OCSLA Jurisdiction and Adjacent State Law in Offshore Wind Development

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Executive Summary

The Outer Continental Shelf Lands Act (OCSLA) directs that the "laws of each adjacent [s]tate" applies to "that portion of the subsoil and seabed of the [O]uter Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the [O]uter Continental Shelf."[1] The Fifth Circuit uses a three-part test to determine whether adjacent state law or maritime law applies.[2]

1) "The controversy must arise on a situs covered by OCSLA (i.e. the subsoil, seabed, or artificial structures permanently or temporarily attached thereto)."[3]
2) "Federal maritime law must not apply of its own force" to the circumstances of that controversy.[4]

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1. 43 U.S.C. § 1333(a)(2)(A).

2. *See infra* Section II(B). *See also* Union Tex. Petroleum Corp. v. PLT Eng'g, Inc., 895 F.2d 1043, 1047 (5th Cir. 1990); Texaco Expl. & Prod., Inc. v. AmClyde Engineered Prods. Co., 448 F.3d 760, 774 (5th Cir. 2006).

3. *Union Tex. Petroleum Corp.*, 895 F.2d at 1047; *see also Texaco Expl. & Prod., Inc.*, 448 F.3d at 774.

4. *Union Tex. Petroleum Corp.*, 895 F.2d at 1047; *see also Texaco Expl. & Prod., Inc.,* 448 F.3d at 774.

3) "The state law must not be inconsistent with Federal law."[5]

Offshore wind foundations and cable installations are likely to be OCSLA situses under the first prong of the test.[6] Offshore wind foundations are fixed structures erected on the seabed and cables are either placed on or buried in the seabed. Torts taking effect on an OCSLA situs, without a "substantial relationship to traditional maritime activity" are likely to be adjudicated under adjacent state law.[7] Likewise, maritime law likely does not apply of its own force to contracts to build or service offshore wind installations because courts are likely to apply the "focus-of-the contract" test and look to the purpose of the contract.[8] When the purpose of the contract is to develop an OCSLA situs, it is unlikely that a court will apply maritime law, even if the contract involves the use of a vessel.[9]

If adjacent state law is applied, the parties cannot contract around OCSLA's application of adjacent state law and they are bound by the adjacent state's contract law.[10] Adjacent state law is determined based on the geographic proximity of the development area to the coast of nearby states and may be indicated by federal agency, state considerations, and/or other factors.[11] BOEM has published projected state boundaries as part of its administrative

5. *Union Tex. Petroleum Corp.*, 895 F.2d at 1047; *see also Texaco Expl. & Prod., Inc.,* 448 F.3d at 774.

6. *See* discussion *infra* Sections II(B)(1), III(A).

7. *See* Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 534 (1995) (quoting Sisson v. Ruby, 497 U.S. 358, 364 n.2 (1990)); *Texaco Expl. & Prod., Inc.*, 448 F.3d at 771 (quoting *Grubart*, 513 U.S. at 534). *See also* Petrobras Am., Inc. v. Vicinay Cadenas, S.A., 815 F.3d 211, 216 (5th Cir. 2016).

8. Grand Isle Shipyard, Inc. v. Seacor Marine, LLC, 589 F.3d 778, 781 (5th Cir. 2009) ("Instead of looking to the site of the tort, other cases have applied what amounts to a focus-of- the-contract test which looks to where the contract contemplates that most of the work will be performed: if a majority of the performance called for by the contract is on stationary platforms on the [Outer Continental Shelf], that is the situs of the controversy for purposes of determining whether the law of the adjacent state applies as surrogate federal law.").

9. *See Union Tex. Petroleum Corp.*, 895 F.2d at 1047.

10. *Petrobras Am., Inc.*, 815 F.3d at 215.

11. Snyder Oil Corp. v. Samedan Oil Corp., 208 F.3d 521, 524 (5th Cir. 2000).

planning areas, boundaries which may be used by a court to determine adjacent states.[12]

I. INTRODUCTION

Offshore wind development in the United States is no stranger to controversy,[13] however, one brand of controversy presents

12. *See* Bureau of Ocean Energy Mgmt., *Administrative Boundaries*, BUREAU OF OCEAN ENERGY MGMT., https://www.boem.gov/oil-gas-energy/mapping-and-data/map-gallery/administrative-boundaries (last visited Mar. 11, 2024) (containing downloadable hyperlinks to maps of the administrative boundaries that BOEM has developed for the Atlantic, Gulf of Mexico, and Pacific regions).

13. The offshore wind industry has faced numerous challenges, from permitting challenges, cancelled projects, terminated contracts, and in early 2025, the revocation of offshore wind leasing areas on the Outer Continental Shelf by President Donald J. Trump. *See* Temporary Withdrawal of All Areas on the Outer Continental Shelf from Offshore Wind Leasing, 90 Fed. Reg. 8363 (Jan. 20, 2025); *see also* Seafreeze Shoreside, Inc. v. United States Dep't of the Interior, 123 F.4th 1, 7 (1st Cir. 2024) (affirming summary judgment granted in favor of the government in various Administrative Procedure Act (APA) challenges to the regulatory approval process for the Vineyard Wind 1 project); Ørsted, *Ørsted Ceases Development of Ocean Wind 1 and Ocean Wind 2 and Takes Final Investment Decision on Revolution Wind*, ØRSTED (Oct. 31, 2023, 7:28 PM), https://us.orsted.com/news-archive/2023/10/orsted-ceases-development-of-ocean-wind-1-and-ocean-wind-2 (describing Ørsted's decision to cease development on two offshore wind projects due to "significant impacts from macroeconomic factors, including high inflation, rising interest rates and supply chain constraints . . ."); State Of N.Y. Pub. Serv. Comm'n, *Order Denying Petitions Seeking to Amend Contracts with Renewable Energy Projects*, STATE OF N.Y. PUB. SERV. COMM'N 1-2 (Oct. 12, 2023), https://documents.dps.ny.gov/public/MatterManagement/MatterFilingItem.aspx?FilingSeq=314376&MatterSeq=48235 (containing a downloadable pdf copy of the Order, whereby the State of New York Public Service Commission denied the petitioners' request to authorize the New York State Energy Research and Development Authority to amend the existing contracts for certain Offshore Wind Renewable Energy Certificates, despite the petitioners' claim that "the combined effects of delays in permitting decisions by federal and/or State entities and of the COVID-19 pandemic have exposed the projects to unprecedented global and regional supply chain bottlenecks, high inflation, and increases in the cost of capital, driven by rising interest rates"); Scott Disavino & Nichola Groom, *New York rejects Orsted, Equinor, BP requests to charge more for offshore wind*, THOMSON REUTERS (Oct. 12, 2023, 5:57 PM EDT), https://www.reuters.com/sustainability/climate-energy/ny-will-not-change-offshore-wind-other-renewable-power-sales-contracts-2023-10-12/ (describing how requests to charge customers more under future power sale contracts were denied by New York regulators, a decision which "could force some developers whose contracts may not cover project costs to scrap plans to sell power to customers in New York, cancel or delay projects, as happened with a couple of offshore wind projects in Massachusetts"); Bryant E. Gardner & Allison N. Skopec, *Keeping Up with the*

particularly prickly issues of first impression for the majority of Circuit Courts where offshore wind farms are slated to operate: OCSLA's imposition of adjacent state law.[14] The vast majority of cases citing OCSLA's jurisdictional provisions are from the U.S. Court of Appeals for the Fifth Circuit.[15] The Fifth Circuit hears appeals from U.S. Federal District Courts in Texas, Louisiana, and Mississippi, where offshore oil and gas exploration on the Outer Continental Shelf (OCS) in the Gulf of Mexico has led to the bulk of disputes related to OCSLA and maritime jurisdiction. The opinions from the Fifth Circuit are only binding precedent on courts within the Fifth Circuit and because most of the current offshore wind projects in development are in the waters off the Northeast and Mid-Atlantic coasts of the U.S., any disputes arising from these projects will likely end up in District Courts within the First, Second, and Third Circuits. The likelihood that these disputes present issues of first impression sets up the potential for confusion as new courts grapple with applying the Fifth Circuit's complicated OCSLA jurisdiction case law. However, the circumstances do create opportunities for courts to develop new approaches to the issues.

This article seeks to clarify the current status of OCSLA adjacent state case law and discusses how it may be applied to offshore wind development. This article aims to assist all stakeholders understand how OCSLA applies adjacent state law to a dispute and the implications of applying adjacent state law instead of maritime law. The article also seeks to indicate how current case law may apply OCSLA to offshore wind development. Lastly, the article introduces ways that courts outside the Fifth Circuit may consider applying their existing precedents to OCSLA and can establish new law where there are no binding precedents.

Unlike the offshore oil and gas industry, the emerging nature of the offshore wind industry has presented limited opportunities for

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Jones Act, 47 TUL. MAR. L. J. 51 (2023) (providing information on how various Jones Act related concerns and controversies continue to draw attention throughout the maritime and offshore wind industries).

14. *See generally* 43 U.S.C. § 1333(a)(2)(A).

15. Roughly 83% percent of OCSLA § 1333 rulings at the U.S. Court of Appeals level are from the Fifth Circuit. Combined, the First, Second, and Third circuits account for only 3% of rulings on OCSLA § 1333. The breakdown at the District Court level is even more stark where 92% of OCSLA § 1333 rulings occur within the Fifth Circuit and only 2% of rulings occur in District Courts within the First, Second, and Third circuits.

disputes invoking OCSLA adjacent state jurisdiction to arise. As the offshore wind industry matures, and additional projects reach the construction and operations phases, disputes are likely to arise and litigation will ensue. The role of OCSLA in determining applicable law can significantly affect how disputes are resolved, with drastic implications that can overrule contract choice of law provisions, limit indemnification protections, and require different litigation strategies. In many instances, whether OCSLA applies adjacent state law can be determinative as to liability. The remedies available to a party under state law may be materially different than under maritime law. In particular, state law is generally more restrictive of indemnification in construction contracts, while maritime law is generally permissive of indemnification agreements.[16] In addition, courts find that OCSLA preempts any choice of law provision within contracts, meaning that if the law of the adjacent state applies, it is the substantive law of the adjacent state that applies.[17]

Developers, service providers, and other stakeholders may find it helpful to consider OCSLA imposed adjacent state law early in their planning processes. While it may be challenging to predict exactly how a court may rule, parties should consider the potential impact on their insurance, indemnification regimes, and operations if the law of other states than those contemplated in their contracts is applied. While the planning, permitting, and financing challenges remain front and center, stakeholders must increasingly shift their attention to the construction and operations phase. It is likely, though one hopes infrequent, that disputes will arise during construction or operation.

Once a dispute turns to litigation, parties should also be mindful that courts have allowed OCSLA jurisdiction to be raised at any point during litigation.[18] Courts have even ruled that OCSLA applied on

16. *See* Baloney v. Ensco Offshore Co., 570 F. App'x. 423, 425 (5th Cir. 2014); Corbitt v. Diamond M. Drilling Co., 654 F.2d 329, 332 (5th Cir. 1981); *see also, e.g.*, Hoda v. Rowan Cos., 419 F.3d 379, 380 (5th Cir. 2005) ("The Louisiana Oilfield Anti-Indemnity Act, applicable if the contract is 'non-maritime,' invalidates . . . indemnity provisions. On the other hand, if the contract is a 'maritime' agreement, federal maritime law does not bar enforcement of that provision.").

17. Petrobras Am., Inc. v. Vicinay Cadenas, S.A., 815 F.3d 211, 215 (5th Cir. 2016).

18. *Id.*

appeal when the issue had never been raised previously.[19] The implications of OCSLA on litigation strategy should not be overlooked. OCSLA adjacent state jurisdiction may also be sought by litigants for reasons other than indemnification enforceability. For example, parties may seek to apply the statute of limitations of an adjacent state to a dispute and will seek OCSLA jurisdiction to do so.[20] Similarly, parties may seek to apply OCSLA jurisdiction to remove cases from state court to federal court.[21]

The variability and added complexity of OCSLA adjacent state law can add uncertainty to project development. Financial and supply chain uncertainty were key issues cited by developers when cancelling projects or attempting to renegotiate power purchase agreements in prior years.[22] Yet political, financial, and supply chain challenges are not the only issues impacting offshore wind development, as legal uncertainty remains a significant factor. In seeking to clarify when and how OCSLA adjacent state law may apply to offshore wind activities, this article aims to reduce some of that uncertainty and provide insight on the topic for all stakeholders as the industry matures.

OCSLA is a far-reaching statute, and this article focuses solely on how the jurisdictional and choice of law elements of OCSLA may apply adjacent state law to offshore wind projects. The article primarily addresses when and how maritime or adjacent state law applies for tort and contract claims, and assesses how courts may determine which state is the adjacent state. The article first provides background on offshore wind development and OCSLA, then identifies the existing tests developed by the Fifth Circuit to determine jurisdiction under OCSLA, and then details the steps courts take to determine whether to apply maritime or adjacent state law. The article next discusses how a court may interpret key aspects of a project or other activities related to offshore wind

19. *Id.*

20. *See* Chevron Oil Co. v. Huson, 404 U.S. 97, 100 (1971) (holding "that [OCSLA], as interpreted in *Rodrigue*, requires that the state statute of limitations be applied to personal injury actions").

21. *See* Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473 (1981).

22. Miriam Wasser, *Offshore wind in the U.S. hit headwinds in 2023. Here's what you need to know*, NPR (Dec. 27, 2023), https://www.npr.org/2023/12/27/1221639019/offshore-wind-in-the-u-s-hit-headwinds-in-2023-heres-what-you-need-to-know; *Ørsted Ceases Development of Ocean Wind 1 and Ocean Wind 2 and Takes Final Investment Decision on Revolution Wind*, *supra* note 13.

development under OCSLA. Next, the article details the particulars of applying adjacent state law by explaining how state borders are projected onto the OCS, how courts determine which state is adjacent, and how OCSLA supersedes an adjacent state's choice of law framework. In closing, the article highlights a few ways that courts hearing OCSLA adjacent state cases on offshore wind may apply their existing maritime law precedents within an OCSLA framework.

II. BACKGROUND

A. *Overview of Offshore Wind*

Despite significant political headwinds, multiple commercial-scale wind farms are delivering power to the grid and additional projects are under construction or scheduled to begin construction.[23] Offshore wind farms are complex projects and include numerous onshore and offshore components.[24] Offshore wind projects can be built over thirty miles offshore on the OCS and include over 100 individual turbines.[25] Their location on the OCS is the reason why OCSLA may apply to disputes that arise during the construction and operation of offshore wind farms.

