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From Tailwind to Typhoon: Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd. Blows Federal Jurisdiction Inland and Creates Dangerous Precedent under Slipshod Interpretation

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FROM TAILWIND TO TYPHOOON: ALLIANCE TO PROTECT NANTUCKET SOUND, INC. V. ENERGY FACILITIES SITING BD. BLOWS FEDERAL JURISDICTION INLAND AND CREATES DANGEROUS PRECEDENT UNDER SLIPSHOD INTERPRETATION

I. INTRODUCTION

“Our decision about energy will test the character of the American people and the ability of the President and the Congress to govern. This difficult effort will be the ‘moral equivalent of war’—except that we will be uniting our efforts to build and not destroy.”

President Jimmy Carter delivered the above statement in his address to the nation on energy on April 18, 1977. Through his speech, President Carter invoked fear of an impending energy crisis that would threaten to topple United States’ sovereignty, destroy the environment, halt the transportation system, cause rampant inflation, decrease production, and increase unemployment. Over thirty years later, President Barack Obama echoed President Jimmy Carter’s sentiment that America’s demand for energy had left the nation economically and politically vulnerable. He further recognized, “The nation that leads the world in creating new energy sources will be the nation that leads the 21st-century global economy.”

The federal government provided incentives for both consumers and producers to share an interest and participate in the clean


2. See id. at 1 (providing context for speech).

3. See id. at 3-4 (quoting President Carter). “If we fail to act soon, we will face an economic, social, and political crisis that will threaten our free institutions.” Id. at 4.

4. See President Barack Obama, President of the United States, Remarks by the President on Clean Energy (Apr. 22, 2009), available at http://www.whitehouse.gov/The_Press_Office/Remarks-by-the-President-in-Newton-IA/ (showing America accounts for less than 5% of world population, but produces about 25% of world oil demand).

5. Id. (describing President Obama’s unveiled program to develop renewable energy projects for U.S. outer continental shelf).
energy initiative through programs awarding tax credits, direct subsidies, loan guarantees, and grants to spur investment. Such initiatives helped spark venture capital investment, which in turn created new technology and caused growth of renewable energy sources. Experts anticipate a 72% increase in electricity generation from renewable resources by 2035, the majority of which will be generated by new wind and biomass facilities. Currently, all wind facilities in the United States are located on land; however, the federal government seeks to lease federal waters for wind projects, which could potentially generate as much as 20% of United States’ electricity by 2030.

With increasing pressure from the federal government for rapid renewable energy growth, state and local governments have implemented various mechanisms to comply with environmental laws and regulations and evaluate the environmental impact of renewable energy projects. Critics opine these “rules, regulations, and bureaucratic red tape” may slow or even halt critical renewable energy projects. Renewable energy projects are heavily litigated because of the relative novelty of renewable energy resources and the tensions between state and federal governments concerning these projects.

The Supreme Judicial Court of Massachusetts recently considered some of the issues surrounding renewable energy. In Alli-

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6. See id. (enumerating federal government created incentives with goal of doubling “nation’s capacity to generate renewable energy”).

7. See id. (explaining results of government initiated incentives concerning renewable energy). “In 2000, energy technology represented just one half of one percent of all venture capital investments. Today, it’s more than 10 percent.” Id.


9. See Obama, supra note 4 and accompanying text (acknowledging government’s interest in renewable energy initiatives).


12. See id. (elaborating on bills Republicans hope to pass to lower litigation levels surrounding renewable energy).

13. For a discussion of the issues considered by the court, see infra notes 17-20 and accompanying text.
ance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Board (Alliance)," the court furthered the federal government’s desire to streamline the local permit application process required for renewable energy initiatives. Specifically, the court upheld the Energy Facilities Siting Board’s (Siting Board) decision to allow Cape Wind Associates (Cape Wind) to construct the necessary transmission lines for a wind-powered energy-generating facility on Horseshoe Shoal in Nantucket Sound.

The court first resolved several jurisdictional authority claims related to the first proposed offshore wind farm in the United States. The Cape Cod Commission (Commission) denied Cape Wind’s proposed development of regional impact (DRI) in 2007, and the court had to determine whether the Siting Board could override the Commission’s prior decision. The court also settled whether the Siting Board had the requisite authority to grant any type of license relating to the Massachusetts’ tidelands. Lastly, the court addressed whether the Siting Board had jurisdiction to consider the “in-state impacts” of a wind farm located in federal waters. The court’s resolution of each jurisdictional issue effectively combined to streamline the approval procedures for proposed offshore wind-power generating facilities. Such resolutions, however, permitted a dangerous lack of accountability for federally authorized energy projects located in federal waters by not allowing states to consider the in-state impact of the facility.

This Casenote examines the Supreme Judicial Court of Massachusetts’ opinion in Alliance, rationalizes the impact of the decision on pending wind-farm proposals, and predicts the subse-

15. See id. at 799-800 (implying effectiveness of having unified, uniform oversight by Siting Board was important to expedite process for wind farm).
16. See id. at 815 (stating holding of case).
18. See Alliance, 932 N.E.2d at 796-98 (holding Siting Board could appropriately approve Cape Wind’s proposal).
19. See id. at 798-803 (describing Siting Board’s authority in relation to public trust doctrine).
20. See id. at 803-06 (considering whether local authorities had jurisdiction to consider in-state effects of federally located facility).
21. For an analysis of the court’s reasoning concerning in-state impacts, see infra notes 142-152 and accompanying text.
II. Facts

In *Alliance*, the Supreme Judicial Court of Massachusetts determined whether a “composite of the ‘individual permits, approvals or authorizations which would otherwise be necessary for the construction and operation’ of the transmission project” issued by the Siting Board could overrule a previous denial of a DRI by the Commission. Cape Wind planned to construct a wind farm of 130

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23. For a discussion of the decision’s impact on future approval procedures, see infra notes 214-221 and accompanying text.
24. For a discussion of the facts of *Alliance*, see infra notes 29-64 and accompanying text.
25. For background material pertaining to the public trust doctrine and a discussion of relevant court decisions, see infra notes 65-123 and accompanying text.
26. For a narrative analysis of *Alliance*, see infra notes 124-162 and accompanying text.
27. For a discussion of the critical analysis of *Alliance*, see infra notes 163-196 and accompanying text.
28. For a discussion of the impact of the *Alliance* holding, see infra notes 197-221 and accompanying text.
29. See *Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd.*, 932 N.E.2d 787, 791 (Mass. 2010) (stating main issue of case). DRI approval is required when a development is likely to present a significant impact on one or more municipality in Barnstable County. *Cape Cod Commission—Regional Land Use Plan*, 1989 Mass. Legis. Serv. 716 (West 1990). Numerous standards and criteria are included into a DRI and the decision surrounding it including the impact of the development on natural resources, existing capital facilities, the physical size of the development, the employees generated by the development, the location of the development, the importance of the development to economic development, and any other factors of regional concern that the Commission may determine. *Id.*
wind turbine generators in Nantucket Sound. The facility's proposed location was more than three miles from any Massachusetts coast, and thus entirely in federal waters. In order to carry the electricity generated at the wind farm to an existing power grid, however, Cape Wind had to construct 18.4 miles of transmission lines through Massachusetts land. After reviewing the proposed wind farm for three-years, the Siting Board approved construction of the transmission line facilities in 2005. The actual construction of the transmission lines, however, required additional approvals from various state and local authorities.

Beginning in 2002, Cape Wind sought the appropriate approval required to construct the transmission lines, received Siting Board Approval in 2005, and thereafter acquired several other necessary approvals. But after public hearings and several requests

30. *Alliance*, 932 N.E.2d at 791 (describing physical specifications of facility).

31. *Id.* (demonstrating actual facility was located in federal waters); see also 43 U.S.C. § 1333 (2006) (noting outer continental shelf is area of exclusive federal jurisdiction). The outer continental shelf encompasses any area extending from three to 200 miles offshore. 43 U.S.C. § 1301 (2006).

32. *Alliance*, 932 N.E.2d at 791-92 (describing physical locations of transmission lines). The proposed lines will run "under the seabed through Nantucket Sound and Lewis Bay for 12.5 miles, coming ashore in the town of Yarmouth[], and continuing underground for 5.9 miles through Yarmouth and Barnstable to an existing switching station in Barnstable." *Id.* at 792.

33. See *id.* at 793 (reiterating court's 2006 decision). The Siting Board acted pursuant to § 69J of the Massachusetts General Laws to approve the facility. *Id.*

Section 69J stipulates:

No applicant shall commence construction of a facility at a site unless a petition for approval of construction of that facility has been approved by the board and, in the case of an electric or gas company which is required to file a long-range forecast pursuant to section sixty-nine I, that facility is consistent with the most recently approved long-range forecast for that company.

MASS. GEN. LAWS ANN. ch. 164, § 69J (West, Westlaw through 2012).

