

CHAPTER 39

OFFSHORE NATURAL GAS

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Scope

The exploration and production (E&P) of natural gas in the waters of the United States, both state and federal, is critical to both the domestic natural gas industry and the burgeoning international natural gas market. With production principally focused in the Gulf of Mexico (GOM), the federal government has collected in excess of 150 Billion dollars in revenue, and produced more than 1 trillion cubic feet (TCF) of gas annually. In 2010, offshore natural gas production accounted for 15% of all natural gas production in the United States. While there has been an uptick in onshore natural gas production through hydraulic fracturing in recent years, offshore natural gas production still plays an essential role in providing supplies and reserves.

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[1] Bureau of Ocean Energy Management

The Bureau of Ocean Energy Management (BOEM) is responsible for leasing and development on the outer continental shelf (OCS). The Department of the Interior established BOEM through Secretarial Order No. 3299, on May 19, 2010, signed by then-Secretary Ken Salazar.¹ BOEM is one of three successors in interest to the Minerals Management Service, with the Office of Natural Resources Revenue (ONRR) and the Bureau of Safety and Environmental Enforcement (BSEE) being the other entities created by Secretarial Order No. 3299.² The Secretary entrusted to BOEM all conventional duties formerly held by the MMS, all renewable activities held

¹ Bureau of Ocean Energy Management, <http://www.boem.gov/Reorganization/> (last visited Oct. 26, 2015).

² Bureau of Ocean Energy Management, <http://www.boem.gov/Reorganization/> (last visited Oct. 26, 2015).

by the MMS, and any other duties not specifically delegated to BSEE and ONRR. Consequently, BOEM assumed responsibility for all planning, leasing, and permitting functions for the development and extraction of natural gas on the OCS.

BOEM's governing statutes consist of the Submerged Lands Act of 1953, Pub. L. No. 83-31 (1953), the Outer Continental Shelf Lands Act of 1953, Pub. L. No. 83-212 (1953), and the Energy Policy Act of 2005, Pub. L. No. 109-58 (2005). BOEM has enacted a comprehensive set of regulations in order to govern the planning process, the lease sale process, and drilling planning.³ Following the explosion on the Deepwater Horizon drilling platform, on the Macondo Prospect, BOEM instituted a series of regulatory reforms aimed at improving accountability and safety measures on the OCS. BOEM continues to update these regulations which have had a significant impact on the practice of drilling offshore.

BOEM is divided primarily along regional lines, with regional directors for the Gulf of Mexico, the Pacific Region, and Alaska. BOEM additionally has offices for Environmental Programs, Renewable Energy Programs, and an Office of Strategic Resources Programs, which includes sub-offices for leasing, economics, and resource evaluation. While the Office of Environmental Programs and the Office of Strategic Resources Programs have activities crucial to the planning and leasing of offshore tracts for natural gas, the regional directors are responsible for applications for permits to drill, suspensions of production, and regulatory compliance once a lessee has acquired a parcel. The Director of BOEM is appointed by the Secretary of the Department of the Interior.

BOEM works closely with the BSEE, its sister agency, who also reports to the Assistant Secretary for Land and Minerals, and who is responsible for enforcing the regulations governing safety and environmental compliance on the OCS.

[2] Bureau of Safety and Environmental Enforcement

The Bureau of Safety and Environmental Enforcement (BSEE) is responsible for resource conservation, environmental stewardship, and enforcing safety standards for the production of offshore oil and gas. Like BOEM, the Department of the Interior established BSEE through Secretarial Order No. 3299, and BSEE began operations independent of BOEM on October 1, 2011. BSEE created specialized subdivisions focusing on oil spill response and environmental enforcement. These subdivisions provide enhanced monitoring and oversight in order to ensure effective compliance with environmental protections and mitigation measures in the event of a spill. The Director of BSEE is a position appointed by the Secretary of the Department of the Interior.

BSEE operates under the same governing statutes as BOEM, with a particular focus on the Submerged Lands Act of 1953 and the Outer Continental Shelf Lands Act of 1953. BSEE also has significant amounts of prior case law through the Minerals Management Service at the Interior Board of Land Appeals, who acts as the body of

³ 30 C.F.R. Part 250.

first jurisdiction for BSEE orders. BSEE also provides guidance through Notices to Lessees (NTLs), which serve to guide lessee activity and practice pending enactment of federal regulations. BSEE also has been responsible for enacting significant regulatory reforms in the wake of the Deepwater Horizon blowout. These rules consist primarily of their safety and environmental systems update⁴ and their final drilling safety rule,⁵ both of which aimed to overhaul the offshore oil and gas safety rules from lessons learned in the Deepwater Horizon blowout and the subsequent investigation. In 2015, BSEE introduced further refinements to well control regulations to continue to update its safety measures.⁶

BSEE is divided along regional lines, with significant operations in the Gulf of Mexico, Alaska, and the Pacific Region. Each of these offices serves as the base for regional inspectors to ensure compliance with BSEE regulations and policy. In addition to the aforementioned divisions on oil spill response and environmental enforcement, BSEE has a centralized offshore regulatory program division, which serves as a regulatory and policy arm of the Bureau. Like BOEM, BSEE conducts oversight over applications for permits to drill, suspensions of production, and takes a large role in terms of drilling safety and compliance. BSEE also reports to the Assistant Secretary for Land and Minerals.

[3] Office of Natural Resources Revenue

The Office of Natural Resources Revenue (ONRR) is responsible for collecting royalties and fees from both onshore and offshore energy development. ONRR also conducts audits of lessee oil and gas operations reports and production accounting. Like BOEM and BSEE, ONRR was created by DOI Secretarial Order No. 3299, and it began operations as a stand-alone entity on October 1, 2010. ONRR inherited the functions of the Minerals Revenue Management Division of the Minerals Management Service, along with other former functions of MMS incidental to royalty management and production accounting. The Director of ONRR is appointed by the Secretary of the Department of the Interior, and the Deputy Assistant Secretary for Natural Resources Revenue Management is appointed by the President of the United States.

ONRR's enabling legislation is different from its sister agencies BOEM and BSEE in that their legislation is principally concerned with accounting, auditing, and revenue management. ONRR's enabling legislation is the Federal Oil and Gas Management Act of 1982, Pub. L. No. 97-451 (1982), and then the Royalty Simplification and Fairness Act of 1996, Pub. L. No. 104-185 (1996). ONRR has additional authority in the Energy Policy Act of 2005, Pub. L. No. 109-58 (2005), and Gulf of Mexico Energy Security Act of 2006, Pub. L. No. 109-432 (2006). Like BSEE, ONRR has significant

⁴ Oil and Gas and Sulfur Operations in the Outer Continental Shelf, 78 Fed. Reg. 20423 (Apr. 5, 2013).

⁵ Bureau of Safety and Environmental Enforcement, Final Drilling and Safety Rule, <http://www.bsee.gov/Regulations-and-Guidance/Recently-Finalized-Rules/Final-Drilling-Safety-Rule/index/> (last visited Apr. 21, 2015).

⁶ Bureau of Safety and Environmental Enforcement, Oil and Gas and Sulfur Operations in the Outer Continental Shelf—Blowout Preventer Systems and Well Control, 80 Fed. Reg. 21503 (Apr. 17, 2015).

precedent at the Interior Board of Land Appeals. ONRR regulations and guidance instruct operators how to pay and account for royalties and production volumes. Failure to account for production or royalties can lead to audits, penalties, and other administrative actions. Recent developments at ONRR include enhanced authority to level civil penalties at payors for failing to abide by the mineral reporting handbook, and applicable regulations governing mineral revenue accounting and auditing.⁷

ONRR is headquartered in Washington, D.C., with its main operations based at Lakewood, Colorado. ONRR also has field offices in New Mexico, Texas, and Oklahoma. ONRR acts as a trustee for revenue from Indian lands, and it disburses funds to tribes, the Land and Water Conservation Fund, the Reclamation Fund, the United States Treasury and individual states.

[4] Minerals Management Service

The Minerals Management Service was an entity of the Department Interior which existed from 1982 until 2010. Pursuant to the Federal Oil and Gas Management Act of 1982 then-Secretary of the Interior James G. Watt assigned the duties as designated under the Act to a new agency within the Department of the Interior. The Minerals Management Service was re-organized following the blowout on the Deepwater Horizon drilling platform, on the Macondo prospect in April 2010. MMS was divided into four subsections, consisting of Offshore Energy and Minerals Management (OEMM), Budget & Administration (BA), Policy & Management Improvement (PMI), and Minerals Revenue Management (MRM). Following the dissolution of MMS, MRM's functions became the Office of Natural Resources Revenue, OEMM's functions became part of BSEE and BOEM, and the activities of PMI and BA were split and/or replicated in the new agencies.

MMS, during its 28 years, consolidated functions previously exercised by the United States Geological Survey, the Bureau of Land Management, and the Bureau of Indian Affairs. MMS reported to the Assistant Secretary for Land and Minerals.

MMS's laws and regulations make up a significant amount of the precedent governing the extraction of natural gas from the outer continental shelf. Cases in which MMS was the plaintiff or the defendant were argued in federal court⁸ and often, at the Interior Board of Land Appeals, the administrative body who held original jurisdiction over MMS matters. The precedent established in these courts by the MMS continues to influence the decisions and the activities of BOEM, BSEE, and ONRR.

While the MMS no longer exists in terms of enforcing policies, regulations,⁹ and procedures, it played an important role in the development of the offshore natural gas

⁷ Kathleen M. Sgamma, Western Energy Alliance Comments on Proposed Civil Penalty Regulations (July 18, 2014), <http://www.westernenergyalliance.org/sites/default/files/Western%20Energy%20Alliance%20comments%20-%20ONRR%20Civil%20Penalties.pdf> (last visited Sept. 23, 2014).

⁸ See, e.g., *Devon Energy Corp. v. Kempthorne*, 551 F.3d 1030 (D.C. Cir. 2008).

⁹ All MMS regulations have been re-organized into the regulations enforced by BOEM, BSEE, and ONRR. See generally 30 C.F.R. Parts 200–299 (BSEE), Parts 500–599 (BOEM), Parts 1200–1299 (ONRR).

industry in developing relevant precedent and practice before BOEM, BSEE, and ONRR. Cases such as *Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. 604 (2000) or *BP Am. Prod. Co. v. Burton*, 549 U.S. 84 (2006) turn upon activities and actions done by the MMS, and continue to affect development on the OCS.

[5] Environmental Protection Agency

The Environmental Protection Agency is not a primary regulator of natural gas exploration and production on the OCS, but operators must comply with EPA regulations and a series of statutes which regulate environmental compliance. The EPA began operations on December 2, 1970, following the passage of the National Environmental Policy Act (NEPA) of 1969. The EPA's mission includes regulating activities which may impair the health of the nation's air, water, land, endangered species, or activities which may produce hazardous waste.

The EPA is divided into 10 regions, and certain activities which are EPA responsibilities have been delegated to states.¹⁰ EPA regions 4, 6, and 10 cover Alaska and the states bordering the Gulf of Mexico, making them the most crucial regions pertaining to offshore natural gas production.

EPA also has specific offices which manage their regulations that cover natural exploration and production activities. Principally, the Office of Air and Radiation, the Office of Water, and the Office of Enforcement and Compliance Assurance take activities which cover natural gas. These offices administer statutes such as the Clean Air Act and its amendments, NEPA, The Clean Water Act, the Endangered Species Conservation Act, the Marine Mammal Protection Act, and the Resource Recovery and Conservation Act. In the Obama Administration, the EPA has embarked a comprehensive effort to update its regulations to put more stringent controls on emissions and waste. Further, as of June 5, 2015, the EPA has embarked on issuing new regulations in order to control pollutants and emissions which have the capacity to contribute to climate change. These regulatory efforts are derived from the above-mentioned legislation, and if enacted, will have a significant impact on exploration and production of natural gas on the OCS.

While operators on the OCS do not typically need certification from the EPA on their drilling plans or with their compliance, EPA standards are built into BOEM and BSEE's regulations and policies. Specifically, NEPA compliance, and ensuring compliance with the Clean Water Act and the Marine Mammal Protection Act are essential to securing an Application for Permit to Drill. Further, if there is a spill, or other potential infraction of laws designed to ensure environmental compliance, the EPA has the power to fine operators for their actions. For instance, in the Deepwater Horizon blowout, the EPA levelled more than a billion dollars in fines for violations of the Clean Water Act. Operators must ensure compliance with EPA laws and

¹⁰ The EPA has a variety of functions under the Clean Water Act and the Clean Air Act that it may delegate to states. Examples include National Pollution Discharge Elimination System permits under the Clean Water Act, and National Emission Standards for Hazardous Air Pollutants under the Clean Air Act.

regulations in order to avoid significant fines for releases on the OCS.

[6] United States Coast Guard

The United States Coast Guard is an agency of the Department of Homeland Security. The Coast Guard was founded by Alexander Hamilton in 1790 which serves to safeguard United States maritime interests.¹¹ The Coast Guard is significant to natural gas production on the OCS in that it is in charge of safety and security on the production rigs, and they monitor and oversee supply ships.¹² Further, the Coast Guard is responsible for conducting environmental reviews under the National Environmental Policy Act for deepwater ports and terminals.¹³ Further, in situations of spills, blowouts, or other accidents offshore, the Coast Guard is typically the first responder.¹⁴

The Coast Guard's mission of Maritime Safety, Maritime Security, and Maritime Stewardship are all incidental to natural gas production on the OCS. As the exclusive law enforcement authority in the U.S. Exclusive Economic Zone (EEZ), the Coast Guard has a significant amount of authority over the actions and activities of producers. Compliance with Coast Guard rules and regulations are critical in order to ensure continuing activities on production platforms. While the Coast Guard may not be in a position to enable production or require environmental mitigation efforts, its role in providing for the safety and security of production in the OCS makes it a critical federal agency for natural gas production on the OCS.

[7] United States Maritime Association

The United States Maritime Association (MARAD) is an agency in the Department of Transportation responsible for the management and supervision of the United States merchant marine fleet. The origins of MARAD stem from the Shipping Act of 1916, and the agency came into its current form in 1950, when President Truman issued Reorganization Plan No. 21.¹⁵ MARAD's mission is to "promote a strong merchant marine for the national defense and development of its foreign and domestic commerce."¹⁶ To that end, MARAD has a significant role in offshore natural gas production by overseeing and influencing drill ships, supply ships, and container vessels that transport natural gas after extraction.

MARAD regulations and policy are critical for service, supply, and transportation vessels required for offshore natural gas production. Principally, regulations and policy from MARAD's Office of Environment, Office of Security, and Office of Safety are necessary to ensure that activities are not unduly delayed due to failure to adhere to

¹¹ United States Coast Guard, <http://www.uscg.mil/top/about/> (last visited Nov. 4, 2014).

¹² 43 U.S.C. § 1332(d), § 1346 (2012).

¹³ See Deepwater Port Act of 1974, Pub. L. No. 93-627 (1974).

¹⁴ 43 U.S.C. § 1347(d) (2012).

¹⁵ United States Maritime Administration, <http://www.marad.dot.gov/about-us/maritime-administration-history-program/short-history/> (last visited June 5, 2015).

¹⁶ United States Maritime Administration http://www.marad.dot.gov/about_us_landing_page/marad_aboutus_history/vessel_short_history/History_Maritime_Administration.htm (last visited Oct. 27, 2014).

regulations. Further, natural gas producers who are interested in exports and imports need to be mindful of MARAD's Deepwater Ports program, which is responsible for licensing and regulating oil and gas ports on the OCS.¹⁷ MARAD is particularly focused on the Merchant Marine Act of 1920 (commonly referred to as The Jones Act), Pub. L. No. 66-261 (1920), which aims to promote and give preference to marine vessels flagged and registered in the United States of America, and crewed by Americans. The Jones Act requires these specific vessels for merchant marine activity between U.S. ports, but not between U.S. and international ports.

[8] National Oceanic and Atmospheric Administration

The National Oceanic and Atmospheric Administration (NOAA) is the federal agency responsible for the protection of the oceans and the atmosphere. Included within NOAA is the National Marine Fisheries Service (NMFS), which focuses NOAA's mission on marine areas. NOAA and NMFS have primary jurisdiction to enforce the Marine Mammal Protection Act, Pub. L. No. 95-522 (1972), and the Magnuson-Stevens Fishery Conservation and Management Act, Pub. L. No. 94-265 (1996) and they play a supportive role to the EPA and the Fish and Wildlife Service on the Endangered Species Act.

Given the fact that offshore natural gas production occurs beneath sensitive marine habitats and designated marine fisheries, operators often must file plans to ensure the sustainability and protection of sensitive habitats. Operators can often ensure compliance with these rules and regulations through the Application for Permit to Drill (APD) process, but keeping apprised of the developments, regulations, and management plans enacted by NOAA are crucial to ensure work does not need revision in compliance with NOAA rules and regulations. Significant areas of the Gulf of Mexico, for example, are considered Marine Protected Areas, and require specific conditions for exploration and production, if exploration and production is permitted at all.¹⁸

NMFS is led by the Assistant Administrator for Fisheries, who oversees the Deputy Assistant Administrator for Regulatory Programs, the Director of Science Programs, and the Deputy Assistant Administrator for Operations. NMFS is also organized by region, along with six science centers and five regions. Through its decentralized structure, NMFS tailors its policies and regulations to the specific habitats which each region covers.

NMFS is particularly critical in helping to create environmental impact statements for particular offshore lease sales, contributing significantly to assessing what planned oil and gas activities may have on protected environments and species. NMFS Office of Protected Resources executes the NEPA documents and analyzes data and comments in order to maintain necessary levels of protection, preservation, and conservation.

¹⁷ United States Maritime Administration http://www.marad.dot.gov/ports_landing_page/deepwater_port_licensing/deepwater_port_licensing.htm (last visited Oct. 27, 2014).

