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Shed a Tier: An Analysis and Critique of Coastal States' Ability to Oppose Trump's 2019–2024 Offshore Oil and Gas Proposal

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INTRODUCTION

In 2017, the Trump Administration announced a proposal to expand leasing offshore areas for oil and gas development as part of President Trump's America-First Offshore Energy Strategy.[1] The proposal allows new offshore oil and gas drilling in almost all coastal areas in the United States, contradicting former President Barack Obama's drilling ban.[2] The colossal expansion will allow oil and gas companies to lease off California's shores for the first time in decades and make available over one billion acres in the Arctic and Eastern Seaboard for potential oil and gas production.[3]

Adverse environmental harm from the oil and gas development process is significant, and it increases in severity with every subsequent stage of the process.[4] For example, during the survey period, high-intensity acoustic signals pulse through the ocean and sedimentary strata and affect surrounding aquatic life.[5] Once potential oil sites are discovered, operators obtain drilling rights and commence exploratory drilling by dredging and filling coastal habitat to install rigs.[6] When this drilling occurs, there is the potential for trace metals, hydrocarbons, and sediment to affect surrounding waters and aquatic life.[7]

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1 Press Release, U.S. Dep't of the Interior, Interior Department Advances America-First Offshore Energy Strategy (May 10, 2017).

2 BUREAU OF OCEAN ENERGY MGMT., 2019–2024 NATIONAL OUTER CONTINENTAL SHELF OIL AND GAS LEASING DRAFT PROPOSED PROGRAM (2018) 1 [hereinafter DPP] (President Obama invoked obscure provision of a 1953 law in outer continental shelf land acts to block new lease sale in large areas of the Arctic and Atlantic.).

3 *See id.* at 8.

4 *See* Jerry M. Neff, Nancy N. Rabalais & Donald F. Boesch, *Offshore Oil and Gas Development Activities Potentially Causing Long-Term Environmental Effects*, *in* LONG-TERM ENVIRONMENTAL EFFECTS OF OFFSHORE OIL AND GAS DEVELOPMENT, Table 4.1 at 149, 151 (Donald F. Boesch & Nancy N. Rabalais eds., 1987).

5 *Id.*

6 *Id.*

7 *Id.* at 153.

Accordingly, the increased potential for environmental harm through subsequent processes prohibits states from meaningfully opposing the oil and gas development until later in the development process. This is because courts interpret risks in earlier stages as too speculative to warrant analysis.[8] This framework allows for increased state involvement as potential environmental harm to coasts becomes more concrete with site-specific analyses and development.[9] This process is called "tiering," which recurs in many of the statutory schemes that are discussed in this paper.[10]

Increased understanding and recognition of harm that accompanies offshore oil and gas development have parties other than environmental advocates concerned. President Trump's 2019–2024 National Outer Continental Shelf Oil and Gas Leasing Draft Proposed Program (DPP) has also activated opposition among coastal states, resulting in governors publicly opposing the expansion[11] and various states' attorneys general collectively signing a letter to the Department of the Interior in opposition.[12] Though the former Secretary of the Interior, Ryan Zinke, sympathized with the Florida governor's opposition by exempting the state from the proposal,[13] this move left other coastal states of both major parties claiming political favoritism for not extending the same preference to them.[14] Accordingly, environmentalists and states are searching for ways they can protect the coast's natural integrity in order to increase tourism and maintain healthy ecosystems and quality-of-life.[15]

8 *See infra* Parts III, IV (discussing state limitations at earlier stages in development).

9 *See infra* Parts III, IV.

10 *See Environmental Operations Section (EOS)*, BUREAU OCEAN ENERGY MGMT., https://www.boem.gov/about-boem/environmental-operations-section-eos [https://perma.cc/EV5F-NALQ] (last visited Feb. 19, 2020) ("Tiering under NEPA refers to a more limited and site-specific environmental evaluation that is placed in our text beneath a broader environmental evaluation in order to avoid unnecessary repetitions.").

11 Coral Davenport, *Florida Is Exempted from Coastal Drilling. Other States Ask, 'Why Not Us?*,*'* N.Y. TIMES (Jan. 10, 2018), https://www.nytimes.com/2018/01/10/climate/coastal-drilling-florida-exempt-zinke.html [https://perma.cc/CM3H-SAB9].

12 Letter from Attorneys General of Various States to Ryan Zinke, Secretary of the Interior (Feb. 1, 2018) (on file with Josh Stein, North Carolina Attorney General).

13 Ryan Zinke (@SecretaryZinke), TWITTER (Jan. 9, 2018, 3:48 PM), https://twitter.com/SecretaryZinke/status/950876846698180608 [https://perma.cc/SW9G-46MW].

14 *See* Oliver Milman, *Coastal States to Trump: Why Is Florida Exempt from Drilling and Not Us?*, GUARDIAN (Jan. 10, 2018, 1:17 PM), https://www.theguardian.com/environment/2018/jan/10/trump-offshore-drilling-florida-ryan-zinke [https://perma.cc/G296-QJH2].

15 *See* Jeff Daniels, *California Gov. Jerry Brown Moves to Block Trump on Offshore Drilling: 'Not Here, Not Now*,*'* CNBC (Sept. 8, 2018, 4:10 PM), https://www.cnbc.com/

This Article will analyze the opportunities for concerned coasts to oppose offshore oil and gas by exercising the powers reserved to the states throughout the phases of the process. It will discuss (1) the delineation of federal and state sovereignty over coastal waters and (2) the planning process and agency responsibilities in administering offshore oil and gas development. Further, it will analyze state opportunities to deter offshore oil and gas throughout (3) the leasing process, (4) the exploration phase, and (5) the development and production process. Finally, the Article will conclude with an analysis on the defects of the process from a state perspective.

I
FEDERAL AND STATE SOVEREIGNTY OVER COASTAL WATERS

This Article focuses on the exploration and development of mineral resources on the Outer Continental Shelf (OCS). The United States defines the OCS as "all submerged lands lying seaward and outside of the area of lands beneath navigable waters . . . , and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control."[16]

A. History

The United States' interest in jurisdiction over the OCS gained recognition shortly after World War II.[17] The war demonstrated the growing importance of oil and gas resources and motivated the United States to expand definitions of freedom of access to the sea.[18] Accordingly, President Truman recognized the importance of advancing exploration and developing technology for offshore resource extraction and issued a proclamation claiming jurisdiction and control of oil and gas resources that underlie parts of the continental shelf off the nation's coasts.[19] The proclamation encouraged exploration and extraction of those resources and resolution of foreign

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2018/09/08/california-gov-brown-signs-legislation-to-block-new-offshore-drilling.html [https://perma.cc/U96W-YWXN]; *see also* Madeleine Carlisle, *Trump's Offshore-Drilling Plan Is Roiling Coastal Elections*, ATLANTIC (Aug. 5, 2018), https://www.theatlantic.com/politics/archive/2018/08/trumps-offshore-drilling-plan-is-roiling-coastal-elections/566726 [https://perma.cc/A3PD-XM7L].

16 43 U.S.C.A. § 1331(a) (Westlaw through Pub. L. No. 116-91).

17 ALISON RIESER ET AL., OCEAN & COASTAL LAW 2–3 (West 4th ed. 2007).

18 *Id.*

19 *See* Proclamation No. 2667, 10 Fed. Reg. 12,305 (Sept. 28, 1945).

state conflicts of interest through equitable principles.[20] However, the proclamation failed to address the interests of coastal states or include any provision addressing the extent of their ownership of offshore lands.[21]

Several coastal states nevertheless claimed ownership and jurisdiction over the three miles that extend seaward from the low water mark under the equal footing doctrine.[22] The equal footing doctrine is a judicially created doctrine that recognizes and grants newly admitted states the same rights and claims to ownership as the original thirteen colonies upon entering the union.[23] Despite the general understanding of state ownership under the equal footing doctrine, the Supreme Court nevertheless upheld President Truman's proclamation: "The United States of America is now, and has been at all times pertinent hereto, possessed of paramount rights in, and full dominion and power over, the lands, minerals and other things underlying the Pacific Ocean lying seaward of the ordinary low-water mark . . . ."[24]

To alleviate the tensions between federal and state governments, Congress clarified the jurisdictional framework of state and federal control over resources in its Submerged Lands Act in 1953.[25] The Act recognized state ownership of the first three miles extending seaward from the low-water mark.[26] However, Congress allowed Texas and Florida to claim ownership of three marine leagues[27] from the shoreline because Congress had previously approved the increased boundary at the time the states joined the Union.[28]

Concurrently with the Submerged Lands Act, Congress passed the Outer Continental Shelf Lands Act (OCSLA),[29] which granted the United States jurisdiction, control, and power over the subsoil and

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20 *Id.*

21 *See id.*

22 *See* United States v. California, 332 U.S. 19, 29–30 (1947); *see also* United States v. Louisiana, 339 U.S. 699, 703 (1950).

