Offshore Wind in Louisiana Waters

LEGAL FRAMEWORK FOR ENVIRONMENTAL REVIEW

TULANE INSTITUTE
ON WATER RESOURCES LAW & POLICY

NATIONAL WILDLIFE FEDERATION

A Report by the Tulane Institute on Water Resources Law & Policy and National Wildlife Federation

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Cover image: National Wildlife Federation

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Preface

Spurring the growth of offshore wind energy in the United States has proven challenging, particularly when it comes to project financing and crafting a legal framework to regulate the industry. There has been significant federal involvement in promoting the development of offshore wind, but efforts in the Gulf of Mexico have been slower to take off. However, closer to shore, Louisiana has initiated efforts to develop the wind industry in state waters. In December 2023, Louisiana's State Mineral and Energy Board approved the first operating agreements for offshore wind project development in state waters.[2] One project will be sited in the coastal waters of Cameron Parish and the other in coastal waters of Terrebonne and Lafourche parishes.[3]

Previous research has focused on possible legal frameworks and standards, primarily at the federal level, that would apply to offshore wind projects.[4] At the state level, over the past year, engagement with Louisiana's Department of Energy and Natural Resources[5] ("LDENR") has largely focused on the state's leasing rules, particularly with respect to environmental concerns, liability, and public involvement. These leasing rules have not yet been promulgated. LDENR instead opted to enter into operating agreements in lieu of the formal leasing process for these initial projects.[6]

Now that there is a tangible process moving forward in Louisiana, this report aims to identify and summarize the federal and state laws that would trigger environmental review for wind projects in state waters and how operating agreements fit into this regime. However, there is still uncertainty due to the lack of detail in the recently approved wind agreements. Offshore wind facilities may be used in utility electricity generation and connected onshore via transmission lines. There is also the possibility that these wind projects will be used to produce hydrogen energy for heavy industry. Depending on the project, different infrastructure, and thus different federal and state laws, would be implicated. This report focuses primarily on wind facilities that would be used for transmission but indicates where additional information and research might be necessary.

Piping Plover. Photo: USFWS

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Photo: Lindsay Kuczera

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Executive Summary

Up until this point, development of offshore wind in the United States has occurred largely in federal waters. Louisiana aims to build projects in state waters, which extend three nautical miles from the shore. This report analyzes the existing legal framework for environmental review of offshore wind projects in Louisiana waters. Though federal agencies have established a planning and regulatory oversight process for offshore wind, Louisiana's state agencies do not have a comprehensive framework. This report covers both state and federal mechanisms for oversight and review of these projects.

Block Island Wind Farm. Photo: Amber Hewett

The primary avenue for federal review of a project in state waters would come through the federal permitting process. Offshore wind in state waters will overlap with federal jurisdiction over navigable waters, and thus likely need a permit from the U.S. Army Corps of Engineers. The Army Corps conducts public interest and environmental reviews on individual permit applications and examines least practicable damage alternatives. These permits also trigger a threshold review under the National Environmental Policy Act and interagency consultation under the Endangered Species Act.

The Army Corps regulatory review process also involves analysis for compliance under several federal conservation statutes. These statutory reviews require the corresponding federal agency to ensure that permitted activities would not adversely impact protected species, habitats, or culturally significant resources. Depending on the severity of impacts, the agency might require mitigation measures.

There are questions about how detailed the Army Corps permit review process would be if the corresponding activity falls under the scope of the nationwide permit program. The Army Corps issues these roughly every five years, preauthorizing certain categories of activities that do not require individualized review, with only some requiring pre-construction notification to the agency. Activities authorized by nationwide permits must also comply with federal law, but environmental impacts would not be studied and scrutinized with

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Prothonotary Warbler.
Photo: Flickr

Uncertainty looms over Louisiana's process as to what laws and standards apply at the state level due to the use of operating agreements in lieu of formal state waterbottom leasing.

as much detail. Offshore wind projects are more likely to avoid litigation if there is a proactive review of environmental impacts. In the current legal landscape, individualized federal permit review is the best way to get such a review.

Regardless of the federal regulatory review employed, there will be some degree of environmental consideration at the state level as developers commence the permitting process. Wind projects in Louisiana waters will undergo the coastal use permitting process, administered by Louisiana's Department of Energy and Natural Resources. The agency must ensure adverse impacts to coastal resources are avoided to the maximum extent practicable. In addition, any state permitting decision affecting natural resources must, at least, undergo a public trust review.

However, uncertainty looms over Louisiana's process as to what laws and standards apply at the state level due to the use of operating agreements in lieu of formal state waterbottom leasing. First, it is unclear how wind energy is classified under state law. This will determine the threshold level of permit review under the state's coastal use permit program. Second, it is unclear what laws and regulations will apply throughout the process, as the agreements reference compliance with "applicable laws" but does little to clarify what they entail. Last, it is unclear what environmental studies are being relied on by wind developers, whether the insurance and financial requirements for operators are sufficient, and who would be liable for damages from unforeseen events.

These questions are not easily answered given the complicated nature of federal environmental review, the relationship between state and federal authorities, and the lack of certainty in the state's operating agreement process. Unfortunately, some of these issues cannot be meaningfully addressed until further project details are publicly available. In the meantime, several measures could be undertaken to lessen both project and regulatory uncertainty. These include:

1. The State and developers should engage with Army Corps' regulatory team to discuss federal review for species and habitat impacts to avoid later legal issues;

2. Louisiana regulators should clarify the legal classification of wind energy under existing law and define "Applicable Laws" as used in the Operating Agreements, particularly with respect to the applicability of the state's wind leasing statute and accompanying regulations;

3. Regulators and developers should increase transparency by making environmental studies and provisions of the insurance policies available;

4. Regulators should allow for meaningful public comment, including ample notice and documentation for review on subsequent changes to Operating Agreements; and

5. Regulators should develop a plan for hazard mitigation and responses to natural disasters for offshore wind in state waters.

Federal Framework

The state of Louisiana has jurisdiction over waters within three miles of the shoreline.[7] Activities in waters beyond the three-mile limit fall under federal jurisdiction. Nevertheless, certain federal environmental laws could apply to activities in state waters that require analysis. Though it cannot yet be said what statutes and permits will be relevant, the Operating Agreements ("OAs") repeatedly refer to compliance with "Applicable Laws."[8] The following section lays out the relevant federal statutes and agency review procedures that could come into play for wind projects in state waters.

Federal Law	Administering Federal Agency	Description	Implementation and Enforcement
Clean Water Act, 33 U.S.C. §§ 1251-1389	Army Corps of Engineers/ Environmental Protection Agency	Protects the nation's waters by reducing pollutant discharges and setting goals for water quality standards	Regulatory permitting program
Coastal Zone Management Act, 16 U.S.C. §§1451-1464	National Oceanic & Atmospheric Administration	Supports the development of programs for the management of coastal resources	State review of federal actions for consistency with state coastal planning
Endangered Species Act, 16 U.S.C. §§ 1531-1544	U.S. Fish & Wildlife Service / National Marine Fisheries Service	Protects threatened and endangered species by prohibiting the take of such species and requiring habitat conservation plans	Penalties, regulatory permitting program and conservation planning
Outer Continental Shelf Lands Act (regulations), 30 C.F.R. §§ 285.900-285.913	Bureau of Safety and Environmental Enforcement / Bureau of Ocean Energy Management	Enforces environmental and safety standards for renewable energy production on the Outer Continental Shelf	Decommissioning standards and financial surety
Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1851-1870	National Marine Fisheries Service	Provides for proper management and conservation of marine fisheries in U.S. waters	Federal agency consultation, review, and habitat management planning
Marine Mammal Protection Act, 16 U.S.C. §§ 1361-1393	U.S. Fish & Wildlife Service / National Oceanic and Atmospheric Administration	Aims to restrict the taking, possession, sale, and importation of marine mammals	Regulatory permitting program
Migratory Bird Treaty Act, 16 U.S.C. §§ 703-712	U.S. Fish & Wildlife Service	Incorporates international treaty obligations for the protection of migratory birds by prohibiting takings	Agency authorizations and penalties for intentional violations
National Environmental Policy Act, 42 U.S.C. §§ 4331-4336e	Council on Environmental Quality	Requires federal agencies to consider environmental impacts and assess alternative actions and mitigation in their decision-making processes	Procedural environmental review requirements
National Historic Preservation Act, 54 U.S.C. §§ 306101-306131	Advisory Council on Historic Preservation	Requires federal agencies to preserve and protect historic and archaeologically significant sites in the United States	Federal agency consultation and review for impacts to sites on the National Historic Register
Rivers and Harbors Act of 1899, 33 U.S.C. §§ 400-403	Army Corps of Engineers	Provides for the protection of navigable waters in the development of harbors and other constructions	Regulatory permitting program

Loggerhead Sea Turtles. Photo: Dawn Childs/USGS

At a base level, several laws dealing with water resources, species, and habitat will likely come into play, either through a regulatory program, agency consultation, or habitat management.