¹⁸ Lauren Wenzel and Billy Causey, National Marine Protected Areas Center, Marine Protected Areas: Connecting Habitats and Ecosystems in the Gulf, http://www.estuaries.org/pdf/2012conference/room18/session2/Wenzel_RAE_2012_pres.pdf (last visited Oct. 2, 2014).

§ 39.02 Major Federal Statutes

[1] Submerged Lands Act of 1953, Pub. L. No. 83-31 (1953) (SLA)

The Submerged Lands Act of 1953 (SLA) served to clarify title to offshore and onshore waterways. In *United States v. California*, 332 U.S. 19 (1947), the Supreme Court held that the United States owned title to all waterways beyond three nautical miles, agreeing with the government that federal management of such waters was necessary for the defense of marginal seas and to regulate commerce. In response, Congress enacted the SLA, which provided state jurisdiction over inland waterways and within three nautical miles, which was extended to three marine leagues for the gulf coast of Florida and for Texas. The constitutionality of the SLA was confirmed through *Alabama v. Texas*, 347 U.S. 272 (1954).

The SLA was particularly important in allowing for the development of natural resources in coastal state waters, and in federal managed waters. Prior to the law's passage, different states asserted jurisdiction and control to differing distances into the marginal seas.¹ Both states and the federal government wanted to exploit potential offshore oil resources, but the continuing litigation over who held jurisdiction impaired development off the coast of California and in the Gulf of Mexico.² In an effort to standardize the jurisdiction of the states and that of the federal government, as well as promote and facilitate the development of natural resources on the OCS, the Congress passed the SLA.

The SLA is divided into three titles, with title 1 focused on definitions. Title 2 concerns the title and resources provided to the states, while title 3 provides for resources and powers delegated to the federal government. The law is codified at 43 U.S.C. § 1301 *et seq.* and was followed closely by the Outer Continental Shelf Lands Act of 1953, which provided for the leasing of federal offshore lands by the Secretary of the Interior.³

[2] Outer Continental Shelf Lands Act of 1953, Pub. L. No. 83-212 (1953) (OCSLA)

The OCSLA delegated power to the Secretary of the Interior and provided for the leasing and development of the OCS. Like the SLA, the OCSLA was a direct result of the conflicting jurisdictions and attempt to develop the OCS which led to *United States v. California*, 332 U.S. 19 (1947). While the SLA served to clarify jurisdiction and enumerate powers, the OCSLA provided a legislative grant and procedures for the development of resources.

The OCSLA provided for the administration of leasing, the disposition of revenues,

¹ H. Rep. No. 215, Report from The Committee on the Judiciary of the House of Representatives to Accompany H.R. 4198 (1953), <http://coast.noaa.gov/data/Documents/OceanLawSearch/House%20Report%20No.%2083-215.pdf?redirect=301ocm> (last visited Oct. 6, 2014).

² H. Rep. No. 215, Report from The Committee on the Judiciary of the House of Representatives to Accompany H.R. 4198 (1953), <http://coast.noaa.gov/data/Documents/OceanLawSearch/House%20Report%20No.%2083-215.pdf?redirect=301ocm> (last visited Oct. 6, 2014).

³ 43 U.S.C. § 1334 (2012); 43 U.S.C. § 1331(b) (2012).

safety and environmental regulations, and enforcement mechanisms for executing the law.⁴ The law served as the basis for the vast majority of the regulatory environment affecting oil and natural gas exploration and production offshore, and remains current. The OCSLA has gone through a number of significant and impactful amendments since its passage. Critically, following an offshore blowout in the Santa Barbara Channel in 1969, which spilled approximately 4.2 million gallons of oil,⁵ Congress passed amendments to OCSLA in 1978 which addressed oil spills, cleanup, and liability.⁶ Additionally, Congress passed several acts which spurred the development of oil spill regulation and research. They included the National Environmental Policy Act, which mandates a detailed environmental review before any major or controversial federal action, the Clean Air Act, which regulates the emission of air pollutants from industrial activities, and the Coastal Zone Management Act, which requires state review of federal actions that would affect land and water use of the coastal zone. In 1977, the Clean Water Act passed, which regulates the discharge of pollutants into surface waters.⁷ The 1978 Amendments called for five-year leasing plans, enhanced consultation with affected state governors and local officials, and recognition of the effect the CZMA had on offshore mineral development.⁸ Further amendments enhanced the environmental protections, the safety requirements, and enforcement and liability laws under the law.⁹

The process for exploration and production was set in the 1978 amendments and remains current. The leasing agency, now BOEM, publishes a five-year schedule for lease availability, which is followed by consultation and input from affected states. If the Secretary proceeds with the sale following consultation, individual lease sales occur. Following a successful lease sale, a winning bidder must submit an exploration plan to BOEM, which involves further consultation with affected state and local leaders, as well as CZMA consistency evaluations. Following successful exploration, an operator must submit a development and production plan, which is included in the application for permit to drill.¹⁰

⁴ 43 U.S.C. § 1331 *et seq.* (2012).

⁵ Santa Barabara Well Blowout, National Oceanic and Atmospheric Administration, <http://incidentnews.noaa.gov/incident/6206> (last visited Oct. 8, 2014).

⁶ Outer Continental Shelf Lands Act Amendments, Pub. L. No. 96-372 (1978).

⁷ Outer Continental Shelf Lands Act, <http://coast.noaa.gov/data/Documents/OceanLawSearch/Summary%20of%20Law%20-%20Outer%20Continental%20Shelf%20Lands%20Act.pdf?redirect=301ocm> (last visited Oct. 8, 2014).

⁸ Review of U.S. Ocean and Coastal Law: The Evolution of Ocean Governance Over Three Decades, Appendix 6 to *An Ocean Blueprint for the 21st Century*, Final Report of the U.S. Commission on Ocean Policy (2004), http://govinfo.library.unt.edu/oceancommission/documents/full_color_rpt/append_6.pdf (last visited Oct. 8, 2014).

⁹ Review of U.S. Ocean and Coastal Law: The Evolution of Ocean Governance Over Three Decades, Appendix 6 to *An Ocean Blueprint for the 21st Century*, Final Report of the U.S. Commission on Ocean Policy (2004) http://govinfo.library.unt.edu/oceancommission/documents/full_color_rpt/append_6.pdf (last visited Oct. 8, 2014).

¹⁰ Review of U.S. Ocean and Coastal Law: The Evolution of Ocean Governance Over Three Decades,

The OCSLA was further amended in 1986, which covered division of revenues and a schedule of revenues under Section 8(g),¹¹ and 1994, and 1999, which covered negotiated agreements for sand and gravel in lieu of competitive bidding,¹² but never again to the degree it was amended in 1978. Following the Macondo blowout, OCSLA was not amended yet again, but rather, BOEM and BSEE comprehensively reviewed and strengthened their regulations.¹³

[3] Federal Oil and Gas Management Act of 1982, Pub. L. No. 97-451 (1982) (FOGRMA)

The Federal Oil and Gas Management Act of 1982 was passed in order to ensure proper accounting and revenue management from offshore and onshore public lands.¹⁴ The law was prompted by outdated and flawed methods of revenue management and accounting by the United States Geological Survey and the Bureau of Land Management, particularly with regard to oil and gas on Indian reservations in the 1970s.¹⁵ FOGRMA provided for the creation of the Minerals Management Service, who had the responsibility of enforcing the law and promulgating regulations under the law from 1982 until its dissolution in 2010. FOGRMA also provided the MMS with enhanced enforcement tools and penalty imposing authority for failure to conduct proper accounting and auditing of oil and gas revenues.¹⁶

FOGRMA has an important role in offshore natural gas production in that royalty management, accounting, and accounting must be conducted according to its sections and the resultant regulations.¹⁷ All natural gas extracted from the territorial sea has royalties which must be paid to the United States, and the primary law which sets out the rules and procedures for those payments is FOGRMA. FOGRMA sets out an affirmative duty to pay royalty,¹⁸ and an affirmative duty to conduct recordkeeping,

Appendix 6 to *An Ocean Blueprint for the 21st Century*, Final Report of the U.S. Commission on Ocean Policy (2004) http://govinfo.library.unt.edu/oceancommission/documents/full_color_rpt/append_6.pdf (last visited Oct. 8, 2014).

¹¹ Review of U.S. Ocean and Coastal Law: The Evolution of Ocean Governance Over Three Decades, Appendix 6 to *An Ocean Blueprint for the 21st Century*, Final Report of the U.S. Commission on Ocean Policy (2004) http://govinfo.library.unt.edu/oceancommission/documents/full_color_rpt/append_6.pdf (last visited June 8, 2015).

¹² Review of U.S. Ocean and Coastal Law: The Evolution of Ocean Governance Over Three Decades, Appendix 6 to *An Ocean Blueprint for the 21st Century*, Final Report of the U.S. Commission on Ocean Policy (2004) http://govinfo.library.unt.edu/oceancommission/documents/full_color_rpt/append_6.pdf (last visited June 8, 2015).

¹³ Robin Dupre, *Post-Macondo Regulations Change the O&G Industry*, Rigzone (Dec. 5, 2011), http://www.rigzone.com/news/article.asp?a_id=113101 (last visited Oct. 8, 2014).

¹⁴ Federal Oil and Gas Management Act of 1982, 30 U.S.C. § 1701 *et seq.* (1982).

¹⁵ Marjane Ambler, Wind River Expose in 1980s Led to National Oil and Gas Reforms, WyoHistory.org, <http://www.wyohistory.org/essays/wind-river-expos%C3%A9-1980s-led-national-oil-and-gas-reforms> (last visited Oct. 17, 2014).

¹⁶ H.R. Rep. No. 97-859 (1982).

¹⁷ *See generally* 30 C.F.R. Part 1200 (2014).

¹⁸ 30 U.S.C. § 1712 (2012).

where the records may be subject to an audit or investigation for up to six years after the records are generated (or longer, if the Secretary notifies the operator that they are the subject of an audit and their records must be maintained longer than the statutory limit).¹⁹ FOGRMA provides for civil penalty authority vested within the MMS (now ONRR),²⁰ as well as provisions covering interest and penalties.²¹

FOGRMA was amended significantly by the Royalty Simplification and Fairness Act of 1996,²² but continues to play an important role in offshore natural gas revenue management. Along with OCSLA, it is a critical piece of legislation governing operations and production on the OCS and should be regularly reviewed and tracked by practitioners.

[4] Deepwater Port Act, Pub. L. No. 93-627 (1974) (DPA)

The Deepwater Port Act of 1974 was signed into law in 1975, and was designed to be a “licensing system for ownership, construction and operation of deepwater ports beyond the coastline and territorial sea.”²³ The law underwent a significant amendment in 2002, The Maritime Transportation Security Act, which expanded the DPA’s authority to natural gas terminals sited offshore.²⁴ As of June 5, 2015, only one deepwater port is in operation: The Louisiana Offshore Oil Port.²⁵ It should be noted that the DPA does not apply to facilities which are exclusively designed for exploration and production.²⁶

With respect to natural gas exploration, production, and liquefaction, no deepwater port currently exists which is permitted for natural gas usage. Several projects are in various stages of applying for licenses, such as the Port Ambrose project proposed by Liberty Natural Gas, LLC off the coast of New York, and the Delfin LNG, LLC proposed terminal off the coast of Louisiana.

The Maritime Administration has only recently received its first applications to

¹⁹ 30 U.S.C. § 1713 (2012).

²⁰ 30 U.S.C. § 1719 (2012).

²¹ 30 U.S.C. § 1721 (2012).

²² See § 39.02[5] for a discussion of the amendments from the Royalty Simplification and Fairness Act.

²³ Review of U.S. Ocean and Coastal Law: The Evolution of Ocean Governance Over Three Decades, Appendix 6 to *An Ocean Blueprint for the 21st Century*, Final Report of the U.S. Commission on Ocean Policy (2004) http://govinfo.library.unt.edu/oceancommission/documents/full_color_rpt/append_6.pdf (last visited Oct. 8, 2014).

²⁴ Marine Transportation Security Act of 2002, 46 U.S.C. § 2101 *et seq.*, (2002). The act covered a significant number of issues beyond natural gas terminal siting, but only Section 106 of the Act is relevant to deepwater terminal siting. Section 106 sets out which parts of the Deepwater Port Act apply to natural gas terminal siting, and which parts of the Deepwater Port Act are inapplicable.

²⁵ LOOP LLC, <http://www.loopllc.com/About-Loop/Story.aspx> (last visited Oct. 17, 2014).

²⁶ Review of U.S. Ocean and Coastal Law: The Evolution of Ocean Governance Over Three Decades, Appendix 6 to *An Ocean Blueprint for the 21st Century*, Final Report of the U.S. Commission on Ocean Policy (2004) http://govinfo.library.unt.edu/oceancommission/documents/full_color_rpt/append_6.pdf (last visited Oct. 8, 2014); *Get Oil Out! Inc. v. Exxon Corp.*, 586 F.2d 726 (9th Cir. 1978).

license these offshore natural gas terminals.²⁷ In October 2014, MARAD released proposed procedures for export licenses which would govern the applications of both Delfin LNG and Port Ambrose.²⁸ These procedures were promulgated under the authority of the Deepwater Port Act and a recent amendment, the Coast Guard and Maritime Transportation Act of 2012, which confirmed MARAD's authority to license the construction and operation of deepwater ports for the export of oil and natural gas from the United States.²⁹

[5] Royalty Simplification and Fairness Act of 1996, Pub. L. No. 104-185 (1996) (RSFA)

RSFA is an act which amended FOGRMA, and remains a principal operating legislation of ONRR. One of the principal elements of RSFA was the provision which provided for the potential delegation of auditing, accounting, and investigations to states, upon a request by the state and a showing of state adequacy and sufficiency to the Secretary of the Interior.³⁰ The law also provided a time limit for initiating actions based on royalty obligations of seven years,³¹ but exempted Indian leases from the law.³² Further amendments affected interest payments as well as adjustments and refunds.³³

RSFA served to decentralized royalty management and accounting from the federal to the state level, and served to limit MMS's (now ONRR's) ability to issue actions or investigations for obligations which became due many years in the past. It lowered the burden of compliance on operators in terms of production accounting and revenue management. Fundamentally, it served to modernize and update revenue management and production accounting after questions and concerns regarding FOGRMA arose in the courts.³⁴ Finally, the law, through its exclusion of Indian mineral leases, served to confirm the Department of the Interior's fiduciary duty over Indian leases, and the fact that the fiduciary duty could not be delegated.

Generally, the most critical element of the legislation, as it has played out in the courts, has been the seven-year statute of limitations to MMS, and now ONRR, orders.³⁵ Operators have tried to extend the meaning or applicability of the statute of limitations in order to further restrain administrative actions by MMS, and then

²⁷ Port Ambrose, LLC, <http://portambrose.com/regulatory-process/> (last visited June 8, 2015); Delfin LNG, LLC, <http://www.delfinlng.com/phoenix.zhtml?c=253829&p=irol-news&nyo=0> (last visited June 8, 2015).

²⁸ 79 Fed. Reg. 200, 62242 (Oct. 16, 2014).

²⁹ 79 Fed. Reg. 200, 62242 (Oct. 16, 2014).

³⁰ 30 U.S.C. § 1735 (2012).

³¹ 30 U.S.C. § 1724 (2012).

³² 30 U.S.C. § 1701 (2012).

³³ 30 U.S.C. § 1721a (2012).

³⁴ H. Rep. No. 104-667 (1996), at 13.

³⁵ *See, e.g.,* BP Am. Prod. Co. v. Burton, 549 U.S. 84 (2006).

ONRR, with limited success.³⁶ RSFA remains a critical constraint on the administrative actions by ONRR and practitioners focusing on offshore natural gas should be mindful of the law, in particular its statute of limitations³⁷ and tolling³⁸ sections, to ensure orders and administrative actions are properly and legally issued.

[6] Energy Policy Act of 2005, Pub. L. No. 109-58 (2005) (EPAct 2005)

EPAct 2005 touched on natural gas production through Subpart F, which generally covered access to federal lands.³⁹ Sections 361–366 focused on improving permitting both onshore and offshore, and resulted in rulemakings aimed to expedite the permitting process. Subpart E also provided production incentives, in the form of royalty relief, to drilling in between 200 and 400 meters below sea level, on wells which are at least 15,000 feet deep.⁴⁰

[7] National Environmental Policy Act, Pub. L. No. 91-190 (1969) (NEPA)

NEPA is arguably the most important environmental protection statute. NEPA requires federal agencies to take a “hard look” at any major action would could have potentially adverse consequences on the environment.⁴¹ NEPA requires a analysis at the lease planning stage, the lease issuance stage, and at the state where BOEM approves a permit to drill.⁴²

Opponents of offshore natural gas production often invoke NEPA when contesting BOEM five-year plans and lease issuance. Frequently, opponents claim BOEM has conducted the proper procedures and the appropriate reviews in developing five-year plans and in doing lease issuance prior to investing significant sums which may be wasted capital following a successful court challenge.⁴³ At the least, as was the case in *Point Hope*, an operator’s actions may be delayed pending a successful review of the environmental regulations. At the worst, the lease will be cancelled. The benchmark case for reference under NEPA is *Natural Resources Defense Council v. Hodel*,⁴⁴ which challenged an Environmental Impact Statement in a five-year leasing plan. The leading case for challenging an offshore production at the exploration and

³⁶ BP Am. Prod. Co. v. Burton, 549 U.S. 84 (2006).

³⁷ 30 U.S.C. § 1724(b) (2012). The seven-year statute of limitations is constructed in favor of operators, limiting government actions but for a very limited number of circumstances described in § 1724(d).

³⁸ 30 U.S.C. § 1724(d) (2012). A tolling agreement will extend the seven-year statute of limitations, and operators should be mindful of the length of the tolling agreement given the limiting language on the government of § 1724(b).

