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Updated August 28, 2025

Congressional Research Service
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R40175

CRS REPORT
Prepared for Members and
Committees of Congress

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SUMMARY

R40175

August 28, 2025

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Offshore Wind Energy Development: Legal Framework

Technological advancement, financial incentives, and policy concerns have driven a global expansion in the development of renewable energy resources. Wind energy, in particular, is often cited as one of the fastest-growing commercial energy sources in the world. Currently, most U.S. wind energy production capacity is based on land. A number of offshore projects have been proposed and are at various stages of the regulatory and commercial process. However, a recent executive order temporarily withdrew the entire U.S. Outer Continental Shelf (OCS) from wind energy leasing and disposition, leaving the status of those and other potential offshore wind power projects in question.

The United States may permit and regulate offshore wind energy development within the areas under its jurisdiction. The federal government and coastal states each have roles in the permitting process, and those roles depend on whether the project is located in state or federal waters. Section 388 of the Energy Policy Act of 2005 (EPAct; P.L. 109-58) amended the Outer Continental Shelf Lands Act (OCSLA) to address previous uncertainties regarding offshore wind projects. Under the EPAct, the Secretary of the Interior has ultimate authority over offshore wind energy development. The statutory authority granted by Section 388 is administered by the Bureau of Ocean Energy Management (BOEM), an agency within the Department of the Interior. Since the passage of EPAct, BOEM has promulgated rules and guidelines governing the permitting and operation of offshore wind facilities. In January 2023, BOEM issued a notice of proposed rulemaking that would establish a leasing system for offshore renewable projects similar to the one in place for offshore oil and gas leasing. In addition, several federal agencies have roles to play in permitting development and operation activities.

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Technological advancements, tax incentives, and concerns about climate change have driven a global expansion in the development of renewable energy resources. Wind energy is a fast-growing source of new electric power generation, and U.S. wind energy production capacity has been increasing consistently over the past several years.[1] In contrast to Europe,[2] the vast majority of wind power capacity in the United States is currently based on land. However, multiple offshore wind and related infrastructure projects have been proposed in recent years to the Bureau of Ocean Energy Management (BOEM).[3]

The focus of this report is the current law applicable to siting offshore wind facilities, including the relationship between state and federal jurisdictional authorities. This report also discusses court challenges to early federal offshore wind energy permitting decisions; regulatory activity following the Energy Policy Act of 2005 (EPAct) that clarified jurisdiction over permitting of offshore wind facilities;[4] and recent developments with respect to the existing statutory and regulatory framework for offshore wind energy production.

Jurisdiction over the Ocean

The United States' authority over the oceans and its natural resources begins at the coast—often called the "baseline" in this context—and generally extends 200 nautical miles out to sea. This is known as the United States' Exclusive Economic Zone (EEZ). The first 12 nautical miles comprise the U.S. territorial sea.[5] Under the 1982 United Nations Convention on the Law of the Sea[6] (UNCLOS), a coastal nation may claim sovereignty over the air space, water, seabed, and subsoil within its territorial sea.[7] U.S. Supreme Court precedent and international practice establish that this sovereignty authorizes coastal nations to permit offshore development within their territorial seas.[8] Although the United States has not ratified UNCLOS, it generally acts in alignment with the treaty's terms.[9]

The U.S. contiguous zone extends beyond the territorial sea to 24 nautical miles from the baseline. In this area, a coastal nation may regulate to protect its territorial sea and to enforce its customs, fiscal, immigration, and sanitary laws.[10]

The jurisdiction of the federal government with respect to individual states is also important. The Submerged Lands Act of 1953[11] assured coastal states control over the lands beneath coastal

[1] *Renewable & Alternative Fuels*, U.S. ENERGY INFO. ADMIN., https://www.eia.gov/renewable/data.php#wind (last visited July 24, 2025).

[2] More information about European offshore wind projects can be found at *Statistics*, WIND EUROPE, https://windeurope.org/data-and-analysis/statistics/ (last visited July 24, 2025).

[3] An updated list of these leases and other documents related to offshore renewable energy projects, which are largely wind energy projects, can be found at *Lease and Grant Information*, BUREAU OF OCEAN ENERGY MGMT., U.S. DEP'T OF THE INTERIOR, https://www.boem.gov/renewable-energy/lease-and-grant-information (last visited July 24, 2025).

[4] Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005) [hereinafter EPAct].

[5] Proclamation No. 5928, 54 Fed. Reg. 777 (Dec. 27, 1988).

[6] U.N. Convention on the Law of the Sea, Dec. 10, 1982, 21 I.L.M. 1261 (entered into force Nov. 16, 1994) [hereinafter UNCLOS].

[7] *Id*. at arts. 2.1, 2.2, 3; *see also* United States v. California, 332 U.S. 19, 29–41 (1947), *superseded by statute*, Submerged Lands Act of 1953, 67 Stat. 29, 43 U.S.C. § 1301; Alabama v. Texas, 347 U.S. 272, 273–74 (1954).

[8] *See* United States v. California, 436 U.S. 32, 36 (1978); United States v. Alaska, 422 U.S. 184, 198–99 (1975); Alabama v. Texas, 347 U.S. at 273–74 (1954); United States v. California, 332 U.S. at 29–41 (1947).

[9] *See* Proclamation No. 5928, 54 Fed. Reg. 777 (Dec. 27, 1988).

[10] UNCLOS, art. 33.