23 *California*, 332 U.S. at 29–30.

24 United States v. California, 332 U.S. 804, 805 (1947).

25 *See generally* 43 U.S.C.A. §§ 1301–15 (Westlaw through Pub. L. No. 116-91).

26 43 U.S.C.A. § 1312.

27 "A unit of length used in marine navigation that is equal to a minute of arc of a great circle on a sphere. One international nautical mile is equivalent to 1,852 meters or 1.151 [statute] miles." *Nautical Miles*, METRIC CONVERSION, https://www.metric-conversions.org/length/nautical-leagues-to-us-nautical-miles.htm [https://perma.cc/YW6F-CLQ2] (last updated July 22, 2018).

28 United States v. Louisiana, 363 U.S. 1, 29 (1960).

29 *See generally* 43 U.S.C.A. §§ 1331–1356 (Westlaw through Pub. L. No. 116-91).

seabed of the outer Continental Shelf, subject to environmental safeguards and navigational principals.[30]

In response to the fluctuating territorial standards of coastal nations, the United Nations negotiated a consistent law of coastal states at its 1982 U.N. Convention on the Law of the Sea.[31] Though some coastal law became customary, such as the two-hundred-mile Exclusive Economic Zone (EEZ) and the twelve-mile territorial sea boundary, the Convention sought to define these basic principles in the international law of the sea.[32]

Among other provisions, the Convention addressed and defined various limits including the territorial sea, the contiguous zone, the EEZ, and continental shelf limits.[33] At the Convention, the U.N. determined that every coastal nation has a right to establish (1) a territorial sea up to twelve nautical miles;[34] (2) a "contiguous zone" not to exceed twelve miles, which allows coastal states to exercise control as necessary to enforce their "customs, fiscal, immigration or sanitary laws and regulations within [their] territory" and punish infringement of those laws;[35] and an EEZ not to extend beyond two hundred nautical miles.[36] The Convention provided a global understanding of the geographical extent of nations' jurisdiction and control off adjacent shorelines.[37] Accordingly, a year later, President Ronald Reagan issued a proclamation adopting and establishing a two-hundred-mile EEZ adjacent to the United States coast.[38] The establishment of the EEZ provided coastal states and the federal government the ability to exercise sovereign rights over the natural resources of the seabed and subsoil. It also established jurisdiction over artificial islands and

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30 43 U.S.C.A. § 1332.

31 RIESER ET AL., *supra* note 17, at 29.

32 *Id.*

33 *See* U.N. Conferences on the Law of the Sea, *United Nations Convention on the Law of the Sea*, Part V, art. 57, (1982), http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm [https://perma.cc/8X5Y-WTCZ] [hereinafter UNCLOS].

34 *Id.* at Part II, art. 3.

35 *Id.* at Part II, art. 33.

36 *Id.* at Part V, art. 57.

37 Tommy T.B. Koh (President of the Third United Nations Conference on the Law of the Sea), *A Constitution for the Oceans*, at xxxiii (Dec. 11, 1982), https://www.un.org/depts/los/convention_agreements/texts/koh_english.pdf [https://perma.cc/6PRN-G5JX] ("The Convention will promote the maintenance of international peace and security because it will replace a plethora of conflicting claims by coastal States with universally agreed limits on the territorial sea, on the contiguous zone, on the exclusive economic zone and on the continental shelf.").

38 Proclamation No. 5030, 48 Fed. Reg. 10,605 (Mar. 10, 1983).

structures within the zone.[39] Thus, the federal government has exclusive control and jurisdiction to manage submerged lands up to two hundred miles beyond the states' three-mile territory in accordance with the Outer Continental Shelf Lands Act.[40]

B. Statutory Schemes in Outer Continental Shelf Lands Oil and Gas Development

1. The Outer Continental Shelf Lands Act

The OCSLA[41] grants the United States "jurisdiction, control, and power" over the subsoil and seabed of the OCS, subject to environmental safeguards and navigational principals.[42] In 1978, Congress amended the Act to create a four-stage leasing program consisting of (1) planning, (2) leasing, (3) exploration, and (4) development and production.[43] However, the Act still left ambiguity regarding the outer limits of the federal government's control and jurisdiction.

The Secretary of the Interior is the principal manager of OCS resources and must primarily manage them within the bounds of OCSLA.[44] OCLSA authorizes the Secretary of the Interior to lease land on the OCS for energy development and to regulate the leasing process.[45] In 2005, the Energy Policy Act amended OCSLA to grant the Bureau of Ocean Energy Management (BOEM) lead management authority for energy projects on federal offshore lands and any projects that make alternative uses of existing oil and natural gas platforms.[46] Prior to BOEM's management of the OCS, the Minerals Management Service held authority to manage OCS lands. However, due to the Deepwater Horizon oil spill, compounded with internal dysfunction,

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39 *Id.*

40 *See* 43 U.S.C.A. § 1333(a)(1) (Westlaw through Pub. L. No. 116-91); *see also* Shell Offshore, Inc. v. Greenpeace, Inc., 709 F.3d 1281, 1288–89 (9th Cir. 2013).

41 *See generally* 43 U.S.C.A. §§ 1331–1356 (Westlaw through Pub. L. No. 116-91).

42 43 U.S.C.A. § 1332(1)–(3).

43 RIESER ET AL., *supra* note 17, at 397.

44 *See* 43 U.S.C.A. § 1334(a) (granting the Secretary of the Interior with primary authority in administering leases).

45 *See id.*

46 *See* Antony C. Marino & C. Jacob Gower, *Oil and Gas Mineral Leasing and Development on the Outer Continental Shelf of the United States*, 4 LA. ST. U. J. ENERGY L. & RESOURCES 1, 10 (2015).

the recent Energy Policy Act delegated primary oversight and management responsibilities to BOEM.[47]

Currently, BOEM is operating under the 2017–2022 National OCS Program established by the Obama Administration.[48] The 2017–2022 National OCS Program allows "11 potential lease sales in four planning areas—10 sales in portions of three Gulf of Mexico program areas that are not under moratorium and one sale offshore Alaska in the Cook Inlet program area."[49]

2. The National Environmental Policy Act

Another statutory scheme governing management of offshore oil and gas resources lies in the National Environmental Policy Act (NEPA) process. NEPA is a procedural statute that requires federal agencies to prepare a report considering environmental impacts of a proposed project for "major Federal actions significantly affecting the quality of the human environment."[50] Though NEPA does not impose substantive requirements, it mandates that all federal agencies engaging in major federal actions that significantly affect "the quality of the human environment" prepare a report[51] that generally comes in the form of an Environmental Impact Statement (EIS).[52] NEPA requires the EIS to include specific provisions in its analysis:

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

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47 *Id.*; *see also Fact Sheet*, BUREAU OCEAN ENERGY MGMT., https://www.boem.gov/sites/default/files/boem-newsroom/BOEM-Fact-Sheet.pdf [https://perma.cc/QBD5-L7WU] (last updated Feb. 2018).

48 *See* Record of Decision Memorandum from Walter D. Cruickshank, Acting Dir., BOEM, to Sally Jewell, Sec'y of the Interior (Jan. 17, 2017) (on file with BOEM).

49 Nick Snow, *DOI Cuts Most Alaska Tracts in Latest 2017-22 OCS Leasing-Plan Move*, OIL & GAS J. (Nov. 21, 2016), https://www.ogj.com/articles/2016/11/doi-cuts-most-alaska-tracts-in-latest-2017-22-ocs-leasing-plan-move.html [https://perma.cc/C4SJ-44LP].

50 42 U.S.C.A. § 4332(C) (Westlaw through Pub. L. No. 116-91).

