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## Legal Limits on Recreational Fishing Near Offshore Wind Facilities

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# Legal Limits on Recreational Fishing Near Offshore Wind Facilities

April 2020

*This study is a product of the Marine Affairs Institute at Roger Williams University School of Law and the Rhode Island Sea Grant Legal Program. Kaithynn Webster, Rhode Island Sea Grant Law Fellow, conducted authored this study with guidance from Read Porter, Senior Staff Attorney. All errors and omissions are the responsibility of the Marine Affairs Institute. This study is provided only for informational and educational purposes and is not legal advice.*

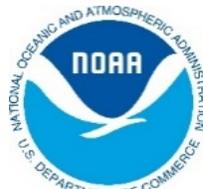
Recreational fishermen on Block Island have expressed concern over potential fishing restrictions around the Block Island Wind Farm (BIWF). As Capt. Chris Willi explained: “When we started hearing about [the BIWF], my concern initially right out of the gate was “Is it going to restrict any fishing; recreational, commercial or otherwise? Are we going to be able to fish around them? Is there going to be a security zone?”<sup>1</sup> While researchers have found that “there is no formal policy in place that would universally limit fishing or navigational access around and through offshore wind farms in U.S. waters,”<sup>2</sup> the BIWF is the first (and, to date, the only) offshore wind farm in the United States. In the absence of legal precedent protecting public access at the site, fishermen who use the wind farm have expressed concern that their access could be restricted in the future.

Existing laws authorize ocean areas to be closed to public access for reasons including navigational safety, fisheries management, and conservation. Potential navigational hazards include collisions among vessels operating in congested areas near turbines or allisions with the turbines themselves. Bottom fishing gear may also contact power cables or otherwise damage vessels, gear, or wind infrastructure. In addition, state and federal fisheries laws allow closures for fisheries management purposes, such as to prevent overfishing. Finally, federal laws may authorize creation of Marine Protected Areas (MPAs) that protect or conserve marine life and habitat by limiting access, including fishing. The state or federal government thus could use a variety of legal mechanisms to limit recreational fishing near wind farms to achieve a variety of policy purposes. While no regulations limiting access to the BIWF exist today, fishermen can benefit from understanding whether and how government agencies can limit access to turbine areas— an issue that is likely to arise in the future as more new wind farms are constructed.

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<sup>1</sup> Interview by American Wind Energy Association with Chris Walli, Captain, Block Island Fishworks, [Youtube](#) (Feb. 14, 2018).

<sup>2</sup> *Id.*



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This study examines the current legal framework governing access to waters around wind turbines and its application to existing offshore infrastructure. It explains current and possible regulations that could be used to restrict public access to offshore wind farms and why and how access to offshore infrastructure has been limited in the past. Part 1 provides context for the use of wind farm areas by recreational fishers. Part 2 introduces legal authority to restrict access to offshore infrastructure for navigational safety, fisheries management, and conservation purposes. Part 3 examines how regulators have limited access to offshore infrastructure in other contexts, including to offshore wind farms in Europe and non-wind farm offshore infrastructure in the U.S. Part 4 concludes that restrictions are most likely to arise based on evidence of navigational hazards, which could prompt U.S. Coast Guard action to establish safety zones or restricted areas in waters less than 12 nautical miles from shore.

## 1 Recreational Fishing Use of the BIWF

Offshore wind farms are attractive sites for the recreational fishing industry. When offshore wind farms are introduced, the man-made structures in the water column and on the seafloor serve as artificial reefs by providing surfaces for species to grow on and shelter for fish.<sup>3</sup> These artificial reefs may change the distribution or abundance of fish populations and serve as an aggregator for fish stocks.<sup>4</sup> By attracting commercially-desirable fish to a known location, wind farms draw commercial and recreational fishermen and offer local economic benefits.<sup>5</sup>

The BIWF is important to the recreational fishing industry, which is an important sector in Rhode Island's economy.<sup>6</sup> Completed in 2016, the BIWF is the first offshore wind farm in the United States. It is located in Rhode Island state waters approximately 3 miles southeast of Block Island and consists of 5 wind turbines and submarine cables to bring the power they generate to shore.<sup>7</sup> The area surrounding the turbines has become a popular destination for charter and individual recreational fishermen participating in the \$400 million-per-year industry.<sup>8</sup> Fishermen have noted a variety of potential concerns as a result of the popularity of the site, including vessel crowding and

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<sup>3</sup> Dan Whilhelmsson et al., *The Influence of Offshore Windpower on Demersal Fish*, 63 ICES J. MARINE SCI., 775, 775 (2006).

