

# Alliance to Protect Nantucket Sound

Deficiencies In The Review  
Of The Cape Wind Project

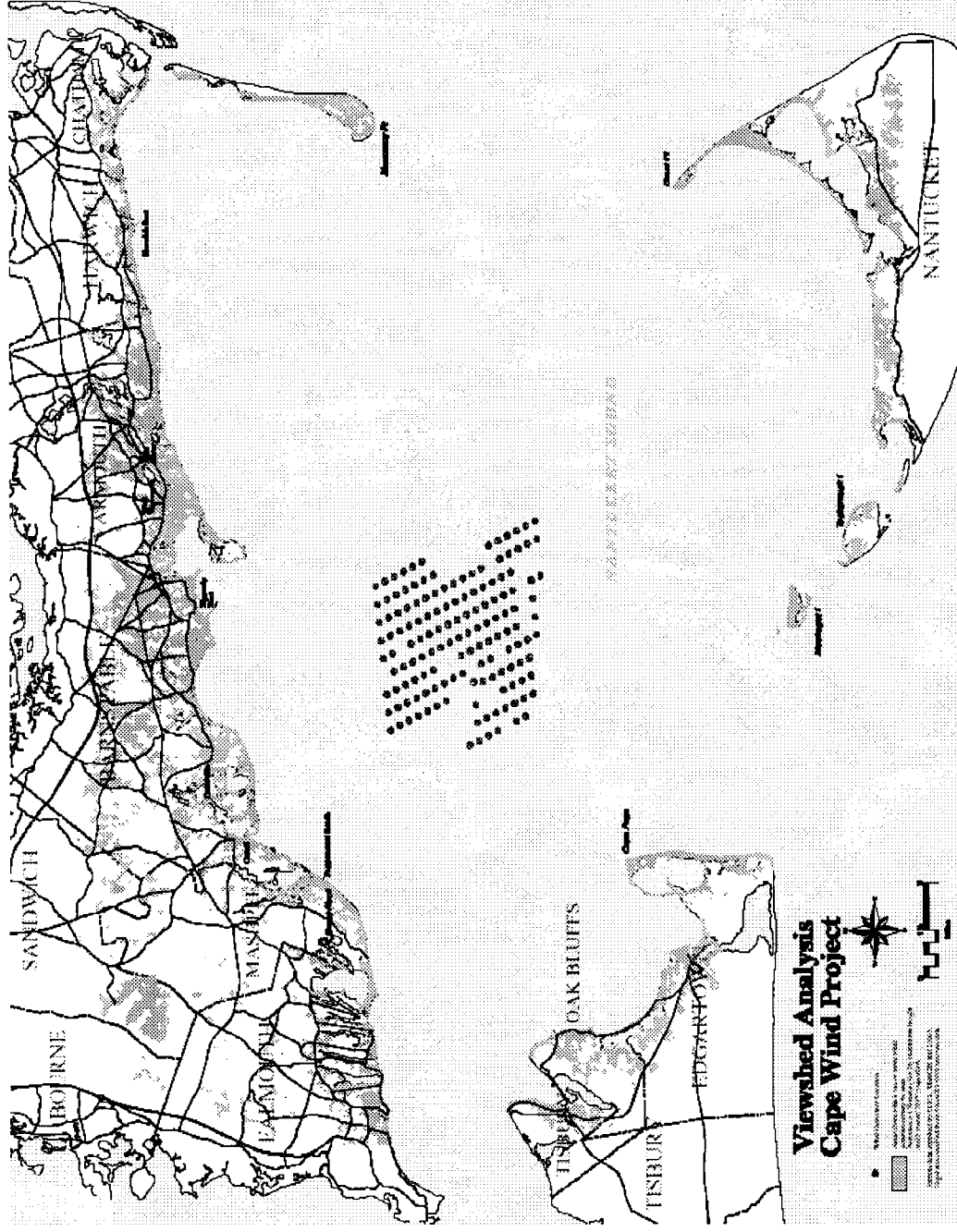
And

A Proposal For Reform

Guy R. Martin  
Perkins Coie LLP  
January 30, 2003

