



## Public Land and Resources Committee Newsletter

### Outer Continental Shelf Management and Development

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#### WHERE THE WIND BLOWS: THE FUTURE OF OFFSHORE WIND ENERGY DEVELOPMENT

Hilary Tompkins, Jennifer Biever, and  
Mary Anne Sullivan

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##### Part 1: A Brief History of Offshore Wind Energy Development in the United States

The path to offshore wind development in the United States has many twists and turns, but some hard lessons of the past bring clarity as to a potential path forward. In 2005, Congress authorized the Department of the Interior (DOI) to administer leases for renewable energy development on the Outer Continental Shelf (OCS). *See* 43 U.S.C. § 1337(p). The Energy Policy Act of 2005 (EPA) amended the Outer Continental Shelf Lands Act (OCSLA) to authorize such projects, subject to certain requirements, namely, coordination with relevant federal agencies and affected state and local governments, obtaining a fair return, and ensuring that renewable energy development occurs in a safe and environmentally responsible manner. In 2008, the Minerals Management Service (now the Bureau of Ocean Energy Management (BOEM)), an agency within DOI, began issuing leases for resource assessment and technology testing offshore New Jersey and Delaware. *See, e.g.*, 73 Fed. Reg. 21,152 (Apr. 18, 2008). However, DOI determined that regulations would be necessary before commencing any commercial development activities offshore. Thus, in 2009, BOEM issued final regulations for commercial development that

provide for four distinct phases: planning, leasing, site assessment, and construction and operations. 30 C.F.R. Part 585. In addition to OCSLA, a number of federal environmental statutory reviews apply to offshore wind, including reviews under the National Environmental Policy Act (NEPA), the National Historic Preservation Act (NHPA), the Endangered Species Act (ESA), and the Migratory Bird Treaty Act (MBTA), to name a few.

The first foray into offshore wind was the Cape Wind project, covering a 25-square-mile area in Nantucket Sound with 130 proposed turbines. The project had suffered undue delays from the start, with its first application filed in November 2001 and a draft Environmental Impact Statement issued in November 2004 by the U.S. Army Corps of Engineers. After review of the proposed project was transferred to DOI pursuant to the EPA, the project developer had to wait for final publication of the 2009 regulations prior to lease issuance. Meanwhile, strong local and tribal opposition was building because of the project's impact on historical and cultural landmarks within Nantucket Sound. After extensive NEPA review and section 106 NHPA consultation, in October 2010 DOI issued the first commercial lease to Cape Wind. Opponents immediately filed suit, challenging DOI's decision on a number of grounds. One claim was based on the National Park Service's finding that the Nantucket Sound

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June 6, 2018

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itself was a traditional cultural property under the NHPA based on the tribes' cultural practices. *See* Minerals Management Service, Cape Wind Energy Project Documentation of Section 106 Finding of Adverse Effect (Revised) at 32–34 (Jan. 13, 2010). After winding its way through the courts, the D.C. Circuit in 2016 struck down portions of DOI's decision, finding violations of NEPA for inadequate consideration of geophysical hazards associated with installing turbines on the subsurface and seafloor and violation of the ESA for failure to consider plaintiffs' submissions on the economic cost of the mitigation measure called "feathering" that would reduce bird take by the turbines. *P.E.E.R. v. Hopper*, 827 F.3d 1077 (D.C. Cir. 2016). The D.C. Circuit did not vacate the lease but remanded the project to DOI to address the deficiencies and dismissed the remaining claims. DOI went to work on addressing the deficiencies, and Cape Wind obtained lease suspensions through 2017, but when vital energy contracts fell through, Cape Wind formally relinquished its lease to BOEM. *See Now It's Official: Cape Wind Project Dead*, BOSTON GLOBE, Dec. 1, 2017, <https://www.bostonglobe.com/business/2017/12/01/now-official-cape-wind-project-dead/0899me8Xd3ziWOujgkvbwL/story.html>.

In the aftermath of the Cape Wind experience, BOEM has taken the lessons learned and created a new program called "Smart from the Start," which seeks to locate wind projects in low-conflict areas, further from shore, and with improved mitigation measures. Under this effort, BOEM identified specific "wind energy areas" that were offered for competitive leasing through NEPA reviews of the entire area. *See, e.g.*, 76 Fed. Reg. 51,391–93 (Aug. 18, 2011). Since the inception of the Smart from the Start program in 2010, BOEM has issued multiple leases along the Atlantic Coast offshore Rhode Island, Massachusetts, New York, New Jersey, Maryland, Virginia, and North Carolina.

## **Part 2: The Current Administration's Potential Impact on Future Wind Energy Development**

BOEM made some real progress in many respects over the last few years to set up the offshore wind industry for a successful takeoff: choosing candidate lease sites designed to avoid the controversy that Cape Wind engendered and introducing some sensible steps to speed the early environmental analysis and decision-making on lease proposals. But the industry needs to be careful what it wishes for when it comes to further streamlining—the risks may outweigh the rewards.

The Trump administration has made a number of proposals to speed the permitting of infrastructure projects. These reforms would apply to offshore wind projects, along with the highway, bridge, and pipeline projects that were likely more "front-of-mind" when the proposals were made. Exec. Order No. 13,807, Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects (Aug. 15, 2017), <https://www.whitehouse.gov/presidential-actions/presidential-executive-order-establishing-discipline-accountability-environmental-review-permitting-process-infrastructure/>; <https://www.whitehouse.gov/wp-content/uploads/2018/02/INFRASTRUCTURE-211.pdf>. This is the fourth consecutive administration to propose streamlining reforms for federal permitting designed to benefit renewable energy projects. However, these streamlining proposals run the risk that agencies spend a lot of time implementing operational changes instead of moving forward on the projects in front of them. Then, just as the agencies and project sponsors understand the new rules of the road, a new administration will come along with different ideas to implement. Pending projects can get caught in the crosswinds, subjecting them to evolving and uncertain requirements.

There are some worthy and interesting concepts in the Trump administration's proposals,

such as replacing detailed impact analyses with performance standards, and limiting the alternatives analysis to options that an agency can act on and that meet the applicant's purpose. *See* <https://www.whitehouse.gov/wp-content/uploads/2018/02/INFRASTRUCTURE-211.pdf>, at 36, 48. For example, there are many options now included in the alternatives analysis that no one wishes to pursue or that the agency has no means to authorize. To the extent they offer environmental benefits, they may warrant discussion under the "no action" alternative, but it is costly and wasteful to address them as if they were serious alternatives that might be implemented in lieu of the proposed action. However, they either create significant litigation risks for project proponents or require amendments to NEPA—amendments that historically have been notoriously difficult to advance.

Many of the other streamlining proposals either do not solve current common causes of delay or are easy (and likely advisable) to evade. For example, it is rare that individual agency issuance of its own Record of Decision (ROD) results in substantial delay, and requiring all agencies to negotiate a single ROD might well take more time. While almost universally ignored, page limits for NEPA documents already exist. Imposing page limits will likely just drive more of the analysis to supporting "technical reports" or create more serious litigation risks—particularly given the extensive judicial precedent under NEPA. Nobody wins in that scenario. Delays are typically the result of lack of resources or political controversy surrounding a project. This is not to say that the current form of encyclopedic environmental impact statements, which regularly carry six and seven figure price tags, is desirable, but the current proposals do not seem likely to fix that problem.

Furthermore, offshore wind developers face two significant challenges that the pending streamlining proposals do nothing to fix. The Jones Act, which requires exclusively U.S.-built, owned, and operated ships (which would be necessary to construct offshore wind projects) to serve the

U.S. "coastwise trade," can represent a significant impediment to early projects. 46 U.S.C. § 50501. Qualifying vessels will be built if the demand is clear and likely to endure, but for those first out of the gate, the supporting vessels are hard to find, and meaningful exceptions are not available. The Jones Act has a powerful array of supporters, and history suggests that project developers need to assume they will have to work within its confines.

Additionally, the Trump administration has proposed to open most of the U.S. offshore to oil and gas development. *See* Exec. Order No. 13,795, Implementing an America-First Offshore Energy Strategy (Apr. 28, 2017), [https://www.eenews.net/assets/2017/04/28/document\\_gw\\_04.pdf](https://www.eenews.net/assets/2017/04/28/document_gw_04.pdf). The opposition to offshore oil and gas drilling in many Atlantic and Pacific coastal states is deep and long-standing. Some states and stakeholders that would welcome offshore wind development may fear that support for the offshore wind industry will undermine their case for opposing oil and gas development. The degree of the collateral damage to the offshore wind industry is not yet apparent, although it appears that DOI will have a tough road ahead unless at least some coastal states are exempted from oil and gas development.

Finally, the administration recently reversed DOI's long-standing legal interpretation that the MBTA applies to the "incidental take" (i.e., unintentional) of migratory birds. *See* M-37050, Migratory Bird Treaty Act Does Not Prohibit Incidental Take (Dec. 22, 2017). While this change in position likely means there will be no incidental take prosecutions under the current administration, it is important to note that circuit courts have ruled on this issue differently, with some still prohibiting incidental take. *See, e.g., United States v. CITGO Petroleum Corp.*, 801 F.3d 477 (5th Cir. 2015); *Newton Cty. Wildlife Ass'n v. U.S. Forest Serv.*, 113 F.3d 110 (8th Cir. 1997), *reh'g and suggestion for reh'g en banc denied, cert. denied*, 118 S. Ct. 1035 (1998); *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297 (9th Cir. 1991); *United States v. FMC Corp.*, 572 F.2d 902 (2d Cir. 1978); *United States v. Apollo Energies, Inc.*, 611 F.3d 679 (10th Cir.



