



HARVARD  
LAW SCHOOL  

---

ENVIRONMENTAL  
& ENERGY  
LAW PROGRAM

LOWRY YANKWICH

# The Implications of BOEM's Decision on the South Fork Wind Farm

| November 8, 2021



# Introduction

The Bureau of Ocean Energy Management (BOEM) is currently reviewing the construction and operations plan (COP) for the South Fork Wind Farm and South Fork Export Cable project (SFW), a prospective offshore wind development that could deliver an estimated 130 megawatts (MW) of electric power to ratepayers on Long Island, in New York. If approved, SFW will become the second large-scale offshore wind farm to be approved in federal waters, following the approval of Vineyard Wind, off the coast of Massachusetts, in May, 2021.

Approval of the project would be significant for two reasons. First, it would be a milestone for the growing offshore wind industry in the United States, and mark progress toward newly-set national renewable energy goals. Second, and perhaps more importantly, it may indicate how BOEM will address the concerns of the fishing industry when considering alternatives, mitigation measures, and cumulative impacts under the [National Environmental Policy Act \(NEPA\)](#).

# Background

The South Fork Wind Farm would be in federal waters, 19 miles southeast of Block Island, Rhode Island, and 35 miles east of Montauk Point, on Long Island. Pursuant to a power purchase agreement made with the Long Island Power Authority in 2017, it would deliver power to residents of Long Island. The project is expected to include up to 15 wind turbines generating approximately 130 MW of electric power, enough to offset the electricity consumption of

72,000 homes.<sup>1</sup> SFW would deliver over four times more power than the Block Island Wind Farm, the country's first offshore wind farm, but less than one-sixth the power of Vineyard Wind.

The proposed siting of SFW overlaps with Cox Ledge, an “area of concern” for fishery managers that provides habitat for several commercially and recreationally valuable species, including Atlantic cod.<sup>2</sup> In 2010, when BOEM was first devising the Rhode Island-Massachusetts Wind Energy Area (WEA) in which SFW is located, it included all of Cox Ledge in the area. However, in response to stakeholder concerns, and following a lengthy review process, BOEM identified and removed portions of Cox Ledge deemed “high-value” from the WEA. According to BOEM, these excluded areas accounted for approximately 22% of the revenue generated by all fisheries in the WEA. For scallops and monkfish in particular, the excluded areas were as much as 50% more valuable by unit area than the rest of the WEA.<sup>3</sup> Nevertheless, concerns over the impacts of offshore development generally and SFW specifically continue to be a major point of discussion, and BOEM is currently funding a three-year study of the movement of Atlantic cod, black sea bass, and other species in southern New England, including the SFW lease area.

---

1 Maximum specifications include up to 15 turbines generating total of 180 MW.

2 See Final Environmental Impact Statement, 3-4. Available at <https://www.boem.gov/renewable-energy/state-activities/south-fork>.

3 See Final Environmental Impact Statement, 3-94.



# Milestone for a Growing Industry

If approved, SFW would be a milestone for offshore wind development in the United States. On April 22, the Biden administration announced an ambitious new target: reducing greenhouse gas emissions 50% over 2005 levels by 2030. To get there, the administration has set a goal of generating 100% carbon-free electricity by 2035,<sup>4</sup> pledging to bring [30 GW of new offshore wind electricity online by 2030](#). The State of New York, which SFW would serve exclusively, has set its own goals of sourcing 50% of its energy from renewable sources by 2030 and developing 9 GW of offshore wind electricity by 2035.<sup>5</sup> The approval and development of the SFW project would be progress toward these national and state-level climate goals.

SFW could be the first federal offshore wind project to produce power. BOEM's record of decision on SFW's COP is expected by January 2022, and SFW's developers have indicated that they plan to start construction as soon as they receive approval. They anticipate the project being operational as early as

2023.<sup>6</sup> Given this timeline, it's possible that SFW would be the first operational large-scale wind farm in federal waters, even though Vineyard Wind was approved a few months earlier. Some have raised concerns that BOEM and wind developers are moving too fast. The consequences of BOEM's speed will be discussed later in the piece.

