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Locke Lord QuickStudy: Offshore Wind Gets Some Modern Love: BOEM/BSEE Update Regulations to Better Reflect Current Practices

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Last week, the Bureau of Ocean Energy Management (BOEM) and the Bureau of Safety and Environmental Enforcement (BSEE) jointly finalized a long-awaited overhaul of their offshore wind leasing and permitting regulations, which they have labeled the Modernization Rule (or "Mod Rule"). The Mod Rule constitutes the first significant revision to the regulations since they were first promulgated almost 15 years earlier to the day, in April 2009. During this time, an entire U.S. offshore wind industry has launched—with more than 30 leases issued, eight commercial scale projects approved, and construction completed or commenced on nearly 4.3 GW of offshore wind generation.

The Mod Rule is intended to apply lessons the U.S. government has learned in the past decade and a half, largely by reducing administrative burdens that have turned out to be too onerous, correcting mistakes, and clarifying ambiguous provisions. By these terms, it has largely (but not entirely) succeeded. BOEM and BSEE have calculated that it will save the industry $1 billion over 20 years, but many additional benefits will be realized that are difficult to quantify in a regulatory impact analysis. It is also notable that the rule achieves these anticipated benefits while essentially leaving unchanged the substantive standards under which offshore wind is leased and permitted. In this QuickStudy, we analyze some of the most significant changes to the regulations.

Leasing Process: The Mod Rule makes numerous strategic revisions to BOEM's offshore wind leasing process. Here are the most significant changes:

- **Leasing Schedule.** The rule establishes a new obligation for BOEM to publish a 5-year leasing schedule and update it every two years. The schedule is limited to a "general description of the areas covered by each proposed lease sale, the calendar year in which each lease sale is projected to occur, and the reasons for any changes made to the previous schedule." The leasing plan regulation is largely unchanged from BOEM's proposed rule, with BOEM resisting suggestions to subject the schedule to more process. BOEM's responses to comments also firmly differentiate this streamlined leasing schedule from the 5-year program that BOEM is required by statute to create for its offshore oil and gas leasing. Contemporaneously with its issuance of the final Mod Rule, BOEM issued a prospective leasing schedule for 2024-2028 pursuant to this new requirement.
- **Area Identification.** BOEM has clarified that at this pivotal point in its multi-stage lease deconfliction process, it will balance conflicts with commercial feasibility considerations—and noted in the preamble that the latter could include state offtake goals. This largely conforms to existing BOEM leasing practice, but it sends a clear signal

to state governments regarding the link between their energy mandates and the amount of acreage that BOEM may seek to auction. This section also contains the seeds of a potential policy shift, as BOEM will now evaluate wind energy mitigation measures at the Area Identification stage of its process. To date, BOEM has generally reserved its pre-lease sale mitigation measures for surveys and other pre-construction activities, deferring consideration of wind energy mitigation measures until it has received a project-specific construction and operations plan (COP). We would urge BOEM to be judicious in imposing mitigations at such an early stage so as to avoid unduly delaying the leasing process with premature environmental analyses, prejudging the potential impacts of purely hypothetical projects, and inadvertently curtailing innovation. At the same time, well-crafted pre-lease mitigations could allow BOEM to auction areas that might have otherwise been left on the cutting room floor based on potential impacts that can be adequately addressed by mitigation at the appropriate stage.

- **Bidding Credits.** The final Mod Rule clarifies that BOEM may use bidding credits—i.e., discounts off the auction price—as a policy mechanism to incentivize developer activities that can either move the overall industry forward or mitigate potential impacts. BOEM has deployed bidding credits in each lease sale during the Biden administration, so this provision is essentially a codification of existing practices. Though BOEM opted against capping the amount of bidding credits in the final rule, it indicated in the rule's preamble that it intended to continue its default policy of offering no more than a 25% discount off the winning bid. We hope BOEM will reconsider this policy to maximize the opportunity to incentivize investment in supply chain, infrastructure, community benefit, fisheries compensation, and other beneficial uses directly relevant to the communities and resources affected by offshore wind.

