

## Developments in Offshore Wind

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### Obama Fast-tracks Federal Development of Offshore Wind

The Obama administration recently announced a strategic plan to accelerate the development of offshore wind by announcing more than \$50 million in new research and development funding. The Department of Energy ("DOE") will spend \$25 million toward the development of innovative wind turbines and design tools; \$18 million toward optimizing the wind and electric markets, and transmission and planning; and \$7.5 million on developing next-generation, more cost-effective designs for wind turbine drivetrains.

In addition, the Obama administration identified four high-priority "Wind Energy Areas"-offshore Delaware, Maryland, New Jersey and Virginia-which will receive accelerated environmental reviews. If no significant impacts are identified, leases could be offered to developers by the Bureau of Ocean Energy Management Regulation and Enforcement ("BOEMRE") by the end of 2011 or early 2012. It is anticipated that later this month, additional high-priority areas will be identified off the coasts of Rhode Island and Massachusetts. A similar process will occur later this spring for the South Atlantic, particularly North Carolina. Eventually, locations in the Pacific, the Gulf of Mexico, the Great Lakes, and Hawaii will likewise be identified. Projects in these designated areas will enjoy a fast-track permitting process. Comprehensive site-specific National Environmental Policy Act ("NEPA") review will remain the responsibility of developers, but BOEMRE will work with project managers to ensure accelerated review schedules. Under the current regulatory environment, it takes anywhere from seven to ten years to receive approvals and fully permit an offshore wind project-slightly more than double the amount of time it takes to permit an offshore oil or natural gas platform-and the Obama administration wants to cut this period in half.

Under the National Offshore Wind Strategy, the DOE is pursuing the development of 10 gigawatts of offshore wind-generating capacity by 2020, and 54 gigawatts by 2030. This would produce enough energy to power 2.8 million and 15.2 million American homes, respectively.

However, federal incentives and programs alone will not be sufficient to jump-start development of offshore wind projects, as state and federal laws share control over offshore wind siting approval and permitting. State and local interests are most immediately impacted by the environmental concerns, and potentially higher electric rates, of offshore wind projects.

## **Intersection of State and Federal Laws**

Under the Submerged Lands Act, Coastal states have jurisdiction over their coastal waters and the use of the seabed from their shoreline extending three nautical miles seaward.<sup>1</sup> Federal waters extend from three nautical miles to 200 nautical miles out to sea to the Outer Continental Shelf.<sup>2</sup> So while most wind farms would be sited more than three miles from the shoreline and therefore in federal waters, transmission lines running from the turbines to the grid onshore would be required in state waters in order to deliver the electricity produced. State governments have jurisdiction over the permitting and siting of transmission lines running through state waters.

The Energy Policy Act of 2005 grants the Department of the Interior jurisdiction for the approval and siting of offshore wind farms in federal waters. The authority to lease and grant use rights in the seabed to developers is exercised through BOEMRE.

In addition to approval and siting requirements, BOEMRE is required under NEPA to consider the impact on the environment when granting a permit or approval for construction of an offshore wind farm. BOEMRE will need to determine whether to submit an environmental assessment or a more involved environmental impact statement ("EIS"). Under an EIS, BOEMRE will need to consider and identify alternatives to a proposed wind farm and its environmental impacts and consequences, taking into account all relevant statutes and regulations.<sup>3</sup>

The federal government and individual Coastal states may have overlapping jurisdiction in coastal waters that are considered "navigable waters."<sup>4</sup> Under the Rivers and Harbors Appropriations Act of 1899, the Army Corps of Engineers must approve the creation of any obstruction-which would include wind turbines-in navigable waters. So even if a wind farm were to be built in state waters, the federal government would be involved.

Federal and state interests are further intertwined under a process mandated by the Coastal Zone Management Act of 1972 ("CZMA"). Under the CZMA, states have the authority to review projects outside of state waters for consistency with state coastal policies if the proposed activity may impact the resources or uses within state waters. For an offshore wind farm, BOEMRE must make a determination whether a proposed project will affect a state's coastal zone, and if so, it must make a determination whether such project is consistent with the state's coastal policies. Such determination is then submitted to the relevant state agency which then has the opportunity to review and comment upon BOEMRE's determination. The state agency can attempt to impose further restrictions on the activity or permit or appeal the consistency determination to the Secretary of Commerce. If the Secretary finds that the activity or permit is consistent with state coastal policies or is otherwise in the interest of national security, the Secretary can overrule the state's appeal.

