

Bottomlands Leasing Policy

Best Practice #18

Enact policies which provide a clear, coordinated and fair process for leasing lake bottomlands to facilitate appropriate offshore wind development.

Various statutes give the states and provinces authority to regulate structures placed on their submerged lands, including requirements affecting design and location. In the U.S., the Submerged Lands Act grants the Great Lakes states the authority to manage, administer, lease, develop and use the lands beneath navigable waters within each state's boundaries. For all of the Great Lakes states, the lakeward boundary of state jurisdiction extends to the international boundary between the U.S. and Canada, except in Lake Michigan where the boundaries have been determined by the states bordering that lake.¹

United States Great Lakes bottomlands are owned and managed by the states on behalf of their citizens. In Canada, Great Lakes bottomlands are considered "crown lands"—also public—and are managed by the provinces. All Great Lakes jurisdictions have some form of regulations regarding bottomland permitting/leasing, but few have legislation that specifically addresses offshore wind. In some jurisdictions, new legislation or a modification of existing rules may be necessary to address offshore wind permitting and leasing.

Importantly, the terms of a lease of publicly-managed bottomlands should be structured to ensure a fair price for the lease or permit and ensure that the offshore wind project has a public benefit. States and provinces should also work with affected communities to examine whether they are allowed to share revenues generated from leasing Great Lakes bottomlands with local communities, and determine an equitable formula for compensating the communities affected.

Fair bottomlands leasing should enable equal access and include rules and procedures that must be followed by all applicants. A Request for Proposals (RFP), Request for Qualifications (RFQ) or other mechanism should ensure that applicants are serious and qualified, and deter speculative dealings where unqualified applicants obtain leases and sell them to appropriate developers. Such an RFP or RFQ for leases would create a consistent, clear process more likely to produce projects that are economically viable and environmentally sound, and ensure a transparent, competitive, and credible process.

Beyond an RFP or RFQ, policies are needed that set standards for siting individual projects in the bottomlands of the Great Lakes. The most likely administrative vehicles for approving use of those bottomlands for offshore wind are leases and permits. Recommended leasing or permitting provisions include²:

- Provisions for installing required transmission facilities, which may be the function of entities other than prospective developers³;
- Provisions for lease renewal to provide for increased stability in the Great Lakes offshore wind industry.⁴ Stability in the leasing process will be valuable both to lessees, who will not be forced to remove productive turbines following the initial term of their leases,⁵ and to electricity consumers, who will benefit from consistent long-term electricity supply and prices⁶;
- Application of joint and several liability applies if a lessee desires to transfer the lease to a third party.⁷ Such a provision would ensure that environmental risks are adequately considered by all parties to the transfer of a lease⁸;

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- Collection of rent and royalties from lessees, and for distribution of those funds to the state affected by the facilities installed. Revenue directed to the states would help offset the impacts of offshore wind development⁹;
 - Requirement for lessees to provide a financial insurance instrument in the event that the lessee becomes insolvent or fails to comply with the provisions of the lease. This would provide additional protection of the public trust in the Great Lakes.¹⁰
 - Requirement for detailed compliance plans at each important stage of the development process in order to ensure that each action taken by the lessee complies with state and federal law¹¹; and
 - A mechanism to evaluate and approve decommissioning plans in the event a lessee terminates a lease.¹² (See [Decommissioning and Reclamation Best Practice](#).)

Any rules adopted should provide clarity and consistency to developers and the public as to the regulatory standards, and related informational and review requirements for offshore wind proposals and the criteria by which such proposals will be evaluated or a project proponent selected. Conditions are routinely attached to such permits or leases to ensure compliance with existing environmental and public safety laws and policies, such as protecting essential aquatic habitat and minimizing interference with coastal processes. States and provinces can also attach conditions to permits or leases that require monitoring of approved structures and projects to ensure that the projects perform as expected and that adverse impacts have indeed been avoided and/or minimized. Bottomlands leasing or permitting policies should include provisions to ensure coordination among relevant Great Lakes regulatory and review agencies to avoid a “race to the bottom” by individual jurisdictions, potentially compromising important regional environmental goals. (See [An Adaptive Regulatory Roadmap for Offshore Wind Best Practice](#).)