34. See *Alliance*, 932 N.E.2d at 792-93 (describing requisite permits and approvals for Cape Wind). Cape Wind was required to obtain multiple permits and underwent a joint review by the Executive Office of Energy and Environmental Affairs and the Commission. *Id.* at 792. The Commission eventually denied approval of a development of regional impact (DRI), which left Cape Wind to either appeal to the Commission or petition the Siting Board for a composite certificate encompassing all necessary permits for the transmission lines. *Id.* at 793. In lieu of appealing the permit denial, Cape Wind sought the composite certificate which was eventually granted by the Siting Board. *Id.* at 794.

35. *Id.* at 792-95 (providing history of various permits and approvals obtained by Cape Wind). Cape Wind sought approval from the Siting Board to construct transmission lines in 2002. *Id.* at 792-93. The court affirmed the Siting Board's 2005 decision granting approval in 2006, and Cape Wind had the requisite approval to seek other state and federal approvals. *Id.* at 793. In seeking state and regulatory approvals, Cape Wind filed an expanded environmental notification for with the Executive Office of Energy and Environmental Affairs (EOEEA). *Id.* at
for additional information from Cape Wind, the Commission denied Cape Wind’s DRI application in October 2007 because Cape Wind failed to submit “the full body of information” requested by the Commission.\(^{36}\) Without exercising its right to appeal the DRI denial to the local county superior court, Cape Wind filed a petition with the Siting Board to obtain a certificate that would serve as “a composite of all individual permits, approvals or authorizations which would be otherwise necessary for the construction and operation of the facility.”\(^{37}\) The Siting Board certificate included the equivalent of the DRI application previously denied by the Commission, as well as eight additional mandatory state and local permits.\(^{38}\) One of the additional eight permits was a tidelands license, which was “generally within the regulatory jurisdiction of [Department of Environmental Protection].”\(^{39}\) In May 2009, after months of hearings, testimony, written discovery, and witness testimony, the Siting Board granted Cape Wind the composite certificate.\(^{40}\)

The court categorized the petitioner’s numerous challenges on appeal: the Siting Board’s jurisdictional authority, the validity of the Siting Board’s decision, and the legality of a Department of Environmental Protection (DEP) regulation.\(^{41}\) Regarding the Siting Board’s jurisdictional authority to override the Commission’s DRI decision, the petitioners argued the statutory language of the Cape Cod Act, which was enacted after the Siting Board’s enabling statute, provided the petitioners could appeal the Commission’s DRI denial only to the local superior court.\(^{42}\) The court “presume[d] that the Legislature act[ed] with full knowledge of existing laws,”

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792. The Commission and the EOEEA then undertook a joint review of Cape Wind’s proposal under the Massachusetts Environmental Protection Act (MEPA). \(\text{Id.}\) The project was found to be in compliance with MEPA by the EOEEA, but the Commission did not issue DRI approval. \(\text{Id.}\) at 793.

36. \(\text{Id.}\) at 793 (detailing history of Commission’s DRI denial).

37. \(\text{Id.}\) at 794 (quoting MASS. GEN. LAWS ANN. ch. 164, § 69K (West, Westlaw through 2012)) (providing history of Cape Wind permit process with Siting Board).

38. \(\text{Id.}\) (describing § 69K certificate).

39. \textit{See Alliance}, 932 N.E.2d at 794 (distinguishing tidelands licenses as traditionally under DEP jurisdiction).

40. \(\text{Id.}\) at 794-95 (describing process by which Siting Board granted composite certificate). The five government entities with permits at issue consisted of: Barnstable, Yarmouth, the DEP, the Executive Office of Transportation and Public Works, and the Commission. \(\text{Id.}\) at 794.

41. \(\text{Id.}\) at 795 (combining appeals and describing categories under which each falls). Petitioners include sixteen individuals, the town of Barnstable, and the Commission. \(\text{Id.}\) at 699 n.1.

42. \(\text{Id.}\) at 796 (outlining petitioner’s argument concerning relationship between Cape Cod Act and Siting Board’s enabling statute).
and noted the Cape Cod Act and the Siting Board’s enabling statute must operate harmoniously together to provide consistency.43 Under this presumption, the court held the Siting Board had the appropriate jurisdiction to override the Commission’s DRI denial.44

The petitioners also averred the Siting Board did not have the authority to grant a certificate containing any type of license relating to Massachusetts’ tidelands because the public trust doctrine required an express delegation of authority, which was traditionally entrusted to the DEP.45 The court determined the Siting Board had the express authority to assume all the powers and obligations “of any and all [s]tate and local agencies with permitting authority over a proposed facility.”46 It recognized the broad language of the Siting Board’s enabling statute included the powers of the DEP.47

The court further reasoned if the Siting Board did not adopt the findings of the DEP concerning a tideland license, it was required to undertake the same reviewing process the DEP did.48 Ultimately, the court affirmed the Siting Board’s approval of Cape Wind’s request for the equivalent of a tideland license.49

The petitioners contended the Siting Board was obligated to consider the in-state impacts of the entire wind farm project in issuing the composite certificate, even though the main facility was located entirely in federal waters.50 According to the court, such an obligation would render the Siting Board’s jurisdiction paramount

43. Id. at 796-97 (showing Cape Cod Act and Siting Board’s enabling statute were contradictory, thus creating inconsistency). If the court read the two statutes as the petitioners suggested, the Siting Board would apply everywhere in Massachusetts, save Barnstable County. Id. at 797. Since the Siting Board maintains responsibility to “provide a reliable energy supply for the commonwealth,” such a reading violates the responsibility of the Siting Board. Id. (quoting Mass. Gen. Laws Ann. ch. 164, § 69H (West, Westlaw through 2012)).

44. Alliance, 932 N.E.2d at 797 (holding purpose of Siting Board’s was to consider needs of broader committee and trumped Commission’s DRI denial).

45. Id. at 798-99 (describing petitioners argument under public trust doctrine).

46. Id. at 799-800 (internal quotation marks omitted) (showing broad interpretation of Massachusetts General Law § 69K encompasses DEP as agency over which Siting Board had authority).

47. Id. at 800 (concluding legislature expressly vested authority in Siting Board to act in place of DEP).

48. Id. (showing Siting Board had more than just power to act in place of DEP).

49. Alliance, 932 N.E.2d at 803 (affirming Siting Board decision concerning tideland license). Further, the court accorded substantial discretion to the Siting Board in interpreting § 69K, the statute it was charged with enforcing. Id. at 802.

50. Id. at 803 (stating petitioners’ argument).
to federal jurisdiction. The majority noted the enabling statute only permitted the Siting Board to regulate a facility within its jurisdiction.

After challenging the Siting Board’s jurisdictional authority, the petitioners attacked the substance of the Siting Board’s decision regarding the composite certificate. The petitioners argued Cape Wind did not make the required good faith effort to obtain DRI approval prior to seeking the composite certificate. The petitioners also claimed the Siting Board did not make sufficient evidentiary findings concerning the need and cost of the facility, the environmental impact of the transmission project, and the pro-

51. Id. at 802-03 (holding Siting Board obligation to consider in-state impacts renders Siting Board jurisdiction paramount to federal jurisdiction). The court read §§ 69J, 69K, and 69O literally to focus on the “physical facility” under the Siting Board’s jurisdiction, which, in the case at hand, is only the two 115 kilovolt electric transmission lines located within three miles of shore. Id. at 803-05. Petitioners did not contest the transmission lines were the only facility located in state waters. Id. at 803. The court, therefore, interpreted facility to encompass purely physical structures. Id.

52. Id. at 803 (restricting Siting Board’s jurisdiction by defining facility as merely physical and not inclusive of in-state impacts on physical facilities outside of, but connected to, state jurisdiction).

53. Id. at 807 (identifying petitioners’ contentions about substance of Siting Board’s decision).

54. Alliance, 932 N.E.2d at 808 (supplying petitioners’ argument concerning good faith effort). Massachusetts General Law § 69L(A) requires a composite certificate applicant finalize a statement including a representation of a good faith effort made by applicant to obtain licenses, permits, and other approvals required from state agencies and local governments. Mass. Gen. Laws Ann. ch 164, § 69L(A) (West, Westlaw through 2012). Petitioners contended that, because the Cape Wind delayed production of site control evidence until shortly before the Commission’s DRI decision deadline, it did not exhibit a good faith effort. Alliance, 932 N.E.2d at 808. The Siting Board argued, and the court agreed, that Cape Wind’s history of participation and agreement to extend the DRI decision deadline by two weeks to give the Commission additional time was substantial evidence of good faith effort to obtain a DRI approval. Id.

55. Alliance, 932 N.E.2d at 809-10 (providing petitioners’ argument that findings related to need and cost were not made). Section 69O of the Massachusetts General Laws requires findings on the need of the facility to meet the energy requirements of the applicant’s market with various other power measures taken into account and a necessary energy supply at the lowest possible cost. Mass. Gen. Laws Ann. ch 164, § 69O (West, Westlaw through 2012). The Commission argued the Siting Board heard no evidence concerning the need for the project to meet the energy requirements of Cape Wind’s market area. Alliance, 932 N.E.2d at 811. The Siting Board, however, looked to its earlier decisions finding the existing transmission system was inadequate to support the wind farm and that the new transmission project was needed for the proposed wind farm to contribute to the regional energy supply. Id. at 811-12.