³⁹ Energy Policy Act of 2005, Pub. L. No. 109-58 (2005), accessed at <http://www.gpo.gov/fdsys/pkg/BILLS-109hr6enr/pdf/BILLS-109hr6enr.pdf>, at 127 (last visited Oct. 30, 2014).

⁴⁰ Energy Policy Act of 2005, Pub. L. No. 109-58 (2005), accessed at <http://www.gpo.gov/fdsys/pkg/BILLS-109hr6enr/pdf/BILLS-109hr6enr.pdf>, at 109–110 (last visited Oct. 30, 2014).

⁴¹ *Earth Island Inst. v. United States Forest Serv.*, 351 F.3d 1291, 1300 (9th Cir. 2003).

⁴² *Native Vill. of Point Hope v. Jewell*, 740 F.3d 489 (9th Cir. 2014).

⁴³ See *Native Vill. of Point Hope v. Jewell*, 740 F.3d 489 (9th Cir. 2014).

⁴⁴ 865 F.2d 288 (D.C. Cir. 1988).

development planning stage is *Edwardsen v. U.S. Department of the Interior*.⁴⁵

[8] Endangered Species Act, Pub. L. No. 93-205 (1973) (ESA)

The ESA, in Section 9, prohibits the taking of a species or a habitat, but limits the takes to threatened or endangered species. Section 7(a) requires BOEM to consult with the USFWS and the NMFS to ensure that a proposed gas production project will not result in a take of a species or habitat.⁴⁶ Following the consultation, NMFS or USFWS, as appropriate, issues an opinion, which assesses the risk of the take, reasonable alternatives, and reasonable and prudent measures that could minimize the impact of the take.⁴⁷ If the reasonable and prudent measures have been implemented and a take still occurs, it is not considered unlawful under Section 9.⁴⁸

[9] Marine Mammal Protection Act, Pub. L. No. 95-522 (1972) (MMPA)

The MMPA prohibits the taking of marine mammal species and habitats, but unlike the ESA or the Magnuson-Stevens Act,⁴⁹ does not require consultation with other agencies.⁵⁰ Given the diminished requirements of the MMPA, operators of natural gas facilities on the OCS who believe they may be at risk of taking a habitat or species through their operations should seek an authorization for such a taking from the US Fish and Wildlife Service or the National Marine Fisheries Service. Failing to receive authorization could result in liability.⁵¹ Further, the NMFS or the USFWS can also issue incidental harassment authorizations, which would not amount to a taking.⁵²

⁴⁵ 268 F.3d 781 (9th Cir. 2001). See Adam Vann, *Offshore Oil and Gas Development: Legal Framework* (Congressional Research Service Sept. 26, 2014), available at <http://fas.org/sgp/crs/misc/RL33404.pdf>.

⁴⁶ 16 U.S.C. § 1536 (2012).

⁴⁷ 16 U.S.C. § 1536 (2012). See also *Bennett v. Spear*, 520 U.S. 154, 170 (1997).

⁴⁸ Review of U.S. Ocean and Coastal Law: The Evolution of Ocean Governance Over Three Decades, Appendix 6 to *An Ocean Blueprint for the 21st Century*, Final Report of the U.S. Commission on Ocean Policy (2004) http://govinfo.library.unt.edu/oceancommission/documents/full_color_rpt/append_6.pdf (last visited Oct. 8, 2014).

⁴⁹ Magnuson-Stevens Fishery Conservation and Management Act, Pub. L. No. 94-265 (1996), accessed at <http://www.nmfs.noaa.gov/sfa/magact/> (last visited June 8, 2015). The Magnuson-Stevens Fishery Conservation and Management Act passed due to declining stocks in fishery resources, and aimed at preventing overfishing, rebuilding fishery stocks, insuring conservation, and facilitating the long-term protection of essential fish habitats while realizing the full potential of the Nation's fishery resources.

⁵⁰ Review of U.S. Ocean and Coastal Law: The Evolution of Ocean Governance Over Three Decades, Appendix 6 to *An Ocean Blueprint for the 21st Century*, Final Report of the U.S. Commission on Ocean Policy (2004) http://govinfo.library.unt.edu/oceancommission/documents/full_color_rpt/append_6.pdf (last visited Oct. 8, 2014).

⁵¹ Review of U.S. Ocean and Coastal Law: The Evolution of Ocean Governance Over Three Decades, Appendix 6 to *An Ocean Blueprint for the 21st Century*, Final Report of the U.S. Commission on Ocean Policy (2004) http://govinfo.library.unt.edu/oceancommission/documents/full_color_rpt/append_6.pdf (last visited Oct. 8, 2014).

⁵² Review of U.S. Ocean and Coastal Law: The Evolution of Ocean Governance Over Three Decades, Appendix 6 to *An Ocean Blueprint for the 21st Century*, Final Report of the U.S. Commission on Ocean

[10] Clean Air Act, Pub. L. No. 88-206 (1963) (CAA)

The CAA, in the context of offshore natural gas production, is important in how it provides the authority to establish national ambient air quality standards (NAAQS). While the EPA has the authority under the CAA to set such standards generally, Congress provided the Secretary of the Department of the Interior the authority to regulate NAAQS on the OCS.⁵³ This division of authority was confirmed in *California v. Kleppe*.⁵⁴ However, continuing disagreement and controversy regarding whether or not regulations covering NAAQS on the OCS off California could coexist with California's coast management plan led to the Clean Air Act Amendments of 1990, which limited DOI jurisdictions over NAAQS on the OCS to Western and Central Gulf of Mexico.⁵⁵ However, the EPA asserts control if a facility is within 25 miles of a state's seaward boundary, and a state can receive a delegation of power from the EPA if the State's air quality enforcement proposal is deemed "adequate."⁵⁶

The net effect of such regulations is that the Department of the Interior, which is ultimately responsible for management and operations of gas production platforms on the OCS, can make regulations governing their impact on air quality. This consolidation of management and environmental responsibility within DOI is advantageous for operators, who can adhere to regulations from a single source rather than from competing or conflicting federal authorities.

[11] Coastal Zone Management Act, Pub. L. No. 92-583 (1972) (CZMA)

The CZMA is one of the most critical laws affecting offshore natural gas production. The passage of the CZMA in 1972 had a significant effect on other laws, most importantly, the OCSLA and its amendments in 1978. Principally, the requirement to manage coastal zones and confer with states and federal agencies on coastal zone management plans injected a significant burden on the development process.⁵⁷ All states with offshore natural gas production, with the exception of Alaska, which

Policy (2004) http://govinfo.library.unt.edu/oceancommission/documents/full_color_rpt/append_6.pdf (last visited Oct. 8, 2014).

⁵³ Review of U.S. Ocean and Coastal Law: The Evolution of Ocean Governance Over Three Decades, Appendix 6 to *An Ocean Blueprint for the 21st Century*, Final Report of the U.S. Commission on Ocean Policy (2004) http://govinfo.library.unt.edu/oceancommission/documents/full_color_rpt/append_6.pdf (last visited Oct. 8, 2014).

⁵⁴ 604 F.2d 1187 (9th Cir. 1979).

⁵⁵ Review of U.S. Ocean and Coastal Law: The Evolution of Ocean Governance Over Three Decades, Appendix 6 to *An Ocean Blueprint for the 21st Century*, Final Report of the U.S. Commission on Ocean Policy (2004) http://govinfo.library.unt.edu/oceancommission/documents/full_color_rpt/append_6.pdf (last visited Oct. 8, 2014).

⁵⁶ Review of U.S. Ocean and Coastal Law: The Evolution of Ocean Governance Over Three Decades, Appendix 6 to *An Ocean Blueprint for the 21st Century*, Final Report of the U.S. Commission on Ocean Policy (2004) http://govinfo.library.unt.edu/oceancommission/documents/full_color_rpt/append_6.pdf (last visited Oct. 8, 2014), at 105.

⁵⁷ 16 U.S.C. § 1455a (2012); 16 U.S.C. § 1455b (2012); 16 U.S.C. § 1556 (2012).

withdrew in 2011, participate in the Coastal Zone Management Program.⁵⁸

Federal agencies such as BOEM who wish to lease parcels on the OCS need to ensure that operators certify that their exploratory plan is consistent with an adjacent state's coastal zone management plan.⁵⁹ The state may be overruled by the Secretary of Commerce, but in practice, this provision of the CZMA acts as a functional power to inhibit drilling if a state disagrees with an offshore lease sale. Such a disagreement led to one of the more significant cases in offshore oil and natural gas production in recent years, which resulted in the government being ordered to pay \$156 million in restitution to an operator whose CZMA certification was nullified by a state law.⁶⁰

[12] Clean Water Act, Pub. L. No. 92-500 (1972) (CWA)

The CWA is an essential law which protects the waters of the United States from pollution. The principal element of the law which regulates the natural gas industry is Section 403, which governs the discharge of pollutants from point sources.⁶¹ Under the CWA, both floating crafts, wells, and vessels are considered point sources,⁶² and all of these potential polluters are critical to natural gas extraction on the OCS. Entities which seek to discharge dredge or fill material into the waters of the United States must seek a permit from the Environmental Protection Agency.⁶³

Permits for discharge can be found at 40 C.F.R. Part 435 Subpart A, which specifically address permits associated with offshore oil and gas extraction.⁶⁴ The stringency of the regulation is based upon whether or not a source of discharge is a new source which began producing following the enactment of the regulation or a source which had been producing oil and/gas prior to the enactment of the regulation.⁶⁵ Toxic pollutants are governed by the best available technology standard, whereas non-toxic

⁵⁸ See, e.g., *AES Sparrows Point LNG, LLC v. Smith*, 527 F.3d 120 (4th Cir. 2008) (where a state was barred from enforcing a zoning amendment because its coastal management plan did not include such measures, thus precluding the State's preemption of the Natural Gas Act under the Coastal Zone Management Act).

⁵⁹ 16 U.S.C. § 1456(c)(3) (2012).

⁶⁰ *Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. 604 (2000).

⁶¹ Review of U.S. Ocean and Coastal Law: The Evolution of Ocean Governance Over Three Decades, Appendix 6 to *An Ocean Blueprint for the 21st Century*, Final Report of the U.S. Commission on Ocean Policy (2004) http://govinfo.library.unt.edu/oceancommission/documents/full_color_rpt/append_6.pdf (last visited Oct. 8, 2014), at 102.

⁶² 43 U.S.C. § 1362(14) (2012).

⁶³ 33 U.S.C. § 1344 (2012).

⁶⁴ Review of U.S. Ocean and Coastal Law: The Evolution of Ocean Governance Over Three Decades, Appendix 6 to *An Ocean Blueprint for the 21st Century*, Final Report of the U.S. Commission on Ocean Policy (2004) http://govinfo.library.unt.edu/oceancommission/documents/full_color_rpt/append_6.pdf (last visited Oct. 8, 2014) at 102.

⁶⁵ Review of U.S. Ocean and Coastal Law: The Evolution of Ocean Governance Over Three Decades, Appendix 6 to *An Ocean Blueprint for the 21st Century*, Final Report of the U.S. Commission on Ocean Policy (2004) http://govinfo.library.unt.edu/oceancommission/documents/full_color_rpt/append_6.pdf (last visited Oct. 8, 2014) at 102.

pollutants are covered by the best conventional pollutant control technology.⁶⁶

It should be noted that the EPA's efforts to enhance the new source performance standards during the second term of the Obama administration do not affect mobile sources such as vessels or platforms, but rather, reflect stationary sources such as power plants.⁶⁷

§ 39.03 Planning and Programming of Federal Offshore Gas Leasing

[1] Developing the Five-Year Program

Pursuant to Section 18 of OCSLA, the Secretary of the Interior must “prepare and periodically revise, and maintain an oil and gas leasing program[.]”¹ The program must be based on the Secretary's determination of what “will best meet national energy needs for the five-year period following its approval or reapproval.”² In preparing this so-called “five-year program,” the Secretary must outline a schedule of proposed lease sales, including information on the size and timing of the lease sales.³ All lease sales within a designated five-year period must be included in the approved five-year program.⁴ Absent an act of Congress, no additional lease sales may be added to an existing five-year program.⁵

In scoping individual five-year programs, the Secretary must take into account and consider the economic, social, and environmental values of oil and gas resources and any potential impacts from oil and gas exploration on other OCS resources and on human, coastal, and marine environments.⁶ The Act requires that the “[t]iming and location of exploration, development, and production” be based upon consideration of a number of factors, including:

- The existing geographical, geological, and ecological information detailing the characteristics potential leasing regions;
- A balance between the benefit of resource development and the risk of detrimental environmental effects;
- The proximity of a prospective leasing region to regional and national energy markets, and the needs of those markets;

⁶⁶ Review of U.S. Ocean and Coastal Law: The Evolution of Ocean Governance Over Three Decades, Appendix 6 to *An Ocean Blueprint for the 21st Century*, Final Report of the U.S. Commission on Ocean Policy (2004) http://govinfo.library.unt.edu/oceancommission/documents/full_color_rpt/append_6.pdf (last visited Oct. 8, 2014), at 102.

⁶⁷ 74 Fed. Reg. 1429 (Jan. 8, 2014).

¹ 43 U.S.C. § 1344(a).

² 43 U.S.C. § 1344(a).

³ 43 U.S.C. § 1344(a).

⁴ “Oil and Gas Leasing on the Outer Continental Shelf,” http://www.boem.gov/uploadedFiles/BOEM/Oil_and_Gas_Energy_Program/Leasing/5BOEMRE_Leasing101.pdf.

⁵ “Oil and Gas Leasing on the Outer Continental Shelf,” http://www.boem.gov/uploadedFiles/BOEM/Oil_and_Gas_Energy_Program/Leasing/5BOEMRE_Leasing101.pdf.

⁶ 43 U.S.C. § 1344 (a)(1).

- The multiple use of the sea and seabed, including fisheries, navigation, existing or proposed sea lanes, potential sites of deepwater ports, and other anticipated uses of OCS resources and space;
- The commercial interest in particular areas for the development of oil and gas resources;
- The laws, goals, and policies of affected states as identified by the governors of those states;
- The relative environmental sensitivity and marine productivity of particular OCS areas; and
- Other relevant environmental and predictive information.⁷

The timing and location of leases must be done in a manner that balances “the potential for environmental damage, the potential for the discovery of oil and gas, and the potential for adverse impact on the coastal zone.”⁸ The Secretary must also ensure that leasing activities are conducted in a manner that ensures that the federal government and the public receive fair market value for the leased lands.⁹

The development of an individual 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.¹⁰ The RFI is published in the *Federal Register* and is followed by a 45-day comment period.¹¹ 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.¹²

Following the RFI, BOEM develops and issues a “draft proposed program” (“DPP”). The DPP is available for a 60-day public comment period.¹³ 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.¹⁴

On the basis of comments on the DPP, BOEM scopes the “proposed program” (“PP”). Section 18(b)(3) of OCSLA requires the Interior Secretary to conduct environmental studies and to prepare an environmental impact statement in accordance with NEPA. ¹⁵ Accordingly, BOEM prepares a draft environmental impact statement

⁷ 43 U.S.C. § 1334(a)(2).

⁸ 43 U.S.C. § 1334(a)(3).

⁹ 43 U.S.C. § 1334(a)(4).

¹⁰ 30 C.F.R. § 556.16(a).

¹¹ 30 C.F.R. § 556.16(a).

¹² 30 C.F.R. § 556.16(a).

¹³ 30 C.F.R. § 556.17(a)(1).

¹⁴ 30 C.F.R. § 556.20.

¹⁵ 43 U.S.C. § 1334(b)(3).

(“DEIS”).¹⁶ The public has 90 days to comment on the PP and 45 days to comment on the DEIS.¹⁷ Following the comment period, BOEM amends the PP and the DEIS 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.

[2] Planning for Specific Lease Sales

The lease sale process begins with publication in the *Federal Register* of a Call for Information and Nominations (“CIN”) seeking the identification of areas in which there is commercial interest for leasing and areas of special concern that should be analyzed in the plan.¹⁸ The CIN may occasionally be preceded by a request of industry interest in specific lease areas.¹⁹ Relevant information sought by the CIN includes geological conditions, including bottom hazards; sea-bed or near-shore archaeological sites; multiple uses of the proposed leasing area, including fisheries, recreation, and navigation; and other socioeconomic, biological, and environmental information. In responding to the CIN, parties must address their responses to the appropriate BOEM regional supervisor. The CIN is accompanied by a notice of intent to prepare an EIS.²⁰ In order to comply with its NEPA obligations, BOEM hosts scoping meetings to solicit public comments regarding issues of consideration for the NEPA document. Both documents are made available for 30 days of public comment.

Thereafter, BOEM analyzes public comments, taking into account resource potential and environmental impacts. On the basis of this information, BOEM publishes an “Area Identification” (“AI”), which defines the geographic scope of the lease sale area to be analyzed in the NEPA process.²¹ The AI is analyzed in a draft EIS, which is published in the *Federal Register* and subject to a 45-day comment period. Concurrently, BOEM hosts public meeting inviting stakeholders and the general public to comment on the draft EIS.

Following the comment period, BOEM prepares a proposed notice of sale (“PNS”), which is published in the *Federal Register*.²² The PNS identifies the proposed timing and location of a proposed lease sale, as well as lease terms and conditions and recommended mitigation measures, including lease stipulations.²³ The PNS is forwarded to the governors of affected states for comment, and the governors have 60

¹⁶ 30 C.F.R. § 556.17(c).

¹⁷ 30 C.F.R. § 556.17(b).

¹⁸ 30 C.F.R. § 556.23(b).

¹⁹ 30 C.F.R. § 556.23(a).

