St. John's Law Review

Volume 96, 2022, Number 2 Article 9

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OFFSHORE WIND ENERGY OR DOMESTIC SEAFOOD? HOW THE DEPARTMENT OF THE INTERIOR CAN FACILITATE BOTH THROUGH SELF-BINDING PROCEDURES

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INTRODUCTION

The United States has many identities, including that of a coastal nation. With the largest Exclusive Economic Zone ("EEZ") in the world, the United States has jurisdiction over more human activity in the ocean than any other country.[1] Like people in most coastal nations, Americans are drawn to the ocean.[2] Almost forty percent of the population lives in coastal counties that constitute less than ten percent of the nation's land mass,[3] and 58.3 million jobs and more than $9.5 trillion of gross domestic product are attributable to ocean resources annually.[4] These figures have increased over time.[5]

The diverse industries supporting these ocean-centered jobs and income include transportation, shipping, tourism, recreation, energy, minerals, national defense, research and education, and

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[1] ROBERT W. SMITH, EXCLUSIVE ECONOMIC ZONE CLAIMS 32 (1986). Under customary international law, the United States has jurisdiction over underwater lands from its shorelines to 200 nautical miles offshore, known as the EEZ. *See* United Nations Convention on the Law of the Sea, art. 57, Dec. 10, 1982, 1833 U.N.T.S. 396.

[2] *Economics and Demographics*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. OFF. FOR COASTAL MGMT., https://coast.noaa.gov/states/fast-facts/economics-and-demographics.html [https://perma.cc/MSN3-HS79].

[3] *Id.* This figure excludes Alaska. *Id.* (citing *American Community Survey Five-Year Estimates*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. OFF. FOR COASTAL MGMT., https://coast.noaa.gov/digitalcoast/data/acs.html [https://perma.cc/KZ33-G4W4] (last visited Oct. 26, 2022)).

[4] *Id.*

[5] *See id.*

fishing,[6] all of which require access to the ocean's seemingly endless, but finite, resources.[7] The government is tasked with the job of ensuring that these industries coexist, which grows more difficult as demand for ocean resources increases.[8] Today, the future of the commercial fishing industry is particularly uncertain, due in part to both increased competition with other ocean users and climate change.[9] This makes the development of offshore wind farms—a countermeasure to the long-term threat of climate change but an aggravator of short-term demands for ocean space—a true Catch-22 for fishermen.[10]

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[6] WILLIAM NICOLLS ET AL., BUREAU ECON. ANALYSIS, DEFINING & MEASURING THE U.S. OCEAN ECONOMY 6 (2020).

[7] P. Hoagland et al., *Marine Policy Overview*, in 6 ENCYCLOPEDIA OCEAN SCIS. 538, 539 (J. Kirk Cochran et al. eds., 3d. ed. 2019) ("In ancient times, the supply of ocean space and fish were thought to be virtually without limit. Modern humans have demonstrated that some uses of the ocean can preclude other uses, underscoring the existence of limits to the supply of space and resources, and giving rise to the potential for conflicts across uses.").

[8] *Commercial Fisheries*, N.J. SEA GRANT CONSORTIUM, https://njseagrant.org/extension/commercial-fisheries/ [https://perma.cc/PWK5-2HND]; Betty Queffelec et al., *Marine Spatial Planning and the Risk of Ocean Grabbing in the Tropical Atlantic*, 78 ICES J. MARINE SCI. 1196, 1197 (2021) ("Marine space and resources are limited, thus, conflicts of use are soaring, as well as the risks of ocean grabbing, i.e. traditional users, such as small-scale fishers, are being pushed aside by new development activities." (citation omitted)); Hoagland et al., *supra* note 7, at 544 ("Competition around the world for materials and food will increase, as will negative impacts from factors that are already affecting our oceans today, such as over-fishing, climate change, and pollution.").

[9] K.M. Brander, *Global Fish Production and Climate Change*, 104 PNAS 19709, 19710 (2007).

[10] Jeremy Firestone, et al., *Regulating Offshore Wind Power and Aquaculture: Messages from Land and Sea*, 14 CORNELL J.L. & PUB. POL'Y 71, 76 (2004) ("[A]lthough offshore wind power facilities would decrease U.S. dependence on fossil fuels and thus, may help alleviate . . . coastal impacts brought about by climate change, in the near term, offshore wind power development may impair the local environment, fishing and other current operations, and the aesthetics of the seascape."). In addition to displacing fishing efforts, offshore wind development can also have negative environmental impacts, including direct habitat loss, underwater vibration, noise, and electromagnetic impulses. *See* Victoria Sutton & Nicole Tomich, *Harnessing Wind is Not (by Nature) Environmentally Friendly*, 22 PACE ENV'T L. REV. 91, 97–98 (2005). For example, the North Atlantic right whale, a "Critically Endangered migratory species" that traverses Wind Energy Areas slated for potential development, may suffer from higher vessel traffic and in turn higher vessel strike rates, noise that can interfere with the species' communication, and other altered oceanographic conditions. E. Quintana-Rizzo et al., *Residency, Demographics, and Movement Patterns of North Atlantic Right Whales* Eubalaena Glacialis *in an Offshore Wind Energy Development Area in Southern New England, USA*, 45 ENDANGERED SPECIES RSCH. 251, 252–53 (2021). Like fisherman, North Atlantic right whales, which also suffer from climate change impacts, stand to both

For coastal governments, it may be easy and even feel necessary to overlook offshore wind energy impacts on fishing. Climate change is an imminent and no longer hypothetical threat to our way of life.[11] Having failed to meaningfully address this problem to date, we are cramming for the metaphorical exam in what has been termed the "Critical Decade" before we reach a point of no return.[12] But the commercial fishing industry's role in the nation's economy,[13] food security,[14] and heritage[15] suggests

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gain and lose in the face of offshore wind energy development. *See id.* The question remains whether offshore wind development will tip whales' fragile existence to the point of extinction before any climate change remediation benefits can be felt. Pam Murphy, *Standing Up for the North Atlantic Right Whale*, YESTERDAY'S ISLAND (Aug. 19, 2021), https://yesterdaysisland.com/standing-up-for-the-north-atlantic-right-whale/ [https://perma.cc/6NJW-45YM] ("[C]considerable uncertainty still exists regarding how the [wind energy] development of the [Massachusetts] region could have an impact on right whales just as they are becoming more reliant on the region.").

[11] *Secretary-General's Remarks at the COP26 Leaders' Event: "Action and Solidarity - The Critical Decade"*, U.N. (Nov. 1, 2021), https://www.un.org/sg/en/node/260444 [https://perma.cc/MD8A-Y77Y].

[12] The "Critical Decade" refers to 2020–2030, the deadline scientists have identified for humans to act "to guarantee that we do not go above 1.5 degrees," believed to be irreparable once reached. *Id.*; Alister Doyle, *World Faces 'Decisive Decade' to Fix Global Warming, Former UN Climate Chief Says*, CLIMATE HOME NEWS (Feb. 24, 2020, 10:36 AM), https://www.climatechangenews.com/2020/02/24/world-faces-decisive-decade-fix-global-warming-former-un-climate-chief-says/ [https://perma.cc/N2TM-A9U9].

[13] The U.S. commercial fishing and seafood industry supports upwards of 1.2 million American jobs. U.S. DEP'T OF COMMERCE, FISHERIES ECONOMICS OF THE UNITED STATES 2017 at 9 (2021).

