Transmission Impossible: The Case for a Nationwide Permit for Offshore Wind Transmission Lines

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The United States is drastically behind the rest of the world when it comes to offshore wind energy. With only one offshore wind farm in operation, developers have cited regulatory burdens and excessive litigation as two of the primary constraints on the industry. Currently, these developers must go through several governmental approval processes, including working with the Bureau of Ocean Energy Management, the Army Corps of Engineers, and state governments. While these lengthy processes rightly offer plenty of opportunities for people to work out legitimate concerns about the projects, some offshore wind opponents have used the process to try to stall and ultimately kill projects.

To help remedy some of that uncertainty plaguing the industry, this Note proposes a new nationwide permit, issued by the Army Corps of Engineers, that would be used exclusively to authorize offshore wind transmission lines. These nationwide permits would drastically speed up approval times, as developers could forgo trying to get their projects individually approved and could instead get their project to fit under these pre-approved permits. Traditionally, the Army Corps of Engineers issues nationwide permits pursuant to its authority under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899. However, as seen in Sierra Club v. Army Corps of Engineers*, projects that use nationwide permits can still be tied up in legal challenges for years when their permits are issued pursuant to Section 404 of the Clean Water Act.*

Therefore, this new nationwide permit would only authorize construction activities that do not constitute a "discharge of dredged materials," which would trigger the need for a Section 404 permit. This proposed permit would only allow construction projects with minimal adverse environmental effects and would

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help with the current needless delay facing offshore wind projects. By streamlining this part of the process, offshore wind developers would have greater certainty and greater ability to attract capital, and the United States would continue to build up an industry that is critical in our fight against climate change.

INTRODUCTION

Offshore wind has the potential to be a huge asset for the United States, with impacts ranging from lowering the amount of carbon emitted by the current electrical system to creating new, green jobs. Located miles off the coast, the wind turbines creating offshore wind energy are powerful generators of electricity as the winds that far from the shore tend to be more regular and reliable than onshore winds.[1] Some industry estimates state that America's coasts offer the opportunity to generate up to 2,000 gigawatts (GWs) of renewable power, twice the nation's current energy consumption.[2]

As such a potentially valuable resource, one would expect that the coastlines of the United States would be dotted with wind farms and that a vibrant offshore wind industry would exist to support the construction and maintenance of the turbines. However, as of the writing of this Note, there is only one offshore wind project online in the United States, generating only 30 megawatts (MWs) of wind power.[3] The industry is beginning to pick up steam, though, as there are over 7,500 MWs of offshore wind projects in progress and another 18,000 MWs of potential capacity in already-issued federal lease areas.[4]

However, it is no small endeavor to build an offshore wind farm. Wind developers must navigate a complex regulatory scheme and failing any of the involved steps could result in the termination of a project. For example, a developer looking to build an offshore wind farm will need to at least obtain permits from the Bureau of Ocean Energy Management (BOEM), the Army Corps of Engineers ("the Corps"), and relevant state agencies.[5] In addition to those permits, developers will need to get approval from the Federal Energy Regulatory Commission (FERC) for the wholesale rates at which it sells power to utilities.[6] Furthermore, in some states, like Rhode Island,[7] developers must also have their power purchase agreements approved by state public utility commissions.[8] While these steps relate more to the project's impact on consumers' energy prices than to the project itself, they still add to the opportunities for public input and to the lengthy project approval process.

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1. *Offshore Wind Research and Development*, OFFICE OF ENERGY EFFICIENCY & RENEWABLE ENERGY, https://www.energy.gov/eere/wind/offshore-wind-research-and-development (last visited June 27, 2020).

2. *Offshore Wind,* AM. WIND ENERGY ASS'N, https://www.awea.org/policy-and-issues/u-s-offshore-wind (last visited June 27, 2020).

3. AM. WIND ENERGY ASS'N, U.S. OFFSHORE WIND INDUSTRY: STATUS UPDATE – OCTOBER 2019 (2019), http://www.awea.org/Awea/media/Resources/Fact%20Sheets/Offshore-Fact-Sheet-Oct-2019.pdf.

4. *Id.*

5. *See* CONG. RESEARCH SERV., R40175, WIND ENERGY: OFFSHORE PERMITTING 2-6 (2015).

6. *See* Federal Power Act § 201, 16 U.S.C. § 824(b)(1) (2018). *See also* New Jersey Dep't of Envtl. Prot., *Permits and Approvals for Construction of Offshore Wind Facilities* (2018), https://www.nj.gov/dep/pcer/docs/windoffshore.pdf (where the offshore wind project needed RHA and CWA permits from the Corps).

7. *See infra* Subpart II.B.

8. 39 R.I. GEN. LAWS § 39-26.1-3 (2020).

All these regulations add more and more time to the project, making the approval process for a project last years, but it is important to keep in mind that most of these regulations are still necessary. Offshore wind farms are serious capital investments that can have detrimental environmental consequences if constructed or sited poorly, including impacts like increasing noise pollution in marine habitats.[9] However, regulation for regulation's sake is not a virtue when it blocks the renewable energy that the United States needs if it is ever going to seriously address climate change. Moreover, opponents have used this complicated regulatory process that was meant to ensure safe and environmentally-friendly wind farms to instead stall and destroy these projects.[10] The opponents do not even have to defeat the project in court; the simple act of dragging out the process is enough to kill an offshore wind farm by driving up costs, making a project miss critical deadlines set out in its power purchase agreement, or scaring off investors.[11]

While BOEM is the federal agency that handles most offshore wind permitting, the Corps has retained some key permitting authorities for offshore wind projects. The Corps, pursuant to its authority under Section 10 of the Rivers and Harbors Act of 1899 (RHA) and Section 404 of the Clean Water Act (CWA), issues permits for activities that involve the construction in or discharge of dredged materials into the navigable waters of the United States.[12] The Corps authorize these activities in one of two ways. The Corps may decide to issue an individualized permit, which requires a lengthy, fact-specific, case-by-case analysis of each project and its impact on the environment.[13] Alternatively, applicants may apply so that their project fits under an already approved national

9. Chloe Taylor et al., *Offshore Wind Energy is a Breeze Environmental & Wildlife Impacts*, CHESAPEAKE CLIMATE ACTION NETWORK (Nov. 16, 2018), https://chesapeakeclimate.org/offshore-wind-energy-breeze-environmental-wildlife-impacts/; *see also* J. Carstensen et al., *Impacts of Offshore Wind Farm Construction on Harbour Porpoises Acoustic Monitoring of Echo-Location Activity Using Porpoise Detectors (T-PODs)*, 321 MARINE ECOLOGY PROGRESS SERIES 295, 306-07 (2006); *see also* WEATHER GUARD LIGHTNING TECH, *Wind Turbine Cost How Much? Are They Worth It In 2020?*, (March 24, 2020) https://weatherguardwind.com/how-much-does-wind-turbine-cost-worth-it/ (where wind turbines cost millions of dollars per megawatt and offshore wind turbines can be as large as 12 megawatts) (last visited November 30, 2020).

10. *See* Katharine Q. Seelye, *After 16 Years, Hopes for Cape Cod Wind Farm Float Away*, N.Y. TIMES (Dec. 19, 2017), https://www.nytimes com/2017/12/19/us/offshore-cape-wind-farm html; *see also* Scott McFetridge, *New Rebellion Against Wind Energy Stalls or Stops Projects*, SEATTLE TIMES (Feb. 21, 2018, 9:05 PM), https://www.seattletimes.com/business/new-rebellion-against-wind-energy-stalls-or-stops-projects/.

11. *See* Seelye, *supra* note 10; *see also* McFetridge, *supra* note 10.

12. Clean Water Act § 404, 33 U.S.C. § 1344 (2018); Rivers and Harbors Appropriation Act of 1899 § 10, 33 U.S.C. § 403 (2018).

13. *See* Sierra Club v. Army Corps of Eng'rs, 909 F.3d 635, 63–40 (4th Cir. 2018).

or regional permit.[14] These permits were designed by the Corps to speed up the authorization of activities that only create a minimal environmental impact.[15]

Given its preexisting authority to create and award permits, the Corps should issue a new nationwide permit (NWP) specifically for offshore wind transmission lines. Instead of authorizing entire offshore wind projects, this permit would only cover the projects' transmission lines, as those cables would be in navigable waters of the United States located in the Corps' jurisdictional waters.[16] This Note argues that the Corps should draft the permit so that it approves activities under the RHA, but also ensure that the activities do not discharge enough dredged materials to require authorization under the CWA. Eliminating this one requirement would still leave the lengthy and thorough regulatory schemes created by BOEM and the states in place, but it would give offshore wind developers more certainty by eliminating one avenue that opponents could use to challenge projects.

There is precedent for the Corps to issue new NWPs pertaining to energy issues for the construction of offshore renewable energy projects. For example, there is Nationwide Permit 52 for Water-Based Renewable Energy Pilot Programs but that program is only for small pilot programs, not full wind farms.[17] Alternatively, there is Nationwide Permit 12 for Utility Lines, which could be used to approve the transmission lines going out to the offshore wind farm, but has other drawbacks (namely, being subject to Section 404 of the CWA) that will be explored later in this Note.[18] Like many, but not all of the NWPs, both of these permits are subject to both the RHA and the CWA.[19]

While the CWA has been pivotal in protecting America's waters, opponents of projects issued under the existing NWPs have used the Act's requirements to stall projects, as illustrated in *Sierra Club v. Army Corps of Engineers*.[20] In that case, the Corps had issued an NWP for an oil pipeline, pursuant to both the CWA and the RHA.[21] Opponents were able to challenge the procedural CWA portions of the permit and halt construction of the project for years.[22] While this specific

14. *Regulatory Program Frequently Asked Questions*, U.S. ARMY CORPS OF ENG'RS, https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Frequently-Asked-Questions/ (last visited June 27, 2020).

