

State Autonomy and the National Outer Continental Shelf Oil and Gas Leasing Program

INTRODUCTION

On January 4, 2018, Secretary of the Interior Ryan Zinke announced a dramatic proposal to significantly expand offshore oil and gas drilling operations in U.S. coastal waters.¹ Touting the plan as a “new path for energy dominance in America,”² Secretary Zinke’s draft proposal envisions making over ninety percent of the outer continental shelf (“OCS”) available for future oil and gas exploration and development.³ To effectuate this plan, the proposal would open up forty-seven potential lease sales for drilling operations in the OCS, including two lease sales in the North Atlantic, and three lease sales in the mid- and South Atlantic regions.⁴

Offshore oil drilling and exploration operations come with tremendous environmental and social costs. Oil spills, wastewater discharges, pipeline and infrastructure emplacement, wetlands loss, and increased marine traffic are but a few of the collateral impacts associated with offshore oil drilling operations that harm fragile coastal ecosystems.⁵ Such operations can also have severe negative consequences for coastal communities through the disruption of commercial fishing, subsistence harvesting, and tourism activities.⁶ The 2010 *Deepwater Horizon* oil spill, in which 3.19 million barrels of crude oil were discharged into the Gulf of

¹ U.S. DEP’T INTERIOR, *Secretary Zinke Announces Plan for Unleashing America’s Offshore Oil and Gas Potential* (Jan. 4, 2018), <https://www.doi.gov/pressreleases/secretary-zinke-announces-plan-unleashing-americas-offshore-oil-and-gas-potential>.

² Lisa Friedman, *Trump Moves to Open Nearly All Offshore Waters to Drilling*, N.Y. TIMES (Jan. 4, 2018), <https://www.nytimes.com/2018/01/04/climate/trump-offshore-drilling.html>.

³ See U.S. DEP’T INTERIOR, *supra* note 1.

⁴ *Id.*; see also BUREAU OCEAN ENERGY MGMT., 2019—2024 Outer Continental Shelf Oil and Gas Leasing, <https://www.boem.gov/NP-DPP-Map-Lower-48-States/> (last accessed Apr. 8, 2018).

⁵ See, e.g., BUREAU OCEAN ENERGY MGMT., BOEM 2017-009, GULF OF MEXICO OCS OIL AND GAS LEASE SALES: 2017—2022, at XVI—XXIX (2017) [hereinafter GULF OF MEXICO EIS]; BUREAU OCEAN ENERGY MGMT., BOEM 2016-069, COOK INLET PLANNING AREA, FINAL ENVIRONMENTAL IMPACT STATEMENT, at ES-3—ES-7 (2016) [hereinafter COOK INLET EIS].

⁶ See COOK INLET EIS, *supra* note 5, at ES-5; see also Lawrence C. Smith, Jr., *Analysis of Environmental and Economic Damages from British Petroleum’s Deepwater Horizon Oil Spill*, 74 ALBAN. L. REV. 563, 565 (2011) (estimating the “[d]amages to BP, the environment, and the U.S. Gulf Coast economy . . . to be \$36.9 billion.”).

Mexico, demonstrates the enormous risks the practice poses to coastal ecosystems and communities.⁷ Further, the large-scale investment in fossil fuel operations could undermine international and state efforts to address climate change. Because individual leases may remain productive for many years⁸ and because offshore oil drilling is a capital-intensive venture, with comparatively low long-term operating costs, significant investments in offshore oil drilling could lock the United States in to decades of fossil-fuel dependency.⁹

Given these concerns, most coastal states oppose the prospect of opening up additional offshore waters to oil and gas drilling.¹⁰ States—including New York—have considered legislation aimed at blocking federal efforts to open coastal waters to offshore drilling and exploration.¹¹ Recently, New York Assemblyman Steve Englebright introduced Assembly Bill No. A09819, which would impose a flat prohibition on the state entering into leases or granting permits for the use of state lands to support oil or natural gas production in federal waters.¹²

This paper adopts the normative premise that coastal states—who will disproportionately incur the environmental and economic costs associated with offshore oil production—should have a meaningful voice in the OCS leasing process to ensure that their coastal resources are utilized in line with state environmental, public health, and land use policies. Accordingly, this

⁷ NOAA, *Plan for Deepwater Horizon Oil Spill Natural Resource Injury Restoration: An Overview* 1 (Oct. 2015), http://www.gulfspillrestoration.noaa.gov/sites/default/files/wp-content/uploads/Overview_10-08-15_for-posting.pdf.

⁸ GULF OF MEXICO EIS, *supra* note 5, at 3-10.

⁹ Peter Erickson & Michael Lazarus, *Today's Oil Drilling Fuels Tomorrow's Political and Economic Problems*, THE GUARDIAN (Sep. 28, 2015), <https://www.theguardian.com/sustainable-business/2015/sep/28/arctic-oil-drilling-carbon-obama-shell-goldman-sachs>.

¹⁰ See Timothy Cama, *Zinke Sees Low Demand, Strong Opposition, for New Offshore Drilling*, THE HILL (Apr. 6, 2018), <http://thehill.com/policy/energy-environment/382005-zinke-sees-low-demand-strong-opposition-for-new-offshore-drilling>.

¹¹ See, e.g., Danielle Muoio & Marie J. French, *States Vow to Fight Offshore Drilling by any Means at Their Disposal*, POLITICO (Mar. 12, 2018), <https://www.politico.com/states/new-york/albany/story/2018/03/12/states-vow-to-fight-offshore-drilling-by-any-means-at-their-disposal-309656>.

¹² A09819, 2018 Leg., Reg. Sess. (N.Y. 2018).

paper examines the various litigation and legislative strategies New York and other states may employ to block federal plans to expand offshore oil drilling.¹³

The paper is structured as follows. Part I briefly introduces the mechanics of offshore drilling and provides a summary of the Outer Continental Shelf Lands Act (“OCSLA”) and the Coastal Zone Management Act (“CZMA”). Part II then discusses various litigation strategies states may utilize to block or delay offshore drilling projects under OCSLA, the National Environmental Policy Act (“NEPA”), and the Endangered Species Act (“ESA”). Part III examines legislative alternatives to litigation and considers the feasibility of regulating critical onshore infrastructure—including coastal pipelines, heliports, waste disposal facilities, and refineries—so as to stymie federal efforts to pursue offshore oil drilling and development. This Part argues that a flat prohibition on the siting of critical infrastructure, as proposed in N.Y. Assembly Bill No. A09819, is not an optimal legislative approach and poses avoidable risks of federal preemption and being struck down as unconstitutional. After proposing an alternative legislative strategy, the paper concludes.

I. OFFSHORE OIL AND GAS DRILLING AND THE FEDERAL REGULATORY LANDSCAPE

This Part first provides a brief history and overview of the offshore oil and gas production process and identifies the critical coastal infrastructure that is necessary for the economical production of petroleum from the OCS. It then summarizes the key elements of the Outer Continental Shelf Lands Act and the Coastal Zone Management Act.

A. Offshore Oil and Gas Drilling: An Overview

¹³ Though the Department of Interior seeks to expand both offshore oil and natural gas production, *see* U.S. DEP’T INTERIOR, *supra* note 1, this paper focuses on OCS lease sales for offshore oil development.

Oil companies first began to explore offshore oil extraction in the late nineteenth century, utilizing wooden piers connected to the shore from which operators drilled into the ocean floor.¹⁴ Rapid improvements in technology throughout the twentieth century, including the development of semisubmersible platforms, new well designs, innovative well-logging techniques, and digital sound recording and processing technologies, allowed for the tapping of oil wells at ever greater depths.¹⁵ Today, modern offshore oil drilling technologies allow companies to drill to extraordinary depths beneath ocean surface waters: The *Deepwater Horizon* explosion involved a well site located under 5,000 feet of water.¹⁶

After a lease sale, oil extraction occurs in four stages: “(1) exploration to locate viable oil or natural gas deposits; (2) development well drilling, platform construction, and pipeline infrastructure placement; (3) operation (oil or gas production and transport); and (4) decommissioning of facilities once a reservoir is no longer productive or profitable.”¹⁷ Depending on the water depth, development wells may be drilled from movable structures, fixed bottom-supported structures, floating vertically moored structures, floating production facilities, or drillships.¹⁸ These platforms are fixed over development wells and serve as a means to control production from wells and as a base for petroleum processing and exportation.¹⁹

An extensive network of coastal infrastructure is needed to support this process. Pipelines transport crude oil from production facilities to onshore distribution and processing centers.²⁰ “Gathering lines” connect individual wells to larger “trunk lines,” which transport the crude oil

¹⁴ NAT’L COMM’N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, *DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING* 23 (2011).

¹⁵ *See generally id.* at 24—53.

¹⁶ *Id.* at viii.

¹⁷ GULF OF MEXICO EIS, *supra* note 5, at 3-10.

¹⁸ *Id.* at 3-29.

¹⁹ *Id.* at 3-33.

