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14. ABSTRACT

The Department of the Interior's Bureau of Ocean Energy Management's recent proposal to open the vast majority of the Outer Continental Shelf to oil and gas leasing raises new questions regarding potentially conflicting uses of the ocean, including military use for training and readiness activities in some of the areas proposed for oil and gas development. Yet with the Trump Administration's revocation of many components of the former National Ocean Policy, including coastal and marine spatial planning and the requirement for federal participation in regional ocean planning processes, there is currently no comprehensive federal policy for deconflicting competing federal, state, and local ocean uses across jurisdictional lines. Ocean governance in the United States remains splintered across multiple agencies at both the federal and local level and divides responsibility across sometimes arbitrary geographic lines. To proactively manage ocean user conflicts resulting from potentially expanded oil and gas development across multiple sectors and regulatory schemes, Congress should amend the Outer Continental Shelf Lands Act to utilize federal-state collaborative marine spatial planning in Outer Continental Shelf leasing determinations.

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Bidding Adieu to the National Ocean Policy: Exploring Offshore Drilling Policies and the Need for Integrated Coastal and Marine Spatial Planning in the Trump Era

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Lieutenant Commander Audrey Nichols serves in the U.S. Navy Judge Advocate General's Corps. This paper was submitted in partial satisfaction of the requirements for the degree of Master of Laws in Government Procurement at The George Washington University Law School. The views expressed in this paper are solely those of the author and do not reflect the official policy or position of the United States Navy, Department of Defense, or U.S. Government.

Abstract

Bidding Adieu to the National Ocean Policy:
Exploring Offshore Drilling Policies and the Need for Integrated Coastal and Marine Spatial Planning in the Trump Era

The Department of the Interior's Bureau of Ocean Energy Management's recent proposal to open the vast majority of the Outer Continental Shelf to oil and gas leasing raises new questions regarding potentially conflicting uses of the ocean, including military use for training and readiness activities in some of the areas proposed for oil and gas development. Yet with the Trump Administration's revocation of many components of the former National Ocean Policy, including coastal and marine spatial planning and the requirement for federal participation in regional ocean planning processes, there is currently no comprehensive federal policy for deconflicting competing federal, state, and local ocean uses across jurisdictional lines. Ocean governance in the United States remains splintered across multiple agencies at both the federal and local level and divides responsibility across sometimes arbitrary geographic lines. To proactively manage ocean user conflicts resulting from potentially expanded oil and gas development across multiple sectors and regulatory schemes, Congress should amend the Outer Continental Shelf Lands Act to utilize federal-state collaborative marine spatial planning in Outer Continental Shelf leasing determinations.

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I. INTRODUCTION

On January 4, 2018, then-Secretary of the Interior Ryan Zinke released the Bureau of Ocean and Energy Management (BOEM) draft proposed plan to open 90 percent of the United States Outer Continental Shelf (OCS) to potential oil and gas leasing from 2019 to 2024 in furtherance of President Donald Trump's "America-First Energy Strategy" to promote energy independence, stimulate the economy, strengthen national security, and enhance military readiness.[1] "I am going to lift the restrictions on American energy, and allow this wealth to pour into our communities," declared President Trump.[2] According to the Department of the Interior's (DOI's) press release, BOEM's draft plan proposes the largest number of oil and gas sales in United States history, with a total of 47 lease sales over a five-year period in the Gulf of Mexico, Alaska, Atlantic, and Pacific regions.[3] This plan presents a staggering shift from the scope of the current oil and gas leasing program, which places 94 percent of the OCS off-limits for oil and gas exploration.[4] BOEM's proposed plan[5] potentially opens areas of the

[1] *See* DEP'T OF INTERIOR, BOEM, 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); Exec. Order No. 13795, 82 Fed. Reg. 20,815 (May 3, 2017). Executive Order 13795, "Implementing an America-First Offshore Energy Strategy," released on April 28, 2017, called for the Secretary of the Interior to review the 2017-2022 OCS leasing program and reconsider certain Obama-era offshore drilling policies. Press Release, Dep't of the Interior (Apr. 28, 2017), Secretary Zinke Commends President Trump's Offshore Executive Order, https://www.doi.gov/pressreleases/secretary-zinke-commends-president-trumps-offshore-executive-order)

[2] Press Release, Dep't of the Interior, *supra* note 1.

[3] Press Release, Dep't of Interior, Secretary Zinke Announces Plan 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.

[4] *Id.* The five-year leasing plan under which BOEM is currently operating covers the period from 2017-2022.

[5] The Draft Proposed Plan for 2019-2024 will replace the 2017-2022 Program upon completion, as directed by Executive Order 13795 of April 28, 2017 and Secretary's Order 3350 of May 1, 2017. *See* BOEM, *National OCS Oil and Gas Leasing Program*, https://www.boem.gov/National-OCS-Program (last visited Apr. 14, 2019).

OCS for business that have not seen oil and gas sales since the 1980s.[6] Moreover, the proposed plan overturns previous efforts by the Obama administration to block offshore drilling in large areas of the Atlantic and Arctic Oceans.[7]

The area targeted for oil and gas development in BOEM's proposed plan, the OCS, includes 1.7 billion acres of "submerged lands, subsoil, and seabed" located offshore and subject to federal regulation under the Outer Continental Shelf Lands Act (OCSLA).[8] Geographically speaking, the OCS refers to that part of the Continental Shelf which lies beyond the historic three-mile boundaries of coastal states.[9] However, the potential effects of oil and gas development would not simply be felt hundreds of miles offshore. Offshore oil and gas activities require complex logistical support both onshore and in and around the exploration and drilling sites, including various transportation vessels, related port facilities, facilities for storing tools and equipment, waste management facilities, pipelines, and numerous personnel to manage and maintain equipment.[10] Additionally, the catastrophic effects of an oil spill are anything but localized—the environmental effects of a major oil spill can affect hundreds and miles of

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[6] Press Release, Dep't of Interior, *supra* note 3. The draft plan includes seven lease sales in the Pacific Region and nine lease sales in the Atlantic region. According to the DOI's press release, there have been no sales in the Pacific Region since 1984 and no sales in the Atlantic region since 1983. *Id.*

[7] *See* THE WHITE HOUSE, OFFICE OF THE PRESS SEC'Y, Statement by the President on Actions in the Arctic and Atlantic Oceans (Dec. 20, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/12/20/statement-president-actions-arctic-and-atlantic-oceans (last visited Apr. 15, 2019); *see also* Darryl Fears and Juliet Eilperin, *President Obama Bans Oil Drilling in Large Areas of Atlantic and Arctic Oceans*, WASH. POST, Dec. 20, 2016, https://www.washingtonpost.com/news/energy-environment/wp/2016/12/20/president-obama-expected-to-ban-oil-drilling-in-large-areas-of-atlantic-and-arctic-oceans/?utm_term=.ab27e8720864

[8] BOEM, Oil and Gas Energy, Leasing, *Outer Continental Shelf*, https://www.boem.gov/Outer-Continental-Shelf/ (last visited April 22, 2019); *see also* BOEM, Oil and Gas Energy, Leasing, *OCS Lands Act History*, https://www.boem.gov/OCS-Lands-Act-History/ (last visited Apr. 15, 2019).

[9] Ctr. for Bio. Diversity v. U.S. Dep't of Interior, 563 F.3d 466, 472 (D.D.C. 2009) (interpreting the OCSLA to define the OCS as "an area of submerged lands, subsoil, and seabed that lies between the outer seaward reaches of a state's jurisdiction and that of the United States.")

[10] *See* D.E. Dismukes, BOEM, *Onshore Oil and Gas Infrastructure to Support Development in the Mid-Atlantic OCS Region*, July 2014, at 3 (available at https://www.boem.gov/ESPIS/5/5402.pdf).

coastline and accompanying aquatic ecosystems,[11] and the resulting economic effects on coastal communities and coastal industries are also far-reaching and long-lasting.[12] Deepwater drilling is considered to be an "inherently risky operation, pushing the envelope of technology and engineering," and naturally, these risks are magnified "with the number of times they are taken."[13]

Unsurprisingly, BOEM's aggressive proposal for expanded offshore drilling drew harsh criticism across a wide spectrum of stakeholders, from business leaders to environmentalists to concerned residents of coastal communities. Sixty-four different environmental groups condemned the plan as a "shameful giveaway" to oil companies.[14] Business leaders, governors and legislators — both Republican and Democratic — from coastal regions across the country have implored DOI to limit the scope of the proposed plan.[15] The Business Alliance for Protecting the Atlantic Coast claimed that "thousands of small businesses, from restaurants to hotels to commercial fishing operations, oppose drilling off their states' waters."[16] "We all saw what happened to the Gulf Coast with Deepwater Horizon," said the president of the Business Alliance for Protecting the Atlantic Coast.[17] On April 20, 2010, the offshore oil rig Deepwater Horizon exploded in the Gulf of Mexico, resulting in the death of 11 workers and the largest oil spill in the

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[11] *See* NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, DEEPWATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING – REPORT TO THE PRESIDENT [hereinafter, NAT'L COMM'N ON BP DEEPWATER HORIZON], at 177 (2011).
[12] *See id* at 185 (potential economic effects estimated in the billions).
[13] Houck, Oliver, *Worst Case and the Deepwater Horizon: There Ought to be a Law*, 24 TUL. ENVTL. L.J. 1, 2-3 (2010).
[14] Lisa Friedman, *Trump Moves to Open Nearly All Offshore Waters to Drilling*, NEW YORK TIMES, Jan. 4, 2018, https://www.nytimes.com/2018/01/04/climate/trump-offshore-drilling.html
[15] Pamela King, *Trump lease plan sparks 'storm surge' of fear in S.C.*, ENERGYWIRE, E&E NEWS (Oct. 3, 2018), https://www.eenews.net/stories/1060100373
[16] Friedman, *supra* note14.
[17] *Id.*

history of offshore drilling operations.[18] As a result, tourism sharply dropped along the Gulf Coast, resulting in an estimated billions of dollars in lost tax revenue, lost jobs, and reduced visitor spending.[19]

As of March 2019, over 48,000 businesses on both coasts have opposed expanded offshore drilling.[20] The mayors of 190 coastal municipalities[21] and the governors of nearly every coastal state have asked that their waters be excluded from consideration for oil and gas exploration.[22] The attorneys general of twelve coastal states submitted a joint letter to then Secretary Zinke, objecting to the proposal on the basis that extraction activities carry a "significant risk of widespread damage, without regard to state borders," which would unnecessarily jeopardize unique state natural resources and "the communities and businesses that depend on them."[23] The attorneys general noted that expanded oil and gas drilling operations "would also bring increased ship traffic and increased ocean user conflicts."[24]

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[18] *See* U.S. ENVT'L PROTECTION AGENCY, *Deepwater Horizon – BP Gulf of Mexico Oil Spill*, https://www.epa.gov/enforcement/deepwater-horizon-bp-gulf-mexico-oil-spill; GREENPEACE, *BP Deepwater Horizon Gulf Oil Spill: Overview* (Aug. 30, 2010), https://www.greenpeace.org/usa/research/overview-gulf-oil-spill/.

[19] Chad Nelson, *Bipartisan opposition is clear against Trump's offshore drilling*, THE HILL (Mar. 1, 2019), https://thehill.com/opinion/energy-environment/432258-bipartisan-opposition-is-clear-against-trumps-offshore-drilling.

[20] *Id.*

[21] *See* Carol J. Miller, *For a Lump of Coal & a Drop of Oil: An Environmentalists Critique of the Trump Administration's First Year of Energy Policies*, 36 VA. ENVTL. L.J. 185, 213 (2018).

[22] *See* Pamela King, *States call for the Fla. treatment in their case against drilling*, ENERGYWIRE, E&E NEWS (January 18, 2018), https://www.eenews.net/stories/1060071269/. After Secretary Zinke granted an unexpected exemption to Florida after meeting with Florida Governor Rick Scott, governors from coastal states in the Mid-Atlantic, New England, Southeast, and Pacific regions requested like treatment. Many of the governors object on the basis that oil and gas development presents an unacceptable risk to their fishing and tourism industries and the overall health of their coastal communities. *Id*.

[23] Letter of Joshua H. Stein, Attorney General of North Carolina, et al, to the Hon. Ryan Zinke, Sec'y of the Interior (Feb. 1, 2018) (available at http://www.marylandattorneygeneral.gov/news%20documents/Offshore_drilling_letter_February_1_2018.pdf); *see also* press release, NEW YORK UNIV. SCHOOL OF LAW, STATE ENERGY AND ENV'T IMPACT CTR (Feb. 1, 2018) (available at http://www.law.nyu.edu/centers/state-impact/news/12-state-ags-to-zinke-terminate-offshore-drilling-plans).

[24] Letter of Joshua H. Stein, et al., *supra* note 25.

BOEM also received a staggering 2,058,752 comments in response to the Notice of Availability of its proposed leasing program in the Federal Register.[25] Concerned citizens and representatives from marine industries, the energy sector, and environmental protection groups, among others, submitted comments for consideration by BOEM.[26] Similar to the concerns raised by state governors, attorneys general, and coastal municipalities, many critics objected to the proposal on the basis of the potentially devastating environmental impacts of an oil spill, particularly in light of the recent Deepwater Horizon oil spill in the Gulf of Mexico.[27] In addition to these concerns surrounding the economic and environmental impacts of another devastating oil spill, another common concern involved the potential for dangerous ocean user conflicts resulting from oil and gas infrastructure and operations. The Atlantic Offshore Lobstermen's Association, for example, commented that "surveys and extraction activities in traditional fishing areas would cause users [sic] conflicts, potentially dangerous conditions for fisherman, and damage to their gear."[28] The Southern Environmental Law Center, in comments submitted on behalf of several conservation groups, argued that offshore drilling in incompatible with a number of significant ocean uses in the Mid-Atlantic and Southeast regions, including tourism and recreation,

[25] *See* BOEM, Notice of Availability, *supra* note 1.
[26] *See id.*
[27] *See id.* Concerns over the threat of an oil spill of a similar magnitude are not merely speculative. Since the Deepwater Horizon disaster, the Bureau of Safety and Environmental Enforcement has reported 4,105 offshore explosions, spills, and other incidents resulting in 13 deaths. Just in 2017, there were 10 offshore oil spills reported. *See* Madeleine Carlisle, *Trump's Offshore-Drilling Plan is Roiling Coastal Elections*, THE ATLANTIC, Aug. 5, 2018, https://www.theatlantic.com/politics/archive/2018/08/trumps-offshore-drilling-plan-is-roiling-coastal-elections/566726/
[28] Letter of J. Grant Moore, President, Atlantic Offshore Lobstermen's Association., to Ryan Zinke, Sec'y of the Dep't of Interior (Mar. 1, 2018).

commercial and recreational fishing activities, and offshore renewable energy development.[29]