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23. *Avangrid, CIP Announce First Power from Nation-Leading Vineyard Wind 1 Project*, VINEYARD WIND (Jan. 3, 2024), https://www.vineyardwind.com/press-releases/2024/1/3/cip-avangrid-announce-first-power-from-nation-leading-vineyard-wind-1-project; Thomson Reuters, *Orsted South Fork offshore wind farm delivers first power to NY electric grid*, THOMSON REUTERS (Dec. 6, 2023, 12:43 PM), https://www.reuters.com/world/us/orsted-south-fork-offshore-wind-farm-delivers-first-power-ny-electric-grid-2023-12-06/; *Governor McKee Highlights Construction Progress on Revolution Wind – Rhode Island and Connecticut's First Utility-Scale Offshore Wind Farm*, OFF. OF THE GOVERNOR (Nov. 16, 2023), https://governor.ri.gov/press-releases/governor-mckee-highlights-construction-progress-revolution-wind-rhode-island-and; *see also* WALTER MUSIAL ET AL., OFFSHORE WIND MARKET REPORT: 2023 EDITION (2023).

24. *See* N.Y. State Energy Rsch. and Dev. Auth., *Offshore Wind 101*, N.Y. STATE ENERGY RSCH. AND DEV. AUTH., https://www.nyserda.ny.gov/All-Programs/Offshore-Wind/About-Offshore-Wind/Offshore-Wind-101 (last visited Feb. 11, 2024).

25. *See, e.g.*, Permitting Council Press Off., *Vineyard Northeast Wind is the Newest Offshore Wind Project to Gain FAST-41 Coverage*, FED. INFRASTRUCTURE PERMITTING DASHBOARD, https://www.permits.performance.gov/fpisc-content/vineyard-northeast-wind-newest-offshore-wind-project-gain-fast-41-coverage (last updated Oct. 26, 2023).

Project components include offshore wind turbine generators (WTGs), offshore substations, inter-array cables, export cables, and an onshore connection to the grid.[26] Offshore wind construction projects are required to submit a Construction and Operations Plan (COP) for BOEM approval.[27] Within the COP, the project developer details out their construction plan, including design and construction details for the various components of the project.[28]

In general, WTGs consist of a foundation anchored to the seabed, a tower built on top of the foundation to support the nacelle, and the blades connected to the nacelle and generator.[29] Inter-array cables run from individual WTGs to the offshore substation where the power generated by each WTG is collected for transmission via export cables to the onshore electrical grid.[30] The inter-array and export cables are typically buried in the seabed to protect them from being fouled by anchors or fishing activity.[31] The offshore substation is generally built in a similar manner to the wind turbines with a foundation that is anchored to the seabed.[32] Scour protection consisting of engineered rock is placed around turbine and offshore substation foundations to protect the foundations from unwanted seabed erosion (scouring).[33]

Numerous vessels may be used to construct offshore wind farms including specialized wind turbine installation vessels (WTIVs), heavy lift and crane vessels, jack-up rigs, and other support vessels.[34] Other vessels such as crew transfer vessels (CTVs), service operation vessels (SOVs), cable-lay vessels (CLVs), fall pipe or scour protection vessels, and other survey and support

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26. *Offshore Wind 101*, *supra* note 24.

27. Bureau of Ocean Energy Mgmt., *Wind Energy Commercial Leasing Process*, BUREAU OF OCEAN ENERGY MGMT., https://www.boem.gov/sites/default/files/documents/about-boem/Wind-Energy-Comm-Leasing-Process-FS-01242017Text-052121Branding.pdf (last updated May 2021).

28. *See, e.g.*, Revolution Wind, LLC, *Construction & Operations Plan*, BUREAU OF OCEAN ENERGY MGMT. 62-124 (Mar. 1, 2023), https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/Revolution%20Wind%20COP%20Volume%201%20March%202023_v2_508c.pdf.

29. *Offshore Wind 101*, *supra* note 24.

30. *Id.*

31. *Construction & Operations Plan*, *supra* note 28, at 76.

32. *Offshore Wind 101*, *supra* note 24.

33. *Construction & Operations Plan*, *supra* note 28, at xxxvii.

34. MATT SHIELDS ET AL., A SUPPLY CHAIN ROAD MAP FOR OFFSHORE WIND ENERGY IN THE UNITED STATES 2-3, 16, 48, 52, 58, 66 (2023).

vessels may be needed to support construction and operations.[35] Some of these vessels (particularly jack-up rigs), may anchor to the seabed while working on a project. Other vessels may rely on dynamic positioning, using sophisticated navigation and control systems to remain stationary in certain positions in the development area.[36]

B. *Overview of OCSLA*

The Outer Continental Lands Shelf Act was passed by Congress in 1953 and authorized the leasing and development of the OCS.[37] In 2005, the Energy Policy Act amended OCSLA to include the authority for the Department of the Interior (DOI) (now via the Bureau of Ocean Energy Management (BOEM)), to oversee development on the OCS for alternative sources of energy.[38] Congress explicitly extended the reach of OCSLA to "installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources, *including non-mineral energy resources*" (emphasis added) in 2021.[39] Based on OCSLA's original purpose, most of the case law interpreting OCSLA is centered on the Gulf of Mexico and falls within the Fifth Circuit.[40] Rulings applying OCSLA from other circuits, in particular the First,

35. *Id*.

36. *See, e.g.*, *In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex., 808 F.Supp.2d 943, 950 (E.D. La. 2011), *sub nom*. *In re* Deepwater Horizon, 745 F.3d 157 (5th Cir. 2014).

37. Outer Continental Shelf Lands Act, Pub. L. No. 212, 67 Stat. 462. *See also* David W. Robertson, *The Outer Continental Shelf Lands Act's Provisions on Jurisdiction, Remedies, and Choice of Law: Correcting the Fifth Circuit's Mistakes*, 38 J. OF MAR. L. & COM. 487, 495 (2007).

38. Bureau of Ocean Energy Mgmt., *BOEM Governing Statutes*, BUREAU OF OCEAN ENERGY MGMT., https://www.boem.gov/about-boem/regulations-guidance/boem-governing-statutes (last visited Mar. 20, 2024).

39. 43 U.S.C. § 1333(a)(1)(A)(iii); *see also* William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, 134 Stat. 3388.

40. *See* Robertson, *supra* note 37, at 493-95. *See generally* Offs. Of the U.S. Att'ys, *Introduction To The Federal Court System*, U.S. DEP'T OF JUST., https://www.justice.gov/usao/justice-101/federal-courts (explaining that the Fifth Circuit Court of Appeals comprises the federal district courts in Texas, Louisiana, and Mississippi).

Second, and Third Circuits, where the majority of current offshore wind project development work is ongoing, are few and far between.

1) Section 1333(a)(1) Asserts Federal Jurisdiction

Among its other provisions, OCSLA establishes federal jurisdiction over all submerged lands on the OCS beyond state coastal waters.[41] Under OCSLA:

> The Constitution and laws and civil and political jurisdiction of the United States are extended, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State, to- (i) the subsoil and seabed of the outer Continental Shelf; (ii) all artificial islands on the outer Continental Shelf; (iii) installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources, including non-mineral energy resources; or (iv) any such installation or other device (other than a ship or vessel) for the purpose of transporting or transmitting such resources.[42]

In essence, OCSLA is declaring "exclusive federal sovereignty" over the OCS and activities conducted on the OCS.[43] Specifically, OCSLA applies federal jurisdiction to "the subsoil and seabed" of the OCS, "all artificial islands on the" OCS, "installations and other devices … attached to the seabed, which may be erected thereon for the purpose of … producing … non-mineral energy resources," and "any such installation or other device (other than a ship or vessel) for the purpose of transporting or transmitting such resources."[44]

That is, OCSLA does not attach federal jurisdiction to the navigable waters over the OCS, nor does it apply if a structure, which would otherwise activate jurisdiction, is not erected on the OCS for the purposes of "exploring for, developing, or producing," or "transporting or transmitting" the resources included within the

41. 43 U.S.C. § 1333(a)(1)(A)(i).

42. *Id.* §§ 1333(a)(1)(A)(i)-(iv).

43. *See* Robertson, *supra* note 37, at 496-97 (explaining how "exclusive federal jurisdiction" within the statute is akin to "exclusive federal sovereignty").

44. 43 U.S.C. §§ 1333(a)(1)(A)(i)-(iv).

statute.[45] The first of these distinctions, that OCSLA does not apply to the navigable waters, leaves to maritime jurisdiction disputes that occur afloat. As to the second distinction, the fact that "non-mineral energy resources" are now included within the text of the statute largely rules out any argument that offshore wind is not a "resource" under OCSLA.

2) Section 1333(a)(2)(A) Applies the Law of Each Adjacent State

After asserting federal jurisdiction over the OCS, Congress then directs that "[t]o the extent that they are applicable and not inconsistent with" federal law, the "laws of each adjacent [s]tate" applies to "that portion of the subsoil and seabed of the [O]uter Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the [O]uter Continental Shelf."[46] OCSLA, therefore, does not impose adjacent state law without limit. Adjacent state law only applies to the extent that state laws are "not inconsistent with … other Federal laws and regulations."[47] That is, "where federal law addresses the relevant issue, state law is not adopted as surrogate federal law on the OCS."[48]

The locations where OCSLA adjacent state law attaches are generally referred to as OCSLA or OCS situses.[49] Whether or not OCSLA applies adjacent state law may significantly impact litigation related to offshore wind activities on the OCS. If OCSLA applies adjacent state law to a controversy, courts consider adjacent state law to be a congressional mandate which precludes parties from choosing to contract around the law of the adjacent state.[50]

45. *Id.* §§ 1333(a)(1)(A)(iii), (iv).

46. *Id.* § 1333(a)(2)(A).

47. *Id.*

48. Parker Drilling Mgmt. Servs., Ltd. v. Newton, 139 S. Ct. 1881, 1886 (2019).

49. *See* Union Tex. Petroleum Corp. v. PLT Eng'g, Inc., 895 F.2d 1043, 1047 (5th Cir. 1990); Texaco Expl. & Prod., Inc. v. AmClyde Engineered Prods. Co., 448 F.3d 760, 774 (5th Cir. 2006) (quoting *Union Tex. Petroleum Corp.*, 895 F.2d at 1047).

50. Petrobras Am., Inc. v. Vicinay Cadenas, S.A., 815 F.3d 211, 215 (5th Cir. 2016) (explaining that "[b]ecause [OCSLA's] choice of law scheme is prescribed by Congress, parties may not voluntarily contract around Congress's mandate" and further noting that "the Supreme Court has held that

That is, OCSLA preempts contract choice of law provisions.[51] The imposition of adjacent state law is a meaningful variable that stakeholders need to consider when planning their operations and devising contracting structures. A party who believes they are acting under one set of laws may be unpleasantly surprised to find that another, the laws of the adjacent state, are instead to be applied to their circumstances by a court.

One additional element of Section 1333(a)(2)(A) is that Congress charged the President with determining and publishing the projected state boundaries within the Federal Register.[52] To date, no President has published the projected state boundaries onto the OCS. The lack of published boundaries adds an additional wrinkle when considering how to apply OCSLA jurisdiction, as just which state is adjacent may not be clear.

III. CURRENT CASE LAW INTERPRETING AND APPLYING OCSLA JURISDICTION

Case law interpreting and applying OCSLA is primarily focused on answering two questions: first, does OCSLA apply to the circumstances of the case? And second, if it does, what body of law is used to adjudicate the case? The second question is often concerned with whether to apply maritime law or the law of the adjacent state to the dispute. The U.S. Supreme Court provides guidance in two key rulings on OCSLA, and the Fifth Circuit provides most of the relevant examples implementing and applying the statute.

Any inquiry into applying OSCLA begins with the Supreme Court's decision in *Rodrigue v. Aetna Casualty & Surety Co.*[53] In *Rodrigue*, the Court found that, under OCSLA, Louisiana state law applied as surrogate federal law in two wrongful death cases where

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Section 1333(a) 'supersede[s] the normal choice of law rules that the forum would apply.'"). *See generally* 43 U.S.C. § 1333(a)(2)(A).

51. *Petrobras Am., Inc.*, 815 F.3d at 215.

52. 43 U.S.C. § 1333(a)(2)(A). *See generally* Federal Outer Continental Shelf (OCS) Administrative Boundaries Extending from the Submerged Lands Act Boundary seaward to the Limit of the United States Outer Continental Shelf, 71 Fed. Reg. 129-31 (Jan. 3, 2006) (containing maps of the administrative boundaries that the Minerals Management Service developed for the coastal states in the Atlantic, Gulf of Mexico, and Pacific regions).

53. *See Union Tex. Petroleum Corp.*, 895 F.2d at 1047. *See generally* Rodrigue v. Aetna Cas. and Sur. Co., 395 U.S. 352 (1969).

workmen were killed in accidents on offshore drilling rigs.[54] The lower courts deciding the suits first held that neither OCSLA nor state law applied, finding that the only remedies available to the families came through the Death on the High Seas Act.[55] The Supreme Court took up the case on appeal and found that OCSLA did apply and proceeded to use Louisiana law as the adjacent state law.[56]

In deciding *Rodrigue*, the Supreme Court established the framework for the current Fifth Circuit test to determine jurisdiction and apply OCSLA.[57] The Court answered the first question by determining that the drilling rigs were "artificial islands" and that OCSLA therefore applied to the lawsuits stemming from the workers' deaths.[58] The Court then reviewed the requirements of the statute and found that "[i]t is evident from [OCSLA] that federal law is 'exclusive' in its regulation of this area, and that state law is adopted only as surrogate federal law."[59] The Court then set out to answer the second question and determine whether federal law or adjacent state law should apply.

In the absence of any relevant federal law, OCSLA imposes adjacent state law *as* federal law.[60] The *Rodrigue* Court explained that "federal law, because of its limited function in a federal system, might be inadequate to cope with the full range of potential legal problems," and that "the Act supplemented gaps in the federal law with state law."[61] Absent any specific federal statutes or regulations that applied to the circumstances of the case, or application of maritime law in admiralty jurisdiction (given that the OCS is

54. *Rodrigue*, 395 U.S. at 354-55.

55. *Id.* at 353.

56. *Id.* at 355.

57. *See generally Union Tex. Petroleum Corp.*, 895 F.2d at 1047 (describing the Court's holding in *Rodrigue*).

58. *Rodrigue*, 395 U.S. at 355.

59. *Id.* at 357 (analyzing OCSLA's language, which states that "the adjacent State's laws were made 'the law of the United States for [the relevant subsoil and seabed] and artificial islands and fixed structures erected thereon,' but only to 'the extent that they are applicable and not inconsistent with other Federal laws'").

60. 43 U.S.C. § 1333(a)(2)(A); *see, e.g.*, Parker Drilling Mgmt. Servs., Ltd. v. Newton, 139 S. Ct. 1881, 1889 (2019).

61. *Rodrigue*, 395 U.S. at 357; *see* 43 U.S.C. § 1333(a)(2)(A).

surrounded by navigable waters), adjacent state law would apply.[62] In *Rodrigue*, the Court analyzed whether maritime law applied to the circumstances on the drilling rigs, and found that it did not:

> "The accidents in question here involved no collision with a vessel, and the structures were not navigational aids. They were islands, albeit artificial ones … and the accidents had no more connection with the ordinary stuff of admiralty than do accidents on piers."[63]

The *Rodrigue* Court went on to note that "[e]ven if the admiralty law would have applied to the deaths occurring in these cases under traditional principles, the legislative history shows that Congress did not intend that result."[64] The Court then explained that because "Congress assumed that . . . admiralty law would not apply unless Congress made it apply," and because Congress chose to apply adjacent state law instead of admiralty law, then OCSLA situses are "to be treated as islands or as federal enclaves within a landlocked State, not as vessels."[65] Therefore, in *Rodrigue*, the Supreme Court provides the path to answer whether maritime law applies.

