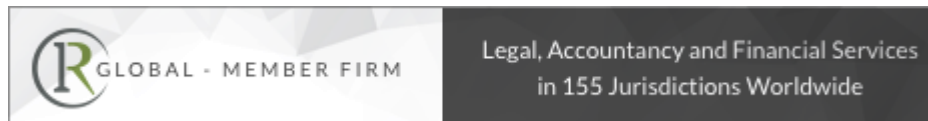




# **Survey of Some Select Wind Energy Legal Issues in the United States**

Buford Boyd Pollett, Managing Attorney, EMC Law PLLC ©2018

[www.emclaw.us](http://www.emclaw.us)

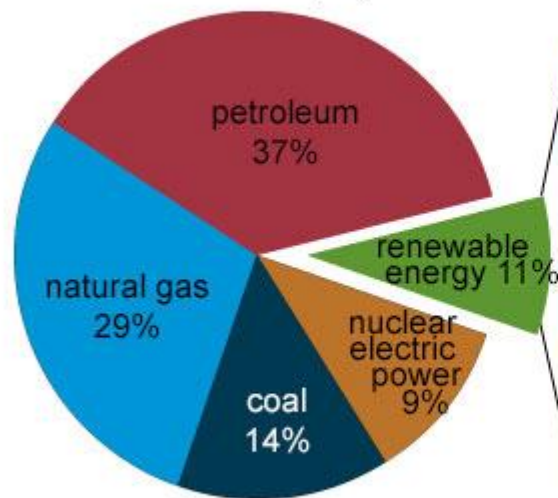


# U.S. Energy Mix

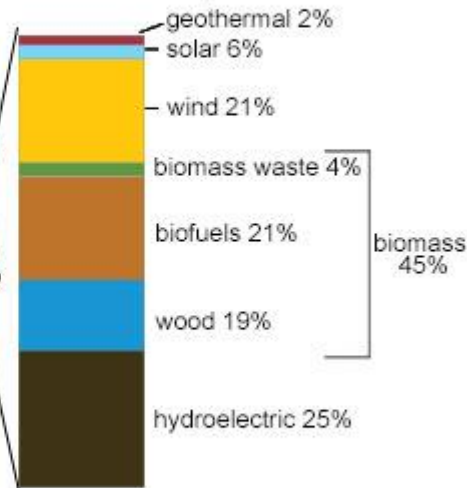
Source: [https://www.eia.gov/energyexplained/?page=us\\_energy\\_home](https://www.eia.gov/energyexplained/?page=us_energy_home)

## U.S. energy consumption by energy source, 2017

Total = 97.7 quadrillion  
British thermal units (Btu)



Total = 11.0 quadrillion Btu



Note: Sum of components may not equal 100% because of independent rounding.  
Source: U.S. Energy Information Administration, *Monthly Energy Review*, Table 1.3 and 10.1, April 2018, preliminary data



# Petroleum – Industrial

Source: Bing



ROBERT D. FLAHERTY | ENERGYLANDSCAPES.NET



# Wind – Utility

Source: Bing





# Solar– Technology

Source: Bing



# Wind Farm Lifecycle

- Screening (*e.g.* virtual screening, wind study)
- Pre-Development (*e.g.* Data Collection)
- Development (*e.g.* Design and Site Engineering Work)
- Construction
- Operations
- End of Life (*e.g.* Decommissioning)