Approval of SFW would also signal the start of a new industry, with its own domestic work force. Unions have largely supported the SFW project, which is anticipated to create tens of thousands of jobs during construction, and just over 4,300 jobs when it's operating.<sup>7</sup> Wind developers have promised to invest in an "Offshore Wind Training Center" and to hire unionized workers as part of a cooperative agreement with the Building and Construction Trades Council of Nassau and Suffolk.<sup>8</sup> An influx of workers joining the industry could increase momentum for further development.

SFW has drawn interest because of its precedent-setting potential as one of the first offshore wind projects to make it to the final permitting stages, and the number and variety of comments BOEM received on the project's draft EIS reflect this. State agencies in Massachusetts and Virginia have commented, as have national environmental groups, the Mashantucket Pequot Tribal Nation, fishery management councils, and members of fishing

---

4 See Executive Order, "Tackling the Climate Crisis," <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/>. "FACT SHEET: President Biden Sets 2030 Greenhouse Gas Pollution Reduction Target Aimed at Creating Good-Paying Union Jobs and Securing U.S. Leadership on Clean Energy Technologies," April 22, 2021, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/22/fact-sheet-president-biden-sets-2030-greenhouse-gas-pollution-reduction-target-aimed-at-creating-good-paying-union-jobs-and-securing-u-s-leadership-on-clean-energy-technologies/>.

5 <https://www.nysersda.ny.gov/all-programs/programs/offshore-wind>.

---

6 <https://southforkwind.com/about-south-fork-wind>.

7 See Final Environmental Impact Statement, 3-161.

8 See, e.g. <https://www.climatejobsny.org/news/2021/2/8/labor-action-alert-for-good-union-jobs>.



communities across the East Coast, union members, and others.<sup>9</sup> If SFW is approved by January 2022, then it will have progressed from Draft Environmental Impact Statement to COP approval in a year, giving credibility to President Biden’s goal of approving at least 16 COPs, representing 19 GW of new energy, by 2025.<sup>10</sup>

## Potential Legal Challenges and Implications for Future Wind Projects

The commercial fishing industry has consistently voiced caution regarding offshore wind development, which is one reason why SFW, with its location overlapping Cox Ledge, has garnered so much attention. An issue to watch as BOEM considers what conditions should be included in any potential approval is how it will respond to the suggestion by the Responsible Offshore Development Association (RODA), a fishing community advocacy organization, to require a four nautical-mile-wide transit lane between turbines for vessel passage through the wind farm. Comments from the fishing community influenced the decision to space turbines in the Vineyard Wind project and SFW one nautical-mile

apart; the transit lane would thus represent a further concession to the fishing industry, which fears that one nautical mile may not provide enough room to fish safely with certain gear, particularly in inclement weather. RODA’s transit lane proposal includes a broader vision of creating transit lanes throughout the RI-MA WEA; thus, adoption of the transit lane alternative for SFW could set a new precedent for other projects in the WEA.

For those concerned about conserving fish habitat, another decision to watch is BOEM’s consideration of the “Fisheries Habitat Impact Minimization Alternative.” This alternative would maintain the same design parameters as the project proposal; however, it would allow BOEM to remove up to four turbines from the plan to reduce impacts to complex habitat. The existing plan already includes provision for “micro-siting,” in which the exact location of turbines is altered slightly where necessary to account for sensitive habitat, but the “habitat” alternative would go a step further by removing some turbines altogether. As with the “transit” alternative, BOEM’s attention to the “habitat” alternative will provide an indication of how it might address similar siting around fishing grounds for future projects.

