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# Contract Provisions and Regulatory Issues to be Considered by the Offshore Wind Sector during the COVID-19 Upheaval

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# Our Presenters

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# Current Status of Offshore Wind Development

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- Permitting reviews and analyses proceeding on desk-tops
- Vineyard Wind end of year time frame for NEPA determination still seems feasible
- Delay in summer environmental field work for addition COPs possible
- A sustained pipeline of projects is important for investment in US operations by global offshore wind companies

# Current Status of Offshore Wind Development (Continued)

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- Connecticut delayed PPA signing deadline; transactional flexibility anticipated
- Anticipated federal infrastructure incentives bill a spot of hope
- Uncertainty prevails throughout the supply chain on how to deal with COVID-19 related contracting issues and delays

# Force Majeure and other Contractual Issues

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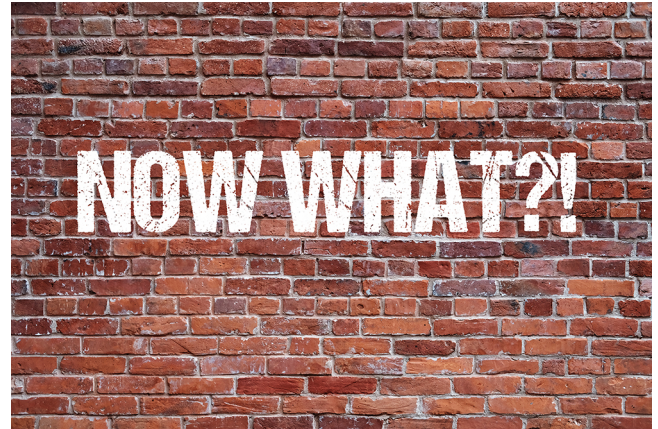
- Force Majeure
- Impossibility, Impracticability and Frustration of Purpose
- Change in Law
- Material Adverse Change (MAC) or Material Adverse Effect (MAE)
- Default, Termination and Dispute Resolution
- Insurance Policies



# COVID-19 Crisis Management: Contracts

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- Health and Safety is #1 Priority
- Determine how you are affected
  - Inability to perform?
  - Counterparties not performing?
  - Both?
- Read your agreements
- Mitigate effects
- Consult your lawyer



# Force Majeure

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- A contractual defense that allows an affected party to suspend or cancel its contractual obligations and limit its liability under certain circumstances. What constitutes an event of force majeure depends on the relevant contractual provision, applicable law and other relevant facts.
- Most force majeure provisions include a list of specified events that are not reasonably foreseeable and that are also outside the control of the parties.

# Force Majeure (Continued)

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- Examples include (a) acts of God; (b) flood, fire, earthquake, or explosion; (c) war, invasion, hostilities (whether war is declared or not), terrorist threats or acts, riot or other civil unrest; (d) government order, law, or actions; (e) embargoes or blockades in effect after the date of this Agreement; (f) national or regional emergency; (g) strikes, labor stoppages or slowdowns or other industrial disturbances; and (h) other similar events beyond the reasonable control of the affected Party.
- Often include specific exclusions, such as local strikes or labor actions, financial or market disruptions and increased cost of performance.



# Is COVID-19 an Event of Force Majeure?

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- Some force majeure provisions include “epidemics, pandemics and quarantines” – currently uncommon, but will be going forward.
- More likely will need to fit into “act of God,” “government order, law, or actions” or a catch-all (“other similar events beyond the reasonable control of the affected Party”).
- Performance must be impossible (not just more difficult or more expensive), unless the provision includes another standard.
- Most courts narrowly interpret force majeure provisions – careful drafting is very important to allocate the risks among the parties to the contract.

# Procedures, Consequences and Other Considerations

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- Affected party will have a duty to notify their counterparty, usually with description of force majeure event, nature of disruption of performance, expected duration, and recovery plan. Sometimes notice requirements are strict and late notice is a bar to relief.
- Usually an on-going event of force majeure will eventually trigger a termination right (e.g., after 120 days the non-claiming party can terminate the agreement).
- Note that either sending or receiving a notice of force majeure may trigger an obligation to give notice under other agreements (e.g. financings)
- Are your force majeure provisions consistent across your contracts?

