the highest electricity rates in the nation,²⁰⁹ up to four times more expensive than those on the mainland.²¹⁰ Moreover, island electricity rates can be volatile, since they are directly tied to the fluctuating cost of crude oil.²¹¹

Deepwater's transmission cable would plug Block Island into the mainland power grid, but Islanders would still have to pay considerably more for electricity than consumers on the mainland.²¹² The island would be charged 1.8 times the cost of mainland electricity in order to help pay for the cost of the transmission cable.²¹³ Even at this inflated rate, however, the local Electric Utility Task Group ("EUTG") estimated that the overall cost of electricity on the island would fall by 40%, dropping from 54 cents/kWh at current fuel charges to 31 cents/kWh.²¹⁴ Typical residential customers would save \$140 per month, and the Town of New Shoreham itself would realize about \$120,000 in annual savings on its electric bill.²¹⁵

²⁰⁸ Alex Kuffner, *Ruin the View?*, PROVIDENCE J., Mar. 7, 2010, at 1.

²⁰⁹ Judy Benson, *Wind Farm Controversy Buffets Tiny Block Island*, THE DAY (May 27, 2012, 12:00 AM), <http://www.theday.com/article/20120527/NWS01/305279956/1070>.

²¹⁰ Alex Kuffner, *Block Island Divided over Wind Farm*, PROVIDENCE J., July 23, 2010, at 4.

²¹¹ Letter from Elec. Util. Task Grp., to Town Council 3 (Nov. 7, 2012) [hereinafter EUTG letter], available at <http://block-island.villagesoup.com/p/letter-from-electric-utility-task-group-to-town-council-re-deepwater/922755> (follow "ACOECOMMENTEUTG" hyperlink).

²¹² *Id.* at 1.

²¹³ Dan West, *Thirty Percent Savings with Wind Farm Cable*, BLOCK ISLAND TIMES (July 26, 2010), <http://block-island.villagesoup.com/p/Thirty-percent-savings-with-wind-farm-cable/91252>.

²¹⁴ EUTG letter, *supra* note 211, at 1.

²¹⁵ *Id.* at 2.

The EUTG also identified three different local environmental benefits to plugging into the mainland power grid.²¹⁶ First is the reduction in emissions from obviating the need to burn one million gallons of diesel fuel per year.²¹⁷ Second is the reduction in noise from the diesel generators.²¹⁸ Finally, environmental risks from the constant transport of diesel fuel and urea (a chemical used in emission control) would be eliminated.²¹⁹

The final benefit accruing to Block Island is better telecommunications access through a fiber optic connection included with the transmission cable.²²⁰ Fiber optic internet connections would be a massive upgrade over the much-maligned Verizon DSL internet upon which the Island currently relies.²²¹

For Block Island residents and homeowners, these benefits are weighed against the aesthetics of adding wind turbines to otherwise pristine ocean views. While aesthetics are inherently difficult to quantify, there is a valid concern that the properties overlooking the Wind Farm will decline in value. Since offshore wind is a nascent industry in the United States, predicting its effects on real estate is a problematic exercise. Some professional analyses and anecdotal evidence indicate adverse effects on property values in proximity to wind farms,²²² while other studies found the evidence to be deficient.²²³

One resident pointed out that if \$250 million worth of property with views of the Wind Farm (a conservative estimate) declined by 10%, this \$25 million dollar loss would have to be weighed against electricity savings for residential customers.²²⁴ But even if a dollar figure like this

²¹⁶ *Id.* at 3.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ Turaj, *Fiber Optics Now Part of Deepwater Cable*, *supra* note 201.

²²¹ *See id.* (“Several members of the public stepped up to voice concerns over Verizon [I]nternet speeds, complaining that they continue to get slower.”).

²²² *See* DO WIND PROJECTS ADVERSELY AFFECT PROXIMATE RESIDENTIAL PROPERTY VALUES?, <http://www.northnet.org/brvmug/WindPower/RealEstate.html> (last visited Jan. 31, 2013) (listing studies and commentary about the adverse effects of wind energy projects on home values).

²²³ *See* BEN HOEN ET AL., THE IMPACT OF WIND POWER PROJECTS ON RESIDENTIAL PROPERTY VALUES IN THE UNITED STATES: A MULTI-SITE HEDONIC ANALYSIS, at iii (2009), *available at* <http://eetd.lbl.gov/ea/ems/reports/lbnl-2829e.pdf?loc=interstitialskip> (“[N]one of the models uncovers conclusive evidence of the existence of any widespread property value impacts that might be present in communities surrounding wind energy facilities.”); GEORGE STERZINGER ET AL., THE EFFECT OF WIND DEVELOPMENT ON LOCAL PROPERTY VALUES 9 (2003), *available at* http://www.repp.org/articles/static/1/binaries/wind_online_final.pdf (“The results of this analysis of property sales . . . suggest that there is no support for the claim that wind development will harm property values.”).

