



Vessel Liability for Allisions and Gear Entanglements with Offshore Wind Turbines

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As offshore wind energy development expands in the Northeast United States, there has been a growing concern in the commercial fishing industry around vessel navigation through, and fishing in, offshore wind farms.¹ This concern is specifically focused on the liability of vessel owners and operators should their vessels or gear damage wind turbines or transmission lines. A second concern focuses on crew and safety requirements for vessels operating within a wind farm. There is a great deal of case law surrounding vessel collisions and allisions, but no cases have dealt with wind turbines. That may soon change with the growth of the offshore wind industry. There is also a wealth of regulations regarding vessel operations and safety requirements, but very few of those regulations deal with vessels operating within a wind farm. This report examines what liability vessels might bear for striking offshore wind turbines and causing damage to transmission cables from fishing gear, and what effect, if any, that liability may have on the vessel owner's insurance policy and premium. This report also examines general crew and safety requirements for commercial fishing vessels in the Northeast and how they may apply to vessels operating within wind farms.

1 Vessel Collision and Allision Liability in the United States, and Insurance Implications

1.1 Vessel Collision and Allision

In the maritime context, there is a distinction between collision and allision. A collision is “[t]he contact of two or more moving vessels.”² An allision, by contrast, is “[t]he contact of a vessel with a stationary object such as an anchored vessel” or wind turbine.³ Outside of the maritime context, the term “collision” is used as an umbrella term covering both types of contact.⁴ However, the term “allision” provides a clearer idea of the

¹ The information in the following paragraph derives from meetings with Connecticut Sea Grant.

² *Collision*, BLACK'S LAW DICTIONARY (11th ed. 2019).

³ *Id.* at *Allision*.

⁴ *See, e.g.*, Ivan Pereira et al., *Cruise Ship Still Docked in San Francisco After Hitting Pier*, ABC NEWS (July 7, 2023, 8:30 PM) <https://abcnews.go.com/US/cruise-ship-damaged-after-striking-san-francisco-pier/story?id=100790400> (using the term collision rather than allision when discussing a cruise ship striking a pier).



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incident that occurred. Clearly understanding what occurred during an incident is crucial to determining what a vessel's liability is for said incident. In the United States, federal courts have jurisdiction over admiralty and maritime cases.⁵ Generally, admiralty and maritime cases are those that involve “the rules governing contract, tort, and workers’-compensation claims arising out of commerce on or over navigable water.”⁶ Under federal admiralty law, certain rules have developed around vessel collisions and allisions.

As a general principle, to be liable for a collision, a vessel must have committed a fault that was a contributory cause of the collision.⁷ A vessel that is in violation of a statute or regulation intended to prevent collisions at the time of the collision is presumed to be at fault, and that fault is presumed to have, at the very least, contributed to the cause of the collision.⁸ The vessel that violated the statute or regulation has the burden to prove that the violation could not have been a cause of the collision.⁹ This is known as the *Pennsylvania* rule.¹⁰ In determining fault, the degree of that fault is also important. The degree to which each vessel is at fault for the collision determines the amount of damages for which they are liable.¹¹ For example, if a vessel's failure to follow a regulation was determined to only account for ten percent of the cause of the incident, that vessel is only liable for ten percent of the damages.¹² In cases of allision, even when a vessel is deemed at fault, the owner or operator of a structure may also be held to some degree of fault for the incident if they too violated a statute or regulation.¹³ There are additional presumptions regarding allisions.

For allisions, there are two important presumptions: the *Oregon* Rule and the *Louisiana* Rule. The *Oregon* Rule applies when a vessel, moving under its own power, “allides with a stationary object,” while the *Louisiana* Rule applies to drifting vessels that allide with stationary objects.¹⁴ Both rules create a rebuttable presumption that the moving vessel was at fault.¹⁵ This presumption can be rebutted by showing “[1] that the allision was the fault of the stationary object[;] [2] that the moving vessel acted with reasonable care[;] or [3] that the allision was an unavoidable accident.”¹⁶ As to this first method of rebutting the presumption, some courts of appeals have held that, to rebut the presumption of fault and clear itself of all liability, a moving vessel must show that the stationary object was solely at fault.¹⁷ Even if a moving vessel cannot make this showing, they can still

⁵ See U.S. CONST. art. III, § 2, cl. 1; 28 U.S.C. § 1333.

⁶ BLACK'S, *supra* note 2, at *Admiralty*.

⁷ THOMAS A. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 14-2, at 118 (5th ed. 2011).

⁸ The *Pennsylvania*, 86 U.S. 125, 135–36 (1873).

⁹ *Id.* at 136.

¹⁰ See, e.g., *Dakota, Minn. & E. R.R. Corp. v. Ingram Barge Co.*, 918 F.3d 967, 971 (8th Cir. 2019).

¹¹ *United States v. Reliable Transfer Co.*, 421 U.S. 397, 411 (1975).

¹² See *id.* (“We hold that when two or more parties have contributed by their fault to cause property damage in a maritime collision or stranding, liability for such damage is to be allocated among the parties proportionately to the comparative degree of their fault. . . .”).

¹³ *Orange Beach Water, Sewer & Fire Prot. Auth. v. M/V Alva*, 680 F.2d 1374, 1383 (11th Cir. 1982) (holding that the “condition of the pipeline . . . constituted an ‘unreasonable’ obstruction to navigation,” in violation of the pipeline’s permit, and contributed to the damage); see also *Port of Seattle v. M/V Saturn*, 562 F. Supp. 70 (W.D. Wash. 1983) (holding that Port of Seattle and Cargill, Inc., a pier owner and lessee/operator, were ten percent at fault for the damages that resulted from the allision for failing to mark the end of the pier with a red light, in violation of an express duty to do so).

¹⁴ See, e.g., *Superior Constr. Co. v. Brock*, 445 F.3d 1334, 1339 n.10 (11th Cir. 2006).

