

# Offshore Oil Leasing: Trump Administration's Environmentally Dangerous Energy Policy

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# OFFSHORE OIL LEASING: TRUMP ADMINISTRATION'S ENVIRONMENTALLY DANGEROUS ENERGY POLICY

CAROL J. MILLER\* & BONNIE B. PERSONS\*\*

## ABSTRACT

The Trump administration's Executive orders on Promoting Energy Independence and Economic Growth ("Energy Independence Order") and Implementing an America-First Offshore Energy Strategy ("Offshore Energy Order") set the stage to open over 90% of the continental shelf to offshore oil drilling from 2019–2024.<sup>1</sup> The Offshore Energy Order ignores the statutory requirements of the Outer Continental Shelf Lands Act ("OCSLA") and the National Environmental Policy Act ("NEPA") to balance energy exploration with safeguards for marine life and the environment.<sup>2</sup> We analyze the lack of express authority in OCSLA for the President to rescind its protective designations, in comparison to other laws that grant such authority.

This Article discusses the traditional administrative processes for assessing environmental concerns with lease proposals, and contrasts those with the Trump administration's proposals for streamlining the

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<sup>1</sup> See Promoting Energy Independence and Economic Growth, Exec. Order 13,783, 82 Fed. Reg. 16,093 (Mar. 31, 2017); Implementing an America-First Offshore Energy Strategy, Exec. Order No. 13,795, 82 Fed. Reg. 20,815 (May 3, 2017); Oliver Milman, *Trump administration plans to allow oil and gas drilling off nearly all US coast*, THE GUARDIAN (Jan. 2, 2018), <https://www.theguardian.com/environment/2018/jan/04/trump-administration-plans-to-allow-oil-and-gas-drilling-off-nearly-all-us-coast> [<https://perma.cc/TJ4P-EFKT>].

<sup>2</sup> Compare *id.* with Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1331–1356(b) (1953) and National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321–4347 (1970).

process. We examine the volatility of oil prices and the impact of hydraulic fracturing (“fracking”) on the viability of offshore leasing. While most mayors,<sup>3</sup> governors,<sup>4</sup> and senators of affected states oppose further offshore drilling,<sup>5</sup> the Trump administration’s proposals ignore these stakeholders.<sup>6</sup> This Article emphasizes the importance of minimizing environmental risks of offshore oil exploration and drilling, including threats to marine mammals and the fishing industry, as well as climate change implications of expanding fossil fuel exploration and use. More safety oversight is needed (including a reversal of the Trump administration’s discontinuance of the Methane Waste Rule,<sup>7</sup> the Well Control Rule,<sup>8</sup> and third-party audits of oil well blowout preventers).<sup>9</sup> This Article concludes with the recommendation that it is imprudent to expand offshore drilling when conservation for future generations and protection of the environment is a more prudent course.

## INTRODUCTION

In response to President Trump’s Executive order on Promoting Energy Independence and Economic Growth (“Energy Independence Order”) and Implementing an America-First Offshore Energy Strategy (“Offshore Energy Order”), Interior Secretary Ryan Zinke proposes

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<sup>3</sup> *Grassroots Opposition to Offshore Drilling and Exploration in the Atlantic Ocean and Eastern Gulf of Mexico*, OCEANA (Oct. 2018), <https://usa.oceana.org/climate-and-energy/grassroots-opposition-offshore-drilling-and-exploration-atlantic-ocean-and> [<https://perma.cc/E8YR-7X2S>].

<sup>4</sup> *Most Coastal Governors Oppose Trump Offshore Drilling Plan*, ASSOCIATED PRESS (Jan. 11, 2018), <https://www.apnews.com/6f2ebeb11aa4ed49b6a491596979c33> [<https://perma.cc/J9R9-GV6Z>].

<sup>5</sup> Keith Schneider, *Trump Unites Democrats and Republicans—to Oppose his Offshore Drilling Plan*, L.A. TIMES (Jan. 11, 2018), <http://www.latimes.com/nation/la-na-offshore-oil-drilling-lawmaker-2018011-story.html> [<https://perma.cc/773S-HEYP>].

<sup>6</sup> See Promoting Energy Independence and Economic Growth, Exec. Order 13,783, 82 Fed. Reg. 16,093 (Mar. 31, 2017).

<sup>7</sup> Lisa Friedman, *Trump Administration Formally Rolls Back Rule Aimed at Limiting Methane Pollution*, N.Y. TIMES (Sept. 18, 2018), <https://www.nytimes.com/2018/09/18/climate/trump-methane-rollback.html> [<https://perma.cc/W4G7-BKMD>].

<sup>8</sup> Oil and Gas and Sulphur Operations on the Outer Continental Shelf—Oil and Gas Production Safety Systems—Revisions, 82 Fed. Reg. 61,703 (Dec. 29, 2017).

<sup>9</sup> Final Comments on Oil and Gas and Sulphur Operations in the Outer Continental Shelf-Blowout Preventer Systems and Well Control Revisions, 83 Fed. Reg. 22,128 (May 11, 2018).

opening up over 90% of the continental shelf to offshore oil drilling from 2019–2024.<sup>10</sup> This reckless decision ignores environmental risks, hazards to aquatic wildlife and the fishing industry, as well as the implications of climate change resulting from expanding fossil fuel exploration and use. Policies that remove third-party audits of equipment such as blow-out preventers are contrary to the safety and environmental protection oversight responsibility of the Bureau of Safety and Environmental Enforcement (“BSEE”).<sup>11</sup> With oil and gas exploration and production at an all-time high, these policies also fail to balance present energy needs with those of future generations.<sup>12</sup>

Part I discusses the purpose of the Outer Continental Shelf Lands Act (“OCSLA”) and the need to balance energy exploration with safeguards for marine life and the environment. It highlights President Obama’s withdrawal of the Alaskan Beaufort Sea and Chukchi Sea from oil exploration.<sup>13</sup> Section II.A describes President Trump’s America First Offshore Energy Policy, and the national Outer Continental Shelf requirements under the National Environmental Policy Act (“NEPA”) regarding oil and gas lease sales. It recognizes that while the President has been delegated authority to create protective designations, he lacks express authority to rescind designations.<sup>14</sup> Section II.B examines traditional processes for assessing environmental concerns with lease proposals and contrasts those with the Trump administration’s proposals for streamlining the process. Section II.C explains that Interior Secretary Zinke’s Draft Proposed Program for 2019–2024 would open up over 90% of the Outer Continental Shelf for drilling, and threaten environmentally sensitive areas of the Outer Continental Shelf.<sup>15</sup> Section II.D examines the volatility of oil prices and the role of shale oil production through hydraulic fracturing (“fracking”).

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<sup>10</sup> Lisa Friedman, *Trump Moves to Open Nearly All Offshore Waters to Drilling*, N.Y. TIMES (Jan. 4, 2018), <https://www.nytimes.com/2018/01/04/climate/trump-offshore-drilling.html> [<https://perma.cc/4Z4G-47DB>].

<sup>11</sup> *History*, BUREAU OF SAFETY & ENVTL. ENFT, <https://www.bsee.gov/who-we-are/history> [<https://perma.cc/UB7X-DNRE>] (last visited Jan. 11, 2019).

<sup>12</sup> *U.S. Field Production of Crude Oil*, U.S. ENERGY INFO. ADMIN. (Oct. 11, 2018), <https://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=MTTFPUS2&f=M> [<https://perma.cc/XQ87-SLN2>].

<sup>13</sup> Elwood Brehmer, *Obama Administration Culls Arctic OCS from Five-Year Lease Plan*, PENINSULA CLARION (Nov. 19, 2016), <http://peninsulaclarion.com/news/2016-11-19/obama-administration-culls-arctic-ocs-from-five-year-lease-plan> [<https://perma.cc/P5DX-X2WG>].

<sup>14</sup> Reservation of Lands & Rights, 43 U.S.C. § 1341(a) (2012).

<sup>15</sup> Friedman, *supra* note 10.

Section II.E recognizes that most mayors, governors and senators of affected states oppose opening up further offshore drilling.<sup>16</sup> Part III discusses environmental risks associated with offshore exploration and drilling, starting with oil spill risks in Section III.A. Section III.B examines threats to marine mammals, coral, and the fishing industry. Section III.C discusses climate change concerns with further use of fossil fuels. This Article concludes by emphasizing the need for more safety oversight, steps to decrease negative environmental impacts associated with offshore exploration and drilling, and the recommendation that it is imprudent to expand offshore drilling.

I. MANAGING OIL AND NATURAL GAS IN THE OUTER CONTINENTAL SHELF: BALANCING PROTECTION OF MARINE RESOURCES & COASTAL ENVIRONMENTS WITH OFFSHORE ENERGY EXPLORATION

OCSLA<sup>17</sup> provides the framework for exploration and management of oil and natural gas in the Outer Continental Shelf, while providing protection for the marine, coastal environment, and shore, as well as restoration of coastal beaches and wetlands.<sup>18</sup> By 1949, there were eleven oil fields and forty-four exploratory wells in the Gulf of Mexico, so the OCSLA was passed in 1953, in part, to establish federal management of oil leases.<sup>19</sup> Along the continental shelf of the United States, current oil reserve estimates include 11.39 billion barrels off the Atlantic coast, 13.07 billion barrels off the Pacific coast, 50 billion barrels off the Alaskan coast, and 73.69 billion barrels in the Gulf of Mexico.<sup>20</sup>

In addition to overseeing the development of oil and mineral interests, the Secretary of the Interior is charged with the “prevention of waste and conservation of natural resources of the outer Continental Shelf.”<sup>21</sup> If there is “a threat of serious, irreparable, or immediate harm or damage to life (including fish and other aquatic life),” the Secretary can

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<sup>16</sup> See *supra* notes 3–5.

<sup>17</sup> Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1331–1356(b) (1953).

<sup>18</sup> *Id.* § 1331.

<sup>19</sup> *OCS Lands Act History*, BUREAU OF OCEAN ENERGY MGMT., <https://www.boem.gov/OCS-Lands-Act-History> [<https://perma.cc/75VV-KZGT>] (last visited Jan. 11, 2019).

<sup>20</sup> Tom DiChristopher, *Obama Invokes 1953 Law to Indefinitely Block Drilling in Arctic and Atlantic Oceans*, CNBC (Dec. 20, 2016), <http://www.cnbc.com/2016/12/20/obama-expected-to-invoke-1953-law-to-block-offshore-drilling.html?view=story&%24DEVICE%24=native-android-mobile> [<https://perma.cc/E3TW-PLFW>].

<sup>21</sup> 43 U.S.C. § 1334(a) (2005).

suspend an operation, activity, or lease<sup>22</sup> where geological and geophysical exploration are unduly harmful to aquatic life.<sup>23</sup> The Ninth Circuit Court of Appeals' interpretation of the OCSLA concluded that if "the risk to the marine environment outweighs the immediate national interest in exploring and drilling for oil and gas," the Secretary can suspend leased operations.<sup>24</sup> The 1978 amendments to OCSLA emphasized that environmental considerations must be a component in mineral leasing decisions.<sup>25</sup> Congress specifically required that the

[m]anagement of the outer Continental Shelf shall be conducted in a manner which considers economic, social, and environmental values of the renewable and nonrenewable resources contained in the outer Continental Shelf, and the potential impact of oil and gas exploration on other resource values of the outer Continental Shelf and the marine, costal, and human environments.<sup>26</sup>

Conflicting claims of jurisdiction by the states and the federal government<sup>27</sup> prompted the passage of the U.S. Submerged Lands Act in 1953, which reserved the first three nautical miles of coastal land to the states, but preserved navigation jurisdiction and development of mineral resources on the Outer Continental Shelf for Congress, pursuant to the Commerce Clause.<sup>28</sup> As an outgrowth of the Presidential Commission on Marine Science, Engineering and Resources,<sup>29</sup> the National Oceanic and Atmospheric Administration ("NOAA") was established in 1970.<sup>30</sup> In requesting the establishment of NOAA under the Department of Commerce,

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<sup>22</sup> *Id.* § 1334(a)(1)(B).

<sup>23</sup> 43 U.S.C. §§ 1340(a)(1), (g)(3) (1985).

<sup>24</sup> *Gulf Oil Corp. v. Morton*, 493 F.2d. 141, 144 (9th Cir. 1973).

<sup>25</sup> See Gordon James, *The Outer Continental Shelf Lands Act Amendments of 1978: Balancing Energy Needs with Environmental Concerns?*, 40 LA. L. REV. 177, 178 (1979).

<sup>26</sup> 43 U.S.C. § 1344(a)(1) (amended 1978).

<sup>27</sup> BUREAU OF OCEAN ENERGY MGMT., *supra* note 19.

<sup>28</sup> U.S. CONST. art. I, § 8, cl. 3; U.S. Submerged Lands Act, 43 U.S.C. §§ 1301–1315 (1953) (amended 2002); the Gulf coasts of Texas and Florida extend to nine nautical miles, but all other states have a three mile limit according to the Bureau of Ocean Energy Management. *Outer Continental Shelf*, BUREAU OF OCEAN ENERGY MGMT., <https://www.boem.gov/Outer-Continental-Shelf> [<https://perma.cc/PM46-3HLL>] (last visited Jan. 11, 2019).

<sup>29</sup> This Commission is also known as the Stratton Commission.

<sup>30</sup> *NOAA Legacy*, NOAA, <http://www.history.noaa.gov/noaa.html> [<https://perma.cc/F7XM-RWQZ>] (last visited Jan. 11, 2019).

President Nixon cited the need “for better protection of life and property from natural hazards . . . for a better understanding of the total environment . . . [and] for exploration and development leading to the intelligent use of our marine resources.”<sup>31</sup>

In 1972, the Coastal Zone Management Act<sup>32</sup> required coastal states to review federal actions that would affect land and water of the coastal zone. The Federal Oil and Gas Royalties Act of 1982 compelled consideration of conservation and environmental protection of federal lands in conjunction with building oil and gas facilities.<sup>33</sup> The Oceans Act of 2000 established the U.S. Commission on Ocean Policy,<sup>34</sup> which had a Joint Ocean Commission with the Pew Oceans Commission to promote a dialogue on restoring and protecting marine resources.<sup>35</sup> The reauthorization of the 1976 Magnuson-Stevens Fishery Conservation and Management Act occurred in 2006,<sup>36</sup> along with that of the Marine Debris Research, Prevention, and Reduction Act.<sup>37</sup>

Under the Department of the Interior, the Bureau of Ocean Energy Management (“BOEM”) was created to manage mineral leasing and offshore operations.<sup>38</sup> BOEM is required to prepare the five-year Outer Continental Shelf oil and gas leasing program, review oil and gas exploration and development plans, and conduct the environmental NEPA analyses.<sup>39</sup> In 2011 (after the Deepwater Horizon oil spill), the BSEE was created to separate the functions of leasing and revenue-raising from the regulatory responsibilities of enforcing safety regulations, with the latter being the primary role of BSEE.<sup>40</sup> BSEE develops regulatory standards for offshore drilling (keeping in mind conservation of natural resources), establishes

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<sup>31</sup> NOAA Celebrates 30 Years of Service, NOAA, [http://www.history.noaa.gov/legacy/30\\_year.html](http://www.history.noaa.gov/legacy/30_year.html) [<https://perma.cc/D9LQ-2SM3>] (last visited Jan. 11, 2019).

<sup>32</sup> Coastal Zone Management Act, 16 U.S.C. §§ 1451–1465 (1972).

<sup>33</sup> Federal Oil & Gas Royalty Management Act, 30 U.S.C. §§ 1701–1759 (1983).

<sup>34</sup> Oceans Act, 5 U.S.C. §§ 552, 552(b), 3109, 5135 (2000).

<sup>35</sup> CONG. RESEARCH. SERV., RL33603, OCEAN COMMISSIONS: OCEAN POLICY REVIEW AND OUTLOOK (2010).

<sup>36</sup> Magnuson-Stevens Fisheries Conservation and Management Act, 16 U.S.C. §§ 1801–1891 (1976) (amended 1996, 2006).

<sup>37</sup> 33 U.S.C. § 1951 (2006).

<sup>38</sup> BUREAU OF OCEAN ENERGY MGMT., *supra* note 19.

<sup>39</sup> U.S. GOV'T ACCOUNTABILITY OFF., OFFSHORE OIL AND GAS RESOURCES INFORMATION ON INFRASTRUCTURE DECOMMISSIONING AND FEDERAL FINANCIAL RISK 2 (May 17, 2017), <https://www.gao.gov/assets/690/684646.pdf> [<https://perma.cc/3CG8-3QFZ>] [hereinafter OFFSHORE DECOMMISSIONING] (referencing 43 U.S.C. § 1344 (2012)).

<sup>40</sup> BUREAU OF SAFETY & ENVTL. ENF'T, *supra* note 11.

standards for decommissioning rigs and platforms, reviews drilling permits, inspects offshore drilling rigs and platforms, and assesses civil penalties for violations.<sup>41</sup> BSEE also collects data and provides the public with technical information about offshore drilling.<sup>42</sup>

In 2013, the United States entered into a Multilateral Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic that became effective March 25, 2016.<sup>43</sup> The signatories were “conscious of the threat from marine oil pollution to the vulnerable Arctic marine environment and to the livelihoods of local and indigenous communities.”<sup>44</sup> Countries entering into this agreement included Canada, Denmark, Finland, Iceland, Norway, Sweden, the Russian Federation, and the United States, all of which are also signatories to the 1990 International Convention on Oil Pollution Preparedness.<sup>45</sup>

President Obama established an Ocean Policy Task Force and used his OCSLA Section 12(a) presidential authority five times to withdraw approximately 160 million acres from future leasing. Four of the declarations affected Alaskan or Arctic waters, and were developed in cooperation with Alaska Native tribes; the fifth concerned the Atlantic Coast.<sup>46</sup> The first executive memorandum established protection of the Bristol Bay area for subsistence use by Alaska Natives, the protection of “wildlife, wildlife habitat, and sustainable commercial and recreational fisheries,” and assurance of the availability of these resources for future generations.<sup>47</sup> The Bristol Bay memorandum is the only one of the protected area declarations that President Trump did not purport to rescind. In conjunction

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<sup>41</sup> See generally *id.*; *Our Organization*, BUREAU OF SAFETY & ENVTL. ENF'T (Mar. 26, 2018), <https://www.bsee.gov/who-we-are/our-organization> [<https://perma.cc/F7LQ-F68R>].

<sup>42</sup> OFFSHORE DECOMMISSIONING, *supra* note 39, at 2.

<sup>43</sup> Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic, May 15, 2013, T.I.A.S. No. 16-325, <https://www.state.gov/documents/organization/264791.pdf> [<https://perma.cc/5Z6P-63TT>].

<sup>44</sup> *Id.* at 1.

<sup>45</sup> *Id.*

<sup>46</sup> Memorandum on Withdrawal of Certain Areas Off Atlantic Coast on the Outer Continental Shelf from Mineral Leasing 2016 DAILY COMP. PRES. DOC. 201600861 (Dec. 20, 2016), <https://www.gpo.gov/fdsys/pkg/DCPD-201600861/pdf/DCPD-201600861.pdf> [<https://perma.cc/FKP9-3ZGD>] [hereinafter Obama 2016 Memorandum on Atlantic Outer Continental Shelf] (2016 memorandum from President Obama).

<sup>47</sup> Memorandum on Withdrawal of Certain Areas of the United States Outer Continental Shelf from Leasing Disposition, 2014 DAILY COMP PRES. DOC. 201400934 (Dec. 16, 2014), <https://www.gpo.gov/fdsys/pkg/DCPD-201400934/pdf/DCPD-201400934.pdf> [<https://perma.cc/WS2A-F9KC>] (2014 memorandum from President Obama).



with a U.S.-Canadian Arctic agreement, President Obama issued an Executive order creating the Northern Bering Sea Climate Resilience Area protective zone,<sup>48</sup> that withdrew from disposition unleased lands of the Arctic Outer Continental Shelf.<sup>49</sup>

While President Obama's original 2017–2022 Five-Year Program would have permitted oil leases in more Alaskan waters, the final Program protected the Chukchi Sea and Beaufort Sea.<sup>50</sup> In issuing his December 20, 2016 memorandum, President Obama created the protective zone, free of oil and mineral exploration for the Beaufort and Chukchi Seas:

[C]onsistent with principles of responsible public stewardship entrusted to this office, with due consideration of (1) the important, irreplaceable values of the Chukchi Sea and portions of the Beaufort Sea for marine mammals, other wildlife, wildlife habitat, scientific research, and Alaska Native subsistence use; (2) the vulnerability of these ecosystems to an oil spill; and (3) the unique logistical, operational, safety, and scientific challenges and risks of oil extraction and spill response in these Arctic waters.<sup>51</sup>

President Obama's order was preceded by a July 2016 rule change, issued by BSEE and BOEM, that limited oil exploration in the Arctic<sup>52</sup> and by a report of the Coast Guard–led Arctic Executive Steering Committee Task Force on Oil Spill Response.<sup>53</sup> This rule change and report recognized the

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<sup>48</sup> Northern Bering Sea Climate Resilience, Exec. Order No. 13,754, 81 Fed. Reg. 90,669, 90,670 (Dec. 9, 2016); *see also* 43 U.S.C. § 1341(a) (2012) (underlying authority for this Executive order).

<sup>49</sup> Memorandum on Withdrawal of Certain Portions of the United States Arctic Outer Continental Shelf from Mineral Leasing, 2016 DAILY COMP. PRES. DOC. 201600860 (Dec. 20, 2016), <https://www.gpo.gov/fdsys/pkg/DCPD-201600860/pdf/DCPD-201600860.pdf> [<https://perma.cc/EYR7-QQF6>] [hereinafter Obama Memorandum on Arctic Outer Continental Shelf] (memorandum from President Barack Obama pursuant to OCSLA Section 12(a)).

<sup>50</sup> Brehmer, *supra* note 13.

<sup>51</sup> Obama 2016 Memorandum on Atlantic Outer Continental Shelf, *supra* note 46.

<sup>52</sup> Cook Inlet Planning Area Outer Continental Shelf Oil and Gas Lease Sale 244, 82 Fed. Reg. 23,291 (May 22, 2017). *See also* Oil and Gas and Sulfur Operations on the Outer Continental Shelf—Requirements for Exploratory Drilling on the Arctic Outer Continental Shelf, 81 Fed. Reg. 46,477 (July 15, 2016).

<sup>53</sup> *See* INTERAGENCY COORDINATING COMMITTEE ON OIL POLLUTION RESEARCH, OIL POLLUTION RESEARCH AND TECHNOLOGY PLAN 2015–2021 (Sept. 2015), <https://www.bsee.gov/sites/bsee.gov/files/bsee-interim-document/statistics/2015-iccopr-research-and-technology-plan.pdf> [<https://perma.cc/9QMU-MCZY>].

ecological sensitivity of the Beaufort Sea Planning Area and Chukchi Sea Planning Area of Alaskan waters.<sup>54</sup> BOEM concluded that there was a 75% chance of at least one oil spill of more than 1,000 barrels, and that two such “small” spills would cause long-term degraded water quality.<sup>55</sup> Each of President Obama’s withdrawals of areas from leasing was declared “without specific expiration,” with the intent to protect it from future reversal.<sup>56</sup>

## II. PRESIDENT TRUMP’S EXPANSION OF OFFSHORE DRILLING OPPORTUNITIES

### A. *America-First Offshore Energy Strategy v. Delegated Authority*

President Trump’s Offshore Energy Order<sup>57</sup> directed his Secretary of the Interior, Ryan Zinke, to review offshore oil drilling policies for the Outer Continental Shelf. On April 28, 2017, President Trump reversed President Obama’s Arctic Outer Continental Shelf Presidential Memorandum that had prohibited future leasing of offshore sites for the purposes of exploration, development, or production of mineral rights.<sup>58</sup> President Trump is the first President to remove land protected by the OCSLA.

The OCSLA delegates authority to the President to create zones of protection, but does not expressly delegate authority to rescind such

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<sup>54</sup> *Id.*; see also Leslie Holland-Bartels & Brenda Pierce, *An Evaluation of the Science Needs to Inform Decisions on Outer Continental Shelf Energy Development in the Chukchi and Beaufort Seas*, U.S. GEOLOGICAL SURVEY (June 2011), <https://pubs.usgs.gov/fs/2011/3048> [<https://perma.cc/VUW2-W6RA>].