[11] 43 U.S.C. §§ 1301–1303, 1311–1315.

waters in an area stretching three nautical miles from the shore in most places, and nine nautical miles in others.[12] States may regulate the coastal waters within their jurisdiction, subject to federal regulation for "commerce, navigation, national defense, and international affairs" and the power of the federal government to preempt state law.[13] The remaining outer portions of waters over which the United States exercises jurisdiction are federal waters.[14]

Thus, the federal government has jurisdiction over the potential locations for offshore wind farms to the boundaries of its EEZ. The scope of this federal authority is discussed in greater detail later in this report.

The Coastal Zone Management Act and the Role of the States

States play an important regulatory role when a wind energy project is proposed for construction in waters under both federal and state jurisdiction. As an initial matter, any wind energy project or facility associated with such a project to be constructed in state waters, including any cables that would be necessary to transmit power back to shore, is subject to applicable state regulation or permitting requirements. The federal Coastal Zone Management Act[15] (CZMA) recognizes three state regulatory frameworks that may be relevant: (1) "State establishment of criteria and standards for local implementation, subject to administrative review and enforcement"; (2) "[d]irect State land and water use planning and regulation"; and (3) regulation development and implementation by local agencies, with state-level review of program decisions.[16] Within these categories, coastal zone regulation varies significantly among the states.

In addition, the CZMA encourages states to enact coastal zone management plans to coordinate protection of habitats and resources in coastal waters.[17] The CZMA establishes a policy of preservation alongside sustainable use and development compatible with resource protection.[18] State coastal zone management programs that are approved by the Secretary of Commerce receive federal monetary and technical assistance. State programs must designate conservation measures and permissible uses for land and water resources[19] and must address various sources of water pollution.[20]

Once a state program is in place, the CZMA requires that the federal government and federally permitted activities be "consistent to the maximum extent practicable with" that program.[21] Following a Supreme Court decision holding that oil and gas leasing in the federal waters of the

[12] *Id.* § 1301(a)(2). State jurisdiction typically extends three nautical miles (approximately 3.3 miles) seaward of the coast or "baseline." Texas and the Gulf Coast of Florida have jurisdiction over an area extending three "marine leagues" (nine nautical miles) from the baseline. *Id.* § 1301(a)(2).

[13] *Id.* §§ 1314(a), 1311(a)(2).

[14] *Id.* § 1302.

[15] 16 U.S.C. §§ 1451–1465.

[16] *Id.* § 1455(d)(11).

[17] Coastal U.S. states and territories, including the Great Lakes states, are eligible to receive federal assistance for their coastal zone management programs. All eligible coastal and Great Lakes states and territories except Alaska participate in the program. *See* Office For Coastal Management, *Coastal Zone Management Programs*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., https://coast.noaa.gov/czm/mystate/ (last visited July 24, 2025).

[18] 16 U.S.C. § 1452(1), (2).

[19] *Id.* § 1455(d)(2), (9)–(12).

[20] *Id.* § 1455(d)(16).

[21] *Id.* § 1456(c).

Outer Continental Shelf (OCS) did not trigger the requirement for state review under the CZMA, Congress amended the "consistency review" provision to include the impacts on a state coastal zone from actions in federal waters.[22] Thus, states may participate in federal efforts to permit projects in federal waters to ensure that such projects are consistent with state coastal zone management regulation.

Federal Permitting

The production of energy on federal and federally controlled lands, including the OCS, requires some form of permission, such as a right-of-way, easement, or license. For *onshore* wind projects on federal public lands, the Department of the Interior (DOI), through the Bureau of Land Management, has created a regulatory program under the Federal Land Policy and Management Act of 1976.[23] A federal statute expressly governing *offshore* wind energy development was not enacted until the Energy Policy Act of 2005. Before enactment of EPAct, some permitting in support of offshore wind energy development had taken place, but the use of the laws existing at that time proved controversial and was challenged in court. The previous regulatory regime, the conflicts it engendered, and EPAct's grant of legal authority to permit offshore wind in federal waters are discussed below.

The Energy Policy Act of 2005 (EPAct)

Prior to enactment of EPAct in 2005, the Army Corps of Engineers (Corps) took the lead role in the federal offshore wind energy permitting process, exercising jurisdiction under Section 10 of the Rivers and Harbors Act (RHA),[24] as amended by the Outer Continental Shelf Lands Act (OCSLA).[25] The Corps has jurisdiction under these laws to permit obstructions to navigation within the "navigable waters of the United States" and on the OCS.[26] The Corps' jurisdiction over potential offshore wind projects had never been made explicit, however.

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[22] *Id.*; Sec'y of the Interior v. California, 464 U.S. 312, 315 (1984), *superseded by statute*, Coastal Zone Act Reauthorization Amendments of 1990, Pub. L. No. 101-508, 104 Stat. 1388-299.

[23] 43 U.S.C. §§ 1701–1785.

[24] 33 U.S.C. §§ 403–687. Section 10 was enacted in 1899, and its text has not changed substantively since that time. It states:

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or enclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

33 U.S.C. § 403.

[25] 43 U.S.C. §§ 1331–1356a.

[26] 33 U.S.C. § 403. Corps regulations define the "navigable waters of the United States" as "those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce." 33 C.F.R. § 329.4. Under the RHA, navigable waters "includes only those ocean and coastal waters that can be found up to three geographic miles seaward of the coast." Alliance to Protect Nantucket Sound, Inc. v. U.S. Dep't of Army, 288 F. Supp. 2d 64, 72 (D. Mass. 2003), *aff'd,* 398 F.3d 105 (1st (continued...)

