Alert

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COZEN O'CONNOR

Developments in Offshore Wind: Part One

On January 20, 2021, President Joseph R. Biden, Jr. was inaugurated as the 46th president of the United States. In his short time in office so far, the new Biden administration has been very busy setting an aggressive policy agenda around several key issues. One key issue — a Biden campaign platform issue — involves climate change and the advancement of renewable energy, including the advancement of offshore wind.

Here, we use the occasion of recent wide-ranging developments since President Biden's election to provide several focused updates about offshore wind developments. These developments demonstrate the significant and broad role that offshore wind will have on furthering Biden administration policy objectives related to addressing climate change, expanding the availability of renewable energy and its contribution to the nation's power needs, and, in the process, creating well-paying, permanent jobs.

The Biden administration's approach to policy setting in the offshore wind context can already be seen in recent legislation and executive orders related to tax law, maritime law, and environmental law. We address the interplay of these legal issues in this white paper in the context of the new administration's overall policy objectives. In part one, we address relatively recent New Jersey and New York state developments as a comparator to the current federal agenda and as an example of how, to date, states have taken the lead on offshore wind development. We also examine recent Biden administration executive actions affecting the offshore wind sector. In part two, we discuss some related tax, maritime, and environmental issues and developments affecting the sector.

State (NJ/NY) Offshore Wind Regulatory Developments

Offshore wind at the state level has seen considerable growth over the past few years, even under the previous administration, with more states approving and developing offshore wind projects. In particular, New Jersey and New York are looking to offshore wind to help achieve clean energy goals and many coastal states are, and have been, relying on regulatory agencies to incentivize and develop offshore wind. Two states currently leading the way are New York and New Jersey, with their preexisting regulatory schemes discussed briefly below.

New Jersey

The state of New Jersey under Governor Murphy seeks to establish 7,500 megawatts of offshore wind by 2035. In 2010, Governor Christie enacted the Offshore Wind Economic Development Act (OWEDA), which creates Offshore Wind Renewable Energy Certificates (ORECs), to incentivize the development of offshore wind. ORECs are awarded to Qualified Offshore Wind Projects (QOWP) by the New Jersey Board of Public Utilities (BPU).[1] In 2018, Governor Murphy signed Executive Order 8, which kicked into high gear the permitting process for offshore wind projects. This New Jersey executive order, among other things, called upon the BPU and other state agencies to take all necessary actions to implement OWEDA and to meet an initial goal of 3,500 megawatts of offshore wind energy generation by 2030.[2] In 2019, Governor Murphy signed Executive Order 92, raising New Jersey's offshore wind goal to 7,500 megawatts by 2035.[3] In order to implement OWEDA and reach Governor Murphy's goals, the BPU has developed regulations for an OREC pricing methodology and application requirements for the solicitation of competitive bids for proposed QOWPs.[4] The BPU solicited proposed projects in 2018 and in 2019 awarded a grant to Orsted's 1,100 megawatt Ocean Wind project.[5] This is the first large-scale offshore wind project in the state that will undergo permitting and construction.

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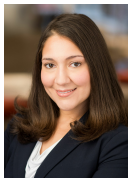

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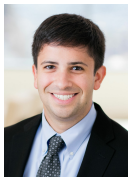

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The BPU also conducted a second round of solicitations in 2020 targeting 1,200 MW to 2,400 MW of offshore wind capacity and is expected to announce an additional offshore wind grant as a result of the second solicitation mid-year in 2021.[6]

The BPU has also recently held an Offshore Wind Transmission Technical Conference that took place virtually on February 26, 2021, to examine the risks associated with a potential separation of the generation and transmission components throughout the development and operation phases of offshore wind development.[7] Amendments to OWEDA in 2020 now allow the BPU to award competitive bids to companies solely for the transmission of wind energy separate and apart from the generation — this is a change from requiring one entity submitting a proposal to be capable of handling both generation and transmission aspects. These amendments do not impact the first two offshore wind solicitations conducted by the BPU. The BPU conference explored the potential implications of these amendments and provided insights for further consideration.

