Go Offshore Young Man! The Categorical Exclusion Solution to Offshore Wind Farm Development on the Outer Continental Shelf

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Introduction

In his remarks on the Deepwater Horizon disaster, the largest oil spill in American history,1 President Barack Obama stated, “The tragedy unfolding on our coast is the most painful and powerful reminder yet that the time to embrace a clean energy future is now. Now is the moment for this generation to embark on a national mission to unleash America’s innovation and seize control of our own destiny.”2 Despite this recognition, the United States is falling behind the rest of the world in clean energy technology and development.3 This Note looks at one way that the United States can reverse this trend: encourage development of offshore wind energy facilities on the Outer Continental Shelf by streamlining the environmental review process.

Perhaps the best illustration of the need to streamline the permitting of offshore wind farms is the Cape Wind project in Nantucket Sound, Massachusetts. Cape Wind has been bogged down by legal challenges and approval processes since it applied for its first permit in November 2001.4 This 130-turbine project, which at its closest point will be 5.2 miles from land, would prevent approximately 880,000 tons of carbon dioxide emissions—the equivalent of burning 570,000 tons of coal—each year.5 Environmental benefits aside, the project would also save the region about $185 million per year on electricity costs, or roughly $4.6 billion over the life of the project.6 Despite these savings, the Cape Wind project has “undergone a more comprehensive and rigorous permitting review than any of New England’s fossil fueled power plants.”7

Specifically, the Cape Wind project has been subject to two different environmental impact studies (“EIS”) under the National Environmental Policy Act (“NEPA”),8 eight lawsuits challenging the adequacy of the environmental review process, and a failed attempt by former Massachusetts Senator Edward Kennedy to provide the Governor of Massachusetts with veto power over the project.9 This opposition to Cape Wind seemingly ignores the federal government’s finding that the project would have mostly “negligible” or “minor” impacts on the environment.10 Even though these findings were published in January 2009, and a favorable

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7. Cape Wind, supra note 5.


10. See id.

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record of decision was published on April 28, 2010, construction has still not commenced. All of this has occurred despite eighty-four percent of Massachusetts residents and fifty-eight percent of Cape-area residents supporting the project.

In stark contrast to the United States, European offshore wind farms have been in operation for the past eighteen years. With thirty-three operational projects in eight countries and five more countries planning to have operational offshore wind farms by 2015, Europe’s offshore wind industry is booming. More importantly, Europe’s sixty-five gigawatts of offshore wind capacity produced four percent of Europe’s energy and prevented the release of ninety-one million tons of carbon dioxide in 2008. The United States could learn from Europe’s successes and failures over the past twenty years to improve its own offshore wind farm approval regime.

Specifically, the Obama administration should take a hard look at the environmental reviews that have been completed for offshore wind farms, both internationally and nationally. In doing so, the administration would discover that the “negligible” to “minor” environmental impacts of the Cape Wind project apply to nearly all offshore wind farms. As such, the U.S. Department of the Interior (“DOI”), Bureau of Ocean Energy Management, Regulation, and Enforcement (“BOEMRE”) should create a categorical exclusion under NEPA for such projects. A categorical exclusion would, in most cases, eliminate the need for EISs and Environmental Assessments (“EA”) prior to issuing leases for the construction and operation of offshore wind farms in the United States.

To prove this point, Part I of this Note discusses the differences between offshore wind farms and onshore wind farms. Part II describes the current regulatory framework for issuing leases on the Outer Continental Shelf to offshore wind farms. Part III examines the categorical exclusion generally: how it has been used and how the courts have reacted to it. Part IV demonstrates that a categorical exclusion is not only appropriate in the offshore wind farm context, but that it would survive judicial scrutiny. Finally, Part V discusses three alternatives to the categorical exclusion: (1) congressional action, (2) an agency rule that would allow for completion of EAs rather than EISs, and (3) a “partial” categorical exclusion, and reveals why these alternatives fail to address the problem as effectively as a categorical exclusion for offshore wind farms.

**Part I: Offshore Wind Generally: You Get What You Pay For**

**A. The Higher Costs of Offshore Wind**

As used in this Note, offshore wind farms are wind farms sited on the Outer Continental Shelf, the permitting of which is controlled by the federal government. Generally, offshore wind turbines are taller, have longer blades, produce more electricity, and are engineered to withstand more intense weather conditions than onshore turbines. The electricity produced by these turbines also needs to be transmitted to shore, requiring installation of new underwater transmission lines. As a result, an offshore wind turbine can cost twice as much to construct as an onshore turbine.

**B. Three Distinct Advantages of Offshore Wind**

Despite higher costs, siting wind farms on the Outer Continental Shelf has several key advantages over siting onshore. This Note focuses on the three advantages most relevant to the ultimate inquiry. First, the Outer Continental Shelf has enormous electricity-producing potential and is located in closer proximity to urban areas with high-energy demands. Second, the aesthetic concerns associated with offshore wind farms are less of a concern for offshore facilities. Finally, a single federal agency oversees the permitting process, which allows for the administration of a consistent, streamlined approval process for offshore wind farms. This Section concludes that these three factors offset the higher costs associated with moving wind farms offshore.

**I. Huge Power Potential Close to High-Demand Areas**

The first key advantage of offshore wind farms is that they can produce huge amounts of electricity close to high-

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15. Id.


19. See id. at 6, 8.

20. Id. at 14.
demand urban centers on the Eastern Seaboard. Because offshore winds are stronger and more constant than onshore winds, an offshore turbine is capable of producing fifteen percent more electricity than an onshore turbine of the same size. Moreover, the major onshore production areas are in the Great Plains, and the need to transmit electricity from this region to the high demand areas along the coasts has proven problematic for onshore wind farm developers. Developing America’s offshore wind resources would alleviate these problems by providing more power than onshore facilities in close proximity to the areas that need it most.

Current technology could capture an enormous amount of the United States’ offshore wind potential. The United States’ offshore wind potential is estimated to be more than 900,000 megawatts (“MW”)—a figure equal to the United States’ current production capacity. Importantly, this figure excludes over two-thirds of the Outer Continental Shelf “to account for shipping lanes and avian, marine mammal, fish, and view shed concerns.” Although there are still technological concerns in siting wind turbines in water deeper than thirty meters, more than ten percent—equivalent to 98,000 MW of potential electric power—of the Outer Continental Shelf is capable of being developed with current technologies. By 2025, the United States could capture up to 70,000 MW of this potential. Unfortunately, the United States has only approved one offshore wind farm.

