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Oil and Gas Mineral Leasing and Development on the Outer Continental Shelf of the United States

*Anthony C. Marino**

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INTRODUCTION

The Outer Continental Shelf (OCS) of the United States—the underwater land beyond the nation’s shores—is teeming with recoverable hydrocarbons.¹ The United States Department of Interior (Interior) manages this 1.7 billion acre expanse and leases large tracts of the OCS for oil and gas exploration. To date, nearly 8,000 active oil and gas leases cover 36 million acres.² Current OCS production accounts for about seven percent of the U.S. domestic natural gas production and roughly twenty-four percent of domestic oil production.³

On a superficial level, an OCS lease is an ordinary two-party contract between the federal government and a willing third party. However, an OCS lease implicates far more than the usual “four corners” of the contract because lessees and their agents must navigate a labyrinth of rules and regulations to remain in compliance with their lease obligations. Given the large volumes of oil and gas production from the OCS, understanding this maze is a daunting, yet important, task.

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1. BUREAU OF OCEAN ENERGY MGMT., ASSESSMENT OF UNDISCOVERED TECHNICALLY RECOVERABLE OIL AND GAS RESOURCES OF THE NATION’S OUTER CONTINENTAL SHELF (2011), http://www.boem.gov/uploadedfiles/2011_national_assessment_factsheet.pdf [<http://perma.cc/5YUW-ECKM>].

2. BUREAU OF OCEAN ENERGY MGMT., Oil and Gas Leasing on the Outer Continental Shelf http://www.boem.gov/uploadedFiles/BOEM/Oil_and_Gas_Energy_Program/Leasing/5BOEMRE_Leasing101.pdf [<http://perma.cc/4DRS-GQ86>].

3. *Id.* For the figures on the volume of production OCS lands over the past decade, see *Outer Continental Shelf Oil Gas Production*, BUREAU OF SAFETY & ENVTL. ENFORCEMENT, http://www.data.bsee.gov/homepg/data_center/production/ocsprod.asp [<http://perma.cc/M5DA-AG7W>] (last visited Sept. 16, 2015).

This article provides an introduction and high-level overview of the leasing of mineral resources on the OCS and the accompanying regulatory regime. Part I traces the history of OCS development, with a particular emphasis on the federal government's interest in offshore minerals and how those interests came into existence. Part II discusses the major pieces of legislation governing oil and gas activities on the OCS. Part III explores the role of Interior as "landlord" of the OCS and tracks its administration of oil and gas activities thereon. Finally, Part IV discusses the body of ancillary laws and rules that govern OCS activities, as well as the agencies and bureaus that enforce them.

I. WHAT IS THE OCS?

This paper is principally about the exploration and production of mineral resources on the OCS. The United States Code defines the OCS as "all submerged lands lying seaward and outside of the area of lands beneath navigable waters . . . and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control."⁴ But this definition is far from illuminating.

The boundaries of the OCS can largely be described by two controlling principles. First, federal interests begin where state ownership ends. And second, federal interests continue to the outer limit of the nation's Exclusive Economic Zone (EEZ) or to the physical end of the continental shelf.

The journey of how these interests came to be begins with President Harry S. Truman, who took special cognizance in the oil and gas resources off the nation's coast and recognized that future advances in exploration and development technology could make this wealth of resources accessible.⁵ To this end, President Truman proclaimed that "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."⁶ He further proclaimed that, where the nation's interest overlapped with that of a foreign state, the United States would endeavor to resolve such overlap through the application of equitable principles.⁷ President Truman did not specifically define the continental shelf. However, customary international law provides that the continental shelf covers the entirety of the continental

4. 43 U.S.C. § 1331(a) (2015).

5. Proclamation No. 2667, 10 Fed. Reg. 12,303 (1945).

6. *Id.*

7. *Id.*

margin, which is “the continuation of the land mass until it reaches the abyssal plain.”⁸

Several coastal states protested President Truman’s proclamation, as it made no provision for state ownership of offshore lands. Louisiana, for example, claimed territory extending 24 nautical miles from its coastline.⁹ Nevertheless, the Supreme Court ruled that the President’s proclamation was legally permissible, and that the federal government owned the soil and seabed beyond the ordinary low water mark of the states’ respective coasts and inland waters.¹⁰

In 1953, Congress partially codified President Truman’s proclamation through the enactment of two companion pieces of legislation—the Submerged Lands Act (Lands Act)¹¹ and the Outer Continental Shelf Lands Act (OCSLA).¹²

Through the Lands Act, the United States ceded ownership of the first three miles of offshore lands to the adjacent coastal States and confirmed the “seaward boundary” of coastal states as “a line three geographical miles distant from its coastline.”¹³ However, Congress left open the possibility that the seaward boundary could be set at three marine leagues (approximately nine nautical miles) if Congress had previously approved that more distant boundary or if that boundary was asserted at the time the state joined the Union.¹⁴ Two states—Texas and Florida—later made successful showings that they were entitled to three marine leagues pursuant to the Lands Act.¹⁵

Through OCSLA, Congress declared that the subsoil and seabed of the OCS are subject to the federal government’s “jurisdiction, control, and power of disposition.”¹⁶ The legislation also established the basic

8. See Restatement (Third) of Foreign Relations Law § 511, cmt. j. (1987).

9. *United States v. Louisiana*, 339 U.S. 699, 702 (1950).

10. *Id.*; *United States v. California*, 332 U.S. 19 (1947); *United States v. Texas*, 339 U.S. 707 (1950).

11. 67 Stat. 132, codified at 43 U.S.C. §§ 1301–15 (2015).

12. 67 Stat. 462, codified at 43 U.S.C. §§ 1331–56a (2015). OCSLA has been amended on a number of occasions; the most significant rounds occurred in 1978 and 1984.

13. 43 U.S.C. § 1312. The other notable exception is the Great Lake states, whose respective seaward boundaries extend to the international boundary. *Id.*

14. *Id.*

15. See *United States v. Louisiana*, 363 U.S. 1, 83 (1960) (Texas); *United States v. Florida*, 363 U.S. 121, 129 (1960) (Florida). Note that Florida’s extended territory only applies to its Gulf coastline, not its Atlantic coastline. Also, Puerto Rico owns three marine leagues off its coast, as authorized by the Puerto Rican Federal Relations Act, as amended. 48 U.S.C. § 749 (2015).

16. 43 U.S.C. § 1332(1) (2015).

framework by which the federal government could issue OCS mineral leases.¹⁷

In 1983, President Reagan issued a proclamation establishing a 200 nautical mile EEZ adjacent to the coasts of the United States, its possessions, and its territories.¹⁸ The federal government's interest in the EEZ is two-fold. First, it exercises "sovereign rights" over the natural resources found therein, including the minerals of the seabed and subsoil.¹⁹ And second, it has "jurisdiction" over any artificial islands, installations, or structures within this zone.²⁰

The United States' claim to the continental shelf adjacent to its coasts or claim to its EEZ overlaps with the claims of other sovereign nations at several points. To avoid conflict resulting from these overlaps, the United States has entered into a number of maritime and continental shelf boundary agreements and treaties with its neighbors,²¹ while other boundaries have been fixed by the International Court of Justice.²²

Since the Gulf of Mexico region of the OCS boasts the most prolific hydrocarbon production, the United States–Mexico international boundary assumes particular relevance. The two countries first agreed on their maritime boundary,²³ and they later agreed to partially resolve their overlapping claims to the continental shelf by divvying up those portions in the Western Gulf of Mexico lying beyond 200 nautical miles of each country's coast.²⁴ A gap remains in the Eastern Gulf of Mexico lying beyond the EEZs of the United States, Mexico, and Cuba. That unresolved area may prove fertile for future agreements.²⁵

17. 43 U.S.C. § 1334.

18. Proclamation No. 5030, 48 Fed. Reg. 10605 (1983).

19. *Id.*

20. *Id.*

21. For a comprehensive list, see *U.S. Maritime Boundaries: Agreements and Treaties*, U.S. DEP'T OF STATE, <http://www.state.gov/e/oes/ocns/opa/c28187.htm> [<http://perma.cc/L9BD-NZHF>] (last visited Jun. 21, 2015).

22. See, e.g., *Delimitation of the Maritime Boundary in the Gulf of Maine (Can. v. U.S.)* 1984 I.C.J. 246 (Oct. 12).

23. Treaty on Maritime Boundaries between the United Mexican States and the United States of America, U.S.-Mex., May 4, 1978, 2143 U.N.T.S. 405.

24. This agreement is referred to colloquially as the "Western Gap Treaty." Treaty Between the Government of the United States of America and the Government of the United Mexican States on the Delimitation of the Outer Continental Shelf in the Western Gulf of Mexico Beyond 200 Nautical Miles, U.S.-Mex., Jun. 9, 2000, T.I.A.S. 01-117.

25. See Robert L. Sebastian, *Status of U.S. Policies: Leasing and Developing Hydrocarbons in Transboundary Areas*, WILSON CENTER, (Feb. 12, 2015), <http://www.wilsoncenter.org/sites/default/files/Mexico%20Reform%20Robert%20Sebastian%2002122015.pdf> [<http://perma.cc/ZVY3-J97C>].

Recently, the United States entered into another agreement with Mexico regarding the exploration of hydrocarbons.²⁶ This agreement would facilitate the identification, exploration, and joint development of reservoirs that straddle the countries' maritime boundary in the Gulf of Mexico.²⁷ Congress subsequently enacted legislation adopting the agreement,²⁸ and Interior is in the beginning phases of implementation.²⁹

II. WHAT REGULATORY REGIME GOVERNS THE OCS?

Interior manages the resources of the OCS, and the bulk of the day-to-day administration has been delegated to the Bureau of Ocean Energy Management (BOEM) and its sister agency, the Bureau of Safety and Environmental Enforcement (BSEE).³⁰

BOEM and BSEE, along with a host of other federal agencies, play an integral role in regulating oil and gas activities on the OCS. However, before turning to the responsibility of each agency, consideration should be given to the major rules governing OCS activities. There are four key pieces to the regulatory puzzle—OCSLA, the Coastal Zone Management Act (CZMA), the National Environmental Protection Act (NEPA), and the Oil Pollution Act of 1990 (OPA 90). Other statutes play important yet ancillary roles in the regulatory scheme.

A. Outer Continental Shelf Lands Act

The principal piece of legislation governing the OCS is OCSLA, which provides the framework for oil and gas exploration in federal waters. In its introductory language, OCSLA declares that United States policy holds up the OCS as a “vital national resources reserve . . . which should be made available for expeditious and orderly development, subject

26. Agreement between the United States of America and the United Mexican States Concerning Transboundary Hydrocarbon Reservoirs in the Gulf of Mexico, U.S.-Mex. Feb. 20, 2012, T.I.A.S. 14-0718.

27. CURRY L. HAGGERTY, CONG. RESEARCH SERV., R43610, LEGISLATION TO APPROVE THE U.S.-MEXICO TRANSBOUNDARY HYDROCARBONS AGREEMENT 3–4 (2014), <http://www.fas.org/sgp/crs/row/R43610.pdf> [<http://perma.cc/QVB3-S5TW>].

28. Bipartisan Budget Act of 2013, P.L. 113-67, 127 Stat. 1181–83 (Dec. 26, 2013).

29. See Secretarial Order No. 3333 (Jun. 3, 2014), available at <http://www.boem.gov/US-Mexico-Secretarial-Order-3333/>; see also Memorandum of Understanding Between BOEM and BSEE (Jul. 17, 2014), <http://www.boem.gov/US-Mexico-BOEM-BSEE-MOU/> [<http://perma.cc/2XZM-BBM4>].

