

# DIG

Fourth Quarter 2022

A Publication of  
Dorsey & Whitney's  
*Development and Infrastructure*  
Industry Group

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Fourth Quarter 2022**

**Dorsey & Whitney LLP  
Development and Infrastructure Industry Group  
Co-Chairs: Jocelyn Knoll and Marcus Mollison**

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# A Note from the DIG Co-Chairs

It's been a while since our inaugural publication of DIG – measured both in time and world events. And while the world of development and infrastructure has not been immune to the disruptions implied by the phrase "new normal," our industries have carried on admirably and managed to build around the challenges.

This issue of DIG addresses the issues and opportunities we see facing the development and infrastructure industry for the foreseeable future. There continue to be challenges, some of which come in the forms of regulations, economic trends, international conflict, and climate change. As you'll see from the articles in this issue, the same challenges provide opportunities for infrastructure and development in the form of benefits from the 2021 Infrastructure Bill and needs that have arisen from the trends we are seeing.

As always, we at Dorsey are here to help. More than 100 lawyers in Dorsey's Development and Infrastructure Industry Group work seamlessly across disciplines and across the globe to provide our public, private, and governmental clients with the advice they need to succeed. Always digging in and always ahead.

*Joan L. Knoll Marcus Mollison*



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# constructive advice

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# Regulatory Whiplash: Updates on Environmental and Other Regulatory Laws

By **Brian B. Bell**

The election of Joe Biden as president of the United States in 2020 led to a sea change in the regulatory environment affecting development and infrastructure companies. President Biden's regulatory priorities in his nearly two years in office have been to roll back executive actions implemented by former President Donald Trump. Consequently, President Biden's actions have generally resulted in the tightening of environmental regulations that President Trump had loosened. This regulatory update focuses on changes related to: the Infrastructure Investment and Jobs Act ("Jobs Bill"), Clean Water Act regulations, climate-related disclosure requirements for publicly traded companies, environmental-justice initiatives, and environmental due diligence.

## STATUTORY

The Infrastructure Bill<sup>1</sup> reinstated an excise tax on certain hazardous chemicals to fund the Superfund. The Superfund was created as part of the Comprehensive Environmental Response, Compensation & Liability Act ("CERCLA") enacted in 1980, but the excise tax had sunset in 1995. Money in the Superfund is used to help finance cleanups where hazardous substances have been released and no responsible party has been identified.

## REGULATORY

### *National Environmental Policy Act ("NEPA") Regulations*

On April 20, 2022, the federal Council on Environmental Quality ("CEQ") finalized rules amending its National Environmental Policy Act ("NEPA")<sup>2</sup> regulations ("2022 NEPA Regulations").<sup>3</sup> NEPA requires federal agencies to prepare environmental impact statements ("EIS") when undertaking or approving projects significantly affecting the environment.<sup>4</sup> The Trump Administration had enacted the first comprehensive revisions to NEPA's implementing regulations since 1978 ("2020 NEPA Regulations"). Generally, the 2020 NEPA Regulations



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eased NEPA's burdens and were more favorable to applicants for federal approvals. The 2022 NEPA Regulations are the first in a two-phase process to significantly amend the 2020 NEPA Regulations.

The 2022 NEPA Regulations repealed the 2020 NEPA Regulations' requirement that agencies base an EIS's purpose-and-need statement on an applicant's goals and the agency's statutory authority. The 2022 NEPA Regulations also removed a requirement that the alternatives considered in an EIS meet the applicant's goals. Moreover, the 2022 NEPA Regulations removed provisions that had prohibited agencies from adopting NEPA regulations more stringent than CEQ's NEPA regulations. Finally, the 2022 NEPA Regulations expanded the scope of environmental effects agencies must consider, which the 2020 NEPA Regulations had narrowed.

CEQ is not done revising the 2020 NEPA Regulations. CEQ indicated it would propose more comprehensive revisions to the 2020 NEPA Regulations in a second phase of rulemaking.

<sup>1</sup> Pub. L. No. 117-58, § 80201, 135 Stat. 1329 (2021).

<sup>2</sup> 42 U.S.C. §§ 4321 to 4370m-12.

<sup>3</sup> 87 Fed. Reg. 23, 453 (Apr. 20, 2022).

<sup>4</sup> See 42 U.S.C. § 4332(c).





### Definition of “Waters of the United States”

The uncertainty over the definition of “waters of the United States” (“WOTUS”) continues. The definition of WOTUS controls what waters are covered by the Clean Water Act (“CWA”) and, by extension, when a permit is required to impact those waters.

On November 18, 2021, the U.S. Environmental Protection Agency (“EPA”) and U.S. Army Corps of Engineers (“Corps”) announced a proposed rule to revise the WOTUS definition adopted by the Trump Administration.<sup>5</sup> The proposed rule would largely reinstate the pre-Trump definition of WOTUS. Once the current rulemaking is finalized, the administration plans to institute a second rulemaking to “build upon the foundation of th[e] pre-2015 definition of WOTUS.

The administration's efforts may be mooted by the Supreme Court's grant of certiorari in January 2022 in *Sackett v. Environmental Protection Agency*.<sup>6</sup> In *Sackett*, the Court will address whether the Ninth Circuit “set forth the proper test for determining whether wetlands are ‘waters of the United States’ under the Clean Water Act.”<sup>7</sup>

<sup>5</sup> Revised Definition of “Waters of the United States,” 86 Fed. Reg. 69,372 (Dec. 7, 2021).

<sup>6</sup> *Sackett v. Env'tl. Protection Agency*, 8 F.4th 1075 (9th Cir. 2021), cert. granted 142 S. Ct. 896 (Jan. 24, 2022).

<sup>7</sup> *Sackett v. Env'tl. Protection Agency*, No. 21-454, 142 S. Ct. 896, 2022 U.S. LEXIS 751 (2022).

<sup>8</sup> Clean Water Act Section 401 Water Quality Certification Improvement Rule, 87 Fed. Reg. 35,318 (June 9, 2022).

<sup>9</sup> 33 U.S.C. § 1341.

<sup>10</sup> *In re Clean Water Act Rulemaking*, 568 F. Supp. 3d 1013 (N.D. Cal. 2021).

<sup>11</sup> *Louisiana v. Am. Rivers*, 142 S. Ct. 1347 (2022).

<sup>12</sup> 87 Fed. Reg. 21,334 (Apr. 11, 2022).

### Section 401 Certification

On June 9, 2022, EPA proposed rule (“Proposed 401 Regulations”)<sup>8</sup> to revise the Trump-era 2020 CWA Section 401 Certification Rule (“2020 401 Regulations”). Under Section 401 of the CWA,<sup>9</sup> before the federal government can issue a permit under the CWA, state or tribal environmental agencies must certify that the permit will not cause violations of state water quality standards. The 2020 401 Regulations generally narrowed the scope of states' authority under Section 401 and required them to act on certification requests more quickly. The Proposed 401 Regulations undo much of the 2020 401 Regulations. The Proposed 401 Regulations: (1) expand the pre-filing meeting requirements; (2) give states and tribes greater flexibility in what is included in a request for certification; (3) remove the permitting agency's sole authority over establishing the certification timeline, allowing states and tribes to reach agreement with the applicant regarding the appropriate time; and (4) return to the scope of the certification that existed before the 2020 401 Regulations by allowing certifying agencies to evaluate the impact of the entire project on water quality, not just the impact of the permitted discharge on water quality.

A federal court in California had vacated the 2020 401 Regulations.<sup>10</sup> But the United States Supreme Court stayed the district court's vacatur.<sup>11</sup> Accordingly, the 2020 401 Regulations will remain in effect until EPA finalizes the Proposed 401 Regulations.

