



May 3, 2024

Offshore Wind: The Bureau of Ocean Energy Management's Engagement with Federally Recognized Tribes

The Bureau of Ocean Energy Management (BOEM), within the Department of the Interior (DOI), administers offshore wind leasing on the U.S. outer continental shelf (OCS). Among its responsibilities, BOEM engages with federally recognized Tribes (hereinafter *Tribes*) at multiple stages of the wind leasing process. Some Tribes have historical connections and/or treaty rights to natural and cultural resources in OCS areas that inform their views on offshore wind development. BOEM's policies for tribal engagement, and the extent to which BOEM incorporates tribal feedback into its offshore wind leasing decisions, have been subjects of congressional interest.

Federal agencies other than BOEM, such as the National Oceanic and Atmospheric Administration (NOAA) and the U.S. Army Corps of Engineers, also have certain permitting responsibilities for offshore wind projects. These agencies' tribal engagement policies and activities are beyond the scope of this CRS product.

BOEM's Offshore Wind Activities

BOEM administers offshore wind leasing under the Outer Continental Shelf Lands Act (OCSLA; 43 U.S.C. §1337(p)) and other laws. BOEM uses a multiphased approach to grant access to ocean areas deemed suitable for wind energy development. BOEM's process includes calls for interest in offshore wind development in particular OCS regions or areas, subsequent assessments to narrow proposed areas to those most suitable for leasing, conduct of lease sales, and review and approval of lessees' site assessment plans (SAPs) and construction and operations plans (COPs). BOEM solicits public feedback at multiple stages and must comply with public scoping requirements of the National Environmental Policy Act (NEPA; 42 U.S.C. §§4321 et seq.).

Under both the OCSLA and NEPA, BOEM must assess the potential environmental impacts of offshore wind projects on the marine ecosystem. Projects may have both adverse and beneficial impacts, such as changes to the ocean environment; habitat alterations; risks that living marine resources may collide with construction vessels and offshore wind structures; altered behaviors and disturbance of migration paths of certain fish, marine mammals, and birds; and water pollution. Some observers also emphasize offshore wind's potential to play a longer-term role in reducing climate change impacts to marine environments.

BOEM requires, both through lease stipulations and as part of the approval process for SAPs and COPs, that offshore wind project developers take steps to mitigate potential adverse environmental impacts. As one example, BOEM has directed lessees to establish "acoustic exclusion zones"

for geophysical sound surveys, so that active survey areas are clear of marine mammals and sea turtles. During both surveys and project construction, BOEM may require monitoring in conjunction with NOAA. NOAA's trained Protected Species Observers look for marine mammals so that the possibility of vessel strikes is minimized.

Tribal Connections to Areas of Potential Offshore Wind Development

Some Tribes have historical connections and/or treaty rights in offshore areas. In the 18th and 19th centuries, the federal government removed many Tribes from their ancestral homelands through treaties and other means. Due to the key role native fish and wildlife played in many Tribes' histories, culture, religion, and economic development, Tribes often reserved rights to maintain access to those resources through treaties. In the Pacific Northwest, several tribal treaties reserved rights to take fish (e.g., Pacific groundfish) and other wildlife at "usual and accustomed" places, which included offshore areas. Tribes without treaty rights may nonetheless practice historic customs such as fishing and gathering and may claim that they continue to exercise sovereignty over their traditional land and waters.

Tribes also may have cultural connections to areas of potential offshore wind development. For example, gathering, fishing, and whaling historically have served important social, economic, and ceremonial roles for many coastal Tribes. In addition, some tribal oral histories and ongoing scientific studies indicate that thousands of years ago, tribal ancestors lived in areas that are now underwater. Therefore, submerged cultural sites could exist offshore.

Due to these historical and continuing connections, some Tribes have expressed concern about potential negative impacts of offshore wind on natural and cultural resources, such as potential impacts to traditional fishing grounds or offshore burial grounds. Other Tribes have opposed these projects because they could obstruct culturally and spiritually significant viewsheds.

BOEM's Tribal Engagement Authorities and Policies

The federal government and Tribes have a complex history that continues to affect their relationships today. The *federal trust responsibility* is a legal obligation under which the United States, through treaties, acts of Congress, and court decisions, "has charged itself with moral obligations of the highest responsibility and trust" toward Tribes (*Seminole Nation v. United States*, 316 U.S. 286, 296-297 (1942)). This responsibility can include obligations to protect tribal treaty rights as well as lands, assets, and resources on behalf of Tribes.

