

The President's Speech and Regulatory Reality on the OCS¹

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In his 2012 State of the Union address, President Obama devoted four paragraphs to what he called “American-made energy.” Of greatest relevance to us today, the President said:

Over the last three years, we've opened millions of new acres for oil and gas exploration, and tonight, I'm directing my administration to open more than 75 percent of our potential offshore oil and gas resources.²



Was the President promising a bold change of course at the Department of the Interior? Was he following the lead of President Jimmy Carter who, in April 1979, directed Secretary Andrus to increase the amount of acreage Andrus was proposing to offer?

Apparently not. Interior's current 5-Year Proposed Program for 2012-2017 would offer 15 lease sales in six planning areas. According to the Bureau of Ocean Energy Management (“BOEM”), this proposed program “makes more than 75% of undiscovered technically recoverable oil and gas resources estimated on the OCS available for development.”³

It appears that the President is directing Secretary Salazar to do exactly what Secretary Salazar has already proposed to do, and the Secretary's Proposed Program is the least aggressive 5-Year Program in history. It offers even less than President Obama directed in his March 31, 2010, Comprehensive Strategy for Energy Security, in which he committed to open up parts of the Atlantic.⁴

But what if the President really had intended “Hope” and “Change” in how our government treats domestic oil and gas production? What would that look like on the OCS?

Let's look at six topics: the 5-Year Program, lease sales, exploration plan approvals, drilling permits, suspensions of production, and geophysical survey permits. For each of these I will first give a short overview of the law, recognizing that half of the audience is half my age and might benefit from a primer.

1 This paper was presented on February 2, 2012, at the 2012 OCS Workshop of the OCS Advisory Board, American Association of Professional Landmen, in The Woodlands, Texas. It reflects solely the views of its author, not of Fulbright & Jaworski L.L.P.

2 The White House, Office of the Press Secretary, “Remarks by the President in State of the Union Address,” January 24, 2012, available at <http://www.whitehouse.gov/the-press-office/2012/01/24/remarks-president-state-union-address>.

3 U.S. Department of the Interior, Bureau of Ocean Energy Management, PROPOSED OUTER CONTINENTAL SHELF OIL & GAS LEASING PROGRAM 2012-2017 at ix (Nov. 2011) (“PROPOSED PROGRAM”).

4 The White House, Office of the Press Secretary, “Obama Administration Announces Comprehensive Strategy for Energy Security,” March 31, 2010, available at <http://www.whitehouse.gov/the-press-office/obama-administration-announces-comprehensive-strategy-energy-security>

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The Five-Year Oil and Gas Leasing Schedule

Let's start with the primer. From 1953 through 1971, the Department held lease sales. There was no Five-Year Leasing Schedule. But the 1970s were the decade of planning statutes: for the BLM, for the Forest Service, for NOAA. There was even legislation pending for a national land use plan.

So, for the convenience of coastal states, Interior began issuing a schedule of upcoming lease sales. It was an administrative action, and it was just a one-page chart.

Enter the United States Congress. In 1978, it added section 18 to the OCS Lands Act. Section 18 requires the Department to keep a schedule of lease sales showing, "as precisely as possible, the size, timing, and location of leasing activity[.]"⁵ Now, the Department cannot issue an oil and gas lease unless it is in an area on the approved schedule.⁶

Section 18 requires a lot of substance and a lot of procedure. Let's start with the substance. Section 18 requires the Department to look at the several "regions" of the OCS: "regions" is the word the statute uses; the Bureau calls them "planning areas."

Section 18 requires the Department to document that it has considered eight factors. These include (a) existing geological and ecological information for each planning area, (b) an "equitable sharing" of benefits and risks among the areas, (c) the needs of energy markets for oil and gas, (d) other uses of the areas, (e) industry nominations of areas, (f) state laws and policies, (g) relative environmental sensitivity of the areas, (g) "predictive information" for the areas.⁷

⁵ 43 U.S.C. § 1344(a).

⁶ "After the leasing program has been approved by the Secretary. . . no lease shall be issued unless it is for an area included in the approved leasing program[.]" 43 U.S.C. § 1344(d)(3).

⁷ 43 U.S.C. § 1344(a)(2)(A) – (H).