The Supreme Court, in *Parker Drilling Mgmt. Servs., Ltd. v. Newton*, explored whether other federal law (besides maritime law) applied in a case by examining when state law was "applicable" and "not inconsistent" with federal law.[66] In *Parker*, the Court held "that where federal law addresses the relevant issue, state law is not adopted as surrogate federal law on the OCS."[67] The Court explained "that state laws can be 'applicable and not inconsistent' with federal law under § 1333(a)(2)(A) only if federal law does not address the relevant issue" and that "[g]iven the primacy of federal law on the OCS and the limited role of state law, it would make little sense to treat the OCS as a mere extension of the adjacent

62. *See Rodrigue*, 395 U.S. at 357-58.

63. *Id.* at 360.

64. *Id.* at 361.

65. *Id. See also id.* at 365-66 (explaining further that "it is apparent that . . . Congress decided that these artificial islands, though surrounded by the high seas, were not themselves to be considered within maritime jurisdiction").

66. Parker Drilling Mgmt. Servs., Ltd. v. Newton, 139 S. Ct. 1881, 1887-88 (2019) ("The question in this case is how to interpret the OCSLA's command that state laws be adopted as federal law on the OCS '[t]o the extent that they are applicable and not inconsistent' with other federal law.").

67. *Id.* at 1886.

State, where state law applies unless it conflicts with federal law."[68] Because "the OCS is not, and never was, part of a State," the court found that state law could not apply "of its own force."[69]

Parker dispels the notion that OCSLA sets up a conflict between federal and state law, and instead the Court points out that "[b]ecause federal law is the only law on the OCS, and there has never been overlapping state and federal jurisdiction there," OCSLA "does not present [an] ordinary question [of] pre-emption cases —*i.e.*, whether a conflict exists between federal and state law."[70] To the Court, OCSLA asks first whether federal law applies, because "to the extent federal law applies to a particular issue, state law is inapplicable."[71] The Court ultimately held, that where federal legislation addressed the minimum wage, California minimum wage law did not apply.[72] Taken together, *Rodrigue* and *Parker* define the thresholds for determining whether federal law (as either maritime or some other federal law) or adjacent state law applies to controversies on the OCS.

The Fifth Circuit has long served as the home waters for OCSLA litigation and the Fifth Circuit's test to determine which law to apply is arguably the operating standard. In *Union Texas Petroleum Corp. v. PLT Engineering, Inc.*, the Fifth Circuit pronounced that in disputes arising on the OCS, the law of the adjacent state applies as surrogate federal law under OCSLA so long as three conditions are met:[73]

1) "The controversy must arise on a situs covered by OCSLA (i.e. the subsoil, seabed, or artificial structures permanently or temporarily attached thereto)."[74]

68. *Id.* at 1889.
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.* at 1893.
73. Union Tex. Petroleum Corp. v. PLT Eng'g, Inc., 895 F.2d 1043, 1047 (5th Cir. 1990); *see also* Texaco Expl. & Prod., Inc. v. AmClyde Engineered Prods. Co., 448 F.3d 760, 774 (5th Cir. 2006).
74. *Union Tex. Petroleum Corp.*, 895 F.2d at 1047.

2) That "[f]ederal maritime law must not apply of its own force" to the circumstances of that controversy.[75]

3) And that "[t]he state law must not be inconsistent with Federal law."[76]

This overarching *PLT* test remains the threshold in the Fifth Circuit from which courts explore both tort and contract cases. Courts approaching OCSLA litigation for the first time with the widespread development of offshore wind may have opportunities to interpret the statute and apply *Rodrigue*, *Parker,* and maritime law with fresh perspectives.

Until 2009, the Fifth Circuit did not have a consistent approach to apply *PLT* in a way that considered the differences between tort and contract cases.[77] Following an en banc hearing, where the entire Fifth Circuit reviewed the issue, the Fifth Circuit, in *Grand Isle*, overruled five of its prior opinions to distinguish between how it applies OCSLA to contract and tort cases.[78]

A last note of analysis on maritime jurisdiction versus OCSLA's application of adjacent state law is that courts may allow OCSLA jurisdiction to be raised on appeal even if the issue is not preserved in a lower court.[79] The Fifth Circuit notes that "[b]ecause Congress has delineated among admiralty, federal law and adjacent

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75. *Id.*

76. *Id.* The U.S. Supreme Court's discussion in *Parker,* detailed in part above, is the primary lens through which to review the third prong of the *PLT* test. *Parker Drilling Mgmt. Servs., Ltd.*, 139 S. Ct. at 1887-88. Because the nuances of determining whether a particular state law is inconsistent with any federal law is decidedly case-sensitive, this paper does not address the *Parker* analysis or the third prong of *PLT* in detail.

77. *See* Grand Isle Shipyard, Inc. v. Seacor Marine, LLC, 589 F.3d 778, 781 (5th Cir. 2009) (discussing how some of the Fifth Circuit's previous contract cases have "looked to the site of the tort to determine the situs of the controversy," while others have applied the focus-of-the-contract test, which "looks to where the contract contemplates that most of the work will be performed," before ultimately holding "that the focus-of-the-contract test is the appropriate test to apply in determining the situs of the controversy in contract cases").

78. *Id.* at 787-88. *See also id.* at 785 ("Although it is clear that *Rodrigue* and *Tallentire* provide the situs rule for tort cases, it does not follow that contract cases triggered by an underlying tort depend on the situs of that tort, i.e., the location of that occurrence.").

79. *See* Petrobras Am., Inc. v. Vicinay Cadenas, S.A., 815 F.3d 211, 215 (5th Cir. 2016).

state law in OCSLA, the parties may not avoid, whether voluntarily or inadvertently, the statutory choice."[80] Therefore, a party may be able to raise, at any point during litigation, the issue of OCSLA jurisdiction, whereas a party can only invoke admiralty jurisdiction in its pleadings.[81]

A. *Tort Jurisdiction Under OCSLA*

Torts comprise a broad category of civil wrongs other than a breach of contract, including claims of products liability, personal injury, and negligence.[82] State common law principles are generally applied to resolve tort cases, however, torts that occur at sea can fall under maritime tort jurisdiction, and if a federal statute does not govern, can be adjudicated under maritime common law.[83] The Fifth Circuit determines whether to apply state law as surrogate federal law or maritime law to a tort occurring on the OCS with the *PLT* test.[84]

1) Does the Tort Controversy Arise on an OCSLA Situs?

The first prong of the *PLT* test looks to establish whether OCSLA jurisdiction can even attach. For OCSLA to apply, "[t]he controversy must arise on a situs covered by OCSLA (i.e. the subsoil, seabed, or artificial structures permanently or temporarily attached thereto)."[85] An OCSLA situs can be "installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources, including non-mineral energy resources"[86] or

80. *Id.*

81. FED. R. CIV. P. 9(h).

82. *Tort*, BLACK'S LAW DICTIONARY (11th ed. 2019).

83. *See* 46 U.S.C. §§ 30301-08 (containing provisions of the Death on the High Seas Act); *see also* Texaco Expl. & Prod., Inc. v. AmClyde Engineered Prods. Co., 448 F.3d 760 (5th Cir. 2006); Rodrigue v. Aetna Cas. and Sur. Co., 395 U.S. 352 (1969).

84. *See generally* Union Tex. Petroleum Corp. v. PLT Eng'g, Inc., 895 F.2d 1043, 1047 (5th Cir. 1990).

85. *Id.*; *Texaco Expl. & Prod., Inc.*, 448 F.3d at 774 (quoting *Union Tex. Petroleum Corp.*, 895 F.2d at 1047). *See generally* 43 U.S.C. § 1333(a)(2)(A).

86. 43 U.S.C. § 1333(a)(1)(A)(iii).

"any such installation or other device (other than a ship or vessel) for the purpose of transporting or transmitting such resources."[87]

In *PLT*, the Fifth Circuit looked to the characteristics of the "installation" in question (an oil pipeline) and found that it was "buried beneath the ocean floor," and was "connected to a platform at one end" and "to a transmission line at the other."[88] The court reiterated that the oil pipeline fell within OCSLA because "[t]he locations where the substantial work was done were covered situses—the subsoil or seabed; an artificial island; and an installation for the production of resources."[89] In a subsequent case, *Texaco Exploration and Production, Inc. v. AmClyde Engineered Products Co., Inc.*, the Fifth Circuit applied the *PLT* test and found that a products liability claim related to offshore oil and gas production arose in circumstances occurring on an OSCLA situs.[90] The court noted that "the claims are inextricably linked to the construction of a platform permanently fixed to the [OCS] for the purposes of development[91] [of energy resources] and would not have arisen but for such development."[92] The platform in question was "designed to flex with the forces of wave, wind, and current" and "is fixed permanently to the Outer Continental Shelf."[93]

Once the connection to the OCS is sufficiently determined for the controversy to come within the ambit of OCSLA, the court must then turn to the second phase of inquiry and decide whether to apply maritime law or adjacent state law.

2) Does Maritime Tort Jurisdiction Apply of Its Own Force?

The Fifth Circuit looks to the principles of general maritime law to determine if maritime jurisdiction applies to the circumstances of a tort on the OCS.[94] The Fifth Circuit relies on the Supreme Court's precedents in *Sisson* and *Grubart* to determine maritime

87. *Id.* § 1333(a)(1)(A)(iv).
88. *Union Tex. Petroleum Corp.*, 895 F.2d at 1047.
89. *Id.* at 1047-48.
90. *Texaco Expl. & Prod., Inc.*, 448 F.3d at 774.
91. 43 U.S.C. § 1331(l) (defining "development" as "activities which take place following discovery of minerals in paying quantities, including . . . *platform construction* . . ." (emphasis added)).
92. *Texaco Expl. & Prod., Inc.*, 448 F.3d at 774.
93. *Id.* at 765.
94. *See id.* at 770.

jurisdiction over torts based on a two-part test of location and connection to maritime activity.[95]

i. Location

The Fifth Circuit notes that the location test of OCSLA-related tort claims may be "easily satisfied," often because the parties do not have much to dispute if the tort occurred either on a vessel or upon navigable waters.[96] In particular, "[t]he location prong asks whether the incident occurred on 'navigable waters' or, if injury occurred on land, whether it was caused by a vessel on navigable waters."[97] To answer that inquiry, the Fifth Circuit "consider[s] where the wrong 'took effect' rather than the locus of the tortious conduct."[98]

In *Petrobras Am., Inc. v. Vicinay Cadenas, S.A.*, the Fifth Circuit ultimately determined that Louisiana Law applied under OCSLA to claims of negligence, products liability, and failure to warn after finding that a faulty buoyancy can tether chain used in oil production facilities on the Gulf of Mexico did not fall under maritime law.[99] The Fifth Circuit noted that although the tether chain "was affixed to the seabed" – a circumstance that ordinarily falls comfortably within OCSLA's attachment of adjacent state law to "fixed structures erected" on the seabed – the court nonetheless was swayed to find "that the tortious activity here 'took effect' in navigable waters with the severance of the" tether chain "deep in the waters of the Gulf of Mexico."[100]

Thus, the Fifth Circuit presents the seemingly incongruous view that the site of a tort can be both an OCSLA situs but that the location where the tort "takes effect" is within maritime tort jurisdiction.

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95. *Id.* at 770-71. *See generally* Sisson v. Ruby, 497 U.S. 358 (1990); Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527 (1995).

96. *Texaco Expl. & Prod., Inc.*, 448 F.3d at 770. *See also Sisson*, 497 U.S. at 360-61 ("As this Court stated the test in *The Plymouth*, . . . 'Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance.'").

97. Petrobras Am., Inc. v. Vicinay Cadenas, S.A., 815 F.3d 211, 216 (5th Cir. 2016).

98. *Id.*

99. *Id.* at 218.

100. *Id.* at 216. *See generally id.* at 217-18 (explaining further how the tether chain incident failed the connection test, leading to the court's conclusion that maritime law does not apply).

ii. Connection

To find a connection to maritime activity the Fifth Circuit applies at a two-part test.[101] First, the Fifth Circuit looks to determine if the underlying incident of the tort "has the potential to disrupt maritime commerce" and next asks "whether the general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity."[102] In a claim of negligence and products liability stemming from the failure of a crane during the construction of an oil exploration tower in the Gulf of Mexico, the Fifth Circuit provided useful context to assess the connection of the incident to maritime law.[103] The barge-mounted crane was lifting a portion of the tower when it failed, which "caused the deck section that was then suspended . . . to fall into the Gulf of Mexico on the [OCS]."[104] The court noted that because the construction project did not relate to traditional maritime activities, but instead was for "the development of the resources of the Outer Continental Shelf," the "complaint would not exist but for the construction of the … tower, an activity undeniably covered by OCSLA."[105] The Fifth Circuit went further, and critically for OCSLA-related activities, explained that "[t]o the extent that maritime activities surround the construction work underlying the complaint, any connection to maritime law is eclipsed by the construction's connection to the development of the Outer Continental Shelf."[106] Although the Fifth Circuit in *Texaco* opined on the connection to maritime jurisdiction, it did not delve deeply into the two parts of the test; the rather summary finding that OCS construction was not traditional maritime activity preempted further analysis into the disruption of maritime commerce or relationship to maritime activity.

In a subsequent case, the Fifth Circuit explored additional factors for consideration in determining whether a tort on the OCS

101. *See Texaco Expl. & Prod., Inc.*, 448 F.3d at 770-71.

102. *Id. See also* Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 533-34 (1995).

103. *Texaco Expl. & Prod., Inc.*, 448 F.3d at 765.

104. *Id.*

105. *Id.* at 771.

106. *Id.*

can disrupt maritime activity.[107] When the tether chains connecting the buoyancy cans in *Petrobras* failed and the equipment sank, the Fifth Circuit found that the incident did "not have the potential to disrupt maritime commercial or navigational activities on or in the Gulf of Mexico."[108] The court looked to the alleged disruption in the case and pointed out that the only "disruption affected oil and gas production and development activities rather than navigation or traditional maritime commerce."[109] The court even considered the role that a vessel played in the incident and noted that the vessel's purpose was "unrelated to the disruption of navigation or maritime commerce activity because the [vessel's] only purpose was to store and process the oil in a fixed location for later transport."[110] Likewise, the court was unswayed by the argument that the floating debris from the incident disrupted maritime navigation, finding the hazard presented "no more than a de minimus potential to disrupt maritime commerce or navigation."[111]

Ultimately, the *Petrobras* court found that neither disruption nor connection to traditional maritime activity brought the negligence claims under maritime jurisdiction.[112] The *Petrobras* court then pointed to the Fifth Circuit's prior ruling in *Texaco* to find that "tort claims resulting from the failure of the tether chain are all 'inextricably intertwined' with . . . oil and gas production and development operations on the Outer Continental Shelf."[113] With the determination that maritime law did not apply of its own force, the Fifth Circuit found that Louisiana law applied.[114]

The key takeaway from the Fifth Circuit's precedents determining tort jurisdiction in OCSLA-related cases is the court's deference to Congress' intention that OCSLA apply adjacent state

107. *See* Petrobras Am., Inc. v. Vicinay Cadenas, S.A., 815 F.3d 211, 217 (5th Cir. 2016) (explaining that "[c]ases from the Supreme Court and this circuit interpret potential disruption of maritime commerce in terms of the incident's effect on the navigability of the waterways).

