ORAL ARGUMENT NOT YET SCHEDULED

No. 22-1222

THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN PETROLEUM INSTITUTE, *et al.*,

Petitioners,

v.

U.S. DEPARTMENT OF THE INTERIOR, *et al.*,

Respondents

Petitioners' Opening Brief

Submitted By:
James M. Auslander
D.C. Bar No. 974898
Peter J. Schaumberg
D.C. Bar No. 913202
Beveridge & Diamond, P.C.
1900 N Street, NW Suite 100
Washington, DC 20036
Phone: (202) 789-6009
Fax: (202) 789-6190
jauslander@bdlaw.com
pschaumberg@bdlaw.com
Attorneys for Petitioners

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

(A) **Parties and Amici.**

1. The American Petroleum Institute, American Exploration & Production Council, EnerGeo Alliance, Independent Petroleum Association of America, International Association of Drilling Contractors, Montana Petroleum Association, National Ocean Industries Association, North Dakota Petroleum Council, Petroleum Alliance of Oklahoma, Southeast Oil and Gas Association, Utah Petroleum Association, and Western States Petroleum Association, on behalf of themselves and their members, (collectively, the "Associations") are Petitioners in this Court.

a. Petitioner American Petroleum Institute ("API") is a District of Columbia nonprofit trade association that represents approximately 600 members involved in all aspects of the U.S. oil and natural gas industry, including the exploration, production, shipping, transportation, and refining of offshore and onshore federal oil and gas. API has no parent corporations, and no publicly held company holds any stock in API.

b. Petitioner American Exploration and Production Council ("AXPC") is a District of Columbia nonprofit trade organization that represents the U.S. oil and gas industry before the national executive, legislative, and judicial branches of government. AXPC represents approximately 25 member companies involved in

the upstream sector of the oil and gas industry. AXPC has no parent corporations and no publicly held company owns any stock in it.

c. Petitioner EnerGeo Alliance is a non-governmental corporate party to this action. EnerGeo is not publicly traded and does not have parent corporations.

d. Petitioner Independent Petroleum Association of America ("IPAA") is a District of Columbia nonprofit trade organization that represents America's independent oil and natural gas producers before the federal executive, legislative, and judicial branches of government. IPAA represents approximately 7,000 members involved in the upstream oil and natural gas industry. IPAA has no parent corporations and no publicly held company owns any stock in it.

e. Petitioner International Association of Drilling Contractors ("IADC") is a Houston, Texas-based Delaware nonprofit trade organization that represents international drilling contractors and other support service contractors comprising the global upstream oil and gas industry supply chain. Such representation provides facilitation/collaboration of best practice policies and national authorities' compliance initiatives in the global oil and gas drilling space. IADC represents approximately 1000 member companies involved in all aspects of the global upstream oil and gas industry. IADC has no parent corporations and no publicly held company owns any stock in it.

f. Petitioner Montana Petroleum Association ("MPA") is a Montana-based trade association representing over 155 member companies involved in all aspects of the oil and natural gas industry. MPA has no parent corporations and no publicly held company owns any stock in it.

g. Petitioner National Ocean Industries Association ("NOIA") is a District of Columbia nonprofit trade organization that represents the U.S. offshore energy industry, including offshore oil and natural gas and offshore wind before the national executive, legislative, and judicial branches of government. NOIA represents approximately 120 member companies involved in all aspects of the oil and gas industry. NOIA has no parent corporations and no publicly held company owns any stock in it.

h. Petitioner North Dakota Petroleum Council ("NDPC") is a North Dakota-based trade organization representing more than 550 companies involved in all aspects of the oil and gas industry since 1952. NDPC has no parent corporations and no publicly held company owns any stock in it.

i. Petitioner Petroleum Alliance of Oklahoma ("PAO") is an Oklahoma nonprofit trade organization that represents the Oklahoma oil and gas industry before the state and national executive, legislative, and judicial branches of

government. PAO represents approximately 1300 member companies involved in all aspects of the oil and gas industry. PAO has no parent corporations and no publicly held company owns any stock in it.

j. Southeast Oil and Gas Association ("SOGA") is a Mississippi nonprofit trade organization that represents the oil and gas industry before the State executive and legislative branches of government. SOGA represents member companies involved in the oil and gas industry. SOGA has no parent corporations and no publicly held company owns any stock in it.

k. Utah Petroleum Association ("UPA") is a Utah-based petroleum trade association. Its members range from independent producers to major oil and natural gas companies widely recognized as industry leaders responsible for driving technology advancement resulting in environmental and efficiency gains. UPA has no parent corporations and no publicly held company owns any stock in it.

l. Western States Petroleum Association ("WSPA") is a non-profit trade association that represents companies that account for the bulk of petroleum exploration, production, refining, transportation and marketing in the five western states of Arizona, California, Nevada, Oregon, and Washington. WSPA represents 15 member companies involved in all aspects of the oil and gas industry. WSPA has no parent corporations and no publicly held company owns any stock in it.

2. United States Department of the Interior; Debra A. Haaland, in her official capacity as Secretary of the United States Department of the Interior; the Bureau of Ocean Energy Management ("BOEM"); and Amanda Lefton, in her official capacity as Director of BOEM, (collectively, "Interior") are Respondents in this Court.

3. No amici have participated in this Court. The Associations are presently unaware of any amici that intend to participate in this appeal.

(B) **Ruling Under Review.** There is no lower court ruling under review. This is an original Petition for Review in this Court. The administrative action on review is Interior's failure to prepare and maintain a Five-Year Leasing Program for leasing federal oil and gas on the Outer Continental Shelf as required by the Outer Continental Shelf Lands Act, 43 U.S.C. § 1344(a), and its implementing regulations, 30 C.F.R. part 556, subpart B.

(C) **Related Cases.** Though the case on review has not previously been before this Court, the Associations have previously challenged this failure to act in separately filed litigation, and that claim was dismissed for lack of subject matter jurisdiction on the basis that exclusive jurisdiction exists in this Court. *American Petroleum Institute, et al. v. U.S. Dep't of the Interior, et al.*, No. 2:21-CV-2506, (W.D. La. filed Aug. 16, 2021); *id.* ECF No. 97 (Nov. 3, 2022).

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Constitutional and Statutory Authorities

Rules and Regulations

Additional Authorities

*Authorities upon which Petitioners chiefly rely are marked with asterisks.

GLOSSARY

API	American Petroleum Institute
BOEM	Bureau of Ocean Energy Management
OCS	Outer Continental Shelf
OCSLA	Outer Continental Shelf Lands Act

INTRODUCTION

This case challenges the Department of the Interior's failure, for the first time in history, to perform its nondiscretionary obligation to prepare and maintain a Five-Year Leasing Program ("Program") for leasing federal oil and gas on the Outer Continental Shelf ("OCS") as required by the Outer Continental Shelf Lands Act ("OCSLA").

The relevant law and facts are straightforward and beyond dispute. Since Congress amended OCSLA in 1978, an effective Program is a statutory prerequisite for any federal oil and gas leasing to occur on the OCS. Interior maintained an effective Program in place for four decades. Yet, Interior allowed the previous Program to expire on July 1, 2022, without a successor Program in place. No Program has been in effect during the ensuing more than six months. Interior has not committed even to a date for adoption of the next Program. A federal court injunction, and then an Act of Congress, were necessary to compel Interior to hold even the remaining OCS oil and gas lease sales scheduled under the prior Program (spanning mid-2017 through mid-2022), which now must occur by September 30, 2023.

This Court should declare Interior in violation of its obligation to prepare and maintain a Program, and compel Interior to adopt promptly a new Program scheduling OCS oil and gas lease sales to occur between 2023 and 2028.

STATEMENT OF JURISDICTION

The Court's December 28, 2022 order directed the parties "to address in their briefs this court's jurisdiction to review respondents' failure to implement a leasing program pursuant to 43 U.S.C. § 1344(a)." This Court has jurisdiction under OCSLA, 43 U.S.C. § 1349(c)(1), and the Administrative Procedure Act ("APA"), 5 U.S.C. § 703.