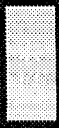
Perkins  
Coie

# Project site map



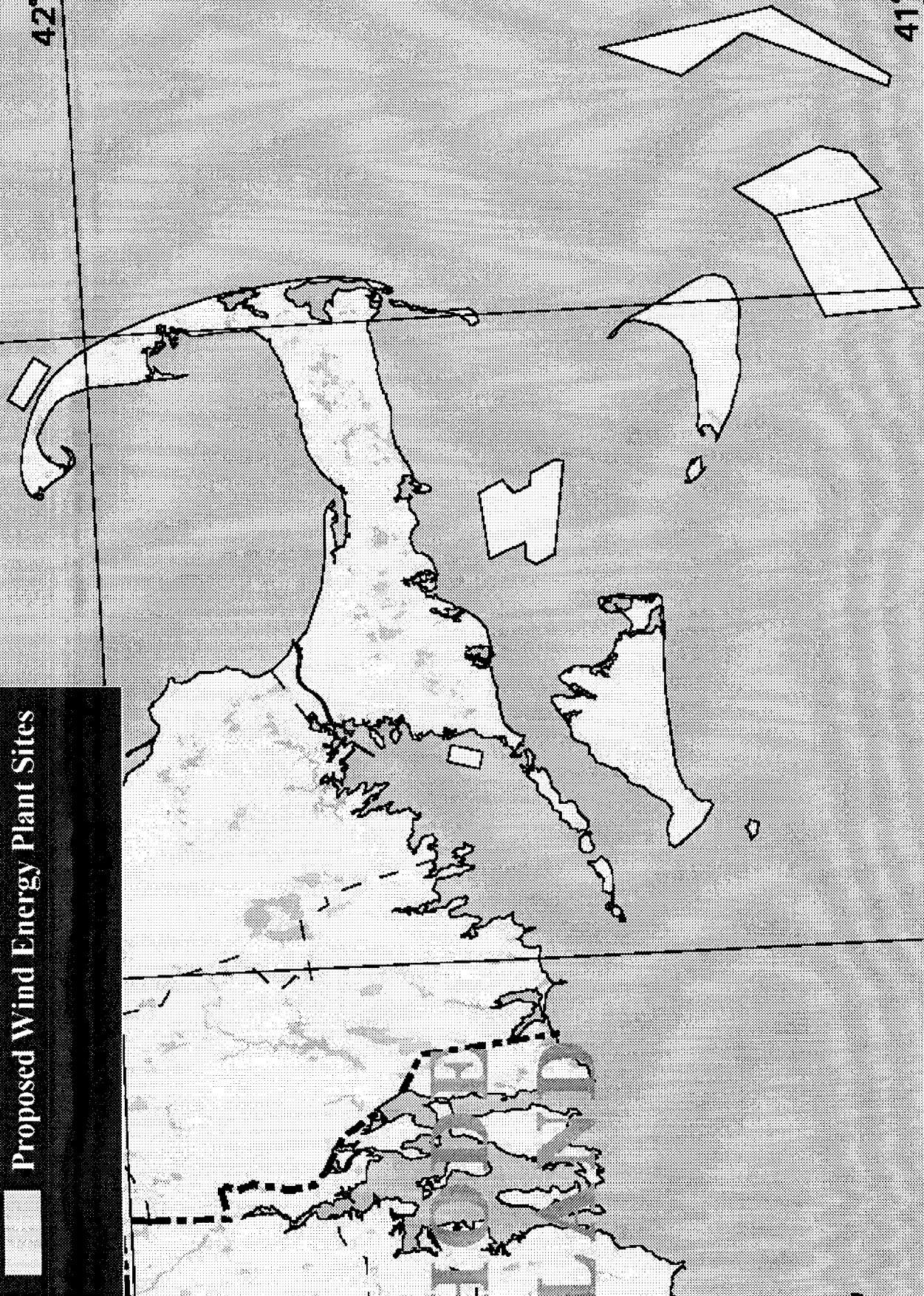
The Alliance to Protect Nantucket Sound [www.saveoursound.org](http://www.saveoursound.org)

