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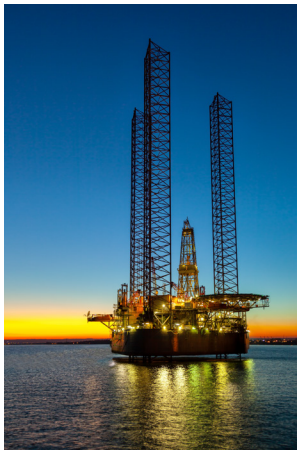

Trump Issues Executive Order Aimed at Expanding Development of Offshore Oil & Gas Resources

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On April 28, 2017, President Donald J. Trump—flanked by Alaska Senator Lisa Murkowski, Alaska Representative Donald Young, Secretary of the Interior Ryan Zinke, and others—signed an Executive Order (EO) intended to fundamentally revise federal offshore oil and gas policies. The EO, entitled "An America-First Offshore Energy Strategy," constitutes a significant first step by the Trump Administration to follow through on the President's campaign promise to "[o]pen . . . offshore leasing on federal lands," which, in turn, was part of the President's broader commitment that the United States "[b]ecome, and stay, totally independent of any need to import energy from the [Organization of the Petroleum Exporting Countries] or any nations hostile to our interests."

In explaining the need for the EO, the Trump Administration states that "[p]ast administrations have been overly restrictive of offshore energy exploration and have taken off the table hundreds of millions of offshore acres for development." In supporting materials accompanying the EO, the Trump Administration notes that 94 percent of the outer Continental Shelf (OCS) is currently unavailable for energy development, and that "[e]ncouraging energy exploration and production, including on the OCS, will help bolster the Nation's position as a global energy leader and foster energy security and resilience for the benefit of the American people." The EO, therefore, aims to address regulatory burdens restricting offshore oil and gas development, and to explore whether additional areas of the OCS—including certain areas withdrawn or otherwise closed to leasing by the Obama Administration—should be offered for leasing and development.

This alert provides an in-depth analysis of the EO and discusses the potential implications of this major executive branch action. Additionally, this alert offers strategies that interested parties might pursue in order to ensure that their views and perspectives are included as the Trump Administration considers future offshore development.

Overview of the EO

The EO is best understood as a symbolic departure from the policies and positions of the Obama Administration vis-à-vis offshore oil and gas development and is intended to "reset" those policies and positions so to better align federal authorities with congressional policy articulated in section 3 of the Outer Continental Shelf Lands Act (OCSLA), which requires the Secretary of the Interior to make OCS minerals available for "expeditious and orderly development" while also mandating the protection and safety of workers and the environment. Moreover, the EO seeks to "maintain the Nation's position as a global energy leader and foster energy security and resilience for the benefit of the American people, while ensuring that any such activity is safe and environmentally responsible."

Many of the Obama Administration's policies focused on ensuring safe and environmentally responsible operations, including taking steps to limit access to OCS acreage. The EO, therefore, seeks to undo many of these restrictive prior Administration actions by reopening OCS acreage and taking a hard look at regulations and policies that may unduly burden OCS development.

Accordingly, the EO mandates that the Secretaries of the Department of the Interior (DOI) and the Department of Commerce (DOC) undertake discrete tasks to ensure that the federal government is maximizing available federal offshore acreage for development while minimizing regulatory burdens. Specifically, the EO requires the following:

Review and Revision of the Five-Year Oil and Gas Leasing Program

Section 3(a) of the EO directs the Secretary of the Interior to revisit the Bureau of Ocean Energy Management's (BOEM) 2017-2022 Five-Year Oil and Gas Leasing Program (2017-2022 Five-Year Program), which was released in the final months of the Obama Administration, on November 18, 2016. The 2017-2022 Five-Year Program included 11 potential lease sales: 10 in the combined Gulf of Mexico Program Area and one in the Alaska Cook Inlet Program Area. Despite compelling support for leasing in the Arctic, Pacific, or Atlantic OCS areas, BOEM decided not to include any lease sales in these areas.