<sup>55</sup> Letter to Secretary Ryan Zinke from Attorneys General of States and Commonwealths of North Carolina, California, Connecticut, Delaware, Maine, Massachusetts, Maryland, New Jersey, New York, Oregon, Rhode Island and Virginia on Initial Atlantic and Pacific State Comments on 2019–2024 National Outer Continental Shelf Oil and Gas Leasing Draft Proposed Program (Feb. 1, 2018), <http://files.constantcontact.com/bfcd0cef001/618a0443-498b-4512-a23e-1fd5afb8bbc3.pdf> [<https://perma.cc/5EXE-RUMS>] [hereinafter Twelve States Letter].

<sup>56</sup> See *supra* notes 46, 47, 49.

<sup>57</sup> Implementing an America-First Offshore Energy Strategy. Exec. Order No. 13,795, 82 Fed. Reg. 20,815 (May 3, 2017).

<sup>58</sup> INTERAGENCY COORDINATING COMMITTEE ON OIL POLLUTION RESEARCH, *supra* note 53; see also Nathan Rott, *Trump Signs Executive Order on Offshore Drilling and Marine Sanctuaries*, NPR (Apr. 27, 2017), <https://www.npr.org/sections/thetwo-way/2017/04/27/525959808/trump-to-sign-executive-order-on-offshore-drilling-and-marine-sanctuaries> [<https://perma.cc/4S5U-2H37>]; Obama Memorandum on Arctic Outer Continental Shelf, *supra* note 49.

zones.<sup>59</sup> Following issuance of the Offshore Energy Order, the League of Conservation Voters, together with nine other groups, filed suit to obtain a declaration that the Order exceeded the President's constitutional authority, as well as his delegated statutory authority under OCSLA.<sup>60</sup> Plaintiffs' suit seeks an injunction against Ryan Zinke and relevant subordinate federal officials to prevent them from exceeding their authority by reopening, without congressional action, lands that have been withdrawn from production.<sup>61</sup> The defendants and intervenor American Petroleum Institute both filed motions to dismiss asserting (1) sovereign immunity, (2) lack of authority for the court to issue an injunction against the President, (3) lack of standing for the plaintiffs, and (4) ripeness—that the suit was premature, since no harm had been threatened or suffered yet.<sup>62</sup> Defendants further asserted that “[i]n passing OCSLA, Congress made clear that the purpose for the United States’ control over the Outer Continental Shelf was to make available its mineral resources for development.”<sup>63</sup> In rejecting these motions to dismiss, the U.S. District Court for Alaska affirmatively noted that “one of the reasons that Congress enacted [OCSLA] was to provide protection to the environment.”<sup>64</sup> The court then proceeded to overrule the objections that plaintiffs lacked standing, and the allegations that the judicial branch could not issue (a) a declaration that the President exceeded his constitutional authority or (b) an injunction against subordinate federal officials in the event the Offshore Energy Order was eventually deemed either *ultra vires* or an act beyond the President's constitutional authority.<sup>65</sup>

Similarly, conservationists, paleontologists, and Native American groups<sup>66</sup> have argued that the President lacks delegated authority to reduce

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<sup>59</sup> 43 U.S.C. § 1341(a) (2012); *see also infra* notes 79–85.

<sup>60</sup> Complaint for Declaratory and Injunctive Relief at 21, League of Conservation Voters v. Trump, No. 3:17-cv-00101 (D. Alaska, May 3, 2017) [hereinafter League of Conservation Voters Complaint] (plaintiffs also include the Natural Resources Defense Council, Sierra Club, Alaskan Wilderness League, Defenders of Wildlife, Northern Alaska Environmental Center, Resisting Environmental Destruction on Indigenous Lands, Center for Biological Diversity, Greenpeace, and the Wilderness Society).

<sup>61</sup> *Id.*

<sup>62</sup> Memorandum of Points and Authorities in Support of Motion to Dismiss Pursuant to FRCP 12(b) at 5, League of Conservation Voters v. Trump, No. 3:17-cv-00101 (D. Alaska filed June 30, 2017).

<sup>63</sup> *Id.*

<sup>64</sup> Order re Motions to Dismiss at 2; League of Conservation Voters v. Trump, No. 3:17-cv-00101 (D. Alaska filed Mar. 19, 2018).

<sup>65</sup> *Id.*

<sup>66</sup> Diné Bikéyah v. Trump, No. 1:17-cv-02605 (D.D.C. Dec. 6, 2017); *but see* Western Energy

the size of, or to eliminate, previously designated National Monuments under the Antiquities Act.<sup>67</sup> Seeking to stop the withdrawal of National Monument status for Bear Ears National Monument, the National Resource Defense Council (together with ten other co-plaintiff groups) filed suit against the President, as well as against the Secretary of the Department of Interior, the Secretary of Agriculture, and the Directors of both the Bureau of Land Management (“BLM”) and the U.S. Forest Service.<sup>68</sup> These groups seek a declaration that the President exceeded his constitutional authority by taking actions to withdraw National Monument status without the necessary delegation of authority from Congress under either the Antiquities Act or under the Property Clause of Article IV.<sup>69</sup> Plaintiffs further seek an order enjoining the relevant subordinate federal officials from moving forward with leasing and disposing of the previously designated public lands.<sup>70</sup>

Article IV, Section 3, clause 2 of the U.S. Constitution vests in Congress the authority to “dispose of and make all needful Rules and Regulations respecting the territory or other Property belonging to the United States.”<sup>71</sup> The President has no corresponding authority under Article II of the U.S. Constitution and can, therefore, only take action with respect to the Property belonging to the United States to the extent the authority is expressly authorized and delegated by Congress.<sup>72</sup>

Section 12 of OCSLA delegates to the President the authority to withdraw areas from leasing,<sup>73</sup> purchase minerals,<sup>74</sup> and restrict mineral development in leased lands for national defense,<sup>75</sup> or suspend those leases in times of war.<sup>76</sup> Most directly, Section 12(a) of OCSLA states,

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Alliance v. Zinke, No. 17-2005 (10th Cir. Dec. 18, 2017); *see also* SVP Files Second Lawsuit Against Bears Ears Reduction, SOC'Y FOR VERTEBRATE PALEONTOLOGY (Dec. 7, 2017), <http://vertpaleo.org/Society-News/SVP-Paleo-News/Society-News,-Press-Releases/SVP-files-second-lawsuit-against-Bears-Ears-reduct.aspx> [<https://perma.cc/XR5V-CH6Y>].

<sup>67</sup> Antiquities Act, 54 U.S.C. §§ 320301(a)–(b) (1906).

<sup>68</sup> Complaint for Injunctive and Declaratory Relief, Nat. Res. Def. Council v. Trump, No. 1:17-cv-02606 (D.D.C. filed Dec. 7, 2017).

<sup>69</sup> *Id.* at 56–57.

<sup>70</sup> *Id.*

<sup>71</sup> U.S. CONST. art. IV, § 3, cl. 2.

<sup>72</sup> *See* U.S. CONST. art. II.

<sup>73</sup> OCSLA § 12(a), 43 U.S.C. § 1341(a) (2012).

<sup>74</sup> *Id.* § 1341(b).

<sup>75</sup> *Id.* § 1341(d).

<sup>76</sup> *Id.* § 1341(b).

“[t]he President of the United States may, from time to time, withdraw from disposition any of the unleased lands of the outer Continental Shelf.”<sup>77</sup> In OCLSA, however, Congress does not expressly authorize the President to place back into operation areas that were specifically withdrawn by prior Presidents.<sup>78</sup>

In contrast, when authorizing the President to withdraw public lands for other prescribed purposes, Congress has been explicit when it intended to include the power to revoke or modify prior proclamations or designations. In the Forest Reserve Act,<sup>79</sup> the Forest Service Organic Act,<sup>80</sup> and the Pickett Act,<sup>81</sup> the President is specifically granted the authority to reserve or withdraw public lands for public purposes such as the creation of national forests. In the Forest Reserve Act, Congress delegated to the President the authority “by public proclamation, to declare the establishment of such reservations and the limits thereof.”<sup>82</sup> To clarify the intended meaning regarding the authority concerning “the limits thereof” in the Forest Reserve Act, Congress provided in the Forest Service Organic Act

[t]hat to remove any doubt which may exist pertaining to the authority of the President thereunto, the President of the United States is hereby authorized and empowered to revoke, modify, or suspend any and all such Executive orders and proclamations, or any part thereof, from time to time as he shall deem best for the public interests.<sup>83</sup>

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<sup>77</sup> *Id.* § 1341(a).

<sup>78</sup> *See generally* OCSLA, 43 U.S.C. §§ 1331–1356(b) (1953).

<sup>79</sup> Forest Reserve Act, 26 Stat. 1095, 1103 (1891) (codified as amended at 16 U.S.C. §§ 55, 61, 471(c), 471(d)), <https://www.loc.gov/law/help/statutes-at-large/51st-congress.php> [<https://perma.cc/RPH8-9FWK>] [hereinafter Forest Reserve Act].

<sup>80</sup> Forest Service Organic Act, 30 Stat. 34–36 (1897) (codified at 16 U.S.C. §§ 473–478, 479–482, 551 (2012)).

<sup>81</sup> Pickett Act, 36 Stat. 847 (1910), *repealed by* Fed. Land Pol’y & Mgmt. Act, § 704(a), 90 Stat. at 2792 (codified at 43 U.S.C. § 1701 et seq. (2012)).

<sup>82</sup> Forest Reserve Act, *supra* note 79 (“Sec. 24. That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof.” 51st Cong., Sess. II, Ch. 561).

<sup>83</sup> Sundry Civil Appropriations Act (also known as the Organic Act of 1897, also known as Forest Service Organic Act), 30 Stat. 34 (June 4, 1897), <https://www.loc.gov/law/help/statutes-at-large/55th-congress/session-1/c55s1ch2.pdf> [<https://perma.cc/9926-PRZH>] (“For the survey of lands that have been or may hereafter be designated as forest reserves

The Forest Service Organic Act also expressly provided that, “The President is hereby authorized at any time to modify any Executive order that has been or may hereafter be made establishing any forest reserve, and by such modification may reduce the area or change the boundary lines of such reserve, or may vacate altogether any order creating such reserve.”<sup>84</sup> Similarly, in the Pickett Act, Congress avoided any confusion by expressly providing that withdrawals or reservations under the Act “shall remain in force until revoked by him or an Act of Congress.”<sup>85</sup>

Having made clear that Congress understands the language necessary to authorize the President to revoke or modify prior Executive proclamations and designations, the absence of such express authority in either the Antiquities Act (granting authority to designate National Monuments) or the OCSLA (granting authority to reserve submerged lands on the Outer Continental Shelf) demonstrates convincingly that Congress intended to retain its authority over such actions.<sup>86</sup>

In addition to the canons of statutory construction and the lack of direct constitutional authority for the President to withdraw or revoke prior executive actions under the Antiquities Act or OCLSA, the common law public trust doctrine supports “the interpretation of [these acts] as

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by Executive Proclamation, under section twenty-four of the Act of Congress approved March third, eighteen hundred and ninety-one, entitled ‘An Act to repeal timber-culture laws, and for other purposes,’ and including public lands adjacent thereto, which may be designated for survey by the Secretary of the Interior, one hundred and fifty thousand dollars, to be immediately available: Provided, That to remove any doubt which may exist pertaining to the authority of the President thereunto, the President of the United States is hereby authorized and empowered to revoke, modify, or suspend any and all such Executive orders and proclamations, or any part thereof, from time to time as he shall deem best for the public interests . . .”).

<sup>84</sup> *Id.* at 36.

<sup>85</sup> Act to Authorize the President of the United States to make withdrawals of public lands in certain cases (also known as the Pickett Act), 36 Stat. 847 (June 25, 1910), <https://www.loc.gov/law/help/statutes-at-large/61st-congress.php> [<https://perma.cc/5QXS-SU8C>] (“That the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States including the District of Alaska and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or an Act of Congress.”).

<sup>86</sup> See *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (when interpreting a statute, a court must presume that a legislature says what it means in a statute and means in a statute what it says there); see also *Estate of Bell v. Commissioner*, 928 F.2d 901, 904 (9th Cir. 1991) (Congress is presumed to act intentionally and purposely when it includes language in one section but omits it in another).

conferring a one-way power to the President, consistent with the longstanding precept that public lands should be protected and managed according to principles of democratic decision-making.”<sup>87</sup> Stated differently, one commentator recently articulated the impact as follows:

[T]he common law public trust doctrine has long been interpreted by several states to constrain actions that threaten to alienate or diminish public trust resources. State common law jurisprudence has evolved to judicially ratify constraints on non-legislative actors with respect to public trust land management, while also serving as a backstop against complete legislative abdication of public trust duties.<sup>88</sup>

This interpretation and application of the public trust doctrine properly applies to the stewardship of federally owned public resources and is entirely consistent with the congressionally limited authority granted to the President under the Antiquities Act and the OCSLA.<sup>89</sup>

*B. Regulatory Streamlining Obfuscates Environmental Protection*

President Trump’s Offshore Energy Order<sup>90</sup> reverses the Obama policy and supplements Trump’s broader Energy Independence Order that calls for reversal of environmental rules to avoid “regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation.”<sup>91</sup> Section 2 of the Energy Independence Order

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<sup>87</sup> Jayni Hein, *Monumental Decision: One Way Levers Towards Preservation in the Antiquities Act and Outer Continental Shelf Lands Act*, 48 ENVT'L L. 125, 131 (2018).

<sup>88</sup> *Id.* at 156.

<sup>89</sup> *Id.* at 157.

<sup>90</sup> Implementing an America-First Offshore Energy Strategy, Exec. Order No. 13,795, 82 Fed. Reg. 20,815 (May 3, 2017).

<sup>91</sup> Promoting Energy Independence and Economic Growth, Exec. Order 13,783, 82 Fed. Reg. 16,093 (Mar. 31, 2017). President Trump’s Energy Independence Order: (1) revokes, rescinds or suspends several prior climate change and GHG directives and documents, while disbanding the Interagency Working Group on Social Cost of Greenhouse Gases (IWG) (§§ 3 and 5); (2) lifts the moratorium on coal leases on federal lands (§ 6); (3) authorizes immediate review, suspension, revision or rescission of the Clean Power Plan (§ 4); and (4) instructs the head of each agency to make immediate review of all agency actions that potentially “burden” the development of domestic energy resources (§ 2).

gives priority to four components of the energy sector: oil, natural gas, coal, and nuclear.<sup>92</sup>

For sales of land on shore, the BLM responded by issuing an Instruction Memorandum to “streamline the leasing process to alleviate unnecessary impediments and burdens, to expedite the offering of lands for lease,”<sup>93</sup> superseding the 2010 guidance.<sup>94</sup> It alleviates the Master Leasing Plans and “duplicative layers of NEPA review” by requiring use of existing NEPA documents, Endangered Species Act and National Historic Preservation Act lease stipulations; it also eliminates the need for additional “coordination,” site visits, or further public comment (eliminating the previous thirty-day public review and comment period).<sup>95</sup> There is a six-month limit on parcel review for specific lease sales, and the auction process will not be halted even if protests regarding parcels have not been resolved.<sup>96</sup> The number of acres of public land offered for oil and gas lease sale auctions increased more than sixfold to 11,859,396 in 2017, compared to 1,946,953 in 2016.<sup>97</sup> This is the onshore parallel to Zinke’s proposal to open up most of the Outer Continental Shelf coastal areas for offshore exploration and drilling.

Normally there are a number of checks and balances through the NEPA process before a sale is held and a lease is subsequently issued for offshore exploration and drilling. Pursuant to the Offshore Energy Order, these checks include a Request for Information (issued July 3, 2017) and the Draft Proposed Program for Outer Continental Shelf Oil and Gas Leasing Program (announced January 4, 2018).<sup>98</sup> Those will be followed by

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<sup>92</sup> *Id.* § 2.

<sup>93</sup> BUREAU OF LAND MGMT., Updating Oil and Gas Leasing Reform—Land Use Planning and Lease Parcel Reviews, IM 2018-034 (Jan. 31, 2018).

<sup>94</sup> BUREAU OF LAND MGMT., Oil and Gas Leasing Reform Land Use Planning and Lease Parcel Reviews, IM 2010-117 (May 17, 2010).

<sup>95</sup> BUREAU OF LAND MGMT., *supra* note 93.

<sup>96</sup> *Id.* (reducing the protest period from thirty to ten days).

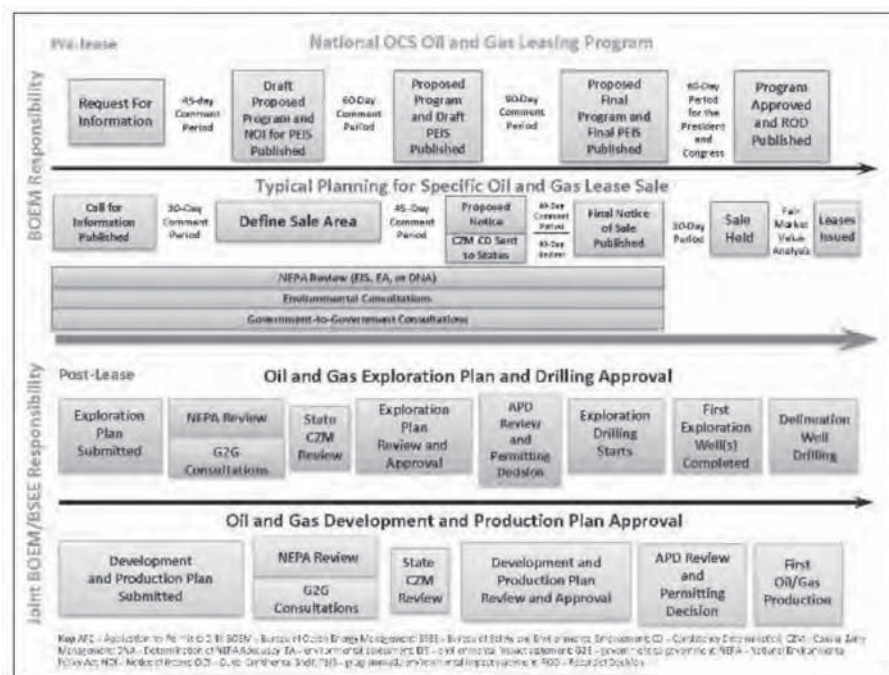
<sup>97</sup> *Acres Offered for Lease and Acres Sold, Calendar Years 2009–2017*, BUREAU OF LAND MGMT., [https://www.blm.gov/sites/blm.gov/files/Table%2011\\_Acreage\\_Offered\\_at\\_Competitive\\_Lease\\_Sale\\_Auctions\\_Since\\_January\\_1\\_2009.pdf](https://www.blm.gov/sites/blm.gov/files/Table%2011_Acreage_Offered_at_Competitive_Lease_Sale_Auctions_Since_January_1_2009.pdf) [<https://perma.cc/N2QR-F5CT>] (last visited Jan. 11, 2019).

<sup>98</sup> BUREAU OF OCEAN ENERGY MGMT., 2019–2024 NATIONAL OUTER CONTINENTAL SHELF OIL AND GAS LEASING DRAFT PROPOSED PROGRAM (Jan. 2018), <https://www.boem.gov/NP-Draft-Proposed-Program-2019-2024/> [<https://perma.cc/Z8N5-99B3>] [hereinafter DRAFT PROPOSAL ON OUTER CONTINENTAL SHELF LEASE SALES FOR 2019–2024] (explaining that this Draft Proposed Program is one of the steps in finalizing the 2019–2024 plan that will be analyzed with Draft Programmatic EIS and was preceded by a Request for Information (RFI) July 3, 2017).



notice and comment and NEPA Environmental Impact Statement (“EIS”) reviews, leading to a Proposed Program, a Proposed Final Program, and ultimately, publication of an Approved Program and Record of Decision.<sup>99</sup> Oil companies must then submit a NEPA-reviewed oil exploration plan prior to acquiring a permit to commence the drilling of an exploratory well.<sup>100</sup> The administrative process through which the national oil and gas leasing program proceeds is detailed in the chart below.<sup>101</sup>

Figure 1



<sup>99</sup> *Id.*

<sup>100</sup> *OSC Oil and Gas Leasing, Exploration, and Development Process*, BUREAU OF OCEAN ENERGY MGMT., <https://www.boem.gov/Alaska-Leasing/#LeasingProcess> [<https://perma.cc/U6MH-6435>] (last visited Jan. 11, 2019).

<sup>101</sup> ADAM VANN, CONG. RESEARCH SERV., RL33404, OFFSHORE OIL AND GAS DEVELOPMENT: LEGAL FRAMEWORK (2018).

Secretary Zinke's implementation of the Secretarial Order, however, limits NEPA review to one year and 150 pages in order to streamline the process for issuing oil and gas leasing permits.<sup>102</sup>

The Secretary of the Interior is authorized to create a Five-Year Program for the leasing policy covering the Outer Continental Shelf.<sup>103</sup> Under the Department of Interior's BOEM, the Trump administration has issued a Five-Year Draft Proposal on Outer Continental Shelf Lease Sales for 2019–2024 to replace the Obama administration's 2017–2022 Program.<sup>104</sup> The new plan would open up 98% of the Outer Continental Shelf for oil and gas exploration,<sup>105</sup> pursuant to Zinke's Secretarial Order 3350.<sup>106</sup> This contrasts sharply to the 6% available for oil exploration before this plan.<sup>107</sup> BOEM estimates that the offshore areas opened under the Trump administration proposal would yield about forty-five billion barrels of oil (twenty-one billion of which would be economical to recover at \$60 per barrel).<sup>108</sup> An economic analysis by Oceana concludes that "the Trump administration's offshore drilling plan threatens more than 2.6 million jobs and nearly \$180 billion in GDP for only two years'-worth of oil and just over one year's-worth of gas at current consumption rates."<sup>109</sup>

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<sup>102</sup> See Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects, Exec. Order No. 13,807, 82 Fed. Reg. 40,463, 40,464 (Aug. 24, 2017); U.S. Dep't of the Interior, Secretarial Order No. 3355 (July 6, 2017), <https://www.doi.gov/pressreleases/zinke-signs-secretarial-order-streamline-process-federal-onshore-oil-and-gas-leasing> [<https://perma.cc/P3SL-H8ZD>] (limiting the NEPA review of onshore and offshore oil and gas leasing permits to one year).

<sup>103</sup> 43 U.S.C. § 1344 (2012).

<sup>104</sup> *Secretary Zinke Announces Plan for Unleashing America's Offshore Oil and Gas Potential*, U.S. DEP'T OF THE INTERIOR (Jan. 4, 2018), <https://www.doi.gov/pressreleases/secretary-zinke-announces-plan-unleashing-americas-offshore-oil-and-gas-potential> [<https://perma.cc/2P6A-UPTV>] [hereinafter *Zinke Offshore Lease Plan*].

<sup>105</sup> DRAFT PROPOSAL ON OUTER CONTINENTAL SHELF LEASE SALES FOR 2019–2024, *supra* note 98 (explaining that this Draft Proposed Program is one of the steps in finalizing the 2019–2024 plan that will be analyzed with Draft Programmatic EIS and was preceded by a RFI July 3, 2017).

<sup>106</sup> U.S. Dep't of the Interior, Secretarial Order No. 3350, Concerning America-First Offshore Energy Strategy (May 1, 2017), <https://www.doi.gov/sites/doi.gov/files/press-release/secretarial-order-3350.pdf> [<https://perma.cc/2P6A-UPTV>].

<sup>107</sup> *Zinke Offshore Lease Plan*, *supra* note 104.

<sup>108</sup> Hiroko Tabuchi & Tim Wallace, *Trump Would Open Nearly All U.S. Waters to Drilling, But Will They Drill?*, N.Y. TIMES (Jan. 23, 2018), <https://www.nytimes.com/interactive/2018/01/23/climate/trump-offshore-oil-drilling.html> [<https://perma.cc/E3D6-C46D>].

