
# THE CLIMATE REPORT
Fall 2019

## Climate Change Regulatory Issues & Updates

### French Parliament Adopts Ambitious Energy-Climate Law

On September 26, 2019, the French Parliament adopted the "Energy-Climate" law, which sets the framework, ambitions, and target of French climate policy for the next 30 years. In particular, it aims to reduce France's dependence on fossil fuels and to develop renewable energies.

Following the British Parliament's declaration on "environment and climate emergency" in May 2019, the new French Energy-Climate law pronounces addressing "ecological and climate emergency" as the main objective of French energy policy, adding for that purpose an amendment to the French energy code. While the impact of such a declaration remains to be determined, it can be considered as an answer to recent climate change claims targeting the French government.

The adoption of the Energy-Climate law constitutes a major step toward achieving the French government's ambition to combat climate change by becoming carbon neutral by 2050. This ambitious objective represents a reduction of France's greenhouse gas emissions by a factor of more than six compared to 1990 emissions levels.

In order to achieve carbon neutrality by 2050, the Energy-Climate law provides for the reduction of fossil fuels consumption by 40% by 2030—instead of the previous 30% target adopted by France—and for the termination of coal-based electricity generation by 2022. The law provides that nuclear power's share of electricity production in France should be reduced by 50% by 2035.

In addition to these reduction targets, the law contains various measures to support the development of renewable energies and various measures to improve the energy efficiency of housing in order to reduce energy consumption by reducing heat loss.

With new ambitious objectives, the implementation of the new Energy-Climate law provides incentives for the development of renewable energies, as well as a wide scope of energy efficient solutions, such as low/positive energy buildings, electric vehicles, and energy storage options.

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### Mexico's Carbon Market Pilot Program

In the context of Mexico's Energy Reform and National Climate Change Strategy (*see* "Mexico Implementing Clean Energy Reform," The Climate Report, Spring 2018), on October 1, 2019, the Ministry of Environment and Natural Resources (*Secretaría de Medio Ambiente y Recursos Naturales*, or "SEMARNAT") published in the *Federal Official Gazette*, a national carbon market pilot program ("Pilot Program").

The Pilot Program aims to establish the preliminary basis for the operation of the country's first carbon market. The initial operation includes only stationary sources from the energy and industrial sectors generating more than 100,000 tons of direct emissions of carbon dioxide and will last for 36 months counted as of January 1, 2020 (ending December 31, 2022).

In accordance with the Pilot Program, SEMARNAT will post on its website the amount of "emission rights" that will be assigned free of charge to each participant, which will be deposited annually in the accounts of the same through a government-operated follow-up system (by October 24, 2020, at the latest).

Not later than November 1 of each calendar year, participants in the Pilot Program will be required to file with SEMARNAT the number of emission rights equivalent to the emissions reported and certified by an accredited verification unit from the preceding year. This obligation must be complied with as of 2021 with respect to emissions generated in 2020.

The participants who comply with the abovementioned obligation will be allowed to use the excess "emission rights" to engage in transactions with other Pilot Program participants or comply with their obligations in subsequent compliance phases within the Pilot Program. Transactions with "emission rights" imply the transfer of the same among the participants through SEMARNAT's follow-up system.

Likewise, the Pilot Program establishes flexible compliance mechanisms with its terms, including: (i) a compensation scheme through eligible mitigation projects or activities; or (ii) recognition of early actions for mitigation projects or activities that received external compensation credits prior to the start of the Pilot Program.

SEMARNAT will evaluate the results and information generated by the implementation of the Pilot Program by the first half of 2021 and will then publish the transition rules for the implementation of the definitive operating phase, formally establishing Mexico's Carbon Market Program.

It is important to note that the Pilot Program's reporting obligation does not exempt participants from complying with their greenhouse gas ("GHG") emissions monitoring, reporting, and verification obligations under other applicable laws and regulations, including 2012's Climate Change General Law ("CCGL") and its implementing regulations.

