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Offshore Oil and Gas Development: Legal Framework

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Summary

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

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

Several contentious legal issues remain the subject of national debate and legislative proposals. Before adjournment, the 109th Congress passed a bill that would allow new offshore drilling in the Gulf of Mexico in an area known as Lease Area 181. This measure was incorporated into H.R. 6111, a broad bill passed in the final days of the 109th Congress. President Bush signed the bill into law (P.L. 109-432) on December 20, 2006.

At the same time, the role of the coastal states in deciding whether to lease in areas adjacent to their shores has also received recent attention, with some legislative proposals granting significant decisional authority to state governments while others would direct the Secretary of the Interior to lease specific areas, limiting the state role to what is provided under existing statutes.

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

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Offshore Oil and Gas Development: Legal Framework

The development of offshore oil, gas, and other mineral resources in the United States is impacted by a number of interrelated legal regimes, including international, federal, and state laws. International law provides a framework for establishing national ownership or control of offshore areas, and United States domestic law has, in substance, adopted these internationally recognized principles. U.S. domestic law further defines U.S. ocean resource jurisdiction and ownership of offshore minerals, dividing regulatory authority and ownership between the states and the federal government based on the resource's proximity to the shore. This report[1] explains the nature of U.S. authority over offshore areas pursuant to international and domestic law. It also describes the laws, at both the state and federal levels, governing the development of offshore oil and gas and the litigation that has flowed from development under the current legal regimes. Also included is an outline of the recent changes to the authorities regulating offshore development wrought by the Energy Policy Act of 2005 and subsequent legislation enacted by the 109th Congress prior to adjournment. Finally, this report discusses legislation under consideration by the 110th Congress that might also amend existing law in this area.

Ocean Resource Jurisdiction

Under the United Nations Convention on the Law of the Sea,[2] coastal nations are entitled to exercise varying levels of authority over a series of adjacent offshore zones. Nations may claim a twelve nautical mile territorial sea, over which they may exercise rights comparable to, in most significant respects, sovereignty. An additional area, termed the contiguous zone and extending 24 nautical miles from the coast (or baseline), may also be claimed. In this area, coastal nations may regulate in so far as necessary to protect the territorial sea and to enforce their customs, fiscal, immigration, and sanitary laws. Further, in the contiguous zone and an additional area, the exclusive economic zone (EEZ), coastal nations have sovereign rights to explore, exploit, conserve, and manage marine resources and jurisdiction over:

> (i) the establishment and use of artificial islands, installations and structures;
> (ii) marine scientific research; and
> (iii) the protection and preservation of the marine environment.[3]

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[1] This report was authored originally by Aaron M. Flynn.

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

[3] Id. at Art. 56.1

The EEZ extends 200 nautical miles from a nation's recognized coastline. This area overlaps substantially with another offshore area designation, the continental shelf. International law defines a nation's continental shelf as the seabed and subsoil of the submarine areas that extend beyond either "the natural prolongation of [a coastal nation's] land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance."[4] In general, however, a nation's continental shelf cannot extend beyond 350 nautical miles from its recognized coastline regardless of submarine geology.[5] In this area, as in the EEZ, a coastal nation may claim "sovereign rights" for the purpose of exploring and exploiting the natural resources of its continental shelf.[6]

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

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[4] Id. at Art. 76.1.

[5] Id. at Art. 76.4-76.7.

[6] Id. at Art. 77.1.

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

[8] *See* United States v. Texas, 339 U.S. 707 (1950); United States v. Louisiana, 339 U.S. 699 (1950); United States v. California, 332 U.S. 19 (1947). In accordance with the Submerged Lands Act, states generally own an offshore area extending three geographical miles from the shore. Florida (Gulf coast) and Texas, by virtue of their offshore boundaries prior to admission to the Union, have an extended three marine league offshore boundary. *See* United States v. Louisiana, 363 U.S. 1, 36-64 (1960); United States v. Florida, 363 U.S. 121, 121-29 (1960).

[9] 43 U.S.C. § 1331(a).

under U.S. control except where U.S. waters have been placed under the primary jurisdiction of the states.

State Jurisdiction. In accordance with the federal Submerged Lands Act of 1953 (SLA),[10] coastal states are generally entitled to an area extending three geographical miles[11] from their officially recognized coast (or baseline).[12] In order to accommodate the claims of certain states, the SLA provides for an extended three marine league[13] seaward boundary in the Gulf of Mexico if a state can show such a boundary was provided for by the state's "constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress."[14] After enactment of the SLA, the Supreme Court of the United States held that the Gulf coast boundaries of Florida and Texas do extend to the three marine league limit; other Gulf coast states were unsuccessful in their challenges.[15]

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

Coastal State Regulation. State laws governing oil and gas development in state waters vary significantly from jurisdiction to jurisdiction. Some state laws are limited to a single paragraph and do not differentiate between onshore and offshore state resources; other states do not distinguish between oil and gas and other types of minerals. In addition to regulation aimed specifically at oil and gas development, it should be noted that a variety of other laws could impact offshore development, such as environmental and wildlife protection laws and coastal zone management regulation. Finally, in states that authorize offshore oil and gas leasing, they decide which lands will be opened for development. Appendix A of this report contains a table of state laws banning or otherwise regulating offshore mineral development. The table indicates which state agency is primarily responsible for

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[10] 43 U.S.C. §§ 1301 *et seq.*

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

[12] 43 U.S.C. §1301(b).

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

[14] 43 U.S.C. §§ 1312, 1301(b).

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

[16] 43 U.S.C. § 1311.

authorizing oil and gas development and if state oil and gas leasing is limited to specific areas by statute.

Federal Resources

The primary federal law governing development of oil and gas in federal waters is the Outer Continental Shelf Lands Act (OCSLA).[17] As stated above, the OCSLA codifies federal control of the OCS, declaring that the submerged lands seaward of the state's offshore boundaries appertain to the U.S. federal government. More than simply declaring federal control, the OCSLA has as its primary purpose "expeditious and orderly development [of OCS resources], subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs...."[18] To effectuate this purpose, the OCSLA extends application of federal laws to certain structures and devices located on the OCS,[19] provides that the law of adjacent states will apply to the OCS when it does not conflict with federal law,[20] and, significantly, provides a comprehensive leasing process for certain OCS mineral resources and a system for collecting and distributing royalties from the sale of these federal mineral resources.[21] The OCSLA thus provides comprehensive regulation of the development of OCS oil and gas resources.

Moratoria

Although in general the OCSLA requires the federal government to prepare, revise and maintain an oil and gas leasing program, many offshore areas are withdrawn from disposition under the OCSLA. There are currently two broad categories of OCS moratoria, those imposed by the President under authority granted by the Outer Continental Shelf Lands Act[22] and those imposed directly by Congress,

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[17] 43 U.S.C. §§ 1331-1356.

[18] 43 U.S.C. § 1332(3).

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

[20] Id.

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

[22] 43 U.S.C. § 1341(a) ("The President of the United States may, from time to time, withdraw from disposition any of the unleased lands of the outer Continental Shelf."). The President's Memorandum on Withdrawal asserts that the presidential authority for imposing the OCS moratorium is contained in section 12(a) of the OCSLA. The statement also indicates that withdrawal from leasing is also authorized under those portions of the Marine Protection, Research, and Sanctuaries Act of 1972 authorizing the President, under certain circumstances, to establish marine sanctuaries and to impose certain levels of environmental protection within those sanctuaries. Notably, this presidential statement does not cite any inherent, constitutionally-based executive authority for executive control of OCS resources, and none is immediately apparent. In general, Congress, acting pursuant to its constitutional authority over federal property and U.S. territories and its authority over foreign and

(continued...)

which have most often taken the form of limitations on the use of appropriated funds.[23] Congressionally imposed moratoria have been imposed since the early 1980s and have been approved annually thereafter. In 1990, President Bush issued a directive essentially paralleling the congressionally mandated moratoria, prohibiting most oil and gas development outside of the offshore areas associated with (though not belonging to) Texas, Louisiana, and Alabama.[24] This presidential withdrawal was to be effective until after the year 2000. In 1998, President Clinton issued a new executive branch moratorium, lasting until June 30, 2012.[25] The Clinton order refers to the 1997 congressional moratorium[26] and adopts the substance of that enactment expressly, which itself included by reference those areas covered by the 1990 presidential withdrawal. The provisions of the moratorium state the following:

> SEC. 108. No funds provided in this title may be expended by the Department of the Interior for the conduct of offshore leasing and related activities placed under restriction in the President's moratorium statement of June 26, 1990, in the areas of northern, central, and southern California; the North Atlantic; Washington and Oregon; and the eastern Gulf of Mexico south of 26 degrees north latitude and east of 86 degrees west longitude.
>
> SEC. 109. No funds provided in this title may be expended by the Department of the Interior for the conduct of offshore oil and natural gas preleasing, leasing, and related activities, on lands within the North Aleutian Basin planning area.
>
> SEC. 110. No funds provided in this title may be expended by the Department of the Interior to conduct offshore oil and natural gas preleasing, leasing and related activities in the eastern Gulf of Mexico planning area for any lands located outside Sale 181, as identified in the final Outer Continental Shelf 5-Year Oil and Gas Leasing Program, 1997-2002.
>
> SEC. 111. No funds provided in this title may be expended by the Department of the Interior to conduct oil and natural gas preleasing, leasing and related activities in the Mid-Atlantic and South Atlantic planning areas.[27]

In addition, the President also withdrew from disposition by leasing all areas on the OCS designated as Marine Sanctuaries at the time. Areas under moratoria as of March 2006 are depicted in **Figure 1**.[28]

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[22] (...continued)
interstate commerce, has sufficient constitutional authority to regulate OCS resources.

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

[24] Statement on Outer Continental Shelf Oil and Gas Development, 26 WEEKLY COMP. PRES. DOC. 1006 (June 26, 1990).

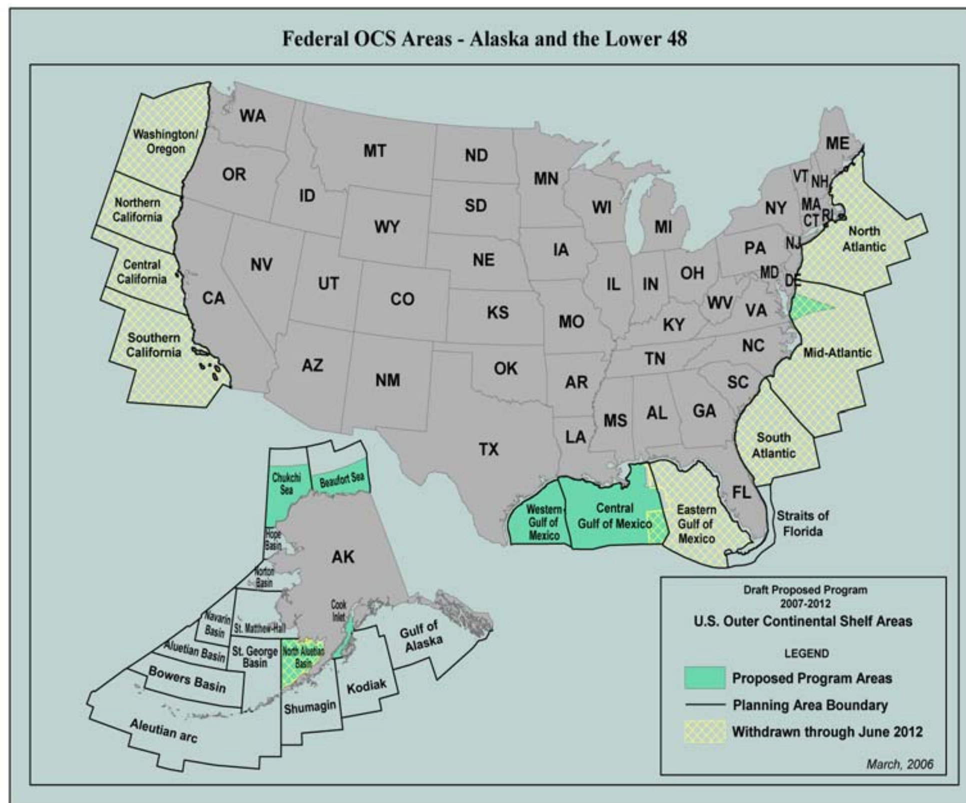
[25] Memorandum on Withdrawal of Certain Areas of the United States Outer Continental Shelf from Leasing Disposition, 34 WEEKLY COMP. PRES. DOC. 1111 (June 12, 1998).

[26] P.L. 105-83.

[27] Id.

[28] **Figure 1** does not account for the recent legislation that made the so-called "181 Area" in the Gulf of Mexico available for leasing. This legislation is discussed *infra.*

Figure 1. Federal Outer Continental Shelf Areas



Congressionally imposed moratoria have closely paralleled the structure and the substance of the Clinton-era withdrawal order discussed above. However, one significant legal difference does exist. The presidential withdrawal only prevents the "disposition by leasing" of the OCS areas it references. Thus, other activities authorized by the OCSLA, such as planning for lease sales or initial oil and gas exploration, might still be carried on in the absence of additional prohibitions. The congressional moratoria have consistently contained broader restrictions. These enactments typically preclude the expenditure of appropriated funds "for the conduct of offshore leasing and related activities" or, even more specifically, "for the conduct of offshore oil and natural gas preleasing, leasing, and related activities."[29] Thus, congressionally imposed moratoria would generally appear to have the effect of prohibiting leasing, exploration, planning for lease sales and other OCS oil and gas related activities authorized by the OCSLA. The enactment of the Energy Policy Act of 2005 does appear to alter this, however. Section 357 of that act requires the Secretary of the Interior to conduct an inventory and analysis of oil and natural gas resources beneath all of the waters of the U.S. OCS.[30] The law permits some forms of exploration, including 3-D seismic technology, but prohibits drilling. The inventory is to include analysis of the existing regulatory structure, including the

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[29] *See, e.g.*, P.L. 106-291.

[30] 42 U.S.C. § 15912.

moratoria, and assess the extent to which relevant laws and policies "restrict or impede the development of identified resources and the extent that they affect domestic supply...."[31]

Bills are often introduced to amend or alter existing prohibitions on OCS development. One such measure, the Gulf of Mexico Energy Security Act of 2006, was enacted just before adjournment of the 109th Congress as part of H.R. 6111, the omnibus Tax Relief and Health Care Act of 2006.[32] This measure provides for the oil and gas leasing in an area in the Gulf of Mexico known as "181 Area." Large portions of this Area are to be offered for oil or gas leasing pursuant to the leasing terms of the OCSLA as soon as practicable after enactment of the act.[33] Leasing in this area had been prohibited under P.L. 105-83.

Leasing and Development

The Secretary of the Interior oversees OCS mineral leasing, with the leasing of tracts and royalty collection performed by the Minerals Management Service (MMS), a bureau of the Department of Interior (DOI).[34] In 1978, the OCSLA was significantly amended so as to increase the role of the affected coastal states in the leasing process.[35] The amendments also revised the bidding process and leasing procedures, set stricter criteria to guide the DOI environmental review process, and established new safety and environmental standards to govern drilling operations.

The OCS leasing process consists of four distinct stages: (1) the five-year planning program,[36] (2) the lease sale,[37] (3) exploration,[38] and (4) development and production.[39]

The Five-Year Plan. The Secretary of the Interior is required to prepare a five-year leasing plan, subject to annual revisions, that governs any offshore leasing that takes place during the period of plan coverage.[40] Each five-year plan establishes a schedule of proposed lease sales, providing the timing, size, and general location of the leasing activities. This plan is to be based on multiple considerations, including the Secretary's determination as to what will best meet national energy

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[31] Id.

[32] P.L. 109-432.

[33] Id. at Division C, § 103 .

[34] 43 U.S.C. §§ 1331(b), 1334; 30 C.F.R. § 250.101.

[35] P.L. 95-372.

[36] 43 U.S.C. § 1344.

[37] 43 U.S.C. §§ 1337, 1345.

[38] 43 U.S.C. § 1340.

[39] 43 U.S.C. § 1351.

[40] 43 U.S.C. § 1344(a), (e).

needs for the five-year period and the extent of potential economic, social, and environmental impacts associated with development.[41]

During the development of the plan, the Secretary must solicit and consider comments from the Governors of affected states, and at least sixty days prior to publication of the plan in the *Federal Register*, the plan is to be submitted to the Governor of each affected state for further comments.[42] After publication, the Attorney General is also authorized to submit comments regarding potential effects on competition.[43] Subsequently, at least sixty days prior to its approval, the plan is to be submitted to Congress and the President, along with any received comments and an explanation for the rejection of any comment.[44] Once the leasing plan is approved, tracts included in the plan will be available for leasing, consistent with the terms of the plan.[45]

The development of the five-year plan is considered a major federal action significantly affecting the quality of the human environment and as such requires preparation of an environmental impact statement (EIS) under the National

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[41] Id.

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

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

43 U.S.C. § 1331(f).

[43] 43 U.S.C. § 1344(d).

[44] Id.; *see also* 30 C.F.R. §§ 256.16-.17.

[45] 43 U.S.C. §1344(d).

Environmental Policy Act (NEPA).[46] Thus, the NEPA review process complements and informs the preparation of a five-year plan under the OCSLA.[47]

Leasing. The lease sale process involves multiple steps as well. Leasing decisions are impacted by a variety of federal laws; however, it is section 8 of the OCSLA and its implementing regulations that establish the mechanics of the leasing process.[48]

The process begins when the Director of MMS publishes a call for information and nominations regarding potential lease areas. The Director is authorized to receive and consider these various expressions of interest in lease areas and comments on which areas should receive special concern and analysis.[49] The Director is then to consider all available information and perform environmental analysis under NEPA in crafting both a list of areas recommended for leasing and any proposed lease stipulations.[50] This list is submitted to the Secretary of the Interior and, upon the Secretary's approval, published in the *Federal Register* and submitted to the Governors of potentially affected states.[51]

The OCSLA and its regulations authorize the Governor of an affected state and the executive of any local government within an affected state to submit to the Secretary any recommendations concerning the size, time, or location[52] of a proposed

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[46] 42 U.S.C. § 4332(2)(C). In general, NEPA and its CEQ regulations require various levels of environmental analysis depending on the circumstances and the type of Federal action contemplated. Certain actions that have been determined to have little or no environmental effect are exempted from preparation of NEPA documents entirely and are commonly referred to as "categorical exclusions." In situations where a categorical exclusion does not apply, an intermediate level of review, an environmental assessment (EA), may be required. If, based on the EA, the agency finds that an action will not have a significant effect on the environment, the agency issues a "finding of no significant impact" (FONSI), thus terminating the NEPA review process. On the other hand, major Federal actions that are found to significantly affect the environment require the preparation of an environmental impact statement (EIS), a document offering detailed analysis of the project as proposed as well as other options, including taking no action at all. NEPA does not direct an agency to choose any particular course of action; the only purpose of an EIS is to ensure that environmental consequences are considered. For additional information, see CRS Report RS20621, *Overview of NEPA Requirements*, by Kristina Alexander.

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

[48] 43 U.S.C. § 1337.

[49] 30 C.F.R. §§ 256.23, 256.25.

[50] 30 C.F.R. § 256.26.

[51] 30 C.F.R. § 256.29.

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

lease sale within sixty days after notice of the lease sale.[53] The Secretary must accept the Governor's recommendations (and has discretion to accept a local government executive's recommendations) if the Secretary determines that the recommendations reasonably balance the national interest and the well-being of the citizens of an affected state.[54]

The Director of MMS publishes the approved list of lease sale offerings in the *Federal Register* (and other publications) at least thirty days prior to the date of the sale.[55] This notice must describe the areas subject to the sale and any stipulations, terms, and conditions of the sale.[56] The bidding is to occur under conditions described in the notice and must be consistent with certain baseline requirements established in the OCSLA.[57]

Although the statute establishes base requirements for the competitive bidding process and sets forth a variety of bid formats,[58] many of these requirements are subject to significant modification at the discretion of the Secretary.[59] Before the acceptance of bids, the Attorney General is also authorized to review proposed lease sales to analyze any potential effects on competition, and may subsequently recommend action to the Secretary of the Interior as may be necessary to prevent violation of antitrust laws.[60] The Secretary is not bound by the Attorney General's recommendation, and likewise, the antitrust review process does not affect private rights of action under antitrust laws or otherwise restrict the powers of the Attorney General or any other federal agency under other law.[61] Assuming compliance with these bidding requirements, the Secretary may grant a lease to the highest bidder, although deviation from this standard may occur under a variety of circumstances.[62]

In addition, the OCSLA prescribes many minimum conditions that all leases must contain. The statute supplies generally applicable minimum royalty or net

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[53] 43 U.S.C. § 1345(a); *see also* 30 C.F.R. § 256.31.

[54] 43 U.S.C. § 1345(c).

[55] 43 U.S.C. § 1337(*l*).

[56] 30 C.F.R. § 256.32(1).

[57] 43 U.S.C. § 1337.

[58] 43 U.S.C § 1337(a)(1)(A)-(H). For example, bids may be on the basis of "cash bonus bid with a royalty at not less than 12 ½ per centum fixed by the Secretary in amount or value of the production saved, removed, or sold ...." *See also* 30 C.F.R. §§ 256.35 - 256.47.

[59] 43 U.S.C 1337(a)(1)-(3), (8)-(9). It should be noted that the OCSLA also provides for a legislative veto of the bidding system selected by the Secretary and that a similar provision was declared unconstitutional by the U.S. Supreme Court. *See* Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983).

[60] 43 U.S.C. § 1337(c); 30 C.F.R. § 256.47(d).

[61] 43 U.S.C § 1337(c), (f).

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

profit share rates, as necessitated by the bidding format adopted, subject, under certain conditions, to Secretarial modification. Indeed, several provisions authorize royalty reductions or suspensions. Royalty rates or net profit shares may be reduced below the general minimums or eliminated to promote increased production.[63] For leases located in "the Western and Central Planning Areas of the Gulf of Mexico and the portion of the Eastern Planning Area of the Gulf of Mexico encompassing whole lease blocks lying west of 87 degrees, 30 minutes West longitude and in the Planning Areas offshore Alaska," a broader authority is also provided, allowing the Secretary, with the lessee's consent, to make "other modifications" to royalty or profit share requirements to encourage increased production.[64] Additionally, the 2005 Energy Policy Act also authorizes royalty relief in the form of reduced payments if 44 cents for every dollar owed to the federal government is paid to the state of Louisiana instead.[65] The lease generating these royalty payments does not necessarily have to be located adjacent to Louisiana waters. Indeed, all OCS leases are covered by the provision. However, in order to take advantage of the reduction, the lessee must have had "an ownership interest in State of Louisiana leases SL10087, SL10088 or SL10187, or ownership interests in the production or proceeds therefrom, as established by assignment, contract or otherwise" as of August 18, 1990.[66] Royalties may also be suspended pursuant to the Outer Continental Shelf Deep Water Royalty Relief Act, discussed *infra* pp. 17-20.

Recently, there has been a great deal of controversy with respect to certain leases issued by MMS in 1998 and 1999 that did not contain price thresholds for royalties. Most MMS leases providing for royalty relief contain oil or natural gas price thresholds: if the price of oil or gas exceeds those thresholds, the federal government is entitled to royalties for oil and gas produced by the lessees. Some have argued that the lack of such thresholds resulted in excessive profits for oil and gas producers holding leases from 1998 and 1999, because they were not required to pay royalties on their oil and gas income to the lessor, the federal government. H.R. 6, passed by the House of Representatives on January 18, 2007, included a provision to address this controversy. However, the Senate version of H.R. 6, passed on June 21, 2007, did not contain this language. A subsequent energy bill passed by the House on August 4, 2007, H.R. 3221, contained language addressing the controversy virtually identical to the language in the original version of H.R. 6. It remains to be seen how this issue will be resolved in conference.[67]

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[63] Id. § 1337(a)(3).

[64] 43 U.S.C. § 1337(a)(3)(B)

[65] P.L. 109-58 (codified at 43 U.S.C. § 1334 note).

[66] Id.

[67] For further discussion of this controversy and proposed legislative resolution, see CRS Report RL33974, *Legal Issues Raised by Provision in House Energy Bill (H.R. 6) Creating Incentives for Certain OCS Leaseholders to Accept Price Thresholds*, by Robert Meltz and Adam Vann.

The OCSLA also generally requires successful bidders to furnish a variety of up-front payments and performance bonds upon being granted a lease.[68] Additional provisions require that leases provide that certain amounts of production be sold to small or independent refiners. Further, leases must contain the conditions stated in the sale notice and provide for suspension or cancellation of the lease pursuant to section 1334.[69] Finally, the law indicates that a lease entitles the lessee to explore, develop and produce oil and gas, conditioned on applicable due diligence requirements and the approval of a development and production plan, discussed below.[70]

Exploration. Exploration for oil and gas pursuant to an OCSLA lease must comply with an approved exploration plan.[71] Detailed information and analysis must accompany the submission of an exploration plan, and, upon receipt of a complete proposed plan, the relevant MMS Regional Supervisor is required to submit the plan to the Governor of an affected state and the state's Coastal Zone Management agency.[72]

Under the federal Coastal Zone Management Act (CZMA), federal actions and federally permitted projects, even in federal waters, must be submitted for state review.[73] The purpose of this review is to ensure consistency with state Coastal Zone Management Programs as contemplated by the federal law. When a state determines that a lessee's plan is inconsistent with its Coastal Zone Management Program, the lessee must either reform its plan to accommodate those objections and resubmit it for MMS and state approval or succeed in appealing the state's determination to the Secretary of Commerce.[74] Simultaneously, the MMS Regional Supervisor is to analyze the environmental impacts of the proposed exploration activities under NEPA; however, it should be noted that regulations prescribe that MMS complete its action on the plan review within thirty days. Hence, extensive environmental review at this stage may be constrained or rely heavily upon previously prepared NEPA documents.[75] If the Regional Supervisor disapproves the proposed exploration plan, the lessee is entitled to a list of necessary modifications and may resubmit the plan to address those issues.[76] Once a plan has been approved, drilling associated with exploration remains subject to the relevant MMS District Supervisor's approval of an Application for a Permit to Drill, which involves analysis of even more specific drilling plans.

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[68] 43 U.S.C § 1337(a)(7); 30 C.F.R. §§ 256.52 - 256.59.

[69] 43 U.S.C § 1337(b). Leases may also be cancelled at any time if obtained by fraud or misrepresentation. 43 U.S.C § 1337(o).

[70] 43 U.S.C § 1337(b)(4).

[71] 43 U.S.C § 1340(b), (c).

[72] 30 C.F.R. §§ 250.226, 250.227, 250.232, 250.235.

[73] 16 U.S.C. § 1456(c).

[74] 30 C.F.R. § 250.235.

[75] 30 C.F.R. § 250.232(c).

[76] 30 C.F.R. §§ 250.231 - 250.233.

Development and Production. While exploration will regularly involve drilling wells, the scale of such activities will significantly increase during the development and production phase. Accordingly, additional regulatory review and environmental analysis are required by the OCSLA before this stage begins.[77] Operators are required to submit a Development and Production Plan for areas where significant development has not occurred before[78] or a less extensive Development Operations Coordination Document for those areas, such as certain portions of the Western Gulf of Mexico, where significant activities have already taken place.[79] The information required to accompany submission of these documents is similar to that required at the exploration phase, but must address the larger scale of operations.[80] As with the processes outlined above, the submission of these documents complements the Department's and MMS's environmental analysis under NEPA. As with the exploration plan review process, it may not always be necessary that a new EIS be prepared at this stage, and environmental analysis may be tied to previously prepared NEPA documents.[81] In addition, affected states are allowed, under the OCSLA, to submit comments on proposed Development and Production Plans and to review these plans for consistency with state Coastal Zone Management Programs.[82] Additionally, if the drilling project involves "non-conventional production or completion technology, regardless of water depth" applicants must also submit a Deepwater Operations Plan (DWOP) and a Conceptual Plan.[83] These additional documents allow MMS to adequately review the engineering, safety, and environmental impacts associated with these technologies.[84]

As with the exploration stage, actual drilling cannot take place without approval of an Application for Permit to Drill (APD).[85] An APD focuses on the specifics of particular wells and associated machinery. Thus, an application must include a plat indicating the well's proposed location, information regarding the various design elements of the proposed well, and a drilling prognosis, among other things.[86]

Lease Suspension and Cancellation. The OCSLA authorizes the Secretary of the Interior to promulgate regulations on lease suspension and

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[77] 43 U.S.C. § 1351.

[78] 30 C.F.R. § 250.201.

[79] Id.

[80] 30 C.F.R. §§ 250.24 - 250.262.

[81] The regulations indicate that "at least once in each planning area (other than the western and central Gulf of Mexico planning areas) we [MMS] will prepare an environmental impact statement (EIS) ...." 30 C.F.R.§ 250.269.

[82] 30 C.F.R. § 250.267.

[83] 30 C.F.R. §§ 250.286, 250.287.

[84] 30 C.F.R.§§ 250.289, 250.292.

[85] 30 C.F.R. §§ 250.410 - 250.469.

[86] 30 C.F.R. § 250.411.

cancellation.[87] The Secretary's discretion over the use of these authorities is specifically limited to a set number of circumstances established by the OCSLA. These authorities are described below.

Suspension of otherwise authorized OCS activities may generally occur at the request of a lessee or at the direction of the relevant MMS Regional Supervisor, given appropriate justification.[88] Under the statute, a lease may be suspended (1) when it is in the national interest, (2) to facilitate proper development of a lease, (3) to allow for the construction or negotiation for use of transportation facilities, or (4) when there is "a threat of serious, irreparable, or immediate harm or damage to life (including fish and other aquatic life), to property, to any mineral deposits (in areas leased or not leased), or to the marine, coastal, or human environment...."[89] The regulations also indicate that leases may be suspended for other reasons, including (1) when necessary to comply with judicial decrees, (2) to allow for the installation of safety or environmental protection equipment, (3) to carry out NEPA or other environmental review requirements, or (4) to allow for "inordinate delays encountered in obtaining required permits or consents...."[90] Whenever suspension occurs, the OCSLA generally requires that the term of an affected lease or permit be extended by a length of time equal to the period of suspension.[91] This extension requirement does not apply when the suspension results from a lessee's "gross negligence or willful violation of such lease or permit, or of regulations issued with respect to such lease or permit...."[92]

After a suspension period of, in general, five years,[93] the Secretary may cancel a lease upon holding a hearing and finding that (1) continued activity pursuant to a lease or permit would "probably cause serious harm or damage to life (including fish and other aquatic life), to property, to any mineral (in areas leased or not leased), to the national security or defense, or to the marine, coastal, or human environment" (2) "the threat of harm or damage will not disappear or decrease to an acceptable extent within a reasonable period of time" and (3) "the advantages of cancellation outweigh the advantages of continuing such lease or permit in force...."[94]

Upon cancellation, the OCSLA entitles lessees to certain damages. The statute calculates damages at the lesser of (1) the fair value of the canceled rights on the date

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[87] 43 U.S.C. § 1334; *see also* 30 C.F.R. §§ 250.168 - 250.185.

[88] 30 C.F.R. §§ 250.168, 250.171-250.175.

[89] 43 U.S.C.§ 1334(a)(1).

[90] 30 C.F.R. § 250.173 - 250.175.

[91] 43 U.S.C.§ 1334(a)(1).

[92] Id.

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

[94] 43 U.S.C. § 1334(a)(2)(A)(i)-(iii). For regulations implementing the cancellation provisions, see 30 C.F.R. §§ 250.180 - 250.185.

of cancellation[95] or (2) the excess of the consideration paid for the lease, plus all of the lessee's exploration- or development-related expenditures, plus interest, over the lessee's revenues from the lease.[96]

The OCSLA also indicates that the "continuance in effect" of any lease is subject to a lessee's compliance with the regulations issued pursuant to the OCSLA, and failure to comply with the provisions of the OCSLA, an applicable lease, or the regulations may authorize the Secretary to cancel a lease as well.[97] Under these circumstances, a nonproducing lease can be canceled if the Secretary sends notice by registered mail to the lease owner and the noncompliance with the statute lease or regulations continues for a period of thirty days after the mailing.[98] Similar noncompliance by the owner of a producing lease can result in cancellation after an appropriate proceeding in any United States district court with jurisdiction as provided for under the OCSLA.[99]

Legal Challenges to Offshore Leasing

Multiple statutes govern aspects of offshore oil and gas development and therefore may give rise to legal challenges. Certainly, violations of the Clean Water Act,[100] Endangered Species Act,[101] and other environmental laws have provided mechanisms for challenging actions associated with offshore oil and gas production in the past.[102] Of primary interest here, however, are legal challenges to agency action with respect to the planning, leasing, exploration, and development phases under the procedures mandated by the OCSLA itself and the related environmental review required by the National Environmental Policy Act. An overview of the relevant case law follows.

Suits Under the Outer Continental Shelf Lands Act. The OCSLA provides for judicial review of agency action alleged to be in violation of federal law, including the OCSLA, its implementing regulations, and the terms of any permit or

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

[96] Exceptions from this method of calculation are carved out for leases issued before September 18, 1978, and for joint leases that are canceled due to the failure of one or more partners to exercise due diligence. 43 U.S.C. § 1334(a)(2)(C)(ii)(I), (II); *see also* 30 C.F.R. §§ 250.184 - 250.185.

[97] 43 U.S.C. § 1334(b).

[98] 43 U.S.C. § 1334(c).

[99] 43 U.S.C. § 1334(d).

[100] 33 U.S.C. §§ 1251-1387.

[101] 16 U.S.C. §§ 1531-1544.

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

lease.[103] The following paragraphs provide an overview of the existing case law and address the limitations applicable to relief at each phase of the leasing and development process.

Jurisdiction to review agency actions taken in approving the five-year plan is vested in the U.S. Court of Appeals for the D.C. Circuit, subject to appellate review by writ of certiorari to the U.S. Supreme Court.[104] It appears that only three challenges to the five-year plan have been brought to court. The first, *California ex. rel. Brown v. Watt*,[105] involved a variety of challenges to the 1980 — 1985 plan, and, while the court ultimately found that the Secretary had failed to comply with certain procedural requirements in making determinations, the court established a relatively deferential standard of review, which it has continued to apply in later challenges. When reviewing "findings of ascertainable fact made by the Secretary," the court will require the Secretary's decisions to be supported by "substantial evidence."[106] However, the court noted that many of the decisions required in the formulation of the five-year plan will involve the determination of policy in the face of disputed facts, and that such determinations should be subject to a less searching standard. In such instances, a court will examine agency action and determine whether "the decision is based on a consideration of the relevant factors and whether there has been a clear error of judgment."[107]

The standards for review outlined in *Watt* have been upheld in subsequent litigation related to the five-year plan.[108] In these subsequent cases, the Court of Appeals for the D.C. Circuit applied a deferential standard in reviewing the Secretary's decisions, particularly in reviewing the Secretary's environmental impact determinations, such that the Secretary could perform environmental analysis using "any methodology so long as it is not irrational."[109] Further, these cases indicate that the Secretary is vested with significant discretion in determining which areas are to be offered for leasing and which areas will not. Thus, while the Secretary must receive and consider comments related to excluding areas from leasing, the court has clearly stated that the Secretary need only identify the legal or factual basis for leasing determinations at this stage and explain those determinations; more searching judicial review of the Secretary's analysis is not required.[110]

Litigation under the OCSLA has also challenged actions taken during the leasing phase. As described above, the OCSLA authorizes states to submit

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[103] 43 U.S.C. § 1349.

[104] 43 U.S.C. § 1349(c).

[105] 668 F.2d 1290 (D.C. Cir.1981).

[106] Watt, 668 F.2d at 1302; *see also* 43 U.S.C. § 1349(c)(6).

[107] Watt, 668 F.2d at 1301-1302 (*quoting* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971) (internal quotations omitted)).

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

[109] California, 715 F.2d at 96 (internal quotations omitted).

[110] Hodel, 865 F.2d at 305.

comments during the notice of lease sale stage and directs the Secretary to accept a state's recommendations if they "provide for a reasonable balance between the national interest and the well-being of the citizens of the affected State."[111] Courts have typically applied the deferential "arbitrary and capricious" standard to Secretary decisions with respect to these recommendations. According to the cases from the Ninth Circuit Court of Appeals, because the OCSLA does not provide clear guidance as to how balancing of national interest and a state's considerations is to be performed, agency action will generally be upheld so long as "some consideration of the relevant factors ..." takes place.[112] Cases from the federal courts in Massachusetts, including a decision affirmed by the First Circuit Court of Appeals, have, while embracing the arbitrary and capricious standard, found the Secretary's balancing of interests insufficient.[113] However, it should be noted that the Massachusetts cases reviewed agency action that was not supported by explicit analysis of the sort challenged in the Ninth Circuit. Thus, it is possible that, given a more thorough record of the Secretary's decision, these courts may afford more significant deference to the Secretary's determination.

Apart from matters relating primarily to the authority of the Secretary to authorize the various stages of leasing, recent litigation has focused on the authority of MMS to require royalty payments on certain offshore leases allegedly subject to mandatory royalty relief provisions. In *Kerr-McGee Oil & Gas Corp. v. Burton*, filed in federal district court on March 17, 2006, the plaintiff, an oil and gas company operating offshore wells in the Gulf of Mexico pursuant to federal leases, is challenging actions by the Department to collect royalties on deepwater oil and gas production.[114] The plaintiff alleges the Department does not have authority to assess royalties based on an interpretation of the 1995 Outer Continental Shelf Deepwater Royalty Relief Act (DWRRA) that the act requires royalty-free production until a statutorily prescribed threshold volume of oil or gas production has been reached.[115]

The DWRRA separates leases into three categories based on date of issuance. These categories are (1) leases in existence on November 28, 1995, (2) leases issued after the five year period, which ended on November 28, 2000, and (3) leases issued in between those periods, during the first five years after the act's enactment. The third category of leases is the current source of controversy. According to Kerr-McGee, its leases, which were issued during the initial five year period after the DWRRA's enactment, are subject to different legal requirements than those applicable to the other two categories. Kerr-McGee argues that the Department has a nondiscretionary duty under the DWRRA to provide royalty relief on its deepwater leases, and that the statute does not provide a exception to this obligation based on

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[111] 43 U.S.C. § 1345(d).

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

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

[114] Kerr-McGee Oil & Gas Corp. v. Burton, No. CV06-0439 LC (W.D. La. March 17, 2006).

[115] P.L. 104-58.

any preset price threshold. To the extent any price threshold has been included in these leases, Kerr-McGee argues that such provisions are contrary to DOI's statutory authority and unenforceable.

Some assert that provisions of the DWRRA, while not explicit, can be interpreted to support the Kerr-McGee position. First, section 302 of the act clearly establishes that deepwater leases[116] existing on the date of the DWRRA's enactment will pay no royalties until either a specified volume of production is reached by the lessee[117] or the price of oil or gas has reached a statutorily prescribed price threshold.[118]

Section 304 of the DWRRA, which addresses deepwater leases[119] issued within five years after the DWRRA's enactment, directs that such leases use the bidding system authorized in section 8(a)(1)(H) of the OCSLA, as amended by the DWRRA. Thus, whether price thresholds could also be applied to leases issued during the five year period post enactment of the DWRRA depends on the authority granted in section 8(a)(1)(H). In general, section 8(a)(1) establishes that Secretary of the Interior may grant OCS oil and gas leases to the highest bidder.[120] It also establishes several methods of bidding and the basis upon which bids are to be made. This includes a variety of mechanisms, such a cash bonus bid plus a minimum royalty or a variable royalty plus a fixed work commitment based on a dollar amount for exploration.[121] Subsection (H), referenced in the DWRRA, authorizes bidding by

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[116] This includes those leases or units "located in water depths of 200 meters or greater in the Western and Central Planning Areas of the Gulf of Mexico, including that portion of the Eastern Planning Area of the Gulf of Mexico encompassing whole lease blocks lying west of 87 degrees, 30 minutes West longitude...." 43 U.S.C. § 1337(a)(3)(C)(i).

[117] 43 U.S.C. § 1337(a)(3)(C). Generally, the Secretary must determine if additional production would be economic absent royalty relief. If it would not, the Secretary may set a threshold volume that may be produced royalty free. The statute provides certain minimum volumes of oil production that is allowable for "new production," increasing the volume to correspond with increase lease depth. The statute defines "new production" as

> (I) any production from a lease from which no royalties are due on production, other than test production, prior to November 28, 1995; or
>
> (II) any production resulting from lease development activities pursuant to a Development Operations Coordination Document, or supplement thereto that would expand production significantly beyond the level anticipated in the Development Operations Coordination Document, approved by the Secretary after November 28, 1995.

[118] 43 U.S.C. § 1337(a)(3)(C)(iii).

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

[120] 43 U.S.C. § 1337(a)(1).

[121] 43 U.S.C. § 1337(a)(1)(A), (B).

> cash bonus bid with royalty at no less than 12 and ½ per centum fixed by the Secretary in amount or value of production saved, removed, or sold, and with suspension of royalties for a period, volume, or value of production determined by the Secretary, which suspension may vary based on the price of production from the lease....[122]

Thus, this provision generally requires subsection (H) leases to provide for royalty payments but allows royalty suspensions for a specific time period, volume, or value of production. Further, the Secretary, in general, appears to have discretion to accept or reject bids based on the method of royalty suspension proposed and to set the value threshold for suspension if such a suspension method were adopted. Thus, for leases issued after the initial five year period, the Secretary would appear to have some flexibility in imposing or conditioning royalty relief. However, it is not clear from the text of this provision that more than one of these reasons for royalty suspension may be used for the same lease under any circumstances, in that "or," often used in a disjunctive sense, could be interpreted to require that only one method of royalty suspension be used per lease.[123] On the other hand, it could be argued that "or" is used in this instance to indicate that all suspension mechanisms are available in any combination determined by the Secretary and that they are not intended to be mutually exclusive.[124]

Whether multiple suspension mechanisms are authorized under subsection (H) is important because the DWRRA stipulates that leases issued during the five-year post-enactment time frame must provide for royalty suspension on the basis of volume. Specifically, section 304 states

> [A]ny lease sale within five years of the date of enactment of this title, shall use the bidding system authorized in section 8(a)(1)(H) of the Outer Continental Shelf Lands Act, as amended by this title, except that the suspension of royalties shall be set at a volume of not less than the following:
>
> (1) 17.5 million barrels of oil equivalent for leases in water depths of 200 to 400 meters;
> (2) 52.5 million barrels of oil equivalent for leases in 400 to 800 meters of water; and
> (3) 87.5 million barrels of oil equivalent for leases in water depths greater than 800 meters.[125]

It is possible to interpret this provision as authorizing leases issued during the five-year period to contain royalty suspension provisions, but only those based on production volume with no allowance at all for a price-related threshold in addition. Such an intent might be gleaned from the language of the quoted section alone;

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[122] 43 U.S.C. § 1337(a)(1)(H).

[123] *See, e.g.*, Zorich v. Long Beach Fire and Ambulance Serv., 118 F.3d 682, 684 (9th Cir. 1997); United States v. O'Driscoll, 761 F.2d 589, 597-98 (10th Cir. 1985).

[124] *See, e.g.*, DeSylva v. Ballentine, 351 U.S. 570, 573 (1956); United States v. Moore, 613 F.2d 1029 (D.C. Cir. 1979).

[125] P.L. 104-58.

indeed, in this provision, Congress provides for a specific royalty suspension method and does not clearly authorize the Secretary to alter or supplement it. Although perhaps unnecessary to Kerr-McGee's position, such an interpretation would be bolstered by a reading of subsection (H) that prohibits multiple suspension mechanisms. Further, while addressing a case that involved these same provisions, the Court of Appeals for the Fifth Circuit appears to have substantially embraced this interpretation, stating

> Section 304 requires the Interior to use the bidding system in Section 303 which includes discretionary royalty suspension "for a period, volume, or value of production determined by the Secretary." That section, however, immediately excepts and replaces Interior's discretion with a fixed royalty suspension for New Leases on a volume basis by providing, "except that the suspension of royalties shall be set at a volume of not less than the following" (followed by amounts which vary based on water depth).[126]

MMS regulations implementing the Department's royalty relief programs do not appear to interpret the DWRRA provisions at issue in the current litigation differently from the Kerr-McGee position. These regulations indicate that pre-DWRRA leases and those issued after November 2000 (i.e., the close of the five-year post-enactment period) may have their royalty relief suspended if oil or gas prices rise above the thresholds contained in each lease.[127] Further, those regulations that specifically address leases issued during the five-year post-enactment period do not indicate that a price threshold can be included in such leases or that termination of a royalty suspension can occur due to changes in oil or gas prices.[128] Thus, while it may be possible for MMS to interpret its authority with respect to the five-year interim period leases broadly by issuing clarifying regulations, there appears to be no indication that it has done so.

Suits Under the National Environmental Policy Act. In the context of proposed OCS development, NEPA generally requires publication of notice of an intent to prepare an Environmental Impact Statement (EIS), acceptance of comments on what should be addressed in the EIS, agency preparation of a draft EIS, a comment period on the draft EIS, and publication of a final EIS addressing all comments at each stage of the leasing process where government action will significantly affect the environment.[129] As described above, NEPA figures heavily in the OCS planning and leasing process and requires various levels of environmental analysis prior to agency decisions at each phase in the leasing and development process.[130] Lawsuits brought under NEPA are thus indirect challenges to agency decisions in that they typically question the adequacy of the environmental analysis performed prior to a final decision.

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[126] Santa Fe Snyder Corp. v. Norton 385 F.3d 884, 892 (5th Cir. 2004).

[127] 33 C.F.R. §§ 203.78, 260.122.

[128] 33 C.F.R. §§ 260.112 - 260.117.

[129] 40 C.F.R. §§ 1501.7, 1503.1, 1503.4, 1506.10.

[130] 42 U.S.C. § 4332.

There has only been one NEPA-based challenge to a five-year plan, *Natural Resources Defense Council v. Hodel*.[131] The plaintiff challenged the adequacy of the alternatives examined in the EIS and the level of consideration paid to cumulative effects of offshore drilling activities. The court held that not every possible alternative needed to be examined, and that the determination as to adequacy was subject to the "rule of reason."[132] This standard appears to afford some level of deference to the Secretary, and his choice of alternatives was found to be sufficient by the court in this instance.[133] However, without significant explanation of the standard of review to be applied, the court did find that the Secretary's failure to analyze certain cumulative impacts was a violation of NEPA.[134] Thus, the Secretary was required to include this analysis, although final decisions based on that analysis remained subject to the Secretary's discretion, with review only under the arbitrary and capricious standard.[135]

As mentioned above, NEPA plays a role in the leasing phase as well. MMS often uses NEPA and its tiering option to evaluate lease sales.[136] The NEPA procedures and standard of review remain the same at this phase; however, due to the structure of the OCSLA process, more specific information is generally required.[137] Still, courts are deferential at the lease sale phase. In challenges to the adequacy of environmental review, courts have stressed that inaccuracies and more stringent NEPA analysis will be available at later phases.[138] Thus, because there will be an opportunity to cure any defects in the analysis as the OCSLA process continues, challenges under NEPA at this phase are often unsuccessful.[139]

It also appears possible to challenge exploration and development plans under NEPA, although a search of the relevant case law has revealed only one NEPA-based challenge to a development and production plan and no challenges to exploration plans.[140] In *Edwardsen v. U.S. Department of the Interior*, the Ninth Circuit Court of Appeals applied the typical "rule of reason" to determine if the EIS adequately addressed the probable environmental consequences of the development and production plan, and held that, despite certain omissions in the analysis and despite an MMS decision to tier its NEPA analysis to an EIS prepared for a similar lease

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[131] Natural Resources Defense Council, Inc. v. Hodel, 865 F.2d 288 (D.C. Cir. 1988).

[132] Id. at 294.

[133] Id. at 296.

[134] Id. at 297-300.

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

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

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

[138] Id. at 1192; Alaska v. Andrus, 580 F.2d 465, 473 (D.C. Cir.1978); Village of False Pass v. Clark, 733 F.2d 605, 612-16 (9th Cir.1984); North Slope Borough v. Andrus, 642 F.2d 589, 594-905 (D.C. Cir.1980).

[139] *But see* Conservation Law Foundation v. Clark, 560 F.Supp. 561 (D. Mass. 1983).

[140] Edwardsen v. U.S. Department fo the Interior, 268 F.3d 781 (9th Cir. 2001).

sale, the requirements of NEPA were satisfied.[141] Thus, while additional analysis was required to account for the greater specificity of the plans and to accommodate the "hard look" at environmental impacts NEPA mandates, the reasonableness standard applied to what must be examined in an EIS did not allow for a successful challenge to agency action.

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141 *Id*. at 784-790.

Appendix.

Table 1. State Laws That Ban or Regulate Offshore Mineral Development

State	Policy	Statutes
AL	Drilling is authorized in Alabama's state waters. The State Lands Division of the Department of Conservation & Land Resources is charged with leasing offshore oil and gas in state waters. In addition, the Alabama State Oil and Gas Board regulates oil and gas production to ensure the conservation and proper development of oil and gas resources.	**Authorization:** Ala. Code §§ 9-15-18; 9-17-1 *et seq*.; 40-20-1 *et seq*.
AK	The Alaska Department of Natural Resources is responsible for leasing oil and gas on state lands, including offshore areas. Certain areas are specifically designated as off limits to oil and gas leasing, and administrative decisions not to offer leases in offshore areas may further restrict access.	**Ban:** Alaska Stat. §§ 38.05.140(f); 38.05.184. **Authorization:** Alaska Stat. §§ 38.05.131 *et seq*.; 38.05.135 *et seq*.
CA	The State Lands Commission is generally responsible for oil and gas leasing. California issued offshore oil and gas leases in the past, while banning development in multiple areas within state waters at both the statutory and administrative levels. California currently has a general ban in place restricting any state agency from issuing new offshore leases, unless the President of the United States determines that there is a "severe energy supply interruption and has ordered distribution of the Strategic Petroleum Reserve ..., the Governor finds that the energy resources of the sanctuary will contribute significantly to the alleviation of that interruption, and the Legislature subsequently acts to amend...[the law] to allow that extraction." The ban is limited to areas that are not currently subject to a lease.	**Ban:** Cal. Pub. Res. Code §§ 6871.1-.2 (repealed 1994); 6870 (Santa Barbara limitations); 6243 (general ban). **Authorization:** Cal. Pub. Res. Code §§ 6870 *et. seq*.; 6240 *et seq*.
CT	Connecticut does not appear to have laws addressing oil and gas development in state waters.	
DE	The Governor and the Secretary of the Department of Natural Resources and Environmental Control are authorized to lease oil and gas in state waters. Lands "administered by the Department of Natural Resources and Environmental Control" may not be leased by the Secretary.	**Ban:** Del. Code Ann. tit. 7 ch. 61 § 6102(e). **Authorization:** Del. Code. Ann. tit. 7 ch. 61.

State	Policy	Statutes
FL	In general, the Department of Natural Resources is vested with the authority to permit oil and gas development on state lands and submerged lands; however, in 1990 Florida enacted a broad ban on offshore oil and gas development by prohibiting oil and gas drilling structures in a variety of locations, including Florida's territorial waters. The development ban provides an exception for valid existing rights.	**Ban:** Fla. Stat. Ann. §377.242. **Authorization:** Fla. Stat. Ann. §§ 377.01 e*t seq*.; 253.001 *et seq*.
GA	The State Properties Commission is authorized to issue leases for state owned oil and gas. The statute does not distinguish between onshore and offshore minerals.	**Authorization:** Ga. Stat. § 50-16-43.
HI	The Board of Land and Natural Resources is authorized to lease oil and gas on state lands, including submerged lands. There would not appear to be a statutory ban in place.	**Authorization:** Hawaii Rev. Stat. §§ 182-1 *et seq*.
LA	The state Mineral Board is responsible for leasing oil and gas in Louisiana and its offshore territory. There does not appear to be a statutory ban on oil and gas drilling in offshore areas, although development is limited to areas offered by the Board for leasing.	**Authorization:** La. Rev. Stat. §§ 30:121 *et seq*.
ME	The Bureau of Geology and Natural Areas has primary authority over oil and gas development on state lands, including tidal and submerged lands. The Bureau is authorized to issue exploration permits and mineral leases.	**Authorization:** Me. Rev. Stat. tit. 12 §§ 549 *et seq*.
MD	The Department of the Environment regulates oil and gas development. The areas underlying Chesapeake Bay, its tributaries, and the Chesapeake Bay Critical Area are unavailable for oil and gas development.	**Ban:** Md. Code, Envt. §14-107. **Authorization:** Md. Code, Envt. §§ 14-101 *et seq*.
MA	The Division of Mineral Resources is charged with administering the leasing of oil and gas on state lands. The law requires a public hearing before any license to explore or lease for extraction is issued for mineral resources located in coastal waters. Further, many of the state's offshore areas are designated as ocean sanctuaries in which oil and gas development is prohibited.	**Authorization:** Mass. Gen. Laws Ann. Ch. 21 §§ 54 *et seq*. **Ban:** Mass. Gen. Laws Ann. Ch. 132A § 15.

State	Policy	Statutes
MS	The Mississippi Major Economic Impact Authority is responsible for administering oil and gas leases on state lands. Offshore oil and gas development is generally permissible. However, specific areas are not available for leasing. No development may occur in areas north of the coastal barrier islands, except in Blocks 40, 41, 42, 43, 63, 64 and 66 through 98. Further, "surface offshore drilling operations" may not be conducted within one mile of Cat Island.	**Authorization:** Miss. Code. Ann. §§ 29-7-1 *et seq.* **Ban:** Miss. Code. Ann. § 29-7-3.
NH	No statute appears to address offshore oil and gas development.	
NJ	State law authorizes the removal of sand and "other materials" from lands under tidewaters and below the high water mark if approved by the Tidelands Resource Council. Offshore oil and gas development is not expressly addressed.	**Authorization:** N.J. Stat. Ann. §§ 12:3-12-1 *et seq.*
NY	Leases and permits for the right to use state owned submerged lands for navigation, commerce, fishing, bathing, and recreation are authorized for specified submerged areas. General authority for issuing oil and gas leases is vested in the Department of Environmental Conservation. Certain submerged lands underlying specified lakes are excluded from exploration and leasing, but offshore areas would not appear to be subject to a similar ban.	**Authorization:** N.Y. Pub. Lands. Law § 75; N.Y. Envt'l & Conserv. Law §§ 23-0101 *et seq.*
NC	State law authorizes the sale or lease of any state owned mineral underlying the bottoms of any sounds, rivers, creeks, or other waters of the State. The state is authorized to dispose of oil and gas "at the request of the Department of Environment and Natural Resources."	**Authorization:** N.C. Gen. Stat. § 146-8.
OR	The Department of State Lands is generally responsible for leasing state owned minerals, including oil and gas. Leasing of tidal and submerged lands is governed by separate provisions of law. There would not appear to be a ban in place.	**Authorization:** Or. Rev. Stat. §§ 274.705 *et seq.*; 273.551 (for submerged lands seaward more than 10 miles easterly of the 124th West Meridian).
RI	The Coastal Resources Management Council is charged with identifying, evaluating, and determining which uses are appropriate for the state's coastal resources and submerged lands.	**Authorization:** R.I. Gen. Laws. §§ 46-23-1 *et seq.*

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