Nos. 07-71457, 07-71989, 07-72183

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALASKA WILDERNESS LEAGUE, NATURAL RESOURCES DEFENSE COUNCIL, and PACIFIC ENVIRONMENT,

RESISTING ENVIRONMENTAL DESTRUCTION ON INDIGENOUS LANDS, a Project of the INDIGENOUS ENVIRONMENTAL NETWORK, CENTER FOR BIOLOGICAL DIVERSITY, and SIERRA CLUB,

NORTH SLOPE BOROUGH and ALASKA ESKIMO WHALING COMMISSION,

Petitioners,

v.

DIRK KEMPTHORNE, Secretary of the Interior, and MINERALS MANAGEMENT SERVICE,

Respondents,

and

SHELL OFFSHORE, INC.,

Respondent-Intervenor.

Petition for Review of Department of Interior Decision

CONSOLIDATED REPLY BRIEF OF PETITIONERS IN NUMBERS 07-71457 AND 07-71989

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INTRODUCTION

Petitioners have shown that the Mineral Management Services' (MMS) failure to examine how Shell's drilling proposal could potentially harm bowhead whales and failure to analyze impacts of a crude oil spill violated the National Environmental Policy Act (NEPA). In response, as to impacts on whales, MMS and Shell rely primarily on previously prepared general lease sale analyses to fulfill their obligation. These documents, prepared before Shell bought its leases and proposed drilling, cannot meet NEPA's requirement to analyze the site-specific impacts of Shell's actual drilling proposal. As to crude oil spill impacts, Respondents continue to assert that agency analysis could ignore entirely such potentially dire consequences even though its own record shows such spills may occur. In the end, Respondents are forced again to rely on the general lease sale level assessments of oil spills, which do not contain an analysis of the potential effects of Shell's proposed plan. Thus, Respondents have not shown that the agency EA, even considered together with the general lease sale analyses, meets NEPA's requirements.

As to Petitioners' argument that potentially significant impacts to bowheads and from a crude oil spill triggers MMS's duty to prepare an EIS, Respondents argue in part that it was not practical to do so. This argument runs counter to Congressional direction, previously recognized by this Court, that all Outer

Continental Shelf Lands Act (OCSLA) processes comply with NEPA. Finally, Respondents' suggestion that the agency can avoid or defer its obligation under OCSLA to obtain and consider information about specific well locations and associated environmental impacts is refuted by the plain language of the statute and regulations.

ARGUMENT

I. THIS COURT HAS JURSIDICTION OVER THE NSB AND REDOIL PETITIONS.

No party has contested this Court's jurisdiction over the timely petition filed by Petitioners Alaska Wilderness League (AWL) et al. challenging the approval of exploration drilling under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370f, and the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1331-1356. Petitioners REDOIL et al. first sought to present their arguments to the agency through an optional administrative appeal. When the Department of Interior refused to grant relief though the administrative appeal process, REDOIL timely filed their petition with this Court. REDOIL joins in the arguments presented in the reply brief of petitioners North Slope Borough and the Alaska Eskimo Whaling Commission (NSB) on the jurisdictional issues.

II. MMS'S FAILURE TO ANALYZE THE IMPACTS OF THE PROPOSED EXPLORATION ACTIVITY VIOLATES NEPA.

Petitioners make two distinct NEPA arguments. First, Petitioners argue that the summary information in the Environmental Assessment (EA) did not fulfill MMS's obligation to take a hard look at the environmental impacts of the exploration proposed. Second, Petitioners argue that there were potentially significant impacts from the proposal that necessitated preparation of an Environmental Impact Statement (EIS). In response, Respondents look to earlier analyses to provide the details missing from the EA challenged here. This strategy fails because, while these documents can provide general information about the nature of impacts, they do not provide site-specific analysis of the exploration plan at issue here.

A. The EA Fails to Take a Hard Look at the Impacts of the Proposed Exploration.

As the Respondents point out, *see* Br. of Resp'ts' (MMS Br.) at 31; Br. of Respondent-Intervenor, Shell Offshore Inc. (Shell Br.) at 8, OCSLA provides for a staged process consisting of four distinct stages: 1) the national five year plan; 2) the lease sale; 3) exploration; and 4) development and production. *See Sec'y of the Interior v. California*, 464 U.S. 312, 337 (1984). NEPA applies at each of these stages. *See Vill. of False Pass v. Clark*, 733 F.2d 605, 609, 614 (9th Cir. 1984) ("NEPA may require an environmental impact statement at each stage: leasing,

exploration, and production and development."). NEPA's tiering concept allows the agency to focus the analysis on the issues that are ripe for decision at each stage. This means that a programmatic EIS can take a broad approach, while subsequent analyses focus on the details of site-specific proposals. In the context of OCSLA, courts have upheld general analysis at the lease sale stage based on the understanding that OCSLA's staged process assures that more thorough analysis will be conducted at subsequent stages. *See Vill. of False Pass v. Watt*, 565 F. Supp. 1123, 1135 (D. Alaska 1983) (suggesting "potential threats to the environment are readily visualized and evaluated" at the OCSLA exploration analysis stage) (quoting *North Slope Borough v. Andrus*, 642 F.2d 589, 595 (D.C. Cir. 1980)).

Contrary to Respondent's assertion that Petitioners "overlook" the tiered nature of this process, MMS Br. at 31; Shell Br. at 7-8, Petitioners' argument is based on this staged process, which allows environmental analysis at the lease-sale stage to be more general and requires additional site-specific analysis when a proposal is made. Despite this principal requiring more detailed analysis at the site-specific stage, Respondents attempt to defend the lack of analysis here by pointing to documents prepared at the lease-sale stage covering the entire Beaufort Sea. The EA at issue here is the first site-specific NEPA analysis of activity on

these leases.[1] This Court has noted, it is "the least troubled by what may seem to be incomplete or speculative data at the lease sale stage." *Tribal Vill. of Akutan v. Hodel*, 869 F.2d 1185, 1192 (9th Cir. 1989). When a specific exploration plan is proposed, the general analysis appropriate to the lease-sale stage must be supplemented by site-specific analysis of the actual proposal. *See* ER 178 (Multi-Sale EIS) (explaining that MMS's tiered NEPA approach "builds on the premise that as both the agencies and companies involved move from general planning, to leasing, to exploration, and to possible development, the specificity of the information improves. The accompanying environmental analysis that flows from each stage also is more specific with respect to location, timing, and magnitude."). Here, as MMS's own analysts acknowledged, this did not happen. *See* ER 934 ("[t]he tiered concept assumes that subsequent environmental documents will be required to focus the analysis on site-specific, project-level issues, impacts, and appropriate mitigation measures developed. In this instance, I definitely do not feel that this has been the case." (emphasis omitted)); ER 921 ("we are always told not to worry about our lease sale analyses, because the specifics will be addressed later. Yet when specific projects do roll around, we are given neither the time nor

[1] Shell's description of the lease sale 195 and 202 EAs as "site specific," Shell Br. at 14, is inaccurate. As Shell acknowledges, "the Multi-Sale EIS covers 9,770,000 acres," Shell Br. at 9, and the subsequent lease sales reoffered the same area. Shell Br. at 14 n.38.

the information necessary to adequately analyze and mitigate the proposed activity").

One of the cases Shell relies upon to argue that the Multi-Sale EIS and lease sale EAs can fulfill MMS's obligation to analyze the specifics of Shell's exploration plan actually stands for the opposite proposition. In *Pit River Tribe v. United States Forest Service*, this Court held that a previous EIS and two previous EAs did not contain sufficient analysis to support the agency's leasing decision. 469 F.3d 768, 784 (9th Cir. 2006). The Court stated, "'when an impact statement is prepared, site-specific impacts need not be fully evaluated until a 'critical decision' has been made to act on site development.' Once a critical decision is made, though, any vague prior programmatic statements are no longer enough." *Id.* (internal citation omitted) (quoting *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1357 (9th Cir. 1994)). Here, a "critical decision" approving an exploration plan has been made and the vague analyses in the lease sale EIS and EAs are no longer adequate.

1. MMS has failed to examine the project specific impacts of the Shell exploration plan on bowhead whales.

Petitioners' opening brief showed that MMS failed to provide a detailed analysis of the impacts of the exploratory activity on bowhead whales—completely failing to analyze the site-specific impacts of ice breaking and failing to take a hard look at the biological impact of admitted migratory deflection.

In response, Respondents allege that the EA is sufficient because the studies cited in the EA discussed the impact of icebreaker noise on whales and the EA itself includes "information regarding the particular types of ice-management vessels that Shell plans to use." MMS Br. at 33 (citing ER 1048-49). The pages of the EA the government cites, however, merely name some of the ships Shell plans to use and provide size information for a subset of these. The EA does not even describe the potential noise output of these boats, let alone analyze the potential biological impact of this noise on migrating and feeding whales.

Given the EA's weakness on this point, Respondents resort to the Multi-Sale EIS's discussion of studies of noise impact on whales. MMS Br. at 33 (citing 123-24; SER 126). Based on these studies, MMS concluded in the Multi-Sale EIS that the impacts of icebreaker noise, "extend commonly out to radii of 10-30 kilometers (6.2-18.6 miles) and sometimes to 50+ kilometers (31.1 miles)." SER 124. MMS also acknowledged in that EIS that "[e]ffects of an actual icebreaker on migrating bowheads, especially mothers and calves, could be biologically significant." *Id.* This discussion, naturally, is general and does not consider the specifics of Shell's subsequent drilling plan. The Multi-Sale EIS, however, does indicate the need for such site-specific analysis, stating "[t]he predicted 'typical' radius of responsiveness around an icebreaker like the *Robert Lemeur* is quite variable, because propagation conditions and ambient noise vary with time and with

location." SER at 124. These variables are the type of considerations that should have been, but were not analyzed here.

Respondents' suggestion that biological impacts to whales from the exploration plan overall were considered is unsupported. Their response acknowledges that industrial activity displaces migrating whales. *See* MMS Br. at 36. As the preceding quote from the Multi-Sale EIS indicates, that EIS did contain a general analysis of the potential impacts of noise to bowhead whales and found that such impacts "could be biologically significant." SER 124. What that EIS could not do is consider whether the specific impacts associated with Shell's proposal would have a significant biological impact on bowheads. Of course, the EIS could not do this since it preceded Shell's acquisition of leases and subsequent development of an exploration plan. As the EIS language MMS quotes indicates, that analysis revealed that "bowheads . . . 'do not seem to travel more than a few kilometers in response to a ***single*** disturbance incident . . . .'" *See* MMS Br. at 36 (emphasis added) (quoting SER 127). The Multi-Sale EIS's conclusion that the energetic cost of displacement would not be great is based on an assumption that the level of activity would be low enough that it would not "cause repeated displacement of specific individuals." SER 127. Shell's proposal, however, includes multiple disturbing activities including two drillships, multiple icebreakers and supply vessels, and aircraft support. Finally, the Federal

Respondents point out that the EIS concluded exploration would likely not serve as a complete barrier to whale migrations. This conclusion is not, of course, tantamount to a conclusion that there would be no biological impacts to whales. *See* AWL Br. at 31-32.