30. BOEM and BSEE succeeded the former Minerals Management Service (MMS) after the *Deepwater Horizon* incident prompted reorganization. See discussion *infra* Part III.

to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs”³¹

OCSLA authorizes the Secretary of Interior to lease land on the OCS and to promulgate rules and regulations regarding the administration of OCS leases.³² Moreover, OCSLA establishes a procedural framework for developing OCS resources as well as imposes certain substantive requirements. The procedural framework consists of four stages: planning, leasing, exploration, and, finally, development and production. Each successive stage is “more specific than the last and more attentive to the potential benefits and costs of a particular drilling project.”³³ Also, each successive step requires certain substantive considerations.³⁴ Those considerations differ at each stage, but two objectives remain consistent throughout—to develop resources in an orderly and expeditious fashion, but to do so in such a way that protects the environment.

B. Coastal Zone Management Act

At various points throughout the leasing process, OCSLA requires Interior to consider local and tribal input in accordance with the Coastal Zone Management Act (CZMA).³⁵ Most final decision-making under CZMA lies principally with the Department of Commerce (Commerce).³⁶ However, at various points throughout the leasing process, OCSLA requires Interior to consider local input, in accordance with the CZMA.³⁷ In the context of OCS oil and gas activities, the CZMA offers at least a dozen discrete opportunities for state input or federal–state cooperation.³⁸

Through the CZMA, Congress declared a national policy to, among other things, “encourage and assist the states to exercise effectively their responsibilities in the coastal zone through the development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone”³⁹ To this end, coastal states may adopt coastal management programs, subject to approval by the Secretary of Commerce.⁴⁰ Such programs can include a variety of

31. 43 U.S.C. § 1332(3) (2015).

32. 43 U.S.C. §§ 1334(a), 1344(a).

33. *Center for Sustainable Economy v. Jewell*, 779 F.3d 588, 594 (D.C. Cir. Mar. 6, 2015).

34. For Stage One, *see* 43 U.S.C. § 1344(a); Stage Two, *see* § 1337(p)(4); Stage Three, *see* §§ 1340(c)(1)(A)–(g)(3); Stage Four, *see* §§ 1351(h)(1)–(h)(1)(D)(i).

35. 16 U.S.C. § 1455 (2015).

36. 16 U.S.C. § 1453(16).

37. 16 U.S.C. § 1456(c).

38. *See* Part IIA, *infra*.

39. 16 U.S.C. § 1452(2).

40. 16 U.S.C. § 1454.

provisions, but should, at a minimum, address permissible land and water uses within the coastal zone in addition to any relevant planning process for energy facilities in or affecting the coastal zone.⁴¹

The CZMA requires any federal agency that undertakes a coastal activity to do so “in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs.”⁴² To that end, federal agencies must provide to the applicable state agency a formal consistency determination (CD) for each such activity within ninety days prior to final federal approval.⁴³ CZMA requires completion of CDs prior to the licensing or permitting of any activities on the OCS.⁴⁴

The CZMA also requires any “applicant for a required federal license or permit to conduct an activity” to certify that the activity will comply with the applicable state’s approved program.⁴⁵ The same is true for any person who submits a “plan for the exploration or development of, or production from, any area which has been leased”⁴⁶ The applicant must furnish a copy of the certification to the state, which then has an opportunity to concur or object.⁴⁷ A license cannot be issued until the applicant receives state concurrence, unless, over the objection of the state, the Secretary of Commerce finds that the activity is consistent with the management program.⁴⁸

C. National Environmental Policy Act

Congress passed NEPA in 1969,⁴⁹ thereby declaring “a national policy” designed to “encourage productive and enjoyable harmony between man and his environment” as well as to “promote efforts [to] prevent or eliminate damage to the environment”⁵⁰ NEPA’s key requirement is that “every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment” contain an Environmental Impact Statement (EIS), consisting of “a detailed statement” that addresses:

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41. 16 U.S.C. § 1455(d).
 42. 16 U.S.C. § 1456(c)(1)(A).
 43. 16 U.S.C. § 1456(c)(1)(C).
 44. 43 U.S.C. § 1351(d) (2015).
 45. 16 U.S.C. § 1456(c)(3)(A) (2015).
 46. 16 U.S.C. § 1456(c)(3)(B).
 47. 16 U.S.C. § 1456(c)(3).
 48. *Id.*
 49. 42 U.S.C. §§ 4321–70h (2015).
 50. 42 U.S.C. § 4321; *see also* 43 U.S.C. § 4331 (2015).

- (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
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.⁵¹

NEPA also requires federal agencies to consult with other federal agencies that may have insight on relevant environmental considerations, either because of that agency's substantive expertise or its jurisdictional authority over a related regulatory scheme.⁵² These requirements, however, are only procedural. NEPA does not require any particular outcome—only that relevant agencies analyze their proposals in accordance with NEPA's guidelines prior to taking action.⁵³

NEPA also created the Council on Environmental Quality (CEQ),⁵⁴ which is tasked with administering NEPA's policy objectives.⁵⁵ To this end, CEQ has promulgated numerous regulations "implementing the procedural provisions" of NEPA, all of which must be incorporated into the regulations and procedures of all other federal agencies.⁵⁶ The regulations cover matters such as when an EIS is required,⁵⁷ the necessary contents to be included therein,⁵⁸ and the extent of notice and comment obligations from the public and other federal agencies.⁵⁹

CEQ regulations permit "tiering." General matters may be covered in an EIS focusing on broad issues, but the reviewing agency may issue narrower statements and analyses as activities become increasingly specific.⁶⁰ These narrower reviews usually take the form of Environmental Assessments (EA). An EA generally reviews available evidence to

51. 42 U.S.C. § 4332(2)(C).

52. *Id.*

53. U.S. Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 756–57 (2004).

54. 42 U.S.C. § 4342.

55. 42 U.S.C. § 4344.

56. 40 C.F.R. §§ 1500.3, 1505.1, 1507.3 (2015).

57. 40 C.F.R. §§ 1501.3, 1502.4.

58. 40 C.F.R. § 1502.

59. 40 C.F.R. §§ 1503.1, 1503.4.

60. 40 C.F.R. § 1508.28.

ascertain whether a full EIS is warranted or, alternatively, whether no significant impact results.⁶¹

D. Oil Pollution Act of 1990

In response to the *Exxon Valdez* oil spill, Congress enacted OPA 90 as an amendment to the Clean Water Act.⁶² Under OPA 90, “each responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone is liable for the removal costs and damages”⁶³ The identity of the “responsible party” varies depending on the type of structure involved, but includes owners, operators, leaseholders, permittees, and holders of rights of way, as may be applicable.⁶⁴

OPA 90 imposes a strict liability regime and offers few defenses when violations occur. In certain cases, the responsible party may avoid liability if the discharge or substantial threat of discharge stemmed from a *force majeure*, the gross negligence or willful misconduct of a claimant, or, occasionally, the fault of a third party.⁶⁵

Additionally, OPA 90 caps liability at different amounts which depend on the type of structure or vessel involved.⁶⁶ These limits do not apply, however, if the discharge or substantial threat of discharge was caused by the responsible party’s gross negligence, willful misconduct, or violation of an applicable federal regulation.⁶⁷

Even where defenses or liability caps apply, the owner or operator of an OCS facility or vessel retains responsibility for all removal costs expended by any government agency, whether it be federal, state, or local.⁶⁸ Further, pursuant to the Oil Spill Financial Responsibility (OSFR) requirement, all responsible parties must “establish and maintain . . .

61. 40 C.F.R. §§ 1508.9, 1508.13. In routine situations, the activity may be “categorically excluded” and, therefore, not subject to either an EIS or EA. 40 C.F.R. § 1508.4 (2015); *Categorical Exclusion Reviews*, BUREAU OF OCEAN ENERGY MGMT., <http://www.boem.gov/Environmental-Stewardship/Environmental-Assessment/NEPA/policy/ce/index.aspx> [<http://perma.cc/FC5E-UJFU>] (last visited Jun. 25, 2015).

62. 33 U.S.C. §§ 2701–20 (2015).

63. 33 U.S.C. § 2702(a). Damages may include injury to or loss of natural resources, real or personal property, subsistence use, revenues, profits and earning capacity, and public services. 40 U.S.C. § 2702(b)(2) (2015).

64. 33 U.S.C. § 2701(32).

65. 33 U.S.C. §§ 2703(a), (b).

66. 33 U.S.C. § 2704(a).

67. 33 U.S.C. § 2704(c)(1). This responsible party is accountable for the actions of its employees, agents, and persons with whom it has contracted. *Id.*

68. 33 U.S.C. § 2704(c)(3).

evidence of financial responsibility sufficient to meet the maximum amount of liability to which [it] could be subjected” if entitled to a limitation of liability.⁶⁹

III. WHO IS IN CHARGE?

The Interior is the principal executive agency in charge of managing federal lands.⁷⁰ Concomitant with this general mission—the management of property—OCSLA tasks the Secretary of Interior with managing the natural resources of the OCS.⁷¹ In turn, the Secretary has delegated certain authorities among three Interior offices: BOEM, BSEE, and the Office of Natural Resource Revenue (ONRR).

This particular division of responsibility is a relatively recent development; previously, the responsibilities allotted to these three offices all fell to the former Minerals Management Service (MMS).⁷² However, in the wake of the *Deepwater Horizon* catastrophe, the perception of dysfunction within MMS prompted a systemic reorganization aimed at “improv[ing] the management, oversight, and accountability of activities on the Outer Continental Shelf[.]”⁷³

A. Bureau of Ocean Energy Management

BOEM oversees all oil and gas leasing activities on the OCS and divides its various missions among several offices.⁷⁴ Importantly,

69. 33 U.S.C. § 2716(a).

70. See *Interior Organizational Chart*, U.S. DEP’T OF INTERIOR, <http://www.doi.gov/whoweare/orgchart.cfm> [<http://perma.cc/97Z6-3QZZ>] (last visited Jun. 10, 2015).

71. See, e.g. 43 U.S.C. § 1334(a) (2015).

72. See *The Reorganization of the Former MMS*, BUREAU OF OCEAN ENERGY MGMT., <http://www.boem.gov/Reorganization/> [<http://perma.cc/WBS7-MPKZ>] (last visited Jun. 10, 2015).

73. See *Secretarial Order No. 3299, DEP’T OF INTERIOR (May 19, 2010)*, available at <https://www.ocsbbs.com/hottopics/2010/interiorsecretaryorder3299.pdf>; see also *Press Release, Fact Sheet: BSEE and BOEM Separation, DEP’T OF INTERIOR (Jan. 19, 2011)*, <http://www.doi.gov/news/pressreleases/upload/01-19-11-Fact-Sheet-BSEE-BOEM-separation-2.pdf> [<http://perma.cc/Y76W-ZS2W>].

74. BOEM operates seven offices, the two most relevant to the aims of this article being the Office of Strategic Resources Programs and the Office of Environmental Programs. The former has three divisions—the Economics Division, the Leasing Division, and the Resource Evaluation Division. The latter is divided between the Environmental Assessment Division and the Environmental Sciences Division. See *BOEM Organizational Chart*, BUREAU OF OCEAN ENERGY MGMT., <http://www.boem.gov/BOEM-Organizational-Chart/> [<http://perma.cc/5W26-7SGF>] (last visited Jun. 25, 2015).