Section 3(a) requires DOI "to give full consideration to revising" the 2017-2022 Five-Year Program so as to hold "annual lease sales, to the maximum extent permitted by law," in the Western Gulf of Mexico, Central Gulf of Mexico, Chukchi Sea, Beaufort Sea, Cook Inlet, Mid-Atlantic, and South Atlantic. Should DOI determine that additional leasing is warranted in these areas, it is likely that BOEM will need to develop a new Five-Year Program. In the interim, section 3(b) of the EO instructs DOI to continue with lease sales under the leasing schedule provided in the existing 2017-2022 Five-Year Program.

Review of National Marine Sanctuary and Monument Designations and Expansions

Section 4 of the EO prohibits the Secretary of Commerce from designating or expanding any National Marine Sanctuary under the National Marine Sanctuaries Act, unless the sanctuary designation or expansion proposal includes a timely, full accounting from DOI of any energy or mineral resource potential within the designated area and the potential impact the proposed designation or expansion will have on the development of those resources. It further directs the Secretary of Commerce, in consultation with DOI, the Department of Defense, and the Department of Homeland Security, to review within 180 days all designations and expansions of National Marine Sanctuaries and Marine National Monuments within the last ten years.

Revision of President Obama's OCSLA Section 12(a) Withdrawal

On December 20, 2016, President Obama issued a Presidential Memorandum utilizing his authority under section 12(a) of OCSLA to withdraw vast areas of the Arctic and Northern Atlantic OCS regions from leasing. Section 5 of the EO revises the language of President Obama's Memorandum to withdraw only "those areas of the Outer Continental Shelf designated as of July 14, 2008, as Marine Sanctuaries under the Marine Protection, Research, and Sanctuaries Act of 1972." With this revision, President Trump effectively reverses President Obama's withdrawal so that much of the acreage previously withdrawn by the Obama Memorandum can now—conceivably, and likely subject to litigation—be included as part of a future BOEM Five-Year Program.

Reconsideration of Obama-Era Regulations and Policies

EO sections 6, 7, 8, and 11 mandate that DOI review a slate of Obama-era policies and regulations that have uniformly been criticized as overly burdensome by the oil and gas industry. Included in the list of policies and regulations subject to review are the Bureau of Safety and Environmental Enforcement's (BSEE) Blowout Preventer Systems and Well Control Rule, BOEM's Air Quality Control, Reporting, and Compliance Rule, the joint BOEM/BSEE Requirements for Exploratory Drilling on the Arctic Outer Continental Shelf Rule, and BOEM's 2016 Notice to Lessees (NTL) governing supplemental financial assurance.

Expediting and Streamlining of Incidental Harassment Authorizations, Incidental-Take Authorizations, and Seismic Survey Permits

Section 9 of the EO directs DOI and DOC to work together to "expedite all stages of consideration of Incidental Take Authorization requests, including Incidental Harassment Authorizations and Letters of Authorization, and Seismic Survey permit applications." The purpose of this pronouncement is to expedite the collection of geological and geophysical data that will help determine the most promising areas of the OCS for future oil and gas development.

Review National Oceanic and Atmospheric Administration (NOAA) Policy Impacting Seismic Activities

Section 10 requires the Secretary of Commerce to review a July 2016 NOAA Technical Memorandum, "Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing," and to revise or rescind the Memorandum, if appropriate, after consultation with the appropriate Federal agencies.

Implications on Specific Matters

Review of BOEM's 2017-2022 Five-Year Program

In all likelihood, DOI will determine that BOEM's 2017-2022 Five-Year Program is too narrow in scope and decide that a new program is necessary. While the Trump Administration can certainly discard President Obama's Five-Year Program, the Administration will not be able to immediately release its own Five-Year Program. Instead, the Trump Administration will need operate in accordance with section 18 of OCSLA, which prescribes very specific steps that DOI must undertake before the agency can implement a new Five-Year Program.

