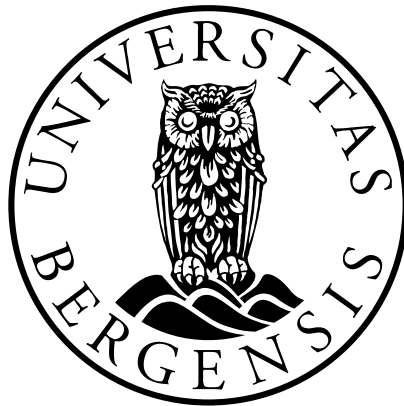


# Offshore Wind Licensing in Norway

*An Analysis of the Rules Concerning  
Authorization and Licensing of Offshore Wind  
Pursuant to the Offshore Energy Act and  
proposed regulation*

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# 1. Introduction

## 1.1 Thesis topic and research questions

The main topic of this thesis is the licensing process for offshore wind electricity generation in Norway. The thesis will present an overview and analysis of both the current and proposed regulation adopting a legal doctrinal method as discussed infra in Chapter 1.4.

In doing so it will look to answer three research questions central to this study. The first being: *What are the existing rules concerning authorization and licensing of offshore wind farms pursuant to the Norwegian legislation and in particular the Offshore Energy Act, and what is their scope and sufficiency?* Later, the thesis will inquire: *What novelty is brought by the proposed new regulation to the Offshore Energy Act with regard to the licensing procedure for offshore wind farms and does this overcome the gaps left by the in-force legislation?* Lastly, the thesis will analyze: *Whether the already existing legislation along with the proposed regulation are adequate to fulfill its own statutory objective by facilitating to an open and fair process when exploiting renewable energy sources at sea.*

## 1.2 Background and relevance

Mutual understanding between nations of the need for a “green change”, to work to transition from fossil fuels towards clean and renewable energy production, has never been higher.

In Norway a part of this transition is working to evolve the offshore wind industry. Even though Norway has some of the best wind resources in the world right off the coast, the nation is still a very small player in the industry compared to neighboring countries like Denmark, Germany and the UK.<sup>1</sup>

There has not been much progress since the Offshore Energy Act in 2010, but with the recent proposal to open zones for new generation capacity and proposal for a new regulation, in addition to more political willingness, the government is taking further steps in developing the offshore wind industry in Norway.

As a recent example of steps taken to promote offshore wind is the proposal recently announced by the government as a response to the COVID-19 effects on the Norwegian economy. NOK 1 billion will be going towards green change in business to facilitate creating value and more jobs

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<sup>1</sup> Jonathan Bosch, Iain Staffell and Adam D. Hawkes, “Temporally explicit and spatially resolved global offshore wind energy potentials” *Energy*, 163 (2018) p. 766-781.

while also cutting emissions, with offshore wind being mentioned as one of the relevant focus areas.<sup>2</sup>

Ever since the 1990s there has been a growing understanding of how fossil fuels impact the climate, with the United Nations Framework Convention on Climate Change (UNFCCC) which entered into force in 1994 acknowledging human interference with the climate system as being a problem.<sup>3</sup> The convention was later followed up by the Kyoto Protocol, the Paris Agreement and the sustainable development goals (SDGs) set by the UN General Assembly in 2015.<sup>4</sup> Norway signed the UNFCCC in 1992 and ratified it in 1993.<sup>5</sup> With ratifying the convention, Norway is committed to the objective of reducing emission to keep temperature rise below 2 degrees, and also to follow national emission targets which are to cut 40% of climate gas emission by 2030 compared to 1990-levels.<sup>6</sup>

The EU has also been working towards a green change, and over time the EU has become a frontrunner when it comes to renewables. In 2018 the share of renewable energy consumption in the Union increased from 17.5% to 18%, an increase which is needed to reach the goal of 32% by 2030.<sup>7</sup>

EU directives on electricity and gas from the 1990s have been followed up by the Third Energy Package set in 2009, a comprehensive set of legal acts that addressed both global and European climate and energy challenges.<sup>8</sup> It was later revised in 2018 to become a part of the “clean energy for all Europeans”-package, a policy framework to transition away from fossil fuels.<sup>9</sup> The newest initiative is the European Green Deal presented on 11 December 2019.<sup>10</sup> The content of the Green Deal is set to help reach the goal of Europe being climate neutral by 2050 by making comprehensive climate and environmental plans across policy areas.

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<sup>2</sup> Ministry of Trade, Industry and Fisheries, “En milliard kroner til grønn omstilling i næringslivet”, 2020.

<sup>3</sup> For more information on the UNFCCC, see: <https://unfccc.int/process-and-meetings/the-convention/what-is-the-united-nations-framework-convention-on-climate-change>

<sup>4</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change, 1997. Paris Agreement, 2015. United Nations General Assembly, «Transforming our world: the 2030 Agenda for Sustainable Development», 2015.

<sup>5</sup> United Nations Framework Convention on Climate Change, 1992

<sup>6</sup> One of the priorities used to reach the emission target is to strengthen Norway’s role as a supplier of renewable energies. See Meld. St. 13 (2014-2015), Ny utslippsforpliktelse for 2030 – en felles løsning med EU, p. 25.

<sup>7</sup> Eurostat, “Share of renewable energy in the EU up to 18.0%”, 2020.

<sup>8</sup> For more information on the Third Energy Package, see: [https://ec.europa.eu/energy/topics/markets-and-consumers/market-legislation/third-energy-package\\_en](https://ec.europa.eu/energy/topics/markets-and-consumers/market-legislation/third-energy-package_en)

<sup>9</sup> For more information on the clean energy for all Europeans package, see:

[https://ec.europa.eu/energy/topics/energy-strategy/clean-energy-all-europeans\\_en](https://ec.europa.eu/energy/topics/energy-strategy/clean-energy-all-europeans_en)

<sup>10</sup> European Union: European Commission, “Communication from the Commission - The European Green Deal”, 2019.

Offshore wind is mentioned specifically in the Deal in Chapter 2.1.2 as being essential to the clean energy transition. The annex to the deal contains a roadmap of initiatives/actions and an indicative timetable of when the actions will take place. “Strategy on offshore wind” is set to be done in 2020 with no further clarity on when. The Norwegian Prime Minister Erna Solberg in March 2020 sent a letter enclosed with the preliminary views of Norway on the Green Deal where there was expressed a full support of the vision.<sup>11</sup>

The EU regulations affects Norway through the EEA Agreement, and the Third Energy Package was incorporated into Norwegian law with effect from 1 November 2019. Even though they are slowly incorporated, Norway does work to efficiently consider the directives that are EEA relevant.<sup>12</sup>

Norway’s history as an oil and gas-nation is known to most and probably does not need to be further elaborated on. However, even though the country’s wealth is built on fossil fuels Norway is on the front line when it comes to electricity production from renewable sources. In 2019 97,5% of Norwegian electricity production came from renewables.<sup>13</sup> Most of it, 93,4% (125,8 TWh), was generated through hydro power, and the remaining 4,1% (5,5 TWh) was wind power. Norway is also one of the world’s largest energy exporters, providing energy security for consuming nations.

The wind power generated in Norway is currently only from onshore turbines. Wind farms on land have caused controversies and are a hot topic of debate, especially in municipalities where the wind turbines are located. There has for example been numerous incidents of sabotage and vandalism.<sup>14</sup>

None the less, a survey done in 2019 shows that the majority of people asked are positive to wind power.<sup>15</sup> The percentage of positive answers is a lot higher for offshore wind than onshore. Reason for this is most likely that placing the turbines offshore will cause less conflicts of interests. In other words, it reduces some of the “not in my back yard” issues, even though there will always be someone with interests that are affected, even offshore.

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<sup>11</sup> Regjeringen, “A European Green Deal – Norwegian perspectives and contributions”, 2020.

<sup>12</sup> Meld. St. 25 (2015-2016), Kraft til endring – Energipolitikken mot 2030, p. 215.

<sup>13</sup> Magne Holstad, “Nok en rekord for vindkraften”, *SSB*, 2020.

<sup>14</sup> A recent example where the locals on an island blocked a ferry from unloading trailers carrying equipment for a disputed wind farm, see Malin Kjellstadli Korsnes, Håvard Ketil Sporsheim and Marius André Jenssen Stenberg, “Lokalbefolkninga stoppa ferje for å hindre vindkraftutbyggjarar”, *NRK*, 2020.

<sup>15</sup> Thea Gregersen and Endre Tvinnereim, “Hva mener folk om vindkraft på land og til havs?”, *Energi og klima*, 2019.

Another example of offshore wind being a current topic is the Hywind Tampen-project which was just recently approved by the Ministry of Petroleum and Energy.<sup>16</sup> Hywind Tampen will be the largest floating offshore wind electricity generation facility in the world, consisting of 11 wind turbines providing about 35% of the Snorre and Gullfaks platforms annual power demand.<sup>17</sup>

A major issue with offshore wind though, is that it is not yet profitable. And for it to become profitable there must be made big initial investments. The Norwegian industry possess technology and knowledge from working in oil and gas. There is a lot of wind resources along the coast with much greater potential for electricity generation than onshore. With such good prerequisites it's a bit strange that not much has happened since the Offshore Energy Act came into force in 2010.

A research report from Centre for Sustainable Energy Studies in 2019 says that while the capability and resources give Norway a good starting point, other factors have made the emergence of offshore wind less successful so far.<sup>18</sup> An example from the research is already having clean and cheap electricity from hydro and onshore wind. They also found that the industry is willing to make a change towards offshore wind but taking petroleum contracts is still too lucrative. They also point to the correlation between how well the oil and gas industry is doing and how much interest there is in expanding the offshore wind industry, and that there were made expectations of commitment from politicians that has not been carried out.

This thesis will explore whether one possible reason for such inactivity in spite of the excellent natural conditions in Norway is the absence of sufficient and adequate licensing regulation.

### **1.3 Structure**

The further structure of the thesis will first be this introductory chapter, including a section on method.

Next it is important to note that the regulation of offshore renewable energies, in this case wind, is not only a matter of national law. The thesis will go over some relevant pieces of public international law in Chapter 2.

