OFFSHORE WIND ENERGY AND THE POTENTIAL OF STATE-LED DEVELOPMENT

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Introduction

Offshore wind has the potential to help the United States transition away from fossil fuels, and yet, the United States has only built two small offshore wind farms.[1] Despite efforts to get large-scale projects approved through the federal system beginning in 2001,[2] the first project was not approved until twenty years later in 2021.[3] It is time to think outside the box, including by considering solutions that have traditionally been antithetical to the liberal environmental movement. Mainstream environmentalists look to the federal government to set national air pollution and water quality standards in order to prevent a race to the bottom among states.[4] However, for renewable energy, certain states have often taken the lead, with the federal government adopting policies only after states have proven their viability.[5] Therefore, in the case of offshore renewable development, giving states more power could enable a race to the top. States can lay the groundwork that enables the federal government to act when the political winds are aligned.

Despite decades of opportunity, there are only two small offshore wind farms in the United States, and both are in waters under state jurisdiction. The Block Island wind farm is the larger of the two projects and has a mere five turbines that can produce thirty megawatts ("MW") of energy.[6] Meanwhile, Europe has built over 5,000 offshore wind turbines, totaling 22,000 MW of wind power.[7] Since the passage of the Energy Policy Act of 2005 ("EPAct"),[8] the Department of the Interior ("DOI") has been tasked with leasing offshore wind in federal waters, and so far it has only approved two projects for development.[9]

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[1] *See* U.S. DEP'T OF ENERGY, OFFSHORE WIND ENERGY STRATEGIES 4 (2022).

[2] *See* Mitchell Hokanson, *Avoiding the Doldrums: Evaluating the Need for Change in the Offshore Wind Permitting Process*, 44 COLUM. J. ENV'T. L. 181, 210 (2019).

[3] *See* U.S. DEP'T OF ENERGY, *supra* note 1, at iii.

[4] *See* Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1210 (1992).

[5] *See* Jeremiah I. Williamson & Matthias L. Sayer, *Federalism in Renewable Energy Policy*, 27 NAT. RES. & ENV'T 19, 19 (2012).

[6] Phil McKenna, *America's First Offshore Wind Energy Makes Landfall in Rhode Island*, INSIDE CLIMATE NEWS (May 1, 2017), https://perma.cc/KMD8-LGRF.

[7] *Offshore Wind in Europe: Key Trends and Statistics 2019*, WIND EUR. (Feb. 23, 2020), https://perma.cc/73RG-VWS.

[8] Pub. L. No. 109-58, 119 Stat. 594.

[9] *See* Nichola Groom, *U.S. Offshore Wind Auction Bids Top $1.5 Bln, with More to Come*, REUTERS, (Feb. 23, 2022), https://www.reuters.com/business/energy/us-hold-its-biggest-offshore-wind-auction-2022-02-23/.

This essay argues that enabling states to have a larger role in the leasing processes for offshore renewables will lead to a significant increase in offshore wind farms. Currently, states are severely limited in their ability to develop offshore renewable energy because they only have jurisdiction over waters within three miles of their coastline.[10] Meanwhile, many of the best areas for offshore wind farms are beyond this limit and under federal jurisdiction.[11] There are multiple mechanisms that the federal government can use to enable states to have greater involvement in offshore wind development. Whereas some of them require statutory changes, others fit within the current regulatory framework. Renewable energy advocates should channel the principles of federalism in order to enable coastal states to start building out renewable energy infrastructure in the ocean.

Part I of this essay provides a background on the benefits and drawbacks to offshore wind development. It briefly summarizes the current regulatory process for leasing offshore wind areas. Part II describes proposals to increase offshore wind development that have already been suggested. These suggestions range from changing environmental review criteria under the National Environmental Policy Act ("NEPA")[12] to extending federal tax credits. Part III examines how the federal government has failed to advance renewable energy production, and why giving states more control over offshore wind will aid in faster development. It also describes how the federal see-saw of priorities between liberal and conservative administrations[13] hampers infrastructure development that takes longer than the length of a presidency. Part III then explores how empowering states will create incentives for improved stakeholder engagement at earlier stages of the planning process for offshore renewable development. Finally, Part III discusses how states already must consent to offshore wind projects, so it makes sense to include them as much as possible when planning development. Part IV examines the agency processes, regulations, and statutes that can be changed in order to provide states with more control. This Part also notes that any change must be judged by its ability to enable rapid development while ensuring conservation of the ocean and mitigation of local stakeholder concerns.

