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Inside:

Introduction

As part of this edition, we are pleased to announce the addition of three colleagues to the Environmental Health & Safety group resident in Denver. Ronda A. Sandquist, Kristi L. Livedalen and Georgina Guy are seasoned environmental attorneys with considerable experience in a wide range of environmental matters, including environmental permitting and siting, natural resource development, NEPA compliance, water rights, endangered species, nutrient trading and litigation. To highlight their experience, Ronda and Georgina's article on the recent 9th Circuit decision, *South Coast Air Quality Management District v. FERC*, 621 F.3d 1085 (9th Cir. 2010), provides insight for development projects subject to NEPA standards. Ronda, Kristi and Georgina complement our Environmental, Health & Safety Practice Group's existing environmental experience and expand our presence and capabilities in the Rocky Mountain region. We are certainly thrilled to have them on board!

In addition to highlighting our new colleagues, this edition looks at the very recent decision of the Supreme Court to evaluate the role of nuisance suits in the regulation of GHGs with its December 6 grant of *certiorari* of the Second Circuit's decision in *Connecticut v. American Electric Power, Inc.* 582 F.3d 309 (2nd Cir. 2009). We also partner with a colleague from our Maritime Industry Group to analyze the Obama Administration's plans to increase environmental regulation of vessels and the potential issues that will result for vessel owners and operators. Finally, we evaluate why the Great Lakes may become an ideal location for off-shore wind energy development than the East Coast.

Enjoy and may we wish you all very safe and Happy Holidays!

Jessica E. DeMonte, Editor

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Ninth Circuit Upholds "Indirect Impacts" Analysis in EIS for Gas Pipeline on US-Mexico Pipeline – *South Coast Air Quality Management District v. FERC*, 621 F.3d 1085 (9th Cir. 2010)

By Ronda L. Sandquist and Gina Guy

In September, the Ninth Circuit Court of Appeals refused to overturn an environmental impact statement (EIS) prepared by the Federal Energy Regulatory Commission (FERC) in connection with a pipeline project to import "dirtier" natural gas from Mexico into Southern California. *South Coast Air Quality Management District v. FERC,* 621 F.3d 1085 (9th Cir. 2010). The Ninth Circuit found that FERC was not required to consider every conceivable "downstream" use where the agency had no control over the time and place of the use, or how the imported gas might be mixed with domestic gas. The decision reaffirms the National Environmental Policy Act's (NEPA) "rule of reason" by keeping the EIS analysis focused on the action itself (approval of the pipeline) and effects of the action that were within the control of the approving agency (FERC). The implication that can be drawn from the Ninth Circuit's opinion is that only those effects that are "reasonably foreseeable" must be considered and evaluated as a part of an EIS. Effects that are tenuous, speculative, uncertain or outside the control of the federal agency would be beyond the EIS scope. The Ninth Circuit's decision provides some clarity to this otherwise murky standard.

NEPA's EIS Requirements

NEPA requires that an environmental impact statement or EIS be prepared by the federal agency that is proposing to undertake a "major Federal action[s] significantly affecting the quality of the human environment."[1] Neither the statute itself nor the implementing regulations adopted by the Council on Environmental Quality (CEQ) identify every activity that could be a "major federal action."[2] Instead, 40 C.F.R. § 1508.18 specifies categories of action that are considered "major", such as the *adoption* of regulations or policies as well as plans governing the use of federally-owned or regulated resources. Projects receiving federal funds or loan guarantees are also subject to NEPA.[3]

One of the primary purposes of the EIS is to indentify and fully disclose to the stakeholders the effects of the proposed action. "Direct effects" are those impacts caused by the action at the same time and place of the action. "Indirect effects," on the other hand, are caused by the action but are either later in time or occur at a distance from the action area, yet are still "reasonably foreseeable" given the scope of the project. These effects must be identified and included in the EIS along with an evaluation of reasonable mitigation measures to offset adverse effects and impacts.