Perhaps more surprisingly, at least to those unfamiliar with the history of the BOEM leasing program, the DOI also received some interesting feedback from the Department of Defense (DoD) and the Department of the Navy. Notwithstanding the proposal's clearly stated emphasis on strengthening natural security, the DoD signaled that expanded oil and gas development activities in the OCS could potentially present a conflict with military training and operations and ultimately, military readiness and national security. In a July 2017 letter submitted in response to BOEM's initial Request for Information on the draft proposed plan, then-Acting Deputy Assistant Secretary of Defense for Force Education and Training noted that the DoD "conducts training, testing, and operations in offshore operating and warning areas, undersea warfare training ranges, and special use or restricted airspace on the outer continental shelf" and that these activities "are critical to military readiness and to our national security."[30] Similarly, on March 9, 2018, the Deputy Assistant Secretary of the Navy for the Environment advised then-Secretary Zinke that the OCS is "critical" to Navy and Marine Corps "operations, testing, and training" because "the Military Services often conduct sensitive operations and hazardous training and testing activities that require unobstructed sea and airspace."[31] Further, the Deputy Assistant Secretary noted that the Navy "uses the airspace, sea surface, sub-surface, and seafloor of the OCS for events ranging from instrumented

[29] Letter of Sierra B. Weaver and Blakely E. Hildebrand, Southern Environmental Law Center, et. al, to Kelly Hammerle, National OCS Oil and Gas Leasing Manager, BOEM (Mar. 9, 2018).
[30] Letter of Kevin Kelly, Acting Deputy Ass't Sec'y of Defense to Ryan Zinke, Sec'y of the Interior (July 27, 2017).
[31] Letter of Karnig Ohannessian, Deputy Ass't Sec'y of the Navy, to Ryan Zinke, Sec'y of the Interior (Mar. 9, 2018).

equipment testing to live-fire exercises" which require "free and open littoral access to the beach and inland to replicate real-world operational requirements."[32] Both the Department of the Navy and the DoD highlighted the need for collaboration between DOI, BOEM, and the military. The DoD further indicated that it would be separately submitting a "detailed review" of "mission compatibility" in the areas identified for potential oil and gas exploration.[33]

Several federal and state officials in Virginia have all made similar statements expressing concerns about the incompatibility of offshore drilling with military operations. The Attorney General for the state of Virginia stated that "[i]nstallation of drilling infrastructure or an unforeseen accident could threaten the ability of military assets based in the region to carry out their vital national security missions."[34] Congressman Scott Taylor, who represents the Norfolk region, indicated that offshore drilling could interfere with military training and commented to the Washington Post, "[t]he reality is, in my district every locality has opposed it . . . Business and industry oppose it. The Navy has problems with it. I have to listen to my people."[35] Likewise, Virginia's two senators, Tim Kaine and Mark Warner, wrote in a letter to the Secretary of Defense that offshore drilling off of Virginia's coasts could "create new challenges for the region's DoD installations across all service branches."[36] In support of their position,

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[32] *Id.*
[33] Letter of C.F. Drummund, Deputy Ass't Sec'y of Defense, to Ryan Zinke, Sec'y of the Interior (Feb. 1, 2018).
[34] *Id.*
[35] Jenna Portnoy, *Rep. Scott Taylor of Va. Beach comes out against offshore drilling*, WASH. POST, Jan. 8, 2018, https://www.washingtonpost.com/local/virginia-politics/rep-scott-taylor-of-virginia-beach-comes-out-against-off-shore-drilling/2018/01/08/c770904e-f4a6-11e7-b34a-b85626af34ef_story.html?utm_term=.aefa2af77116
[36] *Senators concerned about offshore drilling impacts on Virginia military*, WTVR.com (Apr. 24, 2018), https://wtvr.com/2018/04/24/senators-concerned-over-offshore-drilling-impacts-on-virginia-military/

Senators Kaine and Warner cited a January 2018 presentation from Captain (retired) Joseph Bouchard, the former commanding officer of Naval Station Norfolk, highlighting the potential conflicts that offshore drilling rigs could pose to military training activities in the region.[37] Chief among the various conflicts raised by Captain Bouchard are live ordnance training, weapons testing and evaluation, advanced training evolutions with allied forces, and Carrier Strike Group Composite Training Unit Exercises conducted throughout the areas proposed for oil and gas leasing – specifically in and around the Navy's Virginia Capes Operating Area and Surface Combat Systems Center Wallops Island.[38] Based on safety concerns and likely interference with the Navy's use of the ocean space, Captain Bouchard asserted that drilling off the coast of Virginia "would have serious negative impact on the combat readiness of the fleet."[39] As Captain Bouchard noted, the DoD has consistently expressed opposition to offshore drilling in and around military training areas in the Atlantic Ocean, particularly in the waters off of Virginia, since as early as 2005.[40]

More recently, in 2015, the DoD assessed the compatibility of proposed offshore drilling in the Atlantic Ocean with military operations,[41] when the Obama Administration had considered a five-year plan to allow drilling in the Atlantic Ocean between Virginia

[37] *Id.*
[38] Joseph F. Bouchard, *The Impact of Drilling for Oil and Gas in the Navy Virginia Capes Operating Area* (Jan. 12, 2018) (available at https://www.scribd.com/presentation/376827003/Bouchard-Offshore-Drilling-Presentation-2018).
[39] *Id.*
[40] Dave Mayfield, *Waters off Virginia, North Carolina out of offshore drilling plan*, VIRGINIAN-PILOT, May 16, 2015, https://pilotonline.com/news/local/environment/article_63b4d580-001e-5117-bc34-036f1c86343f.html
[41] DEP'T OF DEFENSE, *Mission Compatibility Planning Assessment: BOEM 2017-2022 Outer Continental Shelf (OCS) Oil and Gas Leasing Draft Proposed Program*, Oct. 30, 2015 (available at https://www.boem.gov/2017-2022-DoD-OCS-Report/)

and Georgia.[42] Draft versions of the Obama Administration's plan had included a 50-mile coastal buffer zone where oil and gas leasing would not occur, "in order to reduce conflicts with other uses of the OCS, including the DoD and NASA activities."[43] The DoD's 2015 "Compatibility Planning Assessment" identified several locations "where the [DoD's] offshore readiness activities are not compatible, partially compatible or minimally impacted by oil and gas activities."[44] The DoD also proposed to close off at least ten percent of the areas proposed for oil and gas leasing activities, including seismic exploration and drilling platforms.[45] As for the remaining portions of the proposed lease areas, DoD sought advance notice of oil and gas activity so the department could "study potential hazards on a case-by-case basis."[46] On further analysis, the Obama Administration determined that the areas of DoD concern "significantly overlap[ped] the known geological plays and available resources"[47] and ultimately, the Obama Administration abandoned the proposed plan for expanded drilling in the Atlantic Ocean due the concerns raised by the military and the coastal states impacted. [48]

For the 2019-2024 draft plan, the Trump Administration "considered, but did not choose, an option with a coastal buffer to accommodate military use concerns" at this time.[49] Likewise, the Trump Administration does not appear poised to abandon any plans

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[42] Darryl Fears, *Trump administration plan would widely expand drilling in U.S. continental waters*, WASH. POST, Jan. 4, 2018, https://www.washingtonpost.com/news/energy-environment/wp/2018/01/04/trump-administration-plans-to-allow-drilling-off-all-u-s-waters/?utm_term=.8febc86b8473
[43] Laura B. Comay, CONG. RESEARCH SERV., R44692, *Five-Year Program for Federal Offshore Oil and Gas Leasing: Status and Issues in Brief* at 11 (Jan. 8, 2018).
[44] Darryl Fears, *Obama's Atlantic oil drilling plan takes friendly fire — from the Pentagon*, WASH. POST, Mar. 14, 2016*;* DEP'T OF DEFENSE, *Mission Compatibility Assessment*, *supra*, note 41.
[45] Fears, *supra* note 44.
[46] *Id.*
[47] Comay, *supra* note 43, at page 11.
[48] Fears, *supra* note 42.
[49] Comay, *supra* note 43, at page 11. The Trump Administration stated that that the military coastal buffer and other options "may be further analyzed in subsequent versions of the program." *Id.*

for drilling in the Atlantic Ocean for the proposed 2019-2024 plan. Notwithstanding the chorus of opposition to the unprecedented scope of the draft plan from the military and other ocean stakeholders, the Trump administration has already taken a substantial first step towards moving forward with expanded oil and gas development into the Atlantic Ocean between Delaware and Florida. In November 2018, the National Marine Fisheries Service, a division of the National Oceanic and Atmospheric Administration (NOAA), issued incidental take permits to five oil and gas companies in relation to the companies' plans for conducting seismic surveys, which is considered to be a significant first step towards eventually obtaining final approval for seismic testing from DOI.[50] Though the extent to which the proposed Five Year Plan will actually come to fruition remains uncertain, [51] the unprecedent scope of the proposed plan nonetheless raises several questions about the efficacy of the current OCSLA framework to effectively mitigate resulting ocean user conflicts and address stakeholder concerns.

When then-Secretary Zinke announced the draft leasing proposal to open the majority of the OCS to oil and gas leasing, he asserted that "the states, local communities, and congressional delegations will all have a say" before the proposal becomes final.[52] Indeed, federal laws, including the OCSLA, Coastal Zone Management Act (CZMA) and

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[50] Timothy Cama, *Trump moves toward offshore oil testing in the Atlantic*, THE HILL (Nov. 30, 2018), https://thehill.com/policy/energy-environment/419127-trump-moves-toward-offshore-oil-testing-in-atlantic.

[51] On April 25, 2019, the Wall Street Journal reported that Interior Secretary David Bernhardt indicated that the proposed Five Year Plan could be sidetracked indefinitely by ongoing litigation concerning President Trump's authority to overturn President Obama's partial ban of drilling in areas of the Arctic and Atlantic. The Department of the Interior later clarified that the Department has not placed the Five Year Plan on indefinite hold, but rather, the Department is examining its options moving forward to determine the best pathway to accomplish the President's objectives. *See* Rob Hotakainen, *Trump's 5 Year Plan Placed on Hold*, E&E News PM, Offshore Drilling (Apr. 25, 2019), https://www.eenews.net/eenewspm/2019/04/25/stories/1060218639.

[52] Fears, *supra* note 42.

National Environmental Policy Act (NEPA), require the Secretary of Interior to consider input from the public, including state and local governments, and other federal agencies at various stages of the OCS leasing process.[53] Additionally, insofar as coordination with DoD is necessary for OCSLA leasing decisions, the DOI and the DoD coordinate under the provisions of a 35-year old, two-page memorandum of agreement (MOA) between the two agencies. The memorandum, entitled "Memorandum of Agreement Between the Department of Defense and the Department of the Interior on Mutual Concerns on the Outer Continental Shelf," recognizes that mineral exploration and development and defense-related activities "may conflict" and establishes a basic framework for resolving these conflicts through DoD's review of BOEM's proposed plan and utilization of general or site-specific lease stipulations and lessee advisories.[54] The MOA specifically identifies certain military activities, such as "[i]ntense operations by air, surface, or subsurface units whose activities are hazardous to non-DoD structures" which "may be irreconcilable with mineral exploration/ development and as such could be "deferred from the pending lease offering."[55] The MOA calls for DOI to provide sufficient pertinent data to the DoD, including "appropriate charts [and] coordinates defining boundaries of the proposed area" so DoD can undertake appropriate analysis of the

[53] Pursuant to Section 102(2)(C) of the National Environmental Policy Act (NEPA), federal agencies must prepare a "detailed statement" when assessing a proposal for "major Federal action[] significantly affecting the quality of the human environment." National Environmental Policy Act of 1969, 42 U.S.C. *§§* 4321-4347 (2012). The public statement, called an Environmental Impact Statement (EIS), must describe any environmental impacts of the proposed act, any potential unavoidable adverse environmental impacts, as well as alternatives to the proposal. *Id*. at § 4332(2)(C)(i)-(iii). Various phases of the BOEM's offshore drilling leasing processes have been recognized as triggering NEPA requirements. *See* Sandra Zellmer, Joel A. Mintz, & Robert Glicksman, *Throwing Precaution to the Wind: NEPA and the Deepwater Horizon Blowout*, 2 GEO. WASH. J. ENERGY & ENVTL. L. 62, 63 (2011).

[54] MEMORANDUM OF AGREEMENT BETWEEN THE DEPARTMENT OF DEFENSE AND THE DEPARTMENT OF THE INTERIOR ON MUTUAL CONCERNS ON THE OUTER CONTINENTAL SHELF (1983), available at https://apps.dtic.mil/dtic/tr/fulltext/u2/a270379.pdf (last visited Apr. 15, 2019).

[55] *Id.*

proposed area.[56] Following DoD's review of the proposed plan, DoD then submits a statement in response (the aforementioned "Mission Compatibility Assessment") which may define areas it believes require "deferral from the offering or military stipulations for joint use."[57] Currently, DoD is still in the process of completing its Mission Compatibility Assessment for the draft 2019-2024 program.

Given the very broad scope of the draft proposed plan on which DoD bases its compatibility assessment, the ability of the MOA to effectively address and mitigate conflicts through DoD review at the draft stage seems questionable. By BOEM's own description, the draft proposed plan is intentionally broad (here, proposing to open up 98 percent of the OCS) to allow for further narrowing down based on input from various stakeholders.[58] And as Oceana has argued, BOEM's current draft plan "deviates from the longstanding tradition of deference to the [DoD]when offering offshore drilling leases in federal waters."[59] The aggressive scope of the draft plan in the face of DoD's previous identification of conflicts and concerns also raises questions about the efficacy of the DoD-DOI interagency coordination framework under the 1983 MOA.

