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Offshore Oil and Gas Development: Legal Framework

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September 26, 2014

Congressional Research Service
7-5700
www.crs.gov
RL33404

CRS REPORT
Prepared for Members and
Committees of Congress

Summary

The development of offshore oil, gas, and other mineral resources in the United States is impacted by a number of interrelated legal regimes, including international, federal, and state laws. International law provides a framework for establishing national ownership or control of offshore areas, and domestic federal law mirrors and supplements these standards.

Governance of offshore minerals and regulation of development activities are bifurcated between state and federal law. Generally, states have primary authority in the three-geographical-mile area extending from their coasts. The federal government and its comprehensive regulatory regime govern those minerals located under federal waters, which extend from the states' offshore boundaries out to at least 200 nautical miles from the shore. The basis for most federal regulation is the Outer Continental Shelf Lands Act (OCSLA), which provides a system for offshore oil and gas exploration, leasing, and ultimate development. Regulations run the gamut from health, safety, resource conservation, and environmental standards to requirements for production based royalties and, in some cases, royalty relief and other development incentives.

In 2008, both the President and the 110th Congress removed previously existing moratoria on offshore leasing on many areas of the outer continental shelf. As of the date of this report, Congress has not reinstated the appropriations-based moratoria that were not renewed by the 110th Congress. Other recent legislative and regulatory activity suggests an increased willingness to allow offshore drilling in the U.S. Outer Continental Shelf. In 2006, Congress passed a measure that would allow new offshore drilling in the Gulf of Mexico. Areas of the North Aleutian Basin off the coast of Alaska have also been made available for leasing by executive order. Most recently, the five-year plan for offshore leasing for 2012-2017 adopted by the Bureau of Ocean Energy Management (BOEM) scheduled 16 more lease sales in the Gulf of Mexico and off the coast of Alaska, but did not schedule new lease sales in other areas. The 113th Congress has also shown an interest in this area, including the introduction of H.R. 2231, which would open new offshore areas to leasing and amend other aspects of the offshore leasing program.

In addition to legislative and regulatory efforts, there has also been significant litigation related to offshore oil and gas development. Cases handed down over a number of years have clarified the extent of the Secretary of the Interior's discretion in deciding how leasing and development are to be conducted.

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Ocean Resource Jurisdiction

Under the United Nations Convention on the Law of the Sea,[1] coastal nations are entitled to exercise varying levels of authority over a series of adjacent offshore zones. Nations may claim a 12-nautical-mile territorial sea, over which they may exercise rights comparable to, in most significant respects, sovereignty. An additional area, termed the contiguous zone and extending 24 nautical miles from the coast (or baseline), may also be claimed. In this area, coastal nations may regulate, as necessary, to protect the territorial sea and to enforce their customs, fiscal, immigration, and sanitary laws. Further, in the contiguous zone and an additional area, the exclusive economic zone (EEZ), coastal nations have sovereign rights to explore, exploit, conserve, and manage marine resources and assert jurisdiction over:

i. the establishment and use of artificial islands, installations and structures;

ii. marine scientific research; and

iii. the protection and preservation of the marine environment.[2]

The EEZ extends 200 nautical miles from the baseline from which a nation's territorial sea is measured (usually near the coastline). This area overlaps substantially with another offshore area designation, the continental shelf. International law defines a nation's continental shelf as the seabed and subsoil of the submarine areas that extend beyond either "the natural prolongation of [a coastal nation's] land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance."[3] In general, however, under UNCLOS, a nation's continental shelf cannot extend beyond 350 nautical miles from its recognized coastline regardless of submarine geology.[4] In this area, as in the EEZ, a

[1] United Nations Convention on the Law of the Sea III (entered into force November 16, 1994) (hereinafter UNCLOS).

[2] *Id.* at Art. 56.1.

[3] *Id.* at Art. 76.1.

[4] *Id.* at Art. 76.4-76.7.

coastal nation may claim "sovereign rights" for the purpose of exploring and exploiting the natural resources of its continental shelf.[5]

Federal Jurisdiction

While a signatory to UNCLOS, the United States has not ratified the treaty. Regardless, many of its provisions are now generally accepted principles of customary international law and, through a series of executive orders, the United States has claimed offshore zones that are virtually identical to those described in the treaty.[6] In a series of related cases long before UNCLOS, the U.S. Supreme Court confirmed federal control of these offshore areas.[7] Federal statutes also refer to these areas and, in some instances, define them as well. Of particular relevance, the primary federal law governing offshore oil and gas development indicates that it applies to the "outer Continental Shelf," which it defines as "all submerged lands lying seaward and outside of the areas ... [under state control] and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control.... "[8] Thus, the U.S. Outer Continental Shelf (OCS) would appear to comprise an area extending at least 200 nautical miles from the official U.S. coastline and possibly farther where the geological continental shelf extends beyond that point.[9] The federal government's legal authority to provide for and to regulate offshore oil and gas development therefore applies to all areas under U.S. control except where U.S. waters have been placed under the primary jurisdiction of the states.

State Jurisdiction

In accordance with the federal Submerged Lands Act of 1953 (SLA),[10] coastal states are generally entitled to an area extending three geographical miles[11] from their officially recognized coast (or baseline).[12] In order to accommodate the claims of certain states, the SLA provides for an extended three-marine-league[13] seaward boundary in the Gulf of Mexico if a state can show such

[5] *Id.* at Art. 77.1.

[6] Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, Proclamation No. 2667, 10 *Fed. Reg*. 12,303 (September 28, 1945); Exclusive Economic Zone of the United States of America, Proclamation No. 5030, 48 *Fed. Reg*. 10,605 (March 14, 1983); Territorial Sea of the United States of America, Proclamation No. 5928, 54 *Fed. Reg*. 777 (December 27, 1988); Contiguous Zone of the United States, Proclamation No. 7219, 64 *Fed. Reg*. 48,701 (August 2, 1999).

[7] *See* United States v. Texas, 339 U.S. 707 (1950); United States v. Louisiana, 339 U.S. 699 (1950); United States v. California, 332 U.S. 19 (1947). In accordance with the Submerged Lands Act, states generally own an offshore area extending three geographical miles from the shore. Florida (Gulf coast) and Texas, by virtue of their offshore boundaries prior to admission to the Union, have an extended, three-marine-league offshore boundary. *See* United States v. Louisiana, 363 U.S. 1, 36-64 (1960); United States v. Florida, 363 U.S. 121, 121-129 (1960).

[8] 43 U.S.C. §1331(a).

[9] The U.S. EEZ can conflict with another nation's perceived jurisdiction or authority, including in the Gulf of Mexico. In 2012, the United States and Mexico agreed to diplomatic commitments related to the U.S. EEZ in a specified area of the Gulf of Mexico known as the "transboundary area" via a signed agreement known as the "U.S.-Mexico Transboundary Hydrocarbon Agreement. For a discussion of this agreement and pending legislation to implement the agreement, *see* CRS Report R43204, *Legislation Proposed to Implement the U.S.-Mexico Transboundary Hydrocarbons Agreement*, by Curry L. Hagerty and James C. Uzel.

[10] 43 U.S.C. §§1301 *et seq*.

[11] A geographical or nautical mile is equal to 6,080.20 feet, as opposed to a statute mile, which is equal to 5,280 feet.

[12] 43 U.S.C. §1301(b).

[13] A marine league is equal to 18,228.3 feet.

a boundary was provided for by the state's "constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress."[14] After enactment of the SLA, the Supreme Court of the United States held that the Gulf coast boundaries of Florida and Texas do extend to the three-marine-league limit; other Gulf coast states were unsuccessful in their challenges.[15]

Within their offshore boundaries, coastal states have "(1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective states, and (2) the right and power to manage, administer, lease, develop and use the said lands and natural resources.... "[16] Accordingly, coastal states have the option of developing offshore oil and gas within their waters; if they choose to develop, they may regulate that development.

Coastal State Regulation

State laws governing oil and gas development in state waters vary significantly from jurisdiction to jurisdiction. Some state laws simply grant leasing authority to a state agency and do not differentiate between onshore and offshore state resources; other states do not distinguish between oil and gas and other types of minerals. In addition to state statutes and regulations aimed specifically at oil and gas development, it should be noted that a variety of other laws could impact offshore development, such as environmental and wildlife protection laws and coastal zone management regulation. Finally, in states that authorize offshore oil and gas leasing, the states decide which offshore areas under their jurisdiction will be opened for development.

