Wind Energy: Offshore Permitting

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October 17, 2012

Congressional Research Service
7-5700
www.crs.gov
R40175

CRS Report for Congress
Prepared for Members and Committees of Congress

Summary

Technological advancement, financial incentives, and policy concerns have driven a global expansion in the development of renewable energy resources. Wind energy, in particular, is often cited as one of the fastest-growing commercial energy sources in the world. Currently, all U.S. wind energy facilities are based on land. However, multiple offshore projects have been proposed and are at various stages of the federal permitting process.

The United States has the authority to permit and regulate offshore wind energy development within the zones of the oceans under its jurisdiction. The federal government and coastal states each have roles in the permitting process, the extents of which depend on whether the project is located in state or federal waters. Currently, no single federal agency has exclusive responsibility for permitting related to activities on submerged lands in federal waters; authority is allocated among various agencies based on the nature of the resource to be exploited and the potential impacts incidental to such exploitation. The same is true for the offshore wind energy context, where several federal agencies have a role to play in permitting development and operation activities.

Section 388 of the Energy Policy Act of 2005 (EPAct; P.L. 109-58) amended the Outer Continental Shelf Lands Act (OCSLA) to address previous uncertainties regarding offshore wind projects. This provision retained a role for the Army Corps of Engineers in permitting under the Rivers and Harbors Act but grants ultimate authority over offshore wind energy development to the Secretary of the Interior. The statutory authority granted by Section 388 is administered by the Bureau of Ocean Energy Management (BOEM), an agency within the Department of the Interior (DOI). Since the passage of EPAct, BOEM has promulgated rules and guidelines governing the permitting and operation of offshore wind facilities.

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Technological advancements and tax incentives have driven a global expansion in the development of renewable energy resources. Wind energy, in particular, has been cited as the fastest-growing source of new electric power generation, and U.S. wind energy production capacity has been increasing consistently over the past several years.[1] Currently, unlike much of Europe,[2] all wind power facilities in the United States are based on land. However, multiple offshore projects have been proposed in recent years, including the licensed Cape Wind project off the coast of Massachusetts and several other proposals submitted to the Bureau of Ocean Energy Management (BOEM).[3]

The focus of this report is the current law applicable to siting offshore wind facilities, including the relationship between state and federal jurisdictional authorities. This report also discusses the court challenges to early federal offshore wind energy permitting authorities and regulatory activity following the clarification of jurisdiction over permitting of offshore wind facilities found in the Energy Policy Act of 2005.[4]

Jurisdiction over the Ocean

As a primary matter, it is important to briefly review the source of federal and state claims of jurisdiction over the Outer Continental Shelf.

United States authority in the oceans begins at the coast—called the baseline—and extends 200 nautical miles out to sea. The first 12 nautical miles comprise the U.S. territorial sea.[5] Under the 1982 United Nations Convention on the Law of the Sea[6] (UNCLOS), a coastal nation may claim sovereignty over the air space, water, seabed, and subsoil within its territorial sea.[7] U.S. Supreme Court precedent and international practice indicate that this sovereignty authorizes coastal nations to permit offshore development within their territorial seas.[8] Although the United States has not ratified UNCLOS, it generally acts in alignment with its terms.

The U.S. contiguous zone extends beyond the territorial sea to 24 nautical miles from the baseline. In this area, a coastal nation may regulate to protect its territorial sea and to enforce its customs, fiscal, immigration, and sanitary laws.[9]

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[1] Energy Information Administration, at http://www.eia.gov/cneaf/solar.renewables/page/wind/wind.html.

[2] For an overview of offshore wind farm regulation in the United Kingdom, see Nathanael D. Hartland, The Wind and the Waves: Regulatory Uncertainty and Offshore Wind Power in the United States and United Kingdom, 24 U. Pa. J. Int'l Econ. L. 691 (2003).

[3] A list of these proposals and links to associated documentation can be found at http://www.boem.gov/Renewable-Energy-Program/Current-Projects/Index.aspx.

[4] P.L. 109-58.

[5] Proc. No. 5928 (December 27, 1988).

[6] United Nations Convention on the Law of the Sea, December 10, 1982, 21 I.L.M. 1261 (entered into force November 16, 1994).

[7] UNCLOS arts. 2.1, 2.2, 3; see also United States v. California, 332 U.S. 19 (1947); Alabama v. Texas, 347 U.S. 272, 273-274 (1954).

