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**MARITIME RISK SYMPOSIUM 2023**  
**Maritime College**

**Offshore Wind**

*Today's Legal Challenges*

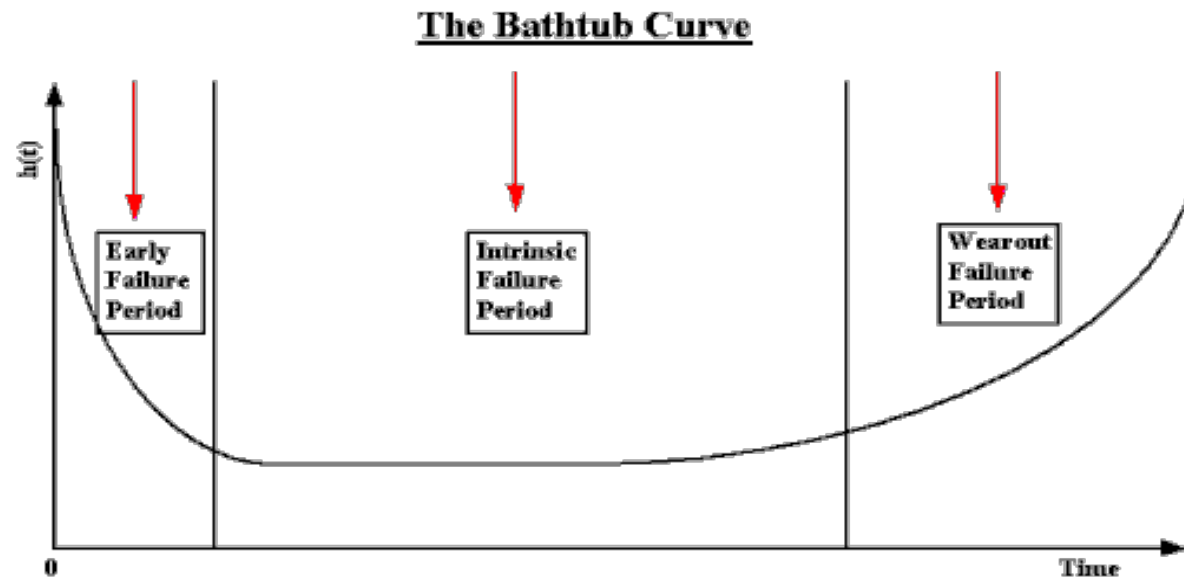
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## The Status of Offshore Wind Development in the United States

“Although offshore wind is gradually developing, it lags behind other important international markets, as the world’s largest economy has deployed less offshore wind than virtually every other advanced economy.” Atlantic Counsel, June 2023