51 *Id.*

52 *See* 40 C.F.R. § 1508.11 (2019) ("Environmental impact statement means a detailed written statement as required by section 102(2)(C) of the Act.").

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.[53]

The Secretary of the Interior and BOEM must comply with NEPA as well as OCSLA because BOEM is a federal agency and offshore oil and gas activities constitute an action "that might significantly affect the quality of the human environment."[54] Thus, BOEM, or an applicant seeking authorization from BOEM to engage in such activities, must prepare a report analyzing the environmental impact of the proposed action.

3. The Coastal Zone Management Act

Though states opposing offshore oil and gas development are unable to prohibit OCS development outright, OCSLA requires the federal government to consider state and tribal concerns and provide them an opportunity to participate in planning decisions through the Coastal Zone Management Act (CZMA).[55] Though seemingly empowering for states, the CZMA is similar to other OCS statutory schemes in that it often fails to provide states a significant role in the planning process or to prohibit the development of offshore oil and gas.[56]

The Coastal Zone Management Act of 1972 aims "to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations" and "to encourage and assist states to exercise effectively their responsibilities in the coastal zone."[57] The National Oceanic and Atmospheric Administration (NOAA) in the Department of Commerce administers the CZMA processes and its requirements.[58]

Congress recognized that this type of land-use planning and management was traditionally a realm of jurisdiction belonging to the states.[59] Accordingly, it aimed to create a cooperative federalism model of coastal management by providing federal funding to states that

53 42 U.S.C.A. § 4332(C)(i)–(v).

54 Jennifer Kilanski, *Overview of BOEM Environmental Review Process*, BUREAU OCEAN ENERGY MGMT. (Aug. 2010), https://www.boem.gov/Renewable-Energy-Program/State-Activities/EnvironmentalPresentation.aspx [https://perma.cc/48PR-DQWL].

55 *See generally* 16 U.S.C.A. §§ 1451–1465 (Westlaw through Pub. L. No. 116-91).

56 *See* Jonathan Schirmer, *Are We Out of the Woods Yet? Arctic Leasing Reform in the Trump Administration*, 41 SEATTLE U. L. REV. 673, 685–86 (2018).

57 16 U.S.C.A. § 1452(1)–(2).

58 RIESER ET AL., *supra* note 17, at 250.

59 *Id.*

developed a plan to achieve costal management goals.[60] Specifically, it increases state management of coastal areas by providing states an incentive to voluntarily create coastal management plans that "give[] full consideration to ecological, cultural, historic, and esthetic values" as well as economic development.[61]

More importantly, the CZMA provides that coastal zone management plans may effectively give rise to a limited waiver of federal supremacy in accordance with the "consistency provision" of the Act.[62] The consistency provision requires federal agencies to carry out a "consistency review" to ensure that their actions conform to the state's federally approved management plan.[63] NOAA regulations provide that federal agencies "shall consider the enforceable policies of management programs as requirements to be adhered to in addition to existing Federal agency statutory mandates" whenever it is legally permissible.[64] However, the Secretary of the Interior may override the state's determination of consistency or continue the project despite the inconsistency if it is necessary to protect national security interests.[65] Thus, federal actions seemingly must adhere to state coastal zone management plans unless doing so would be unlawful.

However, even the consistency provision is not absolute regarding states' ability to prevent federal oil and gas development by banning exploration and development in their respective coastal management plans. Both an increased demand for oil and weakening court interpretations significantly reduced the effectiveness of states' role in OCS development decisions.

Accordingly, Congress amended the Act in 1976 in response to the Arab oil embargo and consequent 1973–1974 energy crisis, which made energy independence a primary political objective.[66] The main blow to states' ability to deter offshore oil and gas came in the form of the Coastal Energy Impact Program (CEIP), which established a ten-year program to provide financial assistance to coastal states that federal offshore oil and gas programs may affect.[67] The program

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60 *Id.*

61 § 1452(2).

62 *Id.*; *see also* 16 U.S.C.A. § 1456(c) (Westlaw through Pub. L. No. 116-91).

63 § 1456(c)(1)(C) ("Each Federal agency carrying out an activity subject to paragraph (1) shall provide a consistency determination to the relevant State agency . . . .").

64 15 C.F.R. § 930.32(a)(1)–(2) (2019).

65 § 1456(3)(A).

66 RIESER ET AL., *supra* note 17, at 252–53.

67 *Id.* at 253.

contains three parts that provide grants and loans to assist states in granting money to offset negative effects of OCS developments.[68]

Congress further amended the Act in 1980 to emphasize the nation's concern with energy independence.[69] The amendments conditioned administrative grants to states based on the presence of coastal energy siting and government facilities in its plan.[70] Though the imposition of these requirements on states has generally been upheld, Courts have relaxed the requirement so that conditioning and guiding offshore oil processes, without an inflexible commitment to potential oil sites in a zoning map, is sufficient for adequate energy facility siting.[71]

With state coastal zone management plan requirements in mind, the prominent inquiry is whether states can effectively use the plan to deter federal offshore oil and gas projects. The state coastal management plans control only up to the bounds of the territorial sea—that is, three miles seaward from the state's coastline.[72] Accordingly, courts have examined states' ability to enjoin a federal action outside their territory that nevertheless affects the coast and consequently results in the action's inconsistency with a coastal management plan.[73]

4. Judicial Review Under Statutory Schemes

NEPA, CZMA, and OCSLA do not provide a private right of action for substantive claims and thus must seek judicial review under the Administrative Procedure Act (APA). The APA provides judicial review for a final agency action that resulted in legal harm where there is no other adequate remedy in a court.[74] In addition, a successful claim

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68 *Id.*

69 *Id.* at 254.

70 *See* 16 U.S.C.A. § 1455(d)(2)(H) (Westlaw through Pub. L. No. 116-91).

71 *See* Am. Petroleum Inst. v. Knecht, 456 F. Supp. 889, 919 (C.D. Cal. 1978) ("Congress never intended that . . . a management program must provide a 'zoning map' . . . [n]or did Congress intend . . . to require such programs establish such detailed criteria that private users be able to rely on them as predictive devices for determining the fate of projects without interaction between the relevant state agencies and the user.").

72 NAT'L OCEANIC AND ATMOSPHERIC ADMIN., BUREAU OF OCEAN ENERGY MGMT., SO WHAT? COASTAL ZONE MANAGEMENT ACT BOUNDARY, https://www.marinecadastre.gov/SiteCollectionDocuments/SoWhat_CZMBoundary_final_template.pdf [https://perma.cc/6QUV-ACFS] (last visited Feb. 19, 2020) ("On the water side, the management area includes all state waters as determined under the Submerged Lands Act. This is three nautical miles from shore for the ocean states and territories . . . .").

73 *Compare* Sec'y of Interior v. California, 464 U.S. 312 (1984), *with* California v. Norton, 311 F.3d 1162 (9th Cir. 2002).

74 *See* 5 U.S.C.A. §§ 702, 704 (Westlaw through Pub. L. No. 116-91).

under the APA can result in a court compelling an "agency action unlawfully withheld or unreasonably delayed" or "hold unlawful and set aside agency action, findings and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[75]

However, the arbitrary and capricious standard is narrow and difficult to overcome due to the high deference that courts give to agencies.[76] Accordingly, a court may not "substitute its own judgement for that of the agency—rather, it must cautiously review the administrative record to ensure that the agency has derived a reasoned judgement from the consideration and application of all pertinent factors."[77] An arbitrary and capricious standard applies when

> the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or [its decision] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[78]

Thus, the narrow judicial review of agency decisions limits states' ability to challenge federal actions on the basis of the extent of harm the project will cause to a state's coastline.

II
PLANNING STAGE

With the understanding of federal and state jurisdiction in coastal waters, this next section describes the federal government's process for proposing oil and gas leases and administering agencies' responsibilities. Throughout the planning process, BOEM adheres to several statutory schemes that strive to increase state participation. However, court interpretations and agency policies have diluted the states' role in the process to render their participation as merely

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75 5 U.S.C.A. § 706(1)–(2)(A) (Westlaw through Pub. L. No. 116-91).

76 Eric R. Womack, *Into the Third Era of Administrative Law: An Empirical Study of the Supreme Court's Retreat from Chevron Principles in United States v. Mead*, 107 DICK. L. REV. 289, 298 (2002) ("Once a court reads a gap in a statute to constitute an implied delegation of decisionmaking authority by Congress to an agency, the court will rarely, if ever, reject the agency's decision as impermissible or arbitrary and capricious.").