### Securities and Exchange Commission Climate Disclosure Rule

In April 2022, the Securities and Exchange Commission (“SEC”) published in the Federal Register its long expected Climate Disclosure Rule.<sup>12</sup> The Climate Disclosure Rule requires that public companies traded in the United States disclose climate-related risks. As proposed, the Climate Disclosure Rule would require all public companies to disclose the quantity of their direct and indirect greenhouse gas emissions. The Climate Disclosure Rule would also require other climate-related



disclosures related to governance, strategy, and risk management.

Uncertainty remains regarding how the Climate Disclosure Rule will impact publicly traded infrastructure companies. The Climate Disclosure Rule would require reporting of downstream GHG emissions resulting from "[u]se by a third party of a [company's] sold products."<sup>13</sup> This requirement would appear to require infrastructure companies that build a road or pipeline to disclose GHG emissions resulting from the use of a road or the consumption of fossil fuels transported in a pipeline.<sup>14</sup>

### **2022 Construction Stormwater General Permit**

In January 2022, EPA issued its 2022 Construction Stormwater General Permit ("CGP"),<sup>15</sup> replacing the 2017 CGP. The CGP regulates management of stormwater at construction sites of at least one acre. Changes between the 2017 and 2022 CGP include:

- Modifying requirements for the storage of construction and domestic wastes to remove the requirement to containerize waste if exposure to stormwater will not result in a discharge of pollutants or stormwater contamination; and
- Requirements that permittees submit photographs showing the stabilized areas of the site along with their notice of termination.

EPA's CGP applies only in Indian country and a limited number of states and territories where the state or territory does not have a delegated National Pollution Discharge Elimination System ("NPDES") permitting authority. Nevertheless, EPA's permit is likely to influence the content of CGPs where states have delegated NPDES authority.

### **EXECUTIVE ORDERS**

In his first day in office, President Biden signed Executive Order ("EO") 13,990<sup>16</sup> emphasizing its goals to "advance environmental justice." The following week, President Biden signed EO 14,008, specifically

addressing climate change.<sup>17</sup> EO 14,008 established Justice40, an initiative to deliver at least 40% of the overall benefits from federal investments in climate and clean energy to disadvantaged communities. Development and infrastructure companies should consider ways in which they can design their projects to advance environmental justice. Incorporating an environmental-justice component into projects could help attract public and private capital.

### **ENVIRONMENTAL DUE DILIGENCE**

On March 14, 2022, EPA issued a proposed rule incorporating ASTM International's updated standards for Phase I Environmental Site Assessments ("ESA").<sup>18</sup> Phase I ESAs are used by those acquiring an interest in real property to qualify for liability protections under CERCLA. Once EPA finalizes the rule, buyers are not required to comply with the updated standards to qualify for liability protections. The action merely allows for the use of the updated standards. Nevertheless, in most cases, developers should rely on the updated Phase I standards.

EPA published a helpful comparison of the previous and updated Phase I standards.<sup>19</sup> With limited exceptions, the updated standards do not depart significantly from the previous standards. ASTM did adopt significant revisions to the requirements for collecting and analyzing historical property information. The updated Phase I standards also describe circumstances under which a Phase I might consider the presence of emerging contaminants of concern, such as polyfluoroalkyl substances ("PFAS"). The updated Phase I standards also incorporate minor revisions to site-reconnaissance standards and the definitions of Recognized Environmental Conditions ("REC"), Historical RECs, and Controlled RECs. ■

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<sup>13</sup> *Id.* at 21,380.

<sup>14</sup> *Id.* ("[A]n energy company that produces oil and gas products may find that a significant category of activity resulting in Scope 3 emissions relates to the end use of its sold products.").

<sup>15</sup> *National Pollutant Discharge Elimination System (NPDES) 2022 Issuance of General Permit for Stormwater Discharges From Construction Activities*, 87 Fed. Reg. 3,522 (Jan. 24, 2022).

<sup>16</sup> 86 Fed. Reg. 7,037 (Jan. 20, 2021).

<sup>17</sup> 86 Fed. Reg. 7,619 (Jan. 27, 2021).

<sup>18</sup> *Standards and Practices for All Appropriate Inquiries*, 87 Fed. Reg. 14,174 (March 14, 2022).

<sup>19</sup> See U.S. Environmental Protection Agency, *Comparison of All Appropriate Inquiries Regulation, the ASTM E1527-13 Phase I Environmental Site Assessment Process, and ASTM E1527-21 Phase I Environmental Site Assessment Process* (March 2022), <https://downloads.regulations.gov/EPA-HQ-OLEM-2021-0946-0002/content.pdf>.



# Building Confidence

By Dick Strassburg and Nate Pearson, TEGRA Group

***Given the tumultuous state of commercial construction, should companies consider renovating or building? Absolutely — as long as they proceed with caution and care.***

Those who have considered a home improvement project lately have seen the rapid rise of building material costs firsthand. Whether you needed lumber for a backyard shed, concrete for a new patio, or windows for a new addition, you saw much higher costs for materials versus what you would have paid two years ago. Eye-popping prices might have put a damper on your willingness or ability to move forward. Understandably, that backyard shed became a “maybe someday” project rather than a “need it right now” project.

The same scenario has been playing out in commercial construction — on a much grander scale. The pre-pandemic building frenzy slowed down precipitously after 2020, primarily because of increased costs. Prices for materials commonly used in the construction industry rose nearly 20% from April 2020 to April 2021, according to a report issued by the Associated General Contractors of America (AGC), marking the largest increase in the 35-year history of the reports.

## **WHERE WE ARE TODAY AND WHY**

While the trend of increasing costs has slowed a bit, it's still ticking upward. The most recent quarterly Construction Analytics Index reports a construction cost increase of 2.9% nationally for the fourth quarter of 2021. That's notable because not too long ago, the construction industry typically saw that kind of cost increase accrue over an entire year, not just one quarter.

Cost increases aren't the only challenge facing the construction industry. Inflation reaching a 40-year high, enduring manufacturing issues, raw materials shortages, the hangover of the lockdown-induced tight labor market, and supply chain delays continue to wreak their own havoc on the industry. But there's even more to add to this 'perfect storm' of higher-than-ever construction costs: higher gas prices and rapidly rising transportation



costs. Trucks haul more than 70% of domestic cargo shipments, according to the Wall Street Journal, and those shipments include construction-critical materials like steel, glass, drywall and lumber. Among the many problems plaguing the trucking industry: there simply aren't enough drivers. The American Trucking Association estimates the industry is 80,000 drivers short of the workers needed to keep goods moving in a timely fashion.

## **HOW CONSTRUCTION FIRMS ARE BEING IMPACTED**

Construction Inflation Alert, a periodic report by AGC dedicated to informing project owners, government officials, and the public about the state of the U.S. construction industry, noted that the current construction climate is far from 'normal' and points to a combination of "supply chain bottlenecks, unpredictable costs and delivery times, and small bid price increases" that threaten to push some construction firms out of business. To prevent budget shortfalls and even business closures, AGC is encouraging construction firms to prioritize communication with clients. Forward-thinking and reputable construction firms provide project owners with timely and credible information about changes in "relevant material costs and supply-chain snarls that may impact the cost and completion time for a project that is underway or for which a bid has already been submitted." Construction firms that remain clear-eyed on cost fluctuations — and that communicate those fluctuations openly and frequently with their clients during the bid process and throughout the project — have an opportunity to emerge from this challenging era stronger than ever.

## **TO BUILD OR NOT TO BUILD**

Of course, these challenging times aren't just difficult for construction companies to navigate. This is also an incredibly challenging time for companies that need to renovate or expand their physical facilities. Do they move forward now, assuming things are only going to get worse? Or do they wait it out, hoping the construction climate improves soon? These are fraught deliberations, and making the wrong decision at the wrong time could result in untold costs and setbacks. On the flipside, an informed approach to construction could yield tremendous outcomes.