56. Alliance, 932 N.E.2d at 811-13 (discussing petitioners’ argument concerning environmental impact). Petitioners argued the Siting Board made insufficient findings concerning the environmental impact of the transmission lines on the environment. Id. at 811. The petitioners specifically contended the Siting Board
ject’s conformance with existing law.\textsuperscript{57} Despite these contentions, the court concluded the Siting Board properly relied on the evidentiary findings from previous proceedings, its previous decisions on the Cape Wind project, and prior reviews by petitioners to issue the composite certificate.\textsuperscript{58}

Lastly, one of the petitioners, Alliance to Protect Nantucket Sound, challenged the DEP’s water-dependent use regulation creating a rebuttable presumption that facilities with a water-dependent use serve a “proper public purpose.”\textsuperscript{59} The DEP previously determined Cape Wind’s proposed transmission lines was a water-dependent use, and the Siting Board adopted the DEP’s determination into its decision to grant the composite certificate.\textsuperscript{60} The Alliance to Protect Nantucket Sound argued the DEP must evaluate the impacts of the actual energy-generating facility to decide whether an infrastructure is water-dependent, and then apply the public cost-benefit analysis test for those infrastructures deemed water-dependent.\textsuperscript{61} The court afforded a highly deferential standard of review to the DEP’s water-dependent use regulation,\textsuperscript{62} which “applies solely to ‘infrastructure facilities used to deliver electricity . . . from an offshore facility[,]’ not to the offshore facility itself.”\textsuperscript{63} While the DEP did not consider the impacts of the facility, it did not have the

\textsuperscript{57} Id. at 815 (presenting petitioners’ argument concerning conformance with existing law). Petitioners suggested a “reasonableness of exemption” standard, as enumerated in § 69O, required the Siting Board to review in-state impacts of Cape Wind’s entire facility. \textit{Id.} The court reiterated the Siting Board did not have jurisdiction over the federally located part of the facility and could only review the part of the facility in its jurisdiction. \textit{Id.} The Siting Board “properly relied on its findings in the §§ 69J and 72 proceedings where § 69O(3) directs it to review reasonableness.” \textit{Id.}

\textsuperscript{58} Id. at 811-13 (stating court’s holding concerning substance of Siting Board decision and resolution of each of petitioners’ contentions with Siting Board analysis of environmental impact).

\textsuperscript{59} Id. at 813-15 (providing both parties’ arguments on validity of DEP’s water-dependent use regulation). Water-dependent uses are “those uses and facilities which require direct access to, or location in, marine or tidal waters and which therefore cannot be located inland.” \textit{Id.} at 814 (emphasis omitted). Alliance to Protect Nantucket Sound argued because wind farms can be located inland they are not water-dependent. \textit{Id.}

\textsuperscript{60} Id. at 814 (explaining Siting Board’s use of DEP’s determination that Cape Wind facility was water-dependent).

\textsuperscript{61} Id. at 815 (providing Alliance to Protect Nantucket Sound’s argument that infrastructure facility is not water-dependent).

authority to do so because the wind farm is located entirely offshore in federal waters. Thus, the court agreed with the DEP's water-dependent use regulation and ultimately upheld the Siting Board's issuance of the composite certificate to Cape Wind.

III. BACKGROUND

A. The Relationship Between the Energy Facilities Siting Board and the Cape Cod Commission

The statutorily created Energy Facilities Siting Board is charged with "provid[ing] a reliable energy supply for [Massachusetts] with a minimum impact on the environment at the lowest possible cost." The governing statute requires the Siting Board review "the need for, cost of, and environmental impacts of transmission lines" when implementing various statutory provisions. Specifically, electric companies may seek a Siting Board-issued composite certificate composed of "all individual permits, approvals or authorizations which would otherwise be necessary for the construction and operation of the [proposed] facility," if it cannot be constructed due to any disapproval from state or local agencies. The Supreme Judicial Court of Massachusetts stated, "The intent and purpose of the statute [ ] is in part to ensure that local boards do not use their power over licenses and permits to thwart the needs of the broader community for a reliable, affordable, and environmentally sound energy supply."

In 1989, the Massachusetts' legislature enacted the Cape Cod Act to protect the unique historical and environmental characteristics of Cape Cod. The Cape Cod Act, in turn, established the Cape Cod Commission. The Commission is a regional planning

63. Id. at 815 (providing court's holding on water-dependent use regulation).
64. Id. (providing holding of court).
65. MASS. GEN. LAWS ANN. ch. 164, § 69H (West, Westlaw through 2012), (providing oversight by state and local governments for Siting Board establishment and procedures).
66. Id. (providing areas of Siting Board jurisdiction). Sections 69H to 69Q list numerous permits, approvals, authorizations, and powers of the Siting Board and thus are considered the "enabling statute." Id. at §§ 69H, 69Q. These sections also provide the required review process of the Siting Board in exercising their powers. Id.
67. Id. at § 68K (describing certificate of environmental impact and public interest).
70. See id. (establishing Cape Cod Commission).
agency that prepares and reviews DRI applications in order to issue DRI certificates. The Commission’s enabling act provides, “Any party aggrieved by a Commission decision on a development of regional impact may appeal the Commission’s decision to the Barnstable county superior court or the land court” and “[t]he foregoing remedy shall be exclusive.”

The Siting Board’s power to grant a composite certificate, which is inclusive of a DRI certificate, and the system of internal appeal established by the Cape Cod Act are contradictory upon first glance; however, Suliveres v. Commonwealth and Commonwealth v. Harris (Harris) demonstrate that courts presume the legislature acted with knowledge of existing laws. Courts thus work to harmonize and accomplish the purposes of both statutes, unless the prior legislation is so inconsistent with a later enactment that both statutes cannot coexist. Despite such a legal truism, the public trust doctrine has created jurisdictional discrepancies between typically conjoined local and federal agencies.

B. The Public Trust Doctrine

Under the public trust doctrine, Massachusetts holds its tidelands in trust for the public to use for traditional water-dependent purposes—fishing, fowling, and navigation. When individuals use the tidelands for nontraditional purposes the legislature mandates the non water-dependent use “serve a proper public purpose.” Massachusetts’ law expressly obligates the DEP “to preserve and

72. See supra note 69 at § 17(b), (d) (describing Commission’s appeal process).
73. 865 N.E.2d 1086 (Mass. 2007).
74. 825 N.E.2d 58 (Mass. 2005).
75. Compare Suliveres v. Commonwealth, 865 N.E.2d 1086, 1090 (Mass. 2007) (holding legislature acts with full knowledge of existing laws), with Commonwealth v. Harris, 825 N.E.2d 58, 67 (Mass. 2005) (showing, without disabling inconsistency, two statutes can be read together, giving meaning and purpose to both).
76. See Harris, 825 N.E.2d at 67 (implying courts should actively attempt to harmonize statutes).
77. See infra notes 78-101 and accompanying text for a discussion of the jurisdictional tensions created by the public trust doctrine.
protect the rights in tidelands of the inhabitants of the common-wealth by ensuring that the tidelands are utilized only for water-dependent uses or otherwise serve a proper public purpose.\textsuperscript{80} Whether other Massachusetts’ agencies have any power over tidelands, however, is often unclear because the Supreme Judicial Court of Massachusetts historically emphasized the importance of using express language to grant tideland authority.\textsuperscript{81}

The Supreme Judicial Court of Massachusetts, in \textit{Fafard v. Conservation Commission of Barnstable (Fafard)},\textsuperscript{82} held only “the Commonwealth [of Massachusetts] or its express designee may act to further public trust rights.”\textsuperscript{83} In \textit{Fafard}, a local commission denied an application for the construction of a pier on a local river and maintained it had the authority to protect “interests of recreation and public trust rights.”\textsuperscript{84} The court explained that “[a]bsent a grant of authority from [Massachusetts], a municipality may not claim powers to act on behalf of public trust rights.”\textsuperscript{85} The court thus prohibited the town from administering public trust rights on behalf of the DEP absent an express legislative delegation or “a grant of authority from the DEP.”\textsuperscript{86} But the court recognized local commissions could adopt public trust doctrine standards more stringent than those in Massachusetts’ law because Massachusetts only “‘establish[d] minimum [s]tate-wide standards.”\textsuperscript{87} The local commission’s stricter tideland controls were permissible provided they “d[id] not usurp the DEP’s authority to deny licenses or permits to applicants” who sought to construct structures not serving a proper public purpose.\textsuperscript{88}

\textsuperscript{80} See \textit{Mass. Gen. Laws Ann.} ch. 91, § 2 (West, Westlaw through 2012) (showing public trust doctrine requirement applicable to case at hand).

\textsuperscript{81} See \textit{infra} notes 82-88 and accompanying text for a discussion of the confusion surrounding which entities have power to control aspects of the public trust doctrine.

