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Fishing Against the Wind: The Federal Government's Obligation to Consider and Mitigate Fishing Impacts from Offshore Wind Development on the Outer Continental Shelf

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FISHING AGAINST THE WIND: THE FEDERAL
GOVERNMENT'S OBLIGATION TO CONSIDER
AND MITIGATE FISHING IMPACTS FROM
OFFSHORE WIND DEVELOPMENT ON THE
OUTER CONTINENTAL SHELF

*Benjamin B. Algeo**

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ABSTRACT

As offshore wind development activity increases along the East Coast of the United States, commercial fishing groups have raised concerns about potential impacts on their operations. This comment examines the Bureau of Ocean Energy Management's legal obligation under the Outer Continental Shelf Lands Act to consider these concerns and mitigate potential impacts during the offshore wind leasing process. The comment concludes that the Act does require the Bureau to both consider any potentially affected fishing uses and to prevent impacts to "reasonable uses," though the Bureau has significant discretion to determine what constitutes a "reasonable use."

INTRODUCTION

On the afternoon of Sunday, March 21, 2021, more than eighty fishing boats paraded out of their docks and into the Gulf of Maine, waving flags in protest.¹ They formed a flotilla about a dozen miles off the coast and invited in local media to cover the event.²

The focus of this protest was a floating offshore wind turbine proposed to be sited off Monhegan Island, within Maine state waters.³ Lobsterman Andy House told a local television channel that the project was “a threat to our livelihood,” and that it would “mess with the ocean and our way of life, no doubt about it.”⁴ According to Mr. House, this proposed turbine was only a “foot in the door” to spur further development within the Gulf of Maine.⁵ Others at the event—and at later protests on the docks and at the Maine Legislature—echoed Mr. House’s concerns, arguing that the construction and operation of offshore wind turbines would seriously interfere with the lucrative lobster fishery that provides their livelihood and anchors their way of life.⁶

These sentiments are not unique to Maine lobstermen. Driven by policy decisions at the state and federal levels, offshore wind development activity in waters off the East Coast of the United States has increased substantially in recent years,⁷ and has drawn the ire of

1. Kirk Moore, *Maine Fishermen Demonstrate Against Offshore Wind Plan*, NAT’L FISHERMAN (Mar. 23, 2021) <https://www.nationalfisherman.com/northeast/maine-fishermen-demonstrate-against-offshore-wind-plan> [<https://perma.cc/G3KC-UWGF>].

2. Don Carrigan, *Dozens of Lobster Boats Gather Off Monhegan to Protest Floating Wind Turbine*, NEWSCENTER ME. (Mar. 22, 2021), <https://www.newscenetermaine.com/article/news/state/dozens-of-lobster-boats-gather-off-monhegan-to-protest-floating-wind-turbine/97-13fe1a8f-9fac-45f8-950a-035d846c9cd8> [<https://perma.cc/PL44-SRDQ>].

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*; see also Don Carrigan, *Lobstermen United Against Monhegan Offshore Wind Project*, NEWSCENTER ME. (Mar. 26, 2021), <https://www.newscenetermaine.com/article/life/lobstermen-united-against-monhegan-offshore-wind-project/97-a4d2385d-defa-42b1-94c4-974988477fda> [<https://perma.cc/AL32-TCYA>]; Don Carrigan, *Maine Lobstermen Rally to Stop Offshore Wind Power*, NEWSCENTER ME. (Apr. 28, 2021), <https://www.newscenetermaine.com/article/life/maine-lobstermen-rally-to-stop-offshore-wind-power/97-993b5ca9-4bf5-4e63-8c43-24a7eb9cfb90> [<https://perma.cc/E2VB-SX44>].

7. See generally BUREAU OF OCEAN ENERGY MGMT., OUTER CONTINENTAL SHELF RENEWABLE ENERGY LEASES (2021).

commercial fishing fleets, particularly in the Northeast.⁸ While these concerns have been raised primarily through administrative channels, in broader public policy debates, and in negotiations with developers, they have also been raised in court by groups seeking to delay, modify, or block the construction of offshore wind altogether.⁹

The Outer Continental Shelf Lands Act (OCSLA), which allows the Secretary of the Interior to lease land on the outer continental shelf for,¹⁰ among other things, offshore wind development, includes a citizen suit provision that facilitates these claims.¹¹ Furthermore, OCSLA § 8(p)(4) includes language directing the Secretary to consider fishing impacts and prevent interference with reasonable uses when conducting renewable energy leasing activities.¹² However, the scope of these obligations has not been clearly defined.¹³ Given the increasing tension between offshore wind development activity and fishing fleets, this will likely be a point of contention in future litigation.

Section II of this comment will explore the current state of offshore wind development in the United States, particularly on the East Coast,¹⁴ including state and federal policies driving growth in development activity, ongoing areas of conflict between commercial fishing fleets and offshore wind developers, and various efforts to resolve those conflicts

8. See, e.g., Sam Evans-Brown, *How Offshore Wind Farms May Affect Fishing Industry*, NAT'L PUBLIC RADIO (August 19, 2020), <https://www.npr.org/2020/08/19/903982632/how-offshore-wind-farms-may-affect-fishing-industry> [https://perma.cc/CPU5-GLKK]; Maddie Stone, "I Can See the Industry Disappearing": US Fishermen Sound Alarm at Plans for Offshore Wind, THE GUARDIAN (July 24, 2021), <https://www.theguardian.com/environment/2021/jul/24/offshore-wind-development-new-jersey-us-fishermen-ocean-life> [https://perma.cc/NT4X-GHXD].

9. See, e.g., Alejandro De La Garza, *U.S. Fishermen Are Making Their Last Stand Against Offshore Wind*, TIME MAGAZINE (Sept. 30, 2021), <https://time.com/6102900/offshore-wind-fishing> [https://perma.cc/9MGW-3GM2].

10. "The U.S. Outer Continental Shelf (OCS) includes the area between state jurisdiction to 200 nautical miles (nm) from shore." BUREAU OF OCEAN ENERGY MGMT., OUTER CONTINENTAL SHELF, <https://www.boem.gov/environment/outer-continental-shelf> [https://perma.cc/MXR8-46NS] (last visited Mar. 13, 2023).

11. See 43 U.S.C.A. § 1349(a)(1) (2022).

12. 43 U.S.C.A. § 1337(p)(4)(I), (J) (2022).

13. See Joseph B. Nelson & David P. Yaffe, *The Emergence of Commercial Scale Offshore Wind: Progress Made and Challenges Ahead*, 10 SAN DIEGO J. CLIMATE & ENERGY L. 25, 33 (2019).

14. While the West Coast and the Gulf of Mexico are home to some nascent offshore wind development activity, this paper focuses on the East Coast, where development activity has progressed further. See *State Activities*, BUREAU OF OCEAN ENERGY MGMT., <https://www.boem.gov/renewable-energy/state-activities> [https://perma.cc/23KE-25H9] (last visited Mar. 13, 2023).

outside of the judicial process. Section III will provide background on OCSLA and the leasing process for offshore wind more broadly. Section IV reviews existing judicial interpretations of OCSLA § 8(p)(4) and regulatory interpretations of the provision's applicability to fishing impacts. Finally, Section V examines the specific text of § 8(p)(4) to determine how it might be applied by a court considering a challenge to regulatory approval of offshore wind development that interferes with commercial fishing activity.

I. BACKGROUND

This section describes current trends in offshore wind development on the East Coast of the United States, conflicts between that development activity and the commercial fishing industry, and efforts to mediate and resolve those conflicts outside of the courts.

1. *Offshore Wind Leasing Activity is Increasing Substantially*

The offshore wind industry in the United States has grown substantially in recent years.¹⁵ While there are only two small operating offshore wind projects in the United States, the 30 megawatt (MW) Block Island Wind Farm off the coast of Rhode Island and the 12 MW Coastal Virginia Offshore Wind pilot project, the much larger 800 MW Vineyard Wind project in Massachusetts and the 132 MW South Fork Wind Farm in New York are both currently under construction.¹⁶ Overall, the United States offshore wind project development pipeline grew 13.5% from the same time in 2021.¹⁷ Industry analysts expect this growth to continue in the coming years.¹⁸

i. State Policies are a Major Driver of Growth in Offshore Wind Development Activity

Several East Coast¹⁹ states have been aggressively pursuing offshore wind as a strategy for meeting climate and renewable energy policy

15. See WALTER MUSIAL ET AL., OFFSHORE WIND MARKET REPORT: 2022 EDITION vi (2022).

16. *Id.* at 7, 14, 17.

17. *Id.* at 8.

18. *Id.* at 20-21.

19. While the Bureau of Ocean Energy Management has conducted some offshore wind leasing activity in the Gulf of Mexico, see Valerie Volcovici, *U.S. Proposes First Offshore Wind Auction in Gulf of Mexico*, REUTERS (Feb. 22, 2023),

goals.²⁰ While approaches vary from state to state, the adoption of offshore wind procurement goals is a common first step.²¹ States have sought to achieve these goals by either soliciting offshore wind projects to enter into power purchase agreements with their utilities, directing the utilities to do the procurement or construct the projects themselves, or by awarding Offshore Wind Renewable Energy Credits (ORECs) to qualifying projects, which serve to compensate those projects for their environmental benefits.²²

States adopting procurement policies have made significant progress toward their offshore wind goals. For example, in 2016, Massachusetts enacted the “Act to Promote Energy Diversity,” which directed electric utilities in the state to procure up to 1,600 MW of offshore wind energy by 2027.²³ Requests for proposals were issued in 2017, and on May 23, 2018, the Vineyard Wind Project was selected to provide the first 800 MW.²⁴ Subsequent procurements secured an additional 1,200 MW from Vineyard Wind and 1,204 MW from the Mayflower Wind Low-Cost Energy Project.²⁵ The Massachusetts Department of Energy Resources,

<https://www.reuters.com/business/energy/us-proposes-first-wind-power-lease-sale-gulf-mexico-2023-02-22> [<https://perma.cc/ZE2U-KNCN>], and off the West Coast, *see* Elizabeth McCarthy, *First West Coast Offshore Wind Lease Auction Generates \$757 Million, Lagging East Coast Result*, UTILITY DIVE (Dec. 8, 2022), <https://www.utilitydive.com/news/first-west-coast-offshore-wind-lease-auction-generates-757-million-laggin/638323> [<https://perma.cc/65RE-WSZ7>], states in those regions have not been as quick to support development. *See* Alex Brown, *More States Back Offshore Wind, Citing Economic Potential*, PEW STATELINE (July 29, 2022), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/07/29/more-states-back-offshore-wind-citing-economic-potential> [<https://perma.cc/SZ5W-WLXQ>].

20. This section is current as of Mar. 14, 2023.

21. The American Clean Power Association reports that, as of 2022, U.S. states had established targets to procure 46,000 MW of offshore wind. *Offshore Wind Power Facts*, AM. CLEAN POWER ASS’N, <https://cleanpower.org/facts/offshore-wind> [<https://perma.cc/3SDQ-DHBV>] (last visited Mar. 13, 2023).

22. PHILLIP BEITER ET. AL, *COMPARING OFFSHORE WIND ENERGY PROCUREMENT AND PROJECT REVENUE SOURCES ACROSS U.S. STATES* 15 (2020).

23. *Offshore Wind Power Facts*, MA. DEP’T OF ENERGY RES., <https://www.mass.gov/service-details/offshore-wind> [<https://perma.cc/YA4F-Q8HR>] (last visited Mar. 22, 2023); *see also* An Act To Promote Energy Diversity, 2016 Mass. Legis. Serv. Ch. 188, § 12 (West).

