



LOUISIANA OFFSHORE WIND ENERGY FRAMEWORK

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ELI's Ocean Program is helping to support ocean and coastal planning efforts around the world that are based on local priorities, transparent and inclusive processes, and best available information. This report incorporates portions of and builds on ELI's previous work analyzing offshore renewable energy frameworks in the states of Delaware (2011), Maryland (2009), and Virginia (2008). ELI has also worked with the five Mid-Atlantic states (New York, New Jersey, Maryland, Delaware, and Virginia) on a regional guide to offshore wind energy management. All of these reports are available at: <https://www.eli.org/ocean-planning/mid-atlantic>.

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Glossary of Acronyms

AES(L)—Alternative Energy Source (Lease)
APA—Administrative Procedure Act
BOEM—Bureau of Ocean Energy Management (within U.S. Department of Interior)
BSEE—Bureau of Safety and Environmental Enforcement (within U.S. Department of Interior)
CC—Consistency Certification
CD—Consistency Determination
CELCP—Coastal and Estuarine Land Conservation Program
CMP—Coastal Management Program
COP—Construction and Operations Plan
CPRA—Coastal Protection and Restoration Authority of Louisiana
CUP—Coastal Use Permit
CWPPRA—Coastal Wetlands Planning Protection and Restoration Act
CZMA—Coastal Zone Management Act
DOTD—Louisiana Department of Transportation and Development
EA—Environmental Assessment
EGA—Exclusive Geophysical Agreement
EIS—Environmental Impact Statement
ELI—Environmental Law Institute
EP—Enforceable Policy
FERC—Federal Energy Regulatory Commission
GAP—General Area Plan
GLD—Geographic Location Description
GP—General Permit
IOU—Investor-Owned Utility
IRP—Integrated Resource Planning
LCMP—Louisiana Coastal Management Program
LDEQ—Louisiana Department of Environmental Quality
LDNR—Louisiana Department of Natural Resources
LDNR-OCM—LDNR's Office of Coastal Management
LDWF—Louisiana Department of Wildlife and Fisheries
LPSC—Louisiana Public Service Commission
NEPA—National Environmental Policy Act
NERR—National Estuarine Research Reserve
NOAA—National Oceanic and Atmospheric Administration (within U.S. Department of Commerce)
NOAA-OCM—NOAA's Office of Coastal Management
OCS—Outer Continental Shelf
OCSLA—Outer Continental Shelf Lands Act
OMR—LDNR's Office of Mineral Resources
OSP—Office of State Parks of Louisiana
OSW—Offshore Wind
OTA—Offshore Terminal Authority of Louisiana
RCPS—New Orleans Renewable and Clean Portfolio Standard
REP—Renewable Energy Pilot
ROW—Right of Way

RPS—Renewable Portfolio Standard

RUE—Right of Use And Easement

SAP—Site Assessment Plan

SCD—State Consistency Determination

SLCRMA—State and Local Coastal Resources Management Act

SLO—State Land Office (within Louisiana Department of Administration)

SMEB—State Mineral and Energy Board of Louisiana

SPA—State Preservation Area

TF—Transmission Facility

WFC—Louisiana Wildlife and Fisheries Commission

WMA—Wildlife Management Area

Introduction

Even with Louisiana's long history of facilitating offshore oil and gas production in the Gulf of Mexico, anticipated offshore wind (OSW) activities in state and federal waters will present new challenges for the state planning and regulatory framework. Offshore wind facilities will require substantial engagement by state agencies and commissions in order to protect state resources and guide development where appropriate. As the federal Bureau of Ocean Energy Management (BOEM) continues to lay the groundwork for offering wind leases on the Gulf of Mexico outer continental shelf (OCS), Louisiana's legislature, agencies, and stakeholders are evaluating the state's ability to manage, plan for, and oversee permitting, environmental review, and integration of offshore energy projects with Louisiana's goals for energy and the coastal environment.

General Overview of State and Federal Jurisdiction

The State of Louisiana has direct regulatory and management jurisdiction over activities occurring in its own state waters and on its lands and submerged lands. Thus, lands under the Gulf of Mexico within three nautical miles of the Louisiana coastline are directly under state jurisdiction and authority.¹ A "baseline" coastline location from which Louisiana's three gulfward miles are measured was established in 1975 by a decree of the U.S. Supreme Court (see Figure 1 on page 2). In 2011, the Louisiana legislature passed a state law purporting to reaffirm the baseline in the face of coastal land loss: "Under no circumstances shall the coastline of Louisiana be nearer inland than the baseline established by [the 1975 coordinates]."²

While some federal permitting requirements will also apply to specific activities on Louisiana's lands and waters, the federal government has exclusive jurisdiction over the Gulf of Mexico outer continental shelf (OCS) beyond the three-nautical-mile limit. Louisiana's ability to affect actions on the federal OCS will depend in substantial part on its participation in federal processes including environmental impact review under the National Environmental Policy Act (NEPA) and federal consistency review provisions of the Coastal Zone Management Act (CZMA) that enable the state to review federal actions outside the state's coastal zone that have effects on land or water uses or natural resources within the coastal zone.³

Louisiana also retains jurisdiction over the portions of OCS energy projects and their support facilities that are within state waters or lands. Thus, for example, although BOEM may issue a wind energy lease on the OCS following environmental impact analysis and federal consistency review, state-level permits and approvals may still be needed for shore-based facilities or for transmission lines traversing state submerged lands.⁴

Louisiana's energy policies affecting electric transmission and distribution within the state will also play a role in the types and likelihood of offshore electric generation facilities, and the siting of electric transmission lines within the state. Federal authority applies to energy distribution where interstate electrical transmission is involved.

¹ Despite Louisiana's continuing assertion in a state statute (La. R.S. § 49:1) that its gulfward boundary is three marine leagues (approximately nine nautical miles) from the coast, the U.S. Supreme Court decided in 1960 that, like most other coastal states, Louisiana has a three-mile territorial sea. See U.S. v. State of Louisiana et al., 80 S.Ct. 961 (1960).

² United States v. Louisiana, 422 U.S. 13 (1975); La. R.S. § 49:1. Louisiana's position that the 1975 line is permanent, notwithstanding coastal land loss, conforms with a statement in federal statute that "any boundary between a State and the United States ... which has been or is hereafter fixed by coordinates under a final decree of the United States Supreme Court shall remain immobilized at the coordinates provided under such decree and shall not be ambulatory." 43 U.S.C. § 1301.

³ See 42 U.S.C. § 4321 et seq. (NEPA); 16 U.S.C. § 1456(c) (CZMA).

⁴ R. Salcido, "Offshore Federalism and Ocean Industrialization," 82 TUL. L. REV. 1355 (2008) provides a useful discussion of the interplay between federal and state jurisdiction and considers alternative models of potential collaborative organization.

Figure 1: Red Dots Depicting the Baseline Boundary Established in 1975 (Credit: LDEQ)



Purpose and Scope of Report

This report is intended to support participation by Louisiana stakeholders in offshore wind energy decision-making by providing an overview of the most relevant *state* laws, regulations, and intergovernmental authorities affecting wind energy development offshore of Louisiana.

This report does not attempt to discuss all state policies that might apply directly or indirectly to OSW development off Louisiana’s coast, but rather focuses on those most directly relevant to decisions about whether such facilities will or will not be permitted, and with what review and conditions. It reviews several key areas of state authority that, taken together, will help determine the state’s ability to influence decisions about OSW development off its coast, including:

- Coastal management policies, including the Coastal Use Permit program and federal consistency review under the CZMA;
- Policies governing public lands and water bottoms, including leases of state land for production of wind energy; water bottom permits and leases; rights-of-way; and other programs and policies that may affect siting within state lands and waters;
- Policies related to privately owned coastal lands;
- Water pollution control policies, including state certification of federal license and permit activities;
- Fish and wildlife protection policies that may restrict or be otherwise relevant to OSW development; and
- State energy policies and programs, including an overview of the Louisiana Public Service Commission’s regulatory jurisdiction over the generation and transmission of electricity.

As noted above, there are many federal regulatory policies that will or may apply outside and inside state boundaries. A comprehensive discussion of these federal laws is outside the scope of this report, but prior publications by ELI related to offshore renewable energy in other states may be helpful in identifying the general federal framework.⁵ Local laws and regulations, both parish and municipal, will also be relevant to land use decisions, particularly facility

⁵ To access these reports, visit ELI, Mid-Atlantic Planning, <https://www.eli.org/ocean-planning/mid-atlantic> (linking to reports on Delaware, Maryland, and Virginia that include discussion of federal laws and policies).

siting decisions at the parcel level. While a detailed discussion of local policies is beyond the scope of this report, the interplay between local control over land use and state authority over energy development is likely to be relevant to OSW decision-making and should be a priority for future research.

State Coastal Management

Louisiana’s coastal management framework is based primarily on the state’s comprehensive coastal planning law: the State and Local Coastal Resources Management Act (SLCRMA). Enacted in 1978 in response to the federal Coastal Zone Management Act (CZMA), the SLCRMA authorizes development and implementation of a coastal program that meets criteria for approval by the National Oceanic and Atmospheric Administration’s Office of Coastal Management (NOAA-OCM) as a state coastal management program (CMP).

The SLCRMA delineates the state’s coastal zone boundary; sets out a comprehensive set of coastal zone management policies to guide land and water use in the coastal zone, including coastal use guidelines; and establishes a governance structure to implement the policies, including the coastal use permit (CUP) program and intergovernmental coordination procedures. The SLCRMA authorizes, but does not require, local governments in the coastal zone to develop their own local coastal management programs, consistent with the statewide coastal use guidelines.

Core Elements of the Louisiana Coastal Program

Coastal Zone Boundary. For purposes of the coastal management program, Louisiana’s coastal zone (also referred to as “coastal area”) was first delineated in the 1980 Louisiana Coastal Management Program (LCMP) Program Document as follows:

“The coastal zone is bounded on the east and west by the respective Mississippi and Texas borders, on the south by Louisiana’s three-mile seaward boundary, and on the north, generally, by the Intracoastal Waterway running from the Texas-Louisiana state line then following highways through Vermilion, (Iberia, and St. Mary Parishes, then dipping southward following the natural ridges below Houma, then turning northward to take in their entirety the parishes of St. Charles, Plaquemines, St. Bernard, Orleans, Jefferson, St. John the Baptist and St. James, a portion of the parishes on the northern shore of Lake Pontchartrain and ending at the Mississippi-Louisiana border.”⁶

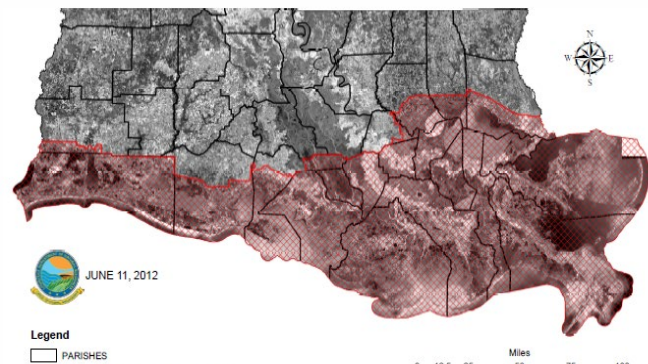


Figure 2: Boundary of the Coastal Zone (credit: LDNR)

In 2022, the seaward boundary in the Gulf of Mexico is still the three-mile state jurisdictional limit, and the eastern and western boundaries are the respective Mississippi and Texas borders. The inland boundary, however, has undergone realignment since the program was first established. In 2009, the state legislature requested that the Coastal Protection and Restoration Authority (CPRA) conduct a science-based study of the adequacy of the inland boundary

⁶ NOAA Office of Coastal Management (NOAA-OCM) and Louisiana Department of Natural Resources (LDNR), *Louisiana Coastal Resources Program Final Environmental Impact Statement* at 1 (1980) (hereinafter “LCMP Program Document”), available at: [https://data.dnr.la.gov/ABP-GIS/ABPstatusreport/OCM FEIS Final Environmental Impact Statement 00-00-1980.pdf](https://data.dnr.la.gov/ABP-GIS/ABPstatusreport/OCM%20FEIS%20Final%20Environmental%20Impact%20Statement%2000-00-1980.pdf).

of the coastal zone to meet the state's current and future needs to manage, protect, and restore its coastal resources.⁷ In 2012, the boundary was officially modified by the legislature through Act 588.

The inland boundary change, which was subsequently approved by NOAA-OCM for CZMA purposes (see below for discussion of federal consistency review), added 2,000 square miles to the coastal zone.⁸ The current coastal zone includes 12 entire parishes and portions of 8 additional parishes. A majority, but not all, of these parishes have adopted local coastal programs that influence coastal use decisions that do not rise to the level of state or national concern (see below for discussion of Coastal Use Permits).⁹

Coastal Use Guidelines. At the center of Louisiana's coastal management framework are the coastal use guidelines ("Guidelines"). The Guidelines are used by LDNR and approved local coastal programs in administering the coastal use permitting program and are the keystone "enforceable policies" of the Louisiana coastal management program, which are applied in federal consistency reviews conducted by LDNR pursuant to the CZMA.

The Guidelines are a product of the SLCRMA of 1978, which directed LDNR to develop, in conjunction with the Department of Wildlife and Fisheries (LDWF), a set of guidelines to serve as criteria for the granting, conditioning, denying, revoking, or modifying of coastal use permits.¹⁰ The statute mandates that the guidelines advance a number of overarching policy goals, which include (but are not limited to):

"(1) To encourage full use of coastal resources¹¹ while recognizing it is in the public interest of the people of Louisiana to establish a *proper balance between development and conservation*....

(3) Require careful consideration of the *impacts of uses on water flow, circulation, quantity, and quality* and require that the discharge or release of any pollutant or toxic material into the water or

⁷ See La. Senate Concurrent Resolution No. 60 of the 2009 Regular Session; see generally LDNR, Coastal Zone Boundary, <http://www.dnr.louisiana.gov/index.cfm?md=pagebuilder&tmp=home&pid=928> (accessed Sept. 2022).

⁸ See Joelle Gore, NOAA-OCM, Letter to Mr. Stephen Chustz, LDNR (Aug. 21, 2012), available at: http://www.dnr.louisiana.gov/assets/OCM/CoastalZoneBoundary/CZB2012/NOAAApprovalCoastalZoneBoundary_2012.pdf.

⁹ The parishes that fall entirely within the coastal zone boundary are: Plaquemines (local program approved in 2000), St. Bernard (local program approved in 1987), Orleans (local program approved in 1987), Jefferson (local program approved as amended in 1987), St. Charles (local program approved in 2017), St. John the Baptist (local program approved in 2018), St. James (local program approved in 1987), Lafourche (local program approved in 1985), Terrebonne (local program approved in 2000), Assumption, St. Mary, and Cameron (local program approved in 1987). The parishes falling partially within the coastal zone boundary are: St. Tammany (local program approved in 1992), Tangipahoa, Livingston, Ascension, St. Martin, Iberia, Vermilion, and Calcasieu (local program approved in 1986). Information on local coastal programs can be found at LDNR, Local Coastal Management Programs, <http://www.dnr.louisiana.gov/index.cfm?md=pagebuilder&tmp=home&pid=111&pnid=192&nid=194> (accessed Sept. 2022).

¹⁰ La. R.S. § 49:214.27.

¹¹ Coastal resources are defined as "wetlands, beaches, dunes, salt domes, reefs, cheniers, and other rare or ecologically sensitive areas as determined by the secretary [of Natural Resources]." 43 La. Admin. Code, Part I § 700.

air of the coastal zone be within all applicable limits established by law, or by federal, state, or local regulatory authority.

(4) Recognize the *value of special features of the coastal zone* such as barrier islands, fishery nursery grounds, recreation areas, ports and other areas where developments and facilities are dependent upon the utilization of or access to coastal waters, and areas particularly suited for industrial, commercial, or residential development and manage those areas so as to enhance their value to the people of Louisiana.

(5) *Minimize, whenever feasible and practical*¹², detrimental impacts on natural areas and wildlife habitat and fisheries by such means as encouraging minimum change of natural systems and by multiple use of existing canals, directional drilling, and other practical techniques.

(6) Provide for *adequate corridors within the coastal zone for transportation, industrialization, or urbanization* and encouraging the location of such corridors in already developed or disturbed areas when feasible or practicable....

(9) *Minimize detrimental effects of foreseeable cumulative impacts* on coastal resources from proposed or authorized uses....

(12) Establish procedures and criteria to ensure that appropriate consideration is given to uses of *regional, state, or national importance, energy facility siting and the national interests in coastal resources.*¹³

Under the SLCRMA, the Guidelines may be modified from time to time: both LDNR and LDWF are authorized to request joint consideration of modifications “as a result of experience in issuing coastal use permits and results of research and planning activities.”¹⁴ The SLCRMA requires public notice and comment before final Guidelines are adopted and generally authorizes “[a]ll governmental bodies” to participate in development of the guidelines “to ensure that their interests are fully considered.”¹⁵

The current versions of the Guidelines are codified as regulations at Title 43, Part 1 of the Louisiana Administrative Code. They comprise a set of overarching *Guidelines Applicable to All Uses* (43 La. Admin. Code, Part 1 § 701) and eight sets of specific guidelines that are applicable only to certain types of uses. The specific guidelines most likely to be relevant to OSW generation

Box A: General Principles for Interpreting the Coastal Use Guidelines

- Encourage multiple concurrent uses of the coastal area while discouraging unnecessary conflicts between uses.
- Prohibit any interpretation of the guidelines that results in an involuntary acquisition or taking of private property.
- Prohibit any use or activity from being carried out in a way that violates the terms of a grant or donation of lands or waterbottoms to the state (or subdivision).

Source: 43 La. Admin. Code, Part I § 701.

¹² Several of the legislative policy goals are qualified with the term “feasible and practical.” The implementing regulations explain that feasible and practical means “those locations, methods and/or practices which are of established usefulness and efficiency and allow the use or activity to be carried out successfully.” 43 La. Admin. Code, Part I § 700.

¹³ La. R.S § 49:214.27 (emphases and super scripts added).

¹⁴ Id.

¹⁵ Id.

and transmission facilities in the coastal zone include (but are not necessarily limited to): *Guidelines for Linear Facilities* (§ 705), *Guidelines for Surface Alterations* (§ 711), and *Guidelines for Dredged Spoil Deposition* (§ 707).¹⁶ The regulations state clearly that a proposed use may be subject to the requirements of more than one guideline or section of guidelines, all of which must be complied with, and note that where there is inconsistency between the specific and general guidelines, the specific should prevail.¹⁷

Guidelines Applicable to All Uses. Section 701 of the coastal management regulations establishes the *standards applicable to all uses of the coastal area* subject to the Guidelines. It sets out various general principles to guide the permitting authority's application and interpretation of the Guidelines (see Box A), enumerates the specific factors that must be considered to determine compliance with the Guidelines, and identifies the numerous types of adverse impacts that must be avoided "to the maximum extent practicable" in all situations.

Section 701 lists the "general factors" to be utilized by the permitting authority (i.e., LDNR or the approved local program) in evaluating whether a proposed use complies with the Guidelines. These factors are:

- “1. type, nature, and location of use;
2. elevation, soil, and water conditions and flood and storm hazard characteristics of site;
3. techniques and materials used in construction, operation, and maintenance of use;
4. existing drainage patterns and water regimes of surrounding area including flow, circulation, quality, quantity, and salinity; and impacts on them;
5. availability of feasible alternative sites or methods of implementing the use;
6. designation of the area for certain uses as part of a local program;
7. economic need for use and extent of impacts of use on economy of locality;
8. extent of resulting public and private benefits;
9. extent of coastal water dependency of the use;
10. existence of necessary infrastructure to support the use and public costs resulting from use;
11. extent of impacts on existing and traditional uses of the area and on future uses for which the area is suited;
12. proximity to and extent of impacts on important natural features such as beaches, barrier islands, tidal passes, wildlife and aquatic habitats, and forest lands;
13. the extent to which regional, state, and national interests are served including the national interest in resources and the siting of facilities in the coastal zone as identified in the coastal resources program;

¹⁶ For reference, the other sets of specific guidelines in Title 43, Part I of the code are: *Guidelines for Levees* (§ 703), *Guidelines for Shoreline Modification* (§ 709), *Guidelines for Hydrologic and Sediment Transport Modifications* (§ 713), *Guidelines for Disposal of Wastes* (§ 715), *Guidelines for Uses that Result in the Alteration of Waters Draining into Coastal Waters* (§ 717), and *Guidelines for Oil, Gas, and Other Mineral Activities* (§ 719).

¹⁷ 43 La. Admin. Code, Part I § 701.

14. proximity to, and extent of impacts on, special areas, particular areas¹⁸, or other areas of particular concern of the state program or local programs;
15. likelihood of, and extent of impacts of, resulting secondary impacts and cumulative impacts;
16. proximity to and extent of impacts on public lands or works, or historic, recreational, or cultural resources;
17. extent of impacts on navigation, fishing, public access, and recreational opportunities;
18. extent of compatibility with natural and cultural setting;
19. extent of long term benefits or adverse impacts.”¹⁹

After enumerating the factors to be considered in determining compliance with the Guidelines, Section 701 states that **it is the policy of the coastal resources program to avoid “significant” adverse impacts of the following types:**

- “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, wetland, 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 dredging²⁰;
12. reductions or blockage of water flow or natural circulation patterns within or into an estuarine system or a wetland forest;

¹⁸ Particular areas are defined as “areas within the coastal zone of a parish with an approved local program which have unique and valuable characteristics requiring special management procedures. Such areas shall be identified, designated, and managed by the local government following procedures consistent with those for special areas.” 43 La. Admin. Code, Part I § 700.

¹⁹ 43 La. Admin. Code, Part I § 701.

²⁰ The regulations define dredging as “the removal by excavation or any other means of native material, including soil, sand, mud, clay, and semisolid sediment, regardless of whether the material supports or is supporting vegetation, from any lands or water bottoms in the coastal zone of Louisiana.” 43 La. Admin. Code, Part I § 700.

13. discharges of pathogens or toxic substances²¹ 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.”²²

Accordingly, the Guidelines Applicable to All Uses require that “**all uses and activities...be planned, sited, designed, constructed, operated, and maintained to avoid [these impact types] to the maximum extent practicable.**”²³ (See Box B on the following page for a description of the “maximum extent practicable” qualifier.)

Guidelines for Linear Facilities. Transmission cables carrying power generated by Gulf of Mexico wind energy facilities to the interstate grid may come onshore in Louisiana, traversing the state’s coastal zone. Subsea and onshore transmission cables installed in the coastal zone will almost certainly be subject to the Guidelines’ requirements for linear facilities, which are defined in the regulations as “uses and activities which result in creation of *structures or works which are primarily linear in nature*. Examples include pipelines, roads, canals, channels, and *powerlines.*”²⁴

Several of the requirements and standards in the Guidelines for Linear Facilities (codified as Section 705 of the regulations) seek to minimize the geographic footprint—both new and cumulative—of linear infrastructure in the coastal zone. For example, all new linear facilities must utilize existing corridors, rights-of-way, canals, and streams to the maximum extent practicable. Also, the multiple use of existing canals, directional drilling, and “other practical techniques” must be utilized to the maximum extent practicable to minimize changes of natural systems and adverse impacts on natural areas and wildlife and fisheries habitat. All types of linear facilities must be planned, designed, located, and built using the “best practical techniques”²⁵ to minimize disruption of natural hydrologic and sediment

²¹ Toxic substances are defined as “those substances which, by their chemical, biological or radioactive properties, have the potential to endanger human health or other living organisms or ecosystems, by means of acute or chronic adverse effects, including poisoning, mutagenic, teratogenic, or carcinogenic effect.” 43 La. Admin. Code, Part I § 700.

²² 43 La. Admin. Code, Part I § 701.

²³ Id.

²⁴ 43 La. Admin. Code, Part I § 700 (emphases added).

²⁵ Best practical techniques are defined as “those methods or techniques which would result in the greatest possible minimization of the adverse impacts listed in § 701.G and in specific guidelines applicable to the proposed use. [They] shall be the best methods

transport patterns, sheet flow, and water quality; to prevent bank slumping, erosion, and saltwater intrusion; and to minimize the potential for inland movement of storm surges.²⁶

Box B: “Maximum Extent Practicable”

Section 701(H) of the Guidelines provides instructions for how the permitting authority should apply the *maximum extent practicable* qualifier, which appears in various standards throughout the general and specific Guidelines.

Ideally, when a standard is qualified by the term “maximum extent practicable,” the proposed use will comply with the standard being qualified – e.g., avoid the adverse impact listed in Section 701(G). However, even if a proposed use does not conform fully with a qualified standard, the activity may still be allowed if the permitting authority performs “a systematic consideration” of all pertinent information regarding the use, the site, and the impacts of the use and “a balancing of their relative significance” and finds:

- (1) The public benefits resulting from the proposed use would clearly outweigh the adverse impacts resulting from noncompliance with the qualified standard;
- (2) There are no feasible and practical alternative locations, methods, and practices for the use that are in compliance with the qualified standard; and
- (3) The use is water dependent *or* would result in significant public benefits *or* would serve an important regional, state, or national interest.

The LDNR-OCM has issued detailed guidance for implementing the 701(H) “maximum extent practicable” analysis, in the form of a *Guide to Developing Alternatives and Justification Analyses for Proposed Uses within the Louisiana Coastal Zone*. While the level of detail required varies by project circumstances, in general the alternatives analysis “should address several options for project siting that are compared equally for feasibility and will allow OCM to determine the least damaging feasible site for the proposed use,” and the justification analysis “should include sufficient detail to clearly demonstrate demand for the proposed use and will allow OCM to determine the public need the proposed use.”

Specific guidance on utilities suggests that new utility facilities/features are likely to require detailed analyses for both alternatives and justification. For siting of utility plants and substations, depending on the affected acreage, two to five alternative sites should be evaluated using the same parameters (e.g., water features and habitat types, surrounding land uses within a mile, current zoning, availability and capacity of existing infrastructure). Even after the initial alternatives analysis reveals the “least damaging feasible site,” then “alternate configurations/methods and/or reduction in scope should be considered” in a further attempt to avoid and/or minimize adverse impacts to coastal resources.

The permitting authority also utilizes the “systematic consideration” process to determine any permit conditions that may be necessary to ensure the use will be carried out utilizing locations, methods, and practices that “maximize conformance to the modified standard; are technically, economically, environmentally, socially, and legally feasible and practical; and minimize or offset those adverse impacts listed in” the guideline.

Sources: 43 La. Admin. Code, Part 1 § 701; LDNR, *Guide to Developing Alternatives and Justification Analyses for Proposed Uses within the Louisiana Coastal Zone* (Mar. 2020), available at: http://www.dnr.louisiana.gov/assets/OCM/permits/NAJ/Combined_Document_rev1_Mar2020.pdf.

or techniques which are in use in the industry or trade or among practitioners of the use, and which are feasible and practical for utilization.” 43 La. Admin. Code, Part I § 700.

²⁶ 43 La. Admin. Code, Part I § 705.

Several of the Section 705 requirements aim to protect high-value coastal resources from impacts associated with installation and operation of linear facilities. There is an unqualified requirement that linear use alignments must “be planned to avoid adverse impacts on *areas of high biological productivity* or *irreplaceable resource areas*,” though such areas are not defined or described in more detail.²⁷ Wetlands are protected by a qualified standard: to the maximum extent practicable, linear facilities involving the use of dredging or filling must be avoided in wetland and estuarine areas. Also, all linear facilities must be planned, designed, located and built using “the best practical techniques” to “minimize adverse impacts on wetlands.”²⁸

Some of the Section 705 guidelines apply specifically to linear facilities “involving dredging,” which would apply to installation of subterranean transmission cables in the coastal zone and other activities that involve removal of native material (e.g., soil, vegetation) from coastal lands or water bottoms. In general, linear facilities involving dredging must be of “the minimum practical size and length.” There is an unqualified prohibition on linear facilities involving dredging that “traverse or adversely affect” any barrier island. To help prevent shoreline degradation, there is a provision that linear facilities involving dredging may not traverse beaches, tidal passes, protective reefs, or other natural gulf shoreline, “unless no other alternative exists.”²⁹

Guidelines for Surface Alterations. Section 711 establishes guidelines for coastal uses that alter the surface or usability of land area or water bottoms. Surface alterations are defined to explicitly include construction and operation of “energy and industrial facilities” and industrial and commercial developments, and it is likely that most proposed activities related to OSW generation or transmission would be subject to the use standards in Section 711.

In general, industrial and commercial uses (among others) are “encouraged” in areas of the coastal zone that are suitable for development.³⁰ Further guidance for identifying “areas suitable for development” is provided in §711(A), which requires that industrial and commercial uses must, to the maximum extent practicable, take place only:

- “1. on lands 5 feet or more above sea level *or* within [“fast lands,” which are lands surrounded by levees or natural formations that would normally prevent activities inside the area from having direct and significant impacts on coastal waters]; or
2. on lands which have foundation conditions sufficiently stable to support the use, and where flood and storm hazards are minimal or where protection from these hazards can be reasonably well achieved, and where the public safety would not be unreasonably endangered, and:

²⁷ 43 La. Admin. Code, Part I § 705 (emphases added).

²⁸ Id. For purposes of the Guidelines, the coastal management regulations define wetlands as “open water areas or areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and under normal circumstances, do support a prevalence of vegetation typically adapted for life in saturated soil conditions.” 43 La. Admin. Code, Part I § 700.

²⁹ 43 La. Admin. Code, Part I § 705. If one of these areas must be traversed for a “non-navigation canal” (not further defined), it must be restored to its natural condition (or better) immediately upon completion of construction using the best available restoration techniques. Other requirements in the linear facilities guidelines address post-project restoration more generally: the “best practical techniques for site restoration and revegetation” must be utilized for all linear facilities; and areas dredged for linear facilities must be “backfilled or otherwise restored to the pre-existing conditions upon cessation of use for navigation purposes to the maximum extent practicable.” 43 La. Admin. Code, Part I § 705.

³⁰ 43 La. Admin. Code, Part I § 711.

- a. the land is already in high intensity of development use; or
- b. there is adequate supporting infrastructure; or
- c. the vicinity has a tradition of use for similar habitation or development.”³¹

Additional siting guidance is provided for “public utilities” (among other public and private works), which generally “shall be encouraged” but to the maximum extent practicable must only take place when:

- “1. they protect or serve areas suitable for development pursuant to [the above-quoted criteria from §711(A)]; and
2. they are consistent with the other guidelines; and
3. they are consistent with all relevant adopted state, local, and regional plans.”³²

These regulations do not define “public utility,” and while definitions found elsewhere in Louisiana law (e.g., La. R.S. § 45:121³³) may be instructive, they are not dispositive as to whether some or all transmission cables transporting electricity from wind energy facilities on the OCS would be considered “public utilities” for purposes of Section 711. Regardless, the above siting standard for public utilities is qualified by “maximum extent practicable,” and the permitting authority has ample discretion in conducting the systematic consideration and balancing test (see Box B) to find such transmission cables in compliance with the Guidelines. Moreover, undersea transmission cables (and potentially land-based transmission infrastructure to which they connect) would likely be considered “coastal water dependent uses,” which are to be “given special consideration in permitting because of their reduced choice of alternatives.”³⁴

Several of the industrial and commercial use standards in Section 711 provide qualified protection for high-value natural resources. Wetland areas to the maximum extent practicable may not be drained or filled, and any approved drain or fill project must be “designed and constructed using best practical techniques to minimize present and future property damage and adverse environmental impacts.”³⁵ Surface alterations for industrial or commercial uses must, to the maximum extent practicable, be located away from “critical wildlife areas and vegetation areas”; and surface alterations in wildlife preserves and management areas must be conducted in strict conformance with requirements of the wildlife management entity. Surface alterations that have “high adverse impacts on natural functions” may not

³¹ 43 La. Admin. Code, Part I § 711.

³² Id.

³³ A definition found in state public utility law provides, “The term “electric public utility” as used in this Chapter means any person furnishing electric service within this state, the parish of Orleans excepted, including any electric cooperative transacting business in this state, provided, however...[describing exemption for entities “owning, leasing, and/or operating an electric generational facility provided such person is not primarily engaged in the generation, transmission, distribution, and/or sale of electricity...” and satisfying other conditions]. La. R.S. § 45:121.