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<sup>16</sup> Ministry of Petroleum and Energy, "Utbyggingen av Hywind Tampen godkjent", 2020.

<sup>17</sup> Equinor, "Hywind Tampen godkjent av myndighetene", 2020.

<sup>18</sup> Lars Ursin, "Ny forskning: Hvorfor får vi ikke fart på havvind?", *Energi og klima*, 2019.

Jens Hanson and Håkon Endresen Normann (ed.), "Conditions for growth in the Norwegian offshore wind industry – International market developments, Norwegian firm characteristics and strategies, and policies for industry development", *Centre for Sustainable Energy Studies*, 2019.

After this the thesis will cover the current regulation for offshore wind licensing in the Offshore Energy Act in Chapter 3 before looking at the newly proposed regulation in Chapter 4.

Chapter 5 will contain an analysis and thoughts on implementation of the proposed regulation as it is at the time of writing, before the thesis is concluded in Chapter 6.

## 1.4 Method

The aim of the thesis is to assess if the current legislation and the proposed regulation make for an adequate and sufficient regulation for exploitation of offshore wind. The work follows general Norwegian legal method with the guidelines it provides for the use and weighting of legal sources.<sup>19</sup>

When working towards this, the focus has been on the Offshore Energy Act and the proposal for new regulation. With energy law being a relatively new field of law in Norway, and offshore wind regulation being even newer, it has been challenging to find enough published legal theory on the matter.<sup>20</sup> There is also a lack of case law. Because of this the thesis has relied on mostly the primary legislative provisions, preparatory works and some public international law as legal sources, in addition to drawing analogies from similar regulation. When drawing analogies from e.g. the Energy Act and Petroleum Act it is important to keep in mind that inequalities and sections not included in the newer Offshore Energy Act can be interpreted as the legislators conscious decision to leave it out, in which case they will be hard to interpret into the new act.

A thing to note about the preparatory works is that there was no NOU made before passing the Act.<sup>21</sup> The passing of an Act without an NOU means that the Act is passed on a less detailed and smaller knowledge base. In other words, the Act will be more based on the will of the legislator rather than the advices and knowledge from a group of people with in-depth knowledge on the subject. When interpreting the Act, you can then to a greater extent assume that the preparatory works represent the will of the legislator.<sup>22</sup>

There could be several reasons for not having done an NOU before passing the Act. One is that the Act, as a legal framework, has drawn inspiration from the energy regulation in both the

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<sup>19</sup> For more on Norwegian legal method, see Mads Henry Andenæs, *Rettskildelære*, 2. utgave, Oslo 2009.

<sup>20</sup> At the time of writing the thesis there is a detailed law commentary on the Offshore Energy Act in the works, see Sigrud Eskeland Schütz, *Havenergilova – Lovkommentar*, Universitetsforlaget, forthcoming.

<sup>21</sup> NOU is an abbreviation of «Norges offentlige utredninger», Norwegian Official Report in English. NOU's are often commissioned by the Norwegian government to be used as a knowledge basis for proposed bills.

<sup>22</sup> It is basic Norwegian legal theory that the closer the preparatory works are to the passing of the Act, the more they express the will of the legislator. For more see Andenæs (2009).

Energy Act and the Petroleum Act with the opportunity to regulate further in the future when more knowledge on the challenges with offshore wind regulation has been gathered.

In regard to public international law, Norway's legal system is dualistic, which means that a piece of international legislation must be incorporated before being applicable in Norway.<sup>23</sup> This will impact the analysis of the licensing regulation in light of public international law. At the same time there is the "presumption principle" which states that Norwegian law shall as far as possible be interpreted in accordance with obligations from public international law.<sup>24</sup> Thus, if regulations and directives are not incorporated and don't have direct impact on national law, they might still have weight when interpreting national regulation.

When working with the proposal the thesis has also relied on environmental impact assessment reports and public consultation responses, which on their own have no independent weight as legal sources when it comes to Norwegian legal method.

Another challenge has been translation. The Offshore Energy Act has no official English version other than an English summary of the preparatory works.<sup>25</sup> The Energy Act does have an unofficial English version, which has been used to look up translation of certain words.<sup>26</sup> In addition the "Judicial dictionary from Norwegian to English" from domstol.no has been used to look up translation of Norwegian legal terms.<sup>27</sup>

An example of translation is the Norwegian word "*konsesjon*" used in the Act and proposed regulation when describing what needs authorization. The term directly translates to "*concession*", but in the English summary of the preparatory works and in the unofficial English version of the Energy Act it is translated to "*license*". Ernst Nordtveit has argued that there in reality is no difference in choosing to translate "*konsesjon*" to "*license*" or "*concession*".<sup>28</sup> This thesis will use the term "*license*" as it is in line with the already translated material that exists.

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<sup>23</sup> Morten Ruud and Geir Ulfstein, *Innføring i folkerett*, 5. utgave, Universitetsforlaget 2018, p. 55.

<sup>24</sup> See for example Rt. 2000 s. 1811, p. 1826

<sup>25</sup> Proposition No. 107 (2008-2009) to the Storting - Concerning an Act on Offshore Renewable Energy Production – English summary.

<sup>26</sup> Lov 29. juni 1990 nr. 50 om produksjon, omforming, overføring, omsetning, fordeling og bruk av energi m.m. (The Energy Act)

<sup>27</sup> The Norwegian Courts Administration, *Judicial dictionary from Norwegian to English*, 2018.

<sup>28</sup> Ernst Nordtveit, "Regulation of the Norwegian upstream petroleum sector" in Tina Hunter (ed.), *Regulation of the Upstream Petroleum Sector - A Comparative Study of Licensing and Concession Systems*, Edward Elgar Publishing 2015.



## 2. International law

### 2.1 UNCLOS

Regulating exploitation of renewable energy sources at sea is not only a matter for national law, but also international law. The United Nations Convention on the Law of the Sea (UNCLOS)<sup>29</sup> was established to create a peaceful, equitable and efficient utilization of the seas and its resources and to protect and preserve the marine environment.<sup>30</sup> It develops on the principle that the seas are the “*common heritage of mankind*”, and that exploring and exploiting it “*shall be carried out for the benefit of mankind as a whole*”.<sup>31</sup> Norway ratified the Convention in 1996.

The Convention sections the seas into different zones. These are the territorial sea, the exclusive economic zone (EEZ), the continental shelf, and the high seas. As the thesis will touch on later, there is currently a proposal to open three zones along the coast of Norway for new capacity generation of offshore wind. All of these are located outside the baseline within the territorial waters or the EEZ, and these are the zones that are the most relevant to this thesis.<sup>32</sup> The baseline is a line along the coast which marks the perimeter of the internal waters and start of the territorial sea, regulated in Norway by the Territorial Waters Act in accordance with the UNCLOS.<sup>33</sup>

UNCLOS Article 2 extends the sovereignty of the coastal State from its land territory and internal waters to the territorial sea, 12 nautical miles from the baseline.<sup>34</sup> The sovereignty extends to the air space, bed and subsoil of the area.<sup>35</sup>

The EEZ is limited to not extending beyond 200 nautical miles from the baseline.<sup>36</sup> In the EEZ the coastal State does not have sovereignty, but it does have sovereign rights in accordance with Article 56 of the Convention. These rights include the sovereign right to economic exploration and exploitation of the zone “*such as the production of energy from the water, currents and*

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<sup>29</sup> The United Nations Convention on the Law of the Sea was signed 10 December 1982 and ratified by Norway 24 June 1996.

<sup>30</sup> UNCLOS, 1982, preamble.

<sup>31</sup> UNCLOS, 1982, preamble.

<sup>32</sup> Ministry of Petroleum and Energy, “Høyringsnotat – Forslag til forskrift om fornybar energiproduksjon til havs og forslag til åpning av område etter havenergilova”, 2019, p. 6, 7 and 8. (Public consultation notice).

<sup>33</sup> UNCLOS, 1982, Article 5. Lov 27. juni 2003 nr. 57 om Norges territorialfarvann og tilstøtende sone (Territorial Waters Act) § 1.

<sup>34</sup> For the limits of the territorial sea, see UNCLOS, 1982, Article 3 and 4.

<sup>35</sup> UNCLOS, 1982, Article 2 (2).

<sup>36</sup> UNCLOS, 1982, Article 57.

winds”.<sup>37</sup> The coastal State also has an exclusive right to construct and to authorize and regulate the construction and operation of “*installations and structures for the purposes provided for in Article 56 and other economic purposes*”.<sup>38</sup> With this the State is given an exclusive right to construct and regulate offshore energy production which again must be in line with the Convention.<sup>39</sup>

## 2.2 EU/EEA-law

Over the years the energy has become a larger part of EU policy. Article 194 of the Treaty on the Functioning of the European Union (TFEU) states what the European Union energy policy consists of. In short it is to ensure a functioning energy market, security of energy supply, promotion of energy efficiency, development of new renewable energies and interconnection of energy networks.<sup>40</sup> There is no equivalent to Article 194 in the EEA Agreement, but legal measures adopted on the basis of Article 194 may be considered relevant to be incorporated to the Agreement.

It is also worth mentioning the discussion whether the EU/EEA rules apply outside of the Norwegian territorial sea or not. Article 126 of the EEA Agreement sets its geographical scope to the “*territory*” of Norway. The Norwegian government has decided to interpret the term “*territory*” according to the fixed international law practice, which sets its limit to Norwegian land territory, internal waters and the territorial sea.<sup>41</sup> This is however not a legal obstacle if Norway wishes to take on specific EEA-commitments outside the territory (in the EEZ or continental shelf) after specific assessments. After examples of this happening there has been a clear premise that the expanded geographical application of some acts does not change the principle understanding of the geographical scope of the EEA Agreement.<sup>42</sup>

In the next sub-chapters, there will be presented a few directives that are relevant to the thesis.

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<sup>37</sup> UNCLOS, 1982, Article 56.

<sup>38</sup> UNCLOS, 1982, Article 60.

<sup>39</sup> Norway established an EEZ on 17 December 1976 when passing Lov 17. desember 1976 nr. 91 om Norges økonomiske sone (The Exclusive Economic Zone Act).

