Avoiding the Doldrums: Evaluating the Need for Change in the Offshore Wind Permitting Process

Mitchell Hokanson*

Introduction 182
I. Overview of Relevant Legal and Political History 186
A. Legal History 186
1. NEPA 186
2. OCSLA 189
3. Other Environmental Law Relevant to Offshore Leasing 191
4. Smart from the Start and BOEM's Current Leasing Process 192
B. Political History 197
1. Obama Era Policies 197
2. Trump Era Policies 200
a. Executive Action 200
b. President Trump's Infrastructure Plan 203
II. The Leasing Process in Action: Block Island, Cape Wind, and Empire Wind 206
A. Block Island 206
B. Cape Wind 209
C. Empire Wind 214
1. Complaint 217
2. NEPA Challenges 218
a. The District Court's Holding 218
b. Recommendations 220
3. OCSLA Challenges 222

* J.D. Candidate, Columbia Law School, Class of 2019. I would like to thank Professor Michael B. Gerrard for his advice and direction throughout the writing of this Note. I would also like to thank Kevin A. Ewing—a partner at Bracewell LLP and counsel to Equinor Wind US LLC in the case of *Fisheries Survival Fund v. Jewell*—for providing access to the administrative record for said case and for speaking with me about the intricacies of the U.S. offshore regulatory regime. Finally, I would like to thank Justin Gundlach for his feedback on earlier drafts.

a. The District Court's Holding 222
b. The Parties' Arguments 222
c. *PEER I*'s Holding 223
d. RFI Stage 225
e. Lease Stage 226
f. Recommendations 227
III. Critiques of the Leasing Process 227
A. Offshore Wind 228
1. Site Selection 229
2. Modification of Existing Environmental Law 231
B. NEPA 232
1. Speeding up the Review Process 232
2. Prioritizing Front End Consideration of Environmental Impacts 235
3. Modifying the Environmental Review Process 236
Conclusion 238

INTRODUCTION

Seventeen of the eighteen warmest years in recorded history have occurred since 2001, and temperatures have increased more than a full degree Celsius since the late 1880s.[1] In line with this upward trend in global temperatures, 2017 was the second warmest year in recorded history, and the highest without an El Niño event.[2]

Experts agree that much of this change is due to the greenhouse effect—a process in which certain gases, called greenhouse gases ("GHGs"), in Earth's atmosphere trap energy from the sun, which results in higher temperatures.[3] While some GHGs are naturally part of the atmosphere, human activity has greatly contributed to

1. Henry Fountain, Jugal K. Patel & Nadja Popovich, *2017 Was One of the Hottest Years on Record. And That Was Without El Niño.*, N.Y. TIMES (Jan. 18, 2018), https://www.nytimes.com/interactive/2018/01/18/climate/hottest-year-2017.html [https://perma.cc/L2JB-FX4Q].

2. El Niño, a shift in tropical weather patterns, has been linked by meteorologists to record high heat spikes in 2015 and 2016, which was the warmest year on record. *Id.*

3. The Greenhouse Effect is defined as the "warming of the surface and lower atmosphere of a planet (such as Earth or Venus) that is caused by conversion of solar radiation into heat in a process involving selective transmission of short wave solar radiation by the atmosphere, its absorption by the planet's surface, and reradiation as infrared which is absorbed and partly reradiated back to the surface by atmospheric gases." *Greenhouse Effect*, MERRIAM-WEBSTER ONLINE, https://www.merriam-webster.com/dictionary/greenhouse%20effect [https://perma.cc/TTE6-JE6B] (last visited Jan. 9, 2019).

the current atmospheric stockpile.[4] To avoid the worst of climate change's effects, some climate scientists have called for a concerted effort to limit global temperature change to 2 degrees Celsius.[5] This 2 degree goal is also found in the Paris Agreement.[6]

There is also an appetite to limit the change to 1.5 degrees Celsius, evidenced by the invitation for the Intergovernmental Panel on Climate Change ("IPCC") to prepare a report on the impacts of a 1.5 degree Celsius warming found in the Decision of the 21st Conference of Parties of the United Nations Framework Convention on Climate Change.[7] The IPCC recently issued a report detailing the possible impacts of a 1.5 degree shift and compared these to the possible impacts of a 2 degree shift.[8]

One way to limit climate change is to decarbonize a country's energy supply. That is, shifting away from burning fossil fuels, like coal and gas, to harnessing renewable sources, like wind and solar, in order to reduce GHG emissions.[9] Organizations such as the Deep Decarbonization Pathways Project ("DDPP") have recommended several energy-mix scenarios to limit climate change to 2 degrees Celsius by limiting fossil fuel usage and increasing the usage of renewable energy sources.[10]

Limiting climate change requires speedy and extensive development of renewables. The DDPP has created several development scenarios that would limit climate change to 2

4. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2014 SYNTHESIS REPORT 47–48 (Rajendra K. Pachauri & Leo Meyer eds., 2014), https://www.ipcc.ch/site/assets/uploads/2018/02/SYR_AR5_FINAL_full.pdf [https://perma.cc/5DEC-XQR9].

5. Bob Silberg, *Why a Half-Degree Temperature Rise Is a Big Deal*, NAT'L AERONAUTICS & SPACE ADMIN.: GLOBAL CLIMATE CHANGE (June 29, 2016), https://climate.nasa.gov/news/2458/why-a-half-degree-temperature-rise-is-a-big-deal/ [https://perma.cc/P438-ZEGP].

6. Paris Agreement to the United Nations Framework Convention on Climate Change, art. 2(1)(a), Apr. 12, 2016, T.I.A.S. No. 16-1104 (entered into force Nov. 4, 2016).

7. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, 2018: GLOBAL WARMING OF 1.5°C., SUMMARY FOR POLICYMAKERS (Valérie Masson-Delmotte et al. eds., 2018), https://www.ipcc.ch/site/assets/uploads/sites/2/2018/07/SR15_SPM_High_Res.pdf [https://perma.cc/K7GY-VQ75].

8. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, 2018: GLOBAL WARMING OF 1.5°C., CHAPTER 3: IMPACTS OF 1.5°C OF GLOBAL WARMING ON NATURAL AND HUMAN SYSTEM 175–283 (Valérie Masson-Delmotte et al. eds., 2018), https://www.ipcc.ch/site/assets/uploads/sites/2/2018/11/SR15_Chapter3_Low_Res.pdf [https://perma.cc/9QUV-MHW2].

9. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *supra* note 4, at 28, 47.

10. JAMES H. WILLIAMS ET AL., PATHWAYS TO DEEP DECARBONIZATION IN THE UNITED STATES 16 (2014), http://unsdsn.org/wp-content/uploads/2014/09/US-Deep-Decarbonization-Report.pdf [https://perma.cc/9643-MS2J].

degrees Celsius, all of which would require a massive increase in the amount of wattage generated by renewable sources.[11] To generate this wattage, many more renewable facilities would need to be constructed in the United States.[12] The DDPP's High Renewables Scenario calls for a whopping 313,208 megawatts ("MW") of offshore wind generation by 2050, and even the Mixed Scenario—which envisions a balance of nuclear power, renewables, and natural gas—calls for 186,802 MW of offshore wind generation capacity by 2050.[13] For some context, the Block Island facility, the first and only wind generation facility in the U.S. and discussed in Section II.A, generates only 30 MW.[14]

Although haste is necessary given the predictable effects of climate change, we must also consider other aspects of environmental protection, such as the protection of biodiversity. Renewable energy generation facilities will occupy extensive amounts of space on land or at sea and may impact important habitats or species. Laws such as the National Environmental Policy Act ("NEPA") require federal agencies to analyze the environmental impacts of proposed agency action (including the permitting of facilities) and consider this information when determining whether to allow said action.[15] The procedural requirements of NEPA are necessary to guard against unreasonable impacts to the environment.

A balance must be struck, choices need to be made, and someone must make them. This is the unenviable position that the Bureau of Ocean Energy Management ("BOEM") finds itself in when it comes to offshore wind. BOEM is currently the federal agency with the authority to issue wind leases on the Outer Continental Shelf ("OCS"), and is thus on the horns of a dilemma—balancing its dual mandates of environmental protection and speedy development of energy facilities on the OCS.

This Note will evaluate the process that BOEM has developed thus far for making such determinations. Given BOEM's mixed

11. *Id.* at 35–36.

12. *Id.*

13. Michael B. Gerrard, *Legal Pathways for a Massive Increase in Utility-Scale Renewable Generation Capacity*, 47 ENVTL. L. REP. NEWS & ANALYSIS 10591, 10592 (2017).

14. *Block Island Wind Farm*, DEEPWATER WIND, http://dwwind.com/project/block-island-wind-farm/ [https://perma.cc/BR67-PYGH] (last visited Jan. 9, 2019).

15. National Environmental Policy Act of 1969 § 102, 42 U.S.C. § 4332 (2018).

success in getting wind energy facilities built, the litigation surrounding the Wind Energy Area offshore New York, ("NY WEA" or "Empire Wind"), is of particular importance, as it brings into question the adequacy of BOEM's leasing procedures. By reviewing the challenges, or lack thereof, to three of BOEM's currently leased facilities, and reviewing critiques of the leasing process by environmental law scholars, this Note will evaluate whether changes should be made by determining the strengths and weaknesses of BOEM's current leasing process.

Intelligent minds could differ on whether BOEM's current leasing procedures satisfy their obligations under environmental laws such as NEPA and OCSLA.[16] Although BOEM has prevailed in the recent litigation surrounding Empire Wind, the agency should nevertheless consider retooling its procedures in order to incorporate programmatic environmental impact statements ("EISs"), broadly-scoped studies evaluating the impacts of large-scale proposals or plans. Although slower and more expensive, these programmatic EISs could lay the groundwork for resolving disputes over offshore wind development by showing that wind energy facilities are sited in locations that limit environmental impacts and other harms. BOEM previously issued a programmatic EIS in 2017 looking at the entire OCS and should continue this trend by issuing smaller programmatic EISs focused on particular regions—such as the Gulf Coast or the Mid-Atlantic regions—instead of proceeding in a piecemeal manner.

Part I of this Note provides a summary of relevant environmental law and regulations and the current political climate surrounding renewable energy development in the United States. It will focus particularly on NEPA, the Outer Continental Shelf Lands Act ("OCSLA"), BOEM's Smart from the Start initiative, and BOEM's current leasing procedures, as they are all under scrutiny in the NY WEA litigation. Part I will also discuss President Trump's recently issued Infrastructure Plan.

Part II of this Note will evaluate whether BOEM's procedures adequately balance the need for speed in developing alternative

16. In dismissing the recent case surrounding Empire Wind, *Fisheries Survival Fund v. Jewell*, the D.C. District Court dismissed Plaintiffs' NEPA claims as unripe, and Plaintiffs' OCSLA claims as procedurally barred. Fisheries Survival Fund v. Jewell, 2018 WL 4705795 (D.D.C. Sept. 30, 2018). The court did not determine definitively that BOEM's procedures satisfy its obligations under both NEPA and OSCLA, and so it is an open question as to whether they are sufficient. *Id.*

energy and environmental protection by looking at three different proposed offshore wind energy projects: Block Island off the coast of Rhode Island, Cape Wind off the coast of Massachusetts, and Empire Wind off the coast of New York. This Note will analyze the lease processes utilized in the former two, and then analyze the legal challenge to BOEM's recent lease of the NY WEA for the Empire Wind project, *Fisheries Survival Fund v. Jewell.* Part II will then propose solutions to some of the potential shortcomings of the leasing process.

Finally, Part III of this Note will look at potential changes and solutions to the approval process offered by environmental law scholars and evaluate them in light of BOEM's current process. It will primarily focus on the recommendations made by Professor Michael B. Gerrard in his article *Legal Pathways for a Massive Increase in Utility-Scale Renewable Generation Capacity* and offer a sympathetic analysis.

I. OVERVIEW OF RELEVANT LEGAL AND POLITICAL HISTORY

A. Legal History

Section A provides an overview of relevant legal history and important environmental legislation. The first subsection, Section A.1, focuses on the National Environmental Policy Act. Section A.2 then focuses on the Outer Continental Shelf Lands Act. This is followed by a discussion of other relevant environmental laws—such as the Endangered Species Act and the Coastal Zone Management Act—in Section A.3. Finally, Section A.4 discusses BOEM's current leasing procedures.

1. NEPA

On January 1, 1970, President Nixon signed NEPA into law. With its enactment, Congress:

> declare[d] that it is the continuing policy of the Federal Government . . . to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and

> fulfill the social, economic, and other requirements of present and future generations of Americans.[17]

To achieve this goal, Congress designed NEPA not as a regulatory scheme that imposed substantive limitations or direct restrictions on industry, but rather as a modification to the decision-making process of federal agencies. As such, NEPA does not "mandat[e] that agencies achieve particular substantive environmental results," but rather establishes a procedure that agencies must use to consider the environmental effects of a proposed action.[18]

Section 102 of NEPA creates demanding obligations for agencies. Section 102 requires that an agency:

> [I]nclude in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.[19]

Courts "ensure that the agency has adequately considered and disclosed the environmental impact of its actions . . . ."[20] In addition to NEPA, many states have their own environmental review laws such as the New York State Environmental Quality Review Act ("SEQRA"), and the California Environmental Quality Act ("CEQA").[21]

NEPA is implicated when agencies propose "actions with effects that may be major and which are potentially subject to Federal

17. 42 U.S.C. § 4331(a) (2018).

18. Marsh v. Or. Nat. Res. Council, 490 U.S. 360, 371 (1989).

19. 42 U.S.C. § 4332(C) (2018).

20. Sierra Club v. FERC, 867 F.3d 1357, 1367 (D.C. Cir. 2017).

21. N.Y. COMP. CODES R. & REGS. tit. 6, pt. 617 (2018); CAL. PUB. RES. CODE §§ 21000–21189.3 (West 2018).

control and responsibility."[22] Thus, if a proposed action is determined to be a major federal action, an agency must apply NEPA and determine for itself its procedural obligations. To do so, an agency must first investigate whether the proposed action "significantly affect[s] the quality of the human environment."[23] Agencies typically make this determination by performing an environmental assessment ("EA").[24] An EA must include "brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E) [of NEPA], of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted."[25] If the environmental impacts are significant, the agency must draft an environmental impact statement ("EIS").[26] Otherwise, if the agency concludes that there will be no significant impacts resulting from the proposed action, it can issue a Finding of No Significant Impact ("FONSI").[27] If a FONSI is issued, an agency need not create an EIS.[28]

Because NEPA has no citizen suit provision, plaintiffs must raise challenges to agency action through the Administrative Procedure Act ("APA"). Under Section 706 of the APA, a court must set aside agency action if found to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.[29] When reviewing agency determinations under this standard, a court may not substitute its own opinion and "interject itself within the area of discretion of the executive as to the choice of the action to be

22. 40 C.F.R. § 1508.18 (2018).

23. 42 U.S.C. § 4332 (2018).

24. 40 C.F.R. §§ 1501.4(b), 1508.9 (2018).

25. *Id.* § 1508.9(b).

26. *See id.* § 1501.4; 42 U.S.C. § 4332(2)(C)(1) (2018).

27. 40 C.F.R. § 1508.13 (2018).

28. *Id.*

29. 5 U.S.C. § 706 (2018). In addition, § 706 requires a court to "hold unlawful and set aside agency action, findings, and conclusions found to be—

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

Id. § 706(2)(A)–(F).

taken."[30] A court instead "'must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.' . . . This inquiry must 'be searching and careful,' but 'the ultimate standard of review is a narrow one.'"[31]

However, a court must still determine whether an agency has taken a "hard look" at the findings.[32] A court must insure that any EIS or EA has "set forth sufficient information for the general public to make an informed evaluation, and for the decisionmaker to consider fully the environmental factors involved and to make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action."[33] Should a court determine that an agency failed to live up to the procedural requirements of NEPA, it may require the agency to go back to the drawing board and start the process anew.

NEPA is one of the largest procedural burdens BOEM faces when attempting to issue offshore leases. BOEM's limited knowledge of the properties of the seafloor on the OCS[34] and of fisheries,[35] and the potential for future technological advancements, all make BOEM's analysis particularly difficult.

2. OCSLA

The Outer Continental Shelf Lands Act was passed in August 1953, and authorized the Secretary of the Interior to administer the

30. Stryker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227–28 (1980) (citation omitted).

31. Marsh v. Or. Nat. Res. Council, 490 U.S. 360, 375 (citing Citizens to Preserve Overton Park, Inc v. Volpe, 401 U.S. 402, 416 (1971)).

32. Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976) (quoting Nat. Res. Def. Council, Inc. v. Morton, 458 F.2d 827, 838 (D.C. Cir. 1972)).

