

---

# *Emerging Trends in US Offshore Wind Energy Development*

August 16, 2021

Interest in US offshore wind development is at an all-time high, as the Biden Administration and lawmakers continue to create renewable energy project incentives and opportunities, shareholders demand action from companies to address climate change, and companies pursue “green” financial investments. From a legal perspective, companies seeking to participate in the offshore wind industry should consider several emerging trends. In this client alert, we highlight policy, legislative and litigation considerations to support a strategic, multi-branch approach to the offshore wind development process.

## **Policy: Key Federal Agency Initiatives to Advance Offshore Wind**

Offshore wind permitting involves an array of federal agencies, including the Bureau of Ocean Energy Management (BOEM), Army Corps of Engineers (Army Corps), Environmental Protection Agency, Advisory Council on Historic Preservation, Coast Guard, Fish & Wildlife Service, and National Oceanic and Atmospheric Administration. The Biden Administration is seeking to streamline the environmental review process for offshore wind projects by improving interagency coordination. For example, in June 2021, BOEM and the Army Corps agreed to partner to support planning and reviewing renewable energy projects, starting with those in Virginia and North Carolina.<sup>1</sup> Those recent efforts augment the work of the Federal Permitting Improvement Steering Council (the Permitting Council)—which includes members from 13 federal agencies, the Council on Environmental Quality, and the Office of Management and Budget—to oversee efforts to expedite offshore wind projects.<sup>2</sup> The aim of the Permitting Council’s authorizing legislation, Title 41 of the Fixing America’s Surface Transportation Act (FAST-41), was to improve the federal review and authorization process for certain projects, including renewable energy generation and electricity transmission. There are currently [12 offshore wind projects](#) participating in the FAST-41 process, and the new executive director of the Permitting Council, Christine Harada, recently

---

<sup>1</sup> Press Release, “BOEM and USACE Collaborate to Meet Offshore Wind Goals,” *BOEM* (June 14, 2021).

<sup>2</sup> Stephen Lee, “New Biden Permitting Boss Looks to ‘Rebuild Interagency Muscle,’” *Bloomberg Law* (July 22, 2021).

reconfirmed its commitment to encouraging investment in green infrastructure by minimizing uncertainty for project proponents.<sup>3</sup>

For its part, BOEM is supplementing its recent, much-publicized auctions of lease areas along the East Coast by taking action to encourage offshore wind development in the West. On July 28, 2021, BOEM published a “Call for Information and Nominations,” soliciting public input and industry interest in development on approximately 90,000 acres of the Outer Continental Shelf off central California (Morro Bay). In addition, BOEM initiated National Environmental Policy Act (NEPA) review to consider potential environmental impacts associated with issuing wind energy leases in the 132,369-acre Humboldt Wind Energy Area, located approximately 275 miles north of San Francisco.<sup>4</sup> California poses unique challenges for offshore wind development, owing to depths of landforms below sea level and the relative distance from wind energy areas to population centers. But as floating turbine technologies progress and transmission issues are addressed, opportunities for offshore wind in the US are expanding westward.

In addition to its recent partnerships with the Army Corps, BOEM has a long-standing Memorandum of Understanding (MOU) with the Federal Energy Regulatory Commission (FERC) for renewable energy projects in offshore waters.<sup>5</sup> Under the 2009 MOU, BOEM has exclusive jurisdiction over the production, transportation and transmission of energy from wind energy projects on the Outer Continental Shelf.<sup>6</sup> FERC retains jurisdiction over interstate electricity transmission, including Regional Transmission Organizations (RTOs) and Independent System Operators (ISOs), which administer the transmission grid on a regional basis. FERC is emerging as a key player in efforts to boost offshore wind generation and has announced steps to “proactively plan for the resource mix of the future, including ... offshore wind.”<sup>7</sup> In October 2020, it held a technical conference on offshore wind integration in RTOs and ISOs.<sup>8</sup> And on July 27, 2021, it issued an Advance Notice of Proposed Rulemaking regarding potential reforms to improve the electric regional transmission planning, cost allocation and generator interconnection processes. Entities with interests implicated by the proposed reforms have until October 12, 2021, to submit comments, including whether they would favor a “more integrated and holistic” transmission planning process.<sup>9</sup> Other FERC actions have the potential to be less friendly to wind energy; for

---

<sup>3</sup> Christine Harada, “[Message from the Executive Director of the Permitting Council \(FPISC\)](#),” *Federal Infrastructure Projects Permitting Dashboard* (July 6, 2021).