³⁴ 43 La. Admin. Code, Part I § 711. The coastal management regulations define coastal water dependent uses to include uses “which must be carried out on, in or adjacent to coastal water areas or wetlands because the use requires access to the water body or wetland...or requires the use of coastal water in the manufacturing or transportation of goods,” and the examples cited in the definition include “ports and necessary supporting commercial and industrial facilities.” 43 La. Admin. Code, Part I § 700.

³⁵ 43 La. Admin. Code, Part I § 711.

occur, to the maximum extent practicable, in or on barrier islands and beaches, isolated cheniers, isolated natural ridges or levees, wildlife and aquatic species breeding or spawning areas, or important migratory routes.³⁶

All sites and facilities subject to Section 711 are required to be designed, constructed, and operated using the best practical techniques to prevent the release of pollutants or toxic substances into the environment and “minimize other adverse impacts.” In particular, the creation of low dissolved oxygen conditions in water or traps for heavy metals must be avoided to the maximum extent practicable. If the use involves placement of fill, to the maximum extent practicable only material that is “free of contaminants and compatible with the environmental setting” may be used as fill. To help minimize the geographic and temporal extent of surface alterations, site clearing must be limited to “areas immediately required for physical development” to the maximum extent practicable, and any areas modified by surface alteration activities must, to the maximum extent practicable, be revegetated, refilled, cleaned, and restored to their predevelopment condition upon termination of the use.³⁷

To the extent OSW development involves subterranean cables or underwater installations in the coastal area, **the creation of “underwater obstructions which adversely affect fishing or navigation” must be avoided to the maximum extent practicable.**³⁸

Guidelines for Dredged Spoil Deposition. Section 707 of the coastal management regulations establishes standards for deposition of dredged materials (spoil), which are relevant to undersea cable installation and other OSW-related activities involving removal of native material (vegetation, soil, or other) from land or water bottoms.

Several of the Section 707 requirements concern avoiding or limiting adverse impacts to existing hydrology and water quality. There is a general requirement that dredged spoil must “be deposited utilizing the best practical techniques to avoid disruption of water movement, flow, circulation, and quality.” Spoil disposal areas must be designed, constructed, and maintained using the best practical techniques to retain the spoil at the site, reduce turbidity, and reduce shoreline erosion when appropriate. Further, spoil may not be disposed of “in a manner which could result in the impounding or draining of wetlands or the creation of development sites” (except as part of an approved levee or surface alteration project).³⁹

The Guidelines for Dredged Spoil Deposition also explicitly protect certain coastal uses and resources from impacts of disposal: spoil may not be disposed of “in such a manner as to create a hindrance to navigation or fishing, or hinder timber growth”; and to the maximum extent practicable spoil may not be disposed of on marsh,⁴⁰ on known oyster or clam reefs, or in submerged vegetation areas.⁴¹

³⁶ 43 La. Admin. Code, Part I § 711.

³⁷ 43 La. Admin. Code, Part I § 711. In practice, the lack of a clear standard for determining when a use has been “terminated” creates challenges in complying with this requirement.

³⁸ *Id.*

³⁹ 43 La. Admin. Code, Part I § 707.

⁴⁰ Marsh is defined as “wetlands subject to frequent inundation in which the dominant vegetation consists of reeds, sedges, grasses, cattails, and other low growth.” 43 La. Admin. Code, Part I § 700.

⁴¹ 43 La. Admin. Code, Part I § 707.

The dredged spoil guideline also includes a general beneficial use standard, which provides,

“Spoil shall be used beneficially to the maximum extent practicable to improve productivity or create new habitat, reduce or compensate for environmental damage done by dredging activities, or prevent environmental damage. Otherwise, existing spoil disposal areas or upland⁴² disposal shall be utilized to the maximum extent practicable rather than creating new disposal areas.”⁴³

Box C: State and Local Consistency with the Coastal Program

In Louisiana, state and local government entities are subject to a state law requirement that their activities be consistent with the coastal program, whether occurring inside or outside the coastal zone. The intergovernmental coordination provision of the SLCRMA explains that LDNR must ensure that “any activity within or outside the coastal zone that affects any land or water use or natural resources of the coastal zone which is undertaken, conducted, or supported by any governmental body is consistent with the state program and any affected approved local program having geographical jurisdiction over the action to the maximum extent practicable...” and “that such governmental body has considered the sustainability of any activity in the coastal zone and has accounted for potential impacts from hurricanes and other natural disasters.” (Note: LDNR’s review of state and local government activities for consistency with the LCMP and the “consistency determination” required by state law are similar to, but distinct from, “federal consistency reviews” performed by LDNR under the federal CZMA and its regulations. To avoid confusion in the terminology, a consistency determination required by state law will be referred to here as state consistency determinations (SCD).)

In general, all governmental bodies in Louisiana must “fully coordinate their activities affecting the coastal zone with the state program and affected local programs.” If LDNR makes a finding that a government action not subject to the CUP program “may significantly affect land and water resources within the coastal zone,” LDNR is required to notify LDWF and the governmental body taking the action. The three parties then coordinate to ensure the action is consistent to the maximum extent practicable with the state coastal program and affected local programs.

Under the SLCRMA, LDNR’s decision to agree with or object to an SCD must be made within three months of receiving it (except as otherwise provided in the CZMA regulations for federal permit and license activities; see below description of federal consistency review for details). When the government action is one proposed by LDNR itself, the SCD is sent to the governor.

Sources: La. R.S. § 49:214.32; LCMP Program Document (1980), *supra* note 6.

⁴² Uplands are defined as “lands 5 feet or more above sea level, fastlands, or all lands outside the coastal zone.” 43 La. Admin. Code, Part I § 700.

⁴³ 43 La. Admin. Code, Part I § 707. The coastal regulation establishing requirements for Coastal Use Permits, Section 723, limits the scope of the beneficial use requirement to projects whose primary purpose is to facilitate the movement or mooring of vessels, and requires a beneficial use plan only for individual activities that involve 25,000 cubic yards or more of dredging. *Id.* at § 723.

Coastal Use Permits

The key regulatory mechanism of the coastal management framework established by the SLCRMA is the coastal use permit (CUP) program. The law provides that no individual or entity may commence “a use of state or local concern” without first applying for and receiving a coastal use permit.⁴⁴ Coastal use permits are issued by LDNR, except where the use is of local concern *and* the local government has an approved local coastal program in place, in which case a CUP may be issued by the local coastal program.

Uses Subject to the CUP Program. The requirements and procedures of the CUP program are triggered by a proposed “use of state or local concern” inside the coastal zone boundary. For CUP purposes, “use” is defined as any use or activity with a direct or significant impact on “coastal waters,” which include “bays, lakes, inlets, estuaries, rivers, bayous, and other bodies of water within the coastal zone which have measurable seawater content (under normal weather conditions) over a period of years.”⁴⁵

Uses of state concern are “uses which directly and significantly affect coastal waters and which are in need of coastal management and which have impacts of greater than local significance or which significantly affect interests of regional, state, or national concern.”⁴⁶ Per the law, examples of uses of state concern include (but are not limited to): any dredge or fill activity that intersects with more than one water body; projects involving use of state owned lands or water bottoms; projects spanning more than one parish; energy facility siting and development; and uses that significantly affect interests of regional, state, or national concern.⁴⁷ Based on the definition and statutory examples, it is likely that most or all activities associated with OSW development would be considered uses of state concern for purposes of the CUP program.

Uses of local concern are “uses which directly and significantly affect coastal waters and are in need of coastal management but are not uses of state concern and which should be regulated primarily at the local level if the local government has an approved program.”⁴⁸ A non-exhaustive list of uses of local concern is also provided in the law (see footnote).⁴⁹ Since OSW-related activities are unlikely to be considered uses of local concern, the CUP permit procedures for uses of local concern, which involve approved local coastal programs in addition to LDNR, are not described in detail here.⁵⁰

⁴⁴ La. R.S. § 49:214.30.

⁴⁵ Id. at § 214.23.

⁴⁶ Id. at § 214.25.

⁴⁷ Id.

⁴⁸ La. R.S. § 49:214.25.

⁴⁹ Uses of local concern include but are not limited to: “(a) Privately funded projects which are not uses of state concern; (b) Publicly funded projects which are not uses of state concern; (c) Maintenance of uses of local concern; (d) Jetties or breakwaters; (e) Dredge or fill projects not intersecting more than one water body; (f) Bulkheads; (g) Piers; (h) Camps and cattlewalks; (i) Maintenance dredging; (j) Private water control structures of less than fifteen thousand dollars in cost; (k) Uses on cheniers, salt domes, or similar land forms.”

⁵⁰ More information on the application and review procedures for CUPs for uses of local concern is found at La. R.S. § 49:214.25 and 43 La. Admin. Code, Part I § 723.

Exemptions. There are some activities that would otherwise appear to qualify as uses of state or local concern but are explicitly exempted from the requirement to obtain a CUP. Exemptions with potential relevance to OSW development and supporting infrastructure include:

- Activities occurring within “fast lands” or wholly on land five feet or more above sea level (unless LDNR determines that the particular activity would have a direct and significant impact on coastal waters);
- “Normal maintenance or repair” of existing structures (including emergency repairs of damage caused by accident or the elements);
- Construction and modification of navigational aids (e.g., channel markers, anchor buoys);
- Areas and facilities subject to the jurisdiction of the Offshore Terminal Authority (see Box D); and
- Other uses which do not have a significant impact on coastal waters.⁵¹

Box D: Offshore Terminals and Deepwater Ports

One of the use types that is exempt from the CUP program is an offshore terminal facility—i.e., activities in “areas and facilities subject to the jurisdiction of the Offshore Terminal Authority” of Louisiana (OTA), which exists to “promote the economic and industrial well being of the state of Louisiana and international trade for the state of Louisiana, its subdivisions and the area served by the Mississippi River and its tributaries.” In addition to promoting industrial and petrochemical uses by providing adequate deep draft port facilities, the OTA is also intended to promote “scientific and all other uses directly related to the offshore terminal facilities which shall be in the public interest...” Activities in OTA areas do not require a CUP from LDNR because they already are governed by a special “environmental protection plan” administered and enforced by the OTA in accordance with LCMP policies and objectives.

Offshore terminal facilities are defined as:

“[A] structure, a series of structures, or facility of any type emplaced within the [marine] coastal waters of Louisiana or seaward thereof and designed to accommodate the cargoes or passengers of deep draft vessels whose draft is greater than the depths of typical inland harbors and waterways, commonly used by ocean going traffic during the first half of the twentieth century, including all pipelines, structures, and facilities directly related thereto and necessary or useful to the operation thereof, whether landward, onshore, or seaward of the main structure or facility itself, including any facility which is part of a deepwater port...”

While most stand-alone OSW facilities are unlikely to qualify as offshore terminal facilities, it is possible that some OSW-related infrastructure in Louisiana’s marine waters—e.g., new multipurpose facilities and/or existing facilities repurposed or modified to include OSW components—may facilitate the movement of cargo between vessels and coastal facilities and thus fall under the definition of “deepwater port.” Although such infrastructure would thus be exempt from CUP requirements, it would be subject to OTA’s environmental protection plan instead. It would also still be subject to federal consistency review.

Sources: La. R.S. § 34:3102; id. at § 49:214.34.

The CUP Application Process. The CUP application procedures are set out in Part 723 of the coastal management regulations. To collect the information required for a CUP review, LDNR uses a “Joint Application” form that is also used by the U.S. Army Corps of Engineers’ New Orleans District for permissions under Section 10 of the Rivers and

⁵¹ La. R.S. § 49:214.34.

Harbors Act and/or Section 404 of the Clean Water Act.⁵² Also, to expedite and streamline the process of issuing CUPs and obtaining “all other concurrently required permits or approvals from other governmental bodies having separate regulatory jurisdiction or authority over uses of the coastal zone,” the SLCRMA requires LDNR and other governmental bodies in Louisiana to work together to establish a “coordinated coastal permitting process” that would allow applicants to use a single application for all required permits or approvals from participating governmental bodies.⁵³

After receiving a complete CUP application, LDNR has up to 10 days to issue public notice of the proposed use, which starts the clock on a 25-day public comment period and a 30-day default review period (which may be slightly longer if a public hearing is held). In some circumstances—e.g., there is significant public opposition to a proposed use, or a hearing has been requested by a local government—LDNR may determine that a public hearing should be held. The permitting body must consider comments received in response to the public notice (whether a public hearing is held or not) and the applicant may be given the opportunity to provide a “resolution or rebuttal to all objections from government agencies and other substantive adverse comments” before a final decision is made on permit issuance.⁵⁴

Ultimately, LDNR determines whether a permit will be issued based on the proposed activity’s consistency with the Guidelines, the state coastal program, and affected approved local programs. (This includes an overarching requirement added to the SLCRMA in 2010 that no activity which is not consistent with the state’s master plan for integrated coastal protection may receive a CUP.⁵⁵) The permit determination is made “after a full and fair consideration of all information before the permitting body, and shall represent an appropriate balancing of social, environmental, and economic factors.”⁵⁶ If permitting staff determine the permit should be issued, a proposed permit is sent to the applicant; if the applicant accepts the permit and its conditions, the permit is signed by a higher official and the permit takes effect.⁵⁷

The applicant’s “acceptance” of the permit signifies the applicant’s agreement with permit conditions, including generally applicable conditions provided in Section 723 and any specific conditions attached by the permitting body to ensure compliance with the coastal program. In some cases, applicants may be required to provide financial assurances “in an appropriate amount to ensure adjustment, alteration, or removal” of permitted activities.⁵⁸

⁵² LDNR-OCM and U.S. Army Corps of Engineers, New Orleans District, Joint Permit Application for Work in the Louisiana Coastal Zone, available at: <http://www.dnr.louisiana.gov/assets/OCM/permits/JPA2010Fillable.pdf>.

⁵³ La. R.S. § 49:214.33. Appendix X of the 1980 Program Document includes copies of a series of Memoranda of Understanding signed by LDNR and other agencies to effectuate this requirement. Pursuant to specific provisions in the SLCRMA, certain permits issued by LDNR for location, drilling, exploration and production of oil, gas, sulphur or other minerals *will substitute for* CUPs, “provided that the [LDNR] office of conservation shall coordinate such permitting actions [with LDNR-OCM] and shall ensure that all activities so permitted are consistent with the guidelines, the state program, and any affected local program. The same is true for permits issued by LDWF for leasing, seeding, cultivating, planting, harvesting or marking of oyster bedding grounds. Id. at § 214.31.

⁵⁴ 43 La. Admin. Code Part I § 723.

⁵⁵ See La. R.S. § 49:214.30.

⁵⁶ 43 La. Admin. Code Part I § 723.

⁵⁷ See id.

⁵⁸ 43 La. Admin. Code Part I § 723.

General Permits. Under the SLCRMA, LDNR is authorized to adopt rules and procedures for the issuance of general coastal use permits (general permits or GPs).⁵⁹ A general permit is intended to serve as “an authorization to prospective users to perform specific uses within prescribed areas of the coastal zone without the necessity for a complete, independent review of each proposed use” to streamline review times.⁶⁰ In practice, all of the GPs likely to be relevant to OSW development require the same application as an individual permit, though use of a GP may yield efficiencies in reviewing the application and/or determining permit conditions.

Under the CUP regulations, general permits may only be issued for clearly described categories of uses that are “substantially similar in nature, that cause only minimal adverse impacts when performed separately, that will have only minimal adverse cumulative impacts and that otherwise do not impair the fulfillment of the objectives and policies of the [LCMP].”⁶¹ To conduct an activity under a general permit, the applicant must provide notice to LDNR, describing the proposed use and receive written authorization that includes conditions “as appropriate,” including mitigation requirements for net losses to ecological values.⁶²

A list of currently available general permits (and their expiration dates) is provided on LDNR’s website.⁶³ Of the 20 general permits now in force, three may be particularly relevant to OSW development. These are:

- **GP-14**, which “provides for a one-time mobilization for the installation, maintenance, removal, and repair of utility lines, wires, cables, conduits, pipes for water pipelines and fiber optic bundles in new or existing corridors within the Louisiana Coastal Zone.” To avail themselves of GP-14, which expires in July 2027, applicants must fill out the same Joint Application used for individual projects and comply with all general and special conditions noted in the general permit, including restrictions on project location, size, and activity types.⁶⁴
- **GP-27**, which “provides for maintenance activities for public port facilities within the Louisiana Coastal Zone. Activities include but are not limited to, dredging of existing interior channels, canals and slips; installation/repair or replacement of mooring structures; installation and maintenance of bulkheads and other bankline stabilization measures; repair or replacement of on-site support facilities (buildings, parking lots, existing access roads); repair or replacement of existing piers and wharves.” To avail themselves of GP-27, which expires in July 2027, applicants must fill out the same Joint Application used for individual projects and comply with all general and special conditions noted in the general permit, including restrictions on project location, size, and activity types.⁶⁵

⁵⁹ La. R.S. § 49:214.30.

⁶⁰ Id.

⁶¹ 43 La. Admin. Code Part I § 723.

⁶² Id.

⁶³ LDNR, Office of Coastal Management—General Permits, <http://www.dnr.louisiana.gov/index.cfm?md=pagebuilder&tmp=home&pid=728> (accessed Sept. 2022).

⁶⁴ LDNR-OCM, *General Permit 14*, available at: http://www.dnr.louisiana.gov/assets/OCM/permits/gp/Current_Documents/GP14_2022.pdf.

⁶⁵ LDNR-OCM, *General Permit 27*, available at: http://www.dnr.louisiana.gov/assets/OCM/permits/gp/Current_Documents/GP27_2022.pdf.

- **GP-11**, which facilitates implementation of the CUP program’s mitigation requirements by providing “for the implementation of individual compensatory mitigation projects to offset unavoidable impacts to coastal resources due to permitted activities and for restoration activities required for permanent impacts following one full growing season or in preparation of a [sic] proposed or by existing mitigation banks.” To avail themselves of GP-11, which expires in May 2026, applicants must fill out the same Joint Application used for individual projects and comply with all general and special conditions noted in the general permit, including restrictions on project location, size, and activity types.⁶⁶

CUP Mitigation Requirements. Since the 1990s, LDNR has required compensatory mitigation for unavoidable habitat losses associated with coastal use permits.⁶⁷ In general, compensatory mitigation is required in connection with CUPs, unless the permittee demonstrates that the required mitigation “would render impracticable an activity proposed to be permitted and that such activity has a clearly overriding public interest” and, after public notice, receives a variance from LDNR.⁶⁸ The requirement to mitigate losses to coastal wetlands ensures the state remains in compliance with the “no net loss” standard required to maintain the federal-state cost-share agreement for coastal restoration projects funded under the Coastal Wetlands Planning Protection and Restoration Act (CWPPRA).⁶⁹

The Rules and Procedures for Mitigation in connection with CUPs are set out in the coastal management regulations (Section 724). **The general rule is that LDNR may not grant a CUP or consistency authorization for an activity unless the permit process includes “evaluation” of ways to avoid, minimize, and restore adverse impacts identified during a thorough review of the Coastal Use Guidelines, and a requirement for compensatory mitigation to offset any net loss of coastal resources’ ecological value anticipated to occur.**

Compensatory mitigation can be accomplished in one of several ways: individual mitigation measures; use of mitigation bank credits of the appropriate type and quantity; a monetary contribution to the Louisiana Wetlands Conservation and Restoration Fund (coastal mitigation account); or “other compensatory mitigation options determined appropriate” by LDNR.⁷⁰ The regulation itself does not prescribe a preferred mitigation type or establish a hierarchy of alternatives; however, according to LDNR, a contribution to the coastal mitigation account—effectively an in-lieu-fee fund—is only available if purchasing credits from a mitigation bank is not an option.⁷¹

LDNR ultimately is responsible for ensuring that the selected compensatory mitigation option is “sufficient, properly located, and accomplished by the most desirable available/practicable option.”⁷² For permittee-responsible mitigation (i.e., individual mitigation measures), it has been LDNR policy that mitigation: must have a positive ecological impact in the coastal area; “should be on-site if possible” (though location on the affected landowner’s property and location within the same hydrologic basin are also listed among the “location priorities”); and should either be the same habitat

⁶⁶ LDNR-OCM, *General Permit 11*, available at: http://www.dnr.louisiana.gov/assets/OCM/permits/gp/Current_Documents/GP11_2021_Final_05_26_21.pdf.

⁶⁷ La. R.S. § 49:214.41; see also LDNR, FAQ—Wetland Mitigation, <http://www.dnr.louisiana.gov/index.cfm/page/1387#mitigation> (accessed Sept. 2022).

⁶⁸ La. R.S. § 49:214.41.

⁶⁹ LDNR, FAQ—Wetland Mitigation, *supra* note 67.

⁷⁰ La. R.S. § 49:214.41.

⁷¹ LDNR, FAQ—Wetland Mitigation, *supra* note 67.

⁷² 43 La. Admin. Code Part I § 724.

type, produce similar ecological values, or contribute to overall wetland health of the hydrologic basin (in that order of preference).⁷³

Box E: Relationship to Army Corps Compensatory Mitigation Requirements

The definition of “wetlands” for CUP mitigation is different from the definition used by the U.S. Army Corps of Engineers in the exercise of its Clean Water Act authorities. Jurisdictional determinations by the Corps will not necessarily always correlate with LDNR’s definition, which states that wetlands are “open water areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances does support a prevalence of vegetation typically adapted for life in saturated soil conditions...”

According to LDNR, “the state and the local Coastal Management Programs always try to coordinate mitigation requirements with the U.S. Army Corps of Engineers; however there could be instances where the requirements differ.” LDNR also notes that payment to the state’s in-lieu-fee fund “will satisfy mitigation options for both [LDNR] and Corps of Engineers,” suggesting that where requirements do align, CUP permittees are not required to mitigate twice for the same exact wetland impacts.

Sources: LDNR, FAQ—Wetland Mitigation, *supra* note 67; 43 La. Admin. Code, Part I, § 700.

Section 724 of the coastal regulations establishes procedures for calculating ecological value of losses and mitigation measures, as well as a schedule of “mitigation processing fees” that range from \$150 (impacts less than 0.5 acres of vegetated wetland) to \$15,000 (impacts over 100 acres). A CUP applicant can request a variance from the compensatory mitigation requirement by following specific procedures that demonstrate that compensatory mitigation is “impracticable” and that there is an overriding public interest in the project.⁷⁴

Federal Consistency Review

Federal Consistency Overview. The federal Coastal Zone Management Act (CZMA or Act) uses two primary incentives to encourage states to implement comprehensive coastal management programs: (1) sustained funding via a NOAA-administered federal grant program; and (2) the use of federal consistency review by states as a management and oversight tool and a check on federal activities in the coastal zone. Louisiana’s CMP (LCMP), developed and implemented by LDNR’s Office of Coastal Management (LDNR-OCM), was approved by NOAA in 1980.⁷⁵

Federal consistency review is the authority granted to states under Section 307 of the CZMA to review proposed “federal actions” in order to determine whether they conform with the state’s approved CMP.⁷⁶ **Through federal consistency review, Louisiana can review federal actions that will have reasonably foreseeable effects on the state’s coastal resources and uses** for consistency with the “enforceable policies” of the Louisiana coastal management program. Federal actions may include activities occurring within or outside of Louisiana’s state boundaries, as long as they affect the Louisiana coastal zone directly (i.e., effects occurring at the same time and place

⁷³ LDNR-OCM, *Frequently Asked Questions* at p. 15 (n.d), available at : http://www.dnr.louisiana.gov/assets/docs/coastal/OCM_FAQs.pdf (accessed Dec. 2022).

⁷⁴ 43 La. Admin. Code Part I §724.

⁷⁵ See LCMP Program Document (1980), *supra* note 6.

⁷⁶ See 16 U.S.C. § 1456.

as the activity) or indirectly (i.e., secondary or cumulative effects that occur later in time or are farther removed in distance but are still reasonably foreseeable).⁷⁷

Overseen by NOAA’s Office of Coastal Management (NOAA-OCM) in accordance with the Act and NOAA’s implementing regulations (“CZMA regulations”), **the federal consistency review process is “the primary means by which a state can address state issues for the review of offshore wind project proposals.”**⁷⁸ While it does not allow states to “regulate” or “manage” offshore activities in federal waters, the review process provides a valuable forum for identifying and resolving issues, and according to NOAA-OCM has been “essential for addressing state issues for offshore wind farms” in other regions.⁷⁹

Box F: Federal Consistency vs. NEPA

- Compliance with the federal consistency requirement complements, but is different from, NEPA compliance.
- NEPA documents can be an effective delivery mechanism for the information and analysis required for federal consistency review.
- The “effects” test triggering certain CZMA requirements is different from the “significant environmental impacts” standard that triggers certain NEPA procedures.
- A finding under NEPA (e.g., a FONSI) is not dispositive for a CZMA threshold determination.

For purposes of this report, there are two main types of “federal actions” that trigger federal consistency review:

- **Federal agency activities**, also referred to as direct federal activities (e.g. a competitive lease sale by BOEM for alternative energy on the OCS); and
- **Federally licensed, permitted, or approved activities**, also referred to as federally authorized activities (e.g., a non-competitive lease sale wherein a non-federal applicant applies to BOEM for approval of a renewable energy project on the OCS).⁸⁰

The federal consistency requirements and procedures differ somewhat depending on the type of federal action being proposed. Notably, federally authorized activities must be consistent with the state program’s enforceable policies, but the standard is more lenient for federal agency activities, which must be consistent with the enforceable policies of the state program *to the maximum extent practicable*.⁸¹ According to the CZMA regulations, consistent to the maximum extent practicable means “fully consistent with the enforceable policies of management programs unless full consistency is prohibited by existing law applicable to the Federal agency.”⁸²

⁷⁷ See 15 C.F.R. § 930.11.

⁷⁸ David Kaiser, NOAA-OCM, *Presentation to the Intergovernmental Renewable Energy Task Force for the Gulf of Mexico Re: CZMA Review of Offshore Renewable Energy Projects* (June 2021), available at: <https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/NOAA-National-Ocean-Service-CZMA-David-Kaiser.pdf>.

⁷⁹ *Id.*

⁸⁰ Another category of federal action subject to consistency review is federal financial assistance. See 15 CFR Part 30, Subpart F.

⁸¹ 15 C.F.R. §§ 930.36, 57.

⁸² The regulations say the “Act was intended to cause substantive changes in Federal agency decision making within the context of the discretionary powers residing in such agencies. Accordingly, whenever legally permissible, Federal agencies shall consider the enforceable policies of management programs as requirements . . . If a Federal agency asserts that full [consistency] it shall clearly describe, in writing, to the State agency the statutory provisions, legislative history, or other legal authority which limits the Federal agency's discretion to be fully consistent with the enforceable policies of the management program.” *Id.* at § 930.32.

Box G: Louisiana's Enforceable Policies

For purposes of federal consistency, “enforceable policies” are state policies that are legally binding (i.e., mandatory) under state law—e.g., constitutional provisions, laws, regulations, land use plans, ordinances, or judicial or administrative decision— by which a state “exerts control over private and public land and water uses and natural resources in the coastal zone,” and which have been incorporated into a NOAA-approved CMP (15 C.F.R. § 930.11). **Enforceable policies (EPs) comprise the substantive standards of a state’s federal consistency review authority.** In order to find a proposed activity inconsistent with the CMP, the state must identify specific enforceable policies that the activity would violate.

Louisiana’s EPs are made up of the SLCRMA, the Coastal Use Guidelines, and various other “state regulatory policies” that have been incorporated into the program, either in the 1980 LCMP Program Document or via approved program changes. **The primary EPs for reviewing proposed OSW activities for consistency with the LCMP will be the Guidelines.** According to BOEM, all the EPs identified by Louisiana as relevant to OCS activities in the Gulf of Mexico are found in the Guidelines.

However, there are other EPs that may be available to help the state influence OSW development in less obvious ways, including decisions about siting related onshore infrastructure. For example, the Program Document identifies a list of additional state laws and regulations that the state may utilize in managing the impacts of “energy facilities” in the coastal zone, including (but are not limited to):

- Authorities to protect archeological/historical remains and sites on state-owned lands and water bottoms (La. R.S. §§ 41:1601-1613);
- Air quality laws (La. R.S. §§ 40:2201-2216);
- Permitting and regulation of geophysical and geological surveying on state lands and waterbottoms and other state-owned servitudes and easements (La. R.S. §§ 30:210-217);
- Permits and leases for the use of waterbottoms, including determination of boundaries, reclamation of lands lost through erosion, and construction of wharfs, piers, bulkheads, fills or other encroachments (La. R.S. § 41:1131);
- Administration and regulation of the state’s Natural Scenic River System, including permits and review of uses thereof (La. R.S. §§ 56:1841-49);
- Supervision, regulation, and permitting of discharges and introductions of polluting substances into the surface waters of the state (La. R.S. §§ 56:1431-1446, 1451-53, 1461-64, 38:216); and
- Issuance of licenses, certification, and permits regulating all phases of construction and operation of offshore terminal facilities within the jurisdiction of the Offshore Terminal Authority (La. R.S. § 4:3101).

The above policies were incorporated as EPs in the original Program Document. Another potentially relevant EP, incorporated via program change in 2011, is a provision from a 2008 Louisiana executive order: “All state agencies shall administer their regulatory practices, programs, contracts, grants, and all other functions vested in them in a manner consistent with the Master Plan and public interest to the maximum extent practicable.” However, as the policy includes a standard explicitly applicable to state agency actions, it is unclear whether and how NOAA-OCM would allow LDNR-OCM to apply this EP in the context of a federal license or permit activity. (A more broadly-worded—and perhaps more useful—version of the master plan consistency requirement, which was added by the legislature to the SLCRMA in 2010, has not been incorporated as a NOAA-approved EP.)

A list of Louisiana’s current enforceable policies, constructed by the Environmental Law Institute using the LCMP Program Document and NOAA’s publicly available program change archives, is on file with ELI and is available on request; however, it may be advisable for interested parties to obtain a current list from LDNR-OCM directly. It is important to note that any EP on which Louisiana will or may rely on during OSW-related federal consistency reviews should be approved by NOAA-OCM in its current form; according to NOAA guidance, “If a state law supersedes or substantively revises an existing enforceable policy, neither the old policy nor the new or revised policy can be used for federal consistency until the changes are approved by NOAA.” It is also important to note that in general, EPs cannot be interpreted as requiring the federal government to obtain a state permit, pay a fee, or be otherwise “regulated” by the state government.

Sources: 15 C.F.R. § 930.11, LCMP Program Document (1980), *supra*; BOEM, *Coastal Zone Management Program Policies for the Gulf of Mexico States Applicable to Outer Continental Shelf Plan Filings*, available at: <https://www.boem.gov/sites/default/files/environmental-stewardship/Environmental-Assessment/CZMA/CZM-Program-Policies-for-GOM-States.pdf>; NOAA-OCM, Program Change Request Details: File No. LA-2011-1, <https://coast.noaa.gov/czmprogramchange/#/public/change-view/470> (accessed Sept. 2022); NOAA-OCM, *Enforceable Policies Transcript* (n.d.), available at: https://coast.noaa.gov/data/digitalcoast/elearning/captivate/enforceable_policies/docs/enforceable-policies-transcript-508c.pdf.