²²⁴ Mike Hickey, Letter to the Editor, *Windfarm: A Dollar a Day?*, BLOCK ISLAND TIMES (Sept. 28, 2009), <http://block-island.villagesoup.com/p/Featured-Letter-Windfarm-A-dollar-a-day/89833>.

could be agreed upon, the cost-benefit analysis still depends largely on the individual. Property values aside, wind farms are not universally condemned as eyesores detracting from natural aesthetics; some people may even find them attractive reminders of forward-thinking green energy production.²²⁵ Moreover, the electricity cost savings may be more or less important to people based on their economic means; a wealthy person may not be persuaded to compromise viewsheds regardless of cost, while someone struggling to pay their bills will likely be more grateful for the financial relief.

B. *Mainland Rhode Islanders*

Ultimately, the short-term effects of the Block Island Wind Farm at the local level will vary widely between individuals. But residents and businesses in mainland Rhode Island have more uniform interests at stake. Unlike people on Block Island, their electricity rates will actually *increase* as a result of the Wind Farm and its PPA. On the other hand, there is no aesthetic obstruction to worry about, as the turbines will not be visible from the mainland. Therefore, for mainland Rhode Islanders, the Deepwater Wind debate boils down to weighing more expensive electricity against the potential for cleaner energy and economic development.

In evaluating and rejecting the 2009 version of the PPA, the PUC based its decision on an estimate that the energy from the Block Island Wind Farm would cost \$390 million more over the duration of the twenty-year contract than traditional market-priced energy.²²⁶ A typical residential customer would incur a 1.7% increase in their electric bill during the first year of the contract,²²⁷ assuming electricity usage of 500 kWh per month, this would equal \$1.35 per month.²²⁸ Business and industrial firms using much greater amounts of electricity would inevitably be hit harder, which is why Rhode Island manufacturing firms Toray Plastics America and Polytop Corporation fought so hard against the PPA. Toray and Polytop face expected rate increases of \$287,000 and \$42,000, respectively.²²⁹

²²⁵ See Justin Good, *The Aesthetics of Wind Energy*, 13 HUMAN ECOLOGY REV. 76, 76 (2006) (“Some people are literally mesmerized by wind turbines, as much by the hypnotic motion of the blades as by the ecologically-satisfying idea of wind turbines as sources of clean and renewable energy. Others are literally repulsed by their industrially-constructed look, and even by their very presence as a visual intrusion on the natural amenity of the landscape.”).

²²⁶ *In re* Proposed Town of New Shoreham Project, 25 A.3d 482, 493 (R.I. 2011).

²²⁷ Review of Amended Power Purchase Agreement Between Narragansett Elec. Co. & Deepwater Wind Block Island, LLC, Docket No. 4185, 2010 WL 3458306, at *50 (R.I.P.U.C. Aug. 16, 2010).

²²⁸ Town of New Shoreham Project, 280 P.U.R.4th 185, 190 (R.I.P.U.C. Apr. 2, 2010), *order corrected* 2010 WL 2719959 (R.I.P.U.C. Apr. 5, 2010).

²²⁹ Review of Amended Power Purchase Agreement Between Narragansett Elec. Co. & Deepwater Wind Block Island, 2010 WL 3458306, at *5.

In exchange for these increased electricity bills, the Block Island Wind Farm is meant to provide both environmental and economic benefits. Unfortunately, in the short term, these benefits appear to fall well short of Governor Carcieri's lofty expectations. It is possible that the second-stage, larger-scale Deepwater Wind Energy Center could one day deliver much greater benefits to Rhode Island, but for now, Rhode Islanders are likely to be underwhelmed by the return generated by their marginally increased utility bills.