Proposed Wind Energy Plant Sites

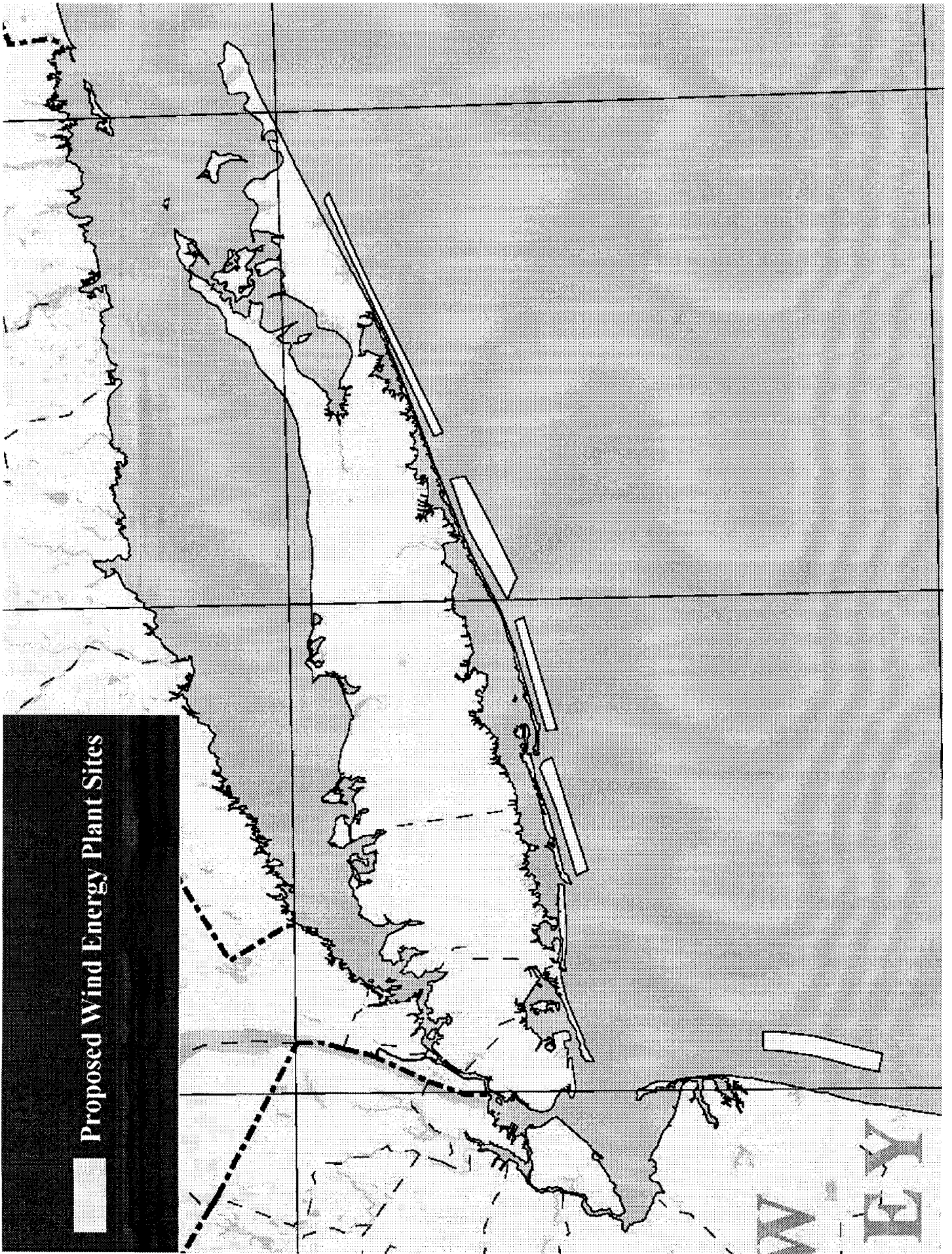
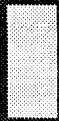


