



## **Offshore Provisions of the Consolidated Land, Energy, and Aquatic Resources (CLEAR) Act**

**By:** [Katherine Wittenberg](#)

### **Title II – Federal Oil and Gas Development; Subtitle A – Safety, Environmental, and Financial Reform of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331, *et seq.***

#### Executive Summary

Title II, Subtitle A of the CLEAR Act addresses proposed amendments (Amendments) to the Outer Continental Shelf Lands Act (OCSLA). The Amendments emphasize that offshore oil and gas resources must be managed in a manner that recognizes and balances the need for domestic sources of energy, food, minerals, and other resources; the potential impacts of development on those resources; and the long-term economic value of the balanced development of OCS resources. With this background, the Amendments to the OCSLA include provisions requiring more attention to safety and performance systems on offshore facilities, increased financial responsibility for operators, and more stringent environmental monitoring and regulations of offshore activities.

#### Amendment to Administration of Leasing of the OCS

The proposed Amendments to the OCSLA leasing provisions emphasize the safeguarding of the marine and coastal environment. The proposed legislation directs the Secretary to prescribe or amend rules as necessary to protect operational safety and protection of marine and coastal environment – in addition to waste and conservation of natural resources.

These regulations would include the following: (1) independent third-party certification requirements of safety systems related to well control, such as blowout preventers (BOPs); (2) performance requirements for BOPs, including subsea testing and secondary activation methods; (3) independent third-party

certification requirements of well casing and cementing programs and procedures; (4) establishment of mandatory safety and environmental management systems by operators on the OCS; and (5) compliance with applicable environmental and natural resource conservation laws. Additionally, the requirement of “prompt and efficient exploration and development” has been modified to insert that exploration and development be accomplished in a manner that prevents harm to the marine and coastal environment.

#### Financial Assurance and Responsibility of Operators

The proposed legislation includes Amendments regarding financial assurance and responsibility of operators. The Secretary is required to periodically review the minimum bond amounts for leases and ensure that any required bond or surety is adequate to comply with this Act or the Oil Pollution Act of 1990, 33 U.S.C § 2701, *et seq.* (OPA); the royalty and rental rates and minimum bond or surety amounts and analyze whether these rates or amounts are appropriate (with public participation available); and the federal offshore oil and gas fiscal system (including bonus bids, rental rates, royalties, and taxes) vis-à-vis those in foreign countries.

#### Leasing on a Competitive Basis; Disqualification from Bidding; Limitation on Tract Size

Under the proposed Amendments, all offshore oil and gas leases, easements, rights-of-way, or other grants shall be issued on a competitive basis. Also, a lease applicant who is “not meeting due diligence, safety, or environmental requirements on other leases” or “is a responsible party for a vessel or a facility from which oil is discharged [within the meaning of OPA] and has not met all of its obligations under [OPA] to provide compensation for covered removal costs and damages” may be disqualified from bidding on an OCS lease. Finally, proposed Amendments limit a lease tract size to an area not to exceed 5,760 acres – regardless of whether the Secretary finds that a larger area is necessary to comprise a reasonable economic production unit.

#### Oil and Gas Exploration Plans: NEPA Compliance; Drilling Permits; “Safety Case”

Currently, offshore oil and gas lessees must submit an Exploration Plan to the Secretary prior to commencing exploration, which the Secretary has 30 days to review. The proposed Amendments would give the Secretary at least 90 days to review an Exploration Plan – and the authority to take more time and suspend the lease pending the plan review. Additionally, the Secretary may not review a lessee’s Exploration Plan unless the applicant “has demonstrated

the capacity and technology to respond immediately and effectively to a worst-case oil spill in real-world conditions in the area of the proposed activity.” The Exploration Plan must also include information regarding a scenario regarding potential blow out along with a detailed response plan and the potential environmental impact.

The proposed Amendments add three significant provisions to regulations regarding O&G Exploration Plans. First, the Secretary shall treat the approval of an exploration plan as an agency action requiring preparation of an environmental assessment (EA) or environmental impact statement (EIS) in accordance with the National Environmental Policy Act, 42 U.S.C. § 4321, et seq. (NEPA). Second, exploration plans for deepwater wells (*i.e.*, greater than 500 ft.) must be based on the “best available technology to ensure safety in carrying out both the drilling of the well and any oil spill response” and “contain a technical systems analysis of the safety of the proposed activity, the blowout prevention technology, and the blowout and spill response plans.” Third, the Secretary shall disapprove an exploration plan if implementation of the plan “would probably cause serious harm or damage to” life, aquatic life, property, mineral deposits, national security, or the marine, coastal, or human environments. If an exploration plan is disapproved, the lease shall be canceled.