\textsuperscript{82} 733 N.E.2d 66 (Mass. 2000).

\textsuperscript{83} \textit{Id.} at 68 (stating holding of court).

\textsuperscript{84} \textit{Id.} at 69 (describing Commission’s basis for decision on town bylaws and regulations with authority over public trust rights).

\textsuperscript{85} \textit{Id.} at 71 (providing express delegation is necessary for tideland protection).

\textsuperscript{86} \textit{Id.} at 76 (concluding bylaws are void because they claim to protect public trust rights). The court in \textit{Farland} eventually upheld the Commission’s denial of the pier permit on the basis of powers granted by Legislature to local conservation commissions rather than under the commission’s claim to protect public trust rights. \textit{Id.}

\textsuperscript{87} \textit{Fafard}, 733 N.E.2d at 72 (explaining local entities can require tideland controls in addition to minimum standard provided by state).

\textsuperscript{88} \textit{Id.} (noting DEP must still have ability deny permits when not serving “proper public purpose[s"]).
The Supreme Judicial Court of Massachusetts in *Moot v. Department of Environmental Protection (Moot)* further demonstrated the importance of express legislative language authorizing the DEP to determine whether a non water-dependent use is for proper public purpose. At issue in *Moot* were DEP-promulgated regulations that indicated the areas subject to licensing and permitting and exempted all landlocked tidelands from such requirements. The defendants sought to construct a project under the landlocked exemption. The court stated the DEP could only regulate the tidelands subject to the authority expressly granted by the state. But by exempting the landlocked tidelands from the licensing requirements, the DEP regulation “fail[ed] to provide for a method by which the department could determine the proper public purpose of nonwater-dependent uses” as required by state law. The DEP had thus forgone its responsibility to preserve and protect the public’s rights in tidelands. Moreover, the DEP “d[id] not have the authority to relinquish or extinguish the public’s rights in any of the [Massachusetts’] tidelands, except on terms expressly authorized by the [l]egislature.” The court concluded the DEP exceeded its authority by abandoning its obligation to ensure all non water-dependent uses of the land serve a proper public purpose.

Despite the Supreme Judicial Court of Massachusetts’ conservative interpretation of express authorization in *Moot*, it has often upheld local bylaws that allow state agencies to regulate and impose conditions to ensure interests described in the statute are achieved. In *Golden v. Board of Selectmen of Falmouth (Golden)*, the court acknowledged the legislature “did not attempt to cover the

89. 861 N.E.2d 410 (Mass. 2007).
90. Id. at 415-17 (demonstrating importance of express authorization granting DEP authority).
91. Id. at 414 (stating central issue of case).
92. Id. at 413-14 (showing licensing exemption allotted by DEP).
93. Id. at 412 (holding the exemption exceeded department authority).
94. Moot, 861 N.E.2d at 417-18 (stating additional issue of regulation’s pre-emption of DEP’s duty to preserve and protect public’s tideland rights).
95. See id. at 419-20 (demonstrating legislature alone has authority to rescind public tideland rights through legislation).
96. Id. at 417 (limiting DEP’s role concerning public interest rights).
97. Id. (showing DEP’s relinquishment of obligation to protect public’s rights in tidelands).
98. Lovequist v. Conservation Comm’n of Town of Dennis, 393 N.E.2d 858, 863-64 (Mass. 1979) (holding no conflict between state and local laws because local law merely furthers state law); see also Golden v. Selectmen of Falmouth, 265 N.E.2d 573, 577 (Mass. 1970) (upholding local bylaw as consistent with Massachusetts Wetlands Protection Act).
entire field of coastal wetlands regulations to the exclusion of regulation by local authority."\textsuperscript{100} Moreover, Massachusetts’ advances in environmental control would be lost if local agencies were not given regulatory authority.\textsuperscript{101}

C. The Separation of State and Federal Jurisdiction and the Intangible Complications

In 1953, Congress enacted the Outer Continental Shelf Lands Act (OCSLA), which granted the jurisdiction of all submerged lands under United States sovereign control or any fixed structures lying seaward of a three-mile boundary from states’ shores to the federal government.\textsuperscript{102} In a landmark 1975 case, \textit{United States v. Maine (Maine)},\textsuperscript{103} the Supreme Court of the United States confirmed and reiterated “paramount rights to the offshore seabed here in the Federal Government as an incident of national sovereignty.”\textsuperscript{104} The Court realized the economic and environmental importance of OCSLA and acknowledged that federal legislation and commercial activity had already begun to exploit offshore resources.\textsuperscript{105} While government emphasis on exploitation of offshore natural resources has been clear for years, the tension between state and federal authority over the permitting process required before harvesting the natural resources is increasingly apparent.\textsuperscript{106}

Without clear legislative or judicial guidance, courts have reached divergent conclusions regarding the overlap of state and federal jurisdiction of offshore natural resources.\textsuperscript{107} The United States Court of Appeals for the First Circuit attempted to balance state and federal powers by holding an authority “cannot do indi-

\textsuperscript{100} Id. at 576 (providing legislative intent in regulating coastal wetlands ).

\textsuperscript{101} Id. at 577 (describing effect of uniform statutory scheme regarding preserving and protecting coastal wetlands).


\textsuperscript{103} 420 U.S. 515 (1975).

\textsuperscript{104} See id. at 524 (explaining state’s historical claims to waters off-coast are not precedential).

\textsuperscript{105} See Id. at 527-28 (providing statistics from 1953-75 to demonstrate amount of natural resources extracted from outer Continental Shelf).

\textsuperscript{106} For a discussion of jurisdictional tensions and complications arising from offshore initiatives, see supra notes 102-105, infra notes 107-119 and accompanying text.

\textsuperscript{107} For a comparison of two different authorities and their divergent outcomes concerning the overlap of state and federal jurisdiction, see infra notes 108-124 and accompanying text.
rectly what it is forbidden to do directly." In New England Legal Foundation v. Massachusetts Port Authority (New England Legal), the Federal Aviation Administration re-structured the landing fee charged at Logan Airport in Boston, Massachusetts. The fee regulations attempted to control conduct rather than simply recover operational costs; the First Circuit thus struck down the regulation as invalid under federal law.

In Ten Taxpayer Citizens Group v. Cape Wind Associates, LLC (Ten Taxpayer), the First Circuit took its position in New England Legal one step further and prohibited Massachusetts from regulating any facilities built on the outer continental shelf. Cape Wind sought to construct a data collection tower located more than three miles from the shore. Though the plaintiffs conceded the facility was within federal jurisdiction, they argued Cape Wind was required to obtain state permits in addition to the permit already granted by the federal government. The plaintiffs further contended Congress gave Massachusetts the authority to regulate activities that affected fishing in local waters, and Cape Wind’s data collection tower would in fact affect fishing in local waters. Despite Massachusetts’ power to regulate activities affecting fishing in local wa-

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109. See id. (indicating state government was attempting to control federally authorized activity).

110. See id. at 159 (describing new landing fee structure). The new landing fee structure essentially increased the landing cost imposed on smaller aircraft and reduced the landing cost for larger aircraft. Id.

111. Id. at 174 (holding on fee regulation). The court held the Port Authority could appropriately enact a landing fee structure as long as it was not an attempt to modify the conduct permitted under Federal Law. Id. In New England Legal, the court struck down the fee structure because the landing fees were not an attempt to recoup costs, but rather to control a federally permissible activity. Id. at 175. The court left room for state regulation of federally permissible conduct as long as such regulation was not an attempt to control such conduct. Id. at 174.

112. 373 F.3d 183 (1st Cir. 2004).

113. Id. at 197 (increasing restriction on state’s ability to regulate federal activity).

114. See id. at 186 (providing facts of case).

115. See id. (stating plaintiffs’ main contention concerning jurisdictional authority over Nantucket Sound).

116. Id. (explaining plaintiffs’ additional contention that state had authority to regulate any activity affecting local waters). The court admitted Congress gave the state the power to regulate activities affecting marine environments and fisheries within three miles of shore. Id. The court went on to show that federal law, under OCSLA, also incorporated state law and its requirements to give exclusive power over the Outer Continental shelf to the federal government. Id. at 197; see also supra notes 98-102 and accompanying text (discussing wetland and offshore jurisdiction).
ters, the First Circuit concluded Massachusetts did not have a "general warrant to 'polic[e] the entire Nantucket Sound for environmental disturbances that could impact fishing.'"\textsuperscript{117} The court recognized federal law adopted those state laws concerning the outer continental shelf that were consistent with OCSLA.\textsuperscript{118} But the adopted state laws cannot require state agency approval for the construction of facilities on the outer continental shelf, because this "would effectively grant state governments a veto power over the disposition of the national seabed" and federal activities outside of the three mile limit.\textsuperscript{119}

The Commission and a local town sought to regulate local docking for a gambling boat in federal waters in \textit{Leisure Time Cruise Corp. v. Town of Barnstable (Leisure Time)}.\textsuperscript{120} The regulations specifically targeted the gambling boat by regulating uses "ancillary to [the gambling boat’s] operation of its gambling cruise" in federal waters.\textsuperscript{121} The district court knew the defendants disapproved of the boat’s use for gambling, a use that sharply contrasted with state laws banning gambling.\textsuperscript{122} In clear distinction to the decision in \textit{New England Legal}, the district court held the applicable federal law did not preempt the regulation.\textsuperscript{123}


\textsuperscript{119} \textit{Id.} at 197 (providing hypothetical situation in which state jurisdiction improperly trumps federal jurisdiction).