33. Sierra Club v. U.S. Army Corps of Eng'rs, 701 F.2d 1011, 1029 (2d Cir. 1983) (citations omitted).

34. For an example of BOEM having insufficient knowledge, see *Pub. Emps. for Envtl. Responsibility v. Hopper*, 827 F.3d 1077 (D.C. Cir. 2016), where the D.C. Circuit held that BOEM's impact statement did not "adequately assess the seafloor and subsurface hazards of [Nantucket] Sound." *Id.* at 1082.

35. Although BOEM was able to collect and analyze information on commercial fisheries off the Atlantic coast, as demonstrated in a 2017 report, the agency recognizes that its analysis has certain shortcomings, including the inability to capture the dynamics of particular subgroups and the limits of its behavioral model. The report acknowledges that the data used provides only a partial picture of the fishing activity along the Atlantic Coast. 1 JUSTIN KIRKPATRICK ET AL., BUREAU OF OCEAN ENERGY MGMT., BOEM 2017-012, SOCIO-ECONOMIC IMPACT OF OUTER CONTINENTAL SHELF WIND ENERGY DEVELOPMENT ON FISHERIES IN THE U.S. ATLANTIC: REPORT NARRATIVE 24–27 (2017).

"expeditious and orderly development" of the Outer Continental Shelf.[36] Congress amended OCSLA through the Energy Policy Act of 2005, giving the Secretary of the Interior the power to issue leases, easements, and rights-of-way for offshore renewable energy projects.[37] These grants, however, must "provide for" 13 specifically identified concerns, including "safety," "protection of the environment," and access to the outer Continental Shelf and its resources.[38] OCSLA contains a citizen suit provision that permits "any person having a valid legal interest which is or may be adversely affected" by a violation of any of OCSLA's provisions or attendant regulations, or the terms of a permit or lease, "to commence a civil action . . . to compel compliance with [OCSLA]."[39]

Following the amendment to OCSLA, the Secretary delegated his authority to issue leases, easements, and rights of way for renewable energy developments to the Mineral Management Service ("MMS"), the predecessor to BOEM.[40] After this delegation of authority, the MMS began to prepare a programmatic EIS, a broad environmental assessment used to evaluate the impacts of large-scale proposals or plans, for the OCS. The MMS sought to collect information about the feasibility of widespread development of the OCS, and use this information to develop regulations that the agency could then use to develop renewable energy sources on the OCS in the most efficient and reasonable manner possible. BOEM has since proceeded to issue several leases for lands on the OCS. Some of these leases have led to litigation and will be discussed in Sections II.B and II.C of this Note.

36. 43 U.S.C. § 1332 (2018).

37. Energy Policy Act of 2005, Pub. L. No. 109–58, 119 Stat. 594 (2005).

38. 43 U.S.C. § 1337(p)(4)(A)–(B) (2018). Other concerns include "conservation of the natural resources of the outer Continental Shelf," "prevention of interference with reasonable uses (as determined by the Secretary [of the Interior]) of the exclusive economic zone, the high seas, and the territorial seas," "consideration of the location of, and any schedule relating to, a lease, easement, or right-of-way for an area of the outer Continental Shelf; and any other use of the sea or seabed, including use for a fishery, a sea lane, a potential site of a deepwater port, or navigation," "public notice and comment on any proposal submitted for a lease, easement, or right-of-way under this subsection," and "oversight, inspection, research, monitoring, and enforcement relating to a lease, easement, or right-of-way under this subsection." *Id.* § 1337(p)(4)(A)–(L).

39. *Id.* § 1349(a)(1).

40. MINERALS MGMT. SERV., GUIDELINES FOR THE MINERALS MANAGEMENT SERVICE RENEWABLE ENERGY FRAMEWORK 1 (2009), https://www.boem.gov/REnGuidebook_03/ [https://perma.cc/RQH6-3TFA].

3. Other Environmental Law Relevant to Offshore Leasing

Agencies must be cognizant of several other environmental laws that may be implicated in the leasing of areas on the OCS. The Coastal Zone Management Act ("CZMA") is one such important law.[41] Under CZMA, states may develop coastal zone management plans for the ocean area under state jurisdiction, which extends three nautical miles from a state's shoreline.[42] Once these plans are developed, states have the ability to review federal activity that may affect the usage of their coastal zones, and states may prevent activity that is inconsistent with their coastal zone management plans.[43] CZMA and coastal zone management plans are incredibly important for the development of offshore wind, as transmission lines from energy generation facilities must traverse this coastal zone to connect to the grid and may be blocked if they run afoul of state coastal plans.

Wildlife protection laws, including the Endangered Species Act ("ESA"),[44] the Marine Mammal Protection Act ("MMPA"),[45] and the Migratory Bird Treaty Act ("MBTA"),[46] attempt to protect biodiversity by preventing "takes" of protected species.[47] These laws require developers and agencies to mitigate potential impacts their projects will have on protected species. Developers must apply for incidental take permits and develop habitat conservation plans if their projects will affect the habitat or result in the death, harassment, or wounding of species.[48] To assist their NEPA and ESA analyses, and thus allow for the faster permitting and development of facilities, agencies such as the Fish and Wildlife

41. 16 U.S.C. §§ 1451–1466 (2018).

42. The legal jurisdiction of Texas, Florida, and Louisiana extends further in the Gulf of Mexico than the jurisdiction of other states. *Federal Offshore Lands*, BUREAU OF OCEAN ENERGY MGMT., https://www.boem.gov/Federal-Offshore-Lands/ [https://perma.cc/FV8N-YP47] (last visited Jan. 8, 2019); *see also* U.S. COMM'N ON OCEAN POLICY, *Primer on Ocean Jurisdictions: Drawing Lines in the Water*, *in* AN OCEAN BLUEPRINT FOR THE 21ST CENTURY 70–71 (2004).

43. JAMES MCELFISH ET AL., ENVTL. LAW INST., A GUIDE TO STATE MANAGEMENT OF OFFSHORE WIND ENERGY IN THE MID-ATLANTIC REGION 4–5 (2014).

44. 16 U.S.C. §§ 1531–1544 (2018).

45. *Id.* §§ 1361–1423h.

46. *Id.* §§ 703–712.

47. *Id.* § 1532(19) ("The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.")

48. *Id.* § 1539(a) (2018).

Service have initiated regional habitat conservation plans that analyze large geographic areas.[49]

Protection of threatened and endangered species is yet another environmental "good" that agencies must balance with the need for renewable facilities. This is no easy balancing test, and environmental groups are torn on supporting potential solutions such as new policies allowing agencies to "put a thumb on the scale" for wind power facilities and other developments with "clear and overwhelming environmental positive[s]" by requiring less scrutiny during ESA analyses.[50] These environmental laws can present significant barriers to the speedy development of renewable energy facilities.

4. Smart from the Start and BOEM's Current Leasing Process

In August 2009, MMS promulgated regulations governing the leasing process and administration of offshore renewable energy projects.[51] MMS revised these regulations on May 16, 2009.[52] Following these revisions, then Secretary of the Interior Ken Salazar launched the "Smart from the Start" initiative in 2010 to speed up the leasing and construction of wind energy.[53]

The Smart from the Start initiative was intended to "streamlin[e] the approval process for individual proposed projects, implement[] a comprehensive expedited leasing framework that includes identifying wind energy areas . . . and mov[e] aggressively on a separate parallel track to process offshore transmission applications."[54] By "eliminating unnecessary regulatory requirements," identifying areas where "fewer user conflicts and

49. J.B. Ruhl, *Harmonizing Commercial Wind Power and the Endangered Species Act Through Administrative Reform*, 65 VAND. L. REV. 1769, 1783 (2012); *see also* J.B. Ruhl, *Regional Habitat Conservation Planning Under the Endangered Species Act: Pushing the Legal and Practical Limits of Species Protection*, 44 SW. L.J. 1393, 1405–06 (1991).

50. Ruhl, *Harmonizing Commercial Wind Power and the Endangered Species Act Through Administrative Reform*, *supra* note 49, at 1773–74.

51. Renewable Energy and Alternate Uses of Existing Facilities on the Outer Continental Shelf, 74 Fed. Reg. 19,638 (Apr. 29, 2009) (to be codified at 30 C.F.R. pts. 250, 285, 290).

52. Renewable Energy Alternate Uses of Existing Facilities on the Outer Continental Shelf—Acquire a Lease Noncompetitively, 76 Fed. Reg. 28,178 (May 16, 2011) (to be codified at 30 C.F.R. pt. 285).

53. OFFICE OF ENERGY EFFICIENCY & RENEWABLE ENERGY, U.S. DEP'T OF ENERGY, A NATIONAL OFFSHORE WIND STRATEGY: CREATING AN OFFSHORE WIND ENERGY INDUSTRY IN THE UNITED STATES 3 (2011), https://www.energy.gov/sites/prod/files/2013/12/f5/national_offshore_wind_strategy.pdf [https://perma.cc/CPR8-U5JQ].

54. *Id.*

resource issues" exist, "organizing an interagency process to gather information from key agencies regarding the environmental and geophysical attributes and other uses of these wind energy areas," and "assembling that data" in a format best able to assist the public in "assess[ing] the feasibility and risks," the Department of the Interior intended to facilitate offshore wind development in a quick and efficient manner.[55] The Department of the Interior's goal is to reduce permitting timelines—currently seven to ten years—by at least half.[56]

To accomplish this ambitious goal, BOEM planned to establish zones of potential development, called Wind Energy Areas ("WEAs"), and then break up the NEPA review process into smaller steps. Instead of performing an EIS on the entire facility up front, it would first perform a NEPA analysis on the potential environmental impacts of leasing and site assessment activities on the WEA. BOEM would then perform an EA or EIS on individual projects proposed in a Construction and Operation Plan. BOEM claimed this strategy would limit duplicative efforts by taking the review process step by step and building up to a final report, as opposed to performing multiple lengthy environmental impact statements due to new information.[57]

BOEM's current leasing procedures reflect the goals of Smart from the Start. The leasing process can proceed in two ways depending on how and by whom it is initiated, and can either be "solicited" or "unsolicited." The solicited bid process is initiated when BOEM identifies an area that appears to be promising for an offshore wind energy development and publishes a Request for Information ("RFI") or a Call for Information and Nominations ("Call") for leasing in specified areas.[58]

BOEM may issue an RFI to determine whether there is competitive interest for scheduling sales and issuing leases. A Call may:

> (1) Request comments on areas which should receive special consideration and analysis;

55. *Id.* at 13.
56. *Id.* at 17.
57. *See id.*
58. *See* 30 C.F.R. §§ 585.210–585.211 (2018).

> (2) Request comments concerning geological conditions (including bottom hazards); archaeological sites on the seabed or nearshore; multiple uses of the proposed leasing area (including navigation, recreation, and fisheries); and other socioeconomic, biological, and environmental information; and
>
> (3) Suggest areas to be considered by the respondents for leasing.[59]

The comment period following the issuance of a Call is forty-five days.[60] BOEM will then utilize the information gathered by any RFI or Call to identify the lease area, to develop leasing provisions, to prepare for environmental review under NEPA, and to satisfy laws like CZMA, ESA, and MMPA.[61]

The unsolicited bid process is initiated when a developer applies for an area that BOEM is not currently considering.[62] If the process is initiated in this way, BOEM will publish an RFI to determine if there is competitive interest in the area identified in the proposal.[63]

Regardless of whether the proposal is solicited or unsolicited, if BOEM determines that competitive interest exists in the lease area, it will proceed with a competitive sale.[64] If BOEM determines that no competitive interest exists, it will publish a Determination of No Competitive Interest.[65] BOEM may then offer the interested party a noncompetitive lease.[66]

Before BOEM offers a lease for sale, it must conduct an Area Identification analysis to "identify areas for environmental analysis and consideration for leasing."[67] BOEM reviews the information gathered and "evaluate[s] the potential effect of leasing on the human, marine, and coastal environments, and develop[s] measures to mitigate adverse impacts, including lease stipulations."[68] BOEM will also issue a Notice of Intent to prepare an EIS or EA.

59. *Id.* § 585.211(a).
60. *See id.*
61. *See id.* § 585.214.
62. *See id.* § 585.230.
63. *See id.* § 585.231.
64. *See id.* § 585.231(c).
65. *See id.* § 585.231(d).
66. *See id.* § 585.231(f).
67. *Id.* § 585.211(b).
68. *See id.*

If BOEM chooses to lease the area, it will issue a Proposed Sale Notice.[69] In the Proposed Sale Notice, BOEM will request public comment on the area available for leasing, lease provisions and terms, auction rules, and other procedures.[70] This comment period will be sixty days.[71] BOEM may issue the Proposed Sale Notice at the same time it completes an EA or EIS for the lease sale.

After BOEM performs its NEPA analysis for the lease sale and considers all comments, BOEM will publish a Final Sale Notice, which includes the final area available for leasing, the final lease provisions and conditions, and finalized procedures for auction and lease issuance.[72]

Thirty days after BOEM issues a Final Sale Notice, it is permitted to hold an auction.[73] The parties may execute the lease after the provisional winner pays the bid and files documents of financial assurance, and after the Federal Trade Commission and the Department of Justice have reviewed the results.[74]

The resulting lease grants the purchaser the right to occupy and to install and operate facilities in the leased area for commercial activity, provided that the purchaser obtains necessary approvals from BOEM.[75] Development is staged, and the lessor must apply for a Site Assessment Plan or Construction and Operations Plan prior to conducting any site assessment activities or activities pertaining to construction of facilities for commercial operations on the lease.[76] BOEM will perform an environmental review on the impacts of these Construction and Operations Plans and Site Assessment Plans as the lease owner applies for them.[77] Importantly, in certain leases, BOEM retains the right to reject a Site Assessment Plan or Construction or Operations Plan based upon its determination that the proposed activity would have

69. *See id.* § 585.211(c).
70. *See id.* § 585.216.
71. *See id.* § 585.211(c).
72. *See id.* § 585.216.
73. *See id.* § 585.211.
74. *See id.* § 585.224(a); 43 U.S.C. § 1337(c) (2018).
75. *See* 30 C.F.R. § 585.200 (2018).
76. *Id.* § 585.600
77. *Id.* § 585.628.

unacceptable environmental consequences or interfere with its other statutory responsibilities, such as those outlined in OCSLA.[78]

The leases issued may also contain provisions that allow for input from other users of the lease area. In the NY WEA lease, for example, BOEM included a special provision requiring the creation of a fisheries communications plan and the hiring of a fisheries liaison.[79] A lease may also require the lessor to meet with local Native American tribes.[80]

To date, BOEM has utilized these procedures, or precursors to them, to issue thirteen commercial wind energy leases on the OCS.[81] These leases are located offshore of Delaware, Maryland, Massachusetts, New Jersey, New York, North Carolina, Rhode Island, and Virginia.[82] Of these thirteen leases, only one facility has been built: the Block Island project located off the coast of Rhode Island.[83] Another project, Cape Wind, located off the coast of Massachusetts near Cape Cod, is no longer in development.[84] Unlike Block Island, Cape Wind precipitated a significant amount of litigation.[85] Although the developer prevailed in almost every case, delays to construction pending research on the seafloor and the loss of its power purchase agreement appear to have sunk this facility.[86] A third lease and planned development, the Empire Wind project off the coast of New York near Long Island, was challenged by litigation brought by several fisheries interest groups, cities, towns, and fishermen's groups.[87]

78. *See* BUREAU OF OCEAN ENERGY MGMT., LEASE NO. OCS-A 0512, COMMERCIAL LEASE FOR SUBMERGED LANDS FOR RENEWABLE ENERGY DEVELOPMENT ON THE OUTER CONTINENTAL SHELF § 3 (2017), https://www.boem.gov/OCS-A-0512/ [https://perma.cc/9A8M-UBC2].

79. *See id.* at add. C, § 4.1.5.

80. *See id.* at add. C, § 4.3.3.

81. *Lease and Grant Information*, BUREAU OF OCEAN ENERGY MGMT., https://www.boem.gov/Lease-and-Grant-Information/ [https://perma.cc/KS8M-AZDN] (last visited Jan. 9, 2018).

82. *Id.*

83. DEEPWATER WIND, *supra* note 14.

84. Bragg, *infra* note 207.

85. CAPE WIND, LITIGATION HISTORY OF CAPE WIND (2014), http://www.capewind.org/sites/default/files/downloads/Litigation%20History%20of%20Cape%20Wind%20May%202%202014.pdf [https://perma.cc/F892-L2GD].

86. *See* Chesto, *infra* note 170.

87. *See* Fisheries Survival Fund v. Jewell, No. 1:16-cv-2409, 2018 WL 4705795 (D.D.C. Dec. 8, 2016).

B. Political History

This section will provide an overview of the political history of the development of offshore wind on the outer continental shelf of the United States. Section B.1 will focus on Obama Era policies, and Section B.2 will then outline Trump Era policies.