In Louisiana, activities in the coastal zone that require a Coastal Use Permit (CUP) from the state are reviewed by LDNRR's Permits/Mitigation Division for consistency with the state's coastal program in connection with the CUP application process. However, there are some activities in or affecting the coastal zone that do not require a CUP but still must be reviewed under the federal consistency authority. These include:

- Federal agencies whose direct activities may affect the coastal zone;
- Non-federal applicants proposing activities located on federal property within the coastal zone (e.g., National Wildlife Refuges);
- Activities in the coastal zone that are statutorily exempt from the requirement to obtain a CUP (e.g., activities within fast-lands or located five or more feet above sea level; activities taking place in areas and facilities of the Offshore Terminal Authority); and
- Activities taking place outside the coastal zone that have reasonably foreseeable effects on coastal uses and resources.⁸³

These activities are reviewed by a different subdivision of LDNR known as the Consistency Section.⁸⁴

Review of Federal Agency Activities. *Federal agency activities* are activities undertaken by federal agencies directly, or on a federal agency's behalf.⁸⁵ Federal agency activities may include, but are not limited to, a federal agency's proposal to physically alter coastal resources, a plan that is used to direct future agency actions, or a proposed rulemaking that alters uses of the coastal zone.⁸⁶

Effects Test. **As a threshold matter, a federal agency must determine if coastal effects are reasonably foreseeable from a proposed activity; this is true for federal agency activities taking place *inside or outside* a state's coastal zone.**⁸⁷ It is the federal agency's responsibility to initiate this threshold determination. NOAA guidance encourages states to "list" in their CMPs the types of federal agency activities that can be generally expected to have coastal effects (and to monitor unlisted activities and help notify federal agencies when an unlisted activity should undergo consistency review), but a state's decision to list or not list a direct federal action in the CMP does not change

⁸³ LDNR, Consistency Section, <http://www.dnr.louisiana.gov/index.cfm/page/1329> (accessed Oct. 2022); LDNR, FAQ—Federal Consistency, <http://www.dnr.louisiana.gov/index.cfm/page/1387#fedcon> (accessed Oct. 2022).

⁸⁴ LDNR, Consistency Section: What is it that we do?, <http://www.dnr.louisiana.gov/index.cfm?md=pagebuilder&tmp=home&pid=105> (accessed Oct. 2022).

⁸⁵ 15 C.F.R. § 930.31. The terms "Federal agency activity" and "Federal development project" also include modifications of any such activity or development project which affect any coastal use or resource, provided that, in the case of modifications of an activity or development project which the State agency has previously reviewed, the effect on any coastal use or resource is substantially different than those previously reviewed by the State agency.

⁸⁶ 15 C.F.R. § 930.31.

⁸⁷ 15 C.F.R. § 930.33. In cases of certain federal "development projects" occurring *inside* the coastal zone, coastal effects are presumed, and the next step in the analysis is automatically required. The term federal "development project" means a federal agency activity involving the planning, construction, modification, or removal of public works, facilities, or other structures, and includes the acquisition, use, or disposal of any coastal use or resource. *Id.* at § 930.31.

the federal agency’s affirmative duty to provide a consistency determination (CD).⁸⁸ For example, if BOEM holds a lease sale for a renewable energy project in federal offshore waters, it is BOEM’s responsibility to determine if there will be coastal effects in one or more coastal states.⁸⁹

In the case of a BOEM lease sale or other direct federal action, the question of whether there will be coastal effects in Louisiana will determine if the state is allowed to engage in a federal consistency review of the action. The CZMA regulations make clear that in performing the so-called “effects test” to determine whether a CD is required, federal agencies should broadly construe the regulation’s definition of “coastal effects,” erring on the side of providing a CD.⁹⁰ NOAA’s *Federal Consistency Overview* (2020 ed.) explains that the “effects test applies to activities and uses/resources that occur outside a state’s coastal zone, so long as the uses or resources impacted are, in fact, uses or resources of a state’s coastal zone.”⁹¹

Coastal uses may include (but are not limited to) public access, recreation, fishing, historic or cultural preservation, development, energy infrastructure and use, hazard management, marinas, floodplain management, scenic and aesthetic enjoyment, and resource creation or restoration. Coastal resources— i.e., the biological or physical resources that are found within the coastal zone on a regular or cyclical basis— may include (but are not limited to) air, tidal and nontidal wetlands, ocean waters, estuaries, rivers, streams, lakes, aquifers, submerged aquatic vegetation, land, plants, trees, minerals, fish, shellfish, invertebrates, amphibians, birds, mammals, and reptiles.

If the answer is that there will be coastal effects, the consistency determination process continues as described in the next section. If the answer to the threshold inquiry is that there will *not* be coastal effects, the federal agency makes a “negative determination” (ND). The federal agency is required to inform the state about a negative determination at least 90 days prior to final approval of the activity if the activity: is identified by the state on its federal consistency “list” (described on page 27) or through monitoring of “unlisted activities” (also discussed on page 27 section); is the same or similar to an activity for which a CD has been prepared in the past; or has been studied by the federal agency in a “thorough consistency assessment” with initial findings on coastal effects.⁹² Following receipt of a negative determination, the state has 60 days to respond, or else concurrence with the ND is presumed. If the state objects to the ND and asserts that coastal effects are reasonably foreseeable, the CZMA regulations require the federal agency to “consider submitting a consistency determination...or otherwise attempt to resolve any disagreement” before final approval of the activity and recommend the federal agency “consider postponing final [approval] until a disagreement has been resolved.”⁹³ If the federal agency issues an ND and final activity approval over the state’s continued objection, the dispute may need to be resolved in court pursuant to the Administrative Procedure Act (APA), a federal

⁸⁸ NOAA-OCM, *Federal Consistency Overview* at 11 (2020), available at: <https://coast.noaa.gov/data/czm/consistency/media/federal-consistency-overview.pdf>.

⁸⁹ Kaiser, *supra* note 78.

⁹⁰ 15 C.F.R. § 930.33.

⁹¹ NOAA-OCM, *Federal Consistency Overview*, *supra* note 88.

⁹² 15 C.F.R. § 930.33.

⁹³ *Id.*

law that allows judges to set aside final federal agency decisions if they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.⁹⁴

It is widely recognized that offshore activities on the OCS can impact a state’s coastal zone through water pollution, air pollution, noise pollution, or a variety of other mechanisms.⁹⁵ However, Louisiana is not necessarily entitled to review every proposed OCS activity in the Gulf of Mexico. According to NOAA-OCM guidance, “The burden for determining or demonstrating effects is greater the farther removed an activity takes place outside of a state’s coastal zone,” and “[m]erely showing impacts from an activity outside of the coastal zone should not be sufficient by itself to demonstrate that reasonably foreseeable effects extend to uses or resources of the coastal zone.”⁹⁶ In July 2022, in the draft environmental assessment (EA) prepared by BOEM to determine whether lease sales and site assessment plans within the Gulf of Mexico Call Area would lead to reasonably significant impacts on the environment (and thus require a full environmental impact statement under NEPA), BOEM’s Gulf of Mexico regional office wrote that it had “determined that Texas, Louisiana, Mississippi, and Alabama may have reasonably foreseeable coastal effects.”⁹⁷

Review Procedures. The general procedures for consistency review of federal agency activities are found in “Subpart C” of the CZMA implementing regulations (15 C.F.R. § 930.30 et seq.). The BOEM regulations for Renewable Energy and Alternate Uses of Existing Facilities on the Outer Continental Shelf (referred to here as the “BOEM renewable energy regulations”), which implement BOEM’s authority over leases, rights of way (ROW), and right of use and easement (RUE) grants for wind energy production on

Box H: Procedural Flexibility and Efficiencies

According to NOAA guidance, a federal agency and the state program can agree at any time to “more flexible consistency review procedures,” provided certain minimum public participation requirements are still met (15 C.F.R. § 930.2). States also may agree to a federal agency’s request to consider some of its activities “de minimis” activities (i.e., activities that are expected to have insignificant direct or indirect coastal effects) or “environmentally beneficial” activities (i.e., an activity that protects, preserves, or restores the natural resources of the coastal zone) that should not be subject to further state review (id. at § 930.33).

For example, in 2013, a Memorandum of Understanding was signed by Louisiana, BOEM, and BSEE to clarify the consistency review process for “minor reconfigurations” of pipelines (i.e., pipeline modifications less than one-and-a-half miles) on the OCS, which may be considered de minimis unless the pipeline right-of-way would obstruct access to offshore sand and gravel deposits in which Louisiana’s state interest is “paramount.” To help accommodate rapid OSW industry growth, the state in theory could reach a similar agreement with BOEM for minor OSW-related projects.

Other tools available to facilitate streamlined federal-state coordination include general consistency determinations for repeated activities (e.g., maintenance), phased consistency determinations, and national or regional consistency determinations (e.g., nationwide rulemakings, national or regional plans) (id. at § 930.36).

Sources: NOAA-OCM, *Federal Consistency Overview*, *supra* note 88; Letter from Keith Lovell, LDNR-OCM, to Angie Gobert, BOEM (Sept. 23, 2013), available at: <https://www.boem.gov/sites/default/files/environmental-stewardship/Environmental-Assessment/CZMA/CZMA-Memorandum-of-Understanding.pdf>

⁹⁴ 5 U.S.C. § 704-706. The CZMA does not include a citizen suit provision, meaning judicial review is available under the APA. In the past, environmental groups have sued federal agencies under the APA claiming that negative determinations were issued contrary to the CZMA. See, e.g., *Ocean Mammal Institute v. Gates*, 546 F.Supp.2d 960 (D. Hawaii 2008).

⁹⁵ See generally BOEMRE, *Alternative Energy Programmatic EIS at 5-115* (2007), available at:

https://www.boem.gov/sites/default/files/renewable-energy-program/Regulatory-Information/Alt_Energy_FPEIS_Chapter5.pdf.

⁹⁶ NOAA-OCM, *Federal Consistency Overview*, *supra* note 88, at 5.

⁹⁷ BOEM, *Gulf of Mexico Renewable Energy Lease Issuance Draft Environmental Assessment at 5-10* (July 2022), available at: <https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/GOM-Wind-Lease-EA.pdf>.

the OCS under the Energy Policy Act of 2005 (30 C.F.R. Part 585), provide additional guidance for consistency reviews in the context of specific offshore activity types.

In general, prior to any competitive commercial lease sale that will have coastal effects in Louisiana, BOEM is responsible for preparing a consistency determination to determine whether issuing leases, and the site characterization and assessment activities that occur in connection with lease issuance, are consistent to the maximum extent practicable with the enforceable policies of the LCMP.⁹⁸ The CZMA regulations require a federal agency to provide the state with a CD “at the earliest practicable time” in the planning of an activity, i.e., “following development of sufficient information to reasonably determine the consistency of the activity with the management program, but before the Federal agency reaches a significant point of decision making in its review process” and the activity can still be modified.⁹⁹ In any case, a CD must be provided to the state at least 90 days before final approval of the federal agency activity (unless both the Federal agency and the State agency agree to an alternative schedule).¹⁰⁰

According to BOEM, it will prepare a CD in connection with the ongoing NEPA review for wind lease sales in the Gulf of Mexico Call Area¹⁰¹; the CD may be issued prior to the Final EA or in connection with a full EIS (if required).¹⁰² Based on language in the Draft EA, it is possible or probable that BOEM will utilize a “regional consistency determination” that addresses coastal effects on multiple states—e.g., Louisiana and Texas—in a combined analysis.¹⁰³ The CZMA regulations authorize regional CDs where states “share common coastal management issues and have similar enforceable policies, e.g., protection of a particular coastal resource.”¹⁰⁴

To comply with the CZMA regulations, a consistency determination must include not only a statement indicating that the proposed activity will be undertaken in a manner consistent to the maximum extent practicable with the enforceable policies of the state CMP, but also a “description” of the agency’s evaluation of the relevant enforceable policies. A **CD must also include what is typically referred to as “necessary data and information,” meaning “a detailed**

⁹⁸ See *id.*; see generally 15 C.F.R. § 930.36.

⁹⁹ 15 C.F.R. § 930.36.

¹⁰⁰ *Id.*

¹⁰¹ See BOEM, *Gulf of Mexico Renewable Energy Lease Issuance Draft Environmental Assessment*, *supra* note 97, at 5-10.

¹⁰² The CZMA regulations authorize federal agencies to use NEPA documents as a vehicle for a consistency determination, as long as the agency ensures the NEPA document “includes the information and adheres to the timeframes required” by the CZMA regulations. 15 C.F.R. § 930.37. In connection with adoption of the OCS Renewable Energy Regulations, BOEM’s predecessor agency (MMS) stated, “Concurrent with the preparation of the final EIS or other NEPA documentation, a CZMA consistency review and subsequent Consistency Determination (CD) is completed by MMS relative to each affected State’s federally approved coastal zone management plan.” Fed. Reg. Vol 74, No. 81 at p. 19659 (Apr. 29, 2009).

¹⁰³ See BOEM, *Gulf of Mexico Renewable Energy Lease Issuance Draft Environmental Assessment*, *supra* note 97, at 5-10.

¹⁰⁴ For a regional CD, the federal agency “should, at a minimum, address the common denominator of these policies, i.e., the common coastal effects and management issues, and thereby address different States’ policies with one discussion and determination.” 15 C.F.R. § 930.36.

description of the activity, its associated facilities, and their coastal effects, and comprehensive data and information sufficient to support” the consistency finding.¹⁰⁵

If the federal agency is aware before submitting the CD that the activity is not fully consistent with a CMP’s enforceable policies (i.e., is only consistent to the maximum extent practicable), the CD must include a written description of the statute, legislative history, or other legal authority that limits the agency’s discretion to modify its activities in a way that would be fully consistent with the enforceable policies.¹⁰⁶

After receiving a CD for a BOEM lease, Louisiana (via LDNR-OCM) must agree or disagree with BOEM’s consistency determination by the end of a 60-day review period, which must involve an opportunity for public participation in the state’s review.¹⁰⁷ If the state does not respond after 60 days (or request an extension), the state’s concurrence with the CD—i.e., agreement by the state that the activity is consistent with the CMP—is presumed.¹⁰⁸ However, if the state notifies the federal agency within two weeks of first receiving the CD that some of the necessary information is missing, the start of the 60-day review period is delayed until the missing information is received.

If the state concurs with the consistency determination, the federal agency activity can proceed (e.g., BOEM can hold the OCS lease sale). If the state *disagrees*, its response to the federal agency must include its reasons for the objection to the determination and identify the specific enforceable policies with which the activity is inconsistent. (If there are alternative measures that would allow the activity to proceed in a manner consistent to the maximum extent practicable with the CMP, the state should describe them; however, failure to describe alternatives does not affect the validity of a state’s objection.¹⁰⁹) When a state issues an objection, the CZMA regulations urge the agencies to “attempt to resolve their differences” and encourage federal agencies to postpone the final federal action until the issues are resolved, utilizing dispute resolution mechanisms (e.g., mediation available through NOAA) as appropriate.¹¹⁰

The state also has the option of issuing a “conditional concurrence”: a letter that sets out the conditions which must be satisfied for the activity to be consistent, explaining why these conditions are necessary to ensure consistency with specified enforceable policies of the CMP. The federal agency is then required to modify the proposed project or plan pursuant to the state’s conditions or to immediately notify the state that its conditions are not acceptable, in which case the process continues as if the state had issued an objection.¹¹¹

¹⁰⁵ 15 C.F.R. § 930.39. The amount of detail in the evaluation of the enforceable policies, activity description and supporting information shall be commensurate with the expected coastal effects of the activity. The Federal agency may submit the necessary information in any manner it chooses so long as the requirements of this subpart are satisfied. *Id.*

¹⁰⁶ 15 C.F.R. § 930.39, see also § 930.32.

¹⁰⁷ 15 C.F.R. § 930.41. Public participation at minimum must consist of public notice for the area(s) of the coastal zone likely to be affected by an activity. The notice must include “sufficient information to serve as a basis for comment...” 15 C.F.R. § 930.42.

¹⁰⁸ The state is entitled to at least one 15-day extension upon its timely request. 15 C.F.R. § 930.41.

¹⁰⁹ 15 C.F.R. at § 930.43.

¹¹⁰ *Id.*

¹¹¹ 15 C.F.R. § 930.4.

If the disagreement cannot be resolved through negotiations and/or agreement on conditions, **the federal agency cannot proceed with the proposed activity over the state's objection unless: (1) it has been 90 days or longer since the federal agency provided the CD to the state; and (2) the federal agency has concluded that its proposed action is consistent with the enforceable policies of the CMP,** notwithstanding the state's disagreement, or has concluded it is consistent to the maximum extent practicable (and described legal impediments to full consistency in writing).¹¹²

"Generally, we try to resolve any differences with the State; however, the CZMA allows us to proceed with the lease sale notwithstanding any unresolved disagreements." –[BOEM](#)

While the CZMA does not have a citizen suit provision or provide other explicit remedies for a state that believes a federal agency action is proceeding in a manner not consistent to the maximum extent practicable, federal courts have held that judicial review of a federal agency's compliance with CZMA requirements is available through the Administrative Procedure Act (APA)¹¹³ and that the burden of demonstrating consistency to the maximum extent practicable falls on the federal agency.¹¹⁴ In 2006, Louisiana brought an action in federal district court against BOEM's predecessor agency, the Mineral Management Service (MMS), based in part on the state's claim that MMS acted arbitrarily and capriciously by issuing a CD that was inadequate under the CZMA's requirements.¹¹⁵ Asking the court to enjoin an offshore lease sale, the state claimed that the CD had failed to adequately address the activity's consistency with many of the applicable enforceable policies—i.e., the Coastal Use Guidelines—and had not supported the CD with necessary data and information.¹¹⁶ Although the preliminary injunction sought by the state was denied for other reasons, the court noted in its ruling that the facts indicated the state had a substantial likelihood of succeeding on the merits of the CZMA claim if the case were to proceed to a trial.

However, even a court ruling favorable to the state can be overridden by the executive branch; for example, this occurred in 2008 when the Department of the Navy—having suffered setbacks against plaintiffs in federal district and appellate court—sought and received a Presidential exemption from CZMA compliance based on a "paramount national interest" in the use of certain sonar technology during training exercises off the California coast.¹¹⁷

Review of Federal License and Permit Activities. **Any non-federal entity— i.e., private individual, business, organization, state or local government agency—that applies to a federal agency for a license, permit, or other authorization for an activity with coastal effects is subject to the CZMA and its regulations.** The general procedures for consistency review of federal license and permit activities are found in Subpart D of the CZMA implementing regulations (15 C.F.R. §§ 930.50 et seq.). As with direct federal actions, the BOEM renewable energy regulations provide additional guidance for consistency reviews in the context of specific activity types and property instruments.

¹¹² Id. at § 930.43

¹¹³ See, e.g., Friends of Earth v. United States Navy, 841 F.2d 927, 936 (9th Cir.1988).

¹¹⁴ See California Coastal Comm'n v. United States, 5 F.Supp.2d 1106, 1112 (S.D.Cal.1998).

¹¹⁵ See Blanco v. Burton, No. CIV.A. 06-3813, 2006 WL 2366046, at 7 (E.D. La. Aug. 14, 2006).

¹¹⁶ See id. The state argued "that by incorporating its analysis from earlier CDs without considering those Guidelines in the light of the destruction the 2005 hurricanes wreaked on coastal wetlands and barrier islands, MMS has failed to demonstrate that Lease Sale 200 is fully consistent with Louisiana's coastal use regulations." Id. At 11.

¹¹⁷ Section 1456(c)(1)(B) of the CZMA permits Presidential exemptions if the activity in question is "in the paramount interest of the United States. See Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 18, 129 S. Ct. 365, 373, 172 L. Ed. 2d 249 (2008).

In general, a federal license or permit activity with reasonably foreseeable coastal effects must be conducted in a manner consistent with enforceable policies of the affected state’s coastal management program, as determined in a consistency certification (CC) prepared by the permit applicant. However, there are three threshold questions that determine how the consistency review process unfolds in each situation: whether the activity is listed or unlisted; whether the activity takes place inside or outside the coastal zone; and whether the activity qualifies as an OCS plan under the CZMA regulations.

Listed vs. Unlisted Activities. The first threshold question is whether a federal license or permit activity appears on the state CMP’s NOAA-approved “list” of federal license and permit activities “which affect any coastal use or resource, including reasonably foreseeable effects, and which the [state] wishes to review for consistency with the management program.”¹¹⁸ A mandatory element of all CMPs, the list is approved as part of the original program document and can only be updated through program changes approved by NOAA-OCM. The list identifies the specific federal license and permit activities that are subject to regular consistency review by the state. States and federal agencies alike use the list to establish expectations regarding the types of federal licenses and permits for which a state expects to receive a consistency certification on a routine basis.

If federal license or permit activity is on the state’s list, no authorization for that activity can be issued by a federal agency until the applicant has complied with Subpart D of the CZMA regulations. It is the responsibility of the federal agency to inform applicants for listed activities of these requirements.¹¹⁹

If the federal license or permit activity is not on the list, it is considered an “unlisted activity” for consistency review purposes. Like all state CZMA agencies, LDNR-OCM is charged with keeping track of unlisted activities (e.g., through review of NEPA documents, Federal Register notices, and other intergovernmental coordination).¹²⁰ When the state identifies an unlisted activity affecting a coastal use or resource, it has 30 days after receiving notice of the proposed activity to notify the applicant, the approving federal agency, and NOAA-OCM that it seeks to review the unlisted activity for consistency with the enforceable policies of the state CMP.

The notification to NOAA-OCM is effectively a request for ad hoc authority to review an unlisted activity, and it must include an analysis that supports the state’s assertion of reasonably foreseeable coastal effects (i.e. documentation of the “effects test”).¹²¹ NOAA-OCM considers the state’s request—as well as any input provided by the applicant and/or the federal agency within 15 days of receiving notice—and typically issues a decision within 30 days, though the deadline may be extended for complex issues or other reasons.¹²²

If NOAA-OCM denies the state’s request for unlisted activity review, the applicant does not need to comply with the CZMA regulations, and the federal agency may approve the license or permit. If NOAA-OCM approves the request to conduct an unlisted activity review, the applicant and the federal agency both must comply with the consistency review procedures in Subpart D, described below.

Activities Outside the Coastal Zone. Another threshold issue is whether the activity will occur within or outside of the coastal zone. By default, a state’s list of federal license and permit activities covers listed activities occurring within the state’s coastal zone. If the state wishes to routinely review federal license or permit activities that

¹¹⁸ 15 C.F.R. § 930.53.

¹¹⁹ 15 C.F.R. § 930.53

¹²⁰ *Id.* at § 930.54.

¹²¹ *Id.*

¹²² *Id.*

occur outside the coastal zone but have reasonably foreseeable coastal effects, the list must include what is known as a geographic location description (GLD).

Typically incorporated in or attached to the list document, a GLD identifies: (a) a specific subset of federal license and permit activities; and (b) specific geographic boundaries outside the coastal zone in which such activities will be subject to consistency review. Most GLDs authorize review of activities in federal waters (OCS) or activities in other state's waters, though inland GLDs are theoretically possible. Like other modifications to the list, GLDs must be approved by NOAA-OCM based on the state's demonstration of the activity's coastal effects.¹²³

As of September 2022, Louisiana does not have any GLDs on its NOAA-approved list of federal license and permit activities.¹²⁴ This means that a federal license or permit activity taking place outside Louisiana's coastal zone—e.g., in federal waters on the OCS—is only subject to federal consistency review if LDNR-OCM requests and receives approval for an unlisted activity review.

OCS Plans. A third threshold determination is whether the federal license and permit activity is considered an “OCS plan” under the CZMA and its regulations. An OCS plan is “any plan for the exploration or development of, or production from, any area which has been leased under the Outer Continental Shelf Lands Act ... which is submitted to [BOEM] and which describes in detail federal license or permit activities.”¹²⁵ In other words, when an applicant for an offshore activity has already been issued a lease, any subsequent application(s) for federal license and permit activities will be reviewed as an OCS plan.

The distinction matters because “OCS plans” are covered by special consistency review procedures, which are codified at Subpart E of 15 C.F.R. Part 930. Applicants for OCS plans are required by the CZMA and its regulations to submit consistency certifications (and necessary data and information for consistency review) to BOEM at the same time they submit the proposed OCS plan and supporting information.¹²⁶ It is then BOEM's responsibility to transmit copies of the CC and other information to the state's CZMA agency, kicking off the procedures set out in Subpart E.

Although the BOEM regulations explicitly designate certain OCS authorizations as OCS plans to be reviewed for consistency pursuant to Subpart E (see Table I), **NOAA-OCM maintains that there is a difference between OCSLA oil and gas plans and renewable energy projects.** While CZMA review is automatic for OCS plans under the CZMA and its regulations, NOAA-OCM contends that when drafting the CZMA, Congress did not contemplate application of its OCSLA provisions to renewable energy, and therefore **renewable projects do not enjoy the same mandatory CZMA review.**¹²⁷ According to a 2021 presentation to the Intergovernmental Renewable Energy Task Force for the

¹²³ 15 C.F.R. § 930.53.

¹²⁴ Louisiana's list is available at <https://coast.noaa.gov/data/czm/consistency/media/la.pdf>.

¹²⁵ 15 C.F.R. § 930.11.

¹²⁶ 15 C.F.R. 9§ 30.76; see also 16 U.S.C. § 1456(C)(3)(b).

¹²⁷ ELI communication with NOAA-OCM (ca. 2017). See also NOAA-OCM, *Federal Consistency Overview*, *supra* note 88, at 17. (“[G]enerally, states have not had to describe [on their lists] geographic areas in federal waters where OCS oil and gas plans would be subject to state CZMA review. This is because the CZMA mandates such reviews and initially oil and gas projects were not far offshore. As the industry moves farther offshore, where a state should have CZMA review may not be as easily determined....[The state's] ability to review [OCS plans] stops at the point where coastal effects are not reasonably foreseeable. Whether coastal effects are reasonably foreseeable is a factual matter to be determined by the State, the applicant and BOEM on a case-by-case basis.”)

Gulf of Mexico by NOAA-OCM, “If non-federal applicant applies to BOEM for approval of a renewable energy project on the OCS, state CZMA review is not automatic.”¹²⁸

Rather, NOAA-OCM maintains that to be entitled to routine consistency review of renewable energy activities on the OCS, a state must “list” the specific OCSLA authorization and have a NOAA-approved GLD for federal waters (acknowledging “[t]his is different than state review of OCSLA oil and gas plans.”¹²⁹) **If a state CMP does not list the OCSLA authorization and/or have a GLD—which currently is the case in Louisiana¹³⁰— the state must request and receive NOAA-OCM approval to perform an unlisted activity review, unless the applicant voluntarily agrees to submit to CZMA review.**¹³¹

Review Procedures. Once it is determined that an applicant for a federal license or permit activity must prepare a consistency certification (CC) in connection with the application, the consistency review process is governed by the procedural requirements set out in Subpart D of the CZMA regulations (except for qualifying OCS plans). As part of the permit application (though not necessarily at the same time the application is submitted), the applicant must provide to the federal permitting agency a certification that the proposed activity complies with and will be conducted in a manner consistent with the enforceable policies of the state’s CMP.¹³² At the same time, the applicant must provide a copy of the CC to the state CZMA agency, accompanied by “necessary data and information” for the consistency review.¹³³

Upon request of the applicant, the state CZMA agency must provide assistance to the applicant in developing the necessary assessment and findings.¹³⁴ Under Subpart D, “necessary data and information” include several specific elements:

- a copy of the federal permit application;
- a copy of other materials provided to the federal agency in support of the application that are relevant to the state’s CMP, including but not limited to “a detailed description of the proposed activity, its associated facilities, the coastal effects, and any other information relied upon by the applicant to make its certification”; and
- information specifically identified in the CMP as necessary data and information for a CC.¹³⁵

¹²⁸ Kaiser, *supra* note 78 (emphasis added).

¹²⁹ *Id.*

¹³⁰ Louisiana’s list is available at: <https://coast.noaa.gov/data/czm/consistency/media/la.pdf>. Based on a review of the program change summaries available on NOAA-OCM’s Program Change Portal, the Louisiana list has been updated only once since the program was established, via a program change in 1986. See NOAA-OCM, Program Change Request Details: File No LA-1986-3, <https://coast.noaa.gov/czmprogramchange/#/public/change-view/441>.

¹³¹ According to NOAA-OCM, for all the renewable energy projects in the Atlantic to date, such projects “have either been within a state’s GLD or the applicant voluntarily agreed to state CZMA review.” Kaiser, *supra* note 78.

¹³² See NOAA-OCM, *Federal Consistency Overview*, *supra* note 88.

¹³³ 15 C.F.R. §§ 930.57-58.

¹³⁴ 15 C.F.R. § 930.58.

¹³⁵ ELI did not identify any specific “necessary data and information” requirements described by Louisiana in either the LCMP program document or the coastal management statutes and regulations.

Once the applicant has provided the state with a CC and all the necessary data and information, the state’s official six-month review period begins. (If the applicant’s initial submission to the state does not include all the necessary data and information, the state has 30 days to notify the applicant and federal agency of such, and the six-month period will not begin until the missing data and information has been received. The regulations also allow the state agency and applicant to mutually agree in writing to stay or “toll” the six-month review period.)¹³⁶

At this point, the state must ensure “timely” public notice of the proposed activity is issued in the areas of the coastal zone likely to be affected by the activity; hearings are not mandatory, but the state must provide a comment period long enough to reasonably inform the public, obtain comments, and develop a decision.¹³⁷ If possible, state CZMA agencies are encouraged to issue joint public notices (and hold joint public hearings) with other federal and state agencies for efficiency.¹³⁸

Although the state has six months to perform the consistency review, Subpart D urges state agencies to notify the applicant and federal agency of its concurrence or objection at “the earliest practicable time” and to provide updates if the review will last longer than three months. At the end of the six-month review period, if the state agency has not responded to the CC, concurrence is presumed.¹³⁹ After the state has issued a concurrence (or is presumed to concur with) the applicant’s CC, the federal agency may proceed with an approval of the license or permit application.¹⁴⁰

As with CDs, conditional concurrences are available for consistency certifications. Subpart D encourages the state agency and applicant to work together (if necessary) during the six-month review period to agree on conditions that would permit the state to concur and to consult with the approving federal agency to ensure any proposed conditions would also satisfy federal requirements.¹⁴¹

Box I: General Concurrences

The process is a bit different for certain categories of minor activities for which the state has adopted a *general concurrence*. A general concurrence is a tool available under Subpart D to help avoid repeated review of “minor federal license or permit activities which, while individually inconsequential, cumulatively affect” the coastal zone. The state CZMA agency may decide to issue a general public notice of general concurrence allowing “similar minor work in the same geographic area” to proceed without case-by-case consistency review, including any conditions that must be followed for the general concurrence to apply. The general concurrence conditions are included on the state’s list of federal permit and license activities, and typically (unless the state indicates otherwise), the applicant is still required to provide the state with a copy of the federal license and permit application, which allows the state agency to monitor the applicant’s adherence to the required conditions.

Source: 15 C.F.R. § 930.53.

¹³⁶ 15 C.F.R. § 930.60.

¹³⁷ *Id.* at § 930.61.

¹³⁸ *Id.*

¹³⁹ 15 C.F.R. § 930.62.

¹⁴⁰ If the federal agency determines prior to the state’s response that the license or permit should be denied on other grounds, it is required to immediately notify the applicant and the state agency. 15 C.F.R. § 930.62.

¹⁴¹ 15 C.F.R. § 930.62.

If the state CZMA agency objects to the CC and is unable to reach an agreement on conditional concurrence, the state must notify the applicant, the federal agency, and NOAA-OCM of the objection before the end of the six-month review period. An objection may be based on a conclusion that, after evaluating the CC, the proposed activity is inconsistent with the enforceable policies of the CMP. An objection also can be based on a determination that the applicant has not supplied the necessary data and information, even after a written request from the state agency. In either case the objection may—but is not required to—describe alternatives that may allow the proposed activity to be conducted in a manner consistent with the state’s enforceable policies.¹⁴²

Once the federal permitting agency has been notified of the state’s objection, the federal license or permit may not be issued unless or until the applicant has made a successful appeal.¹⁴³ The CZMA and its regulations establish an administrative appeal process for applicants for federal license and permit activities who receive objections to their consistency certifications. Subpart H of the CZMA regulations authorizes the Secretary to override the state’s objection for two reasons: the activity is “consistent with the objectives of the CZMA;”¹⁴⁴ or the activity is otherwise “necessary in the interest of national security” (i.e., national security interest would be significantly impaired if the activity does not go forward as proposed).¹⁴⁵

Beyond these substantive grounds, the Secretary (or NOAA-OCM) may override the state’s objection on procedural grounds (e.g., failure to meet review timelines or objection requirements)—and likewise, an applicant’s appeal to the Secretary may be dismissed for failure to comply with the appeal procedures.¹⁴⁶

If the Secretary overrides the state’s objection, the federal agency may issue authorization for the project.¹⁴⁷ If the Secretary declines to override the objection, the project may not be authorized by the federal agency. Either decision by the Secretary is considered a final action that is appealable in court under the APA.¹⁴⁸

¹⁴² Id. at § 930.63.

