A few weeks ago the Trump Administration announced a new proposed plan to drastically increase the amount of offshore areas available for leasing for oil and gas development – essentially opening up almost all of the waters off of the lower 48 states. The announcement at the time attracted a lot of media attention, but I wanted to put the announcement in some context.

Despite the initial hype about the order, I'd like to explain in a little more detail precisely why the announcement in January is unlikely to lead to near-term changes in oil and gas development offshore of the United States, and why any longer-term changes will only occur after a lot of litigation and political wrangling. (This blog post builds on comments I made in this public radio interview and an article in the SF Chronicle.)

There are two primary reasons that – based on law and politics – I am skeptical we will see the Administration's announcement turn into a significant change in offshore oil and gas development. I'll begin with the law in this post, and then move on to the politics in a second post. I'll bring those two points together in a final post.

First the law: The federal government has exclusive control over offshore development in US waters that are more than three miles offshore (nine miles for certain states, such as Texas). Within that area, in theory the federal government can do what it wants, which might indicate that the Trump Administration and a Republican Congress could "drill, baby, drill" as much as they wanted.

But it turns out that prior Congresses have imposed significant procedural and substantive restrictions on how oil and gas development occurs on these lands. The Outer Continental Shelf Leasing Act (OCSLA – there will be a lot of acronyms in this blog post!) sets up a multi-stage process for leasing. First, the federal government has to develop plans to guide decisions to lease offshore areas for development. That is the stage that the Administration announcement kicked off in January. The government has to take public comment on the proposals, and give Congress notice so that it can weigh in if it wants. The government must also do a thorough review of the environmental impacts of its proposed leasing plans under the National Environmental Policy Act (NEPA). There are also questions about whether the proposed lease plans can override proclamations by the outgoing Obama Administration putting major offshore areas off limits to drilling.

After the leasing plans are completed (a process that will likely take much or all of 2018), the next stage is for the government to lease specific blocks of offshore areas to oil and gas companies interested in development. Lease sales also require compliance with NEPA, as well as the Endangered Species Act (ESA) which will require certain procedural steps to

ensure that the leases will not jeopardize the existence of endangered species in the area. In addition, lease sales must comply with the Coastal Zone Management Act (CZMA). The CZMA sets up a joint federal-state process to protect the coasts of the United States. States develop coastal zone management plans under the CZMA to specify how much, and in what ways, they would like to protect their coasts from development. If the federal government does any actions that might affect a state's coastline (such as offshore oil and gas development) there is a process by which the state gets to specify whether that federal activity is consistent with the state's coastal management plan. If the state "vetoes" the federal activity as inconsistent with that plan, then the federal government can override the veto if certain findings are made.

Note that we still have not gotten a single bore-hole into the ocean floor yet to even explore for oil and gas. After the leasing process is complete, the lessee must then generally apply for a separate exploration permit to undertake activities (like drilling a test well) to determine whether and where there are exploitable oil and gas reserves in the lease area. That permit must also comply with NEPA, the ESA, the CZMA, and other federal statutes (like the Clean Water Act, which regulates discharges into the waters of the United States). And even if the exploration process does find exploitable oil and gas reserves, then the lessee will generally need another set of permits for full development of the oil and gas field within the lease area, again complying with all of the relevant laws.

Of course, all of these laws do not prohibit oil and gas development. Compliance with NEPA simply requires adequate review and public disclosure of the environmental impacts of the proposed government action – the law sets no substantive standards for compliance. The ESA prohibits jeopardy to listed species, but that standard is not an absolute bar to development either. As noted above, the federal government can override state objections under the CZMA. A supportive EPA will issue permits under the Clean Water Act (and you can bet the current political leadership will make sure the EPA is supportive). And so on.

The important thing to take away from this summary of the relevant law is that there are a lot of stages between proposing to lease areas for oil and gas development, and actual oil and gas development, and there are a lot of legal steps that have to be followed. Which leads us to the political context.

The political context is that many of the governors of all of the states affected by the proposed expansion of oil and gas development oppose the expansion of development. That includes bleeding-heart liberals like the GOP governor of South Carolina. As well as the GOP governor of the swing state of Florida. Indeed, the politics of the proposal have already lead Secretary Zinke to state that he would exempt Florida from the expansion of

offshore drilling because of the opposition of Governor Scott and the states "unique" situation of having a lot of beaches and a lot of tourism that depends on its coast. (Interestingly, the head of the leasing program in the Department of the Interior later said that Florida was still part of their leasing process, contrary to Zinke's statement.)

Setting aside the absurdity of Florida being unique because of its beaches and tourism industry, the point is that there is a lot of opposition on the ground to offshore leasing, and not just in blue states.

It is that opposition on the ground, particularly at the state level, combined with the extended and complicated legal process I outlines above, which will make massive expansion of offshore oil and gas development so difficult. To make that point clear, I'll use an extreme case: California. However, the points I make in the analysis of California would apply to any other state that seeks to stop this development.