<sup>4</sup> 650 R.I. CODE R. § 20-05-8.4.8.

<sup>5</sup> *What is an Artificial Reef?*, NOAA (last visited Nov. 11, 2019), <https://oceanservice.noaa.gov/facts/artificial-reef.html>.

<sup>6</sup> Interview by Rhode Island Sea Grant with Tiffany Smythe, Assistant Professor, U.S. Coast Guard Academy, <https://seagrant.gso.uri.edu/researchers-look-at-how-the-block-island-wind-farm-impacts-recreation-and-tourism/> (May 8, 2019).

<sup>7</sup> Power from the BIWF is brought to Block Island on a cable owned by Ørsted (formerly Deepwater Wind). The island, including the BIWF, is connected to the mainland by separate cable owned by National Grid. Cassius Shuman, *National Grid to Install New Section of Its Cable*, BLOCK ISLAND TIMES, Feb. 28, 2019.

<sup>8</sup> Talya S. ten Brink & Tracey Dalton, *Perceptions of Commercial and Recreational Fishers on the Potential Ecological Impacts of the Block Island Wind Farm (US)*, 5(439) FRONTIERS MARINE SCI., Nov. 2018, at 10 (“The perceived function of the wind turbines as artificial reefs or fish aggregating devices greatly affected recreational use of the area. Perceptions of greater fish abundance around the turbines will likely have future positive impacts on the recreational, commercial rod and reel, and spearfishing sectors in southern New England.”); see also, e.g., Lisa Prevost, *In Rhode Island, Offshore Wind Farm Emerging as Popular Fishing Spot*, ENERGY NEWS NETWORK, Nov. 4, 2019, <https://energynews.us/2019/11/04/northeast/in-rhode-island-offshore-wind-farm-emerging-as-popular-fishing-spot/>.

fishing pressure.<sup>9</sup> Given the increasing reliance on the BIWF as a recreational fishing site, the impacts of potential government restrictions on wind farm access could be substantial.

Access to wind farms for recreational fishing could extend beyond the BIWF. In recent years, substantial areas of federal offshore waters near Rhode Island have been leased for wind development (Figure 1).<sup>10</sup> Given the scale of these developments, potential restrictions on vessel access and impacts on fishing have been controversial.<sup>11</sup> While many of the disputes about these developments have centered on commercial fishing, limitations on access by recreational users could affect access to substantial desirable fishing ground areas.<sup>12</sup> Consideration of authority over closures in federal lease areas therefore may be an area of concern for recreational fishing stakeholders in the future.

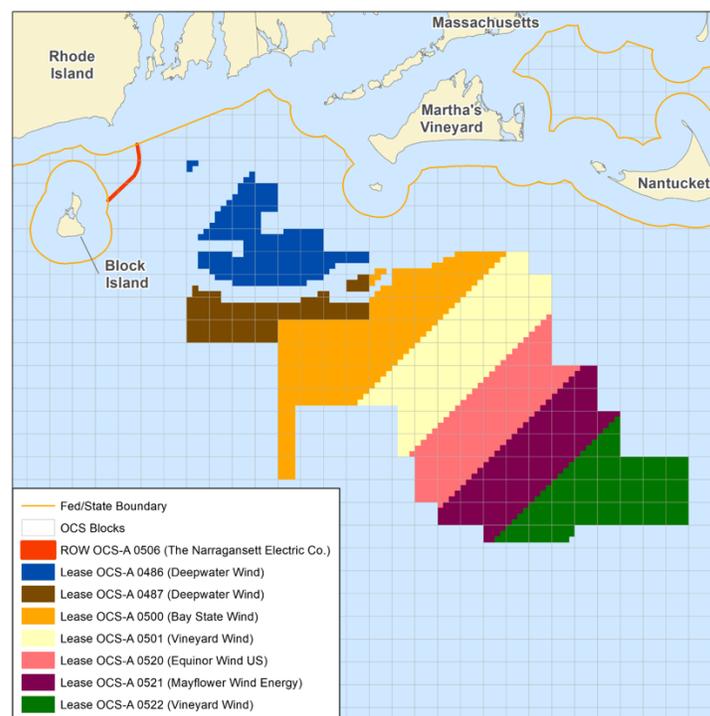


Figure 1. Offshore Wind Lease Areas off Rhode Island.<sup>13</sup>

<sup>9</sup> ten Brink & Dalton, *supra* note 8, at 10 (“Commercial fishers are already observing conflicts in use around the turbines. There could be crowding issues among recreational fishers as well, as the wind farm attracts more users over time.”).