Despite the fact that CCGL has been in place for several years, there remains some confusion regarding how to comply with CCGL reporting requirements, including:

- Lack of GHG calculation methodologies for several sectors, including food and beverages, landfills, and construction. In these cases, CCGL establishes that methodologies included in international standards or *ad hoc* methodologies can be proposed and adopted by the operations prior to SEMARNAT's approval. Nevertheless, SEMARNAT is not issuing such approvals and has adopted the position for operations to use "technically reasonable" calculation methodologies, generating uncertainty on what should be understood as such and confusion among the generators and verification units; and
- Uncertainty of the procedure to report emissions generated by different facilities from the same corporate group (i.e., how to report GHGs from a subsidiary or branch company in the name of its parent and how to include all facilities in such a report since GHG reports from several productive sectors are generally filed *per* facility).

The mentioned challenges have forced the regulated sectors to find, along with advisors and authorities, legal pathways to assure compliance with CCGL's obligations.

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### Update on the EU's Efforts to Finance Sustainable Growth

The European Union's ("EU") plan to incentivize sustainable development and combat "greenwashing"—the omission or inaccurate disclosure of climate-related information—has taken shape since the Action Plan on Financing Sustainable Growth was published in March 2018.

**European "Taxonomy"**

Underpinning the EU Action Plan is the draft Taxonomy Regulation, a proposed far-reaching law meant to create a classification system, or "taxonomy," of environmentally sustainable economic activities throughout the EU.

The draft Taxonomy Regulation, among other things, would create a framework for screening sustainable investments and require that any activity labeled "sustainable":

- Substantially contribute to one of the Taxonomy Regulation's six environmental objectives (e.g., climate change mitigation and adaptation, marine conservation, pollution prevention);
- Pass a "do-no-significant-harm" to the other five environmental objectives;
- Comply with minimum social and governance safeguards; and
- Comply with specific technical screening criteria to be established by the European Commission (the EU executive branch).

In September 2019, the EU member states' ambassadors greenlit a proposal for the European Commission to negotiate an agreed Taxonomy Regulation text with the European Parliament "when practicable," suggesting a further delay of a final text's entry into force.

**Corporate Disclosure**

While seeking to implement a common framework in the Taxonomy Regulation, the EU has identified a lack of uniform corporate disclosure of climate-related information as a main obstacle to sustainable investment. In June 2019, the European Commission issued guidelines on reporting climate-related information as a supplement to its 2017 guidelines on nonfinancial reporting.

Large public interest entities with more than 500 employees (including listed companies, banks, and insurance companies) are encouraged to provide reliable information to investors and the public to compare the impacts of: (i) the company's activities on climate change; and (ii) climate change on a company's development, performance, and position (a so-called "double materiality" standard).

These supplementary guidelines further recommend that reporting companies disclose information relating to their business model, due diligence processes, principal risks and risk management, and outcomes of the company's climate policy. They also simplify previously proposed guidelines by removing the distinction between information that "should" be and is "recommended" to be disclosed.

**EU Green Bond Standard**

Another key development is the European Commission's June 2019 publication of a long-awaited report introducing the EU Green Bond Standard ("EU-GBS"). The EU-GBS is meant to be a voluntary standard that adopts market-leading practices while applying the Taxonomy Regulation to European green bond issuances, such as the "do-no-significant-harm" analysis and sustainable project screening. The EU-GBS notably introduces the requirement of an auditor accredited by the European Securities and Markets Authority to verify that an EU-GBS product's use of proceeds are allocated to finance new and/or refinance existing green projects.

The European Commission's Technical Expert Group, which, among others, drafted the EU Taxonomy report and the EU-GBS report and has been central to building EU sustainable finance policy, is currently set to be dissolved at the end of 2019 and replaced by a yet-undefined EU Platform on Sustainable Finance.