The development of a Five-Year Program typically takes about two and a half years. The process begins with a "request for information" (RFI) from BOEM to the governors of affected states, local governments, industry, other federal agencies, other interested parties, and the general public. The RFI is published in the *Federal Register* and is followed by a 45-day comment period. Any local government that wishes to respond to the RFI must first submit its response to the governor of the state in which it is located.

Following the RFI, BOEM develops and issues a "draft proposed program" (DPP). The DPP is made available for a 60-day public comment period. Also during this time, BOEM must request information from the governors of affected coastal states and from the Secretary of Commerce detailing the relationship between a state's coastal zone management program and oil and gas activity on the OCS.

On the basis of comments on the DPP, BOEM scopes the "proposed program" (PP). Section 18(b)(3) of OCSLA requires the Secretary of the Interior to conduct environmental studies and to prepare an environmental impact statement in accordance with NEPA. Accordingly, BOEM prepares a draft environmental impact statement (DEIS). The public has 90 days to comment on the PP and 45 days to comment on the DEIS. Following the comment period, BOEM prepares and publishes a "proposed final program" (PFP) and a final environmental impact statement (FEIS). The PFP is submitted to Congress for a minimum 60-day period of consideration while the FEIS is published in the *Federal Register* for 30 days. Upon the end of this period, a specific Five-Year Program is announced.

Given that Congress has prescribed a detailed and lengthy process for the development of an OCS leasing program, any Five-Year Program proposed by the Trump Administration will be subject to myriad levels of public review and comment. Interested parties should monitor both BOEM's website and the *Federal Register* for information related to the development of a new Five-Year Program and for requests for public comment. Once the Trump Administration publishes its own Five-Year Program, one can also expect environmental groups and others to challenge the Program—and specific leases sales under that program—in federal court. Accordingly, proponents of expanded drilling access should have an interest in working with the Trump Administration to ensure that the administrative record supporting underlying leasing decisions is robust and supported by sound science, and then consider intervening in litigation should they have standing.

OCSLA Section 12(a)

The question of whether President Trump can reverse President Obama's OCSLA section 12(a) withdrawal will undoubtedly be settled by the courts. The opaque language of section 12(a) itself combined with the scant legislative history makes the provision ripe for judicial review, and provides both supporters and opponents of President Trump's action with ample fodder to litigate the issue.

While there are arguments supporting both sides in the unsettled legal debate over the reversibility of a prior OCSLA section 12(a) withdrawal, the Trump Administration should be able to offer a number of compelling arguments to sustain its reversal of the Obama withdrawal, two of which are briefly mentioned here:

First, it is axiomatic that, absent express Congressional authority, a President does not have the authority to bind his successors. OCSLA is devoid of language suggesting that Congress intended to affirmatively grant predecessor presidents the power to bind their successors by making a withdrawal permanent. Given the lack of an express mandate to the President from Congress, the argument that a section 12(a) withdrawal cannot be undone by future presidents is tenuous at best.

Second, section 12(a) of OCSLA does not contain language that prohibits the revocation of a withdrawal made by a prior Administration. In support of a decision to revoke President Obama's withdrawal, the Trump Administration could argue that the affirmative grant of authority under section 12(a) carries with it an implied authority for revocation. In other words, because Congress did not indicate that any Presidential withdrawal under section 12(a) was permanent, it is subject to revocation by a future Administration.

Opponents of offshore oil and gas development have already vowed to fight President Trump on this issue. Supporters of the President's action, therefore, should look for opportunities to intervene in lawsuits brought by environmental non-governmental organizations and other litigants. Whether a party is able to intervene will ultimately depend on whether that party has standing to sue.

Reconsideration of Obama-Era Regulations and Policies

President Trump's EO takes direct aim at four significant regulations and policies impacting offshore drilling issued during President Obama's tenure. These measures focus heavily on mitigating operational, environmental, and financial risks, and have been criticized by many as standing in the way of "expeditious and orderly development" of offshore resources.