Environmental Review at the Federal Level

Until formal project details for the approved state wind agreements are formulated, there will be uncertainty about the infrastructure and related construction that will be needed to support the recently approved state wind projects. However, at a base level, several laws dealing with water resources, species, and habitat will likely come into play, either through a regulatory program, agency consultation, or habitat management. At present, the most probable mechanism that will initiate federal environmental review is the issuance of a permit by the U.S. Army Corps of Engineers ("Army Corps") in state waters.

Regulatory Review - Federal Permits

The Army Corps has jurisdiction over navigable waters and the territorial sea pursuant to its authority under the **Clean Water Act** ("CWA") and the **Rivers and Harbors Act** ("RHA"). The RHA requires a permit for the construction of piers, wharves, jetties, and transmission lines.[9] The Army Corps also requires a permit for the dredging, filling, or discharge of dredge and fill material into navigable waters defined as "waters of the United States" ("WOTUS").[10] Of particular relevance to projects in state waters is CWA Section 404, which requires a permit from the Army Corps to discharge dredge and fill material into WOTUS.[11] This kind of permit could be necessary for construction of facilities and transmission lines. The Army Corps' Section 404 jurisdiction encompasses the state's coastal waters.[12] Some activities require individual CWA permits, while others fall under pre-authorized general permits. According to Section 404's regulatory guidelines, the Army Corps may not issue a permit "if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem. . ."[13]

Regardless of the statutory authority at hand, the Army Corps employs a public

interest review in all its permitting processes.[14] When reviewing applications, the Army Corps must weigh various factors, including "conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people."[15] Permit applications are also reviewed with respect to effects on wetlands; fish and wildlife; water quality; cultural, historic, scenic and recreational values; limits to territorial seas; and activities affecting the coastal zone.[16]

While the Army Corps might only issue permits for a small component of an offshore wind project, the issuance of a federal permit triggers other laws requiring agency review: Section 7 consultation under the **Endangered Species Act** ("ESA") and environmental assessments under the **National Environmental Policy Act** ("NEPA"). These provisions could bring a state project under federal review, unless the discharge is covered by a general permit.[17] The ESA, administered by the U.S. Fish and Wildlife Service ("FWS") and the National Marine Fisheries Service ("NMFS"), has two main enforcement provisions.[18] Section 7 requires that federal agencies ensure "any action authorized, funded, or carried out by such agency. . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species."[19] If such an action—here, the issuance of a permit—might affect a listed species or its habitat, the Army Corps must consult with the FWS and NMFS, and the Secretary will issue an opinion on the proposed action.[20] In the event that "jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate [the ESA] and can be taken by the Federal agency or applicant in implementing the agency action."[21]

In addition to agency consultation, the ESA employs a regulatory scheme that applies broadly to private and public individuals and entities.[22] It prohibits the "taking" of threatened and endangered species, defined broadly to include any means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[23] However, the FWS permits exemptions to ESA liability for any takings that are incidental to an otherwise lawful activity.[24] Applicants must show what steps they will take to minimize adverse impacts and analyze alternatives.[25] Several federally protected species in the vicinity of Louisiana's coast warrant consideration.[26] There are three endangered species of sea turtle, two endangered species of whale, as well as several threatened marine species.[27]

The other big federal review comes through NEPA. Before issuing an individual permit, the Army Corps must determine whether or not the proposed action will have a significant impact on the human environment.[28] The issuance of a CWA or RHA permit, which is considered a federal action, requires the agency to analyze its

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A technician repairs a blade at the Block Island Wind Farm. Photo: Andrew Ahern

action's potential environmental impacts, which is referred to as an environmental assessment.[29] The Army Corps will either make a Finding of No Significant Impact ("FONSI"), or will require a more detailed environmental impact statement.[30] It may also issue a mitigated FONSI for situations where "an agency concludes its NEPA review with an [environmental assessment] that is based on a commitment to mitigate significant environmental impacts" so that an environmental impact statement is not required.[31] As a general matter, federal agencies may delineate a list of actions in their implementing regulations that are categorically excluded from the NEPA process that normally do not have significant impacts on the human environment.[32] Under the recent changes, an agency may now, in addition to its own exclusions, adopt a categorical exclusion listed in another agency's NEPA procedures.[33]

In some instances, the issuance of such a permit might require NEPA review of the entire project at hand, even if the only federal involvement is an Army Corps permit issuance. Some courts look at the impacts of the entire project that is made possible by the federal activity while others solely focus on the federal activity. The Fifth Circuit Court of Appeals, which encompasses Louisiana, has not interpreted NEPA in a way that would bring a whole project under review in this manner.[34] However, federal agencies must consider direct, indirect, and cumulative impacts in their analyses.[35]

Along with NEPA, the **National Historic Preservation Act** ("NHPA") requires consideration during the federal permitting process.[36] The NHPA requires federal agencies, before the expenditure of funds or issuance of any license, to "take into account the effect of the undertaking on any historic property. The head of the Federal agency shall afford the Advisory Council on Historic Preservation a reasonable opportunity to comment with regard to the undertaking."[37] The definition of historic properties includes archeological resources.[38] Thus, a federal agency must ensure its actions, such as the issuance of a permit, do not have adverse impacts on historic properties.[39]

If the activity has the potential to affect historically and archaeologically important resources, the agency will initiate a review process under NHPA Section 106 where it evaluates program alternatives. Another objective of the NHPA is to "contribute to the preservation of nonfederally owned historic property."[40] At the state level, Louisiana's Historic Preservation Office coordinates with the Advisory Council on Historic Preservation to protect important historical sites.[41] Specifically, Louisiana's State Archaeologist is responsible for administering "those portions of the [NHPA] relative to archaeology."[42] Most archeological resources in the Gulf region are found in the Outer Continental Shelf, beyond state jurisdiction.[43] In federal waters, BOEM requires industry to conduct surveys for historic archaeological sites prior to project commencement.[44]

Next, the **Migratory Bird Treaty Act** ("MBTA"), passed in 1918, codified several of the United States' treaty obligations to implement protections for the safe passage of migratory bird species native to the United States or its territories.[45] It provides that:

> Unless and except as permitted by regulations made as hereinafter provided in this subchapter, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, any part, nest, or egg of any such bird, or any product...[46]

However, these actions would not constitute a violation of the MBTA if FWS has authorized the activity.[47] Historically, the MBTA has been interpreted to prohibit incidental or unintentional takings of migratory birds, but there are no enforceable incidental take regulations at present, and it remains unclear when FWS plans to roll out such regulations.[48] As such, the question of wind operator liability for incidental migratory bird deaths related to wind facilities in state waters is unresolved. Executive Order 13186 also placed a duty on federal agencies to avoid and minimize impacts to migratory birds and their habitats in carrying out their policies and programs.[49] Thus, the MBTA should be considered in the threshold review of other federal actions related to state offshore wind development, like Army Corps permitting.[50] In addition to MBTA protections, some species might also be listed as endangered or threatened under the ESA which would afford additional protections.

The **Marine Mammals Protection Act** ("MMPA") could be relevant during the Army Corps review process. The National Oceanic & Atmospheric Administration ("NOAA"), through the NMFS, and the FWS jointly administer the MMPA. NOAA is responsible for whales, dolphins, porpoises, seals, and sea lions; FWS is responsible for manatees,

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walruses, sea otters, and polar bears.[51] The MMPA prohibits the taking of a marine mammal by any private or public individual or entity and establishes criminal and civil penalties.[52] "Take" means any action "to harass, hunt, capture, collect, or kill, or attempt to harass, hunt, capture, collect, or kill."[53] 1994 Amendments to the MMPA further defined harassment as an action that "has the potential to injure a marine mammal or marine mammal stock in the wild," or "disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering."[54] NOAA and FWS may permit "authorized incidental takes" for non-fishing activities, including renewable energy projects.[55] An incidental take may be authorized only if the following criteria are satisfied:

> (1) finds, based on the best scientific evidence available, that the total taking during the specified time period will have a negligible impact on the species or stock and will not have an unmitigable adverse impact on the availability of the species or stock for subsistence uses;
>
> (2) prescribes regulations setting forth permissible methods of taking and other means of effecting the least practicable adverse impact on the species and its habitat and on the availability of the species for subsistence uses, paying particular attention to rookeries, mating grounds, and areas of similar significance; and
>
> (3) prescribes regulations pertaining to the monitoring and reporting of such taking.[56]