Federal Resources

The primary federal law governing development of oil and gas in federal waters is the Outer Continental Shelf Lands Act (OCSLA).[17] As stated above, the OCSLA codifies federal control of the OCS, declaring that the submerged lands seaward of the state's offshore boundaries appertain to the U.S. federal government. More than simply declaring federal control, the OCSLA has as its primary purpose "expeditious and orderly development [of OCS resources], subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs.... "[18] To effectuate this purpose, the OCSLA extends application of federal laws to certain structures and devices located on the OCS;[19] provides that the law of adjacent states will apply to the OCS when it does not conflict with federal law;[20] and,

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[14] 43 U.S.C. §§1312, 1301(b).

[15] United States v. Louisiana, 363 U.S. 1, 66 (1960) ("[P]ursuant to the Annexation Resolution of 1845, Texas' maritime boundary was established at three leagues from its coast for domestic purposes.... Accordingly, Texas is entitled to a grant of three leagues from her coast under the Submerged Lands Act."); United States v. Florida, 363 U.S. 121, 129 (1960) ("We hold that the Submerged Lands Act grants Florida a three-marine-league belt of land under the Gulf, seaward from its coastline, as described in Florida's 1868 Constitution.").

[16] 43 U.S.C. §1311.

[17] 43 U.S.C. §§1331-1356.

[18] 43 U.S.C. §1332(3).

[19] 43 U.S.C. §1333. The provision also expressly makes the Longshore and Harbor Workers' Compensation Act, the National Labor Relations Act, and the Rivers and Harbors Act applicable on the OCS, although application is limited in some instances.

[20] *Id.*

significantly, provides a comprehensive leasing process for certain OCS mineral resources and a system for collecting and distributing royalties from the sale of these federal mineral resources.[21] The OCSLA thus provides comprehensive regulation of the development of OCS oil and gas resources.

Federal Offshore Energy Development Moratoriums

In general, the OCSLA requires the federal government to prepare, revise, and maintain an oil and gas leasing program. However, some offshore areas have been withdrawn from disposition under the OCSLA pursuant to two broad categories of moratoria applicable to OCS oil and gas leasing: those imposed by the President under authority granted by the OCSLA,[22] and those imposed directly by Congress, which have most often taken the form of limitations on the use of appropriated funds.[23]

Appropriations-based congressional moratoria first appeared in the appropriations legislation for FY1982. The language of the appropriations legislation barred the expenditure of funds by the Department of the Interior (DOI) for leasing and related activities in certain areas in the OCS.[24] Similar language appeared in every DOI appropriations bill through FY2008. However, starting with FY2009, Congress has not included this language in appropriations legislation. As a result, the Bureau of Ocean Energy Management (BOEM), the agency within the Department of the Interior that administers and regulates the OCS oil and gas leasing program, is free to use appropriated funds to fund all leasing, preleasing, and related activities in most OCS areas (where such activities are not prohibited by other legislation).[25] Language used in the legislation that funds DOI in the future will determine whether, and in what form, budget-based restrictions on OCS leasing might return.

In addition to the congressional moratoria, for most of the last 20 years there have been moratoria issued by the executive branch on offshore drilling in many areas. The first of these was issued by President George H. W. Bush on June 26, 1990.[26] This memorandum, issued pursuant to the authority vested in the President under Section 12(a) of the OCSLA, placed under presidential moratoria those areas already under an appropriations-based moratorium pursuant to P.L. 105-83, the Interior Appropriations legislation in place at that time. That appropriations-based moratorium prohibited "leasing and related activities" in the areas off the coast of California, Oregon, and Washington, and the North Atlantic and certain portions of the eastern Gulf of Mexico. The legislation further prohibited leasing, preleasing, and related activities in the North Aleutian basin, other areas of the eastern Gulf of Mexico, and the Mid- and South Atlantic. The

[21] 43 U.S.C. §§1331(a), 1332, 1333(a)(1).

[22] 43 U.S.C. §1341(a).

[23] *See, e.g.*, P.L. 108-447, §§107-109.

[24] P.L. 97-100, §109.

[25] BOEM, the Bureau of Safety and Environmental Enforcement (BSEE), and the Office of Natural Resources Revenue (ONRR) are successors to the agency formerly known the Minerals Management Service (MMS). MMS was renamed the Bureau of Ocean Energy Management, Regulation, and Enforcement (BOEMRE) pursuant to Secretarial Order 3302, issued on June 18, 2010. The jurisdiction and responsibilities of BOEMRE were subsequently divided among the newly created BOEM, BSEE, and ONRR in a second reorganization phase completed on October 1, 2011. For further details about this reorganization, see http://www.boem.gov/About-BOEM/Reorganization/Reorganization.aspx.

[26] Statement on Outer Continental Shelf Oil and Gas Development, 26 Weekly Comp. Pres. Doc. 1006 (June 26, 1990).

presidential moratorium was extended by President Bill Clinton by memorandum dated June 12, 1998.[27]

On July 14, 2008, President George W. Bush issued an executive memorandum that rescinded the executive moratorium on offshore drilling created by the 1990 order of President George H. W. Bush and renewed by President Bill Clinton in 1998.[28] The memorandum revised the language of the previous memorandum so that only areas designated as marine sanctuaries are withdrawn from disposition. The withdrawal has no expiration date.

The July 14, 2008 memorandum, taken together with the expiration of the congressional moratorium, constitutes a significant reduction of federal restrictions on offshore exploration and production. OCS acreage not protected by other statutory measures can now be considered by BOEM for leasing, as described *infra*. However, it is important to note that other prohibitions and moratoria on development on exploration and production in certain areas of the OCS exist. For example, the Gulf of Mexico Energy Security Act of 2006, enacted as part of H.R. 6111, the Omnibus Tax Relief and Health Care Act of 2006,[29] created a new congressional moratorium over leasing in portions of the OCS that do not depend on annual renewal in appropriations legislation. The 2006 legislation explicitly permits oil and gas leasing in areas of the Gulf of Mexico,[30] but also established a new moratorium on preleasing, leasing, and related activity in the eastern Gulf of Mexico through June 30, 2022.[31] This moratorium is independent of any appropriations-based congressional moratorium, and thus would continue even if Congress reinstated the annual appropriations-based moratorium.

Leasing and Development

In 1978, the OCSLA was significantly amended so as to increase the role of the affected coastal states in the leasing process.[32] The amendments also revised the bidding process and leasing procedures, set stricter criteria to guide the environmental review process, and established new safety and environmental standards to govern drilling operations.

The OCS leasing process consists of four distinct stages: (1) the five-year planning program;[33] (2) preleasing activity and the lease sale;[34] (3) exploration;[35] and (4) development and production.[36] This process garnered significant attention in the 112th Congress, where legislation was introduced to accelerate the leasing and permitting process for offshore oil and gas exploration and production. H.R. 1229 would have created new deadlines for review of certain

[27] Memorandum on Withdrawal of Certain Areas of the United States Outer Continental Shelf from Leasing Disposition, 34 Weekly Comp. Pres. Doc. 1111 (June 12, 1998).

[28] Memorandum on Modification of the Withdrawal of Certain Areas of the United States Outer Continental Shelf from Leasing Disposition, 44 Weekly Comp. Pres. Doc. 986 (July 14, 2008).

[29] P.L. 109-432.

[30] *Id.* at §103.

[31] P.L. 109-432, §104(a).

[32] P.L. 95-372.

[33] 43 U.S.C. §1344.

[34] 43 U.S.C. §§1337, 1345.

[35] 43 U.S.C. §1340.

[36] 43 U.S.C. §1351.

permits for exploration and production, while H.R. 1230, introduced the same day, would have required BOEM to lease certain offshore areas for oil and natural gas exploration and production on an accelerated timeline. Both bills were passed by the House of Representatives, but were not passed by the Senate.

The Five-Year Plan

The Secretary of the Interior is required to prepare a five-year leasing plan, subject to annual revisions, that governs any offshore leasing that takes place during the period of plan coverage.[37] Each five-year plan establishes a schedule of proposed lease sales, providing the timing, size, and general location of the leasing activities. This plan is to be based on multiple considerations, including the Secretary's determination as to what will best meet national energy needs for the five-year period and the extent of potential economic, social, and environmental impacts associated with development.[38]

During the development of the plan, the Secretary must solicit and consider comments from the governors of affected states, and at least 60 days prior to publication of the plan in the *Federal Register*, the plan is to be submitted to the governor of each affected state for further comments.[39] After publication, the Attorney General is also authorized to submit comments regarding potential effects on competition.[40] Subsequently, at least 60 days prior to its approval, the plan is to be submitted to Congress and the President, along with any received comments and an explanation for the rejection of any comment.[41] Once the leasing plan is approved, areas included in the plan are to be available for leasing, consistent with the terms of the plan.[42]

The development of the five-year plan is considered a major federal action significantly affecting the quality of the human environment and as such requires preparation of an environmental

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[37] 43 U.S.C. §1344(a), (e).