BOEM's 2016 Financial Assurance NTL

In charging the Secretary of the Interior to direct BOEM to review its 2016 financial assurance NTL, the President brings renewed focus to what type of measures should be imposed to ensure that offshore end of life operations—i.e., decommissioning—will be paid for by the operator rather than the U.S. government and taxpayer. The Obama Administration concluded that existing regulations and policies were insufficient to protect the government and taxpayer from bearing the risks of having to cover decommissioning liabilities because of widespread bankruptcies or other significant events. Accordingly, the resulting policy—the 2016 NTL—required offshore lessees and operators to post significantly increased amounts of supplemental financial assurance—bonding—to cover BSEE's best estimates of future decommissioning. BOEM's policy left a number of critically important issues unresolved and threatened to impose redundant financial assurance requirements without clear justification and explanation. This problem was compounded by the reality that BSEE—the agency charged with estimating decommissioning costs to allow BOEM to determine bond amounts—lacked sufficient real-world data to accurately estimate the cost of future decommissioning. As a result, the amount of additional security that BOEM has required companies to furnish often has been exceedingly high.

Ultimately, BOEM's 2016 NTL has threatened to disrupt the domestic offshore oil and gas industry by driving a number of companies into bankruptcy and off of the OCS. Going forward, it will be imperative for companies to engage with both BOEM and BSEE to ensure that the agencies have an accurate understanding of the financial and operational risks faced by operators, and the types of measures that can adequately address those risks.

BSEE's Well Control Rule

Section 7 of the EO directs the Secretary of the Interior to review BSEE's Well Control Rule to determine whether revisions to the rule are necessary to align BSEE's regulatory regime with the policies

articulated in the EO. Curiously, while the language of the EO states that the Secretary "shall" publish for notice and comment proposed revisions to the Well Control Rule, that mandate is followed by a clause that reads "if appropriate and consistent with law." That language may leave the Secretary of the Interior some flexibility in determining whether to pursue formal rulemaking to address any unduly burdensome requirements in the Well Control Rule. It is also possible that the Secretary could instruct BSEE to issue clarifying policies in the form of formal interpretations of the Well Control Rule provisions or through NTLs containing guidance on Well Control Rule requirements.

In any event, the President's inclusion of the Well Control Rule in the EO suggests that DOI and BSEE will consider input from industry and other stakeholders on the Well Control Rule requirements and whether those requirements can be improved through formal rulemaking or policy guidance. Engagement with BSEE on these important issues will be critical as the agency determines the best path to ensure the Well Control Rule, as it is implemented, is consistent with the current Administration's policies.

BOEM's Proposed Air Quality Rule

Section 8 of the EO orders the Interior Secretary to review BOEM's proposed "Air Quality Control, Reporting, and Compliance" rule and to determine whether the rule should be revised or withdrawn. As discussed in a prior alert, the proposed air quality rule would make significant changes to current BOEM regulations, including addressing a wider range of pollutants and requiring operators and lessees to monitor and control the emissions of a greater number and variety of facilities. As with the other regulations and policies subject to review in the EO, BOEM's proposed air quality rule also has the potential to significantly increase the cost of doing business on the OCS and may forestall further development of oil and gas resources in the deepwater Gulf of Mexico and the Alaska Arctic.

Ultimately, industry should seek to ensure that the Trump Administration—including those within the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB)—understand the true cost of this rule on industry. One of the principal criticisms of the regulations and policies highlighted in the EO is that the Obama Administration did not accurately account for costs of these rules on the regulated community. Accordingly, early engagement with BOEM and OIRA will be critical to ensuring that the air quality rule achieves its underlying environmental objectives without unnecessarily interfering with expeditious and orderly OCS development.