<sup>109</sup> Press Release, Oceana, *New Economic Analysis Finds Trump Administration's Offshore Drilling Plan Threatens 2.6 Million Jobs and Nearly \$180 Billion in GDP* (Mar. 7,

C. *Expanded National Outer Continental Shelf Oil and Gas Leasing Draft Proposed Program Includes Environmentally Sensitive Areas*

Zinke's proposed Five-Year Program would facilitate forty-seven leases, including three in the Chukchi Sea and three in the Beaufort Sea.<sup>110</sup> Despite its role in assuring environmental safety, BSEE issued a permit on November 28, 2017 authorizing Eni U.S. Operating Co. to drill exploratory wells in the Beaufort Sea,<sup>111</sup> the very zone that President Obama had tried to protect because of the potential devastation to marine wildlife.<sup>112</sup> The Notice of Intent to prepare the Draft Programmatic EIS was open for sixty days beginning January 16, 2018,<sup>113</sup> and a call for proposed sale in the Beaufort Sea Planning Area has already been published.<sup>114</sup> The new approach includes "targeted leasing" of areas with "high resource potential."<sup>115</sup> The Draft Proposal on Outer Continental Shelf Lease Sales for 2019–2024 (shown in the map below)<sup>116</sup> includes:

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2018), <http://usa.oceana.org/press-releases/new-economic-analysis-finds-trump-administrations-offshore-drilling-plan-threatens-26> [<https://perma.cc/KA6R-2N3C>].

<sup>110</sup> Press Release, U.S. Dep't of the Interior, Secretary Zinke Announces Plan for Unleashing America's Offshore Oil and Gas Potential (Jan. 4, 2018), <https://www.doi.gov/pressreleases/secretary-zinke-announces-plan-unleashing-americas-offshore-oil-and-gas-potential> [<https://perma.cc/24HV-2M34>].

<sup>111</sup> *BSEE Approves New Drilling Operations in Arctic*, BUREAU OF SAFETY & ENVTL. ENFT (Nov. 28, 2017), <https://www.bsee.gov/newsroom/latest-news/statements-and-releases/press-releases/bsee-approves-new-drilling-operations-in> [<https://perma.cc/L48C-3NF4>]; see Lorraine Crow, *Oil Exploration Approved by Trump Administration as ANWR Drilling Bill Moves Forward*, ECOWATCH (Nov. 29, 2017), <https://www.ecowatch.com/arctic-oil-anwr-drilling-2513482646.html> [<https://perma.cc/GLW7-T47F>]; see also Chris D'Angelo, *Trump Administration Greenlights New Oil Drilling Operations in Arctic Waters*, HUFFPOST (Nov. 28, 2017), [https://www.huffingtonpost.com/entry/spy-island-arctic-drilling\\_us\\_5a1dd740e4b0d724fed450bb](https://www.huffingtonpost.com/entry/spy-island-arctic-drilling_us_5a1dd740e4b0d724fed450bb) [<https://perma.cc/4NJS-YXMS>].

<sup>112</sup> See *supra* notes 13, 47.

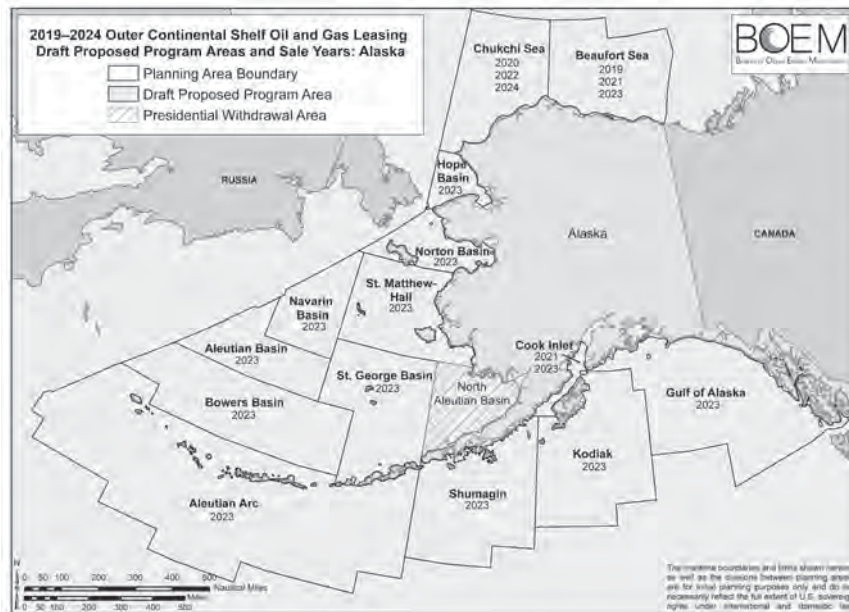
<sup>113</sup> Notice of Availability of the 2019–2024 Draft Proposed Outer Continental Shelf Oil and Gas Leasing Program and Notice of Intent to Prepare a Programmatic Environmental Impact Statement, 83 Fed. Reg. 829 (Jan. 8, 2018).

<sup>114</sup> Outer Continental Shelf, Alaska OCS Region, Beaufort Sea, Proposed Oil and Gas Lease Sale for 2019, 83 Fed. Reg. 13,778 (Mar. 30, 2018).

<sup>115</sup> *Enhancement to Alaska Outer Continental Shelf Lease Sale Process*, BUREAU OF ENERGY DEV., <https://www.boem.gov/About-BOEM/BOEM-Regions/Alaska-Region/Leasing-and-Plans/Leasing/Lease-Sales/Enhancements-AK-Lease-Sales.aspx> [<https://perma.cc/NU22-QZZV>].

<sup>116</sup> *Draft Proposed Program Areas, Sale Years, and Potential Exclusion Areas: Alaska*,

Figure 2



Option 1: Three sales in the Beaufort Sea Program Area in 2019, 2021, and 2023; three sales in the Chukchi Sea Program Area in 2020, 2022, and 2024; two sales in the Cook Inlet Program Area in 2021 and 2023; and one sale each in the Hope Basin, Norton Basin, St. Matthew-Hall, Navarin Basin, Aleutian Basin, St. George Basin, Bowers Basin, Aleutian Arc, Shumagin, Kodiak, and Gulf of Alaska program areas in 2023.<sup>117</sup>

Shell conducted controversial exploration in the Beaufort and Chukchi Seas in 2012; the exploration was marred by numerous

BUREAU OF OCEAN ENERGY MGMT., <https://www.boem.gov/NP-DPP-Map-Alaska/> [<https://perma.cc/5X7P-JELH>] (last visited Jan. 11, 2019).

<sup>117</sup> *Id.* at 10.

problems,<sup>118</sup> after which Shell's drilling contractor (Noble Drilling) pled guilty to eight felony offenses for environmental pollution and safety.<sup>119</sup> After spending \$7 billion in unsuccessful oil exploration, Royal Dutch Shell stopped drilling in the Chukchi Sea in 2015.<sup>120</sup> ConocoPhillips, Statoil, Chevron, BP, and Exxon have all generally suspended offshore drilling in the Arctic area, having deemed it unprofitable.<sup>121</sup> In 2008, the Interior Department withdrew several sales in Alaskan waters due to low demand.<sup>122</sup> Nevertheless, Trump's BOEM completed sales for oil and gas leases in the Cook Inlet in June of 2017<sup>123</sup> as part of Trump's offshore energy strategy encouraging new exploration of oil reserves. In addition, after an expedited review, Trump's BLM has approved seismic surveys

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<sup>118</sup> League of Conservation Voters Complaint, *supra* note 60, at 14 ("During testing in the placid waters of Puget Sound, Shell destroyed its oil spill containment dome, a required component of its plan to respond to oil spills in harsh Arctic conditions. On its way north, Shell's drillship, the Noble Discoverer, dragged its anchor and nearly ran aground while moored near an Alaskan island. Once on the drill-site in the Chukchi Sea, Shell undertook an emergency maneuver to relocate the Noble Discoverer from the exploration site to avoid a large ice floe. On its way back from a drill-site in the Beaufort Sea, Shell lost control of its drilling vessel, the Kulluk, which ran aground in the Gulf of Alaska in severe weather while being towed to Seattle and had to be scrapped").

<sup>119</sup> League of Conservation Voters Complaint, *supra* note 60, at 15.

<sup>120</sup> Erica Martinson, *Why Shell Stopped Drilling in Arctic Alaska*, EYE ON THE ARCTIC (Sept. 28, 2015), <http://www.rcinet.ca/eye-on-the-arctic/2015/09/28/why-shell-stopped-drilling-in-arctic-alaska> [<https://perma.cc/NNZ9-CB7Y>]; see also Dan Joling, *Shell Relinquishes Offshore Leases in Alaska's Chukchi Sea*, POST-GAZETTE (May 10, 2016), <http://www.post-gazette.com/business/powersource/2016/05/10/shell-relinquishes-offshore-leases-in-alaska-s-chukchi-sea/stories/201605100152> [<https://perma.cc/NEN5-8YGV>] (confirming that Royal Dutch Shell PLC had relinquished all but one of its leases (retaining the plugged Burger J well) in the waters off Alaska's northwest coast); see also Yereth Rosen, *Shell Gives Up on All But One Chukchi Sea Lease*, ANCHORAGE DAILY NEWS (updated Sept. 28, 2016), <https://www.adn.com/energy/article/shell-give-all-one-chukchi-sea-lease/2016/05/10> [<https://perma.cc/EM4H-XMET>] (noting that Shell has spent in excess of \$7 billion on its overall Alaska exploration program, but managed to drill only one well to full depth and the results were disappointing).

<sup>121</sup> Chester Dawson, *Exxon Mobil, BP Suspend Canadian Exploratory Drilling Program in Beaufort Sea*, WALL ST. J. (June 26, 2015), <https://www.wsj.com/articles/exxon-mobil-bp-suspend-canadian-arctic-exploratory-drilling-program-in-beaufort-sea-1435348381> [<https://perma.cc/A5VZ-UR2F>].

<sup>122</sup> Patrick Parenteau, *Will Obama's Offshore Drilling Plan be Trumped?*, THE CONVERSATION (Jan. 2, 2017), <http://theconversation.com/will-obamas-offshore-drilling-ban-be-trumped-70125> [<https://perma.cc/WA6N-GNEA>].

<sup>123</sup> Cook Inlet Planning Area Outer Continental Shelf Oil and Gas Lease Sale 244, 89 Fed. Reg. 23,291 (May 22, 2017).

in the Arctic National Wildlife Refuge (“ANWR”) in a push to hold oil and gas lease sales there potentially within the next year.<sup>124</sup>

In the Gulf of Mexico, however, oil companies were only interested in 1% of the 77.3-million-acre (31.2 million hectares) record offering in March of 2018, despite the discounted royalty rates.<sup>125</sup> Yielding \$125.76 million, the average bid of \$153 was below that of 2017 in the area, and significantly below 2013 levels.<sup>126</sup> During the last twenty years, three-fourths of the leases have had only one bid in the Gulf of Mexico, and the bid price has declined significantly since 1983.<sup>127</sup> Exxon Mobil Corporation is instead investing in deep-water oil exploration off foreign coasts, where royalties and tax structures are more favorable and prospects for large discoveries are better.<sup>128</sup> The lowest total of federal royalties revenue from Outer Continental Shelf drilling occurred in 2016, before President Trump took office, as illustrated in the chart below.<sup>129</sup>

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<sup>124</sup> S.G. Oliver, *ANWR May See Seismic Surveys Ahead of Lease Sale*, THE ARCTIC SOUNDER (Aug. 5, 2018), [http://www.thearcticsounder.com/article/1831anwr\\_may\\_see\\_seismic\\_surveys\\_ahead\\_of\\_lease](http://www.thearcticsounder.com/article/1831anwr_may_see_seismic_surveys_ahead_of_lease) [<https://perma.cc/PW34-7TAT>] (noting that rather than completing a full EIS, the BLM is conducting an abbreviated assessment); see also Elizabeth Harball, *Native Corporations Ask to Start Looking for Oil in ANWR*, ALASKA PUB. MEDIA (May 31, 2018), <https://www.alaskapublic.org/2018/05/31/native-corporations-ask-to-start-looking-for-oil-in-anwr> [<https://perma.cc/35SC-XSEE>] (confirming partnership of two native Alaska trial corporations with SAExploration to look for oil).

<sup>125</sup> Richard Valdmanis, *Drillers Give Tepid Response to Record U.S. Offshore Lease Sale*, REUTERS (Mar. 21, 2018), <https://www.reuters.com/article/us-usa-drilling-gulfmexico/drillers-give-tepid-response-to-record-u-s-offshore-lease-sale-idUSKBN1GX18D> [<https://perma.cc/RLD8-AVNB>]; see also Samantha Page, *Trump's Commerce Department is considering shrinking marine monuments for more oil drilling*, THINK PROGRESS (Aug. 25, 2017), <https://thinkprogress.org/commerce-dept-promotes-offshore-drilling-ddf877a5fd5a/> [<https://perma.cc/DV95-3FNK>] (noting that only 1% of the lease offerings in the Gulf were purchased in 2016).

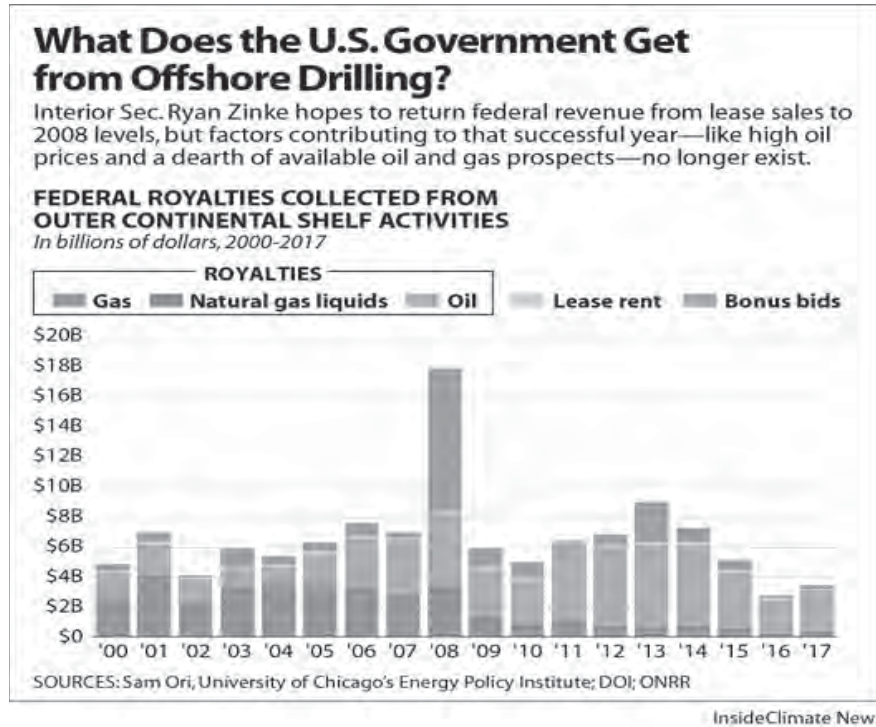
<sup>126</sup> *Id.* Some of the Gulf of Mexico is under a congressional moratorium, precluding development before 2022. *2019–2024 Outer Continental Shelf Oil and Gas Leasing Draft Proposed Program and Potential Exclusion Areas: Gulf of Mexico*, BUREAU OF OCEAN ENERGY MGMT., <https://www.boem.gov/NP-DPP-Map-Lower-48-States/> [<https://perma.cc/N6J8-GVNR>] (last visited Jan. 11, 2019).

<sup>127</sup> David Hilzenrath, *Drilling Down: Big Oil's Bidding*, PROJECT FOR GOVERNMENT OVERSIGHT (Feb. 22, 2018), <https://www.pogo.org/investigation/2018/02/drilling-down-big-oils-bidding> [<http://perma.cc/N7SV-643Q>] (according to the Project on Government Oversight, offshore lease prices have fallen from \$9,068 to \$391 per acre (inflation adjusted) before the latest sales).

<sup>128</sup> *Id.*

<sup>129</sup> *What Does the U.S. Government Get from Offshore Drilling?*, INSIDECLIMATE NEWS (Jan. 10, 2018), <https://insideclimatenews.org/content/what-does-us-government-get-off-shore-drilling> [<https://perma.cc/U9N9-98UJ>].

Figure 3



The Interior Department's Royalty Advisory Committee recommends that the Trump administration cut federal royalties further, from 18.75% to 12.5%.<sup>130</sup> Although the statutory guidance on resource extraction generally calls for the relevant agencies to obtain fair market value for those resources, the departments and agencies are afforded broad discretion to determine what constitutes "fair market value."<sup>131</sup> In practice, the structure of royalty rates established by the BLM has remained largely the same since Congress set the minimum royalty rates at 12.5% in 1920.<sup>132</sup> In 2016, BLM issued a new regulation allowing it to increase royalty rates

<sup>130</sup> Timothy Cama, *Panel Recommends that Zinke Cut Offshore Royalty Rates by A Third*, THE HILL (Feb. 28, 2018), <http://thehill.com/policy/energy-environment/376156-panel-votes-to-recommend-one-third-cut-to-offshore-drilling-royalty> [<https://perma.cc/W739-SC7R>].

<sup>131</sup> See, e.g., Fed. Land Pol'y & Mgmt. Act, 43 U.S.C. § 1701 (2012) (FLPMA); see also OCSLA, 43 U.S.C. § 1344(a)(4) (2012).

<sup>132</sup> Mineral Leasing Act of 1920, 30 U.S.C. § 226(b)(1)(A) (as amended 2012) (setting the minimum royalty at a rate of not less than 12.5%).

for competitive leases above 12.5%.<sup>133</sup> With the change in leadership at the Department of the Interior in 2017, BLM postponed implementation of the new pricing authority and returned to the 12.5% royalty model.<sup>134</sup> Interestingly, as early as 2010, an Interagency Working Group comprised of economic and scientific experts developed more comprehensive pricing models, known as the Social Cost of Carbon and the Social Cost of Methane, that accounted for externalities associated with fossil fuel extraction.<sup>135</sup> Despite the fact that the studies and models prepared by the Interagency Working Group were based on “the latest peer-reviewed science and economic models,” the Trump administration disbanded the group in 2017 and withdrew its technical documents.<sup>136</sup> By ignoring current economic modeling, excluding relevant costs of externalities, and reverting back to outdated pricing models and rates, the Trump administration has prioritized “short-term fossil fuel industry profits over long-term public welfare.”<sup>137</sup> Not surprisingly, with such industry-favoring policies, the United States Government Accounting Office’s review of private consultants’ studies revealed that the U.S. government “take” (royalties and payments earned after exceptions and loopholes) ranks 93rd out of 104 oil and gas fiscal systems examined.<sup>138</sup>

#### D. *Global Oil Prices and Fracking of Shale Oil*

Senator Murkowski chaired the Senate Committee on Energy and Natural Resources’ July 2018 hearings on the volatility of global oil prices.<sup>139</sup> Oil companies are cutting spending on exploration for the fifth

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<sup>133</sup> Waste Prevention, Production Subject Royalties, and Resource Conservation, 81 Fed. Reg. 83,008 (Nov. 18, 2016).

<sup>134</sup> See Waste Prevention, Production Subject to Royalties, and Resource Conservation: Postponement of Certain Compliance Dates, 82 Fed. Reg. 27,430 (June 15, 2017).

<sup>135</sup> See Jayni F Hein, *Federal Lands and Fossil Fuels: Maximizing Social Welfare in Federal Energy Leasing*, 42 HARV. ENVTL. L. REV. 1, 30 (2018); see also INTERAGENCY WORKING GRP. ON SOCIAL COST OF GREENHOUSE GASES, TECHNICAL SUPPORT DOCUMENT: TECHNICAL UPDATE OF THE SOCIAL COST OF CARBON FOR REGULATORY IMPACT ANALYSIS (2016), [https://www.epa.gov/sites/production/files/2016-12/documents/sc\\_co2\\_tsd\\_august\\_2016.pdf](https://www.epa.gov/sites/production/files/2016-12/documents/sc_co2_tsd_august_2016.pdf) [<https://perma.cc/EE2A-J794>].

<sup>136</sup> Promoting Energy Independence and Economic Growth, Exec. Order No. 13,783, 82 Fed. Reg. 16,093, 16,095 (Mar. 31, 2017).

<sup>137</sup> Hein, *supra* note 135, at 21.

<sup>138</sup> U.S. GOV’T ACCOUNTABILITY OFF., GAO-08-691, THE FEDERAL SYSTEM FOR COLLECTING OIL AND GAS REVENUE NEEDS COMPREHENSIVE REASSESSMENT 11 (2008) (citing a 2007 Woods McKenzie report on U.S. take in the deep-water U.S. Gulf of Mexico).

<sup>139</sup> *Full Committee Hearing to Examine Factors that Impact Global Oil Prices Before the U.S. Senate Committee on Energy and Natural Resources*, 115th Cong. (2018), <https://www>



consecutive year, even though oil prices are higher than they have been in the past three years.<sup>140</sup> Exploration for oil in deep-water sites is more expensive and offers a less certain outcome, although 80% of the Gulf of Mexico oil production in 2014 occurred in deep water.<sup>141</sup> Rig rates are down, however, so exploration costs less than it once did.<sup>142</sup> These lower rates may not last, as over 300 rigs will soon be leaving the market.<sup>143</sup> Nevertheless, some energy firms with a long-term outlook may have a renewed interest in offshore drilling (despite the current prolonged low financial return), as digital technology and innovation may help reduce costs.<sup>144</sup>

Recent productivity associated with fracking on land is one of the reasons for reduced interest in offshore drilling. Fracking platforms cost on average \$6 million, while offshore drilling platforms are \$600 million or more.<sup>145</sup> Some firms are shedding assets that do not fit a specific geographic strength, or are pursuing more lucrative opportunities in Colorado, Texas, and South Dakota.<sup>146</sup> In a Senate Committee on Energy and Natural

.energy.senate.gov/public/index.cfm/hearings-and-business-meetings?ID=F5A2A0C5-8044-4EE5-897A-150A18ADF21D [https://perma.cc/WPS5-9CC7]; *Murkowski Convenes Hearing on Global Oil Prices*, U.S. SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES (July 24, 2018), https://www.energy.senate.gov/public/index.cfm/2018/7/murkowski-convenes-hearing-on-global-oil-prices [https://perma.cc/9M22-TX7H].

<sup>140</sup> David Carter Shinn, *Bassoe: Offshore Rig Market Shake Up to Continue 2018 Amid Persistent Low Dayrates*, OFFSHORE ENERGY TODAY (2018), https://www.offshoreenergytoday.com/bassoe-offshore-rig-market-shakeup-to-continue-in-2018-amid-persistent-low-dayrates [https://perma.cc/SF5M-YVBR].

<sup>141</sup> See OFFSHORE DECOMMISSIONING, *supra* note 39, at 8 (noting that from the 1940s to the 1960s all offshore drilling was in shallow water).

<sup>142</sup> Nathalia Jewell & Anne-Fleur Plassais, *Medium- to long-term offshore rig outlook: a case for optimism despite shale growth*, MCKINSEY ENERGY INSIGHTS (Apr. 2018), https://www.mckinseyenergyinsights.com/insights/medium-to-long-term-offshore-rig-outlook-a-case-for-optimism-despite-shale-growth/ [https://perma.cc/7BT4-8TUY].

<sup>143</sup> David Carter Shinn, *Up to 340 offshore drilling rigs could be scrapped by 2020*, BASSOE (Aug 22, 2017), https://www.bassoe.no/up-to-340-offshore-drilling-rigs-could-be-scrapped-by-2020/news/53/ [https://perma.cc/SBP5-YZGU].

<sup>144</sup> See Deborah Byers & Vance Scott, *A Shift in Strategy Could Spur the Resurgence Offshore in 2018*, OFFSHORE MAG. (Feb. 2, 2018), https://www.offshore-mag.com/articles/print/volume-78/issue-1/market-outlook/a-shift-in-strategy-could-spur-the-resurgence-of-offshore-in-2018.html [https://perma.cc/UCF6-PYEN].

<sup>145</sup> William O'Keefe: *Is the Offshore Leasing Rhetoric Much Ado About Not Much?*, RICHMOND TIMES-DISPATCH (Jan. 13, 2018), http://www.richmond.com/opinion/their-opinion/guest-columnists/william-o-keefe-is-the-offshore-leasing-rhetoric-much-ado/article\_699961cc-d0f9-5b4d-a67b-8dbb27e8011f.html [https://perma.cc/U8SL-YT3W].