MMS's citations to the EA on this point merely show that the EA discloses past activities have had an impact on migration patterns. *See* MMS Br. at 35 (citing ER 1071-1075). In addition to failing to analyze the location and intensity of Shell's exploration, the EA fails to look at how the admitted deflection of whales will affect those whales. As Shell quotes in its brief, the definition of biological significance is an impact that "'affects the ability of the animal to grow, survive, and reproduce.'" Shell Br. at 33 n.124 (quoting "NRC Guidance on Determining when Noise Causes Biologically Significant Effects"). The EA fails completely to address the question of how the deflection it indicates is likely to occur will affect the deflected whales' ability to grow, survive, and reproduce.

In the end, the EA and record reveal that instead of taking a hard look at the potential of the exploratory drilling to affect bowheads, MMS fell back on uncertain mitigation measures and simply assumed that impacts would not be significant. While the Federal Respondents assert that "MMS imposed numerous mandatory mitigation measures" on Shell's activity, the list it goes on to provide contains only two conditions relevant to noise impacts on whales—monitoring and

a requirement to secure a subsequent Marine Mammal Protection Act incidental harassment authorization (IHA). *See* MMS Br. at 46. Even assuming monitoring is effective,[2] it can only detect impacts after they have occurred. MMS's "reserved authority to modify approved operations," of course, is not a defined mandatory mitigation measure. *Id*. Despite respondents' arguments to the contrary, MMS Br. at 48, n.17, Shell Br. at 57, reliance on such future undefined actions in an attempt to avoid significant impacts is precisely what this Court found unlawful in *National Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 734-46 (9th Cir. 2001).

Moreover, the Respondents cannot rely on *Edwardsen v. United States Department of the Interior*, 268 F.3d 781 (9th Cir. 2001), to support the argument that a requirement to obtain a future IHA with unknown mitigation measures is sufficient to justify the agency's no potentially significant impacts conclusion. MMS Br. at 48-49; Shell Br. at 56. In *Edwardsen*, the Court examined an EIS, not an EA, and found that it "contains an extensive analysis of the volume of carbon

[2] MMS analysts questioned the effectiveness of Shell's monitoring proposal. *See* Pet'rs' Consolidated Further Excerpts of Record (PFER) 9 ("operating drillships and icebreakers do not make good whale-watching platforms"), ER 924 (questioning whether monitoring "will provide any feedback on disturbance" of bowheads far from icebreakers and drill ships and stating, "there is no guarantee that industry is actually living up to their monitoring requirements by actually recording and providing complete marine mammal observations.").

monoxide, nitrogen dioxide, sulfur dioxide, volatile organic compounds, and particulate matter less than 10 microns in diameter that will be emitted during construction, drilling, and operations." 268 F.3d at 789. Thus, the Court did not hold that the agency could omit analysis of the relevant resources based on the prediction that the substantive standard of a different statute would avoid significant impacts.

Similarly, *Okanogan Highlands Alliance v. Williams*, examined the discussion of mitigation measure in an *EIS* not whether an EA properly relied on mitigation measures. *See* 236 F.3d 468, 477 (9th Cir. 2000). In the case of an EIS, there are admittedly significant impacts to be analyzed and the agency's discussion of mitigation measures is merely a part of this analysis. When an agency relies on mitigation measures to avoid a finding of significance and the obligation to prepare an EIS, these measures must be fully developed and analyzed. *See National Parks & Conservation Ass'n*, 241 F.3d at 734 (reciting mitigation measures "'without supporting analytical data,' is insufficient to support a finding of no significant impact.") (quoting *Okanogan Highlands Alliance*, 236 F.3d at 473).

Northwest Environmental Defense Center v. Bonneville Power Administration does not help their cause either because it separately addresses the narrow issue of whether public controversy requires an EIS, *see* 40 C.F.R. § 1508.27(b)(4), and simply posits that an agency may reasonably

conclude such controversy does not warrant an EIS when concerned commentators concluded that a contractual agreement resolves their earlier concerns regarding the draft EA. *See* 117 F.3d 1520, 1536 (9th Cir. 1997). Similarly, this case differs from *City and County of San Francisco v. United States,* 615 F.2d 498 (9th Cir. 1980), where the decision to forego an EIS was not based solely on the requirement to conform to applicable laws. Rather, the agency's environmental assessment considered and deemed adequate methods of pollution abatement and control that were "either currently in use or planned for the immediate future." *Id.* at 501. Moreover, there is no indication that the air, noise or water pollution at issue could have risen to a level of significance. *Id.*

MMS and Shell's attempts to dismiss the myriad record documents revealing agency experts' concerns that the project could have serious impacts are unpersuasive. Far from "cherry-picking," the record reveals that the agency scientists who looked at the proposal universally expressed concerns about the potential impacts. It is telling that neither Shell nor MMS cite any internal documents from the NEPA process in support of the analysis. The Respondents' various attempts to discredit these consistent comments as coming at a "preliminary point," MMS Br. at 52, or as not fully informed are spurious. These criticisms are found in documents from throughout the NEPA process. *See, e.g.*, ER 902 (1/16/07); ER 921 (1/24/07); ER 934-35 (1/26/07); ER 1009-12 (2/07/07).

Moreover, they were written by experts whose opinions were sought out by the agency because of their expertise, not people who failed to "underst[and] the nature of the EP approval," MMS Br. at 52. Indeed, many of these comments came from a principal drafter of the EA. *See* ER 902; ER 908; ER 921; ER 934-35; ER 998.

Ultimately, Shell and MMS go so far as to state that the EA must be reviewed in isolation, without reference to the record. *See* MMS Br. at 51 ("a reviewing court . . . must determine the rationality of the agency decision based on the explanation presented in the final decision."); Shell Br. at 35. This is at odds with a basic tenet of administrative law—a court reviewing agency action determines its legality by examining the entire administrative record. *See Portland Audubon Soc'y v. Endangered Species Committee*, 984 F.2d 1534, 1548 (9th Cir. 1993) ("Section 706 of the APA provides that judicial review of agency action shall be based on the whole record. The whole record includes everything that was before the agency pertaining to the merits of its decision.") (citation and quotations omitted); *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1332 (9th Cir. 1992) (courts reviewing agency decision not to prepare an EIS "carefully review[ ] the record to ascertain whether the agency decision is founded on a reasoned evaluation of the relevant factors.") (citation and quotation omitted). Moreover,

the Court cannot assure itself that the agency has fulfilled NEPA's obligation of full disclosure without examining the record.

2. The EA is inadequate because MMS failed to examine the impacts of a crude oil spill during Shell's exploratory activity.

Respondents' arguments regarding oil spill impacts are inconsistent and ultimately unsuccessful. Respondents first claim that, even though the record shows that a crude oil spill is foreseeable, MMS may refuse to assess the consequences of such a spill, based solely on the fact that it is not likely. The government fails to dispute the NEPA requirement that when an agency's action creates a risk of an accident with potentially dire consequences, the agency must consider the effects together with the likelihood to determine the significance of such action. It nonetheless insists that probability alone justifies MMS's refusal to consider the effects of a crude oil spill. Perhaps recognizing the weakness of their position that MMS could ignore crude oil spill impacts in the EA, Respondents also make the inconsistent argument that MMS has met its obligation to assess spill impacts from this exploration plan because the EA incorporates the general discussion of oil spill impacts from the Multi-Sale EIS and the Lease Sale 202 EA. Respondents fail, however, to respond to Petitioners' argument that the discussions in these documents do not provide the project-specific, site-specific analysis of oil spill impacts that NEPA demands.

Respondents' main defense for its failure to consider the effects of a crude oil spill is that a crude oil spill is too unlikely.[3] MMS Br. at 40-42; Shell Br. at 20-21. This comports in part with the EA where MMS justifies its decision not to assess crude oil spill impacts for this project based on an assumption that no crude oil spills of any size will occur during exploration. ER 1071. The government response acknowledges, however, as it must, that crude oil spills have occurred during exploration drilling on the OCS, including several on the OCS offshore of northern Alaska. ER 1115, 1119-20 (Table II-4); MMS Br. at 41. The government argues, nevertheless, that it need not address oil spill impacts for these exploratory activities because no large crude oil spills have occurred in U.S. OCS waters during exploratory drilling since 1970, but does not claim that such spills have not

[3] Shell's brief confusingly states that the EA considers the effect of small spills. *See* Shell Br. at 19. The EA, however, addresses only a small diesel fuel spill and unequivocally states that "no crude oil spills are assumed from exploration activities." ER 1071.

occurred elsewhere.[4] *Id*. On this point, the government response does not address but cannot avoid its own most recent analysis of the probability of a large or very large crude oil spill for the Beaufort Sea, which reflects a non-negligible risk of a large crude oil spill during exploration, greater even than the probability of a small crude oil spill during exploration.[5] AWL Br. at 17; *see* PFER 21 (2006 Bercha Report).

The likelihood of a crude oil spill during exploration drilling is much higher than other accidents that courts have allowed agencies to ignore as speculative. *See* AWL Br. at 38-39 & n.10; *Ground Zero Ctr. for Non-Violent Action v. United*

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[4] Respondents do assert that there is no indication that any of the well blowouts cited in the Multi-Sale EIS that released 10 million gallons or more of crude oil happened during exploration. MMS Br. at 42 n.13; ER 161. The source cited in the Multi-Sale EIS, however, clearly identifies an exploratory well in Mexican waters of the Gulf of Mexico (Ixtoc I) as the source of a spill of 140 million gallons of crude oil. *See* PFER 31; ER 161; PFER 2. Although this source is not part of the record, it may be considered by the court, because it is referenced in the record and was thus relied upon by MMS. *See Northcoast Envtl. Ctr. v. Glickman*, 136 F.3d 660, 665 (9th Cir. 1998) ("[w]e allow consideration of extra-record materials … when the agency has relied on documents not in the record") (citation and quotations omitted).

[5] The technical report from which MMS derived the probability of large oil spills for the most recent Beaufort Sea lease sale anticipates at least 18.57 large or very large crude oil spills per 10,000 exploration wells. *See* PFER 21 (2006 Bercha Report) (at least 11.07 large spills, at least 4.75 spills of 10,000-150,000 barrels and at least 2.75 spills greater than 150,000 barrels); ER 511 (citing 2006 Bercha Report). Shell proposes to drill up to 12 wells. ER 1047. Thus, the chance of such a spill exceeds 2%.