¹⁴³ 15 C.F.R. § 930.64.

¹⁴⁴ To override a state’s objection based on the objectives of the CZMA, the Secretary must make three findings: (1) the activity furthers the national interest in a CZMA objective or purpose in a significant or substantial manner; (2) the national interest furthered outweighs the adverse coastal effects of the activity (including cumulative effects); and (3) there is no reasonable, available alternative that would allow the activity to be conducted in a manner consistent with the CMP’s enforceable policies. 15 C.F.R. § 930.121. See also NOAA-OCM, *Federal Consistency Overview*, *supra*, at 19.

¹⁴⁵ 15 C.F.R. § 930.122.

¹⁴⁶ 15 C.F.R. § 930.129; see also NOAA-OCM, *Federal Consistency Overview*, *supra*, at 18.

¹⁴⁷ 15 C.F.R. § 930.129.

¹⁴⁸ NOAA-OCM, *Federal Consistency Overview*, *supra* note 88, at 16.

Box J: Ongoing Monitoring for Consistency

The CZMA regulations at Subpart D include a provision that requires the federal and state agencies to “cooperate” in efforts to monitor federal license and permit activities that have previously been approved, “in order to make certain that such activities continue to conform to both federal and state requirements.”

If the state CZMA agency determines that activities previously deemed to be consistent are later being conducted in a way (or are having an effect on any coastal use or resource) “substantially different than originally described” and therefore are no longer consistent with the CMP, the state must notify the federal agency, the applicant, and NOAA-OCM of a request for “remedial action.” Remedial actions sought must be linked to the substantially different coastal effects. If 30 days pass and the state still maintains non-compliance with the CMP, NOAA-OCM may intervene to require an amended CC or compliance with the originally approved CC.

Alternatively, if the applicant realizes between receiving the original CC and commencing the activity that coastal effects will be substantially different, further coordination with the state, federal agency, and NOAA-OCM may result in a supplemental CC.

Source: 15 C.F.R. §§ 930.65-.66.

TABLE I: Federal Consistency Requirements for OCS Renewable Energy Activities

OCS ACTIVITY	TYPE OF "FEDERAL ACTION"	CZMA REQUIREMENTS	BOEM REQUIREMENT	PROCEDURAL SUMMARY
Competitively Issued Instruments				
Commercial Lease Sale	Direct federal activity (by BOEM)	15 C.F.R. Part 930, Subpart C	See 74 Fed. Reg. at 19651 (Apr. 29, 2009).	To reduce the number of NEPA/CZMA reviews in connection with an OCS project and to reduce processing times for most SAPs, BOEM conducts one CZMA review to cover the lease sale action and site assessment ("SAP activities") anticipated at the time. When BOEM conducts a competitive lease sale, BOEM will determine if the sale activity has reasonably foreseeable coastal effects in one or more state coastal zones. If yes, BOEM submits a CD to the affected state(s) at least 90 days before the lease sale.
Commercial Lease Site Assessment Plan (SAP) (if the SAP is submitted before lease has been issued)	Federal license or permit	15 C.F.R. Part 930, Subpart D	30 C.F.R. § 585.612	If BOEM has not yet prepared a CD, the applicant submits a copy of the SAP, consistency certification, and necessary data and information pursuant to Subpart D to BOEM and the applicable state CZMA agency at the same time.
Commercial Lease SAP (if the plan must undergo additional environmental review after lease has been issued)	Federal license or permit (qualifies as "OCS plan")	15 C.F.R. Part 930, Subpart E	30 C.F.R. § 585.612	If BOEM determines that the action has changed to the extent that the previously conducted environmental reviews (i.e., review of proposed lease sale and site assessment activities) do not cover ¹⁴⁹ the proposed activities, BOEM will notify the applicant that additional information and reviews are required in connection with SAP. After receiving them from the applicant and determining completeness, BOEM forwards a copy of the COP, consistency certification, and associated data and information to affected states for consistency review.
Development Plan (COP) for Commercial Lease (submitted to BOEM after lease issuance)	Federal License or Permit (qualifies as "OCS plan")	15 C.F.R. Part 930, Subpart E	30 C.F.R. § 585.627	After receiving them from the applicant and determining completeness, BOEM forwards a copy of the COP, consistency certification, and associated data and information to affected states for CZMA consistency review.
Limited Lease (lease sale only; covers 6-month "preliminary term" prior to GAP submission)	Direct Federal Action (by BOEM)	15 C.F.R. Part 930, Subpart C	See 74 Fed. Reg. at 19651 (Apr. 29, 2009).	When BOEM conducts a competitive lease sale, BOEM will determine if the sale activity has reasonably foreseeable coastal effects in one or more state coastal zones. If yes, BOEM submits a CD to the affected state(s) at least 90 days before the lease sale.

Right-of-Way (ROW) Grant or Right-of-Use and Easement (RUE) Grant	Direct Federal Action (by BOEM)	15 C.F.R. Part 930, Subpart C	See 74 Fed. Reg. at 19651 (Apr. 29, 2009).	When BOEM conducts competitive issuance of grants, BOEM will determine if the sale activity has reasonably foreseeable coastal effects in one or more state coastal zones. If yes, BOEM submits a CD to the affected state(s) at least 90 days before the lease sale.
Development plan (GAP) for a limited lease, ROW or RUE (if GAP submitted <i>before</i> lease/grant has been issued)	Federal license or permit	15 C.F.R. Part 930, Subpart D	30 C.F.R. § 585.647	Applicant provides a copy of the GAP, consistency certification, and necessary data and information to the applicable state CZMA agencies and BOEM at the same time.
GAP for limited lease, ROW or RUE (if submitted <i>after</i> lease/grant issuance)	Federal license or permit (qualifies as “OCS plan”)	15 C.F.R. Part 930, Subpart E	30 C.F.R. § 585.647	After receiving them from the applicant and determining completeness, BOEM forwards a copy of the COP, consistency certification, and associated data and information to affected states for CZMA consistency review.
Non-Competitively Issued Instruments				
Commercial lease	Federal license or permit	15 C.F.R. Part 930, Subpart D	30 C.F.R. §§ 585.231, 585.611	The lease and SAP are processed simultaneously for a non-competitive lease. The applicant prepares a CC and concurrently submits it to affected state CZMA agency and BOEM, along with the proposed SAP and all supporting information and analysis required in Subpart D.
Combined COP and SAP (submitted for processing with lease application)	Federal license or permit	15 C.F.R. Part 930, Subpart D	See 74 Fed. Reg. at 19690 (Apr. 29, 2009).	The applicant prepares a CC and concurrently submits it to affected state CZMA agency and BOEM, along with the proposed COP/SAP and all supporting information and analysis required in Subpart D.
Development plan (COP) for commercial lease (if submitted after lease has been issued)	Federal license or permit (qualifying as “OCS plan”)	15 C.F.R. Part 930, Subpart E	See 74 Fed. Reg. at 19690 (Apr. 29, 2009).	After receiving them from the applicant and determining completeness, BOEM forwards a copy of the COP, consistency certification, and associated data and information to affected states for CZMA consistency review.
Limited lease, ROW, RUE	Federal license or permit	15 C.F.R. Part 930, Subpart D	See 74 Fed. Reg. at 19672 (Apr. 29, 2009).	The lease application and proposed GAP are submitted and processed simultaneously for a non-competitive lease or ROW/RUE grant. The applicant prepares a CC and concurrently submits it to affected state CZMA agency and BOEM, along with the proposed GAP and all supporting information and analysis required in Subpart D.

¹⁴⁹ If the action proposed under a competitively issued commercial lease does not change from that described in the environmental reviews conducted for the lease sale and site assessment activities, then no further environmental review would be required for an SAP.

Other Coastal Land and Estuarine Programs

Louisiana has a long history of coordinated coastal management, and several current programs that apply specifically to coastal lands are worth noting here.

Federal Coastal Wetlands Planning, Protection and Restoration Act (CWPPRA). The Federal Coastal Wetlands Planning, Protection and Restoration Act (CWPPRA or Act), also known as the Breaux Act, became law in 1990.¹⁵⁰ Its primary purpose was to create an interagency planning and decision-making body, the CWPPRA Task Force, which is led by the New Orleans District of the U.S. Army Corps of Engineers and is charged with selecting, overseeing, and funding coastal restoration projects in Louisiana.¹⁵¹ The Act also mandated the development of a Coastal Wetlands Conservation Restoration Plan (CWPPRA Restoration Plan) to “identify coastal wetlands restoration projects, in order of priority, based on the cost-effectiveness of such projects in creating, restoring, protecting, or enhancing the long-term conservation of coastal wetlands, taking into account the quality of such coastal wetlands...”¹⁵²

Under the Act, the CWPPRA Task Force must compile reports at least every three years to update Congress on the program’s progress.¹⁵³ Due to consistent Congressional reauthorizations to support the federal cost-share of projects, CWPPRA has continued to support coastal restoration in Louisiana for 30 years.¹⁵⁴ Projects selected for funding and management under the Act have incorporated a variety of coastal restoration techniques, including: diversions; freshwater reintroduction; sediment dredging and marsh creation; barrier island restoration; and more.¹⁵⁵ In total, 222

¹⁵⁰ CWPPRA, About CWPPRA: The CWPPRA Legislation, <https://lacoast.gov/new/About/> (accessed Oct. 2022); CWPPRA, Caring for Coastal Wetlands, https://lacoast.gov/new/Pubs/Report_data/Caring.aspx (accessed Oct. 2022).

¹⁵¹ La. Coastal Wetlands Conservation and Restoration Task Force, *The 2006 Evaluation Report to the U.S. Congress on the Effectiveness of Coastal Wetlands Planning, Protection and Restoration Act Projects* at page vii (2006), available at: [https://lacoast.gov/reports/program/CWPPRA 2006 Evaluation Report.pdf](https://lacoast.gov/reports/program/CWPPRA%2006%20Evaluation%20Report.pdf) (noting 70 percent of CWPPRA funding goes to the Task Force and the remaining 30 percent of funds go to non-Louisiana-based projects). Led by the District Commander of the New Orleans District of the U.S. Army Corps of Engineers, the Task Force also includes representatives from four other federal agencies and the state. See U.S. Army Corps of Engineers – New Orleans District, Coastal Wetlands Planning, Protection, And Restoration Act, <https://www.mvn.usace.army.mil/Missions/Environmental/CWPPRA.aspx> (listing the current members of the CWPPRA Task Force and their corresponding agencies) (accessed Sept. 2022).

¹⁵² Notwithstanding the general requirement to prioritize based on cost-effectiveness, the law provides for “due allowance for small-scale projects necessary to demonstrate the use of new techniques or materials for coastal wetlands restoration.” 16 U.S.C. § 3952.

¹⁵³ Coastal Wetlands Planning, Protection and Restoration Act § 303, 16 U.S.C. § 3952(b).

¹⁵⁴ U.S. Army Corps of Engineers – New Orleans District, *CWPPRA: Abbreviated Summary of the Act* at 13-14 (n.d.), available at: <https://www.mvn.usace.army.mil/Portals/56/docs/environmental/cwppra/CWPPRALegislation.pdf>.

¹⁵⁵ La. Coastal Wetlands Conservation and Restoration Task Force, *supra* note 151, at 12; see also Coastal Wetlands Planning, Protection and Restoration Act, CWPPRA Projects, <https://lacoast.gov/new/Projects/List.aspx> (accessed Oct. 2022).

projects have been approved for funding under CWPPRA, about half of which had been constructed as of 2020.¹⁵⁶ These projects have resulted in the protection or creation of almost 100,000 acres of wetlands statewide and the improvement of roughly 355,000 more.¹⁵⁷

In addition to facilitating interagency coordination through Task Force activities, the CWPPRA statute includes an explicit consistency provision, requiring that most U.S. Army Corps of Engineers projects be consistent with the purposes of the CWPPRA Restoration Plan. Under the law, “In implementing, maintaining, modifying, or rehabilitating navigation, flood control or irrigation projects, other than emergency actions, under other authorities, the [Corps], in consultation with [U.S. Fish and Wildlife Service] and the [U.S. Environmental Protection Agency], shall ensure that such actions are consistent with the purposes of the [CWPPRA Restoration Plan].”¹⁵⁸

Also pursuant to CWPPRA, Louisiana (through LDNR-OCM) has developed a separate plan known as the Coastal Wetlands Conservation Plan to help the state achieve the goal of “no net loss” of coastal wetlands. The development and approval of the Coastal Wetlands Conservation Plan triggered a provision of the Act allowing an 85 percent federal cost-share (instead of the default 75 percent federal share under the statute)¹⁵⁹.

The boundary for the plan was used in determining the “CELCP Area,” described below.¹⁶⁰

Comprehensive Master Plan for a Sustainable Coast. In 2007, decades of coordinated coastal planning in Louisiana culminated in the approval by the Coastal Protection and Restoration Authority (CPRA) of *Integrated Ecosystem Restoration and Hurricane Protection: Louisiana’s Comprehensive Master Plan for a Sustainable Coast* (hereinafter “Master Plan”). Approved by the legislature in 2007 and implemented by executive order in 2008, the Master Plan has acquired the force of law: all state agencies must administer their regulatory practices, programs, contracts, grants, and all other functions vested in them “in a manner consistent with the Master Plan and public interest to the maximum extent practicable.”¹⁶¹ As noted previously, the requirement of consistency with the Master Plan has been incorporated into the LCMP.

National Estuarine Research Reserves. Beyond the federal consistency authority, the federal CZMA has given rise to additional tools that Louisiana uses to protect coastal lands. The National Estuarine Research Reserve (NERR) system was created to protect coastal estuaries to allow long-term research, water-quality monitoring, education, and coastal stewardship. NERRs are a state-federal partnership between NOAA, which provides funding and guidance for land acquisition and management, and state agencies or other entities, which manage the reserves.¹⁶²

¹⁵⁶ U.S. Army Corps of Engineers – New Orleans District, Coastal Wetlands Planning, Protection, and Restoration Act, <https://www.mvn.usace.army.mil/Missions/Environmental/CWPPRA.aspx> (accessed Oct. 2022).

¹⁵⁷ CPRA, *2017 Coastal Master Plan* at 131, available at: <https://coastal.la.gov/our-plan/2017-coastal-master-plan/>.

¹⁵⁸ 16 U.S.C. § 3952.

¹⁵⁹ *Id.*

¹⁶⁰ LDNR, *State of Louisiana CELCP Plan* at 12 (May 2011), available at: <https://coast.noaa.gov/data/czm/landconservation/media/celcplanlafinal.pdf>.

¹⁶¹ La. Exec. Order No. BJ 2008 - 7.

¹⁶² See generally NOAA-OCM, National Estuarine Research Reserves—Overview, <https://coast.noaa.gov/nerrs/about/> (accessed Oct. 2022).

An estuary is eligible for inclusion in the NERR system only if state law provides long-term protection for reserve resources to ensure a stable environment for research and the state complies with other NOAA regulations.¹⁶³ These regulations allow multiple uses to the extent permitted by the applicable management plan provided that any uses must be consistent with the mission and goals of the NERR system.¹⁶⁴ Funding for land acquisition in the NERR system and other coastal areas is provided in part by the Coastal and Estuarine Land Conservation Program (CELCP), created as part of CZMA amendments in 2002.¹⁶⁵ CELCP is a competitive grant program that requires states to develop a coastal and estuarine land conservation plan and a process for identifying, ranking, and nominating qualified projects.¹⁶⁶

Louisiana currently participates in CELCP. As a first step in the funding process, LDNR developed and published in 2011 the Louisiana State CELCP Plan.¹⁶⁷ The plan describes (and maps) the geographic extent of coastal and estuarine areas within the state; describes the types of lands and associated values to be protected through the program and the need for conservation through acquisition; and identifies the state's priority areas for conservation. Additionally, after a long campaign by stakeholders, in 2019, Louisiana initiated the process of establishing its first NERR.¹⁶⁸

In the context of OSW development, lands acquired or protected through the NERR or CECLP programs may not be available or may require special attention, such as consulting the terms of a specific management plan or conservation easement, before they can be used for offshore energy transmission projects.

Public Lands and Water Bottoms

Under Louisiana's Civil Code, "public things" that are owned by the state or its political subdivisions include running waters; water and bottoms of natural navigable waterbodies; the territorial sea; and the seashore.¹⁶⁹ Enacted in 1978, Title 14 of Louisiana public lands law codified the state's public trust responsibility to protect, administer, and conserve state lands and water bottoms "to best ensure full public navigation, fishery, recreation, and other interests."¹⁷⁰ Today, the Louisiana Division of Administration oversees the protection, administration, and conservation of state lands and water bottoms consistent with the public trust doctrine.¹⁷¹ A sub-office of the division, the State Land Office (SLO), is responsible for "the control, permitting, and leasing of encroachments upon public lands."¹⁷²

¹⁶³ 16 U.S.C. § 1461.

¹⁶⁴ 15 C.F.R. § 921.1.

¹⁶⁵ 16 U.S.C. § 1456d.

¹⁶⁶ NOAA, *Coastal and Estuarine Land Conservation Program: Final Guidelines* (June 2003), available at: <https://coast.noaa.gov/data/czm/media/CELCPfinal02Guidelines.pdf>.

¹⁶⁷ LDNR, *State of Louisiana CELCP Plan*, *supra*.

¹⁶⁸ See LA SeaGrant, LaNERR, <https://www.laseagrant.org/deltanerr/> (accessed Sept. 2022).

¹⁶⁹ La. Civil Code, art. 450.

¹⁷⁰ La. R.S. § 41:1701.1.

¹⁷¹ *Id.*

¹⁷² La. R.S. § 41:1701. In addition to administering leases of public lands, SLO's duties in connection with this charge include developing and promulgating a comprehensive state master plan for the administration of state lands and water bottoms (to be approved by several other state agencies¹⁷²) and identifying and maintaining a current master list of all public lands and water bottoms in the state.

The SLO's duties include, among other things, implementing several authorities which may be relevant to OSW development on or adjacent to Louisiana's public lands: water bottom permits and leases; rights-of-way; and general-purpose leases of public lands. The following section focuses on these authorities and other key statutory provisions authorizing and limiting the use of public lands for renewable energy generation and transmission.

Leases of State Land for Production of Wind Energy

Specific Authorization of Leases for Wind Energy. Since 2005, Louisiana public lands law has explicitly authorized leases of state lands for the “exploration, development, or production of energy from wind.”¹⁷³ According to the legislature, the intent of the law is to “ensure the viability of the state's natural resources, to provide a continuing energy source for the citizens and businesses of Louisiana, to promote economic development through job retention and creation in Louisiana, and to promote a clean and lasting environment,” by enabling LDNR to promote the generation and use of renewable energy from wind.¹⁷⁴ The statute authorizes LDNR to promulgate implementing regulations, which should include “all provisions necessary to accomplish” this intent.¹⁷⁵

The statute authorizes LDNR, in conjunction with the State Mineral and Energy Board (SMEB), to lease for wind energy “any lands belonging to the state or the title to which is held by the state, including water bottoms, vacant state lands, and lands adjudicated to the state at tax sale, except lands that form any portion of state highway right-of-way.” The law includes explicit provision (“notwithstanding any other provision of law”) for the State Mineral and Energy Board to lease state property under the jurisdiction of the LDWF or the state Wildlife and Fisheries Commission, including but not limited to wildlife management areas and refuges, as long as the Secretary of the Department of Wildlife and Fisheries approves.¹⁷⁶

The statute itself outlines the basic leasing process, but much more detailed procedures are set forth in LDNR's implementing regulations (La. Admin. Code Title 43, Part V, Chapter 7), most recently repromulgated in 2015. The regulations break the state wind leasing process into nine steps: (1) registration by applicants with the Office of Mineral Resources; (2) pre-nomination research; (3) nomination of state lands and water bottoms for wind lease; (4) examination and evaluation of the nomination; (5) issuance of an advertisement of the state tract to be offered for a wind lease and a request for bids; (6) submission of bids; (7) examination and evaluation of bids; (8) award of the state wind lease; and (9) issuance and execution of the state wind lease contract.¹⁷⁷

The first step for a prospective leaseholder is to register with Louisiana's Office of Mineral Resources (OMR) using a form obtained from that agency, which provides OMR with certain information about the prospective applicant (including, for all entities except individuals/sole proprietorships, proof of a current authorization to do business in the state.)¹⁷⁸

Another step that must occur before an applicant can propose a lease location (i.e., “nominate state lands or water bottoms for lease”) is “pre-nomination research.” This involves determining whether the location falls into any of six special categories, and if so, complies with the category's requirements. The special categories are: (1) property under

¹⁷³ La. R.S. § 41:1733; see also 2005 La. Sess. Law Serv. Act 481 (H.B. 428).

¹⁷⁴ La. R.S. § 41:1731.

¹⁷⁵ Id. at § 1734.

¹⁷⁶ Id. at § 1732.

¹⁷⁷ 43 La. Admin. Code Part V § 705.

¹⁷⁸ 43 La. Admin. Code Part § 707. The registration must be renewed annually by the end of January, even by current lessees, who face potential liquidated damages of \$100 per day for failure to properly register. Id.

the jurisdiction of either LDWF or the Wildlife and Fisheries Commission (e.g., wildlife management areas, refuges); (2) school indemnity lands; (3) tax-adjudicated lands; (4) vacant state lands; (5) White Lake; and (6) “legal areas,” a term used to describe state lands or water bottoms whose title “may have been established by compromise,” without or during litigation or by adjudication in a court of law.¹⁷⁹

The pre-nomination research determines and confirms that the lands or water bottoms in question (hereinafter referred to as “the proposed wind lease location”) are “available for wind lease,” and the regulation goes on to list “some conditions indicating availability.” These include the proposed location not having been “taken out of commerce for the purpose of wind leasing” by SMEB; and the proposed location being subject to “an active or non-released land use agreement” granted by the state (and the listed users having been notified).¹⁸⁰

Next, having registered and scheduled a “pre-nomination meeting” with OMR, the applicant submits the wind lease proposal (“nomination”) and a \$400 processing fee to that agency. The application must include certain minimum information, provided in the specific form(s) prescribed by the regulations. The necessary information includes but is not limited to geographic coordinates, acreage calculations (both including and excluding any LDWF or Wildlife and Fisheries Commission property in the area), and a plat of the nominated acreage.¹⁸¹ As of September 2022, the regulations have not been updated to reflect the **legislature’s recent action to expand the maximum acreage for a wind lease from 5,000 acres to 25,000 acres**, but presumably nominations may now identify proposed locations up to the new limit.¹⁸²

The plat is required to clearly identify and label certain geographic features and existing property rights within and near the proposed lease area. These include, but are not limited to:

- All state-owned lands and water bottoms falling within the nomination area;
- Any lands and water bottoms within the nomination area that do *not* belong to the state;
- Any areas falling into one of the six special categories described previously;
- An outline of any active (or non-released) land use agreement granted or advertised by the state that is within, intersecting, abutting, or adjacent to the proposed wind lease location¹⁸³;
- All water bodies; and
- The block name and number (if applicable); the section/township/range (if applicable); and parish name(s).

The applicant is required to provide a “summary of the environmental issues”— e.g., “avian and baseline noise levels, the environmental impact of the placement of wind turbines and other equipment necessary for the exploration, development and production of wind energy, and the steps proposed to minimize the environmental impact, along with any supporting environmental impact documentation.”¹⁸⁴ The application also must include a list of, and contact information for, all of the federal, state, parish, and local governmental entities having jurisdiction over the proposed lease area. Beyond this minimum information necessary for a nomination, OMR may require additional information and/or documentation at its discretion.¹⁸⁵

¹⁷⁹ 43 La. Admin. Code Part V § 709.

¹⁸⁰ *Id.*

¹⁸¹ 43 La. Admin. Code Part V § 711.

¹⁸² See La. R.S. § 30:127 as amended by 2022 La. Sess. Law Serv. Act 443 (H.B. 165).

¹⁸³ An existing or advertised land use agreement could be, e.g., a wind lease, mineral lease, operating agreement, exclusive geophysical agreement, non-exclusive seismic permit, state right-of-way, surface/subsurface agreement.

¹⁸⁴ 43 La. Admin. Code Part V § 711.

¹⁸⁵ *Id.*

The state’s examination and evaluation of the application begins with OMR, where staff make a preliminary determination whether “the state wind lease nomination complies with legal, procedural and technical requirements, as well as with any current policies and practices.”¹⁸⁶ If so, OMR puts the nomination on the agenda for the next meeting of the SMEB’s Tract Evaluation Committee and transmits the portion of the proposal that details the location of the proposed lease to two other agencies who administer leases of state lands: the State Land Office (SLO) and LDWF.¹⁸⁷ These agencies review the proposed lease location and either (1) certify to SMEB that there are no other leases of any kind on the proposed location; or (2) notify SMEB that there are other leases in at the location, attaching a copy of such leases.¹⁸⁸

Next, OMR forwards the application and certifications (or copies of any other leases on the proposed location, if they exist) to the Secretary of LDNR, who is charged with evaluating “whether the lands proposed for lease best support the exploration, development, or production of energy from wind.”¹⁸⁹ **In evaluating the application, the Secretary must consider three factors: the capability of the lease proposal to further the intent of the law¹⁹⁰; the environmental impact of the placement of wind turbines “and other equipment necessary” for wind energy exploration, development, and/or production; and the impact of the proposed lease on other leases, including leases for the exploration or production of subsurface resources.**¹⁹¹

The Secretary of LDNR is required to consult with LDWF in cases where the proposed lease is located on property under the jurisdiction of LDWF or the Wildlife and Fisheries Commission, and at his discretion may consult with “any other state agency or governmental entity that may have jurisdiction within the confines of the proposed lease.”¹⁹²

“Some tracts available for wind leasing may be situated in the Louisiana Coastal Zone ... and may be subject to guidelines and regulations promulgated by [LDNR-OCM] for operations in the Louisiana Coastal Zone.” 43 La. Admin. Code Part V § 715

If based on the evaluation the Secretary of LDNR determines that the proposed lease is “appropriate,” LDNR recommends to SMEB that it conduct a public bid process.¹⁹³ (Otherwise, LDNR notifies SMEB of the negative determination, who in turn notifies the applicant that no bid process will occur.) As part of the public bid process, OMR must publish in the official state journal and relevant parish journals an advertisement of the tract being offered for wind lease, which requests bids for a wind lease on state lands or water

¹⁸⁶ 43 La. Admin. Code Part V § 713.

¹⁸⁷ La. R.S. § 41:1733. Pending a decision on the application, OMR “take[s] the area out of commerce for the purpose of wind leasing while the nomination is being evaluated.” 43 La. Admin. Code Part V § 713.

¹⁸⁸ La. R.S. § 41:1733. The statute authorizes imposition of fees on the applicant to enable SLO and LDWF to fulfill these requirements, subject to APA rulemaking.

¹⁸⁹ La. R.S. § 41:1733.

¹⁹⁰ As noted previously, the stated intent of the law authorizing state wind leases is to “ensure the viability of the state’s natural resources, to provide a continuing energy source for the citizens and businesses of Louisiana, to promote economic development through job retention and creation in Louisiana, and to promote a clean and lasting environment.” La. R.S. § 41:1731.

¹⁹¹ La. R.S. § 41:1733.

¹⁹² Id.

¹⁹³ Id.

bottoms with a primary term of 5 years.¹⁹⁴ The notice(s) must be published at least 60 days, but no longer than 120 days, prior to any lease sale. Per the regulations, bids—which are irrevocable after submission—must be for the whole tract, not portions (despite SMEB’s authority to grant a *lease* “in whole or in part.”)¹⁹⁵ Notably, the 2022 amendments to the law repealed requirements for setting minimum dollar and royalty amounts in connection with the advertisement for bids.¹⁹⁶ **If any “party” (not further defined) opposes a wind lease on the advertised tract, they must submit a formal letter of protest to SEMB at least seven days before the board meets to receive bids.**¹⁹⁷

Any “bid packet” submitted in response to the advertisement must include, among other things, information about the bidder’s experience in the development and production of wind energy, a proposed “plan of operations” (including an overall business plan, layout of power and transmission facilities, details on towers and platforms, etc.), a summary of the overall project and timeframe (including status of wind data reviews and application process with the transmission provider), a summary of expected revenue and cash flow, the measures proposed to reduce risk to the state pursuant to industry standards (see more below), an environmental summary, and a summary of how the project will further the legislative intent for the leasing program.¹⁹⁸

The statute authorizes SMEB to accept “the bid it finds is most advantageous to the state,” affording considerable latitude to the board in its decision.¹⁹⁹ This discretion is explicitly affirmed in the regulations, which state that SMEB “does not obligate itself to accept any bid. Bid acceptance or rejection is at the sole discretion of the [SMEB] which reserves the right to reject any and all bids or to grant a wind lease on any portion of the state tract advertised and to withdraw the remainder of the tract.”²⁰⁰

After a bid is accepted, the bidder has 20 days from receiving a properly executed lease contract from SMEB to execute and return the contract to OMR (or else may face forfeiture of the lease). Leases must be executed upon the terms and conditions provided in the “current state wind lease form,” as well as “any attached riders” (pursuant to SMEB’s discretion to grant a lease “upon

Box K: Coordinating with Other Users of a State Wind Lease Area

- The state wind lease regulations require all bids to include a “summary of how the use of the state land and water bottoms for the exploration, development and production of wind energy will be coordinated with other users of the state lands and water bottoms.”
- In entering a lease contract, the state reserves “full use” and “all rights with respect to” surface and subsurface land uses of the lease area, except for those explicitly granted to the wind lessee. In effect, this may mean the leased area can still be used for exploration, production, and development of oil, gas, and/or other minerals by the state or another lessee/grantee/permittee.
- Co-users of the leased area must agree to coordinate plans and cooperate on activities to minimize interference with other operations to the extent possible.

Source : 43 La. Admin. Code Part V §§ 715, 717.

¹⁹⁴ 43 La. Admin. Code Part V § 715.

¹⁹⁵ Id.; La. R.S. § 41:1733.

¹⁹⁶ 2022 La. Sess. Law Serv. Act 443 (H.B. 165). As of September 2022, the implementing regulations had not been updated to reflect the change.

¹⁹⁷ 43 La. Admin. Code Part V § 715

¹⁹⁸ 43 La. Admin. Code Part V § 717.

¹⁹⁹ La. R.S. § 41:1733.

²⁰⁰ Id.

whatever terms it considers proper”).²⁰¹ Minimum terms include protections for the state against various legal recourse²⁰² and a provision permitting the state, at its option, to “take in kind all or any of the portion due it as royalty”.²⁰³ **As part of the 2022 wind energy legislation, the legislature authorized SMEB to “enter into operating agreements whereby the state receives a share of revenues from the production of” wind energy,** akin to the royalty agreements already used in Louisiana for oil, gas, and other minerals.²⁰⁴

To help ensure wind energy development and operations under the lease conform to best practices and industry standards, the lease contract must require the lessee (and lease operator) to “take measures to reduce risk to the state.”²⁰⁵ Such measures include “effecting compliance with any and all wind energy standards” established by ANSI, AWEA, the International Electrotechnical Commission, and/or “any other entity responsible for establishing wind industry consensus standards.” **These include, but are not limited to, industry standards for wind turbine safety and design, power performance, noise/acoustic measurement, mechanical load measurements, blade structural testing, power quality, and siting.**²⁰⁶

Other mandatory lease provisions include:

- All wind data collected by the lessee during the primary (5-year) term of the lease is to be made public at the end of the primary term;
- In general, the lease contract must maintain and preserve access by the public to “public waterways” running through the state lands covered by the lease;
- Lessee must have an approved general liability insurance policy in place prior to starting construction; and
- Lessee must provide “financial security in a form acceptable” to SMEB prior to starting construction.²⁰⁷

When the five-year primary term ends, the state wind lease cannot be renewed unless the lessee is producing wind-generated electric power. Regardless, ten years after the lease was first issued (or five years after electric power production begins, whichever is sooner), the lessee is required to “release undeveloped acreage” according to procedures set forth in the regulations.²⁰⁸

²⁰¹ 43 La. Admin. Code Part V § 715; La. R.S. § 41:1733.

²⁰² E.g., Leases must not include any express or implied warranty of title and must be granted and accepted without any recourse against the lessor (i.e., the state), who also may not be required to return any payments. 43 La. Admin. Code Part V § 715.