24. *Id.*

25. Press Release, Office of Governor Charlie Baker and Lt. Governor Karyn Polito, Baker-Polito Administration Announces Historic Selection of Offshore Wind Projects to Bring Clean, Affordable Power to the Commonwealth (Dec. 17, 2021), <https://www.mass.gov/news/baker-polito-administration-announces-historic-selection-of-offshore-wind-projects-to-bring-clean-affordable-power-to-the-commonwealth> [<https://perma.cc/3ZA7-8WBG>] (last visited Mar. 13, 2023)

along with the state's electric utilities and Attorney General's office, announced a fourth round of solicitations in February 2023.²⁶

In New York, then-Governor Andrew Cuomo established a procurement goal of 2,400 MW of offshore wind by 2030 in 2017,²⁷ and in 2019, he signed the New York State Climate Leadership and Community Protection Act, which updated the target to 9,000 MW by 2035.²⁸ The state has since completed two offshore wind solicitations, awarding contracts in 2018 to Empire Wind and Sunrise to supply 816 MW and 880 MW of offshore wind, respectively,²⁹ and contracts in 2020 to an Equinor/BP partnership for their 1,260 MW Empire Wind 2 and 1,230 MW Beacon Wind projects.³⁰ The state released its third round of solicitations in July 2022, aiming to procure at least an additional 2,000 MW of offshore wind, and solicitations closed in January 2023.³¹ In a press release announcing the third round solicitation, Governor Kathy Hochul also announced new infrastructure investments, job programs, and electric grid upgrades to support the development of offshore wind.³²

Rhode Island and Connecticut have also embraced the utility procurement approach. In 2018, both states awarded contracts to the Revolution Wind project, Rhode Island for 400 MW and Connecticut for 304 MW.³³ Rhode Island had previously secured a contract for 30 MW

26. See MASS. DEP'T OF ENERGY RES., MASSACHUSETTS 83C ROUND 4 OFFSHORE WIND SOLICITATION: REQUEST FOR PUBLIC COMMENT 1 (2023).

27. ANDREW M. CUOMO, NEW YORK STATE: EVER UPWARD 2017 STATE OF THE STATE 54-57 (2017).

28. New York State Climate Leadership and Community Protection Act, 2019 N.Y. Laws Ch. 106, § 4(5) (codified at N.Y. PUB. SERV. LAW § 66-p(5)).

29. See *2018 Solicitation (Closed)*, N.Y. STATE ENERGY RSCH. AND DEV. AUTH., <https://www.nyserda.ny.gov/All-Programs/Offshore-Wind/Focus-Areas/Offshore-Wind-Solicitations/2018-Solicitation> [<https://perma.cc/NC68-PMTK>] (last visited Mar. 13, 2023).

30. See *2020 Solicitation (Closed)*, N.Y. STATE ENERGY RSCH. AND DEV. AUTH., <https://www.nyserda.ny.gov/All-Programs/Offshore-Wind/Focus-Areas/Offshore-Wind-Solicitations/2020-Solicitation> [<https://perma.cc/3ALQ-ZAUD>] (last visited Mar. 13, 2023).

31. N.Y. STATE ENERGY RSCH. AND DEV. AUTH., ORECRFP22-1, REQUEST FOR PROPOSALS, PURCHASE OF OFFSHORE WIND RENEWABLE ENERGY CERTIFICATES 12 (2022), <https://portal.nyserda.ny.gov/servlet/servlet.FileDownload?file=00P8z000001ZxYsEAK>.

32. Press Release, Off. of Governor Kathy Hochul, Governor Hochul Announces New York's Third Offshore Wind Solicitation to Accelerate Clean Energy Development (July 27, 2022), <https://www.governor.ny.gov/news/governor-hochul-announces-new-yorks-third-offshore-wind-solicitation-accelerate-clean-energy> [<https://perma.cc/EM52-YVCG>] (last visited Mar. 13, 2023).

33. BEITER ET AL., *supra* note 22, at 17; see Anmar Frangoul, *America's First Offshore Wind Farm is Up and Running*, CNBC (Dec. 13, 2016),

from the Block Island Wind Farm demonstration project which, in 2016, became the first operating offshore wind farm in the U.S.³⁴ In 2019, Connecticut passed a law directing its Department of Energy and Environmental Protection (DEEP) to procure 2,000 MW of offshore wind.³⁵ Pursuant to that law, DEEP selected Vineyard Wind's Park Wind project to provide 840 MW of offshore wind to the state's electric utilities, and contracts were finalized in 2020.³⁶ Connecticut intends to undertake another round of procurements in 2023.³⁷ Rhode Island has also passed a law requiring the state's primary electric utility, Rhode Island Energy, to procure an additional 600-1,000 MW of offshore wind.³⁸ Rhode Island Energy opened the solicitation in October 2022, and expects to select bidders in the Summer of 2023.³⁹

Virginia has announced aggressive goals, but mostly left it up to the utilities in the state to achieve those goals. In 2019, then-Governor Ralph Northam issued an executive order directing the Virginia Department of Mines, Minerals, and Energy (DMME) to develop a plan of action for developing 2,500 MW of offshore wind off the coast of Virginia by 2026.⁴⁰ In 2020, he signed the Virginia Clean Economy Act, which directs the state's utilities to construct or procure energy from offshore wind projects totaling up to 5,200 MW by 2034.⁴¹ This approach has been somewhat successful so far: Virginia is already home to the first offshore wind farm in federal waters, the 12 MW Coastal Virginia

<https://www.cnbc.com/2016/12/13/americas-first-offshore-wind-farm-is-up-and-running.html> [<https://perma.cc/LP8V-Q4HW>].

34. *Id.* at 17-18.

35. An Act Concerning the Procurement of Energy Derived from Offshore Wind, 2019 Conn. Legis. Serv. 19-71 (West).

36. *Offshore Wind Power Facts*, *supra* note 23.

37. See Conn. Dep't of Energy and Env't Prot., Notice of Proceeding and Public Meeting, (Mar. 7, 2023), <https://portal.ct.gov/-/media/DEEP/energy/Procurements/2023-Procurements-Final-Notice.pdf>.

38. See An Act Relating to Public Utilities and Carriers— Affordable Clean Energy Security Act, 2022 R.I. Pub. Laws Ch. 373, § 3.

39. *Rhode Island's Procurement of Long-Term Clean Energy – 2022 Offshore Wind RFP Timeline*, R.I. ENERGY, <https://ricleanenergyrfp.com/2022-offshore-wind-rfp/2022-offshore-wind-rfp-timeline> [<https://perma.cc/ZGE2-GW8Q>] (last visited Mar. 22, 2023).

40. GOVERNOR RALPH NORTHAM, EXEC. ORD. NO. 43, EXPANDING ACCESS TO CLEAN ENERGY AND GROWING THE CLEAN ENERGY JOBS OF THE FUTURE (2019), <https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-43-Expanding-Access-to-Clean-Energy-Jobs-of-the-Future.pdf> [<https://web.archive.org/web/20220112040812/https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-43-Expanding-Access-to-Clean-Energy-and-Growing-the-Clean-Energy-Jobs-of-the-Future.pdf>].

41. Virginia Clean Economy Act, 2020 Va. Acts ch. 1193.

Offshore Wind Project (CVOWP), and Dominion Energy, the utility that owns the lease CVOWP is located on, has plans to bring more than 2,600 MW online by 2026.⁴² In August 2022, the Virginia State Corporation Commission approved Dominion's application to recover costs associated with building that project,⁴³ and the company expects to begin construction in early 2023.⁴⁴

Maryland, on the other hand, has relied on ORECs to support the development of 2,800 MWs of offshore wind capacity. In 2017, the Maryland Public Service Commission (PSC) approved OREC proposals from U.S. Wind and Skipjack Offshore Energy LLC for 368 MW of offshore wind capacity.⁴⁵ These proposals were brought under the Maryland Offshore Wind Energy Act of 2013, which established a 500 MW offshore wind procurement goal.⁴⁶ This goal was increased to 1,200 MW by the Maryland Clean Energy Jobs Act of 2019, to be achieved through three solicitations run by the PSC.⁴⁷ The first solicitation under this law was completed Dec. 17, 2021, with the PSC awarding ORECs to U.S. Wind and Skipjack to support an additional 1,600 MW of offshore wind capacity.⁴⁸

New Jersey has also embraced ORECs as the primary policy tool to meet their offshore wind development goals. In 2018, the state raised its offshore wind procurement target from 1,100 MW to 3,500 MW by 2030,⁴⁹ and in 2019, Governor Phil Murphy added a new target of 7,500 MW by 2035.⁵⁰ In 2020, pursuant to an executive order, the New Jersey

42. *Coastal Virginia Offshore Wind*, DOMINION ENERGY, <https://www.dominionenergy.com/projects-and-facilities/wind-power-facilities-and-projects/coastal-virginia-offshore-wind> [<https://perma.cc/BDF3-B7LG>] (last visited Mar. 22, 2023).

43. See Application of Virginia Electric and Power Company for Approval and Certification of the Coastal Virginia Offshore Wind Commercial Project and Rider Offshore Wind, PUR-2021-00142 Final Order at 39 (Virginia State Corp. Comm'n Aug. 5, 2022).

44. Adnan Durakovic, *DEME Starts Work on Coastal Virginia Offshore Wind Project, Vineyard Wind Next*, OFFSHOREWIND.BIZ (Nov. 22, 2022), <https://www.offshorewind.biz/2022/11/22/deme-starts-work-on-coastal-virginia-offshore-wind-project-vineyard-wind-next> [<https://perma.cc/6NMB-B9X9>].

45. See Applications of U.S. Wind, Inc. and Skipjack Offshore Energy, LLC for a Proposed Offshore Wind Project(s) Pursuant to the Maryland Offshore Wind Energy Act of 2013, Case No. 9431, Ord. No.88192 (Md. Pub. Serv. Comm'n, May 11, 2017).

46. Maryland Offshore Wind Energy Act of 2013, 2013 Md. Laws ch. 3.

47. Maryland Clean Energy Jobs Act of 2019, 2019 Md. Laws ch. 757.

48. Press Release, Tori Leonard, Md. Pub. Serv. Comm'n, Maryland PSC Decision Expands Offshore Wind Development (Dec. 17, 2021).

49. An Act Concerning Clean Energy, 2018 N.J. Sess. Law Serv. Ch. 17 (West).

50. Governor Phil Murphy, Executive Order No. 92 (2019).

Board of Public Utilities (BPU) solicited bids from offshore wind developers and awarded ORECs to Ørsted's Ocean Wind project for 1,100 MW of offshore wind capacity.⁵¹ BPU conducted a second solicitation in 2021 and awarded ORECs for a combined 2,658 MW to EDF/Shell's Atlantic Shores Offshore Wind and Ørsted's Ocean Wind II.⁵² BPU anticipates that it will complete the third round solicitation in late 2023.⁵³

In addition, several other East Coast states have indicated interest in promoting offshore wind. This includes Maine, which approved a contract for the 12 MW New England Aqua Ventus floating offshore wind demonstration project sited in state waters,⁵⁴ and submitted a proposal to BOEM to lease a 15.2 sq. mile square mile site in the Gulf of Maine for a floating offshore wind research site.⁵⁵ New Hampshire established an Office of Offshore Wind Energy Development within its Department of Energy to spearhead the state's offshore wind efforts and collaborate with other states.⁵⁶ Delaware established a working group to study opportunities for offshore wind.⁵⁷ In 2021, North Carolina Governor Roy Cooper signed Executive Order No. 218, declaring "[t]he State of North Carolina will strive for the development of [2,800 MW] of offshore wind energy resources off the North Carolina coast by 2030, and [8,000 MW] by 2040."⁵⁸ Finally, South Carolina passed a law in early 2022 to study opportunities for offshore wind development in that state.⁵⁹

51. *New Jersey Offshore Wind Solicitations*, N.J. CLEAN ENERGY, <https://www.njcleanenergy.com/renewable-energy/programs/nj-offshore-wind/solicitations> [<https://perma.cc/PF8K-UNP3>] (last visited Mar. 13, 2023).

52. *Id.*

53. *Id.*

54. Press Release, Me. Pub. Utils. Comm'n, *Maine Aqua Ventus Contract Approved* (Nov. 5, 2019).

55. *Gulf of Maine Floating Offshore Wind Research Array*, ME. GOVERNOR'S ENERGY OFF., <https://www.maine.gov/energy/initiatives/offshorewind/researcharray> [<https://perma.cc/57SX-FJ2L>] (last visited Mar. 13, 2023).

56. *Office of Offshore Wind Energy Development*, N.H. DEP'T OF ENERGY, <https://www.energy.nh.gov/renewable-energy/office-offshore-wind-industry-development> [<https://perma.cc/892L-X3RX>] (last visited Mar. 13, 2023).