15. *See* CONG. RESEARCH SERV., 97-233, THE ARMY CORPS OF ENGINEERS' NATIONWIDE PERMITS PROGRAM: ISSUES AND REGULATORY DEVELOPMENTS 3 (2017).

16. *See* Jeffrey Thaler, *Fiddling as the World Floods and Burns How Climate Change Urgently Requires a Paradigm Shift in the Permitting of Renewable Energy Projects*, 42 ENVTL. L. 1101, 1140–41 (2012). *See also* CONG. RESEARCH SERV., *supra* note 5, at 5.

17. *See* U.S. ARMY CORPS OF ENG'RS, DECISION DOCUMENT NATIONWIDE PERMIT 52 1 (2016), https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll7/id/6763.

18. *See* U.S. ARMY CORPS OF ENG'RS, DECISION DOCUMENT NATIONWIDE PERMIT 12 1-4 (2016), https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll7/id/6725.

19. *See 2017 Nationwide Permits Final Decision Documents*, U.S. Army Corps of Eng'rs, https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Nationwide-Permits/2017_NWP_FinalDD/ (last visited July 1, 2020).

20. *See generally* Sierra Club v. Army Corps of Eng'rs, 909 F.3d 635 (4th Cir. 2018).

21. *Id.* at 640.

22. *Id.* at 641–42.

legal avenue has not been used against offshore wind projects, the "delay at all costs" strategy that offshore wind opponents have taken means it would only be a matter of time before an offshore wind project was challenged in this way.[23] Consequently, the Corps should issue a narrow nationwide permit that will not trigger the CWA.

In this Note, I argue that the Army Corps of Engineers should issue a new nationwide permit for offshore wind transmission lines. In Part I, I briefly explain how offshore wind turbines work and the many ways in which they are regulated. Then, in Part II, I analyze two different offshore wind projects in the United States, their different regulatory experiences, and how opposition killed off the first offshore wind project. Finally, I focus in Part III on the NWP process and why the Army Corps of Engineers should issue a new NWP for offshore wind transmission lines that is not subject to Section 404 of the CWA. These new permits should alleviate some regulatory uncertainty and encourage more offshore wind to be built in the United States.

I. OFFSHORE WIND PROJECTS MUST COMPLY WITH EXTENSIVE FEDERAL, STATE, AND LOCAL GOVERNMENT REGULATIONS

Before delving into the regulatory fight that offshore wind projects face, I want to establish a baseline of how offshore wind turbines work, where they are located, and how that impacts their regulation. In this Part, I outline the basics of offshore wind energy, followed by the current regulatory scheme that projects must navigate.

A. How Offshore Wind Turbines Work and the Current State of Offshore Wind in the United States

In order to understand the regulations facing offshore wind projects, it is necessary to understand how these projects are constructed and situated. Like their onshore counterparts, offshore wind turbines capture the kinetic power of wind to rotate their large blades, which then turn a rotor to generate electricity.[24] These blades and generators are placed atop tall, steel towers and have access to stronger and more reliable winds.[25] Some offshore turbines are secured to the sea floor with large steel foundations, while others are held in place by floating platforms, buoys, or other floating technology.[26] The energy generated from these wind turbines is then transmitted back to the onshore electrical grid through

23. *See generally Offshore Wind Farm Cape Wind Officially Comes to an End*, RENEWABLE ENERGY WORLD (Dec. 4, 2017), https://www.renewableenergyworld.com/2017/12/04/offshore-wind-farm-cape-wind-officially-comes-to-an-end/.

24. *Basics of Wind Energy,* AM. WIND ENERGY ASS'N, https://www.awea.org/wind-101/basics-of-wind-energy (last visited June 27, 2020).

25. *See id.*

26. *Top 10 Things You Didn't Know About Offshore Wind Energy*, OFFICE OF ENERGY EFFICIENCY & RENEWABLE ENERGY (Aug. 12, 2019), https://www.energy.gov/eere/wind/articles/top-10-things-you-didn-t-know-about-offshore-wind-energy.

undersea transmission lines.[27] These cables are buried about six feet under the ocean floor, with developers using specially designed ships and robots to dig up trenches to place the lines.[28] While there are some concerns about the heat generated or the impact of electromagnetic fields on aquatic wildlife, the environmental impact of the cables themselves tends to be very minimal.[29] These cables, as described in the Subpart below, are subject to several different regulatory reviews.

Offshore wind turbines have some distinct advantages compared with onshore turbines. Offshore turbines can be much larger and, therefore, can generate more electricity per turbine.[30] Additionally, the winds offshore are stronger and more regular than onshore winds, which means the turbines can generate more power, more reliably.[31] According to industry sources, offshore wind in the United States has the potential to provide over 2,000 GWs of power, more than double the amount of power the nation currently consumes.[32] However, at the time this Note is written, there is only one complete offshore wind project in the United States, which is the 30 MW Block Island Project off the coast of Rhode Island.[33] In the next Subpart, I explore the complicated hurdles that projects like the Block Island Project have to go through and why it can be so difficult for such projects to succeed.

B. Federal, State, and Local Governments Regulate Different Aspects of Offshore Wind Projects

The reason offshore wind turbines are regulated by several different governmental entities is due to the entities' overlapping jurisdictions over the United States' coastal waters.[34] As I address in Subpart I.B.1, the federal government regulates ocean waters differently based on how far a project is from the shore. The first twelve nautical miles from the shore are known as the "U.S. territorial waters," in which the federal government regulates the air space, water, seabed, and subsoil.[35] In the "U.S. contiguous zone," the federal government regulates the commerce, immigration, and sanitation of waters between twelve to twenty-four nautical miles from the shore.[36] The federal government claims jurisdiction over projects constructed in waters between twenty-four and two

27. *Id.*

28. Patrick J. Kiger, *New Energy Projects Boost the Use of Undersea Power Cables*, NAT'L GEOGRAPHIC (Aug. 18, 2014), https://www.nationalgeographic.com/news/energy/2014/08/140819-submarine-power-cables-offshore-wind/.

29. *Id.*

30. *See* OFFICE OF ENERGY EFFICIENCY & RENEWABLE ENERGY, *supra* note 26.

31. *Id.*

32. AM. WIND ENERGY ASS'N, *supra* note 1.

33. AM. WIND ENERGY ASS'N, *supra* note 3, at 1.

34. CONG. RESEARCH SERV., *supra* note 5, at 2–6, 9.

35. *Id.* at 1.

36. *Id.*

hundred nautical miles from the shore, in the nation's Exclusive Economic Zone.[37]

Within that federal jurisdiction, BOEM is now the agency responsible for regulating and permitting offshore wind farms in federal waters.[38] Historically, the Army Corps of Engineers claimed jurisdiction to regulate offshore wind farms.[39] The Corps relied on Section 10 of the RHA, which gave the Corps the authority to permit obstructions in navigable waters, and on the Outer Continental Shelf Lands Act, which extended that authority to the Outer Continental Shelf.[40] However, Congress did not specifically designate responsibility for regulating offshore wind farms to any particular agency until the Energy Policy Act of 2005, when Congress shifted the majority of that authority to the Department of the Interior.[41] Since then, the Secretary of the Interior, in consultation with other federal agencies, has the leading role in permitting offshore wind farms on the Outer Continental Shelf.[42] After several subsequent reorganizations and delegations, BOEM—an agency within the Department of the Interior—has taken on the majority of the responsibility for managing offshore wind projects at the federal level.[43]

However, despite BOEM's explicit authorization, other agencies still have roles in regulating offshore wind projects. While the Army Corps of Engineers may not be the lead agency, it still regulates the projects under its authority from the CWA and the RHA.[44] Furthermore, states retain some jurisdiction with regards to projects that are within three nautical miles of their coasts.[45]

Given these multiple layers of regulation, it is important to clearly lay out what steps offshore wind projects must navigate and what parties control those steps. In this Subpart, I first focus on the lengthy process BOEM makes offshore wind projects go through. Then, I elaborate on how the Army Corps of Engineers has retained a small, but vital role, in the permitting process. Finally, I explore how states also have the ability to regulate offshore wind projects. This Subpart demonstrates how extensive these regulations are and how there is ample opportunity for public participation and objection throughout the process.

37. *Id.* at 1–2.

38. *Id.* at 5.

39. Michael B. Gerrard, *Legal Pathways for a Massive Increase in Utility-Scale Renewable Generation Capacity*, 47 ENVTL. L. REP. NEWS & ANALYSIS 10591, 10598 (2017).

40. CONG. RESEARCH SERV., supra note 5, at 4.

41. *See* Gerrard, *supra* note 39, at 10598–99; *id.* at 3.

42. CONG. RESEARCH SERV., *supra* note 5, at 4-5.

43. *Id.*

44. *Id.* at 5. *See also* New Jersey Dep't of Envtl. Prot., *supra* note 6.

45. *Id.* at 1–2, 6.