Source: <https://www.nrel.gov/docs/fy17osti/68227.pdf>



# Agenda

- Onshore Development Process
- Onshore v. Offshore
- Local Content
- Takeaways



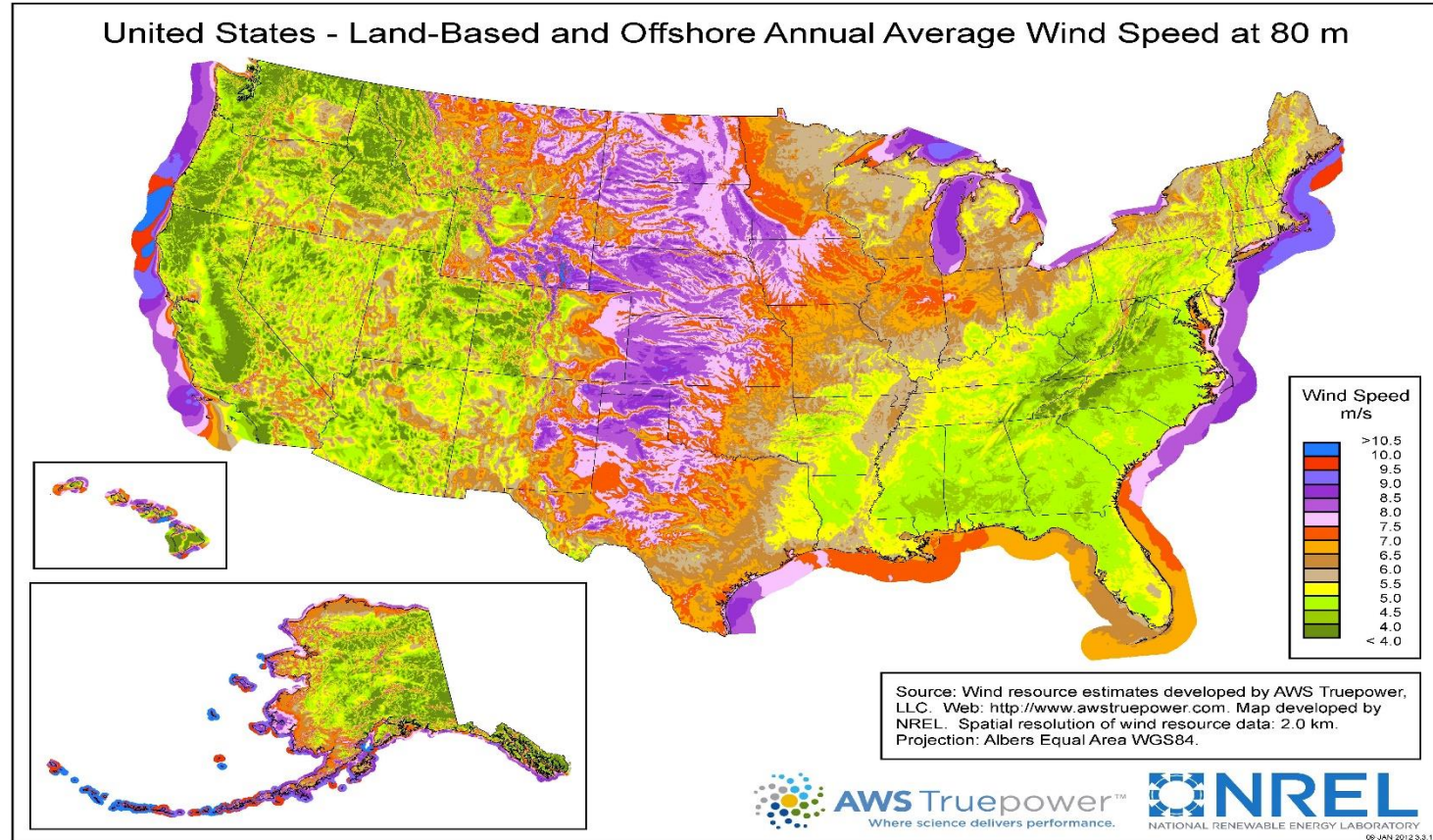
# Development Process

- Assessing the resource
- Tax abatements
- Leasing
- Environmental Studies
- Airspace impacts
- Electric Grid
- Sale of Wind Energy





# Assessing the Resource



# Assessing the Resource

- One or more 50-60 meter test towers (12 months or more of data collection)
  - Wind speed
  - Wind direction
  - Temperature
  - Barometric pressure
- Expert generates wind resource report
- Calculate wind capacity over extended period of time based on size and location of turbines
- Estimate actual v maximum (i.e. 24 hours/day)



# Leasing

- Original wind leases based on traditional *Producers* 88 oil and gas lease
- Wind leases in Oklahoma have generally favored developers
- Texas wind leases have been more favorable to landowners and preserved the landowner's rights to continue using the land for activities such as farming, ranching, hunting, recreation as well as oil and gas exploration and development.