[8] See United States v. California, 436 U.S. 32, 36 (1978); United States v. Alaska, 422 U.S. 184, 199 (1975); Alabama v. Texas, 347 U.S. 272, 273-274 (1954); United States v. California, 332 U.S. 19 (1947).

[9] UNCLOS art. 33.

The jurisdiction of the federal government with respect to individual states is also of importance. The Submerged Lands Act of 1953[10] assured coastal states title to the lands beneath coastal waters in an area stretching, in general, three geographical miles from the shore.[11] Thus, states may regulate the coastal waters within this area, subject to federal regulation for "commerce, navigation, national defense, and international affairs" and the power of the federal government to preempt state law.[12] The remaining outer portions of waters over which the United States exercises jurisdiction are federal waters.[13]

Thus the federal government has jurisdiction over the potential locations for offshore wind farms to the boundaries of its Exclusive Economic Zone (EEZ). However, federal authority would be limited by the internationally recognized right of free passage and by the jurisdiction granted to the states under the Submerged Lands Act. The scope of this federal authority is discussed in greater detail later in this report.

State Permitting

States play an important regulatory role when a wind energy project is proposed for construction in federal or state waters. Under the Coastal Zone Management Act[14] (CZMA) states are encouraged to enact coastal zone management plans to coordinate protection of habitats and resources in coastal waters.[15] The CZMA establishes a policy of preservation alongside sustainable use and development compatible with resource protection.[16] State coastal zone management programs that are approved by the Secretary of Commerce receive federal monetary and technical assistance. State programs must designate conservation measures and permissible uses for land and water resources[17] and must address various sources of water pollution.[18]

The CZMA also requires that the federal government and federally permitted activities comply with state programs.[19] Responding to a Supreme Court decision that excluded oil and gas leasing in the federal waters of the Outer Continental Shelf (OCS) from state review under the CZMA, Congress amended the "consistency review" provision to include the impacts on a state coastal zone from actions in federal waters.[20] Thus, states have some authority to seek consistency

[10] 43 U.S.C. §§1301-1303, 1311-1315.

[11] *Id*. at §1301(a)(2). State jurisdiction typically extends 3 nautical miles (approximately 3.3 miles) seaward of the coast or "baseline." Texas and the Gulf Coast of Florida have jurisdiction over an area extending 3 "marine leagues" (9 nautical miles) from the baseline. 43 U.S.C. §1301(a)(2).

[12] *Id.* at §§1314(a), 1311(a)(2).

[13] *Id.* at §1302.

[14] 16 U.S.C. §§1451-1464.

[15] Coastal U.S. states and territories, including the Great Lakes states, are eligible to receive federal assistance for their coastal zone management programs. Currently, there are 33 approved state and territorial plans. Of eligible states, only Illinois does not have an approved program. See National Oceanic and Atmospheric Administration, Office of Ocean and Coastal Resource Management, State and Territory Coastal Management Program Summaries, available at http://coastalmanagement.noaa.gov/mystate/welcome.html.

[16] *Id*. at §1452(1), (2).

[17] *Id*. at §1455(d)(2), (9)-(12).

[18] *Id.* at §1455(d)(16).

[19] *Id*. at §1456(c).

[20] *Id*.; Sec'y of the Interior v. California, 464 U.S. 312, 315 (1984).

between federal efforts to permit projects in federal waters and state coastal zone management regulation.

In addition to consistency review, projects to be constructed in state waters, including any cables that would be necessary to transmit power back to shore, are subject to all state regulation or permitting requirements. Coastal zone regulation varies significantly among the states. The CZMA itself establishes three generally acceptable regulatory frameworks: (1) "State establishment of criteria and standards for local implementation, subject to administrative review and enforcement;" (2) "[d]irect State land and water use planning and regulation;" and (3) regulation development and implementation by local agencies, with state-level review of program decisions.[21]

Within these frameworks several states, including New Jersey, California, and Rhode Island, consolidate authority for their programs in one agency.[22] In New Jersey, for instance, the state Department of Environmental Protection (through the Coastal Management Office within the Commissioner's Office of Policy, Planning, and Science) is the lead agency for coastal zone management under several state laws.[23] The majority of states, however, operate coastal zone management programs under "networks" of parallel agencies, with various roles defined by policy guidance and memoranda of understanding (MOUs).[24] Based on a series of MOUs, each agency is obligated to issue and apply state regulations and permits consistently with the state's coastal zone management program.[25] Thus, offshore wind energy projects could be subject to comprehensive regulation with permitting authority spread among multiple state and local agencies.