1. BOEM has a Four-Step Process That Includes Several Opportunities for Public Input

While there are still roles reserved for the Army Corps of Engineers and state governments, BOEM leads the majority of the permitting process for offshore wind farms.[46] In this Subpart, I lay out BOEM's four-step process for authorizing offshore wind projects, which involves approving (1) the planning of the project, (2) the leasing process, (3) the site assessment, and finally (4) the project's construction and operations.[47]

First, once a state or offshore wind developers express their interest in building an offshore wind farm, BOEM establishes an Intergovernmental Renewable Energy Task Force, consisting of federal, state, local, and tribal officials.[48] While this task force is not a decision-making body, BOEM does coordinate with the task force to see if and how renewable energy leasing should proceed.[49] Finally, after having either delineated an area for development or having received an unsolicited application from a developer, BOEM will publish notices in the Federal Register, both to entice competitive bids for the space and to solicit comments from the public.[50]

Second, BOEM will start the leasing process by sorting through competitive bids, public comments, and environmental reviews. If there are multiple competitive bids, BOEM will attempt to balance the prospective offshore wind projects with concerns raised by the public.[51] If it identifies a suitable area for offshore wind development, BOEM will conduct the necessary environmental reviews before publishing a notice for lease sales.[52] If there are no competitive bids, BOEM will then conduct the necessary environmental reviews and begin negotiating a lease.[53]

BOEM must then conduct its required environmental reviews for both the competitive and non-competitive leases. For example, in accordance with the National Environmental Policy Act, BOEM must coordinate with other federal, state, or local entities to conduct an environmental review.[54] The agency will at least issue an environmental assessment, whose results could force the project to complete a much more in-depth environmental impact statement.[55] These environmental reviews just further ensure that a project's impacts are made clear

46. *See* CONG. RESEARCH SERV., *supra* note 5, at 4-6.

47. U.S. DEP'T OF ENERGY & U.S. DEP'T OF THE INTERIOR, NATIONAL OFFSHORE WIND STRATEGY: FACILITATING THE DEVELOPMENT OF THE OFFSHORE WIND INDUSTRY IN THE UNITED STATES 35 (2016), https://www energy.gov/sites/prod/files/2016/09/f33/National-Offshore-Wind-Strategy-report-09082016.pdf.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 35–36.

52. *Id.* at 36.

53. *Id.*

54. CONG. RESEARCH SERV., *supra* note 5, at 8.

55. *See id.*

to the public, so that it has an opportunity to comment on the specifics of particular wind farm.[56] Additionally, the project may be subject to further environmental scrutiny by the public and by federal agencies due to the reviews required by the Endangered Species Act, the Marine Mammal Protection Act, and the Migratory Bird Treaty Act.[57]

Third, after the leasing process is concluded, BOEM begins the Site Assessment Phase. In this phase, the lessee has five years to complete the characterization and assessment of what it plans to build on that site.[58] BOEM must then review and approve this part of the submission.[59] Importantly, if the assessment the lessee submits is outside the scope of BOEM's previous environmental reviews, the agency may require new environmental reviews.[60]

For the final step, BOEM reviews the lessee's Construction and Operation Plan, which should contain details of how the lessee plans to build and operate its offshore wind project.[61] BOEM will also then examine the project's engineering plan and its specific environmental impact.[62] Assuming the plan is approved, the lessee must then submit another report detailing the work needed to create and install those facilities.[63] Only after BOEM's concerns have been resolved can the lessee proceed with construction.[64]

While this process may seem long, it does have the benefit of providing multiple opportunities for public input. The various comment periods, whether at the project's leasing stage or during environmental reviews, ensures that the public has plenty of opportunities to engage with a project.[65]

2. The Army Corps of Engineers Has Retained Some Jurisdiction over Offshore Wind Projects

Despite the Energy Policy Act's delegation of authority to BOEM, the Army Corps of Engineers retains the authority to regulate structures like offshore wind projects due to its historical jurisdiction over structures built in the navigable waters of the United States.[66] First, the Corps issues permits under Section 10 of the RHA for any structure that impacts the course, location, or condition of the navigable waters of the United States.[67] Second, the Corps issues permits under Section 404 of the CWA for projects that discharge dredged or fill

56. *Id.*
57. *Id.* at 9.
58. U.S. DEP'T OF ENERGY & U.S. DEP'T OF THE INTERIOR, *supra* note 47, at 36.
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.* at 36–37.
64. *Id.* at 37.
65. BOEM's actions are also subject to the Administrative Procedure Act and can be challenged for, among other things, being arbitrary and capricious. *See* 5 U.S.C. § 706.
66. *See* CONG. RESEARCH SERV., *supra* note 5, at 5.
67. 33 U.S.C. § 403 (2018).

material into the waters of the United States.[68] While many projects need certification under both statutes, some projects may only require one permit from the Corps.[69]

In order to certify a project, the Corps may either issue an individual permit or a general permit.[70] Individual permits are handled on a "case-by-case" basis, through the Corps' own resource-intensive review that requires, among other things, extensive site-specific research, engagement with the public and other federal agencies, and the preparation of formal analyses.[71] Alternatively, applicants can try to fit their project under an already-approved standing authorization of a general permit.[72] The Secretary of the Army may, through the Army Corps of Engineers, issue such general permits on a state, regional, or nationwide basis.[73] Each of these general permits lasts five years, but they may be revoked by the Secretary of the Army if, after public input, the Secretary decides that there are in fact cumulative negative impacts on the environment.[74] The Army Corps of Engineers has issued general permits, including the NWPs, since the mid-1970s and Congress officially codified the program as part of the CWA amendments in 1977.[75]

Nationwide permits are meant to minimize the burden and regulatory delay for projects that will have minimal environmental impacts.[76] Since 1977, the Army Corps of Engineers has reissued the nationwide permits every five years, with the most recent authorization happening in 2017.[77] Currently, there are fifty-two nationwide permits, authorizing activities from utility line construction to cranberry production.[78] In 2016, the average processing time for a nationwide permit was forty days, compared to 217 days for an individual permit.[79] With that stark disparity in processing times, it should come as no surprise that between 2012 and 2015, 97 percent of the 63,000 activities authorized each year were under one of these general permits.[80] Because less than 1 percent of all permits ends up being rejected,[81] what really matters to projects is the time that is spent pursuing these permits.

Each time the Corps issues or reissues nationwide permits, it prepares a regulatory impact analysis for the entire set of permits. For each of the

68. 33 U.S.C. § 1344 (2018).
69. *See* U.S. ARMY CORPS OF ENG'RS, *supra* note 19.
70. *See* U.S. ARMY CORPS OF ENG'RS, *supra* note 14.
71. Crutchfield v. Cty. of Hanover, 325 F.3d 211, 214 (4th Cir. 2003) (citing 33 C.F.R §§ 320.4, 325.1-25.3 (2003)).
72. CONG. RESEARCH SERV., *supra* note 15, at 1.
73. 33 U.S.C. §1344(e)(1) (2018).
74. *Id.* § 1344(e)(2).
75. CONG. RESEARCH SERV., *supra* note 15, at 4.
76. *See id.* at 1, 3.
77. *Id.* at 4–5.
78. *Id.* at 1.
79. *Id.* at 2.
80. *Id.* at 2.
81. U.S. ARMY CORPS OF ENG'RS, *supra* note 14.

nationwide permits, the Corps analyzes environmental assessments to ensure the permits will only have minimal environmental impacts, both in their individual uses and the cumulative applications.[82] For example, when reissuing Nationwide Permit 52, the Corps evaluated the impact of projects not only as statutorily required under the RHA and CWA, but also evaluated the impact that projects would have under other federal environmental statutes like the Coastal Zone Management Act (CZMA), the National Environmental Policy Act, and the Fish and Wildlife Coordination Act.[83] The Corps compiles its information into decisions documents that contain extensive details like the total combined environmental impacts the permits would cause across the nation, statutory authority required, other alternatives to the NWP, and public interest in the projects.[84] The Corps also predicts how many times the permit will be used in the five-year authorization period and if any harm mitigation would be needed if any environmental impacts were identified.[85]

After a lengthy process of engaging the public, interest groups, and federal agencies, the Corps will issue the nationwide permits. In addition to releasing its decision-making documents, the Corps will release documents containing general conditions that apply to all the permits to help protect the environment generally, as well as specific conditions that will apply to each individual NWP.[86]

3. In Addition to Federal Regulations, States Also Have the Ability to Regulate Offshore Wind Farms

While offshore wind projects may be located in federal waters, the states still retain a role in regulating such projects through the Coastal Zone Management Act. Through the CZMA, Congress attempted to preserve, protect, and potentially develop coastal resources while creating and implementing

82. CONG. RESEARCH SERV., *supra* note 15, at 6.

83. *See* U.S. ARMY CORPS OF ENG'RS, *supra* note 17, at 3–4 (stating "[t]he evaluation of this NWP, and related documentation, considers compliance with each of the following laws, where applicable: Sections 401, 402, and 404 of the Clean Water Act; Section 307(c) of the Coastal Zone Management Act of 1972, as amended; Section 302 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended; the National Environmental Policy Act of 1969; the Fish and Wildlife Act of 1956; the Migratory Marine Game-Fish Act; the Fish and Wildlife Coordination Act, the Federal Power Act of 1920, as amended; the National Historic Preservation Act of 1966; the Interstate Land Sales Full Disclosure Act; the Endangered Species Act; the Deepwater Port Act of 1974; the Marine Mammal Protection Act of 1972; Section 7(a) of the Wild and Scenic Rivers Act; the Ocean Thermal Energy Act of 1980; the National Fishing Enhancement Act of 1984; the Magnuson-Stevens Fishery and Conservation and Management Act, the Bald and Golden Eagle Protection Act; and the Migratory Bird Treaty Act. In addition, compliance of the NWP with other Federal requirements, such as Executive Orders and Federal regulations addressing issues such as floodplains, essential fish habitat, and critical resource waters is considered.").