¹⁵ See *id.*; *Fischer v. S/Y NERAIDA*, 508 F.3d 586, 593 (11th Cir. 2007); *Combo Mar., Inc. v. U.S. United Bulk Terminal, LLC*, 615 F.3d 599, 604–05 (5th Cir. 2010); *City of Chicago v. M/V Morgan*, 375 F.3d 563, 571–72, 572 n.11 (7th Cir. 2004) (describing the *Oregon* Rule, then noting that “whether the [vessel] is deemed ‘drifting’ and therefore subject to the *Louisiana* presumption . . . or ‘under power’ and subject to the *Oregon* rule, the analysis remains unchanged.”).

¹⁶ *Fischer*, 508 F.3d at 593 (quoting *Bunge Corp. v. Freeport Marine Repair*, 240 F.3d 919, 923 (11th Cir. 2001)).

¹⁷ See *M/V Morgan*, 375 F.3d at 574 (noting that the vessel “failed to rebut the *Oregon* presumption or exonerate itself from liability by proving . . . that . . . the allision was the sole fault of the bridge”); *Bessemer & Lake Erie R.R. Co. v. Seaway Marine Transport*, 596 F.3d 357, 363 (6th Cir. 2010) (noting that a moving vessel can “rebut *all* liability” by showing the stationary object was solely at fault for the allision); *Dakota, Minn. & E. R.R. Corp. v. Ingram Barge Co.*,

reduce their liability by showing that the stationary object was also partially at fault.¹⁸ One way the moving vessel may show that the stationary object was at fault is through the *Pennsylvania* rule¹⁹—the rule that when a party is in violation of a statute or regulation at the time of a collision or allision, this violation is presumed to have been a cause of the accident unless the violator can show that the violation could not have been a cause of the accident.²⁰ Under the second approach, a vessel may rebut the presumption by showing that it exercised “reasonable care under the circumstances.”²¹ Finally, the third approach—inevitable accident, also known as the Act of God defense—requires that the defendant show that “the accident would have happened anyway regardless of what the defendant did.”²² Essentially, the defendant must show that even if

918 F.3d 967, 972 (8th Cir. 2019) (stating that defendant failed to rebut the Oregon presumption because “it could not prove that ‘the allision was the *sole* fault of the [stationary object].”).

¹⁸ See *Bessemer & Lake Erie R.R. Co.*, 596 F.3d at 363 (“While it may be the case that a moving vessel must rebut the presumption to absolve itself of *all* liability, we know of no case law to the effect that the vessel must rebut the presumption to relieve itself of *some* liability”) (citation omitted); *Dakota, Minn. & E. R.R. Corp.*, 918 F.3d at 972–73 (holding that the *Oregon* rule does not address the “percentages of fault assigned to the parties adjudged negligent” and that a court may reduce the recovery of a negligent bridge owner whose negligence contributed to the allision); *Zerega Ave. Realty Corp. v. Hornbeck Offshore Transp., LLC*, 571 F.3d 206, 212 (2d Cir. 2009); *Combo Mar., Inc.*, 615 F.3d at 607–09 (holding that the *Oregon* and *Louisiana* rules do not affect the principle of comparative fault—that when multiple parties contribute to cause damage, liability for the damage is allocated between them in proportion to their fault—and that the *Louisiana* rule is not a presumption that the drifting vessel was solely at fault); *Hood v. Knappton Corp.*, 986 F.2d 329, 332–33 (9th Cir. 1993) (applying comparative fault principles and assigning twenty-five percent of the fault to plaintiffs while also applying the *Louisiana* presumption).

¹⁹ See *Dakota, Minn. & E. R.R. Corp.*, 918 F.3d at 971; *Superior Constr. Co.*, 445 F.3d at 1339–40; *Cliffs-Neddrill Turnkey International -Oranjestad v. M/T Rich Duke*, 947 F.2d 83, 86, 91 (3d Cir. 1991) (noting that, initially, there is a presumption that the moving vessel is at fault, but this may be rebutted by showing the stationary object was at fault, and reversing the district court’s grant of summary judgment in favor of stationary object because it did not show that, as a matter of law, its statutory violations “‘could not have been’ a cause of the accident,” as required by the *Pennsylvania* rule). Note that one court of appeals has held that “[w]hen presumptions clash, they disappear.” *Rhodi Yachts, Inc. v. Nat’l Marine, Inc.*, 984 F.2d 880, 887 (7th Cir. 1993) (Posner, J.). While this case did not deal with a conflict between the *Oregon* and *Louisiana* rules and the *Pennsylvania* rule, at least one district court has applied this reasoning to a clash between these two presumptions. See *In re International Marine, L.L.C.*, No. 12-358, 2013 WL 3293677, at *7–8 (E.D. La. June 28, 2013). Some decisions have also held that, once the parties present evidence, presumptions become irrelevant. See *Rhodi Yachts*, 984 F.2d at 887; *Pa. R.R. Co. v. S.S. Marie Leonhardt*, 320 F.2d 262, 264 (3d Cir. 1963). Even if a court takes the approach that presumptions vanish when they clash or once parties introduce evidence, showing that the stationary object violated a relevant statute will still be helpful to the moving vessel. The *Pennsylvania* rule creates a presumption as to causation; if the party violated a relevant statute, this violation is presumed to have been at least a contributory cause of the accident. See *The Pennsylvania*, 86 U.S. 125, 136 (1873); Marva Jo Wyatt, *When Two Presumptions Collide: Pennsylvania Rules!*, 44 TUL. MAR. L.J. 487, 493–94 (2020). The presumption makes it so that the violating party must show that their violation “could not have been” a cause of the accident. *The Pennsylvania*, 86 U.S. at 136. In the absence of any presumptions, the law assigns liability for a collision or allision to those parties who are at fault and whose fault “caused or contributed” to the accident. SCHOENBAUM, *supra* note 7, § 14-2, at 107. One is at fault if they fall below the standard of reasonable care, which is based on “(1) general concepts of prudent seamanship and reasonable care; (2) statutory and regulatory rules . . . ; and (3) recognized customs and usages.” See *id.* §14-2, at 109; *Fischer*, 508 F.3d at 594 (quoting *id.*). As such, showing that the stationary object violated an applicable statute or regulation may establish that the stationary object was at fault because it did not exercise reasonable care. Once the moving vessel makes this showing, if the *Pennsylvania* rule applies, the violating party bears the burden of showing that its violation could not have been a cause of the accident. *The Pennsylvania*, 86 U.S. at 136. If the *Pennsylvania* rule does not apply, though, the moving vessel will bear the burden of showing that the stationary object’s violation contributed to cause the accident. See SCHOENBAUM, *supra* note 7, § 14-3, at 122; *Rhodi Yachts*, 984 F.2d at 887 (stating that when presumptions do not apply, the defendant will escape liability unless the plaintiff establishes the claims against her by a preponderance of the evidence). As such, under either approach, showing that the stationary object violated an applicable statute or regulation may help the moving vessel avoid or, at least, limit its liability; whether the *Pennsylvania* rule applies only impacts which party bears the burdens of proof and persuasion. See SCHOENBAUM, *supra* note 7, § 14-3, at 123.