Closely related to the huge power potential of offshore wind is the ease of transmitting this energy to the load centers of the East Coast. Because “[m]uch of this potential is near high-energy demand areas with limited energy resources[,]” the problems associated with transmitting energy from the Great Plains region, where the bulk of onshore wind energy potential is located, to the Eastern Seaboard, are nonexistent with offshore wind farms. For instance, Texas, the nation’s leader in onshore wind energy development, has earmarked nearly $5 billion to build power lines capable of delivering wind energy from west Texas to high-demand cities in east Texas. This $5 billion investment only accounts for improving the transmission grid across one state, not the multiple states across which wind energy would need to be transmitted to reach the Eastern Seaboard. In comparison, the Atlantic Wind Connection has proposed a $5 billion offshore transmission project, stretching from New Jersey to Virginia, that would bring offshore wind energy to high-demand centers on the Eastern Seaboard. Additionally, offshore wind farms rely on underwater transmission lines that run straight from the farm to onshore substations, thereby avoiding the bottleneck caused by transmitting onshore wind power from the Great Plains to the East Coast. Thus, the huge power potential of offshore wind farms and their close proximity to high-demand urban areas on the East Coast is a significant advantage over onshore wind farms.

2. Diminished NIMBYism

The second key advantage of offshore wind farms is that the Not in My Back Yard (“NIMBY”) attitudes—perceived harms associated with aesthetics, noise, and property values—toward these projects are much less pervasive than is experienced with onshore facilities. For instance, although some citizens have expressed a NIMBY attitude toward the Cape Wind project and have unsuccessfully sought to stop the project through legal action, the majority of the region’s citizens support the project. Cape Wind turbines generated some NIMBY sentiments because they would appear as half-inch towers on the horizon on a clear day. But other pro-

22. See generally Paul Davidson, Wind Energy Confronts Shortage of Transmission Lines, USA TODAY (Feb. 26, 2008 11:06 AM), http://www.usatoday.com/money/industries/environment/2008-02-25-wind-power-transmission_N.htm (“Stringing new wires is easier said than done. Wind developers won’t go ahead with projects until transmission lines are in place, and utilities are loath to build the lines until they’re sure the developers won’t back out. . . . Compounding the standoff: Some states don’t want residents paying for lines that will largely benefit neighboring states.”).
24. BOEMRE WHITE PAPER, supra note 18, at 2 n.2.
25. Id. at 2.
26. Id.
27. See supra note 12 and accompanying text.
28. BOEMRE WHITE PAPER, supra note 18, at 14.
30. See Margaret Bryant, Wind Energy in Texas: An Argument for Developing Offshore Wind Farms, 4 ENVT. & ENERGY L. & POL’Y J. 127, 132 (2009) (“Compared to onshore wind farms, offshore wind farms are often located closer to major population centers and produce more energy; therefore, the higher capital costs of building an offshore wind farm may be less than the dual costs of developing onshore wind farms and extensively upgrading the power grid.”) (citations omitted); see also Davidson, supra note 22.
32. The U.S. Department of Energy estimates that to increase the United States’ wind power capacity to twenty percent of total generation would require, at a minimum, twenty billion dollars in investment in upgrading transmission lines. This figure, however, did not account for “significant costs for permitting delays, construction of grid extensions to remote areas with wind resources, and investments in advanced grid controls, integration, and training to enable regional load balancing of wind resources.” U.S. DEPT. OF ENERGY, 20% Wind Energy by 2030 19 (2008), available at www1.eere.energy.gov/windandhydro/pdfs/41869.pdf.
34. AM. Wind Energy Ass’n, supra note 14.
35. See Bryant, supra note 30, at 132 (“[C]ompared to onshore wind farms, offshore development is less likely to incite ‘not in my back yard’ concerns regarding the turbines’ aesthetics.”) (citing Mortensen, supra note 21, at 191).
37. See OP. RESEARCH CORP., supra note 13.

posed projects located further offshore will be impossible to see, greatly reducing aesthetic concerns.\textsuperscript{39}

Conversely, onshore wind farms are highly susceptible to NIMBY sentiments.\textsuperscript{40} In fact, the siting of onshore wind farms is litigated more often than the siting of any other renewable energy source—a trend that is likely to continue into the foreseeable future.\textsuperscript{41} Even though a U.S. Department of Energy study found that there was no impact on property values of homes in close proximity to wind farms,\textsuperscript{42} and a Renewable Energy Policy Project study found homes with views of wind turbines increased in value faster than nearby homes without views,\textsuperscript{43} onshore wind farms directly affect aesthetics for nearby landowners. This may be more important than property values for some landowners.\textsuperscript{44} Thus, the opportunity to move offshore presents the ability to capitalize on wind power while avoiding the often contentious process of siting wind farms onshore.

3. The Ability to Streamline

The final advantage of offshore wind farms is that siting, construction, and operation permitting is managed by one federal agency: BOEMRE,\textsuperscript{45} whereas siting of onshore wind farms is addressed at the state level.\textsuperscript{46} This means that onshore siting decisions are often left to local zoning boards.\textsuperscript{47} This localized decision-making process subjects the siting of onshore wind farms to heightened levels of NIMBYism\textsuperscript{48} and undervalues federally managed migratory wildlife.\textsuperscript{49} In addition to these problems, the regulation of onshore wind farms often varies from state to state, increasing the potential for legal headaches and higher costs for onshore wind farm developers.\textsuperscript{50}

In comparison, BOEMRE is solely responsible for overseeing all aspects of offshore wind farm development and operation.\textsuperscript{51} Because all relevant information is consolidated in one location, developers of offshore wind farms are better apprised of the steps necessary to get their projects up and running.\textsuperscript{52} Moreover, as a federal agency equipped with more resources than its state and local counterparts, BOEMRE is arguably in a stronger position to provide comprehensive evaluations of the issues that arise in the lease-permitting context. Finally, having one federal agency in charge of offshore wind farm leasing makes this Note’s proposed solution, streamlining the approvals process through a categorical exclusion under NEPA, possible.

