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Interior Proposes First Renewable Energy Lease Sale in Federal Waters Offshore California

The proposal would auction off almost 375,000 acres of the Outer Continental Shelf offshore California for wind energy development.

Key Points:

- The two areas proposed for leasing have the potential to provide more than 4.5 gigawatts of energy, which could power more than 1.5 million homes.
- Offshore wind development in federal waters off the California coast will be critical to meeting the Biden-Harris Administration's goal of deploying 30 gigawatts of offshore wind energy by 2030.
- Comments on the proposal and qualification materials are due by August 1, 2022.

On May 31, 2022, the Bureau of Ocean Energy Management (BOEM) published a [Proposed Sale Notice](#) (PSN) for a pair of renewable energy lease sales offshore California.¹ The PSN — which is the third offshore wind auction under the Biden-Harris Administration — represents a major inflection point in the complex and sometimes contentious process to bring wind power to the Outer Continental Shelf (OCS) offshore California. The timing of the PSN also dovetails with the California Energy Commission's May 2022 announcement of the nation's most ambitious target for offshore wind development: the state is seeking to construct 3 gigawatts of offshore wind capacity by 2030, with the potential for 10 to 15 gigawatts by 2045.²

The PSN kicks off a 60-day public comment period ending on August 1, 2022, providing the last opportunity for interested parties to shape the California lease sales. Prospective bidders who are not already qualified to take part in the lease sale must submit their materials during this comment period in order to qualify to participate. The lease sales are expected to be held later this year.

This Client Alert discusses four key aspects of the proposed California lease sales that potential bidders will need to consider: (i) BOEM's novel decision to hold simultaneous lease sales for the first time and the potential future restrictions in the lease areas; (ii) new twists on BOEM's use of multi-factor bidding in the California sales and how bidders may qualify for BOEM's proposed bidding credits; (iii) proposed revisions to BOEM's "affiliated entity" disclosure standards; and (iv) BOEM's proposed lease stipulations for the California lease areas, which will significantly shape how development progresses offshore California.

History of California Leasing Proposals

After years of outreach and stakeholder discussions, BOEM began the leasing process for the OCS offshore California in October 2018 by publishing a “call” for information and nominations for three areas: the Humboldt Call Area offshore the North Coast, and the Morro Bay and Diablo Canyon Call Areas offshore the Central Coast. The leasing process stalled when the US Department of Defense (DOD) raised concerns that offshore wind development in the Morro Bay and Diablo Canyon Call Areas was incompatible with its mission requirements in those areas.

A major breakthrough occurred in May 2021, when the White House, the Department of the Interior (Interior), DOD, and the State of California reached an agreement to advance offshore wind leasing in an area known as the Morro Bay 399 Area. BOEM later issued a call for two extensions to the Morro Bay 399 Area in July 2021, and subsequently announced its identification of two Wind Energy Areas (WEAs) within the Call Areas — the Humboldt WEA and the Morro Bay WEA.

In May 2022, BOEM completed the National Environmental Policy Act (NEPA) processes to assess the potential environmental impacts from site characterization and site assessment activities associated with issuing wind energy leases in the Humboldt WEA. BOEM intends to complete the NEPA process for the Morro Bay WEA before it decides whether to proceed with a Final Sale Notice (FSN) for the California lease sales.

Under the PSN, BOEM is proposing to offer leases in five separate lease areas within the Humboldt and Morro Bay WEAs, as listed in the table below:

Lease Area	Acres
Humboldt WEA	
Humboldt NE	63,338
Humboldt SW	39,031
Morro Bay WEA	
Morro Bay NW	80,062
Morro Bay C	80,418
Morro Bay E	80,418
Total	373,268