South Coast Air Quality Management District v. FERC

In *South Coast,* FERC approved a Certificate of Public Convenience and Necessity pursuant to Section 7(c) of the Natural Gas Act, 15 U.S.C. Sec. 717(f)(c) authorizing the expansion and modification of North Baja's existing pipeline system to allow for the transport of natural gas from Mexico northbound into (the Basin region of) Southern California including areas that comprise the jurisdictional area of the South Coast Air Quality Management Area (District).

In 2007, the FERC released its Draft EIS describing the expected impacts of the project. The District responded to the Draft EIS via the public comment process and intervened in the FERC proceeding contending that the Draft EIS had improperly considered only the impacts of construction and operation of the pipeline itself. The District asserted that FERC was also required to consider the impact of all emissions resulting from the eventual use of the imported gas by consumers in the Basin. The District further contended that FERC was required to evaluate and adopt measures to mitigate impacts from these potentially increased emissions. FERC disagreed and approved the project. The District sought review of the EIS in the Ninth Circuit.

[1] 42 U.S.C. § 4332(c)
[2] 40 C.F.R. Part 1500

[3] As a general rule, most "major Federal actions" require numerous permits (i.e., permits required by the Clean Air Act or the Clean Water Act), rights-of-way grants from multiple landowners and are also required to comply with other statutes such as the Endangered Species Act and the National Historic Preservation Act.

While natural gas is generally regarded as the cleanest conventional fossil fuel, the burning of this energy source releases air pollutants that are federally-regulated. The Wobbe Index measures natural gas interchangeability. Natural gas from outside the US may have a higher average Wobbe Index than US sources, but may be commingled or blended with other gases to lower that value. Gas with a higher Wobbe Index like the non-US gas at issue may burn hotter than gas with a lower Wobbe Index and also may generate more pollutants. *See id*. at 1089. The District asserted that the likelihood of increased pollutants (NOx, an ozone precursor, and particulate matter) from the imported gas, even if mixed with gas from the US, meant that FERC had violated the Clean Air Act, the Natural Gas Act, and NEPA because the EIS neither discussed the impacts from the end use of the imported gas nor added such impacts to the analysis of the existing air quality baseline.

In reviewing the District's alleged NEPA violations pursuant to the Administrative Procedure Act, the Ninth Circuit had to decide: "whether the agency … 'adequately considered and disclosed the environmental impact of its actions', or presented a 'reasonably thorough discussion' of such impacts." FERC acknowledged the possibility that the influx of the gas from Mexico could result in a higher Wobbe Index and potentially increase NOx emissions in the Basin. In response to that concern (which was raised in the approval proceeding for the Draft EIS), the FERC conditioned the North Baja pipeline certificate on compliance with the WI index level imposed by the California Public Utilities Commission (Wobbe Index lowered from 1437 to 1385). With this limitation, FERC concluded that the North Baja project would not proximately cause a material increase in air pollutant emissions. The District contended this was not enough.

The Ninth Circuit disagreed and concluded that FERC had adequately considered the impact of downstream emissions and addressed the increased concerns raised by commenters during the NEPA process. Accordingly, it held that the EIS was adequate. It also found that FERC's analysis was "reasonably thorough" given the "**significant amount of uncertainty** regarding the issue of the ultimate impact of burning the Mexican natural gas delivered by North Baja." The "significant uncertainty" language of the Ninth Circuit's holding confirms that both the effects and the impacts alleged by the District did not meet the "reasonable foreseeable" standard imposed by the EIS regulations. The court's decision will provide further ammunition to defend against EIS challenges where the alleged effects are too tenuous, speculative or uncertain, or are otherwise outside the approving agency's control. This decision would support a finding that these types of effects are not "reasonably foreseeable" and beyond the scope of an EIS analysis.