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[10] Except for Texas, Florida, and Louisiana, which have extended jurisdiction out to about ten miles.
[11] *See* Emily Waltz, *Offshore Wind May Power the Future*, SCI. AM. (Oct. 20, 2008), https://perma.cc/M8BG-C3E.
[12] Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended in scattered sections of 42 U.S.C.).
[13] *See* Phil Taylor, *Interior Offshore Wind Leasing Program Seen as 'Test Case' for Marine Spatial Planning*, N.Y. TIMES (June 23, 2011), https://perma.cc/LGG2-VZWC (reporting that the Obama Administration attempted to expedite offshore wind development through marine spatial planning); Benjamin Storrow, *Bernhardt: Trump Tried to Boost Offshore Wind, Not Kill It*, CLIMATEWIRE (July 21, 2021), https://perma.cc/94DB-4RA6 (reporting that the Trump Administration abruptly extended the environmental review process for Vineyard Wind, and "critics saw the delay as an attempt to kill the project"); Teresa R. Christopher et al., *The Road to 30 Gigawatts: Key Actions to Scale an Offshore Wind Industry in the United States*, CTR. FOR AM. PROGRESS (Mar. 14, 2022), https://perma.cc/VE5C-F88K (noting that the Biden Administration has passed legislation supporting offshore wind infrastructure).

I. Offshore Wind Background

A. *The Potential of Offshore Wind as a Scalable and Economically Viable Energy Source*

Offshore wind is an appealing alternative to fossil fuels because it is abundant, relatively consistent, and geographically close to where the greatest energy demands are. The gross potential is four times current national energy production.[14] Furthermore, as compared to onshore wind, it is stronger and more consistent.[15] Offshore wind also tends to be strongest during the times that electricity demands are highest.[16] Additionally, 80% of U.S. electricity demand comes from states bordering the ocean or the Great Lakes.[17]

Offshore wind is also economically feasible. The price of offshore wind continues to fall because of advancing technology, improved supply chains, and proven success leading to reduced risks for investors.[18] Although wind farms in Europe were initially enabled by government subsidies, recently approved projects will produce energy at a price that is cheaper than energy produced by fossil fuels.[19] As the industry continues to innovate, these prices could drop even more. For example, General Electric is developing a turbine that is substantially larger than any turbines currently installed; a single turbine can produce thirteen MW of power.[20] Additionally, floating offshore wind platforms will enable wind farms in deeper water.[21] This will be especially useful in places like California where offshore wind resources are mostly in deeper water because the continental shelf ends close to shore.[22]

The Biden Administration demonstrated its recognition of the potential of offshore wind by announcing a plan to build 30,000 MW of capacity by 2030,[23] enough to power about 10 million homes.[24] This pledge is part of President Joseph R. Biden Jr.'s ambitious climate goals and bold promises around the expansion of

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[14] Benjamin Fox, *The Offshore Grid: The Future of America's Offshore Wind Energy Potential*, 42 ECOLOGY L.Q. 651, 655 (2015).
[15] *Id.* at 656.
[16] *Id.* at 657.
[17] *Top 10 Things You Didn't Know About Offshore Wind Energy*, OFF. OF ENERGY EFFICIENCY & RENEWABLE ENERGY (Oct. 8, 2020), https://perma.cc/V5B2-KE5L.
[18] *See* Hayley Dunning, *Offshore Wind Power Now So Cheap It Could Pay Money Back to Consumers*, SCI. DAILY (July 27, 2020), https://perma.cc/EK4X-AX3J.
[19] *See id.*
[20] Stanley Reed, *A Monster Wind Turbine Is Upending an Industry*, N.Y. TIMES, Jan. 2, 2021, at B1.
[21] *See Wind on the Waves: Floating Wind Power Is Becoming a Reality*, OFF. OF ENERGY EFFICIENCY & RENEWABLE ENERGY (Dec. 11, 2017), https://perma.cc/8RC5-ESSP.
[22] *Id.*
[23] *See* Press Release, White House, Biden Administration Jumpstarts Offshore Wind Energy Projects to Create Jobs (Mar. 29, 2021), https://perma.cc/949W-6N57.
[24] Alex Brown, *Offshore Wind Takes Off at Last. States Have Been Counting On It.*, STATELINE (Feb. 7, 2022), https://perma.cc/N6QM-R2ND.

renewable energy.[25] The Biden Administration has started making steps towards that goal by approving the first commercial-scale offshore wind farm in federal waters, selling six new offshore wind leases representing a potential of 7,000 MW,[26] and passing legislation that allocates hundreds of millions of dollars annually to the offshore wind industry.[27] Regardless, it remains to be seen whether President Biden will be able to achieve his 30,000 MW goal. As discussed further in Part III, developing offshore wind farms often takes longer than the length of one presidential term, and a new administration could have different priorities.