While some European market participants look with trepidation at upheaval associated with climate-related risks, the EU has shown leadership in significantly, albeit slowly, adapting its laws and policy to address such risks. Companies and investors should observe closely.

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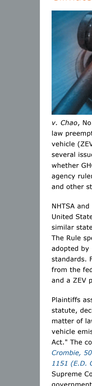
## Climate Change Litigation Issues & Updates



**California and Other States File Lawsuit Challenging Federal Regulations that Preempt State Automobile Emissions Standards**

On September 20, 2019, California, joined by 21 states, the District of Columbia, the people of Michigan, and the cities of New York and Los Angeles ("Plaintiffs"), filed a complaint for declaratory and injunctive relief from the National Highway Traffic Safety Administration ("NHTSA") and Environmental Protection Agency's ("EPA") final action entitled the "One National Program Rule" ("Rule"). *California v. Chao*, No. 1:19-cv-02826 (D.D.C.). According to NHTSA and EPA, "[t]his action makes clear that federal law preempts state and local tailpipe greenhouse gas (GHG) emissions standards as well as zero emission vehicle (ZEV) mandates." Plaintiffs' suit comes only one day after the Rule was signed. The lawsuit raises several issues, including whether NHTSA has authority to preempt state vehicle emissions standards, whether GHG and ZEV standards are sufficiently correlated with fuel economy, whether NHTSA violated agency rulemaking procedures before implementing the Rule, and how the Rule will impact California's and other states' ability to comply with clean air laws.

NHTSA and EPA assert that the federal Energy Policy and Conservation Act of 1975 ("EPCA") gives the United States Department of Transportation the right to set national fuel economy standards that preempt similar state laws, including those that regulate GHG emissions from new passenger cars and light trucks. The Rule specifically identifies the state of California's GHG emission and ZEV standards, which have been adopted by 12 other states, as preempted laws because they conflict with NHTSA's fuel economy standards. Further escalating the matter, the Rule finalizes EPA's decision to rescind California's waiver from the federal Clean Air Act ("CAA") that allows California to set its own, more stringent GHG standards and a ZEV program.

Plaintiffs assert that Congress has never authorized NHTSA to issue a regulation, in EPCA or any other statute, declaring that state laws are preempted by EPCA. Plaintiffs also argue that the Rule is "wrong as a matter of law." According to plaintiffs, "NHTSA's position that the California standards—which regulate vehicle emissions, not fuel economy—are preempted by EPCA contravenes EPCA itself [and] the Clean Air Act." The complaint cites two federal court decisions, *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie, 508 F. Supp. 2d 295 (D. Vt. 2007)*; *Cent. Valley Chrysler-Jeep Inc. v. Goldstene, 529 F. Supp. 2d 1151 (E.D. Cal. 2007)*, "that held that California's decisions are not preempted by EPCA," as well as a Supreme Court decision, *Massachusetts v. EPA, 549 U.S. 497 (2007)*, that "rejected the federal government's argument that greenhouse gas emissions standards under the Clean Air Act interfered with NHTSA's ability to set fuel economy standards under EPCA." Plaintiffs also allege that NHTSA failed to comply with the National Environmental Policy Act's requirement to analyze all potential environmental impacts the Rule might precipitate by preempting California's and other states' air pollution laws currently in effect.

According to plaintiffs, the federal government has historically and consistently looked to California's vehicle emissions laws as a paradigm for national standards, and in their view, the sudden shift in the federal government's willingness to work with the states on the issue is unprecedented. It remains to be seen how the federal government will respond to plaintiffs' arguments, but a long, intense legal battle between the sides appears imminent.