²⁰ *Id.*

to shore.²¹ Some crude oil, however, is transported via oil barge.²² Service vessels and helicopters are the primary means of transporting personnel and cargo.²³ Accordingly, onshore heliports are needed.²⁴ Coastal ports also serve a critical role in the offshore oil production process. Ports function as the base from which support vehicles depart and equipment, supplies, and crew are transported.²⁵ In addition, onshore waste management facilities are necessary to dispose of certain wastes that cannot be discharged into the ocean.²⁶ Finally, refineries are needed to turn crude oil into consumable petroleum.²⁷

B. *The Outer Continental Shelf Lands Act*

This section provides a brief overview of OCSLA and will serve as a foundation for the later discussion of possible litigation and legislative strategies states may pursue in order to block federal efforts to open the OCS for offshore oil drilling. OCSLA governs offshore oil and gas drilling and exploration in the OCS,²⁸ defined as submerged lands beyond three miles from the coast line of each state.²⁹ The Act makes the seabed and subsoil of the OCS subject to the United States' exclusive control³⁰ and grants the Secretary of Interior broad authority to implement regulations that govern drilling procedures and the construction of pipelines in such waters.³¹

²¹ *Id.*

²² D.E. DISMUKES, BUREAU OF OCEAN ENERGY MGMT., BOEM 2014-657, ONSHORE OIL AND GAS INFRASTRUCTURE TO SUPPORT DEVELOPMENT IN THE MID-ATLANTIC OCS REGION 282 (2014).

²³ GULF OF MEXICO EIS, *supra* note 5, at 3-55.

²⁴ DISMUKES, *supra* note 22, at 3.

²⁵ *Id.*

²⁶ *Id.* at 5; GULF OF MEXICO EIS, *supra* note 5, at 3-75.

²⁷ DISMUKES, *supra* note 22, at 8.

²⁸ See 43 U.S.C. §§ 1331—1356b (2012).

²⁹ *Id.* §§ 1301(a)(1), 1331(a).

³⁰ *Id.* § 1332(3).

³¹ *Id.* § 1334. The Bureau of Ocean Energy Management (“BOEM”) administers the oil leasing program outlined in OCSLA, which broadly includes four steps: (1) BOEM develops a schedule of proposed lease sales on the OCS; (2) it then issues individual leases; (3) the agency approves a lessee’s compliant exploration plan and exploration drilling begins; and (4) BOEM approves a lessee’s compliant production and development plan and oil production commences. Bureau Ocean Energy Mgmt., *OCS Oil & Gas Leasing Process*, <https://www.boem.gov/BOEM-OCS-Oil-Gas-Leasing-Process/> (last visited May 3, 2018).

OCSLA also sets out—and gives the Secretary the authority to regulate—bidding procedures for individual lease sales on the OCS.³² Leases are typically five years in duration and “entitle the lessee to explore, develop, and produce the oil and gas contained within the lease area.”³³ The Secretary is entrusted with the responsibility of ensuring that leases are carried out in a manner that provides for “safety” and “protection of the environment.”³⁴ Lessees must submit a development and production plan and a statement describing the non-OCS infrastructure needed to support production activities before development begins.³⁵

Significantly, OCSLA also requires that the Secretary of Interior *not* issue a lease or grant a permit for drilling or exploration activities affecting land or water use in the coastal zone of a state having an approved coastal zone management plan until the state completes a “consistency determination”³⁶—that is, a certification that the activities described in the lease or development and production plan comply with the enforceable polices of the state’s coastal zone management plan.³⁷ However, the Secretary of Commerce may override a state’s denial of a consistency determination if she finds that each activity described in the plan is consistent with the objectives of the CZMA or is otherwise necessary in the interest of national security.³⁸

The Act requires additional cooperation with affected states before the Secretary of Interior may issue a schedule of proposed lease sales.³⁹ The Secretary must first submit a copy of the schedule to the governor of each affected state and then must accept a governor’s

³² 43 U.S.C. § 1337(a)(1).

³³ *Id.* § 1337(b).

³⁴ *Id.* § 1337(p)(3)—(4).

³⁵ *Id.* §§ 1340, 1351(a).

³⁶ *Id.* § 1351(d). In *Secretary of the Interior v. California*, the U.S. Supreme Court held that the state consistency determination required in OCSLA and in the CZMA does not apply to lease sales on the OCS. 464 U.S. 312, 340—41 (1984). Following this decision, Congress amended the CZMA to require such a determination. *See California v. Norton*, 311 F.3d 1162, 1173 (9th Cir. 2002).

³⁷ 16 U.S.C. § 1456(c)(3)(B) (2012).

³⁸ *Id.*

³⁹ *Id.* § 1344(c)(2).

recommendations if “they provide for a reasonable balance between the national interest and the well-being of the citizens of the affected State.”⁴⁰

Finally, OCSLA also explicitly requires the Secretary to consider environmental and social values in developing schedules of proposed OCS leases and in making individual lease determinations: “Management of the [OCS] shall be conducted in a manner which considers . . . the potential impact of oil and gas exploration on other resource values of the [OCS] and the marine, coastal, and human environments.”⁴¹ In addition, OCSLA clarifies that the timing and location of exploration, development and production activities shall be based—in part—on the other uses of the sea, in addition to the “laws, goals, and policies of affected States.”⁴²

C. The Coastal Zone Management Act

The federal regulatory scheme laid out in OCSLA is closely interconnected with the CZMA. This section provides a synopsis of the relevant provisions of the CZMA as they relate to offshore oil production and development.

The CZMA authorizes federal grants to states that devise management programs for coastal areas. Among other requirements, each program must provide: (i) the boundaries of the coastal zone within the state; (ii) the permissible land and water uses within the coastal zone that have a direct and significant impact on coastal waters; (iii) broad guidelines regarding the priorities of uses in designated areas within the coastal zone; (iv) a plan for the protection of beaches; and (v) a planning process for energy facilities likely to be located in the coastal zone.⁴³

⁴⁰ *Id.* § 1345(c). Determination of the “national interest” is based on “the desirability of obtaining oil and gas supplies in a balanced manner and on the findings, purposes, and policies” of the consultation requirement. *Id.*

⁴¹ *Id.* § 1344(1); *see also id.* § 1337(p)(4).

⁴² *Id.* § 1344(2)(D), (F).

⁴³ 16 U.S.C. § 1455(d)(2) (2012).

States must also demonstrate the authority to manage coastal zones in accordance with their plan⁴⁴ and assure that their program protects areas of environmental significance.⁴⁵

In addition, the state’s management program must “provide[] for adequate consideration of the national interest involved in planning for, and managing the coastal zone, including the *siting of facilities such as energy facilities which are of greater than local significance.*”⁴⁶ As to these energy facilities, National Oceanic and Atmospheric Administration (“NOAA”) regulations require that a state “[d]escribe the national interest in the planning for and siting of facilities considered during program development,” indicate the consideration the program gives to national or interstate energy plans, and describe the “process for continued consideration of the national interest in the planning for and siting of facilities during program implementation.”⁴⁷ Finally, the CZMA provides for the suspension and withdrawal of federal funds for noncompliance with the aforementioned requirements.⁴⁸

II. LITIGATION STRATEGIES AVAILABLE TO STATES

Having reviewed the essential elements of OCSLA and the CZMA, this Part examines the various litigation strategies states may utilize to block or delay an impending lease sale on the OCS. States will likely be able to raise challenges pursuant to the terms laid out in OCSLA and the procedures set forth in NEPA and the ESA.

A. *Litigation Strategies Pursuant to OCSLA*

If faced with an impending lease sale on the Atlantic seaboard, New York will likely be able to raise several challenges under OCSLA that could delay or halt the project all together.

⁴⁴ *Id.* § 1455(d)(10).

⁴⁵ *Id.* § 1455(d)(9).

⁴⁶ *Id.* § 1455(d)(8) (emphasis added).

⁴⁷ 15 C.F.R. § 923.52(c) (2018).

⁴⁸ 16 U.S.C. § 1458(c)—(d).

While the availability of these challenges will necessarily depend upon the facts and circumstances surrounding a given lease proposal, this section emphasizes the potential arguments New York will most likely be able to raise.

OCSLA provides that states can propose recommendations on BOEM's schedule of proposed lease sales, which BOEM must accept so long as they provide for a reasonable balance between the national interest and the well-being of the citizens of the affected state.⁴⁹ Courts have had few opportunities to interpret what constitutes a "reasonable balance" in this context.⁵⁰ Still, the legislative history indicates that the state recommendation requirement should not be interpreted as granting states the authority to veto a proposed oil and gas lease sale.⁵¹

With this in mind, New York may consider recommending conditions that would create significant obstacles to the economic development and production of oil and then challenging as arbitrary and capricious any subsequent decision by BOEM that fails to adopt its recommendations.⁵² New York, for instance, may recommend that support and construction vessels travel along routes that do not interfere with the fisheries that sustain the state's \$5 billion commercial fishing industry.⁵³ In addition, New York may also consider recommending onerous time-of-use restrictions for coastal support operations and strict public health and environmental standards for pipelines and other coastal infrastructure, citing the need to protect the historic quality and character of its coastal zone.