Companies looking to expand or build should explore their options immediately rather than assuming that waiting for a couple of years will pay off. As long as companies ask the right questions, they'll be equipped to make smart, informed decisions about whether to pursue their building goals. Companies should ask these four questions:

1. How pressing is our need for expansion or a new facility?
2. Are we willing to explore moving to another city or state to take advantage of benefits such as lower construction costs, increased labor market, tax incentives, etc.?
3. What are our growth projections? Does it make sense to build a facility that will sustain projected growth for five years, ten years, or even more?
4. How can we strategically partner with design, contracting and subcontracting firms to finalize a price and schedule and move forward with confidence?

## **DON'T GO IT ALONE**

Widget makers know widgets — they don't know the ins and outs of construction, much less construction today, with the rapidly evolving issues and challenges facing the industry. Company leaders would be wise to tap into the expertise of industry experts who can guide them through the due diligence process and beyond. More often than not, partnering with an owner's representative firm will be the most comprehensive and efficient way to embark on the smartest and most cost-effective path to project success.

Given the countless considerations and decisions required to achieve an on-time, on-budget building project, it often makes sense for businesses to tap into the expertise and insights of an owner's representative firm that

## BUILDING CONFIDENCE (continued)

is exclusively dedicated to protecting the interests of the owner. By partnering with an owner's rep, businesses can rest assured that every detail of the project is planned and implemented with utmost consideration and care. Owner's rep firms can establish project goals and facilitate terms, assemble teams, review contracts, oversee budgets, manage the project team, and successfully guide projects from concept to occupancy.

Upfront investment in an owner's rep will likely be more than recouped throughout the process. The primary reason? Business owners simply don't have the background or bandwidth to identify project cost-savings opportunities, challenge subcontractors' pricing, or protect against unforeseen or unnecessary cost expenditures.

## A FOUNDATION OF SUCCESS

The construction industry has been a strong driver of American growth and innovation for generations. It has withstood countless storms and will certainly withstand today's challenges. The design and construction firms that adapt, improve, and better serve their clients have an opportunity to continue to grow their revenue and reputation. In turn, businesses that wisely choose to partner with these firms to pursue their growth and expansion plans will do the same. ■

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# Caught Up: Addressing Inflation and Supply Chain Risks

by **Eric Ruzicka, Ben Petre, and Evan Livermore**

Whether supply chain disruptions and high input costs continue, or whether already existing conflicts develop into litigation and ADR, construction project owners, contractors, subcontractors, and suppliers are likely in the near term to experience an increase in disputes over rising supply costs and delays. These disputes will be decided based on the general structure of the agreement (e.g., stipulated sum vs. cost-plus), any specific provisions governing escalation of supply prices, and possibly force majeure clauses or equitable doctrines such as impracticability or frustration of purpose that may excuse performance.

First and foremost, responsibility for increased supply costs will depend on the specific contract structure at issue. For example, under a stipulated sum or lump sum contract, nearly all risk for price increases is shifted to the contractor. That is, under the most basic version of this arrangement, the contractor is simply paid a specified sum to perform the contract, and thus the contractor would bear the additional expense of increased supply costs from the time of bidding. On the other hand, a cost-plus with a guaranteed maximum (GMP) price contract often affords more protection to contractors for increased supply costs due to the cost basis of payment, but subcontractors will still share some of the risk under these contracts if supply cost increases are substantial enough to exceed the GMP.

Both stipulated-sum and cost-plus with GMP construction contracts may separately and expressly address the possibility of supply cost increases through escalation clauses, though these provisions are not included in some of the most common standard-form construction contract documents such as the AIA A201 General Conditions. Escalation clauses commonly take the form of “day one” provisions, allowing the contractor to recover costs associated with materials prices immediately upon increase; or delayed provisions, permitting a contractor to recover costs associated with materials price increases, but only after expiration of a specified period of time. Other escalation clauses, such



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as are present in the Federal Acquisition Regulations, compensate the contractor for higher materials prices but only after the increase exceeds a specified percentage. Escalation clauses may apply generally to the entire project scope, or may be negotiated to apply only to certain materials or scopes of work based on the parties' concern that costs may rise sharply in particular identified areas.

Potential supply cost increases may also be addressed separately from contracts between owners and contractors in subcontracts or in supply contracts between contractors and suppliers. Contractors may attempt to bind subcontractors and suppliers to a firm price to prevent the risk of increased costs. Increasingly, however, in light of ongoing supply chain problems and inflation, subcontractors and suppliers are offering firm pricing only for an extremely short period of time.

Aside from the payment structure under the contract, force majeure provisions are likely to be the focal point of many disputes regarding supply cost increases and supply chain delays. These provisions are generally difficult to satisfy, but may provide relief in some cases. As above, the specific contract language and

## ADDRESSING INFLATION AND SUPPLY CHAIN RISKS (continued)

circumstances will be determinative. For example, many force majeure provisions include language explicitly including or excluding epidemic disease within the events constituting force majeure. This will obviously drive the analysis of whether supply cost increases linked to COVID may excuse performance. However, increased costs alone generally do not constitute force majeure. Courts have expressed a willingness to apply the doctrine if cost increases are extreme, unreasonable, or excessive — assuming there is no contract provision expressly accepting the risk of such increases. Additionally, timing may also be important as a COVID-based argument may not be available under a contract that was entered into after COVID's impacts were understood.

Courts have also indicated an openness to applying the doctrine of impracticability in circumstances of extreme cost escalation, excusing contract performance where performance would necessitate extreme or unreasonable difficulty or expense, including specifically expense relating to sharply increased supply costs resulting from the COVID pandemic. As explained in the Restatement (Second) of Contracts: "A mere change in the degree of difficulty or expense due to such causes

as increased wages, prices of raw materials, or costs of construction, unless well beyond the normal range, does not amount to impracticability ...."

Reliance on the doctrines of impossibility and frustration of purpose is less likely to be successful. With regard to impossibility, courts have generally held that increases in the cost to perform a construction contract, including dramatic increases in the cost of building supplies, do not render contract performance impossible. Likewise, courts have generally held that even an extreme change in market conditions is not enough to invoke the doctrine of frustration of purpose.

Construction project owners, contractors, subcontractors, and suppliers should carefully consider not only how supply cost increases affect disputes on current projects, but also how the current inflation and supply chain disruptions should inform their negotiation of future agreements. ■

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# How to Participate in the Rollout of the 2021 Bipartisan Infrastructure Bill

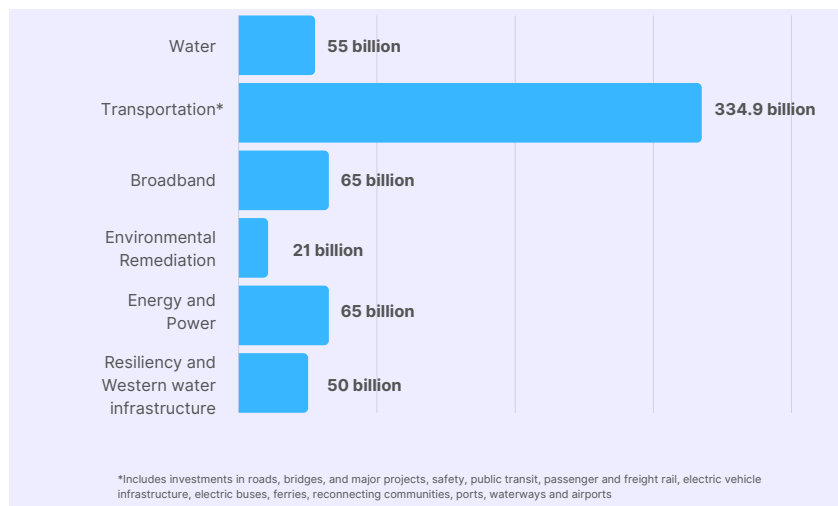
By Troy Keller and Cloe Nixon

In November 2021, Congress passed and President Biden signed into law the bipartisan Infrastructure Investment and Jobs Act (the Infrastructure Act).<sup>1</sup> This \$1.2 trillion package is unprecedented both in its overall scale and the number of new spending programs. And though the rollout of these programs is now well underway, there remains ample opportunity for businesses to get involved, particularly at the state and local levels. In many ways, the Infrastructure Act represents a singular opportunity for business, but it is also a disruptive influence that could re-shape industry sectors and regional economies.