First, a state like California can use its authority under the CZMA to object to any oil and gas development. As noted above, it can't completely veto that development. But it can oppose it, drag its feet, and generally extend the process interminably. That adds time to the process. And time is (for reasons I will explain later on) not the friend of proposals to expand oil and gas development.

Second, a state like California can sue. It can sue to force the federal government to comply with every single one of the legal requirements I've outlined above, at every single stage of the leasing process. That will add time and expense to the leasing process. Litigation could tie up leasing proposals for years. Of course, litigation can be pursued by actors besides the states. Even in states where the government is not opposed to development (like, perhaps, Georgia) environmental groups and businesses that depend on fishing and tourism and local governments can sue and gum up the works. But states have lots of resources, and generally particularly strong credibility in courts. So if a lot of states sue to stop these activities, that will carry a lot of weight in court.

Third, a state like California can use its own state laws and control of state lands to interfere with oil and gas development. How can that be, if the federal government has exclusive control over the offshore areas it will lease? That is because development of offshore areas generally requires access to on-shore infrastructure (think pipelines, loading docks for tankers, etc.) The states generally control (and indeed own) the lands submerged beneath the waters within three miles of the coast. So California (through its State Lands Commission) could block any proposals to install pipelines to connect offshore development with the coastline. With no place to put the oil and gas, there's no way to develop it. (It is

possible that there might be ways to directly transfer oil and gas to tankers from the offshore platforms, but that would likely be more expensive and difficult.)

As an example of exactly how hard a state can make it for the federal government to undertake a development project on federal lands that the state opposes, consider the example of Nevada (an example I noted in my interview with the SF Chronicle). In the 1980s, Congress passed legislation requiring that a high-level radioactive waste storage facility be constructed in Yucca Mountain in Nevada. Nevada was uniformly opposed – at the state and federal level there was bipartisan outrage at what was termed the "Screw Nevada Bill." The state vowed to fight the facility tooth and nail. And so it has. Through legislation prohibiting storage of high-level nuclear waste in the state. Through rejection of application of water rights for the operation of the facility. And through litigation challenging all of the various permitting steps the federal government took to approve the facility before the Nuclear Regulatory Commission. Efforts to use its power in Congress to stop funding for the project. And so on.

Some thirty years after Congress initially designated the Yucca Mountain site, it is still incomplete and has not stored a single ounce of high-level radioactive waste. Whether this is a good or bad thing from a policy perspective (that waste is currently sitting at all of the various nuclear power plants around the country) is beside my point here. Even with strong support from the rest of the country and even with the courts generally ruling for the federal government, Nevada has been able to use a range of tools and powers to slow the construction of the facility to a crawl. (Indeed under the Obama Administration, Nevada even temporarily killed the facility, because one of its senators, Harry Reid, was majority leader in the Senate. The Trump Administration is trying to restart the facility.)

Imagine the logistical and legal difficulties faced by an Administration that seeks to ram through oil and gas development opposed by well over a dozen states. With a complex legal regime that gives those opponents ample opportunities to litigate and delay. Moreover, offshore oil and gas development does not really have time on its side here. That's in part true for political reasons. All it requires is a change in party control at the White House for the leasing plan to be torn up and restarted, excluding most or all of the new areas. Given the long time frame for leasing activities, you would likely need uniform party control by a supportive administration for well over eight years. And even with a supportive executive branch, if opponents flip the balance of power in the House or Senate, then they can use control over the appropriations process to stop funding for leasing activities.

And all of this assumes that the Administration is competent in the legal and political process of developing off-shore leasing. That it doesn't (for instance) make a clearly

political exception from their leasing plan for one state (e.g., Florida) that is hard to distinguish from many other states, opening the door for legal arguments that their leasing plan is arbitrary and capricious. It is true that the OCSLA has very broad standards about when oil and gas development is appropriate, such that courts generally defer to agency decisions about lease plans and leasing. Nonetheless the courts will still enforce minimal standards of rationality and non-arbitrariness in decisionmaking under the Administrative Procedure Act (APA), which applies to almost all federal agency decisions. Given the Administration's current record, one can't exclude the possibility of poor judgment and rushed decisionmaking undermining their leasing process, forcing them to start over, again adding time to the development process.

Finally, there are real questions over the long-term future of oil and gas development. Offshore oil and gas development is often quite expensive. But gas prices are quite low (because of the fracking boom) and while oil prices have ticked up recently, they are still far below the peak prices before the Great Recession. Some analyses predict that oil demand will level-off over the next couple of decades because of the rise of electric vehicles on a global scale. If so, there won't be much appetite for controversial, uncertain, and expensive oil and gas development off the coast of the United States.

Of course, there is uncertainty here. We may see oil prices spike (and most importantly) stay high for years to come because of economic or political changes. There may be a new political consensus in the United States in favor of oil and gas development. However, I think what my analysis makes clear is that for major oil and gas development to occur as a result of the Trump Administration proposal, some sort of major change in the broader political and economic context is required – change that is not currently on the horizon.