C. You Get What You Pay For

In sum, offshore wind farms have several key benefits over onshore facilities that make these farms well worth the additional expense. First, although the monetary costs for these facilities are greater, so too is their ability to deliver significant amounts of power to the areas that need it most. Second, NIMBYism and associated aesthetic concerns are not as problematic when wind farms are moved offshore. Third, having one lead federal agency allows the approval process to be streamlined and cognizable to wind farm developers.\textsuperscript{53}

\textsuperscript{39} See, e.g., Delaware Project Facts, BLUEWATER WIND, http://www.bluewater-wind.com/facts.htm#cat-delaware (last visited Nov. 7, 2010) (“At more than 13 miles from shore, the proposed wind park will be unobstructive. In fact, on a typical hazy summer day, the turbines will be impossible to see from shore, and only slightly visible at other times.”).

\textsuperscript{40} See, e.g., Ronald H. Rosenberg, Making Renewable Energy a Reality—Finding Ways to Site Wind Power Facilities, 32 WM. & MARY ENVTL. L. & POL’Y REV. 635, 641 (2008) (“Because high quality, commercially—viable wind power sites are located in rural places, these land use conversion effects are frequently experienced at largely undeveloped sites sometimes possessing significant natural resource and aesthetic importance. Therein lies the conflict.”); Avi Brisman, The Aesthetics of Wind Energy Systems, 13 N.Y.U. ENVTL. L. J. 1, 122 (2005) (“When individuals reject a wind farm on aesthetic grounds, their claim is that wind farms are threats to natural beauty and that they wish to prevent the rape of a pristine natural resource. In the name of ‘environment,’ ‘landscape,’ and ‘nature,’ these individuals write letters, speak at town meetings, organize, and vote to thwart the efforts to bring this form of renewable energy to their particular place.”).


\textsuperscript{42} Id.

\textsuperscript{43} John Collins Rudolf, Study: No Impact on Property Values from Wind Turbines, N.Y. TIMES GREEN (Dec. 4, 2009 8:52 AM), http://greeninc.blogs.nytimes.com/2009/12/04/study-no-impact-on-property-values-from-wind-turbines/#more-34231 (“Of course, property values are not the only concern that homeowners have about nearby turbines. Residents of rural or scenic areas complain that turbines mar their views or make too much noise.”).

\textsuperscript{44} The BOEMRE was previously known as the Minerals Management Service (“MMS”), which had its name changed after the Deepwater Horizon disaster. BOEMRE “exercise[s] all authorities previously vested in the MMS.” See U.S. DEP’T OF THE INTERIOR, CHANGE OF THE NAME OF THE MINERALS MANAGEMENT SERVICE TO THE BUREAU OF OCEAN ENERGY MANAGEMENT, REGULATION, AND ENFORCEMENT, ORDER NO. 3302 (June 18, 2010), available at http://www.doi.gov/deepwaterhorizon/leader/fma2ModSecurity/gettReady&PageID=353872.


\textsuperscript{46} Id.

\textsuperscript{47} Id.

\textsuperscript{48} Robert S. Guzek, Addressing the Impacts of Large Wind Turbine Projects to Encourage Utilization of Wind Energy Resources, 27 TEMP. J. SCI. TECH. & ENVTL. L. 125, 129 (2008) (“At the local government level there is an increasing sense of trepidation at the prospect of legions of massive wind mills invading their municipalities. The ‘not in my backyard’ ethic, usually associated with toxic and hazardous facilities, is expanding into the siting and development of wind farms.”) (citations omitted).

\textsuperscript{49} See McCammon, supra note 46, at 1289 (“[M]uch of the wildlife harmed by wind farms is migratory, [and thus] the benefits of protecting [wildlife] are external to local or state governments, so they may not fully value them in their decisions.”).


\textsuperscript{53} One of the advantages not discussed in Part I, supra, the minimal environmental impact of offshore wind farms, will be discussed in Part IV, infra. Part I, on the other hand, simply sought to lay out other factors of offshore wind farms that make them superior to onshore facilities.
Part II: The Current Regulatory Framework for Leasing Federal Lands to Offshore Wind Farm Developers

A. BOEMRE as the Lead Agency

Prior to 2005, the U.S. Army Corps of Engineers (“Corps”) was in charge of permitting offshore wind farms under the Rivers and Harbors Act, 33 U.S.C. §§ 407–687, and the Outer Continental Shelf Lands Act (“OCSLA”), 33 U.S.C. §§ 1331–1356a. The first legal challenge to the Cape Wind project started a debate over whether the Corps could lease a full-scale wind farm under these Acts. Congress responded by including section 388 in the Energy Policy Act of 2005. This section amended section 8 of the OCSLA to provide the Secretary of the Interior with the power to grant leases, easements, and rights-of-way on the Outer Continental Shelf for renewable energies.

Because there was inter-departmental confusion regarding the permitting of the various alternative energies on the Outer Continental Shelf, DOI and the Federal Energy Regulatory Commission ("FERC") signed a Memorandum of Understanding ("MOU") that gave the power to lease federal lands for offshore wind farms to DOI. Specifically, the MOU provided BOEMRE with exclusive jurisdiction over the production, transportation, and transmission of power from offshore wind farms on the Outer Continental Shelf. It also charged BOEMRE with "conduct[ing] any necessary environmental reviews, including those under [NEPA], related to offshore wind farm development." This MOU made clear that BOEMRE has the power to issue leases and other necessary approvals to offshore wind farm developers so long as it is done "in a manner that adequately addresses specified issues, including environmental protection . . . ." Twenty days after the MOU was signed, BOEMRE published the final rule, Renewable Energy and Alternate Uses of Existing Facilities on the Outer Continental Shelf. This rule took effect on June 29, 2009.

NEPA created a national policy to "encourage productive and enjoyable harmony between man and his environment" and established the Council on Environmental Quality ("CEQ") to oversee implementation of the Act. To accomplish its policy goals, NEPA requires all federal agencies to prepare a detailed statement on the environmental impacts of every proposed "major [f]ederal action[] significantly affecting the quality of the human environment." CEQ has further divided these "detailed statements" into two categories: the more thorough EIS and the more concise EA. The need to complete either one of these reports is triggered only where (1) the action is a major federal action and (2) the action significantly affects the quality of the human environment. Where an EIS is required, the acting agency must allow the public to make comments on the draft EIS and must respond to those comments when it issues a final EIS.