²⁰³ La. R.S. § 41:1733.

²⁰⁴ La. R.S. § 30:209, as amended by 2022 La. Sess. Law Serv. Act 443 (H.B. 165). The state wind lease law generally requires all “bonuses, rentals, royalties, payments, or other sums due the state” under leases for exploration, development, or production of wind energy be paid to the Office of Mineral Resources for distribution by the state treasurer to appropriate state accounts: 25% to the Wetlands Conservation and Restoration Fund and 75% to the state general fund, except for payments received for leases on DWF or Wildlife and Fisheries Commission properties, all of which are deposited into the Wildlife and Fisheries Conservation Fund. See La. R.S. § 41:1732.

²⁰⁵ 43 La. Admin. Code Part V § 715.

²⁰⁶ Id.

²⁰⁷ Id., see also id. at § 729 (describing required “pre-operations packet”).

²⁰⁸ 43 La. Admin. Code Part V § 729.

The lease must also provide for decommissioning when wind energy production ends. The detailed decommissioning procedures in the state wind lease regulations (Section 733) may soon be updated to reflect the 2022 legislative amendments, which revised the law’s original decommissioning requirement (which had incorporated by reference procedures used for oil, gas, and sulphur facilities). Now, any lease of state land for wind energy must require “a decommissioning plan for the end of the facility’s expected life or upon circumstance that would require closure of the facility.”²⁰⁹ The mandatory decommissioning plan must include the “estimated cost of site closure and remediation” (i.e., removing the wind energy production facility and related infrastructure and restoring the property as nearly as reasonably possible to pre-construction conditions).²¹⁰ Also as of 2022, lessees must comply with the decommissioning rules and regulations used by BOEM for renewable energy facilities on the Outer Continental Shelf.²¹¹

Wind Leases as Alternative Energy Source Leases – Prior Written Approval from Ports or Districts. Since 2010, the Louisiana legislature has authorized the State Mineral and Energy Board (SMEB) to lease state lands and water bottoms²¹² for the exploration, development, and production of energy from “alternative energy sources.”²¹³ Wind energy was included in the definition of alternative energy source (AES) for purposes of the law governing alternative energy source leases (AESL). In addition to authorizing issuance of AESLs and providing SMEB with rulemaking authority, the AESL statute provides for approval of certain leases by ports; harbor and terminal districts; and/or port, harbor and terminal districts (hereinafter referred to collectively as “port(s) or district(s)”).

Given the detailed regime set out in the state wind lease statute and regulations, leases for wind energy are generally exempt from compliance with the state regulatory procedures governing AESLs.²¹⁴ However, wind leases *are* subject to a specific requirement in the AES law (and two corresponding sections of the AESL regulations, which merely reiterate the statutory provisions): prior written approval from ports or districts.²¹⁵

If a state lease for AES development, including wind energy, will “affect” (a) lands owned, leased, or held by servitude by a port or district; and/or (b) public navigable waters that flow through any lands within the jurisdiction of a port or district, then the lease may not be granted without *prior written approval* from the affected port or district.²¹⁶ The port or district’s discretion is somewhat limited, however: their approval must “not be unreasonably withheld” unless the lease would be “detrimental to the needs of commerce and navigation.”²¹⁷ The

²⁰⁹ La. R.S. § 41:1732, as amended by 2022 La. Sess. Law Serv. Act 443 (H.B. 165) .

²¹⁰ *Id.*

²¹¹ La. R.S. § 41:1732, incorporating the provisions of 30 C.F.R. § 585.900 et seq. “to the extent they are not inconsistent with the provisions of this Section or any rules or regulations promulgated pursuant to this Chapter.”

²¹² The alternative energy source statute explicitly includes “road beds, water bottoms, vacant state lands, and lands adjudicated to the state at tax sale” in the description of state property holdings that may be included in an AESL.

²¹³ See La. R.S. § 30:124, as amended by 2010 La. Sess. Law Serv. Act 875.

²¹⁴ La. R.S. § 30:124. Alternative energy sources are defined non-exhaustively to include wind energy, geothermal energy, solar energy, and hydrokinetic energy.

²¹⁵ See 43 La. Admin. Code Part V § 903. (“The Alternative Energy Source Rules as set forth in Chapter 9, except as provided in § 912 and § 913, do not apply to wind energy or geothermal alternative energy sources.”)

²¹⁶ La. R.S. § 30:124.

²¹⁷ *Id.*

statute expressly forbids ports and districts from receiving “compensation” in exchange for their approval (though it does require reimbursement for “actual expenses incurred” in connection with reports or studies undertaken in connection with their approval decision).²¹⁸ If a port or district declines to grant an approval, the SMEB notifies the lease applicant, who then has 60 days to request an administrative hearing, during which the port or district will have the burden of proof in showing that the lease would be detrimental to commerce and navigation. Following a final order of the administrative law judge, either party may appeal to the district judge in East Baton Rouge.²¹⁹

Water Bottom Permits and Leases

States have jurisdiction over waters and submerged lands within their borders but also exercise jurisdiction out to three nautical miles off their coasts (though some federal permitting requirements may apply within the three-mile limit for various activities).²²⁰ **The Louisiana Constitution generally prohibits the “alienation” by the state of its water bottoms—meaning total ownership may not be transferred— but explicitly authorizes leases of state water bottoms “for mineral and other purposes.”**²²¹ According to a 2018 inventory by the State Land Office, the state claims ownership of over 5.7 million acres of water bottoms.²²²

The SLO’s Land and Water Bottom Management Section is responsible for implementing programs related to the control, permitting, and leasing of “encroachments” (defined to include “any construction, or improvement, obstacle, fill, or material which is placed upon or maintained upon”) on state water bottoms.²²³ For purposes of the law’s permit and leasing requirements, state water bottoms include the beds and bottoms of all navigable waters and the banks or shores of bays, arms of the sea, the Gulf of Mexico, and navigable lakes.²²⁴

Water Bottom Permits. In Louisiana, a permit is required prior to commencing any work to construct, create, alter, improve, extend, or maintain any wharf, pier, dock, bulkhead, landfill, structure, or other encroachment on state water bottoms, unless the activity is specifically exempt (see Box L for examples of exempt activities).²²⁵ State public lands law establishes different classes of encroachment permits based on the location and/or use. Among these classes (categorized A through E), the two most likely to apply to encroachments related to OSW development are:

- **Class C Permits:** Construction of commercial wharves and piers.

“Wharf” means a structure built upon pilings extending along the shore and generally connected with the bank or shore along its length, which is built or maintained for the purpose of providing a berthing or mooring

²¹⁸ La. R.S. § 30:124.

²¹⁹ Id.

²²⁰ The federal government approved and confirmed state jurisdiction out to three miles through the Submerged Lands Act. 43 U.S.C. § 1312. In Texas and West Florida this jurisdiction extends to three marine leagues, or nine nautical miles.

²²¹ La. Const., Art. IX § 3.

²²² See La. Legislative Auditor, Inventory of State Lands (Aug. 22, 2018), available at: <https://biotech.law.lsu.edu/blog/0001A476.pdf>.

²²³ La. R.S. §§ 41:1701 et seq. Authorizing the SLO to regulate “encroachments” is based on a legislative determination that “unregulated encroachments upon [public lands] may result in injury and interference with the public use and enjoyment and may create hazards to the health, safety, and welfare of the citizens of this state.” Id. at § 1704.

²²⁴ La. R.S. § 41:1701.

²²⁵ La. R.S. § 41:1706.

place for watercraft or for loading or unloading cargo or passengers onto or from watercraft.²²⁶ To the extent an OSW-related project requires construction of facilities on state water bottoms for unloading cargo or persons related to OSW construction or operations, a Class C permit may be required.

- **Class D Permits:** Construction of structures other than wharves, piers, and coastal restoration projects.

“Structure” means any encroachment upon state lands (other than those which are specified as the subject matter of a particular class of permit) which is permanently attached to the public lands by pilings, or other means, including, but not limited to storage docks, houses, camps, warehouses, residences, bulkheads not proximate to the shore or bank, business establishments, dams, bridges, impoundment structures, or similar works.²²⁷ As the catch-all encroachment permit category, Class D permits may be required for construction of many types of facilities related to OSW, including but not limited to transmission infrastructure and other onshore support facilities.

According to rules issued by SLO to implement the state water bottom leasing program (as revised and published in 2018), the application process begins when the applicant sends the Division of Administration a letter describing proposed physical work, materials to be used, and the body of water involved.²²⁸ The agency then sends the applicant the appropriate permit application form and a copy of the regulations.²²⁹ In addition to filling out the appropriate permit application for SLO, the applicant must apply to the parish government(s) for approval and to the U.S. Army Corps of Engineers for the appropriate federal permit, with public notice issued in connection with one or both applications. In general, encroachment permits expire after two years, at which time the permittee must formally apply to SLO to perform remaining or additional work.²³⁰

Box L: Selected Examples of Encroachments *Not* Requiring Permits

- Piers, wharves, structures, or other improvements within the jurisdiction of any deep-water port commission;
- Temporary extensions to existing encroachment added for a period not to exceed six months, if required by low or high water, unless unduly interfering with public navigation or fishery;
- Ordinary repairs and maintenance to existing encroachments;
- Operations upon navigable waters by the United States Army Corps of Engineers in exercise of their authority over navigation;
- The establishment and maintenance of any encroachment by a state agency in the discharge of its lawful duties or functions;
- Pipeline rights-of-way granted over state lands by the estate; or
- Commercial and noncommercial wharves and piers extending over public lands less than 50 linear feet whose surface area does not exceed 150 square feet, unless part of another encroachment or system or unduly interfering with public interests, navigation, or fishery.

Source: La. R.S. § 41:1705.

²²⁶ Id. at § 1704.

²²⁷ Id.

²²⁸ SLO, State Water Bottom Management: State of Louisiana Rules and Regulations to Implement Act 645 of 1978 at p. 5 (rev. Oct. 2018), available at: <https://www.doa.la.gov/media/ukeoniza/rules.pdf>.

²²⁹ Id. at 5.

²³⁰ La. R.S. § 41:1711.

Lease to Maintain Encroachment. After the construction permit is issued, some owners or occupiers of permitted encroachments must go on to obtain a lease from SLO for “continuing maintenance” of the encroachment.²³¹ A lease is needed for all encroachments requiring a Class C or Class D permit.²³² These leases are *not* subject to competitive bidding, and the rental amount (“consideration”) is determined based on the size of the encroachment (linear feet, area, value) and extent to which the public interest is impaired.²³³

Under the law, the SLO is compelled to grant the lease if “the best interests of the state and applicant will be served” (and subject to approval by the state attorney general).²³⁴ **If the encroachment, activity, or lease would obstruct or hinder navigability, impose “undue or unreasonable restraints” on the state or the public’s rights, or would injure or interfere with the public interest or usage, the application should be limited or denied.**²³⁵ The primary term of a water bottom lease may not be longer than 5 years, though each lease may be renewed up to nine times (in increments of five years or less), up to a maximum of 50 years total (at which point a new lease must be obtained).²³⁶

Leases to maintain encroachments are not required for certain types of encroachments subject to different state leasing regimes, including encroachments in non-navigable waters and activities by a governmental entity (e.g., parish, municipality, the state highway agency) on water bottoms of state-owned lakes, bays, and coves.²³⁷

If an encroachment is located wholly upon state water bottoms—i.e., not “proximate” to any shore or bank—the lease *may* be issued under the procedures, terms, and conditions for general-purposes leases of public lands (described below), as long as the lease is limited to the “area reasonably required to operate or maintain the encroachment.”²³⁸ This option may be considered preferable to the encroachment-maintenance leasing process, depending on the circumstances; for example, the general-purpose lease may be preferred by applicants seeking leases with a primary term longer than five years. Also, it is important to note that **state water bottom leases and permits are legally “subordinate” to all prior servitudes, permits, and leases, and to any future oil, gas, and mineral lease.**²³⁹ Moreover, the state (or an agency having authority) can grant servitudes and other leases affecting the same property without the consent of the water bottom lessee, unless it would “interfere unreasonably and permanently” with the lessee’s use of the property.²⁴⁰ Obtaining a lease through the general-purpose process instead *may* provide the lessee different or stronger protections against future uses, and thus may be preferable to some applicants.

²³¹ *Id.* at § 1708.

²³² The lease is not required for non-commercial wharves and piers.

²³³ See *id.* at § 1709, SLO, *supra* note 228.

²³⁴ La. R.S. § 41:1709.

²³⁵ *Id.* at § 1712.

²³⁶ *Id.* at § 1709; see also SLO, *supra* note 228, at 7.

²³⁷ Leases by the SLO of non-navigable waters as declared by Congress are authorized under La. R.S. § 41:91. Leases by the SLO to governmental entities of state-owned lakes, bays, and coves “primarily for public recreation” are authorized under La. R.S. § 41:1501-09.

²³⁸ La. R.S. § 41:1710. The law authorizing and establishing procedures for the leasing of public lands for “general purposes” is found at La. R.S. § 41:1213.

²³⁹ La. R.S. § 41:1711.

²⁴⁰ *Id.*

LDWF Dredge and Fill License. In addition to any other permits and permissions, any dredging of sand or fill material from state water bottoms requires a license from LDWF.²⁴¹ Of the five classes of licenses, one is most likely to be relevant to OSW-related dredging: Class B, which applies to “dredging of fill sand or fill material for commercial purposes other than the specific intent to offer such fill for resale....”²⁴²

LDWF dredging licenses are valid for a single calendar year (regardless of when during the year it is purchased). In addition to a nominal processing fee, holders of Class B licenses must pay a “royalty” of 25 cents per cubic yard of material dredged.²⁴³ (The statute notes explicitly that Class B licensees may not sell the dredged material, to recover the royalty or otherwise.²⁴⁴)

Rights-of-Way

Offshore renewable energy transmission lines that come ashore in Louisiana must connect to the existing power grid. To do so, they will need to travel across nearshore and onshore areas to reach the point of interconnection.

Rights-of-Way on Public Lands. Louisiana public lands law provides broad authority for the governor and SLO to grant “rights of way across and through any public lands belonging the state to any person or corporation doing business in [Louisiana], provided that adequate consideration is paid” to the state in exchange for the right.²⁴⁵

General procedures for issuing rights-of-way are found in regulations adopted by the SLO, which were most recently updated in 2017.²⁴⁶ Based on the language of the regulations, it is assumed that most or all rights-of-way will be for “pipelines,” but in theory, the same right-of-way issuance procedures could be applied to other linear facilities—e.g., subsea transmission cables. Stakeholders may wish to clarify with SLO the applicability or not of these regulations to subsea transmission cables.

To acquire a right-of-way, the corporate or individual applicant must use the “state right of way form” provided by the SLO.²⁴⁷ Information in the application must include a description indicating the length of the right of way, its location (block number, if offshore; section, township, and range if on land), the name of any waterbody to be crossed, the size of the “pipe” and its location within the right of way, and the product (including estimated volume) to be transported, among other elements of the proposal.

In all cases, the route of a “pipeline” is subject to approval by the Commissioner of the Division of Administration.²⁴⁸ Express consent and approval from the Commissioner also is needed for any “above-ground installations” associated with the project, and additional compensation (beyond the standard length-based fee) may be required. In some cases,

²⁴¹ La. R.S. § 56:2011. While certain activities may be exempted from the royalty payment, there is only one exemption for the licensing requirement: dredging by or on behalf of a port authority/harbor/terminal district.

²⁴² The definition names the specific example of “operations related to mineral activities,” which suggests other energy production activities to which dredging is incidental would fall into the same permit category. La. R.S. § 56:2011.

²⁴³ Id. See also 76 La. Admin. Code Part XIII § 101.

²⁴⁴ Id.

²⁴⁵ La. RS § 41:1173.

²⁴⁶ 43 La. Admin Code Part XXVII § 2701.

²⁴⁷ Id.

²⁴⁸ Id.

notice to or permission from another governmental entity is also required. Permission or “clearance” must be obtained from any agency having permit authority or jurisdiction over the proposed project/operation, including but not limited to the U.S. Army Corps of Engineers, State Office of Public Works, Department of Transportation and Development, Department of Environmental Quality, Water Pollution Control Division, LDWF, LDNR-OCM, and LDNR’s Office of Conservation.²⁴⁹ If the right-of-way will “traverse” a state mineral lease, the applicant must provide a copy of a notice letter sent to the lessee.

The default duration of a right-of-way contract is 20 years (with an option to renew for an additional 20-year term).²⁵⁰ During that time, the state is “held free from any and all liabilities.”²⁵¹

Siting Utilities on State Highway Right-of-Way. The Department of Transportation and Development (DOTD) is granted broad power to acquire public or private property (or use thereof, including servitudes) on “lands necessary for the right-of-way of any highway included in the state highway system,” whether the acquisition occurs by donation, purchase, exchange, lease, or expropriation.²⁵² In general, the DOTD may allow utility installations to be placed on or along a state highway right-of-way if the applicant is a public utility operating under Louisiana Public Service Commission (LPSC) jurisdiction (see later section on state energy policies) or a federal, state, parish, or municipal agency.²⁵³

When a utility installs underground, surface, or overhead facilities within the state highway right-of-way strip (and all public and private driveways located within and/or connecting to it), it must follow DOTD standards regulating location, design, installation, accommodation, and maintenance.²⁵⁴ These regulations, known as the *Standards Manual for Accommodating Facilities on Highway Right-of-Way* (hereinafter “Standards Manual”) provide explicitly that where federal, state, or local laws, regulations, or ordinances and/or “industry or governmental codes” prescribe a higher degree of protection than provided in the Standards Manual, then the higher degree of protection prevails.²⁵⁵ Utilities within the highway right-of-way require a permit from DOTD.²⁵⁶

It is important to note that according to the Standards Manual,

DOTD does not permit any transmission facilities on or parallel to the highway right-of-way. This applies to both overhead and underground facilities. Applications are to indicate whether the proposed facility is a transmission or a distribution facility and in the case of an electric line, the voltage is to be shown. The DOTD will consider *applications for over building existing electric*

²⁴⁹ 43 La. Admin Code Part XXVII § 2701.

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² La. R.S. § 48:217. That law and DOTD real estate regulations specifically authorize DOTD to purchase “additional” right-of-way for use by utilities in circumstances where a utility must be relocated for purposes of a highway construction project and there would otherwise not be enough room to accommodate the utility – e.g., the highway is adjacent to a body of water, railroad right-of-way, or similar constraint, or when DOTD purchases a right-of-way within 15 feet of a building. 70 La. Admin. Code Part XVII § 701.

²⁵³ 70 La. Admin. Code Part II § 513.

²⁵⁴ *Id.* at § 501.

²⁵⁵ *Id.* at § 505.

²⁵⁶ La. R.S. § 48:381.

distribution lines with transmission lines, provided pole locations remain relatively the same and, further, provided that single pole construction is used.²⁵⁷

This general policy may apply to proposed use of a highway right-of-way for modern transmission infrastructure associated with OSW. Any transmission facilities sited in the right-of-way through the “over building” exception will presumably still need to comply with general “location” standards established by DOTD. These include a general requirement that utilities lines must be located “to minimize need for later adjustment”—e.g., to accommodate servicing lines with minimum interference to highway traffic and accommodate future highway improvements. When a utility line runs parallel to a highway, the utility should be located “as near as practicable” to the outer edge of the right-of-way line, for safety purposes and to preserve space for future highway improvements and/or other utility installations; when a utility line crosses a highway, it should cross at a 90-degree angle to the extent feasible. The location of utility lines within the right-of-way limit must conform with policies applicable to the type of highway (e.g., interstate highway or freeway), in addition to specific conditions for the highway section involved.²⁵⁸

A set of special additional conditions apply to new utility installations permitted in “enhancement areas” – i.e., “areas that have been acquired or set aside for their scenic quality, namely scenic strips, overlooks, rest areas, recreation areas, the right-of-way of highways adjacent thereto, and the right-of-way of sections of highways which pass through public parks and historic sights.”²⁵⁹ In enhancement areas, new aerial installations must be avoided where there is a feasible and prudent alternative; if no such alternative is available, new aerial installations may only be considered if three conditions are all satisfied: (1) other locations are unusually difficult and unreasonably costly, or are less desirable from the standpoint of visual quality; (2) underground installation is not technically feasible or is unreasonably costly; and (3) the proposed installation can be made at a location acceptable to the DOTD and will employ suitable design and materials which give adequate attention to the visual qualities of the area traversed. It is not clear how these conditions—including the underground installation alternative—would apply in the case of the overbuilding exception, which appears (though not conclusively) to contemplate overhead lines only. Regardless, new underground utility installations may only be permitted in enhancement areas if they do not require extensive removal or alteration of trees or other natural features visible to a highway user, nor “impair the visual quality of the lands being traversed.”²⁶⁰

²⁵⁷ 70 La. Admin. Code Part II § 513.

²⁵⁸ *Id.* at § 511.

²⁵⁹ *Id.* at § 523.

²⁶⁰ *Id.*

The headquarters utility and permit engineer of DOTD (i.e., the “licensed professional engineer authorized by the chief engineer to perform all of the functions associated with relocating utility facilities and issuing right-of-way permits”) is generally responsible for issuing all right-of-way permits, processing joint use agreements, and relocating utilities for highway construction process.²⁶¹ Utilities are responsible for ensuring that installations within the highway right-of-way are in accordance with “applicable federal, state, and industry standards and policies,” and with carrying out the provisions of any contract or agreement with DOTD made when the permit for construction in a right-of-way is issued. The utility is also responsible for coordinating the location of facility installation with other utilities in the same area, and the Standards Manual is clear that proposed facilities (or their operation or maintenance) **must not unreasonably interfere with facilities of other persons, firms, or corporations whose permits for the use and occupancy of the right-of-way were issued first.**²⁶² Utilities are required to pay a modest annual fee in exchange for their use of the highway right of way.²⁶³

Box M: Utility Rights-of-Way on Private Property

Louisiana law allows any legal entity created for the purpose of or engaged in the generation and transmission and distribution, or the transmission or distribution, of electricity to file an expropriation suit against the owner of “needed property” with whom the company cannot reach agreement. Before filing the suit, the expropriating party must make a good faith attempt to reach an agreement with the owner about compensation and take certain procedural steps.

The generating plants, buildings, transmission lines, stations, and substations for which property is expropriated must be located, constructed, operated, and maintained so as not to interfere more than is necessary with the convenience of the landowners nor with the use of the wires of other companies.

The Civil Code provides that once an entity obtains a servitude or right of way across private property for the installation of an underground or overhead utility line, unless it is a public utility servitude established in a subdivision by the subdivider, the servitude or right of way agreement is primarily effective between the grantor and grantee and their heirs/successors/assigns. For the property right to take effect more widely, the servitude or right of way must be recorded in the parish and include a plat, sketch or aerial photograph showing the approximate location.

Sources: La. R.S.. §§ 9:2726, 19:2 *et seq.*

Leases for General Purposes

Authority to Grant Leases for General Purposes. Louisiana law gives the state and its political subdivisions broad authority to lease public lands for a “legitimate purpose.”²⁶⁴ The process for issuing “general purpose” leases of public lands is set out in Title 41, Chapter 10 of Louisiana’s public lands statutes. These general-purpose leasing provisions exist alongside the laws and regulations governing state water bottom leases, state wind leases, and rights-of-way. **Additional clarification from the state on how some or all of these requirements will apply in the context of OSW generation, transmission (both subsea and in upland areas), and supporting infrastructure could prove beneficial for OSW project planning.** In particular, clarifying which set(s) of default terms and conditions (e.g., maximum duration of the lease, maximum acreage, limitations on ownership and transfer) may or do apply to which types of OSW-related activities would be helpful to project proponents and other stakeholders.

²⁶¹ 70 La. Admin. Code Part II §§ 505, 507.

²⁶² Id. at §§ 503, 513. The DOTD’s records of permits are available to the applicant for permit to determine the existence and location of all facilities within the highway right-of-way.

²⁶³ The maximum fee is \$1,500 per year.

²⁶⁴ La. R.S. §§ 41:1211-12.

The general-purpose leasing law authorizes governmental “lessors”—defined to include the SLO, other state agencies, and political subdivisions (e.g., parish, municipality, levee district, port authority)—to lease of any of their lands, as long as the lease is for a “legitimate purpose” (with some exceptions and limitations).²⁶⁵

Compared with some other state lands leasing regimes, this statute’s procedural requirements are rather straightforward: when the lessor receives a lease application, it determines whether the lands are “leasable” for the proposed purpose.²⁶⁶ If they are leasable, the lessor must initiate a public bidding process, unless the lessor is a qualifying “public benefit corporation” (a non-profit corporation formed for the purpose of managing the property of a political subdivision). For publicly bid leases, the lessor is obligated to either accept the highest bid submitted by an eligible applicant or reject all bids.²⁶⁷ Leases by public benefit corporations are to be negotiated based on “fair and reasonable criteria” and a balancing of factors including, among other things, “stimulating other industrial or commercial activity” within that subdivision.²⁶⁸

General Lease Terms. With respect to lease terms, a lessor is allowed to include “stipulations as may be proper for the development of the lands” in the lease, provided the stipulations are not inconsistent with the statute.²⁶⁹ Leases are limited to a maximum size of 640 acres (which must be contiguous).²⁷⁰ Any contract leasing *state* lands for any purpose must provide for maintenance and preservation of public access to public waterways running through the

Box N: General Protections for Public Access

As noted in the discussions of state wind leases and general-purpose leases, the public’s right to access public waterways supersedes some leases of public lands. Under state law, with a few exceptions, “Any contract entered into for the lease of state lands for any purposes shall require that access by the public to public waterways through the state lands covered by the lease shall be maintained and preserved for the public by the lessee.”

At a higher level, when the SLO Commissioner makes land management decisions, he is required to “make land management decisions based on criteria that include public hunting, fishing, and recreational opportunities as a primary consideration,” based on the recognition that, to the extent authorized by law, the primary uses of public lands that are available for public hunting, fishing, and recreation should be such uses. To ensure accountability with this (rather vague) policy, the Commissioner must provide the state legislature with an annual written report listing all acreage managed by SLO that is available for public hunting, fishing, and recreation, as well as a listing of all acreage that was lost or gained for those purposes.

Sources: La. R.S. §§ 41:16; 56:30.3.

²⁶⁵ La. R.S. §§ 41:1211-12. The lessor may grant a lease for any lands of which it has “title, possession, or custody.” Legitimate purposes include “trapping, grazing, hunting, agricultural, *and any other legitimate purposes*, including, except in the parishes of Livingston, Tangipahoa, St. Helena, St. Tammany, and Washington, removal from the land of subterranean water, or other such substances, other than for oil, gas, or other mineral purposes and development” (emphasis added).

²⁶⁶ La. R.S. § 41:1213.

²⁶⁷ Id. at § 1215. There is an exception for renewals, where the original lessor may be offered a chance to match the highest bid.

²⁶⁸ La. R.S. § 41:1215. A public benefit corporation’s decision to issue a lease under this procedure must be promptly appealed by an opponent of the lease, including an unsuccessful applicant, to a court.

²⁶⁹ Id. at § 1219.

²⁷⁰ Id. at §§ 1216, 1217.

leased land.²⁷¹ Unless the lessor is a port authority, the minimum rent is \$1 per acre and the term of the lease cannot be longer than ten years (though extensions are allowed where improvements worth at least \$2,000 have been made to the property.)²⁷² No lessee may own more than one lease at a time, and prior approval from the government lessor is required before the lessee executes any sublease, transfer, assignment, mortgage, etc.—any of which must confer the “same rights and privileges” that were granted by the lessor to the original lessee.²⁷³

Other Policies that May Affect Siting on Public Lands and Water Bottoms

Private Oyster Leases. Any future OSW-related facilities within or traversing Louisiana’s nearshore coastal waters will encounter a vast network of geographic restrictions based on preexisting private oyster leases. There is a long history of private oyster leasing in Louisiana, which reportedly produces more oysters than any other U.S. state.²⁷⁴ The state government has been responsible for leasing water bottoms since the turn of the 20th century, when parish governments ceded leasing authority to the state.²⁷⁵ Following a legislatively-imposed moratorium on new private oyster leases from 2002-2016, Louisiana law currently authorizes the Department of Fish and Wildlife (LDWF) to issue new leases of state-owned water bottoms for oyster cultivation, bedding, and harvesting.²⁷⁶ According to the agency, there are around 400,000 acres currently under lease.²⁷⁷

Overall, state law provides robust protection for private oyster leases, specifying leaseholder rights in relation to other coastal interests and requiring LDWF to “assist in protecting all lessees of private oyster bedding grounds in the enjoyment of their rights.”²⁷⁸ The oyster leaseholder is the primary manager of the water bottoms under lease because **in general, an oyster lease issued by LDNR provides for exclusive use of the water bottom where it is located.** Accordingly, the oyster leaseholder generally has the right to bring a claim for compensation against a private person or entity whose activities “wrongfully or negligently” damage the oyster resources.²⁷⁹ However, there are a handful

²⁷¹ La. R.S. § 41:1217.1. This provision does not prohibit the commissioner of administration or the secretary of the department having control over the property from restricting access to public waterways if he determines that a danger to the public welfare exists.

²⁷² Id. at § 1217.

²⁷³ Id. at § 1216.

²⁷⁴ LDWF, *Louisiana Oyster Fishery Management Plan* at 7 (2016), available at:

https://www.wlf.louisiana.gov/assets/Resources/Publications/Marine_Fishery_Management_Plans/2016_Oyster_Fishery_Management_Plan.pdf.

²⁷⁵ Id. at 48.

²⁷⁶ La. R.S. § 41:1225.

²⁷⁷ LDWF, Oyster Leases, <https://www.wlf.louisiana.gov/page/oyster-leases> (accessed Sept. 2022).

²⁷⁸ La. R.S. § 56:6.

²⁷⁹ To bring a claim, the oyster lease must have been obtained, recorded, and marked as required by law. La. R.S. § 56:432. Oyster lessees generally do not have the right to bring a claim for damages against a party with a superior right of use – i.e., activities by the state, a political subdivision of the state, or the federal government to further integrated coastal protection (except an oyster

of exceptions to the right of exclusive use: notably, all oyster leases are subordinate to government actions in furtherance of integrated coastal protection; and all oyster leases issued after Phase I of the moratorium listing process is complete will be subordinate to the activities of coastal use permit/authorization holders whose rights vested (i.e., whose application was received by the relevant agency) before those of the oyster lessee.²⁸⁰

Even as the moratorium is lifted, not all “empty” state-owned water bottoms are available for oyster leases. LDWF is prohibited from leasing any water bottom located within 75 feet of the centerline of a pipeline located on a purchased right-of-way (unless the right-of-way is abandoned).²⁸¹ Other areas that are generally off-limits for new or renewed oyster leases are wildlife management areas and designated public oyster seed ground or reservation.²⁸² CPRA is also authorized to delineate a buffer around sensitive or eroding coastal areas, in which oyster leases are not allowed. Alternative oyster cultivation, which requires both a valid oyster lease and an additional permit, is subject to further geographic restrictions.²⁸³ In general, LDWF is directed to ensure that the water bottom areas leased are “as compact as possible” (while taking into consideration conditions affecting the water bottoms’ desirability for oyster cultivation), and the maximum size of any new oyster lease is 1,000 acres.²⁸⁴

lessee may sue for damages if dredging, filling or other integrated coastal protection work has occurred directly on the leased water bottom) or coastal use permit holders with superior rights who are acting in compliance with their permit and other applicable laws.

²⁸⁰ More specifically, state oyster leases that are applied for, renewed, or divided via judicial partition after July 1, 2016, *except* leases issued in post-moratorium Phase I (not yet commenced as of September 2022) will be subordinate to the rights of: (1) a CUP holder engaging in any activity authorized by a CUP, determination, coastal use authorization, or drilling permit (collectively “permit” here) if the permit application was submitted prior to the oyster lease application; if no specific area is delineated in the permit, the default is 75 feet from the center of a pipeline and 250 feet from the outside of a well, platform, shell pad, or facility; and (2) any person to operate, maintain, repair, replace, rehabilitate, or remove any pipeline, well, platform, shell pad, or facility on or impacting the oyster lease, if the structure was placed before September 1980 and/or prior to the date the oyster lease was issued; and/or to cross an oyster lease to perform such activity. 76 La. Admin. Code Part VII § 501.