# Tax Abatements

- Counties and local governments provide tax abatements for wind projects (*e.g.* schools permit limiting valuation of property in the district and new construction)
- Tax abatements often require:
  - Investment at certain minimum levels
  - Defined employment levels and compensation plus benefits
  - Guarantee economic life period (*e.g.* over ten years)
  - See Hidalgo County Texas Tax Abatement Agreement
- Source: [http://agenda.hidalgocounty.us/docs/2014/CC/20141219\\_2476/47878\\_12-22-2014%20Hidalgo%20County%20Wind%20Farm%20Tax%20Abatement%20Agreement.pdf](http://agenda.hidalgocounty.us/docs/2014/CC/20141219_2476/47878_12-22-2014%20Hidalgo%20County%20Wind%20Farm%20Tax%20Abatement%20Agreement.pdf)



# Environmental Studies

- Four season avian assessment
- Wetland jurisdictional review
- Phase one environmental assessment
- Cultural resource analysis





# Airspace Impacts

- Civilian flight operations
- Military flight operations
- Federal Aviation Administration must provide a *no hazard determination* for each turbine location

See <https://stateimpact.npr.org/oklahoma/2017/09/07/oklahoma-latest-front-as-military-and-wind-developers-fight-for-open-sky/> See also <http://www.okenergytoday.com/2018/11/wind-talks-extended-again-over-oklahomas-law-to-protect-military-flight-space/>



# Electric Grid

- Transmission access
- Impact on local grid
- Infrastructure improvements



# Electric Grid Jurisdiction

- *On August 8, 2005, the Electricity Modernization Act of 2005, which is Title XII, Subtitle A, of the Energy Policy Act of 2005 (EPAcT 2005), was enacted into law.*
- *EPAcT 2005 adds a new section 215 to the Federal Power Act (FPA),[3] which requires a Commission-certified Electric Reliability Organization (ERO) to develop mandatory and enforceable Reliability Standards, which are subject to Commission review and approval.*

Quoting <https://www.federalregister.gov/documents/2007/03/27/E7-5285/applicability-of-federal-power-act-section-215-to-qualifying-small-power-production-and-cogeneration>



# Electric Grid Jurisdiction

- Federal Energy Regulatory (FERC) jurisdiction
  - *Wholesale sales of electric energy in interstate commerce*
  - *Transmission of electric energy in interstate commerce*
- FERC claims broad jurisdiction under Section 215 of the Federal Power Act (FPA), *[a]ll users, owners and operators of the bulk-power system* must comply with mandatory electric reliability standards.



# Electric Grid Jurisdiction

- Federal Energy Regulatory (FERC) jurisdiction less clear over siting and construction of transmission lines.
- Interstate commerce includes transmissions of electricity *transmitted from a State and consumed at any point outside thereof*. Quoting 16 USC § 824(c)
- Texas avoids impacts of FPA by generally maintaining an intrastate transmission grid





# Sale of Wind Energy

- Power Purchase Agreements (PPA) – purchaser generally a utility
- Hedge Arrangements (financial PPA) – purchaser generally a financial institution
- Corporate and Industrial Offtake Agreements – *e.g.* Apple, Google and Microsoft entering into PPAs for renewable energy
- Impact of Renewable Energy Credits (*i.e.* Green Tags)