[14] U.S. fisheries also provide upwards of 9.3 billion pounds of seafood annually, an important source of healthful and local protein. NOAA FISHERIES, STATUS OF THE STOCKS 2020: ANNUAL REPORT TO CONGRESS ON THE STATUS OF U.S. FISHERIES at 2 (2021); *see* U.S. DEP'T OF AGRIC., DIETARY GUIDELINES FOR AMERICANS 2020-2025 at 34 (2020), https://www.dietaryguidelines.gov/sites/default/files/2021-03/Dietary_Guidelines_for_Americans-2020-2025.pdf [https://perma.cc/G247-H3BG]. American-caught fish is also one of the most sustainable and low-carbon footprint forms of protein available. *See* Ray Hilborn et al., *The Environmental Cost of Animal Source Foods*, 16 FRONTIERS ECOLOGY ENV'T, 329, 329, 334 (2018); *Sustainable Seafood*, NOAA FISHERIES, https://www.fisheries.noaa.gov/topic/sustainable-seafood [https://perma.cc/8J69-9X39]. While overfishing threatened the sustainability of stocks in the past, since the adoption of the Magnuson-Stevens Conservation and Management Act in 1976, overfishing has largely been overcome in the United States, and "leads the way in science-based fisheries management" for the world. *United States Takes Leading Role in Global Fisheries Management,* NOAA FISHERIES (Nov. 20, 2019), https://www.fisheries.noaa.gov/leadership-message/united-states-takes-leading-role-global-fisheries-management [https://perma.cc/5PZ7-Q27H]; NAT'L RSCH. COUNCIL, EVALUATING THE EFFECTIVENESS OF FISH STOCK REBUILDING PLANS IN THE UNITED STATES 1–7 (2014).

that it should not be overlooked, and that while addressing climate change we should avoid damaging industries like commercial fishing in the process. Congress also mandated this avoidance in the Energy Policy Act of 2005 ("EPAct").[16]

Congress first authorized the development of offshore wind turbines in the United States in 2005, amending the Outer Continental Shelf Lands Act ("OCSLA") through the EPAct.[17] The amendment authorized the Department of the Interior ("Interior") to lease sections of federal submerged lands for the development of renewable energy, similarly to its authority to lease for traditional energy development like offshore drilling for oil and gas.[18] Given the steady and powerful supply of offshore wind paired with the swaths of shallow continental shelf prime for supporting turbine structures, this amendment seemingly opened the door for significant offshore wind energy capturing in the United States.[19]

But, due to regulatory hurdles, public backlash, and lack of economic feasibility, wind energy developers have not taken advantage of offshore leasing opportunities until very recently.[20] Therefore, fishermen had little reason to consider how Interior would weigh their interests against renewable energy developers', and Interior has had few opportunities to test and refine its processes for implementing the EPAct or for its statutory interpretation to be challenged in court.[21] However,

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[15] BARTON SEAVER, AMERICAN SEAFOOD, 1–6 (2017) ("Fishing communities provide for our families, create jobs, sustain heritage, and preserve opportunity.").

[16] 43 U.S.C. § 1337(p)(4).

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

[18] 43 U.S.C. § 1337(p)(4). Prior to 2005, the Army Corp of Engineers was considered the lead authorizing agency for offshore renewable energy development under the Rivers and Harbors Act of 1899. *See* Michael B. Gerrard, *Legal Pathways for a Massive Increase in Utility-scale Renewable Generation Capacity*, 47 ENV'T L. REP. 10591, 10598 (2017).

[19] *See* Taylor J. LeMay, *Offshore Wind: Lessons from Abroad*, 7 LSU J. ENERGY L. & RES., 159, 160–61 (2019) ("[O]ffshore wind development in the U.S. has been widely considered a missed opportunity."); U.S. DEP'T OF ENERGY, OFFSHORE WIND MARKET REPORT: 2021 EDITION viii (2021) (reporting the first ever offshore wind project in federal waters was approved in 2021 and at least fifteen additional projects are in the permitting pipeline).

[20] *See* Kelsey E. Gagnon, *Atomic Energy and Offshore Wind: The Struggle to Fight Climate Change and the Cost to be Clean*, 26 OCEAN & COASTAL L. J. 25, 55 (2021).

[21] *See* Michelle Hokanson, Note, *Avoiding the Doldrums: Evaluating the Need for Change in the Offshore Wind Permitting Process*, 44 COLUM. J. ENV'T L. 181, 223

given the present economic viability of offshore wind development and the Biden Administration's aggressive support for it,[22] fishing industry groups are now scrambling to understand the rights that the EPAct provides them in the face of potential displacement by wind farms.[23]

One provision of the EPAct that has drawn these groups' attention is 43 U.S.C. § 1337(p)(4), which requires the Secretary of the Interior ("Secretary") to "ensure that" offshore renewable energy activities under the act "provide[ ] for" twelve different goals, including "(I) prevention of interference with reasonable uses (as determined by the Secretary) of the exclusive economic zone" and "(J) consideration of . . . any other use of the sea or seabed, including use for a fishery."[24] But what does "provide for" entail? Must Interior ensure that its leasing decisions maintain the complete integrity of each enumerated variable by preventing all potential interference with reasonable uses of the ocean, or alternatively, merely ensure that other reasonable uses can continue to exist? Unfortunately, Interior has failed to implement regulatory or other durable agency guidance that answers these questions, leaving the presidential administrations of the day to decide for their respective terms.

The majority of the legal literature analyzing offshore wind development in the United States recommends improving the permitting process by reducing regulatory barriers.[25] However, they do so while neglecting to consider the impacts on the fishing industry or the science behind it. This Note takes a different course. This Note considers the impacts of conflicting ocean uses and recommends improving the permitting process by revising

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(2019) ("[T]here is not much case law interpreting OCSLA's renewable leasing provisions . . . .").

[22] U.S. DEP'T OF ENERGY, *supra* note 19, at viii ("[T]he Biden Administration announced a 30-gigawatt (GW)-by-2030 national offshore wind energy goal . . . . [This] is the first U.S. national offshore wind energy goal. To make progress toward this goal, BOEM aims to evaluate at least 16 [Construction and Operations Plans] by 2025 . . . .").

[23] Sean Horgan, *Fighting for Fishing Grounds in Face of Wind Farms*, GLOUCESTER DAILY TIMES (May 31, 2021), https://www.gloucestertimes.com/news/fishing_industry_news/fighting-for-fishing-grounds-in-face-of-wind-farms/article_1add69c8-7baf-5085-8042-6259b1145620.html [https://perma.cc/674Q-MTDF] (" 'Nowhere have they said how many people, how many fishermen, they're going to displace,' she said. 'It's like we don't exist and the fishing grounds don't exist.' ").

[24] 43 U.S.C. § 1337(p)(4) (2018).

[25] *See, e.g.*, Gerrard, *supra* note 18, at 10591.

the regulations to impose more robust self-binding leasing processes. Part I provides background on federal management of marine resources with a focus on permitting for offshore wind energy development. Part II compares and contrasts how the Interior Office of the Solicitor's official interpretation of "provide for" under § 1337(p)(4) has changed between the Trump and Biden Administrations.[26] It also argues that the Biden Opinion correctly characterizes the wide discretion the EPAct imparts upon the Secretary. Part III argues that Interior fails to adequately incorporate impacts on fishermen into its leasing decisions and that this harms fishermen, energy developers, and other managers. Part IV proposes Interior implement more specific self-binding procedures to dictate its leasing process to benefit fishermen and wind developers alike, modeled after the federal government's implementation of the Magnuson-Stevens Fishing and Conservation Act ("MSA").