Since the development of offshore wind projects necessarily implicates federal, state and local laws and interests, the nascent offshore wind industry will be looking to state governments to provide incentives for future bids to develop offshore wind power. Along the Eastern seaboard, all states other than Connecticut are offering incentives or issuing requests for bids on projects. The State of New Jersey provides a good example of what one state is doing to promote the development of offshore wind.

## **Offshore Wind Development in New Jersey**

This past August, New Jersey Governor Chris Christie signed the "Offshore Wind Economic Development Act" (the "Offshore Wind Act"), which creates an offshore renewable energy credit ("OREC") that a qualified offshore wind project can earn for each megawatt-hour of offshore wind produced, much like the successful solar renewable energy certificates under the Solar Act. The New Jersey Board of Public Utilities (the "BPU") would require each provider that sells electricity to retail customers in New Jersey to ensure that the electricity sold includes at least a minimum percentage of offshore wind energy as set by the BPU following the approval of a qualified offshore wind project. While the statewide OREC target will be determined by the BPU based on projected offshore wind energy production for any given year, the goal of the Offshore Wind Act is to initially support the generation capacity of 1,100 megawatts from offshore wind projects.



The Offshore Wind Act further authorizes New Jersey's Economic Development Authority (the "EDA") to provide grants and other forms of financial assistance from New Jersey's Global Warming Solutions Fund to develop qualified offshore wind projects and to provide financial assistance to manufacturers of equipment associated with qualified offshore wind projects. In addition, the EDA can also provide credits equal to 100 percent of a business' investment towards a qualified wind energy facility that is located within an "eligible wind energy zone."

A qualified wind energy facility means buildings, including port improvements, and machinery and equipment used in the manufacturing, assembly, development or administration of component parts that support the development and operation of a qualified offshore wind project and that are located in a wind energy zone. The term "wind energy zone" refers to property located within either the Paulsboro Marine Terminal or the Camden Marine Terminal, both of which are located in New Jersey's South Port District. Recognizing the geographical limitations to this definition, legislation has been introduced that proposes to amend the definition of a wind energy zone to include the port district of the Port Authority of New York and New Jersey.

Last month, the BPU proposed new unofficial rules to codify the new statutory requirements enacted through the Offshore Wind Act (the "Rules"). The Rules are designed to provide predictability and more certainty for the financing of offshore wind by establishing an application process and framework under which the BPU will consider and approve applications for qualified offshore renewable facilities and ORECs. In addition to the application procedures, the Rules include the need for an escrow account, the ability for the BPU to designate the application window, and the ability for the BPU to impose appropriate conditions upon any OREC grant.

Perhaps the most notable portion of the application is its requirement that the applicant propose an OREC pricing method and schedule for the BPU's consideration. Allowing for developers to set the OREC price for each specific project, while simultaneously having the BPU mandate an open-book inspection process in order to prevent excess profits (and thus protect utilities), provides economic certainty to both those who lend to, and those who build, offshore projects. This process is intended to allow for developers and lenders to overcome uncertain economics by offering utilities the possibility of a long-term, fixed-price power purchase agreement.

1. State waters off of Texas and the Gulf Coast of Florida extend approximately nine nautical miles seaward.
2. The federal government defines the Outer Continental Shelf as the submerged lands, subsoil and seabed lying between the extent of Coastal states' jurisdiction and the extent of federal jurisdiction.
3. Including the Clean Air Act, the Clean Water Act, the Endangered Species Act, the Fish and Wildlife Coordination Act and state, tribal and local statutes and regulations.
4. Navigable waters are waters that are subject to the ebb and flow of the tide, including interstate wetlands, lakes, rivers, streams and similar water bodies, and that are used for business and transportation.

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