[38] *Id.*

[39] "Affected state" is defined in the act as any state:

> (1) the laws of which are declared, pursuant to section 1333(a)(2) of this title, to be the law of the United States for the portion of the outer Continental Shelf on which such activity is, or is proposed to be, conducted;
> (2) which is, or is proposed to be, directly connected by transportation facilities to any artificial island or structure referred to in section 1333(a)(1) of this title;
> (3) which is receiving, or in accordance with the proposed activity will receive, oil for processing, refining, or transshipment which was extracted from the outer Continental Shelf and transported directly to such State by means of vessels or by a combination of means including vessels;
> (4) which is designated by the Secretary as a State in which there is a substantial probability of significant impact on or damage to the coastal, marine, or human environment, or a State in which there will be significant changes in the social, governmental, or economic infrastructure, resulting from the exploration, development, and production of oil and gas anywhere on the outer Continental Shelf; or
> (5) in which the Secretary finds that because of such activity there is, or will be, a significant risk of serious damage, due to factors such as prevailing winds and currents, to the marine or coastal environment in the event of any oil spill, blowout, or release of oil or gas from vessels, pipelines, or other transshipment facilities....
>
> 43 U.S.C. §1331(f).

[40] 43 U.S.C. §1344(d).

[41] *Id.*; *see also* 30 C.F.R. §§556.16-556.20.

[42] 43 U.S.C. §1344(d).

impact statement (EIS) under the National Environmental Policy Act (NEPA).[43] Thus, the NEPA review process complements and informs the preparation of a five-year plan under the OCSLA.[44]

The current Five-Year Plan took effect on August 27, 2012.[45] The Plan "includes fifteen potential lease sales in six planning areas—the Western and Central Gulf of Mexico (GOM), the portion of the Eastern GOM not currently under Congressional moratorium, and the Chukchi Sea, Beaufort Sea and Cook Inlet planning areas offshore Alaska."[46] The Planning Areas for the 2012-2017 Five-Year Plan, as well as areas restricted for leasing activity under executive or congressional moratoria and areas BOEM deemed to have "low resource potential," are depicted in **Figure 1** and **Figure 2** below.

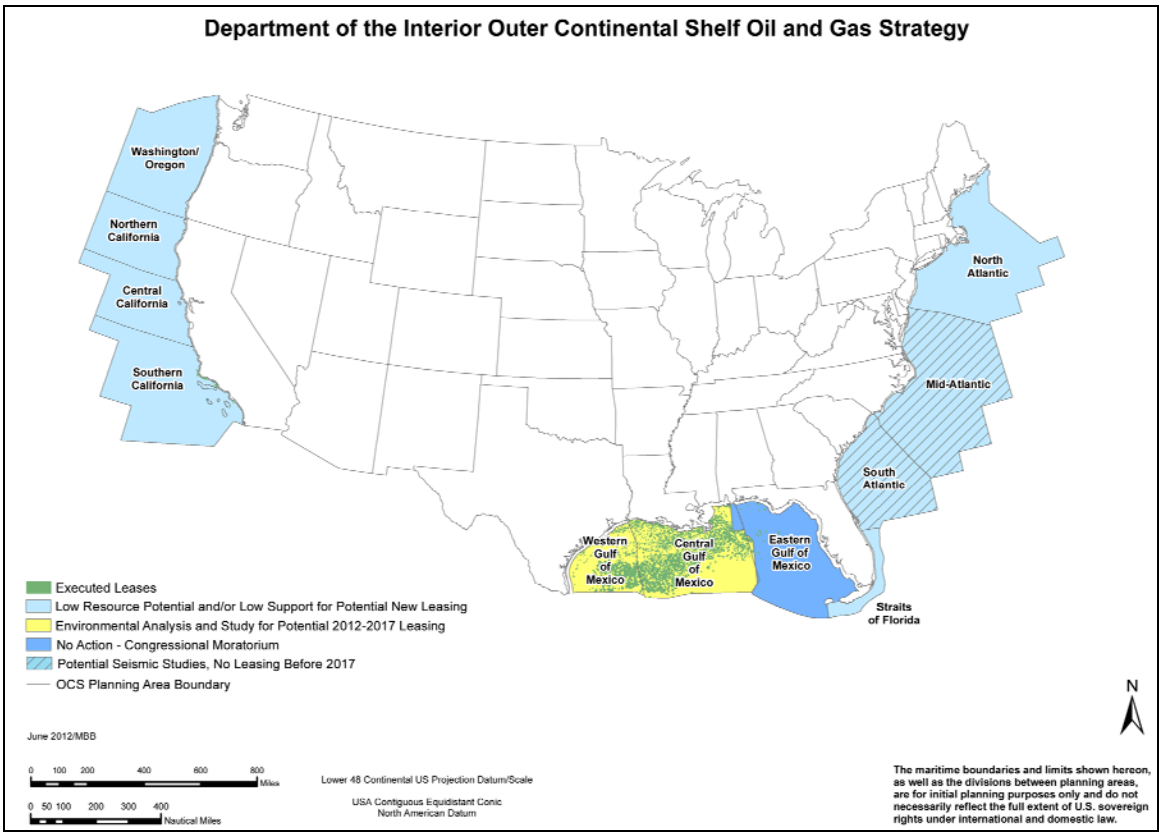
[43] 42 U.S.C. §4332(2)(C). In general, NEPA and the regulations that govern its administration require various levels of environmental analysis depending on the circumstances and the type of federal action contemplated. Certain actions that have been determined to have little or no environmental effect are exempted from preparation of NEPA documents entirely and are commonly referred to as "categorical exclusions." In situations where a categorical exclusion does not apply, an intermediate level of review, an environmental assessment (EA), may be required. If, based on the EA, the agency finds that an action will not have a significant effect on the environment, the agency issues a "finding of no significant impact" (FONSI), thus terminating the NEPA review process. On the other hand, major federal actions that are found to significantly affect the environment require the preparation of an environmental impact statement (EIS), a document offering detailed analysis of the project as proposed as well as other options, including taking no action at all. NEPA does not direct an agency to choose any particular course of action; the primary purpose of an EIS is to ensure that environmental consequences are considered. For additional information, see CRS Report RS20621, *Overview of National Environmental Policy Act (NEPA) Requirements*, by Kristina Alexander.

[44] *See* Natural Resources Defense Council v. Hodel, 865 F.2d 288, 310 (D.C. Cir.1988).

[45] Documents related to the current Five-Year Plan are available at the BOEM website at http://www.boem.gov/Oil-and-Gas-Energy-Program/Leasing/Five-Year-Program/2012-2017/Five-Year-Program.aspx.

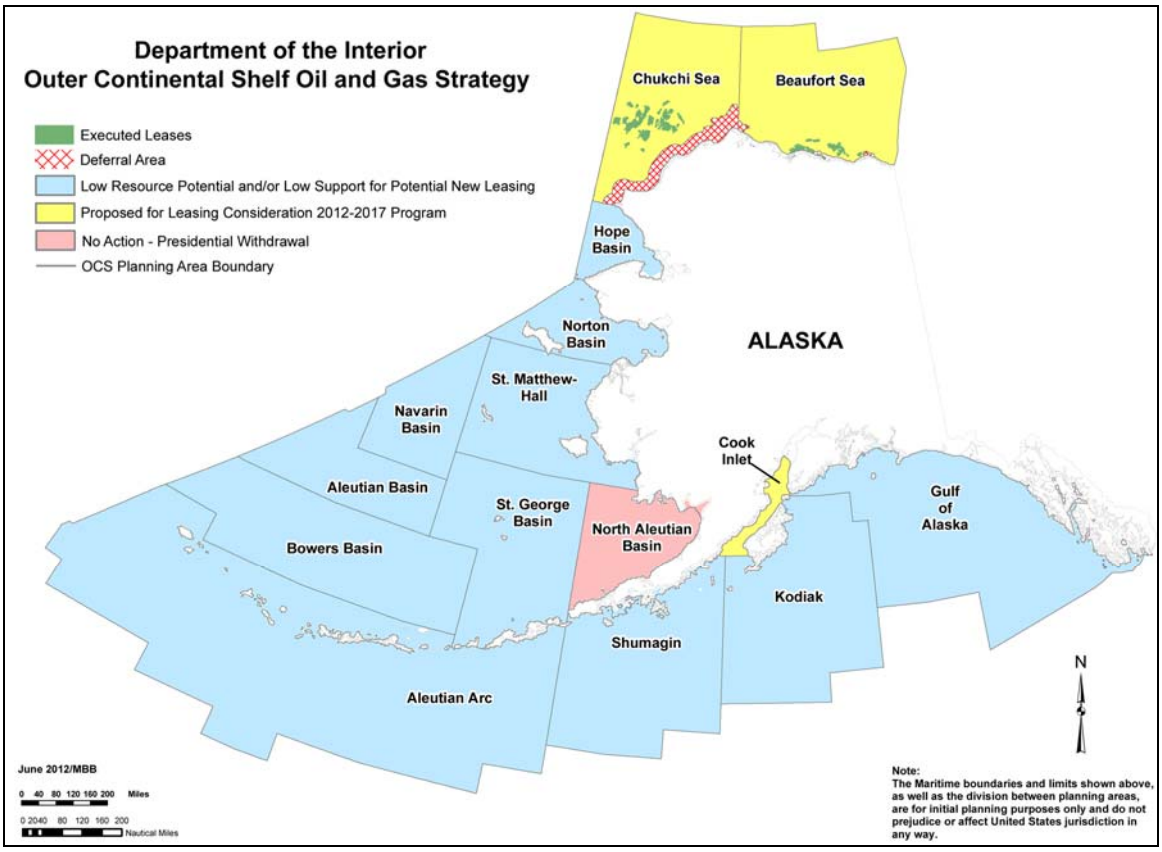
[46] Proposed Final Outer Continental Shelf Oil & Gas Leasing Program 2012-2017, at 1. Document available at http://boem.gov/uploadedFiles/BOEM/Oil_and_Gas_Energy_Program/Leasing/Five_Year_Program/2012-2017_Five_Year_Program/PFP%2012-17.pdf.