77 Blanco v. Burton, No. CIV.A. 06-3813, 2006 WL 2366046, at *7 (E.D. La. Aug. 14, 2006); *see* Sabine River Auth. v. U.S. Dep't of Interior, 951 F.2d 669, 678 (5th Cir. 1992).

78 La. Envtl. Action Network v. U.S. Envtl. Prot. Agency, 382 F.3d 575, 582 (5th Cir. 2004) (quoting Tex. Oil & Gas Ass'n v. U.S. Envtl. Prot. Agency, 161 F.3d 923, 934 (5th Cir. 1998)).

"symbolic."[79] Nevertheless, OCSLA, NEPA, and the CZMA all require state participation throughout the OCS development process, which gives states the opportunity to raise their concerns and provide input in OCS oil and gas development.

A. The Outer Continental Shelf Lands Act

Under OCSLA, BOEM must prepare a five-year program that includes a schedule of proposed oil and gas lease sales in federal waters that would presumably meet national energy demands following program approval.[80] Preparing the five-year program begins with BOEM filing a request for information in the Federal Register to allow states, local governments, industries, and federal agencies to submit comments.[81] Additionally, BOEM must directly contact affected states' governors to "identify specific laws, goals, and policies which they believe should be considered . . . in connection with the leasing program."[82] Once the preliminary scoping is completed, BOEM will prepare a draft proposed program that will be forwarded to affected states' governors and subsequently publish the draft program in the Federal Register.[83]

The Act includes substantive requirements and a series of factors that BOEM must consider in preparing its five-year program.[84] These factors include geographical and ecological characteristics of the planning areas, the environmental risk and relative benefit from OCS development, the location in relation to energy market needs and use of the seabed, and the laws and policies of affected states.[85] An issuance of the draft proposed program is preceded and followed by a comment period that allows for public input.[86]

This comment period allows concerned parties to comment on any part of the five-year plan.[87] Generally, coastal states have a particular interest in this stage of the process because they have an opportunity to

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79 Schirmer, *supra* note 56, at 685.

80 43 U.S.C.A. § 1344(a) (Westlaw through Pub. L. No. 116-91).

81 30 C.F.R. § 556.16(a) (2012).

82 § 556.16(b).

83 30 C.F.R. § 556.17(a)(1)–(2) (2012).

84 43 U.S.C.A. § 1344(a)(2).

85 *Id.*

86 § 1344(c)–(d).

87 *Id.*; Robert B. Wiygul, *The Structure of Environmental Regulation on the Outer Continental Shelf: Sources, Problems, and the Opportunity for Change*, 12 J. ENERGY NAT. RESOURCES & ENVTL. L. 75, 92 (1992).

exclude certain geographic areas from the five-year program.[88] Additionally, states have used this opportunity to request additional research or mitigation measures in areas that are proposed to be leased.[89]

Generally, state actions under OCSLA for judicial review of a five-year plan are not successful.[90] Courts consistently give wide discretion to a Secretary of the Interior's determinations under the five-year plan.[91] Moreover, courts reason that because the purpose of OCSLA is "the expeditious development of OCS resources," other factors that the Act requires the Secretary to consider, such as environmental damage and potential for adverse impact, need not be weighed equally.[92] As long as the Secretary of the Interior "considered" state concerns and provided an explanation that is sufficient to permit the state to understand the basis for the rejection, the Secretary has no obligation to adhere to state concerns or recommendations.[93] Thus, the Secretary essentially has exclusive control over oil and gas development in the planning stage. Consequently, because a Secretary's decision will be overturned only if he exercised a "clear error of judgement," actions under the leasing stage will likely not be successful.[94]

B. The National Environmental Policy Act

As previously mentioned, BOEM must also comply with NEPA.[95] Congress enacted NEPA in 1969 to "encourage productive and enjoyable harmony between man and his environment" by establishing a procedural process by which federal actions that significantly affect

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88 Wiygul, *supra* note 87, at 92–93.

89 *Id.*

90 *See, e.g.*, California v. Watt (*Watt I*), 668 F.2d 1290 (D.C. Cir. 1981); California v. Watt (*Watt II*), 712 F.2d 584 (D.C. Cir. 1983); Nat. Res. Def. Council, Inc. v. Hodel, 865 F.2d 288 (D.C. Cir. 1988).

91 *See, e.g.*, *Watt I*, 668 F.2d at 1290; *Watt II*, 712 F.2d at 584; *Nat. Res. Def. Council, Inc.*, 865 F.2d at 288.

92 *See Watt I*, 668 F.2d at 1316.

93 *Id.* at 1321–22.

94 *Id.* at 1317 (quoting Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971)).

95 *Environmental Assessment*, BUREAU OCEAN ENERGY MGMT., https://www.boem.gov/Environmental-Assessment-Division [https://perma.cc/6RFL-9NZY] (last visited Feb. 19, 2020) ("BOEM prepares *National Environmental Policy Act* (NEPA) documents and Outer Continental Shelf (OCS) Lands Act reports; provides oversight, policy guidance, and direction for NEPA and other environmental laws and regulations affecting OCS activities . . . .").

the environmental quality must adhere before initiating a project.[96] Accordingly, the procedural act requires the Secretary of the Interior to prepare a Programmatic Environmental Impact Statement (PEIS) that includes an overview of possible environmental harm resulting from the five-year program.[97]

Unlike lease-specific EISs, the PEIS identifies areas, resources, and activities that have the potential to create significant environmental impact with a focus on "breadth" rather than "depth."[98] The discrepancy in the analyses' level of specificity is emblematic of the "tiering" framework. Tiering allows for a broad Environmental Impact Statement to cover large projects. Subsequently, agencies must prepare an additional specific, narrower analysis for site-specific projects, projects of a lesser scope, or multistaged projects that require supplemental analysis.[99]

Consequently, NEPA plays a more substantial role in OCS development in the leasing portion of the process, which this Article will address in more detail in the next section. Under NEPA, BOEM need only file a Notice of Intent to prepare a PEIS at the time the Draft Proposed Program is filed.[100] Thereafter, BOEM must publish the draft PEIS in the Federal Register followed by a comment period.[101]

The Trump Administration submitted a new proposed five-year lease schedule for 2019–2024 on January 4, 2018, which is progressing toward displacing the current proposal.[102] In contrast to Obama-era policies, the new proposal includes forty-seven potential lease sales: "19 sales off the coast of Alaska, 7 in the Pacific Region, 12 in the Gulf of Mexico, and 9 in the Atlantic Region."[103] To date, this proposal

96 42 U.S.C.A. § 4321 (Westlaw through Pub. L. No. 116-91).

97 Marino & Gower, *supra* note 46, at 13.

98 *Id.*; *see also* 42 U.S.C.A. § 4332(2)(C) (Westlaw through Pub. L. No. 116-91).

99 *See generally* 40 C.F.R. § 1508.28 (2019).

100 *See Programmatic Environmental Impact Statement for the 2019–2024 National Outer Continental Shelf Oil and Gas Leasing Program*, BUREAU OCEAN ENERGY MGMT., https://www.boem.gov/National-Program-Learn/#peis [https://perma.cc/874D-UZK5] (last visited Feb. 19, 2020).

101 *Id.*

102 *See generally* DPP, *supra* note 2.

103 Press Release, Dep't of the Interior, Sec'y Zinke Announces Plan for Unleashing America's Offshore Oil and Gas Potential (Jan. 4, 2018), https://www.doi.gov/pressreleases/secretary-zinke-announces-plan-unleashing-americas-offshore-oil-and-gas-potential [https://perma.cc/PY2V-4BKG].

comprises the largest number of lease sales ever proposed for the National OCS Program's five-year lease schedule.[104]

Furthermore, the Trump Administration published a Notice of Intent to prepare an EIS for its proposed five-year lease schedule concurrently with the Draft Proposed Program (DPP) on January 8, 2017, in the Federal Register.[105] The comment period for both the DPP and the Notice of Intent to prepare an EIS concluded on March 9, 2018, with over two million comment submissions.[106] Subsequently, the Secretary of the Interior will publish its final proposed program under OCSLA and its draft EIS under NEPA.