*Drilling Permits.* Drilling permits are also addressed and the proposed Amendments would require that, prior to obtaining a drilling permit (for either drilling or significantly modifying a previously-approved well design), a lessee provide: (1) a “full engineering review of the well system” including safety system; and (2) a safety and environmental management plan which includes designation of environmental and safety managers who will be present on the rig at all times and have overall responsibility for the safety and environmental management of the well system and spill response plan.

*Safety Case.* Lessees will be required to submit a “safety case” with each new application to drill on the OCS. A safety case means a body of evidence that provides a basis for determining whether a system is adequately safe for a given application in a given environment.

#### Oil and Gas Development and Production Plans: NEPA Compliance

The scope and contents of a Development and Production Plan (D&P Plan) would be enlarged to include items in addition to work description, facilities description, environmental safeguards, safety standards, and expected rate of production. The proposed Amendments would require further information regarding equipment description, a blowout scenario plan, a worse-case scenario discharge plan, a “comprehensive survey and characterization” of the

coastal or marine environment, and a detailed description of technology to be deployed on the facilities “to routinely observe and monitor in real time the marine environment throughout the duration of operations.”

Approval of a D&P Plan will be considered an agency action requiring preparation of an EA or EIS in accordance with NEPA.

Finally, a D&P Plan will only be approved if the plan complies with all other applicable environmental and natural resource conservation laws and the applicant has available oil spill response and clean-up equipment and technology that has been demonstrated to be capable of effectively remediating the projected worst-case release of oil from activities conducted pursuant to the D&P Plan.

#### Enforcement of Safety and Environmental Regulations: Certifications; Increased Fines

*Annual Certifications.* Significantly, all operators of new or existing drilling and production operations must “annually certify that their operations are being conducted in accordance with applicable law and regulations.” The annual certification will include representations that the operator has examined or tested well control and emergency equipment, reviewed all operational practices to ensure that well control is not compromised at any point while emergency equipment is installed on the wellhead, reviewed emergency shutdown procedures, and ensured that all personnel are adequately trained to perform under normal and emergency operations. In addition to the operator’s certification, the operator’s CEO must also certify that the operator is complying with all applicable laws and regulations. Finally, an independent third party must inspect and certify that emergency equipment is functioning appropriately.

*Substantial Increase in Civil Penalties.* The Amendments would increase daily penalties for non-compliance with a lease term or the Act from \$20,000 to \$75,000 for each day of non-compliance. For those issues where non-compliance constitutes a serious threat of harm to human life or the environment, the daily penalty would be \$150,000. Penalties for knowing and willful violations of lease terms or the Act would increase from \$100,000 to \$10 million.

#### Repeal of incentives

The proposed Amendments would repeal those provisions in the Energy Policy Act of 2005 that offered incentives for natural gas production from deep wells in shallow waters of the Gulf of Mexico and royalty relief from deep water

production in the Gulf and in the Planning Areas offshore Alaska.

Other Amendments: New Funds; Lessee's Data; Environmental Studies; Grants for Technology

*Creation of Funds to be funded by royalty and rental revenue.* The proposed Amendments would create three new funds: the Land and Water Conservation Fund, the Historic Preservation Fund, and the Ocean Resources Conservation and Assistance Fund. For each fiscal year, these three funds will receive \$900 million, \$150 million, and 10% of collected rents and royalties, respectively. This provision, however, is not intended to decrease the amount any State currently receives under the OCSLA.

*Lessee's Data:* The proposed Amendments would require lessees to provide to the Secretary all daily reports regarding oil and gas operations generated by the lessee, contractors, or subcontractors within 24 hours.