²⁰ “Oil and Gas Leasing on the Outer Continental Shelf,” http://www.boem.gov/uploadedFiles/BOEM/Oil_and_Gas_Energy_Program/Leasing/5BOEMRE_Leasing101.pdf.

²¹ 30 C.F.R. § 556.26(a).

²² 30 C.F.R. § 556.29(c).

²³ 30 C.F.R. § 556.29(a).

days to provide comments.²⁴ At the same time, the agency prepares a Coastal Zone Management Act (“CZMA”) consistency determination (“CD”) to ensure consistency with affected states’ coastal zone policies. The affected states are given 60-days to concur with or object to the CD and may request one 15-day extension. An additional 15 days is included in the process for internal BOEM review so that the CD process takes 90 days total. Following a robust consideration of comments on the draft EIS, BOEM publishes a final EIS and provides a 30-day comment period.

Following the PNS, CD, and final EIS processes, BOEM issues a final notice of sale (“FNOS”), which includes the final terms and conditions of the lease sale, including the place and time at which bids must be filed and the date and hour that bids will be opened.²⁵ The FNOS is published in the *Federal Register* at least 30 days prior to the sale.²⁶ A Record of Decision (“ROD”) for the Final EIS is published concurrently with the FNOS.

§ 39.04 Lease Auctions

[1] Eligibility of Lessees

OCS oil and gas leases may only be issued to U.S. citizens, nationals or resident aliens, and to U.S. corporations and partnerships.¹ BOEM’s regulations permit the agency to disqualify any prior leaseholder from acquiring new leases if that leaseholder’s past operating performance has been deemed unacceptable, if the leaseholder has failed to meet due diligence requirements, or if the leaseholder has failed to comply with production reporting requirements.² While joint bidding is permitted, BOEM has a “restricted bidder list” that, under certain conditions, prohibits joint bidding on leases by major oil companies.³

[2] Lease Sale

Individual lease sales are held least 30 days after BOEM publishes the FNOS in the *Federal Register*. The lease sale process requires a qualified bidder to submit by a certain date a sealed bid plus one-fifth of the bonus bid for each tract on which the qualified bidder wishes to bid.⁴ Thereafter, BOEM will hold a public lease sale in the region in which the lease is located.⁵ At the lease sale, the regional director publically opens and reads the bids.⁶ BOEM does not accept or reject bids at the time of lease sale. Rather, BOEM has 90 days to accept or reject bids and reserves the right to reject

²⁴ 30 C.F.R. §§ 556.29(c) and 556.31.

²⁵ 30 C.F.R. § 556.32(a).

²⁶ 30 C.F.R. § 556.32(a).

¹ 30 C.F.R. § 556.35(b).

² 30 C.F.R. §§ 556.35(d), 556.46(h), and 556.44.

³ 30 C.F.R. §§ 556.41(a), (b), and 556.44(a).

⁴ 30 C.F.R. § 556.46.

⁵ 30 C.F.R. § 556.47(a).

⁶ 30 C.F.R. § 556.47(a).

any bid that fails to meet the agency's fair market value assessment.⁷ In making its fair market value assessment, BOEM assesses expected rather than actual activities and results, looking to the value of the right to explore, develop, and produce oil and natural gas resources.⁸ Also during this time, BOEM will coordinate with the Attorney General and the Federal Trade Commission to ensure that any lease award does not violate federal antitrust laws.⁹ Within 11 business days of bid approval, the qualified bidders whose bid—or bids—is accepted must pay the remaining four-fifths of the bonus bid plus the first year rental payment.¹⁰ The bidder must also file a bond.¹¹ If the bidder fails to comply with these requirements within the time allowed, the bidder forfeits its deposit.¹² For rejected bids, BOEM refunds any money deposited plus interest accrued.

[3] Lease Terms and Conditions

Those whose bids are accepted gain exclusive right to engage in exploration, development, and production activities within a particular 9-square mile lease area. BOEM's regulations provide for an initial lease period of five years, though an "authorized officer" may grant up to a 10-year initial period for leases located in "unusually deep water or other unusually adverse conditions" requiring additional time to explore and develop.¹³ For leases located in water depths ranging from 400 to 800 meters (1,312 to 2,624 feet), BOEM's regulations prescribe an eight-year lease term and require that an operator undertake exploratory drilling activities within the first five years, otherwise BOEM will void the lease.¹⁴ BOEM's regulations also prohibit the resale, exchange, assignment, or transfer of a lease tract absent approval by BOEM.¹⁵

Where an operator develops gas resources on a lease, that lease shall continue to run after the initial period so long as the lease produces gas in paying quantities.¹⁶ A lease can also extend beyond the initial term where the operator (1) is engaged in drilling or well reworking operations and the operator receives approval from the Secretary;¹⁷ or (2) where the Director has granted a suspension of production or suspension of

⁷ 30 C.F.R. § 556.47.

⁸ "Oil and Gas Leasing on the Outer Continental Shelf," http://www.boem.gov/uploadedFiles/BOEM/Oil_and_Gas_Energy_Program/Leasing/5BOEMRE_Leasing101.pdf.

⁹ "Oil and Gas Leasing on the Outer Continental Shelf," http://www.boem.gov/uploadedFiles/BOEM/Oil_and_Gas_Energy_Program/Leasing/5BOEMRE_Leasing101.pdf.

¹⁰ 30 C.F.R. § 556.47(f).

¹¹ 30 C.F.R. § 556.47(f).

¹² 30 C.F.R. § 556.47(g).

¹³ 30 C.F.R. § 556.37(a)(1).

¹⁴ 30 C.F.R. § 556.37(a)(2)–(3).

¹⁵ 30 C.F.R. § 556.37(a)(2)–(3).

¹⁶ 30 C.F.R. § 556.37(b).

¹⁷ 30 C.F.R. §§ 556.37(b), 556.70.

operations.¹⁸

The lease agreement executed by BOEM and the successful bidder will contain provisions requiring the bidder to post a surety bond and to make royalty and rental payments, and limiting the sale, assignment or transfer of the lease. The lease contract will also include stipulations and other mitigation measures outlining additional provisions that the leaseholder must meet to address environmental, cultural, and other considerations raised by affected states, federal agencies, tribal governments and other interested parties. The lease agreement will also include a provision mandating that the leaseholder comply with future rules, regulations, and administrative policies issued after execution of the lease.

§ 39.05 Drilling Plans and Permits

[1] Exploration Plans

Before an operator can conduct exploratory drilling activities on its lease, BOEM requires that an operator submit a detailed Exploration Plan (“EP”) to the agency for review.¹ BOEM’s regulations at 30 C.F.R. 550 Subpart B detail the requirements for EPs.² The purpose of the EP is to demonstrate that an operator has planned and prepared to conduct operations:

- In conformance with OCSLA, BOEM, and BSEE’s regulations, lease provisions and stipulations, and other federal laws;
- Safely and in a way that that does not seriously harm or damage the human, marine, or coastal environment;
- According to sound conservation practices;
- In a manner that protects the rights of the lessor;
- In a way that does not interfere unreasonably with other OCS uses, including those related to the military and national security.³

Prior to submitting an EP, an operator may choose—or the Regional Supervisor may direct an operator—to conduct “ancillary activities” such as geological and geophysical (G&G) activities, geological, archaeological, biological survey, and studies modeling oil spills and other hazardous releases.⁴ The information derived from ancillary activities is required to be included in the EP,⁵ and is used to help BOEM in its determination of whether to approve or reject an operator’s plan.

In the EP, the operator must include a description and discussion of the proposed

¹⁸ “Oil and Gas Leasing on the Outer Continental Shelf,” http://www.boem.gov/uploadedFiles/BOEM/Oil_and_Gas_Energy_Program/Leasing/5BOEMRE_Leasing101.pdf.

¹ 30 C.F.R. § 550.201.

² 30 C.F.R. §§ 550.200–550.299.

³ 30 C.F.R. § 550.202(a)–(e).

⁴ 30 C.F.R. § 550.207(a)–(c).

⁵ 30 C.F.R. § 550.214.

exploration activities (e.g., drilling, well test flaring, installation of well protection structures, temporary abandonment) and drilling objectives, as well as a tentative schedule of when drilling will commence and end.⁶ The EP must also include a detailed map of where the well is located on the surface,⁷ a description of the drilling unit,⁸ and a service fee of \$3,442 for each surface location.⁹

In addition, an operator must meet a number of informational requirements, including:

- General information, including information on drilling fluids, chemical products, and new or unusual technology to be used during drilling activities;¹⁰
- Information on oil spill financial responsibility, well control, and a blowout scenario;¹¹
- Information on hydrogen sulfide;¹²
- Information on biological, physical, and socioeconomic conditions;¹³
- Information on solid and liquid waste discharges;¹⁴
- Information on air emissions;¹⁵
- Information on oil and hazardous substance spills;¹⁶
- Information on environmental monitoring;¹⁷
- Information on lease stipulations;¹⁸
- Information on mitigation measures;¹⁹
- Information on support vessels, offshore vehicles, and aircraft to be utilized

⁶ 30 C.F.R. § 550.211(a).

⁷ 30 C.F.R. § 550.211(b).

⁸ 30 C.F.R. § 550.211(c).

⁹ 30 C.F.R. § 550.211(d); 30 C.F.R. § 550.125.

¹⁰ 30 C.F.R. § 550.213.

¹¹ 30 C.F.R. § 550.213.

¹² 30 C.F.R. § 550.215.

¹³ 30 C.F.R. § 550.216.

¹⁴ 30 C.F.R. § 550.217.

¹⁵ 30 C.F.R. § 550.218. It should be noted that BOEM is in the process of substantially revising its air quality regulations. The Spring 2015 Unified Regulatory Agenda indicates that a proposed regulation will be published by August 2015. See <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201504&RIN=1010-AD82>.

¹⁶ 30 C.F.R. § 550.219.

¹⁷ 30 C.F.R. § 550.221.

¹⁸ 30 C.F.R. § 550.222.

¹⁹ 30 C.F.R. § 550.223.

- during operations;²⁰
- Information on onshore support facilities;²¹
- Information on CZMA compliance, including a copy of the consistency certification;²²
- Information on environmental impacts;²³ and
- Administrative information.²⁴

For drilling activities conducted in the Alaska OCS region, an operator must comply with additional information requirements as detailed in Section 550.220.²⁵

Once an operator has assembled the EP and accompanying information, the document is submitted to BOEM as a “proposed EP.”²⁶ Upon receipt of the proposed EP, BOEM has 15 working days to review the submission to determine whether to deem the EP “submitted.”²⁷ If the Regional Supervisor finds a deficiency in the proposed EP, the operator must remedy the proposed EP and resubmit the document.²⁸ Once the EP is “deemed submitted,” BOEM has 30 calendar days in which to take action on the EP.²⁹ The BOEM Regional Supervisor must take one of the following action: approve the EP, require the operator to modify the proposed EP, or disapprove the EP.³⁰ The Regional Supervisor will only disapprove an EP where the “proposed activities would probably cause serious harm or damage to life (including fish or other aquatic life); property; any mineral (in areas leased or not leased); the National security or defense; or the marine, coastal, or human environments,” and the operator is unable to modify its actions to prevent the harm or damage.³¹

Once BOEM has approved an operator’s EP, an operator must conduct its lease activities according to the EP and any conditions on approval.³² Failure to comply with EP terms and conditions could result in enforcement actions by BOEM and the

²⁰ 30 C.F.R. § 550.224.

²¹ 30 C.F.R. § 550.225.

²² 30 C.F.R. § 550.226.

²³ 30 C.F.R. § 550.227.

²⁴ 30 C.F.R. § 550.228.

²⁵ Please note that in February 2015, BOEM and BSEE published in the *Federal Register* a proposed rule detailing additional requirements for exploratory drilling operations in the Beaufort and Chukchi Seas off of the North Slope of Alaska. See “Oil and Gas and Sulphur Operations on the Outer Continental Shelf-Requirements for Exploratory Drilling on the Arctic Outer Continental Shelf,” 80 Fed. Reg. 9915 (Feb. 24, 2015).

²⁶ 30 C.F.R. § 550.231(a).

²⁷ 30 C.F.R. § 550.231(a).

²⁸ 30 C.F.R. § 550.231(b).

²⁹ 30 C.F.R. § 550.233(a).

³⁰ 30 C.F.R. § 550.233(b).

³¹ 30 C.F.R. § 550.233(b).

³² 30 C.F.R. § 550.280(a).

assessment of civil penalties.³³ In order to conduct activities under the approved EP, an operator must obtain myriad approvals and permits from the District Manager or BSEE Regional Supervisor.³⁴ These include:

- an Application for Permit to Drill (APD);³⁵
- approval of production safety systems;³⁶
- approval of new platforms or structures, or other major modifications to existing platforms and structures;³⁷
- approval of application to install lease-term pipelines;³⁸ and
- other permits as required by law.³⁹

Even with an approved EP, the BOEM Regional Supervisor can require an operator to engage in post-approval monitoring in accordance with the Endangered Species Act and the Marine Mammal Protection Act.⁴⁰

[2] Development and Production Plans and Development Operations and Coordination Documents

Prior to conducting any development and production activities on its lease, an operator must submit to BOEM a detailed Development and Production Plan (DPP)⁴¹ or, if the development and production activities will be located in the Western Gulf of Mexico, Development Operations and Coordination Document (DOCD).⁴² BOEM's regulations at 30 C.F.R. 550 Subpart B detail the requirements for DPPs and DOCDs.⁴³ The purpose of the DPP and the DOCD is to demonstrate that an operator has planned and prepared to conduct operations:

- In conformance with OCSLA, BOEM and BSEE's regulations, lease provisions and stipulations, and other federal laws;
- Safely and in a way that that does not seriously harm or damage the human, marine, or coastal environment;
- According to sound conservation practices;
- In a manner that protects the rights of the lessor;

³³ 30 C.F.R. § 550.280(a).

³⁴ 30 C.F.R. § 550.281(a).

³⁵ 30 C.F.R. § 550.281(a)(1). For discussion of APD requirements, see § 39.05[3].

³⁶ 30 C.F.R. § 550.281(a)(2).

³⁷ 30 C.F.R. § 550.281(a)(3).

³⁸ 30 C.F.R. § 550.281(a)(4).

³⁹ 30 C.F.R. § 550.281(a)(5).

⁴⁰ 30 C.F.R. § 550.282.

⁴¹ 30 C.F.R. § 550.201.

⁴² 30 C.F.R. § 550.201.

⁴³ 30 C.F.R. §§ 550.200–550.299.

- In a way that does not interfere unreasonably with other OCS uses, including those related to the military and national security.⁴⁴

Prior to submitting an DPP or DOCD, an operator may choose—or the Regional Supervisor may direct an operator—to conduct “ancillary activities” such as geological and geophysical (G&G) activities, geological, archaeological, biological survey, and studies modeling oil spills and other hazardous releases.⁴⁵

In the DPP, DOCD, the operator must include a description and discussion of the proposed development and production activities (e.g., drilling, well test flaring, installation of well protection structures, temporary abandonment) and drilling objectives, as well as a tentative schedule of when drilling will commence and end.⁴⁶ The DPP and DOCD must also include a detailed map of where the well is located on the surface,⁴⁷ a description of the drilling unit,⁴⁸ a description of the production facilities, including the production platform,⁴⁹ and a service fee of \$3,442 for each surface location.⁵⁰

In addition, an operator must meet a number of informational requirements, including:

- General information, including information on drilling fluids, chemical products, and new or unusual technology to be used during drilling activities;⁵¹
- Information on oil spill financial responsibility, well control, and a blowout scenario;⁵²
- Information on G&G activities;⁵³
- Information on hydrogen sulfide;⁵⁴
- Information on mineral resource conservation;⁵⁵
- Information on biological, physical, and socioeconomic conditions;⁵⁶

⁴⁴ 30 C.F.R. § 550.202(a)–(e).

⁴⁵ 30 C.F.R. § 550.207(a)–(c).

⁴⁶ 30 C.F.R. § 550.241(a).

⁴⁷ 30 C.F.R. § 550.241(b).

⁴⁸ 30 C.F.R. § 550.241(c).

⁴⁹ 30 C.F.R. § 550.241(d).

⁵⁰ 30 C.F.R. § 550.241(e); 30 C.F.R. § 550.125.

⁵¹ 30 C.F.R. § 550.243.

⁵² 30 C.F.R. § 550.243.

⁵³ 30 C.F.R. § 550.244.

⁵⁴ 30 C.F.R. § 550.245.

⁵⁵ 30 C.F.R. § 550.246.

⁵⁶ 30 C.F.R. § 550.247.

- Information on solid and liquid waste discharges;⁵⁷
- Information on air emissions;⁵⁸
- Information on oil and hazardous substance spills;⁵⁹
- Information on environmental monitoring;⁶⁰
- Information on lease stipulations;⁶¹
- Information on mitigation measures;⁶²
- Decommissioning information;⁶³
- Information on related facilities, including the drilling units, production platforms, right-of-way pipelines, and transportation systems;⁶⁴
- Information on support vessels, offshore vehicles, and aircraft to be utilized during operations;⁶⁵
- Information on onshore support facilities;⁶⁶
- Information on CZMA compliance, including a copy of the consistency certification;⁶⁷
- Information on environmental impacts;⁶⁸ and
- Administrative information.⁶⁹

For drilling activities conducted in the Alaska OCS region, an operator must comply with additional information requirements as detailed in Section 550.251.⁷⁰

⁵⁷ 30 C.F.R. § 550.248.

⁵⁸ 30 C.F.R. § 550.249. It should be noted that BOEM is in the process of substantially revising its air quality regulations. The Spring 2015 Unified Regulatory Agenda indicates that a proposed regulation will be published by August 2015. *See* <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201504&RIN=1010-AD82>.

⁵⁹ 30 C.F.R. § 550.250.

⁶⁰ 30 C.F.R. § 550.252.

