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Challenges under OCSLA and the Future of Offshore Drilling under the Obama Administration

*Jennifer Larson**

A. INTRODUCTION

Offshore drilling only makes sense in today's grim economic times and after a year producing historically high gas prices. Or does it? As Senator John McCain and Governor Sarah Palin traveled the presidential campaign trail, many Americans exclaimed "Drill, baby, drill!"—begging for the government to utilize the natural resources in our own backyard, rather than paying unpredictable and, at times, outrageous prices for those resources from our foreign enemies. Still, many other Americans are fearful of such drilling for the effect it may have on the environment and focus not on the need for offshore drilling, but on the need for environmental responsibility. As politicians balance those issues of most importance to all Americans—the economy, national security, and the environment—the future of offshore drilling remains uncertain.

This article discusses the history of offshore drilling, judicial review of the processes involved, and the future of offshore drilling under President Barack Obama's administration. Early Supreme Court decisions wrestling with ownership of the three-mile belt along the coastline of United States, legislation discussing offshore drilling and its environmental impact, and drilling technologies are discussed in Part B to give an overview of the history of offshore drilling in the United States. Part C will discuss the application of the current Outer Continental Shelf Lands Act (OCSLA), the phases of an offshore drilling project for the Mineral Management Service (MMS) and the Secretary of the Interior to oversee pre-leasing, leasing, exploration, and development and production, and recent decisions out of the D.C. Circuit addressing the discretion of the Secretary in supervising these phases. Finally, Part D considers the differences between policies under the Bush administration and the policy under the new Obama administration while addressing the effects of a recent Ninth Circuit decision on the Obama administration's plans for offshore drilling.

The new President enters office with an economic crisis, a country at war, and many other domestic and foreign matters looming. At the onset of the Obama administration, it is too soon to tell which promises made during stump speeches along the campaign trail will remain a priority to the President. His Secretary of the Interior, Ken Salazar, currently remains commit-

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ted to the consideration of offshore drilling in new areas as part of a comprehensive energy plan. But with many Obama supporters ardently opposed to such a plan and the Ninth Circuit's ruling making it increasingly harder for the Secretary of the Interior to oversee such programs, the future of offshore drilling during the Obama administration remains unwritten. It is certain, however, that oil companies, politicians, and citizens who support drilling in these areas as a means of gaining energy independence will not be left unheard.

B. BACKGROUND

1. Early History and the Supreme Court

Several states, including California, Louisiana, and Texas, began issuing leases for drilling on submerged land along their state's coast line over sixty years ago.¹ They, and other coastal states, believed that they owned the tidelands as far out as drilling was possible and began to regulate these areas accordingly.² On October 1, 1945, President Harry S. Truman sought to change this perception when he declared in a proclamation that,

Having concern for the urgency of conserving and prudently utilizing its natural resources, the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control. In cases where the continental shelf extends to the shores of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles. The character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected.³

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1. U.S. CONG. OFFICE OF TECH. ASSESSMENT, OIL AND GAS TECHS. FOR THE ARCTIC AND DEEPWATER, OTA-O-270 (May 1985) at 3, *available at* <http://www.docstoc.com/docs/5793421/Oil-and-Gas-Technologies-for-the-Arctic-and-Deepwater>.
 2. Michael J. McHale, *An Introduction to Offshore Energy Exploration—A Florida Perspective*, 39 J. MAR. L. & COM. 571-74 (2008) (discussing the importance of early Supreme Court decisions in encouraging passage of legislation regulating submerged lands).
 3. Exec. Order No. 9633, 10 Fed. Reg. 12,305 (Sept. 28, 1945).

In a series of cases during the 1940s and 1950s, the United State Supreme Court confirmed federal control of the three-mile marginal belt along the coast.⁴

In the first of these cases, *United States v. California*, Justice Black began by first recognizing the novelty of the issue before the Court.⁵ “The question of who owned the bed of the sea only became of great potential importance at the beginning of [the twentieth] century when oil was discovered there.”⁶ The first production of oil from submerged land occurred in the late 1880s when the citizens of Summerland, California began drilling oil from land submerged beneath the Santa Barbara Channel after discovering that the wells closest to the ocean were the best oil producers.⁷ In 1921, California passed legislation authorizing the grant of permits to California residents for oil and gas exploration on its costal land.⁸ The United States brought suit against California to determine which sovereign owned the submerged land and, at the heart of the matter, which had the superior power to take the vast quantities of oil beneath that land.⁹ Ultimately, the Court sided with the federal government and held that “California is not the owner of the three-mile marginal belt along its coast, and that the federal government rather than the state has paramount rights in and power over that belt, an incident to which is full dominion over the resources of the soil under that water area, including oil.”¹⁰ Thus, the Court established that the federal government holds the authority to determine ownership of these areas.¹¹

Then, in the “Tidelands Cases,” the Supreme Court reinforced its ruling in *United States v. California*.¹² Both Louisiana and Texas claimed ownership to the submerged lands along their coastline beneath the Gulf of Mexico.¹³ In *United States v. Louisiana*, the Court applied the same reasoning it had in *United States v. California* only a few years before.¹⁴ The Court stated,

4. *United States v. California (California)*, 332 U.S. 19, 38 (1947); *United States v. Louisiana (Louisiana)*, 339 U.S. 699, 704 (1950); *United States v. Texas (Texas)*, 339 U.S. 707, 720 (1950).

5. *California*, 332 U.S. at 37.

6. *Id.* at 38.

7. McHale, *supra* note 2, at 572.

8. *California*, 332 U.S. at 38.

9. *Id.* at 23.

10. *Id.* at 38-39.

11. *Id.* at 41.

12. *Louisiana*, 339 U.S. at 704; *Texas*, 339 U.S. at 720.

13. *Louisiana*, 339 U.S. at 701-02; *Texas*, 339 U.S. at 709-12.

14. *Louisiana*, 339 U.S. at 704.

[p]rotection and control of the area are indeed functions of national external sovereignty. The marginal sea is a national, not a state concern. National interests, national responsibilities, national concerns are involved. The problems of commerce, national defense, relations with other powers, war and peace focus there. National rights must therefore be paramount in that area.¹⁵

Accordingly, the Court determined that the federal government had control over the submerged lands at issue.¹⁶

In *United States v. Texas*, which was handed down the same day as *United States v. Louisiana*, Texas asserted ownership of the submerged lands under the Gulf of Mexico beyond the three-mile limit to the outer edge of the continental shelf.¹⁷ Texas argued, because of its history as the Republic of Texas, the state now had exclusive control over the lands and the resources therein.¹⁸ The Court rejected this argument among others and upheld federal control over the submerged lands.¹⁹

2. The Submerged Lands Act and the Outer Continental Shelf Lands Act

In response to the Supreme Court decisions on the issue, Congress enacted the Submerged Lands Act and the Outer Continental Shelf Lands Act in 1953.²⁰ The Submerged Lands Act, enacted on May 22, 1953, preserved control of the outer Continental Shelf beyond state boundaries for the federal government and authorized leasing by the Secretary of the Interior.²¹

Just two months later, Congress passed the Outer Continental Shelf Lands Act (OCSLA) on August 7, 1953, to “amend the Submerged Lands Act in order that the area in the outer Continental Shelf beyond boundaries of the States may be leased and developed by the Federal Government.”²² The Committee on the Judiciary, to whom the bill was referred, considered the necessity of the legislation:

Representatives of the Federal departments, the States, and the off-shore operators all urged the importance and necessity for the enactment of legislation enabling the Federal Government to lease for oil and gas operations the vast areas of the Continental Shelf outside of State boundaries. . . . The committee is also of the opin-

15. *Id.*

16. *Id.* at 706.

17. *Texas*, 339 U.S. at 710-711.

18. *Id.* at 711.

19. *Id.* at 720.

20. 43 U.S.C. §§ 1301, 1331 (2006).

21. 43 U.S.C. §§ 1301-1315 (2006).

22. H.R. REP. NO. 83-413 at 2177 (1953).

ion that legislative action is necessary in order to confirm and give validity to Presidential Proclamation 2667 of September 8, 1945, wherein the President, by Executive declaration asserted, in behalf of the United States, jurisdiction, control, and power of disposition over the natural resources of the subsoil and seabed of the Continental Shelf.²³

OCSLA defines "outer Continental Shelf" as "all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 1301 of this title, and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control."²⁴ Thus, the Act codified the view espoused by the Supreme Court that the federal government has control over these areas.²⁵

The Act gives responsibility to the Secretary of the Interior for the administration of mineral exploration and development of the OCS, and perhaps most significantly, authorizes the Secretary of the Interior to grant oil and gas leases on submerged lands of the outer Continental Shelf.²⁶ The Act, as discussed below, now provides guidelines for implementing an oil and gas exploration and development program on the outer Continental Shelf.²⁷ Also, the Act provides for enforcement of the safety and environmental regulations imposed on any project and the process by which suits may be brought and remedies and penalties enforced.²⁸ The Secretary of the Interior designated the Minerals Management Service (MMS) as the administrative agency charged with managing the mineral leasing of submerged outer Continental Shelf lands and for the supervision of offshore operations after lease issuance.²⁹

Soon after this legislation was enacted and its policies implemented, its constitutionality was upheld by the Supreme Court in *Alabama v. United States*.³⁰ The Court noted that "[t]he power of Congress to dispose of any kind of property belonging to the United States 'is vested in Congress with-

23. *Id.* at 2178.