Then, section 18 requires Interior to base "the timing and location of leasing . . . so as to obtain a proper balance between the potential for environmental damage, the potential for the discovery of oil and gas, and the potential for adverse impact on the coastal zone."⁸ How does one strike such a balance? In a nut shell, the Department starts with an economic net present value of the oil and gas it estimates would be produced under the leasing program. It adjusts that with quantitative and qualitative information to yield a "net social value" for leasing each planning area. The Department then ranks the areas. Generally, the areas that have the highest net social values (like the Central and Western Gulf) are leased first and most often.⁹

Section 18 requires the Department to take five steps to approve a schedule. First is the request for comments. For the current proposal, that was issued on August 1, 2008. Second is the draft proposed program. For the current proposal, that was issued on January 21, 2009. Third is the proposed program, issued on November 10, 2011. Fourth is the proposed final program, which is submitted to the President and the Congress, before whom it sits for at least 60 days. The fifth step is program approval. After that, aggrieved persons can seek judicial review in U.S. Court of Appeals for the District of Columbia Circuit.¹⁰

The Department's Proposed Program and a draft environmental impact statement are now public.

⁸ 43 U.S.C. § 1344(a)(3).

⁹ *State of California v. Watt*, 668 F.2d 1290, 1318-19 (D.C. Cir. 1981) (*per curiam*).

¹⁰ 43 U.S.C. § 1349(c)(1). Four published opinions have interpreted the Department's obligations under section 18 and under NEPA at the 5-Year Program stage. *Center for Biological Diversity v. Department of the Interior*, 563 F.3d 466 (D.C. Cir. 2009); *Natural Resources Defense Council v. Hodel*, 865 F.2d 288 (D.C. Cir. 1988); *California v. Watt*, 712 F.2d 584 (D.C. Cir. 1983); and *California v. Watt*, 688 F.2d 1290 (D.C. Cir. 1981).

Here's the schedule in chart form.

TABLE A: PROPOSED PROGRAM FOR 2012-2017
Lease Sale Schedule

<i>Sale No.</i>	<i>Area</i>	<i>Year</i>
229	Western Gulf of Mexico	2012
227	Central Gulf of Mexico	2013
233	Western Gulf of Mexico	2013
244	Cook Inlet	2013
225	Eastern Gulf of Mexico	2014
231	Central Gulf of Mexico	2014
238	Western Gulf of Mexico	2014
235	Central Gulf of Mexico	2015
242	Beaufort Sea	2015
246	Western Gulf of Mexico	2015
226	Eastern Gulf of Mexico	2016
241	Central Gulf of Mexico	2016
237	Chukchi Sea	2016
248	Western Gulf of Mexico	2016
247	Central Gulf of Mexico	2017

Comments are due February 8, 2012.¹¹

The primer's over. Let's go back to President Obama and American-made energy. Can the Department significantly expand the five-year schedule and still approve a final program this year? No. Why not? Because Secretary Salazar hemmed himself in by his selection of alternatives to be studied for the Proposed Program. The most aggressive program he considered was the Proposed Program itself. The seven other

options considered even smaller programs.¹² So, if Secretary Salazar were to try to expand the schedule now, his lawyers would tell him he must first prepare a draft supplemental environmental impact statement to look at more aggressive options. That won't get done this year.

The only realistic strategy to hope for change is for the Department to complete work on the program for 2012-2017, then immediately announce step one

¹¹ 76 Fed. Reg. 70156 (Nov. 10, 2011).

¹² PROPOSED PROGRAM at 27.

— the request for comments — to begin analyzing a five year schedule for the period 2014-2019. I do not anticipate such an announcement any earlier than Monday, January 21, 2013.

Lease Sales and Litigation

Since January 2009, OCS leasing activity has been a little light. There have been no lease sales in the Pacific OCS Region. There have been no lease sales in the Alaska OCS Region, though on October 3, 2011, BOEM did “reaffirm” its 2008 decision to issue leases at Sale 193 in the Chukchi planning area,¹³ an action it took in response to a lawsuit brought against the sale and an adverse 2010 court ruling.¹⁴

In the Gulf, BOEM held Central Gulf Sale 208 in March 2009, Western Gulf Sale 210 in August 2009, Central Gulf Sale 213 in March 2010, and Western Gulf Sale 218 in December 2011. Central Gulf Sale 216/222 is scheduled for June 2012.