## SUMMARY

The Infrastructure Act allocates funding for transportation, environmental remediation, investments in energy and power, water management, , broadband access, and improving infrastructure resiliency. Notably, over \$550 billion is dedicated to new investments, of which 52% is designated for roads, highways and bridges.<sup>2</sup> See Figure 1 for a more detailed break-down.

Figure 1



The Infrastructure Act operates by distributing funding to federal agencies, who then manage competitive funding opportunities and formula funding.<sup>3</sup> A dozen federal departments and agencies administer funding to more than 100 distinct programs.<sup>4</sup> *The amount of funding each agency oversees is shown in Figure 2.* Funds are distributed through several mechanisms: formula grants (*i.e.*, calculated via a pre-determined basis, typically population), competitive grants, loans, cooperative agreements, contracts, and direct federal spending. The two most used mechanisms, however, are the formula grants and competitive grants.

<sup>1</sup> See, Fact Sheet: The Bipartisan Infrastructure Deal | The White House.

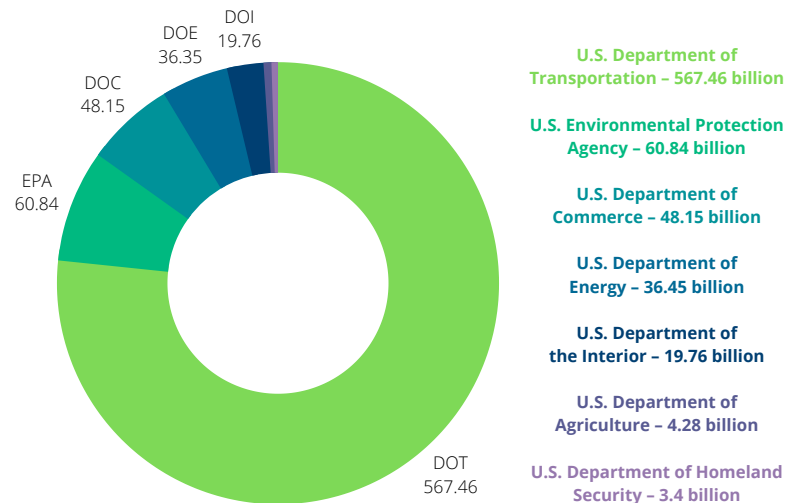
<sup>2</sup> See generally, Legislative Analysis for Counties: The Bipartisan Infrastructure Law (naco.org).

<sup>3</sup> See generally, Legislative Analysis for Counties: The Bipartisan Infrastructure Law (naco.org).

<sup>4</sup> See, The White House, *Building A Better America* (whitehouse.gov) p.457-461.

## BIPARTISAN INFRASTRUCTURE BILL (continued)

Figure 2



While grants are in large part made to states, municipalities and non-profits, companies can participate indirectly as contractors to grantees or as beneficiaries of state-level programs created using Infrastructure Act funding

### What's Happened So Far?

In November of 2021, the Biden Administration created an Implementation Task Force to oversee the rollout of the Infrastructure Act funds. There have already been dozens of site visits to states and districts since the Infrastructure Act was passed, demonstrating the significant amount of coordination at the federal and state level. In April the White House released "Buy American" requirements for projects funded by the Infrastructure Act, stipulating that projects must use U.S.-manufactured construction materials and outlining the process to apply for a waiver. The Buy American requirements took effect on May 14, 2022.<sup>5</sup>

The White House has announced at least \$110 billion in spending for 4,300 projects. The federal agencies tasked with administering the Infrastructure Act funding have efficiently began the roll out of many programs. The applications for several programs have already opened and closed funding for the Fiscal Year 2022 cycle. A number of formula programs, such as the Weatherization Assistance Program, have already distributed funds to states, which then distribute funds to applicants and projects.<sup>6</sup> As expected, existing programs received funding more quickly than new programs created by the Infrastructure Act.

### Anticipated Impacts on Industry

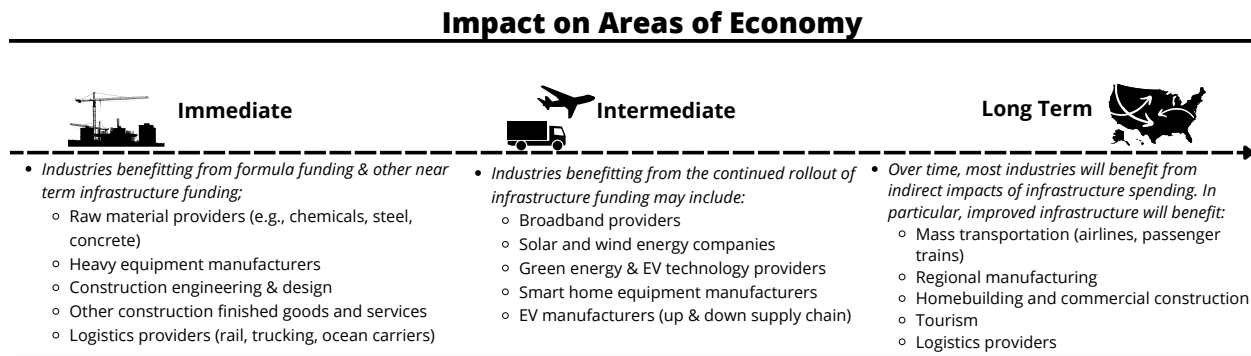
The Infrastructure Act's once-in-a-generation investments in key areas of the U.S. economy will directly benefit industries. For example, construction and its upstream suppliers (e.g., steel, lumber, cement, engineering services) are expecting significant increases in demand. The Infrastructure Act, however, will have an uncertain impact on other industries. Its priorities seem destined to pick winners and losers by preferring some business models over others, and in the short term, the overhang of the anticipated spending from the Infrastructure Act will place increased pressure on already taxed supply chains, potentially disrupting existing industries. *Figure 3 shows potential industry beneficiaries over the short, medium and long-terms.*

<sup>5</sup> See, Announced Infrastructure Spending Chart.

<sup>6</sup> See Office of Energy Efficiency and Renewable Energy, *How to Apply for Weatherization Assistance*. <https://www.energy.gov/eere/wap/how-apply-weatherization-assistance>.



Figure 3



Importantly, the grant process offers some opportunities for companies to make the case that their technologies and models can meet the objectives of the Infrastructure Act.

Regional economies could also be re-shaped due to the Infrastructure Act's geographic spending. It is worth remembering how, during the Great Depression, New Deal spending built massive energy projects, like those administered by the Tennessee Valley Authority. Those projects helped determine where much of the next generation of U.S. manufacturing was located by providing access to abundant electricity. In the 21st century, access to energy and rail remains key for regional development, but so does access to increasingly scarce water resources, broadband Internet and international airports. Cities vying to become regional hubs, like Salt Lake City with its inland port, could find their plans accelerated or shuttered by the effects of the Infrastructure Act.

