

# WHAT ABOUT BOEM? THE NEED TO REFORM THE REGULATIONS GOVERNING OFFSHORE OIL AND GAS PLANNING AND LEASING

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## ABSTRACT

*The nature of offshore oil and gas activities is changing as companies are forced into difficult and remote areas, including the U.S. Arctic Ocean. As evidenced by the 2010 Deepwater Horizon tragedy and Shell's error-plagued efforts to drill exploration wells in the Chukchi and Beaufort seas in 2012, the rules governing whether and under what conditions to allow offshore drilling in frontier areas have not kept pace with environmental and technical changes. These rules were implemented in 1979 and have remained substantively the same since. Recent changes to at the Department of the Interior to disband the Minerals Management Service, improve certain safety requirements, and move toward implementing Arctic-specific spill prevention and response requirements are important steps. Those changes, however, apply only after the decision to allow oil and gas activity has been made. Congress has not amended the governing statute, and the agency has not modified in any meaningful way the regulations that govern the initial processes through which it decides whether and under what circumstances to allow offshore oil and gas activities in a given area. This Article argues that the regulations that govern offshore oil and gas planning and leasing should be fundamentally revised to account for changes in the industry and agency, remedy broadly acknowledged deficiencies, and reflect new administrative policies. It also recommends a path to achieve the needed change.*

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## INTRODUCTION

*“The deterioration of the environment is in large measure the result of our inability to keep pace with progress. We have become victims of our own technological genius.”*<sup>1</sup>

The nature of offshore oil and gas activities is changing. More and more, companies are forced into difficult and remote areas, including the U.S. Arctic Ocean and ultra-deepwater. At the same time, Arctic waters are growing warmer, sea ice is declining rapidly, and the ocean is becoming more acidic.<sup>2</sup> Increasing attention from the scientific community, politicians, and the public at large has been focused on government choices about how to balance the desire for affordable energy with the need to maintain healthy, functioning ocean ecosystems in the Arctic. As evidenced by the 2010 *Deepwater Horizon* tragedy and Shell’s error-plagued efforts to drill exploration wells in the Chukchi and Beaufort seas in 2012,<sup>3</sup> the rules governing whether and under what conditions to allow offshore drilling in frontier areas have not kept pace with environmental and technical changes.

After the 1989 *Exxon Valdez* oil spill in Prince William Sound and the 1969 Santa Barbara blowout, Congress enacted legislation designed to enhance safety, improve government decision-making, and prevent future marine oil disasters.<sup>4</sup> To date, the *Deepwater Horizon* oil spill and the problems experienced by Shell in the Arctic have not spurred similar congressional action. Though Congress has not addressed deficiencies in the law, the Department of the Interior (DOI) has taken some steps to address obvious problems. Most notably, it disbanded the Minerals Management Service and replaced it with three independent successor agencies, improved certain safety requirements, and moved toward implementing Arctic-specific spill prevention and response requirements.<sup>5</sup>

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1. 1969 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: RICHARD NIXON 222 (Washington, D.C.: United States Government Printing Office, 1971).

2. *Arctic Sea Ice Decline*, WEATHER UNDERGROUND, <http://www.wunderground.com/climate/SeaIce.asp> (last viewed Oct. 3, 2014); *Assessment of Arctic Ocean Acidification Studies Seawater pH*, ARCTIC COUNCIL (July 2013), <http://www.arctic-council.org/index.php/en/resources/news-and-press/news-archive/762-assessment-of-arctic-ocean-acidification-studies-seawater-ph>.

3. See *infra* Part II.B.

4. See *infra* Part III.A.

5. See HENRY B. HOGUE, CONG. RESEARCH SERV., R41485, REORGANIZATION OF THE MINERALS MANAGEMENT SERVICE IN THE AFTERMATH OF THE DEEPWATER HORIZON OIL SPILL 2 (2010). As explained below, at least some of the problems

While necessary and laudable, the substantive changes undertaken by DOI apply only after the decision to allow oil and gas activity has been made. DOI has not modified in any meaningful way the planning and leasing regulations that govern the initial processes through which the agency decides whether and under what circumstances to allow offshore oil and gas activities in a given area. These rules have remained essentially unchanged from their initial promulgation more than three decades ago. They have not kept pace with changes in the industry, and they fail to provide effective guidance, reflect new agency culture, incorporate updated analytical methodologies, or conform to modern policy priorities.

Existing law gives DOI ample flexibility to make meaningful changes to these outdated planning and leasing regulations. Regulatory reform could yield a more transparent and inclusive framework to guide decision-making about offshore oil and gas activities. Improved regulations could further good governance by providing for an appropriate balance of costs and benefits, the means to effectively identify and mitigate risks, a measure of consistency and certainty for corporate stakeholders, and meaningful protections for sensitive areas. These benefits could yield substantial improvements in agency decision-making processes and outcomes in the Arctic Ocean.

This Article argues in favor of revising the regulations that govern offshore oil and gas planning and leasing and recommends a path to achieve the needed change. While this Article focuses on application of these regulations to oil and gas activities in the frontier areas—the Arctic Ocean and ultra-deepwater—reform could yield benefits in all federal waters. The first Part of this Article briefly summarizes the history of the Outer Continental Shelf Lands Act, its provisions, and its implementing regulations. Part II explains the need for reform, and Part III identifies the changes that have—and have not—been implemented to date. Part IV addresses DOI’s authority to make the necessary changes. Finally, this Article concludes by suggesting one path DOI could follow if it chooses to revise its existing regulations.

## I. THE OUTER CONTINENTAL SHELF LANDS ACT AND IMPLEMENTING REGULATIONS

Federal offshore oil and gas activities are governed by the Outer Continental Shelf Lands Act (OCSLA).<sup>6</sup> OCSLA calls for the

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addressed by these changes were apparent before the *Deepwater Horizon* tragedy and Shell’s 2012 season. See *infra* Part II.B.

6. Pub. L. No. 83-212, 67 Stat. 462 (1953) (codified at 43 U.S.C. §§ 1331-

“expeditious and orderly development” of offshore oil and gas resources, “subject to environmental safeguards.”<sup>7</sup> The Parts that follow give a brief history of OCSLA, summarize the framework established by the statute, and describe the relevant implementing regulations.

### A. The Outer Continental Shelf Lands Act

Congress enacted OCSLA in 1953.<sup>8</sup> While the original statute authorized development of oil and gas resources on the Outer Continental Shelf (OCS), it did not establish a systematic approach to management; it failed to address oil pollution liability, state and local government involvement, injury to other users of the OCS, environmental concerns, and long-term energy policy.<sup>9</sup>

In 1978, Congress sought to remedy some of these weaknesses through comprehensive amendments to the statute.<sup>10</sup> Those amendments were designed to improve lease administration, promote greater involvement of states and localities, and enhance safety and environmental protection.<sup>11</sup> The 1978 amendments required oil and gas leasing programs intended to encourage more balanced development, less environmental damage, and fewer impacts on coastal zones.<sup>12</sup> The amendments also created an oil and gas information program within the United States Geological Survey, established an offshore oil spill pollution fund, provided grants to coastal states, and established contingency funds for fishermen.<sup>13</sup> In short, Congress intended the 1978 amendments to create a “new statutory regime” that would rein in agency discretion and address the environmental shortcomings of the

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1356b (2012).

7. § 1332(3) (2012).

8. Outer Continental Shelf Lands Act, Pub. L. No. 83-212, 67 Stat. 462 (1953) (codified at 43 U.S.C. §§ 1331-1356b (2012)).

9. H.R. Rep. No. 95-590, at 53 (1977), *reprinted in* 1978 U.S.C.C.A.N. 1450, 1460-61.

10. Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, 92 Stat. 629. The only amendment to OCSLA prior to 1978 concerned the application of state law to OCS activities. 33 U.S.C. §§ 1501-1524 (2012); 43 U.S.C. § 1333 (2012). Section 19(f) of the Deepwater Port Act of 1974 made existing state law applicable to OCS activities, rather than state laws in force at the time of OCSLA’s original enactment. Pub. L. No. 93-627, § 19(f), 88 Stat. 2126, 2146.

11. H.R. Rep. No. 95-590, *supra* note 9, at 55; *see* Robert B. Krueger & Louis H. Singer, *An Analysis of the Outer Continental Shelf Lands Act Amendments of 1978*, 19 NAT. RESOURCES J. 909, 911-22 (1979) (providing a more detailed overview of changes made by the 1978 amendments to OCSLA).

12. 43 U.S.C. § 1344 (2012). Current regulation of five-year leasing programs occurs under 30 C.F.R. §§ 556.16-556.28.

13. H.R. Rep. No. 95-590, *supra* note 9, at 55.

original statute.<sup>14</sup>

While Congress has amended OCSLA since 1978, it has not fundamentally altered the management scheme.<sup>15</sup> Today, the framework for government decisions about OCS oil and gas activities is well-established under the law.

## B. OCSLA Framework

OCSLA establishes a four-stage process for offshore oil and gas planning, exploration, and development.<sup>16</sup> First, the Secretary of the Interior develops a nationwide leasing program, which establishes a five-year schedule of proposed lease sales.<sup>17</sup> The plan must indicate, “as precisely as possible, the size, timing, and location of leasing activity which . . . will best meet national energy needs” and “obtain a proper balance between the potential for environmental damage, the potential for the discovery of oil and gas, and the potential for adverse impact on the coastal zone.”<sup>18</sup>

Second, DOI holds the lease sales scheduled in the five-year leasing program. OCSLA calls for DOI to auction lease tracts in a competitive bidding process; successful companies obtain a conditional right “to explore, develop, and produce the oil and gas contained within the lease area.”<sup>19</sup>

Third, companies submit, and the government evaluates, plans to drill exploration wells on purchased leases.<sup>20</sup> In addition to exploration drilling, companies may apply to conduct seismic testing and other

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14. *Id.* at 53–55 (“The increased importance of OCS resources, the increased consideration of environmental and onshore impacts, and emphasis on comprehensive land use planning require that Congress detail standards and criteria for the Secretary to follow in the exercise of his authority.”).

