



## Transcript of CleanLaw Episode 23: Robin Just asks Hana Vizcarra about Offshore Drilling, June 28, 2019

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**Robin Just:** Welcome to CleanLaw from the Environmental and Energy Law Program at Harvard Law School. I'm Robin Just, our outreach and communications director. In this episode I'll be speaking with our staff attorney Hana Vizcarra about the legal landscape of offshore drilling and the proposed rule changes and executive orders that may affect where and how oil companies operate. We hope you enjoy this podcast.

**Robin:** Hi, I'm Robin Just, the communications director here at the environmental energy law program. I am delighted to be here with our staff attorney Hana Vizcarra who has been tracking developments in offshore drilling under the Trump administration. She's another one I've been wandering into her office and asking her questions and I'm so happy to sit down with her and record some of those answers so we can find out, there've been a lot of developments recently and she's going to just give us some background and talk about what's going on. So Hana, what's going on?

**Hana Vizcarra:** Well, it's great to be here. Thank you Robin. So I think a big theme of the Trump presidency has been this energy dominance theme. Everybody's aware of it. He talks about it quite a bit. One of the ways that's played out has really been with an effort to increase offshore drilling. The president has a pattern of having proclamations or edicts, usually through executive orders, that then the relevant agencies have to follow up to implement, some with more success than others. That is certainly the pattern we're seeing related to offshore drilling as well. So in 2017 President Trump issued an executive order that was titled Implementing an America First Offshore Energy Strategy. This really kicked off a lot of the work that they've done since related to offshore drilling and their efforts to expand energy development in general and it had a number of pieces to it.

**Hana:** First was that it instructed the department of interior to expand leasing to include previously off-limits areas such as the Mid and South Atlantic coast, all of the Gulf of Mexico. Part of that was previously off limits and the Chukchi and Beaufort Seas in Alaska. That order actually overturned three Obama era executive orders that protected parts of the Arctic and the Atlantic areas from oil and gas leasing. The order also ordered a report on marine sanctuaries in monuments and an effort to expedite reviews and permitting under the Marine Mammal Protection Act and the Outer Continental Shelf Lands Act that deal with protected marine species. Then finally, one of the other big pieces that we're following is that the



order directed the agencies to reconsider the series of offshore drilling safety and environmental rules that were proposed or finalized under the Obama administration. So really that executive order was the kickoff to a whole range of activity at the agency level in different pieces of the department of interior and parts of the department of commerce as well.

Robin: You mentioned expanding leasing for offshore drillers, that's part of the executive order intention. Where does that stand?

Hana: So the way that has played out, there's two pieces to it. One is that the agency department of interior has initiated a number of lease sales in the existing lease areas and in the Gulf of Mexico and off the coast of Alaska. But the one that really has garnered the most attention and controversy is that BOEM, the Bureau of Ocean and Energy Management, has proposed dramatically expanding federal managed ocean areas that are available for energy development by creating a new five year plan. So every five years BOEM creates a five-year leasing plan that is supposed to map out what is going to be available for leasing during that timeframe and how that development will go. The existing five year plan that was created under the Obama administration started in 2017. So the administration has asked BOEM to create a new one, which was supposed to start in 2019.

Robin: Wait, so even though the Obama administration did a five year plan, it doesn't matter? The new president can-

Hana: Well the new president has asked the agency to reconsider and create a new one based on new policy considerations and directions that this administration wants to go in.

Robin: The five year plan, forgive me for not remembering if you've already said it, is part of ... Is that just agency mandate? Is that a law? Is that an executive order?

Hana: It's part of the offshore development process under OCSLA. It's part of the agency's leasing authorities that are granted under the Outer Continental Shelf Lands Act. The executive orders, the way that it intersects with this is that Trump, through the executive order, because he wants to see broader ranges of areas offshore available for leasing. He is instructing the agency to consider to implement a new five year plan that it is more expansive than the prior one. Part of the reason is that his executive order actually withdrew protections that Obama had put in place by proclamation for certain areas. So those were areas weren't even considered for leasing in the prior plan because they were withdrawn by presidential proclamation. They were not allowed to be leased.

Robin: I see.



Hana: So now Trump has said he's trying to reverse that and has ordered the agency then to implement a new five year plan that reflects that essentially. So it would start only two years into the five year plan that exists already, but it's triggered by this other action that the president is taking during the executive order.

Robin: The executive order. I see. Does the five year plan need to go through public comment period?

Hana: Yeah.

Robin: Okay.

Hana: So this is where it stands right now, and actually it gets more complicated.