### How can Companies Participate?

***“Building a better America is a shared endeavor no one can do alone, and investing federal infrastructure dollars will require significant coordination between cities, states, Tribal governments, community stakeholders, and other key partners.” – The White House.***

Given that over 90% of Infrastructure Act spending is expected to be deployed by non-federal partners, such as state, local, and tribal entities, coordination with state, local, and tribal governments is essential for any company hoping to participate in Infrastructure Act initiatives.<sup>7</sup> Local governments often don't have the resources or expertise to monitor and identify relevant opportunities, but many state governments have established Infrastructure Act coordination leads who diligently monitor funding opportunities and coordinate with local, non-profit, and private entities regarding funding opportunities. The limited capacity at the state and local level requires private industry to monitor program rollouts by federal agencies and then coordinate with state officials so as not to miss out.

Companies should develop a thoughtful and sophisticated strategy in this regard. It is not too late to begin coordinating with state and local governments about ways in which private industry can assist a state in participating in Infrastructure Act programs. Dorsey's experienced infrastructure task force members are available to assist as you navigate this once-in-a-generation opportunity. ■

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<sup>7</sup> See, White House. May 18, 2022. Building a Better America: Bipartisan Infrastructure Law Technical Assistance Guide. P. 1. Accessed online at [Infrastructure-Technical-Assistance-Guide\\_FINAL2.pdf](https://www.whitehouse.gov/wp-content/uploads/2022/05/Infrastructure-Technical-Assistance-Guide_FINAL2.pdf) (whitehouse.gov).

# Of Megadroughts and Historic Floods – Water and Your Business

By Michael Drysdale and Gage Zobel

Few projects can function without a reliable water supply, and fewer can function under water. Climate change is making water supply more variable at both ends of the spectrum. Gone are the days when adequate and easily available water can simply be assumed by companies or left to the consultants to figure out. Prudent businesses will consider their water needs and vulnerabilities in considering any new projects, expansions, or the long-term viability of existing operations.

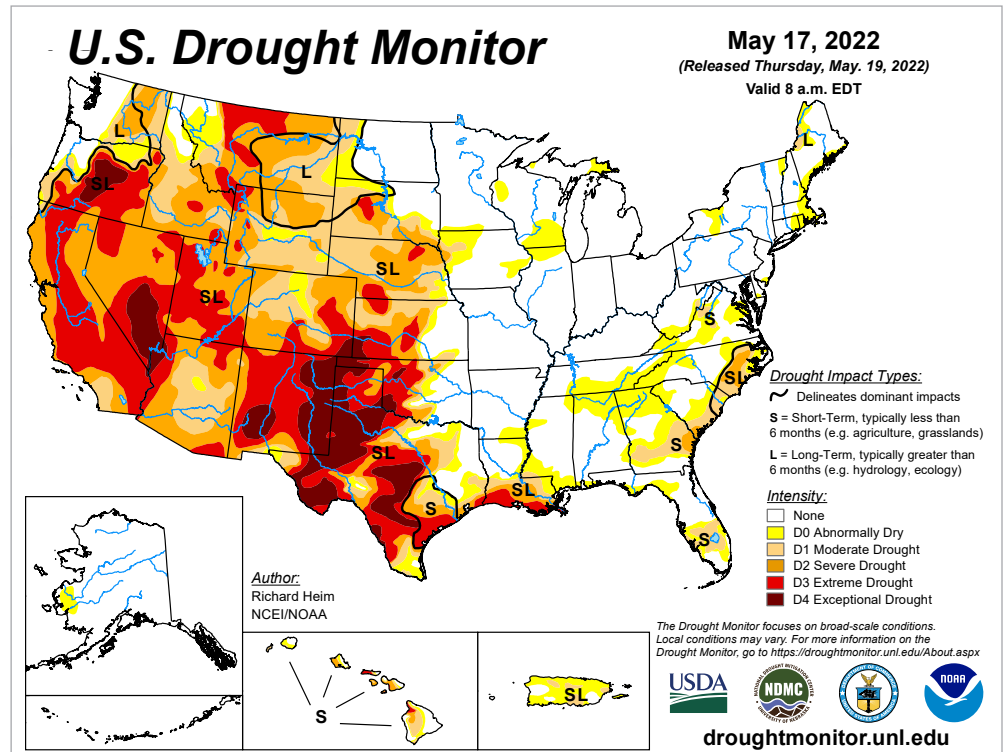
## One Problem – Too Little Water

Much of the Western United States is experiencing severe drought conditions, in some places estimated to be the worst in 1,200 years. The Mid-May 2022 (a time of year of typically high water) USDA drought monitor shows most of the West in "extreme" or "exceptional" drought conditions:

Such drought conditions have dropped Colorado River reservoirs to historic lows, and are raising the prospect of severe water usage restrictions and summer black-outs from inadequate hydroelectric power generation. Similar patterns are recurring throughout the West.

## Another Problem – Too Much Water

Even in a megadrought, specific areas can be deluged. This was vividly illustrated in mid-June, when Yellowstone National Park (in an area



of "extreme drought") received record rainfall and experienced widespread road and infrastructure damage. Separately, much of the Eastern United States has abundant water, but is vulnerable to flooding from major spring run-off and increasing storm intensities. FEMA floodplain maps are frequently outdated and understate both the extent of lands subject to flooding and the depth of flooding in severe storms. Water in structures and processes can cause irreparable damage. Flooding can affect not only the specific property owned and operated by a business, but also the ability of personnel to reach the facility or the ability to obtain supplies and ship products.

## WHAT CAN A BUSINESS DO?

The first and foremost task of a 21st Century business considering its water needs and vulnerabilities is to understand its current water context. This requires three key steps: (1) understanding how water rights are allocated in its jurisdiction, (2) evaluating the water supply and floodplain features of current and prospective locations, and (3) planning for future water variability and other threats to supply.

## Water Rights – Prior Appropriation, Riparian Rights, and Permitting

In the United States there are two major systems of permitting water, appropriate water rights in the



Western U.S. and riparian rights in the East. The appropriation system was first adopted and developed in the 1850s by miners who were determining their relative right to water for sluicing at their mining claims. Appropriative water rights are "usufructs," or real property interests that are held only so long as they are being used for a permitted beneficial use. An appropriated water right essentially grants the holder the right to divert water, transport it to a place of use, and then put that water to beneficial use. What constitutes a beneficial use is depends on the state statutes and/or regulations that govern the prior appropriation system, but typically include irrigation, mining, industrial, municipal, and domestic uses. Finally, competing uses of water rights are governed by the principle of "first in time, first in right," or that those water rights which were permitted earlier (i.e. senior) must be satisfied prior to satisfying newer (i.e., junior) water rights.

In the Eastern U.S., the dominant system is "riparian rights," under which a property owner gains a right to use water by owning property adjacent to a watercourse. In general, all adjacent property owners have equal rights to use water.

Although the Eastern and Western systems for surface water rights greatly vary, the state regimes for permitting groundwater diversions are remarkably similar. Most states permit the diversion of water from groundwater aquifers after applying for and receiving a permit from the appropriate state agency. The use of that water and return flow to surface waters may then fall within the riparian or prior appropriation regime.

To obtain water, an enterprise must either possess water rights directly through its own appropriations or riparian location, or it must contract with an entity that holds such rights and will provide water. Regardless which system applies, water consumption is

also regulated by state and federal governments. Water availability is often constrained by environmental requirements, navigability restrictions, or superseding federal or interstate obligations to protect surface flows or aquifer levels. In locations with declining supplies, these can all act together to squeeze end-users.

### ***Specific Water Environment***

After understanding how an entity can secure water rights, the next task is comparing its water needs with those rights and potential disruptions. In this context, a water user cannot simply rely on an agreement with a private or public entity to ensure adequate water will be available. Such agreements may not be reliable, or may be over-ridden by other considerations outside the supplier's control. Even if an agreement is valid and enforceable, there may not be an adequate remedy. A supplier cannot conjure water out of thin air. Therefore it is critical to look beyond the documents and consider the physical availability of water.