Simultaneous Auctions

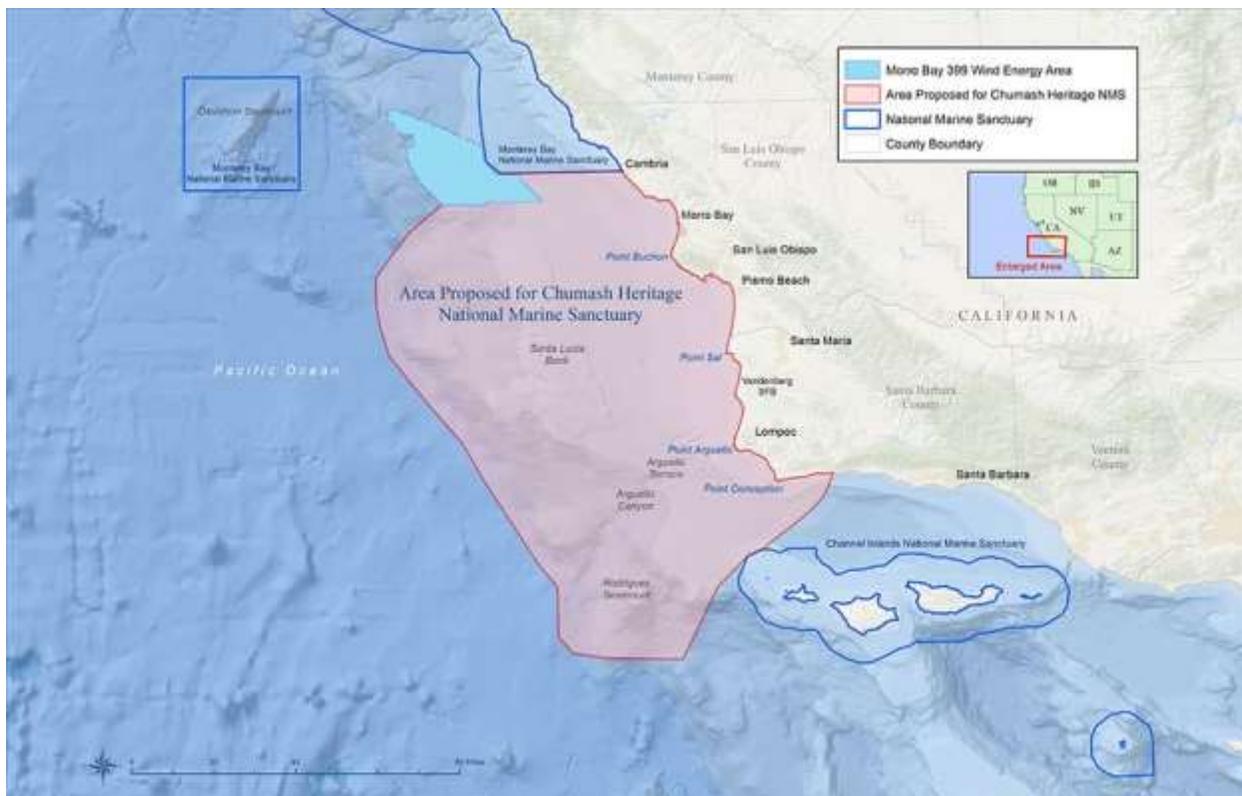
Under the PSN, BOEM is proposing to offer the two WEAs in two separate regional auctions that would run simultaneously — a North Coast auction and a Central Coast auction — where each qualified entity could bid for and ultimately acquire one lease area per region, for a total of two lease areas. BOEM is

also seeking comments on a proposed alternative in which all the lease areas would be offered in a single auction. In this alternative proposal, each qualified entity would be permitted only to bid on one lease area in total at a time, and ultimately win at most one lease area in total.

Possible Future Lease Area Restrictions

The PSN states that there are three potential future restrictions within the two WEAs that qualified entities should be aware of when determining their bids. First, the PSN recognizes the potential for the designation of the Chumash Heritage National Marine Sanctuary, which is adjacent to the Morro Bay WEA. The PSN states that “[p]otential bidders should note that future designation of a National Marine Sanctuary adjacent to a Lease Area may have implications for development of OCS leases for commercial wind energy.” As proposed, the 7,670 square-mile Chumash Heritage National Marine Sanctuary would “protect the region’s important marine ecosystem, maritime heritage resources, and cultural values of Indigenous communities.”³ These protections could include prohibitions on certain activities within the Marine Sanctuary area, and if established, may prevent development of offshore wind or transmission as BOEM does not have authority under the Outer Continental Shelf Lands Act (OCSLA) to issue leases, right-of-way grants, or right-of-use and easement grants within any unit of the National Marine Sanctuary System.⁴

Map of proposed Chumash Heritage National Marine Sanctuary



Second, the PSN notes that the US Coast Guard (USCG) is conducting a Port Access Route Study on the Pacific Coast from Washington to California to evaluate safe access routes for the movement of vessel traffic proceeding to or from ports along the western seaboard. This study aims to determine whether a Shipping Safety Fairway and/or modified routing measures are needed. The PSN states that BOEM is coordinating closely with the USCG to address potential maritime impacts from any future

offshore wind development in the lease areas. However, prospective bidders should be aware that BOEM may require additional navigational mitigation measures in a particular lessee's construction and operations plan (COP) once the lessee's site-specific navigational safety risk assessment is available, and/or through the environmental review process, in order to accommodate these access routes.