2010). There also is the potential for private civil claims under the Administrative Procedure Act (APA) regarding the application of the MBTA that may be filed against DOI for authorizing agency actions that result in incidental take. *Am. Bird Conservancy, Inc. v. FCC*, 516 F.3d 1027, 1031 (D.C. Cir. 2008) (noting that the MBTA applies to federal agencies); *Defenders of Wildlife v. Jackson*, 791 F. Supp. 2d 96, 119 (D.D.C. 2011) (stating that individual plaintiffs may enforce the MBTA against government agencies through APA).

While the United States is a promising market for offshore wind development, it also competes with the rest of the world for the resources for that development. We need to be more efficient and disciplined in our regulatory processes, but the early project sponsors must also have patience and recognize that the early projects will take time and thoughtful cooperation with the regulators.

### **Part 3: Potential Future Process Improvements**

Though the proposed changes from the Trump administration may not hold as much promise as initially hoped, there remains room for further process improvements to streamline the current project review process. These potential streamlining concepts are twofold: proposals that (1) BOEM would implement directly; or (2) would involve coordination with other agencies, but would impact the BOEM process. The process improvements below would reduce the overall review and process timeline while maintaining regulatory certainty and rigor.

First, BOEM should consider developing guidance proscribing how it will handle phased development of offshore wind projects, and how NEPA will apply to each phase. Such clarity may accelerate NEPA review if BOEM can tier to existing and prior NEPA analyses. Consideration of categorical exclusions also would inform the prospect of streamlining routine and low impact activities. BOEM should also establish electronic databases with baseline assessments of impacts likely to

occur from wind projects that could be used as a foundation for reviews of offshore wind projects. BOEM's Atlantic Science Year in Review studies are a good start. Successful mitigation data also should be compiled. These data should be available in usable electronic format to all developers as the starting point for their NEPA analyses. Last, given the information the National Oceanic and Atmospheric Administration (NOAA) already has on potential impacts to marine mammals in the North Atlantic, the NOAA may be able to develop regulations that reduce review times for Incidental Harassment Authorizations or Letters of Authorization under the Marine Mammal Protection Act. The NOAA could also follow the shorter deadlines under the ESA for issuing incidental take statements.

Multiple options exist to improve the current regulatory program, particularly given the nascent stage of offshore wind energy development. The regulated community should be actively evaluating these issues to advocate for and work collaboratively with DOI in furtherance of clear, consistent, and efficient regulations and policy.

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## THE COMPLEXITIES OF MULTIPLE USE MANAGEMENT ON THE OUTER CONTINENTAL SHELF

Rachel Jacobson, Kayla S. Byers, and  
Mark L. Hanin

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### I. Introduction

The Trump administration’s focus on “energy dominance” and promotion of domestic production not only throughout the continental United States, but also across the nation’s vast Outer Continental Shelf (OCS) has been no secret. Within months of taking office, President Trump issued an executive order, Implementing an America-First Offshore Energy Strategy (Exec. Order No. 13,795 (Apr. 28, 2017)), announcing a policy of “encourag[ing] energy exploration and production, including on the [OCS], in order to maintain the Nation’s position as a global energy leader and foster energy security.” A major step toward implementation of this policy occurred in January 2018, when the Bureau of Ocean Energy Management (BOEM)—the agency responsible for OCS management within the Department of the Interior (DOI)—issued a 2019–2024 Draft Proposed Program (DPP), which centers on offshore oil and gas leasing but also addresses renewable energy. The OCS planning and leasing will be funded by the \$171 million appropriated to BOEM in the omnibus spending bill for FY 2018 that President Trump signed into law on March 23, 2018.

The DPP has garnered significant attention because it proposes the largest-ever expansion of offshore leasing, opening more than 98 percent of the OCS for lease sales over a five-year period. It is also a notable change from the status quo in OCS leasing policy; for example, while DOI has exempted West Coast states from new federal lease sales since 1984 (due to congressional moratoria from 1982 to 2008), the DPP would begin leasing off the coasts of California, Oregon, and Washington by 2021. In total, the DPP would propose 47 lease sales over five years across 25 of the 26 BOEM “planning areas” in Alaska, the Pacific Ocean, Gulf

of Mexico, and Atlantic Ocean. The sole planning area excluded is the North Aleutian Basin in southwestern Alaska.

The DPP’s expansive geographic scope, which creates vast opportunities for hydrocarbon exploration and development, inevitably highlights the many challenges that this plan may present for multiple use management on the OCS. Promoting expansive oil and gas operations while preserving the numerous competing and economically and environmentally significant uses of the OCS will be no easy task, requiring thoughtful planning on many levels. It also will benefit from the implementation of technological innovations, where feasible, to reduce the possibility of conflict. In responding to the DPP, stakeholders have raised concerns about the ability to accommodate a broad spectrum of offshore uses—including commercial fishing, renewable energy, military operations, tourism, and conservation—in the wake of this extremely ambitious leasing plan.

After providing background on the DPP, this article surveys the perspectives of key stakeholders and identifies points of contention on the prioritization of oil and gas leasing on the OCS. This debate has manifested not only in comments submitted to BOEM during its public input process, but also in the political arena as legislators and governors have publicly taken steps to support or oppose the draft plan.

### II. Background on BOEM’s Leasing Plans

DOI manages approximately 500 million acres of onshore land—around one-fifth of the total U.S. surface area. Offshore, DOI (through BOEM) manages energy and mineral resources on 1.7 billion acres of federally submerged lands on the OCS. As of January 2018, BOEM oversaw approximately 2900 active oil and gas leases on 15.3 million acres of the OCS, accounting for approximately four percent of domestic natural gas production and 18 percent of domestic oil production. Inherent in these natural resource management responsibilities is a delicate balance

of competing interests and uses, perhaps nowhere as much as on the OCS.

The OCS Lands Act, 43 U.S.C. § 1331 et seq. (OCSLA), directs the Secretary of the Interior to develop five-year plans establishing the federal government's national policy for offshore energy development based on the country's energy needs. Among other things, these plans specify the locations and schedules for BOEM-led auctions for rights to explore and develop offshore oil and gas reserves. Finalization of a five-year plan does not constitute final approval of the scheduled lease sales; each lease sale is subject to additional pre-lease decision processes, including environmental review and analysis. Moreover, even if an entity secures the right to a lease, it need not exercise that right, and many leasing rights on the OCS go unexercised. (As an example, after Royal Dutch Shell PLC acquired leases in the Chukchi Sea for over \$2 billion in 2008, a litany of lawsuits challenged the lease approval and associated environmental review. Shell ultimately curtailed most of its Arctic oil exploration in 2016 after spending around \$7 billion and facing a range of setbacks. See Dan Joling, *Shell Releases Offshore Leases in Alaska's Chukchi Sea*, ASSOCIATED PRESS, May 10, 2016.)

BOEM had already finalized a five-year plan covering 2017–2022 under the Obama administration. However, President Trump directed the agency to set this plan aside and propose a new approach that would promote leasing on the OCS to ensure “energy security,” “economic vitality,” and “military readiness.” Exec. Order No. 13,795. This led to BOEM's currently ongoing planning process, which Secretary of the Interior Ryan Zinke has directed must give “full consideration . . . to leasing the OCS offshore Alaska, Mid-Atlantic, South Atlantic, and the Gulf of Mexico.” Dep't of Interior Secretary's Order 3350, § 4(a)(1) (May 1, 2017).

In the meantime, lease sales continue under the existing 2017–2022 plan while BOEM proceeds with the DPP process. Even absent the Trump

administration's proposed expansion, large areas of OCS remain open for leasing. For example, on March 21, 2018, BOEM held the largest lease sale in U.S. history in the Gulf of Mexico. Notably, however, most of the lease blocks up for auction did not receive any bids (companies bid on 148 of the 14,431 blocks). Opponents may cite the limited interest in this most recent sale as weighing against further expansion of OCS leasing opportunities.

While the 2019–2024 DPP focuses largely on oil and gas exploration, it also discusses renewable energy projects. In the Atlantic, for example, BOEM had issued 13 wind energy leases to date and is “considering offering additional areas” for wind development. DPP § 6.5.4.3. In the Pacific, BOEM “continues to work closely” with states and stakeholders on renewable projects. DPP § 6.5.2.3. Joint review by BOEM and the Federal Energy Regulatory Commission is ongoing for an Oregon State University-sponsored “research lease” for wave energy, which would consist of four test berths on a grid-connected ocean test facility. *Id.* BOEM is also carrying out renewable energy studies in the Gulf of Mexico and expects future renewable leases in that region.

### **III. BOEM's Position on Multiple Use Management**

Multiple use management is built into BOEM's decision-making process as, by law, the agency is directed to “gather[ ] information about multiple uses of the OCS to assist the Secretary in making decisions on the 5-year [leasing] program.” 30 C.F.R. § 556.201. To advance this aim, BOEM solicits input from federal agencies, states, and local governments, industry, nongovernmental organizations, and other interested parties, as discussed in more detail below.

The DPP recognizes the need for multiple use management of the OCS in light of numerous ongoing OCS activities and functions, many of which have significant economic, national security, and environmental implications. For each region, the DPP analyzes the effects on commercial and

recreational fishing, tourism, military training, renewable energy, shipping, marine life and its habitat, and other OCS uses. The DPP also indicates that DOI is committed to working with other federal agencies, state and local governments, and tribal organizations to “cooperatively manage” these other uses and utilize feedback from stakeholders to “explore ways to reduce conflicts.” The question of how that cooperative management will be memorialized and implemented is important in determining if the DPP will survive judicial and political challenge.

It is likely that the National Environmental Policy Act analysis of the environmental and socio-economic impacts of the DPP will contain further discussion of competing uses and possible approaches for successful co-management. For instance, the Final Environmental Impact Statement for the 2017–2022 five-year plan proposed the use of Conflict Management Plans (CMP) in certain regions of Alaska with high potential for multiple use management issues relating to subsistence activities by Native communities. This approach would require oil and gas companies who wish to operate in those areas to submit a CMP to BOEM prior to exploration or development, which BOEM would use in discussions with stakeholders to determine appropriate mitigation and best practices to prevent “unreasonable conflicts.” It remains to be seen whether BOEM will take a similar—or even more expansive—CMP approach in the DPP.

#### **IV. Stakeholder Perspectives on the Competing Uses of the OCS**

A diverse set of stakeholders commented on BOEM’s initial Request for Information (RFI) seeking input on a new five-year plan to replace the Obama era 2017–2022 five-year plan. The RFI generated around 816,000 comments. After publishing the DPP, BOEM opened a second public comment period that closed on March 9, 2018. During this latest round of public comment, many of the same parties that submitted comments in response to the RFI have weighed in again. These stakeholders—including commercial fishermen,

coastal states, environmental groups, and the Department of Defense (DOD), among many other entities and individuals—have expressed a broad range of views about the proper balance between oil and gas leasing and other OCS uses, and how BOEM should weigh OCS priorities and associated risks. The stakeholder perspectives summarized below come from the two comment periods.

***Commercial Fisheries.*** Commercial fisheries have expressed overwhelming opposition to the DPP based on its potential to harm the marine life on which their livelihoods depend. For example, the Massachusetts Lobstermen’s Association stated that new oil and gas exploration could weaken ecosystems, resulting in negative repercussions for their businesses.

***Coastal States.*** Coastal states have adopted widely divergent views on the benefits and drawbacks of new offshore leasing. While some see it as a key driver of employment and economic activity, others place greater emphasis on environmental risks and concerns about clashing multiple uses.

The Outer Continental Shelf Governors Coalition submitted a letter on behalf of five governors from coastal states (Alabama, Alaska, Maine, Mississippi, and Texas) supporting an “all-of-the-above energy plan” that would incorporate hydrocarbon development alongside alternative and renewable energy sources. It also emphasized that new oil and gas leases can strengthen long-term energy security for the United States and, accordingly, urged BOEM to include all currently unleased areas of the OCS in the DPP.

Other states voiced significant opposition to opening new areas on the OCS for leasing. Besides raising concerns about exacerbating climate change effects and oil spill risks, skeptical coastal states identified worries about conflicting OCS uses. The governor of Oregon singled out “multiple, overlapping fishing areas” off the Oregon coast, as well as a “policy preference of Oregonians to . . . prioritize the long-term use and protection of renewable resources.” The attorney general



of Massachusetts cited the “thriving but delicate ecosystem and diverse array of marine life,” as well as a risk that oil and gas exploration or extraction could “hinder recovery of threatened or endangered coastal and marine species.” The attorney general of New York in a March 9, 2018, letter to BOEM strongly opposed offshore drilling based on a host of multiple use concerns and said that New York will “use all appropriate legal avenues to vigorously oppose” the DPP. The California Coastal Commission pointed to coastal tourism as a key basis for opposing new OCS leasing. An association of 12 coastal states (spanning both the western and eastern coasts) expressed a host of multiple use concerns, ranging from risks to endangered and threatened species to commercial fishing, recreation, and research.

In January 2018, Florida Governor Rick Scott requested an exemption from offshore oil and gas exploration for his state. Shortly thereafter, Secretary Zinke announced that Florida would be excluded from the DPP. This statement prompted governors from seven states (Connecticut, Delaware, Massachusetts, Maryland, North Carolina, Rhode Island, and Virginia) to write a letter to BOEM asking for similar exemptions and pointing to myriad multiple use considerations. In Virginia, former Governor Terry McAuliffe had sought an exemption in August 2017 based on concerns regarding inadequate revenue sharing between federal and state governments, which had to be improved “for Virginia to be included in the leasing area.” However, in January 2018, an exemption request submitted by Virginia’s new Governor Ralph Northam did not leave room for new drilling even with improved revenue sharing.

Other coastal state officials have taken more favorable views. Governor Paul LePage of Maine expressed support for offshore drilling and the DPP. Similarly, Mississippi Governor Phil Bryant stated he would not seek an exemption for his state, noting that drilling would occur relatively far offshore and that revenues generated from drilling can be put toward health care, education, and infrastructure.

***Environmental Groups.*** Environmental groups submitted comments that tallied with commercial fisheries and those of coastal states critical of new leasing. Earthjustice gathered the names of over 30,000 individuals for comments emphasizing threats to tourism and the fishing industry off the Atlantic coast. The Center for Biological Diversity (CBD) submitted comments on behalf of itself, the Sierra Club, and other groups that focused on cost-benefit calculations and argued that BOEM should take full account of all relevant costs. For example, the comments argued that marine species migrating through multiple OCS regions may “suffer the cumulative impacts of oil and gas activities in more than one region.” CBD also urged BOEM to more closely study risks of future oil spills, which can substantially hamper multiple uses of the OCS. The Natural Resources Defense Council likewise noted concerns about oil spills, observing that the Deepwater Horizon spill “cost the public more than 16 million user days for outdoor recreation such as boating, recreational fishing, and beach-going.”

***Department of Defense.*** DOD has adopted a more nuanced position, highlighting its military preparedness goals while expressing a willingness to engage in cooperative multiple use management with DOI. DOD has endorsed extending a 2006 congressional moratorium on drilling in the eastern Gulf of Mexico through 2022. In June 2017, the chief of staff of the Air Force offered “whole-hearted support” for extending the ban on oil and gas leasing in eastern Gulf regions past 2022. In comments on the RFI, however, DOD struck a more measured tone without singling out the eastern Gulf. DOD wrote that military readiness activities pursued by the Navy, Air Force, and Marine Corps take place in many areas being considered for future leasing. As such, DOD supported DOI’s request to create an interdepartmental working group to address DOD’s “offshore equities and their compatibility with potential oil and gas leasing” on the OCS. During the Obama administration, DOD had requested to exclude certain areas—such as the Atlantic Coast—from oil and gas exploration due to military training and systems testing activities.

While those requests were accommodated in the 2017–2022 five-year plan, the DPP opens up the Atlantic seaboard for drilling and thus introduces special national security sensitivities the working group may need to address.

***Oil and Gas Industry.*** Oil and gas industry groups have voiced considerable optimism about managing multiple uses on the OCS. A group of oil and gas companies and associations led by the American Petroleum Institute argued that “there is ample evidence that oil and natural gas development and other ocean industries can co-exist and all can thrive.” In support of this view, their letter stated that Alaska and the Gulf of Mexico have developed “robust” commercial and recreational fishing industries alongside oil and gas exploration. A similar theme was sounded by the Louisiana Mid-Continent Oil and Gas Association and Louisiana Association of Business and Industry, who argue that Louisiana “has successfully achieved a multiple use policy when it comes to the resources of the Gulf of Mexico” and that commercial fisheries and wildlife habitat “have long thrived alongside the energy industry” in the state.

## **V. The Political Response to the DPP**

For many decades, issues relating to multiple uses of the OCS have sparked numerous political debates and opposition from both sides of the aisle. As discussed above, governors from some coastal states have supported new oil and gas leasing. However, much controversy has arisen from states seeking exemptions for certain areas included in the DPP. For instance, as discussed above, shortly after the DPP was released, Secretary Zinke announced on social media—in response to Governor Rick Scott’s request—that Florida would be exempt. Officials from other coastal states immediately sought similar treatment, in many instances describing their mix of OCS uses—ranging from tourism to natural resource industries—as being equally important to safeguard as Florida’s. It remains to be seen whether the apparent exemption for Florida will be incorporated into the final offshore leasing plan,

and if so, which additional steps nonexempted states may pursue.

Members of Congress have responded not only through informal efforts with DOI to change the scope of leasing in the final plan, but also with various legislative efforts to prevent drilling in certain areas. Over the past four decades, both states and Congress have played an important role in regulating oil and gas exploration on the OCS. After the 1969 Santa Barbara oil spill that discharged three million gallons of oil, the California State Lands Commission imposed a moratorium on new offshore leases in its three-nautical-mile jurisdiction. (The DPP proposes to open the OCS along California’s entire coast to development.) From 1982 until 2008, Congress included a drilling moratorium for areas of the OCS in annual appropriations bills (excluding parts of Alaska and much of the Gulf of Mexico). Since President George W. Bush’s successful 2008 opposition to such moratoria, they have not reappeared in appropriation packages.

The Gulf of Mexico Energy Security Act of 2006 imposed a stand-alone moratorium on oil and gas leasing within 125 miles of Florida’s western coast and a part of the Gulf’s Central Planning Area. This legislative prohibition is set to expire on June 30, 2022. The Florida coast is now the subject of renewed legislation in Congress that seeks to permanently block oil and gas leasing off the western Florida coast. On January 11, 2018, Congressman Francis Rooney (R-FL) introduced the Protecting and Securing Florida’s Coastline Act of 2018 (H.R. 4770) to transform the existing moratorium into a permanent ban on oil and gas leasing in the eastern Gulf of Mexico. Florida Senator Bill Nelson introduced a similar bill, the Florida Coastal Protection Act (S. 2292), the previous day. Congressman Rooney expressed thanks to Secretary Zinke for his “responsiveness . . . in carving Florida out of the Administration’s updated drilling plan.” Press Release, Congressman Francis Rooney Introduces Legislation to Permanently Ban Drilling in Eastern Gulf (Jan. 12, 2018). But, he added that legislative action is needed to “ensure that future generations do

not have to continue fighting this battle” over a permanent moratorium off the western Florida coast to protect Florida’s “tourism-based economy.” *Id.*

Other legislative steps are also being contemplated. To protect the multiple uses identified in their comments on the DPP, a group of East Coast states is seeking to block DOI’s lease sale program through legislation, including the New England Coastal Protection Act (NECPA, H.R. 4774), introduced in the House and Senate on January 11, 2018. The NECPA would amend OCSLA to prohibit DOI from issuing any leases for exploration, development, or production of oil or gas off the coasts of Maine, New Hampshire, Massachusetts, Rhode Island, and Connecticut. Although NECPA is not likely to become law, it illustrates the extent of disagreement over resource stewardship on the OCS.

## VI. Conclusion

Multiple use management will continue to play a critical role in debates surrounding the future of OCS energy development. Commercial fisheries, coastal states with significant tourism and other off-shore industries, environmental groups, and the military represent just a sample of the many parties with competing OCS uses that have already weighed in on BOEM’s ambitious proposed plan. Successfully managing the interests of this broad spectrum of stakeholders will undoubtedly present challenges for BOEM and require thoughtful planning as the agency moves forward with finalizing the DPP.

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## FIFTH CIRCUIT CHANGES OCS CONTRACTUAL CHOICE OF LAW ANALYSIS

Gerald F. Slattery Jr.

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Exploration and production of oil and gas on the Outer Continental Shelf (OCS), primarily offshore Texas and Louisiana, take place pursuant to a myriad of contracts, governing such activities as platform construction and operation, drilling wells, transportation of workers, wireline services, downhole logging, well completion, and pipeline construction and operation. Disputes under these contracts, often in the context of demands for indemnity following accidents that have caused property damage, personal injury, or death, have led to much litigation.

Federal district courts addressing these contractual disputes must determine what law applies. Is it the law of the adjacent state, pursuant to the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 et seq. (OCSLA)? Or should maritime law apply? These determinations are important, because if the law of the adjacent state applies pursuant to section 1333(a)(2)(A) of OCSLA, the enforceability of provisions indemnifying a party for its own negligence may be limited (Texas law) or altogether prohibited (Louisiana law). Conversely, if maritime law applies, an obligation to indemnify a party for its own negligence generally will be enforced, provided it is expressed in clear language. *Randall v. Chevron U.S.A., Inc.*, 13 F.3d 888, 905 (5th Cir. 1994).

For over 27 years, the Fifth Circuit Court of Appeals used a six-factor test first set forth in *Davis & Sons, Inc. v. Gulf Oil Corp.*, 919 F.2d 313 (5th Cir. 1990), in order to determine whether a contract related to exploration and production activities on the OCS would be governed by maritime law or the adjacent state’s law. But in a recent en banc opinion, *In re Larry Doiron, Inc.*, 879 F.3d 568 (5th Cir. 2018), the Fifth Circuit abrogated the *Davis* test and replaced it with a simplified two-part test. According to the Fifth Circuit, “[t]his is the proper approach in a contract

case and assists the parties in evaluating their risks, particularly their liability under indemnification clauses in the contract.” *Id.* at 576.

Courts applying the *Davis* test in order to determine whether a contract was maritime first examined the historical treatment of similar contracts in the jurisprudence, and then employed a fact-intensive six-point analysis:

We consider six factors in characterizing the contract: 1) what does the specific work order in effect at the time of injury provide? 2) what work did the crew assigned under the work order actually do? 3) was the crew assigned to work aboard a vessel in navigable waters? 4) to what extent did the work being done relate to the mission of that vessel? 5) what was the principal work of the injured worker? and 6) what work was the injured worker actually doing at the time of injury?

*Id.* at 572 (quoting *Davis*, 919 F.2d at 316).

Over time, the Fifth Circuit became frustrated with this fact-parsing analysis because parties to contracts could not know for certain what law would govern their indemnity obligations if an accident occurred. As a result, they could not accurately assess the risks incident to the indemnity provisions in their contracts. One Fifth Circuit panel said that the six-factor test “create[d] uncertainty, spawn[ed] litigation, and hinder[ed] the rational calculation of costs and risks by companies participating in this industry.” *Hoda v. Rowan Cos.*, 419 F.3d 379, 380 (5th Cir. 2005). And the en banc court in *Doiron* said that “most of the prongs of the *Davis & Sons* test are unnecessary and unduly complicate the determination of whether a contract is maritime,” citing the “complex factual explication of the prongs in the panel opinion” to demonstrate its point. 879 F.3d at 572–73.

The *Doiron* en banc court therefore turned to the U.S. Supreme Court’s decision in *Norfolk Southern Railway Company v. Kirby*, 543 U.S.

14 (2004), because it “lights a path to a simpler, more straightforward method for determining whether a contract is maritime. . . .” 879 F.3d at 574. In particular, the en banc court focused on the Supreme Court’s instruction, in the context of a bill of lading, about how to determine whether a contract is maritime: “[T]he answer depends upon . . . the nature and character of the contract, and the true criterion is whether it has reference to maritime service or maritime transactions.” *Kirby*, 543 U.S. at 24 (internal quotation marks omitted). Following this guidance, the *Doiron* court then articulated a simpler two-factor inquiry to replace the *Davis* test:

First, is the contract one to provide services to facilitate the drilling or production of oil and gas on navigable waters? . . . Second, if the answer to the above question is “yes,” does the contract provide or do the parties expect that a vessel will play a substantial role in the completion of the contract? If so, the contract is maritime in nature.

879 F.3d at 576.

According to the Fifth Circuit, this new test properly places the focus on the language of the contract and the expectations of the parties, and removes from the analysis factors in the *Davis* test that were irrelevant to the determination. *Id.* at 576–77. It does seem that the new test can meet the court’s stated objective of “assist[ing] the parties in evaluating their risks,” *id.* at 576, because the choice of law determination should now be more predictable. The analysis will focus not on what was happening when the accident occurred, but on what the parties said, or intended, in their contract.

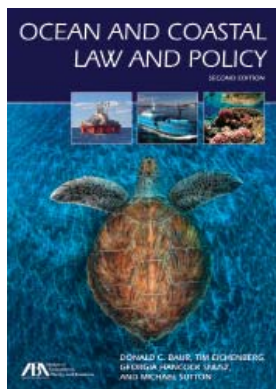
*Doiron* cited an earlier en banc decision by the Fifth Circuit, *Grand Isle Shipyard, Inc. v. Seacor Marine, L.L.C.*, 589 F.3d 778 (5th Cir. 2009). 879 F.3d at 576 n.51. Like *Doiron*, *Grand Isle* addressed contractual choice-of-law issues in a case arising from oil and gas operations on the OCS. The *Grand Isle* en banc court had to decide whether maritime law or the adjacent state’s law



governed in a case where the accident giving rise to the indemnity claim occurred on a crew boat, but the majority of work under the contract was to be performed on a fixed platform. If the dispute were deemed to have arisen on the vessel, maritime law would apply, but if it were deemed to have arisen on the fixed platform, the adjacent state's law would apply pursuant to section 1333(a)(2) (A) of OCSLA. Departing from the approach many Fifth Circuit panels had used in previous years, the *Grand Isle* en banc court held that the situs of the dispute was not where the accident occurred, but where a majority of the work under the contract was to be performed—an approach it called the “focus of the contract” test. 589 F.3d at 781, 787.

It is easy to see the similarity between the Fifth Circuit's reasoning in *Doiron* and in *Grand Isle*. Both cases require that in a contractual choice of law analysis, district courts must focus on what the parties' contracts provide, not the happenstance of where accidents giving rise to indemnity claims occurred. Contracting parties should now have more confidence about what law will apply to their indemnity disputes, which should allow them to better manage risk allocation in their contracts.

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## Ocean and Coastal Law and Policy, Second Edition

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## AN OPINION PIECE—OCEAN 911: WHATEVER HAPPENED TO BEST AVAILABLE AND SAFEST TECHNOLOGY?

Milo C. Mason

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While the Deepwater Horizon (DWH) well blowout, 11 fatalities, and an 87-day oil spill were caused by improper drilling and poor choices by British Petroleum (BP) and its subcontractors, the lives lost and the oil spill pollution damage of the Macondo well most likely would have been prevented if the Blow Out Preventer (BOP) had been the Best Available and Safest Technology (BAST). If the BOP had two blind shear rams sufficiently apart to have at least one ram pinch close the drill pipe and kill the well, the disaster would not have happened.

The Outer Continental Shelf (OCS) Lands Act, as amended nine years after the Santa Barbara, California, oil spill, mandates that the Secretary of the Interior “require, on all new drilling and production operations and, whenever practicable, on existing operations, the use of the best available and safest technologies *which the Secretary determines* to be economically feasible wherever failure of equipment would have a significant effect on safety, health, or the environment, *except where the Secretary determines* that the incremental benefits are *clearly* insufficient to justify the incremental costs of utilizing such technologies.” 43 U.S.C. § 1347(b) (emphasis added). The statutory language requires that the Secretary make determinations about these technologies and about whether the incremental benefits are clearly not worth the extra cost. It is as simple as that.

To have a robust U.S. offshore oil and gas energy program requires the best available and safest technologies. The law requires all operations to be safe and pollution-free all the time. Not 99 percent or 98 percent of the time. BOPs need to prevent blowouts 100 percent of the time. Another DWH disaster event would harm our nation's OCS program for years. The risk of another DWH event even at one percent is too high and the costs of a repeated disastrous spill enormous. Probably 50

percent of the operators on the federal OCS are thinly capitalized, and yet largely self-insured. The risk of another DWH disaster without a BP stepping up to bear most of the costs of the damage would transfer the costs to the coastal states, the tourist industry, and the environment. The regulations on drilling and production safety, adopted in 2016, were considerable steps forward, but they fell short, in many ways, by relying on “standard industry practices,” American Petroleum Institute (API) member agreed-upon performance guidelines, and an absurd and circular logic that “compliance with the regulations equals BAST.” The statutory mandate requiring the Secretary to make independent BAST determinations does not in any way, shape, or form mean that the Secretary should delegate the BAST determinations to API and industry operators.

An industry cost/benefit calculus may be rational, but it does not result in the statutory mandate to require BAST whenever it’s “practicable” and “economically feasible wherever failure of equipment would have a significant effect on safety, health, or the environment, except where the *Secretary determines* that the incremental benefits are clearly insufficient to justify the incremental costs of utilizing such technologies.” 43 U.S.C. § 1347(b) (emphasis added). This statutory language is not just aspirational. It is the law. Yet in the latest regulations on drilling and production safety, the Bureau of Safety and Environmental Enforcement (BSEE) mostly defers to the API agreed-upon standards and “standard industry practice” (SIP). This lowest common denominator agreed-upon technology is not BAST. BSEE basically always allows the best affordable technology, but that is not what the law requires.

The latest 2016 regulations on drilling and production safety and BAST are a vast improvement in many areas over the pre-DWH regulations and seem reasonable until one drills down to the bottom line: they defer to API and the ocean-drilling and producing operator’s SIP at almost every juncture. That may seem reasonable given the limited resources provided by the

Department of the Interior (DOI) budget. But the statute mandates that the Secretary determine BAST and expects, on a technology-by-technology basis, the determination of BAST. At the very least, dedicated independent DOI staff should review on an ongoing and individual technology basis whether SIP or API standards constitute BAST. SIP and API agreed-upon technology may be good enough most of the time. Until it is not. The DWH disaster proved as much. Anything less courts the next ocean disaster.

SIP is not always good enough and certainly not always BAST, as DWH showed. The 1980s regulations concocted the notion (and circular logic) that operator compliance with the regulations constituted BAST. Obviously, the single shear ram in BOPs was neither BAST nor good enough. If we inlay a “good, better, best” analysis on OCS technology, those three tiers of technology quality would place SIP as good, API standards as better, and constantly reviewed and upgraded standards as best.

API standards do not equal BAST. API standards can live with affordable risk. The double shear rams for BOPs designed to always crimp close the drill pipe are quite expensive. But if they had prevented DWH, it would have been worth every cent and saved billions of dollars and, of course, the “incremental benefits” would have been sufficient “to justify the incremental costs.” 43 U.S.C. § 1347(b). Finally, the current regulations, moving in the right direction, require double shear rams by 2021. 30 C.F.R. § 250.734(a)(1). But even that requirement may be waived. *Id.* § 250.107(c)(3).

Most of the 100+ operators on the federal OCS likely want to use BAST and try to use BAST when they can afford it. But the short-term economic pressure not to use BAST, like BP’s too quick efforts to bring in the Macondo well, may overcome the desire to use BAST. The regulatory apparatus at BSEE needs to step up and accomplish the statutory mandate of BAST and prevent the next DWH disaster.

As written, at the end of the day, the regulations almost always defer to industry standards. This creates the emergency and substantiates the obvious conclusion that API, often touted as wise and benevolent, is, in fact, the pro-industry fox that designs and guards our precious offshore chicken coop. The Secretary of DOI is just to count the eggs and occasionally decide, when he has the budget and inkling, whether coop repair needs to occur and is justified or too expensive. That is not what the BAST mandate means. Nor is it best for our nation's offshore oil and gas industry, our oceans, and shorelines. I believe the Secretary should seek and have the resources to determine BAST and constantly guard the ocean coop.

Short-term, short-sighted incremental cost savings to DOI and industry stemming from the Secretary's failure to independently examine technologies and decide on BAST risks another DWH. At the very least, BSEE must make every effort to keep reviewing what should constitute BAST—not just say that compliance with the regulations written years ago constitutes it.

The BAST regulations largely mimic the statutory language regarding BAST (substituting BSEE's "Director" for "Secretary"). 30 C.F.R. § 250.170(c)(1). But the BAST regulations then state that compliance with the regulations (mostly requiring SIP and API agreed-upon standards) is presumed to constitute BAST. 30

C.F.R. § 250.170(c)(2). The preamble to these regulations explicitly states: "BSEE disagrees with the suggestions that the revisions to § 250.107(c) constitute either a BAST program or a BAST determination, and that those revisions will impose new costs on operators." 81 Fed. Reg. 61,834, 61,847 (Sept. 7, 2016).

Granted, with limited resources and budget, BSEE has a herculean task to sort through all of the cutting-edge offshore technology, especially for ultra-deep water and high-pressure drilling zones. It's much easier and cheaper to depend on SIP and API. Current efforts to roll back regulations, enforcement, and budgets make it even easier. But it is not, in the long term, best. And it's not what the statute mandates.

Ocean 911: "What's the emergency?"

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## MOMENTUM BUILDS FOR OFFSHORE WIND ENERGY DEVELOPMENT IN THE UNITED STATES

Raya Treiser, H. David Gold, and Nathaniel Custer

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The beginning of 2018 has offered signs of a renewed push to expand development of offshore wind generation along the U.S. Atlantic coast. Recent announcements from the Department of the Interior, in the broader context of the federal government's initiatives to streamline project permitting and reduce regulatory burdens, indicate an increased focus on offshore wind. Actions by Atlantic states further reflect that policy push, and preview significant opportunities for offshore wind investment and development.

### Department of the Interior Advances Offshore Wind Development

At the April 6 International Offshore Wind Partnering Forum, Secretary of the Interior Ryan Zinke delivered a speech that called for increased offshore wind development along the U.S. Atlantic coast. Stressing the significant growth potential for the U.S. offshore wind industry, Secretary Zinke laid out the Trump administration's plans to offer new offshore wind leases along the coasts of Massachusetts, New Jersey, and New York. Around the same time as his speech, the Department of the Interior's Bureau of Ocean Energy Management (BOEM) released three separate *Federal Register* notices that aligned with the strategy Secretary Zinke announced. Each BOEM notice initiates a public comment period, providing a critical opportunity for interested stakeholders to register their views and help shape the policy and upcoming development opportunities for offshore wind.

- ***Proposed Path for Atlantic Offshore Wind Development.*** On April 6, BOEM invited public comment on “all aspects of its proposed path forward” for offshore wind development on the Atlantic coast. *See* [https://www.gpo.gov/fdsys/pkg/FR-2018-04-06/pdf/2018-](https://www.gpo.gov/fdsys/pkg/FR-2018-04-06/pdf/2018-07106.pdf)

[07106.pdf](https://www.gpo.gov/fdsys/pkg/FR-2018-04-06/pdf/2018-07106.pdf). In its announcement, BOEM articulated certain factors that the agency will use to identify which areas along the Atlantic coast are most conducive to wind generation. BOEM noted that the “proposed path” is a part of “the Administration’s all-of-the-above energy policy.” *See* <https://www.boem.gov/press04042018/>. BOEM is seeking public comments through May 21.

- ***Call for New Leasing Offshore New Jersey and New York.*** On April 11, BOEM issued a “Call for Information and Nominations” for four proposed lease areas in the New York Bight—an area between New Jersey and Long Island. *See* <https://www.gpo.gov/fdsys/pkg/FR-2018-04-11/pdf/2018-07445.pdf>. BOEM is soliciting nominations from companies interested in the proposed leasing areas, as well as information “on the potential for wind energy development in the Call Area.” *See* <https://www.boem.gov/NY-Bight/>. The public comment period runs through May 29.

- ***Proposed Lease Sale Offshore Massachusetts.*** On April 11, BOEM published a “Proposed Sale Notice” (PSN) for two new lease areas off the coast of Massachusetts. *See* <https://www.gpo.gov/fdsys/pkg/FR-2018-04-11/pdf/2018-07379.pdf>. The proposed lease areas would open roughly an additional 140,000 acres to offshore wind development. Stakeholders have until June 11 to submit comments, as well as the “qualification materials” that must be submitted by any company that wishes ultimately to bid on the leases. After the public comment period closes, and once BOEM has reviewed the comments submitted, the agency will issue a “Final Sale Notice” (FSN). There is no mandatory deadline for the FSN, but in previous lease sales, the period between the close of the public comment period on the PSN and the issuance of the FSN lasted four or five months. After the FSN is issued, BOEM will conduct an auction to award the leases. BOEM estimates the auction will be approximately 45 days after the FSN, but in any event, it must be at least 30 days after the FSN.



## Continued Federal Efforts to Streamline Permitting of Offshore Wind Projects

In addition to the opening of new leasing areas, federal agencies are taking steps to streamline the federal review of proposed offshore wind projects once a lease has been granted. On April 9, the Department of the Interior and a dozen other agencies committed to a “One Federal Decision” framework for permitting large infrastructure projects—including offshore wind projects. Other federal agencies that play key roles in offshore wind projects, including the Department of Commerce and Department of Energy, signed on to the Memorandum of Understanding (MOU) establishing the One Federal Decision framework as well. Under the MOU, federal agencies with responsibilities to review or authorize offshore wind projects commit to a number of policies intended to create a more coordinated and streamlined federal review process. This includes:

- **One Federal Decision.** Developing a single Environmental Impact Statement (EIS) and Record of Decision (ROD) to document all required agency reviews for proposed infrastructure projects.
- **Target Deadlines.** Issuing all project approvals within 90 days of the issuance of the ROD, with the goal of completing the permitting process within two years of publication of the notice of intent (NOI).
- **Permitting Timetable.** Establishing—and complying with—a coordinated permitting timetable with target deadlines for intermediate and final milestones that facilitate meeting the two-year target deadline for permit approvals.
- **Concurrent Reviews.** Completing all required federal reviews concurrently rather than sequentially.
- **Dispute Resolution.** Elevating interagency disputes for quick resolution.

The MOU implements the targets and policy directives in Executive Order 13807 and builds on Congress’s similar efforts to streamline federal environmental reviews through Title 41 of the

Fixing America’s Surface Transportation Act (FAST-41). The MOU also builds on several related announcements by the Department of the Interior, including an August 31, 2017, Secretarial Order that establishes an ambitious one-year and 150-page target for any EIS prepared by the Department’s bureaus. The Department is also undertaking a comprehensive review of existing policies and regulations to identify—and reform—unnecessarily burdensome regulations.

The ultimate impact of these streamlining reforms on pending or newly proposed projects will depend to a large extent on their implementation. A number of important issues will have to be addressed as the first projects start going through this process, including:

- **Refining the Timeline Targets.** Under the MOU, the target permitting timeline begins with the publication of the NOI. The MOU further provides that the lead federal agency will publish the NOI only after it consults with cooperating agencies and determines that the project proposal is sufficiently developed. However, there are currently no clear or consistent standards regarding when data are sufficient to complete agency review. As agencies implement the MOU, it will be important to establish a process for coordinating agency decisions regarding the adequacy of the data presented, as well as for quickly elevating and resolving disputes related to the adequacy of data or need for additional data.
- **Voluntary Nature of the Agreement.** At the end of the day, the commitments in the MOU and the directives in the Secretarial Order are not mandated by statute. Because there’s no statutory mandate to adhere to the permitting timetable, there will be a need for continued leadership engagement on a project-specific basis and effective communication and training of agency permitting staff.
- **Ensuring NEPA Adequacy.** Because there have been no changes to the underlying statutory requirements, each agency will

have to determine that the final EIS and ROD meet its respective statutory obligations, including the “hard look” standard under NEPA. This can be especially tricky where agencies like the Army Corps of Engineers have a different standard of analysis (i.e., the “least environmentally damaging practicable alternative”). The lead agency would have to carefully manage the process of coordinating input from all agencies to ensure that the final NEPA document and ROD meet each agency’s respective statutory and regulatory requirements. The MOU itself recognizes this challenge and provides that the lead agency will be responsible for ensuring that “the final EIS (FEIS) includes an adequate level of detail to inform decisions by all agencies with review or authorization decision responsibilities for the proposed project.”

- **Addressing Limited Agency Resources.** Successful implementation of the coordination process and ambitious timelines outlined in the MOU will require significant resources. This can be addressed in part by using available agency authorities to allow cost sharing, retain third-party consultants, or (in some cases) use applicant-prepared NEPA documentation. But much of the coordination and review responsibilities will remain with agency staff. Therefore, it will be important to have dedicated agency staff.

## **Improving Flexibility Through a “Design Envelope” Approach**

In addition to the administration’s general efforts to improve the federal approval process, BOEM has taken steps to develop policies intended to create a more flexible approach to the federal review of offshore wind projects that account for the practical and commercial realities that developers face. On January 12, 2018, BOEM issued draft guidelines for the use of a “Project Design Envelope” approach to facilitate the review of Construction and Operations Plans (COPs) for offshore wind projects. Under this approach, developers would have the option to describe a “reasonable range of

project designs”—such as a range of foundation types, turbine sizes, different candidate ports, and different options for installing and siting required transmission—in a COP for BOEM’s review.

The Project Design Envelope approach could be used before all of a lessee’s design decisions have been made, or where a lessee intends to develop its lease in phases, by describing the reasonable parameters for later development phases. The approach is intended to allow maximum project design flexibility while minimizing the need for additional federal approvals. BOEM is soliciting comments on the draft guidelines and intends to publish a final guidance document later this year.

## **State Efforts Support Offshore Wind Development**

At the state level, several recent initiatives have also emerged to promote offshore wind development along the Atlantic coast. For example, in January, several New York state agencies issued a master plan charting a course to meet Governor Andrew Cuomo’s goal of building 2400 megawatts (MW) of offshore wind energy projects by 2030. The state’s Public Service Commission is now considering the recommendations in the master plan, after which it will begin a bidding process for the first round of projects. Those steps are expected to be completed by the end of 2018.

In New Jersey, Governor Phil Murphy announced plans to bring 3500 MW of offshore wind online by 2030. That is the largest goal set by any state in the United States, and appears to signal a change in the cautious approach that New Jersey has taken to offshore wind development to date. Meanwhile, on April 12, the New Jersey legislature passed a bill (S. 1217) calling for the Board of Public Utilities (BPU) to reconsider a 24-MW project proposed by Fishermen’s Energy (recently acquired by EDF Renewable Energy). The project was initially rejected by the BPU for cost concerns.

In Connecticut, the Department of Energy and Environmental Protection issued a request for

proposals (RFP) for clean energy projects. Developers of offshore wind projects were eligible to submit proposals for up to 825,000 MWh/year—which translates to a total capacity of about 200 MW. Responses to the RFP were due April 2; the winning bids will be announced in June.

## Conclusion

The first quarter of 2018 left little doubt that the momentum for establishing a U.S. offshore wind industry is only increasing. In his speech to the International Offshore Wind Partnering Forum, Secretary Zinke stressed what he views as a unique growth potential for the industry. The combination of federal and state policy support, coupled with the Trump administration's commitment to streamlining federal permitting, presents an important opportunity for offshore wind developers.

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## TRUMP ENERGY POLICY AND THE OCS: ENERGY DOMINANCE OR BUSINESS AS USUAL?

Kenneth Grant and Charles Augustine

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### I. Introduction

President Trump recently outlined, as part of his National Security Strategy, a new national energy policy entitled “Energy Dominance.” While the term “dominance” wasn’t clearly defined, statements put forth by the administration suggest a future in which the United States is self-sufficient in meeting its own demand for energy, while also using the nation’s energy resources to help our allies and other nations become more resilient against entities that use energy to coerce. The policy is largely predicated on reducing regulatory barriers that the administration asserts encumber energy production and distribution, including the exports of energy resources, and constrain economic growth. With regard to the Outer Continental Shelf (OCS), Secretary Zinke asserted that the opening up of “nearly the entire OCS” to oil and gas development “can advance the goal of moving from aspiring for energy independence to attaining energy dominance.” U.S. Department of the Interior Press Release, Secretary Zinke Announces Plan for Unleashing America’s Offshore Oil and Gas Potential (Jan. 4, 2018).

The administration’s rhetoric, however, far exceeds any reasonably expected impact on the production of crude oil and natural gas produced from the OCS and overpromises the likelihood that its OCS policy will lead to energy dominance. Not only is the OCS a small share of U.S. production, total U.S. production represents a relatively small share of global production. Moreover, U.S. policy is largely predicated on market-based principles, which serve to limit the impact of any government policy on production decisions of third-party producers. While government initiatives may at the margin impact the actions of individual companies, our market-based system means that output is fundamentally driven by prices and costs determined by forces largely outside of the control

of U.S. policymakers. Thus, we do not expect the proclaimed policy of “energy dominance” to have much differing impact on production of the nation’s offshore oil and gas resources. Nor do we expect that opening up “nearly the entire OCS” to development will lead the United States to become “energy dominant” or even to become independent of the volatility of world oil prices.

## II. Dominance

As a matter of economics, dominance implies some ability on the part of the dominant party to independently set prices. In this regard, dominance is predicated on, for example, a small number of firms having a significant portion of market share in the relevant market, characteristics distinctly at odds with the market structure of oil and gas production. Energy economists recognize that crude oil is a global commodity, meaning that prices in crude oil markets reflect worldwide supply and demand conditions. Introducing new lower cost supplies can have the effect of lowering oil prices, but it does not alter the fact that all buyers and sellers—including those in the United States—are exposed to prices formed in that worldwide pool. The reality is that the entirety of U.S. production, while having realized significant growth over the past 10 years or so largely as a consequence of what has become known as the shale revolution, still represents less than 15 percent of total global production. And while production from the federal offshore has more recently realized an increase in output, it has declined as a percent total of U.S. production due to the growth in oil production from onshore unconventional resources. Today, the OCS represents less than 20 percent of total U.S. production. Consequently, the OCS represents an even smaller fraction of global oil production. The relative volume of natural gas produced from the OCS is even smaller yet.

Moreover, even in the unlikely event that production from the OCS increased significantly, the fact is that U.S. energy companies do not act in concert as a single market entity. To the

contrary, energy production is undertaken by scores of independent firms, any one of whose total output, i.e., production from the OCS and all other interests, represents a small percentage of total global production. In sum, there is no reasonable expectation that production from the OCS will lead to U.S. energy dominance; nor is there any reasonable expectation that any producer or group of producers operating in the OCS, or the United States as a whole, will be “dominant” in any economically meaningful sense of that term.

## III. Policy

Can the proposed actions underlying the administration’s policy objectives alter these economics, such that increases in oil and gas output from the OCS will render the U.S. energy sector dominant? We don’t believe so, as those actions don’t alter the fundamental principles under which fossil fuels are brought to market. The administration’s most meaningful efforts related to the OCS largely focus on alleviating regulatory burdens associated with the finding and extraction of fossil fuels, including the rescission or reconsideration of certain executive actions, and streamlining of the federal approval process. Assuming for the sake of argument such initiatives are successfully implemented in some timely fashion, such actions would, all else equal, be expected to facilitate marginal improvements in the production of crude oil and natural gas from the OCS, particularly adjacent to areas currently under production. However, these efforts wouldn’t reasonably be expected to do more than that—and that’s a far cry from “dominance.”

Of greater significance is the reality that the current administration’s approach to the extraction of the nation’s energy resources from federal lands, including the OCS, does not fundamentally differ from the approach taken by prior administrations. The administration’s proposal to open up more of the OCS to oil and gas development does not mean that there will be a substantial increase in OCS production. The fact remains that the U.S. energy marketplace is predicated on market-based



principles where individual producers compete to bring the nation's resources to the marketplace. To the extent expected prices and, in particular, expected returns on the capital required for the extraction of resources do not warrant the investment required for the extraction of those resources, the administration's policy will have no material impact on production. Data support the supposition that economics is a greater determinant of OCS development than "regulatory barriers."

For example, analysis put forth by the Department of Interior's Bureau of Ocean Energy Management (BOEM) provides estimates of the undiscovered economically recoverable oil and gas resources located outside of known oil and natural gas resources for the OCS. The analysis effectively shows the supply curve for oil and natural gas, i.e., the quantity of resources that is technically and economically recoverable at different oil and gas prices. Increases in the price of oil from \$60/bbl to \$100/bbl and gas from \$3.20 Mcf to \$5.34 Mcf, for example, increase the quantities of recoverable oil by 3.33 billion barrels and of gas by 17.37 trillion cubic feet. Such changes in prices would reasonably be expected to change producers' incentives vis-à-vis investments in OCS oil and gas production.

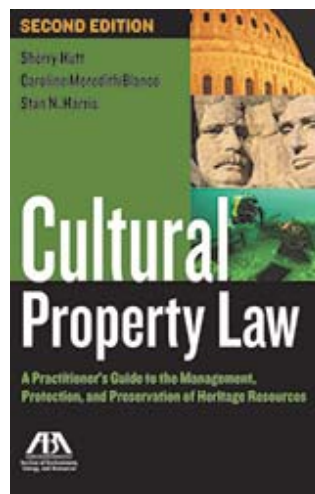
However, market participants don't foresee prices for oil or gas achieving those levels anytime over the foreseeable future. In fact, as we write this, the market expects prices for oil to *decline* below their current levels, while gas prices are expected to remain largely flat. While the administration's efforts may call forth incremental production, those regulatory efforts don't appear to have fundamentally changed the outlook for exploration and production activity in the OCS. While we recognize that the administration has placed significant rhetorical weight on its expansion of OCS areas open to potential exploratory activities (the notable exception being the western coast of Florida), the lack of existing infrastructure in those regions outside of the existing developed producing fields makes such development costly and, given current price expectations, opening up nearly the

entire OCS is unlikely to have any real impact on the nation's energy production, or to lead us to "energy dominance."

#### IV. Conclusion

Somewhat ironically, the activities that the administration calls out as fundamental to achieving "energy dominance"—increased production of fossil fuels and exporting energy resources to other nations—are actually hallmarks of what was achieved under the previous administration. Between 2008 and 2016, the United States realized a significant expansion in the production of its oil and gas resources. The production of oil increased from just less than 5 million barrels per day to over 8.8 million barrels per day. The nation's production of natural gas increased from 20.1 trillion cubic feet to 26.6 trillion cubic feet. This expansion helped transform the domestic and global energy markets through lower prices for oil and gas, even giving rise to the once unimaginable federal approval for the exports of domestically produced oil and natural gas. We note that this expansion took place under the same fundamental set of market-based principles as those underlying the current administration's policy. In this regard, it appears that "energy dominance" is really more "business as usual."

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## THE FIFTH CIRCUIT LIMITS BSEE'S REGULATORY AUTHORITY OVER OFFSHORE CONTRACTORS

Lily N. Chinn and Robert T. Smith

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In the wake of the 2010 Macondo blowout, which involved multiple contractors, the federal government revised its approach to offshore safety and environmental regulation. For the first time, the Bureau of Safety and Environmental Enforcement (BSEE) began to enforce the Outer Continental Shelf Lands Act (OCSLA) against contractors who work for owners and lessees of offshore oil platforms. This change to over a half-century of enforcement policy was a dramatic shift as BSEE and its predecessor agencies, including the Minerals Management Service, had previously stated that the federal government did not regulate offshore contractors.

Numerous contractors that were subject to BSEE's post-Deepwater Horizon enforcement challenged the agency's authority to enforce environmental and safety provisions of OCSLA against them. One of these challenges involved criminal enforcement related to a 2012 multi-fatality fire and explosion on an offshore platform operated by Black Elk Energy. In November 2015, the United States indicted two contractor companies and three of their employees, along with Black Elk Energy, for their alleged roles in causing the explosion. According to the government, the contractors willfully and knowingly failed to abide by welding regulations that had been promulgated under OCSLA. The government charged the contractors with multiple felonies under OCSLA, each of which is punishable by up to 10 years in prison and a fine not to exceed \$100,000.

The contractors moved to dismiss the indictment, arguing that they could not be held criminally liable under OCSLA. More specifically, the contractors argued that, when Congress amended OCSLA, it only authorized the federal government to bring enforcement actions against the holder of a lease or permit on the Outer Continental Shelf. Thus, as a statutory matter, contractors cannot

be held liable for violations of OCSLA. In the alternative, the contractors argued that, even if Congress authorized the federal government to regulate the conduct of contractors, the government had failed to promulgate regulations under which contractors could be held criminally liable. In other words, as a regulatory matter, contractors could not be held criminally liable.

The U.S. District Court for the Eastern District of Louisiana agreed with the contractors and dismissed the OCSLA counts of the indictment against both the contracting companies and their employees in April 2016. Faced with an adverse ruling on contractor liability, the United States appealed to the U.S. Court of Appeals for the Fifth Circuit.

On September 27, 2017, the Fifth Circuit issued an opinion in *United States v. Moss*, 872 F.3d 304 (5th Cir. 2017), affirming the district court's dismissal of OCSLA counts against various offshore contracting companies and individual employees as beyond the scope of BSEE's regulations. This decision is now the law of the land for oil and gas production platforms in the majority of the Gulf of Mexico.

As part of its analysis, the Fifth Circuit first examined the legislative and statutory history of OCSLA, which was enacted in 1953. Although the court noted that the language of the statute appeared to limit the Department of the Interior's authority to promulgate and enforce safety and environmental regulations against offshore contractors—stating that there was “much to be said for the [contractors'] argument” on this topic—the court ultimately declined to reach this issue.

Instead, the Fifth Circuit focused on whether the regulations in force during the Black Elk incident applied to offshore contractors and thus could give rise to criminal liability for those contractors. The court engaged in a holistic and detailed analysis of the various BSEE regulations at issue, ultimately agreeing with the district court that BSEE's

regulatory definition of “You” purposely excluded contractors.

While the case before the Fifth Circuit focused specifically on criminal liability, the court went out of its way to address the applicability of civil liability for contractors under BSEE’s regulations. As the court explained:

The government’s past inaction speaks volumes about the scope of its regulatory authority. . . . BSEE and its predecessors enforced the regulations here at issue for over sixty years only against lessees, permittees and designated operators of offshore production rights. The agency placed responsibility, both civil and potentially criminal, on the named parties for ensuring compliance with the regulations by all of the many contractors, subcontractors and individual employees whose efforts are necessary to develop the Outer Continental Shelf. The agency explicitly disclaimed imposing direct regulatory control on the subordinate parties. The agency’s 2011 about-face “flatly contradicts” the agency’s earlier, contemporaneous interpretation of the regulations. *Moss*, 872 F.3d at 309, 315.

These statements were not made in a vacuum. A second challenge to BSEE enforcement authority to civilly enforce OCSLA through issuance of Incidents of Noncompliance (INC), *Island Operating Co. v. Jewell*, No. 17-130440, was pending before the Fifth Circuit when the *Moss* decision was issued. In the *Island* case, an offshore contractor, Island Operating Co., successfully challenged BSEE’s right to issue it an INC related to a 2012 fire on a platform operated by Apache Corp. in the U.S. District Court for the Western District of Louisiana. The district court held that, under OCSLA, the duty to comply with safety and environmental regulations “does not extend beyond permit-holders and lease-holders.” In a direct nod to the *Island* case, the Fifth Circuit stated that BSEE’s “new position is hardly entitled to deference in the civil context” and directly cited to the district court’s decision in the *Island* case.

Perhaps in light of this dicta in the *Moss* decision, the federal government subsequently dismissed its appeal of the *Island* case in December 2017. Thus, BSEE voluntarily left in place a district court decision holding that OCSLA did not give it the statutory authority for civil regulation of contractors.

Notwithstanding its strong statements on civil liability, however, the Fifth Circuit left open the possibility that BSEE may in the future issue regulations under OCSLA applicable to contractors. More specifically, because the court did not reach the question of whether OCSLA authorizes the Department of the Interior to issue environmental and safety regulations that apply to contractors in *Moss*, it is at least possible that BSEE could attempt to issue such regulations. If it were to do so, however, it would surely face claims that OCSLA does not authorize BSEE to regulate contractors—the issue that the Fifth Circuit declined to resolve in the *Black Elk* case and that was at issue in the *Island* case prior to dismissal. Given the current administration’s view of limited government, however, it seems unlikely that such regulations would be imminent.

**Lily N. Chinn** and **Robert T. Smith** are partners in *Katten Muchin Rosenman LLP’s Environmental and Workplace Safety practice*, and represented one of the contractor companies in the *Black Elk Energy* matter.

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## THE IMPACTS OF EXECUTIVE ACTION ON MARINE PROTECTED AREAS UNDER THE ANTIQUITIES ACT

Shannon Himes

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Papahānaumokuākea Marine National Monument (PMNM) is a pristine area, designated to preserve Hawaii's biodiversity and to protect over 7000 marine species including the endangered Hawaiian monk seal and leatherback turtle.

President Trump's vow to reverse the previous administration's executive actions may jeopardize the future of PMNM and the resources of the Outer Continental Shelf that it protects. In 2016, President Obama expanded PMNM from 362,073 km<sup>2</sup> to 1,508,870 km<sup>2</sup>, creating the largest no-take marine protected area (MPA) in the world at the time and protecting the waters and submerged lands in the United States' exclusive economic zone. Currently, no-take MPAs, which prohibit commercial activities and recreational extraction, cover only three percent (400,000 km<sup>2</sup>) of U.S. marine waters. *See* NOAA, Status of U.S. Marine Protected Areas: 2016 Statistics, *available at* [marineprotectedareas.noaa.gov/aboutmpas/status-of-usa-mpas-2016.html](http://marineprotectedareas.noaa.gov/aboutmpas/status-of-usa-mpas-2016.html).

The Antiquities Act of 1906 (54 U.S.C. § 320301) authorizes the president to declare historic landmarks and create national monuments and imposes a fine or imprisonment on any person who injures any object of antiquity on the designated lands. The Act limits the monument designation to "the smallest area compatible with the proper care and management of the objects to be protected." 54 U.S.C. § 320301(b). In 2006, President Bush created PMNM, requiring vessel monitoring systems and restricting permit approvals to non-commercial Native Hawaiian practices. Proclamation No. 8031, 71 Fed. Reg. 36,441, 36,445, 36,448 (June 26, 2006). Both President Bush and President Obama's proclamations for PMNM declared the importance of conserving the dynamic reef ecosystem and determined seamounts to be in the public interest. *Id.* at 36,443; Proclamation No. 9478, 81 Fed. Reg.

60,227, 60,228 (Aug. 26, 2016). President Obama justified the expansion of PMNM by explaining that scientific research demonstrated that protected species' migrations span beyond PMNM's previous boundaries. 81 Fed. Reg. at 60,228.

President Trump has publicly asserted that past presidents "egregious[ly] abuse[d]" their executive power by creating and expanding national monuments. *See* M. Keneally, *Trump Slams "Massive Federal Land Grab," Calls for Review of National Monuments*, ABC News (Apr. 26, 2017). Within months of assuming office, President Trump issued Executive Order 13792 ordering a review of national monument designations made since January 1, 1996, which was designed in part to encourage energy and economic independence by potentially opening no-take areas to fishing, oil and gas exploration, and mineral extraction from the Outer Continental Shelf. *See* Exec. Order No. 13792, 82 Fed. Reg. 20,429 (Apr. 26, 2017); Exec. Order No. 13795, 82 Fed. Reg. 20,815 (Apr. 28, 2017). Importantly, PMNM overlaps the prime Fe-Mn crust zone, which contains rich stores of cobalt, nickel, manganese, and other metals. *See* N. Fillmore *Papahānaumokuākea Review Spurs Tension with Conservation Groups, Fisheries*, Courthouse News (June 27, 2017).

In response to Executive Order 13792, the Secretary of Commerce prepared a report reviewing 11 marine national monument designations. The government has yet to release this report to the public, but if Secretary Wilbur Ross's recommendations concur with Secretary of the Interior Ryan Zinke's memorandum (prepared at the direction of President Trump), PMNM's expanded boundaries are likely in jeopardy. *See* Ryan K. Zinke, Secretary of the Interior, *Final Report Summarizing Findings of the Review of Designations Under the Antiquities Act* 1–20, 17 (Dec. 5, 2017).

While President Obama likely did not overstep his executive authority by expanding PMNM, President Trump also likely would not exceed his power by reducing PMNM. The Antiquities Act



expressly grants the president power to designate a national monument, but the statute is silent on the power to revoke or abolish an established monument. Past presidents have successfully reduced the size of monuments, but abolishment attempts, namely President Roosevelt's considered abolishment of the Castle-Pinckney National Monument in 1938, have been unsuccessful. *See* 39 U.S. Op. Atty. Gen. 185 (1938). Historically, courts have been deferential to the presidential authority to designate national monuments and have limited their review to the proclamation's statement of the natural or historic interest protected and the minimum area required for protection. *See Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1135 (D.C. Cir. 2002); *Tulare Cty. v. Bush*, 306 F.3d 1138, 1142 (D.C. Cir. 2001). Therefore, a legal action challenging the reduction of PMNM may prove unsuccessful as long as President Trump's administration uses equally supported scientific research to prove that the reduced area is the "smallest area compatible" to provide adequate protection.

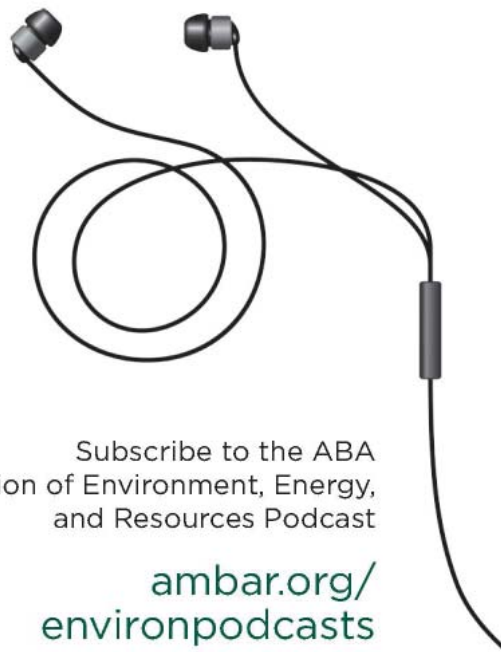
Despite the legal implications, one of the primary purposes of President Trump's executive order was to explore energy independence and promote economic growth. Opening marine protected areas such as PMNM to fishing, oil and gas exploration, and mineral extraction would only provide short-term economic benefits. Fisheries in MPAs restock populations well beyond their boundaries, resulting in job growth for fishermen. Thus, allowing fishing would ultimately reduce fish production and limit job growth. Also, no-take MPAs are better enforced and cheaper to manage than multiple use MPAs. *See* N.C. Ban et al., *Promise and Problems for Estimating Management Costs for Marine Protected Areas*, 4 CONSERVATION LETTERS 241–52 (2011). Finally, PMNM's Native Hawaiian fishing exception strikes an equitable balance between conservation and sustenance. Allowing commercial fishing back into these areas would upset this balance and create costly compliance problems.

Currently, economic growth is threatened by the impacts of climate change and the costs associated

with cutting greenhouse gas emissions. MPAs sequester carbon, but degraded coastal ecosystems emit as much as 1.02 billion tons of carbon dioxide per year. *See* The Blue Carbon Initiative, *Mitigating Climate Change Through Coastal Ecosystem Management*, available at [www.thebluecarboninitiative.org](http://www.thebluecarboninitiative.org). MPAs can prevent the further loss and degradation of these ecosystems, which could offset 3–7 percent of current fossil fuel emissions in two decades. *See* C. Nellemann et al., *Blue Carbon: The Role of Healthy Oceans in Binding Carbon*, United Nations Environment Programme (2009). The expansion of PMNM was a crucial step in the recognition of the inherent value contained within our nation's marine ecosystems. Opening these areas to drilling or mineral extraction would be a rash executive action with irreversible environmental impacts.

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