THE IMPLICATIONS OF THE NOAA NATIONAL SYSTEM OF MARINE PROTECTED AREAS ON THE OUTER CONTINENTAL SHELF LANDS ACT

I. INTRODUCTION: TENSION BETWEEN THE NATIONAL SYSTEM OF MARINE PROTECTED AREAS AND THE 5-YEAR PROGRAM FOR OIL AND GAS LEASING IN THE OUTER CONTINENTAL SHELF.

Perhaps the best place to start is with two truisms. First, America's coast contains ecosystems which are important not only for their biological and scientific value but also for their intrinsic worth.[1] Second, this country relies on oil and natural gas to provide a myriad of essential services and the Outer Continental Shelf ("OCS") is a proven domestic source of these fossil fuels.[2] This paper will explore these truisms by outlining both the substances and procedure of the Outer Continental Shelf Lands Act ("OCSLA" or "the Act") and the National System of Marine Protected Areas ("National System").[3] This exploration will demonstrate that the National System is inherently flawed and creates intractable conflicts with the mission of the OCSLA, hampering essential oil and gas development in this country.

While unfortunate, the tension between protecting the coastal ecosystem and accommodating resource development exists and is extremely polarizing.[4] The OCSLA procedures addressed below demonstrate that extreme care and detailed analysis is required to minimize environmental harm while maximizing resource extraction.[5] However, the National System, specifically Section 5, will negatively impact the efficacy of oil and gas leasing in this country by changing the focus from the OCS to MPAs. Section II of this paper will discuss the OCSLA procedural requirements. Section III will focus on the National System of Marine Protected Areas, specifically, on the Section 5 of the Executive Order and the procedure for nomination and inclusion in the System. Section IV will outline the OCSLA requirements for the 5- Year Program and the impact of recent case law. Section V will examine the potential influence the National Program will have on the 5-Year Plan and will contain references to recently filed comments that will avoid these problems.

II. PROCEDURAL DESIGN OF THE OUTER CONTINENTAL SHELF LANDS ACT

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[1] Defenders of Wildlife, Outer Continental Shelf Drilling: Impacts to Air, Water, Wildlife Coastal Economies and Climate available at http://www.defenders.org/resources/publications/policy_and_legislation/impacts_of_outer_continental_shelf_drilling.pdf

[2] *See, Mineral* Management Service, OCS Oil & Natural Gas Production as a Percentage of Total Production: 1954-2006, 2008 *available at http://www.mms.gov/stats/PDFs/June2008/AnnualProductionAsPercentage1954-2006AsOf6-2008.pdf*. (illustrating that over a fifty two year period OCS production accounted for approximately 11% of crude oil and 17% of natural produced in the United States).

[3] OUTER CONTINENTAL SHELF LANDS ACT, 43 U.S.C. § 1331 et seq.

[4] *See* Steve Lee Myers & Carl Hulse, *Bush Lifts Drilling Moratorium Prodding Congress*, N.Y. TIMES, July 14, 2008 (comparing arguments for and against increased domestic oil and gas production in the Outer Continental Shelf).

[5] *See* 43 U.S.C. §§ 1331 *et seq*. (articulating the procedures required prior to any extraction of oil or gas in the Outer Continental Shelf).

The Outer Continental Shelf Lands Act requires that the Secretary of the Interior prepare and maintain an oil and gas leasing program designed to meet the energy needs over a 5-year period.[6] In part the OCSLA upholds the general national policy that,

> "[t]he outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance [sic] of competition and other national needs."[7]

The Draft Proposed Outer Continental Shelf (OCS) Oil and Gas Leasing Program ("Draft Program") is the first step in the process and sets the foundation for the rest of the leasing program.[8]

Enacted in 1953, the OCSLA extended the jurisdiction of the United States government to the Outer Continental Shelf ("OCS") for the purpose of resource extraction.[9] Originally, OCSLA simply authorized the Secretary of the Interior to lease sections of the OCS for oil and gas extraction without any procedural guidance.[10] Notably absent from the original Act were specific guidelines to protect the environmental, social and cultural integrity of the OCS.[11] Instead the OCSLA was considered "essentially a carte blanche delegation of authority to the Secretary."[12] However, the "blowout of an OCS drilling project" in 1969 off the coast of Santa Barbara California resulting in a major oil spill combined with the effect of the 1973 OPEC oil embargo caused Congress to amend OCSLA including more Congressional guidance to protect environmental, social and economic issues.[13]

The 1978 OCSLA Amendments were intended, in part, as a response to pressure from environmental and social groups concerned about the ecological impact of oil and gas exploration. Also considered were states and local government concerns about the potential impact on their coastlines, commercial and recreational fishing groups, and the realization that the United States needed increased production of domestic oil and gas development.[14] In order to ease the sometimes competing concerns of the various stakeholders, the OCSLA Amendments extended the Secretary's authority to lease sections of the OCS while creating strict procedural guidelines to direct the Secretary's decisions.[15] The framework was designed to "provide a structure for every conceivable step" depriving the Secretary of his limitless discretion.[16]

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[6] 43 U.S.C. § 1344(a).
[7] *Id.* at § 1331
[8] U.S. DEPARTMENT OF THE INTERIOR, MINERALS MANAGEMENT SERVICE, DRAFT PROPOSED OUTER CONTINENTAL SHELF (OCS) OIL AND GAS LEASING PROGRAM 2010-2015 (2009) [hereinafter DRAFT PROPOSED PROGRAM].
[9] *State of California v. Watts*, 668 F.2d 1290, 1295 (1981).
[10] *Id.*
[11] *Id.*
[12] *Id.* (quoting H.R.Rep. No. 590, 95th Cong., 1st Session. 54 (1977).
[13] *Id.*
[14] *Id.*
[15] *Id.* at 1297.
[16] *Id.*

Relevant case law breaks OCSLA into four independent stages each with its own distinct set of procedural requirements.[17]

The preparation of the 5-year Program—the first stage and the motivation for this paper—will be discussed at length. It requires that "[t]he Secretary…prepare and periodically revise, and maintain an oil and gas leasing program to implement the policies of this Act."[18] This Program creates a basis for future decisions made by the Secretary and is the beginning of the analytical process required by statute. As a fundamental principle it is important to note that "prospective lease purchasers acquire no rights to explore, produce or development at the first stage of OCSLA planning."[19]

