



Schulich School of Law
Marine and Environmental Law Institute

Renewable Energy Projects and Spatial Tenure in the Offshore

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ORE Workshop, Nov 4, 2014

Introduction

- ORE infrastructure development requires some assured tenure over marine spaces
 - Levels of investment, need for security
 - Reasonable period in which operations can be planned; incompatible uses excluded
 - Otherwise – commitment of resources impossible
- *Means* of providing necessary tenure can vary from permitting arrangements, leasehold (of varying intensity), conceivably freehold rights

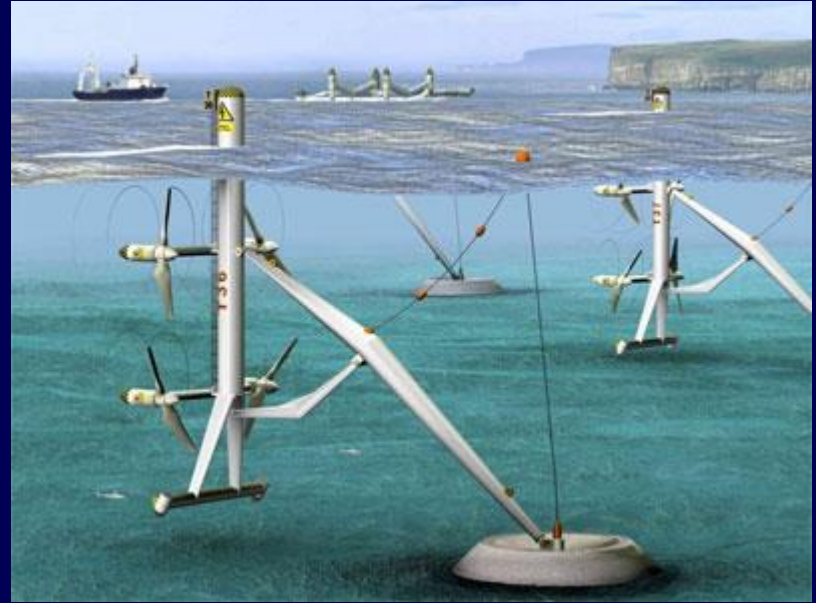
Complexities

- Rights overlaid on competing uses
 - Most *not* entitled to property-like spatial rights
- Long-term rights preclude new, possibly desirable forms of development
- Uncertain information re – other potential valuable uses of what is a public resource





AND: Differing actual requirements for property rights for different ORE technologies





Nova Scotia Policy Development

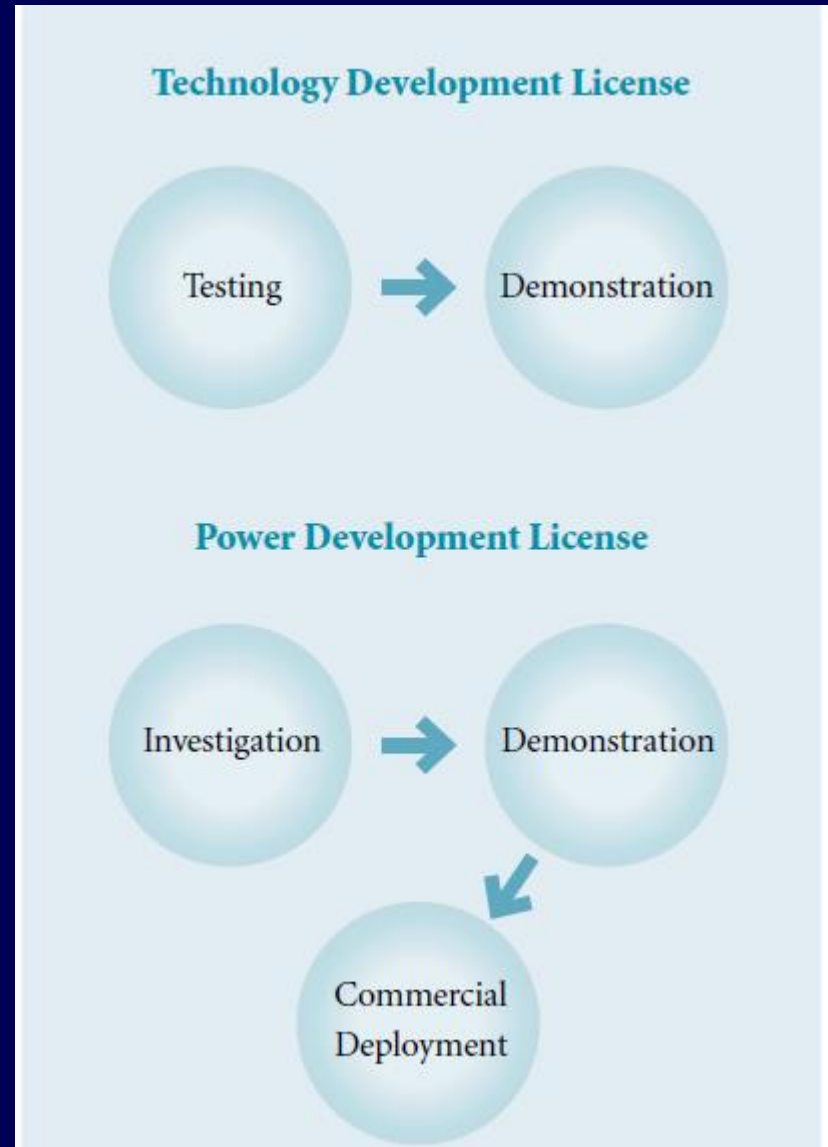
- Most of focus has been on regulatory and EIA elements
 - coupled with development of incentives in electricity regime
- But the nature of the tenurial arrangements applicable to projects also requires attention
 - To date not fully considered
 - Need focussed, rational assessment of policy options in this area