57. *Offshore Wind*, DEL. NAT. RES. AND ENV'T CONTROL, <https://dnrec.alpha.delaware.gov/climate-coastal-energy/renewable/offshore-wind> [<https://perma.cc/P9NL-C265>] (last visited Mar. 13, 2023).

58. Governor Roy Cooper, *Exec. Ord. No. 218, Advancing North Carolina's Economic and Clean Energy Future with Offshore Wind* (2021).

59. Press Release, *Se. Wind Coal.*, *South Carolina Governor McMaster Signs Bill Calling for Offshore Wind Economic Development Study* (June 22, 2022),

These relatively recent state policy developments have kick-started a new era of offshore wind development up and down the East Coast of the United States. As states continue to implement and expand these policies, further growth can be expected.

ii. Federal Policy is Increasingly Favorable Toward Offshore Wind Development

In addition to state policy, federal policy is also driving the growth of offshore wind development in the United States. On his first day in office, President Joe Biden issued Executive Order 13,990, directing federal agencies to “immediately commence work to confront the climate crisis[.]”⁶⁰ A week later, President Biden issued a second executive order, directing the Secretary of the Interior to “identify . . . steps that can be taken, consistent with applicable law, to increase renewable energy production . . . in [offshore] waters, with the goal of doubling offshore wind by 2030.”⁶¹ A few months later, the Bureau of Ocean Energy Management (BOEM) announced a new Wind Energy Area in the New York Bight, and concurrently, DOI, the U.S. Department of Energy, and the U.S. Department of Commerce announced a nationwide 30 GW deployment target for offshore wind, to be achieved by 2030.⁶² At the same time, the U.S. Department of Transportation announced \$230 million in grant funding for “port and intermodal infrastructure-related projects” to support offshore-wind focused port infrastructure.⁶³

Following these announcements, BOEM and DOI have moved forward on significant offshore wind leasing activity. On February 25, 2022, DOI announced \$4.37 billion in competitive lease issuances in the New York Bight for an area covering 488,000 acres.⁶⁴ In May 2022, BOEM held another auction for two lease areas in the Carolina Long

<https://www.sewind.org/news/entry/south-carolina-governor-mcmaster-signs-bill-calling-for-an-offshore-wind-ec> [<https://perma.cc/EA8P-5BDV>].

60. Exec. Ord. No. 13,990, 86 Fed. Reg. 7037, 7037 (Jan. 25, 2021).

61. Exec. Ord. 14,008, 86 Fed. Reg. 7619, 7624 (Feb. 1, 2021).

62. Press Release, The White House, FACT SHEET: Biden Administration Jumpstarts Offshore Wind Energy Projects to Create Jobs (Mar. 29, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/29/fact-sheet-biden-administration-jumpstarts-offshore-wind-energy-projects-to-create-jobs> [<https://perma.cc/T2PV-4M8N>].

63. *Id.*

64. Press Release, U.S. Dep’t of the Interior, Biden-Harris Administration Sets Offshore Energy Records with \$4.37 Billion in Winning Bids for Wind Sale (February 25, 2022), <https://www.doi.gov/pressreleases/biden-harris-administration-sets-offshore-energy-records-437-billion-winning-bids-wind> [<https://perma.cc/UW2S-5AJR>].

Bay, which sold for a combined \$315 million.⁶⁵ That summer, BOEM announced it was undertaking an environmental review of a project proposed off the coast of Maryland,⁶⁶ and pre-lease activities in the Gulf of Mexico,⁶⁷ and the Gulf of Maine.⁶⁸ Finally, in December 2022, the agency awarded five leases off the coast of California for a total of \$757.1 million, which marked the first ever offshore wind lease off the West Coast.⁶⁹

Congressional support for offshore wind development has also increased in recent years. The Inflation Reduction Act of 2022 (IRA) was enacted in August 2022 and expands the areas available for renewable energy leasing to include submerged lands adjacent to U.S. territories and some lands off the coasts of the Carolinas, Georgia, and Florida that had been removed from leasing consideration by President Trump.⁷⁰ The IRA also provides funding for offshore wind transmission activities and boosts tax credits available to renewable energy projects in general.⁷¹ However, the IRA does require BOEM to issue at least sixty million acres for oil and gas leasing every year for ten years following its enactment, if the agency decides to issue any renewable energy leases.⁷²

65. MUSIAL ET AL., *supra* note 15, at vi-vii.

66. Press Release, U.S. Dep't of the Interior, Department of the Interior Announces Environmental Review of First Proposed Wind Energy Project Offshore Maryland (June 6, 2022), <https://www.doi.gov/pressreleases/department-interior-announces-environmental-review-first-proposed-wind-energy-project> [<https://perma.cc/D9ZN-GHEA>].

67. Press Release, U.S. Dep't of the Interior, Department of the Interior Announces Next Steps for Offshore Wind Energy in Gulf of Mexico (July 20, 2022), <https://www.doi.gov/pressreleases/department-interior-announces-next-steps-offshore-wind-energy-gulf-mexico> [<https://perma.cc/LER5-AJYT>].

68. Press Release, U.S. Dep't of the Interior, Biden-Harris Administration Continues Offshore Wind Momentum, Announces Next Steps for Gulf of Maine (Aug. 18, 2022), <https://www.doi.gov/pressreleases/biden-harris-administration-continues-offshore-wind-momentum-announces-next-steps-gulf> [<https://perma.cc/J9YW-8F6H>].

69. Press Release, Biden-Harris Administration Announces Winners of California Offshore Wind Energy Auction (Dec. 7, 2022), <https://doi.gov/pressreleases/biden-harris-administration-announces-winners-california-offshore-wind-energy-auction> [<https://perma.cc/LA2T-ADVC>].

70. LAURA B. COMAY ET AL., OFFSHORE WIND PROVISIONS IN THE INFLATION REDUCTION ACT 1-2 (2022).

71. *Id.* at 2-3.

72. *Id.* at 1.

2. *Resistance from Commercial Fishing Interests*

While state and federal policy has increasingly become more favorable to offshore wind development, proposed projects have faced pushback. Shorefront property owners and local environmental groups were early opponents,⁷³ but in recent years, groups representing commercial fishing interests have joined the fray.⁷⁴ However, BOEM and other organizations are actively working to mitigate conflicts between fishing interests and offshore wind development.⁷⁵

i. Some Commercial Fishing Organizations are Resisting Offshore Wind Development

Offshore wind development on the East Coast has been met with resistance from commercial fishing interests. For example, a suit filed in 2021 by a group of commercial fishing businesses and associations in Rhode Island, Massachusetts, and New York seeks to halt construction of the Vineyard Wind project off the coast of Massachusetts.⁷⁶ As of December 2022, that suit remains pending in the U.S. District Court for the District of Massachusetts.⁷⁷ In 2021, the D.C. Circuit dismissed a similar suit attempting to block the issuance of a lease off the coast of New York.⁷⁸ In New Jersey, the proposed Ocean Wind project has undergone several changes to reduce potential impacts on high-value scallop and surf clam fisheries, but concerns remain.⁷⁹ Fishermen have also raised concerns regarding proposed offshore wind projects in

73. Kathryn Q. Seelye, *After 16 Years, Hopes for Cape Cod Wind Farm Float Away*, N.Y. TIMES (Dec. 19, 2017), <https://www.nytimes.com/2017/12/19/us/offshore-cape-wind-farm.html> [<https://perma.cc/4FQ9-SDB4>].

74. See, e.g., Evans-Brown, *supra* note 8; Stone, *supra* note 8.

75. *Fishing Industry Communication and Engagement*, BUREAU OF OCEAN ENERGY MGMT., <https://www.boem.gov/renewable-energy/fishing-industry-communication-and-engagement> [<https://perma.cc/79CE-3JS2>] (last visited Mar. 13, 2023).

76. Complaint at 1, 82, *Seafreeze Shoreside, Inc. v. U.S. Dep't of the Interior*, No. 1:21-cv-03267 (D.D.C. filed Dec. 15, 2021), 2021 WL 5988803.

77. See David Holtzman, *US Defends Mass. Offshore Wind Farm OK in Fisheries' Suit*, LAW 360 (Dec. 21, 2022) <https://www.law360.com/articles/1560398> [<https://perma.cc/6G4A-Z7PU>].

78. *Fisheries Survival Fund v. Haaland*, No. 20-5094, 2021 WL 2206426 at *1 (D.C. Cir., May 20, 2021).

79. See Kirk Moore, *Ocean Wind Project Worries New Jersey Beach Resorts, Fishing Industry*, NAT'L FISHERMAN (Apr. 20, 2021), <https://www.nationalfisherman.com/mid-atlantic/ocean-wind-project-worries-new-jersey-beach-resorts-fishing-industry> [<https://perma.cc/6VRW-HK5E>].

Maryland, Delaware,⁸⁰ Virginia,⁸¹ North Carolina,⁸² and the Gulf of Maine.⁸³

Common concerns raised by these commercial fishing-aligned groups include potential navigational hazards posed by offshore wind projects, harm to fish species from the installation of wind turbines and other equipment, and the loss of valuable fishing grounds within offshore wind lease areas and near transmission cables.⁸⁴ Some commercial fishing industry groups claim that while the impact of any single offshore wind development may be *de minimis*, the cumulative impact of development activity will be significant.⁸⁵ In at least one instance, BOEM has been receptive to this critique, expanding its environmental impact analysis of the Vineyard Wind project to consider the cumulative impacts of that project and other proposed nearby projects.⁸⁶

80. See Sara Swann, *Why the Fishing Industry is Against Offshore Wind Farms Near Ocean City*, THE DAILY TIMES (July 20, 2018), <https://www.delmarvanow.com/story/news/local/maryland/2018/07/20/offshore-wind-farm-alternative-green-energy-ocean-city-maryland/792786002> [<https://perma.cc/UPJ9-KC2P>].

81. See, e.g., Letter from Christopher M. Moore, Executive Director, Mid-Atlantic Fishery Management Council, to Michelle Morin, Program Manager, Bureau of Ocean Energy Management's Office of Renewable Energy (Aug. 2, 2021) (on file with Regulations.gov).

82. See, e.g., Letter from Christopher M. Moore, Executive Director, Mid-Atlantic Fishery Management Council, to Michelle Morin, Program Manager, Bureau of Ocean Energy Management's Office of Renewable Energy (Aug. 30, 2021) (on file with Regulations.gov).

83. See *infra* INTRODUCTION.

84. See BUREAU OF OCEAN ENERGY MGMT., FISHERMEN WORKSHOPS: PROVIDING INPUT INTO BOEM'S IDENTIFICATION OF AN OFFSHORE WIND ENERGY AREA OFFSHORE NEW YORK 7-10 (2015); Stone, *supra* note 8. The effects of offshore wind development on commercial fishing are not fully understood and are subject to ongoing scientific study and debate. See Andrew B. Gill, et al., *Setting the Context for Offshore Wind Development Effects on Fish and Fisheries*, 33 OCEANOGRAPHY 118, 119 (2020). This paper takes no position in that debate and assumes, for the sake of analysis, that a fishing fleet could prove that an offshore wind project interfered with their operations.

85. See Letter from David E. Frulla et al., Fisheries Survival Fund, to Amanda Lefton, Director, Department of Interior 6-8 (Jul. 26, 2021) (on file with Regulations.gov); Letter from Christopher M. Moore & Thomas A. Nies, Executive Directors, Mid-Atlantic Fishery Mgmt. Council & New England Fishery Mgmt. Council, to Program Manager, Bureau of Ocean Energy Management's Office of Renewable Energy Programs 5-6 (Aug. 26, 2021) (on file with Regulations.gov).