The second stage is the lease-sale stage.[20] During this stage, the Secretary solicits bids according to regulations promulgated in advance and awards leases according to internal regulations.[21] Under the OCSLA the lessee is granted "a priority in submitting plans to conduct [oil and gas exploration]" and does not acquire the rights to start exploration or development.[22]

The third stage, dubbed the "exploration stage," involves "review of the more extensive exploration plan."[23] The lessee must submit an exploration plan to the Secretary which includes, a schedule for the exploration, the type of equipment used for the exploration, a general location for exploration and any other information the Secretary deems necessary.[24] Exploration is also contingent upon a finding that the plans will not "be unduly harmful to aquatic life in the area, result in pollution, create hazardous or unsafe conditions, unreasonably interfere with other uses of the area, or disturb any site, structure, or object of historical or archeological significance."[25]

After accepting the exploration plan, the fourth stage is the development and production stage. During this stage, the lessee must submit yet another plan containing a statement describing all other facilities and operations outside of the OSC that might be used in the production or processing any resources extracted from the leased area.[26] This plan is forwarded to the governor of any state potentially affected (and potentially local governments) for comment and review.[27] In addition, the plan should contain information about the specific work performed, all facilities located on the OCS, environmental safeguards employed in development sites, the relevant safety standards implemented within the development area, the estimated production and time schedule and any other information required by the Secretary via regulations.[28] Moreover, if the proposed development is considered a "major federal action"

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[17] Some cases include a fifth stage, the sale the recovered resources to the Federal government. *See, e.g., Natural Resources Defense Council v. Hodel*, 865 F.2d 288 (1988) (discussing the five stages created by the OSCLA).
[18] 43 U.S.C. § 1344(a)
[19] *Sec'y of the Interior v. California*, 464 U.S. 312, 338 (1984).
[20] 43 U.S.C. § 1337(a).
[21] *See, Center for Biological Diversity v. U.S. Department of the Interior*, No. 07-1247 5 (D.C. Cir. April 17, 2009) (describing the four-step process).
[22] Secr'y of the Interior v. California, 464 U.S. at 313, 43 U.S.C. § 1337(a).
[23] *Id.*, 43 U.S.C. § 1340.
[24] § 1340(c)(3).
[25] § 1340(g).
[26] *Id.*
[27] *Secr'y of the Interior v. California*, 464 U.S. at 338.
[28] 43 U.S.C. § 1351

bringing it within the purview of the National Environmental Policy Act, the required Environmental Impact Statements must be included with the final development plan.[29] Only after thorough review of the plan, consideration and answer to any comment made by the governor of a state potentially affected, may the plan be accepted and the lessee proceed with the development and extraction.

As this summary illustrates, the procedural requirements for oil and gas development in the OCS are detailed and vigorous. The OCSLA requires thorough consideration and analysis of environmental effect of exploration in stage one,[30] stage three,[31] stage four,[32] and all of the studies required under Section 1346 of the Act which will clarify the environmental effect of the process. As will be discussed later, included in these analyses is the implicit and explicit consideration of MPAs making the National System redundant and unnecessary.

III. THE PROCEDURE FOR INDUCTION INTO THE NATIONAL SYSTEM OF MARINE PROTECTED AREAS

On May 26, 2000, President Clinton signed Executive Order 13158 ("the Order") establishing a coordinated national system to protect "significant natural and cultural resources within the marine environment"[33] The Order focuses on Marine Protected Areas or "MPAs" which are defined as:

> "any area of the marine environment that has been reserved by Federal, State, territorial, tribal or local laws or regulations to provide lasting protection for part or all of the natural and cultural resources therein."[34]

The prospective MPA's undergo a simple nomination process and if qualified— according to the requirements of the Framework for the National System of Marine Protected Areas (the Framework)—are inducted into the National System of Marine Protected Areas (National System).[35] This Section will describe the procedural requirements of the National System and describe the potential effect the Order will have on Federal Agencies tasked with the implementation of the OCS oil and gas exploration regulations.

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[29] *Id.*
[30] *See*, 43 U.S.C. § 1331(a) (describing the environmental balancing in the 5-year Program).
[31] § 1340(c)(3).
[32]. § 1351(c). This section requires that the plan include, "he environmental safeguards to be implemented on the outer Continental Shelf and how such safeguards are to be implemented." *Id.* The section also states that the plan must be rejected if the Secretary determines, (i) implementation of the plan would probably cause serious harm or damage to life (including fish and other aquatic life), to property, to any mineral deposits (in areas leased or not leased), to the national security or defense, or to the marine, coastal or human environments,(ii) the threat of harm or damage will not disappear or decrease to an acceptable extent within a reasonable period of time, and (iii) the advantages of disapproving the plan outweigh the advantages of development and production." *Id.*
[33] EXEC. ORDER NO. 13158, 65 Fed. Reg. 34909 (May 31, 2000).
[34] *Id* at § 2.
[35] *See generally*, NATIONAL MARINE PROTECTED AREAS CENTER, FRAMEWORK FOR THE NATIONAL SYSTEM OF MARINE PROTECTED AREAS OF THE UNITED STATES OF AMERICA 2 (2008) (hereinafter FRAMEWORK) (articulating the procedures and guidelines for the create of the National MPA System).

Underlying the Executive Order and the resulting Framework is the recognition that MPAs are important as a tool of marine conservation.[36] MPA is a generic term used to describe marine areas designated and managed by state, federal, local and tribal authorities.[37] Examples of MPAs include National Marine Sanctuaries created under the authority of the National Marine Sanctuaries Act, the North Fork, St. Lucie Aquatic Preserve, Federal Fishery Management Councils, and The Northwestern Hawaiian Island Marine National Monument and the Monomoy National Wildlife Refuge.[38] Because of the need to preserve the ecological, historical and cultural diversity of these designated MPAs the National System creates "comprehensive MPA planning coordination and support."[39] In doing so, the Framework sets forth a specific set of procedures whereby sites are nominated and inducted into the National System.

We will focus on two aspects of the procedure for inclusion in the National System. First, as we will see, the nomination and induction procedure is woefully inadequate risking the inclusion of unqualified sites in to the National System.[40] Second, we will examine Section 5 and the new obligations it creates for federal agencies. As we will see in Section V, these will both negatively affect the OCSLA program potentially impeding the effectiveness of oil and gas development in this country.

