

**SPINNING OUR WHEELS: WHY OFFSHORE WIND PROJECTS
STALL AND HOW TO SPEED UP THE PROCESS**

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ABSTRACT

Halloween 2023 was a truly scary day for the offshore wind industry. The world's largest offshore wind developer, Ørsted, canceled the United States' largest offshore wind projects off the coast of New Jersey, Ocean Wind 1 and Ocean Wind 2. The news blew through the renewable energy sector, undermining ambitious climate goals set by both state and federal governments. Once thought to be too big to fail, this paper examines the legal, regulatory, and policy shortcomings that contributed to the demise of these projects and proposes reforms to support the growth of the offshore wind industry.

Every level of government must make changes to better support the critical transition to renewable energy. The Department of Interior must reimagine its administrative procedures by frontloading programmatic environmental impact statements, combined with larger and more efficient BOEM staff, to reduce risk and avoid a future Ocean Wind. Congress and the Treasury Department must produce clear tax credit eligibility guidance for developers and revise existing legislation to provide direct subsidies rather than ambiguous tax credits. New Jersey and local governments should negotiate flexible agreements that accommodate macroeconomic fluctuations and update municipal plans to accommodate the surge in offshore wind development applications.

* J.D. Candidate, Rutgers Law School, May 2025. I dedicate this piece to the Jersey Shore. The Shore has given me so much and I am so proud of its potential to provide power, opportunity, and health to many more throughout the state. Thank you to my parents, to Chazz, Henry, and George, to Madeline, and to Professor Gold for sticking with me along my twisting academic journey.

By addressing these legal and regulatory challenges, policymakers can foster a more conducive environment for offshore wind projects, enabling the industry to fulfill its potential as a cornerstone of sustainable energy production.

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I. INTRODUCTION

Halloween 2023 was a scary day: Ørsted, the world's largest offshore wind developer, canceled two massive wind farm projects in New Jersey.¹ These two projects, Ocean Wind I and Ocean Wind II, would have provided 2.2 gigawatts of clean electricity by 2026—enough to power over one million homes.² Now, these enormous offshore leases will produce nothing. This news shook the nascent industry, and served a huge blow to the developer, renewable energy advocates, President Biden's climate

1. See Wayne Parry, *Orsted Scraps 2 Offshore Wind Power Projects in New Jersey, Citing Supply Chain Issues*, AP NEWS, <https://apnews.com/article/offshore-wind-orsted-new-jersey-cancelled-b30049502ac14ca6b46e2d3386a350fd> (Oct. 31, 2023, 10:02 PM).

2. Michael Sol Warren, *N.J. Approves 2 More Offshore Wind Farms to Power 1M Homes*, N.J.COM, <https://www.nj.com/news/2021/06/nj-approves-2-more-offshore-wind-farms-to-power-1m-homes.html> (July 2, 2021); see also Press Release, Ørsted, *Ørsted Ceases Development of Ocean Wind 1 and Ocean Wind 2* (Oct. 31, 2023), <https://us.orsted.com/news-archive/2023/10/orsted-ceases-development-of-ocean-wind-1-and-ocean-wind-2>.

agenda, and those still breathing polluted air from New Jersey power plants.³

There was, and still is, hope that offshore wind can help wean the country off fossil fuel-generated power.⁴ In many states, including New Jersey, rapidly developing offshore wind production is key for upholding bold climate promises.⁵ NJ governor, Phil Murphy, with legislative support,⁶ signed an executive order increasing the goal for 11,000 MW of offshore wind power by 2040.⁷ The Biden administration also announced a goal for the United States to generate thirty gigawatts of electricity from offshore wind by 2030.⁸ Momentum was building.

After promises must come action. To start, the Bureau of Ocean Management (“BOEM”) leased 2.7 million acres of land on the outer continental shelf⁹ in the Atlantic Ocean to offshore wind developers.¹⁰ Subsequently, developers invested billions of dollars in equipment, infrastructure, and labor to begin construction and take advantage of numerous tax incentives.¹¹ The question was not “if?” offshore would take off; it was “how soon?”

Ocean Wind, Ørsted’s major New Jersey farm, was the tip of the industry’s spear. The world’s leader in offshore wind, undertaking

3. See Parry, *supra* note 1.

4. See *Exec. Order No. 28* (May 23, 2018), 50 N.J. Reg. 1394(b) (June 18, 2018) (committing New Jersey to provide a blueprint for achieving 100% clean energy sources by 2050); President Joseph R. Biden, Remarks by President Biden Before Signing Executive Actions on Tackling Climate Change, Creating Jobs, and Restoring Scientific Integrity (Jan. 27, 2021) (“[W]e desperately need a unified national response to the climate crisis because there is a climate crisis.”).

