

# First Major U.S. Offshore Windfarm Receives Regulatory Approval

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On March 11, 2021 the Vineyard Wind Project, the first large-scale offshore wind farm in the United States, was approved by the Bureau of Ocean Energy Management, or BOEM. The approval of this project, which will consist of up to 84 turbines capable of generating 800 megawatts of electricity off the coast of Massachusetts, marks a significant milestone in the development of the nascent U.S. offshore wind industry. Currently there are just seven operating turbines in U.S. waters, compared to approximately 5,000 turbines operating in European waters.

A robust offshore wind program in the United States has the potential to create significant opportunities within the maritime industry. In addition to the demand for high specification wind turbine installation vessels, or WTIVs, an offshore project requires a number of ancillary assets including survey vessels, foundation installation vessels, cable laying vessels and construction and maintenance crew vessels, as well as the development of dedicated port facilities. Much of the marine sector that will be required to support the construction and maintenance of projects like Vineyard Wind do not exist in the United States today. This can be attributable to two principal factors. The first has been the uncertainty about the regulatory approval of large-scale projects, and thus the level of demand for such infrastructure, and the second has been the uncertainty about the application of the Jones Act to such projects. Recent events have eliminated much of the uncertainty surrounding both of these factors.

The Biden administration's stated commitment to renewable infrastructure projects have led to optimism that the Vineyard Wind Project will be the first of numerous offshore wind projects to receive the green light. At the end of 2020, there were nine large scale projects, not including Vineyard Wind, that had submitted construction and operation plans to the BOEM and area awaiting regulatory approval. For a more detailed discussion of the approval processes of offshore wind farms in the United States, please see Seward & Kissel's previous publication on this topic [here](#).

## Legal and Regulatory Implications

The longstanding uncertainty surrounding the application of the Jones Act to offshore wind farms has also been recently resolved. Under the Jones Act, a statute dating back to 1920 that was intended to promote the United States' domestic shipping industry, the transport of any materials or merchandise between United States' coastwise points must be conducted using U.S. flagged and constructed vessels that comply with certain other requirements. Prior to December 2020, the Outer Continental Shelf Lands Act, or OCSLA, defined United States coastwise points on the outer continental shelf, where all offshore wind farms are likely to be located, to include "installations and other devices permanently or temporarily attached to the seabed erected for the purpose of exploring for, developing, or producing resources therefrom." While it has long been established that this definition included exploration and extraction of oil, gas and other natural resources, it was not settled whether this language also applied to wind farm installations.

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As noted in Seward & Kissel's previous client alert available [here](#), the National Defense Authorization Act for fiscal year 2021, or NDAA 2021, enacted in December 2020, amended the relevant provisions of the OCSLA to include within the definition of United States' coastwise points "installations for the purpose of developing or producing non-mineral energy resources," therefore removing any uncertainty that the Jones Act would be applicable to offshore wind farms.

There are generally two accepted strategies for constructing and servicing offshore wind farms in compliance with the Jones Act. The first is to rely on U.S. flagged vessels. However, as noted above, this is not currently an option as the first U.S. flagged WTIV is currently under construction for Dominion Energy, with delivery expected in 2023. Additionally, at an estimated construction cost of approximately \$500 million, U.S. flagged WTIVs are unlikely to be able to compete with similar non-U.S. flagged vessels, which can be constructed and operated for significantly lower costs, for projects outside of the United States. As a result, contracts for additional U.S. flagged WTIVs built in the United States are likely to be dependent on the proven viability of additional large-scale projects in United States waters.

The second method for United States wind farms that does not require U.S. flagged WTIVs involved the installation of turbines with equipment and materials transported from port facilities in the United States on board U.S. flagged feeder vessels to a foreign WTIV. This "two step" method is generally viewed as compliant with the Jones Act because the non-U.S. flagged WTIV activities are limited to the installation, and not transport, of merchandise. However, this process is less efficient than direct installation because it requires additional time and operational risk of transferring the turbine equipment from the feeder vessel to the WTIV at the installation site and may increase overall costs because of the requirement for additional vessels and crew. A third method, which was used to construct a two turbine installation off the coast of Virginia, is to load the turbines onto a non-U.S. flagged WTIV outside of the United States, however this is not viewed as viable for large scale projects due to the considerable distance between the loading port and construction site.

Regardless of the whether the United States wind farm industry is ultimately serviced by a fleet of U.S. flagged WTIV's or continues to rely on foreign vessels, the development of offshore wind will result in the growth of the maritime industry. Much like the offshore industry in the Gulf of Mexico, the offshore wind industry will require an East Coast based fleet of support vessels for both the construction and maintenance of the turbines, that have an expected life cycle of nearly [30] years.

Despite the optimism generated by the Biden administration's focus on renewable energy and recent approval of Vineyard Wind and the demonstrated success of such projects in Europe and other parts of the world, headwinds remain. Some of the same forces that opposed, and successfully delayed, the Vineyard Wind Project in the past, including the certain environmental groups, the commercial fishing industry and coastal landowners, continue to object to the project. Additionally, with an estimated cost of \$2.8 billion for the Vineyard Wind Project, financing of the projects is heavily dependent on the current tax incentives and the support of traditional lending institutions. However, despite these remaining obstacles, the rapid development of a significant new offshore industry and the opportunities for the maritime sector are closer today than they have been at any time in the past.

As the preeminent maritime and offshore energy firm with extensive experience in all areas of capital formation, finance and Jones Act regulatory compliance, Seward & Kissel is able to assist new and established entrants into this area.

If you have any questions, please contact your Seward & Kissel relationship partner.