Prior to induction into the National System, an MPA must first be found eligible for nomination.[41] In order to be nominated a site must first meet the definition of an MPA.[42] As defined by Executive Order an MPA is, "any area of the marine environment that has been reserved by the Federal, State, territorial, tribal or local laws or regulations that provide lasting protection for part or all of the natural and cultural resources therein."[43] The Framework has attempted to define these terms in order to focus the sites eligible for consideration.[44] If a site meets the definition of an MPA, it must then demonstrate that it has a management plan and meets a priority conservation objective.[45]

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[36] *Id.* The purpose of the National System is to "support the effective stewardship, conservation, restoration, sustainable use, and public understanding…of the nation's most significant natural and curtural marine heritage and sustainable productin marine resources." *Id* at 13.

[37] *See Id.* (estimating that over 100 legal authorities have established some form of MPA). The MPA Center lists the following as benefits for participant MPAs, (1) enhanced stewardship through improved coordination and public awareness; (2) improved partnership between MPAs in the National System; (3) increased support for marine conservation through public awareness; (4) protecting MPA resources through Section 5 of the Executive order. National Marine Protected Areas Center, Benefits of a National System of MPAs, *available at* http://mpa.gov/pdf/national-system/final_ben_factsheet_oct08.pdf

[38] *Id.* at App. A. iii-v. The Framework estimates that roughly 83 percent of the MPAs were created and governed under state authority and jurisdiction. *Id.* This will be discussed later in the context of the Coastal Zone Management Act and the jurisdiction of states over their own territorial waters.

[39] *Id.* The MPA Center estimates that there are upwards of 1,700 marine areas in the United States. The purpose of the National System is to connect this "patchwork of protected areas" and provide scientific and conservation resources to the individual authorities. *Id.* at App. I, ix.

[40] Appendix A contains comments filed in response to the *Nomination of Existing Marine Protected Areas to the National System of Marine Protected Areas*, 74 FED. REG. 9798 (March 6, 2009).

[41] *Id.* at 17. The MPA Center reviews the sites in the U.S. Marine Protected Areas Inventory to identify areas that may meet the nomination criteria. An invitation to nominate is sent to the managing entities identified. *Id.* at 27–28.

[42] *Id.*

[43] Exec. Order 13158 § 2.

[44] *Id.* at 19–20.

[45] *Id* at 18.

A management plan must be developed according to one of four enumerated scales—a site specific MPA management plan, part of a larger MPA programmatic management plan, component of broader, non-MPA management plan, or be part of a verbal or written agreement.[46] The plan must also contain two components, first specified conservation goals and second a process of requirement for monitoring and evaluating those goals.[47] Furthermore, an MPA must achieve one of the conservation objectives developed by the MPA Center.[48] These objectives include the conservation and management of key benthic habitats, "key cultural sites that are paramount to a culture's identity or survival," key "foraging grounds" and areas that sustain or restore high-priority fishing grounds.[49] If a site meets the definition of an MPA, has a management plan and meets one of the enumerated conservation objectives it is eligible for nomination into the national system.[50]

After reviewing the nominated sites, the MPA Center publishes a list of the sites that meet the minimum criteria in the Federal Register.[51] The Center then "receive[s], evaluate[s] and forward[s]" public comments to the relevant managing entities and make a final determination for each of the nominated sites.[52] The list of MPAs inducted into the National system is then published in the Federal Register and additional information is available through the MPA Center.[53] The MPA Center must then identify and categorize conservation gaps within the National System and consider inclusion of sites which are necessary to fill those gaps.[54] After induction into the National System, MPAs are not subject to any new regulatory structures but have enhanced coordination and cooperation as well as the resources of the MPA Center at their disposal.[55]

While there are problems with the nomination of site into the National System because of a systematic lack of transparency and ill-defined procedure, the real dilemma is Section 5 of the Executive Order. This Section states:

> Each Federal agency whose actions affect the natural or cultural resources that are protected by an MPA shall identify such actions. To the extent permitted by law and to the maximum extent practicable, each Federal agency, in taking such actions, shall avoid harm to the natural and cultural resources that are protected

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[46] *Id.* at 19.
[47] *Id.*
[48] *Id.*
[49] *Id.* at 15.
[50] There is also an additional requirement for sites which are seeking inclusion based on the sites cultural value. The National System integrated the National Register of Historical Places criteria to judge the cultural value of the site to determine whether it should be inducted on that basis. *Id.* at 18, 21.
[51] *See Nomination of Existing Marine Protected Areas to the National System of Marine Protected Areas*, 74 FED. REG. 9798 March 6, 2009 (listing the sites that were found to meet the eligibility criteria).
[52] Framework at 28.
[53] *Id.* at 29. This additional information includes the name, location, category, conservation objective, boundaries, resources, authorizing legislation, and contact information. *Id.*
[54] *Id.* at 30.
[55] *See Id.* at 35–47 (describing the implementation of the National System of MPAs).

> by an MPA. In implementing this section, each Federal agency shall refer to the MPAs identified under subsection 4(d) of this order.[56]

The actual implementation of Section 5 is governed by the relevant federal agency but those agencies are expected to utilize exiting federal review procedures.[57] In addition, there is no single definition for the key terms in Section 5 ("avoid harm," affect" etc.) but the interpretation of the terms is left to the responsible agency.[58] Thus, neither the Executive Order nor the Framework articulates exactly how the review and avoidance is to take place but only requires *some* form of review and avoidance. The full implications of this will be discussed in Section V.

Without any further analysis, two things should be clear from this section. First, while the induction process for MPAs is standardized, the process by which MPAs are originally created is not therefore they are of varying degrees of ecological, cultural and historical integrity. Notice that any site may be eligible providing it meets the standardized definition of an MPA, has a management plan and meets one of the conservation objectives.[59] To illustrate the indefinite nature of this procedure it may be helpful to examine the procedure for designating a Marine Sanctuary under the National Marine Sanctuaries Protection Act (NMSA).[60]

The NMSPA authorizes the Secretary of Commerce to designate certain marine areas for protection.[61] However, the designation process can only be triggered after Secretary has made an initial determination that five qualifying criteria are met and if the area is currently listed on the Secretary's Site Evaluation List (SEL).[62] Only those sites which qualify and are placed on the SEL may be considered for nomination.[63]

The Act also articulates twelve factors to guide the Secretary's determination of whether the five qualifying criteria are met.[64] In weighing these factors, the Act requires that the Secretary consult with a variety of Federal, State and local officials including the relevant Committees in both the House of Representatives and the Senate, the head of the relevant federal

