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Briefing Report: Strengthening the Great Blue Wall: The West Coast Response to Offshore Drilling

UCI Newkirk Center for Science & Society

UCI Law
Center for Land, Environment and Natural Resources (CLEANR)

October 8, 2018

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Defending Tribal, State and local government opposition to offshore oil and gas development on the west coast

The conflict between coastal states and the federal government over offshore oil and gas development has a long history.[1] The debate has centered on state and local governments' ability to affect decisions that may have deleterious effects on their coastlines and economies. The 1969 Santa Barbara oil spill heightened the concerns of coastal states vulnerable to the environmental consequences of decisions made by the federal government, leading to new federal and state legal protections. Recently, the Trump Administration has taken action to roll back these and other environmental protections. [2] The Administration's Proposed Outer Continental Shelf (OCS) Oil and Gas Leasing Program for 2019-2024 ("Draft Proposed Program")[3] proposes to make over 90 percent of the total OCS acreage and more than 98 percent of undiscovered, technically recoverable oil and gas resources in federal offshore areas under consideration for future exploration and development.[4] Five days after releasing the draft plan, Secretary Zinke announced on Twitter that he was removing Florida from the plan, saying the risk to beach tourism revenue driving the state's economy is too great. The public comment period ended March 9, 2018 and the Bureau of Ocean Energy Management (BOEM) is expected to release the second draft this winter.[5] In recent months, numerous state and local governments have taken action to oppose the Trump Administration's Draft Proposed Program.

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1 *See* U.S. v. Cal., 332 U.S. 19, 40 (1947) (holding that the federal government had 'paramount rights' over the area three miles seaward from the normal low water mark); *see* Daniel S. Miller, *Offshore Federalism: Evolving Federal-State Relations in Offshore Oil and Gas Development*, 11 ECOLOGY L.Q. 401, 407–10 (1984).

2 On April 28, 2017, President Trump issued an Executive Order outlining an "America-First Offshore Energy Strategy," purporting to revoke several of Obama's OCSLA withdrawal orders. E.O. No. 13795, 82 Fed. Reg. 20,815.

3 *See* Notice of Availability of the 2019-2024 Draft Proposed Outer Continental Shelf Oil and Gas Leasing Program and Notice of Intent to Prepare Programmatic Environmental Impact Statement, 83 Fed. Reg. 829 (Jan. 8, 2018).

4 The proposed plan calls for 47 lease sales to be scheduled in 25 of 26 areas off the nation's coastlines. *Secretary Zinke Announces Plan for Unleashing America's Offshore Oil and Gas Potential*, U.S. DEP'T OF THE INTERIOR (Jan. 4, 2018), https://www.doi.gov/pressreleases/secretary-zinke-announces-plan-unleashing-americas-offshore-oil-and-gas-potential.

5 Pamela King, *Offshore Drilling: Piecing Together Zinke's 5-Year-Plan Puzzle*, ENERGYWIRE (Apr. 16, 2018), https://www.eenews.net/stories/1060079077/.

BACKGROUND: WEST COAST OFFSHORE OIL AND GAS DEVELOPMENT

Offshore drilling began in California in 1896, with at least 187 offshore oil wells drilled in the Summerland Field in Santa Barbara County by 1902. The Northwest region is not considered to be a rich source of offshore fossil fuel. One lease sale was held in 1964 for the Northwest area. Twelve exploratory wells were drilled, with no commercial discoveries.[6]

The catastrophic Santa Barbara oil spill turned public opinion against offshore drilling and in the 1980s California obtained a series of congressional moratoria on offshore leasing along certain areas of the California coast. When Congress lifted its moratorium on offshore leasing in 1985,[7] local groups undertook a new strategy to prevent offshore leasing along their coastlines: enacting ordinances—by vote of the board of supervisors or city council, or through voter initiative—that prohibit the siting and development of onshore support facilities such as refineries, pipelines, or oil processing or storage facilities for offshore oil and gas operations.[8] In 1994, the California Legislature enacted the California Coastal Sanctuary Act, which prohibited new oil and gas leases in state waters.[9] The Oregon Legislature adopted a moratorium against offshore drilling in the early 1990s and it is still in effect. There haven't been any federal lease sales off the California, Oregon, or Washington coasts since 1984.