On January 20, 2012, BOEM released its final supplemental EIS for Sale 216/222.¹⁵ It is a 1236 page document. Its purpose is to analyze “the potential environmental effects of oil and natural gas leasing, exploration, development, the effects of the *Deepwater Horizon* (DWH) event, and all new information available for the CPA since the publication of the Multisale EIS and the 2009-2012 Supplemental EIS.”¹⁶



Two features of the supplement warrant our attention. The first concerns the Endangered Species Act. As you know, BOEM is required to consult with NMFS and FWS on whether leasing activities are likely to jeopardize the existence of endangered species. The usual result of an ESA consultation is a so-called “biological opinion” from each of the two wildlife agencies. NMFS issued a biological opinion for the Central Gulf sales on July 3, 2007; FWS did so on September 14, 2007. As a result of Macondo, BOEM reinitiated consultation with both agencies in 2010. The new supplemental EIS reports that the “reinitiated consultations are not complete at this time[.] . . . In the meantime, the current consultations remain in effect, and NMFS and FWS recognize that BOEM-required mitigations and other reasonable and prudent measures should reduce the likelihood of impacts from BOEM-authorized activities.”¹⁷ If the two wildlife agencies do not issue their opinions before the sale in June, we can anticipate a lawsuit claiming that BOEM was arbitrary to proceed with the sale.

The second concerns a new “catastrophic spill event analysis.” This is a seventy-page assessment of both a shallow-water and a deepwater oil well blowout. The shallow-water scenario assumes an uncontrolled flow of oil of 30 thousand barrels a day for one to

¹⁷ 216/222 FSEIS at 5-9.

¹³ U.S. Department of the Interior, Bureau of Ocean Energy Management, CHUKCHI SEA OCS OIL & GAS LEASE SALE 193 RECORD OF DECISION (October 2011), available at <http://www.boem.gov/pdfs/Sale193RODwoFINAL.pdf>.

¹⁴ *Native Village of Point Hope v. Salazar*, No. 1:08-cv-0004-RRB (D. Alaska) (Order Remanding to Agency filed July 21, 2010). After the Bureau’s decision on remand, the plaintiffs filed amendments to their complaints and new motions for summary judgment. Oral argument on summary judgment has not yet been scheduled.

¹⁵ 77 Fed. Reg. 2991 (Jan. 20, 2012).

¹⁶ U.S. Department of the Interior, Bureau of Ocean Energy Management, GULF OF MEXICO OIL AND GAS LEASE SALE: 2012, CPA Lease Sale 216/222 Final Supplemental Environmental Impact Statement at vii (2012) (“216/222 FSEIS”).

three months, or up to about 3 million barrels. The deepwater scenario assumes an uncontrolled flow of 30-60 thousand barrels a day for 3 to 4 months, meaning a total spill of between 2.7 and 7.2 million barrels.¹⁸ The analysis is well done, though it contains fewer particular findings on the effects of the Macondo blowout than I expected it would. And the agency is careful to note that “the analysis presented here is intended to be a general overview of potential effects of a catastrophic spill in the Gulf of Mexico. The analysis does not include detailed sale-specific or site-specific analyses[.]”¹⁹

Now, I see no reason why the agency cannot incorporate this analysis in future lease sale NEPA work. What lessees need to bear in mind is that this is not a site-specific analysis, and when you are filing an exploration plan or development operations coordination document (“DOCD”), the lessee ought to be prepared to tailor this assessment to the particulars of its plan. It would be risky simply to incorporate this generic analysis by reference without, for example, referring to areas of coastline or sensitive resources most likely to be contacted by a “catastrophic spill” originating at well sites included in the lessee’s plan.

But there’s more going on in New Orleans than just this compact 1236-page supplemental EIS. On December 29, 2011, the Gulf regional office announced the availability of a draft EIS covering the 10 leases sales scheduled for the Central and Western Gulf during the 2012-2017 time period. Some public hearings have already been held. Comments are due in the middle of February.

There are two lease sale lawsuits of special interest. Both are in federal court, one in Alabama and one in Washington, DC.²⁰

The Alabama suit concerns Sale 213, for which bids were opened in March 2010. But leases for many of the tracts bid on had not been issued when the Macondo well blew out. Briefing on the merits of this case will be completed on February 24.²¹ The gist of the case is whether BOEM, upon learning of the loss of control of the Macondo well, should have stopped issuing leases to perform further NEPA analysis and receive updated opinions from NMFS and FWS.

