

## Developments in Offshore Wind Part Two

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 addressed relatively recent New Jersey and New York state developments and recent Biden administration executive actions affecting the offshore wind sector. In this *Part Two*, we discuss some related tax, maritime, and environmental issues and developments affecting the sector.

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.

### Offshore Wind Tax Developments

#### Production Tax Credit (PTC) for Wind Projects

The 2021 Appropriations Act included a one-year extension of the PTC already in place, which allows a credit against business income tax to taxpayers based on electricity produced by onshore and offshore wind projects. The credit, stated under *I.R.C. § 45(a)(5)*, is a credit of 1.5 cents per kWh of electricity produced by the taxpayer from wind at a qualified facility for the first 10 years after the project is placed in service. The amount of the credit will be adjusted for inflation and phases out based on when the facility construction started. Eligibility for the credit was set to end in 2020, but the 2021 Appropriations Act extended applicability of the credit to projects that begin construction in 2021. Projects that begin construction after 2021 will not be eligible for the credit, which will phase out in 2022.

#### Investment Tax Credit (ITC) for Offshore Wind Projects

A 30 percent ITC against business income tax is now available for certain offshore wind facilities that are located within the inland navigable waters of the United States or in the coastal waters of the United States, and that begin construction before January 1, 2026. The term of the ITC is five years. *I.R.C. § 45(d)(1)*. Unlike the PTC, this ITC for offshore wind projects does not phase out for projects that start construction before 2026. This offshore wind ITC will provide meaningful financial assistance and encouragement for qualified offshore wind projects during the next five years and will likely spur further development initiatives during the period to take advantage of the credit.

#### Research & Development Support Under the 2021 Appropriations Act

Section 3003 of the 2021 Appropriations Act authorizes the creation of a program to fund research and development and commercialization for wind energy technologies. The purposes of the program include improving the efficiency and cost effectiveness of wind energy, optimizing its performance, and reducing barriers to the commercialization of wind technology. The program includes a focus on offshore wind-specific projects and plants. Over \$100 million is allocated to the program, including for awarding grants, performing research, creating demonstration projects, and providing small business vouchers. This program is an indication of the federal government's renewed focus on wind energy, including offshore wind projects, and its commitment to expanding this field.

### Offshore Wind Maritime Legal/Regulatory Developments



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**Industry Sectors**

- Renewable Energy

One of the major questions facing the offshore wind industry for the past several years has been whether and to what extent foreign-flagged vessels may be utilized in support of offshore wind construction and operations. The flurry of offshore wind related activity to start the year by Congress, the president, and Customs and Border Protection (CBP) addressed this issue in part and seem to signal that more action is likely to come in the near future to resolve other open issues.

Under the Jones Act, only U.S. flagged and coastwise qualified (i.e., owned, operated, and controlled by U.S. citizens) vessels are permitted to carry merchandise between any two points in the United States. Thus, foreign-flagged vessels may only be used in support of offshore wind projects in a manner that does not involve transportation of merchandise between two U.S. points — for example, by employing a stationary foreign installation vessel to install components transported aboard U.S. flagged coastwise-qualified feeder vessels. A report issued by the U.S. Government Accountability Office (GAO) in December 2020 titled *Offshore Wind Energy – Planned Projects May Lead to Construction of New Vessels in the U.S., but Industry Has Made Few Decisions amid Uncertainties* highlighted the significance of the issue to the industry by noting that “there are currently no Jones Act-compliant vessels capable of serving as a [wind turbine installation vessel]” and that larger capacity feeder vessels will also likely be needed to support the industry. In other words, while reports of the construction of Jones Act compliant installation and feeder vessels have begun to surface, at least in the near term, use of foreign vessels in some capacity will still be required for offshore wind construction. Thus, it is essential for the industry to have clarity on the exact extent to which foreign vessels may be employed.