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 218.

113. *Id.*

114. *Id.*

law. In both the *Texaco* and *Petrobras* cases, the Fifth Circuit considered the underlying activity's connection to resource development on the OCS and not just the narrow circumstances of the tort.[115] By looking to the "general character of the activity giving rise to the [incident]," the Fifth Circuit necessarily looks toward the OCS.[116] When the underlying activity at issue is OCSLA-authorized offshore development, a court may therefore be unlikely to find that a tort is connected to maritime activity.

B. *Contract Jurisdiction Under OCSLA*

On numerous occasions, courts have found that parties cannot circumvent OCSLA to choose between maritime law or a state's laws in their contracts.[117] Because Congress itself mandates within OCSLA that adjacent state law applies as surrogate Federal law, courts (including the U.S. Supreme Court) have determined that parties may not contract around Congress' choice to apply the law of the adjacent state on the OCS.[118] Therefore, the only way a party can avoid adjacent state law is for a contract to fall within maritime law jurisdiction. Just as it does with tort cases, the Fifth Circuit uses the three-part *PLT* test to determine whether maritime law or adjacent state law applies to contract cases.[119]

If a contract is deemed to be under maritime jurisdiction, any enforceable choice of law or indemnity provision adopted within the contract would apply.[120] In the event that adjacent state law is applied, various states have anti-indemnity statutes that limit the enforceability of indemnity provisions in certain contracts and

115. *Id.* at 217-18; Texaco Expl. & Prod., Inc. v. AmClyde Engineered Prods. Co., 448 F.3d 760, 770-71 (5th Cir. 2006). *See also* Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 534 (1995) (explaining that it is necessary for a court to consider, in part, "the general features of the type of incident involved" in assessing the tort's connection with maritime activity).

116. *Petrobras Am., Inc.*, 815 F.3d at 216; *see also Texaco Expl. & Prod., Inc.*, 448 F.3d at 770-71.

117. *Petrobras Am., Inc.*, 815 F.3d at 215; *see also Texaco Expl. & Prod., Inc.*, 448 F.3d at 772; Union Tex. Petroleum Corp. v. PLT Eng'g, Inc., 895 F.2d 1043, 1050 (5th Cir. 1990).

118. *Petrobras Am., Inc.*, 815 F.3d at 215. *See generally* 43 U.S.C. § 1333(a)(2)(A).

119. *See Union Tex. Petroleum Corp.*, 895 F.2d at 1047.

120. *See, e.g.*, Baloney v. Ensco Offshore Co., 570 F. App'x. 423, 425 (5th Cir. 2014); Corbitt v. Diamond M. Drilling Co., 654 F.2d 329, 332 (5th Cir. 1981); *see also, e.g.*, Hoda v. Rowan Cos., 419 F.3d 379, 380 (5th Cir. 2005).

Congress' mandate within OCSLA for adjacent state law will likely override any choice of law provisions within the contract.[121]

1) Does the Contract Controversy Arise on an OCSLA Situs?

When seeking to determine if a contract controversy arises on an OCSLA situs, the Fifth Circuit conducts the analysis called for under the first prong of the *PLT* test.[122] In short, the Fifth Circuit will find that OCSLA will apply if "[t]he locations where the substantial work was done were covered situses—the subsoil or seabed; an artificial island; and an installation for the production of resources."[123]

The Fifth Circuit clarified how to determine the situs of contract claims in *Grand Isle Shipyard, Inc. v. Seacor Marine, LLC*.[124] There, the court sought to decide whether an indemnity clause within a contract would be upheld under maritime law or struck down if OCSLA applied adjacent state law.[125] The indemnification clause was activated after an employee fell and was injured aboard a vessel while being transported from a work platform to a residential platform.[126] The court noted that there was "no reason to apply tort analysis to determine where the contractual controversy arose" and that "[i]t makes more sense to apply a focus-of-the-contract test and say that a contractual dispute—the 'controversy' under the first condition of the *PLT* test—arises under an OCSLA situs if a majority of the work called for by the contract is on stationary platforms or other enumerated OCSLA situses."[127]

The *Grand Isle* court explained that "we hold that, in determining the first condition of the *PLT* test, a contractual indemnity claim (or any other contractual dispute) arises on an OSCLA situs if a majority of the performance called for under the

121. *See generally Petrobras Am., Inc.*, 815 F.3d at 215; *see, e.g.*, Grand Isle Shipyard, Inc. v. Seacor Marine, LLC, 589 F.3d 778, 781 (5th Cir. 2009).

122. *See Union Tex. Petroleum Corp.*, 895 F.2d at 1047. *See also* discussion *supra* Section III(A)(1).

123. *Union Tex. Petroleum Corp.*, 895 F.2d at 1047-48.

124. *See* Grand Isle Shipyard, Inc. v. Seacor Marine, LLC, 589 F.3d 778, 787 (5th Cir. 2009).

125. *Id.* at 781.

126. *Id.*

127. *Id.* at 787.

contract is to be performed on stationary platforms or other OCSLA situses enumerated in 43 U.S.C. § 1333(a)(2)(A)."[128] Also within *Grand Isle*, the court provided insight on how to determine whether the focus-of-the-contract is an OCSLA situs when the contract consists of a master service agreement and work orders.[129] The Fifth Circuit explained that unless the master service agreement declares otherwise, "courts should ordinarily look to the location where the work is to be performed pursuant to the specific work order rather than the long term blanket contract."[130] Where contract "claims are inextricably linked to the construction of a platform permanently fixed to the [OCS] for the purposes of development [of energy resources]," the Fifth Circuit is likely to find that the controversy arises on an OCSLA situs.[131] That the underlying tort occurred on a vessel will not be sufficient for the contract to fall under maritime jurisdiction.[132]

2) Does Maritime Contract Jurisdiction Apply of Its Own Force?

Similar to its approach with tort claims, the Fifth Circuit applies a test derived from general maritime law to determine if a contract is a maritime contract.[133] The Fifth Circuit's test is similar to the traditional maritime law test, however the Fifth Circuit has implemented certain oil and gas-centric shortcuts.[134] As discussed

128. *Id. See also* Christopher B. Ortte, *Grand Isle III's Tarpon Rodeo: The Confused Seas Of OCSLA & Maritime Law in the Fifth Circuit*, 5 LA. STATE UNIV. J. OF ENERGY L. & RES. 231, 246 (2017) (providing commentary that the court's decision "effectively merged the [test's] first and second prongs").

129. *Grand Isle Shipyard, Inc.*, 589 F.3d at 787 n.6.

130. *Id.*

131. *See* Texaco Expl. & Prod., Inc. v. AmClyde Engineered Prods. Co., 448 F.3d 760, 774 (5th Cir. 2006).

132. See *Grand Isle Shipyard, Inc.*, 589 F.3d at 787-88 ("A number of our cases have determined situs in a contractual indemnity case not by looking at the focus of the contract, but rather looking at where the underlying accident occurred which gave rise to the indemnity claim. Many of those cases, we believe, ultimately reach the correct result for other reasons, and with respect to the extent (and only to that extent) the 'tort' analysis was used in those cases to determine situs, we disagree and overrule that portion of those opinions.")

133. *See In re* Larry Doiron, Inc., 879 F.3d 568, 574-75 (5th Cir. 2018).

134. *Id.* at 575-76 ("[W]e adopt the following two-pronged test to determine whether a contract in this context is maritime: First, is the contract one to provide services to facilitate the drilling or production of oil and gas on navigable waters? . . . Second, if the answer to the above question is 'yes,' does the contract provide or do the parties expect that a vessel will play a

further below, those shortcuts present potential challenges to contract disputes in the offshore wind industry. The line of inquiry to determine if a contract is maritime originates from the U.S. Supreme Court's ruling in *Norfolk Southern Railway Co. v. Kirby* where the Supreme Court held that "[w]hen a contract is a maritime one, and the dispute is not inherently local, federal [maritime] law controls the contract interpretation."[135]

The Fifth Circuit looks to the "primary objective"[136] of the contract to determine if the contract is made in furtherance of maritime commerce.[137] That determination "'depends upon . . . the nature and character of the contract', and the true criterion is whether it has 'reference to maritime service or maritime transactions.'"[138] That is, courts look beyond "the place of the contract's formation or performance" to the contract's underlying purpose to determine the objective of the contract.[139] *Kirby* presented circumstances related to bills-of-lading (which the Supreme Court notes are "essentially, contracts") for transportation of cargo by sea from Australia to Georgia and then by rail from Georgia to Alabama.[140] The Court examined the "primary objective" of the contracts and determined that because the essence of the contract was for transportation by sea (that is, maritime commerce) with incidental transport over land, the contracts fell under maritime law.[141]

The Fifth Circuit later developed a two-part test to apply *Kirby* to development on the OCS in the oil and gas industry.[142] The Fifth Circuit takes a shortcut to answer the question of maritime commerce and laid out its two-prong test in *Doiron*.[143] First, the

substantial role in the completion of the contract? If so, the contract is maritime in nature."). *But see* Barrios v. Centaur L.L.C., 942 F.3d 670, 678 (5th Cir. 2019) (recognizing that caselaw does not adequately define the scope of "maritime commerce," and "[a]s a result, 'most courts resort to a case-by-case approach, relying heavily on precedent'").

135. Norfolk S. Ry. Co. v. Kirby, 543 U.S. 14, 22-23 (2004).
136. *In re Larry Doiron, Inc.*, 879 F.3d at 574 (quoting *Kirby*, 543 U.S. at 24).
137. *Kirby*, 543 U.S. at 25.
138. *Id.* at 24.
139. *Id.*
140. *Id.* at 18-20.
141. *Id.* at 24.
142. *In re* Larry Doiron, Inc., 879 F.3d 568, 575-76 (5th Cir. 2018).
143. *Id.*

Fifth Circuit asks "is the contract one to provide services to facilitate the drilling or production of oil and gas on navigable waters?"[144] The Fifth Circuit notes that its "cases have long held that the drilling and production of oil and gas on navigable waters from a vessel is commercial maritime activity."[145] In short, the first question seeks to answer whether the primary objective of the contract is maritime commerce?[146] If the answer to the first question is yes, the Fifth Circuit then asks, "does the contract provide or do the parties expect that a vessel will play a substantial role in the completion of the contract?"[147] If the court finds in the affirmative to both questions, then the contract is maritime and maritime law will apply of its own force.

i. Is the Primary Objective of the Contract Maritime Commerce?

The contract at issue in *Doiron* was an oral work order issued under a master service contract for repairs to a gas well on a stationary platform in Louisiana waters.[148] The work order called for a two-man team and no vessels, however, after running into challenges with the project, the work crew summoned additional equipment and required the use of a barge-mounted crane.[149] While lifting equipment onto the stationary platform, one of the workers was injured and the parties involved filed indemnification claims.[150] The Fifth Circuit explained that if the contract was maritime, the indemnity provision would be enforced, if not, Louisiana law would apply and the provision would be struck down.[151] The *Doiron* court, referring to Fifth Circuit precedent finding oil and gas development on navigable waters to be maritime commerce, found the primary objective of the contract to be maritime commerce.[152] Ultimately, however, the Fifth Circuit found that the *Doiron* contract was not a

144. *Id.* at 576.
145. *Id.* at 575.
146. *Kirby*, 543 U.S. at 24.
147. *In re Larry Doiron, Inc.*, 879 F.3d at 576.
148. *Id.* at 569-70.
149. *Id.* at 570.
150. *Id.*
151. *Id.*
152. *Id.* at 577.

maritime contract because a vessel did not play a substantial role in the completion of the contract.[153]

As noted in *Doiron,* the Fifth Circuit broadly considers offshore oil and gas development to be maritime commerce.[154] The Fifth Circuit expanded the use of the *Doiron* test beyond the oil and gas industry in *Barrios v. Centaur, L.L.C.*[155] In *Barrios*, the Fifth Circuit explained that with "non-oil-and-gas contracts," the first question should be replaced with "whether … the contract is 'one to provide services to facilitate [activity] on navigable waters?'" (brackets in original).[156] The *Barrios* court found that the contract at issue (for construction on a dock in the Mississippi River via crane barge) was a maritime contract even though it was not a contract related to offshore oil and gas production.[157] The contract at issue "required services to be performed to facilitate the loading, offloading, and transportation of coal and petroleum coke via vessels on navigable waters."[158] The Fifth Circuit therefore seems to expand, through *Barrios,* the definition of maritime commerce to include a wider range of activity occurring on navigable waters.

Significantly however, neither *Doiron* nor *Barrios* implicated OCSLA because the contracts in both cases were carried out within state waters.[159] As the Fifth Circuit reflected on in *PLT*, and the U.S. Supreme Court explored in *Rodrigue,* Congress "had the power to treat activities on the [OCS] as though they had occurred aboard ship and were thus maritime" in nature, and yet instead "Congress decided not to make [maritime law] apply."[160] Therefore, OCSLA plays a significant role in determining whether an activity occurring on the OCS falls under maritime law. In *PLT*, the string of disputed contracts were concerned with the

153. *Id.*
154. *Id.* at 575.
155. *See generally* Barrios v. Centaur L.L.C., 942 F.3d 670 (5th Cir. 2019).
156. *Id.* at 678.
157. *Id.* at 680-81.
158. *Id.* at 681.
159. *In re Larry Doiron, Inc.*, 879 F.3d at 570; *Barrios*, 942 F.3d at 680. *Cf.* Union Tex. Petroleum Corp. v. PLT Eng'g, Inc., 895 F.2d 1043, 1047 (5th Cir. 1990) (providing that "[t]he controversy must arise on a situs covered by OCSLA," thereby making clear that neither controversy in *In re Larry Doiron* nor *Barrios* arose on an OCSLA situs since neither contract was on the OCS).
160. *Union Tex. Petroleum Corp.*, 895 F.2d at 1048 (quoting Rodrigue v. Aetna Cas. and Sur. Co., 395 U.S. 352, 361 (1969)).

construction of an underwater pipeline, a project that required the use of a jack-up barge, multiple other vessels, and underwater divers.[161] The dispute arose in the absence of any tortious action when the contractor failed to make required payments to subcontractors.[162] The Fifth Circuit ruled that the contracts were not maritime, noting that even though the "contracts for the building and completion of the pipeline called for services which were provided from vessels and by divers in the ocean, not on a platform," the contracts were nonetheless made in contemplation of the construction of a facility that "exactly fits the statutory definition of an 'other device[ ] permanently or temporarily attached to the seabed . . . erected thereon for the purpose of . . . developing, or producing resources therefrom.'"[163] The *PLT* court nevertheless allowed that a contract on the OCS can still be found to be a maritime contract if the "controversy bears the type of significant relationship to traditional maritime activities necessary to invoke admiralty jurisdiction."[164]

The Fifth Circuit provides a thorough analysis of when contracts related to OCSLA situses may be considered maritime contracts in its decision in *Laredo Offshore Constructors, Inc. v. Hunt Oil Co.*[165] In *Laredo,* the Fifth Circuit relates the premise "that under the OCSLA, for federal law to oust adopted state law, federal law must first apply independently of the location of the platform or other device at sea."[166] The court pointed to an earlier case where a worker's status as a seaman under the Jones Act "was by itself a sufficient and independent basis for the application of admiralty law."[167] The worker's "status as a seaman depended not on the location of the platforms at sea but upon his assignment to, and

161. *Id.* at 1045-46.