Federal Permitting

Use of federal and federally controlled lands, including the OCS, requires some form of permission, such as a right-of-way, easement, or license.[26] For *onshore* wind projects on federal public lands, the Department of the Interior (DOI), through the Bureau of Land Management, has created a regulatory program under the Federal Land Policy and Management Act,[27] but a federal statute expressly governing *offshore* wind energy development was not enacted until August 2005 as part of the Energy Policy Act of 2005 (EPAct). Before enactment of EPAct, some permitting in support of offshore wind energy development had taken place under laws existing at that time. Use of these authorities proved controversial and was the subject of a lawsuit challenging

[21] 16 U.S.C. §1455(d)(11).

[22] See Rusty Russell, Neither Out Far Nor In Deep: The Prospects for Utility-Scale Wind Power in the Coastal Zone, 31 B.C. Envtl. Aff. L. Rev. 221, 240-241 (2004).

[23] E.g., Freshwater Wetlands Protection Act, N.J.S.A. 13:9B; Flood Hazard Area Control Act, N.J.S.A. 58:16A; Wetlands Act of 1970, N.J.S.A. 13:9A; Waterfront Development Act, N.J.S.A. 12:5-3; NJ Water Pollution Control Act, N.J.S.A. 58:10A; Coastal Area Facility Review Act (CAFRA), N.J.S.A. 13:19; Tidelands Act, N.J.S.A. 12:3.

[24] Russell, supra note 22, at 241.

[25] *Id.* at App. E.

[26] Several federal laws would appear to indicate that Congress intends the OCS to be used only when permission has been expressly granted. See 43 U.S.C. §1332(1), (3) ("the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition.... "); see also 42 U.S.C. §9101(a)(1) (stating that the purpose of the Ocean Thermal Energy Conversion Act is to "authorize and regulate the construction, location, ownership, and operation of ocean thermal energy conversion facilities.").

[27] 43 U.S.C. §§1701 et seq.

preliminary permitting actions. The previous regulatory regime, the conflicts it engendered, and EPAct legal authority are discussed below.

The Energy Policy Act of 2005 (EPAct)

Prior to enactment of EPAct in 2005, the Army Corp of Engineers (Corps) took the lead role in the federal offshore wind energy permitting process, claiming jurisdiction pursuant to Section 10 of the Rivers and Harbors Act (RHA),[28] as amended by the Outer Continental Shelf Lands Act (OCSLA).[29] The Corps has jurisdiction under these laws to permit obstructions to navigation within the "navigable waters of the United States" and on the OCS.[30] The Corps' jurisdiction over potential offshore wind projects had never been made explicit, however.

Section 388 of EPAct sought to address some of the uncertainty related to federal jurisdiction over offshore wind energy development by amending the OCSLA to specifically establish legal authority for federal review and approval of various offshore energy-related projects. The provision amended the OCSLA by adding a new subsection that authorizes the Secretary of the Interior, in consultation with other federal agencies, to grant leases, easements, or rights-of-way on the OCS for certain activities—wind energy development among them—not authorized by other OCSLA provisions, the Deepwater Port Act, the Ocean Thermal Energy Conversion Act, or "other applicable law."[31] A memorandum of understanding between the Department of the

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[28] 33 U.S.C. §§407-687. Section 10 was enacted in 1899, and its text has not changed substantively since that time. It states:

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or enclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same. 33 U.S.C. §403.

[29] 43 U.S.C. §§1331-1356a.

[30] 33 U.S.C. §403. Corps regulations define the "navigable waters of the United States" as "those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce." 33 C.F.R. §329.4. Under the RHA, navigable waters "includes only those ocean and coastal waters that can be found up to three geographic miles seaward of the coast." Alliance To Protect Nantucket Sound, Inc. v. U.S. Dept. of Army, 288 F.Supp.2d 64, 72 (D.Mass. 2003) (hereinafter Alliance I), aff'd, 398 F.3d 105 (1st Cir. 2005) (hereinafter Alliance II); see also 33 C.F.R. §329.12(a). On the OCS, however, the Corps' regulatory jurisdiction extends beyond that three-mile limit for certain purposes. 43 U.S.C. §1333(a)(1), (e).