24. 43 U.S.C. § 1331(a) (2006).

25. *United States v. Louisiana (Louisiana)*, 339 U.S. 699, 704 (1950); *United States v. Texas (Texas)*, 339 U.S. 707, 720 (1950); *United States v. California (California)*, 332 U.S. 19, 38 (1947).

26. 43 U.S.C. § 1337 (2006).

27. 43 U.S.C. § 1346 (2006).

28. 43 U.S.C. §§ 1348-50 (2006).

29. About the Mineral Management Service, <http://www.mms.gov/aboutmms/> (last visited Jan. 4, 2010).

30. *Alabama v. Texas*, 347 U.S. 272, 273 (1954) (holding that the procedures set forth in OCSLA were constitutional).

out limitation.’”³¹ The Court’s validation of OCSLA in *Alabama* confirms the federal government’s legitimacy in managing exploration for natural resources in all areas of the outer Continental Shelf.³²

3. National Environmental Policy Act, Coastal Zone Management Act, Clean Water Act, and Amendments to the Outer Continental Shelf Lands Act

Illustrating the complaints of many environmental groups about the dangerous effects of drilling, a ghastly oil spill occurred in Santa Barbara, California, on January 29, 1969.³³ As workers were making adjustments to the pipe, a natural gas blowout occurred and released oil and gas into the Earth.³⁴ As workers fought to remedy the situation and stop the liquid from pouring into the ocean, thousands of animals were killed, including seals, dolphins, and birds.³⁵ The catastrophe reminded many of the hazards of such exploration and even moved Congress to pass legislation in response.

After the spill, Congress passed the National Environmental Policy Act (NEPA), the Coastal Zone Management Act (CZMA), and the Clean Water Act (CWA). The NEPA mandates an environmental review in the form of an Environmental Impact Statement (EIS) before any major federal action, including the Secretary of the Interior’s authorization of oil and gas leases.³⁶ Specifically, the Act requires all agencies to:

include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity, and

31. *Id.* at 273.

32. *Id.*

33. Santa Barbara’s 1969 Oil Spill, <http://www.sbwcen.org/edu/spill.php?PHPSESSID=9ac5cfa2732a17f899b8c6c6c194f0bf> (last visited January 4, 2010) (discussing the tragic oil spill in Santa Barbara, the ecological impact the spill had on the area and efforts to bring awareness to the dangers of oil spills).

34. *Id.*

35. *Id.*

36. 42 U.S.C. § 4332 (2006).

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.³⁷

Subsequently, the CZMA, passed in 1972, requires state review of federal action that would affect land and water use in the coastal zone.³⁸ It is unclear whether or not the CZMA applies to OCS leases due to the Supreme Court's decision in *Secretary of the Interior v. California*.³⁹ Finally, in 1977, Congress passed the CWA to regulate the discharge of pollutants into surface waters.⁴⁰ In particular, the CWA prohibits all discharges of pollutants unless the Environmental Protection Agency (EPA) has first issued a permit and the pollutants are emitted pursuant to that permit.⁴¹ For violations of the CWA, as in the case of oil spills, the EPA can issue administrative orders and may also seek civil or criminal penalties.⁴²

In addition, the spill in Santa Barbara, California led to the proposal of several amendments to the Outer Continental Shelf Lands Act (OCSLA), which were ultimately passed in 1978.⁴³ Congress explained that the purpose of the amendments was to:

- (1) establish policies and procedures for managing the oil and natural gas resources of the Outer Continental Shelf which are intended to result in expedited exploration and development of the Outer Continental Shelf in order to achieve national economic and energy policy goals, assure national security, reduce dependence on foreign sources, and maintain a favorable balance of payments in world trade;
- (2) preserve, protect, and develop oil and natural gas resources in the Outer Continental Shelf in a manner which is consistent with the need (A) to make such resources available to meet the Nation's energy needs as rapidly as possible, (B) to balance orderly energy resource development with protection of the human, marine, and coastal environments, (C) to insure the public a fair and equitable return on the resources of the Outer Continental

37. *Id.*

38. 16 U.S.C. § 1454 (2006).

39. *Sec'y of the Interior v. California*, 464 U.S. 312, 342-43 (1984) (holding that the Coastal Zone Management Act's consistency provisions does not apply to OCS lease sales because the Secretary's authorization of OCS oil and gas leases is not an activity "directly affecting" the coastal zone).

40. 33 U.S.C. § 1311 (2006).

41. 33 U.S.C. § 1342 (2006).

42. *Id.*

43. *See* 43 U.S.C. § 1331 (2006).

Shelf, and (D) to preserve and maintain free enterprise competition;

(3) encourage development of new and improved technology for energy resource production which will eliminate or minimize risk of damage to the human, marine, and coastal environments;

(4) provide States, and through States, local governments, which are impacted by Outer Continental Shelf oil and gas exploration, development, and production with comprehensive assistance in order to anticipate and plan for such impact, and thereby to assure adequate protection of the human environment;

(5) assure that States, and through States, local governments, have timely access to information regarding activities on the Outer Continental Shelf, and opportunity to review and comment on decisions relating to such activities, in order to anticipate, ameliorate, and plan for the impacts of such activities;

(6) assure that States, and through States, local governments, which are directly affected by exploration, development, and production of oil and natural gas are provided an opportunity to participate in policy and planning decisions relating to management of the resources of the Outer Continental Shelf;

(7) minimize or eliminate conflicts between the exploration, development, and production of oil and natural gas, and the recovery of other resources such as fish and shellfish;

(8) establish an oil spill liability fund to pay for the prompt removal of any oil spilled or discharged as a result of activities on the Outer Continental Shelf and for any damages to public or private interests caused by such spills or discharges;

(9) insure that the extent of oil and natural gas resources of the Outer Continental Shelf is assessed at the earliest practicable time; and

(10) establish a fishermen's contingency fund to pay for damages to commercial fishing vessels and gear due to Outer Continental Shelf activities.⁴⁴

In accordance with this purpose, the 1978 Amendments provide a five-year leasing program, regulations for each phase of the leasing process (from pre-leasing to development and production), and methods of participation in the process for affected state and local governments, federal agents, the public, and Congress.⁴⁵ Additionally, as was the pervading theme, the amendments established an oil spill fund to pay for any oil spill damage on the OCS.⁴⁶

44. 43 U.S.C. § 1802 (2006).

45. 43 U.S.C. §§ 1337-53 (2006).

46. 43 U.S.C. § 1802(8) (2006).

4. Drilling Technology

Offshore drilling technology poses many challenges, and therefore, technologies have been “developed to withstand such environmental factors as water currents, seafloor instability, mud slides, and hurricane-force winds and waves.”⁴⁷ For example, because the sea floor does not provide a stable platform for offshore drilling, an artificial drilling platform must first be created in order to drill for resources beneath the sea.⁴⁸

There are two types of offshore structures used: floating structures and bottom supported structures.⁴⁹ Exploratory drilling during OCSLA’s third phase is done primarily with floating structures because these structures are less expensive than the bottom supported structures.⁵⁰ Some examples of floating structures include drilling barges, jack-up rigs, submersible rigs, and semi-submersible rigs.⁵¹ Drilling barges are “large, floating platforms, which must be towed by tugboat from location to location,” and are mostly used in shallow waters.⁵² Jack-up rigs are different from drilling barges in only one respect.⁵³ Instead of floating above the water, the jack-up rig has legs that may be lowered to reach the sea floor.⁵⁴ Though jack-up rigs are, in this respect more stable than drilling barges, they are still impractical for use in deep waters.⁵⁵ Another floating structure is the submersible rig, which is described as follows:

These rigs consist of platforms with two hulls positioned on top of one another. The upper hull contains the living quarters for the crew, as well as the actual drilling platform. The lower hull works much like the outer hull in a submarine—when the platform is being moved from one place to another, the lower hull is filled with air—making the entire rig buoyant. When the rig is positioned over the drill site, the air is let out of the lower hull, and the rig submerses to the sea or lake floor.⁵⁶

47. U.S. CONG. OFFICE OF TECH. ASSESSMENT, *supra* note 1, at 6.

48. Offshore Drilling, http://www.naturalgas.org/naturalgas/extraction_offshore.asp (last visited Jan. 4, 2010).

49. Maurice F. Funke & Bruce A. Weber, *Final Report: Research and Development Assessment on Safety and Pollution Control for Outer Continental Shelf Operations* 8 (1976), available at <http://www.mms.gov/tarprojects/012/012AA.PDF>.