²⁰ See *The Pennsylvania*, 86 U.S. 125, 135–36 (1873).

²¹ See, e.g., *Fischer*, 508 F.3d at 594; *Weyerhaeuser Co. v. Atropos Island*, 777 F.2d 1344, 1347–48 (9th Cir. 1985).

²² *Fischer*, 508 F.3d at 596.

they failed to use reasonable care, this failure did not cause the accident.²³ As the Eleventh Circuit noted, “[t]his defense sensibly requires a showing that all reasonable measures would have been futile.”²⁴ Although the *Oregon* and *Louisiana* rules place a presumption of fault on moving vessels, there are a number of ways these vessel may still escape, or at least reduce, their liability.

When the wind farms that are currently under construction are operational, transiting through them will present hazards, especially at night and in bad weather. It is possible that a vessel will strike a turbine foundation at some point, presenting the issue of who is liable for damages to either the vessel or the turbine foundation. If a moving fishing vessel were to strike a properly charted wind turbine, that vessel would be presumed at fault for the allision.²⁵ The vessel could, however, attempt to rebut this presumption in a number of ways. First, the vessel could attempt to avoid or, at least, reduce its liability, by showing that the allision was the fault of the wind turbine, the stationary object.²⁶ For example, wind farms are treated as private aids to navigation, so they must be marked as the Coast Guard directs.²⁷ The Coast Guard’s regulations require that private aids to navigation must “be maintained in proper operating condition.”²⁸ As such, if a vessel allided with a wind turbine, but could show that the owner of the wind farm had not properly maintained the private aids to navigation on the turbines, the vessel may be able to establish that the wind farm was, at least partially, at fault for the allision.²⁹ If the vessel makes this showing, it may be able to refute liability, or at least, limit its liability by the amount of fault the wind turbine bears.³⁰ Second, the moving vessel could attempt to rebut the presumption that it was at fault by showing that it exercised reasonable care.³¹ The Eleventh Circuit, for instance, upheld a district court’s determination that the owner of a vessel that drifted into a dock during a hurricane was not liable for the allision because the vessel’s owner took reasonable steps to prepare for the hurricane.³² If a fishing vessel that struck a wind turbine could show that it similarly took reasonable precautions against alliding with these structures, it may also be able to refute liability.³³ Finally, a moving

²³ See *id.*

²⁴ *Id.*

²⁵ See *The Oregon*, 158 U.S. 186, 192–93 (1895) (the other vessel in this case was properly anchored at the time of the incident, so the *Oregon* was presumed to be at fault for not detecting the anchored vessel); *The Louisiana*, e.g., 70 U.S. (3 Wall.) 164, 173 (1865).

²⁶ See, e.g., *Fischer*, 508 F.3d at 593; *Bessemer & Lake Erie R.R. Co. v. Seaway Marine Transp.*, 596 F.3d 357, 362–63 (6th Cir. 2010).

²⁷ See U.S. COAST GUARD, U.S. DEP’T OF HOMELAND SEC., NAVIGATION AND VESSEL INSPECTION CIRCULAR NO. 03-23, at 4 (2023); see also 33 C.F.R. § 64.21 (2024) (requiring owners or operators of structures to “apply for Coast Guard authorization to mark the structure” through the private aid to navigation application process); *id.* § 64.06 (defining “[s]tructures” as “any fixed or floating obstruction, intentionally placed in the water, which may interfere with or restrict marine navigation.”); *id.* (defining “[o]bstruction” as “anything that restricts, endangers, or interferes with navigation.”).

²⁸ See 33 C.F.R. § 66.01-20 (2024).

²⁹ See *The Pennsylvania*, e.g., 86 U.S. (19 Wall.) 125, 136 (1873); *Orange Beach Water, Sewer & Fire Prot. Auth. v. M/V Alva*, 680 F.2d 1374, 1381 (11th Cir. 1982) (holding that the *Pennsylvania* rule applies to allisions); *In re Am. Milling Co.*, 409 F.3d 1005, 1012 (8th Cir. 2005) (the *Pennsylvania* rule applies to violations of regulations, as well as violations of statutes); see also SCHOENBAUM, *supra* note 7, § 14-2, at 109 (noting that fault is determined, among other things, based on the standard of care “derived from . . . statutory and regulatory rules”).

³⁰ See *Dakota, Minn. & E. R.R. Corp. v. Ingram Barge Co.*, 918 F.3d 967, 971–73 (8th Cir. 2019) (upholding district court’s determination that moving vessel failed to rebut *Oregon* presumption and escape all liability by invoking the *Pennsylvania* rule and showing the stationary object was solely at fault, but holding that stationary object’s recovery could still be reduced based on its comparative fault); *Superior Const. Co. v. Brock*, 445 F.3d 1334 (11th Cir. 2006) (suggesting that application of *Pennsylvania* rule to stationary object rebuts the *Oregon* presumption and that, after a moving vessel invokes *Pennsylvania* rule against the stationary object, comparative fault analysis is only proper if the stationary object also invokes *Pennsylvania* rule against moving vessel and neither party can show their violation could not have caused the allision); see also SCHOENBAUM, *supra* note 7, § 14-2, at 109; *United States v. Reliable Transfer Co.*, 421 U.S. 397, 411 (1975) (holding that damage in maritime collision cases is allocated between the parties based on their comparative fault).