OCSLA's explicit requirement that management of the OCS be done in a manner that considers "economic, social, and environmental values" provides further opportunities for

⁴⁹ 43 U.S.C. § 1345(c) (2012).

⁵⁰ *Blanco v. Burton*, No. Civ. A. 06-3813, 2006 WL 2366046 *14 (E.D. La. Aug. 14, 2006).

⁵¹ *Id.* at *14 n.38.

⁵² *Id.* at *14.

⁵³ N.Y. STATE, *Governor Announces \$20 Million in Grants to Sandy-Impacted Fishing Industry* (May 20, 2013), <https://www.governor.ny.gov/news/governor-announces-20-million-grants-sandy-impacted-fishing-industry>.

litigation.⁵⁴ In developing an OCS lease schedule and in making individual lease determinations, BOEM must consider the impacts of oil development and production on marine life and coastal environments and ensure that lease sales are carried out in a manner that provides for protection of the environment.⁵⁵ In addition, BOEM must consider how the timing and location of exploration, development, and production activities will affect other uses of the sea.⁵⁶

The D.C. Circuit has held that these provisions do not require BOEM to consider the downstream climate effects associated with the consumption of oil extracted from the OCS.⁵⁷ Rather, OCSLA only requires that BOEM assess the impacts of oil extraction “on the localized area in and around where the drilling and extraction occur[s].”⁵⁸ Still, given the fragile ecosystems that exist in New York’s coastal areas and the social and economic significance of New York’s marine resources,⁵⁹ OCSLA’s clear mandate that oil leasing be conducted in a manner protective of such considerations provides a potentially fruitful basis for future litigation.

The CZMA also requires that BOEM obtain a consistency determination from each affected state before it grants a lease sale, and OCSLA mandates that BOEM do so before approving a lessee’s exploration plan or production and development plan.⁶⁰ For those states with approved coastal management programs, the consistency determination provision provides another potentially productive foundation for litigation.

New York may be able to challenge a potential lease sale as being inconsistent with its Coastal Zone Management Program (“CMP”). New York’s CMP contains several substantive policies mandating that marine activities not threaten coastal fisheries and natural resources in

⁵⁴ 43 § 1344(1).

⁵⁵ *Id.* §§ 1337(p)(4), 1344(1).

⁵⁶ *Id.* § 1344(2)(D), (F).

⁵⁷ *Ctr. for Biological Diversity v. U.S. Dep’t of Interior*, 563 F.3d 466, 484—85 (D.C. Cir. 2009).

⁵⁸ *Id.* at 485.

⁵⁹ See *infra* section II.B (discussing the endangered and threatened species found in the New York coastal zone).

⁶⁰ See *supra* notes 36--38 and accompanying text.

the coastal zone, which would likely conflict with plans to open up coastal waters for offshore oil production. For instance, CMP policy seven states that “[s]ignificant coastal fish and wildlife habitats will be protected, preserved, and, where practical, restored so as to maintain their viability as habitats.”⁶¹ Further, policy twenty-nine requires that “[t]he development of offshore uses and resources . . . accommodate New York’s long-standing ocean . . . industries, such as commercial and recreational fishing and maritime commerce, and the ecological functions of habitats important to New York.”⁶² Because offshore oil drilling has the potential to significantly affect coastal ecosystems and the local economies that depend upon them,⁶³ New York may argue that *any* lease sale or exploration or development plan is inconsistent with these policies.

Importantly, the Secretary of Commerce has the authority to override a state’s objection to a lease sale or development plan if she finds that each activity in the plan is consistent with the state’s coastal management plan.⁶⁴ This determination, however, is reviewable under an arbitrary and capricious standard of review,⁶⁵ and the burden of establishing compliance is on the federal agency.⁶⁶ Given the above state policies, New York should have a strong legal foundation for challenging any plan that would open its coastal waters for offshore oil production.

In short, New York will likely be able to raise several challenges to a potential lease sale off the New York coast under OCSLA and the CZMA. The consistency determination requirement is particularly promising and should give New York a credible legal hook to delay or halt a potential plan to open its coast to offshore oil drilling and production.

⁶¹ N.Y. DEP’T STATE, NEW YORK STATE COASTAL MANAGEMENT PROGRAM AND FINAL ENVIRONMENTAL IMPACT STATEMENT II-6, at 22 (2017). In addition, policy forty-four makes it an official goal to “[p]reserve and protect tidal and freshwater wetlands and preserve the benefits derived from these areas.” *Id.* at II-6, 116.

⁶² *Id.* at II-6, 100.

⁶³ See *supra* note 6 and accompanying text.

⁶⁴ See *supra* notes 38—**Error! Bookmark not defined.** and accompanying text.

⁶⁵ See *Blanco v. Burton*, No. Civ. A. 06-3813, 2006 WL 2366046 *11 (E.D. La. Aug. 14, 2006) (finding the Secretary’s consistency determination arbitrary and capricious).

⁶⁶ *Conservation Law Foundation v. Watt*, 560 F. Supp. 561, 576 (D. Mass. 1983).

B. *Litigation Strategies Pursuant to NEPA and the ESA*

This section addresses litigation strategies under NEPA and the ESA that states may utilize to slow or even halt unwanted offshore oil development and production projects. Because these statutes are likely relatively familiar to states and to advocates, this paper addresses these issues only in brief before turning to the various legislative approaches New York should consider in responding to Secretary Zinke’s proposal.

NEPA requires that for “major federal actions significantly affecting the quality of the human environment,” federal agencies must prepare an environmental impact statement (“EIS”) detailing, among other things, the purpose of and need for the action, its environmental impacts, and any alternatives to the proposed action.⁶⁷ Courts have determined that an EIS is required at each of the leasing, exploration, and development stages outlined in OCSLA.⁶⁸ When BOEM issues the National OCS Program schedule, in which it specifies “the size, timing, and location of potential leasing activity that the Secretary of the Interior determines best meet national energy needs,”⁶⁹ it need only prepare a programmatic EIS.⁷⁰ Later, when BOEM considers actual lease sale determinations, it conducts site-specific EISs.⁷¹

New York may be able to challenge the scope and sufficiency of the environmental analyses included in a programmatic or subsequent site-specific EIS.⁷² Such a challenge will necessarily be fact specific and an exhaustive explication of the issues that may arise in bringing

⁶⁷ 42 U.S.C. § 4332(C) (2012); 40 C.F.R. § 1502.10—18 (2017).

⁶⁸ *Village of False Pass v. Clark*, 733 F.2d 605, 609 (9th Cir. 1984).

⁶⁹ BOEM, *National OCS Oil and Gas Leasing Program*, <https://www.boem.gov/national-ocs-program/> (last visited Apr. 29, 2018).

⁷⁰ BOEM, *2019-2024 National Outer Continental Shelf Oil and Gas Leasing Program: Frequently Asked Questions*, <https://www.boem.gov/National-Program-FAQ/> (last visited Apr. 29, 2018) [hereinafter BOEM, *FAQ*]; see also *Ctr. for Biological Diversity v. U.S. Dept. of Interior*, 563 F.3d 466, 475—79 (D.C. Cir. 2009).

⁷¹ BOEM, *FAQ*, *supra* note 70.

⁷² 40 C.F.R. § 1508.23. For the specific elements that an agency must include in its consideration of environmental consequences, see 40 C.F.R. § 1502.16.

such a claim is not possible before BOEM issues a draft programmatic EIS for the 2019-2024 National OCS Program. The aforementioned notwithstanding, New York should closely scrutinize BOEM's consideration of climate change effects in its draft EIS. The D.C. Circuit's recent decision in *Sierra Club v. FERC* suggests that agencies must consider downstream greenhouse gas effects in their EISs.⁷³ Significantly, the D.C. Circuit has previously held that BOEM need not consider climate change at the schedule stage, so New York would likely only be able to raise a NEPA challenge based on the omission of downstream climate effects when BOEM proposes to sell a specific lease.⁷⁴ New York should also keep in mind that the Courts of Appeals have been less demanding of agencies as to the scope and sufficiency of environmental analyses at the lease schedule and lease sale stages than at later stages.⁷⁵

States may also challenge a potential lease sale on the OCS under section seven of the ESA. The ESA requires that all federal agencies ensure that an action the agency authorizes “is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species.”⁷⁶ If BOEM determines that an action may affect an endangered or threatened species, or its critical habitat, the agency must consult with the Fish and Wildlife Service (“FWS”) or National Marine Fisheries Service (“NMFS”) to obtain a biological opinion.⁷⁷ If FWS or NMFS subsequently find that the action would jeopardize the species or its critical habitat, BOEM may not proceed.⁷⁸

⁷³ *Sierra Club v. FERC*, 867 F.3d 1357, 1371—74 (D.C. Cir. 2017).

⁷⁴ *Ctr. for Biological Diversity v. U.S. Dept. of Interior*, 563 U.S. 466, 480—82 (D.C. Cir. 2009) (finding plaintiff's NEPA claims not ripe at the program stage).