<sup>40</sup> The Treaty on the Functioning of the European Union (TFEU), Article 194 1. a-d.

<sup>41</sup> Meld. St. 5 (2012-2013), EØS-avtalen og Norges øvrige avtaler med EU, p. 41.

<sup>42</sup> For more on this topic, see Finn Arnesen, “Regulerer EØS-avtalen den norske stats utnyttelse av petroleumforekomster?” *Tidsskrift for rettsvitenskap*, 140 (1994) nr. 3 p. 424-468, in chapter 3.

### 2.2.1 Directive 2009/72/EC

As mentioned previously the Electricity Directive has been incorporated into the EEA Agreement and finally entered into force in Norway in 2019.

The Directive aims to strengthen the internal energy market and continue the liberalization of the sector by implementing rules on mandatory third-party access and unbundling.<sup>43</sup>

Relevant for this thesis is Article 7 which require member states to “*adopt an authorization procedure, which shall be conducted in accordance with objective, transparent and non-discriminatory criteria*”.<sup>44</sup> The Article then lists criteria that the states must consider when granting authorizations for construction of generation capacity, and further regulates that the procedures and criteria must be made public to promote an objective and non-discriminatory process.<sup>45</sup> What the Directive aims to achieve through Article 7 is to prevent discrimination and promote competitive development of energy markets.<sup>46</sup>

After the proposed regulation to the Offshore Energy Act was submitted for public consultation a question has been asked if the licensing process that the Act and proposed regulation sets up is compliant with EEA-law and the criteria of Article 7.<sup>47</sup> More on this topic in Chapter 4 and 5 of the thesis.

Also relevant is Article 8 which regulates tendering for new capacity based on published criteria through a tendering procedure or any procedure being equivalently transparent and non-discriminatory.<sup>48</sup>

### 2.2.2 Directive 2018/2001

Directive 2018/2001 replaced Directive 2009/28/EC as the newest EU renewable energy directive, entering into force on 24 December 2018. It is a part of the “clean energy for all

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<sup>43</sup> For more on mandatory third-party access and unbundling, see Ignacio Herrera Anchustegui, *Transmission Networks in Electricity Competition: Third-Party Access and Unbundling – A Transatlantic Perspective*, 2018.

<sup>44</sup> Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for internal market in electricity and repealing Directive 2003/54/EC, OJ L 211/55, Article 7 (1).

<sup>45</sup> Directive 2009/72/EC, Article 7 (2) and (4).

<sup>46</sup> Ignacio Herrera Anchustegui and Kristoffer Østrem, “The Norwegian Offshore Wind Paradox: Energy sea production compliant with EEA law?”, *efta-studies.org*, 2020. Directive 2009/72/EC, recital 43.

<sup>47</sup> Anchustegui and Østrem (2020).

<sup>48</sup> Directive 2009/72/EC, Article 8 (1).

Europeans”-package, setting a binding target of 32% of energy from renewable sources by 2030.<sup>49</sup>

The Directive also takes steps to make administrative procedures and regulations more efficient to make for easier and more “welcoming” processes for investors and developers. Article 15 states that the member states shall ensure that the administrative procedures are “*streamlined*” with “*predictable timeframes*”, and that rules on authorization, certification and licensing are “*objective, transparent and proportionate*” in addition to non-discriminatory.<sup>50</sup>

The Directive has not yet been incorporated into the EEA Agreement, so it is not directly applicable to the Norwegian legislation, but still of interest to the thesis with its regulation on administrative efficiency and transparency.

### **2.2.3 Directive 2014/52/EU (EIA-Directive) and Directive 2001/42/EC (SEA-Directive)**

Directive 2014/52/EU on the assessment of the effects of certain public and private projects on the environment and Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment are both directives that have an impact on Norwegian offshore wind licensing regulation.

The Environmental Impact Assessment-Directive 85/337/EEC was amended three times before being codified in Directive 2011/92/EU which was then amended by Directive 2014/52/EU. The Directive aims to bring environmental protection and integrate environmental considerations into the authorization process of projects.<sup>51</sup> This is done by setting environmental assessment procedures and criteria, for example for public consultations, to public and private projects listed in Annex I and II of the Directive. The Strategic Environmental Assessment-Directive sets up for assessments at an earlier stage, being broader in scope and used for strategic planning.

Norway’s obligations under the directives are in general covered by the sections on impact assessments in the Plan and Building Act.<sup>52</sup> In regard to the Offshore Energy Act, the act has

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<sup>49</sup> Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources, OJ L 328/82, Article 3 (1).

<sup>50</sup> Directive (EU) 2018/2001, Article 15 (1).

<sup>51</sup> Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, OJ L 124/1, recital 22.

<sup>52</sup> For more see Ot.prp. nr. 32 (2007-2008) Om lov om planlegging og byggesaksbehandling (plan- og bygningsloven) (plandelen).

its own sections on impact assessments that also covers Norway's obligations under the directives, as stated by the Ministry in the preparatory works.<sup>53</sup>

## **2.3 OSPAR**

The Convention for the Protection of the Marine Environment of the North-East Atlantic (the OSPAR Convention) was signed in 1992 and entered into force in 1998. Its goal is to protect the marine environment of the North-East Atlantic by preventing and eliminating pollution and manage human activities so that the marine ecosystem can continue to sustain the use for future generations.<sup>54</sup>

The convention is relevant for offshore wind regulation in Norway when working on delineating zones for possible opening for new generation capacity, impact assessments and licensing procedures through the OSPAR Guidance on Environmental Considerations for Offshore Wind Farm Development.<sup>55</sup> The guidelines recommend how to best assess and manage impacts of wind farms.

# **3. The current licensing process pursuant to the Offshore Energy Act**

## **3.1 Introduction**

The law on renewable energy production at sea (the Offshore Energy Act)<sup>56</sup> entered into force in 2010 following a white paper on Norwegian climate policy.<sup>57</sup> With the white paper the ruling parties of the government and three opposition parties agreed to the "climate settlement".<sup>58</sup> The agreement contained overall climate goals like reduction of emission and working to find better and more effective ways of informing the public on how to reduce emissions. It also said that there is going to be made a national strategy for energy production from offshore wind and other renewable energy sources at sea. The strategy was to look at the need for more research and funding for research driven innovation in offshore wind, to create the amendments

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<sup>53</sup> Ot.prp. nr. 107 (2008-2009) Om lov om fornybar energiproduksjon til havs (havenergilova), page 69.

<sup>54</sup> Convention for the Protection of the Marine Environment of the North-East Atlantic, 1992, preamble.

<sup>55</sup> OSPAR Guidance on Environmental Considerations for Offshore Wind Farm Development, publication number 2008-3, OSPAR Commission, London, UK.

<sup>56</sup> Lov 04. juni 2010 nr. 21 om fornybar energiproduksjon til havs (havenergilova).

<sup>57</sup> St.meld. nr. 34 (2006-2007), Norsk klimapolitikk.

<sup>58</sup> This was the first of two climate agreements made in respectively 2008 and 2012. For the 2008 agreement see Olav Akselsen, Inge Ryan, Lars Peder Brekk, Erna Solberg, Dagfinn Høybråten and Lars Sponheim, "Avtale om klimameldingen", 2008. For the 2012 agreement see Innst. 390 S (2011-2012), Innstilling fra energi- og miljøkomiteen om norsk klimapolitikk.

necessary to be able to hand out licenses, and to make assessments on possible geographical zones to build future wind farms.

The Offshore Energy Act was a product of this strategy. The act is meant to be a legal framework for giving licenses and in other ways regulate planning, development, operations and closure of facilities for generation and transmission of renewable energies at sea.<sup>59</sup>

Before the Offshore Energy Act there was no comprehensive regulation on renewable energy generation outside the baseline. The Energy Act dealt with production, transformation, transmission, turnover, distribution and use of energy on Norwegian territory, and the Petroleum Act covered Norwegian petroleum activity. There is no pure energy section in the Constitution, but § 112 of the Constitution will have relevance when interpreting the demands of impact assessments in the Offshore Energy Act. It gives citizens a right to a sustainable environment and gives the State a duty to secure it. The section plays a factor when interpreting the extent of the administrations duty to investigate and clarify environmental assessments like the ones in Offshore Energy Act § 2-2 (2) and the Petroleum Act § 3-1.<sup>60</sup>

Section 1-3 in the Act states that the right to exploit renewable energy sources at sea belongs to the State.<sup>61</sup> This differs from the corresponding section in the Petroleum Act, § 1-1, which gives the State property rights to subsea petroleum deposits. The reason for this is that renewables are resources that can't be exhausted. It is also hard to claim a property right to renewable energy sources, for example wind, currents, tides or waves, which is air and water set in motion. The solution is then to give the State a sovereign right to exploit these resources.

The Act sets a system where areas are assessed and submitted for public consultation in several stages before the opening of a specific geographical zone. When opened interested parties can apply for a license to exploit renewable energy, in this case offshore wind. After a license is granted the license holder must still have a detail plan and project specific impact assessment approved by the Ministry before development can start.

In the following the thesis will give an overview of the relevant sections. All references to sections in this chapter will be to the Offshore Energy Act unless stated otherwise.

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<sup>59</sup> Ot.prp. nr. 107 (2008-2009), p. 5.

<sup>60</sup> Innst. S. nr. 163. (1991-1992) Innstilling fra utenriks- og konstitusjonskomiteen angående forslag fra Einar Førde og Liv Aasen til ny § 110 b, § 103, § 94 eller § 112 i Grunnloven, p. 6.

<sup>61</sup> In accordance with UNCLOS, 1982, Article 56.

## 3.2 Statutory objective and scope of the Act

### 3.2.1 Statutory objective

Section 1-1 of the act contains its statutory objective. It states that the purpose of the Act is to facilitate for the use of renewable energy sources at sea as best as possible with regards to “*societal goals*”, and to make sure energy facilities are planned, built and disposed of with consideration to energy supply, the environment, safety, industry and other interests.