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**Applications for New South Wales Coal Project Planning Approval Affected by Climate Change Factors in Different Ways**

The New South Wales ("NSW") Independent Planning Commission ("IPC"), as the consent authority for state significant development applications in NSW, Australia, has recently considered three coal project applications. One greenfield site application was refused, while two brownfield expansion and continuation projects were approved with conditions. The conditions for one of the projects included a new condition related to Scope 3 emissions (i.e., indirect emissions which occur in the value chain of the project, including upstream and downstream emissions), while the other included a condition to improve energy efficiency and reduce Scope 1 (direct) and Scope 2 (production related indirect) emissions.

The NSW government has since moved to change the law so that conditions related to Scope 3 emissions cannot be included in project consent conditions.

**Bylong Project Refused**

KEPCO Bylong Australia Pty Ltd made an application to develop and operate an open cut and underground coal mine to recover 124 million tonnes of run-of-mine coal at a combined rate of up to 6.5 million tonnes per annum ("mtpa") for 25 years in the Bylong Valley in NSW (the "Bylong Project"). This is a greenfield site containing substantial productive agricultural land.

While the NSW Department of Planning and Environment produced a final assessment report that recommended approval, the IPC refused the application. It published a 146-page Statement of Reasons for Decision dated September 18, 2019. The refusal reasons included climate change factors as follows:

- The direct and indirect greenhouse gas ("GHG") emissions will adversely impact the NSW environment, the Bylong Project has not minimised scope 1, 2, and 3 GHG emissions to the greatest extent practicable, and there are no offset measures proposed;
- The market substitution of the coal argument was rejected, citing the Gloucester Resources Case (*see* "Australian Court Rejects Proposed Coal Mine in Gloucester Valley, New South Wales," The Climate Report, Spring 2019); and
- The Bylong Project is not in the public interest because it is contrary to the principles of ecologically sustainable development—namely, intergenerational equity—because the predicted economic benefits would accrue to the present generation, but the long-term environmental, heritage, and agricultural costs will be borne by future generations.

**United-Wambo Project Approved**

In contrast to the Bylong Project, the IPC approved an application to expand the existing open cut mining operations at the Wambo Coal Mine and to develop a new open cut mine at the adjoining United Coal Mine by a 50/50 joint venture comprising United Collieries Pty Ltd and Wambo Coal Pty Ltd. This is an existing brownfield site in the Hunter Valley. The proposal involves integrating the two open cut operations to extract up to 10 mtpa of run-of-mine coal over a 23-year period.

The approval was given on August 29, 2019, and was accompanied by a 102-page Statement of Reasons for Decision. The reasons included an acknowledgement that Scope 1, 2, and 3 GHG emissions will be minimised as much as practicable.

The applicant submitted that Scope 3 GHG emissions will be minimised because the most likely export destinations for the project's coal will be to countries that are a party to the Paris Agreement or that otherwise have equivalent domestic policies for reducing GHG emissions. The IPC decided to include a consent condition to give effect to this representation, requiring an Export Management Plan to be approved by the Planning Secretary "to ensure that all reasonable and feasible measures are adopted by the Applicant to minimise greenhouse gas emissions identified as Scope 3 emissions in the EIS to the greatest extent practicable." The Planning Secretary may determine in the future to amend the Export Management Plan or determine it is no longer needed.

**Rix's Creek South Project Approved**

On October 12, 2019, the IPC approved an application by Bloomfield Collieries Pty Ltd ("Bloomfield") to expand and continue open cut coal mining operations at Rix's Creek South Coal mine in the Hunter Valley, NSW, for an additional 21 years, with increased coal production from 2.8 mtpa to 3.6 mtpa (totalling an additional 25 million tonnes of product coal over the project life). The approval was accompanied by a 97-page Statement of Reasons for Decision.

The product coal would be predominately exported to Japan and South Korea (signatories to the Paris Agreement) and to Taiwan (which has developed GHG reduction targets which are enforced by its Greenhouse Gas Reduction and Management Act).