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[56] Exec. Order 13158 § 5.
[57] *Id.* Examples of the review procedures are the National Environmental Policy Act, the Coastal Zone Management Act and the Endangered Species Act.
[58] *Id.* at 45.
[59] *Id.*
[60] Some will argue that the MPA program and the National Marine Sanctuaries Act are not comparable because they serve two different purposes. They will say that the MPA program does not create any new rights, protections or additional regulatory responsibilities while sites designated under the NMSA acquire a new regulatory framework and procedure. *See FIND Response to comments.* However, as will become clear in Section V, the MPA program may still affect federal agencies whose action may effect listed MPAs.
[61] 16 U.S.C. §1433(a).
[62] The initial determination requires the Secretary show that, (1) the designation will help fulfill the stated purposes of the NMSA, (2) the area is of special national significance, (3) there are inadequate State or Federal protections in place, (4) the designation will facilitate the objectives enumerated under the Act and, (5) the area is of a "size and nature" to allow effective conservation and management.
[63] See 16 CFR § 922.10 (2000).
[64] 16 U.S.C. § 1433 (b)(1). These factors include the area's ecological qualities, the historical, cultural or paleontological significance, the potential uses (including commercial and recreational fishing) and the public benefit to be derived from sanctuary status. Id.

agencies and officials at the state and local level whose communities may be affected.[65] Only after weighing the listed factors and consulting with the required officials may the Secretary begin the designation process.

In order to formally designate a National Marine Sanctuary the Secretary must first issue a "Sanctuary proposal." This is done by publishing, in the Federal Register, (1) notice of the proposal, (2) proposed regulations necessary to implement the proposal, and (3) a summary of the draft management plan.[66] The Secretary must also publish notice in the affect community's newspapers and submit documentation to the relevant committees in both the House of Representatives and the Senate.[67] The Act then requires the Secretary to make specific documents available to the public.[68] Finally, the NMSA requires that at least one public hearing be held no sooner than thirty days after making the required documentation available to the public.[69] Only after maneuvering through all of these procedural hurdles may the Secretary designate an area as a Marine Sanctuary.

As the above description illustrates, the NMSA contains a much more detailed procedural framework than then the National System of MPAs. The remarkable procedural differences between the two programs and the stark deficiency of the MPA System would not be so troubling if it were not for Section 5. As we shall explore below Section 5 has startling ramifications for the implementations of the OCSLA leasing program.

IV. THE FIVE-YEAR PROGRAM: CURRENT FORMULATION AND ITS IMPLICATIONS

A. THE OCSLA 5-YEAR PROGRAM PROCEDURAL REQUIREMENTS

Section 18 of OCSLA requires the Secretary to "prepare, maintain, and periodically revise a leasing program consisting of a schedule of proposed lease sales."[70] The purpose of the 5-year program is to identify sections of the OCS for potential oil and gas development and to choose areas for further study.[71] The plan can generally be broken down into three different phases. First—and most importantly—the Secretary must balance certain enumerated social, economic and environmental factors,[72] second, the Secretary must invite comment and consider recommendations from the governors of effected states,[73] third, the Secretary must review the

[65] 16 U.S.C. § 1433(b)(2), see also 16 C.F.R § 922.23 (requiring the continued consultation with affected communities and state and federal agencies).
[66] 16 U.S.C. § 1434(a).
[67] 16 U.S.C. § 1434(a)(1).
[68] These documents include the draft Environmental Impact Statement required under the National Environmental Policy Act, a resource assessment containing the present and potential future uses of the area, any resources that may be subject to the jurisdiction of the Department of the Interior and any information—prepared after consultation with the Secretary of Defense, the Secretary of Energy and the Administrator of the Environmental Protection Agency—on any past, present or potential discharge of materials in the waters surrounding the proposed sanctuary. 16 U.S.C. §1434(a)(2).
[69] 16 U.S.C. §1443(a)(3).
[70] 43 U.S.C. § 1344.
[71] *Id.*
[72] 43 U.S.C. § 1344(a)(1)–(3).
[73] *Id.*at §1344(c) (permitting the submissions of recommendations from the governors of affected states).

leasing program at least annually.[74] For the purposes of this paper, we will primarily focus on the consideration of the social, economic and environmental costs and benefits of oil and gas exploration.

When generating the 5-year program, the Secretary must follow four guiding principles. First, he must consider the impact on the "economic, social and environmental values."[75] Second, the "[t]iming and location of exploration, development, and production of oil and gas among the oil and gas bearing physiographic regions" shall be based on eight different factors.[76] Those factors are: (1) the existing information concerning the geographical, geological and ecological characteristics of such regions; (2) an "equitable sharing of developmental benefits and environmental risks among the various regions"; (3) the "location of such regions in relation to energy markets"; (4) the location of the regions in relation to other uses of the sea; (5) the interest of the producers in development; (6) the laws and policies of the effected states as identified by the governors of those states; (7) the relative environmental sensitivity and marine productivity of the different areas; and (8) the relative environmental and predictive information for different areas of the OCS.[77] The third principle is that the "Secretary shall select the timing and location of leasing, to the maximum extent practicable, so as to obtain a proper balance between the potential for environmental damage, the potential for the discovery of oil and gas, and the potential for adverse impact on the coastal zone."[78] Fourth, the leasing "shall be conducted to assure receipt of fair market value for the lands leased."[79]