I. TURBINES IN THE WATER—OCEAN MANAGEMENT IN THE UNITED STATES AND HOW LEASING FOR OFFSHORE WIND FARMS WORKS

A. What is Ocean Management?

Given that oceans belong to the "commons" and not individuals,[27] human use of the ocean requires governmental and multi-national organizational oversight.[28] Ocean or marine management, also referred to as "ocean governance," is the term used to describe this public management of offshore marine resources through policy, international agreements, and domestic

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[26] Memorandum from Solicitor, U.S. Dep't of Interior on Secretary's Duty to Prevent Interference with Reasonable Uses of the Exclusive Economic Zone, the High Seas, and the Territorial Seas in Accordance with Outer Continental Shelf Lands Act Subsection 8(p) to the Secretary 4–6 (Dec. 14, 2020) [hereinafter Trump Opinion], https://www.doi.gov/sites/doi.gov/files/m-37059.pdf [https://perma.cc/9JDU-4YMD]; Memorandum from Principal Deputy Solicitor, U.S. Dep't of Interior on Secretary's Duties under Subsection 8(p)(4) of the Outer Continental Shelf Lands Act When Authorizing Activities on the Outer Continental Shelf to Secretary 1–2 (Apr. 9, 2021) [hereinafter Biden Opinion], https://www.doi.gov/sites/doi.gov/files/m-37067.pdf [https://perma.cc/ Q8J7-6EBY].

[27] Donald C. Baur & Jena A. MacLean, *The "Degreening" of Wind Energy: Alternative Energy v. Ocean Governance*, 19 NAT. RES. & ENV'T 44, 45 (2004) ("[O]ceans are part of the 'commons,' and held in trust for all citizens.").

[28] Hoagland et al., *supra* note 7, at 540–42.

statutes and regulations.[29] While the term often refers to the international management community, since most of the oceans are areas beyond national jurisdiction,[30] this Note will use the term to refer to domestic ocean management within U.S. waters. "Offshore marine resources" refers to both the physical space of the ocean itself and the natural resources it contains, such as living species, oil and gas below the seabed, and minerals.[31] Because U.S. waters are both expansive and hold many valuable natural resources, human use of the ocean here is great and diverse, including energy extraction, fishing, tourism and recreation, navigation, shipping, military activities, and research.[32]

B. Ocean Management Challenges at a Glance

Effective ocean management is as complicated as the ocean is deep. Compared to nearshore and terrestrial ecosystems, offshore pelagic ecosystems are in "constant flux" and are thus harder to understand, define, and utilize responsibly.[33] Yet, despite this disparity in complexity, offshore resources are largely managed using the same static management techniques as those used on land.[34] Such techniques are characterized by great temporal and spatial scale such as large area closures, and often do not account for the migration of species beyond political

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[29] *See* MALIN SONG ET AL., SUSTAINABLE MARINE RESOURCE UTILIZATION IN CHINA: A COMPREHENSIVE EVALUATION 4 (2020).

[30] *International Ocean Governance*, INT'L UNION FOR CONSERVATION OF NATURE, https://www.iucn.org/theme/marine-and-polar/our-work/international-ocean-governance [https://perma.cc/5DLK-CMKH].

[31] *See* Jean-Baptiste Jouffray et al., *The Blue Acceleration: The Trajectory of Human Expansion into the Ocean*, 2 ONE EARTH 43, 44 (2020).

[32] *See generally* CTR. FOR AM. PROGRESS, BRIEFING FOR PARTICIPANTS OF BLUE FUTURE 2017, APPENDIX 1: SURVEY OF U.S. OCEAN GOVERNANCE (2017), https://cdn.americanprogress.org/content/uploads/2018/05/18120800/BlueFuture-Appendix1-8.pdf [https://perma.cc/DA7S-88A8] (explaining the variety of ocean uses).

[33] Sara M. Maxwell et al., *Dynamic Ocean Management: Defining and Conceptualizing Real-time Management of the Ocean*, 58 MARINE POL'Y 42, 42–43 (2015). Nearshore and on land, primary producers like forests and coral reefs create stationary habitats that endure over lasting time scales. *See id*. Offshore, primary producers "are primarily microscopic and short-lived," and instead of creating stationary habitat, move with "dynamic oceanographic features" like "fronts and eddies." *Id.* at 43. In turn, animals found offshore are often highly migratory, following the food source wherever the ocean carries it, "making [their] habitat more difficult to define than in terrestrial systems." *Id.*

[34] *See id.* at 42.

boundaries, real time alterations in ocean dynamics due to climate change, or the complexity of marine food webs.[35] Accordingly, scientists and managers are calling for "a shift towards *dynamic ocean management*, defined as 'management that changes rapidly in space and time in response to the shifting nature of the ocean and its users based on the integration of new biological, oceanographic, social and/or economic data in near real-time.' "[36]

Dynamic ocean management only becomes more critical and more difficult as human claims to the ocean increase, known as the "blue acceleration."[37] These human claims fall into the categories of food, material, and space.[38] "[A]s land-based sources become fully exploited or exhausted, because of continued population growth and increasing per capita consumption," there has been a "subsequent recognition of the ocean as a new

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[35] *See id.* at 43; Kristen L. Wilson et al., *Incorporating Climate Change Adaptation into Marine Protected Area Planning*, 26 GLOB. CHANGE BIOLOGY 3251, 3252 (2020); Ray Hilborn, *Are MPAs Effective?* 75 ICES J. MARINE SCI. 1160, 1160–61 (2018). Studies are still inconclusive as to the efficacy of these large area closures, such as the Marine National Monuments in the United States, established under the Antiquities Act, which largely prohibit non-subsistence fishing within their boundaries. *See* Aaron Orlowski, *Hawaii Marine Monument Expansion's Impact on Fishing Debated 5 Years Later*, SEAFOODSOURCE (Apr. 15, 2020), https://www.seafoodsource.com/news/environment-sustainability/hawaii-marine-monument-expansion-s-impact-on-fishing-debated-5-years-later [https://perma.cc/YED2-FGW2]. It is posited that for already heavily regulated industries like fishing, these closures merely displace the fishing effort elsewhere, resulting in concentration of effort and reduction of biodiversity in non-closed zones. *See* Hilborn, *supra* note 35, at 1160–61.

[36] Maxwell et al., *supra* note 33, at 43–44 (emphasis omitted) ("[D]ynamic ocean management more closely aligns management response times with the scales of variability in the environment, in marine species movements, and in resource use. While traditional marine spatial management techniques such as shipping lanes or fishery time-area closures can achieve similar objectives . . . traditional spatial closures are not responsive to rapid changes on-the-water."); Easkey Britton et al., *Accelerating Sustainable Ocean Policy: The Dynamics of Multiple Stakeholder Priorities and Actions for Oceans and Human Health*, 124 MARINE POL'Y 1, 1 (2021).

[37] Jouffray et al., *supra* note 31, at 43, 46 (describing the blue acceleration as "a new phase in humanity's relationship with the biosphere, where the ocean is not only crucial for sustaining global development trajectories but is being fundamentally changed in the process").

[38] *Id.* at 44. Jouffray's comprehensive list of ocean claims includes: (1) food: seafood, feeds and nutraceuticals; (2) material: hydrocarbons, minerals, desalinated water, ornamental resources, genetic resources, scientific information; (3) space: shipping, pipelines and cables, tourism and recreation, land reclamation, renewable energies, geoengineering, waste disposal, conservation, territorial boundaries, military activities. *Id.*

economic frontier."[39] And as human expectations for and claims to the ocean's finite resources intensify, so do conflicts.[40]

In the United States, triaging these conflicting claims is particularly challenging given the jurisdictional divisions between coastal states and the federal government,[41] and within the federal government, among numerous specialized agencies.[42] While agreement between coastal states and the federal government is required through the Coastal Zone Management Act ("CZMA"),[43] there is no such consensus mandate among federal agencies.[44] This lack of integration across federal agencies has led to disjointed decision making[45] and "the pursuit of optimizing individual claims" instead of the comprehensive decision making needed to face the blue acceleration.[46] Nowhere

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[39] *Id.* at 43.