Under OCSLA, "[a]ny action of the Secretary to approve a leasing program pursuant to section 1344 of this title shall be subject to judicial review only in the United States Court of Appeal for the District of Columbia." 43 U.S.C. § 1349(c)(1). This Court's prior cases under that statutory provision involved challenges to approved Programs. No court previously had to address a claim for failure to prepare and maintain a Program on the OCS because, until now, Interior had faithfully and continuously done so. Accordingly, the Associations originally joined this claim for failure to timely adopt a Program in their filed litigation in the Western District of Louisiana challenging Interior's nationwide moratorium on federal oil and gas leasing onshore and offshore, believing jurisdiction existed in that forum for all of the Associations' claims.

Interior challenged the district court's jurisdiction, and the district court agreed with Interior. The Magistrate Judge issued a detailed report and recommendation to dismiss Petitioners' claim as filed in the incorrect forum.

American Petroleum Institute v. U.S. Dep't of the Interior, No. 2:21-CV-2506, ECF No. 94 (Oct. 5, 2022) (*API I*). The district court then adopted that recommendation in full and ordered partial dismissal. *Id.* ECF No. 97 (Nov. 3, 2022).[1] That district court's jurisdictional order dissolved the instant case's abeyance per this Court's October 3, 2022 Order.

Per the district court's reasoning, 43 U.S.C. § 1349(c)(1)'s reference to an agency "action" regarding a Program also encompasses agency "inaction" on the same subject matter. *API I* at 6-8. The district court reasoned that, consistent with Supreme Court case law, Congress must expressly vest initial review of agency actions in the district courts. *Id.* at 6 (citing *Florida Power & Light Co. v. Lorion*, 105 S. Ct. 1598, 1607 (1985)). The district court also pointed to Fifth Circuit case law equating agency action and inaction claims for purposes of exclusive appellate jurisdiction. *Id.* at 7 (*JTB Tools & Oilfield Services, L.L.C. v. United States*, 831 F.3d 597, 599 (5th Cir. 2016)). The Fifth Circuit in turn relied on the APA for this principle. *Id.* at 599 n.3 ("The APA provides, in relevant part, that '"agency action" includes the whole or a part of an agency rule . . . or denial thereof, or failure to act.'") (quoting 5 U.S.C. § 551(13)). This Court has not questioned that principle or *JTB Tools*, including in the OCSLA context.

[1] The partial dismissal order is an interlocutory order that does not dispose of all issues in the district court case, and thus is not immediately appealable.

This Court should follow the same reasoning as the district court to establish this Court's jurisdiction over this case. The law-of-the-case doctrine directs courts to avoid "jurisdictional ping-pong" where "litigants are bandied back and forth helplessly between two courts, each of which insists the other has jurisdiction." *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 818 (1988). "Indeed, the policies supporting the doctrine apply with even greater force to transfer decisions than to decisions of substantive law; transferee courts that feel entirely free to revisit transfer decisions of a coordinate court threaten to send litigants into a vicious circle of litigation." *Id.* at 816. Exceptions exist in "extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'" *Id.* at 817 (citation omitted).

Here, this Court ordered an abeyance of this case pending resolution of Interior's motion to dismiss the Associations' same claim based on subject matter jurisdiction, thereby allowing the district court to decide jurisdiction in the first instance. The district court found that this Court has jurisdiction. While the Associations had argued otherwise, and the jurisdictional issue over the Associations' subject claim was one of first impression under OCSLA, the district court's ruling on that issue was not clearly erroneous.

For purposes of this appeal, then, the district court and all parties therefore now agree that jurisdiction exists in this Court over Petitioners' present claim

under OCSLA for Interior's failure to take nondiscretionary action to approve a new Program. This Court therefore has subject matter jurisdiction.

STATEMENT OF ISSUES PRESENTED

Whether Interior's failure to timely prepare and maintain a Five-Year Leasing Program violates the Outer Continental Shelf Lands Act, 43 U.S.C. § 1344, and the Administrative Procedure Act, 5 U.S.C. § 706(1).

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reprinted in the Addendum.

STATEMENT OF THE CASE

This Court is well-familiar with the OCSLA regime for federal oil and gas leasing and development on the OCS. "The OCS is an area of submerged lands, subsoil, and seabed that lies between the outer seaward reaches of a state's jurisdiction and that of the United States." *Ctr. for Biological Diversity v. United States Dep't of Interior*, 563 F.3d 466, 472 (D.C. Cir. 2009). OCSLA authorizes Interior to lease portions of the OCS, including for oil and gas development. *See, e.g.*, 43 U.S.C. § 1337(a).

In 1978, Congress "transformed OCSLA from essentially a carte blanche delegation of authority to the Secretary of Interior . . . into a statute with a structure for every conceivable step to be taken on the path to development of an OCS leasing site." *Ctr. for Sustainable Econ. v. Jewell*, 779 F.3d 588, 594 (D.C. Cir. 2015) (cleaned up, citations and quotation marks omitted). "Procedurally, Interior

must undertake a four-stage process before allowing development of an offshore well," with increasing specificity of analysis at each stage. *Id.* This case involves only the very first stage, i.e., the Five-Year Leasing Program.

Promulgation of a Program can take "two to three years." *See* Five-Year Offshore Oil and Gas Leasing Program: History and Background, Congressional Research Serv., R44504, Sept. 14, 2022. "This process includes 5 major steps, 3 public comment periods, and 3 analytical phases." BOEM, National OCS Program Development Process, July 2022, https://www.boem.gov/oil-gas-energy/national-program/national-ocs-program-process.

It is undisputed that, in over four decades, Interior has never before failed to fulfill its statutory obligation to prepare and maintain a Program.[2] Yet, the 2017-2022 Program expired on July 1, 2022, with no approved successor Program in place. Instead, Interior has been content to run out the clock on the prior Program and cause an unprecedented and uncertain gap in OCS oil and gas lease sales.

Interior commenced its process for the next Program more than five years ago (i.e., longer than a Program's duration). Interior first published a Request for Information in 2017. 82 Fed. Reg. 30,886 (July 3, 2017); 30 C.F.R. § 556.202. In January 2018, Interior published a Draft Proposed Program, the next step in the

[2] BOEM's continuous list of prior Programs covered 1980 through 2022. *See* BOEM Website, https://www.boem.gov/oil-gas-energy/national-program/national-ocs-oil-and-gas-leasing-program-2023-2028.

process. 30 C.F.R. § 556.203; https://www.boem.gov/sites/default/files/oil-and-gas-energy-program/Leasing/Five-Year-Program/2019-2024/DPP/NP-Draft-Proposed-Program-2019-2024.pdf. However, Interior then took no public-facing action on the Program for four-and-a-half years.

In the interim, Interior began systematically cancelling all offshore lease sales in accordance with a January 2021 Executive Order directing that "the Secretary of the Interior shall pause new oil and natural gas leases on public lands or in offshore waters pending completion of a comprehensive review and reconsideration of Federal oil and gas permitting and leasing practices . . . ." Executive Order 14008, § 208, 86 Fed. Reg. 7,619 (Jan. 27, 2021). BOEM rescinded its decision, issued less than a month prior, to hold Gulf of Mexico OCS Lease Sale 257 under the 2017-2022 Program. 86 Fed. Reg. 10,132 (Feb. 18, 2021). Following litigation and a preliminary injunction in the Western District of Louisiana, BOEM proceeded with that lease sale, which was then vacated by the U.S. District Court for the District of Columbia on an environmental review ground and remains before this Court in a separate appeal.[3] In May 2022, Interior further announced cancellations of the remaining scheduled lease sales under the 2017-2022 Program (Lease Sales 258, 259, and 261). *See Biden cancels offshore*

[3] *Friends of the Earth v. Haaland*, 583 F. Supp.3d 113 (D.D.C. 2022), appeals pending, *Friends of the Earth v. Haaland*, Nos. 22-5036; 22-5037, 2022 WL 2354549 (D.C. Cir. June 27, 2022).

oil lease sales in Gulf Coast, Alaska, AP News (May 12, 2022), https://apnews.com/article/climate-environment-alaska-gulf-of-mexico-191a0e2be4a95f703d9f52a6b5c36895.