Promulgation of this rule was possible because "on December 30, 2005, [BOEMRE] issued an Advance Notice of Proposed Rulemaking, seeking comments on the development of regulations to implement section 388" of the Energy Policy Act of 2005. This rule took effect on June 29, 2009, and a Final Environmental Assessment. See BOEMRE Rule, supra note 63, at 19,638. These environmental studies are discussed in greater detail in Part IV.

56. See VANN, supra note 54, at 6–7.
57. Id. at 8.
58. 43 U.S.C. § 1337(g)(1) (2006) ("The Secretary . . . may grant a lease, easement, or right-of-way on the Outer Continental Shelf . . . if those activities . . . (C) produce or support production, transportation, or transmission of energy from sources other than oil and gas.").

60. Id. at 1.
61. Id.
62. See VANN, supra note 54, at 10.
64. Rules promulgated through the informal rulemaking process of the Administrative Procedure Act may not take effect less than 30 days after publication of the rule in the Federal Register. See 5 U.S.C. § 553(d) (2006). The quick
Whether the telephone book-size EIS or the less-burden-some EA is undertaken is largely a matter of agency discretion. However, if only an EA is prepared and questions are raised as to whether the project may cause significant degradation of some human environmental factor, the agency is required to prepare an EIS. Thus, it is possible for an agency to have to prepare both an EA and an EIS for the same project. On the other hand, economic and social impacts will not trigger NEPA requirements where there is no significant environmental impact. To achieve NEPA’s policy goals, the final BOEMRE rule requires two environmental reviews before it issues a commercial lease for an offshore wind farm. One NEPA review is required for the actual lease sale and the Site Assessment Plan (“SAP”) and another, most likely an EIS, is required for the actual lease sale and the Site Assessment Plan (“SAP”) and another, most likely an EIS, is required for the actual lease sale and the Site Assessment Plan (“SAP”) and another, most likely an EIS, is required for the actual lease sale and the Site Assessment Plan (“SAP”) and another, most likely an EIS, is required for the actual lease sale and the Site Assessment Plan (“SAP”) and another, most likely an EIS, is required for the actual lease sale and the Site Assessment Plan (“SAP”) and another, most likely an EIS, is required for the actual lease sale and the Site Assessment Plan (“SAP”) and another, most likely an EIS. Under CEQ regulations, an agency seeking to fulfill NEPA’s environmental review requirements through a categorical exclusion must do so through the notice and comment rulemaking. The agency must show, through the rulemaking process, that the class of actions is “a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations.” Even if a category of actions fits within the categorical exclusion definition, the agency must undertake additional procedural safeguards to ensure the categorical exclusion is consistent with NEPA. Specifically, the agency seeking to create a categorical exclusion must consult with CEQ before publishing the proposed rule in the Federal Register to ensure there is adequate justification for the categorical exclusion. The agency must also “provide extraordinary circumstances in which a normally excluded action may have a significant environmental effect.” In line with this mandate, DOI previously promulgated a list of extraordinary circumstances that would trigger further environmental review for an action that would otherwise fall within a categorical exclusion. This ensures that activities covered by a categorical exclusion do not, either individually or cumulatively, have a significant impact on the human environment, involve unknown environmental risks, impact Native American religious sites, or impact listed species under the Endangered Species Act (“ESA”). This additional review process is called Categorical Exclusion Review (“CER”).

By completing a CER for every activity that falls under a categorical exclusion, the DOI has put a process in place that will ensure environmental protection even where a categorical exclusion is promulgated. If there is a showing of extraor-

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74. Id.
75. 40 C.F.R. § 1508.14.
76. BOEMRE Rule, supra note 63, at 19,689. This Note assumes that the majority of leases to offshore wind farm developers will be commercial leases, as the other lease form, a limited lease, is only for five years and would not likely provide a developer with enough time to turn a profit. See BOEMRE Rule, supra note 63, at 19,657. A commercial lease is a long-term (approximately 30 year) lease that “will provide the access and operational rights, subject to necessary approvals, to produce, sell, and deliver power on a commercial scale through spot market transactions or a long-term power purchase agreement.” BOEMRE Rule, supra note 63, at 19,657. It will also “convey preferential rights to project easements on the OCS for the purpose of installing transmission and distribution systems.” BOEMRE Rule, supra note 63, at 19,657. The rule also bundles the Coastal Zone Management Act (“CZMA”) review with the NEPA review. BOEMRE Rule, supra note 63, at 19,651.
77. See 30 C.F.R. § 285.611 (2010) (describing NEPA information required to be submitted in conjunction with SAP); 30 C.F.R. § 285.646 (describing NEPA information required to be submitted in conjunction with COP); BOEMRE Rule, supra note 63, at 19,689 (indicating that a COP would likely require an EIS but not indicating what type of review an SAP is likely to trigger); see also BOEMRE Rule, supra note 63, at 19,686 (“The two plans for commercial development are a SAP and a COP. These plans should clearly describe the general approach to the project and include detailed technical and environmental information. The two plan approach for commercial activities sets two defined times for conducting NEPA analysis and CZMA reviews. These plans must include all the information needed to conduct appropriate NEPA analysis and for compliance with other Federal laws.”). Because the General Activities Plan (“GAP”) is only triggered for limited leases, the NEPA review associated with the GAP is not relevant to this Note. BOEMRE Rule, supra note 63, at 19,685 (“The SAP and the COP will be used for commercial leases, while the GAP will be used for limited leases and grants.”).
79. See BOEMRE Rule, supra note 63, at 19,689.
80. Id. at 19,689.
81. As required by 40 C.F.R. § 1506.6(b) (2010).
82. See 40 C.F.R. § 1508.4 (2010).
83. Id. § 1507.3(a), (b)(2)(ii).
84. Id. § 1508.4. Even if a categorical exclusion is passed, the “agency may decide in its procedures or otherwise, to prepare environmental assessments for the reasons stated in § 1508.9 even though it is not required to do so.” Id.
85. Id. §1507.3(a). This consultation process gives CEQ 30 days to respond to the action agency with a letter providing its determination on whether the proposed categorical exclusion conforms with NEPA requirements. Id.
86. Id. § 1508.4.
88. See 43 C.F.R. § 46.215(d), (f), (h), (k).
dinary circumstances in the CER, the action agency would then be required to complete an EA or an EIS. 89