Robin: Of course it does.

Hana: Because there's been some developments related to the president's authority to do this in fact. So BOEM issued a draft in January of 2018. It had dramatic expansion of areas available for leasing, all of the Atlantic coast, all of the Gulf of Mexico, Pacific, almost everything in the Arctic and off the Alaska coast. As you probably have noticed and can imagine there is a lot of backlash to that.

Robin: I remember that. It hit the fan, all the governors, even in Florida, right?

Hana: Yeah.

Robin: They said, "No, we don't want this."

Hana: Yeah. The governor of Florida actually specifically asked the president to reconsider. There are methods within the OCSLA, the Outer Continental Shelf Lands Act for the government to take consideration of state's interest. Although it's mostly more about considering their voice, not necessarily giving the States a lot of authority in that area. But in fact all of the Atlantic coastal governors have opposed the plan, whether they're Republican or Democrat. For one of the big examples that comes to mind that did not get a tentative assurance from the agency that maybe they'd be withdrawn like Florida did was South Carolina who cares a lot about their tourism. Really the concerns are for the States that have not traditionally had oil and gas is that it will impact their fishing commercial industry, their recreational fishing, their tourism.

Hana: A lot of them are heavily reliant on their beach tourism and coastal communities and just generally quality of life too for the coastal communities because there's a lot of infrastructure that goes along with this type of development that's on lands. There's been a whole range of responses in anticipation of this type of expansion



from legislatures to really try to find ways and creative ways in some instances to impede that type of development should this leasing plan go into effect. I know some States have passed laws around the waters that they have control over about not aligned for leasing there. But also the use of their coastal areas for infrastructure development in support of efforts.

Robin: Interesting.

Hana: That's something that definitely warrants some more discussion. But it's a lot of, I think it's experimental at the moment to see where that all will go.

Robin: Can I drag you just a tiny bit deeper, pun intended, into that? So state waters are what, two to three miles?

Hana: About three nautical miles. Yeah.

Robin: So this executive order can't touch that?

Hana: So States under OCSLA have control over their water's up to three nautical miles. Then the federal government has control of the resources past that to the full extent of US's-

Robin: 200 miles.

Hana: It's about 200 nautical miles. There are a couple of states that have more control. Texas does. They have a little bit further area because of some historical reasons that it was built into the original statute. But for the most part, especially all the states that haven't traditionally had oil and gas development, you're really talking about their state waters are about three nautical miles.

Robin: Then they can push back with the coastal development as well?

Hana: Land use is generally more of a local control issue, state and local issue. So there's certainly some ... Offshore development requires a lot of onshore support. There's certainly efforts that states and local communities can do to try to mitigate some of the potential impacts. Or what they're trying right now is really actually to impede the development at all. I think that will be an ongoing fight. How successful they are at those efforts will depend on state constitutions, local zoning laws, potential for preemption issues. It doesn't mean that it will necessarily stop offshore development. You don't have to launch equipment from the closest coast necessarily. So I think a lot of that is just really, there's a lot of enthusiasm and a lot of concern and it will remain to be seen what state and local communities actually are able to do.



Robin: They could make it more expensive.

Hana: They could potentially make it more expensive. They can make it a little more difficult. They can require more mitigation in the process. That's so far down the line really. Because let me tell you what's happening first is that none of this is actually happening yet. Because right now the five year plan is actually stopped at the moment. The whole process is on hold. So I mentioned that they had the draft out in January of 2018 we had been expecting a draft, a final proposal last fall, as early as last fall. The agency has supposedly been very diligently working on this. But we hadn't seen anything. Then we had a partial government shutdown and that delayed things as well. Although there were reports that BOEM, that the employees specifically working on the five year plan were actually continuing to work during that time.

Hana: It was a partial shut down, they found some money to fund them. So we all expected maybe there'd be a plan that came out right after. Well in March, March 29th, a judge in Alaska created some problems for them in that area. Has halted the progress with a court decision that vacated the section of President Trump's executive order that revoked former President Obama's withdrawals from leasing. So what I'm talking about there, I mentioned at the very beginning that Obama had three presidential proclamations that withdrew certain areas from leasing. It meant it protected certain areas from being considered for leasing in the five year plan and down the line. So Trump's executive order, the America First Offshore Energy Order in 2017 specifically replaced those. This judge ruled that the statute under which Obama made those withdrawals from leasing the one that we've been talking about quite a bit here, OCSLA, grants the president power to withdraw the areas from leasing.

Hana: This is actually all part of section 12A of that law. But it doesn't also give him the power to reverse a prior withdrawal.