<sup>10</sup> *Lease and Grant Information*, BUREAU OF OCEAN ENERGY MGMT., <https://www.boem.gov/renewable-energy/lease-and-grant-information> (last visited Feb. 4, 2020) (collecting renewable energy lease sale information).

<sup>11</sup> See, e.g., [Letter](#) from Sen. Edward J. Markey, Sen. Sheldon Whitehouse, Sen. Elizabeth Warren & Sen. Jack Reed, to Dr. Walter Cruickshank, Acting Director, Bureau of Ocean Energy Mgmt. (Dec. 14, 2018).

<sup>12</sup> See Dave Monti, *Fishing Report: So Far, So Good for Anglers Near Block Island Wind Farm*, PROVIDENCE J., Aug. 16, 2018, <https://www.providencejournal.com/sports/20180816/fishing-report-so-far-so-good-for-anglers-near-block-island-wind-farm> (reviewing recreational fishing statements about need to study effects of additional wind farms).

<sup>13</sup> *Massachusetts Activities*, BUREAU OF OCEAN ENERGY MGMT., <https://www.boem.gov/renewable-energy/state-activities/massachusetts-activities> (last visited Feb. 4, 2020).

## 2 Legal Authority for Limitations on Access to Offshore Infrastructure

Several U.S. federal and state laws authorize agencies to limit access to offshore areas for fishing purposes. This section introduces these legal authorities, including those authorizing restrictions for navigational safety, fisheries management, and conservation purposes.

### 2.1 Navigational Hazards & Safety

Government agencies are charged with minimizing navigational hazards and may have good reason for concern around offshore infrastructure because increased vessel traffic around offshore wind turbines for recreation, commercial fishing, tourism, and other purposes may increase the risk of collisions leading to property damage or injuries.<sup>14</sup> The U.S. Coast Guard (Coast Guard) and the Rhode Island Coastal Resource Management Council (CRMC) have jurisdiction to regulate the use of areas around wind turbines for safety purposes. These regulations would require fishermen to avoid a defined area due to the potential risk of their vessels or fishing gear colliding with or snagging on a turbine.<sup>15</sup>

The Coast Guard can limit vessel access pursuant to the Ports and Waterways Safety Act.<sup>16</sup> It has issued regulations authorizing several types of access limitations, including Safety Zones and Regulated Navigation Areas. A Safety Zone is an area to which access is limited “for safety or environmental purposes,”<sup>17</sup> whereas Coast Guard District Commanders are authorized establish Regulated Navigation Areas in areas subject to “hazardous conditions.”<sup>18</sup> However, these areas are limited to areas within 12 nautical miles from shore.<sup>19</sup> Thus, while the Coast Guard could potentially use either type of area designation to restrict access to waters around wind turbines, this authority would not apply to wind farms located in the U.S. exclusive economic zone from 12-200 nautical miles from shore.

The First Coast Guard District, which includes Rhode Island, has established a variety of Safety Zones and Regulated Navigation Areas. These safety zones have been created around infrastructure, including a temporary Safety Zone at the BIWF construction site.<sup>20</sup> Regulated Navigation Areas have been established for a range of specific hazards, sometimes in large geographic areas. For example, the entirety of the First Coast Guard District, including Rhode Island, is a Regulated Navigation Area in which tank barge traffic is subject to special conditions to prevent spills,<sup>21</sup> and the entirety of

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<sup>14</sup> ten Brink & Dalton, *supra* note 8, at 10.

<sup>15</sup> *Id.*

<sup>16</sup> 46 U.S.C. §§ 70001-70054; *see also* Frank Lobiondo Coast Guard Reauthorization Act of 2018, Pub. L. 115-282, 132 Stat. 4192 (2018) (reorganizing Coast Guard authority, including Ports and Waterways Safety Act, as amended).

<sup>17</sup> 33 C.F.R. § 165.20.

<sup>18</sup> *Id.* § 165.10.

<sup>19</sup> *Id.* § 165.9(b).

<sup>20</sup> Safety Zone, Block Island Wind Farm; Rhode Island Sound, RI, 81 Fed. Reg. 31,862 (May 20, 2016)

<sup>21</sup> 33 C.F.R. § 165.100.