³¹ See *Fischer*, 508 F.3d at 593.

³² See *id.* at 594, 597.

³³ See *id.* at 594 (citing *The Virginia Ehrman*, 97 U.S. 309, 313) (holding that, in the admiralty context, the standard of care is “reasonable care under the circumstances”).

vessel may rebut the presumption of fault that the *Oregon* and *Louisiana* rules place on it by showing that the allision was an unavoidable accident, or an Act of God, meaning that no matter what the vessel did, the accident would have happened anyway.³⁴ The classic example of an Act of God is an unexpected intense storm.³⁵ As such, if a fishing vessel were to encounter such a storm and could show that, in light of the storm, there was nothing it could have done to avoid the allision, it will be able to rebut the presumption that it was at fault and avoid liability.³⁶ Although under the *Oregon* and *Louisiana* rules a fishing vessel that allides with a wind turbine will be presumed to be at fault, in some circumstances, the vessel may be able to rebut this presumption and avoid liability.

1.2 Limitation of Liability

In the United States, vessel owners are able to limit their liability for incidents that occur on the vessel.³⁷ They may do so through the Limitation of Liability Act of 1851.³⁸ Under the Act, a vessel owner may limit their liability for damages that result from collisions to the value of the vessel and pending freight.³⁹ The value of the vessel is the value at the end of its voyage.⁴⁰ This means that even when a vessel sinks, the vessel owner may limit their liability to the value of the sunken vessel as the sinking is the end of the voyage.⁴¹ The vessel owner may only limit their liability if the incident occurred without their “privity or knowledge” of the owner.⁴² What counts as privity or knowledge differs based on whether the ship owner is an individual or a corporation.⁴³ For an individual owner, it means “personal participation . . . in the fault or negligence which caused or contributed to the loss or injury.”⁴⁴ As such, some courts have held that where an individual owner of a small vessel “is in control of and operating” the vessel, they are considered to be in privity or have knowledge of the negligence or unseaworthiness leading to the accident.⁴⁵ The Second Circuit, however, which covers Connecticut,⁴⁶ has rejected this approach and requires some actual fault or negligence on the part of the owner for the owner to have privity or knowledge.⁴⁷ Individual owners may also delegate inspection and management to “suitably selected employees” and not be in privity with the failures of these employees.⁴⁸ For corporate vessel owners, however, since a corporation can only act through its employees, these individuals’ privity and knowledge must, at some point, be imputed to the corporation.⁴⁹ The privity

³⁴ See *id.* at 593, 596 (quoting *Bunge Corp. v. Freeport Marine Repair, Inc.*, 240 F.3d 919, 923 (11th Cir. 2001)); *Combo Mar., Inc. v. U.S. United Bulk Terminal*, 615 F.3d 599, 605–06 (5th Cir. 2010).

³⁵ See *Warrior & Gulf Navigation Co. v. United States*, 864 F.2d 1550, 1553 (11th Cir. 1989) (quoting *Bradford v. Stanley*, 355 So. 2d 328, 330 (Ala. 1978) (“The act of God principle ‘applies only to events in nature so extraordinary that the history of climatic variations and other conditions in the particular locality affords no reasonable warning of them.’”); *Skandia Ins. Co. v. Star Shipping AS*, 173 F. Supp. 2d 1228, 1239–40 (S.D. Ala. 2001) (noting that storms “that cause[] unexpected and unforeseeable devastation with unprecedented wind velocity, tidal rise, and upriver tidal surge” are Acts of God).

³⁶ See *Fischer*, 508 F.3d at 596.

³⁷ 46 U.S.C. §§ 30501–30530.

³⁸ *Id.*

³⁹ *Id.* § 30523(a)–(b).

⁴⁰ *Place v. Norwich & N.Y. Transp. Co.*, 118 U.S. 468, 491–93 (1886).

⁴¹ *Id.*

⁴² See 46 U.S.C. § 30523(b).

⁴³ *Hammersley v. Branigar Org., Inc.*, 762 F. Supp. 950, 955 (S.D. Ga. 1991); *In re Patton-Tully Transp. Co.*, 797 F.2d 206 (5th Cir. 1986).

⁴⁴ See *Hammersley*, 762 F. Supp at 955 (quoting *Gibboney v. Wright*, 517 F.2d 1054, 1057–58 (5th Cir. 1975)).

⁴⁵ *Fecht v. Makowski*, 406 F.2d 721, 722 (5th Cir. 1969); *In re M/V Sunshine II*, 808 F.2d 762, 765 (11th Cir. 1987) (“[I]n most circumstances negligence in operation will be sufficiently connected to the owner on board his own small vessel and operating it that he will be found to have privity or knowledge”). The Eleventh Circuit, however, also cautioned that this doctrine is “a useful tool . . . not a talisman.” *Id.*

⁴⁶ See *Geographic Boundaries of the United States Courts of Appeals and United States District Courts*, U.S. COURTS, https://www.uscourts.gov/sites/default/files/u.s._federal_courts_circuit_map_1.pdf (last visited Feb. 7, 2024).

⁴⁷ See *In re Interstate Towing, Co.*, 717 F.2d 752, 754 (2d Cir. 1983).

⁴⁸ See *In re Sheen*, 709 F. Supp. 1123, 1133 (S.D. Fla. 1989).