[31] 43 U.S.C. §1337(p)(1). DOI authority to grant leases, easements, or rights-of-way on the OCS is contingent upon the permitted activities being consistent with the purposes specified by the law. The relevant property interest may only be issued if the OCS activity will:

> (A) support exploration, development, production, or storage of oil or natural gas, except that a lease, easement, or right-of-way shall not be granted in an area in which oil and gas preleasing, leasing, and related activities are prohibited by a moratorium;
>
> (B) support transportation of oil or natural gas, excluding shipping activities;
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> (C) produce or support production, transportation, or transmission of energy from sources other than oil and gas; or
>
> (D) use, for energy-related purposes or for other authorized marine-related purposes, facilities

(continued...)

Interior and the Federal Energy Regulatory Commission (FERC) signed in April of 2009 confirmed the exclusive jurisdiction of the Secretary of the Interior, exercised through the Bureau of Ocean Energy Management, Regulation, and Enforcement (BOEM),[32] an agency within DOI, over "the production, transportation, or transmission of energy from non-hydrokinetic renewable energy projects on the OCS."

EPAct also makes clear that federal agencies with permitting authority under other federal laws retain their jurisdiction, despite enactment of this subsection.[33] Thus, the Corps continues to permit offshore development pursuant to the RHA, and other federal agencies with jurisdiction over issues related to energy development, such as species impacts, are similarly unaffected.

The legislative language does not clearly dictate which agency should take the lead role in coordinating federal permitting and responsibility for preparing analysis under the National Environmental Policy Act (NEPA).[34] However, several provisions within Section 388 suggest that DOI is charged with primary responsibility. The law directs the Secretary of the Interior to consult with other agencies as a part of its leasing, easement, and right-of way granting process.[35] DOI is also responsible for ensuring that activities carried out pursuant to its new authority provide for "coordination with relevant federal agencies."[36] The law also directs the Secretary to establish a system of "royalties, fees, rentals, bonuses, or other payments" that will ensure a fair return to the United States for any property interest granted under this provision.[37]

Although Section 388 of EPAct provided DOI with significant flexibility in crafting a regulatory regime for offshore wind energy development, the act did address certain aspects of the property interest granting process. First, the act directed that leases, easements, and rights-of-way are to be issued on a competitive basis,[38] subject to some exceptions as described *infra*. The Secretary is further authorized to provide for the duration of any property interest granted under this subsection and to provide for suspension and cancellation of any lease, easement, or right-of-way.[39]

(...continued)

> currently or previously used for activities authorized under ... [the OCLSA], except that any oil and gas energy-related uses shall not be authorized in areas in which oil and gas preleasing, leasing, and related activities are prohibited by a moratorium. EPAct, §388(a), adding new 43 U.S.C. §1337(p)(1)(A)-(D).

[32] The April 2009 MOU referenced in the text originally confirmed the exclusive jurisdiction of the Minerals Management Service (MMS) over the described projects. The jurisdiction of MMS agreed to in the April 2009 MOU was subsequently transferred to BOEM (initially, jurisdiction was transferred to BOEM's predecessor, the Bureau of Ocean Energy Management, Regulation, and Enforcement, but in October 2011 that agency was reorganized into BOEM and the Bureau of Safety and Environmental Enforcement). Similarly, many of the rulemakings or other administrative actions taken by MMS as described in this memorandum now authorize activity by or assert the jurisdiction of BOEM as the successor agency to MMS.

[33] *Id*. at §1337(p)(9).

[34] NEPA and its role in the offshore wind permitting process are discussed *infra* in the subsection entitled "Additional Laws and Regulations of Note."

[35] *Id.* at §1337(p)(1).

[36] *Id*. at §1337(p)(4).

[37] *Id.* at §1337(p)(2)(A).

[38] *Id*. at §1337(p)(3).

[39] *Id.* at §1337(p)(5).

Section 388 of EPAct also established the method for allocation among states of royalty and other payments collected by the government pursuant to offshore permitting. The allocation is to be based upon a formula that equitably distributes 27% of the revenues collected by the government, based on the proximity of the project to the affected states' offshore boundaries.[40] The act established that states that have a "coastline that is located within 15 miles of the geographic center of the project" are entitled to a revenue share.[41] More than one state may be eligible to receive a portion of these revenues, depending upon the location of a project.