[40] *Id.*

[41] Within U.S. waters, most coastal states have jurisdiction over underwater lands from their shorelines to three nautical miles offshore, while Florida and Texas have jurisdictions extending nine nautical miles. *See* 43 U.S.C. § 1311(a)(2); BUREAU OF OCEAN ENERGY MGMT., *Outer Continental Shelf*, https://www.boem.gov/oil-gas-energy/leasing/outer-continental-shelf [https://perma.cc/QA69-RVSQ]. The federal government has jurisdiction over underwater lands from the end of each state's jurisdiction to 200 nautical miles offshore, known as federal waters. *Id.*

[42] CTR. FOR AMERICAN PROGRESS, *supra* note 32, at 4. "There is no single specific department of oceans within the U.S. government, and, as a result, responsibility for managing ocean and coastal issues and enforcing ocean law and policy is spread widely across the executive branch." *Id*. This includes as many as two dozen bureau-level agencies within as many as a dozen departments charged by federal statutes to implement ocean science and management activities. *See id*.

[43] The Federal Consistency Provision of the CZMA empowers coastal states "in federal agency decision making, which they otherwise would not have, for activities [in federal waters] that may affect a state's coastal uses or resources" by allowing states to create Coastal Zone Management Plans for submission to the Secretary of Commerce, which, if approved, require federal agencies to ensure that their actions are consistent with its contents. NOAA, OFF. FOR COASTAL MGMT., *Federal Consistency*, https://coast.noaa.gov/czm/consistency/ [https://perma.cc/TZ22-JC68]; Coastal Zone Management Act, 16 U.S.C. § 1451 (2018); 15 C.F.R. § 930 (2000); Sarah Y. Dicharry, *Wind Energy Compensation Scheme: Oil-like Royalties or Oyster-like Rent?*, 58 LOY. L. REV. 179, 190 (2012) ("Although state participation is voluntary, the CZMA is appealing because of the power that the federal government surrenders to participating states.").

[44] While the National Environmental Policy Act ("NEPA") "facilitate[s] communication between federal agencies" throughout any given federal permitting process as they evaluate potential environmental impacts, it does not mandate joint-agency decision making. LeMay, *supra* note 19, at 164; 42 U.S.C. §§ 4331–35 (2018).

[45] Baur & MacLean, *supra* note 27, at 44 ("The absence of a unifying set of legal principles for ocean governance is particularly startling when compared to the laws that apply to land management.").

[46] Jouffray et al., *supra* note 31, at 48.

has this been more evident than in the offshore wind permitting process.

C. Offshore Wind Permitting in U.S. Federal Waters

To manage the diverse human uses of the ocean, Congressional statutes have delegated authorities to numerous agencies with the requisite subject matter expertise.[47] Often, these delegations include the authority to issue permits, leases, and licenses.[48] The primary federal agency responsible for addressing renewable energy claims to the ocean is Interior's Bureau of Ocean Energy Management ("BOEM").[49] Through OCSLA, as amended under the EPAct, BOEM is responsible for the leasing of federal submerged lands for renewable energy projects like offshore wind, overseeing permitted projects, and enforcing lease terms.[50]

Per its 2011 implementing regulations, BOEM's commercial offshore wind leasing process follows four stages: Planning and Analysis, Leasing, Site Assessment, and Construction and Operations.[51] In each stage, BOEM is directed to coordinate with the states through Intergovernmental Task Forces—its primary mechanism for engaging with stakeholders, and through which it aims to collect "relevant information that would be useful to [it] during its decision-making process."[52] Through OCSLA and NEPA, BOEM is also required to consider potential impacts to existing ocean uses and user groups.[53]

After completing outreach with Intergovernmental Task Forces, consultation with sister federal agencies with relevant expertise, environmental compliance analyses under NEPA, and consistency determinations under CZMA by any impacted state, BOEM makes a determination about whether to issue a lease.[54] Historically, there is no basis for how long this process takes

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[47] CTR. FOR AM. PROGRESS, *supra* note 32, at 4.

[48] *Id.* at 2.

[49] 43 U.S.C. § 1337 (2018); Trump Opinion, *supra* note 26, at 1.

[50] 43 U.S.C. § 1337.

[51] 30 C.F.R. §§ 585.211–585.231 (2011); BUREAU OF OCEAN ENERGY MGMT., *Wind Energy Commercial Leasing Process*, https://www.boem.gov/sites/default/files/oil-and-gas-energy-program/Leasing/Five-Year-Program/2019-2024/DPP/NP-Wind-Energy-Comm-Leasing-Process.pdf [https://perma.cc/PT34-K2PA].

[52] BUREAU OF OCEAN ENERGY MGMT, *supra* note 51.

[53] 43 U.S.C. § 1337(p)(4); *Id.* §§ 4331–35.

[54] 30 C.F.R. § 585.611.

from the siting to operations phases because no project in federal waters had ever reached this point.[55] It was only in May 2021 that the first large-scale offshore wind project was approved in federal waters, Vineyard Wind 1, which expects to install sixty-two turbines south of Martha's Vineyard and Nantucket and become operational in 2023.[56] If Vineyard Wind's construction goes according to plan, the project's siting-to-operations period will have taken thirteen years.[57] However, President Biden's aggressive renewable energy agenda suggests that this process will be expedited moving forward.[58]

D. A New Era—Offshore Renewable Energy Development Under the Biden Administration

It did not take long for the Biden Administration to kick offshore wind leasing into high gear once taking office. On January 27, 2021, seven days after his inauguration, President Biden signed Executive Order 14008 ("EO"), Tackling the Climate Crisis at Home and Abroad, stating "that climate considerations [will] be an essential element of United States foreign policy and national security."[59] Section 207 of the EO states a "goal of doubling offshore wind by 2030 while ensuring robust protection for our lands, waters, and biodiversity and creating good jobs."[60] Subsequently, at a White House Forum on March 29, 2021, the Administration established the target "to deploy [thirty] gigawatts (GW) of offshore wind . . . by 2030, while protecting biodiversity and promoting ocean co-use."[61]

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[55] Prior to Vineyard Wind 1, numerous projects were proposed and failed in the face of lengthy legal battles, regulatory changes, anti-renewable political administrations, frustration and withdrawal by investors, and failures of power purchase agreements. *See* Hokanson, *supra* note 21, at 209–13.

[56] *Permitting*, VINEYARD WIND, https://www.vineyardwind.com/vw1-permitting [https://perma.cc/344P-JX7C].

[57] *Id.*

[58] *See infra* Section I.D.

[59] Exec. Order No. 14,008, 86 Fed. Reg. 7619 (Jan. 27, 2021) ("Tackling the Climate Crisis at Home and Abroad.").

[60] *Id.*

[61] Press Release, The White House, Fact Sheet: Biden Administration Jumpstarts Offshore Wind Energy Projects to Create Jobs (Mar. 29, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/29/fact-sheet-biden-administration-jumpstarts-offshore-wind-energy-projects-to-create-jobs/ [https://perma.cc/SMZ9-JK9V].

At this same Forum, the Administration announced BOEM would "advance new lease sales and complete review of at least [sixteen] Construction and Operations Plans (COPs) by 2025," estimated to produce more than nineteen gigawatts, including in the newly identified 800,000 acres between Long Island and New Jersey, the "Wind Energy Area in the New York Bight."[62] It later announced an expansion of its goals to include seven additional leasing sales in the Gulf of Maine, New York Bight, Central Atlantic, Gulf of Mexico, the Carolinas, California, and Oregon—in effect, leasing the entire continental U.S. coastline.[63] The project could be further delayed due to the fishing community's recent challenge to the project approval.[64] The challenge was filed on January 31, 2022 by the Responsible Offshore Wind Development Alliance, a coalition of fishing industry workers, on the grounds that BOEM "acted hastily and failed to consider how the . . . project . . . would harm commercial fishermen."[65]

As of March 2022, in addition to the approved Vineyard Wind 1 project slated for construction, sixteen additional leases have been awarded, and more leases will continue to be awarded in twenty-four different lease areas covering an over 1.5 million

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[62] *Id*.

