



What's Next for Offshore Oil and Gas Leasing Under the Trump Administration?

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The Trump Administration's America First Energy Plan calls for "policies that lower costs for hardworking Americans and maximize the use of American resources, freeing us from the dependence on foreign oil." Last month, President Trump issued an Executive Order on Promoting Energy Independence and Economic Growth, which broadly targeted many of the Obama Administration's signature energy and environmental initiatives, including the Clean Power Plan, and called for a federal government-wide review of all agency actions that "potentially burden the safe, efficient development of domestic energy resources." While this Executive Order did not address access to offshore oil and gas resources on the federally managed outer continental shelf (OCS), several recent reports, including statements attributed to Interior Secretary Ryan Zinke, indicate that further executive action is imminent that may lead to additional offshore areas being opened to oil and gas leasing.

This paper (1) provides a brief overview of the offshore oil and gas leasing process under the Outer Continental Shelf Lands Act (OCSLA), (2) describes the Obama Administration's approach to the offshore oil and gas program, including areas in which the last administration scheduled – and did not schedule – potential new lease sales through 2022, and areas it withdrew indefinitely from consideration of oil and gas leasing in the future, and (3) discusses the potential paths forward the Trump Administration may take to reverse President Obama's actions and expand access to offshore conventional energy resources.

I. Offshore Oil and Gas Leasing Under OCSLA

OCSLA governs the management of offshore oil and gas resources in federal waters, generally defined as three miles from the coastline out to the 200-mile exclusive economic zone limit. Section 18 of OCSLA requires the Department of the Interior (DOI) to prepare a nationwide offshore oil and gas leasing program, including development of a five-year schedule of potential lease sales in accordance with certain criteria concerning the nation's energy needs, economic and environmental factors, and input from coastal states, the industry and a broad range of public stakeholders. The Bureau of Ocean Energy Management (BOEM) within DOI is the agency responsible for evaluating which regions, known as planning areas, on the OCS will be included in this schedule for offshore oil and gas lease sales. This schedule is referred to as the Five Year Program.

BOEM prepares the Five Year Program in accordance with a three-step winnowing process prescribed under OCSLA. The process begins with BOEM issuing a Draft Proposed Program, which broadly outlines the offshore planning areas to be evaluated for potential leasing and traditionally includes the most areas for public comment and consideration. Next, BOEM publishes a Proposed Program, which may narrow the areas to be evaluated further based on public input and balancing of the Section 18 factors. At the third and final stage, BOEM issues the Proposed Final Program, which is the final schedule of lease sales for areas included in the Five Year Program and goes into effect after a 60-day review period and approval of the Interior Secretary. In parallel with the OCSLA Section 18 process, BOEM prepares a programmatic environmental impact statement under National Environmental Policy Act (NEPA) that analyzes the potential environmental effects of the offshore oil and gas program in total and by region. At each step of



the process, the Interior Secretary may remove any planning area from further consideration and analysis. Planning areas cannot be added to the program without starting the entire process over again, so that each of the areas that are ultimately included in the Five Year Program schedule of lease sales has been analyzed together through the complete OCSLA and NEPA processes. The Interior Secretary, however, may cancel a scheduled lease sale included in a Five Year Program at any time prior to the sale.

II. The Obama Administration’s Evolving Approach to Offshore Oil and Gas Leasing

The Obama Administration finalized two Five Year Programs, the 2012-2017 Program and the 2017-2022 Program, which became effective on January 17, 2017. The final offshore oil and gas lease sale under the 2012-2017 Program is scheduled for the Cook Inlet Planning Area on June 21, 2017. The first lease sale under the 2017-2022 Program is scheduled for the Gulf of Mexico Regionwide Planning Area on August 16, 2017, which in a new approach to leasing in the Gulf of Mexico will make the entire leasable area across the Western, Central and Eastern Gulf of Mexico Planning Areas available in a single sale.¹

Development of the 2012-2017 Program

In his 2012 State of the Union address, President Obama directed his “administration to open more than 75 percent of our potential offshore oil and gas resources” to leasing. Accordingly, the 2012-2017 Program scheduled annual lease sales in the Western and Central Gulf of Mexico, as well as two sales in the GOMESA region of the Eastern Gulf of Mexico and one potential sale each in the Chukchi Sea, Beaufort Sea and Cook Inlet Planning Areas off of Alaska. Together, these planning areas included more than 75% of the total undiscovered, technically recoverable oil and gas resources in the United States’ OCS, according to BOEM’s 2011 assessment. None of these areas was considered “new” in that in each area there already were active leases in federal waters or, in the case of Cook Inlet, in adjacent state waters.