Figure 1. 2012-2017 Five-Year Plan Planning Areas: Lower 48 States



Source: Bureau of Ocean Energy Management, http://www.boem.gov/uploadedFiles/BOEM/Oil_and_Gas_Energy_Program/Leasing/Five_Year_Program/2012-2017/Program_Area_Maps/Lower%2048%20State%20Planning%20Areas%20with%20restrictions.pdf.

Figure 2. 2012-2017 Five-Year Plan Planning Area: Alaska



Source: Bureau of Ocean Energy Management, http://www.boem.gov/uploadedFiles/BOEM/Oil_and_Gas_Energy_Program/Leasing/Five_Year_Program/2012-2017/Program_Area_Maps/Alaska%20Planning%20Areas%20with%20restrictions.pdf.

Lease Sales

The lease sale process involves multiple steps as well. Leasing decisions are impacted by a variety of federal laws; however, it is Section 8 of the OCSLA and its implementing regulations that establish the mechanics of the leasing process.[47]

The process begins when the Director of BOEM publishes a call for information and nominations regarding potential lease areas. The Director is authorized to receive and consider these various expressions of interest in lease areas and comments on which areas should receive special concern and analysis.[48] The Director is then to consider all available information and perform environmental analysis under NEPA in crafting both a list of areas recommended for leasing and any proposed lease stipulations.[49] This list is submitted to the Secretary of the Interior and, upon the Secretary's approval, published in the *Federal Register* and submitted to the governors of potentially affected states.[50]

The OCSLA and its regulations authorize the governor of an affected state and the executive of any local government within an affected state to submit to the Secretary any recommendations concerning the size, time, or location[51] of a proposed lease sale within 60 days after notice of the lease sale.[52] The Secretary must accept the governor's recommendations (and has discretion to accept a local government executive's recommendations) if the Secretary determines that the recommendations reasonably balance the national interest and the well-being of the citizens of an affected state.[53]

The Director of BOEM publishes the approved list of lease sale offerings in the *Federal Register* (and other publications) at least 30 days prior to the date of the sale.[54] This notice must describe the areas subject to the sale and any stipulations, terms, and conditions of the sale.[55] The bidding is to occur under conditions described in the notice and must be consistent with certain baseline requirements established in the OCSLA.[56]

Although the statute establishes base requirements for the competitive bidding process and sets forth a variety of possible bid formats,[57] some of these requirements are subject to modification at the discretion of the Secretary.[58] Before the acceptance of bids, the Attorney General is also

[47] 43 U.S.C. §1337.

[48] 30 C.F.R. §§556.23, 556.25.

[49] 30 C.F.R. §556.26.

[50] 30 C.F.R. §556.29.

[51] It should be noted that the OCSLA establishes certain minimum requirements applicable to these subjects. For instance, lease tracts are, in general, to be limited to 5,760 acres, unless the Secretary determines that a larger area is necessary to comprise a "reasonable economic production unit.... " *Id.* at §1337(b). The law and its implementing regulations also set the range of initial lease terms and baseline conditions for lease renewal.

[52] 43 U.S.C. §1345(a); *see also* 30 C.F.R. §556.31.

[53] 43 U.S.C. §1345(c).

[54] 43 U.S.C. §1337(*l*).

[55] 30 C.F.R. §556.32(1).

[56] 43 U.S.C. §1337.

[57] 43 U.S.C. §1337(a)(1)(A)-(H). For example, bids may be on the basis of "cash bonus bid with a royalty at not less than 12 ½ per centum fixed by the Secretary in amount or value of the production saved, removed, or sold.... " *See also* 30 C.F.R. §§556.35-556.47.

[58] 43 U.S.C. §§1337(a)(1)-(3), (8)-(9).

authorized to review proposed lease sales to analyze any potential effects on competition, and may subsequently recommend action to the Secretary of the Interior as may be necessary to prevent violation of antitrust laws.[59] The Secretary is not bound by the Attorney General's recommendation, and likewise, the antitrust review process does not affect private rights of action under antitrust laws or otherwise restrict the powers of the Attorney General or any other federal agency under other law.[60] Assuming compliance with these bidding requirements, the Secretary may grant a lease to the highest bidder, although deviation from this standard may occur under some circumstances.[61]

In addition, the OCSLA prescribes many minimum conditions that all lease instruments must contain. The statute supplies generally applicable minimum royalty or net profit share rates, as necessitated by the bidding format adopted, subject, under certain conditions, to secretarial modification. Several provisions authorize royalty reductions or suspensions. Royalty rates or net profit shares may be reduced below the general minimums or eliminated to promote increased production.[62] For leases located in "the Western and Central Planning Areas of the Gulf of Mexico and the portion of the Eastern Planning Area of the Gulf of Mexico encompassing whole lease blocks lying west of 87 degrees, 30 minutes West longitude and in the Planning Areas offshore Alaska," a broader authority is also provided, allowing the Secretary, with the lessee's consent, to make "other modifications" to royalty or profit share requirements to encourage increased production.[63] Royalties may also be suspended under certain conditions by BOEM pursuant to the Outer Continental Shelf Deep Water Royalty Relief Act, discussed *infra*.

The OCSLA generally requires successful bidders to furnish a variety of up-front payments and performance bonds upon being granted a lease.[64] Additional provisions require that leases provide that certain amounts of production be sold to small or independent refiners. Further, leases must contain the conditions stated in the sale notice and provide for suspension or cancellation of the lease in certain circumstances.[65] Finally, the law indicates that a lease entitles the lessee to explore for, develop, and produce oil and gas, conditioned on applicable due diligence requirements and the approval of a development and production plan, discussed below.[66]

Exploration

Exploration for oil and gas pursuant to an OCSLA lease must prepare and comply with an approved exploration plan.[67] Detailed information and analysis must accompany the submission of an exploration plan, and, upon receipt of a complete proposed plan, the relevant BOEM

[59] 43 U.S.C. §1337(c); 30 C.F.R. §556.47(d).

[60] 43 U.S.C. §1337(c), (f).

[61] Restrictions include a statutory prohibition on issuance of a new lease to a bidder that is not meeting applicable due diligence requirements with respect to the bidder's other leases. *See* 43 U.S.C. §1337(d).

[62] *Id.* at §1337(a)(3).

[63] 43 U.S.C. §1337(a)(3)(B).

[64] 43 U.S.C. §1337(a)(7); 30 C.F.R. §§556.52-556.59.

[65] 43 U.S.C. §1337.

[66] 43 U.S.C. §1337(b)(4).

[67] 43 U.S.C. §1340(b), (c).

regional supervisor is required to submit the plan to the governor of an affected state and the state's Coastal Zone Management agency.[68]

Under the Coastal Zone Management Act, federal actions and federally permitted projects, including those in federal waters, must be submitted for state review.[69] The purpose of this review is to ensure consistency with state coastal zone management programs as contemplated by the federal law. When a state determines that a lessee's plan is inconsistent with its coastal zone management program, the lessee must either reform its plan to accommodate those objections and resubmit it for BOEM and state approval or succeed in appealing the state's determination to the Secretary of Commerce.[70] Simultaneously, the BOEM regional supervisor is to analyze the environmental impacts of the proposed exploration activities under NEPA; however, regulations prescribe that BOEM complete its action on the plan review within 30 days. Hence, extensive environmental review at this stage may be constrained or rely heavily upon previously prepared NEPA documents.[71] If the regional supervisor disapproves the proposed exploration plan, the lessee is entitled to a list of necessary modifications and may resubmit the plan to address those issues.[72] Even after an exploration plan has been approved, drilling associated with exploration remains subject to the relevant BOEM district supervisor's approval of an application for a permit to drill. This approval hinges on a more detailed review of specific drilling plan filed by the lessee.