More broadly, the public participation and interagency coordination processes currently required, or in some instances, just encouraged, under the OCSLA and related federal laws, including the National Environmental Policy Act and the Coastal Zone

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[56] *Id.*
[57] *Id.*
[58] According to BOEM, the draft plan is intentionally broad and allows for maximum flexibility, "so that areas considered for leasing may be narrowed at later stages … after further environmental analysis and important input and coordination with key stakeholders." BUREAU OF OCEAN ENERGY MGMT, 2019-2024 NATIONAL OUTER CONTINENTAL SHELF OIL AND GAS LEASING DRAFT PROPOSED PROGRAM (Jan. 2018) at 2, *available at* https://www.boem.gov/NP-Draft-Proposed-Program-2019-2024/.
[59] OCEANA, *Trump Administration Proposes Offshore Drilling in Nearly All U.S. Waters* (Feb. 6, 2018), https://usa.oceana.org/sites/default/files/4046/overview_of_2019-2024_dpp_tps_final_020618.pdf

Management Act, arguably do not provide sufficient (mandatory) mechanisms to facilitate coordinated, strategic planning and informed decision-making across jurisdictional lines throughout all stages of the OCS leasing process to effectively mitigate ocean user conflicts. For decades, academics have recognized that ocean uses are growing and intensifying, and seemingly discrete actions "may well affect one another and the ocean environment itself."[60] "It's crowded out there," says Laura McKay, who manages Virginia's coastal zone management program. At any given time, there are "dozens" of activities occurring off the coast of Virginia, from military training exercises to international shipping to commercial fishing, and underlying these activities are "artificial reefs, whale migration routes, shipwrecks, undersea communications cables, potential wind-turbine development areas," and other activities and processes potentially presenting a conflict with the activities taking place above and around them.[61] In New England's coastal waters, as another example, the plethora of competing ocean uses includes "a national marine sanctuary and other marine protected areas; shipping lanes; several proposed offshore wind farms; areas of offshore dumping, including hazardous waste and munitions; telecommunications cables; dredging projects; fisheries regulatory areas, such as fishery closures; recreational activities; and artificial reefs."[62]

Expanded offshore energy development thus "competes for space in an already busy seascape, and it will have many potential impacts on established patterns of sea use,

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[60] Lawrence Juda, *Ocean Policy, Multi-Use Management, and the Cumulative Impact of Piecemeal Change: The Case of the United States Outer Continental Shelf*, 24 OCEAN DEV. & INT'L L. 355 (1993).
[61] Dave Mayfield, *Ocean plan is first of its kind for Virginia, other mid-Atlantic states,* VIRGINIAN-PILOT, Jul. 8, 2016, https://pilotonline.com/news/local/environment/article_e2894ecd-9347-5580-8a04-0fe5cdd35341.html.
[62] Robin K. Craig, *It's Not Just an Offshore Wind Farm: Combining Multiple Uses and Multiple Values on the Outer Continental Shelf*, 39 PUB. LAND & RESOURCES L. REV. 59, 67-68 (2018).

rights of access, and social and cultural value systems."[63] Oil and gas development in new areas of the OCS will create conflicts between existing and emerging uses and ultimately "increase the pressure on limited marine space and the potential conflict between different uses."[64] Beyond the conflicts previously discussed with military training activities, potential ocean use conflicts resulting from oil and gas development could include "access to valuable areas, damage of gear and pipelines, [and] navigational hazards due to installations and increase traffic congestion[.]"[65] As Peter Arbo and Phạm Thị Thanh Thủy note, ocean use conflicts frequently involve "access to and use of natural resources and space and the distribution of the associated benefits and costs. They can also be about the harm that different co-located activities inflict upon each other through operational or ecosystem impact."[66]

Previously, and at the time BOEM developed its current plan, a national framework existed for collaborative information sharing and planning between federal, state, local, and tribal agencies and entities to identify and manage these types of conflicts under President Obama's National Ocean Policy (NOP).[67] The NOP unambiguously called for the development of regional "coastal and marine spatial plans"[68] that would "build upon and improve existing Federal, State, tribal, local, and regional decisionmaking and planning processes" to ultimately promote and enable "a more integrated, comprehensive, ecosystem-based, flexible, and proactive approach to planning

[63] Katherine L Yates and Corey J. A. Bradshaw, *Offshore Energy and Marine Spatial Planning* 1 (2018).
[64] *Id.* at 2, 6.
[65] Peter Arbo and Pham Thi Thanh Thuy, *Use conflicts in ecosystem-based management – the case of oil versus fisheries*, OCEAN AND COASTAL MGMT, Vol. 122, at 6 (Mar. 2016).
[66] *Id.*
[67] Exec. Order No. 13547, 75 Fed. Reg. 43,021 (July 22, 2010).
[68] Executive Order 13547 defines the term "coastal and marine spatial planning" as "a comprehensive, adaptive, integrated, ecosystem-based, and transparent spatial planning process, based on sound science, for analyzing current and anticipated uses of ocean, coastal, and Great Lakes areas."

and managing sustainable multiple uses across sectors and improve the conservation of the ocean, our coasts, and the Great Lakes."[69] In addition to setting forth requirements for conducting collaborative federal-state coastal and marine spatial planning, Executive Order 13547 also established the first-ever White House-level, interagency National Ocean Council (NOC).[70] The National Ocean Council (NOC) brought together federal agency stakeholders, including the National Oceanic and Atmospheric Administration, the Joint Chiefs of Staff, the National Science Foundation and the Office of Management and Budget.[71] The NOP also directed federal agencies to form Regional Planning Bodies to develop regional ocean plans in collaboration with states, tribes, and fishery management councils.[72] Under the NOP, federal agencies were required to participate in collaborative marine spatial planning efforts as well as comply with NOC-certified plans if the agency's actions were to affect the ocean, coasts, or the Great Lakes.[73]

In December 2016, the first Regional Ocean Plans for the Northeast and Mid-Atlantic regions were released by the National Ocean Council.[74] At the time they were released, the White House described the plans as supporting "efficient and responsive government … to integrate effective interagency coordination."[75] The Mid-Atlantic Regional Ocean Action Plan also touts the value of its collaborative framework,

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[69] Exec. Order No. 13547, *supra* note 65.
[70] Exec. Order No. 13547, *supra* note 65.
[71] Amy Trice, *President Trump Rescinds the National Ocean* Policy, OCEAN CONSERVANCY, *Ocean Currents* (June 19, 2018), https://oceanconservancy.org/blog/2018/06/19/president-trump-rescinds-national-ocean-policy/.
[72] *Id.*
[73] John M Boehnert, *Zoning the Oceans: The Next Big Step in Coastal Zone Management* 62-63, 104 (2014).
[74] Christy Goldfuss and John P. Holdren, P, Archive of President Barack Obama White House, *The Nation's First Ocean Plans* (Dec. 7, 2016), https://obamawhitehouse.archives.gov/blog/2016/12/07/nations-first-ocean-plans (last visited Apr. 15, 2019).
[75] *Id.*

explaining that collaborative ocean planning helps to integrate relevant data from various agencies at different levels of authority, improve communication and coordination across governmental entities in an area, prevent duplication of effort, enhance stakeholder participation and buy-in, proactively plan for new and emerging ocean uses, and increase adaptability to these changing conditions.[76] Indeed, as the Mid-Atlantic Regional Ocean Action Plan explains, the impetus behind the plan was to "improve communication and collaboration among Federal, State, and Tribal management entities at the Mid-Atlantic regional scale and facilitate the transition to a more systems-based approach to ocean management."[77] To that end, the plan identifies several "best practices for enhanced coordination," which include enhanced interagency coordination, enhanced federal-state coordination, and enhanced stakeholder participation.[78] Participating organizations and agencies for the Mid-Atlantic Regional Ocean Action Plan included six coastal states, eight federal agencies (including the Department of Defense, represented by the Department of the Navy and Joint Chiefs of Staff), and two federally recognized tribes.[79]

At the time the Mid-Atlantic and Northeast Regional Ocean Plans were developed, the majority of the OCS was off-limits for oil and gas development, in great contrast to BOEM's current proposed five-year program. These plans accordingly did not focus their efforts on oil and gas development as a potential use of the regions' waters, but rather, they focused on renewable energy development as an emerging ocean use. However, the plans discuss stakeholder engagement in planning for energy

[76] MID-ATLANTIC REGIONAL OCEAN ACTION PLAN at 12, *available at* https://www.boem.gov/Mid-Atlantic-Regional-Ocean-Action-Plan/.
[77] *Id*.
[78] *Id.* at 31-37.
[79] *Id.* at 3.

development offshore generally. The Mid-Atlantic Plan notes that engagement "early and often with other ocean users" is "critical" for offshore energy development activities.[80] The Plan recommends six "ocean energy" strategic actions which, though addressing renewable energy development, could also be relevant in the context of oil and gas development:

(1) Identify key intersections of relevant Federal programs and authorities that affect wind energy development.

(2) Develop internal Bureau of Ocean Energy Management guidance on integrating the Plan-developed best practices for using the [Mid-Atlantic Ocean] Data Portal[81] in management, environmental, and regulatory reviews.

(3) Partner in ongoing and planned studies, identify knowledge gaps, and increase access to research planning cycles related to ocean energy

(4) Use the Data Portal to enhance access to data, environmental reports, and proposed offshore wind development activities.

(5) Improve consultations and communication with Tribes in the region.

(6) Enhance BOEM engagement of fishing industries through improved data and specific interactions.[82]

The plan also addresses national security interests and military use of the ocean in the region, highlighting the importance of coordination and consultation between DoD,

[80] *Id.* at 49.
[81] The Mid Atlantic Ocean Data Portal is "an online, publicly available toolkit and resource center that consolidates available data and enables regional ocean planners and ocean users to visualize and analyze ocean resources and human use information" which "includes a wide range of human use, environmental, socioeconomic, and regulatory data that provides baseline information as well as building blocks for more transparent, coordinated, and informed ocean management, information sharing, and stakeholder engagement." *Id.* at page 17.
[82] *Id.* at 52-55

other federal agencies, and state and tribal entities.[83] The plan recommends two action items for national security:

(1) Use the Plan and Data Portal to guide and inform Department of Defense programs, initiatives, and planning documents.

(2) Identify Department of Defense points of contact for the range of national security data layers in the Data Portal.[84]

Unfortunately, the recommendations of the Mid-Atlantic and Northeast Regional Ocean Plans for integrated federal, state, local, and tribal decision making and information sharing are no longer controlling policy. In June 2018, President Trump issued a new ocean policy under Executive Order 13840[85] which effectively dismantled previous efforts to formalize integrated ocean planning across multiple federal, state, and tribal entities.[86] President Trump's policy "largely downplays an Obama administration emphasis on creating robust data collections that could help managers make decisions"[87] and removes the requirement for federal agency participation in regional ocean planning processes, instead emphasizing state-led planning efforts through existing "regional ocean plans."[88]

In its guidance for implementing Executive Order 13840, the White House clarified that the ocean plans developed by the regional planning bodies in collaboration with various federal, state, tribal, and local marine stakeholders and approved by the

[83] *Id.* at 49.
[84] *Id.* at 48- 49.
[85] Exec. Order No. 13840, 83 Fed. Reg. 29,431 (June 19, 2018).
[86] David Malakoff, *Trump's new oceans policy washes away Obama's emphasis on conservation and climate*, SCIENCE (June 19, 2018), https://www.sciencemag.org/news/2018/06/trump-s-new-oceans-policy-washes-away-obama-s-emphasis-conservation-and-climate. (arguing that the Trump administration policy downplays federal and state collaborative planning).
[87] *Id.*
[88] Exec. Order No. 13840, *supra* note 83.

National Ocean Council are no longer "controlling policy" for federal agencies.[89] Under the old NOP framework, if a region desired to implement marine spatial planning processes, federal agencies were directed to participate and to comply with any resulting plans.[90] Now, states must invite federal agencies to participate in planning processes.[91] The White House heralded the new policy as "streamlin[ing] Federal coordination" and "rolling back excessive bureaucracy created by the previous Administration,"[92] but critics have argued that the new policy might actually inhibit federal-state collaboration on ocean planning, given that federal agencies are only encouraged and no longer required to participate in regional planning processes.[93] In a letter to the House Committee on Natural Resources Chairman Rob Bishop, a group of seven House democrats harshly criticized the new policy as "overturn[ing] years of critical ocean planning and policy" and "unilaterally throwing out many components of the [National Ocean Policy] and decades of work and input from Congress, two previous administrations, policy experts, and the American public."[94]

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[89] Exec. Office of the President, *Guidance for Implementing Executive Order 13840* (June 28, 2018), *available at* https://www.whitehouse.gov/wp-content/uploads/2017/11/20180628EO13840OceanPolicyGuidance.pdf. In December 2016, the National Ocean Council finalized two regional plans, the Northeast Ocean Plan and the Mid-Atlantic Ocean Plan, which represented the culmination of extensive coordination between federal, state, tribal, and local marine stakeholders representing a variety of interests, including fishing, national defense, and energy. *See* Goldfuss and Holdren, *supra* note 72.

[90] Sarah Carr, *New Trump policy throws a curveball into current US ocean planning*, OPEN COMMC'NS FOR THE OCEAN, *The Skimmer on Marine Ecosystems and Management* (Aug. 3, 2018), https://meam.openchannels.org/news/meam/new-trump-ocean-policy-throws-curveball-current-us-regional-ocean-planning-efforts.

[91] Maya Wei-Haas, *Trump Just Remade Ocean Policy—Here's What That Means*, NAT'L GEOGRAPHIC, Jul. 13, 2018, https://www.nationalgeographic.com/environment/2018/07/news-ocean-policy-indigenous-sustainability-fisheries-industry-economy-marine/.

[92] FACT SHEET, THE WHITE HOUSE, *President Donald J. Trump is Promoting America's Ocean Economy*, June 19, 2018, *available at* https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-promoting-americas-ocean-economy/

[93] Carr, *supra* note 90.

[94] Letter of Rep. Raul M. Grijalva, Ranking Member, H. Comm. on Nat. Resources, to the Hon. Rob Bishop, Chairman, H. Comm. on Nat. Resources (Jun. 19, 2018), *available at*

Given the confluence of recent policy actions by the Trump administration to vastly expand offshore drilling and simultaneously eliminate existing federal-state collaborative ocean planning processes, and considering the concerns raised by the DoD, coastal states, and other ocean stakeholders, this paper will evaluate the federal OCS leasing framework under the OCSLA, as impacted by the National Environmental Policy Act (NEPA) and the Coastal Zone Management Act (CZMA), in the context of the need for effective coordination across jurisdictional lines to ultimately ensure multiple and competing ocean uses are identified and resolved throughout all stages of the OCSLA leasing process for offshore oil and gas development. This paper will argue that legislation is needed to reform and modernize the OCS leasing process through utilization of integrated federal-state collaborative coastal and marine spatial planning. Such reform will ensure that comprehensive coordination, meaningful stakeholder participation, and necessary interjurisdictional "multi use management" [95] occurs.

Part II will discuss the history and legal authority for the OCS leasing program, beginning with a discussion of the complex maritime jurisdictional landscape surrounding federal regulation of offshore activities. This section will also provide background information on the longstanding battle between the federal government and coastal states over authority and jurisdiction over OCS resources and regulations. Part III will evaluate the public participation and interagency coordination requirements under the OCSLA, NEPA, and the CZMA and assess their ability to facilitate multi-use management in and around the OCS. Finally, Part IV will analyze the merits of coastal

https://naturalresources.house.gov/imo/media/doc/Democratic%20Hearing%20Request%20on%20National%20Ocean%20Policy%20Cancellation%20June%2019%202018.pdf.

[95] *See* Juda, *supra* note 60.

and marine spatial planning, and Part V will argue that codification of federal-state collaborative marine spatial planning under the OCSLA is necessary to preemptively mitigate ocean user conflicts and ensure more meaningful stakeholder participation throughout the leasing process for offshore oil and gas development.