On the day after the 2017-2022 Program expired, Interior announced a Proposed Program revising the 2018 Draft Proposed Program. Interior Press Release (July 1, 2022), https://www.doi.gov/pressreleases/interior-department-invites-public-comment-proposed-five-year-program-offshore-oil-0; 87 Fed. Reg. 40,859 (July 8, 2022); National Outer Continental Shelf Oil and Gas Leasing, Proposed Program, July 2022, https://www.boem.gov/sites/default/files/documents/oil-gas-energy/national-program/2023-2028_Proposed%20Program_July2022.pdf; 30 C.F.R. § 556.204. The July 2022 Proposed Program, among other things, endorsed a purported zero-leasing option. *E.g.*, Proposed Program at 4 ("[T]his Proposed Program retains the Secretary's discretion at the PFP stage to determine that no OCS oil and gas lease sales in any planning area should be scheduled during the 2023–2028 period."). The Proposed Program did not so much as mention Executive Order 14008 or the "comprehensive review" thereunder as affecting the timing or contents of the Proposed Program. The Proposed Program specified no timeframe for the Program's final procedural steps, that is, Interior's issuance of a Proposed Final Program and subsequent approval of a final Program. 30 C.F.R. § 556.205.

After Interior's cancellation of lease sales, lapse in Programs, and issuance of the Proposed Program, Congress enacted the Inflation Reduction Act. Pub. L. 117-169 (Aug. 16, 2022). Among other things, that Act created a temporary avenue for continued OCS leasing by directing Interior to reinstate Lease Sale 257, and to conduct OCS Lease Sales 258, 259, and 261 scheduled under the 2017-2022 Program "[n]otwithstanding the expiration of the 2017–2022 leasing program." *Id.* § 50264. The latest of these sales must occur "not later than September 30, 2023." *Id.* § 50264(e).

SUMMARY OF ARGUMENT

Interior has failed to fulfill its statutory, nondiscretionary duty to prepare and maintain a Five-Year Leasing Program to enable oil and gas leasing on the OCS beyond July 1, 2022, the previous Program's expiration date. As a result, through inaction, Interior has implemented a self-imposed moratorium on further OCS lease sales, except as temporarily required through September 30, 2023, by the Inflation Reduction Act passed by Congress in August 2022. Interior's failure to timely adopt a new Program is arbitrary and capricious, exceeds statutory authority, and unlawfully withholds or unreasonably delays that required action.

STANDING

Constitutional (Article III) standing requires "(1) injury-in-fact, (2) causation, and (3) redressability." *Fund for Animals, Inc. v. Norton*, 322 F.3d 728,

733 (D.D.C. 2003) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). An association or other organization has constitutional standing on behalf of its members when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

This Court recognizes that "[i]n many if not most cases the petitioner's standing to seek review of administrative action is self-evident" and "does not require parties to file evidentiary submissions." *Fund for Animals*, 322 F.3d at 733 (quotation omitted). "In particular, if the complainant is 'an object of the action (or forgone action) at issue' — as is the case usually in review of a rulemaking and nearly always in review of an adjudication — there should be 'little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.'" *Id.* at 733-34 (quotation omitted).

Here, the Associations readily have standing. Consistent with the above Certificate as to Parties, the Associations are oil and gas industry trade associations. Many of the Associations have members which bid on federal oil and gas leases during OCS lease sales. Other members include service and supply firms that rely on servicing oil and gas operations on OCS leases. The industry

paid approximately $4 billion in OCS lease bonus bid, rental, and royalty revenues to the federal treasury in FY 2021 alone.[4]

The Associations' members face concrete and cognizable harm because of Interior's failure to timely prepare and maintain a Program enabling the leasing of oil and gas on the OCS. OCS leases are a prerequisite to subsequently obtaining exploration and development approvals where economically developable resources are discovered. Without a Program in place, Interior cannot hold OCS lease sales, and in turn the Associations' members cannot bid on, develop, and service them. Many of the Associations' members need regular access to competitive lease sales to make the long-term investments required for offshore development, particularly given the magnitude of the investments required for deepwater projects and advances in technology. The U.S. oil and gas industry as a whole directly and indirectly supports more than 11 million U.S. jobs and makes up 8 percent of the U.S. economy.[5] Delays in OCS leasing are expected to have significant economic impacts, and "lead to reduced industry spending, supported employment and GDP,

[4] See ONRR, Royalty Revenue Data, https://revenuedata.doi.gov/query-data/ (filtered by land type "Federal offshore").
[5] *See* PricewaterhouseCoopers LLP, Impacts of the Oil and Natural Gas Industry on the US Economy in 2019, (July 2021), https://www.api.org/-/media/Files/Policy/American-Energy/PwC/API-PWC-Economic-Impact-Report.pdf.

government revenues, and oil and natural gas production."[6] Indeed, such delays could reduce the annual U.S. Gross Domestic Product by nearly $10 billion and result in 116,000 fewer jobs at its peak impact.[7]

In addition to their individual members' standing for the reasons discussed above, the Associations seek to protect their core purpose in supporting continued oil and gas leasing. And the purely legal question presented in this case regarding Interior's failure to adopt a new Program governing OCS oil and gas leasing does not require individual member participation. *See Ctr. for Sustainable Econ.*, 779 F.3d at 597-98 ("Member participation is not required where a 'suit raises a pure question of law' and neither the claims pursued nor the relief sought require the consideration of the individual circumstances of any aggrieved member of the organization. . . . [The] petition turns entirely on whether Interior complied with its statutory obligations, and the relief it seeks is invalidation of agency action. Neither the claims nor the relief require the participation of [Petitioner's] members.") (citations omitted).

Moreover, Petitioners have actively participated in the development of each Five-Year Leasing Program. Petitioner API further has participated as an

---

[6] *See* The Economic Impacts of a 5-Year Leasing Program Delay for the Gulf of Mexico Oil and Natural Gas Industry (Mar. 2022), https://www.api.org/~/media/files/news/2022/03/eiap-5-year-program-leasing-delay-report-03-24-22.

[7] *See id.*

intervenor-defendant party in every prior litigation involving a Program. *See id.* (challenge to approved 2012-2017 program); *Ctr. for Biological Diversity*, 563 F.3d 466 (challenge to approved 2007-2012 Program); *Natural Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288 (D.C. Cir. 1988) (challenge to approved 1987-1992 Program); *State of Cal. By and Through Brown v. Watt*, 712 F.2d 584 (D.C. Cir. 1983) (challenge to approved 1982-1987 Program); *State of Cal. By and Through Brown v. Watt*, 668 F.2d 1290 (D.C. Cir. 1981) (challenge to approved 1980-1985 Program). Intervention as of right in this Circuit requires standing. *Fund for Animals*, 322 F.3d at 731-32. Standing was uncontested in the above cases. The Associations likewise have standing here.

Thus, the Associations satisfy the "irreducible constitutional minimum of standing." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125, (2014). To the extent that the Court's standing inquiry were to also include "prudential" considerations, they too are satisfied here because Petitioners' interests are "arguably within the zone of interests to be protected or regulated by the statute."[8] *Fund for Animals*, 322 F.3d at 734 n.6 (citing *In re: Vitamins Antitrust Class Actions*, 215 F.3d 26, 29 (D.C. Cir. 2000)). As discussed below, Congress established a system for private parties to expeditiously lease, explore, and develop federally-managed oil and gas on the OCS. *See, e.g.*, 43 U.S.C.