5. See *Exec. Order No. 307* (Sept. 21, 2022), 54 N.J. Reg. 1945(a) (Oct. 17, 2022).

6. See H.D. S3926 219th Sess. (N.J. 2021) (supporting offshore wind by granting easements and authorizing tax credits).

7. See *Exec. Order No. 307*, *supra* note 5.

8. See Press Release, Biden-Harris Administration Approves Fourth Major Offshore Wind Project (Aug. 22, 2023), <https://www.doi.gov/pressreleases/biden-harris-administration-approves-fourth-major-offshore-wind-project>.

9. For our purposes, the Outer Continental Shelf is a statutory designation covering waters and submerged lands three nautical miles from the coastline and beyond. See BUREAU OF OCEAN ENERGY MGMT., OUTER CONTINENTAL SHELF, <https://www.boem.gov/oil-gas-energy/leasing/outer-continental-shelf> (last visited Dec. 6, 2024); 43 U.S.C. § 1331.

10. Almost half of that has come since 2022. See BUREAU OF OCEAN ENERGY MGMT., OFFSHORE WIND COMPETITIVE LEASE SALES (Feb. 2024), <https://web.archive.org/web/20240306170515/https://www.boem.gov/sites/default/files/documents/oil-gas-energy/leasing/Swiler%20Table%20-%20Offshore%20Wind%20Competitive%20Lease%20Sales.pdf>.

11. See Laura Lightbody & Courtney Durham Shane, *Offshore Wind Industry in U.S. Needs Supply Chain Investments*, PEW TRUSTS (Dec. 12, 2023), <https://www.pewtrusts.org/en/research-and-analysis/articles/2023/12/12/offshore-wind-industry-in-us-needs-supply-chain-investments>.

America's largest project.¹² Early on, though, it started to demonstrate cracks in the process.¹³ Pinch points in the supply chain combined with unforeseeable macroeconomic shocks and a strained political environment.¹⁴ Ultimately, it all proved to be too much.¹⁵

So Ørsted wrote down at least \$4 billion in losses and is currently deciding what to do with the area it leased from the federal government.¹⁶ Meanwhile, New Jersey, which still seeks to be a leader in the nascent industry, will push ahead on other projects.¹⁷

New Jersey and Ocean Wind are not outliers either. Projects up and down the eastern seaboard are facing a similar fate.¹⁸ But, why? There was sufficient political support for the project, from local legislators to

12. See Kate Selig, *Biden Approves Largest Wind Project Yet Off U.S. Shores*, WASH. POST, <https://www.washingtonpost.com/climate-environment/2023/07/05/offshore-ocean-wind-project-approved/> (July 5, 2023).

13. See *id.*; Joshua Partlow, *Biden Wants to Move Energy Offshore, But Choppy Seas Are Ahead*, WASH. POST (May 8, 2021), <https://www.washingtonpost.com/nation/2021/05/08/biden-wants-move-energy-offshore-choppy-seas-are-ahead/>.

14. See Ivan Penn, Stanley Reed & Brad Plumer, *What Ails Offshore Wind: Supply Chains, Ships and Interest Rates*, N.Y. TIMES (Dec. 11, 2023), <https://www.nytimes.com/2023/12/11/business/energy-environment/offshore-wind-energy-east-coast.html>; Stanley Reed & Tracey Tully, *Offshore Wind Firm Cancels N.J. Projects, as Industry's Prospects Dim*, N.Y. TIMES (Nov. 1, 2023), <https://www.nytimes.com/2023/11/01/business/energy-environment/offshore-wind-farm-new-jersey.html?searchResultPosition=1>.

15. See Penn, Reed & Tully, *supra* note 14.

16. *Id.*; Parry, *supra* note 1.

17. See Governor Phil Murphy, Statement by Governor Murphy on Offshore Wind Development in New Jersey (Oct. 31, 2023), <https://www.nj.gov/governor/news/news/562023/approved/20231031a.shtml> (“[T]he future of offshore wind in New Jersey remains strong.”).

18. New York, especially, is trying to learn from the mistakes in New Jersey and create more flexible bids that account for inflation. Eduardo Garcia, *New York lures back offshore wind builders burnt by cost hikes*, REUTERS (Feb. 1, 2024, 9:38 AM), <https://www.reuters.com/business/energy/new-york-lures-back-offshore-wind-builders-burnt-by-cost-hikes-2024-02-01/>.

the White House.¹⁹ There was also support from activists, scientists, and economists.²⁰ A failure on this scale should not happen.

Autopsying Ocean Wind reveals broader legal, regulatory, and policy flaws. Some were foreseeable, others were not. Offshore wind, after all, is a new technology and industry. The inquiry here zeroes in on permitting and how inefficient processes can tank the economics of potentially beneficial new technologies.