West Coast Response to Proposed Offshore Oil and Gas Development

In response to the Trump administration's proposal to expand oil and gas leases, dozens of cities, counties, port authorities, and other organizations along the Pacific coast have passed resolutions against offshore drilling.[10] The governors of Washington, Oregon, and California collectively denounced the plan soon after it was announced. The Business Alliance to Protect the Pacific Coast[11] includes more than 1,100 businesses who recognize the unacceptable risk posed by offshore drilling to our ocean-based economy. In a July 2017 letter to federal officials, the California State Lands Commission promised that the body will "use every power in its toolbox to ensure that not a drop of oil or gas from new offshore drilling ever makes landfall in California."[12] Sixteen Congressional delegates from the Pacific Northwest signed a February 1,

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6 Cassandra Profita & Tony Schick, *Q&A: What Are The Chances Of Offshore Oil And Gas Drilling In The Northwest?*, OREGON PUBLIC BROADCASTING/EARTHFIX (Jan. 26, 2018) https://www.opb.org/news/article/qa-what-are-the-chances-of-offshore-oil-and-gas-drilling-in-the-northwest/.

7 There were continuing moratoria in place until 2008, when President Bush lifted the executive moratorium.

8 *See* Breck C. Tostevin, Not on My Beach: Local California Initiatives to Prevent Onshore Support Facilities for Offshore Oil Development, 38 HASTINGS L.J. 957, 960 (1987).

9 CAL. PUB. RES. CODE § 6243.

10 See updated list at *Opposition to New Offshore Drilling in the Pacific Ocean*, OCEANA, http://usa.oceana.org/pacific-drilling (last visited Oct. 5, 2018).

11 BUSINESS ALLIANCE FOR PROTECTING THE PACIFIC COAST, https://defendthepacific.org (last visited Oct. 5, 2018).

12 Keith Schneider & Tony Barboza, *California offshore drilling could be expanded for the first time since 1984 under federal leasing proposal*, L.A. TIMES (Jan. 4, 2018).

2018 letter to Secretary Zinke opposing offshore drilling.[13] Washington Governor Jay Inslee said he would use all his power to make it impossible to drill off the state's coast — with things like tax increases or closing Washington ports to oil and gas equipment. Attorney General Bob Ferguson sent a letter to Interior Secretary Zinke, announcing the state will file a lawsuit against the Trump Administration if it moves forward with current plans to expand offshore drilling. Tribal representatives said the drilling plan would threaten their treaty rights and ability to harvest fish.[14] Similar concerns led to opposition and ultimate abandonment of plans to build coal export terminals in the Pacific Northwest. The past decade saw seven coal export terminals proposed in Oregon, Washington, and British Columbia to great public outcry and opposition. Not one has been constructed.[15]

Treaty Rights

Several Northwest tribes, known as Stevens Treaty tribes, possess harvest rights in the marine environment.[16] Recently, the question of whether "the right of taking fish" also includes the right to protect the environment on which their habitat depends, was answered in the affirmative.[17] The Ninth Circuit held that the treaties required the state of Washington to refrain from building or maintaining road culverts that block salmon migration and their return to spawning grounds. Because these harvest rights also include the right to protect the marine environment on which fish and other marine life depend, it is now an open question what other habitat-damaging activities are encompassed in this right.[18] The Tribes can argue that habitat-damaging activities involved in oil and gas development would violate their treaty right.

RELEVANT FEDERAL LAW

Even though OCS resources belong to the federal government, states control coastal waters out to three miles from the shoreline and have enormous leverage over key aspects of the development process. Any pipelines or other infrastructure intended to transport or process oil and gas onshore would require state approval. Using various state and federal laws, states and advocacy organizations can file lawsuits and stall the leasing process, forcing oil companies to tie up capital for decades with no clear return.[19]

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[13] Molly Solomon, *Cantwell, Seafood Industry Say 'No' To Northwest Offshore Drilling Plan*, OREGON PUBLIC BROADCASTING (Feb. 3, 2018), https://www.opb.org/news/article/washington-oregon-drilling-offshore-maria-cantwell-seafood/.

[14] Courtney Flatt, *Washington Could Use Taxes, Lawsuits To Oppose Offshore Drilling*, OREGON PUBLIC BROADCASTING /EARTHFIX (Feb. 5, 2018), https://www.opb.org/news/article/jay-inslee-washington-lawsuits-offshore-drilling-trump/.

[15] *Coal Scorecard: Your Guide To Coal In The Northwest*, EARTHFIX (Oct. 24, 2017), https://www.opb.org/news/article/coal-score-card/.