II. HISTORY AND LEGAL AUTHORITY FOR THE OCS LEASING PROGRAM

a. *Maritime Jurisdiction and Regulation of Offshore Activities*

Fundamental to an understanding of regulation and management of offshore drilling activities is simply figuring out which level of government has authority and responsibility over a particular marine area. This is not an easy task, as jurisdiction depends, in part, upon a complicated system of maritime boundaries.[96] Legal authority for regulation of oil and gas development stems from a variety of interrelated international, federal, and state laws which "collectively assert a semblance of authority in a system with multiple parties and myriad interests."[97] To familiarize the reader with this regime and competing state and federal interests, this section will first discuss the overarching international law principles which apply to coastal waters and submerged lands. An understanding of the federal-state relationship in ocean governance is

[96] Laura K. Wells, CONG. RESEARCH SERV., R32912, *Federal-State Maritime Boundary Issues* (May 5, 2005).
[97] Payton A. Wells, *Choose Your Laws Carefully: Executive Authority to Unilaterally Withdraw the United States Outer Continental Shelf from Leasing Disposition*, 67 DUKE L. JOURNAL 863, 868 (2018).

important, because OCS management has long been shaped by tensions between federal and state interests, and continues to be so shaped, as the current response of several coastal states to BOEM's current proposed five-year plan demonstrates.[98] Next, this section will review the applicable domestic laws governing authority and management over the OCS. Finally, this section will discuss and analyze the legal framework for oil and gas leasing activities under the OCSLA, including analysis of the OCLSA's provisions for public participation and coordination among various stakeholders in the context of mitigating ocean user conflicts.

b. *International Legal Principles*

Federal authority over OCS resources draws from principles of international law which recognize a coastal nation's maritime jurisdiction over various geographic zones, generally based on proximity to a nation's coastline. These zones consist of the nation's internal waters; territorial sea; contiguous zone; exclusive economic zone; and continental shelf.[99] Under both international and domestic law, the dividing line between the land and internal waters is called the baseline, which in the United States is

[98] Robert J. Wilder, *Cooperative Governance, Environmental Policy, and Management of Offshore Oil and Gas in the United States*, 24 OCEAN DEV. & INT'L L. 41, 55 (1993) (noting that federal-state tensions characterized OCS management in the 1990s).
[99] US COMM'N ON OCEAN POLICY FINAL REPORT, *An Ocean Blueprint for the 21st Century*, at App. 6, *Review of US Ocean and Coastal Law [-] The Evolution of Ocean Governance over Three Decades*, at 5 (2004) [hereinfater, US COMM'N ON OCEAN POLICY REPORT].

interpreted to be the low-water line along the coast.[100] Inland of the baseline, waterbodies such as bays, lakes, and rivers (internal waters) are subject to national sovereignty with some limited exceptions.[101] Adjacent to and seaward of the baseline lies a coastal nation's territorial seas, which have long been recognized as being subject to "unfettered" national sovereignty.[102] This sovereignty extends to the subsoil, seabed, water column, and air space of the territorial sea, subject to some rights of passage for foreign ships.[103] Historically, the United States claimed a three-mile territorial sea, consistent with the seventeenth-century "Freedom of the Seas" doctrine, and it was not until 1988 that President Ronald Reagan declared a 12-mile territorial sea, consistent with the United Nations Convention on the Law of the Sea (UNCLOS).[104]

Seaward of a coastal nation's territorial seas lies the contiguous zone, within which international law also recognizes the right of coastal nations to enforce certain laws relating to customs, fiscal matters, immigration, and sanitation.[105] Consistent with UNCLOS, the U.S. claims a contiguous zone from 12 to 24 nautical miles offshore.[106]

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[100] *Id.* The "normal baseline" is defined by the United Nations Convention on the Law of the Sea as "the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State." United Nations Convention on the Law of the Sea [hereinafter, UNCLOS], art. 3, Dec. 10, 1982, 1833 U.N.T.S. 397, 400.
[101] US COMM'N ON OCEAN POLICY REPORT, *supra* note 99, at 5.
[102] Wells, *supra* note 97, at 868.
[103] US COMM'N ON OCEAN POLICY REPORT, *supra* note 99 at 6.
[104] *See* Wells, *supra* note 97, at 868; Presidential Proclamation 5928 of December 27, 1988, *The Territorial Sea of the United States of America*, 54 Fed. Reg. 777 (Jan. 9, 1989). Article 3 of UNCLOS provides that coastal states have "the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles" measured from the baseline. UNCLOS, supra note 100 at art. 3.
[105] US COMM'N ON OCEAN POLICY REPORT, *supra* note 99, at 7.
[106] *Id.*

Beyond the contiguous zone, coastal nations may claim jurisdiction over an Exclusive Economic Zone (EEZ) under UNCLOS.[107] The EEZ lies adjacent to the 12-mile territorial sea and extends 200 miles seaward from the baseline.[108] Although the United States is not a signatory to UNCLOS, in 1983 President Ronald Reagan accepted the majority of the UNCLOS provisions and proclaimed that the United States had sovereign authority over the natural resources of the EEZ.[109] Under UNCLOS, nations have sovereign rights over ocean resources in the EEZ, including those rights relating to extracting, preserving, and managing resources, including energy production.[110]

Finally, the continental shelf is defined by UNCLOS to include "the seafloor and subsoil (not the water column) that extend beyond the territorial sea throughout the natural prolongation of a coastal nation's land territory to the outer edge of the continental margin (with some limitations), or to 200 miles from the baseline if the continental margin does not extend that far."[111] The Bureau of Ocean Energy and Management defines the continental shelf as "the gently sloping undersea plain between a continent and the deep ocean" which is "an extension of the continent's landmass under

[107] US COMM'N ON OCEAN POLICY REPORT, *supra* note 99, at 7.
[108] *Id*.
[109] Joan M. Bondareff, *The Impact of Coastal and Marine Spatial Planning on Deepwater Drilling*, 26 NAT. RESOURCES & ENV'T 3 (2011).
[110] US COMM'N ON OCEAN POLICY REPORT, *supra* note 99, at 7.
[111] *Id.* at 9.

the ocean."[112] The OCS constitutes "about nine-tenths of the area of the entire Continental Shelf," and can generally be described as "that part of the Shelf lying seaward of the historic boundaries of the coastal states." Thus, the OCS generally begins three nautical miles from the coastline and extends at least 200 hundred miles to the outer limits of the EEZ, or possibly further if the continental shelf extends beyond that point.[113]

c. *History of Domestic Law Governing OCS Development*

Domestic law largely adopts these international standards but further fragments jurisdiction over coastal waters and submerged lands between coastal states and the federal government based on distance from the coastline[114] in a regime described by some scholars as "geographic dual federalism."[115] Prior to the discovery of oil under the sea at the turn of the twentieth century, the question of ownership of the submerged lands had not been of much significance in the United States.[116] Historically, both the states and the federal government generally recognized states as titleholders to the submerged lands within their marginal seas.[117] However, as technology evolved to permit greater exploration of deeper offshore areas, state and federal legislators began to take a greater

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[112] BOEM, *Outer Continental Shelf*, https://www.boem.gov/Outer-Continental-Shelf/ (last visited Apr. 15, 2019).
[113] *Id.*
[114] Adam Vann, CONG. RESEARCH SERV., RL33404, *Oil and Gas Development: Legal Framework*, at page 1 (Apr. 13, 2018).
[115] Wilder, *supra* note 98, at 46.
[116] *See* United States v. California, 332 U.S. 19, 38 (1947) ("The question of who owned the bed of the sea only became of great potential importance at the beginning of this century when oil was discovered there.")
[117] C.M. Peterson, *Lands Underlying Coastal Waters; Areas Leasable Under the Outer Continental Shelf Lands Act,* 1 L. OF FED. OIL AND GAS LEASES § 3.05 (2018).

interest in submerged lands offshore.[118] After oil was discovered offshore, a "great battle" raged between the federal government and coastal states over the rights to the submerged lands below states' marginal coasts.[119] Coastal states quickly began to realize that while the federal government and private oil companies reap most of the direct economic benefits from offshore oil and gas development, the coastal states and their citizens bear the majority of the associated environmental and economic risks.[120] As a result, the struggle between states and the federal government which began as a "struggle for ownership of OCS resources" ultimately morphed into a struggle for regulatory authority over OCS leasing and development.[121]

By the 1930s, several states, including California, began passing legislation regulating oil and gas development in offshore areas, and the federal government began to change its views on title to submerged lands.[122] On September 28, 1945, President Truman broadly declared that all offshore areas on the Continental Shelf were subject to federal control.[123] Following President Truman's "Proclamation on the Continental

[118] Gordon L. James, *The Outer Continental Shelf Lands Act Amendments of 1978: Balancing Energy Needs with Environmental Concerns?*, 40 La. L. Rev. 177, 178 (1979).
[119] Gail Osherenko, New Discourses on Ocean Governance: Understanding Property Rights and the Public Trust, 21 J. Envtl. L. & Litig. 317, 348; *see also* Wells, *supra* note 97, at 870.
[120] Amy McIntire, *Oil and Gas Development on the Outer Continental Shelf: The Uphill Battle for State Input into Federal Policy*, 9 Tex. J. Oil Gas & Energy L. 37, 38 (2013).
[121] *Id.*
[122] *See* James, *supra* note 118 at 178; United States v. California, 332 U.S. 19, 38 (1947).
[123] *Id.*

Shelf,"[124] the Supreme Court rendered decisions in 1947[125] and 1950[126] recognizing the federal government's paramount interest in controlling continental shelf lands.[127] In the landmark case of *United States v. California,* the federal government filed suit against California to essentially quiet title to the underlying lands situated seaward of the state's three-mile territorial seas after the California legislature began authorizing permits for prospecting oil and gas development off its coast.[128] The federal government asserted that the United States was "the owner in fee simple of, or possessed of paramount rights in and powers over, the lands, minerals and other things of value underlying the Pacific Ocean, lying seaward of the ordinary low water mark on the coast of California and outside of the inland waters of the State, extending seaward three nautical miles and bounded on the north and south, respectively, by the northern and southern boundaries of the State of California."[129] While the Court did not adopt the federal government's "fee simple" theory, the court held in favor of the federal government on the basis of its paramount rights.[130]

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[124] Presidential Proclamation No. 2667, *Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf*, 10 Fed. Reg. 12,303 (1945).
[125] *U.S. v. Cal.*, 332 U.S. at 19.
[126] United States v. Texas, 339 U.S. 707 (1950); United States v. Louisiana, 339 U.S. 699 (1950).
[127] James, *supra* note 118, at 178.
[128] *U.S. v. Cal.*, 332 U.S. 19 at 22-38.
[129] *Id.* at 22 (1947).
[130] Osherenko, *supra* note 119, at 349. As the Supreme Court more recently explained in *Northern Mariana Islands v. United States*, the federal government has an "overriding interest" in controlling the marginal sea reasons of national interest, such as national security and relations with other countries. Northern Mariana Islands v. United States, 399 F.3d 1057, 1061 (9th Cir. 2005). The paramountcy doctrine also recognizes that Congress has the sole authority to determine the scope of a coastal state's jurisdiction

After the *United States v. California* decision rejected the "nearly universally assumed states' rights within the 3-mile limit," the issue of states' offshore rights became one of national interest.[131] Ultimately, coastal states successfully sought Congressional action to regain authority over submerged lands.[132] Through the federal Submerged Lands Act of 1953, Congress expressed its disagreement with the Court's holding in *United States v. California* and essentially granted coastal states title to the submerged lands, including all natural resources such as oil and gas, within three miles of the states' official coastline, while at the same time confirming federal jurisdiction and control over the submerged lands seaward from this three-mile mark.[133] As a result, states could exercise authority within three miles of their coastline which would otherwise have been held by the federal government.[134] Specifically, under the Submerged Lands Act, Congress granted coastal states "(1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop,

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in United States marine waters. *Coastal and Marine Spatial Planning: Legal Considerations*, ENVIRONMENTAL LAW INSTITUTE AND CENTER FOR OCEAN SOLUTIONS, June 2010, at page 53.

[131] Wilder, *supra* note 98 at 49.

[132] Osherenko, *supra* note 119 at 353.

[133] Barber v. Hawaii, 42 F.3d 1185, 1190 (9th Cir. 1994) ("In 1953, the Submerged Lands Act was passed to show Congress's disagreement with the Supreme Court's ruling [in United States v. California."]); United States v. Louisiana, 446 U.S. at 253, 256 (1980) ("By that statute [the Submerged Lands Act], the United States released to the coastal States its rights in the submerged lands within stated limits and confirmed its own rights therein seaward of those limits.")

[134] United States v. Alaska, 521 U.S. 1, 6 (1997) (recognizing that the Submerged Lands Act "establishes States' title to submerged lands beneath a 3-mile belt of the territorial sea, which would otherwise be held by the United States.").

and use the said lands and natural resources all in accordance with applicable State law."[135] Thus, states have primary jurisdiction within three-mile area, and may choose to develop energy sources consistent with state law and regulations within this area.[136] Likewise, under the Submerged Lands Act, lands within the three-mile belt are not available for federal oil and gas leasing.[137] However, with respect to commerce and navigational jurisdiction over this three-mile area, the Supreme Court has held the federal government retains concurrent jurisdiction.[138]

Outside of this three-mile radius, the federal government exercises authority over the waters and marine resources located beneath, including oil and gas, under the OCSLA.[139] In passing the OCSLA less than three months after the Submerged Lands Act on August 7, 1953, Congress declared exclusive federal jurisdiction over the Outer Continental Shelf – an area amassing "almost one-tenth the size of the continental United States."[140] Though the OCSLA passed with little fanfare and was largely "unnoticed and unappreciated," scholars of the day recognized the major economic significance of the

[135] 43 U.S.C. § 1311 (a) (2012).
[136] Vann, *supra* note 114, at 3.
[137] Peterson, *supra*, note 117.
[138] *See Barber*, 42 F.3d at 1191 (recognizing that the plain language of the Submerged Lands Act does not demonstrate Congressional intent to retain exclusive rather than concurrent jurisdiction over state waters with respect to navigation).
[139] Osherenko, *supra* note 119 at 354; Outer Continental Shelf Lands Act, Pub. L. 83-212, ch. 345, 67 Stat. 462 (1953) (codified at 43 U.S.C. §§ 1331 et seq.).
[140] Drew F. Cohen, *The Outer Continental Shelf Lands Act Revisited: The Status of the Hornbeck Case and Recent Legislation*, AMER. BAR ASSOC. ENVT'L AND ENERGY L. REPORTER, Fall 2010, at 11, *available at* https://apps.americanbar.org/buslaw/blt/content/2010/10/0002d.pdf.