<sup>146</sup> Sabrina Shankman, *Offshore Drilling Plan Under Fire: Zinke may have Violated Law, Senator Says*, INSIDECLIMATE NEWS (Jan. 11, 2018), https://insideclimatenews.org/news/10012018/trump-offshore-oil-drilling-leases-florida-legal-questions-zinke-california-new

Resources hearing, E. Russell Braziel (CEO for RBN Energy, LLC) testified that despite falling prices for natural gas in the summer of 2008, energy companies increased investment and production of fracking, which generated natural gas in a “shale revolution” that benefitted from advances in drilling and well-completion technologies.<sup>147</sup> Technology led to faster drilling and higher yields of hydrocarbons. For example, a rig in the North Dakota Williston Basin that had produced 225 barrels per month in 2011 was producing 1,450 barrels per month in 2018.<sup>148</sup> Other rigs in Colorado and Wyoming have shown similar increases in production.<sup>149</sup> Since Congress removed the ban on exporting U.S. crude oil in 2015, production has soared to above eleven million barrels per day.<sup>150</sup> This dramatic increase in turn led to a collapse of global crude prices in 2016 (going from \$115 per barrel in 2014 to below \$30 per barrel).<sup>151</sup> Prices have since recovered to \$69 per barrel as of July of 2018.<sup>152</sup> In addition to rising demand, the price increase is due in part to the decision of OPEC+ to draw down excess global oil inventories, the collapse of Venezuelan production, and President Trump’s withdrawal from the Iran nuclear agreement.<sup>153</sup> To maintain these high levels of production even after prices dropped, two-thirds of the U.S. oil producers collectively spent \$2 billion more than they took in during the second quarter of 2018.<sup>154</sup> President Trump’s tariff policies generate fears of global trade war, which will also impact commodities markets, including oil.<sup>155</sup>

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-york-oregon [<https://perma.cc/A99D-EBGY>].

<sup>147</sup> *Full Committee Hearing to Examine Factors that Impact Global Oil Prices Before the U.S. Senate Committee on Energy and Natural Resources*, 115th Cong. (2018) (statement of E. Russell Braziel, President and Chief Executive Officer, RBN Energy, LLC), [http://www.energy.senate.gov/public/index.cfm/files/serve?File\\_id=A389BE3C-4162-4E0A-A1BE-4ED5A94C88ED](http://www.energy.senate.gov/public/index.cfm/files/serve?File_id=A389BE3C-4162-4E0A-A1BE-4ED5A94C88ED) [<https://perma.cc/8FVL-FJEE>] [hereinafter Congressional Testimony of E. Russell Braziel].

<sup>148</sup> *Id.* at 2.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 3.

<sup>151</sup> *Full Committee Hearing to Examine Factors that Impact Global Oil Prices Before the U.S. Senate Committee on Energy and Natural Resources*, 115th Cong. (2018) (statement of Jason Bordoff, Founding Director, Center on Global Energy Policy, Columbia University, at 4), [https://energypolicy.columbia.edu/sites/default/files/pictures/Bordoff%20Senate%20ENR%20Testimony\\_7.24.18\\_FINAL.pdf](https://energypolicy.columbia.edu/sites/default/files/pictures/Bordoff%20Senate%20ENR%20Testimony_7.24.18_FINAL.pdf) [<https://perma.cc/N75P-298B>] [hereinafter Congressional Testimony of Jason Bordoff].

<sup>152</sup> Congressional Testimony of E. Russell Braziel, *supra* note 147, at 2.

<sup>153</sup> Congressional Testimony of Jason Bordoff, *supra* note 151, at 4, 7.

<sup>154</sup> Rebecca Elliot & Bradley Olson, *Drillers Spend Heavily to Extend Oil Boom*, WALL ST. J. (Aug. 13, 2018), at B1.

<sup>155</sup> Congressional Testimony of Jason Bordoff, *supra* note 151, at 10.

With more economical opportunities for fracking, President Trump's Offshore Energy Order promoting oil and gas exploration and extraction may not result in substantial exploration offshore in the near future, even if oil companies acquire some of the leases offered for sale. Some energy firms are more interested in that onshore alternative, made more attractive by the rescission of the Obama administration Fracking Rule<sup>156</sup> and modification of the Methane Waste Rule (discussed *infra*).<sup>157</sup> Citing "administrative burdens and compliance costs that are not justified," the Trump administration's BLM published its 2017 year-end rule to rescind the Fracking Rule for federal and Indian lands.<sup>158</sup>

Fracking, however, is fraught with its own environmental issues. Methane gas poses a danger of explosions at each stage of production.<sup>159</sup> Contamination of groundwater and wells can result from fracking activities.<sup>160</sup> Fracking also competes for scarce water resources, especially in the western United States.<sup>161</sup> In fact, on average, fracking wells require between three million and six million gallons of water per well.<sup>162</sup> In addition to the high levels of water consumption, the high-pressure injection of wastewater during the latter part of the fracking process has been associated with increased frequency of earthquakes.<sup>163</sup> In addition, benzene

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<sup>156</sup> Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands, 80 Fed. Reg. 16,128 (Mar. 26, 2015) (codified at 43 C.F.R. § 3160).

<sup>157</sup> Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources, 81 Fed. Reg. 35,823 (June 3, 2016) (codified at 40 C.F.R. § 60) [hereinafter Methane Waste Rule]; see discussion *infra* of the evolution of the Methane Waste Rule in Section III.C.3.

<sup>158</sup> Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands; Rescission of a 2015 Rule, 82 Fed. Reg. 61,924 (Dec. 29, 2017).

<sup>159</sup> Samantha Page, *A Fireball Exploded in This Man's Face, and Now He is Suing the Nearby Fracking Operation*, THINKPROGRESS (Aug. 12, 2015), <https://thinkprogress.org/a-fireball-exploded-in-this-mans-face-and-now-he-s-suing-the-nearby-fracking-operation-470ba4dc4928> [<https://perma.cc/3274-XYA5>].

<sup>160</sup> *Natural Gas Fracking*, ENVTL. HEALTH CTR., <https://www.ehcd.com/natural-gas-fracking> [<https://perma.cc/4XDR-C48Z>] (last visited Jan. 11, 2019) (discussing the fracking process and attendant risks of contamination to groundwater).

<sup>161</sup> Neela Banerjee, *Limited Water Presents Challenge for Natural Gas Fracking*, L.A. TIMES (Sept. 2, 2014), <http://www.latimes.com/nation/la-na-fracking-water-20140903-story.html> [<https://perma.cc/B7UL-7G8X>] (recognizing that 38% of shale resources are in arid regions or areas with high levels of water stress).

<sup>162</sup> Mark Koba, *Fracking or drinking water? That may become the choice*, CNBC (Sept. 12, 2014), <https://www.cnbc.com/2014/09/12/fracking-for-oil-requires-water-that-may-be-needed-as-drinking-water.html> [<https://perma.cc/LTY2-TM55>].

<sup>163</sup> See James Conca, *Thanks to Fracking, Earthquake Hazards in Parts of Oklahoma Now Comparable to California*, FORBES (Sept. 7, 2016), <https://www.forbes.com/sites/jamesconca/2016/09/07/the-connection-between-earthquakes-and-fracking> [<https://perma.cc/52U5>].

exposure poses risks of respiratory ailments for people in the vicinity of the fracking wells, and endocrine-disrupting chemicals in the water that have been linked to a 40% increased chance of premature births, learning disabilities, and diabetes.<sup>164</sup>

*E. Opposition of Coastal State Mayors, Governors, and Senators to Offshore Drilling*

Most exploration and production along the East Coast are supposed to comply with the Coastal Zone Management Act,<sup>165</sup> which recognizes the need to balance competing ecological interests, natural and scenic characteristics, fish harvesting and habitat, as well as commercial, navigational, residential, and recreational interests, with the goal of energy self-sufficiency and its accompanying extraction of natural resources and fossil fuels.<sup>166</sup>

State attorneys general from twelve states wrote a letter to Secretary Zinke in February of 2018, expressing their “deep concerns about and opposition to the Department of the Interior’s 2019–2024” offshore drilling plan, which “threatens . . . jobs and the economic prosperity of our states.”<sup>167</sup> At risk are three million jobs, dependent on the ocean and coastal economy, that produced \$350 billion in gross domestic product in 2014.<sup>168</sup> The plan also endangers the unique ecologies of the shores and state ocean waters.<sup>169</sup> Similarly, ten governors of Florida, South Carolina, North Carolina, Virginia, Maryland, Delaware, New Jersey, Washington, California, and Oregon also oppose the offshore drilling policy.<sup>170</sup>

-R2D5] (explaining that the water is mixed with chemicals and forced into the earth under high pressure to fracture the rocks encasing the gas energy source); *see also* ENVTL. HEALTH CTR., *supra* note 160 (describing Ellsworth’s U.S. Geological Survey reporting dramatic increase in earthquakes in Midwest coinciding with fracking boom); *see also* Andrzej Kijko & Surina Esterhuyse, *Fracking and Earthquakes—Weighing the Dangers in South Africa*, PHYS.ORG (Dec. 20, 2017), <https://phys.org/news/2017-12-fracking-earth-qauesweighing-dangers-south-africa.html> [<https://perma.cc/32AB-HGW7>].

<sup>164</sup> Judy Stone, *Fracking Is Dangerous to Your Health—Here’s Why*, FORBES (Feb. 23, 2017), <https://www.forbes.com/sites/judystone/2017/02/23/fracking-is-dangerous-to-your-health-heres-why/#417c90c95945> [<https://perma.cc/TA67-JXCL>].

<sup>165</sup> Coastal Zone Management Act, 16 U.S.C. 33 §§ 1451–1455 (1990).

<sup>166</sup> *See id.* § 1451.

<sup>167</sup> Twelve States Letter, *supra* note 55 (the twelve states include North Carolina, California, Connecticut, Delaware, Maine, Massachusetts, Maryland, New Jersey, New York, Oregon, Rhode Island, and Virginia).

<sup>168</sup> *Id.* at 1.

<sup>169</sup> *Id.*

<sup>170</sup> Josh Seigel, *Coastal Governors Oppose Trump’s Offshore Drilling Plan*, WASH.

Interior Secretary Zinke granted Florida an exemption from offshore drilling because of Florida's "unique" situation and Republican Governor Scott's (newly elected U.S. Senator) concerns regarding coastal tourism.<sup>171</sup> Other state governors and attorneys general would like a similar courtesy extended to their states. North Carolina's Outer Banks are renowned for their beauty as a tourist attraction and for their "exceptional environmental fragility,"<sup>172</sup> and North Carolina believes that its coastal tourism is no less worthy of protection than Florida's. All coastal states are highly dependent on coastal tourism, which offshore oil spills would significantly impair.<sup>173</sup>

Joining other U.S. senators from New England in introducing a bill<sup>174</sup> to curtail the Trump administration's offshore drilling plans, U.S. Senators Collins and King (Maine) stated,

the waters off Maine's coast provide a healthy ecosystem for our state's fisheries and support a vigorous tourism industry, both of which support thousands of jobs and generate billions of dollars in revenue for Maine each year. With our environment so closely tied to the vitality of Maine's economy, we cannot risk the health of our ocean on a shortsighted proposal that could impact Maine people for generations. We are proud to join our colleagues from New England to underscore the need to protect our waters from offshore drilling.<sup>175</sup>

Senator Jack Reed lamented, "The Trump Administration's offshore drilling expansion plan is a threat to our economy, the environment, and

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EXAMINER MAG. (Jan. 4, 2018), <https://www.washingtonexaminer.com/coastal-governors-oppose-trumps-offshore-drilling-plan> [<https://perma.cc/XE8Q-TYFG>].

<sup>171</sup> Ledyard King, *More States Want to be Exempted from Drilling*, USA TODAY (Jan. 11, 2017), <https://www.usatoday.com/story/news/politics/2018/01/10/after-trump-administration-excludes-florida-offshore-drilling-other-coastal-states-seek-similar-reli/1019966001> [<https://perma.cc/TTC4-MJTS>]; Hiroka Tabuchi, *Trump Administration Drops Florida from Offshore Drilling Plan*, N.Y. TIMES (Jan. 9, 2018), <https://www.nytimes.com/2018/01/09/climate/trump-florida-offshore-drilling.html> [<https://perma.cc/2ZEC-JJ3K>].

<sup>172</sup> Twelve States Letter, *supra* note 55.

<sup>173</sup> *Id.*

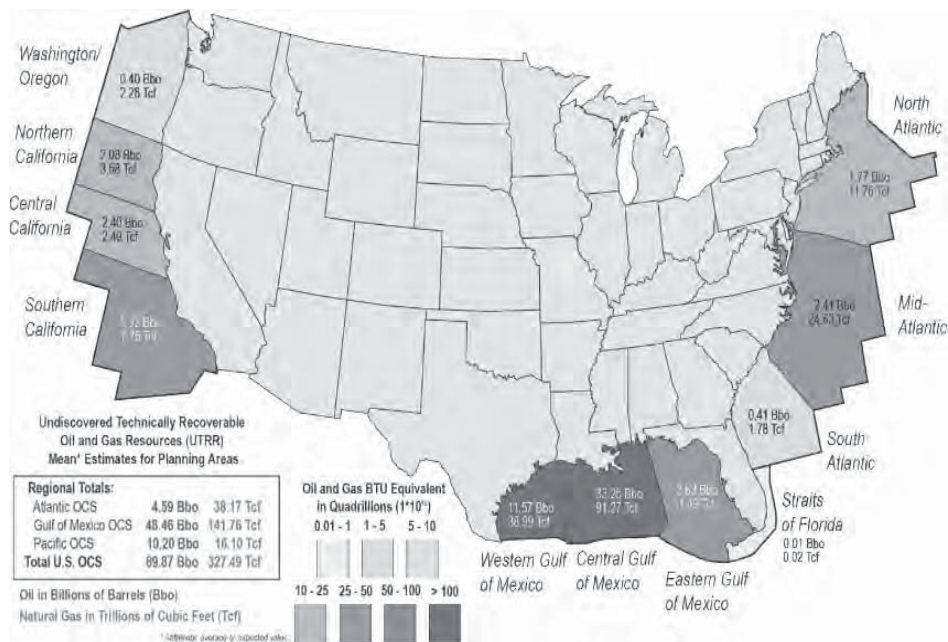
<sup>174</sup> New England Coastal Protection Act, S. 2298, 115th Cong. (2018).

<sup>175</sup> *Senators Introduce Bipartisan New England Offshore Drilling Ban*, U.S. SENATE (Jan 11, 2018), <https://www.whitehouse.senate.gov/news/release/senators-introduce-bipartisan-new-england-offshore-drilling-ban> [<https://perma.cc/KB6E-ZDHT>].

public health. Rhode Islanders don't want offshore oil rigs drilling along our coastline and their voices deserve to be heard."<sup>176</sup>

Seventy percent of voters believe that states should be allowed to request a waiver to prevent offshore drilling along their coasts, according to a University of Maryland Program for Public Consultation poll.<sup>177</sup> In discussing his proposed Five-Year Program, Secretary Zinke noted that Washington, Oregon, Massachusetts, and New Jersey lack significant oil and gas resources off their coasts, so those states may be less likely targets for offshore drilling; however, the Mid-Atlantic area is rich in gas reserves (so those states are more vulnerable to his offshore drilling plans).<sup>178</sup> A map reflecting the federal government's estimates of offshore resource potential in the lower forty-eight states, as prepared by BOEM, is provided below.<sup>179</sup>

**Figure 4**



<sup>176</sup> *Id.*

<sup>177</sup> Miranda Green, *Majority of Voters Oppose Trump Offshore Drilling: Poll*, THE HILL (May 8, 2018), <http://thehill.com/policy/energy-environment/386695-60-percent-of-voters-oppose-the-trump-administrations-offshore> [<https://perma.cc/3EL9-W8D5>].

<sup>178</sup> Pamela King, *Piecing Together Zinke's 5-year-plan Puzzle*, E&E NEWS (Apr. 16, 2018), <https://www.eenews.net/stories/1060079077/> [<https://perma.cc/UQ4V-59ZD>].

<sup>179</sup> *Id.*

In response, Delaware Governor John Carney signed legislation intended to protect Delaware's coast from offshore drilling.<sup>180</sup> In addition, mayors of 190 coastal municipalities have also voiced opposition to the Trump administration's decision to open up offshore drilling.<sup>181</sup>

Virginia heavily relies on commercial fishing and tourism as significant components of its economy. Saltwater commercial fishing, including shellfish aquaculture, Blue Crab, Eastern Oysters, and Atlantic Menhaden, contributes over \$145,000,000 annually to Virginia's economy.<sup>182</sup> Of particular concern is the potential impact of an oil spill on the complex ecosystem of the Chesapeake Bay, which could be destroyed or significantly crippled for decades, even with a small oil spill.<sup>183</sup> Cleanup of the Chesapeake Bay has been a priority since President Reagan endorsed funding for the project in his 1983 State of the Union Address.<sup>184</sup> Notwithstanding this long-standing priority, the Trump administration proposes eliminating the funding of cleanup projects affecting the Chesapeake Bay, the Great Lakes Restoration Initiative,<sup>185</sup> and the Narragansett Bay Estuary Program (that sponsored a conference at which then–Environmental Protection Agency (“EPA”) Secretary Pruitt would not allow EPA scientists to speak about climate change studies).<sup>186</sup>

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<sup>180</sup> *Governor Carney Signs Legislation to Protect Delaware's Coastal Waters and Economy*, DEL. DEP'T OF NAT. RESOURCES & ENVTL. CONTROL (Sept. 20, 2018), <https://news.delaware.gov/2018/09/20/no-offshore-drilling> [<https://perma.cc/ZYR2-PCC5>] (Governor signs Senate Bill 200 prohibiting drilling for oil and natural gas in Delaware's coastal zone and territorial waters and precludes the issuance of any permits in connection with the development of offshore drilling infrastructure; Senate Bill 207 opposes drilling off Delaware's coast and directs state officials to enforce Delaware's rights relating to offshore drilling under state and federal environmental laws).

<sup>181</sup> OCEANA, *supra* note 3.

<sup>182</sup> Letter from General Mark Herring, Va. Att'y Gen., to Kelly Hammerle: Comments on Scoping the Programmatic EIS for the 2019–2024 National Outer Continental Shelf Oil and Gas Leasing Program, 83 Fed. Reg. 829 (Jan. 8, 2018), sent March 8, 2018, at 2, <http://files.constantcontact.com/bfcd0cef001/bdaa245a-7173-4346-af3a-c3aa1495fd9e.pdf> [<https://perma.cc/DQK9-JB7Z>].

<sup>183</sup> Twelve States Letter, *supra* note 55.

<sup>184</sup> Alison Muscatine & Sandra Sugawara, *Chesapeake Bay Emerges as Reagan's Environmental Cause*, WASH. POST (Oct. 7, 1984), [https://www.washingtonpost.com/archive/politics/1984/10/07/chesapeake-bay-emerges-as-reagans-environmental-cause/bbb69c10-b953-4364-bedf-126232e62210/?utm\\_term=.b04dca3c71a8](https://www.washingtonpost.com/archive/politics/1984/10/07/chesapeake-bay-emerges-as-reagans-environmental-cause/bbb69c10-b953-4364-bedf-126232e62210/?utm_term=.b04dca3c71a8) [<https://perma.cc/6NZ5-44CW>].

<sup>185</sup> OFF. OF MGMT. & BUDGET, AMERICA FIRST, A BUDGET BLUEPRINT TO MAKE AMERICA GREAT AGAIN 40 (Mar. 13, 2017), [http://www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/2018\\_blueprint.pdf](http://www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/2018_blueprint.pdf) [<https://perma.cc/V5KB-BNYV>].

<sup>186</sup> Lisa Friedman, *E.P.A. Cancels Talk on Climate Change by Agency Scientists*, N.Y. TIMES (Oct. 22, 2017), <https://www.nytimes.com/2017/10/22/climate/epa-scientists.html> [<https://perma.cc/7VWV-N8AP>].

Apart from the environmental issues discussed above, there are also national security concerns if drilling infrastructure or an oil accident threatened the ability of military bases to conduct operations and training.<sup>187</sup> At jeopardy in Virginia is Naval Station Norfolk (the nation's largest naval base).<sup>188</sup>

Oregon and Washington have also expressed strong bipartisan and public opposition to the federal proposal to expand offshore drilling.<sup>189</sup> Oregon derives an estimated \$2.5 billion annually from its ocean-related economy that includes fishing, tourism, and recreation that would be threatened by the proposed leasing plan.<sup>190</sup> Washington supports a \$50 billion maritime economy and 191,000 maritime-related jobs.<sup>191</sup> In a rare, stark and direct bipartisan statement, U.S. Senator Maria Cantwell and her colleagues stated, "the Department of Interior's proposal to consider drilling off the states we represent, absent stakeholder support and directly contradicting economic and environmental factors of the region, is a waste of time, government resources, and taxpayer dollars."<sup>192</sup> Washington Governor Jay Inslee cited economic harm to the shellfish industry, threats to coastal birds, and threats to the rights of Native Americans in opposing offshore drilling,<sup>193</sup> and Washington Attorney General Bob Ferguson threatened to sue if Secretary Zinke does not remove Washington from the drilling plan.<sup>194</sup>

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<sup>187</sup> Twelve States Letter, *supra* note 55.

<sup>188</sup> *Id.*

<sup>189</sup> Letter from U.S. Senator Mary Cantwell et al. to Secretary Ryan Zinke, U.S. Dep't of the Interior (Feb. 1, 2018), [https://www.energy.senate.gov/public/index.cfm?a=files.serve&File\\_id=DD9CC623-2EB9-4415-BC44-116FF9B6B164](https://www.energy.senate.gov/public/index.cfm?a=files.serve&File_id=DD9CC623-2EB9-4415-BC44-116FF9B6B164) [<https://perma.cc/L2NU-6ZQM>] [hereinafter Cantwell Letter] (expressing strong bipartisan opposition to inclusion of Pacific Northwest waters in the Trump administration's Oil and Gas Leasing Program for 2019–2024. This letter is co-signed by four U.S. Senators and twelve Members of Congress); see also Charlie Plybon, *Oregon Congressional and State Leaders Speak Out Against Offshore Drilling*, SURFRIDER FOUND. (Aug. 24, 2018), <https://www.surfrider.org/coastal-blog/entry/oregon-leaders-from-both-parties-speak-out-against-offshore-drilling> [<https://perma.cc/5XEE-8ALX>] (noting that more than 30,000 comments were submitted in opposition to the proposed program and that numerous coastal cities have passed resolutions in opposition to the plan).

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> Cantwell Letter, *supra* note 189.

<sup>193</sup> Courtney Flatt, *Washington Could Use Taxes, Lawsuit to Oppose Offshore Drilling*, OR. PUB. BROAD. (Feb. 6, 2018), <https://www.opb.org/news/article/jay-inslee-washington-lawsuits-offshore-drilling-trump> [<https://perma.cc/EQ89-XLP6>].

<sup>194</sup> Press Release, Washington Attorney General's Office, AG Ferguson Pledges Lawsuit if Trump's Offshore Drilling Plan Includes Washington (Feb. 5, 2018), <http://www.atg.wa>



California is the nation's third-largest oil producing state and has only thirty-two offshore platforms, dating back to the 1950s.<sup>195</sup> Nonetheless, California Governor Jerry Brown has signed legislation "to thwart the Trump administration's efforts to expand offshore drilling along the California coast."<sup>196</sup> Offshore drilling has been deeply unpopular for decades, and no new federal leases have been awarded off the California coast since 1984.<sup>197</sup> This current round of legislation follows the guilty verdicts against Texas-based Plains All American Pipeline, which was responsible for a major oil spill in 2015 at Refugio State Beach that fouled the beaches across 100 miles around Santa Barbara, California.<sup>198</sup> The Refugio Spill renewed the public opposition that followed the 1969 oil spill of three million gallons in Santa Barbara, which coated California's beaches and wildlife with tar and oil.<sup>199</sup> While California's authority over coastal waters only extends out three miles, these new rules will make it more difficult for offshore oil rigs to operate off California's coast.<sup>200</sup> Coastal economies in California generate nearly \$2 trillion in GDP and provide homes for dozens of endangered or threatened species, including the Leatherback Sea Turtle, Blue Whale, Humpback Whale, Guadalupe Fur Seal, Western Snowy Plover, Marbled Murrelet, Southern Steelhead, Black Abalone, and Coho Salmon.<sup>201</sup> Similarly, off the coast of Massachusetts, the adverse impacts associated with oil and gas drilling could drive the North Atlantic right whale species to extinction.<sup>202</sup>

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.gov/news/news-releases/ag-ferguson-pledges-lawsuit-if-trump-s-offshore-drilling-plan-includes-washington [https://perma.cc/LAY8-P5V2].