The Washington suit concerns Western Gulf Sale 218. Filed by some of the usual suspects, this suit seeks to vacate the results of the sale. It is different than the Alabama suit in a key respect. It brings no claim under the Endangered Species Act, even though the complaint alleges that NMFS and FWS have not completed the 2010 re-initiated consultation. Instead, the only claim is that the August 2011 Supplemental EIS for the sale failed to adequately address all the new information about oil spill risks and impacts coming out of the Macondo spill. But the EIS was supplemented to do precisely that, and it contained a catastrophic oil spill analysis like that in the SEIS for Sale 216/222. So the key to this lawsuit will be how well BOEM responded to the plaintiffs’ comments when it issued the FSEIS and the Record of Decision.

According to the docket sheet, no one from the industry has moved to intervene yet, and the government’s answer to the complaint isn’t due for two more weeks. Those here who are issued leases from this sale need to remember there is risk to your leases. If the plaintiffs succeed and the court remands the case to Interior, it is likely the Department would correct whatever the NEPA violation was and “reaffirm” the leases, as it did last year in the Chukchi Sea. But the filing of the suit operates as what the courts call a *lis pendens*, and the court could void the leases.²²

¹⁸ 216/222 FSEIS at B-12.

¹⁹ 216/222 FSEIS at B-1.

²⁰ *Oceana v. Bureau of Ocean Energy Management*, No. 1:11-cv-02208-JDB (D.D.C.) (filed Dec. 13, 2011); *Defenders of Wildlife v. Bureau of Ocean Energy Management*, No. 10-0254-WS-C (S.D. Ala.) (filed June 30, 2010).

²¹ Order entered Dec. 5, 2011.

²² A few of our higher federal courts have expressed this view in dicta. *Massachusetts v. Watt*, 716 F.2d 946, 952 (1st Cir. 1983); *Conservation Law Fdn. v. Andrus*, 623 F.2d 712, 720 (1st Cir. 1979); *County of Suffolk v. Secretary of the Interior*, 562 F.2d 1368, 1374 (2d Cir. 1977) (citing *New York v. Kleppe*, 429 U.S. 1307, 1312-13 (1976)).

That's the update on lease sales and litigation. Is there something more that BOEM could be doing at the lease sale stage to increase American-made energy? In the Gulf, generally speaking, BOEM is about where it needs to be, with two important qualifications.

1. The Bureau needs to stay on top of even the non-peer-reviewed reports about effects of the Macondo spill and discuss them in the lease sale supplemental EA to review whether that information, if true, would significantly change the conclusions in the Multisale EIS. The EA writers do not need to assume the information is true or give it the dignity of a peer-reviewed report, but they ought to document the Bureau's awareness of it. If the information is not credible or of limited import, the EA writers should say so in the EA.
2. If the consultation under the ESA is still unfinished, the Bureau needs to include in a Record of Decision for the sale (a) its updated assessment of the risk of large oil spills, including information on spills that have occurred outside the U.S. OCS (b) relevant lease stipulations for protecting endangered species, and (c) all of the other precautions (like the requirements in the 2010 Drilling Rule) that will reduce the likelihood that a spill could occur and jeopardize endangered species.

If the Bureau covers these two points, it will dramatically decrease the risk of a successful challenge to a lease sale.

(Marshall, Circuit Justice, 1976) ("Moreover, even after the bids are accepted, I cannot say that the Court of Appeals would be without power to declare the leases invalid if the court determined that the Government entered into leases without compliance with the requirements of the NEPA.") (denying stay pending appeal).

Exploration Plan Approvals

A primer first. In 1978, Congress split the OCS oil and gas program into four separate stages. The idea was to allow the agency to make a series of separate decisions about proceeding to develop oil and gas. At the 5-Year schedule stage, the idea is for the Department to determine where among the several planning areas it should consider leasing. At the leasing stage, the Department is to determine where within the planning area to offer leases. At the exploration stage and the development and production stage, the Department is to determine whether exploration and production can proceed without causing serious harm to the environment. The theory is that the Department is to get increasingly site-specific as it makes it into the last two stages. By then it knows where the wells will be and what resources operations might affect.

On the procedural side of approving exploration, the lessee has to file an exploration plan. The plan can cover more than one lease. Once the plan is deemed complete, the Department has 30 days to act on it. The Department must approve the plan unless it finds that exploration "would probably cause serious harm" to the environment.²³ A decision on the plan can be reviewed directly in a federal court of appeals, based on the record made before the agency. Separate from the plan approval are the well permits. Those must still be obtained, and there is no statutory 30-day time limit on APDs, as some of you have noticed. End of primer.