⁷⁵ *See, e.g., Tribal Village of Akutan v. Hodel*, 869 F.2d 1185, 1192 (9th Cir. 1988) (“We are the least troubled by what may seem to be incomplete or speculative data at the lease sale stage.”).

⁷⁶ 16 U.S.C. § 1536(a)(2) (2012).

⁷⁷ 50 C.F.R. § 402.14 (2017).

⁷⁸ 16 U.S.C. § 1536(b)(3)(A).

There are several endangered and threatened species found in New York's coastal zone and waters that would likely be affected were New York's coastline made available for offshore oil drilling and exploration, including the Atlantic Sturgeon, Piping Plover, Red Knot, North Atlantic Right Whale, Roseate Tern, and Shortnose Sturgeon.⁷⁹ As with a potential NEPA challenge, New York's ability to bring such a claim will rely heavily on the facts and circumstances surrounding a proposed lease sale. Still, New York will likely be able to argue that the waste discharges, construction, marine traffic, and potential oil spills associated with the offshore oil drilling process will threaten the continued existence of these populations.

It is possible that challenges brought under NEPA and the ESA may only *delay* a lease sale in the OCS. After all, NEPA imposes only procedural requirements that an agency must follow—it does not command that a certain choice of action be taken⁸⁰—and a challenge under the ESA leaves open the possibility that BOEM may simply alter a lease plan to resolve any ESA violations. Even so, Secretary Zinke's proposal remains politically unpopular⁸¹ and a shift in national politics could result in the Department of Interior adopting a dramatically different position on offshore drilling. Accordingly, delay strategies through litigation could prove quite effective in actually blocking plans to expand offshore drilling on the OCS.

III. LEGISLATIVE STRATEGIES AVAILABLE TO STATES

This Part examines the various legislative strategies states may pursue to halt federal efforts to develop offshore oil production and development in coastal waters. Any state legislative action will raise threshold questions related to the state statute's compatibility with the

⁷⁹ *North Atlantic Right Whales (Eubalaena glacialis)*, NOAA FISHERIES, <http://www.nmfs.noaa.gov/pr/species/mammals/whales/north-atlantic-right-whale.html> (last updated July 20, 2017); *Species in New York State*, U.S. FISH & WILDLIFE SERVICE: N.Y. FIELD OFFICE, <https://www.fws.gov/northeast/nyfo/es/NYSpecies.htm> (last updated Jan. 24, 2017).

⁸⁰ *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227—28 (1980).

⁸¹ See *infra* notes 10—11.

CZMA, federal preemption under OCSLA, and constitutionality pursuant to the dormant commerce clause. Section III.A first discusses these threshold issues as they apply to New York Assembly Bill No. A09819, which would prohibit the state from entering into leases or granting permits for the use of state lands to support oil or natural gas production in federal waters.⁸² In concluding that such a flat prohibition is suboptimal, this analysis provides the bedrock for section III.B, which advances the argument that New York should adopt an alternative legislative approach that would narrowly target critical infrastructure in the offshore drilling process, including coastal pipelines, heliports, refineries, and waste disposal facilities.

A. Threshold Legal Challenges Associated with State Efforts to Block Offshore Drilling

This section examines the threshold legal challenges that a blanket ban on the construction of oil production infrastructure on state lands, as proposed in Assembly Bill No. A09819, raises. As will be demonstrated, such a ban is not an ideal approach because it would risk invalidating New York’s CMP. This, in turn, would jeopardize important protections that are afforded to New York under the CZMA and OCSLA. In addition, New York’s blanket prohibition, as currently drafted, poses a significant risk of being struck down as preempted under OCSLA and unconstitutional pursuant to the dormant commerce clause.

1. Conflict with the Coastal Zone Management Act.

When a state amends its coastal zone management program, NOAA must determine “if the management program . . . still will constitute an approvable program.”⁸³ NOAA regulations define an amendment to a CMP as a “substantial change” to “[u]ses subject to management” in the coastal zone.⁸⁴ Though the regulations do not make clear what exactly constitutes a

⁸² A09819, 2018 Leg., Reg. Sess. (N.Y. 2018).

⁸³ 15 C.F.R. § 923.81—82 (2018).

⁸⁴ *Id.* § 923.80.

“substantial change,” the limited case law that exists on the subject suggests that Assembly Bill No. A09819, if signed into law, would likely be considered an amendment to the New York CMP, requiring NOAA review for consistency with the CZMA.

In *AES Sparrows Point LNG, LLC v. Smith*, for instance, the Fourth Circuit held that a change to county zoning regulations, which designated a proposed LNG terminal as a prohibited use within the county, was an amendment to Maryland’s Coastal Management Program.⁸⁵ As the court explained, the new county regulations “impose[] a categorical ban on LNG terminals in the Chesapeake Bay Critical Area that the CMP did not previously contain. This . . . constitutes a ‘substantial change’ in the ‘uses subject to management’ by the CMP.”⁸⁶ Currently, New York’s CMP explicitly provides for the consideration of and siting procedures for energy-related infrastructure in coastal areas.⁸⁷ As in *AES Sparrows Point LNG*, Assembly Bill No. A09819 would functionally create a new categorical ban on a subset of energy facilities within New York’s coastal zone. Accordingly, its passage would almost certainly require NOAA review.

NOAA review for consistency with the CZMA will pose a problem for New York. The CZMA requires that state programs “provide[] for adequate consideration of the national interest involved in planning for, and managing the coastal zone, including the siting of facilities such as energy facilities which are of greater than local significance.”⁸⁸ On its face, Assembly Bill No. A09819 appears to conflict with this command. It in no way provides for the consideration of the national interest in making siting decisions regarding support infrastructure for the offshore oil production process—it simply removes these facilities from consideration all together.

⁸⁵ 527 F.3d 120, 126 (4th Cir. 2008).

⁸⁶ *Id.*

⁸⁷ Policy twenty-seven, for instance, states: “Decision on the siting and construction of major energy facilities in the coastal area will be based on public energy needs, compatibility of such facilities with the environment, and the facility’s need for a shorefront location.” N.Y. DEP’T STATE, *supra* note 61, at II-6, 92.

⁸⁸ 16 U.S.C. § 1455(d)(8) (2012). New York’s CMP defines the “national interest” as “national defense, energy production and transmission, recreation, and transportation facilities.” N.Y. DEP’T STATE, *supra* note 61, at II-9, 2.

It is important to note that the CZMA does *not* require that states approve the siting of specific energy facilities in their coastal zones. As the U.S. District Court of the Central District of California explained in *American Petroleum Institute v. Knecht*, the CZMA does not make “affirmative accommodation of energy facilities . . . a [q]uid pro quo for approval.”⁸⁹ Still, NOAA regulations mandate that a coastal management program “describe the process for continued consideration of the national interest in the planning for and siting of facilities during program implementation, including a clear and detailed description of the administrative procedures and decisions points where such interest will be considered.”⁹⁰ As drafted, Assembly Bill No. A09819 contains no such process in considering infrastructure used to support offshore oil drilling and development. Accordingly, in passing this bill, New York faces a serious risk that NOAA will find its CMP no longer in compliance with the CZMA.

If New York decides to pursue a blanket prohibition on the siting of coastal infrastructure notwithstanding the aforementioned, and NOAA determines that its CMP is no longer in compliance with the CZMA, New York will stand to lose its CZMA federal grant money.⁹¹ This financial loss likely will not be of great consequence for New York—in 2016, New York received only \$2.7 million through the CZMA program.⁹² But the decertification of New York’s CMP would come with additional, far more significant costs. As discussed above, OCSLA provides important protections for those affected states that have an approved coastal management program pursuant to the CZMA. Specifically, OCSLA requires that the Secretary of Interior not issue a lease or grant a permit for offshore oil development and production before it

⁸⁹ 456 F. Supp. 889, 924 (C.D. Cal. 1978), *aff’d*, 609 F.2d 1306 (9th Cir. 1979).

⁹⁰ 15 C.F.R. § 923.52(c)(4) (2018).

⁹¹ *See generally id.* § 923.135.

⁹² JOELLE GORE, NAT’L OCEANIC AND ATMOSPHERIC ADMIN., REVISED FY 2016 FINAL FUNDING GUIDANCE AND ALLOCATIONS COASTAL ZONE MANAGEMENT ACT SECTIONS 306/306A AND 309, attach. 1 (2016).

obtains a consistency determination.⁹³ This requirement ensures that affected states have a say in the leasing and permitting processes and also provides a potential basis for litigation if the Secretary fails to adequately consider a state's objections to a development or lease plan.