15. Most recently, OCSLA was amended by the Energy Policy Act of 2005, which granted the Department of the Interior (DOI) jurisdiction for OCS renewable energy projects. Pub. L. No. 109-58, 119 Stat. 594.

16. See Andrew Hartsig, *Shortcomings and Solutions: Reforming the Outer Continental Shelf Oil and Gas Framework in the Wake of the Deepwater Horizon Disaster*, 16 OCEAN & COASTAL L.J. 269, 273 (2011); LeVine, et al., *Oil and Gas in America’s Arctic Ocean: Past Problems Counsel Precaution*, 38 SEATTLE U.L. REV. (forthcoming 2015).

17. 43 U.S.C. § 1344(a) (2012).

18. § 1344(a)(3), (1). As a result of litigation in the early 1980s, these plans are prepared in years ending in 2 and 7. See LeVine, et al. *supra* note 16. The current plan, for example, encompasses 2012–17, BOEM, PROPOSED FINAL OUTER CONTINENTAL SHELF OIL & GAS LEASING PROGRAM (2012), and BOEM will prepare the 2017-2022 program next.

19. § 1337(b)(4).

20. § 1340(c)(1)

activities on their lease tracts.<sup>21</sup> Such activities are subject to approvals separate from the exploration plan process.

Fourth, if companies find resources warranting production, they may submit proposals for development. Operators' activities must conform with approved development and production plans.<sup>22</sup>

In addition to adhering to the mandates established by OCSLA, government agencies involved in offshore oil and gas activities must satisfy the requirements of a variety of other statutes including the National Environmental Policy Act (NEPA), Clean Water Act, Oil Pollution Act of 1990, Endangered Species Act, and Marine Mammal Protection Act. While NEPA applies at all four stages of the process, the requirements of the other statutes are not triggered by the preparation of a five-year leasing program.<sup>23</sup>

### C. Implementing Regulations

Although OCSLA provides a process for decisions about offshore oil and gas activities, the framework is relatively broad and gives DOI substantial flexibility to determine exactly how and where oil and gas activities should be planned and permitted on the OCS.<sup>24</sup> Regulations implementing this framework should provide regulators, oil and gas companies, and the general public with the information and mechanisms needed to implement the statute in a manner consistent with Congress's objectives. In practice, however, DOI's regulations often fall short of the mark.

Although federal agencies can and should address other issues related to the implementation of OCSLA and the other statutes noted above, this Article focuses primarily on DOI regulations governing the first two phases of the OCSLA process: development of a five-year

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21. See NAT'L OCEANIC AND ATMOSPHERIC ADMIN., EFFECTS OF OIL AND GAS ACTIVITIES IN THE ARCTIC OCEAN: SUPPLEMENTAL DRAFT ENVTL. IMPACT STATEMENT ES-1 to ES-4 (2013).

22. 43 U.S.C. § 1351(a)(1).

23. See Hartsig, *supra* note 16, at 273-74. Prior to 2010, companies seeking to operate in the Arctic were subject to EPA regulations implementing the Clear Air Act. See 42 U.S.C. 7627(a), (b) (2010). A legislative rider attached to the 2011 Omnibus Appropriations Act transferred the authority to regulate air emissions from offshore activities in OCS area adjacent to the North Slope Borough of Alaska back to the Department of the Interior. See Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, § 432, 125 Stat. 785, 1048-49. Similarly, prior to 2011, Alaska's Coastal Management Program applied to oil and gas activities in federal waters. That program was allowed to expire in 2011. Tim Bradner, *State's Coastal Zone Management Authority to Expire This Month*, ALASKA J. OF COMMERCE (June 3, 2011), [http://classic.alaskajournal.com/stories/060311/loc\\_sczm.shtml](http://classic.alaskajournal.com/stories/060311/loc_sczm.shtml).

24. See *infra* Part III.A.

program and leasing under that program.

When originally passed by Congress in 1953, OCSLA gave DOI authority to lease OCS lands for oil and gas production.<sup>25</sup> DOI promulgated the first regulations under this authority in 1954.<sup>26</sup> In the following years, DOI updated these regulations as the agency refined its procedures and OCS activities expanded.<sup>27</sup> Although DOI made substantive changes to its OCS leasing regulations between 1954 and 1978, the scope of these early regulations was ultimately limited by the scope of the original statute.

The 1978 amendments to OCSLA mark the transition to the framework in place today. Not surprisingly, those amendments triggered a major overhaul of DOI's OCS regulations in 1979.<sup>28</sup>

In the 35 years since, changes have been made to the regulations governing revenue, safety, and operations.<sup>29</sup> The planning and leasing regulations, however, have remained largely unchanged since their implementation in 1979.<sup>30</sup> Between 1980 and 2011, DOI made a total of twenty-five amendments to these planning and leasing regulations.<sup>31</sup> Of those, only eight were substantive; the remaining seventeen implemented technical corrections, re-designations, and definitional updates.

Of the eight substantive changes, only two were significant. In both cases, the changes were largely directed at operations on leases once they have been purchased.<sup>32</sup> In 1999, DOI amended its regulations to

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25. Section 5 of the original OCSLA of 1953 provides for administration of leasing, Section 6 for maintenance of leases, and Section 8 for leasing procedures. Pub. L. No. 83-212, 67 Stat. 462, 464-65 (1953).

26. Oil and Gas Leasing in Lands Under Rights-of-Way, 19 Fed. Reg. 9041 (Dec. 23, 1954) (codified at 30 C.F.R. pt. 221).

27. For example, in 1975, the Bureau of Land Management (BLM) amended its leasing regulations to establish joint bidding procedures and restrict the ability of major oil companies to bid together and to allow alien permanent residents to bid on and hold OCS leases. 43 C.F.R. § 3300.1, 3302.3-3 (1975). BLM also revised its regulations to require oil and gas companies to provide certain exploration data to the U.S. Geological Survey. 30 C.F.R. §§ 251.12, 252.3 43 C.F.R. § 3302.3-3 (1978).

28. See Outer Continental Shelf Minerals Leasing and Rights-of-Way Granting Programs, 44 Fed. Reg. 38,268 (June 29, 1979 (codified at 43 C.F.R. pt. 2880)). Changes in regulations governing production operations, however, are beyond the scope of this article.

29. See *infra* Part III.B.

30. These regulations are currently codified at 30 C.F.R. §§ 556.16-556.28 (2012) (five-year planning) and §§ 556.29-556.80 (leasing).

31. See *infra* Table A (summarizing the history of 30 C.F.R. pt. 556 from implementation to present).

32. See, e.g., Postlease Operations Safety, 64 Fed. Reg. 72,756 (Dec. 28, 1999) (codified at 30 C.F.R. pt. 250) (updating and clarifying requirements related to post-lease operations and setting out operator disqualification criteria, among

clarify post-lease operating and diligence requirements.<sup>33</sup> Among other things, the amendments allowed for disqualification of operators with repeated poor performance.<sup>34</sup> The second major change came in 2002, when DOI updated decommissioning requirements to improve their clarity and bring the regulations in line with current technologies.<sup>35</sup> The remaining six substantive amendments to the planning and leasing regulations had only minor impact: three changes to surety bond provisions, an alteration of lease terms based on water depth, and two changes to the royalty program.<sup>36</sup> None of these changes affected the regulations that govern DOI's choices about whether and under what conditions to allow offshore oil and gas leasing; the regulations governing those decisions remain more or less the same as they were thirty-five years ago.

In addition to being outdated, DOI's planning and leasing regulations are functionally deficient. The regulations governing the five-year planning process, for example, provide no substantive direction for agency staff or decision-makers to employ as they try to meet the statutory directive to "select the timing and location of leasing, to the maximum extent practicable, so as to obtain a proper balance between the potential for environmental damage, the potential for the discovery of oil and gas, and the potential for adverse impact on the coastal zone."<sup>37</sup> Nor can they be read to include any useful standards,

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other requirements); Oil and Gas and Sulphur Operations in the Outer Continental Shelf—Decommissioning Activities, 67 Fed. Reg. 35,398 (May 17, 2002) (codified at 30 C.F.R. pts. 250, 256) (updating decommissioning requirements for oil and gas operations in the OCS).

33. Postlease Operations Safety, 64 Fed. Reg. at 72,756.

34. Although this provision has been in the regulations for the past fifteen years, the Bureau of Ocean Management (BOEM) and Bureau of Safety Environmental Enforcement (BSEE) have never disqualified an operator on the basis of performance. Instead the agencies and their predecessor, the Minerals Management Service, have relied on Performance Improvement Plans to change operator behavior. On BSEE's website only two operators are listed as participating in Performance Improvement Plans: TALOS Energy LLC is listed as currently participating, and Black Elk Energy Offshore Operations, LLC is listed as previously participating. *Performance Improvement Plans*, BUREAU OF SAFETY AND ENVIRONMENTAL ENFORCEMENT, [http://www.bsee.gov/Inspection-and-Enforcement/Enforcement-Programs/Performance\\_improvement\\_Plans](http://www.bsee.gov/Inspection-and-Enforcement/Enforcement-Programs/Performance_improvement_Plans) (last visited Oct. 10, 2014).

35. Oil and Gas and Sulphur Operations in the Outer Continental Shelf—Decommissioning Activities, 67 Fed. Reg. at 35,398 ("[This rule] restructured the requirements to make the regulations easier to read and understand . . . [and] updated requirements to reflect changes in technology.").