BOEM's three regional directors assume a crucial role in carrying out the BOEM's day-to-day operations and responsibilities.⁷⁵

In particular, the leasing process is quite lengthy and exceedingly complex, as it involves rigorous planning and permitting on the part of BOEM and its officials. The life of a lease can generally be divided into four stages: the Five Year Program, Leasing, Exploration, and, lastly, Development and Production.⁷⁶ In addition to seeing that these principal milestones are met, BOEM ensures compliance with the terms and conditions of executed OCS leases.⁷⁷

1. Five Year Programs

Section 18 of OCSLA requires the Secretary of Interior to “prepare and periodically revise” an oil and gas leasing program. These “Five Year Programs” consist of “a schedule of proposed lease sales indicating, as precisely as possible, the size, timing, and location of leasing activity which [the Secretary of Interior] determines will best meet national energy needs” over the next half decade.⁷⁸ The Secretary of Interior must review the plan annually to assess the need for revision.⁷⁹

BOEM spearheads the crafting of each Five Year Program. The creation of a single program can take years because of the numerous

75. The three regional directors preside over the Gulf of Mexico Region, the Pacific Region, and the Alaska region, respectively. These offices “manage oil and gas resource evaluations, environmental studies and assessments, leasing activities, including review of exploration plans and development plans, fair market value determinations, and geological and geophysical permitting.” *BOEM Fact Sheet*, BUREAU OF OCEAN ENERGY MGMT., <http://www.boem.gov/BOEM-Fact-Sheet/> [<http://perma.cc/BC8M-ZNSD>] (last visited Jun. 25, 2015).

76. *Center for Sustainable Economy v. Jewell*, 779 F.3d 588, 594 (D.C. Cir. Mar. 6, 2015).

77. BOEM also administers the royalty relief provisions of the Gulf of Mexico Energy Security Act of 2006 (GOMESA), 30 C.F.R. §§ 519.410–418 (2015). GOMESA provides a mechanism by which “qualified outer Continental Shelf revenues” are shared with the “Gulf producing States”: Alabama, Louisiana, Mississippi, and Texas. *See* Pub. L. No. 109-432, §§ 102(9), 102(7), 120 Stat. 3001 (2006). Of the qualified revenue, 37.5% is distributed amongst the four states, and 20% of each state’s share is dispersed directly to their coastal political subdivisions. 30 C.F.R. §§ 519.412–.414, .416 (2015).

78. 43 U.S.C. § 1344(a) (2015).

79. 43 U.S.C. § 1344(e). For a discussion on how an annual review may affect an ongoing Five Year Program, see *Proposed Final Outer Continental Shelf Oil & Gas Leasing Program*, BUREAU OF OCEAN ENERGY MGMT. 15 (Jun. 2012), http://www.boem.gov/uploadedFiles/BOEM/Oil_and_Gas_Energy_Program/Leasing/Five_Year_Program/2012-2017_Five_Year_Program/PFP%2012-17.pdf [<http://perma.cc/V6SW-4WYN>] [hereinafter *2012 PFP*].

procedural requirements and substantive considerations that must be satisfied.⁸⁰

BOEM regulations outline a number of steps required in formulating a Five Year Program. The process begins with a request for information filed in the Federal Register, wherein BOEM invites comments from governors of affected states, local governments, industry leaders, and other federal agencies and their agents, including the Attorney General on behalf of the Federal Trade Commission.⁸¹ Thereafter, BOEM will prepare a draft program for publication in the Federal Register.⁸² But, at least sixty days prior to publication, BOEM must first forward a draft to the governor of each affected state; at least fifteen days before publication, BOEM must respond in writing to each gubernatorial comment it timely receives.⁸³

Once a draft program is complete, BOEM forwards it to Congress and the Attorney General, and subsequently publishes it in the Federal Register.⁸⁴ Once again, governors of affected states receive a revised draft, subject to an additional ninety-day comment period.⁸⁵ Any local government affected by the proposal may request a copy from the governor of the state and may also offer comments and recommendations on the proposal.⁸⁶

Before approval of the program can be granted, the final draft must be forwarded to the President and Congress at least sixty days in advance.⁸⁷ If the final draft fails to incorporate a specific recommendation of the Attorney General, or a state or local government, the submission must outline the reasons for the omission.⁸⁸

80. The Five Year Program must consider eight factors: (1) geographical, geological, and ecological characteristics of the planning areas; (2) equitable sharing of developmental benefits and environmental risks; (3) location with respect to regional and national energy markets and needs; (4) location with respect to other uses of the sea and seabed; (5) interests of potential oil and gas producers; (6) laws, goals, and policies of affected states; (7) environmental sensitivity and marine productivity; and (8) environmental and predictive information. Outer Continental Shelf Lands Act, § 18(a)(2), 43 U.S.C. § 1344(a)(2) (2015); *see also* 2012 PFP, *supra* note 79, at 28–30.

81. 30 C.F.R. § 556.16(a) (2015). BOEM will also make direct requests to governors of affected states “to identify specific laws, goals, and policies which they believe should be considered . . . in connection with the leasing program.” § 556.16(b). Additionally, BOEM will make a direct request to the Secretary of Energy to comment on “regional and national energy markets, on OCS production goals and on transportation networks.” *Id.*

82. 30 C.F.R. § 556.17(a)(1).

83. 30 C.F.R. § 556.17(a)(1)–(2).

84. 30 C.F.R. § 556.17(b).

85. *Id.*

86. *Id.*

87. 30 C.F.R. § 556.17(c).

88. *Id.*

During the development of a Five Year Program, BOEM must consider the CZMA programs of affected coastal states.⁸⁹ When BOEM issues the original request for information, it will specifically request the Governors of affected states, as well as the Secretary of Commerce, to provide any relevant information regarding the relationship between the proposed OCS activity and the CZMA programs.⁹⁰

Additionally, BOEM will issue a Programmatic Environment Impact Statement (PEIS) in partial satisfaction of its NEPA obligations.⁹¹ Before preparing the first draft, BOEM must publish a notice of intent to prepare a PEIS as well as a request for comments in the Federal Register.⁹² The draft is published in the Federal Register, after which BOEM solicits comments on the draft, makes revisions, and issues a final PEIS.⁹³ The PEIS provides an overview of the environmental landscape—a review focused on *breadth* of coverage rather than *depth*. It is designed principally for identifying those areas, resources, and activities that could result in significant environmental impacts as well as “broad issues that will likely require more focused and fine-scale evaluations in subsequent NEPA assessments”⁹⁴

In summary, the construction of a Five Year Program is an arduous task. The process requires BOEM to issue and solicit public comments on a Draft Proposed Program, Proposed Program, and Five Year Draft EIS. Furthermore, after all steps are completed, BOEM must issue a Five Year Final EIS and Proposed Final Program for consideration by the President and Congress. At each phase, BOEM must solicit and respond to input from various stakeholders.⁹⁵ Only after the completion of each step, and the incorporation of applicable comments and revisions, may BOEM move forward in the lease process.

2. Leasing

Once a Five Year Program is in place, BOEM can engage in leasing activities in accordance with the strictures of the Program. For logistical purposes, the various OCS regions are divided into planning areas. For

89. 30 C.F.R. § 556.20.

90. *Id.*

91. 2012–2017 OCS Oil and Gas Leasing Program Final Programmatic EIS, 1-7–1-8 (July 2012), http://www.boem.gov/uploadedFiles/BOEM/Oil_and_Gas_Energy_Program/Leasing/Five_Year_Program/2012-2017_Five_Year_Program/2012-2017_Final_PEIS.pdf [<http://perma.cc/K9TU-LFZL>] [hereinafter *Final Programmatic EIS*].

92. *Id.* § 1-1.

93. *Id.*

94. *Id.* § 1-7.

95. See 2012 PFP, *supra* note 79, at 25–26.

example, BOEM divides the Gulf of Mexico region into Western, Central, and Eastern planning areas,⁹⁶ and it will host lease sales for tracts in different planning areas throughout the year.⁹⁷ To initiate the process of conducting a lease sale, BOEM will publish a “Call for Information and Nomination” (Call) in the Federal Register.⁹⁸ The Call will request input on what areas to lease as well as information regarding any areas warranting additional scrutiny.⁹⁹

Thereafter, BOEM will recommend to the Secretary of Interior those “areas identified for environmental analysis and consideration for leasing.”¹⁰⁰ This recommendation must take into account the responses received in response to the Call.¹⁰¹ BOEM must also “consider all available environmental information, multiple-use conflicts, resource potentials, industry interests, and other relevant information.”¹⁰² Lastly, it must “evaluate fully” any adverse economic impacts that may result, as well as ways to mitigate those impacts.¹⁰³

The process of issuing a lease begins with a proposed notice of sale, which the Director of BOEM prepares and presents to the Secretary of Interior for approval. The proposed notice of lease sale is, upon the Secretary of Interior’s approval, forwarded to the governor of any potentially affected state and published in the Federal Register.¹⁰⁴ Thereafter, the governor of any affected state—and any affected local government within that state—may offer comments on the size, timing, and location of the proposed lease sale.¹⁰⁵ The Secretary of Interior must accept any recommendation by the governor of a state that strikes a “reasonable balance between the National interest and the well-being of the citizens of the affected State.”¹⁰⁶

Once the proposed notice of sale is published, interested parties are afforded sixty days during which they may offer comments.¹⁰⁷ After such comments are duly considered and incorporated as appropriate, the Director of BOEM will publish, subject to the approval of the Secretary of

96. See BOEM Gulf of Mexico OCS Region Blocks and Active Leases by Planning Area (Jun. 1, 2015), <http://www.boem.gov/Gulf-of-Mexico-Region-Lease-Map/> [<http://perma.cc/TYW7-XHBY>].

97. See *Lease Sale Information*, <http://www.boem.gov/GOMR-Historical-Lease-Sale-Information/> [<http://perma.cc/SB3J-58XQ>] (last visited Jun. 25, 2015).

98. 30 C.F.R. § 556.23(b) (2015).

99. *Id.*

100. 30 C.F.R. § 556.26(a).

101. *Id.*

102. *Id.*

103. *Id.*

104. 30 C.F.R. § 556.29.

105. 30 C.F.R. § 556.31.

106. *Id.*

107. *Id.*

the Interior, a notice of lease sale in the Federal Register within at least thirty days of the sale date.¹⁰⁸ The notice of lease sale will describe the areas offered for lease and the terms and conditions of the sale.¹⁰⁹

During the sale process, BOEM will also undertake a NEPA review of the areas proposed for lease.¹¹⁰ This review, typically conducted on an area-wide (or multi-area) and multiple-sale basis,¹¹¹ begins with a notice of intent to prepare an EIS.¹¹² That notice is followed by the release of a draft EIS reviewing the areas proposed for lease.¹¹³ Following multiple opportunities for public comment and revisions of the draft, BOEM will release a final EIS.¹¹⁴

This round of NEPA review is more specific and directed than that process undertaken in the course of developing the Five Year Program, as it is designed to provide the “detailed information and fine geographic scale needed to evaluate block-by-block deferrals or other mitigations in a specific planning area”¹¹⁵ The EIS addresses the proposed actions, any alternatives, any adverse scenarios that might result from the proposed and alternate actions, and potential mitigation measures.¹¹⁶

Lease sales are conducted by competitive sealed bidding.¹¹⁷ The bidder must submit a separate bid for each tract in which it is interested, and that bid must be for an entire tract.¹¹⁸ At the time a bid is placed, the bidder must post a deposit with BOEM in the amount of one-fifth of the bid amount.¹¹⁹ BOEM requires formal qualification in order to bid on or

108. 30 C.F.R. § 556.32.

