# What Will COVID-19 Mean for the Offshore Wind Industry?

What will COVID-19 mean for the offshore wind industry? An industry not yet spinning on its own.

Epitomized by the roller coaster ride that defined the stock market over the last few weeks, unpredictability has emerged as one of the few certainties of the coronavirus disease 2019 (COVID-19) crisis. Every industry has seen the effects of the pandemic, from hospitality, to travel, and even to the renewable energy sector.

Indeed, even though the US offshore wind industry is not yet fully established, the repercussions of market contraction, stay at home orders, economic stimulus efforts and the precipitous decrease in deal-making activity could have meaningful impacts on the fledgling market.

The nascent offshore wind market has to the potential to be a significant source of global power generation. The 2019 International Energy Agency (IEA) Offshore Wind Outlook estimates over US$1 trillion would be invested in offshore wind projects by 2040, if the current project pipeline and trajectory come to fruition. The IEA's estimates would result in nearly 10 percent of renewable power coming from offshore wind within two decades, with an approximate 420,000 terawatt-hour annual portfolio from offshore wind.

The COVID-19 crisis is already impacting the renewable energy sector. Following the issuance of numerous "stay at home" orders by state governors across the country, wind and solar power-generating facilities have curtailed activity, including shutting down construction and operations and maintenance projects at many sites.

Already, these shutdowns are having ripple effects across the industry, leading to furloughs, layoffs and demobilizations in many cases. Where the employers are not sufficiently capitalized to absorb long-term payroll impacts, even with the recent federal economic stimulus provisions aimed at supporting small businesses under furlough conditions, the implications for renewable energy industry line workers are significant. Furloughs and layoffs will compound the uncertainty regarding health care and related benefits during extended idle periods.

## Renewable Energy Industry Efforts at the Federal Legislative Level

The renewable sector faces challenges at both ends of the spectrum. From an operating perspective, solar and wind farms will struggle to maintain operations and maintenance, given extensive quarantine measures and layoffs across the industry, from technicians to construction and manufacturing workers. To make matters worse, supply chain problems will cause delays in necessary components coming from China and Europe. Further, where COVID-19 has had a longer presence, and, therefore, disruptive effect, *force majeure* and business interruption claims are piling up and further delaying the delivery of necessary materials for operation and construction.

Renewable energy developers similarly face obstacles to project financing, construction and completion. With the delays in supply chains, reductions in the workforce and funding crunches, projects currently in the development pipeline risk missing development milestones and related tax incentives for construction and production.

In an effort to stabilize the renewable sector in the short term, industry organizations, led by the Solar Industry Association (SIA) and the American Wind Energy Association (AWEA), are lobbying Congress to adopt flexibility in allowing existing policies, some set to expire imminently, to remain through the period of economic uncertainty created by the COVID-19 pandemic. Specifically, AWEA seeks the extension safe harbors for two years for projects in the construction pipeline, which would provide access to tax credits for projects under development. AWEA is also advocating for developers to receive direct pay equal to the value of the tax credits to address potential decreases in the availability of tax equity.

While the US offshore wind industry is admittedly in its infancy, the same obstacles troubling the solar and onshore wind sectors will likely create perils for offshore wind projects in the US pipeline.

Offshore wind shares the volatility that would arise without the benefit of tax credits or other tax equity mechanisms, potentially jeopardizing the industry's ability to generate renewable power at a competitive cost. If the COVID-19 crisis is a protracted one, offshore wind will also likely be hampered by global and domestic supply chain delays.

Although the immediate demands for construction and maintenance components is less acute for offshore wind than other renewable sectors, given that no commercial-scale wind farms exist in US water, a lengthy economic shutdown would inevitably have trickle-down effects on the industry when construction on major projects begin.

Moreover, the US has no domestic supply chain to speak of to support offshore wind installations, and challenging economic conditions may slow the growth and development of that pipeline even further.

## Federal Regulatory Implications

**United States Environmental Protection Agency:** While divining regulatory direction can be complicated, the United States Environmental Protection Agency (US EPA) has provided some direction with respect to several keys areas that may serve as bellwether indicators for the renewable energy industry. As an initial matter, US EPA and all other federal agencies and departments received a directive from the Office of Management and Budget to prioritize activities and resources to "slow the transmission of COVID-19, while ensuring our mission critical activities continue."