B. The Addressable Challenges of Offshore Wind Energy Are Resolvable, but Must Be Addressed

Although offshore wind lacks the same catastrophic outcomes demonstrated by the Deepwater Horizon blowout, conservation concerns still exist. The need for rapid expansion of renewable energy must incorporate reasonable measures to prevent harm to the ocean's ecosystems. For example, there have been legal challenges to wind farms due to concern over protection of endangered species[28] and fisheries.[29]

Many environmental groups are supportive of offshore wind because they have determined that the conservation risks posed by wind turbines can be mitigated with appropriate planning. For example, the Vineyard Wind project was able to reach an agreement with three major environmental groups to protect endangered right whales.[30] Because the concern was over the construction phase of the turbines, the project agreed to pause any of the potentially harmful aspects of construction during migration seasons.[31] Similarly, the concerns of the fishing industry can often be addressed through appropriate design. In the case of Vineyard Wind, the industry requested that turbines be places at least one mile apart so that fishing boats could safely navigate between them.[32]

Instead of environmental harm, aesthetic concerns have created one of the largest barriers to offshore wind development. This was epitomized in the successful fight against the Cape Wind project, which fought over thirty legal challenges and has since asked to end their lease.[33] These anti-wind efforts have used the tools meant to address environmental justice concerns for the sake of preventing

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[25] *See The Biden Plan for a Clean Energy Revolution and Environmental Justice*, BIDEN HARRIS (Mar. 31, 2021), https://perma.cc/5UYF-QBTJ.
[26] *See* Lisa Friedman, *Sale of Leases for Wind Farms off New York Raises More Than $4 Billion*, N.Y. TIMES, Feb. 25, 2022, at A18.
[27] *See* Christopher, *supra* note 13.
[28] *See* Pub. Emps. for Env't Resp. v. Beaudreau, 25 F. Supp. 3d 67, 88 (D.D.C. 2014).
[29] *See* Fisheries Survival Fund v. Jewell, No. 16-CV-2409, 2018 WL 4705795 (D.D.C. Sept. 30, 2018).
[30] *See* Francine Kershaw, *Landmark Offshore Wind Agreement Protects Right Whales*, NAT. RES. DEF. COUNCIL (Jan. 23, 2019), https://perma.cc/N6ZF-8YUF.
[31] *Id.*
[32] *See* Dan Gearino & Phil McKenna, *Government Delays First Big U.S. Offshore Wind Farm. Is a Double Standard at Play?*, INSIDE CLIMATE NEWS (Aug. 19, 2019), https://perma.cc/8P3U-AB3F.
[33] *See* Hokanson, *supra* note 2, at 209–12.

renewable energy close to wealthy coastal property owners.[34] One workaround to this problem is simply to build turbines ten miles off shore where they are no longer visible.[35]

There are additional infrastructure challenges facing largescale expansion of offshore wind. For example, transmission lines and port infrastructure need to be upgraded in order to build and maintain offshore wind farms.[36] Additionally, turbines currently require rare earth metals that may drive environmentally harmful seafloor mining.[37] Hopefully, new technologies and infrastructure investment can resolve these challenges.[38] For example, the Biden administration recently announced that it would provide financing support to build the specialized ships needed to erect offshore wind turbines.[39]

C. Overview of the Offshore Wind Leasing Process

Since the passage of the Submerged Lands Act ("SLA")[40] in 1953, waters within three miles of the coast are under state jurisdiction for leasing, whereas waters beyond that boundary are under federal jurisdiction.[41] The EPAct amended the Outer Continental Shelf Lands Act ("OCSLA")[42] to enable the Secretary of the Interior to lease areas for renewable energy.[43] The Bureau of Ocean and Energy Management ("BOEM")[44] has complete jurisdiction over offshore wind and writes the regulations for lease sales.[45] BOEM undertook a nationwide programmatic

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[34] *See* M.W. Marinakos, *A Mighty Wind: The Turbulent Times of America's First Offshore Wind Farm and the Inverse of Environmental Justice*, 2 BARRY U. ENV'T & EARTH L.J. 82, 85 (2012).
[35] *See* Request for Feedback on BOEM's Proposed Path Forward for Future Offshore Renewable Energy Leasing on the Atlantic Outer Continental Shelf, 83 Fed. Reg. 14,881 (Apr. 6, 2018).
[36] *See* HOUSE SELECT COMM. ON THE CLIMATE CRISIS, SOLVING THE CLIMATE CRISIS: THE CONGRESSIONAL ACTION PLAN FOR A CLEAN ENERGY ECONOMY AND A HEALTHY, RESILIENT, AND JUST AMERICA (June 2020), https://perma.cc/8MM9-BCYQ.
[37] *See* Elizabeth De Santo, Elizabeth Mendenhall & Elizabeth Nyman, *With a Rush to Mine the Ocean Floor, We Need Policy to Prevent Permanent Damage*, GREENBIZ (Aug. 26, 2020), https://perma.cc/X8GQ-RXU4.
[38] *See, e.g.*, Steve Hanley, *Scientists Propose Alternatives to Rare Earth Elements Critical for Wind Turbines*, CLEANTECHNICA (Apr. 8, 2019), https://perma.cc/9XHX-K52J (writing that researchers are making magnets a critical part of a wind turbine from more readily available materials); Jan Dodd, *Rethinking the Use of Rare-Earth Elements*, WINDPOWER MONTHLY (Nov. 20, 2018), https://perma.cc/S8NH-NRJT (discussing improving the efficiency of magnets or using direct drive turbines that do not require rare earth elements).
[39] *See* Press Release, White House, Biden Administration Launches New Federal-State Offshore Wind Partnership to Grow American Made Clean Energy (June. 23, 2022), https://perma.cc/2SMR-TYG7.
[40] Pub. L. No. 31, ch. 65, 67 Stat. 29 (1953).
[41] *Federal Offshore Lands*, BUREAU OF OCEAN ENERGY MGMT. (Mar. 31, 2021), https://perma.cc/K7EP-MHFZ.
[42] 43 U.S.C. §§ 1331–1356.
[43] Energy Policy Act of 2005, Pub. L. No. 109-58, § 388, 119 Stat. 594, 744 (amending 43 U.S.C. § 1337).
[44] BOEM was known as the Mineral Management Service until it was renamed in 2010.
[45] *See* Fox, *supra* note 14, at 660.