Immediately after Macondo, NGOs filed an initial flurry of challenges to exploration plan approvals, but many of those were withdrawn, and I have lost track of any that were not withdrawn. It now appears that the environmental NGOs are pursuing a test case strategy, betting the farm on one particular exploration plan.

²³ 43 U.S.C. § 1340(c)(1) (incorporating 43 U.S.C. § 1334(a)(2)(A)(i)).

About 50 years ago, the historian Bruce Catton wrote a great book about the end of the Civil War. It was called "A Stillness at Appomattox." All lessees have a substantial interest in seeing that Shell does not experience a stillness at Appomattox, its prospect in Mississippi Canyon.

Appomattox is a multi-well plan in deepwater. It was approved in May 2011. Two sets of NGOs, headed by the Defenders of Wildlife and by the Gulf Restoration Network, filed petitions for review in the 11th Circuit Court of Appeals, headquartered in Atlanta.²⁴ The case has been fully briefed and awaits oral argument. I have read only the opening briefs of the four major parties.



Keeping in mind that I haven't read all the briefs, I will hazard a few observations about the case, because it raises a couple of important issues for other lessees and for the Bureau.

The Bureau prepared an environmental assessment, which included an analysis of a generic catastrophic oil spill. But the main focus of the EA was the effects of routine operations. Those of you who attended Fulbright's OCS breakfasts over the last year and a half may recall that I repeatedly sounded the tocsin

²⁴ *Defenders of Wildlife v. Bureau of Ocean Energy Management, Regulation and Enforcement*, Nos. 11-12598 and 11-12599 (consolidated) (11th Cir.).

and alarm about the Bureau's continued use of generic analysis in exploration plan EAs. Sometimes there is no apparent site-specific analysis: the EA appears to be a complete cut and paste from a lease sale EIS.

Other times, there is site-specific analysis, and with a magnifying glass you can find it. Hidden within the generic paragraphs taken from a lease sale EIS will be something like this: "The operator's discharges of effluents are found on Table xx of the exploration plan. Discharges are regulated by EPA. The effects will be localized and negligible." There is no explanation of how quickly the discharges will be diluted in the water column, what the relevant EPA concentration or discharge rate is, what marine life is likely to be affected, or why the effect is negligible. Let me make clear that I am not describing the Appomattox EA here; I'm giving you my impressions from a group of 2011 EAs I've reviewed, both for exploration plans and geophysical permits.

In the Appomattox suit, the NGOs have tried to bang the drum about a lack of site-specific analysis, and their briefs score a couple of rhetorical points. But they make two surprising tactical choices. First, they do not hammer the EA's assessment of the impacts of routine operations; they instead go after the catastrophic spill analysis. Courts are generally very deferential to an agency's choice about how to assess the effects of a low-probability, but catastrophic impact event. Second, the NGOs did not cite the one court NEPA decision most favorable to them.²⁵ Although that opinion was vacated as moot, it provides NGOs with a road map for how to attack OCS exploration plans.

²⁵ *Alaska Wilderness League v. Kempthorne*, 548 F.3d 815 (9th Cir. 2008), opinion vacated and withdrawn, No. 07-71457 (Order, March 6, 2009), appeal dismissed as moot *sub nom.* *Alaska Wilderness League v. Salazar*, 571 F.3d 859 (9th Cir. 2009).

Then there's the Endangered Species Act issue. The NGOs argue, in effect, that the Bureau cannot approve any exploration plans until NMFS and FWS have responded to the Bureau's 2010 request to re-initiate consultation under the ESA. The law on this point does not appear to be settled in the 11th Circuit.

The Bureau's brief and Shell's brief are very well done. But there was one very telling thing missing from both briefs. Neither cited any record of decision by the Bureau explaining why and how it could proceed in the absence of a new biological opinion or explaining why the NGOs' criticisms of the EA were off the mark. The lack of a statement of reasons from the Bureau makes the litigation riskier than it needs to be.

So what does this mean for the Bureau and for other lessees? I would be very surprised if the court issued a ruling before June, and I expect no ruling until the Fall. If your company plans to be drilling under a 2011 or 2012 approved exploration plan this summer or fall, you need to consider a plan to manage the risk that the Appomattox plan might be vacated. If you are preparing to submit an exploration plan or DOCD soon, you need to consider how to present information in the environmental impact analysis which, by regulation, you must submit with your plan in order to head off the kind of challenge that the NGOs have brought against Shell.