109. *Id.*; See also 30 C.F.R. § 560.130 (2015) (criteria for selecting lease sale bidding system).

110. For a detailed discussion on this process, see *Outer Continental Shelf (OCS), Gulf of Mexico (GOM), Oil and Gas Lease Sales for 2017–2012*, 80 Fed. Reg. 82 (Apr. 29, 2015), <https://www.federalregister.gov/articles/2015/04/29/2015-10035/outer-continental-shelf-ocs-gulf-of-mexico-gom-oil-and-gas-lease-sales-for-2017-2022> [<https://perma.cc/896B-UU99>].

111. See 40 C.F.R. § 1502.4 (2015). This grouping is permitted by CEQ regulation.

112. See *2012 PFP*, *supra* note 79, at Figure 1.

113. *Id.*

114. *Id.*

115. See *Final Programmatic EIS*, *supra* note 91, at Table 1-1.

116. See generally, *Gulf of Mexico OCS Oil and Gas Lease Sales: 2012–2017; Western Planning Area Lease Sales 229, 233, 238, 246, and 248; Central Planning Area Lease Sales 227, 231, 235, 241, and 247; Final Environmental Impact Statement*, Vols. I–III (Jul. 2012), <http://www.boem.gov/nepaprocess/> [<http://perma.cc/KLJ3-VKHJ>].

117. 30 C.F.R. § 556.32 (2015).

118. 30 C.F.R. § 556.46.

119. *Id.*

to be approved as an assignee of an OCS lease.¹²⁰ Even if an individual or entity is otherwise qualified, BOEM has the discretion to disqualify that individual or entity if their operating history is unacceptable¹²¹ or if the Secretary of Interior finds “that the bidder is not meeting due diligence requirements on other OCS leases.”¹²²

Leases are “awarded only to the highest responsible qualified bidder.”¹²³ BOEM reviews each bid and determines within ninety days which bid, if any, it accepts.¹²⁴ In performing its review BOEM will consider, among other things, whether the bid is “adequate”—that is, whether it offers “fair market value.”¹²⁵ Ultimately, however, the federal government maintains the discretion to reject any bid.¹²⁶

All deposits made toward unsuccessful bids are refundable.¹²⁷ Winning bidders, on the other hand, must pay the balance of their bonus bid plus first year’s rent, execute all lease documents within eleven business days of acceptance, and post the general lease bond.¹²⁸ At this stage, legal interest in the OCS vests in the lessee.

3. Plans and Information

After an OCS lease is issued, the operator may not begin exploration, development, or production until submission of an Exploration Plan (EP) and, as appropriate, a Development and Production Plan (DPP) or a Development Operations Coordination Document (DOCD),¹²⁹ all of

120. See 30 C.F.R. § 556.35. Only certain individuals and entities may qualify, including American citizens and nationals, permanent resident aliens, domestic corporations, and associations comprised of citizens, nationals, domestic corporations, States, or political subdivisions of States.

121. See 30 C.F.R. § 550.135.

122. 30 C.F.R. § 256.46.

123. 30 C.F.R. § 556.35.

124. 30 C.F.R. § 556.47(e)(2).

125. The receipt of “fair market value” is required by Section 18(a)(4) of OCSLA. See also Modifications to the Bid Adequacy Procedure, 64 Fed. Reg. 132 (July 12, 1999), http://www.boem.gov/uploadedFiles/BOEM/Oil_and_Gas_Energy_Program/Energy_Economics/Fair_Market_Value/174BIDAD.pdf.

126. 30 C.F.R. 556.47(b).

127. The availability of this refund is usually communicated in the proposed and final sale notices. See 30 C.F.R. § 556.216(f).

128. 30 C.F.R. § 556.47(f); see notes 161–64, *infra*.

129. BOEM also imposes special planning requirements for certain proposed deepwater activities. See 30 C.F.R. § 550.201 (noting DWOP and CID requirements); see also §§ 550.296–.299 (outlining regulations regarding CIDs).

which are subject to BOEM approval.¹³⁰ No major permits may be issued until such plans are approved.¹³¹

An EP should cover the “who, what, when, where, and how” of the proposed activities from top to bottom.¹³² The plan must contain certain general information, including a list of all applications and pending permits, all drilling fluids and chemical products to be used, and any new or unusual technology that may be employed.¹³³ It must also provide specific information on a host of other subjects—geological and geophysical data; biological, physical, and sociological information; environmental monitoring systems; environmental mitigation plans;¹³⁴ solid and liquid wastes and discharges; air emissions; and the like.¹³⁵

Perhaps the most important requirements, however, are those pertaining to potential oil spills. An EP must include a description of the worst case blowout scenario,¹³⁶ outline an Oil Spill Response Plan (OSRP) approved by BSEE,¹³⁷ and demonstrate Oil Spill Financial Responsibility (OSFR) as required by OPA 90.¹³⁸ Moreover, an EP must be accompanied by a CZMA consistency certification,¹³⁹ it must also include certain

130. 30 C.F.R. § 550.211. BOEM manages a database with all documents and plans that have been filed. Exploration and Development Plans Online Query, http://www.data.boem.gov/homepg/data_center/plans/plans/master.asp [<http://perma.cc/HK43-3RDL>] (last visited Jun. 19, 2015). For additional guidance, see *Information Requirements for Exploration Plans and Development Operations Coordination Documents*, NTL No. 2008-G04 (April 1, 2008), available at <http://www.boem.gov/Regulations/Notices-To-Lessees/2008/08-g04.aspx> [<http://perma.cc/U7JM-R395>].

131. See Part IIB1, *infra*.

132. See Information Requirements for Exploration Plans, Development and Production Plans, and Development Operations Coordination Documents on the OCS for Worst Case Discharge and Blowout Scenarios, NTL No. 2015-N01 (Jan 14, 2015), available at <http://www.boem.gov/NTL-2015-N01/> [hereinafter 2015 Information Requirements NTL]; see also Frequently Asked Questions Information Sheet, NTL No. 2015-N01 FAQ (Jan 14, 2015), available at <http://www.boem.gov/NTL-2015-N01-FAQs/>.

133. 30 C.F.R. § 550.213.

134. Several of these provisions require consideration and application of the Marine Mammal Protection Act (MMPA) and the Endangered Species Act (ESA). See 30 C.F.R. §§ 550.216, .221, .223.

135. 30 C.F.R. § 550.212.

136. 30 C.F.R. § 550.213(g); see also 2015 Information Requirements NTL, *supra* note 132, at pp. 2–3.

137. 30 C.F.R. § 550.219(a); see discussion *infra* Part IIB.

138. 30 C.F.R. § 550.213(e); see discussion *infra* Part IIA5.

139. 30 C.F.R. § 550.226(a). If a state objects to an applicant’s consistency determination, the applicant may either amend its EP to address the objection or appeal the objection to the Secretary of Commerce. § 550.235.

Environmental Impact Analysis (EIA) information so as to “assist” the government with its NEPA obligations.¹⁴⁰

Once an EP is submitted to BOEM, the appropriate Regional Director of that agency processes the application—coordinating with the governors of affected states to solicit comments on the EP, ensuring compliance with OCSLA and BOEM regulations, and evaluating the EIA information.¹⁴¹ Upon evaluation of the EIA information, BOEM will prepare an EA.¹⁴² Ultimately, BOEM has the discretion to approve the EP, require modification, or disapprove it altogether.¹⁴³

In addition to obtaining an approved EP, an operator may not begin to develop and produce from an OCS lease until it submits a proposed Development and Production Plan (DPP) or a Development Operations Coordination Document (DOCD),¹⁴⁴ subject to BOEM approval. The requirements for submitting a DPP or DOCD largely parallel the EP process. Both documents must include certain information about the proposed development and production activities.¹⁴⁵ These submissions must also discuss mineral resource conservation plans,¹⁴⁶ decommissioning plans,¹⁴⁷ and ancillary plans related to general facilities and operations.¹⁴⁸ As with an EP, a DPP or DOCD must be accompanied by a CZMA consistency certification¹⁴⁹ and certain EIA information.¹⁵⁰ Moreover, the DPP or DOCD must include the same oil spill information as an EP: a worst-case discharge scenario, demonstration of OSFR, and an approved OSRP.¹⁵¹ At this point, BOEM will conduct a separate EA.¹⁵²

Once a DPP or DOCD is submitted to BOEM, the Regional Supervisor takes a number of steps. First, the Supervisor will provide copies of the

140. 30 C.F.R. § 550.227.

141. 30 C.F.R. § 550.232.

142. 30 C.F.R. § 550.232(c); *When to Prepare an Environmental Assessment*, <http://www.boem.gov/Environmental-Stewardship/Environmental-Assessment/NEPA/When-to-Prepare-an-Environmental-Assessment.aspx> [<http://perma.cc/K3XE-HNW7>] (last visited Jun. 24, 2015).

143. 30 C.F.R. § 550.233(b).

144. A DOCD is for leases and units in the Western Gulf of Mexico region, while the DPP is for all other regions. *See* 30 C.F.R. § 550.201(a).

145. 30 C.F.R. §§ 550.242, .243.

146. Mineral resource conservation plans include descriptions of reservoir engineering practices and procedures, recovery practices and procedures, and reservoir development. 30 C.F.R. § 550.246.

147. 30 C.F.R. § 550.255.

148. This information must include a discussion of the various OCS facilities that will directly relate to the proposed activities as well as the plans for transporting production to shore. 30 C.F.R. § 550.256.

149. 30 C.F.R. § 550.260.

150. 30 C.F.R. § 550.261.

151. 30 C.F.R. §§ 550.242(h), .243(h), .250.

152. 30 C.F.R. § 550.269.

DPP or DOCD to the public and specifically to the governors of each affected state and the executives of any affected local government that request a copy; all recipients are afforded sixty days to comment.¹⁵³ The Regional Supervisor retains the discretion to approve proposed DPPs or DOCDs, to require modification, or to disapprove them.¹⁵⁴ In making such a determination, he must consider four critical factors: whether the DPP or DOCD complies with OCSLA and BOEM regulations; whether the affected state has failed to act upon or has objected to the CZMA consistency determination; whether the proposed activities would threaten national security; and whether there are any overriding exceptional circumstances.¹⁵⁵ If the Regional Supervisor disapproves or requires modification of a submitted plan, the lessee must revise the plan and the resubmit it, and the process begins anew. It is only upon final approval of the DPP or DOCD that the lessee can commence exploration and development.

4. Rights of Use and Easement

In order to facilitate development and production, BOEM may grant a Right of Use and Easement (RUE) over lands on the applicant does not have a lease.¹⁵⁶ An RUE is useful principally for the construction of platforms and installations that need to be attached to the seafloor.¹⁵⁷ If the proposed RUE will cover OCS lands already subject to an OCS lease by another party, then before BOEM grants an RUE, that lessee must be afforded the opportunity to comment on the proposal;¹⁵⁸ BOEM will not grant an RUE over the party's objection.¹⁵⁹ Moreover, RUEs are subject to certain bonding requirements secured to cover decommissioning liabilities.¹⁶⁰

5. Bonding

BOEM administers three programs designed to insure that decommissioning obligations and potential oil spills are financially covered: general bonding, supplemental bonding, and OSFR.

153. 30 C.F.R. § 550.267.

154. 30 C.F.R. § 550.270.

155. 30 C.F.R. § 550.271.

156. 30 C.F.R. §§ 550.160–162.

157. 30 C.F.R. § 550.160(a).

158. 30 C.F.R. § 550.160(d).