<sup>195</sup> Paul Rogers, *California Passes Bill to Block Trump's Offshore Drilling Plans*, MERCURY NEWS (Aug. 28, 2018), <https://www.mercurynews.com/2018/08/28/california-passes-bill-to-block-trumps-offshore-oil-drilling-plans> [https://perma.cc/CS85-JNMB].

<sup>196</sup> Jeff Daniels, *California Gov. Jerry Brown Moves to Block Trump on Offshore Drilling: 'Not Here, Not Now'*, CNBC (Sept. 8, 2018), <https://www.cnn.com/2018/09/08/california-gov-brown-signs-legislation-to-block-new-offshore-drilling.html> [https://perma.cc/S9QQ-PQWN]; see CAL. PUB. RES. CODE § 6245 (2018) (imposing public notice and process requirements for the renewal of offshore oil and gas leases, as well as other obligations for new construction and development associated with federal oil and gas leases).

<sup>197</sup> Rogers, *supra* note 195 (citing the non-partisan Public Policy Institute of California poll from January 2018, which found that 69% of Californians oppose new offshore drilling).

<sup>198</sup> Francis Diep, *How the 2015 Santa Barbara Oil Spill Changed California*, PACIFIC STANDARD (Sept. 11, 2018), <https://psmag.com/news/how-the-2015-santa-barbara-oil-spill-changed-california> [https://perma.cc/6Q77-W8T4].

<sup>199</sup> *Id.*

<sup>200</sup> See U.S. Submerged Lands Act, 43 U.S.C. §§ 1301–1315 (1953) (amended 2002).

<sup>201</sup> Twelve States Letter, *supra* note 55.

<sup>202</sup> *Id.*; see Richard M. Pace et al., *State-Space Mark-Recapture Estimates Reveal a Recent Decline in Abundance of North Atlantic Right Whales*, 7 ECOLOGY & EVOLUTION 8730–41 (2017) (estimating that *only* an estimated 460 of the North Atlantic right whales exist).

Collectively, it quickly becomes apparent that virtually all of the states along the Atlantic Coast, and all of the Pacific Coast states between Mexico and Canada, are opposed to the Trump administration's proposal to expand offshore drilling. Even without focusing on the modest economic return to be derived from the proposed federal leases or the significant social costs and risks, the broad and unequivocal state stakeholder opposition should be sufficient to induce the Trump administration to withdraw the proposal to expand offshore drilling along the Atlantic and Pacific Coasts.

### III. ENVIRONMENTAL RISKS ASSOCIATED WITH OFFSHORE DRILLING

#### A. *Oil Spills*

The Oil Pollution Act of 1990 was passed to strengthen the EPA's ability to prevent and respond to catastrophic oil spills,<sup>203</sup> primarily in response to the 1989 Exxon Valdez oil spill.<sup>204</sup> The Act establishes a trust fund (with a tax on oil companies) to assist in funding cleanup of oil spills when responsible parties are unwilling or unable to pay for the cleanup.<sup>205</sup> EPA has established a Spill Prevention, Control and Countermeasure Plan<sup>206</sup> to prevent discharge of oil into navigable waters. It covers on and offshore facilities that store, process, use, or consume oil if a facility has above-ground storage capacity greater than 1,320 U.S. gallons of oil or below ground capacity of more than 42,000 U.S. gallons that have a "reasonable expectation of an oil discharge into or upon navigable waters of the U.S. or adjoining shorelines."<sup>207</sup> In addition, the Act's Facility Response Plan provision requires facilities to submit to EPA a response plan for oil discharge disasters.<sup>208</sup>

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<sup>203</sup> Oil Pollution Act, 33 U.S.C. § 2701 (1990).

<sup>204</sup> *See It Took More Than the Exxon Valdez Oil Spill to Pass the Historic Oil Pollution Act of 1990*, NOAA, <https://response.restoration.noaa.gov/oil-and-chemical-spills/significant-incidents/exxon-valdez-oil-spill/it-took-more-exxon-valdez-oil-s> [<https://perma.cc/2JWB-T5FQ>].

<sup>205</sup> *Summary of the Oil Pollution Act*, ENVTL. PROT. AGENCY, <https://www.epa.gov/laws-regulations/summary-oil-pollution-act> [<https://perma.cc/ARL5-RYTY>].

<sup>206</sup> Spill Prevention, Control and Countermeasure Plan, 40 C.F.R. § 112.

<sup>207</sup> *See Spill Prevention, Control and Countermeasure (SPCC) Regulation, A Facility Owner/Operator Guide to Oil Pollution Prevention*, ENVTL. PROT. AGENCY (June 2010), <https://www.epa.gov/sites/production/files/documents/spccbluebroch.pdf> [<https://perma.cc/9VT9-DLBQ>]; *see also* 40 C.F.R. § 112.1.

<sup>208</sup> *See Oil Spills Prevention and Preparedness Regulations*, ENVTL. PROT. AGENCY, <https://www.epa.gov/oil-spills-prevention-and-preparedness-regulations> [<https://perma.cc/R5LS-KW6L>]; *see also* 40 C.F.R. § 112.3.

According to the International Tanker Owners Pollution Federation (which assists with oil spill clean ups), the average number of major oil spills per year has declined from the 1990s (28.1 per year) to 14.9 per year in the first decade of the 2000s, and is lower in this decade.<sup>209</sup> The largest oil spill on record since 1970 was the Atlantic Empress spill off Trinidad and Tobago, West Indies in 1979 (with 287,000 tons of oil spilled).<sup>210</sup> Half of the large spills occurred while vessels were on the open water, with collisions and groundings accounting for the majority of those accidents.<sup>211</sup> Most of the major spills are not off the coast of the United States, but the three largest spills in U.S. waters are the Santa Barbara, California oil spill (1969), the Exxon Valdez oil spill (1989), and the Deepwater Horizon spill (2010).

According to then-Secretary of the Interior, Bruce Babbitt, the Santa Barbara oil spill in 1969 “was the event that galvanized public awareness of the environment and support for a decade of profound change.”<sup>212</sup> Faced with dying animals and waves silenced by a thirty-five-mile oil slick resulting from a three million gallon spill, the California State Lands Commission issued a moratorium on all new offshore drilling in state waters.<sup>213</sup> Moreover, in 2012, California completed the process to designate 124 marine-protected areas in its coastal waters.<sup>214</sup> These marine-protected areas are potentially threatened by the proposed federal oil leases.

In Alaska, the Exxon Valdez supertanker ran aground, and the resulting oil spill coated Prince William Sound and the Alaska coastline with eleven million gallons of crude oil.<sup>215</sup> This 1989 oil spill was devastating

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<sup>209</sup> *Oil Tanker Spill Statistics 2017*, INT'L TANKER OWNERS POLLUTION FED'N, <http://www.itopf.com/knowledge-resources/data-statistics/statistics> [https://perma.cc/JB97-QS3P] (last visited Jan. 11, 2019).

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> Shelby Grad, *The Environmental Disaster that Changed California—and Started the Movement Against Offshore Oil Drilling*, L.A. TIMES (Apr. 28, 2017), <http://www.latimes.com/local/lanow/la-me-santa-barbara-spill-20170428-htm1story.html#> [https://perma.cc/NS5Z-RWBP].

<sup>213</sup> Christine Mai-Duc, *The 1969 Santa Barbara Oil Spill that Changed Oil and Gas Exploration Forever*, L.A. TIMES (May 20, 2015), <http://www.latimes.com/local/lanow/la-me-ln-santa-barbara-oil-spill-1969-20150520-htm1story.html> [https://perma.cc/LFG8-6NJ3] (noting that Unocol (then Union Oil Co.) had received a waiver of federal requirements that allowed it to build an inadequate protective casing around the drilling hole).

<sup>214</sup> *Marine Protected Area Network Overview*, CAL. OCEAN PROT. COUNCIL, <http://www.opc.ca.gov/marine-protected-area-network-overview> [https://perma.cc/DM24-BVM7] (last visited Jan. 11, 2019).

<sup>215</sup> *Questions and Answers About the Spill*, EXXON VALDEZ OIL SPILL TRUSTEES COUNCIL,

and resulted in the death of an estimated 250,000 seabirds, 2,800 sea otters, 300 harbor seals, 250 bald eagles, and 22 killer whales, as well as the destruction of billions of salmon and herring eggs.<sup>216</sup> The cost of cleaning up after the spill reached \$2.1 billion.<sup>217</sup> Exxon paid \$125 million in criminal fines and civil penalties of \$900 for spill damages to publicly owned natural resources, including land, water, and wildlife.<sup>218</sup> Exxon paid an additional \$303 million in voluntary payments to private parties.<sup>219</sup> In 2008, the U.S. Supreme Court applied maritime common law and reduced the punitive damages from \$2.5 billion to \$507.5 million.<sup>220</sup> With a 1990 presidential moratorium on oil drilling in the Aleutian Basin following the Exxon Valdez spill, President George H.W. Bush reinforced the 1982 congressional ban on offshore drilling along the coastlines.<sup>221</sup> In 2008, his son (George W. Bush) reversed this ban, and also pressured Congress to let the congressional moratorium expire.<sup>222</sup>

Farther south, the 2010 BP Deepwater Horizon oil spill pumped over 3.19 million barrels (133.98 million gallons) of oil into the Gulf of Mexico with devastating impacts on wetlands, endangered species, and fishing industries across over 1,300 miles of shoreline.<sup>223</sup> The disaster was exacerbated by BP's use of Corexit dispersants to break up oil slicks, which increased the severe health hazard posed to human and marine life.<sup>224</sup> The

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<http://www.evostc.state.ak.us/%3FFA=facts.QA> [<https://perma.cc/3LWU-T3WW>] (last visited Jan. 11, 2019).

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> Yereth Rosen, *Exxon Valdez Oil Spill Saga Reaches Anticlimactic End in Federal Court*, ANCHORAGE DAILY NEWS (Oct. 15, 2015), <https://www.adn.com/environment/article/exxon-valdez-saga-reaches-anticlimactic-end-federal-court/2015/10/16> [<https://perma.cc/C6MA-QAD8>].

<sup>219</sup> *See* Certiorari to the United States Court of Appeals for the Ninth Circuit, Exxon Shipping Co. v. Baker, S. Ct. Case No. 07-219 (decided June 25, 2008), <http://www.scotusblog.com/wp-content/uploads/2008/06/07-219.pdf> [<https://perma.cc/A743-K7RT>].

<sup>220</sup> Exxon Shipping Co. v. Baker, 554 U.S. 471, 514 (2008).

<sup>221</sup> *Background on Offshore Drilling and Moratoriums*, U.S. SENATE (Mar. 14, 2018), [http://www.dpc.senate.gov/files\\_energybill/background\\_offshore.pdf](http://www.dpc.senate.gov/files_energybill/background_offshore.pdf) [<https://perma.cc/8VH2-9DB9>].

<sup>222</sup> *Id.*

<sup>223</sup> NOAA, FINAL PROGRAMMATIC DAMAGE ASSESSMENT AND RESTORATION PLAN AND FINAL PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT 2-2 (Feb. 11, 2016), [https://www.gulfspillrestoration.noaa.gov/sites/default/files/wp-content/uploads/Chapter-2\\_Incident-Overview\\_508.pdf](https://www.gulfspillrestoration.noaa.gov/sites/default/files/wp-content/uploads/Chapter-2_Incident-Overview_508.pdf) [<https://perma.cc/GR9U-K8K9>].

<sup>224</sup> Dahr Jamail, *Gulf Health Problems Blamed on Dispersed Oil*, TRUTHOUT (Aug. 12, 2010), <https://truthout.org/articles/gulf-health-problems-blamed-on-dispersed-oil> [<https://perma.cc/4KAY-ZEFL>] (the resulting smaller oil molecules have been ingested by marine

effects of the spill and the cleanup continue to decimate marine animals and birds years after our nation's worst oil spill.<sup>225</sup> The \$4.525 billion United States Justice Department settlement with BP included a \$1.256 billion criminal fine, the largest in United States history, and a \$525 million settlement with the Securities and Exchange Commission.<sup>226</sup> The National Fish and Wildlife Foundation received \$2.4 billion and the United States Coast Guard received \$1 billion to reimburse their cleanup costs.<sup>227</sup> The spill occurred when a blowout preventer failed.<sup>228</sup>

After the Deepwater Horizon spill, BSEE was created in 2011 to focus on enforcement of safety regulations, as well as to collect data and provide the public with technical information about offshore drilling. BSEE administers the Safety and Environmental Management Systems, the Near-miss Reporting System, and the Arctic Rule, as well as the Decommissioning Costs Rule.<sup>229</sup> It performs joint inspections with the Coast Guard.<sup>230</sup> A BSEE panel is investigating a 4,463-foot-deep subsea infrastructure release of oil in October of 2017 about forty miles southeast of Venice, Louisiana, reported by LLOG Exploration Offshore, LLC.<sup>231</sup>

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life, with shrimp in the area being found with oil pouches and dolphins have hemorrhaged to death. Serious illness of people working with the dispersant has been reported).

<sup>225</sup> NAT'L WILDLIFE FED'N, FIVE YEARS & COUNTING: GULF WILDLIFE IN THE AFTERMATH OF THE DEEPWATER HORIZON DISASTER, [http://www.nwf.org/~media/PDFs/water/2015/Gulf-Wildlife-In-the-Aftermath-of-the-Deepwater-Horizon-Disaster\\_Five-Years-and-Counting.pdf](http://www.nwf.org/~media/PDFs/water/2015/Gulf-Wildlife-In-the-Aftermath-of-the-Deepwater-Horizon-Disaster_Five-Years-and-Counting.pdf) [<https://perma.cc/H5M4-ZY3E>] (last visited Jan. 11, 2019) [hereinafter FIVE YEARS & COUNTING] (stating that exposure to oil has resulted in abnormal developments in many species of fish, significantly impacting the coastal shrimp and Atlantic Bluefin tuna industries. An estimated 32% of laughing gulls died as a result of the spill and at least 27,000 Kemp's Ridley sea turtles (an endangered species) were killed. Bottlenose dolphins were dying at four times historic rates four years after the oil spills, and the long-term impact on the wetlands and fisheries is still being studied).

<sup>226</sup> Chris Isidore, Charles Riley & Terry Frieden, *BP to Pay Record Penalty for Gulf Oil Spill*, CNN (Nov. 15, 2012), <http://money.cnn.com/2012/11/15/news/bp-oil-spill-settlement/index.html> [<https://perma.cc/W4E4-A3KF>].

<sup>227</sup> *Id.*

<sup>228</sup> REUTERS, *Faulty Blowout Preventer Contributed to Oil Spill in Gulf of Mexico*, SCI. AM. (2018), <https://www.scientificamerican.com/article/faulty-blowout-preventer-contributed-to-deadly-bp-spill-in-gulf-of-mexico> [<https://perma.cc/JUG9-FJUR>] (noting that a blowout preventer is a multi-ton stack of valves and pipes that sits atop deep water wells to stop oil and gas from gushing upward in an accident).

<sup>229</sup> BUREAU OF SAFETY & ENVTL. ENF'T, *supra* note 11.

<sup>230</sup> *Id.*

<sup>231</sup> Press Release, Bureau of Safety & Envtl. Enf't, Oil Release in Gulf of Mexico Triggers BSEE Panel Investigation (Oct. 16, 2017), <https://www.bsee.gov/newsroom/latest-news/statements-and-releases/press-releases/oil-release-in-the-gulf-of-mexico> [<https://perma.cc/AZ63-SF47>].

In 2016, the Well Control Rule<sup>232</sup> and the Production Safety Systems Rule<sup>233</sup> were adopted to require an independent audit to verify that devices, such as the blowout preventer, would function in actual use to prevent another disaster such as the Deepwater Horizon.<sup>234</sup> As a significant impetus for the implementation of this rule (in addition to the Deepwater Horizon catastrophe), BSEE noted as background for its final action that

despite new regulations and improvements in industry standards and practices since the *Deepwater Horizon* incident, which have resulted in progress in certain areas of safety and environmental protection, loss of well control (LWC) incidents are happening at about the same rate five years after that incident as they were before. In 2013 and 2014, there were 8 and 7 LWC incidents per year, respectively—a rate on par with pre-*Deepwater Horizon* LWCs.<sup>235</sup>

Pursuant to these rules, baseline requirements for design, manufacture, repair, and maintenance of blowout preventers were established, as well as engineering principles for the centering of drill pipes during shearing operations and adequate casing centralization during cementing.<sup>236</sup> Although the safeguards mandated by these rules were only in effect for two years, the “time loss of well control was reduced to zero during federal fiscal year 2017.”<sup>237</sup> The Trump administration, however, has issued a proposed rule to abolish the independent audit requirement for blowout preventer systems and gas lift shutdown valves, deeming such monitoring to be an undue burden on the oil and gas operators.<sup>238</sup> Other components

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<sup>232</sup> Oil and Gas and Sulfur Operations in the Outer Continental Shelf-Blowout Preventer Systems and Well Control Rule, 81 Fed. Reg. 25,888 (Apr. 29, 2016) [hereinafter Well Control Rule].

<sup>233</sup> Production Safety System Rule, 30 C.F.R. § 250 (2016).

<sup>234</sup> *Id.*

<sup>235</sup> Oil and Gas and Sulfur Operations in the Outer Continental Shelf—Blowout Preventer Systems and Well Control, 81 Fed. Reg. 25,888, 25,890 (Apr. 29, 2016) (emphasis in original) (citing BUREAU OF SAFETY & ENVTL. ENF'T, BSEE 2014 ANNUAL REPORT 29–30 (2014), [https://www.bsee.gov/sites/bsee\\_prod.opengov.ibmcloud.com/files/2014\\_annual\\_report\\_final.pdf](https://www.bsee.gov/sites/bsee_prod.opengov.ibmcloud.com/files/2014_annual_report_final.pdf) [<https://perma.cc/X9YD-WAYK>]).

<sup>236</sup> Well Control Rule, *supra* note 232.

<sup>237</sup> Letter from Christopher Eaton, Associate Attorney, Earthjustice et al., to Scott A. Angelle, BSEE Regulations and Development Branch 7 (Aug. 6, 2018), [https://earthjustice.org/sites/default/files/files/FINAL\\_Comments\\_EJ%20et%20al-Well%20Control%20Rule.pdf](https://earthjustice.org/sites/default/files/files/FINAL_Comments_EJ%20et%20al-Well%20Control%20Rule.pdf) [<https://perma.cc/GH9W-A88W>] (comments submitted jointly by seventeen organizations).

<sup>238</sup> Oil and Gas and Sulphur Operations on the Outer Continental Shelf—Oil and Gas

addressed in the new standard include the shutdown valve requirement, pipeline shutdown valve, compressors, heat exchanges, High Integrity Pressure Protection Systems, pump suction lines, and Temperature Safety Element requirements, as well as components regarding leakage rates, including safety valve leakage and testing.<sup>239</sup> BSEE director Scott Angelle brags that the regulatory relief already initiated under the Trump administration could save \$1.3 billion in compliance costs in the next decade.<sup>240</sup>

On July 16, 2018, the Gulf Restoration Network (together with the Sierra Club and the Center for Biological Diversity) filed a complaint against Ryan Zinke as Secretary of the Department of the Interior and his subordinates to stop two offshore Oil and Gas Lease Sales, based in part on BSEE's policy reversal and proposed withdrawal of the Production Safety System and Well Control Rules.<sup>241</sup> According to Gulf Restoration Network's spokesperson, "[t]he crux of the lawsuit is that the Trump administration is using Obama-era rules like the well control rule to justify that their lease sale won't have any impact, while simultaneously rolling back those rules . . . Trump can't have it both ways."<sup>242</sup>

Gulf Restoration Network is seeking a declaration that the Department of the Interior and BOEM failed to adequately perform the

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Production Safety Systems—Revisions, 82 Fed. Reg 61,703 (Dec. 29, 2017) [hereinafter Safety Systems Revisions]; *see also* Oil and Gas and Sulphur Operations on the Outer Continental Shelf—Blowout Preventer Systems and Well Control Revisions, 83 Fed. Reg 22,128 (May 11, 2018) [hereinafter Preventer and Well Control Revisions]; Juliet Eilperin & Dino Grandoni *Trump administration rolls back offshore drilling safety rules from Deepwater Horizon spill*, CHI. TRIBUNE (Dec. 28, 2017), <http://www.chicagotribune.com/news/nationworld/politics/ct-trump-offshore-oil-drilling-safety-rules-20171228-story.html> [<https://perma.cc/KBM6-XJKR>]; Jie Jenny Zou, *8 Years After Deepwater Horizon Explosion, Is Another Disaster Waiting to Happen?*, NPR (Apr. 20, 2018), <https://www.npr.org/2018/04/20/603669896/8-years-after-deepwater-horizon-explosion-is-another-disaster-waiting-to-happen> [<https://perma.cc/7F8C-BKUN>].

<sup>239</sup> Safety Systems Revisions, *supra* note 238.

<sup>240</sup> Eric Lipton, *Trump Rollbacks Target Offshore Rules—Written with Human Blood*, N.Y. TIMES (Mar. 10, 2018), <https://www.nytimes.com/2018/03/10/business/offshore-drilling-trump-administration.html> [<https://perma.cc/7FBA-HDR6>] (noting that Angelle has close ties to smaller oil and gas companies).

<sup>241</sup> Gulf Restoration Network v. Zinke, Case No. 1:18-cv-01674 (D.D.C. filed July 16, 2018) (seeking to stop Offshore Oil & Gas Lease Sales 250 and 251).

<sup>242</sup> Mike Ludwig, *Lawsuit challenges Trump's massive offshore drilling sale in Gulf of Mexico*, SALON (July 21, 2018), [https://www.salon.com/2018/07/21/lawsuit-challenges-trumps-massive-offshore-drilling-sale-in-gulf-of-mexico\\_partner](https://www.salon.com/2018/07/21/lawsuit-challenges-trumps-massive-offshore-drilling-sale-in-gulf-of-mexico_partner) [<https://perma.cc/S9S4-UN8G>] (quoting Gulf Restoration Network spokesperson, Dustin Renaud, who made the comments to media outlet Truthout).

analysis required under the NEPA and the Administrative Procedure Act (“APA”).<sup>243</sup> More specifically, the complaint alleges that

Interior turned a blind eye to the policies it had adopted and begun implementing—such as repealing significant drilling safety regulations and reducing royalty rates to spur development of marginal, shallow-water oil fields—that will considerably increase the effects and risks to the environment from oil and gas activities resulting from the lease sales.<sup>244</sup>

The complaint further notes that “the safety measures that BSEE proposed to rescind or revise in the Well Control Rule are critically important for preventing spills, reducing the impacts of spills that may occur, and protecting worker safety.”<sup>245</sup> In addition, Gulf Restoration Network points out that BOEM “has repeatedly recognized that reducing regulatory oversight of offshore drilling makes both losses of well control and catastrophic oil spills more likely.”<sup>246</sup>

As part of the effort to limit opposition to rollbacks of safety regulation, access to safety reports may be limited. For example, the National Academies of Sciences, Engineering, and Medicine (“NASEM”) reports important improvements in the reliability of bolts used on offshore drilling rigs, but cautions that the members of the industry need to work with the U.S. Department of the Interior’s BSEE to further improve reliability and safety culture.<sup>247</sup> The NASEM provides grants for testing new technologies or methods of monitoring environmental restoration projects and health risks in the wake of oil spills.<sup>248</sup> Information about offshore oil drilling safety may not be forthcoming, however, since the Trump administration is considering shelving a NASEM study related to such safety.<sup>249</sup>

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<sup>243</sup> Gulf Restoration Network v. Zinke, Case No. 1:18-cv-01674 (D.D.C. filed July 16, 2018) at ¶ 9.

<sup>244</sup> *Id.* at ¶ 6.

<sup>245</sup> *Id.* at ¶ 74.

<sup>246</sup> *Id.* at ¶ 75.