[16] *See* Wash. v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979).

[17] U.S. v. Wash., 827 F.3d 836 (9th Cir. 2016).

[18] *See* Michael C. Blumm, *Indian Treaty Fishing Rights and the Environment: Affirming the Right to Habitat Protection and Restoration*, 92 WASH. L. REV. 1, 27 (2017).

[19] Sam Ori, *Why Trump's Offshore Drilling Expansion Won't Be So 'Yuge'*, FORBES (Jan. 8, 2018).

Outer Continental Shelf Lands Act (OCSLA)

Passed in 1953, OCSLA asserted the federal government's exclusive jurisdiction and control over the seabed, subsoil, and natural resources of the OCS, to provide for the development of its vast mineral resources.[20] Section 11 authorizes geological and geophysical exploration in the OCS provided that it is "not unduly harmful to aquatic life"[21] and Section 12 delegated to the president broad authority to withdraw areas from leasing.[22] State laws could apply so long as they did not interfere with the objectives of federal law.[23] In 1978, OCSLA amendments added explicit environmental protections to the leasing process.[24]

Using his authority under OCSLA section 12(a),[25] President Obama protected approximately 160 million acres in the Atlantic and Arctic from future oil and gas leasing, explicitly stating that such withdrawals shall be "without specific expiration."[26] Numerous scholars have argued that, given the restraints imposed on the executive branch by OCSLA, only Congress has the power to rescind or modify these designations.[27]

Some suggest OCSLA should be amended to include an independent assessment by states in their role as public trust defenders to analyze the impacts of an entire offshore project to their coasts and to the interests of the national public who would access the commonly owned ocean resources from their coasts. Once rendered, the analysis could prompt a federal response to the stated project impacts and state-rendered recommendation on the project's impact to public trust interests.[28]

Coastal Zone Management Act (CZMA)

Congress enacted the CZMA in 1972 in response to a growing national concern over the need to preserve, protect, and wisely develop the resources of the nation's coastal areas.[29] Instead of

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20 *See* 43 U.S. § 1333(a)(1); OCSLA § 4; S. REP. NO. 83-411, at 2.

21 OCSLA § 11(a).

22 *Id.* § 12(a).

23 *Id.* § 4(a)(2).

24 Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, § 102, 92 Stat. 629, 631 (codified at 43 U.S.C. § 1802 (2012)) (stating the purpose is to develop oil and natural gas resources in the OCS "in a manner which is consistent with the need (A) to make such resources available to meet the Nation's energy needs as rapidly as possible, (B) to balance orderly energy resource development with protection of the human, marine, and coastal environments").

25 43 U.S.C. § 1341(a) (2012).

26 Coral Davenport, *Obama Bans Drilling in Parts of the Atlantic and Arctic*, N.Y. TIMES (Dec. 20, 2016), https://www.nytimes.com/2016/12/20/us/obama-drilling-ban-arctic-atlantic.html (reporting on the withdrawal of 3.8 million acres of the Atlantic and 115 million acres of the Arctic from future leasing); *see* Robert T. Anderson, *Protecting Offshore Areas from Oil and Gas Leasing: Presidential Authority Under the Outer Continental Shelf Lands Act and the Antiquities Act*, 44 Ecology L.Q. 727, 731–32 (2018).

27 Robert T. Anderson, *Protecting Offshore Areas from Oil and Gas Leasing: Presidential Authority Under the Outer Continental Shelf Lands Act and the Antiquities Act*, 44 ECOLOGY L.Q. 727 (2018); Jayni Foley Hein, *Monumental Decisions: One-Way Levers Towards Preservation in the Antiquities Act and Outer Continental Shelf Lands Act*, 48 ENVTL. L. 125, 143-45 (2018).

28 Rachel Ganong, *The Slippery Shelf: Ceding the Public Trust to Administrative Ambivalence in Offshore Development*, 36 Wm. & Mary ENVTL. L. & POL'Y REV. 193, 221 (2011).