In addition, the language authorized considerable regulation of impacts associated with offshore development by requiring the Secretary to ensure that "any activity under this subsection" be carried out in a manner that adequately addresses specified issues, including environmental protection, safety, protection of U.S. national security, and protection of the rights of others to use the OCS and its resources.[42] This subsection also establishes specific financial security requirements for projects. The law requires the holder of a Section 388 property interest to "provide for the restoration of the lease, easement, or right-of-way" and to furnish a surety bond or other form of security, leaving the amount and the exact purposes to which any forfeited sums will be applied to the Secretary's discretion.[43] Further, in conjunction with the authority to require some form of financial assurance, the Secretary is empowered to impose "such other requirements as the Secretary considers necessary to protect the interests of the public and the United States."[44] Thus, the Secretary, depending on how these authorities are exercised, may potentially regulate many aspects of any industry that is permitted to operate on the OCS under this subsection of the OCSLA.

EPAct also contained a provision expressly providing for a state consultative role in the permitting process. Section 388 requires the Secretary of the Interior to provide for coordination and consultation with a state's governor or the executive of any local government that may be affected by a lease, easement, or right-of-way granted under this new authority.[45] In addition, the law makes clear that it does not affect any state's claim to "jurisdiction over, or any right, title, or interest in, any submerged lands."[46]

On April 29, 2009, the Minerals Management Service (MMS) issued a final rule establishing the permitting process and setting forth a royalty collection and allocation structure for OCS energy projects, as directed by EPAct.[47] The rulemaking created a system whereby BOEM[48] will issue two types of OCS leases. Limited leases would grant access and operational rights to the lessee for activities related to the production of energy, including assessment and testing activities, but

[40] *Id.* at §1337(p)(2)(B).

[41] *Id.*

[42] 43 U.S.C. §1337(p)(4). MMS also appears to have adopted this interpretation in a rulemaking, stating that "MMS interprets the authority granted in section 388(a) of the Energy Policy Act of 2005 to issue leases, easements or rights-of-way as also providing MMS authority to regulate or permit the activities that occur on those leases, easements or rights-of-way, if those activities are energy related." 70 *Federal Register* 77345, 77346 (December 30, 2005).

[43] 43 U.S.C. §1337(p)(6).

[44] *Id*.

[45] *Id*. at §1337(p)(7).

[46] EPAct, §388(e).

[47] 74 *Federal Register* 19,638 (April 29, 2009).

[48] *See supra* fn. 32.

would not authorize production of energy products for sale or distribution.[49] Commercial leases would give the lessee full rights to receive authorizations necessary to assess, test, and produce renewable energy on a commercial scale over the long term (approximately 30 years).[50]

The rulemaking sets forth a formula for determining payment amounts, including lease payments and royalties, owed by parties participating in OCS renewable energy projects.[51] The rulemaking also establishes the method of allocation of the revenues received by the federal government from these parties. As mandated by EPAct, BOEM shares 27% of these revenues with affected states. The rulemaking explains that if any area of a project is within three miles of any state submerged lands, the federal revenues from that project will be shared with the states.[52] Revenues from such projects are to be shared with all states within 15 miles of the geographical center of the project.[53] Revenues from a project will not be shared with a state if the nearest point on its coastline is more than 15 miles from the geographic center of a qualified project area, even if a portion of the qualified project area is located within 3 nautical miles of that state's seaward boundary.[54] The proportionate revenue sharing will be based on the objective measure of the lease area active at the end of the fiscal year in which BOEM collects the sharable revenue.[55] The configuration of the area on the last day of the fiscal year is used to determine eligible state payments for that year.[56]

EPAct Exemptions

As described above, Section 388 of EPAct expands federal OCS leasing law to include wind energy production and sets forth procedures for granting a lease, easement, or right-of-way in federal waters.[57] However, Subsection (d) exempts certain actions from specific Section 388 requirements. This "savings provision" states that the law does not require

> the resubmittal of any document that was previously submitted or the reauthorization of any action that was previously authorized with respect to a project for which, before the date of enactment of this Act—
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> (1) an offshore test facility has been constructed; or
>
> (2) a request for a proposal has been issued by a public authority.