## MEGADROUGHTS AND HISTORIC FLOODS (continued)

Similarly, any operation has to consider its elevation and drainage, including for all means of moving people and goods to and from the facility. Many stormwater systems are designed for a once-in-10-year flood. What happens in a 15-year storm, or a 50-year storm? How do the efforts of other entities in the same basin to keep their properties dry affect the flow of water to their neighbors? Where does excess water flow and accumulate? And most ominously, what happens if dikes or levees fail?

### ***Planning for Future Variability and Threats to Supply***

The final step is evaluating how increased variability in water supply can affect current and future operations. On the supply side, this means evaluating how continued or renewed drought could trigger consumption restrictions or even cut-offs. In particular, the threat of prolonged drought and reduced surface water flows is becoming a reality throughout the Western United States. In many cases these reduced surface flows affect more than local communities, extending into interstate battles. For instance the reduced flows in the Colorado River implicate the

broad swaths of Wyoming, Utah, Colorado, New Mexico, Arizona, Nevada, and California. This water shortage will especially affect those states with the highest population growth, such as Arizona, Utah, and Nevada. In light of this scenario, a business or developer ought to seek out competent counsel to perform proper diligence that any water supply they are anticipating is secure regardless of ongoing drought conditions.

In terms of flooding, business should be equally cognizant of the potential damage from water releases and an overabundance of water. A large portion of Western rivers were dammed and reservoirs built throughout the early 1900's. Therefore when water exceeds the capacity of reservoirs, spillover occurs and downstream users risk the potential of flooding.

When considering groundwater resources, it is becoming clear that many aquifers are not replenishing as fast as water is being withdrawn. For instance, wide swaths of the Great Plains overlay the Ogallala Aquifer. This water aquifer underlying most of Nebraska, Kansas, and Oklahoma has been

depleted as pivots and groundwater irrigation (diversions) far exceed perennial seepage (yields). This is turning the aquifer into a non-renewable resource. In order to combat, or at least postpone, the loss of groundwater aquifers many states now institute conservation measures and encourage conservation practices. A business located in an area with a depleting groundwater aquifer should be aware of these regulations and take advantage of their own conservation measures to preserve their future right to use the water.

In light of these disruptions, businesses should consider re-evaluating their water supply and making water supply an explicit consideration in future planning. Much like how Covid and the war in Ukraine have made us re-evaluate global supply chains, a prudent business or real estate developer will consider their own water supply and determine if and how it may be susceptible to disruption. ■

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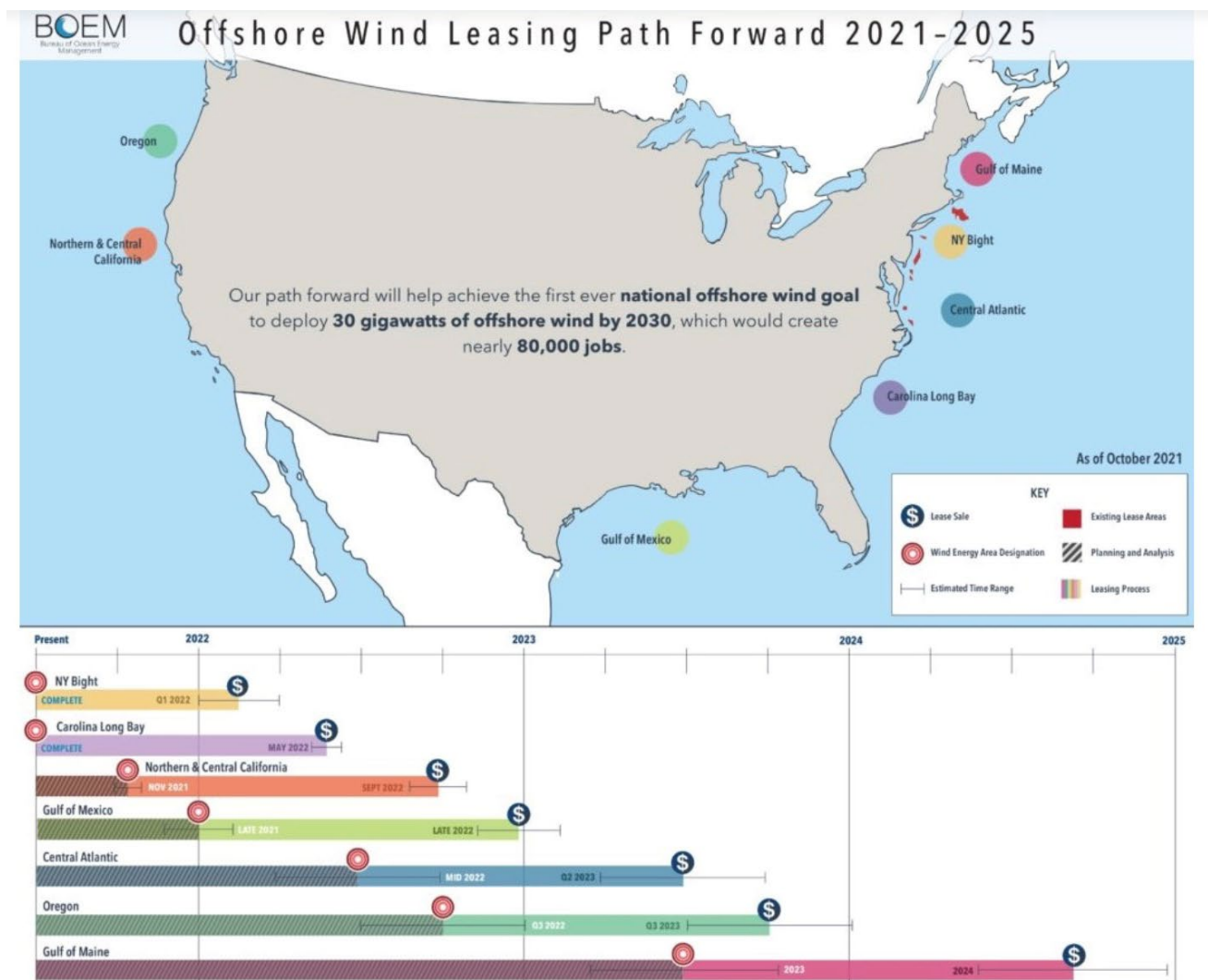


# Large-Scale Offshore U.S. Wind Projects: They're Actually Happening

By Jocelyn Knoll

The breakout of the U.S. offshore wind industry is happening — finally. For over 15 years offshore wind proponents in Europe and the U.S. touted the anticipated advantages of electricity produced by offshore wind: reduce air pollution, increase energy independence, and provide new economic opportunities to U.S. workers and businesses. Since taking office in early 2021, the Biden Administration has removed the offshore wind regulatory development roadblocks that existed under the Trump Administration, which in turn has moved U.S. offshore wind development into the long-awaited deployment phase. Further, the Biden