86. Bruce Mohl, *Feds Call for More Study on Vineyard Wind*, COMMONWEALTH MAGAZINE (Aug. 9, 2019), <https://commonwealthmagazine.org/energy/feds-call-for-more-study-on-vineyard-wind> [<https://perma.cc/96D9-3DAP>].

ii. BOEM and Other Groups are Working to Mitigate and Minimize Conflicts Between Commercial Fishing and Offshore Wind Development Interests

BOEM and other groups are working to mitigate and minimize potential conflicts between commercial fisheries and offshore wind development.⁸⁷ BOEM regularly engages with commercial fishermen to get their perspective on the biological and socioeconomic impact of offshore wind development.⁸⁸ This engagement happens through conversations with Regional Fishery Management Councils, participation in state-led fishery advisory group meetings, and through a National Academies Fisheries Steering Committee.⁸⁹

Furthermore, in March 2019, BOEM, along with the National Oceanic and Atmospheric Administration and National Marine Fisheries Service, entered into a ten-year Memorandum of Understanding (MOU) with the Responsible Offshore Development Alliance, a membership coalition of fishing industry associations and fishing companies, to

explore potential collaborations on issues of mutual interest, including: effectively engaging local and regional fishing interests in the offshore wind development process; identifying the most effective ways to bring fishing industry expertise and information into planning and development processes; and developing a collaborative regional research and monitoring framework to ensure decisions are based on the best available science.⁹⁰

BOEM also issued a Request for Information (RFI) to solicit input from the fishing community regarding best practices for avoiding, minimizing, and possibly compensating for impacts from offshore wind

87. See *Fishing Industry Communication and Engagement*, *supra* note 75 (highlighting BOEM's ongoing fishing industry engagement activity, and developer activity).

88. See generally BUREAU OF OCEAN ENERGY MGMT., COMMERCIAL FISHING FREQUENTLY ASKED QUESTIONS WIND ENERGY ON THE OUTER CONTINENTAL SHELF (2018).

89. See generally *id.*

90. Mem. of Understanding Between the Nat'l Oceanic & Atmospheric Admin.'s Nat'l Marine Fisheries Serv., Bureau of Ocean Energy Mgmt., & The Responsible Offshore Dev. Alliance at 2 (2019) <https://www.boem.gov/sites/default/files/documents//NOAA-BOEM-MOU.pdf>.

development.⁹¹ Specifically, the RFI sought input on project siting, design, navigation and access; safety measures and training; environmental monitoring; and financial compensation for fishing losses.⁹² The RFI also sought broader feedback on how to develop guidance related to commercial fisheries impacts.⁹³ BOEM published draft guidance based on the input it received during the RFI process.⁹⁴ The draft guidance recommends lessees engage directly with fishing communities prior to carrying out development activities and made specific recommendations about project design elements and siting choices that would avoid or minimize impacts to fisheries.⁹⁵ The draft guidelines also recommended that lessees work with state and federal fisheries management agencies to monitor their environmental impacts and consider establishing a compensation process “if a project is likely to result in lost income to commercial and recreational fisheries.”⁹⁶

Finally, BOEM requires offshore wind developers to include information on commercial fisheries affected by development activities when submitting project proposals, and failure to do so can result in delay or denial of plan approval.⁹⁷ BOEM has developed guidelines to help developers meet these requirements through fisheries engagement and communications plans.⁹⁸ Many private developers have hired fisheries liaisons, and some have published fisheries communications plans on their websites.⁹⁹ For example, Vineyard Wind’s fisheries engagement plan includes surveys, meetings, email and social media updates, radio alerts to vessels at sea, 24-hour phone lines, trade

91. BUREAU OF OCEAN ENERGY MGMT., REQUEST FOR INFO. GUIDANCE FOR MITIGATING IMPACTS TO COMMERCIAL AND RECREATIONAL FISHERIES FROM OFFSHORE WIND ENERGY DEV. 2 (2021).

92. *Id.*

93. *Id.* at 4.

94. *Reducing or Avoiding Impacts of Offshore Wind Energy on Fisheries*, BUREAU OF OCEAN ENERGY MGMT., <https://www.boem.gov/renewable-energy/reducing-or-avoiding-impacts-offshore-wind-energy-fisheries> [<https://perma.cc/4NDF-EE7Z>] (last visited Mar. 13, 2023).

95. BUREAU OF OCEAN ENERGY MGMT., DRAFT GUIDELINES FOR MITIGATING IMPACTS TO COMMERCIAL AND RECREATIONAL FISHERIES ON THE OUTER CONTINENTAL SHELF PURSUANT TO 30 CFR PART 585 4-6 (2022).

96. *Id.* at 7.

97. BUREAU OF OCEAN ENERGY MGMT., GUIDELINES FOR PROVIDING INFORMATION ON FISHERIES SOCIAL AND ECONOMIC CONDITIONS FOR RENEWABLE ENERGY DEVELOPMENT ON THE ATLANTIC OUTER CONTINENTAL SHELF PURSUANT TO 30 CFR PART 585 (2020).

98. *Id.*

99. See *Fishing Industry Communication and Engagement*, supra note 75.

publications, and direct one-on-one contact with individual fishermen, facilitated by paid fisheries liaisons and representatives.¹⁰⁰

However, these efforts have not always been adequate to address fishing industry concerns,¹⁰¹ and some groups have pursued litigation against BOEM and developers to prevent, delay, or modify what they see as harmful offshore wind projects.¹⁰² These suits tend to focus in part on BOEM's alleged failure to mitigate fishing impacts during the leasing process.¹⁰³ Thus, the laws governing the leasing process are of central importance in these suits.

II. THE LAWS GOVERNING THE OFFSHORE WIND LEASING PROCESS

The process of leasing land on the outer continental shelf for renewable energy production is governed by the Outer Continental Shelf Lands Act (OCSLA). This section describes the OCSLA broadly, as well as the specific provisions relating to offshore wind leasing; the process laid out in BOEM's rules for issuing a lease; BOEM's obligations under the National Environmental Policy Act (NEPA) during the leasing process; and finally, how these laws and rules can provide a cause of action for affected commercial fishing fleets seeking to challenge offshore wind development.

1. *The Outer Continental Shelf Lands Act*

Congress passed the OCSLA in 1953 “[t]o provide for the jurisdiction of the United States over the submerged lands of the outer Continental Shelf, and to authorize the Secretary of the Interior to lease such lands for certain purposes,” namely oil and gas drilling, and sulphur and other mineral mining.¹⁰⁴ The OCSLA further stated that it is “the

100. KRISTA BANK AND ERIK PECKAR, VINEYARD WIND LLC, FISHERIES COMM’N PLAN 10 (9th ed. 2020); *We Want to Hear from Fishermen*, VINEYARD WIND LLC, <https://www.vineyardwind.com/fisheries> [<https://perma.cc/S9VC-PLR6>] (last visited Mar. 13, 2023).

101. See, e.g., Kirk Moore, *Offshore Wind Advocates, Fishermen Push Last Arguments for BOEM Study*, NAT’L FISHERMAN (Jul. 27, 2020), <https://www.nationalfisherman.com/national-international/offshore-wind-advocates-fishermen-push-last-arguments-for-boem-study> [<https://perma.cc/6GF6-B4PM>].

102. De La Garza, *supra* note 9.

103. See, e.g., Complaint at 1-2, *Seafreeze Shoreside, Inc. v. U.S. Dep’t of the Interior*, No. 1:21-cv-03267 (D.D.C. Dec. 15, 2021), 2021 WL 5988803.

104. Outer Continental Shelf Lands Act, Pub. L. No. 83-212, 67 Stat. 462, (codified as amended at 43 U.S.C.A. §§ 1331-1356b (1953)).

policy of the United States that . . . this subchapter shall be construed in such manner that the character as high seas of the waters above the outer Continental Shelf and the right to navigation and fishing therein shall not be affected.”¹⁰⁵ For more than fifty years, OCSLA energy leases were issued only for oil and gas-related activities.¹⁰⁶

However, the Energy Policy Act of 2005 (EPAAct) opened the door to leases for renewable energy production.¹⁰⁷ Section 388 of that law, codified as OCSLA § 8(p), grants the Secretary of the Interior the authority to issue leases to produce energy from sources other than oil and gas.¹⁰⁸ OCSLA § 8(p)(4) directs the Secretary to ensure activity under that subsection is carried out . . .

[I]n a manner that provides for—

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

105. 43 U.S.C. § 1332(2) (1953).

106. *OCS Lands Act History*, BUREAU OF OCEAN ENERGY MGMT., <https://www.boem.gov/oil-gas-energy/leasing/ocs-lands-act-history> (last visited Mar. 13, 2023).

107. Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594.

108. *Id.* § 388(p)(1)(C), 119 Stat. at 744-45 (codified at 43 U.S.C.A. § 1337(p)(1)(C)).

(L) oversight, inspection, research, monitoring, and enforcement relating to a lease, easement, or right-of-way under this subsection.¹⁰⁹

The extent to which this language imposes a legal obligation on the Secretary, and by extension BOEM,¹¹⁰ to mitigate fishing impacts related to renewable energy leasing activity remains an open legal question that is the focus of this comment. But first, it is worth understanding how the renewable energy leasing process under the OCSLA works.

2. *Renewable Energy Leasing Under the OCSLA*

Following the passage of the EPAct, BOEM's precursor, the Mineral Management Service,¹¹¹ promulgated rules under OCSLA § 8(p), laying out the process for issuing a lease for renewable energy production on the outer continental shelf.¹¹² These rules provide that BOEM should follow different procedures depending on whether a lease is solicited by the agency or proposed by a developer, and whether there are multiple developers interested in a lease area.¹¹³

i. Initiating the Leasing Process

BOEM may initiate the leasing process by soliciting interest in a renewable energy lease by publishing a request for interest in the Federal Register.¹¹⁴ Alternatively, a developer may initiate the process by

109. 43 U.S.C. § 1337(p)(4).

110. The Secretary's authority under § 8 of the OCSLA is delegated to BOEM by legislative rule. *See* 30 C.F.R. § 585.100 (2022).

111. The Mineral Management Service was reorganized into three separate independent entities in 2010. *The Reorganization of the Former MMS*, BUREAU OF OCEAN ENERGY MGMT., <https://www.boem.gov/about-boem/reorganization/reorganization-former-mms> [https://perma.cc/2MQ3-RRHM] (last visited Mar. 23, 2023). BOEM took over the Service's leasing functions, the Office of Natural Resources Revenue handles revenue collection, and the Bureau of Safety and Environmental Enforcement handles safety and environmental regulations. *Id.*

112. Renewable Energy and Alternate Uses of Existing Facilities on the Outer Continental Shelf, 74 Fed. Reg. 19638 (April 29, 2009). The rules were amended a few times following their initial promulgation, most notably in 2011. *See* Renewable Energy Alternate Uses of Existing Facilities on the Outer Continental Shelf-Acquire a Lease Noncompetitively, 76 Fed. Reg. 28178 (May 16, 2011), and are now codified in 30 C.F.R. § 585.100 *et seq.*

113. 30 C.F.R. §§ 585.210, 585.211(a), 585.212, 585.230 (2022).

114. *Id.* § 585.210.

requesting a lease from BOEM.¹¹⁵ When BOEM receives a request from a qualified developer,¹¹⁶ the agency publishes a request for interest in the Federal Register to determine if other developers are interested in developing the lease area.¹¹⁷

ii. Competitive Lease Issuance

If BOEM identifies interest in a potential lease site from more than one developer, the agency may elect to proceed with the competitive lease sale process.¹¹⁸ This process involves several steps: first, BOEM publishes a Call for Information and Nominations (“Call”) for leasing in specified areas requesting comments on “areas which should receive special consideration and analysis . . . , socioeconomic, biological, and environmental information” including a potential lease area’s use for “navigation, recreation, and fisheries,” and “areas to be considered by the respondents for leasing.”¹¹⁹

Next, BOEM consults with “appropriate Federal agencies, States, local governments, affected Indian Tribes, and other interested parties” to identify areas to be considered for leasing (the “Area Identification Process”).¹²⁰ In the Area Identification Process, BOEM may assess “the potential effect of leasing on the human, marine, and coastal environments” of both the areas nominated in the Call and “other areas that BOEM determines are appropriate for leasing.”¹²¹ BOEM then establishes measures to mitigate adverse impacts.¹²²

Following the Area Identification Process, BOEM publishes a Proposed Sale Notice in the Federal Register and sends it directly to the “Governor of any affected State, any Indian Tribe that may be affected, and the executive of any local government that might be affected,”

115. *Id.* § 585.230.

116. Specifically, a developer’s unsolicited lease application must include (1) a description of the area requested for leasing, (2) a “general description of . . . objectives and facilities . . . used to achieve those objectives,” (3) a schedule of proposed activities, (4) data relating to resource quality and potential environmental impacts, (5) a statement that the proposed leasing activities conforms with state or local energy planning efforts, (6) a statement of qualifications and (7) an acquisition fee. 30 C.F.R. § 585.230 (2022).