Robin: Interesting.

Hana: The judge determined that such a reversal, that's reserved for Congress. That Congress intentionally held that power back for themselves.

Robin: That language is in OCSLA?

Hana: So there's not language specifically addressing this in OCSLA. But the provision section 12A that grants the president authority to withdraw offshore areas from leasing, the way that the judge interpreted the structure of the statute and the powers that Congress intended to grant the president was to hold back for Congress the power to reverse those decisions. So basically they're saying President Trump, just a federal district court judge who said that President Trump



doesn't have the authority to undo President Obama's withdrawals of those areas from leasing.

Robin: Interesting.

Hana: We'll see what happens. That has now been appealed to the ninth circuit by the administration. So we don't know what's going to happen with that. It is a really interesting case to watch for a number of reasons, but it's halted their five year plan efforts at the moment. Because at the moment they can't include all these areas that they were going through this process in order to include. The outcome really will dictate whether their current iteration of their proposal is even viable.

Robin: So in addition to this executive order and the lawsuit there have also been some rollbacks to offshore drilling rules. Is that right? Could you walk us through some of that?

Hana: Absolutely. It's actually still all related to the executive order. Everything comes back to it. I think I mentioned in the beginning that part of what the executive order did was order the agencies to review and reconsider some of the rules that were put in place under the Obama administration. So that's something that this administration and particularly the department of interior has been undergoing. So as a result of the order, the interior secretary also issued a rule implementing it. I'm sorry, not a rule, a secretarial order that followed up on the executive order to instruct the agency as to how he wanted it to implement the president's wishes. As a result of that BOEM, the Bureau of Ocean and Energy Management, which handles leasing and other issues was instructed to completely stop work on an offshore air quality control rule that was proposed in 2016. So they have done that.

Hana: They were also told to initiate a review of a 2016 requirement. This was actually a notice to lessees. So it's not a rule in the same way as some of these others for additional financial security for lessees. At the moment that is actually still in place. The agency was instructed to review it. I don't know what that review looks like, but that notice to lessees still is listed as active.

Robin: The financial security is to ensure that they can deal with cleanups and decommissioning?

Hana: Decommissioning, that type of thing. They were also instructed to review the 2016 Arctic exploratory drilling rule that imposed new requirements for drilling in the challenging and fragile environment in the Arctic. We haven't seen a proposal come out from that review yet, so I'm not really sure where that stands. The two main rules that we have seen work on besides just the halting of some of the air



quality rule for example, actually come out of BSEE, which is another portion ... Both BOEM and BSEE are part of interior and both deal with offshore drilling.

Hana: They are the two agencies. BOEM primarily handles leasing and permitting in that area. BSEE, the Bureau of Safety and Environmental Enforcement, as you can tell from its name, is supposed to be more the safety and environmental regulator. There's some overlapping authorities there though. But BSEE was instructed to revise the Obama era offshore production safety systems rule. They have done that. Their revision is final. Rolling back a number of certain safety requirements for offshore equipment. It's pretty technical and not a huge earth shaking change.

Robin: This isn't the blowout preventer?

Hana: Nope. That's the next one.

Robin: Okay.

Hana: But both are related.

Robin: And these are rules that came out after Deep Water Horizon?

Hana: Right. All of this stuff actually came out after, all of the rules that the administration had instructed the agency to reconsider or review, all of these rules are post Deep Water Horizon in 2010. It was part of a really large reorganization of the agency as well as once the reorganization was done, which resulted in the creation of both BOEM and BSEE. Which previously they were one agency. There was also a significant amount of work done to try to improve safety and environmental operations for offshore drilling. So in addition to the offshore production safety systems rule, the other rule that they have actually finalized revisions to is the well control rule. They just finalized revisions to that in May, 2019. So this May.

Hana: It'll loosen some requirements that were included in the blowout preventer systems and well-controlled rule of 2016. Then one other action that's been taken is BOEM and NOAA, which is part of department of commerce, have also worked on expediting incidental take authorization requests for size seismic survey permits. They've published updated technical guidance on that process. There's a rule proposal on the authorization process for oil and gas activities in the Gulf of Mexico, but that's not yet finalized. So the biggest one and that you hear most about is probably the well controllable, which was just recently finalized.

Hana: Yesterday of a number of environmental organizations have challenged that rule and just filed a suit I think. Is today the 12th?



Robin: 13th.

Hana: 13th, okay. Two days ago. June 11th I think it was. So just this week.

Robin: Okay.