B. Judicial Review of Categorical Exclusions

1. The Standard of Review

Where an agency is not barred from creating a categorical exclusion, either through its own regulations or by statute, 90 and promulgates a rule creating a categorical exclusion through the proper procedures of section 553(a) of the Administrative Procedure Act (“APA”), 91 a court reviewing the final rule will do so under the highly deferential “arbitrary and capricious or abuse of discretion” standard contained in section 706 of the APA. 92 Under this standard, “the court must consider whether the decision was based on a consideration of the relevant facts and whether there has been a clear error of judgment.” 93

In the environmental context, courts sitting in review will examine the administrative decision to make sure the agency took a “hard look” at the record, or that its decision is reasonable based on the entire record. 94 Nevertheless, the court may not substitute its judgment for that of the agency. 95 To ensure that judicial review “is to be more than a meaningless exercise,” the court is required to do “enough steaming in technical matters to determine whether the agency has exercised a reasonable discretion.” 96 If the agency supports its categorical exclusions with sufficient scientific evidence, an agency decision to promulgate a categorical exclusion is not likely to be overturned on judicial review. The following two Sections discuss cases striking down and upholding categorical exclusions based on this deferential standard of review.

2. Cases Striking Down Categorical Exclusions

Federal courts have generally held categorical exclusions to be arbitrary and capricious in two situations: first, where the agency did not consider scientific data when it determined that a categorical exclusion was appropriate; and second, where the agency used scientific data, but only did so after the fact as a post-hoc rationalization for the categorical exclusion. 97 This Section discusses examples from each of these situations.

Categorical exclusions that are struck down because the agency does not support its decision with scientific evidence are found to be arbitrary and capricious because there is no record for the reviewing court to understand why the agency made its decision. 98 In Heartwood, Inc. v. United States Forest Service, 99 the court found that the U.S. Forest Service’s (“USFS”) rationale for quadrupling the allowable timber harvest that qualified for a categorical exclusion—that the lower limit was “unreasonably conservative”—was “a classic example of an arbitrary decision.” 100 The court reasoned that the decision was arbitrary because USFS “did not provide any rationale for why this magnitude of timber sales would not have a significant effect of the environment[,] . . . nor evidence regarding the details of these prior harvests[,] nor [an] analysis of their environmental effects upon which they based their opinion.” 101 The court did not accept USFS’s argument that its “expertise and prior experience with timber sales having ‘these characteristics’ was sufficient to support a categorical exclusion under the APA.” 102 From this, it becomes clear that the agency must make its record and do so with actual scientific reasoning regarding why the proposed categorical exclusion would not have a significant impact on the human environment. 103

Courts have similarly struck down categorical exclusions where scientific data is produced as a post-hoc rationalization for the categorical exclusion. In Sierra Club v. Bosworth, 104 the Ninth Circuit held that USFS acted arbitrarily and capri-

89. Id. § 46.205(a).
90. Congress may block an agency’s ability to pass categorical exclusions and an agency’s own regulations can also serve to bar the creation of a categorical exclusion. See, e.g., High Sierra Hikers Ass’n v. Blackwell, 390 F.3d 630, 641 (9th Cir. 2004) (holding that “the Forest Service’s own regulations [d]id not permit the categorical exclusion of activities in wilderness areas” the Forest Service’s decision to issue one-year renewable and special-use permits in congressionally designated wilderness areas was “not [an] allowable categorical exclusion[] and require[d] the issuance of an EA or an EIS”). Neither Congress nor DOI have barred the creation of a CE for offshore wind farms. This is evidenced by the fact that BOEMRE left open the possibility of promulating a CE for offshore wind energy in its final rule. BOEMRE Rule, supra note 63, at 15,689.
91. Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706, 3015, 3015, 3344, 4301, 5335, 5372, 7521 (2006). The proper rulemaking process is required to be followed under the APA in order for the categorical exclusion to take effect. See, e.g., Felix Concolor v. U.S. Forest Serv., No. 89-6428-E, 1990 U.S. Dist. LEXIS 9498, at *12–13 (D. Or., July 12, 1990) (“[P]ublic comment is required prior to the establishment of a valid categorical exclusion, and . . . it is not appropriate for an agency to rely upon the categorical exclusions . . . due to this procedural inadequacy.”). This note assumes that the proper administrative procedure would be followed in the promulgation of a categorical exclusion for offshore wind.
92. 5 U.S.C. § 706; see infra Parts III.B.2 and III.B.3.
94. See Marsh v. Or. Natural Res. Council, 490 U.S. 360, 374 (1989) (extending the “hard look” standard to NEPA cases); cf Greater Bos. Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970) (“If satisfied that the agency has taken a hard look at the issues with the use of reasons and standards, the court will uphold its findings, though of less than ideal clarity, if the agency’s path may reasonably be discerned, though of course the court must not be left to guess as to the agency’s findings or reasons.”).
97. See generally Jerri J. Zhang, Note, A New View, or Just Being Difficult? The Ninth Circuit’s View on Categorical Exclusions, 16 Mo. Envtl. L. & Pol’y Rev. 263, 272–74 (2009) (discussing precedents in which courts struck down categorical exclusions because the agencies promulgating them failed to make a complete record based on scientific data or made post-hoc rationalizations to justify their decisions).
98. See Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (noting that even under the arbitrary and capricious standard, “the agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made’” (citation omitted)).
100. Id. at 975.
101. Id.
103. However, the agency is not required to prepare an EIS or an EA in order to implement the categorical exclusion. Id. at 972–74.
104. Sierra Club v. Bosworth, 510 F.3d 1016 (9th Cir. 2007).
sequently in making a categorical exclusion for prescribed burn projects because “[i]n requesting the data call [for scientific data to be used in determining whether to grant a categorical exclusion], the Deputy Chief of the Forest Service stated that USFS’ intend[s] to put this information to good use supporting a categorical exclusion for fuels treatment, rehab and salvage.” 105 The court went on to explain that this “[p]ost-hoc examination of data to support a pre-determined conclusion is not permissible[,]”106 as it “frustrate[s] the fundamental purpose of NEPA, which is to ensure that federal agencies take a ‘hard look’ at the environmental consequences of their actions, early enough so that it can serve as an important contribution to the decision making process.” 107 Thus, an agency that has collected scientific evidence only after it has already decided to pass a categorical exclusion is likely to have its categorical exclusion struck down by a court; the court has no record on which to review the agency action.108