84. *See, e.g.*, *id.*

85. CONG. RESEARCH SERV., *supra* note 15, at 6.

86. *Id.* at 3.

comprehensive land and water use planning.[87] Instead of dictating federal regulations, Congress instructed the states to make plans that would meet congressional criteria, such as plans that define coastal boundaries as well as plans for what specific land and water uses will be subject to that plan.[88] These Coastal Zone Management Plans are supposed to give the states flexibility to meet federal guidelines in ways that would best suit their circumstances.[89] However, the Secretary of Commerce still retains some control as he or she must approve plans for states to receive federal funding.[90]

Under the CZMA, states have the jurisdiction to regulate offshore wind transmission cables that transmit power back to the shore and potentially have jurisdiction over wind turbines in federal waters depending on where the turbines are built.[91] When the federal government itself acts or approves other's activities with permits in state waters, the CZMA requires a consistency review with the state's Coastal Zone Management Plan.[92] However, the Secretary of Commerce can overrule a state's objections if he or she determines that the project would in fact be in compliance with a state's Coastal Zone Management Plan.[93]

In conclusion, offshore wind projects must go through a comprehensive regulatory system. This system requires a project to go through a four-step BOEM process, obtain permits from the Army Corps of Engineers, and navigate state regulations. These processes create a lengthy system that provides plenty of opportunities for public engagement. Because the regulatory system is already quite comprehensive, issuing a new NWP would not leave offshore wind projects unregulated or deny the opportunity for public input. However, even under the best circumstances, the existing process can take years. Meanwhile, opponents can use procedural hurdles to slow down and eventually kill offshore wind projects.

II. THE EXTENSIVE REGULATION OF THE OFFSHORE WIND INDUSTRY PRESENTS SEVERAL OPPORTUNITIES FOR OPPOSITION TO DELAY PROJECTS UNTIL THEY BECOME INFEASIBLE

The divergent stories of the Cape Wind Project and the Block Island Project illustrate how regulatory structures can be used to either help or kill offshore

87. NAT'L OCEANIC & ATMOSPHERIC ADMIN., COASTAL ZONE MANAGEMENT OVERVIEW 12, https://coast.noaa.gov/data/digitalcoast/pdf/czma-overview.pdf (last visited June 27, 2020).

88. *Id.* at 18.

89. *Id.* at 12.

90. *See* CONG. RESEARCH SERV., *supra* note 5, at 2.

91. *Id.* at 3.

92. *Id.* at 2–3.

93. Erica Schroeder, Comment, *Turning Offshore Wind On*, 98 CALIF. L. REV. 1631, 1647 (2010). Additionally, offshore wind projects may be subject to many other state regulatory processes, including a state's environmental regulations or getting approval from the state's public utility commission, but those processes will not be covered in this Note.

wind projects. While this subject has been covered extensively by others,[94] a short history is important to highlight how opponents will fight against these wind farms. It should be noted that there are people with legitimate concerns about offshore wind farms, such as fishermen who worry about the wind farms' impacting their livelihoods.[95] However, wind turbines have always had other opponents, ranging from fossil fuel interests who fund anti-wind initiatives[96] to wealthy homeowners who would rather not see the turbines in the distance.[97] The goal of this Note is to not override all objections to offshore wind projects, but to remove one tactic from those who oppose offshore wind projects with such ulterior motives. Their tactics, which were on full display with the Cape Wind Project, showed how the regulatory process can be abused by people with enough money to take down projects. By contrast, the Block Island Project shows how community and regulatory support can help speed the process for a project.

A. The Defeat of the Cape Wind Project by Many Delays

The demise of the Cape Wind Project demonstrates how a well-funded opposition campaign need not defeat a wind project in court; all it has to do is delay the project long enough to make it financially infeasible. In 2001, the Cape Wind Project was set to be the first offshore farm in the United States.[98] The project's developer invested between $40 and $100 million into the wind farm and pursued the necessary permits for over a decade.[99] The wind farm was going to be about five miles off the coast of Cape Cod in Nantucket, Massachusetts and would feature 130 turbines over a twenty-five-square-mile area.[100] It would have generated over 450 MWs, enough to power roughly 200,000 homes.[101]

Described as experiencing a "slow death," the Cape Wind Project faced organized opponents who used the legal system to create obstacle after obstacle to block the wind farm.[102] Though the project would be five miles off the coast,

94. *See, e.g.*, Dominic Spinelli, Note, *Historic Preservation & Offshore Wind Energy Lessons Learned from the Cape Wind Saga*, 46 GONZ. L. REV. 741 (2010-2011); Jeremey Firestone et al., *Wind in the Sails or Choppy Seas? People-Place Relations, Aesthetics and Public Support for the United States' First Offshore Wind Project*, 40 ENERGY RES. & SOC. SCI. 232 (2018).

95. *See* Gerrard, *supra* note 39, at 10600.

96. *See* Rebecca Leber, *Oil Billionaire Weighs in on Wind Turbines "Once They're There, They Haunt You"*, THINKPROGRESS (Aug. 20, 2013, 4:41 PM), https://thinkprogress.org/oil-billionaire-weighs-in-on-wind-turbines-once-theyre-there-they-haunt-you-7424092684bf/.

97. For example, President Trump has had a contentious relationship with offshore wind since turbines were put off the coast of his golf course in Scotland. *See* Aaron Rupar, *Future Generations Will Look Back on Trump's Latest Wind Turbines Rant in Awe and Horror*, VOX (Dec. 23, 2019, 12:20 PM), https://www.vox.com/policy-and-politics/2019/12/23/21035132/trump-wind-turbines-turning-point-usa-speech.

98. *See* Kenneth Kimmell & Dawn Stolfi Stalenhoef, *The Cape Wind Offshore Wind Energy Project A Case Study of the Difficult Transition to Renewable Energy*, 5 GOLDEN GATE U. ENVTL. L.J. 197, 198, 201 (2011); *see also* Seelye, *supra* note 10.

99. *See* Kimmell & Stalenhoef, *supra* note 98, at 199; Seelye, *supra* note 10.

100. Kimmell & Stalenhoef, *supra* note 98, at 200.

101. *Id.*

102. RENEWABLE ENERGY WORLD, *supra* note 23.

wealthy landowners on the waterfront were concerned that the wind turbines could be seen from their properties.[103] This common cause among the wealthy led to an unusual bipartisan alliance, including the likes of liberal Senator Ted Kennedy and William Koch, the brother of the infamous conservative megadonors, Charles and David Koch.[104] For his part, Kennedy lobbied against the wind farm and attempted to stop the project by introducing amendments to various unrelated bills to halt all development of offshore wind until there was further study.[105] As for William Koch, he co-chaired the Alliance to Protect Nantucket Sound (the Alliance), where he said his strategy was to "delay, delay, delay" the wind project by constantly challenging rulings in favor of the Cape Wind Project.[106]

In order to "delay, delay, delay" the projects, the Alliance challenged decision after decision to stall the project indefinitely.[107] It poured millions into challenging every successful ruling that the Cape Wind Project received.[108] As a result of the Alliance and its challenges, the project faced hurdles from the state's Cape Cod Commission (which had jurisdiction over the transmission cables) and from federal permitting agencies, and from various lawsuits.[109] The Alliance even unsuccessfully challenged the Army Corps of Engineers permit for an otherwise insignificant data tower to test the winds in that area.[110] Each of these interruptions delayed the project's construction a bit further, shortening the timeline to actually build the project every time.

Ultimately, this "delay at every turn" strategy worked, as the project ended up missing a major construction deadline in 2015, which led to the cancellation of its contracts to sell power to the local utilities.[111] It was this dragging out of the permitting process, combined with the lawsuits, that slowed the project down and resulted in its abandonment.[112] Given that this was the first attempt at an offshore wind farm, it is easy to see how legal challenges could scare away investors who might not be willing to pour extra millions in to defending a project in court.

103. Seelye, *supra* note 10.

104. *See id.*

105. Throughout his tenure in the Senate, Senator Kennedy proposed at least one amendment attempting to block the offshore wind project. Several senators and representatives (including Senator John Warner of Virginia, who, it was later revealed, had family and friends that owned property on the Cape), joined Senator Kennedy's efforts to introduce several amendments from 2002 onwards, but none of these amendments succeeded in becoming law. Kimmell & Stalenhoef, *supra* note 98 at 203–04.

106. Seelye, *supra* note 10.

107. *Id.*

108. *Id.*

109. *See* Kimmell & Stalenhoef, *supra* note 98, at 207–09.

110. *Id.* at 216–19.

111. Seelye, *supra* note 10.

112. *Id.*

B. The Block Island Wind Project Shows What Happens When a Project Has Broad Support

In contrast to the Cape Wind Project, which failed due to concerted political and legal pushback, the Block Island Project had the political and community support necessary to become the first offshore wind farm in the United States.[113] In 2006, while the Cape Wind Project was struggling through regulatory issues, Rhode Island Governor Donald Carcieri announced a plan to acquire more wind energy for the state.[114] After a competitive bidding process, state officials selected Deepwater Wind to build Rhode Island's first offshore wind farm.[115]

One of the keys to Block Island's success was the relative ease in which it navigated the regulatory hurdles. From the start, Rhode Island promised to help the project with the state and federal regulatory processes.[116] In particular, Rhode Island conducted extensive studies of its waters to figure out where to place the project and brought natural opponents of the wind project, like fishing groups, to the negotiating table to try to resolve their issues early on.[117]

The Block Island Project was also helped along by substantial political and community support. For the community, this project represented a chance for a concrete and targeted benefit in the form of massive electricity savings.[118] Block Island had incredibly high electricity rates[119] and this wind farm provided its residents with a cheaper way to power their community.[120] The new wind project, which may not have lowered the bills in other areas of the country, would drastically lower the bills in Block Island and bring the community a massive financial payout.[121] This specific benefit may be why the community was more receptive than the community around the Cape Wind Project.[122] Politically, the project enjoyed support from not only the governor, but also the legislature, which twice redefined what counted as "commercially reasonable" proposals so that the utilities had to purchase power from the wind farm.[123]

Like most offshore wind projects, the Block Island wind farm needed permits from the Army Corps of Engineers, approving the project's impact on

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113. Brian M. Gibbons, Note, *Second Wind A Legal and Policy-Based Evaluation of the Block Island Wind Farm and the Legislation That Saved It*, 45 CONN. L. REV. 1457, 1460–62 (2013).

