

To download other chapters or the full book, please visit
<https://www.eli.org/eli-press-books/environmental-protection-in-the-trump-era>

Environmental Protection in the Trump Era

Summer 2017



The Environmental Law Institute (ELI) makes law work for people, places, and the planet. Since 1969, ELI has played a pivotal role in shaping the fields of environmental law, policy, and management, domestically and abroad. Today, in our fifth decade, we are an internationally recognized, nonpartisan research and education center working to strengthen environmental protection by improving law and governance worldwide.

ELI staff contributing to this paper include Senior Attorneys Jay Austin, Tobie Bernstein, and James M. McElfish, Jr., Visiting Attorney Scott Badenoch, and Public Interest Law Fellow Benjamin Solomon-Schwartz. The authors thank Thien Chau and Madison Peticca for their assistance with research. Funding for research and drafting was provided by the Walton Family Foundation and the American Bar Association, Section of Civil Rights and Social Justice.

Stephen J. Wermiel

Chair, Section of Civil Rights and Social
Justice Publishing Committee
American Bar Association
American University
Washington College of Law

Tanya N. Terrell

Director, Section of Civil Rights and
Social Justice
American Bar Association

Sally Small Inada

Editor & Consultant, Section of Civil Rights
and Social Justice
American Bar Association

Paula Shapiro, Esq.

Associate Director, Section of Civil Rights and
Social Justice
American Bar Association

Design by Davonne Flanagan. Cover photo by Joyce N. Boghosian, (from Flickr), licensed under CC BY-SA 2.0.

Environmental Protection in the Trump Era.

© 2017 American Bar Association and Environmental Law Institute®, Washington, D.C.

All rights reserved.

Increasing Offshore Drilling for Oil and Gas

[The Outer Continental Shelf Lands Act \(OCSLA\)](#) governs all federal submerged lands from three miles seaward of the U.S. coast (the boundary of state waters) out to 200 miles seaward (the boundary of the U.S. exclusive economic zone). The Act:

- gives the Department of the Interior responsibility for managing mineral exploration and development of these lands, primarily offshore drilling for oil and natural gas; and
- gives the president authority to withdraw offshore lands from development.

The Trump Administration is attempting to revoke a series of Obama Administration actions under OCSLA, including reopening areas that are currently off-limits to oil and gas exploration.



Process.

OCSLA requires that federal leases of oil and gas rights be sold according to a series of five-year plans produced through an intensive public notice-and-comment process specific to the Act. The [current plan](#), covering the years 2017-2022, was finalized in November 2016; it scheduled lease sales in the Gulf of Mexico and in Alaska's Cook Inlet, but no other areas in the Arctic, Pacific, or Atlantic outer continental shelf.

Leasing Withdrawals. Section 12(a) of OCSLA grants the president authority “from time to time, to withdraw from disposition any of the unleased lands” of the outer continental shelf. This **authority has been used by six presidents to establish and maintain temporary oil and gas leasing moratoria as well as to create permanent protected areas.** [President Obama withdrew](#) certain areas of the OCS, including large portions of the U.S. Arctic and the underwater canyon complexes off the Atlantic Coast, from leasing for exploration, development or production “for a time period without specific expiration.” Section 12(a) does not provide explicit criteria for the exercise of this withdrawal power.

As with presidential designation of national monuments under the Antiquities Act ([see Chapter 5](#)), **OCSLA provides no express language authorizing a president to terminate a leasing withdrawal.** No president has ever revoked an open-ended withdrawal under Section 12(a), and it is legally untested whether a president can terminate a previous withdrawal. However, in 2008, President George W. Bush did rescind time-limited withdrawals issued by President Clinton that were designed to end in 2012, bringing them to an end immediately; but he left in place permanent marine sanctuary withdrawals that were without expiration dates.

Areas to Watch

Litigation challenging:

- revocation of OCSLA Section 12(a) leasing withdrawals, including the Chukchi and Beaufort Sea and Atlantic Canyons withdrawals;
- revocation of the BSEE Well Control Rule; and
- Department of Commerce review of Marine Sanctuaries and Marine National Monuments.

Trump Executive Order. On April 28, 2017, President Trump signed [Executive Order 13795](#) on “Implementing an America-First Offshore Energy Strategy.”