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US Supreme Court to Address Availability of Climate Change-Related Public Nuisance Claims

By Karen A. Winters and John D. Lazzaretti

On December 6, 2010, the US Supreme Court granted *certiorari* with respect to the decision of the Second Circuit Court of Appeals in *Connecticut v. American Electric Power, Inc.*, 582 F.3d 309 (2d Cir. 2009) allowing greenhouse gas (GHG) related public nuisance claims to proceed over threshold objections as to standing and justiciability. The grant of *certiorari* is set against the backdrop of the results of the mid term elections and the implications of those results for continued advancement by US EPA of its regulation of GHGs in response to the Court's previous decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007). The case will be the first opportunity the US Supreme Court has had to address the role the Courts may play with respect to control of GHGs in the absence of comprehensive federal climate change legislation.

In *Connecticut v. American Electric Power*, eight states,[4] the New York City, and several private land trusts[5] brought suit in the US District Court for the Southern District of New York against six electric power corporations under theories of federal and state common law public nuisance. The plaintiffs alleged that the defendants' GHG emissions, constituting approximately 10 percent of the nation's total anthropogenic carbon dioxide emissions, were contributing to global warming and, as a result, causing intensified and prolonged heat waves, flooding, rising sea levels, reduced snow pack and other climatic effects that were damaging the plaintiffs' property and risking the health of their citizens. The plaintiffs sought an injunction holding the defendants jointly and severally liable, capping their GHG emissions at a set level, and requiring the defendants to then reduce their carbon dioxide emissions by a specified percentage each year for at least a decade.

The district court dismissed the plaintiffs' claims on political question grounds, finding that, "[b]ecause resolution of the issues presented . . . requires identification and balancing of economic, environmental, foreign policy, and national security interests, 'an initial policy determination of a kind clearly for non-judicial discretion' is required." *Connecticut v. American Electric Power Co.*, 406 F. Supp. 2d 265, 274 (S.D.N.Y. 2005) (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004). A two-judge panel[6] of the US Court of Appeals for the Second Circuit reversed, finding that the plaintiffs' federal common law public nuisance claims would not implicate a political question in the absence of congressional action addressing GHG emissions. *Connecticut v. American Electric Power Company, Inc.*, 582 F.3d 309, 330-31 (2nd Cir. 2009). The Second Circuit addressed several other issues in its opinion as well, including other potential grounds for barring the plaintiffs' claims under the political question doctrine, whether the plaintiffs had standing to bring their claims, and whether these claims had been displaced by the Clean Air Act, ultimately rejecting each of these arguments.

After denial of the defendants' petition for rehearing *en banc*, all of the defendants except the Tennessee Valley Authority (TVA) petitioned the US Supreme Court for *certiorari* on the following three issues:[7]

1. Whether States and private parties have standing to seek judicially-fashioned emissions caps on five utilities for their alleged contribution to harms claimed to arise from global climate change caused by more than a century of emissions by billions of independent sources.
2. Whether a cause of action to cap carbon dioxide emissions can be implied under federal common law where no statute creates such a cause of action, and the Clean Air Act speaks directly to the same subject matter and assigns federal responsibility for regulating such emissions to the Environmental Protection Agency.
3. Whether claims seeking to cap defendants' carbon dioxide emissions at "reasonable" levels, based on a court's weighing of the potential risks of climate change against the socioeconomic utility of defendants' conduct, would be governed by "judicially discoverable and manageable standards" or could be resolved without "initial policy determination[s] of a kind clearly for nonjudicial discretion." Baker v. Carr, 369 U.S. 186, 217 (1962).

Petition for Writ of Certiorari, *American Electric Power Co., Inc. v. Connecticut*, Case No. 10-174.

The case has advanced over the other closely watched case of *Comer et al v Murphy Oil USA et al* No. 07-60756 (5th Cir., October 16, 2009) which had been scheduled for rehearing by the Fifth Circuit Court of Appeals sitting *en banc*. In an odd twist of judicial procedure, the panel

[4] California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont and Wisconsin

[5] The three private land trusts, Open Space Institute, Inc., Open Space Conservancy, Inc., and Audobon Society of New Hampshire filed a separate but substantially similar complaint in the related case *Open Spaces Institute, Inc. v. American Electric Power Co., Inc.*, Case No. 04-05670 (S.D.N.Y.), though also adding a private nuisance claim. For ease of reference, these two cases are referred to collectively as the *American Electric Power* case.