Section 388 of EPAct addresses some of the uncertainty related to federal jurisdiction over offshore wind energy development by amending OCSLA to establish legal authority for federal review and approval of various offshore energy-related projects. Section 388 authorizes the Secretary of the Interior, in consultation with other federal agencies, to grant leases, easements, or rights-of-way on the OCS for certain activities—wind energy development among them—not authorized by other relevant statutes.[27]

EPAct also makes clear that federal agencies with permitting authority under other federal laws retain their jurisdiction.[28] Thus, offshore development continues to require a Corps permit pursuant to the RHA. Federal agencies that take actions with respect to energy development must also, for example, comply with applicable environmental review requirements and species protection laws.[29] The legislative language does not clearly dictate which agency should take the lead role in coordinating federal permitting and responsibility for preparing analysis under the National Environmental Policy Act (NEPA).[30] However, the language does suggest that DOI is charged with primary responsibility: The EPAct directs the Secretary of the Interior to consult with other agencies as a part of its leasing, easement, and right-of-way granting process,[31] and DOI is responsible for ensuring that activities carried out pursuant to its new authority provide for "coordination with relevant federal agencies."[32] The law also directs the Secretary to establish a system of "royalties, fees, rentals, bonuses, or other payments" that will ensure a fair return to the United States for any property interest granted under this provision.[33]

While Section 388 of EPAct provided DOI with significant flexibility in crafting a regulatory regime for offshore wind energy development, the act specifically addressed certain aspects of the process related to the grant of property interests. First, the act directed that leases, easements, and rights-of-way are to be issued on a competitive basis, subject to limited exceptions.[34] The

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Cir. 2005); *see also* 33 C.F.R. § 329.12(a). On the OCS, however, the Corps' regulatory jurisdiction extends beyond that three-mile limit for certain purposes. 43 U.S.C. § 1333(a)(1), (e).

[27] 43 U.S.C. § 1337(p)(1). DOI authority to grant leases, easements, or rights-of-way on the OCS is contingent upon the permitted activities being consistent with the purposes specified by the law. The relevant property interest may only be issued if the OCS activity will:

> (A) support exploration, development, production, or storage of oil or natural gas, except that a lease, easement, or right-of-way shall not be granted in an area in which oil and gas preleasing, leasing, and related activities are prohibited by a moratorium;
>
> (B) support transportation of oil or natural gas, excluding shipping activities;
>
> (C) produce or support production, transportation, or transmission of energy from sources other than oil and gas; or
>
> (D) use, for energy-related purposes or for other authorized marine-related purposes, facilities currently or previously used for activities authorized under ... [the OCLSA], except that any oil and gas energy-related uses shall not be authorized in areas in which oil and gas preleasing, leasing, and related activities are prohibited by a moratorium.

EPAct, § 388(a), adding new 43 U.S.C. § 1337(p)(1)(A)-(D).

[28] 43 U.S.C. § 1337(p)(9).

[29] *See, e.g.*, Env't Def. Ctr. v. BOEM, 36 F.4th 850, 891 (9th Cir. 2022) (holding that BOEM had not satisfied its requirements under NEPA, the ESA, and the CZMA when it authorized well stimulation treatments off the coast of California).

[30] NEPA and its role in the offshore wind permitting process are discussed *infra* in the subsection entitled "Other Statutes of Note."

[31] 43 U.S.C. § 1337(p)(1).

[32] *Id.* § 1337(p)(4).

[33] *Id.* § 1337(p)(2)(A).

[34] *Id.* § 1337(p)(3). The statute provides for two exceptions to the general requirement that a property interest issued (continued...)

Secretary is further authorized to provide for the duration of any property interest granted under this subsection and to provide for suspension and cancellation of any lease, easement, or right-of-way.[35]

In general, an offshore wind energy developer that is granted a lease, easement, or right-of-way is responsible for royalties or other payments. Section 388 of EPAct also established the method for allocating those payments among states. The allocation is based upon a formula that equitably distributes to states 27% of the revenues collected by the federal government, based on the proximity of the project to the affected states' offshore boundaries.[36] The act established that states that have a "coastline that is located within 15 miles of the geographic center of the project" are entitled to a revenue share.[37] Thus more than one state may be eligible to receive a portion of these revenues, depending upon the location of a project.

In addition, EPAct authorized considerable regulation of impacts associated with offshore development. It required the Secretary to ensure that "any activity under this subsection" be carried out in a manner that adequately addresses specified issues, including environmental protection, safety, protection of U.S. national security, and protection of the rights of others to use the OCS and its resources.[38] It also established specific financial security requirements for projects. The law requires the holder of a Section 388 property interest to "provide for the restoration of the lease, easement, or right-of-way" and to furnish a surety bond or other form of security, leaving the amount and the exact purposes to which any forfeited sums will be applied to the Secretary's discretion.[39] Further, in conjunction with the authority to require some form of financial assurance, the Secretary is empowered to impose "such other requirements as the Secretary considers necessary to protect the interests of the public and the United States."[40] Thus the Secretary, depending on how these authorities are exercised, may potentially regulate many aspects of any industry that is permitted to operate on the OCS under this subsection of the OCSLA.

EPAct also contained a provision expressly providing for a state consultative role in the permitting process. Section 388 requires the Secretary of the Interior to provide for coordination and consultation with a state's governor or the executive of any local government that may be affected by a lease, easement, or right-of-way granted under this authority.[41] In addition, the law makes clear that it does not affect any state's claim to "jurisdiction over, or any right, title, or interest in, any submerged lands."[42]

In 2009, DOI issued a final rule establishing the permitting process and setting forth a royalty collection and allocation structure for OCS renewable energy projects, as directed by EPAct.[43]

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under this provision be granted on a "competitive basis": (1) if the Secretary of the Interior determines that there is no competitive interest, or (2) if the project meets certain criteria indicating a limited scope. *Id.*

[35] *Id.* § 1337(p)(5).

[36] *Id.* § 1337(p)(2)(B).

