

# NEPA Beyond 50:

## EIA for Infrastructure Investment



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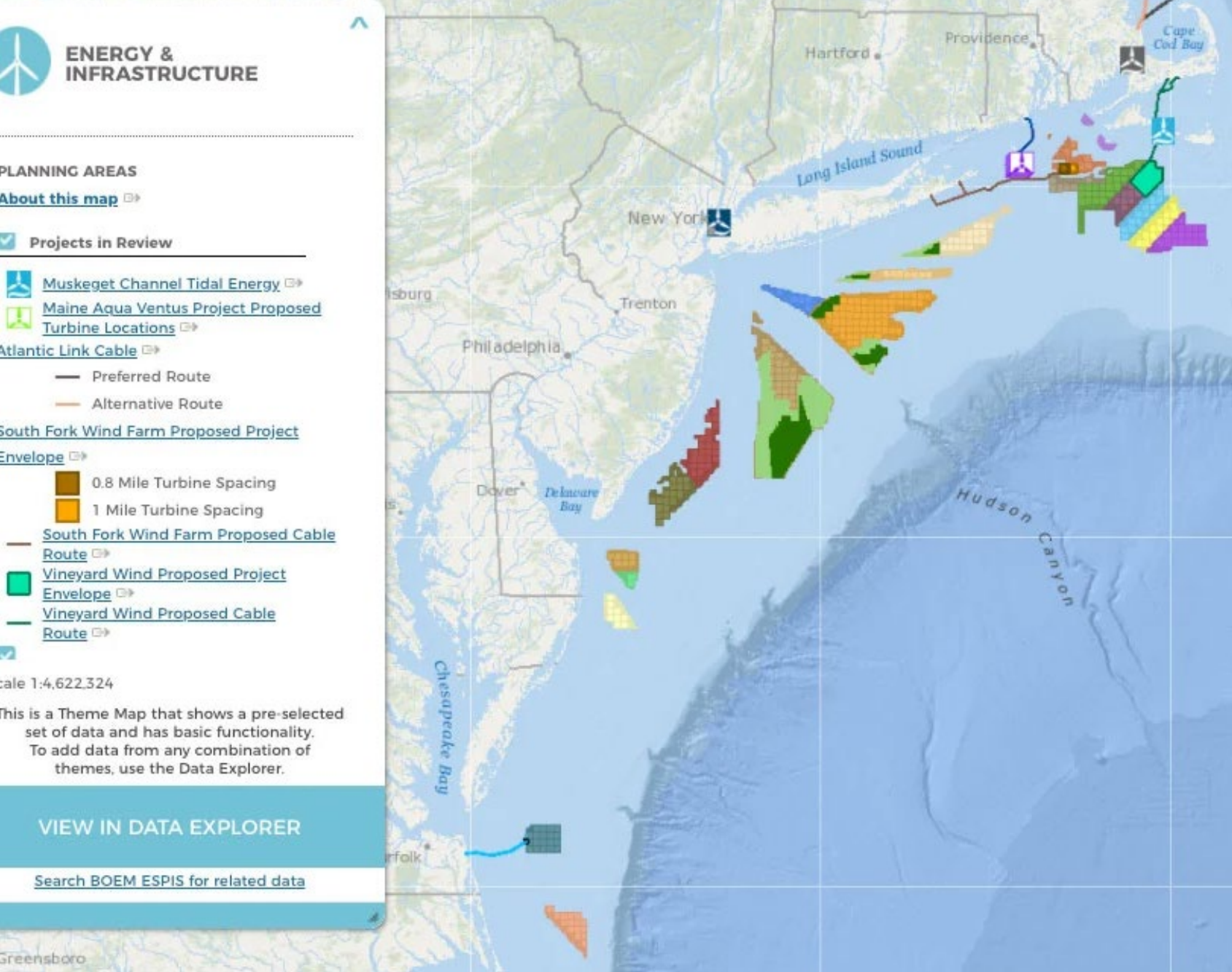
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- National Goal: 30 GW by 2030
- Now: 7 turbines with 42 MW total capacity
- 22 active offshore wind leases on the East Coast
- Vineyard Wind ROD – May 21, 2021 (800 MW)
- South Fork Wind ROD – November 23, 2021
- 9 projects “In Progress”
- 3 projects “Planned”

# How does NEPA apply to Offshore Wind Projects?

- A statement of national environmental policy:
  - “to promote efforts which will prevent or eliminate damage to the environment and the biosphere and stimulate health and welfare of man”
  - “to enrich the understanding of the ecological systems and natural resources important to the Nation”
  - “encourage productive and enjoyable harmony between man and his environment”
- Procedural requirements for federal agencies to implement that national environmental policy
- Authorizing legislation for a Council on Environmental Quality (“CEQ”) to implement that national environmental policy

# NEPA – Statute, Regulations, and Common Law

- The Statute
  - 42 U.S.C. §§ 4321 – 4347
- NEPA “streamlining” (e.g., FAST Act)
  - 42 U.S.C. § 4370m et seq.
- The Regulations – Many Different Sources
  - CEQ, 40 C.F.R. Parts 1500 – 1508
  - Federal agency NEPA procedures approved by CEQ
- Caselaw
  - Thousands of judicial decisions over the last 50 years.
  - Seventeen cases in the Supreme Court.

