

Progress in US Federal Regulatory Process Supporting Offshore Wind Development Alert

February 2012



The United States has taken a step closer to providing some regulatory certainty for the development of renewable energy on the Atlantic Outer Continental Shelf (OCS).

On February 2, 2012, the Department of Interior's (DOI) Bureau of Ocean Energy Management (BOEM) released four filings which will be published in the Federal Register on February 3, 2012.¹ Furthermore, on February 3, 2012, BOEM released two additional filings to be published in the Federal Register on February 6, 2012.

BOEM issued:

1. Notice of the Availability of an Environmental Assessment and a Finding of No Significant Impact;
2. Notice as to the Form that BOEM will use to issue renewable energy commercial leases on the OCS;
3. Call for Information and Nominations for Commercial Leases for Wind Power on the OCS off Maryland;
4. Call for Information and Nominations for Commercial Leases for Wind Power on the OCS off Virginia;
5. Call for Information and Nominations for Commercial Leases for Wind Power on the OCS off Massachusetts; and
6. Notice of Intent to Prepare an Environmental Assessment for OCS off Massachusetts.

BOEM Finds No Significant Impact Associated with Issuing Leases off Mid-Atlantic OCS

Pursuant to the National Environmental Policy Act of 1969 (NEPA), BOEM was required to conduct a NEPA review because it is the lead agency for issuing offshore leases in the OCS. The purpose of NEPA is to require federal agencies to consider environmental consequences of a proposed action (and to weigh environmental factors equally to other factors) during the agency's decision-making process before taking any action

¹ The date of publication in the Federal Register triggers the clock for purposes of responding to an administrative agency's filing or determining the effective date of the particular Notice or Rule.

subject to NEPA.² **The Notice of the Availability of an Environmental Assessment and a Finding of No Significant Impact**³ informs the public that BOEM's NEPA review resulted in a finding that no significant environmental impact would result from the issuance of leases in the Wind Energy Areas previously identified on the OCS off New Jersey, Delaware, Maryland, and Virginia. The Environmental Assessment (EA) provides evidence and analysis to guide the agency in determining whether a more detailed Environmental Impact Statement is required; here, the EA suffices for NEPA compliance purposes because BOEM made a finding of no significant impact. Therefore, the preparation of a more detailed Environmental Impact Statement is not required. The EA considers the reasonably foreseeable impacts of approving site assessment activities, such as the installation and operation of met towers and buoys, on the leases that BOEM may issue. According to the federal regulations governing renewable energy alternate uses of facilities on the OCS, once a lease is issued by BOEM and the lessee submits a Site Assessment Plan (SAP), BOEM will then determine whether the EA properly analyzes the environmental consequences of activities addressed in the lessee's SAP or whether an additional NEPA analysis is required before BOEM may approve the SAP. Furthermore, when a lessee submits a construction and operations plan (COP) to develop a wind energy facility on its leased area, BOEM will then conduct a separate NEPA review for the specific proposed project.

BOEM to Use Form 0008 to Issue Commercial Renewable Energy Leases on OCS

Although BOEM has yet to determine the auction format and process to be used for issuance of competitive leases, it has finalized the form to be used for issuance of competitive renewable energy leases on the OCS. The February 3, 2012 Federal Register contains the much-anticipated final lease (Form 0008) to be used by BOEM in issuing commercial leases on the OCS.⁴ Although BOEM has modified and improved some of the provisions of its proposed draft lease, other concerns remain unaddressed in the final lease form: the remaining concerns will inevitably be factored into the decisions of developers and their lenders as we move toward project financing and development. Here, more so than in more mature industries, the project financing and development of offshore wind on the OCS will be impacted by the regulatory regime: the BOEM lease needs to be considered and its terms and omissions addressed in the project financing and transaction documents. The lease form will be effective as of February 21, 2012, 15 days following publication in the Federal Register.⁵

BOEM Issues Call for Information and Nominations for Commercial Leases off Maryland, Virginia and Massachusetts

BOEM also initiated the processes for leasing on the OCS off of Maryland, Virginia and Massachusetts.

The **Call for Information and Nominations for Commercial Leases off of Virginia** (Virginia Call)⁶ is at a preliminary stage, with BOEM seeking information to gauge whether sufficient interest exists in some or all of the area off of Virginia to trigger the administrative process for issuing competitive leases or, alternatively, whether it may make a finding of no competitive interest, triggering the noncompetitive leasing process. Rather than issue a Request for Information (RFI), BOEM issued the Virginia Call to expedite the leasing process, citing the goals of Secretary Salazar's "Smart from the Start"

2 Actions subject to NEPA review include federal, state, or local projects, programs, or exercises that are partly or entirely funded, assisted, conducted, regulated or approved by a federal agency.

3 Available as of February 3, 2012 at: <https://www.federalregister.gov/a/2012-02494>

4 Available as of February 3, 2012 at: <https://www.federalregister.gov/a/2012-02496>

5 The lease form is effective 15 days after publication, which falls on President's Day, a holiday; therefore, it is effective as of February 21, 2012.

6 Available as of February 3, 2012 at: <https://www.federalregister.gov/a/2012-2516>

initiative, which was commenced in 2010 to facilitate a more streamlined process for siting and leasing offshore wind facilities in the identified Wind Energy Areas in the Atlantic Ocean.

The **Call for Information and Nominations for Commercial Leases off of Maryland** (Maryland Call)⁷ follows from the nine expressions of interest received by BOEM in response to an RFI issued in November of 2010. By issuing the Maryland Call, BOEM finds that competitive interest exists in the area off of Maryland and seeks detailed and specific information concerning interested parties' qualifications, capabilities, interest, and plans for constructing, operating, maintaining and decommissioning offshore wind facilities off of Maryland.

The **Call for Information and Nominations for Commercial Leases off of Massachusetts** (Massachusetts Call)⁸ follows from eleven expressions of interest received by BOEM in response to an RFI initially issued in December of 2010 and then reopened for further comment in March of 2011. BOEM now seeks nominations from commercial developers for the revised area under consideration (the "Call Area") partly to determine whether competitive interest exists in any portion of the Call Area or whether the noncompetitive leasing process would be triggered by the resulting nominations. Simultaneously with the Massachusetts Call, BOEM issued a **Notice of Intent to Prepare an Environmental Assessment**⁹ for the Massachusetts Call Area, initiating the review under NEPA further described earlier in this Alert.

Nominations responding to both the Virginia Call and Maryland Call are due to BOEM postmarked no later than March 19, 2012, which is 45 days after publication in the Federal Register. Nominations responding to the Massachusetts Call are due to BOEM postmarked no later than March 22, 2012, which is 45 days after publication in the Federal Register.

In summary, the actions taken by BOEM today continue to provide some progress toward further encouraging offshore wind development on the OCS.

If you have any questions or comments about this Alert, please contact Grace Kurdian or John Imhof, or your usual WFW contact.

7 Available as of February 3, 2012 at: <https://www.federalregister.gov/a/2012-2497>

8 Available as of February 6, 2012 at: <https://www.federalregister.gov/a/2012-02645>

9 Available as of February 6, 2012 at: <https://www.federalregister.gov/a/2012-02649>

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