Development and Production

While exploration often will involve drilling wells, the scale of such activities is likely to significantly increase during the development and production phase. Accordingly, additional regulatory review and environmental analysis are typically required before this stage begins.[73] Operators are required to submit a Development and Production Plan for areas where significant development has not occurred before[74] or a less extensive Development Operations Coordination Document for those areas, such as certain portions of the Western Gulf of Mexico, where significant activities have already taken place.[75] The information required to accompany submission of these documents is similar to that required at the exploration phase, but must address the larger scale of operations.[76] As with the processes outlined above, the submission of these documents complements any environmental analysis required under NEPA. It may not always be necessary to prepare a new EIS at this stage, and environmental analysis may be tied to previously prepared NEPA documents.[77] In addition, affected states are allowed, under the OCSLA, to submit comments on proposed Development and Production Plans and to review

[68] 30 C.F.R. §§550.226, 550.227, 550.232, 550.235.

[69] 16 U.S.C. §1456(c).

[70] 30 C.F.R. §550.235.

[71] 30 C.F.R. §550.232(c).

[72] 30 C.F.R. §§550.231-250.233.

[73] 43 U.S.C. §1351.

[74] 30 C.F.R. §550.201.

[75] *Id.*

[76] 30 C.F.R. §§550.24-550.262.

[77] The regulations indicate that "at least once in each planning area (other than the western and central Gulf of Mexico planning areas) we [BOEM] will prepare an environmental impact statement (EIS).... " 30 C.F.R. §550.269.

these plans for consistency with state coastal zone management programs.[78] Additionally, if the drilling project involves "non-conventional production or completion technology, regardless of water depth," applicants might also submit a Deepwater Operations Plan (DWOP) and a Conceptual Plan.[79] allow BOEM to review the engineering, safety, and environmental impacts associated with these technologies.[80]

As with the exploration stage, actual drilling requires approval of an Application for Permit to Drill (APD).[81] An APD focuses on the specifics of particular wells and associated machinery. Thus, an application must include a plat indicating the well's proposed location, information regarding the various design elements of the proposed well, and a drilling prognosis, among other things.[82]

Lease Suspension and Cancellation

The OCSLA authorizes the Secretary of the Interior to promulgate regulations on lease suspension and cancellation.[83] The Secretary's discretion over the use of these authorities is specifically limited to a set number of circumstances established by the OCSLA. These circumstances are described below.

Suspension of otherwise authorized OCS activities may generally occur at the request of a lessee or at the direction of the relevant BOEM Regional Supervisor, given appropriate justification.[84] Under the statute, a lease may be suspended (1) when it is in the national interest; (2) to facilitate proper development of a lease; (3) to allow for the construction or negotiation for use of transportation facilities; or (4) when there is "a threat of serious, irreparable, or immediate harm or damage to life (including fish and other aquatic life), to property, to any mineral deposits (in areas leased or not leased), or to the marine, coastal, or human environment.... "[85] The regulations also indicate that leases may be suspended for other reasons, including (1) when necessary to comply with judicial decrees; (2) to allow for the installation of safety or environmental protection equipment; (3) to carry out NEPA or other environmental review requirements; or (4) to allow for "inordinate delays encountered in obtaining required permits or consents.... "[86] Whenever suspension occurs, the OCSLA generally requires that the term of an affected lease or permit be extended by a length of time equal to the period of suspension.[87] This extension requirement does not apply when the suspension results from a lessee's "gross negligence or willful violation of such lease or permit, or of regulations issued with respect to such lease or permit.... "[88]

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[78] 30 C.F.R. §550.267.

[79] 30 C.F.R. §§550.286, 550.287.

[80] 30 C.F.R. §§550.289, 550.292.

[81] 30 C.F.R. §§550.410-550.469.

[82] 30 C.F.R. §550.411.

[83] 43 U.S.C. §1334; *see also* 30 C.F.R. §§550.168-550.185.

[84] 30 C.F.R. §§550.168, 550.171-550.175.

[85] 43 U.S.C. §1334(a)(1).

[86] 30 C.F.R. §550.173-550.175.

[87] 43 U.S.C. §1334(a)(1).

[88] *Id.*

If a suspension period reaches five years,[89] the Secretary may cancel a lease upon holding a hearing and finding that (1) continued activity pursuant to a lease or permit would "probably cause serious harm or damage to life (including fish and other aquatic life), to property, to any mineral (in areas leased or not leased), to the national security or defense, or to the marine, coastal, or human environment"; (2) "the threat of harm or damage will not disappear or decrease to an acceptable extent within a reasonable period of time"; and (3) "the advantages of cancellation outweigh the advantages of continuing such lease or permit in force.... "[90]

Upon cancellation, the OCSLA entitles lessees to certain damages. The statute calculates damages at the lesser of (1) the fair value of the canceled rights on the date of cancellation[91] or (2) the excess of the consideration paid for the lease, plus all of the lessee's exploration- or development-related expenditures, plus interest, over the lessee's revenues from the lease.[92]

The OCSLA also indicates that the "continuance in effect" of any lease is subject to a lessee's compliance with the regulations issued pursuant to the OCSLA, and failure to comply with the provisions of the OCSLA, an applicable lease, or the regulations may authorize the Secretary to cancel a lease as well.[93] Under these circumstances, a nonproducing lease can be canceled if the Secretary sends notice by registered mail to the lease owner and the noncompliance with the lease or regulations continues for a period of 30 days after the mailing.[94] Similar noncompliance by the owner of a producing lease can result in cancellation after an appropriate proceeding in any U.S. district court with jurisdiction as provided for under the OCSLA.[95]

Lease Assignments and Transfers

The OCSLA also provides the framework for federal oversight of transfers of offshore oil and gas exploration and production leases. Section 5(b) of the OCSLA states that "[t]he issuance and continuance in effect of any lease, or of any assignment or other transfer of any lease, under the provisions of this Act shall be conditioned upon compliance with regulations issued under this Act."[96] The OCSLA further provides that "[n]o lease issued under this Act may be sold, exchanged, assigned, or otherwise transferred except with the approval of the Secretary [of the Interior, whose authority is exercised by BOEM]. Prior to any such approval, the Secretary shall consult with and give due consideration to the views of the Attorney General."[97] These two requirements—of continued compliance with the OCSLA and the regulations issued pursuant to

[89] 43 U.S.C. §1334(a)(2)(B). The requisite suspension period may be reduced upon the request of the lessee.

[90] 43 U.S.C. §1334(a)(2)(A)(i)-(iii). For regulations implementing the cancellation provisions, see 30 C.F.R. §§550.180-550.185.

[91] The statute requires "fair value" to take account of "anticipated revenues from the lease and anticipated costs, including costs of compliance with all applicable regulations and operating orders, liability for cleanup costs or damages, or both, in the case of an oil spill, and all other costs reasonably anticipated on the lease.... " 43 U.S.C. §1334(a)(2)(C).

[92] Exceptions from this method of calculation are carved out for leases issued before September 18, 1978, and for joint leases that are canceled due to the failure of one or more partners to exercise due diligence. 43 U.S.C. §1334(a)(2)(C)(ii)(I), (II); *see also* 30 C.F.R. §§550.184-550.185.

[93] 43 U.S.C. §1334(b).

[94] *Id*. at §1334(c).

[95] *Id*. at §1334(d).

[96] *Id*. at §1334(b).

[97] *Id*. at §1337(e).

it, and of obtaining BOEM approval prior to transfer—are the only restrictions placed upon transfers by the OCSLA.[98]

The terms of the lease itself create obligations for offshore oil and natural gas exploration and production lessees. BOEM employs a form lease, so all lessees are bound by virtually identical lease terms and conditions. With respect to transfers, Section 20 of the form lease provides that "[t]he lessee shall file for approval for with the appropriate field office of the Bureau of Ocean Energy Management, any instrument of assignment or other transfer of this lease, or any interest therein, in accordance with applicable regulations."[99] This filing requirement is the only new restriction or condition placed on transfers by the terms of the lease. However, the regulations issued by the agency pursuant to its OCSLA authority set forth more detailed requirements applicable to transfers of all or part of the lease.