²⁸¹ La. R.S. § 56:427.

²⁸² 76 La. Admin. Code Part VII § 501.

²⁸³ La. R.S. § 56:431.2.

²⁸⁴ La. R.S. § 56:427.

An oyster lease can be cancelled by LDWF if the lessee fails to pay the annual rent (currently \$3/acre) by the appropriate deadline; in 2022, the agency reported cancelling “dozens” of leases.²⁸⁵ Another reason a lease can be forfeited is for violation of the law that no single lessee may hold more than 2,500 acres under oyster lease at the same time.²⁸⁶ If any lessee is found by a court to have leased more than the allotted amount, they must forfeit *all* leases held on any state water bottoms.²⁸⁷ To help enforce this requirement, LDWF’s Oyster Lease section is responsible for maintaining an “indexing system” to determine acreage held by all oyster leases on state-owned water bottoms. LDWF is also required by law to maintain a complete, up-to-date map “showing all leases of water bottoms and natural reefs in the waters of the state,” which should be considered—but not relied on as dispositive—by OSW project planners.²⁸⁸

Mineral Leases on State-Owned Lands and Water Bottoms. While its jurisdiction has since been expanded to include alternative energy source leases (described above), Louisiana’s State Mineral and Energy Board (SMEB) was originally established in 1936 to administer Louisiana’s proprietary interest in minerals.²⁸⁹ The SMEB is authorized to lease for the “development and production of minerals, oil, and gas” any lands belonging to the state, including water bottoms.²⁹⁰ The Office of Mineral Resources (OMR), an office within LDNR, supports the SMEB in the issuing and supervising such leases.²⁹¹ This includes administering a complex mineral leasing process.

The Louisiana Constitution and state statute mandate prior public notice and public bidding for all state mineral leases (and other conveyances involving mineral rights owned by the states).²⁹² The SMEB complies with this requirement by holding monthly public sales of state mineral leases; according to LDNR’s Mineral Leasing Manual, “the entire state mineral lease acquisition process revolves around these sales.”²⁹³

The state mineral leasing process is made up of the same nine steps as the wind energy leasing process, which is unsurprising given that both public land leasing programs are administered by the SMEB under the same overarching statutory authority.²⁹⁴ Those nine steps are described in the state wind lease section above and are not reiterated here.²⁹⁵ Mineral lease regulations identify specific conditions that indicate whether public lands or water bottoms are “available” for a mineral lease under the law. Based on these criteria, conditions that may disqualify a location for mineral lease availability include: (a) SMEB has issued a moratorium against mineral leasing of the state lands or water bottoms (e.g., Lake Pontchartrain); (b) The location already has been nominated and approved for advertisement

²⁸⁵ Victor Skinner, “More Oyster Leases than Usual Cancelled by Louisiana” (Mar. 8, 2022), *Biz New Orleans*, <https://www.bizneworleans.com/more-oyster-leases-than-usual-canceled-by-louisiana/>.

²⁸⁶ La. R.S. § 56:432, 76 La. Admin. Code Part VII § 501.

²⁸⁷ *Id.*

²⁸⁸ La. R.S. § 56:6; see LDWF, Oyster Map, <https://gis.wlf.la.gov/oystermap/map.html> (accessed Sept. 2022).

²⁸⁹ La. R.S. § 30:121.

²⁹⁰ La. R.S. § 30:124. The SMEB shares authority for mineral leasing of “state agency lands” with the respective state agencies.

Id. at §§ 152, 153.

²⁹¹ La. R.S. § 36:358.

²⁹² See La. Const. Art. IX §5; La. R.S. § 30:121.

²⁹³ Office of Mineral Resources (OMR), *Mineral Leasing Manual* at D.1 (n.d.), available at:

<http://www.dnr.louisiana.gov/index.cfm?md=pagebuilder&tmp=home&pid=354>.

²⁹⁴ See generally La. R.S. § 30:124.

²⁹⁵ For details on the nine-step process, see the Mineral Leasing Manual published online by OMR, *supra* note 293.

for a future state mineral lease sale; (c) The state lands or water bottoms are subject to an active (or non-fully-released/expired/terminated) state mineral lease or state operating agreement; or (d) the state lands or water bottoms already are subject to an active state exclusive geophysical agreement (type II or III).²⁹⁶

As is explicitly noted in the Mineral Leasing Manual, “Some tracts available for mineral leasing may be situated in the Louisiana Coastal Zone...and may be subject to [the Coastal Use Guidelines] for operations in the Louisiana Coastal Zone.”²⁹⁷ One of the sets of specific use guidelines (Section 719) establishes standards for oil, gas, and other mineral activities; these include a broad requirement that “[m]ineral exploration, production, and refining facilities shall be designed and constructed using best practical techniques to minimize adverse environmental impacts.”²⁹⁸

According to the Mineral Leasing Manual, OMR publishes the “Louisiana State Leases CD/ROM” on a monthly basis, and it includes GIS data cataloguing tracts to be offered for lease at upcoming sales, “active state mineral leases and state operating agreements,” “otherwise unavailable acreage,” and other geographic layers that may be useful to OSW project planners interested in identifying potential land use conflicts. The data is available upon request and payment of an annual fee of \$200.²⁹⁹

Box O: Leases with the Right to Erect Storage and Transportation Facilities

- A related but separate public lands leasing authorization, also administered by SMEB, allows “lessors” (the state and political subdivisions) to lease lands, navigable waters, and water bottoms for the purpose of granting to the lessee “the right to erect and use on the surface of the leased premises tanks and facilities for the receipt, storage, withdrawal, transportation, and shipment of oil, natural gas, liquid or liquified hydrocarbons, carbon dioxide, goods, wares, and merchandise, and for other purposes necessary and incidental thereto...”
- The same law authorizes leases for underground storage of certain minerals and for making/using caverns in salt domes for certain purposes.
- Such a lease, known as a “lease with the right to erect storage and transportation facilities,” may not cover an area larger than 640 acres or be granted for a term longer than 25 years.

Source: La. R.S. §§ 30:148.1 et seq.

Operating Agreements. In limited situations, state law authorizes SMEB to permit mineral operations to be conducted under an “operating agreement” in lieu of a mineral lease.³⁰⁰ If these locations are not included in the data layers of the Louisiana State Leases CD/ROM (described above), the location of any operating agreements should be otherwise ascertained from the Office of Mineral Resources by anyone planning an OSW-related project on Louisiana state water bottoms.

Similar to a lease, an operating agreement is a contractual agreement between the state and the operator to reestablish (or attempt to reestablish) production of hydrocarbons from an existing well, on an area of state lands or water bottoms that was previously leased for mineral development but on which the mineral lease has been terminated.³⁰¹ Before entering an operating agreement, SMEB must determine that “due to equity, economics, and other factors,” it is in the

²⁹⁶ La. R.S. § 30:212.

²⁹⁷ OMR, Mineral Leasing Manual, *supra* note 293.

²⁹⁸ 43 La. Admin. Code Part I § 719.

²⁹⁹ La. R.S. § 30:126(B). See also the [OMR Forms page](#).

³⁰⁰ 43 La. Admin. Code Part V § 201.

³⁰¹ *Id.*

best interest of the state to assume a portion of the risk of establishing production in an existing well, and receive a graduated share of production or its value.³⁰²

Notably, as part of the 2022 wind energy bill, SMEB’s authorization to enter into operating agreements appears to have been extended to cover wind energy. The authorizing statute now provides that SMEB may:

“Enter into operating agreements whereby the state receives a share of revenues from the production of oil, gas, and other minerals, *and wind energy*, after deduction of costs, in whole or in part, such as for drilling, testing, completion, equipping, or operating a well or wells, as may be agreed upon by the parties, and assumes all or a portion of the risk cost of development or production activity in those situations where the board determines it is in the best interest of the state, either in equity or in developmental productivity to do so, such as, but not limited to the following illustrations...”³⁰³

Among the illustrations (see footnote), perhaps the most relevant to potential wind energy activities is the one that suggests operating agreements can be used for “[e]stablishing a contract on unleased state acreage within an established unit.”³⁰⁴

Permits for Geophysical Surveys on State Lands. Louisiana public lands law authorizes SMEB to grant exclusive and nonexclusive permits to conduct “geophysical and geological surveys of any kind” on state-owned lands, including water bottoms. To the extent that OSW project planning involves qualifying “survey” activities on Louisiana’s state-owned lands or water bottoms, a permit will be required.³⁰⁵ To the extent there are exclusive permits in effect in Louisiana’s coastal water bottoms, it may limit geographic areas available for OSW-related facility siting.

SMEB has adopted a concise set of regulations to implement the permitting requirement (sometimes referred to as “seismic permits”).³⁰⁶ Under the rules, all geophysical and geological survey permits are valid for one year and are not transferable. No permit may be granted for a location that is already covered by a valid state mineral lease which is in full force and effect.³⁰⁷

Exclusive geophysical agreements (EGAs) are awarded through a public bid process. An EGA ensures that SMEB will not grant any additional seismic agreements or permits in the nominated area during the primary term of the EGA (or the option term if activated), but an EGA does not preclude issuance of new mineral leases in the area. A new EGA is subject to, and does not supersede, “any existing seismic permits, leases, or other agreements of any kind with the state of Louisiana in the nominated area at the time awarded, of which all parties are hereby deemed to have notice.”³⁰⁸ EGA Type II and III permits carry additional rights related to buffer zones and mineral lease options.

³⁰² 43 La. Admin. Code Part V § 201.

³⁰³ La. R.S. § 30:209.

³⁰⁴ *Id.* The other illustrations include: taking over an abandoned well with appropriate land area in an attempt to reestablish production rather than plug and abandon the well; reestablishing a reasonable prospective productive area around a well already drilled wherein the lease was lost through an oversight or technicality; and establishing a contractual agreement on acreage where title is disputed and production from the disputed acreage is being settled. *Id.*

³⁰⁵ La. R.S. § 30:212.

³⁰⁶ See La. Admin Code. Tit. 43, Part V §§ 101 et seq.

³⁰⁷ La. Admin Code. Tit. 43, Part V § 101.

³⁰⁸ 43 La. Admin Code. Part V § 103.

Any permit for a geophysical survey entailing the use of “shot points” in any water bottom must obtain a “special permit,” provide certain financial guarantees, and receive approval from LDWF. These special permits are granted under rules and regulations promulgated by LDWF for the protection of oysters, fish, and wildlife.³⁰⁹ Under the rules, “any exploration work involving the discharge of explosives and other energy sources in the state of Louisiana for geophysical exploration” requires the applicant to obtain a bond to cover potential environmental damages and related expenses.³¹⁰

LDWF’s seismic exploration regulations include a provision explicitly “recogniz[ing] that conflicts may arise from time to time between parties regarding access to and use of public waters, waterbottoms, public lands and natural resources”; where such a conflict cannot be otherwise resolved, LDWF has the discretion to restrict or suspend “such potentially or actually conflicting activities” to provide reasonable and safe access to public resources.³¹¹

State Parks, Nature Preserves, and Wildlife Management Areas. The Office of State Parks (OSP) is responsible for serving the people of Louisiana and their visitors by preserving and protecting natural areas of “unique or exceptional scenic value,” establishing and operating parks that provide recreational use of natural resources, and preserving, protecting, and portraying historic and scientific sites of statewide importance.³¹² The classification system for sites under OSP jurisdiction is as follows:

- *State preservation areas (SPA):* Areas of “exceptional scenic value”³¹³ which, because of their unique characteristics, should be preserved for current and future enjoyment. SPAs are required to provide a “sufficient buffer area against outside disturbances and encroachments” and “undisturbed habitat for native wildlife,” while also “[allowing] the development of public use areas, if these can be developed without impairing the scenic, natural, or ecological features of the area.” To promote large swaths of undisturbed habitat, the absolute minimum size is 500 acres, though 1,000 acres is the “preferred” minimum.
- *State preservation sites:* Smaller equivalents of an SPA, which are established primarily to preserve a unique natural feature of ecological or scientific interest. There is no minimum acreage requirement, only a requirement that it be large enough to encompass the special feature and a sufficient buffer.
- *State historic sites:* Areas which possess historical, cultural, or memorial significance.
- *State Parks:* Natural areas which, when evaluated on a statewide basis, possess outstanding potential for recreation utilization. The natural area must possess outstanding scenic and natural qualities to provide a recreation opportunity of high quality in a natural setting recreation opportunity of high quality in a natural setting.³¹⁴

³⁰⁹ La. R.S. § 30:214; see also 76 La. Admin. Code Part I § 301.

³¹⁰ Id. The applicant also must provide proof of general liability insurance of at least one million dollars.

³¹¹ 76 La. Admin. Code Part I § 301.

³¹² La. R.S. § 56:1682.

³¹³ “Exceptional scenic value” refers to rare natural scenery unlikely to be preserved if the property remains in the ownership of private citizens and which is sufficiently distinctive to attract and interest people from all parts of the state. Id. at § 1684.

³¹⁴ La. R.S. § 56:1684.

A few provisions of the OSP regulations may limit actions on lands it holds under these classifications. In general, no building, structure, or other feature of any site may be altered, erected, or constructed without written consent of the assistant secretary of OSP (or their designee).³¹⁵ It is unlawful to intentionally remove, damage, disturb, or destroy any OSP property (including but not limited to structures, watercraft, movables, signs, markers, natural features, cultural features wildlife, and plants).³¹⁶ Automobiles, trucks, and any other wheeled vehicles may only be operated on roads, lanes, or byways designated for vehicular traffic, unless otherwise authorized by the site manager. All watercraft located on or adjacent to any site must be operated in a careful and reasonable manner, and commercial boats are prohibited from using any OSP facility without the assistant secretary's written consent.³¹⁷

The law authorizing establishment of OSP system also mandates that the Secretary of the Department of Culture, Recreation and Tourism must “consult with and provide guidance to the heads of all state agencies on matters affecting recreation.”³¹⁸

Box P: Publicly Held Conservation Servitudes on Privately-Owned Lands

State law authorizes the purchase of conservation servitudes (referred to in most states as easements) to limit land uses on privately held land. Holders of these easements may include governmental bodies or charitable groups. Conservation servitudes can be used to impose limitations or affirmative obligations for purposes including retaining or protecting a property's natural, scenic, or open-space values; its availability for agricultural, forest, recreational, or open-space use; protecting natural resources; maintaining or enhancing air or water quality; or preserving the historical, archaeological, or cultural aspects of unimproved immovable property.

Conservation servitudes are created, conveyed, recorded, assigned, released, modified, terminated, or otherwise altered or affected in the same manner as other servitude contracts under state law. As publicly recorded property instruments, the existence and terms of conservation servitudes that may restrict OSW-related siting decisions should be available for public inspection during project planning.

Source: La. R.S. § 9:1273.

Local Land Use Regulation. Louisiana has delegated substantial authority over land use decisions to its 64 parishes and 304 municipalities.³¹⁹ Onshore facilities associated with offshore energy production and transmission will need to comply with existing planning and zoning requirements.

Planning Commissions. Since 1921, the Louisiana Constitution has enabled parishes and municipalities (i.e., “local governmental subdivisions”) to adopt regulations for land use and zoning, as well as standards for the use, constructions, demolition and modification of areas and structures.³²⁰ Currently, state laws authorizing local land use

³¹⁵ 25 La. Admin. Code Part IX § 303.

³¹⁶ Id.

³¹⁷ 25 La. Admin. Code Part IX § 307.

³¹⁸ La. R.S. § 56:1801.

³¹⁹ For a more detailed history of Louisiana planning and zoning laws, see Lauren Land, La. Sea Grant, *Brief History of Planning and Zoning in Louisiana* (Jan. 2013), available at: <http://www.laseagrant.org/wp-content/uploads/Lafourch-Brief-History-Planning-Zoning-La.pdf>.

³²⁰ La. Const., Article VI § 17.

regulation are codified in the Louisiana Revised Statutes as Title 33, Municipalities and Parishes, Part IV: Physical Development of Parishes and Municipalities. **Louisiana allows, but does not require, every parish and municipality to make, adopt, amend, extend, or carry out master plans**, and to establish a planning commission to exercise certain planning duties and other discretionary powers.³²¹

After a parish planning commission or municipal planning commission is established, state law requires that commission to “make and adopt a master plan for the physical development” of the unincorporated territory of a parish or the municipality, respectively.³²² Once the planning commission has adopted a master plan pursuant to specified procedures, no public utility (or other “public building or structure”), whether publicly or privately owned, can be authorized or constructed without the planning commission’s prior approval.³²³

State law officially defines “master plan” as “a statement of public policy for the physical development of a parish or municipality adopted by a parish or municipal planning commission,”³²⁴ though the statute goes on to provide slightly more detail on both the planning process and plan contents. Procedurally, the planning commission is required to undertake “careful and comprehensive surveys and studies” of present conditions and future growth.³²⁵ Before adopting a master plan—or any part, amendment, or extension of a plan—the commission must provide public notice and hold a public hearing.³²⁶ Regarding the plan’s substance, a parish or municipal plan is *required* to provide “a general description or depiction of existing roads, streets, highways, and publicly controlled corridors, along with a general description or depiction of other public property within the jurisdiction that is subject to the authority of the commission.”³²⁷ A plan *may include* the planning commission’s “recommendations” on the general location and extent of public utilities and terminals, whether publicly or privately owned or operated, including their removal, relocation, change of use, or extension.³²⁸

³²¹ La. R.S. § 33:102. Beyond developing and adopting a master plan, state law allows planning commissions to, among other things, promote public interest in and understanding of a plan; attend planning conferences or meetings of planning institutes or hearings upon pending planning legislation. And, “[i]n general, a commission shall have such powers as may be necessary to enable it to fulfill its functions, promote planning, and in all respects carry out the purposes of [the authorizing statute].” La. R.S. § 33:110.

³²² La. R.S. § 33:106.

³²³ Id. at § 109. If the planning commission disapproves, the legislative body of the municipality or parish can override the disapproval with a two-thirds majority. Id.

³²⁴ La. R.S. § 33:101.

³²⁵ Id. at § 107. The general purpose of the planning exercise must be “guiding and accomplishing a coordinated, adjusted, and harmonious development of the parish or municipality...and its environs which will, in accordance with present and future needs, best promote health, safety, morals, order, convenience, prosperity, and general welfare, as well as efficiency and economy in the process of development...” Id.

³²⁶ La. R.S. § 33:108.

³²⁷ La. R.S. § 33:106.

³²⁸ Id. More broadly, the parish or municipal plan may also include the planning commission’s “recommendations for the development of the parish or municipality,” including but not limited to the “general location, character, and extent” of

Legal Effect. Importantly, once a parish or municipal planning commission adopts a master plan, **all state agencies and departments are required to “consider” the master plan before undertaking “any activity or action which would affect the adopted elements of the master plan.”**³²⁹ Relatedly, the governing authority of the parish or municipality must “consider” the adopted master plan before adopting, approving, or promulgating any local laws, ordinances, or regulations that would be inconsistent.³³⁰

Coordination is also an important function of a parish or municipal planning commission. State law requires the planning commission to “consult and advise with public officials and agencies, public-utility companies, civic, education, professional, and other organizations, and with citizens with relation to the protecting or carrying out of a plan.”³³¹

Zoning. Where a municipal planning commission has been established, it also serves as a “municipal zoning commission,” which exercises the municipality’s police power to regulate and restrict the location and use of buildings, structures, and land for commerce, industry, residence, and other purposes.³³² State law requires zoning regulations to be made in accordance with a comprehensive plan, giving reasonable consideration to the character of a zoning district and “its peculiar suitability for particular uses...”³³³ Zoning regulations, restrictions, and district boundaries may be modified or repealed from time to time; however, if 20 percent or more of the area’s owners protest the proposed change, a majority vote of the municipal legislative body is needed to override the owners’ objection.³³⁴ As stated above, renewable offshore energy projects are likely to be affected by land use plans and zoning regulations to the extent that they may affect where transmission lines come ashore, and where support facilities may be placed. In practice, compliance with local land use and zoning requirements may also be required or considered in connection with other permits and approvals.

transportation routes (e.g., railroads, streets, bridges) and other public infrastructure (e.g., parks, aviation facilities, waterfronts).
Id.

³²⁹ La. R.S. § 33:109.1.

³³⁰ Id. at § 109.

³³¹ Id. at § 110.

³³² La. R.S. § 33:110 (noting that “when acting as such, it shall hold separate meetings with separate minutes and records”). State law authorizes zoning commissions to amend, supplement, change, modify, and repeal zoning regulations and to make these final recommendations (after public hearing) to the legislative body for final decisions. See La. R.S. §§ 33:4721, 4726. Municipalities with populations of 50,000 or more are further authorized to “define and regulate the kind, style, and manner of construction of buildings and other edifices which may be erected on certain designated streets and thoroughfares and may permit or prohibit the establishment and operation of businesses and trades within designated limits.” La. R.S. § 33:4731.

³³³ La. R.S. § 33:4723.

³³⁴ Id. at § 4725.

Privately-Owned Coastal Lands and Waters

Unlike many other coastal states, most of Louisiana’s coastal marshlands—around 80 percent—are privately owned.³³⁵ In order to use these water bottoms for OSW-related purposes—e.g., for transmission infrastructure—companies will likely need to obtain property rights from private owners. If companies and landowners are unable to reach voluntary agreements, expropriation may be available in some situations.

Awareness of Dual-Claimed Lands

By their nature, the privately-owned coastal marsh lands are among the most susceptible to submersion as erosion, sea level rise, subsidence, and other factors drive rapid coastal land loss. As a result, a substantial portion of Louisiana’s current water bottoms are still claimed and controlled by the private entities (e.g., oil and gas companies) and individuals who owned the parcels before they were submerged—even though under state law (Louisiana Civil Code, Art. 450), the state is the rightful owner of all submerged lands under navigable waters. The State Land Office (SLO) classifies most of these now-submerged lands as “dual claimed” (i.e., claimed by both the state and by the private owner) while waiting for the state legislature to resolve the situation.³³⁶ According to a 2018 inventory by SLO, there are over 285,000 acres of dual-claimed water bottoms in Louisiana (see map by the Louisiana Legislative Auditor, reproduced in Figure 3 below).³³⁷

³³⁵ CPRA, 2012 Master Plan at 167. This situation arose in part from two federal laws passed in 1849 and 1850: the Swamp Land Grants Acts, which granted around nine million acres of federally owned “swamp and overflowed lands” to Louisiana to incentivize draining these lands for agricultural cultivation. Jacques Mestayer, *Saving Sportsman's Paradise: Article 450 and Declaring Ownership of Submerged Lands in Louisiana*, 76 LA. L. REV. 889, 896–97 (2016). After becoming the owner to these new marshlands, the state went on to authorize “alienation”—i.e., transfer of full ownership—of “sea marsh and sea prairie subject to tidal overflow” to private landowners.

³³⁶ Id. at 889-91. See id. for a detailed description of how the complex legal and political situation developed. See also S. Sneath, “A conundrum: Who owns Louisiana land after it washes away?” (Feb. 4, 2020), Nola.com, https://www.nola.com/news/environment/article_a9c4d222-4381-11ea-ac9a-ff8b99383e6e.html.

³³⁷ See La. Legislative Auditor, *Inventory of State Lands* at 10 (Aug. 22, 2018), available at: <https://biotech.lsu.edu/blog/0001A476.pdf>.

Dual Claimed Water Bottoms in Southeastern Louisiana
As of May 2018

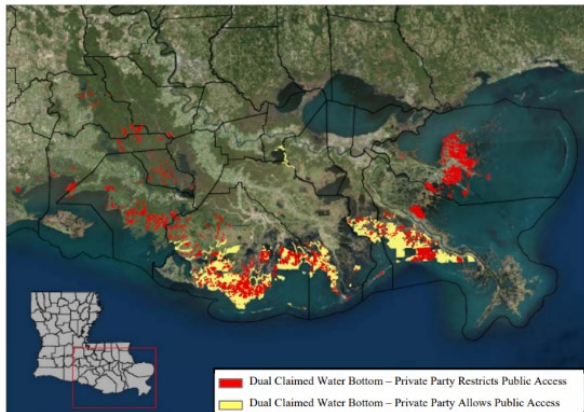


Figure 3: Dual Claimed Water Bottoms (credit: La. Legislative Auditor 2018)

As a result, in Louisiana, **lack of clear title to many coastal water bottoms may complicate efforts to site transmission infrastructure on or across these stretches of the coastline.** For example, it is possible that a user would be required to pay both the state and the private landowner for the right to use a dual claimed area.³³⁸ This may make siting transmission infrastructure in Louisiana’s coastal lands and waters relatively challenging compared with other Gulf Coast states.

Expropriation

Louisiana law authorizes expropriation of private lands by entities engaged in generating, transmitting, and distributing electricity. Transmission lines and other infrastructure for which property is expropriated must be located, constructed, operated, and maintained so as not to be dangerous to people or property nor interfere “more than is necessary” with the landowners’ convenience.³³⁹ Expropriation can be achieved only after attempting to reach an agreement with the landowner as to compensation, by filing an expropriation petition with the appropriate court.³⁴⁰ The court then considers the plaintiff’s request for expropriation and, in deciding to grant the request, determines the amount of compensation that must be paid to the landowner in exchange for the expropriated property right.³⁴¹

³³⁸ See *id.* at 12.

³³⁹ La. R.S. § 19:2.

³⁴⁰ *Id.* In general, the petition must be filed by the plaintiff in the district court of the parish in which the property to be expropriated is situated. La. R.S. § 19:2.1.

³⁴¹ See generally La. R.S. §§ 19:1 et seq.

Water Pollution Control

Louisiana’s water pollution control laws may affect the permitting, construction, and operation of offshore wind energy facilities. Facilities such as turbines, although they are more likely to be placed in federal waters, may be subject to state review. In addition, transmission and other facilities may be placed in Louisiana state waters, and the construction and operation of these facilities may result in waste heat, turbidity, or other forms of pollution. These facilities thus may be subject to state water pollution control law administered by the Louisiana Department of Environmental Quality (LDEQ).³⁴²

Water Quality Standards

Section 303 of the Clean Water Act directs states to adopt water quality standards that define the goals for ambient conditions within waters of the state.³⁴³ The standards must identify the designated use or uses to be made of the waters, provide narrative or numerical water quality criteria sufficient to protect those uses, and establish an antidegradation policy to protect those waters currently meeting or exceeding levels necessary to protect designated uses.

The Louisiana water quality standards apply to all waters of the state, including Gulf of Mexico waters.³⁴⁴ The standards indicate which of seven designated uses apply to each basin and waterbody.³⁴⁵ For example, designated uses for many of Louisiana’s estuarine and Gulf of Mexico waters include primary contact recreation (swimming), secondary contact recreation (boating), fish and wildlife propagation (fishing), and to a lesser extent, oyster propagation.³⁴⁶ A handful of coastal or estuarine water segments in Louisiana are assigned the designated use “Outstanding Natural Resource Waters” – e.g., estuarine portions of Bayou Bienvenue, Bayou St. John, Terre Beau Bayou, Bayou Dupre, Bashman Bayou, and Bayou Chaperon.³⁴⁷ Outstanding natural resource waters are waters designated for:

“[P]reservation, protection, reclamation, or enhancement of wilderness, aesthetic qualities, and ecological regimes, such as those designated under the Louisiana Natural and Scenic Rivers System or those designated by the department as waters of ecological significance. Characteristics of *outstanding natural resource waters* include, but are not limited to, highly diverse or unique instream and/or riparian habitat, high species diversity, balanced trophic structure, unique species, or similar qualities.”³⁴⁸

³⁴² La. R.S. § 30:2011.

³⁴³ 33 U.S.C. § 1313. Tribes are authorized to establish water quality standards for waters within their jurisdiction, but state standards will apply in the absence of approved tribal standards.

³⁴⁴ La. Admin. Code Title 33, Part IX, § 107 (defining “waters of the state”).

³⁴⁵ *Id.* at § 1111. There are seven water uses designated for surface waters in Louisiana: agriculture, drinking water supply, fish and wildlife propagation, outstanding natural resource waters, oyster propagation, primary contact recreation, and secondary contact recreation.

³⁴⁶ See 33 La. Admin. Code Part IX § 1123.

³⁴⁷ *Id.*

³⁴⁸ 33 La. Admin. Code Part IX § 1111.

In addition to setting out the designated uses for each water body, the standards set out water quality criteria that apply to all waters or to specific designated uses. There are narrative “general criteria” that apply to (human activities affecting) all surface waters, including wetlands – these include criteria for, e.g., aesthetic conditions, color, floating/suspended/settleable solids, toxic substances, and flow. For *turbidity*, which is affected by dredging and other human activities disturbing the water bottom (among other causes), the general criteria³⁴⁹ include as a “guideline” maximum turbidity levels for estuarine bayous and canals (50 NTU³⁵⁰) and outstanding natural resource waters (25 NTU); however, the regulation also notes that “[LDEQ] may exempt for short periods certain activities permitted under Sections 402 or 404 and certified under Section 401 of the Clean Water Act, such as maintenance dredging of navigable waterways or other short-term activities that the state determines are necessary to accommodate legitimate uses or emergencies or to protect the public health and welfare.”³⁵¹

For some pollutants that may relate to OSW development, numeric criteria have been established. For example, for *temperature*, LDEQ has established both maximum temperature and temperature differential standards that apply to estuarine and coastal waters: a maximum temperature of 95 degrees (Fahrenheit) (allowing some variation for effects of certain natural conditions); a maximum 2-degree rise from ambient temperature during the summer months; and a maximum 4-degree from ambient temperature during the rest of the year. Once the maximum is reached, no additional “process heat” can be added.³⁵² Only a few other numeric criteria—e.g., for dissolved oxygen and bacteria— have been established for estuarine and/or “coastal marine water” segments.³⁵³

According to the LDEQ’s 2022 water quality inventory pursuant to the Clean Water Act (“Integrated Report”), many of the water quality standards have not been updated in decades.³⁵⁴ For example, turbidity criteria have not been updated since 1984, though LDEQ initiated a study in 2020 to review existing data and determine needs for developing appropriate numeric turbidity criteria, in particular to protect fish and wildlife propagation and outstanding natural resource uses.³⁵⁵ For dissolved oxygen, “[t]he majority of marine and estuarine waters are...still defined by water quality criteria recommendations from over 40 years ago,” and several coastal segments are under consideration for DO criteria revision.³⁵⁶

³⁴⁹ Id. at § 1113. “Turbidity other than that of natural origin shall not cause substantial visual contrast with the natural appearance of the waters of the state or impair any designated water use. Turbidity shall not significantly exceed background; background is defined as the natural condition of the water. Determination of background will be on a case-by-case basis.” Id.

³⁵⁰ 33 La. Admin. Code Part IX § 1113. NTUs are “nephelometric turbidity units.” In the 2022 Integrated Report, DEQ reported that only 3 estuarine segments are impaired for turbidity. DEQ, *2022 Water Quality Inventory: Integrated Report* (305b/303d) at p. 7 (hereinafter Integrated Report), available at: <https://deq.louisiana.gov/page/2022-water-quality-inventory-integrated-report-305b303d>.

³⁵¹ 33 La. Admin. Code Part IX § 1113.

³⁵² Id. at § 1123.

³⁵³ Id. at § 1113.

³⁵⁴ See generally Integrated Report, *supra* note 350.

³⁵⁵ Id. at 36.

³⁵⁶ Id. at 41.