# The Bathtub Curve

Not just an engineering theory  
but also a legal theory

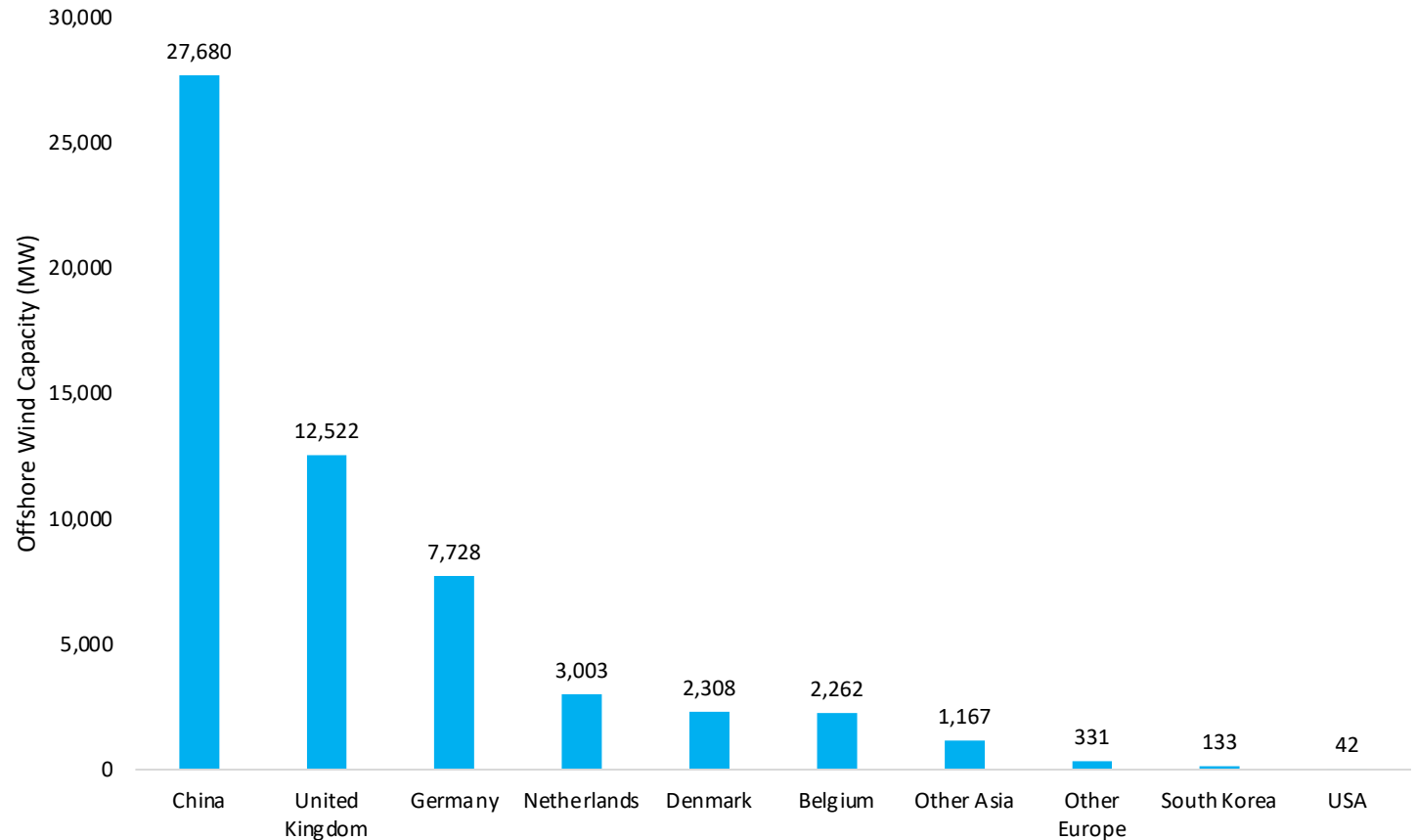


# Global Offshore Wind Installations

## U.S. lags the rest of the world in offshore wind

- **57,176 MW of global installations at end of 2021**
  - 28,980 MW in Asia-Pacific
  - 28,154 MW in Europe
  - 42 MW in U.S.
- **2021 Additions**
  - 16,900 MW in China
  - 2,317 MW in United Kingdom
  - 605 MW in Denmark
  - 12 MW installed in U.S.

Total Global Offshore Wind Installations, 2021



# What are the Risks

- The Legal Risks the Offshore Wind Industry face are, in some way, similar to the risks a new business or new industry faces.
  - Production delays due to operational difficulties and incidents.
  - Financial risks
  - Regulatory risks

# Construction, Production and Operational Risks

- Personal injury
  - Insurable
- Property damage
  - Insurable
- Materials
  - Uninsurable risk effecting timeline of project
- Man Power & Skilled labor
  - Uninsurable risk effecting timeline

# Financial Risks

- Some recent articles highlight the risks:
  - Bloomberg – August 2023 – “The US offshore wind industry faces a perfect storm of rising costs, permitting delays and grid connection hurdles – all leading to low returns. Inflation and supply chain challenges have driven up capital expenditure, while financing costs have spiraled due to rising interest rates. Developers want to renegotiate their previously-agreed offtake deals which are no longer profitable while some are trying to cancel their contracts altogether.”

# Financial Risks (Cont'd)

- Utility Dive – October 4, 2023
- Avangrid has filed settlements with Connecticut electric distributors Eversource Energy and United Illuminating that, if approved, would cancel the power purchase agreements for the 804-MW offshore Park City Wind project.
- Financial challenges triggered by supply chain disruptions, rising interest rates and other factors rendered the Park City Wind project “unfinanceable under its existing contracts,”
- Massachusetts regulators approved the termination of PPAs tied to the 1,200-MW SouthCoast Wind project, an offshore development by Shell New Energies and Ocean Winds North America, on Friday in what’s just the latest rash of offshore wind contract cancelations.



# Financial Risks (Cont'd)

- Danish wind power developer Orsted announced a \$4 billion write-down for the first nine months of the year and said it was canceling two off-shore wind projects that were planned off the coast of New Jersey.
- Its Ocean Wind 1 project would have been New Jersey's first offshore wind farm and would have generated enough electricity to power half a million homes starting in 2025. The second, similarly sized project would have followed a few years later.
- Orsted CEO Mads Nipper said "significant adverse developments from supply chain challenges, leading to delays in the project schedule, and rising interest rates," were to blame for the project cancelations.