Our friends at the Bureau should remember to do two things. First, they should obtain a copy of the Statement of Reasons the Department prepared for OCS Lease Sale 92 in the North Aleutian Basin. That Statement, some 70 pages, is a lot longer

than what the Bureau needs to do for an individual exploration plan. But if the Bureau compares that Sale 92 statement with the very terse "Response to Public Comments" in its recent EAs, it will see there is a lot of room for improvement. A similar and more accessible illustration is the Department's 2011 Record of Decision for Lease Sale 193,²⁶ not as persuasively done as that for Sale 92, but still helpful in defending the agency's decision if challenged in court.

Second, they should make their site-specific analyses in the EAs easier to find and at least a little beefier. Any lessee whose plan is vacated while drilling is underway faces tens of millions of dollars in unrecoverable losses. Lessees and the Bureau both can address this risk better than they have.

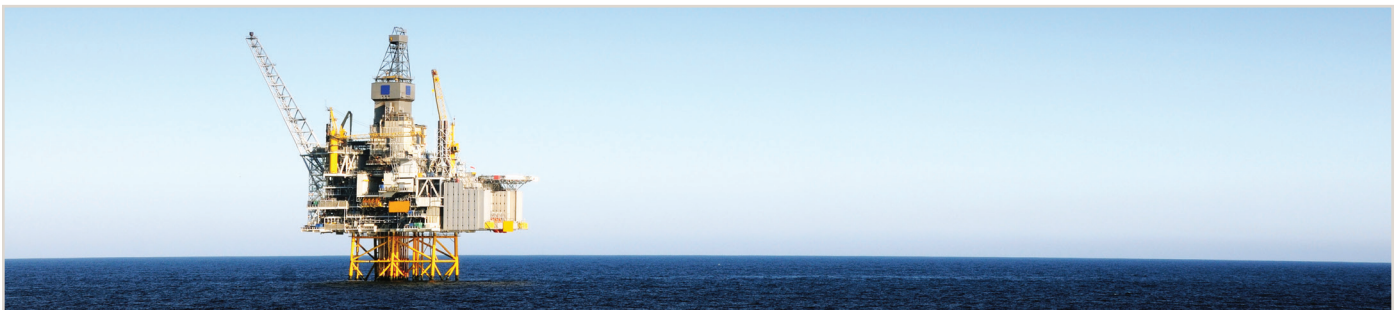
Drilling Permits

In 2010 and 2011, my firm hosted a series of breakfast seminars entitled "Getting Going Again in the Gulf," a forum to help address the effect of Secretary Salazar's moratoria and the subsequent slow pace of permitting. In those seminars we looked at oil spill response plan requirements, well containment requirements,²⁷ worst case discharge requirements, and moving-target requests for information by agency personnel.

But permitting is picking up a bit, with the Louisiana Department of Natural Resources reporting last week that 39 rigs were working offshore Louisiana (state and federal seabed). So how do I best use my seven minutes

²⁶ See footnote 13 above.

²⁷ See, for example, Leggette, A SAFER AND SWIFTER BOEMRE (June 2011) (available at www.fulbright.com). Additional materials may be found on the Fulbright website under the program series "Getting Going Again in the Gulf."



for the subject of drilling permits? I want to devote it to a question of spelling.

As we all know, the Department has authority to issue regulations under the OCS Lands Act. And it has the power to interpret those rules, resulting in a kind of edict called notices to lessees. But since Macondo, the Bureau has gone the extra mile. It has changed the spelling of the word “edict” itself: it is now spelled e-m-a-i-l.

Let me illustrate with two important changes that the agency has implemented without notice and comment rulemaking.

First, it used to be that an APD was approvable upon a showing that the lessee’s oil spill response plan had provision for a relief well and the resources to contain oil at the surface. Now the lessee must also show the ability to apply subsurface capping stacks or “flowback and capture” systems. This change was implemented through a March 28, 2011, white paper.

Second, in light of a directive from Washington, the Gulf Regional office is no longer allowing lessees to obtain permits and plan approvals based on certifications of oil spill response plans. If the worst case discharge in a lessee’s regional OSRP gets “worsen,” then nothing will be approved until the Bureau approves the revised OSRP. This change was communicated by email.

There’s a problem with this edict barring certifications. It violates 30 C.F.R. § 254.2(b): “you may operate your facility after you submit your plan while MMS reviews it for approval. To operate a facility without an approved [oil spill response] plan, you must certify in writing to the Regional Supervisor that you have the capability to respond . . . to a worst case discharge[.]”