\textsuperscript{120} 62 F. Supp. 2d 202, 205-06 (D. Mass. 1999) (offering contrasting opinion to other court opinions concerning state regulation of federal activity). Leisure Time Cruise Corporation sought to operate a cruise for several hours twice daily. \textit{Id.} at 205. The cruise would carry passengers into federal waters in Nantucket Sound for several hours of gambling and drinking in an attempt to avoid state regulation of gambling. \textit{Id.}

\textsuperscript{121} \textit{Id.} at 206 (noting nature of regulation). The gambling ship was specifically required to procure a number of local permits and perform a long list of improvement to the waterfront and parking areas. \textit{Id.}

\textsuperscript{122} \textit{Id.} at 205 (presenting objections to gambling boat). In town meetings, town councilors blatantly objected to the proposed offshore gaming activities. \textit{Id.}

\textsuperscript{123} \textit{Id.} at 208 (holding regulation did not impede cruise ship’s ability to comply with federal statutory requirements). The court’s \textit{New England Legal} decision provided the necessary leeway for its \textit{Leisure Time} decision as the court discussed an impermissible regulation that indirectly attempted to control a
IV. NARRATIVE ANALYSIS

The Alliance case concerns the disjointed and complex processes through which agencies—federal, state and local—approve environmental projects, and the underlying tension between local agencies and the federal government.124 The Supreme Judicial Court of Massachusetts emphasized the importance of a streamlined approval process that does not impinge on a state’s need for reliable, affordable, and environmentally friendly energy.125 In creating a slightly more streamlined process, the court also drew a decisive line for the Commonwealth of Massachusetts’s jurisdictional reach.126 The case demonstrates the significance of new energy initiatives, reconciles the powers of the local agencies in Massachusetts, and limits the state’s power to inhibit such initiatives.127

A. Reconciling Local Jurisdictional Discrepancies

The court presumed the legislature acted with an awareness of existing laws.128 With no glaring or disabling inconsistencies between the governing acts or statutes, the Supreme Judicial Court of Massachusetts followed the precedential desire set by Harris and harmoniously molded two pieces of legislation.129 The Siting Board’s enabling statute provides an appeal process for denials of composite certificates, the result of which gives the Siting Board final affirmation or denial of the certificate decisions.130 The court easily recognized the jurisdictional supremacy of the Siting Board completely permissible federal activity. See supra note 111 for a discussion of the holding in New England Legal. Leisure Time involved a state regulation controlling an activity that, while permissible under federal law, was left by the federal government for individual state control. See Leisure Time, 62 F. Supp. 2d at 204. The “cruise to nowhere” in Leisure Time simply sought to avoid that state regulation and had not been preempted by federal law. Id. at 204; see also infra note 219 for a discussion of preemption.

125. See id. at 797 (explaining purpose of Siting Board).
126. See supra notes 41-72 and accompanying text for a discussion of the court’s decision to eliminate the overlap of state and federal jurisdiction.
127. See infra notes 128-152 and accompanying text for an explanation of the court’s rationale.
128. See supra note 75-76 and accompanying text for an articulation of how the court reconciles the seemingly conflicting statutes.
129. See Alliance, 932 N.E.2d at 796 (harmonizing two statutes). The court stated: “[T]he two statutes can be read together, giving meaning and purpose to both.” Id.
concerning certificate decisions but struggled with its analysis of Siting Board jurisdictional authority over Massachusetts’ tidelands.  

The large amount of legislation surrounding the public trust doctrine and cautious judicial treatment of the doctrine illustrate the importance of the public trust doctrine. In an effort to create a more streamlined approval process for large renewable energy initiatives, the Siting Board asked the Supreme Judicial Court of Massachusetts to expand its interpretation of express delegation of public trust rights. The court acknowledged and agreed with the petitioner’s argument that only “an entity to which the Legislature properly has delegated authority may administer public trust rights[,]” but finagled its interpretation of the Siting Board’s governing statute to infer such a delegation of authority to the Siting Board.  

The court began by analyzing the DEP’s authority to “protect the interests of the Commonwealth” in the tidelands as expressly delegated in its governing statute. The Siting Board’s governing statute, however, contained “no mention of public trust rights or obligations[,]” but the court asserted the legislature did give the Siting Board the authority to issue a certificate “in the form of a composite of all individual permits, approvals or authorizations which would otherwise be necessary for the construction and operation of the facility.” The court thus determined no mention of

131. See supra notes 128-130 and accompanying text (explaining Siting Board’s jurisdictional supremacy over the Commission). But see infra notes 132-141 and accompanying text (discussing public trust doctrine posing challenge to Siting Board’s jurisdictional supremacy).

132. See supra notes 82-101 and accompanying text for a discussion of the importance of “express” delegation.

133. See Alliance, 932 N.E.2d at 799-800 (providing Siting Board’s proposed interpretation of express delegation). The court affirmed the Siting Board’s interpretation of express delegations of authority, which streamlined the approval process of renewable energy projects because, in granting the Siting Board the jurisdiction to act in the DEP’s shoes, the legislature still required the Siting Board to conduct the same research as the DEP would have conducted. Id. at 800. A composite certificate granted by the Siting Board is determined in the same manner and has the same effect as a decision made by the DEP. Id. Because both the Siting Board and the DEP arrive at the same result, the court concluded that the Siting Board could act in the DEP’s place without overstepping the express grant of jurisdiction with relation to tidelands licenses. Id.

134. See infra notes 169-182 and accompanying text for a discussion of the court’s avoidance of the term express.

135. Alliance, 932 N.E.2d at 799 (quoting MASS. GEN. LAWS ANN. ch. 91, § 2 (West, Westlaw through 2012)) (describing DEP’s tideland authority).

136. Id. (quoting MASS. GEN. LAWS ANN. ch. 91, § 2 (West, Westlaw through 2012)) (asserting Siting Board stands in place of DEP); see also supra note 130 and accompanying text (discussing certificate of economic impact and its composition).
public trust rights or obligations was necessary because the Siting Board’s governing statute adopted and integrated the DEP’s expressly delegated and vested authority regarding tideland licensing.137

The court found support for its interpretation of the tideland authority delegation in the apparent redundancy if the Siting Board was not vested with the power to issue tideland licenses.138 The Siting Board’s governing legislation required it to evaluate whether the facility in question would conform to all “laws, ordinances, and regulations that would otherwise govern it in the absence of a [Siting Board issued composite] certificate.”139 This evaluation procedure inherently included the same review process taken by the DEP and the same powers afforded to the DEP.140 The court, therefore, concluded the legislature delegated “both the power and the obligation to stand in the shoes of the DEP” to the Siting Board, and the Siting Board “did not exceed its authority by including the equivalent of a [DEP issued] tidelands license in the certificate it granted Cape Wind.”141

B. The Insurmountable Wall Dividing State and Federal Jurisdiction.

Where the Supreme Judicial Court of Massachusetts blurred the jurisdictional line between local agencies, it drew a rigid line between state and federal jurisdiction concerning the in-state impacts of a federally-located facility.142 The Siting Board limited its jurisdictional scope by considering the in-state impacts from only the portion of the proposed facility located outside of federal waters—the transmission lines connecting the proposed wind facility

137. Alliance, 932 N.E.2d at 799 (giving DEP tideland authority to Siting Board).
138. Id. at 800 (explaining process through which Siting Board must issue composite certificates).
139. Id. at 800 (describing Siting Board’s obligations throughout approval process).
140. Id. (interpreting Siting Board’s governing statute). According to the court, the Siting Board’s governing statutes imposes “an express legislative directive” on the Siting Board “to stand in the shoes of any and all [s]tate and local agencies with permitting authority over a proposed ‘facility.’” Id. This directive conveys the Siting Board with the right to assume “all the powers and obligations of such an agency with respect to the decision whether to grant the authorization.” Id.
141. Id. (providing Court’s holding concerning tideland’s licensing power granted to Siting Board).
142. See infra notes 186-196 and accompanying text for a discussion of the rigid division of state and federal jurisdiction.
to the state electric grid. The petitioners claimed the Siting Board should have considered "all direct and indirect impacts of the entire project" before issuing a composite certificate of approval.

A literal reading of the Siting Board's statutory language required the Siting Board to focus on the proposed facilities when evaluating a composite certificate application. The court reiterated that the petitioners conceded the transmission lines were the only physical facility located within the state waters and thus within the Siting Board's jurisdiction. The Siting Board, therefore, could only evaluate the "the compatibility of the facility" with its "considerations of environmental protection, public health and public welfare."