On the environmental side, wind energy's cleanliness has always been its most salient selling point. Once the turbines are constructed and spinning, the Block Island Wind Farm will not produce pollution or greenhouse gas emissions.²³⁰ At the state level, the energy produced by the Block Island Wind Farm will offset energy that would have otherwise come from fossil fuels. Currently, 97% of Rhode Island's electric power generation comes from natural gas.²³¹ This is significant because natural gas is relatively clean burning compared to other fossil fuels, with only 55% of the carbon content for coal and 70% of that for oil.²³² Therefore, the actual greenhouse gas offset from the Block Island Wind Farm is proportionally lessened in that it will replace natural gas power rather than coal or oil.²³³

In economic terms, the Block Island Wind Farm has thus far dramatically failed to live up to its initial expectations. In 2009, Governor Carcieri claimed that the project would "create a minimum of 800 jobs with annual wages of \$60 million."²³⁴ But when the PUC examined the PPA, they initially rejected it partly on the basis that the Block Island Wind Farm would create only thirty-five to fifty temporary jobs and six

²³⁰ *The Opportunity*, DEEPWATER WIND, <http://dwwind.com/about/the-opportunity> (last visited Jan. 31, 2013).

²³¹ See *Energy Efficiency & Renewable Energy in My State: Rhode Island*, U.S. DEP'T OF ENERGY, http://apps1.eere.energy.gov/states/electricity_generation.cfm/state=RI (last visited Jan. 31, 2013) (charting fuel sources for electric power generation).

²³² ENERGY INFO. ADMIN. OFFICE OF OIL AND GAS, NATURAL GAS 1998: ISSUES AND TRENDS, at xvi, 3 (1999), available at http://www.eia.gov/pub/oil_gas/natural_gas/analysis_publications/natural_gas_1998_issues_trends/pdf/it98.pdf.

²³³ The need to burn diesel fuel to provide power on Block Island will be obviated by the Wind Farm, but the Island itself will only use about 10% of the power generated, with the 90% remainder being exported to the mainland. *Block Island Wind Farm Fact Sheet*, DEEPWATER WIND, http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=27&ved=0CF8QFjAGOBQ&url=http%3A%2F%2Fdwwind.com%2Ffile_download%2F167%2FBIFW%2BFact%2BSheet%2B070111.pdf&ei=Cvi8UOiuJLK30gGny4HYBA&usq=AFQjCNEEII6yCqOcPzuE5DHgBmMigIVeZA (last visited Feb. 11, 2013).

²³⁴ *Governor Carcieri Hails Deepwater Wind Rhode Island Lease Agreement at Quonset Business Park*, R.I. ECON. DEV. CORP. (June 30, 2009), <http://www.riedc.com/news/2009/06/deep-water-wind-quonset>.

permanent ones.²³⁵ Moreover, the PUC lamented the potential loss of jobs that could accompany a spike in electricity rates:

It is basic economics to know that the more money a business spends on energy, whether it is renewable or fossil based, and whether it is produced in Rhode Island or elsewhere, the less Rhode Island businesses can spend or invest, and the more likely existing jobs will be lost to pay for these higher costs. Spending large amounts of ratepayer funds on renewable energy development can lead to green jobs at new businesses, but one cannot ignore the fact that higher energy costs could lead to the loss of regular jobs at existing business as well.²³⁶

In summary, the short-term environmental and economic benefits to mainland Rhode Island are underwhelming compared to Governor Carcieri's enthusiastic rhetoric. In the long run, however, Deepwater may have further opportunities to make a much bigger environmental and economic impact.

C. *The Block Island Wind Farm as a Demonstration Project*

In the short term, Block Island is set to benefit economically at the subjectively-valued price of compromised ocean views, while mainland Rhode Islanders anticipate increased electricity rates for dubious economic and environmental benefits. But, as a demonstration project, the Block Island Wind Farm is likely to have much greater longer-term consequences by serving as a model for future offshore wind farm development in the northeastern United States.

Deepwater Wind is already planning a "second generation" of offshore wind farms, including the Deepwater Wind Energy Center, 150 to 200 turbines located further offshore, about 15 miles southeast of Block Island,²³⁷ and the Hudson Canyon Wind Farm, another 200 turbines 35 miles south of Long Island.²³⁸ These much larger projects have the potential to displace far more fossil-fuel greenhouse gas emissions than the Block Island Wind Farm²³⁹ and, because of economies of scale, would

²³⁵ Town of New Shoreham Project, 280 P.U.R.4th 185, 216 (R.I.P.U.C. Apr. 2, 2010), *order amended*, No. 4111, 2010 WL 2719959 (R.I.P.U.C. Apr. 5, 2010).

²³⁶ *Id.* at 217.

²³⁷ *Deepwater Wind Energy Center*, *supra* note 1.

²³⁸ *Hudson Canyon Wind Farm*, DEEPWATER WIND, <http://dwwind.com/hudson-canyon/hudson-canyon-project-overview> (last visited Jan. 31, 2013).