Environmental Impact Statement ("EIS") for offshore renewable energy,[46] but it has not done any regional EISs, nor is NEPA review required when BOEM is selecting which areas to prioritize for leasing.[47] BOEM outlines four main steps for offshore wind development: planning, leasing, site assessment, and construction and operation.[48] During the planning stage, BOEM identifies priority Wind Energy Areas ("WEA") that will be offered for leases.[49]

II. Overview of Published Proposals to Improve Offshore Wind Development

This Part highlights some of the improvements that academics and policymakers have proposed to address the challenges resulting in the current lack of offshore wind development. The proposal to increase states' roll in offshore wind development suggested in this essay do not negate the importance of the existing policy proposals. Rather, they can be used in tandem to ensure that both federal and state governments are able to work towards expanding renewable energy capacity.

One way to encourage planning and identification of potential environmental challenges is to require regional programmatic EISs for offshore renewable development.[50] Seeing a vacuum of effective regional planning, New York undertook a programmatic EIS for the 2,400 MW of offshore wind it plans to bring online by 2030.[51] This is also an example of how states may be best equipped to lead the way for offshore wind expansion.

Another change involving NEPA could help to address the opposition raised by wealthy coastal communities who co-opt environmental justice tactics.[52] Congress could instruct reviewing agencies to limit the use of aesthetic concerns about turbines as a basis for objecting to their construction.[53] There is precedent for changing NEPA requirements. For example, the EPAct created categorical exclusions for certain activities involving onshore oil and gas development.[54]

Improving interagency coordination to prevent delays and confusion is a further method to remove barriers for the industry. As a demonstration of the bureaucratic hurdles that developers must overcome, ten different agencies or governmental entities were part of creating a draft EIS for a proposed offshore wind

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[46] *See* Hokanson, *supra* note 2, at 185.
[47] *See id.* at 221.
[48] Wind Energy Commercial Leasing Process, BUREAU OF OCEAN ENERGY MGMT., https://perma.cc/M3FG-M5EX.
[49] *Id.*
[50] *See* Hokanson, *supra* note 2, at 185.
[51] *See id.* at 230.
[52] *See* Marinakos, *supra* note 34, at 85.
[53] *See* Michael B. Gerrard, *Legal Pathways for a Massive Increase in Utility-Scale Renewable Generation Capacity*, 47 ENV'T L. REP. NEWS & ANALYSIS 10,591, 10,602 (2017).
[54] George Cameron Coggins & Robert L. Glicksman, *External Oil and Gas Leasing Constraints—Pre-lease Environmental Assessment*, 4 PUB. NAT. RES. L. § 39:7 (2d ed. 2021).

facility near Rhode Island.[55] One way to address this hurdle is to use the Fixing America's Surface Transportation ("FAST") Act,[56] passed in 2015.[57] This would enable the Federal Permitting Improvement Steering Council to set deadlines for agencies performing environmental review of offshore wind projects.[58] The FAST Act also aimed to address the litigation risks faced by companies investing in large infrastructure projects such as offshore windfarms. It did this by requiring plaintiffs to have raised issues during the approval process comment period.[59] Furthermore, there is a two-year statute of limitations.[60]

Finally, in order to address some of the major infrastructure challenges, the federal government can create or extend incentives through tax credits, loan guarantees, and grants.[61] These types of incentives can encourage workforce development, port infrastructure upgrades, and general interest in investing in offshore wind.