29 16 U.S.C. §§ 1451, 1452 (1985).

drafting a comprehensive statute controlling coastal uses, Congress adopted a voluntary program that sought to encourage each state to establish its own separate coastal management program.[30] The CZMA encourages the development of state programs by providing monetary assistance to states that develop and exercise management programs consistent with its standards, and by requiring that federal activities in or affecting the coastal zone conform with an approved state program.[31]

A state management program must contain provisions allowing for consideration of the national interest in the planning, siting, and development of major energy facilities that are necessary to meet other than local energy demand.[32] However, the national interest provisions are not substantive requirements that would force a state to site an energy facility it considered not in its interest as long as the state considers 'other than local interests.'[33]

State and local governments were dealt a significant blow when the Supreme Court ruled that federal offshore leasing does not directly affect adjoining states' coastal zones and therefore does not require that states approve the tracts as 'consistent' with coastal programs authorized pursuant to the CZMA.[34] However, Congress responded by amending the Act and clarifying the legislature's intent for coastal states to be able to review any activities would affect their coastal zones, whether directly or indirectly.[35] Congress specifically stated its intent that states should be allowed to review offshore oil and gas leases. This intent was recognized by the Ninth Circuit Court of Appeals in 2002.[36]

National Environmental Policy Act (NEPA)

NEPA [37] requires federal agencies to consider not just the "direct effects" of an action, but also the "indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable."[38] Federal agencies must prepare a detailed Environmental Impact Statement (EIS) for any major Federal action significantly affecting the environment, which addresses: "(1) the environmental impact of the proposed action; (2) any adverse environmental effects which cannot be avoided if the proposal is implemented; (3) alternatives to the proposed action; (4) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and (5) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented."[39] The primary purpose of an EIS is to force the

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30 *Id.* § 1454.
31 *Id.* § 1456(a).
32 *Id.* § 1455(c)(3)(B).
33 *See* Am. Petroleum Inst. v. Knecht, 609 F.2d 1306 (9th Cir. 1979) (finding that California's Coastal Management Plan complies with the CZMA).
34 Sec'y of the Interior v. Cal., 464 U.S. 312 (1984).
35 Linda Krop, *Defending State's Rights Under the Coastal Zone Management Act-State of California v. Norton*, 8 SUSTAINABLE DEV. L. & POL'Y 54, 56 (2007).
36 Cal. v. Norton, 311 F.3d 1162 (9th Cir. 2002) (lease suspensions subject to state review under the CZMA).
37 42 U.S.C. § 4321.
38 40 C.F.R. §1508.8.
39 *Id.* § 4332(c).

government to take a "hard look" at its proposed action, and to provide a full and fair discussion of significant environmental impacts and inform decision makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.[40]

To comply with NEPA, BOEM must prepare a Programmatic EIS for the Draft Proposed Program that addresses the affected environment and its resources, all impacts related to the Program, all alternatives to the Program, and mitigation measures that could be implemented. A reasonable alternatives analysis must also consider the role of renewable energy and conservation.

Endangered Species Act (ESA)

The ESA[41] is designed to protect endangered and threatened fish, wildlife and plant species and the ecosystems upon which they depend. For marine species, the ESA is administered by NOAA Fisheries. Under the ESA, species are listed as "threatened" or "endangered", based on the risk of extinction of that species, and the species' "critical habitat" is designated. Once listed, the ESA makes it unlawful to "take" individuals of an endangered species and, by regulation, a threatened species, including significant habitat modification or degradation which "actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating, feeding or sheltering."

The ESA requires formal consultation between federal agencies and the U.S. Fish and Wildlife Service or NOAA Fisheries when an action that a federal agency is authorizing, funding, or carrying out "may affect" a listed species. The consultation is required to ensure that the agency's actions and the actions of any permit or license applicant are not likely to "jeopardize the continued existence" of a listed species, or "destroy or adversely modify" a species' designated critical habitat. Where actions are found to likely jeopardize a listed species or destroy or adversely modify critical habitat, reasonable and prudent alternatives are required which would not jeopardize the species or injure habitat. Where no alternatives can be developed, the project cannot go forward. The Draft Proposed Program proposes leasing in areas that have been designated as critical habitat for endangered or threatened species, triggering the formal consultation process and other requirements under the ESA.