In an earlier related action that is not intended to affect the winning project in the first solicitation, nor the instructions related to the second solicitation, on November 18, 2020, the BPU formally requested that PJM Interconnection incorporate New Jersey's offshore wind goals into the PJM transmission planning process through the PJM State Agreement Approach (SAA).[8] This was the first time a PJM state had requested the application of the SAA, which seeks to have PJM include state public policies into the transmission planning process. In this case, the BPU is seeking a first-of-its-kind public competitive solicitation process to examine the potential and possibilities for greater efficiency in meeting New Jersey's offshore wind goals through an integrated suite of onshore and offshore transmission upgrades, while also seeking to protect consumer's downside risk and project-on-project risk for generator developers. These developments demonstrate a commitment to a dynamic approach to addressing and reaching New Jersey's offshore wind objectives.

New York

In 2019, Governor Cuomo signed into law the Climate Leadership and Community Protection Act for the state of New York (CLCPA). The CLCPA requires that at least 70 percent of New York's electricity come from renewable energy sources by 2030 and it sets a goal for the development of 9,000 megawatts of offshore wind generation by 2035.[9] The New York State Energy Research and Development Authority (NYSERDA) issues competitive solicitations for offshore wind energy and contracts with offshore wind developers for ORECs. The state has, similar to New Jersey, undergone two solicitation cycles and has approved four offshore wind projects: (i) Empire Wind 1 for 816 megawatts, (ii) Sunrise Wind for 880 megawatts, (iii) Equinor Wind for a 1,260 megawatt Empire Wind 2 Project and (iv) the 1,230 megawatt Beacon Wind Project. New York is also developing the South Fork Wind Farm, which will be a 130-megawatt offshore wind project by the Long Island Power Authority.[10] In total, New York's approved offshore wind projects have generation capacity of 4,300 megawatts. The New York Public Service Commission (PSC) has developed the criteria for offshore wind solicitations and works with NYSERDA to approve and develop proposed projects.[11]

A New Federal Regime for Offshore Wind

On December 27, 2020, Congress passed the Consolidated Appropriations Act, 2021.[12] Shortly thereafter, on January 1, 2021, Congress voted to override then-President Donald J. Trump's veto of the National Defense Authorization Act for Fiscal Year 2021 (NDAA for FY2021).[13] On January 20, within the first hours of his administration, President Biden signed Executive Order 13990, *Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis* (the Climate Science EO), a broad executive order aimed at addressing general environmental challenges and the climate crisis. Most recently, as part of a flurry of executive orders in late January, President Biden also issued Executive Order 14005, *Ensuring the Future Is Made in All of America by All of America's Workers* (Jan. 25, 2021) (the Made in America EO) and Executive Order 14008, *Tackling the Climate Crisis at Home and Abroad* (Jan. 27, 2021) (the Climate Crisis EO). The occasion of these recent important and historic actions provides an opportunity to review and discuss relevant developments in the offshore wind sector about which our clients and others may be interested.

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The 2021 Appropriations Act addressed, among other things, what were then immediate concerns about the looming expiration of the production tax credit and the investment tax credit, and included provisions specifically directed at offshore wind projects. The passage of the NDAA for FY2021 by Congress, which included an amendment of the Outer Continental Shelf Lands Act (OCSLA) to clarify that the Jones Act applies to offshore wind projects on the outer continental shelf (OCS), in combination with President Biden's Made in America EO, signal a strong continued commitment to the use of U.S. flagged coastwise qualified vessels in support of the burgeoning offshore wind industry. These tax and maritime implications are further discussed in part two.

President Biden's Climate Science EO and Climate Crisis EO are clear policy signals that climate change will be an ongoing concern under the current administration, with the Climate Science EO serving as a directive to all federal agencies to review actions taken under the previous administration to ensure protection of public health and the environment. Equally weighted, the stated purpose of President Biden's Climate Crisis EO is "to move quickly to build resilience, both at home and abroad, against the impacts of climate change." The Climate Science EO is the mechanism that allows federal agencies to go about implementing this administration's policy agendas. In comparison, the Climate Crisis EO focuses on, and sends policy signals about, combating climate change through several initiatives, including rejoining the Paris Agreement, ending federal subsidies for fossil fuels, calling for a carbon pollution-free electricity sector by 2035, and incentivizing renewable energy production. Further, the Climate Crisis EO seeks to have the federal government take aggressive and comprehensive action to address the looming climate change crisis, and, importantly, aims to double U.S. offshore wind capacity by 2030. Thus, the Climate Crisis EO serves as the means by which this administration will seek to advance its climate change policy objectives. Given the far-ranging legal implications of the Climate Crisis EO on offshore wind, we discuss it in more detail below.