3. Cases Upholding Categorical Exclusions

In contrast, courts have upheld categorical exclusions when supported by previously collected scientific data. For instance, in Colorado Wild Heartwood v. United States Forest Service, the court found “the Forest Service’s decision to use an acreage limitation [was] permissible and rational” because USFS had reviewed 154 timber harvest projects and found that “potential environmental impacts are better predicted using acres treated rather than the total volume of timber removed, regardless of acreage.”109 Moreover, the court rejected the plaintiff’s argument that the categorical exclusion was arbitrary and capricious because it would ignore significant environmental impacts to certain sites.110 Noting that the categorical exclusion itself precluded USFS from applying the categorical exclusion where “extraordinary circumstances are present,” the court held that it must assume USFS will properly examine whether such extraordinary circumstances exist in a CER.111 Thus, if an agency decision is supported by sufficient scientific evidence that is made part of the record, a reviewing court will defer to the agency’s expertise under the arbitrary and capricious standard and assume that the agency will properly use the CER process to determine whether further environmental review is warranted.112

Because few agencies have pursued categorical exclusions as aggressively as USFS,113 there is little to no case law on how much scientific evidence is actually needed in the administrative record to support a categorical exclusion. Perhaps this uncertainty has led to agencies not using categorical exclusions in this manner or maybe there is little political willpower to promulgate USFS-like categorical exclusions. Regardless, courts may not substitute their judgment for that of the agency, and so long as the agency can show that its decision was rational and made after taking a hard look at the entire record, the categorical exclusion would withstand judicial review. Moreover, the possibility of significant environmental impacts is not enough to derail a categorical exclusion, as the court must assume that the agency will properly assess the likelihood of significant impacts in the CER process.

C. Lessons Learned

In sum, federal courts are not likely to strike down a categorical exclusion as arbitrary and capricious where there is an administrative record that contains sufficient scientific data generated prior to the decision to create the categorical exclusion. Because the arbitrary and capricious standard of review prevents courts from substituting their judgment for that of the agency, an agency should demonstrate that it took a hard look at the available scientific data. If it is successful in doing so, then its categorical exclusion would likely withstand judicial review; however, if the categorical exclusion is clearly not supported by the science, a reviewing court will likely strike it down as arbitrary and capricious.114

Part IV: Streamlining NEPA: The Case for a Categorical Exclusion for Offshore Wind Farms on the Outer Continental Shelf

A. The Need to Streamline NEPA Review

While some legal scholars have discussed streamlining NEPA review for alternative energy projects, no commentators have addressed the specific need for an offshore wind farm categorical exclusion.115 A categorical exclusion for offshore wind,

105. Id. at 1026.
106. Id.
107. Id.
108. But see Wildlaw v. U.S. Forest Serv., 471 F. Supp. 2d 1221, 1252 (M.D. Ala. 2007) (holding that the same categorical exclusion for fuel reduction projects at issue in Sierra Club v. Boxworth were not arbitrary and capricious because “the Forest Service took a ‘hard look’ at the relevant factors by conducting what [was] by all accounts an exhaustive review of past projects and their effects on the environment”). However, the court made no mention of post-hoc decision-making. Id.
110. Id.
111. Id. (citing Sullivan v. Everhart, 494 U.S. 83, 94 (1990)).
112. Cf. Utah Envtl. Cong. v. Boxworth, 443 F.3d 732, 744 (10th Cir. 2006) (upholding USFS’ decision not to prepare an EA for a categorical excluded activity even though a CER found “some possible effects” because “none were potentially significant” and “because the agency exhibited no clear error of judgment in its factual determinations”).
however, could spur development of this clean technology, thereby helping the United States regain its competitive edge in clean energy technology and development. Additionally, a categorical exclusion for offshore wind farms on the Outer Continental Shelf would withstand judicial review. Over a decade of environmental studies from both Europe and the United States have conclusively shown that offshore wind farms have minimal environmental impacts.116

To prove that a categorical exclusion is appropriate and would withstand judicial review, this Section reviews the environmental studies done on European offshore wind farms and the EISs completed for offshore wind farms in the United States. It is clear that enough scientific evidence exists to support an agency record capable of withstanding judicial review. As such, a categorical exclusion for offshore wind farms should be used to streamline the NEPA process for development of offshore wind farms on the Outer Continental Shelf.

B. Environmental Studies on Offshore Wind Farms

As a preliminary matter, it is important to understand why using completed EISs and European environmental studies of offshore wind farms are appropriate to support a categorical exclusion. In its guidance document to federal agencies, Establishing and Applying Categorical Exclusions Under the National Environmental Policy Act, CEQ explicitly provided that “(1) previously implemented actions[,] (2) impact demonstration projects[,] (3) information from professional staff, expert opinion, or scientific analyses[,] and (4) other agencies’ experiences” may all be used to support a new categorical exclusion.117 Previous EISs fall under the first category,118 while European studies fall under the third category.119 In fact, European studies have already been used by BOEMRE to support its final rule for offshore wind farm leasing on the Outer Continental Shelf.120 Thus, compiling an administrative record using these scientific studies is accepted practice.

The programmatic EIS for offshore alternative energy development concluded that offshore wind farms generally have negligible,121 minor,122 and moderate123 impacts on biological and physical resources.124 It also concluded that the potential for major125 impacts is limited to offshore wind farms’ impacts on endangered and threatened species.126 However, the potential for major impacts on endangered and threatened species should not prevent the issuance of a categorical exclusion for offshore wind farms because existing measures under federal law provide additional layers of protection for these species.

Specifically, pursuant to section 7 of the ESA, where an agency action may impact threatened or endangered species, the agency is required to consult with the U.S. Fish and Wildlife Service (“FWS”) or the National Oceanic and Atmospheric Administration’s National Marine Fisheries Service.127 A categorical exclusion for offshore wind farms would not remove this consultative requirement. In addition, BOEMRE would be required to conduct an EA if it found that any listed species could be impacted.128 Because there are built-in measures for ensuring that impacts on federally protected species are given proper consideration, this Note focuses on impacts to non-listed species, which would potentially suffer the greatest impact because they would have no

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116. See infra Part IV.B.
118. Id. at 6 ("Evaluation of implemented actions analyzed in an EIS may also be useful. In such cases, the action must have independent utility to the agency, separate and apart from the broader action analyzed in the EIS, and the EIS must specifically address its environmental effects and determine them not to be significant.").
119. Id. ("In addition, outside experts can be looked to as sources of information to substantiate a new categorical exclusion. Those individuals should have expert knowledge, training, and experience relevant to the implementation and environmental effects of the actions described in the proposed categorical exclusion.