BOEM and BSEE's Arctic Drilling Rule

Section 11 of the EO directs the Secretary of the Interior to review the Arctic Exploratory Drilling Rule issued by BSEE and BOEM in July 2016 and, "if appropriate," publish for notice and comment a proposed rule "suspending, revising, or rescinding this rule." In issuing the Rule, BSEE and BOEM sought to codify and enhance requirements for companies conducting exploratory drilling operations in the Beaufort and Chukchi Planning Areas of the Alaskan OCS. While no companies appear to have imminent plans to conduct exploratory drilling operations in those planning areas, the inclusion of this rule in the EO signals that the Administration may wish to take the opportunity to revise or rescind specific requirements that may unduly burden expeditious and orderly development.

Among other things, it is likely that the Trump Administration will closely scrutinize the requirement that an operator seeking to conduct offshore exploratory drilling operations in the Beaufort and Chukchi Seas have access to a dedicated, same season relief rig that could be used in the event of a loss of well control. This type of requirement has been the subject of intense debate, both in the United States and in other countries with Arctic drilling activities. Any subsequent rulemaking seeking to rescind this or any other requirements under this rule likely will be challenged in federal court.

Seismic Surveying

As noted above, section 9 of the EO tasks DOI and DOC with developing an expedited and streamlined process for approving all stages of consideration of Incidental Take Authorization requests, including Incidental Harassment Authorizations and Letters of Authorization, and Seismic Survey permit applications. This provision of the EO is aimed at expediting the federal government's and industry's

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ability to get an accurate assessment of the resource potential underlying the OCS—particularly in areas such as the Atlantic where seismic surveying has not been conducted in decades. Ultimately, this should allow industry—and the federal government—to better scope future Five-Year Programs to include those areas with the greatest reserves.

It is worth noting that this provision of the EO also could impact ongoing litigation between environmental NGOs and BOEM over seismic surveying in the Gulf of Mexico. In June 2010, several environmental non-governmental organizations challenged BOEM's Finding of No Significant Impact (FONSI) for Gulf of Mexico geological and geophysical (G&G) exploration. In June 2013, the parties entered into a settlement agreement to stay proceedings for 30 months to allow (i) NOAA/National Marine Fisheries Service (NMFS) to act on BOEM's Marine Mammal Protection Act (MMPA) application for incidental take pursuant to seismic surveys; and (ii) BOEM and NMFS to undertake an EIS and related Endangered Species Act (ESA) consultation on the MMPA application. In February 2016, the parties entered into a stipulation agreeing to extend the stay until September 25, 2017.

Because of the stipulation, most observers agreed that NMFS would have to issue final Incidental Take Regulations (ITRs) by September 25, 2017. Indeed, the agencies have been working toward this deadline and on September 30, 2016 published a draft programmatic EIS. The programmatic EIS, however, worried some in industry that NMFS would impose unduly burdensome restrictions on seismic activities in the Gulf of Mexico.

The EO may allay some industry concerns because it may forestall issuance of the ITRs and eventually lead to less burdensome restrictions on those companies engaged in seismic activities. Therefore, even though development of the ITRs is under court order, BOEM and NMFS may need to seek leave of the court or enter into further stipulation with plaintiffs to ensure that the ITRs are consistent with the pronouncement of section 9 of the EO.

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Ultimately, President Trump's "reset" of federal policies related to offshore oil and gas development potentially sets the stage for meaningful reforms aimed at facilitating the expeditious and orderly development of OCS oil and gas resources. Given the degree of opposition to offshore drilling, it is likely that this EO and/or future Trump Administration actions taken pursuant to this EO will be challenged in federal court. In this uncertain environment, it will be critically important for companies engaged in offshore operations to understand legal and policy risks and opportunities and be prepared to engage with the executive branch and to intervene in litigation to protect strategic interests.

For more information

Van Ness Feldman LLP is available to provide counsel to companies and others as they assess these considerations. For further information and analysis, please contact Michael Farber or R. Scott Nuzum at 202-298-1800.

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