



Josh Kaplowitz

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▸ What is your role with Locke Lord and your interest in the offshore wind energy sector?

I’m senior counsel at Locke Lord, a premier full-service law firm. I advise offshore wind developers, advocacy groups, and companies in the supply chain on legal and policy issues. I also represent onshore renewable energy companies on permitting issues.

I’ve been involved in offshore wind law and policy for well over a decade. For five years, I was a career attorney at the solicitor’s office at the Department of Interior where I was frontline attorney adviser to the Bureau of Ocean Energy Management’s (BOEM) offshore wind program straddling the Obama and Trump administrations.

I spent a year and a half at GE as commercial counsel for their U.S. offshore wind business, and then two years at the American Clean Power Association as their vice president for offshore wind before coming to Locke Lord.

▸ BOEM recently released the next phase of its Renewable Energy Modernization Rule. Could you explain what this means for the future of U.S. offshore wind?

The U.S. offshore wind industry is facing some positive trends and some challenges for sure. The modernization rule plays an unequivocally positive role, although there were some missed opportunities for it to be even more of a game changer.

First off, I agree with BOEM that the rule will save developers a sizable amount of money. Obviously, when you consider the massive capital costs for these projects, these savings may not seem huge — but they are not insignificant.

But perhaps just as important as the cost savings, the rule creates efficiencies and codifies regulatory practices that had previously been done on more of an ad-hoc basis. Developers, particularly in a complex industry like this, need certainty. Having that certainty codified in the regulations is crucial.

In turn, that makes the industry more resilient in the face of economic and political uncertainty — that everyone understands what the rules are and that they align with how the industry actually functions.

▸ What brought about the need for this updated rule?

In a nutshell, the rule is about the collective need for alignment between regulations and industry practice. The Department of Interior got the authority to regulate offshore wind in 2005, and then in 2009, it promulgated offshore wind regulations that remained virtually unchanged for 15 years. When you think back to 2009, there certainly weren’t any offshore wind farms spinning off of the U.S., and there was only one proposal in federal waters, Cape Wind. The writers of the regulations didn’t know nearly as much about how offshore wind works as BOEM does today.

So instead, they based their regulations off of what they knew, which was offshore oil and gas primarily in the Gulf of Mexico. Given the lack of industry knowledge at the time, the fact that U.S. offshore wind has gotten as far as it has with those regulations is actually quite impressive. One of the main reasons is that the original drafters had the foresight to include a mechanism to allow for case-by-case exemptions to the rules if they weren’t functioning well.

Over time, it became clear there were aspects of the rules that just didn’t align with industry practices or simply weren’t efficient. These issues were aggregated and evolved into the Modernization Rule.

▸ Getting into some of the specifics of the rule, how will it help projects better align with the European practices, and why is this important?

It’s vital for the U.S. and other countries to look to Europe for lessons because they have the most mature industry and strong environmental laws. BOEM and BSEE, to their credit, have done that with the Mod Rule.



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The biggest example of this is BOEM’s decision to codify the project design envelope (PDE), which is the practice of proposing a range of design parameters for the project in your construction operation plan (COP). As the project moves through the permitting process, the developer gets more commercial information and works with key stakeholders and can narrow down the project parameters until it reaches a final project proposal. And so BOEM is saying in the Mod Rule: “Yes, we want you to use the project design envelope approach.” This ensures that, as developers refine their PDE, it doesn’t trigger a completely new environmental analysis, require resubmittal of the COP, and unduly delay the permitting process.

Another key change that looks to the European experience is the timing of providing financial assurance for decommissioning. Decommissioning costs are significant, and it makes sense that developers would provide security to ensure money is available to decommission projects when they reach the end of their lifespan. The original regulations had been interpreted to require that the entire decommissioning financial assurance be provided up front.

In Europe, it’s provided on more of a schedule, and so that’s what BOEM has adopted. This will save developers a

lot of money by not locking up as much capital on the front end, while still ensuring the decommissioning costs will be covered when they’re needed.

► **What kind of options will the rule give developers looking to increase onshore fabrication of project components?**

The rule as it was originally drafted suggested that no fabrication could take place until you were at the very end of the permitting process and all your engineering reports had been reviewed and there were no objections. This is a big problem. Developers must be able to start their procurement and manufacturing far enough in advance that once they receive final approval, they’re ready to start putting steel in the water.