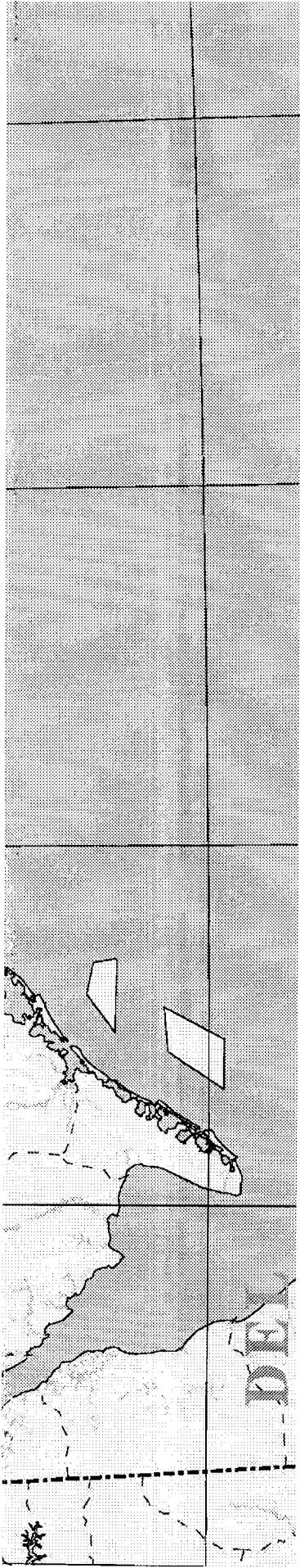
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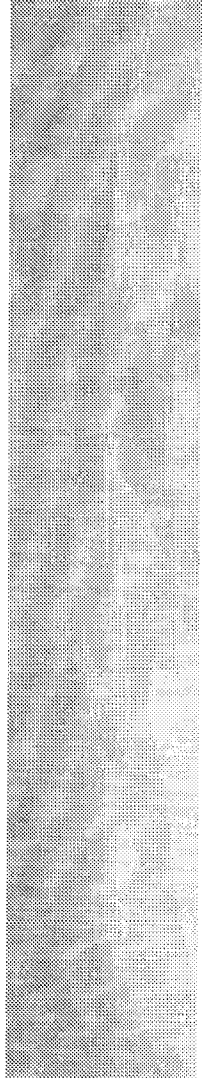


Proposed Wind Energy Plant Sites





■ Proposed Wind Energy Plant Sites



# Adequacy Of Existing Program -- Who's Right?

There exists “no clear authority within the federal government to comprehensively review, permit, and provide appropriate regulatory oversight of such projects.”

- Director, Minerals Management Service, July 25, 2002

“Together with the National Environmental Policy Act, the Corps’ section 10 regulations provide for clear authority to conduct a comprehensive environmental review process and to issue permits”

- Conservation Law Foundation, November 7, 2002

# Overview Of Problems With Section 10 Process For Cape Wind Project

- The Corps lacks jurisdiction
- There is no authority to allow federal offshore lands and waters to be used for wind energy or other uses that have not been specifically addressed by Congress (authorized uses - oil, gas, minerals, ocean thermal, deepwater ports)
- Section 10 is not up to the task- a comparison to other laws demonstrates its weaknesses
- Permits for wind energy under section 10 violate the public trust doctrine
- The Corps lacks the relevant expertise
- No payments will be made to federal, state, or local government - free federal land use

# Overview Of Problems With Section 10 Process, Cont.

- The current section 10 process is defective
  - Improper scope
  - Unlawful role of Cape Wind in NEPA review
  - Failure to conduct bird studies identified as necessary by FWS
  - Failure to conduct programmatic review and consider cumulative effects
- The Status of Nantucket Sound as a Marine Protected Area has been ignored
- The Corps says the Natural Historic Preservation Act does not apply
- State review procedures are being circumvented and are inadequate



# Elements Of A Rivers And Harbors Act Review

- Section 10, enacted in 1899, is concerned with a decision on navigability, not energy or use of federal lands
- The Corps applies a general and vague public interest test, as set forth in one paragraph of the regulations
- The same procedural reviews that apply to every federal decision apply here, like NEPA and Endangered Species Act. These procedures add nothing special to the section 10 review

# Elements of An Outer Continental Shelf Lands Act Review

- Enacted in 1953, amended in 1978 and 1985, to serve as overall charter and source of regulation for offshore development
- Recognizes OCS as U.S. property
- Delegates authority to Secretary of the Interior
- Environmental study program for all potential lease and development areas
- Comprehensive review of OCS areas to develop five-year schedule for lease sales in specified areas

# **Outer Continental Shelf Lands Act, Cont.**

- Authorizes issuance of leases to grant property rights
- Requires receipt of fair market value based on competitive bidding
- Provides for appropriate staff and expertise
- Establishes procedural regulations for program management
- Specifies environmental standards

# Outer Continental Shelf Lands Act, Cont.

- Calls for annual reviews
- Sets mechanism for declaring areas off-limits to development
- Authorizes regulations
  - 300 pages of regulations in place on how to make decisions, protect the environment, etc.
- Defines significant role for states, local governments, and provides for revenues to them
- NEPA, ESA, and all of the other procedures used under section 10 still apply