There are two different incidental take authorizations: Incidental Harassment Authorizations or a Letter of Authorization, depending on the severity of impacts.[57] Since the impacts that are permitted by a Letter of Authorization are more severe, they must be approved via regulation.[58] With regard to wind projects, there are two definitions of "take" under the MMPA that could trigger liability: 1) the negligent operation of a vessel or 2) a negligent action which disturbs a marine mammal.[59] At the very least, certain wind operations in state waters may constitute harassment under the MMPA, and depending on the outcome of the Army Corps' regulatory review, could potentially require an incidental take authorization.[60] Various other wind projects across the country, though in federal waters, are in the process of obtaining MMPA incidental take authorizations.[61] Like the MBTA, many species protected by the MMPA are also threatened or endangered, so there is considerable overlap with the ESA. There are additional regulations applicable to threatened and endangered marine mammals.[62]

Finally, there is the potential that the **Magnuson-Stevenson Fishery Conservation and Management Act** might come into play. This law governs the management of fisheries in U.S. waters with the objective to "promote the protection of essential fish habitat in the review of projects conducted under Federal permits, licenses,

or other authorities that affect or have the potential to affect such habitat."[63] If a federal agency determines that an action, which in the state wind context would likely be the issuance of an Army Corps individual permit, may adversely affect essential fish habitat ("EFH"), they must consult with NMFS.[64] The agency must also prepare a written assessment analyzing the effect of the action on the EFH.[65] This can be done in conjunction with other assessments required by federal conservation laws, such as the ESA.[66] State agencies are not required to consult with the Secretary regarding EFH, but NMFS will make recommendations and coordinate with state entities to reduce potential adverse impacts to EFH.[67] There are eight regional fishery management councils that assist with developing fishery management plans.[68] Relevant to Louisiana is the Gulf of Mexico Fishery Management Council, a region encompassing fifty-three species with EFH.[69] While most of this extends far offshore, there is designated EFH for shrimp fisheries that span across the Louisiana coastline, which could warrant consultation.[70]

Uncertainty Regarding Army Corps Permit Review

A large question underlies the level of review that would be triggered by Army Corps action – whether federal permits for the construction of offshore wind facilities would fall under an existing CWA nationwide permit ("NWP"). If an activity subject to Army Corps jurisdiction falls under an existing NWP, there will likely not be an individualized environmental review

Brown Pelican. Photo: Restore the Mississippi River Delta

under NEPA. The Army Corps conducts a Regulatory Impact Analysis for the issuance of NWPs, as well as a decision document for each general permit, to purportedly comply with NEPA.[71] Thus, these environmental analyses are done in advance of NWP issuance, and individual actions authorized by existing NWPs are not scrutinized to the same extent. Other federal statutes triggered by a permit issuance would be less detailed under an NWP authorization.

Currently, there are fifty-nine active NWPs that cover a range of activities with minimal adverse impacts.[72] Any action not authorized by an existing NWP would have to be authorized by a general regional permit or an individual permit.[73] NWPs, which are reauthorized every five years, make up ninety-seven percent of the Army Corps' regulatory program.[74] An individualized authorization is always required under these circumstances.[75] For state offshore wind projects, potentially relevant NWPs include:

A large question underlies the level of review that would be triggered by Army Corps action – whether federal permits for the construction of offshore wind facilities would fall under an existing CWA nationwide permit ("NWP").

NWP	Description	Pre-Construction Notification ("PCN")
6 Survey Activities	Covered activities include: core sampling, seismic exploratory operations, plugging of seismic shot holes. . . exploratory trenching, soil surveys, sampling, sample plots or transects for wetland delineations, and historic resources surveys Does not authorize any permanent structures	PCN not required
12 Oil or Natural Gas Pipeline Activities	Activities related to "construction, maintenance, repair, and removal of oil and natural gas pipelines and associated facilities in WOTUS, provided the activity does not result in the loss of greater than 1/2-acre of WOTUS for each single and complete project"	PCN required if: a section 10 RHA permit is required, the discharge will result in the loss of greater than 1/10-acre of WOTUS, or the activity is associated with an overall project that is greater than 250 miles in length and the project purpose is to install new pipeline along the majority of the distance of the overall project length." Must include any other permits used or intended to be used to authorize any part of the proposed project or any related activity
18 Minor Discharges	Applies to discharges of dredged or fill material if it will not cause loss of more than 1/10 acre of WOTUS Quantity of material or volume of the area excavated does not exceed 25 cubic yards below the plane of the ordinary high-water mark	PCN required if located in a special aquatic site, including wetlands
19 Minor Dredging	For activities affecting a maximum of 25 cubic yards	PCN not required
52 Water- Based Renewable Energy Generation Pilot Projects	Applies to experimental projects where water-based renewable energy generation units are monitored to collect information on performance and environmental effects Discharge must not cause the loss of greater than 1/2-acre of WOTUS. The placement of a transmission line on the bed of a WOTUS from the renewable energy generation units to a land-based distribution facility is considered a structure under Section 10 of the RHA	PCN required Project verification copies sent to NOAA
57 Electric Utility Line Activities	Activities required for the construction, maintenance, repair, and removal of electric utility lines, telecommunication lines, and associated facilities in WOTUS, provided the activity does not result in the loss of greater than 1/2-acre of WOTUS for each single and complete project District Engineer may require mitigation to ensure that activity results in no more than minimal adverse environmental effects	PCN required if a Section 10 permit is required, or the discharge will result in the loss of greater than 1/10-acre of WOTUS PCN must include any other permits used to authorize any part of the proposed project or any related activity that requires Army Corps authorization

NWPs only authorize single and complete projects.[76] There are thirty-two general conditions that apply to all prospective NWP permittees.[77] Several might be particularly relevant to any NWPs that cover aspects of state wind projects:

General Condition	Description
2: Aquatic Life Movements	Activities shall not substantially disrupt the necessary life cycle movements of aquatic species indigenous to the waterbody, or those that migrate to the area
3: Spawning Areas	Activities in spawning areas during spawning seasons must be avoided to the maximum extent practicable; activities that lead to the destruction of such areas are not authorized
4: Migratory Bird Breeding Areas	Activities in waters that are breeding areas for migratory birds must be avoided to the maximum extent practicable
5: Shellfish Beds	No activity may occur in areas of concentrated shellfish populations
12: Soil Erosion and Sediment Controls	Appropriate soil and sediment controls must be utilized during construction
17: Tribal Rights	Permitted activities may not impair tribal rights, including reserved rights, fishing rights, and hunting rights
18: Endangered Species	Does not authorize activities "likely to directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Federal Endangered Species Act, or which will directly or indirectly destroy or adversely modify designated critical habitat or critical habitat proposed for such designation." Must go through Endangered Species Act section 7 consultation addressing the consequences of the proposed activity on listed species or critical habitat Non-federal permittees must submit a PCN if any listed species or its critical habitat might be affected District engineer may add specific conditions based on consultation
19: Migratory Birds and Bald and Golden Eagles	Permittee must ensure its activities comply with the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act Must contact U.S. Fish and Wildlife Service to determine what actions need to be taken to reduce adverse effects to migratory birds / eagles and whether "incidental take" permits are necessary
20: Historic Properties	No activity that may have the potential to cause effects to properties listed, or eligible for listing, in the National Register of Historic Places, is authorized until the requirements of the National Historic Preservation Act have been satisfied
22: Critical Water Resources	National Oceanic and Atmospheric Administration-managed marine sanctuaries, monuments, and National Estuarine Research Reserves Discharges under other NWPs do not authorize activities in these areas
23: Mitigation	District Engineer must consider an array of factors to ensure individual and cumulative adverse impacts are no more than minimal Compensatory mitigation – must comply with 33 C.F.R. § 332
25: Water Quality	Pertains to a state's authority under CWA Section 401 water quality certification (however, seems unlikely Louisiana would choose to exercise this power to block a permit)
26: Coastal Zone Management	Coastal Zone Management consistency concurrence

General permit descriptions taken from Army Corps Regulatory Documents.[78]

As noted in the Army Corps' public interest review and the NWP General Conditions, these preauthorized general permits incorporate standards with other habitat and conservation laws. However, under most circumstances, these impacts will not be scrutinized in advance of the individual activity. This key difference underscores the importance of an individualized permitting process.

Block Island Wind Farm Construction. Photo: Deepwater Wind

There are additional federal laws that deal with the planning and management of aquatic coastal habitats that might not be directly raised in a permit review but merit consideration.