117. 30 C.F.R. § 585.231(b) (2022).

118. *Id.* § 585.210. If BOEM does not identify competitive interest in a lease area, it still may move forward, following slightly amended procedures. *See id.* §§ 585.230-585.234. This is not common, however.

119. *Id.* § 585.211(a).

120. *Id.* § 585.211(b).

121. *Id.* § 585.211(b)(1)-(2).

122. *Id.* § 585.211(b)(2)-(4).

allowing sixty days for comment submission.¹²³ The Proposed Sale Notice proposes an area for leasing, lease provisions, and auction and award procedures.¹²⁴

Following the comment period, but at least thirty days before the date of the final sale, BOEM publishes a Final Sale Notice in the Federal Register including the same information included in the Proposed Sale Notice, along with any revisions based on the comments submitted.¹²⁵ BOEM then conducts a lease auction according to the procedures outlined in the Final Sale Notice and awards the lease to the winning bidder.¹²⁶

iii. Post-award Procedures

Once BOEM has awarded a lease, the winning bidder has twelve months to submit either a Site Assessment Plan (“SAP”) or a combination Site Assessment and Construction Operations Plan (“COP”).¹²⁷ A SAP “describes the activities (e.g., installation of meteorological towers, meteorological buoys) [a lessee plans] to perform for the characterization of [its] commercial lease, including [its] project easement, or to test technology devices.”¹²⁸ A COP, on the other hand, “describes [a lessee’s] construction, operations, and conceptual decommissioning plans” under its lease.¹²⁹ As mentioned above, the COP may be submitted concurrently with the SAP, but if the SAP is submitted independently, the COP must be submitted within five years of approval of the SAP.¹³⁰

A SAP, COP, or combination SAP/COP must demonstrate that the planned activities conform with all applicable laws and regulations; are safe; will not “unreasonably interfere with other uses of the OCS”; will not “cause undue harm or damage to” natural resources, life, property, the environment, or historical or archaeological sites; and conform to the highest standards for technology, management practices, and personnel.¹³¹

123. *Id.* § 585.211(c).

124. *Id.* § 585.216.

125. *Id.* §§ 585.211(d), 585.216.

126. *Id.* §§ 585.220-585.224.

127. *Id.* § 585.235.

128. *Id.* § 585.605(a).

129. *Id.* § 585.620.

130. *Id.* § 585.235.

131. *Id.* §§ 585.606, 585.621.

Notably, a SAP, COP, or combination SAP/COP must describe “those resources, conditions, and activities . . . that could be affected” by offshore wind development activity, including “recreational and commercial fishing.”¹³² Once submitted, “BOEM may approve, disapprove, or approve with modifications” any SAP,¹³³ COP,¹³⁴ or combination SAP/COP. No lease activity may take place until the plan describing those activities is approved.¹³⁵

3. *BOEM’s NEPA Obligations During the Renewable Energy Leasing Process*

The National Environmental Policy Act (NEPA) plays a substantial role in the offshore wind leasing process. NEPA requires an agency to take a “hard look” at the environmental consequences of a proposed action involving federal money or resources before moving forward.¹³⁶ The central requirement of NEPA is that federal agencies must prepare an Environmental Impact Statement (EIS) before undertaking any activity “significantly affecting the quality of the human environment.”¹³⁷ An EIS must describe in detail the environmental impact of and any alternative to the proposed action, “the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity, and any irreversible and irretrievable commitments of resources which would be involved.”¹³⁸ An agency conducting an EIS must also consult with “any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved.”¹³⁹

When it is not clear whether an agency action will require an EIS, an agency may prepare a preliminary Environmental Assessment (EA) to determine whether a planned activity will “significantly affect[] the quality of the human environment,” and thus necessitate an EIS.¹⁴⁰ The EA must “[b]riefly discuss the purpose and need for the proposed action, alternatives . . . , and the environmental impacts of the proposed action

132. *Id.* §§ 585.611(b)(7), 585.627(a)(7).

133. *Id.* § 585.613(e).

134. *Id.* § 585.628(f).

135. *Id.* §§ 585.605(c), 585.613, 585.620(c).

136. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976).

137. 42 U.S.C.A. § 4332(C) (2022).

138. 42 U.S.C.A. § 4332(C)(i)-(v).

139. *Id.* § 4332(C) (flush language).

140. *Id.* § 4332(C); *see* 40 C.F.R. § 1501.5 (2022).

and alternatives,”¹⁴¹ and conclude with either a Finding of No Significant Impact (FONSI) that indicates no EIS is necessary or a determination that that an EIS is necessary.¹⁴²

NEPA is implicated throughout the OCSLA renewable energy leasing process. Specifically, NEPA review is required prior to approval of a COP,¹⁴³ is required “as appropriate” prior to SAP approval,¹⁴⁴ and can be triggered prior to lease sale during the Area Identification Process.¹⁴⁵ Thus, a wind project in federal water may undergo several rounds of NEPA analysis before final construction may commence.

4. *Legal Avenues for Citizens to Challenge the OCSLA Leasing Process*

An individual or group seeking to challenge the issuance of a renewable energy lease under the OCSLA has two possible avenues to bring their claims.¹⁴⁶ First, the OCSLA includes a citizen suit provision allowing private individuals to compel compliance with its terms. Second, the Administrative Procedure Act (APA) allows private individuals affected by a final agency action to challenge that action in court.

i. The OCSLA Citizen Suit Provision

The OCSLA includes a citizen suit provision allowing “any person having a valid legal interest which is or may be adversely affected” to bring suit to “compel compliance with” the OCSLA “against any person[,]” including federal government officials, “for any alleged violation of any provision of this subchapter.”¹⁴⁷ Notably, under this provision, any potential plaintiff must file notice with the Secretary of the Interior and any other appropriate government official at least sixty days prior to filing suit.¹⁴⁸

141. 40 C.F.R. § 1501.5(c).

142. *Id.* § 1501.5(c).

143. 30 C.F.R. § 585.628(b) (2022).

144. *Id.* § 585.613(b).

145. *See id.* § 585.211.

146. Any party who wishes to bring suit must also demonstrate they have standing to sue under Article III of the United States Constitution by showing that they have suffered an “injury in fact,” caused by the defendant’s actions, and redressable by a favorable ruling. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992).

147. 43 U.S.C. § 1349(a)(1).

148. *Id.* § 1349(2)(A).

ii. The Administrative Procedure Act

The APA allows “a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute” to challenge such actions in court.¹⁴⁹ A reviewing court must “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law”¹⁵⁰

III. JUDICIAL AND REGULATORY INTERPRETATIONS OF
OCSLA § 8(P)(4)

While a few courts have considered challenges to offshore wind project brought under OCSLA § 8(p)(4), to date, these decisions have not clarified whether and to what extent that provision requires BOEM to mitigate impacts on fisheries. However, the Department of Interior’s legislative rules guiding the leasing process and interpretive opinions of the Department of Interior Solicitor’s Office do shed some light on that agency’s understanding of its obligation under that provision.

I. Case Law

A central question in cases brought by commercial fishing groups challenging offshore wind development is whether the Secretary of the Interior, acting through BOEM, has violated the requirements of OCSLA § 8(p)(4).¹⁵¹ Specifically, plaintiffs have raised claims that BOEM failed to carry out leasing activity “in a manner that provides for . . . prevention of interference with reasonable uses (as determined by the Secretary) . . . [and] consideration of . . . any other use of the sea or seabed, including use for a fishery” by failing to mitigate or prevent fisheries impacts.¹⁵² Plaintiffs have claimed that these failures also violated other parts of § 8(p)(4), such as the requirements that BOEM provide for “safety,”¹⁵³ “protection of the environment,”¹⁵⁴ “prevention of waste,”¹⁵⁵ and

149. 5 U.S.C. § 702 (1982).

150. *Id.* § 706(2)(A) (1966).

151. *See* Fisheries Survival Fund v. Jewell, 236 F.Supp.3d 332, 334 (2017); Complaint at 35-45, Seafreeze Shoreside, Inc. v. U.S. Dep’t of the Interior, No. 1:21-cv-03267 (D.D.C. filed Dec. 15, 2021), 2021 WL 5988803.

152. 43 U.S.C. § 1337(p)(4)(I), (J).

153. *Id.* § 1337(p)(4)(A).

154. *Id.* § 1337(p)(4)(B).

155. *Id.* § 1337(p)(4)(C).

conservation of resources.¹⁵⁶ Plaintiffs typically also argue that the agency's decision-making was the result of an inadequate environmental review under NEPA.¹⁵⁷

Claims under OCSLA § 8(p)(4) have been brought in three cases decided by the D.C. Circuit. However, none of these decisions directly addressed the issue of fishing impacts; thus, their applicability to that issue is limited.

i. *Town of Barnstable v. F.A.A.*

The first time a federal appeals court considered claims implicating OCSLA § 8(p)(4) was in *Town of Barnstable v. F.A.A.*, a 2011 decision issued by the D.C. Circuit. The case involved a challenge to the Federal Aviation Administration's (FAA's) conditional "Determination of No Hazard" regarding the proposed Cape Wind Energy Project.¹⁵⁸ The project, originally proposed in 2001, was an early effort to construct 130 wind turbines in the Horseshoe Shoal Region of Nantucket Sound of the coast of Massachusetts.¹⁵⁹ From the start, it was met with well-funded opposition from local landowners who objected to the project's potential impact on the environment, navigation, and viewsheds.¹⁶⁰ This opposition took a particularly litigious form, and the proposal "slogged through state and federal courts and agencies for more than a decade."¹⁶¹

In *Town of Barnstable*, the D.C. Circuit considered OCSLA § 8(p)(4) in the context of standing. Specifically, when deciding whether the FAA's determination caused the plaintiff's alleged injury (as is required to show standing under Article III of the U.S. Constitution), the court noted that the ultimate decision to allow the project to move forward, which would cause the aviation hazards that constituted plaintiffs'

156. *Id.* § 1337(p)(4)(D).

157. See *Fisheries Survival Fund v. Jewell*, 236 F.Supp.3d 332, 334 (2017); *Complaint at 65-78, Seafreeze Shoreside, Inc. v. U.S. Dep't of the Interior*, No. 1:21-cv-03267 (D.D.C. filed Dec. 15, 2021), 2021 WL 5988803.

158. See *Town of Barnstable v. F.A.A.*, 659 F.3d 28, 30-31 (D.C. Cir. 2011).

159. See *Pub. Emps. For Env't Resp. v. Hopper*, 827 F.3d 1077, 1080 (D.C. Cir. 2016).

160. Seelye, *supra* note 73.

161. PEER, 827 F.3d at 1084 (citing *All. to Protect Nantucket Sound, Inc. v. U.S. Dep't of Army*, 288 F.Supp.2d 64 (D. Mass. 2003), *aff'd*, 398 F.3d 105 (1st Cir. 2005); *All. to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd.*, 448 Mass. 45, 858 N.E.2d 294 (2006)); see also *Town of Barnstable v. O'Connor*, 786 F.3d 130 (1st Cir. 2015); Timothy H. Powell, *Revisiting Federalism Concerns in the Offshore Wind Energy Industry in Light of Continued Local Opposition to the Cape Wind Project*, 92 BOSTON UNIV. L. R. 2023, 2032-37 (2012) (summarizing state and federal legal challenges to the Cape Wind project prior to 2012).

alleged harm, rested with the Department of the Interior at a later stage in the process.¹⁶² However, the court noted that OCSLA § 8(p)(4) required the Department of the Interior to “take into account the ‘safety’ of the activities enabled” by its approval; thus, it had to take the FAA’s determination “very, very seriously” before issuing approval.¹⁶³ The court, therefore, concluded that the causation element of standing had been met.¹⁶⁴

ii. Public Employees for Environmental Responsibility v. Hopper

The D.C. Circuit again considered claims implicating OCSLA § 8(p)(4) when it heard another challenge related to the Cape Wind Energy Project in *Public Employees for Environmental Responsibility v. Hopper* (hereinafter *PEER*). *PEER* was an appeal from an earlier decision in the U.S. District Court for the District of Columbia, and several orders that followed it, partially rejecting summary judgment to plaintiffs on various claims “that the government violated half a dozen federal statutes in allowing the project to move through the regulatory approval process.”¹⁶⁵ The plaintiff-appellants included conservation organizations, the Town of Barnstable, Massachusetts, and several individuals.¹⁶⁶ They brought claims concerning various approvals by different agencies,¹⁶⁷ none of which directly related to fisheries impacts, though they did challenge BOEM’s alleged failure to rely on adequate geophysical and geotechnical surveys when it conducted an EIS for the Cape Wind Project.¹⁶⁸ Plaintiffs brought claims related to this alleged failure under NEPA, the OCSLA, and the National Historic Preservation Act.¹⁶⁹

In developing the EIS, BOEM had relied on surveys provided by Cape Wind.¹⁷⁰ However, emails from BOEM’s geologist Richard Clingan indicated that he was not satisfied with the quality of these surveys.¹⁷¹ Based on these emails, plaintiffs argued that BOEM did not

162. *Town of Barnstable v. F.A.A.*, 659 F.3d 28, 31-32 (D.C. Cir. 2011).