II. DISCUSSION

A. *The Federal Government's Leasing and Review Process.*²¹

The following section is in two parts. First, an overview of the Bureau of Ocean Energy Management (“BOEM”), the federal agency responsible for developing offshore wind, and the National Environmental Protection Act (“NEPA”), the statute dictating a majority of BOEM’s permitting. Second, recommendations on how to lease the ocean more efficiently without gutting important provisions in NEPA.

1. BOEM

In the orchestra of offshore wind development, BOEM is the conductor.²² To fulfill its obligations set by the White House, BOEM must

19. See, e.g., Nikita Biryukov, *Gov. Murphy, Democrats Stick with Offshore Wind Despite End of Major Windfarm Projects*, N.J. MONITOR (Nov. 1, 2023, 11:34 AM), <https://newjerseymonitor.com/2023/11/01/gov-murphy-democrats-stick-with-offshore-wind-despite-end-of-major-windfarm-projects/>; WHITE HOUSE, *FACT SHEET: Biden-Harris Administration Advances Offshore Wind Transmission, Strengthens Regional Supply Chain Buildout, and Drives Innovation*, (Sept. 21, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/09/21/fact-sheet-biden-harris-administration-advances-offshore-wind-transmission-strengthens-regional-supply-chain-buildout-and-drives-innovation/>.

20. See Alison Chase, *Offshore Wind Done Right*, NRDC (Feb. 18, 2022), <https://www.nrdc.org/bio/alison-chase/offshore-wind-done-right> (activist); see also Alex Cuffner, Scientists: *No Link between Whale Deaths and Offshore Wind Construction. Here's Why.*, PROVIDENCE J. (Mar. 2, 2024), <https://www.providencejournal.com/story/news/environment/2024/03/02/no-link-to-offshore-wind-in-death-of-south-kingstown-ri-whale-experts-say/72805692007/> (scientists).

21. This resource offers a good overview. See generally Heidi Willers, *Grounding the Cape Wind Project: How the FAA Played into the Hands of Wind Farm Opponents and What We Can Learn from It*, 77 J. AIR L. & COM. 605 (2012).

22. See 30 C.F.R. § 585.211(a) (2023). In the wake of the BP oil spill, the Obama administration reshuffled the federal agencies responsible for leasing offshore land to energy companies to resolve previous conflicts of interest. See Exec. Order No. 13,543, 75 Fed. Reg. 29397 (May 26, 2010). They created BOEM to be solely responsible for the development of America’s offshore energy on its Outer Continental Shelf (OCS) while other

lease areas of the ocean to developers to build turbines or drilling rigs to produce energy.²³ Offshore wind site development is a complicated multi-year process, but BOEM distills it into four phases: siting,²⁴ leasing,²⁵ planning,²⁶ and construction.²⁷ Each of these four phases involves extensive environmental review, public comment, developer collaboration, and synchronization with utilities.²⁸ Not surprisingly, this process takes years for a single project.²⁹

It is a gargantuan task. There are dozens of offshore wind projects in the siting, leasing, and planning stages as of early 2024.³⁰ There are also dozens of offshore drilling projects that BOEM must manage as well.³¹ All of these responsibilities—researching, soliciting bids, coordinating with other agencies, completing impact statements, responding to public comments, fending off lawsuits, and more—are fulfilled by a department of just 603 people.³²

agencies would handle regulation. See *Organizational History*, BUREAU OF SAFETY AND ENV'T ENFORCEMENT, <https://www.bsee.gov/about-bsee/our-organization/organizational-history> (last visited Dec. 9, 2024).

23. See *About BOEM Fact Sheet*, BUREAU OF OCEAN ENERGY MGMT., <https://www.boem.gov/sites/default/files/documents/newsroom/fact-sheets/BOEM-FactSheet-About.pdf> (last visited Dec. 9, 2024).

24. They first scour the ocean for locations that would be suitable for offshore wind development called Wind Energy Areas (WEAs). NEW JERSEY OFFSHORE WIND STRATEGIC PLAN, NEW JERSEY BD. OF PUB. UTILS. & INTERAGENCY TASKFORCE ON OFFSHORE WIND 16 (July 2020), https://www.nj.gov/bpu/pdf/Draft_NJ_OWSP_7-13-20_highres.pdf.

25. Once the WEA gains approval, it is leased to a developer via auction. *Id.* The lease grants the lessee the right to operate subject to obtaining additional approvals. *Id.*

26. After BOEM grants the lease, the developer submits a Site Assessment Plan (SAP) and a Construction Operation Plan (COP) to BOEM for review. Then, the developer and BOEM go through a back-and-forth revision process on the SAP and COP that includes opportunity for public comment. *Id.*; see also A CITIZEN'S GUIDE TO NEPA, COUNCIL ON ENV'T QUALITY 13 (Jan. 2021), <https://ceq.doe.gov/docs/get-involved/citizens-guide-to-nepa-2021.pdf>.