III. States May Enable Offshore Development Where the Federal Government Has Faltered

Looking to onshore wind as a case study, states have been drastically more successful than the federal government at constructing renewable energy projects. In 2003, the National Renewable Energy Laboratory credited state-level policies for driving the past five years of growth in wind power.[62] By 2015, only 1% of wind energy was coming from federal land.[63]

Although rapid expansion of offshore wind energy through federal agencies sounds ideal, empowering states to have a larger role in the process may be more realistic. First, some states do not have to contend with extreme changes in energy priorities with every new administration. Second, state politicians are more accountable to local stakeholders and therefore more likely to engage in improved early planning procedures. Finally, states already must provide their consent to federally approved projects. Regardless, increasing state involvement does not preclude the federal government from also engaging in offshore renewable development.

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[55] *See* Notice of Public Meetings and of Availability of a Draft Environmental Impact Statement for Deepwater South Fork LLC's Proposed Wind Energy Facility Offshore Rhode Island, 86 Fed. Reg. 1520 (Jan. 1, 2021).
[56] Pub. L. No. 114-94, 129 Stat. 1312.
[57] *See* Gerrard, *supra* note 53, at 10,605.
[58] Hokanson, *supra* note 2, at 198–99.
[59] *Id.*
[60] *Id.*
[61] *See* HOUSE SELECT COMM. ON THE CLIMATE CRISIS, *supra* note 36.
[62] *See* L. BIRD ET AL., NAT'L RENEWABLE ENERGY LAB'Y, NREL/TP-620-34599, POLICIES AND MARKET FACTORS DRIVING WIND POWER DEVELOPMENT IN THE UNITED STATES (July 2003), https://perma.cc/JCZ4-NKLB.
[63] Elizabeth Shogren, *At the BLM, A Mixed Record for Renewables on Public Lands*, HIGH COUNTRY NEWS (Dec. 4, 2015), https://perma.cc/WN46-MHGN.

A. *Stable Political Priorities Will Enable States to Build More Offshore Wind Farms*

One of the greatest advantages that many states have is that their renewable energy development is more insulated from the political back-and-forth between administrations. In part, this is because states such as California and New York have been more successful than Congress at passing statutes that promote renewable energy and set clean energy targets.[64] Additionally, factors such as economics, mobilization of environmental organizations, and the technical potential for wind and solar also play a role in determining which states continue to develop renewable energy while the federal government see-saws.[65] For example, although Kansas is a reliably red state, it also has so much wind power potential that it could theoretically provide the majority of the nation's electricity demand.[66] Kansas initially passed a renewable energy target of 20% by 2020, only to later repeal the law in 2015 following political pressure from organizations lead by the Koch brothers.[67] Despite the repeal, Kansas still surpassed its original goal, producing 30% of their energy from wind by 2016.[68] The shift in political priorities could not prevail over the economics of wind power in Kansas, which allows the state to export clean energy and provide payments to farmers who host turbines.[69]

As another example, Massachusetts often elects Republican governors, but those governors do not necessarily oppose renewable energy expansion in unison with their federal counterparts.[70] For instance, the Trump Administration delayed the permitting process for Vineyard Wind, the first large-scale project approved for federal waters.[71] Meanwhile, Massachusetts Governor Charlie Baker supported Vineyard Wind as well as other offshore wind projects off of his state's coast.[72]

Persistent and stable drivers of renewable energy are particularly useful when faced with the massive infrastructure projects required to decarbonize our economy. It will take much longer than the length of one presidential term to build a meaningful number of wind farms.[73] In a recently announced partnership with eleven governors along the East Coast, the Biden administration pledged to facilitate timely permitting and environmental reviews, but did not specify how

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[64] *See* Brown, *supra* note 24.
[65] *See* Roger Karapin, *Federalism as a Double-Edged Sword: The Slow Energy Transition in the United States*, 29 J. ENV'T & DEV. 26, 43 (2020).
[66] Justin Gillis & Nadja Popovich, *In Trump Country, Renewable Energy Is Thriving*, N.Y. TIMES, June 6, 2017, at A20.
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *See, e.g.*, Miriam Wasser, *What You Need to Know About the New Mass. Climate Law*, WBUR (Mar. 26, 2021), https://perma.cc/EC7U-RV3W.
[71] *See* Storrow, *supra* note 13.
[72] *See id.*; Jon Chesto, *Biden Administration Grants Vineyard Wind Its Final Major Permit*, BOS. GLOBE (May 11, 2021), https://perma.cc/ZP6S-R3LC.
[73] *See* Christopher, *supra* note 13 ("Projects take approximately four to eight years from the sale of lease to an operational farm, but many have taken longer.").

they would achieve this goal.[74] The reality of the current Biden Administration is that statutes with lofty climate goals are not likely to be passed.[75] Therefore, favorable renewable energy policy will be dependent on agency action that the next administration may roll back in a few years. States with the right incentives can see through longer-term projects.