163. *Id.* at 32.

164. *Id.* at 34.

165. *PEER*, 827 F.3d at 1081; *see Pub. Emps. for Env’t Resp. v. Beaudreau*, 25 F.Supp.3d 67, 130 (D.D.C. 2014).

166. *Alliance to Protect Nantucket Sound Br. at ii-iii*, *PEER*, 827 F.3d 1077 (D.C. Cir. 2016).

167. *PEER*, 827 F.3d at 1081.

168. *Id.* at 1083; *see* 42 U.S.C. §§ 4331-4332 (2022).

169. *Alliance to Protect Nantucket Sound Br. at 27*, *PEER*, 827 F.3d 1077 (D.C. Cir. 2016).

170. *PEER*, 827 F.3d at 1082.

171. *Id.*

take a “hard look” at the geological and geophysical environment that was required by NEPA, and therefore, the EIS was defective.¹⁷²

BOEM, on the other hand, argued that the distinction “between the ‘initial decision’ to issue a lease and the consequences of that decision” was significant, and that while the geological and geophysical data may have been insufficient to support the eventual construction of wind turbines, there was “at least sufficient data ‘to support [the Bureau’s] initial decision . . . to offer a lease’”¹⁷³ The court found this argument unpersuasive, holding that that “the impact statement must . . . look beyond the decision to offer a lease and consider the predictable consequences of that decision,” including the eventual construction of wind turbines.¹⁷⁴

Plaintiffs asserted that, by failing to obtain adequate geological and geophysical surveys, BOEM had not only violated NEPA but also the OCSLA and the National Historic Preservation Act.¹⁷⁵ As to the OCSLA, plaintiffs alleged that BOEM had failed to meet OCSLA § 8(p)(4)’s requirement that it provide for, among others, safety, protection of the environment, and conservation of resources during leasing activity.¹⁷⁶

Plaintiffs asserted that these statutes required BOEM to obtain adequate surveys before approving a COP, which BOEM had already done for the Cape Wind Project, and that the requirements could not be waived or departed from in this instance.¹⁷⁷ The court disagreed, holding that while OCSLA § 8(p)(4) and the Preservation Act “may require Cape Wind to obtain subsurface data before beginning construction, they do not independently require geological surveys before the Bureau can approve a construction plan.”¹⁷⁸ Because it concluded there was no OCSLA or National Historic Preservation Act violation, the court did not require Cape Wind to put its project on hold and only required that BOEM remedy its NEPA violation by supplementing its EIS “with

172. “Plaintiffs argue that the Bureau’s 2009 [EIS] is arbitrary and capricious because it does not adequately assess the seafloor and subsurface hazards of the Sound.” *Id.*

173. *Id.* (quoting Defendants’ Br. at 42).

174. *Id.*

175. Alliance to Protect Nantucket Sound Br. at 35-37, PEER, 827 F.3d 1077 (D.C. Cir. 2016). The National Historic Preservation Act requires consideration of possible effects on “historic properties” including shipwrecks, lighthouses, and prehistoric archeological sites, before an agency engages in a “federally-assisted undertaking,” including the issuance of a renewable energy lease on the outer continental shelf. 54 U.S.C. § 306108 (2014).

176. Alliance to Protect Nantucket Sound Br. at 35, PEER, 827 F.3d 1077 (D.C. Cir. 2016); see 43 U.S.C.A. § 1337(p)(4)(A)-(B), (D).

177. PEER, 827 F.3d at 1085.

178. *Id.*

adequate geological surveys before Cape Wind may begin construction.”¹⁷⁹

iii. Fisheries Survival Fund v. Haaland

Another suit, filed only a few months after the *PEER* decision, seemed to implicate the question of OCLSA § 8(p)(4)’s applicability to fishing impacts more directly.¹⁸⁰ In 2016, following BOEM’s release of a Final Sale Notice for a lease area off the coast of New York (hereinafter the “NY Wind Energy Area” or “NY WEA”), as well as an EA finding no significant impact associated with the lease issuance, a group of plaintiffs representing fishing interests brought suit to prevent BOEM from issuing the lease.¹⁸¹ The plaintiffs sought injunctive and declaratory relief under the APA and the OCSLA citizen suit provision, asserting violations of NEPA and OCSLA § 8(p)(4).¹⁸²

Relying on the cause of action under APA § 706, the plaintiffs asserted that BOEM violated NEPA by (1) “failing to consider the foreseeable, likely impacts of a wind farm in the NY WEA on fisheries, ocean and benthic fish habitat, protected species, navigation, and others prior to issuing the FSN;” (2) “segmenting and limiting its NEPA analysis to its initial decision to offer a lease and (to some extent) the development of an SAP, rather than looking beyond the decision to offer a lease and consider the predictable consequences of its [Final Sale Notice], specifically the construction and operation of a wind farm in the NY WEA;” and (3) “failing to consider reasonable alternative sites for

179. *Id.* at 1084. While the court’s holding in *PEER* was favorable to Cape Wind, the project never came to fruition, in large part due to “endless litigation” initiated by project opponents who embraced a strategy of “delay, delay, delay” to ultimately prevent its construction. Seelye, *supra* note 73.

180. Complaint at 1, *Fisheries Survival Fund v. Jewell*, 236 F.Supp.3d 332 (D.D.C. Dec. 8, 2016), (No. 1:16-cv-02409).

181. *Fisheries Survival Fund v. Haaland*, 858 Fed. Appx. 371, 372 (D.C. Cir., May 20, 2021).

182. Complaint at 24-29, *Fisheries Survival Fund*, 236 F.Supp.3d 332 (No. 1:16-cv-02409); Atlantic Wind Lease Sale 6 (ATLW-6) for Commercial Leasing for Wind Power on the Outer Continental Shelf Offshore New York—Final Sale Notice MMAA104000, 81 Fed. Reg. 75429, 75431 (Oct. 31, 2016); Environmental Assessment for Commercial Wind Lease Issuance and Site Assessment Activities on the Atlantic Outer Continental Shelf (OCS) Offshore New York; MMAA104000, 81 Fed. Reg. 36344, 36344 (June 6, 2016).

the wind farm project” in their EA.¹⁸³ The plaintiffs maintained that BOEM should have prepared a full EIS before issuing the lease.¹⁸⁴

The plaintiffs’ OCSLA claims rested on the premise that § 8(p)(4) “imposes a legal obligation on the government to protect ‘safety,’ existing ‘natural resources’ and any ‘reasonable uses,’ of a proposed lease area, and to consider areas for fishing and navigational purposes.”¹⁸⁵ The plaintiffs also asserted that the language from the original 1953 version of the OCSLA, which remains in the law today, proclaims that “the character of the waters above the outer continental shelf as high seas and the right of navigation and fishing therein shall not be affected” by leasing activities,¹⁸⁶ and cited a First Circuit decision from 1979 to suggest that this language “imposes a duty not to ‘go forward with a lease sale in a particular area if it would create unreasonable risks [to fisheries] in spite of all feasible safeguards.’”¹⁸⁷

The plaintiffs’ first claim under the OCSLA was that “BOEM did not protect ‘safety,’ existing ‘natural resources,’ and ‘reasonable uses’ as the OCSLA requires, because . . . it proceeded with the FSN without considering the risk that a windfarm” constructed in the NY WEA would pose to fishing and other uses.¹⁸⁸ They also challenged BOEM’s rule allowing a developer to propose a lease through the unsolicited bidding process, claiming it allows “a private wind developer to select an ocean area for development without adequate public input in violation of protections for ‘safety,’ existing ‘natural resources,’ and ‘reasonable uses.’”¹⁸⁹

While the resolution of these questions could have been illuminating, the court declined to answer them. Instead, it dismissed the plaintiffs’ OCSLA claims on the grounds that they had failed to provide sixty days’ notice to BOEM before filing suit, as required by the citizen suit provision.¹⁹⁰ The court also dismissed the plaintiffs’ NEPA claims as unripe,¹⁹¹ noting that an agency needs to prepare an EIS “only once it

183. Complaint at 25-26, *Fisheries Survival Fund*, 236 F.Supp.3d 332 (No. 1:16-cv-02409).

184. *Id.* at 26.

185. *Id.* at 27 (citing 43 U.S.C.A. §§ 1337(p)(4)(I)-(J)).

186. 43 U.S.C. § 1332(2); *see also* Complaint at 27, *Fisheries Survival Fund*, 236 F.Supp.3d 332 (No. 1:16-cv-02409).

187. Complaint at 27, *Fisheries Survival Fund*, 236 F.Supp.3d 332 (No. 1:16-cv-02409) (quoting *Massachusetts v. Andrus*, 594 F.2d 872, 891 (1st Cir. 1979)).

188. *Id.* at 27-28 (citing 43 U.S.C.A. §§ 1337(p)(4)(I)-(J)).

189. *Id.* at 28 (citing 43 U.S.C.A. §§ 1337(p)(4)(I)-(J)).

190. *Fisheries Survival Fund v. Jewell*, No. 16-cv-2409 (TSC), 2018 WL 4705795 at *11 (D.D.C. Sept. 30, 2018).

191. *Id.* at *10.

reaches a critical stage of a decision which will result in irreversible and irretrievable commitments of resources to an action that will affect the environment.”¹⁹² In cases involving multi-stage leasing programs, this occurs once the agency relinquishes the authority to disallow “all surface disturbing activities.”¹⁹³ The court reasoned that “[o]n its own, the lease at issue does no more than grant Statoil the exclusive right to submit a Site Assessment Plan and Construction and Operations Plan to BOEM for approval” and BOEM retained the ability to deny either.¹⁹⁴ Thus, the court affirmed the district court’s dismissal of the suit, and the questions it raised about OCSLA § 8(p)(4)’s application remained unresolved.¹⁹⁵

2. *Regulatory Interpretations*

On the other hand, regulatory interpretations of OCSLA § 8(p)(4) do provide some insights on this issue. Specifically, the DOI Solicitor’s Office has issued two opinion memorandums analyzing the Secretary’s obligations under § 8(p)(4) to mitigate or minimize fishing impacts while carrying out leasing activity. These opinions, which do not carry the force of law, are nonetheless indicative of the agency’s understanding of its obligations under § 8(p)(4) and how that understanding has shifted with changing Presidential Administrations.

On December 14, 2020, during the final weeks of the Trump Administration, DOI Solicitor Daniel H. Jorjani¹⁹⁶ weighed in on the issue of the Secretary’s obligations under OCSLA § 8(p)(4) to mitigate fishing impacts.¹⁹⁷ Jorjani, in a memorandum opinion addressed to the Secretary of the Interior, urged a “nuanced interpretation” of §

192. *Id.* at *7 (quoting *Ctr. for Biological Diversity v. U.S. Dep’t of Interior*, 563 F.3d 466, 479 (D.C. Cir. 2009)).

193. *Id.* at *7 (quoting *Wyoming Outdoor Council v. United States Forest Serv.*, 165 F.3d 43, 49 (D.C. Cir. 1999)).

194. *Id.* at *8.

