This document has been prepared as part of the implementation project of Legal Pathways to Deep Decarbonization (Michael B. Gerrard and John C. Dernbach, eds. Environmental Law Institute [2019]) (LPDD). For background information on the project, see https://lpdd.org

LPDD Model Law: Ending Fossil Fuel Leasing on Federal Lands

The U.S. Geological Survey determined in 2018 that fossil fuel production from the public lands and Outer Continental Shelf of the United States accounted for nearly 24 percent of U.S. contributions to greenhouse gas emissions. The development of these resources is entirely within the control of the U.S. government as their owner. While a variety of public land laws provide for the leasing of these mineral interests for extraction, Congress retains the authority to alter these laws and change the leasing regime, which is administered by the Secretary of the Interior.

The model law accompanying this memorandum provides for ending new leasing of these federally owned resources in both the onshore and offshore environments, and implements the following recommendation from Chapter 24, Appendix B of *Legal Pathways to Deep Decarbonization in the United States* 644 (Michael Gerrard & John Dernbach eds., ELI 2019): the federal government should "stop leasing its land for fossil fuel extraction."

The primary laws that govern onshore leasing are the Mineral Leasing Act, 30 U.S.C. §§ 181 *et seq.*, the Mineral Leasing Act for Acquired Lands, 30 U.S.C. §§ 351 *et seq.*, and with respect to the National Petroleum Reserve-Alaska (NPR-A), the Naval Petroleum Reserves Production Act of 1976, 42 U.S.C. §§ 6501-08 (NPRPA). The model law refers to lands "within the NPR-A" rather than to the relevant Act (the NPRPA) in order to avoid creating ambiguities with respect to other lands subject to the NPRPA that have been divested from federal ownership. Leasing on the Outer Continental Shelf (OCS) is governed by the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331 et seq. (OCSLA). The model law uses a "notwithstanding" provision in order to avoid the need to amend numerous provisions of these laws, which will continue to govern existing fossil fuel leases, and several of which also cover leasing of minerals other than fossil fuels.

Note that the model law does not apply to leasing of fossil fuel resources held or administered in trust for American Indian tribal nations and their members by the U.S. government. Leasing of these Indian lands is governed by a complex web of additional laws with an overlay of federal trust responsibilities, treaty requirements, and commitments which would need to be addressed via intergovernmental negotiation, compensation, and additional measures to protect the interests of the beneficiaries.

The model law further provides that nonproducing federal leases will not be extended, renewed, or reinstated. Differing terms are used here because of the underlying statutes and the requirements applicable to existing leases. The prohibition on continuation of these leases is limited to nonproducing leases as those currently in production represent a substantial commitment of resources by the lessee – with correspondingly substantial financial exposure to the federal government, and in the case of oil and gas resources, the possibility of unwarranted waste and loss of resources if not continued (e.g., physical damage to the wellfield).

A substantial number of previously issued fossil fuel leases are in “suspended” status either at the request of the lessee or at the direction of the Secretary. Most of these suspensions are for resource conservation, *force majeure* events, are awaiting development of supporting infrastructure, or are suspended for environmental reasons. A 2018 GAO study suggested that a great many onshore oil and gas leases are in suspended status (and that among these 75 percent had been suspended for more than three years), and some advocates have suggested that portions of the industry have been stockpiling leases for speculative future use or conveyance. During the period of suspension, the lease term does not run, but is reserved (tolled), and resumes after the suspension is ended.

The model law provides the Secretary with discretion to cancel any lease that has been suspended for five years and has never produced in paying quantities. This provision supplements the existing – and very limited – provisions for cancellation of suspended leases under existing law (e.g., findings of serious, irreparable harm, violations, etc.). The Secretary will have discretion to determine which of these suspended, nonproducing leases will be cancelled, and when, in order to avoid waste or loss of resources and to accommodate reasons for the suspensions. Normal financial compensation requirements would continue to apply to such discretionary cancellations of nonproducing leases to ensure that the cancellations do not result in uncompensated taking or violation of lease terms.

(Alternatively, the law could be revised to *direct* the Secretary to cancel such leases after the five-year total has been reached (*e.g.,* “the Secretary shall”). This would remove administrative discretion to consider any specific circumstances, such as those related to management of adjacent leases or costs for compensation, under which the tolled lease term would be allowed to run.)

Ending new fossil fuel leasing on federal lands and waters will have financial implications for states and federal programs that receive the bulk of these rental and royalty funds, so the model law operates chiefly prospectively. Thirty-five states currently receive shares of fossil fuel leasing revenues from federal lands. Apart from laws that dedicate 50 percent of onshore leasing revenues to states (90 percent to Alaska) and 40 percent to a reclamation fund, the laws governing OCS revenues provide substantial funding shares to states on the Gulf of Mexico and provide the federal government with funding for the Land and Water Conservation Fund (LWCF), which supports federal and state conservation purchases and maintenance. The recently-enacted Great American Outdoors Act (Pub. L. 116-152, enacted August 4, 2020) makes funding of the LWCF permanent, and provides five years of funding for deferred conservation expenditures derived from both OCS and onshore revenues. An analysis suggests that most of the latter funds would come from OCS oil and gas activities. The OCS funding stream for these purposes includes royalties from current and future production from *existing* leases, which would be unaffected by the model law, as well as from bonus bids and royalties from future leases, which would be prohibited. The model law, moreover, does not affect revenues from future renewable energy leases.

The model law is based partially on S. 750 and H.R. 2242, 115th Congress (the “Keep It in the Ground Act of 2017”), but differs because of those bills’ inconsistent characterizations of the provisions of the existing statutory provisions governing lease suspensions, cancellations, and extensions, and their use of terms that differ from existing law. (For example, “renewal” applies only to a limited subset of mineral leases; “extension” of a lease term occurs automatically for so long as production continues in paying quantities). The model also draws upon proposals such as J. Leshy, *Interior’s Authority to Curb Fossil Fuel Leasing*, 49 ELR 10631 (2019) (examining sources of authority under existing law).

The model law deals separately with OCS leasing because the operative law is different, and also because decisions about OCS leasing will have a greater fiscal impact on conservation funding. It is noteworthy that many of the co-sponsors of the “Keep It in the Ground Act” also co-sponsored and voted for the Great American Outdoors Act, which relies on these revenues.

The model law’s cancellation provisions also reflect differences in the OCSLA, and specifically provide that cancellation of suspended nonproducing leases is by “notice” rather than federal district court action. As with the onshore sections, the model law makes cancellation of leases under suspension discretionary, and for similar reasons; these include potentially very high costs for closure and decommissioning of OCS production facilities, and compensation for what are typically large bonus bids on the OCS. However, in the alternative the language could be made mandatory. The model law also would not require the serious harm, threat, and other findings of 43 U.S.C. § 1334(a)(2)(A) for cancellation of suspended leases. Lessee compensation would be as provided by existing law.