27. Once both are finally approved, the developer may begin installation. NEW JERSEY OFFSHORE WIND STRATEGIC PLAN, *supra* note 24, at 16.

28. See *id.*

29. See *id.*

30. See *Lease and Grant Information*, BUREAU OF OCEAN ENERGY MGMT., <https://www.boem.gov/renewable-energy/lease-and-grant-information> (last visited Dec. 9, 2024). For an interesting and helpful interactive map see *Offshore Renewable Activity*, BUREAU OF OCEAN ENERGY MGMT., <https://www.boem.gov/renewable-energy/offshore-renewable-activities> (last visited Dec. 9, 2024).

31. See *Lease Sales*, BUREAU OF OCEAN ENERGY MGMT., <https://www.boem.gov/oil-gas-energy/lease-sales> (last visited Dec. 9, 2024).

32. *About BOEM Fact Sheet*, *supra* note 23; *Fedscope*, U.S. OFF. OF PERS. MGMT., <https://www.fedscope.opm.gov> (last visited Dec. 9, 2024) (click the "Quarter Months" link in the Employment section; then click "March 2023;" then click "Cabinet-level agencies;" finally click "Department of Interior"). 603 people make up less than 0.1% of the Department of Interior's workforce. *Id.* Compare this to the Bureau of Land Management

2. NEPA

Enacted in 1970 amid burning rivers,³³ oil-slicked beaches,³⁴ and choked-out cities,³⁵ Congress created NEPA to promote “harmony between man and his environment.”³⁶ However, unlike other environmental statutes that Congress passed in the ’70s, NEPA pointed its gaze directly at the Federal Government.³⁷

NEPA is both simple and complicated. In its essence, NEPA is a “show your work” statute, meaning that it does not create any environmental standards itself. It does, however, require that the federal agency perform a “detailed statement” to show that they considered how their action would affect the “quality of the human environment.”³⁸ Even though agencies may comply with NEPA however they please, the generally accepted practice is to complete an Environmental Impact Statement (“EIS”).³⁹ They are infamously long documents that can take years to complete.⁴⁰

which employs over 9,000. *Id.* BOEM is staffed like an agency that is strictly administrative despite being responsible for many massive infrastructure mandates. *See id.*

33. *The 1969 Cuyahoga River Fire*, NAT’L PARK SERV., <https://www.nps.gov/articles/story-of-the-fire.htm> (last visited Dec. 9, 2024).

34. Jon Hamilton, *How California’s Worst Oil Spill Turned Beaches Black and the Nation Green*, NPR (Jan. 18, 2019, 5:29 AM), <https://www.npr.org/2019/01/28/688219307/how-californias-worst-oil-spill-turned-beaches-black-and-the-nation-green>.

35. Jim Dwyer, *Remembering a City Where the Smog Could Kill*, N.Y. TIMES (Feb. 28, 2017), <https://www.nytimes.com/2017/02/28/nyregion/new-york-city-smog.html>.

36. 42 U.S.C. § 4321. NEPA’s stated purposes are fourfold: (1) “To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; [(2)] to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; [(3)] to enrich the understanding of the ecological systems and natural resources important to the Nation; and [(4)] to establish a Council on Environmental Quality.” *Id.*

37. 42 U.S.C. § 4332 (“[A]ll agencies of the Federal Government shall . . .”). When people think of polluters, they might think of corporations and corporate scandals: Big Oil, Big Chemical, Big Auto, Big Whatever. However, the Federal Government is responsible for some of our nation’s worst environmental scars, and some of our largest disasters. NEPA attempted to address that. *See id.*

38. *See* 42 U.S.C. § 4332(C).

39. *See National Environmental Policy Act Review Process*, EPA, <https://www.epa.gov/nepa/national-environmental-policy-act-review-process> (last visited Dec. 9, 2024).

40. PAUL A. ENGLISH ET AL., IMPROVING EFFICIENCIES OF NATIONAL ENVIRONMENTAL POLICY ACT DOCUMENTATION FOR OFFSHORE WIND FACILITIES CASE STUDIES REPORT, BUREAU OF OCEAN ENERGY MGMT. 1 (2017), <https://www.boem.gov/sites/default/files/environmental-stewardship/Environmental-Studies/Renewable-Energy/Improving-Efficiencies-of-National-Environmental.pdf>.

Unsurprisingly, agencies and industries have fought to avoid them. One option they have that is relevant to BOEM is the Environmental Assessment (“EA”).⁴¹ When it is unclear whether a major action would affect the quality of the human environment, agencies can perform an EA. It is a simpler version of an EIS, and if it produces a “Finding of No Significant Impact” (“FONSI”), the agency can skip the EIS altogether.⁴²

NEPA opens the door for further delays by subjecting an agency’s process to judicial review under the Administrative Procedures Act.⁴³ If a court agrees with the claimant that the agency was “arbitrary and capricious,” it may force the agency to redo its process and may award a temporary injunction.⁴⁴ For some projects, this can be a death sentence.