NS Marine Renewables

- 2010: *Renewable Electricity Plan*
 - Target 40% renewables by 2020
- 2011: *Fournier Report: Marine Renewable Energy (MRE) Legislation*
 - Recommend integrated inter-agency, federal-provincial approach
 - Conditional license periods, followed by lease arrangements (Letter of Authority + Crown Lease)
 - No details on lease approaches
- 2012: *Nova Scotia MRE Strategy*
 - To lead on to legislation

NS MRE Strategy: Proposals

- Two license classes:
Technology Development License and Power Development License.
- Power Development
 - Investigation
 - Demonstration
 - Commercial Deployment
- Crown Lease only at end of process





- Little or No Detail on Lease Arrangements
 - Once legislation in place, “Marine Renewable Energy License will be the primary tool for defining project or company-specific opportunities and obligations” (*MRE Strategy*)
 - Puts lease clearly in a secondary status: licenses will define area, obligations etc
 - Lease “integrated” in licensing process

And some things we just don't talk about...



- Provincial jurisdiction?
- Competing rights?
- Legal viability of scheme?



Jurisdiction



- Province currently taking the lead
 - BUT – provincial jurisdiction is territorial: **no jurisdiction** to lease, license outside the province
 - Areas within the province include those that came into Confederation in 1867, based on English law of the time
 - *Waters Inter Fauces Terrae*
 - Imprecise, define bay-by-bay

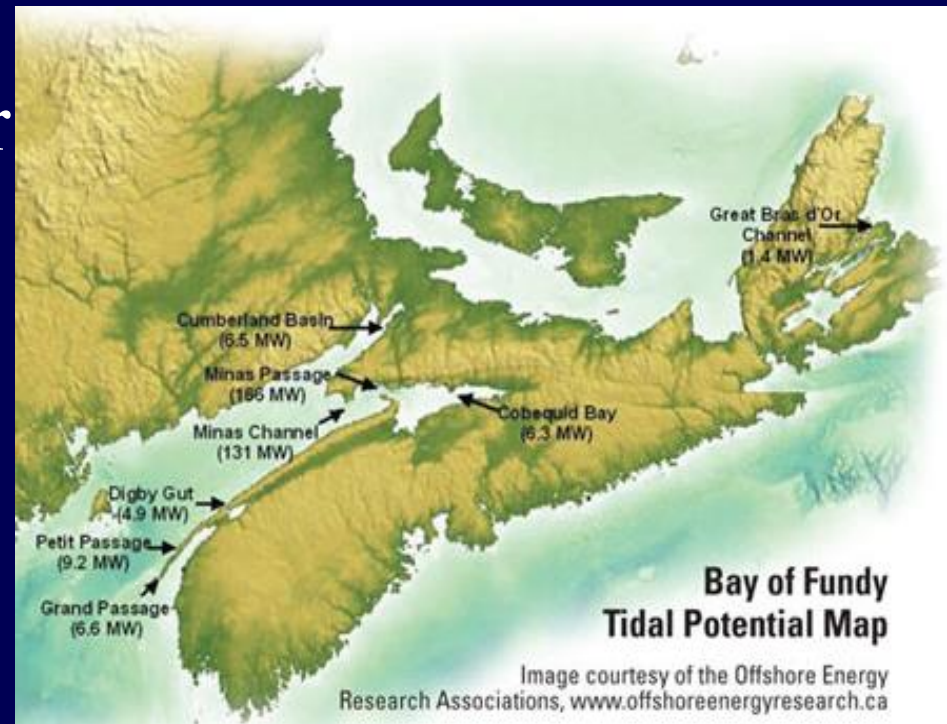
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- “The Province of Nova Scotia considers **submerged land located along the coast of Nova Scotia to be provincial Crown land**, ... Under the Crown Lands Act, the Minister of Natural Resources is responsible for Crown lands, including submerged lands along the coast of the province.
 - “The **landward boundary** of coastal land owned by the province **begins** at the mean high water mark on the shore ...”