36. See 58 Fed. Reg. at 45,255; 61 Fed. Reg. 55,887; 62 Fed. Reg. 36,995; 66 Fed. Reg. 11,512; 66 Fed. Reg. 60,147; 73 FR 52,917. See Table A for a summary of these changes.

37. 43 U.S.C. § 1344(a)(3); *id.* § 1344(a)(1). BOEM has stated that "[s]triking



guidelines, or benchmarks to guide consideration of the nine factors that the statute requires the agency to consider in allocating the “[t]iming and location of exploration, development, and production” among the various ocean regions.<sup>38</sup> Instead, the existing regulations cover only: nominations for inclusion of areas in the plan; public notice, including review by state and local governments; consultation; consistency with state coastal zone management programs; reports from federal agencies; and requirements for area identification and lease tract size.<sup>39</sup> The closest the regulations come to providing guidance on the balancing required in crafting the leasing program are the directions to the agency to “evaluate fully the potential effect of leasing on the human, marine and coastal environments, and develop measures to mitigate adverse impacts, including lease stipulations.”<sup>40</sup>

The regulations governing lease sales are similarly devoid of substantive direction with regard, for example, to determining whether to hold a scheduled sale and what portions of the OCS program area should be included in that sale. In fact, the only explicit requirement regarding the ocean environment is the direction to “develop measures, including lease stipulations and conditions, to mitigate adverse impacts on the environments.”<sup>41</sup> All of the remaining regulations describe opportunities for comment, bidding requirements and systems, bonding, or other procedural requirements.<sup>42</sup>

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this balance based on a consideration of the principles and factors enumerated in section 18(a) is a matter of judgment for which no ready formula exists. Section 18 requires the consideration of a broad range of principles and factors rather than imposing an inflexible formula for making decisions.” BOEM, PROPOSED FINAL OUTER CONTINENTAL SHELF OIL & GAS LEASING PROGRAM 188 (2012). Without regulatory guidance to help it undertake that balancing, the agency in 2012 was left to quote extensively from the D.C. Circuit opinions evaluating challenges to its earlier efforts. *Id.* at 191-93.

38. 43 U.S.C. § 1344(a)(2). For example, OCSLA Section 18(a)(2)(B) requires consideration of “an equitable sharing of developmental benefits and environmental risks among the various regions.” *Id.* § 1344(a)(2)(B). BOEM meets this obligation using a net benefits calculation. See BOEM, PROPOSED FINAL OUTER CONTINENTAL SHELF OIL & GAS LEASING PROGRAM 134 (2012). There are no regulations to guide this analysis, the factors considered, or reliance on the conclusions reached.

39. 30 C.F.R. §§ 556.16-556.28 (2011).

40. *Id.* § 556.26(b).

41. *Id.* § 556.29(a).

42. *Id.* §§ 556.29-.80. Separate regulations govern lease cancellation and suspension. See §§ 550.181-.185.

## II. THERE IS CLEAR NEED TO REFORM THE AGENCY'S PLANNING AND LEASING REGULATIONS

DOI's regulations have not kept pace with changes in the oil and gas industry since the late 1970s. The following Subparts describe the rapid pace of change, calls for regulatory change, and the new priorities that are not reflected in existing regulations.

### A. Rapid Change and Growing Challenges in the Oil and Gas Industry

The nature of the offshore oil and gas industry has changed substantially since DOI promulgated its planning and leasing regulations in the late 1970s. Most notably, exploration and production have been forced to deeper and more remote waters. These places in the ocean—ultra-deepwater and the Arctic Ocean—are often referred to as “frontier areas,” and it is widely recognized that good management of the resources in these frontier areas requires particular care.<sup>43</sup>

In the Gulf of Mexico, offshore exploration and development began in shallower waters on the continental shelf. In the 1980s, however, economic and geologic factors pushed the industry to explore “larger fields in deeper waters.”<sup>44</sup> Discoveries in deeper water led to producing wells in the 1990s, and by the end of that decade, deepwater production surpassed production from shallow waters.<sup>45</sup> Shortly thereafter, deepwater wells were producing twice as much oil as shallow water wells, and a growing amount of that oil came from “ultra-deepwater” wells more than 5,000 feet below the ocean surface.<sup>46</sup> At the same time, “[d]rilling contractors developed a new generation of vessels that took drilling from 5,000 to 10,000 feet of water, and from 20,000 to 30,000 feet of sub-seafloor depth.”<sup>47</sup> At these extreme depths, operating challenges include: extreme pressure and temperature; difficult and poorly

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43. See NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, REPORT TO THE PRESIDENT 300-01 (2011), available at <http://www.gpo.gov/fdsys/pkg/GPO-OILCOMMISSION/pdf/GPO-OILCOMMISSION.pdf>.

44. NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, A BRIEF HISTORY OF OFFSHORE OIL DRILLING 7 (2010), available at <http://cybercemetery.unt.edu/archive/oilspill/20121211011815/http://www.oilspillcommission.gov/sites/default/files/documents/A%20Brief%20History%20of%20Offshore%20Drilling%20Working%20Paper%208%2023%2010.pdf>.

45. *Id.* at 9–10.

46. *Id.*

47. NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, REPORT TO THE PRESIDENT, *supra* note 43, at 37.

understood geology; increased distances from reservoir to drilling unit; exposure to ocean currents; the need to use remotely operated vehicles; and the presence of methane hydrates.<sup>48</sup> Despite these challenges, deepwater production is likely to grow in importance.<sup>49</sup>

Similarly, the growing interest in exploring for oil and gas in the Arctic Ocean has been described as part of a new Arctic “gold rush.”<sup>50</sup> Energy companies spent billions of dollars purchasing leases and pursuing exploration in federal waters of the U.S. Arctic Ocean in the 1980s and early 1990s.<sup>51</sup> However, no development resulted, and by 2000, industry had allowed almost all of those leases to expire.<sup>52</sup> A decade or so later, changing conditions in the Arctic, high energy prices, and rising demand led to renewed interest in the region. Between 2003 and 2008, energy companies purchased more than 1 million acres of leases in the Beaufort Sea and more than 2 million acres in the Chukchi Sea.<sup>53</sup> Shell sought approvals to drill exploration wells beginning in 2007,<sup>54</sup> but the company has yet to complete any wells.<sup>55</sup>

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48. *Id.* at 51–52.

49. *Oversight Hearing on “The Final Report from the President’s National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling Before the H. Comm. on Natural Res., 112<sup>th</sup> Cong. 37 (2011) (joint statement of the Honorable Bob Graham, Co-Chairman, National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, and the Honorable William K. Reilly, Co-Chairman, National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling) [hereinafter Graham & Reilly Testimony]; see also NAT’L COMM’N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, A BRIEF HISTORY OF OFFSHORE OIL DRILLING, supra note 44, at 15 (“[M]ost experts project the world’s appetite for oil and other fuels to grow for the foreseeable future. The role of deepwater oil and gas in providing that energy is also likely to grow.”).*

50. *See, e.g.,* Isaac Arnsdorf, *Diamonds to Oil Bring Gold Rush Dreams to Melting Arctic*, BLOOMBERG (Apr. 30, 2014), <http://www.bloomberg.com/news/2014-04-29/diamonds-to-oil-bring-gold-rush-dreams-to-melting-arctic.html>.

51. *See* LeVine, et al. *supra* note 16 (forthcoming 2015).

52. *Id.*

53. *See* BUREAU OF OCEAN ENERGY MGMT., HISTORICAL LEASE SALE SUMMARY TABLE, (May 13, 2014), *available at* [http://www.boem.gov/uploadedFiles/BOEM/About\\_BOEM/BOEM\\_Regions/Alaska\\_Region/Leasing\\_and\\_Plans/Leasing/Historical\\_Alaska\\_Region\\_Lease\\_Sales.pdf](http://www.boem.gov/uploadedFiles/BOEM/About_BOEM/BOEM_Regions/Alaska_Region/Leasing_and_Plans/Leasing/Historical_Alaska_Region_Lease_Sales.pdf).

54. MINERALS MGMT. SERV., ENVIRONMENTAL ASSESSMENT: SHELL OFFSHORE INC. BEAUFORT SEA EXPLORATION PLAN 2 (2007), *available at* [http://www.boem.gov/uploadedFiles/BOEM/About\\_BOEM/BOEM\\_Regions/Alaska\\_Region/Environment/Environmental\\_Analysis/2007-009.pdf](http://www.boem.gov/uploadedFiles/BOEM/About_BOEM/BOEM_Regions/Alaska_Region/Environment/Environmental_Analysis/2007-009.pdf).

55. *See* Clifford Krauss, *Shell Submits a Plan for New Exploration of Alaskan Arctic Oil*, N.Y. TIMES, (Aug. 28, 2014), [http://www.nytimes.com/2014/08/29/business/shell-submits-a-plan-for-new-alaskan-arctic-oil-exploration.html?\\_r=0](http://www.nytimes.com/2014/08/29/business/shell-submits-a-plan-for-new-alaskan-arctic-oil-exploration.html?_r=0) (showing that Shell is continuing its pursuit of Arctic drilling but has not yet succeeded).

The challenges of operating in the Arctic Ocean are different, but no less severe, than those in deepwater environments.<sup>56</sup> These challenges include “extreme cold, extended seasons of darkness, hurricane-strength storms, and pervasive fog,” and the need to protect rich, sensitive, and important ecosystems.<sup>57</sup> There is very limited infrastructure in the region: the nearest Coast Guard station is in Kodiak, Alaska, roughly 1,000 miles from the likely locations of oil and gas exploration,<sup>58</sup> and the nearest large deepwater port is in Dutch Harbor.<sup>59</sup> There is no proven method to respond effectively in icy waters, and traditional response methods may be ineffective.<sup>60</sup> In addition, the Arctic region is changing rapidly as a result of warming climate, and the lack of information about the marine ecosystem or those changes makes it difficult to assess or mitigate the effects of industrial activities.<sup>61</sup>

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56. See LeVine, et al., *supra* note 16 (forthcoming 2015).

