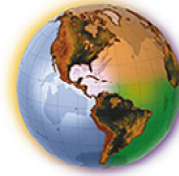


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Offshore renewable energy leasing: Let the competition begin!

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After almost a decade of anticipation, the federal government recently held its first-ever competitive commercial wind energy lease sales on the U.S. Outer Continental Shelf (OCS). In July 2013, Deepwater Wind, LLC fended off two other bidders for a pair of leases offshore Rhode Island and Massachusetts with a winning bid of \$3.8 million. In a September 2013 sale, Dominion Resources, Inc. acquired a 113,000-acre lease offshore Virginia with a bid of \$1.6 million. Further lease sales offshore Maryland and New Jersey are anticipated in the near future, with another sale offshore Massachusetts likely to follow. These offshore wind projects can be huge—it is estimated that Dominion's lease offshore Virginia is capable of generating 2 gigawatts of electricity, enough to power 700,000 homes.

What is often overlooked is that obtaining an OCS renewable energy lease is only the first step of a complex multistaged process culminating in the approval and eventual construction of an offshore wind energy facility. Obtaining a lease is no guarantee of success. Look no further than the as-yet-unbuilt Cape Wind project (now entering its third year of litigation), or Statoil's recently abandoned pilot project for floating turbines offshore Maine, to see

About Trends

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that developing wind energy offshore the United States is technically, financially, and administratively challenging.

A commercial wind project on the OCS requires a lease from, and project approval by, the U.S. Department of the Interior's (DOI) Bureau of Ocean Energy Management (BOEM). While BOEM's regulatory leasing and development process is well understood among industry participants, it is not widely grasped by the public or advocates involved in the offshore wind energy debate. The following discussion serves as a primer on the major stages of BOEM's commercial wind energy leasing and approval process and describes the current status of the wind industry on the OCS.

Statutory authority for OCS wind development

The OCS lies beyond state submerged lands, which for most coastal states extends three nautical miles from shore. The OCS Lands Act (OCSLA) grants the Secretary of the Interior the authority to issue leases, easements, and rights of way on the OCS for the purpose of exploiting its resources. 43 U.S.C. §§ 1331 et seq. Although these "resources" traditionally consisted of minerals such as oil and gas, the Energy Policy Act of 2005 amended OCSLA to expand DOI's authority to issue leases, easements, and rights of way for the purposes of "produc[ing] or support[ing] production, transportation, or transmission of energy from sources other than oil and gas." 43 U.S.C. § 1337(p)(1)(C). The Secretary delegated this authority to BOEM, which now authorizes commercial wind projects on the OCS.

BOEM's regulations—staged leasing and development

In 2009, BOEM promulgated a comprehensive suite of rules establishing a three-stage process for the leasing and development of renewable energy on the OCS: (1) lease issuance, (2) submission and approval of a Site Assessment Plan (SAP), and (3) submission and approval of a Construction and Operations Plan (COP). See 30 C.F.R. Part 585. These stages involve the conveyance of different rights.

Lease: An OCS wind lease, like an OCS oil and gas lease, does not convey an absolute right to develop. Rather, when an applicant acquires a lease, it obtains the exclusive right to apply for the subsequent approval of its SAP and COP, which only then allows the lessee to develop renewable energy-related facilities on its lease. The lease also confers the right to project easements for installing transmission capacity and certain other appurtenances necessary for the full enjoyment of the lease, which may be sought at the COP stage. 30 C.F.R. § 585.200(b). The lease does not grant exclusive control over the entire lease area; it only gives the lessee the exclusive right to use what is necessary for its activities. BOEM may grant other rights, such as a right-of-way for cables or pipelines, across a lease area so long as they do not unreasonably

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interfere with lease activities. Other uses of the ocean in the lease area, such as fishing and shipping, may continue.

Pursuant to OCSLA, all renewable energy leases must be issued competitively unless BOEM determines that no competition for a lease area exists. 43 U.S.C. § 1337(p)(3). Consequently, the first step in the leasing process is the publication in the Federal Register of a Request for Interest (RFI) or Call for Information (Call), which solicits input from the public and potential developers for the primary purpose of determining whether competitive interest exists in an OCS area. See 30 C.F.R. §§ 585.210–585.214. If no competitive interest exists, BOEM may issue a lease noncompetitively. 30 C.F.R. §§ 585.231–585.232. Otherwise, BOEM must auction leases competitively under the process described at 30 C.F.R. §§ 585.210–585.216.

When auctioning leases competitively, BOEM may consider factors other than the highest monetary bid in determining which party ultimately is awarded a lease. 30 C.F.R. §§ 585.220–585.224. Such factors include whether an applicant has a power purchase agreement with an onshore utility (as Deepwater Wind had), the size and nature of the project that the developer is considering, and the nature of the technology to be deployed. BOEM will permit only those legally, technically, and financially qualified to hold a lease to participate in an auction or to indicate competitive interest in response to a RFI or Call. See *also* 30 C.F.R. §§ 585.106–585.107. To a greater extent than BOEM’s OCS oil and gas leasing program, the intention is to ensure that those who obtain wind leases are actually capable of developing them.

SAP: An approved SAP allows the lessee to construct meteorological towers and install meteorological buoys on the lease. See 30 C.F.R. §§ 585.605–585.618. The lessee may then gather information regarding wind and wave conditions to help with the design of its renewable energy project.