The court further justified the Siting Board's limited jurisdiction by relying on Maine, which held the federal government has paramount rights to the offshore seabed, to show that federal jurisdiction controls the outer continental shelf and any waters beyond three miles from shore. It hypothesized that if the Siting Board considered the impacts of the wind farm itself, the Siting Board would have the power to deny the facility altogether and thus state jurisdiction would have trumped federal jurisdiction in violation of Maine. The Supreme Judicial Court of Massachusetts reiterated Ten Taxpayer: "The [S]iting [B]oard does not have [the] authority to do indirectly what it cannot do directly." But the court also relied on Leisure Time to allow the Siting Board to consider the impacts of the transmission lines located in federal waters "because those impacts relate directly to the 'facility' over which the Siting Board has jurisdiction."

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143. Alliance, 932 N.E.2d at 803 (describing Siting Board's interpretation of its jurisdiction).
144. Id. (providing petitioner's contentions with Siting Board's state jurisdiction).
145. Id. (demonstrating court's literal reading of facility).
146. See supra note 51 (explaining parties' stipulation that transmission lines were only physical facility located in state waters).
147. Alliance, 932 N.E.2d at 803 (showing stipulation properly limited Siting Board's jurisdiction rigidly to state waters).
148. Alliance, 932 N.E.2d at 804 (relying on Maine to show supreme federal jurisdiction over the offshore seabed).
149. Id. (hypothesizing impermissible state jurisdiction trumping federal jurisdiction).
150. Id. at 805 (utilizing Ten Taxpayer to ensure states do not indirectly regulate federally approved and entirely federally located projects).
151. Id. (internal quotation marks omitted) (applying Leisure Time to demonstrate Siting Board can evaluate entire length of transmission lines).
ineligible to evaluate the in-state impacts of the federally-located wind facility, the court further justified its opinion by assuring that numerous federal authorities would consider such in-state impacts in their permitting decision for Cape Wind.\textsuperscript{152}

C. A Dissent Attuned to Future Consequences

The Supreme Judicial Court of Massachusetts upheld the Siting Board’s issuance of a composite certificate, but Chief Justice Margaret H. Marshall’s dissent contended that the delegation of public trust rights to the Siting Board and the inability of any state authority to consider the in-state impacts of the federally-located wind farm were misplaced and disabling for state authority.\textsuperscript{158} First, the dissent elaborated on the national importance of the public trust doctrine, and Massachusetts’ strong interest in protecting the public trust as a fiduciary to its citizens.\textsuperscript{154} It then interpreted \textit{Farland} as authorizing only \textit{express} delegation of public trust rights and differentiated the court’s reliance on \textit{Farland} to show properly delegated authority had not been passed to the Siting Board.\textsuperscript{155} Second, the dissent disagreed with the majority’s conclusion that allowing the Siting Board to consider the in-state impacts of the wind farm would constitute a denial of the wind farm altogether.\textsuperscript{156} It is the courts’ role to regulate the procedures employed to reach of a decision, not the decision itself, because consideration of the potential impacts alone does not equate to the denial of a certificate.\textsuperscript{157} The dissent contended that the court’s holding undermined the Siting Board’s obligation, if in fact the Siting Board received the authority to “stand in the shoes of [the] DEP,” to act

\textsuperscript{152} \textit{Id.} at 805-06 (assuring federal and state agencies scrutinize in-state impacts). Federal statute requires the Coastal Zone Management Office review and evaluate “[f]ederal permitting decisions relating to a project that affects use of land, water, or natural resources of a State’s coastal zone.” \textit{Id.} at 806 n.35.

\textsuperscript{153} See \textit{infra} notes 154-162 and accompanying text for a discussion of each contention presented by the dissenting opinion.

\textsuperscript{154} \textit{Alliance}, 932 N.E.2d at 816-17 (Marshall, J. concurring in part and dissenting in part) (describing history and importance of public trust doctrine).

\textsuperscript{155} \textit{Id.} (distinguishing interpretations of \textit{Farland}).

\textsuperscript{156} \textit{Id.} at 823 (questioning majority’s decision to prohibit consideration of in-state impacts). The dissent contends the question is whether Massachusetts is required to consider the potential impacts of the federally located wind farm, not whether Massachusetts, in its consideration of potential in-state impacts, could deny the wind farm. \textit{Id.}

\textsuperscript{157} \textit{Id.} at 822-23 (averring court’s focus should be on procedure used to arrive at decision, not ultimate outcome, because merely providing procedure for evaluation does not determine outcome).
upon its "fiduciary responsibility to protect the interests of the commonwealth and its inhabitants, in the tidelands."158

The dissent touted the difficulty in restoring the public trust doctrine once undermined.159 Bolstering this point, the dissent argued the court’s opinion pitted the public trust doctrine against the federal government energy policy when the policies should instead complement each other.160 The dissenting opinion concluded the court set a dangerous precedent as it "exalt[ed] regulatory expediency at the cost of fiduciary obligation."161 It ominously warned "[a] wind farm today may be a drilling rig or nuclear power plant tomorrow."162

V. CRITICAL ANALYSIS

The Supreme Judicial Court of Massachusetts sensed the federal government’s desire for renewable energy sources and the imminence of reliable energy initiatives.163 While the court properly upheld the Siting Board’s approval of Cape Wind’s transmission lines, it also limited Massachusetts’ power to control its own shores and undermined the public trust doctrine.164 The court expanded the interpretation of express delegations of authority, created a more rigid three-mile boundary to the state’s jurisdiction, and paved the way for a less stringent approval process for offshore energy initiatives.165

A. A Harmonious Discord of Statutory Language

The court properly recognized the Siting Board’s authority to generally override a decision by the Commission, as well as a decision by any individual permitting agency involved in the construc-

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158. Id. at 822 (internal quotations omitted) (arguing allocated fiduciary responsibility requires consideration of all possible in-state impacts).
159. Alliance, 932 N.E.2d at 816 (Marshall, J. concurring in part and dissenting in part) (stating loss of trust in government and public trust doctrine is not easily restored).
160. Id. at 824 (describing interaction between public trust doctrine and government energy policy).
161. Id. (summarizing majority’s opinion and its potential consequences).
162. Id. at 816 (warning of far reaching consequences).
163. See supra notes 157-162 and infra 164-187 and accompanying text for a discussion of the court’s implied desire to promote efficiency and increase renewable energy sources.
164. See supra notes 138-148 and accompanying text (describing limitations of state jurisdiction).
165. See generally Alliance, 932 N.E.2d at 815-16 (Marshall, J., concurring in part and dissenting in part) (describing court’s interpretation of express delegation as undermining state’s authority over its own shores).

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tion and operation of the Cape Wind facility. It accurately emphasized the specific language of the Siting Board’s governing statute when granting the Siting Board the general authority over the approval process. The court’s harmonious interpretation, however, began to falter when it attempted to compare the language of the Siting Board’s governing statute with the public trust doctrine.

B. “Express Delegation” Leaves Room for Interpretation?

Under the public trust doctrine, “only [Massachusetts], or an entity to which the Legislature properly has delegated authority, may administer public trust rights.” The court in Fafard emphasized that an express delegation embodied the appropriate delegation with little room for inferences, and exemplified how courts should first look “to see whether there was ... an express legislative intent to forbid local activity on the same subject.” In Fafard, as in Alliance, there was no legislation that expressly delegated authority to the agency in question concerning the litigation action. In both cases, therefore, the court was “confronted with one of the hard cases ... in which it is asserted that a legislative intent to bar local action should be inferred in all the circumstances.”

According to the court in Fafard, a court can infer the legislative intent to bar an action where the “local regulation would some-

166. See supra note 131 and accompanying text (explaining rationale behind seeking statutory harmony and Siting Board’s overriding authority)
167. See supra notes 75-76, 132-141 and accompanying text (exploring court’s analysis of Siting Board’s supreme authority over approval process)
168. See Alliance, 932 N.E.2d at 797-99 (comparing public trust doctrine to Siting Board’s governing statute); see also Fafard v. Conservation Comm’n of Barnstable, 733 N.E.2d 66, 70 (Mass. 2000) (explaining delegation of public trust rights).
169. See Alliance, 932 N.E.2d at 799 (describing delegation of authority under public trust doctrine). See supra notes 78-101 and accompanying text for a discussion of authorities with public trust rights.
171. Compare supra notes 82-88 and accompanying text (explaining lack of express delegation of authority in Fafard), with supra note 47 and accompanying text (describing DEP as covered under Siting Board authority even without express delegation).
172. See Fafard, 733 N.E.2d at 72 (alteration in original) (quoting Town of Wendell v. Attorney Gen., 476 N.E.2d 585, 589 (Mass. 1985)) (internal quotation marks omitted) (acknowledging existence of certain situations in which legislative intent to bar local action should be always be inferred).
how frustrate the purpose of the statute so as to warrant an
inference that the Legislature intended to preempt [the ac-
tion]."173 The regulations challenged in Fafard did not "usurp
the DEP's authority to deny licenses or permits to applicants who seek
to build structures that do not serve [a proper public] purpose."174
Instead, the regulations required a local permit in addition to the
state requirements for applicants.175