The Marine Mammal Protection Act (MMPA)

The MMPA[42] prohibits, with certain exceptions, the "take" of marine mammals in U.S. waters and by U.S. citizens on the high seas. This includes any act that results in disturbing or molesting a marine mammal.[43] Exceptions to the take prohibition include where an "incidental

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[40] Baltimore Gas and Electric Co. v. Natural Res. Defense Council, 462 U.S. 87 (1983); 40 C.F.R. § 1502.1.
[41] 16 U.S.C. §§ 1531–44
[42] 16 U.S.C. §1361 et seq. (1972).
[43] *See* NAT'L OCEANIC & ATMOSPHERIC ADMIN., *Marine Mammal Protection Act*, https://www.fisheries.noaa.gov/topic/laws-policies#marine-mammal-protection-act (last visited Oct. 5, 2018).

harassment" or "incidental take" authorization is issued, for the "unintentional, but not unexpected" take of a small number of a marine mammals. NOAA Fisheries may only authorize the incidental take of a species if it finds that the taking would be of a small number, would have no more than a "negligible impact" on the species, and would not have an "unmitigable adverse impact" on the availability of the species or stock for subsistence uses.[44] All stages of oil and gas development in the marine environment, including seismic surveys and exploratory drilling, have the potential to impact marine mammals.[45] Similarly to the ESA, where the Draft Proposed Program proposes take of marine mammals, the MMPA requires the appropriate consultation and authorization process.

Public Trust Doctrine

The public trust doctrine has ancient roots and remains a foundation stone in American common and statutory law.[46] It provides that certain natural resources are held by the government in trust for the benefit of the people and may receive special protection from courts and legislatures. Although the scope of the public trust was traditionally applied to cases involving navigation, commerce, and fisheries, the public trust is adaptable to changing needs and circumstances.[47] Federal courts have recognized the doctrine for well over a century, but some states have also codified public trust doctrine protections as a matter of state law.[48] Public trust doctrine obligations on the federal government with regard to public lands, including federal ocean waters, exist by implication in combinations with statutory and constitutional mandates.[49]

One can argue that the potential degree of environmental harm caused by offshore oil and gas activities to West Coast public lands substantially impairs the public's interest and any benefit does not further the trust purposes for certain public trust natural resources. Some suggest that public trust doctrine jurisprudence supports the interpretation that OCSLA Section 12(a) reserves to the legislative branch the power to reduce or abolish offshore protected areas.[50]

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[44] *See* NAT'L OCEANIC & ATMOSPHERIC ADMIN., *Incidental Take Authorizations Under the Marine Mammal Protectoin Act*, https://www.fisheries.noaa.gov/node/23111 (last visited Oct. 5, 2018). Note that in addition to consultation under the ESA and MMPA, action agencies must also consult with NOAA Fisheries pursuant to the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801–83, with respect to any designated "essential fish habitat" ("EFH") affected by their actions. This law requires the action agency to address measures to preserve EFH.

[45] MARINE MAMMAL COMM'N, *Oil and Gas Development and Marine Mammals*, https://www.mmc.gov/priority-topics/offshore-energy-development-and-marine-mammals/offshore-oil-and-gas-development-and-marine-mammals/ (last visited Oct. 5, 2018).

[46] *See* MICHAEL C. BLUMM & MARY CHRISTINA WOOD, THE PUBLIC TRUST DOCTRINE IN ENVIRONMENTAL AND NATURAL RESOURCES LAW (2nd ed. 2013).

[47] *See* Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971) (holding that under the public trust doctrine, the needs of future generations are above the current economic needs of private owner).

[48] *See* Robin K. Craig, *A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 Ecology L.Q. 53, 71–72, 80, 92 (2010).

[49] *See* Alexandra B. Klass*, Renewable Energy and the Public Trust Doctrine*, 45 U.C. DAVIS L. REV. 1021, 1035 (2012).

[50] Jayni Foley Hein, *Monumental Decisions: One-Way Levers Towards Preservation in the Antiquities Act and Outer Continental Shelf Lands Act*, 48 ENVTL. L. 125, 162 (2018).

RELEVANT STATE LAW

California

In response to a successful citizens' initiative, the state legislature enacted the California Coastal Act of 1976 as a comprehensive scheme to govern development, preservation, and land use planning for the entire California coastal zone.[51] Under the Coastal Act, a local government within the coastal zone must prepare and submit a local coastal plan (LCP) to the California Coastal Commission for review and approval.[52] Once the Commission certifies the LCP, the local government has authority to issue permits for development consistent with the LCP.[53] Like the federal CZMA, the Coastal Act allows for development of land use plans at a lower level of government while ensuring that local governments consider broader state interests. The Coastal Act requires that local governments consider anticipated future energy facilities while preparing their LCPs.