States Dep't of the Navy, 383 F.3d 1082, 1090 (9th Cir. 2004) (risk of accidental explosion estimated to be "between one in 100 million and one in one trillion"); *see also Sierra Club v. Watkins*, 808 F. Supp. 852, 867-69 & n.24 (D.D.C. 1991) (requiring an EA that had already discussed accidents with probabilities of one in a million to discuss the effects of additional possible accidents the agency concluded were even less likely). Accordingly, it was arbitrary for MMS to conclude, based on probability alone, that a crude oil spill is not reasonably foreseeable.[6]

Moreover, the government does not dispute the NEPA requirement that an agency must consider likelihood and consequences together in order to determine the potential significance of effects from an agency action that creates a risk of an

[6] Respondents' attempt to distinguish *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission*, 449 F.3d 1016 (9th Cir. 2006), is premised on their assumption that the Multi-Sale EIS evaluated the effects of a spill from this project. *See* Shell Br. at 23-24; MMS Br. at 45 n.16. This assumption is incorrect. *See infra* 18-21. Contrary to these arguments, this case is closely analogous to *San Luis Obispo*. There, an agency premised its refusal to assess the potentially significant impacts of a terrorist attack on a nuclear facility based on its determination that the probability of such an attack is low, 449 F.3d at 1028-30, the very same justification relied on by MMS in refusing to assess in the EA the site-specific impacts of a crude oil spill during Shell's exploration activities.

accident with potentially dire consequences.[7] *See* AWL Br. at 39-40. Nor does it argue that a large crude oil spill during Shell's exploratory drilling could not have dire consequences. *See* MMS Br. at 39-46. However, MMS does not assert, nor could it, that in evaluating potential impacts to determine whether they might be significant, the EA considered oil spill risks together with the potentially severe impacts. The EA, in fact, reached its conclusion by assuming that no spills would occur. Thus, MMS's refusal to prepare an EIS without first addressing the effects of such a spill is arbitrary.

Though insisting that MMS bore no obligation to assess the effects of a crude oil spill from this exploration plan under NEPA, Respondents make the inconsistent argument that the EA adequately assess such impacts because it incorporates the discussions from the Multi-Sale EIS and Lease Sale 202 EA of the generic potential effects of a large crude oil spill from a platform or pipeline. *See* Shell Br. at 22-23; MMS Br. at 43-45. But all Respondents can do is recite that the

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[7] Shell makes a misleading argument that *City of New York v. United States Department of Transportation*, 715 F.2d 732 (2d Cir. 1983) gives the agency discretion to ignore the risk of a large crude oil spill simply because the probability is not high. Shell Br. at 24-25. While the court did excuse the agency's decision to ignore the effects of an accident which the record indicated was "'essentially impossible,'" and therefore "added nothing to the risk of high-consequence accidents," *City of New York*, 715 F.2d at 750, it also noted that the agency had considered, as required by NEPA, the effects of low-probability high-consequence accidents, including those that would occur once every one thousand years and once every 300 million years. *Id.*. at 746-47.

Multi-Sale EIS discusses the potential effects to a variety of resources from large oil spills, in general, that might occur throughout the 9.8 million acre Beaufort Sea planning area and that the Lease Sale 202 EA updates this discussion, MMS Br. at 43, which Petitioners have already acknowledged, AWL Br. at 42.[8]

Respondents fail to respond to Petitioners' argument that those lease sale documents do not analyze the site-specific effects to the particular suite of resources that may be affected by a spill from a project with the timing, location, and magnitude of Shell's proposed exploratory activities, as required by NEPA. *See* AWL Br. at 41-43. The closest they come is to state that certain oil spill launch areas projected in the Multi-Sale EIS overlap the leases where Shell

[8] Implicitly acknowledging that a site-specific analysis is required, Shell twice baldly asserts that the Lease Sale 195 EA provided the requisite "*site specific* information." Shell Br. at 14, 22. This unsupported, assertion is false, because like the Multi-Sale EIS, its focus is a Beaufort-wide lease sale, not this exploration plan and, like the Multi-Sale EIS, the Lease Sale 195 EA merely discusses the effects of a generic oil spill in the Beaufort Sea, not the effects of a spill during Shell's particular project. *See, e.g.*, PFER 7-8 (Lease Sale 195 EA at 43-44) (noting that the severity of effects to fish populations depend on the timing and location of a spill and identifying the potential for significant effects to local populations, but not specifying any particular locations where such effects may occur); PFER 5 ("proposed Sale 195 area is identical to that offered in Sale 186."). MMS must not have agreed that this lease sale EA added to the assessment of the consequences of an oil spill, because, while it references all three lease sale documents for a discussion of oil spill *trajectories*, the exploration plan EA references only the Multi-Sale EIS and the Lease Sale 202 EA, but not the Lease Sale 195 EA, for a discussion of oil spill effects, *see* ER 1116, 1131.

proposes to drill, and argue that MMS properly utilized its prior spill trajectory analysis. MMS Br. at 43-44. Describing an oil spill's trajectory, however, is different from identifying, and assessing the significance of, the adverse effects to the specific locations, wildlife populations, and subsistence activities contacted by that oil.[9] Accordingly, MMS misplaces its reliance on *Edwardsen*. While *Edwardsen* condones MMS's decision to use a lease sale spill *trajectory analysis* in a later full scale EIS where the agency evaluated oil spill impacts from a development project, it does not excuse the agency from completing a project-specific *impact assessment*. *See* 268 F.3d at 785-86.

The Multi-Sale EIS does not separately describe, nor assess the significance of, the effects that will result from a spill that originates from each identified potential launch area, but instead generally estimates impacts throughout the 9.8 million acre lease sale area.[10] *See* AWL Br. at 42. The Shell exploration plan EA

[9] Shell represents there is only a 35% likelihood that a large crude oil spill will contact the bowhead migration corridor, *see* Shell Br. at 25, but the EA itself acknowledges "any spill that occurred at a drill site would contact the bowhead migration corridor." ER at 1076; *see* AWL Br. at 15 (quoting ER 936).

[10] Dr. Wilder, who prepared a draft section of the EA that addressed oil spill impacts to polar bears, criticized the failure of the lease sale documents to provide the requisite site-specific analysis. *See* ER 934-35 (specifically discussing polar bears' vulnerability to an oil spill and stating that "the NEPA analysis that has been performed for the lease sales is not focused enough to adequately address the specific issues associated with site-specific activities.").

does not either, of course, because it declines to assess any oil spill impacts based on the assumption that no spills would occur. The EA's conclusory assertion in an appendix that no new significant effects of an oil spill are identified from Shell's project, *see* Shell Br. at 23; ER 1116, does not meet NEPA's requirement for a project-specific assessment. [11]

Ultimately, Respondents miss the fundamental point that the prior discussions of oil spill impacts, based on the "incomplete or speculative data [available] at the lease sale stage," *Tribal Vill. of Akutan*, 869 F.2d at 1192, do not evaluate the project-specific, site-specific effects of a crude oil spill from the exploratory activities proposed by Shell. *See* AWL Br. at 40-42. Nor, of course, does the EA itself. *See, e.g.*, ER 1071. Accordingly, MMS arbitrarily issued a finding of no significant impact in violation of NEPA.

B. NEPA Significance Criteria Require an EIS for the Proposed Exploration.

Although the government states that in "practice" it has chosen to prepare EAs instead of EISs for exploration plans to help it meet the OCSLA thirty-day

[11] MMS fails entirely to rebut AWL's argument that the EA does not analyze project-specific oil spill impacts to polar bears. *See* AWL Br. at 43; ER 497. Instead, MMS merely points to a recitation in the EA that MMS provided information about polar bears to Shell. MMS Br. at 44 n.14. Providing information to Shell, however, does not equate to analyzing the impacts of Shell's exploratory activity, which is what NEPA demands.

timeframe, MMS Br. at 32, it does not argue that this time limit exempts it from NEPA.[12] To the contrary, Congress expressly provided that NEPA applies to all actions MMS takes pursuant to OCSLA.[13] *See* 43 U.S.C. § 1866(a) (providing that

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[12] Shell's suggestion that an EIS is never required for an exploration plan, *see* Shell Br. at 11-12 (stating the statutory time frame "suggests that NEPA's EIS procedures cannot apply to MMS's review of exploration plans under OCSLA"), is contrary to well-established law disfavoring repeals by implication. Shell's argument boils down to an assertion that OCSLA repealed by implication NEPA's requirement that an environmental impact statement precede every major federal action with the potential to significantly affect the environment. 42 U.S.C. § 4332(c). "Repeals by implication are disfavored-'[t]he intention of the legislature to repeal "must be clear and manifest.'"" *Nigg v. U.S. Postal Serv.*, 2007 WL 2410165, at *4 (9th Cir. Aug. 27, 2007) (quoting *Morton*, 417 U.S. 535, 551 (quoting *United States v. Borden*, 308 U.S. 188, 198 (1939))). Because there is no irreconcilable conflict between OCSLA's thirty-day timeframe and NEPA's command that every project that may significantly affect the environment be preceded by an environmental impact statement, MMS must comply with both. *See Morton v. Mancari*, 417 U.S. 535, 550-51 (1974).

[13] Accordingly, this case is dramatically different from *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n*, 426 U.S. 776 (1976) where the relevant statute was enacted before NEPA and the Court had to assume that NEPA's instruction that it apply where not precluded by another statute meant NEPA had to give way to the previously enacted provision. Here, Congress enacted the relevant provision of OCSLA, 43 U.S.C. 1340(c), after NEPA and specifically provided that it did not alter the agency's obligations under NEPA, *see* 43 U.S.C. § 1866(a). In *Westlands Water District v. Dep't of Interior*, unlike here, the relevant provision did not explicitly provide that NEPA was to apply. *See* 43 F.3d 457, 460 (9th Cir. 1994). Indeed, in *Westlands Water District*, another section of the statute explicitly stated that NEPA applied to other obligations, creating the implication NEPA did not apply to the section at issue. Moreover, unlike the exploration approval plan process here, the obligation there was to be performed "upon enactment", and did not provide the agency with discretion that would be informed by NEPA's requirements. *Id*.

unless expressly provided, nothing in the 1978 amendments to OCSLA, which imposed the statutory requirement to approve exploration plans within 30 days, "shall be construed to amend, modify or repeal any provision of" NEPA). This Court has recognized that depending upon the significance of potential impacts, "NEPA may require an environmental impact statement at each stage: leasing, exploration, and production and development." *Vill. of False Pass*, 733 F.2d at 614. MMS regulations also indicate that MMS intends to apply NEPA fully to its review of exploration plans. *See* 30 C.F.R. § 250.232(c) ("The Regional Supervisor will evaluate the environmental impacts of the activities described in your proposed EP and prepare environmental documentation under the National Environmental Policy Act (NEPA) (42 U.S.C. 4321 *et seq*.)"). While the regulations do indicate that MMS normally will begin this process after the application is deemed complete, there is nothing in the regulations prohibiting the agency from beginning the process earlier. Indeed, the regulations indicate that the applicant's duty to submit environmental information is intended to help MMS comply with NEPA. *See* 30 C.F.R. § 250.227(a)(3).

Here, there is ample evidence in the record that the exploratory drilling program may significantly affect the environment. *See* NSB Br. at 39-51; AWL Br. at 8-18; *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1998). As discussed further in the NSB reply brief, several significance factors identified

in the governing regulations are triggered here, and therefore MMS must prepare an EIS. *See* 40 C.F.R. § 1508.27(b); NSB Reply Br. Sec. III.