114. *Id.* at 1460.

115. *Id.*

116. *Id.*

117. Gerrard, *supra* note 39, at 10600.

118. *Id.*

119. Block Island was powered by expensive diesel generators, with costs reaching 60 center per kilowatt/hour. *See* Michelle Froese, *Block Island Officially Switches from Diesel to Offshore Wind Power,* WINDPOWER ENG'G & DEV., (May 1, 2017), https://www.windpowerengineering.com/block-island-officially-switches-diesel-offshore-wind-power/.

120. Gerrard, *supra* note 39, at 10600.

121. *See id.*

122. It may also be a factor that the majority of homeowners on Cape Cod are incredibly wealthy and perhaps electricity savings are not at the forefront of their minds. *See* Seelye, *supra* note 10. *See also* Froese, *supra* note 119.

123. Gibbons, *supra* note 113 at 1460–61.

the navigable waters under Section 10 of the RHA and the impact of construction and dredging on water quality under Section 404 of the CWA.[124] Deepwater Wind submitted its project in September 2012.[125] Two years later, after a lengthy comment period, Deepwater got all its permits approved in September 2014 as the Corps's report found that the project and its transmission systems would not adversely impact the environment.[126] Finally, because it lacked the legal struggles that troubled the Cape Wind Project, Deepwater Wind was actually able to build the first offshore wind farm in America and brought it online in December 2016, with five turbines and a generating capacity of 30 MWs.[127]

C. Community Support is Key to Certainty for These Projects and Their Success

There are innumerable differences that could have led to the divergent outcomes between these two projects, but the most striking difference is the support of the community. In Block Island, the community where the wind farm was being built was supportive of the project and used that support to help it succeed, including by having the local governments come around to support the wind farm.[128] That support was key as the project worked its way through the regulatory process described in Part I of this Note.

In contrast, the community in the Cape Wind Project was able to successfully block the project from ever being built. Their "delay, delay, delay" regulatory strategy took the already lengthy process that all projects must go through and stretched it out even further, to the point where the project missed a critical construction deadline and its power purchase agreement with the utility was cancelled. This particular opposition may be unique, as most communities are not as full of wealthy and politically connected opponents as those the Cape Wind Project faced. However, Cape Cod will not be the only place where opposition emerges and it does not require the assets of billionaires to coordinate a strategy of endless lawsuits.

Without community support, projects risk constant appeals and new lawsuits to try to slow them down. The lawsuits should be "avoided at all costs."[129] Their potential to slow down projects could scare away investors who may be nervous of investing upwards of hundreds of millions of dollars if there are

124. *Id.* at 1477–78.

125. *Deepwater Wind (Block Island Wind Farm)*, U.S. ARMY CORPS OF ENG'RS, https://www.nae.usace.army.mil/Missions/Projects-Topics/Deepwater-Wind/ (last visited June 27, 2020).

126. *Corps approves Deepwater Wind's permit request to construct five wind turbines off Block Island coast*, U.S. ARMY CORPS OF ENG'RS, https://www.nae.usace.army.mil/Media/News-Releases/Article/497044/corps-approves-deepwater-winds-permit-request-to-construct-five-wind-turbines-o/ (last visited November 21, 2020).

127. *See Our Offshore Wind Projects in the U.S.*, ORSTEAD, https://us.orsted.com/wind-projects (last visited June 27, 2020).

128. Gerrard, *supra* note 39, at 10600.

129. Michelle Froese, *Lessons Learned from Cape Wind,* WINDPOWER ENGINEERING & DEV. (July 30, 2019), https://www.windpowerengineering.com/lessons-learned-from-cape-wind/.

going to be years of extensive court battles. Not knowing the fate of regulatory hurdles, in addition to the risk of lawsuits from community groups, could scare away investment in these windfarms.[130] Moreover, offshore wind farms are particularly risky investments as there is a high capital cost of preparing the site and the equipment often has to be created and made as site specific as possible to take advantage of each location's unique geography and wind resource.[131]

Despite its eventual success, the Block Island wind farm still took ten years to build and had to go through many of the same regulatory processes that the Cape Wind Project went through. The Block Island Project was certainly helped along by a supportive public and state, especially considering the project was within the state's three-mile coastal zone.[132] However, given the growing need for renewable energy to decrease our reliance on fossil fuels,[133] it will not be possible to build every project in an area with near-perfect political and community support.

III. GIVEN THE REGULATORY AND POLITICAL HURDLES FOR OFFSHORE WIND PROJECTS, THE ARMY CORPS OF ENGINEERS SHOULD ISSUE A NEW NATIONWIDE PERMIT FOR OFFSHORE WIND TRANSMISSION LINES

Because project organizers and developers cannot count on stellar community relations each time they want to build a wind farm, and because there are monied offshore wind opponents willing to fund legal challenges, we should be looking for ways to minimize some of that legal uncertainty for offshore wind projects. In this Note, I advocate for one way to do just that: by proposing a new NWP for offshore wind transmission lines. As mentioned, offshore wind has the potential to provide more than double the nation's current power consumption.[134] While the idea of capturing and using all that power is farfetched, it is equally as farfetched that the United States only has one offshore wind farm, generating only 30 MWs.[135] To put these numbers in context, as of 2018, Europe has 18,499 MWs offshore wind projects installed already.[136]

One way to help close that gap would be to provide more regulatory certainty to offshore wind developers and investors. Offshore wind developers have stated that the regulatory uncertainty makes it hard to attract investors,

130. Nathanael D. Hartland, Comment, *The Wind and the Waves Regulatory Uncertainty and Offshore Windpower in the United States and the United Kingdom,* 24 U. PA. J. INT'L ECON. L. 691, 727 (2003).

131. *Id.* at 728.

132. Joseph B. Nelson & David P. Yaffe, *The Emergence of Commercial Scale Offshore Wind Progress Made and Challenges Ahead*, 10 SAN DIEGO J. CLIMATE & ENERGY L. 25, 45 (2018-19).

133. *Environmental Benefits*, AM. WIND ENERGY ASS'N, https://www.awea.org/wind-101/benefits-of-wind/environmental-benefits (last visited June 27, 2020).

134. AM. WIND ENERGY ASS'N, *supra* note 1.

135. ORSTEAD, *supra* note 127.

136. *Offshore Wind in Europe Key Trends and Statistics 2018,* WIND EUROPE, https://windeurope.org/about-wind/statistics/offshore/european-offshore-wind-industry-key-trends-statistics-2018/ (last visited June 27, 2020).

which makes sense considering only one offshore wind project has ever been built in this country.[137] BOEM has also found that regulatory uncertainty was one of the top issues holding back offshore wind farms.[138] To help ameliorate this problem, this Note proposes that the Army Corps of Engineers issue a new NWP for offshore wind project transmission lines.

This nationwide permit should be limited to the transmission lines for offshore wind farms. The Corps only issues NWPs for projects that have minimal adverse environmental impacts,[139] so a permit for the transmission lines—which just go from the projects to shore—is more likely to be issued than a permit for both the transmission lines and the wind turbines, which have a much longer and more elaborate construction process, potentially with more environmental impacts.[140] Moreover, the transmission lines will start in federal waters, but because they need to reach the shore, those lines will also fall under the state's jurisdiction.[141] Thus, the Corps could potentially have to regulate the transmission lines pursuant to Section 10 of the RHA and Section 404 of the CWA.

However, due to the potential for litigation under the CWA, the Corps should issue a permit that does not also require certification under Section 404. Instead, the Corps should permit the transmission lines only under Section 10 of the RHA. While the Corps often certifies projects under both statutes, there are many examples of projects only needing a permit for one. For example, NWP 1 is for the placements of aids to navigations and regulatory markers in the waters of the United States.[142] NWP 1 does not impact the quality of the water and, thus, only requires authorization under the RHA.[143] In contrast, NWP 34, which is used for cranberry bogs, only involves Section 404 CWA authorization, as it does not authorize any activities in Section 10 waters.[144]

A new NWP will not solve every problem facing offshore wind farms, but it will help bring more regulatory certainty to the process as it will limit one avenue for legal challenges that opponents can bring against wind farms. In this Part, I first discuss why the permit should be issued under the RHA. Then, I discuss how the permit should not be issued under the CWA, showing how those

137. Ashlyn N. Mausolf, Note, *Clearing the Regulatory Hurdles and Promoting Offshore Wind Development in Michigan*, 89 UNIV. OF DETROIT MERCY L. REV. 223, 236 (2011).

138. *See* U.S. DEP'T OF ENERGY & U.S. DEP'T OF THE INTERIOR, *supra* note 47, at vii, ix.

139. *Nationwide Permit Reissuance*, U.S. ARMY CORPS OF ENG'RS (Jan. 6, 2017), https://www.usace.army.mil/Media/Fact-Sheets/Fact-Sheet-Article-View/Article/1043655/nationwide-permit-reissuance/.

140. If an NWP was issued for the transmission lines, the full wind turbines would still go through the many environmental regulations previously described. *See* Part I.

141. *See* Thaler, *supra* note 16, at 1140–41.

142. *See generally* U.S. ARMY CORPS OF ENG'RS, DECISION DOCUMENT NATIONWIDE PERMIT 1 (2016), https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll7/id/6714.

143. *Id.* at 1.