The wording in the purpose section is broad with terms like “*societal goals*”, “*the environment*” and “*other interests*”. Take for example “*the environment*” which could be interpreted as social or cultural environment, but also environment as in nature and climate. The overall purpose of renewable energy with regards to “*societal goals*” could also have many interpretations. A natural understanding would be a use of renewable energy sources in a way that coincides with the, at the time being, majority of the political view of the state.

The preparatory works shows this being questioned in the public consultation responses.<sup>62</sup> Norsk Vassdrags- og Energidirektorat (NVE) gave feedback that the broad terms used to describe the statutory objective made it hard to use as a licensing criteria, and that it could make it harder to deal with competing measures.<sup>63</sup> The Ministry did not see this as a problem when more license criteria can be made when opening geographical zones for application and when § 3-3 gives further possibility to regulate necessary criteria for license application. The Ministry also noted that “*the environment*” is a collective term covering conservation, natural environment, biodiversity, climate, cultural heritage and cultural environment.

In order to achieve the purpose of the act there are sections on safety, closure and removal, expropriation, responsibility of system operators, import and export of energy, and compensation to fishermen.<sup>64</sup> In addition to this, sections on planning, opening of geographical zones and licensing create a legal framework for the licensing process which helps balance the negative impact exploitation of resources could have, against the benefits it brings.

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<sup>62</sup> Ot.prp. nr. 107 (2008-2009), p. 60.

<sup>63</sup> Norsk Vassdrags- og Energidirektorat translates to «Norwegian Water Resource and Energy Directorate» in English. The Directorate is under the Ministry of Petroleum and Energy and is responsible for management of Norway’s water and energy resources. For more info see <https://www.nve.no/om-nve/?ref=mainmenu>

<sup>64</sup> The Offshore Energy Act, Chapters 5-9.

### **3.2.2 Scope**

Section 1-2 sets the factual and geographical scope of the act as renewable energy production, conversion and transmission on the continental shelf and Norwegian sea territory outside the baseline.

Within the baseline, in the internal waters, production, transmission and conversion of energy is regulated by the Energy Act. The geographical scope of the Acts does not overlap, and installations which cross the baseline will be covered by both. A scenario where a development project has to comply with both sets of regulation is not good in terms of having simple and efficient legislation. Therefore, there is an exclusionary section allowing to expand sections in the Offshore Energy Act to also apply in internal waters.<sup>65</sup>

In the preparatory works the Ministry points to using this section to enable the Offshore Energy Act sections on opening of geographical zones and the States sovereign right to exploitation of energy sources also within the internal waters.<sup>66</sup> Section 1-1 (3) in the Energy Act also states that the Ministry in certain cases can limit the application of certain sections in the Act in respect to developments covered by the Offshore Energy Act. This could solve possible issues with projects overlapping jurisdictions.

There is also an exclusionary section to the factual scope of the Act which gives the King by decision of Council of State a possibility to apply the act on non-renewable energy production facilities at sea.<sup>67</sup> This section has to be interpreted with the purpose of the act in mind, and is not meant to generally regulate non-renewable energy production at sea.<sup>68</sup>

### **3.3 Opening of geographical zones for application**

As mentioned previously the State has a sovereign right to exploit the renewable energy sources at sea. This means that a license is needed for someone else to get this right, as regulated in § 3-1 for production installations and § 3-2 for network installations.

A license is an authorization to do or use something, in this case exploit wind for electricity generation. The reason for requiring a license to exploit resources is that it gives the State control with how, where and when the exploiting happens. This way the exploitation will

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<sup>65</sup> The Offshore Energy Act, § 1-2 (7).

<sup>66</sup> Ot.prp. nr. 107 (2008-2009), p. 79.

<sup>67</sup> The Offshore Energy Act, § 1-2 (8).

<sup>68</sup> Ot.prp. nr. 107 (2008-2009), p. 79.



happen in the best interest of how the State sees fit. More on which licenses are needed in Chapter 3.4.

Section 2-2 (1) states that before anyone can apply for a license the King by decision of Council of State must decide on a specific geographical zone in accordance with § 1-2 to be opened for application and granting.

Before a zone can be opened there must be prepared a strategic impact assessment, see § 2-2 (2), but because of the large areas of sea along the coast of Norway there first has to be done an initial “coarse screening” to figure out which areas are best suited for development. Both the screening process and the strategic impact assessment is to be carried out by the NVE.

After the most suited areas have been identified, the State can continue with the strategic impact assessment. It is further stated in § 4-1 that before starting the impact assessment the proposed assessment program must be submitted for public consultation. After all this is done and the impact assessment has been completed the assessment will be submitted for public consultation along with the proposal for opening of zones.

### **3.3.1 Strategic impact assessment**

Before opening zones for renewable energy generation § 2-2 (2) states that there must be prepared strategic impact assessments evaluating environmental and societal consequences of renewable energy production, and possible consequences it will have for other industry interests. Impact assessments are a requirement several times in the licensing process. First there must be done an initial assessment when delineating zones for possible opening for new generation capacity, second as a strategic impact assessment in accordance with § 2-2 (2), and finally as a project specific impact assessment when applying for a license in accordance with § 3-1 (3). More on the project specific impact assessment in Chapter 3.4.2.

The reason behind having impact assessments as a requirement is to secure a process where the State has control that the planning and building of infrastructure happens in a comprehensive and long-term perspective, and that all relevant interests are taken into consideration, listened to and evaluated at an early phase.<sup>69</sup> This will make for a more predictable licensing process going forward.

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<sup>69</sup> Ot.prp. nr. 107 (2008-2009), p. 64.

The question is then what is meant by “*impact assessment*”. A natural understanding of the word suggests that there be done an assessment on what impact an action will have on “status quo” and give an overview of consequences in alternative outcomes if that is applicable. In this case that is what impact renewable energy production will have on the environment, social and business interests.

The actual extent of what the assessment has to cover is not specifically regulated in the Act, but the Ministry mention in the preparatory works that renewable energy production at sea requires a lot of area which can bring consequences for fisheries, sea transport, petroleum recovery and bordering onshore regions, and also that network capacity and infrastructure for transmission has to be considered.<sup>70</sup> An impact assessment then naturally has to at a minimum account for these, in addition to other interests that would or could be affected by opening the zone for renewable energy production.

The use of impact assessments is not a practice exclusive to Norway. As previously mentioned, there are conventions and EU-directives that bind states to assess and protect environmental interests when authorizing plans or projects. What varies is how the different states implement regulation that fulfills the duties under international law.

In 2010 NVE did a first “coarse screening” of 15 geographical zones suited for wind power generation along the coast of Norway. The zones were compiled in a report with recommendations that there be made strategic impact assessments.<sup>71</sup> The report also contained a draft for the assessment program, in accordance with § 4-1 (1) of the Offshore Energy Act.

According to the plan the assessment program had to include information on energy production, the energy system and the market. It also had to include how it relates to other legislation, plans or conservation zones, risk, overall effects and cross-border effects. Also, natural environment, business and social interests must be addressed. Under “*social interests*” the report lists cultural environment, landscape, “*outdoor life*”<sup>72</sup> and travel. The assessment must then describe possible actions to reduce disadvantages for the affected interests.<sup>73</sup>

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<sup>70</sup> Ot.prp. nr. 107 (2008-2009), p. 64.

<sup>71</sup> Norges vassdrags- og energidirektorat, *Havvind – Forslag til utredningsområder*, Oslo, 2010.

<sup>72</sup> Translation of the Norwegian term «friluftsliv». A longer and more fitting translation would be “*physical activity in open spaces during leisure time to experience diverse natural environments and foster experiences of nature*». Definition taken from Kirsti Pedersen Gurholt and Trygve B. Broch, “Outdoor life, nature experience, and sports in Norway: tensions and dilemmas in the preservation and use of urban forest”, *Sports in Society – Cultures, Commerce, Media, Politics*, 22 (2019) nr. 4 p. 573-588.

<sup>73</sup> Norges vassdrags- og energidirektorat (2010), p. 11.

After the report had been on public consultation there were no submissions that in NVEs opinion provided a basis to reduce the number of zones, which meant that they could start working on the strategic impact assessment.<sup>74</sup>

The strategic impact assessment of the 15 zones was released in “*Havvind, Strategisk konsekvensutredning*”, a report by NVE released in December 2012.<sup>75</sup> The assessment followed the draft from 2010 with a goal to give enough basis of knowledge to make recommendations for which zones to open.



Figure 1: Picture showing recommended zones categorized from A-C.<sup>76</sup>

Out of the 15 geographical zones NVE suggested to prioritize the opening of Sørlege Nordsjø I and II, Utsira nord, Frøyagrunnene and Sandskallen – Sørøya nord. These zones were very

<sup>74</sup> Norges vassdrags- og energidirektorat, *Havvind – Strategisk konsekvensutredning*, Oslo, 2012, p. 3.

<sup>75</sup> Norges vassdrags- og energidirektorat (2012).

<sup>76</sup> Norges vassdrags- og energidirektorat (2012), p. 149.

well suited in terms of technical and economic circumstances, and the consequences of opening were seen as “acceptable”.<sup>77</sup> They noted that there may be needed to impose conditions or requirements for mitigating measures in the event of future development in accordance with § 3-4.<sup>78</sup>

### 3.3.2 Decision to open

After the preliminary screening, strategic impact assessment and public consultation, the proposal for opening of zones must be submitted for public consultation in accordance with § 2-2 (3). After this, the King by decision of Council of State can decide to open specific geographical zones for the purpose of granting of licenses.<sup>79</sup>

It can be read from § 2-2 (1) that no one has the right to have their license application processed if it is for an area that has not been opened.<sup>80</sup>

The fact that § 2-2 gives the authority to the King by decision of Council of State also means that it can't be delegated to the Ministry.<sup>81</sup> This underlines the importance of the decision, and that it has to be made in an overall perspective with all relevant conditions and interests taken into account.