[37] *Id.*

[38] *Id.* § 1337(p)(4). DOI also appears to have adopted this interpretation in a rulemaking, stating that it "interprets the authority granted in section 388(a) of the Energy Policy Act of 2005 to issue leases, easements or rights-of-way as also providing MMS authority to regulate or permit the activities that occur on those leases, easements or rights-of-way, if those activities are energy related." 70 Fed. Reg. 77345, 77346 (Dec. 30, 2005).

[39] 43 U.S.C. § 1337(p)(6).

[40] *Id.*

[41] *Id.* § 1337(p)(7).

[42] EPAct, § 388(e).

[43] 74 Fed. Reg. 19638 (Apr. 29, 2009).

The rulemaking authorized BOEM to issue two types of OCS leases. Limited leases grant access and operational rights to the lessee for activities related to the production of energy, including assessment and testing activities, but do not authorize production of energy products for sale or distribution.[44] Such leases generally support exploration and allow the lessee to develop a fuller proposal for energy production, potentially leading to the sale of a commercial lease. Commercial leases give the lessee full rights to receive authorizations necessary to assess, test, and produce renewable energy on a commercial scale over the long term (approximately 30 years).[45]

The 2009 final rule set forth a formula for determining payment amounts, including lease payments and royalties, owed by parties participating in OCS renewable energy projects.[46] The rulemaking also establishes a formula for allocation of federal revenues from lessees. As mandated by EPAct, BOEM shares 27% of revenues for any project "located wholly or partially within the area extending three nautical miles seaward of State submerged lands"[47] with any "eligible state," which is defined as a "coastal State having a coastline (measured from the nearest point) no more than 15 miles from the geographic center of a qualified project area."[48] To determine each eligible state's share of those revenues, the agency uses an "inverse distance formula, which apportions shares according to the relative proximity of the nearest point on the coastline of each eligible State to the geographic center of the qualified project area."[49]

In April 2024, BOEM issued a rule to amend the administrative processes for offshore renewable energy leasing, including wind energy.[50] The rule requires BOEM to schedule offshore wind leasing well in advance for planning purposes (similar to the five-year plans required for offshore oil and gas operations under the OCSLA), reform the competitive auction process for offshore wind leases, and allow for more flexibility in oversight of offshore geophysical and geotechnical surveying.[51]

The National Environmental Policy Act (NEPA)

NEPA requires federal agencies to analyze and disclose the environmental consequences of certain federal actions. In general, NEPA requires various levels of environmental analysis depending on the circumstances and the type of federal action contemplated.[52] While a number of categorical exclusions may be available to bypass full NEPA analysis, major federal actions that are found to significantly affect the environment generally require the preparation of an environmental impact statement (EIS), a document containing detailed analysis of the project as proposed, as well as other alternatives, including taking no action at all.[53] If it is uncertain whether the action will have a significant environmental impact, an agency may prepare an environmental assessment (EA) to assess the impacts of the project, and proceed to an EIS only if

[44] 30 C.F.R. § 585.113.

[45] *Id.* § 585.235.

[46] 30 C.F.R. § 585.540.

[47] *Id.*

[48] *Id.* at §§ 585.112, 585.540.

[49] *Id.* § 585.540(c).

[50] Renewable Energy Modernization Rule, 89 Fed. Reg. 42602 (May 15, 2024).

[51] *Id.* For more information on the five-year planning process for offshore oil and gas leasing, see CRS Report RL33404, *Offshore Oil and Gas Development: Legal Framework*, by Adam Vann (2018).

[52] For more information on NEPA's requirements, see CRS In Focus IF12560, *National Environmental Policy Act: An Overview*, by Kristen Hite and Heather McPherron (2025).

[53] 43 U.S.C. § 4336.

necessary.[54] Potential environmental impacts of offshore wind energy projects include, for example, impacts on fish and wildlife (e.g., marine mammals, birds, shellfish, finfish) and their habitats, including ocean waters and the benthic zone wildlife; impacts on aesthetics, cultural resources, and socioeconomic conditions; and impacts on air and water quality.[55]

Many wind energy projects have similar environmental impacts, and the impacts of activities at the exploration or assessment stages may be less significant than the potential impacts of commercial activity. In addition, a lessee may need to develop a detailed project description for commercial leasing before the impacts of the full project may be known. To account for these common variables, DOI began a "tiered" review process for offshore wind permitting in late 2007, publishing the Programmatic Environmental Impact Statement for Alternative Energy Development and Production and Alternate Use of Facilities on the Outer Continental Shelf.[56] Among other things, this document established a baseline analysis that helps to satisfy the requirements of NEPA for offshore renewable energy leasing, including offshore wind projects. This can reduce the regulatory burden of NEPA obligations for subsequent federal actions related to offshore wind.

Recent developments may influence BOEM's NEPA compliance efforts for offshore wind projects. First, in *Seven County Infrastructure Coalition v. Eagle County*, the Supreme Court held that federal agencies are not required to consider indirect environmental impacts upstream or downstream of a project requiring federal authorization.[57] The Court also held that federal agencies are entitled to "substantial deference" in evaluating scope, causality, potential alternatives to the action, and other technical aspects of NEPA review.[58]

Additionally, in November 2024, the U.S. Court of Appeals for the D.C. Circuit declared that President Carter's 1977 executive order mandating CEQ to issue regulations binding on all federal agencies exceeded the President's statutory authority.[59] However, a subsequent majority concurring en banc declined to extend that reasoning.[60] Also, in February 2025, the U.S. District Court for the District of North Dakota invalidated CEQ's 2024 regulations based in part on

[54] *Id.*

[55] *See, e.g.*, BUREAU OF OCEAN ENERGY MGMT., U.S. DEP'T OF THE INTERIOR, VINEYARD WIND 1 FINAL ENVIRONMENTAL IMPACT STATEMENT (2021), https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/Vineyard-Wind-1-FEIS-Volume-1.pdf.