Coastal Management

As discussed above, the issuance of a federal permit triggers various other federal statutes that warrant consideration. However, there are additional federal laws that deal with the planning and management of aquatic coastal habitats that might not be directly raised in a permit review but merit consideration. First is the **Coastal Wetlands Planning, Protection, and Restoration Act** ("CWPPRA"). Congress enacted CWPPRA in 1990 to address coastal land loss in Louisiana.[79] It focuses primarily on ecosystem restoration projects. CWPPRA projects are subject to a twenty-five percent state cost share, which is lowered to fifteen percent pursuant to the CWPPRA conservation plan, which has a policy of "no net loss" of wetlands"[80] It requires the Army Corps to ensure all its activities are consistent with Louisiana's restoration plan that is submitted pursuant to CWPPRA.[81] Thus, any regulatory actions must be consistent with the priorities and policies of the state plan.[82]

Next, the Barataria-Terrebonne National Estuary Program warrants consideration. The National Estuary Program, administered by the Environmental Protection Agency, is a nonregulatory component of the CWA that provides funding and technical assistance to restore habitats and water quality in ecologically-significant estuaries.[83] Designated estuaries must develop and implement a long-term plan focused on local priorities.[84] Barataria-Terrebonne was established in 1990.[85] Its management plan convenes a wide array of stakeholders and sets goals for habitat conservation, but nothing in the plan itself is legally enforceable. In 2022, Barataria-Terrebonne was awarded $4,5000,000 from the Bipartisan Infrastructure Law which will be allocated over five years for

"projects addressing habitat protection or restoration, climate change mitigation, or environmental justice issues."[86]

Further, NOAA's Office of Coastal Management administers the Coastal Zone Management Act ("CZMA").[87] The CZMA established a national framework for states and territories to better manage coastal resources by incentivizing the development and administration of state-level Coastal Management Programs ("CMP").[88] CMPs are primarily a tool for state-level review of federal activities to ensure consistency with state and local coastal programs.[89] Upon approval, a state program becomes eligible for federal grants.[90] Louisiana administers a CMP, and several parishes administer local programs. With respect to the approved state wind OAs, the projects will be sited in Louisiana's coastal waters and thus fall under the state's program. NOAA will not have much involvement through the CZMA, unless wind facilities are sited near a federally managed area, such as a National Estuarine Research Reserve, which might then involve collaboration with NOAA.[91] In June of 2023, NOAA accepted the Atchafalaya River System into the National Estuarine Research Reserve System.[92] As noted in the Army Corps permitting section, an activity that would result in discharges impacting critical water resources, including National Estuarine Research Reserves, is not authorized by an NWP and would require an individual review.[93] Though this recent designation still requires several procedural steps before it becomes official, it could require additional regulatory review based on the siting of projects and related infrastructure.

It is worth noting that if the current state-level projects are used in hydrogen production, there could be other federal entities involved in project review, as this sort of energy production would require unique infrastructure and implicate different laws.

Site tour at Hywind Scotland. Photo: Lindsay Kuczera

South Fork Wind Farm. Photo: Amber Hewett

Decommissioning

The Bureau of Ocean Energy Management ("BOEM") is the federal agency with authority over the development, leasing, and administration of offshore energy activities in federal waters.[94] Alongside BOEM is the Bureau of Safety and Environmental Enforcement ("BSEE") which has regulatory authority over construction, safety, and natural resource conservation in conjunction with alternative energy activities in the Outer Continental Shelf. [95] BSEE's regulations contain the requirements for decommissioning, which is the ending of operations and returning the operating area to its conditions prior to the project.[96] BSEE has promulgated regulations specific to renewable energy including offshore wind. These regulations require operators to submit an application with BSEE to determine what technical and environmental reviews are needed to safely decommission a site.[97] Decommissioning must be complete within two years following termination of the lease or grant.[98]

Louisiana's Department of Energy and Natural Resources has incorporated these federal decommissioning regulations into its state wind leasing rules.[99] Thus, while BOEM does not have direct authority over wind projects in state waters, its regulatory standards would apply, in theory, when the state enters into a lease. Whether they apply to operators who are not lessees is uncertain and will be discussed in the Operating Agreement section.

State Framework

In addition to the previously discussed federal statutes and programs, Louisiana administers various programs relevant to the development and production of wind energy in state waters.

Law	Administering Agency	Description	Enforcement and Implementation
State and Local Coastal Resources Management Act, LA. REV. STAT. §§ 214.21-214.42	Louisiana Department of Energy & Natural Resources	Established Louisiana's Coastal Resource Program	Regulatory permit program, consistency review, mitigation
Wildlife and Fisheries LA. REV. STAT. §§ 56:1-30.5; 56:2011-2015	Louisiana Department of Wildlife & Fisheries/ Wildlife & Fisheries Commission	Provides for the management of special wildlife areas and conservation of state wildlife and fisheries	Species and habitat management programs, dredge and fill licenses

Bryde's Whale. Photo: shutterstock

Environmental Review at the State Level

The bulk of state environmental review comes from the **State and Local Coastal Resources Management Act** ("SCLRMA"), enacted pursuant to the federal CZMA, which created Louisiana's Coastal Resource Program. It is administered primarily by the Louisiana Department of Energy & Natural Resource ("LDENR") Office of Coastal Management, with support from the Department of Wildlife and Fisheries.[100] Parishes may administer their own coastal programs if they are in compliance with state standards. Ten parishes administer their own local coastal programs, including Cameron, Lafourche, and Terrebonne, where state projects will be sited.[101]

The SCLRMA's key regulatory tool is the Coastal Use Permit ("CUP") program. A CUP is required prior to commencing any activity of state or local concern within the coastal zone.

Regulatory Review – State Permits

The SCLRMA established Louisiana's Coastal Resource Program, which gives LDENR the authority to ensure that federal actions in the state's coastal zone are consistent with the state's program, coordinate the activities of other state agencies impacting coastal resources, and most importantly, administer a regulatory program.[102] The SCLRMA's key regulatory tool is the Coastal Use Permit ("CUP") program. A CUP is required prior to commencing any activity of state or local concern within the coastal zone, which includes energy development activities, dredge and fill activities, and industrial development, among others.[103] However, there are exemptions. LDENR regulations provide that "[CUP]s shall not be required for the location, drilling, exploration, and production of oil, gas, sulphur, and other minerals subject to regulation by the Office of Conservation..."[104] There are instead separate rules and procedures for in-lieu permits laid out in a Memorandum of Understanding between the Coastal Management Section and Office of Conservation.[105] Due to questions of whether wind energy is classified as a mineral resource, the status of these activities under the law is left unclear.

LDENR also issues general coastal permits for activities "substantially similar in nature that cause only minimal adverse impacts when performed separately."[106] Several general permits ("GPs"), listed below, may authorize certain state wind energy activities.[107]

Clapper Rail. Photo: Flickr

General Permit No.	Description
GP-6	Provides for the installation, replacement, maintenance, and removal of up to 10,000 linear feet of pipeline in vegetated wetlands, spoil banks, and open water areas
GP-12	Provides for a one-time mobilization for the maintenance of existing channels, canals and slips that are used for access to oil, gas and salt water disposal wells and production facilities within the Coastal Zone of Louisiana and that are located in fields in which the applicant has a valid Coastal Use Field-Wide Maintenance Dredging Strategy Permit
GP-15	Provides for the maintenance dredging of existing channels, canals, ditches and slips that are utilized for commercial purposes or private navigation within the Louisiana Coastal Zone
GP-16	Provides a one-time mobilization for the construction of new channels and slips that are used for access to oil, gas, and salt water disposal wells and production facilities within the Coastal Zone of Louisiana and that are located in open water, excluding Lake Pontchartrain and Lake Maurepas
GP-19	Provides for a one-time mobilization for minor oil and gas activities including but not limited to those caused by the construction and installation of platforms, towers, landing pads, structures used to support pipelines and cables, staging and work areas, and parking areas that have adverse impacts to 1.0 acre or less, with no more than 0.1 acre of vegetated wetland impacts, within the Coastal Zone of Louisiana
GP-22	Provides for operations for seismic surveys to include surveying locations, placement of bamboo poles, receiver lines, casings (pipes), buoys, stakes, detectors, etc. The pipes are to be marked with flags by day and yellow lights by night. Generation of seismic energy source may be drilling and detonation of shot points, discharge of air guns in water, and/or use of Vibraseis or other vibrating energy sources

Further, the regulations provide that the Coastal Resource Program has a policy to avoid certain adverse impacts to the maximum extent practicable:

Adverse Impacts in CUP Regulations
1.Reductions in the natural supply of sediment and nutrients to the coastal system by alterations of freshwater flow
2. Adverse economic impacts on the locality of the use and affected governmental bodies
3. Detrimental discharges of inorganic nutrient compounds into coastal waters
4. Alterations in the natural concentration of oxygen in coastal waters
5. Destruction or adverse alterations of streams, wetlands, tidal passes, inshore waters and waterbottoms, beaches, dunes, barrier islands, and other natural biologically valuable areas or protective coastal features
6. Adverse disruption of existing social patterns
7. Alterations of the natural temperature regime of coastal waters
8. Detrimental changes in existing salinity regimes
9. Detrimental changes in littoral and sediment transport processes
10. Adverse effects of cumulative impacts
11. Detrimental discharges of suspended solids into coastal waters, including turbidity resulting from dredging
12. Reductions or blockage of water flow or natural circulation patterns within or into an estuarine system or a wetland forest
13. Discharges of pathogens or toxic substances into coastal waters
14. Adverse alteration or destruction of archaeological, historical, or other cultural resources
15. Fostering of detrimental secondary impacts in undisturbed or biologically highly productive wetland areas
16. Adverse alteration or destruction of unique or valuable habitats, critical habitat for endangered species, important wildlife or fishery breeding or nursery areas, designated wildlife management or sanctuary areas, or forestlands
17. Adverse alteration or destruction of public parks, shoreline access points, public works, designated recreation areas, scenic rivers, or other areas of public use and concern
18. Adverse disruptions of coastal wildlife and fishery migratory patterns
19. Land loss, erosion, and subsidence
20.Increases in the potential for flood, hurricane and other storm damage, or increases in the likelihood that damage will occur from such hazards
21. Reduction in the long-term biological productivity of the coastal ecosystem.[108]

Hywind, Scotland. Photo: Lindsay Kuczera

In the event that the developing wind projects are used in the production of hydrogen, these federal standards may be implicated, along with potential review by other entities.

LDENR's regulations contain guidelines for implementing its responsibilities under the coastal program and issuance of CUPs. When reviewing any CUP application, LDENR must consider information regarding a long list of general factors, including public and private benefits, existing infrastructure, proximity and extent of impacts on wildlife, the likelihood of cumulative impacts, and the extent of long-term benefits and impacts.[109] The regulations include additional guidelines for specific uses that might apply to wind projects. For activities involving linear facilities, LDENR must ensure that dredging is of minimal size and length, siting avoids highly productive biological areas, and existing lines and corridors be utilized, among various other similar considerations.[110] CUPs also require that the permittee fulfill mitigation obligations to minimize, restore, and compensate for loss of ecological value due to the permitted action.[111]

LDENR's coastal regulations rely on federal standards in certain instances. For example, the Coastal Program mitigation must take CWPPRA's requirements into account.[112] Further, pipelines transporting natural gas or other gas must comply with federal safety regulations.[113] In the event that the developing wind projects are used in the production of hydrogen, these federal standards may be implicated, along with potential review by other entities.

There are several other state entities that might have a role in permitting, depending on siting and necessary infrastructure. The Louisiana Department of Wildlife & Fisheries ("LDWF") requires a license for any dredging of sand or fill material from state waters.[114] These are divided into several classes and require royalty payments for each cubic yard of material dredged.[115] Class B licenses must be obtained for the dredging of state waters

for commercial purposes, which includes mineral activities, and must be renewed annually.[116] LDWF regulations require Class B license holders to report monthly on dredging operations.[117] These are issued in lieu of CUPs but must be consistent with the state's program.[118] In addition, the Louisiana Department of Environmental Quality ("LDEQ") must certify any federal permits issued under the Clean Water Act.[119] Under section 401, a state must certify that a federal permit will comply with all applicable water quality standards, giving a state broad authority to grant or deny a permit.[120] However, it is unlikely that LDEQ would deny a nearshore permit on those grounds.

Beyond permit review, there are additional state authorities that manage coastal resources and manage plant and wildlife habitat. There are two bodies that share responsibilities for wildlife and fisheries programs: LDWF and the Wildlife & Fisheries Commission.[121] While both play roles in managing state lands, the Commission is "a policy-making and budgetary-control board, with no administrative functions."[122] LDWF oversees the state's wildlife refuges and conservation areas.[123] It also works alongside LDENR to administer the state's Coastal Resource Program. One special area managed by LDWF in the vicinity of state wind development is the Atchafalaya Delta Wildlife Management Area, stretching 125,000 acres.[124] There are specific regulations that deal with mineral operations in state wildlife refuges, but there currently are no projects sited in a wildlife refuge.[125] Further, LDWF cooperates with FWS to support conservation of federally protected species.[126]

One special area managed by LDWF in the vicinity of state wind development is the Atchafalaya Delta Wildlife Management Area, stretching 125,000 acres.

Dolphin. Photo: National Wildlife Federation

Caminada Headlands. Photo: Restore the Mississippi River Delta

Public Trust Duties

The Louisiana Constitution places a continuing duty on all state agencies that implement statutes and regulations that impact the natural resources of the state.

The Louisiana Constitution places a continuing duty on all state agencies that implement statutes and regulations that impact the natural resources of the state. Article Nine begins: "The natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people. The legislature shall enact laws to implement this policy."[127] Given that the state holds title to the beds of navigable waters, the scope of this mandate applies widely. However, the constitutional provision on its own does not specify how this policy should be interpreted and lacked a clear mechanism to ensure compliance.

In a landmark 1984 decision, the Louisiana Supreme Court weighed in on this constitutional provision. It held that this constitutional mandate applied not only to the legislature, but also to state agency decision-making processes.[128] An environmental group challenged a permit decision for a hazardous waste facility.[129] In its analysis of the Commission's permit review process, the court reasoned that a minimum level of review and analysis, clearly documented, was mandated in pursuit of constitutional and statutory duties. It is a "rule of reasonableness" requiring the agency, "before granting approval of proposed action affecting the environment, to determine that adverse environmental impacts have been minimized or avoided as much as possible consistently with the public welfare."[130] The court went on to note that environmental protection is not an exclusive goal of the constitutional mandate, but instead requires a balancing of factors where "environmental costs and benefits must be given full and careful consideration along with economic, social and other factors."[131]

This has become understood as Louisiana's pronouncement of its public trust duty. To fulfill this duty, an agency must satisfy several procedural requirements. In a subsequent case, a Louisiana circuit court laid out the minimum requirements that an agency must include in its record of decision:[132]

1) a general recitation of the facts as presented by all sides;

2) a basic finding of facts as supported by the record;

3) a response to all reasonable public comments;

4) a conclusion or conclusions on all issues raised which rationally support the order issued; and

5) any and all other matters which rationally support the DEQ's decision. This is not an exclusive listing, but merely illustrative.[133]

The court laid out three additional considerations an agency must consider in reaching a decision:

1) the potential and real adverse environmental effects of the proposed project have been avoided to the maximum extent possible;

2) a cost benefit analysis of the environmental impact costs balanced against the social and economic benefits of the project demonstrate that the latter outweighs the former; and

3) there are alternative projects or alternative sites or mitigating measures which would offer more protection to the environment than the proposed project without unduly curtailing non-environmental benefits to the extent applicable.[134]

This mandate has been applied broadly to state agency procedures that impact natural resource management and environmental quality. Thus, any permitting decisions made by Louisiana agencies, primarily LDENR, in connection with offshore wind facilities in state waters will necessitate a public trust review. Unfortunately, this duty can only be truly enforced through judicial review.

This mandate has been applied broadly to state agency procedures that impact natural resource management and environmental quality.

Shrimp Boat, New Orleans, LA. Photo: Helen Rose Patterson

Operating Agreements and Liability

Though much attention has been given to Louisiana's wind leasing statutes and regulations, the initial offshore wind projects are proceeding via operating agreements with the State Mineral and Energy Board.

The first offshore wind projects in Louisiana will be sited on state water bottoms. Though much attention has been given to Louisiana's wind leasing statutes and regulations, the initial offshore wind projects are proceeding via operating agreements with the State Mineral and Energy Board ("SMEB"). The SMEB is an office within LDENR with the exclusive authority to lease state lands for the development of minerals, oil, and gas.[135] It is also authorized to explore and develop such lands on its own behalf or through others contracted for that purpose.[136] The contractual OA process may be used in lieu of the formal state leasing process when SMEB determines it is in the best interest of the state either in equity or developmental productivity.[137] In December, the SMEB approved OAs with two different companies. Since both contain largely the same language, the following section simply refers to them collectively as a single OA. Going forward, however, it will be important to analyze any new OA individually.