The Obama Administration's attempt to increase renewable energy projects on land under federal jurisdiction demonstrates the limitations of exclusive federal efforts. The Administration used programs such as "Smart from the Start" to try to improve interagency coordination and prioritization of renewable projects.[76] "Smart from the Start" proved successful in some ways and reduced DOI permitting times from four years to one-and-a-half years.[77] Regardless, achieving 1% of wind energy coming from federal land is not the type of dramatic change that will be required to address any climate related goals. Additionally, this kind of programmatic prioritization is difficult to write into regulations and highly dependent on who is staffing these positions. Therefore, state-led initiatives may have greater success because they will have greater longevity.

B. *State Control Will Improve Planning Processes and Decrease Legal Challenges*

In contrast to the federal process, states have more incentive to incorporate stakeholders because state-level politicians are more accountable to those interested stakeholders.[78] In order to avoid major legal challenges to offshore leasing, affected stakeholders and governments need to be engaged during the early planning stages. Improved stakeholder engagement when selecting a WEA would allow for conflicts to be addressed before they become major obstacles to a developer who already has a lease in hand.

Unfortunately, the current BOEM regulations are sparse on crucial details that would enable or improve engagement with stakeholders. Although both the statute[79] and the regulations[80] require consultation and coordination with affected states and local governments, the BOEM regulations do not provide any guidance on the timing or process of engagement. The regulation's preamble merely suggested that the agency will form task forces with state and local governments during the leasing process, but it made no requirements for public hearings or

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[74] *See* White House, *supra* note 39.
[75] *See, e.g.*, Josh Siegel et al., *Biden's Climate Agenda Stalls, and Progressives Fume*, POLITICO (Feb. 13, 2022), https://perma.cc/B2K7-W2CY.
[76] *See* David J. Hayes et al., STAN. L. SCH., A 21ST CENTURY GOVERNANCE CHALLENGE: FINDING EFFECTIVE MECHANISMS TO ADDRESS CLIMATE CHANGE ACROSS THE FEDERAL GOVERNMENT 48 (July 13, 2015), https://perma.cc/E3MN-7A6F.
[77] *Id.* at 40.
[78] *See, e.g.*, Michael C. Pollack, *Land Use Federalism's False Choice*, 68 ALA. L. REV. 707, 708 (2017).
[79] 43 U.S.C. § 1337(p)(7).
[80] Renewable Energy and Alternate Uses of Existing Facilities on the Outer Continental Shelf, 74 Fed. Reg. 19,638 (Apr. 29, 2009) (to be codified at 30 C.F.R. pts. 250, 285, 290).

feedback processes.[81] Nor did the preamble discuss which affected non-governmental parties must be included.[82]

Without clear guidelines on how to engage local stakeholders, the leasing process has left out important players. Notably, no representatives from the fishing or shipping industry attended the first Delaware Task Force Meeting in 2009.[83] The meeting attendees included one representative from the offshore wind industry and the rest were government officials.[84] As Cape Wind demonstrated, poor coordination with stakeholders can lead to extensive litigation over projects. In contrast, state officials have more incentives to consult with the appropriate parties before conflicts turn into a multiyear litigation battle.

C. *Offshore Wind Development Currently Requires State Approval*

Offshore renewable development in federal waters is already dependent on state consent and policy. All transmission lines must pass through waters with state jurisdiction and be connected to a land-based grid.[85] Therefore, they require state easements and a federal consistency review to ensure that projects comply with a state's coastal zone management plan under the Coastal Zone Management Act ("CZMA").[86] Furthermore, states control much of the port infrastructure that needs to be updated in order to build and service offshore wind.[87] Even if this is best incentivized by federal programs, it will require state-led action.

D. *The Ongoing Role of the Federal Government in Offshore Renewable Development*

Giving states a larger role in offshore wind development does not exclude the federal government from also developing renewable energy in the ocean. As an example, all offshore oil drilling was initially done through state leasing, and the federal government only got involved after the states proved the potential.[88] The proliferation of offshore drilling in the Gulf of Mexico is a testament to the ability of the federal government to enable large scale production of energy in federal waters, even in the face of concern from multiple interest groups.

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[81] *See id.*
[82] *See id.*
[83] *See Attendees at Delaware Task Force Meeting*, BUREAU OF OCEAN ENERGY MGMT. (Oct. 29, 2009), https://perma.cc/KM3K-67NM.
[84] *See id.*
[85] Joseph B. Nelson & David P. Yaffe, *The Emergence of Commercial Scale Offshore Wind: Progress Made and Challenges Ahead*, 10 SAN DIEGO J. CLIMATE & ENERGY L. 25, 56 (2019).
[86] Hokanson, *supra* note 2, at 191.
[87] *See* Brown, *supra* note 24; Lars Anderson, *Ports and Harbors: How US Offshore Wind Developers Are Anchoring Their Claims*, GREENTECH MEDIA (Jan. 27, 2020), https://perma.cc/85PT-CEVJ.
[88] *See The History of Offshore Oil and Gas in the United States (Long Version)* (Nat'l Comm'n on the BP Deepwater Horizon Oil Spill & Offshore Drilling, Staff Working Paper), https://perma.cc/3RS8-34V4.