50. Offshore Drilling, *supra* note 48.

51. *See id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

Finally, semisubmersible rigs are similar to submersible rigs with one major exception.⁵⁷ Because of differences in the technology used, semisubmersible rigs are not confined to shallow waters as are the submersible rigs.⁵⁸ For this reason, the semisubmersible rig is the most common type of offshore drilling rig.⁵⁹ But because floating structures cannot operate in water deeper than about 6,000 feet, bottom supported structures are usually used in the later phases of exploration.⁶⁰

During the fourth phase of the process, the development and production phase, bottom-supported structures are used.⁶¹ Because of their expense, these structures are only practical after the exploratory phase reveals wells that are commercially viable.⁶² These structures are "constructed near land, in pieces."⁶³ Then, as each part of the rig is completed, it is carried out to the drilling location.⁶⁴ Construction "or assembly can even take place as the rig is being transported" from land to the drilling location in the middle of the water.⁶⁵

5. Environmental Impact

Aside from the obvious economic impact of development and production of these resources, perhaps the most frequently considered repercussion of offshore drilling is the effect that it may have on the environment. First, the literature and statutes are chiefly concerned with the occurrence of oil spills.⁶⁶ One survey of the subject, written shortly after passage of the 1978 OCSLA Amendments, notes that "[a]lthough the risk of catastrophic oil spills from offshore operations is believed to be low, effective containment and cleanup measures are essential in light of the potential harmful effects of any such spill."⁶⁷ A disaster of this nature first affects marine life, including all of the species of fish, birds, and marine animals that call the water and the surrounding lands home.⁶⁸

After the effects on the animals in the early stages of the spill clean-up are known, the extent of the greater environmental damage can be evalu-

57. *Id.*

58. *See id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. U.S. CONG. OFFICE OF TECH. ASSESSMENT, *supra* note 1, at 10-11.

67. *Id.* at 10.

68. McHale, *supra* note 2, at 584.

ated.⁶⁹ In addition to the effects on the environment and the animals that inhabit the area, concern must also be shown for the humans who live in the area, as these individuals may be affected by both health risks and the damage that may be done to their local economies.⁷⁰ For example, fishing and other marine-based employment may be entirely lost subsequent to an oil spill.⁷¹

Even in the absence of an oil spill, oil exploration and production may still impact the environment. For example, offshore drilling projects have the potential to cause temporary or permanent hearing damage and can even affect the biological functions and behavioral patterns of animals such as bowhead whales because of their sensitivity to noise.⁷² Much research has been conducted on how offshore drilling will affect the bowhead whale, an endangered species, but the significance of the specific dangers to this endangered species and others is unknown.⁷³ Other general dangers remain unknown, including the impact of rig and pipeline placement on animals that live near the bottom of the ocean, the effect of the noise and human presence, and the danger presented by pollutants often emitted during the drilling process.⁷⁴

C. CURRENT LAW

1. OCSLA Today

As the Congressional Declaration of Policy states, “the outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs.”⁷⁵ In this vein, the administrative agencies involved with the implementation of the Act have struggled to maintain this balance between exploration and environmental consciousness.

To facilitate the procedure and purpose of OCSLA, the Secretary of the Interior designated the responsibilities and supervision of leasing the outer Continental Shelf (OCS) to the Minerals Management Service (MMS).⁷⁶ To-

69. *See id.*

70. *Id.*

71. *Id.*

72. *Alaska Wilderness League v. Kempthorne*, 548 F.3d 815, 820 (9th Cir. 2008).

73. U.S. CONGRESS, OFFICE OF TECH. ASSESSMENT, *supra* note 1, at 10.

74. Robert B. Wiygul, *The Structure of Environmental Regulation on the Outer Continental Shelf: Sources, Problems, and the Opportunity for Change*, 12 J. ENERGY NAT. RESOURCES & ENVTL. L. 75, *7 (1992).

75. 43 U.S.C. § 1332(3) (2006).

76. About the Mineral Management Service: OCSLA Lands Act History, <http://www.mms.gov/aboutmms/OCSLA/ocslahistory.htm> (last visited Jan. 4, 2010).

day, the MMS “implements an OCS oil and gas exploration and development program that provides the nation with 27 percent of its domestic oil production and 15 percent of its domestic natural gas production.”⁷⁷

Under OCSLA, there are four stages to developing an offshore oil well: (1) pre-leasing, (2) leasing, (3) exploration, and (4) development and production.⁷⁸ As the Supreme Court noted, because a lease may be canceled or suspended at any time, “the purchase of a lease [standing alone] entails no right to proceed with full exploration, development, or production.”⁷⁹

a. Pre-Leasing

The creation of a new five-year program consists of several phases. First, the MMS publishes a request for comments and information regarding the preparation of a new five-year program and announces the start of scoping for the associated Environmental Impact Statement (EIS).⁸⁰ The MMS also sends letters to the governors of affected states and the heads of interested federal agencies to request their input.⁸¹

Second, after considering all the information related to the factors and principles of Section 18 of OCSLA and other comments, the Secretary selects a Draft Proposed Program (DPP) as the initial proposal for the five-year program.⁸² The MMS announces the DPP and Notice of Intent (NOI) to prepare an EIS in the *Federal Register* and then distributes the DPP to governors of affected states and interested parties for a sixty-day comment period.⁸³

Third, preparation of a Proposed Program (PP) is based on further Section 18 analyses and consideration of the comments MMS received concerning the DPP.⁸⁴ The MMS publishes the announcement of the PP in the *Federal Register* and distributes it along with the draft of the EIS for the five-year program to the governors of affected states and other interested parties for a ninety-day comment period.⁸⁵

77. *Id.*

78. *Sec’y of the Interior v. California*, 464 U.S. 312, 337 (1984).

79. *Id.* at 313.

80. 43 U.S.C. § 1344(c)(1) (2006); *see* 40 C.F.R. § 1501.7 (2009).

81. 43 U.S.C. § 1344(c)(1) (2006).

82. U.S. DEP’T OF THE INTERIOR MINERALS MGMT. SERV., LEASING OIL AND NATURAL GAS RES.: OUTER CONT’L SHELF 10, *available at* <http://www.mms.gov/ld/PDFs/GreenBook-LeasingDocument.pdf>.

83. 43 U.S.C. § 1344(c)(2) (2006); U.S. DEP’T OF THE INTERIOR MINERALS MGMT. SERV., *supra* note 82, at 10, 16.

84. U.S. DEP’T OF THE INTERIOR MINERALS MGMT. SERV., *supra* note 82, at 10.

85. 43 U.S.C. § 1344(c)(3) (2006); U.S. DEP’T OF THE INTERIOR MINERALS MGMT. SERV., *supra* note 82, at 10.

Fourth, preparation of a Proposed Final Program (PFP) is based on additional Section 18 analyses and consideration of the comments MMS received about the PP.⁸⁶ The PFP represents the third and final draft of the proposal.⁸⁷ The MMS announces the PFP in the *Federal Register* and submits it to the President and Congress along with summaries of any comments received and an explanation of the responses on any recommendations from affected state and local governments and the Attorney General.⁸⁸ The MMS issues the final EIS along with the PFP.⁸⁹ Finally, sixty days after the PFP is submitted to the President and Congress, the Secretary may approve the new five-year program.⁹⁰

b. Leasing

Under OCSLA, the Secretary of Interior has discretion to determine when, where, and how lease sales will be conducted.⁹¹ According to Section 8:

[t]he Secretary is authorized to grant to the highest responsible qualified bidder or bidders by competitive bidding, under regulations promulgated in advance, any oil and gas lease on submerged lands of the outer Continental Shelf which are not covered by leases meeting the requirements of subsection (a) of section 1335 of this title.⁹²

The Secretary does not have complete control over the bidding system, however, because it is subject to Congressional review.⁹³ Usually, the sale process begins by publishing a Call for Information and Nominations and a Notice of Intent to Prepare an EIS (NOI) in the *Federal Register*.⁹⁴ Second, the MMS identifies the geographical area to be considered for approval.⁹⁵

86. U.S. DEP'T OF THE INTERIOR MINERALS MGMT. SERV., *supra* note 82, at 10.

87. *Id.*

88. 43 U.S.C. § 1344(d)(2) (2006); U.S. DEP'T OF THE INTERIOR MINERALS MGMT. SERV., *supra* note 82, at 10.

89. *See* 42 U.S.C. § 4332(2)(C) (2006); 43 U.S.C. § 1344(d)(2) (2006).

90. 43 U.S.C. § 1344(e) (2006); U.S. DEP'T OF THE INTERIOR MINERALS MGMT. SERV., *supra* note 82, at 10.

91. *See* 43 U.S.C. § 1337 (2006).

92. *Id.* § 1337(a)(4).

93. *Id.* § 1337(a)(4).

94. U.S. DEP'T OF THE INTERIOR MINERALS MGMT. SERV., LEASING OIL AND NATURAL GAS RES.: OUTER CONTINENTAL SHELF 16, *available at* <http://www.mms.gov/ld/PDFs/GreenBook-LeasingDocument.pdf>.

95. *Id.* at 17.