The NSW Department of Planning and Environment recommended approval of the project with conditions, one of which required Bloomfield to take all reasonable steps to improve energy efficiency and to reduce the project's GHG emissions. Bloomfield must prepare and implement an Air Quality and Greenhouse Gas Management Plan to the satisfaction of the Planning Secretary containing best practice management measures to be taken to minimize GHG emissions and to improve energy efficiency. It must report to the Planning Secretary annually on the plan.

The IPC also made the following comments:

- Market forces in the planned export countries of Japan, South Korea, and Taiwan are likely to lead buyers in those countries to seek coal products which best meet their requirements and minimize associated emissions in order to achieve the relevant domestic emissions reduction targets.
- The IPC is satisfied with Bloomfield's commitments to minimize Scope 1 and 2 emissions (over which it has direct control) to the greatest extent practicable. The IPC notes that Bloomfield does not have direct control over Scope 3 emissions, but has committed to a range of measures to reduce GHG emissions. The agreed upon conditions are adequate and reasonable for a project of this size and nature, given the current national and state policies.

**Related Legislative Proposal**

On October 24, 2019, the NSW Minister for Planning introduced a bill into Parliament to prohibit project consent conditions that seek to control Scope 3 GHG emissions or other climate change impacts occurring outside Australia. The bill is the Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019. It will, if passed, prohibit the imposition of conditions of a development consent that purport to regulate any impact of the development occurring outside Australia. It will also remove the specific requirement in a state environment planning policy to consider downstream GHG emissions in determining whether to approve mining, petroleum production, or extractive industry development applications. This legislation will not retroactively invalidate any conditions previously imposed. It will apply to future projects only.

For the bill to become law, it has to be passed by the Lower and Upper Houses. While the government has a majority in the Lower House, it will need to rely on some independent members in the Upper House for it to be passed if the opposition Labor Party members oppose the bill. It remains to be seen whether those members will support this bill. The Minister is seeking to have the bill passed by year's end

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**Ninth Circuit Affirms BIA Approval of California Wind Project**

On September 23, 2019, the U.S. Court of Appeals for the Ninth Circuit affirmed the Bureau of Indian Affairs' ("BIA") approval of an industrial-scale wind facility in Southern California, concluding that the BIA's review of the project complied with the National Environmental Policy Act ("NEPA") and the Administrative Procedure Act ("APA"). *Protect Our Communities Found. v. LaCounte*, 939 F.3d 1029 (9th Cir. 2019).

The wind facility at issue was broken into two phases to address the fact that some turbines will be located on federal land, while other turbines will be located on tribal land. Phase I of the project, involving 65 turbines on federal land, was approved by the Bureau of Land Management ("BLM"). Phase II of the project, involving 20 turbines on tribal land, was approved by the BIA. Both approvals were based on an environmental impact statement ("EIS")—required under NEPA and prepared by BLM—that covered both phases. Two individuals and an environmental group challenged BIA's approval of Phase II based on the EIS, which identified an "unavoidable adverse impact" to golden eagles from collision with the turbines and loss of breeding territory that were particularly acute for Phase II.

Plaintiffs first argued that the EIS was deficient with respect to Phase II because it did not consider an alternative where only some of the Phase II turbines would be authorized. The court found, however, that the EIS was sufficient because it rightly looked at Phase I and Phase II as a combined project that was merely divided into phases because of a jurisdictional line and included an alternative where fewer than all turbines would be constructed, even though the reduced number of turbines would be in Phase I.

Plaintiffs next argued that BIA should have prepared a supplemental EIS ("SEIS") to analyze information that arose after the EIS was published. But the court found that: (i) none of the information available after the EIS was published was sufficiently both new and significant (under relevant case law or the NEPA regulations) to warrant a SEIS; (ii) the EIS did not "reject" the Phase II turbines as Plaintiffs claimed; and (iii) BIA's review of environmental impacts met the APA's "hard look" requirement.