⁴⁹ See *id.*, at 1133 n.14; *Coryell v. Phipps*, 317 U.S. 406, 410–11 (1943) (Douglas, J.).

and knowledge of high level corporate officials with authority over the relevant activities are imputed to the corporation.⁵⁰ For example, the knowledge of “shore-based managing officials” extends to the corporation, but a ship’s captain, however, is not high-ranking enough for her knowledge to be imputed to the corporation.⁵¹ In addition, although a ship owner has a duty to appoint a competent crew, when the owner carries out this duty, but the competent crew commits a “mistake of navigation,” the owner is not in privity with this failure.⁵² It should be noted that limiting a vessel owner’s liability only serves to limit the amount that may be awarded in damages and has no bearing on fault or causation.⁵³

If a fishing vessel is operating within a wind farm and strikes a turbine, the owner of the vessel may be able to limit their liability. However, if the vessel owner is operating the vessel at the time of the incident, it is highly unlikely that the vessel owner would be able to limit their liability if they are within the boundaries of a court of appeals that has held that owners of small vessels have privity or knowledge when operating their vessel.⁵⁴ If an individual owner is not operating the vessel, or even onboard the vessel, however, they may not be in privity or knowledge of the operator’s actions, and may be able to limit their liability.⁵⁵ Determining whether a corporate shipowner has privity or knowledge of the negligence or unseaworthiness leading to the accident will be a fact-specific inquiry based on, among other things, who within the corporation had knowledge of the relevant circumstances and whether the cause of the accident was a mistake of navigation or was the result of an incompetent crew. For instance, if a vessel owner knew that the master regularly transited through a wind farm, the vessel owner may be determined to be in privity or knowledge of the master’s actions and may be unable to limit their liability.⁵⁶ A corporate owner, on the other hand, may be able to limit their liability if they can show that they used reasonable care in selecting a competent crew who nonetheless acted negligently; for example, by showing that the captain was qualified, but inexplicably failed to take the appropriate actions under the circumstances, such as posting a lookout.⁵⁷ A given vessel owner’s ability to limit their liability after an allision with a wind turbine will depend on the circumstances of the allision.

1.3 Insurance Implications

There are several different kinds of marine insurance policies that cover different subject matters.⁵⁸ One of the primary policies is hull insurance.⁵⁹ Hull insurance covers the vessel itself and most equipment on the vessel.⁶⁰ These policies contain clauses that are standard across the industry⁶¹ and cover damage that results

⁵⁰ See *Coryell*, 317 U.S. at 410–11; *In re Kristie Leigh Enters., Inc.*, (*Kristie Leigh I*), 72 F.3d 479, 481 (5th Cir. 1996).

⁵¹ Compare *Pennzoil Producing Co. v. Offshore Express, Inc.*, 943 F.2d 1465, 1474 (5th Cir. 1991), with *In re Kinsman Transit Co.*, 338 F.2d 708, 715 (2d Cir. 1964).

⁵² See *Hellenic Lines, Ltd. v. Prudential Lines, Inc.*, 813 F.2d 634, 638–39 (4th Cir. 1987) (“Where the acts of negligence result not from any lack of competence on the part of the crew, but rather are merely ‘mistakes of navigation,’ the shipowner is not precluded from the limitation of liability.”); *Kristie Leigh I*, 72 F.3d at 481 (5th Cir. 1996) (quoting *Continental Oil Co. v. Bonanza Corp.*, 706 F.2d 1365, 1377 n.15 (5th Cir. 1983) (en banc)) (“[N]o court has previously denied a corporate shipowner limitation of liability for a master’s navigational errors at sea when the owner has exercised reasonable care.”).

⁵³ *Royal Mail Steam Packet Co. v. Companhia De Navegaco Lloyd Brasileiro*, 31 F.2d 757, 759 (E.D.N.Y. 1928); see *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 453 (2001) (opining that “a vessel owner need not confess liability in order to seek limitation under the Act”).

⁵⁴ *Fecht*, 406 F.2d at 722.

⁵⁵ 46 U.S.C. § 30523(b); see *Hammersley v. Branigar Org., Inc.*, 762 F. Supp. 950, 958 (S.D. Ga. 1991) (holding that owners who were not present at the marina, onboard the vessel, nor had knowledge of the negligent docking of their vessel did not have privity or knowledge of this negligence and could limit their liability under the Act).

⁵⁶ See *Pennzoil Producing Co.*, 943 F.2d at 1474.

⁵⁷ See *Hellenic Lines, Ltd.*, 813 F.2d at 638–39; *Kristie Leigh I*, 72 F.3d at 480, 482.

⁵⁸ SCHOENBAUM, *supra* note 7, § 19-1, at 347.

⁵⁹ *Id.*

⁶⁰ AM. INST. OF MARINE UNDERWRITERS, AMERICAN INSTITUTE HULL CLAUSES (1977), <http://www.aimu.org/forms/7.pdf>.

⁶¹ See SCHOENBAUM, *supra* note 7, § 19-10.

from perils of the sea as well as additional perils that may hazard the vessel.⁶² These additional perils include damage to the vessel that results from mechanical failure.⁶³ Some hull policies contain clauses that restrict the vessel operations to a specific geographic location,⁶⁴ and if “a vessel ventures voluntarily outside of the navigational limits specified in a hull policy, and sinks or is otherwise destroyed while outside the mentioned limits, the insurer is relieved from liability for the loss of the vessel.”⁶⁵

Additionally, hull policies do not cover liability for damage to fixed objects like wind turbines or piers.⁶⁶ In order to obtain coverage for liability for damage to fixed objects, vessel owners need to obtain a protection and indemnity policy (P&I).⁶⁷ P&I policies cover liability for damage to fixed objects caused by the vessel.⁶⁸ Additionally, P&I coverage generally does not cover beyond the amount to which the vessel owner would be entitled to limit their liability.⁶⁹ Marine insurance policy rates will generally increase as a result of the policy holder filing a claim.⁷⁰

If a vessel operating within a wind farm strikes a turbine, regardless of fault, that vessel’s insurance premiums are likely to increase.⁷¹ How much the premiums may increase is unknown. Additionally, some insurers in the future may include geographic restrictions in their policies that would exclude wind farms. If a vessel with such a clause in its policy suffers some casualty within a wind farm, the insurer would likely be excused from covering the damages.

2 Vessel Liability for Gear Interactions with Submerged Cables

Although federal law imposes criminal sanctions on those who willfully or negligently “break or injure” submarine cables, this only applies if the damage to the cable “interrupt[s] or embarrass[es] . . . telegraphic communication;” as such, these sanctions most likely would not apply to damaging electric transmission cables.⁷² A company, however, may recover sufficient damages to cover the repair of a damaged cable, minus depreciation if the repairs increase the useful life of the cable or increase its value, from the vessel that damaged the cable through a tort action.⁷³

The location of submarine cables is typically labeled on navigational charts, and wind farms are no exception.⁷⁴ A vessel that damages a submarine cable may not be held liable if the cable was outside of the marked cable area.⁷⁵ In the offshore wind context, this would mean that the company constructing and

⁶² AM. INST. OF MARINE UNDERWRITERS, *supra* note 60.