1. Obama Era Policies

Throughout his presidency, Barack Obama was a strong proponent of renewable energy, and called for the development of renewable energy generation facilities.[88] At his direction, the Environmental Protection Agency ("EPA") promulgated the Clean Power Plan,[89] and the United States signed, but did not ratify, the Paris Agreement.[90] President Obama, in an attempt to bypass climate-deniers in Congress, used executive actions to push through his reforms.[91]

At the same time, under executive direction, agencies pushed wind development. In 2011, BOEM and the Department of Energy ("DOE") jointly issued a "National Offshore Wind Strategy" that envisioned 54 gigawatts ("GW") of wind energy capacity by 2030.[92] DOE issued its Wind Vision report in 2015, in which it envisioned 86 GW of capacity by 2050.[93] For context, the Indian Point nuclear

88. Kathleen Hennessey, *Obama to Tout Renewables, Announce Solar Panel Back at the White House*, L.A. TIMES (May 9, 2014, 3:00 AM), http://www.latimes.com/nation/nationnow/la-na-nn-obama-energy-20140508-story.html [https://perma.cc/9WVR-X7DY].

89. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

90. Tanya Somanader, *President Obama: The United States Formally Enters the Paris Agreement*, OBAMA WHITE HOUSE (Sept. 3, 2016, 10:41 AM), https://obamawhitehouse.archives.gov/blog/2016/09/03/president-obama-united-states-formally-enters-paris-agreement [https://perma.cc/WX5B-TPAF].

91. Suzanne Goldenberg, *Barack Obama Pledges to Bypass Congress to Tackle Climate Change*, THE GUARDIAN (June 25, 2013, 4:00 PM), https://www.theguardian.com/world/2013/jun/25/barack-obama-climate-change-strategy [https://perma.cc/7PSJ-7Q78]; *Climate Change and President Obama's Action Plan*, OBAMA WHITE HOUSE, https://obamawhitehouse.archives.gov/president-obama-climate-action-plan [https://perma.cc/KXX2-3LEJ] (last visited Jan. 9, 2018); *see generally Regulation Database—Executive Orders*, SABIN CTR. FOR CLIMATE CHANGE L., http://columbiaclimatelaw.com/resources/climate-deregulation-tracker/database/executive-orders/ [https://perma.cc/R4EJ-EWE7] (last visited Jan. 9, 2019).

92. OFFICE OF ENERGY EFFICIENCY & RENEWABLE ENERGY, *supra* note 53.

93. U.S. DEP'T OF ENERGY, WIND VISION: A NEW ERA FOR WIND POWER IN THE UNITED STATES (2015), https://www.nrel.gov/docs/fy15osti/63197-2.pdf [https://perma.cc/552C-GKKW].

facility has about 2 GW of capacity, and provides about twenty-five percent of the electric power used in New York City and Westchester County.[94]

One year later, the Department of the Interior retooled the National Offshore Wind Energy Strategy in order to achieve the ambitious goals of Wind Vision.[95] The new wind strategy identified three areas of agency focus: (1) reducing costs by better understanding the meteorological, oceanic, and seafloor conditions on the OCS; (2) supporting effective stewardship by increasing efficiency, consistency, and clarity in the regulatory process; and (3) increasing public support by better communicating the costs and benefits of wind energy.[96]

The majority in Congress largely did not support President Obama's ambitious climate goals or his executive actions.[97] Congress did, however, partially adopt President Obama's 2012 executive order *Improving Performance of Federal Permitting and Review of Infrastructure Projects*,[98] and its resulting report and recommendations, into the Federal Permitting Act.[99] The Federal Permitting Act was signed into law in December 2015 as the Fixing America's Surface Transportation Act ("FAST Act").[100]

The FAST Act is intended to expedite federal decision-making by improving efficiency, increasing transparency, and requiring adherence to certain described best practices.[101] It establishes a Federal Permitting Improvement Steering Council, whose Executive Director is tasked with gathering information on projects covered by the Act and developing project performance

94. *Indian Point Energy Center*, ENTERGY, http://www.entergy-nuclear.com/plant_information/indian_point.aspx [https://perma.cc/8MBJ-W6WC] (last visited Jan. 9, 2019). The Hoover Dam also has about 2 GW of capacity. *Hoover Dam: Frequently Asked Questions and Answers*, BUREAU OF RECLAMATION, https://www.usbr.gov/lc/hooverdam/faqs/powerfaq.html [https://perma.cc/UNK5-7USW] (last visited Jan. 9, 2019).

95. U.S. DEP'T OF ENERGY & U.S. DEP'T OF INTERIOR, NATIONAL OFFSHORE WIND STRATEGY (2016), https://www.boem.gov/National-Offshore-Wind-Strategy/ [https://perma.cc/C55U-74Q2].

96. *Id.* at viii–ix; *see also* OFFICE OF ENERGY EFFICIENCY & RENEWABLE ENERGY, *supra* note 53, at 3.

97. Goldenberg, *supra* note 91.

98. Improving Performance of Federal Permitting and Review of Infrastructure Projects, Exec. Order No. 13,604, 77 Fed. Reg. 18,885 (Mar. 22, 2012).

99. Gerrard, *supra* note 13, at 10603.

100. *Id.*; *see* Fixing America's Surface Transportation Act, Pub. L. No. 114-94, 129 Stat. 1312 (2015) [hereinafter FAST Act].

101. *See* FAST Act.

schedules.[102] These performance schedules must recommend completion dates for environmental reviews and authorizations.[103] These recommendations impose rigid timelines for agency action.[104] In addition, the Executive Director and the Council may recommend that the Director of the Office of Management and Budget or the Council on Environmental Quality ("CEQ") issue guidance to agencies on how to effectuate best practices and how to best comply with the FAST Act.[105] As of yet, President Trump has not appointed an Executive Director, but the Acting Executive Director is Angela Colamaria.[106]

The Act also limits judicial review of project approvals by imposing a two-year statute of limitations.[107] In addition, judicial review is afforded only to parties that submit comments during the approval process and is limited to the issues raised in those comments.[108]

In sum, President Obama supported renewable energy development throughout his presidency, and under his direction, BOEM, the Department of the Interior, and DOE heavily pushed offshore wind energy development.

102. *See* 42 U.S.C. § 4370m-1(a)–(b) (2018).

103. *See id.* § 4370m-1(c)(1).

104. *See id.* § 4370m-1(c)(1)(C)(ii)(II)(cc) (stipulating that agencies must render decision no later than 180 days after all information needed to complete a review is in its possession.)

105. Specifically, the Council is required to issue recommendations on what current best practices are with respect to:

> (i) enhancing early stakeholder engagement, including fully considering and, as appropriate, incorporating recommendations provided in public comments on any proposed covered project; (ii) ensuring timely decisions regarding environmental reviews and authorizations, including through the development of performance metrics; (iii) improving coordination between Federal and non-Federal governmental entities, including through the development of common data standards and terminology across agencies; (iv) increasing transparency; (v) reducing information collection requirements and other administrative burdens on agencies, project sponsors, and other interested parties; (vi) developing and making available to applicants appropriate geographic information systems and other tools; (vii) creating and distributing training materials useful to Federal, State, tribal, and local permitting officials; and (viii) addressing other aspects of infrastructure permitting, as determined by the Council.

Id. § 4370m-1(c)(2)(B).

106. *Federal Permitting Improvement Steering Council (FPISC) Leadership*, FED. INFRASTRUCTURE PROJECTS: PERMITTING DASHBOARD (June 7, 2018), https://www.permits.performance.gov/about/federal-permitting-improvement-steering-council-fpisc-leadership [https://perma.cc/6YDB-MAR4].

107. *See* 42 U.S.C. § 4370m-6(a)(1)(A) (2018).

108. *See id.* § 4370m-6(a)(1)(B).

2. Trump Era Policies

a. Executive Action

President Trump has undone much of the progress achieved by President Obama. Through an executive order, entitled *Promoting Energy Independence and Economic Growth*, President Trump revoked several key executive orders and memoranda issued by the Obama administration.[109] Those revoked actions include the moratorium on federal coal leasing, guidance for the social costs of GHG emissions, and guidance on how to account for climate change in environmental reviews.[110] President Trump also called for the EPA to rescind or amend regulations such as the Clean Power Plan—which capped carbon dioxide emissions from existing power plants—that he believed burdened domestic energy generation.[111]

President Trump has announced his plan to withdraw from the Paris Agreement.[112] He claims the agreement is economically unfair, and took particular issue with the Agreement's emissions reduction provisions, which he believes limits the use of coal for energy generation.[113] The United States is the only country to indicate its intent to withdraw from the Agreement.[114] However, due to the limitations on withdrawal in Article 28 of the Agreement, the United States is still a member of the Agreement.[115]

Even so, renewable energy development in the United States is proceeding. In March of 2017, President Trump's first year in office, BOEM held an auction for a wind energy lease area off the coast of North Carolina. Secretary of the Interior Ryan Zinke

109. Promoting Energy Independence and Economic Growth**,** Exec. Order No. 13,783, 82 Fed. Reg. 16,093 (Mar. 28, 2017).

110. SABIN CTR. FOR CLIMATE CHANGE L., *supra* note 91.

111. Exec. Order No. 13,783, *supra* note 109.

112. Remarks Announcing United States Withdrawal from the United Nations Framework Convention on Climate Change Paris Agreement, 2017 DAILY COMP. PRES. DOC. 1 (June 1, 2017).

113. *Id.*

114. Lisa Friedman, *Syria Joints Paris Climate Accord, Leaving Only U.S. Opposed*, N.Y. TIMES (Nov. 7, 2017), https://www.nytimes.com/2017/11/07/climate/syria-joins-paris-agreement.html [https://perma.cc/5PTT-QQR5].

115. Article 28 of the Paris Agreement does not permit parties to withdraw before three years have elapsed since the entry into force, and withdrawals do not take effect until on year from the Depositary's receipt of a notification of withdrawal. The agreement went into force on November 4, 2016. The earliest possible effective withdrawal date is November 4, 2020. *See* Paris Agreement, *supra* note 6, at Art. 28.

hailed this auction and lease as a "big win."[116] BOEM also announced the release of a Proposed Sale Notice for an area off the coast of Massachusetts that both Equinor (then Statoil), a Norwegian company, and PNE Wind, a German company, have expressed interest in.[117] The auction for this 390,000 acre WEA offshore Massachusetts was held on December 13–14, 2018. In the wake of the $405 million deal, Secretary Zinke said, "To anyone who doubted that our ambitious vision for energy dominance would not include renewables, today we put that rumor to rest."[118]

Additionally, BOEM published a Request for Feedback on April 6, 2018 seeking input on its "Proposed Path Forward for Future Offshore Renewable Energy Leasing on the Atlantic Outer Continental Shelf."[119] On April 11, 2018, BOEM issued a call for information on and recommendations for areas to develop located off the coast of New York in order to prepare for potential leases.[120] Secretary Zinke claims to be "very bullish on offshore wind" and BOEM is also expected to publish a Call for Information and Nominations for three areas off the coast of Northern and Central California.[121]

At the same time, DOE has been hard at work evaluating its Wind Vision Roadmap. In May 2018, DOE released an update to Wind Vision, based upon its 2017–2018 working sessions.[122] Included are

116. Derrick Z. Jackson, *Made in America: Trump Embracing Offshore Wind?*, UNION OF CONCERNED SCIENTISTS: BLOG (Apr. 6, 2017, 4:03 PM), https://blog.ucsusa.org/derrick-jackson/trump-embracing-offshore-wind [https://perma.cc/8M5U-BN9H].

117. *Proposed Commercial Wind Leases Offshore Massachusetts*, BUREAU OF OCEAN ENERGY MGMT., https://www.boem.gov/Unsolicited-Lease-Requests/ [https://perma.cc/NBK9-3C44] (last visited Jan. 9, 2019).

118. Press Release, U.S. Dep't of the Interior, BIDDING BONANZA! Trump Administration Smashes Record for Offshore Wind Auction with $405 Million in Winning Bids (Dec. 14, 2018), https://www.doi.gov/pressreleases/bidding-bonanza-trump-administration-smashes-record-offshore-wind-auction-405-million [https://perma.cc/D63F-GRM7].

119. BUREAU OF OCEAN ENERGY MGMT., BOEM–2018–0018, REQUEST FOR FEEDBACK ON BOEM'S PROPOSED PATH FORWARD FOR FUTURE OFFSHORE RENEWABLE ENERGY LEASING ON THE ATLANTIC OUTER CONTINENTAL SHELF (2018).

120. BUREAU OF OCEAN ENERGY MGMT., BOEM–2018–0004, COMMERCIAL LEASING FOR WIND POWER ON THE OUTER CONTINENTAL SHELF IN THE NEW YORK BIGHT—CALL FOR INFORMATION AND NOMINATIONS (2018).

121. Press Release, U.S. Dep't of the Interior, Trump Administration Delivers Historic Progress on Offshore Wind (Oct. 18, 2018), https://www.doi.gov/pressreleases/trump-administration-delivers-historic-progress-offshore-wind [https://perma.cc/V9E7-9YBZ].

122. *See* OFFICE OF ENERGY EFFICIENCY & RENEWABLE ENERGY, U.S. DEP'T OF ENERGY, DOE/GO-102018-5056, WIND VISION DETAILED ROADMAP ACTIONS: 2017 UPDATE (2018),

revisions both increasing and decreasing the priority of actions, adding new actions, and significantly retooling others based upon new insight.[123] It appears the Trump Administration may not be completely averse to the development of renewable energy facilities, but the administration's lack of criticism should not be construed as support.

Notwithstanding these potential indications of renewable energy development, the Trump administration presents a danger to the environment through its active support of fossil fuel energy generation.[124] If the current administration's policy is followed through to 2050, the United States' emissions will slightly increase, mostly due to a growth in natural gas consumption.[125] If this policy of fossil fuel consumption is carried out, the U.S. will not meet its envisioned emissions reductions, making it even less likely that climate change will be limited to 2 degrees Celsius.[126]

Despite this daunting political climate, BOEM is still promoting and providing for the development of offshore wind facilities. While it appears that the Trump Administration has not sought to prevent new lease auctions, and members of his cabinet have praised BOEM's efforts, this should not be taken as support for renewable energy. Considering that President Trump fought wind development prior to his presidency,[127] his administration's complacency could turn to disapproval in an instant.

https://www.energy.gov/sites/prod/files/2018/05/f51/WindVision-Update-052118-web_RMB.pdf [https://perma.cc/P3QN-Y8HR].

123. For example, the new report increased the priority level of Action 6.3.1, which aimed to develop and disseminate information on environmental, social, and economic impacts. *Id.* at 49–50. It also added Action 6.2.1, aimed at improving understanding of the interactions among wind energy, wildlife, and habitat, and the risks associated with these interactions. *Id.* at 46.

124. *See supra* note 112.

125. U.S. ENERGY INFO. ADMIN., ANNUAL ENERGY OUTLOOK 2018 WITH PROJECTIONS TO 2050 13–14 (2018), https://www.eia.gov/outlooks/aeo/pdf/AEO2018.pdf [https://perma.cc/D4FE-XVNR].

126. John H. Cushman, Jr., *No Drop in U.S. Carbon Footprint Expected Through 2050, Energy Department Says*, INSIDECLIMATE NEWS (Feb. 6, 2018), https://insideclimatenews.org/news/06022018/eia-trump-greenhouse-gas-emissions-rise-climate-change-natural-gas-wind-solar-energy [http://perma.cc/V8K3-U98H].

127. Nathan Vardi, *The Giant Swedish Company Building the Wind Farm Trump Opposed in Scotland*, FORBES (Jan. 10, 2017, 11:45 AM), https://www.forbes.com/sites/nathanvardi/2017/01/10/the-giant-swedish-company-building-the-wind-farm-trump-opposed-in-scotland/#49b6be935b64 [https://perma.cc/REM6-KYBB].

b. President Trump's Infrastructure Plan

On February 12, 2018, President Trump unveiled an infrastructure plan that, among other things, sought to reduce inefficiencies in the federal permitting process and limit judicial review of permitting decisions.[128] His recommendations focused on (1) establishing a firm timeline for agency review of environmental impacts, (2) streamlining NEPA, (3) limiting judicial review of permitting decisions, and (4) limiting the scope of an agency's alternatives analysis under NEPA.

President Trump's first recommendation relating to the restructuring of the review process is for Congress to establish a firm timeline for agencies to complete their environmental reviews up to the FONSI or record of decision ("ROD") stage of the process.[129] He recommends agencies be required to arrive at the FONSI or ROD stage no more than twenty-one months after they begin their environmental reviews.[130] Additionally, he recommends a three-month deadline for permitting decisions after an agency issues a FONSI or ROD.[131]

If Congress were to accept this recommendation, agencies would have to perform their analyses more quickly and may have to perform the bulk of their analysis prior to the initiation of an EA in order to meet deadlines. As discussed in Section III.B, a potential solution for this problem is the increased usage of programmatic EISs. In the case of the NY WEA, BOEM took twenty-three months to publish an EA,[132] and still has not issued a ROD or FONSI. This provision would require a significant change to BOEM's review process for the agency to be able to perform a satisfactory analysis by the deadline.