159. See *Rooster Petroleum, LLC v. Fairways Offshore Exploration, Inc.*, No. 12-1322, 2013 WL 6274375, at *10 (E.D. La. Dec. 4, 2013).

160. See 30 C.F.R. § 550.1011.

As a threshold matter, all “designated operators” must post a general bond for any OCS lease assumed,¹⁶¹ which may be lease-specific or area-wide.¹⁶² General bond amounts may be set at one of three levels, depending on the operational stage of oil and gas activities.¹⁶³ These bonding requirements must be satisfied before any changes to a lease assignment or operational activity will be approved.¹⁶⁴

When necessary to ensure compliance with lease and regulatory obligations, BOEM may require additional security in amounts greater than the general bond.¹⁶⁵ If required, the additional security must be based on an assessment of the operator’s ability to satisfy its financial obligations.¹⁶⁶ The Regional Director for the Gulf of Mexico has prescribed guidelines for that area to determine whether supplemental bonding will be required and, if so, in what amount.¹⁶⁷ Under this regime, BOEM applies an established formula that evaluates the lessee’s cumulative potential decommissioning liability and net worth, judged against its debt-to-equity ratio.¹⁶⁸ However, these regional rules and bonding regulations are currently being reevaluated, and they may be adjusted for current and future leases alike.¹⁶⁹

161. 30 C.F.R. § 556.52(c); *Guidelines for General Lease Surety Bonds*, NTL No. 2000-G16 (Sept. 7, 2000), <http://www.boem.gov/Regulations/Notices-To-Lessees/2000/00-g16.aspx> [<http://perma.cc/95D3-G3ML>].

162. There are three OCS “areas”: the Gulf of Mexico and Atlantic area, the Pacific area, and the Alaska area. 30 C.F.R. § 556.52(b).

163. In order to secure a lease (with no operational activity), the operator must post a lease specific bond of \$50,000 or an area-wide bond of at least \$300,000. 30 C.F.R. §§ 556.52(a)(1) & (2). Once an exploration plan (EP) has been submitted, these amounts increase to \$200,000 for a lease-specific bond or \$1,000,000 for an area-wide bond. § 556.53(a). And once a Development and Production Plan (DPP) or a Development Operations Coordination Document (DOCD) is submitted, the amounts increase again, to \$500,000 for a lease-specific bond and \$3,000,000 for an area-wide bond. § 556.53(b).

164. 30 C.F.R. § 556.52(a).

165. 30 C.F.R. § 556.53(d).

166. 30 C.F.R. § 556.53(d)(1).

167. *Supplemental Bond Procedures*, NTL No. 2008-0N07, MINERALS MGMT. SERV. (Aug. 28, 2008), <http://www.boem.gov/NTL-No-2008-N07/> [<http://perma.cc/29Y5-JCLL>].

168. *Id.*

169. *Risk Management, Financial Assurance, and Loss Prevention*, 1010-AD83, BUREAU OF OCEAN ENERGY MGMT., REGULATION, & ENFORCEMENT, <http://www.regulations.gov/#!docketDetail;D=BOEM-2013-0058> [<http://perma.cc/8E43-MSQ9>] (last visited Jun. 12, 2015). This reevaluation was largely precipitated by the high-profile bankruptcy of ATP Oil & Gas Corp. For the backstory, see *In re ATP Oil & Gas Corp.*, No. 12-36187, 2013 WL 3157567, at *1 (Bankr. S.D. Tex. June 19, 2013); see also Independent Petroleum Association of America, *Comments on BOEM’s Risk Management, Financial Assurance, and Loss Prevention ANPR*, INDEP. PETROLEUM ASS’N AM., 17–24 (Nov. 17, 2014), <http://www.ipaa.org/wp-content/uploads/downloads/2014/11/IPAA-BOEM-ANPR-Final-Comments.pdf> [<http://perma.cc/YX4H-YF7S>].

Finally, BOEM also administers OPA 90's OSFR requirements.¹⁷⁰ The term OSFR refers to the "capability and means by which a responsible party for a covered offshore facility will meet removal costs and damages for which it is liable under [OPA 90]"¹⁷¹ Under these regulations, the "designated applicant"¹⁷² for each covered offshore facility (COF)¹⁷³ must demonstrate OSFR in the highest amount applicable to any COF for which it is the designated applicant.¹⁷⁴ The requisite amount of OSFR is based on a calculation of the worst-case potential oil spill discharge volume.¹⁷⁵ The designated applicant may demonstrate OSFR in a number of ways, including self-insurance, third-party insurance, indemnity, surety bond, or by any other method approved by the Director of BOEM.¹⁷⁶

Each OCS lease issued may be subject to different bonding requirements. The three different bond structures are tailored to the specific nature and risks of the OCS leases on an individual basis. In doing so, BOEM is able to ensure sufficient coverage of costs related to decommissioning and environmental conservation; thus reducing the risk posed by activities on the OCS.

6. Lease Management

In addition to its various roles in the leasing process, BOEM insures that contractual obligations are satisfied throughout the term of the lease. To this end, BOEM plays two essential roles. First, it must approve, among other things, qualification, designation, and transfer of operators and operatorship, and assignments of working record title and operating rights. In adjudicating these matters, BOEM looks to ensure that the assignee is qualified and that the required bonding and OSFR is in place.¹⁷⁷

BOEM's second role is ensuring compliance with OCS lease terms. It enforces these obligations through the citation process; BOEM may cite a

170. 30 C.F.R. § 553 (2015); 33 U.S.C. §§ 2701–20 (2015); *Guidelines for Oil Spill Financial Responsibility (OSFR) for Covered Facilities*, NTL No. 2008-N05, MINERALS MGMT. SERV. (Aug. 26, 2008), <http://www.bsee.gov/Regulations-and-Guidance/Notices-to-Lessees/2008/08-n05/> [<http://perma.cc/7DQ6-Q95V>].

171. 30 C.F.R. § 553.3 (2015).

172. *Id.*

173. *Id.* COFs generally include all structures and their component parts (including wells), equipment, pipelines, and devices, which have a worst case oil-spill discharge potential which exceeds 1,000 barrels of oil.

174. 30 C.F.R. § 553.13.

175. 30 C.F.R. § 553.14. The worst case discharge calculation is used in a number of other related contexts. *See* note 222, *infra*.

176. 30 C.F.R. § 553.20. For context on how OSFR works in practice, see *Jefferson Block 24 Oil & Gas, L.L.C. v. Aspen Ins. UK Ltd.*, 652 F.3d 584 (5th Cir. 2011).

177. For a discussion on the adjudication process, see Joan Seelman, *Overview of Adjudication Unit Filings* (Apr. 8, 2014), available at <http://www.smr-lawfirm.com>.

lessee for violation of a provision of the lease itself or for violating a federal regulation.¹⁷⁸ Depending on the citation issued, BOEM can revoke certain rights, levy civil penalties, or, ultimately, cancel a lease.

BOEM maintains the authority to disapprove or revoke an operator's designation if the "operating performance is unacceptable,"¹⁷⁹ and it has wide latitude to determine whether a given operator's performance is sufficient. In making such determinations, BOEM examines many aspects of an operator's performance, including incidents of noncompliance, civil penalties, and failures to adhere to OCS lease obligations.¹⁸⁰ Furthermore, BOEM has the authority to levy civil penalties in certain situations, namely those involving: (1) BOEM citations that are not timely corrected, (2) violations of OSFR requirements,¹⁸¹ and (3) mandatory penalties under the Federal Oil and Gas Royalty Management Act (FOGRMA).¹⁸²

BOEM may also cancel leases in circumstances where there is probable cause to believe that (1) continued activity will damage property, mineral deposits or the marine, coastal, or human environment; (2) the situation is unlikely to change in the immediate future; (3) lease cancellation is a preferable option to continuing the lease; and (4) the lease has been suspended for at least five years or the lessee requests cancellation.¹⁸³ In most cases the lessee is entitled to compensation, unless the cancellation results from certain specified situations, such as a lack of CZMA concurrence, failure to submit a DPP, or failure to comply with an approved DPP.¹⁸⁴

B. Bureau of Safety and Environmental Enforcement

In addition to BOEM's involvement with lease management, BSEE plays a central role in overseeing activity on those leases. As a general requirement, actors on the OCS must perform all operations in a safe and workmanlike manner, while maintaining all equipment and work areas in a safe condition.¹⁸⁵ To this end, BSEE is authorized to regulate

178. *National Office Potential Incident of Noncompliance (PINC) List*, BUREAU OF OCEAN ENERGY MGMT., REGULATION, & ENFORCEMENT (updated Oct. 2010), <http://www.boem.gov/Regulations/National-Office-PINC-List.aspx> [<http://perma.cc/RWZ5-LN5C>].

179. 30 C.F.R. § 550.135 (2015).

180. 30 C.F.R. § 550.136. For additional discussion on "incidents of noncompliance," see note 206, *infra*.

181. 30 C.F.R. § 550.1404.

182. 30 C.F.R. § 550.1450.

183. 30 C.F.R. § 550.181.

184. 30 C.F.R. § 550.185. For an example of when refunds are warranted, consider *Amber Resources Co. v. U.S.*, 538 F.3d 1358 (Fed. Cir. 2008).

185. 30 C.F.R. § 250.107(a).

exploration, development, and production operations on the OCS.¹⁸⁶ In addition, it requires employment of the “best available and safest technology” (BAST) when appropriate.¹⁸⁷

As with BOEM’s regulatory authority, most of BSEE’s requirements are found in the Code of Federal Regulations, but BSEE also issues Notices to Lessees and Operators (NTLs) explaining regulations in greater detail. Nevertheless, regulators at the enforcement level enjoy certain levels of discretion as to how those regulations are applied in practice.

BSEE imposes rigorous requirements on every facet of the industry to accomplish its goals. To illustrate, BSEE presides over the life of the well—from drilling operations,¹⁸⁸ to completion operations,¹⁸⁹ to workover,¹⁹⁰ and finally ending with decommissioning.¹⁹¹ Regulations cover materials and structures, including production safety systems,¹⁹² platform and structure design, maintenance, and fabrication.¹⁹³

BSEE also administers a number of regulations beyond the scope of its safety mission. For example, the measurement of oil and gas production and surface commingling fall under BSEE control,¹⁹⁴ as does the administration of voluntary and involuntary unitization processes.¹⁹⁵ Moreover, BSEE is empowered to provide royalty relief to lessees in certain circumstances.¹⁹⁶

186. 30 C.F.R. § 250.101.

187. 30 C.F.R. §§ 250.107(c)–(d).

188. 30 C.F.R. §§ 250.400–490. This includes drilling permits, casing and cementing, diverter systems, blowout preventers, drilling fluid, etc.

189. 30 C.F.R. §§ 250.500–531.

190. 30 C.F.R. §§ 250.600–620.

191. 30 C.F.R. §§ 250.1700–1754. This subpart includes plugging and abandonment, platform removal, site clearance, and pipeline decommissioning.

192. 30 C.F.R. §§ 250.800–808.

193. 30 C.F.R. §§ 250.900–921.

194. 30 C.F.R. §§ 250.1200–1205.

195. 30 C.F.R. §§ 250.1300–1304.