What can be done to change this practice of dispensing with notice-and-comment rulemaking? The lack of notice and comment is made worse here by Secretary Salazar’s distaste for the agency’s former practice of informal vetting of drafts of NTLs by MMS with

the regulated community to iron out problems before the NTLs were issued. Mr. Salazar took office decrying this sort of practice as “coziness,” though most Americans would call it “communication,” or “dialog.”

There are only three approaches. One is Congressional oversight hearings. One is for an industry working group to put together a petition for rulemaking to address those problems industry has with the current set of requirements. And one is to sue.

This last option may be required to deal with the new edict on OSRPs, because sometimes the reason a lessee’s worst case discharge estimate gets bigger is new downhole pressure information while the lessee is in the middle of drilling the well. Waiting on the Bureau in such a situation is extremely expensive.

Suspensions of Production

In a decision dated May 31, 2011, the Director of Interior’s Office of Hearings and Appeals revolutionized Department policy on granting suspensions of production for OCS leases. The decision is *Statoil/ExxonMobil*.²⁸ The revolution is to require that a lessee seeking an SOP have a contract to a production facility signed before the end of the primary term.²⁹

ExxonMobil and Statoil filed suit in the Western District of Louisiana. On January 9, 2012, the companies announced they had reached a settlement with Interior. The key point for us today is that agency has not withdrawn the OHA Director’s decision. It is still the governing position. It is legally incorrect and creates enormous uncertainty for lessees and the Bureau as to how the ruling is to apply in other

28 *Statoil Gulf of Mexico LLC; ExxonMobil Corporation*, 42 OHA 261 (May 31, 2011), *reversing* 178 IBLA 244 (2009).

29 [Editor’s Note: A primer and analysis of this decision are available on the Fulbright website under the title “The Latest Assault on Deepwater Assets: The Vanishing Suspension of Production,” (June 16, 2011). There will be found the slides from a Web seminar provided by Mr. Leggette. In the interest of brevity, the current paper has omitted the primer and analysis, and the reader is referred to the website for additional information.]

cases. It is the opposite of the kind of policies the Bureau needs to pursue in the search for American-made energy.

What is to be done if we hope for change? There are options, but I would note the following contingent course of action. If Mr. Obama is not re-elected, and depending on the composition of the Department of the Interior transition team, then you might see a memorandum from the new Secretary of the Interior on January 22, 2013, revoking the Director's decision.

Geophysical Survey Permits

Geophysical surveys can be conducted under the authority of an oil and gas lease, for example if a lessee is managing production from a large unit through 4D geophysical surveys. But most surveys are still conducted under the authority of a geological and geophysical (or "g&g") permit.

Primer time again. One of the best kept secrets of the OCS Program is that the Department has much less authority to delay or deny g&g permits than it thinks. When Congress drafted section 11(a) of the OCS Lands Act in 1953, it envisioned that private parties would have a right to conduct non-lease g&g exploration. An amendment to the bill added the requirement that the person get a permit from the Secretary, but the Secretary's review was to be limited to determine whether the g&g work would interfere with actual lease operations or would be "unduly