Agencies like BOEM, however, should be wary of cutting corners to meet these deadlines—many successful legal challenges to agency action alleging failure to adhere to NEPA "involve[d] agencies that felt time pressures during permitting or project review and decided to ignore or deemphasize issues or otherwise

128. THE WHITE HOUSE, LEGISLATIVE OUTLINE FOR REBUILDING INFRASTRUCTURE IN AMERICA 35 (2018), https://www.transportation.gov/sites/dot.gov/files/docs/briefing-room/304441/legoutline.pdf [https://perma.cc/SD4S-9AA8].

129. *Id.*

130. *Id.*

131. *Id.*

132. *Lease OCS-A 0512*, BUREAU OF OCEAN ENERGY MGMT., https://www.boem.gov/Lease-OCS-A-0512/ [https://perma.cc/MUE5-HY9N] (last visited Jan. 9, 2019).

failed to fully address omissions identified in public comments."[133] Courts will still require agencies to take a hard look at the environmental impacts of agency action, regardless of the time limits for review set by Congress as failure to review these impacts would constitute a failure to "consider an important aspect of the problem" and violate Section 706 of the APA.[134]

President Trump also recommends that the CEQ streamline the NEPA process,[135] that agencies be permitted to use categorical exclusions established by other federal agencies,[136] that agencies be permitted to receive funding from non-federal agencies to support the review process,[137] and that projects with positive environmental effects be afforded further streamlined NEPA review.[138]

President Trump's infrastructure plan also recommends limiting judicial review of permitting decisions. The plan first recommends that injunctive relief be limited to "exceptional circumstances" to prevent undue delay to necessary infrastructure projects.[139] Without more explanation of what an exceptional circumstance entails, it is unclear what effect this will have if adopted. This heightened standard may prevent frivolous challenges, but it may also prevent access to courts by plaintiffs who may be entitled to injunctive relief under the current standards.[140]

133. Edward McTiernan, Michael B. Gerrard, Allison B. Rumsey & Harris D. Sherman, *Expediting Environmental Review and Permitting of Infrastructure Projects: The 2015 FAST Act and NEPA*, ARNOLD & PORTER ADVISORY (Dec. 22, 2015), https://www.arnoldporter.com/en/perspectives/publications/2015/12/expediting-environmental-review-and-permitting [https://perma.cc/YG3F-RYPG].

134. Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

135. THE WHITE HOUSE, *supra* note 128, at 36.

136. *Id.* at 37–38.

137. *Id.* at 41.

138. *Id.* at 40.

139. *Id.* at 49–50.

140. "[A] plaintiff seeking a permanent injunction must satisfy a four-factor test . . .(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction. The traditional four-factor test applies when a plaintiff seeks a permanent injunction to remedy a NEPA violation." Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 156–57 (2010) (internal citations omitted). In addition, a court shall "(1) consider the potential effects on public health, safety, and the environment, and the potential for significant negative effects on jobs resulting from an order or injunction; and (2) not presume that the harms described in paragraph (1) are reparable." 42 U.S.C. § 4370m-6(b)(1) (2018).

Additionally, the plan recommends that Congress shorten the statute of limitations period for challenging permitting decisions to one-hundred-and-fifty days.[141] This would theoretically spur investment by reducing uncertainty and preventing delays in project construction and delivery.[142] This is shorter than the two-year statute of limitations established by the FAST Act,[143] and significantly shorter than the six-year statute of limitations that existed prior.[144] If adopted by Congress, this recommendation may limit delays, but may also prevent parties from seeking relief if the agency uncovers latent issues. This is especially problematic considering President Trump's recommendations that Congress limit the review period to twenty-one months. Because the proposed timeframe is so short, agencies may not have the time to take a sufficiently hard look at potential issues and may make mistakes that become apparent late in the process. In addition, a shorter statute of limitations may result in more challenges up front, as potential plaintiffs may file early to ensure that they may raise their challenges.

President Trump's plan also calls for limiting the scope of an alternatives analysis under NEPA to those actions an agency has authority over,[145] removing compulsory review of EISs by the EPA under Section 309 of the Clean Air Act,[146] and requiring agencies to cooperate and produce a single environmental review document and record of decision.[147] These recommendations, if adopted, would streamline the environmental review process. Removing Section 309 of the Clean Air Act may be dangerous, given the EPA's role of ensuring environmental compliance, but it is perhaps true, as the plan points out, that agencies are now more cognizant of NEPA's requirements and the EPA's watchful eye is no longer necessary.[148]

In sum, the President's plan would surely increase the speed of the permitting and environmental review process. However,

141. THE WHITE HOUSE, *supra* note 128, at 50.

142. *Id.*

143. *See* 42 U.S.C. § 4370m-6(a)(1)(B)(2018).

144. THE WHITE HOUSE, *supra* note 128, at 50. It is comparable to the statute of limitations for challenging surface transportation projects, however. *See* 23 C.F.R. § 771.139 (2018).

145. THE WHITE HOUSE, *supra* note 128, at 36.

146. *Id.* at 36–37

147. *Id.* at 35–36.

148. *Id.* at 36–37.

Congress must take care to ensure any changes do not go too far and limit the efficacy of statutes intended to reduce environmental impacts.

II. THE LEASING PROCESS IN ACTION: BLOCK ISLAND, CAPE WIND, AND EMPIRE WIND

A. Block Island

The first—and currently only—offshore wind facility in the United States is a small project off the coast of Rhode Island.[149] This facility, the Block Island wind farm, generates 30 MW using five turbines.[150] It began commercial operations in December 2016 and connects to the electrical grid on Block Island, a small island that previously relied on diesel generators to meet its energy needs.[151] Its construction was the product of a successful planning and leasing process.

The ball started rolling in 2004, when Rhode Island passed a renewable portfolio standard that required the state to produce sixteen percent of its electrical power demands with renewables by 2019.[152] Recognizing the dearth of information about the ocean lands under Rhode Island's jurisdiction, the Coastal Resources Management Council of Rhode Island, the state agency with jurisdiction over coastal resources, created the Rhode Island Ocean Special Area Management Plan ("RI O-SAMP") to be incorporated into the coastal management plan.[153]

From 2008 to 2010, the Coastal Resource Center of the University of Rhode Island led the effort to develop the RI O-SAMP by coordinating the efforts of resource users, academics, government agencies, and interest groups.[154] The resulting study looked at marine ecology, archaeological resources, fisheries, recreation,

149. DEEPWATER WIND, *supra* note 14.

150. DEEPWATER WIND, 2015-2016 TIMELINE FOR BLOCK ISLAND WIND FARM (2016), http://dwwind.com/wp-content/uploads/2016/01/BIWF-Timeline-2016.pdf [https://perma.cc/5ZQX-DQEY].

151. Crystal Bui, *Block Island Shuts Down Generators, Draws Power from Wind Farm*, NBC 10 NEWS (Providence) (May 1, 2017), http://turnto10.com/news/local/block-island-draws-power-from-wind-farm [https://perma.cc/MZ9U-8LYE].

152. Michael Burger, *Consistency Conflicts and Federalism Choice: Marine Spatial Planning Beyond the States' Territorial Seas*, 41 ENVTL. L. REP. NEWS & ANALYSIS 10602, 10606 (2011).

153. *Id.*

154. *Id.*

energy, and tourism, among others, and extended 30 miles offshore (including both state and federal waters).[155]

Interestingly, the lease issuance to Deepwater Wind, LLC predated this research effort. The governor of Rhode Island issued a feasibility study for a wind facility offshore Rhode Island in April 2007. A year later the state requested commercial proposals,[156] eventually choosing Deepwater Wind, LLC as its "preferred developer."[157] This process proceeded smoothly, even though no leasing regime existed for offshore wind permits in state waters, and the fact that Deepwater Wind, LLC did not know where its lease would be located once it finally received the lease.[158]

In August 2011, BOEM issued a Call for Information and Nominations for an area offshore Rhode Island and Massachusetts, including the area that the Block Island wind farm now occupies.[159] In addition, BOEM issued a Notice of Intent to perform an EA.[160] It was determined that competitive interest existed in the location, and in February 2012, BOEM identified a WEA pursuant to a memorandum of understanding between Massachusetts and Rhode Island.[161]

Assisted by the research already performed by the Coastal Resources Management Council of Rhode Island, BOEM released an EA in July 2012 that considered the reasonably foreseeable environmental impacts associated with the approval of site assessment activities (including the construction of meteorological towers and the placement of buoys).[162] BOEM made available a

155. *See* R.I. COASTAL RES. MGMT. COUNCIL, RHODE ISLAND OCEAN SPECIAL AREA MANAGEMENT PLAN (2010), http://www.crmc.ri.gov/samp_ocean/finalapproved/RI_Ocean_SAMP.pdf [https://perma.cc/6TCL-E555]; *see also* Burger, *supra* note 152, at 10606–07.

156. Burger, *supra* note 152, at 10607.

157. *Id.*

158. *Id.*

159. *Commercial Wind Leasing Offshore Rhode Island and Massachusetts*, BUREAU OF OCEAN ENERGY MGMT., https://www.boem.gov/Commercial-Wind-Lease-Rhode-Island-and-Massachusetts/ [https://perma.cc/63LV-3KMZ] (last visited Jan. 9, 2019).

160. Commercial Wind Lease Issuance and Site Characterization Activities on the Atlantic Outer Continental Shelf (OCS) Offshore Rhode Island and Massachusetts, 76 Fed. Reg. 51,381 (Aug. 18, 2011).

161. *BOEM Identifies Wind Energy Area Offshore Rhode Island and Massachusetts*, BUREAU OF OCEAN ENERGY MGMT. (Feb. 24, 2012), https://www.boem.gov/BOEM-Newsroom/Press-Releases/2012/press02242012.aspx [https://perma.cc/4LWL-PKQD].

162. However, it should be noted that the study did not analyze the environmental impacts of a wind facility. OFFICE OF RENEWABLE ENERGY PROGRAMS, BUREAU OF OCEAN ENERGY MGMT., OCS EIS/EA BOEM 2013-1131, COMMERCIAL WIND LEASE ISSUANCE AND SITE ASSESSMENT ACTIVITIES ON THE ATLANTIC OUTER CONTINENTAL SHELF OFFSHORE RHODE

revised EA in June 2013, along with a FONSI, meaning that reasonably foreseeable environmental impacts associated with the issuance of the lease would not significantly affect the environment, including fisheries and federally protected species.[163]

BOEM issued a Proposed Sale Notice in December of 2012. About two years after BOEM issued a Call, it held a competitive auction in July of 2013.[164] BOEM provisionally awarded the lease to Deepwater Wind.[165] In September of the same year, Deepwater Wind and BOEM executed the lease.[166]

Although the lease process used by BOEM in the Rhode Island-Massachusetts WEA was very similar to the one utilized in the recent NY WEA lease, the only legal challenges the Block Island facility had to face concerned its power purchasing agreement.[167] Block Island faced little opposition, likely due to the extensive and early research efforts which allowed Rhode Island to choose the best site for the facility, and the energy generated by this facility was cheaper than that generated by the island's diesel generators.[168] The RI O-SAMP allowed for BOEM to locate an area for development that would be the least disruptive to other uses, would have a non-significant impact on the environment, and would be supported by the local population.

ISLAND AND MASSACHUSETTS: REVISED ENVIRONMENTAL ASSESSMENT 1–3 (2013), https://www.boem.gov/uploadedFiles/BOEM/Renewable_Energy_Program/State_Activities/BOEM%20RI_MA_Revised%20EA_22May2013.pdf [https://perma.cc/F5JL-73KE].

163. *Id.*

164. *See* Press Release, U.S. Dep't of the Interior, Interior Holds First-Ever Competitive Lease Sale for Renewable Energy in Federal Waters (July 31, 2013), https://www.doi.gov/pressreleases/news/pressreleases/interior-holds-first-ever-competitive-lease-sale-for-renewable-energy-in-federal-waters [https://perma.cc/PKY8-NMTW].

165. *Id.*

166. BUREAU OF OCEAN ENERGY MGMT., *supra* note 159.

167. The initial power purchase agreement was determined to be too costly by the state public utilities commission, but the Rhode Island legislature passed legislation in response that required the utility commission to consider environmental issues. The commission then approved the agreement, which was upheld by the Rhode Island Supreme Court, In re *Proposed Town of New Shoreham Project*, 25 A.3d 482 (R.I. 2011), and in the First Circuit, *Riggs v. Curran*, 863 F.3d 6 (1st Cir. 2017).

168. Cassius Shuman, *Island Operating on Wind Farm Power*, BLOCK ISLAND TIMES (May 1, 2017, 9:15 AM), http://www.blockislandtimes.com/article/island-operating-wind-farm-power/49352 [https://perma.cc/3Z4Z-HXSM]; *Rhode Island State Energy Profile*, U.S. ENERGY INFO. ADMIN. (June 21, 2018), https://www.eia.gov/state/print.php?sid=ri [https://perma.cc/N453-53LF].

B. Cape Wind

While Block Island faced little resistance, the Cape Wind project faced a large and organized opposition. This pressure was too much to bear for the lease holders, Cape Wind Associates, LLC ("CWA"), who requested a two-year suspension of their lease and payment obligations in June 2017.[169] This request came months after several news publications reported that Cape Wind had attempted to terminate its lease.[170] CWA announced its intent to relinquish the lease in December 2017, and officially did so on May 10, 2018.[171]

Its detractors ranged from Bill Koch-backed group Alliance to Protect Nantucket Sound,[172] to the late Senator Ted Kennedy,[173] to former Natural Resources Defense Council attorney and professor emeritus of environmental law at the Elisabeth Haub School of Law at Pace University Robert F. Kennedy, Jr.,[174] to Native American tribes.[175] CWA has been involved in over thirty lawsuits in both state and federal court.[176]

The Cape Wind project was projected to generate 454 MW of power, utilizing 130 wind turbines.[177] It was sited in Horseshoe

169. *Cape Wind*, BUREAU OF OCEAN ENERGY MGMT., https://www.boem.gov/Massachusetts-Cape-Wind/ [https://perma.cc/JJL9-UEHZ] (last visited Jan. 9, 2019).

170. Jon Chesto, *Now It's Official: Cape Wind Project Dead*, BOSTON GLOBE (Dec. 1, 2017), https://www.bostonglobe.com/business/2017/12/01/now-official-cape-wind-project-dead/0899me8Xd3ziWOujgkvbwL/story.html [https://perma.cc/5ZEQ-EMMY]; Robert Walton, *Cape Wind Developers Call It Quits*, UTILITY DIVE (Dec. 4, 2017), https://www.utilitydive.com/news/cape-wind-developers-call-it-quits/512203/ [https://perma.cc/3TND-S6S6]; Christine Legere, Ethan Genter, Geoff Spillane & Doug Fraser, *The Final Blow for Cape Wind*, CAPE COD TIMES (Dec. 1, 2017, 9:41 PM), http://www.capecodtimes.com/news/20171201/final-blow-for-cape-wind [https://perma.cc/UBK9-YPQ5]; Katharine Q. Seelye, *After 16 Years, Hopes for Cape Cod Wind Farm Float Away*, N.Y. TIMES (Dec. 19, 2017), https://www.nytimes.com/2017/12/19/us/offshore-cape-wind-farm.html [https://perma.cc/3MDV-RUUB].

171. BUREAU OF OCEAN ENERGY MGMT., *supra* note 169.

172. GREENPEACE, BILL KOCH: THE DIRTY MONEY BEHIND CAPE WIND OPPOSITION (2010), http://www.greenpeace.org/usa/wp-content/uploads/legacy/Global/usa/binaries/2010/bill-koch-the-dirty-money-beh.pdf [https://perma.cc/6SCJ-2NL9].

173. Seelye, *supra* note 170.

174. Robert F. Kennedy, Jr., Opinion, *An Ill Wind Off Cape Cod*, N.Y. TIMES, Dec. 16, 2005, at A41.

175. *Cape Wind Opponents Appeal Federal Decision Upholding Lease*, ASSOCIATED PRESS, Nov. 29, 2017, https://www.apnews.com/c002553c3a0345d2bccddc3096c49d2a [https://perma.cc/Z6SA-D5HW]; *see also* Pub. Emps. for Envtl. Responsibility v. Beaudreau (*PEER I*), 25 F. Supp. 3d 67, 93–94 (D.D.C. 2014).

176. CAPE WIND, *supra* note 85.

177. *PEER I*, 25 F. Supp. at 85.