These protections are of even greater significance for affected states that neighbor other states in which it would be economically feasible to locate critical infrastructure for the offshore oil development process. New York is one such state. Were the Secretary of Interior to propose a lease sale off the New York coast, a developer might decide to locate critical onshore infrastructure in New Jersey. To underscore this point, it is worth noting that, while there are currently no oil refineries within New York, New Jersey contains five—four of which are located in coastal communities near New York City.⁹⁴ Because refineries are a necessary component of the oil production process,⁹⁵ an offshore oil developer would be tempted to utilize New Jersey as its base of operations. Under this plausible factual scenario, a blanket prohibition in the mold of Assembly Bill No. A09819 would provide little protection to New York while leaving it without the safeguards of the consistency determination requirement.

Accordingly, it is of paramount importance that New York adequately incorporate processes to consider national interests, including in energy production and transmission, in crafting its legislative response to federal efforts to expand offshore oil production. Section III.B provides one possible approach New York may adopt that would address this concern.

2. *Preemption under the Outer Continental Shelf Lands Act.*

This section examines whether OCSLA would preempt a state statute that imposes a blanket prohibition on the siting of critical infrastructure in coastal areas. While courts have

⁹³ See *supra* notes 36—**Error! Bookmark not defined.** and accompanying text (setting out the consistency determination requirement).

⁹⁴ *Id.*

⁹⁵ See generally *supra* note 27 and accompanying text.

made clear that OCSLA preempts state authority over conduct occurring *on the OCS* itself,⁹⁶ OCSLA’s preemptive reach over conduct and activities *beyond* the OCS is far from established. A state law may be preempted through “express language in a statute,” field preemption, in which Congress intends to “foreclose any state regulation in the area,” or conflict preemption.⁹⁷ This section addresses these three possible bases for preemption in turn.

OCSLA does not explicitly preempt the state regulation of offshore development and production processes that occur outside the OCS. To the contrary, OCSLA utilizes language that only extends federal jurisdiction to activities conducted *on the OCS*.⁹⁸ Similarly, there is little evidence to support the conclusion that Congress intended OCSLA to field preempt the state regulation of activities conducted outside of the OCS. While no court has directly confronted this issue, the Supreme Court’s recent decision in *Oneok, Inc. v. Learjet, Inc.* is instructive. In *Oneok*, the Court noted that the Natural Gas Act was “drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way.”⁹⁹ Accordingly, the Court found it necessary to “proceed cautiously” in finding field preemption of the relevant state law.¹⁰⁰

As with the Natural Gas Act, OCSLA was similarly drawn with regard for the continued exercise of state power. The Act’s consistency determination requirement¹⁰¹ and its mandate that the Secretary of Interior consider affected states’ recommendations in developing lease program schedules¹⁰² reflect an active, participatory role of the states in the offshore oil development and production process. Indeed, some scholars have characterized the consistency determination as a

⁹⁶ See, e.g., *Ten Taxpayer Citizens Group v. Cape Wind Associates, LLC*, 373 F.3d 183, 196 (1st Cir. 2004) (“In our view, the OCSLA leaves no room for states to require licenses or permits for the erection of structures on the seabed on the outer Continental Shelf.”).

⁹⁷ *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1594—95 (2015).

⁹⁸ See, e.g., 43 U.S.C. § 1337(h) (disclaiming federal jurisdiction over submerged lands in state waters).

⁹⁹ *Oneok, Inc.*, 135 S. Ct. at 1599.

¹⁰⁰ *Id.*

¹⁰¹ 43 U.S.C. § 1351(d).

¹⁰² *Id.* § 1344(c).

form of “reverse preemption” in that it “allows states to exert influence over federal agencies acting under the authority of other federal statutes.”¹⁰³ If there was any doubt left regarding Congress’s intent with respect to field preemption, OCSLA states: “the rights and responsibilities of all [Coastal and affected] States . . . to preserve and protect their marine, human, and coastal environments through such means as regulation of land, air, and water uses, of safety, and of related development and activity should be considered and recognized.”¹⁰⁴

Recent decisions from the U.S. District Court for the Eastern District of Louisiana further support this conclusion. In one such case, a Louisiana parish brought suit against Total Petrochemical & Refining, alleging that its oil production and transportation operations caused damage to land and waterbodies located within its coastal zone.¹⁰⁵ The parish claimed that these operations violated the Louisiana State and Local Coastal Resources Management Act, which prohibits individuals from engaging in a “use”—defined as an “activity within the coastal zone” having a “direct and significant impact on coastal waters”—without first receiving a coastal use permit.¹⁰⁶ In holding that the case should be remanded to state court, the district judge implicitly recognized that OCSLA did not preempt the state and local regulation of oil infrastructure in coastal lands and waters. As the court noted, “None of the activities, including those that involved pipelines that ultimately stretch to the OCS took place *on the OCS*.”¹⁰⁷ The court also rejected arguments that OCSLA gave the federal court jurisdiction over the Parish’s injuries

¹⁰³ Ann E. Carlson & Andrew Mayer, *Reverse Preemption*, 40 *ECOLOGY L.Q.* 583, 597 (2013).

¹⁰⁴ 43 U.S.C. § 1332(5). OCSLA also states that the Secretary shall consider the “laws, goals, and policies of affected States” in determining the timing and location of activities on the OCS. *Id.* § 1344(2)(D), (F).

¹⁰⁵ *Parish of Plaquemines v. Total Petrochemical & Refining USA, Inc.*, 64 F. Supp. 3d 872, 877—78 (E.D. La. 2014).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 894—95 (emphasis added).

merely because the infrastructure at issue was connected to operations on the OCS.¹⁰⁸

Subsequent decisions from the district have affirmed this conclusion.¹⁰⁹

Conflict preemption poses a more plausible basis for challenging New York’s regulation of the critical infrastructure in the offshore oil production and development process. The Supreme Court has reiterated that “a state law is preempted where ‘it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’”¹¹⁰ Challengers to Assembly Bill No. A09819 will have a strong argument that the law, in rendering the construction of onshore infrastructure on state lands impossible, conflicts with Congress’s objective of making the OCS “available for expeditious and orderly development.”¹¹¹

A more nuanced approach, in which the regulation of critical onshore infrastructure makes offshore production and development activities difficult and economically unattractive, would appear to rest on safer footing. Critics may argue that such a statute would still stand as an obstacle to the purpose of OCSLA. Congress, however, did not have as its goal the uninhibited development of offshore oil activity on the OCS. Instead, the Act’s declaration of policy makes clear that Congress sought a *balanced* approach to the development of the OCS, taking environmental and public-health factors into consideration.¹¹² With this in mind, it is arguable that the state regulation of critical infrastructure actually *further*s the goals of the statute insofar

¹⁰⁸ *Id.* at 898.

¹⁰⁹ *See, e.g., Parish v. Exxon Mobile Corp.*, No. 13-6717, 2015 WL 4097111, *17 (E.D. La. Jul. 7, 2015).

¹¹⁰ *Arizona v. United States*, 567 U.S. 387, 406 (2012) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1940)).

¹¹¹ 43 U.S.C. § 1332(3). Other commentators seem to agree with this general conclusion. *See, e.g.,* Richard Breeden, *Federalism and the Development of Outer Continental Shelf Mineral Resources*, 28 STAN. L. REV. 1107, 1149 (1976) (“The difficult problem, of course, will be to ascertain which statutes create undue interference with federal objectives in the absence of an outright clash in state and federal laws. The question is one of degree and hence calls for case-by-case determinations.”).

¹¹² *See, e.g.,* 43 U.S.C. § 1332(3) (“[T]he outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards.”); *id.* § 1332(5) (“[T]he rights and responsibilities of all States and, where appropriate, local governments, to preserve and protect their marine, human, and coastal environments through such means as regulation of land, air, and water uses, of safety, and of related development and activity should be considered and recognized.”).

as it ensures the safe and responsible development of the OCS. This position is further bolstered by the Supreme Court’s recognition of a presumption against preemption in traditional domains of state regulation.¹¹³ Environmental, land use, and public health regulations are such traditional areas of state and local control.¹¹⁴

In sum, a flat prohibition on the siting of critical onshore infrastructure poses a significant and avoidable risk of being struck down as preempted under OCSLA. Section III.B propose an alternative approach that considers the balance Congress sought to achieve in OCSLA.

3. *Challenges Pursuant to the Dormant Commerce Clause.*

The Supreme Court has recognized two general categories of state activity that may violate the dormant commerce clause: (1) a state law that “discriminates on its face against interstate commerce”;¹¹⁵ and (2) a state law that “regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental.”¹¹⁶ As to the former category, the Supreme Court has explained that “discrimination” means the “differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.”¹¹⁷ When a state engages in such differential treatment, the Supreme Court has adopted “a virtually *per se* rule of invalidity.”¹¹⁸ With regard to the latter category, the Supreme Court in *Pike v. Bruce Church, Inc.* adopted “a much more flexible approach” wherein the state law will be upheld “unless the burden imposed on such commerce is clearly excessive in relation

¹¹³ See *Hillman v. Maretta*, 569 U.S. 483, 490—91 (2013) (noting that there is a presumption against the preemption of state laws governing domestic relations).

