



## Guidance Documents: Key Legislation for Consenting in the United States

*The guidance documents are intended to be available for regulators and advisors as they carry out their decision-making and for developers as they prepare consenting and licensing applications. This country-specific document presents an overview of key consenting requirements relevant for marine renewable energy development in the United States from pre-application, through to application and post-consent and is intended mainly for developers and consultants.<sup>1</sup> It is not intended to replace any formal guidance or prescribe action, but rather provide a starting point for understanding the key requirements of the regulatory framework.*

### United States regulatory context

In the United States (U.S.), regulatory responsibility for marine renewable energy (MRE) projects will fall to an assortment of federal, state, and local agencies dependent on where an MRE project is located (Table 1). Requirements in U.S. state waters vary by state<sup>2</sup>; therefore, this document focuses on the relevant agencies and regulatory requirements for projects in federal waters (Table 2). In addition, federally recognized Native American tribes are sovereign nations and, in some locations, may require tribal consultations across jurisdictions<sup>3</sup>. Tidal energy projects are most likely to be located in state waters, ocean current energy projects in federal waters or the exclusive economic zone (EEZ), and wave energy may be located in state or federal waters or the EEZ due to their spatial and energy requirements.

**Table 1.** Regulatory jurisdictions in the U.S.<sup>4</sup>

Designation	Location	Agencies with jurisdiction
Inland waters	Shoreward of the mean low water line	State and some local agencies. Some federal agencies may also have jurisdiction in inland waters.
State waters	Shore (generally mean high water, but varies by state) to 3 nautical miles	State agencies. Some federal agencies may have jurisdiction in state waters.
Federal waters	3 to 12 nautical miles	Federal agencies.
Exclusive economic zone	12 to 200 nautical miles	Federal agencies.

<sup>1</sup> This country-specific document should be read in conjunction with the background guidance document, which can be found on *Tethys*: <https://tethys.pnnl.gov/guidance-documents>.

<sup>2</sup> Information about state, as well as federal, regulatory processes for MRE can be found in the [Handbook of Marine and Hydrokinetic Regulatory Processes](#)

<sup>3</sup> Executive Order 13175 of November 6, 2000. Consultation and Coordination with Indian Tribal Governments. FR Vol. 65, No. 218. November 9, 2000.

<sup>4</sup> <https://marinecadastre.gov/news/load.php?url=posts/zones-limits-and-maritime-jurisdictions.html>



**Table 2.** Main federal agencies with jurisdiction over licensing/authorization for marine renewable energy projects.

Agency	Relevant Statute	Implementation
Federal Energy Regulatory Commission (FERC)	Federal Power Act <sup>5</sup> , Energy Policy Act of 2005 <sup>6</sup>	Authorization of all marine renewable energy projects in state and federal waters and the exclusive economic zone (EEZ) through FERC license.
Bureau of Ocean Energy Management (BOEM)	Outer Continental Shelf Lands Act <sup>7</sup> , Energy Policy Act of 2005	Responsible agency for seafloor leases, including research leases, between 3 nautical miles and 200 nautical miles.
Relevant federal agencies acting as a cooperating agency	National Environmental Policy Act <sup>8</sup>	Environmental assessment performed to identify potential impacts from a proposed action (includes federal agency actions, federally funded activities, or federally permitted/licensed activities) in federal waters and the EEZ and can include state waters.

### Species and/or populations at risk

Potential effects to species and/or populations at risk are regulated by the National Marine Fisheries Service (NMFS) and U.S. Fish and Wildlife Service (FWS) (Table 3).

**Table 3.** Regulations related to species and/or populations at risk

Agency	Relevant Statute	Implementation
National Marine Fisheries Service (NMFS); U.S. Fish and Wildlife Service (FWS)	Endangered Species Act (ESA) <sup>9</sup> Section 7	Endangered species consultation with NMFS and FWS based on relevant ESA-listed species.
NMFS, FWS	Marine Mammal Protection Act <sup>10</sup>	Marine mammal consultation with NMFS and FWS for any marine mammal.
FWS	Fish and Wildlife Coordination Act <sup>11</sup>	Fish and Wildlife Coordination Act consultation with FWS.
FWS	Migratory Bird Treaty Act <sup>12</sup>	Migratory bird consultation with FWS.