⁶¹ 30 C.F.R. § 550.253.

⁶² 30 C.F.R. § 550.254.

⁶³ 30 C.F.R. § 550.255.

⁶⁴ 30 C.F.R. § 550.256.

⁶⁵ 30 C.F.R. § 550.257.

⁶⁶ 30 C.F.R. § 550.258.

⁶⁷ 30 C.F.R. § 550.260.

⁶⁸ 30 C.F.R. § 550.261.

⁶⁹ 30 C.F.R. § 550.262.

⁷⁰ Please note that in February 2015, BOEM and BSEE published in the *Federal Register* a proposed rule detailing additional requirements for exploratory drilling operations in the Beaufort and Chukchi Seas off of the North Slope of Alaska. *See* "Oil and Gas and Sulphur Operations on the Outer Continental Shelf-Requirements for Exploratory Drilling on the Arctic Outer Continental Shelf," 80 Fed. Reg. 9915 (Feb. 24, 2015).

Once an operator has assembled the DPP or DOCD and accompanying information, the document is submitted to BOEM as a “proposed DPP” or “proposed DOCD.”⁷¹ Upon receipt of the proposed DPP or DOCD, BOEM has 25 working days to review the submission to determine whether to deem the DPP or DOCD “submitted.”⁷² If the Regional Supervisor finds a deficiency in the proposed DPP or DOCD, the operator must remedy the proposed DPP or DOCD and resubmit the document.⁷³ Once the DPP or DOCD is “deemed submitted,” BOEM has 60 calendar days in which to take action on the DPP or DOCD.⁷⁴ The BOEM Regional Supervisor must take one of the following action: approve the DPP or DOCD, require the operator to modify the proposed DPP or DOCD, or disapprove the DPP or DOCD.⁷⁵ The Regional Supervisor will disapprove a DPP or DOCD where the document is found to not comply with the requirements of OCSLA, in instances where an affected state has not made a final consistency determination under CZMA, where there are national security or defense conflicts, or where exceptional circumstances are found to exist.⁷⁶

Once BOEM has approved an operator’s DPP or DOCD, an operator must conduct its lease activities according to the DPP or DOCD and any conditions on approval.⁷⁷ Failure to comply with the DPP or DOCD terms and conditions could result in enforcement actions by BOEM and the assessment of civil penalties.⁷⁸ In order to conduct activities under the approved DPP or DOCD, an operator must obtain myriad approvals and permits from the District Manager or BSEE regional supervisor.⁷⁹ These include:

- an Application for Permit to Drill (APD);⁸⁰
- approval of production safety systems;⁸¹
- approval of new platforms or structures, or other major modifications to existing platforms and structures;⁸²
- approval of application to install lease term pipelines;⁸³ and

⁷¹ 30 C.F.R. § 550.266(a).

⁷² 30 C.F.R. § 550.266(a).

⁷³ 30 C.F.R. § 550.266(b).

⁷⁴ 30 C.F.R. § 550.270(a)(1).

⁷⁵ 30 C.F.R. § 550.270(b).

⁷⁶ 30 C.F.R. § 550.271.

⁷⁷ 30 C.F.R. § 550.280(a).

⁷⁸ 30 C.F.R. § 550.280(a).

⁷⁹ 30 C.F.R. § 550.281(a).

⁸⁰ 30 C.F.R. § 550.281(a)(1). For discussion of APD requirements, see § 39.05[3].

⁸¹ 30 C.F.R. § 550.281(a)(2).

⁸² 30 C.F.R. § 550.281(a)(3).

⁸³ 30 C.F.R. § 550.281(a)(4).

- other permits as required by law.⁸⁴

Even with an approved DPP or DOCD, the BOEM Regional Supervisor can require an operator to engage in post-approval monitoring in accordance with the Endangered Species Act and the Marine Mammal Protection Act.⁸⁵

[3] Application for Permits to Drill

BSEE's regulations at 30 C.F.R. Part 250 Subpart D describe the procedures for obtaining an application for permit to drill ("APD"). An APD is required before a lessee or operator drills any well or before the lessee or operator sidetracks, bypasses, or deepens a well.⁸⁶

Obtaining an APD is a multi-step process that requires an operator to submit a host of information, including:

- A plat that shows surface and subsurface location of the proposed well and all wells in the vicinity;⁸⁷
- Proposed well design criteria, including pore pressure, drilling fluid weights, and casing setting depths;⁸⁸
- The drilling prognosis with estimated depths to, *inter alia*, the top of marker formations, significant porous and permeable zones containing gas, and major faults. The drilling prognosis must also include a projected plan for well testing;⁸⁹
- Information on casing and cementing programs;⁹⁰
- A description and schematic of the diverter and blowout preventer ("BOP") systems, including independent third-party verification and supporting documentation demonstrating that the BOP blind-shear rams are capable of shearing any drill pipe in the hole under maximum anticipated surface pressure;⁹¹
- A description of plans if the operator proposes to use a mobile offshore drilling unit ("MODU"), including proof of fitness (which includes a heightened requirement for operating in frontier areas);⁹² and
- Additional information, including the rated capacities for the rig and other

⁸⁴ 30 C.F.R. § 550.281(a)(5).

⁸⁵ 30 C.F.R. § 550.282.

⁸⁶ 30 C.F.R. § 250.410(a).

⁸⁷ 30 C.F.R. § 250.412.

⁸⁸ 30 C.F.R. § 250.413.

⁸⁹ 30 C.F.R. § 250.414.

⁹⁰ 30 C.F.R. § 250.415.

⁹¹ 30 C.F.R. § 250.416.

⁹² 30 C.F.R. § 250.417.

equipment, information on drilling fluids, and proof that equipment is fit for drilling conditions.⁹³

In addition, the well for which the APD is sought must have been included in an operator's exploration plan ("EP"), development and production plan ("DPP"), or development operations coordination document ("DOCD").⁹⁴ The operator must also be able to meet the requirements for oil spill financial responsibility as outlined in Part 553 of 30 CFR.⁹⁵ Two versions of the APD must be submitted to the BSEE district manager: a version containing all proprietary information and a public information requirement.⁹⁶ A service fee of \$2,113 is also due with the APD.

§ 39.06 Offshore Natural Gas Operations

[1] Production Requirements

Operations to extract natural gas offshore take similar forms to operations to extract gas onshore. Like onshore operations, the leases have primary terms and secondary terms. The authority to lease offshore blocks to operators is within OCSLA¹ and BOEM has regulations governing the primary term of the lease.² Generally, the primary term of an offshore lease is five years where the depth is less than 400 meters, eight years where the depth is 400–800 meters, and 10 years where the water depth is greater than 800 meters.³ The regulation also states that exploratory wells must be drilled within five years on the mezzanine depth,⁴ but it is possible to toll this time limitation through a suspension of operations. This regulation was last examined in 1996, and deepwater drilling has become much more common in the intervening 18 years. Lessees complete and submit standard lease forms which outline rights and responsibilities on the leased parcel, and the form in turn acts as a governing document for conduct on the OCS.⁵

A lessee is required to pay annual rentals on its lease and the rentals are due in advance of each lease year.⁶ Rental fees are calculated on a per acre basis and are established in the Final Notice of Sale.⁷ A lease will not be executed until the lessee pays the bonus and the first year rental on the lease, both of which will be laid out in

⁹³ 30 C.F.R. § 250.418.

⁹⁴ 30 C.F.R. § 250.410(b).

⁹⁵ 30 C.F.R. § 250.410(c).

⁹⁶ 30 C.F.R. § 250.410(d)(1)–(2).

¹ 43 U.S.C. § 1337(b) (2012).

² 30 C.F.R. § 256.37 (2014).

³ 30 C.F.R. § 256.37 (2014).

⁴ 30 C.F.R. § 256.37 (2014).

⁵ Oil and Gas of Submerged Lands Lease, Bureau of Ocean Energy Management, <http://www.boem.gov/BOEM-2005/> (last visited Apr. 24, 2015).

⁶ 30 C.F.R. § 1218.151 (2014).

⁷ Oil and Gas of Submerged Lands Lease, Bureau of Ocean Energy Management, <http://www.boem.gov/BOEM-2005/> (last visited Apr. 24, 2015).

the Final Notice of Sale.⁸ A bidder on a lease must pay 20% of the bonus along with its bid, and then the remaining 80% in order to be paid in full on the bonus.⁹ Rentals must be paid on the lease on any year, even when there is no production.¹⁰ This means that rentals are due for any year in which there is no production in paying quantities, due to authorized suspensions, insufficient production, or because gas has yet to be produced in paying quantities. Failure to remit rental payments on time will result in late charges being assessed by ONRR.¹¹

A lease may require minimum royalties to be paid to ONRR, if it is detailed in the lease form.¹² Minimum royalties must only be paid following the initiation of royalty-bearing production, and are to be paid at the end of a lease year.¹³ Royalty payments are clearly articulated in ONRR's Mineral Revenue Reporter Handbook,¹⁴ the Minerals Production Reporter Handbook,¹⁵ and the Oil and Gas Payor Handbook.¹⁶ Further, ONRR regulations on royalties provide for the standards for reporting royalties, and the distinctions between reporting processed and unprocessed gas.¹⁷ Certain leases on the OCS are exempt from royalty under the terms of the Deepwater Royalty Relief Act of 1995,¹⁸ but recent programs on royalty relief have focused on shallow or difficult fields. Operators should look to the lease in order to determine the established royalty rate, which may range from 12.5% in earlier leases to 18.75% in more recent offerings. Any questions or concerns regarding royalty payments or royalty reporting should be directed to the appropriate Assistant Director at ONRR.

Following the conclusion of the primary term, the only way an operator can keep a lease active is through a duly authorized suspension of production or operations, or maintaining the lease through operations. Interruptions in operations are afforded at 180-day grace period, but there are strict requirements for notifying District Managers

⁸ Oil and Gas of Submerged Lands Lease, Bureau of Ocean Energy Management, <http://www.boem.gov/BOEM-2005/> (last visited Apr. 24, 2015); *see also* 30 C.F.R. § 1218.155 (2014).

⁹ 30 C.F.R. § 1218.155(b) (2014).

¹⁰ 30 C.F.R. § 1218.151 (2014).

¹¹ 30 C.F.R. § 1218.1510 (2014).

¹² Oil and Gas of Submerged Lands Lease, Bureau of Ocean Energy Management, <http://www.boem.gov/BOEM-2005/> (last visited Apr. 24, 2015); *see also* 30 C.F.R. § 1202.53 (2014).

¹³ Oil and Gas of Submerged Lands Lease, Bureau of Ocean Energy Management <http://www.boem.gov/BOEM-2005/> (last visited Apr. 24, 2015).

¹⁴ Mineral Revenue Reporter Handbook, Office of Natural Resources Revenue, V. 2.0 <http://www.onrr.gov/ReportPay/PDFDocs/RevenueHandbook.pdf> (last visited Apr. 24, 2015).

¹⁵ Mineral Revenue Reporter Handbook, Office of Natural Resources Revenue, V. 2.0 <http://www.onrr.gov/ReportPay/PDFDocs/RevenueHandbook.pdf> (last visited Apr. 24, 2015).

¹⁶ Oil and Gas Payor Handbook, Office of Natural Resources Revenue, V. 3, <http://www.onrr.gov/ReportPay/PDFDocs/ogphb3.pdf> (last visited Apr. 24, 2015).

¹⁷ 30 C.F.R. §§ 1202.150–1202.152 (2014).

¹⁸ Outer Continental Shelf Deep Water Royalty Relief Act of 1995 Summary, Energy Information Administration, http://www.eia.gov/oil_gas/natural_gas/analysis_publications/ngmajorleg/continental.html (last visited Jan. 30, 2015).

and Regional Supervisors regarding the cessation of production, the resumption of production, and drilling and re-working operations.¹⁹

Production in paying quantities can have a variety of meanings, but is not explicitly articulated either in the legislation or in the regulations. BSEE has determined that production in paying quantities would allow for a positive stream of income after deducting direct lease operating costs and minimum or actual royalty payments.²⁰ BSEE reserves the right to seek production data in the event that production appears to be insufficient.²¹ In such a situation, an operator has an 180 day window afforded to operations interruptions in order to show how a lease did not expire of its own terms for failure to produce in paying quantities.²² This data is generally available through ONRR, but it is not required that companies report their direct costs associated with lease operations and maintenance. Companies do have the ability to seek a suspension of production in the event that they are not producing in paying quantities.

The other way to ensure a lease's continuance through the secondary term is to conduct well drilling and reworking. Drilling and reworking operations are articulated precisely within the BSEE regulations which focus on work done on a well in order to maintain or restore productivity to a well following initial completion.²³

[2] Suspensions

[a] Suspensions—In General

An operator may request a suspension of production or a suspension of operations prior to lease expiration.²⁴ The effect of a suspension is to extend the term of the length of the suspension.²⁵ Suspensions may last for up to five years, but typically last a much shorter period of time.²⁶ A suspension of operations automatically terminates when the suspended operations commence, and a suspension of production ends automatically when production begins.²⁷ BSEE can terminate a suspension if the justification for the suspension no longer exists, and a directed suspension ends based on the terms of the

¹⁹ 30 C.F.R. § 25.180 (2014).

²⁰ NTL No. 2008-N09, Extension of Lease and United Terms By Production in Paying Quantities, Minerals Management Service, <http://www.bsee.gov/Regulations-and-Guidance/Notices-to-Lessees/2008/08-n09/> (effective Oct. 29, 2008) (last visited Feb. 3, 2014).

²¹ NTL No. 2008-N09, Extension of Lease and United Terms By Production in Paying Quantities, Minerals Management Service, <http://www.bsee.gov/Regulations-and-Guidance/Notices-to-Lessees/2008/08-n09/> (effective Oct. 29, 2008) (last visited Feb. 3, 2014).

²² NTL No. 2008-N09, Extension of Lease and United Terms By Production in Paying Quantities, Minerals Management Service, <http://www.bsee.gov/Regulations-and-Guidance/Notices-to-Lessees/2008/08-n09/> (effective Oct. 29, 2008) (last visited Feb. 3, 2014).

²³ 30 C.F.R. § 250 at Subpart F.

²⁴ 30 C.F.R. § 250.171 (2014).

²⁵ 30 C.F.R. § 250.169 (2014).

²⁶ 30 C.F.R. § 250.170 (2014).

²⁷ 30 C.F.R. § 250.170 (2014).

directed suspension in the letter to the operator.²⁸ BSEE retains the right to grant successive suspensions.²⁹ BSEE can also request supplementary materials to any suspension within the regulations³⁰ which afford the agency significant latitude with respect to suspensions.

[b] Suspensions of Production

Suspensions of Production are opportunities for a leaseholder to keep a lease intact beyond the 180 day grace period when not producing in paying quantities. There are two different classes of suspensions of production: a directed suspension, which is ordered by the Regional Supervisor of BSEE, or a requested suspension, which is requested by the operator. Suspensions of Production, and of Operation, are clearly articulated within the BSEE's applicable sections of the Code of Federal Regulations.³¹ A directed suspension, either of production or operations, is only done in the interest of national security or defense, or when an operator fails to comply with an applicable law, regulation, order, or provision of a lease.³²

Requested Suspensions of Production are more common. An operator may request a suspension of production in order to properly develop a lease, in order to secure proper transportation facilities, in order to enter into sales contracts, or to avoid continued operations which would result in abandonment of the lease.³³ The request must include the justification for the suspension, a reasonable schedule of work leading to the commencement or restoration of the suspended activity, a statement affirming that the well is determined to be producible, a commitment to production and the applicable service fee.³⁴ A commitment to production is a significant issue in contested suspensions of production. Where a project has a facility in place or is in process, it is much more likely that a suspension of production will be granted. However, if an operator is looking to bring in more partners on a lease, or has yet to prove reserves through exploratory wells, or has other significant omissions in its current stage of development, BSEE may be less likely to grant an SOP.³⁵ Suspensions of production are also utilized during hurricanes. In that instance, BSEE may issue blanket suspensions of production in order to allow for repairs or maintenance in response to damage caused by a hurricane.³⁶ Further, a Regional Supervisor may allow for more

²⁸ 30 C.F.R. § 250.170 (2014).

²⁹ 30 C.F.R. § 250.170 (2014).

³⁰ 30 C.F.R. § 250.1717(2014).

³¹ 30 C.F.R. §§ 250.168–250.177 (2014).

³² 30 C.F.R. § 250.173 (2014).

³³ 30 C.F.R. § 250.174 (2014).

³⁴ 30 C.F.R. § 250.171 (2014).

³⁵ See generally *ATP Oil and Gas Corporation*, 171 IBLA 250 (2008), *Union Pacific Resources Co. and Levinson Partners Corporation*, 149 IBLA 294 (1999).

³⁶ See, e.g., NTL No. 2012-G02, *Damage Caused by Hurricane Isaac*, http://www.bsee.gov/uploadedFiles/BSEE/Regulations_and_Guidance/Notices_to_Lessees/2012/NTL%202012-G02.pdf (effective Sept. 1, 2012) (last visited Feb. 4, 2015).

than 180 days to resume leasehold operations based on the operating conditions.³⁷

[c] Suspensions of Operations

A suspension of operations is often of a more limited duration than a suspension of production and does not require a showing that the well is determined to be producible. The conditions precedent required for a suspension of operations are typically circumstances beyond the control of the operator.³⁸ The conditions include a primary term or a commitment to drill for five years or less, significant geophysical information, particularly if a salt sheet exists, or a showing of additional time needed in order to conduct and acquire, or interpret geophysical data.³⁹ These types of suspensions of operations are known as subsalt suspensions of operations.⁴⁰ The need to conduct operations at a vertical depth of 25,000 feet could also merit a suspension of operations.⁴¹ These types of suspensions of operations are known as ultradeep suspensions of operations.⁴² Like a suspension of production, an operator must pay the associated fees, and provide a justification for the suspension and its length, and a reasonable schedule of work leading to the commencement or resumption of operations.⁴³

A unique situation with respect to Suspensions of Operations is Directed Suspensions which inhibit activities when and where military activities take place.⁴⁴ This program, in conjunction with the United States Air Force, directed specific drilling periods for operators on particular leases so as not to interfere with military activities above the leases.⁴⁵ Later leases included language which inhibited the need for this guidance beyond the leases articulated in the Notice to Lessees.⁴⁶ The *window schedule* for these particular leases is laid out in the Notice to Lessees and through a

³⁷ 30 C.F.R. § 250.180 (2014).