57. Graham & Reilly Testimony, *supra* note 49, at 38; see also *Legislative Hearing on H.R. 2231 Before the Subcomm. on Energy and Mineral Res. of the H. Comm. on Natural Res.*, 112th Cong. 2-7 (2013) (statement of Michael LeVine, Pacific Senior Counsel, OCEANA).

58. Dan Joling, *Critics Say Grounding Shows Arctic Drilling Danger*, USA TODAY, (Jan. 3, 2013), <http://www.usatoday.com/story/news/nation/2013/01/02/arctic-drilling-danger/1805577/>.

59. See Deborah Zabarenko, *Arctic Oil Spill Would Challenge Coast Guard*, REUTERS (Jun. 20, 2011), <http://www.reuters.com/article/2011/06/20/us-arctic-oil-idUSTRE75I6O620110620> (quoting U.S. Coast Guard Adm. Robert Papp Jr. as saying that “[t]here is nothing up there to operate from at present and we’re really starting from ground zero”).

60. See WORLD WILDLIFE FUND, NOT SO FAST: SOME PROGRESS IN SPILL RESPONSE, BUT US STILL ILL-PREPARED FOR ARCTIC OFFSHORE DEVELOPMENT (2009), available at [http://assets.worldwildlife.org/publications/401/files/original/Not\\_So\\_Fast\\_Some\\_Progress\\_in\\_Spill\\_Response\\_but\\_US\\_Still\\_Unprepared\\_for\\_Arctic\\_Offshore\\_Development.pdf?1345754373](http://assets.worldwildlife.org/publications/401/files/original/Not_So_Fast_Some_Progress_in_Spill_Response_but_US_Still_Unprepared_for_Arctic_Offshore_Development.pdf?1345754373) (showing difficulties with spill response in Alaska); PEW ENV’T GRP., OIL SPILL PREVENTION AND RESPONSE IN THE U.S. ARCTIC OCEAN: UNEXAMINED RISKS, UNACCEPTABLE CONSEQUENCES 73-75 (2010), available at [http://www.pewtrusts.org/~media/legacy/oceans\\_north\\_legacy/page\\_attachments/Oil-Spill-Prevention.pdf](http://www.pewtrusts.org/~media/legacy/oceans_north_legacy/page_attachments/Oil-Spill-Prevention.pdf) (showing the particular risks associated with drilling in the Arctic); Jacob D. Unger, note, *Regulating the Arctic Gold Rush: Recommended Regulatory Reforms to Protect Alaska’s Arctic Environment from Offshore Oil Drilling Pollution*, 31 ALASKA L. REV. 280-90 (2014) (proposing a multi-factor reform to better align corporate incentives and to compensate harmed individuals for losses due to oil spills).

61. INTERAGENCY WORKING GROUP ON COORDINATION OF DOMESTIC ENERGY DEVELOPMENT AND PERMITTING IN ALASKA, MANAGING FOR THE FUTURE IN A RAPIDLY CHANGING ARCTIC 8 (2013), available at [http://www.afsc.noaa.gov/Publications/misc\\_pdf/IAMreport.pdf](http://www.afsc.noaa.gov/Publications/misc_pdf/IAMreport.pdf).

**B. The Need for Reform Has Been Broadly Recognized in Light of the Tragedy in the Gulf of Mexico and Accidents and Near-Misses in the Arctic**

The risks inherent in operating in frontier areas have been underscored by the 2010 *Deepwater Horizon* tragedy and by the substantial problems that Shell encountered in its efforts to drill exploration wells in the Chukchi and Beaufort Seas in 2012. Those problems and their causes have been detailed elsewhere and are not repeated here.<sup>62</sup> It is instructive, however, to note that both events spurred broad calls for reform.

The need for reform was, at least in part, evident even before the *Deepwater Horizon* tragedy. Before the accident, DOI had initiated two studies: one “to examine how to upgrade the safety inspection program for offshore rigs,” and the other “to analyze issues associated with drilling in the Arctic.”<sup>63</sup> In addition, there was substantial evidence that close relationships between regulators and industry resulted in criminal and unethical behavior as well as problems with oversight of industry operations.<sup>64</sup> In January 2009, Secretary of the Interior Ken Salazar announced “an ethics reform initiative in response to the problems identified at [the Minerals Management Service] and elsewhere in the agency.”<sup>65</sup> There were also identified problems with the agency’s compliance with the National Environmental Policy Act (NEPA),

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62. See, e.g., NAT’L COMM’N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, REPORT TO THE PRESIDENT, *supra* note 43; U.S. COAST GUARD, REPORT OF INVESTIGATION INTO THE CIRCUMSTANCES SURROUNDING THE MULTIPLE RELATED MARINE CASUALTIES AND GROUNDING OF THE MODU KULLUK (2014), available at <http://www.uscg.mil/d17/sectoranchorage/command/KULLUK%20Investigation.pdf>; U.S. DEP’T OF THE INTERIOR, REVIEW OF SHELL’S 2012 ALASKA OFFSHORE OIL AND GAS EXPLORATION PROGRAM (2013).

63. COUNCIL ON ENVIRONMENTAL QUALITY, REPORT REGARDING THE MINERALS MANAGEMENT SERVICE’S NATIONAL ENVIRONMENTAL POLICY ACT POLICIES, PRACTICES, AND PROCEDURES AS THEY RELATE TO OUTER CONTINENTAL SHELF OIL AND GAS EXPLORATION AND DEVELOPMENT 2 n.3 (2010), available at <http://www.whitehouse.gov/sites/default/files/microsites/ceq/20100816-ceq-mms-ocs-nepa.pdf>.

64. See U.S. DEPARTMENT OF THE INTERIOR, OFFICE OF THE INSPECTOR GENERAL, INVESTIGATIVE REPORT: MMS OIL MARKETING GROUP-LAKEWOOD (2008), available at [https://web.archive.org/web/20081002100545/http://www.doiig.gov/upload/RIK%20REDACTED%20FINAL4\\_082008%20with%20transmittal%209\\_10%20date.pdf](https://web.archive.org/web/20081002100545/http://www.doiig.gov/upload/RIK%20REDACTED%20FINAL4_082008%20with%20transmittal%209_10%20date.pdf) (describing the scandal in which MMS employees developed close personal relationships with industry members).

65. NAT’L COMM’N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, REPORT TO THE PRESIDENT, *supra* note 43, at 78 (citing Press Release, U.S. Department of the Interior, Secretary Salazar Launches Ethics Reform Initiative in Meeting with Minerals Management Service).

including in Alaska.<sup>66</sup>

The 2010 *Deepwater Horizon* spill triggered much more intense scrutiny of existing OCS oil and gas practices, including the creation of a Presidential Commission tasked with determining the causes of the disaster, improving oil spill response, and “recommend[ing] reforms to make offshore energy production safer.”<sup>67</sup> According to the co-chairmen of the National Commission on the *Deepwater Horizon* and Offshore Drilling:

The explosion at the Macondo well and the ensuing enormous spill—particularly jarring events because of the belief they could never happen—force a reexamination of many widely held assumptions about how to reconcile the risks and benefits of offshore drilling, and a candid reassessment of the nation’s policies for the development of a valuable resource. They also support a broader reexamination of the nation’s overall energy policy.<sup>68</sup>

In the wake of the *Deepwater Horizon* tragedy, many of the reforms identified as necessary understandably focused on safety, oversight, and accident prevention and response.<sup>69</sup> Calls for reform, however, were not limited to those areas. Experts also identified the need to reconsider how decisions are made about “whether, when, where, and how to engage in offshore drilling”<sup>70</sup>—choices that are made during the planning and lease-sale phases of the OCSLA process. There were specific calls for DOI to change the manner in which it undertook planning, leasing, and environmental review. The National Commission, for example, identified the need for “a more comprehensive overhaul of both leasing and the regulatory policies and institutions used to oversee offshore

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66. See, e.g., U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-276, OFFSHORE OIL AND GAS DEVELOPMENT: ADDITIONAL GUIDANCE WOULD HELP STRENGTHEN THE MINERALS MANAGEMENT SERVICES ASSESSMENT OF ENVIRONMENTAL IMPACTS IN THE NORTH ALEUTIAN BASIN (2010).

67. NAT’L COMM’N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, REPORT TO THE PRESIDENT, *supra* note 43, at vi.

68. Graham & Reilly Testimony, *supra* note 49, at 36; see also U.S. DEPARTMENT OF THE INTERIOR, OUTER CONTINENTAL SHELF SAFETY OVERSIGHT BOARD REPORT TO SECRETARY OF THE INTERIOR KEN SALAZAR 1 (2010), available at <http://www.doi.gov/news/pressreleases/loader.cfm?csModule=security/getfile&PageID=43677> (“The accident and ensuing spill challenged 40 years of generally accepted belief that offshore operations could occur safely under existing regulation and oversight.”).

69. NAT’L COMM’N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, REPORT TO THE PRESIDENT, *supra* note 43, at 249-78.