Third, a draft EIS is prepared and public hearings occur.⁹⁶ After the hearings, draft comments are considered and incorporated into a final EIS.⁹⁷ Fourth, a Proposed Notice of Sale (a public announcement of the sale) is issued and each affected state governor may return comments.⁹⁸ Then, after issuance of a Final Notice of Sale, the lease sales become open to the public.⁹⁹ Finally, the MMS considers the bids and issues a lease.¹⁰⁰

Upon completion of the foregoing steps, the lease becomes effective on the first day of the month following the date on which it is signed, and grants “the right to explore, develop, and produce oil and/or natural gas for a specific period and from a specific tract of OCS land.”¹⁰¹ A lease tract may not exceed 5,760 acres and the primary term runs for five years.¹⁰² But the lease may be extended beyond the primary term if a discovery is made within the initial term.¹⁰³ Regardless of discovery, the Federal Government reserves the right to suspend or cancel the lease at any time.¹⁰⁴

c. Exploration

Before any exploration can occur, the lessee must submit an Exploration Plan (EP) for review and approval.¹⁰⁵ The MMS then has thirty days to review the plan.¹⁰⁶ The agency must disapprove if the plan would result in “serious harm or damage” to the marine, coastal, or human environment.¹⁰⁷ Once the EP is completed and approved, the lessee may begin exploring the approved area for the natural resources.¹⁰⁸ In order to discover these resources in commercial quantities, “the lessee will drill one or more wells from drilling units which can be categorized as (1) floating units, such as drillships, semisubmersibles, and drilling barges; and (2) bottom-founded units that are floated to the drillsite but rest on the seafloor during drilling

96. *Id.* at 18-20.

97. *Id.* at 20.

98. *Id.* at 21-22.

99. *Id.* at 23.

100. *Id.* at 23-25.

101. *Id.* at 24.

102. *Id.* at 9, 24.

103. *Id.* at 25.

104. *Id.*

105. 43 U.S.C. § 1340(c) (2006).

106. *Id.*

107. 43 U.S.C. § 1334(a)(2)(A)(i) (2006).

108. U.S. DEP’T OF THE INTERIOR MINERALS MGMT. SERV., LEASING OIL AND NATURAL GAS RES.: OUTER CONTINENTAL SHELF 39, available at <http://www.mms.gov/ld/PDFs/GreenBook-LeasingDocument.pdf>.

operations.”¹⁰⁹ These technologies allow the lessee to determine if commercial quantities of the natural resources exist in that area.

d. Development and Production

Even after a discovery is made, the paperwork does not end for the lessee.¹¹⁰ The production operations must first appear in a DPP that is submitted to the MMS for review by affected states and other agencies.¹¹¹ The production operations will then be considered for approval.¹¹² The MMS discussed the development and production phase in a recent publication:

Development and production entails installation of platforms and production systems and the drilling of development wells. In addition, onshore support facilities, if not already in place, must be constructed. The oil and natural gas produced offshore are separated and moved to shore for final processing. The natural gas is transported solely by pipelines, while crude oil is moved by pipeline, barge, or tanker to shore facilities. All platform and artificial island installations, platform facilities, and pipelines require the MMS approval. Throughout the drilling and production phases, the MMS inspects the operations to ensure compliance with regulations.¹¹³

At the conclusion of production, all wells must be shut-in and equipment must be removed from the lease premises.¹¹⁴

In all phases, from pre-leasing to development and production, the Secretary of the Interior is charged with the responsibility of ensuring:

- (A) safety;
- (B) protection of the environment;
- (C) prevention of waste;
- (D) conservation of the natural resources of the outer Continental Shelf;
- (E) coordination with relevant Federal agencies;
- (F) protection of national security interests of the United States;
- (G) protection of correlative rights in the outer Continental Shelf;
- (H) a fair return to the United States for any lease, easement, or right-of-way under this subsection;

109. *Id.*

110. *See id.*

111. *Id.*

112. *Id.*

113. *Id.* at 40.

114. *Id.*

(I) prevention of interference with reasonable uses (as determined by the Secretary) of the exclusive economic zone, the high seas, and the territorial seas;

(J) consideration of—

(i) the location of, and any schedule relating to, a lease, easement, or right-of-way for an area of the outer Continental Shelf; and

(ii) any other use of the sea or seabed, including use for a fishery, a sealane, a potential site of a deepwater port, or navigation.¹¹⁵

2. Judicial Review and Citizen Suits under OCSLA

Generally, the OCSLA permits citizen suits and judicial review of the decisions of the Secretary of the Interior.¹¹⁶ The decision of the Secretary of the Interior to approve a leasing program is subject to judicial review only in the United States Court of Appeals for the District of Columbia.¹¹⁷ Then, the decision of the Secretary “to approve, require modification of, or disapprove any exploration plan or development and production plan under the [OCSLA is] subject to judicial review only in a United States Court of Appeals for a circuit in which an affected state is located.”¹¹⁸

Citizen suits are not allowed in matters concerning the Secretary’s leasing program approval, exploration plans, or any development and production plan.¹¹⁹ Judicial review of these actions is only available to a person who participated in the administrative proceedings related to the actions in question, is adversely affected, files a petition for review of the Secretary’s action within sixty days after the date of the action, and promptly transmits copies of the petition to the Secretary and Attorney General.¹²⁰

For matters not specifically excluded by the Act, “any person having a valid legal interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this subchapter against any person, including the United States, and any other government instrumentality or agency.”¹²¹ A maximum fine of \$20,000 is available as a civil penalty.¹²² Also, for a number of actions, criminal penalties including a fine of not more than \$100,000, imprisonment of not more than ten years, or

115. 43 U.S.C. § 1337(p)(4) (2005).

116. 43 U.S.C. § 1349(a)(1) (2006).

117. 43 U.S.C. § 1349(c)(1) (2006).

118. 43 U.S.C. § 1349(c)(2) (2006).

119. 43 U.S.C. § 1349(c)(3) (2006).

120. *Id.*

121. 43 U.S.C. § 1349(a)(1) (2006).

122. 43 U.S.C. § 1350(b)(1) (2006).

both, are available.¹²³ Each day a violation occurs constitutes a separate violation for the calculation of both civil and criminal penalties.¹²⁴

3. Challenging OCSLA Five-Year Programs: *Watt I*, *Watt II*, and *Hodel*

The first three five-year programs prepared and approved under Section 18 of the OCSLA were challenged in court in 1980, 1982, and 1987.¹²⁵ These decisions generally granted the Secretary of Interior wide discretion in approving five-year programs.¹²⁶ Subsequently, no lawsuits were filed challenging the five-year programs approved for 1992-1997, 1997-2002, and 2002-2007.

a. *Watt I*

In the first decision to challenge a five-year program, *California v. Watt* (*Watt I*), the court made it clear that the Secretary would be given great deference to make decisions regarding the OCS.¹²⁷ In 1980, after a sixty-day congressional consideration period for the 1980-1985 leasing program expired, Secretary Watt approved the Final Program which he had inherited from Secretary Andrus, the previous Secretary of the Interior.¹²⁸ The Program specified, in pertinent part, proposed sales in the Gulf of Mexico, the Atlantic, the coast of California, and the coast of Alaska.¹²⁹

First, the court determined the standard of review to be applied when considering the Secretary's decisions and decided upon a hybrid approach. The court reasoned:

[w]hen reviewing findings of ascertainable fact made by the Secretary, the substantial evidence test guides our inquiry. When reviewing the policy judgments made by the Secretary, including those predictive and difficult judgmental calls the Secretary is called upon to make, we will subject them to searching scrutiny to ensure that they are neither arbitrary nor irrational Finally, in reviewing the leasing program, the Secretary's interpretation of section 18 or its component provisions may be in issue. In passing thereon, we adhere to the principle that the interpretation of a stat-

123. 43 U.S.C. § 1350(c) (2006).

124. 43 U.S.C. §§ 1350(b), (c) (2006).

125. *Natural Res. Def. Council v. Hodel* (*Hodel*), 865 F.2d 288, 293 (D.C. Cir. 1988); *California v. Watt* (*Watt II*), 712 F.2d 584, 590 (D.C. Cir. 1983); *California v. Watt* (*Watt I*), 668 F.2d 1290, 1300 (D.C. Cir. 1981).

126. *Wiygul*, *supra* note 74, at 10.

127. *Watt I*, 668 F.2d at 1302.

128. *Id.* at 1300.