Such clarity appears to have been provided with respect to projects on the U.S. outer continental shelf (OCS). Under Outer Continental Shelf Lands Act (OCSLA), the Jones Act’s restrictions also apply on the outer continental shelf in some instances. Based on the prior wording of OCSLA, there was an open question as to whether OCSLA’s extension of the Jones Act applied to offshore wind installations on the OCS. This question was addressed, at least in part, by passage of the National Defense Authorization Act (NDAA) for FY2021, which included an amendment to the OCSLA, the effect of which was to clarify that U.S. law (including the Jones Act) applies to “installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources, **including non-mineral energy resources.**” (Emphasis supplied).

President Biden echoed this commitment to the application of the Jones Act to offshore wind projects by issuing the Made in America Executive Order. The Made in America Executive Order included the Jones Act under its definition of “Made in America Laws” meaning that increased intergovernmental consultation will be required before a waiver of the Jones Act may be granted. A White House press release indicated that the Made in America Executive Order “[r]eiterates the President’s strong support for the Jones Act. The President will continue to be a strong advocate for the Jones Act” and that with the signing of the NDAA for FY 2021, “the Jones Act has also been affirmed as an opportunity to invest in America’s workers as we build offshore renewable energy, in line with the President’s goals to build our clean energy future here in America.”

Shortly after the president’s issuance of the Made in America Executive Order, CBP, the agency charged with interpretation of the Jones Act, issued ruling letter HQ H309186 (Jan. 27, 2021), its first interpretative ruling relating to application of the Jones Act to offshore wind turbines and installations since 2011. CBP applied the amended language of OCSLA to conclude that the Jones Act would be violated by several proposed scenarios involving the lading of scour protection by a non-coastwise qualified vessel at a U.S. point (either Port Providence or a vessel anchored in U.S. waters or on the OCS) and unloading of the scour at a monopile or wind turbine generator installed on the seabed of the OCS. CBP also found that the Jones Act would be violated by scenarios that involved lading of scour at a U.S. point (either Port Providence or a vessel anchored in U.S. waters or on the OCS) and unloading on the pristine seabed of the OCS prior to the construction of any offshore wind monopiles.

While the above actions appear to have resolved questions relating to application of the Jones Act on the OCS, questions remain as to CBP’s interpretation of what items carried aboard a vessel constitute “merchandise” (i.e., an item covered by the Jones Act and required to be transported between U.S. points by a U.S. flagged coastwise qualified vessel). In particular, CBP excludes

items deemed to be “vessel equipment” from the definition of merchandise. At the end of 2019, CBP issued a revocation of prior rulings that relied upon a standard for such determinations tied to whether the item at issue was utilized in fulfilling the “mission of the vessel” because CBP determined such an approach was overbroad.<sup>1</sup> Instead, CBP indicated that it would interpret “vessel equipment” to include items that are “necessary and appropriate for the navigation, operation, or maintenance of a vessel and for the comfort and safety of the persons on board.” CBP made clear, however, that this determination would be made on a case-by-case basis and specifically declined at that time to clarify how this standard would be applied to offshore wind projects. Thus, uncertainty remains as to how the Jones Act will apply with respect to the carriage of various components and equipment needed for offshore wind construction and operations. However, given the momentum behind the industry evidenced by congressional, executive, and CBP action in the early part of the year, further clarification on this issue in the near future seems likely.

## Offshore Wind Environmental Legal/Regulatory Developments

### The Social Cost of Carbon

The social cost of carbon (SCC) is an important policy tool in the climate change discussion, including with respect to environmental permitting for offshore wind, which is discussed in more detail below. The SCC, which attaches a monetary amount to the impacts of a ton of carbon (CO<sub>2</sub>) in a given year, has broad implications, depending on the amount and where it is used in any federal cost-benefit analysis. A cost-benefit analysis is typically required prior to a federal agency implementing any new rule or engaging in any governmental decision-making, including federal permitting decisions. Section 5 of the Climate Crisis Executive Order takes the first step toward restoring application of a higher value SCC and previously established values for other greenhouse gases such as methane (CH<sub>4</sub>) and nitrous oxide (NO<sub>x</sub>). To that end, President Biden’s Climate Crisis Executive Order recreates the Interagency Working Group on Social Cost of Greenhouse Gases (IWG), which was disbanded by executive order under the Trump administration.<sup>2</sup> The IWG is tasked with evaluating and setting the SCC, methane, and nitrous oxide values by January 2022. The revamped SCC values and values for CH<sub>4</sub> and NO<sub>x</sub> are likely to be in alignment with the values developed under the Obama administration, if not greater.