²³⁹ *See id.* (noting that Hudson Canyon will displace more than 1.7 million tons of carbon dioxide emissions each year); *Deepwater Energy Center*, *supra* note 1 (stating that the Deepwater Wind Energy Center will displace more than 1.7 million tons of carbon dioxide emissions each year).

produce cheaper electricity.²⁴⁰ If the Block Island Wind Farm is successful, Deepwater's experience with building the Wind Farm and navigating federal and state politics and regulations will give it a strong competitive advantage,²⁴¹ and with the utility-scale wind farms could come the permanent jobs that have yet to materialize in Rhode Island.

But the Block Island Wind Farm has policy implications beyond serving as a physical model for larger projects. The most controversial aspect of the Wind Farm is how the Rhode Island government has forced the project through the regulatory process with official state sponsorship and narrowly tailored legislation, and the way this has benefitted one particular for-profit company. A crucial question is whether this should serve as a model for other states looking to kick-start renewable energy development.

Based on the rampant controversy and fierce litigation surrounding the project, it appears that, at the very least, the project could have been conceived and executed much more effectively at the state level. In retrospect, the biggest mistake was in the way Rhode Island sought a specific "partner" for wind energy development.²⁴² Instead of assigning exclusive rights to one company to develop a wind farm,²⁴³ the state could have preserved an element of competition by passing strong pro-wind energy legislation that could benefit multiple developers. By preserving a competitive marketplace for multiple renewable energy firms, electricity distributors would have actual options to choose from, and could select their own partners based on price rather than litigating over the interpretation of "commercially reasonable." Moreover, public sentiment would remain more favorable, because even if/when ratepayers ended up paying more for electricity, it would seem less like "an inside deal . . . to specifically guarantee one company's revenues and profits."²⁴⁴

On the other hand, freer negotiations between multiple developers

²⁴⁰ *Deepwater Wind Submits Plan for Nation's First Regional Offshore Wind Farm to Supply Multiple East Coast States*, DEEPWATER WIND, <http://dwwind.com/news/deepwater-wind-submits-plan-for-nation-s-first-regional-offshore-wind-farm-to-supply-multiple-east-coast-states> (last visited Jan. 31, 2013).

²⁴¹ See Scott DiSavino, *Deepwater to Build First U.S. Offshore Wind Farm*, REUTERS (Oct. 3, 2012), <http://www.reuters.com/article/2012/10/03/us-deepwater-wind-idUSBRE8920ZX20121003> ("With Block Island we are gaining real-time information on what it will cost to build the bigger project. That is a huge competitive advantage as we look to transition to the 1,000-MW (Deepwater Wind Energy Center) we are hoping to build in federal waters,' [Deepwater Wind CEO Bill] Moore said. . . . 'There are other companies interested in that federal lease, but we have an advantage because of our prior selection by Rhode Island as their preferred developer").

²⁴² Timothy C. Barmann, *Wind Farm Gathers Steam—Rhode Island Seeks Private Partner for Project*, PROVIDENCE J., Apr. 4, 2008, at F1.

²⁴³ Timothy C. Barmann, *N.J. Firm Picked to Build State's Wind Farm*, PROVIDENCE J., Sept. 25, 2008, at 1.

²⁴⁴ Tracy Breton, *Outgoing Lynch Urges Groups to Fight Wind-Farm Project*, PROVIDENCE J., Jan. 4, 2011, at 5.

would likely take longer, and projects might be more likely to hit snags in the regulatory process without the express support of the state. But ultimately, shifts in energy policy cannot be expected to happen as quickly as Governor Carcieri anticipated in Rhode Island. In its rush to get steel in the water, Rhode Island managed to alienate the rate-paying public and likely ended up with more expensive energy than if it had acted more deliberately.

D. *Renewable Energy Regulatory Reform*

As a demonstration project in a nascent industry, the Block Island Wind Farm will have long-term implications for offshore wind energy in the United States. If this industry emerges as Deepwater expects, state and federal regulatory schemes may adapt their own permitting processes in the interest of efficiency and precision. Also, applicants for permits will seek out the most cost-effective and efficient ways of securing permits from multiple agencies.

Projects on the scale of the Block Island Wind Farm are always going to involve complex permitting processes. But some of these frameworks are already being streamlined and adjusted as they evolve and are applied to new projects.

