CALMING THE SEAS FOR OFFSHORE WIND: RENEWABLE ENERGY MODERNIZATION RULE SEEKS TO BOOST REGULATORY AND FINANCIAL CERTAINTY FOR WIND ON THE OUTER CONTINENTAL SHELF

Date: 2 May 2024

US Energy, Infrastructure, and Resources Alert

By: John W. Northington Jr., Samuel R. Boden, Derek B. Kalbfleisch

On 24 April 2024 the Bureau of Ocean Energy Management (BOEM) and the Bureau of Safety and Environmental Enforcement (BSEE) issued a final rule to update regulations for renewable energy development on the US Outer Continental Shelf (OCS).[1] The new rule, known as the Renewable Energy Modernization Rule (the Rule), is intended to increase regulatory certainty for developers of offshore wind projects. Along with the rule, BOEM announced a new five-year leasing plan with a goal of bringing 12 new offshore wind lease sales by 2028, including four potential offshore lease sales in 2024, one each in 2025 and 2026, two in 2027, and four in 2028.[2]

These actions constitute the latest steps in the Biden Administration's efforts to deploy 30GW of offshore wind by 2030.[3] It also comes after a series of setbacks for the Administration in offshore wind, including three canceled projects off the coast of New York on 19 April 2024 due to supply constraints.[4]

The Rule aims to encourage wind development on the OCS through modernizing regulations, streamlining processes, reducing administrative burdens, enhancing compliance, and correcting technical errors and inconsistencies. The agencies expect the Rule will save the industry US$1 billion over the next 20 years.[5]

REGULATORY CERTAINTY

The Rule attempts to standardize and streamline safety regulations applicable to offshore wind. The Rule clarifies safety management system (SMS) regulations by setting clear information requirements and incentivizing the use of third-party SMS certifications. The Rule also clarifies how BSEE will conduct inspections and allows lessees to self-inspect under certain criteria. Additionally, the Rule requires use of new verifications for facility design, fabrication, and installation. These verifications will encourage a performance-based approach to give flexibility to operators on the best way to ensure the safety of personnel on or near OCS renewable energy facilities.

To streamline processes, the Rule eliminates certain burdensome requirements for offshore wind developers, such as the requirement that developers conduct site assessments for certain meteorological buoys and increases flexibility for submission of geotechnical surveys. The Rule also explains how BOEM will coordinate with tribes that may be affected by any leases, easements, or rights-of-way.

©2005-2026 K&L Gates LLP. All Rights Reserved.

FINANCIAL CERTAINTY

In addition to establishing a more standardized regulatory framework, the Renewable Energy Modernization Rule includes provisions intended to provide offshore wind developers with greater financial certainty during the development process. Namely, the Rule establishes a public renewable energy leasing schedule, which will be updated every two years, and reforms BOEM's renewable energy auction regulations. This regulatory schedule provides stakeholders with additional certainty for planning. The Rule revises the current auction formats, bid systems, and bid variables with a more flexible process to accommodate the circumstances surrounding individual auctions. Specifically, the Rule formalizes how BOEM considers factors that provide a developmental advantage or advance public policy in its bid evaluations. BOEM uses bidding credits to quantify non-monetary value from a project. BOEM has used bidding credits on many of its past lease sales on a range of policy topics to prioritize bids which advance domestic supply chains, promote workforce training, or provide community benefit agreements. Additional changes aim to deter potential bidder collusion and specify actions to be taken if a provisional winner fails to meet its obligations; or if an existing lease is relinquished, contracted, or cancelled.

Notably, the Rule provides additional avenues for lessees to demonstrate financial assurance. The Rule allows developers to incrementally fund decommissioning accounts, adds letters of credit as acceptable financial assurance instruments. Moreover, the Rule finalizes BOEM's use of credit ratings to demonstrate a lessee's financial strength and allows lessees to demonstrate capacity to meet financial assurance requirements based on electricity sales contracts and net income projections.