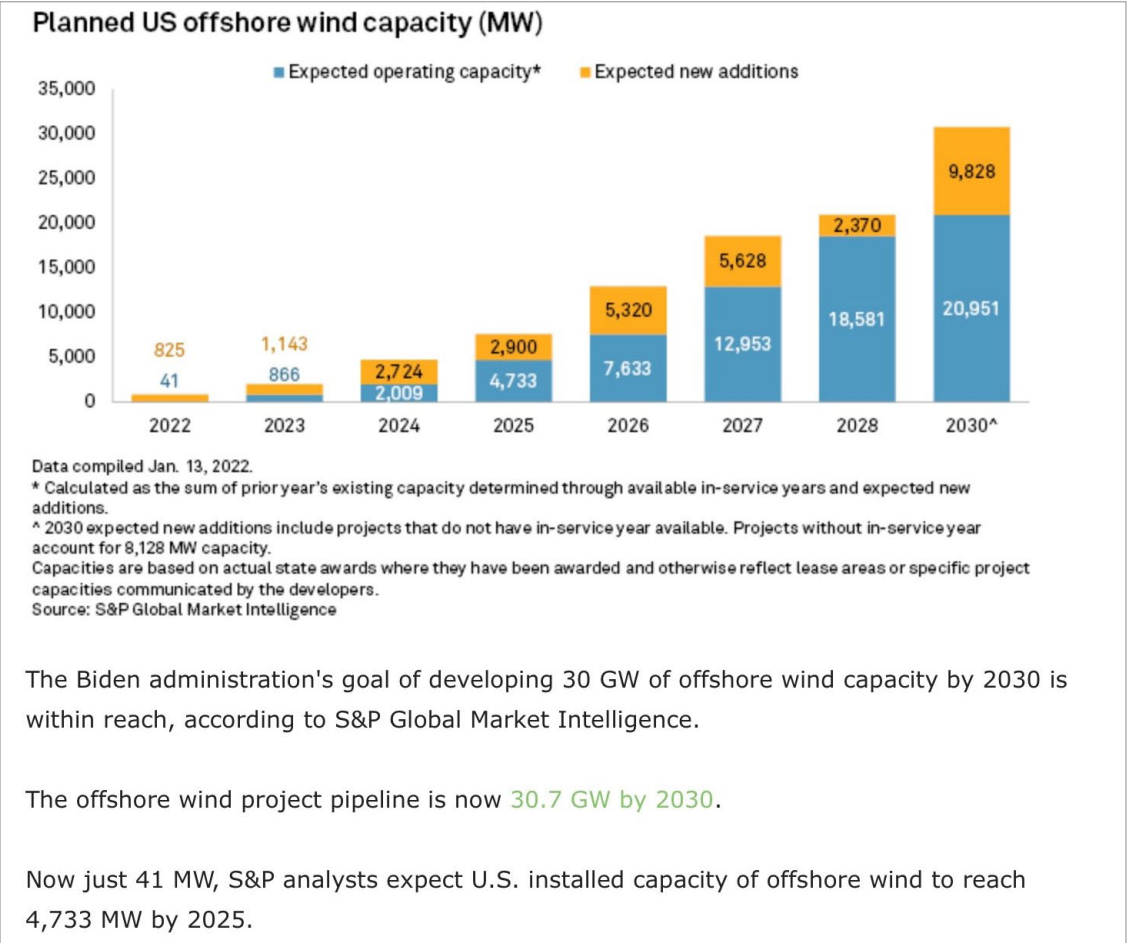
Administration has set the nation's first national offshore wind energy development goal: 30 gigawatts ("GW") of offshore wind energy by 2030, powering approximately 10 million homes and creating nearly 100,000 high-paying jobs. Recently, on September 15, 2022, the Administration refined this goal to include 15 GW of installed floating offshore wind capacity by 2035, which will allow development in deep waters (waters with depths greater than 165 feet). New York's first offshore wind farm, the South Fork Wind project, approved in November 2021, is scheduled to start generating electricity in late 2023 via 12 offshore wind



Courtesy: BOEM

LARGE-SCALE OFFSHORE U.S. WIND PROJECTS (continued)

turbines. The Massachusetts' Vineyard Wind 1 project, the first large scale U.S. offshore wind project, fully approved for construction in July 2021, should also come online in 2023, with 62 offshore turbines producing .8 GW of electricity to power approximately 400,000 homes. These east coast projects use fixed-bottom technology, which means the turbines' platforms are affixed to the ocean floor. While Massachusetts and other east coast states continue to move their offshore wind projects from design to construction, California and other west coast and gulf coast states have joined the clean energy frenzy. With deeper ocean waters than the U.S. east coast, the anticipated California projects will benefit from the continued development of floating offshore wind platform technologies.

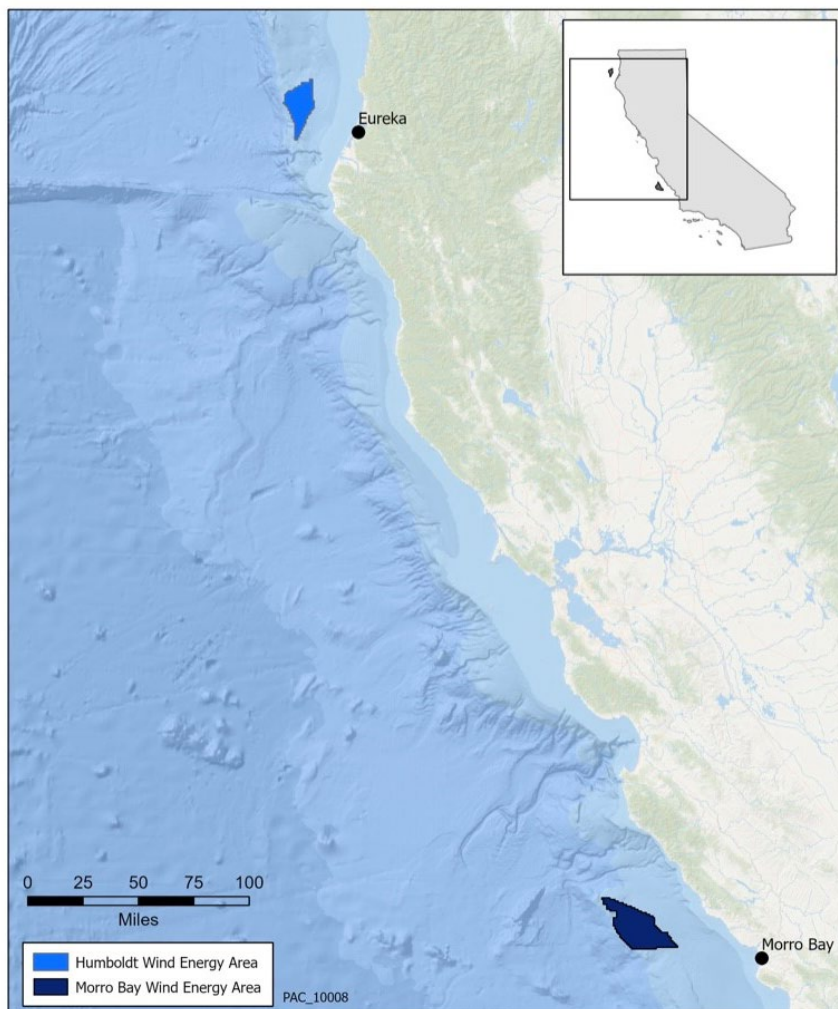


In late July 2022, California Governor Gavin Newsom, a strong proponent of offshore wind development, sent a letter to the California Air Resources Board, stating:

California is home to one of the world's best offshore wind resources in the world and I am confident that this clean, domestic source of electricity can play an important role in meeting our state's growing need for clean energy . . . . That is why I am asking the California Energy Commission to establish a planning goal of at least 20 GW by 2045 . . . and to work with our federal partners to accelerate the deployment of offshore wind . . . .

The timing of Governor Newsom's July 22 letter aligned closely with the federal Bureau of Ocean Energy Management's ("BOEM") August 1, 2022 notice and comments deadline for its proposed sale notice ("PSN") of five offshore wind leases off California's north and central coasts: the Morro Bay Wind Energy Area and Humboldt Wind Energy Area, which total approximately 373,268 acres. BOEM estimates that these two areas could support a total of 4.5 GW of offshore wind energy, enough to power more than 1.5 million homes. The next step in BOEM's





process for these areas is to hold an offshore wind energy lease sale on December 6, 2022. The expectation is that these California leases will generate billions of dollars in revenue, all to the good of U.S. taxpayers.