One example is the USACE and the BOEM combining their NEPA process²⁴⁵ and therefore avoiding bureaucratic redundancy. This type of interagency cooperation can even bridge federal and state regulatory systems; recently, the USACE extended its commenting deadline in part to more closely “coincide with the public notice comment periods of both the Rhode Island Coastal Resources Management Council and the Rhode Island Department of Environmental Management.”²⁴⁶ Concurrent comment periods involving multiple agencies are a relatively easy way to simplify the administrative process and to ensure that all public comments are received and considered by all of the agencies involved.

Future offshore wind projects planned by Deepwater Wind will also be simplified by their location; the Deepwater Wind Energy Center²⁴⁷ and the Hudson Canyon Wind Farm²⁴⁸ will be located in federal waters, eliminating the need for permits from state agencies like the CRMC for the turbines themselves. Instead, these wind farms will be under the jurisdiction of the BOEM.

²⁴⁵ Notice of Determination of No Competitive Interest, 77 Fed. Reg. 47,092, 47,092 (Aug. 7, 2012).

²⁴⁶ Press Release, U.S. Army Corps of Eng’rs, Public Comment Period Extended to Feb. 10 on Deepwater Wind Proposal to Build Wind Turbines off Block Island Coast (Dec. 19, 2012), *available at* <http://www.nae.usace.army.mil/news/12/2012-127.pdf>.

²⁴⁷ *Deepwater Wind Energy Center*, *supra* note 1.

²⁴⁸ *Hudson Canyon Wind Farm*, *supra* note 238.

The BOEM, formerly the Minerals Management Service, has undergone substantial recent reorganization to keep up with development of offshore resources.²⁴⁹ The agency has already instituted an initiative to facilitate new offshore wind projects by expediting the offshore leasing process. Specifically, BOEM initiated revisions to the offshore leasing process by eliminating a redundant step when only one developer expresses interest in a lease area.²⁵⁰ This reform was part of Secretary of the Interior Ken Salazar's "Smart from the Start" initiative designed to spur "rapid and responsible" wind energy development off the Atlantic coast.²⁵¹

Deepwater itself has also simplified its permitting process by using one comprehensive Environmental Report/Construction and Operations Plan that has been submitted to multiple agencies and is available for review on Deepwater's website.²⁵² The report was prepared by Tetra Tech, an international provider of environmental and energy consulting services.²⁵³ This report can serve as a model for other companies undertaking renewable energy projects—namely, it may be easiest to hire an outside consultant to prepare one comprehensive document rather than put together separate more narrowly tailored packets of information for submission to different agencies.

V. CONCLUSION

In the long run, Rhode Island's rocky beginning in renewable energy may someday be forgotten if larger-scale wind farms trim the costs and create more jobs. But for now, the Block Island Wind Farm's controversial state-sponsored journey through the legislative and regulatory process should serve as a cautionary tale to policymakers in other states: by pushing and rushing an otherwise untenable and anticompetitive project through the legal and regulatory system, you risk alienating your constituencies and raising electricity costs.

At the federal level, Deepwater Wind is fortunate to be working within

²⁴⁹ *Reorganization of the Bureau of Ocean Energy Management, Regulation and Enforcement*, BUREAU OF OCEAN ENERGY MGMT., REGULATION AND ENFORCEMENT, <http://www.boemre.gov/> (last visited Jan. 31, 2013).

²⁵⁰ Press Release, Bureau of Ocean Energy Mgmt., Regulation & Enforcement, Fact Sheet: Revisions to Offshore Renewable Energy Regulations (2010), *available at* <http://www.doi.gov/news/pressreleases/loader.cfm?csModule=security/getfile&PageID=73318>.

²⁵¹ Press Release, U.S. Dep't of the Interior, Salazar Launches 'Smart from the Start' Initiative to Speed Offshore Wind Energy Development off the Atlantic Coast (Nov. 23, 2010), *available at* <http://www.doi.gov/news/pressreleases/Salazar-Launches-Smart-from-the-Start-Initiative-to-Speed-Offshore-Wind-Energy-Development-off-the-Atlantic-Coast.cfm>.

²⁵² DEEPWATER WIND, *supra* note 145.

²⁵³ *Our Company*, TETRA TECH, <http://www.tetrattech.com/about/our-company.html> (last visited Feb. 12, 2013).

an evolving regulatory framework designed specifically to accommodate offshore wind energy development. While the wisdom of renewable energy tax credits can be debated and will impact the take-home profitability of such projects, the evolution of the nuts-and-bolts regulatory process is a less controversial, more practical companion to the emerging industry.