BOEM PROPOSES REGULATIONS TO IMPROVE OFFSHORE WIND LEASE AUCTION PROCESSES AND PROJECT DEVELOPMENT TIMELINES

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In 2023, federal agencies are poised to deliver rapid advancements in the development of offshore wind projects in the United States. In particular, the Biden administration's Bureau of Ocean Energy Management (BOEM)—the federal agency with critical authority over offshore wind assets developed and built in federal waters—is the fulcrum of this advancement and has taken recent actions to execute on the administration's ambitious plans to deploy offshore wind power infrastructure.

In addition to increased development activity and an emerging domestic supply chain, newly proposed regulations by BOEM represent a substantial regulatory shift that will improve transparency into the timing of future offshore wind lease auctions, streamline approval and oversight processes for projects currently in development, and provide needed guidance for future projects.

These proposed changes will facilitate offshore wind deployment in the coming decade as the industry makes plans to construct a large pipeline of East Coast projects, followed by the West Coast and Gulf of Mexico. This article provides an overview of BOEM's proposed Renewable Energy Modernization Rule and new regulatory environment that shapes the next generation of offshore wind projects, summarizes the most recent California lease auction, and previews the anticipated offshore lease auctions in 2023 and 2024.

BOEM MODIFIES REGULATORY PROCESSES FOR OFFSHORE WIND PROJECTS

Since BOEM and its predecessor organization first published renewable energy regulations in 2009, the agency has conducted 11 offshore wind lease auctions and now manages 27 active commercial leases. Throughout this period, the agency, with input from industry, identified several opportunities to increase transparency, streamline various regulatory processes, and protect U.S. taxpayers. On 12 January 2023, BOEM issued proposed rules that address a number of concerns and bottlenecks that have been identified by the offshore wind industry. In developing the proposed regulations, BOEM relied on lessons learned from the development of existing lease areas, long-established historical precedent with oil and gas leases also regulated by BOEM, and BOEM also looked to European approaches where the offshore wind industry is more mature. We outline the proposed modifications below.

Establishing a Public Renewable Energy Leasing Schedule

The proposed regulations would require the Secretary of the Interior to publish a schedule of BOEM's anticipated lease sales. The schedule would include information such as the location of the anticipated leases and expected

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timing of the lease sale. BOEM first released a five-year schedule of planned lease sales on 13 October 2021, for years 2021 to 2025. The proposed regulations would codify a process to maintain and periodically update this five-year schedule, requiring an update every two years with explanations for schedule changes. The schedule allows stakeholders and interested bidders to plan projects further in advance. By providing long lead times, BOEM hopes to reduce risk and provide more regulatory certainty, facilitating investments in offshore wind projects and the local supply chain.

Eliminating BOEM Approval for Deployment of Meteorological Buoys

Under current regulations, deployment of meteorological buoys (met buoys) requires approval from both BOEM, via approval of a site assessment plan (SAP), and the U.S. Army Corps of Engineers (Corps), via approval of a Nationwide Permit 5 (NWP 5). Because developers typically no longer use fixed-bottom met buoys, and current technologies cause only minimal environmental impacts, the proposed regulations would remove the requirement for BOEM approval, thus requiring only Corps approval. The proposed regulations eliminate the need for BOEM to approve an SAP prior to deploying non-fixed-bottom met buoys.

BOEM also would not require a limited lease for buoys deployed on off-lease areas, to encourage data gathering for additional areas suitable for offshore wind generation. BOEM's rationale for proposing to eliminate this approval is that the Corps already authorizes placement of scientific measurement devices within navigable waters through the NWP 5 process, and therefore is best equipped to evaluate and approve these deployments. Removal of this redundant approval requirement and the need to obtain SAP approval prior to met buoy deployment could substantially reduce the time the developer needs to commence the site assessment process.

Increasing Flexibility in COP Design Parameters and Turbine Locations

BOEM currently requires applicants to provide geotechnical, geophysical, biological, and archaeological surveys when submitting a construction and operations plan (COP). Under the proposed regulations, rather than providing specific turbine locations and designs, developers may submit “project design envelopes,” which would allow the developer to provide a range of design parameters and locations. Geotechnical information for individual turbine locations could later be submitted after COP approval but before construction. This change would enable developers to achieve COP approval before identifying precise wind turbine locations, which are often uncertain when submitting the COP, and would avoid the need to perform repeat survey and boring work in the event the developer later decides to change turbine locations. This flexibility would also allow developers to adjust project design based on availability of new technologies or other unexpected circumstances, and defers BOEM's review to the Facility Design Report (FDR) or Fabrication and Installation Report (FIR).