Shoal in Nantucket Sound, and was expected to provide up to three quarters of the energy needs for Cape Cod over the lifetime of the turbines.[178] It was first proposed in 2001 by CWA, who sought permission from the U.S. Army Corps of Engineers ("Corps") to construct a wind facility on Horseshoe Shoal.[179] A month after CWA contacted the Corps, the Corps determined that an environmental impact statement was necessary.[180] A Notice of Intent to prepare an EIS was published in January 2002, and public scoping meetings were held the same year.[181] The Corps issued a Draft EIS two years later.[182]

When the Secretary of the Interior delegated the authority to lease lands on the OCS for renewable energy generation to the MMS in 2005, the MMS reviewed the Cape Wind application to determine how the agency should proceed with the lease process.[183] MMS determined that its regulations differed substantially from those of the Corps, and that due to these differences, it was necessary to prepare a new EIS.[184] MMS issued a Notice of Intent to perform its own EIS in 2006.[185] This EIS became available in January 2008, and a final EIS was published in January 2009.[186]

This EIS evaluated the environmental impacts of the proposed 130-turbine wind generation facility.[187] MMS anticipated negligible to minor effects on the environment and moderate effects to

178. *Cape Cod Commission Denies Cape Wind Application*, REUTERS, Oct. 19, 2007, https://www.reuters.com/article/environment-utilities-operations-capewin/cape-cod-commission-denies-cape-wind-application-idUSN1930289620071019? [https://perma.cc/494B-GAG3].

179. At this point in time, it was unclear which agency had authority to site alternative energy projects on the OCS. The Energy Policy Act of 2005 remedied this lack of clear federal regulatory authority. Congress delegated this authority to the Department of the Interior, and the Secretary of the Interior then delegated this authority to the MMS, the precursor to BOEM. 1 MINERALS MGMT. SERVICE, MMS EIS-EA OCS PUB. NO. 2008-040, CAPE WIND ENERGY PROJECT FINAL ENVIRONMENTAL IMPACT STATEMENT E-5 (2009), https://www.boem.gov/uploadedFiles/BOEM/Renewable_Energy_Program/Studies/Cape%20Wind%20Energy%20Project%20FEIS.pdf [https://perma.cc/SQ4P-SQ63].

180. *Id.* at E-4.

181. *Id.*

182. *Id.*

183. *Id.* at E-4–E-5.

184. The MMS EIS incorporated those sections of the Corps' report as appropriate, and treated comments made on the Corps' EIS as scoping comments. *Id.* at E-4–E-5.

185. *Id.*

186. *Id.* at 1-1.

187. *Id.* at E-1–E-2.

waterfowl.[188] In light of these predictions, the Department of the Interior decided to offer a commercial lease to CWA in April 2010.[189] At the same time, it issued an EA detailing the foreseeable impacts of the lease, including the development of a wind facility,[190] and issued a finding of no new significant impact.[191] In October of 2010, CWA signed the lease—the first commercial offshore renewable energy lease in the United States.[192] CWA filed a Construction and Operations Plan in February 2011,[193] which BOEM approved in April of the same year.[194] CWA submitted revisions in 2014, which BOEM also approved.

Throughout this period CWA was delayed by numerous lawsuits. Recognizing that many of these plaintiffs filed suit with the sole intention of delay, one federal judge wrote, "[t]here comes a point at which the right to litigate can become a vexatious abuse of the democratic process."[195] But abusive as they may have been, the attacks succeeded in stymieing the project and contributed to its failure. Because CWA had not lived up to its contractual obligations by failing to meet financing deadlines, the two utility companies that had entered into a power purchase agreement with CWA terminated their contracts in January 2015.[196]

188. *Id.* at E-11.

189. MINERALS MGMT. SERV., RECORD OF DECISION: CAPE WIND ENERGY PROJECT HORSESHOE SHOAL, NANTUCKET SOUND 4 (2010), https://www.boem.gov/uploadedFiles/BOEM/Renewable_Energy_Program/Studies/CapeWindROD.pdf [https://perma.cc/Q6S5-56MC].

190. MINERALS MGMT. SERV., CAPE WIND ENERGY PROJECT ENVIRONMENTAL ASSESSMENT 1, 2 (2010), https://www.boem.gov/Renewable-Energy-Program/Studies/CapeWindEA-pdf.aspx.

191. MINERALS MGMT. SERV., FINDING OF NO NEW SIGNIFICANT IMPACT (FONNSI) (2010), https://www.boem.gov/Renewable-Energy-Program/Studies/CapeWindFONNSI-pdf.aspx [https://perma.cc/8RX2-WUXW].

192. BUREAU OF OCEAN ENERGY MGMT., LEASE NO. OCS-A 0478, COMMERCIAL LEASE FOR SUBMERGED LANDS FOR RENEWABLE ENERGY DEVELOPMENT ON THE OUTER CONTINENTAL SHELF (2010), https://www.boem.gov/uploadedFiles/BOEM/Renewable_Energy_Program/Studies/CapeWind_signed_lease.pdf [https://perma.cc/4PR5-8WD6].

193. ESS GROUP, INC. ET AL., CAPE WIND ENERGY PROJECT: CONSTRUCTION AND OPERATIONS PLAN (2011), https://www.boem.gov/uploadedFiles/BOEM/Renewable_Energy_Program/Studies/Final_Redacted_COP.pdf [https://perma.cc/4HZM-4E6N].

194. BUREAU OF OCEAN ENERGY MGMT., RECORD OF DECISION: CAPE WIND ENERGY PROJECT (2010), https://www.boem.gov/uploadedFiles/BOEM/Renewable_Energy_Program/Studies/Record_of_Decision42011.pdf [https://perma.cc/NWN9-BZ5B].

195. Lawrence Susskind & Ryan Cook, *The Cost of Contentiousness: A Status Report on Offshore Wind in the Eastern United States*, 33 VA. ENVTL. L.J. 204, 220 (2015) (citation omitted).

196. *Id.* at 221.

A month later, CWA officially requested a two-year suspension of its lease.[197] This suspension was granted by BOEM considering CWA's "good faith" efforts to meet milestones, the "extensive legal challenges," and BOEM's commitment to regulatory flexibility and speed.[198] During this suspension period, however, the D.C. Circuit struck another blow to Cape Wind. Judge Arthur R. Randolph vacated BOEM's EIS and required more research be done to determine whether the seafloor could support the monopile foundations of the wind turbines.[199] The D.C. Circuit did not vacate the lease.[200]

To add insult to injury, the Massachusetts legislature passed legislation a few months later, in August 2016, requiring the procurement of 1,600 MW of offshore wind.[201] Under the legislation's definition of offshore wind energy generation, however, Cape Wind was not an eligible facility because it was located too close to inhabited areas and the lease had been issued prior to the date cut-off for consideration.[202] At this point, Cape Wind had lost its financial support, public support, and legislative support.

CWA applied for another suspension request in June 2017 due to litigation delays and the loss of financing.[203] BOEM did not

197. Letter from Abigail Ross Hopper, Dir., Bureau of Ocean Energy Mgmt., to James S. Gordon, Manager & Member, Cape Wind Associates, LLC (July 24, 2015), https://www.boem.gov/Lease-Suspension-Order/ [https://perma.cc/Z7AU-D946] (granting CWA's lease term suspension request).

198. *Id.* at 1.

199. Pub. Emps. for Envtl. Responsibility v. Hopper (*PEER II*), 827 F.3d 1077, 1083–84 (D.C. Cir. 2016).

200. *Id.* ("The Bureau therefore violated NEPA, but that does not necessarily mean that the project must be halted or that Cape Wind must redo the regulatory approval process.").

201. *See* Press Release, Mass. Dep't of Energy Res., Governor Baker Signs Comprehensive Energy Diversity Legislation (Aug. 8, 2016), https://www.mass.gov/news/governor-baker-signs-comprehensive-energy-diversity-legislation [https://perma.cc/XQK7-GZBE].

202. The legislature defined "offshore wind developer" as "a provider of electricity developed from an offshore wind energy generation project that is located on the Outer Continental Shelf and for which no turbine is located within 10 miles of any inhabited area," and "offshore wind energy generation" as "offshore electric generating resources derived from wind that: (1) are Class I renewable energy generating sources, as defined in section 11F of chapter 25A of the General Laws; (2) have a commercial operations date on or after January 1, 2018, that has been verified by the department of energy resources; and (3) operate in a designated wind energy area for which an initial federal lease was issued on a competitive basis after January 1, 2012." H.B. 4568, 189th Gen. Ct. (Mass. 2016).

203. Letter from Dennis J. Duffy, Vice President, Cape Wind Associates, LCC, to James Bennett, Chief, Office of Renewable Energy, Bureau of Ocean Energy Mgmt. (June 22,

respond to this request,[204] but did release the court-mandated supplementary EIS in September 2017, determining that the impacts found did not differ from those predicted in its earlier EIS.[205] This appears to not have altered CWA's decision, as they relinquished their lease in December 2017.[206] This was approved by BOEM on May 10, 2019.[207]

Cape Wind, proposed in 2001, is dead in the water seventeen years later. Delays due to litigation and regulatory confusion have taken their toll on Cape Wind's developers. This stands in stark contrast to the two-year process of Block Island detailed above. The differences in the processes are legion, but there are two main differences between the two developments (other than size).[208] The first is that Block Island started with a detailed survey on oceanic conditions, whereas Cape Wind began with an EIS that was large in scale, but limited in actual detail.[209] The second difference is that Block Island had the support of the Rhode Island legislature, while Cape Wind's support from Massachusetts dried up once Bill Koch and the Kennedys stepped in. Because Block Island had the RI O-SAMP and widespread support, it was sited in such a way to avoid conflicts and given many benefits, while Cape Wind dove headfirst into the fray and had to fend for itself.

2017), https://www.boem.gov/CWA-to-BOEM-Lease-Suspension-Request/ [https://perma.cc/V33Q-6EMY] (requesting two-year suspension of the lease).

204. BUREAU OF OCEAN ENERGY MGMT., *supra* note 169.

205. BUREAU OF OCEAN ENERGY MGMT., RECORD OF DECISION: CAPE WIND ENERGY PROJECT (2017), https://www.boem.gov/ROD-CWA-MA/ [https://perma.cc/6ET3-ZLZ8].

206. *It's Over, Cape Wind Ends Controversial Project*, CAPE COD TIMES (Dec. 1, 2017, 2:00 PM), http://www.capecodtimes.com/news11/20171201/its-over-cape-wind-ends-controversial-project [https://perma.cc/8HSJ-3A77].

207. Mary Ann Bragg, *Cape Wind Lease Officially Comes to End*, CAPE COD TIMES (June 23, 2018, 5:35 PM), http://www.capecodtimes.com/news/20180622/cape-wind-lease-officially-comes-to-end [https://perma.cc/5NRQ-35A4].

208. Block Island has five turbines, while Cape Wind would have had 130. With the developer of Block Island seeking to expand Block Island with the 400 MW facility, Revolution Wind, we may see if the difference in size plays a factor in how much litigation a project can avoid and survive. *See Revolution Wind*, DEEPWATER WIND, http://dwwind.com/project/revolution-wind/ [https://perma.cc/6HUS-Z3SV] (last visited Jan. 9, 2019).

209. In the last case regarding Cape Wind, the D.C. Circuit found that BOEM violated NEPA by issuing a lease without "first obtaining sufficient site-specific data on seafloor and subsurface hazards . . . ." Pub. Emps. for Envtl. Responsibility (*PEER II*) v. Hopper, 827 F.3d 1077, 1081 (D.C. Cir. 2016) (internal citation omitted).

C. Empire Wind

The WEA off the coast of New York was auctioned off in December 2017 after a six-year process.[210] Planning for the NY WEA began in November 2010, when BOEM held a task force meeting to discuss the possibility of renewable energy projects off the coast of New York. In September 2011, a consortium consisting of the New York Power Authority, the Long Island Power Authority, and Consolidated Edison submitted an unsolicited lease request to BOEM.[211] In January 2013, BOEM issued an RFI, seeking public comment and gauging competitive interest in the WEA.[212] After determining that competitive interest existed, BOEM published a Call in May 2014, seeking additional commercial nominations and further comments on site conditions, resources, and other uses of the area, so that the agency could determine whether to offer the site, or part of the site, in a lease.[213] At the same time, BOEM published a Notice of Intent to perform an EA.[214] This EA was intended to determine whether significant environmental impacts would result from the lease and site characterization and assessment activities, such as the installation of meteorological towers or buoys.[215]

BOEM then proceeded to the Area Identification stage of the lease process. During Area Identification, BOEM "considered comments from relevant stakeholders such as the maritime community and commercial fishing industry; state and local renewable energy goals; and trends in global offshore wind development, and identified commercial fishing, maritime navigation/safety and visual impacts as issues warranting additional

210. Defendants' Motion for Summary Judgment at 10, Fisheries Survival Fund v. Jewell, No. 1:16-cv-02409, 2018 WL 4705795 (D.D.C. Oct. 24, 2017) [hereinafter Defs.' Mot. for S. J.]; ADMINISTRATIVE RECORD FOR FISHERIES SURVIVAL FUND V. JEWELL, No. 1:16-cv-02409, 2018 WL 4705795 (D.D.C. Oct. 24, 2017) [hereinafter NYAR] 53232–36 (on file with author).

211. NYAR 54665–857.

212. BUREAU OF OCEAN ENERGY MGMT., *supra* note 132; *see also* Defs.' Mot. for S. J., *supra* note 210, at 9; Plaintiffs' Motion for Summary Judgment at 9, Fisheries Survival Fund v. Jewell, No. 1:16-cv-02409, 2018 WL 4705795 (D.D.C. Sept. 12, 2017) [hereinafter Pls.' Mot. for S. J.].

213. *Id.* NYAR 45942.

214. Pls.' Mot. for S. J., *supra* note 212, at 10; Defs.' Mot. for S. J., *supra* note 210, at 9; NYAR 75598–600.

215. *Id.*

analysis."[216] After weighing potential conflicts with the existing uses of the identified area and other development considerations, BOEM designated the entire Call Area as the NY WEA.[217]

On June 6, 2016, BOEM published a Proposed Sale Notice for the NY WEA announcing proposed terms for a lease sale and invited public comment during the following 60-day period.[218] BOEM also published a Notice of Availability of the initial EA analyzing the reasonably foreseeable environmental impacts of leasing the NY WEA[219] and solicited comments on the EA.[220]

BOEM published a revised EA and a FONSI on October 31, 2016.[221] Simultaneously, BOEM announced that it had removed from the lease a portion of the area, Cholera Bank, which contained sensitive habitat[222] and published a Final Sale Notice announcing its intent to offer the lease for sale at auction.[223]

A collection of opponents comprised of cities and towns, fisheries interest groups, and companies ("Plaintiffs") opposed this lease, and responded to the Final Sale Notice by sending BOEM a notice letter pursuant to the citizen suit provision of OCSLA. Plaintiffs then commenced an action in the D.C. District Court against Sally Jewell, then Secretary of the Interior, and BOEM ("Defendants") on December 8, 2016,[224] alleging violations of NEPA and OCSLA. Plaintiffs claimed that BOEM had acted without consideration of the benthic resources and habitat that lay in the NY WEA.[225]

216. Defs.' Mot. for S. J., *supra* note 210, at 9; NYAR 45742–56.

217. NYAR 45761–76, 45741–77.

218. Defs.' Mot. for S. J., *supra* note 210, at 10; Pls.' Mot. for S. J., *supra* note 212, at 11; NYAR 47230–238.

219. Defs.' Mot. for S. J., *supra* note 210, at 10; NYAR 38595.

220. NYAR 38595.

221. Pls.' Mot. for S. J., *supra* note 212, at 17; Defs.' Mot. for S. J., *supra* note 210, at 10.

222. NYAR 74232–681.

223. NYAR 75588–97; Pls.' Mot. for S. J., *supra* note 212, at 23; Defs.' Mot. for S. J., *supra* note 210, at 10.

224. The listed plaintiffs are: Fisheries Survival Fund; the Borough of Barnegat Light, New Jersey; The Town Dock; Seafreeze Shoreside; Sea Fresh USA; Garden State Seafood Association; Rhode Island Fisherman's Alliance; Long Island Commercial Fishing Association, Inc.; the Town of Narragansett, Rhode Island; the Narragansett Chamber of Commerce; the City of New Bedford, Massachusetts; and the Point Pleasant (NJ) Dock Co-Operative. Complaint at 1, Fisheries Survival Fund v. Jewell, No. 1:16-cv-02409, 2018 WL 4705795 (D.D.C. Dec. 8, 2016).

225. *Id.* at 3–4.