# SILVER LININGS

- The Revolution Wind project is a joint project between Revolution Wind and Eversource and will be located more than 32 miles southeast of the Connecticut coast, according to Orsted's website.
- Orsted has projects ongoing in Maryland, New York and Rhode Island.
- Orsted's CEO stated positive stating "We firmly believe the U.S. needs offshore wind to achieve its carbon emissions reduction ambition, and we remain committed to the US renewables market and truly value the efforts by the US government to support the build-up of the US offshore wind industry."

# Regulatory Risks

- The bathtub model is the expectation that a rapidly developing industry will face growing pains. The maturing of the US offshore industry will be tied to how fast we learn from those with a more advanced industry.
- Regulatory Uncertainty and slow approval process.
  - Project developers stress that there are not enough regulatory personnel to quickly approve projects.
  - The Biden administration has instituted plans to advance offshore wind in the United States.
  - But the administrations commitments do little to address the delays that result from the environmental permitting process nor provide clarity on the federal regulatory process.

# Legislation Effecting Offshore Wind

- Garamendi Amendment to Outer Continental Shelf Lands Act (“OCSLA”)
- Merchant Mariner Document Legislation
- Jones Act Waiver Amendment
- 2022 Crewing Legislation
- 2022 Garamendi proposal to “Close Agency Loopholes in the Jones Act”
- 2023 Congressional Forecast

# EVOLUTION OF OFFSHORE WIND AND THE COASTWISE LAWS

- Over the past year, a number of new interpretations related to application of the coastwise laws to the developing offshore wind industry in the United States have clarified how construction and operation of offshore wind farms will proceed.
- The U.S. coastwise laws, which impose restrictions on the transportation of merchandise and passengers, as well as towing and dredging operations, are interpreted and enforced by U.S. Customs and Border Protection (“CBP”).
- There was much uncertainty in the offshore wind industry for many years with respect to how the coastwise laws would apply to offshore wind farm construction and operation.
- Following the 2021 National Defense Authorization Act, which clarified that the coastwise laws apply to offshore wind on the U.S. outer continental shelf as they do for oil and gas, CBP began issuing rulings applying the laws to the offshore wind industry – and industry is requesting more and more CBP rulings to clarify how the contemplated offshore wind work can be performed in compliance with the law.
- There remains issues pending before the CBP but there have been some recent and noteworthy interpretations.

# *Status of Project Crew*

- A number of personnel are required to install offshore wind turbines and related work that are transported offshore by an installation vessel. These personnel are heavily involved in the installation work but are not involved in navigation or operation of the vessel itself. The status of these personnel was unclear with respect to whether they would be considered crew or passengers, which would implicate passenger transport restrictions under the Passenger Vessel Services Act (“PVSA”).
- CBP has addressed the transportation of “project crew” for an offshore wind project in numerous rulings to date. CBP determined that “project crew” includes those personnel who travel onboard a foreign flag vessel to project sites, including those personnel temporarily disembarking from a foreign flag vessel at each site to perform work on an offshore turbine foundation. CBP ruled that project crew would not be considered passengers under the PVSA if they are also performing tasks onboard the vessel that are “directly and substantially related to the operation, navigation, or business of the vessel,” in addition to work performed off the vessel at each site. CBP also ruled that contract management personnel onboard a vessel to observe and monitor vessel operations did not constitute “passengers” because they serve a necessary business function of the vessel in performing offshore construction work

# Cablelaying

- It has been CBP's long-standing interpretation that cablelaying is not engagement in the coastwise trade and can be conducted by a foreign flag vessel because it is paid-out, not unladen.
- In addition, CBP has confirmed that picking up cable laid prior and wet-stored on the seabed to connect it to another section is still part of the cablelaying operation.
- Once laid, however, the cable becomes a coastwise point. As such, the transportation of any subsequent installations, such as of mats, rock bags, or loose rock, to cover or protect the cable, would be subject to the coastwise laws if transported from a U.S. port.
- CBP also recently confirmed its position with respect to return of surplus cable following a cablelaying operation. Although CBP initially stated that there was no "de minimis" exception, it later modified its initial ruling on surplus cable to acknowledge prior rulings that allowed up to 5% of the cable laden on the vessel to be unladen at a second coastwise point. Accordingly, any surplus cable that remains on the vessel after cablelaying may be landed at a U.S. port as long as it is 5% or less of the cable initially laden for the project