144. *See* U.S. ARMY CORPS OF ENG'RS, DECISION DOCUMENT NATIONWIDE PERMIT 34 1, 38 (2016), https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll7/id/6746.

permits open new paths for litigation, and how this permit might be written to avoid being subject to the CWA.

A. This New Nationwide Permit Will Be Subject to Section 10 of the National Rivers and Harbors Act

The Army Corps of Engineers has the obligation to regulate offshore transmission lines, even if developers would prefer to never file a permit. The RHA prohibits any obstruction in the waters of the United States unless it is either (i) affirmatively approved by Congress; or (ii) recommended by the Chief of Engineers and authorized by the Secretary of the Army.[145] Furthermore, it is unlawful to excavate, fill, or otherwise modify any of the channels of navigable waters of the United States unless recommended by the Chief of Engineers and authorized by the Secretary of the Army.[146] These permits are necessary to ensure that projects, including offshore wind projects, do not obstruct large portions of navigable waters.[147]

The Supreme Court has interpreted these provisions broadly and given the Corps authority to issue permits for a wide variety of structures.[148] Since *Gibbons v. Ogden*, the Court has held that federal authority over navigation is critical to the government's role in regulating interstate and foreign commerce.[149] Thus, to regulate those navigable waters, the Corps requires either an individual or general permit for activities that construct, excavate, or deposit materials into those waters.[150] The Corps asserts this authority because of the inherent importance of federal regulation of navigable waters.[151]

Because transmission lines will be located in the coastal waters of the United States, it would be difficult argue that the Corps does not have jurisdiction under the RHA. In order to get the power from the offshore wind turbines to the shore, developers have to bury cables in the sea floor.[152] Whether or not the activity constitutes dredging, which will be addressed in the following Subpart, it is clearly an obstruction being laid in ocean waters.[153] Moreover, there is precedent for this determination in existing permits, such as NWP 52, where the

145. 33 U.S.C. § 403 (2018).

146. *Id.*

147. *Id.*

148. *See* United States v. Republic Steel Corp., 362 U.S. 482, 485–88 (1960).

149. W. Christian Hoyer, *Corps of Engineers Dredge and Fill Jurisdiction Buttressing a Citadel Under Siege*, 26 U. FLA. L. REV. 19, 20–21 (1973).

150. Regulation of Coastal Wetlands and Other Waters in the United States, CS005 ALI-ABA 1, *3–4 (West).

151. *See* Hoyer, *supra* note 149, at 20–21.

152. OFFICE OF ENERGY EFFICIENCY & RENEWABLE ENERGY, *supra* note 27.

153. *See* 33 U.S.C. § 403 (2018) (prohibiting the "building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States" without approval).

placement of a transmission line in a bed of navigable water is a "structure" under Section 10 of the RHA.[154]

B. This New Nationwide Permit Should Not Be Subject to the Clean Water Act as the Act Could Be Used as a Tool by Opponents to Delay Projects

The Army Corps of Engineers also has the authority to regulate the discharge of dredged or fill materials in the waters of the United States under Section 404 of the CWA.[155] Section 404 is meant to ensure that any activity that discharges into the waters of the United States has no other practicable alternative that would be less environmentally harmful and that the waters would not be significantly degraded by the discharge.[156] If applying for an individual permit, applicants must submit lengthy reports, showing, among other things, that their project minimizes environmental impacts and potential mitigation strategies.[157] If attempting to use an existing general permit, applicants must demonstrate that their project would fit under the activities authorized by that permit.[158]

If the Corps issues a permit pursuant to Section 404 of the CWA for a project in state waters, then the Corps also needs to obtain a Section 401 Water Quality Certification from the state or tribe where the discharge would originate.[159] The state or tribe may either issue a certification of compliance or waive the requirement.[160] Those options pose two problems for potential wind projects. First, both the certification and waiver of the certification require procedures to notify the public, usually requiring public comments and hearings.[161] In addition to adding to the already lengthy regulatory process, if a state does not follow procedure properly, mishandling the public comment process can lead to litigation.[162] Second, in approving the compliance of a particular NWP, a state or tribe may add regional conditions or reject an NWP entirely, due to the state certification requirements in the Clean Water Act.[163]

154. U.S. ARMY CORPS OF ENG'RS, *supra* note 17, at 6.

155. *Permit Program Under CWA Section 404 Overview*, U.S. ENVTL. PROT. AGENCY, https://www. epa.gov/cwa-404/permit-program-under-cwa-section-404 (last visited June 30, 2020).

156. *Id.*

157. *See id.*

158. *See id.*

159. *Basic Information on CWA Section 401 Certification*, U.S. ENVTL. PROT. AGENCY, https://www. epa.gov/cwa-401/basic-information-cwa-section-40-certification (last visited Dec. 6, 2019).

160. *Id.*

161. 33 U.S.C. § 1344 (2018). *See* also Sierra Club v. U.S. Army Corps of Eng'rs, 909 F.3d 635, 652–54 (where part of the reason the Corps' permits were vacated was because they failed to do the necessary public comment period).

162. *See* Sierra Club v. U.S. Army Corps of Eng'rs, 909 F.3d 635, 653–54 (4th Cir. 2018).

163. CONG. RESEARCH SERV., *supra* note 15, at 16. Because Section 401 of the Clean Water Act requires state certification of the NWPs, states can just decide to deny blanket clean water certification to NWPs, forcing the projects to seek individual certifications. For example, some states have opposed NWP

For example, Nationwide Permit 52 is for pilot programs for offshore renewable energy projects, but New York added a regional condition which denies the permit for any work associated with wind or solar energy generation.[164]

As I explain below in Subpart III.B.1, *Sierra Club v. Army Corps of Engineers* demonstrates how requiring a Section 404 CWA permit can potentially doom a project. First, the requirements for those permits allow states to add new conditions that may lead to projects falling short of the original NWP. Second, adding to the permitting process provides an opportunity for further litigation that lengthens the regulatory timeframe.

1. West Virginia's Regional Conditions Imposed in Sierra Club *through Its Certification of the Section 404 Nationwide Permit Provided Opponents with the Opportunity for Litigation*

To exemplify how Section 404 permits can slow down or even halt a project, this Note examines *Sierra Club v. United States Army Corps of Engineers*.[165] This case is about how opponents halted a proposed oil pipeline with a Section 404 permit. While this Note does not advocate for streamlining the process to approve oil pipelines*, Sierra Club* is useful to show what could happen if offshore wind permits were subject to a Section 404 permit.

The problems for the pipeline in *Sierra Club* started with the special conditions West Virginia imposed for projects accepted under Nationwide Permit 12.[166] When the Army Corps of Engineers tried to change that special condition, the Fourth Circuit Court of Appeals held that the Corps was not entitled to deference about whether it had the authority to do so.[167]

The project at the center of this controversy was going to be built by Mountain Valley, LLC ("Mountain Valley") and would have consisted of a forty-two-inch diameter natural gas pipeline running 304 miles through parts of West Virginia and Virginia.[168] This pipeline fell under the Corps's jurisdiction for two reasons. First, the proposed route crossed the Corps's Huntington District and 591 federal water bodies, including three rivers that are considered under the Corps's authority as navigable waters under Section 10 of RHA.[169] Additionally, the Corps had jurisdiction under Section 404 of the CWA as construction of the

29, and have denied blanket water quality certification for that NWP, citing that it is inconsistent with state water quality standards and other state wetlands management activities.

164. U.S. ARMY CORPS OF ENG'RS, FINAL REGIONAL CONDITIONS, WATER QUALITY CERTIFICATION AND COASTAL ZONE CONCURRENCE FOR NATIONWIDE PERMIT 52 – (WATER-BASED RENEWABLE ENERGY GENERATION PILOT PROJECTS) WITHIN THE NEW YORK DISTRICT REGULATORY BOUNDARY IN THE STATE OF NEW YORK 4, https://www.nan.usace.army.mil/Portals/37/docs/regulatory/Nationwide%20Permit/NWP2020/NWP%2052.pdf?ver=2020-03-10-162151-217 (last visited June 30, 2020).

165. 909 F.3d at 635.

166. *Id.*

167. *See id.* at 651–52.

168. *Id.* at 639.

169. *Id.*

pipeline would have discharged some dredged materials, such as dirt and clay, into those federal waters.[170]

Therefore, prior to constructing the pipeline, Mountain Valley had to obtain permits from the Corps.[171] As explained in Subpart I.B.2, Mountain Valley had the choice to try to obtain an individual permit for its project, but it decided to try to fit its project under Nationwide Permit 12, which regulates pipelines and utility lines crossing federal waters.[172]

However, when West Virginia approved Nationwide Permit 12, it added several special conditions that all projects in the state would need to meet.[173] The state was well within its statutory rights to do this, as Nationwide Permit 12 is in part authorized by Section 404 of the CWA, which allows a state to add any number of conditions when it issues a clean water certification.[174] The court in *Sierra Club* focused on two of the special conditions that West Virginia imposed on the permit and how it applied to this project: Special Conditions A and C.[175] Special Condition A required individual Water Quality Certification for pipelines that either: (i) were equal to or greater than thirty-six inches in diameter, or (ii) crossed a body of water subject to Section 10 the Rivers and Harbors Act of 1899.[176] Special Condition C required that the individual stream crossings be completed within 72 hours.[177]

To comply with Special Condition A, Mountain Valley originally applied to the West Virginia Department of Environmental Protection (DEP) for an individual Water Quality Certification.[178] On March 23, 2017, DEP issued a conditional grant of the certification, subject to certain special conditions, including Special Conditions A and C.[179] The Sierra Club petitioned the court for review, but then DEP sought a voluntary remand of its own decision,

170. *Id.*

171. *Id.* (citing 33 U.S.C. § 1344(a)).