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[74] *Id* at § 1344(a).
[75] 43 U.S.C. § 1344(a)(1).
[76] *Id.* at § 1344(a)(2).
[77] *Id.*
[78] *Id.* at § 1344(a)(3).
[79] *Id.* at 1344(a)(4). Also key to understanding the requirements of the 5-Year Program are the purposes of the 1978 Amendments which are: (1) establish policies and procedures for managing the oil and natural gas resources of the Outer Continental Shelf which are intended to result in expedited exploration and development of the Outer Continental Shelf in order to achieve national economic and energy policy goals, assure national security, reduce dependence on foreign sources, and maintain a favorable balance of payments in world trade; (2) preserve, protect, and develop oil and natural gas resources in the Outer Continental Shelf 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, (C) to insure the public a fair and equitable return on the resources of the Outer Continental Shelf, and (D) to preserve and maintain free enterprise competition; (3) encourage development of new and improved technology for energy resource production which will eliminate or minimize risk of damage to the human, marine, and coastal environments; (4) provide States, and through States, local governments, which are impacted by Outer Continental Shelf oil and gas exploration, development, and production with comprehensive assistance in order to anticipate and plan for such impact, and thereby to assure adequate protection of the human environment; (5) assure that States, and through States, local governments, have timely access to information regarding activities on the Outer Continental Shelf, and opportunity to review and comment on decisions relating to such activities, in order to anticipate, ameliorate, and plan for the impacts of such activities; (6) assure that States, and through States, local governments, which are directly affected by exploration, development, and production of oil and natural gas are provided an opportunity to participate in policy and planning decisions relating to management of the resources of the Outer Continental Shelf; (7) minimize or eliminate conflicts between the exploration, development, and production of oil and natural gas, and the recovery of other resources such as fish and shellfish; (8) establish an oilspill liability fund to pay for the prompt removal of any oil spilled or discharged as a result of activities on the Outer Continental Shelf and for any damages to public or private interests caused by such spills or discharges; (9) insure that the extent of oil and natural gas resources of the Outer Continental Shelf is assessed at the earliest practicable time; and (10) establish a fishermen's contingency fund to pay for damages to commercial fishing vessels

Section 18 also includes a mechanism by which state governments, federal agencies and private parties are included in the decision making process. Section 18(c)(1) requires the Secretary to consult with federal agencies and state governments effected by the program and also permits the Secretary "invite and consider suggestions" from an executive official from any effected local government.[80] State governments can also offer comment through § 1345 which permits the Governor to submit comments and recommendations to the Secretary.[81] If a Governor requesting modification, the Secretary must respond in writing either granting the request or denying the request and stating reasons for the denial.[82] Accordingly, while the states cannot necessarily block adjacent oil and gas development in the OCS, they have considerable influence in the decision.

Additionally, the Courts have weighed in on the Section 18 requirements finding that while the Secretary must adhere to the many procedural requirements, the actual implementation of the program is still subject to the discretion of the Secretary. For example, in determining whether the Secretary adequately balanced the social, environmental and economic factors the *Watt*s I Court stated that they "must determine whether 'the decision is based on a consideration of the relevant factors and whether there has been a clear error in judgment."[83] In terms of balancing the competing interests of the oil and gas leasing program the Secretary must use all of the available information and make an informed, rational decision. Thus, the Courts have applied the "rationality test" for all policy decision and "close calls" made by the Secretary in creating a comprehensive 5-year program.[84]

B. TREATMENT OF MPAS IN THE CURRENT DRAFT PROPOSED PLAN

The Draft Proposed Outer Continental Shelf Oil and Gas Leasing Program ("Draft Proposed Program") does not concern itself with Marine Protected Areas. In the Draft Proposed Program, the only Protected Areas specifically exempted from drilling are Federal Sanctuaries under "executive withdrawal" under Section 12 of the OCSLA.[85] Thus, with the exception of specific federal sanctuaries, the Draft Proposed Program does not explicitly protect MPAs.

Also of interest, is that there is no specific discussion of the National Marine Sanctuaries Protection Act and the resulting protected areas.[86] This is curious because any mention of the NMSPA would indicate that all Sanctuaries under that Act are protected while its absence might lead to the contrary conclusion. One potential explanation for this omission is that the Congressional Moratorium, which lapsed in September 2008, specifically prohibited leasing in areas designated sanctuaries and therefore specific discussion in the Draft Proposed Program was

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and gear due to Outer Continental Shelf activities. OUTER CONTINENTAL SHELF RESOURCE MANAGEMENT, DECLARATION OF PURPOSE, 43 U.S.C. § 1802 (1978).

[80] *Id.* at § 1344(c)(1).

[81] § 1345.

[82] *Id.*

[83] Watts I, 668 F.2d at 1319.

[84] As we will see below, part of the reason the Court has applied the rationality test to the Secretary's decision at the 5-year Program stage is that the Program is intended to be broad and over-inclusive.

[85] 43 U.S.C. §1340(a) (2000).

[86] NATIONAL MARINE SANCTUARIES PROTECTION ACT 16 U.S.C. § 1431 *et seq.* (2000)

unnecessary. Since the moratorium was allowed to lapse, there is no longer any specific prohibition on development in the Sanctuaries. Therefore, according to the plain language of the Draft Proposed Plan there is little explicit consideration of MPAs, both federal and state. Nonetheless, as we shall see shortly, the OCSLA both implicitly and explicitly requires the study and conservation of the marine environment including those areas protected by MPAs.

C. REASONS THAT MPA WERE NOT CONSIDERED IN THE DRAFT PROPOSED PROGRAM

Close reading of the Draft Proposed Program will not reveal any direct discussion of the National System of MPAs; in fact, the Draft Proposed Program does not reference even one specific MPA.[87] Considering the number of MPAs that exist along the coastline in this country, this omission is surprising.[88] As will be discussed in Section V below, this oversight does not close the door on detailed analysis or protection of MPAs. Relevant to this paper, there are two possible explanations for the omission, first, MPAs created by state and local governments are within the three mile state jurisdictional limitation and the OCS is outside of this geographic area. Second, full discussion of the potential effect on MPA's is mandatory later in the OCSLA leasing process and consideration in the Draft Proposed Program is premature and unnecessary.

Generally, every state has jurisdiction and control over "all submerged lands shoreward of a line three geographical miles from its 'coast line.'"[89] In *U.S. v. California*, the Court was asked to decide who had jurisdiction over a section of the OCS for the purpose of leasing for resource extraction by defining the term "inland waters" and "coastline."[90] Without going into extensive detail, the Court ruled in favor of California which argued for a more expansive definition expanding the state jurisdiction.[91] This ruling is in standing with the traditional recognition of State jurisdiction over "navigable waters" within the State's boarders.[92] Thus, according to statute, the States maintain jurisdiction over a three mile zone of their coastline.