Absent from the 2012-2017 Program were any potential lease sales in the Atlantic OCS, which has a history of leasing and exploration during the 1970s and 1980s, but has had no active leases since then. Between 1977 and 1984, industry drilled 46 exploration wells in the Atlantic OCS, all of which were abandoned as non-commercial at the time. Although BOEM evaluated the Mid and South Atlantic Planning Areas, the final program did not include a potential lease sale in those areas on the grounds of (1) the lack of current geological and geophysical (G&G) data to inform leasing decisions, including from modern seismic surveys, and (2) the need for further public input, as well as the development of information, concerning the infrastructure that would be necessary to support offshore oil and gas exploration, including emergency response, environmental concerns, and potential conflicts with existing uses on the Atlantic OCS, including in particular naval and other military activity.

¹ Most of the Eastern Gulf of Mexico Planning Area remains under a Congressional leasing moratorium through June 2022, with the exception of a sliver on the western side of the Planning Area that was opened for leasing under the Gulf of Mexico Energy Security Act (GOMESA) of 2006.



Implementation of the 2012-2017 Program and Development of the 2017-2022 Program

In its second term, the Obama Administration increasingly focused on leasing and development in the Gulf of Mexico, which is one of the most mature and prolific basins in the world. Although its relative significance in the mix of domestic oil sources has declined with the rise of shale developments onshore, the federal offshore Gulf of Mexico still accounts for approximately 17% of the United States' total crude oil production, and the U.S. Energy Information Administration projects overall production from the Gulf of Mexico OCS to continue to increase in the coming years. The Obama Administration ultimately did not lease, nor plan future lease sales, in more controversial or “new” areas, such as offshore Alaska and the Atlantic. Moreover, the Obama Administration used its authority under Section 12(a) of OCSLA in an effort to remove large areas in those regions from consideration for offshore oil and gas leasing even beyond 2022. We discuss each in turn.

Offshore Alaska

The Obama Administration cancelled the Beaufort Sea and Chukchi Sea offshore lease sales scheduled under the 2012-2017 Program. In light of a disappointing result with the exploration well drilled in the Chukchi Sea in the summer of 2015, and also citing “the high costs associated with the project, and the challenging and unpredictable federal regulatory environment offshore Alaska,” Shell discontinued its offshore Alaska exploration program for “the foreseeable future.” In October 2015, citing “current market conditions and low industry interest,” DOI cancelled both the Beaufort Sea and Chukchi Sea lease sales scheduled under the 2012-2015 Program. By the following spring, the industry had relinquished all but one of the active federal leases in the Chukchi Sea Planning Area, for which it had paid a total of more than \$2.6 billion in Lease Sale 193 in 2008.²

Unlike in the 2012-2017 Program, the Obama Administration scheduled no potential offshore oil and gas lease sales in the Alaskan Arctic in the 2017-2022 Program. Rather, the Chukchi Sea and Beaufort Sea Planning Areas were removed from the 2017-2022 Program at the Final Proposed Program stage in the OCSLA process. In removing the Arctic planning areas, BOEM cited a combination of factors, including that the “Arctic is a unique, sensitive and costly environment in which to operate” and that “the increase in domestic onshore production from shale formations, and other market factors, have shifted expectations regarding oil and gas price trajectories and substantially reduced the incentive for expensive Arctic exploration and production.”

Moreover, the Obama Administration went even further than merely declining to hold lease sales or to schedule future sales through 2022. It sought to prevent future offshore oil and gas lease sales in certain areas offshore Alaska, including in most of the Arctic Ocean. Section 12(a) of OCSLA provides that “the President of the United States may, from time to time, withdraw from dispensation any of the unleased lands

² The Interior Department re-affirmed Chukchi Sea Lease Sale 193 twice during the Obama Administration, first in 2011 and again in 2015, after completing supplemental NEPA analyses to address deficiencies identified by the courts in the original Lease Sale 193 EIS published in 2007.



of the outer Continental Shelf.” Prior to the Obama Administration, Section 12(a) was a relatively obscure provision that had been used sparingly. President Obama, however, exercised authority under Section 12(a) on five occasions to withdraw areas offshore Alaska from consideration of offshore oil and gas leasing.

President Obama first used Section 12(a) on May 31, 2010 to withdraw the North Aleutian Basin Planning Area, which includes the rich Bristol Bay fishery off of western Alaska, from consideration of leasing through 2017. In December 2014, President Obama acted to make the Section 12(a) withdrawal for the North Aleutian Basin more permanent by extending the withdrawal “for a time period without specific expiration.” Although the exercise of executive authority offshore Alaska is always a politically sensitive issue, the North Aleutian Basin Section 12(a) withdrawals were not controversial because (1) there was no real industry interest in offshore oil and gas leasing in that area, and (2) recognition of the importance of the Bristol Bay fishery to Alaska’s economy and to Alaska Natives.