<sup>247</sup> *Report Identifies Options for Lowering Risk of Failure of Undersea Bolts on Offshore Oil and Natural Gas Rigs*, NAT’L ACAD. SCI., ENG’G & MED. (Mar. 9, 2018), <http://www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=25032> [<https://perma.cc/P3VN-89D4>].

<sup>248</sup> *National Academies’ Gulf Research Program Awards \$5.3 Million to Enhance Environmental Restoration Outcomes and Improve Oil Spill Risk Assessment*, NAT’L ACAD. SCI., ENG’G & MED. (Jan. 18, 2018), <http://www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=01242018> [<https://perma.cc/2FE8-CWHP>].

<sup>249</sup> Michael Halpern, *Bottling Up Science*, 35 ENV’T L. FORUM 39 (Mar.–Apr. 2018).



There are 2,200 oil and gas platforms from Brownsville, Texas to Mobile, Alabama, of which 240 platforms in shallow Gulf Coast water were listed as “idle iron.”<sup>250</sup> Platforms<sup>251</sup> must be removed and wells permanently plugged within one year after an offshore lease terminates.<sup>252</sup> Decommissioning involves a process of removing platforms and other structures, removing or cleaning out pipelines, plugging wells, and clearing sites of debris, which can cost tens of millions of dollars for shallow water wells.<sup>253</sup> Gulf rig owners are required to buy additional surety bonds or provide assurances that will cover the cost of removing rigs after production has stopped.<sup>254</sup> The Trump administration is rescinding that requirement and is easing the deadlines for removal of the unproductive or damaged platforms and pressure safety valves.<sup>255</sup> A number of these platforms are operated by smaller, independent companies such as Energy XXI, which has been cited for 207 safety violations during 337 inspections.<sup>256</sup> Poor maintenance, equipment failures and metal fatigue on aging devices were among the problems.<sup>257</sup> With \$1.1 million in fines, Energy XXI filed for Chapter 11 bankruptcy reorganization.<sup>258</sup> This is a clear illustration of why such bonds are necessary to prevent the federal government from having to pay for removal of old platforms and to prevent delays in removal of aging platforms that could result in environmental consequences.

With the long history of enormous oil spills, environmentally sensitive areas (on and offshore) are vulnerable. Despite this vulnerability, the Trump administration is actively rolling back the safety measures and protective designations intended to protect the most precious and vulnerable public lands. Opening up drilling in ANWR is also a priority of the energy-minded Republicans and has generated a significant controversy since the 1970s between energy supporters and environmentalists. To protect caribou and polar bears and their habitat, ANWR has been closed to drilling since 1980. Although Alaska Senator Lisa Murkowski's bill that

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<sup>250</sup> OFFSHORE DECOMMISSIONING, *supra* note 39, at 11 (defining “idle iron”).

<sup>251</sup> *Id.* at 6 (recognizing different types of offshore platforms, including fixed platform, compliant tower, floating production system, tension leg platform, and Spar).

<sup>252</sup> *Id.* at i.

<sup>253</sup> *Id.* at 2.

<sup>254</sup> *Id.* But the Government Accountability Office found that of \$38.2 billion in decommissioning liabilities as of October 2015, Interior held or required about \$2.9 billion in bonds and other financial assurances and had foregone requiring about \$33 billion in bonds for most of the remaining liabilities. *See also* BUREAU OF SAFETY & ENVTL. ENF'T, *supra* note 11.

<sup>255</sup> Safety Systems Revisions, *supra* note 238, at 61,714; Lipton, *supra* note 240.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

would allow oil and natural gas drilling within the wilderness of ANWR was reported out by the Senate Budget Committee,<sup>259</sup> her vote on the final version of the 2017 tax reform bill<sup>260</sup> was secured by inclusion of a provision opening 1.5 million acres in ANWR to oil drilling.<sup>261</sup> Trump's Offshore Energy Order, opening up ANWR and offshore drilling in Alaskan waters, also has the support of Alaskan Governor William Walker<sup>262</sup> and many "energy first" groups.<sup>263</sup> Environmental organizations, led by the League of Conservation Voters, filed suit to challenge the offshore oil drilling policy.<sup>264</sup> The Congressional Budget Office estimates that Section 1002 will net \$2.2 billion in the next decade for the state and federal government.<sup>265</sup> However, the director of the International Energy Agency doubts that drilling will occur before 2030 since the market is not good due to the low price of oil and high initial costs.<sup>266</sup>

*B. Risk to Marine Mammals, Coral, Fish, and the Fishing Industry*

Tourism, recreation, fish, and coral need clean water, free of the risk of oil spills, as does the fishing industry. Shrimping fisheries are often impacted by and in conflict with oil exploration.<sup>267</sup> Commercial fishing for lobster is an iconic part of Maine's coastal communities, "with the world famous lobster fishery alone bringing in \$530,000,000 in landings."<sup>268</sup> The Atlantic coastal economy contributes \$92 billion toward the U.S.

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<sup>259</sup> D'Angelo, *supra* note 111.

<sup>260</sup> An Act to Provide for Reconciliation Pursuant to Titles II and V of the Concurrent Resolution on the Budget for Fiscal Year 2018, Pub. L. No. 115-97, §§ 20001(b)(2)(A)–(B) (Dec. 22, 2017) [hereinafter Tax Cuts and Jobs Act].

<sup>261</sup> Ben Wolfgang, *Drilling in section of ANWR included in final GOP tax-reform package*, WASH. TIMES (Dec. 17, 2017), <https://www.washingtontimes.com/news/2017/dec/17/drilling-in-section-of-anwr-included-in-final-gop/> [<https://perma.cc/ZF5P-NG6R>].

<sup>262</sup> Press Release, Alaska Office of the Governor, Governor Walker Issues Statement on Reversal of Arctic OCS Withdrawal (Apr. 28, 2017), <https://gov.alaska.gov/newsroom/2017/04/governor-walker-issues-statement-on-reversal-of-arctic-ocs-withdrawal> [<https://perma.cc/9DGH-SHZ2>].

<sup>263</sup> *Ebell Reacts to Tax Bill Passage, ANWR Oil Production*, COMPETITIVE ENTER. INST. (Dec. 20, 2017), <https://cei.org/content/ebell-reacts-tax-bill-passage-anwr-oil-production> [<https://perma.cc/R7K8-RNGT>].

<sup>264</sup> League of Conservation Voters Complaint, *supra* note 60.

<sup>265</sup> Nick Sobczyk, *Little Drilling Expected Before 2030; Murkowski Seeks New Bill*, E&E NEWS (Jan. 17, 2018), <https://www.eenews.net/stories/1060071129> [<https://perma.cc/67P5-SHGV>].

<sup>266</sup> *Id.*

<sup>267</sup> See generally FIVE YEARS & COUNTING, *supra* note 225.

<sup>268</sup> Twelve States Letter, *supra* note 55.

gross domestic product, over 60% of which comes from these fishing industries.<sup>269</sup> According to statistics used in a letter that twelve attorneys general sent to Secretary Zinke, “our nation’s ocean-based economy generated \$352 billion in gross domestic product, including employing 3.1 million people and generating \$123 billion in annual wages” in 2014.<sup>270</sup>

Offshore drilling jeopardizes national marine sanctuaries off the coast of California and Washington, in addition to jeopardizing the Alaskan shoreline. Nevertheless, Commerce Secretary Wilbur Ross sent a letter to President Trump evaluating the possibility of reducing the size of eleven national marine sanctuaries to facilitate more oil and gas exploration.<sup>271</sup> The Trump administration’s offshore drilling policy jeopardizes sixty-eight national parks.<sup>272</sup>

As part of its complaint to block offshore Oil and Gas Lease Sales 250 and 251, discussed above, Gulf Restoration Network is seeking a declaration that the Department of the Interior’s BOEM failed to adequately perform the analysis required under the NEPA and the APA.<sup>273</sup> More specifically, the complaint alleges that the oil and gas leasing, exploration, and development, together with the associated operations (including seismic surveys, pipeline installation, as well as the production of solid, liquid, and gaseous waste) would adversely impact the Gulf’s species and habitats.<sup>274</sup> The complaint then specifically catalogues these impacts:

Effects from these activities on the environment include vessel strikes, noise (from vessels, seismic surveys, construction and general operations), oil spills (both large and small), bottom habitat destruction, and marine debris and other water pollution. Oils and gas activities also degrade air quality, contribute to climate change, erode coastal

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<sup>269</sup> Lauren Kubiak, *Offshore Drilling Plan Shouldn’t Risk Communities and Coasts*, NAT. RES. DEF. COUNCIL (Mar. 9, 2018), <https://www.nrdc.org/experts/lauren-kubiak/offshore-drilling-plan-shouldnt-risk-communities-and-coasts> [<https://perma.cc/38TY-FP6W>].

<sup>270</sup> Twelve States Letter, *supra* note 55.

<sup>271</sup> Valerie Volcovici, *U.S. Marine Sanctuary Oil Drilling Report Sent to Trump, Not Public*, REUTERS (Oct. 25, 2017), <https://www.reuters.com/article/us-usa-oceans-drilling/u-s-marine-sanctuary-oil-drilling-report-sent-to-trump-not-public-idUSKBN1CU2Y2> [<https://perma.cc/7BN9-5K3H>].

<sup>272</sup> Carly Cassella, *Trump’s Plan to Expand Offshore Drilling Puts 68 National Parks in Grave Danger*, SCI. ALERT (May 29, 2018), <https://www.sciencealert.com/trump-plan-off-shore-drilling-68-national-parks-at-risk> [<https://perma.cc/F8ZD-QFFF>].

<sup>273</sup> Gulf Restoration Network v. Zinke, Case No. 1:18-cv-01674 ¶ 9 (D.D.C. filed July 16, 2018) (seeking to stop Offshore Oil & Gas Lease Sales 250 and 251).

<sup>274</sup> *Id.* ¶ 52.

wetlands, impair commercial and recreational fishing opportunities, harm archaeological resources and degrade recreational and aesthetic experiences.<sup>275</sup>

The harms from oil and gas activities can be catastrophic, as when the Deepwater Horizon rig exploded and sank on April 20, 2010, killing eleven people and causing the biggest environmental disaster in the history of the Gulf.<sup>276</sup>

Among the environmental impacts, the Deepwater Horizon incident alone contaminated 112,000 square kilometers of ocean waters and 2,100 kilometers of shoreline.<sup>277</sup> Scientists estimate that this incident killed or seriously harmed billions of animals, including over 100,000 animals that belong to species listed as threatened or endangered.<sup>278</sup> In sum, the Department of Interior, which has a statutory duty to balance the interests of the environment with its responsibility to steward the resources on the Outer Continental Shelf,<sup>279</sup> appears to have abandoned any pretense of considering any factors other than those of the energy industry, which stands to profit in the short term at the expense of the environment and the public at large.

To compound this one-sided approach to addressing Interior's statutory obligation, the Department is also seeking to eviscerate the minimal remaining regulatory requirements to which industry objects. For example, companies are required to seek a Letter of Authorization for Incidental Taking of marine mammals as a prerequisite to drilling or using seismic air gun blasting to survey coastal waters.<sup>280</sup> NOAA traditionally recommends that requests be made eighteen months before commencement of a project.<sup>281</sup> There is a thirty-day comment period for the application, and a thirty to sixty-day comment period after the proposed Letter of Authorization is

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<sup>275</sup> *Id.* ¶ 53.

<sup>276</sup> *Id.* ¶ 54.

<sup>277</sup> *Id.* ¶ 57.

<sup>278</sup> *Id.* ¶ 59.

<sup>279</sup> See 43 U.S.C. § 1334(a) (2012).

<sup>280</sup> See *Understanding Permits and Authorizations for Protected Species*, NOAA FISHERIES (June 24, 2017), [https://www.fisheries.noaa.gov/insight/understanding-permits-and-authorizations-protected-species#what\\_types\\_of\\_permits\\_and\\_authorizations\\_are\\_available\\_for\\_endangered\\_and\\_threatened\\_species?](https://www.fisheries.noaa.gov/insight/understanding-permits-and-authorizations-protected-species#what_types_of_permits_and_authorizations_are_available_for_endangered_and_threatened_species?) [https://perma.cc/2GT9-DTGD].

<sup>281</sup> *Incidental Take Authorizations Under the Marine Mammal Protection Act*, NOAA FISHERIES (Oct. 25, 2018), <https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act> [https://perma.cc/K7LM-8WKU].

published in the Federal Register.<sup>282</sup> President Trump's Executive Order 13,795 intends to streamline the permitting process by expediting all stages of Seismic Survey permit applications, Incidental Harassment Authorization, and Letters of Authorization under OCSLA and the Marine Mammal Protection Act.<sup>283</sup> As a result of such expedited review, there is likely to be decreased genuine consideration of environmental impacts.

Oil companies seeking to conduct a seismic survey are required to obtain a Letter of Authorization if there is likelihood of harm to protected species that is incidental to their operations.<sup>284</sup> Seismic surveys rely on gun blasts that generate sonic waves that provide data for the exploratory investigation.<sup>285</sup> This technique is known as seismic reflection, and relies on measuring the two-way travel time of seismic waves from the ocean surface to various rock formations within the earth.<sup>286</sup> The seismic waves, or blasts, are generated by an array of air guns that produce low-frequency sound pulses that penetrate deep into the subsurface and are reflected back at different rates, depending on the density of the subsurface geological features.<sup>287</sup> These measurements permit geologists to collect information about thickness and depth of different formations, as well as about the probable existence of formations that are likely to hold oil and natural gas reservoirs.<sup>288</sup>

The resulting seismic shockwaves can pose significant harm to marine mammals and other species for hundreds of miles outside of the initial blast area, including injury to hearing, balance, reproduction, and ultimately, the survival of these animals.<sup>289</sup> Cetaceans should not be

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<sup>282</sup> *See id.*

<sup>283</sup> Implementing an America-First Offshore Energy Strategy, Exec. Order No. 13,795 at § 9, 82 Fed. Reg. 20,815, 20,817 (May 3, 2017).

<sup>284</sup> *See* Marine Mammal Protection Act of 1972 § 101(a)(5), 16 U.S.C. § 1371(a)(5) (2012).

<sup>285</sup> U.S. DEP'T OF INT. MINERALS MGMT. SERV., LEASING OIL AND NATURAL GAS RESOURCES: OUTER CONTINENTAL SHELF 14, <https://www.boem.gov/BOEM-Newsroom/Offshore-Stats-and-Facts/Atlantic-Region/GreenBook-LeasingDocument-pdf.aspx> [<https://perma.cc/J4PE-6MJ8>] (last visited Jan. 11, 2019).

<sup>286</sup> *Id.*

<sup>287</sup> *Fact Sheet: Geological and Geophysical Surveys*, BUREAU OF OCEAN ENERGY MGMT. (Dec. 2017), <https://www.boem.gov/Geological-and-Geophysical-Surveys> [<https://perma.cc/LK9K-Y78G>].

<sup>288</sup> *Id.*; *see also* U.S. DEP'T OF INT. MINERALS MGMT. SERV., *supra* note 285, at 14.

<sup>289</sup> *See infra* note 290 (discussing impacts on the animals). Hemorrhaging and bursting of ear drums can also occur. NOAA granted Incidental Harassment Authorizations on November 30, 2018 to five companies to conduct deep penetration seismic surveys using air gun arrays to obtain geophysical data to screen for potential hydrocarbon prospects on the ocean floor on the Atlantic Outer Continental Shelf, despite the grave risk to

exposed to underwater noise levels exceeding 180 decibels (“dB”); with Level B harassment at 160 dB, there is a disruption of breathing, nursing, breeding, feeding, sheltering and migration behavioral patterns.<sup>290</sup> Even at over 300 miles away, slow-rolling sound waves from military sonar emitting 235 dB can be deafening or rupture the lungs of cetaceans.<sup>291</sup> Members of the fishing industry are concerned that the impact of seismic

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marine mammals, risks which NOAA characterized as “transitory” and lacking in scientific evidence to indicate mortality of any animal as a direct result of the noise. Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Geophysical Surveys in the Atlantic Ocean, 83 Fed. Reg. 63,268, 63,278 (Dec. 7, 2018). BOEM approval is still pending.

<sup>290</sup> See Takes of Marine Mammals Incidental to Specified Activities; Marine Geophysical Survey in the Pacific Ocean Off Costa Rica, April Through May, 2011, 76 Fed. Reg. 6430, 6438 (Feb. 4, 2011) (discussing 1995–2000 National Marine Fishery Studies); see also Rosana Xia, *New Rules Would Make It Easier To Find Oil—and Endanger Whales and Dolphins*, L.A. TIMES (Apr. 2, 2018), [http://www.latimes.com/local/lanow/la-me-marine-mammal-oil-drilling-20180402-story.html# \[https://perma.cc/6UD3-GFPV\]](http://www.latimes.com/local/lanow/la-me-marine-mammal-oil-drilling-20180402-story.html# [https://perma.cc/6UD3-GFPV]) (discussing the dismantling of regulations limiting the intense seismic blasts used by oil exploration operators, which is so damaging to the hearing of whales and dolphins); *Gray Whale*, NOAA, [https://www.fisheries.noaa.gov/species/gray-whale \[https://perma.cc/QFS9-6PL6\]](https://www.fisheries.noaa.gov/species/gray-whale [https://perma.cc/QFS9-6PL6]) (last visited Jan. 11, 2019) (The gray whale population is approximately 200 individuals. “Ocean noise threatens whale populations, interrupting their normal behavior and driving them away from areas important to their survival. Increasing evidence suggests that exposure to intense underwater sound in some settings may cause some whales to strand and ultimately die.” Gray whales make one of the longest annual migrations of any mammal, traveling about 10,000 miles round trip, which makes them particularly vulnerable); Endangered and Threatened Species; Initiation of 5-Year Reviews for the Endangered Fin Whale, Endangered Gray Whale Western North Pacific Distinct Population Segment, and Endangered Sei Whale, 83 Fed. Reg. 4032 (2018) (notice of initiation of five-year review and request for information, no report available yet).

<sup>291</sup> See Brenda Peterson, *Killing with Sound: What Happens When the Whales Stop Singing?*, HUFFPOST (Apr. 24, 2013), [https://www.huffingtonpost.com/brenda-peterson/killing-with-sound\\_b\\_2744864.html \[https://perma.cc/ZBQ2-4M8Q\]](https://www.huffingtonpost.com/brenda-peterson/killing-with-sound_b_2744864.html [https://perma.cc/ZBQ2-4M8Q]). See also John Slocum, *Does Military Sonar Kill Marine Wildlife?*, SCI. AM., [https://www.scientificamerican.com/article/does-military-sonar-kill/ \[https://perma.cc/W87W-VCQU\]](https://www.scientificamerican.com/article/does-military-sonar-kill/ [https://perma.cc/W87W-VCQU]) (last visited Jan. 11, 2019) (Military sonar jeopardizes dolphins and whales); see also *Winter v. Nat. Res. Def. Council*, 555 U.S. 7 (2008) (holding that the importance of training of Navy sailors outweighed the harm to thirty-seven marine mammal species in Southern California coastal waters); *Nat. Res. Def. Council v. Pritzker*, 828 F.3d 1125 (9th Cir. 2016) (holding that the National Marine Fisheries Service failed to adopt mitigating measures that could reduce the effects of low-frequency active sonar); but see Virginia Morell, *U.S. Navy to Limit Sonar Testing to Protect Whales*, SCI. MAG. (Sept. 16, 2015), [http://www.sciencemag.org/news/2015/09/us-navy-limit-sonar-testing-protect-whales \[https://perma.cc/PCW9-28BQ\]](http://www.sciencemag.org/news/2015/09/us-navy-limit-sonar-testing-protect-whales [https://perma.cc/PCW9-28BQ]) (discussing the Navy’s agreement to limit its sonar testing and use of explosives off of designated areas of the Southern California coast and Hawaii. Multiple NGO lawsuits have attempted to limit Navy testing, with mixed and often temporary success).

blasting may reduce their catch rate by 50% or more in an affected area.<sup>292</sup> SAE exploration has sought federal authorization to conduct 3-D seismic exploration in the Beaufort Sea.<sup>293</sup>

Environmental concerns deserve serious consideration in light of the gravity of damage to wildlife, sea mammals, and water quality posed by oil spills and practices used in oil exploration. Proposed regulatory changes in offshore drilling should more carefully consider minimizing environmental impacts.<sup>294</sup> Unfortunately, the pro-energy emphasis of the Trump administration favors expediting of environmental hurdles, instead of adopting preventative measures. With decreased funding for enforcement actions, vigilant enforcement of environmental regulations is less likely to occur under the Trump administration.

### C. *Climate Change*

#### 1. Energy Industry Advocates Who Deny Climate Change Exists Are Setting Policy

The relevant leadership of the Trump administration largely rejects the conclusion of the climate science community, and doubts that human activities are the source of global warming or climate change.<sup>295</sup> As early as 2012, Donald Trump tweeted that “[t]he concept of global warming was created by and for the Chinese in order to make U.S. manufacturing non-competitive.”<sup>296</sup> Consistent with his rejection of climate change as

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<sup>292</sup> See Mike Gaworecki, *Trump to Aim Oil-seeking Airgun Blasts on Atlantic Whales, Dolphins*, ENVIRONMENTALISTS AGAINST WAR ON THE PLANET & ALL ITS PEOPLE (Sept. 16, 2017), <http://www.envirosagainstar.org/know/read.php?itemid=19807> [https://perma.cc/7PGG-R9SP]; *Citizen Call To Action*, CLEAN OCEAN ACTION, <http://www.cleanoceanaction.org/index.php?id=814> [https://perma.cc/K7GN-DG7R] (last visited Jan. 11, 2019). See also Helen Scales, *Atlantic Seismic Tests for Oil: Marine Animals at Risk?*, NAT'L GEOGRAPHIC (Mar. 1, 2014), <https://news.nationalgeographic.com/news/energy/2014/02/140228-atlantic-seismic-whales-mammals> [https://perma.cc/9Y54-BMTA] (noting that fish eggs and larvae can be killed by intense noise).

<sup>293</sup> League of Conservation Voters Complaint, *supra* note 60, at 15.

<sup>294</sup> See John Pertgen, *Federal Regulatory Actions Impacting Offshore Drilling*, INT'L ASS'N OF DRILLING CONTRACTORS (July 25, 2017), <http://www.iadc.org/wp-content/uploads/2018/11/20181031-regulations-summary.pdf> [https://perma.cc/547T-N3VV] (listing regulatory actions).

<sup>295</sup> Mazin Sidahmed, *Climate Change Denial in the Trump Cabinet: Where Do His Nominees Stand?*, THE GUARDIAN (Dec. 15, 2016), <https://www.theguardian.com/environment/2016/dec/15/trump-cabinet-climate-change-deniers> [https://perma.cc/WPE6-4UQ3].

<sup>296</sup> Louis Jacobson, *Yes, Donald Trump Did Call Climate Change a Chinese Hoax*, POLITIFACT

real, much less as a matter of national security,<sup>297</sup> President Trump has filled his Cabinet with officials who are advocates for the energy industry, and who also reject generally accepted climate science.<sup>298</sup>

The two agencies most responsible for the prudent and effective management of federally owned public resources and for balancing environmental concerns with the demands of other stakeholders are the Department of the Interior and the EPA.<sup>299</sup> Scott Pruitt, a longtime critic of the EPA, was President Trump's first Administrator of the EPA.<sup>300</sup> Pruitt has been a vocal opponent of the Obama-era Clean Power Plan and a fossil fuel industry advocate long before entering the Cabinet.<sup>301</sup> In 2016, Pruitt published an article in which he flatly stated, "that debate [on man-made global warming] is far from settled. Scientists continue to disagree about the degree and the extent of global warming and its connections to the actions of mankind."<sup>302</sup> Although Pruitt left the EPA in July 2018 amid claims of ethics violations and rampant conflicts of interest,<sup>303</sup> he may now become a coal industry consultant.<sup>304</sup> Pruitt's replacement is Andrew Wheeler, a former coal lobbyist.<sup>305</sup> Under Wheeler's leadership, the EPA has removed numerous resources dedicated to helping local governments address climate change.<sup>306</sup>

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(June 3, 2016), <https://www.politifact.com/truth-o-meter/statements/2016/jun/03/hillary-clinton/yes-donald-trump-did-call-climate-change-chinese-h> [<https://perma.cc/3994-YY78>].