SHARED TRANSMISSION

The Rule allows for the continued use of multiple factor auctions through bidding credits with a category for "agreements by a potential lessee that would facilitate shared transmission solutions and grid interconnection…."[6] In response to comments on this addition, BOEM noted that the list is 'representative and not exhaustive," and that whether to utilize this credit would not be governed by the regulation.[7]

BOEM did not propose specific new regulation regarding transmission, however it noted that in its finalization description that it was "continuing to develop and implement a planned approach to transmission that includes the use of shared transmission infrastructure and corridors, meshed systems, and the development of an offshore grid, where approached."[8]

BOEM does note that it is clarifying that if there is state or regional transmission operator planning process that identifies a need for an offshore right of way to achieve its intended purpose, BOEM may determine there is not competitive interest under its current authority to "allow[] the expeditious and orderly development of OCS energy facilities…" in certain circumstances.[9]

CONCLUSION

In many ways, the Rule mirrors the well-established regulatory framework for OCS leasing for oil and gas, and the Rule constitutes BOEM's and BSEE's efforts to create a mature market for development of offshore wind. BOEM has long provided a five-year schedule for oil and gas leasing, and the Rule provides the same for renewable energy leasing. Similarly, through the Rule, BSEE and BOEM seek to harmonize the safety and financial

©2005-2026 K&L Gates LLP. All Rights Reserved.

standards for wind with those of the more mature oil and gas regime to make it more readily understandable and certain for operators and regulators alike.

The rule also provides additional tools and statements that align with the Department of Energy's recent Atlantic Offshore Wind Transmission Action Plan.[10] These revisions will provide flexibility and clarity in the regulations that allow for steps that incentivize and allow expeditious approval of planned transmission projects for offshore wind.

While this rule should simplify leasing and development of offshore wind, it may take some time for the benefits from the Rule to overcome headwinds associated with supply chain and other economic challenges to the offshore wind market. Further, potential changes in the federal legislative and executive branches in 2024 may result in additional obstacles to establishing a robust offshore wind ecosystem on the OCS, although the Rule should be published in the Federal Register early enough to be insulated from claw back under the Congressional Review Act.

Regardless, the Rule is evidence of the Biden Administration's commitment to offshore wind as a key component of its renewable energy goals and its desire to jump-start this industry. The firm's lawyers and advisors are available to help developers and potential lessees on the OCS understand this new regulatory regime.

FOOTNOTES

[1] Renewable Energy Modernization Rule, Docket No. BOEM-2023-0005 (Apr. 24, 2024) (to be codified 30 C.F.R. pts. 285, 585).

[2] *Id.*; *Interior Department Finalizes Rule to Streamline and Modernize Offshore Renewable Energy Development*, Dep't of Interior (Apr. 24, 2024),https://www.doi.gov/pressreleases/interior-department-finalizes-rule-streamline-and-modernize-offshore-renewable-energy.

[3] FACT SHEET: Biden Administration Jumpstarts Offshore Wind Energy Projects to Create Jobs, White House (Mar. 29, 2021),https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/29/fact-sheet-biden-administration-jumpstarts-offshore-wind-energy-projects-to-create-jobs/.

[4] Benjamin Storrow, *3 offshore wind projects nixed in New York*, Greenwire (Apr. 19, 2024), https://www.eenews.net/articles/3-offshore-wind-projects-nixed-in-new-york/.

[5] Renewable Energy Modernization Rule, *supra* note 1 at 13.

[6] Id. at 95.

[7] Id. at 106.

[8] Id. at 199.

[9] Id. at 201

[10] https://www.energy.gov/gdo/atlantic-offshore-wind-transmission-action-plan

©2005-2026 K&L Gates LLP. All Rights Reserved.

KEY CONTACTS



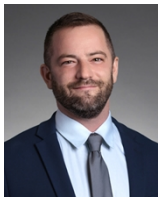
JOHN W. NORTHINGTON JR.
GOVERNMENT AFFAIRS ADVISOR

HOUSTON, WASHINGTON, DC
+1.713.815.7318
JOHN.NORTHINGTONJR@KLGATES.COM



SAMUEL R. BODEN
ASSOCIATE

HARRISBURG
+1.717.231.4502
SAM.BODEN@KLGATES.COM



DEREK B. KALBFLEISCH
ASSOCIATE

SEATTLE
+1.206.370.7644
DEREK.KALBFLEISCH@KLGATES.COM

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.

©2005-2026 K&L Gates LLP. All Rights Reserved.