195. *Id.*

196. The Solicitor of the Department of the Interior is appointed by the President and confirmed by the Senate. *See* U.S. OFF. OF PERS. MGMT., UNITED STATES GOVERNMENT POLICY AND SUPPORTING POSITIONS A/K/A “PLUM BOOK” 116 (2020).

197. *See generally* U.S. Dep’t. of the Interior, Off. of the Solicitor, M-37059, Mem. on Secretary’s Duty to Prevent Interference with Reasonable Uses of the Exclusive Economic Zone, the High Seas, and the Territorial Seas in Accordance with Outer Continental Shelf Lands Act Subsection 8(p), Alternate Energy-related Uses on the Outer Continental Shelf (Dec. 14, 2020).

8(p)(4)(I),¹⁹⁸ which requires the Secretary to conduct leasing activity in a manner that “provides for . . . prevention of interference with reasonable uses (as determined by the Secretary) of the exclusive economic zone, the high seas, and the territorial seas.”¹⁹⁹

Jorjani argued that while a strict textualist analysis of the provision would prohibit any and all interference with fishing activity, such a construction is impermissibly narrow.²⁰⁰ Instead, according to Jorjani, the provision should be read to prevent “all interference, if the proposed activity would lead to unreasonable interference, but not the type of interference that would be described as *de minimis* or reasonable.”²⁰¹ Jorjani further urged the Secretary to consider “not only the individual proposed activity but how that activity would add to the overall level of interference with a reasonable use and to consider the nature of the interference from the perspective of the other users” when conducting leasing activities.²⁰² Thus, the determination of what constitutes “unreasonable interference” would be based on the perspective of the fishing user and would consider all the cumulative interference from a proposed activity and other “pre-existing wind energy activities.”²⁰³ Jorjani described this approach as “err[ing] on the side of less interference rather than more interference” with fishing uses.²⁰⁴

Jorjani’s memorandum was short-lived, however. In April 2021, less than four months after its issuance, DOI Principal Deputy Solicitor Robert T. Anderson withdrew Jorjani’s memorandum and replaced it with a new memorandum opinion interpreting § 8(p)(4) more broadly.²⁰⁵ Anderson rejected Jorjani’s approach of interpreting § 8(p)(4)(I) on its own to impose strict requirements on the Secretary with regards to fishing impacts, and instead, urged the Secretary to “strike a rational

198. *Id.* at 1-2. The memorandum was prepared in response to an earlier memorandum from the Division of Mineral Resources of the Solicitor’s Office to BOEM’s Office of Renewable Energy Programs advising that § 8(p)(4)(I) requires only that BOEM “prevent interference with the legal right to fish or navigate, rather than prevent physical impediments to fishing and vessel transit.” *Id.* at 1.

199. 43 U.S.C.A. § 1337(p)(4)(I).

200. U.S. Dep’t. of the Interior, *supra* note 197, at 1-2. Jorjani’s analysis assumes the Secretary has determined fishing to be a “reasonable use” as contemplated by § 8(p)(4)(I). *Id.* at 4.

201. *Id.* at 2.

202. *Id.*

203. *Id.* at 11-12.

204. *Id.* at 15.

205. U.S. Dep’t. of the Interior, Off. of the Solicitor, M-37067, Mem. on Secretary’s Duties under Subsection 8(p)(4) of the Outer Continental Shelf Lands Act When Authorizing Activities on the Outer Continental Shelf 1-2 (Apr. 9, 2021).

balance between [OCSLA § 8(p)(4)'s] enumerated goals."²⁰⁶ Anderson noted that case law supports the proposition that when Congress provides "a general requirement that an agency accomplish one or more broadly defined goals[.]" it does not provide a narrow directive, but instead allows that the agency use its discretion, technical expertise, and policy judgment to balance competing interests and goals.²⁰⁷ Anderson noted that several of the provisions of § 8(p)(4) are inherently in tension; thus, reading each enumerated provision as an absolute requirement is impossible.²⁰⁸ According to Anderson, the statute should be read to require "discretionary balancing among its several factors."²⁰⁹ Anderson concluded that the Secretary "retains wide discretion to determine the appropriate balance between two or more goals [enumerated in OCSLA § 8(p)(4)] that conflict or are otherwise in tension."²¹⁰

Thus, DOI has shifted from an interpretation of OCSLA § 8(p)(4) that imposes more strict requirements on the Secretary (and therefore BOEM) to prevent certain fishing impacts during the leasing process, to an interpretation that allows discretionary balancing among that provision's several, and potentially conflicting, statutory goals.

IV. ANALYSIS

Given the dearth of case law on point, the question of BOEM's obligations to mitigate fishing impacts in the offshore wind leasing process remains open. Furthermore, because tensions remain between commercial fishing fleets and offshore wind development, this question is likely to arise in future litigation. This begs the question: how should a court reviewing BOEM's approval of offshore wind leasing activity assess claims that BOEM failed to meet the requirements of OCSLA §

206. *Id.* at 1-2 (quoting U.S. Dep't. of the Interior, *supra* note 197, at 2).

207. *Id.* at 1-4 (citing *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55 (2004); *Lovgren v. Locke*, 701 F.3d 5, 32 (1st Cir. 2012); *Watt v. Energy Action Education Foundation*, 454 U.S. 151 (1981); *Commonwealth of Mass. v. Andrus*, 594 F.2d 872, 889 (1st Cir. 1979)).

208. "[T]he Secretary's obligations to provide for the 'protection of the environment,' the 'prevention of waste,' the 'protection of national security interests of the United States,' and the 'fair return to the United States' may weigh in favor of Secretarial actions to maximize low-emission and renewable electrical generation from offshore wind facilities, but, in some circumstances, the siting and operation of those facilities may not optimally provide for other 'reasonable uses' of the exclusive economic zone." *Id.* at 4 (citing 43 U.S.C. § 1337(p)(4)(B)-(C), (F), (H)-(I)).

209. *Id.* at 4.

210. *Id.* at 5.

8(p)(4) because the approval authorizes some alleged interference with commercial fishing activity?

While many of the provisions of OCSLA § 8(p)(4) could be relevant to this question, for example, the provisions referencing “protection of the environment”²¹¹ and “conservation of the natural resources[,]”²¹²

§§ 8(p)(4)(I) & 8(p)(4)(J) are most directly on point. These provisions require that the Secretary carry out leasing activity . . .

[I]n a manner that provides for . . .

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

(J) consideration of—

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

(ii) any other use of the sea or seabed, including use for a fishery, a sealane, a potential site of a deepwater port, or navigation.”²¹³

These provisions impose both a procedural obligation on BOEM to consider potential fisheries impacts before approving any development activity and a substantive obligation to prevent that activity from interfering with any commercial fishing activity that BOEM deems to be “reasonable,” though the agency has wide discretion to determine what is and is not reasonable.

211. 43 U.S.C.A. § 1337(p)(4)(B).

212. § 1337(p)(4)(D).

213. § 1337(p)(4)(I)-(J). As was mentioned above, the original OCSLA also includes language indicating that it is “the policy of the United States that . . . this subchapter shall be construed in such manner that the character as high seas of the waters above the outer Continental Shelf and the right to navigation and fishing therein shall not be affected.” 43 U.S.C.A. § 1332(2). Per its plain language, this provision is a statement of Congressional policy, not a specific standard that imposes legal obligations on BOEM during the leasing process. Some plaintiffs have attempted to assert claims under this provision of the OCSLA, but in doing so ignore the prefatory language in that section indicating that it is a statement of policy, not an independent legal requirement. *See, e.g.,* Compl. at 27, *Fisheries Survival Fund v. Jewell*, 236 F.Supp.3d 332 (2017) (stating that the OCSLA “requires that ‘the character as high seas of the waters above the outer Continental Shelf and the right to navigation and fishing therein shall not be affected’”); *see also* Compl. at 44, *Seafreeze Shoreside, Inc. v. U.S. Dep’t of the Interior*, No. 1:21-cv-03267 (D.D.C. filed Dec. 15, 2021), 2021 WL 5988803 (making out a similar claim).

1. *OCSLA § 8(p)(4)(J): the Procedural “Consideration” Requirement*

The language of OCSLA § 8(p)(4)(J)’s indicates that its obligation on BOEM is a procedural one, namely “consideration” of other uses of the ocean and seabed including, as are relevant here, “use for a fishery, a sealane . . . or navigation.” Dictionaries define “consideration” as “a matter weighed or taken into account when formulating an opinion or plan;”²¹⁴ or “[s]omething that may be taken into account when forming an opinion.”²¹⁵ Therefore, the requirement that BOEM “consider” other uses implies that BOEM must identify and analyze relevant information about those uses prior to approving any leasing activity, such as a lease issuance, or SAP or COP approval. It does not, however, indicate that BOEM take any particular action to mitigate or prevent any particular impact on that use that the leasing activity will have.²¹⁶

Thus, while OCSLA § 8(p)(4)(J) unambiguously expresses a Congressional intent that BOEM consider any potential impacts on commercial fishing activity that could be disrupted by leasing activity, it does not go any further than that.

2. *OCSLA § 8(p)(4)(I): the Substantive “Prevention” Requirement*

OCSLA § 8(p)(4)(I), on the other hand, imposes a more substantive requirement on BOEM to prevent interference with reasonable uses. This provision is best understood when broken down into its component parts.

First, it grants the Secretary (who has delegated their authority to BOEM) the authority to determine what constitutes a “reasonable use.” This language should be understood as establishing a highly discretionary standard. Not only does this provision use the qualifier “reasonable” to describe the uses to which it applies, it expressly delegates the authority to determine what constitutes a “reasonable use” to the agency, without any further qualifications.

It could be argued that OCSLA § 8(p)(4)(J)’s reference to specific uses (“for a fishery, a sealane, a potential site of a deepwater port, or navigation”) implies that the Secretary should consider those to be

214. *Consideration*, MERRIAM-WEBSTER.COM DICTIONARY (2022), <https://www.merriam-webster.com/dictionary/consideration> [<https://perma.cc/R46D-Y5UE>].

215. *Consideration*, BLACK’S LAW DICTIONARY (11th ed. 2019).

216. This is analogous to an agency’s procedural obligations under NEPA to consider possible environmental impacts of a proposed actions, which do not independently impose any substantive requirements on the agency.

“reasonable uses” under § 8(p)(4)(I). This is not so. While the Secretary’s reasonableness determination may be informed by its consideration of other uses under § 8(p)(4)(J), the language of § 8(p)(4)(I), specifically “reasonable uses (*as determined by the Secretary*)” (emphasis added), is clear that the reasonableness determination is ultimately an exercise of the Secretary’s discretion. Furthermore, requiring “prevention of interference” with every use that BOEM is required to “consider” would render the consideration requirement surplusage, as the agency could not possibly prevent interference with the use without first considering it.²¹⁷

Also, it makes sense that OCSLA § 8(p)(4)(J) affords less discretion to BOEM to determine which uses fall into its scope because its obligation (“consideration”) is only procedural, whereas § 8(p)(4)(I)’s obligation (“prevention of interference”) is substantive. This seems to indicate a policy choice by Congress to ensure that the perspectives and needs of current ocean users are included in the leasing process, while allowing the agency the ultimate discretion to determine how to balance those needs with the statute’s other objectives.

Second, OCSLA § 8(p)(4)(I) calls for “prevention,” commonly understood as “[t]he stopping of something, esp[ecially] something bad, from happening,”²¹⁸ of “interference,” meaning “[t]he act or process of obstructing normal operations or intervening or meddling in the affairs of others,”²¹⁹ with the identified reasonable uses. This part of § 8(p)(4)(I) leaves little room for discretion. If BOEM determines a use is reasonable and that leasing activity will obstruct that use’s operations, it must stop the obstruction from occurring.²²⁰

217. “‘Courts should give effect, if possible, to every clause and word of a statute’ so that ‘no clause is rendered superfluous, void, or insignificant.’” VALERIE C. BRANNON, CONGRESSIONAL RESEARCH SERVICE, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS 56 (2018) (quoting *Young v. UPS*, 135 S. Ct. 1338, 1352 (2015)).

218. *Prevention*, BLACK’S LAW DICTIONARY (11th ed. 2019).

219. *Interference*, BLACK’S LAW DICTIONARY (11th ed. 2019).