[6] The Second Circuit panel consisted of only two judges because Justice Sotomayor, originally on the panel, was elevated to the US Supreme Court prior to the decision. Justice Sotomayor did not participate in consideration of the defendants' petition for *certiorari* and will not participate in the appeal.

[7] While many thought TVA would not support *certiorar*i, this past August TVA filed its own brief in support of review, though limited to the issues of whether prudential standing should bar the plaintiffs claims and whether US EPA's steps to regulate GHG emissions since the Second Circuit's decision have displaced the plaintiffs' federal common law claims. See Brief for the Tennessee Valley Authority in Support of Petitioners, *American Electric Power Co., Inc. v. Connecticut,* Case No. 10-174.

decision was vacated and the district court decision dismissing the claims reinstated in *Comer et al. v. Murphy Oil, USA, et al.*, No. 07-60756 (5th Cir, October 16, 2009). The grant of rehearing *en banc* under Fifth Circuit Rule 41.3 automatically vacated the panel decision and stayed the mandate. The *en banc* court, however, consisted only of nine judges – just enough for a quorum. Shortly before oral argument, an additional judge recused herself, leaving the Fifth Circuit without a quorum and without authority to transact judicial business.

After considering several options, including asking the chief justice to appoint a judge from another circuit and proceeding without a quorum under the Rule of Necessity, the remaining judges concluded that, without a quorum, the court not only lacked authority to proceed with the appeal, it also lacked authority to adopt a procedure for overcoming its lack of a quorum. As a result, the Fifth Circuit dismissed the appeal without opinion or order. Since the panel decision had already been vacated by local rule, this left the district court's original order of dismissal in place and the plaintiffs without an order from which to seek *certiorari*.

The plaintiffs in *Comer* have petitioned the US Supreme Court for a writ of *mandamus* requiring the Fifth Circuit to either resolve the appeal or reinstate the panel decision reversing the district court's dismissal. Given the need to resolve the procedural issues raised by the Fifth Circuit's dismissal before the merits of the district court's order can be addressed, however, the substantive issues of justiciability raised in *Comer* will not be addressed for some time, if at all.

A third case where a district court dismissed climate change related claims has made its way to the Ninth Circuit Court of Appeals, where it is currently awaiting oral argument. *Native Village of Kivalina v. ExxonMobil Corp. et al*, 663 F.Supp 2d 863 (N.C. Cal. 2009), *appeal docketed* No. 09-17490 (9th Cir. November 6, 2009). Like *American Electric Power*, the arguments on appeal in *Kivalina* include both whether a plaintiff has standing to sue emitters of GHG for harmful climatic effects of global warming and whether finding that such emissions are a federal public nuisance entails a non-justiciable political question. As opposed to the cap on emissions sought in *American Electric Power*, however, the plaintiffs in *Kivalina* are seeking only monetary damages, leaving open the possibility of a second appeal to the Supreme Court on the unique issues raised by a claim for damages even if the Court finds that district courts lack the authority to cap and reduce GHG emissions.

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The Obama Administration's Sea Change: Increased Environmental Regulations on Vessels

By Allen A. Kacenjar and Michael P. Hartman

The Obama Administration has significantly stepped up efforts to impose new environmental restrictions on vessels and to enforce existing environmental standards. Given the unique interaction of environmental and admiralty law and the combination of international and national treaties, laws and regulations, there is a real premium on identifying and understanding these developments in order to craft strategies to influence key rules, minimize enforcement risks, and guide investment, planning, and training efforts.