Indeed, on February 26, 2021, Heather Boushey, on behalf of the IWG, announced that the IWG would immediately replace “the previous Administration’s estimates with the estimates developed prior to 2017, adjusted for inflation” (i.e., restoring Obama-era values).<sup>3</sup> The quick decision stems from a January 27, 2021, memorandum from President Biden titled “Memorandum on Restoring Trust in Government Through Scientific Integrity and Evidence-Based Policymaking.” The memorandum directs federal agencies to “review and expeditiously update” any policy, process, or practice that does not use best available science. The IWG also anticipates an upcoming Federal Register notice to determine whether an update to the approach to value discounting is warranted and, if so, a more complete revision to the estimates is expected to be released within a year. While the full impacts of even higher SCC, CH<sub>4</sub>, and NO<sub>x</sub> values remain to be seen, continued encouragement of renewable energy development projects, including offshore wind projects, is anticipated.

### Offshore Wind Permitting Developments and Considerations

#### NEPA Developments for Offshore Wind

Most major infrastructure projects, including offshore wind, are highly impacted by legal and regulatory developments relating to the National Environmental Policy Act of 1969 (NEPA). Section 207 of the Climate Crisis Executive Order mandates that Bureau of Ocean Energy Management’s (BOEM) review of siting and permitting processes be in consultation with other agencies, including the chair of the Council on Environmental Quality (CEQ). CEQ is the agency responsible for overseeing and implementing NEPA. NEPA is the legal mechanism by which federal agencies must consider the environmental impacts for infrastructure projects through issuance of an Environmental Impact Statement (EIS), which is required all for “major Federal actions” that may “significantly affect” the quality of the human environment.<sup>4</sup>

NEPA is not designed to stop a project and is procedural in nature. It is designed to require thorough environmental review and public input before, for example, BOEM can issue an offshore wind lease to a potential developer through a formal Record of Decision.<sup>5</sup> Importantly, a BOEM lease is required for any offshore wind project on the OCS,<sup>6</sup> and typically before an application can be submitted to the Federal Energy Regulatory Commission (FERC) for its approval and licensing of any hydrokinetic project seeking to transmit electricity to the interstate electricity grid. Clearing the NEPA hurdle is an important milestone for any infrastructure project requiring federal approval(s). As it relates to offshore wind, developers further along in the BOEM leasing and FERC licensing process, which will include the NEPA review process, also have competitive advantages to obtaining state approvals for obtaining renewable energy credits used to fund the project.

The Climate Crisis Executive Order had the immediate effect of placing BOEM back on track for its NEPA review of the Vineyard Wind project. Changes to the Vineyard Wind turbines and signals from the previous administration that these changes might result in a deficient EIS caused Vineyard Wind to request that BOEM stop consideration of its application. Any requirement for a new application would have resulted in over a year of delay. On January 22, 2021, Vineyard Wind requested its original application continue through the review process. In a recent press release, BOEM announced that it would continue its environmental review of the Vineyard Wind project and proceed with development of a final EIS, signaling that a new application would not be required due to the turbine changes.

More changes to the previous administration's NEPA policies are also likely on the horizon. For example, Section 7(e) of the Climate Science Executive Order directs CEQ to rescind its August 2017 draft guidance on consideration of greenhouse gas (GHG) emissions during NEPA review, reverting instead to the August 2016 guidance issued in the final months of former President Barack Obama's administration. This guidance will immediately restore the environmental review advantages of all clean energy projects, not just offshore wind projects.