172. *Id.* at 640–41.

173. *Id.* at 640–41.

174. *Id.* at 640; *see also* 33 C.F.R. § 330.4(c)(1)-(2) (2016).

175. 909 F.3d. at 640–41.

176. *Id.* at 640–41. Section 10 of the Rivers and Harbors Act applies "to any navigable water of the United States." Rivers and Harbors Appropriation Act of 1899 § 10, 33 U.S.C. § 403 (2018). The Army Corps of Engineers defines navigable waters as including "the oceans and navigable coastal and inland waters, lakes, rivers, and streams. Corps jurisdiction extends shoreward to the mean high-water line. The Corps general definition of navigable waters of the United States is 'those waters subject to the ebb and flow of the tide shoreward to the mean high water mark and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the waterbody, and is not extinguished by later actions or events which impede or destroy navigable capacity.'" *See* U.S. ARMY CORPS OF ENG'RS, WHAT IS THE DEFINITION OF "WATER OF THE UNITED STATES" & "NAVIGABLE WATERS OF THE UNITED STATES"?, DECISION DOCUMENT NATIONWIDE PERMIT 34 1, 38 (2016), https://www.swl.usace.army.mil/Portals/50/docs/regulatory/Navigable%20Waters%20of%20the%20US.pdf.

177. 909 F.3d. at 641.

178. *Id.*

179. *Id.*

contending that it needed time to do further evaluation.[180] The Fourth Circuit Court of Appeals granted that request.[181] Once the case was remanded, DEP waived its requirement that Mountain Valley obtain an Individual 401 Water Quality Certification.[182] The Army Corps of Engineers then issued its verification concluding that the project met the requirements of NWP 12, despite the fact that the project's construction timeline would take four to six weeks.[183] The Corps reasoned that the project's proposed "dry-cut" method, where water would be diverted around the construction site, would be much more environmentally friendly than the "wet-cut" method, where water flows over the project during construction, even if the project would then exceed the seventy-two-hour deadline set in Special Condition C.[184]

On May 22, 2018, Sierra Club asked the court to stay this new verification on the grounds that it was contrary to the seventy-two-hour limit set forth in Special Condition C.[185] The Fourth Circuit stayed the verification.[186] Eight days later, the Corps sent a letter asking DEP if it considered the "dry-cut" method to be less environmentally harmful to the four rivers in question and if the proposed method was actually more stringent than those called for in Special Condition C.[187] The following day, DEP replied that it agreed that this method was preferable, but did so without any input from the public.[188] On July 3, 2018, the Corps reinstated Mountain Valley's permits with these new modifications.[189] The modifications allowed "dry cutting" in lieu of Special Condition C so that the project could proceed.[190]

Subsequently, the Sierra Club sued and the Fourth Circuit ultimately held that the Corps was not due deference here, as the CWA did not allow the Corps to simply swap out standards set by the states.[191] Furthermore, the court held that this exercise of authority overrode states' rights in determining their own water quality standards.[192] Finally, the court held that DEP's actions did not properly consult the public and were not consistent with protocols laid out in the CWA.[193]

Sierra Club highlights the opportunities to challenge projects that apply for nationwide permits issued under the CWA. First, all permits issued under Section

180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.* at 641–42.
185. *Id.* at 642.
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.* at 641–48.
192. *Id.* at 647.
193. *Id.* at 653–54.

404 are subject to a state's own clean water permitting process,[194] meaning that West Virginia could add any conditions to its own clean water permitting process and those conditions would be added to any NWP in West Virginia.. Those conditions may be useful and helpful to constrain projects, but states are able to put whatever conditions they want into the permits.[195] If a state decided to put in a condition that was close to impossible to meet, then the project would either fail to meet that general permit—and would then have to apply for a (much harder to get) individual permit—or risk seeking an exception, which could be challenged in court. Second, one of the conditions states can impose on a general permit is to require projects to seek Individual Clean Water Certifications. That certification process inherently slows down a project as states will need to allow additional public comment periods.[196] Furthermore, if that process is not followed, then opponents can challenge the Clean Water Certification and further delay projects. Given the limited environmental impact of placing transmission cables, combined with the already extensive regulation on offshore wind turbines, the new NWP should avoid being subject to the CWA.

2. This New Nationwide Permit Could Avoid the Clean Water Act's Jurisdiction by Precisely Approving Certain Activities

In order to avoid the need for a CWA permit, this new NWP will need to not allow any activities that fall under Section 404. Under Section 404, the Army Corps of Engineers regulates activities that cause the discharge of dredge or fill material in the navigable waters of the United States,[197] but the Corps's interpretation of that statute has shifted over the years. From 1977 to 1993, the Corps defined "discharge of dredged material" as "any addition of dredged materials into the waters of the United States."[198] This interpretation specifically excluded excavation, even if that excavation led to some incidental fallback of debris that would be released into the water, as the Corps did not believe that Congress authorized the Corps to regulate excavation under Section 404.[199] In 1986, the Corps clarified the definition to exclude "*de minimis*, incidental soil movement occurring during normal dredging operations."[200] This definition

194. 3 U.S.C. § 1344 (2018) (under which any state certification "shall become a condition on any Federal license or permit subject to the provisions of this section"). Any of the state's conditions may not be changed or altered by federal agencies. *See* 909 F.3d. at 645–46. There seems to be nothing limiting what the states may include in their own certification process.

195. *See* CONG. RESEARCH SERV., *supra* note 15, at 16. For example, some states have opposed NWP 29, and have put in conditions denied blanket water quality certification for that NWP. Instead, projects have to seek individualized certifications.

196. *See Sierra Club*, 909 F.3d at 640.

197. 33 U.S.C. § 1344 (2018).

198. Radcliffe Dann IV, *Clean Water Act Jurisdiction over Excavation Activities The "Tulloch Rule" Revised*, 38 COLO. LAW., 83, 84 (2009).

199. *Id.*

200. *Id.*; Corey Elizabeth Burnham, Note, *The Tulloch Rule Its Rise, Demise & Resurrection Will the New Version of the Rule Withstand Judicial Scrutiny?*, 33 CONN. L. REV. 1349, 1351 (2001).

allowed projects that involved only *de minimis* soil movement to be exempt from Section 404 permits.[201] The Corps stated that Congress intended the CWA to regulate only the discharge of the dredged material, and if it were to regulate the incidental fallback, it would be exceeding congressional intent and would be regulating the dredging itself.[202]

In addition to the Corps's view, numerous cases—beginning with *North Carolina Wildlife Federation v. Tulloch*—have shifted the interpretation of Section 404 of the Clean Water Act.[203] *Tulloch* centered around a development project on wetlands that would normally require a permit from the Corps.[204] Trying to avoid the complications of a federal permitting process, the developers used techniques that would limit the discharge of excavated materials to a *de minimis* amount, thus circumventing the need for a Section 404 permit.[205] Environmental groups sued and claimed that the Environmental Protection Agency (EPA) and the Army Corps of Engineers should have stepped in because this excavation should have required a Section 404 permit.[206] As part of the settlement, EPA and the Corps issued the "Tulloch Rule" in 1993, which removed the *de minimis* exception and changed the definition of "discharge of dredged material" to "any addition of dredged material into, including any redeposit of dredged material within, the waters of the United States."[207]

In later cases, trade associations repeatedly argued that the Tulloch Rule exceeded EPA's and the Corps's statutory authorities and challenged the new rule in court.[208] In *American Mining Congress v. U.S. Army Corps of Engineers*, the D.C. District Court issued a nationwide injunction prohibiting the agencies from enforcing the rule, holding that if Congress had wanted to give the Corps that much regulatory authority, it would have done so in the statute.[209] The U.S. Court of Appeals for the District of Columbia would later uphold the district court's injunction in *National Mining Association v. U.S. Army Corps of Engineers*.[210] In that case, the court held that "incidental fallback" that happened as part of extraction was not an "addition" of a pollutant, and therefore was not a discharge subject to Section 404.[211] The court disagreed with the assertion that just because some debris moves during an activity that it automatically becomes a pollutant subject to Section 404.[212] The court held that the Corps had

201. Burnham, *supra* note 200, at 1351.
202. Dann, *supra* note 198, at 84.
203. Burnham, *supra* note 200, at 1351.
204. *See* Dann, *supra* note 198, at 84.
205. *Id.*
206. *See id.*
207. *Id.*
208. *Id.* at 84–5.
209. Am. Mining Cong. v. U.S. Army Corps of Eng'rs, 951 F. Supp. 267, 278 (D.D.C. 1997), *aff'd sub nom*. Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs, 145 F.3d 1399 (D.C. Cir. 1998).
210. Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs, 145 F.3d 1399, 1410 (D.C. Cir. 1998).
211. *Id.* at 1404.
212. Dann, *supra* note 198, at 84–85.

overstepped its authority pursuant to Section 404 to regulate *all* activities that surrounded dredging.[213] In his concurrence, Judge Silberman developed a test where the difference between incidental fallback and redeposit was better understood in terms of (i) the time the material is held before being dropped back and (ii) the distance between where the material is collected and where it was deposited.[214]

After losing in the D.C. Circuit, the Corps and EPA decided to issue a new rule, dubbed "Tulloch II."[215] Among other changes, it eliminated the "any" qualifier from "redeposit" and expressly excluded incidental fallback from its jurisdiction.[216] The eventual regulation even defined incidental fallback as "the redeposit of small volumes of dredged material that is incidental to excavation activity in waters of the United States when such material falls back to substantially the same place as the initial removal."[217] However, like clockwork, the trade groups challenged the regulation and the court discarded this new interpretation.[218] Instead, in *National Ass'n of Home Builders v. U.S. Army Corps of Engineers*, the D.C. District Court adopted the test from Judge Silberman's concurrence, where it matters how long and how far one moves the dredged material.[219]

After having their prior interpretations vacated, EPA and the Corps decided to return to the original 1999 definition of the rule that considers "any discharge of dredged material" to be "any addition of dredged material into, including redeposit of dredged material other than incidental fallback within, the waters of the United States."[220] The rule specifically does not define incidental fallback and leaves that issue to a case-by-case interpretation for the relevant agency.[221] As the rule stands right now, the best way to avoid the need for a Section 404 permit would be to move the dredged material as little as possible and to displace it for as short a time as possible.[222]

For the new nationwide permit this Note proposes, the Army Corps of Engineers should make sure to only include transmission lines that will not cause any discharge of dredged materials, thereby avoiding the need for a Section 404

213. *Nat'l Mining Ass'n*, 145 F.3d at 1405.