70. Graham & Reilly Testimony, *supra* note 49, at 36.

activities.”<sup>71</sup> It determined that management and oversight—on the part of both government and industry—had not “kept pace with rapid changes in the technology, practices, and risks associated with the different geological and ocean environments being explored and developed for oil and gas production.”<sup>72</sup>

The National Commission concluded that “[f]undamental reform” was “needed in both the structure of those in charge of regulatory oversight and their internal decision-making process to ensure their political autonomy, technical expertise, and their full consideration of environmental protection concerns.”<sup>73</sup> Similarly, there have been repeated calls to reform the NEPA regulations at all stages of the OCSLA process.<sup>74</sup> The Council on Environmental Quality, for example, recommended reforms designed to address shortcomings in the application of NEPA to OCS activities.<sup>75</sup>

In addition to recommending general reforms that apply to all areas of the OCS, the National Commission also identified the specific need to reform the OCS leasing process in frontier areas, including the Arctic:

In less well-explored areas, Interior should reduce the size of lease sales so their geographic scope allows for a meaningful analysis of potential environmental impacts and identification of areas of ecological significance. A bidder on tracts in these areas and all other areas should be able to demonstrate, in addition to financial prequalification and ability to contain a maximum-size spill, experience operating in similar environments and a record of safe, environmentally responsible operation—either in the United States or as verified by a peer regulator for another country. The distinction between the OCS and less well-explored areas in the Gulf should be defined by the new entity in charge of leasing and environmental science.<sup>76</sup>

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71. NAT’L COMM’N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, REPORT TO THE PRESIDENT, *supra* note 43, at 250.

72. *Id.* at 251.

73. *Id.* at vii.

74. See, e.g., *id.* at 261 (“The Council on Environmental Quality and the Department of the Interior should revise and strengthen the NEPA policies, practices, and procedures to improve the level of environmental analysis, transparency, and consistency at all stages of the OCS planning, leasing, exploration, and development process.”); COUNCIL ON ENVIRONMENTAL QUALITY, *supra* note 63, at 23-29.

75. See COUNCIL ON ENVIRONMENTAL QUALITY, *supra* note 63, at 4.

76. NAT’L COMM’N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, REPORT TO THE PRESIDENT, *supra* note 43, at 262.

Similar calls for fundamental reform were again heard, with renewed vigor, in the wake of the grounding of Shell's *Kulluk* drilling unit and the numerous other problems encountered by Shell during its 2012 Arctic drilling attempts.<sup>77</sup> Shell's failed efforts to complete exploration wells in the Chukchi and Beaufort Seas triggered reviews and evaluations that reinforced the broad need for reform.<sup>78</sup> In the Coast Guard report on the grounding of the *Kulluk*, the Assistant Commandant states that "the inadequate assessment and management of risks by the parties involved was the most significant causal factor in the mishap" and expresses dismay at the "significant number and nature of the potential violations of law and regulations."<sup>79</sup> Similarly, DOI's review of Shell's 2012 drilling season identified the need for Arctic-specific safety and response regulations.<sup>80</sup> The need to reform NEPA processes in the Arctic region was identified even prior to 2012.<sup>81</sup>

In sum, many of the problems that have come to light in the past decade, and the resulting calls for reform, involve systemic failures in DOI's culture, decision-making, planning, and evaluation of potential in-the-water impacts. As many of the analyses show, regulatory changes should be informed by a holistic view of the way government makes decisions about whether and under what conditions to allow oil and gas leasing, exploration, and development. It is not sufficient simply to examine safety, oversight, and revenue. Though those issues are important, true reform requires reexamining all aspects of the relevant decisions. In this reexamination, the planning and leasing stages are significant, because they occur before rights are transferred to energy companies. Once an OCS lease has been sold, it becomes much more difficult and costly for the government to prevent or significantly curtail exploration activities. While OCSLA does allow the government to

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77. See Dan Joling, *Shell Kulluk Ship Investigation Called For By House Democrats*, HUFFINGTON POST (Jan. 3, 2013), [http://www.huffingtonpost.com/2013/01/03/shell-kulluk-ship-investigation\\_n\\_2404904.html](http://www.huffingtonpost.com/2013/01/03/shell-kulluk-ship-investigation_n_2404904.html).

78. See Ed Crooks, *US Reviews Shell's Arctic Drilling Plans*, FINANCIAL TIMES, (Jan. 9, 2013), <http://www.ft.com/cms/s/0/356b14ee-5a0a-11e2-88a1-00144feab49a.html#axzz3Eu2hk97B>.

79. U.S. COAST GUARD, *supra* note 62, at 1.

80. U.S. DEP'T OF THE INTERIOR, *supra* note 62.

81. See Letter from Carole A. Holley, Alaska Program Co-Director, Pacific Environment, to Horst Greczmiel, Associate Director for NEPA Oversight, re: *Review of MMS NEPA Policies, Practices, and Procedures for OCS Oil and Gas Exploration and Development* (June 17, 2010), [http://www.whitehouse.gov/files/ceq/pe\\_ceq\\_nepa\\_comments\\_06\\_17\\_10\\_final.pdf](http://www.whitehouse.gov/files/ceq/pe_ceq_nepa_comments_06_17_10_final.pdf); see also U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 66, at 21 (finding that the process for meeting NEPA requirements was "ill defined," and that agency staff lacked "adequate guidance on how . . . to implement NEPA with respect to" programs areas).



cancel leases and prohibit exploration and development,<sup>82</sup> this option is rarely exercised.<sup>83</sup> Reform, therefore, should encompass the entirety of the OCSLA process; it should not be limited to standards that apply only after areas have been included in leasing programs and leases have been sold to energy companies.

### C. Existing Regulations Do Not Provide Guidance with Respect to New Priorities and Policies

In addition to accounting for changes in the industry and calls for reform generated by the *Deepwater Horizon* tragedy and Shell's error-plagued Arctic drilling efforts, existing regulations should be updated to ensure that planning and leasing activities adhere to administrative priorities and policies that have been established in recent years. These policies include efforts to ensure transparency and open government, provide for greater stewardship of ocean and coastal resources, and promote integrated management in the U.S. Arctic.

At the broadest level, transparency is essential to ensure the accountability of, and good performance by, industrial operators and contractors as well as regulatory agencies. President Obama made a commitment to create "an unprecedented level of openness in Government," and "a system of transparency, public participation, and collaboration."<sup>84</sup> Similarly, the Office of Management and Budget directed executive agencies to, among other things, publish information online, improve the quality of government information, and foster a culture of open government.<sup>85</sup> DOI's planning and leasing regulations fail to implement these directives or move toward their underlying goals in any meaningful way; they do little to ensure the availability of public data, studies, or other information relevant to decisions about oil and gas planning and leasing on the OCS.

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82. 43 U.S.C. § 1334 (2012).

83. Though not expressly invoking this authority, BSEE limited the depth to which Shell was permitted to drill in 2012 in light of the company's failure to comply with the terms of the conditional approval granted for its exploration proposal. *BSEE Authorizes Shell Preparatory Activities in Beaufort Sea: Limited Activities to be Conducted in Non-Oil-Bearing Zones*, BSEE (Sept. 20, 2012), <http://www.bsee.gov/BSEE-Newsroom/Press-Releases/2012/BSEE-Authorizes-Shell-Preparatory-Activities-in-Beaufort-Sea/>. The company had not received requisite certification for part of its response plan. *Id.*

84. Transparency and Open Government, 74 Fed. Reg. 4685 (Jan. 29, 2009).

85. *Memorandum for the Heads of Executive Departments and Agencies*, THE WHITE HOUSE OFFICE OF THE PRESS SECRETARY (Jan. 9, 2009), [http://www.whitehouse.gov/the\\_press\\_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-3-9-09](http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-3-9-09).

Existing regulations also predate President Obama's 2010 Executive Order establishing a "National Policy for the Stewardship of the Ocean, Our Coasts, and the Great Lakes."<sup>86</sup> The President declared that it is United States policy to "protect, maintain, and restore the health and biological diversity of ocean, coastal, and Great Lakes ecosystems and resources," to improve resiliency of ocean ecosystems, and to "use the best available science and knowledge to inform" decisions about the ocean.<sup>87</sup> The Executive Order requires executive branch agencies to take the necessary actions to implement the National Ocean Policy and its associated stewardship principles "to the fullest extent consistent with applicable law."<sup>88</sup> Existing regulations, however, provide no standards to ensure that DOI's planning and leasing activities comply.

With respect to the Arctic in particular, existing planning and leasing regulations offer no standards to help regulators seeking to comply with the National Strategy for the Arctic Region,<sup>89</sup> which calls for the pursuit of responsible stewardship, protection of the Arctic environment, and conservation of the region's resources.<sup>90</sup> Similarly, the Administration's new "Integrated Arctic Management" approach is intended to incorporate environmental, economic, and cultural needs into more holistic management for the Arctic region.<sup>91</sup> Existing regulations, however, do not offer guidance to help agency officials, industry, and the public understand how DOI's planning and leasing processes will accommodate the new approach.<sup>92</sup>

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86. Exec. Order No. 13,547, 75 Fed. Reg. 43,023 (July 19, 2010).

87. *Id.* at § 2(a).

88. *Id.* at § 6.

89. See generally WHITE HOUSE, NATIONAL STRATEGY FOR THE ARCTIC REGION (2013) available at [http://www.whitehouse.gov/sites/default/files/docs/nat\\_arctic\\_strategy.pdf](http://www.whitehouse.gov/sites/default/files/docs/nat_arctic_strategy.pdf).

90. *Id.* at 2.

91. *Id.* at 8.

92. See *id.* (calling for the establishment and institutionalization of a framework for integrated Arctic management); see also INTERAGENCY WORKING GROUP ON COORDINATION OF DOMESTIC ENERGY DEVELOPMENT AND PERMITTING IN ALASKA, MANAGING FOR THE FUTURE IN A RAPIDLY CHANGING ARCTIC: A REPORT TO THE PRESIDENT 46 (2013) (defining "Integrated Arctic Management" as "a science-based, whole-of-government approach to stewardship and planning in the U.S. Arctic that integrates and balances environmental, economic, and cultural needs and objectives. It is an adaptive, stakeholder-informed means for looking holistically at impacts and sensitivities across the U.S. Arctic and generating sustainable solutions.").