*Environmental Studies:* Provisions regarding environmental studies would be modified to require the Secretary of Commerce to conduct studies, at least every three years, in order to assess and manage environmental impacts on human, marine, and coastal environments of the Coastal Shelf and other areas that may be affected by oil and gas development. Furthermore, in connection with its role relating to safety, environmental protection, and spill response, the Secretary would be directed to carry out a program of research, development, and assessment of technology and development issues relating to industry trends, new technologies, oil spill response and mitigation, and human risk factors.

*Grants and awards for innovative technology:* A new section would be added to the OCSLA regarding developing innovations in oil spill containment and response technologies. Under this amended provision, the Secretary would establish competitive grants programs for development of new technology and ideas relating to preventing, detecting, and responding to oil spills, especially in the deep or extreme environments where energy activities occur. The Secretary would also establish an awards program to recognize excellence in this field.

## **Title VI – Outer Continental Shelf Coordination and Planning**

Under Title VI, the proposed Amendments would create OCS regions in order to promote coordinated regional planning efforts, to ensure that decisions are based on the best available science, and to ensure protection and maintenance of marine eco-system health in decisions affecting siting of energy facilities for federal energy resources on the OCS. Four regions would

be created: the Pacific OCS Region, the Gulf of Mexico OCS Region, the Atlantic OCS Region, and the Alaska OCS Region.

The proposed Amendments would require the Secretary to create a Regional OCS Council for the four regions, with representatives from federal, state, and tribal governments, along with representatives from fisheries and any regional ocean partnership established. The Secretary would prepare an initial assessment for each region of available resources, infrastructure, and marine and environmental issues. Each regional council would prepare a “multiobjective, science and ecosystem-based, spatially explicit, integrated marine energy and energy-related mineral resources Strategic Plan” in order to foster the development of OCS energy resources with protecting the marine ecosystem and long-term economic interests in the area. These Strategic Plans would be available for public review and comment and ultimate approval by the Secretary. Strategic Plans would be reviewed at least every 5 years.

Finally, the proposed Title VI Amendments would establish an Ocean Resources Conservation and Assistance Fund. The so-called “ORCA Fund” would provide funds to be used exclusively for “activities that contribute to the conservation, protection, maintenance, and restoration of ocean, coastal, and Great Lakes ecosystems in a manner that is consistent with federal environmental laws and that avoids environmental degradation.” The fund would be administered by the Secretary of Commerce and provide grants to coastal states and Indian tribes and grants for conservation and management of ocean, coastal, and Great Lakes ecosystems and marine resources, among other things. A review panel will analyze the grant applications – which may be made by federal, state, tribal, local agencies, fishery or wildlife management organizations, nonprofit organizations, and academic institutes – and make recommendations to the Secretary.

The proposed Amendments would also require the Secretary to continue to implement, without delay, the rule for Renewable Energy and Alternate Uses of Existing Facilities on the OCS.

## **Title VII – Gulf of Mexico Restoration**

Under Title VII, the proposed Amendments add provisions for addressing restoration, long-term environmental monitoring and research programs, and emergency migratory species alternative habitats.

With respect to the restoration program for the Gulf, the program would coordinate federal, state, and local restoration programs to ensure the greatest contribution in restoring biological productivity and ecosystem functions in the Gulf. The task force created would establish a comprehensive

plan for long-term restoration of the Gulf which will identify means to restore the fish, wildlife, and coastal habitat along the Texas, Louisiana, Mississippi, Alabama, and Florida coastlines.

The Secretary would also be required to establish a long-term environmental monitoring program in the Gulf to assess the long-term direct and indirect effect of the *Deepwater Horizon* oil spill. For at least 10 years, this program would monitor and research the physical, chemical, and biological characteristics of the affected marine, coastal, and estuarine areas of the Gulf affected by the spill. The program requires reports, with data available to the public.

Finally, the proposed Amendments would create an emergency migratory species alternative habitat program to improve and restore wetland and riparian habitats. The program would also encourage the conversion of agricultural lands for provide for alternative migratory habitat for waterfowl and other migratory birds. The national Fish and Wildlife Foundation may assist with this program.

For additional information, please contact [Katherine Wittenberg](#) or [Mike Beatty](#)

---

2010, Beatty & Wozniak, P.C. All rights reserved.  
This newsletter does not constitute legal advice The views expressed in this newsletter are the views of the authors and not necessarily the views of the firm. Please consult with legal counsel for specific advice and or information.  
Read our complete [legal disclaimer](#).