Thus, where a project has resulted from a public entity's request for proposals or where a project is associated with an existing offshore test facility, previously submitted documents do not need to be resubmitted and previously authorized actions do not need to be reauthorized, essentially maintaining the status quo with respect to these projects.[58] This provision does not seem to

[49] *Id.* at 19,647.
[50] *Id.*
[51] *Id.* at 19,678-19,682.
[52] *Id.* at 19,678.
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.*

exempt *unauthorized* actions associated with the exempted actions, or, indeed, any other aspect of the related project, from a requirement to comply with the property interest acquisition provisions of Section 388. Thus, siting and construction of an offshore data tower, such as Cape Wind's data tower in Nantucket Sound, would not have to be reauthorized. However, any activity that had not been authorized before EPAct's enactment on August 8, 2005, such as the construction of additional facilities, would appear to be subject to the requirements of Section 388.

Section 388 also contains two exceptions to the general requirement that a property interest issued under this provision be granted on a "competitive basis": (1) if the Secretary of the Interior determines that there is no competitive interest, or (2) if the project meets certain criteria indicating a limited scope.

Additional Laws and Regulations of Note

The National Environmental Policy Act (NEPA)

In addition to the regulatory regime authorized by Section 388, it is also noteworthy that a variety of laws predating the enactment of EPAct remain applicable to offshore wind energy development. The act makes clear that Section 388 does not affect the jurisdiction, responsibility, or authority of any federal or state agency operating under other federal law.[59] Thus, it would seem that the state role provided for by the CZMA and the Corps permitting authority provided by the RHA, both described above, remain intact. Other federal laws that are likely to be relevant in the permitting process are described below.

First, the Department of the Interior and any cooperating federal, state, or local entities are required to undertake an environmental review process mandated by the National Environmental Policy Act (NEPA).[60] NEPA requires federal agencies to take a "hard look" at, and to disclose, the environmental consequences of their actions. In general, NEPA and its implementing regulations require various levels of environmental analysis depending on the circumstances and the type of federal action contemplated. Certain actions that have been determined to have little or no environmental effect are exempted from preparation of NEPA documents entirely and are commonly referred to as "categorical exclusions."[61] In situations where a categorical exclusion does not apply, an intermediate level of review, an environmental assessment (EA), may be required. If, on the basis of the EA, the agency finds that an action will not have a significant effect on the environment, the agency issues a "finding of no significant impact" (FONSI), thus terminating the NEPA review process. On the other hand, major federal actions that are found to significantly affect the environment require the preparation of an environmental impact statement (EIS), a document containing detailed analysis of the project as proposed, as well as other options, including taking no action at all. NEPA does not direct an agency to choose any particular course of action; the only purpose of an EIS is to ensure that environmental consequences are considered. Thus, in practice, NEPA review will likely provide information on wind energy projects, including impacts on "existing resources of the final alternative sites in terms of physical oceanography and geology; wildlife, avian, shellfish, finfish and benthic

[59] 43 U.S.C. §1337(p)(9).

[60] 42 U.S.C. §§4321 et. seq.

[61] 40 C.F.R. §1508.4.

habitat; aesthetics, cultural resources, socioeconomic conditions, and air and water quality. Human uses such as boating and fishing will also be described."[62]

In late 2007, MMS published the Programmatic Environmental Impact Statement for Alternative Energy Development and Production and Alternate Use of Facilities on the Outer Continental Shelf.[63] Among other things, this document establishes a baseline analysis that helps to satisfy the requirements of NEPA for offshore renewable energy leasing, including offshore wind projects. The agency did make it clear that "additional environmental review pursuant to the NEPA will be required for all future site-specific projects on the OCS."[64]

Other Statutes of Note

In addition to the role interested parties and cooperating agencies may play under NEPA, certain federal agencies have independent sources of jurisdiction over specific ocean resources. Thus, they would also likely be involved in the permitting of offshore wind energy facilities. Some of the most relevant authorities are the Endangered Species Act (ESA),[65] the Marine Mammal Protection Act (MMPA),[66] and the Migratory Bird Treaty Act (MBTA).[67]