An even hotter issue to watch relates to the previous administration's changes to NEPA regulations. On July 16, 2020, under the prior administration, CEQ finalized a new rule effective September 14, 2020, which some viewed as limiting NEPA reviews for certain projects, particularly more carbon intensive projects. Although procedural in nature, NEPA review and litigation is known to often delay a controversial project for many years. The new NEPA rules were spurred by President Trump's August 15, 2017, Executive Order 13807 requiring federal agencies to process environmental reviews for "major infrastructure projects" as One Federal Decision (OFD).<sup>7</sup> One clear purpose of OFD was to expedite environmental reviews for oil and gas infrastructure projects. The new NEPA rule implemented myriad changes to NEPA regulations in alignment with OFD. While seemingly innocuous, the changes have been argued to have broad effects on the NEPA process that make it too easy to get through environmental review without full public engagement.<sup>8</sup> The new rule is currently subject to litigation, but is currently being evaluated by the Biden administration.

The full effect of the Biden administration's reversal or changes to NEPA in the offshore wind context remains to be seen. The new administration has stated it is reviewing the new NEPA rule to determine whether changes are required. The Climate Science Executive Order revokes OFD, the very basis for the rule change, signaling modification is likely, and the CEQ has sought stays in many of the pending challenges to the rule, with one request for stay denied in the U.S. District Court for the Western District of Virginia. Thus, the new administration will need to address the issue sooner rather than later.

### **Other Environmental Permitting Considerations**

The NEPA process for large-scale projects also often involves consultation and collaboration with other agencies with responsibilities to protect natural resources under a variety of other statutes, like the EPA or the U.S. Fish and Wildlife Service (USFWS). The Climate Crisis Executive Order is a signal to these agencies that their consultation for offshore wind projects should be particularly timely, in addition to their own separate reviews, while revocation of OFD is a separate signal to reestablish clean energy project advantages in environmental permitting review.

In addition to BOEM and FERC authorization activities and the consultation process, offshore wind

development will also involve the typical environmental permitting processes associated with any large infrastructure project. It will involve the crossing of wetlands and other waters of the United States (WOTUS) requiring permitting approval under the Clean Water Act (CWA), over which EPA has authority to regulate, or require review of species regulated by the Endangered Species Act (ESA) or the Marine Mammal Protection Act (MMPA), over which USFWS has authority to regulate. The building of ports or onshore office and/or maintenance spaces are likely to be on current or former industrial areas with soil and groundwater contamination issues, which would require thorough environmental due diligence under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) and its state counterparts prior to acquisition or leasing.

The Climate Crisis Executive Order does not specifically address these everyday environmental considerations and concerns. Some approval processes (for example, ESA and MMPA review) will be addressed early through consultation in the NEPA process and the Biden administration's potential changes to this process. Section 401 water quality certifications under the CWA are likely to be required for the transmission crossings and onshore interconnection cables from either EPA or a state agency with delegated authority to issue Section 401 certifications. A Section 404 permit under the CWA for dredge and fill activities in wetlands is also likely to be required from either the regional U.S. Army Corps of Engineers with EPA-delegated permit authority or a state agency with EPA-delegated authority to issue such permits. The state may also have its own host of environmental siting statutes and regulations for consideration, subject to review and approval by the overseeing state agency.

In addition, Section 328(a) of the Clean Air Act (CAA) requires federal air pollution regulations to be extended to projects on the OCS if the project is located within 25 miles of the state seaward border. Assuming that applies, the construction period of an offshore wind project may generate GHG emissions, which, depending on the attainment status of that area, may trigger a robust New Source Review under the CAA. Some CAA permitting (perhaps pursuant to a general permit) will likely be required for more routine pieces of equipment that generate emissions — backup generators, for example. The CAA offshore wind regulations codified at 40 C.F.R. part 55 would be managed by EPA.

While the Climate Crisis Executive Order does not address the details of an offshore wind project's robust and complex environmental permitting regime, it does signal that such projects should be given priority and should be timely.

## **Trends and Environmental Permitting Issues for the Future**

As the regulatory and permitting regimes for offshore wind projects become clearer and more favorable, the technology behind those projects also continues to advance. Currently, the elevation of the OCS on the U.S. East Coast makes it the most technically feasible location for offshore wind. Commercial scale turbines used or planned to be used still require foundation support, which leads to an intense construction process requiring pile driving and, by extension, more impacts during construction on the sea floor and to aquatic life.