[8] The Supreme Court has concurred that "'prudential standing' is a misnomer as applied to the zone-of-interests analysis." *Lexmark*, 572 U.S. at 127.

§§ 1332(3), 1344(a)(2)(E). OCSLA's core requirements and Interior's implementing regulations, including for Five-Year Leasing Programs, thus directly implicate the Associations' members that bid on, own, operate, and service OCS leases.

STANDARD OF REVIEW

Section 706(1) of the APA states that a "reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). "The only action a court may compel an agency to take under § 706(1) is discrete action that the agency has a duty to perform." *Western Org. of Res. Councils v. Zinke*, 892 F.3d 1234, 1241 (D.C. Cir. 2018) (citing *Norton v. Southern Utah Wilderness Alliance (SUWA)*, 542 U.S. 55, 62-63 (2004)). "The legal duty must be 'ministerial or nondiscretionary' and must amount to 'a specific, unequivocal command.'" *Id.* (citing *SUWA*, 542 U.S. at 63-64). "Review of a five-year leasing program for compliance with OCSLA charts the typical contours of administrative review generally." *Ctr. for Sustainable Econ.*, 779 F.3d at 600.

ARGUMENT

I. RESPONDENTS HAVE FAILED IN THEIR NONDISCRETIONARY OBLIGATION TO PREPARE AND MAINTAIN AN OCS FIVE-YEAR LEASING PROGRAM.

As discussed above, this case involves only the first stage—a Five-Year Leasing Program—in OCSLA's multistage leasing and development process, and Interior's failure to complete that stage as required. As also discussed above, this

Court is statutorily designated to consider challenges involving Programs and has repeatedly done so over many years. *See* 43 U.S.C. § 1349(c)(1).

OCSLA specifically mandates that Interior "*shall prepare* and periodically revise, and *maintain* an oil and gas leasing program to implement the policies of this subchapter." 43 U.S.C. § 1344(a) (emphasis added). "The leasing program shall consist of a schedule of proposed lease sales indicating, as precisely as possible, the size, timing, and location of leasing activity which he determines will best meet national energy needs for the five-year period following its approval or reapproval." *Id*. Further, OCSLA requires that "no lease shall be issued unless it is for an area included in the approved leasing program." 43 U.S.C. § 1344(d)(3). BOEM's implementing regulations at 30 C.F.R. §§ 556.200 – 556.205 similarly recognize BOEM's obligation to promulgate a Program. *See* 30 C.F.R. § 556.200 ("Section 18(a) of OCSLA (43 U.S.C. 1344(a)), *requires the Secretary to prepare an oil and gas leasing program* that consists of a five-year schedule of proposed lease sales to best meet national energy needs, showing the size, timing, and location of leasing activity as precisely as possible.") (emphasis added).

Indeed, this Court has previously recognized Interior's obligation to prepare and maintain Programs in the first instance. For example, the Court has highlighted "Interior's *continuing duty* to promulgate five-year Leasing Programs." *Ctr. for Biological Diversity*, 563 F.3d at 485 (emphasis added). In another case,

the Court explained that "[OCSLA] created a framework to facilitate the orderly and environmentally responsible exploration and extraction of oil and gas deposits on the OCS. It charges the Secretary of the Interior with preparing a program *every five years* containing a schedule of proposed leases for OCS resource exploration and development." *Ctr. for Sustainable Econ.*, 779 F.3d at 592 (emphasis added).

The Court's recognition of Interior's nondiscretionary duty is well-founded. Even under ordinary circumstances, "[t]he word 'shall' usually connotes a requirement." *In re National Nurses United*, 47 F.4th 746, 754 (D.C. Cir. 2022), *quoting Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 171 (2016). "Courts look to context to confirm whether 'shall' imposes a mandatory obligation or whether instead 'the context of a particular usage . . . require[s] the construction of . . . 'shall' as permissive.'" *Id.*, *quoting LO Shippers Action Comm. v. ICC*, 857 F.2d 802, 806 (D.C. Cir. 1988). "When context confirms that 'shall' is used in its ordinary, mandatory sense, it imposes a clear duty to act." *Id.*

Nothing in 43 U.S.C. § 1344 suggests that "shall" is to be construed here as anything other than mandatory. Moreover, this rule of construction applies with special force here, given that OCSLA addresses federally-managed lands, and the Property Clause of the Constitution gives Congress the exclusive power to manage the United States' lands and associated resources. U.S. Const. art. IV, § 3, cl. 2.

"[T]he constitutional power of Congress in this respect is without limitation." *United States v. California*, 332 U.S. 19, 27 (1947), as supplemented, 332 U.S. 804 (1947). Accordingly, where, as here, Congress has dictated that the Executive "shall" (as opposed to "may") do something related to federally-managed lands, the obligation is nondiscretionary.

Consistently, this Court has appreciated the importance under OCSLA of Interior having a Program in place:

> This first stage, involving approval of a leasing program, carries enormous "practical and legal significance." *Watt I*, 668 F.2d at 1299. The key national decisions as to the size, timing, and location of OCS leasing—as well as the basic economic analyses and justifications for such decisions—are made at this first stage. See 43 U.S.C. § 1344(d)(3). The Program also creates important reliance interests. Federal, state, and local governments, and the companies that participate in national and international energy markets, form long-term plans on the basis of the leasing program. The leasing schedule is therefore "extremely important to the expeditious but orderly exploitation of OCS resources." *Watt I*, 668 F.2d at 1299.

Ctr. for Sustainable Econ., 779 F.3d at 595; *see also State of Cal. By & Through Brown v. Watt*, 668 F.2d 1290, 1316 (D.C. Cir. 1981) ("the Act has an objective—the expeditious development of OCS resources"); *Louisiana v. Biden*, No. 2:21-CV-00778, 2022 WL 3570933, at *15 (W.D. La. Aug. 18, 2022) ("The OCSLA also directs the Secretary of the DOI to administer a leasing program to sell

exploration interests in portions of the OSC [sic] to the highest bidder. 43 U.S.C. §§ 1334(a) and 1337(a)(1).").

Similarly, Interior's continuous maintenance of a Program is necessary to fulfill statutory directives for oil and gas leasing on the OCS. For more than 70 years, Congress has declared the OCS to be "a vital national resource reserve held by the Federal Government for the public," and directed the Secretary of the Interior to make the OCS "available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs." 43 U.S.C. § 1332(3). Indeed, Congress amended OCSLA in 1978, including introducing the Program requirement, for the express purpose of "expedit[ing] 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." 43 U.S.C. § 1802(1); *see also id.* § 1801(8) (Congress responding to various "problems which tend to retard the development of the oil and natural gas reserves of the Outer Continental Shelf"). Congress so amended OCSLA "to promote the swift, orderly and efficient exploitation of our almost untapped domestic oil and gas resources in the Outer Continental Shelf." H.R. Rep. No. 95–590, at 53 (1977). This Court similarly has

found that "Congress has already decided that the OCS should be used to meet the nation's need for energy." *Ctr. for Biological Diversity*, 563 F.3d at 485.

Accordingly, Congress' mandate to Interior is clear and OCSLA creates a nondiscretionary and continuing duty for Interior to prepare and maintain a Program in place. While OCSLA does not prescribe the precise contents of any Program, it does not authorize Interior simply to eschew that step and thereby interminably halt OCS oil and gas leasing. That is why Interior had maintained a continuous series of successor Programs, until expiration of the 2017-2022 Program. Here, there is no dispute that Interior has failed to approve and maintain a Program since July 1, 2022. Without a Program in place, OCSLA's directives cannot be achieved. This is a textbook failure by Interior to undertake a "discrete action that [Interior] has a duty to perform" under 43 U.S.C. § 1344(a), and for which the Court thus should compel Interior action under 5 U.S.C. § 706(1). Accordingly, the Court should declare that Interior violated OCSLA by failing to approve and maintain a Program in place.