129. *Id.*

ute by those entrusted with its administration is entitled to substantial deference.¹³⁰

Applying this seemingly confusing hybrid approach, the court found that the Secretary erred by failing to comply with the Act in several ways.¹³¹ The Secretary's errors included failing to consider developmental benefits and environmental risks, failing to consider relative environmental sensitivity and marine productivity, as well as failing to qualify environmental costs to the extent that they were quantifiable.¹³² Instead of striking down the plan altogether, the court remanded the program "for reconsideration in accordance with the Act, and with opportunity for public comment, and approval by the new Secretary of Interior."¹³³ Specifically, the court noted that the Secretary would be able to remedy these issues during the process of preparing a new five-year program for 1982-1987.¹³⁴

b. *Watt II*

In 1982, the court issued an order adopting the Secretary's position that the remand could be met during revision, and the court approved the Secretary's timetable for its completion.¹³⁵ Subsequently, the Secretary approved the final five-year program for 1982-1987.¹³⁶ Petitioners in *California v. Watt (Watt II)* challenged various aspects of that plan.¹³⁷

First, petitioners claimed that the size and location of the leasing activity were not as precise as required by section 18(a).¹³⁸ The court rejected this claim, finding that section 18(a) requires as much precision as present information supports, and so perfect precision is not necessary.¹³⁹ Therefore, the Secretary's description of the size and location was sufficiently precise.¹⁴⁰

Next, petitioners argued that the Secretary failed to consider the section 18(a)(2) factors as required.¹⁴¹ The factors required under section 18(a)(2) include:

130. *Id.* at 1302.

131. *Id.* at 1325.

132. *Id.*

133. *Id.* at 1326.

134. *Id.*

135. *Watt II*, 712 F.2d at 590.

136. *Id.*

137. *Id.*

138. *Id.* at 591.

139. *Id.*

140. *Id.* at 592.

141. *Id.* at 594.

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- (A) existing information concerning the geographical, geological, and ecological characteristics of such regions;
 - (B) an equitable sharing of developmental benefits and environmental risks among the various regions;
 - (C) the location of such regions with respect to, and the relative needs of, regional and national energy markets;
 - (D) the location of such regions with respect to other uses of the sea and seabed, including fisheries, navigation, existing or proposed sealanes, potential sites of deepwater ports, and other anticipated uses of the resources and space of the outer Continental Shelf;
 - (E) the interest of potential oil and gas producers in the development of oil and gas resources as indicated by exploration or nomination;
 - (F) laws, goals, and policies of affected States which have been specifically identified by the Governors of such States as relevant matters for the Secretary's consideration;
 - (G) the relative environmental sensitivity and marine productivity of different areas of the outer Continental Shelf; and
 - (H) relevant environmental and predictive information for different areas of the outer Continental Shelf.¹⁴²

The Court determined that the Secretary had fully considered the factors for consideration when performing the balancing analysis required by section (a)(3).¹⁴³ Further, the Court found the Secretary's cost-benefit analysis to be reasonable.¹⁴⁴

The other claims came from states affected by the plan. The states of Washington and Oregon contended that the Secretary did not adequately consider the effects of the five-year program on their states. In particular, they argued that the Secretary's analysis with respect to the impact of the program on the environment as required by the OCSLA and the NEPA was severely lacking.¹⁴⁵ The Court rejected each of these arguments, finding that the Secretary complied with both the OCSLA and the NEPA as required.¹⁴⁶ Since the Secretary's decisions were "reasonable and supported by the evidence in the record to the extent required by section 18," the Secretary's five-year program, as amended from *Watt I*, was upheld.¹⁴⁷

142. 43 U.S.C. § 1344(a)(2) (2006).

143. *Watt II*, 712 F.2d at 599 (applying 43 U.S.C. § 1344(a)(3) (2006)).

144. *Watt II*, 712 F.2d at 600.

145. *Id.* at 608.

146. *Id.* at 610.

147. *Id.* at 611.

c. Hodel

In 1985, the D.C. Circuit reviewed Secretary Hodel's 1980-1985 decisions under both the NEPA and OCSLA.¹⁴⁸ Under the NEPA, Petitioner (the National Resource Defense Council) argued that the Secretary should have considered conservation policies, including "requiring more stringent appliance efficiency standards and stricter automobile fuel economy standards" in order to eliminate the need for the leasing program.¹⁴⁹ Although the court recognized that the Secretary does in fact have a duty to consider reasonable conservation solutions, the court found that the Secretary had fulfilled this duty.¹⁵⁰

When reviewing actions under the NEPA, the court stated that "as long as the agency's decision is 'fully informed' and 'well-considered,' it is entitled to judicial deference and a reviewing court should not substitute its own policy judgment."¹⁵¹ The only role of a court analyzing a federal officer's actions under the NEPA is to "ensure that the statement contains sufficient discussion of the relevant issues and opposing viewpoints to enable the decisionmaker to take a 'hard look' at environmental factors, and to make a reasoned decision."¹⁵² Thus, even though the court found the Secretary's analysis of the impacts of the program on migratory species inadequate, the court only asked the Secretary to make further examinations that were adequate in the Secretary's view.¹⁵³

Then, considering the OCSLA issues, the court reaffirmed the standards of review applied in *Watt I* and *Watt II*:

those deferential standards require that the record show that the Secretary's factual determinations are based upon substantial evidence, that the Secretary's policy judgments are based upon rational consideration of identified, relevant factors, and that the Secretary's construction of the statute is permissible When the Secretary's program meets these standards, we defer to his findings, interpretations, and judgments; when it does not, we remand for his appropriate consideration or action.¹⁵⁴

148. Nat'l Res. Def. Council v. Hodel (*Hodel*), 865 F.2d 288 (D.C. Cir. 1988).

149. *Id.* at 295.

150. *Id.* at 296-97.

151. *Id.* at 294 (citing *North Slope Borough v. Andrus*, 642 F.2d 589, 599 (D.C. Cir. 1980)).

152. *Hodel*, 865 F.2d at 294 (quoting *Izaak Walkton League of Am. v. Marsh*, 655 F.2d 346, 371 (D.C. Cir. 1981)).

153. *Id.*

154. *Id.* at 300 (citing both *California v. Watt (Watt I)*, 668 F.2d 1290 (D.C. Cir. 1981) and *California v. Watt (Watt II)*, 712 F.2d 584 (D.C. Cir. 1983)).

Applying these standards of review, the court considered petitioners' allegation that the Secretary arbitrarily included and excluded certain areas under the five-year plan.¹⁵⁵ The court found, as the government argued, that the Secretary met his burden by explanations included in the letters the Secretary sent to the affected states' governors.¹⁵⁶ Finally, under OCSLA, the court held that the Secretary completed the requisite cost-benefit analysis and that the Secretary did not err in reducing the minimum bid price.¹⁵⁷

Separately, under section 111 of Public Law 99-591, the People of the State of California also challenged the five-year program.¹⁵⁸ In pertinent part, this public law provides:

(a) The Secretary of the Interior may consider and accept, as part of the Outer Continental Shelf oil and gas leasing program for 1987 to 1992, any recommendation included in any proposal submitted to him with respect to lease sales on the California Outer Continental Shelf by the . . . Governor of California on May 7, 1986. The major components of those proposals shall be examined in the final environmental impact statement for the program. Consideration or acceptance of any such recommendation shall not require the preparation of a revised or supplemental draft environmental impact statement.

(b) The Secretary shall submit a copy of the draft proposed final leasing program for offshore California to the cochairmen of the negotiating group referred to in subsection (a) When submitting the proposed final leasing program to the President and the Congress in accordance with section 18(d) of the Outer Continental Shelf Lands Act (43 U.S.C. 1344(d)), such submission shall indicate in detail why any specific portion of the proposals referred to in subsection (a) of this section was not accepted.¹⁵⁹

California argued that the Secretary did not provide adequate explanations for rejecting portions of proposals submitted by the Governor of California under section 111.¹⁶⁰ The court ruled that, unlike the OCSLA and NEPA issues, judicial review was not available for this issue.¹⁶¹ After assessing the issues above, the court remanded the portion of the case requiring the Secre-

155. *Hodel*, 865 F.2d at 300-06.

156. *Id.* at 305.

157. *Id.* at 307-316.

158. *Id.* at 316.

159. Pub. L. No. 99-591 § 111 (Ca. 1986).

160. *Hodel*, 865 F.2d at 316.

161. *See id.* at 317-18.

tary to perform an analysis of the impacts of the program on migratory species, but upheld the program in all other respects.¹⁶²

The D.C. Circuit did not agree with how the Secretary weighed each factor required of each test or how he made other specific discretionary decisions. These decisions are notable, however, because in each case the court relied heavily on the discretion of the Secretary to carry out the proper analysis in accordance with the statutes. Together, these cases mean “there will be very few cases in which a secretarial decision to include a tract for leasing in the five-year plan can successfully be challenged.”¹⁶³ Therefore, the challengers to such plans will have a seemingly insurmountable obstacle to overcome in bringing suit against the Secretary of the Interior.

D. ANALYSIS

When considering the issue of offshore drilling, Congress and the President must consider the effects such drilling will have on the economy, gas prices, the environment, and on national security. First, many suggest that if drilling is allowed, gas prices will decrease dramatically and thus allow our economy to rebound and rescue the nation from the current economic slowdown.¹⁶⁴ Those who oppose drilling, however, argue that because of the amount of time necessary to approve the leases and to actually begin producing resources, drilling is not the answer to the ailing economy.¹⁶⁵ Second, it is beyond argument that offshore drilling inflicts some amount of harm on the environment, though many differ as to the extent of the harm inflicted.¹⁶⁶ Finally, it cannot be disputed that the United States is dependent on foreign countries for oil, for it has been estimated that at least twenty-five percent of oil imported into the United States originates from the Middle East.¹⁶⁷ After the attacks of September 11th and the increasing tensions between the United States and the Middle East, such reliance can no longer be substantiated. Our dependence on foreign countries gives those nations leverage over our nation, thereby decreasing U.S. national security.¹⁶⁸

162. *See id.* at 319.

163. Wiygul, *supra* note 74, at 13.

164. GreenPeace.org, *Offshore Drilling—It's NOT the Answer to High Gas Prices at the Pump* (2008), <http://www.greenpeace.org/usa/news/offshore-drilling-it-s-not-t>.

165. *Id.*

166. *Id.*

167. Lynn S. Sletto, *Piecemeal Legislative Proposals: An Inappropriate Approach to Managing Offshore Oil Drilling*, 33 GOLDEN GATE U. L. REV. 557, 580 (2003) (discussing the ineffectiveness of legislation in regulating offshore drilling).

168. *Id.* at 580-581.

1. Policy under the Bush Administration

From the beginning of President George W. Bush's time in office, he emphasized energy policy. In his first State of the Union Address on January 29, 2002, he recognized the interdependence of the economy and energy policy.¹⁶⁹ "Good jobs also depend on reliable and affordable energy. This Congress must act to encourage conservation, promote technology, build infrastructure, and it must act to create energy production at home so America is less dependent on foreign oil."¹⁷⁰ President Bush's energy plan included opening oil exploration in the Arctic National Wildlife Refuge (ANWR) and in the Outer Continental Shelf (OCS).¹⁷¹ At first, drilling in ANWR was President Bush's main focus because of his hesitancy to drill in the OCS, but his proposal to drill in ANWR would not make it out of Congress.¹⁷² Unfortunately, then, both facets of Bush's plan to encourage American energy independence were abandoned.¹⁷³

In his second term, as the economic crisis worsened, President Bush focused on opening up certain areas of the OCS for offshore drilling. Many were astonished to hear of such a plan because the Bush family had taken a negative view of offshore drilling in the past. Specifically, President George H.W. Bush was the first president to declare a moratorium prohibiting drilling on most of the areas of the OCS in 1990.¹⁷⁴ The President's authority to declare such a moratorium is set forth in OCSLA, which states that "[t]he President of the United States may, from time to time, withdraw from disposition any of the unleased lands of the outer Continental Shelf."¹⁷⁵ The former President Bush's moratorium was set to expire in 2002, but President Bill Clinton extended the moratorium to last until 2012.¹⁷⁶ Further, in 2002, when drilling off Florida's coast met opposition, President Bush announced a plan to buy back federal oil and gas leases to help his brother, Jeb Bush, who was running for re-election in Florida at the time.¹⁷⁷

169. Robin Kundis Craig, *The Bush Administration and the Environment: An Overview and Introduction*, 25 W. NEW ENG. L. REV. 1, 3 (2003) (discussing President George W. Bush's environmental policy).

170. *Id.*

171. Gary C. Bryner, *The National Energy Policy: Assessing Energy Policy Choices*, 73 U. COLO. L. REV. 341, 347 (2002) (evaluating the effectiveness of President George W. Bush's energy plan).

172. *See id.* at 344.

173. *See id.*

174. Sletto, *supra* note 167, at 567.

175. 43 U.S.C. § 1341(a) (2006).

176. *See* Jennifer Auther, *Clinton Extends Moratorium on Offshore Oil drilling*, CNN, June 12, 1998, <http://www.cnn.com/TECH/science/9806/12/offshore.drilling.pml/>.

177. *See* Craig, *supra* note 169, at 7.

Despite the views of the President and the Bush family on this issue in the past, on June 18, 2008, President Bush ended the presidential moratorium.¹⁷⁸ This was not the only obstacle that would need to be surmounted. Indeed, every year since 1981 Congress has also enacted a moratorium on drilling in the OCS.¹⁷⁹ Thus, not only did President Bush lift the presidential ban on drilling in the OCS, but he also urged Congress to lift its ban, “asserting that those steps and others would lower gasoline prices and ‘strengthen our national security.’”¹⁸⁰ In an attempt to justify his changed position, Bush stated that “scientists have developed innovative techniques to reach Anwar’s oil with virtually no impact on the land or local wildlife.”¹⁸¹

Since 2008 was in fact an election year, Bush could not refuse this chance to make Republicans look forward-thinking and Democrats quite the opposite.¹⁸² Specifically, he said;

I know the Democratic leaders have opposed some of these policies in the past. Now that their opposition has helped drive gas prices to record levels, I ask them to reconsider their positions. If Congressional leaders leave for the Fourth of July recess without taking action, they will need to explain why \$4-a-gallon gasoline is not enough incentive for them to act.¹⁸³

Environmentalists and Democrats complained of Bush’s efforts to lift the ban, implying that it was an attempt to apply a quick-fix to an economic problem that may not be so easily remedied.¹⁸⁴ The Democratic majority leader, Senator Harry Reid, remarked:

[t]he facts are clear. Oil companies have already had ample opportunity to increase supply, but they have sat on their hands. They aren’t even using more than half of the public lands they already have leased for drilling. And despite the huge tax breaks President Bush and Republican Congresses have given oil and gas compa-

178. Sheryl Gay Stolberg, *Bush Calls for End to Ban on Offshore Oil Drilling*, NEW YORK TIMES, (June 19, 2008), available at http://www.nytimes.com/2008/06/19/washington/19drill.html?_r=1&partner=rssnyt.

179. See Author, *supra* note 176.

180. Stolberg, *supra* note 178.

181. *Id.*

182. *Id.*

183. *Id.*

184. See Associated Press, *Bush Lifts Ban On Offshore Drilling: Congress Must Still Lift Legislative Ban Before Controversial Drilling Can Happen*, CBS News, (July 14, 2008), <http://www.cbsnews.com/stories/2008/07/14/national/main4257757.shtml>.

nies to invest in refineries, domestic production has actually dropped.¹⁸⁵

Another critic, Gene Karpinski, an environmentalist and the president of the League of Conservation Voters, condemned President Bush by claiming that he “has once again ignored the wise precedent set by his father and taken reckless action that has neither hope of reducing gas prices nor concern for long-term consequences.”¹⁸⁶

Shortly after President Bush lifted the presidential moratorium on drilling, the Minerals Management Service (MMS) began plans to offer certain areas of the OCS for drilling.¹⁸⁷ In a press conference on June 30, 2008, President Bush’s Secretary of the Interior, Dirk Kempthorne, announced the beginning of a new leasing program for the OCS.¹⁸⁸ Secretary Kempthorne remarked:

When our current five-year program for Outer Continental Shelf oil and gas leasing was launched in July 2007, oil was selling for \$64 a barrel . . . Today a barrel of oil costs more than \$120, almost double the price a year ago. Clearly, today’s escalating energy prices and the widening gap between U.S. energy consumption and supply have changed the fundamental assumptions on which many of our decisions were based . . . The American people and the President want action and this initiative can accelerate an offshore exploration and development program that can increase production from additional domestic energy resources.¹⁸⁹

As described in the OCSLA section above, the process starts with a call for information and then a comment, and as Secretary Kempthorne’s press release recognizes, the efforts taken by the MMS at the end of the Bush Administration will give the next administration a two-year head start.¹⁹⁰

Though the current program (2007-2012) only includes areas in the Gulf of Mexico, Alaska, and the Atlantic not under a congressional ban, the new plan (2010-2015) may consider any area, recognizing that congressional action must be taken before any area under the ban may be drilled upon.¹⁹¹ Such areas may well be considered because it is estimated that those areas

185. Stolberg, *supra* note 178.

186. Associated Press, *supra* note 184.

187. See McHale, *supra* note 2, at 578-79.

188. MMS Press Release, DEPARTMENT OF THE INTERIOR, *Interior Department Initiates New Five Year Oil and Gas Leasing Program for Outer Continental Shelf Seeks Public Comment to Address Changed Energy Situation*, (July 30, 2008), <http://www.mms.gov/ooc/press/2008/pressDOI0730.htm>.

189. *Id.*

190. *Id.*

191. *Id.*

contain “an additional 18 *billion* barrels of oil and 76 *trillion* cubic feet of natural gas in yet-to-be-discovered fields.”¹⁹²

Then, on July 17, 2008, in the *Federal Register*, the MMS stated its plans to open and publicly announce bids for the area beginning on August 20, 2008.¹⁹³ In an effort to justify the program, the MMS estimated in a report that the oil and gas production occurring on the OCS supplies the United States with twenty-seven percent of the domestic oil production and fifteen percent of domestic natural gas production.¹⁹⁴

In a final attempt to ensure that offshore drilling would occur in the areas of the OCS previously banned by the President and by Congress, the MMS issued a Draft Proposed Program (DPP) on January 16, 2009, just as the Bush administration was coming to an end.¹⁹⁵ The DPP provides for thirty-one OCS lease sales in areas off Alaska, the Atlantic coast, the Pacific coast, and in the Gulf of Mexico.¹⁹⁶ The DPP is an important step in the process, as the Secretary recognized it as the tool to gather information “allowing the process to move forward in a way that will allow the next Administration to design a program that meets the objectives of the Nation.”¹⁹⁷ The DPP discusses the background and importance of the document:

This DPP is part of a multi-step process to prepare a new 5-Year Program to possibly replace the current one that began on July 1, 2007, and will end on June 30, 2012. The Secretary instituted the multi-step program preparation process two years early in order to provide an opportunity for greater access to domestic energy resources in a shorter time frame Before the new 5-Year Program may be approved and implemented, MMS must accept and consider comments on the draft proposed program, issue for public review and comment a proposed program and draft Environmental Impact Statement (EIS), and issue a proposed final program and final EIS.¹⁹⁸

192. *Id.* (emphasis in original).

193. See McHale, *supra* note 2, at 578-79.

194. Sec’y of the Interior, *Frequently Asked Questions: Draft Proposed Program*, July 16, 2009, <http://www.mms.gov/5-year/FrequentlyAskedQuestionstest.htm>.

195. Press Release, Dep’t of the Interior, *MMS Announces Milestones in Energy Development: Includes Alternative Energy, Traditional Sources* (Jan. 16, 2009), <http://www.mms.gov/ooc/press/2009/press0116.htm>.

196. See DRAFT PROPOSED OUTER CONTINENTAL SHELF (OCS) OIL AND GAS LEASING PROGRAM 2010–2015, DEP’T OF THE INTERIOR 3 (Jan. 2009), [http://www.mms.gov/5-year/PDFs/2010-2015/DPP%20FINAL%20\(HQPrint%20with%20landscape%20maps,%20map%2010\).pdf](http://www.mms.gov/5-year/PDFs/2010-2015/DPP%20FINAL%20(HQPrint%20with%20landscape%20maps,%20map%2010).pdf).

197. *Id.* at 2.

198. *Id.*

The attempts by the Bush administration to spur offshore drilling in the last months before leaving office came after Congress, at the end of September 2008, had finally allowed the more than twenty-year-old moratorium on such activities to expire.¹⁹⁹ Per the DPP, the MMS will accept comments for sixty days beginning January 21, 2009.²⁰⁰ Following this, President Barack Obama's administration will choose to keep the plan in place, to overhaul it, or to abandon it entirely.²⁰¹ In a report accompanying the DPP, the MMS recognizes the choice facing Barack Obama and his advisors.²⁰² The report states:

[t]he President has acted to remove the withdrawal without restrictions, and Congress has acted to discontinue the annual moratoria without any further restrictions This draft proposed program (DPP) provides the next Administration with the maximum flexibility and the maximum available information to make these important decisions.²⁰³

2. The Future Role of the Judiciary: *Alaska Wilderness League v. Kempthorne*

On November 20, 2008, in one of the first judicial reviews of the exploration phase under OCSLA, the Ninth Circuit held that the MMS should have done a more exhaustive environmental review.²⁰⁴ The case arose from a five-year plan issued by the MMS in 2002 for lease sales in the Beaufort Sea.²⁰⁵ According to OCSLA, the MMS prepared an Environmental Impact Statement (EIS) to analyze "the potential effects of oil exploration and production on the region's wildlife, environment, and subsistence activities."²⁰⁶ The MMS then began holding lease sales, and the leases Shell purchased, those at issue in this case, were purchased in July 2004.²⁰⁷

199. See Cynthia Dizikes, *First Step Toward New Oil Drilling*, L.A. TIMES, Nov. 13, 2008, available at 2008 WLNR 21650447.

200. Ayesha Rascoe, *UPDATE 1-U.S. Government Issues Draft Offshore Drilling Plan*, REUTERS, Jan 16, 2009, <http://uk.reuters.com/article/oilRpt/idUKN1631193520090116?pageNumber=2&virtualBrandChannel=0&sp=true>.

201. See *id.*

202. See DRAFT PROPOSED OUTER CONTINENTAL SHELF (OCS) OIL AND GAS LEASING PROGRAM 2010–2015, *supra* note 196 at 1.

203. *Id.*

204. See *Alaska Wilderness League v. Kempthorne*, 548 F.3d 815, 835 (9th Cir. 2008).

205. *Id.* at 817.

206. *Id.* at 818.

207. *Id.*

OCSLA requires the MMS to approve a lessee's Exploration Plan (EP) before the lessee, and in this case, Shell may begin drilling in the exploratory phase.²⁰⁸ In accordance with this part of OCSLA, Shell submitted its EP for the Beaufort Sea region on November 2006, detailing their "plans to use two drilling vessels, two icebreaking ships, various other supply boats, and up to six aircraft."²⁰⁹ Noting that the EP was not yet complete by its standards, the MMS "sought more information on the 'potential impact of underwater noise,' conflict avoidance mechanisms, and other mitigation measures that could ameliorate the deleterious effects of the exploratory drilling."²¹⁰ The MMS also requested more specific information about the location of the wells, which was not given in the final version of the EP that was approved by the MMS on January 17, 2007.²¹¹

During its review, the MMS determined that Shell's activities "would not significantly affect the quality of the human environment" or "cause 'undue or serious harm or damage to the human, marine, or coastal environment.'"²¹² Thus, an EIS for this particular EP was not required by the MMS.²¹³

Petitioners, including the Alaska Wilderness League, the National Resources Defense Council, and the Pacific Environment, filed a Petition for Review with the Ninth Circuit on April 13, 2007.²¹⁴ Then, on August 14, 2007, the Ninth Circuit granted the motion to stay until this matter could be considered on the merits.²¹⁵

In the Ninth Circuit's decision on the merits, the court upheld the rather low standard of review used by the D.C. Circuit, looking at "whether the agency has (1) taken a 'hard look' at the potential impact of its actions; (2) considered all of the relevant factors in its decision; and (3) provided an adequate statement of reasons to explain why a project's impacts are insignificant."²¹⁶ Then, the court turned to the requirements under the NEPA, and found that "'an EIS *must* be prepared if 'substantial questions are raised as to whether a project . . . may cause significant degradation of some human environmental factor.'"²¹⁷

208. *Id.* (citing 30 C.F.R. §250.201 (2007)).

209. *Id.*

210. *Alaska Wilderness League v. Kempthorne*, 548 F.3d 815, 819 (9th Cir. 2008).

211. *Id.*

212. *Id.*

213. *See id.*

214. *Id.*

215. *Id.* at 820.

216. *Id.* at 821.

217. *Id.* at 824 (emphasis original) (quoting *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1332 (9th Cir. 1992)).

The court then turned to the merits of the case, determining that the MMS failed to provide “a convincing statement of reasons explaining why Shell’s exploratory drilling plans at these *specific* sites would have an insignificant impact on bowhead whales and Inupiat subsistence activities.”²¹⁸ Because the MMS failed to take a “‘hard look’” at these issues, the court determined that the agency had not given sufficient information so as to preclude it from not completing an EIS.²¹⁹ Therefore, the court ordered the MMS to either prepare “a more thorough environmental analysis or an EIS, as necessary, examining the consequences of drilling at these specific locations.”²²⁰

Then, turning to the agency’s compliance with OCSLA, the court found that because Shell had not provided locations of proposed drilling sites in 2008 and 2009, the agency could not approve the EP.²²¹ In the end, the court vacated the MMS’s approval of Shell’s EP and remanded for the agency to either prepare a revised EA or an EIS.²²²

Many environmentalists, including Charles Clusen, the director of the Alaska Project for the National Resources Defense Council, criticized the ruling saying that “‘Americans are looking for a clean energy future, and trading animals and their habitat for massive oil company profits is the way of the past.’”²²³ In response to the court’s ruling a spokesperson from Shell responded by saying:

the ruling delays drilling and extends the timeline it will take to bring this much-needed U.S. production on-line. That timeline starts only after we drill our first well. While we assess our options . . . it’s important to remember that we hope to make Alaska a long-term commitment for Shell. We believe developing offshore Alaska is the right decision for the citizens of Alaska and the state’s economy and will help provide a secure energy future for the U.S.²²⁴

Several months later, after President Barack Obama took office, the effects of which will be discussed below, Shell withdrew its EP, effectively

218. *Id.* at 825.

219. *Id.* at 833.

220. *Id.* at 834.

221. *See id.* at 834-35.

222. *Id.* at 835.

223. Tony Hopfinger, *Court Ruling Jeopardizes Shell’s Offshore Drilling Plans in Alaska*, ALASKA DISPATCH, November 20, 2008, <http://www.alaskadispatch.com/dispatches/energy/318-court-ruling-jeopardizes-shells-offshore-drilling-plans-in-alaska>.