Section 5 of that Order:

- purported to immediately revoke President Obama’s withdrawals of offshore Arctic and Atlantic areas under Section 12(a) of OCSLA.

Section 3 directed the Secretary of the Interior to:

- consider revising the leasing schedule to include sales in these and other areas, and
- on July 3 the Department [commenced the process](#) of developing a new leasing plan covering the years 2019-2024; a comment period on this initial proposal closed on August 17.

Other provisions direct the Secretary to:

- review operating requirements on current lessees (Section 6); and
- to review, reconsider, and revise or rescind existing final rules on well control and on offshore Arctic drilling (Sections 7 and 11) and a proposed rule on offshore air quality (Section 8).

Section 4 of the Order directed the Secretary of Commerce to:

- refrain from designating or expanding any National Marine Sanctuary absent an accounting of the area’s energy or mineral resource potential, and
- to review all Marine Sanctuaries and Marine National Monuments designated or expanded in the past 10 years; a comment period on this review opened on June 26 and closed on August 14.



Discussion.

A coalition of 10 environmental and indigenous groups immediately [brought suit](#) in the District of Alaska **to enjoin Section 5 of the Executive Order and reinstate the Obama-era withdrawals**, which included 98% of U.S. Arctic waters and a series of Atlantic canyons stretching from Massachusetts to Virginia. The plaintiffs note that OCSLA makes no provision for revoking a leasing withdrawal, and they cite a [fifty-year string of OCSLA withdrawals](#) that stand today. Their argument parallels the debate over the Antiquities Act ([see Chapter 5](#)), which likewise delegates power to the president to designate national monuments but no express power to revoke them. **The American Petroleum Institute has intervened in the lawsuit and moved to dismiss it.**

The Executive Order’s other directives are moving forward, but **implementing them will entail time, agency resources, public participation, Congressional oversight, and the possibility of additional court challenges.** Section 3’s call to revise the offshore leasing schedule “to the maximum extent permitted by law” could well lead to drilling in Arctic or Mid- and South Atlantic areas that are excluded by the current 2017-2022 Leasing Program, and seismic surveys are [already moving forward](#) in the Atlantic. But the reopening of the existing leasing plan has both [strong support in Congress](#) and [bipartisan opposition](#), and in any event will require repeating the contentious, lengthy public planning process.

Similarly, Section 7 directed Secretary Zinke to **review the Bureau of Safety and Environmental Enforcement’s 2016 rule on blowout preventers and well control**, a direct response to the *Deepwater Horizon* explosion and oil spill in the Gulf of Mexico, and to propose a revised rule “if appropriate and as consistent with law.” Under the Administrative Procedure Act, applicable requirements for revising this or any final rule will include another full notice-and-comment rulemaking ([see Chapter 8](#)), which must produce a “reasoned analysis”—the Supreme Court’s [State Farm standard](#)—to justify the changes. Any revised rule will again be subject to judicial review for compliance with APA procedures and consistency with OCSLA.

Finally, like other Administration actions (including the “two-for-one” Executive Order, [see Chapter 2](#)), **several of the offshore Order’s provisions emphasize regulation’s costs with little or no consideration of benefits:**

- The Section 4 accounting of the value of Marine Sanctuaries and Marine National Monuments calls for analyzing the “costs of managing” and the “opportunity costs associated with” these protected areas, but not for analysis of their offsetting benefits for fisheries, recreation, or other ocean services;
- Section 6 mandates modifying operator regulations and financial assurance policies to “minimiz[e] unnecessary regulatory burdens,” without any corresponding mention of increased environmental or safety risks; and
- Sections 9 and 10 dismiss [documented concerns](#) about the potential effects of seismic surveying on marine mammal populations.

Each of these policy decisions also may get tested in court against their respective governing statutes.



Opportunities for Public Engagement.

Environmental or citizen action groups may engage in public notice-and-comment processes for the ongoing development of the 2019-2024 Leasing Program, as well as for any rulemaking procedure to repeal or replace the Bureau of Safety and Environmental Enforcement (BSEE) Well Control Rule. Though the comment period for the review of Marine Sanctuaries and Marine National Monuments has ended, additional stakeholder engagement may help draw attention to the value of specific areas pending a final decision. Finally, litigation over the Section 12(a) withdrawals is ongoing, and additional court cases may emerge in the wake of attempts to implement other sections of the Executive Order.