Even though the Submerged Lands Acts bestows State control over the ocean three miles from its coast, the Federal government maintains a "strong federal presence" within that zone.[93] Under the Submerged Lands Act, the Federal government retains control for "all its navigational servitude and rights in and power of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international

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[87] *See generally*, DRAFT PROPOSED PROGRAM (articulating the plan for resource extraction in the OSC).
[88] *See Id* (estimating that there are approximately 1700 MPAs in the United States).
[89] SUBMERGED LANDS ACT OF 1953, 43 U.S.C. §§ 1301–1303. Texas and Florida have acquired control over 9 *nautical miles* into the Gulf of Mexico. U.S. Commission on Ocean Policy, AN OCEAN BLUEPRINT FOR THE 21ST CENTURY: FINAL REPORT OF THE U.S. COMMISSION ON OCEAN POLICY, *PRIMER ON OCEAN JURISDICTIONS: DRAWING LINES IN THE WATER* (Sept. 20, 2004) *available at* http://oceancommission.gov/documents/full_color_rpt/03a_primer.pdf
[90] *U.S. v. California*, 381 U.S. 139 (1964) (discussing the language of the Submerged Lands Act). In this case the Court was asked to define the extent of "submerged lands" under California's jurisdiction as defined by the Submerged Lands Act of 1953 that, "grants to the State title to and ownership of the lands beneath navigable waters within the boundaries of the respective States." *Id.*
[91] *Id.*
[92] *see* Robin Kundis Craig & Sara Miller, *Ocean Discharge Criteria and Marine Protected Areas: Ocean Water Quality Protection Under the Clean Water Act*, 29 B.C. ENVT' AFF. L. REV. 1, 8 (2001) (discussing the impact of MPAs on the efforts of the U.S. Environmental Protection Agency to establish ocean discharge criteria).
[93] *Id.* at 12.

affairs."[94] For example, the Federal government retains authority, under the Rivers and Harbors Act, to prohibit the "construction or obstruction in navigable waters" absent consent from Congress or the Army Corps of Engineers even if those waters are within the three mile state jurisdiction.[95] Hence, even though the Submerged Land Act confers state control over the three mile area, the Federal government may still exert jurisdiction in certain enumerated areas.

The Federal government maintains exclusive jurisdiction and control over a much larger expanse of the coastal seas. Generally, the Federal government has exclusive jurisdiction over the 200 mile exclusive economic zone (EEZ) which begins at the point the three mile state jurisdiction ends.[96] It is this area three to two hundred miles off the coast that contains the outer continental shelf. The OCS generally begins 3-9 miles from the coast and may extend for more than 200 hundred miles.[97] The OCSLA gives the Federal government exclusive jurisdiction over the submerged lands in the continental shelf. Therefore, the Federal government and not the states have complete control and jurisdiction over the OCS and the resources therein. This obviously implicates the absence of MPA's in the OCS subject to the requirements of the OCSLA.[98]

The jurisdictional difference illustrates one of the main reasons that MPAs are not discussed in the Draft Proposed Program. Simply stated, most MPAs do not extend into the OCS and are therefore not within the required scope of Section 12 of the OCSLA.[99] According to the Framework, the majority of the MPAs were designated by local and state governments and not under federal statutes.[100] This has two primary effects. First, the state and local MPAs exist within the 3 mile jurisdiction set by the Submerged Lands Act which is generally not part of the OCS. Second, as a general rule the federal government cannot intrude upon state jurisdiction over the 3 mile zone and cannot therefore, lease extraction rights therein.[101] Consequently,

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[94] *Id* at 9 (quoting 43 U.S.C. 1314(a)).
[95] *Id.*
[96] *See Id.* at 11–12. The 200 mile EEZ is derived from the United Nations Convention on the Law of Sea which proscribes a 12 mile territorial sea, a 24 mile contiguous zone and a 200 mile exclusive economic zone. *Id.* While the United States is not a signatory of the Convention, it has implicitly excepted the 200 mile EEZ through various government actions. *Id.*
[97] U.S. Commission on Ocean Policy, AN OCEAN BLUEPRINT FOR THE 21ST CENTURY: FINAL REPORT OF THE U.S. COMMISSION ON OCEAN POLICY, *PRIMER ON OCEAN JURISDICTIONS: DRAWING LINES IN THE WATER* (Sept. 20, 2004) *available at* http://oceancommission.gov/documents/full_color_rpt/03a_primer.pdf
[98] *See, Secretary of the Interior v. California*, 464 U.S. 312 (1983) (discussing the different geographic jurisdictions of the states and federal government).
[99] The requirements of the OCSLA beyond the Program Planning stage that many require detailed consideration of state and local MPAs will be discussed later in the context of the Coastal Zone Management Act.
[100] FRAMEWORK App. B at iv.
[101] The OCSLA does not prohibit the leasing of territory within the 3-mile zone. 43 U.S.C. § 1337. In fact, the Act contains a provision that specifically articulates the procedure for a lease for a portion of the OCS located within the 3 mile zone. *Id.* Further, the OCSLA contains a provision that deals exclusively with potential jurisdictional conflicts between the federal government and states. 43 U.S.C. § 1336(a). This is all in addition to the exceptions- discussed above- to the general rule that states have exclusive jurisdiction over actions within the 3 mile zone. However, to the author's knowledge there are no cases that test whether the Federal government has exercised its jurisdiction to lease areas within the 3 mile zone. In addition, the language of the OCSLA is defined in terms of the Submerged Lands Act, therefore as a general rule, the states still enjoy exclusive jurisdiction and control over the 3-mile zone with the relevant OCSLA sections seemingly just keeping the federal government's options open. § 1337(h).

federal leasing activities do not exist within the vast majority of MPAs and therefore discussion at the 5-year Planning stage is simply out of place.

In addition to the jurisdictional limitation, it is important to understand that the OCSLA is "pyramid-like in structure." This alludes to the relative broad and inclusive planning permitted during the 5-year program and the narrower more "focused" planning during the exploration and development phases.[102] For this reason, at the early stage in the planning process, the Secretary may tend to err on the side of over-inclusion.[103] The rationale behind this is that because any area within the OCS that may potentially be leased must be included in the Draft Proposed Program, the failure to include such an area results in its total exclusion from lease consideration. Therefore, all areas—even those areas ultimately exempt for environmental reason—are included at this stage in the process despite a low probability for future developed for oil and gas leasing. So, while areas that will never actually be leased are included in the preliminary rounds, it does not mean that they will actually be exposed to oil and gas leasing activities after more targeted studies.

As is clear from this section, the Draft Proposed Program is just the beginning of a very long process. The OCSLA requires the Secretary to consider the entire OCS and make certain determinations about the potential impact leasing will have on the environment. We have proposed two reasons for the omission of MPAs in the Draft Proposed Program, first, since the majority of MPAs fall under state or local jurisdiction, they are not in danger of being leased and developed by the federal government; second, the Draft Proposed Program analyzes the OCS in its entirety and does so very broadly and a more detailed examination of specific sites and the effect of development will occur later. Regardless of the reason, what will become apparent is that the National System has the potential of sabotaging the OCSLA process by creating additional analytical responsibilities which will interfere with the proper function of the federal oil and gas leasing program.