There is no doubt that the federal government has successfully developed huge infrastructure projects and is theoretically capable of repeating the process with offshore wind. Railroads are one clear example of successful nationwide expansion of infrastructure that had profound impacts for the country.[89] The federal government enabled this achievement through huge subsidies and land grants.[90] However, given the current political landscape at the federal level, a similar scale of effort is unlikely. Instead, if we allow states to be the laboratories of democracy, they can figure out how to get projects successfully up and running and continue to drive prices down. This will allow the federal government to expend less political capital whenever it operates in a place where renewable development is a priority.

IV. How to Enable States to Take a Larger Role in Offshore Wind Development

A. *Mechanisms to Give States More Control over Offshore Wind Development*

Because the federal government currently has jurisdiction over most offshore renewables, it must act to enable states to have more control. There are a number of potential mechanisms that would give states a greater role in developing offshore wind farms. Without changing any regulations, BOEM could adapt its practices to enable states to take the lead in selecting WEAs. If Congress was willing to provide a statutory change, states could also be given the lead role in selecting the developer to receive an ocean lease. Finally, Congress could simply grant jurisdiction of offshore areas to the states. The grant could limit state authority to offshore renewable projects.

1. Option 1: Allow States to Take the Lead in Selecting WEAs

The simplest option for giving states more power in offshore wind development is to empower states to take the lead in selecting the WEAs that will be offered for leasing. Currently, OCSLA specifically requires coordination and consultation with affected local and state governments during the leasing process.[91] Therefore, allowing states to run the stakeholder input process and select priority leasing areas would be legal under the statute and simply amplifies the meaning of "coordination and consultation". Because the BOEM regulations provide so little guidance on how these areas should be selected, this will only require a change in BOEM processes and will not require any alterations to the regulations. Although the regulations say that BOEM may establish a task force to select WEAs, they also specifically note that BOEM "is not limited to using just task forces for coordination

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[89] *See* Thomas C. Jensen et al., *Are Ocean Wind Turbines Like Homesteads and Gold Mines and Railroads? A Public Lands Policy Question for the Climate Change Era*, 34 PUB. LAND & RES. L. REV. 93, 134 (2013).
[90] *Id.*
[91] 43 U.S.C. § 1337(p)(7).

and consultation."[92] BOEM could still deny the WEA selection if a state did not adequately address any of the requirements dictated by the statute.

2. Option 2: Expand States' Role to Include Selection of the Developer

In order to extend states' power beyond the WEA selection phase and into the leasing phase, Congress will need to amend OCSLA. Section 1337(p)(3) requires the Secretary to provide leases on a competitive basis.[93] Therefore, this would preclude BOEM from simply allowing states to reach an agreement with offshore wind developers.

Nevertheless, there is room for BEOM to consider, if not give complete deference to, state level agreements with offshore renewable energy producers. The regulations note that before the rule was finalized, a number of states had already made power purchase agreements with offshore developers.[94] Therefore, those agreements were taken into consideration during the competitive leasing process.[95] However, this was only one of multiple factors that the federal government used.[96] The rule also notes the potential to take future state agreements into consideration even though BOEM does not currently do so.[97] Regardless, because it cannot be guaranteed, it will be difficult for states to reach any meaningful agreements with prospective developers without statutory change.

3. Option 3: Granting States Jurisdiction over Offshore Areas

The most extreme mechanism for increasing the role of states would be to expand their jurisdiction over the waters adjacent to their coastlines by extending the three-mile boundary. This would require congressional action through a statutory modification of the SLA. Although it is improbable that the federal government will give up so much power, if comprehensive climate legislation is unlikely, perhaps a solution that returns power to the states would be possible. Statutorily increasing state jurisdiction over the ocean has precedent: the original passage of the SLA gave jurisdiction to the states out to the current three-mile limit.[98]

A complete return of jurisdiction would raise a host of concerns over fishing, shipping lanes, and environmental protection. Even though offshore oil and gas

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[92] Renewable Energy and Alternate Uses of Existing Facilities on the Outer Continental Shelf, 74 Fed. Reg. 19,638, 19,653 (Apr. 29, 2009) (to be codified at 30 C.F.R. pts. 250, 285, 290).
[93] 43 U.S.C. § 1337(p)(7).
[94] Renewable Energy and Alternate Uses of Existing Facilities on the Outer Continental Shelf, 74 Fed. Reg. at 19,638, 19,663.
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *See The History of Offshore Oil and Gas in the United States, supra* note 88, at 5.

drilling is now losing support from politicians across the political spectrum,[99] other environmental harms loom. For example, mining of rare earth metals on the ocean floor has the potential to destroy ecosystems on the seabed that we have yet to understand.[100] Because sediment disrupted by mining is likely to spread much farther than the specific mining area, it ignores state boundaries and would benefit from federal level regulations.