The federal trust responsibility underpins multiple statutory and regulatory requirements concerning tribal consultation. For example, the National Historic Preservation Act (NHPA; 54 U.S.C. §§300101 et seq.) requires tribal consultation when federal actions may impact tribal historic, cultural, and religious sites. Agencies also may invite Tribes to be cooperating agencies in the development of required documents under NEPA. Pursuant to such authorities, BOEM invites Tribes to be cooperating agencies in NEPA reviews for offshore wind COPs and consults with Tribes under Section 106 of the NHPA when considering approvals for activities that may impact tribal historic, cultural, and religious sites.

The federal trust responsibility also is the basis for several executive orders, presidential memoranda, and departmental policies on tribal consultation. For example, Executive Order 13175 requires agencies to conduct “meaningful consultation” with Tribes for federal actions with potential “tribal implications.” In addition, DOI and BOEM have issued departmental and agency-specific tribal consultation policies. Under these policies, BOEM conducts formal tribal consultations and engages informally by meeting with Tribes at multiple stages of the offshore wind leasing and permitting process. For example, Tribes have participated in BOEM’s intergovernmental renewable energy task forces, which provide BOEM with feedback on proposed regional offshore wind activities.

BOEM also has encouraged offshore wind developers to cooperate with Tribes. At some lease auctions, BOEM has awarded bidding credits to developers who contribute to tribal offshore wind workforce development or negotiate community benefit agreements (CBAs) with Tribes. CBAs address potential impacts to communities that use lease areas or are otherwise impacted by lease area development. CBA benefits may include community payments. BOEM also has included stipulations in offshore wind leases that require developers to engage with Tribes and report on their engagements. BOEM guidance directs lessees to work with Tribes to establish “the level of engagement the Tribe considers appropriate.” One example of cooperation is a joint letter in which the Northern Chumash Tribal Council (a California state-recognized tribe) and three offshore wind lessees expressed support for a phased approach to the proposed designation of a NOAA marine sanctuary.

Tribal Concerns About BOEM’s Engagement

Some Tribes and tribal associations have expressed concerns that BOEM is inadequately engaging or consulting with Tribes about offshore wind projects. Some Tribes have sued BOEM, claiming inadequate or untimely consultation under the NHPA and other statutes. Some Tribes have advocated not only for consultation but also for a standard that Tribes must provide free, prior, and informed consent for activities within BOEM’s jurisdiction that affect them. Some Tribes also have expressed concern about a lack of capacity to analyze highly technical documents, such as environmental impact statements, within BOEM’s required timeframes. In addition, some Tribes have advocated for an increased opportunity to share in the potential economic benefits of offshore wind

projects. The National Congress of American Indians (NCAI) has asserted that Tribes should be able to negotiate fair compensation for the use of tribal lands and resources, including revenue sharing.

In light of all these tribal concerns, in 2023 NCAI urged BOEM to stop scoping and permitting offshore wind projects until the agency developed a procedure that protected tribal “environmental and sovereign interests.”

BOEM Tribal Engagement Efforts

BOEM is taking steps to expand its tribal engagement and consultation. BOEM has stated that it “needs an improved understanding” of tribal relationships with the marine and coastal environments to better assess the effects of wind energy development on cultural sites. To develop that understanding, BOEM has initiated a series of collaborative research projects to develop cultural landscape assessments.

Beyond these studies, in FY2022 (the most recent year available), BOEM reported on multiple actions:

- developed new lease stipulations requiring lessees to draft tribal communication plans for leases in the New York Bight, Carolina Long Bay, and California;
- hosted meetings with BOEM leadership and Tribes in the Atlantic, Pacific, and Gulf of Mexico regions;
- developed an interagency tribal engagement series on offshore wind for FY2023; and
- issued a contract to three Indian-owned businesses to facilitate tribal review of offshore wind documents

Issues for Congress

In recent decades, congressional interest in federal-tribal consultation on federal actions has grown, especially as some Tribes have sought more input into federal decisionmaking. Tribal consultation issues for BOEM include what it should encompass, when it should occur, and how the agency should consider tribal input. For example, some Members of Congress have requested extensions of the agency’s public comment periods to allow for “robust comments” from Tribes and other communities.

Beyond consultation, Congress could consider whether to maintain BOEM’s current framework for tribal involvement or provide the agency with additional mandates and funding to address tribal concerns about offshore wind. For example, options could include establishing programs for tribal capacity-building, requiring archaeological surveys earlier in the leasing process, directing that leases mandate CBAs with affected Tribes, establishing tribal revenue sharing, or paying Tribes to monitor leases for potential impacts. Congress also may continue to deliberate actions to mitigate potential marine ecosystem impacts of offshore wind, including any impacts to tribal treaty rights to offshore groundfish, salmon, and other species.

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