The OA contains general contractual requirements for project planning, development, and decommissioning. Six months before beginning construction, the Operator must submit a Construction and Operational Plan to LDENR's Office of Mineral Resources that includes a description of the wind turbine generators, a schedule and description of proposed activities, and information about surface water location and depth, as well as general structural requirements.[138] In addition, the Operator must submit a contingency plan identifying risks to equipment and measures to address potential equipment failures.[139] Throughout the duration of OA, the Operator is held to the standard of a "reasonably prudent operator" which relates to a duty to fully develop discovered resources, but Louisiana courts have held that this does not encompass an implied duty to restore and remediate.[140] Remediation, restoration, and decommissioning are addressed separately in the OA. Before construction starts, the Operator must submit a Decommissioning Plan and establish restoration security to cover the decommissioning and other restoration obligations.[141] LDENR's Office of Mineral Resources has the discretion to reject the plan if it does not adequately describe the cost of restoration and decommissioning.[142] Operators are responsible for removing, decommissioning, and restoring the site "as near as practical" to its previous condition at their sole risk, cost, expense, and subject to compliance with all applicable laws and procedures.[143] Restoration obligations must be completed within two years following the date wind energy production ceases or the agreement ends and are not considered fulfilled until the State accepts.[144] However, there are no rules or regulatory standards specific to LDENR's acceptance of obligation and restoration activities.

Black Skimmer. Photo: Bigstockphoto

Gaps in the State Framework

Since these are the first projects proceeding under state jurisdiction, there is a lack of clarity on what state laws apply and how the OA impacts liability, especially with regard to environmental harm. To start, there is concern about public involvement as the projects develop. The OA provides that its terms "shall not be modified or amended, nor shall any of its requirements be waived, except in a subsequent writing executed by all Parties.[145] Since it provides the Operators and State the power to amend the OA, it is unclear whether subsequent changes, amendments, or omissions of the originally-approved OA would be publicly announced and subject to public notice and comment. Further, the use of an operating agreement on its own changes the contractual relationship of the parties and the applicable law and regulations. Because LDENR did not undergo the formal leasing process with the initial wind projects, a key question is how the absence of a lease impacts the liability and duties of the State and Operator in the development and production of offshore wind.

Liability

There are several concerns with existing financial assurances and oversight with respect to environmental liability. The OA provides that "[t]he State shall be held free and harmless from liability or responsibility for any and all costs and expenses so incurred under the terms of this Agreement."[146] The Operator is responsible for all environmental damage that results from the production of wind energy as well as for all damages to the property, irrespective of whether it was due to negligence or to the nature of the activities.[147] This includes loss or damage

A key question is how the absence of a lease impacts the liability and duties of the State and Operator in the development and production of offshore wind.

Pelicans at the mouth of the Mississippi River. Photo: Helen Rose Patterson

to soil, water, aquifers, vegetation, and all environmental damage.[148] However, environmental damage is not defined.

The Operator must obtain commercial general liability insurance, with the State named as an additional insured, with the following limits: $1,000,000 per occurrence for property damage (non-environmental) with a $2,000,000 aggregate; and $10,000,000 for environmental damage for each occurrence.[149] Notably, the environmental damage provision of the general liability policy contains no aggregate dollar amount, unlike the provisions for bodily injury or property damage. While this provides some financial assurance to address potential environmental harm, there is little information on how payouts would be administered, under what standards, and what to do in the event that the policy payouts are insufficient. This is especially concerning, given that neither LDENR nor other state entities have indicated undertaking their own preliminary studies on foreseeable environmental issues for the awarded projects, instead leaving that to the operators and developers. While the actual operation of wind facilities likely does not raise many pollution concerns, the vast network of oil and gas infrastructure during construction and maintenance does. Whether the damage covered by the insurance policy would be sufficient to remediate significant environmental damage is uncertain. There is no additional information on what constitutes each category of damages, nor is there financial assurance for property and environmental damage that may occur beyond what is included in the OA.

Moreover, commercial general liability insurers are exempt from form filing requirements and approval provisions.[150] Typically, insurers must submit basic policy forms, containing information on coverage, exclusions, etc., for approval of the Insurance Commissioner. Unlike other forms of insurance across all sectors, these commercial policyholders are not required to file such documents in order to keep "a competitive marketplace."[151] The insurer must maintain a copy of the following for five years: 1) the data and procedures used in underwriting, 2) the policy and date of issuance, 3) annual data on each insured risk, and 4) a record of all complaints.[152] While the insurer would be required to produce such records upon request by the commissioner or someone acting on their behalf, no mention is made of whether other interested parties may obtain such information. With LDENR being an insured party but also a government entity with regulatory oversight over the activities covered in the policy, it is unclear whether

there is some other route to obtain copies of the commercial general liability policies. This could create issues surrounding transparency and public access to key provisions detailing the scope of insurance coverage, applicable exclusions, and how claims are resolved.

Legal Uncertainty

A big concern with the use of OAs on their own is the lack of clarity in what statutes and regulations are enforceable, as well as who should enforce them and how. To begin, there is the question of the classification of wind as a mineral resource under Louisiana law, which leaves uncertain whether it would qualify for certain CUP exemptions for the exploration and production of oil, gas, and other minerals.[153] Next, the OA provisions repeatedly state that operators must comply with all "Applicable Laws" but fail to clarify what those entail, except for one mention in the bankruptcy and security section. It provides that the state shall be entitled to use any escrow fund or performance bond "to remedy any damage to the Property if Operator fails to comply with its Restoration Obligations of Article 13, Applicable law, that LAC 43:V:701 *et seq*.."[154] The regulations cited here are a reference to LDENR's wind leasing regulations, which incorporate BOEM's decommissioning requirements into the state regime.[155]

Yet whether the state's wind leasing regulations section apply, in whole or in part, is unclear. It appears from a basic reading of the OA that all of those provisions would constitute an Applicable Law as mentioned throughout – including in the OA decommissioning. Yet at the same time, there are already inconsistencies between what the OA requires compared to the leasing regulations. For example, the rating requirements for insurance policies differ between the two. Leaseholders would be required to have a policy from an insurer with not less than an A rating, but the OA says not less than an A-.[156] Such a difference may not have a significant impact, but the fact that there is a less stringent allowance in the OA calls into question the enforceability of state wind regulations in the absence of a lease.

Finally, there is the increasing risk of hurricanes and related natural disasters in the Gulf of Mexico. Existing state laws and regulations do not provide specific standards or enforceable requirements with respect to hazard mitigation, natural disaster planning, or emergency response. With respect to liability for damages due to an extraordinary incident (force majeure or suspending event), the OA provides certain time periods where the Operator is exempt from the requirements of the Agreement due to circumstances beyond their control when acting "diligently, reasonably, and in good faith attempting to mitigate and eliminate the effects of such Incident..."[157] The OA contains significant flexibility with compliance during suspending events and force majeure events, yet it does not indicate how damages incurred during such events would be addressed. This should be determined prior to the start of operations.

A big concern with the use of operating agreements on their own is the lack of clarity in what statutes and regulations are enforceable, as well as who should enforce them and how.

Shrimp Boats at Port Fourchon. Photo: Helen Rose Patterson

Several administrative adjustments could be implemented to provide regulatory certainty and help ensure risks to the environment, species, and habitat are minimized.

Recommendations

As things currently stand, there is a considerable amount of legal uncertainty with the current path being taken to grow the offshore wind industry in state waters. All stakeholders in this process should prioritize comprehensive planning, public transparency, and regulatory certainty to ensure that the first wind projects in Louisiana proceed safely and successfully.

Several administrative adjustments could be implemented to provide regulatory certainty and help ensure risks to the environment, species, and habitat are minimized. Below are several pathways to achieve a more comprehensive regulatory environment for offshore wind that benefits stakeholders, developers, and agencies.

1. The State and developers should engage with Army Corps' regulatory team to discuss federal review for species and habitat impacts to avoid later legal issues;

2. Louisiana regulators should clarify the legal classification of wind energy under existing law and define "Applicable Laws" as used in the Operating Agreements, particularly with respect to the applicability of the state's wind leasing statute and accompanying regulations;

3. Regulators and developers should increase transparency by making environmental studies and provisions of the insurance policies available;

4. Regulators should allow for meaningful public comment, including ample notice and documentation for review on subsequent changes to Operating Agreements; and

5. Regulators should develop a plan for hazard mitigation and responses to natural disasters for offshore wind in state waters.

Endnotes

[1] Principal Authors: Haley Gentry, William B. Wiener, Jr. Foundation Research Fellow, Tulane Institute on Water Resources Law & Policy. Special thanks to: Helen Rose Patterson, Senior Campaign Manager - Offshore Wind Energy, National Wildlife Federation; as well as the staff and research assistants at the Tulane Institute on Water Resources Law & Policy.

[2] Tristan Baurick, *Louisiana Signs Agreements to Build First Offshore Wind Farms in State Waters,* TIMES-PICAYUNE (Dec. 13, 2023), https://www.nola.com/news/environment/louisiana-signs-agreements-for-its-first-offshore-wind-farms/article_1f2a8708-99f2-11ee-a5c8-976e6eb24217.html.