Perhaps the most obvious nexus between vessel operation and environmental law is the potential for water quality impacts. During August 2010, the US Environmental Protection Agency (US EPA) finalized a 598-page report to Congress entitled *Study of Discharges Incidental to Normal Operation of Commercial Fishing Vessels and Other Non-Recreational Vessels Less than 79 Feet*."[8] This latest sign that the Obama Administration is tightening environmental regulations for vessels highlighted numerous discharges

[8] A complete copy of the study is available at: http://www.epa.gov/npdes/pubs/vesselsreporttocongress_all_final.pdf.

US EPA believes may impact the aquatic environment and human health. Specifically, US EPA focused on deck washdown, fish hold effluent, graywater, bilgewater and marine engine effluent. Bilgewater effluent was found to contain the largest variety of priority pollutants, including total arsenic and dissolved copper at levels nearly 1,000 times the human health standard. US EPA's study also links these contaminants to key water quality concerns. For example, it asserts that leaching of copper from antifouling hull coatings is a major source of copper pollution and water quality concerns in the Chesapeake Bay, Port Canaveral and several harbors in the state of Washington.

While commercial vessels and commercial fishing vessels less than 79 feet in length are exempt from regulation until 2013[9], US EPA's recent findings foreshadow increased regulation when that exemption ends. There are several alternate courses US EPA may choose including extending the applicability of the current Vessel General Permit (VGP)[10] and/or establishing pollutant-specific standards that target arsenic and copper in particular. US EPA is also negotiating a Memorandum of Agreement with the US Coast Guard to address Coast Guard enforcement of the VGP and future regulations.

Simultaneously, the Obama Administration is pressing forward with the regulation of airborne emissions from vessels under the Clean Air Act (CAA). For example, US EPA recently promulgated more stringent exhaust emission standards for the largest marine diesel engines used for propulsion on oceangoing vessels (Category 3 engines).[11] These standards are part of a coordinated strategy to address emissions from all oceangoing vessels that impact US air quality. US EPA's coordinated strategy also includes implementing global emission standards for marine engines contained in Annex VI to the International Convention on the Prevention of Pollution from Ships (MARPOL Annex VI).[12] The strategy involves designating US coasts as Emission Control Areas[13] to force significant reductions in NOx and particulate matter emissions. These standards will mandate extensive investments in control equipment and technology by shipowners, who will ultimately pass those costs on to their customers. The emission standards apply in two stages: near-term standards for newly-built engines will apply beginning in 2011, and long-term standards requiring an 80-percent reduction in nitrogen dioxides which will begin in 2016.

Since entering office, President Obama has also actively pushed for federal climate change regulations.[14] Having already promulgated the first-ever greenhouse gas (GHG) emissions standards for cars and trucks in April 2010; mandated GHG emissions reporting from large emission sources nationwide and developed a GHG permitting approach for stationary sources, it is unsurprising that US EPA is also focused on GHG emissions from vessels. With the backing of the Obama administration, US EPA is actively working to develop "standards to reduce GHG emissions from nonroad sources such as marine and aircraft..."[15] While expectations that Congress would pass comprehensive climate legislation may have temporarily suspended litigation to force the promulgation GHG emissions standards for marine vessels,[16] the changing political tide against GHG legislation may well spur environmental groups to press forward with their lawsuits.

[9] On July 30, 2010, President Obama signed P.L.111-215 (Senate Bill S. 3372) into law. Full text is available at: http://www.epa.gov/npdes/pubs/s3372pl111209.pdf which amends P.L. 110-299 (Senate bill S. 3298) that generally imposes a moratorium during which time neither US EPA nor states may require NPDES permits for discharges incidental to the normal operation of commercial fishing vessels and other non-recreational vessels less than 79 feet. P.L. 111-215 extended the expiration date of the moratorium from July 31, 2010 to December 18, 2013.

[10] The VGP includes general effluent limits applicable to all discharges; general effluent limits applicable to 26 specific discharge streams; narrative water-quality based effluent limits; inspection, monitoring, recordkeeping, and reporting requirements; and additional requirements applicable to certain vessel types.