196. Various provisions within Section 8 of OCSLA authorize royalty relief. 43 U.S.C. § 1337 (2015). BSEE has the discretion to grant relief in “end of life” lease situations, 43 U.S.C. §§ 1337(a)(3)(A) & (B) (2015); 30 C.F.R. §§ 203.50–56 (2015), and in “special circumstances.” 30 C.F.R. § 203.80. BSEE administers the royalty relief provisions of the Deep Water Royalty Relief Act (DWRRA) for those OCS leases granted prior to November 28, 1995 and those granted after November 28, 2000, though BSEE no longer administers DWRRA for leases granted between those dates. *See* Information to Lessees (Aug. 8, 2005), <http://www.boem.gov/Regulations/Information-to-Lessees/Santa-Fe-Snyder-ITL.aspx> [<http://perma.cc/XQ7Y-GAKX>]. Relief under these provisions is automatic. *See* Santa Fe Snyder v. Norton, 385 F.3d 884 (5th Cir. 2004). And lastly, BSEE is tasked with providing royalty relief for qualifying “deep gas wells” and “ultra-deep” wells that are not otherwise eligible for deep water royalty relief. 30 C.F.R. §§ 203.30–36; 30 C.F.R. §§ 203.40–48. Note that the Energy Policy Act of 2005 also provides royalty relief for certain deep water relief, but as with certain leases under DWRRA, this relief is

As with BOEM, BSEE allocates its responsibilities between several divisions and offices; it also has three regional offices, each run by a regional director.¹⁹⁷ Regional offices are primarily charged with reviewing permits and conducting inspections to ensure compliance with all relevant laws, regulations, and permits.¹⁹⁸

1. Permitting

In conjunction with its other regulatory functions, BSEE manages the permitting process for all OCS activities. Applicants may seek one of three major permits, depending on the proposed activity or the structure involved. The first type is granted through a process employing the Application for Permit to Drill (APD).¹⁹⁹ The second type is issued through the Platform Approval Program (PAP),²⁰⁰ and the third may be obtained by submitting an Application for Pipeline Right-of-Way Grant (APROW).²⁰¹ This permitting process, especially in the context of an ADP, is inextricably linked to the EP, DPP, and DOCD processes and requirements administered by BOEM.²⁰²

2. Inspections and Enforcement

BSEE may perform scheduled or unscheduled²⁰³ inspections of any OCS facility as well as any vessel that is engaged in drilling or other downhole operations.²⁰⁴ Through these inspections, BSEE is able to verify compliance with any number of requirements, including those imposed by the applicable lease, OCSLA, regulations, and BSEE-approved plans.²⁰⁵ To ensure a measure of consistency, BSEE has promulgated a list of Potential Incidents of Non-Compliance (PINCs), which it uses in determining whether operators or contractors are in compliance with federal regulations.²⁰⁶

automatic and not administered by BSEE.

197. BSEE Organizational Chart, <http://www.bsee.gov/WorkArea/DownloadAsset.aspx?id=85899353164> [<http://perma.cc/WBJ9-7N7R>] (last visited Jun. 24, 2015).

198. Gulf of Mexico Region, <http://www.bsee.gov/About-BSEE/BSEE-Regions/Gulf-of-Mexico-Region/> [<http://perma.cc/F368-Z7ZK>] (last visited Jun. 24, 2015).

199. 30 C.F.R. § 250.410 (2015).

200. 30 C.F.R. § 250.905.

201. 30 C.F.R. § 250.1015.

202. See discussion in Part IIA3, *supra*.

203. 30 C.F.R. § 250.131.

204. 30 C.F.R. § 250.130.

205. 30 C.F.R. § 250.130(a).

206. *Potential Incident of Noncompliance – PINC*, <http://www.bsee.gov>

If BSEE observes a violation, a civil penalty may be levied as appropriate.²⁰⁷ In certain circumstances, however, BSEE may, at its discretion, provide an opportunity to correct the violation and avoid penalty.²⁰⁸ Where a penalty is assigned, the amount is based on the severity of the violation or violations, the operator's history of compliance, and the size of the company.²⁰⁹

Ultimately, BSEE can declare performance "unacceptable" based on accidents, pollution, environmental damage, specific incidents of noncompliance, or civil penalties issued.²¹⁰ If BSEE makes such a designation, it will refer the matter to BOEM, which may subsequently decide to disqualify the operator.²¹¹

3. Safety and Environmental Management Systems Programs

BSEE requires nearly all actors²¹² on the OCS to develop and implement a Safety and Environmental Management System (SEMS) Program.²¹³ BSEE considers the SEMS Program Initiative to be "the cornerstone of a hybrid regulatory approach that emphasizes performance in order to achieve risk reduction offshore."²¹⁴

SEMS Programs are intended to create comprehensive safety documents that identify all potential safety hazards.²¹⁵ A SEMS Program itself does not require BSEE approval, but must be made available for

/Inspection-and-Enforcement/Enforcement-Programs/Potential-Incident-of-Noncompliance---PINC/ [http://perma.cc/M28F-H2EK] (last visited Jun. 12, 2015).

207. 30 C.F.R. § 250.1400.

208. 30 C.F.R. § 250.1451.

209. 30 C.F.R. § 250.1471. The maximum penalty BSEE may impose is \$40,000 per day per incident. § 250.1403.

210. 30 C.F.R. §§ 250.135, .136.

211. 30 C.F.R. § 250.135; *see also Revised Assessment Matrix*, NTL 2011-N06 (Jul. 30, 2011), <http://www.bsee.gov/Regulations-and-Guidance/Notices-to-Lessees/2011/11-n06/> [http://perma.cc/G7AB-V8BD].

212. The regulations continuously speak to "You", which includes lessees, owners or holders of operating rights, operators, and holders of pipeline rights-of-way. 30 C.F.R. § 250.105.

213. 30 C.F.R. § 250.1900; "Guidance on the Development, Implementation and Maintenance of a Safety and Environmental Management Systems (SEMS) Program for Outer Continental Shelf (OCS) Oil, Gas and Sulphur Operations", NTL No. 2011-N09 (Oct. 21, 2011), <http://www.bsee.gov/Regulations-and-Guidance/Notices-to-Lessees/2011/11-N09/> [http://perma.cc/N7FN-MJVT].

214. BUREAU OF SAFETY & ENVTL. ENFORCEMENT, ANNUAL REPORT 2014, http://www.bsee.gov/uploadedFiles/BSEE/BSEE_Newsroom/Publications_Library/Annual_Report/BSEE%202014%20Annual%20Report.pdf [http://perma.cc/6BVQ-CU4D] (last visited Jun. 11, 2015).

215. 30 C.F.R. § 250.1901.

BSEE's inspection upon request.²¹⁶ A complete SEMS Program must incorporate a minimum criteria of seventeen program elements, including operational procedures, safe working practices, incident investigation, and work authority.²¹⁷ Moreover, per BSEE regulations, SEMS Programs must meet or exceed an exhaustive list of industry standards adopted by the American Petroleum Institute.²¹⁸

4. Oil Spill Preparedness

BSEE also imposes and enforces oil spill response requirements on all offshore facilities, even those located within state waters.²¹⁹ These requirements also extend to offshore pipelines.²²⁰ An owner or operator of an offshore facility must submit an Oil Spill Response Plan (OSRP) for each facility or pipeline under its control, and BSEE must approve the plan before operation of that facility or pipeline can commence.²²¹ The OSRP must be updated each time significant changes are made to the facilities or operations.²²² All operations must be conducted in conformity with an approved and up-to-date plan.²²³

An OSRP for an OCS facility must satisfy a number of criteria. All plans must include an emergency response action plan, an inventory of all equipment, a list of relevant contracts, contingency provisions for a worst-case discharge scenario, plans for the use of dispersants, an *in situ* burning plan, and a thorough discussion of training and drills.²²⁴ BSEE also mandates specialized training for response personnel, execution of practice exercises for personnel and equipment, routine maintenance and periodic inspection of response equipment, and implementation of a number of other safety procedures.²²⁵

Of these requirements, perhaps the single most important is the worst-case discharge scenario. As a primary consideration, BSEE plan must determine the projected volume of a worst-case spill, and BSEE provides

216. 30 C.F.R. § 250.1902. BSEE has begun performing routine audits of SEMS programs to ensure compliance. ANNUAL REPORT 2014, *supra* note 214, at 10.

217. 30 C.F.R. § 250.1902(a).

218. 30 C.F.R. § 250.1902(c); 30 C.F.R. § 250.198(h)(79).

219. 30 C.F.R. § 254.1(a).

220. Dry gas is exempted. 30 C.F.R. § 254.1(c).

221. 30 C.F.R. § 254.2(a).

222. 30 C.F.R. § 254.30(b)(2); *see also* NTL No. 2013-N02, *Significant Change to Oil Spill Response Plan Worst Case Discharge Scenario* (Aug. 26, 2013), http://www.bsee.gov/uploadedFiles/BSEE/Regulations_and_Guidance/Notices_to_Lessees/2013/NTL2013-N02.PDF [<http://perma.cc/BV6R-3QSW>].

223. 30 C.F.R. § 254.2(a).

224. 30 C.F.R. § 254.21(b).

225. 30 C.F.R. §§ 254.41–43.

metrics to facilitate volume calculations for platforms, exploratory or drilling operations, and pipelines.²²⁶ Following this volume projection, owners and operators must then detail how they would respond to a worst case spill, describing the necessary equipment, personnel, and support vessels in addition to an estimate of the probable response time.²²⁷ This scenario must take into account the likely trajectory and persistence of the spill in the area, adjacent environmentally sensitive areas, and the effects of possible adverse weather conditions.²²⁸ The OSRP mandate ensures that, if and when oil spills occur, key players are prepared to mitigate the damage.

5. *Suspensions of Operation or Production*

BSEE's Regional Supervisors have the authority to suspend operations or production activities on OCS leases by ordering a Suspension of Operations (SOO) or Suspension of Production (SOP).²²⁹ SOOs and SOPs are necessary to hold the lease at the end of its term. The two serve different, but related, functions. SOOs apply to situations where, despite diligent efforts, the drilling of a well is delayed as a result of factors beyond the lessee's control, such as "unexpected weather, unavoidable accidents, or drilling rig delays."²³⁰ In contrast, SOPs apply to situations where the lessee needs additional time "to properly develop [its] lease" in order to erect production facilities, secure means of transporting product, or procure sales contracts.²³¹

In each case, BSEE requires a statement from the lessee regarding why an SOO or SOP is needed and for how long, as well as a "reasonable schedule of work" that will bring operations or production back online.²³² And in the case of an SOP, the lessee must both make a showing that a well capable of producing in paying quantities has been drilled, and also make a sufficient showing of its "commitment to production."²³³

The Regional Supervisors may grant an SOO or SOP by request of the lessee or, in certain cases, of their own accord.²³⁴ A Supervisor has wide

226. 30 C.F.R. § 254.47.

227. 30 C.F.R. §§ 254.26(d)(1)–(4).

228. 30 C.F.R. §§ 254.26(b)–(d).

229. 30 C.F.R. § 250.168.

230. 30 C.F.R. § 250.175(a).

231. 30 C.F.R. § 250.174.

232. 30 C.F.R. §§ 250.171(a), (b).

233. 30 C.F.R. §§ 250.171(c), (d); *see also* Suspension of Production/Operations Overview, NTL No. 2000-G17 (Sept. 1, 2000).

234. 30 C.F.R. § 250.172. The Secretary of Interior purported to act in accordance with the SOO/SOP provisions when issuing the moratorium after the

latitude to grant or deny a request for an SOO or SOP,²³⁵ and the Supervisor may order an SOO or SOP when the operating or producing party is noncompliant with “an applicable law, regulation, order, or provision of a lease or permit” or when “[t]he suspension is in the interest of National security or defense.”²³⁶ By issuing SOOs and SOPs, BSEE is able to better control operations on the OCS and infuse flexibility into the otherwise inflexible process when the realities of development and production so demand.