BOEM held the auction on December 15–16, 2016,[226] and Equinor—then called Statoil—was the provisional winner of the lease.[227] Equinor ("Defendant-Intervenors") then successfully moved to intervene in the case.[228]

Plaintiffs sought a preliminary injunction to prevent the Defendants from executing the lease, but Judge Tanya Chutkan of the D.C. District Court denied their motion on February 15, 2017.[229] BOEM and Equinor then proceeded to execute the lease on March 15, 2017.[230]

Plaintiffs, Defendants, and Defendant-Intervenors all filed motions for summary judgment.[231] The Parties filed the final reply on January 10, 2018, and filed a joint request for oral argument.[232]

The Court issued an opinion on September 20, 2018.[233] Judge Chutkan granted Defendants' motion for summary judgment, denied Plaintiffs' motion, and denied Defendant-Intervenor's motion as moot.[234] The Court found that Plaintiffs' NEPA allegations were not ripe, and that Plaintiffs' OCSLA allegations were procedurally barred.[235] Plaintiffs filed a motion to alter judgment, pursuant to Federal Rule of Civil Procedure 59(e) on October 29, 2018,[236] which Defendants and Defendant-Intervenor have opposed.[237] The Court has not yet ruled on these motions.

226. NYAR 53232–36; Pls.' Mot. for S. J., *supra* note 212, at 23; Defs.' Mot. for S. J., *supra* note 210, at 10.

227. *Id.*

228. Equinor moved to intervene on January 9, 2017. Motion to Intervene, Fisheries Survival Fund v. Jewell, No. 1:16-cv-02409 (D.D.C. Jan. 9, 2017). Judge Chutkan granted this motion on Jan. 16, 2018. Minute Order, Fisheries Survival Fund, v. Jewell, No. 1:16-cv-02409, 2018 WL 4705795 (D.D.C. Jan. 16, 2017).

229. Order, Fisheries Survival Fund v. Jewell, No. 1:16-cv-02409 (D.D.C. Feb. 15, 2017).

230. NYAR 46753–802.

231. *See* Pls.' Mot. for S. J., *supra* note 212; Defendant-Intervenor's Cross Motion for Summary Judgement, Fisheries Survival Fund v. Jewell, No. 1:16-cv-02409, 2018 WL 4705795 (D.D.C. Oct. 24, 2017); Defs.' Mot. for S. J., *supra* note 210.

232. Notice of Request for Oral Argument, Fisheries Survival Fund v. Jewell, No. 1:16-cv-02409, 2018 WL 4705795 (D.D.C. Feb. 1, 2018).

233. Fisheries Survival Fund, v. Jewell, 2018 WL 4705795, at *4–6 (D.D.C. Sept. 30, 2018).

234. *Id.*

235. The court also found that Plaintiffs had standing to raise both their NEPA and OCSLA claims under a theory of procedural standing. *Id.*

236. *See* Plaintiffs' Motion to Alter or Amend Judgment, Fisheries Survival Fund v. Jewell, No. 1:16-cv-02409 (D.D.C. Oct. 29, 2018).

237. *See* Defendants' Motion to Alter or Amend Judgment, Fisheries Survival Fund, v. Jewell, No. 1:16-cv-02409 (D.D.C. Nov. 13, 2018); *see* Defendant-Intervenor's Motion to Alter or Amend Judgment, Fisheries Survival Fund v. Jewell, No. 1:16-cv-02409 (D.D.C. Nov. 13, 2018).

1. Complaint

The Plaintiffs' complaint alleges that BOEM's current leasing procedures fail to adequately satisfy the requirements of NEPA and OCSLA. More specifically, they argue that BOEM violated NEPA by: (1) improperly segmenting its environmental analysis by looking only at the foreseeable impacts of the lease sale and exploration, and failing to analyze the impacts of a wind facility in the NY WEA; (2) performing an inadequate alternatives analysis by not looking at other sites for development; and (3) failing to perform a full-fledged EIS given the significant impacts a wind facility would allegedly have.[238] Plaintiffs also allege that the procedures violated OCSLA at the RFI phase and the lease issuance phase, as BOEM failed to consider the significant risks that potential lease activities pose to the interests that OCSLA aims to protect.[239]

238. Complaint, *supra* note 224, at 25–26.

239. "The Secretary [of the Interior] shall ensure that any activity under this subsection is carried out in a manner that provides for—

(A) safety;
(B) protection of the environment;
(C) prevention of waste;
(D) conservation of the natural resources of the outer Continental Shelf;
(E) coordination with relevant Federal agencies;
(F) protection of national security interests of the United States;
(G) protection of correlative rights in the outer Continental Shelf;
(H) a fair return to the United States for any lease, easement, or right-of-way under this subsection;
(I) prevention of interference with reasonable uses (as determined by the Secretary) of the exclusive economic zone, the high seas, and the territorial seas;
(J) consideration of—
(i) the location of, and any schedule relating to, a lease, easement, or right-of-way for an area of the outer Continental Shelf; and
(ii) any other use of the sea or seabed, including use for a fishery, a sea lane, a potential site of a deepwater port, or navigation;
(K) public notice and comment on any proposal submitted for a lease, easement, or right-of-way under this subsection; and
(L) oversight, inspection, research, monitoring, and enforcement relating to a lease, easement, or right-of-way under this subsection.

43 U.S.C. §1337(p)(4)(A)–(L) (2018).

2. NEPA Challenges

a. The District Court's Holding

Judge Chutkan found that Plaintiffs' NEPA claims were not ripe. In doing so, the Court made the determination that Defendants did not impermissibly defer consideration of the impacts of construction of a wind facility on the OCS.

For the Court, the question of ripeness turned on whether BOEM had reached the "critical stage of a decision which will result in 'irreversible and irretrievable commitments of resources' to an action that will affect the environment."[240] In a multiple stage leasing process—seen typically in the oil and gas context—it has been held that an agency reaches this critical stage when it "no longer 'retain[s] the authority to preclude all surface disturbing activities' subsequent to an oil and gas lease."[241] If an agency does not retain this authority, "an EIS assessing the full environmental consequences must be prepared before commitment . . . ."[242] The Court held—and the parties agree—that the legal standard for oil and gas is applicable here, and that "lease issuance triggers NEPA obligation unless the issuing agency 'retains[s] the authority to preclude all surface disturbing activities.'"[243]

But while the parties agreed on the legal standard, they differed on the question of its application. Plaintiffs argue that to satisfy this standard, BOEM was required to retain the "*absolute right* to prevent *all* surface-disturbing activity."[244] Plaintiffs' theory is that because BOEM's right to cancel a lease is limited by Equinor's regulatory compliance and by the lease criteria, the agency no longer has the *absolute* right to prevent surface-disturbing activity. Defendants argue conversely that the language of the lease establishes BOEM's absolute authority to preclude activity in the

240. Ctr. for Biological Diversity v. U.S. Dep't of Interior, 563 F.3d 466, 480 (D.C. Cir. 2009) (quoting Wyo. Outdoor Council v. U.S. Forest Serv., 165 F.3d 43, 49 (D.C. Cir. 1999)).

241. *Wyo. Outdoor Council*, 165 F.3d at 49 (quoting Sierra Club v. Peterson, 717 F.2d 1409, 1412 (D.C. Cir. 1983)).

242. *Peterson*, 717 F.2d at 1415.

243. Fisheries Survival Fund v. Jewell, No. 16-cv-2409, 2018 WL 4705795, at *7 (D.D.C. Sept. 30, 2018) (quoting *Wyo. Outdoor Council*, 165 F.3d at 49).

244. Plaintiffs' Opposition to Defendants' and Statoil's Motion for Summary Judgment, Reply in Support of Plaintiffs' Motion for Summary Judgment and Response to Amicus Curaie Brief at 22, Fisheries Survival Fund v. Jewell, No. 1:16-cv-02409, 2018 WL 4705795 (D.D.C. Nov. 28, 2018) (hereinafter Pls.' Reply)

leased area.[245] Because the lease states that "BOEM can deny all development if it determines that the environmental consequences would be unacceptable," Defendants claim that the lease is directly analogous to the no surface occupancy leases that both *Sierra Club v. Peterson* and *Conner v. Burford* found did not constitute irreversible and irretrievable commitments of resources.[246]

The Court held that the Defendants' characterization of the legal standard was correct. First looking at the lease terms, the Court found that the lease grants Equinor only the exclusive right to submit a Site Assessment Plan and a Construction and Operations Plan to BOEM for approval, and that no activity is permitted until plans are submitted and approved. The Court further found that BOEM "retained the right to disapprove a [Site Assessment Plan] or [Construction and Operations Plan] based on the Lessor's determination that the proposed activities would have unacceptable environmental consequences"[247] and that BOEM's regulations provide for cancellation of a lease if continued activity would cause serious environmental harm.[248]

With this understanding of the lease, the Court rejected Plaintiffs' argument that the above conditions precluded BOEM from changing its mind unilaterally. Because "none of the 'conditions' at issue involve or presuppose any transfer of authority to prevent lease activities out of BOEM's hands," the Court distinguished the leases at issue in both *Peterson* and *Conner*.[249]

Characterizing the leases in *Peterson* and *Conner* as granting lessees a right to develop that could be regulated, but not precluded, the Court found that the lease at issue here was of a different kind. The lease purchased by Equinor did not involve BOEM "effectively trad[ing] the authority to *preclude* all activity for the authority to *regulate* that activity," and thus BOEM was not required to perform an EIS.[250]

245. *Id.*

246. Defendants' Reply in Support of Motion for Summary Judgment at 5–6, Fisheries Survival Fund v. Jewell, No. 1:16-cv-02409, 2018 WL 4705795 (D.D.C. Jan 10, 2018) (citing *Peterson*, 717 F.2d 1409 and Conner v. Burford, 605 F. Supp. 107 (D. Mont. 1985)).

247. Fisheries Survival Fund v. Jewell, No. 16-CV-2409, 2018 WL 4705795, at *8 (D.D.C. Sept. 30, 2018) (quoting NYAR 0046754).

248. *Id.* Cancellation of a lease in this way requires notice and opportunity for a hearing. 30 C.F.R. § 585.437(b)(4)(i)–(iii) (2018).

249. Fisheries Survival Fund v. Jewell, No. 16-CV-2409, 2018 WL 4705795, at *8 (D.D.C. Sept. 30, 2018).

250. *Id.*

Because the Court found that the lease sale did not commit any resources, much less irretrievably, it found that BOEM's NEPA obligations had not yet matured. Thus, Plaintiffs' challenges here were not ripe.[251]

b. Recommendations

Despite this victory, BOEM should still look to reconfigure its leasing procedures. Currently the Smart from the Start initiative attempts to reduce repetitive discussions of the same issues by waiting until such issues arise and then performing an EA or EIS.[252] It envisions several small environmental reviews building up to an ultimate review of the impacts of the construction of the facility and its operation.[253] But this is the wrong way to go about developing wind facilities sensibly, as it is reactive instead of proactive—instead of discovering potentially project-stopping issues up front, they are only discovered later in the process after capital, energy, and time has been expended in reliance on a lease. If a full environmental review is done at the leasing stage, an agency is in a better position to decide whether to grant a lease, where to site it, and its terms.

BOEM should instead front-load its NEPA analysis by performing more programmatic EISs, as recommended by Professor Michael B. Gerrard and discussed in Part III. This would allow BOEM to predict future issues and would force the agency and any lessors to focus on avoiding any unacceptable environmental impacts up front. With this knowledge, developers would be able to blueprint and fast-track facilities that would survive NEPA. Moreover, agencies would only need to summarize and incorporate discussions from the broader EIS before concentrating on specific

251. Interestingly, the court did not attempt to distinguish *PEER II*, where a similar challenge was raised. Plaintiffs there were challenging the adequacy of an EIS that was issued prior to the Cape Wind lease. Pub. Emps. for Envtl. Responsibility v. Hopper (*PEER II*), 827 F.3d 1077, 1083–84 (D.C. Cir. 2016). Although the Cape Wind lease had a similar provision requiring the lessee to obtain approval before commencing any activity and allowed BOEM to unilaterally reject any plans, the D.C. Circuit held that surveying was necessary. *Id.* at 1084. The court did not reference this lease provision when it determined that an agency's "impact statement must therefore look beyond the decision to offer a lease and consider the predictable consequences of that decision," such as the construction of a wind farm. *Id.* It is unclear why the outcome here differs from the outcome in *PEER II*.

252. OFFICE OF ENERGY EFFICIENCY & RENEWABLE ENERGY, *supra* note 53, at 17.

253. *Id.*

issues, which would also speed up the process.[254] This process—working from a broad to a narrow focus—is already a part of BOEM's regulations, and is called tiering.[255] Tiering is appropriate when it helps the lead agency focus on the issues that are ripe for decision, and exclude those already decided.[256] While not all mitigation decisions are ripe for decision at this early stage, siting and design are.

If BOEM develops a programmatic EIS for smaller areas, such as a regional EIS for the mid-Atlantic region, it can satisfy NEPA with respect to early stage actions such as need and site selection.[257] BOEM would only need to supplement this programmatic EIS with a subsequent EIS or EA if new information arose or a change in plans occurred.[258] A broad analysis followed by supplementary studies would allow BOEM to proceed swiftly through the environmental review process by ensuring proper siting, and then, by requiring supplements only when new information would provide BOEM with a better understanding of the environmental impacts of a facility. BOEM would still be required to perform site-specific analyses on local impacts, such as visual effects or effects on navigation, but programmatic EISs would speed up the process by allowing informed decision-making up front.

Although BOEM was not required to retool its leasing process given its victory in the District Court, it may still behoove the agency to look into tiering its analysis. Starting broadly and getting progressively narrower may take more time up front, but the creation of a framework of analysis should make each subsequent step faster. This would result in increased speed without compromising on environmental protection.

254. *See* 40 C.F.R. § 1508.28 (2018).

255. *Id.*

256. *Id.*

257. *See, e.g.,* W. Lands Project v. Bureau of Land Mgmt., No. 13-cv-339, 2014 WL 2892256 (S.D. Cal. June 25, 2014), *aff'd*, 668 F. App'x 802 (9th Cir. 2016); Ctr. for Biological Diversity v. Dep't of Interior, 563 F.3d 466, 474 (D.C. Cir. 2009) ("Under this approach, an agency may issue a broader EIS at the earlier 'need and site selection' stage of a program, and issue subsequent, more detailed environmental impact statements at the program's later, more site-specific stage.") (citing 40 C.F.R. § 1508.28).

258. 40 C.F.R. § 1508.28 (2018).

3. OCSLA Challenges

a. The District Court's Holding

The Court did not engage with the merits of Plaintiffs' OSCLA claims. Because Plaintiffs failed to comply with the statutorily mandated sixty-day waiting period of OCSLA, the Court held that their claims were procedurally barred. While Plaintiffs first argued that they should be excused from the statutory requirements as the lease auction occurred only forty-five days after the Final Sale Notice was published, giving them insufficient time to notify Defendants of their claims, and alternatively, that their claims fell within Section 1349(a)(3)'s exception for issues that constitute "an imminent threat to the public health or safety," the Court found neither argument convincing.[259]

Finding the language of Section 1349 unambiguous, the Court first held that construing the statute's sixty-day requirement flexibly would "flatly contradict[] the language of the statute."[260] The existence of the exception for unacceptable hardship also supports this holding, as Congress clearly understood that exigent circumstances could exist, and fashioned a safety valve accordingly.

The Court then held that Plaintiffs were not eligible for the exigent circumstance exception of Section 1349(a)(3).[261] While Plaintiffs did provide notice of the alleged violation, they failed to demonstrate an imminent threat to public safety or an immediate effect on their legal interests.[262] Because the lease had no immediate effect other than granting Equinor the right to submit a Site Assessment Plan and a Construction and Operations Plan, Plaintiffs are unable to invoke the statutory exception, and their OCSLA claims are procedurally barred.

b. The Parties' Arguments

Although the Court did not reach the merits of Plaintiffs' OCSLA claims, this Note will engage with the parties' arguments. It will also recommend modifications to BOEM's leasing procedures that may help the agency better deal with these kinds of challenges.

259. Fisheries Survival Fund v. Jewell, No. 16-CV-2409, 2018 WL 4705795, at *10–11 (D.D.C. Sept. 30, 2018)

260. *Id.* at *11 (quoting Hallstrom v. Tillamook County, 493 U.S. 20, 27 (1989)).