Subpart J of 30 C.F.R. Part 556 sets forth the regulatory requirements adopted by BOEM for the assignment or transfer of offshore oil and natural gas exploration and production leases. Section 556.62(a) lists the requirements for recipients of transferred leases in whole or in part. The regulation states that BOEM will "approve the assignment to you of the ownership of the record title to a lease or any undivided interest in a lease, or an officially designated subdivision of the lease, only if: (1) [y]ou qualify to hold a lease under §556.35 (2); [y]ou provide the bond coverage required under Subpart I of this part; and (3) [t]he Regional Director [of BOEM] approves the assignment."

The criteria cited in this regulation can trigger further regulatory obligations. For example, the requirement that the transferee be qualified to hold a lease under 30 C.F.R. Section 556.35(b) means that, unless the requirement is waived by the agency, the transferee must be either (i) citizens or nationals of the United States; (ii) aliens lawfully admitted for permanent residence in the United States; (iii) corporations organized under the laws of the United States or any state therein (including territories and the District of Columbia); or (iv) associations of such citizens, nationals, resident aliens, or corporations.[100] Only these parties may be assigned all or part of an offshore lease. Similarly, the regulations require that the transferee satisfy the applicable regulatory bonding requirements,[101] which mandate the satisfaction of several obligations at varying stages of the exploration and production process. For example, bonding requirements apply to lessees, and therefore transferees, if various activities are undertaken pursuant to the lease. Submission of a proposed Exploration Plan for approval triggers a new set of bonding requirements,[102] as does submission of a Development and Production Plan or Development Operations Coordination Document.[103] The amount of bonding necessary can be adjusted by the Regional Director based on a variety of circumstances.[104] The regulations also provide a number of other requirements applicable to the bonds themselves, including procedures for lapses in bond

[98] It is important to note that a secondary market for offshore oil and gas exploration and production leases has developed. Although lease transfers of this type need only comply with the OCSLA and BOEM provisions discussed in this section, transactions in a secondary market might come under the jurisdiction of other federal laws and agencies.

[99] Form BOEM-2005 (October 2011).

[100] 30 C.F.R. §556.35(b)

[101] *Id.* at §556.62(a)(2).

[102] *Id.* at §556.53(a).

[103] *Id.* at §556.53 (b).

[104] *Id.* at §556.53 (c)-(f).

coverage[105] or upon termination of the lease,[106] or for the use of alternative financial instruments to satisfy the bonding requirements.[107] All of these bonding requirements are applicable to transferees, although as noted previously, in the case of partial transfers another record title owner of the lease may also satisfy the requirements.

Another ministerial component of the transfer process is the approval of the transaction by the BOEM Regional Director. 30 C.F.R. Section 556.64 sets forth the process for requesting approval of a transfer from the Regional Director. The regulations also require consultation with the Attorney General prior to approval of the transfer, although BOEM may act on the transfer if the Attorney General does not respond to a request for consultation within 30 days.[108] While a separate instrument of assignment must be filed for each lease transfer, if there are multiple transfers to the same person, association, or corporation, one request for approval of the transfers may be deemed sufficient.[109]

The regulations also offer some clarification regarding the procedures for partial transfers. When all of the record title for only a portion of the acreage in a lease is transferred, the transferred and retained portions are segregated and considered to be separate and distinct leases by BOEM, making the transferee a lessee from the government's perspective, with the lease being maintained under separate records and all provisions of the lease being applicable to the transferee, including rental requirements, royalty rights, and term of the lease.[110]

Legal Challenges to Offshore Leasing

Multiple statutes govern aspects of offshore oil and gas development, and therefore, may give rise to legal challenges. Certainly, violations of the Marine Mammal Protection Act,[111] Endangered Species Act,[112] and other environmental laws have provided mechanisms for challenging actions associated with offshore oil and gas production in the past.[113] Of primary interest here, however, are legal challenges to agency action with respect to the planning, leasing, exploration, and development phases under the procedures mandated by the OCSLA itself and the related environmental review required by the National Environmental Policy Act.

Suits Under the Outer Continental Shelf Lands Act

The Administrative Procedure Act provides for judicial review of agency action alleged to be in violation of federal law, including the OCSLA, its implementing regulations, and the terms of any

[105] *Id.* at §556.55.

[106] *Id*. at §556.58.

[107] *Id.* at §556.52 (f)-(g), §256.56, §256.57.

[108] *Id.* at §556.65.

[109] *Id.* at §556.67.

[110] *Id.* at §556.68.

[111] 16 U.S.C. §§1361-1423.

[112] 16 U.S.C. §§1531-1544.

[113] Village of Akutan v. Hodel, 869 F.2d 1185 (9th Cir. 1988); Village of False Pass v. Clark, 733 F.2d 605 (9th Cir. 1984); North Slope Borough v. Andrus, 642 F.2d 589 (D.C. Cir. 1980); Conservation Law Foundation v. Andrus, 623 F.2d 712 (1st Cir. 1979).

permit or lease.[114] The following paragraphs provide an overview of the existing case law and address the limitations applicable to relief at each phase of the leasing and development process.

Jurisdiction to review agency actions taken in approving the five-year plan is vested in the U.S. Court of Appeals for the D.C. Circuit, subject to appellate review by writ of certiorari from the U.S. Supreme Court.[115] A few challenges to five-year plans have been brought. The first, *California ex. rel. Brown v. Watt*,[116] involved a variety of challenges to the 1980-1985 plan, and, while the court ultimately found that the Secretary had failed to comply with certain procedural requirements in making determinations, the court established a relatively deferential standard of review, which it has continued to apply in later challenges. When reviewing "findings of ascertainable fact made by the Secretary," the court will require the Secretary's decisions to be supported by "substantial evidence."[117] However, the court noted that many of the decisions required in the formulation of the five-year plan will involve the determination of policy in the face of disputed facts, and that such determinations should be subject to a less searching standard. In such instances, a court will examine agency action and determine whether "the decision is based on a consideration of the relevant factors and whether there has been a clear error of judgment."[118]

The standards for review outlined in *Watt* have been upheld in subsequent litigation related to the five-year plan.[119] In these subsequent cases, the Court of Appeals for the D.C. Circuit applied a deferential standard in reviewing the Secretary's decisions, particularly in reviewing the Secretary's environmental impact determinations, such that the Secretary could perform environmental analysis using "any methodology so long as it is not irrational."[120] Further, these cases indicate that the Secretary is vested with significant discretion in determining which areas are to be offered for leasing and which areas will not. Thus, while the Secretary must receive and consider comments related to excluding areas from leasing, the court has clearly stated that the Secretary need only identify the legal or factual basis for leasing determinations at this stage and explain those determinations. More searching judicial review of the Secretary's analysis is not required.[121]

Litigation under the OCSLA has also challenged actions taken during the leasing phase. As described above, the OCSLA authorizes states to submit comments during the notice of lease sale stage and directs the Secretary to accept a state's recommendations if they "provide for a reasonable balance between the national interest and the well-being of the citizens of the affected State."[122] Courts have typically applied the deferential "arbitrary and capricious" standard to the Secretary's decisions with respect to these recommendations. According to the cases from the Ninth Circuit Court of Appeals, because the OCSLA does not provide clear guidance as to how

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[114] 43 U.S.C. §1349.

[115] 43 U.S.C. §1349(c).

[116] 668 F.2d 1290 (D.C. Cir. 1981).

[117] *Id.* at 1302; *see also* 43 U.S.C. §1349(c)(6).

[118] *Id*. at 1301-1302 (*quoting* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971) (internal quotations omitted)).

[119] *See* California v. Watt, 712 F.2d 584 (D.C. Cir. 1983); Natural Resources Defense Council v. Hodel, 865 F.2d 288 (D.C. Cir. 1988).

[120] *California*, 712 F.2d at 596 (internal quotations omitted).

[121] *Hodel*, 865 F.2d at 305.

[122] 43 U.S.C. §1345(d).

balancing of national interest and a state's considerations is to be performed, agency action will generally be upheld so long as "some consideration of the relevant factors ..." takes place.[123] Cases from the federal courts in Massachusetts, including a decision affirmed by the First Circuit Court of Appeals, have, while embracing the arbitrary and capricious standard, found the Secretary's balancing of interests insufficient.[124] However, it should be noted that the Massachusetts cases reviewed agency action that was not supported by explicit analysis of the sort challenged in the Ninth Circuit. Thus, it is possible that, given a more thorough record of the Secretary's decision, these courts may afford more significant deference to the Secretary's determination.