In review, NEPA adds scrutiny to major federal action when there is a potential for significant impact on the environment.⁴⁵

B. Navigating NEPA and Reforming the Process

1. BOEM’s Current Approach

In this industry, time is risk. A developer’s business model demands large amounts of upfront capital, expertise, and investment with the promise of stable, lucrative, long-term returns.⁴⁶ Delays increase costs for developers, make financing more difficult, and open the possibility for macroeconomic changes such as inflation, wars, or pandemics to change

41. See EPA, *supra* note 39.

42. See *id.*

43. See NINA M. HART, CONG. RSCH. SERV., R47205, JUDICIAL REVIEW AND THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969 6 (2022); Richard H. Mays, *Standard of review for NEPA cases*, 4 ENV’T. L. FORMS GUIDE § 46:24 (2024).

44. Susannah T. French, *Judicial Review of the Administrative Record in NEPA Litigation*, 81 CAL. L. REV. 929, 957, 966–67 (1993). For an analysis of how plaintiffs have performed in NEPA litigation over the last few decades see David E. Adelman & Robert L. Glicksman, *The Limits of Citizen Environmental Litigation*, 33 NATURAL RES. & ENV’T 17, 18–20 (2019).

45. This discussion does not touch on the Administrative Procedure Act which *does* allow courts to review the substantive agency action, however, unlike NEPA that substantive decision does not have to weigh environmental factors. 5 U.S.C. § 706(2)(a). Although the APA standard is very deferential to agency discretion, the courts have not turned a blind eye to official pronouncements that may harm the environment. See *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 413–14, 420 (1971).

46. See Florian Kühn et al., *How to Succeed in the Expanding Global Offshore Wind Market*, MCKINSEY (Apr. 20, 2022), <https://www.mckinsey.com/industries/electric-power-and-natural-gas/our-insights/how-to-succeed-in-the-expanding-global-offshore-wind-market#/> (“Offshore wind projects typically take several years to complete but are based on cost calculations made months in advance of the auction—and several years before the project is commissioned into service.”).

the landscape.⁴⁷ This is one reason why NEPA receives a ton of blame from offshore wind advocates.⁴⁸

BOEM decided that it would expedite the leasing process and satisfy its NEPA obligations by implementing a strategy called “Smart from the Start.”⁴⁹ This strategy breaks up the environmental review process into tiny parts, implementing EAs liberally in the beginning and saving EISs for after the developer committed, and started the planning and construction phases.⁵⁰ They have used this process over thirteen times, with only one reaching the construction phase.⁵¹

2. Proposed Improvements

At the federal level, there is a legal efficiency problem with offshore wind. The goals are ambitious, the requirements are onerous, and the means are scarce. BOEM, the federal courts, and Congress can each make changes to help facilitate this transformative infrastructure project.

a. BOEM’s Environmental Impact Statements

Now that over a dozen offshore wind projects have slogged through the first iteration of BOEM’s “assembly line,” with at least two failing, it is time for BOEM to reconsider its order of operations. To do so, BOEM should implement Programmatic EISs that take place before the siting stage to allow BOEM to tailor efforts to more favorable areas, increase transparency, and engage stakeholders in a more meaningful way.⁵²

47. This is exactly what happened to Ocean Wind I and II. In the five years between winning the lease and shutting down shop, they faced numerous global obstacles, and fickle political support gave out. See Stanley Reed & Tracey Tully, *Offshore Wind Firm Cancels N.J. Projects, as Industry’s Prospects Dim*, N.Y. TIMES (Nov. 1, 2023), <https://www.nytimes.com/2023/11/01/business/energy-environment/offshore-wind-farm-new-jersey.html>.

48. See PHILIP ROSSETTI, ADDRESSING NEPA-RELATED INFRASTRUCTURE DELAYS 4–5 (2021) (suggesting that NEPA is a larger barrier for clean energy projects than fossil fuel projects).

49. Mitchell Hokanson, *Avoiding the Doldrums: Evaluating the Need for Change in the Offshore Wind Permitting Process*, 44 COLUM. J. ENV’T. L. 181, 192–93 (2019).

50. *Id.*

51. *Id.* at 196.

52. *Id.* at 220. This recommendation is heavily influenced by Mitchell Hokanson and Prof. Michael B. Gerrard, who predicted this issue five years ago. *Id.* Their recommendations were to front-load with the hopes that this would speed up the process. *Id.* As noted *infra*, this will likely not speed up the process big picture because BOEM will be doing more full-length EISs, however, this note argues that it will simplify work from the developer’s perspective. See discussion *infra* Section II(B)(2)(b).