OCSLA.[141] At the time of the Act's passage, Warren Christopher, who went on to serve as Secretary of State under President Bill Clinton, wrote of the "enormous riches"[142] promised within the OCS and even argued that the resources within the Outer Continental Shelf made its federal acquisition "more important to the nation than the Louisiana Purchase."[143]

Congress, too, recognized the value of the resources within the OCS, and determined that federal jurisdiction would best allow for development of OCS mineral resources through a private leasing framework.[144] Beyond asserting exclusive federal jurisdiction over the OCS, the OCSLA clearly indicates Congressional intent to explore and develop mineral resources in the OCS. The OCSLA amended the Submerged Lands Act "in order that the area in the outer Continental Shelf beyond boundaries of the States may be leased and developed by the Federal Government,"[145] and the Act explicitly declares it the national policy of the United States to make the submerged lands in the OCS "available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and

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[141] Warren Christopher, *The Outer Continental Shelf Lands Act: The Key to a New Frontier*. 6 STAN. L. REV. 23, 23 (1953-1954).
[142] *Id.* at 25.
[143] *Id.* at 23.
[144] Cohen, *supra* note 140, at 11 (citing Sen. Rep. No. 411, 83d Cong. 1st Sess. 2 (1953)) available online at https://apps.americanbar.org/buslaw/blt/content/2010/10/0002d.pdf.
[145] Jennifer Larson, *Challenges under OCSLA and the Future of Offshore Drilling under the Obama Administration*, 13 SMU SCI. & TECH. L. REV. 55, 58 (2009) (citing H.R. REP. No. 83-413 at 2177 (1953)).

other national needs..."[146] Courts recognize that the primary purpose of the Act is "to establish procedures to expedite exploration and development of the OCS," and "[t]he remaining purposes primarily concern measures to eliminate or minimize the risks attendant to that exploration and development."[147] To accomplish these policy goals, the OCSLA vests the Secretary of the Interior with responsibility for administering development and exploration of minerals in the OCS, and, importantly, authorizes the Secretary of the Interior to grant leases for oil and gas development in the submerged lands of the OCS.[148] Following what was then the largest oil spill in history off of the coast of Santa Barbara, California,[149] Congress amended the OCSLA in 1978 to establish revised safety and environmental standards for offshore drilling operations, significantly increase state participation in the planning process for OCS leasing, and revise the bidding and leasing process.[150] The 1978 amendments reflect Congressional intent to

[146] 43 U.S.C. § 1332(3) (2012).
[147] Cal. by Brown v. Watt, 668 F.2d 1290, 1316 (D.C. Cir.1981).
[148] 43 U.S.C. § 1337 (2012).
[149] On January 29, 1969, a massive oil spill occurred off the coast of Santa Barbara, California, resulting in three million gallons of oil spilled into the Pacific Ocean across 800 square miles, killing thousands of birds, marine mammals, and fish. Kate Wheeling and Max Ufberg, 'The Ocean is Boiling': The Complete Oral History of the 1969 Santa Barbara Oil Spill, PACIFIC STANDARD (Apr. 18, 2017), https://psmag.com/news/the-ocean-is-boiling-the-complete-oral-history-of-the-1969-santa-barbara-oil-spill. The catastrophe spurred significant concern among citizens and Congress alike, spurring significant environmental legislation, including the National Environmental Policy Act and the Coastal Zone Management Act. *See* Larson, *supra* note 143 at 60. *See also* James, *supra* note 116 at 181 ("The Santa Barbara spill was a major catalyst of the general environmental movement which swept the country in the early 1970's. Americans realized that our modern industrialized society has been causing a gradual deterioration in the environment.")
[150] Vann, *supra* note 114, at 6.

strike a balance between competing national interests in protecting the coastal environment and providing for efficient, expeditious development of the OCS.[151]

d. *OCS Leasing Under the OCSLA*

As amended, the OCSLA lays out both a procedural roadmap and "a set of substantive requirements" governing how DOI makes areas of the OCS available for resource development.[152] Procedurally, the OCSLA provides for a four-step process to facilitate the "expeditious but orderly development of OCS resources."[153] The Bureau of Ocean Energy Management (BOEM) currently exercises delegated authority from the Secretary of Interior[154] to administer this phased process, which proceeds from "broad-based planning to an increasingly narrow focus as actual development grows more imminent."[155] The four statutory phases, discussed in greater detail below, are "(1) the five-year planning program; (2) preleasing activity and the lease sale; (3) exploration; and (4) development and production".[156] Each phase is intended to be "increasingly detailed and focused, honing in on the specific activities and areas at issue."[157] Each phase is also

[151] James, *supra* note 118, at 187.
[152] Ctr. for Sustainable Econ. v. Jewell, 779 F.3d 588, 594 (D.D.C. 2015)
[153] Ctr. for Biological Diversity v. United States DOI, 563 F.3d 466, 472 (2009) (citing California v. Watt, (Watt I), 668 F.2d 1290, 1297 (D.C. Cir. 1981).
[154] 30 C.F.R. § 550.101.
[155] *Ctr. for Biological Diversity*, 563 F.3d at 473 (citing *Watt I*, 668 F.2d at 1290, 1297).
[156] Vann, *supra* note 114, at 6. Separate regulatory review occurs at each of these stages. The four-part process is intended to "forestall premature litigation regarding adverse environmental effects that all agree will flow, if at all, from only the latter stages of OCS exploration and production." Defs. of Wildlife v. Bureau of Ocean Energy Mgmt., Regulation & Enf't, 871 F. Supp. 2d 1312, 1315 (S.D. Ala. 2012).
[157] Zellmer, Mintz, & Glicksman, *supra* note 53, at 2.

intended to "strike an appropriate balance … between local and national environmental, economic, and social needs."[158]

i. The Five-Year Program

At the initial five-year planning stage, BOEM prepares a schedule of proposed lease sales, to include the timing, scope, and geographical location of the proposed leasing activities.[159] This stage is important in both the practical and legal sense, as BOEM not only makes these key scoping decisions, but also provides "basic economic analyses and justifications for such decisions."[160] Development of the five-year program generally occurs over a period of two or three years, during which BOEM publishes successive drafts for review and comment by the public.[161] Several principles govern BOEM's development of an OCS leasing program, consistent with the OCSLA.[162] First, the Secretary of Interior (via BOEM) must conduct the program "in a manner which considers economic, social, and environmental values of the … resources contained in the [OCS], and the potential impact of oil and gas exploration on other resource values of the [OCS] and the marine, coastal, and human environments."[163] Next, the Secretary must

[158] *Ctr. for Sustainable Econ*, 779 F.3d 588 at 594.
[159] Vann, *supra* note 114, at 7.
[160] *Ctr. for Sustainable Econ*, 779 F.3d 588 at 595.
[161] Comay, *supra* note 43, at 1.
[162] *Ctr. for Biological Diversity*, 563 F.3d at 473.
[163] *Id.* (citing 43 U.S.C. § 1344(a)(1)).

consider eight factors,[164] including industry interests, energy needs, environmental information, and potentially conflicting uses of the OCS leasing areas.[165] The final leasing areas are then selected after narrowing down all potentially available leasing areas based on these factors.[166] The OCSLA does not clarify how the Secretary must weigh these factors, but courts have recognized the Secretary's broad discretion in weighing the potential for environmental harm against the potential for oil and gas discovery in order to best meet the nation's energy needs.[167] While the OCSLA does not mandate interagency coordination at this phase, the statute states that the Secretary "shall consider" the suggestions of "any interested Federal agency" and the Governors of potentially affected states.[168] Interagency coordination could also occur at this stage to assess potential environmental impacts of the proposed lease program in accordance with NEPA, and as discussed further herein.[169]

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[164] These eight factors are: (1) "Geographical, Geological, and Ecological Characteristics"; (2) "Equitable Sharing of Developmental Benefits and Environmental Risks"; (3) "Location with Respect to Regional and National Energy Markets and Needs"; (4) "Other Uses of the Sea and Seabed"; (5) "Laws, Goals, and Policies of Affected States Identified by Governors"; (6) "Interest of Potential Oil and Gas Producers"; (7) "Environmental Sensitivity and Marine Productivity"; and (8) "Environmental and Predictive Information." BOEM, *2019-2024 National Outer Continental Shelf Oil and Gas Leasing Program, Frequently Asked Questions*, https://www.boem.gov/National-Program-FAQ/; 43 U.S.C. § 1344(a)(2)(A)-(G) (2012).

[165] 43 U.S.C. § 1344(a)(2).

[166] Comay, *supra* note 43, at 1. Before approving any final leasing program, the Secretary of the Interior must submit to Congress and the President each program for a minimum 60-day period. Id.]

[167] *See, e.g.*, Cal. by Brown v. Watt, 668 F.2d 1290, 1317 (D.C. Cir.1981).

[168] 33 U.S.C § 1344(c)(1) (2012).

[169] Under NEPA, federal agencies must "consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved [in the major federal action at issue]." 42 U.S.C. § 4332(c). Interagency coordination could also occur if required under the Endangered Species Act, 16 U.S.C. § 1531, which mandates interagency consultation to ensure federal actions do not jeopardize the existence of any listed threatened or endangered species.

ii. Leasing Process

Following approval of the five-year leasing program by the Secretary, BOEM solicits competitive bids for specific offshore areas and issues leases during the second pre-leasing/lease stage.[170] This process starts when the Director of BOEM publishes a formal call for information seeking comments from "industry and the public" on "[p]otential multiple uses of the proposed leasing area, including navigation, recreation, and fisheries" and "[o]ther socioeconomic, biological, and environmental information."[171] After considering available information, including information regarding conflicting uses and comments from potentially affected state and local governments and interested parties, the BOEM Director conducts NEPA environmental analysis and creates a list of recommended leasing areas, including any proposed lease stipulations to mitigate adverse impacts.[172]

Following approval by the Secretary of the Interior, the list is published in the Federal Register and submitted to governors of affected states, who may submit comments and recommendations to BOEM regarding the "the size, timing, and location of the proposed sale."[173] BOEM "shall" accept a state's recommendations and "may" accept a local government's recommendations "*if* it determines they strike a reasonable

[170] *Ctr. for Biological Diversity*, 563 F.3d at 473.
[171] 30 C.F.R. § 556.301.
[172] Vann, *supra* note 114, at 11; 30 C.F.R. 556.302(a)-(b).
[173] 30 C.F.R. § 556.305. Local governments may also provide comments to BOEM, though they are also required to send their comments to the governor of their state. *Id*.

balance between the national interest and the well-being of the citizens of the affected State."[174] Consistent with federal regulations, and as discussed further herein, BOEM then issues a "consistency determination" under the CZMA to any affected coastal states with approved coastal zone management programs.[175] This required determination assesses whether the proposed lease sale is consistent, "to the maximum extent practicable,"[176] with the state's coastal zone management program.[177]

iii. Oil and Gas Exploration and Production

During the third phase in the OCS leasing process, BOEM reviews more detailed exploration plans developed by the lessees and makes a determination as to whether to allow exploration to proceed. Here, the lessee's exploration plan must comply with other relevant federal laws, including the CZMA, NEPA, and the Endangered Species Act.[178] The OCSLA specifically requires lessees to include a certification that the exploration

[174] 43 U.S.C. § 1345(c) (2012) (emphasis added).
[175] 30 C.F.R. § 556.305(b). All 35 coastal and Great Lakes states and territories, with the exception of Alaska, are eligible to participate in the National Coastal Zone Management Program. NAT'L OCEANIC AND ATMOSPHERIC ADMIN. (hereinafter, NOAA), OFFICE FOR COASTAL MGMT., *Coastal Zone Management Programs*, https://coast.noaa.gov/czm/mystate/ (providing additional information and links to states' approved programs). In general, a consistency determination is required when a federal agency proposes to take an action with "reasonably foreseeable effects" on the uses or resources of a state's coastal zone. NOAA, CZMA FEDERAL CONSISTENCY OVERVIEW, at 4-5 (rev. Jan. 4, 2016) The CZMA requires such federal actions to be consistent with a state's approved Coastal Management Program. *Id.* at 4. A state's coastal resources include "biological or physical resources that are found within a state's coastal zone on a regular or cyclical basis." *Id.* at 8. Coastal resources include "activities as: public access, recreation, fishing, historic or cultural preservation, development, energy infrastructure and use, hazards management, marinas, floodplain management, scenic and aesthetic enjoyment, and resource creation or restoration." *Id.*
[176] Federal regulations define the phrase "consistent to the maximum extent practicable," to mean "fully consistent with the enforceable policies of management programs unless full consistency is prohibited by existing law applicable to the Federal agency." H2O v. Town Bd. of E. Hampton, 147 F. Supp. 3d 80, 88 (E.D.N.Y. 2015) (referencing 15 C.F.R. § 930.32).
[177] 30 C.F.R. § 556.305.
[178] Defs. of Wildlife v. Bureau of Ocean Energy Mgmt., 684 F.3d 1242, 1245 (11th Cir. 2012).

plan "complies with the enforceable policies of such state's approved [CZMA] management program and will be carried out in a manner consistent with such program."[179] BOEM is again required to consider potentially conflicting uses of the ocean as well as safety and environmental concerns. Specifically, BOEM will only allow further exploration to occur only if it finds that the exploration plan "will not be unduly harmful to aquatic life in the area, result in pollution, create hazardous or unsafe conditions, unreasonably interfere with other uses of the area, or disturb any site, structure, or object of historical or archeological significance."[180]

Finally, during the fourth stage, production, BOEM and those affected states and local governments review an even more detailed plan from the lessee.[181] A production plan cannot move forward at this point unless the affected coastal state or states concurs (or is presumed to concur)[182] with the plan's CZMA consistency certification; however, the plan can still move forward over the state's objection if the Secretary of Commerce determines that the development activities are consistent with the objectives of the CZMA and are "necessary in the interest of national security."[183] Additionally, a production plan could also be terminated at this point if BOEM determines the operations

[179] 16 U.S.C. § 1456(c)(3)(B) (2012)
[180] 43 U.S.C. § 1340(g)(3) (2012).
[181] *Ctr. for Biological Diversity*, 563 F.3d at 473.
[182] A state is presumed to concur with the consistency determination if the state does not respond within the requisite timeline. NOAA, OFFICE FOR COASTAL MGMT., *Federal Consistency*, https://coast.noaa.gov/czm/consistency/.
[183] 16 U.S.C. § 1456(c).

would "threaten national security or defense," or because of exceptional circumstances, that implementation of the plan would "probably cause serious harm or damage … to the national security or defense, or to the marine, coastal, or human environments."[184]

III. PUBLIC PARTICIPATION AND INTERAGENCY COORDINATION UNDER THE OCSLA, NEPA AND THE CZMA

i. *State Participation under the OCSLA*

As amended, the OCSLA explicitly recognizes the rights of states and local governments to participate in federal policy and planning decisions relating to OCS mineral development and production "to the extent consistent with the national interest."[185] Importantly, the 1978 amendments also marked a shift from a singular focus on mineral resource development to broader consideration of other potential OCS uses, and the interactions between such uses and OCS development.[186] The findings and purposes of the 1978 amendments reflect an awareness of the multi-use nature of the OCS and "emphasize the need for states to be kept informed and have input into OCS decisions made by the federal government."[187] In amending the OCSLA, Congress thus intended that a wider number of factors be taken into consideration as OCS leasing

[184] 43 U.S.C. § 1351(h)(1)(C)-(D) (2012).
[185] 43 U.S.C. § 1332(4)(C) (2012).
[186] Juda *supra* note 60, at 365.
[187] *Id.* at 365-366.

decisions were made, and also that a wider and more diverse "cast of players" would participate in OCS leasing decisions.[188]