Third, the PSN describes the DOD's previous finding that its mission activities within the Morro Bay Call Area are incompatible with offshore wind development. However, as noted above, in May 2021, the DOD, Interior, and California announced an agreement finding that the proposed lease areas in the Morro Bay WEA are suitable for development, with the inclusion of site-specific lease and permitting stipulations. Prospective bidders should know that consultation with the DOD will likely be needed to develop these stipulations during the project review stage.

Use of Multi-Factor Bidding

As permitted by its offshore renewable energy leasing regulations, BOEM is proposing to structure the upcoming California lease sales as multiple-factor bidding auctions, using a combination of a monetary factor and up to two non-monetary factors. Unlike its first auction in the New York Bight, which relied on an ascending bid format, the Biden-Harris Administration also used a multi-factor auction in the Carolina Long Bay lease sale held in May 2022. This transition to a multi-factor bidding in the Carolinas and now in California is an indication of the administration using its regulatory tools to advance key policy initiatives as part of this program, including to promote supply chain development and environmental justice goals. In California, BOEM is proposing a credit for potential bidders who make financial commitments to support workforce training programs for the offshore wind industry and/or development of a domestic supply chain for the industry. BOEM is also proposing a separate credit for committing to establish a community benefit agreement (CBA) with a community or select stakeholder group whose use of the proposed lease areas — or whose use of resources harvested from the lease area — would be directly impacted by offshore wind development. While BOEM previously offered a credit for workforce training and domestic supply chain development commitments in the Carolina Long Bay lease sale, the CBA credit is new concept in BOEM's multi-factor auctions.

In a multi-factor auction, the bid made by each bidder in a particular round is the sum of both a cash amount and a non-monetary factor, here composed of bidding credits. The credits proposed in the PSN will be critical for bidders seeking to participate in the California lease sales, and the agency is soliciting feedback on both proposed credits. Notably, in soliciting comments on the proposed credits, BOEM is specifically seeking feedback on whether the credit in question is consistent with the agency's statutory mandate under OCSLA to ensure that leasing provide a "fair return to the United States."

To obtain one or more bidding credits, a potential bidder must submit a conceptual strategy along with its [Bidder's Financial Form](#) (BFF) by a date that will be identified in the FSN, explaining how the bidder qualifies for the credits and describing the verifiable actions the bidder would take to fulfill its credit commitments and that would allow BOEM to confirm compliance with the commitments. If a bidder wishes to qualify for a credit in both California leasing regions, the bidder need only submit a single conceptual strategy. A BOEM panel will then review each conceptual strategy and notify the bidder if it qualifies for the credit. BOEM is encouraging prospective bidders to review its proposed [BFF Addendum](#) when attempting to qualify for one or more bidding credits. Bidders are eligible to qualify for one or both of the bidding credits described below, and the commitment for the bidding credit would be included in a lease addendum to bind the lessee and all future assignees.

The proposed workforce training / supply chain development credit would be worth 20% of the bidder's cash bid; while a bidder could commit to both workforce training and supply chain development in its

conceptual strategy, the total amount of the credit would still be 20%. BOEM's proposed leases and BFF Addendum describe the types of programs or initiatives to which a bidder may contribute financially in order to qualify for this credit, and include contributions toward maritime training necessary for the crewing of vessels for the construction, servicing, and/or decommissioning of wind energy projects in the US, contributions toward training workers in skills or techniques necessary to manufacture or assemble offshore wind components, subcomponents, or subassemblies, and development of Jones Act-compliant vessels, among many other categories of contributions. BOEM is also seeking input on activities that should qualify for the bidding credit to support a floating wind supply chain. As proposed, contributions must equal at least 80% of the bidding credit cash value. BOEM is proposing to allow a successful bidder to defer its payments for the workforce training / supply chain credit, with 25% of the contribution due when the then-lessee submits its first COP and the remainder due before the lessee submits its first Facility Design Report (FDR).

The proposed CBA credit would be worth 2.5% of a bidder's cash bid. BOEM intends this credit to mitigate potential impacts to the community or stakeholder groups with interests in the proposed lease areas, and is focused particularly on assisting the fishing industry in adapting to offshore wind development. As proposed, a lessee could enter a CBA with a single or multiple counterparties, and may enter into more than one CBA. If a bidder has an existing CBA that complies with BOEM's requirements, it must note that on the BFF, or else explain that it is committing to enter into a new CBA. Unlike the workforce training / supply chain credit, bidders seeking the CBA credit do not need to make an explicit financial commitment to qualify for the credit, but will instead retain flexibility to determine the optimal benefits on which the parties to the CBA can agree. However, the then-lessee would need to submit documentation showing that it has met its CBA commitment no later than submission of its first FDR. Any commitments would also be included in a lease addendum.