# Impossibility, Impracticability and Frustration of Purpose

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Common law concepts that are narrowly construed by most courts:

- Impossibility: performance can be excused if it becomes objectively impossible, not just more expensive or difficult due to an unforeseen event.
- Impracticability: excuses performance where an unforeseen event has cause performance to be so difficult or expensive that it becomes impracticable, even if technically possible, only where the non-occurrence of such event was a basic assumption of the contract (see Restatement (Second) of Contracts §261 and UCC §2-615).
- Frustration of Purpose: a limited excuse of performance in some jurisdictions where an unforeseen event removes or destroys the main purpose for entering into the contract. Both parties must have known such main purpose prior to entering into such contract.

# Other Contract Provisions to Review

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- Change in Law
- Material Adverse Change (MAC) or Material Adverse Effect (MAE)
- Default, Termination and Dispute Resolution
- Insurance Policies



# NEPA and Offshore Wind

- **Who, what and when**
  - BOEM
  - Requires federal agencies to consider the environmental consequences of their actions
    - Procedural Statute
    - Does Not Dictate Outcome
  - For Commercial OSW - Provides for Two Bites
    - Lease Sale/Site Assessment Plan - EA
    - COP – EIS
- **Current Situation**
  - Vineyard Wind and the Supplemental EIS
  - COVID-19 impacts on the NEPA review



# NEPA Reform

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- Codifies E.O 13807 (OFD, presumptive page limits and timelines)
- Simplifies definition of “environmental effects” to be reasonably foreseeable and require a reasonably close causal relationship to the proposed action
  - Exclude terms direct and indirect from definition;
  - Strikes separate definition of “cumulative impacts”; and
  - Analysis of cumulative effects will no longer be required under NEPA; effects should not be considered significant if remote in time, geographically remote or the result of a lengthy causal chain.

# NEPA Reform (Continued)

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- Requires public comments be “specific” and “timely submitted.”
- Clarifies that “reasonable alternatives” must be “technically and economically feasible.”
- Provides more flexibility to allow project sponsors to participate in preparation of EIS



# NEPA and Offshore Wind

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- NEPA Reform
  - Comment Period Closed March 10
  - 598,989 Comments Received
  - Motivation to complete before end of year
    - Trump Agenda
    - CEQ refused congressional request to extend comment period
  - If finalized – litigation likely



# FERC PJM MOPR Order

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- Calpine Corporation v. PJM Interconnection, 169 FERC ¶ 61,239, December 19, 2019
  - Set a minimum price for bidding into capacity markets based on technology costs.
  - Removed exemptions for renewables.
  - Compliance filing, other renewables vs. OSW

# FERC PJM MOPR Order (Continued)

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- Follow on to: ISO New England Inc., 162 FERC ¶ 61205 (Mar. 9, 2018)
  - Phase out of renewables exemption
  - Substituting Competitive Auctions with Sponsored Policy Resources (CASPR)
  - Vineyard Wind –partial clearing in current auction

# Cabotage Laws –Jones Act

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[US Customs and Border Security, Modification and Revocation of Ruling Letters Relating to CBP's Application of the Jones Act to the Transportation of Certain Merchandise and Equipment Between Coastwise Points, effective February 17, 2020.](#)

# Cabotage Laws –Jones Act (Continued)

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- Overturned the Koff Rulings on vessel movement during lift
- Eliminated *de minimus* cargo exceptions: cargo is anything left attached to the seabed
- Eliminated purpose-of-vessel exceptions
- Generally supports use of foreign installation vessels under current Jones Act work-arounds



# Questions?



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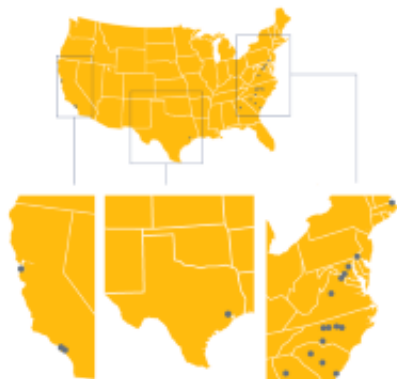
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