Despite the intent of the 1978 amendments to provide for greater state participation in OCSLA leasing decisions, and notwithstanding the amended Act's explicit mandate that BOEM "shall" accept certain coastal state recommendations, critics have argued that states' voices have not been sufficiently considered in OCS leasing decisions.[189] Courts have afforded DOI considerable deference in choosing to reject a state's recommendation, thereby rendering the "reasonable recommendation" provision somewhat toothless.[190] So long as the Secretary of the Interior actually responds to comments from coastal states, courts do not require any further evidence of actual consideration or incorporation of the comments.[191] Critics have consequently characterized the OCSLA's "reasonable recommendation provision" as nothing more than a "glorified opportunity [for states] to submit comments to [the] Interior, [and] [o]nce [the] Interior has the comments, the Secretary retains full discretion to accept them or reject them…"[192] Thus, while the OCSLA arguably has the capacity to provide for consideration of multiple ocean uses through the statute's state participation provisions,

[188] *Id.* at 365.
[189] *See generally* McIntire, *supra* note 120.
[190] McIntire, *supra* note 120, at 61
[191] *Id.*
[192] *Id.* (citing 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, 93 (1990)).

current jurisprudence does not favor BOEM's mandatory consideration of coastal state input.

ii. *BOEM's Requirements under NEPA*

Under the National Environmental Policy Act (NEPA), federal agencies, such as BOEM, before undertaking a "major federal actio[n] significantly affecting the quality of the human Environment," must prepare and file an environmental impact statement (EIS), which describes, among other things, the environmental impact of the agency's proposed action, any unavoidable adverse environmental effects, and alternatives to the proposed action.[193] The purpose of this requirement is to ensure that agencies consider all significant aspects of the environmental impacts of their proposed action—in other words, to ensure agencies take a "hard look" at the environmental consequences of their actions[194]—and to inform the public that the agency has thoroughly analyzed environmental concerns throughout its decision-making process.[195] Federal regulations require agencies to "make diligent efforts to involve the public in preparing and implementing their NEPA procedures," through public meetings, hearings, and public availability of NEPA-related documents.[196]

Importantly, NEPA also "facilitates interagency relationships" to the extent that interagency coordination is necessary to assess environmental impacts.[197] NEPA

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[193] 42 U.S.C. § 4332(2)(C)(i)-(v) (2012).
[194] *See* Kleppe v. Sierra Club, 427 U.S. 390, 410, n.21 (interpreting NEPA to require agencies to take a "hard look" at the environmental consequences of their proposed actions)
[195] Baltimore Gas & Electric v. Natural Resources Defense Council, 462 U.S. 87, 97(1982) (recognizing the twofold purpose of NEPA in considering significant aspects of the environmental impacts of proposed actions and informing the public of such consideration). *See also* Zellmer, Mintz, & Glicksman, *supra* note 53, at page 1.
[196] 40 C.F.R. §1506.6.
[197] Robert B. Keiter, *NEPA and the Emerging Concept of Ecosystem Management on the Public Lands*, 25 LAND & WATER L. REV. 43, 47 (1990)

mandates interagency consultation at the beginning stages of the NEPA analysis, requiring federal action agencies to "consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved."[198] Federal agencies must also notify agencies affected by the proposed action and afford the affected agency an opportunity to comment.[199] DOI's NEPA implementing regulations broadly provide that responsible officials "must *whenever possible* consult, coordinate, and cooperate with relevant State, local, and tribal governments and other bureaus and Federal agencies concerning the environmental effects of any Federal action within the jurisdictions or related to the interests of these entities."[200] Finally, any resulting EIS must discuss "possible conflicts between the proposed action and the objectives of Federal, regional, state, and local … policies and controls for the for the area concerned."[201] Thus, as Lawrence Juda argues, NEPA and the EIS process are significant in the context of multi-use management, because they afford outside agencies the chance to "provide input into what in the past were single use decisions taken by particular agencies."[202]

However, NEPA only mandates procedural requirements for considering environmental impacts, and courts have consistently held that it does not require any particular outcome or decision.[203] NEPA also allows for discretion on the agency's part in determining the level of analysis to be conducted (subject, of course, to judicial review). For instance, when an agency is unsure as to whether a proposed action meets

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[198] *Id.* at 47 (citing 42 U.S.C. § 4332(C)).
[199] *Id.*; 40 C.F.R. §1501.7.
[200] 43 C.F.R. § 46.155 (emphasis added).
[201] Keiter, *supra* note 197, at 47 (citing 42 U.S.C. § 4332(C)).
[202] Juda, *supra* note 60, at 360.
[203] *See*, *e.g.*, Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989)("[I]t is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process.")

the criteria for a major federal action requiring an EIS, the agency may prepare a shorter environmental assessment (EA), which publicly explains why the agency deems an EIS to be unnecessary.[204] Agencies may also issue a finding of no significant impact (FONSI) statement, which explains why the action will not significantly affect the human environment and why an EIS will therefore not be drafted.[205] Finally, agencies may avoid drafting a full environmental impact statement by relying on categorical exclusions for actions determined not to individually or cumulatively have a significant impact on the human environment.[206] Agencies are charged with establishing their own NEPA implementing regulations, consistent with Council on Environmental Quality requirements.[207] Agencies generally designate actions normally requiring an EIS, actions requiring an EA, and actions normally subject to categorical exclusions.[208]

Whether or not an agency determines that an action necessitates an EIS, EA, or is subject to a categorical exclusion significantly affects the level of environmental review undertaken as well as the degree to which the public and other agencies are required to be involved. For actions determined to require an EIS, agencies must undergo a scoping process which involves public meetings with federal, state, local, and tribal stakeholders to identify concerns, potential environmental impacts, and potential alternatives to the

[204] H2O v. Town Bd. of E. Hampton, 147 F. Supp. 3d 80, 114-15 (E.D.N.Y. 2015)
[205] *Id.* at 115.
[206] NEPA.GOV, NATIONAL ENVIRONMENTAL POLICY ACT, *Categorical Exclusions*, https://ceq.doe.gov/nepa-practice/categorical-exclusions.html
[207] REPORT REGARDING THE MINERALS MANAGEMENT SERVICE'S NATIONAL ENVIRONMENTAL POLICY ACT POLICIES, PRACTICES, AND PROCEDURES AS THEY RELATE TO OUTER CONTINENTAL SHELF OIL AND GAS EXPLORATION AND DEVELOPMENT, Aug. 16, 2010, at page 9, *available at* https://www.doi.gov/sites/doi.gov/files/migrated/news/pressreleases/upload/CEQ-Report-Reviewing-MMS-OCS-NEPA-Implementation.pdf (last visited Apr. 16, 2019).
[208] *Id.*

proposed action.[209] Agencies are encouraged to engage in this process when drafting an EA, but as DOI's implementing regulations provide, they are not required to do so.[210]

Further, when agencies rely on categorical exclusions, they may essentially "bypass the environmental review entirely,"[211] along with any significant public participation, because agencies often fail to provide any public notice before relying on a categorical exclusion.[212] Council for Environmental Quality (CEQ) regulations require that action agencies invite comments from the public and necessary state and federal agencies before preparing a final EIS,[213] but agencies are not similarly required to provide for public notice and participation before preparing an EA. DOI's implementing regulations provide for public notification and involvement "to the extent practicable" when an EA is prepared, but the methods for doing so are left to the discretion of the responsible official.[214]

In the context of OCSLA leasing, it is well established that NEPA's requirements apply to each stage of the OCSLA leasing process,[215] and BOEM prepares "NEPA documents"[216] at each stage of the leasing process, generally beginning with an overarching programmatic EIS for the five year program.[217] This programmatic EIS assesses the region-wide environmental impacts of the proposed leasing program,

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[209] See, e.g., 43 C.F.R. § 46.235.
[210] 43 C.F.R. § 46.235.
[211] Ctr. for Biological Diversity v. Zinke, 260 F. Supp. 3d 11, 17 (D.D.C. 2017).
[212] Zellmer, Mintz, & Glicksman, *supra* note 53, at 7.
[213] 40 C.F.R. § 1503.1.
[214] 43 C.F.R. § 46.305.
[215] Vill. of False Pass v. Clark, 733 F.2d 605, 609 (9th Cir. 1984); see also Ctr. for Biological Diversity v. Zinke, 260 F. Supp. 3d 11, 18 (D.D.C. 2017)
[216] According to BOEM, this may include preparation of an EIS, EA, or categorical exclusion review "to verify that neither an EA nor an EIS is needed." Bryan Cameron, Jr., and Tershera Matthews, OCS REPORT BOEM 2016-014, *OCS Regulatory Framework* (Mar. 2016) at page 5.
[217] *Id.*

including some limited discussion of space-use conflicts in the context of potential environmental impacts.[218] For example, the final programmatic EIS for the 2017-2022 program briefly discusses specific military uses in various leasing regions, including weapons testing, submarine and anti-submarine activity, and military waste dumping activities. The programmatic EIS also identifies and briefly discusses various other economic and recreational uses of the areas in and around the OCS leasing areas, including tourism and fishing.[219] However, at this point, the precise locations and details of the potential offshore drilling activities are not finalized, so any space-use conflict discussion is relatively short. Indeed, courts recognize that even further along in the process, at the lease stage, BOEM is not required to conduct an environmental analysis "on a site-specific level of detail."[220] According to BOEM, "more detailed and geographically-focused analyses" is conducted "as the program progresses from the planning to the leasing to the exploration and development stages."[221] BOEM indicates that for post-lease NEPA analysis, the agency employs a method of "tiering"[222] which involves a "more *limited* and site-specific environmental evaluation that is placed … beneath a broader environmental evaluation to avoid unnecessary repetitions."[223] In

[218] *See, e.g.* DEPT' OF INTERIOR, BOEM, FINAL PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT, OUTER CONTINENTAL SHELF OIL AND GAS LEASING PROGRAM: 2017-2022, (Nov. 2016), *available at* https://www.boem.gov/fpeis-volume1/.
[219] *Id*.
[220] Native Vill. of Point Hope v. Jewell, No. 12-35287, 2014 U.S. App. LEXIS 1150, at 7 (9th Cir. 2014)
[221] BOEM, *Programmatic Environmental Impact Statement (2012-2017)*, https://www.boem.gov/5-Year/2012-2017/PEIS.aspx (last visited Apr. 16, 2019).
[222] CEQ regulations define tiering as referring to the "coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basinwide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared." 40 C.F.R. § 1508.
[223] BOEM, *Regions, Environmental Operations Section (EOS)*, https://www.boem.gov/Environmental-Operations-Section/ (emphasis added).

some cases, BOEM produces less-detailed EAs later in the leasing process, relying on the broad analysis previously conducted in the programmatic EIS.[224]

Though this practice is not inconsistent with existing CEQ regulations, some critics argue that such use of tiering "disguises the agency's failure to ever consider the site-specific, project-level effects."[225] This informational problem was highlighted in the context of federal onshore oil and gas leasing, which similarly proceeds through a phased planning process. In 1987, the National Academy of Sciences/National Research Council (commissioned by Congress) assessed that "the type and level of impacts from production are not known when planning occurs," which raises questions regarding whether the impacts of oil and gas exploration and development can be sufficiently identified and analyzed during the planning phases.[226]

In addition to tiering its NEPA analysis, BOEM also relies on categorical exclusions from NEPA's EIS requirements for some OCS leasing activities in the Gulf of Mexico,[227] notwithstanding a series of efforts to curtail this practice following the Deepwater Horizon disaster.[228] After the Deepwater Horizon oil spill, an independent commission established by President Obama analyzed the causes of the disaster and

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[224] *See* Cameron, Jr. and Matthews, *supra* note 216, at page 5; Zellmer, Mintz, & Glicksman, *supra* note 53, at 63.
[225] Zellmer, Mintz, & Glicksman, *supra* note 53, at 67.
[226] George C. Coggins, Charles F. Wilkinson, John D. Leshy, & Robert L. Fischman, *Federal Public Lands and Resources Law* 581(7th ed. 2014) (citing NATIONAL RESEARCH COUNCIL, *Land Use Planning and Oil and Gas Leasing on Onshore Federal Lands* 10-13 (1989)).
[227] Cameron, Jr. and Matthews, *supra* note 216, at 5, *see also* Zellmer, Mintz, & Glicksman, *supra* note 53, at 66-67 (arguing that improper use of tiering, among other problems, led to the Mineral Management Service's failure to properly analyze all environmental risks prior to the Deepwater Horizon oil spill).
[228] *See, e.g.,* Zellmer, Mintz, & Glicksman, *supra* note 53. In the aftermath of the Deepwater Horizon oil spill, the Council on Environmental Quality recommended that Interior revise its categorical exclusions relating to OCS drilling activities. While Interior published notice of its intent to conduct such a review in 2010, this review was still ongoing in 2017. Ctr. for Biological Diversity v. Zinke, 260 F. Supp. 3d 11, 18-19 (D.D.C. 2017).

recommended regulatory changes regarding offshore drilling practices.[229] The Council on Environmental Quality also conducted a review of DOI's procedures for fulfilling NEPA's requirements in the context of oil and gas leasing.[230] Both the commission and the CEQ suggested "major revisions" to DOI's procedures, including changes to DOI's use of categorical exclusions, and in 2010 DOI published a notice of intent to conduct a broad review of its categorical exclusions for OCS leasing decisions.[231] Scholars have also criticized BOEM's use of categorical exclusions beyond certain routine, administrative actions, because the use of categorical exclusions can facilitate approval of agency actions posing serious risks without sufficient analysis of potential environmental consequences.[232] The categorical exclusion process has also been criticized because it may allow potentially risky actions to proceed without an opportunity for significant public input."[233] Nonetheless, as the District of Columbia Circuit recently noted, DOI has continued to approve offshore drilling permits in the Gulf of Mexico through the use of categorical exceptions, and its promised review of categorical exclusions has yet to be concluded.[234]

Also problematically, BOEM has never published formal guidance on its implementation of NEPA in the context of OCS leasing. BOEM relies on DOI's overarching NEPA guidelines, which include categorical exclusions for ministerial and administrative actions such as "internal organizational changes" and "routine financial

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[229] *Zinke*, 260 F. Supp. at 15. The Commission's report is available at https://www.nrt.org/sites/2/files/GPO-OILCOMMISSION.pdf.
[230] *Id*.
[231] *Id.* at 15-16.
[232] Zellmer, Mintz, & Glicksman, *supra* note 53, at 7.
[233] *Id.*
[234] *Zinke*, 260 F. Supp. at 19.

transactions."[235] BOEM also relies on DOI's Departmental Manual, which provides OCS leasing-specific specific NEPA guidance and applicable categorical exclusions for BOEM's predecessor agency, the Mineral Management Service.[236] BOEM does not have its own specific regulations governing its implementation of NEPA's requirements, an issue which led the National Commission and the CEQ to recommend reforming the manner in which DOI fulfills its NEPA obligations in the context of OCS leasing.[237]

Given BOEM's lack of specific NEPA guidance for OCS leasing, its use of tiering for post-lease proposals, and its continued use of categorical exclusions for some offshore drilling activities in the Gulf of Mexico region, it is clear that the quality and extent of environmental analysis and public participation could vary largely and significantly under the NEPA framework. The degree of public participation also varies greatly according to some of the agency's discretionary choices on whether to prepare an EIS vice an EA. NEPA's requirements for consideration of feedback and input from interested parties are also ultimately intended to "help realize the substantive goal of environmental protection"[238] and not necessarily mitigate user conflicts such as those potentially created by military use of OCS leasing areas. To the extent that BOEM conducts space-use analysis in its programmatic EIS, this analysis is certainly limited by the lack of specific geographical information available at that phase. But following development of the five-year plan and after leases are granted, BOEM does not

[235] 43 C.F.R. § 46.210.
[236] Andrew Hartsig, Michael Levine, Jayni Foley Hein, & Jason Schwartz, *Next Steps to Reform the Regulations Governing Offshore Oil and Gas Leasing and Planning*, Alaska Law Review 2016, at page 8.
[237] *Id.* at 9.
[238] *See* North Slope Borough v. Andrus, 642 F.2d 589, 598 (D.C. Cir. 1980).

necessarily conduct the same full-scale, comprehensive EIS review, instead relying on tiering of previous analysis and less-detailed EAs.