Briefly, each of these laws sets parameters for federal activities that potentially inflict certain kinds of harm upon designated species of plants and animals. The ESA prohibits any person, including private entities, from "taking" a "listed" species.[68] *Take* is broadly defined as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct."[69] Additionally, a federal agency permitting or undertaking action that could impact a protected species is subject to Section 7 of the ESA, which requires consultation with the U.S. Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS or NOAA Fisheries), depending upon the species affected.[70]

The Section 7 consultation process involves several initial steps leading to a determination of whether a listed species or its designated critical habitat is present in a project area.[71] If a listed

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[62] See U.S. Army Corps Of Eng'rs, Environmental Impact Statement: Scope of Work, Wind Power Facility Proposed by Cape Wind Associates, LLC 3, available at http://www.nae.usace.army.mil/projects/ma/ccwf/windscope.pdf. See also United States v. Alaska, 503 U.S. 569, 579-580 (1992) (holding that Corps permitting decisions under Section 10 are not limited to considerations of navigation).

[63] Document available at http://ocsenergy.anl.gov/documents/fpeis/index.cfm.

[64] *Id.*

[65] 16 U.S.C. §§1531-1544.

[66] 16 U.S.C. §§1361-1407.

[67] 16 U.S.C. §§703-712.

[68] Under the ESA, species are listed as either "endangered" or "threatened" based on the risk of their extinction. An "endangered" species is "any species which is in danger of extinction throughout all or a significant portion of its range." A "threatened" species is "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. §§1532(6), (20).

[69] 16 U.S.C. §1532(19).

[70] *Id.* at §1536(a)(2).

[71] 50 C.F.R. §402.12(c). It should also be noted that some protections also attach to "candidate" species, i.e., those proposed but not officially listed. Under current law, an agency must "confer" with the appropriate Secretary if agency action will likely jeopardize the continued existence of any candidate species or adversely modify critical habitat proposed for designation. This is distinct from the Section 7 consultation process, less formal, and meant to assist planning early in the process should the species be listed and more definite protections attach. See 16 U.S.C.
(continued...)

species or critical habitat is present, then the permitting/acting federal agency must prepare a biological assessment, evaluating the potential effects of the action.[72] If the acting federal agency determines that a project may adversely affect a listed species or critical habitat, formal consultation and preparation of a biological opinion are required.[73] The biological opinion contains a detailed analysis of the effects of the agency action and contains the final determination as to whether the proposed action is likely to jeopardize the species or destroy or adversely modify its critical habitat.[74] If review results in a jeopardy or adverse modification determination, the biological opinion must identify any "reasonable and prudent alternatives" that could allow the project to proceed.[75] Projects that will result in a level of injury to a species or habitat that will fall short of jeopardizing survival may still be approved subject to certain terms.[76]

The agency may be allowed to take some individuals of a listed species without triggering penalties under the act. These incidental takings are to be described in a statement accompanying the biological opinion.[77] Takings allowed under the consultation process are deemed consistent with the ESA; thus, they are not subject to penalties under the act, and no authorization other than the Incidental Take Statement or permit is required.[78]

Similarly, non-government entities may take a listed species if they receive an Incidental Take Permit from either FWS for NMFS under Section 10 of the ESA.[79] To qualify for such a permit, a party must prepare a habitat conservation plan, in which the applicant describes the steps it will take to monitor, minimize, and mitigate any impacts to the threatened species; alternative actions and why they are not being used; and any other necessary and appropriate measures imposed by FWS or NMFS.[80]

The MMPA prohibits, with certain exceptions, the taking of marine mammals in U.S. waters and by U.S. citizens on the high seas, as well as the importation of marine mammals and marine mammal products into the United States. The statute is jointly administered by the Department of Commerce (through NOAA/NMFS) and the Department of the Interior (through FWS).[81] Among the statutory exceptions to the moratorium is a provision allowing NMFS or FWS to authorize, for a period of not more than five consecutive years, the "incidental" taking of small numbers of marine mammals.[82] Such incidental takes may be authorized only upon a finding that the take will

(...continued)

§1536(a)(4); 50 C.F.R. §402.10.

[72] 50 C.F.R. §402.12(b), (d).

[73] *Id.* at §402.14(e).

[74] *Id.* at §402.14(h).

[75] *Id.* at §402.14(h)(3).

[76] *Id.* at §402.14(i).

[77] *Id.* at §402.14(i)(1)(i)-(v).

[78] 16 U.S.C. §1536(b)(4); 50 C.F.R. §402.14(i)(5).