III
LEASING STAGE

Once BOEM establishes its final draft for a five-year program, it can begin leasing planning areas for development. This process begins with BOEM publishing "Calls for Information and Nominations" in the Federal Register, which invites input on what areas it should lease.[107] Once BOEM considers submitted comments and makes its determination, it will recommend "areas identified for environmental analysis and consideration for leasing" to the Secretary of the Interior.[108] Subsequently, BOEM will forward a proposed notice of sale, following the Secretary of the Interior's approval, to the governor of any affected state.[109]

At this stage in the process, OCSLA provides affected states an opportunity to offer comments regarding the size, timing, and location of the proposed lease sale.[110] Though the Secretary of the Interior may consider local governments' concerns and suggestions, the Secretary of the Interior must follow the governor's recommendations if the

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104 *Id.* ("This is the largest number of lease sales ever proposed for the National OCS Program's 5-year lease schedule.").

105 Notice of Availability of the 2019-2024 Draft Proposed Outer Continental Shelf Oil and Gas Leasing Program and Notice of Intent to Prepare a Programmatic Environmental Impact Statement, 83 Fed. Reg. 829 (Jan. 8, 2018).

106 *Notice of Availability (NOA) of the 2019-2024 Draft Proposed Outer Continental Shelf (OCS) Oil and Gas Leasing Program and Notice of Intent (NOI) to Prepare a Programmatic Environmental Impact Statement (EIS)*, REGULATIONS.GOV, https://www.regulations.gov/docket?D=BOEM-2017-0074 [https://perma.cc/3N9H-7C2X] (last visited Feb. 19, 2020).

107 *See* 30 C.F.R. § 556.23(b) (2019).

108 30 C.F.R. § 556.26(a) (2019).

109 30 C.F.R. § 556.29 (2019).

110 30 C.F.R. § 556.31 (2019).

recommendation achieves a "reasonable balance between the National interest and the well-being of the citizens of the affected State."[111] Subsequently, BOEM will publish the proposed notice of sale, followed by a comment period.[112] Once BOEM considers and incorporates comments as necessary, it will publish a notice of sale, which includes the terms and conditions of sale, in the Federal Register.[113]

Throughout the leasing and sale process, the Secretary of the Interior must also comply with requirements under the CZMA, NEPA, and OCSLA to ensure that states and the interested public have opportunities to intervene.[114]

A. The Coastal Zone Management Act

In contrast with the planning stage, states have much more ability and control over the leasing stage under the CZMA. Though court interpretations initially deterred states' ability to push back on federal OCS development, subsequent amendments strengthened the role of state participation in the leasing stage.

Initial challenges to halt OCS development at the leasing stage were unsuccessful.[115] The Supreme Court held that the consistency provision was unavailable in the leasing stage because it triggered only a limited preliminary activity that did not "directly affect" the state's coastline.[116] Thus, the state could challenge only offshore oil and gas development under the consistency provision at the time specific exploration plans or development and production plans were submitted for federal approval.[117]

Shortly thereafter, the 1990 amendments to the CZMA emboldened California to attempt enforcing adherence to its management plan through the consistency provision.[118] The 1990 amendments essentially overruled previous cases by removing "directly" from "directly affects" and thus expanded the circumstances where the consistency

111 § 556.31(b).

112 30 C.F.R. § 556.32 (2019).

113 *Id.*

114 *BOEM Governing Statutes*, BUREAU OCEAN ENERGY MGMT., https://www.boem.gov/Governing-Statutes [https://perma.cc/6XT6-CFBB] (last visited Feb. 19, 2020).

115 *See* Sec'y of the Interior v. California, 464 U.S. 312, 338 (1984).

116 *Id.*

117 *See id.*

118 *See* California v. Norton, 150 F. Supp. 2d 1046, 1052 (N.D. Cal. 2001).

provision applies. Accordingly, the 1990 amendments require federal agencies to find their activities are consistent with a state's management plan if such activity "affects" a state's coastline, removing the need to show the activity "directly affects" the coastline.[119] Indeed, Congress enacted the Act with the intent to clarify that offshore oil and gas projects are subject to the CZMA consistency determinations.[120] Accordingly, a leasing entity must provide the state with a consistency determination that assures the significant decision to extend the life of oil exploration and production is consistent with the state's coastal zone management program.[121]

After the 1990 amendments passed, the Trump Administration's leasing plan would seemingly be unable to proceed in states that have a moratorium on offshore oil and gas. However, the courts have not recognized the consistency provision as a veto power, and in 2006, the Bush administration amended the CZMA:

> [I]n all foreseeable instances, lease suspensions would not be subject to federal consistency review since (1) in general, they do not authorize activities with coastal effects, and (2) if they did contain activities with coastal effects, the activities and coastal effects would be covered in a State's review of a previous lease sale, an EP or a DPP.[122]

This regulation runs counter to the 1990 amendments, which allow states to demand an early consistency review where "future, indirect effects shall be considered in the context of a proposed federal activity."[123] However, the regulations may force the courts to analyze Congress's intent to determine if the regulations are similar to the Act itself.[124] Nevertheless, states still have considerable ability to enforce their consistency provision in the subsequent exploration or development and production stages.

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119 Linda Krop, *Defending State's Rights Under the Coastal Zone Management Act—State of California v. Norton*, 8 SUSTAINABLE DEV. L. & POL'Y 54, 56 (2007).

120 *Norton*, 150 F. Supp. 2d at 1052; *see also* 16 U.S.C.A. § 1456(c)(3)(B) (Westlaw through Pub. L. No. 116-91).

121 *Norton*, 150 F. Supp. 2d at 1054; *see also* Patrick B. Sanders, *Blanco v. Burton: Louisiana's Struggle for Cooperative Federalism in Offshore Energy Development*, 69 LA. L. REV. 255, 270–74 (2008) (describing case where the Court held the MMS unlawfully failed to comply with State CZP in violation of the CZMA's consistency determination and encouraged a settlement agreement).

122 Coastal Zone Management Act Federal Consistency Regulations, Final Rule, 71 Fed. Reg. 788, 792 (Jan. 5, 2006).

123 Krop, *supra* note 119, at 58.

124 *Id.*

B. The Outer Continental Shelf Lands Act

Though OCSLA serves as a procedural statute in guiding the leasing process, it also includes substantive requirements regarding the consideration of state recommendations.[125] Drafters of the Act required federal entities to "insure that Governors of affected States, and local government executives within such States, have a leading role in OCS decisions and particularly as to potential lease sales and development and production plans."[126] These requirements usually become actionable in the exploration and development stages of OCS development because they have significant impacts on coastal states.[127]

Specifically, OCSLA states that "the Secretary [of the Interior] shall accept recommendations of the Governor . . . if he determines, after having provided the opportunity for consultation, that they provide for a reasonable balance between the national interest and the well-being of the citizens of the affected State."[128] Accordingly, the Secretary may decide not to accept the governor's recommendations if they do not strike a reasonable balance between the national and individual states' interests.[129] Moreover, a Secretary's rejection of a governor's recommendation is final and not a basis for judicial review or enjoining a lease sale.[130] Thus, despite the powerful language that mandates federal activities to adhere to state recommendations, the Act's requirements are generally not effective in giving states an opportunity to voice concerns and participate in OCS development decisions.

Courts have consistently upheld rejections of state input despite the statute's clear language.[131] Generally, courts give enormous deference to the Secretary to reject state plans in the leasing stage as long as the Secretary's determination is not arbitrary or capricious.[132] States have challenged a Secretary's rejection of governors' recommendations at

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125 43 U.S.C.A. § 1344(c) (Westlaw through Pub. L. No. 116-91).

126 *See* H.R. REP. NO. 95-590 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 1450, 1558.

127 Schirmer, *supra* note 56, at 687.

128 43 U.S.C.A. § 1345(c) (Westlaw through Pub. L. No. 116-91).

129 § 1345(c)–(d).

130 § 1345(d).

131 *See* California v. Watt (*Watt III*), 683 F.2d 1253 (9th Cir. 1982), *rev'd on other grounds sub nom.* Sec'y of the Interior v. California, 464 U.S. 312 (1984); *cf.* Foundation v. Watt, 560 F. Supp. 561 (*Watt IV*) (D. Mass. 1983), *aff'd sub nom.* Massachusetts v. Watt, 716 F.2d 946 (*Watt V*) (1st Cir. 1983); Massachusetts v. Clark, 594 F. Supp. 1373 (D. Mass. 1984).