Govt of NS Website

- And the seaward boundary???



- Current areas of interest for tidal power likely within province (Bay of Fundy) – but for the future?
- Especially wind farms? On open coasts?





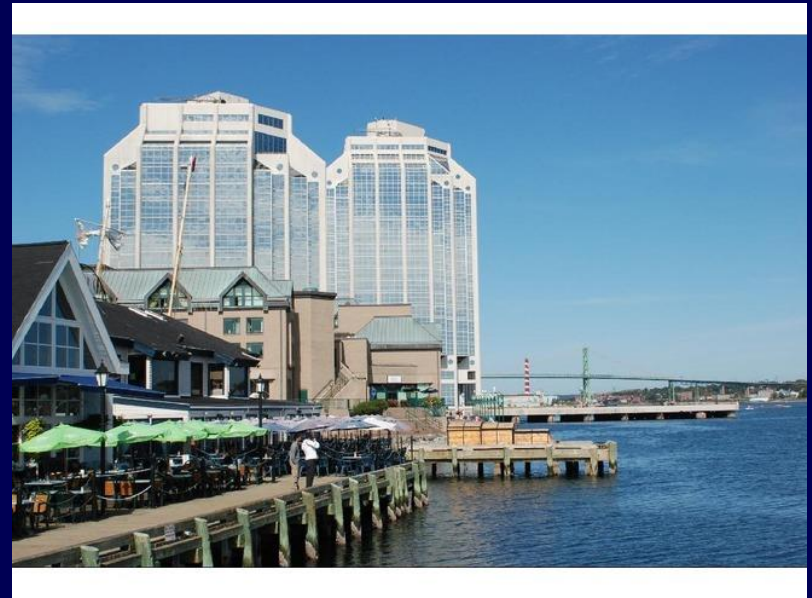
Competing Private *Rights*

Tidal Waters Inside Province

- NS will have licensing, leasing powers
- Subject to federal reg. in areas of federal jurisdiction (fisheries, navigation) - Manageable
- But for leasing: public rights of fishing & navigation can only be extinguished by explicit *federal* legislation (BC Fisheries Case)
- No such legislation directly applicable to the leasing/property rights authorization



- Leaves operators subject to private challenges in public nuisance
- May or may not be covered by regulatory approvals: *Navigable Waters Act, Fisheries Act*



*Esson v Wood 1887 SCC:
Destruction of Wharf as abatement
Of Public Nuisance*



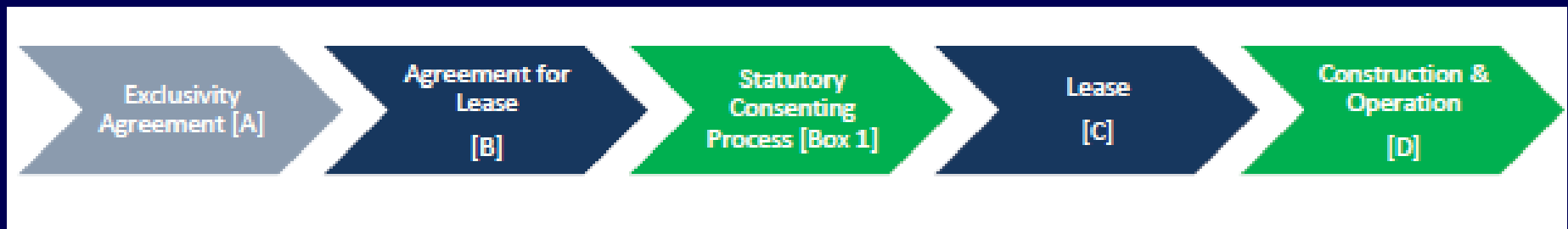
So – work to be done...

And in the process of legislative development,
some other issues to consider

- Analogizing from Aquaculture or Oil and Gas models?
 - Licenses (eg 3-license Danish process) or full lease (eg. 50 year windfarm leases from UK Crown Estates)
 - Current NS Crown Land Policy provides little or no substance: negotiable



- Hybrid with lease - but of secondary effect?
 - BOEMRE leases in US: come before approvals and maintain exclusive right to proceed
 - UK – in stages: exclusivity maintained but consents are determinative