120. See MINERALS MGMT. SERV., U.S. DEP’T OF THE INTERIOR, OCS ALTERNATIVE ENERGY AND ALTERNATE USE FINAL PROGRAMATIC ENVIRONMENTAL IMPACT STATEMENT (EIS) § 5.2.2.1.4, at 5–122 (2007), available at http://oesenergy.anl.gov/documents/lpeis/index.cfm [hereinafter FINAL PEIS] ("In-depth interviews with residents of two Danish towns with views of offshore wind facilities showed that there was very strong support for the concept of wind power and that more than two-thirds of respondents at both locations felt that the wind facilities would either have a positive effect on the landscape or would be neutral in effect.").
extra-agency oversight should BOEMRE pass a categorical exclusion for offshore wind farms.

An expansive 2009 study completed by the United Kingdom’s (“U.K.”) Department of Energy and Climate Change “concluded that there were no overriding environmental considerations” to justify blocking offshore wind farms planned for construction and operation off the U.K. Coast.

This study examined the potential impacts of offshore wind on all components of the marine environment including marine mammals, migratory birds, fisheries and other biota, and benthos.

The impacts assessed included, but were not limited to, seismic and acoustic disturbances, obstruction/collision risks to migratory paths and other movements, and habitat changes.

The report recommended a cautionary approach to the development of offshore wind resources.

A CER satisfies the cautionary principles outlined in the U.K. study by providing for an assessment of project’s individual and cumulative impacts and ensuring additional environmental review where warranted. Thus, implementing a categorical exclusion in the United States would be consistent with the recommendations of the U.K. study.

Similarly, a Danish study evaluating fifteen years of experience with the world’s two largest offshore wind farms found limited environmental impacts. The study concluded that offshore wind farms, if placed right, can be engineered and operated without significant damage to the marine environment and vulnerable species.

Thus, even large offshore wind farms, if properly sited to avoid cumulative impacts associated with spatial issues, pose limited risks to the environment.

From this study, it becomes clear that if the United States is mindful of cumulative impacts in the offshore wind leasing process, the environmental impacts of these projects will be minimized. Because the CER specifically takes into account cumulative effects on federally protected species and the environment, an EA would be prepared in the event that a CER determined that such cumulative effects were significant.

In addition to these large-scale studies, the Final EIS for the Cape Wind project found that the project had potential to cause “major” impacts only on marine birds and visual resources. However, neither of these potential major impacts would prevent BOEMRE from promulgating a categorical exclusion. The only possible major impact to marine birds was on the roseate tern, an endangered species.

As an endangered species, the tern is protected by the ESA, and as such, any potential harm to this bird would be properly assessed under the section 7 consultation process before an offshore wind farm could be built. With regard to the potential for major visual impacts, aesthetic concerns are not an overriding concern for the majority of citizens nor would they alone trigger the NEPA process.

Moreover, studies have shown that property in close proximity to wind farm projects, onshore or offshore, does not lose value.

Because the rest of the impacts range from negligible to moderate, the final EIS for Cape Wind similarly supports a categorical exclusion for offshore wind farms.

The European studies and EISs discussed in this Subpart show that offshore wind farms present “no overriding environmental considerations” that would justify stopping their development. Although some environmental concerns remain regarding the development and siting of these facilities, they are not so pervasive that a categorical exclusion would pose a significant threat to the human environment. The United States should draw on the vast experiences and data available and issue a categorical exclusion for offshore wind farms.

C. Ensuring Environmental Protection and Renewable Development

The environmental impacts of offshore wind farms have been studied for the past fifteen years, and though some uncertainty remains as to the cumulative effects of numerous offshore facilities, the overriding consensus is that offshore wind farms have no significant impact on the human environment.

Moreover, because a CER would be required for every lease sale, this preventative measure would ensure the project met the criteria for a categorical exclusion. Finally, the offshore wind farms would still have to undergo other inter-agency review processes required by the ESA and the Coastal Zone Management Act.
Because all of these other environmental measures are already in place, conducting two environmental reviews is redundant, and a categorical exclusion would eliminate these repetitive environmental review processes. Simply put, given the exhaustive framework of existing environmental review procedures, a categorical exclusion for offshore wind farms would not jeopardize the environmental integrity of our nation’s coastline. As sufficient scientific data to support a categorical exclusion already exists, BOEMRE should promulgate a categorical exclusion for offshore wind farms so that Americans will be able to harness a vast clean energy resource in a timely fashion.

Part V: Possible Alternatives

Some may argue that this proposal goes too far, that it eviscerates the purpose of NEPA or that more research is needed before acting in such a broad manner. However, failure to expedite the offshore wind farm siting process will lead to both an increased risk of harm from global climate change and the United States falling further behind the rest of the world in offshore wind energy development and utilization. Three possible alternatives to this Note’s categorical exclusion proposal are (1) the creation of a categorical exclusion by Congress for offshore wind farms, (2) the use of EAs until the environmental impacts of offshore wind farms are better understood, and (3) the creation of a partial categorical exclusion for the Site Assessment Plan (“SAP”) portion of the lease process. This Section discusses each of these alternatives and reveals why each fundamentally fails to expedite the process in an appreciable manner. None of these alternatives would ameliorate one of the most significant hurdles facing offshore wind: the time-intensive process required to bring an offshore wind farm into operation.

A. Congressional Action

Although a congressionally enacted categorical exclusion could be immune to judicial review,146 this alternative has several significant drawbacks. First, Congress has historically avoided creating categorical exclusions for entire classes of non-administrative activities; it is much more likely to do so for specific projects.147 Second, none of the recently stalled climate bills propose a categorical exclusion for offshore wind energy development.148 Third, the political climate in Washington makes it such that any congressional action on this issue is unlikely.149 Consequently, this Note’s proposal is more likely to occur and, therefore, is superior to a congressionally enacted categorical exclusion.