In compliance with the OMB directive, US EPA Office of Enforcement and Compliance (OECA) on March 26th issued guidance regarding operational adjustments to address the pandemic. In a guidance document entitled COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program, among other measures, indicated that while it will require continued compliance with environmental reporting and operational requirements, it acknowledged the effects that personnel shortages and remote working conditions have had on environmental health & safety capabilities at regulated entities.

Accordingly, US EPA has relaxed some routine reporting deadlines and made provisions for alternate procedures for monitoring and compliance procedures. US EPA has also pooled its own resources to support initiatives to combat COVID-19, including working with manufacturers of disinfectants to expedite review processes and get products to market. This shift in focus will inevitably result in a reordering of staff support for less high-priority initiatives, although it remains to be seen the extent to which those efforts will result in reduced activity in support of offshore wind permitting matters.

On another front, while we are not yet aware of any developments directly related to the renewable energy sector, US EPA has indicated that it plans to waive compliance requirements and deadlines for a number of other industries, including oil refiners, water utilities and sewage plants. EPA has further signaled its intent to postpone, or altogether waive, deadlines previously adopted requiring sources of air emissions to switch to cleaner-burning summer-grade gasoline.

These measures, while not targeted to renewable energy sources, appear to indicate a willingness by US EPA to consider relaxing regulatory requirements on regulated industries where compliance would work a hardship in the context of the COVID-19 pandemic.

**Department of Interior:** The Department of the Interior (DOI), along with its subsidiary agency the Bureau of Ocean Management, is subject to the same OMB directive described above. Up until last week, however, DOI appeared to be advancing its regulatory agenda in a manner as close to "business as usual" as possible. For example, within the last several weeks, DOI moved forward with measures that would ease protections under the Migratory Bird Act, as well as taking steps forward on pending oil and gas development projects. There have not been any direct indications from DOI, or more specifically from BOEM, related to the permitting review and analyses currently underway with respect to offshore windfarm projects. Nonetheless, if DOI's current operating mode is indicative of its broader approach, the tea leaves would not suggest impending additional delays attributable solely to the COVID-19 crisis beyond the delays and challenges facing all agencies with staffing reductions and remote-working conditions.

The Business Network for Offshore Wind, among other renewable trade organizations, have worked to secure additional funding, contemplated in the Administration's 2021 Budget, to secure more regulatory review staff manpower at BOEM to reduce the backlog of offshore wind permitting documents currently pending review. The expectation is that expedited permit review would lead to accelerated project approvals, and ultimately kickstart the construction phase for a number of offshore wind farms currently in the development pipeline.

## Federal Small Business Assistance Measures

There will be much written about the CARES Act, signed into law on March 27, 2020. Indeed, it may have some utility for the offshore wind industry, as well. For US companies working in and around offshore wind in the US that qualify as a small business, a number of economic relief mechanisms may be available to weather the COVID-19 crisis and maintain viability when the offshore wind market regains steam. A number of factors to determine whether a business qualifies as "small" and, therefore, eligible for the relief under the CARES Act are (1) average annual revenue (depending on the industry, annual revenue may not exceed US$1 million or US$30 million); and (2) average annual number of employees (depending on the industry, the maximum number of employees might be 250 or 1500).

Without conducting a deep dive into the CARES Act, which many others will do in the coming days, the following provisions may be of significance to small business working to gain a foothold in the US offshore wind industry:

- The Coronavirus Preparedness and Response Supplemental Appropriations Act ("Phase One" of COVID-19 legislation) removed regulatory hurdles and authorized the Small Business Administration to provide an estimated US$7 billion in low-interest disaster loans to small businesses.
- The Families First Coronavirus Response Act – "Phase Two" requires employers with fewer than 500 employees to provide two weeks' worth of paid sick leave if employees are unable to work due to quarantine or symptoms, are caring for someone affected by COVID-19 symptoms or quarantine, or with a child out of school where schools have closed. Employers will receive tax credits to offset the costs of providing paid leave.
- Coronavirus Aid, Relief, and Economic Security Act of 2020 ("CARES Act")– "Phase Three" provides:
  - Paycheck Protection Program – up to US$10 million per company to provide cash-flow assistance to employers who maintain payroll during the COVID-19 emergency.
    - Provides relief to: small businesses, start-ups, veterans' organizations and nonprofits of 500 employees or fewer (with some limitations); sole proprietorships and independent contractors.
  - Economic Injury Disaster Loan Expansion
  - SBA grants to small business development centers and women's business centers to provide education, training and advising to "cover small business concerns" related to the effects of COVID-19 on individuals, supply chains and communities, including supply chain disruptions, staffing challenges, decreases in gross receipts or customers, or a business closure.