Floating turbines, however, are on the horizon. Several floating wind projects are in the early phases (pilot or small scale) either in areas where fixed foundation turbines might be too disruptive to the local economy (e.g., Maine) or areas of the OCS where the water is too deep for fixed foundation construction (e.g., Maine, California, and Hawaii). Maine is leading the way to advance this new technology via a pilot project. On January 22, 2021, in a letter to the local fishing industry, Maine Governor Janet Mills announced she would propose a 10-year moratorium on any state water, offshore wind projects, while continuing to support the planned floating turbine research project in federal waters and extending the time for public input of that project. Thus, despite opposition, Maine appears slated to move forward with advancing floating turbine technology along its coast. Other, larger projects are also slated along the coast of California and Hawaii, with Oregon and Washington expected to follow.

While too early to detail a comparison of floating vs. fixed foundation offshore wind projects from an environmental permitting perspective, it is possible that floating turbines will have the upper hand to the extent they can be built to scale, which is still far in the future. This will be the only offshore wind option in certain areas of the OCS. The less disruptive nature of the construction and

maintenance of floating turbines (which can be pulled to shore for repairs, upkeep, and decommissioning) will inevitably lead to less aquatic environmental impacts and a shorter environmental permitting timeline. Whether the permitting and siting advantages will outweigh cost considerations of purchasing more expensive turbines (or, in areas where fixed-foundation is not technically feasible, of relying on other clean energy projects like solar and onshore wind) is likely to be a hot topic in the future.

## 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 Executive Order 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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<sup>1</sup> *Modification and Revocation of Ruling Letters Relating to CBP's Application of the Jones Act to the Transportation of Certain Merchandise and Equipment Between Coastwise Points*, CUSTOMS BULLETIN AND DECISIONS, VOL. 53, NO. 45, (December 11, 2019).

<sup>2</sup> As a matter of historical background, in 2009, under the Obama administration, the Council of Economic Advisors (CEA) and Office of Management and Budget (OMB) convened to form an interagency group focused on establishing uniform monetary impacts caused by CO<sub>2</sub>, the Interagency Working Group on Social Cost of Carbon (later the Interagency Working Group on Social Cost of Greenhouse Gases) (both referred to as the IWG). The dollar figure that was developed was to account for long term damage done by a ton of CO<sub>2</sub> emissions in a given year, assessing global impacts and discounted to present value. The IWG evaluated and updated its report on the SCC in August 2016. A social cost of CH<sub>4</sub> and NO<sub>x</sub> was also developed and used by federal agencies under the Obama administration. On March 28, 2017, IWG was disbanded by President Donald Trump via Executive Order 13783, *Promoting Energy Independence and Economic Growth* (March 28, 2017), along with revocation of the documents created by IWG. Interim values were then developed by the U.S. Environmental Protection Agency (EPA) that accounted for only domestic impacts and used a lower discount rate, resulting in a significantly lower SCC.

<sup>3</sup> White House Briefing Room, *A Return to Science: Evidence-Based Estimates of the Benefits of Reducing Climate Pollution* (Feb. 26, 2021), available here.

<sup>4</sup> 42 U.S.C. § 4332(2)(C).

<sup>5</sup> The Department of Interior's Mineral Management Service NEPA Manual, effective May 27, 2004, effectively deems "[a]pproval of offshore lease sales" a major federal action requiring an EIS.

<sup>6</sup> 30 C.F.R. § 585.104.

<sup>7</sup> Executive Order 13807, *Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects* (Aug. 15, 2017).

<sup>8</sup> Some of the most notable NEPA changes include: (1) a two-year timeline limit on preparing an EIS (40 C.F.R. § 1501.10); (2) removing the requirement to consider the "cumulative" effects of a project (*id.* §§ 1508.1, 1502.16); (3) changing the requirement to consider the "controversy" of the project to a requirement to consider "disputed issues" in an EIS (*id.* § 1502.12); (4) providing broad factors to be used in determining whether NEPA applies at all (*id.* § 1501.1); and (5) clarifying the scope of categorical exclusions (CE) and explicitly providing a catch-all to allow a CE that cannot be excluded based on "extraordinary circumstances" to continue to be excluded based on mitigating circumstances (*id.* 40 C.F.R. § 1501.4).