III. THE MMS APPROVAL VIOLATES OCSLA.

In arguing that MMS did not violate OCSLA by approving Shell's exploration plan without determining and approving the location of each proposed well and without considering information relevant to site-specific, project specific impacts, Respondents overlook critical applicable regulatory requirements and rely on others that do not support their position.[14]

In arguing that it did not need to ascertain the specific location of each well, the government overlooks the critical regulatory provision, which requires an exploration plan to include a map showing the surface location and water depth "of

[14] Respondents' counter-arguments also raise a red herring. Contrary to Respondents' suggestions, *see* MMS Br. at 61-62; Shell Br. at 58, Petitioners need not demonstrate that the proposed activities will likely cause "serious harm or damage . . . to the marine, coastal, or human environment," 43 U.S.C. § 1334(a)(2)(A)(i), in order to prevail on their arguments that the approval of the exploration plan violates OCSLA. *See* AWL Br. at 45-47. Though it is certainly true that before it approves an exploration plan, MMS must determine that the approved activities will not cause such serious harm, *see* 43 U.S.C. § 1340(c)(1), Petitioners' argument addresses the threshold requirement that MMS must first obtain and evaluate site-specific information when considering an exploration plan, 30 C.F.R. §§ 250.211(b), 250.203. This required site-specific information enables MMS to determine whether the particular activities identified in the plan may cause serious environmental harm. MMS failed to meet these threshold requirements here.

each proposed well" as well as the locations of associated drilling anchor units, 30 C.F.R. § 250.211(b). Without such information, MMS cannot meet its obligation to "review and approve proposed well location and spacing" under Shell's 3-year exploration plan. *See* 30 C.F.R. § 250.203; Oil and Gas and Sulphur Operations in the Outer Continental Shelf—Plans and Information, 70 Fed. Reg. 51,478 51,484 (Aug. 30, 2005) ("A location plat is required for MMS evaluation"). Respondents' only defense is to cite a regulation, 30 C.F.R. § 250.201(c), that might, in some circumstances, allow the Regional Director to relax informational requirements. Respondents provide no explanation of how this regulation might apply, nor any indication that the Regional Director actually invoked such authority in this case to excuse Shell from identifying well locations for 2008 and 2009.[15] MMS Br. at 62-64. Rather, this appears to be a post-hoc rationalization concocted solely as a litigation position, and does not support MMS's actual approval decision in this case. Shell argues that an applicant may modify a plan to identify well locations, but relies on a regulation that authorizes modifications only "[d]uring the review of [a] proposed [exploration plan]" and provides that MMS may reinitiate its

[15] Respondents point only to Shell's explanation, in the Exploration Plan, that it must conduct further seismic surveys to determine where to drill in 2008 and 2009. MMS Br. at 63; SER 256. Respondents offer no support for the idea that exploratory activities at the Sivulliq prospect in one year are necessary for Shell to determine where, in later years, to drill on prospects separated from Sivulliq by up to 80 miles. *See* MMS Br. at 63; ER 1133.

completeness review of any such amended plan. 30 C.F.R. § 250.232(d); Shell Br. at 32. This regulation does not authorize modifications of a plan that has already been approved.

Neither may MMS defer its obligation to consider the location of each well until it receives applications for permits to drill. *See* MMS Br. at 63-64; Shell Br. at 32. MMS regulations make clear that precise well location information must be received before it approves an exploration plan.[16] *See* 30 C.F.R. §§ 250.211(b), 250.231(b), 250.232-.233. Moreover, before it approves an exploration plan, MMS must first determine that there is not "any proposed activity under such plan" that is likely to cause serious environmental harm. *See* 43 U.S.C. §§ 1340(c)(1), 1334(a)(2)(A)(i). In making this determination, MMS reviews, *inter alia*, required information regarding potentially hazardous conditions on or beneath the sea floor for each proposed well, the depth of each proposed well and a scenario for the potential blowout of the well expected to have the most oil, including the time it would take to drill a relief well. *See* 30 C.F.R. §§ 250.214(d), (f), 250.213(g). MMS cannot reasonably make this determination without knowing the location of

[16] Shell misplaces its reliance on an MMS regulation, which provides that in order to obtain subsequent approval to drill a particular well, a company must "[i]nclude the well in your approved Exploration Plan[.]" 30 C.F.R. § 250.410(b); *see* Shell Br. at 32, n.121.

each well.[17] Because MMS failed to determine and approve the location of each well included in Shell's exploration plan, as OCSLA requires, 30 C.F.R. §§ 250.211(b), 250.203, MMS arbitrarily approved the plan.

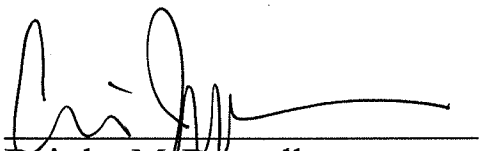
MMS erroneously suggests that Petitioners have not shown that MMS failed to consider any relevant, available environmental information. MMS Br. at 64. As MMS has explained, its regulations require that it obtain project-specific information regarding the specific location of wells and the specific drill ships and associated equipment, 30 C.F.R. §§ 250.211(b), (c), so that it can evaluate the environmental impacts of the proposed activities as necessary to comply with OCSLA, 70 Fed. Reg. at 51,484, and NEPA, *id*. at 51,478 (right col.). Petitioners have shown that MMS failed to consider the site-specific threats to bowhead whales and the project-specific impact of a crude oil spill, AWL Br. at 28-43, 47; *see supra* 6-21. This violates OCSLA. *See* 43 U.S.C. § 1346(d).

[17] When the Regional Supervisor sought guidance from the MMS Gulf of Mexico Region regarding Shell's lack of site specific well information, an analyst from that office indicated they could not approve an exploration plan without proper information on shallow hazards, collected within 500 meters of proposed well sites. *See* PFER 10-11 (email exchange between William Donoghue and Jeffrey Walker Jan. 25 & 30, 2007).

CONCLUSION

For the foregoing reasons, this Court should vacate MMS's approval of the Shell exploration plan and remand it to the agency to comply with NEPA and OCSLA.

Respectfully submitted this 2nd day of November, 2007.



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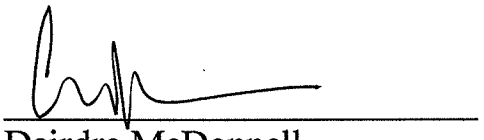
CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP.P. 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBERS 07-71457 AND 07-71989

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached CONSOLIDATED REPLY BRIEF OF PETITIONERS IN NUMBERS 07-71457 AND 07-71989 is proportionately spaced, has a typeface of 14 points, and contains 6919 words.

Dated this 2nd day of November, 2007,



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PROOF OF SERVICE

I, Iris Korhonen-Penn, certify that on November 2, 2007, an original and fifteen (15) copies of the foregoing CONSOLIDATED REPLY BRIEF OF PETITIONERS IN NUMBERS 07-71457 AND 07-71989 were dispatched to the Clerk of the Court, U.S. Court of Appeals for the Ninth Circuit, 95 Seventh Street, San Francisco, California 94103, via courier service, to be delivered before 3:30PM on November 5, 2007. I also certify that on November 2, 2007, two (2) hard copies of the CONSOLIDATED REPLY BRIEF OF PETITIONERS IN NUMBERS 07-71457 AND 07-71989 were served by first-class mail, postage prepaid, on:

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ADDENDUM

National Environmental Policy Act of 1969, 42 U.S.C. § 4332

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 42. The Public Health and Welfare
Chapter 55. National Environmental Policy (Refs & Annos)
Subchapter I. Policies and Goals (Refs & Annos)

➡ § 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall--

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason

of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction. [FN1]

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

CREDIT(S)

(Pub.L. 91-190, Title I, § 102, Jan. 1, 1970, 83 Stat. 853; Pub.L. 94-83, Aug. 9, 1975, 89 Stat. 424.)

Current through P.L. 110-106 approved 10-25-07

END OF DOCUMENT

Outer Continental Shelf Lands Act, 43 U.S.C. § 1334

Effective: August 8, 2005

United States Code Annotated Currentness
Title 43. Public Lands (Refs & Annos)
Chapter 29. Submerged Lands
Subchapter III. Outer Continental Shelf Lands (Refs & Annos)
➡ **§ 1334. Administration of leasing**

(a) Rules and regulations; amendment; cooperation with State agencies; subject matter and scope of regulations

The Secretary shall administer the provisions of this subchapter relating to the leasing of the outer Continental Shelf, and shall prescribe such rules and regulations as may be necessary to carry out such provisions. The Secretary may at any time prescribe and amend such rules and regulations as he determines to be necessary and proper in order to provide for the prevention of waste and conservation of the natural resources of the outer Continental Shelf, and the protection of correlative rights therein, and, notwithstanding any other provisions herein, such rules and regulations shall, as of their effective date, apply to all operations conducted under a lease issued or maintained under the provisions of this subchapter. In the enforcement of safety, environmental, and conservation laws and regulations, the Secretary shall cooperate with the relevant departments and agencies of the Federal Government and of the affected States. In the formulation and promulgation of regulations, the Secretary shall request and give due consideration to the views of the Attorney General with respect to matters which may affect competition. In considering any regulations and in preparing any such views, the Attorney General shall consult with the Federal Trade Commission. The regulations prescribed by the Secretary under this subsection shall include, but not be limited to, provisions--

(1) for the suspension or temporary prohibition of any operation or activity, including production, pursuant to any lease or permit (A) at the request of a lessee, in the national interest, to facilitate proper development of a lease or to allow for the construction or negotiation for use of transportation facilities, or (B) if there is a threat of serious, irreparable, or immediate harm or damage to life (including fish and other aquatic life), to property, to any mineral deposits (in areas leased or not leased), or to the marine, coastal, or human environment, and for the extension of any permit or lease affected by suspension or prohibition under clause (A) or (B) by a period equivalent to the period of such suspension or prohibition, except that no permit or lease shall be so extended when such suspension or prohibition is the result of gross negligence or willful violation of such lease or permit, or of regulations issued with respect to such lease or permit;

(2) with respect to cancellation of any lease or permit--

(A) that such cancellation may occur at any time, if the Secretary determines, after a hearing, that--

(i) continued activity pursuant to such lease or permit would probably cause serious harm or damage to life (including fish and other aquatic life), to property, to any mineral (in areas leased or not leased), to the national security or defense, or to the marine, coastal, or human environment;

(ii) the threat of harm or damage will not disappear or decrease to an acceptable extent within a reasonable period of time; and

(iii) the advantages of cancellation outweigh the advantages of continuing such lease or permit in force;

(B) that such cancellation shall not occur unless and until operations under such lease or permit shall have been under suspension, or temporary prohibition, by the Secretary, with due extension of any lease or permit term continuously for a period of five years, or for a lesser period upon request of the lessee;

(C) that such cancellation shall entitle the lessee to receive such compensation as he shows to the Secretary as being equal to the lesser of (i) the fair value of the canceled rights as of the date of cancellation, taking account of both anticipated revenues from the lease and anticipated costs, including costs of compliance with all applicable regulations and operating orders, liability for cleanup costs or damages, or both, in the case of an oilspill, and all other costs reasonably anticipated on the lease, or (ii) the excess, if any, over the lessee's revenues, from the lease (plus interest thereon from the date of receipt to date of reimbursement) of all consideration paid for the lease and all direct expenditures made by the lessee after the date of issuance of such lease and in connection with exploration or development, or both, pursuant to the lease (plus interest on such consideration and such expenditures from date of payment to date of reimbursement), except that (I) with respect to leases issued before September 18, 1978, such compensation shall be equal to the amount specified in clause (i) of this subparagraph; and (II) in the case of joint leases which are canceled due to the failure of one or more partners to exercise due diligence, the innocent parties shall have the right to seek damages for such loss from the responsible party or parties and the right to acquire the interests of the negligent party or parties and be issued the lease in question;

(3) for the assignment or relinquishment of a lease;

(4) for unitization, pooling, and drilling agreements;

(5) for the subsurface storage of oil and gas from any source other than by the Federal Government;

(6) for drilling or easements necessary for exploration, development, and production;

(7) for the prompt and efficient exploration and development of a lease area; and

(8) for compliance with the national ambient air quality standards pursuant to the Clean Air Act (42 U.S.C. 7401 et seq.), to the extent that activities authorized under this subchapter significantly affect the air quality of any State.