[3] *Id.*

[4] *See e.g.,* LOUISIANA OFFSHORE WIND ENERGY FRAMEWORK, ENV'T L. INST. (Dec. 2022), *available at* https://www.eli.org/sites/default/files/files-pdf/Louisiana%20State%20Offshore%20Wind%20Energy%20Framework%20-%20Dec%202022.pdf.

[5] Beginning in January 2024, LDNR was renamed as "Louisiana Department of Energy and Natural Resources." Brooke Thorington, *Department of Natural Resources Will Have A New Name in 2024,* LA. RADIO NETWORK (June 13, 2023), https://louisianaradionetwork.com/2023/06/13/department-of-natural-resources-will-have-a-new-name-in-2024/.

[6] LA. REV. STAT. § 30:209.

[7] Bureau of Ocean Energy Mgmt., *Outer Continental Shelf,* https://www.boem.gov/oil-gas-energy/leasing/outer-continental-shelf (last visited Feb. 27, 2024).

[8] The OA defines Applicable Laws as "any applicable, valid, final, and non-appealable federal or state statute, law, rule, regulation, or order, or any judicial decision, as may now be in effect or which may be enacted, adopted, or made effective at a future date. . . . all statutes, laws, rules, regulations, orders, and judicial decisions that pertain to the generation of electricity through the use of a wind turbine and related activities including but not limited to all such matters that pertain to protection of the environment, environmental matters, pollutants, minimum water quality standards, dredging, filling, local navigation, and/or health and safety matters." Wind Energy Operating Agreement Art. 1.2, *available at* https://www.dnr.louisiana.gov/assets/OMR/media/forms_pubs/Cajun_Wind_FINAL_AGMT_SIGNED.pdf.

[9] 33 U.S.C. § 403.

[10] 33 U.S.C. § 1344.

[11] 33 U.S.C. § 1344.

[12] U.S. Env't Prot. Agency, *U.S. Interactive Map of State and Tribal Assumption under CWA Section 404*, https://www.epa.gov/cwa404g/us-interactive-map-state-and-tribal-assumption-under-cwa-section-404 (last visited Jan. 3, 2024).

[13] 40 C.F.R. § 230.10.

[14] *See* 33 C.F.R. § 320.4(a).

[15] 33 C.F.R. § 320.4(a)(1)-(3).

[16] 33 C.F.R. § 320.4(b)-(h).

[17] ESA consultation and NEPA review theoretically occur at the nationwide level ahead of general permit reauthorization and sometimes can be skipped at the project specific level. *See generally* Reissuance and Modification of Nationwide Permits, 86 Fed. Reg. 73522 (2021).

[18] NMFS deals with endangered and threatened marine species specifically.

[19] 16 U.S.C. § 1536(a)(2).

[20] 16 U.S.C. § 1536(b)(3)(A).

[21] *Id.*

[22] 16 U.S.C. § 1538(a).

[23] 16 U.S.C. § 1532(19).

[24] 16 U.S.C. § 1539(a)(1).

[25] 16 U.S.C. § 1539(a)(2).

[26] Nat'l Marine Fisheries Serv., *Threatened and Endangered Species List Louisiana,* https://www.fisheries.noaa.gov/southeast/consultations/threatened-and-endangered-species-list-louisiana (last visited Jan. 10, 2024).

[27] *Id.*

[28] 42 U.S.C. § 4332(2)(C).

[29] 33 C.F.R. § 230.7(a) ("[m]ost permits will normally require only an [environmental assessment]").

[30] 40 C.F.R. § 6.206.

[31] FINAL GUIDANCE FOR FEDERAL DEPARTMENTS AND AGENCIES ON THE APPROPRIATE USE OF MITIGATION AND MONITORING AND CLARIFYING THE APPROPRIATE USE OF MITIGATED FINDINGS OF NO SIGNIFICANT IMPACT, 76 Fed. Reg. 3843-01 (Jan. 11, 2011).

[32] 42 U.S.C. § 4336(a)(2).

[33] 42 U.S.C. § 4336c.

[34] The Fifth Circuit has typically not imposed this sort of review when the Army Corps issues permits Atchafalaya Basinkeeper v. Army Corps, 894 F.3d 692 (5th Cir. 2018). However, if the Army Corps issues permits for part of a project that impact a larger area of wetlands, the court might require a more demanding analysis of cumulative impacts. See O'Reilly v. All State Financial Co., 2023 WL 6635070 (5th Cir. 2023).

[35] Kleppe v. Sierra Club, 427 U.S. 390, 410 (1976); "cumulative effects "result from the incremental effects of the action when added to the effects of other past, present, and reasonably foreseeable actions" 40 C.F.R. § 1508.1(g)(3).

[36] 36 C.F.R. § 800.16(y).

[37] 54 U.S.C. § 306108 (internal punctuation omitted).

[38] 36 C.F.R § 800.16(l)(1) (archaeological resource is defined as "any material remains of human life or activities that are at least 50 years of age and that are of archaeological interest").

[39] 36 C.F.R. §§ 800.3-800.800.6.

[40] 54 U.S.C. § 300101(4).

[41] La. Office Cultural Dev., *Division of Historic Preservation Section 106 Review,* https://www.crt.state.la.us/cultural-development/historic-preservation/section-106-review/index (last visited Mar. 6, 2024).

[42] LA. REV. STAT. § 41:1604(6).

[43] Bureau Ocean Energy Mgmt., *Gulf of Mexico Archaeological Information,* https://www.boem.gov/regions/gulf-mexico-ocs-region/office-environment/gulf-mexico-archaeological-information (last visited Feb. 27, 2024).

[44] *Id.*

[45] 16 U.S.C. §§ 703-711; U.S. Fish & Wildlife Serv., *Migratory Bird Treaty Act of 1918,* https://www.fws.gov/law/migratory-bird-treaty-act-1918.

[46] 16 U.S.C. § 703(a).

[47] 50 C.F.R. § 21.10.

[48] The Biden Administration proposed a rule reinstating incidental take regulations after being withdrawn under President Trump, but nothing has yet been promulgated. Bobby Magill, *Migratory Bird Rule Likely Shelved Until After November Elections,* BLOOMBERG L. (Jan. 23, 2024), https://news.bloomberglaw.com/environment-and-energy/migratory-bird-rule-likely-shelved-until-after-november-election.

[49] Exec. Order. No. 13186, 77 Fed. Reg. 60381 (2001).

[50] *See id.*

[51] Nat'l Marine Fisheries Serv., *Marine Mammal Protection Act Policies, Guidance, and Regulations,* https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-protection-act-policies-guidance-and-regulations (last visited Apr. 15, 2024).

[52] 16 U.S.C. §§ 1371, 1374-75.

[53] 16 U.S.C. §§ 1361(13).

[54] 16 U.S.C. § 1362(18).

[55] Nat'l Marine Fisheries Serv., *Laws & Policies: Marine Mammal Protection Act,* https://www.fisheries.noaa.gov/topic/laws-policies/marine-mammal-protection-act; Specific regulations have been promulgated for federal offshore wind facilities at 50 C.F.R. §§ 217.260, 217.270.

[56] 50 C.F.R. §§ 18.27(b), 216.102.

[57] 50 C.F.R. § 18.124 (describing Level B harassment); *see also* Nat'l Marine Fisheries Serv., *Incidental Take Authorizations Under the Marine Mammal Protection Act,* https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act (last visited Mar. 6, 2024).

[58] 50 C.F.R. § 216.106.

[59] 50 C.F.R. § 216.3.

[60] *Id*.

[61] *See* Nat'l Marine Fisheries Serv., *Incidental Take Authorizations for Other Energy Activities (Renewable/LNG)*, https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-other-energy-activities-renewable (last visited Apr. 15, 2024).

[62] 50 C.F.R. §§ 223.101, 224.101.

[63] 16 U.S.C. § 1801.

[64] 16 U.S.C. § 1855(b)(2).

[65] 50 C.F.R. § 600.920(e)(1). The Assessment must contain "(i) [a] description of the action[,] (ii) [a]n analysis of the potential adverse effects of the action on EFH and the managed species[,] (iii) [t]he Federal agency's conclusions regarding the effects of the action on EFH[, and] (iv) [p]roposed mitigation, if applicable." 50 C.F.R. § 600.920(e)(3).

[66] 50 C.F.R. § 660.920(f).

[67] 50 C.F.R. § 600.925(c).

[68] Nat'l Marine Fisheries Serv., *Partners: Regional Fishery Management Councils,* https://www.fisheries.noaa.gov/topic/partners (last visited Feb. 27, 2024). In addition, NMFS works with councils to provide recommendations on actions with potential adverse impacts. 50 C.F.R. § 600.905(c).

[69] *See* Nat'l Marine Fisheries Serv., *Essential Fish Habitat – Data Inventory,* https://www.habitat.noaa.gov/protection/efh/newInv/index.html (last visited Apr. 15, 2024).

[70] Nat'l Marine Fisheries Serv., *Essential Fish Habitat Mapper,* https://www.habitat.noaa.gov/apps/efhmapper/?page=page_1 (accessed Feb. 22, 2024).

[71] Nicole T. Carter, CONG. RESEARCH SERV., 97-233, THE ARMY CORPS OF ENGINEERS' NATIONWIDE PERMIT PROGRAM: ISSUES AND REGULATORY DEVELOPMENTS, 6 (2017).

[72] U.S. ARMY CORPS OF ENG'RS 2021 NATIONWIDE PERMITS, (Jan. 13, 2021), https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll7/id/20099.

[73] 33 C.F.R. § 330.1.

[74] Carter, *supra* note 71, at 1-2.

[75] *Id.* at 4.

[76] U.S. ARMY CORPS OF ENG'RS 2021 NATIONWIDE PERMITS, *supra* note 72, at 49.

[77] *Id*. at 47-70.

[78] *Id*.

[79] 16 U.S.C. §§ 3951-3957.

[80] 16 U.S.C. § 3953(b).

[81] 16 U.S.C. § 3952(d)(1).

[82] COASTAL WETLANDS CONSERVATION AND RESTORATION PLAN FISCAL YEAR 1999-00, (Mar. 29, 1999), *available at* https://www.lacoast.gov/reports/cwcrp/Conservation%20and%20Restoration%20Plan%201999.pdf. This was the last report submitted to Congress pursuant to CWPPRA, but there have been subsequent coastal conservation plans. Such as the Coastal Protection and Restoration

Authority's Master Plans. While the issue has not been directly addressed, these might also be considered for consistency purposes. *See* La. Coastal Prot. & Restoration Authority, *2023 Coastal Master Plan,* https://coastal.la.gov/our-plan/2023-coastal-master-plan/.

[83] U.S. Env't Prot. Agency, *Overview of the National Estuary Program,* https://www.epa.gov/nep/overview-national-estuary-program (last visited Apr. 15, 2024).

[84] *Id*.

[85] Barataria-Terrebonne Nat'l Estuary Program, *What is BTNEP?* https://btnep.org/about-btnep/what-is-btnep/.

[86] *Id*.

[87] 16 U.S.C. §§1451-1464.

[88] 16 U.S.C. § 1452.

[89] 16 U.S.C. § 1456(c).

[90] 16 U.S.C. § 1455.

[91] 16 U.S.C. § 1456d.

[92] Press Release, La. Coastal Prot. & Restoration Auth., *NOAA Accepts Gov. Edwards' Nomination of Atchafalaya River System into the National Estuarine Research Reserve System,* (June 14, 2023), https://coastal.la.gov/news/noaa-accepts-gov-edwards-nomination-of-atchafalaya-river-system-into-the-national-estuarine-research-reserve-system/#:~:text=The%20Atchafalaya%20Basin%20is%20considered,education%2C%20and%20community%20outreach%20initiatives.

[93] *See* ARMY CORPS 2021 NATIONWIDE PERMITS, *supra* note 72 at 53.

[94] *See generally* 30 C.F.R. §§ 550-586.

[95] 43 U.S.C. § 1348; 30 C.F.R. § 285.102.

[96] 30 C.F.R. §§ 285.900-913.

[97] 30 C.F.R. § 285.907.

[98] 30 C.F.R. § 285.902.

[99] LA. REV. STAT. § 41:1732(C); LA. ADMIN. CODE tit. 43, pt. 5, § 733.

[100] *See* LA. REV. STAT. § 49:214.27.

[101] La. Dep't Energy & Nat. Res., *Coastal Management Programs,* https://www.dnr.louisiana.gov/index.cfm?md=pagebuilder&tmp=home&pid=111 (last visited Jan. 8, 2024).

[102] *See A Coastal User's Guide to the Louisiana Coastal Resources Program,* La. Dep't Energy & Nat. Res., Office of Coastal Mgmt. (Jan. 2015), https://data.dnr.la.gov/LCP/LCPHANDBOOK/FinalUsersGuide.pdf.

[103] LA. ADMIN. CODE tit. 43, pt. 1, § 723(A)(2).

[104] LA. ADMIN. CODE tit. 43, pt. 1, § 723(A)(3).

[105] *Id*.

[106] LA. ADMIN. CODE tit. 43, pt. 1, § 723(E)(1)(b).

[107] La. Dep't Energy & Nat. Res., *Office of Coastal Management – General Permits,* https://www.dnr.louisiana.gov/index.cfm?md=pagebuilder&tmp=home&pid=728 (last visited Jan. 10, 2024).

[108] LA. ADMIN. CODE tit. 43, pt. 1, § 701(G).

[109] *See* LA. ADMIN. CODE tit. 43, pt. 1, § 701(F) for a complete list.

[110] LA. ADMIN. CODE tit. 43, pt. 1, § 705.

[111] LA. ADMIN. CODE tit. 43, pt. 1, § 724.

[112] *A Coastal User's Guide to the Louisiana Coastal Resources Program, supra* note 102, at II-3.

[113] *See* LA. ADMIN. CODE tit. 43, pt. 11, §§ 301-329.

[114] LA. REV. STAT. § 56:2011.

[115] *Id*.

[116] LA. REV. STAT. § 56:2011(B)(1)(b).

[117] LA. ADMIN. CODE tit. 76, pt. 8, § 103.

[118] LA. REV. STAT. § 49:214.31(C).

[119] La. Dep't Env't Quality, *Water Quality Certifications*, https://deq.louisiana.gov/page/quality-certifications (last visited Mar. 7, 2024).

[120] 33 U.S.C. § 1341.

[121] LA. REV. STAT. §§ 56:1; 56:30.

[122] LA. REV. STAT. § 56:2(A).

[123] La. Dep't Wildlife & Fisheries, *Wildlife Management Areas, Refuges, and Conservation Areas*, https://www.wlf.louisiana.gov/page/wmas-refuges-and-conservation-areas (last visited Jan. 10, 2024).

[124] LA. ADMIN. CODE tit. 76, pt. 3, § 301.

[125] *See* LA. ADMIN. CODE tit. 76, pt. 3, § 103.

[126] 16 U.S.C. § 1535(a).

[127] LA. CONST. art. 9, § 1 (1974).

[128] Save Ourselves, Inc. v. Louisiana Env't Control Comm'n, 452 So. 2d 1152, 1157 (La. 1984).

[129] The Environmental Control Commission was created as a body within LDENR but was subsequently transferred to the Louisiana Department of Environmental Quality. LA. REV. STAT. § 30:2013.

[130] *Save Ourselves,* 452 So. 2d at 1157.

[131] *Id*.

[132] Matter of Rubicon, 95-0108 (La. App. 1 Cir. 2/14/96); 670 So. 2d 475.

[133] *Id*. at 483.

[134] *Id*.

[135] LA. REV. STAT. § 30:124(B).

[136] LA. REV. STAT. § 30:209(1).

[137] LA. REV. STAT. § 30:209.

[138] Wind Operating Agreement, Art. 7.3.

[139] *Id*.

[140] Broussard v. Hilcorp Energy Co., 2009-0449 (La. 10/20/09); 24 So. 3d 813, 820; Wind Operating Agreement, Art. 7.1.

[141] Wind Operating Agreement, Art. 9.2.

[142] Wind Operating Agreement, Art. 13.6.

[143] Wind Operating Agreement, Art. 13.1.

[144] Wind Operating Agreement, Art. 13.3.

[145] Wind Operating Agreement, Art. 16.9.

[146] Wind Operating Agreement, Art. 6.9. "State" includes LDENR, all its offices, and its employees or other representatives.

[147] Wind Operating Agreement, Art. 7.1.

[148] *Id*.

[149] Wind Operating Agreement, Art. 8.1.

[150] LA. ADMIN. CODE tit. 37, pt. 13, § 9011.

[151] LA. ADMIN. CODE tit. 37, pt. 13, § 9003.

[152] LA. ADMIN. CODE tit. 37, pt. 13, § 9017.

[153] LA. ADMIN. CODE tit. 43, pt. 1, § 723(A)(3).

[154] Wind Operating Agreement, Art. 9.2.

[155] LA. ADMIN. CODE tit. 43, pt. 5, § 733(A).

[156] LA. ADMIN. CODE tit. 43, pt. 5, § 729(A)(2); Wind Operating Agreement, Art. 8.1.

[157] Wind Operating Agreement, Art. 15.1.

Block Island Wind Farm Sunrise. Photo: Deepwater Wind

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