162. *Id.* at 1046.

163. *Id.* at 1047 (quoting 43 U.S.C. § 1333(a)(1)).

164. *Id.* at 1048 (quoting Laredo Offshore Constructors, Inc. v. Hunt Oil Co., 754 F.2d 1223, 1231 (5th Cir. 1985)). *See generally Laredo Offshore Constructors, Inc.*, 754 F.2d at 1233 (holding that the contract in dispute was not a maritime contract and that OCSLA adjacent state law instead applied).

165. *See Laredo Offshore Constructors, Inc.*, 754 F.2d at 1231-33.

166. *Id.* at 1230.

167. *Id.* at 1230-31.

responsibilities on, the tender, which was unquestionably a vessel."[168]

The *Laredo* court distinguishes between contracts which have an independent basis for invoking maritime law from other contracts that fall under OCSLA.[169] For example, the Fifth Circuit notes that a contract to "transport people and supplies in a vessel to and from a well site on navigable waters is clearly a maritime contract," while a contract for construction of a stationary platform is not.[170] The court goes on to explain that "[w]hile the contract no doubt contemplated the hiring of vessels and seamen to build the structure, the subject matter of this case has no direct relationship with these traditional subjects of maritime law."[171] The court holds that "[i]t is fundamental that the mere inclusion of maritime obligations in a mixed contract does not, without more, bring nonmaritime obligations within the pale of admiralty law" on the OCS.[172]

An example of where the Fifth Circuit found a maritime contract can be seen in *Baloney v. Ensco Offshore Co.*[173] There, a jack-up rig was considered to be a vessel and not an OCSLA situs (even though it was jacked-up on the OCS) because the purpose of the contract at issue was for repairs to the vessel in support of the vessel's "primary purpose."[174] That is, when the contract is about the vessel, it may be found to be a maritime contract because the "controversy bears the type of significant relationship to traditional maritime activities necessary to invoke admiralty jurisdiction."[175]

In short, for the Fifth Circuit to find that a contract on the OCS is a maritime contract, the primary objective of the contract must independently establish a "significant relationship to traditional maritime activities."[176] A contract that only "contemplate[s] in part the use of [the] instruments of admiralty" will

168. *Id.* at 1231 (quoting Kimble v. Noble Drilling Corp., 416 F.2d 847, 850 (5th Cir. 1969)).

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. Baloney v. Ensco Offshore Co., 570 F. App'x. 423, 429 (5th Cir. 2014).

174. *Id.* at 427-28.

175. Union Tex. Petroleum Corp. v. PLT Eng'g, Inc., 895 F.2d 1043, 1048 (5th Cir. 1990) (quoting *Laredo Offshore Constructors, Inc.*, 754 F.2d at 1231).

176. *Id.* (quoting *Laredo Offshore Constructors, Inc.*, 754 F.2d at 1231).

not "oust OCSLA-adopted state law."[177] A contract that achieves this standard, must still satisfy the second element of the Fifth Circuit's *Doiron* test.

Therefore, as it pertains to OCSLA-anchored cases, the Fifth Circuit is seemingly distinguishing between a contract to build an OCS situs (not maritime commerce; therefore not a maritime contract) from a contract for services to facilitate activity on the OCS (could be maritime contract if a vessel plays a substantial role in completing the contract).[178]

ii. Does a Vessel Play a Substantial Role in the Completion of the Contract?

If a contract overcomes the first hurdle and is in furtherance of maritime commerce, the Fifth Circuit looks to the second part of the *Doiron* test and seeks to determine if a vessel plays a substantial role in the completion of the contract.[179] In particular, the court values whether the parties expected a vessel to be required to fulfill the contract.[180] To aid in assessing the expectation, the *Doiron* court offers examples for courts to determine whether a vessel plays a substantial role in the contract and notes that parties can present "evidence of the work actually performed and the extent of vessel involvement in the job."[181] Likewise, the Fifth Circuit explains that courts should also consider the role of seamen and vessel crew in a project.[182] However, the court also notes that if a vessel is only needed because of an "unexpected problem," or if it was a mixed contract, performed only in part with a vessel, then a court may

177. *Laredo Offshore Constructors, Inc.*, 754 F.2d at 1231-32.

178. *See Union Tex. Petroleum Corp.*, 895 F.2d at 1048-49; *Laredo Offshore Constructors, Inc.*, 754 F.2d at 1231-32; Earnest v. Palfinger Marine U.S., Inc., 90 F.4th 804, 812-13 (5th Cir. 2024).

179. *In re* Larry Doiron, Inc., 879 F.3d 568, 576 (5th Cir. 2018).

180. *See id.*

181. *Id.* at 577.

182. *Id.* ("It is also conceivable, for example, that the seaman status of a crew . . . could be relevant to whether the vessel involvement was a substantial part of the overall contract. If the contract provided only for work to be done by permanent crewmembers aboard a vessel, the substantial vessel involvement issue would ordinarily be answered. If part of the contract work involves work by crewmembers aboard a vessel and part does not, the work by seaman aboard a vessel would be part of the factual mix that the district court could consider in resolving whether the overall contract involved substantial involvement of a vessel.").

conclude that the use of a vessel was not expected within the contract or did not play a substantial role in the contract.[183]

In *Doiron,* where the contract was deemed nonmaritime, the work "crew encountered an unexpected problem that required a vessel and a crane to lift equipment needed to resolve [the] problem."[184] The Fifth Circuit found that "[t]he use of the vessel to lift the equipment was an insubstantial part of the job and not work the parties expected to be performed."[185] In contrast with *Doiron,* the Fifth Circuit found in *Barrios* that "[t]he . . . [c]ontract makes clear that the parties expected [a barge and tugboat] to play a significant role in the completion of the work."[186] In addition, the court noted that the project proposal indicated that "the parties expected the barge to play a critically important role" in the project and provide "a necessary work platform, an essential storage space for equipment and tools, and a flexible area for other endeavors related to the construction work."[187]

In both *Doiron* and *Barrios*, however, the Fifth Circuit did not have occasion to analyze the interplay between OCSLA and the role of a vessel in the contracts. But in January 2024, the Fifth Circuit provided further insight into applying the second *Doiron* prong to an OCSLA contract.[188] Within its decision in *Earnest v. Palfinger Marine USA, Inc.,* the Fifth Circuit acknowledged its "inconsistent" history in determining contract cases that in the past may have "led to divergent results."[189] The *Earnest* case presented a contract indemnity claim that arose when a lifeboat davit system on an oil platform on the OCS failed during a lifeboat drill.[190] A lifeboat plunged into the sea, killing two workers and injuring another platform worker involved in the drill.[191] The Fifth Circuit noted that the parties did not challenge the first or third prongs of the *PLT* test, but that the second prong, whether the maritime law

183. *See id.*
184. *Id.*
185. *Id.*
186. Barrios v. Centaur L.L.C., 942 F.3d 670, 681 (5th Cir. 2019).
187. *Id.*
188. *See* Earnest v. Palfinger Marine U.S., Inc., 90 F.4th 804, 812-13 (5th Cir. 2024).
189. *Id.* at 811.
190. *Id.* at 807.
191. *Id.*

applied of its own force to the contract, was the source of the appeal.[192]

To address the second prong of *PLT,* the Fifth Circuit applied the *Doiron* test.[193] The *Earnest* decision provides a deeper analysis of just when a vessel plays a substantial role in a contract, finding that for the contract to inspect and repair the oil platform's lifeboats, "the 'nature and character' of the contract is for the repair and maintenance of vessels necessary to support offshore drilling and production of oil and gas, *i.e.*, maritime commerce."[194] The court first finds that lifeboats are vessels and then that the lower court's "focus on 'use,'" of a vessel "and not on whether a vessel will play a substantial role in the completion of the contract, made the lifeboats incidental when instead they are central to performance of this contract."[195]

While the *Earnest* decision helps to further pinpoint when the role of a vessel is "substantial," the role of the vessel is only the second part of the traditional maritime contract jurisdiction inquiry.[196] The first question to determine maritime contract jurisdiction is derived from *Kirby* and asks whether the primary objective of the contract is maritime commerce.[197] The substantial role of any vessels or the expectation of the role of a vessel adds a wrinkle to the question of whether OCSLA adjacent state or maritime jurisdiction applies, but the issue of maritime jurisdiction is still likely to be decided on the purpose of the contract.[198]

C. *Identifying the OCSLA Adjacent State*

OCSLA applies adjacent state law, but just which state is adjacent is often a question to be determined by the courts. The first source to determine adjacency would be the projected state boundary lines published by the President, however, the projected

192. *Id.* at 808.
193. *Id.* at 809-14.
194. *Id.* at 813 (quoting *In re* Larry Doiron, Inc., 879 F.3d 568, 575 (5th Cir. 2018)).
195. *Id.* at 812-13.
196. *See id.* at 808.
197. Norfolk S. Ry. Co. v. Kirby, 543 U.S. 14, 24 (2004). *See also In re Larry Doiron, Inc.*, 879 F.3d at 575-76.
198. *See* Baloney v. Ensco Offshore Co., 570 F. App'x. 423 (5th Cir. 2014).

state boundaries on the OCS have yet to be published.[199] In lieu of published boundaries, the Fifth Circuit has identified multiple factors it considers to determine which state is adjacent to development on the OCS.[200] The court notes, however, that the intent of the parties, as manifested through their contracts, is irrelevant because OCSLA's choice of adjacent state law is mandatory.[201] The factors that courts look to include the "geographic proximity" of the development to the nearby coastal states, any determinations by federal agencies of which state is adjacent to the development,[202] prior court decisions interpreting the adjacency of the development area or development areas similarly situated, and what the projected state boundaries might be.[203] In addition, courts may also consider evidence of how the relevant states view their own adjacency to a development.[204]

Courts on the Fifth Circuit look to establish geographic proximity based on the physical location of the development area.[205] In *Reeves v. B & S Welding, Inc.* the court sought to determine which state was adjacent in order to apply state law to an indemnity claim arising from an injured worker on an offshore platform.[206] The *Reeves* court affirmed the district court's finding that the platform was "closer to the Texas coast than to the

199. Snyder Oil Corp. v. Samedan Oil Corp., 208 F.3d 521, 524 (5th Cir. 2000) ("The President has failed to publish the boundary projections required by OCSLA.").

200. *Id.* at 524 (referring to the court's "adjacency" analysis in Reeves v. B & S Welding, Inc., 897 F.2d 178 (5th Cir. 1990), where the court considered the following four types of evidence: "(1) geographic proximity; (2) which coast federal agencies consider the subject platform to be 'off of'; (3) prior court determinations; and (4) projected boundaries").

201. *Id.* at 525.

202. See *id.*, for the court's explanation that "[a]gency determinations of projected boundaries, or other determinations of a similar nature, make it more probable that if the President does ever 'project boundaries' those boundaries will be consistent with these other agency determinations." However, the Department of the Interior administrative boundaries published in the Federal Register do not fulfill "the President's duty to draw boundaries under OCSLA." Danos & Curole Marine Contractors, Inc. v. BP Am. Prod. Co., 61 F. Supp. 3d 679, 686 (S.D. Tex. 2014).

203. *Id.* at 524.

204. *See id.* at 526-27.

205. *See Reeves*, 897 F.2d at 179; Pittencrieff Res., Inc. v. Firstland Offshore Expl. Co., 942 F. Supp. 271, 277 (E.D. La. 1996).

206. *Reeves*, 897 F.2d at 179.

Louisiana coast" and that various federal agencies considered the particular offshore oil field to be "'adjacent' to Texas, rather than Louisiana."[207] The *Reeves* court also pointed to prior judicial findings that the oil field area was "adjacent to Texas under OCSLA."[208] In *Pittencrieff Resources, Inc. v. Firstland Offshore Exploration Co.*, two parties entered into a joint operating agreement for oil and gas offshore lease areas.[209] The court looked at the distance of the lease areas from the coasts of the nearby states and found that the lease area was "for purposes of the OCSLA, 'adjacent' to the coast of the State of Alabama."[210] The court noted that based on the evidence presented, the leased areas were "located approximately 56 miles from Alabama, 57 miles from Florida, and 64 miles from Louisiana."[211] Because no other evidence was presented by the parties in *Pittencrieff*, the court considered no other factors in determining adjacency.[212]

The Minerals Management Service (MMS), a precursor to BOEM, published its administrative boundaries for the Atlantic Region of the OCS in 2006.[213] BOEM later republished the MMS boundaries to articulate its offshore planning areas and projections for state boundaries within the OCS.[214] As the primary federal

207. *Id.* (noting that "the United States Department of Interior Bureau of Land Management, the United States Department of Interior Mineral Management Service, the National Oceanic & Atmospheric Administration, and the Coast Guard" all considered where the platform was located to be adjacent to Texas).

208. *Id.* at 179-80.

209. *Pittencrieff Res., Inc.*, 942 F. Supp. at 273.

210. *Id.* at 277.

211. *Id.*

212. *See id*. *See generally* Snyder Oil Corp. v. Samedan Oil Corp., 208 F.3d 521, 524 (5th Cir. 2000).

213. Federal Outer Continental Shelf (OCS) Administrative Boundaries Extending from the Submerged Lands Act Boundary seaward to the Limit of the United States Outer Continental Shelf, 71 Fed. Reg. 129 (Jan. 3, 2006). *See generally* Bureau of Ocean Energy Mgmt., *The Reorganization of the Former MMS*, BUREAU OF OCEAN ENERGY MGMT., https://www.boem.gov/about-boem/reorganization/reorganization-former-mms (last visited Mar. 18, 2024) (explaining how MMS was later divided into and replaced by three separate entities, including BOEM).