II. RESPONDENTS MUST APPROVE A NEW OCS FIVE-YEAR LEASING PROGRAM PROMPTLY.

As additional relief, the Court should compel Interior to approve a final Program promptly, and by no later than September 30, 2023.

There is no legitimate reason Interior cannot promptly finalize a Program. OCSLA and BOEM regulations specify a 90-day period for federal, state, and local

government and public comments on the Proposed Program. 43 U.S.C. § 1344(d)(1); 30 C.F.R. § 556.204(b). The next step is for Interior to issue a Proposed Final Program, followed by an at least 60-day waiting period for Presidential and Congressional review before Interior approves the final Program. 43 U.S.C. § 1344(d)(2); 30 C.F.R. § 556.205.

Interior issued its Proposed Program more than six months ago (after the prior Program expired), and the comment period ended on October 6, 2022. 87 Fed. Reg. at 40,859. That Proposed Program was also accompanied by an expansive Draft Programmatic Environmental Impact Statement under the National Environmental Policy Act. Interior has issued nothing since then. Nor has Interior, either in the Proposed Program or elsewhere, announced when it will complete the remaining steps in the Program process.

As discussed above, Congress via the Inflation Reduction Act ensured that the remaining OCS lease sales scheduled under the previous Program (Lease Sales 257, 258, 259, and 261) would be held before September 30, 2023. But after that date, Interior would again have no authority to hold OCS lease sales unless it approves a new Program. Robust studies and Interior's unprecedented delay to date, including 4.5 years between the Draft Proposed Program and Proposed Program, encompassing the first 18 months of the current Administration, have afforded more than sufficient opportunity for stakeholder input and for Interior to

approve a final Program. Moreover, Interior requires substantial additional time to complete all procedural requirements to hold individual lease sales under the approved Program. *See* 30 C.F.R. part 556, subpart C; OCS Oil and Gas Leasing, Exploration, and Development Process, Aug. 17, 2022, https://www.boem.gov/sites/default/files/documents/oil-gas-energy/national-program/OCS%20Leasing%20Process%20Diagram.pdf (depicting steps both for the "National OCS Leasing Program" and subsequently for "Typical Planning for Specific Oil and Gas Lease Sale"). Thus, the Court should not countenance any further delay by Interior beyond September 30, 2023 for final Program adoption.

CONCLUSION

For the reasons addressed herein, Petitioners respectfully request that this Court (i) declare that Respondents have violated OCSLA's mandate to prepare and maintain a Five-Year Leasing Program, and (ii) order Respondents to promptly adopt a new Program by no later than September 30, 2023.

Dated: January 17, 2023

Respectfully submitted,

/s/ James M. Auslander

James M. Auslander
D.C. Bar No. 974898
Peter J. Schaumberg
D.C. Bar No. 913202
Beveridge & Diamond, P.C.
1900 N Street, NW Suite 100
Washington, DC 20036
Phone: (202) 789-6009
Fax: (202) 789-6190
jauslander@bdlaw.com
pschaumberg@bdlaw.com
Attorneys for Petitioners

FED. R. APP. P. 32(G) CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,681 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point, Times New Roman font.

/s/ James M. Auslander
James M. Auslander
Attorney for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2023, I electronically filed the foregoing Petitioners' Opening Brief with the Clerk of Court using ECF. I also certify that the foregoing document is being served this day on all counsel of record via transmission of Notice of Electronic Filing generated by ECF.

/s/ James M. Auslander
James M. Auslander
Attorney for Petitioners

Addendum

Pertinent Statutes, Regulations and Rules

43 USC 1344: Outer Continental Shelf leasing program
Text contains those laws in effect on January 16, 2023

From Title 43-PUBLIC LANDS
CHAPTER 29-SUBMERGED LANDS
SUBCHAPTER III-OUTER CONTINENTAL SHELF LANDS
Jump To:

§1344. Outer Continental Shelf leasing program

(a) Schedule of proposed oil and gas lease sales

The Secretary, pursuant to procedures set forth in subsections (c) and (d) of this section, shall prepare and periodically revise, and maintain an oil and gas leasing program to implement the policies of this subchapter. The leasing program shall consist of a schedule of proposed lease sales indicating, as precisely as possible, the size, timing, and location of leasing activity which he determines will best meet national energy needs for the five-year period following its approval or reapproval. Such leasing program shall be prepared and maintained in a manner consistent with the following principles:

(1) Management of the outer Continental Shelf shall be conducted in a manner which considers economic, social, and environmental values of the renewable and nonrenewable resources contained in the outer Continental Shelf, and the potential impact of oil and gas exploration on other resource values of the outer Continental Shelf and the marine, coastal, and human environments.

(2) Timing and location of exploration, development, and production of oil and gas among the oil- and gas-bearing physiographic regions of the outer Continental Shelf shall be based on a consideration of-

(A) existing information concerning the geographical, geological, and ecological characteristics of such regions;

(B) an equitable sharing of developmental benefits and environmental risks among the various regions;

(C) the location of such regions with respect to, and the relative needs of, regional and national energy markets;

(D) the location of such regions with respect to other uses of the sea and seabed, including fisheries, navigation, existing or proposed sealanes, potential sites of deepwater ports, and other anticipated uses of the resources and space of the outer Continental Shelf;

(E) the interest of potential oil and gas producers in the development of oil and gas resources as indicated by exploration or nomination;

(F) laws, goals, and policies of affected States which have been specifically identified by the Governors of such States as relevant matters for the Secretary's consideration;

(G) the relative environmental sensitivity and marine productivity of different areas of the outer Continental Shelf; and

(H) relevant environmental and predictive information for different areas of the outer Continental Shelf.

(3) 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.

(4) Leasing activities shall be conducted to assure receipt of fair market value for the lands leased and the rights conveyed by the Federal Government.

(b) Estimates of appropriations and staff required for management of leasing program

The leasing program shall include estimates of the appropriations and staff required to-

(1) obtain resource information and any other information needed to prepare the leasing program required by this section;

(2) analyze and interpret the exploratory data and any other information which may be compiled under the authority of this subchapter;

(3) conduct environmental studies and prepare any environmental impact statement required in accordance with this subchapter and with section 4332(2)(C) of title 42; and

(4) supervise operations conducted pursuant to each lease in the manner necessary to assure due diligence in the exploration and development of the lease area and compliance with the requirements of applicable law and regulations, and with the terms of the lease.

(c) Suggestions from Federal agencies and affected State and local governments; submission of proposed program to Governors of affected States and Congress; publication in Federal Register

(1) During the preparation of any proposed leasing program under this section, the Secretary shall invite and consider suggestions for such program from any interested Federal agency, including the Attorney General, in

consultation with the Federal Trade Commission, and from the Governor of any State which may become an affected State under such proposed program. The Secretary may also invite or consider any suggestions from the executive of any affected local government in such an affected State, which have been previously submitted to the Governor of such State, and from any other person.

(2) After such preparation and at least sixty days prior to publication of a proposed leasing program in the Federal Register pursuant to paragraph (3) of this subsection, the Secretary shall submit a copy of such proposed program to the Governor of each affected State for review and comment. The Governor may solicit comments from those executives of local governments in his State which he, in his discretion, determines will be affected by the proposed program. If any comment by such Governor is received by the Secretary at least fifteen days prior to submission to the Congress pursuant to such paragraph (3) and includes a request for any modification of such proposed program, the Secretary shall reply in writing, granting or denying such request in whole or in part, or granting such request in such modified form as the Secretary considers appropriate, and stating his reasons therefor. All such correspondence between the Secretary and the Governor of any affected State, together with any additional information and data relating thereto, shall accompany such proposed program when it is submitted to the Congress.

(3) Within nine months after September 18, 1978, the Secretary shall submit a proposed leasing program to the Congress, the Attorney General, and the Governors of affected States, and shall publish such proposed program in the Federal Register. Each Governor shall, upon request, submit a copy of the proposed leasing program to the executive of any local government affected by the proposed program.