[63] Press Release, U.S. Dep't of the Interior, Secretary Haaland Outlines Ambitious Offshore Wind Leasing Strategy (Oct. 13, 2021), https://www.doi.gov/pressreleases/secretary-haaland-outlines-ambitious-offshore-wind-leasing-strategy [https://perma.cc/78VK-52GX]; Press Release, U.S. Dep't of the Interior, Interior Department Announces Historic Wind Energy Auction Offshore New York and New Jersey (Jan. 12, 2022), https://www.doi.gov/pressreleases/interior-department-announces-historic-wind-energy-auction-offshore-new-york-and-new [https://perma.cc/GWQ5-N7H3]; Press Release, U.S. Dep't of the Interior, Biden-Harris Administration Announces Wind Energy Lease Sale Offshore the Carolinas (Mar. 25, 2022), https://doi.gov/pressreleases/biden-harris-administration-announces-wind-energy-lease-sale-offshore-carolinas [https://perma.cc/8BT4-BLR2].

[64] *Responsible Offshore Development Alliance Files 60-Day Notice Letter*, RESPONSIBLE OFFSHORE DEV. ALL. (Oct. 19, 2021), https://rodafisheries.org/responsible-offshore-development-alliance-files-60day-notice-letter/ [https://perma.cc/53ZJ-6XAX]. This Notice Letter was followed by a formal complaint. Compl. for Declaratory & Injunctive Relief at 1–3, Responsible Offshore Dev. All. v. Dep't of the Interior, No. 1:22-CV-00237 (D.D.C. 2022).

[65] Miriam Wasser, *Fishermen Challenge Federal Approval of First Large-Scale Offshore Wind Project*, WBUR (Sept. 13, 2021), https://www.wbur.org/news/2021/09/13/roda-fishermen-lawsuit-vineyard-wind-boem [https://perma.cc/7ZKB-J36T] ("The government has a duty here to minimize interference with commercial fishing, with navigation, with the way that our fishing industry utilizes the ocean to provide food. And they didn't do that in this case . . . ."). *See generally* Compl. for Declaratory & Injunctive Relief, *supra* note 64.

additional proposed acres of wind turbines in federal waters.[66] This recent political support, paired with lower operating costs, new domestic turbine manufacturing and installation capabilities, a renewed thirty percent investment tax credit, and technological advances, appears to be drawing substantial investor and developer interest in U.S. federal waters with no signs of stopping.[67] But how BOEM and the Biden Administration plan to continue facilitating leasing at this scale while also "providing for" other ocean uses as required by OCSLA remains unclear.[68] In order for BOEM to fulfill that aspect of its statutory mandates, it must determine how it will reconcile traditional claims to the ocean, like commercial fishing, and these new offshore wind claims.

II. COMPARING THE TRUMP AND BIDEN ADMINISTRATIONS' INTERPRETATIONS OF OCSLA'S § 1337(P)(4)

How BOEM will weigh the commercial fishing industry's claim to ocean space against renewable energy developers hinges on the interpretation of "provide for" under 43 U.S.C. § 1337(p)(4). This section requires the Secretary to ensure that offshore renewable energy activities under the act provide for variables including "(I) prevention of interference

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[66] Nathan C. Howe, et al., *Record-Setting New York Bight Auction and Newly-Announced Oregon Lease Areas Portend Rapid Growth in U.S. Offshore Wind Industry*, NAT'L L. REV. (Mar. 16, 2022), https://www.natlawreview.com/article/record-setting-new-york-bight-auction-and-newly-announced-oregon-lease-areas-portend [https://perma.cc/S69Y-VVUH].

[67] U.S. DEP'T OF ENERGY, *supra* note 19, at 7 (these incentives "are likely to increase the industry's confidence in the future market and may catalyze investment in domestic manufacturing and supply chain capabilities, vessel and port construction, and grid infrastructure necessary for sustained, long-term growth"); Gerrard, *supra* note 18, at 10598; Elizabeth McGowan, *Giant, Turbine-Installing Ship is Dominion Energy's $500M Bet on U.S. Offshore Wind*, ENERGY NEWS NETWORK (Mar. 8, 2022), https://energynews.us/2022/03/08/giant-turbine-installing-ship-is-dominion-energys-500m-bet-on-u-s-offshore-wind/ [https://perma.cc/4TN3-XETW].

[68] 43 U.S.C. § 1337(p)(4) (2018). While the Administration has expressed that it "will meet [its] clean energy goals while addressing the needs of other ocean users and potentially impacted communities" and that it "want[s] to reduce potential conflicts as much as [it] can while meeting the administration's goal to deploy [thirty] gigawatts of offshore wind by 2030," it has not codified a mechanism to do via an official regulation, policy, or procedure. Coral Davenport, *Biden Administration Plans Wind Farms Along Nearly the Entire U.S. Coastline*, N.Y. TIMES (Oct. 15, 2021), https://www.nytimes.com/2021/10/13/climate/biden-offshore-wind-farms.html.

with reasonable uses (as determined by the Secretary) of the exclusive economic zone" and "(J) consideration of . . . any other use of the sea or seabed, including use for a fishery."[69] Since the Secretary's requirement to "consider" fishing under subsection (J) is a low bar to meet, these memorandums focus on the statutory meaning of subsection (I). The only regulatory clarification Interior has made to this broad text was via 30 C.F.R. § 585.621(c), qualifying that an interference of a reasonable use must itself be reasonable.[70]

Because no court has addressed this question on the merits,[71] the presidential administrations of the day have maintained the authority and discretion to interpret[72] and re-interpret[73] this ambiguous text to align with their "legitimate policy choices."[74] The opinions of the Trump and Biden Administrations, respectively, have served to dampen and enhance the viability of U.S. offshore wind development.[75] These interpretations are reflected in the opinion memos of Interior's Solicitor's Office under each of these political administrations.[76]

A. The Trump Administration's Interpretation—Only De Minimus Interference with Fishing Permitted

The Trump Administration interpreted the EPAct to require that the Secretary give significant deference to commercial fishermen. In December 2020, the Interior's Solicitor's Office

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[69] 43 U.S.C. § 1337(p)(4).

[70] 30 C.F.R. § 585.621(c) (2011).

[71] The question of what "provide for" entails was raised in *Fisheries Survival Fund v. Jewell*, but the case was dismissed on procedural grounds. 236 F. Supp. 3d 332, 337 (D.C.C. 2017) (dismissing claim that DOI failed to properly consider and provide for fishing, safety, conservation of natural resources, and navigation during both the site selection and the lease issuance process).

[72] *See* Chevron v. Nat. Res. Def. Council, 467 U.S. 837, 866 (1984) ("When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail.").

[73] *See* Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins., 463 U.S. 29, 44–45 (1983) (holding agencies can change their interpretations of statutes so long as they are rational and do not meet the high bar of "arbitrary and capricious").

[74] *Chevron*, 467 U.S. at 866.

[75] Miriam Wasser, *Biden Administration Approves 1st Major Offshore Wind Energy Project*, NPR (May 11, 2021, 2:57 PM), https://www.npr.org/2021/05/11/995852356/biden-administration-approves-first-major-offshore-wind-energy-project [https://perma.cc/BVK9-EEPK].