⁶³ *Id.*

⁶⁴ CHARLES M. DAVIS, MAR. L. DESKBOOK § XXII(AA)(1) (2016).

⁶⁵ Lexington Ins. Co. v. Cooke's Seafood, 686 F. Supp. 323, 327 (S.D. Ga. 1987).

⁶⁶ See AM. INST. OF MARINE UNDERWRITERS, *supra* note 60 (enumerating what is covered and excluded under a standard hull policy and not mentioning striking fixed objects); AM. INST. OF MARINE UNDERWRITERS, PROTECTION AND INDEMNITY (P AND I) CLAUSES (1983), <http://www.aimu.org/forms/23.pdf> (specifically listing damage to fixed objects as being covered by a standard P&I policy).

⁶⁷ AM. INST. OF MARINE UNDERWRITERS, *supra* note 66.

⁶⁸ *Id.*

⁶⁹ See, e.g., THE SWEDISH CLUB, RULES FOR P&I INSURANCE, RULES FOR FD&D INSURANCE, ARTICLES OF ASSOCIATION 11 (2023), https://www.swedishclub.com/media_upload/files/Publications/TSC%20PI-FDD%20Rules%202023-2024-WB.pdf

⁷⁰ Mariners Ins., *How Do Boat Insurance Rates Get Affected?*, MARINERS GEN. INS. GRP. (Mar. 26, 2016), <https://www.marinersins.com/boat-insurance-rates/>.

⁷¹ See *id.*

⁷² See 47 U.S.C. §§ 21–22.

⁷³ See Pillsbury Co. v. Midland Enterprises, Inc., 715 F. Supp. 738, 763 (E.D. La. 1989); Am. Tel. & Tel. Co. v. M/V Cape Fear, 967 F.2d 864, 875–76 (3d. Cir. 1992) (noting that common law tort actions are available to cable owners whose cables are damaged by others).

⁷⁴ See OFF. OF COAST SURV., NAT’L OCEANIC & ATMOSPHERIC ADMIN., BLOCK ISLAND SOUND, POINT JUDITH TO MONTAUK POINT, CHART 13215 (21st ed. 2023).

⁷⁵ Optical Commc’ns Grp., Inc. v. M/V Ambassador, 938 F. Supp. 2d 449, 460–64 (S.D.N.Y. 2013).

maintaining the wind farm would need to ensure that their inter-array⁷⁶ and transmission cables are within the marked cable area. Vessels are cautioned to use “special care when anchoring, fishing or engaging in underwater operations near areas where these cables” exist.⁷⁷

There are no known permanent prohibitions on fishing within wind farms in the United States. Fishing within a wind farm is an individual risk assessment by a fisher. If a fisher does elect to fish within an offshore wind farm, and they damage their gear on a submarine cable or the base of a turbine, they may complete and submit a form for reimbursement for the gear.⁷⁸ The form is submitted to the wind farm operator’s Corporate Fisheries Liaison.⁷⁹ After submitting this particular form, a representative of the company, the company’s Corporate Fisheries Liaison, and the Fisheries Representative for the applicant’s home port investigate the claim and either grant or deny the request.⁸⁰ If the company denies the request, the fisher may appeal the decision.⁸¹ Once the claim is approved or appeals have been exhausted, the fisher cannot make a claim for compensation for damage or loss to gear related to the same incident.⁸² For instance, if a vessel damages its gear on a transmission cable from a wind farm and the fisher makes a claim, whatever the outcome, the fisher cannot turn around and make another claim for the same incident they already made a claim for. They may still fish in the same area and if, in the future, their gear is damaged by the same cable, they may make another claim.

3 Vessel and Crew Regulations and Safety as They Relate to Offshore Wind and Fishing Vessels

3.1 Vessel Operation Within Wind Farms

There are currently no known permanent regulations that bar vessels from operating within wind farms. The locations of turbines are charted⁸³ and listed as private aids to navigation.⁸⁴ There are regulations that apply to vessels regardless of where they are operating in United States waters.⁸⁵ Operating within an offshore wind farm would not free a vessel from these generally applicable regulations.

⁷⁶ *Export and inter-array cable installation*, WIND & WATER WORKS, [https://www.windandwaterworks.nl/cases/export-and-inter-array-cable-installation#:~:text=Cabling%20is%20a%20critical%20component,substation%20to%20the%20onshore%20network.\(last visited Jan. 3, 2024\)](https://www.windandwaterworks.nl/cases/export-and-inter-array-cable-installation#:~:text=Cabling%20is%20a%20critical%20component,substation%20to%20the%20onshore%20network.(last%20visited%20Jan.%203,%202024)) (“[A]rray cables link[] individual wind turbines to the substation at sea”).

⁷⁷ 2 NAT’L OCEANIC & ATMOSPHERIC ADMIN., UNITED STATES COAST PILOT 8 (53rd ed. 2024), https://www.nauticalcharts.noaa.gov/publications/coast-pilot/files/cp2/CPB2_WEB.pdf.

⁷⁸ *Gear Loss Claim Form*, VINEYARD WIND,

<https://static1.squarespace.com/static/5a2eae32be42d64ed467f9d1/t/61685c6ddd5fb9581a6bdab6/1634229381298/G+Claim+Application+Form.pdf> (last visited Jan. 4, 2024); *Gear Loss Claim Instructions*, ØRSTED, <https://orstedcdn.azureedge.net/-/media/www/docs/corp/us/mariners/gear-loss-claim-202311.pdf?rev=8603b322c8074a1e8c6b623c41c2edb5&hash=2C5F92CDFCAA6ADEC5A5AC38A5B31D9B> (last visited Feb. 6, 2024).