(d) Comments by Attorney General on anticipated effect on competition; comments by State or local governments; submission of program to President and Congress; issuance of leases in accordance with program

(1) Within ninety days after the date of publication of a proposed leasing program, the Attorney General may, after consultation with the Federal Trade Commission, submit comments on the anticipated effects of such proposed program upon competition. Any State, local government, or other person may submit comments and recommendations as to any aspect of such proposed program.

(2) At least sixty days prior to approving a proposed leasing program, the Secretary shall submit it to the President and the Congress, together with any comments received. Such submission shall indicate why any specific recommendation of the Attorney General or a State or local government was not accepted.

(3) After the leasing program has been approved by the Secretary, or after eighteen months following September 18, 1978, whichever first occurs, no lease shall be issued unless it is for an area included in the approved leasing program and unless it contains provisions consistent with the approved leasing program, except that leasing shall be permitted to continue until such program is approved and for so long thereafter as such program is under judicial or administrative review pursuant to the provisions of this subchapter.

(e) Review, revision, and reapproval of program

The Secretary shall review the leasing program approved under this section at least once each year. He may revise and reapprove such program, at any time, and such revision and reapproval, except in the case of a revision which is not significant, shall be in the same manner as originally developed.

(f) Procedural regulations for management of program

The Secretary shall, by regulation, establish procedures for-

(1) receipt and consideration of nominations for any area to be offered for lease or to be excluded from leasing;

(2) public notice of and participation in development of the leasing program;

(3) review by State and local governments which may be impacted by the proposed leasing;

(4) periodic consultation with State and local governments, oil and gas lessees and permittees, and representatives of other individuals or organizations engaged in activity in or on the outer Continental Shelf, including those involved in fish and shellfish recovery, and recreational activities; and

(5) consideration of the coastal zone management program being developed or administered by an affected coastal State pursuant to section 1454 or section 1455 of title 16.

Such procedures shall be applicable to any significant revision or reapproval of the leasing program.

(g) Information from public and private sources; confidentiality of classified or privileged data

The Secretary may obtain from public sources, or purchase from private sources, any survey, data, report, or other information (including interpretations of such data, survey, report, or other information) which may be necessary to assist him in preparing any environmental impact statement and in making other evaluations required by this subchapter. Data of a classified nature provided to the Secretary under the provisions of this subsection shall remain confidential for such period of time as agreed to by the head of the department or agency from whom the information is requested. The Secretary shall maintain the confidentiality of all privileged or proprietary data or information for such period of time as is provided for in this subchapter, established by regulation, or agreed to by the parties.

(h) Information from all Federal departments and agencies; confidentiality of privileged or proprietary information

The heads of all Federal departments and agencies shall provide the Secretary with any nonpriviledged [1] or nonproprietary information he requests to assist him in preparing the leasing program and may provide the Secretary

with any privileged or proprietary information he requests to assist him in preparing the leasing program. Privileged or proprietary information provided to the Secretary under the provisions of this subsection shall remain confidential for such period of time as agreed to by the head of the department or agency from whom the information is requested. In addition, the Secretary shall utilize the existing capabilities and resources of such Federal departments and agencies by appropriate agreement.

(i) Application

This section shall not apply to the scheduling of any lease sale in an area of the outer Continental Shelf that is adjacent to the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, or the Commonwealth of the Northern Mariana Islands.

(Aug. 7, 1953, ch. 345, §18, as added Pub. L. 95–372, title II, §208, Sept. 18, 1978, 92 Stat. 649 ; Pub. L. 117–169, title V, §50251(b)(1)(B), Aug. 16, 2022, 136 Stat. 2055 .)

Editorial Notes

Amendments

2022-Subsec. (i). Pub. L. 117–169 added subsec. (i).

Statutory Notes and Related Subsidiaries

Transfer of Functions

Functions of Secretary of the Interior to promulgate regulations under this subchapter which relate to fostering of competition for Federal leases, implementation of alternative bidding systems authorized for award of Federal leases, establishment of diligence requirements for operations conducted on Federal leases, setting of rates for production of Federal leases, and specifying of procedures, terms, and conditions for acquisition and disposition of Federal royalty interests taken in kind, transferred to Secretary of Energy by section 7152(b) of Title 42, The Public Health and Welfare. Section 7152(b) of Title 42 was repealed by Pub. L. 97–100, title II, §201, Dec. 23, 1981, 95 Stat. 1407 , and functions of Secretary of Energy returned to Secretary of the Interior. See House Report No. 97–315, pp. 25, 26, Nov. 5, 1981.

[1] *So in original. Probably should be "nonprivileged".*

43 USC 1349: Citizens suits, jurisdiction and judicial review
Text contains those laws in effect on January 16, 2023

From Title 43-PUBLIC LANDS
CHAPTER 29-SUBMERGED LANDS
SUBCHAPTER III-OUTER CONTINENTAL SHELF LANDS
Jump To:

§1349. Citizens suits, jurisdiction and judicial review

(a) Persons who may bring actions; persons against whom action may be brought; time of action; intervention by Attorney General; costs and fees; security

(1) Except as provided in this section, any person having a valid legal interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this subchapter against any person, including the United States, and any other government instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution) for any alleged violation of any provision of this subchapter or any regulation promulgated under this subchapter, or of the terms of any permit or lease issued by the Secretary under this subchapter.

(2) Except as provided in paragraph (3) of this subsection, no action may be commenced under subsection (a)(1) of this section-

(A) prior to sixty days after the plaintiff has given notice of the alleged violation, in writing under oath, to the Secretary and any other appropriate Federal official, to the State in which the violation allegedly occurred or is occurring, and to any alleged violator; or

(B) if the Attorney General has commenced and is diligently prosecuting a civil action in a court of the United States or a State with respect to such matter, but in any such action in a court of the United States any person having a legal interest which is or may be adversely affected may intervene as a matter of right.

(3) An action may be brought under this subsection immediately after notification of the alleged violation in any case in which the alleged violation constitutes an imminent threat to the public health or safety or would immediately affect a legal interest of the plaintiff.

(4) In any action commenced pursuant to this section, the Attorney General, upon the request of the Secretary or any other appropriate Federal official, may intervene as a matter of right.

(5) A court, in issuing any final order in any action brought pursuant to subsection (a)(1) or subsection (c) of this section, may award costs of litigation, including reasonable attorney and expert witness fees, to any party, whenever such court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in a sufficient amount to compensate for any loss or damage suffered, in accordance with the Federal Rules of Civil Procedure.

(6) Except as provided in subsection (c) of this section, all suits challenging actions or decisions allegedly in violation of, or seeking enforcement of, the provisions of this subchapter, or any regulation promulgated under this subchapter, or the terms of any permit or lease issued by the Secretary under this subchapter, shall be undertaken in accordance with the procedures described in this subsection. Nothing in this section shall restrict any right which any person or class of persons may have under any other Act or common law to seek appropriate relief.

(b) Jurisdiction and venue of actions

(1) Except as provided in subsection (c) of this section, the district courts of the United States shall have jurisdiction of cases and controversies arising out of, or in connection with (A) any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf, or which involves rights to such minerals, or (B) the cancellation, suspension, or termination of a lease or permit under this subchapter. Proceedings with respect to any such case or controversy may be instituted in the judicial district in which any defendant resides or may be found, or in the judicial district of the State nearest the place the cause of action arose.

(2) Any resident of the United States who is injured in any manner through the failure of any operator to comply with any rule, regulation, order, or permit issued pursuant to this subchapter may bring an action for damages (including reasonable attorney and expert witness fees) only in the judicial district having jurisdiction under paragraph (1) of this subsection.

(c) Review of Secretary's approval of leasing program; review of approval, modification or disapproval of exploration or production plan; persons who may seek review; scope of review; certiorari to Supreme Court

(1) Any action of the Secretary to approve a leasing program pursuant to section 1344 of this title shall be subject to judicial review only in the United States Court of Appeal [1] for the District of Columbia.