[76] Trump Opinion, *supra* note 26; Biden Opinion, *supra* note 26.

under the Trump Administration issued an opinion ("Trump Opinion") interpreting § 1337(p)(4), replacing guidance to the Secretary previously issued in September of that same year.[77] The opinion includes three key findings.[78] First, it corrects the interpretation of the September memo by advising that § 1337(p)(4)(I) intends to prevent interference of both the legal and equitable rights to fish—not just the legal right.[79]

Second, it advises that subparagraph (I) "requires the Secretary to act to prevent interference with reasonable uses in a way that errs on the side of less interference rather than more interference."[80] The opinion further explains that, "This means preventing all interference, if the proposed activity would lead to unreasonable interference, but not the type of interference that would be described as *de minimis* or reasonable."[81] It also means "disallow[ing] interference that [can] practically be avoided."[82] While the statute does not use the term "unreasonable" to qualify "interference," Interior's implementing regulation 30 C.F.R. § 585.621(c) does, stating that a developer's Construction and Operation Plan "[must] not *unreasonably* interfere with other uses of the OCS."[83]

Third, the opinion advises the Secretary that whether or not a proposed project would result in "unreasonable interference" should be determined using the following considerations:

1. ***Determine what is unreasonable based on the perspective of the fishing user.*** This means, for example, that for commercial fishermen whose transit would suffer minimal interference (e.g., adding only a couple minutes to arrive at their fishing location), such interference by itself would likely not constitute unreasonable interference. If the proposed wind energy activity, however, would bar access to, or greatly impact fishing activity, then this degree of interference would rise to the level of unreasonableness.
2. ***Determine what is unreasonable based on the cumulative interference.*** While one minimal interference by itself might not be unreasonable, the cumulative effect of

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[77] Trump Opinion, *supra* note 26, at 1.
[78] *Id.* at 15.
[79] *Id*. at 2.
[80] *Id.* at 2.
[81] *Id.*
[82] *Id.* at 5.
[83] 30 C.F.R. § 585.621(c) (2011) (emphasis added).

> multiple interferences from a proposed activity, along with the interference from other pre-existing wind energy activities, might lead to a determination that the cumulative impact is unreasonable as a whole, given the limitations on the Secretary.[84]

This fishermen-centric interpretation[85] was consistent with the Trump Administration's pro-fishing and seafood industry priority.[86] And since traditional energy extraction would be considered another reasonable use under § 1337(p)(4), this opinion may also have served the Administration's priority of expanding offshore oil and gas extraction.[87]

B. The Biden Administration's Interpretation—Discretion to Balance Policy Priorities

The Biden Administration's interpretation acknowledged the Secretary's wide discretion under the EPAct. In April 2021, the Interior Solicitor's Office under the Biden Administration issued an opinion ("Biden Opinion") interpreting § 1337(p)(4), replacing the Trump Administration's December 2020 memorandum.[88] The opinion presents two key findings.[89] First, the subsection "requires discretionary balancing among [§ 1137(p)(4)'s] several factors" by the Secretary that need only be "rational."[90] Second, this "subsection may not be read to impose . . . the requirement that the Secretary 'prevent[ ] all interference, if the proposed activity would lead to unreasonable interference.' "[91] It goes on to

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[84] Trump Opinion, *supra* note 26, at 11.

[85] Kirk Moore, *Workboat: Wind Power Whiplash with Vineyard Wind Review Complete*, RESPONSIBLE OFFSHORE DEV. ALL. (Mar. 9, 2021), https://rodafisheries.org/workboat-vineyard-wind-review/ [https://perma.cc/FUB4-KZAD] ("[The] legal memorandum argu[ed] that Interior officials were under obligation not to approve any ocean industrial development that would impede fishermen's ability to work in those areas. Commercial fishing advocates saw . . . Interior's legal memo as a boost for fishermen to slow the pace of wind energy siting and permitting processes.").

[86] Exec. Order No. 13,921, 85 Fed. Reg. 28,471 (May 7, 2020); Proclamation No. 10,049, 85 Fed. Reg. 35,793 (June 5, 2020).

[87] Exec. Order No. 13,783, 82 Fed. Reg. 16,093 (Mar. 28, 2017); Exec. Order No. 13,795, 82 Fed. Reg. 20,815 (April 28, 2017); Exec. Order No. 13868, 84 Fed. Reg. 15,495 (Apr. 10, 2019).

[88] Biden Opinion, *supra* note 26, at 2.

[89] *Id.* at 4–5.

[90] *Id.* at 4.

[91] *Id.* at 4–5 (alteration in original).

describe this additional requirement identified in the December 2020 memo as "extra-statutory policy advice."[92]

In the absence of case law interpreting this section of OCSLA, the memorandum cites to court opinions interpreting similar types of statutes requiring "that an agency accomplish one or more broadly defined goals,"[93] such as MSA[94] and a Bureau of Land Management statute regarding wilderness preservation.[95] It observes that courts have consistently found that such statutes were written to provide agencies with discretion, since "various congressional goals 'can be in tension with one another.' "[96] The memo further posits that while Interior "may establish uniform processes for balancing the [§ 1337](p)(4) factors or define ambiguous language in those factors" through regulations, the current regulations "largely reiterate the requirements of subsection [1337](p) itself, and therefore do not add to the analysis of what the subsection does and does not require of the Secretary."[97]

C. Comparing the Opinions—Policy Reigns Supreme

Both the Trump and Biden Opinions agree that to interpret "provide for" under subsection (p)(4) as requiring that offshore wind energy leases must not interfere *at all* with other reasonable uses would be to render the EPAct unimplementable.[98] The opinions diverge in how the Secretary must determine what constitutes "reasonable" interference, and in turn, what level of interference is permissible.

According to the outcome-oriented Trump Opinion, the statute demands that deference be given to fishermen.[99] According to the Biden Opinion, the statute gives the Secretary discretion to prioritize ocean uses without inhibition.[100] While the Trump Opinion restricts the EPAct under what it claims is a

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[92] *Id.* at 5.

[93] *Id.* at 1, 3.

[94] 16 U.S.C. § 1801 (2018).

[95] 43 U.S.C. § 1782(c) (2018).

[96] Biden Opinion, *supra* note 26, at 3 (citing Lovgren v. Locke, 701 F.3d 5, 32 (1st Cir. 2012)).

[97] *Id.* at n.2.

[98] Trump Opinion, *supra* note 26, at 11; 43 U.S.C. § 1782(c); Biden Opinion, *supra* note 26, at 3–4.

[99] Trump Opinion, *supra* note 26, at 11.

[100] Biden Opinion, *supra* note 26, at n.2.

strict statutory interpretation, it actually just injects its "extra-statutory policy advice" into its reading.[101] The Biden opinion reads as a plain language statutory interpretation, and correctly acknowledges the Secretary's broad discretion to implement the EPAct according to policy preferences.[102]

Under both opinions, the lack of regulatory or other durable agency guidance to standardize Interior's implementation of § 1137(p)(4) leaves offshore wind leasing decisions beholden to the changing tides of political administrations—a particularly challenging hurdle given that lease approvals can span multiple presidencies. While Congress rightfully bestowed the discretion to triage competing ocean uses to the Secretary, which requires significant technical expertise and fact finding,[103] Interior should implement self-binding procedures to create long-term standards for implementation that managers and constituents can rely upon moving forward.

III. WHY INTERIOR'S (LACK OF) PROCESS IS HURTING FISHERMEN AND OFFSHORE WIND DEVELOPERS ALIKE

Prior to the 2005 EPAct, when offshore wind leasing lacked a statutory Polaris and was governed by a hodgepodge of consultation and permitting authorities, a question at the fore

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[101] *Id.* at 5.