Narragansett Bay is regulated to address commercial vessel risk of grounding by requiring local pilots and other mechanisms.<sup>22</sup> The Coast Guard appears to have legal authority to deploy either of these zone designations to the BIWF and other wind farm areas within 12nm of the coast as conditions warrant. Creation of these areas would occur upon a determination by an authorized official or the District Commander that they are necessary to protect against risks to the infrastructure or vessels.<sup>23</sup>

Coast Guard Aids to Navigation restrictions may also affect uses of wind farm areas.<sup>24</sup> An Aid to Navigation is any device external to a vessel or aircraft specifically intended to assist navigators in determining their position or safe course, or to warn them of dangers or obstructions to navigation.<sup>25</sup> Structures that may be obstructions to vessels must be lighted and permitted as Private Aids to Navigation (PATONs).<sup>26</sup> The Rhode Island Department of Environmental Management (RIDEM) has issued regulations establishing a uniform state waterway marking system, which prohibit mooring or fastening a vessel to an Aid to Navigation that has been prescribed by the Coast Guard.<sup>27</sup> This prohibition applies to the BIWF and will also apply to future wind farms in state waters less than 3nm from shore. While it does not limit approaching the turbines, this regulation makes it unlawful for recreational fishermen to attach vessels directly to any turbine stanchions.

The U.S. Army Corps of Engineers (USACE) has independent authority to limit access to ocean areas for safety, but its authority does not appear to be relevant to offshore wind farms. USACE is authorized to implement “danger zones” or “restricted areas” in which vessel access is limited. A danger zone is “a defined water area (or areas) used for target practice, bombing, rocket firing or other especially hazardous operations, normally for the armed forces.”<sup>28</sup> A restricted area is “a defined water area for the purpose of prohibiting or limiting public access to the area. . . . [that] generally provide security for Government property and/or protection to the public from the risks of damage or injury arising from the Government’s use of that area.”<sup>29</sup> A wind farm is not an area used for hazardous military operations, nor is it government property, so neither area designation appears relevant to the offshore wind farm context. As a result, USACE is unlikely to designate the area around wind farms as danger zones or restricted areas.

States, including Rhode Island, may restrict the uses of areas of state waters under state law. The Rhode Island Coastal Resources Management Council (CRMC) developed offshore wind regulations prior to the BIWF project, which are set forth as the Ocean Special Area Management Plan (Ocean

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<sup>22</sup> *Id.* § 165.122.

<sup>23</sup> *Id.* § 165.5.

<sup>24</sup> 14 U.S.C. § 81.

<sup>25</sup> 33 C.F.R. § 62.3; U.S. COAST GUARD, [AIDS TO NAVIGATION MANUAL: ADMINISTRATION](#), COMDTINST M16500.7A, at 61 (2005).

<sup>26</sup> 14 U.S.C. § 83; 33 CFR § 67.01-1.

<sup>27</sup> 250 R.I CODE R. § 80-00-1.13.

<sup>28</sup> 33 C.F.R. § 334.2; *Danger Zones and Restricted Areas*, U.S. ARMY CORPS OF ENG’RS (last visited Nov. 11, 2019), <https://www.nao.usace.army.mil/Missions/Regulatory/NavDangerZones/>.

<sup>29</sup> *Id.*

SAMP).<sup>30</sup> The Ocean SAMP indicates that CRMC is reluctant to restrict access to the wind farm because allowing fishermen to fish in the area is “a critical means of mitigating the potential adverse impacts of offshore structures on commercial and recreational fisheries and recreational boating,”<sup>31</sup> but it is possible that changing conditions at the BIWF require reconsideration of access restrictions.

CRMC may limit offshore development by declaring an Area of Particular Concern (APC), but APC limits are unlikely to restrict access to existing developments. APCs may include: “(1) Areas with unique or fragile physical features . . . ; (2) Areas of high natural productivity; (3) Areas with features of historical significance or cultural value; (4) Areas of substantial recreational value; (5) Areas important for navigation, transportation, [and] military . . . ; and (6) Areas of high fishing activity.”<sup>32</sup> APCs designated to date include, for example, shipping lanes, unexploded ordnance locations, and historic shipwreck sites.<sup>33</sup> Emerging evidence of factors such as navigation hazards, unsustainably high fishing effort, or special ecosystem value could potentially support designation of the BIWF or other wind farms as new APCs in the future.<sup>34</sup> “Large-scale, small-scale, or other offshore development” projects are presumptively excluded from APCs.<sup>35</sup> However, APC designation does not appear to apply any restrictions on the use of areas around existing developments. Designation as an APC therefore appears more likely to preclude future offshore wind development in APCs than to result in limitations on recreational fishing access to wind farm sites.