While they may face the same challenges they would have at later stages, these early and thorough EISs may help avoid litigation down the line by reducing the number of open issues.⁵³ They could better anticipate complaints and quickly dismiss subsequent claims when the financial and logistical stakes are higher. In addition to avoiding litigation, BOEM would be able to better tailor efforts to only the areas most likely to succeed.⁵⁴

There are strong arguments for the current process. The leasing and siting stages consist mostly of surveys, have minimal actual impact on the environment, and are a natural fit for EAs.⁵⁵ Delaying EISs until after completing some low-impact work is a logical tactic that agencies can employ to alter the EIS calculus.⁵⁶ What is the environmental impact of a project that is already ninety percent complete? Less than a project that is zero percent complete.

The problem⁵⁷ with this strategy in the offshore wind context is that it is optimized for *leases* and not completed projects. By waiting until the developer is already on board to address the bulk of the NEPA-related delays, BOEM is lengthening the investment-to-revenue timeline from a developer's perspective and adding risk to the project.

BOEM is unlikely to add an additional step that courts have not required under NEPA, nor is this step likely to yield better environmental results.⁵⁸ BOEM's mandate is to lease offshore land, not perform environmental impact statements.⁵⁹ However, the ultimate goal should not be leases granted; it should be megawatts of power produced. The process should be optimized for that goal.

b. Bolstering BOEM to Support the Increased Number of

53. An assumption worth noting is that BOEM will have sufficient information available and direction in their bids to predict what the wind farm will look like and what its environmental impacts will be. For example, if BOEM conducts an EIS for fifty turbines, but the developer wants to do one hundred in the same WEA, that would defeat the purpose of pre-completing the assessment.

54. See Hokanson, *supra* note 49, at 220.

55. See PAUL A. ENGLISH ET AL., *supra* note 40, at 183; e.g., Notice of Intent to Prepare an Environmental Assessment for a Wind Energy Research Lease on the Atlantic Outer Continental Shelf Offshore Maine, 88 Fed. Reg. 28611 (May 4, 2023).

56. See *generally* Env't Prot. Info. Ctr. v. U.S. Forest Serv., 451 F.3d 1005 (9th Cir. 2006).

57. This strategy is vulnerable to a challenge that the process does not account for the "cumulative effects" of an individual action but has not had a problem in court so far. *Id.* at 1014.

58. See *generally id.*

59. See NEW JERSEY OFFSHORE WIND STRATEGIC PLAN, *supra* note 24, at 16.

EISs by Adding Staff and Eliminating Redundancies

While the above section makes recommendations for how BOEM can better navigate existing regulations, this section makes recommendations for how parties can support BOEM by increasing its capacity and reducing external inefficiencies.

First, there are several changes to BOEM's NEPA requirements that the Council on Environmental Quality can make to help make BOEM more efficient. One proposal is to allow BOEM to utilize institutional knowledge from European projects in areas where their own research would be redundant.⁶⁰ A regional study, accounting for the numerous projects, would also allow BOEM to approve more projects faster and may produce better environmental results by assessing regional impacts.⁶¹ Additionally, BOEM proposed an Energy Modernization Rule in January 2023 that speaks to specific areas of the surveying and leasing process where they can lower environmental assessment standards, such as met buoys, and clarifying procedures.⁶² Finally, BOEM proposed a more flexible method for proposing alternatives and catering to public feedback.⁶³ Developers have come out strongly in favor of these changes, urging the need for certainty, clarity, and procedural updates.⁶⁴

There also is an opportunity for BOEM and the CEQ to agree on categorical exclusions for certain surveying and auctioning processes.

60. PAUL A. ENGLISH ET AL., *supra* note 40, at 183. European countries have an almost twenty-year head start on the United States in terms of research, environmental review, and cost/benefit analysis. *Id.* at 2. Normally, the federal government has certain approved providers to do EISs. BOEM could expand that to pre-existing foreign analysis. *Id.* at 183.

61. *See* Hokanson, *supra* note 49, at 221.

62. Renewable Energy Modernization Rule, 88 Fed. Reg. 5968 (proposed Jan. 30, 2023) (to be codified at 30 C.F.R. pt. 585) ("The proposed rule contains seven main components that would accomplish the following: (1) eliminate site assessment plan requirements for met buoys; (2) adopt a flexible and performance-based approach to geophysical and geotechnical surveying; (3) conform the CVA review standard to industry practice and provide flexibility in the CVA nomination and engineering report submittal process; (4) clarify auction procedures; (5) align financial assurances with the risk to U.S. taxpayers and permit incremental funding of decommissioning accounts; (6) clarify and enhance safety management requirements; and (7) make other revisions and technical corrections that would improve BOEM's OCS renewable regulatory program and fix technical errors and inconsistencies.").