Plaintiffs' final arguments centered on the claim that BIA improperly failed to require the wind facility operator to obtain a Bald and Golden Eagle Protection Act ("BGEPA") permit from the U.S. Fish and Wildlife Service. To the contrary, the court found that BIA's Record of Decision required the operator to both apply for and comply with any requirements under a BGEPA permit.

The Ninth Circuit's decision in this case paves the way for this renewable energy project to move forward. It also underscores, however, that renewable energy projects face challenges on environmental grounds under NEPA, even if such challenges differ from the challenges that fossil fuel projects face based on greenhouse gas emissions.

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## Climate Change Transactional Issues & Updates

### Will FERC's New PURPA Regulations Have a Chilling Effect on Renewable Energy Development?

The Public Utility Regulatory Policies Act of 1978 ("PURPA") was enacted during the height of the energy crisis and was intended to reduce the country's dependence on oil and natural gas. Among its provisions is a requirement that electric utilities purchase energy and capacity generated by wind, solar, and other renewable generation technologies from so-called "qualifying facilities" ("QFs") at a rate less than the utility's "avoided cost" (i.e., the cost of its own generation that will be avoided if other generation comes on line). Seemingly overnight, in certain regions of the country, PURPA transitioned from being an afterthought to a key driver in renewable project development. Dramatic declines in utility-scale wind and solar costs over the last decade have permitted developers to offer rates below the utility's avoided cost, allowing them to secure long-term offtake contracts at fixed rates. These long-term offtake contracts proved critical to developers in securing financing for their renewable projects, particularly outside of the major regional energy markets and in states without renewable portfolio standards.

But while PURPA was a boon for renewable energy developers, utilities who were forced to buy power—rather than to build and own their own generation or sign power purchase agreements after competitive solicitations—began to criticize the "gaming" of PURPA by well-financed developers, such as those who use the so-called "one-mile rule" to build multiple solar farms just over one mile apart in order to evade regulatory size limitations on their PURPA-qualifying projects. Increasingly, utilities argued in state regulatory proceedings that energy procured through PURPA was raising rates for ratepayers and circumventing the utilities' resource planning and procurement processes. Several state commissions and legislatures responded by revising their states' interpretation of PURPA. Certain states passed reforms that effectively make it more difficult for QF developers to secure financing, such as shorter contract lengths, reduced maximum size limitations, and differing methods of calculating avoided cost, resulting in lower rates recovered by developers under offtake contracts. North Carolina, for example, passed a law that required facilities larger than one megawatt ("MW") to undergo competitive solicitation and limited offtake contracts to 10 years.

The Federal Energy Regulatory Commission ("FERC") recently entered the fray in this long-running fight between utilities and project developers by proposing to "modernize" its PURPA regulations. In its recent Notice of Proposed Rulemaking ("NOPR"), FERC set out a series of proposed reforms, many of which offer additional flexibility to state commissions as they implement PURPA. In determining the rates utilities are required to pay for energy generated by QFs, FERC proposed to permit states to base rates on the utility's avoided cost at the time of delivery or on projected energy prices at the time of delivery, and to allow states to set energy and capacity rates in competitive solicitations. FERC also proposed to require that states develop objective and reasonable criteria assessing a QF's commercial viability and financial commitment to construction before the QF is deemed to have a "legally enforceable obligation," which determines the date on which a QF can elect to have its avoided cost rate determined. The NOPR also offered new regulations on the one-mile rule that would permit third parties to challenge whether adjacent wind and solar facilities between one and 10 miles apart are a single facility for purposes of implementing size restrictions. FERC also proposed to provide utilities a rebuttable presumption that QFs as small as one MW (rather than 20 MW) have nondiscriminatory access to markets, which ultimately would require QFs to sell energy directly in regional markets rather than under a long-term contract with their host utilities.