While federal and state agencies have authority to implement access restrictions under a range of statutes and regulations, no restrictions are planned at this time. The Ocean SAMP indicates that CRMC has discussed the issue with the Coast Guard, USACE, and the Bureau of Ocean Energy Management (BOEM), all of which have indicated that “no vessel access restrictions are planned for the waters around and through offshore structures and developments, or along cable routes, except for those necessary for navigational safety.”<sup>36</sup> Any future navigation safety restrictions around the wind turbines likely would involve substantial federal-state coordination. The Ocean SAMP indicates that CRMC will work to “promote safe navigation, fishing and recreational boating activity around and through offshore structures” in partnership with federal agencies, regional organizations, and individuals, including the Coast Guard, U.S. Navy, USACE, the National Oceanic and Atmospheric Administration (NOAA), fishermen’s organizations, marine pilots, recreational boating organizations, and other marine safety organizations.<sup>37</sup> CRMC has also requested notification from federal agencies prior to implementation of access restrictions for navigational safety reasons at the wind farm or along cable routes.<sup>38</sup> As a result, future restrictions for navigational safety are likely to

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<sup>30</sup> 650 R.I. CODE R. § 20-05-1.1.1 *et seq.*

<sup>31</sup> 650 R.I. CODE R. § 20-05-8.4.8.

<sup>32</sup> 650 R.I. CODE R. § 20-05-11.10.2.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> 650 R.I. CODE R. § 20-05-8.4.8.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

include opportunities for substantive input from recreational fishermen and other interested stakeholders.

## 2.2 Fisheries Area Closures

Fisheries management offers an independent rationale for area-based restrictions on fishing access and use of specific areas of the marine environment. While fishing at the wind farm produces economic and social benefits for recreational and commercial fishermen due to fish aggregation, intensification of fishing pressure at turbine sites could lead to local overexploitation of stocks.<sup>39</sup> While no such regulations exist to date, fisheries regulations could be used in the future where circumstances demand limits on fishing pressure to ensure stock sustainability.

Federal fisheries law authorizes regulators to close areas to fishing. The Magnuson-Stevens Fishery Conservation and Management Act (MSA) governs fisheries management in federal waters. The MSA authorizes area closures in federal fisheries (beyond 3nm from shore) as part of fishery management plans.<sup>40</sup> These area closures may be specific to particular times of the year or particular types of fishing gear. For example, the Northeast Fishery Management Council (NEFMC) established the Western Gulf of Maine Closed Area was created to reduce the mortality of Atlantic Cod and other groundfish species by preventing fishing for groundfish in the area.<sup>41</sup> This closure was developed to enhance groundfish productivity and “maximize societal net benefits from the groundfish stocks.”<sup>42</sup> The NEFMC could develop similar area closures limiting fishing access to wind farms in federal waters upon a determination that a closure is needed and would be consistent with the national standards under the MSA (e.g., by enhancing safety, preventing overfishing, and/or protecting habitat).<sup>43</sup> It would likely accomplish such closures through amendments to relevant fishery management plans either singly or through an omnibus amendment.

States can establish fishery area closures in state waters out to 3nm from shore. In Rhode Island, RIDEM regulates fishing and can establish closed areas in Rhode Island waters.<sup>44</sup> These closures, like their federal counterparts, can be limited by time, location, and gear. For example, RIDEM regulations prohibit “commercial netting” and use of trawls in all coastal salt ponds.<sup>45</sup> The BIWF turbines are in state waters, so RIDEM would be the regulatory authority with jurisdiction to determine whether area closures are needed and, if so, what actions would be appropriate. RIDEM has not indicated that it is considering any action to restrict fishing at the wind farm.

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<sup>39</sup> *Id.*; ten Brink & Dalton, *supra* note 8, at 10 (collecting sources).

<sup>40</sup> 16 U.S.C.A. § 1801(b); Michael D. Russell, *The Conflict Between Local Fishing Industry and the Protection of Marine Fishery Resources in Recreational Fishing Alliance v. Evans*, 22 J. NAT. RES. & ENVTL. L. 97 (2008).