261. *Id.*

262. *Id.*

Plaintiffs invoke Section 1349, alleging that BOEM's leasing procedures failed to adequately consider its obligations under OCSLA.[263] Plaintiffs allege that BOEM failed to properly consider and provide for OCSLA's mandates at both the RFI stage (the siting decision), and the lease issuance stage.[264]

In particular, Plaintiffs claim that BOEM did not properly provide for, consider, and prevent unreasonable risks to fishing, safety, conservation of natural resources, and navigation.[265] Plaintiffs take issue with the scoping of the EA here as well, arguing that BOEM did not properly consider the risks to natural resources, fisheries, safety, and navigation, because it improperly deferred the analysis of the environmental impacts of a wind farm.[266]

Defendants look to *PEER I* to support their argument that BOEM's scope was too narrow. Defendants argue that the RFI was an interstitial step, and thus not an "activity" that implicated OCSLA.[267] Defendant-Intervenors argue that even if OCSLA did apply, their extensive engagement with shareholders is evidence of the agency's engagement with OCSLA's mandate.[268] Defendants also argue that BOEM satisfied its OCSLA obligations in the leasing stage and point to the relevant sections of the EA as evidence.[269] Further, Defendants make the argument that analyzing the impacts of a wind energy generation facility is not appropriate at this time because no construction plan exists.[270]

c. *PEER I*'s Holding

Because there is not much case law interpreting OCSLA's renewable leasing provisions, the interpretation of *PEER I* is crucial to the resolution of Plaintiffs' claim.[271] In *PEER I*, the Court held

263. Pls.' Mot. for S. J., *supra* note 212, at 38.
264. *Id.*
265. *Id.* at 38–39.
266. *Id.* at 38.
267. Defs.' Mot. for S. J., *supra* note 210, at 36.
268. Defendant-Intervenor's Cross Motion for Summary Judgment, *supra* note 231, at 12–13.
269. Defs.' Mot. for S. J., *supra* note 210, at 41–44.
270. *Id.* at 39.
271. There exist only two cases interpreting OCSLA's renewable leasing provisions: Town of Barnstable v. Fed. Aviation Admin., 659 F.3d 28, 34–36 (D.C. Cir. 2011) (determining that the FAA did not properly provide for "safety" when it did not did not assess risks to aviation from Cape Wind's turbines and remanded to the agency) and Public Emps. for Envtl. Responsibility v. Beaudreau (*PEER I*), 25 F. Supp. 3d 67, 107 (D.D.C. 2014)

that "the Secretary's overall obligation under 43 U.S.C. § 1337(p)(4) to provide for safety is an obligation that applies *not only* to approving individual steps of the process, such as the timing of the collection of survey data, *but rather* to the entirety of the leasing process."[272] The parties differ on the interpretation of this language, and the resolution of this claim hinges on *PEER I's* meaning.

The parties emphasize different sections of the above holding. Plaintiffs argue that this language requires BOEM to comply with its obligations under 43 U.S.C. § 1337(p)(4) both when "approving *individual steps* of the process" *and* "'to the *entirety* of the leasing process' as a whole."[273] While Defendants first argue that *PEER I* is inapplicable as no segmentation claim was before the court in that case,[274] they also argue that "BOEM's compliance with Section 8(p)(4) should be viewed, not in isolation, but *in the context of the entire regulatory process*, including BOEM's review of a Construction and Operations plan proposal."[275] Defendants claim that they do not need to consider impacts on OCSLA's areas of concern from a wind farm given the structure of the regulatory process.[276] They argue that because BOEM has safeguarded against impacts by retaining the ability to reject any construction proposals with unacceptable environmental risks, they are permitted to defer consideration at this stage.[277]

The best interpretation of this language is that an agency must look at whether a particular action provides for OCSLA's mandates *within the context of the lease process* when it is deciding whether to approve said action. This interpretation is supported by the context of *PEER I*. There, the Court was attempting to determine if BOEM provided for safety when it allowed for the delay of surveys during the Construction and Operations Plan approval phase. This delay was sought because the developer could not secure the funding to survey until a Construction and Operations Plan was approved.

(determining that BOEM did not violate 43 U.S.C. § 1337(p)(4) when it allowed for a "departure" from a regulatory deadline).

272. *PEER I*, 25 F. Supp. 3d at 107 (emphasis added).

273. Pls.' Reply, *supra* note 244, at 34 (emphasis added).

274. *Id.* at 25.

275. Defs.' Mot. for S. J., *supra* note 210, at 39.

276. *Id.*

277. *Id.*

The court held that BOEM was permitted to approve a Construction and Operations Plan and delay collection of data because this would allow for surveying to be performed, and thus provide for safety and protection of the environment. The Court held that BOEM made a valid determination that a delay at this point would provide for safety in the long run.[278]

Given this interpretation, it appears that OCSLA requires BOEM to look at the broader context of a lease to determine if OCSLA's concerns have been provided for when it acts. Here, the action was the issuance of a lease, but the broader context is disputed. Plaintiffs argue that the broader context is the construction of a wind farm, while Defendants argue that there is no broader context—because there is no plan for a wind farm before the agency, the only concerns here are the effects of a lease issuance.[279] Although BOEM could theoretically predict the effects of a wind farm (and did do so in its 2007 programmatic EIS), it is likely that the Defendants are correct that there is currently no larger context.

If the Court in this case arrives at a similar conclusion, it will likely find that BOEM satisfied its obligations under OCSLA. BOEM offers significant evidence of its work to satisfy its obligations under OCSLA, and within the context of a lease sale, it appears that BOEM has provided for safety and environmental protection.

d. RFI Stage

It is unlikely that BOEM was required to consider OCSLA at the RFI stage of the process. There are two reasons for this. First, Section 1337 requires an agency to look at the applicant's "activities" for compliance when granting a "lease, easement, or right-of-way." Site selection is not agency action covered by

278. Public Emps. for Envtl. Responsibility v. Beaudreau (*PEER I*), 25 F. Supp. 3d 67, 106–07 (D.D.C. 2014).

279. Defendants' understanding mirrors the three stages of activity prescribed by OSCLA in the oil and gas context: leasing, exploration, and development and production. *See* Oceana v. Bureau of Ocean Energy Mgmt., 37 F. Supp. 3d 147, 180 (D.D.C. 2014); Ctr. for Biological Diversity v. Dep't of Interior, 563 F.3d 466, 483–85 (D.C. Cir. 2009). Although these cases concern OCSLA's oil and gas provisions and not the renewable energy provisions, they may still be applicable here. The Court in *Fisheries Survival Fund v. Jewell* held that the "oil and gas lease legal framework" was "analogous and appropriate" in the NEPA context, and it is possible that the oil and gas framework is similarly analogous in the OCSLA context. Fisheries Survival Fund v. Jewell, No. 16-cv-2409, 2018 WL 4705795, at *7 n.4 (D.D.C. Sept. 30, 2018).

Section 1337, and is not covered by the citizen suit provision in Section 1349. Secondly, even if this claim was raised under the APA, an RFI is not final agency action and is thus not reviewable.[280] An RFI does not mark the consummation of an agency's decision-making process, as it is only an "interlocutory" step, and because no rights and obligations flow from it—an RFI is merely an information gathering activity.[281] A future court will likely find that BOEM is not required to consider OCSLA at the RFI stage of the leasing process.

e. Lease Stage

While the RFI determination was likely not a step at which BOEM must consider OCSLA's mandate, BOEM was required to consider OCSLA at the lease issuance stage of the Empire Wind project.[282] Here, BOEM clearly engaged with OCSLA's areas of concern and considered other uses of the sea and seabed,[283] and because it is likely permitted to limit its analysis to the impacts from surveying activities instead of the impacts from a wind energy generation facility, it did fulfill its obligations under OCSLA. Because the only concern here was the effect of the lease, there was no broader context that BOEM was required to consider. This mirrors the three-stage development process found in the oil and gas context,

280. Final agency action for which there is no other adequate remedy in a court is subject to judicial review under the APA. *See* 5 U.S.C. § 704 (2018); Bennett v. Spear, 520 U.S. 154, 177–78 (1997).

281. *See Bennett*, 520 U.S. at 177–78.

282. 43 U.S.C. § 1337(p)(1),(4) (2018) (BOEM "may grant a lease, easement, or right-of-way" if the activity it is leasing the OCS for "is carried out in a manner that provides for [OCSLA's mandates].").

283. BOEM did look at: (1) fishing impacts, identifying potential losses of revenue; (2) navigation impacts, by working with the U.S. Coast Guard to develop plans that meet the unique needs of the facility; and (3) natural resources, by performing research in its REA, and removing five aliquots from the lease area that contained particularly sensitive benthic habitat. *See generally* BUREAU OF OCEAN ENERGY MGMT., OCS EIS/EA BOEM 2016-070, COMMERCIAL WIND LEASE ISSUANCE AND SITE ASSESSMENT ACTIVITIES ON THE ATLANTIC OUTER CONTINENTAL SHELF OFFSHORE NEW YORK: REVISED ENVIRONMENTAL ASSESSMENT (2016), https://www.boem.gov/NY-EA-FONSI-2016/ [https://perma.cc/DJ6K-V8UG]; BUREAU OF OCEAN ENERGY MGMT., OCS EIS/EA BOEM 2016-042, COMMERCIAL WIND LEASE ISSUANCE AND SITE ASSESSMENT ACTIVITIES ON THE ATLANTIC OUTER CONTINENTAL SHELF OFFSHORE NEW YORK: ENVIRONMENTAL ASSESSMENT (2016), https://www.boem.gov/NY-Public-EA-June-2016/ [https://perma.cc/SLS3-HM8N]; *see also* KIRKPATRICK ET AL., *supra* note 35; JUSTIN KIRKPATRICK ET AL., BUREAU OF OCEAN ENERGY MGMT., BOEM 2017-012, SOCIO-ECONOMIC IMPACT OF OUTER CONTINENTAL SHELF WIND ENERGY DEVELOPMENT ON FISHERIES IN THE U.S. ATLANTIC: APPENDIX (2017).

which is separated into leasing, exploration, and development and production. Given that the Court found precedent in the oil and gas context persuasive in its NEPA analysis, it is possible such an understanding will be persuasive to other courts. Consequently, when an issue like this is raised in the future, a court will likely find that BOEM satisfied its OSCLA obligations.

f. Recommendations

While future courts will likely determine that BOEM engaged sufficiently with OCSLA, if a court does determine that BOEM failed to consider the potential impacts to other uses of the OCS, it will require BOEM to go back and perform an analysis on the impacts of a wind facility. This should be the starting point for the leasing process going forward. Just as a programmatic EIS would front-load NEPA analysis, it would do the same for OCSLA analysis. A programmatic EIS for a particular region would allow for an agency to correctly site a project by identifying the impacts a development could have on OCSLA's areas of concern very early in the process. If any deviations from a plan are necessary (such as the departure from procedure in *PEER I*), a detailed programmatic EIS could be sufficient to show BOEM is accounting for OCSLA's considerations in the broader context of the project.

III. Critiques of the Leasing Process

Several environmental law practitioners and academics have proposed alternatives to BOEM's current leasing procedures. Professor Michael B. Gerrard of Columbia Law School is among them.[284] In his article *Legal Pathways for a Massive Increase in Utility-Scale Renewable Generation Capacity*, Professor Gerrard identifies the four most important legal obstacles to the speedy development of renewable energy projects: (1) site acquisition and approval, (2) NEPA, (3) state and local approvals, and (4) various species protection laws.[285] He presents several recommendations that he believes will bring agencies' leasing programs into line with both

284. Professor Michael B. Gerrard is the Andrew Sabin Professor of Professional Practice and Director of the Sabin Center for Climate Change Law at Columbia Law School; Chair of the Faculty of Columbia's Earth Institute; and Senior Counsel at the law firm Arnold & Porter.

285. Gerrard, *supra* note 13, at 10591.

state and national environmental law, and will allow for the rapid leasing and development of lands for the massive number of needed renewable energy generation facilities.[286] This Note will respond to his critiques and recommendations in regards to site selection in offshore areas and NEPA, and compare them to recommendations made by other environmental law practitioners, the President, and Congress.

A. Offshore Wind

Professor Gerrard notes that the biggest problems facing wind energy developers are regulatory fragmentation and confusion, shifts in political support, high costs, and public opposition.[287] As shown above, wind farms can fail due to a lack of political support and public opposition, and projects such as Cape Wind have fallen victim to both.[288] The lack of clear regulatory authority also doomed Cape Wind—having to restart the process partway through was a severe blow. And, clearly, while there have been technological advancements in production and turbine construction,[289] and Congress has extended the termination date of federal tax credits,[290] these wind farms are still very costly to develop and profit from.[291]

286. *Id.*

287. *Id.* at 10598.

288. *See supra* Section II.B.

289. *Next Generation Wind Technology*, OFF. OF ENERGY EFFICIENCY & RENEWABLE ENERGY, https://energy.gov/eere/next-generation-wind-technology [https://perma.cc/3JYS-FGAU] (last visited Jan. 10, 2019).

290. *Renewable Electricity Production Tax Credit (PTC),* DEP'T OF ENERGY, https://energy.gov/savings/renewable-electricity-production-tax-credit-ptc [https://perma.cc/D2QX-Y55Y] (last visited Jan. 10, 2019).

291. The DOE's recent $6 million funding allocation to support advanced research and development ("R&D"), and its selection of the New York State Energy Research and Development Authority ("NYSERDA") to administer an $18.5 million offshore wind R&D consortium may further alleviate this issue by promoting development that reduces costs and environmental impacts. *See Department of Energy Announces $18.5 Million for Offshore Wind Research,* OFF. OF ENERGY EFFICIENCY & RENEWABLE ENERGY (June 15, 2018), https://www.energy.gov/eere/wind/articles/department-energy-announces-185-million-offshore-wind-research [https://perma.cc/354F-7FA7]; *EERE Funding Opportunity Exchange*, OFF. OF ENERGY EFFICIENCY & RENEWABLE ENERGY, https://eere-exchange.energy.gov/Default.aspx#FoaIdf227569c-def4-4ca4-b061-6b5369a194b8 [https://perma.cc/RS52-BD65] (last visited Jan. 10, 2019).

1. Site Selection

Professor Gerrard makes several recommendations, focusing particularly on agency action and congressional action. His first recommendation is for BOEM to stay the course with Smart from the Start and continue to designate WEAs and hold lease auctions. Professor Gerrard notes that the Empire Wind auction attracted six serious bidders, and that several developers have submitted unsolicited applications for leases, indicating that the demand exists. Given this demand, he recommends BOEM continue to service that demand.[292]

But while he believes this part of Smart from the Start is a good idea, Professor Gerrard recommends a change in the way that BOEM goes about preparing areas for lease. To expedite approval of projects, he recommends the usage of programmatic EISs.[293] He points out that this kind of EIS was successful in speeding up development of solar energy as part of the Western Solar Plan—the detailed examination of species presence and habitat in a programmatic EIS paved the way for individual projects to receive speedy NEPA and ESA review.[294]

This recommendation is a good one. As evidenced by the Western Solar Plan, broadly scoped but detailed environmental review reports can not only assist agencies in their evaluation of individual projects, but may also assuage the fears of developers and financiers who may be concerned with potential risks and delays due to the environmental review process and litigation, as effects on potential plaintiffs may be avoided or addressed. If Congress adopts something akin to President Trump's infrastructure plan sometime in the future, agencies will have to move much more quickly through their environmental reviews, and these programmatic EISs could potentially assist agencies in doing so. Widely scoped and detailed reviews would help agencies identify areas of focus early and allow them to better use the limited time they have to analyze potential impacts.

BOEM's recent Request for Feedback is a step in the right direction. By seeking feedback, BOEM will be better able to locate areas on the OCS that feature the highest potential for

292. Gerrard, *supra* note 13, at 10601.
293. *Id.*
294. *Id.* at 10597.

development. This process may assist BOEM in developing a programmatic EIS for the OCS or locating smaller areas on the OCS where programmatic EISs could be useful. The resulting information can be used to site wind energy facilities in a manner that will streamline the leasing process and allow for the rapid development of renewable energy on the OCS.

The New York State Energy Research and Development Authority ("NYSERDA") appears to agree with Professor Gerrard. On June 14, 2018, pursuant to SEQRA, NYSERDA issued a Final Generic Environmental Impact Statement for Procurement of Offshore Wind—containing a programmatic EIS—detailing the impacts of New York's planned procurement of 2,400 MW of offshore wind energy by 2030.[295] Just as Professor Gerrard recommends, NYSERDA created and used programmatic EISs to determine the best locations on the OCS to site wind energy generations facilities.[296] The Final EIS should allow development to proceed smoothly in the area offshore of New York.

Michael Pentony, Administrator of the Greater Atlantic Regional Fisheries Office of the National Marine Fisheries Service, a division of the National Oceanic and Atmospheric Administration, also appears to agree with Professor Gerrard. In a comment on BOEM's April 11, 2018 Call regarding the New York Bight, he wrote that BOEM "should conduct a cumulative analysis to inform the planning process" so that it could "sufficiently identify the appropriate scale of leasing in the New York Bight . . . ."[297] Pentony argues that the current manner of leasing, in which "cumulative impacts are evaluated on a project-by-project basis with very limited assessment at the leasing stage," is insufficient "given the scale and speed of proposed development on the OCS."[298] With respect to the New York Bight, Pentony argues that "[t]he construction of wind farms is a reasonably foreseeable action in the leasing process that should be assessed for its cumulative effects on marine

295. N.Y. STATE DEP'T OF PUB. SERV. & ECOLOGY & ENV'T, INC., DOC. NO. 10C9610.0015.02-B4925, FINAL GENERIC ENVIRONMENTAL IMPACT STATEMENT FOR PROCUREMENT OF OFFSHORE WIND (2018).