<sup>5</sup> Federal Power Act of 1920. 16 USC § 791a.

<sup>6</sup> Energy Policy Act of 2005. 42 USC § 13201 et seq.

<sup>7</sup> Outer Continental Shelf Lands Act of 1953. 43 USC § 1331 et seq.

<sup>8</sup> National Environmental Policy Act of 1969. 42 USC § 4321 et seq.

<sup>9</sup> Endangered Species Act of 1973. 16 USC § 1531 et seq.

<sup>10</sup> Marine Mammal Protection Act of 1972. 16 USC. ch 31 § 1361 et seq.

<sup>11</sup> Fish and Wildlife Coordination Act of 1980. 16 USC § 2901 et seq.

<sup>12</sup> Migratory Bird Treaty Act of 1918. 16 USC § 703 et seq.



## Habitat alteration or loss

Potential effects to habitat are regulated by NMFS and FWS (Table 4).

**Table 4.** Regulations related to habitat alteration or loss

Agency	Relevant Statute	Implementation
National Marine Fisheries Service (NMFS)	Magnuson-Stevens Fishery Conservation and Management Act <sup>13</sup>	Consultation with NMFS if a project is expected to adversely impact Essential Fish Habitat.
US Fish and Wildlife Service (FWS)	Fish and Wildlife Coordination Act	Consultation with FWS for any action that might impact fish and wildlife habitat.
NMFS, FWS	Endangered Species Act Section 7	Consultation with NMFS or FWS for any action that might affect designated critical habitat <sup>14</sup> for an ESA-listed marine species.

## Effects on water quality

Potential effects to water quality are regulated by the U.S. Army Corps of Engineers (USACE) (Table 5).

**Table 5.** Regulations related to effects on water quality

Agency	Relevant Statute	Implementation
U.S. Army Corps of Engineers (USACE)	Clean Water Act; Rivers and Harbors Act <sup>15</sup> (RHA) Section 10	Section 10 permit is needed for activities that modify any navigable waterway including building, excavating, or filling. Nationwide Permit 52, needed from USACE, is a general permit allowing certain activities on a nationwide basis (for both Section 10 and Clean Water Act Section 401) under which MRE project activities may likely be covered.
Environmental Protection Agency (EPA), USACE	Clean Water Act <sup>16</sup> , Section 402 and 404	Section 402 and 404 permits are needed from EPA and USACE, which cover water quality for pollution discharge and discharge of dredge and fill material respectively.
Designated state agency or tribe, if not Environmental Protection Agency (EPA)	Clean Water Act Section 401	Section 401 water quality certification is needed from designated state agencies or tribes for federal consenting on actions that may lead to discharge into waters of the US. Clean Water Act Section 402 and 404 permits, FERC licenses, and River and Harbors Act Section 10 permit are all subject to Section 401.

<sup>13</sup> Magnuson-Stevens Fishery Conservation and Management Act. 16 USC § 1801 et seq. As amended by the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2007

<sup>14</sup> <https://www.fisheries.noaa.gov/national/endangered-species-conservation/critical-habitat>

<sup>15</sup> Rivers and Harbors Appropriation Act of 1899. 33 USC § 401 et seq.

<sup>16</sup> Clean Water Act of 1972. 33 US Code § 1251-1387



## Effects on social and economic systems

Potential social and economic effects can be regulated by a variety of federal and state agencies (Table 6).

**Table 6.** Regulations related to effects on social and economic systems

Agency	Relevant Statute	Implementation
Relevant federal agency	National Environmental Policy Act (NEPA) for federal actions, Magnuson-Stevens Fishery Conservation Act, Outer Continental Shelf Lands Act, USACE Tribal Nations Program and others <sup>17</sup>	Require social impact assessment (e.g., NEPA requires social and economic effects, including impacts to historic and cultural resources, to be considered as part of environmental assessments). Independent from Section 106, the USACE Tribal Nations Program enables Tribes to be engaged in any decisions that may affect tribal interests, including projects requiring in-water consenting (i.e., RHA Section 10).
Relevant federal agency	Executive Order 13175	Required consultation and coordination with federally recognized tribal governments to protect cultural resources and fishing areas
Advisory Council on Historic Preservation and relevant state agencies	National Historic Preservation Act (NHPA) <sup>18</sup> Section 106	NHPA Section 106 consultation is required for federal actions, which include identification of historic resources and assessment of potential impacts