Even when an agency prepares an EIS, and is therefore subject to the most rigorous public notice and participation requirements, the level of participation desired by citizens is not always realized.[239] A study conducted to assess NEPA's effectiveness 25 years from its inception concluded that "[s]ome citizens' groups and concerned individuals view the NEPA process as largely a one-way communications track that does not use their input effectively." The study also determined that "creating a true partnership with the community involves more than holding a hearing and making documents available" because "[p]ublic involvement takes effort — and time."[240] The formality of the NEPA public hearing process can detract from successful collaboration and a foundation of mutual trust – citizens often feel that they have been invited to participate too late in the process, and their voices are not truly heard or reflected in the final agency decision.[241] Given all of the above concerns – the potential inconsistency of the scope of NEPA review, the availability of categorical exclusions at different phases of the leasing process to avoid environmental review entirely, the drawbacks of the formal NEPA hearing process – NEPA is arguably not the most effective vehicle for ensuring effective interagency coordination, stakeholder participation, and overall multi-use management throughout BOEM's OCS leasing decision-making process.

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[239] COUNCIL ON ENVIRONMENTAL QUALITY, EXEC. OFFICE OF THE PRESIDENT, THE NATIONAL ENVIRONMENTAL POLICY ACT, A STUDY OF ITS EFFECTIVENESS AFTER 25 YEARS, (Jan. 1997), at 18, *available at* https://ceq.doe.gov/docs/ceq-publications/nepa25fn.pdf (last visited Apr. 16, 2019).
[240] *Id.*
[241] *Id.*

iii. *BOEM's Requirements under the CZMA*

Beyond NEPA, the Coastal Zone Management Act (CZMA)[242] provides another potential avenue for BOEM's consideration of multiple ocean uses and stakeholder concerns. Under the CZMA, BOEM must undertake additional environmental analysis and consultation with affected coastal states prior to approving OCS leasing plans. Enacted in 1972, the CZMA recognizes "a national interest in the uses and resources of the coastal zone and in the importance of balancing the competing uses of coastal resources."[243] In keeping with the CZMA's broad goals of promoting state and federal cooperation and participation in the development of coastal zone management programs,[244] all federal actions, including OCS leasing activities, which have reasonably foreseeable effects on the uses or resources of a state's coastal zone (whether inside or outside of the coastal zone) must be consistent with the federally-approved, enforceable policies of the state's coastal management program..[245] The CZMA and the National Oceanic and Atmospheric Association's (NOAA) implementing regulations provide federal consistency requirements for specific types of federal actions, including federal

[242] 16 U.S.C. §§ 1451 et seq (2012).
[243] NOAA, Proposed Rule, PROCEDURAL CHANGES TO THE COASTAL ZONE MANAGEMENT ACT FEDERAL CONSISTENCY PROCESS, [hereinafter, NOAA, Proposed Rule], https://www.federalregister.gov/documents/2019/03/11/2019-04199/procedural-changes-to-the-coastal-zone-management-act-federal-consistency-process; 16 U.S.C. § 1451.
[244] Sec'y of Interior v. Cal., 464 U.S. 312, 317 (1984); *See also* 16 U.S.C. § 1452 (2012).
[245] 16 U.S.C § 1456.

agency activities and development projects (to include OCS oil and gas lease sales), federal permitting activities (for non-federal applicants); and OCS development, exploration, and production plans.[246]

CZMA consistency review is "intertwined" with the oil and gas leasing program under the OCSLA.[247] The mechanics of consistency review, including rights of appeal, vary according to the specific action at issue. Of note, the five year National OCS Program is not subject to consistency review, as potential lease sales are considered too speculative at this point to necessitate CZMA application.[248] For OCS oil and gas lease sales, BOEM prepares a consistency determination for review by the affected coastal state or states.[249] If a coastal state objects to BOEM's consistency determination, BOEM may still approve the lease sale if BOEM determines the sale is "consistent to the maximum extent practical" with the affected coastal state's enforceable coastal management policies.[250] After a lease sale is approved, additional CZMA consistency review is required before the Secretary of Interior can approve a permit for an OCS Exploration Plan or Development and Production Plan. Under the CZMA regulations for OCS exploration, development, and production plans, the affected coastal state or states

[246] 15 C.F.R. Part 930.
[247] NOAA, Proposed Rule, *supra* note 243.
[248] *Id.*
[249] 16 U.S.C. § 1456; 15 CFR § 930.36.
[250] 15 C.F.R. § 930.43(d); 15 CFR § 930.36.

must concur or be conclusively presumed to concur with the permittee's required CZMA consistency certification.[251] If the coastal state objects to the consistency certification, CZMA still allows the Secretary of the Interior to permit these activities over a coastal state's objection if, on appeal by the applicant, the Secretary of Commerce finds that the activity is consistent with the CZMA's objectives or is otherwise necessary in the interest of national security.[252]

Thus, the CZMA gives states some say, but not the final say, in OCS oil and gas leasing decisions. And like NEPA, the CZMA can also be read to reflect a greater consciousness of the effects of one ocean use on other ocean uses, and on the natural environment as well.[253] Potential conflicts between oil and gas activities and existing and emerging ocean uses, such as commercial fishing, military training exercises, and renewable energy development, may be appropriately addressed during CZMA consistency review. For example, Virginia's enforceable management policies for subaqueous lands require "considerations of potential effects on marine and fisheries resources, wetlands, adjacent or nearby properties, anticipated public and private benefits, and water quality standards."[254] As Laurence Juda argues, the CZMA and its consistency

[251] NOAA, Proposed Rule, *supra* note 243.
[252] *See* 16 U.S.C. § 1456(c)(3)(B)(iii).
[253] Juda, *supra* note 60, at 361.
[254] VIRGINIA DEP'T OF ENVT'L QUALITY, *Federal Consistency Information Package, Summary of the Enforceable Policies Comprising Virginia's Coastal Zone Management Program,* https://www.deq.virginia.gov/Programs/EnvironmentalImpactReview/FederalConsistencyReviews.aspx#enforce.

provisions provide a significant mechanism for considering OCS decisions "in a wider context" and "advance[ing] a multi-use perspective on ocean management efforts even in areas beyond the state's coastal zone."[255]

Unfortunately, the extent to which a state's identification of potential use conflicts will actually be incorporated into BOEM's decision-making matrix is dubious. The CZMA's application to the OCSLA leasing process, and the history of federal and state cooperation in offshore energy development, raise questions about the viability of the CZMA as an effective avenue of ensuring meaningful collaboration and participation between BOEM and coastal states. The consistency review process, by its own terms, entails a formal, arguably reactionary process by which federal agencies submit a written consistency determination to the states for review, and states then submit a formal written response objecting or concurring with the determination.[256] If the states object to the consistency determination, the CZMA's implementing regulations provide for both formal and informal dispute resolution.[257]

Though a plain reading of the CZMA and the OCSLA explicitly promotes the need for a cooperative federal-state relationship throughout the OCS leasing process,

[255] Juda, *supra* note 60, at 363.
[256] 15 C.F.R. § 930.78.
[257] 15 C.F.R. Subpart G.

some scholars argue that the CZMA has failed to realize these goals.[258] Historically, DOI has been reticent to comply with the CZMA's consistency provisions in the context of OCS leasing.[259] Following a "tortured history" of DOI's attempts to mitigate state influence in OCS leasing determinations, Congress amended the CZMA in 1990 to clarify that OCS lease sales were covered by the CZMA.[260] Only then, in 1990, years after the enactment of the CZMA, did states have an opportunity to provide input in OCS leasing activities under the CZMA.[261] Yet even after the 1990 amendments, DOI has continued to resist state review of OCS leasing plans, and critics argue that the CZMA has failed to afford states a meaningful opportunity to shape the federal OCS leasing program.[262]

Most recently, on March 1, 2019, NOAA sought public comment on potential revisions to federal consistency regulations "to make the federal consistency process more efficient across all stages of OCS oil and gas projects from leasing to development" and to "provide industry with greater predictability" when investing in oil and gas projects.[263] NOAA also appears to be considering limits to the scope of the appellate process for state consistency objections during the OCS leasing process.[264] The full

[258] *See* McIntire, *supra* note 120, at 37; Sam Kalen, Ryan M. Seidemann, James G. Wilkins, & Megan K. Terrell, *The Lingering Relevance of the Coastal Zone Management Act to Energy Development in our Coastal Waters?* 24 Tul. Envtl. L.J. 73 (2010).
[259] McIntire, *supra* note 120, at 58-59.
[260] Kalen, Seidemann, Wilkins, & Terrell, *supra* note 258, at 84.
[261] *Id.*
[262] *Id.* at 107.
[263] NOAA, PROPOSED RULE, *supra* note 243.
[264] *Id.*

extent of NOAA's plans for revising the CZMA leasing regulations for oil and gas projects remains unclear, but critics point out that such language concerning "greater predictability" and "efficiency" generally point towards deregulation.[265] Critics fear that revised CZMA regulations may afford coastal states even less of an opportunity to voice their concerns and objections to the proposed offshore drilling program.[266] The comment period for the notice of proposed rulemaking ends on April 25, 2019.[267]

IV. COASTAL AND MARINE SPATIAL PLANNING AND THE WAY AHEAD FOR THE OCSLA LEASING PROGRAM

a. The Need for Reforming the OCSLA

Together, the CZMA, NEPA, and the OCSLA provide at least some avenues for interagency coordination and BOEM's consideration of coastal state and stakeholder input throughout the OCS leasing process, thereby offering the potential for BOEM to engage in an interjurisdictional, comprehensive planning approach to OCS leasing decisions. Unfortunately, current practice and judicial interpretations leave much room for improvement. The degree of interagency coordination and actual adoption of coastal state and stakeholder comments into BOEM's final decisions is largely discretionary and may vary according to the level of analysis undertaken under NEPA. The National

[265] Anna M. Phillips and Rosanna Xia, *Trump might limit states' say in offshore drilling plan. Here's how*, L.A. TIMES, Mar. 21, 2019, https://www.latimes.com/politics/la-na-pol-trump-offshore-drilling-states-coastal-act-20190321-story.html?outputType=amp.
[266] *Id.*
[267] NOAA, Proposed Rule, *supra* note 243.

Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, which was charged with recommending reforms for safer offshore energy development, recognized these gaps in the laws regulating OCS leasing. The Commission's report specifically addressed the need for more robust interagency coordination during the OCSLA leasing process, stating:

> Under OCSLA, it is up to the Secretary of the Interior to choose the proper balance between environmental protection and resource development. In making leasing decisions, the Secretary is required to solicit and consider suggestions from any interested agency, but he or she is not required to respond to the comments or accord them any particular weight. Similar issues arise at the individual lease sale stage and at the development and production plan stage. ... A more robust and formal interagency consultation process is needed—with the goal of identifying precise areas that should be excluded from lease sales because of their high ecological importance or sensitivity.[268]

Yet despite repeated criticism of the manner in which DOI (through BOEM) manages the OCSLA leasing process, BOEM has not as of yet updated its regulations to address the way it prepares five-year leasing programs, conducts lease sales, or evaluates

[268] NAT'L COMM'N ON BP DEEPWATER HORIZON, *supra* note 11, at 262.

and approves exploration plans.[269] As Andrew Hartsig, director of the Arctic Program at the Ocean Conservancy, argues, "[t]he regulations that govern these phases of the OCSLA process remain essentially unchanged from their initial promulgation more than three decades ago. They have not kept pace with changes in the industry. They fail to provide effective guidance, reflect new agency culture, incorporate updated analytical methodologies, or conform to modern policy priorities."[270] Though BOEM purports to have modernized its decision-making process through the use of shared data portals,[271] President Trump's new ocean policy makes clear that the Regional Ocean Plans are not controlling, and degree to which BOEM will internalize and incorporate coastal state and stakeholder concerns within the new ocean policy framework remains uncertain.