If SFW is approved will RODA, or others, challenge BOEM’s decision in court? In September, 2021, following the approval of Vineyard Wind, RODA filed a petition in the First Circuit Court of Appeals against the Departments of the Interior, Commerce, and the Army, alleging violations of the Outer Continental Shelf Lands Act, [National Environmental Policy Act \(NEPA\)](#), Clean Water Act, Administrative Procedure Act, Endangered Species Act, Marine Mammal

---

<sup>9</sup> Note that Vineyard Wind received more than 30,000 comments.

<sup>10</sup> <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/29/fact-sheet-biden-administration-jumpstarts-offshore-wind-energy-projects-to-create-jobs/>.



Protection Act, and Merchant Marine Act of 1920<sup>11</sup>. On October 19, 2021, while the petition in the First Circuit was still pending, RODA issued a 60-day “notice of intent to sue” BOEM, the Army Corps, and other agencies in federal district court.<sup>12</sup>

The notice raises numerous prospective legal arguments. Under the Outer Continental Lands Act, the notice criticizes the government for adopting a policy that affects the “right of navigation and fishing therein,” offering leasing rights at too low a price, failing to ensure that activities will be carried out safely, failing to protect the environment, and inadvertently limiting “reasonable uses” of federal waters. The notice also alleges numerous violations of the Clean Water Act, and failure to protect right whales under the Endangered Species Act. Without a more extensive legal analysis, and without briefing from RODA, it is difficult to know which, if any, of these legal arguments will prove successful.

Wind development zeal puts pressure on NEPA, the statute governing environmental review of major government decisions like wind development projects. NEPA is meant to require government decision-makers to take a “hard look” at a proposed action prior to approving it.<sup>13</sup> Moreover, NEPA review should not presuppose approval. The Biden administration’s promises to accelerate the

pace of offshore wind deployment could place the review of future proposals in tension with NEPA’s requirements. As Doug Christel, a fisheries policy analyst at the National Oceanographic and Atmospheric Association (NOAA) said in an interview, the speed at which government agencies are now expected to work may be unsustainable, absent hiring of additional staff or other organizational changes. A case considering the sufficiency of the SFW NEPA analysis would set expectations for future wind project environmental assessments.

If SFW is approved and construction begins early in 2022, the project will demonstrate some of the impacts of offshore wind projects on fish habitat and fishing. The construction phase is anticipated to be the most disruptive for commercial fishing, because it will involve the greatest amount of additional boat traffic in the area. Fishers have expressed concern that, in spite of a promise by the U.S. Coast Guard (USCG) not to create an exclusionary zone around wind developments barring fishing vessels from entry, they may become functionally, if not formally, excluded from certain fishing grounds. They have also expressed concern that the USCG might revoke its promise in response to accidents that occur. Fishers also worry that they will not be adequately compensated for damage to their vessels and gear that results from accidents and snags in the area.

SFW’s developers have agreed to create a claims program for gear damage; however, it remains to be seen how generously the program will be administered in practice. Additionally, fishers assert that such claims programs should not be implemented on a project level, but instead should

---

11 <https://www.mytimes.com/2021/09/13/roda-appeals-vineyard-wind-1-decision/>.

12 <https://rodafisheries.org/wp-content/uploads/2021/10/60-day-Notice-of-Intent-to-Sue-10-19-2021.pdf>.

13 *Baltimore Gas and Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87 (1983).



be designed at a system level. BOEM's treatment of this mitigation measure will offer insight into how compensation for damage to fishing vessels and gear might be handled going forward.

## Conclusion

Projects like Vineyard Wind and SFW, by virtue of their pioneer status, will set the tone for future wind development. Change generates new questions. Will development be seen as a form of conversion, replacing one industry with another, or one habitat with another? When priorities conflict, what will take precedence? And will courts accept BOEM's full-speed-ahead approach? BOEM's decision regarding SFW will offer new information, if not complete answers.

See EELP's previous pieces on offshore wind development on our [Legal Dilemmas Rising with the Seas](#) page.