President Obama’s subsequent use of the 12(a) authority for areas in the Alaskan Arctic were much more controversial, particularly within the State of Alaska and among the Alaskan Congressional delegation. In January 2015, President Obama used Section 12(a) to withdraw “for a time period without specific expiration” approximately 9.8 million acres within the Beaufort and Chukchi Sea Planning Areas from oil and gas leasing, including areas that had been identified as important to Alaska Native subsistence hunting and fishing as well as Hanna Shoal, a biological hotspot in the Chukchi Sea.

Two more rounds of withdrawals in the Alaskan Arctic occurred near the end of the Obama Administration. On December 9, 2016, President Obama issued an Executive Order on Northern Bering Sea Climate Resilience that, among other things, used Section 12(a) to withdraw, for a period without specific expiration, from oil and gas leasing the Norton Basin Planning Area and part of the St. Matthew Hall Planning Area near St. Lawrence Island in the Bering Sea off northwest Alaska. Finally, and most expansively, President Obama on December 20, 2016 withdrew under Section 12(a) -- again for a period without a specific expiration -- the entire Chukchi Sea Planning Area and most of the Beaufort Sea Planning Area, with the exception of about 2.8 million acres of the nearshore Beaufort Sea. On the same day, Prime Minister Justin Trudeau announced that Canada would ban new licensing in the Canadian Arctic Ocean for a period of five years, and that future decisions regarding leasing in those waters would be based on a review of climate and marine science at the end of that period.

The Atlantic

As discussed above, although the Obama Administration did not include any offshore oil and gas lease sales in the Mid or South Atlantic in the 2012-2017 Program, it laid foundation for consideration of the Atlantic during the development of the next Five Year Program. In July 2014, BOEM finalized a Programmatic Environmental Impact Statement (PEIS) evaluating the potential effects of G&G activity, including seismic surveys, in the Mid and South Atlantic Planning Areas. The G&G PEIS established safeguards and mitigation measures designed to eliminate or reduce the environmental effects of survey activity that would be necessary to update decades-old G&G data in support of potential oil and gas exploration in the Atlantic. BOEM also included one potential offshore lease sale in the Mid and South Atlantic Planning Areas in its Draft Proposed Program for 2017-2022, published in January 2015.



By the Proposed Program stage in the development of the 2017-2022 Program, however, the Obama Administration again withdrew the Mid and South Atlantic from potential offshore oil and gas leasing, at least through 2022. In the Proposed Program, published in March 2016, BOEM based the decision to remove the Atlantic from the 2017-2022 Program on “[n]umerous stakeholders, including many citizens living along the Atlantic coast and their public officials, [who] expressed concern that oil and gas activities and their potential impacts could jeopardize existing economic activities and the health of important contributors to coastal economies,” including ocean-dependent tourism, commercial and recreational fishing, and commercial shipping and transportation. BOEM also cited a 2015 assessment by the Department of Defense (DOD) that identified “much of the area offshore Virginia, as well as significant portions of the Program Area offshore North Carolina” as places where oil and gas activity would be incompatible with DOD’s activities.

At the end of the Administration and on the same day as the last round of Section 12(a) withdrawals off of Alaska, President Obama also used the Section 12(a) authority to withdraw, for a period without specific expiration, from oil and gas leasing areas associated with 26 subsea canyons and canyon complexes along the eastern seaboard, totaling 3.8 million acres. In making these withdrawals, President Obama cited the “critical importance of the canyons along the edge of the Atlantic continental shelf for marine mammals, deepwater corals, other wildlife, and wildlife habitat.” Near the end of the Obama Administration, BOEM also notified G&G contractors that had submitted permit applications to conduct surveys in the Atlantic that BOEM would not approve those applications.

III. Potential Paths Forward for Offshore Oil and Gas Leasing During the Trump Administration

The Obama Administration’s decisions about the areas to include in – and exclude from – the completed 2017-2022 Program, and its exercise of authority under Section 12(a) to withdraw substantial areas off of Alaska and in the Atlantic, set the stage for the Trump Administration’s executive action on access to offshore oil and gas resources. There are three potential avenues that the Trump Administration can take as it charts a path forward for offshore oil and gas. First, the Trump Administration can, through its own executive action, attempt to rescind some or all of the Obama Administration’s withdrawals under Section 12(a). Second, the Trump Administration could initiate the OCSLA Section 18 planning process and develop a new Five Year Program to supersede the current 2017-2022 Program, which as discussed below is similar to what President Obama did when he took office. Finally, the Trump Administration could work with Congress to open areas and schedule offshore oil and gas lease sales legislatively.