Challenges and Benefits

Clear leasing policies that are grounded in existing state laws and authorities are important to avoid, or quickly resolve, potential legal challenges.¹³ Because the submerged lands in the Great Lakes are subject only to state control, the offshore renewable energy permitting process administered by the Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE) under the authority of Outer Continental Shelf Lands Act has no application within the Great Lakes.¹⁴ Within the Great Lakes, developers face regulatory uncertainty and must continue to contend with multiple potentially overlapping permitting agencies and opposition groups that will use this uncertainty to discourage development. Until there is a level of regulatory certainty comparable to that established by the BOEMRE regulations, the development of offshore wind projects in the Great Lakes will likely be out-paced by projects on the coasts. This, in turn, could slow any related economic activity in the region and postpone the environmental and human health-related benefits of wind-generated electricity.¹⁵

On the U.S. side of the basin, the Public Trust Doctrine creates an affirmative duty for the states to protect their publicly-owned submerged lands and other trust resources, and also creates a legal basis for citizens and environmental groups to challenge a state’s decision in court if they believe it is contrary to its trust responsibilities. The public trust doctrine virtually insulates the states from any regulatory taking claim because it is the publicly-owned bottomlands that are being controlled and regulated, not privately owned property.¹⁶

Who should implement this practice?

State and provincial governmental regulators should implement this practice.

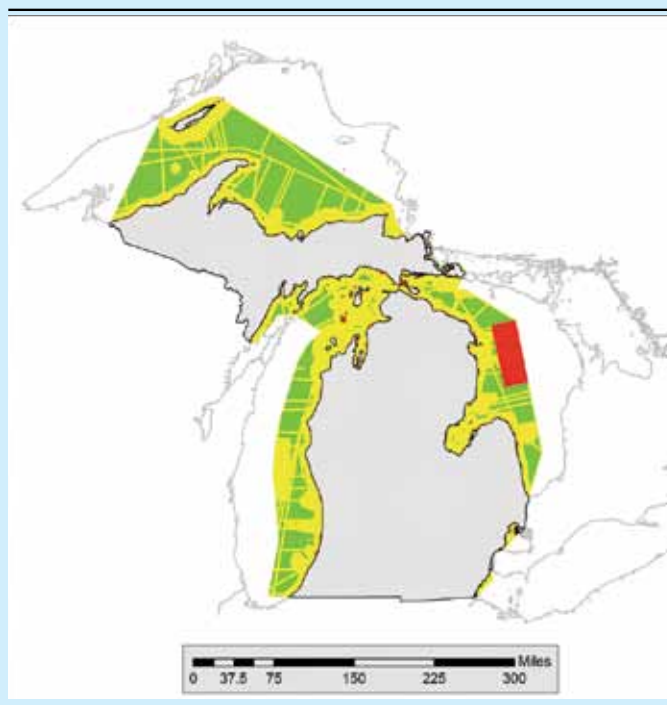
Case Example | Michigan Legislation to Guide Leasing of Great Lakes Bottomlands

A bill introduced into the Michigan legislature in 2010 (HB 6564)¹⁷ would establish regulations for leasing of bottomlands of the Great Lakes owned by the state. Under Sec. 32409, the legislation includes provisions to minimize delay and duplication and to coordinate leasing, permitting, and other regulatory processes with the many federal, state and tribal entities involved.

The state's coordination process calls for use of the same applications as required by other state or federal agencies, use of information from reports, analyses, environmental impact statements, environmental assessments, and other documents as required by those agencies, and holding hearings jointly with other agencies.

The bill includes specific requirements for the siting, construction, operation and decommissioning of offshore wind energy facilities in the Great Lakes and criteria for reviewing applications thereof. It also outlines the steps to nominate Great Lakes bottomland parcels for lease and an auction process to acquire a bottomland parcel. The bill includes provisions that must be included in a public notice of parcels nominated for lease, including a minimum bid. The bill also outlines criteria for lease bidders, procedures for the lead state agency to award the successful lease bidder, terms of leases, and royalty payments by lessees and their public benefits. HB 6564 proposes that an Offshore Wind Energy Trust Fund is created within the State of Michigan's Treasury for which royalty payments are deposited and used for public purposes as described in the legislation. These purposes include – but are not limited to – protecting and managing bottomlands, enhancing and restoring Great Lakes aquatic environments and nearshore habitat, and managing submerged cultural resources. Preference is given to activities located not more than 30 miles from the shoreline of a county with shoreline nearest to any particular (1) offshore wind energy facility.