<sup>41</sup> DAVID THOMAS & OWEN LIU, CLOSED AREA TECHNICAL TEAM (CATT), [NEW ENGLAND CLOSED AREA LITERATURE REVIEW](#) (2012).

<sup>42</sup> *Id.*

<sup>43</sup> 16 U.S.C. § 1851.

<sup>44</sup> R.I. GEN. LAWS § 46-1-1 (giving Director “control and supervision of all the harbors and tidewaters of the state, for the preservation, development, and improvement thereof and the promotion of the interests of the state therein.”).

<sup>45</sup> 250 R.I CODE R. § 90-00-6.8.

## 2.3 Marine Protected Areas

Conservation purpose provide a third legal basis for area closures around wind turbines. Several statutes authorize creation of marine protected areas (MPAs) where access and uses may be restricted. MPAs are defined under federal law as “any area of the marine environment that has been reserved by Federal, State, territorial, tribal, or local laws or regulations to provide lasting protection for part or all of the natural and cultural resources therein.”<sup>46</sup> A MPA may be established to maintain marine biological diversity and protect habitats by restricting fishing and other activities, such as dredging, dumping, and vessel traffic.<sup>47</sup>

Establishment of a National Marine Sanctuary at a wind farm site could result in limits on access. The National Marine Sanctuary Program was established by Title III of the Marine Protection, Research and Sanctuaries Act (MPRSA) of 1972 and authorizes the Secretary of Commerce to designate marine areas of special national significance as national marine sanctuaries.<sup>48</sup> The scope of a sanctuary’s regulatory authority is further defined in its designation document and can include prohibiting the operation of vessels within the area.<sup>49</sup> Within these bounds, the Program can issue regulations necessary to protect the resources and qualities for each individual sanctuary, including regulations governing fishing activities.<sup>50</sup> However, NOAA must provide the relevant fishery management council an opportunity to prepare sanctuary fishing regulations under the MSA.<sup>51</sup> As a result, the NEFMC would have initial authority to develop any fishing regulations required in any future National Marine Sanctuary established under the MPRSA in or near Rhode Island.

Congress or the President have established two additional forms of MPAs without following the process set out in the MPRSA. In 1992, Congress itself designated the Stellwagen Bank National Marine Sanctuary in the National Marine Sanctuaries Program Amendments of 1992.<sup>52</sup> As it does for other National Marine Sanctuaries, the NEFMC has established fishing restrictions in Stellwagen Bank, including “rolling closures for groundfishing, catch limits for individual species, and a large, indefinite year-round closure in the Gulf of Maine.”<sup>53</sup> More recently, in 2016, President Obama established the Atlantic Canyons and Seamounts Marine National Monument pursuant to the Antiquities Act.<sup>54</sup> National Monuments must be established to protect a particular natural heritage

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<sup>46</sup> 16 U.S.C. § 1431-2.

<sup>47</sup> 16 U.S.C. § 1431-2.

<sup>48</sup> 33 U.S.C. § 1401.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> Pub. L. 102-587, tit. II, 106 Stat. 5039 (1992); *see also* Stellwagen Bank National Marine Sanctuary Regulations, 58 Fed. Reg. 53,865, 53,865 (Oct. 19, 1993) (currently codified at 15 C.F.R. §§ 922.140-922.143) (discussing history of sanctuary establishment).

<sup>53</sup> *Stellwagen Bank National Marine Sanctuary FAQs*, NOAA (last visited Dec. 21, 2019), <https://stellwagen.noaa.gov/about/faq.html>.

<sup>54</sup> Northeast Canyons and Seamounts Marine National Monument, Pres. Proc. No. 9496 of Sep. 16, 2016, 81 Fed. Reg. 65,161 (Sep. 21, 2016).

and will include use restrictions consistent with that purpose.<sup>55</sup> While challenged in court, the D.C. Circuit Court of Appeals recently upheld the application of the Antiquities Act to ocean waters and its associated fishing restrictions.<sup>56</sup> As a result, future Presidents could create new National Monuments that could potentially incorporate wind farm sites. Congressional or Presidential creation of a new National Marine Sanctuary or National Monument could affect future use of wind farm areas for fishing, but are not expected at this time.