(b) Compliance with regulations as condition for issuance, continuation, assignment, or other transfer of leases

The issuance and continuance in effect of any lease, or of any assignment or other transfer of any lease, under the provisions of this subchapter shall be conditioned upon compliance with regulations issued under this subchapter.

(c) Cancellation of nonproducing lease

Whenever the owner of a nonproducing lease fails to comply with any of the provisions of this subchapter, or of the lease, or of the regulations issued under this subchapter, such lease may be canceled by the Secretary, subject to the right of judicial review as provided in this subchapter, if such default continues for the period of thirty days after mailing of notice by registered letter to the lease owner at his record post office address.

(d) Cancellation of producing lease

Whenever the owner of any producing lease fails to comply with any of the provisions of this subchapter, of the lease, or of the regulations issued under this subchapter, such lease may be forfeited and canceled by an appropriate proceeding in any United States district court having jurisdiction under the provisions of this subchapter.

(e) Pipeline rights-of-way; forfeiture of grant

Rights-of-way through the submerged lands of the outer Continental Shelf, whether or not such lands are included in a lease maintained or issued pursuant to this subchapter, may be granted by the Secretary for pipeline purposes for the transportation of oil, natural gas, sulphur, or other minerals, or under such regulations and upon such conditions

as may be prescribed by the Secretary, or where appropriate the Secretary of Transportation, including (as provided in section 1347(b) of this title) assuring maximum environmental protection by utilization of the best available and safest technologies, including the safest practices for pipeline burial and upon the express condition that oil or gas pipelines shall transport or purchase without discrimination, oil or natural gas produced from submerged lands or outer Continental Shelf lands in the vicinity of the pipelines in such proportionate amounts as the Federal Energy Regulatory Commission, in consultation with the Secretary of Energy, may, after a full hearing with due notice thereof to the interested parties, determine to be reasonable, taking into account, among other things, conservation and the prevention of waste. Failure to comply with the provisions of this section or the regulations and conditions prescribed under this section shall be grounds for forfeiture of the grant in an appropriate judicial proceeding instituted by the United States in any United States district court having jurisdiction under the provisions of this subchapter.

(f) Competitive principles governing pipeline operation

(1) Except as provided in paragraph (2), every permit, license, easement, right-of-way, or other grant of authority for the transportation by pipeline on or across the outer Continental Shelf of oil or gas shall require that the pipeline be operated in accordance with the following competitive principles:

(A) The pipeline must provide open and nondiscriminatory access to both owner and nonowner shippers.

(B) Upon the specific request of one or more owner or nonowner shippers able to provide a guaranteed level of throughput, and on the condition that the shipper or shippers requesting such expansion shall be responsible for bearing their proportionate share of the costs and risks related thereto, the Federal Energy Regulatory Commission may, upon finding, after a full hearing with due notice thereof to the interested parties, that such expansion is within technological limits and economic feasibility, order a subsequent expansion of throughput capacity of any pipeline for which the permit, license, easement, right-of-way, or other grant of authority is approved or issued after September 18, 1978. This subparapraph [FN1] shall not apply to any such grant of authority approved or issued for the Gulf of Mexico or the Santa Barbara Channel.

(2) The Federal Energy Regulatory Commission may, by order or regulation, exempt from any or all of the requirements of paragraph (1) of this subsection any pipeline or class of pipelines which feeds into a facility where oil and gas are first collected or a facility where oil and gas are first separated, dehydrated, or otherwise processed.

(3) The Secretary of Energy and the Federal Energy Regulatory Commission shall consult with and give due consideration to the views of the Attorney General on specific conditions to be included in any permit, license, easement, right-of-way, or grant of authority in order to ensure that pipelines are operated in accordance with the competitive principles set forth in paragraph (1) of this subsection. In preparing any such views, the Attorney General shall consult with the Federal Trade Commission.

(4) Nothing in this subsection shall be deemed to limit, abridge, or modify any authority of the United States under any other provision of law with respect to pipelines on or across the outer Continental Shelf.

(g) Rates of production

(1) The leasee [FN2] shall produce any oil or gas, or both, obtained pursuant to an approved development and production plan, at rates consistent with any rule or order issued by the President in accordance with any provision of law.

(2) If no rule or order referred to in paragraph (1) has been issued, the lessee shall produce such oil or gas, or both, at rates consistent with any regulation promulgated by the Secretary of Energy which is to assure the maximum rate of production which may be sustained without loss of ultimate recovery of oil or gas, or both, under sound engineering and economic principles, and which is safe for the duration of the activity covered by the approved plan. The Secretary may permit the lessee to vary such rates if he finds that such variance is necessary.

(h) Federal action affecting outer Continental Shelf; notification; recommended changes

The head of any Federal department or agency who takes any action which has a direct and significant effect on the outer Continental Shelf or its development shall promptly notify the Secretary of such action and the Secretary shall thereafter notify the Governor of any affected State and the Secretary may thereafter recommend such changes in such action as are considered appropriate.

(i) Flaring of natural gas

After September 18, 1978, no holder of any oil and gas lease issued or maintained pursuant to this subchapter shall be permitted to flare natural gas from any well unless the Secretary finds that there is no practicable way to complete production of such gas, or that such flaring is necessary to alleviate a temporary emergency situation or to conduct testing or work-over operations.

(j) Cooperative development of common hydrocarbon-bearing areas

(1) Findings

(1) Findings

(A) [FN3] The Congress of the United States finds that the unrestrained competitive production of hydrocarbons from a common hydrocarbon-bearing geological area underlying the Federal and State boundary may result in a number of harmful national effects, including--

(i) the drilling of unnecessary wells, the installation of unnecessary facilities and other imprudent operating practices that result in economic waste, environmental damage, and damage to life and property;

(ii) the physical waste of hydrocarbons and an unnecessary reduction in the amounts of hydrocarbons that can be produced from certain hydrocarbon-bearing areas; and

(iii) the loss of correlative rights which can result in the reduced value of national hydrocarbon resources and disorders in the leasing of Federal and State resources.

(2) Prevention of harmful effects

(2) Prevention of harmful effects

The Secretary shall prevent, through the cooperative development of an area, the harmful effects of unrestrained competitive production of hydrocarbons from a common hydrocarbon-bearing area underlying the Federal and State boundary.

CREDIT(S)

(Aug. 7, 1953, c. 345, § 5, 67 Stat. 464; Sept. 18, 1978, Pub.L. 95-372, Title II, § 204, 92 Stat. 636; Aug. 18, 1990, Pub.L. 101-380, Title VI, § 6004(a), 104 Stat. 558; Aug. 8, 2005, Pub.L. 109-58, Title III, § 321(a), 119 Stat. 694.)

Current through P.L. 110-106 approved 10-25-07

END OF DOCUMENT

Outer Continental Shelf Lands Act, 43 U.S.C. § 1340

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 43. Public Lands (Refs & Annos)
Chapter 29. Submerged Lands
Subchapter III. Outer Continental Shelf Lands (Refs & Annos)
➡ **§ 1340. Geological and geophysical explorations**

(a) Approved exploration plans

(1) Any agency of the United States and any person authorized by the Secretary may conduct geological and geophysical explorations in the outer Continental Shelf, which do not interfere with or endanger actual operations under any lease maintained or granted pursuant to this subchapter, and which are not unduly harmful to aquatic life in such area.

(2) The provisions of paragraph (1) of this subsection shall not apply to any person conducting explorations pursuant to an approved exploration plan on any area under lease to such person pursuant to the provisions of this subchapter.

(b) Oil and gas exploration

Except as provided in subsection (f) of this section, beginning ninety days after September 18, 1978, no exploration pursuant to any oil and gas lease issued or maintained under this subchapter may be undertaken by the holder of such lease, except in accordance with the provisions of this section.

(c) Plan approval; State concurrence; plan provisions

(1) Except as otherwise provided in this subchapter, prior to commencing exploration pursuant to any oil and gas lease issued or maintained under this subchapter, the holder thereof shall submit an exploration plan to the Secretary for approval. Such plan may apply to more than one lease held by a lessee in any one region of the outer Continental Shelf, or by a group of lessees acting under a unitization, pooling, or drilling agreement, and shall be approved by the Secretary if he finds that such plan is consistent with the provisions of this subchapter, regulations prescribed under this subchapter, including regulations prescribed by the Secretary pursuant to paragraph (8) of section 1334(a) of this title, and the provisions of such lease. The Secretary shall require such modifications of such plan as are necessary to achieve such consistency. The Secretary shall approve such plan, as submitted or modified, within thirty days of its submission, except that the Secretary shall disapprove such plan if he determines that (A) any proposed activity under such plan would result in any condition described in section 1334(a)(2)(A)(i) of this title, and (B) such proposed activity cannot be modified to avoid such condition. If the Secretary disapproves a plan under the preceding sentence, he may, subject to section 1334(a)(2)(B) of this title, cancel such lease and the lessee shall be entitled to compensation in accordance with the regulations prescribed under section 1334(a)(2)(C)(i) or (ii) of this title.

(2) The Secretary shall not grant any license or permit for any activity described in detail in an exploration plan and affecting any land use or water use in the coastal zone of a State with a coastal zone management program approved pursuant to section 1455 of Title 16, unless the State concurs or is conclusively presumed to concur with the consistency certification accompanying such plan pursuant to section 1456(c)(3)(B)(i) or (ii) of Title 16, or the Secretary of Commerce makes the finding authorized by section 1456(c)(3)(B)(iii) of Title 16.

(3) An exploration plan submitted under this subsection shall include, in the degree of detail which the Secretary may by regulation require--

(A) a schedule of anticipated exploration activities to be understaken [FN1];

(B) a description of equipment to be used for such activities;

(C) the general location of each well to be drilled; and

(D) such other information deemed pertinent by the Secretary.

(4) The Secretary may, by regulation, require that such plan be accompanied by a general statement of development and production intentions which shall be for planning purposes only and which shall not be binding on any party.

(d) Drilling permit

The Secretary may, by regulation, require any lessee operating under an approved exploration plan to obtain a permit prior to drilling any well in accordance with such plan.

(e) Plan revisions; conduct of exploration activities

(1) If a significant revision of an exploration plan approved under this subsection is submitted to the Secretary, the process to be used for the approval of such revision shall be the same as set forth in subsection (c) of this section.

(2) All exploration activities pursuant to any lease shall be conducted in accordance with an approved exploration plan or an approved revision of such plan.