<sup>297</sup> Julian Borger, *Trump Drops Climate Change from US National Security Strategy*, THE GUARDIAN (Dec. 18, 2017), <https://www.theguardian.com/us-news/2017/dec/18/trump-drop-climate-change-national-security-strategy> [<https://perma.cc/5HYQ-KU4V>].

<sup>298</sup> See Sidahmed, *supra* note 295 (listing Trump appointments of climate deniers to Cabinet-level positions).

<sup>299</sup> See, e.g., OCLSA, 43 U.S.C. §§ 1331–1356(b) (1953); see also Hein, *supra* note 87 (discussing the import of the Antiquities Act).

<sup>300</sup> Coral Davenport, *Senate Confirms Scott Pruitt as E.P.A. Head*, N.Y. TIMES (Feb. 17, 2017), <https://www.nytimes.com/2017/02/17/us/politics/scott-pruitt-environmental-protection-agency.html> [<https://perma.cc/E9N3-QYUU>].

<sup>301</sup> See Sidahmed, *supra* note 295.

<sup>302</sup> Scott Pruitt & Luther Strange, *The Climate-Change Gang*, NAT'L REV. (May 17, 2016), <https://www.nationalreview.com/2016/05/climate-change-attorneys-general> [<https://perma.cc/74PZ-3KJX>].

<sup>303</sup> Alessandra Potenza & Angela Chen, *Scott Pruitt out as head of the Environmental Protection Agency*, THE VERGE (July 5, 2018), <https://www.theverge.com/2018/7/5/17205926/scott-pruitt-epa-politics-environment-andrew-wheeler> [<https://perma.cc/6Z56-DZD9>].

<sup>304</sup> Lisa Friedman, Hiroko Tabuchi & Eric Lipton, *Scott Pruitt, Former E.P.A. Chief, Is in Talks for His Next Job: Coal Consultant*, N.Y. TIMES (Sept. 12, 2018), <https://www.nytimes.com/2018/09/12/climate/pruitt-coal-consulting.html> [<https://perma.cc/MVL5-S94T>].

<sup>305</sup> See Potenza & Chen, *supra* note 303.

<sup>306</sup> Lisa Friedman, *E.P.A. Scrubs a Climate Website of 'Climate Change'*, N.Y. TIMES



The leadership at the Department of the Interior has a similar orientation when it comes to promoting energy interests and downplaying climate change issues. Ryan Zinke was appointed as Secretary of the Interior to lead the Department.<sup>307</sup> As a Congressman from Montana, Zinke opposed a federal ban on leasing for coal extraction from federal property and even suggested that the stakeholders should control a “royalty policy committee” that he believes should be created to advise the Department of the Interior.<sup>308</sup> Zinke has defended expanded oil, gas, and coal production on federal lands, while pledging to head off increases to royalty payments made by the energy industry.<sup>309</sup> During his confirmation, Zinke acknowledged that climate change was not a hoax, but emphasized that the science on humans’ role may not be settled.<sup>310</sup> Since his confirmation, he has had an order issued which rescinds authorities that are inconsistent with his American Energy Independence Order, including reports on climate action plans and climate action strategies to reduce methane emissions, as well as the Department’s guidance on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Reviews.<sup>311</sup> In sum, the Trump administration and its key Cabinet-level officials appear to be singularly focused on protecting and promoting the interests and profits of the energy industry without regard to the resulting impacts on the environment, including impacts on climate change or the interests of the other statutorily recognized stakeholders.<sup>312</sup>

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(Oct. 20, 2017), [https://www.nytimes.com/2017/10/20/climate/epa-climate-change.html?\\_r=0](https://www.nytimes.com/2017/10/20/climate/epa-climate-change.html?_r=0) [https://perma.cc/V6TT-ACKK].

<sup>307</sup> Jessica Taylor, *Trump Taps Montana Rep. Ryan Zinke to Lead Interior Department*, NPR (Dec. 13, 2106), <https://www.npr.org/2016/12/13/505462597/trump-taps-montana-rep-ryan-zinke-to-lead-interior-department> [https://perma.cc/JLE7-M2FY].

<sup>308</sup> Tom Lutey, *Zinke bill to end coal leasing ban, add community input, advances*, BILLINGS GAZETTE (Sept. 6, 2016), [https://billingsgazette.com/news/government-and-politics/zinke-bill-to-end-coal-leasing-ban-add-community-input/article\\_8c119dbf-83ed-5870-ae0b-93c0fd6f291d.html](https://billingsgazette.com/news/government-and-politics/zinke-bill-to-end-coal-leasing-ban-add-community-input/article_8c119dbf-83ed-5870-ae0b-93c0fd6f291d.html) [https://perma.cc/VC6E-82VB].

<sup>309</sup> Eric Wolff, *Interior Pick Zinke on Climate Change: ‘I Don’t Think It’s a Hoax’*, POLITICO (Jan. 17, 2017), <https://www.politico.com/story/2017/01/ryan-zinke-interior-climate-change-233703> [https://perma.cc/VU6E-L3HM].

<sup>310</sup> *Id.*

<sup>311</sup> U.S. Dep’t of the Interior, Secretarial Order No. 3360 (Dec. 22, 2017), <https://assets.documentcloud.org/documents/4343673/3360-20-20Rescinding-20Authorities.pdf> [https://perma.cc/32CS-6PFS].

<sup>312</sup> *See, e.g.*, U.S. Dep’t of the Interior, Final Report: Review of the Department of the Interior Actions that Potentially Burden Domestic Energy, 82 Fed. Reg. 50,532 (Nov. 1, 2017), [https://www.doi.gov/sites/doi.gov/files/uploads/interior\\_energy\\_actions\\_report\\_final.pdf](https://www.doi.gov/sites/doi.gov/files/uploads/interior_energy_actions_report_final.pdf) [https://perma.cc/E53S-UGP5] (discussing Secretarial Order Nos. 3348, 3349, 3350, 3352, 3353, 3354, and 3360).

## 2. Notwithstanding Their Denials, Climate Change Exists

According to a report published by the National Research Council of the National Academy of Sciences, the scientific consensus is that the Earth's climate is warming.<sup>313</sup> More specifically, this conclusion is supported by 97% of abstracts of scientific peer-reviewed articles on climate change, which recognize human activities as a cause of climate change.<sup>314</sup> Even Trump's appointed Administrator of NASA, Jim Bridenstine (who had flatly rejected climate change arguments in 2013), has revised his views and now acknowledges, "I don't deny the consensus. I believe fully in climate change and that we human beings are contributing to it in a major way."<sup>315</sup> This view is echoed in the 2017 Climate Science Special Report released by the U.S. Global Change Research Program, which is administered by NOAA.<sup>316</sup> The Climate Change Special Report states that the periods between 1901–2016 were the "warmest in the history of modern civilization" and concluded, "based on extensive evidence, that it is extremely likely that human activities, especially emission of greenhouse gasses, are the dominant cause of the observed warming since the mid-20th century."<sup>317</sup>

The Climate Change Special Report is supported by "[t]housands of studies conducted by tens of thousands of scientists around the world [who] have documented changes in surface, atmospheric, and oceanic temperatures."<sup>318</sup> Average global surface temperatures continue to rise, and the past three years have been the warmest since 1880 (when official record-keeping began).<sup>319</sup> Seventeen of the eighteen warmest years on

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<sup>313</sup> *Scientific consensus: Earth's climate is warming*, NASA, <https://climate.nasa.gov/scientific-consensus> [<https://perma.cc/P7YE-DH5P>] (last visited Jan. 11, 2019).

<sup>314</sup> *Id.*

<sup>315</sup> Ross Pomeroy, *Trump's NASA Chief Changed His Mind on Climate Change. He Is a Scientific Hero.*, REAL CLEAR SCI. (June 11, 2018), <https://www.space.com/40857-trumps-nasa-chief-changed-his-mind-on-climate-change-he-is-a-scientific-hero.html> [<https://perma.cc/SNN5-L4LB>].

<sup>316</sup> *Climate Science Special Report: Fourth National Climate Assessment (NCA4), Volume 1*, U.S. GLOBAL CHANGE RESEARCH PROGRAM (2017), <https://science2017.globalchange.gov> [<https://perma.cc/6TQ5-59Y2>] (peer-reviewed four-year national assessment required of the National Academy of Science).

<sup>317</sup> *Id.* This is the primary major document released under the Trump administration that does recognize climate change as a real and serious problem.

<sup>318</sup> *Id.* § 1.1.

<sup>319</sup> *Facts: Global Temperature*, NASA (Oct. 15, 2018), <https://climate.nasa.gov/vital-signs/global-temperature> [<https://perma.cc/XGH3-QTT3>].

record occurred since 2001, with 2016 being the warmest.<sup>320</sup> Ten of the highest annual average land and sea temperatures have also occurred during the past twenty years (1998–2017), according to NOAA.<sup>321</sup> This evaluation of the climate data is not limited to the United States. The Intergovernmental Panel on Climate Change (“IPCC”), formed by the United Nations and World Meteorological Organization, also concluded that “[w]arming of the climate system is unequivocal, as is now evident from observations of increases in global average air and ocean temperatures, widespread melting of snow and ice and rising global average sea level.”<sup>322</sup>

Rising global sea levels are exacerbated by the melting ice caps and glaciers.<sup>323</sup> Antarctica is one of the fastest warming areas of the Earth, where a massive iceberg the size of Delaware calved off Antarctica’s Larsen C ice shelf in July of 2017.<sup>324</sup> Greenland’s Petermann Glacier has experienced similar impacts, and has calved a ninety-seven-square-mile iceberg in 2010 and a fifty-square-mile section in 2012.<sup>325</sup>

### 3. Fossil Fuels and Their By-Products Represent a Major Driver for Greenhouse Gases

The foundation of climate change is primarily associated with atmospheric conditions (gases and aerosols) and cloud effects which contribute to the capture of outgoing (short and long wavelength) radiation.<sup>326</sup>

<sup>320</sup> *Id.*; see also NASA, *NOAA Data Shows 2016 Warmest Year on Record Globally*, NASA (Jan 18, 2017), <https://www.nasa.gov/press-release/nasa-noaa-data-show-2016-warmest-year-on-record-globally> [<https://perma.cc/5DJ5-YWJS>].

<sup>321</sup> *National Climate Report—Annual 2017*, NOAA (Jan. 12, 2018), <https://www.ncdc.noaa.gov/sotc/national/201713> [<https://perma.cc/JKN3-US5R>] (but heat wave indicators still place the 1930s dust bowl at the top point of large sections of the nation experiencing heat waves simultaneously); *Climate Change Indicators: High and Low Temperatures*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/climate-indicators/climate-change-indicators-high-and-low-temperatures> [<https://perma.cc/37FE-JN4N>].

<sup>322</sup> IPCC, *CLIMATE CHANGE 2007: SYNTHESIS REPORT* 26, 30 (2017) (examining 577 climate studies, with a particular focus on seventy-five, to reach its conclusions).

<sup>323</sup> Associated Press, *Melting ice sheets are hastening sea level rise, satellite data confirms*, THE GUARDIAN (Feb. 13, 2018), <https://www.theguardian.com/environment/2018/feb/13/melting-ice-sheets-are-hastening-sea-level-rise-satellite-data-confirms> [<https://perma.cc/6ZPX-PQ2H>].

<sup>324</sup> *Massive Iceberg Breaks Off from Antarctica*, NASA (July 12, 2017), <https://www.nasa.gov/feature/goddard/2017/massive-iceberg-breaks-off-from-antarctica> [<https://perma.cc/J2YJ-MHN6>].

<sup>325</sup> Hannah Osborne, *NASA Images Reveal Huge Crack on Greenland’s Petermann Glacier*, NEWSWEEK (Apr. 18, 2017), <https://www.newsweek.com/nasa-ice-shelf-crack-iceberg-images-petermann-glacier-585396> [<https://perma.cc/V6FM-HR6K>].

<sup>326</sup> U.S. GLOBAL CHANGE RESEARCH PROGRAM, *supra* note 316, at chapter 2.0.

Greenhouse gases (“GHGs”) contribute to global warming by increasing particular gases and aerosols that augment the atmospheric capture of outgoing radiation.<sup>327</sup> GHGs include carbon dioxide (“CO<sub>2</sub>”),<sup>328</sup> methane,<sup>329</sup> nitrogen oxide,<sup>330</sup> and fluorinated gases.<sup>331</sup> Consistent with the observed trends in the temperature data, global GHG emissions increased by 70% from 1970 to 2004 according to the IPCC, with annual CO<sub>2</sub> emissions growing by 80%.<sup>332</sup>

In *Massachusetts v. EPA*, the Supreme Court recognized that the EPA’s rulemaking authority extended to the regulation of GHGs pursuant to Section 111 of the Clean Air Act (“CAA”).<sup>333</sup> In this 2007 decision, the Court concluded that GHGs qualify as “air pollutant[s]” under the CAA.<sup>334</sup> To comply with the Court’s directive, EPA issued the “Endangerment Rule” in 2009, declaring that CO<sub>2</sub> and other GHGs were linked to climate change and were harmful to human health and the environment.<sup>335</sup>

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<sup>327</sup> Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,499 (Dec. 15, 2009).

<sup>328</sup> CO<sub>2</sub> enters the atmosphere through the burning of fossil fuels—oil, natural gas, and coal—solid waste, trees and wood products, and also as a result of other chemical reactions, e.g., manufacture of cement. *Global Greenhouse Gas Emissions Data*, U.S. ENVTL. PROT. AGENCY (Apr. 13, 2017), <https://www.epa.gov/ghgemissions/global-greenhouse-gas-emissions-data> [<https://perma.cc/HEV3-V5SQ>] (note this information used to be listed by the EPA under the heading climate change, but now refers to greenhouse gases without discussing climate effects).

<sup>329</sup> *Id.* Methane (CH<sub>4</sub>) is emitted during the production and transport of coal, natural gas, and oil. Methane emissions also result from livestock and other agricultural practices and by the decay of organic waste in municipal solid waste landfills.

<sup>330</sup> *Id.* Nitrous oxide (N<sub>2</sub>O) is emitted during agricultural and industrial activities, as well as during combustion of fossil fuels and solid waste.

<sup>331</sup> *Id.* Fluorinated gases include hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF<sub>6</sub>), and are synthetic, powerful GHGs that are emitted from a variety of industrial processes (and are not naturally occurring substances). Fluorinated gases are sometimes used as substitutes for ozone-depleting substances (e.g., CFCs, HCFCs, and halons). These gases are typically emitted in smaller quantities, but because they are potent greenhouse gases, they are sometimes referred to as High Global Warming Potential (GWP) gases.

<sup>332</sup> IPCC, *supra* note 322, at 26, 30 (examining 577 climate studies, with a particular focus on seventy-five to reach its conclusions).

<sup>333</sup> *Mass. v. Env’tl. Prot. Agency*, 549 U.S. 497 (2007); *cf.* *Am. Elec. Power Co., Inc. v. Conn.*, 564 U.S. 410 (2011) (deciding that the CAA authority to regulate GHGs displaced federal common law nuisance).

<sup>334</sup> *Mass. v. Env’tl. Prot. Agency*, 549 U.S. at 528–29 (quoting 42 U.S.C. § 7602(g)).

<sup>335</sup> Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,535 (Dec. 15, 2009) (Endangerment Rule or Endangerment Finding). The Endangerment Rule still applies to the recognition

CO<sub>2</sub> is one of the primary GHGs, and is generated in significant quantities when fossil fuels burn.<sup>336</sup> The emissions of CO<sub>2</sub> increased by 6% in 2010 (564 million more tons of carbon in the air than in 2009) on a world-wide basis, resulting in the highest annual net increase ever in carbon pollution.<sup>337</sup> Gasoline emits 157.2 pounds of CO<sub>2</sub> per million British thermal units (“btu”) of energy (compared to 228.6 lb/btu for anthracite coal).<sup>338</sup> The U.S. Energy Information Administration estimates that gasoline use in 2016 emitted 1,102 million metric tons of CO<sub>2</sub> and diesel transportation emitted 437 million metric tons.<sup>339</sup> About 30% of total energy-related CO<sub>2</sub> emissions in the U.S. that year were generated by the transportation sector.<sup>340</sup>

Offshore drilling, and the use of the oil and gas it produces, contributes directly to climate change.<sup>341</sup> A report by the Clean Air Task Force in 2012 identified methane and black carbon as two potent GHGs that will likely be released in significant amounts if drilling proceeds on the Outer Continental Shelf in the Arctic.<sup>342</sup> The report notes that while the burning of the oil extracted from these wells will undoubtedly help intensify climate change, the greater concern relates to the natural gas (mostly methane) and black carbon.<sup>343</sup> In order to capture the natural gas attendant to the drilling operations, the operator requires either a pipeline to ship it to the consumer, or a secondary process to supercool the methane so that it can be shipped by tanker as liquid natural gas.<sup>344</sup> Neither of

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of the link between GHGs and climate change, notwithstanding EPA Director Pruitt’s removal of climate change information from EPA website.

<sup>336</sup> *Frequently Asked Questions: How much carbon dioxide is produced from burning gasoline and diesel fuel?*, U.S. ENERGY INFO. ADMIN., <https://www.eia.gov/tools/faqs/faq.php?id=307&t=11> [https://perma.cc/TQ7A-GNC4] (last visited Jan. 11, 2019).

<sup>337</sup> Seth Borenstein, *Biggest jump ever seen in global warming gases*, BOSTON GLOBE (Nov. 3, 2011), <https://www.bostonglobe.com/news/nation/2011/11/03/biggest-jump-ever-seen-global-warming-gases/b1VYJHTZNSgThyLlegBPao/story.html> [https://perma.cc/Z2CH-H8FU] (referencing work from the U.S. Department of Energy’s Oak Ridge National Lab and IPCC).

<sup>338</sup> *Frequently Asked Questions: How much carbon dioxide is produced when different fuels are burned?*, U.S. ENERGY INFO. ADMIN., <https://www.eia.gov/tools/faqs/faq.php?id=73&t=11> [https://perma.cc/4YFR-MWNZ] (last visited Jan. 11, 2019).

<sup>339</sup> U.S. ENERGY INFO. ADMIN., *supra* note 336.

<sup>340</sup> *Id.*

<sup>341</sup> *Price of Oil: Climate Disruption*, OIL CHANGE INT’L (2018), <http://priceofoil.org/thepriceofoil/global-warming/> [https://perma.cc/G43A-SFJL].

<sup>342</sup> Bryan Walsh, *It’s Not Just Spills—The Climate Risks of Arctic Drilling*, TIME (July 20, 2012), <http://science.time.com/2012/07/20/its-not-just-spills-the-climate-risks-of-arctic-drilling> [https://perma.cc/3GBB-RVGP].

<sup>343</sup> *Id.*

<sup>344</sup> *Id.*

these options are readily available or accessible from the proposed fields, and the necessary energy infrastructure is lacking in the Arctic.<sup>345</sup> As a result, it is not currently “easy nor cheap” for the well operators to adequately capture the methane that is extracted along with the oil.<sup>346</sup> Accordingly, the typical practice is for the well operators to flare (burn) the methane in a controlled process.<sup>347</sup> The by-product of this flaring is soot, also known as black carbon.<sup>348</sup> Black carbon settles on the snow and ice, darkening the ground, resulting in increased radiation capture and warming.<sup>349</sup>

The heat absorption capacity of methane is twenty-three to 100 times greater than that of CO<sub>2</sub>,<sup>350</sup> and methane-flaring associated with burning oil and gas raises GHG concerns.<sup>351</sup> The Obama-era Methane Waste Rule<sup>352</sup> required natural gas producers to reduce natural gas wastes from venting, flaring, and leaks during the production process as a measure aimed at reducing this GHG.<sup>353</sup> The BLM of the Trump administration, however, filed its proposed revisions to the Methane Waste Rule in the Federal Register “[to reduce] unnecessary compliance burdens.”<sup>354</sup> In support of the Paris Agreement, however, the international Oil & Gas Initiative has set a target of 0.25% for “average methane intensity” (a reduction from 0.32% in 2017).<sup>355</sup>

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<sup>345</sup> *Id.*

<sup>346</sup> *Id.*

<sup>347</sup> See Walsh, *supra* note 342.

<sup>348</sup> *Id.*

<sup>349</sup> *Id.*

<sup>350</sup> *Global Mitigation of Non-CO2 Greenhouse Gases: Coal Mining*, U.S. ENVTL. PROT. AGENCY (Aug. 9, 2016), <https://www.epa.gov/global-mitigation-non-co2-greenhouse-gases/global-mitigation-non-co2-greenhouse-gases-coal-mining> [<https://perma.cc/TL2H-467C>]; Robert Howarth, *Methane Emissions and Climatic Warming Risk from Hydraulic Fracturing and Shale Gas Development: Implications for Policy*, ENERGY & EMISSION CONTROL TECH. J. 45, 45 (Oct. 8, 2015).

<sup>351</sup> *Id.*

<sup>352</sup> Methane Waste Rule, *supra* note 157.

<sup>353</sup> See Carol Miller, *For a Lump of Coal & A Drop of Oil: An Environmentalist's Critique of the Trump Administration's First Year of Energy Policies*, 36 VA. ENVTL. L.J. 185, 224 (2018).

<sup>354</sup> Waste Prevention, Production Subject to Royalties and Resource Conservation; Rescission or Revision of Certain Requirements, 83 Fed. Reg. 7924, 7924 (Feb. 22, 2018) (extending the comment period until Apr. 23, 2018).

<sup>355</sup> OGJ editors, *OGCI sets first collective methane target*, OIL & GAS J. (Sept. 24, 2018), <https://www.ogj.com/articles/2018/09/ogci-sets-first-collective-methane-target.html> [<https://perma.cc/7SFL-TCZW>] (noting that “The methane intensity refers to the methane that gets lost in the atmosphere when producing oil and gas, as a percentage of the gas sold.” The Oil and Gas Initiative (OGCI) is a ten-member international consortium of non-U.S. oil and gas producers).

Expanded oil and gas production under OCSLA carries with it significant external costs including air pollution, an increased risk of oil spills, and impacts on climate change.<sup>356</sup> Fossil fuel extraction from federal public lands by private leaseholders results in approximately 21% of all domestic GHG emissions.<sup>357</sup> The oil and gas industry generates more methane pollution than any other industry in the United States.<sup>358</sup> Nonetheless, the Department of Interior's fossil fuel leasing programs have historically operated separately from any past or present U.S. climate change goals.<sup>359</sup>

#### 4. Climate Change Consequences to the Atmosphere Logically Follow

According to the EPA, an increase in atmospheric concentrations of GHGs results in "positive climate forcing," or warming.<sup>360</sup> Since air can hold 7% more water for every degree Celsius increase in temperature,<sup>361</sup> average rising temperatures contribute significantly both to increased water vapor (itself a powerful GHG) in the atmosphere, but also to the development of large storms.<sup>362</sup> At present, there is 5–8% more water vapor circulating in the atmosphere than there was a generation ago.<sup>363</sup> Similarly, warm ocean temperatures are one of the key factors that strengthen

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<sup>356</sup> See Hein, *supra* note 135, at 18 (discussing the Department of Interior's planning and lease terms which ignore the "externality costs of oil, gas, and coal produced on federal land.").

<sup>357</sup> STRATUS CONSULTING, GREENHOUSE GAS EMISSIONS FROM FOSSIL ENERGY EXTRACTED FROM FEDERAL LANDS AND WATERS: AN UPDATE 11 (Dec. 23, 2014), <https://riggingthesystem.org/wp-content/uploads/2017/07/Stratus-Report.pdf> [<https://perma.cc/8UBW-HH2K>].

<sup>358</sup> *Overview of Greenhouse Gases: Methane Emissions*, U.S. ENVTL. PROT. AGENCY (Apr. 14, 2017), <https://www.epa.gov/ghgemissions/overview-greenhouse-gases> [<https://perma.cc/53W7-QRVY>].

<sup>359</sup> Hein, *supra* note 135, at 22.

<sup>360</sup> *Climate Change Indicators: Greenhouse Gases*, U.S. ENVTL. PROT. AGENCY (Feb. 22, 2017), <https://www.epa.gov/climate-indicators/greenhouse-gases> [<https://perma.cc/6UJ5-NJTZ>].