### 3 Examples of Existing Limitations on Access to Offshore Infrastructure

Consideration of how governments have limited access to offshore wind turbines and other infrastructure can shed light on how legal authorities have been used in the real world. The prior section examined the types of legal authorities agencies could theoretically use to restrict access to offshore wind farms in Rhode Island. However, many of these authorities are unlikely to be used in practice. This section considers existing access limitations applied to European wind farms and to U.S. oil platforms and aquaculture sites to ground these potential authorities in real-world examples.

#### 3.1 Access to European Wind Farm Areas

Europe's twenty-year lead on building offshore wind turbines has led to an array of regulations limiting public access to wind farms. The expanding offshore wind farms in Europe and a reduction in the available space at sea for other activities has led the European Commission to develop a plan to share the seas throughout the European Union (EU).<sup>57</sup> Under the Maritime Spatial Planning Directive, EU countries have until 2021 to design a maritime spatial plan that outlines where each maritime sector can operate.<sup>58</sup> One of the minimum requirements of a plan is to "take into account environmental, economic and social aspects, as well as safety aspects..." of relevant activities and uses in marine waters.<sup>59</sup> Belgium and the Netherlands currently have their own laws in place concerning offshore access. The applicable regulations prohibit fishing within offshore energy facilities in Belgium and the Netherlands, primarily due to navigational safety concerns.<sup>60</sup> In Belgium, all non-maintenance vessels must remain at least 500 meters from wind farms at all times, which has angered fishermen that are concerned about depleted stocks outside the wind farm area.<sup>61</sup> On the

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<sup>55</sup> 54 U.S.C. § 320301(b).

<sup>56</sup> *Mass. Lobstermen's Ass'n v. Ross*, 945 F.3d 535 (D.C. Cir. 2019).

<sup>57</sup> Directive 2014/89/EU, of the European Parliament & the Council of the European Union of 23 July 2014 [Establishing a Framework for Maritime Spatial Planning](#), 2014 O.J. (L. 257) 135.

<sup>58</sup> Kait Bolongaro, *Fishermen and Wind Farms Struggle to Share the Sea*, POLITICO (Dec. 19, 2017, 8:01 AM CET), <https://www.politico.eu/article/fishermen-offshore-wind-farms-struggle-to-share-sea/>.

<sup>59</sup> Directive 2014/89/EU, *supra* note 49.

<sup>60</sup> 650 R.I. CODE R. § 20-05-8.4.8. These restrictions are similar to those placed on offshore oil rigs in these same countries for navigational safety. *Id.* See also Raza Ali Mehdi, et al., [Improving the Coexistence of Offshore Wind Farms and Shipping: An International Comparison of Navigational Risk Assessment Processes](#), 17 WORLD MARITIME U. J. MARINE AFF. 397, 416-17 (2018) (noting focus on navigational safety).

<sup>61</sup> *Id.* The 500m turbine exclusion zone applies to the entire area of any wind farm with turbine spacing less than or equal to 1km. Turbine spacing differs by farm, but Belgium prioritizes energy density in its offshore wind farms, resulting in

other hand, the United Kingdom (U.K.) does not restrict access to its offshore wind farms. To the contrary, fishermen are only prevented from fishing in areas where turbines are under construction or closed for maintenance.<sup>62</sup> The U.K. approach is similar to that applied by the Coast Guard in the U.S., which created a temporary safety zone during construction of the BIWF. The European approach indicates that navigation safety has been the primary reason provided for limits on access to wind farms, but that responses may vary from substantial prohibited areas around each turbine to more limited construction closures.

### 3.2 Access to Non-Wind Offshore Infrastructure in the U.S.

U.S. regulators have limited access to offshore infrastructure other than wind farms. This section reviews restrictions created for oil platforms and offshore aquaculture sites, which could present analogous issues for wind farms. Offshore oil platforms are similar to wind turbines because they create artificial reefs, and the Coast Guard may designate safety zones around oil platforms to alleviate navigational hazard concerns. Offshore aquaculture net pens are underwater structures that harbor farmed fish, and regulations can restrict fishing around the area to protect the fish inside. These examples of different types of regulated offshore infrastructure demonstrate how the state and federal government may regulate offshore wind farms in the future.