Section 2-2 (4) states that the Ministry in “*special cases*” can make exceptions to the rule of opening zones. This is meant as a narrow exception rule mainly for pilot projects or smaller facilities that supply petroleum installations.<sup>82</sup>

The previously mentioned Hywind Tampen-project is exactly this, a project which will be supplying the Snorre and Gullfax petroleum installations with power. The exclusionary provision was although not used in this case. The reason being that the project is to be governed by Norwegian petroleum legislation. The two platforms will be the only recipients of power from the wind turbines, making the installations and cables of the project classify as “*devices*” for petroleum activity pursuant to § 1-6 d) of the Petroleum Act.<sup>83</sup> This authorization granting on the basis of previously awarded licenses pursuant to § 3-3 of the Petroleum Act and the consequences of it has been brought up by Anchustegui in his commentary of the EFTA

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<sup>77</sup> Norges vassdrags- og energidirektorat (2012), p. 10.

<sup>78</sup> Norges vassdrags- og energidirektorat (2012), p. 150.

<sup>79</sup> The Offshore Energy Act, § 2-2 (1).

<sup>80</sup> Ot.prp. nr. 107 (2008/2009), p. 80.

<sup>81</sup> Ministry of Justice and Public Security, *Lovteknikk og lovforberedelse*, Oslo, 2012, p. 126.

<sup>82</sup> Ot.prp. nr. 107 (2008/2009), p. 80.

<sup>83</sup> Equinor, *Hywind Tampen PUD del II - Konsekvensutredning*, 2019, p. 17.

Surveillance Authority's (ESA) approval of Hywind Tampen. Here he mentions it leading to both benefit from the generous Norwegian tax regime for petroleum activity and circumvention of the need to conduct environmental impact assessments if authorized pursuant to the Offshore Energy Act.<sup>84</sup>

After the strategic impact assessment from 2012 the Ministry did not see there being a basis for opening any zones yet, but in the State budget of 2018 the government stated that they still wanted to keep working on the matter.<sup>85</sup> Seeing that some years had passed since 2012 the Ministry commissioned NVE to consider if there had been any changes that would affect the impact assessments.<sup>86</sup> The answer from NVE was that they did not think there had been any change of significant importance from the recommendations made in 2012.<sup>87</sup>

In June 2019 the Ministry sent out a proposal, along with the proposal for a new regulation to the Offshore Energy Act, for public consultation to open two, possibly three, zones for new capacity generation.<sup>88</sup> The two zones suggested for opening were Utsira Nord and Sandskallen-Sørøyra Nord, while the Ministry requested feedback on whether or not to open Sørilige Nordsjø II.<sup>89</sup>

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<sup>84</sup> Ignacio Herrera Anchustegui, "Greenlight to offshore wind farms in the EEA. Is Hywind Tampen's State aid approval a kickstart for the Norwegian Offshore Wind Industry?", *European State Aid Law Quarterly*, forthcoming.

<sup>85</sup> Prop. 1 S (2017-2018) Proposisjon til Stortinget (forslag til stortingsvedtak), Chapter 16.3.1.

<sup>86</sup> Ministry of Petroleum and Energy, "Åpning av områder for vindkraft til havs", 2017.

<sup>87</sup> Norges vassdrags- og energidirektorat, "NVE anbefaler områder for energiproduksjon til havs", 2018.

<sup>88</sup> Ministry of Petroleum and Energy (2019).

<sup>89</sup> Ministry of Petroleum and Energy (2019), p. 5.

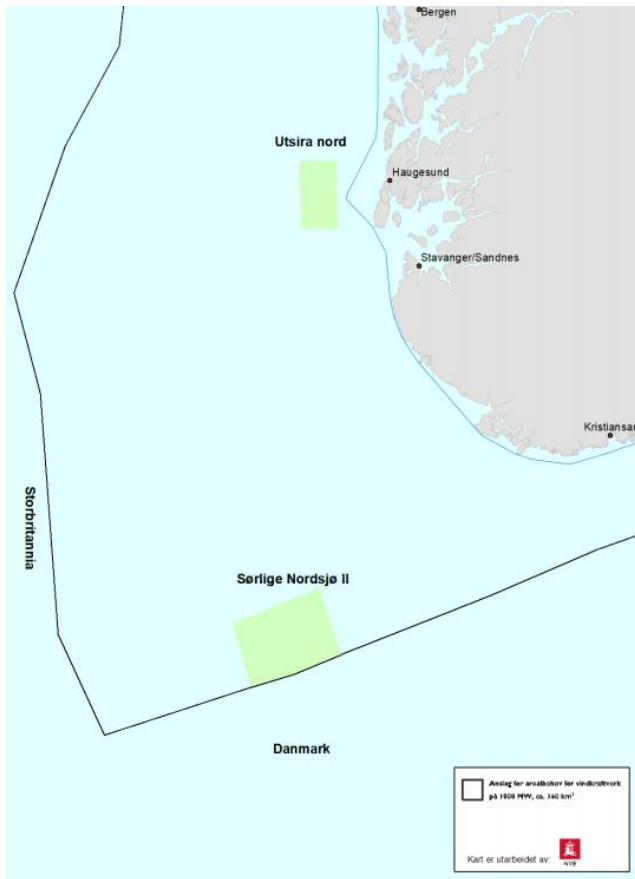


Figure 2: Utsira Nord and Sørlige Nordsjø II.<sup>90</sup>

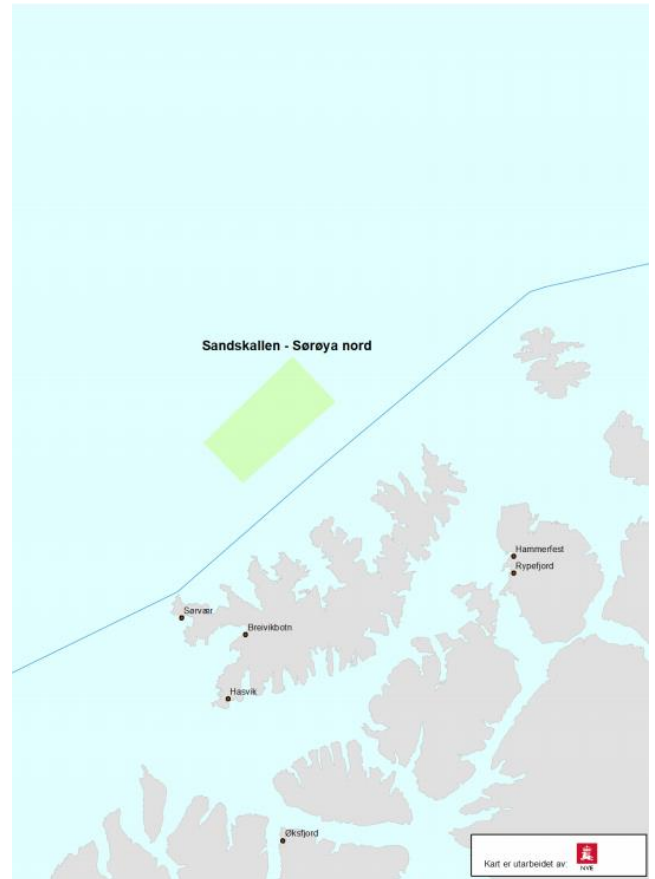


Figure 3: Sandskallen - Sørøya nord.<sup>91</sup>

The consultation deadline was 1 November 2019, and the feedback from the public consultation is being processed by the Ministry with an aim to being finished before the summer of 2020.<sup>92</sup>

### 3.4 The license application

When a state has opened a specific geographical zone for license application parties interested can begin the application process.

This is regulated in § 3-1 (1) for production installations and in § 3-2 (1) for network installations.<sup>93</sup> The Norwegian system requires a license for “*building, owning or running*” either one of these.

<sup>90</sup> Ministry of Petroleum and Energy (2019), attachment 4.

<sup>91</sup> Ministry of Petroleum and Energy (2019), attachment 4.

<sup>92</sup> According to the Minister of Petroleum and Energy, Tina Bru, see Bendik Støren, “Dagens lovverk står i veien for havvind, mener jusprofessor”, *e24*, 2020.

<sup>93</sup> «*Production installation*» is defined in § 1-4 (2) as «*equipment and associated structures for utilization of renewable energy sources for the production of electrical energy*».

Note that this is one license needed for all activity relating to production or network installations. This makes the Norwegian system differ from other countries where there is often a requirement of several licenses. For example, to establish an offshore wind farm in Denmark the project developer is required to have three licenses pursuant to the Danish Promotion of Renewable Energy Act (RE-Act):<sup>94</sup> a license to carry out preliminary investigations pursuant to § 22, a license to construct and establish the turbines pursuant to § 25, and a license for exploitation of the wind power pursuant to § 29.<sup>95</sup>

There are points to take from both approaches. With the Danish method one could say that the State is given more control through a step by step process, and that it gives more flexibility and efficiency for the project developers when different parties can own and deliver different parts of the development. It was given feedback during the public consultation of the Act that the Norwegian method could come in conflict with wanted operation and maintenance methods.<sup>96</sup> The Ministry responded that the suggested type of license requirement was coinciding with the one in the Energy Act.<sup>97</sup> There was also voiced feedback on worries for this system being a problem for a license holders “flexible and rational” ownership and operation arrangements, but the Ministry clarified that this would not mean a general ban on separating ownership and operations.<sup>98</sup>

The licenses are given by the Ministry and NVE, unlike with opening of zones where the King by decision of Council of State has authority. The reason behind this is mentioned in the preparatory works as being that the most essential interests are presupposed to have already been accounted for in the decision to open a zone, and that the authority to grant the license itself can therefore be given directly to the Ministry.<sup>99</sup>

The Act is silent on what is required by the applicant to include in their license application. It is also silent on the procedure of how the applications are assessed and how the license is

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«*Network installation*» is defined in § 1-4 (3) as «*electrical equipment and associated structures for the conversion and transmission of electrical energy*».

<sup>94</sup> Lovbekendtgørelse 2020-02-07 nr. 125 om fremme af vedvarende energi.

<sup>95</sup> For a detailed comparative analysis of the licensing process for offshore wind in Denmark and Norway, see Catharina Hovland, *Licensing Offshore Wind Farms, A Comparative Analysis of the Authorisation Regimes for Offshore Wind Energy Production in Denmark, Norway and the United Kingdom*, The University of Bergen, 18 June 2019. (Note that the thesis was written before the proposed new regulation to the Offshore Energy Act was submitted for public consultation).