Rescission of Section 12(a) Withdrawals

President Trump’s anticipated executive order regarding access to offshore oil and gas resources likely will attempt to undo some or all of the Obama Administration’s Section 12(a) withdrawals offshore Alaska and in the Atlantic. While the language of Section 12(a) speaks to the President’s authority to “withdraw” areas from leasing, the President’s ability to remove areas from consideration of oil and gas leasing in perpetuity on the one hand, or to rescind a predecessor’s withdrawals on the other hand, has not been tested in the courts. Moreover, the rescission of certain of the withdrawals may be complicated from a stakeholder standpoint. For example, while the State of Alaska likely would welcome rescission of President Obama’s December 20, 2016 withdrawal of the Chukchi Sea and most of the Beaufort Sea Planning Areas, undoing the North



Aleutian Basin withdrawal and potentially exposing the Bristol Bay fishery to oil and gas leasing in the future may be met with concern even in Alaska, including by Alaska Natives.

Action by President Trump to scale back, or to undo in their entirety, President Obama's Section 12(a) withdrawals likely will be met with legal challenges that will test the effectiveness of Section 12(a) as a mechanism to remove offshore areas from consideration under the Section 18 five year planning process and to make them off limits to oil and gas leasing in a lasting way. If President Obama's withdrawals under Section 12(a) are found to be easily rescinded by subsequent executive action, then an ironic legacy of the Obama Administration's efforts to protect sensitive offshore areas from the threats posed by oil and gas development will be that Section 12(a), which gained prominence in the last administration, would have a short life as an enduring tool for environmental protection.

Development of a New Five Year Program

In addition, President Trump may direct the Interior Department to initiate the process for developing a new Five Year Program that would supersede the current 2017-2022 Program. As discussed above, it is generally understood that OCSLA requires potential lease sales in any planning area to have been analyzed both individually, and in conjunction with the other potential sales included in the program, throughout the entire OCSLA and NEPA process. Specifically, OCSLA Section 18(e) provides that the Interior Secretary may "revise and reapprove" the Five Year Program at any time, but that any such revision must occur "in the same manner as originally developed" unless the revision is "not significant." It is for this reason that, for example, the Trump Administration probably would not be able to simply schedule a lease sale in a planning area – such as the Mid and South Atlantic – that the Obama Administration dropped from the current 2017-2022 Program. To administratively schedule a lease sale in a planning area not included in the current Five Year Program, the Trump Administration likely would have to re-initiate the OCSLA planning process from the beginning, by issuing a new Draft Proposed Program and starting a new PEIS.

It is not uncommon for a new administration to begin its own five year planning process soon after taking office. For example, in February 2009, then Interior Secretary Salazar extended public comment on the Draft Proposed Program for 2010 to 2015 published at the very end of the Bush Administration, and then published a narrower Proposed Program in November 2011 to cover the period 2012 through 2017. Because the current 2017-2022 Program has been finalized, the Trump Administration would have to start from the beginning of the OCSLA Section 18 process and go through each of the three steps in the development of new Five Year Program, which typically takes at least two years.

Legislative Action

An avenue available to the Trump Administration to schedule additional offshore oil and gas lease sales in areas not included in the current 2017-2022 Program, without having to re-initiate the OCSLA Section 18 process, would be to work through Congress. Congress has the ability to enact legislation to alter the Five Year Program, including by opening areas and mandating lease sales. In recent years, a number of bills have been introduced in Congress either to require additional offshore lease sales, or to impose moratoria on leasing in certain areas. For example, earlier this month Alaska's Senators introduced the Offshore Production and Energizing National Security Alaska ("OPENS Alaska") Act of 2017, which among other



things, would rescind President Obama's December 20, 2016 12(a) withdrawals in the Arctic and require lease sales in both the Beaufort and Chukchi Sea Planning Areas.

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It is apparent that the Obama Administration's policies and actions with respect to offshore oil and gas leasing are among the targets for executive action by the Trump Administration, in keeping with the President's America First Energy Plan. While the contours of the anticipated executive action remain to be seen, as discussed above there are several avenues available to the new administration to expand the oil and gas industry's access to areas offshore, including in the Alaskan Arctic and in the Atlantic off of the eastern seaboard. Any such action, however, likely will present a host of political, administrative and legal challenges – including some novel issues – for the new administration to wrestle with. Moreover, given how the oil market outlook has changed, it remains to be seen just how significant for U.S. production the opening of areas put off limits by President Obama might be.

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