A more measured approach would extend jurisdiction to the states only for the purposes of offshore renewable development. This would leave overlapping federal and state jurisdiction, with the federal government retaining control over all other matters. Congress could amend the SLA by first extending the state jurisdiction and next directing DOI to periodically review the program with the potential to expand the area. The initial boundary could be twelve miles. It needs to be more than ten miles so that turbines can be out of sight of the coastline to avoid aesthetic complaints. A periodic review by DOI every three to five years would enable BOEM to determine how states are using the increased jurisdiction over offshore renewables and assess if available technology has made offshore renewable development likely to benefit from further expansion of the boundary. Additionally, there is no reason that the federal government could not have dual jurisdiction over offshore wind development and begin developing in areas that are not being prioritized by states.

One way for the federal government to further cabin this limited jurisdiction model would be to maintain jurisdiction over areas that transmission lines pass through. In this scenario, jurisdiction would be granted for the offshore renewable production areas, but energy transmission lines would still require an easement to pass through federal waters. Because transmission lines are necessary for the success of a project, this would give the federal government the ultimate veto power over a project. For example, the Block Island Wind project required a federal right-of-way grant for its transmission lines to pass through water under federal jurisdiction.[101] If unknown harmful effects of offshore wind production materialize, further development could be prevented by the denial of federal permits.

This method of a limited transfer of jurisdiction assumes that the federal government is generally supportive of offshore wind development and is simply hamstrung by the multitude of bureaucratic hurdles. Without consistent federal support, this method would resemble the 1,100-mile Dakota Access Pipeline, which

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[99] *See* Timothy Puko & Andrew Duehrn, *Republican Fervor Ebbs for Offshore Drilling*, WALL ST. J. (Nov. 29, 2019), https://perma.cc/LRC9-RL9V.

[100] *See* De Santo, *supra* note 37.

[101] Lauren Perkins, *Hope on the Horizon for Offshore Wind Development? An Examination of the Regulatory Framework Rhode Island Navigated to Make the Nation's First Offshore Wind Farm a Reality, and the Implication for California's Ability to Adopt a Similar Approach Under the Coastal Zone Management Act*, 9 SAN DIEGO J. CLIMATE & ENERGY L. 265, 279 (2018).

included thirty-seven miles under federal control.[102] The fate of the pipeline oscillated based on whichever administration happened to be in power.[103]

B. *Considerations for Any Changes That Give States Additional Control over Offshore Leasing*

Regardless of the chosen mechanism, any changes must take three main issues into consideration. The first is ensuring that environmental and safety concerns as specified in the statute are not ignored by state plans. The second concern is ensuring that wind farm locations do not conflict with other federal management priorities, such as shipping lanes or federally managed fisheries. The third concern is ensuring that areas of the ocean that affect more than one state will get adequate input from all affected states. Fortunately, giving states more control does not necessarily imply that those states will completely disregard their neighbors. When Rhode Island created an Ocean Spatial Area Management Plan in preparation for developing Block Island Wind, it specifically designated areas that would require input from Massachusetts and equitable sharing of economic costs and benefits.[104]

Any issue around borders or how to draw delimiting lines between state jurisdictions raises a host of problems about how to draw those lines. Because resources such as fish do not stay in one place, this is an especially challenging task. One option would be to say that any boundary areas should be left to the exclusive federal jurisdiction, but it is unclear how wide that boundary should be. Furthermore, what would equitable delimitation of offshore jurisdiction look like? States such as New Hampshire have short coastlines (18.5 miles for New Hampshire), as compared to 1,500 miles for Massachusetts. Therefore, New Hampshire is unlikely to back any delimitation based on the coastline. Regardless of these border challenges, states are likely to find a way to compromise if it allows them to develop more renewable energy.

Conclusion

From offshore drilling to onshore wind farms, states have been the pioneers of energy production only to be followed by the federal government. As the nation looks to transition to renewable energy, it would be wise to learn from this history and enable states to play a larger role in the expansion of offshore wind development. As the Biden Administration works to fulfil lofty decarbonization goals, it is possible that they will end up achieving large infrastructure rollouts. However, the fate of offshore wind will then depend on future presidential elections.

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[102] *See Dakota Access Pipeline*, HARV. L. SCH. ENV'T & ENERGY LAW PROGRAM (Nov. 24, 2017), https://perma.cc/BXW5-EBTP.
[103] *See id.*; Peter Baker & Coral Davenport, *Trump Revives Keystone Pipeline Rejected by Obama*, N.Y. TIMES, Jan. 24, 2017, at A1.
[104] Perkins, *supra* note 101, at 278.

Meanwhile, if states are given the opportunity, those that are eager to meet the demands of their climate conscious constituents could continue offshore wind development. Although "states' rights" is not often a rallying cry within the environmental movement, it may be time to imagine new solutions.