<sup>96</sup> Ot.prp.nr. 107 (2008-2009), p. 67.

<sup>97</sup> Lov 29. juni 1990 nr. 50 om produksjon, omforming, overføring, omsetning, fordeling og bruk av energi m.m. (energiloven), §§ 3-1, 3-2 and 5-1.

<sup>98</sup> Ot.prp. nr. 62 (2008-2009) Om lov om endringer i energiloven, p. 39.

<sup>99</sup> Ot.prp. nr. 107 (2008-2009), p. 67.

awarded. A finished license regulation that is silent on these matters is obviously not sufficient, but as previously mentioned the Act was passed in 2010 as a framework with intent to add more regulations later. Section 3-3 states that the application is to be sent to the Ministry and that they can issue regulations on license applications, among others on what information an application must contain. In the new proposed regulation, the Ministry has presented more detailed rules on this which will be addressed in Chapter 4 of the thesis.

After reviewing a submitted application, the Ministry then decides to approve or dismiss it. A license is given for up to 30 years with a possibility to extend, see § 3-5 (2). When approving an application, the Ministry can also set terms among other things regarding development progress, safety, connection to the grid and further investigations, see § 3-4.

Before development can start there are still a few things that have to be taken care of. First § 3-1 (2) states that a detail plan of the project development has to be approved by the Ministry, and second § 3-1 (3) states that a project specific impact assessment has to be approved before the detail plan can be accepted.

In the next two sections the thesis will present the rules on detail plans and project specific impact assessments in the Offshore Energy Act.

### **3.4.1 Detail plan**

After being granted a license the licensee must submit a detail plan for the construction and operation of the installation, see § 3-1 (2). The purpose of the detail plan is to act together with the license as the overall framework for the development of the project.<sup>100</sup> The plan must explain the technical, safety-related and environmental circumstances and otherwise complement the license where it is needed. This means that the extent of the detail plan depends on how much of the project has already been regulated in the licensing decision. If the licensing decision covers the most essential parts of the development project the detail plan can for example be limited to just include the placement of the turbines, and opposite if the licensing decision is more open in regards to the project development the detail plan will have to be more extensive.<sup>101</sup>

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<sup>100</sup> Ot.prp. nr. 107 (2008-2009), p. 67.

<sup>101</sup> Ot.prp. nr. 107 (2008-2009), p. 67.



The Act is silent on the specifics of what the applicant is to include in the detail plan. Section 3-3 states that the Ministry can issue regulations on the required content of the detail plan. Again, more on this in Chapter 4 of the thesis.

There is a possibility to waive the requirement of the detail plan in § 3-1 (2) last sentence. The Ministry can only do so in “*special cases*”. What is meant by “*special cases*” is not clear from the wording of the section. When the purpose of having a detail plan is to act as a framework and roadmap for the development project one can assume from a natural understanding of the wording “*special cases*” that a case where the project is larger or more technically demanding than normal is not what is the aim of the exclusionary provision, but rather where the development project is smaller and there are no more unresolved conditions to regulate. This is confirmed by the Ministry in the preparatory works where they mention pilot projects with all relevant matters covered by the license application as an example.<sup>102</sup> They also mention that this is not a general exclusionary provision and that an exemption from the requirement of a detail plan is basically excluded for the bigger projects.<sup>103</sup>

### **3.4.2 Project specific impact assessment**

Section 3-1 (3) states that the applicant must carry out and get approved a project specific impact assessment before the detail plan can be accepted.

As mentioned in Chapter 3.3.1, impact assessments are required several times in the licensing process. What an impact assessment involves at the stage of opening zones for new generation capacity generation has already been covered. The question is then what the project specific impact assessment made before applying for a license involves.

First of all, while the preliminary assessments and the strategic impact assessment pursuant to § 2-2 (2) is done under State auspices, the project specific impact assessment is to be carried out by the applicant. This means that the State takes the cost of the assessments initial of opening zones while the project specific one will be paid by the developer. In Danish offshore wind regulation, the RE-Act § 23 stk. 3, the licensee must carry the States cost of preliminary assessments after the license is awarded. There are no similar sections in the Offshore Energy Act, or in the proposed regulation.

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<sup>102</sup> Ot.prp. nr. 107 (2008-2009), p. 67.

<sup>103</sup> Ot.prp. nr. 107 (2008-2009), p. 68.

What the developer needs to cover in the project specific assessment will largely depend on what has already been assessed at the two earlier stages of assessments. In the preparatory works the Ministry states that the project specific assessment will have to investigate the conditions that were not assessed during the zone opening.<sup>104</sup> This includes assessments of the specific technical choices and solutions of the project.

It was also mentioned in the preparatory works that it will not always be expedient in situations where there are several applicants to the same area that they all perform full impact assessments.<sup>105</sup> Although there has to be done assessments to the point that there is a proper basis of knowledge to make a decision to approve for a license. One would assume that after two assessments under State auspices prior to opening will mean that enough data and knowledge on these subjects has been obtained already. You could perhaps question if a system with this many rounds of assessments makes for efficient use of time and resources.

Furthermore, it will have to include how the technicalities of the specific development will affect the environment and other interests, for example regarding the choice of turbines and foundations. The Act does not state specifics, but again the new proposed regulation has more detailed sections on this.<sup>106</sup>

#### **4. The proposal for a new regulation to the Offshore Energy Act**

Along with the proposal for which zones to open for license application the Ministry sent out a proposal for a new regulation to the Offshore Energy Act for public consultation.<sup>107</sup>

As previously mentioned, the Offshore Energy Act is a framework act which requires more detailed regulation of the licensing process for offshore renewable electricity generation. Since the opening of new zones makes it possible to apply for generation licenses the Ministry saw it necessary to create this regulation in order to bring more detailed rules and clarify the licensing process.<sup>108</sup>

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<sup>104</sup> Ot.prp. nr. 107 (2008-2009), p. 38.

<sup>105</sup> Ot.prp. nr. 107 (2008-2009) p. 81.

<sup>106</sup> Ministry of Petroleum and Energy (2019), p. 21, § 9.

<sup>107</sup> Ministry of Petroleum and Energy (2019).

<sup>108</sup> Ministry of Petroleum and Energy (2019), p. 3.

The proposed regulation has sections on the geographical scope of the Act, notices, project specific impact assessments, the license application, detail plans, pilot projects, compensation to fishermen and various other sections.<sup>109</sup>

In short, the proposal sets up a two-stage system for license application and granting.<sup>110</sup> A project developer will first have to send a notice with a draft of the project specific impact assessment program for approval by the Ministry. When the program is approved the developer must apply for a license for renewable energy generation within two years. During these two years the right to apply for a license is exclusive to the developer who gets their assessment program approved. This seems to create a system where licenses will be given on a “first come first served basis”.<sup>111</sup>

In the following the thesis will elaborate on the relevant sections of the proposed regulation.<sup>112</sup>

#### **4.1 Expansion of scope**

The proposed regulation starts in § 1 by expanding the geographical scope of the Act. The section states that § 2-2 on opening of geographical zones for license application in the Act is expanded to also apply to sea areas within the baseline.<sup>113</sup> The proposal § 1 also sets Chapters 5, 6, 9 and 10 of the Act to apply within the baseline.

The possibility to expand the section on opening of zones to within the baseline was already mentioned in the Acts preparatory works.<sup>114</sup> The Ministry also notes in the consultation paper that the positive and negative effects on environment and society will in many cases be the same without regards to the specific geographical zone being inside or outside the baseline. The length and shape of the Norwegian coast, with islands and fjords, makes the baseline vary. Sometimes being closer/further from land and somewhere being at shallower/deeper sea. Because of this it might at times be random if a suited zone is in or outside of the line. Maybe somewhere it will be more profitable to have a project closer to land even though it will have a

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<sup>109</sup> Ministry of Petroleum and Energy (2019), §§ 1 – 23.

<sup>110</sup> Anchustegui and Østrem (2020).

<sup>111</sup> Anchustegui and Østrem (2020).

<sup>112</sup> A point that is missing from the proposed regulation, which is a subject too extensive for this thesis, is the matter of support schemes for renewable energy production. This was brought up by Anchustegui in Anchustegui and Østrem (2020). For more on state aid in energy law see Ignacio Herrera Anchustegui and Christian Bergqvist, “The role of State aid law in energy”, in Tina Soliman Hunter, Ignacio Herrera Anchustegui, Penelope Crossley and Gloria M. Alvarez (ed.), *Routledge Handbook of Energy Law*, Routledge 2020.

<sup>113</sup> Section 1-2 (7) in the Offshore Energy Act gives the King by decision of Council of State authority to create regulations on expanding the geographical scope to areas within the baseline.

<sup>114</sup> Ot.prp. nr. 197 (2008-2009), p. 79.

bigger impact on the environment. The expansion of the geographical scope will then make for better and more efficient area management and a more coherent set of rules with regard to the Energy Act and overlapping scopes.<sup>115</sup>

#### **4.2 Notice with draft of assessment program and the project specific impact assessment**

The proposal § 3 suggests that the licensing process starts with the project developer sending in a notice with a draft of the project specific impact assessment program. The section requires the submitter to be a legal person registered in Norway or in another other country which fulfills the requirements of § 3-5 in the Offshore Energy Act. This will to some extent prevent individuals to rightfully apply for licenses, but it is not a rule that excludes non-serious parties from the licensing process. A system of pre-qualification could help in this regard, and in making the licensing process more efficient. Section 3-3 of the Act opens up for making further regulation on who can apply for and receive a license, and pre-qualification. The proposed regulation is silent on this matter.

Section 4 (1) of the proposal gives more information on what the notices have to contain. This includes a description of the planned facility, possible development solutions, the project area, and based on knowledge available at the time (for example from the strategic impact assessment), possible effects on other industries, environment and society. The term “*project area*” is defined in § 2 (b) as a specifically defined geographical area within a zone that has been opened in accordance with § 2-2 of the Act. Furthermore, the notice will have to contain a description of matters that will be assessed, the methods used and information on the applicant’s business.<sup>116</sup> A natural understanding of “*the applicant’s business*” will most likely imply all aspects, both technical capability and financial capacity.

