

Offshore wind projects: lay down the law

Legal Ease

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As states begin the process of ramping up the wind energy component of their renewable portfolio standards, the prospect of offshore wind is becoming an increasingly attractive siren to those seeking low-carbon energy alternatives. The opportunity for substantial development in the Mid-Atlantic area is a matter of record, as parties are regularly responding to myriad RFPs for large-scale wind arrays on a scale well beyond ground-based counterparts. This article discusses the burgeoning opportunities for the port community as support and supply chain components of these projects and touches upon some of the legal issues that could arise as permitting and construction begin.

The three major federal environmental statutes triggered by an offshore continental shelf wind project are the National Environmental Policy Act, Endangered Species Act, and Migratory Bird Treaty Act. Of these, the environmental impact statement (if needed) under NEPA would touch upon the impacts to the two other statutes, as well as a broad array of potential impacts to water quality from construction and operation. It would also examine in detail the decision-making process that lead to the conclusion that an offshore wind project was the government's final decision.

What is left unexamined by NEPA and the other environmental laws is the supply chain implications of a wind development. One of the most exciting aspects of large-scale projects of this type is the intensity of need and use of steel and other important industrial materials. Thus one of the potentially important aspects of renewable energy development is the very real need for industrial processes to create the components of electricity generation, such as the need for steel in vast quantities and state-of-the-art carbon fibers for the blades. However, one question remaining is whether in evaluating the greenhouse gas implications of any given generation technology, the supply chain use of fossil fuels should be included in the carbon calculations attributable to the proposed project.

In theory, if the U.S. is to maximize its opportunities for economic expansion in renewable energy, advocating for and even subsidizing the domestic mining and production of the raw materials needed for the tower, turbine, and blades could create new opportunities for mining metallurgical coal (just as its use for energy generation declines) and steel manufacture. This in turn gives rise to considerations under the Clean Air Act and Clean Water Act (among others) with respect to emissions.

Whether the supply chain is serviced domestically or internationally, ports are likely to benefit from the increasing need for both shipping and laydown services. While the wind towers are generally regulated under federal environmental laws, the laydown areas are land-based and most likely impacted by state programs and local zoning and land-use regulations, as are the power cables that would lead from the offshore array to the local distribution system.

The model in Europe contemplates laydown areas often approaching 1,500 acres, whereas the U.S. model will likely need to make do with much smaller parcels adjacent to or near established ports. For example, the German Port of Bremerhaven is well in excess of 1,000 acres of impervious surface. That project grafted into the U.S. in the Mid-Atlantic region, assuming a parcel of similar magnitude is available, would present complex issues relating to stormwater control, and most likely high quality wetland-filling and stream-crossing permits, given the proximity to the coast.

Moreover, given the proximity of these facilities to sensitive waterways, and the industrial nature of the use, regulators will also keep a close eye on storm water discharges. Even much smaller laydown areas in the vicinity of ports in this region are sure to raise similar issues, and thus mitigation costs would need to be incorporated into the project pro forma at the earliest opportunity as the associated costs could be material for financing.

In sum, the opportunities for port development associated with offshore



wind projects in the Mid-Atlantic are quite substantial. While this article has raised issues regarding local and federal environmental and land use requirements, the general perception is that this is a favorable commercial opportunity linked to crucial renewable energy proliferation. Ports may wish to proactively begin to identify portions of existing sites or nearby properties that would be suitable for this use and commence the approvals process quickly in order to market pre-approved facilities.

As has been demonstrated with midstream natural gas projects, a party's ability to demonstrate readily-available laydown yards can be a material boost to that party's likelihood to land a major deal in support of the project.



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