# *Mechanical Dredging*

- Dredging in U.S. waters is restricted to coastwise qualified vessels.
- However, CBP has consistently ruled that use of certain devices to bury cable in the seabed for the purpose of cablelaying does not constitute dredging and may be conducted by foreign flag vessels.
- CBP has ruled that cable burial devices that use a jetting action to emulsify the seabed and temporarily displace the sediment, allowing the cable to sink down and bury into the seabed is not dredging.
- Further, CBP has recently ruled that use of a mechanical cutter burial tool to create a narrow slice of the seabed to bury a cable could be used to open a 1 to 1.5-meter-deep trench, approximately 0.25 to 0.45 m wide.
- Thus, CBP did not consider this operation to be dredging, even if the burial was done separate from the cablelaying operation.
- It would be prudent for operators to obtain CBP rulings approving the use of any new cable burying technology



# *Pristine Sites*

- CBP's first ruling addressing pristine sites with respect to offshore wind farm construction was published in early 2021 in the context of scour protection.
- CBP originally ruled that pristine sites on the OCS, where there were no installations on the seabed, were considered coastwise points.
- However, CBP promptly modified the ruling to align with numerous longstanding rulings that found a pristine site was not a coastwise point.
- Therefore, a foreign flag vessel could transport from a U.S. port and install components at sites where there were no other installations.
- CBP expanded on this ruling recently to address the installation of monopiles at pristine sites on the OCS. In that ruling, CBP found no violation would occur when an installation vessel loaded multiple monopiles at a U.S. port and proceeded offshore to install each monopile at pristine wind turbine installation sites on the OCS.
- CBP noted that once the monopiles were installed at each site, the first installation at each pristine site, the sites would become coastwise points and any future transportation to the sites must be done by a coastwise qualified vessel.

# Regulatory Risks (Cont'd)

As noted by the Atlantic Council in a recent article -

- Since 2009, the US Bureau of Ocean Energy Management (BOEM) has been responsible for lease sales and the coordination of permitting activity for US offshore wind projects. However, the US Bureau of Safety and Environmental Enforcement (BSEE) remains responsible for offshore wind safety and environmental enforcement and compliance, while other agencies have environmental authority over permitting processes related to protected species and other filings under the National Environmental Policy Act (NEPA). This lack of federal coordination can result in delays issuing Environmental Impact Statements—federal documents that assess the impact that a project might have on the surrounding environment—preventing the deployment of these projects.

# Offshore Wind, U.S. Flagged Vessels, and the Jones Act

- A majority of the 25 vessels needed for an offshore wind project will be required to be Jones Act compliant, i.e., American built and manned. .
- Despite the CBP rulings allow construction vessels not engaging in transportation to be foreign flagged, such as Wind Turbine Installation Vessels (WTIVs) for turbine installation and Heavy-Lift Vessels (HLVs) for foundation installation, the need for Jones Act compliant vessels is massive.
- Many coastwise qualified feeder barges and tugs will be needed.
  - But with all the uncertainty, who will risk building these vessels.

# Challenges

## Inflation

- As prices for supplies increase, developers will continue to negotiate their PPA's with states.

## Supply Chain

- The U.S. is in the process of developing a supply chain for offshore wind, but according to NREL and ACP, we are still lacking adequate numbers of equipment, vessels and mariners.

## Crewing and Vessel Needs Remain and Are Critical

- Where is the funding for new turbine installation vessels? We only have one.
- Where is the funding or plan for training new OSW workers?
- Will we see new legislation introduced this Congress expanding the Jones Act to the OCS?



# Challenges, Cont.

## Litigation

- Litigation is ongoing with respect to BOEM's approval of the Vineyard Wind project, but work can continue. The Department of Justice defended the Record of Decision in federal court
- The challenges come from both fishing groups (RODA) and locals (Nantucket Residents Against Turbines)

## Fishing Conflicts

- The National Academies of Science as created a new standing committee to work with BOEM on fishing conflicts, but they remain unresolved
  - **Atlantic Right Whale Protection** are endangered species with fewer than 350 left. With corpses of whales washing up on east coast beaches, the public is suspicious about the ties to OSW surveys. But NMFS has denied there is any connection

# *Conclusion Always be an Optimist!*

Clearly, rapidly rising inflation and supply chain issues were not in the forefront of anyone's mind when developers negotiated contracts. Those issues will resolve themselves over time and new projects will emerge.

And, because offshore wind continues to be a highly active and developing industry in the United States, CBP is now publishing frequent interpretations on how construction of offshore wind must be accomplished. This is good news – progress!

With additional rulings pending, it is critical that stakeholders keep a close watch on any new and changing interpretations released and review any planned operations for compliance.

In addition, stakeholders should consider seeking a CBP ruling to confirm compliance with the coastwise laws in areas and on issues for which no CBP rulings have been issued previously.