Among other questions related to the proposed bidding credits, BOEM is soliciting input on whether it has the authority under OCSLA to pursue an additional bidding credit for a CBA addressing impacts attributable to potential offshore wind development "not covered" under the lease area use bidding credit discussed above, but instead involving, in BOEM's words, "a more general CBA." BOEM would determine bidder eligibility for bid credits in each auction prior to the mock auction.

"Affiliated Entity" Standards

A new wrinkle in the California PSN is BOEM's decision to seek comment on its expanded definition of "affiliated entities" who may not compete against each other in a single auction. This limitation is intended to ensure that a single entity bids on and wins a single lease, preventing anti-competitive actions and coordination between related entities. Affiliated entities are prohibited from bidding against one another therefore this issue requires close attention, particularly as the industry is seeing an increasing number of joint ventures and consortia participating in auctions. BOEM is now considering expanding the definition of affiliated entities to encompass companies that have entered into agreements related to disposition of leases acquired in the auction.

BOEM requires eligible bidders to note on their BFF any other eligible bidders with whom they are affiliated. In the proposed California auctions, as in previous offshore wind lease sales, BOEM considers two entities to be affiliated if: (a) one entity (or its parent or subsidiary) has or retains a right, title, or interest in the other entity (or its parent or subsidiary), including the ability to control or direct actions with respect to such entity, either directly or indirectly, individually or through any other party; or (b) the entities are both direct or indirect subsidiaries of the same parent company. This is consistent with the definition of "affiliate" at 30 C.F.R. § 1206.20 in the Office of Natural Resources Revenue regulations, cited by BOEM in previous recent auctions.

However, in the PSN, BOEM is soliciting comments on potential revisions to the definition of affiliated entities. BOEM's existing definition of affiliated entities is tied to direct or indirect ownership or control of one entity over another. As BOEM states in the PSN, this definition does not prevent bidding by multiple entities who do not share common ownership or control, but who have formed agreements "with the effect of circumventing the spirit of a one-per-customer sale." As such, BOEM is requesting comments on whether to revise the definition of affiliated entities — at least for this lease sale — to include bidders that have, prior to the auction, entered into an agreement with each other that is related to the disposition of leases offered in either of the auctions. BOEM notes that this change would likely be accompanied by new requirements to disclose any agreements with affiliated bidders regarding the disposition of leases acquired in the auction. This revision to the definition of affiliated entities would be novel for BOEM, and could have implications for bidders seeking to enter into joint venture agreements for development of their leases prior to a lease sale — if BOEM adopts this revised definition, bidders would need to ensure that they do not enter into such agreements with other qualified bidders who will also participate in an auction.

As noted above, affiliated entities are not permitted to compete in the same auction against each other. However, assuming that BOEM maintains the two separate auction approach currently proposed for California, one affiliate may participate in the North Coast auction while the other affiliate competes in the Central Coast Auction. If multiple affiliated bidders have qualified to bid in the same auction, the bidders must decide prior to the auction which affiliate will participate. BOEM will disqualify any affiliated bidders who seek to participate in the same auction.

Proposed Lease Stipulations

Along with the potential restrictions noted above related to navigation and the DOD, the PSN describes additional potential lease stipulations that may be required. Some of these stipulations are similar to stipulations included in previous BOEM east coast leases while others are new or modified. According to the PSN, these lease stipulations are being considered "to ensure that communities, particularly underserved communities, are considered and engaged throughout the offshore wind energy development process, that potential impacts and benefits from Lessees' projects are documented, and Lessees' project proposals are informed by or altered to address those impacts and benefits."⁵

1. **Stakeholder Engagement.** As in past leases, BOEM is proposing a requirement that winning bidders engage with Tribal governments, ocean users, underserved communities, agencies, and other stakeholders that may be potentially affected by activities on the OCS. As part of this stipulation, the lessee would have to submit a semi-annual progress report that identifies the parties that may be affected, describes the lessee's engagement activities, and discusses how the project will be informed by the outcomes of these engagement activities.
2. **Tribal Communications Plan.** Similar to past leases, BOEM is proposing a stipulation that would require the lessee to develop a Native American Tribes Communications Plan (NATCP) to develop protocols for unanticipated discovery of any potential pre-contact archaeological resource(s). Unlike past leases on the east coast, this requirement potentially may not be limited to federally recognized Tribes but instead would require the lessee to work with BOEM and the California Native American Heritage Commission to identify Tribes with cultural and historical ties to the lease areas and invite those Tribes to participate in the development of the NATCP.
3. **Enhanced Archeological Survey Requirements.** BOEM is proposing to modify its prior lease stipulations for archaeological survey requirements. The revised stipulation would require that the lessee (i) describe the methods it uses to conduct archaeological surveys, (ii) coordinate a

Tribal pre-survey meeting with all Tribes identified in the NATCP, and (iii) immediately halt bottom-disturbing activities within 50 meters of an unanticipated discovery of a potential archaeological resource.