The water quality standards also include *an antidegradation policy*.³⁵⁷ It generally requires that the existing instream water uses and the level of water quality necessary to protect the existing uses must be maintained and protected.³⁵⁸ More particularly, “Where the water quality exceeds levels necessary to support the protection and propagation of fish, shellfish, and wildlife and recreation in and on the water, that water quality must be “maintained and protected.” *However*, LDEQ may allow limited degradation if it finds—after full satisfaction of the inter-governmental coordination and public participation provisions of the state's continuing planning process (which is used to implement the antidegradation policy pending development of more detailed procedures in collaboration with EPA Region 6)—that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located.³⁵⁹ Also as part of the antidegradation policy, the state is required to “assure the highest statutory and regulatory requirements shall be achieved for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control.”³⁶⁰

Water Pollution Permitting

Consistent with the Clean Water Act, discharge of a pollutant from a point source in Louisiana is prohibited in the absence of a Louisiana Water Discharge Permit System (LWDPS) permit issued by LDEQ.³⁶¹

With the notable exception of OSW-powered “clean hydrogen” production facilities (see following paragraph),³⁶² LDEQ’s water pollution permitting requirements are likely to have limited direct applicability to OSW facilities because these facilities are unlikely to discharge pollution once construction is complete (and because they are likely to be located in federal, and not state, waters). By analogy, the application for the well-known Cape Wind project indicated that neither turbines nor the electrical service platform require the use of water for operations or maintenance, and runoff of rainwater from these facilities will not affect water quality and therefore does not require a stormwater discharge permit.³⁶³ Similarly, although underwater transmission lines may require permits from the U.S. Army Corps of Engineers for construction in federally-protected waters pursuant to section 404 of the CWA and

³⁵⁷ See 40 C.F.R. § 131.12.

³⁵⁸ 33 La. Admin. Code Part IX § 1109.

³⁵⁹ *Id.*

³⁶⁰ *Id.* See also Integrated Report, *supra* note 350, at 36.

³⁶¹ La. R.S. § 30:2074; 33 La. Admin. Code Part IX § 301; see also 33 U.S.C. § 1342.

³⁶² U.S. Department of Energy, How Wind Energy Can Help Clean Hydrogen Contribute to a Zero-Carbon Future (Aug. 16, 2022), <https://www.energy.gov/eere/articles/how-wind-energy-can-help-clean-hydrogen-contribute-zero-carbon-future>.

³⁶³ See Cape Wind Energy, *Offer For Lease, Easement Or Right-Of-Way and Grant of Lease, Easement or Right-of-Way for Energy and Related Purposes* at D1, available at: https://www.boem.gov/sites/default/files/uploadedFiles/BOEM/Renewable_Energy_Program/Studies/Cape%20Wind%20Application.pdf.

Section 10 of the Rivers and Harbors Act, cable construction would not likely require a LWPDS permit from the state of Louisiana.³⁶⁴

While submarine cables and most offshore generation facilities are unlikely to require LWPDS permitting, the same cannot be said for new proposals to produce “clean hydrogen” in Louisiana using OSW power. In September 2022, a multi-organization partnership led by Greater New Orleans, Inc. received a \$50 million-dollar federal grant to support a clean hydrogen cluster in south Louisiana through planning, business development, workforce training, technology “testbeds,” and public-private partnerships to stimulate commercial-scale investments.³⁶⁵ Clean hydrogen, also called “green hydrogen,” describes using renewable energy sources to produce hydrogen through electrolysis: a process in which “[sea]water molecules are split into oxygen and hydrogen using an electric current” generated by, e.g., OSW turbines. This process produces a form of wastewater that must be discharged back into the ocean; the discharged water is significantly higher-salinity, and thus may be considered a pollutant by water quality regulators.³⁶⁶

Additionally, onshore facilities, including transmission lines located in upland areas, are likely to require permitting through the program for stormwater discharges related to construction.³⁶⁷

Box Q: Expedited LWPDS Permitting

Pursuant to a 2006 authorization by the state legislature, LDEQ has established an expedited permit program, wherein certain permit applicants may request expedited processing of a permit by the agency. Eligible applications include requests proposing new construction and requests that will result in the creation of new permanent jobs (which are given highest consideration for expediting), as well as permit modifications associated with new construction and/or which provide a direct benefit to the environment.

Sources: 33 La. Admin. Code Part I § 1801; La. R.S. § 30:214.5.

³⁶⁴ For purposes of the LWPDS program, “waters of the state” means all surface waters within the state of Louisiana and, on the coastline of Louisiana and the Gulf of Mexico, all surface waters extending therefrom three miles into the Gulf of Mexico. La R.S. § 30:2073A. However, the regulation specifically provides that a LWPDS permit is *not* required for “discharge of dredged or fill material resulting from activities which are permitted by the U.S. Army Corps of Engineers, such as channel dredging and construction.” 33 La. Admin. Code Part IX § 301.

³⁶⁵ See Office of Governor John Bel Edwards, Gov. Edwards Hails Clean Energy ‘Milestone’ as Louisiana Hydrogen Project Wins \$50 Million Federal Grant (Sept. 2, 2022), <https://gov.louisiana.gov/index.cfm/newsroom/detail/3814>.

³⁶⁶ See generally the 2021 environmental impact analysis for the HT1 Hydrogen Demonstrator Project off the coast of Scotland, available at: https://marine.gov.scot/sites/default/files/vattenfall_-_screening_opinion_request_report_redacted.pdf.

³⁶⁷ See 33 La. Admin. Code Part IX § 301. For a description of stormwater permitting considerations for a previous offshore wind project, see MMS, *Cape Wind Energy Project: Final Environmental Impact Statement*, OCS Pub. No. 2008-040, at Appendix C: Draft Stormwater Prevention Plan (2009).

TMDLs

Under the federal Clean Water Act, Louisiana must regularly identify waters that do not meet its water quality standards and must periodically submit to U.S. EPA a list of those impaired waters. It must develop total maximum daily loads (TMDLs) for waters impaired by a pollutant, identifying allowable pollutant loadings from permitted point sources and nonpoint sources (plus a margin of safety) that would allow those waters to meet water quality standards.³⁶⁸ In Louisiana, LWPDS permits and Permitting Implementation Plans (for point sources) and Watershed Implementation Plans (for non-point sources) set out measures needed to achieve the load reductions delineated by the TMDLs.³⁶⁹

Louisiana has complied with the requirement to create a 303(d) list; LDEQ already has completed the state's 2022 biannual list and associated report.³⁷⁰ A number of TMDLs for specific waterbodies and pollutants have been developed, many following a court order issued in 1999.³⁷¹ LDEQ's 2022 list of waters in non-attainment anticipates creation of additional TMDLs for more waterbodies and impairments, most immediately including a TMDL for fecal coliform in Bayou Blue.

The 2022 Integrated Report does not indicate whether implementation plans are planned for offshore areas. While TMDLs theoretically could affect the planning and implementation of offshore renewable energy facilities in Louisiana, they may have limited applicability in this context.

Water Quality Certification

Even if offshore renewable energy facilities are placed in federal waters, they may be subject to state review pursuant to section 401 of the Clean Water Act. Section 401 requires states to review applications for federal permits and licenses to certify that the federally authorized actions will not violate adopted water quality standards. No federal license or permit may be granted until the certification has been obtained, or waived by state inaction.³⁷²

In Louisiana, water quality certification is handed by the General and Municipal Permits Section of the Water Permits Division in the Office of Environmental Services of LDEQ according to procedures set out in Title 33, Part IX, Subpart I of the Louisiana Administrative Code.³⁷³ Notwithstanding the present uncertainty regarding the regulatory scope and process for implementing Section 401 (see Box below), **certification may prove to be the most potent regulatory provision available to Louisiana in the water quality context.** Louisiana would have the opportunity to certify any offshore renewable energy project that affects state waters, including through direct emplacement of

³⁶⁸ 33 U.S.C. § 1313.

³⁶⁹ LDEQ, *TMDL Facts* (2013), available at:

https://deq.louisiana.gov/assets/docs/Water/TMDL/TMDL_Brochure_Final_2013.pdf; see generally LDEQ, TMDL, <https://deq.louisiana.gov/page/tmdl> (accessed September 2022).

³⁷⁰ Integrated Report, *supra* note 350.

³⁷¹ See LDEQ, TMDL Reports and Models, <https://deq.louisiana.gov/page/tmdl-reports-and-models> (accessed September 2022). See generally [E8-19863.pdf \(govinfo.gov\)](#) (identifying court order issued in October 1999 in *Sierra Club, et. al. v. Clifford et. al.*, No. 96-0257 (E.D. La.)).

³⁷² 33 U.S.C. § 1341.

³⁷³ 33 La. Admin Code Part IX, § 1503.

generation facilities or through placement of transmission lines in state waters. Projects that fail to meet state water quality standards may be halted³⁷⁴ or the state may place conditions on their approval.³⁷⁵

Box R: Uncertainty as to Scope of Future Section 401 Reviews

Section 401 certification has been carried out by states for almost 50 years under regulations adopted by EPA in 1971. Since 1994, when the Supreme Court ruled in PUD No. 1 of Jefferson County v. Washington Dep't of Ecology, states have exercised their authority under Section 401 to impose conditions on proposed federal license and permit “activities as a whole”—i.e., not only on the “discharge” itself—under the legal cover provided by that ruling.

After 25 years of status quo, in 2019, the Trump administration proposed to reverse the Supreme Court’s interpretation of Section 401 by adopting new regulations. The Trump rule, finalized by EPA in 2020, essentially adopted the dissenting view from the 1994 Supreme Court case, authored by Justice Thomas, which had argued for a narrower interpretation of the statute that would allow states to impose only “direct conditions” on “discharges.”

Environmental groups filed lawsuits to enjoin Trump’s 401 rule, and the Biden administration requested to have the rule remanded to EPA for reconsideration. In late 2021, a federal district court-- the U.S. District Court for the Northern District of California— vacated the new rule and remanded the rule to EPA. On April 6, 2022 the Supreme Court issued a so-called “shadow docket” ruling in Louisiana v. American Rivers, which “stayed” (i.e. suspended) the California district court’s decision and reinstated the Trump rule.

Now, states and EPA await the outcome of the 9th Circuit’s appellate decision, and an ultimate decision by the Supreme Court, where, if certiorari is granted, Justice Thomas’s interpretation of Section 401 is likely to comprise the majority opinion.

Sources: PUD No. 1 of Jefferson County v. Washington Dep't of Ecology, 511 U.S. 700 (1994); In Re: Clean Water Act Rulemaking, 568 F. Supp. 3d 1013 (N.D. Cal. 2021); Louisiana et al. v. American Rivers et. al, Supreme Court of the United States’ ruling on Application for Stay (Apr. 6, 2022).

Fish and Wildlife Management

Together, Louisiana’s Wildlife and Fisheries Commission (WFC) and the Department of Fish and Wildlife (LDWF) have broad authority over the state’s wildlife and fisheries. In addition to any direct requirements, wildlife-related requirements and/or considerations may be incorporated into other agencies’ decision making. For example, public lands law provides that all state water bottom permits and leases granted by SLO “shall be subject to the laws of the state concerning wildlife and to the rules, regulations, and orders authorized by such laws.”³⁷⁶

General Authorities to Protect and Manage Living Resources. The Commission and DWF are responsible for, among other things:

- Adopting rules and regulations for the “comprehensive control of birds, shellfish, finfish, and wild quadrupeds,” whether they be game or fur-bearing or not, and whether they be found in the state’s borders or in any of its waters, including gulfs;

³⁷⁴ See, e.g., Islander East Pipeline Co. v. McCarthy, 525 F.3d 141 (2d Cir. 2008) (upholding Connecticut’s determination that offshore pipeline project would violate water quality standards).

³⁷⁵ See, e.g., MMS, *supra* note 367, at 1-12 (reviewing Massachusetts laws for the Cape Wind project to obtain a state water quality certification).

³⁷⁶ La. R.S. § 41:1711.

- Improving, enlarging, and protecting the natural oyster reefs of this state as conditions may warrant (subject to the provisions stipulated in state law);
- Protecting and propagating, when possible, all species of birds and game and establishing preserves and hatcheries to be maintained and operated by the commission;
- Protecting game reserves placed under the control of the state;
- “Rigidly enforcing” all law relative to the bedding, fishing, selling, shipping, and canning of oysters; all law relative to the protection, propagation, and selling of birds and game; all law relative to the protection, propagation, and sale of all species of fish in the state, whether salt water or fresh water fish, shell fish, or fish of any description; and all law relative to diamond-back terrapin and shrimp;
- In “every possible way,” assisting in “developing the natural resources of the state under his jurisdiction to their fullest proportions”;
- Prohibiting discharge of brines from salt domes and other petroleum waste into waters off the state’s Gulf of Mexico coastline “when it becomes evident that said discharge is damaging or threatens to damage the aquatic life in the waters of the state”; and
- Issuing rules and regulations to set seasons, times, places, size limits, quotas, daily take, and possession limits, based upon biological and technical data, for all wildlife and fish, having as their objective the sound conservation, preservation, replenishment, and management of a species.³⁷⁷

One of the WFC’s most sweeping authorities with respect to coastal waters is the establishment of “closed zones.” Acting on its own or concurrently with a duly authorized parish game and fish commission, WFC may set aside “suitable locations in any of the waters of the state in whole or in part,” for the purposes of operating and maintaining hatcheries, sanctuaries, or propagating places for fish, with the ultimate goal of maintaining and restocking the supply in those waters. The law empowers WFC to “do anything necessary” to carry out the authorization, including purchasing or expropriating property. Full or partial fishing restrictions are mandatory in such zones, and the law goes further in prohibiting any person from willfully entering any area of land or water set aside for this purpose after WFC has posted notice.³⁷⁸ (Note, however, there is a generally applicable clarification in the fish and wildlife statutes that nothing in such statutes “affects in any way the authority of [LDNR] to lease or otherwise administer the beds and bottoms of navigable rivers, streams, bayous, lagoons, lakes, bays, sounds and inlets bordering on or connecting with the Gulf of Mexico within the territory or jurisdiction of the state...”³⁷⁹)

Natural and Scenic Rivers. LDWF also regulates certain activities in and affecting state waters that have been designated “scenic rivers” under the Louisiana Natural and Scenic Rivers System.³⁸⁰ The Natural and Scenic Rivers System was established by the legislature for the purposes of preserving, protecting, developing, reclaiming, and enhancing the “wilderness qualities, scenic beauties, and ecological regime” of “certain free-flowing streams or segments.”³⁸¹ Once a river or segment has been designated a scenic river³⁸², LDWF is required to develop and

³⁷⁷ La. R.S. § 56:6.

³⁷⁸ La. R.S. § 56:315, 316.

³⁷⁹ La. R.S. § 56:4.

³⁸⁰ La. R.S. § 56:1840 et seq.. See also LDWF, Scenic Rivers Permits, <https://www.wlf.louisiana.gov/page/scenic-rivers-permits> (accessed Sept. 2022).

³⁸¹ Id. at § 1841.

³⁸² A list of designated scenic rivers can be found at La. R.S. § 56:1847. A map is available on the LDWF website. See LDWF, Scenic Rivers Permits, *supra* note 380.

implement a management plan in consultation with the Division of Administration (which houses the State Land Office), LDEQ, and the Louisiana Department of Culture, Recreation and Tourism, and with the advice of other agencies that LDWF determines may have an interest in the plan.³⁸³

Another effect of a scenic river designation is that under Louisiana law, in “planning for the use and development of water and water-related resources,” state agencies must give “full and equal consideration” to the potential natural and scenic river areas, and “all river basin reports and project plans should discuss any such potential and all economic value evaluations should consider aesthetic values as well as monetary values.”³⁸⁴ Moreover, no state agency is allowed to authorize or concur in local or federal agencies’ plans that would directly or indirectly “detrimentally affect” a natural or scenic river, or plans in which the full and equal consideration as a natural or scenic river with aesthetic values has not been discussed and evaluated.³⁸⁵ In addition to planning, the Natural and Scenic Rivers statute grants LDWF authority to regulate activities that “may directly and significantly degrade the ecological integrity” of a natural and scenic river, specifically including crossings by and “sharing of land and air space” with utilities.³⁸⁶ Some activity types are generally prohibited by the legislature—i.e., channelization, clearing and snagging, channel realignment, and reservoir construction within designated waters.³⁸⁷ When an activity has potential to cause ecological degradation, the proponent submits an application to LDWF, who evaluates the proposed activity, considering various impact types and in consultation with other state agencies.³⁸⁸

Special Management Areas. There are several other types of special management areas fall under LDWF jurisdiction. According to LDWF, the agency currently maintains more than 1.5 million acres of Louisiana’s land and waterways as wildlife management areas, refuges, and conservation areas.³⁸⁹ FWC is authorized, on behalf of LDWF and the state of Louisiana, to acquire land in any wilderness area in the state from a willing seller at an agreed-upon price. The commission is also authorized to accept from any person, the state, or the federal government “any lands or waters suitable for wildlife refuges, wildlife management areas, and public hunting grounds,” and to adopt rules and regulations for the birds, animals and fish found there.³⁹⁰

There is a broad general prohibition on “taking by any means” any wild animal or bird within any state wildlife refuge, wildlife management area, or public hunting ground.³⁹¹ Take is defined (in the previous chapter of Title 56, but presumably applicable absent further definition) to include “wounding or killing by any means or device.”³⁹² To the

³⁸³ La. R.S. § 56:1846.

³⁸⁴ Id. at § 1848.

³⁸⁵ Id.

³⁸⁶ La. R.S. § 56:1850.

³⁸⁷ Id. For Comite River and other statutory exceptions, see id. at § 1855.

³⁸⁸ La. R.S. § 56:1849. For reference, the application form is available at https://www.wlf.louisiana.gov/assets/Conservation/Maintaining_Natural_Scenic_Rivers/Files/scenic_rivers_permit_app.pdf.

³⁸⁹ LDWF, Wildlife Management Areas, Refuges, and Conservation Areas, <https://www.wlf.louisiana.gov/page/wmas-refuges-and-conservation-areas> (accessed Sept. 2022).

³⁹⁰ La. R.S. § 56:763.

³⁹¹ Id. at § 761.

³⁹² La. R.S. § 56:8.

extent that OSW-related activities resulted in harm to a bird or animal in a coastal WMA (see figure 4³⁹³), it would result in a Class 2 violation, the penalty for which is a fine ranging from \$100 to \$1,000 and “and forfeiture to the commission of anything seized in connection with the violation.”³⁹⁴ Overall, an area’s classification as WMA, fish propagation area, or other LDWF-managed land is likely to carry more weight during permit and/or lease application reviews than with respect to potential consequences related to accidental harm to birds or animals. For purposes of intergovernmental coordination, LDWF is responsible for reviewing and comment on any environmental impact statements relative to fish and wildlife resources or their habitat and to review and comment on the discharge of the dredge and fill material into the waters of the state.³⁹⁵



Figure 4: Partial Map of WMA Areas (credit: LDWF)

Otherwise, restrictions in fish and wildlife laws and regulations on OSW-related activities are limited. The fish and game management regulations primarily focus on direct, intentional take of fish and wildlife and provide limited protection of habitat. Endangered species are also protected in Louisiana, but in practical effect, any protections beyond those already enjoyed by species under the Federal Endangered Species Act are limited. Like federal

law, Louisiana law bars the “take” of federally-listed endangered and threatened species, though “take” is not defined to explicitly include incidental harm; any additional species listed under the state law classifications “prohibited” and “restricted harvest” are only protected by limits on possession and harvest, respectively.³⁹⁶ The WFC is authorized to establish “such programs, including acquisition of land or aquatic habitat or interests therein” to conserve threatened or endangered species, but this authority does not extend to the power of expropriation.³⁹⁷ As a result, while offshore renewable energy development will require consultation to prevent the take of federally listed threatened and endangered species, Louisiana’s ESA analogue is unlikely to play an important role in restricting energy development.

³⁹³ Cropped from original. Source: LDWF, Master Plan for Wildlife Management Areas and Refuges (2014), available at: [LDWF Master Plan for Wildlife Areas and Refuges 2014.pdf \(louisiana.gov\)](https://www.louisiana.gov/~/media/2014/07/16/LDWF_Master_Plan_for_Wildlife_Areas_and_Refuges_2014.pdf).

³⁹⁴ La. R.S. § 56:32.

³⁹⁵ LDEQ serves as a clearinghouse for all statements of environmental impact to be prepared or reviewed by state agencies other than the Department of Transportation and Development.

³⁹⁶ LDWF, Rare, Threatened, and Endangered Ranks and Statuses, <https://www.wlf.louisiana.gov/page/rare-threatened-and-endangered-ranks-and-statuses> (accessed Oct. 2022).

³⁹⁷ La. R.S. § 56:1903.

State Energy Policies and Programs

Louisiana Public Service Commission: Regulating Wind Energy Generation and Transmission

Plenary Authority of the Commission. The Louisiana Public Service Commission (LPSC) regulates public utilities, including electricity utilities, serving the state.³⁹⁸ As in other states, LPSC regulations govern provision of utility services to consumers and the rates that can be charged.³⁹⁹ Notably for OSW, in Louisiana—where the state constitution provides plenary authority to the Commission—LPSC regulates not only the generation and distribution of electricity, but also transmission facilities.⁴⁰⁰

In Louisiana, the LPSC has jurisdiction over investor-owned utilities (IOUs) and some electric co-operatives (“co-ops”).⁴⁰¹ However, LPSC does *not* have power to regulate a public utility that is owned, operated, or regulated by a political subdivision’s governing authority (except as a result of a public referendum), referred to here as a “municipal utility.”⁴⁰² Notably, the New Orleans area is served by a locally-regulated IOU (Entergy New Orleans, Inc, or “Entergy NO”) that is *not* subject to LPSC regulation.

According to the publicly available Utilities Map published by LPSC, there are **four investor-owned utilities** operating in Louisiana: Cleco Power LLC; Entergy Gulf States Louisiana, LLC; Entergy Louisiana, LLC (ELL); and the Southwestern Electric Power Company (SWEPCO). There are also **nine co-ops** operating under the jurisdiction of the LPSC.⁴⁰³ Utilities operating in Louisiana that are *not* under LPSC’s regulatory jurisdiction include around 20 municipally owned and operated utilities around the state, the South Louisiana Electric Cooperative Association (SLECA), and the Southwest Louisiana Electric Membership Corporation (SLEMCO).

Authority to Regulate Transmission Facilities. Prior to 2013, siting decisions for electric bulk transmission facilities in Louisiana were “left predominantly in the hands of the electric utilities subject to

Box S: Selected Examples of Utilities Serving Coastal Parishes

- Most of Cameron Parish is served by an LPSC-regulated cooperative (JDEC), and another PSC-regulated cooperative (EGSL) serves the northwestern portion of Cameron and much of Calcasieu Parish.
- Iberia, St. Martin, and St. Mary Parishes are served all or mostly by CLECO.
- Vermilion and Terrebonne Parishes are largely served by co-ops that are not regulated by LPSC (SLEMCO and SLECA, respectively), though some areas are covered by an Entergy IOU.

Source: LPSC, Utilities Map, *infra* note 403.

³⁹⁸ See La. Const. Art. IV § 21; see also La. R.S. §§ 45-1161 et seq.

³⁹⁹ See La. R.S. § 45:1163.

⁴⁰⁰ LPSC, *General Order Asserting Jurisdiction Over The Certification of Utility Transmission Projects and the Determination of Whether Those Projects Are In The Public Interest* at 5 (Sept. 18, 2013) (hereinafter General Order 2013), available at: <https://lpsepubvalence.lpsc.louisiana.gov/portal/PSC/ViewFile?fileId=5IWzU72W2gY%3d>; see also *Piedmont Env’t Council v. FERC*, 558 F. 3d 304 (4th Cir. 2009).

⁴⁰¹ La. Const. Art. IV § 21; La. R.S. § 12:426.

⁴⁰² La. Const. Art. IV § 21.

⁴⁰³ LPSC, Utilities Map, https://www.lpsc.louisiana.gov/Utilities_Map (accessed September 2022).

judicial oversight” (which was only exercised when affected landowners refuse to voluntarily allow a needed expropriation).⁴⁰⁴ In 2013, the LPSC issued its “General Order Asserting Jurisdiction Over The Certification of Utility Transmission Projects and the Determination of Whether Those Projects Are In The Public Interest.”⁴⁰⁵ In effect, this order provides that no entity subject to LPSC’s jurisdiction or regulatory authority is allowed to construct any Transmission Facility within the state⁴⁰⁶ without the utility having first applied for and received an order from the LPSC that the public convenience and necessity would be served through the completion and siting of that Transmission Facility.⁴⁰⁷

For specific purposes of this jurisdictional order, the term "Transmission Facility" (TF) is defined as:

- a system of structures, wires, insulators, and associated hardware, but not including switching or substations,
- that carry electric energy over distances,
- that are located in whole or in part within the State of Louisiana,
- that furnish electric service within the state,
- that would be constructed and operated at or above a nominal 100kV,
- that exceeds one mile in length,
- and for which the estimated cost of construction exceeds \$20 million dollars.⁴⁰⁸

Moreover, an independent transmission company (“Transco”) that may not currently qualify as a public utility subject to the Commission’s jurisdiction must consent to LPSC’s jurisdiction in order to file an application for, and obtain, a certificate of public convenience and necessity under the order.⁴⁰⁹

⁴⁰⁴ LPSC, General Order 2013, *supra* note 400, at 5. (“Louisiana courts have required electric utilities exercising expropriation authority pursuant to La. R.S. 19:2(7), to show that the expropriation serves a public and necessary purpose, and that the route selected is based on sound engineering and economic principles. In determining whether the expropriating authority abused its discretion in selecting a particular route, Louisiana courts also have considered the inconvenience which the selected route may cause the landowner. See, e.g., Louisiana Power & Light Co. v. Caldwell, 360 So. 2d 848, 851-52 (La. 1978).”)

⁴⁰⁵ *Id.* On the need for a new approach, the LPSC asserted, “A reviewing court will not and cannot engage in the type of inquiry that the Commission would undertake in a certification and siting analysis, i.e., whether the proposed transmission facility will result in service at the lowest reasonable cost consistent with economic, reliability, and safety considerations.” *Id.*

⁴⁰⁶ Except Orleans Parish.

⁴⁰⁷ General Order 2013, *supra* note 400, at 16.

⁴⁰⁸ *Id.* at 9.

⁴⁰⁹ *Id.* at 10. The order defines “Transco” as: “An Independent Transmission Company or other entity that owns or controls Transmission Facilities (or that proposes to construct or own new Transmission Facilities) that currently may not be a public utility subject to the Commission’s jurisdiction but which has planned, proposed, or seeks to construct a Transmission Facility and demonstrates in its Application to the Commission, in addition to the other requirements of this General Order, that it can construct and thereafter own and operate the proposed Transmission Facility...” *Id.*

Signaling the scope of entities and activities to which LPSC intends to apply the order, it states,

The Commission intends to exercise its jurisdiction and authority over any Transmission Facility if the costs of the Transmission Facility, and the costs of any associated retail rate impacts, will be reflected or recovered in the retail or wholesale rates to be assessed to customers of Louisiana electric public utilities or cooperatives.⁴¹⁰

Public Convenience and Necessity Determination. When LPSC receives an application for a proposed Transmission Facility, it will review the application to determine whether the TF is “in the public interest and the interests of affected ratepayers, enhances reliability of service, and/or provides economic benefits, and/or promotes policy goals.”⁴¹¹ The applicant bears the burden to prove that the proposed TF is in the public interest and therefore should be sited and issued the certificate.

In making the public interest determination, the Commission “may consider” factors including:

- Impact of the proposed TF on costs and retail rates;
- Impact of the proposed TF on service reliability;
- Reduction of congestion;
- Interstate or intrastate benefits expected to be achieved; and
- Whether the proposed TF is consistent with public policy.⁴¹²

Other factors that the Commission may consider are whether “the generalized siting of the proposed Transmission Facility is appropriate” and “construction of *this* Transmission Facility (as opposed to construction of another transmission facility or construction of generation, for example) is a *reasonable* and *cost-effective* solution to the problem being addressed in the Application.”⁴¹³ In addition, the Commission may consider “criteria required in or established under federal statutes, Federal Energy Regulatory Commission (FERC) Order No. 1000, other FERC Orders, and/or regulations, and potential impacts on other affected utilities and the customers of those utilities.”⁴¹⁴

The transmission order is clear that the LPSC’s certification and siting review is in addition to, and not intended to obviate, “any other approvals that may be required under local, state and/or federal law.”⁴¹⁵ The order clarifies that in reviewing the proposed “generalized siting” for “appropriateness,” the Commission will only review and approve a generalized substation-to-substation corridor (or similar general arrangement) for the proposed TF—i.e., LPSC will not consider or approve a specific, parcel-by-parcel routing configuration. This is because LPSC does not have jurisdiction over issues related to expropriation, land use planning, zoning, and environmental impacts; in fact, the transmission order is explicit such issues “shall not be considered in the certification or siting proceedings” before the Commission.⁴¹⁶ (Nevertheless, it is “the intent” of LPSC that its issuance of a certificate of public

⁴¹⁰ General Order 2013, *supra* note 400, at 9.

⁴¹¹ *Id.* at 10.

⁴¹² *Id.* at 10.

⁴¹³ General Order 2013, *supra* note 400, at 10-11 (emphases added).

⁴¹⁴ General Order 2013, *supra* note 400, at 11.

⁴¹⁵ *Id.*

⁴¹⁶ *Id.*

convenience and necessity will establish “presumptive evidence” of the “public and necessary purpose” of a TF during an expropriation proceeding.)

It is important to mention that several LPSC-regulated utilities participate in Regional Transmission Organizations (RTOs), including the Midcontinent Independent System Operator (MISO) and the Southwest Power Pool (SPP).⁴¹⁷ These arrangements required prior approval from and a determination by LPSC that it was in the public interest for the IOUs to “transfer functional control of their bulk transmission assets” to the RTO.⁴¹⁸ Identification of nuanced issues relating to—and clarification of the relationships between—RTOs, utilities, and LPSC is beyond the scope of this report but may be a useful topic of future research if OSW facilities are to be sited off Louisiana’s coast.

Box T: Overhead Powerline Safety Act

In 2001, Louisiana amended its public utility statutes to add the Overhead Powerline Safety Act, which creates a 10-foot safety buffer around all high-voltage (600 or more volts) overhead powerlines. In general, no person can perform any activity on any land, building, highway or waterway that will result in that person or their equipment coming within 10 feet of a high voltage overhead line. Temporary permission may be granted by the operator of the overhead line, but only with prior notice and by mutual agreement on safety conditions. Expenses incurred by the operator of the overhead line – e.g., mechanical barriers and other clearances—will be charged to the person performing the work.

Based on a requirement in the law directing LPSC to ensure utilities notify their customers of this requirement, it appears to be targeted toward small-scale, private activities, not to utility-scale construction. Still, to the extent existing corridors are utilized for new higher-capacity transmission infrastructure, this statute may require coordination with existing utilities using overhead powerlines in the same area.

Source: La. R.S. §§ 45:141 et seq.

Scope of LPSC Jurisdiction – Potential Application to OSW. For purposes of LPSC’s regulatory jurisdiction generally, electric public utility means any entity “furnishing electric service within” Louisiana (except in Orleans Parish), including any electric cooperative transacting business in the state. There is an exception to the definition in the statute for entities “owning, leasing, and/or operating an electric generational facility *provided such person is not primarily engaged in the generation, transmission, distribution, and/or sale of electricity...*” (and satisfies other conditions).⁴¹⁹

For purposes of the order on transmission jurisdiction, transmission facilities are defined similarly, but not identically, to electric public utilities. In addition to establishing de minimum thresholds for voltage, length, and cost, the definition is further refined to clarify that a regulated “TF” does not include switching and/or substations; that a TF may be located “in whole or in part” in Louisiana. The TF definition in the order reiterates the requirement found in the statutory definition that the facility must “furnish electrical service within the state.”⁴²⁰

Generation of OSW Energy in Louisiana Waters. At least in the OSW industry’s nascent stages, any entity that constructs and generates wind energy in state waters would likely fall squarely within the regulatory definition (i.e., not qualify for the exception for entities “not primarily engaged” in the energy business) of public electrical utility.

⁴¹⁷ For a discussion of Louisiana RTOs and their potential role in scaling up wind energy, see generally <https://gov.louisiana.gov/assets/docs/CCI-Task-force/3-11/LouisianaRTOsPowerProducersGroup3.11.2021.pdf>.

⁴¹⁸ See, e.g., LPSC Order No. U-32148 (June 28, 2012).

⁴¹⁹ La. R.S. § 45:121.

⁴²⁰ LPSC, General Order 2013, *supra* note 400, at 9.