The Supreme Judicial Court in Alliance relied almost exclu-
sively on Fafard to support its reading of the legislation affecting the
Siting Board, but conveniently avoided the value Fafard placed on
the express delegation of authority.176 Unlike the DEP's governing
legislation, there is no express language in the Siting Board's gov-
erning statute allocating authority over the tidelands to the Siting
Board.177 The court deviated from history and the precedent sur-
rounding public trust rights by expanding the public trust authority
to any entity whose governing statute can be interpreted to show
even a tangential connection to public trust rights.178

Further, Alliance is inconsistent with Fafard as it allows the Sit-
ing Board to "usurp the DEP's authority."179 In Alliance, the com-
posite certificate issued by the Siting Board served as the only, not
additional, license—unlike the additional requirements imposed in
Fafard.180 The Supreme Judicial Court of Massachusetts broadened
the potential for local agencies to discover an implied authority
over the public trust rights and granted the Siting Board supreme

173. Id. (quoting Boston Gas Co. v. Newton, 682 N.E.2d 1336, 1399 (Mass.
1997)) (internal quotation marks omitted) (exemplifying situation in which legis-
slative intent to bar local action should always be inferred).
174. Id. at 72-73 (upholding pier regulations because DEP's authority was not
undermined).
175. Id. at 74 (allowing permitting additions provided there is no usurpation
of DEP authority).
176. See Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting
Bd., 932 N.E.2d 787, 799-801 (Mass. 2010) (avoiding express delegation of author-
ity issue as addressed in Fafard).
2012) (lacking express delegation of Siting Board authority over tidelands), with
press authority to DEP over tidelands).
178. See infra notes 180-183 and accompanying text (explaining historical ten-
cencies when allocating public trust rights); see also supra notes 169-177 and infra
notes 179-182 and accompanying text (discussing court's deviation from historical
tendencies when allocating public trust rights).
179. Compare Fafard, 733 N.E.2d at 72 (describing delegation of authority),
with Alliance 932 N.E.2d at 801 (showing delegation of authority in Alliance has
different effect than delegation of authority in Fafard).
180. See Alliance, 932 N.E.2d at 800-01 (concluding Siting Board did not im-
pose additional restrictions but rather acted in DEP's place).
jurisdiction over the DEP in future cases requiring a tideland license. The court eliminated some of the potential red tape and redundancy surrounding the elongated energy project permitting process, but also confirmed the fear articulated by the court in *Golden* by creating a lenient precedent that could be used to prevent local communities from exercising regulatory control.

C. Building an Insurmountable, Rigid Separation Between State and Federal Jurisdiction

The DEP, or any agency entrusted with administering public trust rights, has an obligation to protect the state’s interest in the tidelands. The federal government has retained exclusive control over the outer continental shelf and adopted an energy policy actively promoting offshore development of renewable energy. The Siting Board’s responsibility to provide a reliable energy supply for Massachusetts is seemingly supportive of both the public trust doctrine and the federal government’s energy initiative, yet *Alliance* pits the public trust doctrine against the federal government’s energy policy by prohibiting the Siting Board’s consideration of in-state impacts of the proposed wind farm.

Before *Alliance*, the Massachusetts courts clearly had not reached consensus on the permissible level of interaction between state and federal authorities. The Supreme Judicial Court of Massachusetts attempted to define and consolidate previously inconsistent holdings but overreached in its interpretation and restrictions. The precedent does not require an outright ban on

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181. See *supra* notes 169-182 and accompanying text for a discussion of how the court reinterpreted express delegation of authority.

182. See *Alliance*, 932 N.E.2d at 797-98 (describing and affirming Siting Board’s purpose to streamline permitting process). The court relied on *City Council of Agawam v. Energy Facilities Siting Bd.*, 776 N.E.2d 1002 (Mass. 2002) to show the community’s desire for a “reliable, affordable, and environmentally sound energy supply” and the Siting Board’s role in ensuring the community’s desire was achieved. *Id.* at 797.

183. See *supra* notes 78-88 and accompanying text for a discussion of public trust rights and the duty involved in protecting them.

184. See *supra* notes 102-106 and accompanying text for a discussion of federal jurisdiction over the outer continental shelf.

185. See *Alliance* 932 N.E.2d at 816 (dissenting because majority’s opinion pits public trust doctrine against federal government’s strong desire for renewable energy).

186. See *supra* notes 107-123 and accompanying text for contrasting opinions on permissible level of state involvement in federal activity.

187. See *infra* notes 192-196 and accompanying text for a discussion of the court’s overextension of authority and misplaced reliance on certain precedential decisions.
any state decision contemplating a federally authorized action. In fact, the court in Leisure Time permitted state regulation of an activity ancillary to a federally-located operation. In holding the "law in question [must] actually conflict[ ] with federal law . . . such that compliance with both [local] and federal law is a physical impossibility," the court in Leisure Time demonstrated how state law could supplement federal law. Unlike Alliance, Leisure Time also recognized that the procedure does not necessarily determine the outcome, and it is not the court's duty to regulate the procedure based on a potential outcome.

The Supreme Judicial Court of Massachusetts incorrectly relied on the facts of Ten Taxpayer because no part of a federally-located facility or operation in Ten Taxpayer crossed into state jurisdiction—every facet of the facility at issue in Ten Taxpayer was located within federal jurisdiction. Both courts correctly recognized "[an agency] does not have the authority to do indirectly what it cannot do directly," but in Alliance the portion of the wind farm located in


189. See supra notes 120-123 and accompanying text for a discussion of the court's holding in Leisure Time.

190. Leisure Time, 62 F. Supp. 2d at 208 (internal quotation marks omitted) (indicating state regulation may involve federal activity in some form); see also Casino Ventures v. Stewart, 183 F.3d 307, 310 (4th Cir. 1999) (emphasizing caution in analyzing possible preemption of state law by federal law because state laws are generally intended to promote public welfare). The Fourth Circuit confirmed the district court's Leisure Time holding in Casino Ventures, a case with similar facts as Leisure Time. Casino Ventures, 183 F.3d at 310. The court stated: "[S]tate law is preempted if federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it." Id. (emphasis added) (quoting Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992)) (internal quotation marks omitted).

191. Compare Leisure Time, 62 F. Supp. 2d at 208-09 (stating procedure does not determine outcome), with Alliance 932 N.E.2d 787, 804-05 (implying state regulation or authority would have conclusive negative outcome for entirety of project). The court in Alliance assumed that to permit a state agency's involvement in the regulation of a federal activity would essentially grant the state authority over the federal activity. Alliance, 932 N.E.2d at 805. The court in Leisure Time, however, allowed such supplemental state regulation, which thus enabled the state agency's involvement in regulating a federal activity without trumping federal jurisdiction. Leisure Time, 62 F. Supp. 2d at 208.

192. Ten Taxpayer, 373 F.3d at 186 (describing location of proposed facility). Unlike the data collection facility in Ten Taxpayer, which was located entirely in federal waters with no effect in state waters, the wind farm in Alliance physically crossed into state jurisdiction; thus, the court should distinguish between the two facilities and reach divergent holdings. See generally infra note 193 and supra note 32 and accompanying text.
Massachusetts' jurisdiction directly impacted the public.\textsuperscript{193} By accounting for the in-state impact of the entire facility, the Siting Board would not necessarily denying the federally approved facility but rather supplement the federal law approving the facility.\textsuperscript{194} Thus, the \textit{Alliance} court improperly restricted the Siting Board’s evaluation exclusively to the physical part of a facility is located in the state based on the misguided notion that such evaluations would inherently lead to a denial of the entire facility and state law trumping federal law.\textsuperscript{195} Stripping Massachusetts of its ability to evaluate the in-state impacts of a project as a whole set a dangerous precedent, especially when a portion of the project is located in state waters.\textsuperscript{196}

\section{VI. Impact}

The growing energy crisis promises to infiltrate every facet of society, which has resulted in a general concern about a future without renewable energy.\textsuperscript{197} Both foreign countries and the federal government increasingly pressure citizens and corporations to adopt new lifestyles.\textsuperscript{198} Money exists in renewable energy initiatives; it is available for start-up companies, from which future-savvy investors can realize enormous profits.\textsuperscript{199} Technological advances allow the United States to harness wind, water, and solar energy to heat homes, power infrastructure, and run transportation systems.\textsuperscript{200} Renewable energy is now out-sprinting the legislation, and courts must therefore tread with caution when addressing renewa-

\begin{itemize}
\item \textsuperscript{193} See \textit{supra} note 32 and accompanying text for a description of the physical location of the transmission lines located within state jurisdiction.
\item \textsuperscript{194} See \textit{Leisure Time}, 62 F. Supp. 2d at 208 (holding state's interaction with federal activity was not necessarily automatic regulation of federal activity automatically).
\item \textsuperscript{195} See \textit{supra} notes 188-190 and accompanying text (suggesting some state interaction with federal activity is both necessary and permissible).
\item \textsuperscript{196} See \textit{supra} notes 153-166 and accompanying text (elaborating potential consequences of court's holding), \textit{supra} notes 142-152 and accompanying text (discussing court's strict limitation on state jurisdiction).
\item \textsuperscript{197} See \textit{supra} notes 3-5 and accompanying text for a discussion of industries potentially affected by an energy crisis.
\item \textsuperscript{198} See \textit{supra} notes 6-9 and accompanying text for a discussion of the federal programs implemented to spur renewable energy initiatives.
\end{itemize}

ble energy initiatives.\textsuperscript{201} A war is brewing in the guise of renewable energy between the legislative and the judicial branches on both a national and state level that has the ability to threaten national sovereignty.\textsuperscript{202}