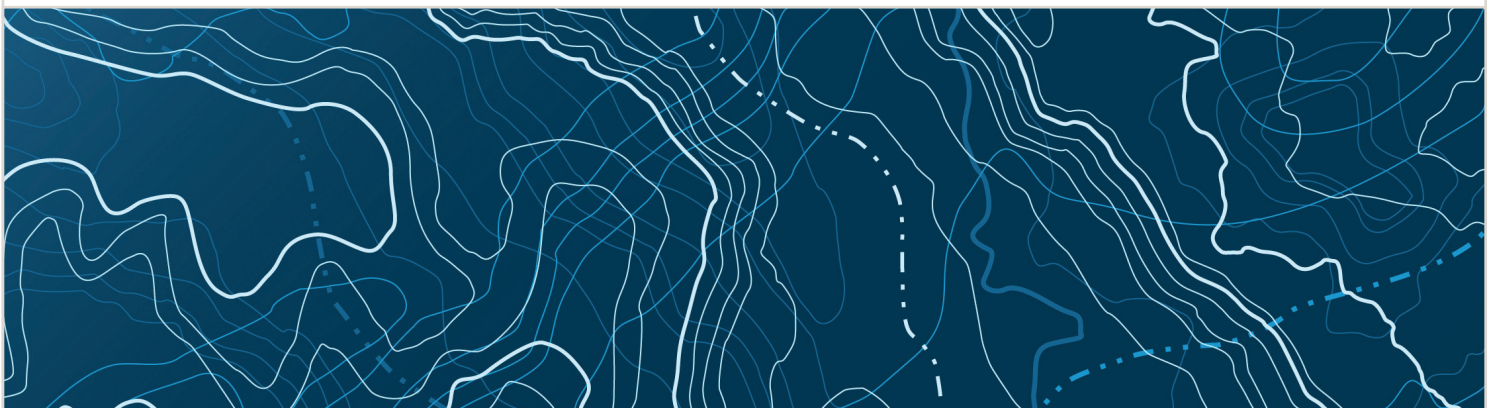
harmful" to aquatic life.³⁰ BOEM's desire to have a moratorium on geophysical surveys in the Atlantic pending the completion of an EIS would not be a reason to deny an application if the evidence showed the survey was not likely to cause undue harm to aquatic life. In other words, if market demand for a survey made the expense of litigation worthwhile, a survey company could sue to compel the Department to issue the improperly withheld permit.

But permits are federal actions. So permittees also have to contend with NEPA, the Endangered Species Act, and the Marine Mammal Protection Act. There is currently pending in New Orleans federal court a suit by the Natural Resources Defense Council and others against the Department over the issue of geophysical surveys in the Gulf.³¹ The suit, filed after Macondo, challenges MMS's July 2004 Programmatic Environmental Assessment under NEPA and the related Finding of No Significant Impact. The suit says the Finding was arbitrary, and that the agency needs to prepare an EIS on the effects of geophysical surveys. The suit is just a NEPA challenge; it does not raise claims under the ESA or the MMPA.

The suit has slowed the pace of g&g permitting in the Gulf, though the pace has picked up in recent months. According to the court docket, the case has been stayed

³⁰ 43 U.S.C. § 1340(a)(1); S. Rep. 83-411 at 39 (1953).

³¹ *Natural Resources Defense Council Inc. v. Salazar*, No. 2:10-cv-01882-JCZ-JCW (E.D. La.) (filed June 30, 2010).



almost from its filing. The plaintiffs, the government, and industry trade associations have been in settlement discussions under promises of confidentiality. Based on a review of the publicly available permit approvals in 2011, there appear to be areas of special concern to the environmental groups, and only two permits have been issued in those areas of concern, both issued with extraordinary operating restrictions.

Outside of that lawsuit, the Department has solved the NEPA issue by its supplemental EISs for the Western and Central Gulf. Both incorporate the massive 2008 "Sperm Whale Seismic Study" and other information about the effects of sonic energy on marine life. For example, the EAs issued for the two permits I just mentioned tiered off the several EISs for Gulf sales.

So the most difficult issue facing geophysical surveyors in the Gulf is the problem of so-called "takes" of individual marine mammals or of individual members of endangered sea turtle species. The Department and the industry are left in some uncertainty while they await the results of the 2010 re-initiation of consultation under the Endangered Species Act, which might produce additional restrictions to minimize unauthorized "takes." And the National Marine Fisheries Service has yet to propose incidental harassment regulations under the MMPA.

Our hope for change for geophysical surveys lies in vigorous engagement by a coordinated work group of members of the API, IPAA, and the IAGC to cause NMFS and FWS to issue workable guidance grounded in better science.

Conclusion

To his great credit, President Bill Clinton recognized that the best way to administer the federal leasing program in the Gulf of Mexico was to try to make the Gulf the most inviting place to make oil and gas investments in the world. President Clinton championed deepwater royalty relief and re-envisioned the relationship of the government and the industry. He emphasized partnership, better communication, and greater speed and predictability in leasing and permitting. His policies helped foster the dramatic growth of deepwater development in the Gulf.

Today, President Clinton's policies are out of favor at the Department of the Interior. Our two OCS Bureaus are well-intentioned, and are led by a group of thoughtful and capable people. But they are still struggling with the burden of implementing policy choices directed by Mr. Salazar. Those choices were hardly the only possible responses to the Macondo spill.

Now it is up to this industry to continue to engage the government and interested members of the public to identify those policies and requirements that are thoughtful, workable, and necessary, and to separate them from those that are not. That is the only way we will have an abundance of American-made energy from the OCS.



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