¹¹⁴ E.g., *Nat’l League of Cities v. Usery*, 426 U.S. 833, 851—52 (1976), overruled by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

¹¹⁵ *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 550 U.S. 330, 338 (2007); see also *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

¹¹⁶ *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

¹¹⁷ *United Haulers Ass’n, Inc.*, 550 U.S. at 338.

¹¹⁸ *Philadelphia*, 437 U.S. at 624.

to the putative benefits.”¹¹⁹ Because application of strict scrutiny will often prove fatal, the threshold question of whether a state statute facially discriminates against interstate commerce is of critical importance, and is the dispositive inquiry here.¹²⁰

No court has entertained a dormant commerce clause challenge aimed at the state regulation of offshore oil and gas production.¹²¹ The Third Circuit, however, addressed an analogous challenge in *Norfolk Southern Corp. v. Oberly*, in which it considered the constitutionality of a provision in Delaware’s Coastal Zone Act (“CZA”) that prohibited “offshore gas, liquid, or solid bulk product transfer facilities” in Delaware’s coastal zone.¹²² Norfolk Southern, which sought to develop a coal-loading and transfer operation in Delaware Bay, alleged that this provision violated the dormant commerce clause.¹²³ In considering this challenge, the court rejected the argument that heightened scrutiny should apply to the CZA. As the court explained, the dormant commerce clause is implicated when a “state law . . . impose[s] an import or export embargo which preclude[s] interstate commerce in a specified good while leaving unaffected the in-state trade in that good.”¹²⁴ Delaware’s CZA, the court reasoned, merely regulated “an in-state activity—vessel-to-vessel coal transfers—in a wholly nondiscriminatory manner.”¹²⁵ The court then applied the *Bruce Church* balancing test, but found no incidental burden on interstate commerce because Delaware’s CZA applied to “any coal transporter, regardless of state affiliation.”¹²⁶

¹¹⁹ *Pike*, 397 U.S. at 142 (citing *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443 (1970)).

¹²⁰ See *Philadelphia*, 437 U.S. at 624.

¹²¹ Section III.B.1, *infra*, discusses dormant commerce cases related to the state regulation of pipelines.

¹²² 822 F.2d 388, 391 (1987).

¹²³ *Id.* at 392.

¹²⁴ *Id.* at 401 (citing *Philadelphia*, 437 U.S. at 624).

¹²⁵ *Id.*

¹²⁶ *Id.* at 407.

Norfolk Southern supports the conclusion that a state measure that restricts offshore oil development activities within coastal zones generally will not impermissibly burden interstate commerce so long as the regulation does not facially advantage or have the disproportionate incidental effect of advantaging in-state commerce in the relevant market for offshore oil.¹²⁷ On its face, however, Assembly Bill No. No. A09819 appears to discriminate against out-of-state interests in that its prohibitions only apply to state authorizations related to “oil or natural gas production from *federal waters*.”¹²⁸ By leaving open the possibility of state approval of activities supporting oil or natural gas production in *state waters*, Assembly Bill No. A09819 is vulnerable to the attack that it is merely a protectionist measure. Section III.B proposes an alternative approach, which addresses this potential dormant commerce clause challenge.

B. Recommendations: Targeting Critical Infrastructure in Coastal and Onshore Areas

Given the aforementioned threshold considerations, this section provides recommendations as to how New York should craft legislation that will allow it to assert control over the offshore oil production processes that occur in state waters and lands while avoiding the legal and strategic pitfalls described above. Due to their importance in the offshore oil development process, this paper recommends that New York target coastal pipelines, heliports, waste disposal facilities, and refineries for regulation. Because the regulation of oil pipelines in coastal waters raises distinct jurisdictional and constitutional questions, this section briefly addresses points of caution in targeting pipelines before turning to specific recommendations.

¹²⁷ There is some ambiguity as to what would constitute the relevant market in a dormant commerce clause challenge to a statute or local ordinance that bans the siting of critical infrastructure for offshore oil production in coastal areas. The Supreme Court has adopted a relatively narrow view of what constitutes the relevant market in a given dormant commerce clause challenge. *See, e.g., General Motors Corp. v. Tracy*, 519 U.S. 278, 297—98 (1997) (holding that bundled natural gas sold primarily to residential customers and unbundled natural gas sold in bulk served different markets for the purpose of the Court’s dormant commerce clause analysis). Accordingly, a court would likely find that offshore oil—rather than oil—is the relevant market in such a challenge.

¹²⁸ A09819, 2018 Leg., Reg. Sess. (N.Y. 2018) (emphasis added).

1. *State Regulation of Coastal Pipelines.*

In state waters, the Pipeline Safety Act (“PSA”) grants the Pipeline and Hazardous Materials Safety Administration Office of Pipeline Safety (“PHMSA”) exclusive jurisdiction over the safety standards applicable to gathering and trunk pipelines.¹²⁹ Courts will find state laws preempted that purport to regulate environmental standards when their “practical impact” is to mandate safety standards.¹³⁰

Nevertheless, courts have concluded that the PSA does *not* preempt the state and local imposition of non-safety regulations on pipelines and pipeline infrastructure. In *Texas Midstream Gas Services, LLC v. City of Grand Prairie*, for instance, the Fifth Circuit upheld a city setback requirement for natural gas compressor stations, explaining, “None of [our] cases foreclose laws primarily related to aesthetics or non-safety police powers. . . . The PSA preempts safety standards Grand Prairie’s setback requirement is not a safety standard in letter, purpose, or effect. It may remain in force.”¹³¹ The court also noted that a non-safety regulation is not preempted by the PSA merely because it “incidentally affect[s] safety, so long as the effect is not ‘direct and substantial.’”¹³² The Fourth Circuit reached the same conclusion in *Washington Gas Light Co. v. Prince George’s County Council*.¹³³

Recently, the U.S. District Court for the District of Maine considered whether the PSA preempted the City of South Portland’s zoning ordinance, which prohibited the storing and

¹²⁹ U.S. DEP’T OF TRANSP., *Fact Sheet: Offshore Pipelines* (Dec. 1, 2011), <https://primis.phmsa.dot.gov/comm/FactSheets/FSoOffshorePipelines.htm>; *see also* 49 U.S.C. § 60104(c) (2012); 49 C.F.R. § 195.1(a)(1) (2017); *Kinley Corp. v. Iowa Utilities Bd., Utilities Div. Dept. of Commerce*, 999 F.2d 354, 358 (8th Cir. 1993) (finding HLPESA preempts state law related to safety).

¹³⁰ *People ex rel. Sneddon v. Torch Energy Services*, 125 Cal. Rptr. 2d 365, 369 (Ct. App. 2002) (quoting *Gade v. National Solid Wastes*, 505 U.S. 88, 106 (1992)).

¹³¹ 608 F.3d 200, 212 (5th Cir. 2010).

¹³² *Id.* at 211.

¹³³ 711 F.3d 412, 420—21 (4th Cir. 2013) (upholding a county ordinance that made it impossible to site a natural gas substation in the county).

handling of petroleum products for the bulk loading of crude oil onto any marine vessel, rendering impractical the operation of a pipeline that had been transporting tar sands oil.¹³⁴ The district court found that the PSA did not preempt the ordinance because it merely “prohibit[ed] one activity at one end of the pipeline”—it did not set any additional requirements as to how a company must “construct and operate a pipeline.”¹³⁵ Moreover, the court found that the ordinance was not in conflict with the goals of the PSA, explaining, “A ban on one form of subsequent transportation at the end of the pipeline is not in conflict with the goal of promoting the safety of pipelines and preventing spills.”¹³⁶ Finally, the court noted that states and local entities retain broad authority to direct the siting of oil pipelines.¹³⁷

The question still remains whether this authority extends to siting and regulatory decisions as to pipelines transporting crude oil from the OCS in state coastal *waters*. While OCSLA gives the Secretary of Interior the authority to grant easements and rights-of-way to build pipelines, the terms of the Act and BOEM’s regulations limit this authority to easements and rights-of-way located on the OCS, not within submerged state lands.¹³⁸ Accordingly, states appear to be left with broad authority to approve or reject rights-of-way for oil pipelines traversing submerged state lands and impose siting and non-safety regulations upon such pipelines.¹³⁹ At least one commentator holds the position that a state may simply “refuse to sell

¹³⁴ *Portland Pipe Corporation v. South Portland*, No. 15-cv-00054-JAW, 2017 WL 6757556, *49 (D. Maine Dec. 29, 2017).

¹³⁵ *Id.* at *86.

¹³⁶ *Id.*

¹³⁷ *Id.* at *87 (“Congress did not intend the PSA to preempt state and local authority ‘to prescribe the location or routing of a pipeline facility.’ . . . [S]tates and localities retain their ability to prohibit pipelines altogether in certain locations.” (quoting *Huron Portland Cement Co. v. City of Detroit, Mich.*, 362 U.S. 440, 442 (1960))).

