

Offshore Wind Litigation With Daniel Pope, Ty Johnson and Taylor Stuart

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On this episode of the Bracewell Environmental Law Monitor, host [Daniel Pope](#) talks with [Tyler Johnson](#) and [Taylor Stuart](#) about offshore wind litigation over the energy transition, and more specifically over litigation regarding some of the challenges to new projects in the offshore wind space which are under development off the East Coast.

Tyler is senior counsel in Bracewell's Seattle office and has a broad background advising international energy clients across a wide array of regulatory issues. Taylor is an associate in the environment, lands and resources group in Washington, DC.

Can you give us a snapshot of what's going on today in the offshore wind industry?

A better way to phrase it is what is not going on in offshore wind because there's so much happening right now. Since Biden's inauguration, the federal government has been pushing hard to push offshore wind forward and make up for some lost time during the Trump administration. There's been a lot of leasing efforts on the part of the Bureau of Ocean Energy Management (BOEM) which is the sub-agency within the Department of the Interior that's tasked with leasing parcels of the outer continental shelf to developers for both oil and gas and renewable energy development.

In the past two years, BOEM has really been pushing forward on its East Coast leasing. Right now there are 25 active leases off the East Coast, and this includes the most recent New York Bight leases and the Carolina Long Bay leases that were recently auctioned off. But BOEM is also pushing forward on

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other coasts as well. They're planning lease auctions offshore California, both in Northern and Central California, and that will likely happen later this year.

Can you give an overview on what the prices for these leases go for, or what's the trend line on these leases?

They have been ranging over the years. In the very early stages of offshore wind development, they were as low as \$5 million in 2016. They popped up to around \$40 million. They're really getting up there and people were really shocked at those numbers. Over time, they went up to \$100 million or so off the coast of Massachusetts, and then in this most recent New York Bight auction, they jumped up as high as we've seen them before, anywhere from \$200 million to the highest lease area went for \$1.1 billion, and collectively that New York Bight lease auction garnered \$4.37 billion that went to the Treasury. A huge amount of money that's going toward just these leases alone, and that's only the right to submit plans for the project development. That's not any right to actually develop the project or anything like that. It's just to submit plans to the federal government to eventually develop the project years later.

What precedent is out there for offshore wind?

One surrounds the ill-fated Cape Wind project, which was proposed off the coast of Cape Cod in the sound between Martha's Vineyard and Nantucket. This project garnered a lot of media attention and ultimately, of course, was never constructed. It was mired in litigation, various suits filed at the district court and ultimately the appeal to the DC circuit. The litigation involved a host of violations of National Environmental Policy Act (NEPA) and the Outer Continental Shelf Lands Act (OCSLA). The ultimate outcome here was that the DC circuits ultimately criticized how BOEM complied with NEPA, basically deferring on geophysical and geotechnical surveys.

What can you tell us about the challenges that are pending in court today?

There are about half a dozen cases that are pending today, and most of them are from fishing industry, resident groups, environmental NGOs, or in one case, an onshore solar developer. That's a little bit of an outlier. But those are the typical groups that we've seen in the past and that we're seeing now, and we're seeing a few cases that are challenging the project at different stages. The Fisheries Survival Fund case in the DC circuit was challenging the lease issuance. But right now, we're seeing cases that are challenging the first COP approvals that we've seen from BOEM.

What are some of the significant challenges for the offshore wind industry itself? Is this garden variety administrative litigation, or is there something else going on that the industry is really going to have to grapple with?

Some of the litigation is focused on trying to invalidate BOEM's leasing process, and its stage development process for offshore wind projects. One of

the fundamental concerns that we hear from is that they don't feel like they got an adequate say in where an offshore wind project is located. And so, one project or one piece of litigation, the Save Long Beach Island case, which is a group based in New Jersey, looking to challenge BOEM's offshore wind leasing program, that regulatory paradigm that was established in 2009. If successful, there could be ramifications to the agency, and the entirety of its leasing process. Many of those same issues were successfully resolved in BOEM's favor, regarding Equinor's lease for the Empire Wind project, that DC circuit case that was mentioned, and the decision was issued just last year. So, there's some helpful precedent in defending the leasing program there. But nonetheless, I think we'll continue to see challenges to that leasing process.

Want to learn more? Contact [Daniel Pope](#) with your questions.

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