

Offshore Wind a Biden Priority, but Federal Permits Remain a High Hurdle

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President Biden in March of this year announced plans to “jumpstart” offshore wind projects, making that renewable energy resource a focal point of his administration’s energy and environmental policies. A White House fact sheet committed the administration to “advance new lease sales and complete review of at least 16 Construction and Operations Plans (COPs) by 2025.”

The administration also announced steps to expedite approval of the 1,100-MW Ocean Wind Power offshore project in New Jersey, and the Department of Energy (DOE) announced \$8 million in offshore wind research and development funding for 15 new projects. On May 11, the Department of the Interior (DOI) approved the 800-MW Vineyard Wind project, sited about 12 nautical miles offshore of Martha’s Vineyard, Massachusetts—the first large-scale, offshore wind project in the U.S.

Yet, despite such optimistic pronouncements, the reality of dramatically accelerating offshore project approvals nationwide is something else altogether. Three weeks after the administration’s announcements, the Bureau of Ocean Energy Management (BOEM), the federal agency that oversees offshore wind projects, canceled two wind development zones off Long Island citing concerns

about maritime traffic, marine life feeding areas, and visibility from nearby beaches. Collectively, the new administration’s actions raise a key question: How will existing federal laws and regulations affect the push to expand offshore wind power capacity?

Any offshore wind project is subject to complex environmental approvals involving more than a dozen federal or state agencies. For many projects, these intricate procedures have contributed to delays, and put feasibility and financing at risk. The complexity of these reviews and required permits is almost certainly why the small, five-turbine Block Island Wind Farm off Rhode Island took about seven years to bring to full operation.

It’s unlikely the road to offshore wind farm development will suddenly become a superhighway. Indeed, federal requirements and procedures for wind farm project approvals are not going to change overnight. Even with the administration’s commitment, project proponents must follow government approval procedures. Simultaneously, project opponents seeking to ensure compliance with the law will leverage the courts for any perceived deviation from the regulatory process. Those challenges can take months, if not years, to be adjudicated.

Despite delays due to environmental opposition or a lack of equipment vital for deployment and operation, there are avenues that reduce the risk for delays and would allow industry to capitalize on the administration's goals.

First, be an expert in the process. In the case of Vineyard Wind, DOI's BOEM served as the lead federal agency for the Final Environmental Impact Statement (FEIS), in accordance with Council on Environmental Quality/ National Environmental Policy Act (NEPA) regulations. However, the formal FEIS Record of Decision was jointly signed and addressed the collective permitting decisions of DOI/BOEM, the U.S. Army Corps of Engineers (USACE), and the National Oceanic and Atmospheric Administration/National Marine Fisheries Service. This complex NEPA process and joint agency permitting authority will likely serve as a template for offshore wind energy projects within U.S. waters.

Second, consider your options. For example, by siting a wind farm within state waters, the federal agency with the lead jurisdiction is the USACE, as per Sections 10 and 408 of the Rivers and Harbors Act. We understand that the Block Island Wind Farm was sited just inside the 3-mile state water limit for this very reason. The Corps' regulatory program is well-established and many applicants have prior experience meeting the rigorous regulatory requirements for other types of large-scale development projects.

Third, anticipate objections and plan for overcoming or mitigating them. For example, are there species of marine wildlife that may soon be listed as endangered or even threatened under the Endangered Species Act? If so, don't wait for the federal designation; if you analyze your

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project's impact before federal action, you will likely save months of delays. Anecdotally, companies with similar energy development initiatives, such as pipelines, have reduced delays by six months or more by pursuing this strategy.

Finally, build your network of relationships—the public, permitting agencies, stakeholders, partners, experts, and consultants—early in the process. Communication should be transparent and frequent. The sooner industry is aware of the challenges that might arise, the better it can be prepared to mitigate concerns, modify designs, or adjust siting considerations within a fully informed permitting process. Success is a team effort.

Changing permitting rules and regulations depends on multiple variables rooted in law, agency rulemaking, and policy. All agencies with jurisdictional responsibilities, including the Corps of Engineers, must follow prescribed rules and procedures. Failure to do so will result in agency decisions being legally challenged as arbitrary and capricious.

Remember that federal regulations and procedures, underpinned by current law, will always govern the pace of advancement. Therefore, offshore wind farm applications must painstakingly adhere to proper procedures. Otherwise, even the most viable proposals will encounter multiple speedbumps along the energy revolution highway.

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