

Wind Farms And The Law Of The Sea

Law360, New York (February 15, 2011) -- Ever-proliferating plans to install offshore wind farms on the U.S. continental shelf could prove the final incentive to ratify a treaty that has been adrift since 1982, when it was proposed by the U.N. Convention on the Law of the Sea.

With several East Coast states and the federal government leading the way, and the private sector in aggressive pursuit, the prospects that offshore wind turbines will play a part in U.S. energy production are better than ever before. Proof rests in examples of recent projects:

- In the first week of February, the U.S. Department of the Interior announced plans that could lead to the issuance of leases for four new East Coast wind farm's in 2011 as part of a streamlined approval process and the U.S. Department of Energy announced that it intends to spend more than \$50 million over the next five years to speed development of offshore wind farms.
- Google's Atlantic Wind Connection Project (AWC) involves building an offshore high voltage direct current (HVDC) undersea cable transmission backbone to connect up to 6,000 megawatts of offshore wind generation along several eastern seaboard states. The AWC backbone transmission cable will ultimately power 1.9 million homes across Virginia, New York and New Jersey. Virginia and North Carolina have begun actively exploring offshore wind opportunities.
- The Interior Department's Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE) had rapid response when it sought proposals to develop wind energy projects off Maryland's coast. Eight companies quickly expressed interest; Fishermen's Energy was promptly selected to build 130 turbines in a 206-square-mile area of the Atlantic.
- Deepwater Wind recently revised plans submitted to BOEMRE, dramatically expanding its original plan for a 100 turbine, 350 MW wind farm. Deepwater now seeks BOEMRE approval of a 200 turbine, 1,000 MW wind farm in Rhode Island Sound. The plan includes a transmission line that would distribute electricity produced by the project to distribution centers between Massachusetts and New York.
- Secretary of the Interior Ken Salazar recently announced a revised permitting process that eliminates regulatory redundancies and "needless red tape." Dubbed "Smart from the Start", the revised permitting process began with BOEMRE's immediate identification of several designated Wind Energy Areas, is intended to shorten the permitting process by two to five years.

- In January 2011, The U.S. Environmental Protection Agency approved the Cape Wind Project just 24 hours after the U.S. Army Corps of Engineers issued Cape Wind a permit under the Rivers and Harbors Act.

This sea change highlights significant wind energy harbinger of large projects located offshore, beyond U.S. territorial waters. As the wind farms become larger, with more turbines, they will, of course, occupy larger areas of the sea, and if these projects are located beyond the territorial waters of the U.S., they will occupy space in the international waters above the continental shelf.

But since 1982, the U.S. has refused to ratify a treaty that would protect the country's investment in wind energy, align the U.S. with current international law of the sea and end the long-running and sometimes stormy struggle to settle who owns the sea and the land below it.

For more than a century, international law, strongly supported by the U.S. and other major trading nations, stated all nations were entitled to freedom of the sea once outside the three-mile limit of territorial waters. Starting in 1940, however, skirmishes over who owns what part of the ocean prompted intervention by the U.N.

In 1958, the U.N. developed the Convention on the Continental Shelf that recognized the rights of coastal states to explore and develop natural resources. In 1973, the U.N. Convention on the Law of the Sea took on the ambitious task of outlining a comprehensive law of the sea that speaks to a wide range of issues.

The most challenging task was establishing recognition of the right of coastal states in an Exclusive Economic Zone (EEZ) beyond the territorial sea. An EEZ extends 200 miles from the coastline and beyond when the continental shelf extends beyond 200 miles.

It took nine years and the participation of 160 nations, but in 1982 the convention presented the Law of the Sea Treaty. The treaty covers myriad issues, such as navigational rights of ships and aircraft, limits on the extension of national sovereignty over the oceans, environmental protection of the oceans, conservation of living resources and mining rights and the EEZs that play a pivotal role in the U.S.' wind-energy program.

Although sovereign rights with respect to the continental shelf remained as set forth in the 1958 convention, the EEZ section of the Law of the Seas recognizes a coastal state's right to sovereignty over the waters and air space above the continental shelf in EEZs and includes among other rights, the right to develop and exploit wind energy in EEZs.

The U.S. signed the treaty, but has never ratified it. Instead, the U.S. has relied on a patchwork of legislation and executive acts to define the country's territorial waters that does not protect the country's maritime interests and requires meticulous reconciliation of statutory rights.

In 1976, the U.S. Congress passed the Magnuson Fishery Conservation and Management Act, which was the first unilateral declaration of exclusive rights over a 200-mile zone by a major coastal state.

Subsequently, President Ronald Reagan expanded upon the Magnuson Act's declaration of jurisdiction and co-opted aspects of the Law of the Sea Treaty even while refusing to sign it.

In 1988, President Reagan, spurred on by national security concerns that Soviet Union vessels were spying on the U.S., issued Executive Proclamation 5923, which officially increased the outer limit of U.S. territorial waters from three miles to 12 miles. U.S. domestic law, however, largely retained the three-mile limit. Determining whether a statute's application is limited to the three-mile limit or extends to the 12-mile limit requires a meticulous review.

The U.N. has tried to ameliorate the U.S.' principal problem with the treaty, which stemmed from a section dealing with deep sea mining. The U.N. modified the treaty in 1994. Seventy-one nations, including the U.S., approved the treaty. The U.S. signed the convention and recognizes it as general international law. The U.S. Senate, however, has not ratified the treaty, despite a series of bipartisan presidential endorsements.

The Clinton, Bush and Obama administrations have all endorsed the treaty. President Bill Clinton sent the treaty to the Senate in 1994 for advice and consent. The Senate did not act on the treaty. Thirteen years later, President George W. Bush urged the Senate to approve the treaty, stating in part that the treaty "will secure U.S. sovereign rights over extensive marine areas ... and it will give the U.S. a seat at the table when rights that are vital to our interest are debated and interpreted." The Senate Foreign Relations Committee voted 17-4 to send the treaty to the full Senate for a vote. That did not happen.

Secretary of State Hillary Clinton in 2009 said ratifying the Law of the Sea would be one of her priorities. As of early 2011, however, the Senate has not consented to the convention and thus it has not been ratified by the U.S.

In a more puzzling development, the U.S. has considerable domestic legislation that conforms to the unratified treaty. The U.S. is in the awkward position of selecting specifically selected rights afforded by the treaty while refusing to accept some of the obligations the treaty imposes.

This stance is at odds with the significant progress made over the past 12 months by proponents of offshore wind projects on the U.S. continental shelf and stands to block additional progress.

Perhaps ratification relies on a clear understanding of the billions of dollars that will be invested in offshore wind farms. Many of these wind farms, which will provide a permanent, direct source of energy to some of the most densely populated areas in the U.S., will be built and maintained beyond U.S. territorial waters, and on the surface of international waters.

The U.S. cannot continue to rely solely on its own unilateral declaration of international law to justify the development of wind energy on its continental shelf. The Senate is risking an opportunity to protect rights and investments which are vital to our interests by continuing to refuse to ratify a treaty that establishes and recognizes both EEZs and the rights of coastal nations to develop wind energy in their EEZs.

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