6. Decommissioning

Ensuring safe and effective decommissioning of inactive wells is of the utmost importance on the OCS, and responsibility for those processes is one of the primary obligations that operators assume. All lessees and grantees are jointly and severally liable for all decommissioning costs and obligations related to their operation sites.²³⁷ These obligations include the plugging and abandonment of all wells,²³⁸ decommissioning or removing all OCS facilities and constructions (including pipelines) and clearing the seafloor of obstructions.²³⁹ These obligations must be satisfied within one year of the expiration of the applicable lease, right-of-way, or RUE.²⁴⁰

While BOEM administers decommissioning bond requirements, BSEE ultimately enforces the actual decommissioning obligations when the time comes.²⁴¹ If lessees or right-of-way holders fail to satisfy their decommissioning obligations in accordance with BSEE regulations and orders, their general and supplemental bonds are subject to forfeiture.²⁴²

Deepwater Horizon incident. See *Hornbeck Offshore Servs., L.L.C. v. Salazar*, 696 F. Supp. 2d 627, 631–32 (E.D. La. 2010).

235. 30 C.F.R. § 250.175 (visiting factors for considering a discretionary SOO); see *ATP Oil & Gas Corp. v. Dep’t of Interior*, Civ. A. 08-1514, 2009 WL 2777868, at *5 (E.D. La. 2009).

236. 30 C.F.R. § 250.173(b).

237. 30 C.F.R. § 250.1701.

238. 30 C.F.R. § 250.1710.

239. 30 C.F.R. § 250.1725.

240. *Id.*

241. 30 C.F.R. §§ 250.1700–.1754 For additional discussion see MINERALS MANAGEMENT SERVICE, U.S. DEP’T OF THE INTERIOR, STRUCTURE-REMOVAL OPERATIONS ON THE GULF OF MEXICO OUTER CONTINENTAL SHELF: PROGRAMMATIC ENVIRONMENTAL ASSESSMENT, MMS 2005-013 (Feb. 2005), <http://www.boem.gov/BOEM-Newsroom/Library/Publications/2005/2005-013.aspx> [<http://perma.cc/MEV4-YVEL>].

242. See discussion *infra* Section II.A.5.

C. Office of Natural Resource Revenue

The Secretary of Interior is also charged with royalty collection and distribution.²⁴³ But as previously discussed, the Secretary has largely delegated this responsibility to the Office of Natural Resource Revenue (ONRR).²⁴⁴ ONRR engages in significant data collection from lessees and operators regarding, among other things, production volumes and royalties.²⁴⁵ Any party that may owe royalties must submit monthly production and royalty reports on ONRR-approved forms, accompanied by the royalty amount due and owing for the prior month's production, insofar as royalties are owed.²⁴⁶

As with the royalty and production reports, royalty payments are due at the end of the month following the month during which the oil or gas was produced.²⁴⁷ If a payor underpays royalties, interest accrues on the amount underpaid from the due date at the rate of interest published by the Internal Revenue Service (IRS).²⁴⁸ Late payments and underpayments are also subject to late payment charges.²⁴⁹

Lessees, operators, and royalty payors must retain records regarding lease operations for at least six years, and sometimes longer if ONRR initiates an audit or orders preservation of records for an additional period of time.²⁵⁰ As several courts have acknowledged, this retention requirement is quite encompassing.²⁵¹

ONRR has the right to audit any party required to make a payment pursuant to an OCS lease;²⁵² this audit power is remarkably expansive.²⁵³ In support of its mission to collect royalties, the Secretary of Interior is authorized to issue subpoenas, administer oaths, and engage in traditional forms of discovery.²⁵⁴

243. 30 U.S.C. §§ 1711–26 (2015). This codification is largely comprised of the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), Pub. L. No. 97-451, 96 Stat. 2447, as amended by the Federal Oil and Gas Royalty Simplification and Fairness Act of 1996 (FOGRSFA), Pub. L. No. 104-185, 110 Stat. 1700; *see also* 43 U.S.C. § 1338 (2015).

244. *See generally* 30 C.F.R. Chapter XII (2015).

245. 30 C.F.R. § 1210.01 (2015).

246. 30 C.F.R. §§ 1210.50, .53, .101(a), .102, .103.

247. 30 C.F.R. § 1218.50(a).

248. 30 C.F.R. § 1218.54. On the flip side, if a payor overpays royalties, it may recoup the amount of overpayment. § 1218.53.

249. 30 C.F.R. § 1218.150.

250. 30 C.F.R. §§ 1212.50–51.

251. *See Santa Fe Energy Prods. Co. v. McCutcheon*, 90 F.3d 409 (10th Cir. 1996); *Shell Oil Co. v. Babbitt*, 125 F.3d 172 (3d Cir. 1997).

252. 30 C.F.R. § 1217.50.

253. *See Phillips Petroleum v. Lujan*, 963 F.2d 1380 (10th Cir. 1992).

254. 30 U.S.C. § 1717 (2015).

ONRR may assess civil penalties for underpayment or failure to pay royalties owed.²⁵⁵ In many cases, ONRR may issue a notice of non-compliance prior to issuing a penalty, thereby affording the non-complying party an opportunity to correct the matter voluntarily.²⁵⁶ In certain situations, however, ONRR lacks the discretion to permit correction; some penalties are automatic under the Federal Oil and Gas Royalty Management Act (FOGRMA).²⁵⁷ In considering what the penalty amount should be, ONRR will consider the severity of the violation, the history of compliance, and the size of the violating business.²⁵⁸

ONRR also collects the annual rental due under applicable OCS leases, and it exercises a number of methods to effectuate debt collection.²⁵⁹ For example, if a debt is 180 days past due, ONRR may refer the matter to the Department of Treasury to initiate collection proceedings.²⁶⁰ It may further recommend to other agencies, including BOEM and BSEE, revocation of the debtor's lease, licenses, grants, and permits.²⁶¹

Lastly, ONRR calculates and pays the amounts due to various states under the myriad laws authorizing revenue sharing.²⁶² Along with payment, it also provides an explanation of the payment calculation.²⁶³

255. 30 U.S.C. § 1702.

256. 30 C.F.R. §§ 1241.51–.56.

257. 30 C.F.R. § 1241.60. Penalties are automatic for knowingly or willfully failing to pay royalties or for failing or refusing to permit an inspection or audit. 30 U.S.C. § 1719(c). Penalties are also automatic for knowingly or willfully providing false information to ONRR. 30 U.S.C. § 1719(d).

258. 30 C.F.R. § 1241.70.

259. 30 C.F.R. § 1218.151.

260. 30 C.F.R. §§ 1218.702–.703.

261. 30 C.F.R. § 1218.705.

262. 30 C.F.R. § 1219.100. Three revenue-sharing programs are worth mentioning: First, coastal states receive twenty-seven percent of all royalties collected from federal leases located within the first three nautical miles of the OCS that is seaward of the States' territorial limits (colloquially, the "8G Line"). See Comprehensive Omnibus Budget Reconciliation Act, P.L. 99-272, 100 Stat. 148–151, amending and codified as Section 8(g) of OCSLA, 43 U.S.C. § 1337(g). Second, coastal states receive certain grant moneys for environmental protection efforts under the Coastal Impact Assistance Program (CIAP). See Section 384, Energy Policy Act of 2005, P.L. 109-58, 119 Stat. 737, codified as Section 31 of OCSLA, 43 U.S.C. § 1356a; see also Office of Inspector General, *Management of the Coastal Impact Assistance Program in the State of Louisiana*, at 2–3 (Sept. 2014), <https://www.doi.gov/sites/doi.gov/files/ER-IN-FWS-0010-2013Public.pdf> [<https://perma.cc/EZ96-BS43>]. Third, Gulf States and their local governments receive a percentage of royalties from certain OCS leases in the Gulf of Mexico. See Gulf of Mexico Energy Security Act, Pub. L. No. 109-432, 120 Stat. 3001. (2006).

263. 30 C.F.R. § 1219.104.

D. Administrative Appeals to the Interior Board of Land Appeals

An absolute prerequisite to contesting any agency decision or order is exhaustion of the aggrieved party's administrative remedies. This requirement applies to orders from BOEM, BSEE, and ONRR, alike.²⁶⁴ All three Interior bureaus provide administrative appeals processes designed to resolve disputes prior to judicial intervention.²⁶⁵

BOEM's and BSEE's appeals processes are substantially similar. Any party adversely affected by a final order or decision of BSEE may, with some exceptions, appeal that decision or order to the Interior Board of Land Appeals (IBLA), within sixty days of receipt of the final order,²⁶⁶ but only after first filing a Notice of Appeal with the issuing authority that promulgated the final order.²⁶⁷ The appealing party must continue to comply with BOEM or BSEE order in the interim, unless (1) BOEM or BSEE directs otherwise; (2) the aggrieved party posts a surety bond, if the order is a civil penalty; or (3) the IBLA grants a request for stay pending the adjudication of the appeal.²⁶⁸

ONRR's appeals process is slightly different. It employs a two-part process under which final orders are appealable first to the ONRR Director²⁶⁹ and then to the IBLA.²⁷⁰ Additionally, when lodging an appeal with the ONRR Director, the aggrieved party must file notice with the issuing authority within thirty days of service, as opposed to the sixty days required by BSEE and BOEM.²⁷¹

Once before the IBLA, appeals are conducted in accordance with a special set of administrative rules and procedures.²⁷² Only after the IBLA

264. See 30 C.F.R. § 290.8 (BSEE), § 590.8 (BOEM); § 1290.110 (ONRR).

265. For an in-depth discussion of the nuances in Interior administrative appeals, see Sarah L. Inderbitzin, *Appeals of ONRR, BSEE, and BOEM Orders, Decisions, INCs, NONCs, and Penalty Assessments: What Do I Do Now?*, <http://www.onrr.gov/compliance/PDFDocs/RMMLF-Appeals-Final.pdf> [<http://perma.cc/4XA6-JFK9>] (last visited June 19, 2015).

266. 30 C.F.R. § 290.2 (BSEE), § 590.3 (BOEM).

267. 30 C.F.R. § 290.4(a) (BSEE), § 590.4(a) (BOEM). Timely filing of a Notice of Appeal is a jurisdictional requirement, and an appeal will be dismissed if the notice is not filed. See, e.g., *American Petroleum Energy Co.*, 160 Interior Dec. 59 (IBLA 2003).

268. 30 C.F.R. § 290.7 (BSEE), § 590.7 (BOEM).

269. 30 C.F.R. § 1290.105(a).

270. 30 C.F.R. § 1290.108.

271. 30 C.F.R. § 1290.105(a).

272. 43 C.F.R. §§ 4.20–31 (Part 4, Subpart B), .40–.452-9 (Part 4, Subpart E), .901–.909 (Part 4, Subpart J) (2015); IBLA Manual (Nov. 5, 2010), <https://www.doi.gov/sites/doi.gov/files/uploads/IBLAMManual-2011.pdf> [<https://perma.cc/75R5-9DWU>].

has rendered its decision may a party that is aggrieved by an adverse finding seek judicial relief in the appropriate forum.²⁷³

IV. WHAT IS LEFT?

As previously mentioned, leasing and operational activities on the OCS are subject to more than thirty federal laws which are administered by a variety of federal agencies and departments. A few entities within that patchwork warrant further discussion.