# Elements Of An Ocean Thermal Energy Conversion Act Review

- Enacted in 1980 to regulate ocean thermal conversion facilities
- Established licensing system to allow location of facilities
- Delegates decision to NOAA
- Requires role for agencies with specific expertise
- Specifies decisionmaking criteria
- Defines role for coastal states
- NEPA and other laws still apply

# Elements Of A Deepwater Ports Act Review

- Enacted in 1974 to govern use of ocean for port facilities
- Requires licenses to occupy sites
- Licenses issued by Secretary of Transportation, Coast Guard
- Payments made to United States
- Decisionmaking standards specified
- Environmental review standards specified
- Role defined for coastal states
- Comprehensive implementing regulations, not just a permit process
- NEPA and other laws still apply

# Elements Of A Geothermal Steam Act Review (Onshore alternative energy)

- Enacted in 1980, Congress seeks to promote alternative energy, including federal lands
- Focuses program on high potential areas without significant resources conflicts (known geothermal resource areas)
- Requires issuance of leases
- Payment of rentals, royalties to United States
- Delegated to Secretary of the Interior
- Specifies environmental standards
- Provides for protecting certain areas from development
- Complete implementing regulations developed through public process
- NEPA and other laws still apply

# Other Federal Resource Management Laws With Similar Principles And Elements

- Federal Power Act
- Federal Land Management Policy Act
- Surface Mining Control and Reclamation Act
- National Forest Management Act
- Mineral Leasing Act
- Fishery Conservation and Management Act



# Common Elements In These Other Laws Lacking Under Section 10

- Statement of Congressional purpose regarding the activity
- Delegation to agency with relevant experience for the activity involved - not ancillary issues like navigation
- Specific standards against which agency discretion is measured - not just “public interest”
- Specific additional environmental protections standards, including protected areas

## **Common Elements In These Other Laws Lacking Under Section 10, Cont.**

- Mechanism to authorize use and occupancy to land/waters (property right)
- Requirement to pay for that right
- A role for states, local governments that goes beyond general procedures like NEPA, CZMA
- Due diligence requirements
- Citizen suit authority

# Procedural Statutes Do Not Compensate For What is Missing

- NEPA, CZMA, ESA, all apply to all federal decisions in marine environment. They add no special weight to section 10 and do not make up all that is missing from the existing and comparable comprehensive programs for other uses of federal lands
- Corps is not following recommendations and guidance under these laws or conducting an adequate NEPA review, which undermines the basic premise that NEPA is enough
  - Role of CWA in EIS
  - Failure to require bird studies
  - No cumulative effects or programmatic review
- The Corps is selective about what procedural rules it applies - it refuses to apply National Historic Preservation Act

# State Review Does Not Compensate For What Is Missing

- Cape Wind does not recognize state's jurisdiction in offshore waters, even though expressly confirmed by Fishery Conservation and Management Act
- Cape Wind argues that protections to Cape and Islands Sanctuary limited to coastal strip
- Cape Wind argues that Energy Facility Siting Board (EFSB) cannot review or consider the wind plant, only the cable
- Cape Wind attempted to keep parties out of EFSB review, including the Alliance
- CZMA, as an example, could be expanded and strengthened to provide a more significant state role

# Principles For Reform

- Specific Congressional authority, with goals and standards for this activity. Not simply general authority to address program areas
- Moratorium on permits until an adequate program is established
- Full adherence to new program once it is in place
- Carefully screened wind energy pilot projects should be approved on an expedited basis in noncontroversial locations
- Lead agencies - MMS/NOAA
- National Academy of Sciences review
- Comprehensive planning for leasing program
- Property rights mechanism-leases issued by MMS
- Site-specific permits for projects issued by NOAA
- Strengthening of the states' role under CZMA and other laws

# Principles For Reform, Cont.

- Payments to United States, based on competition, with allocation to coastal states, communities, portion of funds also dedicated to alternative energy research and developments
- Specified procedural role for states, local governments in decisions
- Financial incentives for development
- Criteria specified for decisions - not a general public interest standard
- Environmental standards established; areas designated as off-limits, including Nantucket Sound
- Mandated public involvement
- Citizen suit authority