The Mod Rule says that, so long as your third-party certified verification agent is involved, developers are free to conduct onshore fabrication while the permitting process is going on.

► **In what ways does the ruling streamline overly burdensome processes?**

Beyond what I’ve already mentioned, there are three key ex-

amples of how the rule streamlines the permitting process:

First, it gets rid of the site assessment plan requirement for deployment of meteorological (met) buoys.

The original rule assumed that developers were going to be installing met towers that are pile driven into the seabed as tall as the hub height of a wind turbine. Installation of these structures could have environmental impacts, and so it made sense to have a separate plan for that.

But it quickly became apparent that developers were shifting rapidly to the use of met buoys for measuring wind speed. A buoy is a buoy, and they are routinely deployed off our coasts with minimal permitting because they have minimal environmental effects. But under the original BOEM regulations, developers were waiting a year or more to be allowed to deploy their met buoys. Now, developers just need to get a general permit from the U.S. Army Corps, which approves buoys within a matter of weeks using a standard set of conditions. That is all time and money saved by developers, with knock-on benefits from being able to start collecting wind speed data much sooner.

Second is the timing of data submittal. The original regulations required that your COP had to have a geotechnical exploration at every single turbine location. But with the PDE approach, you may not know exactly where your turbines will be located at the time of COP submittal.

BOEM went in the direction of offering a more flexible and performance-based approach to data submittal. You still must present enough data for engineering or environmental purposes, but the data can be provided when it's needed. The geotech at every turbine location can now be submitted after COP approval when BSEE is reviewing the final engineering reports. A third example of streamlining is BOEM's reform of the offshore wind lease structure. Under the original regulations, the operations term started when you got your COP approval. The default length was only 25 years, which BOEM realized was too short of time, given the ever-expanding design life of these devices. But it was only 22-23 years because it can take several years after COP approval to construct your project and put it in commercial operation.

Now, the operations term starts once you're completely done and are generating energy commercially on all your wind turbines, and it lasts 35 years instead of 25. That's much more certainty.

► Will this ruling help with offshore transmission issues?

This is an area where the rule could help in a small but significant way.

The U.S. offshore wind industry is eventually going to need to move from radial transmission where every single project has its own line to shore to some sort of shared offshore grid. One of the challenges has been: How do you align the process of siting shared transmission, which would collect from multiple projects, with the process of siting each individual wind farm? How do you make sure that the shared transmission is going to be ready in time to allow individual

projects to plug in so they're not just sitting there waiting for transmission?

BOEM is required by statute to determine if there is competitive interest in offshore transmission rights-of-way before they are issued. In the Mod Rule, BOEM signaled that, if a company has won a state request for proposal (RFP) for stand-alone offshore transmission, that could be a major factor in determining whether there is competitive interest in the property right needed to build that transmission line offshore. In effect, BOEM is saying, "States, you go first. You do RFPs to figure out who you want to build these transmission lines, find the most qualified companies from a technical and economic perspective, and we will run our competitive process in a way that heavily factors in whether a transmission developer has secured a state RFP." This approach eliminates a key source of uncertainty, and thus helps facilitate this future world where we have backbone transmission.

► What challenges might companies and stakeholders have to face in light of the ruling?

Because much of the rule involves codifying practices that were already being done on a case-by-case basis, I actually don't think the transition for developers is going to be that hard.

Stakeholders are generally not affected by the rule. The Mod Rule is really a model of good government. BOEM and BSEE have improved their processes in rational, well-considered ways, but the compromising the rigor of their environmental and safety analyses.

► What do you feel is the industry's reaction to the new rule?

I think it is generally positive. BOEM and BSEE hit a solid double here, but I think they maybe missed some opportunities that would have made it a home run.

It would have been very helpful, for instance, if BOEM had bound itself to a more predictable permit review timeline. NEPA does require you to go through your NEPA process from a notice of intent to a final environmental impact statement within two years with some exceptions, but there's less certainty in terms of the length of time between submitting your COP and starting the NEPA process on the front end, and then going from your final environmental impact statement to your approval.

We could have also used more certainty regarding leasing. The rule includes a requirement that BOEM issue a leasing plan every few years, but it would be helpful if they outlined what factors they will be using to ensure a future administration is constrained from just doing no additional leasing. This is critical because the U.S. industry needs a pipeline of new projects to help build and sustain a domestic supply chain and ensure that states can meet their ambitious offshore wind energy mandates and goals. ↵

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