# The Statute

- “Action Forcing” – 42 U.S.C. § 4331(a)
  - “it is the continuing policy of the Federal Government ... to use all practicable means and measures,...to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.” 42 U.S.C. § 4331(a)
- The Action Required – 42 U.S.C. § 4332(C)
  - For every “major Federal action[] significantly affecting the quality of the human environment, a detailed statement by the responsible official on –
    - (i) the environmental impact of the proposed action,
    - (ii) any adverse environmental effects which cannot be avoided...,
    - (iii) alternatives to the proposed action,...

# The Regulations

- **CEQ Regulations**

- Promulgated in 1978 to provide step-by-step instructions on the implementation of NEPA
- Prior to 2020, only one regulation amended once – 40 C.F.R. § 1502.22 (1986) – incomplete or unavailable information
- Entitled to “substantial deference.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 355 (1989).
- CEQ Regulations revised for the first time, 85 Fed. Reg. 43304-76 (July 16, 2020).
- CEQ has finalized three amendments, 87 Fed. Reg. 23452 (April 20, 2022), with more scheduled for proposal in June of 2022.

# Agency Implementing Regulations

- Other Agencies Have CEQ-Approved NEPA Implementing Regulations:
  - Department of the Interior, 43 C.F.R. Part 46
    - Bureau of Ocean Energy Management, 516 DM 15
    - Bureau of Ocean Energy Management 30 CFR Part 585—RENEWABLE ENERGY AND ALTERNATE USES OF EXISTING FACILITIES ON THE OUTER CONTINENTAL SHELF
  - National Oceanic and Atmospheric Administration, [Administrative Order \(NAO\) 216-6A](#)
  - Army Corps of Engineers, 33 C.F.R. Part 230
- No agency has updated regulations to incorporate the 2020 CEQ revisions



# Executive Order 13990: Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis

## **Sec. 2. Immediate Review of Agency Actions Taken Between January 20, 2017, and January 20, 2021**

- Agency actions subject to review are those “regulations, orders, guidance documents, policies, and any other similar agency actions promulgated, issued, or adopted between January 20, 2017, and January 20, 2021, that are or may be inconsistent with, or present obstacles to, the policy set forth in section 1 of this order.”
- Agencies are directed to “consider suspending, revising, or rescinding the agency actions.”
- Directs DOJ to notify courts with pending litigation on any action being reviewed to consider a stay



# E.O. 13990 Sec. 7 Revocations

Executive actions revoked or suspended with direction to agency heads to consider whether to recommend a replacement order include:

- Executive Order 13807 Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects  
“The Director of OMB and the Chair of the Council on Environmental Quality shall jointly consider whether to recommend that a replacement order be issued.”
- CEQ is directed to rescind its June 2019 draft guidance on GHG guidance. CEQ, as appropriate and consistent with applicable law, shall review, revise, and update its “Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews,” 81 Fed. Reg. 51866 (Aug. 5, 2016).

# E.O. 14008: Tackling the Climate Crisis at Home and Abroad

- CEQ's review of the 2020 NEPA rule will need to be coordinated with the Department of the Interior's Section 207 review of:  
“siting and permitting processes on public lands and in offshore waters to . . . increase renewable energy production on those lands and in those waters, with the goal of doubling offshore wind by 2030 while ensuring robust protection for our lands, waters, and biodiversity and creating good jobs.”
- CEQ's NEPA review will need to include Section 213 provisions:
  - “to ensure that Federal infrastructure investment reduces climate pollution, and to require that Federal permitting decisions consider the effects of greenhouse gas emissions and climate change”; and
  - “to accelerate the deployment of clean energy and transmission projects in an environmentally stable manner.”

# Conservation & Environmental Justice

Under E.O. 14008, development of renewable energy production and transmission will have to be harmonized with other goals:

- Section 216, of conserving at least 30 percent of our lands and waters by 2030; and
- Section 219, of securing environmental justice and spurring economic opportunity for disadvantaged communities that have been historically marginalized and overburdened by pollution and underinvestment in housing, transportation, water and wastewater infrastructure, and health care.

# DOI Secretarial Orders 3398 & 3399

- S.O. 3398 rescinded S.O. 3355, which implemented E.O. 13807 with tighter Interior timelines for EIS (1 year) and EA (6 months)
- S.O. 3399 instructs Interior bureaus/offices to implement 2020 CEQ NEPA regulations only:
  - Without changing the “application or level of NEPA” compliance that would have occurred under the prior CEQ regulations and,
  - consistent with Department’s own NEPA regulations, the Departmental Manual, and guidance from the Department’s Office of Environmental Policy and Compliance.
  - Departmental regulations found to “irreconcilably conflict” with the 2020 CEQ regulations must be referred for resolution by the Department and CEQ.

# Let's continue the conversation!

Post questions and comments via chat in the IAIA22 platform.



## #iaia22

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