[56] Document available at Bureau of Ocean Energy Mgmt., U.S. Dep't of the Interior, Guide To The OCS Alternative Energy Final Programmatic Environmental Impact Statement (2007), https://www.boem.gov/renewable-energy/guide-ocs-alternative-energy-final-programmatic-environmental-impact-statement-eis. NEPA requires programmatic environmental impact statements be reconsidered every five years. *See* 42 U.S.C. § 4336b. Where an existing NEPA analysis may serve for a given proposal, DOI allows documentation via memorandum to file that a proposed action is adequately analyzed in an existing environmental impact statement or environmental assessment. U.S. Dep't of the Interior Handbook of National Environmental Policy Act Implementing Procedures § 3.1, available at https://www.doi.gov/media/document/doi-nepa-handbook. If a programmatic analysis is on file to support a specific project, existing analysis may be incorporated by reference and supplemented with new analysis pertinent to the action at hand. *Id*. at 3.2. For further discussion of tiered reviews and other aspects of NEPA compliance, see CRS In Focus IF12560, *National Environmental Policy Act: An Overview*, by Kristen Hite and Heather McPherron (2025).

[57] 145 S. Ct. 1497 (2025). For further discussion of *Seven County*, see CRS Legal Sidebar LSB11333, *"Deference Squared": Supreme Court Limits NEPA's Scope and Courts' Reach in Seven County Infrastructure Coalition*, by Kristen Hite (2025).

[58] *Seven Cnty.*, 145 S. Ct. at 1511-1512.

[59] Marin Audubon Soc'y v. Fed. Aviation Admin., 121 F.4th 902 (D.C. Cir. 2024).

[60] *See* Marin Audubon Socy. v. Fed. Aviation Administration, 129 F.4th 869, 873 (D.C. Cir. 2025).

finding that they exceeded statutory authority, but that ruling was subsequently vacated and dismissed as moot by the U.S. Court of Appeals for the Eighth Circuit.[61]

Following the Eighth Circuit decision, CEQ rescinded its NEPA regulations in their entirety.[62] Other agencies have also amended or rescinded portions of their NEPA regulations, including DOI, which issued an interim final rule partially rescinding its NEPA regulations and transferring many others to an internal handbook via interim final rule on July 3, 2025.[63] It is unclear whether and to what extent these changes will impact DOI's offshore wind leasing oversight.

Other Statutes of Note[64]

In addition to the role interested parties and cooperating agencies may play under NEPA, certain federal agencies have independent sources of jurisdiction over specific ocean resources. Some of the most relevant authorities are the Endangered Species Act (ESA),[65] the Marine Mammal Protection Act (MMPA),[66] and the Migratory Bird Treaty Act (MBTA).[67] The agencies that administer those statutes do not have final authority over leasing decisions, but are likely to be involved in the environmental review process leading to a final DOI decision.[68]

Briefly, each of those laws sets parameters for federal activities that potentially harm designated species of plants and animals. Offshore wind energy projects may impact marine species due to their obstructive, noise, or water quality impacts, and they may impact avian species primarily as a navigational hazard (i.e., birds striking wind turbine blades in motion).[69]

The ESA prohibits any person, including private entities and government agencies, from "tak[ing]" an endangered species.[70] This prohibition may be extended to "threatened" species.[71] *Take* is broadly defined as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct."[72] Additionally, a federal agency undertaking an action, such as issuing a permit, that could affect a listed species or its critical habitat is subject

[61] Iowa v. CEQ, 765 F. Supp. 3d 859 (D.N.D. 2025), *vacated and appeal dismissed by*, No. 25-1641, 2025 WL 2205808 (8th Cir. July 29, 2025); *see also* CRS Legal Sidebar LSB11260, *Marin Audubon Society v. Federal Aviation Administration: D.C. Circuit Challenges CEQ's Authority to Issue NEPA Regulations*, by Kristen Hite and Abigail A. Graber (2025).

[62] Removal of National Environmental Policy Act Implementing Regulations, Interim Final Rule, 90 Fed. Reg. 10610 (Feb. 25. 2025).

[63] National Environmental Policy Act Implementing Regulations, 90 Fed. Reg. 29498 (July 3,2025).

[64] CRS Coordinator of Research Planning for the American Law Division Erin Ward and former Legislative Attorney Linda Tsang assisted with the preparation of this section.

[65] 16 U.S.C. §§ 1531–1544.

[66] *Id*. §§ 1361–1407.

[67] *Id*. §§ 703–712.

[68] These agencies include the U.S. Fish and Wildlife Service, an agency under the jurisdiction of the Department of the Interior, and the National Marine Fisheries Service, an agency under the jurisdiction of the Department of Commerce.

[69] *See* BUREAU OF OCEAN ENERGY MGMT., U.S. DEP'T OF THE INTERIOR, SUPPORTING NATIONAL ENVIRONMENTAL POLICY ACT DOCUMENTATION FOR OFFSHORE WIND ENERGY DEVELOPMENT RELATED TO AVIAN SPECIES RESEARCH (2022), https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/Avian%20White%20Paper.pdf.

[70] Under the ESA, species are listed as either "endangered" or "threatened" based on the risk of their extinction. An "endangered" species is "any species which is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6).

[71] *Id*. § 1533(d). A "threatened" species is "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *Id.* § 1532(20).