Apart from matters relating primarily to the authority of the Secretary to authorize the various stages of leasing, recent litigation has focused on the authority of MMS/BOEM to require royalty payments on certain offshore leases allegedly subject to mandatory royalty relief provisions. In *Kerr-McGee Oil & Gas Corp. v. Allred*, the plaintiff, an oil and gas company operating offshore wells in the Gulf of Mexico pursuant to federal leases, challenged actions by the department to collect royalties on deepwater oil and gas production.[125] The plaintiff alleged the department does not have authority to assess royalties based on an interpretation of amendments to the OCSLA found in the 1995 Outer Continental Shelf Deep Water Royalty Relief Act (DWRRA), that the act requires royalty-free production until a statutorily prescribed threshold volume of oil or gas production has been reached, and does not permit a price-based threshold for this royalty relief.[126]

The DWRRA separates leases into three categories based on date of issuance. These categories are (1) leases in existence on November 28, 1995; (2) leases issued after November 28, 2000; and (3) leases issued in between those periods, that is, during the first five years after the act's enactment. The third category of leases is the source of current controversy. According to Kerr-McGee, its leases, which were issued during the initial five-year period after the DWRRA's enactment, are subject to different legal requirements from those applicable to the other two categories. Kerr-McGee argued that the department has a nondiscretionary duty under the DWRRA to provide royalty relief on its deepwater leases, and that the statute does not provide an exception to this obligation based on any preset price threshold. To the extent any price threshold has been included in these leases, Kerr-McGee argued that such provisions are contrary to DOI's statutory authority and unenforceable.

Section 304 of the DWRRA, which addresses deepwater leases[127] issued within five years after the DWRRA's enactment, directs that such leases use the bidding system authorized in Section 8(a)(1)(H) of the OCSLA, as amended by the DWRRA. Section 304 of the DWRRA also stipulates that leases issued during the five-year post-enactment time frame must provide for royalty suspension on the basis of volume. Specifically, Section 304 states:

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[123] California v. Watt, 683 F.2d 1253, 1269 (9th Cir. 1982); *see also* Tribal Village of Akutan v. Hodel, 869 F.2d 1185 (9th Cir. 1988).

[124] Conservation Law Foundation v. Watt, 560 F.Supp. 561 (D.Mass. 1983), aff'd sub nom. Massachusetts v. Watt, 716 F.2d 946 (1st Cir. 1983); Massachusetts v. Clark, 594 F.Supp. 1373 (D.Mass. 1984).

[125] Kerr-McGee v. Allred, No, 2:06 CV 0439, 2007 WL 3231634 (W.D. La. Oct. 30, 2007).

[126] P.L. 104-58.

[127] This term refers to "tracts located in water depths of 200 meters or greater in the Western and Central Planning Area of the Gulf of Mexico, including that portion of the Eastern Planning Area of the Gulf of Mexico encompassing whole lease blocks lying west of 87 degrees, 30 minutes West longitude.... " 43 U.S.C. §1337 note.

> [A]ny lease sale within five years of the date of enactment of this title, shall use the bidding system authorized in section 8(a)(1)(H) of the Outer Continental Shelf Lands Act, as amended by this title, except that the suspension of royalties shall be set at a volume of not less than the following:
>
> (1) 17.5 million barrels of oil equivalent for leases in water depths of 200 to 400 meters;
>
> (2) 52.5 million barrels of oil equivalent for leases in 400 to 800 meters of water; and
>
> (3) 87.5 million barrels of oil equivalent for leases in water depths greater than 800 meters.[128]

It is possible to interpret this provision as authorizing leases issued during the five-year period to contain *only* royalty suspension provisions that are based on production volume with no allowance at all for a price-related threshold in addition. Such an intent might be gleaned from the language of the quoted section alone; indeed, in this provision, Congress provides for a specific royalty suspension method and does not clearly authorize the Secretary to alter or supplement it. Kerr-McGee's challenge to the Secretary's authority to impose price-based thresholds on royalty suspension was based on this interpretation of the statutory language above.

The U.S. District Court for the Western District of Louisiana agreed with Kerr-McGee's interpretation of the language discussed above. The court found that the DWRRA allowed only for volumetric thresholds on royalty suspension for leases issued between 1996 and 2000, and that the Secretary did not have authority under the DWRRA to attach price-based thresholds to royalty suspension for those leases.[129] On January 12, 2009, the U.S. Court of Appeals for the Fifth Circuit issued a decision affirming the district court's ruling,[130] and on October 5, 2009, the U.S. Supreme Court denied a petition for writ of certiorari.[131]

In *Center for Biological Diversity v. U.S. Department of the Interior*,[132] the plaintiff challenged the five-year plan for 2007-2012 on several grounds. Among these was a claim that DOI had failed to satisfy the requirement found in Section 18(a)(2)(G) of the OCLSA that, in preparing the five-year plan, DOI must consider "the relative environmental sensitivity and marine productivity of different areas of the outer Continental Shelf."[133] The court found that DOI's analysis, which relied solely on "physical characteristics" of different shoreline areas, did not satisfy the requirements of Section 18(a)(2)(G) because it failed to consider non-shoreline areas of the OCS.[134] The court therefore vacated the five-year program and remanded it to DOI for reconsideration. In a later order, the court clarified that this relief related only to those portions of the five-year plan that related to leasing in the Chukchi, Beaufort, and Bering Seas, as the environmental sensitivity analysis for these areas was the only analysis that was found to be deficient.[135]

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[128] P.L. 104-58.

[129] Kerr-McGee v. Allred, slip. op. at 8-9.

[130] Kerr-McGee Oil & Gas Corp. v. U.S. Dep't of Interior, 554 F.3d 1082 (5th Cir. 2009).

[131] U.S. Dept. of the Interior v. Kerr-McGee Oil and Gas Corp., 130 S. Ct. 236 (Mem) (2009).

[132] 563 F.3d 466 (D.C. Cir. 2009).

[133] 43 U.S.C. §1344(a)(2)(G).

[134] 563 F.3d at 488.

[135] Center for Biological Diversity v. U.S. Department of the Interior; Order upon consideration of respondent's petition for rehearing and/or clarification, No. 07-1247 (D.C. Cir. July 28, 2009).

Suits Under the National Environmental Policy Act

In the context of proposed OCS development, NEPA regulations generally require publication of notice of an intent to prepare an Environmental Impact Statement (EIS), acceptance of comments on what should be addressed in the EIS, agency preparation of a draft EIS, a comment period on the draft EIS, and publication of a final EIS addressing all comments at each stage of the leasing process where government action will significantly affect the environment.[136] As described above, NEPA figures heavily in the OCS planning and leasing process and requires various levels of environmental analysis prior to agency decisions at each phase in the leasing and development process.[137] Lawsuits brought under NEPA are thus indirect challenges to agency decisions in that they typically question the adequacy of the environmental analysis performed prior to a final decision.

In *Natural Resources Defense Council v. Hodel*,[138] the plaintiff challenged the adequacy of the alternatives examined in the EIS and the level of consideration paid to cumulative effects of offshore drilling activities. The court held that not every possible alternative needed to be examined, and that the determination as to adequacy was subject to the "rule of reason."[139] This standard appears to afford some level of deference to the Secretary, and his choice of alternatives was found to be sufficient by the court in this instance.[140] However, without significant explanation of the standard of review to be applied, the court found that the Secretary's failure to analyze certain cumulative impacts was a violation of NEPA.[141] Thus, the Secretary was required to include this analysis, although final decisions based on that analysis remained subject to the Secretary's discretion, with review only under the arbitrary and capricious standard.[142]

As mentioned above, NEPA plays a role in the leasing phase as well. BOEM often uses NEPA and its tiering option to evaluate lease sales.[143] The NEPA procedures and standard of review remain the same at this phase; however, due to the structure of the OCSLA process, more specific information is generally required.[144] Still, courts are deferential at the lease sale phase. In challenges to the adequacy of environmental review, courts have stressed that inaccuracies and more stringent NEPA analysis will be available at later phases.[145] Thus, because there will be an opportunity to cure any defects in the analysis as the OCSLA process continues, challenges under NEPA at this phase are often unsuccessful.

It is also possible to challenge exploration and development plans under NEPA. In *Edwardsen v. U.S. Department of the Interior*, the Ninth Circuit Court of Appeals applied the typical "rule of reason" to determine if the EIS adequately addressed the probable environmental consequences of the development and production plan, and held that, despite certain omissions in the analysis and

[136] 40 C.F.R. §§1501.7, 1503.1, 1503.4, 1506.10.

[137] 42 U.S.C. §4332.

[138] 865 F.2d 288 (D.C. Cir. 1988).

[139] *Id.* at 294.

[140] *Id.* at 296.

[141] *Id.* at 297-300.

[142] *See* California ex. rel. Brown v. Watt, 668 F.2d 1290, 1301-1302 (D.C. Cir. 1981).