### III. CONGRESS HAS NOT ACTED TO REVISE OCSLA, AND NON-LEGISLATIVE REFORMS HAVE YET TO ADDRESS DEFICIENCIES IN THE ADMINISTRATION OF OCS PLANNING AND LEASING

As established in the preceding Parts, the rules governing OCS planning and leasing are more than three decades old, do not provide meaningful substantive guidance, have not kept pace with changes in the industry, and do not account for new administrative policies and priorities. Many of these failings have received additional emphasis in the wake of the *Deepwater Horizon* disaster and Shell's 2012 failures. Congress, however, has taken no meaningful action to address the problems, and regulatory change at DOI, while significant, has not addressed planning or leasing.

#### A. Lack of Congressional Action

In the past, Congress has taken meaningful action to address the deficiencies in the statutory regime made apparent by major oil spills. After the *Exxon Valdez* disaster, Congress passed the Oil Pollution Act of 1990 (OPA), which, among other things, mandated double-hulled tankers and facility-specific spill response plans for offshore drilling rigs.<sup>93</sup> Earlier, the 1969 Santa Barbara blowout was one of the key factors that led Congress to pass the National Environmental Policy Act (NEPA) and drove Congress and the California state legislature to pass other substantive legislation.<sup>94</sup>

The *Deepwater Horizon* disaster led to calls for Congress to reform OCSLA and other statutes affecting offshore oil and gas activities and spill response. The National Commission, for example, recommended that "Congress should review and consider amending where necessary the governing statutes for all agencies involved in offshore activities to be consistent with the responsibilities functionally assigned to those agencies."<sup>95</sup> More specific recommendations were made to remove or raise OPA's \$75 million limit on a responsible party's liability for damages, improve the manner in which funds may be disbursed from the Oil Spill Liability Trust Fund, extend the 30-day deadline for

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93. Oil Pollution Act of 1990, Pub. L. 101-380, 104 Stat. 484 (codified as amended at 33 U.S.C. §§ 2701-2719 (2012)).

94. See, e.g., *45 Years after the Santa Barbara Oil Spill, Looking at a Historic Disaster Through Technology*, NOAA OFFICE OF RESPONSE AND RESTORATION, (Jan. 28, 2014), <http://response.restoration.noaa.gov/about/media/45-years-after-santa-barbara-oil-spill-looking-historic-disaster-through-technology.html>.

95. NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, REPORT TO THE PRESIDENT, *supra* note 43, at 256.

reviewing exploration plans, codify the division of DOI's planning, revenue, and enforcement functions, and better fund needed science.<sup>96</sup> Some of the recommended changes—extending the deadline for review of exploration plans, for example—would specifically amend provisions of OCSLA or another statute to improve the decision-making or liability scheme. Others—codifying the division of revenue, planning, and enforcement, for example—would create new requirements to help insulate decisions from political pressure and likely improve the scientific basis for decisions.<sup>97</sup>

Despite these calls for reform, Congress took no action to amend OCSLA or otherwise alter the standards, requirements, or decision-making framework applicable to offshore oil and gas activities. Congress considered a series of proposals that would have implemented substantive changes, but it passed only one law, the RESTORE Act, which addresses restoration in the wake of the *Deepwater Horizon* spill and the allocation of administrative and civil penalties.<sup>98</sup> More recently, congressional action has focused on efforts designed to increase offshore leasing and production, although no legislation has been enacted.<sup>99</sup>

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96. See *id.* at 262, 264, 283–86; see also Graham & Reilly Testimony, *supra* note 49, at 4–5 (identifying need to codify division of DOI functions, raise the liability limit, and raise the per incident payout amount from the Oil Spill Liability Trust Fund); Unger, *supra* note 60 (proposing a four-step reform process to the OPA and related laws).

97. See, e.g., Graham and Reilly Testimony *supra* note 49, at 9 (stating that “[o]ther Commission recommendations will require congressional action, especially those recommendations that seek to promote the independence of the Offshore Safety Authority from politics”); Hartsig, *supra* note 16, at 311–14 (articulating the National Commission’s recommendations for an interagency approach to facilitate expert scientific review system-wide).

98. The RESTORE Act establishes a Gulf Coast Ecosystem Restoration Council, allocates 80% of “all administrative and civil penalties related to the Deepwater Horizon spill to a Gulf Coast Restoration Trust Fund, and outlines a structure by which the funds can be utilized to restore and protect the natural resources, ecosystems, fisheries, marine and wildlife habitats, beaches, coastal wetlands, and economy of the Gulf Coast region.” RESTORE Act, GULF COAST ECOSYSTEM RESTORATION COUNCIL, <http://www.restorethegulf.gov/council/about-gulf-coast-ecosystem-restoration-council> (last visited Oct. 10, 2014).

99. See Offshore Energy and Jobs Act, H.R. 2231, 113th Cong. (2013) (this bill, which passed the House of Representatives, would, among other actions, expand offshore leasing, remove important environmental safeguards, and prioritize oil and gas activities above other uses of ocean resources); see, e.g., Michael LeVine, *Written Testimony for Legislative Hearing on HR 2231, the “Offshore Energy and Jobs Act,”* H.R. Comm. on Natural Resources, Subcommittee on Energy and Mineral Resources (June 11, 2013).

## B. Some Progress Has Been Made to Improve Safety, Prevention, and Response

Though Congress has not taken meaningful action other than passing the RESTORE Act, DOI and industry have made some strides to improve safety, prevention, and independent decision-making. While important, none of these changes affect the manner in which the agency evaluates planning or leasing decisions.

DOI began its reform effort by dividing the agency that had been charged with overseeing oil and gas activities on the OCS—the Minerals Management Service (MMS)—into the Bureau of Ocean Energy Management, Regulation, and Enforcement (BOEMRE) and the Office of Natural Resources Revenue (ONRR).<sup>100</sup> The former was tasked with handling regulatory functions, while the latter took on the accounting functions of the former MMS.<sup>101</sup> Later, BOEMRE was further divided into the Bureau of Ocean Energy Management (BOEM), which handles planning and approvals, and the Bureau of Safety and Environmental Enforcement (BSEE), which is charged with enforcement and oversight.<sup>102</sup> This division is at least partially responsive to the need identified by the National Commission and others to separate revenue collection, safety, and planning.<sup>103</sup>

Building on this division, ONRR promulgated a series of new regulations designed to improve its revenue collection functions.<sup>104</sup> Additionally, DOI has:

initiated additional inspections of all deepwater oil and gas drilling operations in the Gulf of Mexico and issued a safety notice to all rig operators; drafted and implemented the 30-Day Safety Report, including the issuance of Notices to Lessees on

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100. See, e.g., HOGUE, *supra* note 5, at 3, 10–11.

101. *Id.*

102. *Id.* at 3–4. Ken Salazar, Secretarial Order 3299: “Establishment of the Bureau of Ocean Energy Management, the Bureau of Safety and Environmental Enforcement, and the Office of Natural Resources Revenue,” DEPARTMENT OF INTERIOR (May 19, 2010), <http://www.doi.gov/deepwaterhorizon/loader.cfm?csModule=security/getfile&PageID=32475>.

103. See *supra* Part II.B; see also Press Release, U.S. Department of the Interior, Salazar Divides MMS’s Three Conflicting Missions: Establishes Independent Agency to Police Offshore Energy Operations (May 19, 2010), available at <http://www.doi.gov/news/pressreleases/salazar-divides-mmss-three-conflicting-missions.cfm> (quoting Secretary of the Interior Salazar as stating that the purpose of the reorganization was to divide the “three distinct and conflicting missions” of the Minerals Management Service—“effective enforcement, energy development, and revenue collection”).

104. *Rules and Regulations*, OFFICE OF NATURAL RESOURCES REVENUE, [http://www.onrr.gov/Laws\\_R\\_D/default.htm](http://www.onrr.gov/Laws_R_D/default.htm) (last visited Oct. 10, 2014).

new safety and environmental requirements, and the initiation of new rulemakings for safety and environmental protection; established a moratorium on operations utilizing certain equipment associated with deepwater drilling; and implemented new requirements that operators must submit information regarding blowout scenarios with their Exploration Plans.<sup>105</sup>

Beyond these changes, BSEE finalized an Offshore Drilling Safety rule in August 2012.<sup>106</sup> “The final rule included some additional requirements about barriers that must be in place within the wells and extended some of the requirements pertaining to blowout preventers . . . .”<sup>107</sup> BSEE has also issued a draft Safety Culture Policy Statement and proposed revisions to its Safety and Environmental Management Systems (SEMS) Rule.<sup>108</sup>

DOI has committed to implementing Arctic-specific safety and spill prevention regulations.<sup>109</sup> It has done so at least in part in response to the deficiencies made evident by Shell’s problematic 2012 efforts to drill exploration wells.<sup>110</sup> These regulations are likely to codify prevention and response measures employed in the 2012 season but not address government planning or leasing obligations. In addition, DOI has stated its intent to use a “targeted approach” to leasing in the Arctic, which recognizes that some areas of the Arctic may not be suitable for leasing, or may require specific mitigation measures.<sup>111</sup> However, DOI has yet to

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105. COUNCIL ON ENVIRONMENTAL QUALITY, *supra* note 63, at 2 n.3.

106. Press Release, BSEE, BSEE Releases Offshore Drilling Safety Rule, (Aug. 15, 2012), *available at* <http://www.bsee.gov/BSEE-Newsroom/Press-Releases/2012/BSEE-Releases-Offshore-Drilling-Safety-Rule/>.