[72] *Id*. § 1532(19).

to Section 7 of the ESA.[73] Section 7 of the ESA requires that federal agencies ensure that their actions do not jeopardize listed species or adversely modify or destroy critical habitat.[74] To comply with this obligation, the act requires federal agencies to consult with the U.S. Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS or NOAA Fisheries), depending upon the species affected, about the potential effect of their actions on listed species and critical habitat.[75]

The Section 7 consultation process begins with a determination, with the help of FWS and NMFS, that a listed species or its designated critical habitat may be present in a project area.[76] If a listed species or critical habitat may be present, then the "action agency" (in this context, DOI, as it considers acting on a permitting decision) generally must prepare a biological assessment, evaluating the potential effects of the action on the listed species and critical habitat.[77] If the acting federal agency determines that a project may adversely affect a listed species or critical habitat, it must undertake formal consultation with the Services, which concludes with a biological opinion.[78] The biological opinion, which is prepared by FWS or NMFS as appropriate, contains a detailed analysis of the effects of the agency action and determines whether the proposed action is likely to (1) jeopardize the species or (2) destroy or adversely modify its critical habitat.[79]

Projects that may take listed species but not jeopardize their survival may proceed, subject to certain terms and conditions to implement "reasonable and prudent measures" to minimize their impacts on the species.[80] Any such biological opinion includes an "incidental take statement" that allows the agency to move forward with the action or lease that is expected to result in take of some individuals of a listed species without triggering penalties under the Act. The term *incidental* means the harm occurs as part of, but is not the purpose of, carrying out an otherwise lawful activity.[81] The incidental take statement specifies the anticipated amount of incidental take from the action, and any take consistent with the incidental take statement's terms and conditions is not considered a prohibited taking.[82]

The MMPA prohibits, with certain exceptions, taking marine mammals in U.S. waters and by persons and vessels subject to U.S. jurisdiction on the high seas.[83] The MMPA defines *take* to mean to "harass, hunt, capture, or kill" marine mammals or to attempt those activities.[84] The statute is jointly administered by the Secretary of Commerce (through NOAA/NMFS) and the

[73] *Id.* § 1536. Listed species are species determined to be threatened species or endangered species under the Act.

[74] *Id.* § 1536(a)(2).

[75] *Id.* For more on the consultation process, see CRS Report R46867, *Endangered Species Act (ESA) Section 7 Consultation and Infrastructure Projects*, by Erin H. Ward and Pervaze A. Sheikh (2021).

[76] 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12(c). Some protections also attach to species proposed for listing and critical habitat proposed for designation. 16 U.S.C. § 1536(a)(4). Federal agencies must "confer" with the appropriate Secretary if their actions are likely to jeopardize the continued existence of any proposed species or adversely modify critical habitat proposed for designation. *Id.* This process is distinct from the Section 7 consultation process, less formal, and meant to assist planning early in the process should the species be listed and more definite protections attach. *See id.* § 1536(a)(4); 50 C.F.R. § 402.10.

[77] 16 U.S.C. § 1536(c); 50 C.F.R. § 402.12(b), (d).

[78] 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14(e).

[79] 16 U.S.C. § 1536(b)(3); 50 C.F.R. § 402.14(h).

[80] 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i).

[81] 16 U.S.C. § 1539(a)(1)(B).

[82] *Id.* § 1536(b)(4), (o)(2); 50 C.F.R. § 402.14(i)(1)(i)–(v).

[83] 16 U.S.C. § 1371(a).

[84] *Id.* § 1362(13).

Secretary of the Interior (through FWS).[85] The MMPA allows FWS and NMFS to authorize the incidental taking of small numbers of marine mammals for a period of not more than five consecutive years.[86] Such incidental take may be authorized only upon certain findings, in particular that the take will have a *negligible impact* on the species or stock.[87]

Implementing regulations establish procedures for administering the MMPA, including how to apply for authorization for incidental takes.[88] These regulations set forth the procedures for submitting requests for such authorization to the NMFS or FWS, standards for review, and the form of the authorization.[89]

The MBTA is the domestic law that implements U.S. obligations under various treaties for the protection of migratory birds.[90] The MBTA generally prohibits the taking, killing, possession, or transportation of, and trafficking in, migratory birds, their eggs, parts, and nests unless authorized by a permit.[91] The MBTA does not define *take*. FWS regulations define *take* to mean to "pursue, hunt, shoot, wound, kill, trap, capture, or collect" or to attempt to do so.[92] The rotating turbines of wind energy projects may unintentionally cause this type of harm to migratory bird species. It is an open legal question whether the MBTA prohibits such "incidental take."[93] Unlike the ESA and the MMPA, the MBTA does not explicitly authorize the incidental taking of birds by an otherwise lawful activity, such as a wind energy project.[94] To the extent the MBTA's prohibitions apply to the incidental take of migratory birds by the operation of permitted wind energy facilities, the Secretary of the Interior is authorized to determine if, and by what means, the taking of migratory birds should be allowed.[95] Any such allowances must be "compatible with the terms of the conventions" and give "due regard to the zones of temperature and to the distribution, abundance, economic value, breeding habits, and times and lines of migratory flight" of migratory birds.[96] FWS regulations at 50 C.F.R. Part 21 allow for take permits for special uses, although an applicant must make "a sufficient showing of benefit to the migratory bird resource, important

[85] The statute defines *Secretary* as the Secretary of the department in which NOAA is operating (Commerce) for purposes of regulation related to all members of the order Cetacea (whales and porpoises) and all members, except walruses, of the order Pinnipedia (seals). The statute defines *Secretary* as Secretary of the Interior (operating through the FWS) with respect to all other marine mammals (manatees, dugongs, polar bears, sea otters, and walruses). 16 U.S.C. § 1362(12)(A).