# Onshore Wind Farm Timeframe

- Preconstruction assessment 3-5 years
- Construction 1-2 years



## Survey of Some Select Wind Energy Legal Issues

# U.S. Regulatory Framework

Source: <https://www.boem.gov/Regulatory-Roadmap/>



# Offshore Wind

- *Jurisdiction*
- *State Activities*
- *Federal Offshore Leasing*



## Survey of Some Select Wind Energy Legal Issues

# U.S. Regulatory Framework

Source: <https://www.boem.gov/Resource-Evaluation-Data/>





## Jurisdiction

- Federal law
- State law
- Local law

## Federal Statutes

- Submerged Lands Act (SLA) of 1953
- Outer Continental Shelf Lands Act of 1953 (OCSLA)
- Energy Policy Act of 2005 (EPAAct)

## Submerged Lands Act (SLA) of 1953

- Reiterated Federal Government's claim to the lands of the Outer Continental Shelf (OCS) (*i.e.* **submerged lands seaward of state jurisdiction**)
- Granted most states the power to regulate the natural resources of submerged lands from the coastline up to **3 nautical miles (5.6 km)** into the Atlantic, Pacific, the Arctic Oceans, and the Gulf of Mexico
- **Texas and the Florida's west coast** have jurisdiction that extends from the coastline up to **3 marine leagues (16.2 km)** into the Gulf of Mexico

## Survey of Some Select Wind Energy Legal Issues

# Outer Continental Shelf Lands Act of 1953 (OCSLA)

- Congress and the President have amended OCSLA since enactment in 1953. See <http://www.epw.senate.gov/ocsla.pdf>
- OCSLA provides the basic legal framework regarding Federal responsibility over the submerged lands of the OCS.

Source <http://www.boem.gov/Governing-Statutes/>

## Energy Policy Act of 2005 (EPAAct)

- *Authorized the BOEM to issue leases, easements and rights of way to allow for renewable energy development on the Outer Continental Shelf (OCS). Provided a general framework for BOEM to follow when authorizing these renewable energy activities.*