Hana: It's in the Northern district of California. They just filed it. They're making a number of allegations about the process under which this rule was developed and I believe also some of the technical support. I have not yet actually read the complaint so I can't really give you a whole lot of detail on it yet and that's probably-

Robin: We'll do a follow up.

Hana: I was going to say we should have another conversation once I have. There is, and I don't know if this is part of it, it may be, there was an interesting little detail question that came up a couple of weeks ago. I know one organization was questioning the use of some industry standards in the final rule and it's an interesting question.

Hana: It may be part of their challenge. When the final well-controlled control rule came out there were a few stories out there around its use of industry standards. It actually incorporated a number of industry standards into the regs and there was some question about that and whether that's proper or how it was done. There's a couple of interesting things on that. I don't know. This may be part of the lawsuit that was filed. I haven't actually read the challenge yet. But one important note for that is though that this is a really technical rule about drilling operations and it's not unusual for the agencies to rely on technical standards that are developed by industry groups in conjunction with those who are operating, but also usually with some involvement of the regulators either tracking it or just keeping abreast of what the standards that are being developed.

Hana: You have organizations that create best practices based on the experience of the industry and the technical knowledge within it. The agencies are actually encouraged to adopt those bylaws as much as possible. Of course, they have to do their own evaluation on them and make sure that they do with the rule needs them to do. The adoption of API standards into the regulation themselves is not necessarily something new or revolutionary or unusual or in any way inherently problematic. I do think sometimes that gets distorted in discussion. In fact right now across many different areas of rules, you will find industry standards adopted into regulations in various ways. There was one interesting question with this particular rule though, and this actually is relevant for how we've seen rule making go under this administration across the board.



Hana: So what was interesting in this rule, they adopted a number of API standards. API is the American Petroleum Institute, which is a very large industry association. It has its lobbying arm that many people are probably most familiar with, but it also has, a good portion of it is really dedicated to technical development of the industry and standards and things like that. So the final rule adopted a particular API bulletin, which was not at all mentioned in the proposal. So there's been some discussion over whether that follows proper procedures, whether that's appropriate for a couple of reasons. There was a general call for comments on a particular issue, situations where drilling can continue before receiving an alternative safe drilling margin approval from BSEE and asking commenters to give information about how that could be done. But the proposal did not list any particular standards or bulletins or anything that they were considering.

Hana: It was a really general request. The API bulletin that was ultimately included in the final rule was mentioned in comments. For general requests like that it wouldn't be unusual for the agency to review suggestions in response to the proposal in comments and then maybe issue a supplemental proposal that identified its preferred changes and give people an opportunity to comment specifically on the bulletin that it was proposing to adopt. That didn't happen in this case. So there's been some concern over whether that it violates the Administrative Procedures Act's requirements for notice and opportunity to comment. Either the agencies can include things in a final rule that were not included in a proposal.

Robin: I see.

Hana: If we didn't allow agencies to do that, we would never get any rules out. Because also you want them to. Because you want them to consider the comments carefully and actually adjust their proposals as a response. That's why we have public comments. But they have to be a logical outgrowth of what the public was asked to comment on and if they're not or if they're too far outside of that really there's an expectation that the public should have an opportunity to comment. So this could potentially fall in that area. If a court finds that that wasn't appropriate, and this is just one small example of administrative procedure and how it works in these rules. BOEM could be ordered to go back and put out a new proposal or something along those lines. The other issue with this particular document was that it wasn't a full blown standard developed through a voluntary consensus process, which is how API technical standards are generally developed.

Hana: It's a "bulletin" which is a little bit different. The agency actually acknowledged in their rule that it may not be considered a voluntary consensus standard. That could become an issue. But generally courts are pretty differential to agency decisions on technical standards. So it'll be a fight over whether their technical evaluations are so arbitrary or their decision is ultimately so arbitrary that the



court can't defer to their decision making in that process. So again this is just one tiny example of a potential challenge to the well control rule because it's something that I know that there had been some discussion about with some organizations. I'm not sure if that's a major issue in the current challenge that's before the court because I have to read it still. But it's an interesting example of some of the challenges with these rule roll backs and how the Administrative Procedures Act comes into play.

Robin: I've been grateful for that lately. The Administrative Procedures Act, which I knew very little about before I started working here.

Hana: It is a really, administrative law is at the heart of environmental law for sure. It's one of those things that is ... Almost any environmental case involves an issue related to the Administrative Procedures Act and administrative law in general.

Robin: So there's a whole, I mean there are many other facets to this that we won't talk about today. But one of the final big pieces maybe we could discuss is the impact this executive order has on marine national monuments and sanctuaries.