132 *See* Tribal Vill. of Akutan v. Hodel, 869 F.2d 1185, 1190 (9th Cir. 1988).

the leasing stage several times with varying interpretations.[133] The Ninth Circuit seems to downplay the binding nature of the governor's recommendations on federal actions, allowing the Secretary to easily reject the governor's recommendation.[134] In contrast, Massachusetts courts emphasize that the Secretary "must accept the Governor's recommendations unless he finds the recommendations do not provide a 'reasonable balance' between the national interest embodied in OCSLA and the well-being of the citizens of the Commonwealth."[135]

Thus, the requirement to adhere to governor recommendations gives states some utility to raise concerns to the Secretary of the Interior, though they are unable to enforce them.[136] Generally, however, courts will not overturn a Secretary's determination to reject the governor's recommendations at the leasing stage.[137]

C. The National Environmental Policy Act

Though NEPA plays a role in the leasing stage, the tiering framework relaxes the specificity required in a NEPA analysis at the leasing stage and consequently inhibits states' ability to seek relief under NEPA.[138] Interestingly, only one provision within OCLSA requires a NEPA analysis, and it is located in the development and production plans section of the Act.[139] Regardless of OCSLA's silence on the necessity of a NEPA analysis in the leasing stage, the analysis is required by implication prior to any lease sale due to the anticipated impacts the sale would have on the environment.[140] Consequently, once BOEM publishes the notice of lease sale in the Federal Register, BOEM must prepare an EIS for the proposed planning areas.[141] However, in multistage leasing programs, "[the] obligation to fully comply with NEPA do[es] not mature until leases are issued," because

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133 *See id.*; *see also Watt III*, 683 F.2d at 1253, *rev'd on other grounds sub nom. California*, 464 U.S. at 312; *cf. Watt IV*, 560 F. Supp. at 561, *aff'd sub nom. Watt V*, 716 F.2d at 946; *Massachusetts*, 594 F. Supp. at 1373.

134 *See Tribal Vill. of Akutan*, 869 F.2d at 1190; *Watt III*, 683 F.2d at 1253.

135 *Massachusetts*, 594 F. Supp. at 1387.

136 Wiygul, *supra* note 87, at 114–15.

137 *Id.* at 114.

138 *See* 40 C.F.R. § 1508.28 (2019).

139 RIESER ET AL., *supra* note 17, at 400; *see also* 43 U.S.C.A. § 1351(e)(1) (Westlaw through Pub. L. No. 116-91).

140 RIESER ET AL., *supra* note 17, at 400; *see also* 43 U.S.C.A. § 1346 (Westlaw through Pub. L. No. 116-91).

141 *See* 40 C.F.R. § 1502.4 (2019).

only at that point has there been an "irreversible and irretrievable commitment of resources."[142]

Thus, the EIS need not fully comply with statutory requirements under NEPA at the leasing stage. However, unlike the PEIS undertaken in the planning process, the EIS in the leasing process is comparatively more thorough and specifically requires assessing environmental impacts on a "fine geographic scale," including alternatives to the proposed action and potential mitigation measures.[143] In addition, the EIS must consider the direct effects of leasing and cumulatively "consider the environmental impact of future exploration and development activity in preparing environmental analyses in conjunction with the [leases] in this case."[144]

However, despite the incremental increase in EIS specificity and completeness at the leasing stage, the analysis still does not require a level of stringency that provides states the ability to challenge an EIS's completeness under NEPA. The lax requirement at the leasing stage is problematic because it is the last opportunity to review the cumulative environmental impacts of the leasing area as a whole.[145] Similar to the planning stage, courts generally adhere to the tiering rationale and allow federal agencies to omit information about adverse effects to specific species in the leasing area in reliance that the effects will be analyzed at a site-specific level in subsequent processes.[146]

Furthermore, due to the Act's overall procedural nature, even a successful NEPA action can deter offshore oil and gas only to the extent that requiring a revision of the analysis could render OCS development less attractive and thus influence an agency's final decision.[147]

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142 Ctr. for Biological Diversity v. U.S. Dep't of Interior, 563 F.3d 466, 480 (D.C. Cir. 2009) (internal quotation marks omitted).

143 Marino & Gower, *supra* note 46, at 15.

144 League for Coastal Prot. v. Norton, No. C 05-0991 CW, 2005 WL 2176910, at *5 (N.D. Cal. Aug. 31, 2005).

145 M. David Kurtz, *Managing Alaska's Coastal Development: State Review of Federal Oil and Gas Lease Sales*, 11 ALASKA L. REV. 377, 398 (1994) ("The paramount importance of the lease sale stage emanates from the fact that it is the only opportunity to review the entire lease sale area as a whole.").

146 *See* Native Vill. of Point Hope v. Jewell, 740 F.3d 489, 498 (9th Cir. 2014) ("missing information from the FEIS and SEIS is not 'essential' to informed decision-making at the lease sale stage").

147 Schirmer, *supra* note 56, at 689.

For example, Massachusetts prevailed in its NEPA claim on an EIS's inadequacy because the EIS covered twenty-five million acres, which was too large an area to be adequately site specific.[148] Thus, the court held the geographic scale considered in the analysis would "dilute" necessary protective measures and potential harms.[149] Furthermore, the court found that when the initial twenty-five-million-acre project area that was originally proposed was substantially reduced, the change in scale rendered the EIS insufficient because it was no longer representative of the sale that could legally occur.[150] However, the judgment on the NEPA claim did not enjoin offshore oil and gas development, rather, the judgment required federal agencies to reconduct their analysis on a smaller geographic scale.

D. The Endangered Species Act

BOEM must operate within the bounds of federal law in the development of offshore oil and gas.[151] Accordingly, BOEM must ensure that OCS oil and gas development complies with federal acts such as the Clean Air Act and Clean Water Act.[152] Among these federal acts, the Endangered Species Act (ESA) provides states the ability to challenge OCS development if it would jeopardize an endangered or threatened species.[153]

BOEM is responsible for adhering to the ESA throughout the OCS development process.[154] Yet, in the development process, the oil and gas operators are beginning to drill, and BOEM is no longer the primary actor in the OCS.[155] Consequently, BOEM must ensure that the development that would foreseeably result from the lease and sale "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat."[156]

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148 *See* Massachusetts v. Clark, 594 F. Supp. 1373, 1383 (D. Mass. 1984).

149 *Id.*

150 *Id.* at 1381.

151 *BOEM Governing Statutes*, *supra* note 114.

152 *Id.*

153 *See, e.g.*, Oceana v. Bureau of Ocean Energy Mgmt., 37 F. Supp. 3d 147, 174 (D.D.C. 2014) (case challenging BOEM's actions for failure to comply with the Endangered Species Act).

154 *See* 16 U.S.C.A. § 1536(a)(2) (Westlaw through Pub. L. No. 116-91).

155 *See* Kurtz, *supra* note 145, at 381 ("The lessee must provide further environmental reports explaining any planned exploration or development activities once the lease is sold.").

156 16 U.S.C.A. § 1536(a)(2).

Like other federal agencies, BOEM must consult with the U.S. Fish and Wildlife Service or National Marine Fisheries Service.[157] The consulted federal agency will then issue a biological opinion, which identifies potential effects of the federal action on the endangered species and provides alternatives to the proposed action to avoid harm to the species.[158] Furthermore, the agency must not make an "irreversible or irretrievable commitment of resources."[159]

Once again, the "tiering" principle essentially bars successful ESA claims at the leasing stage. A lease sale will generally not violate the ESA because the granting of a lease does not constitute an "irreversible or irretrievable commitment of resources."[160] Thus, a challenge under the ESA would likely be more effective in the development process because many endangered species are at a greater risk with development activities, such as potential oil spills and increased traffic.[161]

IV
EXPLORATION STAGE

Generally, during the exploration phase, the ability to rely on documents in previous stages using the "tiering" principle combined with an agency's heavy deference severely inhibit states' ability to halt development at this stage.[162] Though challenges at this stage may delay drilling activities, this Article's research failed to identify any drilling project that agencies or courts canceled due to egregious environmental harm that would result. Accordingly, this section will provide a brief discussion of OCSLA, NEPA, the ESA, and the CZMA's role in the exploration stage without providing an in-depth analysis of legal claims that are technically available.