³⁸ 30 C.F.R. § 250.175 (2014).

³⁹ 30 C.F.R. § 250.175 (2014).

⁴⁰ NTL No. 2007-G22, Suspensions of Operations for Subsalt and Ultradeep Geophysical Work, <http://www.bsee.gov/Regulations-and-Guidance/Notices-to-Lessees/2007/07-g22/> (effective June 25, 2007) (last visited Feb. 5, 2015).

⁴¹ 30 C.F.R. § 250.175 (2014).

⁴² NTL No. 2007-G22, Suspensions of Operations for Subsalt and Ultradeep Geophysical Work, <http://www.bsee.gov/Regulations-and-Guidance/Notices-to-Lessees/2007/07-g22/> (effective June 25, 2007) (last visited Feb. 5, 2015).

⁴³ 30 C.F.R. § 250.171 (2014).

⁴⁴ Joint NTL No. 2014-G01, Drilling Windows, Eastern Planning Area, Gulf of Mexico, http://www.bsee.gov/uploadedFiles/BSEE/Regulations_and_Guidance/Notices_to_Lessees/2014/Joint%20NTL%202014-G01.pdf (effective June 1, 2014 and expires February 28, 2015) (last visited Feb. 5, 2015).

⁴⁵ Joint NTL No. 2014-G01, Drilling Windows, Eastern Planning Area, Gulf of Mexico, http://www.bsee.gov/uploadedFiles/BSEE/Regulations_and_Guidance/Notices_to_Lessees/2014/Joint%20NTL%202014-G01.pdf (effective June 1, 2014 and expires February 28, 2015) (last visited Feb. 5, 2015).

⁴⁶ Joint NTL No. 2014-G01, Drilling Windows, Eastern Planning Area, Gulf of Mexico, http://www.bsee.gov/uploadedFiles/BSEE/Regulations_and_Guidance/Notices_to_Lessees/2014/Joint%20NTL%202014-G01.pdf (effective June 1, 2014 and expires February 28, 2015) (last visited Feb. 5, 2015).

designated web page, and the windows are periodically updated online and through subsequent Notices to Lessees.⁴⁷ The effect of the windows is to toll the leases, to eliminate the rental and royalty obligations during the suspended period, and to potentially delay the minimum royalty and prorated rental until when the suspension terminates.⁴⁸

[3] Drilling and Service Contracts

Drilling service contracts are an important component of offshore natural gas extraction, because the contracts cover numerous activities on the rig. Drilling and service contracts will cover a variety of contractors, activities, and agreements, all of which need to be effectively coordinated and managed to ensure effective operations on a lease. Critical to these contracts are indemnity provisions. Parties can choose maritime laws only for maritime contracts, but if the contract requires work to be done on the rig, OCSLA and its requirement of adjacent state law is a requirement.

A common method of handling drilling and service contracts on the rig is using a master service agreement (MSA), which is to cover all activities from a given contractor. MSA's allow operators to group contracts by party, rather than by individual activity, which can help manage the complexity and variety of activities. In each MSA, the warranty provision, the reporting provision, the standard of performance, the indemnity provision, the insurance provision, the choice of law provision, and the arbitration provision are the most important points. Frequently, one contractor will seek access to the MSA of other contractors in order to compare and contrast the proffered MSA to those negotiated with other contractors. By doing so, a contractor may be better able to evaluate how their agreement understates or overstates their risk profile as compared to other contractors on the rig.

Day work contracts are frequent in offshore drilling, and while these types of contracts typically provide for single activities, they may be re-used following a negotiation. A day work drilling contract will typically provide for broad reciprocal indemnity. Forms are available for day work, and for MSA contracts from the International Association of Drilling Contractors, but these are not customized and may not contain the protections that operators seek. In day work contracts, it is essential to be clear and precise in particular on the indemnity provision, the warranty provision, the standard of performance, sound location, pollution provisions, the insurance provisions, and consequential damages. It is also essential to know what provisions are allowed in such contracts by the adjacent state law. There are significant restrictions in Texas and Louisiana⁴⁹ and attempting to include a provision which is

⁴⁷ Joint NTL No. 2014-G01, Drilling Windows, Eastern Planning Area, Gulf of Mexico, http://www.bsee.gov/uploadedFiles/BSEE/Regulations_and_Guidance/Notices_to_Lessees/2014/Joint%20NTL%202014-G01.pdf (effective June 1, 2014 and expires February 28, 2015) (last visited Feb. 5, 2015).

⁴⁸ Joint NTL No. 2014-G01, Drilling Windows, Eastern Planning Area, Gulf of Mexico, http://www.bsee.gov/uploadedFiles/BSEE/Regulations_and_Guidance/Notices_to_Lessees/2014/Joint%20NTL%202014-G01.pdf (effective June 1, 2014 and expires February 28, 2015) (last visited Feb. 5, 2015).

⁴⁹ See, e.g., The Louisiana Oilfield Anti-Indemnity Act, La. Rev. Stat. Ann. 9:2780 (2014).

unenforceable in an adjacent state could render the contract unenforceable.

§ 39.07 Administrative Appeals

[1] Office of Hearings and Appeals

[a] Overview

If BOEM, BSEE, or ONRR have evidence that an operator has violated federal regulations affecting production, reporting or paying royalties, it may issue a notice of non-compliance, an incident of non-compliance, or civil penalties associated with the violation.¹ While ONRR-associated orders may go through an internal appeals or alternative dispute resolution process, BOEM and BSEE orders are appealed directly to the Interior Board of Land Appeals (IBLA), which has original jurisdiction over order from BOEM, BSEE, ONRR, and BLM.² The IBLA is managed by the Office of Hearings and Appeals (OHA) at the Department of the Interior, and consists of administrative law judges and associated personnel whose decisions are considered final actions appealable to district courts.³

[b] ONRR

Operators can appeal ONRR orders as defined by 30 C.F.R. § 1290.102 or BOEM and BSEE order to IBLA. OHA has the delegated authority from the Secretary of the Interior to hear and decide appeals of agency actions.⁴ ONRR orders are appealable under 30 C.F.R. Part 1290, Subpart B, but one is not able to appeal an agency decision which is not an order.⁵ ONRR regulations clearly define what constitutes an order,⁶ and the IBLA has rejected appeals of documents which lacked “mandatory or ordering language.”⁷ IBLA faced the question again in 2007 finding that an order (1) did not need to give the recipient the right to appeal, (2) the document must have mandatory or ordering language and require the recipient to report, compute, or pay royalties or other obligations, and (3) the document must constitute an adjudication of the existence of facts sufficient to support a ruling on the issues presented.⁸ The

¹ Inderbitzin, Sarah, *Appeals of ONRR, BSEE, and BOEM Orders, Decisions, INCs, NONCs, and Penalty Assessments: What Do I Do Now?*, Office of Natural Resources Revenue, <http://www.onrr.gov/compliance/PDFDocs/RMMLF-Appeals-Final.pdf> (last visited Mar. 6, 2015).

² <http://www.doi.gov/oha/ibla/index.cfm> (last visited Mar. 4, 2015).

³ Interior Board of Land Appeals, <http://www.doi.gov//oha/ibla/index.cfm> (last visited Dec. 17, 2014).

⁴ Inderbitzin, Sarah, *Appeals of ONRR, BSEE, and BOEM Orders, Decisions, INCs, NONCs, and Penalty Assessments: What Do I Do Now?*, Office of Natural Resources Revenue, <http://www.onrr.gov/compliance/PDFDocs/RMMLF-Appeals-Final.pdf> (last visited Mar. 6, 2015); 43 C.F.R. § 4.403.

⁵ Inderbitzin, Sarah, *Appeals of ONRR, BSEE, and BOEM Orders, Decisions, INCs, NONCs, and Penalty Assessments: What Do I Do Now?*, Office of Natural Resources Revenue, <http://www.onrr.gov/compliance/PDFDocs/RMMLF-Appeals-Final.pdf> (last visited Mar. 6, 2015); 30 C.F.R. § 1290.104(a).

⁶ Inderbitzin, Sarah, *Appeals of ONRR, BSEE, and BOEM Orders, Decisions, INCs, NONCs, and Penalty Assessments: What Do I Do Now?*, Office of Natural Resources Revenue, <http://www.onrr.gov/compliance/PDFDocs/RMMLF-Appeals-Final.pdf> (last visited Mar. 6, 2015).

⁷ *Xanadu Exploration Company*, 157 IBLA 183 (2002).

⁸ Inderbitzin, Sarah, *Appeals of ONRR, BSEE, and BOEM Orders, Decisions, INCs, NONCs, and*

consequence of the *Devon* decision was that Dear Payor and Dear Report letters, which are frequently issued by ONRR, are not considered orders subject to appeal to IBLA. Regulations governing the appeal of ONRR orders with respect to the timing of filing an appeal, addresses, and the method of delivery may be found at 30 C.F.R. § 1290.105.⁹

It has been recommended that If an operator receives a document that may not look like an order, they should file an appeal even if they question whether or not is appealable in order to preserve their rights of appeal.¹⁰ ONRR regulations do not provide for extensions of time to appeal.¹¹ In order to stay the effectiveness of the order on appeal, the recipient must post a bond consistent with the regulations at 30 C.F.R. Part 1243.¹² Regulations governing the substance of the appeal are articulated in 30 C.F.R. Part 1290, and a decision on the appeal will be issued by the ONRR Director.¹³ The Department of the Interior has 33 months from the commencement of an administrative action to issue a decision for cases involving federal leases, and rules regarding the 33 month time period can be found at 43 C.F.R. Part 4, Subpart J.¹⁴ Failure to abide by the timeline will result in a ruling for the appellant, unless the amount at issue is greater than \$10,000, in which case the appeal is decided in favor of DOI.¹⁵

Penalty Assessments: What Do I Do Now?, Office of Natural Resources Revenue, <http://www.onrr.gov/compliance/PDFDocs/RMMLF-Appeals-Final.pdf> (last visited Mar. 6, 2015); *Devon Energy, et al.*, 171 IBLA 43 (2007).

⁹ Inderbitzin, Sarah, *Appeals of ONRR, BSEE, and BOEM Orders, Decisions, INCs, NONCs, and Penalty Assessments: What Do I Do Now?*, Office of Natural Resources Revenue, <http://www.onrr.gov/compliance/PDFDocs/RMMLF-Appeals-Final.pdf> (last visited Mar. 6, 2015); Orders to Perform a Restructured Accounting on Federal leases have a 60-day time frame based on RSFA at 30 U.S.C. § 1724(d)(4)(B)(ii)(V).

¹⁰ Inderbitzin, Sarah, *Appeals of ONRR, BSEE, and BOEM Orders, Decisions, INCs, NONCs, and Penalty Assessments: What Do I Do Now?*, Office of Natural Resources Revenue, <http://www.onrr.gov/compliance/PDFDocs/RMMLF-Appeals-Final.pdf> (last visited Mar. 6, 2015).

¹¹ Inderbitzin, Sarah, *Appeals of ONRR, BSEE, and BOEM Orders, Decisions, INCs, NONCs, and Penalty Assessments: What Do I Do Now?*, Office of Natural Resources Revenue, <http://www.onrr.gov/compliance/PDFDocs/RMMLF-Appeals-Final.pdf> (last visited Mar. 6, 2015); 30 C.F.R. § 1290.105(b).

¹² Inderbitzin, Sarah, *Appeals of ONRR, BSEE, and BOEM Orders, Decisions, INCs, NONCs, and Penalty Assessments: What Do I Do Now?*, Office of Natural Resources Revenue, <http://www.onrr.gov/compliance/PDFDocs/RMMLF-Appeals-Final.pdf> (last visited Mar. 6, 2015).

¹³ Inderbitzin, Sarah, *Appeals of ONRR, BSEE, and BOEM Orders, Decisions, INCs, NONCs, and Penalty Assessments: What Do I Do Now?*, Office of Natural Resources Revenue, <http://www.onrr.gov/compliance/PDFDocs/RMMLF-Appeals-Final.pdf> (last visited Mar. 6, 2015); 30 C.F.R. § 1290.105(a) and (g).

¹⁴ Inderbitzin, Sarah, *Appeals of ONRR, BSEE, and BOEM Orders, Decisions, INCs, NONCs, and Penalty Assessments: What Do I Do Now?*, Office of Natural Resources Revenue, <http://www.onrr.gov/compliance/PDFDocs/RMMLF-Appeals-Final.pdf> (last visited Mar. 6, 2015).

¹⁵ Inderbitzin, Sarah, *Appeals of ONRR, BSEE, and BOEM Orders, Decisions, INCs, NONCs, and Penalty Assessments: What Do I Do Now?*, Office of Natural Resources Revenue, <http://www.onrr.gov/compliance/PDFDocs/RMMLF-Appeals-Final.pdf> (last visited Mar. 6, 2015).

Appeal of ONRR orders to the IBLA is governed by 43 C.F.R. Part 4, Subpart E.¹⁶ Appeals may be longer than 30 pages and there are no rules allowing for extensions of time, but IBLA may grant extensions when submitted in the form of a pleading and served upon all parties to a proceeding.¹⁷ ONRR must compile a full administrative record for the matter before IBLA, and once a matter is appealed to IBLA, the Office of the Solicitor at the Department of the Interior assumes management of the case.¹⁸ IBLA may uphold, reverse or remand the ONRR Director's decision.¹⁹ Any party may request re-consideration of an IBLA decision.²⁰

Appeals of notices of noncompliance or civil penalties are handled by an administrative law judge (ALJ) in OHA under the regulations at 30 C.F.R. § 1241.²¹ Decisions made by the ALJ are appealable to IBLA.²²

[c] BOEM and BSEE

BOEM and BSEE orders may only be appealed to IBLA.²³ Appealing to the IBLA is the only method of exhausting administrative remedies for recipients of BOEM and BSEE Orders, unless the Assistant Secretary for Land and Minerals makes a BOEM or BSEE or IBLA decision effective immediately.²⁴ BOEM and BSEE orders provide

¹⁶ Inderbitzin, Sarah, *Appeals of ONRR, BSEE, and BOEM Orders, Decisions, INCs, NONCs, and Penalty Assessments: What Do I Do Now?*, Office of Natural Resources Revenue, <http://www.onrr.gov/compliance/PDFDocs/RMMLF-Appeals-Final.pdf> (last visited Mar. 6, 2015).

¹⁷ Inderbitzin, Sarah, *Appeals of ONRR, BSEE, and BOEM Orders, Decisions, INCs, NONCs, and Penalty Assessments: What Do I Do Now?*, Office of Natural Resources Revenue, <http://www.onrr.gov/compliance/PDFDocs/RMMLF-Appeals-Final.pdf> (last visited Mar. 6, 2015).

¹⁸ Inderbitzin, Sarah, *Appeals of ONRR, BSEE, and BOEM Orders, Decisions, INCs, NONCs, and Penalty Assessments: What Do I Do Now?*, Office of Natural Resources Revenue, <http://www.onrr.gov/compliance/PDFDocs/RMMLF-Appeals-Final.pdf> (last visited Mar. 6, 2015).

¹⁹ Inderbitzin, Sarah, *Appeals of ONRR, BSEE, and BOEM Orders, Decisions, INCs, NONCs, and Penalty Assessments: What Do I Do Now?*, Office of Natural Resources Revenue, <http://www.onrr.gov/compliance/PDFDocs/RMMLF-Appeals-Final.pdf> (last visited Mar. 6, 2015).

²⁰ Inderbitzin, Sarah, *Appeals of ONRR, BSEE, and BOEM Orders, Decisions, INCs, NONCs, and Penalty Assessments: What Do I Do Now?*, Office of Natural Resources Revenue, <http://www.onrr.gov/compliance/PDFDocs/RMMLF-Appeals-Final.pdf> (last visited Mar. 6, 2015).

²¹ Inderbitzin, Sarah, *Appeals of ONRR, BSEE, and BOEM Orders, Decisions, INCs, NONCs, and Penalty Assessments: What Do I Do Now?*, Office of Natural Resources Revenue, <http://www.onrr.gov/compliance/PDFDocs/RMMLF-Appeals-Final.pdf> (last visited Mar. 6, 2015).

²² Inderbitzin, Sarah, *Appeals of ONRR, BSEE, and BOEM Orders, Decisions, INCs, NONCs, and Penalty Assessments: What Do I Do Now?*, Office of Natural Resources Revenue, <http://www.onrr.gov/compliance/PDFDocs/RMMLF-Appeals-Final.pdf> (last visited Mar. 6, 2015).

²³ Inderbitzin, Sarah, *Appeals of ONRR, BSEE, and BOEM Orders, Decisions, INCs, NONCs, and Penalty Assessments: What Do I Do Now?*, Office of Natural Resources Revenue, <http://www.onrr.gov/compliance/PDFDocs/RMMLF-Appeals-Final.pdf> (last visited Mar. 6, 2015); *see also* 30 C.F.R. Part 290, Subpart A, 30 C.F.R. Part 590, Subpart A.