B. Environmental Assessments

Another alternative is that BOEMRE could amend the current regulatory scheme through notice and comment rulemaking to require one or two EAs rather than two environmental reviews (at least one of which will be an EIS) for offshore wind farm construction and operation activities on the Outer Continental Shelf. As discussed, BOEMRE left open the possibility that it would do this in the future. Starting with an EA rather than an EIS would decrease the amount of time required for some projects.150 However, this solution would, in effect, be requiring an EA for offshore wind projects where one is not necessary; environmental studies have shown that offshore wind farms generally do not have significant impacts. Because this Note’s solution would ensure that only those projects that truly warrant further environmental review complete an EA, it is superior to an alternative that requires one or two EAs for every project, regardless of what the likely environmental impacts will be.

C. “Partial” Categorical Exclusion

The third and final alternative to this Note’s proposal is that BOEMRE could promulgate a categorical exclusion for only those activities associated with the SAP phase of the leasing process. As mentioned, this phase includes constructing meteorological towers that collect data on environmental factors that are critical to determining whether a site is appropriate for an offshore wind farm.

The American Wind Energy Association (“AWEA”) proposed creating a categorical exclusion for SAP activities in its comments to BOEMRE’s draft rule regarding the use of alternate energy on the Outer Continental Shelf.151 AWEA argued that because BOEMRE has already “reviewed subsea surveying and [meteorological] tower installation in its

146. See Aaron Ehrlich, In Hidden Places: Congressional Legislation That Limits the Scope of the National Environmental Policy Act, 13 Hastings W.-Nw. J. Envtl. L. & Pol’y 285, 287 (2007) (“Congress frequently includes provisos which eliminate or limit the scope of judicial review, thereby significantly limiting the case law which discusses such exemptions.”); Victor M. Sher & Carol Sue Hitting, Eroding the Landscape: Eroding the Law: Congressional Exemption from Judicial Review of Environmental Laws, 15 Harv. Envtl. L. Rev. 435, 480–481 (1991) (“Over the last twenty years of exemptions from environmental laws, Congress has frequently insulated federal agencies from judicial and public scrutiny by eliminating the right to judicial review under existing statutes.”).

147. See Ehrlich, supra note 146, at 291–300 (discussing project-specific NEPA exemptions but not mentioning any blanket exemptions); Pamela Baldwin, Cong. Research Serv., No. 98-417 A, Statutory Modifications of the Application of NEPA (1998), available at http://ncconline.org/nle/crs-envtl/environmental analysis and adopting lease provisions, and prepare documentation to satisfy relevant Federal requirements, such as NEPA, CZMA [and] ESA.”).


149. See Larry Bivins, Energy Challenge Needs Big Solutions, LANING ST. J., Oct. 18, 2010, http://www.lansingjournal.com/depth?1287689122777 (“In his first address to a joint session of Congress, President Barack Obama urged Congress to send him a bill limiting carbon emissions and requiring utilities to use renewable energy to produce at least some of their electricity. Now Obama seems resigned to having to accomplish his energy-climate goals without a major bill from Congress.”); Norm Ornstein, Obama’s Grim Future of Stalemate, FIN. TIMES, Oct. 12, 2010, http://www.fintimes.com/cms/s/0/0/92e2c298-d664-a0f0-0014f14febad0.html (pointing to trade policy as one of the only areas where Congress may be able to agree this coming term).


151. See AWEA Comments, supra note 78, at 78.
Programmatic Environmental Impact Statement . . . [and] concluded that subsea surveys are likely to have ‘negligible’ environmental impacts and that installation of a typical meteorological tower is unlikely to cause a significant environmental impact,” requiring an EIS for a typical wind farm SAP was “wholly unjustified.”152 Despite these arguments, BOEMRE decided to reject this proposal when it promulgated its final rule.153

Additionally, although this proposal would likely withstand legal challenges because similar activities fall within a categorical exclusion, it would only shorten the offshore wind farm approval process by one year.154 Creating a categorical exclusion for offshore wind farms has the potential to take even more time off the development process and is able to do so without negatively impacting the environment. Although a partial categorical exclusion is arguably more politically palatable, it is also less effective at trimming the waiting period for bringing an offshore wind development online.

**Conclusion**

In his speech on the Deepwater Horizon oil spill, President Barack Obama declared that increased production of alternative energy sources was necessary to prevent future environmental disasters of this nature.155 Instead of waiting for Congress to act, which seems unlikely to occur in the foreseeable future, the President can encourage federal agencies to create incentives for the development of clean energy resources right now.156 In particular, the President could encourage BOEMRE to create a categorical exclusion for development of offshore wind farms on the Outer Continental Shelf—a decision that would likely withstand judicial review.

The current approval process, requiring two environmental reviews, is redundant and unnecessary. Not only do offshore wind farms have a proven track record of being environmentally sound, measures in current federal law already ensure environmental protection. In particular, the consultation provisions of environmental statutes such as the ESA require oversight where threatened or endangered species are potentially impacted. Moreover, the CER process would ensure that where there are extraordinary circumstances, an EA would be completed to ensure that environmental impacts are properly assessed. Requiring two environmental reviews with these protective measures already in place is unnecessary and needlessly slows down the development of offshore wind farms on the Outer Continental Shelf.

A categorical exclusion for offshore wind farms would allow the United States to tap a resource that could provide large amounts of power to high-demand centers, create jobs, and protect the environment. Moreover, if the concerns associated with global climate change are in fact a reality, the need to reduce our reliance on greenhouse gas emitting sources of energy is of pressing importance. Offshore wind promises to deliver clean energy to the areas that need it most while having minimal environmental impacts. The only question that remains is whether the Obama administration has the political willpower to turn words into action.

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152. See id.
153. See BOEMRE Rule, supra note 63, at 19.685 (“Any construction activities (e.g., installation of a meteorological tower, a meteorological buoy) or the testing of technology devices needs to be proposed in the SAP, COP, or GAP. We have changed the text of the rule to reflect these changes.”).
154. See AWEA Comments, supra note 78, at 69 fig.1, 72 fig.2 (estimating a timeline of 66 months in figure 1 and a timeline of 53 months in figure 2).
155. See Obama Oil Spill Remarks, supra note 2.
156. President George W. Bush did so through the U.S. Forest Service’s creation of categorical exclusions, discussed in Part III, supra.