¹³⁸ See 43 U.S.C. § 1337(h) (2012) (“Nothing contained in this section shall be construed to alter, limit, or modify any claim of any State to any jurisdiction over, or any right, title, or interest in, any submerged lands.”); see also *id.* § 1337(p)(1); 30 C.F.R. § 585.200(b) (2018) (“A lease issued under this part confers on the lessee the right to one or more project easements without further competition for the purpose of installing gathering, transmission, and distribution cables; pipelines; and appurtenances *on the OCS*.” (emphasis added)).

¹³⁹ Breeden, *supra* note 111, at 1116 (“At the present time, . . . there is no statutory authority for the Interior Department or its lessees to take pipeline corridors through state offshore lands. In the Outer Continental Shelf

or lease easements or land parcels where they are necessary for OCS-related support or transit facilities.”¹⁴⁰ The California State Lands Commission seems to have embraced this view as well. In a recent letter to BOEM requesting that it exempt the Pacific Outer Continental Shelf from the Department of Interior’s plan to open additional offshore waters for oil and gas development, the Commission noted, “Given how unpopular oil development in coastal waters is in California, it is certain that the state would not approve new pipelines or allow use of existing pipelines to transport oil from new leases onshore.”¹⁴¹

Notwithstanding the foregoing, a flat prohibition on the siting of new pipelines in New York coastal waters is not a prudent approach. For one, such a ban would likely conflict with the CZMA’s command that coastal zone management programs take into consideration the national interest in siting decisions for energy infrastructure in coastal zones.¹⁴² As already discussed, conformity with the CZMA is of critical strategic importance for states like New York. And, while a flat prohibition on the siting of new pipelines should not pose a dormant commerce clause problem so long as the ban applies equally to in-state and out-of-state entities and waters, such a provision would pose a significant risk of being preempted under OCSLA.¹⁴³

Thus, although states appear to be on solid footing in imposing siting restrictions and other non-safety regulations on coastal pipelines, a more nuanced approach is needed. This paper proposes one such approach in the following section.

Lands Act, Congress limited the Interior Department’s powers to grant pipeline rights-of-way across *federal OCS areas*.”); Marc J. Hershman & Dowell R. Fontenot, *Local Regulation of Pipeline Sitings and the Doctrines of Federal Preemption and Supremacy*, 36 LA. L. REV. 929, 932 (1976) (“Federal statutes grant condemnation power for acquiring rights-of-way for gas, but not oil, pipelines, thus relegating the latter to reliance on state condemnation authority.”).

¹⁴⁰ Breden, *supra* note 111, at 1115.

¹⁴¹ Letter from Gavin Newsom, Lieutenant Governor, State of Cal., to Kelly Hammerle, Nat’l Program Manager, Bureau Ocean Energy Mgmt. (Feb. 7, 2018), https://www.eenews.net/assets/2018/02/28/document_ew_01.pdf.

¹⁴² See *supra* section III.A.1.

¹⁴³ *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 550 U.S. 330, 346—47 (2007); *Norfolk Southern Corp. v. Oberly*, 822 F.2d 388, 407 (1987); see also *supra* section III.A.1.

2. *Legislative Recommendations.*

Given their significance in the offshore production process, New York should consider targeting costal pipelines, heliports, industrial waste facilities, and refineries within New York's coastal zone for strict regulation. This section considers each of these elements of the offshore drilling process in turn before proposing an alternative to Assembly Bill No. A09819.

Rather than impose a flat prohibition on the siting of oil pipelines in New York's coastal waters, New York should consider requiring potential developers to obtain a permit that includes strict siting and operational restrictions. Such a permit might require that pipelines not pass through or near wetlands areas or commercial fisheries, or disturb historic uses of the coastal zone. There is precedent for this type of state regulation. Louisiana, for instance, mandates that pipeline developers obtain a coastal use permit, which requires that “[p]ipeline routes . . . be located in non-wetland areas and existing disturbed corridors (e.g., spoil banks) whenever feasible and practicable.”¹⁴⁴ Additionally, Santa Barbara County requires that pipelines be sited “so as to avoid important coastal resources (e.g., recreation, habitat, archaeological areas).”¹⁴⁵

New York should also consider imposing significant fees for easements that would allow developers to build pipelines through coastal waters. A word of caution is in order. In *Western Oil and Gas Association v. Cory*, the Ninth Circuit struck down the portion of California's easement fees for coastal oil pipelines that were based on the volumetric flow of petroleum over coastal areas because they imposed “an undue burden on interstate commerce” and were not a justifiable means of compensating California for the environmental damage attributable to the pipelines.¹⁴⁶ However, the Ninth Circuit has upheld siting fees for coastal pipelines that use an

¹⁴⁴ LA. DEP'T NAT'L RESOURCES, COSTAL USE PERMIT – GENERAL PERMIT-6, at 7, http://www.dnr.louisiana.gov/assets/OCM/permits/gp/Current_Documents/GP06_2014.pdf.

¹⁴⁵ SANTA BARBARA CTY. CODE § 35.5, at 5-16 (2011).

¹⁴⁶ *Western Oil and Gas Ass'n v. Cory*, 726 F.2d 1340, 1343—45 (9th Cir. 1984).

“evenhanded formula” based on the underlying property value of the disturbed land, even when such fees are quite financially burdensome.¹⁴⁷ New York may consider imposing an easement fee based on the societal costs of downstream greenhouse gas emissions associated with the crude oil that the pipeline would transport, utilizing the federal social cost of carbon. Though this scheme could be challenged as impermissibly relying on the volumetric flow of petroleum, as in *Western Oil and Gas Association*, New York could argue that this scheme is a reasonable means of compensating the state for climate consequences associated with the extraction and eventual combustion of petroleum. Alternatively, New York could impose a flat per-acre easement fee.

Finally, New York should follow California’s lead and *require* that crude oil produced offshore be transported through pipelines.¹⁴⁸ Currently, there are nine active refineries on the Atlantic Coast, none of which are connected to major interstate crude oil pipelines.¹⁴⁹ Because the Atlantic Coast does not have the sophisticated pipeline infrastructure found in the Gulf of Mexico, potential developers would likely rely upon tankers to transport offshore oil produced in Atlantic waters.¹⁵⁰ Requiring that oil be transported through pipelines—when coupled with the aforementioned restrictions—would force developers to incur significant upfront costs, making offshore oil production activities considerably less economically attractive.

As discussed above, helicopters are another necessary component of the offshore oil drilling and production process and are a primary mode of transporting personnel to and from offshore rigs.¹⁵¹ Currently, New York law requires private developers to obtain municipality

¹⁴⁷ See, e.g., *Shell Oil Co. v. City of Santa Monica*, 830 F.2d 1052, 1060 (9th Cir 1987).

¹⁴⁸ CAL. PUBLIC RESOURCES CODE § 30262(a)(7)(A) (“All oil produced offshore California shall be transported onshore by pipeline only.”).

¹⁴⁹ DISMUKES, *supra* note 22, at 254.

¹⁵⁰ *Id.* at 282 (“Pipeline options are likely to be expensive and reduce producer flexibility in marketing crude output since an extensive system linking crude to multiple refineries, like that in the GOM, does not exist. Further, most of the region’s refineries now import crude oil via tanker, so continued tanker imports, via floating production, storage, and offloading (FPSOs) are likely to be the near term, if not longer term option.”).

¹⁵¹ See *infra* note 23 and accompanying text.

approval before constructing new heliport facilities or modifying an existing heliport facility.¹⁵² New York should consider amending its CMP to prevent municipalities located within New York's coastal zone from approving the construction of new heliport facilities or major modifications to existing heliport facilities that would accommodate the transportation needs of offshore oil production activities. In addition, New York might consider amending its CMP to cap helicopter traffic within the coastal zone at current levels.

As to onshore disposal facilities, New York might consider imposing strict requirements on the types of waste that such facilities are allowed to receive. Specifically, New York may impose a requirement barring an industrial- or municipal-waste treatment facility from accepting produced sands, wash water from drilling operations, radioactive materials, and other exploration and production wastes derived from offshore oil drilling operations. Because these wastes cannot be discharged directly into the ocean,¹⁵³ this restriction could further frustrate efforts to develop the OCS for offshore oil drilling.

Finally, New York could amend its CMP to prohibit the siting of petroleum refineries within its coastal zone. Refineries are already subject to significant regulatory burdens that make the construction of a new refinery within New York unlikely. In addition, the economics of investing in a new refinery are not currently favorable: At present, there is excess refining capacity nationally, which has "squeezed margins and profitability" at refineries.¹⁵⁴ Still, if the Trump Administration successfully rolls back automobile fuel-efficiency regulations,¹⁵⁵ demand for refining services could increase. Accordingly, it is still in New York's best interest to amend

¹⁵² See N.Y. GENERAL BUSINESS LAW § 14-249 (McKinney 2018).

¹⁵³ See *infra* note 26 and accompanying text.

¹⁵⁴ DISMUKES, *supra* note 22, at 271.