<sup>4</sup> Press Release, “[BOEM Advances Offshore Wind Leasing Process in California](#),” *BOEM* (July 28, 2021).

<sup>5</sup> “[Memorandum of Understanding Between the U.S. Department of the Interior and Federal Energy Regulatory Commission](#)” (Apr. 9, 2009).

<sup>6</sup> *Id.*

<sup>7</sup> [Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection](#), 86 FR 40266, 40296 (July 27, 2021).

<sup>8</sup> Federal Energy Regulatory Commission, “[Technical Conference regarding Offshore Wind Integration in RTOs/ISOs](#).”

<sup>9</sup> [Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection](#), 86 FR 40266, 40280 (July 27, 2021).

instance, FERC has yet to respond to calls to address potential chilling effects of its minimum offer price rule (and other similar rules) on offshore wind projects.<sup>10</sup>

Finally, the Department of Energy (DOE) plans to engage in efforts to support offshore wind projects. Secretary of Energy Jennifer Granholm, along with other Administration officials, recently announced a national goal to deploy 30 gigawatts of offshore wind energy capacity by 2030.<sup>11</sup> DOE's Loan Programs Office will provide \$3 billion in funding for offshore wind projects through its [Title 17 Innovative Energy Loan Guarantee Program](#).<sup>12</sup> In addition, DOE is providing \$8 million for 15 new offshore wind research and development projects through the National Offshore Wind R&D Consortium.

### **Legislation: Infrastructure Packages and Other Targeted Bills Poised to Further Support Offshore Wind**

The US Senate approved a bipartisan infrastructure bill on August 10, 2021. While the bill does not expressly address offshore wind, it includes provisions to boost the federal government's energy transition policies more broadly. For instance, the package would permanently reauthorize FAST-41—the Permitting Council otherwise will sunset at year-end 2022—and provide grants for manufacturing intended to help develop supply chains for clean energy technologies.<sup>13</sup> Senators also are moving forward with a \$3.5 trillion budget reconciliation package that likely will include more ambitious clean energy investments and incentives, such as tax credits and R&D funding.

Other strategies are currently being pursued by federal lawmakers to support offshore wind development:

- The Offshore Wind Jobs and Opportunity Act would provide grants through the Interior Department to unions and higher education institutions to train offshore wind workers.<sup>14</sup>
- The Streamlining Interstate Transmission of Electricity Act would give FERC new siting authorities under the Federal Power Act for inter-regional high voltage transmission infrastructure. It would also create new eminent domain authority under the Federal Power Act “to prevent abuses related to transmission siting.”<sup>15</sup>

---

<sup>10</sup> Catherine Morehouse, “States Ask FERC To Eliminate MOPR, Grant More Flexibility In Pursuing Alternatives To PJM Capacity Market,” *Utility Dive* (Apr. 26, 2021).

<sup>11</sup> Press Release, “Department of Energy, Energy Secretary Granholm Announces Ambitious New 30GW Offshore Wind Deployment Target by 2030,” *Dept. of Energy* (Mar. 29, 2021).

<sup>12</sup> *Id.*

<sup>13</sup> H.R. 3684.

<sup>14</sup> Press Release, “Senators Markey, Carper, Whitehouse, Cardin, and Van Hollen Reintroduce Legislation to Magnify Offshore Wind Workforce Training,” *Ed Markey U.S. Senator for Massachusetts* (July 28, 2021).

<sup>15</sup> Press Release, “Whitehouse & Quigley Introduce Bills to Power Clean Energy Future,” *Sheldon Whitehouse U.S. Senator for Rhode Island* (Aug. 6, 2021).