The Act's major energy siting provisions are contained in section 30260, which provides for siting of new coastal-dependent industrial development if three requirements are met: if (1) alternative locations are infeasible or more environmentally damaging; (2) to do otherwise would adversely affect the public welfare; *and* (3) adverse environmental effects are mitigated to the maximum extent feasible.[54]

Oregon

Oregon's Ocean Resources Management Act[55] prioritizes the protection of renewable resources over nonrenewable resources and created the Ocean Policy Advisory Council (OPAC). OPAC members advise the Governor, state agencies and local governments on ocean policy and resource management matters and provide input to the Territorial Sea Plan (TSP).[56] The TSP guides the actions of state and federal agencies that are responsible for managing coastal and ocean resources in the public trust.

Washington

Washington's Ocean Resources Management Act[57] prohibits oil and gas exploration, production, and drilling in the state's marine waters, in the outer coast, the Strait of Juan de Fuca, and in Puget Sound. The state's Shoreline Management Act[58] also prohibits such exploration or production in Puget Sound and the Strait of Juan de Fuca. Washington's federally approved Coastal Zone Management Program (CZMP) sets out state policies, including prioritizing ocean uses that do not adversely impact renewable resources over those that have

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51 CAL. PUB. RES. CODE §§ 30000-30900.
52 Id. § 30500(a).
53 Id. § 30600.5.
54 *Id.* § 30260.
55 ORS 196.405–.515.
56 ORS 196.433.
57 RCW 43.143.010.
58 RCW 90.58.160.

adverse impacts to renewable resources; conserving fossil fuels; and protecting existing ocean uses and ocean resources from likely, long-term significant adverse effects. Further, Washington's Marine Spatial Plan[59] creates a framework for developing marine plans for Washington's waters, including the potential for marine renewable energy.

Local Initiatives

Offshore development threatens sensitive coastal areas not only with oil spills and air and water pollution, but also with the development of extensive onshore support facilities such as refineries, pipelines, oil and gas separation facilities, tanker farms, and other staging areas. As a result, numerous local governments have recently taken action expressing opposition through resolutions.[60] These actions build on prior efforts made during the Regan Administration to block onshore development.[61]

In California, the oil and gas industry challenged land use ordinances banning onshore support facilities adopted by coastal cities and counties in the 1980s.[62] The Western Oil and Gas Association warned that the ordinances would "create a wall from the Mexican border to the Oregon state line blocking development of oil in the outer continental shelf." The Court ruled that these challenges were not ripe for judicial review since it was not clear whether any oil and gas leases remaining off the California coast would ever be offered for sale.[63]

Proponents of offshore development may argue that local government ordinances that ban onshore support facilities in all circumstances may conflict with the Coastal Act siting provisions. The Coastal Act could be amended to replace its outdated 1970s-era policy, which makes allowances for offshore production, with a policy stating that offshore oil and gas development is no longer in the state interest. Renewable sources such as wind and wave energy could be supported instead.[64]

PROPOSED AND RECENTLY PASSED LEGISLATION

National

The proposed West Coast Ocean Protection Act (HR 169) would permanently ban offshore drilling on the outer continental shelf of Washington, Oregon and California.[65] The legislation would amend the Outer Continental Shelf Lands Act. The bill was first introduced in 2010 but

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[59] Required by RCW 43.372.

[60] See updated list at *Opposition to New Offshore Drilling in the Pacific Ocean*, OCEANA, http://usa.oceana.org/pacific-drilling (last visited Oct. 5, 2018); Chris Liedle, *Coastal Cities Announce Public Opposition to Federal Proposal for Offshore Drilling*, KATU NEWS (Mar. 7, 2018).

[61] *See supra* note 8.

[62] W. Oil & Gas Ass'n v. Sonoma Cty., 905 F.2d 1287 (9th Cir. 1990).

[63] *Id.*

[64] Charles Lester, *Trump's push for new offshore drilling is likely to run aground in California*, THE CONVERSATION (Feb. 6, 2018).

[65] Tony Schick, *West Coast Lawmakers Seek Ban On Offshore Drilling*, OREGON PUBLIC BROADCASTING (Jan. 6, 2017).

never made it out of the Senate Committee on Energy and Natural Resources. Similar bills have been introduced three other times. The California Clean Coast Act (HR 731) would similarly protect the California coast.