214. *Compare* Federal Outer Continental Shelf (OCS) Administrative Boundaries Extending from the Submerged Lands Act Boundary seaward to the Limit of the United States Outer Continental Shelf, 71 Fed. Reg. at 129, *with* Bureau of Ocean Energy Mgmt., *Atlantic NAD 83 Federal Outer Continental Shelf (OCS) Administrative Boundaries*, BUREAU OF OCEAN

agency responsible for coordinating development on the OCS, BOEM's administrative boundaries would likely be highly persuasive to a court when determining an adjacent state.[215]

Lastly, if a court applies adjacent state law, it is likely that the substantive law of the adjacent state will apply.[216] The Fifth Circuit has found that it is "beyond any doubt that OCSLA is itself a Congressionally mandated choice of law provision requiring that the substantive law of the adjacent state is to apply even in the presence of a choice of law provision in the contract to the contrary."[217] That is, the adjacent state's choice of law framework will likely not apply and only the law of the adjacent state will apply to the dispute.[218]

IV. APPLYING OCSLA TO OFFSHORE WIND

Disputes arising during the construction or operation of offshore wind farms will likely present questions of jurisdiction to courts without significant experience interpreting and applying OCSLA adjacent state law. Offshore wind development is largely occurring off the Northeast U.S. coast with projects under construction off the coast of Rhode Island and Massachusetts.[219] Other lease areas off the coast of the Mid-Atlantic, Gulf of Mexico, and the West Coast are likely to see development in the coming years.[220]

For courts weighing OCSLA's jurisdiction for the first time, the Fifth Circuit's case law may prove a useful model to determine

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ENERGY MGMT. (Jan. 2010), https://www.boem.gov/sites/default/files/uploadedFiles/BOEM/Oil_and_Gas_Energy_Program/Mapping_and_Data/Administrative_Boundaries/Atl_Plan.pdf.

215. *See Snyder Oil Corp.*, 208 F.3d at 525.

216. *See* Petrobras Am., Inc. v. Vicinay Cadenas, S.A., 815 F.3d 211, 215 (5th Cir. 2016) (describing how the Supreme Court has ruled that 43 U.S.C. § 1333(a), which contains the provision that makes adjacent state law applicable as surrogate federal law, "supersede[s] the normal choice of law rules that the forum would apply").

217. Union Tex. Petroleum Corp. v. PLT Eng'g, Inc., 895 F.2d 1043, 1050 (5th Cir. 1990).

218. *See id.*

219. See Bureau of Ocean Energy Mgmt., *Offshore Renewable Activities*, BUREAU OF OCEAN ENERGY MGMT., https://www.boem.gov/renewable-energy/offshore-renewable-activities (last visited Mar. 18, 2024), for an interactive map that BOEM has published on its website, containing details regarding the status of offshore renewable energy development projects on the OCS.

220. *Id.*

whether an offshore wind related tort or contract controversy arises on an OCSLA situs. Courts could choose to adopt the Fifth Circuit's *PLT* decision and apply the three-pronged test to determine which law to apply to offshore wind projects. Below is a high-level exploration of how the *PLT* test could be applied to offshore wind disputes.

A. *Are Offshore Wind Farms OCSLA Situses?*

The first step in the *PLT* test is to determine if the controversy arises on an OCSLA situs.[221] With the explicit extension of OCSLA to "non-mineral energy resources" in 2021, the question of whether "development" of offshore wind projects constitute OCSLA situses is likely a resolved issue and will not offer many circumstances to argue that an offshore wind farm is not an OCSLA situs.[222] Importantly, OCSLA jurisdiction does not apply if the controversy arises within state waters or on the high seas. OCSLA only applies to the OCS.[223]

1) Tort Jurisdiction

Torts occurring on offshore wind farms located within federal waters on the OCS are likely to be considered OCSLA situses under the Fifth Circuit's approach. The Fifth Circuit case law considers "[c]ontinental shelf platform construction" to be "explicitly included within the OCSLA definition of 'development.'"[224] Structures affixed on the OCS seabed fall within the "statutory definition of an 'other device[ ] permanently or temporarily attached to the seabed . . . erected thereon for the purpose of . . . developing, or producing resources therefrom.'"[225] Monopiles, jackets, and other fixed offshore wind turbine or substation foundations are likely to be considered OCSLA situses given their status as installations attached to the

221. *Union Tex. Petroleum Corp.*, 895 F.2d at 1047.

222. *See generally* 43 U.S.C. § 1333(a)(1)(A)(iii); William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, 134 Stat. 3388.

223. 43 U.S.C. §§ 1333(a)(1)(A)(i)-(iv), 1333(a)(2)(A); Rodrigue v. Aetna Cas. and Sur. Co., 395 U.S. 352, 365-66 (1969).

224. Texaco Expl. & Prod., Inc. v. AmClyde Engineered Prods. Co., 448 F.3d 760, 768 (5th Cir. 2006).

225. *Union Tex. Petroleum Corp.*, 895 F.2d at 1047 (quoting 43 U.S.C. § 1333(a)(1)).

seabed for the purpose of producing "non-mineral energy resources."[226] Individual wind turbines and substations may also be considered "artificial islands" and fall squarely within the statutory definition as such.[227] Other devices, such as jack-up rigs and seabed equipment used for cable laying or trenching would likewise also be considered OCSLA situses if they are "temporarily attached to" or "erected" on the seabed.[228] In fact, the Fifth Circuit has expressly held a jack-up rig to be an OCSLA situs when a worker fell to their death from the jack-up rig.[229]

Lastly, although operational floating wind installations are further away on the development horizon, they will likely present the most challenging question from an OCSLA situs standpoint. Fifth Circuit case law appears mixed with different cases finding both that floating installations are OCSLA situses and that they are not. One case explains that "OCSLA covers fixed platform workers, while floating rig workers, even those whose tasks are essentially identical to the tasks performed by fixed platform workers, are treated differently."[230] Those floating platforms receive a different treatment because "floating rigs are treated like vessels."[231] Vessels are expressly excluded from OCSLA by the statue.[232]

Therefore, a key determinant in whether floating offshore wind is an OCSLA situs may be how vessel-like a floating wind installation is. Dynamically positioned floating platforms, commonly referred to as mobile offshore drilling units (MODUs) are typically considered to be vessels by the Fifth Circuit.[233] A useful description of a dynamically positioned MODU is provided in the

226. 43 U.S.C. § 1333(a)(1)(A)(iii). *See also Union Tex. Petroleum Corp.*, 895 F.2d at 1047-48 (reasoning that the locations where the substantial work for the contracts was to be performed constituted OCSLA situses, including "an installation for the production of resources").

227. 43 U.S.C. § 1333(a)(1)(A)(ii); *See also Rodrigue*, 395 U.S. at 360 (describing an offshore drilling rig as an artificial island on the OCS and therefore not subject to admiralty law).

228. 43 U.S.C. § 1333(a)(1)(A)(iii).

229. Barker v. Hercules Offshore, Inc., 713 F.3d 208, 213 (5th Cir. 2013).

230. Longmire v. Sea Drilling Corp., 610 F.2d 1342, 1348 (5th Cir. 1980).

231. *Id.*

232. 43 U.S.C. § 1333(a)(1)(A)(iv).

233. *See In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex., 808 F.Supp.2d 943, 947, 950 (E.D. La. 2011).

Deepwater Horizon litigation.[234] The Deepwater Horizon rig "was a dynamically-positioned semi-submersible Deepwater drilling vessel" and "[i]t employed a satellite global positioning device and complex thruster technology to stabilize itself" at all times while afloat in position over the well-head.[235] Importantly, the Deepwater Horizon "had no legs or anchors connecting it to the seabed."[236] Likewise, the presence of a distinct "marine crew" that is "responsible for maintaining the location of the vessel" may signify that the floating installation is a vessel and not an OCSLA situs.[237]

In contrast to the typical MODU, a floating offshore wind installation would likely be anchored via mooring lines to the seabed without dynamic positioning or marine crew.[238] Similar to the design proposals for floating offshore wind, the Fifth Circuit has stated that "a floating [Outer Continental Shelf] facility," even though it was classified by the United States Coast Guard, was an OCSLA situs.[239] Ultimately, how a floating wind installation is positioned and anchored to the seabed may be the deciding factor in whether it is deemed to be "permanently or temporarily attached to" or "erected" on the seabed.[240]

A tort occurring on the waters within the designated offshore lease area and not directly on or closely connected to fixed structure may not qualify as an OCSLA situs.[241] However, an OCSLA situs may be found when the tort occurs in "boats in the waters immediately adjacent to [a] platform[]."[242] In *Rodrigue*, the two workers who were killed had been working on fixed platforms on the OCS when they fell from the platforms into boats floating

234. *Id.* at 950.

235. *Id.*

236. *Id.*

237. United States v. Kaluza, 780 F.3d 647, 651 (5th Cir. 2015).

238. *See, eg.*, Matthew Hall, *Floating Offshore Wind Array Design*, NAT'L RENEWABLE ENERGY LAB'Y, https://www.nrel.gov/wind/floating-offshore-array-design.html (last visited Mar. 18, 2024); Emma C. Edwards et al., *Evolution of floating offshore wind platforms: A review of at-sea devices*, RENEWABLE AND SUSTAINABLE ENERGY REVS., June 28, 2023, at 1, 3.

239. *See* Earnest v. Palfinger Marine U.S., Inc., 90 F.4th 804, 806 (5th Cir. 2024).

240. 43 U.S.C. § 1333(a)(1)(A)(iii). *See also* Robertson, *supra* note 37, at 499 (concluding, after having raised concerns about OCSLA's definition of "erected," that the term is likely to mean "'placed,' 'built,' 'assembled,' or 'fashioned'").

241. *See* Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 218-19 (1986).

242. *See id.* at 218.

alongside the platforms.[243] Unlike the circumstances in *Rodrigue,* where the boats were "immediately adjacent to the platforms," the U.S. Supreme Court found that OCSLA did not apply when platform workers died when the helicopter they were riding in crashed into the sea miles away from their work platform.[244] Therefore, tort cases arising from operations within a offshore wind lease area but not directly on an OCS situs may fall under maritime law.

Lastly, it is not likely that courts will see a meaningful distinction between tort claims arising during the construction phase or the post-construction operations phase of a project. The statute is broadly worded to apply to the subsoil, seabed, artificial islands, and other installations and does not distinguish between phases of operation other than the fact that a tort occurring before any physical structure is in contact with the seabed may fall outside of OCSLA.[245]

2) Contract Jurisdiction

Applying the Fifth Circuit's "focus-of-the-contract" test to contracts entered into to facilitate the development of offshore wind would likely lead a court to conclude that contracts to construct an OCSLA situs activate the first prong of *PLT*.[246] In particular, a contract dispute "arises on an OSCLA situs if a majority of the performance called for under the contract is to be performed on stationary platforms or other [enumerated] OCSLA situses."[247] In *PLT,* the Fifth Circuit ruled that OCSLA applied to the contracts in dispute, noting that even though the "contracts for the building and completion of the pipeline called for services which were provided from vessels and by divers in the ocean, not on a platform," the contracts were nonetheless made in contemplation of the

243. Rodrigue v. Aetna Cas. and Sur. Co., 395 U.S. 352, 353-54 (1969).

244. *Tallentire*, 477 U.S. at 218-19.

245. 43 U.S.C. §§ 1333(a)(1)(A)(i)-(iv); See *id.* § 1333(a)(1)(A)(iii), as an indication that the statute may only apply to installations "which may be erected" on the seabed, a distinction that likely means a tort occurring *before* a structure is attached to the seabed would not fall under OCSLA.

246. *See generally* Grand Isle Shipyard, Inc. v. Seacor Marine, LLC, 589 F.3d 778, 781 (5th Cir. 2009); Union Tex. Petroleum Corp. v. PLT Eng'g, Inc., 895 F.2d 1043, 1047 (5th Cir. 1990).

247. *Grand Isle Shipyard, Inc.*, 589 F.3d at 787.

construction of a facility that "exactly fits the statutory definition of an 'other device[ ] permanently or temporarily attached to the seabed . . . erected thereon for the purpose of . . . developing, or producing resources therefrom.'"[248] Therefore, contracts for the construction of offshore wind farms in which "a majority of the performance" of the contract is the building of or working on an offshore wind structure, would likely be found to be OCSLA situses.[249]

Likewise, contracts for the installation of undersea export and array cables will likely be viewed similarly to the pipeline in *PLT*.[250] There, the Fifth Circuit deemed a pipeline that was "buried beneath the ocean floor," and "connected to a platform at one end" and "a transmission line at the other" to be an OCSLA situs.[251] The description of the *PLT* pipeline is similar to that of array cables linking individual turbines to an offshore substation. A court would likely also consider an export cable to be an OCSLA situs based on a similar rationale.

Determining whether a mixed contract dispute arises on an OCSLA situs under the first *PLT* prong may be a more fact-dependent analysis than a tort claim because the "focus-of-the-contract" test requires a thorough inquiry into the contract in order to determine where the majority of performance occurs.[252] Use of bundled contracts, such as those for transport and installation (a T&I contract) or engineering, procurement, construction, and installation contracts (EPCI)[253] may complicate the ability of courts to determine

248. *Union Tex. Petroleum Corp.*, 895 F.2d at 1047 (quoting 43 U.S.C. § 1333(a)(1)).

249. *Grand Isle Shipyard, Inc.*, 589 F.3d at 787.

250. *Cf.* U.S. Customs and Border Prot., *H329630: Coastwise Transportation; Undersea Cable Laying; 46 U.S.C. § 55102; 46 U.S.C. § 55109; 19 C.F.R. § 4.80b; Outer Continental Shelf Lands Act; 43 U.S.C. § 1333.*, U.S. CUSTOMS AND BORDER PROT. (Mar. 9, 2023), https://rulings.cbp.gov/search?term=jones%20act&collection=ALL&sortBy=DATE_DESC&pageSize=30&page=1%2F1000 (stating that OCSLA "extends U.S. jurisdiction to devices attached to the seabed of the OCS for the purpose of producing wind energy, such as the wind energy turbine generators contemplated in the present matter").

251. *Union Tex. Petroleum Corp.*, 895 F.2d at 1047-48.

252. *Grand Isle Shipyard, Inc.*, 589 F.3d at 781.

253. See Blackridge Rsch. & Consulting, *What is an EPC Contract? Here's What You Need to Know*, BLACKRIDGE RSCH. & CONSULTING, https://www.blackridgeresearch.com/blog/what-is-an-epc-contract (last updated Oct. 17, 2023), for more information on engineering, procurement, and construction

where the majority of performance takes place. For example, if a contractor is responsible for both the transport of monopiles or cables from the site of manufacture and the installation of those components on the seabed (via a T&I contract), the determination of whether the majority of performance is in the transport of the installation could have significant impact on the outcome of a dispute. That is, if the transport by vessel constitutes the majority of the work performed, the contract may not be on an OCSLA situs and would likely be under maritime law.[254] When assessing whether or not a contract is a maritime contract, courts consider the duration of a contract (and the amount of time it is performed on a vessel) but also the distribution of the value of the contract between work performed on a vessel and off.[255]

Similarly, an EPCI contract for the design of offshore wind structures or components, the purchasing of the raw materials for those components, the construction or building of the components, and the installation of those components on the OCS may be considered to be an OCSLA contract. Again, a court would likely look to the value of the services performed, and if the majority of the time or value of an EPCI contract refers to the construction of a facility that "exactly fits the statutory definition of an 'other device[ ] permanently or temporarily attached to the seabed,'" a court would likely find that a contract dispute arises on an OCSLA situs.[256]

However, contracts related to offshore wind construction or operations services where the majority of performance does not occur on the stationary structures on the OCS, may not be OCSLA situses. For example, entities engaged in development on the OCS may be able to make use of traditional maritime contracts to charter vessels used in offshore wind construction instead of entering into offshore construction contracts. Contracts that are for the use of a vessel as a vessel may be more likely to remain in maritime law because the focus of the contract would not be the development of an OCSLA situs. Likewise, a contract to transport workers to offshore wind farms via crew transport vessels (CTVs) may not be deemed to be on

(EPC) contracts, another example of a bundled contract that is akin to an EPCI contract.