107. OIL SPILL COMMISSION ACTION, ASSESSING PROGRESS THREE YEARS LATER 7 (2013), *available at* [http://oscaction.org/wp-content/uploads/FINAL\\_OSCA-No2-booklet-Apr-2013\\_web.pdf](http://oscaction.org/wp-content/uploads/FINAL_OSCA-No2-booklet-Apr-2013_web.pdf).

108. *Id.*

109. See Tim Bradner, *Interior Dept. May Have Draft Rules for Arctic by Year-end*, ALASKA J. OF COMMERCE (Sept. 22, 2014), <http://www.alaskajournal.com/Alaska-Journal-of-Commerce/June-Issue-3-2013/Interior-Dept-may-have-draft-rules-for-Arctic-by-year-end>.

110. See U.S. DEPARTMENT OF THE INTERIOR, REPORT TO THE SECRETARY OF THE INTERIOR, REVIEW OF SHELL’S 2012 ALASKA OFFSHORE OIL AND GAS EXPLORATION PROGRAM 6 (2013), *available at* <http://www.doi.gov/news/pressreleases/upload/Shell-report-3-8-13-Final.pdf> (“Government and industry should continue to evaluate the potential development of additional Arctic-specific standards in the areas of drilling and maritime safety and emergency response equipment and systems.”).

111. U.S. DEPT. OF THE INTERIOR, BUREAU OF OCEAN ENERGY MGMT, PROPOSED FINAL OUTER CONTINENTAL SHELF OIL & GAS LEASING PROGRAM 2012-2017 206 (2012), *available at* [http://www.boem.gov/uploadedFiles/BOEM/Oil\\_and\\_Gas\\_Energy\\_Program/Leasing/Five\\_Year\\_Program/2012-](http://www.boem.gov/uploadedFiles/BOEM/Oil_and_Gas_Energy_Program/Leasing/Five_Year_Program/2012-)

implement this change in a planning process or lease sale, and there has been no proposal to formalize it in regulation.

Industry, too, has made progress.<sup>112</sup> According to the former commissioners from the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, companies and spill response organizations have “significantly expanded the quality and quantity of the equipment to respond to a spill.”<sup>113</sup>

### **C. Despite Some Progress on Other Fronts, the Regulations Governing Planning and Leasing Have Not Improved**

The reforms and policy changes enumerated above, though potentially valuable in increasing safety, accident prevention, and spill response, apply only after DOI has decided to allow oil and gas activities to proceed in particular areas. None of the codified improvements have addressed the identified deficiencies in the administration of planning and leasing on the OCS. For example, the former members of the National Commission “remain concerned that [BOEM] has as yet to propose any regulations strengthening practices and procedures for preparing [environmental impact] statements and improving the quality of the reviews during the planning, leasing, exploration, and development stages.”<sup>114</sup>

The planning and leasing stages are especially critical because they are when DOI determines whether particular areas of the ocean will be made available for leasing and potential exploration drilling and development. To the extent that DOI and other agencies wish to implement broad management decisions affecting the OCS—such as a decision not to allow drilling activities in an important marine area—they can most easily do so at the planning and leasing stages. As noted above, once an energy company leases an area of the OCS, it becomes significantly more difficult for the government to reverse course. For all of these reasons, DOI should take action to reform the regulations governing its preparation of five-year leasing programs and sale of OCS leases.

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2017\_Five\_Year\_Program/PFP%2012-17.pdf; *see id.* at 7 (noting that “certain subsets of Arctic areas will be excluded because environmental and subsistence conditions strongly weigh in favor of keeping them off the table for exploration and development”).

112. *See generally* OIL SPILL COMMISSION ACTION, *supra* note 107.

113. *Id.* at 3. The former commissioners also express hope, though tempered, for the industry-sponsored Center for Offshore Safety. *Id.* at 7.

114. *Id.* at 8.

#### IV. DOI CAN TAKE ACTION THAT WOULD MEANINGFULLY ADDRESS SHORTCOMINGS IN EXISTING PLANNING AND LEASING REGULATIONS

As the preceding Part makes clear, both DOI and industry have improved some of the structures, regulations, and policies that govern offshore oil and gas activities. The reforms undertaken to date have been necessary and important, but they have not been comprehensive, and significant shortcomings remain. To address these shortcomings, DOI could carry out a broader reform process—one designed to advance the foundational changes that started when Secretary Salazar disbanded the Minerals Management Service and created BOEM, BSEE, and ONRR. While many aspects of DOI's OCS regulations should be revisited,<sup>115</sup> substantive changes to the regulations that govern the planning and leasing stages are particularly critical.

As explained in the Parts below, OCSLA gives DOI discretion to promulgate revised planning and leasing regulations. Revised regulations could provide more clarity and guidance, which, in turn, would help to ensure more effective balancing of energy development and environmental protection. This type of regulatory reform could remedy many of the deficiencies identified in the foregoing Parts.

##### A. DOI Has the Authority to Pursue Regulatory Reform

OCSLA not only calls for the “expeditious and orderly development” of offshore oil and gas resources, it also requires that development to be “subject to environmental safeguards.”<sup>116</sup> As described above, Congress enacted the 1978 Amendments to OCSLA in part to help ensure that efforts to develop oil and gas resources were balanced with environmental protections.<sup>117</sup> OCSLA's provisions allow DOI significant flexibility to determine how to achieve this balance, but current regulations provide relatively little guidance. Given the flexibility inherent in OCSLA, DOI is free to promulgate revised regulations that provide more direction to regulators, the industry, and the general public. In fact, with regard to leasing, OCSLA explicitly provides that the Secretary of the Interior “may at any time prescribe and amend . . . rules and regulations as he determines to be necessary

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115. For example, DOI has not yet reformed regulations that govern its review of exploration plans for OCS oil and gas activities. NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, REPORT TO THE PRESIDENT, *supra* note 43, at 80.

116. 43 U.S.C. § 1332(3) (2012).

117. *See supra* Part I.A.



and proper in order to provide for the prevention of waste and conservation of the natural resources of the outer Continental Shelf, and the protection of correlative rights therein . . . .”<sup>118</sup>

OCSLA’s mandate to develop a five-year OCS leasing program offers a good example of the discretion afforded to DOI. Section 18 of OCSLA requires the Secretary of the Interior to prepare a five-year OCS leasing program that achieves “a proper balance between the potential for environmental damage, the potential for the discovery of oil and gas, and the potential for adverse impact on the coastal zone.”<sup>119</sup> The statute requires the Secretary to consider certain factors when making this determination,<sup>120</sup> but it is for the Secretary to decide what actually constitutes a “proper balance” and determine how to measure the various factors considered.<sup>121</sup> Ultimately, OCSLA “gives the Secretary of the Interior tremendous discretion.”<sup>122</sup>

Existing regulations provide no guidance to help the Secretary strike the balance mandated by OCSLA. Regulations implementing this section of OCSLA simply do not address this aspect of the statute. As a result of this regulatory deficiency, “[t]he Secretary can assign significant weight to environmental protection concerns – or not.”<sup>123</sup>

DOI has the ability to clarify the five-year program balancing requirements imposed by OCSLA through promulgation of revised agency regulations, so long as the new regulations are consistent with the underlying statute.<sup>124</sup> Given the broad statutory mandates described above, DOI has significant latitude to develop more detailed regulations that include standards defining the various factors and explaining how the Secretary will consider and weigh them. Such regulations would create an understandable and repeatable process to help ensure that future five-year programs achieve the “proper balance” mandated by OCSLA’s five-year planning provisions.

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118. § 1334(a).

119. *Id.* § 1344(a)(3).

120. *Id.* § 1344(a)(2).

121. For example, OCSLA Section 18(a)(2)(G) requires consideration of “the relative environmental sensitivity and marine productivity of different areas of the outer Continental Shelf.”

122. NAT’L COMM’N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, REPORT TO THE PRESIDENT, *supra* note 43, at 80.

123. *Id.*

124. *Cf.* *Chevron v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984) (holding that if Congress has not directly addressed a particular question, courts must defer to the agency’s permissible construction of the statute).

## B. Improvements to OCS Planning and Leasing Regulations Could Remedy the Shortcomings Identified in the Foregoing Sections

Carried out effectively, reform of DOI's OCS planning and leasing regulations could result in guidance that leads to better processes and outcomes. Revised regulations could help ensure that DOI applies the National Environmental Policy Act (NEPA) consistently and receives the full benefit of the process; is armed with knowledge sufficient to make informed decisions; conforms to new policies that promote ocean stewardship; and fulfills the Administration's commitment to transparency and open government. This type of regulatory reform could also benefit energy companies seeking to operate on the OCS by fostering more regulatory consistency and certainty.

Revised regulations could clarify and strengthen DOI's application of NEPA requirements to the OCSLA planning and leasing process. For example, revised regulations could codify processes for NEPA consultation and coordination among DOI agencies—such as BOEM, BSEE, and the Fish and Wildlife Service—and with other federal agencies including the National Oceanic and Atmospheric Administration, the U.S. Coast Guard, and others. Similarly, regulations could specify a protocol that facilitates effective consultation with affected tribes and Native corporations. Clarifying the relationship between OCSLA and NEPA at the planning and lease-sale stages could also reduce confusion related to “tiering” between different levels of environmental analysis,<sup>125</sup> which could help eliminate analytical gaps and ensure that environmental analyses more accurately capture the cumulative effects of existing and anticipated development. By spelling out exactly how the agency will comply with NEPA's requirements at each stage of the OCSLA process, DOI can reduce confusion, promote consistency, and facilitate more meaningful involvement.