V. THE EFFECT OF THE NATIONAL SYSTEM OF MPA ON THE OIL AND GAS LEASING PROGRAM.

One of the principle concerns with the MPA program is that Section 5 of the Executive Order authorizing the program increases the Secretary of the Interior's already expansive analytical responsibilities. Because of the lackluster procedure of the Framework, the expansion would include exhaustive, expensive and unnecessary consideration of all MPAs in the National System regardless of their ecological or cultural worth. Now, while the goals of the MPA System—increased coordination and public education— are reasonable, the scope is

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[102] *Id.*

[103] In *Hodel* the petitioners argued that the Secretary's oil prices were too broad and therefore incorrectly inflated the economic value of oil and gas leasing. *Natural Resources Defense Council v. Hodel*, 865 F.2d 288 (1988). The petitioners therefore argued that the price scheme should be changed to reflect what they considered to be realistic price fluctuation. *Id.* The Court noted that the 5-year plan was just the starting phase in the process and the Secretary needed the flexibility to include "many areas in the program at the start." *Id.* The Court supported this thesis by referencing the statutory requirement that any leased area must be included in the 5-year plan or be completely restricted from leasing at a later time. Therefore, as the Court conceded, "[the plan will proceed] from broad-based planning to an increasingly narrower focus as actual development grows more imminent" and the Secretary should be given more deference at the beginning stages of plan development. *Watt I*, 668 F.2d at 1297.

disproportionate and manifestly *unreasonable*. Section 5 of the Executive Order compounds the System's inherent procedural deficiencies making the effect of the National System completely unpredictable.

In terms of the OCSLA leasing program, there are two main problems with the National System. First, OCSLA already considers the ecological effect of drilling at length and increased federal obligations will impede the proper function of the OCSLA program. Second, by changing and expanding the role of federal agencies, the MPA program will increase litigation and possibly force the Secretary of the Interior to reject leasing proposals that would otherwise by eligible for exploration. For these two reasons, the MPA program should be changed to limit the effect of Section 5.

A. OCSLA Already Requires Consideration of Many MPAs and Requiring Additional Consideration is Unnecessarily Burdensome

OCSLA does a more than adequate job of ensuring that the environmental effects of oil and gas leasing are understood and minimized. As discussed in Section IV, the OCSLA requires exhaustive study of the environmental and ecological effects of drilling in the OCS. A few observations about this requirement, first, the majority of MPAs are created by state or local mandate and therefore not located within the OCS. Second, the current Draft Proposed Program contains balancing of environmental factors required under Section 18 and an analysis of the environmental sensitivity of the proposed areas. Third, OCSLA calls for environmental studies throughout the entire leasing process.[104] Lastly, under the Act the Secretary is required to consider the effect leasing has on state Coastal Zone Management program which contain many state MPA programs.

The majority of MPAs are not at risk of oil and gas development under the OCSLA. The reason for this is that the majority of the OCS is beyond the three mile area in which the states have jurisdiction.[105] Remember that about 83% of all MPAs are created by state and local entities.[106] While it is not impossible for the Secretary to develop within this three mile area, OSCLA has procedural mechanisms that dictate how and when the Secretary can consider development within the three mile zone.[107] For example, the Act requires consultation with the Governor of the state affected and a percentage of the revenues from any development.[108] While this does not amount to an outright prohibition, the Act's insistence on state consultation limits the likelihood of actual development without state consent which would negate the state's claim to the MPA.[109]

The Draft Proposed Program, which precipitated this paper, contains an exhaustive study of the environmental effects of any proposed drilling. Section 18 requires the Secretary to:

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[104] *See* 43 U.S.C. §§ 1331–1345.
[105] *Supra* note 97.
[106] FRAMEWORK, App. B at iv. This leaves approximately 17% of the MPA which are run by the federal government.
[107] 43 U.S.C. § 1337(g).
[108] *Id.*
[109] *See e.g.* 43 U.S.C. §§ 1334(h), 1337(g), 1344(c), 1345, 1351 (requiring the solicitation of input from governors of affected states).

> select the timing and location of leasing, to the maximum extent practicable, so as to obtain a proper balance between the potential for *environmental* damage, the potential for the discovery of oil and gas, and the potential for adverse impact on the coastal zone.[110]

It also requires the Secretary to consider the "the relative environmental sensitivity and marine productivity of different areas of the outer Continental Shelf."[111] Furthermore the Secretary is required to "conduct environmental studies and prepare any environmental impact statement required."[112] Thus, in the first stage in the leasing process the Secretary is required to consider the environmental balanced against the economic benefit, consider the environmental sensitivity of the regions and conduct any and all environmental studies required by the National Environmental Policy Act as well as the OCSLA.

The above mentioned studies are only in the first of four stages. The OCSLA also requires consideration of environmental factors during in the exploration and development phases. During the exploration phase Secretary must find that "such exploration will not be unduly harmful to aquatic life in the area, result in pollution, create hazardous or unsafe conditions, unreasonably interfere with other uses of the area."[113] The development stage requires that the lessee submit a plan that includes "the environmental safeguards to be implemented on the outer Continental Shelf and how such safeguards are to be implemented."[114] The section also states that the plan must be rejected if the Secretary determines that the plan will have an adverse effect on the OCS environment.[115] This illustrates the many precautions taken to protect the marine environment, including the environment in MPAs. The OCSLA also contains express provision for the protection of areas covered in state coastal zone management programs.

The Coastal Zone Management Act (CZMA) was enacted to "encourage prudent management and conservation of natural resources in the coastal zone."[116] The CZMA encourages states to develop a coastal management plan which takes into account the needs of the state, the national interest and the federal agencies "principally affected by such a program."[117] The management plan is then approved by the Secretary of Commerce creating both state and federal obligations vis-à-vis the marine areas included in the plan.[118] These plans

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[110] 43 U.S.C. § 1344(a)(3).
[111] § 1344(2)(g).
[112] § 1344 (b)(3).
[113] § 1340(c)(3).
[114] § 1351(c).
[115] *Id.* The Section states the Secretary shall reject plan if: "(i) implementation of the plan would probably cause serious harm or damage to life (including fish and other aquatic life), to property, to any mineral deposits (in areas leased or not leased), to the national security or defense, or to the marine, coastal or human environments,(ii) the threat of harm or damage will not disappear or decrease to an acceptable extent within a reasonable period of time, and (iii) the advantages of disapproving the plan outweigh the advantages of development and production." Id.
[116] *Sec'y of the Interior v. California*, 464 U.S. 312. For purposes of this case, the coastal zone is defined as the 3-mile strip within the state's jurisdiction. *Id.*
[117] *Id.*
[118] *See Id.* (discussing the CZMA in relation to the OCSLA).

are not only important for coordinating state conservation of marine ecosystems, but also influence decisions made by the Secretary under OCSLA.