(2) Any action of the Secretary to approve, require modification of, or disapprove any exploration plan or any development and production plan under this subchapter shall be subject to judicial review only in a United States court of appeals for a circuit in which an affected State is located.

(3) The judicial review specified in paragraphs (1) and (2) of this subsection shall be available only to a person who (A) participated in the administrative proceedings related to the actions specified in such paragraphs, (B) is adversely affected or aggrieved by such action, (C) files a petition for review of the Secretary's action within sixty days after the date of such action, and (D) promptly transmits copies of the petition to the Secretary and to the Attorney General.

(4) Any action of the Secretary specified in paragraph (1) or (2) shall only be subject to review pursuant to the provisions of this subsection, and shall be specifically excluded from citizen suits which are permitted pursuant to subsection (a) of this section.

(5) The Secretary shall file in the appropriate court the record of any public hearings required by this subchapter and any additional information upon which the Secretary based his decision, as required by section 2112 of title 28. Specific objections to the action of the Secretary shall be considered by the court only if the issues upon which such objections are based have been submitted to the Secretary during the administrative proceedings related to the actions involved.

(6) The court of appeals conducting a proceeding pursuant to this subsection shall consider the matter under review solely on the record made before the Secretary. The findings of the Secretary, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The court may affirm, vacate, or modify any order or decision or may remand the proceedings to the Secretary for such further action as it may direct.

(7) Upon the filing of the record with the court, pursuant to paragraph (5), the jurisdiction of the court shall be exclusive and its judgment shall be final, except that such judgment shall be subject to review by the Supreme Court of the United States upon writ of certiorari.

(Aug. 7, 1953, ch. 345, §23, as added Pub. L. 95–372, title II, §208, Sept. 18, 1978, 92 Stat. 657 ; amended Pub. L. 98–620, title IV, §402(44), Nov. 8, 1984, 98 Stat. 3360 .)

Editorial Notes

References in Text

The Federal Rules of Civil Procedure, referred to in subsec. (a)(5), are set out in the Appendix to Title 28, Judiciary and Judicial Procedure.

Amendments

1984-Subsec. (d). Pub. L. 98–620 struck out subsec. (d) which provided that except as to causes of action considered by the court to be of greater importance, any action under this section would take precedence on the docket over all other causes of action and would be set for hearing at the earliest practical date and expedited in every way.

Statutory Notes and Related Subsidiaries

Effective Date of 1984 Amendment

Amendment by Pub. L. 98–620 not applicable to cases pending on Nov. 8, 1984, see section 403 of Pub. L. 98–620, set out as a note under section 1657 of Title 28, Judiciary and Judicial Procedure.

[1] *So in original. Probably should be "Appeals".*

5 USC 706: Scope of review
Text contains those laws in effect on January 16, 2023

From Title 5-GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I-THE AGENCIES GENERALLY
CHAPTER 7-JUDICIAL REVIEW
Jump To:
Source Credit
Miscellaneous

§706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall-

(1) compel agency action unlawfully withheld or unreasonably delayed; and
(2) hold unlawful and set aside agency action, findings, and conclusions found to be-
(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
(D) without observance of procedure required by law;
(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393 .)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
	5 U.S.C. 1009(e).	June 11, 1946, ch. 324, §10(e), 60 Stat. 243 .

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

STATUTORY NOTES AND RELATED SUBSIDIARIES

ABBREVIATION OF RECORD

Pub. L. 85–791, Aug. 28, 1958, 72 Stat. 941 , which authorized abbreviation of record on review or enforcement of orders of administrative agencies and review on the original papers, provided, in section 35 thereof, that: "This Act [see Tables for classification] shall not be construed to repeal or modify any provision of the Administrative Procedure Act [see Short Title note set out preceding section 551 of this title]."

paid for gas produced from Federal land and on the outer Continental Shelf shall be assessed on all gas produced, including all gas that is consumed or lost by venting, flaring, or negligent releases through any equipment during upstream operations.

(b) EXCEPTION.—Subsection (a) shall not apply with respect to—

(1) gas vented or flared for not longer than 48 hours in an emergency situation that poses a danger to human health, safety, or the environment; Time period.

(2) gas used or consumed within the area of the lease, unit, or communitized area for the benefit of the lease, unit, or communitized area; or

(3) gas that is unavoidably lost.

SEC. 50264. LEASE SALES UNDER THE 2017–2022 OUTER CONTINENTAL SHELF LEASING PROGRAM. Deadlines.

(a) DEFINITIONS.—In this section:

(1) LEASE SALE 257.—The term "Lease Sale 257" means the lease sale numbered 257 that was approved in the Record of Decision described in the notice of availability of a record of decision issued on August 31, 2021, entitled "Gulf of Mexico, Outer Continental Shelf (OCS), Oil and Gas Lease Sale 257" (86 Fed. Reg. 50160 (September 7, 2021)), and is the subject of the final notice of sale entitled "Gulf of Mexico Outer Continental Shelf Oil and Gas Lease Sale 257" (86 Fed. Reg. 54728 (October 4, 2021)).

(2) LEASE SALE 258.—The term "Lease Sale 258" means the lease sale numbered 258 described in the 2017–2022 Outer Continental Shelf Oil and Gas Leasing Proposed Final Program published on November 18, 2016, and approved by the Secretary in the Record of Decision issued on January 17, 2017, described in the notice of availability entitled "Record of Decision for the 2017–2022 Outer Continental Shelf Oil and Gas Leasing Program Final Programmatic Environmental Impact Statement; MMAA104000" (82 Fed. Reg. 6643 (January 19, 2017)).

(3) LEASE SALE 259.—The term "Lease Sale 259" means the lease sale numbered 259 described in the 2017–2022 Outer Continental Shelf Oil and Gas Leasing Proposed Final Program published on November 18, 2016, and approved by the Secretary in the Record of Decision issued on January 17, 2017, described in the notice of availability entitled "Record of Decision for the 2017–2022 Outer Continental Shelf Oil and Gas Leasing Program Final Programmatic Environmental Impact Statement; MMAA104000" (82 Fed. Reg. 6643 (January 19, 2017)).

(4) LEASE SALE 261.—The term "Lease Sale 261" means the lease sale numbered 261 described in the 2017–2022 Outer Continental Shelf Oil and Gas Leasing Proposed Final Program published on November 18, 2016, and approved by the Secretary in the Record of Decision issued on January 17, 2017, described in the notice of availability entitled "Record of Decision for the 2017–2022 Outer Continental Shelf Oil and Gas Leasing Program Final Programmatic Environmental Impact Statement; MMAA104000" (82 Fed. Reg. 6643 (January 19, 2017)).

(b) LEASE SALE 257 REINSTATEMENT.—

(1) ACCEPTANCE OF BIDS.—Not later 30 days after the date of enactment of this Act, the Secretary shall, without modification or delay—

(A) accept the highest valid bid for each tract or bidding unit of Lease Sale 257 for which a valid bid was received on November 17, 2021; and

(B) provide the appropriate lease form to the winning bidder to execute and return.

(2) LEASE ISSUANCE.—On receipt of an executed lease form under paragraph (1)(B) and payment of the rental for the first year, the balance of the bonus bid (unless deferred), and any required bond or security from the high bidder, the Secretary shall promptly issue to the high bidder a fully executed lease, in accordance with—

(A) the regulations in effect on the date of Lease Sale 257; and

(B) the terms and conditions of the final notice of sale entitled "Gulf of Mexico Outer Continental Shelf Oil and Gas Lease Sale 257" (86 Fed. Reg. 54728 (October 4, 2021)).

(c) REQUIREMENT FOR LEASE SALE 258.—Notwithstanding the expiration of the 2017–2022 leasing program, not later than December 31, 2022, the Secretary shall conduct Lease Sale 258 in accordance with the Record of Decision approved by the Secretary on January 17, 2017, described in the notice of availability entitled "Record of Decision for the 2017–2022 Outer Continental Shelf Oil and Gas Leasing Program Final Programmatic Environmental Impact Statement; MMAA104000" issued on January 17, 2017 (82 Fed. Reg. 6643 (January 19, 2017)).