²⁴ Inderbitzin, Sarah, *Appeals of ONRR, BSEE, and BOEM Orders, Decisions, INCs, NONCs, and Penalty Assessments: What Do I Do Now?*, Office of Natural Resources Revenue, <http://www.onrr.gov/compliance/PDFDocs/RMMLF-Appeals-Final.pdf> (last visited Mar. 6, 2015); *See also* 30 C.F.R. §§ 290.8(b) and 590.8(b).

the recipient 60 days following receipt to file an appeal.²⁵ BSEE and BOEM Orders do not provide for extensions of time to file an appeal, and appeals require filing fees and processing fees.²⁶ Following notice of an appeal, BOEM and BSEE forward the notice, the administrative record and the decision to the Office of the Solicitor at the Department of the Interior, who reviews the file for completeness and forwards the file on to IBLA.²⁷ Appellants have 30 days following filing their notice of appeal to file a statement of reasons limited to 30 pages detailing their reasons for appeal.²⁸ Failure to adhere by the established timelines can result in summary dismissal.²⁹ The procedures for remand and reconsideration are identical for BOEM and BSEE decisions as they are for ONRR decisions.³⁰

BOEM and BSEE incidents of noncompliance and civil penalties are appealable directly to IBLA under the same procedures as their orders.³¹ Bonds are required when appealing incidents of noncompliance and civil penalty orders, which may be satisfied through your lease-specific/area-wide bond, based on the discretion of the Regional Supervisor.³²

²⁵ Inderbitzin, Sarah, *Appeals of ONRR, BSEE, and BOEM Orders, Decisions, INCs, NONCs, and Penalty Assessments: What Do I Do Now?*, Office of Natural Resources Revenue, <http://www.onrr.gov/compliance/PDFDocs/RMMLF-Appeals-Final.pdf> (last visited Mar. 6, 2015); *See also* 30 C.F.R. §§ 290.3 and 590.3.

²⁶ Inderbitzin, Sarah, *Appeals of ONRR, BSEE, and BOEM Orders, Decisions, INCs, NONCs, and Penalty Assessments: What Do I Do Now?*, Office of Natural Resources Revenue, <http://www.onrr.gov/compliance/PDFDocs/RMMLF-Appeals-Final.pdf> (last visited Mar. 6, 2015). *See also* 30 C.F.R. §§ 290.4 and 590.4.

²⁷ Inderbitzin, Sarah, *Appeals of ONRR, BSEE, and BOEM Orders, Decisions, INCs, NONCs, and Penalty Assessments: What Do I Do Now?*, Office of Natural Resources Revenue, <http://www.onrr.gov/compliance/PDFDocs/RMMLF-Appeals-Final.pdf> (last visited Mar. 6, 2015). *See also* *Samedan Oil Corp. v. Aera Energy LLC*, 163 IBLA 63 (2004).

²⁸ Inderbitzin, Sarah, *Appeals of ONRR, BSEE, and BOEM Orders, Decisions, INCs, NONCs, and Penalty Assessments: What Do I Do Now?*, Office of Natural Resources Revenue, <http://www.onrr.gov/compliance/PDFDocs/RMMLF-Appeals-Final.pdf> (last visited Mar. 6, 2015). *See also* 43 C.F.R. § 4.412(a).

²⁹ Inderbitzin, Sarah, *Appeals of ONRR, BSEE, and BOEM Orders, Decisions, INCs, NONCs, and Penalty Assessments: What Do I Do Now?*, Office of Natural Resources Revenue, <http://www.onrr.gov/compliance/PDFDocs/RMMLF-Appeals-Final.pdf> (last visited Mar. 6, 2015). *See also* 43 C.F.R. § 4.412(c).

³⁰ Inderbitzin, Sarah, *Appeals of ONRR, BSEE, and BOEM Orders, Decisions, INCs, NONCs, and Penalty Assessments: What Do I Do Now?*, Office of Natural Resources Revenue, <http://www.onrr.gov/compliance/PDFDocs/RMMLF-Appeals-Final.pdf> (last visited Mar. 6, 2015);

³¹ Inderbitzin, Sarah, *Appeals of ONRR, BSEE, and BOEM Orders, Decisions, INCs, NONCs, and Penalty Assessments: What Do I Do Now?*, Office of Natural Resources Revenue, <http://www.onrr.gov/compliance/PDFDocs/RMMLF-Appeals-Final.pdf> (last visited Mar. 6, 2015);

³² Inderbitzin, Sarah, *Appeals of ONRR, BSEE, and BOEM Orders, Decisions, INCs, NONCs, and Penalty Assessments: What Do I Do Now?*, Office of Natural Resources Revenue, <http://www.onrr.gov/compliance/PDFDocs/RMMLF-Appeals-Final.pdf> (last visited Mar. 6, 2015). *See also* 30 C.F.R. §§ 250.1400 and 550.1400.

[2] Review by District Court

Decisions from the IBLA are appealable to federal district court, and with only a few exceptions, going through IBLA is required in order to exhaust administrative remedies.³³ Following final decision from IBLA or the Assistant Secretary for Land and Minerals, an affected party has exhausted their administrative remedies and may appeal.³⁴ For federal leases subject to RSFA, an appellee has 180 days to appeal to district court.³⁵ An appellee only has 90 days to file an appeal for Non-RSFA leases, which are any leases issues prior to RSFA's enactment on August 13, 1996.³⁶ There is an exception for a review of the Secretary's action to approve a leasing program, which is reviewable in the D.C. Circuit Court.³⁷ There is also an exception for the Secretary's action to approve, require modification of, or disapprove an exploration plan or any development and production plan.³⁸ Those decisions are reviewable only in the federal court of appeals where an affected state is located, and the appellant has 60 days to appeal the Secretary's action.³⁹

§ 39.08 State Law Affecting Offshore Natural Gas

[1] OCSLA and Choice of Law

Offshore production of natural gas can be impacted by state law in one of two ways.

³³ Inderbitzin, Sarah, *Appeals of ONRR, BSEE, and BOEM Orders, Decisions, INCs, NONCs, and Penalty Assessments: What Do I Do Now?*, Office of Natural Resources Revenue, <http://www.onrr.gov/compliance/PDFDocs/RMMLF-Appeals-Final.pdf> (last visited Mar. 6, 2015); 30 C.F.R. § 1290.110(a); *see also* Interior Board of Land Appeals, <http://www.doi.gov/oha/ibla/index.cfm> (last visited May 5, 2015).

³⁴ Inderbitzin, Sarah, *Appeals of ONRR, BSEE, and BOEM Orders, Decisions, INCs, NONCs, and Penalty Assessments: What Do I Do Now?*, Office of Natural Resources Revenue, <http://www.onrr.gov/compliance/PDFDocs/RMMLF-Appeals-Final.pdf> (last visited Mar. 6, 2015);

³⁵ Inderbitzin, Sarah, *Appeals of ONRR, BSEE, and BOEM Orders, Decisions, INCs, NONCs, and Penalty Assessments: What Do I Do Now?*, Office of Natural Resources Revenue, <http://www.onrr.gov/compliance/PDFDocs/RMMLF-Appeals-Final.pdf> (last visited Mar. 6, 2015). *See also* 30 U.S.C. § 1724(j).

³⁶ Inderbitzin, Sarah, *Appeals of ONRR, BSEE, and BOEM Orders, Decisions, INCs, NONCs, and Penalty Assessments: What Do I Do Now?*, Office of Natural Resources Revenue, <http://www.onrr.gov/compliance/PDFDocs/RMMLF-Appeals-Final.pdf> (last visited Mar. 6, 2015). *See also* 30 U.S.C. § 226-2.

³⁷ Inderbitzin, Sarah, *Appeals of ONRR, BSEE, and BOEM Orders, Decisions, INCs, NONCs, and Penalty Assessments: What Do I Do Now?*, Office of Natural Resources Revenue, <http://www.onrr.gov/compliance/PDFDocs/RMMLF-Appeals-Final.pdf> (last visited Mar. 6, 2015). *See also* 43 U.S.C. § 1349(c).

³⁸ Inderbitzin, Sarah, *Appeals of ONRR, BSEE, and BOEM Orders, Decisions, INCs, NONCs, and Penalty Assessments: What Do I Do Now?*, Office of Natural Resources Revenue, <http://www.onrr.gov/compliance/PDFDocs/RMMLF-Appeals-Final.pdf> (last visited Mar. 6, 2015). *See also* 43 U.S.C. § 1349(c).

³⁹ Inderbitzin, Sarah, *Appeals of ONRR, BSEE, and BOEM Orders, Decisions, INCs, NONCs, and Penalty Assessments: What Do I Do Now?*, Office of Natural Resources Revenue, <http://www.onrr.gov/compliance/PDFDocs/RMMLF-Appeals-Final.pdf> (last visited Mar. 6, 2015). *See also* 43 U.S.C. § 1349(c).

First, if the drilling platform is within the State's territorial sea, defined as three nautical miles or three marine leagues depending on the State, then the platform is considered to be in state waters and adjacent state law applies.

Alternatively, if the platform or drill ship is outside the boundaries of the territorial sea, federal law applies and the primary law is the Outer Continental Shelf Lands Act, and its amendments. However, OCSLA does provide for the enforcement of civil and criminal codes of adjacent states where legal gaps exist, and there would be no conflict with other federal laws or regulations.¹ Consequently, large gaps can exist, and a small but influential set of cases, detailed below, have set the stage for determining when to invoke state law in federal waters in order to resolve a criminal or civil action, and when there is an applicable federal statute or regulation.

[2] *Rodrique v. Aetna Casualty & Surety* (S. Ct. 1969)

The applicability of the OCSLA and the method of gap-filling the federal law was first encountered in *Rodrique v. Aetna Casualty & Surety Co.*,² a case where petitioners brought suit in under the Death on the High Seas Act and the OCSLA. The suit concerned the wrongful death of two men who were working on an artificial island drilling rigs off the coast of Louisiana.³ In the case, the district court and the Fifth Circuit Court of Appeals held that the only applicable law was the Death on the High Seas Act, which would have precluded additional avenues of recovery under the OCSLA. The Supreme Court reversed, finding by unanimous opinion that the petitioners could seek recovery through OCSLA, and the applicable Louisiana law.

The Court found that the OCSLA intended to make adjacent law the applicable law in situations where federal law did not provide an appropriate remedy, and that admiralty law, which is the applicable law for the Death on the High Seas Act, was inapplicable because the decedents were not working on vessels, but rather, fixed structures. The Court went to great length to examine the intent and the underlying motivation behind Section 1333(a)2(A), and the relationship between the dominant law, OCSLA, and the surrogate state laws that may be applicable. The Court noted that Congress had specifically considered when to apply Admiralty or Maritime law, and that it was not intended to apply to situations occurring on stationary structures not erected as navigational aids.

[3] *Laredo Offshore v. Hunt Oil* (5th Cir. 1985)

Rodrique set the stage for *Laredo Offshore Constructors, Inc. v. Hunt Oil Co.*,⁴ which dealt principally with the construction of an offshore platform rather than work on artificial islands. *Laredo* brought the case as an admiralty action, given the number of vessels and seamen required to build the platform.⁵ *Hunt* sought to dismiss claiming

¹ 43 U.S.C. § 1333(a)(2)(A) (2012).

² 395 U.S. 352 (1969).

³ *Rodrique v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969).

⁴ 754 F.2d 1223 (5th Cir. 1985).

⁵ *Laredo Offshore Constructors, Inc. v. Hunt Oil Co.*, 754 F.2d 1223 (5th Cir. 1985).

that the building of the platform was not a maritime activity, and was outside the admiralty jurisdiction of the court. The district court agreed with Hunt, and Laredo appealed.

On appeal, the court questioned whether or not admiralty should be invoked or whether OCSLA, and consequently, Louisiana (the adjacent state) law should apply. The court found that OCSLA should apply, given that 42 U.S.C. § 1349(b) specifically stated that the scope of the law extended to platform construction. Additionally, the court reasoned that the contracts at issue were intimately connected with an operation on the OCS, and that Congress intended OCSLA to cover them.

Laredo attempted to argue that the jurisdictional conflict between maritime law and OCSLA should be resolved in favor of maritime law. This argument focused on the choice of law test between maritime and OCSLA/adjacent state law. The Fifth Circuit reasoned that the facts of this case, like *Rodrique*, did not bear a significant relationship to traditional maritime activities. Instead, the Fifth Circuit determined that there were maritime obligations in a mixed contract, and that the non-maritime provisions should not be adjudicated under admiralty law. The Fifth Circuit held the platforms to be treated as if they were an artificial island, making the holding in *Rodrique* applicable to platforms as well as artificial islands.

The Fifth Circuit remanded the case to allow Laredo to bring the case under OCSLA jurisdiction, and the verdict, which was somewhat non-specific on when to invoke traditional maritime law vs. OCSLA set the stage for *Union Texas Petroleum v. PLT Engineering, Inc. (UTP)*.⁶

[4] *UTP v. PLT Eng'g Inc. (5th Cir. 1990)*

UTP concerned the construction of a gathering line on the seafloor of the OCS, and whether or not maritime law or the adjacent Louisiana law could apply to a contractual dispute.⁷ In the case, UTP contracted with PLT to build the gathering line, and in the course of completing the contract, UTP found out that PLT had failed to pay some of its contractors.⁸ UTP invoked a clause in the contract allowing it to withhold payment to PLT, and instituted an interpleader action enabling PLT and the subcontractors to determine how the withheld money should be allocated.⁹ The district court found that OCSLA applied and as a consequence, the Louisiana Oil Well Lien Act (LOWLA) act could be invoked. Under this law, the interpleader action was dismissed and UTP appealed the dismissal of the interpleader.

The circuit court expressed a three part test for invoking OCSLA and as a consequence, adjacent state law, from *Rodrique*: (1) the controversy must arise on sites covered by OCSLA; (2) Federal Maritime Law must not apply of its own force; and

⁶ 895 F.2d 1043 (5th Cir. 1990).

⁷ *Union Texas Petroleum Corp. v. PLT Engineering, Inc.*, 895 F.2d 1043, 1045 (5th Cir. 1990).

⁸ 895 F.2d at 1046.

⁹ 895 F.2d at 1046.

(3) the state law must not be inconsistent with federal law.¹⁰ The court found that because the gathering line was to be attached to the seabed, that the first condition of the three part test was met.¹¹ The court used the reasoning from *Rodrique* and *Laredo*, that the subject matter of the controversy bears a significant relationship to traditional maritime law, to fulfill the second part of the test.¹² The court concluded that the contracts were non-maritime in nature, and that OCSLA applied.¹³ UTP argued that the choice of law provisions in the contract compelled the parties to follow maritime law, but the court found that OCSLA is a congressionally mandate choice of law provision, and that the choice of maritime law was in opposition to clear congressional intent in OCSLA.¹⁴ The remainder of the decision focused on UTP's arguments under LOWLA, which are outside the scope of this section.

[5] Choice of Law Provisions

While invoking OCSLA vs. invoking Maritime Law is somewhat clearer due to precedent and various cases, it is not always clear which state law to invoke. OCSLA states that the law of the adjacent state "which would be within the area of the state if its boundaries were extended seaward to the margin of the Continental Shelf."¹⁵ No President has accomplished the publication of the extended lines, and as a consequence, certain areas within the Gulf of Mexico have ambiguous adjacent state law.¹⁶

[6] *Snyder Oil Corp. v. Samedan Oil Corp.* (5th Cir. 2000)

Snyder Oil Corp. v. Samedan Oil Corp.,¹⁷ focused on the issue of which adjacent state law should apply. The two companies had entered into a joint operating agreement to develop Block 261, Main Pass Area, South and East Addition, commonly referred to as Main Pass 261.¹⁸ Snyder sought declaratory judgment in Louisiana as to the rights of the parties under the JOA, while Samedan subsequently sued in Alabama, seeking dismissal or transfer of Snyder's suit. The Southern District of Alabama took jurisdiction, effected the transfer of Snyder's suit from the Western District of Louisiana, and dismissed the motion to dismiss.¹⁹

Both district courts had conducted an adjacency determination from *Reeves v. B&S Welding, Inc.*²⁰ and Snyder's appeal to the circuit court concerns whether the

¹⁰ 895 F.2d at 1047.

¹¹ 895 F.2d at 1047-48.

¹² 895 F.2d at 1048.

¹³ 895 F.2d at 1050.

¹⁴ 895 F.2d at 1050.

¹⁵ 43 U.S.C. § 1333(a)(2)(A) (2012).

¹⁶ It should be noted that only the substance laws of the adjacent state are invoked, and that procedural laws of the adjacent state are not invoked.

¹⁷ 208 F.3d 521 (5th Cir. 2000).

¹⁸ 208 F.3d at 522.

¹⁹ 208 F.3d at 522.

²⁰ 897 F.2d 178 (5th Cir. 1990).

application of the test from *Reeves* was correct. The test from *Reeves* consists of (1) testimony and exhibits regarding which state is adjacent; (2) whether courts had considered other platforms from the same field to be adjacent to a particular state, and (3) projected boundary determinations.²¹ *Reeve* provides for boundaries to be developed for a particular dispute, but is not conclusive for the purposes of OCSLA.²² In *Snyder*, the court clarified the test to be (1) geographic proximity; (2) which coast federal agencies determine the subject platform to be adjacent to; (3) prior court determinations, and (4) projected boundaries.²³

Snyder's argument focused on reducing the test to geographic proximity, if express determination had not been established.²⁴ The court rejected the argument, determining that it must follow *Reeves* and consider all relevant evidence, and not just geographic proximity.²⁵ The circuit court examined whether or not the district court had examined the proper evidence and Samedan presented evidence that federal and state agencies believed Main Pass 261 to be off the coast of Alabama, and that the projected state lines would place the platform in Alabama water.²⁶ The circuit court concluded that based on the test from *Reeves*, Main Pass 261 would be adjacent to Alabama, and Alabama state law when properly invoked by OCSLA.²⁷

§ 39.09 Impact of the 2010 Deepwater Horizon Blowout

[1] The Blowout and Immediate Aftermath

On April 20, 2010, the Transocean ultra-deepwater, semi-submersible rig Deepwater Horizon, under contract to BP, suffered a blowout on the Macondo prospect, on MMS Lease Mississippi Canyon Block 252.¹ The blowout occurred at approximately 9:45 PM, and almost immediately, a series of explosions critically damaged the rig.² On April 22, 2010, the Deepwater Horizon sank, and oil flowed into the Gulf of Mexico for an additional 85 days.³ While the disaster concerned an oil well, the response and

²¹ 897 F.2d at 179–180.

