



## **Offshore Wind Energy Development**

While the offshore wind power industry is still in its infancy in the United States, it is being stimulated by improved technology and federal tax credits that have made it more attractive commercially. Additionally, developers are looking increasingly to the lead of European countries such as Denmark, the United Kingdom, and Germany, where growing numbers of offshore projects are being licensed.

In fact, the United States already has a wind energy management program applicable on some federal lands onshore. This comprehensive program is carried out by DOI's Bureau of Land Management under broad authority provided by the Federal Land Policy and Management Act.

Conversely, there is no comprehensive and coordinated federal regime in place to regulate offshore wind energy development or to convey property rights to use the public space of the OCS for this purpose. In the absence of a specific regime, the U.S. Army Corps of Engineers (USACE) is the lead federal agency responsible for reviewing and granting a permit for this activity. Its authority, however, is based on Section 10 of the Rivers and Harbors Act, which, although it has a public interest requirement, primarily regulates obstructions to navigation, including approval of any device attached to the seafloor.

In reviewing a proposed project under Section 10, the USACE is required by the National Environmental Policy Act to consult other federal agencies. Depending on the circumstances, these agencies and authorities may include:

- The U.S. Coast Guard, which regulates navigation under several federal statutes.
- The Federal Aviation Administration, which regulates objects that may affect navigable airspace pursuant to the Federal Aviation Act.
- The U.S. Environmental Protection Agency, which may conduct a review for potential environmental impacts of a project pursuant to the Clean Water Act and Clean Air Act.
- The National Marine Fisheries Service (NMFS), which may review projects for potential impacts to fishery resources pursuant to the Magnuson-Stevens Fishery Conservation and Management Act. In addition, NMFS' review includes assessing potential impacts to endangered or threatened species under the Endangered Species Act or the Marine Mammal Protection Act.
- The U.S. Fish and Wildlife Service, which may review projects for potential impacts to endangered species or marine mammals under its jurisdiction pursuant to the Endangered Species Act or the Marine Mammal Protection Act.

- In addition, depending on its location, a wind energy project, or at least its Section 10 permit, may be subject to review by one or more state coastal management programs in accordance with the CZMA federal consistency provisions.

The Section 10 review process stands in stark contrast both to the well established DOI regulatory program for onshore wind energy and, in the marine setting, to the robust regulatory program for offshore oil and gas that has developed under the OCSLA. Using the Section 10 process as the primary regulatory vehicle for offshore wind energy development is inadequate for a number of reasons. First and foremost, it cannot grant leases or exclusive rights to use and occupy space on the OCS. It is not based on a comprehensive and coordinated planning process for determining when, where, and how this activity should take place. It also lacks the ability to assess a reasonable resource rent for the public space occupied or a fee or royalty for the energy generated. In other words, it lacks the management comprehensiveness that is needed to take into account a broad range of issues, including other ocean uses in the proposed area and the consideration of a coherent policy and process to guide offshore energy development.

**“An Ocean Blueprint for the 21<sup>st</sup> Century”**  
**Chapter 24: Managing Offshore Energy and Other Mineral Resources**