[86] *Id.* § 1371(5)(A).

[87] *Id.* § 1371(5)(A)(i).

[88] 50 C.F.R. pt. 18 (FWS regulations); 50 C.F.R. pt. 216, Subpart I (NMFS regulations).

[89] 50 C.F.R. §§ 18.27, 216.31–216.47.

[90] 16 U.S.C. §§ 703-712. *See also* CRS Report R44694, *The Migratory Bird Treaty Act (MBTA): Selected Legal Issues*, by Cassandra J. Barnum (2025).

[91] *See* 16 U.S.C. §§ 703-704. Birds that receive protection under the MBTA are listed at 50 C.F.R. § 10.13.

[92] 50 C.F.R. § 10.12.

[93] *See* Barnum, *supra* note 90, at 7-16.

[94] To address some of the uncertainty regarding incidental takes and compliance with the MBTA, in 2015, the FWS announced that it was considering developing an MBTA permitting program to authorize incidental takes of migratory birds. Migratory Bird Permits: Programmatic Environmental Impact Statement; Notice of Intent, 80 Fed. Reg. 30,032, 30,035 (proposed May 26, 2015) (noting that the FWS was considering "whether a general conditional authorization can be developed for hazards to birds related to wind energy generation"). However, in 2018, the FWS announced that it was no longer pursuing the action. Migratory Bird Permits; Programmatic Environmental Impact Statement, Announcement, 83 Fed. Reg. 24,080 (May 24, 2018).

[95] 16 U.S.C. § 704.

[96] *Id.*

research reasons, reasons of human concern for individual birds, or other compelling justification."[97]

Due to differing legal analyses by various courts and changing interpretations of the MBTA's prohibitions by different Administrations, it is unclear how the MBTA prohibitions apply to incidental taking of migratory birds from offshore wind energy projects.[98] A number of DOI memoranda have reached different conclusions on the MBTA's applicability to incidental takes. Most recently, on April 11, 2025, Acting Solicitor Gregory Zerzan of the second Trump Administration issued a memorandum opinion, M-37085, instructing all offices and bureaus of DOI to treat a 2017 opinion—which found that the MBTA's take prohibitions "do not apply to the accidental or incidental taking or killing of migratory birds"—as controlling "except with respect to actions relying on such opinion that are to be taken within the jurisdiction of the United States District Court for the Southern District of New York," a nod to a 2020 decision from that court that vacated the 2017 opinion.[99]

Additionally, on July 29, 2025, Secretary of the Interior Doug Burgum issued Order No. 3437, titled "Ending Preferential Treatment for Unreliable, Foreign-Controlled Energy Sources in Department Decision Making."[100] The order instructed Assistant Secretaries to conduct various reviews, including of "wildlife permits and analyses, including but not limited to ... Incidental Take permits" and "Migratory Bird Treaty Act compliance consultation."[101] It remains to be seen whether this order will result in FWS further revising its position on incidental take under the MBTA.

Trump Administration Executive Orders

The current Administration has issued a series of executive documents that may limit or even prevent offshore wind energy development in federal waters. The first and arguably most impactful of these for the wind energy industry is an executive memorandum titled "Temporary Withdrawal of All Areas on the Outer Continental Shelf from Offshore Wind Leasing and Review of the Federal Government's Leasing and Permitting Practices for Wind Projects" (the Wind Directive), issued on the first day of the Administration, January 20 2025.[102] This directive mandated several actions designed to limit further wind energy leasing and development on the OCS.

The Wind Directive withdrew all areas in the OCS from "disposition for wind energy leasing" beginning on January 21, 2025, and remaining in effect until revocation via another executive action. The authority for this withdrawal is Section 12(a) of OCSLA, which authorizes the President to "from time to time, withdraw from disposition any of the unleased lands of the outer Continental Shelf."[103] While previous Administrations have withdrawn offshore areas on many occasions, this appears to be the first withdrawal under Section 12(a) of OCSLA that focuses exclusively on offshore wind projects. There is a dearth of case law interpreting withdrawal

[97] 50 C.F.R.. § 21.95.

[98] *See* Barnum, *supra* note 90, at 7-16.

[99] Memorandum from Acting Solic., DOI, to Sec'y & Asst. Sec'y for Fish & Wildlife & Parks, DOI (Apr. 11, 2025) https://www.doi.gov/sites/default/files/documents/2025-04/m-37085.pdf.

[100] Secretary of the Interior, Order No. 3437: Ending Preferential Treatment for Unreliable, Foreign-Controlled Energy Sources in Department Decision Making (July 29, 2025), available at https://www.doi.gov/document-library/secretary-order/so-3437-ending-preferential-treatment-unreliable-foreign.

[101] *Id.* at 3-4.

[102] 90 Fed. Reg. 8363 (Jan. 20, 2025) (hereinafter Wind Directive).

[103] 43 U.S.C. §1341(a).

authority under Section 12, so it is not clear whether Presidents can limit withdrawals to certain types of energy production. Similarly, it is not clear that the President has the authority to revoke Section 12 withdrawals, and at least one federal court has held that he does not have such authority.[104] Note, however, that the Wind Directive contemplates a future revocation via presidential memorandum, and thus the Administration could argue that conclusion of the withdrawal is not a revocation but rather the endpoint of a Section 12 withdrawal that was always intended to be time-limited.