Improving the Project Design and Installation Verification Process

Another component of BOEM's proposal involves several minor changes to the design and installation verification process. Under the current regulations, developers must have a certified verification agent (CVA) provide third-party review of the FDR and FIR. The CVA also monitors installation activities and must provide a final report to BOEM prior to the facility's commercial operation.

The new regulations would enable BOEM to approve CVA nominations separately from the approval processes for the SAP and COP, which will allow for CVA approval before COP submittal. BOEM understands that

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developers have indicated these changes will streamline the design approval process. Verification of design and commissioning of critical safety systems also would be included with the CVA's scope of review.

Reforming BOEM's Renewable Energy Lease Auction Regulations

The proposed regulations include changes to BOEM's lease auction procedures based on lessons learned from previous auctions. Key changes include:

Formalization of Community-Investment Bidding Credits

BOEM seeks to formalize the multiple-factor framework used in the Carolina Long Bay and California lease auctions by including rules for bidding credits that would be used to fund investments toward “advancing a domestic supply chain or requiring workforce development agreements.” This is consistent with the Biden administration's focus on workforce development across a large number of agencies, including related programs at the Department of Energy and the Department of Transportation.

Deterring Potential Bidder Collusion

New regulations would explicitly prohibit certain communications between bidders relating to auction strategies or economic valuations of leases that would have the potential to reduce final bid prices.

Definition of Provisional Winner

The proposed regulations introduce the term “provisional winner,” defined as “the bidder that BOEM determines has submitted the winning bid at the close of the auction, pending completion of the government's post-auction reviews and lease award reconsideration process.” The proposed regulations would also specify the provisional winner's obligations and actions that BOEM is authorized to take should a provisional winner fail to meet its obligations.

Actions Taken if an Existing Lease is Relinquished, Contracted, or Cancelled

The proposed regulations establish clear authority for BOEM to offer a lease to the next highest bidder if a provisional winner fails or is unable to execute a lease. The proposed regulations would also clarify that if a lease area is later relinquished or reduced in size, BOEM may re-issue the previously leased area in a subsequent auction.

Tailoring Financial Assurance Requirements and Expanded Options

The proposed regulations alter the financial assurance requirements that BOEM uses to protect against default by lessees or grant holders. The new rules would eliminate the need to provide supplemental financial assurance prior to COP approval, but would continue to require such assurance after COP approval and prior to outer continental shelf installation activities. However, the new rules would also change the security that must be provided upon lease execution, and rather than the previous US$100,000 that was required, the new rules would require a full 12-months' rent prior to lease execution. On balance, BOEM does not anticipate the changes to have a financial impact on lessees.

Other changes would allow use of letters of credit, grant BOEM discretion to accept other forms of security, and allow guarantors to provide security only up to a stated amount, with the remainder fulfilled by other instruments.

Additionally, rather than having to fund the full decommissioning costs of a project up front, BOEM's new rules would allow staged funding of decommissioning costs in accordance with a set schedule, either through a trust

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account or other security instrument, a significant development that could facilitate smaller offshore wind developers being able to qualify for leases.

Other Revisions in the Proposed Regulations

Finally, the proposed regulations include additional changes to further streamline the regulatory processes with a goal of facilitating faster in-water deployment and commercial operations. These proposed changes would include:

1. Clarify procedures allowing for staged submittals of FDRs and FIRs;
2. Confirm that developers may commence fabrication of major components on land prior to submittal of FDRs and FIRs;
3. Streamline and improve safety management systems;
4. Restructure lease terms, lengthen operation terms to 30-years, and add new procedures for segregating and consolidating lease areas;
5. Permit regulatory waivers before or after a lease or grant is awarded;
6. Authorize civil penalties for regulatory violations that threaten serious, irreparable, or immediate harm;
7. Require lessees to perform annual on-site inspections; and
8. Standardize annual per-acre rental rates for grants.

RECENT AND UPCOMING BOEM LEASE SALES

Northern California Auction of Humboldt and Morro Bay Lease Areas

Shortly before the release of the proposed regulatory changes, on 7 December 2022, BOEM announced the results of its OSW auction for five lease areas of northern California. The California lease sale represents the third major offshore wind lease sale in 2022, and the first for the Pacific region. The California sale drew competitive final bids from five companies totaling US$757.1 million for lease areas comprising 373,268 total acres with estimated generation potential of up to 4,600 megawatts.