(d) REQUIREMENT FOR LEASE SALE 259.—Notwithstanding the expiration of the 2017–2022 leasing program, not later than March 31, 2023, the Secretary shall conduct Lease Sale 259 in accordance with the Record of Decision approved by the Secretary on January 17, 2017, described in the notice of availability entitled "Record of Decision for the 2017–2022 Outer Continental Shelf Oil and Gas Leasing Program Final Programmatic Environmental Impact Statement; MMAA104000" issued on January 17, 2017 (82 Fed. Reg. 6643 (January 19, 2017)).

(e) REQUIREMENT FOR LEASE SALE 261.—Notwithstanding the expiration of the 2017–2022 leasing program, not later than September 30, 2023, the Secretary shall conduct Lease Sale 261 in accordance with the Record of Decision approved by the Secretary on January 17, 2017, described in the notice of availability entitled "Record of Decision for the 2017–2022 Outer Continental Shelf Oil and Gas Leasing Program Final Programmatic Environmental Impact Statement; MMAA104000" issued on January 17, 2017 (82 Fed. Reg. 6643 (January 19, 2017)).

43 USC 3006.

SEC. 50265. ENSURING ENERGY SECURITY.

(a) DEFINITIONS.—In this section:

(1) FEDERAL LAND.—The term "Federal land" means public lands (as defined in section 103 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1702)).

(2) OFFSHORE LEASE SALE.—The term "offshore lease sale" means an oil and gas lease sale—

(A) that is held by the Secretary in accordance with the Outer Continental Shelf Lands Act (43 U.S.C. 1331 et seq.); and

(b) Evidence of payment via *pay.gov* of the fees listed in paragraph (a) of this section must accompany the submission of a document for approval or filing, or be sent to an office identified by the Regional Director.

(c) Once a fee is paid, it is nonrefundable, even if your service request is withdrawn.

(d) If your request is returned to you as incomplete, you are not required to submit a new fee with the amended submission.

(e) The *pay.gov* Web site is accessible at *https://www.pay.gov/paygov/* or through the BOEM Web site at *http://www.boem.gov/Fees-for-Services.*

(f) The fees listed in the table above apply equally to any document or information submitted electronically pursuant to part 560, subpart E, of this chapter.

§ 556.107 Corporate seal requirements.

(a) If you electronically submit to BOEM any document or information referenced in § 560.500 of this chapter, any requirement to use a corporate seal under this chapter will be satisfied, and you will not need to affix your corporate seal to such document or information, if:

(1) You properly file with BOEM a paper, with a corporate seal and the signature of the authorized person(s), stating that electronic submissions made by you will be legally binding, as set forth in § 560.502 of this chapter; and

(2) You make electronic submissions to BOEM through a secure electronic filing system that conforms to the requirements of § 560.500; or,

(b) You may file with BOEM a non-electronic document, containing a corporate seal and the signature of an authorized person(s), attesting that future documents and information filed by you by electronic or non-electronic means will be legally binding without an affixed corporate seal. If you file such a non-electronic attestation document with BOEM, any requirement for use of a corporate seal under the regulations of this chapter will be satisfied, and you will not need to affix your corporate seal to submissions where they would have been otherwise required.

(c) If the State or territory in which you are incorporated does not issue or require corporate seals, the document referred to in paragraphs (a) and (b) of this section need not contain a corporate seal, but must still contain the signature of the authorized person(s), a statement that the State in which you are incorporated does not issue or require corporate seals, and a statement that submissions made by you will be legally binding.

(d) Any document, or information submitted without corporate seal must still contain the signature of an individual qualified to sign who has the requisite authority to act on your behalf.

(e) Any document or information submitted pursuant to this section is submitted subject to the penalties of 18 U.S.C. 1001, as amended by the False Statements Accountability Act of 1996.

Subpart B—Oil and Gas Five Year Leasing Program

§ 556.200 What is the Five Year leasing program?

Section 18(a) of OCSLA (43 U.S.C. 1344(a)), requires the Secretary to prepare an oil and gas leasing program that consists of a five-year schedule of proposed lease sales to best meet national energy needs, showing the size, timing, and location of leasing activity as precisely as possible. BOEM prepares the five year schedule of proposed lease sales consistent with the principles set out in section 18(a)(1) and (2)(A)-(H) of OCSLA (43 U.S.C. 1344(a)(1) and (2)(A)-(H)) to obtain a proper balance among the potential for environmental damage, the potential for the discovery of oil and gas, and the potential for adverse impact on the coastal zone, as required by OCSLA section 18(a)(3) (43 U.S.C. 1344(a)(3)).

§ 556.201 Does BOEM consider multiple uses of the OCS?

BOEM gathers information about multiple uses of the OCS in order to assist the Secretary in making decisions on the 5-year program pursuant to provisions of 43 U.S.C. 1344. For this purpose, BOEM invites and considers suggestions from States and local governments, industry, and any other interested parties, primarily through public notice and comment procedures. BOEM

also invites and considers suggestions from Federal agencies.

§ 556.202 How does BOEM start the Five Year program preparation process?

To begin preparation of the Five Year program, BOEM invites and considers nominations for any areas to be included or excluded from leasing, by doing the following:

(a) BOEM prepares and makes public official protraction diagrams and leasing maps of OCS areas. In any area properly included in the official Five Year diagrams and maps, any area not already leased for oil and gas may be offered for lease.

(b) BOEM invites and considers suggestions and relevant information from governors of States, local governments, industry, Federal agencies, and other interested parties, through a publication of a request for information in the FEDERAL REGISTER. Any local government must first submit its comments on the request for information to its State governor before sending the comments to BOEM.

(c) BOEM sends a letter to the governor of each affected State asking the governor to identify specific laws, goals, and policies that should be considered. Each State governor, as well as the Department of Commerce, is requested to identify the relationship between any oil and gas activity and the State under sections 305 and 306 of the CZMA, 16 U.S.C. 1454 and 1455.

(d) BOEM asks the Department of Energy for information on regional and national energy markets and transportation networks.

§ 556.203 What does BOEM do before publishing a proposed Five Year program?

After considering the comments and information described in § 556.202, BOEM will prepare a draft proposed Five Year program.

(a) At least 60 days before publication of a proposed program, BOEM will send a letter, together with the draft proposed program, to the governor of each affected State, inviting the governor to comment on the draft proposed program.

(b) A governor, whether for purposes of preparing that State's comments or otherwise, may solicit comments from local governments that he determines may be affected by an oil and gas leasing program.

(c) If a governor's comments on the draft proposed program are received by BOEM at least 15 days before submission of the proposed program to Congress and its publication for comment in the FEDERAL REGISTER, BOEM will reply to the governor in writing.

§ 556.204 How do governments and citizens comment on a proposed Five Year program?

BOEM publishes the proposed program in the FEDERAL REGISTER for comment by the public. At the same time, BOEM sends the proposed program to the governors of the affected States and to Congress and the Attorney General of the United States for review and comment.

(a) Governors are responsible for providing a copy of the proposed program to affected local governments in their States. Local governments may comment directly to BOEM, but must also send their comments to the governor of their State.

(b) All comments from any party are due within 90 days after publication of the request for comments in the FEDERAL REGISTER.

§ 556.205 What does BOEM do before approving a proposed final Five Year program or a significant revision of a previously-approved Five Year program?

At least 60 days before the Secretary may approve a proposed final Five Year program or a significant revision to a previously approved final Five Year program, BOEM will submit a proposed final program or proposed significant revision to the President and Congress. BOEM will also submit comments received and indicate the reasons why BOEM did or did not accept any specific recommendation of the Attorney General of the United States, the governor of a State, or the executive of a local government.