¹⁵⁵ See generally Chris Mooney et al., *Trump Administration Drafts Plan to Unravel Obama-era Fuel-Efficiency Rules, Challenge California*, WASHINGTON POST (Apr. 27, 2018), https://www.washingtonpost.com/news/energy-environment/wp/2018/04/27/trump-administration-drafts-plan-to-unravel-obama-era-fuel-efficiency-rules-challenge-california/?noredirect=on&utm_term=.8ff2f7560417.

its CMP to prohibit the siting of petroleum refineries within its coastal zone despite the regulatory and economic challenges a prospective refinery developer already faces.

Appendix 1 provides a draft bill that incorporates the many considerations discussed herein. Rather than impose a flat prohibition on the siting of critical support infrastructure in the coastal zone, the proposed bill creates a presumption that certain strict standards will apply to the offshore oil production process. Critically, the standards only apply so long as there is no “energy emergency,” defined as “a severe shortage in energy supply to the State of New York” that cannot be met through energy efficiency measures or the procurement of renewable energy. In this way, the proposed bill explicitly considers the “national interest” in energy production, thereby averting a potential conflict with the Coastal Zone Management Act.¹⁵⁶

Additionally, by making offshore oil production and development difficult and economically unattractive, but not *impossible*, the proposed bill dodges a possible conflict preemption challenge under OCSLA. Ultimately, Congress sought to achieve a *balanced* approach in developing the OCS for offshore production.¹⁵⁷ In light of modern considerations—such as the pressing national need to address climate change and the ecological dangers of offshore drilling that the *Deepwater Horizon* catastrophe exposed—the proposed bill achieves such a balanced approach. Moreover, the bill averts a possible dormant commerce clause challenge by applying its conditions to both state and federal offshore waters and to both in-state and out-of-state developers.

As to the specific conditions imposed, the proposed bill requires that crude oil produced in offshore waters be transported via pipeline. It further mandates that a developer of a coastal

¹⁵⁶ See generally *infra* section III.A.1.

¹⁵⁷ 43 U.S.C. § 1443(3) (2012) (declaring it to be the policy of the United States that the OCS “be made 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*.”) (emphasis added).

pipeline obtain a permit, which imposes strict siting requirements, prior to construction. The bill also imposes a fee—tied to the downstream climate costs associated with combusting the extracted crude oil—that developers must pay in order to obtain an easement over state coastal lands. It also requires that municipalities within New York’s coastal zone not approve the construction of new heliport and petroleum refinement facilities. Finally, the bill prohibits waste management facilities from accepting wastes associated with the offshore oil production process.

Taken together, these measures should make the prospect of offshore oil production in New York coastal waters an economically unattractive venture for most, if not all, potential developers. But this scheme still leaves open the possibility that a developer may attempt to site critical infrastructure in a nearby state such as New Jersey. To minimize this risk, New York should consider entering into an interstate agreement with neighboring states. Appendix 2 provides one feasible approach New York might adopt to resolve this threat. The draft agreement gives each neighboring state a reciprocal veto right over the construction of certain onshore infrastructure in a neighboring jurisdiction that would be used to support offshore oil production in federal waters abutting its coastal territory.

Importantly, such an agreement likely would not require congressional approval pursuant to the Compact Clause. As the Supreme Court explained in *Cuyler v. Adams*, “Where an agreement is not ‘directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States,’ it does not fall within the scope of the Clause and will not be invalidated for lack of congressional consent.”¹⁵⁸ The Court has also made plain that reciprocal state agreements that increase states’ bargaining power with respect to the *corporate entities* that they regulate do

¹⁵⁸ 449 U.S. 433, 440 (1981) (citations omitted).

not encroach upon federal supremacy—rather, “the test is whether the Compact enhances state power *quoad* the National Government.”¹⁵⁹ The Courts of Appeals have also recognized that congressional consent is not necessary as to interstate agreements that relate to areas of regulation traditionally left to the states.¹⁶⁰ As proposed, the interstate agreement would not seek to increase the power of the states in relation to the federal government. Instead, it would merely increase New York’s and its neighboring states’ bargaining power with respect to potential oil developers. Further, the proposed interstate agreement involves land use and environmental regulations—traditional areas of state jurisdiction. Accordingly, New York would likely not need to obtain congressional consent in order to enter such a proposed interstate agreement.

CONCLUSION

In the face of Secretary Zinke’s aggressive push to expand offshore oil drilling in U.S. coastal waters, states are not powerless actors that must passively accept this “new path for energy dominance in America.” To the contrary, this paper has demonstrated that states have a multitude of litigation and legislative strategies at their disposal to block federal efforts to open their coastlines to offshore drilling when states determine that such efforts conflict with their environmental, public health, and land use policies.

Still, states should proceed with caution. A flat prohibition on the siting of critical infrastructure on state lands, like that proposed in Assembly Bill No. A09819, would risk invalidating a state’s coastal management program, which would waive important protections under OCSLA and the CZMA. Moreover, blanket prohibitions pose a substantial risk of being

¹⁵⁹ *U.S. Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452, 473 (1978).

¹⁶⁰ *See, e.g., McComb v. Wambaugh*, 934 F.2d 474, 479 (3rd Cir. 1991) (“[T]his Compact focuses wholly on adoption and foster care of children—areas of jurisdiction historically retained by the states. . . . Congressional consent, therefore, was not necessary for the Compact’s legitimacy.”).

struck down as preempted by OCSLA or unconstitutional pursuant to the dormant commerce clause. If states look to the litigation and legislative recommendations provided herein, they will find themselves on surer footing in asserting their legitimate interests in safeguarding their citizens and coastlines from the dangers of offshore oil production.

Appendix 1

AN ACT to amend the environmental conservation law, in relation to the responsible regulation of offshore oil production and development activities, the People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The environmental conservation law is amended by adding a new section 13-0901 to read as follows:

§ 13-0901. Restrictions on activities related to offshore oil production and development.

1. Unless the Governor of the State of New York, upon considering the advice of the Commissioner of the Department of Environmental Conservation and the New York Public Service Commission, finds and declares an “energy emergency” in the State of New York, the following conditions apply:

- (a) All crude oil produced in offshore or state waters shall be transported onshore by pipeline;
- (b) A coastal use permit must first be obtained from the Department of Environmental Conservation prior to construction or operation of a pipeline used for the transportation of crude oil produced in offshore or state waters;
- (c) No municipality or county that is at least partly located within the New York coastal zone may approve the siting and/or construction of new heliport facilities within its jurisdiction after June 1, 2018;
- (d) No municipality or county that is at least partly located within the coastal zone may approve the siting and/or construction of any modification to an existing heliport facility that would increase the air traffic to and from the heliport facility from that existing as of June 1, 2018;
- (e) No municipality or county that is at least partly located within the coastal zone may approve the siting and/or construction of a petroleum refinement facility within its jurisdiction; and
- (f) No industrial or municipal waste facility shall accept produced sands, wash water from drilling operations, radioactive materials, industrial and municipal wastes, and other exploration and production wastes derived from crude oil production processes in offshore or state waters.

2. The Department of Environmental Conservation may not approve a coastal use permit unless the following conditions are met:

- (a) A petroleum pipeline may not be located within 1,000 ft. of or disturb any federal or state park, local waterfront revitalization area, or estuarine sanctuary;
- (b) A petroleum pipeline must be sited so as to minimize, to the maximum extent possible, any disturbance to or interference with a historical use of the State's coastal zone, including, but not limited to: commercial and recreational fishing, boating, and swimming;
- (c) An applicant for a coastal use permit must obtain an easement before constructing a petroleum pipeline, the cost of which will be calculated by applying the Social Cost of Carbon to the total estimated downstream greenhouse gas emissions associated with the construction and operation of the pipeline.

3. For the purposes of this statute, the following definitions apply:

- (a) "Energy emergency" shall mean a severe shortage in energy supply to the State of New York such that current energy capacity in the NY-ISO region is incapable of meeting current energy demand and it is shown that such excess demand cannot be met through demand-side management or energy efficiency measures, or through the procurement of additional renewable energy resources, including, but not limited to, offshore wind resources.
- (b) "Coastal zone" shall mean the territory and coastal waters, including their submerged lands, as defined in the New York Coastal Zone Management Program.
- (c) "Federal park," "state park," "local waterfront revitalization area," and "estuarine sanctuary" shall be accorded their meanings as defined in the New York Coastal Zone Management Program.
- (d) "Social Cost of Carbon" shall mean the estimate of the aggregated costs associated with greenhouse gas emissions, utilizing a three percent discount rate, as determined by the federal Interagency Working Group on the Social Cost of Greenhouse Gases as of January 19, 2017.

Appendix 2

1. The agreeing states recognize that each state has an interest in protecting the environmental quality, integrity, and historic uses of its state waters and coastal territories. No agreeing state shall enter into or execute a sale, lease, conveyance, easement, right-of-way, or permit for a facility to be used to support the production and development of offshore oil in federal waters abutting a neighboring state's coastal waters without the express consent and prior approval of the aforementioned neighboring state.

2. For the purposes of this agreement, the following definitions apply:

- (a) "Facility" shall include heliports, municipal and industrial waste complexes, petroleum pipelines, petroleum refineries, and industrial buildings.