Lease Structure: The final Mod Rule largely tracks the proposed rule in overhauling the structure of renewable energy leases to reflect actual development. Consistent with its proposed elimination of the site assessment plan (SAP) for meteorological buoys (as discussed further below), BOEM has decided to merge the one-year preliminary term and 5-year site assessment term into one 5-year "preliminary period" before a lessee must submit a COP. This is then followed by open-ended "COP review" and "design and construction" periods. The prior 25-year operations term gave lessees less than 25 years to operate their projects, as the operations term began upon COP approval. The Mod Rule replaces the 25-year term with a 35-year "operations period" (increased from a 30-year period in the proposed rule) that commences once a project has finished construction and is fully functional. This means the operations period isn't triggered while partially completed projects generate energy into the grid during construction—a potentially major benefit, given that larger wind farms can take up to two full years to construct. Significantly, BOEM has added a provision to the final rule allowing lessees to propose an even longer operations period in their COPs. Additionally, BOEM may now extend any of these lease periods for "good cause," a more flexible standard than in the original regulations. BOEM's move toward longer operations periods makes sense given recent improvements in the design life of wind turbines and other components—and could positively affect the financing of these projects.

Offshore Transmission Planning: The proposed Mod Rule solicited suggestions for new provisions relating to offshore transmission planning but did not suggest any specific language. In the interim, several states began advancing procurement mechanisms for the construction of shared (or "backbone") transmission lines, and numerous commenters on the proposed rule recommended that BOEM provide more specificity on how it would participate in the planning process for an offshore grid. The final rule provides some answers by stating that in determining whether there is competitive interest in an offshore transmission right of way (ROW) grant under OCSLA Section 8(p)(3), BOEM will consider whether a transmission developer has already won a contract from a state, regional transmission organization (RTO), or independent system operator (ISO). This provision effectively gives the green light to states to plan for backbone transmission without waiting for BOEM to undertake its own parallel transmission planning process, with BOEM poised to quickly (and likely noncompetitively) issue ROWs to the winners of state transmission procurements. This approach reverses the order of operations for offshore wind energy generation, where BOEM first holds competitive lease sales and states then award offtake contracts to leaseholders.

Financial Assurance: The financial assurance amendments in the final Mod Rule are virtually unchanged from the proposed rule. BOEM has eliminated the financial assurance requirement at COP approval because that step in the regulatory process creates no liabilities. It has also clarified that its regulations allow it to agree to an incremental funding schedule for a lessee's decommissioning financial assurance. This provision provides the bulk of the economic benefit that BOEM calculated for the Mod Rule, given that decommissioning bonding is a significant expense that can now be spread out across the operations period of a project rather than provided in its entirety up front. BOEM has deemed this approach, which is similar to that used in Europe, to constitute a reasonable balance of risk to the taxpayer against financial benefit to developers, noting that offshore wind farms have low operating expenses and various means of ensuring solvency throughout the life of the project. Additionally, BOEM has modified its criteria for determining when a lessee's financial strength can be a substitute for a decommissioning bond, placing more emphasis on a lessee's investment-grade credit rating and contracted revenue stream. Finally, BOEM has streamlined the process for obtaining a third party or parent company guaranty in lieu of a decommissioning bond.

Elimination of the Site Assessment Plan for Met Buoys: As expected, BOEM has eliminated the requirement to submit a site assessment plan (SAP) for the deployment of meteorological (met) buoys on a lease to measure wind speeds. The SAP was established in the original 2009 rule when it was assumed that wind speeds would be measured using fixed-bottom met towers. When the offshore wind industry migrated to buoys a few years later, the year-long SAP preparation and approval process became a symbol of regulatory overkill. In removing the SAP requirement for met buoys, BOEM noted their low environmental impacts and the fact that buoys are already routinely permitted by the U.S. Army Corps of Engineers (USACE) under Nationwide Permits. Note that BSEE retains the authority to order decommissioning of buoys if USACE doesn't require it, and BOEM will still require a SAP for met tower installation.

Flexibility for COP Data Submittal: The final Mod Rule makes several key changes to better align its COP review process with BOEM's now-codified policy of allowing lessees to submit proposals with a range of design parameters, known as a project design envelope (PDE). Over the past few years, BOEM has used its authority to issue regulatory departures (see below) to provide some of this flexibility on a case-by-case basis; however, embedding the PDE in the regulations will provide lessees with much more long-term certainty.