Adding to this problem is the current ocean policy's marked shift away from mandated use of comprehensive, collaborative federal-state marine spatial planning methods, and arguably, a step backwards in terms of modernizing ocean governance. In the United States, ocean management has traditionally been focused on single sector approaches, which can fail to adequately address multiple and potentially conflicting uses of the ocean space.[272] Ocean governance is allocated among at least twenty different

[269] Hartsig, Levine, Foley Hein, & Schwartz , *supra* note 236, at 7.
[270] *Id.*
[271] BOEM's website states that "BOEM depends on data to make its decisions on how to reduce and avoid multiple use conflicts-- whether within the agency or with other ocean users, such as national security, ocean energy facilities, commercial and recreational fishing, ocean aquaculture, maritime commerce and navigation, tribal interests, critical undersea infrastructure and other ocean uses." *See* BOEM, *Multiple Uses of the OCS*, https://www.boem.gov/Multiple-Uses-of-the-OCS/ (last visited Apr. 16, 2019).
[272] Alison W. Bates, *Revisiting Approaches to Marine Spatial Planning*, Perspectives on and Implications for the U.S., AG. & RESOURCE ECON. REV. 175, 207 (2017).

federal agencies, and each coastal state also manages its coastal zone in accordance with related state laws and regulations.[273] Scholars argue that single-sector management fails to effectively consider multiple competing ocean uses, because it "does not account for the outcomes of such interactions, cumulative e ects over spatial and temporal scales, and how ecosystem services (provided to people) may be a ected, nor does it allow for explicit consideration of tradeo s among ocean users."[274]

b. *Coastal and Marine Spatial Planning as a Means to Resolve Multi-Use Conflicts*

Coastal and marine spatial planning (CMSP), also simply called marine spatial planning (MSP),[275] as recognized in the former NOP under President Obama, has emerged over the last decade as an effective means to resolve these use conflicts. Several European countries have implemented marine spatial planning to resolve ocean use conflicts, with Belgium adopting CMSP methods as early as 2003,[276] and the Netherlands adopting an integrated management plan for the North Sea in 2005 to manage conflicts between military exercises, shipping routes, and areas of ecological concern.[277] CMSP efforts in Europe have generally employed a "top-down" approach, producing "sectoral or multi use zones allocated to existing and future ocean users."[278] More recently, in Asia, China has also utilized a top-down CMSP approach similar to ocean zoning.[279] More than 60 countries around the world now utilize CMSP to deconflict competing uses

[273] *Id.*
[274] *Id.*
[275] For purposes of this analysis, the terms CMSP and MSP are used interchangeably.
[276] Bondareff, *supra* note 109, at 3; Boehnert, *supra* note 71, at 65.
[277] Bondareff, *supra* note 109, at 3-4; Boehnert, *supra* note 71, at 65.
[278] Bates, *supra* note 272, at 208.
[279] *Id.*

of ocean space and the marine environment.[280] And the pervasiveness of CMSP is increasing, with one-third of the world's exclusive economic zone expected to be subject to government-approved CMSP plans by 2030.[281]

In the United States, support for the concept of marine spatial planning began to emerge in the reports of the Pew Ocean Commission (2003) and the U.S. Commission on Ocean Policy (2004), which made references to "the need to plan for current and new uses of the oceans."[282] In 2009, President Obama convened an Interagency Ocean Policy Task Force to recommend a framework for "improved stewardship, and effective coastal and marine spatial planning."[283] In 2010, President Obama signed Executive Order 13547, adopting the recommendations of the Task Force and championing the concept of CMSP. President Obama's executive order defined "coastal and marine spatial planning" as follows:

> [A] comprehensive, adaptive, integrated, ecosystem-based, and transparent spatial planning process, based on sound science, for analyzing current and anticipated uses of ocean, coastal, and Great Lakes areas. Coastal and marine spatial planning identifies areas most suitable for various types or classes of activities in order to *reduce conflicts among uses*, reduce environmental impacts, *facilitate compatible uses*, and preserve critical ecosystem services to meet economic, environmental, security, and social objectives. In practical terms, coastal and marine spatial planning provides a public policy process for society to better determine how the

[280] Yates and Bradshaw, *supra* note 63, at 2.
[281] *Id.* at 56.
[282] Bondareff, *supra* note 109, at 4.
[283] THE WHITE HOUSE, PRESIDENT BARACK OBAMA, COUNCIL ON ENVIRONMENTAL QUALITY, *Interagency Ocean Policy Task Force* (June 12, 2009), https://obamawhitehouse.archives.gov/administration/eop/ceq/whats_new/Interagency-Ocean-Policy-Task-Force.

ocean, our coasts, and Great Lakes are sustainably used and protected--now and for future generations.[284]

CMSP has also been defined as a "public process of analyzing and allocating the spatial and temporal distribution of human activities in marine areas to achieve ecological, economic, and social objectives that are usually specified through a political process."[285] MSP/CMSP may further be characterized as a process to "understand and harmonize current and projected uses of the ocean waters and seabed with desired ecological, economic, and social goals."[286] Marine spatial planning is generally viewed as a subset of ecosystem management, which ties resource management to geographic areas defined by ecological boundaries as opposed to traditional and sector-based or jurisdictional boundaries.[287] Key characteristics of CMSP include an integrated approach "across and among sectors and governmental agencies, and among different levels of government;" and a strategic, future-oriented, and participatory framework for active stakeholder engagement throughout the process.[288] Critically, CMSP requires coordination with federal agencies and state, local, and tribal governments and public participation throughout the decision-making process because ecological processes are not confined to specific geographical boundaries.[289] This type of multi-disciplinary, comprehensive management approach is especially well-suited to anticipating and addressing the potentially wide spread use conflicts resulting from offshore drilling activities.

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[284] Exec. Order No. 13547, 75 Fed. Reg. 43,021 (July 22, 2010)(emphasis added).
[285] Boehnert, *supra* note 73, at 64 (internal citations omitted).
[286] *Id.*
[287] *See* Yates and Bradshaw, *supra* note 63, at 6; *see also* Keiter, *supra* note 195, at 45.
[288] Yates and Bradshaw, *supra* note 63, at 7.
[289] *See* Keiter, *supra* note 195, at 45.

c. CMSP in the Context of Oil and Gas Development

Many CMSP efforts across the world have in fact been driven by expanded offshore energy development (though predominantly renewable energy development), because ocean energy projects by their very nature "take up large areas of ocean space" and are "likely to compete with other purposes for the same space."[290] Expanded offshore energy development "competes for space in an already busy seascape, and it will have many potential impacts on established patterns of sea use, rights of access, and social and cultural value systems."[291] Oil and gas development in new areas of the outer continental shelf will unquestionably create conflicts between current and emerging uses of ocean space.[292] In addition to the concerns raised by the Department of Defense regarding impacts to the military's ability to exercise necessary freedom of navigation and effectively conduct training and testing operations offshore, other issues of concern resulting from offshore energy development include negative impacts on offshore aquaculture, marine transport, commercial fishing, and recreational activities.[293]

The National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling specifically recognized the value of CMSP in the context of OCSLA leasing decisions, stating:

> Coastal and marine spatial planning applies a multisector approach in an effort to simultaneously reduce user conflicts and environmental impacts associated with ocean and coastal activities. Integrating five-year leasing plans and associated

[290] Yates and Bradshaw, *supra* note 63, at 14.
[291] *Id.* at 1.
[292] *Id.* at 2.
[293] *Id.* at 14.

> leasing decisions with the coastal and marine spatial planning process will be an important step toward assuring the sustainable use of ocean and coastal ecosystems. It could also reduce uncertainty for industry and provide greater predictability for potential users of different areas.

Though President Trump's executive order contains some verbiage which is arguably comparable to the rhetoric espoused by advocates of CMSP, calling for "coordination, consultation, and collaboration regarding ocean-related matters … among Federal, State, tribal, and local governments, marine industries, the ocean science and technology community, other ocean stakeholders, and foreign governments and international organizations" and "use of the best available ocean-related science and knowledge" to "inform decisions,"[294] the executive order removes all references to ecosystem-based management and CMSP. President Trump's executive order also removes the requirement for federal participation in regional ocean planning efforts. The White House did not directly address this shift away from coastal and marine spatial planning, but ocean stakeholders in the commercial sector were quick to recognize and applaud the change.

In a press release, the National Ocean Industries Association addressed the new policy and noted that the offshore oil and gas industry have largely opposed coastal and marine spatial planning initiatives, stating:

> "NOIA welcomes today's Executive Order addressing policy for the nation's oceans, particularly as it addresses the previous Administration's National Ocean

[294] Exec. Order No. 13840, 83 Fed. Reg. 29,431 (June 19, 2018).

> Policy and its Marine Spatial Planning (MSP) initiative, which caused consternation, uncertainty and concern for the offshore energy industry and other ocean stakeholders. The offshore oil and gas industry and many others have largely viewed the MSP initiative as an uber-bureaucratic 'solution' to a government self-imposed problem. In addition, not all stakeholders and activities were treated equally in the zoning process. The offshore energy industry has successfully operated side by side with other ocean users, without major conflict, guided by the planning inherent in the five year offshore national program and the leasing process mandated by the Outer Continental Shelf Lands Act. The Executive Order reverses the misguided course of the 2010 National Ocean Policy.[295]

Opponents of CMSP and the former NOP, like the National Ocean Industries Association, have expressed concern that CMSP could result in far-reaching regulation over not just ocean space but also inland areas as well.[296] Groups representing commercial fisherman have expressed concern that CMSP could reduce their access to ocean waters, and a conservative website expressed apprehension that CMPS "has the potential for the greatest encroachment on private property rights we have ever faced in this nation … [CMSP] has the potential for turning over control of commercial and recreational fishing to the United Nations."[297] Indeed, President Trump's new policy seems to address these concerns, with a marked emphasis on economic efficiency over

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[295] Press Release, National Ocean Industries Association, *NOIA Welcomes Executive Order on National Ocean Policy* (June 19, 2018), https://www.noia.org/noia-welcomes-new-executive-order-on-national-ocean-policy/.
[296] Boehnert, *supra* note 73, at 116.
[297] Morgan Gopnik, *What Regional Ocean Planners Can Learn from U.S. Public Lands Management*, SEA GRANT LAW AND POLICY JOURNAL 46, 51 (2013).

ecosystem-based planning efforts. With regard to these regulatory overbreadth concerns, CMSP is not a regulatory system in and of itself, but rather, a means or a tool to be employed as part of a broader regulatory structure.[298] The primary output of CMSP is a "comprehensive spatial management plan,"[299] such as the (no longer controlling) Mid-Atlantic Regional Ocean Action Plan, which guides management decisions but does not replace traditional sector-based management.[300] Nonetheless, there exists a perception that CMSP will slow down permitting processes and generally harm economic activity.[301] To that end, ongoing community engagement across a variety of sectors and stakeholder interests (which is already a foundational component of CMSP) will be critical to dispelling potentially misguided perceptions about the nature of CMSP.

V. CONCLUSION

Because the United States has yet to codify CMSP into law, progress in moving towards national CMSP efforts has been single-handedly stalled by President Trump's Executive Order. As Allison Bates notes, President Obama's NOP was not adopted through the legislative process and did not provide for mandated CMSP on a national scale.[302] Unfortunately, a presidential "pen and phone"[303] strategy like that employed by President Obama for implementing CMSP via executive order can easily be reversed by the next Administration. Though regional and state-level CMSP is still occurring

[298] Boehnert, *supra* note 73, at 64.
[299] Yates and Bradshaw, *supra* note 63, at 12.
[300] *Id.* at 11.
[301] Gopnik, *supra* note 297, at 49.
[302] Bates, *supra* note 272, at 209.
[303] Peter Baker, *Can Trump Destroy Obama's Legacy*, N. Y. TIMES, June 23, 2017, https://www.nytimes.com/2017/06/23/sunday-review/donald-trump-barack-obama.html.

throughout the United States,[304] currently there exists no national policy to utilize CMSP at the federal level or even mandate consideration of any regional marine spatial plans.

In contrast to onshore public lands, the federal government's offshore holdings in the OCS are not subject to any form of planning mandate.[305] Nearly all onshore public lands are subject to some form of "legal mandate that the relevant federal agencies plan for those lands' management and use."[306] Specifically, Congress enacted planning mandates for Bureau of Land Management and U.S. Forest Service lands to alleviate regulatory fragmentation which diminished the value and utility of these terrestrial public lands.[307] Offshore, Congress has failed to similarly establish "basic priorities, parameters, and boundaries" for management, and governance remains fractured over multiple agencies across sometimes "arbitrary" geographical lines.[308] Compounding the problem is the fact that states exercise regulatory control over the three-mile stretch off the states' coastlines, adding even more agency bureaucracies into the mix.[309] And even further complicating matters is the lack of any sort of formalized hierarchy of ocean policy priorities and a lack of legal coordination among national marine regulatory schemes.[310] The fragmented nature of the current regime certainly does not mitigate conflicts among ocean users, and in fact exacerbates conflicts.[311] As Professor Robin

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[304] Yates and Bradshaw, *supra* note 63, at 209-210.
[305] Robin K. Craig, *An Historical Look at Planning for the Federal Public Lands: Adding Marine Spatial Planning Offshore*, 6 Geo. Wash. J. Energy & Envtl. L. 1, 1 (2015).
[306] *Id*.
[307] *Id*. at 20. Congress enacted the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1782 (2012), to provide a more effective land management framework, including planning. *Id.* at 3-4. Congress addressed planning requirements for the National Forests in the Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. §§ 528-531 (2012), the Forest and Rangeland Renewable Resources Planning Act of 1974, 16 U.S.C. §§ 1600-1614 (2012), and National Forest Management Act of 1976, 16 U.S.C. §§ 1600-1614 (2012). *Id.* at 5-8.
[308] Craig, *supra* note 62, at 78-79.
[309] Craig, *supra* note 305. at 10.
[310] *Id.* at 11.
[311] *See id.* at 15.

Kundis Craig argues, "offshore waters and lands are increasingly experiencing a multiple use dilemma … reminiscent of traditional public lands. As is true of terrestrial public lands, moreover, not all offshore activities are mutually compatible, resulting in a recognized need for increased ocean planning."[312] New and "more intense" ocean uses, such as expanded offshore drilling in areas previously undeveloped, "create the need for more sophisticated ocean governance and ocean planning."[313] Furthermore, in the case of offshore oil and gas development, which has the potential to affect a giant swath of interests at the local, regional, state, and federal level, across multiple sectors, public participation is particularly important to ensure the legitimacy of BOEM's planning process and its ultimate leasing decisions.[314]

While the OCSLA, the CZMA, and NEPA all provide avenues for stakeholder participation and interagency coordination, they do not mandate the type of modern, interdisciplinary, collaborative approach needed to anticipate and resolve multiple use conflicts in the context of offshore drilling. CMSP offers a solution to both planning for and mitigating conflicting uses of the ocean resulting from expanded drilling. It also provides for greater participation and accountability in a controversial process impacting a huge variety of stakeholders, from the United States Navy to commercial fisherman to concerned residents of coastal towns. In order to ensure that the inevitable ocean use conflicts resulting from expanded offshore drilling are appropriately anticipated and resolved, congressional action is necessary to amend the OCSLA to mandate use of comprehensive CMSP throughout all stages of the oil and gas leasing process.

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[312] Craig, *supra* note 62, at 62-63.
[313] *See* Donna R. Christie, *Lead, Follow, or Be Left Behind: The Case for Comprehensive Ocean Policy and Planning for Florida*, 44 STETSON L. REV. 335, 380 (2015).
[314] *See id.* at 383.

Specifically, data and recommendations assimilated throughout CMSP processes could be used by BOEM in drafting its initial Five Year Program, and at each subsequent phase of the OCSLA leasing process to narrow down the areas potentially available or offshore oil and gas development. CMSP could supplement, complement, and even streamline existing participation and collaboration already being undertaken in accordance with the OCSLA, NEPA, and CZMA. Comprehensive CMSP could bring all relevant governmental agencies together and ensure all parties have access to timely data regarding ocean uses to ultimately inform better decision making. Creating a legally binding connection between CMSP and the OCSLA leasing process will also establish greater legitimacy for a program surrounded by much opposition and controversy. By its very nature, CMSP affords a more participatory, stakeholder-driven approach to decision-making,[315] which is necessary for achieving greater transparency and accountability.[316]

Finally, integrating CMSP into the OCSLA leasing process (as opposed to integration into a broader federal ocean policy) could also serve as a more palatable alternative to those opposed to widespread reform of United States ocean policy writ large. It is indisputable that the stakes are high when it comes to the business of offshore drilling – the potential for catastrophic damage is real, and the far-reaching impacts of an oil spill affect stakeholders across the political spectrum. Given the unique risks associated with offshore drilling operations and the recognized deficiencies of the current planning and leasing process to effectively incorporate stakeholder concerns into BOEM's decision-making process, there is a strong case to be made for amending the OCSLA to incorporate CMSP. If the majority of the OCS is potentially going to be open

[315] *See* Yates and Bradshaw, *supra* note 63, at 2.
[316] *See* Christie, *supra* note 313, at 383-384.

for business, as President Trump intends, the need for reforming the OCSLA leasing process is more pressing than ever.