California

California recently passed legislation (SB 834/ AB 1775) that would prohibit the State Lands Commission from approving any new leases for pipelines, piers, wharves, or other infrastructure needed to support new federal oil and gas development in the three-mile area off the coast that is controlled by the state.[66] The legislation would also require a public process and consideration of certain factors before allowing new infrastructure on existing state leases that would support new federal oil and gas development. California officials have argued that expanding offshore oil production would most likely require the construction of expensive new platforms and onshore support equipment whose presence could harm the state's multibillion-dollar coastal economy, including tourism, fishing and the marine ecosystem.[67]

The California Senate leadership has shown interest in opposing any rollback of existing California law through its "Preserve California" legislative package,[68] which, under the "California Environmental Defense Act," would adopt pre-Trump federal environmental and safety regulations as the minimum standards under California law.[69]

Oregon

Oregon's moratorium on oil and gas drilling in the nearshore (HB 3613) is set to expire soon. With strong support in both the House and Senate, proposed legislation is expected to strengthen the language and include infrastructure prohibitions, as well as move from a temporary to permanent moratorium.[70] After legislative counsel review, the bill is currently planned to be introduced in December 2018. Legislative session begins February 2019.

Washington

In response to the proposed offshore drilling expansion, Senator Ranker introduced Senate resolution 8017, formally memorializing its opposition to the policy and requesting an exclusion from the drilling plan, similar to Florida.

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66 *Jackson and Muratsuchi to Reintroduce Legislation to Halt New Federal Offshore Oil Drilling,* http://sd19.senate.ca.gov/news/2018-01-04-jackson-and-muratsuchi-reintroduce-legislation-halt-new-federal-offshore-oil (last visited Oct. 5, 2018).

67 Keith Schneider & Tony Barboza, *California offshore drilling could be expanded for the first time since 1984 under federal leasing proposal*, L.A. TIMES (Jan. 4, 2018).

68 *Senate Unveils California Environmental Defense Act, Public Lands and Whistleblower Protections*, KEVIN DE LEON (Feb. 23, 2017), http://sd24.senate.ca.gov/news/2017-02-23-senate-unveils-california-environmental-defense-act-public-lands-and-whistleblower.

69 SB 49 would make certain federal laws enforceable under state law, even if the federal government rolls back and weakens those standards. *Id*.

70 Interview with Charlie Plybon, Oregon Policy Manager, Surfrider Foundation (May 29, 2018).

RECENT LITIGATION

Gulf Restoration Network v. National Marine Fisheries Service (2018)

Gulf Restoration Network, Sierra Club, and the Center for Biological Diversity sued the Trump administration for failing to complete consultation on the impact of offshore drilling to endangered species in the Gulf of Mexico. The groups, represented by Earthjustice, challenge the government's unreasonable delay in completing the wildlife consultation, which has not been done since the disastrous Deepwater Horizon oil spill. The case is pending in federal district court in Florida.

Gulf Restoration Network v. Zinke (2018)

Earthjustice, representing the same conservation groups, filed a challenge to two offshore oil and gas lease sales held in the Gulf of Mexico. The lease sales are the largest areas ever offered for oil and gas development in U.S. history. The lawsuit challenges the environmental review of the lease sales on the basis that it underestimates the effects of the lease sales on the environment and climate change.

Center for Biological Diversity v. EPA (2018)

Conservation groups sued the U.S. Environmental Protection Agency for permitting oil companies to dump waste into the Gulf of Mexico without evaluating the dangers to water quality, marine species or the environment. The lawsuit challenges the Clean Water Act general permit that authorizes offshore oil and gas facilities to discharge unlimited wastewater, including chemicals used in hydraulic fracturing, into the Gulf of Mexico. The case is brought under the National Environmental Policy Act and the Clean Water Act.

Lighthouse Resources Inc. v. Inslee (2018)

Companies associated with the proposed development of a coal export terminal in Longview, Washington, filed a lawsuit in federal court against Governor Jay Inslee and two other Washington State officials, alleging that the defendants took actions to block a coal export terminal in violation of the dormant Commerce Clause. The plaintiffs also asserted that the defendants' actions were preempted by the Interstate Commerce Commission Termination Act and the Ports and Waterways Safety Act. The complaint alleged that the defendants had expressed "unyielding opposition to coal and coal exports," citing the governor's writings and statements regarding his concerns about coal combustion and export and climate change. The complaint also alleged that the defendants coordinated with other states to block coal exports. The plaintiffs asserted that the defendants violated the dormant foreign and interstate Commerce Clause by denying and refusing to process permits and expanding the scope of State Environmental Policy Act review beyond the boundaries of the state.