(f) Drilling permits issued and exploration plans approved within 90-day period after September 18, 1978

(1) Exploration activities pursuant to any lease for which a drilling permit has been issued or for which an exploration plan has been approved, prior to ninety days after September 18, 1978, shall be considered in compliance with this section, except that the Secretary may, in accordance with section 1334(a)(1)(B) of this title, order a suspension or temporary prohibition of any exploration activities and require a revised exploration plan.

(2) The Secretary may require the holder of a lease described in paragraph (1) of this subsection to supply a general statement in accordance with subsection (c)(4) of this section, or to submit other information.

(3) Nothing in this subsection shall be construed to amend the terms of any permit or plan to which this subsection applies.

(g) Determinations requisite to issuance of permits

Any permit for geological explorations authorized by this section shall be issued only if the Secretary determines, in accordance with regulations issued by the Secretary, that--

(1) the applicant for such permit is qualified;

(2) the exploration will not interfere with or endanger operations under any lease issued or maintained pursuant to this subchapter; and

(3) such exploration will not be unduly harmful to aquatic life in the area, result in pollution, create hazardous or unsafe conditions, unreasonably interfere with other uses of the area, or disturb any site, structure, or object of historical or archeological significance.

(h) Lands beneath navigable waters adjacent to Phillip Burton Wilderness

Outer Continental Shelf Lands Act, 43 U.S.C. § 1340

The Secretary shall not issue a lease or permit for, or otherwise allow, exploration, development, or production activities within fifteen miles of the boundaries of the Phillip Burton Wilderness as depicted on a map entitled "Wilderness Plan, Point Reyes National Seashore", numbered 612-90,000-B and dated September 1976, unless the State of California issues a lease or permit for, or otherwise allows, exploration, development, or production activities on lands beneath navigable waters (as such term is defined in section 1301 of this title) of such State which are adjacent to such Wilderness.

CREDIT(S)

(Aug. 7, 1953, c. 345, § 11, 67 Stat. 469; Sept. 18, 1978, Pub.L. 95-372, Title II, § 206, 92 Stat. 647; July 19, 1985, Pub.L. 99-68, § 1, 99 Stat. 166.)

Current through P.L. 110-106 approved 10-25-07

END OF DOCUMENT

Outer Continental Shelf Lands Act, 43 U.S.C. § 1346

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 43. Public Lands (Refs & Annos)
Chapter 29. Submerged Lands
Subchapter III. Outer Continental Shelf Lands (Refs & Annos)
➡ **§ 1346. Environmental studies**

(a) Information for assessment and management of impacts on environment; time for study; impacts on marine biota from pollution or large spills

(1) The Secretary shall conduct a study of any area or region included in any oil and gas lease sale or other lease in order to establish information needed for assessment and management of environmental impacts on the human, marine, and coastal environments of the outer Continental Shelf and the coastal areas which may be affected by oil and gas or other mineral development in such area or region.

(2) Each study required by paragraph (1) of this subsection shall be commenced not later than six months after September 18, 1978, with respect to any area or region where a lease sale has been held or announced by publication of a notice of proposed lease sale before September 18, 1978, and not later than six months prior to the holding of a lease sale with respect to any area or region where no lease sale has been held or scheduled before September 18, 1978. In the case of an agreement under section 1337(k)(2) of this title, each study required by paragraph (1) of this subsection shall be commenced not later than 6 months prior to commencing negotiations for such agreement or the entering into the memorandum of agreement as the case may be. The Secretary may utilize information collected in any study prior to September 18, 1978.

(3) In addition to developing environmental information, any study of an area or region, to the extent practicable, shall be designed to predict impacts on the marine biota which may result from chronic low level pollution or large spills associated with outer Continental Shelf production, from the introduction of drill cuttings and drilling muds in the area, and from the laying of pipe to serve the offshore production area, and the impacts of development offshore on the affected and coastal areas.

(b) Additional studies subsequent to leasing and development of area

Subsequent to the leasing and developing of any area or region, the Secretary shall conduct such additional studies to establish environmental information as he deems necessary and shall monitor the human, marine, and coastal environments of such area or region in a manner designed to provide time-series and data trend information which can be used for comparison with any previously collected data for the purpose of identifying any significant changes in the quality and productivity of such environments, for establishing trends in the areas studied and monitored, and for designing experiments to identify the causes of such changes.

(c) Procedural regulations for conduct of studies; cooperation with affected States; utilization of information from Federal, State and local governments and agencies

The Secretary shall, by regulation, establish procedures for carrying out his duties under this section, and shall plan and carry out such duties in full cooperation with affected States. To the extent that other Federal agencies have prepared environmental impact statements, are conducting studies, or are monitoring the affected human, marine, or coastal environment, the Secretary may utilize the information derived therefrom in lieu of directly conducting such activities. The Secretary may also utilize information obtained from any State or local government, or from any

person, for the purposes of this section. For the purpose of carrying out his responsibilities under this section, the Secretary may by agreement utilize, with or without reimbursement, the services, personnel, or facilities of any Federal, State, or local government agency.

(d) Consideration of relevant environmental information in developing regulations, lease conditions and operating orders

The Secretary shall consider available relevant environmental information in making decisions (including those relating to exploration plans, drilling permits, and development and production plans), in developing appropriate regulations and lease conditions, and in issuing operating orders.

(e) Assessment of cumulative effects of activities on environment; submission to Congress

As soon as practicable after the end of every 3 fiscal years, the Secretary shall submit to the Congress and make available to the general public an assessment of the cumulative effect of activities conducted under this subchapter on the human, marine, and coastal environments.

(f) Utilization of capabilities of Department of Commerce

In executing his responsibilities under this section, the Secretary shall, to the maximum extent practicable, enter into appropriate arrangements to utilize on a reimbursable basis the capabilities of the Department of Commerce. In carrying out such arrangements, the Secretary of Commerce is authorized to enter into contracts or grants with any person, organization, or entity with funds appropriated to the Secretary of the Interior pursuant to this subchapter.

CREDIT(S)

(Aug. 7, 1953, c. 345, § 20, as added Sept. 18, 1978, Pub.L. 95-372, Title II, § 208, 92 Stat. 653, and amended Oct. 31, 1994, Pub.L. 103-426, § 1(b), 108 Stat. 4371; Dec. 21, 1995, Pub.L. 104-66, Title I, § 1082(b), 109 Stat. 722.)

Current through P.L. 110-106 approved 10-25-07

END OF DOCUMENT

Outer Continental Shelf Lands Act, 43 U.S.C. § 1866

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 43. Public Lands (Refs & Annos)
Chapter 36. Outer Continental Shelf Resource Management
Subchapter III. Miscellaneous Provisions
§ 1866. Relationship to existing law

(a) Except as otherwise expressly provided in this chapter, nothing in this chapter shall be construed to amend, modify, or repeal any provision of the Coastal Zone Management Act of 1972 [16 U.S.C.A. § 1451 et seq.], the National Environmental Policy Act of 1969 [42 U.S.C.A. § 4321 et seq.], the Mining and Mineral Policy Act of 1970 [30 U.S.C.A. § 21a], or any other Act.

(b) Nothing in this chapter or any amendment made by this Act to the Outer Continental Shelf Lands Act (43 U.S.C. 1331 et seq.) or any other Act shall be construed to affect or modify the provisions of the Department of Energy Organization Act (42 U.S.C. 7101 et seq.) which provide for the transferring and vesting of functions to and in the Secretary of Energy or any component of the Department of Energy.

CREDIT(S)

(Pub.L. 95-372, Title VI, § 608, Sept. 18, 1978, 92 Stat. 698.)

Current through P.L. 110-106 approved 10-25-07

END OF DOCUMENT

§ 250.202 What criteria must the Exploration Plan (EP), Development and Production Plan (DPP), or Development Operations Coordination Document (DOCD) meet?

Your EP, DPP, or DOCD must demonstrate that you have planned and are prepared to conduct the proposed activities in a manner that:

(a) Conforms to the Outer Continental Shelf Lands Act as amended (Act), applicable implementing regulations, lease provisions and stipulations, and other Federal laws;

(b) Is safe;

(c) Conforms to sound conservation practices and protects the rights of the lessor;

(d) Does not unreasonably interfere with other uses of the OCS, including those involved with national security or defense; and

(e) Does not cause undue or serious harm or damage to the human, marine, or coastal environment.

§ 250.203 Where can wells be located under an EP, DPP, or DOCD?

The Regional Supervisor reviews and approves proposed well location and spacing under an EP, DPP, or DOCD. In deciding whether to approve a proposed well location and spacing, the Regional Supervisor will consider factors including, but not limited to, the following:

(a) Protecting correlative rights;

(b) Protecting Federal royalty interests;

(c) Recovering optimum resources;

(d) Number of wells that can be economically drilled for proper reservoir management;

(e) Location of drilling units and platforms;

(f) Extent and thickness of the reservoir;

(g) Geologic and other reservoir characteristics;

(h) Minimizing environmental risk;

(i) Preventing unreasonable interference with other uses of the OCS; and

(j) Drilling of unnecessary wells.

§ 250.204 How must I protect the rights of the Federal government?

(a) To protect the rights of the Federal government, you must either:

(1) Drill and produce the wells that the Regional Supervisor determines are necessary to protect the Federal government from loss due to production on other leases or units or from adjacent lands under the jurisdiction of other entities (e.g., State and foreign governments); or

(2) Pay a sum that the Regional Supervisor determines as adequate to compensate the Federal government for your failure to drill and produce any well.

(b) Payment under paragraph (a)(2) of this section may constitute production in paying quantities for the purpose of extending the lease term.

(c) You must complete and produce any penetrated hydrocarbon-bearing zone that the Regional Supervisor determines is necessary to conform to sound conservation practices.

§ 250.205 Are there special requirements if my well affects an adjacent property?

For wells that could intersect or drain an adjacent property, the Regional Supervisor may require special measures to protect the rights of the Federal government and objecting lessees or operators of adjacent leases or units.

§ 250.206 How do I submit the EP, DPP, or DOCD?

(a) *Number of copies.* When you submit an EP, DPP, or DOCD to MMS, you must provide:

(1) Four copies that contain all required information (proprietary copies);

(2) Eight copies for public distribution (public information copies) that omit information that you assert is exempt from disclosure under the Freedom of Information Act (FOIA) (5 U.S.C. 552) and the implementing regulations (43 CFR part 2); and

(3) Any additional copies that may be necessary to facilitate review of the EP, DPP, or DOCD by certain affected States and other reviewing entities.

(b) *Electronic submission.* You may submit part or all of your EP, DPP, or DOCD and its accompanying information electronically. If you prefer to submit your EP, DPP, or DOCD electronically, ask the Regional Supervisor for further guidance.

(c) *Withdrawal after submission.* You may withdraw your proposed EP, DPP, or DOCD at any time for any reason. Notify the appropriate MMS OCS Region if you do.

ANCILLARY ACTIVITIES

§ 250.207 What ancillary activities may I conduct?

Before or after you submit an EP, DPP, or DOCD to MMS, you may elect, the regulations in this part may require, or the Regional Supervisor may direct you to conduct ancillary activities. Ancillary activities include:

(a) Geological and geophysical (G&G) explorations and development G&G activities;

(b) Geological and high-resolution geophysical, geotechnical, archaeological, biological, physical oceanographic, meteorological, socioeconomic, or other surveys; or

(c) Studies that model potential oil and hazardous substance spills, drilling muds and cuttings discharges, projected air emissions, or potential hydrogen sulfide (H_2S) releases.