[11] *Available at* http://www.epa.gov/OTAQ/regs/nonroad/marine/ci/420f09029.htm

[12] The International Convention for Prevention of Pollution from Ships (MARPOL) (1973, amended 1978), 1340 U.N.T.S. 184.

[13] *See* EPA-420-F-09-029, June 2009.

[14] John M. Broder, Obama Affirms Climate Change Goals, NYTimes.com, Nov. 18, 2008, *available at* http://www.nytimes.com/2008/11/19/us/politics/19climate.html.

[15] US EPA, "Fiscal Year 2011-2015 EPA Strategic Plan" (Sept. 30, 2010), available at http://www.epa.gov/cfo/plan/plan.htm.

[16] *See Center for Biological Diversity, et al. v. US EPA*, Cmplt, p.2 n.2 ("Despite the urgency of addressing global warming, Plaintiffs refrained from filing suit earlier to give the new administration a change to act on the petitions. However, the new administration has been in office since January 20, 2009 – over 130 days – and has still not acted.").

Given these developments, GHG regulation of marine vessels may well be on the horizon.

This suite of extensive environmental developments is a call to action for vessel owners, operators and businesses who rely heavily on cost-effective marine transportation. As those most likely to be affected by the developments, they are encouraged to get engaged in the regulatory process and take a proactive approach towards compliance. US EPA has encouraged owners and operators to establish training and shoreside verification programs. By taking an active role in the process, owners and operators can move towards reducing regulatory restrictions, minimizing stranded capital and capital investment, eliminating costs associated with vessel detainment and preventing regulatory violations.

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Winds of Change: Offshore Wind Development May Be Coming to the Great Lakes

By Jessica E. DeMonte and Rebekah M. VanDrake

The US is looking for clean, renewable energy sources to keep up with the country's increasing energy demands. As such, wind energy development has gained some popularity in recent years. [17] Onshore wind projects have popped up all over the country. However, offshore projects have been slower to develop. This may be poised to change – with the Great Lakes looking like a potential spot for offshore wind energy development.

The Energy Policy Act, signed by President Bush on August 8, 2005, amended the Outer Continental Shelf Lands Act to grant the Department of the Interior (DOI) authority to regulate offshore renewable energy development, including offshore wind in federal waters. The DOI delegated this authority to the Bureau of Ocean Energy Management, Regulation and Enforcement (Bureau)[18], giving the Bureau the authority to issue leases, easements, or rights-of-way for activities that produce or support production, transportation, or transmission of energy from sources other than oil and gas. Pursuant to this delegated authority, the Bureau adopted final regulations in 2009 for Outer Continental Shelf renewable energy development[19] and approved, in 2010, the first offshore wind project in federal waters. The proposed project—the Cape Wind Energy Project—includes a 130 turbine wind farm to be arranged in a grid pattern in the federal waters of Nantucket Sound in the Atlantic Ocean.[20] Significant opposition exists for the project. Thus, while the major federal approvals and lease details have been approved, construction and operation permits will still need to be obtained as the project proceeds, opening the door for public sentiment to delay actual construction.

Development of offshore wind on the Atlantic Coast has, in many ways, overshadowed potential development in the Great Lakes. However, unlike the Atlantic Coast, the Great Lakes states own the waters up to international boundaries and are therefore authorized to lease the lake-bed without federal oversight. Further, since the Great Lakes are not "federal waters", the US Army Corps of Engineers, not the Bureau, will be the lead agency for permitting Great Lakes offshore wind projects. The Army Corps of Engineers does not currently intend to develop offshore wind-specific

[17] The US DOE has stated that the US may possess enough wind to meet at least 20 percent of its energy need. *See* US DOE, *20% Wind Energy by 2030: Increasing Wind Energy's Contributions to U.S. Electricity Supply* (May 2008).

[18] *See* http://www.boemre.gov/.