In the face of these sweeping changes, however, FERC Commissioner Richard Glick issued a strident dissent, claiming that if adopted the NOPR would make it difficult (if not impossible) for QFs to obtain project financing. Further, Glick accused his fellow commissioners of "using the success of competition in certain parts of the country" (i.e., those with robust wholesale energy markets) "as a reason to scale back PURPA throughout the country" (i.e., in those regions without robust wholesale energy markets). In short, Glick opined that the NOPR "would effectively gut" PURPA and usurp the role of Congress in setting national energy policy.

What effect these proposals will ultimately have on PURPA and on renewable energy development remains to be seen at this point, as FERC's modernizing proposals are just that—proposals. FERC will accept comments on the NOPR until December 3, 2019, and may revise its proposals in light of such feedback. Thereafter, the new regulations will be subject to judicial review, and states will revise and apply their own rules. Nevertheless, if finalized and if Commissioner Glick's predictions come to pass, a niche but important means through which developers have secured offtake contracts and financed renewable energy projects could be eliminated.

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### Continued Uncertainty for Domestic, Commercial-Scale Offshore Wind

Recent demands by the U.S. Department of the Interior are delaying agency approval of the first commercial-scale offshore wind farm in the United States. The project under review is the Vineyard Wind project, an 800-megawatt wind farm off the shore of Massachusetts ("Vineyard Project"). While Europe has been leading the offshore wind charge with more than 105 wind farms (with capacity sizes ranging up to 650 megawatts) and a total of about 18,500 megawatts online, the offshore wind industry in the United States is a nascent industry, with only one 30-megawatt operational offshore wind farm, the Block Island Wind Farm. The sheer magnitude of the Vineyard Project, which is more than 26 times the capacity of the Block Island Wind Farm, makes it a monumental and groundbreaking project in the United States.

The permitting and approval process for offshore wind in the United States is a multistep, multiagency process that spans over 30 different agencies at the federal, state, and local levels. At the federal level, approval must be obtained by the U.S. Department of the Interior's Bureau of Ocean Energy Management ("BOEM"), which is tasked with managing the development of offshore renewable energy in federal waters. The BOEM's project approval process requires an environmental review with an opportunity for public comment. Although the BOEM was initially expected to issue an environmental impact study for the Vineyard Project in July 2019, that timeline has been extended to late 2019 or early 2020 in response to demands from stakeholders and other federal agencies for a more comprehensive supplemental environmental impact study. The driving concern behind the supplemental environmental impact study is the cumulative effect the Vineyard Project and five adjacent wind farms would have on the nearby commercial fishing industry.

This delayed timeline, however, has not dissuaded the developers of the Vineyard Project from moving forward with the development of the $2.8 billion dollar project. Although they initially planned to start construction by the end of 2019 to take advantage of production tax credits, after the BOEM's determination that a supplemental environmental impact study was necessary, they determined simply to revise the project's timeline. In addition, they doubled down on their offshore wind gamble by submitting proposals to Massachusetts' electric distribution companies for Vineyard Wind 2, an offshore wind farm with a minimum capacity of 400 megawatts.

Because many states have recently issued commercial-scale offshore wind solicitations in an effort to meet aggressive clean energy goals (*see* "All Eyes on Offshore Wind—Will It Become a Reality in the United States?," The Climate Report, Summer 2018), they are also invested in the outcome of the BOEM's determination with respect to the Vineyard Project. Accordingly, governors of numerous coastal states including Massachusetts, Connecticut, Maine, New Hampshire, and Virginia have urged the BOEM to render its decision on the Vineyard Project approval by no later than March 2020, as further delay will have a negative impact not only on the Vineyard Project itself, but also on offshore wind development in the United States generally.

Thus, the federal, state, and local approval and permitting process for offshore wind here in the United States is proving to be not only lengthy, but also unpredictable. The Vineyard Project's approval process and unprecedented scale are laying the groundwork for numerous projects that will come after it. Now, developers, state representatives, and stakeholders must stand by to see if commercial-scale offshore wind can surpass these regulatory hurdles and become a thriving industry in the United States.

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