- **G&G Data.** The final Mod Rule adopts the proposed rule's performance-based standard for lessees' submittal of geophysical and geotechnical (G&G) data supporting their COP application. Instead of the prior prescriptive requirement that the COP must contain a geotechnical exploration (e.g., a physical seabed sample) at every wind turbine location, lessees must now submit G&G data with their COPs that is sufficient to "define the baseline geological conditions of the seabed … develop a geologic model, assess geologic hazards, and determine the feasibility of the proposed site for your proposed facility." The more detailed geotechnical data may now be deferred to the facilities design report (FDR) that BSEE reviews after COP approval. This more flexible approach will, among other things, make it easier for developers to adjust their project design earlier in the permitting process without having to redo costly geotechnical surveys.
- **Cable Routes.** BOEM has provided itself and lessees with more flexibility regarding the size of project easements and ROWs for offshore transmission cables. The original regulations prescribed easements and ROWs that were 200 feet wide; however, BOEM and industry have since recognized that more flexibility is needed to avoid subsea hazards and obstacles during the construction process. BOEM may now issue easements and ROWs that are wide enough to provide sufficient off-lease transmission cable space "to accommodate potential changes at the design and installation phases" of projects.

- **COP Revisions.** The final Mod Rule grants BOEM enhanced flexibility regarding which design changes require a revision to the COP. The use of a PDE did not align well with the original regulations, under which *any* design change could trigger a COP revision. Now, the regulations anticipate design changes within the PDE, and may only require COP revisions that are material and proportionate to the magnitude of the modification.

We note that not all of Mod Rule is aimed at increased COP flexibility. The proposed rule would have allowed some marine archaeological data to be submitted as late as the FDR on a case-by-case basis, but BOEM has withdrawn this language in the final rule in response to comments from stakeholders. This was not entirely surprising, given that in the interim between the proposed and final rule, BOEM issued guidance establishing a checklist for data, including marine archaeological surveys, that must be submitted before BOEM will issue a notice of intent (NOI) to prepare an environmental impact statement under the National Environmental Policy Act (NEPA).

Engineering Reports: BSEE, which only last year received its authority over the post-COP approval engineering reports, has finalized rules that provide lessees—and itself—with more flexibility in submitting and reviewing those reports. First, the final Mod Rule clarifies that you can submit FDRs and fabrication and installation reports (FIRs) at different times for different portions of the wind farm (e.g, wind turbines, substations, export cables). Second, lessees now have much greater leeway to nominate their independent third-party certified verification agents (CVAs) for BSEE approval, as the CVA is encouraged to provide oversight much earlier in the project design process. Third, BSEE has amended a particularly problematic provision in the original regulations that prevented lessees from engaging in “fabrication” until after the FDR and FIR had passed muster. Under the final Mod Rule, lessees can engage in onshore manufacture and fabrication at any time prior to FDR/FIR submittal—a reasonable allowance given developers’ commercial need to commence procurement at an early stage and BSEE’s lack of jurisdiction over onshore activities.

Safety & Inspections: BSEE has included additional specificity regarding the contents of a lessee’s safety management system (SMS), along with new reporting requirements. BSEE has also added a new regulation that offers the potential for more lenient auditing requirements for any developer who gets its SMS certified by a “recognized accreditation organization.”

Departures: BOEM and BSEE have created more flexibility to deviate from their own regulations, clarifying that they may issue departures anytime its existing regulations are “impractical or unduly burdensome and the departure is necessary to achieve the intended objectives of the renewable energy program.” The original departure regulation was rooted primarily in the need to “[f]acilitate the appropriate activities on a lease or grant under this part,” which may have inadvertently constrained BOEM and BSEE from being agile in its programmatic regulatory processes, including actions taken prior to lease issuance.

What’s next? The new regulations take effect 60 days after their imminent publication in the Federal Register, but there is more to be done. For starters, BOEM’s regulations are now inconsistent with standard BOEM leases in several respects. Some of these differences are ministerial (e.g., updating citations and definitions), while others are more material, such as the above-referenced changes in lease structure/duration and financial assurance. BOEM acknowledged that leases may need to be amended, but the preamble is non-committal as to when and how this will happen. Additionally, we haven’t seen the last regulatory amendments. BSEE has indicated that it will be proposing additional changes to its offshore wind safety regulations; while the Unified Regulatory Agenda indicates that it could come out in May 2024, realistically we anticipate seeing something no sooner than late summer.

For questions about the Mod Rule or how it may affect your company or project, please contact the authors.

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