[19] *See* Final Rule, *Renewable Energy and Alternate Uses of Existing Facilities on the Outer Continental Shelf*, 74 Fed. Reg. 19637 (April 29, 2009) (codified at 30 CFR Parts 250, 285, and 290); *see also* US Department of the Interior, *Guidelines for the Minerals Management Service Renewable Framework* (July 2009).

[20] The Massachusetts Supreme Judicial Court for the County of Suffolk recently overruled objections to the project from local residents and activists claiming that the project's developers failed to obtain proper permits for construction of the wind farm. *See Alliance to Protect Nantucket Sound Inc. et al. v. Energy Facilities Siting Board et al.*, Case Nos. SJC-10596 & SJC-10578 (Mass. Aug. 31, 2010)

permitting requirements, but will instead evaluate each proposal on a "per project" basis under its existing permitting program.[21] While this may result in some uncertainty for permit applicants, the Army Corps of Engineers' current permitting process has fewer requirements than the Bureau's program. For example, a developer that has obtained a lease under the Bureau's regulations may not undertake any site assessment without a Bureau-approved Site Assessment Plan and may not conduct any construction of the facility until it has received approval of its Construction and Operations Plan.[22] However, a permittee under the Army Corps of Engineers program will only have to demonstrate that the proposed offshore wind project's cumulative impacts will not adversely affect the public interest in order to obtain a permit to construct the operation, which is less onerous than the multi-step lease and permitting process under the Bureau's regulations.

In addition, Great Lakes states and interested stake-holders are already working with developers on offshore wind facility proposals. The Cuyahoga County, Ohio Commissioners created the Great Lakes Energy Development Task Force[23] which is comprised of a number of organizations, citizens, governments, non-profit and for-profit entities, to explore the legal, technical, environmental, economic, and financial aspects of developing wind technology. The Task Force conducted the Great Lakes Wind Energy Center Feasibility Study (published in April 2009)[24], which indicates that it is feasible to develop an offshore demonstration wind turbine project in Lake Erie. On May 14, 2010 the Lake Erie Energy Development Corporation[25], an off-shoot of the Task Force, entered into a Memorandum of Understanding with General Electric Company, an industry leader in wind turbine technology, to construct a 15-20 MW pilot project of four to eight turbines. This demonstration-size wind farm will provide valuable information as to the cost of construction and operation of a large-size wind farm, as well as the electricity yield that such a wind farm is likely to produce to support a more full-scale project.

Based on the progress in the Great Lakes region, it may become the more desirable location to develop offshore wind energy due to its more stream-lined permitting process, and motivated governmental and community buy-in. The Bureau's offshore wind energy regulations are cumbersome and involve a multi-step process that can include significant delay. On the Atlantic Coast, it could take upwards of eight to 10 years to get a project constructed, while it may take only three to four years for an offshore wind facility in the Great Lakes. Moreover, many of the Great Lakes States already have statutes and regulations in place to allow for the leasing of Great Lakes waters to offshore wind developers that are much more straight-forward than the Bureau's leasing regulations.[26]

Therefore, although a full-scale offshore wind project has yet to be proposed for the Great Lakes, the winds of change may be blowing in its direction. The key to successfully navigating the permitting requirements in the Great Lakes is early action. This may include a pre-application meeting with the Army Corps of Engineers, and any other applicable federal and state agencies, to preliminarily discuss the components of a proposed project and the utilization of existing stakeholder groups to obtain public support.

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[21] *See* Aug. 24, 2009 letter to Terry Yonker, Great Lakes Wind Collaborative, from John W. Peabody, Major General, US Army Division Engineer.
[22] *See, e.g.,* 30 CFR §285.600.
[23] *See* http://development.cuyahogacounty.us/en-US/energy-task-force.aspx.
[24] To view the Feasibility Study in its entirety visit http://development.cuyahogacounty.us/pdf_development/en-US/GLWECFeasibilityRpt.pdf.
[25] *See* http://www.leedco.org/.
[26] *See, e.g.,* Ohio Rev. Code §1506.11; Ohio Admin. Code Chapter 1501-6.

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