Sierra Club v. U.S. Department of Interior (2018)

Sierra Club filed a Freedom of Information Act (FOIA) lawsuit against the U.S. Department of the Interior seeking to compel a response to its September 2017 requests for documents related to external communications of six DOI officials, including the Secretary of the Interior. For these personnel, Sierra Club sought emails, text messages, faxes, voice mails, calendars, and sign-in sheets for meetings involving non-DOI persons. Sierra Club alleged that it submitted the requests "as part of its ongoing national effort to protect our public lands and promote the transition from fossil fuels to clean energy sources." Sierra Club alleged that "[b]ecause key DOI staff involved in agency decisionmaking appear to have strong industry ties, it is critical that the public be able to understand how the agency was influenced in these matters."

League of Conservation Voters v. Trump (2017) [71]

Following President Trump's April 28, 2017 Executive Order reversing President Obama's January 27, 2015 and December 20, 2016 withdrawals in the Arctic and Atlantic Oceans, LCV filed a lawsuit alleging that the President "lacks authority to reverse or undo Section 12(a) withdrawals" and "[n]either OCSLA nor any other statute authorizes the President to re-open for disposition areas withdrawn under OCSLA Section 12(a). The lawsuit alleges that the Trump Administration's position that the Secretary of the Interior need not determine whether offshore lease sales are consistent with federally approved state coastal management plans violates separation of powers principles and is beyond his statutory authority.

Environmental Defense Center v. Bureau of Safety and Environmental Enforcement (2014)

The Environmental Defense Center (EDC) filed a lawsuit in the federal district court for the Central District of California alleging that federal agencies and officials failed to comply with NEPA when they approved 51 Applications for Permits to Drill and Applications for Permits to Modify for offshore drilling. EDC alleged that the permits would facilitate oil and gas development and production in federal waters off California's coast and would authorize well stimulation such as acid well stimulation and hydraulic fracturing. EDC said that the Bureau of Safety and Environmental Enforcement (BSEE) improperly relied on categorical exclusions or no written NEPA documentation at all in making its determinations on these permits. Among the environmental risks enumerated in the complaint are increased greenhouse gas emissions. The Center for Biological Diversity (CBD) filed a similar lawsuit. EDC and CBD reached settlement agreements pursuant to which the Bureau of Ocean Energy Management (BOEM) and BSEE agreed to prepare a programmatic environmental assessment (EA) to analyze the potential impacts of certain well-stimulation practices including hydraulic fracturing on the Pacific outer continental shelf. After the EA was finalized and a Finding of No Significant Impact (FONSI) was approved, both EDC and CBD – as well as the State of California – brought new litigation

[71] See Complaint for Declaratory and Injunctive Relief in League of Conservation Voters v. Trump, No. 3:17-cv-00101-SLG (D. Alaska May 3, 2017).

challenging the agencies' action under NEPA and the ESA. The State included a claim under the CZMA.

Communities for a Better Environment v. Bay Area Air Quality Management District (2014)

Environmental organizations filed a lawsuit in California Superior Court challenging the granting by the Bay Area Air Quality Management District (BAAQMD) of a permit to Kinder Morgan to conduct crude-by-rail operations. The organizations allege that the Kinder Morgan operations will bring North Dakotan Bakken crude oil to Bay Area refineries in the same types of rail cars that were involved in the explosive train derailment in Québec in July 2013. They allege that the BAAQMD permit was issued in a "clandestine" manner "without any notice or public process whatsoever." They claim that BAAQMD "eschewed" its CEQA obligations by designating the project as "ministerial" and thereby failed to consider a number of impacts, including significant increases in greenhouse gas emissions.

Center for Biological Diversity v. California Department of Conservation, Division of Oil, Gas, and Geothermal Resources (2013)

Several environmental groups commenced a lawsuit against the California Department of Conservation, Division of Oil, Gas, and Geothermal Resources (DOGGR) alleging that the state has failed to properly oversee hydraulic fracturing operations. According to the complaint, the state's Underground Injection Control program requires a division of DOGGR to regulate oil and natural gas fracking operations. The lawsuit sought to prohibit hydraulic fracturing of oil and natural gas wells until DOGGR took steps to regulate the wells and ensure that the operations posed no risks to public health or the environment.