[102] *Id.*

[103] Mistretta v. United States, 488 U.S. 361, 372 (1989) ("[O]ur jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."). While it is almost certain that the EPAct would pass the current nondelegation doctrine's "intelligible principle" test, should the Supreme Court overturn this test as its plurality decision in Gundy v. United States suggests it might under a more conservative court, the EPAct could be unconstitutionally broad. *See* 139 S. Ct. 2116, 2123 (2019); *id. at* 2131 (Alito, J., concurring) ("If a majority of this Court were willing to reconsider the approach we have taken for the past [eighty-four] years, I would support that effort."); *id.* at 2133 (Gorsuch, J., dissenting) (challenging stare decisis on the grounds that the "unbounded policy choices" that overly broad statutes delegate to the Executive branch "have profound consequences for the people they affect"). With the addition of originalist Justice Amy Coney Barrett to the bench following *Gundy*, this possibility may soon be actualized. Peter Wallison, *An Empty Attack on the Nondelegation Doctrine*, REGUL. TRANSPARENCY PROJECT (Apr. 22, 2021), https://regproject.org/blog/an-empty-attack-on-the-nondelegation-doctrine/ [https://perma.cc/2TVV-NZU2]; Jim Saksa, *Barrett, with Scalia as Model, May Be a Moderate on Regulation*, ROLL CALL (Oct. 8, 2020), https://www.rollcall.com/2020/10/08/barrett-with-scalia-as-model-may-be-a-moderate-on-regulation/ [https://perma.cc/84WE-HWX4].

was, "Which regulatory framework will protect the public's interest in ocean resources while at the same time providing developers with a viable framework?"[104] Critics at that time hoped for reform that would shift the United States away from "ad hoc" ocean management,[105] establish a process dictated by the government instead of developers,[106] and authorize a leasing program "not . . . so general that it leaves the substance of such an offshore program to the preferences of the policy leadership of departments, which will change over time."[107] Some proposed that a national schematic with a balancing test for weighing competing ocean uses against one another, with coherent criteria, could provide needed transparency, certainty, and consistency.[108]

The EPAct laid the groundwork for meeting these goals by establishing Interior as the clear federal lead for leasing and requiring it to issue "necessary" specific implementation processes via regulations using its technical expertise and fact-finding.[109] Subsection (p)(4) of the EPAct, requiring the Secretary to provide for the enumerated conflicting ocean uses, practically begged Interior to create a proper balancing test.[110]

Interior issued 30 C.F.R. § 585, which established detailed processes pertaining to the application and competitive bidding processes for leases but did practically nothing to clarify Interior's balancing of ocean uses under (p)(4).[111] The only clarification the regulation made to the balancing process was to require that developers show in their Construction and Operations proposals that a project would not "*unreasonably*" interfere with other ocean uses.[112] This preservation of the Secretary's full discretion to determine what constitutes

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[104] Firestone, et al., *supra* note 10, at 74.

[105] Baur & MacLean, *supra* note 27, at 45.

[106] *Id.* at 49.

[107] Guy R. Martin & Odin A. Smith, *The World's Largest Wind Energy Facility in Nantucket Sound? Deficiencies in the Current Regulatory Process for Offshore Wind Energy Development*, 31 B.C. ENV'T AFFS. L. REV. 285, 315 (2004).

[108] *Id.* at 308 ("While it may not be necessary to have a regulatory program for wind energy as highly detailed as that for oil and gas, it cannot reasonably be argued that such significant activities can be permitted merely under a vague public interest principle guided by no standards of decisionmaking, no articulated balancing test, and no established environmental safeguards and criteria.").

[109] *See* 43 U.S.C. § 1337(p)(8) (2018).

[110] 43 U.S.C. § 1337(p)(4).

[111] 30 C.F.R. § 585 (2022).

[112] 30 C.F.R. § 585.621(c) (emphasis added).

"reasonable" reinforced the exact vagueness the EPAct empowered Interior to correct. Further, it reinforced the politicization of leasing, which has resulted in a pattern of Interior turning the offshore wind valve completely on or off depending on whether the White House is blue or red.[113]

In addition to leaving wind developers and fishermen frustrated by a process that is subject to drastic and unpredictable change on a four-year cycle, this unfettered political discretion is also resulting in rushed, ad-hoc leasing decisions.[114] Whereas a leasing system rooted in written procedural standards can evolve over time to better address diverse ocean users' needs by giving managers and stakeholders something to react to, enabling the government to identify holes in its methods, and preventing the inadvertent exclusion of certain constituents from stakeholder engagement efforts, an uncodified political process fails to establish reliable protocol at all. Such uncodified political processes also demand over-simplification of the rightfully complicated dynamic ocean management regime for the sake of making progress quickly, since a pro-wind Administration will have only four years to act before a potentially anti-wind Administration enters and turns the leasing valve off once more.

To check the requisite box that it considered impacts to the commercial fishing community,[115] the pro-wind Biden Administration accepts their feedback through public comment periods, ad-hoc workshops, and informal communication with the National Marine Fisheries Service ("NMFS")—the federal agency responsible for regulation of commercial fishing.[116] However, it

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[113] An example is the stark contrast between the Interior's inaction to lease offshore wind projects under the Republican Trump Administration and its aggressive steps to do so under the Democratic Biden Administration. *See supra* Sections I.C–D; *see also* Brian Kennedy & Alison Spencer, *Most Americans Support Expanding Solar and Wind Energy, but Republican Support Has Dropped*, PEW RSCH. CTR. (June 8, 2021), https://www.pewresearch.org/fact-tank/2021/06/08/most-americans-support-expanding-solar-and-wind-energy-but-republican-support-has-dropped/ [https://perma.cc/NDQ7-BZTB] (highlighting the contrast in Republican and Democratic support for renewable energy development, generally).

[114] Uma Outka, *Renewable Energy Siting for the Critical Decade*, 69 U. KAN. L. REV. 857, 861 (2021).

[115] *See* 43 U.S.C. § 1337(p)(4)(J)(ii); 42 U.S.C. §§ 4331–35.

[116] *Fishing Industry Communication and Engagement*, BUREAU OCEAN ENERGY MGMT., https://www.boem.gov/atlantic-fishing-industry-communication-and-engagement [https://perma.cc/QN3F-MLV3] (last visited Oct. 27, 2022).

fails to include the commercial fishing community or NMFS representatives in its invitation-only Intergovernmental Renewable Energy Task Forces—the public engagement bodies BOEM uses to inform its leasing decisions at the Siting phase—allegedly due to Federal Advisory Committee Act restrictions.[117]

This lack of engagement with fisheries constituents is a problematic gap in Interior's leasing process. According to the Marine Fisheries Advisory Committee, a Federal Advisory Committee under NMFS comprised of diverse fisheries and protected species constituents:

> The lack of a national strategy for [offshore wind energy ("OWE")] planning has led to a piecemeal approach that has resulted in anger and dissatisfaction by fishermen and others with regional processes. The national priority to achieve energy independence and transition to renewable sources resulted in OWE projects on the Atlantic seaboard being permitted and constructed with minimal input from stakeholders and review by federal and state agencies. . . . The current process across different regions of the U.S. is disparate and difficult to follow. BOEM needs to improve and standardize engagement with coastal communities, recreational and commercial fishers, environmentalists, researchers, and other ocean users/industries whose livelihoods and heritage depend on responsible use of the coastal areas of the U.S.[118]

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[117] MARINE FISHERIES ADVISORY COMMITTEE, REPORT OF THE OFFSHORE WIND AD HOC WORKING GROUP 4 (July 1, 2020), https://media.fisheries.noaa.gov/dam-migration/mafac_20200701_offshore_wind_secretary_transmittal_letter_&_report.pdf [https://perma.cc/B2M2-QA88]. The Federal Advisory Committee Act places restrictions on the federal government engaging with stakeholders to obtain recommendations outside of formal Federal Advisory Committee processes. *The Federal Advisory Committee Act (FACA) Brochure*, U.S. GEN. SERV. ADMIN., https://www.gsa.gov/policy-regulations/policy/federal-advisory-committee-management/advice-and-guidance/the-federal-advisory-committee-act-faca-brochure [https://perma.cc/7N7U-2AZE]. While BOEM and NOAA signed a Memorandum of Understanding in early 2022 to "[r]esponsibly [a]dvance [o]ffshore [w]ind," the agreement was broad, merely stating the agencies' intent to "coordinate resources, input, and associated responsibilities" pertaining to offshore wind without identifying concrete or self-binding measures for doing so. Memorandum of Understanding between the National Oceanic and Atmospheric Administration and Bureau of Ocean Energy Management to Responsibly Advance Offshore Wind Energy (Jan. 12, 2022), https://www.noaa.gov/sites/default/files/2022-01/MOU%20NOAA%20BOEM%20SIGNED%20-%20011222.pdf [https://perma.cc/K6GQ-A5WH].