OCSLA requires that the exploration plan comply with the "applicable state management program developed under the CZMA."[119] Furthermore, OCSLA allows for Secretarial disapproval if the plan is not consistent with the state management program.[120] A state management plan must also be complied with at the development and production stage. If the affected state believes the development plan is inconsistent with the management plan, it may veto the plan as "inconsistent."[121] While this veto may be overridden by the Secretary of Commerce, it is yet another example of how much influence the states have on OCSLA planning.[122] Therefore, the OCSLA expressly provides for state coastal management plans requiring that any exploration or development plans submitted to the Secretary be in conformance with such a plan. Consequently, state management plans—including state MPAs—are considered during the OCS leasing process. Section 5 will place an additional burden on the Secretary and restrict the proper functioning of the OCSLA.

B. Section 5 May Unreasonably Increase the Role of MPAs in the OSCLA Leasing Calculation

As discussed in the previous Section, not only is there ample consideration of the ecological impacts of oil and gas exploration but state MPAs are either not directly affected by the OCS development or often times they are protected under the purview of state coastal zone management plans. Some will argue that even if MPAs are implicitly or explicitly considered during the OCSLA process, there is no harm in additional levels of agency deliberation under Section 5. However, this ignores the reality of Section 5. If applied to the OCS, Section 5 will increase the potential for litigation, force exclusion of qualified sites undermining the purpose of the statute and force the Secretary to make decisions based on political reasons and not on science.

Section 5 will force Federal agencies to consider the impact of their actions on the MPAs caused by exploration and development in the OCS. The "avoid harm" language may cause some areas to be eliminated from the Draft Proposed Plan thus excluding them from considering during the 5-year period the Program is operable. For example, consider a small MPA, which is not significant for cultural or environmental reasons, off created by a local government at the request of an environmental organization. Under Section 5, when considering exploration in the OCS the Secretary must now attempt to "avoid harm" to this MPA. Does this precluded exploration in this area if that exploration may minimally increase silt in the MPA during construction? Does this preclude exploration if seismic activity will temporarily displace a certain fish species in the MPA? What about the effect on aesthetics during the exploration

[119] *Id.*
[120] 43 U.SC. § 1340(c)(2). The Secretary may approve a plan that is not in compliance with a state management plan if the Secretary finds that the plan is "consistent with CZMA goals or in the interest of national security." *Sec'y of the Interior v. California*, 464 U.S. 312.
[121] *Id.*
[122] *Id.*

process? The lack of definitive answers to these questions illustrates the fundamental problem with Section 5.

Neither the Executive Order nor the Framework articulates specific parameters for the interpretation of Section 5.[123] If it is interpreted liberally, some potential exploration sites will not be included in the 5-year plan because exploration and extraction might adversely affect MPAs. The effect of excluding sites from the 5-year Program means that those sites may not be developed during the period the Program controls OCS drilling. The danger of this is that sites which should be eligible for exploration cannot even be considered for leasing, exploration and development.[124] The exact consequence of limiting the sites for leasing is open for debate but what is clear is that it will severely limit the available options in the future. In a time when we need to keep all options on the table, this is not the time to place additional restrictions on potential oil and gas development.

This is especially true when the pyramid-like structure of the OCLSA leasing procedure is taken into account. This structure has two effects. First, it ensures the Secretary has all credible options available to make leasing decisions. The 5-year plan does give anyone rights to lease, develop or explore it is the beginning of the process and as discussed above should be considered a macro-level investigation of oil and gas development. As discussed above the 5-year plan gives the Secretary a preliminary list of potential sites for exploration which is purposefully broad and inclusive. Section 5 would in effect force the Secretary to micro-analyze the potential impact of drilling on MPAs and in doing so unnecessarily limit the sites for potential development. Further, the pyramid-like structure means that more detailed environmental studies are completed as the process continues. In addition to identifying potential sites, the 5-year plan identifies areas necessary for further study including any gaps in environmental knowledge. For these reasons, Section 5 has the potential of hamper the orderly development of oil and gas development policy in OCS.

Second, the pyramid-like structure delays litigation over environmental issues until the later stages in the process when the effect of drilling is more defined. This means that costly and burdensome litigation generally occurs when the Secretary has actually identified areas that will be leased or permitted development. The reason for the litigation delay is that in the preliminary stages of the OCS development are meant to give the Secretary complete information from which to make a decision. Litigation should be delayed until the Secretary has made leasing decisions and areas are under serious consideration for leasing. Section 5 may move litigation up to the 5-year planning stage. This premature litigation will have a negative effect on the Secretary's ability to make informed decisions by forcing decisions based on the fear of lawsuits instead of balancing the factors articulated in Section 18 of the OCSLA.

VI. CONCLUSION

The goals of the MPA program are commendable. Everyone recognizes that it is important to conserve America's coasts for ecological, cultural and social reasons. However,

[123] *See* FRAMEWORK at 43–45 (discussing the "avoid harm" requirement).

[124] It is important to remember that inclusion in the 5-year plan does not mean that the site will be explored or developed but is only a potential site for development which requires further study.

Section 5 of the MPA Executive Order is like using an axe in place of a scalpel. Instead of simply creating a system of communication and coordination amongst MPAs, it changes the responsibilities of federal agencies. It will drastically increase the Secretaries obligations to MPA programs at the expense of a functional national oil and gas leasing system. It does so by placing additional analytical responsibilities during the planning phase which may unnecessarily decrease the number of potential leasing sites. It also may have the effect of increasing litigation early in the process which will adversely affect proper decision making. OCSLA does a more than adequate job of considering and analyzing the potential environmental effects of drilling in the OCS and Section 5 only confounds the attempt to generate a comprehensive plan for resource extraction. For these reasons, Section 5 must be eliminated or clarified so as not to interfere with the obligations of federal agencies.

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