Adoption of revised OCS planning and leasing regulations could also help ensure that DOI has access to the information necessary to make wise decisions about whether, where, and how to make areas of the OCS available for oil and gas development. For example, revised regulations could require a certain level or quality of scientific information about an area of the OCS before that area is included in a five-year program or lease sale. Similarly, revised regulations could require DOI to take certain steps to solicit and consider traditional knowledge about marine areas under consideration for leasing. These

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125. Cf. COUNCIL ON ENVIRONMENTAL QUALITY, *supra* note 63 at 22–26; NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, REPORT TO THE PRESIDENT, *supra* note 43, at 260.

steps would help ensure that government agencies have access to, and take into account, information from local residents, including Alaska Natives. Revised regulations could also ensure that regulators understand the potential limitations of oil spill response in a given area, which could help DOI effectively describe and weigh the potential risks of activities in areas where there are significant hurdles to effective spill response.

Regulatory reform can also provide direction to facilitate compliance with the stewardship responsibilities established in the National Ocean Policy.<sup>126</sup> Regulations could establish standards that help DOI ensure that its planning and leasing activities “protect, maintain, and restore the health and biological diversity” of ocean and coastal areas and improve resiliency of ocean ecosystems “to the fullest extent consistent with applicable law.”<sup>127</sup> With respect to the Arctic in particular, revised regulations could help define how DOI comports with the National Strategy for the Arctic Region, including its calls to “pursue responsible Arctic region stewardship,” and “protect the Arctic environment and conserve its resources.”<sup>128</sup> For example, regulations could require DOI to use available information to identify marine areas that are most critical to ecosystem functioning, including regions identified as subsistence use areas. Revised regulations could also codify DOI’s “targeted approach” to leasing in the Arctic, which recognizes that some areas of the Arctic may not be suitable for leasing or may require specific mitigation measures.<sup>129</sup>

OCS planning and leasing regulations could also be revised to promote more transparent and inclusive processes, consistent with President Obama’s open government directive.<sup>130</sup> DOI could change existing regulations to ensure that data, studies, and other information relevant to OCS planning and leasing processes are made available to the public and posted online for easy access. Ensuring the availability of information about the OCS may also help foster increased or more meaningful public participation in OCS planning and leasing processes.

In addition, regulatory reform could have the salutary benefit of providing certainty to companies. As one example, albeit from the exploration phase, both ConocoPhillips and Statoil identified uncertain

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126. Exec. Order No. 13,547, *supra* note 86.

127. *Id.* at §§ 2(a), 6.

128. WHITE HOUSE, *supra* note 89.

129. See U.S. DEPT. OF THE INTERIOR, *supra* note 110, at 7 (noting that “certain subsets of Arctic areas will be excluded because environmental and subsistence conditions strongly weigh in favor of keeping them off the table for exploration and development.”).

130. See *supra*, Part II.C.

standards as reasons for delaying exploration in the Arctic Ocean. In fact, ConocoPhillips announced in a press statement that it was delaying planned exploration activities “given the uncertainties of evolving federal regulatory requirements and operational permitting standards.”<sup>131</sup> Using regulatory reform to clarify the planning and leasing processes—and the exploration plan approval process—would provide at least a measure of the certainty that these companies seek.

### CONCLUSION AND PATH FORWARD

The 1978 amendments to OCSLA were intended to ensure an appropriate balance between the pursuit of hydrocarbon resources in federal waters and the protection of the marine environment. All too often, however, DOI has fallen short of this objective. Over the years, there have been numerous calls for reform, especially in the wake of the 2010 *Deepwater Horizon* tragedy and Shell’s error-ridden effort to drill exploration wells in the Chukchi and Beaufort seas in 2012.<sup>132</sup>

DOI has taken some important steps toward better governance of OCS oil and gas activities. The most visible and public of these changes has been the transition from the Minerals Management Service (MMS) to the three new agencies that have taken its place: ONRR, BSEE, and BOEM. This change was intended to be more than a re-branding of a troubled agency; it was meant to be a step toward fundamental change in agency culture.<sup>133</sup> While there has been some progress in that direction, the cultural shift largely has yet to be codified in new or revised agency regulations.

The exceptions to this rule have been largely directed at safety and performance standards, such as promulgation of the 2013 Offshore Drilling Safety Rule,<sup>134</sup> issuance of the draft Safety Culture Policy Statement and proposed revisions to the Safety and Environmental Management Systems Rule,<sup>135</sup> and the announcement of future Arctic-specific safety and prevention regulations.<sup>136</sup> With regard to planning and leasing, however, BOEM and BSEE still rely on outdated regulations

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131. News Release, Regulatory Uncertainty Leads ConocoPhillips to Put 2014 Chukchi Sea Exploration Drilling Plans on Hold, ConocoPhillips Alaska (April 10, 2013), available at <http://alaska.conocophillips.com/Documents/NR-AK-Chukchi%20Sea-FINAL%204-9-2013.pdf>.

132. HOGUE, *supra* note 5, at 9.

133. See generally *id.*

134. Press Release, BSEE, *supra* note 106.

135. Revisions to Safety and Environmental Management Systems, 76 Fed. Reg. 56,683 (Sep. 14, 2011) (to be codified as 30 C.F.R. pt 250).

136. Bradner, *supra* 109.

that have not kept pace with changes the industry and do not reflect new priorities and policies. Similar problems exist with respect to the regulations that address the approval of exploration and oil spill response plans, and it is clear that comprehensive reform is needed.

DOI is already contemplating Arctic-specific regulations aimed at improving drilling safety and spill response in that region. The agency should complete this process. Once the new Arctic-specific rules are complete, DOI could announce an Advance Notice of Proposed Rulemaking and begin a suite of regulatory reforms that cover other aspects of the OCSLA process, including the five-year planning, lease sale, and exploration plan approval stages. This sort of comprehensive overhaul would not be simple, and DOI might consider a step-wise process that aims to reform one portion of the regulations at a time. This process would take time—each portion of the regulations could easily take a year or more to complete<sup>137</sup>—but that is all the more reason to start now.

Announcing this type of comprehensive regulatory reform would send a strong signal that DOI intends to keep moving forward with the transition from the old MMS and toward a new way of doing business on the OCS.

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137. See, e.g., WILMA A. LEWIS, MARY L. KENDALL & RHEA S. SUH, U.S. DEP'T OF THE INTERIOR OUTER CONTINENTAL SHELF SAFETY OVERSIGHT BOARD REPORT TO SECRETARY OF THE INTERIOR KEN SALAZAR 26 (2010), available at <http://www.doi.gov/news/pressreleases/upload/OCS-Safety-Oversight-Board-Report.pdf> (recognizing that “[r]egulations typically take years to promulgate”).

## APPENDIX

**TABLE A. 30 C.F.R. pt. 556 Amendment History Summary**

Date	Federal Register	Summary
1979-06-29	44 FR 38,268	Implements OCSLA 1978 changes; redesignates 43 CFR Subpart 2883 (rights-of-way management) into Part 3300
1982-10-22	47 FR 47,006	Redesignates 43 CFR Part 3300 (admin. by BLM) to 30 CFR Part 256 (MMS)
1983-09-23	48 FR 43,323	Adds a new Information Collection section to 30 CFR Part 256
1988-01-28	53 FR 10,596	Restructures and consolidates existing rules; formalizes OCS Orders developed to govern operations conducted in each of MMS's four OCS Regions and portions of selected Notices to Lessees and Operators issued by regional offices
1989-12-08	54 FR 50,615	Technical corrections
1993-08-27	58 FR 45,255	Amends surety bond provisions
1994-10-21	59 FR 53,091	Specifically states the authority of MMS to require lessees or operators to conduct archaeological resource surveys and submit reports prior to exploration, development and production, or installation of lease term or right-of-way pipelines; standardizes the definition and use of the term "archaeological resources"
1996-07-03	61 FR 34,730	Allows agency extension of bid acceptance period
1996-10-30	61 FR 55,887	Amends lease terms based on depth
1997-05-22	62 FR 27,948	Amends surety bond provisions; makes other changes that reduce the risk of default by an underfunded operator

<b>Date</b>	<b>Federal Register</b>	<b>Summary</b>
1997-07-10	62 FR 36,995	Correction to 62 FR 27948
1999-02-24	64 FR 9065	Technical corrections
1999-03-18	64 FR 13,343	Correction to 64 FR 9065
1999-12-28	64 FR 72,756	Updates and clarifies requirements related to post-lease operations; allows the grant of rights-of-use and easements for an OCS blocks to state lessees; brings uniformity to the public release time for all proprietary geophysical data and information gathered under prelease; clarifies the distinction between granting and directing a suspension; requires evacuation statistics for natural occurrences; sets out criteria to disqualify an operator with repeated poor operating performance; allows operators the opportunity to propose alternative regulatory approaches
2000-01-19	65 FR 2874	Technical corrections
2001-02-23	66 FR 11,512	Establishes a new leasing incentive framework; adds minor reporting requirement for all leases issued with royalty suspension and specifies the allocation of royalty relief on a field having lease issued before and after 2000
2001-06-19	66 FR 32,902	Eliminates separate offshore definition of "affected state"
2001-12-03	66 FR 60,147	Modifies surety provisions; codifies terms and conditions under which a surety will be relieved of responsibility when MMS terminates the period of liability of a bond
2002-05-17	67 FR 35,398	Updates decommissioning requirements
2005-08-25	70 FR 49,871	Implements new fees to offset internal costs
2005-09-26	70 FR 56,119	Hurricane Katrina related extensions

<b>Date</b>	<b>Federal Register</b>	<b>Summary</b>
2005-10-27	70 FR 61,891	Hurricane Katrina related extensions
2008-08-25	73 FR 49,943	Electronic payments
2008-09-12	73 FR 52,917	Creates bonus royalty credits for relinquishing certain leases
2009-09-14	74 FR 46,904	Technical corrections
2011-10-18	76 FR 64,432	Redesignates 30 CFR Part 256 (MMS) to 30 CFR Part 556 (BOEM)