[79] 16 U.S.C. §1539.

[80] 50 C.F.R. §17.32(b)(1) (for FWS); 50 C.F.R. §222.307(b)(5) (for NMFS).

[81] The statute defines *Secretary* as the Secretary of the department in which NOAA is operating (Commerce) for purposes of regulation related to all members of the order Cetacea (whales and porpoises) and all members, except walruses, of the order Pinnipedia (seals). The statute defines *Secretary* as Secretary of the Interior (operating through the FWS) with respect to all other marine mammals (manatees, dugongs, polar bears, sea otters, and walruses). 16 U.S.C. §1362(12)(A).

[82] 16 U.S.C. §1371(5)(A).

have a negligible impact on the species or stock and will not have an unmitigable adverse impact on the availability of the species or stock for taking for subsistence purposes by Alaskan natives as authorized by other sections of the MMPA.[83]

The regulations establish procedures for administering the MMPA, including application for authorization for incidental take of small numbers of marine mammals.[84] These regulations set forth the procedures for submission of requests for such authorization to the NMFS or FWS, standards for review, and the form of the authorization.[85]

The MBTA is the domestic law that implements U.S. obligations under separate treaties with Canada, Japan, Mexico, and Russia for the protection of migratory birds.[86] The MBTA generally prohibits the taking, killing, possession, or transportation of, and trafficking in, migratory birds, their eggs, parts, and nests.[87] Like the ESA, the general ban on taking protected birds can be waived under certain circumstances. Pursuant to Section 704, the Secretary of the Interior is authorized to determine if, and by what means, the taking of migratory birds should be allowed.[88] FWS is responsible for permitting activities that would otherwise violate the MBTA. Its regulations at 50 C.F.R. Section 21 make exceptions from permitting requirements for various purposes and provide for several specific types of permits, such as import and export permits, banding and marking permits, and scientific collection permits.[89] More general permits for special uses are also provided for under the regulations, although an applicant must make "a sufficient showing of benefit to the migratory bird resource, important research reasons, reasons of human concern for individual birds, or other compelling justification."[90]

It appears that FWS has not set MBTA regulations specific to the sort of unintentional harm caused by the rotating turbines of wind energy projects; thus, it is not clear that the permitting process under current regulations is immediately applicable to wind energy projects.[91] The FWS has, however, adopted voluntary, interim guidelines for minimizing the wildlife impacts from wind energy turbines.[92] As these guidelines indicate, compliance does not shield a company from prosecution for MBTA violations; however, "the Office of Law Enforcement and Department of Justice have used enforcement and prosecutorial discretion in the past regarding individuals, companies, or agencies who have made good faith efforts to avoid the incidental take of migratory birds."[93]

[83] 16 U.S.C. §1371(5)(A)(i).

[84] 50 C.F.R. §18.27 (FWS regulations); 50 C.F.R. Part 216, Subpart I (NMFS regulations).

[85] *Id.*

[86] Birds that receive protection under the MBTA are listed at 50 C.F.R. §10.13.

[87] 16 U.S.C. §703.

[88] 16 U.S.C. §704.

[89] 50 C.F.R. §§21.11-21.26.

[90] *Id.* at §21.27.

[91] See 69 *Federal Register* 31074 (June 2, 2004) ("Current regulations authorize permits for take of migratory birds for activities such as scientific research, education, and depredation control. However, these regulations do not expressly address the issuance of permits for incidental take.").

[92] U.S. Fish and Wildlife Service, Interim Guidance on Avoiding and Minimizing Wildlife Impacts from Wind Turbines (May 2003) (available at http://www.fws.gov/habitatconservation/wind.pdf).

[93] *Id.* at 2.

Conclusion

Interest in developing offshore wind energy resources continues to grow, and projects are already in the initial stages of development. The United States has been developing the legal and regulatory framework to manage the issuance of permits for offshore development in its territorial sea and on the Outer Continental Shelf. The OCSLA, as amended by EPAct 2005, provides DOI with authority to grant offshore property interests for the purpose of wind energy development (exercised through BOEM). Additional laws that predate the enactment of EPAct 2005 continue in force and also appear likely to remain a source of regulation, despite the apparent primary authority granted to DOI. Further, states also may claim a role in the permitting of offshore wind energy development pursuant to authorities granted under existing federal law.

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