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157 *See id.*

158 *See* § 1536(a)(3).

159 § 1536(d).

160 *See* Conservation Law Found. v. Andrus, 623 F.2d 712, 714–15 (1st Cir. 1979); Vill. of False Pass v. Clark, 733 F.2d 605, 610 (9th Cir. 1984); Defs. of Wildlife v. BOEM, 871 F. Supp. 2d 1312, 1326–27 (S.D. Ala. 2012).

161 *See* Wiygul, *supra* note 87, at 122.

162 *See, e.g.*, Native Vill. of Point Hope v. Salazar, 680 F.3d 1123, 1135 (9th Cir. 2012) ("BOEM's decision that Shell's exploration plan complied with OCSLA's requirements is entitled to deference and is supported by the record as a whole.").

A. The Outer Continental Shelf Lands Act

OCSLA guides the exploration stage of the OCS development and requires an operator preparing to drill wells on an OCS lease to submit an exploration plan (EP).[163] An EP is a detailed report that requires documentation of the flora and fauna of environmentally sensitive areas within the project area; a description of the drilling program; an Oil Spill Contingency Plan; a description of the onshore support facilities required; and a projection of air pollutant emissions resulting from the project.[164]

Once an applicant completes an EP, it must submit the EP to BOEM to review the submission and either identify problems and deficiencies or deem the plan submitted.[165] However, BOEM can reject an EP only if it would "probably cause serious harm or damage to life" and can modify an EP only if it conflicts with OCSLA or its regulations, which provides BOEM great latitude in approving EPs.[166] Though interested parties may challenge BOEM's determination to approve, modify, or disapprove an EP,[167] the deferential standard has only delayed—but not denied—an applicant's ability to implement its EP.[168]

B. The National Environmental Policy Act

The approval or disapproval of an EP is a "major federal action" that attaches NEPA and ESA requirements.[169] Regardless, until 2012, EPs qualified for a categorical exclusion under NEPA, removing the requirement for applicants to prepare an analysis of environmental impacts.[170] However, the Deepwater Horizon oil spill in 2010 prompted reorganization in the Act's administration;[171] under the new structure,

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163 43 U.S.C.A. § 1340(c)(1) (Westlaw through Pub. L. No. 116-91).

164 30 C.F.R. § 250.33(a)–(b) (1997) (The Gulf of Mexico region is exempted from the requirement to describe the required onshore support facilities.).

165 30 C.F.R. § 550.231 (2019).

166 § 250.33(i)(3).

167 43 U.S.C.A. § 1349(c)(2)–(3) (Westlaw through Pub. L. No. 116-91).

168 Native Vill. of Point Hope v. Salazar, 680 F.3d 1123, 1135 (9th Cir. 2012) ("BOEM's decision that Shell's exploration plan complied with OCSLA's requirements is entitled to deference and is supported by the record as a whole.").

169 *See* Alaska Wilderness League v. Jewell, 788 F.3d 1212, 1225 (9th Cir. 2015).

170 *See Managing the NEPA Process—Minerals Management Service*, U.S. DEP'T INTERIOR, https://www.doi.gov/elips/search?template=All&query=%22Chapter%2015%3A%20MANAGING%20THE%20NEPA%20PROCESS%E2%80%94MINERALS%20MANAGEMENT%20SERVICE%22&archived=0 [https://perma.cc/6TJP-8XVY] (last visited Feb. 19, 2020).

171 *Native Vill. of Point Hope*, 680 F.3d at 1127.

BOEM was responsible for approving EPs and the Bureau of Safety and Environmental Enforcement (BSEE) had authority to review oil spill contingency plans.[172] Importantly, the reorganization expressly conditioned EP approval on the receipt of an environmental analysis under NEPA.[173]

Despite the imposition of NEPA requirements, the tiering framework combined with agency deference renders challenges under NEPA at the exploration stage largely unsuccessful. The inapplicability of NEPA predominately arises from the "rule of reason" that relieves agencies from preparing a full EIS for federal actions that arise from nondiscretionary duties.[174] In determining applicable NEPA requirements for Oil Spill Contingency Plans, courts recognize BSEE's approval of an Oil Spill Contingency plan as a nondiscretionary duty because BSEE must approve the plan upon a finding it meets OCSLA's requirements.[175] Accordingly, the preparation of a NEPA analysis when preparing an EP "would merely 'require an agency to prepare a full EIS due to the environmental impact of an action it could not refuse to perform,' which would clearly violate NEPA's 'rule of reason.' "[176]

Likewise, NEPA analyses required for BOEM's approval of an EP generally heavily reference previously prepared broad environmental analyses that are subject to agency deference[177] or issue a "Finding of No Significant Impact," which waives the requirement to prepare an environmental analysis.[178] Consequently, a comprehensive report that analyzes the environmental impact that occurs from exploratory

172 30 C.F.R. § 250.1918 (2013).

173 30 C.F.R. § 550.231 (2019).

174 *Alaska Wilderness League*, 788 F.3d at 1225.

175 *Id.* at 1226 ("BSEE is required to approve an OSRP that meets the statute's requirements, which the agency reasonably interprets to be the checklist of six requirements set forth in § 1321(j)(5)(D).").

176 *Id.* (quoting Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 769 (2004)).

177 *See* Oceana v. Bureau of Ocean Energy Mgmt., 37 F. Supp. 3d 147, 154 (D.D.C. 2014) ("When an agency is evaluating scientific data within its technical expertise, an extreme degree of deference to the agency is warranted.") (quoting Nat'l Comm. for the New River v. F.E.R.C., 373 F.3d 1323, 1327 (D.C. Cir. 2004)); Defs. of Wildlife v. Bureau of Ocean Energy Mgmt., 684 F.3d 1242, 1247 (11th Cir. 2012) ("The Shell EA 'tiers' from two prior EIS's: the 2007 Multisale EIS covering eleven Gulf lease sales in the 2007–2012 Multisale and the 2009 supplemental EIS for seven remaining lease sales in the 2007–2012 Multisale.").

178 Native Vill. of Point Hope v. Salazar, 680 F.3d 1123, 1128 (9th Cir. 2012) (upholding BOEM's Finding of No Significant Impact).

drilling is generally not a successful claim for entities opposing federal offshore oil and gas projects from occurring.

C. The Endangered Species Act

The ESA is largely inapplicable at the exploration stage for many of the same reasons as NEPA and therefore fails to effectively deter offshore oil and gas in the exploration stage. The ESA's inapplicability generally follows the same analysis as NEPA in the exploration stage. Consequently, "[e]ven if there is agency 'action,' . . . ESA consultation is triggered only if 'there is *discretionary* Federal involvement or control,' "[179] because "consultation would be merely a 'meaningless exercise' if the agency lacks the power to implement changes that would benefit endangered species."[180] Since approving an Oil Spill Contingency plan is a nondiscretionary duty, the ESA requirements do not affect the BSEE's approval of the plan.[181]

In addition, the discretion afforded to agencies allows BOEM to rely on previous analyses through the tiering framework. In fact, in a 2012 case, courts upheld BOEM's EP approval despite the agency's reliance on a U.S. Fish and Wildlife Service consultation that BOEM itself acknowledged may not be accurate due to the Deepwater Horizon disaster and was in the process of being revised.[182] Nevertheless, the court mentioned that BOEM retains the authority to suspend activities upon a finding that the action would jeopardize threatened or endangered species.[183]

D. The Coastal Zone Management Act

Once the EP is complete, the governor and management agency of the affected state receives a copy of the document. Regulations require the regional supervisor of the project to consult with the state regarding the governor's comments and concerns with the EP and ensure consistency with a federally approved Coastal Management Plan.[184]

Though the CZMA consistency provision during the exploration stage provides states with some ability to participate in EP authorization, it does not allow states to reject plans based on

179 *Alaska Wilderness League*, 788 F.3d at 1219 (quoting 50 C.F.R. § 402.03 (2012) (alteration in original)).

180 *Id.* at 1219 (quoting Sierra Club v. Babbitt, 65 F.3d 1502, 1509 (9th Cir. 1995)).

181 *Id.*

182 *Defs. of Wildlife*, 684 F.3d at 1252.

183 *Id.* at 1253.