Quoting <https://www.boem.gov/Regulatory-Framework/>

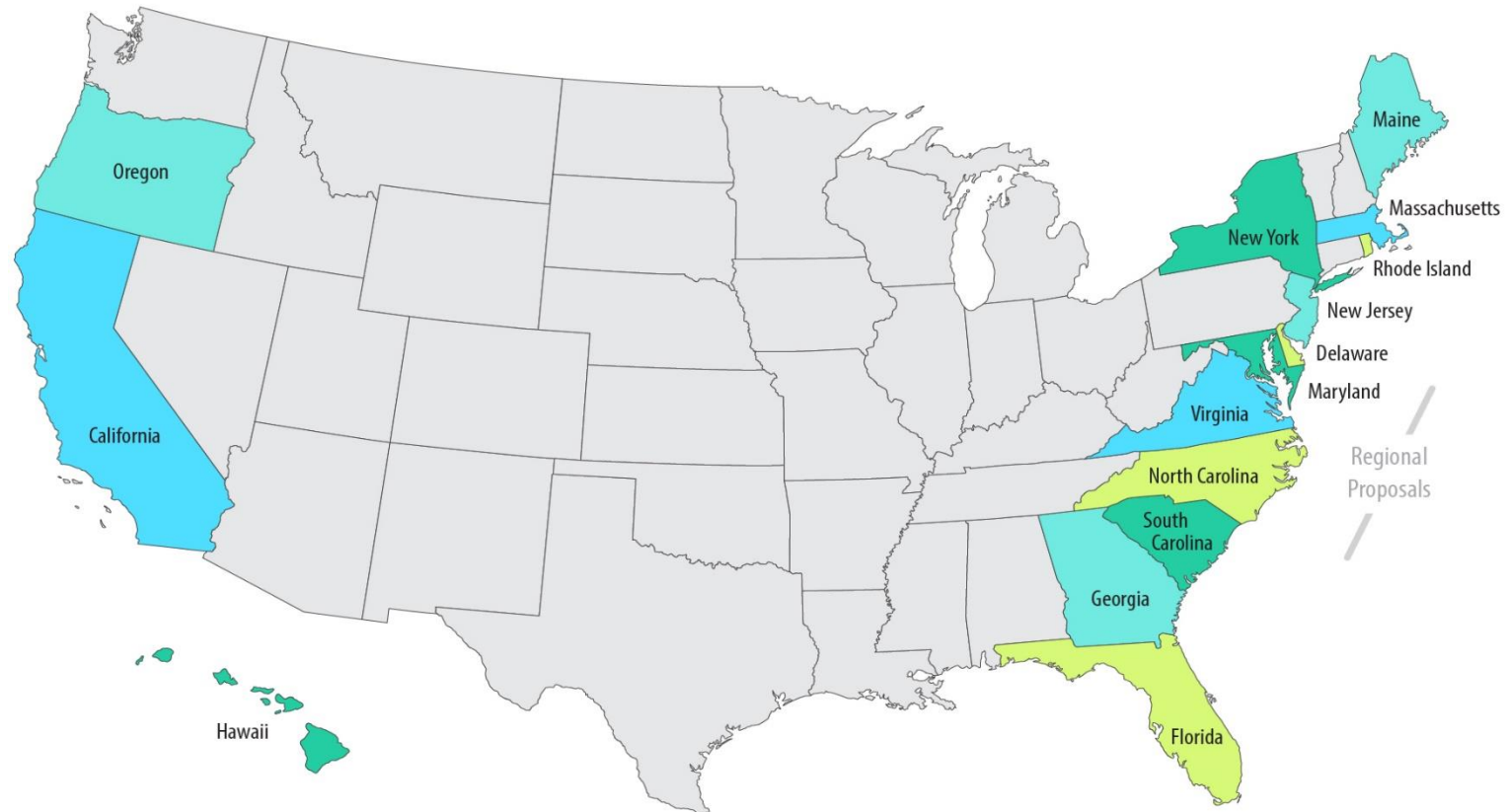


## Energy Policy Act of 2005 (EPAct)

- *EPAct requires that the BOEM coordinate with **relevant** Federal agencies and **affected** state and local governments, obtain fair return for leases and grants issued, and ensure that renewable energy development takes place in a safe and environmentally responsible manner.*

Quoting <https://www.boem.gov/Regulatory-Framework/> (emphasis added.)

# State Activities



Source: <https://www.boem.gov/Renewable-Energy-State-Activities/>

## BOEM Office of Renewable Energy Programs Leasing

### ➤ **Leasing**

- *12 active commercial wind energy leases in the Atlantic*
- *Upcoming lease sales in MA and NY*
- **Site Assessment Plans (SAP)** - 6 approved (MA, RI, VA, MD, MA, NJ)
- **Construction and Operations Plans (COP)** - 2 processing (Vineyard Wind and Deepwater Wind South Fork)

Quoting <https://www.boem.gov/Bennett-and-Feinberg-presentation/> Anticipated Call from presentation at the Offshore Wind Summit Houston in September 2018



## BOEM Office of Renewable Energy Programs Leasing

- ***Planning activities continue off Hawaii, California, Carolina and the New York Bight***
- ***Anticipated Call for Information and Nominations offshore California later this year***

Quoting <https://www.boem.gov/Bennett-and-Feinberg-presentation/> Anticipated Call from presentation at the Offshore Wind Summit Houston in September 2018



# Local Content

- *State and local requirements (e.g. Maryland Offshore Wind Energy Act of 2013)*
- *Federal requirements (e.g. Jones Act Shipping and cabotage requirements)*



# Takeaways

- Turning Not In My Back Yard *NIMBY* (e.g. protecting views) to Please In My Back Yard *PIMBY* is an ongoing challenge for the wind sector
- Watch for novel *use* claims (e.g. private nuisance) between wind developers
- Creating financing, profitability and risk sharing innovations are important to attract contractors to do the work needed to design and construct wind farms