214. *Id.* at 1410 (Silberman, J., concurring).

215. Dann, *supra* note 198, at 85.

216. *Id.*

217. *Id.*

218. *Id.*

219. Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs, No. 01-0274 (JR), 2007 WL 259944, at *3 (D.D.C. Jan. 30, 2007).

220. Dann, *supra* note 198, at 86.

221. *Id.*

222. *See* Dann, *supra* note 198 at 86. As an example, dropping an anchor onto the ocean floor is unlikely to need a Section 404 permit because, while the anchor might drag up some dredged material from the sea floor when it lands, that material does not go very far and is only lifted off the ground for a moment. In contrast, if someone were to mechanically scoop sand out of the sea floor to put in a post and then several weeks later dump that sand elsewhere in the bay, that is much more likely to need a Section 404 permit due to increased time of disturbance and distance of the discharge of dredged material.

permit. One technique that the Corps might consider including in its list of approved activities is jet-plowing. Jet-plowing uses blades and pressurized water to create a trench in the sea floor.[223] Right behind those jets, machines lay the cable in the trench so that the jetted material settles back down into the trench on top of the cable.[224] Because the vast majority of the material falls back into the trench at near the "same time and same location" where it was excavated, the Corps does not consider it to be a discharge of dredged or fill material and thus it does not need a Section 404 permit.[225]

One criticism is that jet-plowing and other similar techniques may not be feasible for most offshore wind farms. If that is true, and the projects will discharge enough dredged material that the Corps will have to regulate the activity under Section 404 anyway, the projects could still apply for the transmission lines under Nationwide Permit 12, which covers utility lines. Alternatively, the projects could apply for individual permits on a case-by-case basis. Furthermore, by creating one avenue for construction under a general permit, the proposed NWP should incentivize the industry to research and develop other techniques that disturb as little sea floor as possible, even if the technology is not yet feasible.

By constructing the permit to allow for jet-plowing and other non-discharge-causing techniques, the Army Corps would be able to craft an NWP for offshore wind transmission lines that would not be subject to the regulatory burden of a Section 404 permit. While this permit only addresses one agency's approval of one part of an offshore wind project, it should bring more regulatory certainty to the process for developers and remove one tool from opponents' toolbox.

3. Implications for this New Nationwide Permit

While the details of the proposed NWP will have to be decided by the Army Corps of Engineers, I want to highlight some of the advantages and trade-offs of this new permit. First, I address the advantages of this permit, namely that it will hopefully speed up the approval of offshore wind turbines. Next, I discuss the drawbacks, which could include potential reductions in environmental protection and public participation. Finally, I argue that these reductions are either minimal or are adequately mitigated elsewhere in the process.

First, the most significant benefit of this permit is that it will help offshore wind farms address one major regulatory hurdle. As discussed, uncertainty can make it hard for energy projects to attract investors, especially when only one

223. MALCOLM SHARPLES, OFFSHORE ELECTRICAL CABLE BURIAL FOR WIND FARMS: STATE OF THE ART, STANDARDS AND GUIDANCE & ACCEPTABLE BURIAL DEPTHS, SEPARATION DISTANCES AND SAND WAVE EFFECT 19 (2011), https://www.bsee.gov/sites/bsee.gov/files/tap-technical-assessment-program/final-report-offshore-electrical-cableburial-for-wind-farms.pdf.

224. *Id.*

225. *Id.*

such project currently exists in the United States.[226] At the time of writing, there have been no cases where offshore wind farms were challenged on their Section 404 permits. However, when opponents are looking to employ a "delay, delay, delay" strategy,[227] it appears inevitable that if an NWP is issued under both the RHA and the CWA, it will be challenged under both those statutes, just as the permit in *Sierra Club*.[228] While this NWP will not solve every issue facing offshore wind projects, it will make investors feel more confident and help usher in more offshore wind in a time where we need as much renewable energy as possible to fight climate change.

While I understand concerns about not subjecting transmission lines to the CWA, there are two reasons that the environmental impact of the cables is very minimal. First, NWPs are only issued for projects that have minimal adverse environmental impact.[229] Thus, the Army Corps of Engineers will simply not issue the NWP if it finds that constructing these cables would more than a *de minimis* environmental impact and then projects would have to apply for individual permits.[230] However, given that this NWP will be issued for just the laying of the transmission cable (ideally disturbing as little sediment as possible), it seems unlikely that such a minor action would trigger larger environmental impact. Second, this NWP will only be for part of the project. The rest of the wind farm, including the turbines, will still be regulated by the BOEM, as explained in Part I. If the wind farm is located within twelve miles of the shore, as the Block Island project was, then the turbines would also need RHA and CWA permits from the Army Corps of Engineers.[231] In sum, other environmental regulations—separate from a Section 404 regulation of the transmission lines—monitor the environmental impacts of the project beyond the transmission cables.

Finally, there is a concern that one of the reasons that the projects would get approved more quickly is that the proposed NWP limits public participation. This is partly true: The public has a less direct route to comment or to bring litigation on this step in the process because nationwide permits are issued every five years instead of on a case-by-case basis.[232] But again, this permit covers only a portion of a much larger project. The public has the ability to comment on or challenge decisions ranging from their state public utility commissions to BOEM's process.[233] This public participation is important and helps rightfully challenge projects when they step out of their boundaries. However, litigation for

226. *See* Hartland, *supra* note 130, at 726–28.

227. *See* Seelye, *supra* note 10.

228. *See generally* Sierra Club v. U.S. Army Corps of Eng'rs, 909 F.3d 635 (4th Cir. 2018).

229. 33 U.S.C. § 1344(e) (2018) ("[T]he Secretary may . . . issue general permits . . . [that] will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment.").

230. *See id.*

231. *See* CONG. RESEARCH SERV , *supra* note 5; *see also* New Jersey Dep't of Envtl. Prot , *supra* note 6.

232. *See* CONG. RESEARCH SERV., *supra* note 16.

233. *See supra* Subpart I.B.1.

litigation's sake is improper when it comes to building the necessary renewable energy that we need to fight climate change.

CONCLUSION

A new NWP would help spur the development of more offshore wind farms across the country. By specifically tailoring the permit to activities that will not lead to the discharge of dredge materials, this permit can avoid the need for a CWA Section 404 permit and the potential litigation surrounding those issues, as highlighted in *Sierra Club*.[234] By bringing more regulatory certainty to the offshore wind development process, and by cutting off at least one avenue for offshore wind opponents, this proposed permit should provide offshore wind developers and investors with more confidence to grow this socially beneficial industry.

This new NWP is not a panacea to all the regulations facing offshore wind. Developers will still need to navigate the entire BOEM process and state environmental laws. There will likely be critics who say that this permit will not go far enough to spur industry investment. However, I believe that it is a step in the right direction.

This new NWP will not open the nation's coasts to ruthless development, but if adopted, it could help projects that are already under consideration. Currently, there are offshore wind farm plans going through the regulatory process, including projects in both New York and Massachusetts.[235] Both the New York and Massachusetts projects have experienced regulatory problems related to their transmission lines. In New York, the offshore wind project was originally very popular with residents.[236] However, when the wealthy land owners learned that transmission cables were going to cut through a beach near their Hampton properties, they caused a ruckus.[237] Now, developers are considering re-routing and lengthening the project's transmission lines to get around local opposition.[238] In Massachusetts, the State is attempting again to build a wind farm after its failure with the Cape Wind Project.[239] As in New York, the project has also faced pushback on its transmission.[240]

There has not yet been a Section 404 case brought against offshore wind transmission lines, but it is only a matter of time before Section 404 is used in

234. *See generally* Sierra Club v. U.S. Army Corps of Eng'rs, 909 F. 3d 635 (4th Cir. 2018).

235. AM. WIND ENERGY ASS'N, U.S. OFFSHORE WIND ENERGY: STATUS UPDATE – JUNE 2020 (2020), https://www.awea.org/Awea/media/Resources/Fact%20Sheets/Offshore-Fact-Sheet.pdf.

236. *See* Debra West, *The Hamptons Love Green Energy. But That Wind Farm?,* N.Y. TIMES (Sept. 14, 2019), https://www.nytimes.com/2019/09/14/nyregion/hamptons-wind-farm.html.

237. *Id.*

238. *Id.*

239. *See* Rich Saltzberg, *Vineyard Wind Dealt Blows on Two Fronts,* MV TIMES (July 10, 2019), https://www.mvtimes.com/2019/07/10/vineyard-wind-suffers-cable-defeat/.

240. *Id.*

that "delay, delay, delay" strategy that worked so well against the Cape Wind Project. Regulation of offshore wind turbines is necessary but making the process overly cumbersome and open to legal challenge will only leave the United States further behind in race to develop renewable energy. This new NWP will help us catch up.