296. *Id.*

297. Letter from Michael Pentony, Reg. Admin., Greater Atl. Reg. Fisheries Office, Nat'l Marine Fisheries Service, to Luke Feinberg, Project Coordinator, Office of Renewable Energy Programs, Bureau of Ocean Energy Mgmt. (June 7, 2018), *as reprinted in*, Motion to Take Judicial Notice, Exhibit A, at 2, Fisheries Survival Fund v. Jewell, No. 1:16-cv-02409, 2018 WL 4705795 (D.D.C. Jun. 29, 2018).

298. *Id.* at 2–3.

resources, habitat, commercial and recreational fisheries, and associated communities that may be affected by the development of offshore energy leases in one or more areas within the New York Bight."[299] Professor Gerrard's advice is being echoed by some federal and state agencies, and BOEM should consider following it.

2. Modification of Existing Environmental Law

Professor Gerrard also recommends that Congress instruct reviewing agencies that visual and aesthetic impacts do not form a basis for denying permits for wind facilities.[300] This would prevent NIMBY-ism ("Not in My Back Yard") from blocking necessary development. President Trump's infrastructure plan recommends the CEQ streamline the NEPA process, and although not explicitly referenced, Professor Gerrard's recommendation could fit within President Trump's plan.[301]

Professor Gerrard also suggests that Congress amend CZMA to include a specific mandate for offshore wind power development and require revisions to CZMA plans to align with this mandate.[302] This would prevent states from blocking facilities whose transmission lines cross into state waters.

Finally, Professor Gerrard believes that major federal facilities should negotiate power purchase agreements between federal facilities and producers so that the developers can secure financing.[303] This could jump-start the development process by making these investments less risky.

These recommendations would clearly promote the development of offshore wind, but they may be a hard sell to the current administration and Congress. Legislators are beholden to their constituents, who may protest development of specific projects or development in specific areas. Furthermore, an amendment to CZMA limiting state autonomy and the issuance of an instruction to agencies to ignore aesthetic concerns would be difficult to push through a Republican administration and Republican-controlled Senate. However, with the development of floating wind turbines,

299. *Id.* at 3.

300. Gerrard, *supra* note 13, at 10602.

301. THE WHITE HOUSE, *supra* note 128, at 36.

302. Gerrard, *supra* note 13, at 10602; s*ee also* Jeffrey Thaler, *Fiddling as the World Burns: How Climate Change Urgently Requires a Paradigm Shift in the Permitting of Renewable Energy Projects*, 42 ENVTL. L. 1101, 1148 (2012).

303. Gerrard, *supra* note 13, at 10601.

aesthetic concerns may no longer be a factor, as future facilities could exist further out on the OCS where they would be less visible.[304] This does not solve potential CZMA issues, as transmission cables will still have to enter waters under state jurisdiction, but these facilities may avoid raising the ire of coastal property owners since the turbines will be more out of sight and potentially out of mind. In addition to citizen protests, these changes will likely encounter opposition from other energy interests who may face adverse market effects, such as coal and natural gas interests.

Professor Gerrard's recommendations regarding a change in BOEM's leasing process would be both feasible and effective. They would increase the speed of review, but this speed would not come at the expense of environmental protection, as BOEM would still perform a hard look analysis in the programmatic EIS or in a supplemental report. The front-loading of the environmental analysis and creation of a leasing framework in a programmatic EIS would allow an agency and a developer to spend less time on the back-end performing regulatory review and fending off legal challenges. His recommendations for congressional action are similarly effective, and although they may not appear to be feasible in the current political climate, they fit within the broad recommendations of President Trump's infrastructure plan.

B. NEPA

Professor Gerrard's recommendations for lowering the obstacles to mass development of renewable energy projects attempt to address three issues: the slowness of agency action; the lack of front-end consideration; and the improper balancing of environmental concerns in NEPA reviews.[305]

1. Speeding up the Review Process

To deal with the sluggish pace of the regulatory decision-making and review process, Professor Gerrard recommends that the federal agencies increase their functional capacity by hiring more staff,[306]

304. *Hywind—The World's Leading Floating Offshore Wind Solution,* EQUINOR, https://www.equinor.com/en/what-we-do/hywind-where-the-wind-takes-us.html [https://perma.cc/NHM2-P8QV] (last visited Jan. 10, 2019).

305. Gerrard, *supra* note 13, at 10604–05.

306. *Id.*

implement the FAST Act to set deadlines for environmental review,[307] and allow certain projects to obtain approvals with a lower degree of environmental review.[308]

Professor Gerrard's first recommendation that agencies hire more staff dovetails well with President Trump's recommendation to Congress that federal agencies be permitted to accept funds from non-federal entities to support reviews and defray costs.[309] Some agencies already employ a similar cost-saving strategy, requiring applicants to pay for the costs of review. These strategies could both result in an agency hiring more staff or consultants by allowing costs to be passed on to applicants.

The lease in the NY WEA had an arrangement in which Equinor agreed to shoulder the costs of surveying and site assessment in return for the exclusive right to propose a wind farm. This exchange solves both a collective action problem and a funding problem. Few organizations would be willing to contribute to studies unless it would benefit them, and the ability to trade funding for exclusive development rights is a way to spur development. This type of arrangement, or the arrangement proposed by President Trump, could be very beneficial, especially when there is no other organization to step in to assist, such as the University of Rhode Island did for Block Island.[310] Increasing funding will lead to increased functional capacity, which will provide for both speed and diligence in the environmental review process.

Professor Gerrard's second recommendation that deadlines for environmental review be instituted also appears to be reasonable, especially given the fact that precedent already exists in CZMA.[311] President Trump's infrastructure plan similarly recommends that Congress create time limits for NEPA review.[312] These time limits

307. *Id.* at 10605.

308. *Id.*

309. THE WHITE HOUSE, *supra* note 128, at 41.

310. *See supra* Section II.A.

311. Thaler, *supra* note 302, at 1146 n.253 ("Under the Coastal Zone Management Act, an untimely response by a state agency to a consistency determination means that its concurrence is presumed. For example, for a lease or grant sale, the state agency only has 60 days to respond once BOEM submits its consistency determination, or else it is presumed to concur. For approval of an applicant's Site Assessment Plan and Construction and Operations Plan, the state agency's concurrence is presumed if it does not respond to BOEM within six months from the start of its consistency review.") (internal citations omitted).

312. THE WHITE HOUSE, *supra* note 128, at 35–36.

would allow for a streamlined process of review and would give developers and financiers a better idea of when construction and operation will begin. While no project is without risk, this would reduce some uncertainty and increase investment. However, this process should not completely declaw NEPA—any time limit proposed should provide ample time for an agency to assess properly any environmental impacts, lest the determination be overturned by the judiciary. NEPA's protections should not be eliminated in exchange for improved response times. While striking a balance may be difficult, time limitations could theoretically result in agencies pursuing more efficient processes—such as tiering by creating regional programmatic EISs.

Professor Gerrard also proposes that CEQ, BLM, or BOEM amend their NEPA regulations to allow for projects to obtain approval with a lower degree of environmental review, provided they meet certain conditions. He argues that the use of "mitigated FONSIs," a middle ground between a full EIS and a FONSI would reduce the number of EISs and thus speed up development.[313] Currently an agency can issue a mitigated FONSI, meaning that an EIS is not required to be performed, if a proposal features certain mitigating actions, provided that the site does not have special issues that need to be accounted for.[314] These have been held to satisfy NEPA.[315] Requiring fewer site-specific EISs through the usage of programmatic EISs or mitigated FONSIs speeds up the process by removing repetitive and time-consuming steps, but care must be taken to ensure that the processes being eliminated do not result in fewer protections for the environment.

Several of President Trump's recommendations to Congress are similar to those recommendations of Professor Gerrard. In his infrastructure plan, President Trump recommends Congress or the CEQ establish procedures that expedite environmental and permitting reviews for projects that enhance the environment.[316] Trump also recommends Congress permit agencies to adopt categorical exclusions—projects that do not require environmental review as they are of a size or type that has previously been

313. Gerrard, *supra* note 13, at 10605.

314. *Id.* Trevor Salter, *NEPA and Renewable Energy: Realizing the Most Environmental Benefit in the Quickest Time*, 34 ENVIRONS ENVTL. L. & POL'Y J. 173, 182–84 (2011).

315. *See* City of Auburn v. U.S Gov't, 154 F.3d 1025, 1031–33 (9th Cir. 1998).

316. THE WHITE HOUSE, *supra* note 128, at 40.

determined to not have a significant environmental impact—established by other agencies instead of requiring agencies to duplicate studies.[317]

Both recommendations would create incentives for developers to propose projects that have little to no significant impact on the environment, or even spur developers to propose projects that improve the environment. If Congress or the CEQ promulgate rules in line with these recommendations, it is likely that developers would change their approach to development in order to receive expedited review.[318] Developers could also increase the rate at which they propose projects that would provide environmental benefits and projects with no significant environmental impacts. These recommendations would both increase the speed of the review process and promote environmental benefits—a win-win.

2. Prioritizing Front End Consideration of Environmental Impacts

Professor Gerrard also takes issue with BOEM's wait-and-see strategy for performing NEPA analyses, and believes that agencies should consider potential impacts on the front-end.[319] He recommends that BOEM increase its usage of programmatic EISs, and recommends that the CEQ require that agencies deal with potential permitting issues before the scoping process begins.[320] As stated above, both of these recommendations may increase the amount of time spent in the early part of the leasing process, but this investment of time would pay dividends down the road. The increased usage of programmatic EIS would allow for siting that avoids other uses (which may have powerful interest groups, such as fisheries in the NY WEA case) and locations in which the

317. *Id.* at 37–38.

318. The CEQ issued an advance notice of proposed rulemaking in order to solicit comments on potential updates and clarification to its existing NEPA regulations. COUNCIL ON ENVTL. QUALITY, CEQ-2018-0001, UPDATE TO THE REGULATIONS FOR IMPLEMENTING THE PROCEDURAL PROVISIONS OF THE NATIONAL ENVIRONMENTAL POLICY ACT (2018). It is clear there is some appetite for change, given the 12,541 comments on the CEQ's advance notice of proposed rulemaking. *Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act*, REGULATIONS.GOV, https://www.regulations.gov/docket?D=CEQ-2018-0001 [https://perma.cc/XGU5-LGHA] (last visited Jan. 14, 2019). It is thus possible that these recommendations may soon become codified.

319. Gerrard, *supra* note 13, at 10605.

320. *Id.*

environmental impacts would be too great. A detailed programmatic EIS would require supplements only when changes in circumstances or new information would be expected to change the impacts. New York permits this strategy under SEQRA,[321] and this is also likely to be permissible under existing federal regulations.[322] Once an agency has performed the necessary research, the development of offshore wind can proceed efficiently, adverse environmental impacts can be avoided, and less time will be wasted pursuing development in areas that may be unsuitable for wind energy development. These recommendations, if pursued, would effectively balance the need for speedy development of renewable energy facilities with environmental protection.

3. Modifying the Environmental Review Process

Finally, Professor Gerrard believes that the NEPA environmental review process should be altered to better account for the positive environmental impacts that renewable energy brings.[323] He recommends that the CEQ issue regulations requiring agencies to consider positive impacts,[324] and regulations preventing agencies from denying projects based on aesthetic impacts.[325]

These recommendations provide solutions to the speed versus environmental protection trade off, but these solutions also complicate the balancing analysis. An agency may end up choosing the outcome with the most positive impacts after weighing the potential benefits of a project against its potential detriments, but this is not a sure thing—many externalities are not yet

321. "The SEQRA regulations provide: The lead agency may require a supplemental EIS, limited to specific significant adverse environmental impacts not addressed or inadequately addressed in the EIS that arise from: (a) changes proposed for the project; (b) newly discovered information; or (c) a change in circumstances related to the project. (quoting N.Y. COMP. CODES R. & REGS. Tit. 6, § 617.9 (2018)). Thus, a supplemental EIS may be required to address specific issues that were omitted or not adequately addressed in either the draft or the final EIS in cases where one of the three situations outlined in the regulations arises." 1 MICHAEL B. GERRARD ET AL., ENVIRONMENTAL IMPACT REVIEW IN NEW YORK § 3.13[2] (2018).

322. *See* 40 C.F.R. § 1508.28 (2018).

323. Gerrard, *supra* note 13, at 10605.

324. *Id.*

325. *Id.* at 10602.

cognizable.[326] When comparing the positive climate effects of a renewable facility and the positive effects of a healthy species population, it is hard to tell which is more valuable, especially when the potential utility of a particular species is not yet identifiable. However, given the large number of species that will go extinct given a climate increase of 2 degrees Celsius or more,[327] the negative impacts of wind energy facilities are preferable.

As discussed in Part III.B.2, Professor Gerrard also argues that unavoidable aesthetic impacts should not be a cause for rejection of renewable energy and recommends the CEQ issue a regulation instructing reviewing agencies that "unavoidable visual and aesthetic impacts do not provide a basis for denying wind energy permits."[328] Given the reality of climate change, Congress and agencies should ignore NIMBY-ism. We must all make sacrifices and visual impacts are a small sacrifice to make. The issuance of this regulation would speed up the environmental review process by limiting litigation and would not have any adverse effects on environmental protection.

Professor Gerrard's recommendations here are all valid avenues of hastening the development of renewable energy facilities. His suggestions to alter NEPA are reasonable, but any changes to NEPA must still ensure that permitted activity on the OCS does not have significant and unacceptable impacts on the environment. It is important to develop renewable energy quickly given the rapidly warming climate, but it is also important to recognize that some delay may be necessary to ensure that agencies properly address all impacts to the environment. Many of Professor Gerrard's recommendations may soon come to fruition, as President Trump's

326. Such externalities could possibly include the potential future usage of a species of animal or plant to develop a vaccine to prevent illness or disease, something the ESA considers. *See* 16 U.S.C. § 1531(a)(3) (2018) (". . . these [endangered] species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and *scientific value* to the Nation and its people") (emphasis added).

327. Press Release, World Wildlife Fund, Half of Plant and Animal Species at Risk from Climate Change in World's Most Important Natural Places (Mar. 14, 2018), https://www.worldwildlife.org/press-releases/half-of-plant-and-animal-species-at-risk-from-climate-change-in-world-s-most-important-natural-places [https://perma.cc/V6SZ-W4KF]; *see generally* J.B. Ruhl, *Climate Change and the Endangered Species Act: Building Bridges to the No-Analog Future*, 88 B.U. L. REV. 1 (2008) (discussing different ways to use the ESA in response to climate change, and referring to "doomed" species).

328. Gerrard, *supra* note 13, at 10602.

infrastructure plan features recommendations that incorporate similar ideas and solutions.

CONCLUSION

The United States is dragging its feet on offshore renewable energy development. As of now, there is only one offshore wind facility in the United States, and it is unclear when the next will be built. This dearth of wind facilities is partially due to BOEM's inadequate leasing procedures. BOEM should improve these procedures in order to better balance its twin goals of the speedy development of the OCS and environmental protection. Environmental law practitioners, government officials, and academics have proposed solutions to problems they see in BOEM's current leasing procedures, and BOEM should look to these recommendations if it decides to modify its leasing process.

Professor Gerrard's perhaps most important recommendation is that BOEM increase its usage of programmatic environmental impact statements. By creating detailed reports of broad geographic areas, BOEM and other agencies can better site projects and reduce administrative load in the later stages of the process. Once a programmatic EIS has been completed, BOEM would only need to perform supplemental analyses when necessary due to changed circumstances, newly discovered information, or changed development plans. These are possible solutions to the sluggish speed of the review process.

Considering potential impacts at the earliest possible time is the best plan of action not only because it results in speedy review, but also because it satisfies NEPA and OCSLA. BOEM's current regulations were under threat in the NY WEA litigation, and although BOEM emerged victorious, challenges to BOEM's regulations are likely to arise in the future. Thus, BOEM should look to the recommendations proposed by Professor Gerrard.

An infrastructure plan like that of President Trump, if accepted by Congress, would speed up the permitting and environmental review processes, but care must be taken to ensure that these changes do not erode at the foundations of environmental protectionism that are enshrined in laws like NEPA. Some of President Trump's recommendations echo those made by Professor Gerrard, and Congress should seriously consider

adoption of those that speed up the review process without sacrificing NEPA's protections.

The current climate trend is concerning, and the prompt development of renewable energy is certainly a partial solution to the problem. But as beneficial as renewable energy is, it is important to find the correct balance between the speedy development of renewable energy generation and environmental protection. Balancing the two is a tall order, but it is possible to promote responsible development in a swift and efficient manner, while maintaining the strong environmental protections that laws like NEPA provide.