COP: A COP is the plan for the construction and operation of a renewable energy project and contains the particulars of project design, construction, operation, and decommissioning. 30 C.F.R. §§ 585.620–585.638. BOEM’s approval of the COP allows the lessee to construct and operate a renewable energy facility. COP approval has the most significant potential environmental impact and the greatest likelihood of interfering with alternate uses of the project area. Consequently, approval of a COP entails the agency’s most rigorous impact analyses under federal statutes such as the National Environmental Policy Act (NEPA), the Coastal Zone Management Act, and the National Historic Preservation Act.

The BOEM regulations require that a lessee provide the results of numerous “site characterization” surveys with its COP, including a shallow hazards survey, geological survey, geotechnical survey, and archaeological resource survey. 30 C.F.R. § 585.626(a)(1)–(5). BOEM does not require a permit authorizing these activities,

although the manner in which they are conducted may appear as lease stipulations.

“Smart from the Start” streamlining initiative

Most discretionary federal actions trigger environmental review under NEPA and other applicable statutes. In November 2010 Interior Secretary Salazar announced the “Smart from the Start” Atlantic Offshore Wind initiative to accelerate commercial wind energy development on the OCS. Originally conceived as a NEPA streamlining tool, Smart from the Start adopts a landscape-scale approach to optimally siting wind projects to maximize resource recovery and minimize potential conflicts or impacts. At the core of the initiative is the identification of “wind energy areas” that represent the best prospects for siting wind projects on the OCS. The agency refers to the identification of the wind energy areas as the “planning” stage of its decision-making process, which precedes the three regulatory stages described above.

BOEM’s consideration of lease issuance in one or more established wind energy areas is the subject of an Environmental Assessment (EA) under NEPA, which is generally shorter and narrower than an Environmental Impact Statement (EIS). The EA evaluates the reasonably foreseeable impacts associated with the first two stages of the leasing and development process:

- (1) Lease issuance (including reasonably foreseeable consequences associated with site characterization activities); and
- (2) SAP approval (including reasonably foreseeable consequences associated with meteorological towers and buoys).

The process is designed to be proactive and facilitate the leasing phase so that applicants can obtain the exclusive opportunity to develop the lease area. If the lessee subsequently submits a SAP, BOEM will determine whether the EA prepared for leasing in that wind energy area adequately considered the environmental consequences of the activities proposed in the SAP. If so, no further NEPA analysis would be required; if not, BOEM would prepare additional NEPA analysis (e.g., a site-specific EA) prior to SAP approval.

The EA prepared for a wind energy area is not required to analyze the environmental consequences associated with the third stage of the process, approving a COP. Instead, when a lessee submits its COP, BOEM will prepare a NEPA document evaluating the reasonably foreseeable environmental and socioeconomic consequences associated with the specific wind project being proposed. BOEM will use this NEPA document for the purpose of deciding whether to approve the COP. 30 C.F.R. § 585.628.

The Smart from the Start initiative is intended to provide for a quicker, more targeted NEPA process that is proportionate to the impacts of each decision BOEM is making. The staged granting of rights avoids conducting unnecessarily detailed and highly speculative NEPA analysis too early in the process, only to potentially start over again when specific plans emerge that may invalidate assumptions about project design or environmental impacts. It also allows for analysis of impacts on a broad geographic scale and provides a basis for subsequent tiering. The agency is then able to limit its more comprehensive environmental review and decision-making efforts to those actions later in the process that are most likely to have significant impacts—namely, the construction and operation of wind facilities. To date, BOEM has issued two Final EAs intended to analyze the impacts of lease issuance and SAP approval: in the Mid-Atlantic (Delaware, Maryland, New Jersey, and Virginia) in 2012 and offshore Rhode Island and Massachusetts in 2013.

State of the industry

There are currently five commercial wind leases on the OCS: Cape Wind in Nantucket Sound, Bluewater Wind in the Maryland Wind Energy Area, Dominion Resources in the Virginia Wind Energy Area, and two Deepwater Wind leases in the Rhode Island/Massachusetts Wind Energy Area. All but the Cape Wind lease were issued under the Smart from the Start initiative. The Cape Wind and the Bluewater Wind leases were issued noncompetitively, while Dominion and Deepwater Wind won their leases at competitive auction. Except perhaps for Cape Wind, it does not appear that development of these leases is imminent; none of the lessees has yet submitted a SAP, and the regulations do not require the submission of a COP during the first five years.

However, BOEM has finally entered into a “leasing mode,” and Smart from the Start is the model. The agency has identified additional wind energy areas offshore Maryland, New Jersey, and Massachusetts capable of supporting numerous wind energy projects. The initial NEPA review to support lease issuance and SAP approval in the wind energy areas offshore Maryland and New Jersey is complete, with a Final EA anticipated for a new wind energy area offshore Massachusetts at the end of 2013. Barring significant changed circumstances, BOEM need only publish proposed competitive sale notices to begin qualifying individual bidders. Industry can anticipate a sale offshore Maryland in early 2014 and sales in the New Jersey and Massachusetts wind energy areas later that year. BOEM is currently working on developing wind energy areas offshore North Carolina and South Carolina, although a timetable for leasing is unclear.

OCS wind development is a daunting endeavor, both technically and financially. A flurry of offshore renewable energy leasing activities over the next two years is expected and welcome. Yet,

development of actual wind projects will proceed cautiously until lessees can determine how to successfully develop their existing prospects.