"Not in my backyard" is a phrase often associated with large renewable energy projects.\textsuperscript{203} Many local groups, formed to protect the public from corporate moneymaking schemes, oppose large energy projects.\textsuperscript{204} These groups are influential within local communities, and often have the power to influence permitting decisions concerning large renewable energy projects.\textsuperscript{205} As a result of such opposition, renewable energy projects experience unreasonably long delays, encounter years of litigation, and assume enormous expenses even after project approval.\textsuperscript{206} The Cape Wind project is the nation’s first proposed offshore wind facility and has thus experienced widespread opposition with little evidentiary support demonstrating its efficiency and vitality.\textsuperscript{207}

The Supreme Judicial Court of Massachusetts’ decision in \textit{Alliance} to uphold the Siting Board’s approval of solely the transmission lines marks a turning point in the internal war concerning the Cape Wind project.\textsuperscript{208} The court sought to eliminate the redundancies within the approval process by granting the Siting Board

\begin{itemize}
  \item \textsuperscript{201} See Alex Guillen, \textit{GOP 2012 Agenda: What Energy Debate?}, POLITICO (Oct. 18, 2011 4:46 PM), \url{http://www.politico.com/news/stories/1011/66281.html} (describing GOP candidates pushing for long term renewable energy through wind and solar policies, though such legislation has often failed).
  \item \textsuperscript{202} See Juliano, \textit{supra} note 11 (discussing tensions between legislatures and increased litigation created by renewable energy proposals).
  \item \textsuperscript{203} See Filippo Zuliani, \textit{Green Energy—But Not In My Back Yard!}, P\textsc{resseurop} (May 6, 2011), \url{http://www.presseurop.eu/en/content/article/639811-green-energy-not-my-back-yard} (describing not in my back yard opposition to renewable energy projects).
  \item \textsuperscript{204} See Lisa Gibson, \textit{Facing the Vocal Opposition}, Biomass Power & Thermal \url{http://biomassmagazine.com/articles/3741/facing-the-vocal-opposition} (last visited Feb. 10, 2011) (exemplifying local group’s opposition to renewable energy).
  \item \textsuperscript{205} See id. (showing locals group’s success in quashing construction of biomass power plant); see also Tom Donohue, \textit{Progress Denied: How Red Tape Is Costing Jobs}, Free Enterprise Magazine (Mar. 15, 2011), \url{http://www.USChamberMagazine.com/article/progress-denied-how-red-tape-is-costing-jobs} (opining about “broken permitting process” and environmental activists’ resourcefulness and determination to destroy clean energy projects).
  \item \textsuperscript{206} See Gibson, \textit{supra} note 206 (contending financial concerns of lengthy litigation halted project); see also Juliano, \textit{supra} note 11 and accompanying text (exploring issues of “red tape” and increased cost surrounding litigation).
  \item \textsuperscript{207} See Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd., 932 N.E.2d 787, 792 (Mass. 2010) (describing history of Cape Wind’s efforts to secure necessary permits).
  \item \textsuperscript{208} See \textit{infra} notes 209-217 and accompanying text for a discussion of possible impacts of the court’s holding in \textit{Alliance}.
\end{itemize}
the final say and the authority over public trust rights.\textsuperscript{209} The decision further acknowledged the bureaucracy used by many permitting agencies to delay construction, provide more time to voice opinions, and increase costs for corporations.\textsuperscript{210} In attempting to minimize such bureaucracy, the court misinterpreted the meaning of proper delegation of authority and undermined the significance of express delegations of public trust rights.\textsuperscript{211} The ability to now infer public trust rights without an express delegation creates more situations in which competing agencies will assume public trust authority—even without a clause similar to the one granting the Siting Board supreme jurisdiction.\textsuperscript{212}

The Supreme Judicial Court of Massachusetts focused on the Siting Board and the other interacting Massachusetts’ agencies.\textsuperscript{213} The rationale of the court, however, has far-reaching consequences.\textsuperscript{214} The court sought to eliminate unnecessary evaluation and approval processes, but in doing so limited the state’s voice, whether supportive or resistant.\textsuperscript{215} Jurisdictions now have the ability to infer public trust rights to create a streamlined approval process within the state, eliminating some red tape but also eliminating potentially valuable barriers and input from opposition.\textsuperscript{216} As previously noted by the dissent, “a wind farm today may be a drilling rig or nuclear power plant tomorrow.”\textsuperscript{217}

Expediting the approval process for renewable energy projects is an important endeavor; but courts must ensure, unlike in Alliance, that such expedition does allow federal authorities to impinge

\textsuperscript{209} See supra notes 124-141 and accompanying text for a description of the court’s rationale in approving the Siting Board’s decision.

\textsuperscript{210} See Alliance, 932 N.E.2d at 797-98 (discussing court’s decision to eliminate redundancy by streamlining permitting process).

\textsuperscript{211} See supra notes 169-182 and accompanying text (deciding to expand meaning of express delegation, while limiting state authority to consider in-state impacts of federally located facilities).

\textsuperscript{212} See supra notes 169-182 and accompanying text for court’s reinterpretation of express and implications surrounding such inferred delegation.


\textsuperscript{214} See supra note 208-221 and accompanying text for a description of the consequences potentially resulting from the court’s decision.

\textsuperscript{215} See supra notes 124-152 and accompanying text for a discussion of court’s reasoning and conclusion.

\textsuperscript{216} See supra notes 163-182 and accompanying text for a illustration of how the court’s holding eliminated some redundancy in permitting decisions.

\textsuperscript{217} See Alliance, 932 N.E.2d at 816 (Marshall, J. concurring in part and dissenting in part) (providing context for quotation).
on state sovereignty. The state legislature must recognize and anticipate the necessity of renewable energy projects so agencies are not hopelessly pitted against each other in power struggles. Despite undermining the public trust doctrine and limiting certain voices, Alliance has nonetheless paved the way for the approval of the United States' first proposed offshore wind facility. The decision was a step toward maintaining national sovereignty, independent of foreign energy imports, and toward creating more reliable, efficient, and environmentally aware renewable energy.

Spencer Curtis*

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218. See Gibson, supra note 204 (discussing impact litigation costs on failure of renewable energy project); see also supra notes 183-196 and accompanying text (criticizing court's for limitation on state's authority to consider in-state impacts of federally located facility).

219. See supra notes 65-77 and accompanying text for a discussion of the presumption that the legislature acts with full knowledge of existing laws. See also Shanna L. Peterson, High Stakes and Law Tides: The Fourth Circuit Gambles by Forbidding Riverboat Casinos in Casino Ventures v. Stewart, 7 VILL. SPORTS & ENT. L.J. 397, 420-24 (2000) (criticizing court's interpretation of conflict preemption). The article emphasizes the importance of congressional intent, shown through legislative history, and plain language as important factors in deciding preemption of state law by federal law. Id. at 423. It further accused the federal court of judicial activism, but "the basic idea behind conflict preemption is that performing the permitted act under federal law without violating state law would be impossible." Id. at 421. Unlike the court in Alliance, however, the court in Casino Ventures did not find performance of an act permitted under federal law without violating state law impossible. See generally Casino Ventures v. Stewart, 183 F.3d 307, 310 (4th Cir. 1999). The federal court thus placed a higher value on the "basic idea behind conflict preemption" than on the implied preemptive intent of Congress. Peterson, supra, at 421; see Casino Ventures, 183 F.3d at 313. Casino Ventures suggests the legislature should explicitly demonstrate its preemptive intent in order to prevent courts from actively attempting to supplement or mold state law to supplement federal law. See Peterson, supra, at 425. The court in Alliance did the opposite in presupposing that permitting state review of in-state impacts of a federally located facility would determine the outcome and override federal law. See supra notes 192-196 and accompanying text.

220. See generally Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd, 932 N.E.2d 797, 815 (Mass. 2010) (upholding Siting Board's granting of composite certificate for all permits necessary for transmission lines leading to federally approved facility).

221. See Project At A Glance, CAPEWIND.ORG http://www.CapeWind.org/article24.htm (last visited Feb. 10, 2012) (showing importance of Cape Wind Project for achieving energy independence, reliable energy, lower energy costs, more jobs, and cleaner air).

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