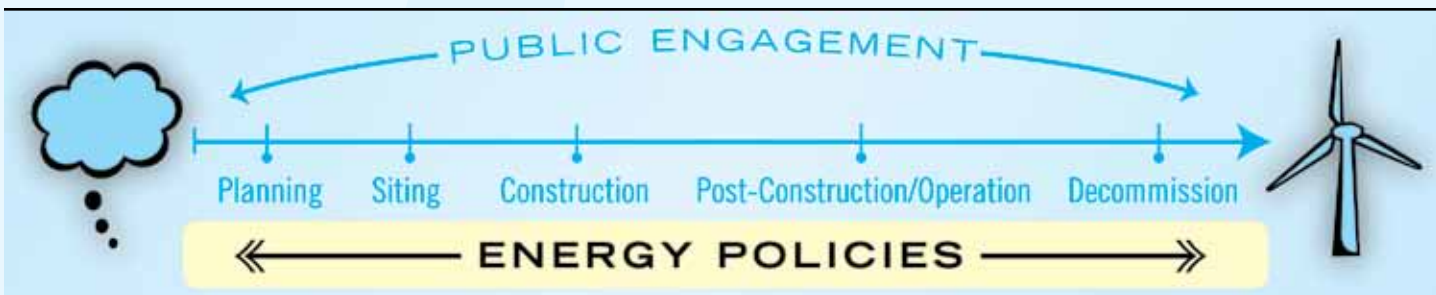
There are several opportunities for the general public to review and provide comment on proposed bottomland parcel nominations and permit applications for site assessment, construction and operation, and decommissioning work through public comment periods and public hearings.



Application of mapping criteria for Michigan offshore wind siting. Red=categorically excluded; yellow=conditional; green=most favorable. Source: Report of the Michigan Great Lakes Wind Council, Oct. 1, 2010.

When should this practice happen?

Ideally, these policies are in place before wind projects are developed and are periodically adapted and updated to reflect emerging issues and challenges.



Related Tools

Issue Paper 3: Michigan's Great Lakes Bottomlands and Wind Energy | http://www.michiganglowcouncil.org/meeting_materials/042309/issue_papers/IssuePaper3_Bottomlands.pdf | This issue paper examines a range of issues for that the Michigan Great Lakes Wind Council considered as it developed recommendations for its final report issued in 2010.

- 1 Isely, E. S. and V. Pebbles. 2009. U.S. *Great Lakes Policy and Management: A Comparative Analysis of Eight States' Coastal and Submerged Lands Programs and Policies*, *Coastal Management*, 37:2,197 — 213.
- 2 *Renewable Energy and Alternate Uses of Existing Facilities on the Outer Continental Shelf*, 74 Fed. Reg. 19,638–40 (Apr. 29, 2009).
- 3 Commercial leases issued by the BOEMRE include the right to transmit electricity produced on the outer continental shelf across federally-controlled land. 30 C.F.R. § 285.200.
- 4 *Alliance to Protect Nantucket Sound v. Energy Facilities Siting Bd.*, 932 N.E.2d 787 (Mass. 2010) (describing a prospective wind farm developer's struggle to acquire transmission rights within both state and federal waters).
- 5 30 C.F.R. § 285.425 (allowing a lessee to continue to conduct activities upon renewal of a lease).
- 6 *Supra* Part II.A (explaining that volatility in the price of electricity generated by natural gas causes uncertainty and concern among consumers).
- 7 30 C.F.R. § 285.411 (providing for joint and several liability among prior and subsequent lessees on the outer continental shelf and referencing environmental and operational problems as specific sources of liability).
- 8 *Id.*
- 9 H.R. 6564, 95th Leg., Reg. Sess. (Mich. 2010); see also *Report of the Michigan Great Lakes Wind Council*, http://www.michiganglowcouncil.org/GLOWreportOct2010_with%20appendices.pdf.
- 10 30 C.F.R. §§ 285.515-521 (requiring financial assurances for commercial and limited leases issued by the BOEMRE for parcels on the Outer Continental Shelf); *id.* § 285.535 (requiring forfeiture of a bond if a lessee fails to comply with a term of a lease issued by the BOEMRE); *id.* § 285.913 (requiring forfeiture of a bond if a lessee fails to comply with a decommissioning plan).
- 11 *Id.* §§ 285.611-612 (requiring developers submitting SAPs to include sufficient information to allow the BOEMRE to comply with NEPA and CZMA); *id.* §§ 285.646-647 (requiring developers submitting GAPs to submit the same information).
- 12 *Id.* § 285.905 (requiring developers on the OCS to submit decommissioning plans to the BOEMRE).
- 13 Conger, H. 2011. *A Lesson from Cape Wind: Implementation of Offshore Wind Energy in the Great Lakes Should Occur Through Multi-State Cooperation*. Unpublished Draft anticipated for [Loyola University Chicago Law](http://www.loyola.edu/loyola-law).
- 14 43 U.S.C. § 1337(p)(1) (allowing the Secretary of the Interior to issue renewable energy leases only on the outer continental shelf).
- 15 Conger, H., 2011, p. 137.
- 16 Shafer, Chris A., January 2006. *Legal Framework Pertaining to Lakebed Alterations*. Thomas M. Cooley Law School, Lansing, Michigan.
- 17 <http://www.legislature.mi.gov/documents/2009-2010/billintroduced/House/htm/2010-HIB-6564.htm>

Great Lakes
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