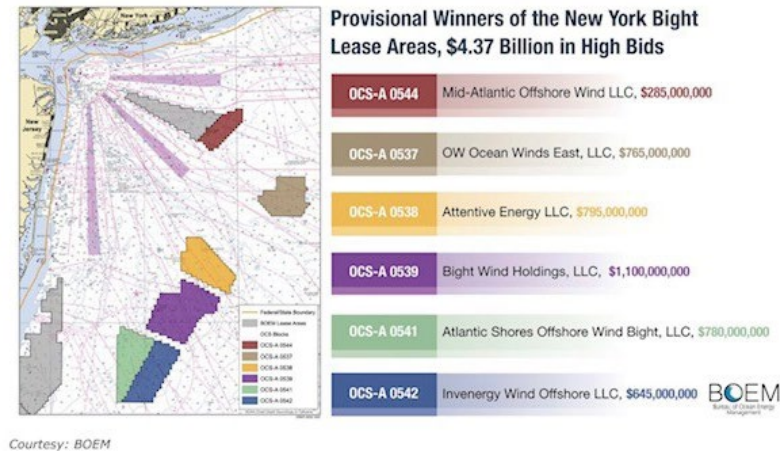
Put simply, the U.S. Government has found a new cash cow. The California PSN is the third offshore wind auction under the Biden Administration. The first Biden Administration auction was New York Bight in February 2022, six lease sites off the New York and New Jersey coasts that generated a total of \$4.37 billion in revenue for the U.S. Treasury. BOEM's conservative estimate is that Bight has the potential to generate between 5.6 GW and 7 GW, enough to power more than 2 million homes. The \$4.37 billion collected from the Bight auction is "more than three times the revenue received from all U.S. offshore oil and gas lease auctions over the past five years," according to a June 18, 2022 Reuter's report.

On May 11, 2022, BOEM held its second auction under the Biden Administration for two lease areas in the Carolina Long Bay

area, located offshore of the North Carolina and South Carolina border. BOEM anticipates that these two lease areas will generate at least 1.3 GW of offshore wind energy, enough to power nearly 500,000 homes. The Carolina lease sale drew competitive winning bids from two entities totaling approximately \$315 million. To put the two recent BOEM auctions into perspective, the Massachusetts site secured \$405.1 million in 2018 and one New York Bight site secured \$1.1 billion in 2022. BOEM intends to hold up to five new offshore wind lease sales by 2025: the California auctions, the Gulf of Mexico, the Central Atlantic, Oregon, and the Gulf of Mexico. Collectively, New York and New Jersey have set the nation's largest regional offshore wind target by setting a target to install over 16 GW of offshore wind electricity capacity by 2035. Upping the ante for his state, California's Governor Newsom, in his July 2022 letter, challenged California to develop 20 GW of installed offshore wind capacity by 2045.

The New York Bight offshore wind leases include novel stipulations intended to facilitate the development of a robust domestic U.S. supply chain for offshore wind energy and enhance engagement with Native American Tribes, the commercial fishing industry, other ocean users, and underserved communities. The Department of the Interior ("DOI") has incorporated monetary incentives into the stipulations to source major components domestically, including blades, turbines, and foundations. DOI's requirements include Project Labor Agreements whenever reasonably possible to ensure union-built projects. And just as importantly, a requirement that each lessee prepare plans for contributing to the creation of a robust and resilient US-based offshore wind supply. Since the pandemic, the media, politicians, and seemingly everyone else have bemoaned national and global supply chain woes. Launching a new industry in the U.S., especially now, presents opportunities and challenges to build the supply chain needed to deploy numerous offshore wind projects and increase electricity sources for tens of millions of American consumers.

## LARGE-SCALE OFFSHORE U.S. WIND PROJECTS (continued)



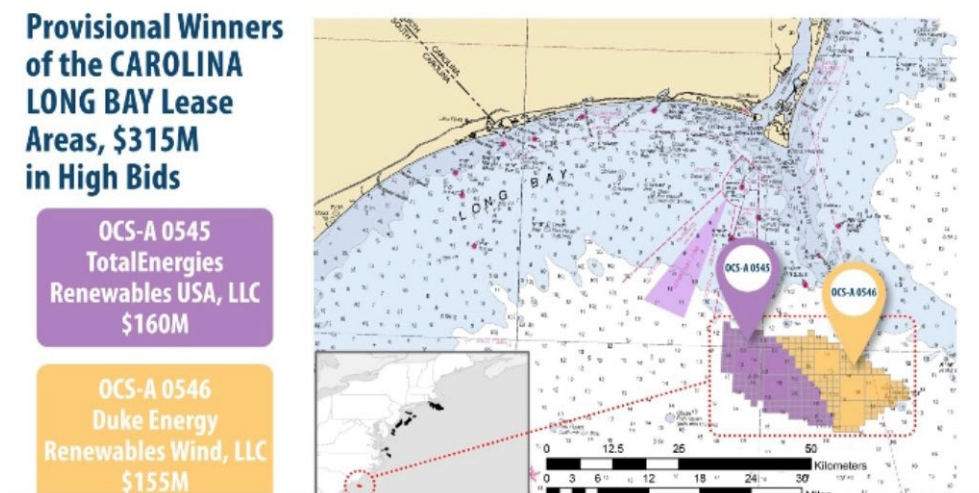
New York and New Jersey, embracing their large stakeholder positions in U.S. offshore wind development, joined with BOEM to publish "A Shared Vision on the Development of an Offshore Wind Supply Chain." This report supports their collective intent to "work together to advance common interests and shared values of economic prosperity and energy resilience." Their goal: "This collaboration will serve as a model for future engagement and establish the United States as a global leader in the offshore wind market." The BOEM, New York, and New Jersey consortium have formed the NY/NJ Bight Regional Working Group on Supply Chain Development, which is committed to developing best practices and guidance that will, among other things:

- define what constitutes domestic/local supply chains;
- develop metrics for supply chain development goals; and

- promote accountability by sharing information on how developers are meeting supply chain and equity goals.

The Working Group's intent is that these best practices serve as a model to other states and projects. Obviously, it is long-term and repeated results (meaning US-based jobs, revenue, and successfully completed and operational projects) that will ultimately define whether this consortium succeeds.

Erik Military, president of the National Ocean Industries Association, recently touted actual examples of US-based offshore wind-related manufacturing: a Texas-built offshore wind substation and Jones Act wind installation vessel; a Louisiana-built offshore wind service operation vessel; and Carolina-manufactured (both Carolinas) transmission tables. Recent legislative actions will further boost U.S.-based offshore wind-manufacturing. The Inflation Reduction Act creates new energy tax credits, and the Bipartisan Infrastructure





Act contains funding for offshore wind platform technologies and related research and development. The Infrastructure Law also includes Buy America requirements that will apply to wind turbine blades, fixed bottom and floating platforms, installation vessels, and more. These laws will further encourage the development of a sustainable, robust U.S.-based supply chain.

Putting aside various views on climate change and politics, many States have passed legislation mandating the development of clean energy, in particular offshore wind energy. Twenty-three States have a coastline to call their own, not to mention the States that have Great Lakes' shorelines. And our friends to the north in Canada have the longest coastline in the world. In terms of opportunity, there is the exciting potential for the new burgeoning U.S.-based offshore wind industry to grow the economies across almost all fifty States and in Canada, provide new sustainable energy sources, contribute to energy independence, reduce carbon emissions, develop a supply chain that can serve as a model to other industries, and offer a smorgasbord of interesting, high paying jobs to young people. Although offshore wind naysayers still exist, governments and U.S.-based businesses are finally waking up to the possibilities of a successful U.S. offshore wind industry. ■

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