²² *Snyder Oil Corp. v. Samedan Oil Corp.*, 208 F.3d 521, 523 (5th Cir. 2000).

²³ 208 F.3d at 524.

²⁴ 208 F.3d at 524.

²⁵ 208 F.3d at 524.

²⁶ 208 F.3d at 525.

²⁷ 208 F.3d at 528.

¹ National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, *Deep Water: The Gulf Oil Disaster and the Future Of Offshore Drilling*, Report to the President, Government Printing Office, January 2011 <http://www.gpo.gov/fdsys/pkg/GPO-OILCOMMISSION/pdf/GPO-OILCOMMISSION.pdf>, at 114 (last visited Feb. 6, 2015).

² National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, *Deep Water: The Gulf Oil Disaster and the Future Of Offshore Drilling*, Report to the President, Government Printing Office, January 2011 <http://www.gpo.gov/fdsys/pkg/GPO-OILCOMMISSION/pdf/GPO-OILCOMMISSION.pdf>, at 114 (last visited Feb. 6, 2015).

³ National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, *Deep Water: The Gulf Oil Disaster and the Future Of Offshore Drilling*, Report to the President, Government Printing

regulatory and policy changes had effects on the offshore natural gas industry as well. President Barack Obama convened the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling in order to investigate the accident and make recommendations on future offshore drilling policies. President Obama also instigated a six-month moratorium on deepwater oil drilling and suspended planned lease sales, along with investigating 29 rigs in the Gulf of Mexico.

The Commission made a series of recommendations in its report, and BOEM and BSEE began making regulatory changes in order to ensure that the problems and failures identified through the investigation would not continue. The Commission specifically recommended enhanced risk management and risk assessment in order to reduce uncontrolled hydrocarbon releases and near misses.⁴ The Commission also recommended an independent safety and platform integrity and security agency,⁵ which has since become the core mission of BSEE. The Commission recommended updated and enhanced policies, practices, and procedures under NEPA⁶ in order to appropriately plan for activities on the OCS. The Commission recommended enhanced interagency consultation⁷ and enhanced well containment capabilities.⁸ The Commission also recommended enhanced financial responsibilities for operators working in the OCS.⁹

Other entities proposed regulatory changes as well, which, along with the Com-

Office, January 2011 <http://www.gpo.gov/fdsys/pkg/GPO-OILCOMMISSION/pdf/GPO-OILCOMMISSION.pdf>, at 165 (last visited Feb. 6, 2015).

⁴ National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, Deep Water: The Gulf Oil Disaster and the Future Of Offshore Drilling, Report to the President, Government Printing Office, January 2011 <http://www.gpo.gov/fdsys/pkg/GPO-OILCOMMISSION/pdf/GPO-OILCOMMISSION.pdf>, at 251 (last visited Feb. 6, 2015).

⁵ National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, Deep Water: The Gulf Oil Disaster and the Future Of Offshore Drilling, Report to the President, Government Printing Office, January 2011 <http://www.gpo.gov/fdsys/pkg/GPO-OILCOMMISSION/pdf/GPO-OILCOMMISSION.pdf>, at 256 (last visited Feb. 6, 2015).

⁶ National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, Deep Water: The Gulf Oil Disaster and the Future Of Offshore Drilling, Report to the President, Government Printing Office, January 2011 <http://www.gpo.gov/fdsys/pkg/GPO-OILCOMMISSION/pdf/GPO-OILCOMMISSION.pdf>, at 261 (last visited Feb. 6, 2015).

⁷ National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, Deep Water: The Gulf Oil Disaster and the Future Of Offshore Drilling, Report to the President, Government Printing Office, January 2011 <http://www.gpo.gov/fdsys/pkg/GPO-OILCOMMISSION/pdf/GPO-OILCOMMISSION.pdf>, at 263 (last visited Feb. 6, 2015). The Commission also had oil spill specific recommendations and restoration recommendation which are outside the scope of this chapter.

⁸ National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, Deep Water: The Gulf Oil Disaster and the Future Of Offshore Drilling, Report to the President, Government Printing Office, January 2011 <http://www.gpo.gov/fdsys/pkg/GPO-OILCOMMISSION/pdf/GPO-OILCOMMISSION.pdf>, at 272 (last visited Feb. 6, 2015).

⁹ National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, Deep Water: The Gulf Oil Disaster and the Future Of Offshore Drilling, Report to the President, Government Printing Office, January 2011 <http://www.gpo.gov/fdsys/pkg/GPO-OILCOMMISSION/pdf/GPO-OILCOMMISSION.pdf>, at 283 (last visited Feb. 6, 2015).

mission, helped BOEM and BSEE enact regulatory changes following the blowout.¹⁰ President Obama tasked Michael R. Bromwich to lead BOEM during the turnaround, and to manage the splitting of BOEM and BSEE from what used to be BOEMRE.¹¹ BOEM instituted a new recusal policy for employees with potential conflicts of interest, and instituted a comprehensive NEPA review process.¹² BOEM also began new implementation teams designed to take a critical eye to the agency's regulatory efforts.¹³

[2] BOEM Regulatory Changes

BOEM and BSEE's rules were re-organized within the Code of Federal Regulations in 2011, which helped to clarify and isolate the different regulations pertinent to each agency.¹⁴ Critical to operators, BOEM issued Notices to Lessees following the blowout, which made immediate changes in how the lessees acted within the bounds of their leases.¹⁵ The first of these was issued on August 2, 2010, and dealt with shallow water operations in the Gulf of Mexico.¹⁶ These initial Notices to Lessees survived legal challenge, and provided for enhanced financial and operational security for drilling in the Gulf of Mexico.¹⁷ Notices to Lessees covering exploration plans, Development and Production Plans, and Worst Case Discharge and Blowout scenarios were reissued in 2015, serving to provide continued guidance on how BOEM would review applications for permits to drill.¹⁸ As notices to lessees are not permanent, and require regular renewals, it is anticipated that BOEM and BSEE will codify the

¹⁰ Curry L. Hagerty, *Deepwater Horizon Oil Spill: Selected Issues for Congress*, Congressional Research Service, July 30, 2010, accessed at <http://fas.org/sgp/crs/misc/R41262.pdf>, at 27–28 (last visited Feb. 10, 2015).

¹¹ Bureau of Ocean Energy Management, *Regulatory Reforms*, <http://www.boem.gov/Regulatory-Reform/> (last visited Feb. 10, 2015).

¹² Bureau of Ocean Energy Management, *Regulatory Reforms*, <http://www.boem.gov/Regulatory-Reform/> (last visited Feb. 10, 2015).

¹³ Bureau of Ocean Energy Management, *Regulatory Reforms*, <http://www.boem.gov/Regulatory-Reform/> (last visited Feb. 10, 2015).

¹⁴ 76 Fed. Reg. 64432 (Oct. 11, 2011).

¹⁵ Bureau of Safety and Environmental Enforcement, *Notice to Lessees, Frequently Asked Questions: Shallow Water Drilling*, Aug. 2, 2010, http://www.bsee.gov/Regulations-and-Guidance/Notices-to-Lessees/2010/Shallow_Water/ (last accessed Feb. 10, 2015).

¹⁶ Bureau of Safety and Environmental Enforcement, *Notice to Lessees, Frequently Asked Questions: Shallow Water Drilling*, Aug. 2, 2010, http://www.bsee.gov/Regulations-and-Guidance/Notices-to-Lessees/2010/Shallow_Water/ (last accessed Feb. 10, 2015).

¹⁷ *See Century Exploration New Orleans, LLC v. United States*, 745 F.3d 1168 (Fed. Cir. 2014) (pending appeal to U.S. Supreme Court).

¹⁸ NTL No. 2015-N01, *Information Requirements for Exploration Plans, Development and Production Plans, and Development Operations Coordination Documents on the OCS for Worst Case Discharge and Blowout Scenarios: Frequently Asked Questions*, Jan. 14, 2015, <http://www.boem.gov/NTL-2015-N01-FAQs/> (last visited Feb. 10, 2015); *see also* NTL No. 2015-N01, *Information Requirements for Exploration Plans, Development and Production Plans, and Development Operations Coordination Documents on the OCS for Worst Case Discharge and Blowout Scenarios*, Jan. 14, 2015, <http://www.boem.gov/NTL-2015-N01/> (last visited Feb. 10, 2015).

requirements currently contained in their notices to regulations in the future. Additionally, it is possible that enhanced protections may be mandated by Congress. However, the current practice has been to update interpretation and guidance through notices to lessees.

[3] BSEE Regulatory Changes

BSEE has been more active than BOEM in creating regulatory changes to respond to the blowout. On May 27, 2010, the Department of the Interior issued a report to the President calling for increased safety measures on the OCS.¹⁹ On October 14, 2010, BOEMRE issued an interim final rule designed to implement the recommendations of the report to the President.²⁰ Following the Interim Final Rule, BOEMRE issued an additional report to the President on September 14, 2011, which included a series of regulatory recommendations.²¹ BSEE issued a final rule in response to their reports, which took effect on October 22, 2012.²² Prior to that date, the interim final rule from 2010 had remained in effect. The rule addressed enhancing casing, cementing, and certification requirements, as well as enhanced testing and verification of blowout preventers.²³ Fundamentally, the rule incorporated the most advanced standards and best practices identified in order to achieve well control and to ensure proper containment in potential discharge situations. This rule represented the most comprehensive change that has occurred in the wake of the blowout, and is the change that will have the greatest lasting legacy. BSEE committed to additional measures internally such as developing an Investigations and Review Unit in order to identify internal flaws and problems, and setting up an Ocean Energy Safety Advisory Committee.²⁴

§ 39.10 Offshore Natural Gas Transmission

Following production of natural gas from offshore sources, operators will have transported the gas into the interstate pipeline system for transmission to onshore markets. Once the gas enters into an interstate pipeline, the Federal Energy Regulatory Commission (FERC) takes jurisdiction over the transmission of the gas, pursuant to Section 1(b) of the Natural Gas Act.¹ However, while the gas is in gathering lines, or upstream from a central point of aggregation, it is not subject to FERC's jurisdiction.²

The Natural Gas Act and its progeny construed that the grant of authority provided

¹⁹ 77 Fed. Reg. 50855 (Aug. 22, 2012).

²⁰ 77 Fed. Reg. 50855 (Aug. 22, 2012).

²¹ 77 Fed. Reg. 50855 (Aug. 22, 2012).

²² 77 Fed. Reg. 50855 (Aug. 22, 2015).

²³ See <http://www.bsee.gov/BSEE-Newsroom/Press-Releases/2012/BSEE-Releases-Offshore-Drilling-Safety-Rule/> (Aug. 15, 2012).

²⁴ See generally <http://www.bsee.gov/About-BSEE/BSEE-History/Reforms/Reforms/> (Feb. 15, 2015).

¹ 15 U.S.C. § 717(b); see also *Jupiter Energy Corp. v. FERC*, 407 F.3d 346 (5th Cir. 2005).

² *Transcontinental Gas Pipe Line Corporation, Williams Gas Processing—Gulf Coast Company, L.P., Jupiter Energy Corporation*, Order on Remand, 121 FERC ¶ 61,157 (2007).

to the Federal Power Commission (FPC, the predecessor to FERC), would be that the terms production and gathering would be narrowly construed to drawing the gas from the earth and preparing it for distribution.³ In 1983, FERC developed a primary function test, which employs physical and non-physical factors, to determine whether a certain facility is engaged in gathering gas or the interstate transmission of gas.⁴ The physical factors include the facility's length and diameters, the extension of the facility beyond the central point in the producing field, the facility's geographic configuration, the placement of compressors and processing plants, the location of wells along the facility, and operating pressures.⁵ Non-physical factors include the purpose, location and operation of the facility, the general business activity of the owner of the facility, and whether the jurisdictional determination is consistent with the objectives of the NGA and the Natural Gas Policy Act.⁶

In 1990, FERC modified the test by adopting a sliding scale to the primary function test due to increased depths of offshore production, which were further from existing interstate pipeline connections.⁷ FERC further refined the test in 1997 by analyzing systems with a central aggregating point, and adjusting the weight to be afforded to the behind the plant criterion so that the location of the processing plant is not necessarily determinative, and finally, by focusing primarily on the physical factors of the test.⁸ This version of the test remains in effect, and is applied when operators contest FERC jurisdiction over their pipelines based on whether or not the pipelines are for gathering or for transmission of the gas.

FERC clarified their jurisdiction on November 15, 2007, following circuit court remands for Jupiter Energy Corporation and Transcontinental Gas Pipe Line Corporation.⁹ The purpose of the remand was the clarify FERC precedent on the primary function test, which had most recently been revised in 2000 in *Sea Robin*. In the Order, the court articulated that certain lengths and diameters of pipelines were consistent

³ Jupiter Energy Corp. v. FERC, 407 F.3d 346 (5th Cir. 2005); *see also* Northern Natural Gas Co. v. State Corp. Comm'n, 372 U.S. 84 (1963).

⁴ Jupiter Energy Corp. v. FERC, 407 F.3d 346 (5th Cir. 2005); *see also* Farmland Industries, Inc., CRA, Inc., 23 FERC ¶ 61,063 (1983).

⁵ Jupiter Energy Corp. v. FERC, 407 F.3d 346 (5th Cir. 2005); *see also* Sea Robin Pipeline Co. v. FERC, 127 F.3d 365, 368 (5th Cir. 1997) (citing EP Operating Co. v. FERC, 876 F.2d 46, 48 (5th Cir. 1989)).

⁶ Jupiter Energy Corp. v. FERC, 407 F.3d 346 (5th Cir. 2005); *see also* Transcontinental Gas Pipe Line Corporation, Williams Gas Processing-Gulf Coast Company, L.P., 97 FERC ¶ 61,296, at 62,380 (2001) (describing the *Farmland Industries* test).

⁷ Jupiter Energy Corp. v. FERC, 407 F.3d 346 (5th Cir. 2005); *see also* Amerada Hess Corp., 52 FERC ¶ 61,268, at 61,988 (1990) (responding to EP Operating Co. v. FERC, 876 F.2d 46 (5th Cir. 1989)).

⁸ Jupiter Energy Corp. v. FERC, 407 F.3d 346 (5th Cir. 2005); Transcontinental Gas Pipe Line Corporation, Williams Gas Processing-Gulf Coast Company, L.P., 97 FERC ¶ 61,296, at 62,380 (2001) (citing Sea Robin Pipeline Co. v. FERC, 127 F.3d 365, 368 (5th Cir. 1997)) (internal citations omitted).

⁹ *Transcontinental Gas Pipe Line Corporation, Williams Gas Processing—Gulf Coast Company, L.P., Jupiter Energy Corporation*, Order on Remand, 121 FERC ¶ 61,157 (Nov. 15, 2007).

with gathering functions.¹⁰ FERC also decided to look at what the functions of the pipeline at issue were, continuing to examine non-physical factors to their analysis.¹¹ FERC clearly articulated its central aggregation point, pointing out a series of small diameter pipelines which connect to a central point, from which a larger diameter pipeline moves the gas.¹² To FERC, the pipelines upstream of this central aggregation point are considered non-jurisdictional gathering pipelines while the larger diameter pipe is considered jurisdictional transmission pipeline. FERC did explain how some pipelines may have the length and pressure characteristics of a transmission pipeline, but non-physical factors can then be determinative in deciding whether or not the pipeline should be considered jurisdictional.¹³ Through FERC precedent on the physical and non-physical factors associated with the primary function test, operators can gain a better understanding of whether or not their pipelines will be subject to FERC or state authority. Alternatively, the operator can seek a declaratory order to avoid any potential problems during operations of the pipeline.

§ 39.11 Conclusion

Offshore natural gas law is promulgated by numerous federal and state agencies, under enabling statutes and corresponding regulations. Navigating the applicable law or regulation is essential to avoiding costly penalties, fines, or other enforcement actions. The Deepwater Horizon on the Macondo prospect made a number of changes to the federal agencies most directly associated with the extraction of natural gas on the OCS, and it is important to stay updated with the continuing regulations from BOEM and BSEE. Even with the rise of shale gas in the United States, offshore natural gas continues to influence the United States' energy portfolio.

¹⁰ *Transcontinental Gas Pipe Line Corporation, Williams Gas Processing—Gulf Coast Company, L.P., Jupiter Energy Corporation*, Order on Remand, 121 FERC ¶ 61,157, at ¶ 13 (Nov. 15, 2007).

¹¹ *Transcontinental Gas Pipe Line Corporation, Williams Gas Processing—Gulf Coast Company, L.P., Jupiter Energy Corporation*, Order on Remand, 121 FERC ¶ 61,157, at ¶ 18 (Nov. 15, 2007).

¹² *Transcontinental Gas Pipe Line Corporation, Williams Gas Processing—Gulf Coast Company, L.P., Jupiter Energy Corporation*, Order on Remand, 121 FERC ¶ 61,157, at ¶ 23 (Nov. 15, 2007).

¹³ *Transcontinental Gas Pipe Line Corporation, Williams Gas Processing—Gulf Coast Company, L.P., Jupiter Energy Corporation*, Order on Remand, 121 FERC ¶ 61,157, at ¶¶ 24–29 (Nov. 15, 2007).