The Wind Directive also directed the heads of all "relevant agencies" to refrain from issuing "new or renewed approvals, rights of way, permits, leases, or loans for onshore or offshore wind projects pending the completion of a comprehensive assessment and review of Federal wind leasing and permitting practices."[105] The memorandum directs the Secretary of the Interior to lead the comprehensive assessment effort in consultation with a number of other specified federal agencies.[106]

In May 2025, 17 states brought a legal challenge seeking to enjoin the execution of the Wind Directive.[107] The states argue that "[t]he various actions taken by Agency Defendants to implement the Wind Directive are arbitrary and capricious under the Administrative Procedure Act"; that the directive and the implementing actions are "contrary to and in excess of statutory authority under numerous federal statutes including the Clean Air Act, the Endangered Species Act, and the Outer Continental Shelf Lands Act ... among others"; and that both are beyond any legal authority of the executive branch as granted by Congress.[108]

DOI has also issued a series of orders in 2025 that may hamper or cease development of offshore wind capacity in federal waters, including the following:

- A July 15, 2025, secretarial order issued by DOI's Deputy Chief of Staff—Policy mandates that "all decisions, actions, consultations, and other undertakings ... related to wind and solar energy facilities shall require submission to the Office of the Executive Secretariat and Regulatory Affairs, subsequent review by the Office of the Deputy Secretary, and final review by the Office of the Secretary."[109] This requirement does not apply to other energy facilities.
- An August 1, 2025, secretarial order issued by Secretary of the Interior Doug Burgum directing DOI to "optimize the use of lands under its direct management" during NEPA reviews by considering the surface area footprint of proposed energy projects,[110] an approach likely to hinder permitting of wind and

[104] League of Conservation Voters v. Trump, 363 F. Supp. 3d 1013 (D. Alaska 2019). For further discussion of this litigation and the scope of the president's Section 12 authority, *see* CRS Legal Sidebar LSB11259, *Biden Administration Withdraws Offshore Areas from Oil and Gas Leasing: Can a Withdrawal Be Withdrawn?*, by Adam Vann (2025).

[105] 90 Fed. Reg. at 8364.

[106] *Id.*

[107] Complaint for Declaratory and Injunctive Relief, New York v. Trump, No. 1-25-cv-11221 (D. Mass. May 5, 2025), available at https://ag.ny.gov/sites/default/files/court-filings/state-of-new-york-et-al-v-donald-trump-united-states-department-of-the-interior-complaint-2025.pdf.

[108] *Id.* at 5.

[109] United States Department of the Interior Memorandum: Departmental Review Procedures for Decisions, Actions, Consultations, and Other Undertakings Related to Wind and Solar Energy Facilities (July 15, 2025), available at https://www.doi.gov/media/document/departmental-review-procedures-decisions-actions-consultations-and-other.

[110] United States Department of the Interior Secretarial Order 3438: Managing Federal Energy Resources and Protecting the Environment (August 1, 2025), available at https://www.doi.gov/document-library/secretary-order/so-3438-managing-federal-energy-resources-and-protecting.

solar production facilities on federal lands, as these projects require a greater surface acreage than other forms of energy production do. The order claims that the land management requirements of various federal statutes "give rise to the question on whether the use of Federal lands for any wind and solar projects is consistent with the law, given these projects' encumbrance on other land uses, as well as their disproportionate land use when reasonable project alternatives with higher capacity densities are technically and economically feasible."[111]

- An August 7, 2025, announcement that BOEM and BSEE will undertake a "full review of offshore wind energy regulations," including the Renewable Energy Modernization Rule and financial assurance requirements and decommissioning cost estimates for offshore wind projects, "to ensure alignment with [OCSLA] and America's energy priorities under President Donald J. Trump."[112]
- A series of actions aimed at specific offshore wind projects already in development, including an August 22, 2025, director's order issued by the acting director of BOEM instructing Revolution Wind to "halt all ongoing activities related to the Revolution Wind Project" off the coast of Rhode Island pending review by BOEM to "address concerns related to the protection of national security interests of the United States and prevention of interference with reasonable uses of the exclusive economic zone, the high seas, and the territorial seas"[113] and reported plans to vacate BOEM's recent approval of a U.S. wind project off the coast of Maryland.[114]

Conclusion

Interest in developing offshore wind energy resources has grown in recent years, and a number of projects are in various stages of development. The legal and regulatory framework to manage the issuance of permits for offshore development in the U.S. territorial sea and on the Outer Continental Shelf is still developing. The EPAct of 2005 was an important step in defining that framework, as it amended OCSLA to provide DOI with authority to grant offshore property interests for the purpose of wind energy development (exercised through BOEM). Additional laws that predate the 2005 EPAct enactment continue in force and also appear likely to remain a source of regulation. Further, states have a role under existing federal law in permitting offshore wind energy development, including ensuring that the projects are consistent with their plans for management of coastal zones. The second Trump Administration, however, has withdrawn offshore areas for further wind leasing and has paused further action on offshore wind pending review, leaving the near-term future of wind energy development uncertain.

[111] *Id.*

[112] U.S. Dep't of the Interior, Interior Launches Overhaul of Offshore Wind Rules to Prioritize American Energy Security (Aug. 7, 2025), available at https://www.doi.gov/pressreleases/interior-launches-overhaul-offshore-wind-rules-prioritize-american-energy-security.

[113] U.S. Dep't of the Interior, Bureau of Ocean Energy Management, Director's Order (Aug. 22, 2025), https://www.boem.gov/sites/default/files/documents/renewable-energy/Director%26%23039%3BsOrder-20250822.pdf?VersionId=VO3AWAHsV_kDvT048xf8dG7A.Rsj6HZJ.

[114] Reuters, *Trump administration plans to cancel approval of Maryland offshore wind project* (Aug. 26, 2025), https://www.msn.com/en-us/news/us/trump-administration-plans-to-cancel-approval-of-maryland-offshore-wind-project/ar-AA1LfYlT?ocid=BingNewsSerp.

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