## Doing Deals in the COVID-19 Economy

It comes as no surprise that the COVID-19 crisis has led to a contraction of deal-making activity across the spectrum. Several additional factors render the US offshore wind market potentially more at-risk in the face of a looming recession, including the lack of maturity of the industry as a whole and the uncertainty surrounding the regulatory status of major offshore wind projects. In a "cash is king" economy, the influx of CAPEX costs necessary to build an industry may be chilled to some extent.

That said, for the projects well down the road, and supported by multinational investment sources, the interruption from COVID-19 limitations may not have material effects because they are buffered both by lack of exposure due to immaturity, as well as the benefit of nascency as an insulating factor. This is particularly true given that the primary projects in advanced stages of development continue to be subject to federal, state and local regulatory review. Indeed, Vineyard Wind I, the furthest along the development path, was not projected to receive regulatory approvals until the end of 2020, and that was prior to any potential COVID-19 crisis-related delays.

To the extent contracts are being negotiated, unprecedented concerns are affecting the course of those negotiations. Existing contracts are being reviewed for financial soundness, exculpatory clauses, and *force majeure* provisions. The thought leadership realm is seeing an influx of authorship regarding the extent to which *force majeure* provisions do – or do not – cover pandemics, such as the COVID-19 outbreak, and the extent to which relief may be sought. Already, COVID-19 riders are circulating, either as post-hoc amendments to existing contracts or prospective provisions in the cases where new contracts are being inked. This is an area that will likely generate significant litigation, and could portend significant economic consequences for contracts that are jeopardized by COVID-19 impacts.

Another potential challenge to the offshore wind industry concerns the US supply chain for construction, maintenance and vessel solutions, only now beginning to take shape. The financial uncertainty around the viability of the industry, and the long run up to construction of the first commercial project in the US, has led to a bit of a "chicken or egg" approach to investments in the US supply chain. Compounding the calculus, it is hardly news that supply chains across the globe are strained and shipments are lagging significantly, which could have impacts for US offshore wind farm construction, depending on the length and severity of the supply chain squeeze.

## Could the COVID-19 Crisis Create Opportunity for a New Industry?

Despite the onslaught of negativity in the news cycles round the clock, the impacts of the COVID-19 crisis may not signal dire consequences for the US offshore wind industry. Indeed, the infancy of the industry could prove to be its best defense. Without an extensive network of commercial wind farms in operation, the need for a robust supply chain is less paramount than for existing renewable energy projects already in operation. Regulatory delays could be seen as a cautionary factor, but they could also provide the cushion necessary for the US offshore wind industry to absorb the impacts of the COVID-19 crisis, without suffering the economic impacts that a more mature operating industry will experience.

The US offshore wind industry has been growing and developing over the last decade, despite the regulatory, economic, supply chain, training, vessel solution and workforce challenges that are well-known to those in the space. Indeed, the US offshore wind market has been operating in "building" mode for some time, laying the necessary infrastructure to scale up the industry once the regulatory logjam is broken and construction begins in earnest.

Further, the creation of an entirely new industry provides an infusion of capital and jobs for skilled workers, at a time when the US economy will be searching for growth markets and employment opportunities.

It also lays the foundation for the case to ramp up and modernize US shipyards for vessel new-builds to support construction and maintenance activity, and a platform to manufacture products new to the US market, such as subsea power cables and wind turbine component parts. Perhaps the "can do" approach that foreign and domestic companies in the offshore wind market have displayed to date will provide the nimbleness and creativity that will allow the US offshore wind market to emerge from the crisis without the drag that established, infrastructure-heavy industries will not be able to avoid.

Moreover, the offshore wind industry will not be saddled with the scale of economic losses that more mature industries will have to grapple with when emerging from the crisis. With this foundation, and support from the federal government through tax equity mechanisms and economic stimulus funds, the offshore wind industry presents a unique economic recovery and growth opportunity.

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## Contact

**Emily Huggins Jones**
Partner, Cleveland
T +1 216 479 8509
E emily.hugginsjones@squirepb.com







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