<sup>361</sup> *Id.*; see also *Climate*, NOAA, <http://www.noaa.gov/climate> [<https://perma.cc/SN36-N6J5>] (last visited Jan. 11, 2019) (indicating that the average surface temperature of the Earth has risen 1.68 degrees Fahrenheit from 1880 to 2016).

<sup>362</sup> Umair Irfan, *One of the Clearest Signs of Climate Change in Hurricanes Irma, Maria, and Harvey was the Rain*, VOX (Sept. 29, 2017), <https://www.vox.com/energy-and-environment/2017/9/28/16362522/hurricane-maria-2017-irma-harvey-rain-flooding-climate-change> [<https://perma.cc/VEA4-9GYR>].

<sup>363</sup> Jeff Nesbit, *This Is How the World Ends: Will We Soon See Category 6 Hurricanes?*, THE GUARDIAN (Sept. 15, 2018), [https://www.theguardian.com/us-news/2018/sep/15/hurricane-category-6-this-is-how-world-ends-book-climate-change?CMP=Share\\_AndroidApp\\_Email](https://www.theguardian.com/us-news/2018/sep/15/hurricane-category-6-this-is-how-world-ends-book-climate-change?CMP=Share_AndroidApp_Email) [<https://perma.cc/BD7X-22TC>].

hurricane development.<sup>364</sup> Recent research notes that intense hurricane activity has increased over the last forty years—especially in the North Atlantic and western North Pacific Oceans.<sup>365</sup> Global warming creates the conditions that increase the chances of extreme weather.<sup>366</sup> Rising ocean levels and the amplified effect on storm surge result from more powerful storms, enhancing the risk to coastal oil rigs. In 2005, Hurricanes Katrina and Rita wreaked havoc on oil production in the Gulf of Mexico by damaging or destroying thirteen oil rigs and shutting down nine out of twelve oil pipelines used to bring oil and gas onshore.<sup>367</sup> Jeff Masters, a noted American meteorologist, anticipates that storms with winds in excess of 200 mph are now almost certain to occur, and to occur more often.<sup>368</sup> Climatologists predict that more extreme weather patterns will be driven by climate change, resulting in significant disruption of marine life, crop failure, and potential collapse of the food chain.<sup>369</sup>

##### 5. The Climate Change Problem Has Been Recognized Globally But Requires Concerted Action

Although the scientific community, and eventually the global political community, came to recognize the importance of climate change issues, effective response requires concerted action by all concerned. The goal of the Paris Climate Agreement<sup>370</sup> is to keep global temperatures no more than 3.6 degrees Fahrenheit above pre-industrial times, with a stretch goal

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<sup>364</sup> *Hurricanes and Climate Change*, UNION OF CONCERNED SCIENTISTS (Dec. 1, 2017), [https://www.ucsusa.org/global-warming/science-and-impacts/impacts/hurricanes-and-climate-change.html#.W5rYe\\_ZlB9M](https://www.ucsusa.org/global-warming/science-and-impacts/impacts/hurricanes-and-climate-change.html#.W5rYe_ZlB9M) [<https://perma.cc/NVM7-6GF7>].

<sup>365</sup> *Id.*

<sup>366</sup> *Id.*

<sup>367</sup> *Rita Wreaks Havoc on Oil Rigs*, NBC NEWS (Sept. 28, 2005), [http://www.nbcnews.com/id/9520571/ns/business-oil\\_and\\_energy/t/rita-wreaks-havoc-oil-rigs-platforms#.W5rbLPZlB9M](http://www.nbcnews.com/id/9520571/ns/business-oil_and_energy/t/rita-wreaks-havoc-oil-rigs-platforms#.W5rbLPZlB9M) [<https://perma.cc/DG5B-N4T7>] (noting that oil rigs are tethered to the Gulf's floor and not nearly as secure as platforms in storms).

<sup>368</sup> See Nesbit, *supra* note 363.

<sup>369</sup> *Climate Impacts on Agriculture and Food Supply*, ENVTL. PROT. AGENCY (historical material that existed on EPA website Jan. 19, 2017), [https://19january2017snapshot.epa.gov/climate-impacts/climate-impacts-agriculture-and-food-supply\\_html](https://19january2017snapshot.epa.gov/climate-impacts/climate-impacts-agriculture-and-food-supply_html) [<https://perma.cc/EG3G-GR4M>].

<sup>370</sup> United Nations Framework Convention on Climate Change, Adoption of the Paris Agreement (Dec. 12, 2015), <http://unfccc.int/resource/docs/2015/cop21/eng/109.pdf> [<https://perma.cc/W5GQ-5SG7>] [hereinafter Paris Agreement]. One-hundred-seventy-five of 197 participating parties (countries) have ratified the convention as of this writing. *The Paris Agreement*, UNITED NATIONS CLIMATE CHANGE, [http://unfccc.int/paris\\_agreement/items/9485.php](http://unfccc.int/paris_agreement/items/9485.php) [<https://perma.cc/DW5P-RZ9F>] (last visited Jan. 11, 2019).



of no more than approximately 2.7 degrees Fahrenheit above.<sup>371</sup> To achieve these goals, the Agreement calls for: (a) a limit on the amount of GHGs emitted by human activity, to the point that equilibrium can be maintained by the natural absorption of the GHGs produced; (b) an audit by each participating country every five years to motivate progress; and (c) financial contributions by wealthier nations to poorer nations with “climate finance” to fund the switch to renewable energy and to adapt to climate change.<sup>372</sup>

To begin the effort to address the impacts on climate change, and prior to the Trump administration’s decision to withdraw from the Paris Climate Agreement,<sup>373</sup> the U.S. committed to the goal of reducing greenhouse gas emissions by 26–28% below 2005 levels by 2025.<sup>374</sup> As an additional element of the federal government’s effort to reduce the U.S. contribution to global warming, the BLM finalized a rule in November 2016 governing venting and flaring on federal lands which was expected to reduce methane emissions by 41–60%.<sup>375</sup> This Methane Waste Rule requires certain natural gas producers to reduce natural gas wastes from venting, flaring, and leaks during the production process as a measure aimed at reducing GHGs.<sup>376</sup>

In a separate effort that began initially as a response to the 1973 oil embargo,<sup>377</sup> Congress established the Corporate Average Fuel Economy

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<sup>371</sup> Helen Briggs, *What is in the Paris Climate Agreement?*, BBC NEWS (May 31, 2017), <https://www.bbc.com/news/science-environment-35073297> [<https://perma.cc/D2CN-QNL6>].

<sup>372</sup> *Id.*

<sup>373</sup> See *President Donald Trump Announces U.S. Withdrawal from the Paris Climate Accord*, THE WHITE HOUSE (June 1, 2017), <https://www.whitehouse.gov/blog/2017/06/01/president-donald-j-trump-announces-us-withdrawal-paris-climate-accord> [<https://perma.cc/ZH69-4QNK>]. See also Nell Greenfield Boyce, *Trump’s Budget Slashes Climate Change Funding*, NPR (Mar. 16, 2017), <http://www.npr.org/sections/thetwo-way/2017/03/16/520399205/trumpw-budget-slashes-climate-change-funding> [<https://perma.cc/6NNZ-Y8RM>].

<sup>374</sup> Press Release, The White House, Off. of the Press Sec’y, FACT SHEET: U.S. Reports its 2025 Emissions Target to the UNFCCC (Mar. 31, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/03/31/fact-sheet-us-reports-its-2025-emissions-target-unfccc> [<https://perma.cc/25GR-JFF8>].

<sup>375</sup> Hein, *supra* note 135, at 19 (citing BUREAU OF LAND MGMT., REGULATORY IMPACT ANALYSIS FOR: REVISIONS TO 43 CFR 3100 (ONSHORE OIL AND GAS LEASING) AND 43 CFR 3600 (ONSHORE OIL AND GAS OPERATIONS) ADDITIONS OF 43 CFR 3178 (ROYALTY-FREE USE OF LEASE PRODUCTION) AND 43 CFR 3179 (WASTE PREVENTION AND RESOURCE CONSERVATION) (2016), <https://www.blm.gov/download/file/fid/6588> [<https://perma.cc/2YYQ-HCSD>].

<sup>376</sup> Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources, 81 Fed. Reg. 35,823 (June 3, 2016) (codified at 40 C.F.R. § 60) (Methane Rule).

<sup>377</sup> *A Brief History of U.S. Fuel Efficiency Standards*, UNION OF CONCERNED SCIENTISTS (Dec 6, 2017), [https://www.ucsusa.org/clean-vehicles/fuel-efficiency/fuel-economy-basics.html#\\_W5\\_KY\\_ZFwIk](https://www.ucsusa.org/clean-vehicles/fuel-efficiency/fuel-economy-basics.html#_W5_KY_ZFwIk) [<https://perma.cc/535B-S6BH>].

(“CAFE”) Standards in 1975.<sup>378</sup> These standards mandated that average fuel economy of the new car fleet would increase roughly double to 27.5 mpg by 1985.<sup>379</sup> The CAFE standards were later modified to assist with reducing global warming pollution by as much as 570 million metric tons in 2030—the equivalent of shutting 140 coal-fired power plants for a year.<sup>380</sup>

The foregoing initiatives are prime examples of steps taken in recognition of the importance of addressing GHG emissions as a contributor to global warming. To be effective, however, they require consistent and sustained political will notwithstanding the private interests of specific industry stakeholders.

#### 6. The Trump Administration Has Abandoned the United States’ Commitment to Participate in Addressing Climate Change in Favor of Specific Industry Stakeholders

As discussed above, the Trump administration and its leadership have largely rejected the scientific consensus that global warming and climate change are a global threat, much less a threat to the interests of the United States. When viewed together with the clear and strong relationship that the Trump administration has with the energy industry, the unilateral actions taken make more sense. The following are all viewed as burdens to the energy industry stakeholders: the shift to renewable energy sources, regulations mandating increased fuel efficiency for the transportation sector, limitation of emissions from coal-fired power plants, and the recapture standards for methane during oil and gas extraction. Within this context, the Trump administration has taken the following actions to roll back decades of efforts to make energy use more efficient and mitigate environmental impacts.

Despite overwhelming evidence that combatting climate change should be a priority, President Trump unilaterally withdrew<sup>381</sup> the United States from its international commitment to the 2015 Paris Climate Agreement.<sup>382</sup> The U.S. is now the only country in the world (other than Nicaragua, which is actually ahead of the goals set in the Paris Climate Agreement) not committed to carbon reduction.<sup>383</sup> At the G20 Hamburg

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<sup>378</sup> See Energy Pol’y & Conservation Act of 1975, 42 U.S.C. §§ 6201–6422 (2012).

<sup>379</sup> UNION OF CONCERNED SCIENTISTS, *supra* note 377.

<sup>380</sup> *Id.*

<sup>381</sup> See THE WHITE HOUSE, *supra* note 373. See also Greenfield Boyce, *supra* note 373.

<sup>382</sup> See Paris Agreement, *supra* note 370.

<sup>383</sup> Mythiti Sampathkumar, *Syria Signs Paris Agreement—Leaving US Only Country in*

Climate and Energy Action Plan for Growth in July of 2017, all member countries of the G20 other than the U.S. reaffirmed their commitments to the goals of the Paris Climate Agreement, including financial support for developing countries.<sup>384</sup> President Trump's Energy Independence Order rescinds prior presidential actions centered on a climate change agenda, including President Obama's Executive Order No. 13,653 on Preparing the United States for Impacts of Climate Change, the President's Climate Action Plan (promulgated in 2013), and three other presidential memoranda and a report on climate change from the Obama administration.<sup>385</sup> Catering to the energy industry, the BLM has largely abandoned any meaningful effort to balance the interests of nonindustry stakeholders. BLM's priority has become leasing federal land for fossil fuel extraction, while BOEM has prioritized offshore exploration over environmental concerns related to fossil fuels' contribution to climate change.<sup>386</sup>

At the same time, the Trump administration is actively trying to roll back safety regulations and environmental standards.<sup>387</sup> President Trump has also rescinded President Obama's 2014 Climate Action Plan Strategy to Reduce Methane Emissions.<sup>388</sup> On June 15, 2017, BLM and EPA reversed course and postponed compliance with the 2016 rules on venting and flaring indefinitely.<sup>389</sup> The District Court for the District of Columbia (in a two-to-one decision) held on July 3, 2017 that BLM and

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*the World to Refuse Climate Change Deal*, THE INDEPENDENT (Nov. 7, 2017), <https://www.independent.co.uk/news/world/middle-east/syria-paris-agreement-us-climate-change-donald-trump-world-country-accord-a8041996.html> [<https://perma.cc/SD7L-RTK4>].

<sup>384</sup> European Commission Statement ST/17/1960, G20 Leaders' Declaration: Shaping an Interconnected World (July 8, 2017).

<sup>385</sup> Promoting Energy Independence and Economic Growth, Exec. Order No. 13,783, § 3, 82 Fed. Reg. 16,093, 16,094 (Mar. 31, 2017) (revoking Exec. Order No. 13,653 on Preparing the United States for the Impacts of Climate Change (Nov. 1, 2013)); Presidential Memorandum—Power Sector Carbon Pollution Standards (June 25, 2013); Presidential Memorandum: Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment (Nov. 3, 2015); Presidential Memorandum—Climate Change and National Security (Sept. 21, 2016); The President's Climate Action Plan, Report of the Executive Office of the President (June 2013); Climate Action Plan Strategy to Reduce Methane Emissions, The Report of the Executive Office of the President (Mar. 2014).

<sup>386</sup> See *supra* Part I.

<sup>387</sup> Oliver Milman, *Blow for EPA as court blocks bid to slacken safety rules for chemical plants*, THE GUARDIAN (Aug. 17, 2018), <https://www.theguardian.com/environment/2018/aug/17/epa-setback-court-chemical-safety-environment?> [<https://perma.cc/23XH-HC78>].

<sup>388</sup> Promoting Energy Independence and Economic Growth, Exec. Order No. 13,783, § 3, 82 Fed. Reg. 16,093, 16,094 (Mar. 31, 2017).

<sup>389</sup> See Waste Prevention, Production Subject to Royalties, and Resource Conservation: Postponement of Certain Compliance Dates, 82 Fed. Reg. 27,430 (June 15, 2017).

EPA's suspension of the rule was "arbitrary [and] capricious,"<sup>390</sup> and that a delay had the effect of making a change in the regulation without following APA rules.<sup>391</sup> On October 4, 2017, the U.S. District Court for Northern California issued an order enjoining the postponement of implementation of the Methane Waste Rule.<sup>392</sup> To conform with the courts' orders to comply with the APA, BLM filed its proposed revisions to the Methane Waste Rule on February 22, 2018 in the Federal Register "[to reduce] unnecessary compliance burdens."<sup>393</sup> Accordingly, the Methane Waste Rule remains in effect until such time as proper notice, comment, and rule-making procedures have been completed to implement a new rule.

About 30% of total energy-related CO<sub>2</sub> emissions in the U.S. in 2016 were generated by the transportation sector.<sup>394</sup> The 2012 GHG standards for cars and light trucks were scheduled to be phased in from model years 2017–2025.<sup>395</sup> The Trump administration, however, is in the process of rolling back CAFE mileage guidelines that make the use of these fuels more efficient.<sup>396</sup> This short-sighted approach to resource management

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<sup>390</sup> See Admin. Proc. and Jud. Rev. Standards, 42 U.S.C. § 7607(d)(9)(A) (2012).

<sup>391</sup> Clean Air Council v. Pruitt, 862 F.3d 1, 6 (D.C. Cir. 2017) (recognizing that while an agency's decision to grant a petition to reconsider a regulation is not reviewable final agency action, an agency's final decision to implement a stay of an existing regulation is reviewable). See also Lisa Friedman, *Court Blocks E.P.A. Effort to Suspend Obama-Era Methane Rule*, N.Y. TIMES (July 3, 2017), <https://www.nytimes.com/2017/07/03/climate/court-blocks-epa-effort-to-suspend-obama-era-methane-rule.html> [<https://perma.cc/B76W-N28Q>].

<sup>392</sup> State of California et al. v. Zinke, No. 3:17-CV-03804 (N.D. Cal. Oct. 4, 2017) and Sierra Club v. Zinke, No. 3:17-CV-03885 (N.D. Cal. Oct. 4, 2017) (ruling in related cases that BLM violated the APA to justify postponing a rule that was already in effect); see also *Methane and Waste Prevention Rule*, BUREAU OF LAND MGMT., <https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/operations-and-production/methane-and-waste-prevention-rule> [<https://perma.cc/KX98-PYKD>] (last visited Jan. 11, 2019).

<sup>393</sup> Waste Prevention, Production Subject to Royalties and Resource Conservation: Rescission or Revision of Certain Requirements, 83 Fed. Reg. 7924, 7924 (Feb. 22, 2018).

<sup>394</sup> *Id.*

<sup>395</sup> See ENVTL. PROT. AGENCY ET AL., INTERIM JOINT TECHNICAL ASSESSMENT REPORT: LIGHT DUTY VEHICLE GREENHOUSE GAS EMISSION STANDARDS AND CORPORATE AVERAGE FUEL ECONOMY STANDARDS FOR MODEL YEARS 2017–2025 (Sept. 2010), <https://www.epa.gov/sites/production/files/2016-10/documents/ldv-ghg-tar.pdf> [<https://perma.cc/49QV-7RP9>].

<sup>396</sup> See Patrick Martin, *Pruitt says Obama-era EPA Auto Industry Standards are "Inappropriate"*, WASH. POST (Apr. 3, 2018), [https://www.washingtonpost.com/video/politics/pruitt-says-obama-era-epa-auto-industry-standards-are-inappropriate/2018/04/03/8037ad12-374e-11e8-af3c-2123715f78df\\_video.html?utm\\_term=.ce79c72fe589](https://www.washingtonpost.com/video/politics/pruitt-says-obama-era-epa-auto-industry-standards-are-inappropriate/2018/04/03/8037ad12-374e-11e8-af3c-2123715f78df_video.html?utm_term=.ce79c72fe589) [<https://perma.cc/9TYU-2M6Y>]; Jennifer Dlouhy, Ryan Beene & John Lippert, *EPA Chief Signals Show Down with California on Fuel Emission Standards*, BLOOMBERG (Mar. 13, 2018), <https://www.bloomberg.com/news/articles/2018-03-13/epa-chief-signals-showdown-with-california-on-tailpipe-standards> [<https://perma.cc/S5FF-CQ9P>].

and maximizing short-term energy industry profits fails to meet even the minimum standards exercised with broad administrative discretion that have been delegated by Congress. Since the Trump administration has so abdicated its statutorily mandated responsibilities, stakeholders at the state and local government level are stepping in where possible to fill the void. By way of example, Massachusetts' Global Warming Solutions Act requires climate-warming emissions to be reduced by 25% by 2020 and 80% by 2050, as it fosters clean energy policies.<sup>397</sup> California has joined seventeen U.S. states that formed a U.S. Climate Alliance to implement the GHG goals of the Paris Climate Agreement in response to President Trump's 2017 announcement that he was removing the U.S. from that international agreement.<sup>398</sup> California has also cooperated with forty subnational governments to encourage reduction in GHGs, and Governor Brown hosted a Global Climate Action Summit in September of 2018.<sup>399</sup> During his closing remarks, Governor Brown revealed that the State of California is teaming up with a private satellite imaging company to develop, and eventually launch, a satellite to help pinpoint the sources of climate-change-causing pollutants with precision so that they can be stopped.<sup>400</sup>

The Trump administration has charted a dangerous course by unilaterally promoting the interests of the energy industry without regard to the environment. The competing stakeholders are interested in not only

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<sup>397</sup> See *Global Solutions Act Background*, MASS. EXEC. OFF. OF ENERGY & ENVTL. AFFAIRS (2019), <https://www.mass.gov/service-details/global-warming-solutions-act-background> [<https://perma.cc/ZPN6-26V4>]; see also Twelve States Letter, *supra* note 55.

<sup>398</sup> An Act Establishing the Global Warming Solutions Act, ch. 298, 2008 Mass. Acts ch. 298 (adding the Climate Protection and Green Economy Act, codified at MASS. GEN. LAWS ch. 21N §§ 1–9 (2008)); *Seventeen Governors in U.S. Climate Alliance Mark One-Year Anniversary with New Wave of Climate Actions*, U.S. CLIMATE ALLIANCE (June 1, 2018), <https://www.usclimatealliance.org/publications/oneyearanniversary> [<https://perma.cc/35ZH-DGPH>]. The U.S. Climate Alliance is working to reduce super pollutants, mobilize financing for climate projects, modernize the grid, promote renewable energy, advance energy efficiency standards for consumer products and appliances, build greater resiliency in communities in partnership with the Nature Conservancy and National Council on Science and the Environment, increase carbon storage, and accelerate clean transportation.

<sup>399</sup> See *About the Summit*, GLOBAL CLIMATE ACTION SUMMIT, <https://globalclimateactionsummit.org/about-the-summit> [<https://perma.cc/9CR5-RXVU>]; Deborah Halberstat, *The Impact of Recent Ocean Management Decisions of the Trump Administration*, ENVTL. L. INST. (July 23, 2018), <https://www.eli.org/events/impact-recent-ocean-management-decisions-trump-administration> [<https://perma.cc/638S-B7GT>].

<sup>400</sup> Governor Brown Closes Global Climate Action Summit: "We're Launching Our Own Damn Satellite," GLOBAL CLIMATE ACTION SUMMIT (Sept. 14, 2018), <https://www.globalclimateactionsummit.org/governor-brown-closes-global-climate-action-summit-were-launching-our-own-damn-satellite> [<https://perma.cc/3LKS-8QWQ>].

the proper stewardship of public resources, but also in health and welfare issues that are potentially affected by the administration's singular focus. Moreover, the administration has damaged the United States' standing and credibility by taking unilateral actions in derogation of its established commitments to its global partners and allies.

#### CONCLUSION

President Trump exceeded the authority granted to Presidents under the OCSLA when he rescinded President Obama's Executive orders that protected certain Alaskan waters from future oil leases. The Property Clause of Article IV of the U.S. Constitution clearly vests in Congress the authority to dispose of and to make all "needful Rules and Regulations" with respect to public property belonging to the United States.<sup>401</sup> The President, and by extension, his Cabinet secretaries and subordinate federal officials, can only take action on such property-related matters to the extent expressly delegated by Congress. Congress has made clear in numerous federal acts that provide for the withdrawal or reservation of federal lands that it is capable of providing a clear delegation of authority to modify or revoke such designations when it so desires. In OCSLA, Congress chose not to authorize the President to revoke or modify the prior Executive orders. Accordingly, the Offshore Energy Order violates the separation of powers doctrine by seeking to usurp Congress' authority under the Property Clause of Article IV. Accordingly, actions taken by subordinate executive officials are properly enjoined as *ultra vires* activities not supported by law.

Aside from the purely legal question of presidential authority, the Offshore Energy Order makes little practical sense. Energy production is at an all-time high, so energy extraction should not supersede environmental considerations. Environmental conservation for the sake of future generations should take priority over leasing of federal lands (on and offshore) for exploitation of energy resources today. The U.S. Energy Information Administration's Annual Energy Outlook predicts that the U.S. will be a net exporter of oil by 2029 without any new offshore drilling leases.<sup>402</sup> Consideration of the short- and long-term consequences of such policies on the health of our citizens and our environment is paramount to avoiding the tragedy of the commons for our coastal communities and

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<sup>401</sup> U.S. CONST. art. IV, § 3, cl. 2.

<sup>402</sup> Kubiak, *supra* note 269.

marine ecosystems. Executive orders should be consistent with the intent of the laws they implement. The EIS process should not be short-circuited or expedited. The recognized dangers should be honestly considered, rather than just using an EIS as window dressing before offering to sell offshore oil leases. Additional steps should be taken to reduce the likelihood of oil spills and other environmental risks by reinstating independent audits of equipment (such as the blowout preventers and pressure safety valves). The expedited sale of additional offshore oil and gas leases seems to be accompanied with little guidance to assure that these activities are implemented in ways that minimize contamination of water, avoid destruction of species habitat, protect against deafening consequences for aquatic species, and minimize climate change consequences. BSEE should be living up to its role of protecting the environment by assuring timely safety checks on equipment, rather than prioritizing lessening the burdens of regulations on industries associated with offshore exploration and drilling. This is not the time to expand offshore drilling for oil and gas.