Similar to the May 2022 Carolina Long Bay auction, the California auction featured a multiple-factor auction format that allows for a bid price that combines a monetary component and a non-monetary component of up to 30% in credits for investments in the local community. Up to a 20% credit is available for bidders who committed to funding programs supporting offshore wind workforce training programs, developing a U.S. domestic supply chain, or both. A 5% credit is available for Lease Area Use community benefit agreements (CBAs) with communities, stakeholder groups, or Tribal entities whose use of the lease areas or use of the resources harvested from the lease areas is expected to be impacted by offshore wind development. Another 5% credit is available for General CBAs with communities, Tribes, or stakeholder groups that are expected to be affected by the potential impacts on the marine, coastal, or human environment from lease development.

The lease sale caps work that began in August 2016, when BOEM first published a Request for Interest (RFI) in California Offshore Wind. The time needed to advance the California lease areas to auction took nearly seven years to coordinate with state agencies, identify Wind Energy Areas (WEAs), complete environmental

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reviews, review multiple rounds of public comments, and publish lease auction notices. Several more years will be needed before the projects become operational.

Once a lease has been awarded, the developer has one year to perform preliminary activities including submission of an SAP, followed by five years to conduct site assessment activities and submit a COP. BOEM then performs additional environmental and technical reviews in its evaluation of the COP. Once BOEM approves the COP, the lease will commence the operations phase, including project construction. In reality, this means that the time between the RFI to the time of construction for these projects could exceed 13 years. This overly burdensome regulatory process has caused concern among some investors and many think it has limited the investment of capital into the industry.

Offshore Wind Lease Auctions in 2023 and Beyond

BOEM anticipates conducting four additional offshore wind lease auctions in 2023 and 2024. The time needed for BOEM to progress these lease areas from the initial call areas to auction has dramatically reduced as BOEM works to prepare these leases for market. The four upcoming lease auctions are as follows:

Gulf of Mexico

BOEM issued an RFI to assess interest in offshore wind development in the Gulf of Mexico on 11 June 2021. On 20 July 2022, BOEM identified two WEAs located off the coasts of Galveston, Texas, and Lake Charles, Louisiana. BOEM finalized the two WEAs on 31 October 2022. BOEM intends to hold a lease auction early in 2023 and will likely issue a Proposed Sale Notice soon.

Central Atlantic

On 16 November 2022, BOEM announced eight draft WEAs off the coasts of North Carolina, Virginia, Maryland, and Delaware. BOEM intends to hold an auction for this region sometime in 2023. Notably, the Inflation Reduction Act removed a 10-year moratorium for issuance of new offshore wind lease areas off the coast of North Carolina and other Southeastern states. Elimination of the moratorium could make this region more attractive for offshore wind in the near term by providing more opportunity for investments in a local supply chain in the lower mid-Atlantic region.

Oregon

BOEM published a Call for Information and Nominations in April 2022, for two offshore wind regions off the coast of Oregon. The public comment period closed on 28 June 2022, and BOEM is considering the submitted nominations. BOEM intends to hold an auction for this region later in 2023 after the Central Atlantic auction concludes.

Gulf of Maine

BOEM published a Request for Information relating to the placement of offshore wind installations off the coast of Maine in August 2022, and intends to hold an auction in late 2023 or early 2024.

CONCLUSION

Over the past year, while BOEM has successfully conducted a record three offshore wind lease auctions, and plans to conduct at least four more in the next two years, including the currently untapped Gulf of Mexico and off

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the coasts of Oregon and Maine, the newly proposed regulatory changes have the potential to significantly advance the industry through the development of a more reasonable and predictable regulatory process. By proposing new regulations, BOEM looks forward to providing developers with greater transparency and a longer planning horizon by providing current and updated five-year plans for upcoming lease sales. BOEM's proposed regulations would also streamline site assessment and construction design processes after a lease has been awarded, mitigating bottlenecks and reducing the economic and time burdens on developers as they prepare for installation.

BOEM is accepting comments on this proposed rule until 60 days after the date of publication in the Federal Register. K&L Gates' multi-disciplinary offshore wind industry group has the experience to help clients navigate the BOEM processes, and bring projects to commercial operations. If you have any questions, please reach out to any of the firm's offshore wind team.

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