[118] Marine Fisheries Advisory Committee, *supra* note 117, at 7.

Because fishermen lack direct access to BOEM in the leasing process, they find themselves negotiating with the developers directly, exchanging the little leverage they have in the form of local acquiescence for small modifications to site plans.[119] Under pro-wind administrations, where much deference is given to developers' goals, this puts fishermen at a serious disadvantage with little to no real bargaining power.

The lack of a stable, national schematic to consider impacts to fisheries inevitably breeds the current all-or-nothing leasing pattern,[120] public skepticism,[121] and prioritization of one-off leasing requests instead of long-term strategic approaches necessary to avoid a blue acceleration.[122] However, these shortfalls can be remedied under the existing EPAct.

IV. SELF-BINDING PROCEDURES INTERIOR SHOULD IMPLEMENT TO IMPROVE CONSISTENCY, TRANSPARENCY, AND LONG-TERM COMPLIANCE WITH OCSLA

The EPAct provided Interior with the opportunity to depoliticize and standardize the offshore wind leasing process.[123] While Interior has not taken advantage of this opportunity to date, by revising 30 C.F.R. § 585 it could create the long-term stability that developers, fishermen, and managers need. As noted, the ambiguous text in subsection (p)(4) of the EPAct requires Interior to consider and balance competing ocean uses, including commercial fishing, and should be clarified.[124] The

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[119] *See* Maddie Stone, *'I Can See the Industry Disappearing': US Fishermen Sound Alarm at Plans for Offshore Wind*, GUARDIAN (July 24, 2021, 11:39 AM), https://www.theguardian.com/environment/2021/jul/24/offshore-wind-development-new-jersey-us-fishermen-ocean-life [https://perma.cc/8VAN-FXTR]. Such modifications include, for example, addition of an open area to fishing at the edge of the lease area. *See id.*

[120] If a defined, evidence-based leasing process was established via regulations under the EPAct to self-bind Interior across political administrations, a steadier and plateaued curve of lease issuances could replace the current boom-or-bust curve. *See infra* Part IV.

[121] Marine Fisheries Advisory Committee, *supra* note 117, at 7.

[122] *See supra* Section I.A.

[123] *See supra* Part III.

[124] *See id*. The Responsible Offshore Development Alliance echoed this same sentiment in a subsequent letter to BOEM, stating the need for a codified and standardized process to mitigate impacts to fishermen. Press Release, Responsible Offshore Development Alliance, U.S. Seafood Organizations Recommend Steps to Reduce Impacts from Offshore Wind Energy (Jan. 11, 2022),

fisheries management regime under MSA, another ocean management statute requiring a federal agency to take action while providing for various conflicting factors,[125] provides a replicable model for clarifying the implementation of an ambiguous parent statute—facilitating greater certainty for those regulated and reduced ad-hoc agency decision-making.[126]

Under MSA, Congress compelled the Department of Commerce to issue fisheries management plans "consistent with" ten enumerated "national standards" which operate as the "touchstone concepts" used for fishery conservation and management.[127] Similar to the enumerated ocean uses in the EPAct, some of MSA's ten national standards can be read to facially contradict one another, for example, obtaining optimum yield of fisheries and minimizing bycatch of non-target species.[128] And some of these standards require further defining themselves—for example, MSA fails to define "optimum yield."[129] To fill in these highly technical and sometimes highly political statutory gaps, NMFS implemented regulations, establishing a highly regarded MSA regime.[130]

By utilizing the regulatory process to clarify the EPAct's statutory ambiguities, BOEM could begin to build a more structured leasing process that formally incorporates public

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https://rodafisheries.org/us-seafood-organizations-recommend-steps-to-reduce-impacts/ [https://perma.cc/A2U8-JFVK].

[125] 16 U.S.C. § 1851(a) (2018).

[126] Martin & Smith, *supra* note 107, at 309–11 (applauding the success of this regime's "specific decisionmaking criteria").

[127] 16 U.S.C. § 1851(a); Alexandra Carter, *A National Standard for Climate-Ready Fisheries*, AM. PROGRESS (Sept. 24, 2019), https://www.americanprogress.org/article/national-standard-climate-ready-fisheries/ [https://perma.cc/MV67-WZ54]. The ten national standards include: (1) preventing overfishing while providing for optimum yield of fish harvests, (2) managing based on the best scientific information available, (3) managing interrelated stocks as a unit, (4) fair and equitable allocation of stock quotas to fishermen, (5) consideration of efficiency in management measures, (6) taking into account variations and contingencies of catch and stock data, (7) minimizing regulatory costs and duplication, (8) consider impacts to communities, (9) minimize bycatch and mortality of bycatch, and (10) promote safety of human life at sea. 16 U.S.C. § 1851(a).

[128] One way to reach optimum yield could be to use fishing equipment like gill nets that also increase the taking of non-target, "bycatch" species. Leonardo G. Berninsone et al., *Switching Gillnets to Longlines: An Alternative to Mitigate the Bycatch of Franciscana Dolphins (*Pontoporia blainvillei*) in Argentina*, 7 FRON. MAR. SCI. 1, 2 (2020).

[129] 16 U.S.C. § 1851(a).

[130] *See* 50 C.F.R. §§ 600.305–.355; Carter, *supra* note 127.

input and establishes self-binding requirements for its decision making. For a political Administration like Biden's, expressing long-term interest in renewable energy leasing but with only a four-year term to execute this priority, creating a more sustainable leasing process would help it to accomplish its goals well past its tenure. Defining terms like "reasonable uses" and processes like "coordinating with relevant federal agencies" in codified regulations would put BOEM leaps and bounds ahead of where it is now, moving towards a more stabilized and less politically rife leasing process. If BOEM fails to establish a more comprehensive and replicable national leasing process and continues down the ad-hoc path that has become its norm, the cumulative effects of its leasing decisions could lead to the complete displacement of ocean uses like fishing.

CONCLUSION

The future of the commercial fishing industry in the U.S. is uncertain, posing a threat to jobs, access to sustainable seafood, and a part of our heritage. At the same time, global climate change poses an existential and no longer distant threat to society. Given the decades' worth of backlogged climate change remediation work the Biden Administration inherited, it may believe that it must sacrifice fishing for the sake of renewable energy development and that there simply is no time to stop and create inclusive and replicable self-binding procedures.[131] But under the current OCSLA text, it is Interior's duty to ensure that offshore wind leases are not issued in such a way so as to displace the fishing industry entirely, which can only be ensured if a replicable national process is established.

Accordingly, Interior should revise 30 C.F.R. § 585 to clarify the broad language of § 1337(p)(4) of OCSLA by establishing replicable, evidence-based methods for how it will consider impacts to the fishing industry in its leasing decisions. Such regulatory guidelines would facilitate greater transparency, certainty, and consistency for energy developers, fishermen, and managers across political administrations, and help this country transition to clean energy in a more sustainable manner. The

[131] Baur & MacLean, *supra* note 27, at 49. If time was on our side, perhaps these choices "need not be mutually exclusive." *Id.* But the Biden Administration inherited decades worth of decarbonization catch-up work, and the clock is ticking.

American people deserve both clean energy and sustainable fisheries, and an improved offshore wind leasing program under the existing EPAct could ensure both.