254. *See Grand Isle Shipyard, Inc.*, 589 F.3d at 781.

255. Barrios v. Centaur L.L.C., 942 F.3d 670, 681 (5th Cir. 2019).

256. *Union Tex. Petroleum Corp.*, 895 F.2d at 1047 (quoting 43 U.S.C. § 1333(a)(1)).

OCSLA situses, and therefore remain under maritime law, even if the contracts with the workers attaches to an OCSLA situs.[257] A court would likely find that a majority of the performance of transport contracts would be maritime and thus under the first prong of *PLT,* the controversy would not arise on an OCSLA situs.[258] Similarly, contract disputes for ancillary services, such as surveying, protected species monitoring, or similar activities occurring on navigable waters in support of offshore wind construction or operations would likely remain under maritime law because they would occur on navigable waters, not on OCSLA situses.

B. *Does Maritime Law apply of its own force to Offshore Wind Development?*

Under the second prong the Fifth Circuit's *PLT* test, courts apply traditional maritime law tests to determine if the circumstances of a tort or a contract fall under maritime law.[259]

1) Offshore Wind and Maritime Torts

The circumstances surrounding torts that arise during offshore wind development are not likely to present particularly new issues for courts. Although offshore wind may be a new industry, the test to determine maritime tort jurisdiction is well-established by the Supreme Court.[260] Courts must look to where the tortious wrong "took effect," and must determine "whether the general character of the activity giving rise to the plaintiff's injury is substantially related to traditional maritime activity."[261] A court must conclude that both factors, a maritime location and connection to maritime

257. *See* Laredo Offshore Constructors, Inc. v. Hunt Oil Co., 754 F.2d 1223, 1231 (5th Cir. 1985) ("An agreement to transport people and supplies in a vessel to and from a well site on navigable waters is clearly a maritime contract."). *Contra Grand Isle Shipyard, Inc.*, 589 F.3d at 781 (holding that "a majority of the contractor's work would be performed on stationary platforms on the OCS, [and that] this should be deemed the relevant 'situs' for the instant indemnity dispute").

258. *See* Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 210 (1986).

259. *See Union Tex. Petroleum Corp.*, 895 F.2d at 1047.

260. *See* Sisson v. Ruby, 497 U.S. 358, 360-61 (1990); Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 531-34 (1995).

261. Petrobras Am., Inc. v. Vicinay Cadenas, S.A., 815 F.3d 211, 216 (5th Cir. 2016).

activity, are satisfied to find that maritime law applies of its own force.[262]

i. Location

Torts occurring on the location of a fixed platform, such as a turbine foundation, offshore substation, or cable installation, would likely only fall under maritime law if the injury "was caused by a vessel on navigable waters."[263] Otherwise, the location of the fixed platforms would like be considered "artificial islands," and be the very type of structures to which Congress choose not to apply maritime law.[264] In that instance, OCSLA would apply adjacent state law to the tort, rather than maritime law.

Particular questions could arise if a vessel is fixed to the seabed, such as a jack-up rig, however, again the Supreme Court has provided guidance that answers this issue.[265] Where a work barge was fixed to the riverbed for piling driving, the Supreme Court saw no issue with considering it a vessel located in navigable waters.[266] In addition, a tort that "takes effect" on a floating wind installation would likely be considered to occur on a maritime locale. In *Petrobras*, the Fifth Circuit noted that a an underwater assemblage that "was affixed to the seabed" was a maritime location because the tort "'took effect' in navigable waters" and the tether chain itself "failed deep in the waters of the Gulf of Mexico."[267] Recall that before considering the maritime law prong of the *PLT* test, the court must first find that the tort (the controversy) arose on an OCSLA situs.[268] The important distinction here is that a court may determine that the situs of the tort (first *PLT* prong) and the location where the tort takes effect (first factor of the second *PLT* prong) can be the same place but have different

262. *Id.*

263. *Id.*

264. *See* Rodrigue v. Aetna Cas. and Sur. Co., 395 U.S. 352, 361, 365-66 (1969).

265. *See Grubart*, 513 U.S. at 535.

266. *Id.*

267. *Petrobras Am., Inc.*, 815 F.3d at 216-17 (determining however, that the tether chain incident failed the connection test and that maritime law did not apply).

268. Union Tex. Petroleum Corp. v. PLT Eng'g, Inc., 895 F.2d 1043, 1047 (5th Cir. 1990).

legal significance.[269] The *Petrobras* situs was OCSLA and yet the tort took effect in navigable waters.[270] A floating offshore wind installation could likewise be both an OCSLA situs and, for the purposes of determining whether maritime tort law applies of its own force, be located in navigable waters.

If a court determines that the tort takes effect on a maritime location, it must next determine that the tortious wrong has sufficient connection to maritime activity. If the tort does not carry sufficient connection, OCSLA would apply adjacent state law.

ii. Connection

The connection to maritime law is a two-part analysis that looks to determine if the tort "has 'a potentially disruptive impact on maritime commerce'" and that "'the general character' of the 'activity giving rise to the incident' shows a 'substantial relationship to traditional maritime activity.'"[271] Parties could make the argument that a tort occurring on an offshore wind installation has the potential to disrupt maritime commerce, however, the Fifth Circuit has distinguished torts occurring during an offshore construction project.[272] When the tether chains connecting the buoyancy cans in *Petrobras* failed and the equipment sank, the Fifth Circuit found that the incident did "not have the potential to disrupt maritime commercial or navigational activities."[273] The court pointed out that the only "disruption affected oil and gas production and development activities rather than navigation or traditional maritime commerce."[274] Similarly, a tort arising during the construction of an offshore wind installation (where, for example components are dropped into the sea due to an equipment failure leads only to a project disruption), a court may be disinclined to find that there is a disruption to traditional

269. *See generally id.*; *Petrobras Am., Inc.*, 815 F.3d at 216.

270. *Petrobras Am., Inc.*, 815 F.3d at 213-14, 216 (describing how the tort occurred *in* navigable waters as opposed to *on* navigable waters, since the tether chains were floating 660 feet under the surface of the Gulf of Mexico).

271. *Grubart*, 513 U.S. at 534 (quoting Sisson v. Ruby, 497 U.S. 358, n.2, 364-65 (1990); *see also* Texaco Expl. & Prod., Inc. v. AmClyde Engineered Prods. Co., 448 F.3d 760, 770-71 (5th Cir. 2006).

272. *See Petrobras Am., Inc.*, 815 F.3d at 217.

273. *Id.*

274. *Id.*

maritime commerce. In that instance, maritime law would likely not attach and OCSLA would apply adjacent state law.

In addition, even if a court determines that there is potential to disrupt maritime commerce, Fifth Circuit case law points out that generally, construction projects do not relate to traditional maritime activities.[275] The Fifth Circuit has previously held that "[t]o the extent that maritime activities surround the construction work underlying the complaint, any connection to maritime law is eclipsed by the construction's connection to the development of the Outer Continental Shelf."[276] Therefore, it may be challenging to convince a court that a tort occurring during the construction phase of an offshore wind installation, presents a sufficient connection to traditional maritime activity for maritime tort law to attach.

It may be easier to find a maritime connection for torts occurring during offshore wind operations and maintenance. The nature of the activity occurring during these phases may present more traditional maritime circumstances. Where the activities are less focused on the construction of an OCSLA situs, but instead are related to the servicing of an OCSLA situs, those activities may look more maritime in nature. That is torts arising during the transport of workers from shore to platform would likely fall within traditional maritime activity.[277] Likewise, any servicing of platforms from a vessel could be deemed to have a connection to traditional maritime activity. However, courts may nonetheless look to instances where the Supreme Court allowed OCSLA to apply adjacent state law when the tort occurred "on boats in the waters immediately adjacent to [fixed] platforms."[278]

In short, while the test to determine whether or not maritime law applies to torts occurring on the OCS is well-known, the specific factual pattern that arises in a particular incident may have significant and meaningful impact on whether or not maritime or adjacent state law applies.

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275. *See Texaco Expl. & Prod., Inc.*, 448 F.3d at 771.

276. *Id.*

277. *See* Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 218-19 (1986).

278. *Id.* at 218 (referencing the respondents' argument that OCSLA governed their cause of action, especially given the Court's prior recognition of "the applicability of state law through OCSLA to accidents that resulted in deaths or injuries not on platforms, but on boats in the waters immediately adjacent to the platforms").

2) Offshore Wind and Maritime Contracts

Under the second prong the *PLT* test, the question of whether maritime law applies of its own force can only be answered by determining whether the primary objective of the contract is maritime commerce and if so, whether "the contract provide[s] or do the parties expect that a vessel will play a substantial role in the completion of the contract."[279]

The Fifth Circuit has noted that "'[i]n the context of contract disputes, the principle underlying *Rodrigue*,'" namely that "'Congress decided not to make [admiralty law] apply'" to activity on the OCS, "'precludes the application of maritime law except in those cases where the subject matter of the controversy bears the type of significant relationship to traditional maritime activities necessary to invoke admiralty jurisdiction.'"[280] That is, if the contract does not sufficiently relate to maritime commerce, and the use of a vessel is nonexistent or insubstantial, the OCSLA will apply adjacent state law to the contract.

i. Is the Primary Objective of the Contract Maritime Commerce?

In regard to "non-oil-and-gas contracts," the Fifth Circuit asks "whether … the contract is 'one to provide services to facilitate [activity] on navigable waters[?]'" (brackets in original).[281] Where a construction contract for a dock where "required services [were] to be performed to facilitate the loading, offloading, and transportation of coal and petroleum coke via vessels on navigable waters," the contract was deemed to be a maritime contract.[282] However, in *PLT*, the Fifth Circuit ruled that the construction contracts for an under water pipeline were not maritime.[283] The court noted that even though the "contracts for the building and completion of the pipeline called for services which were provided from vessels and by divers in the ocean," the contracts were nonetheless made in contemplation of

279. *In re* Larry Doiron, Inc., 879 F.3d 568, 574, 576 (5th Cir. 2018).

280. Union Tex. Petroleum Corp. v. PLT Eng'g, Inc., 895 F.2d 1043, 1048 (5th Cir. 1990) (quoting Rodrigue v. Aetna Cas. and Sur. Co., 395 U.S. 352, 361 (1969), Laredo Offshore Constructors, Inc. v. Hunt Oil Co., 754 F.2d 1223, 1231 (5th Cir. 1985)).

281. Barrios v. Centaur L.L.C., 942 F.3d 678 (5th Cir. 2019) (quoting *In re Larry Doiron, Inc.*, 879 F.3d at 576).

282. *Id.* at 680-81.

283. *Union Tex. Petroleum Corp.*, 895 F.2d at 1047.

the construction of a facility that "exactly fits the statutory definition of an 'other device[ ] permanently or temporarily attached to the seabed . . . erected thereon for the purpose of . . . developing, or producing resources therefrom.'"[284] A contract that arises on an OCSLA situs can nevertheless be a maritime contract if the "controversy bears the type of significant relationship to traditional maritime activities necessary to invoke admiralty jurisdiction."[285]

A construction contract to build an offshore wind installation is unlikely to be a maritime contract unless the controversy bears an independent and significant relationship to maritime activity.[286] Although many construction contracts are likely to contemplate the use of vessels, the fact that the structures to be erected are themselves OCSLA situses is likely to preclude a finding that the primary objective of the contract is maritime commerce.[287] The nuanced difference between the objective of the various agreements within the web of contracts on an offshore wind project may lead to findings that the more significant contracts (particularly those of the tier-one contractors) are not maritime, while some of the smaller, more finite contracts could be maritime.

For example, an EPCI contract for export or array cables or a T&I contract for foundation transport and installation may be considered contracts to develop OCSLA situses and therefore the primary objective of the contract would not be maritime commerce.[288] When the contract in dispute was a stationary platform construction contract, the Fifth Circuit explained that "[w]hile the contract no doubt contemplated the hiring of vessels and seamen to build the structure, the subject matter of this case has no direct relationship with these traditional subjects of maritime law."[289] That is, a contract for the installation of foundations, towers, or turbine components that calls for the use of crane vessels or jack-up rigs, is unlikely to be viewed as a maritime contract even though numerous vessels may be instrumental in carrying out the objective of the contract. Similarly, contracts to place scour

284. *Id.* (quoting 43 U.S.C. § 1333(a)(1)).

285. *Id.* at 1048 (quoting *Laredo Offshore Constructors, Inc.*, 754 F.2d at 1231).

286. *Laredo Offshore Constructors, Inc.*, 754 F.2d at 1231.

287. *See Union Tex. Petroleum Corp.*, 895 F.2d at 1048.

288. *See Laredo Offshore Constructors, Inc.*, 754 F.2d at 1231.

289. *Id.*

protection or to lay cables are also unlikely to be maritime contracts. Any contracts where the primary objective is to place installations on the seabed from a vessel are likely to be viewed by a court as contracts to create OCSLA situses.[290] The use of vessels in any of those contracts is unlikely to shift the perspective of a court unless the contract contains sufficient independent basis to attach maritime law of its own force.[291] Parties may be able to create independent basis for maritime law if they enter into separate contracts for the provision of a vessel (such as a time charter) to be used in the construction of a project.

A court may be persuaded that a separate contract for a vessel to be used in constructing offshore wind installations may be a maritime contract.[292] Likewise, as various types of specialized equipment may be installed on vessels to enable construction of these large and complex offshore structures, contracts to lease or maintain this equipment may fall under maritime law if the equipment is considered part of the vessel. Courts have found that contracts to repair vessel equipment are maritime contracts because the primary objective of the contract is the ability of the vessel to carry out its function.[293] Although the equipment may be necessary to complete the overarching project, the equipment may be viewed as being integral to the vessel's purpose, and therefore maritime.[294] Similarly, contracts to "transport people and supplies in a vessel to and from" a project site will likely be a maritime contract.[295] Contract disputes that arise about the carriage of goods and people on navigable waters are the sort of "controversy [that] bears the type of significant relationship to traditional maritime activities necessary to invoke admiralty jurisdiction."[296]

In addition to contracts for the construction or operation of an offshore wind farm, some parties may consider using a separate indemnity contract from their works contract to avoid OCSLA's

290. *See* 43 U.S.C. § 1333(a)(1)(A)(iii).

291. *See Laredo Offshore Constructors, Inc.*, 754 F.2d at 1231.

292. *See* Baloney v. Ensco Offshore Co., 570 F. App'x. 423, 427 (5th Cir. 2014).

293. *Id.*

294. *See id.*

295. *See Laredo Offshore Constructors, Inc.*, 754 F.2d at 1231.

