

DOI's Regulation of Offshore Wind Leases Coming Into Clearer Focus With Recent MOA

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After a slow start, the offshore wind industry in the United States is finally poised to take off. Just last month, the Department of the Interior's (DOI) Bureau of Ocean Energy Management (BOEM) finalized its [environmental analysis](#) relating to the first proposed large-scale, commercial wind farm offshore the United States. This not only signaled that BOEM will likely permit that project to move forward with operations but also established a framework for BOEM's use as it considers proposals for additional commercial-scale wind projects. Also last month, the Biden administration announced its interagency plan to ["catalyze offshore wind energy\[.\]"](#) Against this backdrop of increasing activity and investment in the offshore wind industry, this article outlines DOI's regulatory framework for offshore wind leases, including the division of roles and responsibilities between DOI's subagencies — the BOEM and the Bureau of Safety and Environmental Enforcement (BSEE).

In 1953, Congress authorized DOI to regulate oil and gas development offshore with the Outer Continental Shelf Lands Act (OCSLA). DOI, in turn, delegated its authority to various predecessor agencies that are today's BOEM and BSEE. Generally, BOEM is tasked with "leasing, geological and geophysical permitting, plan review and approval, and environmental analyses and studies" while BSEE is tasked with "permitting, environmental compliance, resource conservation, engineering standards and regulations, oil spill preparedness, inspections, enforcement, and investigations related to OCS mineral resource development activities." See [Memorandum of Agreement \(MOA\) between the BOEM and the BSEE](#) — *Renewable Energy* (Dec. 22, 2020) (the 2020 MOA).

With the Energy Policy Act of 2005 (the EAct), Congress amended the OCSLA to authorize DOI to issue regulations governing development of energy from offshore sources other than oil and gas, including wind energy. DOI delegated the authority over offshore renewable energy development to BOEM. See Congressional Review Service Report R 40175 (*updated* March 8, 2021) (the [2021 CRS Report](#)). Accordingly, BOEM adopted regulations in 2009 governing the development of renewable energy offshore — including wind energy. See 30 C.F.R. Part 585. Given that both subagencies have developed institutional knowledge and experience through the decades spent regulating offshore oil and gas, BOEM and BSEE executed the 2020 MOA, which is "intended to clarify each bureau's roles and responsibilities" with respect to offshore renewable energy development. With the MOA,

BOEM and BSEE recognized that although BOEM is the primary subagency tasked with the regulation of renewable energy development, it “would benefit from consultation and coordination with” BSEE regarding compliance and enforcement functions (subject matter traditionally within BSEE’s ambit of responsibility). Thus, under the MOA, BSEE will assist BOEM with 16 “functional areas” relating to safety and environmental compliance, including, for instance, the development and oversight of Safety Management Systems, structural assessments, incident reporting and related investigations, review of proposed plans for decommissioning and site clearance, etc. Although it lacks independent enforcement authority regarding offshore wind, under the MOA, BSEE will provide recommendations for enforcement that BOEM may pursue. The MOA itself is not very detailed, but both BSEE and BOEM will be preparing standard operating procedures (SOPs) to flesh out the coordination of the duties between the two bureaus.

Although DOI has assumed the primary responsibility for regulating the development of wind energy offshore, it is important to recognize that offshore wind energy projects are subject to extensive, interagency and inter-jurisdictional regulatory processes. Indeed, the EPAct requires consultation between DOI and other federal agencies, and it expressly provides for DOI’s consultation with coastal states and local authorities throughout the permitting process. Additionally, and apart from DOI’s regulatory functions, offshore wind lessees must obtain permits and approvals from other federal agencies (e.g., Environmental Protection Agency, United States Army Corps of Engineers) and also from relevant regional, state, and local authorities (e.g., relating to export lines and onshore facilities). Given that offshore wind energy development is in its infancy in the United States, the legal framework governing offshore wind energy is still developing and, for that reason, remains somewhat uncertain. The recent MOA shows that agencies will likely rely on their existing experience regulating the oil and gas industry to draw some early divisions of labor between themselves when it comes to offshore wind.

We are keeping a close eye on developments in offshore wind and will continue to provide updates on those developments, including forthcoming updates regarding state involvement in the regulatory process through the Coastal Zone Management Act.

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National Law Review, Volume XI, Number 119

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