The next step is the Ministry presenting the draft for public consultation before it can approve it based on the draft itself and received consultation responses, see § 4 (3) and (4). When approving the Ministry can change the project area if needed to another location within the opened zone.<sup>117</sup> It is also important to note the wording in § 4 (4) where it states that the Ministry “*can*” approve the assessment program. This means that they are not obligated to approve a

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<sup>115</sup> Ministry of Petroleum and Energy (2019), p. 12.

<sup>116</sup> Ministry of Petroleum and Energy (2019), p. 19, § 4 (1) b)-c).

<sup>117</sup> Ministry of Petroleum and Energy (2019), p. 13.

draft, even if it fulfills all the legal requirements. If they wish they can choose to wait with approving a notice so that they can see different initiatives in context.<sup>118</sup>

When looking at the purpose of the Offshore Energy Act it makes sense that the Ministry needs this freedom of management over the areas to be able to make decisions on the use of renewable energy sources at sea that are in the best interest of all.<sup>119</sup> At the same time applicants do have legitimate expectations to have their notices approved or rejected within reasonable time and with a proper justification of the decision. In the event of an eventual rejected notice there will have to be filed a complaint pursuant to Chapter 6 of the Public Administration Act.<sup>120</sup>

The proposed regulation also has a section that goes more into detail of what the project specific impact assessment must contain. As mentioned in Chapter 3.4.2, the content of a project specific impact assessment will vary based on what matters were covered from earlier impact assessments. This has now been specified in § 6 (1) of the proposal. It states that the assessment must be adapted based on the magnitude of the development and if it is in any way covered by earlier impact assessments of the zone. It then goes on to give a comprehensive list of what an assessment to the extent necessary must contain, pursuant to § 6 (2) a) and b).

Section 6 (2) a) covers the criteria related to the technicalities of the specific project. First the assessment must account for the energy facility including at least a description of alternative developments and a justification of choice of development solution and project area, in addition to connection to network facilities and possible coordination with petroleum activities. Next an assessment of which approvals and licenses there will be applied for pursuant to other applicable legislation, a description of planned technical solutions, development completion timeframe and plans for closure of the facility.

Section 6 (2) b) sets the criteria for what to include in the assessment of the developments impact on environmental and societal interests. The points needed to be accounted for include the present environmental state of the area and how it would most likely develop if the project is not developed, how the facility will pollute, needs for transportation, cultural heritage and environment, fishing and other industries, and risk of accidents and preparedness. The developer also has to clarify how the environmental criteria and consequences have been

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<sup>118</sup> Ministry of Petroleum and Energy (2019), p. 13.

<sup>119</sup> The Offshore Energy Act, § 1-1.

<sup>120</sup> The possibility to litigate administrative decisions in Norwegian courts is limited because of the concept of «forvaltningskjønn». For more see Jan Fridthjof Bernt and Ørnulf Rasmussen, *Frihagens forvaltningsrett*, 2. edition, 2010.

assessed and taken into account for the development solutions chosen, and descriptive measures to reduce environmental damage.

With this, the proposal gives more guidance for project developers on what their assessments have to include, with the reservation that these points have not already been accounted for by previous assessments.

Section 6 (3)-(5) further states that the data and methods used to describe effects, and any possible issue with the data and methods, shall be elaborated on. Also, that consequences of alternative solutions must be justified, and that the Ministry can demand further investigations and information.

When the assessment program is approved there is a timeframe of two years where notices on equivalent projects in the same project area will not be reviewed, see § 4 (5). Note that a project area is possibly only a part of and not necessarily a whole opened geographical zone, which means that there can still be multiple notices submitted for different parts of the same zone. Although when an assessment program has been approved for a project area that area is locked for other applicants for up to two years if the developer does not apply for a license.

The Ministry mentions in the consultation paper that the licensing process starts with the developer sending in a notice with proposal to an assessment program, that it is then submitted for public consultation, and that the Ministry after can choose to approve the program or not. What it does not mention is how this will work in practice. Do interested project developers send in their notices whenever they wish? Will there be some sort of set timeframe where it is possible to send a notice after the decision to open a zone? And how will the Ministry assess and choose between the received notices?

In order to live up to the duty of adopting an authorization procedure which is “*objective, transparent and non-discriminatory*” pursuant to Article 7 in the Electricity Directive this must be structured and made clearer for interested parties through further regulation. The approval of a program does not guarantee getting a license, but it does lock out competitors for the time being. This means that the notice with proposed assessment program makes the basis of what the interested parties will compete against each other with, not their license applications. It is therefore a critical step in the licensing process, which needs to be properly regulated before opening zones for application.

Cost is mentioned in the consultation paper as a reason to why an approved program will lock others out of sending notices for the same area. The Ministry reasons that it is costly to develop a project for production of renewable energy at sea, especially work related to the project specific impact assessment.<sup>121</sup> The Ministry is here talking about the cost put on the developer, not the State, since the new § 5 sets a fee for processing notices with assessment programs. The current amount is set at NOK 100.000 with an opportunity to alter pursuant to § 5 (3). This will help identify serious applicants and cover some of the administrative costs that the State will have when processing.<sup>122</sup>

### **4.3 The license application**

In the two-year time frame after having the assessment program approved the project developer has a reserved right to apply for a license in the specific project area, reading § 7 in conjunction with § 4 (5). The project developer then has two years to finish the project specific impact assessment before applying. The proposed regulation does not state what happens if an application is not submitted within two years. Since a lot of resources will already have been spent, both from private and public parties, it has to be assumed that the project area most likely will be made available for new applicants. Either by selecting from assessment program drafts already sent in, or by setting up a new timeframe allowing for developers to send notices.

Furthermore, the proposal brings more detailed rules on what the license application must contain. The content of a license application is currently not regulated in detail in the Offshore Energy Act other than § 3-3 which gives the Ministry authority to create further regulation, as they have done now with § 7 in the proposed regulation.

The application shall contain information on the applicant, the business and its financial capacity, on who in Norway that will act as the representative to the Ministry, which zone and project area the application is for and if the applicant is applying for other licenses for example through the Energy Act. Finally, the application must contain a description of the planned project including estimated capacity, annual production, solutions for connecting to the grid, cost estimates, assessment of profit and potential for conflict with other interests.

In § 7 (3) the Ministry is given further authority to derogate from the requirements just mentioned, and also the authority to request additional information if needed.

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<sup>121</sup> Ministry of Petroleum and Energy (2019), p. 13.

<sup>122</sup> Ministry of Petroleum and Energy (2019), p. 14.

The next step is to submit the application along with the finished project specific impact assessment for public consultation, in accordance with § 7 (4). After a minimum of six weeks the Ministry can make a decision on granting a license based the application, impact assessment and responses to the consultation.<sup>123</sup> Section 8 repeats § 3-5 in the Act that says a license will be given for up to 30 years with a possibility to extend.

#### **4.4 Detail plan**

The proposal also brings more regulation on the detail plans that are required to be approved before construction of a licensed development project can begin.

First § 9 states that the detail plan must be sent to NVE for approval within 2 years of the license decision. If the Ministry set any requirements of more information when approving the license these requirements have to be accounted for in the detail plan. In addition, the plan has to present the planned construction of the project and describe the economic, resource, technical, environmental and security issues in development and operation of the project. The minimum requirements of the plan are listed in § 9 (2) a)-e) as points that complement or are covered by the already mentioned aspects. Same as the Ministry when approving a license application, the NVE can demand further information if required, see § 9 (3).

Section 10 gives NVE the authority to make the decision on approval of detail plans. It also sets an obligation to justify the decision, including what environmental conditions that the approval is linked with and possible conditions about measures that needs to be taken to reduce negative environmental impact.

After the detail plan approval decision by the NVE the project developer has three years to get the project operating. The term “*operating*” is defined in § 10 (4) as when a facility has produced and transported electricity out of the project area. The reason for setting a deadline is to secure progress for the licensed project. If the deadlines are not held the licensee will be faced with fines pursuant to § 10-6 of the Act, or a revocation of the license pursuant to § 10-7 (2). If a license is revoked the Ministry can announce the license for application from other interested parties, see § 10-7 (4).

In light of the circumstances a deadline of three years to have the project operating might be a bit tight. Especially considering this will be a completely new industry in areas which at the moment does not have the infrastructure needed for energy generation. There is an option to

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<sup>123</sup> Ministry of Petroleum and Energy (2019), p. 21, § 8.



apply for a deadline extension for up to two years pursuant to § 11 (1) in the proposed regulation which might, to some extent, help circumvent trouble relating to the deadline for the first licensed projects.

#### **4.5 Pilot projects**

The proposal also sets the rules for pilot projects. In § 2-2 (4) of the Act there is an exclusionary provision that lets the Ministry make exceptions to the rules on opening of zones in “*special cases*”. As mentioned previously this was meant to be a narrow exception rule for cases like small pilot projects, not a general exception for regular projects. The same goes for the requirement of approved detail plan, see § 3-1 (2) last sentence in the Act, and the requirement of notice with assessment draft in the Act § 4-1. Section 12 of the proposal now expressly states that these requirements do not apply for pilot projects.

An application for a pilot project is to be sent to the Ministry without notice. Nevertheless, §§ 6 and 7 of the proposal still applies as far as they are appropriate for the application.

The need to facilitate for pilot projects and technology development is pivotal for the development of the offshore wind industry, especially when it comes to floating wind turbine technology which faces more challenges than fixed-foundation turbines. An example of a pilot project is the Hywind Demo which was installed by Equinor outside of Karmøy in 2009.<sup>124</sup> It was the world’s first floating wind turbine. Through testing and development, it led to another pilot project in 2017, Hywind Scotland, the world’s first commercial floating wind farm.