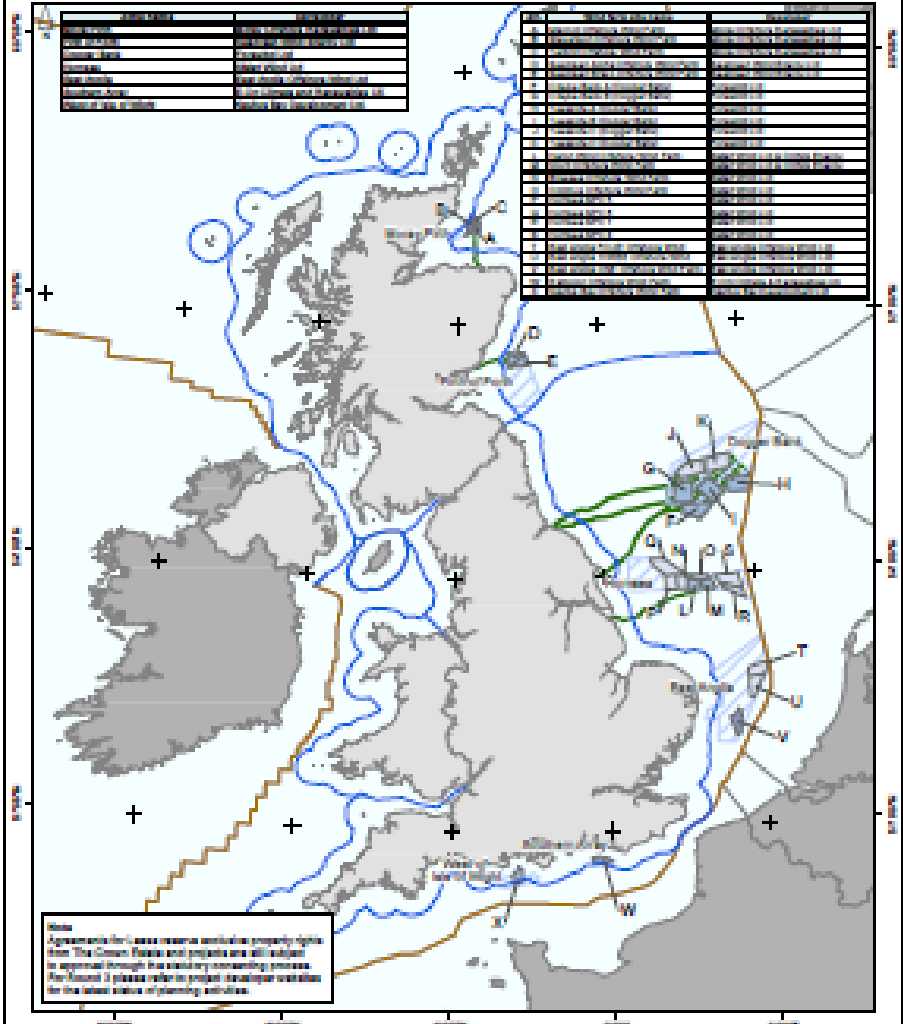
UK License/Lease Process



- Protection of other interests:
 - Consultation in licensing, leasing
 - Maintenance of compliance status (realistic?)
 - Oil & gas clause in UK leases – can remove rights and compensate in face of new discoveries
 - Concern: long tenure with unknown future interests – consider the scope of areas affected, eg, in UK wind farms



Round 3 Offshore Wind



Note:
 Agreements for lease reserve maritime property rights from The Crown Estate and projects are still subject to approval through the statutory consenting process. For Round 3 please refer to project developer websites for the latest status of planning activities.

Wind Farm Status

- Consented Wind Farm
- In Planning Wind Farm
- Pre-planning Wind Farm
- Area of Search
- Report Cable Agreements

Base Map

- Territorial Waters Limit
- UK Continental Shelf
- International Waters
- United Kingdom
- Europe



Map Scale

0 100 200 km

Legend

01 02 03 04 05 06 07 08 09 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88 89 90 91 92 93 94 95 96 97 98 99 100

Map Information

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THE CROWN ESTATE



- Appropriate Agency?
 - Conflict of Interest in UK Crown Estate: run as a “business”
 - High fees – and now an investor in technology and in London Array project
 - Echoes of the Deepwater Horizon problem with US regulators



- Federal-Provincial Cooperation
 - Mirror legislation to remove jurisdictional conflicts – as with oil and gas arrangements
 - Add: explicit federal power to over-ride fisheries rights?
 - BUT – is “one-window” approach really desirable, feasible
 - And for how many industries??

- Given large areas (wind) and long tenures – need to consider conflict with traditional rights?
 - Traditional forms of spatial rights (eg TURFs) never recognized under the *international* regime of marine space
 - Freedom of the seas ignored, or not concerned with, local (private, *communal*) territorial rights
 - Expansion of coastal state jurisdiction in 20th century replaced FOS with *state* control – in many places, communal interests lost
- Now: privileging one form of use – in scope of legal protection – over others?



- Finally: this is about security of investment & incentives for development:
 - Is leasehold protection **or** guaranteed access to the grid the more important, significant form of “tenure” and incentive?