The most straightforward arrangement would be for an existing Louisiana utility to propose to add an in-state OSW facility to its existing “fleet” of plants, through direct ownership or a life-of-unit contract with an affiliate company. In that case, the utility would agree to acquire the new power plant following its construction by wind turbine Company X, and LPSC would have to approve the agreement. By analogy, LPSC recently approved a 20-year agreement under which Entergy will add 475 MW of “new-build solar generating capacity” from four separate facilities (constructed by two different companies) located across the state.⁴²¹

The so-called 1983 General Order requires a utility to obtain LPSC’s approval of any project to construct, convert, or purchase new generating resources, and requires advance certification by the Commission that the proposed project serves the public convenience and necessity.⁴²²

Generation of OSW Energy in Federal Offshore Waters. Regarding LPSC jurisdiction over OSW energy generated in federal waters, some of the potential scenarios include:

- Company A generates wind power in federal waters, and Company A also owns and operates transmission cables carrying high-voltage AC electricity from a common offshore transformer for connection to an AC/DC power conversion station located in Louisiana.

Here, Company A appears to fall within the LPSC definitions of public electrical utility and TF.

- Company B generates wind power in federal waters, which is collected at a common offshore transformer. Company C owns and operates transmission cables carrying high-voltage AC electricity from the common offshore transformer, which connects to the onshore grid via an AC/DC power conversion station that is located within Louisiana (except Orleans Parish).

Here, Company C appears to fall within the statutory definition of electrical utility and the definition of TF.

- Company D generates wind power in federal waters, which is collected at a common offshore transformer. Company E owns and operates transmission cables carrying high-voltage AC electricity from the common offshore transformer, which crosses through Louisiana’s coastal waters or elsewhere in the state, but ultimately connects to the grid via an AC/DC power conversion located in a neighboring state.

It is not clear on the face of the law and/or transmission order whether Company E would qualify as “furnishing electric service within the state,” pursuant to LPSC’s definition of “transmission facility” for purposes of the 2013 jurisdictional order (see below). On one hand, if future grid configurations result in a scenario in which high-voltage transmission lines are passing through the state, but are not at any point connected to a station that steps down voltage for distribution to customers in Louisiana, it may seem counterintuitive to justify such a transmission cable as

⁴²¹ See Entergy Louisiana (ELL), “Entergy Louisiana receives approval to purchase 475 MW of solar power, add green tariff option” (Sept. 21, 2022), www.entergynewsroom.com.

⁴²² *Matter of Expansion Util. Power Plant*, 1983 WL 177112, at 1 (Sept. 20, 1983). (“No electric public utility subject to the jurisdiction of the Commission shall commence any on site construction activity or enter into any contract for construction or conversion of electric generating facilities or contract for the purchase of capacity or electric power, other than emergency or economy power purchases, without first having applied to the Commission for a certification that the public convenience and necessity would be served through completion of such project or confecton of such contract. Feasibility and engineering studies, site acquisition and related activities preliminary to a determination of the desirability or need for plant construction or conversion on purchase power contracts are exempted from this requirement.”)

“furnishing electrical service within the state.” On the other hand, the order asserting LPSC’s jurisdiction over transmission acknowledges that one reason for issuing the order is to ensure that LPSC “will be in a position to exercise jurisdiction over the certification, siting and construction process should areas in Louisiana be designated as national interest electric corridors, should transmission be required or recommended by MISO or ITC, or should transmission be recommended due to the FERC Order No. 1000 planning processes.”⁴²³ While it is possible this statement contemplates Louisiana connecting via in-state distribution stations to all such “corridors,” it also possible that LPSC intends to assert its “general siting” jurisdiction over any transmission cable running through the state, particularly since electricity delivered by interstate cable to a Regional Transmission Organization from which Louisiana utilities receive power—e.g., MISO, SPP—is arguably “furnished” within Louisiana eventually. While arguably LPSC could address this ambiguity on its own under its existing authority, clarification of this and other ambiguities by the state legislature may be desirable to help expedite offshore energy developments requiring transmission lines through Louisiana.

State Incentives for Renewable Energy Production and Use

Renewable Energy Pilot Program. In 2010, the LPSC approved a Renewable Energy Pilot Program (REP).⁴²⁴ The program was “an experimental study for the purpose of determining what renewable resources can be used by LPSC-jurisdictional utilities to meet a federal or state RPS should one be imposed, taking into consideration transmission and transportation constraints specific to Louisiana utilities, while at the same time ensuring that Louisiana ratepayers are protected from a significant increase in rates.”⁴²⁵ Wind power was one of many renewable energy sources eligible for the pilot.⁴²⁶

The 2010 REP program included two components: a research component and a request for proposals (RFP) component. The research component involved researching and evaluating renewable energy projects sited in Louisiana; it required utilities to develop at least three small, “self-build” pilot projects or offer a tariff to purchase renewable energy based on a specified price and standardized terms. The RFP component was intended to allow utilities to “evaluate characteristics of larger renewable projects,” by requiring the jurisdictional utilities collectively to request a maximum of 350 MW total capacity, divided according to proportion of retail sales. LPSC issued a general order memorializing its implementation plan for the REP in December 2010.⁴²⁷ The implementation plan clarified that a routine certification proceeding was required for each renewable resource selected for the RFP component.⁴²⁸

Following the REP, several Louisiana utilities entered power purchase agreements with renewable providers under the RFP component. In December 2011, LPSC approved a 31-MW renewable energy purchase agreement (REPA) between SWEPCO and a subsidiary of BP Wind Energy, finding that the onshore wind energy purchase agreement price and terms served the public convenience and necessity and were in the public interest.⁴²⁹ However, the wind

⁴²³ LPSC, General Order 2013, *supra* note 400.

⁴²⁴ See LPSC, Louisiana Pub. Serv. Comm’n, Ex Parte, General Order 7-21-10 (Docket No. R-28271, Subdocket B).

⁴²⁵ LPSC, Louisiana Pub. Serv. Comm’n, Ex Parte, No. R-28271 (Dec. 9, 2010).

⁴²⁶ LPSC, Louisiana Pub. Serv. Comm’n, Ex Parte, General Order 7-21-10 (Docket No. R-28271, Subdocket B).

⁴²⁷ LPSC, Louisiana Pub. Serv. Comm’n, Ex Parte, No. R-28271 (Dec. 9, 2010).

⁴²⁸ *Id.*

⁴²⁹ See LPSC, Order No. U-32095 (Dec. 14, 2011).

turbines generating the purchased power, which became commercially operational in late 2012, are located in Kansas, not within Louisiana.⁴³⁰

In August 2013, the originally-authorized REP program concluded with a series of reports from utilities and LPSC staff. The August 2013 order included discussion of the LPSC's determination that a statewide RPS would not be imposed following the pilot program. However, the research component of the REP program was extended, with LPSC authorizing SWEPCO and Entergy's standard offer tariff programs to remain in place until their respective 30 MW caps were reached or until LPSC determines that it is in the public interest to terminate the tariffs.⁴³¹ As of 2022, utilities continue to file annual reports on implementation of the REP general order.⁴³²

Renewable Portfolio Standards. Renewable portfolio standards (RPS), also referred to as RES (renewable energy standards) are policies requiring or encouraging electricity suppliers to provide their customers with a minimum share of electricity from renewable resources. Since Iowa established the first statewide RPS, over half the states have followed suit, establishing renewable or clean energy requirements.⁴³³ With LPSC having declined to establish an RPS following the REP or otherwise, Louisiana is not one of those states.⁴³⁴ However, Louisiana's most populous city has acted where the state has not, adopting a mandatory renewable standard in 2021. In addition, Entergy Louisiana—which provides electric service to over a quarter of the state's residents—has announced the company's own goal of achieving significant carbon emissions reductions by 2030, and of reaching net-zero emissions by 2050.⁴³⁵

New Orleans RCPS. Under Louisiana law, the Council of the City of New Orleans is the governmental body with authority over public utilities in the City of New Orleans.⁴³⁶ On May 20, 2021, the City Council adopted a mandatory Renewable and Clean Portfolio Standard (RCPS).⁴³⁷ Among other goals, it calls for net zero carbon emissions resources by 2040 and 100% zero carbon emission resources by 2050. It also provides that the use of renewable energy credits without the purchase of associated energy should be initially limited to 25% and phased out completely by 2050. Resources that count toward this standard include, but are not limited to, utility-scale and distribution-scale renewable resources, energy efficiency, demand-side management, energy storage, and nuclear

⁴³⁰ See AEP Renewables, Flat Ridge Wind II, <https://www.aeprenewables.com/flat-ridge-wind-ii/> (accessed Oct. 18, 2022).

⁴³¹ LPSC, *Louisiana Pub. Serv. Comm'n, Ex Parte*, General Order 08-21-13 (Docket No. R-28271, Subdocket B).

⁴³² See generally LPSC Docket No. R-28271, <https://lpsepubvalence.lpsc.louisiana.gov/portal/PSC/DocketDetails?docketId=153>.

⁴³³ See NCSL, Renewable Portfolio Standards, <https://www.ncsl.org/research/energy/renewable-portfolio-standards.aspx> (accessed September 2022).

⁴³⁴ See generally DSIRE, Renewable Energy Pilot Program (Mar. 24, 2016), <https://programs.dsireusa.org/system/program/detail/4596>. (“In June 2010, the Louisiana Public Service Commission (LPSC) unanimously approved a Renewable Energy Pilot Program to determine whether a renewable portfolio standard (RPS) is suitable for Louisiana. The program was concluded in August of 2013 with the determination that, while utilities, staff, and regulators learned a great deal, a mandatory RPS was not needed in Louisiana.”)

⁴³⁵ Entergy, Climate Commitment, Goals, and Action, <https://www.entergy.com/environment/goals/> (accessed September 2022).

⁴³⁶ This authority is pursuant to the Louisiana Constitution and the Home Rule Charter of the City of New Orleans.

⁴³⁷ Council of the City of New Orleans, *Resolution and Order Adopting a Renewable and Clean Portfolio Standard*, Resolution R-20-182 (May 2021), available at: https://cityofno.granicus.com/MetaViewer.php?view_id=&clip_id=3852&meta_id=538696

power. Resources directly connected to the utility's transmission and distribution systems shall be considered high-priority resources and shall be incentivized to transmission through a compliance credit multiplier.⁴³⁸

The RCPS also sets a Customer Protection Cost Cap, which limits compliance costs to not more than 1% of the year's total utility retail sales. In years where the utility cannot comply with the RCPS through reasonable measures, they will be required to pay an Alternative Compliance Payment into a CleanNOLA fund up to the amount of the Consumer Protection Cost Cap. These funds are to be used for RCPS compliance purposes. Additionally, the utility must file three-year compliance plans informed by their IRPP with the Council for review and approval, along with annual compliance reports.⁴³⁹

In addition to any greenhouse gas reductions it helps achieve, the New Orleans RCPS may provide a valuable "laboratory" for how renewable energy is incentivized, procured and distributed in Louisiana more broadly. As the New Orleans RCPS is implemented in the years to come, lessons learned at intersection of RPS standards, an IOU, MISO, and Louisiana ratepayers may end up providing building blocks for future statewide actions.

Integrated Resource Planning. As part of its plenary authority over public utilities, LPSC has authority over "electric utility resource planning matters."⁴⁴⁰ In a General Order issued in 2012, which governs all IOUs regulated by LPSC, the Commission established an Integrated Resource Planning (IRP) Process. Through the order, the Commission adopted rules under which utilities "develop long-term resource plans, which include both supply and demand-side resources, and consider transmission needs, in order to satisfy the utility's load requirements."⁴⁴¹ The order does not mandate a specific substantive planning outcome nor specific investment decisions, but rather is focused on establishing an open and collaborative process for planning. One of the Commission's primary motivations was the desire for an ongoing framework that would engage and inform regulators during the utilities' routine planning processes, as well as allow for stakeholder input and comment.

IRP Process. The IRP process begins when an IOU submits their request to initiate the IRP process and files required data assumptions to be used in the IRP, as well as a description of the studies to be performed. (The assumptions and judgments utilized in the report's analyses include, among other things, fuel costs, transmission topology, environmental issues, and renewable resource considerations.) The next step is for the IOU to hold a preliminary stakeholder meeting and invite stakeholders to file written comments.

At some point after this first round of public engagement, the utility publishes a draft IRP report. Key components of an IRP report include but are not limited to: a system reliability assessment; a resource needs assessment (anticipated capacity needs over the planning period); and identification and evaluation of viable resource alternatives. These include both supply-side and demand-side alternatives; include both renewable and non-renewable alternatives; and must evaluate, among other things, potential environmental costs associated with the operation of the resource during the planning period.

Further stakeholder engagement is required after the draft report is released: the utility is required to hold a second stakeholder meeting and to solicit comments on the draft report. The LPSC staff also submit comments on the draft report. Having taken the comments into account, and based on various technical and financial analyses, the IRP selects

⁴³⁸ Id.

⁴³⁹ Id.

⁴⁴⁰ LPSC, *In re: Development and Implementation of Rule for Integrated Resource Planning for Electric Utilities* (hereinafter General Order on IRP) at 1 (2012), available at:

<https://lpscpubvalence.lpsc.louisiana.gov/portal/PSC/ViewFile?fileId=WfdhpDM5CjE%3D>.

⁴⁴¹ Id.

the final expansion plan. The utility prepares and files a final report, at which time stakeholders have the opportunity to submit a list of disputed issues and alternative recommendations. LPSC staff submit their recommendations to the Commission, including whether a proceeding will be necessary to resolve the disputed issues.

The final step of the IRP process is to develop an action plan, which links between the utility's preferred portfolio and the specific actions to be performed during the first five years of the planning period. The action plan must include a timetable, descriptions of the actions necessary, and the amount of capacity involved. Additionally, the plan must discuss permitting issues or other regulatory actions that are required, as well as environmental impacts and plans to meet environmental regulatory requirements.

Opportunities to Advance OSW. While the IRP process does not create enforceable renewable energy policies or establish specific metrics and measures, the process can be used by utilities, stakeholders, and the Commission as a vehicle for advancing clean energy policy goals.

The report is an opportunity to acknowledge how different renewable energy resources compare and signal technologies of interest to the utility; for example, Entergy's 2019 report—which covers the long-term planning period 2019-2038—stated, “Among all technologically-feasible renewable energy options, solar and onshore wind resources are the most cost effective, commercially-available alternatives to meet ELL's capacity and energy needs;”⁴⁴² then went on to describe modeling and analyses that allowed Entergy to conclude that “solar appears to be the preferred renewable alternative over wind initially, as the model selects solar resources prior to wind in all futures.”⁴⁴³ In September 2022, LPSC approved a 20-year agreement between Entergy and two different solar plant construction companies that will add a total of 475MW of solar-generated power to its resource portfolio.⁴⁴⁴ While the IRP did not mandate this outcome, it helped set the stage by transparently presenting and justifying the utility's renewable expansion plans with stakeholders and the LPSC. Entergy also used its 2019 IRP to publicize its proposal for a “Geaux Green” voluntary tariff—developed in response to ratepayers' express desires—to provide its customers the opportunity to subscribe to renewable energy resources. The tariff was also approved by LPSC in September 2022.⁴⁴⁵

As Entergy has recently demonstrated, Louisiana's ratepayers and IOUs are ready and willing to start integrating utility-scale renewable resources when it is in the public interest. As OSW technology becomes more cost-effective and the regional grid becomes more accommodating, the IRP process and its opportunities for stakeholder input can be used to ensure Louisiana IOUs identify, consider, and plan for expanding their resources to include wind energy generated in the Gulf.

Recent OSW-Related Developments in Louisiana

In late September 2022, local media reported that Public Service Commissioner Craig Greene had “issued a directive to utilities to evaluate the costs and benefits of offshore wind power in their long-range resource planning.”⁴⁴⁶ According to the report, Greene stated that LPSC had “directed each utility to fully analyze the feasibility of offshore wind as each company carries out their resource planning,” in an effort to help determine “Louisiana's future with

⁴⁴² Entergy Louisiana, *2019 Integrated Resource Plan*, available at: https://www.entropy-louisiana.com/userfiles/content/irp/2019/ELL_IRP_2019_public.pdf

⁴⁴³ *Id.*

⁴⁴⁴ See Entergy, “Entergy Louisiana receives approval to purchase 475 MW of solar power, add green tariff option,” *supra*.

⁴⁴⁵ *Id.*

⁴⁴⁶ Sam Karlin, “Entergy partners with offshore wind developer to explore Gulf of Mexico potential,” (Sept. 23, 2022), Nola.com, https://www.nola.com/news/environment/article_2a752480-3b82-11ed-b892-1bbc5fc1d7b6.html.

offshore wind.”⁴⁴⁷ The directive, which had not been published in LPSC’s public document archives as of mid-October 2022, follows a non-binding May 2022 Louisiana House Resolution “urging and requesting” the LPSC “to investigate the benefits, feasibility, costs, and pathways to achieving demonstrable offshore wind energy development by 2026.”⁴⁴⁸

On the same day, Entergy announced and local media reported that Entergy is “actively exploring potential offshore wind projects” in Louisiana state waters in the Gulf of Mexico.⁴⁴⁹ According to the reports, Entergy Louisiana, Entergy New Orleans and Diamond Offshore Wind have signed a memorandum of understanding (MOU) “regarding the evaluation and potential early development of wind power generation in the Gulf of Mexico.”⁴⁵⁰

⁴⁴⁷ Id.

⁴⁴⁸ 2022 Louisiana House Resolution No. 25.

⁴⁴⁹ Karlin, *supra* note 446.

⁴⁵⁰ Brandon Scardigli and Lee Sabatini, Entergy News Center, “Entergy Louisiana, Entergy New Orleans and Diamond Offshore Wind seek to evaluate offshore wind,” (Sept. 23, 2022), <https://www.energynewsroom.com/news/entergy-louisiana-entergy-new-orleans-diamond-offshore-wind-seek-evaluate-offshore-wind/>.

Conclusion

Notable and/or Unique Features of Louisiana’s Legal and Regulatory Framework

While no two states’ laws, regulations, or coastal programs are identical, there are certain cross-cutting features and trends that national practitioners routinely encounter—and may anticipate—in connection with coastal laws and regulations. In Louisiana, however, many features of the state’s framework are unique or otherwise stand out among the rest of the states, including other coastal states where OSW has been or is being pursued or considered.

These include, but are not necessarily limited to:

- Louisiana’s “working coast” is more densely crowded by existing users than most other states’ coastal zones. While the ethos of the industrial coast, existing linear infrastructure, and port facilities may be helpful in facilitating fast growth of a new offshore industry, the network of existing leases and physical infrastructure related to oil, gas, and other mineral/chemical industries, together with the network of private oyster leases and privately held lands and waterways in the coastal zone, are likely to make siting decisions relatively complicated.
- The geography of Louisiana’s coastal area is changing comparatively rapidly due to erosion, sea level rise, subsidence, and other factors.
- Louisiana’s “coastal zone” boundary, as delineated for purposes of state law and the Coastal Zone Management Act, has a relatively wide landward strip, thus extending the many special protections and considerations that apply to coastal zone projects further inland than in many other coastal states.
- Louisiana’s NOAA-approved Coastal Management Program has been updated less frequently than other states with active offshore energy industries.
- The Louisiana Constitution gives the state’s Public Service Commission plenary authority to regulate electricity supply, transmission, and distribution, which is not the case in all coastal states.
- In Louisiana, the legacy of privately-owned water bottoms is likely to make efforts to site transmission infrastructure through Louisiana’s coastal marshes challenging, both in itself and as compared with other Gulf Coast states.
- Louisiana does not have a statewide Renewable Portfolio Standard. (While over half of U.S. states do have an RPS, none of the other Gulf Coast states has one in place, either.)
- Louisiana allows, but does not require, parishes and municipalities to develop and implement comprehensive land use plans. Many other states mandate local land use planning and establish minimum elements to be included in the plans. The lack of statewide mandate may result in less uniformity and predictability among local land use restrictions, compared with states with mandatory and/or more standardized comprehensive planning requirements.

Opportunities to Strengthen Louisiana’s OSW Framework

The preceding sections of this report include many observations and recommendations related to Louisiana’s existing legal and regulatory framework for OSW, all of which are not reiterated or summarized here. However, it is important to highlight that as prospects for OSW energy production in the Gulf of Mexico gain momentum, Louisiana stakeholders may wish to consider, and evaluate the potential benefits and feasibility of, *at least* the following types of state-level measures:

1. Enact legislation or by executive order or other means establish a unified administrative process to coordinate the development and review of wind energy facilities in state and federal coastal waters. Under current procedures, responsibilities related to environmental impact review are divided among several agencies – e.g., LDNR is charged with coastal permitting and consistency reviews; the State Mineral and Energy Board and State Land Office and are charged with administering leases of public lands and water bottoms; LDWF issues additional permits for water bottoms; LDEQ handles water pollution permits and serves as a “clearinghouse” for all EISs prepared or reviewed by state agencies (other than DOTD); and all coastal activities must be consistent with the master plan developed and implemented by CPRA. Given the significant tradeoffs at stake from siting of energy facilities and transmission facilities (and supporting services) in both state and federal waters, and the competing uses for Louisiana’s marine and estuarine waters and onshore areas, it may be desirable to establish a primary coordinator to get ahead of anticipated offshore wind energy proposals. Many of the obstacles to offshore alternative energy development encountered thus far in other states have come from the lack of a straightforward path for planning, evaluation, and permit coordination. Thus, even in states supportive of OSW development, the review process has been uncertain.

In its 2021-2025 CZMA Section 309 enhancement plan, the LCMP acknowledged that improvements could be made to the coastal review process. It identified “lack of awareness of the CUP program” as an emerging issue and articulated a need to “[r]eview current permitting processes, policies, and tools to improve ease of use and efficiency, and investigate new opportunities for streamlining regulatory processes...”⁴⁵¹ If undertaken, such a review could present a good opportunity to consider how CUP reviews for proposed OSW facilities will be coordinated with other agencies’ processes. Designation of a coordinating entity or body could improve the clarity of the process without changing any of the underlying review standards or the jurisdiction of any of the Louisiana agencies responsible for applying these standards.

At a minimum, LDNR and SMEB should provide additional clarification regarding the type(s) of state leases, property rights (e.g., rights of way), and permits required for OSW generation and/or transmission projects within or traversing state waters and water bottoms.

2. Comprehensively map Louisiana’s ocean and coastal resources and proactively identify potential conflicting uses. Louisiana’s coast is the subject of many studies and plans, and many coastal mapping efforts have been undertaken in connection with those activities, with varying degrees of success.⁴⁵²

Nevertheless, in its 2021-2025 CZMA Section 309 enhancement plan, LDNR-OCM identified “mapping/GIS” for permitting purposes among the coastal program’s priority needs and information gaps.⁴⁵³ Indeed, 2020 guidance from

⁴⁵¹ LDNR-OCM, *Louisiana Coastal Management Program Coastal Zone Management Act Section 309 Program Guidance: 2021 to 2025 Enhancement Cycle* at 51, available at:

http://www.dnr.louisiana.gov/assets/OCM/Interagency/309/309_2021_2025AS_FINAL.pdf. The plan further notes, “As recommended in NOAA’s 312 review, [LDNR-]OCM seeks to identify and assess policies, processes, documents, and internal systems, to increase efficiencies and reduce inaccuracies during the permitting process. New or improved policies and/or updates to permitting procedures may potentially improve the mitigation process and ensure that adequate compensatory mitigation is assessed for projects located within the coastal zone.” *Id.* at 54.

⁴⁵² See, e.g., La. Legislative Auditor, *Inventory of State Lands*, *supra* note 337, at 2 (concluding that “OSL has not maintained a current or comprehensive inventory of state lands” as required by law).

⁴⁵³ LDNR-OCM, *supra* note 451, at 51.

LDNR on identifying alternatives for utility “routing” in the coastal zone suggests that prospective sites (and their owners) can be identified using a combination of, e.g., “current aerial photography,” clerk of court records, local newspapers, a “drive by search,” Multiple Listing Real Estate Searches (MLS). This suggests an inefficient, ad-hoc site identification process that can be improved, including through comprehensive mapping of Louisiana’s coastal waters.

Investments in comprehensive mapping of Gulf and coastal resources and conflicts could substantially aid in the protection of Louisiana’s coastal environment, and the identification of preferred areas and existing and/or potential linear infrastructure corridors where permitting could be readily carried out. This information could result in the avoidance or reduction of unnecessary delays and encourage appropriate project proposals. It could also help prevent the occurrence of inconsistent decisions that would prevent the development of suitable facilities or impede desired OSW-related activities. Taking mapping efforts a step further toward comprehensive marine spatial planning, policymakers could authorize and planners could implement advance designation of preferred corridors for transmission facilities through Louisiana’s coastal waters.

In the 2021-2025 CZMA Section 309 enhancement plan, LDNR-OCM indicated that ocean planning, which can encompass mapping and marine spatial planning activities, was a low priority for this cycle. The next plan, which will cover 2026-2030, could be used to identify ocean planning as a higher priority, increasing the likelihood that federal financial assistance can be successfully leveraged to support these types of activities.

3. Update the Coastal Use Guidelines to include specific guideline sections or provisions better suited to address OSW. Louisiana’s Coastal Use Guidelines form the backbone of both the Coastal Use Permit program and federal consistency review enforceable policies. The most pertinent existing sections—the Guidelines Applicable to All Uses (Section 701) and the Guidelines for Linear Facilities (Section 705)—were last updated in 1980, and thus reflect the reasonable assumptions of that era – i.e., that coastal energy development would be mostly oil and gas related. A new set of specific guidelines for siting offshore renewable energy facilities could be adopted, akin to the specific guidelines for oil and gas (Sec. 719), and/or the linear facility guidelines could be updated with more specific guidance on routing transmission cables, including how existing linear corridors may or may not be utilized in connection with new coastal projects. (Note: Any updates to the Coastal Use Guidelines should be submitted to NOAA-OCM as a program change to ensure Louisiana’s enforceable policies are up-to-date and available for application during federal consistency review of OSW proposals.)

The *Guide to Developing Alternatives and Justification Analyses for Proposed Uses within the Louisiana Coastal Zone*, which is used by CUP applicants and LDNR to help the permitting authority determine whether proposed projects are consistent with the guidelines to the maximum extent practicable, was last updated in 2020, predating several significant developments in both federal and state policies to facilitate wind energy production within Louisiana and in the Gulf of Mexico. The instructions in that guide for evaluating utility siting and routing could be updated with more specific guidance on OSW to facilitate a smoother permitting process for those facilities.

4. Update the NOAA-approved Louisiana Coastal Management Program to reflect emerging coastal industries and modern policy priorities. The NOAA-approved LCMP, from which Louisiana derives its federal consistency review authority, can be updated in various ways to better address OSW projects in or affecting Louisiana’s coastal waters:

4a. Update Louisiana’s list of federal license and permit activities to ensure federal consistency review of all relevant permit and license actions. Federal license or permit approvals for activities by non-federal entities (15 C.F.R. Part 930, Subparts D & E) require federal consistency review for activities *within* the coastal zone only if the licenses and permits are listed on the state’s approved list; and for approvals of federal license and permit activities *outside* the coastal zone only if they are on the list *and* within a geographic location description (see 4b). Otherwise,

the state must seek case-by-case NOAA-OCM approval through an Unlisted Activity Request, which gives the state a limited timeframe to prepare information and analysis needed to justify an assertion of coastal effects.

The current list includes a broad category of “permits required for offshore drilling, pipeline corridors, and associated activities pursuant to the OCS Lands Act (43 USC 1334) and 43 USC 931(c) and 20 USC 185.” However, NOAA-OCM has recently indicated that more specific reference to renewable energy activities is required for purposes of the federal permit and license list.⁴⁵⁴ Rhode Island’s list could provide a useful model; among other Department of Interior permits and licenses, it lists: “Issuance or approval of leases, permits, easements, rights-of-way, exploration plans, development plans, production plans, and other authorizations, as appropriate, pursuant to [OCSLA and the EPA of 2005, with citations] for the construction, maintenance, and/or support activities related to OCS energy development.”⁴⁵⁵ Importantly, the Rhode Island list specifically identifies two subcategories of such activities: “Any offshore wind facilities of a permanent nature, regardless of size” and “Underwater cables.” Once approved by NOAA-OCM, this type of language signals unambiguously to applicants that Louisiana intends to conduct routine federal consistency reviews for these activities.

4b. Consider developing one or more Geographic Location Descriptions to facilitate reviews of OSW projects in federal waters and/or interstate consistency review. The “list” described in 4a guarantees review of listed activities within the state’s coastal zone. However, a federally licensed or permitted activity outside the coastal zone – e.g., on the federal OCS or in an adjacent state’s territorial waters—is considered “unlisted” unless it is covered by a NOAA-approved Geographic Location Description (GLD). A state’s CMP can proactively develop and incorporate a GLD if there is an activity of concern that is expected to take place in the future, especially if it is an activity or development type that is expected to recur. Developing a GLD, which involves identifying and analyzing information to support an assertion to NOAA-OCM that the activity outside the coastal zone will have reasonably foreseeable coastal effects, can involve a heavy administrative lift for the CMP on the front end, but will pay dividends after its incorporation into the program by eliminating the need for hurried, ad-hoc UAR submissions. The LCMP should consider developing a GLD for some or all of the wind energy areas identified by BOEM off the coast of Lake Charles. To the extent LCMP is concerned that OSW-related activities in Texas waters would adversely impact Louisiana’s coastal area, a GLD for those areas could also be sought to enable what is known as “interstate consistency review” – review by State A of federal actions taking place within State B’s coastal zone.

4c. Ensure NOAA has approved the current version of any and all state laws, regulations, and other authorities that LCMP may rely on as “enforceable policies” for federal consistency reviews of offshore wind energy projects. Since a state’s enforceable policies applicable for federal consistency review are limited to those that have been approved by NOAA, the version of the statute, regulation, etc. that was approved by NOAA is what is enforceable – not necessarily the version of the law that is currently in effect. According to NOAA-OCM guidance, “If a state law *supersedes or substantively revises* an existing enforceable policy, neither the old policy nor the new or revised policy can be used for federal consistency until the changes are approved by NOAA.”⁴⁵⁶ Whereas some

⁴⁵⁴ As of 2021, NOAA-OCM maintains that to be entitled to routine consistency review of renewable energy activities on the OCS, a state CMP must list *the specific OCSLA authorization*. See generally Kaiser, *supra* note 78.

⁴⁵⁵ NOAA-OCM, *Rhode Island’s Listed Federal Actions*, available at: <https://coast.noaa.gov/data/czm/consistency/media/ri.pdf>.

⁴⁵⁶ NOAA OCM, *Enforceable Policies Transcript* (accessed July 2021),

https://coast.noaa.gov/data/digitalcoast/elearning/captivate/enforceable_policies/docs/enforceable-policies-transcript-508c.pdf.

The reference in the transcript to “substantive revision” is a lower bar than is set out in federal regulations re: CZMA program changes, which provide that if and when previously approved enforceable policies “become obsolete or unenforceable” through

states submit annual or routine updates to their enforceable policies, the last time LCMP made any substantive change to the statewide coastal program was in 2011, and that was not a comprehensive update of enforceable policies that have changed since original approval.⁴⁵⁷ Additions and amendments to state law, regulation, etc. underlying LCMP enforceable policies should be promptly submitted to NOAA for incorporation into the coastal program, allowing strengthened policies to be properly captured in federal consistency review and to provide project proponents a more accurate representation of the enforceable policies.

5. Leverage the Coastal Master Plan process to help promote and/or facilitate environmentally responsible OSW-related development off Louisiana’s coast. The 2017 edition of the Coastal Master Plan makes no references to wind, or even renewable, energy. This is in stark contrast to the master plan’s explicit protection of and “Support for Oil and Gas Activities and Communities.” While there is not yet any existing OSW infrastructure to protect from coastal hazards, the Master Plan community engagement process can be used to ensure that interests of the OSW industry are heard during plan development and, potentially, reflected in the plan itself. The Energy and Industry Focus Group, which was expanded beyond oil and gas prior to the 2017 edition of the plan, may provide an existing vehicle for such engagement.⁴⁵⁸

subsequent changes in state statutes/regulations, “such policies will no longer be enforceable for purposes of CZMA Federal consistency review.”

⁴⁵⁷ See NOAA-OCM, Program Change Request Details: LA-2011-1 (accessed Oct. 2022),

<https://coast.noaa.gov/czmprogramchange/#/public/change-view/470>.

⁴⁵⁸ See CPRA, 2017 Coastal Master Plan, *supra* note 157, at 50.



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