184 43 U.S.C.A. § 1340(c)(1) (Westlaw through Pub. L. No. 116-91).

environmental considerations.[185] The consistency provision unofficially allows states to negotiate with the lessees to require protections beyond what BOEM requires.[186] However, such authority fails to provide states the ability to block offshore oil and gas development.[187]

V
DEVELOPMENT AND PRODUCTION STAGE

After the exploration stage, any additional drilling can occur only with the submission of a Development and Production Plan (DPP).[188] An operator must submit a DPP for developing OCS resources in accordance with a lease in regions where significant development has not taken place.[189] Though a DPP includes much of the same information as an EP, it requires more details regarding the operation of the proposed project: (1) current geological and geophysical information, (2) environmental safeguards that will be put in place, (3) anticipated discharges and disposal plans, assessment of cumulative environmental impacts, (4) alternatives to the proposed action, (5) an expected rate of development and production, and (6) a time schedule for performance.[190]

A. The Coastal Zone Management Act

In the development and production stage, states are the ultimate authority on whether a plan satisfies a consistency review.[191] Further, if a state determines that a DPP is inconsistent with a coastal zone management plan, the only way to appeal the consistency determination is through an administrative appeal, where states' determinations are per se valid.[192] Though states cannot outrightly ban a project from development, they can use the consistency provision to

185 John K. Van de Kamp & John A. Saurenman, *Outer Continental Shelf Oil and Gas Leasing: What Role for the States?*, 14 HARV. ENVTL. L. REV. 73, 107 (1990).

186 *Id.*

187 *Id.* at 107.

188 Wiygul, *supra* note 87, at 129.

189 *Id.*

190 30 C.F.R. § 250.34 (1997); 43 U.S.C.A. § 1351(c) (Westlaw through Pub. L. No. 116-91).

191 Wiygul, *supra* note 87, at 160–61.

192 *Id.*

require additional information, impose additional conditions on DPP, and slow down the development process.[193]

An administrative appeal is available through the Secretary of Commerce, which will review the consistency provision or determine if inconsistency is necessary in the interest of national security.[194] NOAA regulations have set forth a three-part test to determine if oil and gas development is necessary in the interest of national security and therefore exempt from the consistency provision, according to the following guidelines:

> (a) The activity furthers the national interest as articulated in § 302 or § 303 of the Act, in a significant or substantial manner,
>
> (b) The national interest furthered by the activity outweighs the activity's adverse coastal effects, when those effects are considered separately or cumulatively [, and]
>
> (c) There is no reasonable alternative available [e.g., location, design, etc.] which would permit the activity to be conducted in a manner consistent with the enforceable policies of the management program.[195]

Critically, as of 2019, federal agencies have never rejected a DPP on the basis of environmental harm.[196] Nevertheless—and despite any direct authority from the CZMA—California, Florida, and Alaska have used the consistency provision to impose additional conditions on exploration and development plans and slow down the development process.[197] States have used their authority under the consistency provision "to require mitigation measures such as the barging of drilling muds to shore, extra precautions against oil spills, and extra training for personnel."[198] Despite oil companies' opposition to the states' ability to condition a consistency determination on additional requirements, it is rarely challenged because of the lengthy appeal process that can render the project unprofitable. Consequently, the consistency provision in the development stage is likely the primary

193 *Id.* at 161.

194 16 U.S.C.A. § 1456(c)(3)(A) (Westlaw through Pub. L. No. 116-91).

195 15 C.F.R. § 930.121 (2020).

196 *See, e.g.*, California v. Norton, 311 F.3d 1162, 1171 (9th Cir. 2002) (acknowledging that DPP activities will affect the natural resources of the coastal zone but enjoins agency action on procedural grounds).

197 Wiygul, *supra* note 87, at 161–62.

198 *Id.*

means for coastal states to influence an OCS exploration and development operation.

Despite states' general lack of ability to deter oil and gas development through the CZMA, supporters of offshore oil and gas development are looking for further ways to hinder state participation in the management of their coasts.[199] In June 2018, House Republicans prepared a proposal that would impose heavy penalties on states that disapprove of drilling offshore in over half of the lease blocks off their coasts.[200] An Arizona representative characterized the proposal as "a ransom note in cheap disguise."[201] However, there has been no further discussion indicating a serious intent to proceed with the bill.[202]

B. The Outer Continental Shelf Lands Act

The required DPP in the development and production phase gives states an opportunity to deter offshore oil and gas because the documentation is actionable under OCSLA, which imposes specific procedures for challenging a DPP. Complaints must be filed in the U.S. Courts of Appeals in the circuit where the affected state is located.[203] However, no litigation has been filed under OCSLA in the U.S. Court of Appeals regarding exploration and development because states seem to have more success enforcing their concerns under the CZMA consistency determination.

C. The National Environmental Policy Act

Though opportunities exist for states to indirectly challenge a DPP or an EP under NEPA, similar to OCSLA, states rarely pursue a NEPA challenge in the exploration and development stage because the CZMA consistency process has provided a superior means of deterring offshore oil and gas.[204]

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199 *See* Dino Grandoni, *House Republicans Propose Financial Penalties for States That Block Offshore Drilling*, WASH. POST (June 14, 2018), https://www.washingtonpost.com/news/energy-environment/wp/2018/06/13/house-republicans-propose-financial-penalties-for-states-that-block-offshore-drilling [https://perma.cc/P538-6H5L].

200 *Id.*

201 *Id.*

202 *Legislative: Hearing on Oil Industry Resource Ransom Act*, NAT. RESOURCES COMMITTEE (June 14, 2018), https://naturalresources.house.gov/hearings/hearing-on-oil-industry-resource-ransom-act [https://perma.cc/B3G9-5SKT].

203 43 U.S.C.A. § 1349(c)(2) (Westlaw through Pub. L. No. 116-91).

204 Wiygul, *supra* note 87, at 134.

CONCLUSION AND CRITIQUE

In analyzing state powers to deter federal offshore oil and gas projects, several recurring themes become apparent. First, the "tiering approach" recommended through OCSLA and the courts renders the statutory mechanisms put in place to encourage state participation in the development of OCS resources largely symbolic. In the initial stages of the process, analyses require little specificity, which essentially allows the federal government to have complete control over the planning and leasing stages. Indeed, cumulative impacts of the analysis are rarely required at the early stages in the process. While statutory schemes include avenues for states to voice their concerns, no real enforceable powers exist in determining whether an area will be leased or not.

This framework seems structured on the basis that potential environmental problems will be addressed at later stages in the process when more site-specific analyses are underway. While logical in theory, states generally have very little power to enforce their own laws and policies at later stages in the process. Though the CZMA consistency review gives states some power over operational matters, it generally does not allow for states to influence the decision to proceed with development. Thus, a Secretary of the Interior should satisfy a greater burden in justifying why he or she rejected state recommendations earlier in the process.

Second, the environmental reports under NEPA and OCSLA generally analyze costs and benefits to the nation as a whole rather than the cost and benefit to coastal states directly affected by the development. Moreover, costs are generally difficult to accurately predict due to large leasing sizes that inhibit an analysis's ability to analyze the environment in detail. Though the Bush and Obama Administrations generally used smaller leasing areas, the statute does not mandate the size of the leasing area and the leasing area can potentially be expanded again in the Trump Administration. Consequently, the analysis of a project's costs may appear even more diluted when compared to the harm suffered to the country as a whole.

Third, the structure in place does not allow for a prohibition on development on the basis of environmental harm. As previously mentioned, NEPA is primarily procedural and thus imposes no substantive requirements on developers of OCS resources. Further, OCSLA imposes a very high standard to enjoin drilling on the basis of environmental concerns. Thus, the arbitrary and capricious standard

should be lowered to give states a greater opportunity to challenge an agency decision on the basis of its analysis of environmental harms.

Despite the statutory scheme's desperate need for reform, the complexity of the offshore oil and gas development process compounded with increasing opposition and awareness of climate change will likely stall oil and gas operations until a new administration. At which point, OCS oil and gas drilling enthusiasm can quickly lose the political momentum necessary to proceed. Thus, bureaucratic hurdles, state moratoriums, political disfavor, and obstructionist litigation will likely be coastal states' most effective strategy for deterring offshore oil and gas until drastic reforms can ensure that states' concerns are adequately considered in the development of OCS oil and gas resources.