§ 250.208 If I conduct ancillary activities, what notices must I provide?

At least 30 calendar days before you conduct any G&G exploration or development G&G activity (see § 250.207(a)), you must notify the Regional Supervisor in writing.

(a) When you prepare the notice, you must:

(1) Sign and date the notice;

(2) Provide the names of the vessel, its operator, and the person(s) in charge; the specific type(s) of operations you will conduct; and the instrumentation/techniques and vessel navigation system you will use;

(3) Provide expected start and completion dates and the location of the activity; and

(4) Describe the potential adverse environmental effects of the proposed activity and any mitigation to eliminate or minimize these effects on the marine, coastal, and human environment.

(b) The Regional Supervisor may require you to:

(1) Give written notice to MMS at least 15 calendar days before you conduct any other ancillary activity (see § 250.207(b) and (c)) in addition to those listed in § 250.207(a); and

(2) Notify other users of the OCS before you conduct any ancillary activity.

§ 250.209 What is the MMS review process for the notice?

The Regional Supervisor will review any notice required under § 250.208(a) and (b)(1) to ensure that your ancillary activity complies with the performance standards listed in § 250.202(a), (b), (d), and (e). The Regional Supervisor may notify you that your ancillary activity does not comply with those standards. In such a case, the Regional Supervisor will require you to submit an EP, DPP, or DOCD and you may not start your ancillary activity until the Regional Supervisor approves the EP, DPP, or DOCD.

§ 250.210 If I conduct ancillary activities, what reporting and data/information retention requirements must I satisfy?

(a) *Reporting.* The Regional Supervisor may require you to prepare and submit reports that summarize and analyze data or information obtained or derived from your ancillary activities. When applicable, MMS will protect and disclose the data and information in these reports in accordance with § 250.197(b).

(b) *Data and information retention.* You must retain copies of all original data and information, including navigation data, obtained or derived from your G&G explorations and development G&G activities (see § 250.207(a)), including any such data and information you obtained from previous leaseholders or unit operators. You must submit such data and information to MMS for inspection and possible retention upon request at any time before lease or unit termination. When applicable, MMS will protect and disclose such submitted data and information in accordance with § 250.197(b).

[70 FR 51501, Aug. 30, 2005, as amended at 72 FR 25200, May 4, 2007]

CONTENTS OF EXPLORATION PLANS (EP)

§ 250.211 What must the EP include?

Your EP must include the following:

(a) *Description, objectives, and schedule.* A description, discussion of the objectives, and tentative schedule (from start to completion) of the exploration activities that you propose to undertake. Examples of exploration activities include exploration drilling, well test flaring, installing a well protection structure, and temporary well abandonment.

(b) *Location.* A map showing the surface location and water depth of each proposed well and the locations of all associated drilling unit anchors.

(c) *Drilling unit.* A description of the drilling unit and associated equipment you will use to conduct your proposed exploration activities, including a brief description of its important safety and pollution prevention features, and a table indicating the type and the estimated maximum quantity of fuels, oil, and lubricants that will be stored on the facility (see third definition of ''facility'' under § 250.105).

(d) *Service fee.* You must include payment of the service fee listed in § 250.125.

[70 FR 51501, Aug. 30, 2005, as amended at 71 FR 40911, July 19, 2006]

§ 250.212 What information must accompany the EP?

The following information must accompany your EP:

(a) General information required by § 250.213;

(b) Geological and geophysical (G&G) information required by § 250.214;

(c) Hydrogen sulfide information required by § 250.215;

(d) Biological, physical, and socioeconomic information required by § 250.216;

(e) Solid and liquid wastes and discharges information and cooling water intake information required by § 250.217;

(f) Air emissions information required by § 250.218;

(g) Oil and hazardous substance spills information required by § 250.219;

(h) Alaska planning information required by § 250.220;

(i) Environmental monitoring information required by § 250.221;

(j) Lease stipulations information required by § 250.222;

(k) Mitigation measures information required by § 250.223;

(l) Support vessels and aircraft information required by § 250.224;

(m) Onshore support facilities information required by § 250.225;

(n) Coastal zone management information required by § 250.226;

(o) Environmental impact analysis information required by § 250.227; and

(p) Administrative information required by § 250.228.

§ 250.213 What general information must accompany the EP?

The following general information must accompany your EP:

(a) *Applications and permits.* A listing, including filing or approval status, of the Federal, State, and local application approvals or permits you must obtain to conduct your proposed exploration activities.

(b) *Drilling fluids.* A table showing the projected amount, discharge rate, and chemical constituents for each type (*i.e.*, water-based, oil-based, synthetic-based) of drilling fluid you plan to use to drill your proposed exploration wells.

(c) *Chemical products.* A table showing the name and brief description, quantities to be stored, storage method, and rates of usage of the chemical products you will use to conduct your proposed exploration activities. List only those chemical products you will store or use in quantities greater than the amounts defined as Reportable Quantities in 40 CFR part 302, or amounts specified by the Regional Supervisor.

(d) *New or unusual technology.* A description and discussion of any new or unusual technology (see definition under § 250.200) you will use to carry out your proposed exploration activities. In the public information copies of your EP, you may exclude any proprietary information from this description. In that case, include a brief discussion of the general subject matter of the omitted information. If you will not use any new or unusual technology to carry out your proposed exploration activities, include a statement so indicating.

(e) *Bonds, oil spill financial responsibility, and well control statements.* Statements attesting that:

(1) The activities and facilities proposed in your EP are or will be covered by an appropriate bond under 30 CFR part 256, subpart I;

(2) You have demonstrated or will demonstrate oil spill financial responsibility for facilities proposed in your EP according to 30 CFR part 253; and

(3) You have or will have the financial capability to drill a relief well and conduct other emergency well control operations.

(f) *Suspensions of operations.* A brief discussion of any suspensions of operations that you anticipate may be necessary in the course of conducting your activities under the EP.

(g) *Blowout scenario.* A scenario for the potential blowout of the proposed well in your EP that you expect will have the highest volume of liquid hydrocarbons. Include the estimated flow rate, total volume, and maximum duration of the potential blowout. Also, discuss the potential for the well to bridge over, the likelihood for surface intervention to stop the blowout, the availability of a rig to drill a relief well, and rig package constraints. Estimate the time it would take to drill a relief well.

(h) *Contact.* The name, address (e-mail address, if available), and telephone number of the person with whom the Regional Supervisor and any affected State(s) can communicate about your EP.

§ 250.214 What geological and geophysical (G&G) information must accompany the EP?

The following G&G information must accompany your EP:

(a) *Geological description.* A geological description of the prospect(s).

(b) *Structure contour maps.* Current structure contour maps (depth-based, expressed in feet subsea) drawn on the top of each prospective hydrocarbon-bearing reservoir showing the locations of proposed wells.

(c) *Two-dimensional (2–D) or three-dimensional (3–D) seismic lines.* Copies of migrated and annotated 2–D or 3–D seismic lines (with depth scale) intersecting at or near your proposed well locations. You are not required to conduct both 2–D and 3–D seismic surveys if you choose to conduct only one type of survey. If you have conducted both types of surveys, the Regional Supervisor may instruct you to submit the results of both surveys. You must interpret and display this information. Because of its volume, provide this information as an enclosure to only one proprietary copy of your EP.

(d) *Geological cross-sections.* Interpreted geological cross-sections showing the location and depth of each proposed well.

(e) *Shallow hazards report.* A shallow hazards report based on information obtained from a high-resolution geophysical survey, or a reference to such report if you have already submitted it to the Regional Supervisor.

(f) *Shallow hazards assessment.* For each proposed well, an assessment of any seafloor and subsurface geological and manmade features and conditions that may adversely affect your proposed drilling operations.

(g) *High-resolution seismic lines.* A copy of the high-resolution survey line closest to each of your proposed well locations. Because of its volume, provide this information as an enclosure to only one proprietary copy of your EP. You are not required to provide this information if the surface location of your proposed well has been approved in a previously submitted EP, DPP, or DOCD.

(h) *Stratigraphic column.* A generalized biostratigraphic/lithostratigraphic column from the surface to the total depth of the prospect.

(i) *Time-versus-depth chart.* A seismic travel time-versus-depth chart based on the appropriate velocity analysis in the area of interpretation and specifying the geodetic datum.

(j) *Geochemical information.* A copy of any geochemical reports you used or generated.

(k) *Future G&G activities.* A brief description of the types of G&G explorations and development G&G activities you may conduct for lease or unit purposes after your EP is approved.

§ 250.215 What hydrogen sulfide (H_2S) information must accompany the EP?

The following H_2S information, as applicable, must accompany your EP:

(a) *Consistency certification.* A copy of your consistency certification under section 307(c)(3)(B) of the CZMA (16 U.S.C. 1456(c)(3)(B)) and 15 CFR 930.76(d) stating that the proposed exploration activities described in detail in this EP comply with (name of State(s)) approved coastal management program(s) and will be conducted in a manner that is consistent with such program(s); and

(b) *Other information.* ''Information'' as required by 15 CFR 930.76(a) and 15 CFR 930.58(a)(2)) and ''Analysis'' as required by 15 CFR 930.58(a)(3).

§ 250.227 What environmental impact analysis (EIA) information must accompany the EP?

The following EIA information must accompany your EP:

(a) *General requirements.* Your EIA must:

(1) Assess the potential environmental impacts of your proposed exploration activities;

(2) Be project specific; and

(3) Be as detailed as necessary to assist the Regional Supervisor in complying with the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 *et seq.*) and other relevant Federal laws such as the ESA and the MMPA.

(b) *Resources, conditions, and activities.* Your EIA must describe those resources, conditions, and activities listed below that could be affected by your proposed exploration activities, or that could affect the construction and operation of facilities or structures, or the activities proposed in your EP.

(1) Meteorology, oceanography, geology, and shallow geological or man-made hazards;

(2) Air and water quality;

(3) Benthic communities, marine mammals, sea turtles, coastal and marine birds, fish and shellfish, and plant life;

(4) Threatened or endangered species and their critical habitat as defined by the Endangered Species Act of 1973;

(5) Sensitive biological resources or habitats such as essential fish habitat, refuges, preserves, special management areas identified in coastal management programs, sanctuaries, rookeries, and calving grounds;

(6) Archaeological resources;

(7) Socioeconomic resources including employment, existing offshore and coastal infrastructure (including major sources of supplies, services, energy, and water), land use, subsistence resources and harvest practices, recreation, recreational and commercial fishing (including typical fishing seasons, location, and type), minority and lower income groups, and coastal zone management programs;

(8) Coastal and marine uses such as military activities, shipping, and mineral exploration or development; and

(9) Other resources, conditions, and activities identified by the Regional Supervisor.