224. *Id.* (internal quotations omitted).

making the court's decision in this case void.²²⁵ The analysis used in the decision, however, remains valid and sheds light on how the Ninth Circuit will analyze similar cases in the future. In accordance with OCSLA, any decision of the Secretary regarding an exploration plan or development and production plan is subject to judicial review only in a United States Court of Appeals for a circuit in which an affected state is located.²²⁶ Therefore, decisions regarding drilling in the Beaufort Sea or on any part of the OCS in Alaska will be reviewed by the Ninth Circuit and by the tests laid out in this decision. Because all such decisions are subject to review in the Ninth Circuit, this court has an amazing opportunity to stall drilling projects in the future and may prove to be an insurmountable obstacle to offshore exploration, development, and production.

3. Policy under the Obama Administration

a. During the Election

In the early days of the election, Democratic presidential nominee Barack Obama supported continuing the moratorium on offshore drilling that had been in place since President George H.W. Bush.²²⁷ In fact, in June 2008 he criticized Republican presidential nominee John McCain for switching positions on offshore drilling from being opposed to the idea to suggesting that he would consider it as part of a multi-faceted energy plan.²²⁸ Obama quipped, "I think he continues to find himself being pushed further and further to the right in ways that in my mind don't show a lot of leadership."²²⁹

Then, only months later, in August 2008 when Obama unveiled his energy plan, he too had shifted his stance on offshore drilling.²³⁰ Obama went from being a major opponent of offshore drilling to stating that "[h]e could live with it if it is done in an environmentally sound way and as part of comprehensive, bipartisan legislation on energy."²³¹ In an interview with the *Palm Beach Post* in August 2008, he defended his perceived flip-flop by saying:

225. *Kemphorne*, 571 F.3d 859.

226. 43 U.S.C. § 1349(c)(2) (2006).

227. Michael B. Gerrard, *McCain vs. Obama on Environment, Energy, and Resources*, 23 NAT. RESOURCES J. 3, 4 (2008).

228. Richard Carson & Alex Brandon, *Obama Challenges McCain on Offshore Oil Drilling, Security*, USA TODAY, June 18, 2008, available at http://www.usatoday.com/news/politics/election2008/2008-06-18-obama-mccain-security_N.htm.

229. *Id.*

230. See Gerrard, *supra* note 227, at 5.

231. *Obama Outlines Energy Plan; McCain Advocates Drilling*, USA TODAY, August 5, 2008, available at http://www.usatoday.com/news/politics/election2008/2008-08-04-obama-oil_N.htm.

[m]y interest is in making sure we've got the kind of comprehensive energy policy that can bring down gas prices If, in order to get that passed, we have to compromise in terms of a careful, well thought-out drilling strategy that was carefully circumscribed to avoid significant environmental damage - I don't want to be so rigid that we can't get something done.²³²

b. In the Early Days of the Administration

Now that the election is over and the magic of Inauguration Day is fading, many are waiting with baited breath to see how President Barack Obama will, among other issues, handle the subject of offshore drilling. Before the President was inaugurated, his Secretary of the Interior, Ken Salazar, was already discussing the administration's plans for drilling.²³³ Salazar stated plainly, "[t]here are places in the OCS where it is appropriate for drilling There may be other places that are off-limits."²³⁴

Not long after he was sworn in on the Capitol steps, Obama ordered all pending regulations initiated by the previous administration to be halted.²³⁵ In the early days, it seemed that the proposal initiated by the Bush administration to expand offshore drilling to areas previously under the moratorium may be continued.²³⁶ The plan discussed by Secretary Salazar was not unlike the plan considered by the Obama administration during the final stages of the election; it calls for offshore drilling in concert with solar energy, wind power, and biofuel supplies.²³⁷

In line with President Obama's statements on the issue, both during the campaign and now at the beginning of his administration, Secretary Salazar mentioned that "[a]s we move forward with the development of our oil and gas resources, both on-shore and off-shore, they have to be part of a set of a

232. Michael C. Bender, *Obama Would Consider Off-Shore Drilling as Part of Comprehensive Energy Plan*, PALM BEACH POST, August 1, 2008, available at <http://www.palmbeachpost.com/state/content/state/epaper/2008/08/01/0801obama1.html>.

233. See Daniel Whitten, *Salazar Says Obama May Ban Offshore Drilling in Some Areas*, BLOOMBERG, January 15, 2009, available at <http://www.bloomberg.com/apps/news?pid=20601207&sid=A2tq34QdWN1s&refer=energy>.

234. *Id.*

235. Amy Goldstein, *Regulators Ordered to Leave Work Unfinished*, WASHINGTON POST, January 21, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/20/AR2009012004363.html>.

236. Tom Doggett, *US Interior Secretary Says Open to New Offshore Drilling*, REUTERS, January 28, 2009, <http://uk.reuters.com/article/oilRpt/idUKN2853346020090128>.

237. *Id.*

comprehensive energy program.”²³⁸ Although Salazar mentioned the Gulf of Mexico as one place to allow more drilling, the Secretary said the Department would be considering which areas to open up as the administration continued.²³⁹

Recently, however, Secretary Salazar announced that the Department “will require oil and natural-gas companies to clear more regulatory hurdles before they are allowed to drill on federal lands.”²⁴⁰ This seems to be a shift from both Salazar and Obama’s stance in the earlier days of the administration. Still, since it is fairly early in the Obama administration, and the President seems to have been occupied with the health care debate and other pressing issues, it is difficult to ascertain which of the President’s policies will mirror his rhetoric from the campaign trail and which policies will not. Certainly though, oil companies, environmentalists, and the citizens and leaders of the affected states will be anxious to see whether or not this five-year program will continue through all phases and allow oil production in recently prohibited OCS areas.

E. CONCLUSION

While the Obama administration now seems open to drilling in certain areas of the OCS as part of a comprehensive energy plan, there are still many obstacles that must be overcome before those areas begin producing oil. First, the Obama administration, specifically the Secretary of the Interior and the MMS, must continue the planning and preparation for the 2010-2015 five-year program. Those plans include: amassing large amounts of research as to the environmental impact of drilling in the OCS areas; requesting and receiving comments from the public, the governors of the affected states, and other interested parties; holding lease sales; reviewing the proposed drilling plans of the oil companies who purchase the leases; allowing the lease-holding oil companies to begin exploratory drilling; and ultimately working with those oil companies as they produce oil in the areas that are found to be ripe with resources.

Then, the Obama administration and those parties lobbying to allow drilling in the areas of the OCS previously prohibited must continue their efforts to convince Congress not to renew the congressional moratorium on drilling. Due to pressure from environmentalists and the democratic majority in Congress, this will not be an easy task.

Finally, and perhaps most often forgotten, the MMS will have to ensure that it is reviewing and approving all phases of the program with the scrutiny required by the D.C. Circuit (in decisions affecting when to grant leases) and

238. *Id.*

239. *Id.*

240. Stephen Power, *Salazar to Toughen U.S. Drilling Rules*, WALL STREET JOURNAL, January 6, 2010, available at http://online.wsj.com/article/SB126274070210717245.html?mod=googlenews_wsj.

the Ninth Circuit (in decisions affecting the exploratory and development and production phases for all OCS areas that fall within the Ninth Circuit's jurisdiction). It seems that for decisions pertaining to the approval of the pre-leasing and leasing phases, which all come within the D.C. Circuit's jurisdiction, the Secretary and the MMS will have broad discretion. Then, if the remaining circuits follow the lead of the Ninth Circuit in scrutinizing decisions relating to the exploratory, development, and production phases, the decisions of the administration in these phases will *not* be given great deference, and the Secretary and the MMS will have to ensure that their decisions properly consider the environmental effects on the OCS areas at issue.

In determining the future of offshore drilling, President Obama will be forced to listen to two very different and very vocal factions. On the one hand, there are those who unequivocally support drilling as a necessary step to ensure energy independence and to cease American reliance on foreign enemies for these resources once and for all. On the other hand, many Americans vehemently oppose drilling because of the potential environmental impact they fear it will have and because of their view that it will not yield enough to sustain the nation's current consumption rate.

With re-election not too far on the horizon, both of these groups of Americans and political pundits will be watching President Obama's decisions on this issue with particular interest. President Obama's Secretary of Interior, Ken Salazar, originally committed to continuing plans to drill offshore, but only as part of a comprehensive energy plan. One of the questions that will be posed to both Salazar and Obama is: what exactly will this comprehensive energy plan entail? Will it include almost limitless offshore drilling or will it impose severe restrictions making drilling for natural resources impossible? Will it include restrictions on the natural resources consumed by Americans? These are questions that have yet to be answered by the new administration, yet these questions must be answered to understand the contours of the energy plan under President Obama. And, with Salazar's recent flip-flop on this issue, many more questions may remain for the Obama administration in the coming months and years.

As President Obama attempts to handle pressing issues facing America today, namely the economic crisis and the war, he must also consider his administration's next steps either towards or away from offshore drilling. In either direction, Obama risks alienating one group of Americans, but hard decisions such as this one are all in a day's work for the United States President. Because the energy issue will likely affect our country and the world as a whole for many future generations, it would behoove President Obama to carefully consider the effects that offshore drilling will have for decades into the future and not only during his presidency.