220. In his now-rescinded Memorandum Opinion, Solicitor Jorjani argued that “any compensation system established by a lessee to make users of the lease area whole financially does not negate interference—indeed the creation of such a system *presumes* interference.” U.S. Dep’t. of the Interior, *supra* note 197, at 12. While it’s true that such a system presumes interference, it does not follow that compensation can’t facilitate “prevention” of that interference as OCSLA § 8(p)(4)(I) requires. *Id.* The statute does not dictate how prevention should be accomplished. If a commercial fishing fleet engaged in “reasonable use” is willing to voluntarily modify their normal operations to accommodate an offshore wind farm in exchange for compensation, the interference has been prevented, and therefore BOEM’s obligation under subsection 8(p)(4)(I) has been met. *Id.* (emphasis in original).

Thus, as applied to commercial fishing activity, OCSLA § 8(p)(4)(I)'s function is as follows: BOEM must first use its discretion to determine whether the specific fishing activity at issue constitutes a "reasonable use." However, once BOEM makes that determination, its discretion is much more limited; it must "prevent" (i.e., stop) any "interference" (i.e., hinderance to normal operation), with commercial fishing activity deemed a "reasonable use."

3. *The Rest of OCSLA § 8(p)(4)*

The determination of what constitutes a "reasonable use" requires consideration of the other provisions of OCSLA § 8(p)(4),²²¹ as ultimately, BOEM must ensure that leasing activity "is carried out in a manner that provides for" the objectives enumerated in that section.

Some of the provisions of OCSLA § 8(p)(4) are more applicable to the reasonableness determination than others. For example, some of the provisions are more like § 8(p)(4)(J) in that they impose procedural requirements on BOEM during the leasing process. This includes § 8(p)(4)(E), which calls for "coordination with relevant Federal agencies;" § 8(p)(4)(K), which calls for "public notice and comment" on proposed leases, easements, and rights-of-way; and § 8(p)(4)(L), which calls for "oversight, inspection, research, monitoring, and enforcement" of those leases, easements, and rights-of-way. These provisions have little bearing on the question of the reasonableness of an existing use.

The rest of OCSLA § 8(p)(4)'s provisions are more relevant to the reasonableness determination: whether a use is reasonable or not might be determined with reference to its effect on the environment,²²² natural

221. In full, OCSLA § 8(p)(4) directs the Secretary to "ensure that any activity under this subsection is carried out in a manner that provides for (A) safety; (B) protection of the environment; (C) prevention of waste; (D) conservation of the natural resources of the outer Continental Shelf; (E) coordination with relevant Federal agencies; (F) protection of national security interests of the United States; (G) protection of correlative rights in the outer Continental Shelf; (I) prevention of interference with reasonable uses (as determined by the Secretary) of the exclusive economic zone, the high seas, and the territorial seas; (J) consideration of— (i) the location of, and any schedule relating to, a lease, easement, or right-of-way for an area of the outer Continental Shelf; and (ii) any other use of the sea or seabed, including use for a fishery, a sealane, a potential site of a deepwater port, or navigation; (K) public notice and comment on any proposal submitted for a lease, easement, or right-of-way under this subsection; and (L) oversight, inspection, research, monitoring, and enforcement relating to a lease, easement, or right-of-way under this subsection." 43 U.S.C.A. § 1337(p)(4).

222. *Id.* § 1337(p)(4)(B).

resources,²²³ and national security,²²⁴ and whether it is wasteful,²²⁵ unsafe,²²⁶ or interferes with correlative rights or other existing reasonable uses.²²⁷ Thus, these objectives should inform BOEM's reasonableness determination.

Furthermore, because the reasonableness determination ultimately informs whether BOEM has an obligation to prevent interference with a use, that determination should involve consideration of the comparative reasonableness of any competing use of a lease area. For example, if an existing use is somewhat protective of the environment, but the competing lease use would be more protective, than the decision by BOEM that would ultimately best fulfill its objective to protect the environment under OCSLA § 8(p)(4)(B) would be to not prevent interference with that use. Thus, the *more* reasonable use is the lease use, not the existing use.

Therefore, BOEM's reasonableness determination can be summarized as an effort to answer the following question: Does the existing use better advance the enumerated objectives of OCSLA § 8(p)(4) than the proposed lease use? If so, it is a reasonable use and BOEM must prevent interference. If not, there is no statutory obligation to do so.

This is similar to the interpretation advanced by Deputy Solicitor Anderson, but not the same. Under Anderson's interpretation, OCSLA § 8(p)(4) only provides factors among which BOEM must strike an appropriate balance, instead of independent legal requirements.²²⁸ Therefore, according to Anderson, BOEM retains broad discretion throughout its decision-making process, not just when determining the relative reasonableness of a use.

Anderson's interpretation is not supported by the text of the statute. For one, the prefatory language in OCSLA § 8(p)(4) does not call for an optimal balance or weighing of factors therein; it directs "provide for" the enumerated objectives. To "provide for" something means "to cause [it] to be available or to happen in the future,"²²⁹ implying it should, at least some degree, be accomplished.

223. § 1337(p)(4)(D).

224. § 1337(p)(4)(F).

225. § 1337(p)(4)(C).

226. § 1337(p)(4)(A).

227. § 1337(p)(4)(G)-(I).

228. U.S. Dep't. of the Interior, *supra* note 205, at 4-5.

229. *Provide for*, MERRIAM-WEBSTER.COM DICTIONARY, <https://www.merriam-webster.com/dictionary/provide%20for> [<https://perma.cc/9AE7-794T>] (last visited Mar. 22, 2023).

Furthermore, while some of the objectives in OCSLA § 8(p)(4) are relatively broad and ambiguous, suggesting that the determination as to whether they have been met is subject to some agency discretion as Deputy Solicitor Anderson suggests, others are not. The command that BOEM consider certain uses and prevent interference with reasonable uses, and the requirements of coordination with other agencies, notice and comment, oversight, inspection, research, monitoring, and enforcement of lease provisions, do not use language that implies they are discretionary in any way. They impose clear, concrete requirements that BOEM is obligated to follow.

Therefore, while Solicitor Anderson is correct that the statute grants BOEM discretion to balance fishing impacts with other competing interests, it does not do so implicitly as part of a broad grant of statutory authority, as he suggests. Instead, it does so expressly, by granting BOEM the narrow authority to determine what constitutes a “reasonable use” in OCSLA § 8(p)(4)(I). If BOEM determines that a given use is reasonable, it must prevent interference. If BOEM determines that it’s not reasonable, it does not have to. But what BOEM cannot do, under the clear language of the statute, is decide that a use is reasonable and then later decide some other consideration outweighs its obligation to prevent interference.

4. *The Department of the Interior’s Rules Governing the Leasing Process Are Consistent with the Requirements of the Statute*

DOI’s notice and comment rules governing BOEM’s activities are consistent with the language of OCSLA § 8(p)(4) concerning fisheries impacts.²³⁰

i. *The Rules Governing Lease Issuance Adequately Provide for Consideration of the Use of the Sea and Seabed for Fisheries*

DOI’s legislative rules governing BOEM’s leasing process, including those governing competitive and noncompetitive lease issuance, provide several opportunities for BOEM to “consider” an area’s “use for a fishery” as required by OCSLA § 8(p)(4)(J). Each step of the process involves publication in the Federal Register, thereby, providing notice to potentially affected parties. Specifically, during the Call stage, the rules direct BOEM to request comments on the use of the

230. See 30 C.F.R. §§ 585.100-585.1019; see *infra* Part II(2).

area for “navigation, recreation, and fisheries,”²³¹ and during the Area Identification Process, BOEM must consult with relevant “Federal agencies, States, local governments, affected Indian Tribes, and other interested parties” about “potential effect of leasing on the human, marine, and coastal environments.”²³² Leasing an area used for commercial fishing would affect all three, so BOEM is clearly obligated by its own rules to consider commercial fishing uses at that stage.

Because BOEM does not approve any construction activity when issuing a lease, the requirement that BOEM “prohibit interference with reasonable uses” under § 8(p)(4)(I) is less applicable,²³³ though BOEM is required to “develop measures to mitigate adverse impacts, including lease stipulations” during the Area Identification Process, which at least requires the agency to contemplate how it should meet that obligation at later stages.

ii. The Rules Governing Approval of a COP, SAP, or Combination SAP/COP Adequately Provide for Prevention of Interference with Reasonable Uses

BOEM’s obligation to “prevent interference with reasonable uses” is most directly addressed by the rules governing approval of a SAP, COP, or combination SAP/COP, following the issuance of a lease award. These rules give BOEM the authority to “approve, disapprove, or approve with modifications” any SAP, COP, or combination SAP/COP and include a requirement that the lessee show their planned activities will not, among other requirements, “unreasonably interfere with the other uses of the [outer continental shelf].”²³⁴

This language closely mirrors the text of OCSLA § 8(p)(4)(I), with a notable exception: in the rule, the word “unreasonably” precedes “interfere,” whereas the OCSLA includes no such qualifier. At first blush, this may seem inconsistent. However, this is best understood as a restatement of the requirement that BOEM prevent interference with reasonable uses. In other words, “unreasonable interference” is simply interference with a use that BOEM has deemed reasonable. Therefore,

231. 30 C.F.R. § 585.211(a)(2).

232. *Id.* § 585.211(b), .211(b)(2). This step typically involves consultation with, among others, the National Marine Fisheries Service and the Coast Guard.

233. *See* Fisheries Survival Fund v. Jewell, No. 16-cv-2409 (TSC), 2018 WL 4705795 at *8 (D.D.C. Sept. 30, 2018) (holding that the issuance of a lease grants the holder only “the exclusive right to submit a Site Assessment Plan and Construction and Operations Plan to BOEM for approval”).

234. 30 C.F.R. §§ 585.606, 585.621.

the regulation's prohibition against only unreasonable interferences rests on a permissible interpretation of the statute.²³⁵

CONCLUSION

In summary, while there is an absence of case law interpreting OCSLA § 8(p)(4)'s requirements relating to fisheries impacts, the plain text and agency interpretations indicate that BOEM's obligations when considering a proposed renewable energy development on the outer continental shelf are as follows: first, under § 8(p)(4)(J), BOEM has an obligation to consider any potential fishing or navigation uses of a lease area or proposed lease area before issuing an approval. Specifically, under DOI rules, it must solicit information about these uses through public comments and consultation with relevant Federal agencies, state and local governments, and Tribal authorities.

Second, if BOEM identifies a fishing or navigation use within a lease area, it must determine whether that use is "reasonable" under OCSLA § 8(p)(4)(I). This determination must be made prior to approving any site assessment or construction work that may interfere with that use. Because renewable energy leasing activity must be carried out in a manner that provides for the enumerated objectives in § 8(p)(4), the determination of what constitutes a reasonable use should be informed by those objectives and involve a weighing of the fishing or navigation use of the lease area against the proposed lease-related use. If BOEM determines that the fishing or navigation use is reasonable as compared to the leasing use, it has a nondiscretionary obligation to "prevent interference" with that fishing or navigation use.

Under DOI's rules, the reasonableness analysis occurs when BOEM assesses whether a lease applicant submitting a SAP, COP, or combination SAP/COP has demonstrated that their proposed activities will not "unreasonably interfere with existing uses." BOEM may carry out its "prevention" obligation under OCSLA § 8(p)(4)(I) by either disapproving—or approving with appropriate modifications—a SAP, COP, or combination SAP/COP that does unreasonably interfere.

235. Solicitor Jorjani agreed that courts would likely uphold 30 CFR § 585.621 as a reasonable interpretation of the OCSLA but argued that the question of reasonableness of interference should be determined from the perspective of the fishing user and based on cumulative interference. However, this approach elevates the perspective of one use (fishing) over all others, something the act clearly does not allow for. U.S. Dep't. of the Interior, *supra* note 197, at 11.

If BOEM fails to meet these obligations during the leasing process, affected commercial fishermen may be able to delay or altogether prevent a project from moving forward by bringing a lawsuit. Thus, to carry out its statutory objective to issue leases for renewable energy production on the outer continental shelf,²³⁶ the agency must carefully consider fishing impacts and prevent interference with fishing uses it determines to be reasonable.

236. *See* 43 U.S.C. § 1337(p)(1)(C).