296. Union Tex. Petroleum Corp. v. PLT Eng'g, Inc., 895 F.2d 1043, 1048 (5th Cir. 1990) (quoting *Laredo Offshore Constructors, Inc.*, 754 F.2d at 1231).

imposition of adjacent state law.[297] When it comes to indemnity contracts, the primary purpose of the contract may be the most consequential hurdle for a party to overcome to enforce indemnification. With a separate indemnity contract, the question that courts will be asked to parse through is whether the primary purpose of the indemnity contract is just the indemnification, or if the indemnification imputes the underlying purpose for which indemnity is sought. An indemnification contract would need to point directly and specifically to the project, parties, and likely, the contract(s) to which the indemnification agreement applies. If the court that is considering the primary purpose of the indemnification contract looks to those other agreements that are underlying the indemnification's purpose and if the purpose of those contracts is to construct an OCSLA situs, the court may feel compelled to find that the primary objective of the indemnity contract is to indemnify for the construction of an OCSLA situs. If that is the case, the court may find that using a separate contract to side-step OCSLA's mandate of adjacent state law goes against the will of Congress.[298] This is not to say, however, that indemnification clauses within contracts are contradicted by OCSLA. While some states may look unfavorably on indemnification, maritime law broadly allows for indemnification contracts.[299]

If a court determines that a contract in which the controversy arises on an OCSLA situs does not have as its primary objective the facilitation of maritime commerce, the contract will be deemed to fall under adjacent state law.[300] If a court instead finds that the primary objective of the contract is maritime commerce, the inquiry

297. See William Durham, *The enforceability of knock-for-knock indemnity clauses in offshore wind construction contracts*, INT'L BAR ASS'N (Mar. 31, 2023), https://www.ibanet.org/clint-march-2023-feature-6, for more information on knock-for-knock indemnity clauses and the theory that a separate indemnification contract would be free to select maritime law in a choice of law clause.

298. *See* Petrobras Am., Inc. v. Vicinay Cadenas, S.A., 815 F.3d 211, 215 (5th Cir. 2016).

299. *See, e.g.*, *Baloney*, 570 F. App'x. at 425; Corbitt v. Diamond M. Drilling Co., 654 F.2d 329, 332 (5th Cir. 1981); Hoda v. Rowan Cos., 419 F.3d 379, 380 (5th Cir. 2005).

300. *See Laredo Offshore Constructors, Inc.*, 754 F.2d at 1231-32; *see also Union Tex. Petroleum Corp.*, 895 F.2d at 1049-50.

does not end there. Next, the court must decide if a vessel plays a substantial role in the completion of the contract.[301]

ii. Does a Vessel Play a Substantial Role?

If a court determines that the primary objective of a contract is to facilitate maritime commerce, the court must then determine if "'a vessel . . . play[s] a substantial role in the completion of the contract.'"[302] A vessel can play a substantial role in the contract without being the object of the contract.[303] Therefore, contracts related to traditional maritime activity that satisfy the first element of the *Doiron* test need only expect "that a vessel will play a substantial role in the completion of the contract" to satisfy the second element.[304] While the nuanced analysis in *Earnest* demonstrates when a vessel plays a substantial role in a contract, and how the role of a vessel can be a broader than "use" of a vessel, that difference may be less significant to offshore wind activities.

Vessels are likely to play substantial roles in most contracts that arise on OCSLA situses related to the construction or operation of offshore wind farms. As noted above, contracts for the installation of fixed structures will likely expect those activities to occur from crane vessels and jack-up rigs. Cable laying and rock installation will also contemplate that those activities will occur from specialized vessels. Transport contracts for people and components will largely expect those activities to occur by vessel but may also occur by helicopter. Therefore, most contracts that pass the first *Doiron* element are likely to expect vessels to play a substantial role in completing the contract.[305]

However, a separate indemnity contract may not satisfy the second element of *Doiron*.[306] Where the indemnity contract covers

301. *In re* Larry Doiron, Inc., 879 F.3d 568, 574, 576 (5th Cir. 2018).

302. Earnest v. Palfinger Marine U.S., Inc., 90 F.4th 804, 812 (5th Cir. 2024) (quoting *In re Larry Doiron, Inc.*, 879 F.3d at 576).

303. *Id.*

304. *In re Larry Doiron, Inc.*, 879 F.3d at 576.

305. *See id.*

306. *See generally id.* (stating that the test of determining whether the contracting parties expected a vessel to play a substantial role in the contract's completion "places the focus on the contract and the expectations of the parties" and "is the proper approach in a contract case and [will] assist[] the parties in evaluating their risks, particularly their liability under indemnification clauses in the contract").

the activity of a vessel or its crew, it could be argued that the vessel plays a substantial role in the completion of the underlying contract. However, the focus of an indemnification contract is a transfer of financial risk and can be entirely completed without a vessel playing a substantial role in providing the indemnification. Therefore, even if an indemnification contract had a maritime primary objective, it would likely fail to satisfy the Fifth Circuit's second *Doiron* element because it is unlikely that a vessel plays a substantial role in the contract[307] Without a vessel playing a substantial role, the contract would likely not be a maritime contract and OCSLA would apply adjacent state law.

C. *Identifying Adjacent State Law*

It is likely that BOEM's administrative boundaries would be a key factor that courts rely on to determine the adjacent state for offshore wind development areas.[308] Although courts have historically looked first to the geographic proximity of a development, the factors have not been "articulate[d] [as] a specific test" and a court may be free to explore the factors out of order.[309] Given BOEM's role in coordinating development on the OCS, BOEM's administrative boundaries would likely be highly persuasive to a court.[310] A court would likely then look next to which state's coast was closest to the offshore development area, followed by interest in adjacency indicated by relevant states involved in the project.[311] Courts may need to look to the parties to provide measurements and may need to devise a process to measure distance.[312] Additionally, the Fifth Circuit case law does not appear

307. *See generally id.*

308. *See Atlantic NAD 83 Federal Outer Continental Shelf (OCS) Administrative Boundaries*, *supra* note 215.

309. Snyder Oil Corp. v. Samedan Oil Corp., 208 F.3d 521, 524 (5th Cir. 2000) (describing how the court will consider the following type of evidence in its "adjacency" analysis: "(1) geographic proximity; (2) which coast federal agencies consider the subject platform to be 'off of'; (3) prior court determinations; and (4) projected boundaries").

310. *See generally id.*

311. *See generally id.* The involvement of multiple states in the approval process for some offshore wind projects (e.g. for Coastal Zone Management Act (CZMA) consistency) may complicate the analysis of adjacency.

312. See Pittencrieff Res., Inc. v. Firstland Offshore Expl. Co., 942 F. Supp. 271, 277 (E.D. La. 1996), for an instance where the court did not articulate how

to divide adjacency within the same development area. Where offshore wind lease areas cross projected state boundaries or BOEM's administrative area boundaries, courts may be challenged to consider different ways to determine which state is "adjacent."

For projects where multiple states are arguably adjacent, such as in lease areas in the waters off the coast of Rhode Island, Massachusetts, and New York, the fact that courts have previously relied on prior judicial determinations of adjacency, could mean that the first instance of a finding of adjacency for a project could be binding on an entire development lease area.[313] Given that courts (and the various stakeholders) would have an interest in promoting consistency, it is unlikely that a particular contract (say for an export cable) could seek a different finding of adjacency from other aspects of a project or development lease area.

While the default may be to find that the geographically closest state is adjacent, there may be valid arguments that another state's law should apply. For example, the geographically closest state may not be related to a particular project (not purchasing any of the electricity) or have only a limited interest in a project such as serving as the site of an export cable landfall. Additionally, projects may sell electricity to multiple states, setting up a circumstance where the geographically adjacent state's law could override the interest of another state for which the project was built.[314] Other factors such as local content requirements may also influence courts. Courts may need to weigh multiple factors and interests to determine adjacency. Although the intent of the *parties* is

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to determine the lease area's distance to the adjacent state, but nevertheless found the lease area to be adjacent to Alabama for purposes of OCSLA given the record's reflection "that the property in question is located approximately 56 miles from Alabama, 57 miles from Florida, and 64 miles from Louisiana").

313. *See generally Snyder Oil Corp.*, 208 F.3d at 522, 524.

314. *But see* Off. of Governor Ned Lamont, *Connecticut, Massachusetts, and Rhode Island Sign First-Time Agreement for Multi-State Offshore Wind Procurement*, OFF. OF GOVERNOR NED LAMONT (Oct. 4, 2023), https://portal.ct.gov/Office-of-the-Governor/News/Press-Releases/2023/10-2023/Connecticut-Massachusetts-and-Rhode-Island-Sign-First-Time-Agreement-on-Offshore-Wind. (describing the three states' offshore wind multi-state coordination memorandum of understanding, whereby the three states "request that offshore wind developers submit multi-state offshore wind project proposals for consideration by the soliciting parties through their respective offshore wind procurements for selection in 2024," which might further complicate the issue of adjacency).

irrelevant to determining the adjacent state, the intent of federal agencies and the states could be highly relevant. Evidence that BOEM, and/or relevant states consider a project to be related to a particular state or states could be used to determine adjacency.[315] Therefore, state requirements for local content, the location of a power purchase agreement (PPA), CZMA consistency determinations, and other factors could all be raised by a party seeking to establish a particular state as adjacent.

Although courts may be inclined to find a sole adjacency, a party could argue that different aspects of a project may have different adjacent states. For example, a party could attempt to argue that an export cable running from an offshore lease area into a state's territorial waters was "adjacent" to that state, even if the overall project's lease area was closer to the coast of a different state. A party would likely need to convince a court that a specific element of a project was distinguishable and differentiated from the lease area or the overall project in order to establish a different adjacency.

Once the adjacent state is determined, courts would then apply the law of the adjacent state to the facts and issues of the case. Perhaps most significant to offshore wind development is the fact that most states have in place laws that restrict indemnification agreements in construction contracts.[316] Depending on whether OCSLA applies adjacent state law and which state is adjacent, the ultimate result of a dispute could be determined early in a case because of jurisdiction.

V. OTHER CIRCUITS APPLYING OCSLA TO OFFSHORE WIND

Other than the Fifth Circuit, the other Federal Circuit Courts have seen little need to develop case law interpreting and applying OCSLA adjacent state law jurisdiction. The Circuit Courts seeing offshore wind disputes for the first time are likely to look to the Fifth Circuit's *PLT* test to apply OCSLA. Distilling down the Fifth

315. *See generally Snyder Oil Corp.*, 208 F.3d at 524. However, this brings up various questions about how federal or state interests are to be expressed in a case; should a federal or state agency take an active role and argue for a particular adjacency determination or do the parties need to present evidence of federal or state agency preference?

316. See RANDY J. MANILOFF ET AL., GENERAL LIABILITY INSURANCE COVERAGE: KEY ISSUES IN EVERY STATE (2021), for a fifty state survey on the permissible scope of indemnification in construction contracts.

Circuit's conceptual approach in *PLT*, the Fifth Circuit takes its underlying maritime law tests for tort and contract jurisdiction and overlays the structure of OCSLA law handed down from the Supreme Court in *Rodrigue*. This framework is likely to be adopted on the other circuits.

All Federal courts must follow Supreme Court precedents. While few (if any) circuits have implemented their own case law to apply Supreme Court precedents on OCSLA jurisdiction to the degree that the Fifth Circuit has, many (if not all) of the circuits have developed and implemented maritime caselaw to adjudicate issues arising on navigable waters within their geographic areas. These circuits, therefore, may choose to develop their own version of the *PLT* test based on *Rodrigue* and apply their own case law on the underlying maritime questions in lieu of the Fifth Circuit's. The circuits, however, may still find Fifth Circuit law to be persuasive, particularly given the experience the Fifth Circuit has deciding OCS-related issues. That the Fifth Circuit has a turbulent history with deciding OCSLA issues may be a point in favor of other circuits applying their own maritime case law in a *PLT*-type test of their own.[317]

Circuits new to OCSLA jurisdiction will have the opportunity to forge a different path from the Fifth Circuit. They will not be burdened by decades of case law conditioned by the offshore oil and gas industry and may consider the offshore wind industry and its policy considerations anew. Similar to how the Fifth Circuit considers the offshore oil and gas exploration conducted from a vessel to be maritime commerce, new circuits could find that offshore wind development is a form of maritime commerce.[318] As an illustration, the First Circuit's test to determine whether a contract is a maritime contract only looks to determine if "the principal objective of a contract is maritime commerce" and does not include a second element requiring that a vessel play a substantial

317. *See* Earnest v. Palfinger Marine U.S., Inc., 90 F.4th 804, 809 (5th Cir. 2024) (referring to the *en banc* court's acknowledgement that 5th Circuit "caselaw distinguishing between maritime and nonmaritime contracts in the offshore oil field context has 'been confusing and difficult to apply' (quoting *In re* Larry Doiron, Inc., 879 F.3d 568, 571 (5th Cir. 2018))).

318. *In re Larry Doiron, Inc.*, 879 F.3d at 575; *see* Barrios v. Centaur L.L.C., 942 F.3d 670, 678 (5th Cir. 2019) (noting that "caselaw doesn't clearly define the boundaries of 'maritime commerce'" (quoting Lightering LLC v. Teichman Grp, LLC, 328 F.Supp.3d 625, 637 (S.D.Tex. 2018))).

role in the completion of the contract.[319] Other circuits may have similarly different tests that still comply with Supreme Court precedent but allow for new approaches to OCSLA. In those instances, the circuits may benefit from using their existing maritime law tests to find the best way to implement their own case law to the circumstances of offshore wind disputes.

VI. CONCLUSION

In conclusion, it is likely that torts arising on offshore wind projects and contracts for the construction of offshore wind farms will fall within OCSLA adjacent state law jurisdiction. OCSLA jurisdiction attaches when a controversy arises "on a situs covered by OCSLA" and "[f]ederal maritime law [does] not apply of its own force."[320] The construction of wind turbines and the laying of export and array cables are activities likely to be considered by courts as occurring on OCSLA situses even if a vessel is involved.[321] OCSLA's choice of law cannot be circumvented by a contract choice of law provision, but parties may be able to structure their contracts in a way to engineer the jurisdiction they seek.[322] However, in the event that adjacent state law is applied, many states within offshore wind development areas have anti-indemnification laws that will limit the enforceability of indemnification provisions in construction contracts. In short, the liability for a tort or contract dispute arising from offshore wind projects is likely to be decided based on which law applies. Whether maritime law or adjacent state law under OCSLA jurisdiction applies is likely to be the deciding factor.

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319. J-Way S., Inc. v. U.S. Army Corps of Eng'rs, 34 F.4th 40, 44 (1st Cir. 2022) (quoting Norfolk S. Ry. Co. v. Kirby, 543 U.S. 14, 25 (2004)). *Contra In re Larry Doiron, Inc.*, 879 F.3d at 575-76.

320. Union Tex. Petroleum Corp. v. PLT Eng'g, Inc., 895 F.2d 1043, 1047 (5th Cir. 1990) (providing, additionally, that the adjacent state law must not contradict federal law as another element to be satisfied).

321. *See id.* at 1047-49.

322. Petrobras Am., Inc. v. Vicinay Cadenas, S.A., 815 F.3d 211, 215 (5th Cir. 2016).