The Climate Crisis EO

The Climate Crisis EO aims to double U.S. offshore wind capacity by 2030. More specifically, Section 207 of the Climate Crisis EO directs the Secretary of the Interior to review "siting and permitting processes" in offshore waters and to identify steps that can be taken to increase renewable energy production in those waters, "with the goal of doubling offshore wind by 2030 while ensuring robust protection for our lands, water, and biodiversity, and creating good jobs." The Climate Crisis EO requires the Secretary of the Interior to work with a newly developed National Climate Task Force. The task force is comprised of cabinet members and heads of federal agencies, and is designed to deploy a coordinated and collaborative government-wide approach to combat the climate crisis.[14]

In a sign of commitment to quickly translate policy to action, the Department of the Interior and the Bureau of Ocean Energy Management (BOEM) have already taken steps to review processes to increase offshore wind in furtherance of the Climate Crisis EO. On February 3, 2021, the BOEM announced that it would resume environmental review of a proposed 800-megawatt offshore wind project off the coast of Massachusetts.[15] Offshore wind in federal waters has been developing slowly over the past few years but that development is expected to pick up speed because of the Climate Crisis EO. In this regard, we note that in June 2020, the first turbine for offshore wind in federally owned waters was installed off the coast of Virginia.[16] In order to reach the goal of doubling offshore wind production by 2030, federal agencies will likely permit more offshore wind projects in federal waters and will likely explore ways to encourage similar development in state waters.

Offshore wind developers must navigate a lengthy approval process with demanding application requirements. The developers must then work with the state agencies and other governmental bodies at the municipal and federal levels to successfully achieve permitting and construction goals. With President Biden's Climate Crisis EO looking to increase offshore wind development, it is expected that federal agencies will work to streamline federal permitting and approval requirements with state governments. The offshore wind industry is optimistic, in part, based on the selection of Amanda Lefton as the director for the BOEM. Lefton is experienced in offshore wind, having served as the First Assistant Secretary for Energy and the Environment in New York state. She is expected to work with states to improve federal coordination and cooperation to

further advance offshore wind.[17] With these developments at the state level, it is expected that offshore wind will grow as part of the solution to climate change and as a way to create jobs and other benefits in the process.

Conclusion

The offshore wind sector is well positioned to provide a synergistic focus for addressing climate change and meeting the nation's renewable energy goals. The enormous scope and scale of offshore wind development makes it a critical part of the drive for accomplishing President Biden's Climate Crisis EO objectives, as well as those of U.S. coastal states where the prospects for offshore wind are under various stages of development. Navigating the legal, regulatory, political, and technical waters associated with this development requires the assistance of experienced professionals who can provide guidance and advice regarding the many complex issues and concerns.

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[1] *N.J.S.A.* 48:3-87.1 and 48:3-87.2.

[2] State of New Jersey Department of Environmental Protection, Offshore Wind in New Jersey.

[3] State of New Jersey, *Governor Murphy Signs Executive Order to Increase Offshore Wind Goal to 7,500 Megawatts by 2035* (Nov. 19, 2019).

[4] *N.J.A.C.* 14:8-6 *et seq.*

[5] Press Release for New Jersey Board of Public Utilities, *New Jersey Board of Public Utilities Awards History 1,100 MW Offshore Wind Solicitation to Orsted's Ocean Wind Project* (June 21, 2019).

[6] Press Release for New Jersey Board of Public Utilities, *NJBPU Takes Major Steps Forward for Offshore Wind in New Jersey* (Sept. 9, 2020).

[7] See Notice of Technical Conference, *In the Matter of Offshore Wind Transmission*, Docket No. QO20100630 (Jan. 26, 2021).

[8] Order, *In the Matter of Offshore Wind Transmission*, Docket No. QO20100630 (Nov. 18, 2020).

[9] Climate Leadership and Community Protection Act, amending Environmental Conservation Law §75 *et seq.*; *see also* Climate Act.

[10] New York State Energy Research and Development Authority, Offshore Wind Project.

[11] New York State Department of Public Service, Offshore Wind.

[12] Consolidated Appropriations Act,2021, Pub.L.116-260, enacted December 27, 2020.

[13] *Pub.L.116-283.*

[14] The White House Briefing Room, the Climate Crisis EO.

[15] *See generally* Bureau of Ocean Energy Management, *Vineyard Wind.*

[16] Dominion Energy, Coastal Virginia Offshore Wind.

[17] Press Release for Bureau of Ocean Energy Management, *BOEM Announces Amanda Lefton as New Director* (Feb. 5, 2021).