63. *See generally* PROCESS FOR IDENTIFYING ALTERNATIVES FOR ENVIRONMENTAL REVIEWS OF OFFSHORE WIND CONSTRUCTION AND OPERATIONS PLANS PURSUANT TO THE NATIONAL ENVIRONMENTAL POLICY ACT (NEPA), BUREAU OF OCEAN ENERGY MGMT. (2022).

64. *See* American Clean Power Association, National Offshore Industries Association (NOIA), and Business Network for Offshore Wind (BNOW), Comments on the Bureau of Ocean Energy Management's Renewable Energy Modernization Rule 6-7 (May 1, 2023), <https://cleanpower.org/wp-content/uploads/2023/05/ACP-Comments-on-BOEM-Modernization-Rule.pdf>.

There is precedent for categorical exclusions in other agencies.⁶⁵ For an agency attempting to work at breakneck speeds, this can be a huge time and resource saver. Ultimately, though, there will have to be a combination of these proposals; BOEM cannot afford to take years for each impact statement.

Finally, BOEM should add lawyers and engineers to its staff to help process the documents, as it is currently understaffed.⁶⁶ As noted, BOEM is a comparatively small agency with a large mandate. While they have some of the fastest EIS processing times in the Department of Interior, they are still slow compared to other agencies.⁶⁷ This note recommends that BOEM perform *more* EISs to increase efficiency. However, this efficiency could be undone if the additional workload swamps the staff.

c. Avoiding the Calls to Abolish NEPA

This is the point in the story where the audience turns on the anti-hero, NEPA. It is a frustrating statute. Shorter EISs – intended to increase the turnaround time from survey to construction – are more likely to wind up getting delayed through litigation.⁶⁸ Longer EISs are less likely to get sued but take more time and resources to produce.⁶⁹ Add in the fact that many NEPA claims are against climate-saving renewable energy projects,⁷⁰ it is unsurprising that offshore wind advocates and developers express frustration with NEPA.

The instinct to lower the bar is understandable. NEPA is a heavily politicized statute with bipartisan support calling for its end,⁷¹ and environmentalists rethinking how it can be modernized and made more

65. See 40 C.F.R. § 1501.4; see also *Earth Island Inst. v. Muldoon*, 82 F.4th 624, 637 (9th Cir. 2023).

66. See Iulia Gheorghiu, *BOEM Needs Staffing Help with Offshore Wind Permitting Regardless of Election Results, Experts Say*, UTIL. DIVE (Oct. 15, 2020), <https://www.utilitydive.com/news/boem-interior-staffing-help-with-offshore-wind-permitting-election/587092/>.

67. See EPA, *supra* note 39; COUNCIL ON ENV'T QUALITY, EXEC. OFF. OF THE PRESIDENT, ENVIRONMENTAL IMPACT STATEMENT TIMELINES (2010–2018) 6, 8–14 (2020).

68. See ROSSETTI, *supra* note 48, at 6–7.

69. *Id.*

70. Aidan Mackenzie & Santi Ruis, *No, NEPA Really Is a Problem for Clean Energy*, INST. FOR PROGRESS (Aug. 17, 2023), <https://ifp.org/no-nepa-really-is-a-problem-for-clean-energy/>.

71. See Diane Katz, *Time to Repeal the Obsolete National Environmental Policy Act (NEPA)*, THE HERITAGE FOUND. (Mar. 14, 2018), <https://www.heritage.org/government-regulation/report/time-repeal-the-obsolete-national-environmental-policy-act-nepa> for a politically conservative view.

tailored to address climate change.⁷² NEPA advocates point to its numerous successes since the 1970s in ensuring collaboration between the federal government, developers, and the community.⁷³

There is potential bipartisan acceptance that something needs to change.⁷⁴ A bipartisan reform that barely failed to pass the Senate in 2022 would have introduced several changes to the implantation of NEPA that could have helped expedite infrastructure projects.⁷⁵ Often, however, proposed legislation amounts to a devil's bargain: green power in exchange for an open floodgate for fossil fuels.⁷⁶

This proposed legislation puts the politics of renewable energy in clear view. Congress could waive all permitting requirements for offshore wind, as they have done for many other controversial federal projects.⁷⁷ But renewable energy advocates need to be realistic about what is possible at this stage and ask themselves if they are willing to let fossil fuel industry interests hold them hostage.

NEPA was a transformative statute that changed the balance of priorities in federal decision-making.⁷⁸ Abolishing or gutting the hard-won statute to push renewable energy projects would almost certainly

72. See Akielly Hu, *White House Takes a Crack at Much-Needed Permitting Reform*, GRIST (Aug. 1, 2023), <https://grist.org/regulation/white-house-takes-a-crack-at-much-needed-permitting-reform/> for a progressive view making similar points.