- The Advanced Energy Technologies and Grid Efficiency Act would direct an interagency working group to identify reliability gaps in the existing electric grid that could impede the introduction of renewables and fund grid upgrades.<sup>16</sup>
- The Offshore Wind American Manufacturing Act would create two new tax credits to incentivize domestic production of qualified offshore wind components and dedicated offshore wind vessels. The 30 percent investment tax credit and a new production tax credit (ranging from two to five cents per watt multiplied by the total capacity of the turbine) would both expire in 2030.<sup>17</sup>

### **Litigation: Best Practices for Minimizing Controversy and Delay**

The first proposed US offshore wind project, Cape Wind, was beleaguered by litigation and ultimately abandoned in 2017. The project was attacked from a multitude of angles, with claims brought in 32 separate court cases and administrative hearings.<sup>18</sup> Local residents and other plaintiffs claimed violations of NEPA, the Administrative Procedure Act, the Endangered Species Act and the Migratory Bird Treaty Act. And the Wampanoag Tribe in Massachusetts raised concerns regarding impacts to cultural resources and subsistence fishing.<sup>19</sup>

While the legal framework for offshore wind projects has evolved significantly since Cape Wind, litigation risk continues to be a crucial consideration in offshore wind development. Indeed, despite the political and social momentum in support of renewable energy, an opponent of the Vineyard Wind project sued federal regulators last month, asking the court to vacate BOEM's Record of Decision approving the project.<sup>20</sup> The lawsuit alleges that regulators failed to consider impacts on ocean users, endangered species and onshore renewable developers as part of the project's review under NEPA, in addition to violations of other environmental statutes.

A study of relevant permitting precedent can inform a proactive approach to help forestall disputes and controversy. Assembling a legal team with deep knowledge of and experience with the relevant regulatory authorities and a track record of permitting successes should be a key part of the strategy for offshore wind developers. Before the permitting process even begins, project proponents are well-served by prioritizing meaningful engagement with key stakeholders, including Tribes and potential Environmental Justice communities. Once the permitting process is underway, developers should support agency efforts to develop a thorough administrative record to fully document decisions that will withstand any future challenges. Federal agencies and project

---

<sup>16</sup> Id.

<sup>17</sup> Press Release, "[Senator Markey Announces Legislation to Create Offshore Wind Manufacturing Tax Credits, Cultivate Robust Domestic Offshore Wind Supply Chain](#)," *Ed Markey U.S. Senator for Massachusetts* (Aug. 11, 2021).

<sup>18</sup> Cape Wind, "[Litigation History of Cape Wind \(in chronological order\)](#)" (May 2, 2014).

<sup>19</sup> Abby Goodnough, "[For Cape Cod Wind Farm, New Hurdle is Spiritual](#)," *New York Times* (Jan. 4, 2010).

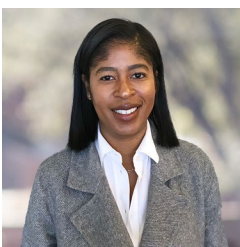
<sup>20</sup> Benjamin Storrow, "[Solar Executive With Ocean Views Sues Vineyard Wind](#)," *E&E News Climatewire* (July 20, 2021).

proponents alike have begun to involve counsel (including appellate litigators) early in the process to help build a defensible record and limit litigation risk.

As support for offshore wind swells in Congress and federal agencies, companies that keep these trends and best practices in mind will be best positioned to navigate regulatory processes and achieve successful project outcomes.

---

## *Contributors*



**Peggy Otum**  
PARTNER, CO-CHAIR,  
ENERGY, ENVIRONMENT  
AND NATURAL  
RESOURCES PRACTICE

[peggy.otum@wilmerhale.com](mailto:peggy.otum@wilmerhale.com)  
+1 628 235 1161



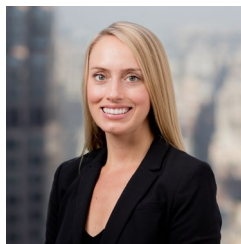
**H. David Gold**  
SPECIAL COUNSEL

[david.gold@wilmerhale.com](mailto:david.gold@wilmerhale.com)  
+1 617 526 6425



**Bonnie L. Heiple**  
COUNSEL

[bonnie.heiple@wilmerhale.com](mailto:bonnie.heiple@wilmerhale.com)  
+1 617 526 6745



**Shannon  
Morrissey**  
SENIOR ASSOCIATE

[shannon.morrissey@wilmerhale.com](mailto:shannon.morrissey@wilmerhale.com)  
+1 628 235 1020



**Caroline McHugh**  
ASSOCIATE

[caroline.mchugh@wilmerhale.com](mailto:caroline.mchugh@wilmerhale.com)  
+1 617 526 6732



**Cary Glynn**  
ASSOCIATE

[cary.glynn@wilmerhale.com](mailto:cary.glynn@wilmerhale.com)  
+1 202 663 6153