⁷⁹ See *Gear Loss Claim Instructions*, ØRSTED, <https://orstedcdn.azureedge.net/-/media/www/docs/corp/us/mariners/gear-loss-claim-202311.pdf?rev=8603b322c8074a1e8c6b623c41c2edb5&hash=2C5F92CDFCAA6ADEC5A5AC38A5B31D9B> (last visited Feb. 6, 2024).

⁸⁰ *Id.* at 1.

⁸¹ *Id.* at 1.

⁸² *Gear Loss Claim Form*, *supra* note 78.

⁸³ *Id.*

⁸⁴ See OFF. OF COAST SURV., *supra* note 74.

⁸⁵ U.S. COAST GUARD, *supra* note 27.

⁸⁵ See Convention on the International Regulations for Preventing Collisions at Sea, pt. A, r. 1(a), Oct. 20, 1972, 1050 28 U.S.T. 3459, 1050 U.N.T.S. 15824 [hereinafter COLREGS]; 33 U.S.C. §§ 1601-1608 (incorporating the COLREGS into the United States Code).

3.1.1 Lookout Regulations

In the United States, vessels must follow the “rules of the road.” These rules were adopted internationally through the Convention on the International Regulations for Preventing Collisions at Sea and codified within the United States Code.⁸⁶ Those regulations require all vessels to maintain a lookout.⁸⁷ Generally, for large vessels, the lookout requirement has been interpreted as requiring that a lookout have no other job than to maintain a vigilant watch.⁸⁸ However, this bright-line rule does not apply to smaller vessels, such as small fishing vessels and pleasure craft.⁸⁹ While this does not absolve fishing vessels of the lookout requirement, it does allow for some flexibility as the court will evaluate the adequacy of the lookout “realistically in light of all the circumstances.”⁹⁰ It is not unreasonable to believe that a small fishing vessel engaged in fishing within an offshore wind farm would not have a lookout at all times. Smaller vessels may not be able to physically or financially accommodate an extra hand to just stand lookout. The lookout requirement is not the only requirement for vessels, but it is one of the more important requirements when operating in the confined area of an offshore wind farm.

3.1.2 Navigational Regulations

The United States Coast Guard requires that documented commercial fishing vessels that operate beyond the Boundary Lines—the lines drawn by the Coast Guard that divide internal and offshore waters for several laws and regulations—or operate with more than sixteen individuals on board, as well as certain vessels that transport cargo, including these fish-related products, to or from certain places in the Aleutian Islands maintain up-to-date navigation publications.⁹¹ As offshore wind farms are installed, the Coast Guard creates temporary safety zones around each turbine and offshore substation.⁹² The safety zones typically last until the date the Coast Guard anticipates construction will be completed, accounting for potential delays, but are not enforced past the end of construction if the developer finishes earlier than expected.⁹³ Once the wind farms have been established, the turbine and, generally, the associated cable locations are marked on navigational charts.⁹⁴ At present, there are no charted restrictions around the fully operational offshore wind turbines in the United States,⁹⁵ and they are marked as private aids to navigation in the Light List.⁹⁶ With the navigation requirements imposed by the Coast Guard and the inclusion of turbines on navigation charts, vessels should be fully aware of the location of offshore wind turbines. If vessels operating within an offshore wind farm strike an unlit turbine or drag a cable in an area that they thought was clear, having the required publications and equipment on board and in use may help in proving they were not in violation of a statute or regulation at the time of the allision.

⁸⁶ COLREGS, *supra* note 85; 33 U.S.C. §§ 1601-1608.

⁸⁷ COLREGS, *supra* note 85, at pt. B, r. 5.

⁸⁸ *See, e.g.,* Anthony v. Int’l Paper Co., 289 F.2d 574, 580 (4th Cir. 1961); United Overseas Exp. Lines v. Medluck Compania Maviera, S.A., 785 F.2d 1320, 1321–22, 1326 (5th Cir. 1986) (citing *In re Flota Mercante Gran Colombiana, S.A.*, 440 F. Supp. 704, 714–15 (S.D.N.Y. 1977)).

⁸⁹ *See* Capt’n Mark et al. v. Sea Fever Corp., 692 F.2d 163, 166 (1st Cir. 1982); *In re Interstate Towing Co.*, 717 F.2d 752, 755 (2d Cir. 1983); *see also* Anthony, 289 F.2d at 580 (noting that size of the vessel is an important factor when determining whether the vessel needs “a separate and independent lookout.”).

⁹⁰ *Capt’n Mark*, 692 F.2d at 166.

⁹¹ 46 C.F.R. §§ 28.50, 28.225 (2023); U.S. *Boundary Line*, U.S. COAST GUARD, <https://www.dco.uscg.mil/CG-ENG-2/BoundaryLine/> (last visited Feb. 6, 2024).

⁹² *See* Safety Zone; South Fork Wind Farm Project Area, Outer Continental Shelf, Lease OCS-A 0517, Offshore Rhode Island, Atlantic Ocean, 88 Fed. Reg. 13745 (proposed Mar. 6, 2023) (to be codified at 33 C.F.R. pt. 147).

⁹³ *See, e.g., id.*

⁹⁴ *See* U.S. COAST GUARD, *supra* note 27, at 6–7.

⁹⁵ OFF. OF COAST SURV., NAT’L OCEANIC & ATMOSPHERIC ADMIN., BLOCK ISLAND SOUND, POINT JUDITH TO MONTAUK POINT, CHART 13215 (21st ed. 2023); *see also* OFF. OF COAST SURV., NAT’L OCEANIC & ATMOSPHERIC ADMIN., CAPE MAY TO CAPE HATTERAS, CHART 12200 (53rd ed. 2023).

⁹⁶ U.S. COAST GUARD, *supra* note 27; 2 U.S. COAST GUARD, DEP’T OF HOMELAND SEC., LIGHT LIST 3 (2023).