## Additional Information

### Marine Spatial Planning

While there is currently no nationwide regulation directing marine spatial planning in the U.S., marine spatial plans have been completed at both the state and regional levels:

- Oregon's Territorial Sea Plan Part 5<sup>19</sup> designates areas for MRE development in state waters.
- Washington's Marine Spatial Plan<sup>20,21</sup> coordinates management of ocean uses and potential for new uses including MRE along the coast.
- Rhode Island (Ocean Special Area Management Plan<sup>22</sup>) and Massachusetts (Ocean Management Plan<sup>23</sup>) both have plans, but they are focused on wind energy development.
- The Northeast Regional Planning Body's (covering area offshore Maine to the north and Connecticut/Rhode Island to the south) Northeast Ocean Plan<sup>24</sup> summarizes the ocean planning process and provides a guide for agency decision-making.

<sup>17</sup> For more information on the USACE Tribal Policy: <https://www.usace.army.mil/Missions/Civil-Works/Tribal-Nations/>

<sup>18</sup> National Historic Preservation Act of 1966. 16 USC § 470 et seq.

<sup>19</sup> <https://www.oregon.gov/lcd/OCMP/Pages/Territorial-Sea-Plan.aspx>

<sup>20</sup> <https://apps.leg.wa.gov/rcw/default.aspx?cite=43.372&full=true>

<sup>21</sup> [https://misp.wa.gov/wp-content/uploads/2018/06/WA\\_final\\_MSP.pdf](https://misp.wa.gov/wp-content/uploads/2018/06/WA_final_MSP.pdf)

<sup>22</sup> [https://www.crc.uri.edu/download/RI\\_Ocean\\_SAMP\\_V11.pdf](https://www.crc.uri.edu/download/RI_Ocean_SAMP_V11.pdf)

<sup>23</sup> <https://www.mass.gov/service-details/massachusetts-ocean-management-plan>

<sup>24</sup> <https://neoplan.org/plan/>



- The Mid-Atlantic Regional Planning Body's (covering the shore out to 200 nm and between New York/Connecticut/Rhode Island border to the north and the Virginia/North Carolina border to the south) Mid-Atlantic Regional Ocean Action Plan<sup>25</sup> documents agreed-upon practices and provides best practices to inform decision-making.

### Adaptive Management

No formal regulations for adaptive management exist in the U.S. However, guidance specific to developing adaptive management plans has been published by natural resource agencies<sup>26</sup> and it has been used for impacts to wildlife from MRE developments in several cases (e.g., Ocean Power Renewables<sup>27</sup> and Oregon PacWave wave energy test site<sup>28</sup>).

### Consistency Between Jurisdictions

Federal consistency determination under the Coastal Zone Management Act (CZMA)<sup>29</sup> Section 306 requires that any federal action that may have an effect on coastal uses and resources has to be consistent with any state approved Coastal Zone Management Plans.

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<sup>25</sup> <https://www.boem.gov/sites/default/files/environmental-stewardship/Mid-Atlantic-Regional-Planning-Body/Mid-Atlantic-Regional-Ocean-Action-Plan.pdf>

<sup>26</sup> Hanna, L.; Copping, A.; Geerlofs, S.; Feinberg, L.; Brown-Saracino, J.; Gilman, P.; Bennet, F.; May, R.; Köppel, J.; Bulling, L.; Gartman, V. (2016). Assessing Environmental Effects (WREN): Adaptive Management White Paper. Report for International Energy Agency (IEA).

<sup>27</sup> <https://www.orpc.co/our-approach/environmental-affairs/adaptive-management>

<sup>28</sup> <https://tethys.pnnl.gov/sites/default/files/publications/Final-License-Application-for-the-Pac-Wave-South-Project.pdf> (Appendix I and J)

<sup>29</sup> Coastal Zone Management Act of 1972. 16 USC. § 1451-1465