Hywind Scotland consists of five turbines with a combined installed capacity of 30 MW providing renewable energy to 20.000 households in the UK.<sup>125</sup> The floating turbine technology eventually resulted in the Hywind Tampen project which was recently approved by the Ministry.<sup>126</sup> Equinor is also using the Hywind Scotland project to test out Batwind. Batwind is a battery storage solution which can help stabilize the volatile nature of wind power.<sup>127</sup>

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<sup>124</sup> For more information on the Hywind Demo, see: <https://www.equinor.com/no/what-we-do/floating-wind/hywind-demo.html>

<sup>125</sup> Hywind Scotland brochure, available at: <https://www.equinor.com/no/news/worlds-first-floating-wind-farm-started-production.html>

<sup>126</sup> Ministry of Petroleum and Energy (2020).

<sup>127</sup> For more information on Batwind, see: <https://www.equinor.com/no/news/26june2018-equinor-has-installed-batwind.html>

## 5. Implementing the proposed regulation as is, issues?

The Ministry mentions in the consultation paper that the Offshore Energy Act gives the government a framework to manage renewable energy production at sea. Furthermore, it indicates that the Act provides for several different approaches to granting licenses and regulating activity, and that it is therefore considered of use with more detailed regulation from the proposal.<sup>128</sup> At another section of the consultation paper they again mention that “*the proposed regulation clarifies the process for handling applications for licenses*”.<sup>129</sup>

The question can then be asked, does it really?

As mentioned earlier, based on the regulation from both the Act and proposal presented in the thesis, the license application process in Norway can be divided into two stages.<sup>130</sup> The first stage is when interested parties send notices with a draft of the project specific impact assessment program for approval by the Ministry. Stage two is after the Ministry has chosen and approved a program draft. The chosen developer then has an exclusive right to apply for a license within two years of approval.

The proposal does bring more detailed regulation on the requirements for the content of the assessment program draft and the license application, but it does not contain any section that clarifies the handling of them by the Ministry. This was given feedback on during the public consultation. Several parties that gave feedback called for a more structured process for submission of notices that ensures the selection of projects based on announced transparent, objective and non-discriminatory criteria, and regulation that ensures that the developer awarded a license is capable of realizing the project.<sup>131</sup>

The same consultation responses suggest looking at the granting of production licenses pursuant to the petroleum legislation for reference. Section 3-5 of the Petroleum Act covers announcing areas for license application and the criteria for granting. Before a license can be given, the Ministry must publicly announce the area that license applications can be submitted for, and the handling of the applications is to be done by objective criteria as well as the terms and conditions stated in the announcement notice.<sup>132</sup> It is further stated in the Petroleum Regulation

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<sup>128</sup> Ministry of Petroleum and Energy (2019), p. 11.

<sup>129</sup> Ministry of Petroleum and Energy (2019), p. 12.

<sup>130</sup> Anchustegui and Østrem (2020).

<sup>131</sup> See for example responses from Equinor ASA, Aker Solutions AS and Kværner AS, available at: <https://www.regjeringen.no/no/dokumenter/hoyring-av-forslag-om-opning-av-omrade-for-fornybar-energi-til-havs-og-forslag-til-forskrift-til-havenergilova/id2662577/?expand=horingsvar>

<sup>132</sup> Lov 29. november 1996 nr. 72 om petroleumsvirksomhet (petroleumsloven), § 3-5 (1) and (3).

that a production license is to be granted on the basis of the applicants technical competence, financial capacity and project development plan.<sup>133</sup> This regulation meets the requirements of Directive 94/22/EC Article 3 and 5.<sup>134</sup>

The equivalent of Directive 94/22/EC for renewables and offshore wind is Directive 2009/72/EC, which has finally been incorporated into the EEA Agreement and entered into force in Norway from 1 November 2019. The Electricity Directive covers the procedure for new generation capacity in Article 7. It, like Article 5 in Directive 94/22/EC, also states that the procedure has to be conducted in accordance with objective, transparent and non-discriminatory criteria, but it does not have the same demand for announcement of area for license applications as Article 3 in Directive 94/22/EC. Member States have the freedom to regulate it how they wish, and the Directive does not require it to be drafted in a particular legislative document as long as the criteria are met and the authorization procedure and criteria are made public.<sup>135</sup>

One could argue that the proposal § 4 fulfills the demand of appropriate criteria pursuant to Article 7 (2) when giving detailed requirements of what the notice with assessment draft must contain. Of the criteria listed in Article 7 one of the most central ones when deciding on project and developer will be “*the characteristics particular to the applicant, such as technical, economic and financial capabilities*”.<sup>136</sup> This is covered in the proposal § 4 through the need to inform on the applicant’s business, which will include the technical, economic and financial capabilities. The criterium of considering the applicant’s characteristics could also be covered by implementing a system of pre-qualification, pursuant to § 3-3 (1) of the Offshore Energy Act.

Although even if § 4 meets the required criteria of the Directive, the procedure is as it stands non-existing. At the moment there is no authorization procedure published for when the three suggested zones are possibly opened for new generation capacity. The interested parties can send in notices with assessment program drafts as soon as the zones open, and instead of e.g. a system with licensing rounds as in the petroleum sector they will have to hope to be the one who wins the “first come first served”-race.

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<sup>133</sup> Forskrift 27. juni 1997 nr. 653 til lov om petroleumsvirksomhet, § 10.

<sup>134</sup> Directive 94/22/EC of the European Parliament and of the Council of 30 May 1994 on the conditions for granting and using authorizations for the prospecting, exploration and production of hydrocarbons, OJ L 164/3. The Directive is incorporated into the EEA Agreement and entered into force in Norway with effect from 27 June 1997.

<sup>135</sup> Directive 2009/72/EC, Article 7 (4). Anchustegui and Østrem (2020).

<sup>136</sup> Directive 2009/72/EC, Article 7 (2) (h).

This means that as of now, with the Act and proposed regulation, the two-stage licensing process is not compliant with EEA-law. One would assume however that the criteria and procedure are developed in time for the zones opening.

Going back to the case of Hywind Tampen and the fact that it was not awarded a license pursuant to the Offshore Energy Act, the reason may have been just this. The Act was barebones in regard to regulating the licensing process, and with the addition of the proposed regulation it will still be. With such a basic regulation it does not yet support and encourage interested parties to invest in and develop the industry. It is therefore not surprising that the Ministry granted authorization based on the previously awarded production license instead of the “unfinished” Offshore Energy Act, especially when interpreting the turbines as being “*devices*” pursuant to § 1-6 (d) of the Petroleum Act seems to be within both the wording of and intention of the section.

## **6. Conclusion**

The thesis has attempted to illustrate and critically analyze the current legislative licensing procedures for offshore wind in Norway, and how it will look if the proposed regulation is passed as it is in the proposal from June 2019.

The first research question asked what the existing rules concerning authorization and licensing for offshore wind farms pursuant to Norwegian legislation are, and what their scope and sufficiency is.

The Offshore Energy Act sets a system of assessments, public consultations and opening of areas before project developers can begin the application process. The Act is vague regarding the detailed content of the required license application, project specific impact assessment and detail plan. The act is also silent on the procedure of awarding the licenses. But the Act was passed as a piece of framework legislation with the intent to further regulate these things later, which is where the proposed regulation comes in to clarify the process.

Norway is a huge oil and gas nation, surrounded by the best nations in offshore wind, and the country even has some of the world’s best wind resources off the coast.<sup>137</sup> This puts it in an excellent position to take advantage of the perks given to it to become big in a new export industry and even secure jobs and wealth for the future. Especially in a time when the

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<sup>137</sup> Bosch, Staffell and Hawkes, (2018).

Norwegian supply industry is experiencing a possible setback in the coming years as a result of COVID-19 and the following blow to the oil industry.<sup>138</sup>

It is likely that very basic legislation and not much development since the Offshore Energy Act in 2010 has caused interested parties and developers to not have been able to conduct projects and create new electricity generation capacity as they would have liked.

The next research question asked what novelty the proposed new regulation to the Offshore Energy Act brings with regard to the licensing procedure for offshore wind, and if it overcomes the gaps left by the in-force legislation.

It is evident that the proposed regulation complements the Act on many areas that were needed as well as that it is lacking in some. The expansion of the geographical scope to within the baseline for certain sections of the Act will make for a more comprehensive and systematic management of areas for renewable energy production at sea. This in addition to the section on pilot projects can make for more attractive and easier to access project opportunities for developers, fostering growth and progress.

Also, the sections with more detailed regulation on the project specific impact assessment, the license application and the detail plan were needed in order to complement the Act in areas that were intended for further regulation later.

The proposal splits the licensing process into two stages. The first where notices with assessment program drafts are submitted to the Ministry for approval, and the second being the license application. What it does not however is provide assessment criteria for these two stages.

Finally, the third research question asked whether the already existing legislation along with the proposed regulation are adequate to fulfill its own statutory objective by facilitating to an open and fair process when exploiting renewable energy sources at sea.

Using the answer of the first two research questions as a premise for the third one the answer is no. What is needed is a clear and transparent process that allows for competition for the eventually opened zones, like the licensing rounds used for petroleum. The “first come first serve” system does not live up to the Acts statutory objective or Article 7 of the Electricity Directive. The Ministry mention in the public consultation paper that the proposed regulation

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<sup>138</sup> Marius Lorentzen, “Aker-sjefen varsler at tusenvis av arbeidsplasser er i spill: - Dette er virkelig ikke tidspunktet for økt skatt”, *e24*, 2020.

*“clarifies the process for handling applications for licenses”*.<sup>139</sup> What also needs to be clarified is the handling process for the notices with impact assessment drafts, which is where the interested parties in reality will be competing against each other to hopefully be picked and get the exclusive right to apply for a license.

As it stands it seems as the proposal is a missed opportunity. The proposed regulation was a chance to create a clear and effective set of rules that in turn could help develop an industry with great prerequisites in Norway, which has been held back by among other things lacking regulation. As mentioned earlier, one would assume that the criteria and procedures for handling notices and applications will be developed in time for the proposed zones opening for new generation capacity, either through changes in the proposed regulation or later given guidelines. If it does not, it is not sure that the licensing process for offshore wind in Norway will be compliant with EU/EEA-law.<sup>140</sup>

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<sup>139</sup> Ministry of Petroleum and Energy (2019), p. 12.

<sup>140</sup> Anchustegui and Østrem, (2020).

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