4. **Project Labor and Supply Chain.** As in past leases, BOEM is proposing two lease stipulations about labor and supply chain. The first stipulation would require lessees to make every reasonable effort to enter into a Project Labor Agreement (PLA) covering the construction stage of any project proposed for the lease areas. The second stipulation would require lessees to establish a Statement of Goals in which the lessee would describe its plans for contributing to the creation of a robust and resilient US-based offshore wind industry supply chain.
5. **Enhanced Commercial Fisheries Stipulation.** BOEM's previous east coast leases have included stipulations surrounding a project's impact on commercial fisheries. BOEM is proposing additional new elements to this stipulation for the California leases that include: (i) identifying dock space and transit routes that would minimize space use conflicts and potential impacts to protected species; (ii) minimizing both congestion and the creation of obstacles that could lead to an increased risk of entanglement; (iii) to the extent practicable, prioritizing Federal and state climate change adaptation strategies for fisheries; and (iv) implementing a requirement that the lessee contact potentially affected commercial fishing communities before submitting its COP to discuss potential conflicts between seasonal fishing operations and the lessee's survey and development activities.
6. **Updated Species Mitigation Measures.** BOEM proposes to include in the leases the measures identified in the WEAs' NEPA Environmental Assessments to protect birds and marine species. The PSN notes that any additional measures arising from statutory consultation processes would also be incorporated into the leases.
7. **Research Access.** BOEM proposes a new stipulation that would require the lessee to permit BOEM access to the lease area to conduct future research and "other activities."

Looking Forward

As noted, BOEM's publication of the PSN in the Federal Register kicks off a 60-day comment period, which will close on August 1, 2022. This PSN represents an important step toward the development of offshore wind projects off California's coast. As described above, the PSN introduces a number of new proposed changes into BOEM's expanding offshore wind leasing program, including the proposed novel structure to potentially hold two auctions simultaneously, the proposed and other potential bidding credits, and BOEM's request for comments on expanding its definition of "affiliated entities."

Comments on the PSN can be submitted via the [Federal Rulemaking Portal](#) or by mail. BOEM plans to host an auction seminar on June 16, 2022 to discuss the lease sale process. If not already qualified by BOEM to participate in the California auctions, companies, joint ventures, and consortia wishing to participate in the proposed lease auctions must submit qualifications packages demonstrating that they are qualified to bid on and hold offshore renewable energy leases pursuant to BOEM's regulations at 30 C.F.R. §§ 585.106 and 585.107 by no later than August 1, 2022. Following the public comment period on the PSN, BOEM will review the submitted comments and conduct its qualification review to determine the eligible bidders. Once those activities are complete, BOEM will publish the FSN in the Federal Register, formally announcing the details of the lease auctions later this year.

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Endnotes

¹ Pacific Wind Lease Sale 1 (PACW-1) for Commercial Leasing for Wind Power on the Outer Continental Shelf in California— Proposed Sale Notice, 87 Fed. Reg. 32,443 (May 31, 2022).

² CEC, Offshore Wind Energy Development off the California Coast Maximum Feasible Capacity and Megawatt Planning Goals for 2030 and 2045 (May 6, 2022), available at: <https://efiling.energy.ca.gov/GetDocument.aspx?tn=242970&DocumentContentId=76566>. This report is in response to the directive set forth by Assembly Bill 525 (AB 525, Chiu, Chapter 231, Statutes of 2021). The law directs that on or before June 1, 2022, the CEC shall "evaluate and quantify the maximum feasible capacity of offshore wind to achieve reliability, ratepayer, employment, and decarbonization benefits and shall establish megawatt offshore wind planning goals for 2030 and 2045."

³ Office of National Marine Sanctuaries, National Oceanic and Atmospheric Administration, Proposed Designation of Chumash Heritage National Marine Sanctuary Fact Sheet (Nov. 10, 2021), available at: <https://nmssanctuaries.blob.core.windows.net/sanctuaries-prod/media/chumash/2021-proposed-designation-chumash-heritage-national-marine-sanctuary.pdf>.

⁴ 30 C.F.R. § 585.204.

⁵ 87 Fed. Reg. at 32,447.