Like offshore wind farms, oil platforms act as artificial reefs and attract mariners.<sup>63</sup> In Louisiana, recreational fishing is centered around the platforms, and over 70% of recreational fishing trips occur at the platforms.<sup>64</sup> Few Gulf of Mexico platforms have safety zones, and safety zones that have been established are designed to tackle specific safety issues and typically still allow fishing.<sup>65</sup> In California, by contrast, most oil platforms have safety zones that limit any public access to the waters around the structures.<sup>66</sup> The safety zones for offshore platforms in the Southern California Bight prohibit vessels coming within 150 meters of the platforms.<sup>67</sup> Similarly, all of the oil platforms off the coast of Santa Barbara, California, such as the Exxon Santa Ynez, are Coast Guard restricted areas for safety purposes.<sup>68</sup> The differing approaches used in California and Louisiana suggest that the Coast Guard bases restrictions on specific navigational risks at particular locations rather than

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close spacing. RASMUS BORRMANN ET AL., DEUTSCHE WINDGARD GMBH, CAPACITY DENSITIES OF EUROPEAN OFFSHORE WIND FARMS 6, 16-17 (2018). As a result, the restriction appears to exclude fishing vessels from wind farm areas in several Belgian wind farms. *Id.* at 33-35 (collecting turbine spacing by farm).

<sup>62</sup> Bolongaro, *supra* note 50.

<sup>63</sup> Sean van Elden et al., [Offshore Oil and Gas Platforms as Novel Ecosystems: A Global Perspective](#), 6 FRONTIERS MARINE SCI. 1, 3 (2019).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 4.

<sup>66</sup> Jeremy T. Claisse et al., [Oil Platforms off California are Among the Most Productive Marine Fish Habitats Globally](#), 111 PROC. NAT'L ACAD. SCI. 15,462, 15,462 (2014).

<sup>67</sup> Donna M. Schroeder & Milton S. Love, [Recreational Fishing and Marine Fish Populations in California](#), 43 CAL. COOPERATIVE OCEANIC FISHERIES INVESTIGATIONS REP. 182, 184 (2002).

<sup>68</sup> Rikki Grober-Dunsmore et al., National Marine Protected Areas Center, [STATE OF THE NATION'S DE FACTO MARINE PROTECTED AREAS](#) 27 (2008).

adopting a universal approach. In addition, as in Europe, navigation risks are the primary justification for restrictions on access to oil platforms in the U.S.

Offshore aquaculture suggests the potential for fishery-based area closures. NOAA recently issued regulations to govern offshore aquaculture pursuant to the MSA. While the agency's authority to issue the regulations has been challenged in court,<sup>69</sup> if valid the regulations would authorize permitting of aquaculture facilities in the federal waters of the Gulf of Mexico.<sup>70</sup> The regulations provide for designation of a restricted access zone around each facility. For example, "[e]xcept for broodstock . . . possession of any wild fish at or within the boundaries of an aquaculture facility's restricted access zone is prohibited."<sup>71</sup> Thus, while these facilities might act as fish aggregators, risks of poaching or harm to the facilities can provide a justification to restrict both recreational and commercial fishing at aquaculture sites. These restrictions provide an example of an access restriction intended to support sustainable fisheries management.

## 4 Conclusion

The purpose of this paper has been to aid the public in understanding current and possible regulations limiting public access to offshore wind farms for recreational fishing in waters near Rhode Island. No state or federal agency has indicated an intention to limit access to the BIWF or other future wind farms to date, but federal and state agencies have legal authority to restrict access to particular areas if needed to reduce navigation hazards, for fisheries management, or upon designation of a MPA. Past experience in Europe and statements in the Ocean SAMP agree that navigation safety is the most likely justification for future restrictions, whether at the BIWF or elsewhere. However, this study identified no evidence of navigational safety hazards associated with the BIWF, and any future closures for this or other reasons would likely include a robust interagency process. Should restrictions be needed, this analysis suggests that the U.S. Coast Guard would be the agency best suited to establish them through safety zones or restricted areas. Coast Guard authority is limited to U.S. territorial waters less than 12nm from shore, however, so wind farms located beyond this limit are less likely to see regulatory vessel restrictions, even if evidence identifies navigational hazards associated with these wind farms.

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<sup>69</sup> *Gulf Fishermen's Network v. Nat'l Marine Fisheries Serv.*, 341 F. Supp.3d 362 (E.D. La. (2018)).

<sup>70</sup> GULF OF MEX. FISHERY MGMT. COUNCIL, AQUACULTURE FISHERY MANAGEMENT PLAN: FREQUENTLY ASKED QUESTIONS, <http://archive.gulfcouncil.org/Beta/GMFMCWeb/Aquaculture/Aquaculture%20FMP%20FAQs.pdf> (last visited Nov. 11, 2019).

<sup>71</sup> 50 C.F.R. § 622.106(11).