73. See Elly Pepper, *Never Eliminate Public Advice: NEPA Success Stories*, NAT. RES. DEF. COUNCIL (Feb. 1, 2015), <https://www.nrdc.org/resources/never-eliminate-public-advice-nepa-success-stories> (pointing to examples from each state of how the NEPA process required the government to consider an alternative that was more suitable to the public).

74. See Colin Mortimer, *Manchin's Permitting Reform Effort Is Dead. Biden's Climate Agenda Could Be a Casualty*, VOX, <https://www.vox.com/policy-and-politics/2022/12/12/23500140/permitting-reform-inflation-reduction-act-congress-manchin> (Dec. 16, 2022, 12:04 PM); Laura Hale, *President Trump Announces "Massive Permit Reform" Push*, REP. CARD FOR AMERICA'S INFRASTRUCTURE (Jun. 9, 2017), <https://infrastructurereportcard.org/president-trump-announces-massive-permit-reform-push/>.

75. See S. 22650 117th Cong. ("Building American Energy Security Act of 2022") (2022). Those changes were to (1) shorten the statute of limitations, (2) shorter deadlines, and (3) force dispute resolution. See generally *id.*

76. Lylla Younes & Gautama Mehta, *Permitting Reform Is Back. Is the Latest Deal Worth It?*, GRIST (Aug. 2, 2024), <https://grist.org/regulation/manchin-barrasso-permitting-reform-bill-fossil-fuels/>.

77. The most recent example that comes to mind is the controversial border wall that evaded EIS requirements, thanks to a statute giving the Secretary of Homeland Security broad powers. Mark Nevitt, *The Environmental Law of the Border Wall*, LAWFARE (Oct. 11, 2023, 5:27 PM), <https://www.lawfaremedia.org/article/the-environmental-law-of-the-border-wall>.

78. See Dinah Bear, *The National Environmental Policy Act: Its Origins and Evolutions*, 10 NAT. RES. & ENV'T. 3, 5 (1995).

have unintended negative consequences for the environment in other sectors.⁷⁹

III. CONCLUSION

The reality with offshore wind is that it is so new. Oil, gas, and nuclear have had a multi-decade head start.⁸⁰ In each of those cases, there were stretches of public opposition, economic uncertainty, and government subsidy.⁸¹ However, right now, it very much feels as though offshore wind has reached a fork in the road. Down the line, Ocean Wind's failure could simply be seen as an expensive learning experience, or it could be a warning of more failed projects to come.

To ensure that the former comes to fruition, the law must adapt. On the federal level, BOEM should alter its "Smart From the Start" approach to environmental impact statements by performing the bulk of the work before a developer gets on board, shortening the cash bridge that the corporation must cross. To support the agency, BOEM should receive more funding to hire more staff and produce more thorough statements more quickly. BOEM can also work with the CEQ to reduce redundancies in its review process. All of this should be done before Congress takes a pen to NEPA.

The large wave of projects over the last few years has faced a gauntlet of challenges—a pandemic, wars, inflation, and political polarization. It was enough to rattle established industries.⁸² Through it all, offshore wind developers, politicians, engineers, and construction workers push on.⁸³ There is still money to make, air to clean, and a climate to save. Will the orchestra of global corporations, federal agencies, state actors, local governments, and private persons find harmony?

79. See RICHARD N.L. ANDREWS, *MANAGING THE ENVIRONMENT, MANAGING OURSELVES: A HISTORY OF AMERICAN ENVIRONMENTAL POLICY* 217–18 (3rd ed. 2020) (noting NEPA helped give President Obama the information needed to cancel the Keystone XL Pipeline.)

80. *History of Power: The Evolution of the Electric Generation Industry*, POWER (Oct. 1, 2022), <https://www.powermag.com/history-of-power-the-evolution-of-the-electric-generation-industry/>.

81. Jeff Johnson, *Long History of U.S. Energy Subsidies*, C&EN (Dec. 19, 2011), <https://cen.acs.org/articles/89/i51/Long-History-US-Energy-Subsidies.html>; J. SAMUEL WALKER & THOMAS B. WELLOCK, *A SHORT HISTORY OF NUCLEAR REGULATION, 1946–2009* 18 (Oct. 2010).

82. See Teresia Angelia Kusumahadi & Fikri C. Permana, *Impact of COVID-19 on Global Stock Market Volatility*, 36 J. ECON. INTEGRATION 20, 20–21 (2021).

83. Wayne Parry, *Despite Loss of 2 Major Projects, New Jersey Is Moving Forward with its Offshore Wind Power Goals*, ASSOCIATED PRESS, <https://apnews.com/article/offshore-wind-new-jersey-transmission-projects-e4761f9bfd8a422b1c4321ee7798a61> (Nov. 17, 2023, 1:29 PM).