



KEEPING UP WITH U.S. OFFSHORE WIND

The pace of U.S. offshore wind activity is racing forward. The first half of 2021 has seen significant developments at the state and federal levels, which require a comprehensive understanding of the regulatory and legal playing field that apply to offshore projects in the U.S., in particular the Jones Act.

After the Executive Orders were issued, there was a visible shift in regulatory priorities, which reveals the complex legal and regulatory landscape that stakeholders in the offshore wind arena must understand and navigate.

Offshore wind energy is a critical part of multiple U.S. States' clean energy plans. After taking office in January 2021, the Biden Administration quickly issued two Executive Orders that directly impact offshore wind. The Executive Orders reveal that: (1) offshore wind power is a critical element of the Administration's climate change policy goals; and (2) the Administration supports the Jones Act as part of a broader policy that seeks to maximize the use of U.S. goods, products, services and materials.¹ After the Executive Orders were issued, there was a visible shift in regulatory priorities, which reveals the complex legal and regulatory landscape that stakeholders in the offshore wind arena must understand and navigate.

January 2021

- Congress passed the National Defense Authorization Act for FY 2021 (NDAA) which amended the Outer Continental Shelf Lands Act (OCSLA) to apply to alternative energy projects, including offshore wind projects, conducted on the Outer Continental Shelf (OCS). The OCSLA amendment ended an open ended question of whether

OCSLA was solely limited to oil and gas and mineral activities or whether it also extended to offshore wind activities.

- For the first time, the U.S. Customs and Border Protection (CBP) confirmed that the coastwise laws, commonly referred to as the Jones Act, apply to offshore wind energy projects on the Outer Continental Shelf (OCS). CBP's Headquarters Ruling HQ H309186 (January 27, 2021) examined the application of the Jones Act to the installation of scour material during different phases of offshore wind tower construction and maintenance.² While initially holding in the January ruling that transportation from a coastwise point to a pristine seabed constituted coastwise transportation under the Jones Act, CBP reversed this portion of the ruling in March 2021 in Headquarters Ruling HQ 317289 (March 25, 2021).

February 2021

- The Bureau of Ocean Energy Management (BOEM) announced Amanda Lefton as its new Director. Director Lefton resumed

BOEM's review of Vineyard Wind's permitting process stating that offshore wind will help the nation battle climate change while driving economic developments.

- The Federal Energy Regulatory Commission (FERC) accepted a "State Agreement Approach Study Agreement" between PJM Interconnection, LLC (PJM)³ and the New Jersey Board of Public Utilities. Pursuant to this order, PJM will operate a competitive proposal window to expand the current PJM transmission system and identify system improvements to provide deliverability of 7,500 MW of offshore wind to New Jersey by 2035. To note, New Jersey is the first state in the PJM region to use the State Agreement Approach. Within the region, Maryland and Virginia have also adopted offshore wind targets.
- The U.S. House of Representatives reintroduced the Growing Renewable Energy and Efficiency Now (GREEN) Act which is aimed at extending tax credits for renewable energy. The proposed credits include a new offshore wind investment tax credit

¹ Executive Order 14005, "Strengthening 'Buy American' Provisions, Ensuring Future of America is Made in America by All of America's Workers" (January 25, 2021); See also "Executive Order on Tackling the Climate Crisis at Home and Abroad" (January 27, 2021) (The Biden administration has also articulated its goal of "doubling offshore wind by 2030 while ensuring [. . .] creating good jobs.")

² For further details see: <https://www.hfw.com/CBP-rules-that-the-Jones-Act-applies-to-offshore-wind-energy-projects-on-the-outer-continental-shelf-Feb-2021>

³ PJM is a regional transmission organization that coordinates the movement of wholesale electrical power across multiple states.

(ITC). This proposed legislation would extend the offshore wind ITC by one year for projects that commence construction prior to the end of 2026. This bill is currently in committee.

March 2021

- The Departments of Interior (DOI), Energy (DOE), and Commerce (DOC) announced a shared goal to deploy 30 gigawatts (GW) of offshore wind in the U.S. by 2030.
- BOEM plans to complete a review of 16 Construction and Operations Plans (COPs) for offshore wind projects by 2025, an amount said to represent more than 19 GW of new clean energy for the country.
- BOEM published a Notice of Intent (NOI) to prepare an Environmental Impact Statement (EIS) for Ocean Wind, LLC's proposed 1,100-MW wind farm offshore New Jersey.