3.2 Days-at-Sea Limitations and Extended Transit Times Around and Through Offshore Wind Farms

Regional fisheries management councils set limits on the number of days a vessel can be at sea while participating in a particular fishery.⁹⁷ In the Northeast, these limits are set by the New England Fishery Management Council (NEFMC) and the Regional Administrator of the National Marine Fisheries Service for the Northeast Region on the New England multispecies, monkfish, and Atlantic sea scallop fisheries.⁹⁸ Days-At-Sea (DAS) are defined as “the 24-hr period of time or any part thereof during which a fishing vessel is absent from port to fish for, possess, or land, or fishes for, possesses or lands, regulated species, monkfish, or scallops.”⁹⁹ Concerns have been raised about how increased transit times to fishing grounds caused by going around wind farms will affect the DAS allocations.

DAS allocations are based on how much fishing a fishery can support without being overfished, as well as historic DAS allocations.¹⁰⁰ DAS may be permanently transferred from one vessel to another in order to allow for greater flexibility and economic opportunity within the fishery.¹⁰¹ The counting for DAS starts when the vessel crosses a demarcation line that is outside the port and stops when the vessel returns across the demarcation line.¹⁰² The problem is that when wind farms are built and transit times increase through and around them, that time counts against the DAS. One solution could be to move demarcation lines. However, doing so would change the fishery and restrict effort controls on the fishery by allowing for more DAS than the fishery may be able to sustain. Buffer zones around wind farms may be a way to account for increased transit times. The idea is that a vessel transiting through a buffer zone would be credited a half DAS, or some other fraction of a DAS, for every day it was transiting. At present, it is unknown what effect buffer zones of this type would have on fisheries.

At present, the NEFMC has not made any changes to DAS allocations to accommodate for increased transit times around offshore wind farms. There is not enough data available for the Council to make any determination about changes to DAS. Additionally, the NEFMC has made no determinations regarding fishing within wind farms. Again, there is not enough data for the Council to make any informed rule changes and as a result, any action by the NEFMC on this issue is not likely to happen for a few years. Right now, fishing within a wind farm is an individual risk assessment by fishers.

3.3 Distress and Rescue Operations Within Wind Farms

A major concern of vessel operators in and around wind farms is the potential for mishaps and marine casualties. The Coast Guard is the lead agency for responding to marine casualties, and is required to “develop, establish, maintain, and operate . . . rescue facilities for the promotion of safety on, under, and over the high seas and waters subject to the jurisdiction of the United States.”¹⁰³ While it is required to maintain rescue facilities, the Coast Guard has no affirmative duty to conduct search and rescue operations.¹⁰⁴ The Coast Guard has the authority to create regulations and policies around search and rescue operations, including how and when operations are conducted.¹⁰⁵ In 2021, the Coast Guard released a report to Congress

⁹⁷ See NEW ENGLAND FISHERIES MGMT. COUNCIL, AMENDMENT 16 TO THE NORTHEAST MULTISPECIES FISHERY MANAGEMENT PLAN 5 (2009), https://d23h0vhsm26o6d.cloudfront.net/091016_Final_Amendment_16.pdf.

⁹⁸ 50 C.F.R. § 648.2 (2024) (defining “Council” and “Regional Administrator”); *id.* § 648.90(a)(2).

⁹⁹ *Id.* § 648.2 (defining “Day(s)-at-Sea”).

¹⁰⁰ See *id.* § 648.90(a)(2) (discussing what data is used, including historic DAS usage and “estimates of fishing mortality and overfishing levels,” to determine DAS allocations and other management measures).

¹⁰¹ NEW ENGLAND FISHERIES MGMT. COUNCIL, AMENDMENT 13 TO THE NORTHEAST MULTISPECIES FISHERY MANAGEMENT PLAN § 3.5.2 (2003).

¹⁰² 50 C.F.R. § 648.10(e)(5)(iii) (2024).

¹⁰³ 14 U.S.C. § 102(4).

¹⁰⁴ *Turner v. United States*, 736 F.3d 274, 280 (4th Cir. 2013).

¹⁰⁵ 14 U.S.C. §§ 102(3)–(4), 503, 521(a).

on search and rescue operations near offshore wind farms.¹⁰⁶ In that report, the Coast Guard stated that it does not have authority to approve or disapprove any proposed offshore wind energy development, and that it would need further studies to understand how offshore wind farms may affect its operations.¹⁰⁷ The Coast Guard has suggested that offshore wind farms be laid out in such a way that helicopters can transit through them “at low altitude in bad weather.”¹⁰⁸ The Coast Guard has explicitly stated that it would conduct search and rescue operations in and around offshore wind farms in United States waters,¹⁰⁹ despite there being no affirmative duty to do so.¹¹⁰

4 Conclusion

As offshore wind energy development continues in the Northeast, interactions between vessels and wind turbines are possible. Vessels are not presently prohibited from fishing in, or transiting through, offshore wind farms. The choice to do so is entirely up to the individual fisher. However, fishing in and transiting through offshore wind farms present hazards that may expose fishers to liability. Vessels striking a turbine are likely to be held at fault and liable for damages to the turbine. Such incidents, when claimed against insurance policies, are likely to raise policy premiums. Vessels dragging and damaging cables may be held liable for damages to the cables, even when the vessel’s gear is damaged in the process. Fishers who suffer damage to their gear as a result of interactions with cables or turbine foundations may recover some, if not all, of the value of the damaged gear through the developer’s gear loss claims process. The potential damage to vessels, gear, or turbines may be an acceptable risk if transiting around an offshore wind farm would count against allocated DAS. Fishers must also balance the risk of suffering a casualty within a wind farm and needing rescue. Balancing the risks against the potential advantages is up to the individual fisher.

¹⁰⁶ U.S. COAST GUARD, DEP’T OF HOMELAND SEC., SEARCH AND RESCUE OPERATIONS NEAR OFFSHORE WIND ENERGY PROJECTS (2021).

¹⁰⁷ *Id.* at 3-4.

¹⁰⁸ U.S. COAST GUARD, DEP’T OF HOMELAND SEC., NAVIGATION AND INSPECTION CIRCULAR NO. 01-19, enclosure 2 § 8(a) (2019).

¹⁰⁹ *Id.*

¹¹⁰ *Turner v. United States*, 736 F.3d 274, 280 (4th Cir. 2013).