Hana: Yeah. So there were actually two executive orders very closely related and close in time as well in 2017 that President Trump issued that relate to this. There was one, this executive order number 13792. Then the one that we've already been talking about, which was just a couple of days later, is 13795. They ordered the department of commerce, which includes NOAA and the National Marine Fisheries to review marine sanctuaries that were ... And they also ask interior to review monuments. So there had been a process at the agencies to review these sanctuaries and monuments and consider whether they should be revised or whether there should be some potential changes to the activities allowed within them. The secretaries of those two agencies were asked to issue a report to the president.

Hana: Secretary Zinke submitted his final recommendations, which we have actually seen. He looked at five marine monuments in his review and his final recommendations suggested alterations to the management or size of three of them including changing up how fishing was managed within those areas.

Robin: To allow commercial fishing?

Hana: To potentially allow commercial fishing. Basically his recommendation was to return control over that to the regional fisheries councils is my understanding. But an existing presidential proclamation had actually prohibited commercial fishing in those areas. So he's basically recommended to overturn that existing proclamation and return that decision making power to the fisheries council that oversee commercial fishing. The secretary of commerce also supposedly



submitted a report to the president, but we haven't seen its content. So we don't know. It was not made public.

Robin: Does it ever have to be?

Hana: No, not really. The only reason the interior secretaries was, I believe it was leaked. So we don't really know what's happening, what Wilbur Ross, the commerce secretary recommended. Right now nothing has happened with the sanctuaries. So we haven't had any significant-

Robin: Oh the management policies have not changed yet?

Hana: Well there's not been any move by the administration to change the size of the offshore sanctuaries. We've seen a lot happen onshore related to monuments, Bears Ears is in the news a lot.

Robin: Right.

Hana: There's been some discussion but nothing specific around potentially changing boundaries or anything like that has yet happened for the offshore ones. So that's still something that's out there, something that was part of this executive order but we haven't really seen come to fruition yet.

Robin: People can look at our regulatory rollback tracker to keep track of when these things do change.

Hana: Yeah, we are trying to keep up with this as much as possible. We have an offshore energy page, offshore development page on our tracker that, as you can tell just from this discussion, this is a complicated process because there's a lot of interconnected issues. But we set it up the way we talked about it today. We actually have the landing page that really talks about what the executive order asks the agencies to do, what the secretarial order from interior that followed up on that asked the BSEE and BOEM, etc to do. Then we have a page that just tracks what's happened with the rules, the actual regulations. That we have one, a sub page that specifically focuses on leasing activity.

Hana: We're not trying to follow every little lease sale, but we're really trying to follow the development of these major changes like the five year plan and the now litigation involved with that. Then we also have one that tracks monuments and sanctuaries issues that right now is combined where we have both the onshore and offshore stuff combined, although that might change. So yeah, there's a lot going on. I think it can sometimes be hard to get your head around all the different pieces of this puzzle and how they're trying to go about expanding offshore development opportunities through both just leasing opportunity but



also changing the rules a bit. The rule changes we've seen I would say are certainly responsive to industry concerns for costs and efficiency and strengths, quickness of permitting and things along those lines.

Hana: So what we've seen them try to implement and do certainly fits within that. But yeah it's a broad spectrum. It's a whole court press here on efforts to try to get around to push for more development. Just from our discussion, you can see that there's a process for all of this. There's processes that have to be respected. That's what our regulatory process and administrative law process is set up intentionally with somewhat complicated processes but because they want to incorporate public comments you want to have opportunities for anybody involved too to be able to voice their opinions and thoughts and expertise, for transparency, for real reasoned consideration of the science involved. So the success of these, while we have seen a couple of things go final, the well control rule and the offshore drilling, let's see, the systems rule I think, I can't remember exactly what it's called, it's like the safety drilling systems rule have both gone final.

Hana: There are some more in the works that we've seen are under agency consideration right now. They did halt the progress on the air quality rule. There's a lot of stuff that's still in process and even these rules. As we've seen just this week, we have a legal challenge to the well control revision. This is an ongoing issue and something that has involved a lot of different voices with states and legislatures voicing their opinion as well.

Robin: Thank you so much for that fantastic walk through a lot of what's happening with offshore drilling right now. I'm looking forward to catching up with you again soon as we see more things change and you have a chance to read that challenge.

Hana: Yeah. Next time maybe we can have a conversation with some of the more interesting wonky legal issues in some of these things rather than those big, broad overview.

Robin: Yeah, great. Well, thank you, Hana. It's been so nice-

Hana: Not a problem.

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