April 2021

- BOEM announced a plan for an EIS for Revolution Wind's 880-MW offshore project which is set to supply power to Rhode Island and Massachusetts. The Revolution Wind project is being jointly developed by Massachusetts-based Eversource Energy and Denmark-based Ørsted.

May 2021

- Vineyard Wind, a joint venture between Avangrid Renewables Inc. and Copenhagen Infrastructure Partners, gained approval to commence construction and operation from the DOI and DOC for its 800-MW offshore wind project after BOEM issued its Record of Decision (ROD). The ROD will allow the joint venture to build up to 84 turbines twelve nautical miles off of Nantucket and Martha's Vineyard. The \$2.8 billion project, known as Vineyard Wind 1, will be the first commercial-scale offshore wind farm in the country, and is set to start operating by 2023.

- The DOI, the DOD, and the State of California identified two areas off the coast of California as potential wind energy areas that could provide up to 4.6 GW of energy – enough to power up 1.6 million homes. The identified areas are 399 square miles off central California; northwest of Morro Bay that is estimated to support 3 GW of production; and Humboldt Call Area off northern California that is estimated to support 1.6 GW of production.

June 2021

- BOEM and the State of California held an intergovernmental renewable energy task force in June to discuss potential Wind Energy Area's (WEAs). These WEAs will undergo an environmental analysis, with a proposed sale notice for one lease sale auction to follow mid-2022.
- BOEM published a Request for Interest (RFI) in the Federal Register seeking interest in commercial leasing for potential offshore wind development on the Gulf of Mexico OCS. In this announcement, BOEM states it is seeking developer interest in an area spreading almost 50 million acres offshore Texas, Louisiana, Mississippi, and Alabama throughout the 45-day comment period.
- BOEM held its first Gulf of Mexico Intergovernmental Renewable Energy Task Force to help coordinate planning, solicit feedback, and exchange scientific and process information. The task force is comprised of federal, tribal, state and local government members from the interested states.
- BOEM announced a proposed lease sale of over 7 GW of offshore wind in the OCS in the New York Bight – an amount estimated to eventually power 2.6 million homes. The Proposed Sale Notice includes eight lease areas covering 600,000 acres of shallow waters located between Long Island and New Jersey.

- Eversource and Ørsted announced their contract with Dominion Energy to charter Dominion's offshore wind turbine installation vessel, Charybdis, which is currently being built in Brownsville, Texas by Keppel. The Charybdis, will be the first Jones Act-compliant offshore turbine vessel in the United States and is expected to be sea ready by late 2023.

As U.S. offshore wind expands, stakeholders and regulators will face novel challenges. The offshore wind industry is developing and will continue to develop new technologies and will operate in areas that may have limited experience with offshore projects. How regulators and the courts handle these new developments based on pre-existing law is an open ended question. Diverse stakeholders in offshore wind construction projects, including vessel owners and operators, and project developers, should take into consideration the various regulations, particularly the Jones Act, that apply to offshore wind projects before moving forward.

For further information, please contact the authors of this briefing:



MICHAEL WRAY

Partner, Houston

T +1 (713) 706 4905

E michael.wray@hfw.com



MELANIE FRIDGANT

Associate, London

T +44 (0)20 7264 8845

E melanie.fridgant@hfw.com

HFW has over 600 lawyers working in offices across the Americas, Europe, the Middle East and Asia Pacific. For further information about our energy capabilities, please visit www.hfw.com/Energy.

hfw.com

© 2021 Holman Fenwick Willan LLP. All rights reserved. Ref: 003178

Whilst every care has been taken to ensure the accuracy of this information at the time of publication, the information is intended as guidance only. It should not be considered as legal advice. Holman Fenwick Willan LLP is the Data Controller for any data that it holds about you. To correct your personal details or change your mailing preferences please email hfwenquiries@hfw.com

Americas | Europe | Middle East | Asia Pacific