(c) *Environmental impacts.* Your EIA must:

(1) Analyze the potential direct and indirect impacts (including those from accidents, cooling water intake structures, and those identified in relevant ESA biological opinions such as, but not limited to, those from noise, vessel collisions, and marine trash and debris) that your proposed exploration activities will have on the identified resources, conditions, and activities;

(2) Analyze any potential cumulative impacts from other activities to those identified resources, conditions, and activities potentially impacted by your proposed exploration activities;

(3) Describe the type, severity, and duration of these potential impacts and their biological, physical, and other consequences and implications;

(4) Describe potential measures to minimize or mitigate these potential impacts; and

(5) Summarize the information you incorporate by reference.

(d) *Consultation.* Your EIA must include a list of agencies and persons with whom you consulted, or with whom you will be consulting, regarding potential impacts associated with your proposed exploration activities.

(e) *References cited.* Your EIA must include a list of the references that you cite in the EIA.

[70 FR 51501, Aug. 30, 2005, as amended at 72 FR 18585, Apr. 13, 2007]

§ 250.228 What administrative information must accompany the EP?

The following administrative information must accompany your EP:

(a) *Exempted information description (public information copies only).* A description of the general subject matter of the proprietary information that is included in the proprietary copies of your EP or its accompanying information.

(b) *Bibliography.* (1) If you reference a previously submitted EP, DPP, DOCD, study report, survey report, or other material in your EP or its accompanying information, a list of the referenced material; and

(2) The location(s) where the Regional Supervisor can inspect the cited referenced material if you have not submitted it.

REVIEW AND DECISION PROCESS FOR THE EP

§ 250.231 After receiving the EP, what will MMS do?

(a) *Determine whether deemed submitted.* Within 15 working days after receiving your proposed EP and its accompanying information, the Regional Supervisor will review your submission and deem your EP submitted if:

(1) The submitted information, including the information that must accompany the EP (refer to the list in § 250.212), fulfills requirements and is sufficiently accurate;

(2) You have provided all needed additional information (see § 250.201(b)); and

(3) You have provided the required number of copies (see § 250.206(a)).

(b) *Identify problems and deficiencies.* If the Regional Supervisor determines that you have not met one or more of the conditions in paragraph (a) of this section, the Regional Supervisor will notify you of the problem or deficiency within 15 working days after the Regional Supervisor receives your EP and its accompanying information. The Regional Supervisor will not deem your EP submitted until you have corrected all problems or deficiencies identified in the notice.

(c) *Deemed submitted notification.* The Regional Supervisor will notify you when the EP is deemed submitted.

§ 250.232 What actions will MMS take after the EP is deemed submitted?

(a) *State and CZMA consistency reviews.* Within 2 working days after deeming your EP submitted under § 250.231, the Regional Supervisor will use receipted mail or alternative method to send a public information copy of the EP and its accompanying information to the following:

(1) *The Governor of each affected State.* The Governor has 21 calendar days after receiving your deemed-submitted EP to submit comments. The Regional Supervisor will not consider comments received after the deadline.

(2) *The CZMA agency of each affected State.* The CZMA consistency review period under section 307(c)(3)(B)(ii) of the CZMA (16 U.S.C. 1456(c)(3)(B)(ii)) and 15 CFR 930.78 begins when the State's CZMA agency receives a copy of your deemed-submitted EP, consistency certification, and required necessary data and information (see 15 CFR 930.77(a)(1)).

(b) *MMS compliance review.* The Regional Supervisor will review the exploration activities described in your proposed EP to ensure that they conform to the performance standards in § 250.202.

(c) *MMS environmental impact evaluation.* The Regional Supervisor will evaluate the environmental impacts of the activities described in your proposed EP and prepare environmental documentation under the National Environmental Policy Act (NEPA) (42 U.S.C. 4321 *et seq.*) and the implementing regulations (40 CFR parts 1500 through 1508).

(d) *Amendments.* During the review of your proposed EP, the Regional Supervisor may require you, or you may elect, to change your EP. If you elect to amend your EP, the Regional Supervisor may determine that your EP, as amended, is subject to the requirements of § 250.231.

[70 FR 51501, Aug. 30, 2005, as amended at 72 FR 25200, May 4, 2007]

§ 250.233 What decisions will MMS make on the EP and within what timeframe?

(a) *Timeframe.* The Regional Supervisor will take one of the actions shown in the table in paragraph (b) of

§ 250.228 What administrative information must accompany the EP?

The following administrative information must accompany your EP:

(a) *Exempted information description (public information copies only).* A description of the general subject matter of the proprietary information that is included in the proprietary copies of your EP or its accompanying information.

(b) *Bibliography.* (1) If you reference a previously submitted EP, DPP, DOCD, study report, survey report, or other material in your EP or its accompanying information, a list of the referenced material; and

(2) The location(s) where the Regional Supervisor can inspect the cited referenced material if you have not submitted it.

REVIEW AND DECISION PROCESS FOR THE EP

§ 250.231 After receiving the EP, what will MMS do?

(a) *Determine whether deemed submitted.* Within 15 working days after receiving your proposed EP and its accompanying information, the Regional Supervisor will review your submission and deem your EP submitted if:

(1) The submitted information, including the information that must accompany the EP (refer to the list in § 250.212), fulfills requirements and is sufficiently accurate;

(2) You have provided all needed additional information (see § 250.201(b)); and

(3) You have provided the required number of copies (see § 250.206(a)).

(b) *Identify problems and deficiencies.* If the Regional Supervisor determines that you have not met one or more of the conditions in paragraph (a) of this section, the Regional Supervisor will notify you of the problem or deficiency within 15 working days after the Regional Supervisor receives your EP and its accompanying information. The Regional Supervisor will not deem your EP submitted until you have corrected all problems or deficiencies identified in the notice.

(c) *Deemed submitted notification.* The Regional Supervisor will notify you when the EP is deemed submitted.

§ 250.232 What actions will MMS take after the EP is deemed submitted?

(a) *State and CZMA consistency reviews.* Within 2 working days after deeming your EP submitted under § 250.231, the Regional Supervisor will use receipted mail or alternative method to send a public information copy of the EP and its accompanying information to the following:

(1) *The Governor of each affected State.* The Governor has 21 calendar days after receiving your deemed-submitted EP to submit comments. The Regional Supervisor will not consider comments received after the deadline.

(2) *The CZMA agency of each affected State.* The CZMA consistency review period under section 307(c)(3)(B)(ii) of the CZMA (16 U.S.C. 1456(c)(3)(B)(ii)) and 15 CFR 930.78 begins when the State's CZMA agency receives a copy of your deemed-submitted EP, consistency certification, and required necessary data and information (see 15 CFR 930.77(a)(1)).

(b) *MMS compliance review.* The Regional Supervisor will review the exploration activities described in your proposed EP to ensure that they conform to the performance standards in § 250.202.

(c) *MMS environmental impact evaluation.* The Regional Supervisor will evaluate the environmental impacts of the activities described in your proposed EP and prepare environmental documentation under the National Environmental Policy Act (NEPA) (42 U.S.C. 4321 *et seq.*) and the implementing regulations (40 CFR parts 1500 through 1508).

(d) *Amendments.* During the review of your proposed EP, the Regional Supervisor may require you, or you may elect, to change your EP. If you elect to amend your EP, the Regional Supervisor may determine that your EP, as amended, is subject to the requirements of § 250.231.

[70 FR 51501, Aug. 30, 2005, as amended at 72 FR 25200, May 4, 2007]

§ 250.233 What decisions will MMS make on the EP and within what timeframe?

(a) *Timeframe.* The Regional Supervisor will take one of the actions shown in the table in paragraph (b) of

this section within 30 calendar days after the Regional Supervisor deems your EP submitted under § 250.231, or receives the last amendment to your proposed EP, whichever occurs later.

(b) *MMS decision*. By the deadline in paragraph (a) of this section, the Regional Supervisor will take one of the following actions:

The regional supervisor will . . .	If . . .	And then . . .
(1) Approve your EP	It complies with all applicable requirements	The Regional Supervisor will notify you in writing of the decision and may require you to meet certain conditions, including those to provide monitoring information.
(2) Require you to modify your proposed EP.	The Regional Supervisor finds that it is inconsistent with the lease, the Act, the regulations prescribed under the Act, or notify Federal laws.	The Regional Supervisor will notify you in writing of the decision and describe the modifications you must make to your proposed EP to ensure it complies with all applicable requirements.
(3) Disapprove your EP ..	Your proposed activities would probably cause serious harm or damage to life (including fish or other aquatic life); property; any mineral (in areas leased or not leased); the national security or defense; or the marine, coastal, or human environment; and you cannot modify your proposed activities to avoid such condition(s).	(i) The Regional Supervisor will notify you in writing of the decision and describe the reason(s) for disapproving your EP. (ii) MMS may cancel your lease and compensate you under 43 U.S.C. 1334(a)(2)(C) and the implementing regulations in §§ 250.182, 250.184, and 250.185 and 30 CFR 256.77.

§ 250.234 How do I submit a modified EP or resubmit a disapproved EP, and when will MMS make a decision?

(a) *Modified EP*. If the Regional Supervisor requires you to modify your proposed EP under § 250.233(b)(2), you must submit the modification(s) to the Regional Supervisor in the same manner as for a new EP. You need submit only information related to the proposed modification(s).

(b) *Resubmitted EP*. If the Regional Supervisor disapproves your EP under § 250.233(b)(3), you may resubmit the disapproved EP if there is a change in the conditions that were the basis of its disapproval.

(c) *MMS review and timeframe*. The Regional Supervisor will use the performance standards in § 250.202 to either approve, require you to further modify, or disapprove your modified or resubmitted EP. The Regional Supervisor will make a decision within 30 calendar days after the Regional Supervisor deems your modified or resubmitted EP to be submitted, or receives the last amendment to your modified or resubmitted EP, whichever occurs later.

§ 250.235 If a State objects to the EP's coastal zone consistency certification, what can I do?

If an affected State objects to the coastal zone consistency certification accompanying your proposed EP within the timeframe prescribed in § 250.233(a) or § 250.234(c), you may do one of the following:

(a) *Amend your EP*. Amend your EP to accommodate the State's objection and submit the amendment to the Regional Supervisor for approval. The amendment needs to only address information related to the State's objection.

(b) *Appeal*. Appeal the State's objection to the Secretary of Commerce using the procedures in 15 CFR part 930, subpart H. The Secretary of Commerce will either:

(1) Grant your appeal by finding, under section 307(c)(3)(B)(iii) of the CZMA (16 U.S.C. 1456(c)(3)(B)(iii)), that each activity described in detail in your EP is consistent with the objectives of the CZMA, or is otherwise necessary in the interest of national security; or

(2) Deny your appeal, in which case you may amend your EP as described in paragraph (a) of this section.

consequencies together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.

(b) Alternatives, which include:

(1) No action alternative.

(2) Other reasonable courses of actions.

(3) Mitigation measures (not in the proposed action).

(c) Impacts, which may be: (1) Direct; (2) indirect; (3) cumulative.

§ 1508.26 Special expertise.

Special expertise means statutory responsibility, agency mission, or related program experience.

§ 1508.27 Significantly.

Significantly as used in NEPA requires considerations of both context and intensity:

(a) *Context.* This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) *Intensity.* This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

[43 FR 56003, Nov. 29, 1978; 44 FR 874, Jan. 3, 1979]

§ 1508.28 Tiering.

Tiering refers to the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basinwide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement