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Legal Framework – Offshore Renewable Energy Development Process

Impacts on Shipping and Commercial, Tribal, and Recreational Fisheries from Development of Renewable Energy on the West Coast – Committee Meeting #5

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Offshore Renewable Energy (ORE)

- Offshore Wind/Floating Wind Turbines
- Floating Tidal Energy Converters
- Floating Wave Energy Converters
- Floating Solar Energy Converters
- Hydrokinetic
- Floating Ocean Thermal Energy Converters

Potentially Relevant Agencies

- Bureau of Safety and Environmental Enforcement (BSEE)
- Bureau of Ocean Energy Management (BOEM)
- Federal Energy Regulatory Commission (FERC)
- U.S. Coast Guard (USCG)
- U.S. Army Corps of Engineers (ACOE)
- U.S. Department of Defense (DOD)
- U.S. Fish and Wildlife Service (FWS)
- National Oceanic and Atmospheric Administration (NOAA)
- State agencies (WA, OR, CA, etc.)

ORE Considerations

- Archaeological/cultural sites
- Fisheries
- Historic properties
- Migratory species
- Native American interests
- Navigation/maritime commerce
- Protected species (e.g., marine mammals, birds, sea turtles, bats)
- Sensitive offshore habitats
- Recreation and tourism
- National Security
- Power Grid

ORE Legal Framework

Sources of Authority

- Treaty
- Statute
- Tribal law
- Regulation
- Executive Order
- Foreign law
- Agency legal opinion
- MOU/MOA
- Policy Guidance

Department of the Interior

Minerals Management Service

**30 CFR Parts 250, 285, and 290
Renewable Energy and Alternate Uses of
Existing Facilities on the Outer
Continental Shelf; Final Rule**

States

Coastal Zone Management

- States play an important regulatory role with offshore renewable energy (ORE) (16 U.S.C. §§ 1451-1456)
- Protection of habitats and resources in coastal waters
- ORE project in state waters (including transmission cables) subject to applicable state regulation or permitting requirements
- Federal Coastal Zone Management Act
 - 1. State establishment of criteria and standards for local implementation, subject to administrative review and enforcement
 - 2. direct State land and water use planning and regulation
 - 3. regulation development and implementation by local agencies, with state-level review of program decisions
- States may participate in federal efforts to permit projects in federal waters to ensure that such projects are consistent with state coastal zone management regulation

Credit: CRS R40175, Offshore Wind Energy Development: Legal Framework (Feb. 28, 2023)

Submerged Lands Act of 1953

- Assured coastal states control over the lands beneath coastal water in an area stretching 3 NM from shore
 - Texas and Gulf Coast Florida = 9 NM
- States may regulate the coastal waters within their jurisdiction, subject to federal regulation for “commerce, navigation, national defense, and international affairs” + power of federal government to preempt state law
- Remaining outer portion of waters over which the US exercises jurisdiction are federal waters
 - 43 U.S.C. §§ 1301-1303, 1311-1315

Credit: CRS R40175, Offshore Wind Energy Development: Legal Framework (Feb. 28, 2023)



Federal

Outer Continental Shelf Lands Act (OCSLA)

- 43 U.S.C. §§ 1331-1356a
- Extends U.S. jurisdiction to the outer Continental Shelf (OCS), including installations and other devices **attached** to the seabed **for the purpose of** exploring for, developing, or producing resources, including non-mineral energy resources.
- Jurisdiction of OCSLA comprises the ocean floor but not the waters above it
- Key consideration is whether installation or device is affixed to the seabed
- 2021 National Defense Authorization Act (Garamendi Amendment) amended the OCSLA to include developing, or producing resources, including non-mineral energy resources on the OCS
 - Prior wording only referred to oil and gas and other minerals

Energy Policy Act of 2005 (EPAcT)

- Important step in defining legal and regulatory framework to manage issuance of permits for offshore development in territorial sea and OCS
- Section 388 amended OCSLA to establish legal authority for federal review and approval of various offshore energy-related projects
- Authorized Secretary of the Interior (in consultation with fed agencies) to:
 - Grant leases, easements, or rights-of-way on the OCS for certain activities not authorized by other relevant statutes
- Authorized considerable regulation of impacts associated with offshore development

National Environmental Policy Act (NEPA)

- Requires federal agencies to analyze and disclose the environmental consequences of their actions
- Preparation of environmental impact statement (EIS)
- DOI Programmatic Environmental Impact Statement for Alternative Energy Development and Production and Alternative Use of Facilities on Outer Continental Shelf
 - Established a baseline analysis that assists in meeting NEPA requirements for ORE leasing (including offshore wind)
 - <https://www.boem.gov/renewable-energy/guide-ocs-alternative-energy-final-programmatic-environmental-impact-statement-eis>

Rivers and Harbors Act

- Army Corps of Engineers has jurisdiction to permit obstructions to navigation within the navigable waters of the US on the US
 - 33 U.S.C. § 403
- Offshore development may require a permit pursuant to the RHA

Endangered Species Act (ESA)

- 16 U.S.C. §§1531-1544
- Prohibits any person from “taking” an endangered species (or threatened species)
- Take = “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct”
- ESA Section 7 – federal agencies must ensure that their actions do not jeopardize listed species or adversely modify or destroy critical habitat
- Consultation with US Fish and Wildlife Service (FWS) or National Marine Fisheries Service

Marine Mammal Protection Act (MMPA)

- 16 U.S.C. §§ 1361-1407
- Prohibits (with exceptions) taking marine mammals in U.S. waters and by persons and vessels subject to U.S. jurisdiction on the high seas
 - NOTE: applies to “vessels”
- Jointly administered by Secretary of Commerce (NOAA/NMFS) and Secretary of Interior (FWS)

Migratory Bird Treaty Act (MBTA)

- 16 U.S.C. § 703-712
- Domestic law that implements U.S. obligations under separate treaties with Canada, Japan, Mexico ,and Russia for the protection of migratory birds
- Generally prohibits taking, killing, possession, or transportation of, and trafficking in, migratory birds, their eggs, parts, and nests unless authorized by a permit
 - E.g., wind energy turbine blades
- FWS permitting requirements (50 CFR Part 21)

Magnuson-Stevens Fishery Conservation Management Act (MSFCMA)

- 16 U.S.C. §§ 1801–1883
- Establishes a national program for the conservation and management of the fishery resources of the U.S. to prevent overfishing, to rebuild over-fished stocks, and to facilitate long-term protection of essential fish habitats.
- Establish administrative provisions, catch limitations, closed areas, gear restrictions, and other requirements for particular species

Coast Guard

- 43 U.S.C. § 1333(d)
 - Marking of artificial islands, installations, and other devices
- Chapter 700, 46 U.S. Code, Ports and Waterways Safety
- Title 30, CFR Part 585 – Regulations for Renewable Energy on the OCS
- Title 30, CFR Part 285 – Renewable Energy and Alternate Uses of Existing Facilities on the OCS
- 33 CFR 140.101
 - Fixed OCS Facilities inspections
- USCG Navigation Center Work Instruction 2022-01
- Marine Planning to Operate and Maintain the Marine Transportation System and Implement National Policy, COMDTINST 16003.2
- Multiple Use Waterway Management Planning Guide, COMDTINST 5223.1
- Navigation Safety Risk Assessments Tactics, Techniques, and Procedures, CGTTP 3-71.4

Executive Orders and Regulations

- EO 13007: Indian Sacred Sites
- EO 13175: Consultation with Indian Tribal Governments
- 30 CFR Parts 250, 285, and 290 Renewable Energy and Alternate Uses of Existing Facilities on the Outer Continental Shelf; Final Rule



⌵ PRESIDENTIAL ACTIONS

Temporary Withdrawal of All Areas on the Outer Continental Shelf from Offshore Wind Leasing and Review of the Federal Government's Leasing and Permitting Practices for Wind Projects

The White House

January 20, 2025

Guidance Documents and Memorandum of Agreement/Understanding

- MOA Between BOEMRE and USCG, OCS-06 (July 27, 2011)
- MOU Between BOEMRE and USCG (Sept. 30, 2004)
- MOU Between the BSEE-DOI, and USCG-DHS (Nov. 27, 2012)
- MOA Between BSEE and USCG regarding Floating OCS Facilities (Jan. 28, 2016)
- MOU Between FERC and DOI outlining their respective jurisdictions (April 9, 2009)
- MOU Between FERC and USCG regarding Hydrokinetic Projects (Mar. 6, 2013)
- MOU Between FERC and ACOE facilitating the development of hydro projects (July 21, 2016)
- MOA Between ACOE and USCG (June 2, 2020)
- BOEM / FERC Guidelines on Regulation of Marine and Hydrokinetic Energy Projects on the OCS
- BOEM Guidelines for Activities Requiring Authorization for Renewable Energy Development on the Outer Continental Shelf Pursuant to 30 CFR Part 585

Approaching Jurisdictional Analysis

Overview

- Jurisdiction is a government's power to exercise legal authority involving:
- Substantive law
- Regulated activity
 - vessel/device/installation + registration
- Location

Substantive Law

- Substantive domestic, foreign, or international law
- Applied to the respective activity or operation
- Prohibits certain action or requires affirmative conduct

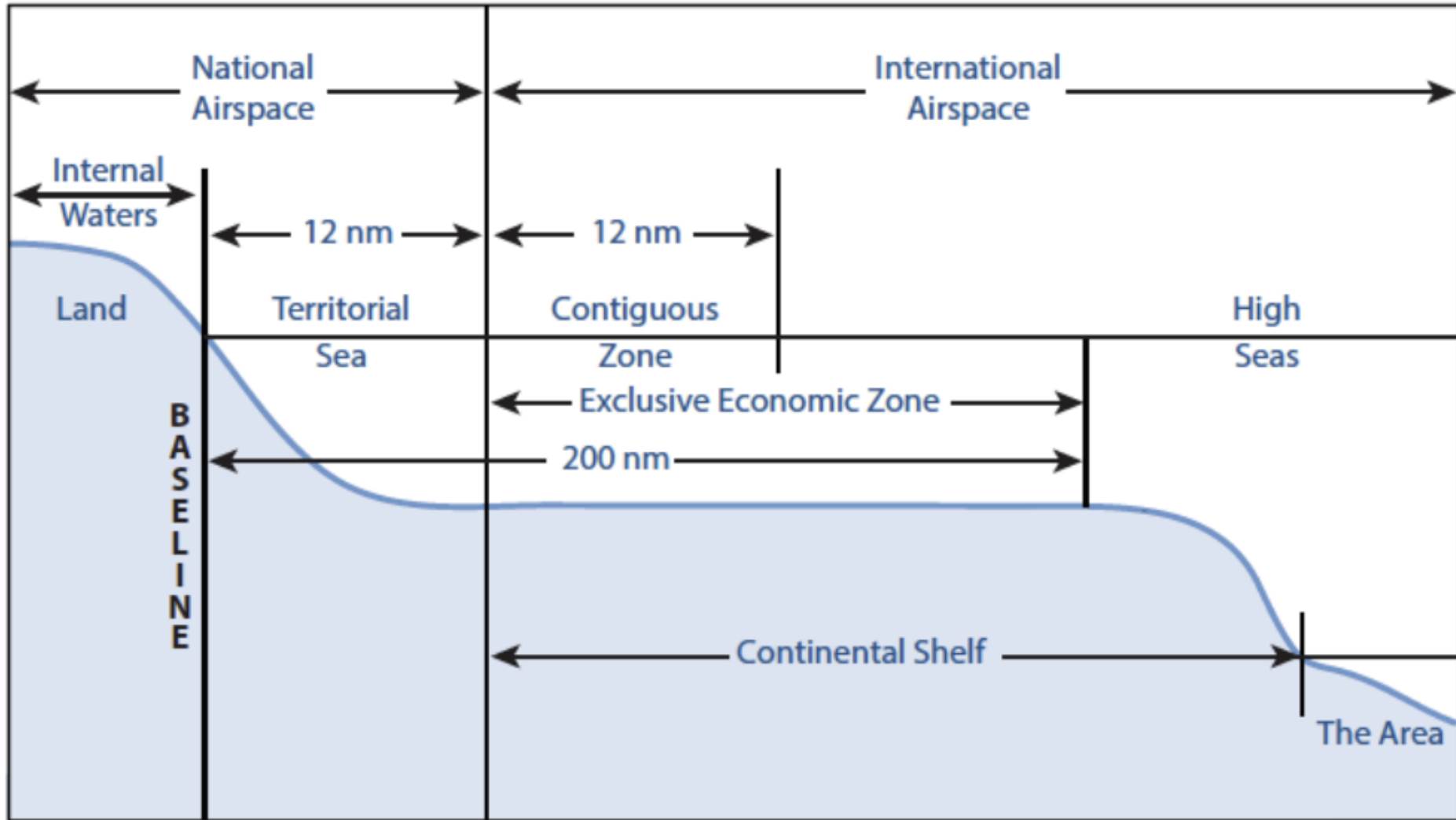
Regulated Activity

- Device
- Installation
- Vessel
- Registration/Flag
- Commercial? Research? Public/defense?

Location

- The extent of U.S. jurisdiction is defined by the nature of the waters in which it applies
- 1. Internal Waters - waters landward of baseline
- 2. Territorial Sea – 0-3 NM or 0-12 NM
 - Per UNCLOS and Presidential Proclamation
- 3. Contiguous Zone – 12-24 NM
 - Customs, Fiscal, Immigration, Sanitation
- 4. Exclusive Economic Zone – 200 NM
- 5. Continental Shelf – 200 NM
- 6. High Seas & Deep Ocean Floor - beyond 12 NM or 200 NM

Maritime Zones Schematic



nm – nautical mile

Credit: Tufts

Questions?

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