[143] *See* 30 C.F.R. §256.26(b); 40 C.F.R. §1508.28.

[144] Tribal Village of Akutan v. Hodel, 869 F.2d 1185, 1191 (9th Cir. 1988).

[145] *Id.* at 1192; Alaska v. Andrus, 580 F.2d 465, 473 (D.C. Cir. 1978); Village of False Pass v. Clark, 733 F.2d 605, 612-616 (9th Cir. 1984); North Slope Borough v. Andrus, 642 F.2d 589, 594-905 (D.C. Cir. 1980).

despite an MMS decision to tier its NEPA analysis to an EIS prepared for a similar lease sale, the requirements of NEPA were satisfied.[146] Thus, while additional analysis was required to account for the greater specificity of the plans and to accommodate the "hard look" at environmental impacts NEPA mandates, the reasonableness standard applied to what must be examined in an EIS did not allow for a successful challenge to agency action.

[146] 268 F.3d 781, 784-790 (9th Cir. 2001).

Appendix. State Laws That Ban or Regulate Offshore Resource Development

Table A-1. State Laws That Ban or Regulate Offshore Resource Development: Policy and Statutes

State	Policy	Statutes
AL	Drilling is authorized in Alabama's state waters. The State Lands Division of the Department of Conservation & Land Resources is charged with leasing offshore oil and gas in state waters. In addition, the Alabama State Oil and Gas Board regulates oil and gas production to ensure the conservation and proper development of oil and gas resources.	**Authorization:** Ala. Code §§9-15-18; 9-17-1 *et seq.*; 40-20-1 *et seq.*
AK	The Alaska Department of Natural Resources is responsible for leasing oil and gas on state lands, including offshore areas. Certain areas are specifically designated as off limits to oil and gas leasing, and administrative decisions may further limit access.	**Ban:** Alaska Stat. §§38.05.140(f); 38.05.184. **Authorization:** Alaska Stat. §§38.05.131 *et seq.*
CA	The State Lands Commission is generally responsible for oil and gas leasing. California currently has a general ban in place restricting any state agency from issuing new offshore leases, unless the President of the United States determines that there is a "severe energy supply interruption and has ordered distribution of the Strategic Petroleum Reserve ... , the Governor finds that the energy resources of the sanctuary will contribute significantly to the alleviation of that interruption, and the Legislature subsequently acts to amend...[the law] to allow that extraction." The ban is limited to areas that are not currently subject to a lease.	**Ban:** Cal. Pub. Res. Code §§6871.1-.2 (repealed 1994); 6870 (Santa Barbara limitations); 6243 (general ban). **Authorization:** Cal. Pub. Res. Code §§6870 *et. seq.*; 6240 *et seq.*
CT	Connecticut does not appear to have laws addressing oil and gas development in state waters.	
DE	The governor and the Secretary of the Department of Natural Resources and Environmental Control are authorized to lease oil and gas in state waters. Lands "administered by the Department of Natural Resources and Environmental Control" may not be leased by the Secretary.	**Ban:** Del. Code Ann. tit. 7 ch. 61 §6102(e). **Authorization:** Del. Code. Ann. tit. 7 ch. 61.
FL	In general, the Department of Natural Resources is vested with the authority to permit oil and gas development on state lands and submerged lands; in 1990, Florida enacted a broad ban on offshore oil and gas development by prohibiting oil and gas drilling structures in a variety of locations, including Florida's territorial waters. The development ban provides an exception for valid existing rights.	**Ban:** Fla. Stat. Ann. §377.242. **Authorization:** Fla. Stat. Ann. §§377.01 *et seq.*; 253.001 *et seq.*
GA	The State Properties Commission is authorized to issue leases for state-owned oil and gas. The statute does not distinguish between onshore and offshore minerals.	**Authorization:** Ga. Stat. §50-16-43.
HI	The Board of Land and Natural Resources is authorized to lease oil and gas on state lands, including submerged lands. There would not appear to be a statutory ban in place.	**Authorization:** Hawaii Rev. Stat. §§182-1 *et seq.*
LA	The state Mineral Board is responsible for leasing oil and gas in Louisiana and its offshore territory. Development is limited to areas offered by the Board for leasing.	**Authorization:** La. Rev. Stat. §§30:121 *et seq.*

State	Policy	Statutes
ME	The Bureau of Geology and Natural Areas has primary authority over oil and gas development on all state lands. The Bureau is authorized to issue exploration permits and mineral leases.	**Authorization:** Me. Rev. Stat. tit. 12 §§549 *et seq*.
MD	The Department of the Environment regulates oil and gas development. The areas underlying the Chesapeake Bay, its tributaries, and the Chesapeake Bay Critical Area are unavailable for oil and gas development.	**Ban:** Md. Code, Envt. §14-107. **Authorization:** Md. Code, Envt. §§14-101 *et seq*.
MA	The Division of Mineral Resources is charged with administering the leasing of oil and gas on state lands. The law requires a public hearing before any license to explore or lease for extraction is issued for mineral resources located in coastal waters. Many of the state's offshore areas are designated as ocean sanctuaries in which oil and gas development is prohibited.	**Authorization:** Mass. Gen. Laws Ann. Ch. 21 §§54 *et seq*. **Ban:** Mass. Gen. Laws Ann. Ch. 132A §15.
MS	The Mississippi Major Economic Impact Authority is responsible for administering oil and gas leases on state lands. Offshore oil and gas development is generally permissible. Specific areas are not available for leasing. No development may occur in areas north of the coastal barrier islands, except in Blocks 40, 41, 42, 43, 63, 64, and 66 through 98. Further, "surface offshore drilling operations" may not be conducted within one mile of Cat Island.	**Authorization:** Miss. Code. Ann. §§29-7-1 *et seq*. **Ban:** Miss. Code. Ann. §29-7-3.
NH	New Hampshire does not appear to have laws addressing offshore oil and gas development in state waters.	
NJ	State law authorizes the removal of sand and other materials from lands under tidewaters and below the high water mark if approved by the Tidelands Resource Council. Offshore oil and gas development is not addressed.	**Authorization:** N.J. Stat. Ann. §§12:3.-12.1 *et seq*.
NY	Leases and permits for the right to use state-owned submerged lands for navigation, commerce, fishing, bathing, and recreation are authorized for specified submerged areas. General authority for issuing oil and gas leases is vested in the Department of Environmental Conservation. Certain submerged lands underlying specified lakes are excluded from exploration and leasing, but offshore areas would not appear to be subject to a similar ban.	**Authorization:** N.Y. Pub. Lands Law §75; N.Y. Envt'l & Conserv. Law §§23-0101 *et seq*.
NC	State law authorizes the sale or lease of any state-owned mineral underlying the bottoms of any sounds, rivers, creeks, or other waters of the state. The state is authorized to sell, lease, or otherwise dispose of oil and gas at the request of the Department of Environment and Natural Resources.	**Authorization:** N.C. Gen. Stat. §146-8.
OR	The Department of State Lands is generally responsible for leasing state owned minerals, including oil and gas. Leasing of tidal and submerged lands is governed by separate provisions of law. There does not appear to be a ban in place.	**Authorization:** Or. Rev. Stat. §§274.705 *et seq*.; 273.551 (for submerged lands seaward more than 10 miles easterly of the 124th West Meridian).
RI	The Coastal Resources Management Council is charged with identifying, evaluating, and determining which uses are appropriate for the state's coastal resources and submerged lands.	**Authorization:** R.I. Gen. Laws §§46-23-1 *et seq*.

State	Policy	Statutes
SC	The State Budget and Control Board is authorized to "negotiate for leases of oil, gas and other mineral rights upon all of the lands and waters of the State, including offshore marginal and submerged lands."	**Authorization:** S.C. Code. Ann. §§10-9-10 *et seq*.
TX	The School Land Board is authorized to lease those portions of the Gulf of Mexico under the state's jurisdiction for oil and gas development.	**Authorization:** Tex. Nat. Res. Code §§52.011 *et seq*.
VA	The Marine Resources Commission is authorized to grant easements or to lease "the beds of the waters of the Commonwealth outside of the Baylor Survey" for oil and gas development.	**Authorization:** Va. Code Ann. §28.2-1208.
WA	In general, the Department of Natural Resources is responsible for mineral development on state lands. State law prohibits leasing of tidal or submerged lands "extending from mean high tide seaward three miles along the Washington coast from Cape Flattery south to Cape Disappointment, nor in Grays Harbor, Willapa Bay, and the Columbia river downstream from the Longview bridge, for purposes of oil or gas exploration, development, or production."	**Ban:** Wash. Rev. Code Ann. §§43.143.005 *et seq*.

Source: CRS.

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