A. Coast Guard

By virtue of the authority granted under numerous federal statutes, the United States Coast Guard (USCG) is tasked with a variety of relevant responsibilities on the OCS, mainly regarding navigation and workplace safety.²⁷⁴ The USCG has the jurisdiction to investigate certain incidents occurring on the OCS, including substantial fires or oil spills and events leading to death or serious injury.²⁷⁵ It also enforces specified workplace safety rules on the OCS, particularly those pertaining to general workplace conditions²⁷⁶ and the provision of protective equipment for employees.²⁷⁷ Moreover, the USCG prescribes design and equipment standards for

273. See 5 U.S.C. § 704 (2015) (“Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.”).

274. See, e.g., Ports and Waterways Safety Act, 33 U.S.C. §§ 1221–36 (2015); Magnuson-Stevens Fisheries Conservation and Management Act, 16 U.S.C. §§ 1801–91 (2015); Endangered Species Act, 16 U.S.C. §§ 1531–44; Marine Mammal Protection Act, 16 U.S.C. §§ 1361–1423h.

275. 33 C.F.R. § 140.201 (2015).

276. 33 C.F.R. §§ 142.81–90. The Occupational Safety and Health Administration (OSHA) may also enforce workplace safety laws on the OCS so long as jurisdiction is not otherwise preempted by another federal agency. 29 U.S.C. § 653(b)(1) (2015) (declaring that OSHA regulations “apply to working conditions of employees with respect to which other Federal Agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health.”). “Preemption” in this context means that the other agency has “promulgat[ed] specific regulations or [] assert[ed] comprehensive regulatory authority . . .” *Chao v. Mallard Bay Drilling*, 534 U.S. 235, 243. There is considerable overlap between the regulatory authority of OSHA and the Coast Guard, and pursuant to a Memorandum of Understanding between the agencies, OSHA’s jurisdiction is largely confined to incidents of discrimination and recordkeeping. Memorandum of Understanding, 48 Fed. Reg. 11,365 (Mar. 17, 1983); see also Daniel H. Wooster, *Welcome Aboard, OSHA: Occupational Safety and Health Regulations May Apply to Uninspected Vessels in State Waters*, 27 TUL. MAR. L.J. 227 (2002) (mapping the overlap between OSHA and Coast Guard regulatory authority).

277. 33 C.F.R. §§ 142.21–48.

operations on the OCS, including facilities,²⁷⁸ various types of vessels,²⁷⁹ and Mobile Offshore Drilling Units (MODUs).²⁸⁰ The USCG enforces certain general rules regarding appropriate operations for all OCS facilities,²⁸¹ with specific rules applying to manned facilities,²⁸² MODUs,²⁸³ and other vessels.²⁸⁴ Additionally, it regulates navigational issues related to fixed structures on the OCS, requires the installation of particular sound equipment and lights, and carries out other miscellaneous precautionary measures.²⁸⁵ To that end, the USCG has enacted “safety zones” around some OCS facilities where access is restricted in order to prevent accidents.²⁸⁶

The USCG possesses the authority to inspect any OCS activity or facility at any time.²⁸⁷ Although it conducts annual inspections of all fixed OCS facilities, this duty remains largely relegated to self-inspection.²⁸⁸ BSEE, however, inspects USCG-related items on OCS facilities on USCG’s behalf, as part of its routine inspection regime.²⁸⁹ This overlay is indicative of the many ways that USCG’s jurisdiction over OCS activities overlaps with that of BSEE. In order to prevent unnecessary duplication of efforts, the Coast Guard and BSEE adhere to a Memorandum of Understanding (MOU) wherein each recognizes the roles and responsibilities of the other.²⁹⁰ The USCG and BSEE have entered into other, more specific MOUs regarding incident investigations, floating offshore facilities, Safety Management Systems (SMS), SEMS, MODUs, and fixed OCS facilities.²⁹¹

278. 33 C.F.R. §§ 143.100–.120.

279. 33 C.F.R. §§ 143.300–.407.

280. 33 C.F.R. §§ 143.200–.210.

281. 33 C.F.R. §§ 146.1–.5.

282. 33 C.F.R. § 146.101.

283. 33 C.F.R. §§ 146.200–.215.

284. 33 C.F.R. §§ 146.301–.405.

285. 33 C.F.R. §§ 67.01–.50.

286. 33 C.F.R. §§ 147.1–.1116.

287. 33 C.F.R. § 140.101(a), (c).

288. 33 C.F.R. § 140.103.

289. See 33 C.F.R. § 140.101(b). To this end, BSEE utilizes a special list of Potential Incidents of Noncompliance referred to as the “Z-PINCS”. See *Personal Safety Guidelines*, BUREAU OF SAFETY AND ENVTL. ENFORCEMENT, http://www.bsee.gov/uploadedFiles/BSEE/Enforcement/Inspection_Programs/GL-Z.pdf [<http://perma.cc/737G-D8PL>] (last updated May, 2008).

290. *Memorandum of Understanding Between the Bureau of Safety and Environmental Enforcement – U.S. Department of Interior, and the U.S. Coast Guard – U.S. Department of Homeland Security*, U.S. COAST GUARD (Nov. 27, 2012), http://www.uscg.mil/hq/cg5/cg522/cg5222/docs/mou/BSEE_USCG_MOU_NOV_2012.pdf [<http://perma.cc/C5N6-GQ73>].

291. See generally, *Memoranda of Understanding (MOUs) & Memoranda of Agreement (MOAs)*, U.S. COAST GUARD (last modified Aug. 7, 2015), <http://www.uscg.mil/hq/cg5/cg522/cg5222/mou.asp> [<http://perma.cc/Y8PS-R982>].

Finally, the USCG enforces and administers several provisions of OPA 90.²⁹² For example, to maintain compliance with OPA 90, a responsible party must receive a Certificate of Financial Responsibility (COFR) from the USCG in addition to the requisite OSFR certification from BOEM.²⁹³ Through extensive efforts, the USCG helps make sure that the OCS remains safe for workers and vessels carrying out business on its waters.

B. Environmental Protection Agency

The Environmental Protection Agency (EPA) also plays an important role on the OCS, enforcing provisions of the Clean Water Act (CWA) and the Clean Air Act (CAA), among numerous other statutes and regulations. As an example, under Section 402 of the CWA, the EPA must issue and assure compliance with National Pollutant Discharge Elimination System (NPDES) permits.²⁹⁴ The EPA also regulates unpermitted discharges.²⁹⁵ Furthermore, it is responsible for enforcing the CAA regulations regarding “OCS Sources,” notwithstanding those portions of the OCS adjacent to Texas, Louisiana, Mississippi, Alabama, and the North Slope borough of Alaska.²⁹⁶ To fulfill its duties, the EPA must work in concert with the numerous other agencies overseeing OCS activities.

C. Federal Energy Regulatory Commission

The Federal Energy Regulatory Commission (FERC) forms another branch of this administrative network, as it regulates certain pipelines established on the OCS. Among its many responsibilities, FERC enforces the provisions of the Natural Gas Act relating to the transportation of natural gas in interstate commerce.²⁹⁷ In determining its jurisdiction, FERC distinguishes those lines that serve a transportation function from those that serve one of production, gathering, or aggregating;²⁹⁸ FERC’s regulations are limited to the former.²⁹⁹ By limiting the scope of its reach

292. 33 C.F.R. §§ 135.1–405 (2015).

293. 33 C.F.R. §§ 135.215 & 138 (2015); *see also* Notice to Lessees and Operators of Federal Oil and Gas Leases in the Outer Continental Shelf and Located in Certain Areas of Coastal States, NTL No. 2008-N05 (Aug. 26, 2008), <http://www.boem.gov/Regulations/Notices-To-Lessees/2008/08-n05.aspx> [<http://perma.cc/DP92-MDWE>].

294. 33 U.S.C. § 1342 (2015).

295. 33 U.S.C. § 1319; 40 C.F.R. § 122.1 (2015).

296. 42 U.S.C. § 7627 (2015).

297. 15 U.S.C. § 1717 (2015).

298. Transcontinental Gas Pipe Line Corp., 121 FERC ¶ 61157, 61701 (Nov. 15, 2007).

299. *See* Jupiter Energy Corp. v. F.E.R.C., 482 F.3d 293 (5th Cir. 2007).

over these pipelines, FERC manages to avoid the duplication and conflict that can be inherent in such inter-agency systems.

D. Pipeline and Hazardous Materials Safety Administration

The Pipeline and Hazardous Materials Safety Administration (PHMSA) within the Department of Transportation also exercises regulatory authority on the OCS. In particular, PHMSA prescribes minimum safety standards for the transportation of gas once it is transferred from a producing operator to a transporting operator.³⁰⁰ It also enforces certain reporting requirements regarding such lines.³⁰¹ In doing so, PHMSA builds another layer of oversight into the process of exploring and developing OCS energy sources.

E. United States Geological Survey

Within Interior, the United States Geological Survey (USGS) supports the missions of BOEM and BSEE by gathering and disseminating information on the geological structures and mineral resources of the OCS.³⁰² To this end, the USGS is tasked with a number of specific missions under various federal laws,³⁰³ many of which directly or indirectly support mineral development on the OCS. USGS is thus vested with certain powers to effectuate its goals, which include the authority to conduct surveys, investigations, and research,³⁰⁴ as well as the authority to collect, evaluate, and analyze information on federally owned mineral resources.³⁰⁵ The data resulting from USGS provides an invaluable resource to other agencies' efforts to regulate OCS activity.

F. National Oceanic and Atmospheric Administration

Another major player on the OCS, the National Oceanic and Atmospheric Administration (NOAA) within the Department of

300. See 49 C.F.R. §§ 192.1, 195.0 (2015).

301. 49 C.F.R. § 191.1.

302. Memorandum of Understanding Between the United States Geological Survey and the Minerals Management Service Implementing Their Respective Responsibilities Under Secretarial Order No. 3071, as Amended, at p. 3 (Sept. 1, 1988), available at <http://www.usgs.gov/mou/mms3071.pdf>.

303. See Summary of U.S. Geological Survey Authorities, http://www.doi.gov/partnerships/upload/geological_survey_authorities.pdf [<http://perma.cc/46J8-QSAK>] (last visited June 8, 2015).

304. 43 U.S.C. § 31 (2015).

305. 30 U.S.C. §§ 1601–04 (2015).

Commerce administers the CZMA.³⁰⁶ NOAA plays an important role in OPA 90 enforcement actions by administering the rules governing trustees.³⁰⁷ As noted in BOEM regulations, NOAA also administers marine sanctuary regulations, the Fisherman's Contingency Fund, and the Coastal Energy Impact Program.³⁰⁸

All of these peripheral entities work in tandem with BOEM, BSEE, and ONRR to regulate the 1.7 billion acre expanse that makes up the United States' OCS. With so many moving parts, each agency plays a vital role in protecting the environment, individuals, and businesses that thrive off of the rich resources unique to this part of the world.

CONCLUSION

The legal landscape governing OCS activities is varied and complex. And perhaps more importantly, that landscape is always in flux. It continuously morphs—usually incrementally and trudgingly, but occasionally in leaps and bounds. Despite the complexity of this terrain, one thing is clear: OCSLA is the North Star. It establishes the framework for the exploration of hydrocarbons on the OCS. Everything else—the various laws, regulations, regulatory agencies, etc.—is merely detail.

306. 16 U.S.C. §§ 1451–66 (2015); 15 C.F.R. § 923.1 (2015).

307. The rules are referred to as the Natural Resource Damage Assessment (NRDP). 15 C.F.R. § 990.10; “OPA Guidance”, http://www.darrp.noaa.gov/library/1_d.html [<http://perma.cc/7RJ5-ELXS>] (last visited June 8, 2015).

308. 30 C.F.R. § 556.7(d) (2015).